THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Trial Court Judge

Appellate Case No. 2019-000182

Donald Stanley and Sean Reiter,
Individually and as Class Representatives, ... Respondents,

v.

Southern States Police Benevolent Association, Inc., ... Appellant.

FINAL REPLY BRIEF OF APPELLANT SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION, INC.

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INTRODUCTION

The majority of Plaintiffs-Respondents' Brief ("Resp. Br.") preoccupies itself with three, ultimately irrelevant issues: (1) whether Defendants-Appellants, the Southern States Police Benevolent Association ("PBA"), should be regulated as an insurance company; (2) Plaintiffs' dissatisfaction with PBA's withdrawal of its defense of Michael Slager, who currently sits in federal prison as a convicted felon for killing an unarmed citizen and whose under-oath lies were highlighted by Judge Norton in rendering his sentence as well as the Fourth Circuit Court of Appeals in affirming that sentence. *See United States v. Slager*, 912 F.3d 224, 231 (4th Cir. 2019) (detailing "four different accounts as to what happened" in the shooting that Mr. Slager put forth over the course of his criminal case and observing that "the district court discredited Defendant's testimony, characterizing it as 'contradictory,' 'self-serving, evolving, and internally inconsistent'") (quoting *United States v. Slager*, 2018 WL 445497, *4, *6 (D.S.C. Jan. 16, 2018)); and (3) misstatements about PBA's finances. None of these arguments justifies class certification.

First, with regard to the "insurance company" argument, that issue has long since been put to bed. PBA sought the appropriate opinions on this subject and it was decided that PBA should be regulated by the Department of Consumer Affairs, not by the Insurance Commissioner. Plaintiffs may be dissatisfied with that decision, but it has been made by the proper State authorities. It is not the purpose of civil litigation – and certainly not the purpose of S.C. Rule 23 – to undo these regulatory structures.[1] At this point, any further argument by Plaintiffs on whether

[1] The "unlicensed insurer" issue does not supply Plaintiffs with a basis to recover damages simply because PBA allegedly was not licensed as an insurer at relevant points in time. Plaintiffs make no effort to rebut this Court's opinion in *Lenz v. Walsh*, 362 S.C. 603, 608, 608 S.E.2d 471, 473 (Ct. App. 2005), where the Court addressed, in a matter of first impression, "whether a homeowner may recover payments made to an unlicensed builder under a residential construction contract." This Court held that "generally, a homeowner may not recover payments already made to an unlicensed contractor merely because the contractor did not hold a license when the contract was executed." *Id.* The reasoning and holding from *Lenz* should apply here – assuming the legal defense benefit is a policy of insurance, Plaintiffs cannot recover their payments

PBA should be treated as an insurance company is simply tilting at windmills because the issue has been definitively resolved.[2] Therefore, the cases Plaintiffs cite addressing class certification in cases involving insurance companies (Resp. Br. at 27-28) are simply inapplicable.

The same is true for the Slager arguments. As PBA forecast in its Initial Brief (see PBA Final Br. at 6-7), much of this lawsuit revolves around Plaintiffs' and their counsel's complaints about the Slager defense, which is simply irrelevant to this case, especially whether it should be certified as a class action. Both Plaintiffs have been defended by PBA-provided counsel when they have so requested and testified to their satisfaction of the representation provided.[3] Plaintiffs have no standing to complain about any issues surrounding the defense of another PBA member – especially where, as occurred here, that member (Slager) pursued his own civil action against PBA and Plaintiffs received their own cost-free representation.[4] Those facts demonstrate exactly why

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(i.e., dues) simply because the PBA was not licensed as an insurer when certain PBA members joined the Plan. The received the benefit of their bargain – cost-free and effective representation – either way.

[2] Plaintiffs recognized this principle by filing an ill-considered mandamus petition with the Supreme Court that would direct the South Carolina Department of Consumer Affairs Administrator and Consumer Advocate to enforce S.C. Code Ann. § 37-16-50. The Supreme Court denied Plaintiffs' petition for writ of mandamus in an order entered September 30, 2019. *See Stanley v. S.C. Dept. of Consumer Affairs and Consumer Advocate Carolyn "Carri" Grube Lybarker*, Case No. 2019-000866 (S.C. S. Ct. Sept. 30, 2019).

[3] In March 2005, Mr. Stanley was accused of striking a child with his departmental vehicle. (Stanley Dep. (R. p. 745, line 12-p. 746, line 6)). He acknowledged PBA paid attorney Andy Savage to represent him, and further acknowledged he had no complaints with Mr. Savage's representation. (Stanley Dep. (R. p. 748, lines 10-17)). In March 2016, Mr. Stanley was named as a co-defendant in a lawsuit brought by Akilou Smith. (R. pp. 239-248.) As in 2005, Mr. Stanley had no concerns with PBA's obtaining legal counsel for him, nor did he believe that PBA did anything wrong in hiring his counsel. (Stanley Dep. (R. p. 744, lines 11-19)). In fact, Mr. Stanley was dismissed as a defendant from that case in March 2019. *See Smith*, D.E. 78 (Order Ruling on Report and Recommendation). In June 2004, Mr. Reiter had an automobile accident in which he struck and killed a pedestrian, and he contacted PBA after the accident. (Reiter Dep. (R. p. 793, lines 3-5)). PBA assigned him a lawyer – again, Mr. Savage, who is now *suing* PBA in this case – and Mr. Reiter agreed that he was pleased with his lawyer's work on the case. (Reiter Dep. (R. p. 793, lines 22-25)).

[4] Indeed, when asked what he expected to receive for being a member of PBA, Mr. Reiter responded, "That as long as I was acting in the line of duty, I would be provided an attorney," and when asked "[d]id you receive what you expected," he replied, simply and succinctly, "I did, yes." (Reiter Dep. (R. p. 824, lines 2-5, 8-10)). For his part, Mr. Stanley agreed that, other than the Slager events, PBA has done nothing that

class certification is improper in this case – if any PBA member is unhappy with his or her representation or otherwise believes that PBA has failed to provide that member with representation or other membership benefits, then that member can file its own individual lawsuit against PBA, as Slager did, and litigate the unique facts and issues relating to that member. But there is no basis to cram thousands of members – none of whom (other than these Plaintiffs and their counsel) has expressed the slightest interest in suing PBA, which jeopardizes PBA's ability to fund the legal defense of these members – into an unwieldy class action based on nothing more than Plaintiffs' and their counsel's subjective beliefs that PBA should be regulated as an insurer and that PBA "might" one day decline to fund the defense of another member (never mind that PBA has funded, and is funding, the defenses of hundreds of South Carolina PBA members).

Third, Plaintiffs' brief contains conscious, intentional misrepresentations of the record and completely unsupported statements of fact. In particular, on page 4 of their brief, Plaintiffs state "[o]nly about 10% of the dues collected by the PBA go to the defense of its members under the Plan," asserting that "[t]he remainder, constituting 90% of the dues collected, was spent on Defendant's employees, officers, and board members." (Resp. Br. at 4). They repeat this falsehood on page 9. These misrepresentations are drawn from a conscious twisting of PBA's responses to interrogatories, which were not put before the trial court. Plaintiffs know these misrepresentations are incorrect because they have deposed PBA's financial director and been given audited financial reports regarding its spending. In addition, as a 501(c)(5) nonprofit, PBA is required to file yearly reports with the Internal Revenue Service detailing its spending and employee compensation. These reports, called 990 reports, are publicly available, and have been provided to Plaintiffs. As a result, they are aware of all PBA's spending, and they have consciously

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he would consider "unfair," in bad faith, or in breach of contract. (Stanley Dep. (R. p. 697, line 16-p. 698, line 10)).

misrepresented it to this Court to gain an advantage by slandering PBA.

Once these red herrings are eliminated, Plaintiffs' arguments are easily disposed of, and they make hardly any effort to defend the Certification Order. That Order was properly appealed, and now that it is on appeal, the entire Order is reviewable. The trial court's communications ban, entered without any briefing by or notice to the parties, plainly lacks the required specific findings required by Supreme Court precedent. Nor can the trial court's certification of an injunctive relief class withstand scrutiny given the court's complete lack of discussion in entering such relief.

Plaintiffs' arguments for certification of a damages class should fare no better. Many of Plaintiff's arguments are off-point and do not address the certifiability of a particular claim, but instead argue the merits of the claims – exactly what they claim courts should not do at this stage. Each claim they assert is permeated with individualized issues that render certification untenable. The Circuit Court reversibly erred in ruling otherwise.

ARGUMENT

Plaintiffs propose three issues on this appeal: (1) is the Certification Order reviewable; (2) were PBA's arguments preserved; and (3) did the trial court properly certify the class. The answer to the first two questions is "yes," while the answer to the third question is "no."

I. THE CERTIFICATION ORDER IS REVIEWABLE ON THIS APPEAL.

Plaintiffs seem to argue that (1) the Certification Order is not appealable, and (2) even if it is, the Court should limit its review to the communications ban. Neither argument is supportable.

A. The Entire Certification Order Is Reviewable on This Appeal.

1. Plaintiffs' Arguments on Appealability Should Be Rejected.

Plaintiffs spend significant time arguing "class certification orders are not appealable." (Resp. Br. at 15). Those arguments, however, are futile as the Court already has made the decision

to accept the appeal.

Furthermore, contrary to Plaintiffs' assertions, as this Court noted just last year, the "supreme court has . . . 'reviewed interlocutory orders involving class certification when they contain other appealable issues.'" *BLH by Hensley v. S.C. Dept. of Social Services*, 423 S.C. 422, 428, 814 S.E.2d 628, 641 (Ct. App. 2018) (quoting *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 449, 661 S.E.2d 81, 85 (2008)). Accordingly, South Carolina's appellate courts frequently have accepted interlocutory appeals of class certification orders – including this Court in *BLH* last year. *See, e.g.*, *Salmonsen*, 377 S.C. at 449-50, 661 S.E.2d at 85-86 (order requiring class members to "opt in" was properly reviewed on interlocutory appeal); *Ferguson v. Charleston Lincoln/Mercury, Inc.*, 344 S.C. 502, 509, 544 S.E.2d 285, 289 (2001) (reviewing order that granted summary judgment and also denied class certification); *Eldridge v. City of Greenwood*, 308 S.C. 125, 127, 417 S.E.2d 532, 534 (1992) (trial court order limiting communications with class members held immediately appealable); *BLH*, 423 S.C. at 428, 814 S.E.2d at 641 (reviewing class certification order that also required defendant to disclose names and addresses of potential class members).

In particular, the Supreme Court's decision in *Eldridge* in squarely on point. As here, that appeal concerned a trial court order banning communications with class members (in that case, the plaintiffs were restricted). The Supreme Court rejected the appealability argument, holding the trial court's prohibition on communications "was in the nature of an injunction" and "injunctions are immediately appealable. Thus, the trial court's order is properly before this Court." 308 S.C. at 127, 417 S.E.2d at 534. There can be no serious dispute that the communications ban is, as in *Eldridge*, "in the nature of an injunction" and, therefore, is immediately appealable.

2. Because the Appeal Is Properly Before the Court, the Entire Certification Order Is Open to Review.

Similarly, Plaintiffs' argument that the Court's review is limited to the "appealable issues,"

i.e., "the ban on class communications" (Resp. Br. at 19), should be rejected. Indeed, in *BLH*, this Court accepted interlocutory review where the trial court's orders certifying the class also required the defendant agency to produce the names and addresses of the class members. This Court rejected the plaintiffs' contention that the orders were not appealable, then went on to analyze the commonality requirement, held commonality had not been established, and "reverse[d] the grant of class certification." *BLH*, 423 S.C. at 431, 814 S.E.2d at 643. Likewise, in *Ferguson*, the plaintiff moved for class certification and the defendant moved for summary judgment; the trial court granted summary judgment, which mooted the class certification issue. The plaintiff appealed both issues, and the Supreme Court reviewed both, holding – in language dispositive to the present appeal – "we may review an interlocutory order *when, as now, it contains other appealable issues*." *Ferguson*, 344 S.C. at 509, 544 S.E.2d at 289 (emphasis added).

The rule, therefore, is "an order that is not directly appealable will nonetheless be considered if there is an appealable issue before the Court and a ruling on appeal will avoid unnecessary litigation." *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991) (quoted in *Ferguson*, 344 S.C. at 509-10, 544 S.E.2d at 289). Plaintiffs concede there is at least one appealable issue before the Court (the communications ban) and they do not dispute that a ruling on this appeal will avoid unnecessary litigation – specifically, a wholly unnecessary (and possibly unconstitutional) class trial. In short, South Carolina law directs that the Court, having made the decision to review the Certification Order, review the entire Order, not just the portions deemed immediately appealable.[5]

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[5] *Salmonsen v. CGO, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008), is inapposite. There, the parties appealed and cross-appealed five different orders, one of which was the denial of class certification. *Id.* at 448, 661 S.E.2d at 84-85. The Supreme Court held the order establishing "opt-in procedures" appealable and denied review of the *separate* orders concerning class certification. *Id.* at 449-53, 661 S.E.2d at 85-87. Those circumstances are different than the single order at issue on this appeal.

B. The Trial Court's Communications Ban Should Be Reversed.

Plaintiffs attempt to avoid reversal of the communications ban by purporting to distinguish *Eldridge*, which dealt with the exact same issue, but their efforts fail.[6] Plaintiffs argue the *Eldridge* opinion was issued prior to a ruling on class certification, unlike the post-certification ban in this case (Resp. Br. at 16), but that is a distinction without a difference.[7] Indeed, Plaintiffs overlook the critical ruling in *Eldridge*, which applied the United States Supreme Court's directive on a communications ban in a class action:

> an order limiting communications between parties and potential class members *should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties.* Only such a determination can ensure that the court is furthering, rather than hindering the policies embodied in the [Rules].

Eldridge, 308 S.C. at 128, 417 S.E.2d at 534 (emphasis added) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 101 (1981)). Here, the Circuit Court failed to make the "specific findings" that reflected "a weighing of the need for a limitation and the potential interference with the rights of the parties," and Plaintiffs make no effort to argue it did. For this basic reason, the communications ban cannot stand.

Furthermore, as a practical matter, PBA cannot be prohibited from communicating with its members "regarding the litigation." (Resp. Br. at 18 n.2). With thousands of members, it is inevitable that some, perhaps many, of them will inquire of their local or associational leadership

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[6] Plaintiffs assert this issue was not raised below, but that issue is easily answered – the trial court entered the communications ban *sua sponte*, without allowing the parties to brief or argue the issue, which was not raised in either the briefing on the certification motion or the hearing on the motion. *See Eldridge*, 308 S.C. at 126, 417 S.E.2d at 533 (reciting that defendant "moved the Circuit Court" to ban the plaintiffs from communicating with "potential members of the plaintiff class").

[7] Indeed, S.C. R. Civ. P. 23(d)(2), upon which Plaintiffs rely (*see* Resp. Br. at 16), simply allows a court to issue certain orders during "the pendency of the action by the party seeking to maintain the action on behalf of the class" without regard to whether the order issues before or after the order on class certification.

about the status of the lawsuit, how it affects them (or not), and so forth. An outright ban on any communications whatsoever is exactly what the *Eldridge* court, taking its cues from the U.S. Supreme Court, wanted to avoid, particularly where, as here, the trial court gave no reason and made no findings whatsoever to support a blanket prohibition on communications. The Circuit Court's communications ban should be reversed.

II. THE CIRCUIT COURT REVERSIBLY ERRED IN CERTIFYING A CLASS.

A. PBA Properly Preserved the Issues for Appeal.

Plaintiffs attempt to prevent this Court from reviewing the erroneous Certification Order by asserting that certain arguments PBA raises in the appeal brief were not "made before the trial court or ruled on by the trial court." (Resp. Br. at 21). That is incorrect. PBA presented arguments on each of the Rule 23 requirements raised in this appeal and the inability of Plaintiffs to meet their burden under the rubric of class certification. Moreover, after issuance of the trial court's order, PBA argued: (1) the trial court improperly certified an injunctive relief class; (2) reliance, damages, and other issues defeat commonality; (3) PBA's defenses defeat commonality; and (4) the adequacy requirement is not met. (*See* R. pp. 475-485; pp. 488-491). By raising these issues with the trial court, PBA satisfied the preservation requirements such that they are properly before this Court. *See, e.g.*, *Buist v. Buist*, 410 S.C. 569, 576, 766 S.E.2d 381, 384 (2014) ("Husband's motion to reconsider constituted a timely challenge to the family court's award of attorney's fees."); *Brown v. Odom*, 425 S.C. App. 420, 430, 823 S.E.2d 183, 188 (Ct. App. 2018) (issue preserved for appeal where raised for first time in motion to reconsider); *see also Beaufort Co. School District v. United Nat. Ins. Co.*, 392 S.C. 506, 532 n.8, 709 S.E.2d 85, 99 n.8 (Ct. App. 2011) (issue preserved for appeal where not raised in motion to reconsider but argued in hearing on motion to reconsider: "The trial court denied Appellants' motion to reconsider. Therefore, we find the Trust's issues preserved for appeal.").

Moreover, PBA's briefing and oral arguments to the trial court in opposition to class certification presented detailed arguments on each of the Rule 23 requirements at issue on this appeal. While phrasing and nuance of the arguments may not be identical given the phrasing and nuance found in the trial court's order, the fact remains that the issues raised in this appeal were properly presented to the trial court and ruled upon. Further, the arguments were once more raised in the Motion for Reconsideration. In sum, the arguments presented by PBA to the trial court provided a fair opportunity to the court to rule on the issues and provides this Court the opportunity to conduct a meaningful appellate review. *See Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review."). Additionally, our Supreme Court has held that issue preservation rules should be approached with a "practical eye and not in a rigid, hyper-technical manner." *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011). "[A] party is not required to use the exact name of a legal doctrine in order to preserve the issue." *Herron*, 395 S.C. at 466, 719 S.E.2d at 642. Plaintiffs' technical objections to the issues presented on this appeal should not win the day. Rather, a fair reading on the underlying briefing and arguments sets forth a clear record that the issues raised by the PBA to the trial court were properly raised and ruled upon, such that consideration by this Court is warranted

B. The Trial Court Reversibly Erred in Certifying an Injunctive Relief Class.

Plaintiffs do not dispute that an injunction "is a drastic remedy issued by a court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). The trial court made no effort to analyze any, let alone all, of those elements, nor did it make any findings that

they were present in this case. The trial court reversibly erred in entering the injunction.

1. The Basis for Plaintiffs' Requested Injunction Requiring "Oversight" or Licensure of PBA Has Been Mooted and, Therefore, Does Not Provide a Basis for Class Certification.

Here, Plaintiffs have not – and cannot – put forth any legal authority entitling them to injunctive relief. In their Amended Complaint, Plaintiffs assert the future irreparable injury to the class would be PBA's "acting without any regulatory oversight whatsoever," and they seek injunctive relief to "bar [PBA] from operating" and issuing the Plan "unless Defendant obtains proper authority and licensing[.]" (Am. Compl. (R. p. 64, paras 125, 127)). PBA has sought proper authority for providing the Plan under South Carolina law, and is currently regulated by the State through the South Carolina Department of Consumer Affairs. Thus, Plaintiffs' request for an injunction based on an alleged "lack of oversight" (Stanley Dep. (R. p. 700, lines 24-25)), is entirely moot.

"An appellate court 'will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.' . . . This is true when some event occurs making it impossible for [a] reviewing [c]ourt to grant effectual relief.'" *Shah v. Richland Memorial Hosp.*, 350 S.C. 139, 151, 564 S.E.2d 681, 687 (Ct. App. 2002) (quoting *Mathis v. So. Carolina State Hwy. Dep't,* 260 S.C. 344, 346, 195 S.E.2d 713, 714-15 (1973)). Thus, the appellate courts in this State have rejected injunction requests where, as here, the basis for the proposed injunction has been mooted. *See, e.g.*, *United Student Aid Funds, Inc. v. S.C. Dept. of Health and Env. Control*, 356 S.C. 266, 275, 588 S.E.2d 599, 603 (2003) (reciting that "the Court of Appeals did not address the issue of injunctive relief" against defendant agency because employee "is no longer employed by the State"); *McMillan v. BCG Properties, LLC*, 2007 WL 8326632, *3 (S.C. Ct. App. Nov. 3, 2003) (plaintiff sought injunction to prevent building from being demolished, but parties stated in

briefs that the building "ha[s] been demolished": "[b]ecause a decision on this issue would not grant [plaintiff] any effectual relief, we hold this issue moot"); *Shah*, 350 S.C. at 152, 564 S.E.2d at 688 (request for injunction over breach of contract "is no longer viable as the disputed contract has now expired, and thus there is nothing for the court to enjoin"). The injunctive relief claim, therefore, was erroneously certified on this basis.[8]

2. The Alleged Concern of "Future" Harm Is Not Sufficient to Certify an Injunctive Relief Class, and Plaintiff Reiter Has No Standing to Request an Injunction In Any Event.

Even if the primary basis for the purported injunctive relief class had not been mooted, the record testimony does not remotely rise to the level of injunctive relief sufficient to permit an injunctive relief class. There is no threat of immediate harm, which is required for an injunction.

First, Plaintiffs admit "Reiter is no longer a member of the PBA." (Resp. Br. at 47). Accordingly, there is simply no legal basis for Plaintiff Reiter (or any other former member) to obtain injunctive relief pertaining to the structure, management, and operations of an organization, PBA, of which he is no longer a part. *See, e.g.*, *Meehan v. Meehan*, 2006 WL 7285712, *2 (S.C. Ct. App. Feb. 10, 2006) (in action by plaintiff challenging conveyance of deeds, Court upheld trial court's dismissal of case for lack of standing where plaintiff "did not own the . . . properties at the time [his] Mother transferred them to [his siblings]"). Stated differently, Reiter's injunctive relief claim against the PBA is moot. Because Plaintiff Reiter, a non-member of PBA, has no standing to enjoin PBA, the certification of an injunctive relief class in his name should be reversed.

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[8] Despite agitating for greater "oversight" and turning a blind eye to the fact that the PBA is under the oversight of the South Carolina Department of Consumer Affairs Administration and Consumer Advocate, Plaintiffs and their counsel have shifted their argument to complain about how the Administrator is exercising that oversight – hence the dubious (and rejected) mandamus petition they filed before the Supreme Court as described in footnote 2, *supra*.

Second, Plaintiff Stanley has not come close to establishing the type of imminent harm that would warrant an injunctive relief class. Indeed, an injunction "is a drastic remedy issued by a court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf*, 361 S.C. at 121, 603 S.E.2d at 907. To obtain an injunction, Plaintiffs "must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *Id.*, 603 S.E.2d at 908. Plaintiffs have, and are pursuing, an adequate remedy at law and they are unlikely to succeed on the merits of their claims.

Plus, Plaintiff Stanley's testimony makes clear that he will not suffer irreparable harm if an injunction is not issued; indeed, he will not suffer *any* harm absent an injunction other than purely speculative and conjectural "harm." As he testified, "I'm concerned that there could be a similar situation [to Slager] and the PBA decides they're not covering." (Stanley Dep. (R. p. 692, lines 8-10)). Purported "concerns" that a "similar" situation "could" happen at some unidentified time in the future are a wholly insufficient basis for an injunctive relief class: "Irreparable injury must be both imminent and likely; speculation about potential future injuries is insufficient." *Williams v. Stirling*, 2018 WL 7824521, *2 (D.S.C. Dec. 13, 2018) (citing *Winter v. Nat'l Resource Def. Council, Inc.*, 555 U.S. 7, 22 (2008)); *see also Genesis Health Care, Inc. v. Azar*, 2019 WL 2612737, *2 (D.S.C. June 26, 2019) ("[T]he Court cannot issue a preliminary injunction 'simply to prevent the possibility of some remote future injury.'") (quoting *Winter*, 555 U.S. at 22).

Not only are Plaintiff Stanley's "concerns" insufficient to warrant injunctive relief, those "concerns" ultimately proved completely unfounded because the PBA provided him with lawyer at no cost to him. In 2019, the case was dismissed. Thus, Stanley was not harmed at all, let alone "irreparably" harmed. Therefore, Stanley's own facts provide a textbook example as to why

injunctions, and thus injunctive relief classes, should only be reserved for those occasions where truly imminent and irreparable harm is present, not speculative concerns about what might happen in the future. The trial court erred in certifying an injunctive relief class for this alternative reason.[9]

C. The Trial Court Reversibly Erred in Certifying a Class for Monetary Relief.

Likewise, the trial court reversibly erred in certifying a class for monetary relief. Plaintiffs' claims are permeated with individualized issues and they do not meet hardly any of the required elements for class certification.

1. The "Rigorous Analysis" Courts Must Conduct Before Certifying a Class Requires More Than Simply Reading the Complaint.

There is no basis whatsoever to credit Plaintiffs' assertion that a plaintiff can meet its burden on class certification "by an examination of the pleadings, not a full-blown evidentiary hearing as Defendant has suggested." (Resp. Br. at 24). That is absurd. The Supreme Court has deemed it "imperative" that "the court apply a rigorous analysis to assure the prerequisites of Rule 23(a) have been satisfied." *Waller v. Seabrook Island Prop. Owners Ass'n*, 300 S.C. 465, 467, 388 S.E.2d 799, 801 (1990) (citing *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982); *see also Gardner v. South Carolina Dept. of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003) ("In deciding whether class certification is proper, the court must apply a rigorous analysis to determine each prerequisite is satisfied."). Plaintiffs concede the trial court must conduct a

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[9] Furthermore, as noted above, Plaintiffs went further in their depositions and demanded PBA be dismantled, with all membership agreements rescinded and all membership dues refunded. Attempting to flee from their own testimony, Plaintiffs now assert that they "are not seeking to enjoin Defendant from operating at all." (Resp. Br. at 43 (emphasis original)). Tellingly, they do not refute their own sworn testimony from their depositions where they agreed they were seeking exactly this remedy. Plaintiffs have made no effort to fit their case within the "rare[]" circumstances under which the "especially drastic remedy" of a mandatory injunction could be obtained. *Johnson v. Phillips*, 315 S.C. 407, 417, 433 S.E.2d 895, 901 (1993), *aff'd in part, rev'd in part on other grounds by Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995). Plaintiffs also do not dispute that most courts reject requests for a rescissionary remedy on a classwide basis, and the trial court erred in not so ruling here. *See, e.g., Whitmire v. Adams*, 273 S.C. 453, 456, 257 S.E.2d 160, 163 (1979) (refusing relief in class action that sought rescission of deeds).

"rigorous analysis" but believe that determination must be "based largely, if not exclusively, on the pleadings." (Resp. Br. at 24).

Plaintiffs' assertion is non-sensical. If all it took for class certification was a simple review of the complaint, there would be no reason for any analysis, let alone the required "rigorous" analysis. Plaintiffs agree "commonality is based on the existence of common issues of fact and law" (*id.* at 25), and the only way to determine whether those "issues of fact and law" are or are not "common" is to rigorously analyze those factual and legal issues, not just rely on unsworn and untested complaints and end the "analysis" there. Nothing in the Supreme Court's leading cases of *Waller* or *Gardner* suggests the required "rigorous analysis" should be limited to the complaint. Plaintiffs' argument should be rejected.

Moreover, that "rigorous analysis" includes analyzing the defendant's potential defenses to the claims asserted. The Supreme Court held as such in *Gardner*: "A court determines the existence of commonality among defendants by examining the plaintiffs' claims *and the defendants' anticipated defenses*." *Gardner*, 353 S.C. at 22, 577 S.E.2d at 201 (emphasis added). Plaintiffs' tactical decision not to discuss the individualized defenses that permeate their claims should not be rewarded; those individualized issues preclude a finding of commonality. In short, the Circuit Court failed to engage in the required rigorous analysis to support its holding that common legal and factual questions exist.

2. By Not Responding to Several of PBA's Arguments, Plaintiffs Have Implicitly Conceded That the Trial Court Ruled on Them Incorrectly.

Plaintiffs ignore numerous claims they have alleged that, PBA argued in its Initial Brief, are not certifiable. (*See* Final Br. at 19-20 (fiduciary duty), 23-24 (negligence and negligent misrepresentation), 26-27 (unjust enrichment). Plaintiffs do not refer to any of those claims in their brief other than in a single footnote, and even then they do not attempt to defend the trial

court's certification of those claims. (*See* Resp. Br. at 33 n.9).

As this Court has observed, an appellee's "failure to respond to [an] argument in its brief could amount to a concession that the trial court ruled incorrectly. *See* 5 Am.Jur.2d *Appellate Review* § 555, at 254 (1995) ('[i]f an appellee fails to respond to an issue in its brief, the [appellate] court may treat the failure to respond as a confession that the appellant's position is correct')." *First Union Nat. Bank of S.C. v. FCVS Comms.*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996), *rev'd in part on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997); *see also Turner v. S.C. Dept. of Health and Environmental Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008). The Court should view Plaintiff's failure to defend the certification of the above claims as a concession that "the trial court ruled incorrectly."[10]

3. The Trial Court Reversibly Erred in Ruling Plaintiffs Satisfied the Commonality Standard.

Under South Carolina law, a court "determines the existence of commonality" by "examining the plaintiffs' claims and the defendants' anticipated defenses." *Gardner*, 353 S.C. at 22, 577 S.E.2d at 201. Here, the trial court examined neither the specific claims Plaintiff assert nor PBA's defenses to those claims. Accordingly, the court erred in holding Plaintiffs satisfied

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[10] As PBA established in its Initial Brief and arguments to the trial court, these claims are not certifiable anyway. *See Kitchens v. U.S. Shelter*, 1988 WL 108598, *3 (D.S.C. June 30, 1988) (reciting that court denied class certification to fiduciary duty claim "on the grounds that evidence of alleged ... breach of fiduciary duty [was] individual as to each class member and that each class member's claim would require separate evidence"); *Spelman v. Bayer Corp.*, 2012 WL 13047524, *4 (D.S.C. Dec. 17, 2012) (denying certification to negligent misrepresentation claim, as "each class member would be required to prove his reliance and require individualized inquiries into each class member's circumstances"); *Melton ex rel. Dutton v. Carolina Power & Light Co.*, 283 F.R.D. 280, 290 n.7 (D.S.C. 2012) (because unjust enrichment claim required factfinder to make numerous "individualized determinations," it was unlikely any "supposed common question" would be capable of classwide resolution); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009) ("In short, common questions will rarely, if ever, predominate an unjust enrichment claim, the resolution of which turns on individualized facts.").

the commonality requirement.[11]

a. Plaintiffs' Tort Claims Are Inappropriate for Certification.

Plaintiffs assert four claims sounding in tort: breach of fiduciary duty, fraudulent inducement, negligence, and negligent misrepresentation. Remarkably, Plaintiffs argue for certification of only one of those claims – fraud. They make no effort to rebut PBA's arguments that the fiduciary duty, negligence, and negligent misrepresentation claims are not certifiable.

Plaintiffs do argue – erroneously – their fraud in the inducement claim is certifiable, but they limit their discussion to three paragraphs and several misstatements of the law. Plaintiffs do not dispute that they must prove nine elements to establish fraud alone, along with an additional three to establish fraud in the inducement:

> To prevail on a cause of action for fraud, a Plaintiff must prove by clear, cogent and convincing evidence the following elements: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. ***To establish a claim or defense of fraud in the inducement, a plaintiff must prove the nine elements of fraud as well as the following three elements***: (1) that the alleged fraudfeasor made a false representation relating to a present or preexisting fact; (2) that the alleged fraudfeasor intended to deceive him; and (3) that he had a right to rely on the representation made to him.

Moseley v. All Things Possible, Inc., 388 S.C. 31, 35-36, 694 S.E.2d 43, 45 (Ct. App. 2010), *aff'd*, 395 S.C. 492, 719 S.E.2d 656 (2011) (internal quotations omitted) (emphasis added). It is inconceivable each of those twelve elements could be resolved on a classwide basis, and the trial

[11] Plaintiffs assert in their brief, for the first time, several other "additional legal issues" that they claim are "common" issues. (Resp. Br. at 32-33). They have not pleaded those issues as "common" in the operative complaint. "It is well-established that parties cannot amend their complaints through briefing or oral advocacy." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013); *Bilbro v. Haley*, 229 F. Supp. 3d 397, 427 n.22 (D.S.C. 2017) (same). Plaintiffs' effort to add allegedly common issues through its response brief should be rejected.

court made no effort to argue they can be – and neither have Plaintiffs.

Plaintiffs limit their fraud argument to reliance, arguing "the reliance issue is common to the entire class" because the class members supposedly "were induced to pay membership dues to an illegal, unauthorized insurer." (Resp. Br. at 37). The problems with that argument are numerous. First, the very premise of the assertion – that PBA is purportedly "an illegal, unauthorized insurer" – is wrong because the South Carolina regulators have spoken on this issue and have determined that PBA need not become a licensed insurer. Second, in any event, there is no evidence anyone – including Plaintiffs – were "induced" to do anything. (*See* Reiter Dep. (R. p. 807, lines 10-15) (unaware of an untruthful representation made by PBA); (Stanley Dep.) R. p. 677, line 21-p. 678, line 4; p. 678, line 22- p. 679, line 6; p. 679, lines 10-12, 16-18; p. 703, line 25 through p. 704, line 2 (testifying PBA has not (1) misrepresented anything to Stanley or anyone else, or (2) committed an act he would consider fraudulent or misled anyone)).

Third, the reliance element of the fraud claim precludes certification. Plaintiffs concede they must prove reliance, and they fail to cite any case applying South Carolina law that has certified a fraud-based class. Plaintiffs ignore the Fourth Circuit Court of Appeals opinion that applied South Carolina law and denied certification of claims of fraud/negligent misrepresentation:

> Indisputably, negligent misrepresentation and fraud require proof of reliance. *See Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 565 S.E.2d 309, 313-14 (Ct. App. 2002) (recounting elements of negligent misrepresentation and fraud claims under South Carolina law). To establish fraud, a plaintiff must prove, *inter alia*, that the hearer relied on the truth of a fraudulent statement, and had a right to rely thereon. *Id.* To establish negligent misrepresentation, a plaintiff must prove, *inter alia*, that the plaintiff "justifiably relied on [a false] representation, and ... the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation." *Id.* at 14. Thus, both theories of liability require that the plaintiff demonstrate (1) actual reliance ***and*** (2) that the plaintiff had a right to rely on the misstatement (in the case of fraud) or that such reliance was justifiable under the circumstance (in the case of negligent

misrepresentation). Almost inevitably, establishing these elements requires an individualized inquiry.

Gunnells v. Healthplan Servs., 348 F.3d 417, 434-35 (4th Cir. 2003) (emphasis original). In short, "[b]ecause proof of reliance is generally individualized to each plaintiff allegedly defrauded ... negligent misrepresentation claims are not readily susceptible to class action treatment, precluding certification of such actions as a class action." *Id.* (quoting *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 362 (4th Cir. 2004)).[12]

b. Plaintiffs' Breach of Contract Claim Is Individualized.

To prove claims for breach of contract, Plaintiffs must show "the existence of a contract, its breach, and damages caused by such breach." *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 652, 780 S.E.2d 263, 272 (Ct. App. 2015). Whether PBA breached a contract with a member of the Plan must be examined on an individual level. Individual circumstances also dictate the amount of damages, if any, caused by any alleged breach.[13]

Plaintiffs' Amended Complaint does not allege PBA breached a contract as to any putative class member through wrongful denial of any benefit under the Plan. Rather, Plaintiffs claim PBA

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[12] Plaintiffs cite four cases for the proposition that reliance is not an impediment to class certification. (Resp. Br. at 37-38). Critically, all four cases were brought under federal and/or state securities statutes, a context in which courts have long held that plaintiffs-investors are entitled to a presumption of reliance under the "fraud on the market theory." *See Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455, 461-62 (2013). That theory, however, has never been extended to non-securities cases, and there is no evidence South Carolina courts would do so. *See, e.g., Comer v. Life Insurance Company of Ala.*, 2010 WL 11531156, *1 (D.S.C. Feb. 22, 2010) ("South Carolina law requires proof of reliance in the circumstances of this case and the Fourth Circuit has found that individualized inquiry is necessary when reliance is in issue.") (*citing Gunnells*, 348 F.3d at 434).

[13] Furthermore, any "damages" Plaintiffs may assert are purely speculative, as demonstrated by Plaintiffs' argument they have asserted a claim called "failure to maintain appropriate reserves," which, they say, "put the Plaintiffs *at risk* of not receiving the benefit that they have paid for over the years." (Resp. Br. at 13 (emphasis added).) But it is undisputed that neither Stanley nor Reiter failed to receive "the benefit" they paid for, as both received effective and cost-free counsel, so there is no evidence before this Court that would support the so-called "risk" they assert. Moreover, Plaintiffs fail to grasp the internal inconsistency of their (false) assertion that PBA supposedly keeps 90% of the dues yet somehow also maintains "[in]appropriate reserves," which is non-sensical.

was not authorized to enter into the contracts and, therefore, breached the implied covenants of good faith and fair dealing. (Am. Compl. (R. p. 59, para 85)). "However, there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do." *Hotel & Motel Holdings*, 414 S.C. at 653, 780 S.E.2d at 273 (quoting *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995)). Accordingly, to demonstrate a breach of the covenant, members of the class must show PBA acted outside the provisions of their individual contracts. Plaintiffs do not address this fundamental legal issue, which necessarily requires an even more heightened level of fact-intensive, individualized inquiry, rendering a class action untenable.

To the extent PBA could be found to have breached a duty by failing to seek proper guidance on licensure, any potential breach has since been cured. PBA sought proper authority for providing the Legal Defense Plan under South Carolina law, and it is currently regulated by the state through the Department of Consumer Affairs. The element of breach is moot and, therefore, cannot be common to the class. The breach of contract claim is not certifiable.

c. Damages Issues Are Individualized.

Without bothering to tie their alleged damages to any specific claim, Plaintiffs assert that individual damages are not an impediment to class certification. (*See* Resp. Br. at 38-40). Their theory on damages, however, is completely inappropriate: they claim they "are seeking the return of some or all of the dues that the class members paid to Defendant," and as a result "there is no difference in damages suffered by each member." (*Id.* at 38). Plaintiffs fail to factor in the legal fees PBA has paid on behalf of its members, which PBA plainly would be entitled to recover as a set-off or by way of counterclaim against the class members that have been defended or are presently being defended by PBA-retained counsel. It is absurd for Plaintiffs to contend these are "class-wide legal issues" (*id.* at 39) and they cite no case adopting their theory of damages.

In short, Plaintiffs' claim that "Defendant's potential liability does not vary from class member to class member" simply blinks reality. There are at least three categories of individuals for purposes of damages calculations: (1) members who have had past representation by PBA but are not currently represented by PBA-funded counsel; (2) members who are currently represented by PBA-funded counsel; and (3) members that have never an event that required had PBA-funded counsel. Plaintiff offer no reasonable basis as to how or why all three categories should be lumped together or how their alleged damages should be calculated. Damages issues are individualized and provide another basis to reverse the Certification Order.[14]

4. The Trial Court Erred in Ruling Plaintiffs Satisfied Typicality.

To establish typicality, Plaintiffs must show they "possess the same interest" and "suffer the same injury" as the persons they propose to represent. *Burton v. Chrysler Group LLC*, 2012 WL 7153877, *3 (D.S.C. Dec. 21, 2012) (quoting *McClain v. S.C. Nat'l Bank*, 105 F.3d 898, 903 (4th Cir. 1997)). To satisfy the typicality requirement, Plaintiffs must prove their "interest in prosecuting [their] own case . . . simultaneously tend[s] to advance the interest of the absent class members." *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006). Here, proof of either Plaintiff's claims would not prove the other Plaintiff's claims, let alone those of over 2,000 other putative class members. For example, if Plaintiff Stanley somehow could prove PBA breached a contract with him (and he cannot, given that he admitted under oath that PBA has never breached any contract with him, (*see* Stanley Dep. (R. p. 182, lines 1-10), that would not prove PBA breached a contract with any other putative class member. Typicality, therefore, is not satisfied.

Furthermore, Plaintiffs do not establish typicality because they are seeking a remedy –

[14] Plaintiffs note that Federal Rule of Civil Procedure 23(c)(4) "permits courts to certify a class with respect to particular issues." (Resp. Br. at 39). That is true, but there is no corresponding provision in South Carolina's version of Rule 23, so Plaintiff's carve-out-the-damages-issue proposal should be rejected.

shutting down PBA – that, they admit, no one else has requested or desired. (Reiter Dep. (R. p. 816, lines 16-19)). There is simply no basis for such a remedy, nor is there any reasonable basis to conclude these two Plaintiffs, who admittedly received the very benefits they bargained for under the Plan, are typical of the over 2,000 PBA members they purport to represent. The trial court failed to rigorously analyze the typicality requirement and erroneously concluded these Plaintiffs, neither of whom have been personally damaged by any acts or omissions of PBA (beyond the speculative derivative "harm" they believe they sustained from the Slager events, which did not involve either of them), are appropriate and typical representatives of the proposed class.

Plaintiffs conclusorily assert each putative class member was injured by PBA because PBA supposedly acted as an unlicensed insurer, issuing unauthorized "policies" through the collection of the $23.50 monthly membership dues for participation in the Plan. (Am. Compl. (R. pp. 46-47, paras 11, 16)). Neither Plaintiff can offer any examples of how he personally, or any member of the class, has been similarly injured (or injured at all), whether or not caused by the alleged lack of licensure. They instead simply aver that the amount paid in membership dues constitutes an injury entitling themselves and class members to refunds and rescission of their Plan membership contracts. (Am. Compl. (R. p. 47, para 16)). That is absurd. Where "each Plaintiff will have been injured, if at all, in different ways and to different degrees," South Carolina law instructs that "[e]ach Plaintiff must prove his own claim." *Mulcahey v. Columbia Organic Chems. Co.*, No. 91-CP-40-3491, 1995 S.C. C.P. LEXIS 1, *9 (S.C. Ct. Com. Pl. Mar. 31, 1995). Moreover, typicality does not exist where "each member has unique damages which will require unique defenses." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 301, 705 S.E.2d 475, 478 (Ct. App. 2011). Such "proof issues ... prevent any claim from being 'typical.'" *Mulcahey*, 1995 S.C. C.P. LEXIS 1, at

*9.

Fundamentally, Plaintiffs' claims are simply a thinly veiled attempt to terminate memberships and disgorge PBA of membership fees voluntarily paid because Plaintiffs disagree with PBA's decision to not provide legal representation to Michael Slager under the provisions of the Plan, a matter that has been long been settled in other courts. These claims are not typical of the class, but rather represent the efforts of two individuals and their lawyers to obtain monetary and injunctive relief at the significant expense (and to the severe detriment) of former and current PBA members. There has been no evidence presented any other PBA members desire rescission of their memberships or any former PBA members desire their membership dues to be refunded. Accordingly, Plaintiffs failed to establish their claims as typical of the class.

5. The Trial Court Erred in Ruling Plaintiffs Satisfied Adequacy.

Plaintiffs' first problem with adequacy is they have defined themselves out of their own class. Quoting the United States Supreme Court, the South Carolina Supreme Court has observed "due process' of course requires that the named plaintiff ***at all times adequately represent*** the interests of the absent class members.'" *Hosp. Mgmt. Assocs., Inc. v. Shell Oil Co.*, 356 S.C. 644, 664, 591 S.E.2d 611, 621 (2004) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)) (emphasis added by *Hospitality Mgmt.*). "Significantly, a class representative '***must be part of the class*** and possess the same interest and suffer the same injury as the class members.'" *Id.*, 591 S.E.2d at 622 (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997) (emphasis added)); *see also Bailey v. Patterson*, 369 U.S. 31, 33 (1962) ("They [plaintiffs] cannot represent a class of whom they are not a part.").

Here, neither Plaintiff is a "part of the class" as required by settled precedents of the South Carolina and United States Supreme Courts. The class the trial court certified is defined as: "All

residents of South Carolina who participated in the Defendant's Legal Defense Benefit Plan by paying member dues to the Defendant in exchange for benefits of said Plan from August 4, 2013 to August 4, 2016." (Cert. Order (R. p. 15)). Significantly, the trial court qualified that definition with certain exclusions: "Excluded from the class are Defendant's *current and former executive and local board members* or executive level officers, employees, and persons that timely and properly exclude themselves from the class." (R. p. 15 (emphasis added)).

Plaintiffs do not dispute they were, at one time, a local board member or otherwise a leader in a local PBA chapter. (Reiter Dep. (R. p. 788, lines 11-13); (Stanley Dep. (R. p. 641, lines 16-22)). As former "executive and local board members," Plaintiffs fall squarely within their own exclusion. Accordingly, they are "not part of the class" as required by the *Hospitality Mgmt.* and by United States Supreme Court cases. For this reason, they are inadequate representatives. *See, e.g., Weinberger v. Retain Retail Co.*, 498 F.2d 552, 556 (4th Cir. 1974) (certification properly denied where named plaintiff was "not a member of the class he seeks to represent").

One of Plaintiffs' most misleading arguments acknowledges the exclusion but states their definition excludes "current and former executive and local board members . . . that timely and properly exclude themselves from the class." (Resp. Br. at 47 (purporting to quote from Cert. Order (R. p. 4)). Thus, Plaintiffs assert, the executive/local board member exclusion "only applies to those who exclude themselves." (*Id.*) That is a complete falsehood obscured by Plaintiffs' improper use of ellipses. The un-doctored exclusions are worth stating again, in full:

> Excluded from the class are Defendant's current and former executive and local board members or executive level officers, employees, and persons that timely *and* properly exclude themselves from the class.

(Cert. Order (R. p. 15) (emphasis added)). Thus, a plain reading of the Order excludes from the class PBA's "current and former executive and local board members or executive level officers"

– which Plaintiffs concede encompass both Stanley and Reiter – *as well as* "persons that timely and properly exclude themselves from the class." Plaintiffs have excluded themselves from their own class definition, and their effort to rewrite the Certification Order should be rejected.

Plaintiffs' second adequacy problem is they have "interests that are antagonistic or adverse to those of the rest of the class." *Waller*, 300 S.C. at 468, 388 S.E.2d at 801 (citing *Runion v. U.S. Shelter*, 98 F.R.D. 313 (D.S.C. 1983)). "If so, that plaintiff will not be considered an adequate representative of the class." *Waller*, 300 S.C. at 468, 388 S.E.2d at 801. A disqualifying antagonistic interest can include "when the named representative has a claim which conflicts with the economic interests of the class." *Id.* The importance of this factor should be considered in light of the fact that "a plaintiff who sues on behalf of a class and the attorney representing the class assume a fiduciary obligation to absent members of the class." *Premium Inv. Corp. v. Green*, 283 S.C. 464, 470, 324 S.E.2d 72, 76 (Ct. App. 1984).

In his deposition, Mr. Reiter testified he and Mr. Stanley had "stepped up at the helm" because they wanted to see PBA "shut down," despite being unaware of any other members who shared that desire (Reiter Dep. (R. p. 816, line 10-p. 817, line 7)) and notwithstanding his own testimony that "[t]he legal defense is a valuable service" (Reiter Dep. (R. p. 818, line 13)). The stated goal of this case by the class representatives, then, is to judicially force the closure of PBA, the rescission of memberships, and disgorgement of membership dues voluntarily paid – a remedy, three years into the case, they stand alone in seeking because they cannot name any other PBA members who desire such a drastic and unwarranted result. (Reiter Dep. (R. p. 816, lines 16-19)). Such interests are antagonistic to the proposed class.

Dismantling PBA, as Plaintiffs desire, indisputably would deprive all members of the benefit of the prepaid Legal Defense Plan and require them to immediately make alternative

arrangements for legal representation for circumstances currently covered by the Plan. As such, Plaintiffs' goal clearly is against the economic interests of the putative class members, due to the high cost of replacing the legal defense benefit and other Plan benefits (such as accidental death benefits) through individual, private resources. The other benefits provided by PBA, such as lobbying efforts and accidental death benefits, for which these class members have voluntarily paid monthly dues, would also cease – all without any evidence that any person other than two Plaintiffs (one of whom is not even a member of PBA and would be wholly unaffected by such a result) and their lawyers desire such a draconian result.

Plaintiffs do not attempt to rebut the Supreme Court's ruling in *Waller*, in which the Court noted the allegations revealed "interests which are adverse and antagonistic to beachfront property owners. Beachfront property owners who would directly benefit from the assessment would most certainly find this action repugnant to their interests. Consequently, appellants would be inadequate representatives of the putative class of *all* property owners." 300 S.C. at 469, 388 S.E.2d at 801-02 (emphasis added). Similarly, in this case, Plaintiffs seek to invalidate PBA memberships as provided by a nonprofit organization for the primary benefit of its members. PBA members who directly benefit from memberships most certainly would find this action repugnant to their interests. Thus, *Waller* precludes certification.

Plaintiffs' efforts are antagonistic to the interests of PBA members who wish to remain members and retain their benefits. At the very least, their claims are antagonistic to the economic interests of those members of the class who cannot afford to suddenly retain private counsel in the absence of their PBA Plan benefits. Plaintiffs' stated goals, if permitted, would significantly and unfairly harm other PBA members who receive benefits from their participation in the Plan. This

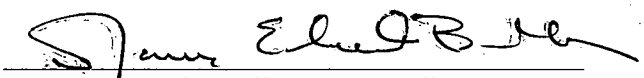
Court should, therefore, reverse the trial court's class certification.[15]

CONCLUSION

This case is inappropriate for class certification, and the Circuit Court erred in ruling otherwise. PBA respectfully requests this Court reverse the grant of class certification.

[15] Plaintiffs seriously err in asserting "that class members can opt-out of the class, which should resolve any objections a PBA member might have to the litigation." (Resp. Br. at 44.) A class member's right to have his or her interests adequately represented and the right to opt out are two separate rights, as federal courts have held in rejecting this exact argument. *See Colindres v. QuietFlex*, 235 F.R.D. 347, 376 (S.D. Tex. 2006) ("Providing class members notice an opt-out opportunity may alert class members that they can pursue individual damages claims, but are not a substitute for the adequate, conflict-free representation required under Rule 23(a)(4).").

Respectfully submitted,



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DATED: December 12, 2019.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Trial Court Judge

Appellate Case No. 2019-000182

Donald Stanley and Sean Reiter,
Individually and as Class Representatives, ... Respondents,

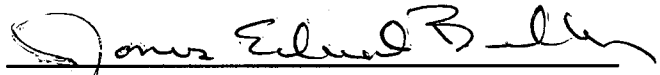
v.

Southern States Police Benevolent Association, Inc., ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Appellant complies with Rule 211(b), SCACR.

December 12, 2019



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