

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ROBERT S. BENNETT, NACHAEL
FOSTER, ANDREW BAYLEY, and others
similarly situated,

Plaintiffs,

v.

STATE BAR OF TEXAS,

Defendant.

Civil Action No. 4:21-cv-02829

**DEFENDANT STATE BAR OF TEXAS' EMERGENCY
MOTION TO EXTEND THE DEADLINE TO RESPOND TO
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Pursuant to Federal Rule of Civil Procedure 6(b)(1)(A) and this Court's Local Rule 7.8, Defendant State Bar of Texas respectfully moves to extend the deadline for it to file a response to Plaintiffs' Motion for Class Certification (ECF No. 23). Defendant's response is currently due by March 16, 2022. *See* Local Civil R. 7.4. Under the Local Rules' default briefing schedule, it is possible that this extension motion would not be resolved before Defendant's current response deadline, and Plaintiffs have not agreed to Defendant's request for a ruling on an expedited basis. Therefore, Defendant requests that the Court treat this as an emergency motion and provide a ruling on an expedited basis. *See* Court Procedures and Practices Section A.4.

Defendant requests that the Court postpone the deadline for its response until after the Court has ruled on Defendant's pending motions to dismiss this action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) (ECF No. 12), or, in the alternative, to transfer the case to the U.S. District Court for the Western District of Texas, Austin Division, under 28 U.S.C. § 1404(a) (ECF No. 13). If granted, Defendant's pending motions would either moot Plaintiffs' Motion for Class Certification or cause it to be heard by the Western District, which would obviate

the need for Defendant to file a response in this Court. Postponement, therefore, would conserve both party and judicial resources, and is also particularly appropriate where, as here, Defendant argues that the Court lacks subject-matter jurisdiction over this action. *See Warnock v. Pecos Cty.*, 88 F.3d 341, 343 (5th Cir. 1996) (explaining that “sovereign immunity deprives the court of jurisdiction”).

Pursuant to this Court’s Local Rule 7.1(D), counsel for Defendant has conferred with Plaintiffs’ counsel about this motion, and counsel for the parties do not agree regarding the motion’s disposition.

I. Background

On August 30, 2021, Plaintiffs—three active members of the Texas State Bar who reside in Harris and Tarrant Counties—filed their complaint, naming only the “State Bar of Texas” as a defendant. *See* Compl. ¶¶ 2, 18 (Aug. 30, 2021), ECF No. 2. Plaintiffs purport to represent a putative class consisting of “all Texas-licensed attorneys, past or present, and on either active or inactive status, who have endured First Amendment violations because of the Texas Bar’s relevant unlawful conduct.” *Id.* ¶ 21. They assert causes of action under the First Amendment and 42 U.S.C. § 1983, as well as state-law claims of money had and received and unjust enrichment. *Id.* ¶¶ 25-37. Among other things, they seek “compensatory and/or punitive damages”; injunctive relief, including an order requiring the Bar to refund previously paid membership fees; and “equitable monetary relief.” *Id.* at 14-15; *see also id.* ¶ 5 (seeking “a refund of the full amount paid in membership dues to the [Bar] during recent years, plus court costs, damages and expenses including attorney’s fees”).

On January 24, 2022, Defendant State Bar of Texas filed motions to dismiss this action under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), or, in the alternative, to transfer this

case to the U.S. District Court for the Western District of Texas, Austin Division, under 28 U.S.C. § 1404(a). Defendant’s motion to dismiss argues that the Court lacks subject-matter jurisdiction over this action because the Texas State Bar is entitled to sovereign immunity, and also that Plaintiffs fail to state a claim under 42 U.S.C. § 1983 because the State Bar is not a “person” subject to suit under § 1983. Alternatively, Defendant requested transfer of this action—including the issues raised in Defendant’s motion to dismiss—to the Western District, which has overseen the litigation on which Plaintiffs’ complaint relies. *See McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), *petitions for cert. filed*, No. 21-800 (U.S. Nov. 24, 2021), and No. 21-974 (U.S. Dec. 30, 2021). Plaintiffs’ responses to Defendant’s motions to dismiss or transfer are due by March 11, 2022. *See* Order (Feb. 16, 2022), ECF No. 21.

On February 23, 2022, Plaintiffs filed a “Notice of Motion for Class Certification,” asking the Court to certify a proposed class and three sub-classes under Federal Rule of Civil Procedure 23(a) and 23(b)(2) (ECF No. 23). Plaintiffs filed their class certification motion before the resolution of Defendant’s outstanding motions to dismiss or transfer, before Defendant has answered Plaintiffs’ complaint, before the Court has held an initial scheduling conference, and before the Parties have conducted any discovery in this case. Defendant’s response to Plaintiffs’ Motion for Class Certification is currently due by March 16, 2022. *See* Local Civil R. 7.4; Court Procedures and Practices Section B.5(e).

II. The Court Should Grant Defendant’s Request to Postpone the Deadline to Respond to Plaintiffs’ Class Certification Motion

There is ample good cause to postpone Defendant’s deadline to respond to Plaintiffs’ Motion for Class Certification until after the Court rules on Defendant’s pending motions to dismiss or transfer. *See* Fed. R. Civ. P. 6(b)(1)(A). First, considerations of sound case management and judicial economy favor ruling on Defendant’s dispositive motion to dismiss (including

Defendant’s claim of sovereign immunity) before ruling on class certification. Under Federal Rule of Civil Procedure 23(c)—which provides that class certification should be decided “[a]t an early practicable time”—district courts have broad “flexibility when presented with both a dispositive motion and a motion for class certification,” and may “reserve decision on a class certification motion pending disposition of a motion to dismiss.” *In re Starbucks Emp. Gratuity Litig.*, 264 F.R.D. 67, 75 (S.D.N.Y. 2009) (citing *Project Release v. Prevost*, 722 F.2d 960, 963 (2d Cir. 1983)), *aff’d sub nom. Barenboim v. Starbucks Corp.*, 549 F. App’x 1 (2d Cir. 2013); *see also Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 218 (5th Cir. 1998) (recognizing district court’s “inherent power to control its docket” including “the authority to decide the order in which to hear and decide pending issues”). Courts thus routinely rule on dispositive motions first, as “the failure of the entire claim moots the class action issue.” *Jacobs v. Gromatsky*, 494 F.2d 513, 514 (5th Cir. 1974) (per curiam); *see Floyd v. Bowen*, 833 F.2d 529, 534-35 (5th Cir. 1987) (district court properly denied class certification because it found against plaintiffs on merits); *Vallejo v. Garda CL Sw., Inc.*, 56 F. Supp. 3d 862, 874 (S.D. Tex. 2014) (granting summary judgment for defendant and denying plaintiffs’ motion to bring collective action as moot); *see also Saroza v. Lyons, Doughty & Veldhuis, P.C.*, No. 17-00523, 2021 WL 2549273, at *4 (D.N.J. June 22, 2021) (collecting cases), *appeal filed*, No. 21-2350 (3d Cir. July 19, 2021).

Ruling on a motion to dismiss first is particularly appropriate where, as here, the Court has yet to resolve the threshold issue of whether it has subject-matter jurisdiction over the action, which implicates “the court’s fundamental power even to hear the suit.” *Ford v. NYLCare Health Plans of Gulf Coast, Inc.*, 301 F.3d 329, 333 (5th Cir. 2002) (citation omitted) (explaining that with limited exceptions, “Article III standing must be decided prior to . . . class certification”); *see Saroza*, 2021 WL 2549273, at *3 (“Courts generally decide standing issues before class

certification issues because standing is jurisdictional.”); *see also Warnock v. Pecos Cty.*, 88 F.3d 341, 343 (5th Cir. 1996) (explaining that claims barred by sovereign immunity should be dismissed under Rule 12(b)(1) because “sovereign immunity deprives the court of jurisdiction”).

Second, postponing Defendant’s deadline to respond to Plaintiffs’ motion would “protect both the parties and the court from needless and costly further litigation” and conserve party and judicial resources, especially if the Court grants either of Defendant’s pending motions. *Vallejo*, 56 F. Supp. 3d at 874 (quoting *Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984)). Defendant’s motion to dismiss, if granted, would moot Plaintiffs’ Motion for Class Certification, obviating the need for Defendant to file a response at all. Alternatively, if the Court transfers this case to the Western District, which has overseen the *McDonald* litigation on which Plaintiffs’ complaint relies, then it would be appropriate for the Western District to also decide Plaintiffs’ class certification motion and set the associated briefing schedule. In either scenario, Defendant would not need to file its response in this Court, and the Court would not need to consider that response.

Finally, Defendant’s requested extension would not cause prejudice to Plaintiffs. *See* 4B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1165 (4th ed. 2008) (“[A]n application for extension of time under Rule 6(b)(1)(A) normally will be granted in the absence of bad faith on the part of the party seeking relief or prejudice to the adverse party.”). Plaintiffs can hardly complain about Defendant’s request for an extension considering their *own* delays in pursuing this case and their recent extension requests—including one they made just *one day* after filing their Motion for Class Certification. *See* Pls.’ Reply to Pls.’ Show Authority Mot. ¶ 9 (Feb. 24, 2021), ECF No. 24 (requesting extension to respond to Defendant’s motions to dismiss or transfer). Plaintiffs cannot show that they would be harmed by Defendant’s requested extension.

III. Conclusion

Defendant State Bar of Texas respectfully requests that the Court postpone the deadline for it to respond to Plaintiffs' Motion for Class Certification until after the Court has ruled on Defendant's pending motions to dismiss or transfer.

Dated: March 2, 2022

Respectfully submitted,

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Counsel for Defendant State Bar of Texas

CERTIFICATE OF CONFERENCE

Pursuant to this Court's Local Rule 7.1(D), I certify that on February 28, 2022, I conferred with Plaintiffs' counsel regarding the relief sought in this motion, and that the parties do not agree regarding the motion's disposition.

Dated: March 2, 2022

/s/ Patrick W. Mizell
Patrick W. Mizell
Counsel for Defendant State Bar of Texas

CERTIFICATE OF SERVICE

I certify that on March 2, 2022, I electronically filed the foregoing motion with the Clerk of the Court for the U.S. District Court for the Southern District of Texas by using the Court's CM/ECF system, which will send notification of such filing to the following:

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Dated: March 2, 2022

/s/ Patrick W. Mizell
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CIVIL ACTION NO. 4:21-CV-02829

ORDER

Defendant State Bar of Texas' Motion to Extend the Deadline to Respond to Plaintiffs' Motion for Class Certification is GRANTED.

IT IS THEREFORE ORDERED that Defendant's deadline to respond to Plaintiff's Motion for Class Certification (ECF No. 23) is postponed. A new deadline for Defendant's response will be set following entry of the Court's Orders ruling on Defendant's pending Motion to Dismiss (ECF No. 12) and Defendant's pending Motion to Transfer (ECF No. 13), unless the Court's Orders render Plaintiff's Motion for Class Certification moot.

It is so ORDERED.

Date

The Honorable Alfred H. Bennett
United States District Judge