IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ERIC STEWARD, et al., *Plaintiffs*	§	
v.	§	Case No. 5:10-CV-1025
RICK PERRY, Governor of the State of Texas, THOMAS SUEHS, Executive Commissioner of the Texas Health and Human Services Commission, CHRIS TRAYLOR, Commissioner of the Texas Department of Aging and Disability Services, *Defendants*	§	

DEFENDANTS' OPPOSED MOTION TO ABATE PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

TO THE HONORABLE JUDGE ORLANDO L. GARCIA:

Defendants **GOVERNOR RICK PERRY**, in his official capacity as Governor of The State of Texas, **THOMAS SUEHS**, in his official capacity as Executive Commissioner of the Texas Health and Human Services Commission, and **CHRIS TRAYLOR**, in his official capacity as Commissioner of the Texas Department of Aging and Disability Services (collectively, "Defendants"), move to abate Plaintiff's Motion for Class Certification [Dkt. # 13] until a decision on Defendants' anticipated motion to dismiss and completion of appropriate class discovery, if necessary.

I. INTRODUCTION and PROCEDURAL BACKGROUND

Plaintiffs filed their Original Complaint (the "Complaint") [Dkt. # 1] on December 20, 2010, and served Defendants with the Complaint on or about December 21, 2010. On January 7,

2011, Defendants filed an unopposed motion to extend the deadline for responding to the Complaint until March 1, 2011, which the Court granted. [Dkt. ## 6, 7.]

On January 19, 2011, Plaintiffs filed their Motion for Class Certification and accompanying memorandum of law. [Dkt. ## 13, 14.] Defendants subsequently requested that Plaintiffs agree to abate a decision on their motion until the Court ruled on Defendants' anticipated motion to dismiss and completion of class discovery. Plaintiffs' counsel did not agree to this request.

Plaintiff's Motion for Class Certification should be abated for at least two reasons. First, Plaintiffs' motion is premature under Local Rule CV-23, pursuant to which class certification motions are to be filed *after* a defendant has filed an answer. Second, Plaintiffs' motion should be abated to allow for completion of the requisite class discovery.

II. ARGUMENT

A. Plaintiffs' Motion For Class Certification Is Premature Under Local Rule CV-23.

Local Rule CV-23 states, "When a class action allegation is made in any pleading, the movant shall file, within 30 days after any defendant's first pleading, a motion for class certification. … Failure to timely file a motion for class certification shall constitute a waiver of the request for any class action." W.D. Tex. Local Rule CV-23. Thus, the 30-day period for a class certification to be filed does not begin until a defendant files its first pleading.

The term "pleading," as defined in Rule 7(a) of the Federal Rules, includes a complaint and an answer. FED. R. CIV. P. 7(a); *see also Turner v. Johnson*, 106 F.3d 1178, 1185 n.27 (5th Cir. 1997) ("The term 'pleadings' is defined by Rule 7(a) to include a complaint and an answer."). The Fifth Circuit and its district courts have repeatedly held that the filing of a "pleading," when used in the Federal Rules, means a pleading as defined by Rule 7(a). *See, e.g.,*

Turner, 106 F.3d at 1185 n.27 (applying Rule 7(a) definition to Rule 56 as to matters outside the "pleadings"); *Frohn v. PCNB Corp.*, 2010 WL 1416186, at *1 n.1 (S.D. Miss. Apr. 7, 2010) (applying definition to Rule 12(c)); *In re Morrison*, 421 B.R. 381, 389 (Bnkr. S.D. Tex. 2009) (applying definition to Rule 12(h)(2)); *Interam. Quality Foods, Inc. v. Parrot Ice Drink Products of Am., Ltd.*, 2009 WL 3008295, at *1 (W.D. Tex. Sept. 17, 2009) (applying to Rule 38); *Saddler v. Quitman Co. School Dist.*, 2009 WL 1658114, at *1 (N.D. Miss. June 11, 2009) (applying definition to Rule 15); *Groden v. Allen*, 2009 WL 1437834, at *3 (N.D. Tex. May 22, 2009) (applying to definition to Rule 12(f)).

Furthermore, a "pleading" does not include a motion, such as a motion to dismiss. *See Zaidi v. Ehrlich*, 732 F.2d 1218, 1219-20 (5th Cir.1984) (holding that motion to dismiss does not constitute a "pleading" under Rule 15); *Lineberry v. U.S.*, 2009 WL 763052, at *3 (N.D. Tex. Mar. 23, 2009) (same as to Rule 12(f)); *Knickerbocker v. Harvey*, 2006 WL 3301065, at *1 (W.D. Tex. Nov. 7, 2006) (same as to Rule 12(e)). This holds true when the filing of a "pleading" initiates a deadline period, meaning that the filing of a motion to dismiss will not start a deadline period triggered by the filing of a "pleading." *See Cambridge Integ. Servs. Group, Inc. v. Concentra Integ. Servs.*, Inc., 2010 WL 4736171, at *1-*2 (W.D. La. Nov. 16, 2010) (holding that deadline for jury trial request under Rule 38 did not begin to run upon filing of a motion to dismiss).

Thus, under Local Rule CV-23, the appropriate time for Plaintiffs to file their Motion for Class Certification will not begin until a Defendant has filed an answer. The period under Local Rule CV-23 did not begin when Defendants filed their motion for an extension to respond to the complaint on January 7, 2011. [Dkt. # 6.] Nor will the period begin to run when Defendants file their anticipated motion to dismiss on or before March 1, 2011. Rather, if that anticipated

motion is denied, Defendants will file their first pleading in accordance with Rule 12(a), and Plaintiffs may *then* move for certification. This timeline provided by Local Rule CV-23 provides for a more logical and efficient determination of class certification issues. "Without knowing which of the plaintiffs' claims will ultimately survive a motion to dismiss, it will be difficult to determine whether there are 'questions of law and fact common to the class' and whether the 'claims or defenses of the representative parties are typical of the claims or defenses of the class.'" *Sevin v. Parish of Jefferson*, 2009 WL 68880, at *1 (E.D. La. Jan. 9, 2009) (quoting FED. R. CIV. P. 23).

In short, Plaintiffs' present Motion for Class Certification is premature under Local Rule CV-23 and should be abated on that basis alone.

B. Plaintiffs' Motion for Class Certification Should Be Abated To Allow For Class Discovery.

In addition, Plaintiffs' Motion for Class Certification should be abated to allow for appropriate class discovery. The Fifth Circuit and the Federal Rules of Civil Procedure recognize the need for class discovery as part of the "rigorous analysis" of the Rule 23 prerequisites to certify a class. *See Unger v. Amedisys Inc.*, 401 F.3d 316, 320-21 (5th Cir. 2005). "District courts are required to take a 'close look' at the parties' claims and evidence in making its Rule 23 decision." *Id.* at 321 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997)). "To assist the court in this process it may sanction controlled discovery at the certification stage. The plain text of Rule 23 requires the court to 'find,' not merely assume, the facts favoring class certification." *Unger*, 401 F.3d at 421 (citing FED. R. CIV. P. 23).

Even prior to the 2003 Amendments to the Federal Rules of Civil Procedure, the Fifth Circuit recognized the need for class discovery. *See Stewart v. Winter*, 669 F.2d 328, 331 (5th Cir. 1982) ("In light of the mandate of Rule 23(c)(1) that a certification determination be made

'(a)s soon as practicable after the commencement of (the) action,' we think it imperative that the district court be permitted to limit pre-certification discovery to evidence that, in its sound judgment, would be 'necessary or helpful' to the certification decision."). Indeed, the Fifth Circuit held that, under the prior version of Rule 23, failure to allow for adequate class discovery can constitute an abuse of discretion justifying vacating a certification order and remanding the case so that such discovery can be conducted. *Duke v. Univ. of Tex. at El Paso*, 729 F.2d 994, 996 (5th Cir. 1984).

The 2003 Amendments changed the timing of class certification from "[a]s soon as practicable after the commencement of the action" to "[a]t an early practicable time after a person sues or is sued as a class representative." FED. R. CIV. P. 23(c). This amendment codified the need to provide sufficient time to develop the record and conduct the necessary discovery before deciding certification issues. *See* 2003 Notes of Advisory Committee to Rule 23, ¶¶ 3, 48; *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007) ("Rule 23(c)(1)(A) no longer demands that the district court rule on class certification 'as soon as practicable,' but instead insists only upon a ruling 'at an early practicable time.'"). Not surprisingly, courts in the Fifth Circuit have since held that class discovery is necessary to develop the evidentiary record before a motion for certification can be decided. *See, e.g., Morrow v. City of Tenaha Deputy City*, 2010 WL 2721400, at *3 (E.D. Tex. July 8, 2010) ("The purpose of limited discovery before the class certification hearing is to allow the parties to explore the facts that support or counsel against class certification."); *Pinero v. Jackson Hewitt Tax Service Inc.*, 594 F.Supp.2d 710, 723 (E.D. La. 2009) ("Further, the record is not sufficiently developed to support class certification. Little discovery has been conducted in the matter, and plaintiff's motion for class certification does not attach any evidence to support the motion. The

parties are ordered to present the Court a schedule for refiling their motion for class certification which incorporates a period for discovery on the class issues."); *Sevin v. Parish of Jefferson*, 2009 WL 68880, at *1 (E.D. La. Jan. 9, 2009) ("the current [certification] hearing date does not allow the defendants sufficient time to conduct class discovery and prepare their responsive memoranda.").

In this case, there are numerous certification issues that require discovery so that appropriate evidence may be presented to the Court. First, Defendants have the right to discover whether the named Plaintiffs actually share common questions of fact. Although Plaintiffs have made allegations of common facts in the complaint, the Court is required to look "beyond the pleadings … in order to make a meaningful determination of the certification issues." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744 (5th Cir.1996). Second, discovery is appropriate to determine whether Plaintiffs' claims are typical of the putative class. For example, Plaintiffs have recently disclosed that Plaintiff Holmes allegedly "moved out of the nursing facility where he had been residing into a small group home in the community." [P.'s Motion for Class Cert. at 1 n.3, Dkt # 13.] This revelation certainly calls into question whether Plaintiff Holmes's circumstances are typical of the putative class members, and Defendants have the right to discover similar evidence regarding the other named Plaintiffs.

Lastly, and most importantly, Defendants have the right to take discovery regarding the standing of each Plaintiff to seek the requested relief. As recognized in cases cited in support of Plaintiffs' Motion for Class Certification, "any analysis of class certification must begin with the issue of standing." *Murray v. Auslander*, 244 F.3d 807, 810 (11th Cir. 2001) (quotations omitted) (cited in Exhibit 1, ADA Class Certification Cases, Dkt. # 14-1). *Murray* involved claims similar to those made here challenging the provision of community-based services to

developmentally disabled individuals. *Id.* at 809. After the district court had certified a class, the Eleventh Circuit remanded the case and directed the district court to conduct "an evidentiary inquiry to determine whether at least one named representative of the class has standing to bring a non-moot claim." *Id.* at 811. The same holds true here. Defendants have the right to conduct discovery into whether the named Plaintiffs have standing to bring non-moot claims, particularly given that at least one of the named Plaintiffs has already admitted to having received the relief requested by this suit.

Thus, Defendants request that, should their anticipated motion to dismiss be denied, Plaintiffs' Motion for Class Certification be abated to allow for a three-month period of class discovery.

III. CONCLUSION

For these reasons, Defendants respectfully request that Plaintiff's Motion for Class Certification be abated pending a ruling on Defendants' anticipated motion to dismiss and completion of class discovery, if necessary.

Respectfully submitted,

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Attorneys for Defendants

CERTIFICATE OF CONFERENCE

I certify that I contacted Garth Corbett, counsel for Plaintiffs, regarding abating Plaintiffs' Motion for Class Certification pending resolution of Defendants' anticipated motion to dismiss and completion of class discovery, as requested in this motion. Mr. Corbett indicated that Plaintiffs oppose the relief requested in this motion.

/s/ Nancy K. Juren
NANCY K. JUREN

CERTIFICATE OF SERVICE

I certify that a true and correct copy of *Defendants' Opposed Motion to Abate Plaintiffs' Motion for Class Certification* was served by CM/ECF system on January 27, 2011, upon the following individuals at the listed addresses:

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