UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOSEPH GALLOWAY, individually, DANA BROCKWAY, as next friend of ERIC B., on behalf of all those similarly situated, JOHN HALT, as next friend of DANIEL H., on behalf of all those similarly situated, Plaintiffs v. STACEY DELGADO, individually and in her official capacity, MRS. HENRY, in her capacity as executor of the estate of Mr. Henry, MR. WILLIAMS, individually and in his official capacity, MR. SHACKLEFIELD, individually and in his official capacity, MR. RANGEL, individually and in his official capacity, MR. TREVIÑO, individually and in his official capacity, MANUEL TORRES, individually and in his official capacity, MR. BRIGGS, individually and in his official capacity, MR. WATSON, individually and in his official capacity, ROBERT McQUEEN, individually and in his official capacity, VERONICA GAGNE, individually and in her official capacity, DON BRANTLEY, individually and in	§ §	CIVIL ACTION NO. 1:07-CV-276 (LY) **PLAINTIFF BROCKWAY'S MOTION FOR PRELIMINARY INJUNCTION**

his official capacity, §
§
LINDA REYES, individually, §
§
DWAYNE HARRIS, individually and in §
his official capacity, §
§
DWIGHT HARRIS, individually, §
§
BART CALDWELL, individually and in §
his official capacity, §
§
JOYCE McDANIELS, individually and in her §
official capacity, §
§
VENUS KITCHENS, individually and in her §
official capacity, §
§
TERI WILSON, individually and in her §
official capacity, §
§
GERALDO PENUELAS, individually §
and in his official capacity, §
§
DON FREEMAN, individually and in his §
official capacity, §
§
BLU NICHOLSON, individually and in §
his official capacity; §
§
JEROME PARSEE, individually, §
§
LYDIA BERNARD, individually and in §
her official capacity, §
§
CHESTER CLAY, individually and in his §
official capacity, §
§
KERRI DAVIDSON, individually and in §
her official capacity, §
§
ED OWENS, in his official §
capacity as Executive Director of the Texas §
Youth Commission, §
§
JUAN S. MUNOZ, individually and in his §
official capacity as a member of the Board of §

the Texas Youth Commission,	§
	§
DON BETHEL, individually and in his official capacity as a member of the Board of the Texas Youth Commission,	§
	§
STEVE FRYAR, individually and in his official capacity as a member of the Board of the Texas Youth Commission,	§
	§
PATSY REED GUEST, individually and in her official capacity as a member of the Board of the Texas Youth Commission,	§
	§
BILL MAHOMES, JR., individually and in his official capacity as a member of the Board of the Texas Youth Commission,	§
	§
GOGI DICKSON, individually and in her official capacity as a member of the Board of the Texas Youth Commission,	§
	§
UNKNOWN TYC STAFF, in their official and individual capacities; and,	§
	§
TEXAS YOUTH COMMISSION,	§
	§
Defendants.	§

PLAINTIFF DANA BROCKWAY'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Dana Brockway, as the next friend of her minor child, A.B., respectfully files this Motion for a Preliminary Injunction pursuant to Federal Rule of Civil Procedure 65, and requests this Court enter a preliminary injunction to enjoin the Texas Youth Commission (TYC) from violating A.B.'s constitutional rights.[1]

The injunction seeks to prohibit TYC from interfering with A.B.'s rights under the Fifth and Fourteenth Amendments to the United States Constitution. TYC denies A.B. parole and admission to treatment programs because he is asserting his constitutional protections against

[1] In Plaintiffs' Amended Complaint, A.B. is incorrectly identified as "Eric B." Pursuant to this Court's standing Privacy Policy and Public Access to Electonic Files, A.B. is appropriately identified by his initials, not a pseudonym.

self-incrimination. Ms. Brockway requests TYC be prohibited from conditioning A.B.'s parole on surrendering his Fifth Amendment protections, and requests A.B. be allowed to complete treatment in a less restrictive setting.

In support, Ms. Brockway will show:

FACTS

A.B. is a sixteen-year-old child currently held in the custody of the Texas Youth Commission ("TYC") at the McClennan County State Juvenile Correctional Facility II, in Mart, TX ("Mart"). Defendant Ed Owens is TYC's Conservator.[2] A.B. arrived in TYC custody on November 6, 2006. Exhibit 1, Monthly Individual Case Plan, July 17, 2007. A.B. was adjudicated delinquent in the juvenile court in Collin County, TX, on November 2, 2006, for the offense of attempted sexual assault. Exhibit 2, Order of Disposition with TYC Commitment. A.B. has appealed his adjudication to the Texas Fifth Court of Appeals, challenging, *inter alia*, the sufficiency of the evidence presented and the failure of the trial court to allow the jury to consider the lesser included offense of assault. *See* Brief for Appellant, *A.E.B. v. State*, No. 05-06-1536-CV (Tex. App.—Dallas filed March 14, 2007). A.B. denies he committed the charged offense, and refuses to answer questions about it on advice of counsel.

Pending the resolution of his appeal, A.B. was sentenced to TYC custody for the purpose of rehabilitation. *See* Exhibit 2 ("the child is in need of rehabilitation"). TYC's statutory purpose is "to provide a program of constructive training aimed at rehabilitation and reestablishment in society of children adjudged delinquent." TEX. HUM. RES. CODE ANN. § 61.002 (Vernon 2001). To fulfill this statutory mandate, TYC has created the "Resocialization©" program. To be released from a secure TYC facility to a less restrictive setting (such as a halfway house or their parents' custody), a child has to complete their "phases"

[2] When Plaintiffs filed their Amended Complaint, Owens was TYC's Acting Executive Director. Owens has since been made the conservator, and Dimitria Pope has been appointed Acting Executive Director.

in the "Resocialization©" program and complete their "Minimum Length of Stay" in TYC's secure facilities custody.[3] The secure facilities are prison-like. There are five phases (0-4) to the program, and each phase has three components (Academic, Behavior, and Correctional, or A, B, C). A child can complete one of their phases, and not advance in the others. After A.B. completes all three components, TYC's Sex Offender Treatment Program, and serves one year in TYC custody, he will be paroled and released from TYC's custody. 37 TEX. ADMIN. CODE § 85.59(d)(2) (2007).

To complete the "Correctional Therapy," or "C" phase, a child must identify the "errors in [their] thinking." "C-1" requires memorizing "nine thinking errors." "C-2" requires a child to write and memorize their "life story." "C-3" requires a child to talk about their "offense." "C-4" requires developing a "success plan," which outlines what the child will do when they leave TYC custody. *See* 37 TEX. ADMIN. CODE § 87.3(d)(3).

Because he was adjudicated for committing a sex offense, A.B. is also required to complete TYC's Sex Offender Treatment Program before he can be released from a secure facility to a less restrictive setting. 37 TEX. ADMIN. CODE § 85.51(15); Exhibit 1. Like "Correctional Therapy," sex offender treatment also requires the child discuss the charged offense. TYC will not even allow A.B. to enroll in the program because he will not admit he committed the offense. Exhibit 4, Affidavit of A.B.

TYC refuses to allow A.B. to participate in "Correctional Therapy" and sex offender treatment because he is asserting his rights under the Fifth Amendment of the United States Constitution. Participation in both the "Correctional Therapy" program and TYC's Sex Offender Treatment Program require children to forego their Fifth Amendment rights to enter the program. TYC does not grant children immunity for statements made during "Correctional Therapy" or

[3] The Minimum Length of Stay is determined according to TYC policy. 37 TEX. ADMIN. CODE § 85.25 (2007). A.B. completed his minimum sentence on November 6, 2007. *See* Exhibit 1; Exhibit 3, Correspondence between TYC and Scott Medlock, counsel for A.B.

sex offender treatment, and the communications are not privileged or confidential. Because he cannot discuss the offense he was adjudicated of committing until his appeal is resolved, A.B. cannot progress beyond phase "C-2" in the "Correctional Therapy" component, and TYC will not even allow him to enroll in the Sex Offender Treatment Program.

A.B. has successfully completed the "A" and "B" components of TYC's rehabilitation program. A.B. earned his G.E.D. to complete the "A," or "Academic" component, and was the valedictorian of his class in TYC. *See* Exhibit 1 ("[A.B.] has achieved his G.E.D. His teachers commented he works hard in class…"); Exhibit 4. TYC will not allow A.B. to take college-level coursework while he remains incarcerated. *See* Exhibit 4; Exhibit 5, Youth Complaint Resolution Form ("College classes will not be offered for the fall semester"). A.B. has not committed any major disciplinary violations in TYC custody, allowing him to obtain phase "B-4" in the "Behavior" component. *See* Exhibit 1. A.B. is frequently asked by TYC staff to assist with work in the facility, such as serving other children food. A.B. was even designated by TYC to distribute grievance forms to other children, an important position of trust. *See* Exhibit 4.

On November 1, 2007, TYC convened a panel of its staff to consider releasing A.B. on parole. *See* Exhibit 4. On November 5, 2007, TYC told A.B. he would be released to parole on November 14, 2007. TYC had A.B. sign documents related to his sex offender registration, which indicate he would be released on November 14, 2007. *See* Exhibit 6, Pre-Release Notification Form ("Not later than the 7th day after 11-14-07 (date of release/placement on community supervision or juvenile probation), I must personally appear at the following local law enforcement authority to verify and complete my registration…"). While on parole, A.B. would be required to attend out-patient sex offender treatment therapy, see his parole officer regularly, obey various parole conditions, and register as a sex offender. TYC will not allow

A.B. to participate further in its rehabilitation programs because he is asserting his Fifth Amendment rights. As such, the plans for release were cancelled.

A.B. has attempted to resolve these issues through TYC's internal grievance procedure. *See* Exhibit 7, Correspondence from Dana Brockway to TYC, February 5, 2007; Exhibit 8, Correspondence from TYC to Dana Brockway, February 5, 2007; Exhibit 9, Correspondence from Dana Brockway to TYC, March 20, 2007; Exhibit 10, Correspondence from Ed Owens to Dana Brockway, April 16, 2007.

ARGUMENT

A federal court should grant a preliminary injunction when the movant has clearly carried the burden of persuasion on all four of the following prerequisites: (1) a substantial threat that Plaintiff will suffer irreparable injury if the injunction is not granted, (2) a substantial likelihood that Plaintiff will prevail on the merits, (3) the threatened injury to Plaintiff outweighs the threatened harm to the Defendants, and (4) granting the preliminary injunction will not disserve the public interest. *See Mississippi Women's Med. Clinic v. McMillan*, 866 F.2d 788, 790 (5th Cir. 1989). Because the Defendants are public institutions, the third and fourth elements are properly considered together. *See Spiegel v. City of Houston*, 636 F.2d 997, 1002 (5th Cir. 1981). A.B. satisfies each element necessary for a preliminary injunction.

1. Plaintiff Will Suffer Irreparable Injury if the Court Does Not Enjoin Defendants from Enforcing Their Unconstitutional Policy

A.B. will suffer immediate and irreparable injury, for which he has no adequate remedy at law, if this Court does not immediately prevent Defendants from enforcing their unconstitutional policy. TYC's policy both prohibits A.B. from being paroled and denies him access to the treatment guaranteed by the Constitution. The requested injunction is necessary to protect A.B.'s constitutional right not to be compelled to be a witness against himself, and his right to receive treatment in TYC's facilities. "Violation[s] of constitutional rights constitute[]

irreparable harm as a matter of law." *Cohen v. Coahoma Co.*, 1992 U.S. Dist. LEXIS 20844, *24 (N.D. Miss. 1992) (citing *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976)). "Irreparable injury is established upon movants showing constitutionally protected rights have been violated." *See Murillo v. Musegades*, 809 F.Supp. 487, 497 (W.D. Tex. 1992) (citing *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984); *Mendoza v. INS*, 559 F.Supp. 842, 850 (W.D. Tex. 1982)).

2. Plaintiff Will Prevail on the Merits Because TYC Violates A.B.'s Fifth and Fourteenth Amendment Rights

A.B. is protected by the Fifth Amendment from TYC compelling him to make incriminating admissions. TYC's treatment program requires him to make such statements despite the fact he has an active appeal of the adjudication in his criminal case. If A.B. were to make the statements TYC requires, they could be used against him in his challenge to the criminal adjudication. Moreover, because he is asserting his Fifth Amendment rights, TYC denies A.B. the opportunity to participate in "correctional therapy" and sex offender treatment. TYC is constitutionally required to provide A.B. access to its rehabilitative programs. TYC's refusal to do so violates A.B.'s rights under the Fourteenth Amendment.

a. TYC Policy Violates A.B.'s Fifth Amendment Rights

The Fifth Amendment states "no person … shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. It was applied against the states through the Fourteenth Amendment in *Malloy v. Hogan*, 378 U.S. 1 (1964), where the privilege to remain silent was recognized as an independent liberty interest. The Supreme Court has extended this protection to a number of situations where incriminating statements could be used against a person in future criminal proceedings. "The Amendment not only protects the individual being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v.*

Turley, 414 U.S. 70, 76 (1973). *See also Uniformed Sanitation Men Ass'n. v. Comm'r of Sanitation*, 392 U.S. 280 (1968) (loss of employment); *Spevack v. Klein*, 385 U.S. 511 (1967) (disbarment). A.B.'s Fifth Amendment rights extend after his adjudication. The State cannot "call for answers that would incriminate him in a pending or later criminal prosecution." *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984). The Supreme Court has clearly stated "the privilege against self-incrimination does not terminate at the jailhouse door." *McKune v. Lile*, 536 U.S. 24, 36 (2002) (Kennedy, J., for plurality).

TYC has placed A.B. in a classic "speak or be punished" situation. *See Chapman v. State*, 115 S.W.3d 1 (Tex. Crim. App. 2003). A person cannot be compelled to bear witness against themselves when doing so results in an automatic penalty. *Id.* "A command to speak, under the threat of loss of liberty, implicitly forecloses the option of remaining silent." *Montana v. Fuller*, 915 P.2d 809 (Mont. 1996). "[A] State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984) (citing *Lefkowitz*, 414 U.S. at 805). The Supreme Court has held "If [a person] asserts the privilege, he 'may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him' in subsequent criminal proceedings." *Murphy*, 465 U.S. at 429 (emphasis in original) (citing *Maness v. Meyers*, 419 US 449, 473 (1975)).

The Supreme Court directly addressed the question of whether an adult inmate can be compelled to participate in sex offender treatment therapy when doing so would require making damaging admissions that could be used against him in subsequent criminal proceedings. In *McKune v. Lile*, 536 U.S. 24 (2002), a plurality of four justices determined an adult inmate could be compelled to participate in sex offender treatment programs by restricting his access to prison

privileges, such as "visitation rights, earnings, work opportunities, ability to send money to family, canteen expenditures, access to a personal television, and other privileges." *McKune*, 536 U.S. at 31. The plurality determined denying an inmate these minor privileges was not a deprivation of liberty under the *Sandin v. Connor*, 515 U.S. 472 (1995), "atypical and significant hardship" standard. The Court would, however, likely rule differently in this case. Justice Kennedy's opinion for the plurality specifically states "respondent's decision not to participate in the [program] *did not extend his term of incarceration*. Nor did his decision affect his eligibility for good-time credits or parole." *McKune*, 536 U.S. at 38 (Kennedy, J., emphasis added). Justice O'Connor agreed with the plurality that the loss of privileges in *McKune* was not enough to constitute compulsion, noting, however, that "some penalties are so great as to 'compel' such testimony, while others do not rise to that level." *McKune*, 536 U.S. at 49 (O'Connor, J., concurring in the result). Justice O'Connor specifically noted if the penalty was "longer incarceration" then the statements would be "compelled." *Id.* at 52. A four justice minority argued in dissent that even denying the inmate access to those minimal privileges violated his Fifth Amendment rights. *McKune*, 536 U.S. at 49 (Stevens, J., dissenting).

State supreme courts that have considered the issue have determined extending an adult inmate's incarceration because he or she refuses to make incriminating statements in sex offender treatment programs is unconstitutional. *Johnson v. Fabian*, 735 N.W.2d 295 (Minn. 2007); *Montana v. Fuller*, 915 P.2d 809 (Mont. 1996). Other federal courts have come to the same conclusion. *See United States v. Antelope*, 395 F.3d 1128 (9th Cir. 2004) (extending inmate's sentence for refusal to participate in sex offender treatment unconstitutional); *Donhauser v. Goord*, 314 F.Supp.2d 219 (N.D. N.Y. 2004) (sex offender treatment program unconstitutional when failure to participate forfeits "good time" credits toward parole), *remanded for further proceedings at* 181 Fed. Appx. 11 (2d Cir. 2006). Unlike the adult inmate

in *McKune*, A.B. is not being denied a television in his cell—he is being denied release to parole and access to TYC's rehabilitation programs.

b. TYC Policy Violates A.B.'s Fourteenth Amendment Rights to Rehabilitation

TYC is required to provide A.B. appropriate treatment as a condition of his incarceration. TYC's statutory purpose is "to provide a program of constructive training aimed at rehabilitation and re-establishment in society of children adjudged delinquent by the courts of this state." TEX. HUM. RES. CODE ANN. § 61.002 (Vernon 2007). Because TYC's purpose is to *rehabilitate* children like A.B., and *not to punish them*, A.B. has a Fourteenth Amendment right to receive treatment during his incarceration. TYC cannot force A.B. to surrender his Fifth Amendment rights in order to receive treatment.

Unlike adult inmates in the adult prison system, children held in TYC custody have a right to receive rehabilitative services. "[A]n institutionalized juvenile in Texas has a constitutional and statutory right to receive effective and adequate treatment." *Morales v. Turman*, 383 F.Supp. 53, 118 (E.D. Tex. 1974), *rev'd on other grounds*, 535 F.2d 864 (5th Cir. 1976), *rev'd per curiam*, 430 U.S. 322, (1977). "Juvenile courts were created for treatment and rehabilitation of juvenile offenders and this focus on the best interest of the child through treatment sets juveniles apart from regular criminal courts which directed their efforts at punishing the offender." *In the matter of J.S.S.*, 20 S.W.3d 837 (Tex. App. – El Paso 2000). TYC violates children's constitutional rights when it does not provide them required treatment. "Where the State, as *parens patriae*, imposes such detention, it can meet the Constitution's requirement of due process and prohibition of cruel and unusual punishment if, and only if, it furnishes adequate treatment to the detainee." *Morgan v. Sproat*, 432 F.Supp. 1130, 1136 (N.D. Miss. 1977) (citing *Martarella v. Kelley*, 349 F.Supp. 575, 585 (S.D. N.Y. 1972)).

The federal courts have previously required TYC to provide treatment to the children in its custody. "The basis for commitment [to TYC custody]—to rehabilitate and re-establish the juvenile in society—is clearly grounded in a *parens patriae* rationale. Thus, under the *parens patriae* theory, the juvenile must be given treatment lest the involuntary commitment amount to an arbitrary exercise of governmental power proscribed by the due process clause." *Morales*, 383 F.Supp. at 71. "Appropriate treatment is essential to the validity of juvenile custody, and therefore that a juvenile may challenge the validity of his custody on the ground that he is not in fact receiving any special treatment." *Id.* (citing *In re Gault*, 387 US 1, 22 (1967)).

Furthermore, A.B. is entitled to be held in the least restrictive setting possible while receiving the treatment because he was civilly committed to TYC to receive rehabilitation, not criminally convicted to be punished. The Supreme Court held in *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982), that civilly committed persons "thus [enjoy] constitutionally protected interests in conditions of reasonable care and safety, reasonably non-restrictive confinement conditions, and such training as may be required by these interests." A secure facility, such as where A.B. is currently held, is not the appropriate least restrictive setting for him to receive treatment. "When the state chooses, for the most humane motives, to offer or require institutional confinement of a person, it must consider means that are capable of achieving its purposes in ways that are least stifling to personal liberty, and it must offer a therapeutic consideration, a *quid pro quo*, for the deprivation." *Gary W. v. Louisiana*, 437 F.Supp. 1209, 1217 (E.D. La. 1976). Ms. Brockway has arranged for A.B. to see a respected sex offender treatment professional in the community should he be released. Exhibit 11, Affidavit of Dana Brockway. A.B.'s progress in the other aspects of TYC's treatment program demonstrate he does not need to be held in a secure facility during the completion of his treatment.

3. Protection of A.B.'s Rights Serves the Public Interest, and Outweighs Any Harm to TYC

The public interest is always served by the protection of constitutional rights. *See*, *e.g.*, *Cohen v. Coahoma Co.*, 1992 U.S. Dist. LEXIS 208044, *25 (N.D. Miss. 1992) (rights of prisoners); *Murillo v. Musegades*, 809 F.Supp. 487, 498 (W.D. Tex. 1992) (Fifth Amendment rights) (citing *Electronic Data Sys. Corp. Iran v. Social Sec. Org. of Gov't of Iran*, 508 F.Supp. 1350, 1358 (N.D. Tex. 1981)). It is further in the public interest to assure individuals such as A.B. are returned "to society as good citizens living life on the right side of the law." *Ferguson v. Ashcroft*, 248 F.Supp.2d 547, 556 (M.D. La. 2003). Continuing to incarcerate A.B. without providing him the rehabilitative services required by the Fourteenth Amendment disserves the public interest.

Any interest TYC has in continuing to incarcerate A.B. does not outweigh the protection of the rights afforded him under the Constitution. Continuing to house him in a secure facility, as opposed to a less restrictive facility, places A.B. in ongoing physical danger. TYC does not employ a custodial classification system to separate low-risk children, such as A.B., from high-risk, violent children. *See*, *e.g.*, Exhibit 12, Texas State Auditor's Office, An Investigative Report on the Texas Youth Commission, at 1 (March 16, 2007) ("As many as 24 youths of various ages and levels of offenses sleep in the same room"). A.B. has been assaulted on multiple occasions in TYC's facilities, suffering physical injuries. Exhibit 4.

Moreover, TYC will, in some situations, waive the requirement that children receive treatment before they can be released on parole. 37 TEX. ADMIN. CODE § 87.55 (2007) (waiving treatment requirements when "due to staff vacancies, program closures, or insufficient agency resources, participation in the program will extend the youth's length of stay" or if "the youth is unable to participate in specialized treatment due to a medical, mental health, or mental retardation condition"). Though this waiver policy does not apply by its terms to A.B., its

existence demonstrates that continuing to incarcerate all children who have completed all but sex offender treatment is unnecessary.

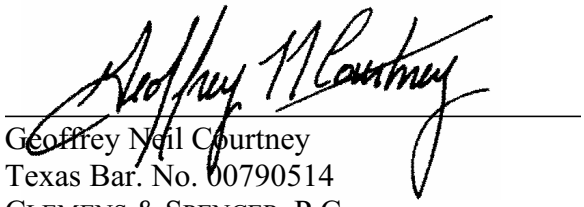
Granting Plaintiff Dana Brockway's Motion for a Preliminary Injunction will serve the public interest and the benefits to A.B. outweigh any imagined harm to TYC.

CONCLUSION

Therefore, Plaintiff Dana Brockway pleads the Court set her Motion for a Preliminary Injunction for an evidentiary hearing, and after the hearing, issue an injunction against Defendant Owens and TYC prohibiting Defendants from:

1. Considering A.B.'s assertion of his Fifth Amendment rights when making decisions about releasing him on parole;
2. Denying A.B. participation in TYC's correctional therapy program and sex offender treatment program; and,
3. Housing A.B. in a secure facility during the completion of the treatment programs.

Dated: November 19, 2007.



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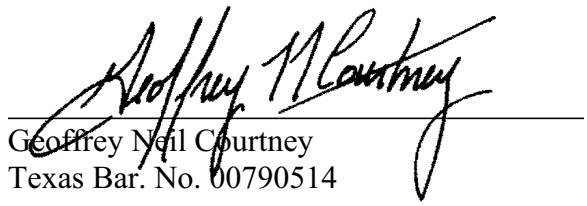
ATTORNEY FOR PLAINTIFF CLASS

CERTIFICATE OF CONFERENCE

I hereby certify that I have conferred with counsel regarding the filing of this matter.

Dated: November 19, 2007.



Geoffrey Neil Courtney
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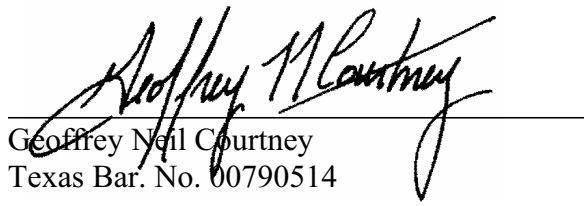
CERTIFICATE OF SERVICE

I hereby certify that all counsel of record have been served via the CM/ECF system.

Dated: November 19, 2007.



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