UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Robert S. Bennett, Nachael Foster, Andrew Bayley and others similarly situated	§	
	§	**CIVIL ACTION 4:21-cv-2829**
Plaintiffs	§	
	§	
	§	
vs.	§	
	§	
	§	**CLASS ACTION COMPLAINT**
State Bar of Texas aka the "Texas Bar" (and culpable officials within it)	§	

Defendants

NOTICE OF MOTION FOR CLASS CERTIFICATION

To the Defendants and Attorneys of record:

The Plaintiffs hereby request of the Court an order certifying this case as a class action pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure on behalf of the following classes of similarly situated persons:

PROPOSED CLASS:

The **PROPOSED CLASS** consists of all Texas-licensed attorneys, past or present, and on either active or inactive status, who have endured and / or continue enduring either (or both) of the following:

A) First Amendment violations because of the Texas Bar's relevant unlawful conduct; and / or:

B) the Texas Bar's having coercively taken attorney funds through dues and other fees to finance the Texas Bar's ongoing efforts to maintain an attorney disciplinary system that violates U.S. constitutional 4th & 5th Amendment protections through the Bar's takings without providing its members with due process of law. Caselaw establishes that the applicable standard of proof for disciplinary grievances against allegedly unethical attorneys should be a "clear & convincing" burden of proof instead of a mere "more probable than not" one that the Texas Bar nevertheless still embraces. The latter standard is lighter and enables the Texas Bar to extortionately intimidate compulsory members into tacitly acquiescing to the Texas Bar's transgressions which are substantially motivated by that Bar's leaders' own quest for further self-enrichment & favors. *See* http://www.TexasBarSunset.com/salaries .

Class **A**) has proposed sub-classes, too:

Sub-class A) #1 includes Texas Bar members who do not agree with the Texas Bar's current or previous unlawful practice of engaging in political and / or ideological activities that were or are non-germane to regulating the legal profession and / or improving the quality of legal services.

Sub-class A) #2 consists of Texas-licensed attorneys, past or present, who did not or who do not agree with the Texas Bar's having unlawfully not given them constitutionally adequate and meaningful notice of how their coercively extracted dues money would be spent or where their fees would go.

Sub-class A) #3 includes those members, past or present who disagree with that Bar's having not given them adequate opportunities to oppose such expenditures, much less veto authority over such expenditures.

Membership in any one of the abovementioned 3 sub-classes makes a person a member of the overall class categorized with the letter **A)**, above.

Meanwhile if the U.S. Supreme Court determines that entities such as the Texas Bar are labor unions for which membership dues may *not* permissibly be mandatory, in accordance with the case *Janus v. AFSCME*, 138 S. Ct. 2448 (2018), the proposed class thereby *also* includes all Texas-licensed attorneys, past or present and on active or inactive status, who have had to involuntarily pay annual dues to the Texas Bar during recent years. Texas is one of a growing list of different states whose attorney bars' disapprovingly compulsory members presently have issues such as these pending before the U.S. Supreme Court. *McDonald v. Firth* (No. 21-800 (U.S.); No. 20-5448, 4 F 4th 229 (5th Cir. 2021); No. 1:19-cv-219- LY (W.D. Tex.)).

The relevant term of previous years of compensable infractions goes back as far as is permissibly possible, with a bare *minimum* of two years before this lawsuit was filed during August of 2021. This motion is based upon an accompanying memorandum of law and all other matters of record within this overall case. A proposed order is included.

Plaintiffs' counsel Rich Robins has cordially interacted with Defendants' counsel on February 22, 2022, regarding the Plaintiffs' Motion for Class Certification. Defendants' counsel is cordially opposed to this motion.

Dated: February 23, 2022

Respectfully submitted,

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By: 

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I. Introduction

This action seeks class-wide declaratory and injunctive relief on behalf of all persons who are Texas-licensed attorneys, past or present, and on either active or inactive status, who have endured First Amendment and / or Due Process violations because of the Texas Bar's relevant unlawful conduct. The Plaintiffs have satisfied each of the four requirements of Rule 23(a) [numerosity, commonality, typicality & adequacy] and they also satisfy the requirements of Federal Rule of Civil Procedure 23(b)(2). Final declaratory relief is appropriate with respect to the class as a whole.

A) Statement of the Nature and Stage of the Proceeding

The three plaintiffs are members of the Texas Bar and include Robert Bennett (of Houston), Andrew Bayley (of Houston) and Nachael Foster (of Arlington, Texas and with significant ties to Houston). All three object to having to be members of the Texas Bar, mainly because of its encroachments upon their First Amendment and Due Process rights in the abovementioned ways. They seek relief and are eagerly willing to serve as named plaintiffs in this class action endeavor.

B) Statement of Issues to be ruled upon by the Court

Whether the proposed class satisfies the requirements of Federal Rules of Civil Procedure Rule 23(a) and (b)(2).

C) Summary of the Argument

The proposed class definition meets the requirements of Fed.R.Civ.Proc., Rule 23(a) and (b)(2). The proposed class *s*atisfies the four requirements of Rule 23(a). (1) The proposed class of Texas Bar members is so numerous that joinder is impractical. (2) There are questions of law or fact common to the proposed class of members – namely whether their First Amendment and Due Process rights have been and / or remain violated by the Texas Bar. (3) The claims of the named Plaintiffs are typical of the class claims. Finally, (4) the named plaintiffs will fairly and adequately protect the interests of the class because they are conscientious and as Texas Bar members they are subject to the challenged actions. Meanwhile their legal counsel has been zealously policing the

Texas Bar on behalf of all fellow members for at least a decade, and counting…

The proposed class action also satisfies Rule 23(b)(2) because the Defendants have acted or refused to act on grounds applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

II. The proposed class definition satisfies the requirements of Federal Rule of Civil Procedure 23.

Courts have adopted a liberal approach to class certification by requiring that "[i]f a Court errs, the Court should err in favor of the maintenance of a class action." *Rubenstein v. Collins*, 162 F.R.D. 534, 536 (S.D. Tex. 1995 (Hoyt, J.). Thus, "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *In re Enron Corp. Securities Derivative "ERISA" Litigation*, 228 F.R.D. 541, 555 (S.D. Tx. 2005) (quoting *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 178 (1974)).

Rule 23 includes an implicit requirement that the class be adequately defined so that the class membership is clearly ascertainable. In a (b)(2) class, however, the actual membership of the class need not be precisely drawn. *Bratcher v. Nat'l Standard Life Ins. Co*., 365 F.3d 408, 413 (5th Cir. 2004); *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972).

The requirement that a class be clearly defined is not particularly stringent, and plaintiffs need only establish that "the general outlines of the membership of the class are determinable at the outset of the litigation." 7A Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE § 1760 at 118. In other words, the class must be sufficiently definite "that it is administratively feasible for the court to determine whether a particular individual is a member." *Id*. at 121. In this case, the proposed class definition consists of all members, past & present, of the Texas Bar who have endured unconstitutional harms including First Amendment and Due Process ones.

"'Defining a class as consisting of all persons who have been or will be affected by the conduct charged to the Defendants is entirely appropriate where only injunctive or declaratory relief is sought.'" *Fischer v. Dallas Federal Sav. & Loan Assoc*., 106 F.R.D. 465, 470 (N.D. TX. 1985) (quoting *Rice v. City of Philadelphia*, 66 F.R.D. 17 (E.D. Pa. 1974). Here the proposed

class is clear and is defined explicitly by whether class members will suffer a specific injury. The class definition accordingly meets the requirements of Fed.R.Civ.Proc, Rule 23.

III. This action satisfies the requirements of Fed. R. Civ. Proc. Rule 23(a).

A) **Numerosity and Impracticality of Joinder**

The proposed class satisfies Rule 23(a)(1) because the class is "so numerous that joinder is impractical." Courts have found the numerosity requirement of Rule 23(a)(1) to be satisfied where relatively few class members are involved. See e.g., *Carey v. Greyhound Bus Co*., 500 F.2d 1372, 1381 (5th Cir. 1974) (number of class members assumed to be 28); *Arkansas Education Association v. Board of Education*, 446 F.2d 763, 765-66 (8th Cir. 1971) (class membership of 20 persons). See generally, 3B MOORE'S FEDERAL PRACTICE ¶ 23.05 [1], at 23-154 to 23-155 (1978).

Rule 23(a)(1) does not require the moving party to determine the exact size of the class, especially where it would be unreasonable to require a moving party to identify the names of all class members. *Bratcher*, supra, 365 F.3d at 415 (certifying class "although exact number of class members continuing to pay discriminatory premiums was unknown"); 7 Wright and Miller, FEDERAL PRACTICE AND PROCEDURE: Civil § 1762. Rather, "the conduct complained of is the benchmark for determining whether a subdivision (b)(2) class exists.'" *Yaffe*, supra, 454 F.2d at 1366. "Where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied." *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 370 (C.D. Cal. 1982); see also, *Zeidman v. J. Ray McDermott & Co*., 651 F.2d 1030, 1038 (5th Cir. 1981) (plaintiff must offer only a "reasonable estimate of the number of purported class members"). The numerosity requirement of Rule 23(a)(1) is satisfied in this case as the Texas Bar presently has over a hundred thousand members. *See* http://www.TexasBarSunset.com/voter-abstention .

B) **Common Questions of Law or Fact**

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." The Fifth Circuit has held that the test for commonality "is not demanding and is met where there is at least one issue, the resolution of which will affect all or a significant number of the putative

class members." *Mullen v. Treasure Chest Casino*, LLC, 186 F.3d 620, 625 (5th Cir. 1997) (quoting *Lightburn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997)).

In this case, the common questions of law presented are whether the Defendants committed the alleged transgressions. "The loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality). The only harm to the Texas Bar resulting from recoupment and / or offsetting of bar membership dues that were taken in violation of due process and equal protection is that Bar's resulting inability to extract mandatory dues from its members in violation of the First Amendment, which is really "no harm at all." *Christian Legal Soc'y v. Walker*, 453 U.S. 853, 867 (2006). The same can be said for violations of the Plaintiffs' Due Process rights.

Even where there are individual variations in the facts or legal issues as they relate to a particular named plaintiff or proposed class member, the commonality requirement is satisfied so long as the class shares some common question of law or fact. It is clear that the claims plaintiffs present raise questions of law and fact common to the proposed class members. *See*, e.g., *Lightbourn v. County of El Paso*, supra, 118 F.3d at 426 ("allegations of similar . . . practices generally meet the commonality requirement"); *Senter v. General Motors Corp*., 532 F.2d 511, 524 (6th Cir. 1976), cert. denied, 429 U.S. 870 (1976) (class certification granted in employment discrimination action brought on behalf of Black employees even though it was "manifest that every decision to hire, fire or discharge an employee may involve individual considerations"); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 937 (2nd Cir. 1968) (class certified in challenge to relocation practices of urban renewal project despite the different treatment suffered by each tenant during the relocation process); and *Cullen v. New York State Civil Service Commission*, 435 F. Supp. 546, 559 (E.D.N.Y. 1977) (class certification granted in lawsuit challenging coercive practices in obtaining political contributions from public employees even though "fact questions specific to each instance of the alleged coercion will remain").

C) **Typicality of Claims**

Rule 23(a)(3) requires that the claims of the named plaintiffs be "typical of the claims ... of the class." Meeting this requirement usually follows from the presence of common questions

of law. See, *James v. City of Dallas*, Tex., 254 F.3d 551, 571 (5th Cir. 2001) ("critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class"); *Stirman v. Exxon Corp*., 280 F.3d 554, 562 (5th Cir. 2002) (same); 3B MOORE'S FEDERAL PRACTICE ¶ 23.06-2, at 23-325. As set forth in this filing today, the Plaintiffs' claims present common questions of law and fact.

The Plaintiffs in our case have no interest that will conflict with those of the proposed class. The named Plaintiffs have identical legal theories and will seek the same injunctive and declaratory relief for themselves and for the class as a whole. Plaintiffs seek to vindicate the rights of unnamed class members, rights that are violated through the application of the Defendants' uniform unlawful policies and practices. No conflict exists between the Plaintiffs and the class they seek to represent; the issues herein arise out of a common pattern and practice of illegal activities. The typicality requirement of Rule 23(a)(3) is therefore satisfied.

D) **Adequacy of Representation**

The final requirement for class certification, set out in Rule 23(a)(4) is that the named plaintiffs "will fairly and adequately protect the interest of the class." The two principal elements of this requirement are: (1) that the class representative's interests are co-extensive and not antagonistic to the class members' interests; and (2) that counsel for the named representatives is qualified. *Johnson v. Georgia Highway Express, Inc*., 417 F.2d 1122, 1124-25 (5th Cir. 1969).

The interests of the class representatives here are not antagonistic to those of the proposed class members. Their mutual goal is to declare the Defendant Texas Bar's challenged policies and practices as unlawful and to enjoin further violations. Meanwhile the Plaintiffs' legal counsel is reasonably well informed about the Texas Bar and is becoming increasingly experienced in complex litigation including regarding class actions. For years Attorney Rich Robins' website **TexasBarSunset.com** has attracted almost as much internet traffic as TexasBar.com, itself, as Amazon's Alexa.com traffic meter helps demonstrate. Meanwhile Attorney Robins is the *only* attorney who testified critically about the Texas Bar during all 3 available public hearing opportunities which were part of the most recent Sunset Review process. Those hearings took place at the state legislature in Austin, Texas during 2016 and 2017. Despite his well-meaning criticism

meant to bring the Texas Bar more in compliance with longstanding legal precedent and other laws, Attorney Robins nevertheless testified in *support* of the Sunset bill which would keep the Texas Bar (and attorney self-rule) in existence. One can confirm this, for example, by viewing the **Senate State Affairs Committee Sunset hearing that took place on March 23rd, 2017.** Attorney Robins' testimony begins during the third hour at approximately minute **3:37:30**
http://tlcsenate.granicus.com/MediaPlayer.php?view_id=42&clip_id=11969

Attorney Robins and the Plaintiffs' goal is not to destroy self-rule here in Texas, but rather to help fix it by reducing our legal licensing authority's activities to merely those of attorney licensing and regulation. Trade association functions are potentially corrupting and alienating of members and are therefore best reserved for a *voluntary* entity, resembling the bar duality of Virginia among other states. Attorney Robins' passion for helping Texas become more efficient, stronger, and happier will increasingly fuel his eagerness to adapt to surprises and hardships in this litigation so that his clients, as well as the state of Texas, and some fine people he knows at the Texas Bar can all benefit. Attorney Robins and his allies will gladly and adequately represent both named and unnamed class members while increasingly demonstrating that the requirements of Rule 23(a)(4) are satisfied in this case.

IV. This action satisfies the requirements of Rule 23(b)(2).

In addition to satisfying the four requirements of Rule 23(a), a certifiable class action must meet one of the requirements of Rule 23(b). This action meets the requirements of Rule 23(b)(2):

> "the party opposing the class has acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . "

Analysis of the requirements of subsection (b)(2) reveals "that the party opposing the class does not have to act directly against each member of the class. As long as his actions would affect all persons similarly situated, his acts apply generally to the whole class." 7A Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 1775, at 19. In this case, the Texas Bar Defendants have not compensated their harmed members or adequately (if at all) modified their policies & practices. Thus, the proposed class in this case has been necessitated by the

Defendants' challenged policies and practices. The requirements of subsection (b)(2) have accordingly been met.

V. This action is properly brought as a class action for the following reasons:

A) The proposed class is so numerous and geographically dispersed throughout the United States and abroad that the joinder of all class members is impracticable. Although the exact number and identity of all class members is not yet known, the Plaintiffs believe that there are over a hundred thousand class members, even though around 80% reliably abstain annually from voting in the Texas Bar's month-long, internet elections. *See* http://www.TexasBarSunset.com/voting-abstention .

B) The disposition of the Plaintiffs' and proposed class members' claims in a class action will provide substantial efficiencies and benefits to the parties, the court system, taxpayers and society.

C) The proposed class is ascertainable and there is a well-defined community of interest in the questions of law or facts alleged herein. After all, the Texas Bar violated or infringed upon First Amendment and Due Process rights of each proposed class member in essentially similarly callous and even predatory ways.

D) There are questions of law and fact common to the proposed class which predominate over any questions that may affect particular class members, namely the violation of each class member's First Amendment and Due Process rights and whether the Plaintiffs and proposed class members are entitled to an award of attorney's fees, expenses and punitive damages against the Defendants.

E) The Plaintiffs' claims are typical of the claims of the members of the proposed class.

F) A class action is superior to other available methods for the fair and efficient adjudication of this controversy for at least the following reasons:

G) Given the size of individual proposed class member's claims and the expense of litigating those claims, few, if any, proposed class members could afford to or would seek legal redress individually for the wrongs that the Defendant committed against them. Meanwhile

absent proposed class members have no substantial interest in individually controlling the prosecution of individual actions. Furthermore:

(1) This action will promote an orderly and expeditious administration and adjudication of the proposed class claims by establishing economies of scale, time, effort, and resources.

(2) Without a class action, proposed class members will continue to suffer damages, and the Defendants' violations of law will proceed without remedy while the Defendants continue to reap and retain the substantial proceeds of wrongful conduct.

(3) The Plaintiffs know of no difficulty that will be encountered in the management of this litigation which would preclude its maintenance as a class action.

CONCLUSION & PRAYER

For the foregoing reasons, this action should please be certified as a class action pursuant to Fed.R.Civ.Proc., Rule 23(a) and (b)(2). The Plaintiffs seek damages, legal and equitable relief on behalf of the proposed class on grounds generally applicable to the entire proposed class. The Plaintiffs' Attorney Rich Robins hereby submits this Motion for Class Action Certification while thanking the Court for its time.

DATED: February 23rd, 2022

Respectfully submitted,

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By: 

Rich Robins
Attorney-In-Charge

CERTIFICATE OF CONFERENCE

Plaintiffs' counsel Rich Robins hereby certifies that he cordially interacted with Defendants' counsel on February 22, 2022 regarding the Plaintiffs' Motion for Class Certification. Defendants' counsel is opposed to the motion.

Defendant(s):

State Bar of Texas aka the "Texas Bar"
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As represented by:

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By: 
Rich Robins
Attorney In Charge

CERTIFICATE OF SERVICE

I, Rich Robins, do hereby certify that on February 23rd, 2022, we electronically filed with the Clerk of the Court for the U.S. District Court for the Southern District of Texas (via the Court's recently merged CM/ECF/PACER system) a true and correct copy of the above and foregoing Plaintiffs' Motion for Class Certification. The Clerk will send notification of such filing to the Defendant State Bar of Texas aka the "Texas Bar" at:

State Bar of Texas aka the "Texas Bar"
Texas Law Center
1414 Colorado Street
Austin, Texas 78701

via their legal counsel:

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Tel. 713-758-2932

By: 
Rich Robins
Attorney In Charge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Robert S. Bennett, Nachael Foster, Andrew Bayley and others similarly situated	§	
	§	**CIVIL ACTION 4:21-cv-2829**
Plaintiffs	§	
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	§	
	§	**CLASS ACTION COMPLAINT**
State Bar of Texas aka the "Texas Bar" (and culpable officials within it)	§	

Defendants

ORDER

Having reviewed the pending Motion for Class Certification, the Court hereby grants the motion and defines the requested class accordingly. The Court orders as follows:

THE COURT FINDS that Class requirements under FRCP 23 are met in that:

a. The class is so numerous that joinder of all members is impracticable. There are over a hundred thousand members of the class.

b. There are questions of law and fact common to the class.

c. The claims of the named Plaintiffs are typical of the class claims.

d. The named plaintiffs will fairly and adequately protect the interests of the class because they are conscientious attorneys as well as Texas Bar members who are subject to the challenged actions. Meanwhile their legal counsel, who increasingly has complex litigation experience and class action attorney allies, has been zealously, visibly and accessibly policing the Texas Bar on behalf of all fellow members for at least a decade.

IT IS HEREBY ORDERED that the Plaintiffs' Motion for Class Certification is hereby **GRANTED**.

IT IS FURTHER ORDERED that notice shall be given to the class members in a form and manner to be determined by the Court upon application by Plaintiffs.

IT IS FURTHER ORDERED that certification of this class is not intended to and does not adjudicate any substantive defenses which Defendants may assert.

IT IS FURTHER ORDERED that the certified class is defined as follows:

All Texas-licensed attorneys, past or present, and on either active or inactive status, who have endured and / or continue enduring either (or both) of the following:

A) First Amendment violations because of the Texas Bar's relevant unlawful conduct; and / or:

B) the Texas Bar's having coercively taken attorney funds through dues and other fees to finance the Texas Bar's ongoing efforts to maintain an attorney disciplinary system that violates U.S. constitutional 4th & 5th Amendment protections through the Bar's takings without providing its members with due process of law, in particular without an adoption of the "clear & convincing" burden of proof for attorney grievance prosecutions even though reportedly most other states and the American Bar Association (ABA) have otherwise embraced them.

It is so ORDERED.

Signed on _____ at Houston, Texas.

_____
Honorable Alfred H. Bennett
United States District Judge