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

VICKEE BYRUM, et al.	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. A-07-CA-344 LY
	§	
GORDON E. LANDRETH, et al.	§	
Defendants.	§	

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

Defendants Gordon Landreth, Alfred Vidaurri, Jr., Rosemary Gammon, Robert Kyle Garner, Janet Parnell, Peter L. Pfeiffer, Diane Steinbrueck, Peggy Lewene Vassberg, and James Walker, II (collectively "Defendants") file this Reply to Plaintiffs' Response to Defendants' Cross-Motion for Summary Judgment, respectfully showing the court as follows:

The Texas Registration Law survives constitutional scrutiny because (1) it restricts speech that is misleading and deceptive to the general public; and (2) it advances the state's substantial interest in preventing consumers from being misled and is not more extensive than necessary to serve that interest.

This reply first addresses Plaintiffs' objections to Defendants' summary judgment evidence and established the admissibility of the evidence. Next, Defendants address Plaintiffs' arguments that the Registration Law fails the *Central Hudson* test. Defendants incorporate by reference herein Exhibits A – B.

I. RESPONSE TO EVIDENTIARY OBJECTIONS

A. The ICR Study

Plaintiffs object to the International Communications Research ("ICR") Study as inadmissible hearsay. Survey results may be admitted into evidence under the present sense impression or then existing state of mind exceptions to hearsay. *See* FED. R. EVID. 803(1), 803(3); *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F.2d 1049, 1054 (5th Cir. 1981); *Holiday Inns, Inc. v. Holiday Out in America*, 481 F.2d 445, 447 (5th Cir. 1973); *Simm v. Louisiana State Bd. of Dentistry*, 2002 WL 257688. at *5 (E.D. La. 2002). "Surveys and customer questionnaires are admissible, if they are pertinent to the inquiry, upon a showing that the poll is reliable and was compiled in accordance with accepted survey methods." *Brunswick Corp.*, 649 F.2d at 1054 (internal citation omitted). Surveys are frequently admitted into evidence where, as here, the possibility of consumer confusion is at issue. *See Brunswick Corp.*, 649 F.2d at 1054; *Exxon Corp. v. Texas Motor Exchange of Houston, Inc.*, 628 F.2d 500, 506 (5th Cir. 1980).

The ICR survey is a reliable survey compiled in accordance with accepted survey methods. Defendants submit Exhibit A in response to Plaintiffs' concerns about the survey methodology and reliability.[1] The ICR survey was supervised by John DeWolf, who has 17 years of experience conducting market surveys and research for ICR. Exhibit A, at ¶ II. Mr. DeWolf testified that in his professional opinion, the methods, protocols and models used in conducting the study are those which are commonly used and widely accepted for statistical

[1] Plaintiffs argue that the ICR survey does not meet the seven factors set out in *Toys R. Us, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189, 1205 (E.D.N.Y. 1983). Response at 4. The seven factors are commonly used to determine the admissibility of surveys used in trademark infringement cases. By contrast, the Supreme Court has employed a lower standard in admitting survey evidence in commercial speech cases. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) ("we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information …we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether."). Nonetheless, Mr. DeWolf's affidavit demonstrates that the ICR survey meets all seven of the factors cited in *Toys R. Us.*

analysis of this sort. *Id.* at ¶ IV. Neither Mr. DeWolf, nor any of the interviewers conducting the telephone survey, had knowledge of this litigation or the purpose for which the survey was to be used. *Id.* at ¶ VI. The interviewers who conducted the survey were competent professionals trained to conduct telephone survey in a non-leading and non-suggestive manner. *Id.* at ¶ III. The survey questions were clear and objective. *Id.* at ¶¶ IV & VII.. The survey polled over 1000 people, chosen as a representative sample of the universe of consumers who may make hiring decisions for design services. *Id.* at ¶ V. There is no reason to doubt the reliability of the survey.[2] The ASID email Plaintiffs seek to admit to challenge the ICR survey is irrelevant and inadmissible.[3]

Alternatively, the ICR survey is admissible under the residual hearsay exception of Federal Rule of Evidence 807. The residual hearsay exception applies when:

> (a) the statement is offered as evidence of a material fact; (b) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (c) the general purpose

[2] Plaintiffs imply that the survey is biased by noting that the survey was done by ICR under contract with the American Society of Interior Designers (ASID), a fact which Defendants stated openly in their Motion for Summary Judgment evidence. ASID's contract with ICR does not cast any doubt on the survey's methodology or results. The fact that a survey is commissioned by a party to the litigation or a group interested in the litigation does not impugn the survey's trustworthiness. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626-27 (1995) (Supreme Court admitted into evidence study conducted by Defendant and survey commissioned by Defendant). As long as the survey interviewers are not aware of the purpose for which the survey is conducted, the survey results are not compromised.

[3] Defendants object to Plaintiffs' exhibit 3 on several grounds. First, the exhibit is irrelevant. FED. R. EVID. 402. As stated in fn 2, ASID's interest in this lawsuit had no impact on the survey. The survey was conducted by an independent and respected survey company and those involved in the survey were not aware of this litigation. *See* Exhibit A, Affidavit of John deWolf, at ¶ VI. The email Plaintiffs seek to introduce in Exhibit 3 is not proof that the survey methodology or results were compromised in any way by ICR's contract with ASID. Thus, it is not a proper challenge to Defendants' evidence and has no relevance to the issues in this lawsuit. Second, the prejudicial effect of Plaintiffs' Exhibit 3 far outweighs its probative value. FED. R. EVID. 403. While the email has very little if any probative value, its prejudicial effect is substantial. The inclusion of the exhibit is intended to cast doubt on the reliability of Defendants' survey evidence and suggest some collusion between Defendants and ASID. Defendants cannot control what emails are sent out by organizations unaffiliated and uncontrolled by Defendants, and inferences contained in such emails should not be used against Defendants. Third, the email is inadmissible hearsay. Though Plaintiffs claim the exhibit is submitted simply for the significance of the matters asserted, the exhibit has no effect if the substance of the email is not considered. Plaintiffs use the exhibit to suggest that ASID's involvement makes the study untrustworthy. In order to demonstrate this, Plaintiffs essentially rely on the substance of the email, or the truth of the matters asserted. Finally, Plaintiffs have provided no authentication for this email. There is no showing that the email is a true and correct copy of an email sent by ASID.

> of these rules and the interest of justice will best be served by admission of the [survey] into evidence.

Schering Corp. v. Pfizer Inc., 189 F.3d 218, 231 (2nd Cir. 1999).

The ICR survey is offered as evidence of a material fact—whether consumers are likely to be misled by unlicensed individuals using the term "interior design." A survey of public perception regarding the licensing of design professionals is more probative than any other evidence that could be offered on this point. Courts have relied on survey evidence in commercial speech cases similar to this one to determine whether speech is misleading. *See e.g. Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626-27 (1995); *Seabolt v. Texas Board of Chiropractic Examiners*, 30 F.Supp.2d 965, 968 (S.D. Tex. 1998); *Simm*, 2002 WL 257688. at *5. The interest of justice favors admitting this survey into evidence.

Plaintiffs complain that the ICR Study is irrelevant because Defendants failed to ask the questions Plaintiffs suggest should have been asked. Response at 4. Any technical objections to the survey, such as the format of the question or the manner in which the survey was taken, bear on the survey's weight, not its admissibility. *See Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 795 (5th Cir. 1983); *C.A. May Marine Supply Co.*, 649 F.2d at 1055 n. 10; *Holiday Inns, Inc. v. Holiday Out in America*, 481 F.2d 445, 447 (5th Cir.1973); *Simm*, 2002 WL 257688, at *6 (finding that "quibbles" over the language of a survey used in a commercial speech case do not affect the survey's admissibility). Furthermore, the ICR survey is clearly relevant to this lawsuit. The survey established that more than half of those surveyed felt it was deceptive or misleading for both a licensed professional and an unlicensed practitioner to use the exact same professional title, and almost three-quarters of respondents reported

that it was important to them that a professional hired to provide services be licensed. These issues are the core of Defendants' case and the ICR survey provides relevant evidence.

B. Gordon Landreth's Affidavit

Plaintiffs contend that some statements in Gordon Landreth's affidavit are not made with personal knowledge and are irrelevant. Response at 5. In response to Plaintiffs' concerns about Mr. Landreth's personal knowledge, Defendants submit an amended affidavit as Exhibit B. The amended affidavit touches on the same topics as the original affidavit but provides more clarification as to the basis for Mr. Landreth's opinions. Federal Rule of Civil Procedure 56(e) requires that summary judgment affidavits be based upon personal knowledge, contain admissible evidence, and affirmatively demonstrate the competency of the affiant to testify as to matters contained therein. *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 80 (5th Cir.1987). Gordon Landreth's amended affidavit fulfills all of these requirements.

As the chair of the Texas Board of Architectural Examiners ("TBAE" or "Board"), Mr. Landreth is uniquely positioned to testify about the Board's role, duties, and mission. Mr. Landreth has the responsibility to ensure that the Board fairly enforces the laws of the State and acts in a way that protects the health, safety and welfare of the public. Exhibit B, at ¶ V. His affidavit explains how the Board carries out its mission, and why and how the Board enforces the Registration Law.

In addition, Mr. Landreth's opinion regarding his understanding of the Registration Law is admissible. Federal Rule of Evidence 701 allows opinion testimony by lay witnesses if the opinions are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony of the determination of a fact in issue, and (c) not based

on scientific, technical, or other specialized knowledge within the scope of Rule 702. FED. R. EVID. 701. Witness testimony as to inferences drawn from the witness' perception of facts or data reviewed is admissible. *See Beech AICRraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988) ("Rule 701 permits even a lay witness to testify in the form of opinions or inferences drawn from her observations when testimony in that form will be helpful to the trier of fact."); *U.S. v. Polishan*, 336 F.3d 234, 242 (3rd Cir. 2003) ("Lay opinion testimony may be based on the witness's own perceptions and knowledge and participation in the day-to-day affairs of [the] business.")(internal citation and quotation marks omitted).

Mr. Landreth's understanding of the purpose of the Registration Law is rationally based on his perception of the legislative record, citizen comments, and his knowledge of the TBAE. Exhibit B, at ¶ III. His opinion as chair of the TBAE is helpful to a determination of the purpose of the Registration Law as well as whether the Registration Law furthers a substantial state interest, key issues in this lawsuit. Mr. Landreth's opinions are based solely on his experience as chair of the Board and as a citizen of the state, not on any scientific or technical expertise. Mr. Landreth's testimony about his own perceptions of the Registration Law, and the ways the Registration Law is construed and enforced by the TBAE, is admissible opinion testimony.

1. Committee on State Affairs Interim Report

Part of what Mr. Landreth considered in examining the legislative history of the Registration Act was the Texas House of Representatives Interim Report to the 71st Texas Legislature (Exhibit 1 attached to Affidavit of Gordon Landreth). Plaintiffs admit the Interim Report is admissible in principle but claim that it contains inadmissible hearsay.[3] Response at 4.

[3] Plaintiffs correctly point out that the Interim Report submitted by Defendants with their Cross-Motion for Summary Judgment was incomplete. Defendants apologize that the report submitted with Defendants' motion was missing every other page. This was a clerical error and was not intentional. Defendants forwarded a full and corrected version of the Interim Report to Plaintiffs' counsel as soon as the error was brought to Defendants'

The legislative report, and all statements therein, are admissible as a public record, pursuant to Federal Rule of Evidence 803(8). Statements, opinions and conclusions contained in these reports are admissible as long as (1) all statements are based on a factual investigation; and (2) any portion of the report that is admitted must be sufficiently trustworthy. FED. R. EVID. 803(8)(c); *See Beech AICRraft*, 488 U.S. at 169 (adopting a broad interpretation of "factual findings" to encompass reports which contain opinions or conclusions).[4] Courts repeatedly allow reports of congressional committees as exceptions to the hearsay rule. *See. e.g. Moss v. Ole South Real Estate, Inc.*, 933 F.2d 1300, 1307-08 (5th Cir. 1991) (noting that evaluative reports are generally reliable and do not have the problems associated with most hearsay); *Stasiukevich v. Nicolls*, 168 F.2d 474, 479 (1st Cir. 1948) ("The official report of a legislative or congressional committee is admissible in evidence in a judicial proceeding, as an exception to the hearsay rule, where the report, within the scope of the subject matter delegated to the committee for investigation, contains findings of fact on a matter which is at issue in the judicial proceeding.")(citing *Wigmore on Evidence*, §§ 1662, 1670).

The Interim Report is highly relevant to the question of legislative intent. The Supreme Court has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill." *Garcia v. U.S.*, 469 U.S. 70, 76 (1984). The Committee on State Affairs was taxed with the responsibility of investigating, through public hearings and testimony, the feasibility of a regulation on the interior design profession. *See e.g.* TEX. GOV'T

---

attention. Attached as Exhibit 2 to Exhibit B is a corrected version of the Interim Report. Defendants ask the Court to substitute this corrected exhibit for the previous version submitted.

[4] The Advisory Committee to the Federal Rules proposed a nonexclusive list of four factors to consider in determining the admissibility of an investigation under Fed. R. Evid. 808(8): (1) the timeliness of the investigation; (2) the investigator's skill or experience; (3) whether a hearing was held; and (4) possible bias when reports are prepared with a view to possible litigation (citing *Palmer v. Hoffman*, 318 U.S. 109 (1943)). Advisory Committee's Notes on Fed. R. Evid. 803(8). The Interim Report was prepared by the House committee during the 71st legislative session while the Registration Law was being debated, long before any litigation arose. The House committee held public hearings on the subject matter of the report. The Interim Report meets all of the *Palmer* factors.

CODE §301.014(a)(1)-(3). This report summarizes the different positions of the bill's proponents and opponents. The statements in the report were made based on factual investigation, testimony, and analysis. Plaintiffs have not objected to statements in this report being untrustworthy. *See Mole v. Ole South Real Estate*, 933 F.2d 1300, 1350 (5th Cir. 1991) (opponent bears the burden of showing report to be untrustworthy). The report, the statements contained therein, and Mr. Landreth's comments regarding the report contained in his affidavit are admissible.

2. Transcript of Hearing on Architectural Decisions Sunset Meeting

Mr. Landreth also reviewed a transcript of the testimony before the Sunset Meeting during a Hearing on Architectural Decisions held on August 15, 1990. *See* Exhibit 2 to Affidavit of Gordon Landreth. This document was transcribed by Staci Williams, a certified court reporter, on June 17, 2007 from legislative tapes. Courts may take judicial notice of legislative testimony in determining a motion for summary judgment challenging the constitutionality of a statute. *Levy v. Scranton*, 780 F. Supp. 897, 900-01 (N.D.N.Y. 1991); *Stasiukevich*, 168 F.2d at 479. Defendants ask this court take judicial notice of this transcript, pursuant to Federal Rule of Evidence 201, and consider it in making its determination of Defendants' motion for summary judgment.

3. Letter and Written Testimony from Citizens' Groups

In response to Plaintiffs' hearsay objection, Defendants have addressed the evidentiary concerns relating to these exhibits. The letter from Alan Fondy, Field Consultant for the State Firemen's and Fire Marshalls' Association of Texas dated April 13, 1989 and the written testimony from Carole Patterson (now Carole Zoom) on behalf of the Coalition of Texans with

Disabilities (*see* Exhibits 3 and 4 of Affidavit of Gordon Landreth) are resubmitted with authenticating affidavits from the authors, thus curing any hearsay objections.

Gordon Landreth relied on the State Firemen's and Fire Marshalls' Association letter and Carole Patterson's written testimony as evidence of concerns from citizens' groups. These exhibits informed his understanding of the purposes underlying the Registration Law. *See* Exhibit B, at ¶ VIII. He quotes from these sources not for the truth of the statements contained therein, but to show what he reviewed and relied on them in forming his opinions about the Registration Law.

C. Congressman Gene Green's Affidavit

While Congressman Green was a Texas State Senator, he authored and worked on the passage of the Registration Law. As the author of the bill and the chair of the conference committee which conducted hearings on the bill, Congressman Green is uniquely positioned to provide his opinion about the law's intent. Indeed, it would be hard to find an individual with *more* personal knowledge about the legislative intent of this bill than Congressman Green. Congressman Green does not speak as the entire Texas Legislature when making these statements in his affidavit, but as the author of the bill. His familiarity with the law and the concerns expressed during the public hearings is sufficient foundation for Congressman Green to provide his opinions about what he perceived as the intent and purpose of the Registration Law. Further, his impressions, beliefs and intentions relating to the passage of this law are relevant to this case. His testimony is relevant as it goes directly to the issue of whether or not the government has a substantial interest that is being advanced by the Registration Law.

II. CONSTITUTIONALITY OF THE REGISTRATION LAW

The Registration Law passes all four *Central Hudson*[5] factors. The speech Plaintiffs seek to engage in is inherently misleading, as demonstrated by the ICR survey. Plaintiffs attack the survey but offer no rebuttal evidence of their own. Plaintiffs only "support" for their position is the ASID website, which Plaintiffs claim lists some individuals who are unlicensed in Texas as interior designers. This "evidence" is wholly irrelevant. ASID and TBAE are entirely separate and unaffiliated entities. Defendants have no control over ASID and are not at all responsible for what is on ASID's website. Surely the law will not be struck down as unconstitutional based on the existence of misleading information on the internet. If Plaintiffs' claims about ASID's website are true, then ASID *would* be providing misleading information. But this has no bearing on the constitutionality of the Texas Registration Law.

In determining whether speech is inherently misleading, Courts look to whether the terms at issue have specific meaning, such that their use would be likely to mislead the public. *See American Academy of Pain Management v. Joseph*, 353 F.3d 1099, 1101 (9th Cir. 2004); *Kale v. South Carolina Dept. of Health and Environmental Control*, 391 S.W.2d 5733, 574 (S.C. 1990). When the terms have a specific meaning—as do "interior design" and "interior designer"—their use by those who do not meet the requirements for use of the terms is inherently misleading. Plaintiffs do not persuasively distinguish the cases cited by Defendants on this point. Plaintiffs state that in *Joseph*, California had an "obvious, substantial, and well-documented interest in preventing terms like 'board certified' from being co-opted by ad hoc, fly-by-night, 'certifying' entities." Response at 10. It is not clear why Texas would not have a similar substantial interest in preventing terms like "interior designer" from being co-opted by ad hoc, unlicensed and untrained decorators. In distinguishing *Maceluch v. Wysong*, 680 F.2d 1062 (5th Cir. 1982), Plaintiffs note that there are important differences in training and public perception between

[5] *Central Hudson Gas & Elec. Corp v. Public Service Commission of New York*, 447 U.S. 557, 563-64 (1980).

M.D.'s and D.O.'s. However, the differences in training between interior decorators and licensed interior designers are arguably even greater (given that interior decorators are not required to have *any* training at all, while interior designers have significant training and education requirements). Based on the Fifth Circuit's reasoning in *Maceluch*, the Registration Law should be found constitutional.

Plaintiffs' reliance on *Pruett v. Harris County Bail Bond Board*, 2007 WL 1632697 (5th Cir. June 7, 2007) is misplaced. In contrast to *Pruett*, Defendants do not argue that the speech at issue is misleading because a statute says the speech is misleading. Rather, Defendants argue that the speech is misleading because empirical and anecdotal data shows the speech to be misleading. The Registration Law addresses the misleading nature of the underlying speech at issue, unlike the law at issue in *Pruett*. If the underlying speech is inherently misleading, the speech is outside the protection of the First Amendment and the government can regulate the speech as it sees fit. *Seabolt v. Texas Bd. of Chiropractic Examiners*, 30 F.Supp.2d 965, 968 (S.D. Tex. 1998).

The legislative record indicates that use of the title "interior designer" by unlicensed practitioners created confusion in the marketplace before the challenged law, TEX. OCC. CODE § 1053.151, was adopted. *See* Interim Report at 9 and Legislative testimony at 11-12. The confusion does not come *because* of Texas Occupation Code § 1053.151; indeed, § 1053.151 was passed to address this confusion. Defendants are not making a "circular" argument as was arguably the case in *Pruett.* The argument is actually quite linear and straightforward—legislators determined that consumers are harmed when unlicensed practitioners hold themselves out as interior designers; in response, the legislature passed a law to restrict this behavior, in keeping with the legislature's role of protecting Texas consumers. Defendants now present

evidence that the legislature's solution was not unconstitutional because the underlying speech *is* inherently misleading.[6]

Plaintiffs appear to be arguing that the State may never enact a facially constitutional restriction upon misleading commercial speech because such a restriction would be based upon a determination that the speech is misleading. Plaintiffs' argument not only is in derogation of commercial speech jurisprudence, it is an indulgence in the same sort of circular reasoning Plaintiffs ascribe to Defendants. Plaintiffs then revert to the argument that technically true statements are not misleading. Response at 6. Commercial speech cases have repeatedly held a true statement may be restricted as misleading or deceptive. *See* Defendant's Motion for Summary Judgment at 8-10 (discussing *Joseph* and *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91 (1990)).

On the second *Central Hudson* prong, Defendants have shown a substantial state interest in protecting consumers from misleading advertisement and ensuring the accuracy of commercial information in the marketplace. *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). This state interest is especially strong in the context of advertising for professional services because of the high possibility of abuse. *In re R.M.J.*, 455 U.S. 191, 202 (1982). The Registration Law directly advances this substantial state interest. Plaintiffs have not refuted this point, but have simply stated conclusorily that this prong "obviously" cannot be met. Response at 8-9. Defendants have provided evidence of the legislative intent to further these substantial state

[6] *Pruett* can also be distinguished on the basis that Defendants in *Pruett* pointed to a different statute altogether (from the Business and Commerce Code) in order to defend the constitutionality of the challenged statute (under the Occupation Code). Here, Defendants do not point to a statute outside the Occupation Code to support their argument but rather ask the Court to read the provisions of the Occupation Code together as a whole in order to give them their proper meaning as intended by the legislature. This is in keeping with a well-settled canon of statutory construction that "the provisions of a unified statutory scheme should be read in harmony, so that no provision is left inoperative, superfluous, or contradictory." *E.E.O.C. v. Exxon Corp.*, F.Supp.2d 635, 642 (N.D. Tex. 1998) (*citing Holley v. United States*, 123 F.3d 1462, 1468 (Fed. Cir. 1997)). Reading the provisions of a statute together is not bootstrapping.

interests. The affidavit of Congressman Green, the committee Interim Report, the testimony from the senate hearing, and the letters and testimony from consumer groups all support Defendants' position that the Registration Law furthers a substantial state interest of ensuring the accuracy of information provided to consumers. Plaintiffs have provided no evidence to the contrary.

Finally, the Registration Law is reasonably tailored to the State's interest. Even if the law is imperfect, the legislature's judgment should not be second-guessed. *Board of Trustees of State University of N.Y. v. Fox*, 492 U.S. 469, 477 (1989). Though Plaintiffs urge what they consider to be a better way to advance the state interest, absent a showing that the Registration Law is "substantially excessive," the law should not be struck down. *Id.*

III. PRAYER FOR RELIEF

Defendants pray that Plaintiffs' Motion for Preliminary Injunction and Plaintiffs' Motion for Summary Judgment be denied. Defendants further pray that Defendants' Motion for Summary Judgment be granted and that Plaintiffs' claims be dismissed with prejudice. Defendants pray for such other relief to which they may be justly entitled.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Litigation

ROBERT B. O'KEEFE
Chief, General Litigation Division

/s/ Marina Grayson
MARINA GRAYSON
Texas Bar No. 24042098
ERIKA M. LAREMONT
Texas Bar No. 24013003
Assistant Attorney General
General Litigation Division
Post Office Box 12548, Capitol Station
Austin, Texas 78711-2548
512-463-2120
512-320-0667 (*Fax*)

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I certify that on July 16, 2007, a true and correct copy of the foregoing document was filed with the Court's ECF system and send via the ECF electronic notification system to:

Cindy Olson Bourland
Merica & Bourland, P.C.
400 West 15th Street STE 900
Austin, Texas 78701

William H. Mellor
Clark M. Neily
Institute for Justice
901 North Glebe Road, STE 900
Arlington, Virginia 22203

Jennifer M. Perkins
398 South Mill Avenue, STE 301
Phoenix, Arizona 85281

/s/ Marina Grayson
MARINA GRAYSON
Assistant Attorney General