IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 01-9090

IN RE CHERIE ROBINSON AND SHERITA HARRISON

ORDERED:

Absent an accompanying petition for writ of mandamus, the Court takes no action on the emergency motion for temporary relief, as styled above, received May 31, 2001. See Texas Rules of Appellate Procedure 52.10(a). Justice Hecht and Justice Owen note their dissent and would vote to grant the stay.

As ordered by the Supreme Court of Texas, in chambers,

with the Seal thereof affixed at the City of Austin, this 1st day of June, 2001.

JOHN T. ADAMS, CLERK
SUPREME COURT OF TEXAS

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

June 1, 2001

Mr. John W. Thomas
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Austin, TX 78701

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Mr. Kevin Buchanan
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5910 N. Central Expressway
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Mr. Ethan L. Shaw
390 Park Street, Suite 500
Beaumont, TX 77701

RE: IN RE CHERIE ROBINSON AND SHERITA HARRISON

Dear Counsel:

Enclosed, please find an order of the Court of this date regarding the above referenced matter.

Sincerely,

John T. Adams, Clerk

Encl.

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

May 31, 2001

Mr. John W. Thomas
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5910 N. Central Expressway
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Mr. Ethan L. Shaw
390 Park Street, Suite 500
Beaumont, TX 77701

RE: IN RE CHERIE ROBINSON AND SHERITA HARRISON

Dear Counsel:

Absent an accompanying petition for writ of mandamus, the Court will take no action on the emergency motion for temporary relief, as styled above, received today. See Texas Rules of Appellate Procedure 52.10(a). An order will be issued June 1, 2001 noting this and the dissent of Justice Hecht and Justice Owen, who would vote to grant the stay.

Sincerely,

John T. Adams, Clerk

ORIGINAL

No. _____

IN RE: CHERIE ROBINSON AND SHERITA HARRISON

IN THE SUPREME COURT
OF TEXAS

00-0000

FILED ON BEHALF OF INTERVENORS
CHERIE ROBINSON AND SHERITA HARRISON

EMERGENCY MOTION FOR TEMPORARY RELIEF

RECEIVED
SUPREME COURT
OF TEXAS
2001 MAY 31 PM 4:43
JOHN T. ADAMS, CLERK
BY _____ DEPUTY

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EMERGENCY MOTION FOR TEMPORARY RELIEF

This action arises out of the preliminary settlement of a class action lawsuit against Blockbuster, Inc. Blockbuster was facing a number of class action lawsuits all over the country concerning its late fee policy. Blockbuster settled a case that was pending in Jefferson County, Texas (*Kim Ann Scott and Malia Knight, Individually, and on behalf of all others similarly situated v. Blockbuster Inc.*; No. D 162-535; In the 136th Judicial District Court of Jefferson County, Texas) before Judge Milton Shuffield the day before a judge in Chicago was to rule on a contested class certification motion which had been briefed and argued months before, and which had been continued from March 21, 2001.

Several parties, including relators, have intervened and appealed the class certification order of the trial court in Jefferson County which certified a nationwide class for settlement purposes. A final hearing to determine the fairness of the settlement is not scheduled until December 10, 2001. Class notice, however, is scheduled to go out tomorrow, June 1, 2001 to some 40 million Blockbuster members nationwide.

Relators moved the trial court to stay issuance of class notice pending the outcome of the interlocutory appeals of the class certification order. Tex. R. App. P. 29.5 provides that a trial court lacks jurisdiction to interfere with or impair the effectiveness of any relief sought or that may be granted on appeal. Issuing class notice for a preliminary class settlement that is subject to at least two pending interlocutory appeals would obviously impair the effectiveness of any relief the parties may receive from their appeal. One of the issues on appeal is the specificity of the class definition and adequacy and accuracy of the notice itself.

Relators did not receive the ruling denying that motion from the District Court until yesterday. They moved for immediate relief from the Beaumont Court of Appeals today, and that relief was denied. Relators now seek relief from this Court and, due to the short time notice, have not been able to prepare a formal petition for writ of mandamus in accordance with Rule 52.

Relators ask that this Court temporarily stay the issuance of the class notice until a proper Petition for Writ of Mandamus can be filed and a decision made thereon. A copy of the pleading filed with the Beaumont Court of Appeals is attached hereto in order to provide additional detail should it be required.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Emergency Motion for Temporary Relief has been served on the following *via* facsimile transmission on the 31st day of May 2001.

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COURT OF APPEALS
NINTH DISTRICT OF TEXAS
BEAUMONT, TEXAS

****

NO. 09-01-001-72-CV

****

CHERIE ROBINSON AND SHERITA HARRISON

Intervenor Plaintiffs/Appellants

v.

BLOCKBUSTER INC.

Defendant/Appellee

AND

KIM ANN SCOTT AND MALIA KNIGHT

Plaintiff/Appellees

FROM THE DISTRICT COURT, JEFFERSON COUNTY
136TH JUDICIAL DISTRICT

****

EMERGENCY MOTION FOR TEMPORARY ORDER STAYING CLASS NOTICE PENDING RESOLUTION OF THE INTERLOCUTORY APPEALS OF THE DISTRICT COURT'S APRIL 11, 2001 CLASS CERTIFICATION ORDER

TO THE HONORABLE COURT:

Appellants ask the Court for a temporary order staying the trial court's April 11, 2001 class certification order and the issuance of notice commencing on June 1, 2001 to nearly 40 million Blockbuster Inc. ("Blockbuster") customers nationwide pending this appeal.

I.

INTRODUCTION

This is an extraordinary case. This is an unusual case. This is a case that affects some 40 million members of Blockbuster nationwide, making it one of the biggest class actions in American history. This is a case that profoundly affects the relationship between the courts of two sister states – Texas and Illinois – and thus invokes fundamental principles of comity.

II.

STATEMENT OF FACTS

1. On February 18, 1999, a nationwide class action was filed in the Circuit Court for Cook County Illinois in a case captioned *Cohen v. Blockbuster et al.* This was the first class action filed in the United States challenging Blockbuster's practice of charging late fees or extended viewing fees ("EVFs") to its members upon the late return of a video.

2. The theory of the *Cohen* action was that Blockbuster's EVFs constitute are excessive and disproportionate and thus constitute an unlawful penalty or liquidated damage provision in its video rental agreements. The *Cohen* action named as defendants

both Blockbuster (which operates some 4,273 company owned stores in the U.S.) and a defendant class of independent Blockbuster franchisees (which operate, collectively, some 918 Blockbuster stores in the U.S.)

3. The *Cohen* action also sought injunctive relief stopping or modifying Blockbuster's EVF practice going forward.

4. This case (*Scott v. Blockbuster Inc.*) was filed in Jefferson County, District Court (the "District Court") on March 29, 2000, more than 13 months after the filing of the *Cohen* action in Illinois. The *Scott* action did not seek injunctive relief against Blockbuster, and did not sue a defendant class of independent Blockbuster franchisees.

5. The *Cohen* plaintiffs filed a motion for nationwide class certification on July 14, 2000. After full briefing, a hearing on that motion occurred on January 30, 2001. The Illinois court took the motion under advisement (as well as Blockbuster's dispositive motion for summary judgment which was also briefed and argued) and set a ruling date for March 21, 2001. Prior to the March 21, 2001 ruling date, Blockbuster informed the Illinois court that it either had reached a settlement of *Cohen*, or was very close to one, and thus induced a delay in the Illinois court's ruling to April 12, 2001.

6. On April 11, 2001, at 1:58 p.m., the plaintiffs in *Scott* filed a Third Amended Petition with the District Court. The amended petition included new theories of recovery not previously plead, and named for the first time a new party plaintiff – Malia Knight – a resident of Harrison County, Texas.

7. At 2:40 p.m. on April 11, 2001, forty-two minutes after the filing of plaintiffs' amended petition, the District Court entered its preliminary order approving

class settlement (the "April 11th Order"). A copy of the April 11th Order is attached hereto as **Exhibit 1**.

8. As part of its April 11th Order, the District Court certified a nationwide class of some 40 million EVF paying Blockbuster members, purportedly in accordance with Rule 42 of the Texas Rules of Civil Procedure ("Rule 42"). The District Court also preliminarily approved a settlement of the *Scott* action and issued an anti-suit injunction enjoining all other litigation against Blockbuster in Texas and across the nation, including the first filed *Cohen* action in Illinois.

9. Also as part of its April 11, 2001 class certification order, the District Court approved a form of notice to be disseminated commencing June 1, 2001 to the 40 million class members throughout the United States.

10. There was no hearing of any kind prior to the District Court's entry of its April 11, 2001 class certification order. *See* Exhibit 2. Needless to say, there was no notice given to the *Cohen* plaintiffs or any other litigants with pending claims against Blockbuster prior to the District Court entering its April 11th Order.

11. The District Court's failure to conduct a hearing prior to certifying a nationwide class of some 40 million Blockbuster members violated Rule 42(c)(1): ("as soon as practicable after the commencement of an action brought as a class action, the court shall, *after hearing*, determine by order whether it is to be so maintained.") Rule 42 (c)(1) makes no distinction for a trial court's certification of a settlement class as opposed to a contested litigation class.

12. On April 12, 2001, Blockbuster appeared before the Illinois court for the previously scheduled ruling (originally set for March 21, 2001) and moved for a stay of *Cohen* based on its eleventh hour "settlement" reached in the *Scott* action. The Illinois court ordered briefing and argument on Blockbuster's motion to stay *Cohen*.

13. On April 23, 2001, the Illinois court denied Blockbuster's motion to stay *Cohen*. At the same time, the Illinois court granted the *Cohen* plaintiffs' vigorously contested motion for nationwide class certification and certified two nationwide plaintiff classes (one for persons who paid EVFs and a separate class for persons who paid "non return fees" for completely failing to return videos to Blockbuster). The Illinois court also certified a nationwide defendants' class of Blockbuster franchisees and issued a counter-injunction enjoining the application of the District Court's April 11, 2001 anti-suit injunction, and denied Blockbuster's motion for summary judgment. On the subject of comity, the Illinois court had this to say:

> Judge Biebel: [A]nd this is my concern, ... that on the day before I was due to decide this case, I have a Texas case seemingly in violation of its own law, not giving me the comity, the respect, that I was due to decide this case after I had heard it. I had entertained settlement discussions and indeed allowed this case to be pushed back to allow the parties to discuss the matter.

Transcript of May 14, 2001 hearing in *Cohen*.

14. On April 20, 2001, class members Cherie Robinson and Sherita Harrison intervened in the *Scott* action. Class member Brian Peters also intervened in the *Scott*

action. All the intervenors are members of both the *Scott* consent class certified by the District Court and the contested litigation class certified by the Illinois court.

15. On May 1, 2001, Intervenors moved before the District Court to vacate its April 11th Order and to stay the *Scott* action in deference to the first filed and more mature *Cohen* action in Illinois.

16. On April 27, 2001, Intervenor *Peters* filed an interlocutory appeal of the District Court's April 11, 2001 class certification order. This appeal is pending.

17. On May 9, 2001, Intervenors Robinson and Harrison filed an interlocutory appeal of the District Court's April 11, 2001 class certification order. This appeal is pending.

18. On May 29, 2001, the District Court denied Intervenors Robinson and Harrison's motion to vacate the April 11th Order and stay the *Scott* action. A copy of the District Court's letter opinion is attached hereto as **Exhibit 3**. Also on May 29, 2001, the District Court granted Blockbuster's motion to modify the District Court's April 11th Order to, among other things, amend the class definition, amend the form of class notice and dissolve the District Court's anti-suit injunction which violated the Texas injunction rules.

19. Finally, the District Court denied Intervenors' motion to stay class notice in *Scott*, pending the determination by this Court of the pending interlocutory appeals.

III.

THE NINTH DISTRICT COURT OF APPEALS HAS JURISDICTION OVER THIS MOTION FOR AN EMERGENCY TEMPORARY ORDER AND OVER THE DISTRICT COURT'S APRIL 11, 2001 INTERLOCUTORY ORDER GRANTING CLASS CERTIFICATION

This Court has jurisdiction over this interlocutory appeal under Tex. Civ. Prac. & Rem. Code § 51.014 which reads in pertinent part:

(a) A person may appeal from an interlocutory order of a district court, county court at law, or county court that:

* * *

(3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure;

(4) grants or refuses a temporary injunction or grants or overrules a motion to dissolve a temporary injunction as provided by Chapter 65;

(b) An interlocutory appeal under Subsection (a) shall have the effect of staying the commencement of a trial in the trial court pending resolution of the appeal.

Once jurisdiction vests in this Court under Tex. Civ. Prac. & Rem. Code § 51.014, the Texas Rules of Appellate Procedure specifically provide this Court with authority to provide, and enforce, temporary orders in order to protect the parties and this Court's jurisdiction, and to preserve the status quo pending the resolution of the interlocutory appeal in the Court of Appeals:

Rule 29.3 of T.R.A.P. states:

> The appellate court may make any temporary orders necessary to preserve the parties' rights until a disposition of the appeal ...

Enforcement of Temporary Orders. While an appeal from an interlocutory order is pending, only the appellate Court in which the appeal is pending may enforce the order.

T.R.A.P., Rule 29.4.

In this case, Blockbuster will provide notice commencing on June 1, 2001 to nearly 40 million members nationwide informing them of a purported nationwide settlement that was rife was procedural errors in a case that should have been stayed under long established principles of comity accepted by the Texas Supreme Court. Intervenors request that this Court stay the June 1, 2001 notice because:

1) the nationwide notice issued pursuant to an invalid order of nationwide class certification is misleading, inaccurate and will cause substantial confusion among Blockbuster members nationwide, and will adversely affect the orderly administration of justice and this Court's jurisdiction over the pending interlocutory appeal;

2) the notice in *Scott* will conflict with nationwide notice in the *Cohen* action, which is currently before the Illinois court for approval this afternoon at 2:00 p.m. This Court should maintain the status quo by staying the notice in *Scott*.

3) the District Court failed to comply with Texas Rule 42 when it certified a nationwide class of nearly 40 million Blockbuster members and approved a form of class notice in less than 42 minutes, without a hearing, and without any finding as to typicality, commonality or other elements of certification required by Rule 42, and without having before it a Motion for Class Certification or other supporting pleading; and

4) the trial court failed to apply settled principles of comity under Texas law, and stay this case in favor of the first filed *Cohen* case, which was certified on a nationwide basis by the Illinois court in a contested proceeding.

IV.

LEGAL ARGUMENT

A. By amending the class definition and form of notice contained in District Court's April 11, 2001 class certification order and the form of the notice approved on April 11, 2001, the District Court interfered with this Court's jurisdiction over the pending interlocutory appeal of that order.

The District Court approved a form of notice for a defined nationwide class on April 11, 2001. It then amended that order twice - effectively changing the form of notice and changing the definition of the class. This was improper. In *Intratex Gas Co. v. Beeson et al.*, 22 S.W. 3rd 398 (Supreme Court of Texas 2000), the Texas Supreme Court found that Rule 42 "implicitly requires the representative plaintiffs to demonstrate not only that an identifiable class exists, but that it is susceptible to precise definition ... A properly defined class is imperative for a suit to proceed as a class action because the class definition facilitates identifying, *at the outset*, the individuals affected by the litigation ..." *Id.* at page 403. In *Intratex*, the Texas Supreme Court further held: "In making a class certification decision, the trial court in the *first instance* must determine whether a class exists, and must ensure that a class is properly defined, based on the available evidence." *Id.* at 406 (emphasis supplied).

Under the rule of *Intratex*, the District Court was required "in the first instance" on April 11, 2001 – to ensure that the *Scott* settlement class was "properly defined" based on the "available evidence." As of April 11, 2001, there was absolutely nothing in the record before the District Court that would allow the District Court to identify, much less define, a plaintiff's class of persons that incurred Blockbuster's so called "non return fee". The District Court's amendment of its April 11, 2001 class certification order interferes with and impairs appellate jurisdiction of this Court because it changed the class definition after the fact, and neither the original definition or the amended one, is "properly defined" under *Intratex*. *See also*, T.R.A.P. Rule 29.

Intervenors respectfully submit that the orderly administration of justice mandates that this Court stop the June 1, 2001 notice until the pending Rule 29 appeals are finally adjudicated. *See, Reeves v. City of Dallas*, 2001 Tex. App. Lexis 2956 (Ct. App. – Dallas May 7, 2001)("a trial court cannot make any order which interferes with or impairs the jurisdiction of the appellate court or the effectiveness of any relief sought or that may be granted on appeal while the interlocutory appeal is pending.")(internal quotations omitted). If this Court permits class notice to proceed in *Scott* and then, subsequently, the District Court's April 11, 2001 class certification order is reversed, in whole or in part, it would then be necessary for Blockbuster to issue a second nationwide notice retracting the first notice, and then a third notice if the *Cohen* case proceeds in Illinois. *See, Central Power & Light Company v. City of San Juan*, 962 S.W. 2d 601 (Ct. App. Corpus Christi, 1997). Such a result would lead to significant confusion among class members and would clearly be detrimental to justice in this case. Furthermore, there is no prejudice to

Blockbuster from a stay of class notice in *Scott* until appellate review is completed and there is no prejudice to the class since Blockbuster does not provide any settlement consideration to the class until there is a final judgment of fairness and all appeals have been exhausted.

B. The notice to the *Scott* Settlement Class is misleading, defective and inconsistent with Blockbuster's recent position in taken in the *Cohen* action.

The class notice approved by the District Court on April 11, 2001 is riddled with defects and material omissions. The amendments make it worse not better. Blockbuster's plan of distribution of the notice is inconsistent with Blockbuster's stated position to the Illinois court in *Cohen*. Attached hereto as **Exhibit 4** is Blockbuster's Sur-Reply memorandum on final class certification and class notice filed on May 23, 2001 in *Cohen*. As this Court can plainly see, several of the objections that Blockbuster raised to the class notice in *Cohen* can be turned around and redirected at the form of class notice that Blockbuster proposes to disseminate in *Scott*. Consider the following comments submitted by Blockbuster to Judge Biebel in *Cohen*:

Blockbuster's Argument:	"Any class notice given in this action [*Cohen*] must inform class members of the Texas settlement and their right to participate and/or opt out of that settlement. The proposed notice [in *Cohen*] does not even reference the previously certified and settled Texas action, and thus is woefully deficient in advising class members of their rights regarding the subject matter at hand." *See*, **Exhibit 4** attached hereto at page 5.

Issue:

The same thing could be said of the proposed settlement notice in *Scott*. It makes absolutely no reference to the two nationwide plaintiffs classes certified in *Cohen* and the one nationwide defendants class certified in *Cohen*. The proposed revised notice in *Scott*, at paragraph 9(b) merely states that "as of May 17, 2001 actions are pending in Illinois, California ... in which Blockbuster customers are prosecuting ***putative class claims*** based upon Blockbuster's extended viewing and non return fee policies." The *Cohen* class is not a putative class. Rather, it is a certified litigation class. Thus, the *Scott* notice (and the proposed amendment thereto) is materially inaccurate and deficient. In addition, the proposed *Scott* class notice fails to inform class members that (i) other pending EVF cases (eg. *Cohen*, *Holly* and others) include a demand for injunctive relief to stop or modify Blockbuster's current per rental period EVF practice – something that the *Scott* settlement fails to obtain, and (ii) the Trojan Horse provision may create a release and estoppel of future (post April 1, 2001) claims against Blockbuster. Such omissions are, likewise, material and misleading.

Blockbuster's Argument:

"Blockbuster has already indicated that it can identify with reasonable certainty the names and addresses of a large portion of the members of the EVF class, thus rendering [Cohen] plaintiffs' proposed method of distribution inappropriate and deficient under the standards of due process. Moreover, it is plaintiffs' burden to prove that such name and address information is not available and/or reliable." *See*, **Exhibit 4** at pages 5-6.

Issue:

Blockbuster has stated to the Illinois court that it is able to identify with "reasonable certainty" the names and addresses of most of the members of an EVF class. This presumably would include the *Scott* settlement class. If true, the form of class notice approved by this Court on April 11, 2001 (*USA Today*

Blockbuster website, and in store distribution) may not the best means practicable to notify the *Scott* settlement class. *See*, April 11, 2001 Order at paragraph 10. Moreover, neither Blockbuster nor the *Scott/Knight* plaintiffs have filed an affidavit or pleading with this Court contradicting Blockbuster's own statement to the Illinois court.

Blockbuster's Argument: "In fact, the named plaintiffs [in *Cohen*] lack standing to assert a claim against a Blockbuster franchise store. They have not even attempted to allege that a single one of them rented a video (much less incurred EVFs or the retail price for an unreturned video) at a Blockbuster franchise. As such, there can be no defendant class since the [*Cohen*] *plaintiffs have no standing to assert a claim against anyone other than Blockbuster Inc.*" *See*, **Exhibit 4** at page 8.

Issue: Intervenors could not have said it better. There is no evidence in the record that, as of April 11, 2001 when this Court certified the *Scott* settlement class, Plaintiff *Scott* had ever rented a video (much less incurred an EVF) at a Blockbuster company owned store. Moreover, there is no evidence in the record that either Plaintiff *Scott* or *Knight* ever paid a "non return fee" to a Blockbuster company owned store. Thus, these plaintiffs lack standing to assert representative claims against Blockbuster, much less to settle such claims on behalf of a nationwide class of Blockbuster members.

C. The named plaintiffs *Scott* and *Knight* have no standing to assert class action claims against Blockbuster. Therefore, notice to 40 million members of the settlement class is improper.

There was nothing in the record as of April 11, 2001 showing that Plaintiff Scott had paid an EVF or "non return fee" to Blockbuster. There is nothing in the record showing that Plaintiff Knight an EVF in Jefferson County, or has paid a "non return fee"

to Blockbuster. In *TCI Cablevision of Dallas et al. v. Owens*, 8 S.W.3rd 837 (Beaumont Ct App. 2000), the Ninth District Court of Appeals in Beaumont directly addressed the standing requirement in a class action:

> Generally, a plaintiff cannot represent those having causes of action against other defendants against whom the plaintiff has no cause of action and from whose hands he suffered no injury. This rule applies even if the plaintiffs injuries are identical to those of the parties they are representing.

Id. at 843. (internal citations and quotations omitted).

Plaintiff *Scott* has no viable cause of action against Blockbuster because she was not a customer of Blockbuster. Her single claim for "control" is certainly not typical of the claims of those Blockbuster members who patronize the vast majority of Blockbuster company owned stores. Neither Plaintiff *Scott* nor Plaintiff *Knight* has plead a claim for a "non return fee" on behalf of a class of forced purchasers. Since they lack standing to assert a "non return" claim, they are inadequate to represent a "non return" class.

Indeed, there was nothing in the record as of April 11, 2001 – and there is nothing in the record now – that evidences that Plaintiff *Scott* and Plaintiff *Knight* paid an EVF or a "non return fee" to Blockbuster. Since Plaintiffs *Scott* and *Knight* lack standing to assert either an EVF or a "non return" claim against Blockbuster, they are inadequate to represent the class certified by the District Court on April 11, 2001.

D. The District Court failed to perform any analysis, much less a "rigorous analysis", to determine whether all prerequisites to class certification under Rule 42 were met at the time it certified a settlement class in *Scott*.

When the District Court issued its April 11, 2001 class certification order, it failed to perform a "rigorous analysis" to determine whether all prerequisites to class certification pursuant to Rule 42 were met. *See, Southwestern Refining Company et al. v. Bernal et al.* 22 S.W. 3rd 425, 435 (Supreme Court of Texas, May 11, 2000). As the Texas Supreme Court stated in *Bernal*, "to make a proper analysis going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination on certification issues." *Id.* The District Court's class certification order in *Scott* is found at paragraph 2 of the April 11, 2001 class certification order and reads:

> The [Texas] Court preliminarily finds that the prerequisites of Rule 42 of the Texas Rules of Civil Procedure have been satisfied for settlement purposes only and hereby certifies a settlement class as set forth above subject to further review of the [Texas] Court.

Intervenors respectfully submit that the foregoing language in the District Court's April 11, 2001 class certification order is much too broad and too general to meet the "rigorous analysis" test of *Bernal*. Specifically, the District Court makes no finding that the *Scott* settlement class meets three of the four threshold requirements of Rule 42(a): numerosity, commonality, and typicality. The only Rule 42(a) requirement specifically addressed by the District Court's class certification order is adequacy of representation, which is mentioned in paragraph 3 of the April 11, 2001 class certification order, and

for which there is absolutely no factual record or support. Furthermore, had the District Court gone "beyond the pleadings" to determine "claims, defenses, relevant facts and applicable substantive law" in connection with the *Scott* certification, as required by *Bernal*, the District Court would have identified grave problems with Kim Ann Scott's adequacy to serve as a representative plaintiff in this case.

Indeed, "a look beyond the pleadings" would have revealed that all Blockbuster Video stores located in Jefferson County are franchises and not owned by Blockbuster. Thus, it is apparent that Plaintiff *Scott* never paid an EVF to Blockbuster in Jefferson County and, as result, has no cognizable cause of action against Blockbuster under any of the Counts plead in the Third Amended Class Action Petition with the sole possible exception of the Count entitled "Control" which is set forth in paragraph 10.1 of Plaintiffs Third Amended Class Action Petition.[1]

It is elementary that, in order to be an adequate class representative under Rule 42(a), the named Plaintiff must have a claim that is typical of the claims of the class as a whole. Because there is nothing in the record that shows Plaintiff *Scott* has ever paid EVFs to Blockbuster in Jefferson County within the class definition period, Plaintiff *Scott* does not satisfy the typicality requirement of Rule 42(a).[2] *See, Rainbow Group et.*

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1 In both *Scott* and *Cohen*, Blockbuster has consistently argued to the Texas and Illinois courts that Blockbuster's franchisees are independent and that Blockbuster has no control over them.

2 As discussed *supra*, the *Scott* plaintiffs never filed a motion for class certification with this Court prior to entry of the class certification order on April 11, 2001. Thus, there has been no proffer by the Plaintiffs of any facts necessary to establish a finding that *Scott* even has a

al. v. Johnson et al., 990 S.W. 2d 351, 358 (Austin -- 1999):

> The United States Supreme Court has held that the typicality requirement mandates that the [class] representative possess the same interests and suffer the same injury [as other members of the class]. Although it is not necessary that named representative suffer precisely the same injury as other class members, there must be a nexus between the injury suffered by the representative and the injury suffered by other members of the class. (internal citations and quotations omitted).

Id. In its April 11, 2001 class certification order, the District Court made no finding that Plaintiff *Scott* suffered the same injury as other members of the class or that there was a sufficient "nexus" between her claims and the claims of the other class members. Under these circumstances, where there was absolutely no factual basis for the District Court's finding that the named plaintiffs satisfied the adequacy requirements of Rule 42, it is premature and prejudicial to allow a notice to the 40 million members of the settlement class. [3]

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meritorious cause of action against Blockbuster, much less a claim that meets the typicality requirement under Rule 42(a).

[3] According to *Bernal*, " a trial court's certification must indicate how the claims will likely be tried so that conformance with Rule 42 may be meaningfully evaluated." *See, Bernal* at page 435. The District Court's April 11, 2001 class certification order gives no indication of how the claims in *Scott* will likely be tried and thus fails to establish a trial plan required by *Bernal*. Specifically, the District Court's April 11, 2001 certification order does not provide for confirmatory discovery for the plaintiffs and absent class members, does not set discovery deadlines and guidelines for fact and expert discovery, and does not set deadlines for pretrial motions and other pretrial matters. Because the Texas Supreme Court in *Bernal* rejected the previous "approach of certify now and worry later" in the context of class actions, it was necessary for the District Court to enter a specific case management plan as part of its April 11, 2001 class certification order – something the District Court clearly did not do.

E. The District Court violated TRCP Rule 42(c)(1) by failing to conduct a hearing prior to certifying a class in *Scott*.

There was no hearing of any kind prior to this Court's entry of its April 11, 2001 class certification order. *See*, **Exhibit 2**. This was in clear violation of Texas law which requires a hearing prior to entry of an order certifying a class action. *See*, TRCP Rule 42(c)(1) ("as soon as practicable after the commencement of an action brought as a class action, the [Texas] court shall, *after hearing*, determine by order whether it is to be so maintained"). Rule 42(c)(1) makes no distinction for certification of a settlement class as opposed to a contested litigation class. In *Saint Louis Southwestern, supra*, the Texas appellate court found that the failure to conduct a hearing at the time of class certification constituted reversible error:

> the rule [42(c)] specifically provides that the [trial] court shall make its determination ***after conducting a hearing. Failure to conduct a hearing with opportunity for the opposing parties to be heard, constitutes an abuse of discretion.***

Saint Louis Southwestern at page 31. (emphasis supplied).

In *Saint Louis Southwestern*, the appellant/opposing parties were "plaintiffs in other lawsuits who had been brought unwillingly in as members of the class action" while the parties who obtained the class certification order at issue were "plaintiffs who initiated the class action and defendants named in the class action." *Id.* at page 28. In the *Scott* action, the *Scott/Knight* plaintiffs and Blockbuster were the original parties to the action but other plaintiffs with other lawsuits against Blockbuster were "opposing" parties with a right to be heard under the rule of *Saint Louis Southwestern*. Even

assuming arguendo, that the plaintiffs in *Cohen*, *Holly* and other pending class actions against Blockbuster did not have a right to appear at the certification hearing in *Scott*, the fact remains that there was no hearing at all in *Scott* in clear violation of TRCP Rule 42(c)(1).

The *Saint Louis Southwestern* court specifically noted that, like the situation here, the class certification order was entered by the trial court almost immediately after the filing of the complaint:

> **the time sequence of the petition, answer, and [certification] order was unusually close.** Plaintiffs (appellees) filed their original petition at 11:29 a.m. December 21, 1995 and filed a motion for class certification at 11:29 a.m. On that same date, [defendant] filed its answer at 11:34 a.m., and at 11:53 a.m. the class certification order signed by the trial judge was filed.

Id. at page 28. (emphasis supplied).

In the *Scott* case, it is difficult to imagine that, in the 42 minute interval that elapsed between the filing of the Third Amended Petition adding a new party plaintiff [Malia Knight] and the District Court's entry of its April 11, 2001 class certification order, it was possible for the District Court to perform a "rigorous analysis" before ruling on class certification to determine whether all prerequisites to class certification had been met under Rule 42. *See*, *Bernal supra* at 435.

F. Comity requires that the District Court defer to the Circuit Court for Cook County, Illinois which has already certified a contested nationwide class in a case that was filed thirteen months before the *Scott* action.

The June 1, 2001 notice in *Scott* should be stopped because this case should have been stayed all together in deference to the *Cohen* action filed almost 13 months before in Illinois. [4] Texas has long recognized that general principles of comity require that a Texas trial court stay an action where there exists another action filed in another state and involving the same parties and involving substantially the same causes of action. *See, Space Master International v. Porta–Kamp Manufacturing Company,* 794 S.W. 2d 944, 946 - 947 (Court of Appeals of Texas, 1990)("As a matter of comity ... it is the custom for the court in which the later action is instituted to stay proceedings therein until the prior action is determined or, at least, for a reasonable time, **and the custom has practically grown into a general rule which strongly urges the duty upon the court** in which the subsequent action is instituted to do so.")(internal citations omitted). *See*

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[4] It is widely recognized that certification in a contested proceeding dramatically changes the playing field in favor of plaintiffs in a class action. This is especially so where a defendant's dispositive motion to dismiss and/or for summary judgment is denied – as was the case in *Cohen*. Blockbuster's fear of losing the pending motions before Judge Biebel motivated it to rush through its eleventh hour settlement of *Scott*. In light of these facts and circumstances, this Court should have awaited the result of Judge Biebel's ruling on April 12, 2001 before entertaining Blockbuster's application to approve the *Scott* settlement. This is because, once Judge Biebel ruled in favor of the *Cohen* plaintiffs in a contested class certification proceeding, the *Cohen* plaintiffs' leverage in settlement negotiations would have increased dramatically. Indeed, Texas Rule 42(b)(4)(B) indicates that the Court should consider "the extent and nature of any litigation concerning the controversy ***already commenced by or against members of the class***" prior to certifying a class under Texas Rule 42. Had the District Court fully considered the procedural posture of *Cohen*, comity would have clearly dictated that the District Court defer and "give effect to the laws and judicial decisions" of Judge Biebel's court prior to entering its April 11, 2001 order. *See, Gannon v. Payne,* 706 S.W. 2d 304, 306 (Supreme Court of Texas, 1986).

also, VE Corporation v. Ernst & Young, 860 S.W. 2d 83,84 (Supreme Court of Texas - Houston, 1993)("Identical suits may be pending in different states ... in such a situation the principle of comity generally requires the later – filed suit to be abated.")(internal citations omitted); *Alpine Gulf, Inc. v. Valentino*, 563 S.W. 2d 358, 359 (Tex. App. – Houston, 1978)("the trial court abused its discretion when it refused to stay the [later filed Texas] suit.")

Alpine Gulf is particularly instructive in this case because the Houston appellate court ordered that the later filed Texas suit be stayed in deference to a similar case filed in New York five days earlier: "in this case, counsel for appellee filed suit in New York then five days later filed suit in Texas seeking the same ultimate relief. ***Therefore, as a matter of comity, the Texas action should be stayed*** ... the trial court is instructed to stay this suit pending ultimate adjudication or disposition of the New York suit." *Id.* at page 360.

In the instant situation, nationwide class action litigation was first instituted against Blockbuster in the *Cohen* case on February 18, 1999. The *Scott* case was filed in this Court on March 29, 2000, more than 13 months after the filing of the *Cohen* action. Clearly, there is no question that the *Cohen* case was not only filed prior to *Scott*, but moreover, it covers Blockbuster's conduct for a longer period of time; challenges both Blockbuster's past per diem EVF policy and its current per-rental-period EVF policy; covers a defendant's class of approximately 1000 Blockbuster franchisees; and asserts an additional plaintiffs' class of forced videotape purchasers. Accordingly, the District Court should have vacated the April 11th Order and stayed the *Scott* case

entirely. *See, Space Master International v. Porta–Kamp Manufacturing Company,* 794 S.W. 2d 944, 946, 946 (Court of Appeals of Texas - Houston, 1990)("... a motion to stay is directed to the discretion of the court and the granting or denying of such a motion will be reviewed for abuse of discretion.); *Alpine Gulf, Inc. v. Valentino,* 563 S.W. 2d 358, 359 (Tex. App. – Houston, 1978)(trial court abused discretion when it refused to stay suit for temporary injunction filed in Texas, when suit between same parties for same ultimate relief had been filed five days earlier in United States District Court in New York; trial court should have, as a matter of comity, stayed the action).

Blockbuster has taken the position that, in the context of overlapping class actions involving substantially the same issues and parties, the more recently filed case should be stayed in favor of previously filed suits in sister states. In a pleading filed with a Maryland court, Blockbuster conceded the point when it argues "Courts faced with parallel or overlapping suits involving substantially the same parties and the same issues **routinely stay the cases pending the outcome of the first filed case.**"

On April 18, 2001, Blockbuster moved to stay a case pending in the District Court for Dallas County, Texas, captioned *Peters v. Blockbuster.* Making the point succinctly, Blockbuster stated to the Dallas County Court:

> The instant class action [*Peters v. Blockbuster*] was filed on December 22, 2000, while the two cases included in the Beaumont settlement were filed in March and May of that year ... Courts in this state and elsewhere have granted stays or abatements when, as here, a more mature action involves the same parties and issues.

Notably, Blockbuster's argument to the Dallas County court seeking a stay of the *Peters* class action relies on the same Texas cases cited by Intervenors' Motion to Vacate and Stay, including *Space Master International v. Porta–Kamp Manufacturing Company*, 794 S.W. 2d 944, 946,947 (Court of Appeals of Texas, 1990)("As a matter of comity ... it is the custom for the court in which the later action is instituted to stay proceedings therein until the prior action is determined or, at least, for a reasonable time, ***and the custom has practically grown into a general rule which strongly urges the duty upon the court in which the subsequent action is instituted to do so.***")(internal citations omitted) and *Alpine Gulf, Inc. v. Valentino*, 563 S.W. 2d 358, 359 (Tex. App. – Houston, 1978)("the trial court abused its discretion when it refused to stay the [later filed Texas] suit.")

In seeking a stay of *Peters*, Blockbuster also cited to the Dallas County court, for the proposition that a second filed class action should be stayed in favor of a first filed class action, *Wyatt v. Shaw Plumbing Co.*, 760 S.W. 2d 245, 248 (1988)("Abatement of a lawsuit due to the pendency of a prior suit is based on the principles of comity, convenience and the necessity for an orderly procedure in the trial of contested issues.")

Citing to the Delaware Supreme Court's decision in *McWane Cast Iron Pipe Corp. v. McDowell – Wellman Engineering Co.*, 263 A.2d. 281, 282-83 (Delaware 1970), Blockbuster argued to the Maryland court that a stay should be "freely given" when:

> There is prior action pending elsewhere, in a court capable of doing prompt and complete justice, involving the same parties and same issues; that, as a general rule, litigation should be confined to the forum in which it is first

> commenced; ... that these concepts are impelled by considerations of comity and necessities of an orderly and efficient administration of justice.

McWane at 283. Blockbuster then went further and argued to the Maryland court that the "first to file rule" is particularly suitable for class actions. Blockbuster said it best:

> ***These general principles involving [the stay of subsequently filed] parallel or overlapping suits are particularly appropriate in class action suits.*** For example, the Court of Chancery of Delaware recently followed *McWane* and stayed a stockholder class action suit filed in Delaware in favor of a similar class action suit that had been filed [first] in federal court in California. See, *Derdiger v. Tallman*, 2000 Del. CH. Lexis 107, 4 (Del. Chanc. Ct. 2000). In that case, the [Delaware]court specifically considered whether the McWane standard applies when the two competing classes have different lead plaintiffs and counsel. See, Id. at 14-19, Particularly in those cases that have already been certified and in which counsel have been chosen, [such as Cohen] the [Delaware] court concluded that applying the McWane standard was appropriate. See, Id. at 18-21. The [Delaware] court determined that the plaintiffs in the different lawsuits were in fact the same parties. *See*, Id at 22-23. Moreover, the [Delaware] court held that the parties in the different suits need not be identical; substantial or functional identity is sufficient. *Id.* at 25 and n.28.

Finally, Blockbuster closed with the following statement to the Maryland court:

> [C]ourts faced with similar situations as the one *sub judice* routinely, and properly, stay all proceedings in deference to more advanced actions in sister states.

Blockbuster has taken the same position in the Pennsylvania court as it has in the Maryland and Texas courts. In its May 21, 2001 motion to stay recently filed in the Philadelphia County Court of Common Pleas, Blockbuster argued to the Pennsylvania court that "Courts in this Commonwealth and elsewhere have granted stays or abatements when, as here, a more mature [class] action involves the same parties and issues."

Having taken the position in legal proceedings in Texas, Maryland, Pennsylvania, California and possibly other states that comity requires that a trial court stay a subsequently filed class action in deference to a first filed class action in sister state, Blockbuster is judicially estopped from taking a contrary position in this case. *See*, *Huckin v. Connor et. al.*, 928 S.W. 2d 180, 182 (Tx. 1996)("under the doctrine of judicial estoppel ... a party is estopped merely by the fact of having alleged or admitted in his pleadings in a former proceeding under oath the contrary to the assertion sought to be made...it has likewise been held that it is not necessary that the party invoking this doctrine should have been a party to the former proceedings.") In *Huckin*, the Houston appellate court stated that the elements necessary to establish judicial estoppel in Texas are:

i) the sworn, prior inconsistent statement must have been made in a judicial proceeding;

ii) the party now sought to be estopped must have successfully maintained their prior position;

iii) the prior inconsistent statement must not have been made inadvertently;

iv) the statement must be deliberate, clear and unequivocal.

Id. at 182-83.

Blockbuster's legal position asserted to the courts of Texas, Maryland, California and Pennsylvania satisfy the four elements of judicial estoppel specified in *Huckin*. Blockbuster's motions to stay were supported by sworn affidavits by its counsel; Blockbuster's motions to stay subsequently filed class actions were granted by the Dallas County court in Texas and the Baltimore City court in Maryland; Blockbuster's prior inconsistent statements were not made inadvertently or by mistake; and Blockbuster's statements were deliberate, clear and unequivocal. Thus, having taken a firm and unequivocal position that the "first to file" rule applies across the board in multi-state national class actions, Blockbuster is estopped from advancing a different, self serving theory at this stage of the litigation. *Id.* at 427. *See also, Miles v. Ford Motor Company et al.*, 914 S.W. 2d 135, 138 (Supreme Court of Texas 1995)("this [common law] rule is grounded on the principles of comity, convenience, and the need for an orderly procedure in resolving jurisdictional disputes.")

Based on the foregoing Intervenors respectfully request that this Court immediately stay the dissemination of class notice in the *Scott* action until the pending interlocutory appeals can be properly adjudicated by this Court.

Respectfully submitted,

MOORE, LANDREY, L.L.P.
390 Park Street, Suite 500
Beaumont, Texas 77701
(409) 835-3891
(409) 835-2707 FAX

Ethan Shaw
State Bar No.: 18140480

Of Counsel:

John J. Beins, Esquire
Seth D. Goldberg, Esquire
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BEINS, GOLDBERG & GLEIBERMAN
5335 Wisconsin Avenue, N.W., Suite 910
Washington, D.C. 20015
Tel: (202) 686-1966
Fax: (202) 686-5517

CERTIFICATE OF CONFERENCE AND COMPLIANCE

Counsel for Appellants has notified the Appellees of the filing of the Motion for Emergency Relief by expedited delivery of this motion , pursuant to Texas Rule of Appellate Procedure 52.10.

ETHAN L. SHAW

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been sent to all counsel of record on this 31st day of May, 2001.

ETHAN L. SHAW

COURT OF APPEALS
NINTH DISTRICT OF TEXAS
BEAUMONT, TEXAS

****

NO. 09-01-001-72-CV

****

CHERIE ROBINSON AND SHERITA HARRISON

Intervenor Plaintiffs/Appellants

v.

BLOCKBUSTER INC.

Defendant/Appellee

AND

KIM ANN SCOTT AND MALIA KNIGHT

Plaintiff/Appellees

FROM THE DISTRICT COURT, JEFFERSON COUNTY
136TH JUDICIAL DISTRICT

****

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day appeared ETHAN L. SHAW, who stated:

"I am over twenty-one years of age and competent in all respects to make this affidavit. I have examined the exhibits attached to Emergency Motion for Temporary Order Staying Class Notice Pending Resolution of the Interlocutory Appeals of the District Court's April 11, 2001, Class Certification Order, Exhibits 1 through 4, and based upon my personal knowledge the exhibits are true and correct copies of those documents, or the excerpted portions of those documents, and are entered in the record below."

Further, Affiant saith not.

ETHAN L. SHAW

SUBSCRIBED AND SWORN BEFORE ME on this 31st day of May, 2001

Rachel L. Wilson
Notary Public in and for the
State of Texas

RACHEL L. WILSON
COMMISSION EXPIRES
FEBRUARY 28, 2002

My commission expires: 02/28/02
Printed name of notary:
RACHEL L. WILSON

Exhibit 1

Case No. D 162-535

KIM ANN SCOTT and MALIA KNIGHT, Individually and on behalf of all others similarly situated,	)	IN THE DISTRICT COURT OF
Plaintiffs,	)	
v.	)	JEFFERSON COUNTY, TEXAS
BLOCKBUSTER INC.,	)	
Defendant.	)	136th JUDICIAL DISTRICT

PRELIMINARY ORDER APPROVING CLASS SETTLEMENT

Counsel for Plaintiffs Kim Ann Scott and Malia Knight (hereinafter "Plaintiffs" or "Class Representatives") and Defendant Blockbuster Inc. ("Blockbuster") being present before the Court, the parties to the above-entitled litigation (the "Litigation") having entered into a Settlement Agreement (the "Agreement"), which is subject to review under Texas Rule of Civil Procedure 42 and which, together with the exhibits thereto, sets forth the terms and conditions for the proposed settlement of the claims alleged in the Litigation; the Court having read and considered the Agreement, accompanying documents and evidence; the parties to the Agreement having consented to the entry of this Order; and all capitalized terms used herein having the meanings defined in the Agreement;

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. Pursuant to Texas Rule of Civil Procedure 42, this action is hereby certified, for purposes of the settlement only, as a class action on behalf of the following:

> All members of Blockbuster who incurred an extended viewing fee ("EVF") between January 1, 1992, and April 1, 2001, and who were not class members in the Michigan settlement, *Harrada v. Blockbuster Inc.*, Case No. 99 923662 CP, Circuit Court of Wayne County, Michigan, dated September 1, 2000.

Class members of the Michigan settlement included members of Blockbuster who incurred an extended viewing fee between June 1, 1998, and December 31, 1999, and whose most recent rental activity as of August 6, 2000, occurred at a Michigan store that utilized the "Coming Attractions" curve signage in 1998-1999, which predominantly includes the Blockbuster stores in the greater Detroit metropolitan area.

Specifically excluded from the Class are all currently serving judges and justices of the state of Texas and their spouses and anyone within three degrees of consanguinity from those judges and justices and their spouses.

2. The Court preliminarily finds that the prerequisites of Rule 42 of the Texas Rules of Civil Procedure have been satisfied for settlement purposes only and hereby certifies a settlement class as set forth above subject to further review of the Court.

3. Plaintiffs Kim Ann Scott and Malia Knight are certified as Class Representatives for the purposes of the settlement only, and G. Kevin Buchanan and Edward Rugger Burke, III, of Buchanan, Burke & Tinney; Timothy J. Crowley and Richard E. Norman of Crowley Douglas & Norman, LLP; Timothy W. Ferguson of The Ferguson Firm; Maureen Kane Berg and Russell Jackson Drake of Whatley Drake, L.L.C. and T. John Ward, Jr. of Perry, Womack & Ward, L.L.P. are appointed counsel for the Settlement Class (the "Class Counsel"), for the purposes of settlement only.

4. A hearing (the "Settlement Hearing") is hereby scheduled to be held before the Court on December 10, 2001, at 9:00 a.m. for the following purposes:

a. to finally determine whether this action satisfies the applicable prerequisites for class action treatment for settlement purposes under Rule 42 of the Texas Rules of Civil Procedure;

b. to determine whether the proposed settlement is fair, reasonable, adequate, and in the best interests of the Settlement Class and should be approved by the Court;

c. to determine whether the Final Order and Judgment as provided under the Agreement should be entered, dismissing the Litigation with prejudice, and to determine whether the release by the Settlement Class of the Released Parties, as set forth in the Agreement, should be afforded to the Released Parties;

d. to consider the application by Class Counsel for an award of attorneys' fees and expenses; and

e. to rule upon such other matters as the Court may deem appropriate.

5. The Court preliminarily finds the proposed settlement to be fair, reasonable, and adequate and reserves the right to finally approve the settlement and to make a determination as to the fees and costs to be awarded to Class Counsel. The Court finds that the benefits provided and available to the Settlement Class appear to be a reasonable compromise of the factually and legally disputed claims in this lawsuit, as evidenced by the pleadings, motions, briefs, and other materials in the Court's files, the fact that the outcome of these disputes remains uncertain, and the fact that, by the settlement, the parties can avoid the risk and expense attendant to further litigation, trial, and appeal of such claims.

6. The Court preliminarily finds that Class Counsel have provided adequate representation to the Settlement Class. Class Counsel conducted a factual investigation, conducted discovery, engaged in motion practice, and performed an analysis of the relevant facts and law, both with regard to class certification and the merits of the action.

7. The Court expressly approves the remedial relief offered by Blockbuster and finds that the portion of the Membership Application as revised (attached as Exhibit C) clearly and adequately discloses the substance and manner of assessment of extended viewing fees as well as the costs for unreturned videos and other rental items. The Court expressly finds that, under the Membership Application as revised, a member's retention of a rental item beyond the initial

viewing period is not a breach of the member's agreement with Blockbuster and that a member is expressly authorized to keep a rental item for a longer duration in exchange for the associated rental charges.

8. The Court approves the form and substance of the individual Notice of Proposed Class Action Settlement as set forth in the Agreement and the form and substance of the Notice of Proposed Class Action Settlement (collectively the "Class Notice") and the same or substantially similar text will be published to the Settlement Class pursuant to the Agreement.

9. Blockbuster shall cause the Class Notice to be delivered and published in accordance with the Agreement.

10. The form and method set forth in the Agreement for notifying the Settlement Class of the settlement and its terms and conditions meet the requirements of Rule 42(b)(4) and 42(e) of the Texas Rules of Civil Procedure and due process, constitute the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons and entities entitled to this notice. The Court finds that the proposed notice by publication in (1) *USA Today*, (2) on the Internet, and (3) on the Blockbuster Settlement Website, and by individual notice in the manner indicated in the Settlement Agreement, is clearly designed to advise class members of their rights and to protect the rights of absent class members.

11. Any member of the Settlement Class who wishes to be excluded from the Settlement Class may request exclusion by submitting a completed request for exclusion from the Settlement Class. To be effective, the request for exclusion must be signed by the member of the Settlement Class and must set forth the member's full name, current address and telephone number, and Blockbuster account number and must be served on Class Counsel by December 3, 2001.

Exhibit C

12. The Court will consider objections to the settlement only if such objections and any supporting papers are filed in writing on or before December 3, 2001, with the Clerk of the Court, District Court of Jefferson County, Jefferson County Courthouse, 1001 Pearl Street, Beaumont, Texas 77701, and served upon Buchanan, Burke & Tinney, L.L.P., P.O. Box 721000, Dallas, Texas 75372-1000.

13. Attendance at the hearing is not necessary; however, persons wishing to be heard are required to indicate in their written objection, whether or not they intend to appear at the hearing. Members of the Settlement Class need not appear at the hearing or take any other action to indicate their approval.

14. Pending final determination of whether the settlement should be approved, and in aid of the Court's jurisdiction to implement and enforce the proposed settlement, the Class Representatives, all members of the Settlement Class, and anyone who acts or purports to act on their behalf, shall not institute or prosecute any action, and are hereby enjoined from instituting or prosecuting any action, that asserts Released Claims against any Released Party through the Effective Date of the Settlement Agreement, as those terms are defined in the Agreement.

15. If: (a) the Agreement is terminated by any of the Settling Parties; or (b) any specified condition to the settlement set forth in the Agreement is not satisfied and the satisfaction of such condition is not waived in writing by counsel; or (c) the Court rejects, in any respect, the Final Order and Judgment in the form and content attached to the Agreement as Exhibit E and/or Class Counsel or the Settling Parties fail to consent to the entry of another form of order in lieu thereof; or (d) the Court rejects any component of the Agreement, including any amendment thereto approved by counsel; or (e) the Court approves the Agreement, including any amendment thereto approved by counsel, but such approval is reversed on appeal and such reversal becomes final by lapse of time or otherwise, then, in any such event, the Agreement,

including any amendment(s) thereof, and this Preliminary Order certifying the Settlement Class and approving the Class Representatives for purposes of the settlement shall be null and void, of no further force or effect, and without prejudice to any party, and may not be introduced as evidence or referred to in any actions or proceedings by any person or entity, and each party shall be restored to his, her, or its respective position as it existed prior to the execution of the Agreement to the maximum extent practicable.

16. The Court retains exclusive jurisdiction over the action to consider all further matters arising out of or connected with the settlement, including the enforcement of the Agreement.

Milton Grimes Schield
District Court Judge

FILED
at 2:40 o'clock P M.
APR 11 2001
JOHN B. APPLEMAN
CLERK, DISTRICT COURT OF JEFFERSON CO., TEXAS
BY

Exhibit C

Exhibit 2

RENE MULHOLLAND, CSR, RPR
OFFICIAL COURT REPORTER
136 DISTRICT COURT
JEFFERSON COUNTY COURTHOUSE
1001 PEARL STREET, ROOM 204 • BEAUMONT, TEXAS 77701 • (409) 835-8514

May 10, 2001

Mr. John J. Beins
Beins, Goldberg, & Gleiberman
The Chevy Chase Pavilion
5335 Wisconsin Avenue, NW, Suite 910
Washington, DC 20015

Re: Case No. D-162,535; Kim Ann Scott and Malia Knight, Individually And On Behalf of Others Similary Situated v. Blockbuster, Inc.

Dear Mr. Beins:

Pursuant to our conversation this morning about the above-captioned case, I have looked in my records and there was no record taken on anything on April 11, 2001.

If I can be of any further assistance to you, please do not hesitate to contact me at the above offices.

Very truly yours,

Rene Mulholland

Rene Mulholland, CSR, RPR

Exhibit 3

CHAMBERS OF
JUDGE MILTON GUNN SHUFFIELD
136TH DISTRICT COURT
JEFFERSON COUNTY COURTHOUSE
BEAUMONT, TEXAS 77701

409-835-8481
409-784-5814 (Facsimile)

MICHELLE LARRE
COORDINATOR

RENE MULHOLLAND
COURT REPORTER

STANLEY HATCHER
BAILIFF

May 29, 2001

Re: No. D-162,535; Kim Scott and Malia Knight, individually and on behalf of all others similarly situated v. Blockbuster, Inc.

To All Counsel:

I have now had an opportunity to consider Intervenors, Cheris Robinson's and Sherita Harrison's, Motion to Vacate. In essence, intervenors request that this Court vacate the preliminary approval of settlement of this class-action lawsuit on the grounds of comity in respect of an earlier filed lawsuit[1].

Contained in the Order of Preliminary Approval presented to and signed by this Court, is an anti-suit injunction, which was described as "pretty standard". This has drawn much criticism from several quarters and was rejected by the Cohen Court through issuance of its own counter-injunction. The Cohen Court has, likewise, denied a Motion to Abate/Dismiss in light of the preliminary approval by this Court of the class-action settlement[2].

The history of this case is troublesome in that it is but one of successive efforts to settle competing class-actions. As has become prevalent in these competing, multi-jurisdictional state class-actions (with no process for consolidated management such as in the federal system) any settlement reached is, inevitably, questioned as a "reverse auction". This, coupled with

[1] The Cohen suit currently pending in Chicago, Illinois.

[2] I am advised this ruling is currently on appeal.

the fact that the Order of Preliminary Approval came no less than one day prior to the Cohan Court's scheduled ruling on class certification in that case has prompted more than one observer to characterize the approval of the settlement as "fishy"[1].

While a Motion to Abate filed prior to this Court's preliminary approval of the settlement should and would have received strong consideration, the parties have now reached the proposed settlement and this Court has entered a Preliminary Order approving it. Thus, the desire to avoid costly, duplicitous efforts in separate states is removed. Subject to final approval, this case is settled. Thus, the only efforts remaining will focus on the appropriateness of the settlement. To the extent that the alleged race to settlement did, in fact, generate an unreasonable settlement, Texas procedure allows the safeguard of the final settlement approval hearing wherein all concerns can be voiced and considered by the Court. Accordingly, intervenors, Cherie Robinson and Sherita Harrison's Motion to Vacate will be denied.

At the most recent hearing on the matter, there was a motion made by other, separate intervenors, to rewrite the preliminary approval and to create a sub-class of plaintiffs the members of which would be those persons having paid EVF's after Blockbuster's change of its policy. Having considered the matter, I believe the settlement class as currently structured adequately protects those members. The real issue is whether it would be appropriate for the settlement to contain an agreement that future charges would be appropriate. This, again, may be the subject of much debate at the final approval hearing. Nonetheless, the parties have reached a proposed settlement, which has been preliminarily approved which will, ultimately, stand or fall on its own merits.

Accordingly, the Motion to Amend the Preliminary Settlement Approval will be denied.

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[1] The lack of a record of the hearing in question, although appropriate under Texas Procedure, has likewise fostered much debate. Whether this Court was aware, or not, of the pendency of the Cohan certification issue is of no moment. The issue before this Court at that juncture was the preliminary approval of a proposed class-action settlement in one of numerous state courts around the nation, all of which were proceeding without regard for the others. Stated differently, this Court did not preliminarily approve the timing of the settlement – only its proposed substance and procedural safeguards.

Counsel for Blockbuster and class counsel should prepare an Order in accordance with the above and coordinate distribution of this to all known interested parties who have not made a formal appearance in this matter.

Very truly yours,

Judge Milton Gunn Shuffield

JMGS/ml

FILED
3:42 P M.
MAY 29 2001

Exhibit 4

IN THE CIRCUIT COURT OF COOK COUNTY, STATE OF ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

MARC COHEN, UWE STUECKRAD, MARC PERPER, and DENITA SANDERS, individually and on behalf of all others similarly situated,	)	
Plaintiffs,	)	Case No. 99 CH 2561
v.	)	(consolidated with Case No. 99 CH 8984)
BLOCKBUSTER ENTERTAINMENT INC., individually and on behalf of all entities doing business as Blockbuster or Blockbuster Video,	)	Judge Biebel
Defendant.	)	

DEFENDANT'S SURREPLY MEMORANDUM ON
FINAL CLASS CERTIFICATION AND CLASS NOTICE

On the April 23, 2001, this Court entered a "preliminary finding of class certification" which, like the preliminary certification in Romstadt v. Apple Computer, Inc., 948 F. Supp. 701 (N.D. Ohio 1996), is "subject to revision on further consideration." Transcript of April 23, 2001 *Proceedings* ("4/23/01 Transcript") at pp.57-58. In its April 25, 2001 Order, this Court indicated that the preliminary certification is "subject to review and final determination upon further consideration of the Court at a subsequent hearing." Order, dated April 25, 2001, at ¶ 1. Blockbuster respectfully requests that this Court proceed to such "further consideration" of class certification *prior* to considering the plaintiffs' proposed form of class notice. In support of such request, Blockbuster offers the following reasons why final class certification, and therefore any consideration of the plaintiffs' proposed notice, is improper under these circumstances:

(a) On April 23, 2001, this Court stated that it would "hold off" final certification of the classes "until I hear what happens in the [Texas] case." 4/23/01 Transcript at p.60. The Texas court has not yet ruled. In addition, on May 22, 2001, at 3:00 p.m., the Texas court will entertain the parties' Joint Motion for Preliminary Approval of Addendum to April 11, 2001 Settlement Agreement. See Exhibit A hereto. Plaintiffs' counsel in the various EVF actions – including the Cohen plaintiffs' counsel – have, once again, been invited to take part in this hearing. See Exhibit B hereto. Plaintiffs' contention that Blockbuster was "not going to join in a motion to enhance the settlement" is plainly proven wrong by this motion for preliminary approval to a settlement addendum. See Transcript of May 14, 2001 Proceedings ("5/14/01 Transcript") at p.57 (Exhibit C hereto). If plaintiffs' counsel again elects to sit silently in Texas without participating in this preliminary approval hearing (which opportunity to participate is precisely what this Court requested that Blockbuster provide, see 4/23/01 Transcript at p.57), they should not be heard to complain in Illinois. Moreover, because this Court specifically indicated that final certification depends in some fashion upon the proceedings in Texas, this Court should not finally certify a class or approve the form of notice until the Texas court has ruled upon the pending motions affecting its preliminary approval of the national class settlement.

(b) On May 14, 2001, this Court "invite[d] the parties to take this to the Appellate Court." See 5/14/01 Transcript at p.89. Blockbuster has indeed sought "some guidance from the Appellate Court" as suggested by this Court (id.), and has appealed this Court's denial of the motion to stay all further proceedings. See Exhibit D hereto. Blockbuster is also requesting that the appellate court stay this action pending hearing on the appeal.

(c) The Court's conclusion that later-filed cases must defer to the first-filed case is inconsistent with Illinois law as to the appropriate factors for considering whether to stay this matter pending the Texas settlement. See May v. Smithkline Beecham Clinical Labs., Inc., 710 N.E.2d 460, 465 (5th Dist. 1999) ("It has already been determined that the time of filing actions is not determinative as to a motion to stay."); see also Kaden v. Pucinski, 263 Ill.App.3d 611, 617 (1st Dist. 1994) ("The time of filing the actions, however, is not determinative."); Klehn v. Love, 143 Ill.App.3d 434 (1st Dist. 1986) ("Additionally, in deciding whether a suit should be dismissed under section 2-619(a)(3), the order or times in which the various suits were filed is usually not determinative."). Thus, under Illinois law, there is no reason to proceed with this matter in light of the Texas settlement.

(d) This Court erroneously relied on Texas law to hold that the first-filed doctrine bears some relevance to whether to stay or certify an Illinois state court action. Texas law is irrelevant to the question of whether this action should be stayed under Illinois law. Moreover, the cited Texas law does not support the continued maintenance of a litigated action when the issue is subject to a settlement in another jurisdiction. See Alpine Gulf Inc. v. Valentino, 563 S.W.2d 358, 360 (Tex. App. 1978) (regarding two litigated actions – i.e., not a settlement – and addressing a factually distinct situation in which the same individual filed suit first in New York and then, five days later, filed an identical action seeking identical relief in Texas); VE Corp. v. Ernst & Young, 860 S.W.2d 83 (Tex. 1993) (regarding an entirely different issue: whether a second filed action renders an appeal of the first-filed action moot).

(e) There is already a certified class in Texas bearing "similar class allegations and similar causes of action" and therefore the duplicative certification of the proposed plaintiff

classes would undermine the principles of judicial economy, efficient adjudication, and – perhaps most importantly – protection for the interest of class members. See Newberg on Class Actions (3d ed.) § 7.31 ("When cases bearing similar class allegations and similar causes of actions are pending in different courts, such as different federal and state courts or different state courts, courts should be kept informed of class certification proceedings relating to the same cause of action, and ***rarely should the same class be certified on the same cause of action before more than one court***, in the absence of special circumstances.") (emphasis added). There is no basis on which to conclude that duplicative certification is justified. This Court should not violate all principles of comity, judicial economy, and the efficient adjudication of justice by certifying duplicative plaintiff classes in this litigation, regardless of how hard this Court (or any of the other twenty judges presiding over similar EVF litigation) has worked on this litigation.

(f) Individual class notice for the Texas settlement class will begin on June 1, 2001.[1] If this Court finally certifies a plaintiff class, it will be required to give notice to the class members. 735 ILCS 5/2-803. Absent class members could thus receive two notices of pending lawsuits and would inevitably be confused as to their rights and remedies in either or both actions. See Rhonda Wasserman, "Duelling Class Actions," 80 BULR 461, 478-79 (April 2000) (noting the dangers of confusion and prejudice inherent for the class members with sequential class notices for different class actions); see also In re Prudential Secs. Inc. Limited Partnership

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[1] Plaintiffs incorrectly contend that the Texas notice will not issue as a result of the pending appeals in Texas. See Plaintiffs' Reply Memorandum at p.2, n.1. This is incorrect. The pending appeals do not address or affect class notice, and therefore individual notice in the Texas action will proceed as planned on June 1, 2001.

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Litig., 107 F.3d 3, 1996 WL 739258 (2nd Cir. 1996) (unpublished) (demonstrating the likely confusion from sequential notices of different actions pertaining to the same subject matter).

(g) By virtue of elementary principles of res judicata, each class member can assert its claim against Blockbuster only once. The national class of Blockbuster members has, by way of a class action settlement in Texas, embarked upon a process to settle its claims down in Texas. That settlement process will – barring rejection by the Texas court – shortly result in a final judgment which will preclude all further litigation of this lawsuit. As such, a competing certification of a litigated class in this action would not serve the interests of the "efficient adjudication of the controversy." 735 ILCS 5/2-801(4); see also Burke v. Local 710 Pension Fund, No. 98C3723, 2000 WL 336518 at *6 (N.D. Ill. Mar. 28, 2000) (denying certification of duplicative litigation because, *inter alia*, "plaintiffs' interest in maintaining this separate cause of action which seeks the same redress as the [other pending] case is not significant . . . [and] it is highly desirable to concentrate this litigation in one forum"). Indeed, the competing certification and sequential notice to the same national class is not merely inefficient, but is the epitome of chaos.

(h) Any class notice given in this action must inform class members of the Texas settlement and their right to participate and/or opt out of that settlement. The proposed notice does not even reference the previously certified and settled Texas action, and thus is woefully deficient in advising class members of their rights in regard to the subject matter at hand.

(i) Blockbuster has already indicated that it can identify with reasonable certainty the names and addresses of a large portion of the members of the EVF class, thus

rendering plaintiffs' proposed method of distribution inappropriate and deficient under the standards of due process. Moreover, it is plaintiffs' burden to prove that such name and address information is not available and/or reliable.

(j) As to the "unreturned video class," as previously indicated to this Court, Blockbuster *cannot identify* the members in this class. See Defendant's Memorandum In Opposition To Plaintiffs' Motion For Certification ("Opposition Mem.") at p.14. Plaintiffs have presented *absolutely no evidence* that the unreturned video class members are identifiable. None. An ability to determine who is in the class and who is not in the class is a prerequisite to a class properly certifiable under 735 ILCS 5/2-801. Charles Hester Enters., Inc. v. Illinois Founders Ins. Co., 137 Ill. App. 3d 84 (5th Dist. 1985), aff'd, 114 Ill.2d 278 (1986) (certification properly denied where some of plaintiffs' class voluntarily purchased the accused product and some were required to purchase the product); Adams v. Jewel Companies, Inc., 63 Ill. 2d 336, 348-49 (1976) (finding class action to be improper, referring to the vast number of unidentified individuals in the class and the lack of objective corroboration for each claim).

(k) The plaintiff classes preliminarily certified by this Court do not exclude Blockbuster members who reside in Michigan. The claims asserted on behalf of residents of Michigan have already been either adjudicated in favor of Blockbuster or otherwise settled, and are thus barred. Opposition Mem. at p.16.

(l) The members of the plaintiff classes are subject to Blockbuster's claims of offset, recoupment, and counterclaims for the unpaid amounts outstanding on their Blockbuster membership accounts. As previously noted, many absent class members are likely to wind up *owing* a net sum to Blockbuster. Opposition Mem. at pp. 18-19. As such, certification is not

appropriate. Cf. Heaven v. Trust Co. Bank, 118 F.3d 735, 738 (11th Cir. 1997) (affirming denial of certification and noting that plaintiffs' "exposure as counterclaim defendants could well exceed the amount they might recover for statutory penalties as class members.").

(m) If indeed notice is given to the proposed plaintiff classes, it should properly inform the class members of the likelihood of an adverse judgment against them. As such, the propriety and the viability of Blockbuster's counterclaim must first be determined before the form of notice is approved by this Court. See Client Follow-Up Co. v. Hynes, 434 N.E.2d 485, 490 (1st Dist. 1982) (indicating that the "possible adverse consequences to class members" of maintaining the class action was a factor to be considered in determining the appropriate form of notice).

(n) The claims of Messrs. Cohen and Perper are barred by the doctrine of voluntary payment. As such, their claims are barred and they cannot serve as class representatives. Opposition Mem. at pp. 19-21.

(o) This Court does not have and cannot effectively assert personal jurisdiction over Blockbuster franchisees who have absolutely no contacts whatsoever with Illinois – *i.e.*, they have never done business in Illinois, the transactions at issue with respect to non-Illinois franchisees did not occur in Illinois and the class members on whose behalf this action is prosecuted against non-Illinois franchisees do not reside in Illinois. As such, the assertion of this matter against a class of defendant franchisees is contrary to due process. See In re the Gap Stores Securities Litigation, 79 F.R.D. 283, 291-292 (N.D. Cal. 1978) ("Elemental concepts of due process require that a defendant not suffer a binding adjudication of his rights

and liabilities unless . . . he has certain minimum contacts with the forum state.") (citing International Shoe Co. v. Washington, 326 U.S. 310 (1945)).

(p) Blockbuster Inc. is not and cannot be an appropriate representative of the Blockbuster franchisees that comprise the preliminarily certified defendant class. Not only is Blockbuster a distinct legal entity, but Blockbuster is contractually adverse to the franchisees through the indemnity provisions of the respective franchise agreements.

(q) Plaintiffs have offered absolutely no evidence of how any Blockbuster franchisee conducts its business and no evidence of commonality among the defendant class members; the *only* evidence on point is that offered by Blockbuster – i.e., that Blockbuster cannot control the activity of its franchisees. Opposition Mem. at p.25.

(r) All the proposed plaintiff class members do not have colorable claims against all the proposed defendant class members, and therefore the defendant class cannot be certified. Thillens, Inc. v. Community Currency Exchange Ass'n of Illinois, 97 F.R.D. 668, 675 (N.D. Ill. 1983) ("A defendant class will not be certified unless each named plaintiff has a colorable claim against each defendant class member.").

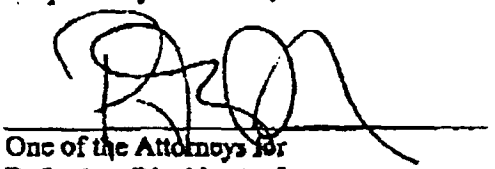
(s) In fact, the named plaintiffs lack standing to assert a claim against a Blockbuster franchise store. They have not even attempted to allege that a single one of them rented a video (much less incurred EVFs or the retail price for an unreturned video) at a Blockbuster franchise. As such, there can be no defendant class since the plaintiffs have no standing to assert a claim against anyone other than Blockbuster Inc.

(t) Plaintiffs have not even contemplated the need for notice to the defendant class or the practicability of such. Notice is required to all the members of the proposed defendant class members, along with an opportunity to opt out. See In re the Gap Stores Securities Litigation, 79 F.R.D. at 291 (agreeing that "notice to the representative cannot be deemed the functional equivalent of notice to the class because the defendant class representative's interests are not necessarily coextensive with those of the class").

(u) One of the factors the Court apparently deemed relevant to the certification of these classes was whether the Texas court was "bamboozled" into preliminarily approving the class settlement. As the Texas court explained, it was not bamboozled. Indeed, even Mr. Edward Joyce, counsel for plaintiffs in this action and one of the many counsel who attended the recent May 7, 2001 hearing in the Texas settlement action, recognized that he has literally *no* basis on which to conclude that the Texas court was "bamboozled." See 5/14/2001 Transcript at pp.52-53 (admitting that his "bamboozled" conclusion was based literally upon nothing – *i.e.*, simply the lack of a record of the Texas preliminary approval hearing – rather than on any affirmative evidence that the Texas court was misled). See also Motion to Reconsider at pp.6-8 (demonstrating that the Texas court was fully and sufficiently informed).

Dated: May 23, 2001

Respectfully submitted,



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