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

ERIC STEWARD, by his next friend and mother, Lilian Minor, *et al.*,	§	
Plaintiffs,	§	
v.	§	CIV. NO. 5:10-CV-1025-OG
RICK PERRY, Governor, *et al*.	§	
Defendants.	§	

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

Plaintiffs Eric Steward, Linda Arizpe, Andrea Padron, Patricia Ferrer, Benny Holmes, and Zackowitz Morgan (collectively, "plaintiffs") hereby file this Response (the "Response") to Defendants' Opposed Motion to Abate Plaintiffs' Motion for Class Certification (the "Motion"), and respectfully request that the Court deny the Motion and refuse to abate proceedings on Plaintiffs' Motion for Class Certification. In support of their Response, plaintiffs state that:

PRELIMINARY STATEMENT

Defendants Rick Perry, Governor of the State of Texas, Thomas Suehs, Executive Commissioner of the Texas Health and Human Services Commission, and Chris Traylor, Commissioner of the Texas Department of Aging and Disability Services (collectively, the "defendants") seek to indefinitely suspend the decision regarding whether to certify a class in this matter, asserting that plaintiffs' motion for class certification is "premature" and that defendants need undefined discovery on class issues. Plaintiffs' class certification motion is not premature and the Motion must be denied because Local Rule CV-23 only states the latest

possible date on which a motion for class certification may be filed, and says nothing about how early it may be filed. Given Federal Rule 23's mandate that class certification is to be decided at an "early practicable stage," plaintiffs' class certification motion was timely filed. The Motion must also be denied because plaintiffs' class certification motion is properly before the court, and the defendants' request for a 90-day class discovery period is both unnecessary and excessive because they already have access to extensive information about the plaintiffs.

ARGUMENT AND AUTHORITIES

I. PLAINTIFFS' MOTION FOR CLASS CERTIFICATION IS PROPERLY FILED IN CONFORMITY WITH LOCAL RULE CV-23 AND FED. R. CIV. P. 23.

A. Defendants' Interpretation of Local Rule CV-23 is Contrary to the Purpose of Both Rule 23(c)(1)(A) of the Federal Rules of Civil Procedure and the Local Rule.

Pursuant to Rule 23(c)(1)(A) of the Federal Rules of Civil Procedure, "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." In order to implement the directive to decide class certification "at an early practicable time," many district courts have, by local rule, required parties seeking class action status to move for class certification within a relatively short time after commencement of the action. *See*, 8 Newberg on Class Actions § 24:78, Timing of Class Motions and Applicable Local Rules (4th ed.). These local rules exist to implement and provide context to the requirement of Rule 23(c)(1)(A) that class certification be determined early in the case. Douglas G. Smith, *The Intersection of Constitutional Law and Civil Procedure: Review of Wholesale Justice--Constitutional Democracy and the Problem of the Class Action Lawsuit (Part II)*, 104 Nw. U. L. Rev. Colloquy 330, 333-34 & n. 16 (2010). They are designed to ensure, not deter, the prompt filing of class certification motions. The defendants' interpretation of the Local Rule CV-23 to preclude the filing of a class motion until

after a motion to dismiss has been filed, briefed, and decided – a period that can easily exceed six months or even a year – is contrary to the purpose of both the local rule and Rule 23(c)(1)(A) and should be rejected.

B. Local Rule CV-23 Establishes a Deadline for Filing the Motion for Class Certification, Not a Waiting Period.

Under the local rules, plaintiffs' motion for class certification must be filed *no later* than 30 days after defendants file their first pleading. *See* W.D. Tex. R. CV-23. Fairly read, CV-23 establishes a *deadline*, after which a motion for class certification is untimely and deemed waived. While plaintiffs need not file a motion for class certification until after the defendants have filed a pleading, there is no reason why plaintiffs should be precluded from filing sooner if, as is the case here, they can establish that all of the criteria for class certification are met. There are, however, several reasons why plaintiffs might be prejudiced if precluded from moving for class certification for a substantial period of time. During the delay, defendants might take steps to moot out the named plaintiffs. If the named plaintiffs' claims become moot prior to filing the motion for class certification, the motion generally must be denied. *See Brunet v. City of Columbus*, 12 F.3d 390, 399-400 (6th Cir. 1993) (explaining that where a defendant moots the named plaintiffs' non-transitory claims before the filing of a class certification motion, the motion cannot be pursued). In addition, if class certification is substantially delayed, plaintiffs' ability to obtain discovery regarding the defendants' treatment of absent class members may be also delayed,

In any case, such delay can be prejudical. However, where the rights of individuals with developmental disabilities are at stake, such delay is unconscionable. As the facts of the named plaintiffs demonstrate, the defendants' failure to provide them with appropriate treatment, including federally-required specialized services sufficient to constitute active treatment, has not

just arrested their development, it has led to significant regression. This is a case that warrants expeditious prosecution, not foot-dragging and delay. Certainly, the Local Rules do not require the type of extensive delay that the defendants are attempting to obtain.[1]

II. DEFENDANTS' REQUEST TO DELAY THEIR RESPONSE TO THE CLASS CERTIFICATION MOTION TO CONDUCT DISCOVERY SHOULD BE DENIED.

Defendants contend that "there are numerous certification issues that require discovery…." *Def.'s Mot. to Abate* at 6. Specifically, defendants want the opportunity to determine (a) whether the class plaintiffs share common questions of fact, (b) whether plaintiffs' claims are typical of the proposed class, and (c) whether each plaintiff has standing. *Id.* at 6. To develop these certification issues defendants seek an additional 90 days to perform discovery.[2] *Id.* at 7. However, discovery is neither necessary nor appropriate for any of these issues, given the fact that the plaintiffs are seeking a (b)(2) class and that defendants are in possession of or are entitled to access much of the relevant material.[3]

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[1] Even if the Local Rules led to such an inappropriate result, Local Rule CV-1(e) provides that "[a]ny judge of this Court may waive any requirement of these rules regarding the administration of that judge's specific docket."

[2] Considering defendants' argument that plaintiffs' motion for class certification is not appropriate until defendants file an answer, which will not occur until after their motion to dismiss is decided, plaintiffs' class motion might very well be delayed for many months, if not longer, depending on the Court's calendar and ability to analyze and resolve the motion in a written decision. Furthermore, in the unlikely event that the disposition of defendant's motion to dismiss warrants modification of the class certification order, the Court retains the authority to alter or amend the class certification order at any time prior to final judgment. Fed. R. Civ. P. 23(c)(1)(C).

[3] Defendants cite to numerous cases to support their right to take discovery. These cases, however, concerned class-related issues that were considerably more complex, both legally and factually, and usually related to damage claims for a 23(c) class. For example, *Unger v. Amedisys, Inc.*, 401 F.3d 316, 320 (5th Cir. 2005) involved plaintiffs that were solicited over the internet and through newspaper advertisements. The class involved both persons and entities that purchased common stock and the class was seeking money damages. And as the court noted for class actions seeking money damages, the court is obligated to make additional findings of predominance and superiority; requirements the court called "far more demanding" than those required for a (b)(2) class. *Castano v. The American Tobacco Company* , 84 F.3d 734, 737-738 (5th Cir. 1996) involved a multi-state class action. The plaintiff class initially consisted of all nicotine dependent persons in the United States. Plaintiffs were also asking for compensatory and punitive damages. *Pinero v. Jackson Hewitt Tax Service Inc., et al.*, 594 F.Supp.2d 710 (E.D. La. 2009) involved a class action suit against a tax return preparer where the claims included state law claims of fraud, breach of contract, negligence, invasion of privacy, violation of Louisiana Database Security Breach Notification Law and violation of the Louisiana Unfair Trade Practices Act, as well a federal claim. Again, it was a case seeking monetary damages for the class.

A. No Discovery is Needed to Address Commonality.

Under Fed. R. Civ. P. 23(a)(2), there must be "questions of law or fact common to the class." "[F]actual differences among plaintiffs are not relevant when their legal theories are similar." *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985); *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982).

Here, plaintiffs' legal theories are indeed similar. Specific questions of law are common to the plaintiffs and the putative class including: (1) whether defendants violated Nursing Home Reform Amendments (NHRA), 42 U.S.C. § 1396r(e)(7) by (a) failing to establish a screening and assessment program that accurately determines if individuals with developmental disabilities can be appropriately placed in a community setting or should be admitted to a nursing facility; (b) failing to conduct professionally acceptable assessments to determine what specialized services such individuals require; (c) failing to provide an array of specialized services to all individuals with developmental disabilities in nursing facilities requiring them and in a manner that satisfies federal standards for active treatment; and (2) whether defendants are violating the Americans with Disabilities Act, 42 U.S.C. § 12131(2), and Section 504 of the Rehabilitation Act, 29 U.S.C § 794(a) by failing to: (a) offer alternate community services to all individuals with developmental disabilities living in nursing facilities but who can safely live in a community-based setting with appropriate supports, and (b) offer community services to individuals with developmental disabilities at risk of admission to nursing facilities, in order to divert the unnecessary admission of those individuals who can be appropriately served in a community-based or alternate setting. Pl. Compl. ¶¶ 210-238.

Of course, all that is required for class certification is one common legal issue. Because commonality can be determined solely based upon an analysis of the legal claims raised, there is no discovery to be had from plaintiffs regarding commonality

B. Defendants do not need Discovery Regarding Typicality

For typicality to be satisfied under Fed. R. Civ. P. 23(a)(3), "the claims . . . of the representative parties [must be] typical of the claims . . . of the class. . . ." That is, under typicality, "the critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality." *James*, 254 F.3d 551, 571 (5th Cir. 2001) (quoting 5 Moore's Federal Practice § 23.24[4] (3d 3ed. 2000)).

In this case, plaintiffs' claims are not only typical of those of the putative class, they are identical to those brought on behalf of the class. Because the focus of the typicality inquiry, like that of commonality, is on the legal claims raised, there is simply nothing for defendants to seek discovery about. *See Curtis v. Comm'r, Maine Dept. Human Servs.*, 159 F.R.D. 339, 341 (D. Me. 1994) (typicality is met because "representative Plaintiff is subject to the same statute and policy as the class members"); *Appleyard v. Wallace*, 754 F.2d at 958 ("[t]he similarity of the legal theories shared by plaintiffs and the class at large is so strong as to override whatever factual differences might exist and dictate a determination that the named plaintiffs' claims are typical of those of the members of the putative class"); *Risinger v. Concannon*, 201 F.R.D. 16, 22 (D. Me. 2001) (finding typicality where plaintiffs invoking same Medicaid Act provisions, allege same systemic deficiencies, and seek the same relief). Defendants' assertion that they need time to conduct discovery regarding typicality is simply untenable.

C. Defendants do not Need Discovery Regarding Plaintiffs' Standing.

Unlike commonality and typicality which can be satisfied by reference to the legal claims raised in the case, standing does focus on the factual posture of the plaintiffs. However, in the context of this case, it is difficult to imagine what information the defendants could seek that they do not already have.

Virtually all of the information relevant to the current situation of each named plaintiff is contained in the records of the nursing facilities in which they reside or have resided.[4] Not only do defendants have access to these records, they have already formally notified plaintiffs that they are obtaining those records. With those records, defendants will be able to ascertain the named plaintiffs' current living situation, medical status, treatment regimens, PASARR records, and more. It is difficult to imagine what information plaintiffs may have about their current situation that would be relevant to their standing that is not included in those records.

D. Alternatively, Should the Court Determine that Some Limited Discovery Regarding Class Issues Will be Allowed, the Court Should Establish a Tight Discovery Schedule.

Should the Court determine that some limited discovery regarding class issues should be allowed, the defendants should be required to submit their discovery requests forthwith and file their response to plaintiffs' motion for class certification promptly after receiving the plaintiffs' responses. Plaintiffs propose the following schedule, should the Court allow defendants' discovery request:

Defendants serve any discovery, limited only to class issues by February 15, 2011;
Plaintiffs serve their answers/responses by March 15, 2011;

[4] In the case of plaintiff Holmes, who recently transitioned from the nursing facility where he was residing when the complaint was filed to a small community-based group home, the relevant information regarding his situation is available from the nursing home where he resided and group home where he currently lives. Just as defendants have access to nursing facility records of all Medicaid residents, they also have access to similar records of Medicaid residents in community placements provided through the various Medicaid waiver programs. Mr. Holmes' community placement is through the Home and Community-based Services Waiver program.

Defendants file their response to plaintiffs' class certification motion by April 1, 2011; and Plaintiffs file their reply to defendants' response by April 15, 2011.

III. CONCLUSION

For the foregoing reasons, Defendants' Opposed Motion to Abate Plaintiffs' Motion for Class Certification should be denied. In the alternative, should the Court permit the defendants limited discovery on issues relating to the class, it should be subject to a very tight schedule so that the class motion can be fully briefed and ready for argument by the beginning of April, 2011. Finally, plaintiffs respectfully request all other relief to which they may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Garth Corbett, hereby certify that all parties have been served through the Court's ECF system, or if such party does not accept service through the Court's ECF system, then by first class mail.

/s/ Garth A. Corbett
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