IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

BRG OF DICKENS COUNTY, INC.,

Plaintiff,

v.

UNITED STATES ATTORNEY GENERAL JANET RENO, ON BEHALF OF THE DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION,

Defendant.

Civil Action No.
5:98-CV-169-C

JUDGMENT

For the reasons stated in the Court's order of even date,

IT IS ORDERED, ADJUDGED, AND DECREED that the above-styled and -numbered cause is **DISMISSED**.

Dated this 17th day of July, 1998.

SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

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ORDER

On this day the Court considered Defendant United States Department of Justice's Renewed Motion to Dismiss Plaintiff's First Amended Complaint, filed July 8, 1998. On July 14, 1998, Plaintiff filed a Response to Defendant's Motion to Dismiss. No reply was permitted. After considering all relevant arguments and evidence, the Court **DISSOLVES** the temporary restraining order entered in state court and **GRANTS** Defendant's Motion to Dismiss.

I.
BACKGROUND

On August 15, 1997, the Department of Justice notified Dickens County, Texas, that it was initiating an investigation of certain conditions of confinement at the Dickens County Correctional Center ("DCCC") in Spur, Texas. During the investigation, DCCC was operated by a private, for-profit corporation, BRG Correctional Management Systems, or a related entity,

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Plaintiff, BRG of Dickens County, Inc. ("BRG"), under contract with Dickens County.[1] During the fall and winter of 1997, the Department of Justice investigated DCCC by having experts tour the facility, by interviewing staff and inmates, and by reviewing documents. On June 12, 1998, a Justice Department attorney informed counsel for BRG that the Department was going to send a letter describing the results of its investigation of DCCC. On June 18, 1998, BRG obtained an *ex parte* temporary restraining order in state court enjoining the Department from sending its findings letter. Subsequently, on June 23, 1998, the Department of Justice filed a notice of removal in state court, removing BRG's state court action to this Court pursuant to 28 U.S.C. §§ 1442(a)(1) and 1446.

On June 29, 1998, this Court granted BRG leave to file a First Amended Complaint, which was filed on July 1, 1998. In its First Amended Complaint, BRG alleges that the Department of Justice violated a confidentiality agreement and failed to abide by all agreements between the Department and BRG.

II.
RULE 12(b)(6) STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), motions to dismiss raise the defense of failure to state a claim upon which relief may be granted. This motion is appropriate when the defendant or counter-plaintiff attacks the complaint because it fails to state a legally cognizable claim. In other words, a motion to dismiss an action for failure to state a claim "admits the facts

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[1]Evidently BRG no longer operates DCCC, which is now supposedly operated by another for-profit corporation, Correctional Services Corporation.

alleged in the complaint, but challenges plaintiff's rights to relief based upon those facts." *Tel-Phonic Servs., Inc. v. TBS Int'l. Inc.*, 975 F.2d 1134, 1137 (5th Cir. 1992).

While this motion is often filed before the first responsive pleadings of the defendant, it is not waived if it is not filed in the answer or pre-answer stage. FED. R. CIV. P. 12(h)(2).

The test for determining the sufficiency of a complaint under Rule 12(b)(6) was set out by the United States Supreme Court in *Conley v. Gibson*:

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

355 U.S. 41, 45-46 (1959); *see also Grisham v. United States*, 103 F.3d 24, 25-26 (5th Cir. 1997).

The *Conley* test is a rigorous standard, but subsumed within it is the requirement that the plaintiff state its case with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged. *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989).

In a Rule 12(b)(6) motion to dismiss, the allegations of the complaint must be taken as true. *Grisham*, 103 F.3d at 25. Further, the allegations in the complaint should be construed favorably to the pleader. *Oppenheimer v. Prudential Securities, Inc.*, 94 F.3d 189, 194 (5th Cir. 1996). This requirement is consistent with the well-established policy that the plaintiff be given every opportunity to state a claim. *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977).

III.
DISCUSSION

At the heart of BRG's lawsuit is an argument that the Attorney General has not complied with the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.C. § 1997 *et seq.* Under CRIPA, the Attorney General may institute civil actions in the name of the United States, for equitable relief to ensure the full enjoyment of constitutional rights by individuals incarcerated in state and local correctional facilities. 42 U.S.C. § 1997a(a). The statute requires the Attorney General to certify, at the commencement of an action, that the following pre-suit requirements have been met: (1) at least forty-nine days previously, she has notified in writing the governor of the state of the alleged constitutional deficiencies, detailing supporting facts and recommended remedial measures; (2) at least seven days prior to the commencement of an investigation, she has notified the governor of the state of her intention to commence an investigation; and (3) she believes the action is of general public importance. 42 U.S.C. § 1997(b)(1)-(3).

The legislative history of CRIPA specifically states that the Attorney General's certification process is not subject to judicial review.

> As with certification requirements in other statutes, the facts and judgments contained in the certification under this section [42 U.S.C. § 1997(b)] are not judicially reviewable and shall not be a matter of litigation in any way.

Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 96-897 at 14, *reprinted in* 1980 U.S.C.C.A.N. 832, 838; *see United States v. Commonwealth of Penn.*, 832 F. Supp. 122, 126 (E.D. Pa. 1993).

Courts which have considered review of the Attorney General's certification process have uniformly concluded that the Attorney General's certification is not subject to judicial review. *Pennsylvania*, 832 F. Supp. at 126; *United States v. State of Tenn.*, 798 F. Supp. 483, 488-89 (W.D. Tenn. 1992); *United States v. State of Illinois*, 803 F. Supp. 1338, 1340-41 (N.D. Ill. 1992); *United States v. State of New York*, 690 F. Supp. 1201, 1204-05 (W.D. N.Y. 1988).

This Court is in agreement with the other district courts which have passed judgment on the issue, and finds that it is without jurisdiction to inquire into the Attorney General's certification process, specifically the facts and judgments contained in the certification. Inasmuch as BRG's entire suit is based upon the way in which the Attorney General has gone about the certification process, and given the Court's lack of jurisdiction over this controversy, the Motion to Dismiss must be **GRANTED**. Furthermore, because granting leave to amend would be futile, BRG's Motion for Leave to Amend is **DENIED**. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Regarding the state court's temporary restraining order, the Court finds the state court was without jurisdiction to enter such an order. Implicit in the relationship between state and federal courts is the basic legal principle that state courts are without jurisdiction to review the discretion or enjoin the acts of federal officers. ". . . [A] state court is without power to review the discretion exercised by the Attorney General of the United States under federal law." *Rogers v. Calumet Nat'l Bank*, 358 U.S. 331 (1959); *see also State of Ala. v. Rogers*, 187 F. Supp. 848, 852 (M.D. Ala. 1960), *aff'd*, 285 F.2d 430 (5th Cir. 1961). Because the 110th Judicial District

Court of Dickens County, Texas, was without power to issue the injunction, the existing temporary restraining order is a legal nullity and is hereby **DISSOLVED**.

IV.
CONCLUSION

Because Congress has precluded judicial review of the Attorney General's certification process, and because state courts are without jurisdiction to enjoin the federal acts of federal officers, Defendant's Motion to Dismiss is **GRANTED** and the Temporary Restraining Order issued in the state court is **DISSOLVED**. All relief not expressly granted is denied.

SO ORDERED.

Dated this 17th day of July, 1998.

SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE