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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____
DEPUTY

MARKETING ON HOLD, INC. §
d/b/a SOUTHWESTERN TARIFF ANALYST, and §
HARRIS COUNTY HOSPITAL DISTRICT, §
Plaintiffs, §
§
§
VS. §
§
WALLACE B. JEFFERSON, CHIEF JUSTICE; §
NATHAN L. HECHT, JUSTICE; §
HARRIET O'NEILL, JUSTICE; §
DALE WAINWRIGHT, JUSTICE; §
DAVID MEDINA, JUSTICE; §
PAUL W. GREEN, JUSTICE; §
PHIL JOHNSON, JUSTICE; §
DON R. WILLETT, JUSTICE; and §
EVA GUZMAN, JUSTICE; §
In their official capacities, §
Defendants. §

A10CA104 SS
Civil Action No. _____
(Jury)

COMPLAINT FOR DECLARATORY RELIEF,
JURY TRIAL DEMAND

Plaintiffs MARKETING ON HOLD, INC., doing business as SOUTHWESTERN TARIFF ANALYST (“STA”) and HARRIS COUNTY HOSPITAL DISTRICT (“HCHD”) (collectively, “Plaintiffs”) bring this Complaint against the honorable CHIEF JUSTICE WALLACE B. JEFFERSON and JUSTICES NATHAN L. HECHT, HARRIET O’NEILL, DALE WAINWRIGHT, DAVID MEDINA, PAUL W. GREEN, PHIL JOHNSON, DON R. WILLETT, and EVA GUZMAN in their official capacities (collectively, the “Justices” or “Defendants”).¹ Plaintiffs complain and allege, upon information and belief, as follows:

¹ See *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 & n. 10, 109 S.Ct. 2304, 2312 & n. 10, 105 L.Ed.2d 45 (1989); see also *Howlett v. Rose*, 496 U.S. 356, 365-66, 110 S.Ct. 2430, 2437, 110 L.Ed.2d 332 (1990). In *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), the Supreme Court fashioned an exception to Eleventh Amendment immunity. It allowed a claim seeking prospective

NATURE OF THE ACTION

1. Plaintiffs bring this action against the Justices of the Texas Supreme Court, in their official capacities, under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 for deprivation of Plaintiffs' due process rights as a result of the delay caused by the Justices' failure to decide an *interlocutory* appeal of a class certification order that has been pending before the Texas Supreme Court for over *four years* without a decision, and nearly *three years* since oral argument. The entire interlocutory appeal process began with an appeal by Southwestern Bell Telephone Company, the class action defendant, to the Texas Thirteenth Court of Appeals, which affirmed the trial court's class certification order. It has now been nearly *seven years* since the appeal process began, and the underlying case has been *stayed* during that entire period of time. The underlying suit is now nearly *ten years old without a trial or discovery on the merits*, because of the foregoing delay and Texas laws and rules applicable to class actions.²

2. STA is the class representative named in the class certification order, and is a class member and owner of several claims made the subject of the underlying class action. The Harris County Hospital District is a class member and also an owner of a claim in the underlying class action. The Harris County Hospital District has joined in this federal complaint in support of STA's continuing efforts to address the delay by the Texas Supreme Court and the injury and irreparable harm being caused to its own claim as well as the claims

equitable relief against a state official to proceed in federal court, in order to prevent future constitutional violations. Plaintiffs do not seek damages against the Justices, but only seeks *prospective* declaratory relief against the Justices, as allowed under *In Ex Parte Young*. Consequently, neither the Eleventh Amendment to the United States Constitution, federalism nor comity is a bar to Plaintiffs' claims herein.² Since the time that STA filed the class action on May 4, 2000, the Texas Legislature and Texas Supreme Court made substantial changes to Texas class laws and rules.

of the class, as a result of the delay.

28 U.S.C. §§ 2201 and 2202 Prospective Declaratory Relief

3. This Complaint is only for *prospective* declaratory relief³ under 28 U.S.C. §§ 2201 and 2202, which is made necessary because the continuing delay deprives Plaintiffs and the class their U.S. constitutional right to due process and judicial access, by denying them a trial of their claims and causes of action at a meaningful time and in a meaningful manner.⁴

4. In May 2000, the underlying case was filed by STA as a class action against Southwestern Bell Telephone Company (“Southwestern Bell”). In January 2003, a four-day class certification hearing was held, and in May 2003 the trial court certified a class of approximately 6,000 business, governmental and institutional customers of AT&T Texas (formerly, Southwestern Bell Telephone Company) (“**Southwestern Bell**” or “**SWBT**”), naming STA as class representative. Harris County Hospital District is one of nearly 300 state and federal governmental entities listed by Southwestern Bell as a putative class member.

5. Southwestern Bell Telephone Company appealed the certification order in May 2003, and since that time the case has been stayed pursuant to Texas law, until the interlocutory appeal is concluded. It has now been *nearly ten years* since the suit was filed, and during this entire period, STA has been precluded discovery on the merits or a trial on the merits.

6. When the subject class action was filed in May 2000, the Texas Supreme

³ See *Will v. Michigan Dep't of State Police*, *supra*.

⁴ *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L.Ed.2d 18 (1976) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”) (internal quotation marks and citations to precedent omitted).

Court's history of reviewing class certification orders was extremely sparse. Indeed, over the nearly sixty year period prior to May 2000, beginning with the adoption of Texas Rule of Civil Procedure 42 in 1941 (based, in part, upon Federal Rule of Civil Procedure 23), the Texas Supreme Court had issued opinions deciding the propriety of a trial court's certification order in only three interlocutory appeals, *each of which took less than 1 year to decide after oral argument*.

7. However, recent statistical trend analysis of the Texas Supreme Court's history of deciding class action appeals now indicates that it will probably be many more months and could be several more years before the Texas Supreme Court decides the subject interlocutory appeal. See paragraph 40, *infra*. This continuing delay, while costly in the past, is now irreparably injuring Plaintiffs and the class. More specifically, during continued delay, critical documentary evidence will undoubtedly be destroyed (or lost) pursuant to Southwestern Bell's own practices or otherwise; and expectedly, witnesses' memories will fade and witnesses will retire, become unavailable or incapable of testifying, or die.⁵ The claims of Plaintiffs and the class are losing coherence⁶ and degrading by reason of the delay, which is adding significantly to the expense in prosecuting their case.

**The Trial Court's Class Certification is Affirmed by the Court of Appeals,
and then Appealed by SWBT to the Texas Supreme Court**

8. The class certification by the trial court was affirmed by the Thirteenth Court of Appeals in August 2005. Following that decision, Southwestern Bell appealed to the Texas Supreme Court; the case was docketed as Case No. 05-0748, styled Southwestern Bell

⁵ Further, during this lengthy delay, Plaintiffs and the class have lost their lead counsel due to his tragic death, and his firm is now in the process of winding down and dissolving.

⁶ See *Johnson v. Jones*, *infra*.

Telephone Company v. Marketing on Hold, Inc. d/b/a Southwest Tariff Analyst (“Case No. 05-0748”). Case No. 05-0748 is an *interlocutory* appeal of the trial court’s order certifying a class in Cause No. 2000-05-001931-B, Marketing On Hold, Inc. d/b/a Southwestern Tariff Analyst, et al. v. Southwestern Bell Telephone Company, pending in the 138th Judicial District Court of Cameron County, Texas (“Cause No. 2000-05-001931-B”). As stated above, the class consists of approximately 6,000 business and institutional customers (for profit and non-profit) and governmental customers of Southwestern Bell throughout Texas. The class claims total approximately \$80 million, including interest.

9. Although Cause No. 2000-05-001931-B has been stayed for nearly seven years pursuant to Texas Civil Practice & Remedies Code 51.014(b), the delay and injury complained of herein is the result of the inaction by the Texas Supreme Court while the case has been pending before that court.

10. For nearly a year, Case No. 05-0748 has been the oldest appeal awaiting a decision at the Texas Supreme Court, not merely the oldest *interlocutory* appeal.

42 U.S.C. § 1983 and 28 U.S.C. §§ 2201, 2202 Applicable

11. When sued for prospective relief, as is the case here, a 42 U.S.C. §1983 action may be maintained against a state official in his or her official capacity because official-capacity actions for prospective relief are not treated as actions against the State. See *Will v. Michigan Dep't of State Police*, supra, at n. 10. Therefore, Plaintiffs seek declaratory relief against the Justices under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202 on the grounds that Plaintiffs and the class are currently being denied their constitutional rights as a result of the delay of Case No. 05-0748 and stay of the trial, and will continue to be deprived their due

process rights while Case No. 05-0748 is pending without a decision by the Justices of the Texas Supreme Court, which the court is constitutionally bound to provide. Plaintiffs have no reason to believe that the Texas Supreme Court would refuse to follow federal law, once its application to Plaintiffs' case has been declared by this Court. Therefore, at this time, Plaintiffs are not requesting any orders beyond the declaratory relief sought herein.

**No Request for Injunction or Mandamus Relief,
and No Request for Bright-Line Tests or Deadlines**

12. Plaintiffs do not seek an injunction or mandamus relief at this time. Plaintiffs are only seeking declaratory relief relating to the specific facts in this case alone. In order to grant relief herein, Plaintiffs are not requesting, nor is this Court required to articulate, a bright-line test to ascertain *when* a delay becomes intolerable; nor are Plaintiffs requesting, or is the Court required to set, a deadline by which the Texas Supreme Court must act.

**Delay which results in Violation of U.S. Constitutional
Rights and Protections Requires Court Action**

13. When a failure of a court to render a decision or to otherwise take appropriate legal action continues indefinitely, constitutional rights and protections of the litigant are damaged or lost; therefore, when proper application is made to an appropriate court, the litigant's constitutional rights and protections must be safeguarded. Under the facts in this case, Plaintiffs have made a prima facie case under the applicable laws of the United States for this Court to take action for the protection of Plaintiffs' and class' constitutional due process rights. "[A]n appeal that is inordinately delayed is as much a 'meaningless ritual' as an appeal that is adjudicated without the benefit of effective counsel." *Maynard v. Casebolt*, 2000 WL 1005265, *3 (10th Cir. 2000). To nominally allow class action claims but "allow

indefinite postponement of the trial” of those claims reduces those claims to a “nullity.” *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1163 (2nd Cir. 1986). Not only are Plaintiffs denied a judicial disposition of its claims as guaranteed by the Constitution, by reason of delay, Plaintiffs are also being denied the right to a review by the United States Supreme Court at a meaningful time if the Texas Supreme Court were to issue a decision adverse to Plaintiffs and the class. Without action by this Court, Plaintiffs and the class are totally at the mercy of the state Supreme Court, and are unable to otherwise exercise their federally protected constitutional rights. The delay in this case is far more harmful than such a delay in the rendering of a final decision. A ruling at the interlocutory level, even in Plaintiffs’ favor, would only have the effect of returning the case to the trial court so that STA could begin to undertake its litigation on the merits. In effect, Plaintiffs’ are stuck in a black hole with the inability to appeal their constitutional deprivation to the United States Supreme Court while they are frozen in an interlocutory appeal. Thus, the interlocutory nature of the state court appeal uniquely counsels in favor of federal relief, because the delay operates to obstruct United States Supreme Court review. See *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978).

This Court is the Only Court of Recourse for Plaintiffs and the Class

14. Plaintiffs and the class have no other recourse than to make proper application to this Court. More specifically, Plaintiffs and the class have no ability to appeal to any other court, nor do they have the ability to undertake any other legally recognized action than to make application to this court for relief. That this court has jurisdiction to grant the relief requested herein has clearly been established by applicable statutory and case law.

STA's Actions before Filing this Suit

15. Following oral argument held on March 22, 2007, STA undertook all conceivable action to obtain a prompt and timely ruling from the Supreme Court of Texas. For example, STA has filed post-oral argument briefs as well as a motion requesting a prompt decision. Despite these filings, the court has yet to request a response from SWBT, set the motion for a hearing, or take any known action with respect to the motion or the appeal.

JURISDICTION AND VENUE

16. The federal claims asserted herein arise under and pursuant to the Fourteenth Amendment of the United States Constitution. This action is authorized by 42 U.S.C. § 1983, which provides redress for the deprivation under color of state law of rights secured by the Constitution and the laws of the United States; the rights implicated in this case arise under the Fourteenth Amendment to the Constitution.

17. The jurisdiction of the Court is founded on 28 U.S.C. §§ 1331 and 1343(a).⁷

18. This court also has authority to provide declaratory relief in this case under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

19. This Court has personal jurisdiction over the Justices because they are all citizens and residents of Texas.

⁷ Plaintiffs bring no state law claims in this complaint; therefore, there is no jurisdictional bar under *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900 (1984). Additionally, *Rooker-Feldman* does not bar Plaintiffs' due process claim. *Rooker-Feldman* is a narrow doctrine, confined to cases where the losing party in a state court judgment seeks review and rejection of the judgment in federal district court. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). Since there is no adverse state court judgment against the Plaintiffs which Plaintiffs could have appealed to the Supreme Court, *Rooker-Feldman* is inapplicable. See *Wolfe v. Strankman*, 392 F.3d 358, 363 (9th Cir. 2004).

20. Venue is proper under 28 U.S.C. § 1391(b), because one or more of the Justices resides within the Austin Division of the United States District Court for the Western District of Texas, and because all or a substantial portion of the events giving rise to the claims occurred in this District and Division.

PARTIES

21. Plaintiff Marketing On Hold, Inc., doing business as Southwestern Tariff Analyst, is a corporation organized and existing under the laws of the State of Texas, with its principal office for business in Houston, Harris County, Texas.

22. Plaintiff Harris County Hospital District is a political subdivision of the State of Texas organized as a hospital district in Harris County, Texas, created under Texas Health & Safety Code §281 Subchapter A and pursuant to Article IX of the Texas Constitution, with its administrative offices located at 2525 Holly Hall Drive, Houston, Texas 77054. The Harris County Hospital District includes, without limitation, Ben Taub General Hospital, Lyndon B. Johnson General Hospital, Quentin Mease Community Hospital, fourteen community health centers, eight school based clinics and a dialysis center in Harris County, Texas.

23. Defendants are the following Texas Supreme Court Justices, in their official capacities: CHIEF JUSTICE WALLACE B. JEFFERSON and JUSTICES NATHAN L. HECHT, HARRIET O'NEILL, DALE WAINWRIGHT, DAVID MEDINA, PAUL W. GREEN, PHIL JOHNSON, DON R. WILLETT, and EVA GUZMAN. Each is a resident of the State of Texas, and may be served with summons wherever he/she may be found.

BACKGROUND

The Plaintiffs

24. Plaintiff STA is in the business of auditing telephone bills and records, and then making recommendations to its customers about ways to reduce their telephone bills and/or obtain refunds for overbillings. In the course of this business, STA determined that many of its customers had been billed by SWBT for items that were unauthorized. Five of those customers chose to assign their claims to STA, which STA is pursuing in Cause No. 2000-05-001931-B.

25. HCHD is a political subdivision which consists of several significant hospitals and health care facilities in Harris County, Texas. In 2006, HCHD hired STA to perform an audit of its Southwestern Bell telephone services and bills. Since that time, STA has obtained nearly \$1 million in refunds, credits and savings for HCHD relating to HCHD's telephone bills and services with Southwestern Bell. Additionally, HCHD is also currently pursuing approximately \$900,000 more in potential refunds discovered by STA; these claims are currently being pursued by HCHD at the Texas Public Utility Commission ("PUC"), State Office of Administrative Hearings ("SOAH"), and state district court in Travis County Texas. However, the claims that are the subject of this federal complaint are not included within any of the pending matters at the PUC, SOAH or state district court. It was only within the past few months that HCHD became aware that it is a member of the class in Cause No. 2000-05-001931-B. Since that time, HCHD has learned that its class claim totals approximately \$75,000, plus interest, and that the class claim is not included among the other claims that HCHD is pursuing at the PUC, SOAH or state district court, or has previously

pursued against Southwestern Bell.

Nature of the Underlying Class Action

26. Cause No. 2000-05-001931-B is a class action that was filed on May 4, 2000, in which STA sued SWBT for unauthorized billings made on the telephone bills of approximately 6,000 business, institutional and governmental customers of SWBT throughout Texas.⁸ STA estimates that class member claims range from the low thousands of dollars to several hundred thousand dollars.

27. The class is defined, in part, by the language in ordinances used by municipalities to govern the fees paid by SWBT for use of the municipalities' rights-of-way from 1991 through 2000. These types of ordinances are referred to as Specified Annual Payment ordinances ("**SAP Ordinances**"), and are sometimes referred to as "franchise agreements." SAP Ordinances were used by SWBT for most Texas municipalities beginning in 1991 until no later than May 31, 2000. May 31, 2000 is believe to be the latest possible date for the accrual of a claim under a SAP Ordinance because June 1, 2000 is the effective date for SWBT's "fee per line" tariff, adopted under Chapter 283 of the Texas Local Government Code. The "fee per line" tariff had the effect of changing the method of determining the amount to be paid by SWBT for the use of municipal rights-of-way, from a specified annual payment to a fee per line amount. This change applied to most, if not all, municipalities throughout Texas. Depending on the municipality, however, most SAP Ordinances expired pursuant to their terms before May 31, 2000. For example, San Antonio's SAP Ordinance expired on July 31, 1997, Houston's expired on September 30,

1998, Dallas' expired on July 1, 1999, and Fort Worth's expired on September 30, 1999. Indeed, of the over 450 municipalities in Texas that had SAP Ordinances, approximately 305 municipalities had SAP Ordinances that expired before May 31, 2000. For purposes of this Complaint, these expiration dates are important because the customer billing data and information that would be used to calculate the class' damages in Cause No. 2000-05-001931-B is now from nine to eighteen years old.

No Assurance that Discoverable Evidence will be Preserved

28. Importantly, documentation and witness testimony obtained by STA through pre-certification discovery revealed that SWBT has a policy to only retain customer billing records and data for 12 years, or less. Therefore, the longer Plaintiffs' case is delayed, the greater the likelihood that records will be destroyed, especially records not yet discovered or requested by Plaintiffs. As discussed in greater detail below under the heading "Plaintiffs' Cause of Action for Declaratory Relief," Plaintiffs cannot rely upon SWBT's designated witnesses and counsel to know about the existence of all of the records and data that Plaintiffs have requested, notwithstanding that Plaintiffs' requests are very clear and very specific. This is illustrated by the fact that the so-called "knowledgeable" witnesses who SWBT produced for deposition did not even know about the archived "MIAS tapes," see paragraphs 67 through 70, *infra*, the existence of which SWBT's counsel finally revealed after two years of pre-certification discovery. These tapes contained data that STA had been seeking to find for two years. Under these circumstances, it is not reasonable to believe that SWBT is preserving evidence that SWBT doesn't know or has denied exists. When SWBT

⁸ Exhibit 1 is a list of "putative class members," provided by SWBT. Exhibit 2 is a list of governmental

denies that records exist, the only way for STA to ensure that the “non-existent” records are preserved is to conduct discovery and locate the records itself – just as STA had to do with regards to the MIAS database tapes. However, at some point, if all institutional memory and record of evidence has been lost or destroyed as a result of the delay, it will probably become impossible for STA to locate relevant evidence, much less challenge SWBT on its denial that (lost or destroyed) evidence ever existed. Moreover, SWBT has grown substantially since the appeal began. Importantly, the number of employees and complexity of SWBT continues to increase organically and through mergers and acquisitions, making it even less likely that discoverable evidence will be found in the proverbial haystack.⁹ The foregoing facts and circumstances plainly show that there is an imminent danger of irreparable harm to Plaintiffs and the class caused by the continuing delay by the Texas Supreme Court.

Pre-Certification Discovery was Limited to Certification Hearing Issues

29. Rule 42 of the Texas Rules of Civil Procedure, as promulgated and applied by the Texas Supreme Court, allows a party to maintain an action as a class action if the prerequisites of Rule 42(a) and (b) are satisfied. Under Texas Rule of Civil Procedure 42(c) (2)(A), “[w]hen a person sues or is sued as a representative of a class, the court must – *at an early practicable time* – determine by order whether to certify the action as a class action.” [Emphasis added]. Also under Texas law, “trial courts [are to] limit pre-certification discovery to the particular issues governing certification in each case . . .” *In re SCI Tex. Funeral Servs.*, 236 S.W.3d 759, 760 (Tex. 2007). After filing suit, STA began its pre-

entities that were extracted from Exhibit 1.

⁹ In 2000, Forbes reported that SBC Communications (SWBT’s parent) had 202,500 employees. Forbes currently reports that AT&T has 301,000 employees. After SBC acquired AT&T, it changed its name to AT&T.

certification discovery.¹⁰ Initially, SWBT claimed that it only had several months of historical customer billing records in digital form. However, after STA conducted extensive pre-certification depositions of SWBT employees, SWBT revealed that it actually had over ten years of digital historical billing records on computer tapes. STA contends that when all of these digital records are produced to STA, assuming SWBT has preserved these records, STA will be able to determine the identity of the class members and the amount of the alleged damages for most of the SAP Ordinance period. However, there still is an eighteen month period of digital records that SWBT insists it does not have. Notwithstanding SWBT's insistence, STA believes that further discovery would have revealed the existence of such "missing" records, but as time passes, the risk increases that these records will never be found.

The Trial Court Certifies the Class after a Four Day Certification Hearing

30. Promptly after discovering the previously concealed computer tapes, STA sought a certification hearing, which the trial court conducted over a four-day period in January 2003.

31. On May 1, 2003, an order was entered by the 138th District Court certifying a class. The class definition provides readily ascertainable objective criteria to specifically identify the members of the class. In summary, it states that the class consists of SWBT customers who paid so-called "municipal" charges/fees on certain services identified by SWBT's own Universal Service Order Codes (USOCs).

¹⁰ STA also disposed of a motion to transfer venue wherein SWBT sought to have the case transferred to Harris County, Texas, which is where SWBT had sued STA and its customers who assigned STA their claims; this suit was filed the afternoon of May 4, 2000, the very day that STA filed its class action.

**SWBT Files an Interlocutory Appeal of the Certification Order, Which
Stays the Case pending the Conclusion of the Appeal**

32. Following entry of the class certification order by the trial court in Cause No. 2000-05-001931-B, on May 12, 2003, SWBT filed its Notice of Appeal to the Thirteenth Court of Appeals District of Texas. The case has been on appeal since that date.

33. Texas Civil Practice & Remedies Code § 51.014(a)(3), allows for an interlocutory appeal of a class certification order. Important to the issue of substantial prejudice and the denial of due process is that under Tex. Civ. P. Rem. C. § 51.014(b), an interlocutory appeal of a class certification order stays the commencement of a trial in the trial court pending resolution of the appeal. Consequently, SWBT's interlocutory appeal of the trial court's class certification order has resulted in staying Plaintiffs' and the class' ability to prosecute their claims and causes of action pending the conclusion of the appeal at the Texas Supreme Court.¹¹

**SWBT's Appeals, and the Court of Appeals Affirms the Class Certification
Within Eighteen Months After SWBT's Opening Brief**

34. The Texas Constitution Article 5, Sec. 31(a) states:

The Supreme Court is responsible for the efficient administration of the judicial branch and shall promulgate rules of administration not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.

SWBT sued for declaratory judgment, and threatened to add damage claims against the customers. Ultimately, after the 269th District Court abated the Harris County case, SWBT dismissed that suit.

¹¹ In stark contrast to Section 51.014(b), Federal Rule of Civil Procedure 23(f) does not allow an appeal as a matter of right; rather, it is within the court of appeals' discretion whether or not to permit an appeal of an order granting or denying class action certification. Rule 23(f) also states that an appeal does not stay the trial court proceeding unless the trial judge or the court of appeals so orders. Moreover, in *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 837 (7th Cir. 1999), the Seventh Circuit held that stays pending Fed. R. Civ. P. 23(f) appeals should not be routinely granted; and in *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000), the First Circuit emphasized that "interlocutory appeals should be the exception, not the rule." The various federal courts of appeals differ on the precise criteria for reviewing requests to appeal class certifications.

Texas Government Code § 74.021 states that “[t]he supreme court has supervisory and administrative control over the judicial branch and is responsible for the orderly and efficient administration of justice.” Texas Government Code § 74.024(a) provides that “[t]he supreme court may adopt rules of administration setting policies and guidelines necessary or desirable for the operation and management of the court system and for the efficient administration of justice.”¹² The overriding purpose of judicial rules of procedure is to obtain “a just, fair, equitable and impartial adjudication *with as great expedition and dispatch ... as may be practicable.*” *In re Houston Lighting & Power Co.*, 976 S.W.2d 671, 673 (Tex. 1998) (citing Tex. R. Civ. P. 1) [Emphasis added]. Indeed, based on the authority granted to it under Texas Constitution Article 5, § 31 and Texas Government Code § 74.024, the Texas Supreme Court promulgated Rule 28 of the Texas Rules of Appellate Procedure. Under Rule 28.1, “[a]n appeal from an interlocutory order, when allowed, will be *accelerated.*” [Emphasis added].

35. The Thirteenth Court of Appeals issued its opinion eighteen months after SWBT filed its opening brief. See *Southwestern Bell Telephone Company v. Marketing On Hold, Inc.*, 170 S.W.3d 814 (Tex. App. – Corpus Christi 2005, review granted).

**SWBT Appeals to the Texas Supreme Court on September 13, 2005,
and the Texas Supreme Court Grants SWBT’s Petition for Review**

36. Case No. 05-0748 was docketed at the Texas Supreme Court on September 13, 2005. SWBT file its petition for review on November 7, 2005. The Texas Supreme Court

¹² Former section 25 of article 5, repealed in 1985, provided that “the Supreme Court is empowered to make and establish rules of procedure, not inconsistent with the laws of the state, for the government of all courts, *to expedite the dispatch of business therein.*”

has jurisdiction to review an interlocutory appeal of an order certifying or denying certification of a class action without regard to whether a conflict exists between courts of appeals. TEX. CIV. PRAC. & REM.CODE § 51.014(a)(3); TEX. GOV'T CODE § 22.225(d). *Bowden v. Phillips Petroleum Co.*, 247 S.W.3d 690, 696 (Tex. 2008). A class certification order is reviewed by the Texas Supreme Court for abuse of discretion. *Bowden*, 247 S.W.3d at 696.

37. The Texas Supreme Court did not grant review of SWBT's appeal solely based on SWBT's petition for review. Before granting SWBT's petition on February 23, 2007, the Texas Supreme Court requested and received full briefing on the merits from the parties. A month later, the Texas Supreme Court heard oral argument on March 22, 2007. **It has now been over four years since SWBT appealed to the Texas Supreme Court and two years and ten months since oral argument, and no decision has yet been rendered by the Texas Supreme Court.**

Plaintiffs' Class Action the Oldest Appeal at the Texas Supreme Court

38. Case No. 05-0748 is the oldest appeal without a decision at the Texas Supreme Court, and the oldest post-oral argument appeal. (Source: Docketdb.com) Obviously, there will always be an oldest case; but this is an interlocutory appeal which by the Texas Supreme Court's own appellate Rule 28.1 is considered to be accelerated. Importantly, unlike most other appeals where the parties have already had their "day in court," the trial on the merits of this case has been stayed for nearly seven years pending a final decision by the appellate courts on class certification.

39. Case No. 05-0748 was docketed at the Texas Supreme Court on September 13,

2005, or 1,571 days ago as of January 1, 2010. As of January 1, 2010, it has been 1,016 days since oral argument.¹³ Since oral argument in Case No. 05-0748, the Texas Supreme Court has issued over 200 opinions in other cases that were docketed after Case No. 05-0748, and has issued more than 50 opinions in appeals that were heard by oral argument after STA's oral argument (most of which were docketed after Case No. 05-0748).

**Analysis of Supreme Court History in Deciding
Class Certification Appeals Demonstrates the Probability of Further Delay**

40. Based upon an analysis of the Texas Supreme Court's history in deciding class certification appeals, it is expected that Plaintiffs and the class will have to wait substantially longer before the Texas Supreme Court issues its decision. Attached as Exhibit 3 to this Complaint is a statistical analysis prepared June 23, 2009 by Robert R. Hill, who holds a Ph.D. in Quantitative Management Science; his Resume is attached as Exhibit 4. Mr. Hill's analysis shows that the time it takes for the Texas Supreme Court to decide a class certification appeal has been substantially increasing since Plaintiffs filed suit against SWBT in May 2000. However, during this same period, the number of petitions and applications filed with the Texas Supreme Court declined, and the number of petitions and applications granted remained about the same. (Source: Appendix A to Texas Supreme Court Docket Analysis: July 1, 2008, by Pamela Stanton Baron, State Bar of Texas, Advanced Personal Injury Law Course 2008.) Despite the decline in filings at the Texas Supreme Court, the statistical analysis prepared by Mr. Hill shows that the *expected decision date* for Case No.

¹³ There are two older post-oral argument cases at the Texas Supreme Court, but both are original proceedings.

05-0748 is **September 20, 2010**, with an *upper limit* of **February 20, 2013**.¹⁴ Such a lengthy delay deprives Plaintiffs and the class of liberty and property without due process of law. Based upon this analysis, Plaintiffs and the class could be waiting several more years before there is a decision by the Texas Supreme Court.

**STA Timely and Repeatedly Requested a More
Expeditious Review by the Texas Supreme Court, which has Proved Futile**

41. Following the oral argument, on August 16, 2007 and again on May 14, 2008, STA filed letter briefs requesting that the Court rule that SWBT's petition was improvidently granted, and dismiss SWBT's appeal, because of false cites and material misrepresentations of the record by SWBT. In the May 14, 2008 letter, STA also stated, in relevant part, as follows:

This is not an appeal from a final judgment where all the issues have been litigated. This is an interlocutory appeal which has delayed this litigation for years. This leads to a denial of justice and raises the dangers of loss of memory, loss of evidence, and the disappearance or death of witnesses. . . .

As can be seen from this letter, over a year and a half ago STA was asking the court to rule, because the delay risked substantial injury and prejudice to Plaintiffs and the class and deprived them of their right to due process. SWBT did not respond to these briefs, nor did the court request a response.

42. In August 2009, it was reported in the press that Justice Brister would be leaving the Texas Supreme Court on September 7, 2009. Concerned that Justice Brister's departure might further delay a decision by the court, STA filed yet another request for decision. This time the request was filed on August 27, 2009 as an "Emergency Motion for

¹⁴ The lower limit of April 20, 2008, has obviously already passed.

Expedited Decision, Motion to Dismiss, and Motion for Damages and Sanctions.”¹⁵ SWBT did not respond to STA’s motions. The court has not requested a response from SWBT, and has not ruled on the motions or set a hearing date.

SWBT Refuses to Voluntarily Resume Discovery

43. STA recently sent SWBT a letter requesting that discovery resume in light of the fact that the Texas Supreme Court had yet to decide the certification appeal. SWBT unequivocally refused, stating that “under the circumstances, Southwestern Bell is prepared, if necessary, to resist Marketing on Hold’s effects to resume discovery in the underlying case.” Obviously, any efforts by STA to resume discovery without SWBT’s cooperation would be futile until the certification appeal is concluded, and would likely result in other costly and timely appellate procedures (e.g., mandamus). Since STA has not been able to continue its discovery of additional databases and records, Plaintiffs have no way to know, and may never know, what was available before the case was stayed nearly seven years ago that is not in existence today due to a retention policy or otherwise, and has no way to know what records and databases will be destroyed in the future while the case is stayed during the appeal. STA’s inability to continue its investigation and discovery is seriously prejudicing and injuring Plaintiffs’ and the class’ case.

Prior Texas Supreme Court Justices have Viewed Significantly Less Delay to be Unjust

44. This is not the first time that concerns have been raised about the Texas

¹⁵ The motion for damages and sanctions was against SWBT and its counsel, on the grounds that SWBT made serious and material misrepresentations and mischaracterizations of the facts and the record, upon which the court relied when making its decision to grant SWBT’s petition. These were not only made in SWBT’s briefing, but were also blatantly made during oral argument and in response to the justices’ questions.

Supreme Court's delay in issuing opinions following oral argument. Indeed, several former Texas Supreme Court Justices have admitted to "unjustified delay" in deciding cases and that such delay is a denial of justice. See *Greathouse v. Charter Nat. Bank-Southwest*, 851 S.W.2d 173, 177-178 (Tex. 1992) (Justice Lloyd Doggett dissenting);¹⁶ see also *Delaney v. University of Houston*, 835 S.W.2d 56, 61-65 (Tex. 1992) (Justice Doggett dissenting; Justice Mauzy concurring). In *Greathouse*, Justice Doggett stated his concern that a sixteen-month lapse between argument and release of the opinion is "too long," and is "justice denied." Notably, *Greathouse* was an appeal of a case that had already been tried on the merits. If sixteen-months was considered too long for a case that had been tried, surely thirty-three months (and counting) is too long for a case not previously given on the merits, much less a trial.

45. In *Hurlbut v. Gulf Atlantic Life Ins. Co.*, 749 S.W.2d 762, 769 (Tex. 1987), Justice Robertson's dissent addressed the injustice that he believed existed after an eleven year old case was remanded to begin the process all over again:

This lawsuit was originally filed eleven years ago. After a lengthy trial, the jury returned findings of fact that were in every way favorable to C. Daniel Hurlbut and A.C. Hovater. The trial judge rendered a judgment in favor of

¹⁶ Justice Doggett stated, in relevant part, as follows: "While a split of legal authority regarding even the single, narrow issue presented here necessitates careful review, the rather modest record together with briefing provided by the parties suggest that the sixteen-month lapse between argument and release of an opinion is too long. Such delay has a detrimental effect on both the parties and the process . . . I continue to assert that 'justice delayed [has been] justice denied.'

A dilatory resolution of the issue presented injects prolonged uncertainty into commercial litigation, with resulting unfairness to businesses instituting suits to enforce debts, as well as to debtors who seek to ensure the proper calculation of any claimed deficiency. The delay also 'breaches the public's trust in performing the duties of the judiciary in a timely and responsible manner.'

As judges, our commitment should be to a legal system that provides litigants a just and timely resolution of their disputes. See Texas Supreme Court, Code of Judicial Conduct, Canon 3, pt. A(7) ('[a] judge should dispose promptly of the business of the court. '); Texas Lawyer's Creed-A Mandate for Professionalism (adopted November 7, 1989) (a judge owes the public the same 'diligence, candor [and] punctuality' that this Creed demands of lawyers"). . . ."

Hurlbut and Hovater based upon that jury verdict.

During the three and one-half years the case was pending in the court of appeals, A.C. Hovater died. Thus, this case presents the perfect example of the truth of the maxim that "justice delayed is justice denied." There is no longer any possibility of justice for Hovater. His heirs have assumed the pursuit of his appeal.

Now, eleven years after Hurlbut and Hovater first went to court seeking a remedy for their wrong, this court remands the cause back to the trial court for a new trial. The parties will begin the process all over again. How many more years will it be before the case is finally resolved and the wrong is made right?

In Plaintiffs' case, STA has not even had the opportunity to conduct discovery on the merits, much less have a trial.

Plaintiffs' Claims and Case are being Injured by Continuing Delay

46. This begs the question, what has happened during the nearly seven years that Plaintiffs' class action has been stayed pending the interlocutory appeal of the class certification order? Certainly, as discovery and the trial become more distant from the relevant events, memories will fade. In addition, fact witnesses (such as SWBT's employees), expert witnesses and attorneys will likely have left their employment, retired or died during the six year period. Indeed, the class' lead counsel, John O'Quinn, tragically died on October 29, 2009; and the class' experts, both of whom are former SWBT employees, are now 79 and 59 years old. Moreover, SWBT's lead trial counsel has moved to another law firm and no longer represents SWBT, and other SWBT attorneys have moved into other areas. The SWBT's employees who gave depositions leading to the discovery of the undisclosed computer tapes are approaching retirement age, and one or more has moved into another area of the massive company. Will these and other fact witnesses still be around or even remember the relevant facts after a six, seven, eight, nine or ten year delay? And

what about the documentary evidence and digital records? These too are often lost, misplaced or destroyed over a six year period. Indeed, it was not until after two years of discovery and numerous depositions that SWBT finally disclosed the existence of digital records covering most of the SAP Ordinance period at issue; but even then, SWBT claimed that eighteen months of digital records were missing. SWBT may claim that it is currently preserving these digital records, but would it have preserved this evidence had STA not, through extensive discovery, begun to close in on the persons who had knowledge of their existence? Plaintiffs contend that there is a high probability that records still undisclosed are at serious risk of being destroyed as a result of SWBT's own retention policy, or otherwise lost or destroyed. There is absolutely no reason to believe that SWBT employees who are unaware of this litigation or that records they maintain are material and relevant thereto, will protect and retain these records beyond SWBT's official retention policy periods, which usually provides for the destruction of records after 12 years or less?

47. Clearly, the delay in this case is adding to the cost of prosecuting the class action and is diminishing the coherence of the case as the case degrades. Plaintiffs and the class will continue to be harmed by loss of witnesses, memories and documentary evidence. However, if this Court declares that Plaintiffs' and the class' due process rights are being violated and will continue to be violated by the delay, Plaintiffs have no reason to believe that the Texas Supreme Court will not promptly decide the case thereby mitigating the injury.

**The United States Supreme Court has Warned of the
Danger of Not Timely Determining Interlocutory Appeal**

48. The denial of due process is accentuated by the fact that this case is an interlocutory appeal. In *Johnson v. Jones*, 515 U.S. 304, 309-310, 115 S.Ct. 2151, 2154 -

2155 (U.S. 1995), the United States Supreme Court analyzed the purpose of interlocutory appeals. Justice Breyer stated:

... interlocutory appeals-appeals before the end of district court proceedings-are the exception, not the rule. The statute recognizes that rules that permit too many interlocutory appeals can cause harm. An interlocutory appeal can make it more difficult for trial judges to do their basic job-supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence. It also risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary. . . .

Of course, sometimes interlocutory appellate review has important countervailing benefits. In certain cases, it may avoid injustice by *quickly* correcting a trial court's error. It can simplify, or more appropriately direct, the future course of litigation. And, it can thereby reduce the burdens of future proceedings, perhaps freeing a party from those burdens entirely. Congress consequently has authorized, through other statutory provisions, immediate appeals (or has empowered courts to authorize immediate appeals) in certain classes of cases – classes in which these countervailing benefits may well predominate. . . . See 28 U.S.C. § 1292 (immediate appeal of, *e.g.*, orders granting or denying injunctions; authority to “certify” certain important legal questions); Fed.Rule Civ.Proc. 54(b) (authorizing district courts to “direct the entry of a final judgment as to one or more but fewer than all of the claims or parties”); 28 U.S.C. §§ 1292(e), 2072(c) (1988 ed., Supp. V) (authorizing this Court to promulgate rules designating certain kinds of orders as immediately appealable); cf. 28 U.S.C. § 1651 (authorizing federal courts to “issue all writs necessary or appropriate,” including writs of mandamus).

[Emphasis added]. Here, the interlocutory appeal has neither been quick, nor has it simplified or directed the future course of the litigation; the interlocutory appeal has completely stopped litigation by its delay and the stay provision of Tex. Civ. P. & Rem. C. § 51.014(b), and has added significantly to the costs and significantly diminished the coherence of the case.

**Other U.S. Courts of Appeals Strongly Favor
Policy Against Delay and Denial of Due Process**

49. The Fifth Circuit has declared in another context that “[t]he cancerous malady of delay, which haunts our judicial system by postponing the rectification of wrong . . . , must be excised from the judicial process at every stage.” *Rheuark v. Shaw*, 628 F.2d 297, 304 (5th Cir. 1980). Federal courts have previously addressed the issue of delay and due process in a civil case. In *Ad Hoc Committee on Judicial Administration v. Com. of Mass.*, 488 F.2d 1241, 1244 (1st Cir. 1973), a class action brought under 42 U.S.C. § 1983, the plaintiffs alleged that Massachusetts’ failure to provide “court facilities, judges, clerical personnel, and other facilities” violates their Sixth and Fourteenth Amendment rights. The federal judiciary was being asked to order enlargement and restructuring of the entire state court system. In relevant part, the First Circuit Court of Appeals stated:

To date, delay as an aspect of due process has been defined in the context of a particular case; a court looks at the effect of delay on the parties, at their diligence, at the nature of the case, and at the interests at stake. The Supreme Court has not quantified even in criminal cases the right to a speedy trial. “We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.” *Barker v. Wingo*, 407 U.S. 514, 521, 92 S.Ct. 2182, 2187, 33 L.Ed.2d 101 (1972). Whatever the extent of any correlative right in civil cases, it would, as plaintiffs concede, be less than speedy. **In any event, whether delay is a violation of due process depends on the individual case. Delay per se is not unconstitutional; it may become such only when an injured plaintiff, ready and eager for trial, or a defendant, seeking vindication and himself ready for trial, are denied for too long his day in court.** If a five year delay in a civil action reflects simply the parties’ utilization of pre-trial discovery or settlement negotiations there is no constitutional violation.

* * * * *

Moreover, one might doubt the wisdom of casting a federal district court in the role of receiver for a state judicial branch.

* * * * *

The courts always remain open in **individual cases** to complaints of unconstitutional deprivation through delay. And, of course, principles announced in one case may be such as to control other-possibly many other-later cases. But we decline to ask the federal district court to forego its usual adjudicatory role in favor of the sweeping administrative and legislative functions urged upon us.

[Emphasis added]. Here, Plaintiffs are not asking the federal court to enlarge or restructure the Texas judicial system, or cast the federal district court in the role of a receiver; rather, in this federal complaint Plaintiffs are only asking the Court to address the constitutional issues involving the delay in Case No. 05-0748 and the stay of Cause No. 2000-05-001931-B.

50. In *Lucien v. Johnson*, 61 F.3d 573, 574-576 (7th Cir. 1995), Justice Posner stated the following:

Delay in court, or in administrative tribunals (which the Illinois Court of Claims more closely resembles), is of course an old story, and a traditional source of exasperation to litigants. But outside of the criminal arena, where the right to a speedy trial has both constitutional and statutory footing, it is exceedingly difficult to obtain a remedy against delay by an adjudicative body. Harm from delay is hard to prove, and judges are reluctant to order other judges (or their administrative counterparts) to hurry up. [Cites omitted.]

It is not impossible to obtain relief . . . , especially when . . . all the litigant is asking for is to be permitted to bypass some normally mandatory procedural prerequisite, such as having to take an administrative appeal, and proceed directly to court. But when the relief sought is an order to the delaying agency to hurry up, the seeker's prospects are, as a practical matter, very close to nil. To make a persuasive case of delay so protracted as to entitle the victim of the delay to such a remedy, he will have to wait a long time before seeking the remedy in order to let the delay mount up to a point where he has a persuasive claim. When he does finally press the claim, the adjudicative body against which he is seeking relief will have it within its power to moot his case by acting before his claim for relief can be decided.

This sequence begs for an exception to the ordinary rules of mootness. Lucien alleges that he has other property claims pending in the Illinois Court of Claims and that if he does not get a remedy in the present suit he will have to

bring a suit based on delay in processing those other claims and that suit too is likely to wash out as moot before he can get a judgment. One of his claims was six years old when it finally was decided while this suit was pending in the district court. These circumstances bring the case within the exception to mootness for claims that are capable of repetition but that evade review. [Cites omitted.] . . . Special circumstances made the likelihood of a repetition of the delay of which the plaintiffs were complaining very slight.

As mootness is the only ground on which the state has chosen to defend the district court's judgment in this court, our normal course would be to remand. But we think it would be a mistake to spin out the case in this way, for we are sure that Lucien has no claim. It is true that *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315-16, 107 S.Ct. 2378, 2385-86, 96 L.Ed.2d 250 (1987), holds that the Constitution requires a state to waive its sovereign immunity to the extent necessary to allow claims to be filed against it for takings of private property for public use. Cf. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 36-41, 110 S.Ct. 2238, 2250-53, 110 L.Ed.2d 17 (1990); *Ward v. Board of County Commissioners*, 253 U.S. 17, 24, 40 S.Ct. 419, 422, 64 L.Ed. 751 (1920). . . .

A complication is that almost certainly his personal property was not taken *for a public use*. It was either lost or stolen. If, as appears from the court of claims' decisions on Lucien's claims, his property was merely lost, or was stolen not by prison guards but by other inmates, then Lucien has no federal constitutional claim even if the loss or theft would not have occurred but for the negligence or even the gross negligence of the prison's employees. Accidental injuries are not takings. [Cites omitted.] But suppose that some of his property was, as it may have been, taken by guards. It is a nice question what exactly a person's rights are when the government takes his property other than for a public use. Probably he is entitled, under the authority of either the just-compensation clause or the due process clause, to full common law damages. *Schroeder v. City of Chicago*, *supra*, 927 F.2d at 961; *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464-65 (7th Cir.1988). But that is of no moment here. . . .

Of particular note is Justice Posner's statement that "when the relief sought is an order to the delaying agency to hurry up, the seeker's prospects are, as a practical matter, very close to nil. To make a persuasive case of delay so protracted as to entitle the victim of the delay to such a remedy, he will have to wait a long time before seeking the remedy in order to let the delay mount up to a point where he has a persuasive claim." In Case No. 05-0748, there should be

no doubt that Plaintiffs and the class have waited the protracted “long time” necessary for its constitutional claims to be persuasive and ripe. With regards to the other issues raised by Justice Posner in *Lucien*, Plaintiffs are able to prove the harm caused as a result of the delay and stay of their case, see *supra* and *infra*; and although this Complaint does not seek “taking” relief, Plaintiffs would be able to show that Plaintiffs’ and the class’ claims and causes of action are being delayed for *public use*, whether it’s putting their class action case on a back-burner in favor of other cases it deems more urgent or important, or some other use. In other words, whatever use the Justices have made of this case should be considered a *public use*.

**The Texas Supreme Court’s Own Rules of Judicial Administration
Sets a Standard for a More Prompt Adjudication of Plaintiffs’ Case**

51. Rule 6 of the Texas Rules of Judicial Administration sets a standard for the time within which a civil jury trial should occur. It states, in relevant part, as follows:

District and statutory county court judges of the county in which cases are filed should, so far as reasonably possible, ensure that all cases are brought to trial or final:

- b. **Civil Cases Other Than Family Law.**
 - (1) *Civil Jury Cases.* Within 18 months from appearance date.
- c. **Complex Cases.** It is recognized that in especially complex cases or special circumstances it may not be possible to adhere to these standards.

Although class actions are generally considered complex, this one is not “especially” complex. In this case, the relatively straight forward issues presented for oral argument were described by the Texas Supreme Court’s staff attorney as follows: “(1) whether a corporation advancing claims it got by assignment can serve as class representative in a challenge to

SWBT's billing for passed-along municipal fees and (2) whether the certified class met the requirement that common questions among the class predominate." Including the submission term, the Texas Supreme Court is now into its fourth term during which it might have resolved these issues. By comparison, the United States Supreme Court has a practice of hearing and deciding all cases that are ready for submission during that same term. Indeed, the most recent United States Supreme Court opinions addressing class certification or Federal Rules of Civil Procedure 42 issues were decided within a few months after the oral argument.¹⁷ No reasonable person would say that it's just or fair, or that a litigant is receiving due process, when it takes over four years at the Texas Supreme Court, nearly seven years at the appellate courts, and nearly ten years in total, just to determine whether this case may be tried as a class action; nor can it be considered just or fair, or due process, when it takes a litigant ten years before it may begin discovery on the merits or its case on the merits.

52. If the Texas Supreme Court were to decide the appeal today, considering motions for rehearing and the time it would take to get the case started again, if that's possible, discovery on the merits would not likely begin until well into the tenth year, and the case would not likely get to a trial or final disposition until its eleventh year or later. If the Texas Supreme Court were to reverse the certification on an issue that could be cured by another certification hearing, *arguendo*, the lengthy appeal process would start all over again while the case is once again stayed. And why wouldn't SWBT (or any other defendant in a

¹⁷ See *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *Ortiz v. Fibreboard*, 527 U.S. 815 (1999); *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982); *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395 (1977); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

class action case) file an appeal of a class certification order when they can be assured that the case will languish for years while on appeal, thereby causing the case to continue to degrade and lose coherence, and increasing the likelihood that the case will never be tried?

53. One might wonder what harm is being done by continued delay *if* the Texas Supreme Court ultimately reverses the lower courts and de-certifies the class in a way that cannot be cured on remand? The answer is: irreparable harm. Filing a class action tolls the running of the statute of limitations as to the class claims, for all members of the class as to the named defendants. *Mayfield v. San Jacinto Sav. Ass'n*, 788 S.W.2d, 119, 121 (Tex. App. – Houston [14th Dist.] 1990, writ denied). Therefore, even if the Texas Supreme Court determines that a class action may not be maintained under any circumstance, each and every class member still has a claim for which the statute of limitations has been tolled. But those claims will ultimately become worthless when documentary evidence is lost or destroyed, and memory of the facts and events fades. This will result in the loss of the valuable claims of 6,000 businesses, institutions, and governmental entities, ranging from thousands of dollars to several hundred thousand dollars each – claims that might be very helpful to a business, non-profit organization or governmental entity, especially during these difficult economic times. In the case of HCHD, considering that its mission is to improve its community's health by delivering high-quality health care to Harris County residents, a recovery on its class action claim would be particularly helpful – and the delay that the Texas Supreme Court is causing in the prosecution of the class' claims is particularly harmful.

**Purpose Enunciated by United States Supreme Court and
Texas Supreme Court Favors Class Actions**

54. The United States Supreme Court has stated that a “principal purpose” of class

actions is “the efficiency and economy of litigation.” *American Pipe & Const. Co. v. Utah*, 414 U.S. 538, 553, 94 S.Ct. 756, 766 (U.S. Cal. 1974). In *Bernal*, 22 S.W.3d at 437, the Texas Supreme Court stated:

The class action is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment. It is not meant to alter the parties' burdens of proof, right to a jury trial, or the substantive prerequisites to recovery under a given tort. Procedural devices may “not be construed to enlarge or diminish any substantive rights or obligations of any parties to any civil action.” TEX.R. CIV. P. 815; *see also* TEX. GOV'T CODE § 22.004(a); *In re Ethyl Corp.*, 975 S.W.2d 606, 613 (Tex.1998) (“The systemic urge to aggregate litigation must not be allowed to trump our dedication to justice, and we must take care that each individual plaintiff's-and defendant's-cause not be lost in the shadow of a towering mass litigation.”) (quoting *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir.1992)). Although a goal of our system is to resolve lawsuits with “great expedition and dispatch and at the least expense,” the supreme objective of the courts is “to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law.” TEX.R. CIV. P. 1. This means that “convenience and economy must yield to a paramount concern for a fair and impartial trial.” *In re Ethyl Corp.*, 975 S.W.2d at 613. And basic to the right to a fair trial-indeed, basic to the very essence of the adversarial process-is that each party have the opportunity to adequately and vigorously present any material claims and defenses.

The Texas Supreme Court has stated further that “[w]hen properly applied the class action device is unquestionably a valuable tool in protecting the rights of our citizens.” Despite these valuable reasons for pursuing cases as a class action, even the most well-intentioned procedures can result in a denial of due process, such as the case here.

55. The May 2009 edition of the Texas Bar Journal contains an article titled “In Memoriam: Texas Class Actions” by Alistar B. Dawson and Geoff A. Gannaway. The article begins:

Writing an obituary for the class action in the state of Texas may be premature. Still practitioners on the defense side of the bar can confirm that, while there is still a detectable heartbeat in class-action litigation, nobody expects a

significant recovery. The fact of the matter is that plaintiffs' attorneys are not filing many class actions in Texas state courts. The balance has tipped so far against Texas class actions that cases either are not filed at all, or are filed in alternative forums – across state borders in Oklahoma and Arkansas, and even in federal courts.

While the 2003 promulgation of House Bill 4 certainly played a role in the evisceration of class actions in Texas, the real work had already been nearly completed by the Texas Supreme Court. With each decision in the early part of this decade, the court increasingly tightened certification requirements. In the wake of the substantive law on certifications established by the Texas Supreme Court, most of House Bill 4's content had no great impact. Even before House Bill 4, a defendant against whom a class was certified could be reasonably confident that, if it waited out the appellate process, the Texas Supreme Court would overturn the certification. Against that backdrop, perhaps the most notable role of House Bill 4 in the death of class actions is that it lengthened the reach of the Texas Supreme Court to police class certifications. The other provisions of House Bill 4, such as restrictions on attorneys' fees and coupon settlements, probably played some role in deterring class actions, but the broad interlocutory appeal that House Bill 4 birthed had the effect of increasing review of certifications by a court perceived by many to be very conservative. The Supreme Court blazed the trail for busting classes, and House Bill 4 came after, ensuring that more class defendants could follow that trail (and thus get to refuge in the Supreme Court). As icing on the cake, House Bill 4 was followed closely by the federal Class Action Fairness Act of 2005 (CAFA), which gave defendants more opportunities to get classes into federal court. As discussed herein, the confluence of these factors has stanching the flow of class actions into Texas courts and pushed litigants to other jurisdictions and procedural mechanisms.

72 Texas Bar Journal at 366. If the factors described above were not sufficient to cause the death of class actions in Texas, a delay of six or more years while a defendant appeals a class certification order will surely be the final nail in the class action coffin.

**Plaintiffs' and the Class' Claims are a Valuable Property Right,
The Protection of Which is Recognized by Texas and Federal Courts**

56. Plaintiffs' and the class' causes of action against SWBT in Case No. 05-0748 are valuable and marketable property rights. See *Valero Eastex Pipeline v. Jarvis*, 990 S.W.2d 852, 855 (Tex.App.—Tyler 1999) (the general rule in Texas is that a cause of action is

a property right which may be assigned, except when a statute expressly prohibits the assignment). Texas law recognizes a right of access to courts the deprivation of which triggers due process requirements. Texas Constitution, Article 1, Section 13; *Waites v. Sondock*, 561 S.W.2d 772, 773-74 (Tex. 1977) (recognizing that the contravention of the Texas Constitution's guarantee that "all courts shall be open" can trigger federal due process concerns); *Main Place Custom Homes, Inc. v. Honaker*, 192 S.W.3d 604, 627 (Tex. App. – Fort Worth 2006) (holding that a "cause of action is property"); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (noting that a "cause of action has been described as a species of property protected by the Fourteenth Amendment's Due Process Clause" (quotation omitted)). Plaintiffs and the class are being deprived these property rights as a result of the delays described herein.

57. Attached as Exhibit 5 is a true and correct copy of STA's Second Amended Original Petition filed in the underlying class action, which sets forth Plaintiffs' and the class' claims and causes of action at issue.

**Deprivation of Plaintiffs' and the Class' Claims are
Actionable Under 42 U.S.C. § 1983**

58. Title 42 of the United States Code, Section 1983 provides, in relevant part, as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . ."

The Justices are considered a “person” under Section 1983. See *Will v. Michigan Dep't of State Police*, supra, at n. 10. As a result of the Justices failure to decide the subject class action after over four years at the Texas Supreme Court, and almost three years after oral argument, Plaintiffs and the class are being deprived due process. Declaratory relief is available to redress the continuing and prospective deprivation of due process caused by such delay.

PLAINTIFFS' CAUSE OF ACTION FOR DECLARATORY RELIEF
(DECLARATORY JUDGMENT)

59. Plaintiffs by this reference incorporate the allegations of paragraph 1-58 of this Complaint as if fully set forth herein.

Plaintiffs and the Class have No Viable Post-Deprivation Relief

60. As illustrated by the analysis prepared by Dr. Hill, the recent delays in deciding class certification appeals is unprecedented and unexplained. These delays have resulted in a complete deprivation of Plaintiffs' and the class' property interest in accessing the Texas courts. This deprivation has occurred in the absence of *any* procedure. Unlike due process cases involving the termination of some statutory entitlement, Plaintiffs and the class have received no hearing at all assessing *either* their entitlement to the underlying matter they are pursuing, which is the certification of the class action itself, *or* the validity of the Texas Supreme Court's delay. Nor is it practicable, given the nature of the alleged deprivation, for them to receive a post-deprivation hearing, because it is the delay itself that constitutes the

deprivation, so waiting until after the delay is over to conduct a hearing would be too late.¹⁸ Thus, the question upon which this claim substantively turns is: Does the Texas Supreme Court's delay in entering a decision in the interlocutory appeal constitute to a deprivation of Plaintiffs' and the class' property interest in their cause of action?

61. Plaintiffs and the class have no viable post-deprivation relief; thus, the extraordinary act of granting equitable relief against the Justices of the Texas Supreme Court is appropriate in this case. Here, Plaintiffs may not seek relief in federal district court for a taking of its property rights, because of the Texas Supreme Court's Eleventh Amendment immunity. Since Texas has not consented to this sort of suit, and since there is no applicable exception, any inverse condemnation claim under the Fifth Amendment must proceed in state court. See *John G. & Marie Stella Kenedy Mem'l Found. v. Mauro*, 21 F.3d 667, 674 (5th Cir.1994) (“[An] inverse condemnation claim brought directly against the State of Texas is . . . barred by the Eleventh Amendment.”). Although a taking claim may be filed against the state in state court, in Plaintiffs' and the class' case, pursuing a post-deprivation taking claim in state court would be inadequate because there is no known procedure under state law for obtaining just compensation as a result of the Texas Supreme Court's deprivation of a property right for public use. Neither the Texas Constitution nor the Texas legislature have given the Texas Supreme Court the authority to effect a taking and thereby obligate taxpayers to pay the enormous sums of public revenues to make Plaintiffs and the class whole. Consequently, it is not viable relief for Plaintiffs and the class if they must wait until there is

¹⁸ Because the right that Plaintiffs are alleging is access to the legal system rather than some more conventional form of “property,” they are able to proceed on the theory that it is the delay itself that works the deprivation rather than simply preventing an otherwise arguably adequate procedure from being timely enough to constitute “due” process.

absolutely no question that they have been permanently deprived their class claims as a result of the delay (which might mean that the parties have died or are out of business, material witnesses have died, or material records have been lost or destroyed), when even after that has occurred there is no relief of just compensation available for the taking of their claims. The inadequacy of such takings claims is further justification for providing equitable relief herein.

Equitable Relief is Justified in Plaintiffs' Case Due to Ongoing Irreparable Harm

62. Any further delay in this case will severely prejudice Plaintiffs' and the class' ability to meaningfully take advantage of their right of access to Texas courts. The facts in this case justify equitable relief. Plaintiffs and the class will suffer irreparable injury in the interim while waiting for the Texas Supreme Court to finally act; and further delay will vitiate the effectiveness of Plaintiffs' and the class' ultimate remedy.

63. More specifically, as stated above, Plaintiffs and the class have recently suffered the tragic loss of their lead counsel, John O'Quinn. In addition to supporting the class with his superior experience, skill and knowledge, Mr. O'Quinn and/or the O'Quinn Law Firm have heretofore provided substantial financial resources for prosecuting the class claims. Although the O'Quinn Law Firm has publicly indicated that (1) Mr. O'Quinn provided for the eventuality of his death by establishing a succession plan which assures both the financial and legal continuity of the firm, and that the plan is in place, and (2) the firm is fully solvent and has the financial security which insures the firm's ability to service its cases, both present and in the future, Mr. O'Quinn's recently probated Will directs that steps be taken to provide for the orderly winding up and dissolution of the O'Quinn Law Firm.

Therefore, the support that Mr. O'Quinn and his firm provides to this case will probably be lost if this case is not promptly decided.

64. Needless to say, the attorneys for STA and the class have already expended well over 1,000 hours and well over \$100,000 just to get to this stage of the case, and substantial more time and money will have to be invested to prepare the case to trial. Clearly, the loss of the O'Quinn Law Firm's resources could irreparably harm Plaintiffs and the class' ability to prosecute this case. The sooner the Texas Supreme Court decides the appeal, the less harm will likely result.

65. Although Plaintiffs and SWBT disagree on the length of time and expense involved in prosecuting this class action, there is no question that the expense will be significant. The class' expert, Mr. Charles Clapsaddle, testified that his fee for calculating damages alone would be \$50,000. In stark contrast to Mr. Clapsaddle's estimate, Southwestern Bell's witness, Mr. Gerald Fielder, testified that "to calculate damages as minimally specified by Mr. Clapsaddle" would conservatively cost \$2,350,000.¹⁹ Either way the costs will be significant, and if Plaintiffs and the class lose the resource of the O'Quinn Law Firm, it might be a devastating blow to their case, which is more likely to occur as the delay continues.

¹⁹ Mr. Fielder also gave his opinion that in order to accurately calculate the damages of the 6,000 class members for the entire SAP period, one must inspect the microfiche bill of each and every one of SWBT's 5,797,628 Texas customers for each month of the first 24 months of the SAP Ordinance period (e.g., from 1991 to 1993). He testified that this would require 1,391,430,720 hours of work, which he calculated by assuming ten minutes to review each bill, and then multiplying 10 times 5,797,628 times 24. While Mr. Fielder's premise will be a subject of dispute when the case resumes, one can see that Mr. Fielder's formula was erroneous even assuming, *arguendo*, that the premise was correct, and should have been 5,797,628 divided by 6 times 24 (or 23,190,512 hours). Either way, Plaintiffs disagree with this premise and estimate, which Mr. Fielder has left out of the \$2,350,000 amount.

66. The delay of the appeal at the Texas Supreme Court is unexplained and unreasonable. Continued delay of Plaintiffs' and the class' case will undermine their ability to effectively prosecute their case. As time continues to elapse, witnesses' memories will fade or be lost and documents will be misplaced or destroyed; consequently, delayed action might lead to an inaccurate verdict. As that occurs, this class action will offer Plaintiffs and the class only unreliable and ineffective relief.

67. The following paragraphs illustrate the importance of locating and preserving SWBT's historical data and documentation to STA and the class' ability to prosecute this case and obtain an accurate verdict. Cause No. 2000-05-001931-B arose as a result of a different class action involving SWBT; that class action was known as the *Mireles* class action.²⁰ Like Plaintiffs' class action, the *Mireles* case also involved issues relating to municipal charges on bills of SWBT's customers from 1991 through 2000. The claims that are the subject of Plaintiffs' case were essential carved out of the *Mireles* settlement. In *Mireles*, SWBT produced a witness, GERALYN Lotridge, a 25 year SWBT employee, who testified that digital customer billing records only go back four months from the current month, and after that she has to go into optical storage to review customer billing records. She also testified that she has no optical storage records prior to October 1992, and that when reviewing optical storage records, she would have to look at customer bills one at a time, and for each bill she would have to look at each page to identify any municipal charges. SWBT and the *Mireles* plaintiffs used Ms. Lotridge's testimony to support their *cy pres* settlement,²¹

²⁰ Cause No. 98-07-3003-E, styled *Jose Mireles and Patricia Genuchi, et al., v. Southwestern Bell Telephone Company*, in the 357th Judicial District Court of Cameron County, Texas.

²¹ The 5 million SWBT customers who were purportedly covered by the *Mireles* settlement received absolutely nothing from the settlement – no money, property, credits or coupons – largely based upon Ms.

and their representation that “it would be extraordinarily difficult, if not impossible, to identify the specific amounts that individual Settlement Class members might recover . . .,” among others.

68. In Plaintiffs’ case, for the first two years, SWBT stuck with Ms. Lotridge’s explanation of SWBT’s ability to provide historical customer billing records. But after taking numerous depositions probing into the whereabouts of SWBT’s databases and the records contained therein, STA learned that SWBT does maintain *digital* customer billing records for nearly the entire SAP Ordinance period from 1991 through 2000, with the exception of an approximately 18 month missing period. Obviously, due to the massive size of SWBT, one SWBT witness’ knowledge about historical billing records may not be the same as another SWBT witness, and this generally illustrates the problem that Plaintiffs and class will face when its case is no longer stayed. First, there is the very real possibility that SWBT will present witnesses who are unaware of the specific records STA and the class are requesting, and that it may take numerous depositions to find the person who has knowledge and control of the requested records. Second, there is the significant risk that the institutional memory of records and events has faded or that the employees with knowledge of relevant facts no longer work at SWBT or have died. For example, in Plaintiffs’ case, SWBT produced Mr. Robert Lampe, Jr., as a person knowledgeable about customer billing records. Mr. Lampe was 45 at the time of his deposition on May 15, 2002. Mr. Lampe worked for SWBT in St. Louis, Missouri, which is where SWBT has maintained, for decades, certain

Lotridge’s testimony and SWBT’s representation that there were no digital customer billing records beyond the four most current months. The *Mireles* plaintiffs and SWBT used this testimony to convince the court that it was economically infeasible to use SWBT’s optical storage records to obtain the identity of the class member and their specific damages.

customer billing records. Although Mr. Lampe had worked for SWBT since 1980, Mr. Lampe was not familiar with SWBT's Operating Practice 99 which sets forth certain retention periods for retaining customer billing records. Mr. Lampe testified that although he was not involved in backing up the Customer Record Information System ("CRIS") database, he was aware that the CRIS database was backed up, but he did not know where the back ups were retained, how often the database was backed up, or who was in charge of backing up the databases (stating that there are 3,000 employees in the CRIS department). Mr. Lampe also stated that SWBT only keeps a version of the customer's bill in the CRIS database for two years, and indicated that if SWBT had a dispute with a customer about a bill that was over two years old, then SWBT would have no record of the bill.

69. A few months after Mr. Lampe's deposition, SWBT presented Mr. Gerald Fielder and Mr. Joey Lewis for their depositions. Mr. Fielder worked in San Antonio, Texas, and had been working for SWBT for 23 years at the time. Mr. Fielder worked with SWBT's computerized billing records, including the CRIS system, the Marketing Information Analysis System ("MIAS") and the Enterprise Data Warehouse ("EDW") system. When asked about historical databases for the business and residence billed revenue database, he stated that SWBT only has a few months history. He knew that backups were made to be restored in the event of a computer failure, but he did not know how long those backups were kept, nor did he know the names of the persons who would know. When describing SWBT's new system, he stated that under the retention policies, whenever data tapes expired, they were reused again. Mr. Lewis had been working for SWBT since 1977, and was the director of marketing mechanization, working in St. Louis, Missouri. When asked about retention

policies for SWBT, Mr. Lewis stated "I know that there are some. I don't know what they all are." When asked if he had ever heard of SWBT's Operating Practice 99, relating to retention periods, he stated "No I have not." Asked if he had any information about the length of time certain data is to be retained by SWBT, he stated "I know that there are certain rules that certain data has to [be] retained and maintained", and that it "depends on the data that has to be retained. I don't know what the different retention periods are for different data." Mr. Lewis also testified about a different system known as "BOSS," the acronym for "billing order and sales support." BOSS had been in place since 1982, and was the system that Mr. Lewis supported. He stated that the CRIS system had been around since the 1970s. Mr. Lewis testified that the BOSS system has a copy of the bill on-line with immediate access for four months, the current and three prior bills. He testified that SWBT has a backup copy of the bill that's on a diskette platter, which at that time went back to 1992. Although the deposition notice asked for a person knowledgeable about the CRIS database, storage of the CRIS data, as well as knowledge of the availability, location, and backup of the information contained in Southwestern Bell Form 2733, Mr. Lewis testified that he was not knowledgeable about backups and where they are located. He stated that he would not be able to provide information about what's on the CRIS database, how the CRIS data is maintained or what is done with the data.

70. It wasn't until after the deposition of Mr. Lewis that SWBT's counsel informed STA that they had discovered historical digital customer billing records on archived "MIAS tapes." Except for approximately eighteen missing months, it appeared that SWBT had archived tapes covering 96 months during the 1990s, covering most of the SAP Ordinance

period at issue in Plaintiffs' case. However, these tapes have not been produced to STA nor has STA fully inspected or tested all of the data from these tapes. Prior to the certification appeal, STA had only been delivered a sample of the data purportedly contained on the tapes. Mr. Fielder testified that it would take approximately 8 to 16 weeks to deliver a complete download, on a month by month basis, of the MIAS tapes as requested by Mr. Clapsaddle, the class' expert. This download was not given to Mr. Clapsaddle before the case was appealed or since, and STA has received no indication from SWBT that the download was ever done; consequently, even after the appeal is concluded, it is anticipated that STA will have to wait at least 8 to 16 weeks to be delivered the download of the MIAS archived tapes.²² As time continues to pass, the 12 year retention period is expiring for the remainder of the months covered by the class' claims. By June 2012, the retention period will have expired for all of the records that would support the class' claims. However, if tapes are destroyed or reused as the retention period expires for each monthly tape, then as each month passes while this case is being appealed and the class is denied these records, a month of data is being lost. As these tapes and other data are lost or destroyed, Plaintiffs' and the class' case is being irreparably injured. Importantly, these tapes may not be the only data that SWBT has had in its possession that would have allowed the class to calculate damages. The class' expert, Mr. Clapsaddle, believed that SWBT had other databases, records and information that would have allowed STA to identify class members and calculate damages. Plaintiffs' concern is that there are probably SWBT employees who do not know about the

²² These downloads are not the only requested information that have not been produced by SWBT. For example, on February 28, 2003, STA's counsel requested missing reports which have not yet been produced by SWBT, some of which show a retention period of 12 years and some show a retention period

class action litigation or the importance of certain records and databases to the class' case, who are probably destroying those records and databases as retention periods expire.

71. Clearly, STA has already experienced significant difficulties in locating and obtaining SWBT's historical customer billing records and data. See paragraphs 67 through 70, *supra*. Delay is making that task much more difficult, if not ultimately impossible. Notably, SWBT's own employees who were produced as being knowledgeable about such matters, did not even have sufficient knowledge to be able to tell STA whether the records existed, much less if they had been or when they would be destroyed pursuant to SWBT's own written practices. The SWBT employees deposed in this case had been employed by SWBT for 22, 23 and 25 years at the time that the case was stayed in 2003. These employees are now approaching 30 years or more of employment at SWBT, if they are even still employed by SWBT. As employees with knowledge of the databases involved in this lawsuit leave SWBT's employment, the class' ability to obtain information from such witnesses with "institutional memory" of SWBT's information, records and databases is diminished.

72. In addition to the case degrading and losing its coherence due to the loss of SWBT witnesses, the class' own witnesses and attorneys are not getting any younger (as stated above, one expert witness is now 79 years old and another is 59).

Plaintiffs have no Viable Means for Locating and Preserving Evidence

73. A plaintiff usually bears the responsibility for preventing prejudice to its claims by investigating, memorializing testimony from potentially forgetful or absent witnesses, and preserving documents. However, because the class action case has been stayed pending the

by reference to a specific SWBT Operating Practice without providing the number of years for the record to be

certification appeal, SWBT is resisting discovery, and Plaintiffs and the class lack a viable procedure for obtaining appropriate discovery, Plaintiffs and the class have no viable means for locating and preserving evidence until after the certification appeal is concluded. This seriously prejudices Plaintiffs and the class, and their ability to effectively prosecute their claims.

Declaratory Relief Requested

74. Therefore, Plaintiffs brings this claim for a declaratory judgment under Federal Rules of Civil Procedure 57 and 28 U.S.C. §§2201 and 2202, asking the Court to declare the status of Plaintiffs' and the class' due process rights under the Fourteenth Amendment with regards to Case No. 05-0748 and Cause No. 2000-05-001931-B, including, but not limited to, declaring (1) that Plaintiffs and the class are currently being deprived and will continue to suffer deprivation of their right to due process as a result of the Texas Supreme Court's delay in issuing its decision/opinion in Case No. 05-0748 while the case is stayed, (2) that Plaintiffs and the class are being indefinitely deprived their legal right of judicial access, and (3) that the Texas Supreme Court is constitutionally bound to make a decision at a meaningful time and in a meaningful manner.

PRAYER

WHEREFORE, Plaintiffs pray for judgment as follows:

1. For declaratory judgment as requested herein; and
2. For such other and further relief as this Court may deem just and proper.

retained.

JURY DEMAND

To the full extent available, Plaintiffs demands a trial by jury.

Dated: February 10, 2010.

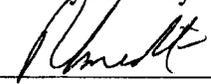
Respectfully submitted,



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