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No. 09-0432

IN THE

SUPREME COURT OF TEXAS

**IN RE OLSHAN FOUNDATION REPAIR COMPANY, L.L.C. and
OLSHAN FOUNDATION REPAIR COMPANY OF DALLAS, LTD.,
Relators**

Real Parties in Interest: Kenneth and Vickie Kilpatrick

**Respondent: Hon. John Fostel,
271st District Court, Wise County, TX**

**RESPONSE TO PETITION
FOR WRIT OF-MANDAMUS**

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RESPONSIVE ISSUES PRESENTED

- Reply Issue One:** Judge Fostel did not abuse his discretion in holding that the subject arbitration clauses was unconscionable because it requires the Real Parties in Interest to pay an arbitrator exorbitant amounts of money to receive a ruling that the contract is void as a matter of law for violating the Texas Home Solicitation Act. (Responsive to Relators' Issue 4)
- Reply Issue Two:** Olshan's undisputed violation of the Texas Home Solicitation Act means that the subject contract and its arbitration clause never existed. (Responsive to Relators' Issue 3)
- Reply Issue Three:** Judge Fostel properly enforced the express terms of the arbitration clause in the Olshan contract which required the application of Texas arbitration law. (Responsive to Relators' Issues 1 & 2)
- Reply Issue Four:** Olshan's petition for writ of mandamus should denied because Olshan waited too long to file its writ of mandamus.

STATEMENT OF FACTS

I. Factual Background

In 2002, Olshan sent a representative to the Kilpatricks' home to sell the Kilpatricks the Cable-Lock Foundation Repair System to repair damage to their home.¹ Olshan's representative evaluated the Kilpatricks' home, made representations about the quality and characteristics of the Cable-Lock Foundation Repair System, answered the Kilpatricks' questions about the System and made an offer on behalf of Olshan to provide the services at the Kilpatricks' home at a particular cost.² All of the events surrounding this transaction occurred at the Kilpatricks' residence.³ Based on these representations, the Kilpatricks signed an agreement on April 9, 2002 for Olshan to provide them with these foundation repairs for the cost of \$19,250.⁴

Olshan subsequently installed forty-one precast pilings beneath the Kilpatricks' home. After Olshan made its repairs, new damage began to appear. After several failed attempts by Olshan to adjust the pilings, the Kilpatricks hired their own engineer, Peter De la Mora, to investigate the problems. In a November 8, 2006 report, Mr. De la Mora concluded that Olshan had not repaired the home in a proper

¹ (Kilpatrick Mandamus Record at Relator 00039)

² (Kilpatrick Mandamus Record at Relator 00039)

³ (Kilpatrick Mandamus Record at Relator 00039)

⁴ (Kilpatrick Mandamus Record at Relator 00029, 00042) (Kilpatrick Mandamus at Appendix 3)

manner and that the damage to the Kilpatricks' home was caused by Olshan's faulty repairs.

II. Procedural Background

The Kilpatricks filed suit on June 6, 2007.⁵ Olshan filed an original answer and plea in abatement on February 8, 2008. Olshan subsequently set their motion to abate for May 12, 2008. At the hearing before Judge Fostel, the Kilpatricks contended that: (1) no contract or arbitration clause existed because the contract did not comply the Texas Home Solicitation Act, (2) the Federal Arbitration Act ("FAA") did not apply because the contract specifically called for the application of Texas arbitration law, and (3) requiring the use of the American Arbitration Association ("AAA") for arbitration was substantively unconscionable because of the expense required to perform a meaningless act.⁶

To support their unconscionability defense, the Kilpatricks submitted affidavits and invoices to evidence the costs of arbitration under AAA as well as the costs of Olshan's services.⁷ Additionally, the Kilpatricks also submitted the affidavits and invoices utilized in *Olshan Foundation Repair Co. v. Ayala*, 180 S.W.3d 212 (Tex. App.-San Antonio 2005, pet. denied).⁸ This evidence established that when the

⁵ (Kilpatrick Mandamus Record at Relator 0001-0007)

⁶ (Kilpatrick Mandamus Record at Relator 00030-00045)

⁷ (Kilpatrick Mandamus Record at Relator 00030-00045)

⁸ (Kilpatrick Mandamus Record at Relator 00043-00044)

Ayalas sued Olshan for damage caused during the installation of pilings, Olshan invoked the same arbitration clause in their standard form contract that it has attempted to invoke against the Kilpatricks. In *Ayala*, AAA charged the homeowners \$33,900 in arbitration fees.⁹ This Court denied Olshan's petition for review when the Court of Appeals affirmed the trial court's finding that these costs were unconscionable.¹⁰ In the case at bar, Olshan failed to refute any of this evidence. Olshan also did not contest the fact that their contract was void under the Texas Home Solicitation Act, but merely argued that the arbitrator should resolve this issue. After several oral hearings, Judge Fostel ultimately determined that Olshan's motion to abate should be denied.¹¹

Olshan filed its petition for writ of mandamus with the Fort Worth Court of Appeals on August 29, 2008. On October 2, 2008, the Fort Worth Court of Appeals denied Olshan's petition for writ of mandamus in this case.¹⁵ Olshan then waited over seven and one half months and filed its petition for writ of mandamus with this Court on May 22, 2009.

⁹ (*Kilpatrick Mandamus Record at Relator 00041-00044*)

¹⁰ In addition to this evidence, the Kilpatricks submitted another affidavit demonstrating that even under the revised AAA rules that sometimes allows for the use of one arbiter rather than three; these costs still rose to \$11,406.10. (*Kilpatrick Mandamus Record at Relator 00041-00042, 00045*)

¹¹ (*Kilpatrick Mandamus Record at Relator 00066*)

¹⁵ (*Kilpatrick Mandamus at Appendix 2*)(This order is also attached, but not bates-labeled in Olshan's record. In its proper order this order would be *Kilpatrick Mandamus Record at Relator 00067-68*)

Olshan also filed similar motions to abate in five other trial courts and an additional motion in a separate cause in the 271st District Court. Only two of these trial courts granted Olshan's motion to abate. Further, upon filing a motion to reconsider in both of those causes based upon the Dallas Court of Appeals decision in Cause No. 05-08-01143-CV; *In re Olshan Foundation Repair Company and Olshan Foundation Repair Company of Dallas, Ltd, Relators*, one of those cases settled and the other remains pending. Olshan challenged the denial of their motions to abate by filing five petitions for writ of mandamus in the Fort Worth, Dallas, and Waco courts of appeal. These petitions for writ of mandamus were nearly identical and all were denied.¹⁶ Olshan has now sought mandamus relief in this court for three of these cases.¹⁷

STANDARD FOR MANDAMUS RELIEF

Mandamus is an extraordinary remedy reserved only for when the trial court commits a clear abuse of discretion and when no adequate remedy by appeal exists. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135-36 (Tex. 2004). A trial court commits a clear abuse of discretion when it clearly fails to correctly analyze or apply the law to the facts. *Id* at 135; *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). To show a clear abuse of discretion, a relator must establish "that the trial court could reasonably

¹⁶ (Attached to this response as *Appendix A* are the appellate denials for *Waggoner*, *Duque*, *Tisdale*, *Kilpatrick*, and *Tingdale*)

¹⁷ Olshan has filed petitions for writs of mandamus with this court in *Kilpatrick*, *Tisdale*, and *Waggoner*. Olshan has refused to answer discovery in *Duque* and *Tingdale* because it will be filing its petitions for writ of mandamus in this court. As of the filing of this response, Olshan has not done so.

have reached only one decision" but refused to make that decision. *In re Prudential Inc. Co.*, 148 S.W.3d at 135. Even if a reviewing court would have decided the issue differently, it cannot alter the trial court's decision unless it was arbitrary or unreasonable. *Id.* An erroneous choice as a matter of law can be committed in one of the following ways:

(i) By making a choice that is not within the range of choices permitted by law; (ii) by arriving at its choice in violation of an applicable legal rule, principle, or criterion; or (iii) by making a choice that "[is] legally unreasonable in the factual-legal context in which it [is] made."

See W. Wendell Hall, *Standards of Review in Texas*, 38 ST. MARY'S L. J. 47, 63 (2006) (citing and quoting *Landon v. Jean-Paul Budinger, Inc.*, 724 S.W.2d 931, 989-40 (Tex. App.-Austin 1987, no writ). Not one of the courts which have previously reviewed these issues has found that Olshan has satisfied this heavy burden.

ARGUMENT & AUTHORITIES

The trial court did not abuse its discretion in denying Olshan's motion to compel arbitration because: (1) the costs of arbitration would be procedurally unconscionable; (2) no valid written contract or arbitration clause existed because Olshan failed to comply with the Home Solicitation Act; and (3) Olshan cannot compel arbitration under the FAA because the arbitration clause specifically chose the application of Texas' arbitration laws. In addition, Olshan is precluded from seeking mandamus because it delayed in seeking mandamus relief from this Court. Anyone

of these grounds provides a sufficient basis for denying the mandamus relief Olshan requests. As shown below, the Kilpatricks should prevail on all four of these grounds.

I. Olshan's petition for writ of mandamus should be denied because arbitration would be unconscionable.

In its petition for mandamus, Olshan contends that the Kilpatricks failed to produce evidence necessary to justify their claim of unconscionability regarding arbitration in this cause. In actuality, the Kilpatricks were the only party to offer any evidence of the costs of such an arbitration while Olshan remained silent at both the trial court and the court of appeals. Only before this Court has Olshan [mally discussed the mechanics of this arbitration and its costs. Unfortunately, their proffer is both inaccurate and untimely.

Both the United States Supreme Court and this Court have ruled that where an arbitration is so cost-prohibitive that it prevents a party from exercising his statutory rights to seek redress, an arbitration agreement can be invalidated as being unconscionable. *Green Tree Fin. COlp. v. Randolph*, 531 U.S. 79, 91(2000); *In Re FirstMerit Bank, NA.*, 52 S.W.3d 749, 757 (Tex. 2001).

In *Olshan Foundation Repair Company v. Ayala*, the San Antonio Court of Appeals upheld a trial court's determination that the standard arbitration provision Olshan uses in its contracts was substantively unconscionable, because AAA's fees were almost three times the cost of the original contract for Olshan's services. *Olshan Foundation Repair Company v. Ayala*, 180 S.W.3d 212, 216 (Tex. App. – San

Antonio 2005, pet. denied). This Court found no reversible error and denied Olshan's petition for review in *Ayala* on October 27, 2006.

In response to Olshan's motion to abate in the case at bar, the Kilpatricks submitted a recent billing statement for a similar case to theirs to be arbitrated by AAA.²⁰ The Kilpatricks also submitted evidence to the Court as to the costs of the services provided by Olshan to the Kilpatricks. Further, the Kilpatricks submitted to the trial court the same evidence the Ayalas submitted.²¹ In *Ayala*, the Ayalas paid Olshan \$22,650 for the installation of pilings at their home. *Ayala*, 180 S.W.3d at 216. The Kilpatricks paid \$19,250.²² Like the Kilpatricks, the Ayalas signed a contract with Olshan that contained Olshan's standard arbitration clause requiring the use of AAA. When Olshan attempted to compel arbitration, the Ayalas submitted evidence that (1) the AAA would preside over the arbitration; and (2) the arbitration would cost the parties over \$ 63,670.00. *Id.* at 216. Olshan did not controvert any of this evidence. *Id.* Just as in *Ayala*, Olshan once again did not controvert any of the evidence submitted by the Kilpatricks in the trial court. There is no logical reason that the Kilpatricks should be treated differently than the Ayalas when Olshan is trying to enforce the same arbitration clause, the trial court was presented with the same

²⁰ (*Kilpatrick Mandamus Record at Relator 00045*)

²¹ (*Kilpatrick Mandamus Record at Relator 00043-00044*)

²² (*Kilpatrick Mandamus Record at Relator 00029, 00042*)

evidence, and Olshan once again failed to refute any of it!²³ Obviously, the trial court did not abuse its discretion by reaching the same result that was approved in *Ayala* based upon the same evidence.

In addition, the trial court had evidence demonstrating unconscionability that the trial court in *Ayala* did not possess. Judge Fostel was able to compare the disproportionate amount of the arbitration costs to the futility of ordering the Kilpatricks to waste money to arbitrate under a contract that never existed as a matter of law because it was void under the Home Solicitation Act.²⁴ The trial court was certainly entitled to weigh the futility of Olshan's arbitration request against the costs incurred by the Kilpatricks when making its factual determination regarding unconscionability, regardless of whether the ultimate decision on this issue needs to be made by an arbitrator or judge. Olshan may disagree with Judge Fostel's factual determinations, but nothing indicates that he misapplied the law. Accordingly, Judge

²³ Olshan does not contest this evidence but merely argues that the Kilpatricks should be treated differently than the Ayalas because the Ayalas went to the trouble of receiving an invoice from AAA, where the Kilpatricks have submitted estimated costs based upon prior invoices from AAA.

²⁴ Generally, Texas law does not require a party to perform a useless act. *Bailey v. Brodhead*, 838 S.W.2d 922, 925 (Tex. App.--Austin 1992, no writ); *Pacesetter Pools, Inc. v. Pierce Homes, Inc.*, 86 S.W.3d 827, 832 (Tex.App-Austin 2002, no writ). Under these circumstances, ordering the parties to arbitration would be meaningless. If this Court grants Olshan's petition for mandamus and compels the parties to arbitrate this matter, the first act of the Kilpatricks will be to file a motion for summary judgment with the arbitrator on the issue of the contract being void. The arbitrator will have no choice but declare the Olshan contracts with the Kilpatricks void. At that point, no valid agreement to arbitrate will exist in this matter and the arbitrator will be divested of jurisdiction. The Kilpatricks will then return to the trial court and seek their legal remedies relating to their claims under the Texas Deceptive Trade Practices Act and all other applicable Texas law that does not necessitate a valid contract. During this exercise, the Kilpatricks would incur significant costs simply to obtain an order that would put the Kilpatricks in the same position that they currently occupy. Thus, granting Olshan's petition for mandamus will result in simply delaying the proceeding, needlessly running up expenses for both parties and, ultimately, returning to the trial court to resolve the dispute between the parties. Any money or time spent in arbitration of this particular dispute is a complete waste of the parties' resources. Texas law strongly disfavors requiring a party to perform a useless act. It was clearly within Judge Fostel's discretion to compare the excessive arbitration costs with the futility of ordering arbitration when making his substantive unconscionability determination.

Fostel did not abuse his discretion and Olshan's petition for mandamus should be denied.

At the eleventh hour, Olshan has finally decided to try and contest the Kilpatricks' evidence. Specifically, Olshan attached to its petition for mandamus as Appendix 6, AAA's Commercial Arbitration Rules. This information was not provided to either the trial court or court of appeals. Olshan now wants this Court to rule that the trial court abused its discretion by failing to consider the evidence that Olshan did **not** proffer to it. Obviously, the trial court cannot have abused its discretion and this new information has no relevance to this Court's consideration of this issue.²⁵

Moreover, Olshan current production of this information demonstrates that it could have provided this information to the trial court and simply chose not to. Furthermore, the seven hearings on Olshan's motions to abate occurred in six different courts over a period of months. Not only did Olshan fail to produce this evidence in any of these courts, it also failed to offer it to the Second Court of Appeals, the Fifth Court of Appeals, or the Tenth Court of Appeals. Now it asks this Court to grant its petition for mandamus and find that the trial court and court of appeals both abused their discretion, because Olshan failed to provide this new information to the trial court over a year ago. This new evidence clearly does not

²⁵ In contrast, the Kilpatricks anticipated this argument in the trial court and provided evidence that even under these revised procedures the costs would be unconscionable. Olshan never contravened this evidence in the trial court and has not done so here. Further, as Olshan has never denied that the Texas Home Solicitation Act voids this contract, even a reduced-cost arbitration is still a useless act, thus, constituting unconscionability.

demonstrate that the trial court abused its discretion in denying Olshan's motion to compel.

II. The Court should deny Olshan's petition for writ of mandamus because the trial court properly held that a valid arbitration agreement did not exist because Olshan failed to comply with the Texas Home Solicitation Act.

Chapter 39 of the Texas Business and Commerce Code, the "Home Solicitation Act," governs contracts between consumers and merchants when activities surrounding the transaction occur at places other than the merchant's place of business. Its purpose is to protect a consumer from high pressure sales tactics occurring in his or her home designed to overwhelm and confuse the consumer's decision-making processes. In the trial court, the Kilpatricks proved that Olshan violated the Home Solicitation Act. As a consequence, the contract is void and never existed. *Tex. Bus. & Com. Code* § 39.008(b).

Olshan has never contested that it failed to comply with the Home Solicitation Act or the consequences of its failure. Instead, Olshan has only argued that the Kilpatricks must pay thousands of dollars to an arbitrator to make this obvious ruling. Thus, Olshan seeks this mandamus relief solely to compel a useless act that will further delay the adjudication of this case on the merits. This is not a proper use of the extraordinary remedy of mandamus.

This Court recently reiterated that the parties are entitled to select whether a court or an arbitrator determines gateway matters associated with arbitration. *In re Morgan Stanley & Co., Inc.*, ___ S.W.3d ___ (Tex. 2009) citing *In re Weekley*

Homes, L.P., 180 S.W.3d 127, 130 (Tex. 2005) and *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009). If the agreement is silent or unclear, the courts rather than the arbitrator should decide the issue. *Id* The trial court was the proper entity to adjudicate Olshan's violation of the Home Solicitation Act.

Olshan's arbitration clause dictates that if any inconsistencies between the arbitration agreement and statutes shall be resolved "*by any court having jurisdiction and in accordance with practice of such court.*"³² Since the Texas Home Solicitation Act means that no valid contract to arbitrate exists, the Home Solicitation Act is a statute "inconsistent" with the enforcement of Olshan's arbitration clause. The trial court had proper jurisdiction, and therefore, was the proper entity for resolving any issues associated with the Home Solicitation Act. Olshan presented no evidence to the trial court to refute the Kilpatricks' claim that Olshan failed to comply with the Home Solicitation Act. The trial court did not abuse its discretion in refusing to compel arbitration.

III. Even if the arbitration clause had been silent as to whether the court or arbitrator decides preliminary issues concerning enforceability of the arbitration agreement, the trial court and not the arbitrator, would still decide whether the Texas Home Solicitation Act voids the arbitration agreement because the trial court must decide whether a valid arbitration agreement even existed. (Not Briefed)

³² (*Kilpatrick Mandamus Record at Relator 00029,00042*) (*Kilpatrick Mandamus at Appendix 3*)

IV. The Texas General Arbitration Act prohibits the arbitration of this cause.

The Kilpatricks contend that the arbitration clause, drafted by Olshan, contained in the contract between the parties specifically selected the Texas General Arbitration Act ("TGAA") and excluded the FAA.³³ Based on the requirements of the TGAA, the facts of this case mandate that this matter not be arbitrated.³⁴

A. Federal and Texas Law allow parties to select the law governing arbitration.

As arbitration under the FAA is a matter of consent and not coercion, the parties may structure the arbitration proceedings in any manner they see fit including abiding by state rules of arbitration where those state rules act to stay an arbitration when the FAA would permit it to go forward. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 477 and 479 (1989). The Fifth Circuit Court of Appeals determined that the FAA did not pre-empt the application of the TGAA where the parties specifically agreed that the arbitration of any disputes would be governed by the Texas law. *Ford v. Nylcare Health Plans of the GulfCoast, Inc.*, 141 F.3d 243 (5th Cir. 1998). Generally, the Fifth Circuit permits

³³ Under Chapter 171 of the Texas Civil Practice and Remedies Code, an arbitration agreement for the acquisition by one or more individuals of property or services for which the total consideration paid by the individual(s) is not more than \$50,000 is unenforceable unless all parties and their attorneys sign the agreement. *Tex. Civ. Prac. & Rem. Code*, §171.002 (a)(2). The public policy underlying this statute is that the Texas Legislature wanted to protect consumers just like the Real Parties in Interest from being forced to incur significant costs associated with arbitration to resolve disputes for transactions of this size. Since no attorney on behalf of the Real Parties in Interest signed the contract and since the cost of the services and property provided by Relators to Real Parties in Interest was less than \$50,000, neither the trial court nor this Court cannot enforce the arbitration agreement under the Texas General Arbitration Act.

³⁴ Olshan contends that a presumption exists in favor of arbitration. The cases cited by Olshan for this presumption concern whether the claims in the case are subject to arbitration. No such presumption exists for determining whether the FAA pre-empts the TGAA or not.

arbitration under non-FAA procedures if the contract expressly references the use of state arbitration law. *Action Industries, Inc. v. United States Fidelity & Guaranty Company*, 358 F.3d 337, 341 (5th Cir. 2004). Moreover, Texas Courts consistently enforce choice-of-law provisions contained in arbitration clauses even when the factual analysis of the case would not give rise to the application of the chosen law. Where parties selected the application of the FAA in the arbitration clause, Texas Courts have held that the FAA controls even when no evidence of the involvement of interstate commerce is adduced. *Teel v. Beldon Roofing & Remodeling Co.*, 2007 Tex. App. LEXIS 3721, (Tex. App. - San Antonio 2007, pet. denied); *In Re Kellogg Brown & Root*, 80 S.W.3d 611, 617 (Tex. App. - Houston [1st Dist.] 2002, orig. proc.).

B. Olshan's Magic Words Request

In an effort to undo the choice of Texas arbitration law that Olshan made when they wrote the arbitration clause in this matter, Olshan now asks this Court to impose a magic word requirement. Nowhere in *In Re L & L Kempwood Associates, L.P.*, 9 S.W.3d 125, 127 (Tex. 1999), however, did this Court require that parties use any specific words to effectively exclude application of the FAA. Time and time again, the United States Supreme Court, the Fifth Circuit Court of Appeals, the Texas Supreme Court, the Second Court of Appeals in Fort Worth, the Fifth Court of Appeals in Dallas, the Tenth Court of Appeals in Waco and a numerous district courts have opined that parties may select to have an arbitration governed by a law other

than the FAA. In order to give full effect to the arbitration clause to which the parties agreed, the selection of arbitration with these limitations must be enforced. *Volt*, 489 U.S. at 479.

In the case at bar, Olshan wrote the contract and, more specifically, the arbitration clause at issue in this cause. If Olshan had wanted the FAA to govern the arbitration clause in these contracts, they could have simply written the application of the FAA into the clause or left the clause silent as to which law shall govern the arbitration. By virtue of their writing, Olshan imposed the use of Texas arbitration law upon the Kilpatricks. To now strip parts of the arbitration clause because, in hindsight, Olshan decides it does not like them, is not only patently unfair to the Kilpatricks but is blatant gamesmanship designed to avoid the consequences of a choice-of-law selection clause.

V. Olshan's petition for writ of mandamus should be denied because Olshan did not seek mandamus relief with this Court in a diligent manner.

"[M]andamus relief may be denied to a party for a lack of diligence" or to those who "slumber on their rights." *Rivercenter Associates v. Rivera*, 858 S.W.2d 366, 367 (Tex. 1993) (orig. proceeding). A four-month delay in filing a writ of mandamus justifies denying a petition for writ of mandamus. *Id.* On May 22, 2009, Olshan filed its petition for writ of mandamus in this Court, which was over seven and one-half months after the Fort Worth Court of Appeals denied Olshan's petition for mandamus on October 2, 2008.

Olshan's delay has been extremely prejudicial. This lawsuit was filed over two years ago. Shortly before filing suit the Kilpatricks provided Olshan with a copy of Ron Tallent's estimate to repair the Kilpatricks' home. In compliance with an agreed scheduling order, the Kilpatricks designated Mr. Tallent as an expert on May 29, 2009. The trial court's scheduling conference is currently set for October 5, 2009, and the Kilpatricks hope that trial is set shortly after that date. Unfortunately, Mr. Tallent has diabetes, which has become progressively worse during the last year.³⁸ Olshan's nearly eight month delay in seeking mandamus relief may preclude the Kilpatricks from using Mr. Tallent if trial is postponed. This not only hinders their ability to present their case, but would increase the costs and cause further delays.³⁹ Olshan should not be allowed to seek mandamus relief after waiting over seven and one-half months after the court of appeals denied the relief they requested.


WHEREFORE, PREMISES CONSIDERED, the Real Parties in Interest, Kenneth and Vickie Kilpatrick, respectfully request that this Court deny Relators' petition for writ of mandamus. The Real Parties in Interest also request that the court award them such other relief as may be proper.

³⁸ Appendix B.

³⁹ Olshan's only explanation for this delay is that Steve Thornton's grandmother passed away. Steve Thornton is local counsel for the Kilpatricks, and lead counsel are Robert Loree and Todd Lipscomb. Olshan contends that it delayed filing the mandamus in this case, because it was attempting to schedule mediation with Mr. Thornton when his grandmother passed away. This is not a valid excuse. The passing of Mr. Thornton's grandmother did not prohibit Olshan from contacting lead counsel, Robert Loree and Todd Lipscomb, about scheduling mediation. In fact, mediation has never been scheduled in this case.

Moreover, Mr. Thornton's grandmother passed away on October 15, 2008. Olshan has not provided any explanation as to why it waited over seven months before seeking mandamus relief. Olshan recently used this same excuse and affidavit on June 5, 2009 when it requested a stay from the trial court. Judge Monte Lawlis, a senior visiting judge in the 271st District Court, rejected this meritless argument and denied Olshan's request for a stay.

Respectfully submitted,
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CERTIFICATE OF SERVICE


I certify that Relators have been served a true and correct copy of the foregoing document on July 16, 2009 to the following counsel of record:

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