NO. 05-0748

In the Supreme Court of Texas

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MARKETING ON HOLD, INC. D/B/A SOUTHWEST TARIFF ANALYST,
Respondent.

ON REVIEW FROM THE THIRTEENTH COURT OF APPEALS
NO. 13-03-00287-CV

MOTION FOR REHEARING

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF TEXAS:

Respondent, Marketing on Hold, Inc. d/b/a Southwest Tariff Analyst ("STA"), files this brief requesting that the Court grant rehearing, vacate its February 19, 2010 Opinion, and deny the petition for review as improvidently granted, as follows:

INTRODUCTION

This is an interlocutory appeal of a class certification based on a phone company's overcharges to its customers. On February 19, 2010, the Court issued its Opinion, which affirmed all the bases for class certification except one—the court found that the class representatives were not adequate to represent the class. This Opinion was extraordinary for many reasons, not the least of which is that denial of class certification on the basis of inadequacy of representation is rare in both Texas jurisprudence and national jurisprudence. And, the

Opinion is also extraordinary because the evidence in this record reveals that the Respondent is the most qualified class representative for this highly technical case. The purpose of this motion for rehearing is to provide the Court with an opportunity to correct errors in the Opinion. *See Wentworth v. Meyer*, 839 S.W.2d 766, 778 (Tex. 1992) (Cornyn, J., concurring).

STANDARD OF REVIEW

To understand the errors addressed in this motion for rehearing, it is necessary to understand the standard of review that governs these issues.

An order that grants class certification is reviewed for abuse of discretion. *Henry Schein, Inc. v. Stromboe,* 102 S.W.3d 675, 691 (Tex. 2002). If some evidence supports the trial court's decision, the trial court does not abuse its discretion. *See Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002). "With respect to resolution of factual issues or matters committed to the trial court's discretion, . . . the reviewing court may not substitute its judgment for that of the trial court." *Walker v. Packer*, 827 S.W.2d 833, 839-840 (Tex. 1992).

It is well settled that the question whether the class representatives are adequate is a matter committed to the trial court's discretion. *See, e.g., Bilodeau v. Webb*, 170 S.W.3d 904, 916 (Tex. App.—Corpus Christi 2005, pet. denied); *Entex v. City of Pearland*, 990 S.W.2d 904, 915 (Tex. App.—Houston [14th Dist.] 1999, no pet.) If, as here, there is evidence to support the trial court's finding that the class representatives are adequate, there is no abuse of discretion in that finding. *See Bilodeau,* 170 S.W.3d at 916. When the trial court's findings of fact are unchallenged, as here, "[t]hey are binding on an appellate court unless the contrary is established as a matter of law, or if there is no evidence to support the finding." *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986).

As will be discussed, under this standard of review, the Court could not have concluded that the trial court abused its discretion in finding that the class representatives were adequate.

ARGUMENT

1. The Court erred in holding the class representative inadequate based on threatened "peril" or an enhanced "risk of conflicts"

In its holding that the class representative was not adequate, the Court found that because the class representative as an assignee, there was increased "peril" or enhanced "risk of conflicts." *See Southwestern Bell Telephone Co.*, 2010 WL 572876, at *14. That finding is factual error because no evidence supports it. The trial court found no evidence of any conflict or antagonism among class members and this Court did not reference any such evidence either. The only assertions of conflict were Southwestern Bell's "merely speculative or hypothetical" allegations, which were insufficient to defeat class certification (III CR 953).

Which brings us to the Court's legal error. The Court's focus on the "peril" or "risk" of conflicts was flawed. It is well settled, in Texas and elsewhere, that potential conflicts are insufficient to find a class representative inadequate. *See, e.g., Employers Cas. Co. v. Texas Ass'n of School Boards Workers' Compensation Self-Ins. Fund*, 886 S.W.2d 470, 475-476 (Tex. App.—Austin 1994) writ dism'd w.o.j.); *In re Cardizem CD Antitrust Litigation*, 200 F.R.D. 297, 306 (E.D. Mich. 2001) (Defendants asserted same perils and risks against assignee class representatives; court reviewed the law and held "Defendants' arguments about potential conflicts are ... insufficient to deny class certification.").[1]

[1] The dissent recognized this problem *Southwestern Bell Telephone Co.*, 2010 WL 572876, at *15 (O'Neill, J., dissenting).

It is only "actual conflicts" between the class representative and the absent class members that can result in a class representative being found inadequate. *See* Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 1765 (Westlaw update 2009) (citations omitted) (hereafter "Wright & Miller"). If no actual conflicts exist, the trial court should certify the class; the trial court can always reevaluate should actual conflicts later occur or be discovered. *Id*. "[S]peculative conflict should be disregarded at the class certification stage." Herbert B. Newberg & Alba Conte, 1 NEWBERG ON CLASS ACTIONS § 3.25, at 3-136 (2003). Moreover, only conflicts going to the heart of the litigation will defeat the adequacy of representation. *See Phillips Petroleum Co. v. Bowden,* 108 S.W.3d 385, 399 (Tex. App.—Houston [14th Dist.] 2003), *rev'd in part on other grounds,* 247 S.W.3d 690 (Tex. 2008); *Lubin v. Farmers Group, Inc.*, 2009 WL 3682602, at *11 (Tex. App.—Austin 2009, no pet. h.); *In re NASDAQ Market-Makers Antitrust Litigation*, 169 F.R.D. 493, 513 (S.D.N.Y.1996) (stating that, to preclude certification, conflicts must be "apparent, imminent, and on an issue at the very heart of the suit").

The Court should grant rehearing to correct this factual and legal error.

2. There is no actual conflict because STA had a "materially lesser interest" than other class members

In holding that STA was not an adequate class representative, the Court held that STA had a "materially lesser interest" than other class members. *Southwestern Bell Telephone Co.*, 2010 WL 572876, at *13. That statement is NOT true. As stated in the assignment/transfer of claims and causes of action that was executed by each of STA's assignors (P's Ex. 7-11), STA took a direct assignment of ALL of Assignor's claims. The Court in making its conclusion is undoubtedly doing so based upon the separate agreement between STA and the assignors

whereby (1) the assignor acknowledged that it "retains no right or interest in the claims," but (2) STA had a contractual obligation to pay the assignor 70% of the net proceeds from any recovery on the assigned claim. This contractual obligation to pay the assignors 70% of any recovery on the assigned claims does not mean that STA has a lesser interest in the claim or that an actual conflict is created between STA and other class members. *See Blackie v. Barrack,* 524 F.2d 891, 909-10 (9th Cir. 1975) (holding that "courts have generally declined to consider conflicts, particularly as they regard damages, sufficient to defeat class action status at the outset unless the conflict is apparent, imminent, and on an issue at the very heart of the suit"), *cert. denied,* 429 U.S. 816 (1976). STA's 100% of the assigned claims total approximately $300,000, broken down as follows: USAA - $250,000; Petrocon Engineering - $10,000; and Riverway Bank, Russell & Smith Ford and S&B Engineers combining to total $40,000. Thus, even after STA pays its contractual obligation to its assignors, STA will be left with approximately $90,000 (2 RR 151-154). That interest is still substantially more than 100% of the separate claims of Petrocon, Russell & Smith, S&B, and Riverway. In other words, if Petrocon, Russell & Smith, S&B or Riverway had sought to be class representative, then none of them would have as large a claim as that which STA would receive on its assigned claims.

It is important to also note that based on the Court's logic, most, if not all, other class members would be in the same "materially lesser interest" classification. Nearly all of the class members are entities. Most of the entities are owned at some level by an individual or individuals who make the decisions for that company, whether it is a board of directors, owner, or CEO. If any one of those companies were class representative in this case, when the time came to make the decision on how to prosecute or settle the case, the person making the decision might very

well think about how much he/she will actually get from the case. For example, in the case of a sole proprietorship, the owner might recover 100%. But, in a large corporation, members of the board of directors with no stake in the company might recover zero. So, in future class action litigation, unless the class representative is a 100% owner of a company or an individual who owns the claim (none in this case), the Court imposes upon courts the requirement to search into the background of the decision-makers of the class representatives to determine their "net recovery" as a percentage of the total claim, and to determine subjectively whether that percentage means that the class representative has a "materially lesser interest." Surely, this result was not intended and can be corrected by granting a rehearing and recognizing that STA's 30% net recovery on $300,000 in total claims is not a "materially lesser interest."

Not only does the Court's "materially lesser interest" not apply in this case, but also the fact that an assignee has a lesser interest in the claims than the assignor or other class members is not determinative of the ability of the class representative to represent the class adequately. *See, e.g., In re Cardizem,* 200 F.R.D. at 306; *In re S. Cent. States Bakery Prods.,* 86 F.R.D. 407, 418 (M.D. La. 1980).

Thus, it was error for the Court to consider STA's "materially lesser interest" in its determination of the ability of STA to represent the class adequately. The Court should grant this motion for rehearing to correct that error.

3. There is no evidence to support the Court's conclusions that about STA's incentives or motivations

The Court committed other factual errors in its opinion by stating that because STA is an assignee who only has 30 percent of any net recovery, STA has an "incentive in settling quickly

in order to minimize litigation expenses . . .", "is not seeking relief to make itself whole," will not "hold out for a settlement that approximates [the class'] actual damages," or is motivated to pursue theories of relief that "are more efficient but yield less recovery for absentee class members."[2] *See Southwestern Bell Telephone Co.*, 2010 WL 572876, at *13 . In one short paragraph, the Court reached all of those conclusions—but there is absolutely no evidence in the record to support them.

And, on this record, the Court's conclusions are illogical. Just as the Court assumed, without evidence, that because of STA's 30 percent share of any recovery, STA had an incentive to settle quickly in order to minimize litigation expenses, the Court could also assume that because of STA's 30 percent share of any recovery, it has a greater incentive to hold out longer for a settlement closer to 100 percent of damages, in order to maximize its recovery. Either assumption is equally flawed.[3] The flaw is that either assumption is based on sheer speculation. In the face of such speculative assumptions, a trial court cannot abuse its discretion in finding the class representatives adequate. *See Bilodeau v. Webb*, 170 S.W.3d 904, 916 (Tex. App.—Corpus Christi 2005, pet. denied). The Court's assumptions are also flawed because they are unsupported by the testimony of STA's representatives. During the certification hearing, Mr. Wilder testified on cross-examination as follows:

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[2] Southwestern Bell's expert witness, Linda Mullinex, took the position that assignees can never be class representatives, a position that is clearly contrary to the law. *See* (4 RR 53). The Court quotes her as saying that she had "never seen anything like this before," but the full quote includes "I wasn't certain whether or not this had ever occurred." (4 RR 61). Clearly, based on the case law, assignees serving as class representatives not only has occurred, but is commonplace. It is curious that the Court relied on Professor Mullinex's partial statement in this regard, because the Court expressly disagreed with every other one of Professor Mullinex's positions, such as her positions on standing, commonality and typicality.

[3] As Justice O'Neill pointed out in dissent, STA's incentives to either minimize expenses or maximize recovery are the same as any other class member. *See Southwestern Bell Telephone Co.*, 2010 WL 572876, at *16 (O'Neill, J., dissenting). There was no evidence otherwise.

Q. What are your duties as class representative, or what STA's [sic] duties as class representative?
A. To vigorously pursue this matter and to treat all of the members, I guess, evenly.
Q. Let's go back to your prior answer with respect to treating your clients dutifully. That means if they're very large like USAA, or very small, you have an obligation to be sure that they are treated fairly and equally?
A. Absolutely.
Q. Regardless of the amount that you're going to recover?
A. Correct.
Q. You're not sure whether you have an obligation to supervise your lawyers. Do you have an obligation to pay attention to the case and to evaluate the evidence as it comes so you can evaluate the strengths and weaknesses of your case?
A. I think that's part of the vigorous pursuit.

(2 RR 155-156). Clearly, this testimony supports a rehearing and correction of these errors by the Court. In addition, STA's president, Mr. Shelton stated that STA's duties as class representative are to "vigorously represent the class, to put their needs above ours." (2 RR 59).

There is also no evidence to support the Court's assumption that STA will pursue theories of relief that will yield less, or that they will not hold out for a settlement that approximates the class' actual damages. The Court should be able to take judicial notice of STA's persistence in this case to recover for the class. The Court might also take judicial notice of recent news reports where STA is pursuing 100% of a different claim for the Harris County Hospital District at the Texas Public Utility Commission. *See* (http://www.khou.com/news/local/66175902.html).

4. There is no actual conflict because STA has consulting contracts or because some class members have not entered into assignments

The Court also held that because STA had consulting contracts with some class members or because some class members had not assigned their claims, STA stood in "somewhat different shoes from other class members . . ." *Southwestern Bell Telephone Co.*, 2010 WL 572876, at

*13. There is also no evidence of that. With regard to the claims asserted against Southwestern Bell, STA, as an assignor, stands in exactly the same shoes as every other class member, as the Court stated earlier in its Opinion.

With regard to unassigned claims, STA has never claimed any stake or interest in any of the claims of class members other than the five assigned claims. STA expressly stipulates that is has no right to any recovery on any claim in this case other than the five assigned claims. As noted in the STA consulting contract, an example of which is found in the record, STA only has an interest in billing errors identified by STA, presented to the customer, accepted by the customer, and recovered through STA's efforts. (II CR 444). Once again, the Court's focus on speculative or hypothetical conflicts is an insufficient basis on which to find the class representative inadequate. The Court should grant the motion for rehearing to correct that error.

5. There is no evidence of STA's lack of knowledge of the claims

The Court also committed an error of fact in its statement that STA's "only knowledge of the claims it holds must be obtained from its assignors." *See Southwestern Bell Telephone Co.*, 2010 WL 572876, at *14. There is nothing in the record to support that statement. As a matter of uncontroverted fact, none of the assignors or putative class members even knew about the claims until the claims were brought to their attention by STA (2 RR 59). In addition, the uncontroverted testimony of STA's representatives is that STA discovered the billing error from Southwestern Bell's own records. (II CR 406-407; II CR 629; 2 RR 77-78). Southwestern Bell's own records will allow STA and its expert witness, Charles Clapsaddle, to determine the amount of the overbillings by Southwestern Bell, without any need to obtain information from STA's assignors or other class members (2 RR 207-213; 3 RR 6-9).

The trial court heard testimony of the wide experience and knowledge that STA president Mike Shelton and STA head auditor Mark Wilder had with regard to Southwestern Bell billing procedures in general and in the overcharging claims in particular (2 RR 24, 34, 40-41, 46, 67, 86-87). As a finding of fact, unchallenged by Southwestern Bell on appeal, the trial court found that: "[e]vidence has been presented that STA has knowledge and expertise about billing procedures and information retrieval systems of SWBT which are not common knowledge nor widely known to members of the putative class. This knowledge and expertise gives STA a superior ability to pursue this litigation and supervise its class counsel." (III CR 950).

Courts that have denied class certification based on the lack of knowledge of the class representative have done so "only in flagrant cases, where the putative class representatives display an alarming unfamiliarity with the suit, display an unwillingness to learn about the facts underlying their claims, or are so lacking in credibility that they are likely to harm their case." *In re Frontier Ins. Group, Inc. Securities Litigation*, 172 F.R.D. 31, 47 (E.D.N.Y.1997); *see also Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417, 430 (4th Cir. 2003) (rejecting argument about the class representative's lack of knowledge as "particularly meritless" where "hornbook law" states that the representative need not have knowledge, where such knowledge can be gained through discovery and investigation); *see also Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 176-177 (S.D.N.Y. 2008) (citing cases)

Even a "marginal familiarity" with the case is sufficient. *See Johnson v. Rohr-Ville Motors, Inc*., 189 F.R.D. 363, 369 (N.D. Ill. 1999). The decertification of a class based on the lack of knowledge of the class representative is so disfavored that the United States Supreme Court has expressly disapproved of attacks based on the class representative's alleged ignorance.

See Baffa v. Donaldson, Lufkin & Jenrette Securities Corp., 222 F.3d 52, 61 (2d Cir. 2000) (holding that the Supreme Court "expressly disapproved of attacks on the adequacy of a class representative based on the representative's ignorance.").

On this record, there is certainly evidence that supported the trial court's finding that STA possessed superior knowledge of the claims and was uniquely equipped to represent the interests of the class. Because some evidence supported that determination, the trial court could not have abused its discretion. *See Butnaru,* 84 S.W.3d at 211. Thus, the Court erred in reversing the trial court's finding that STA was an adequate class representative. This motion for rehearing gives the Court the opportunity to correct that error.

6. There is no evidence that STA (1) was never personally aggrieved, (2) is "simply lending its name" to a suit controlled by class counsel, or (3) solicited its assignments to become class representative.

The Court found that STA was never personally aggrieved. In the past, this Court has only addressed whether a party is personally aggrieved in the context of whether a party has standing. *See DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 -305 (Tex. 2008); *M.D. Anderson Cancer Center v. Novak*, 52 S.W.3d 704 (Tex. 2001). In this case, however, the Court first made the determination that STA has standing. The Court found that STA stepped into the shoes of its claimholders, and that its claims are, by definition, the same as any other class member. On that basis, STA has been personally aggrieved, and the Court should grant rehearing to correct this error.

In finding that STA was an inadequate class representative, the Court expressed its concern that STA would simply lend its name "to a suit controlled entirely by the class attorney." *See Southwestern Bell Telephone Co.*, 2010 WL 572876, at *14 (quoting Wright & Miller, at §

1766). There is no evidence of that at all. In fact, the evidence shows that the STA representatives vigorously pursued this class action litigation, attending to the case, evaluating evidence, attending most of the depositions, attending hearings, accompanying counsel to document production, and consulting with counsel regularly (2 RR 59-60, 81, 155-60). The trial court found that the STA representatives were "active participant[s]" in the case, and that evidence had been presented that "STA will vigorously prosecute this cause of action on behalf of the putative class as class representative, and supervise class counsel (III CR 952, 954).[4]

Because evidence supports the finding that STA is not simply lending its name to a suit controlled by the attorney, and because there is no evidence to the contrary, the trial court did not abuse its discretion in finding that STA was an adequate class representative. Moreover, because the Court erred in basing its holding on speculative conflicts, on propositions for which there is no evidence in the record, and in ignoring the evidence that supported the trial court's findings of adequacy, the Court should grant rehearing and correct those errors.

The Court also concluded that STA solicited its assignments just to become class representative. There is also no evidence of that. The evidence is to the contrary. The record shows that at the time STA received the assignments, STA had already been seeking class representative status in the *Mireles* case by its own objection and intervention, before it ever received an assignment. This is plainly reflected on the face of each of the five assignments and related agreements, which state that STA had intervened on behalf of itself and all others similarly situated in *Mireles*. (P's Ex. 7-11).

[4] Justice O'Neill noted that Southwestern Bell's argument that STA would put itself at the "disposal of the lawyers," was based on a misquotation of Mike Shelton's testimony. *See Southwestern Bell Telephone Co.*, 2010 WL 572876, at *18 (O'Neill, J., dissenting).

STA did not need or take the assignments to seek class representative status. It was already seeking that status based on its own municipal charge claim in the *Mireles* class action. However, the assignments did allow STA to achieve a Rule 11 agreement in *Mireles* that prevented the assigned claims, as well as the claims of all of the other class members in this instant case, from being completely released and discharged by the *Mireles* settlement which paid class members not a single penny, much less a coupon.

7. The seven year interlocutory class certification appeal process has denied STA and the class due process

This has been an "accelerated" interlocutory appeal of a class certification hearing. It has been over seven years since the certification hearing, and the trial on the merits of STA and the class' case has been stayed during that entire period. STA contends that STA and the class have been denied its U.S. constitutional right under the Fifth and Fourteenth Amendment 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. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L.Ed.2d 18 (1976). This denial of due process has irreparably harmed STA and the class because during the delay, critical documentary evidence has undoubtedly been destroyed (or lost) pursuant to Southwestern Bell's own practices, retention policy of 12 years or less, or for other reasons; and expectedly, witnesses' memories have faded and witnesses have retired, become unavailable or incapable of testifying, or are deceased. The claims of STA and the class are losing coherence and degrading by reason of the delay, which is adding significantly to the expense in prosecuting their case. As a result of this denial of due process, STA asks the Court

to grant it a rehearing, and then dismiss the appeal as improvidently granted since the Court was unable to decide the case during a time period that satisfied due process.

8. STA has recently discovered a serious risk of actual bias, based on objective and reasonable perceptions.

In its Response to Plaintiff's Motion for Class Certification, Southwestern Bell made the argument that there will be intra-class conflict because the class includes defense-oriented law firms, insurance companies, and large businesses with substantial relationships with SWBT, "who would almost certainly refuse to participate in the proposed class action." Of course, this does not create an intra-class conflict and courts have held that those who do not want to participate in a class action can simply opt out to avoid a conflict. For example, *see County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1304-05 (2d Cir.1990); *Abby v. City of Detroit*, 218 F.R.D. 544, 548 (E.D. Mich. 2003); *In re K Mart Corp. Securities Litigation*, 1996 WL 924811, 7 (E.D.Mich.1996). The point that Southwestern Bell is trying to make was that the court should not certify the class because defense-oriented law firms and insurance companies oppose class actions. The alleged conflict that Southwestern Bell describes does not go to the heart of the litigation, but rather to these putative class members' desire to see an end to class actions in Texas generally.

STA recently stumbled upon an issue that causes STA serious concern about its due process in this appeal. STA's concern is that there is a serious risk of actual bias—based on objective and reasonable perceptions. The United States Supreme Court recently held in *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 2263, 173 L.Ed.2d 1208 (2009):

> The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may

> be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review . . .

As stated in *Caperton*, it is not necessary to question the "subjective findings of impartiality and propriety." Nor is it necessary to determine whether there is actual bias. *Id.*

STA has found that Justice Wainwright lists Southwestern Bell's general counsel, Richard M. Parr, on his website. (http://www.reelectdalewainwright.com/endorsements). Presumably, this endorsement reflects a relationship with Mr. Parr or AT&T, or a substantial campaign contribution. Listed with Mr. Parr on Justice Wainwright's endorsement page are an overwhelming number of individuals with defense-oriented law firms, and organizations that are publicly known to oppose class actions. They are the very entities that Southwestern Bell argues would have intra-class conflicts with STA. Most alarming is the fact that Mr. Parr is representing Southwestern Bell as an attorney of record in this very appeal. As a result of the objective and reasonable perception of actual bias by Justice Wainwright, who wrote the majority opinion, and without regard to whether or not Justice Wainwright holds any subjective actual bias against STA or the class, there certainly is an risk of actual bias based on objective and reasonable perception, and such risk is a denial STA and the class' constitutional right to due process; therefore, STA must respectfully request that the Court consider Justice Wainwright's recusal from this appeal.

CONCLUSION

This Court should grant Respondent's motion for rehearing, vacate the February 19, 2010 Opinion, and deny the petition for review as improvidently granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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