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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Russell B. Toomey, Plaintiff, v. **State of Arizona; Arizona Board of Regents, d/b/a University of Arizona,** a governmental body of the State of Arizona; et al., Defendants.	Case No. 4:19-cv-00035-TUC-RM (LAB) **JOINT PROPOSED DISCOVERY AND BRIEFING SCHEDULE WITH RESPECT TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**

On April 5, 2019, Plaintiff Dr. Toomey filed a Motion for Class Certification. (Doc. 28). On April 22, 2019, the Court granted the parties 'joint motion (a) to stay briefing on the motion for class certification and (b) to propose a discovery and briefing schedule for the motion no later than 10 calendar days following the Court's ruling on a pending motion to dismiss. (Doc. 38). At the parties 'request, the Court extended that deadline to January 17, 2020, (Doc. 73), and again to January 31, 2020, (Doc. 79).

Pursuant to those orders, the parties submit their respective proposals for a discovery and briefing schedule for Plaintiff's Motion for Class Certification.

Position of Plaintiff Dr. Toomey

Plaintiff respectfully requests that the Court set a schedule for resolving the Motion for Class Certification without additional discovery. "In determining whether to grant [pre-

certification] discovery the court must consider its need, the time required, and the probability of discovery resolving any factual issue necessary for the determination." *Kamm v. Cal. City Dev. Co.,* 509 F.2d 205, 210 (9th Cir. 1975). "Where the necessary factual issues may be resolved without discovery, it is not required." *Id.* Here, Dr. Toomey has filed a simple motion for class certification under Federal Rule of Civil Procedure 23(b)(2), which is the traditional method for vindicating civil rights claims. Motions to certify a class pursuant to 23(b)(2) are usually simple to resolve because they challenge a single governmental policy and seek only injunctive relief—not damages. As discussed in Plaintiff's Motion for Class Certification, Dr. Toomey has satisfied all the elements of class certification as a matter of law. All of the issues Defendants seek to develop through discovery are simply immaterial to Dr. Toomey's motion.

Despite Defendants' assertions to the contrary, no expert testimony is necessary to establish that the class is numerous to make joinder impossible. Motions for class certification are not governed by the Federal Rules of Evidence, and courts regularly draw reasonable inferences from publicly available data and common sense. *Valenzuela v. Ducey*, No. CV-16-03072-PHX-DGC, 2017 WL 6033737, at *4 (D. Ariz. Dec. 6, 2017). "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.'" 1 Alba Cone & Herbert B. Newberg, Newberg on Class Actions § 3.3 (4th ed. 2002)). Moreover, "classes including future claimants generally meet the numerosity requirement due to the impracticality of counting such class members, much less joining them." *J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019).

In these circumstances, the most efficient course of action is for the parties to brief the Motion for Class Certification on the current record. In opposing the motion, Defendants are free to argue that disputed questions of fact preclude certification. If the Court finds that the record is insufficient to carry Dr. Toomey's burden or that disputed

questions of fact preclude certification, the Court can deny the motion without prejudice to allow discovery to take place. See *Jensen v. Natrol LLC*, No. 17-CV-03193-VC, 2020 WL 416420, at *1 (N.D. Cal. Jan. 27, 2020) (denying the motion for class certification "without prejudice to filing a renewed motion on a stronger evidentiary record").

By contrast, Defendants 'proposal for the Court to delay ruling on the motion while the parties engage in unnecessary and irrelevant discovery disregards the instruction in Federal Rule of Civil Procedure 23(c)(1)(A) that "[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 this case, the Complaint was filed over a year ago, on January 23, 2019, (Doc. 1), and the Motion for Class Certification was filed on April 4, 2019 (Doc. 28). As a courtesy, Dr. Toomey agreed to stay briefing on the Motion for Class Certification while the Defendants 'Motion to Dismiss was pending and then agreed to two additional extensions of time for the parties to discuss an appropriate briefing schedule. Defendants now seek an additional eight months of fact discovery simply to respond to a class certification motion that can be decided on the undisputed record. Such a delay is unreasonable and would be prejudicial to Dr. Toomey and the class he seeks to represent. One of the benefits of certifying a class action is that it prevents the class's claims from becoming moot if some unforeseen event—such as a new job or an accident—moots the claim of the class representative. *See Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Each day that passes without certification deprives the class of that protection.

Accordingly, Dr. Toomey proposes the following schedule.

- Plaintiff shall file a renewed Motion for Class Certification within 21 days. A new motion is necessary to account for new legal developments that occurred in the past year and to provide new affidavits from attorneys at Willkie Farr & Gallagher, LLP, who will be filing notices of appearance to replace Aiken Schenk as co-counsel.

- Defendants shall file their opposition to certification within 30 days of Plaintiff's motion.
- Plaintiff shall file a reply within 21 days of Defendant's opposition.

Position of the State Defendants

Defendant State of Arizona, Andy Tobin, and Paul Shannon ("State Defendants") respectfully request that the Court permit reasonable discovery limited to class certification issues to occur prior to the full briefing of Plaintiff's Motion for Class Certification. Plaintiff is taking the position that State Defendants should not be entitled to "additional discovery" on class certification issues. However, Plaintiff's assertion is misleading on two fronts: first, absolutely no class certification or merits discovery has yet occurred in this matter; and, second, as set forth below, such discovery is necessary for the adjudication of the issue of class certification.

Plaintiff's extreme position that absolutely no discovery should be permitted on class certification issues is undercut by the fact that Plaintiff previously stipulated and jointly requested that this Court permit the parties to submit a *discovery and briefing* schedule to the Court – *i.e.* Plaintiff clearly previously foresaw that a discovery schedule would be needed in this matter. (*See* Dkts. 36 and 38.) Indeed, Plaintiff did not notify Defendants of his about-face on the issue of class discovery until very recently. Furthermore, Plaintiff's position is all the more troublesome because Plaintiff is requesting that the Court prevent any discovery on class certification issues while simultaneously giving notice to the Court that he intends on filing a renewed Motion for Class Certification. Thus, Plaintiff is requesting that the Court deny all discovery on a renewed Motion for Class Certification that Defendants have not yet had the opportunity to review. Such a position is patently contrary to the requirement that the trial court "must conduct a rigorous analysis to determine whether party seeking class certification has met the prerequisites of Rule 23." *In re Hyundai & Kia Fuel Econ. Litig.*, 881 F.3d 679, 690 (9th

Cir.), *reh'g en banc granted sub nom. In re Hyundai And Kia Fuel Econ. Litig.*, 897 F.3d 1003 (9th Cir. 2018), and *on reh'g en banc*, 926 F.3d 539 (9th Cir. 2019) (quoting *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001)).

Plaintiff attempts to couch this as a "simple" motion for class certification, in which there are no factual issues to be resolved. To the contrary, there are significant questions whether this case is appropriate for class certification, especially with respect to issues of numerosity, commonality and typicality. For example, Plaintiff purports to meet the numerosity threshold by citing to a single study by the Williams Institute and using broad extrapolation. Plaintiff's reference to one study regarding gender nonconformity (and its supposition that it meets numerosity based on the statistics cited in the study) need not be accepted as "fact" – especially given Plaintiff's admission that not all people who identify as transgender suffer from gender dysmorphia and not all people who suffer from gender dysmorphia seek transition-related surgical care. State Defendants should be able to challenge Plaintiff's statistical assertions regarding numerosity. State Defendants are unable to fully do so without some discovery (including expert discovery) on the issue.

Accordingly, State Defendants intend on engaging in discovery regarding whether Plaintiff truly can meet the numerosity threshold including subpoenas to the insurance providers and expert witnesses to challenge Plaintiff's statistical representations with respect to numerosity. In addition, State Defendants will propound limited written discovery and take the deposition of Plaintiff with respect to other key class certification issues such as commonality, typicality, class definition, and adequacy.

In the Ninth Circuit, a "class action determination can only be decided after the district court undertakes a 'rigorous analysis 'of the prerequisites for class certification." *ABS Entm t, Inc. v CBS Corp.*, 908 F.3d 405, 427 (9th Cir. 2018) (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011)). In this matter, in order for the Court to undertake the analysis of class certification, particularly on the issue of numerosity,

discovery is required. *Kamm v. California City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975) ("The propriety of a class action cannot be determined in some cases without discovery;" "To deny discovery in [such cases] would be an abuse of discretion."); *Doninger v. Pac. Nw. Bell, Inc.,* 564 F.2d 1304, 1313 (9th Cir.1977) (stating that "the better and more advisable practice for a District Court to follow is to afford the litigants an opportunity to present evidence as to whether a class action was maintainable" and that such an opportunity requires "enough discovery to obtain the material").

As set forth above, State Defendants strongly dispute Plaintiff's class action allegations, particularly regarding the issues of numerosity. The pleadings alone will not resolve the questions of class certification – *e.g.* the issue of numerosity requires the Court to make a determination not only as to whether statistical evidence cited by Plaintiff is an appropriate authority to establish numerosity but also as to the reliability and validity of such statistical evidence in the State of Arizona and among state employees. This issue cannot be resolved without vigorous discovery.

Based on the foregoing, State Defendants respectfully request that the Court permit reasonable discovery limited to class certification issues to enable the parties to determine whether class certification is appropriate. The proposed schedule seeking six months of discovery takes into account factors such as: (i) the likely time needed to subpoena the insurance providers and resolve with them any HIPAA issues; (ii) expert discovery including expert depositions; and (iii) response time pursuant to Federal Rules of Civil Procedure for written discovery. State Defendants request that the Court enter the following proposed discovery schedule and discovery limits:

- Plaintiff shall file a renewed Motion for Class Certification on or before **February 21, 2020**.
- Plaintiff shall provide full and complete expert disclosures required by Rule 26(a)(2)(A)-C of the Federal Rules of Civil Procedure, no later than **May 1, 2020.**

- Defendants shall disclose expert witness regarding class certification issues and serve expert witness reports no later than **June 1, 2020.**
- The parties shall propound written discovery regarding class certification issues no later than **June 16, 2020.**
- The party shall serve rebuttal expert reports with respect to class certification issues no later than **July 10, 2020.**
- The parties shall complete non-expert and expert discovery regarding class certification issues, including the completion of expert, party, and non-party depositions, on **July 31, 2020**.
- Defendants shall file their opposition to certification within 30 days of the close of Discovery – i.e. on or before **August 31, 2020**.
- Plaintiff shall file a reply within 15 days of Defendant's opposition – i.e. on or before **September 15, 2020**.
- Within 15 calendar days following the Court's ruling on the Motion for Class Certification, the parties will file a joint proposed schedule for discovery on the merits and other remaining requisite deadlines in the case.

Position of the University Defendants

Defendants Arizona Board of Regents, Ron Shoopman, Larry Penley, Ram Krishna, Bill Ridenour, Lyndel Manson, Karrin Taylor Robson, Jay Heiler, and Fred DuVal (collectively, "University Defendants") take no position on Plaintiff's Motion for Class Certification on the existing record. University Defendants will abide by the result reached whether by agreement of Plaintiff and State Defendants or by an order of this Court.

Respectfully submitted this 31st day of January, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2020 I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by mail as indicated on the Notice of Electronic Filing.

/s/ Christine K. Wee
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