

IN THE SUPREME COURT OF TEXAS

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No. 03-0547
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BMG DIRECT MARKETING, INC., PETITIONER,

v.

PATRICK PEAKE, INDIVIDUALLY AND AS REPRESENTATIVE OF OTHERS SIMILARLY
SITUATED, RESPONDENT

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS
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Argued February 18, 2004

JUSTICE HECHT, concurring.

I agree with the Court that “the voluntary-payment doctrine’s full-knowledge requirement has been met” in this case, and that “the classmembers’ unlawful-penalty allegation, under the circumstances presented here, does not implicate the type of fraud, duress or coercion that would preclude the voluntary-payment defense”.¹ All of the class’s arguments thus having been rejected, and a dispositive defense having been conclusively established, the class cannot proceed on any claim it has asserted (those being only for damages, not injunctive relief), and the case is at an end. Because this is an interlocutory appeal from a class certification order, this Court cannot issue a

¹ *Ante* at ____.

judgment on the merits, so it remands the case to the trial court with the elliptic direction to “determine the effect of BMG’s voluntary-payment defense on the requirements for class certification”.² Since “dispositive issues should be resolved by the trial court before certification is considered”,³ and now the Court has resolved a dispositive issue for the trial court, there is nothing left for the trial court to do but dismiss the case. I concur in remanding the case for that purpose.

Nathan L. Hecht
Justice

Opinion delivered: November 18, 2005

² *Id.* at ____.

³ *State Farm Mut. Auto. Ins. Co. v. Lopez*, 156 S.W.3d 550, 557 (Tex. 2004).