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**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION**

JOHN DOE #1; JUAN RAMON MORALES;)
JANE DOE #2; JANE DOE #3; IRIS)
ANGELINA CASTRO; BLAKE DOE; BRENDA)
VILLARRUEL; and LATINO NETWORK,)

Plaintiffs,)

v.)

DONALD TRUMP, in his official capacity as)
President of the United States; U.S.)
DEPARTMENT OF HOMELAND SECURITY;)
KEVIN MCALEENAN, in his official capacity as)
Acting Secretary of the Department of Homeland)
Security; U.S. DEPARTMENT OF HEALTH)
AND HUMAN SERVICES; ALEX M. AZAR II,)
in his official capacity as Secretary of the)
Department of Health and Human Services; U.S.)
DEPARTMENT OF STATE; MICHAEL)
POMPEO, in his official capacity as Secretary of)
State; and UNITED STATES OF AMERICA,)

Defendants.)

CASE NO. 3:19-cv-01743-SI

**DEFENDANTS’ MOTION FOR
EXTENSION OF TIME TO RESPOND
TO PLAINTIFFS’ MOTION FOR
CLASS CERTIFICATION**

EXPEDITED HEARING REQUESTED

**DEFENDANTS' MOTION FOR EXTENSION OF TIME TO RESPOND
TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Defendants request a 14-day extension of time, up to and including December 6, 2019, to file a response to Plaintiffs' Motion for Class Certification, ECF No. 44. Pursuant to Local Rule 7-1, the Parties conferred on the relief requested in this motion by telephone on November 15, 2019. Counsel for Plaintiffs represented that Plaintiffs oppose this request for a brief extension of the briefing schedule. The Parties also conferred on an expedited schedule for hearing of this extension motion. For the reasons set out below, Defendants request a ruling on this motion by Wednesday, November 20, 2019. To that end, the Parties stipulated to a briefing schedule where Defendants would file this motion today, Monday, November 18, 2019, and Plaintiffs agreed to file any response by tomorrow, Tuesday, November 19, 2019.

Defendants respectfully request that the Court grant this motion and provide Defendants a reasonable amount of time to brief class certification. Good cause exists for this request because (1) a ruling on class certification is premature at this stage of the case, (2) Plaintiffs have not provided basic information on the pseudonymous Plaintiffs that Defendants may need to fully respond to the Motion for Class Certification, and (3) Defendants have multiple competing deadlines in this case, including the upcoming production of documents and the hearing on Plaintiffs' Motion for a Preliminary Injunction.

Plaintiffs filed their Motion for Class Certification late in the evening on Friday, November 8, 2019, ECF No. 44, on the same day Plaintiffs filed their Motion for a Preliminary Injunction, ECF No. 46.¹ As set out in Defendants' Opposition to Plaintiffs' Motion for

¹ Plaintiffs rushed to file their class certification motion at the same time as their preliminary injunction motion and did not properly meet and confer on the motion before filing. Instead, Plaintiffs sent an email on the afternoon of November 8, 2019, stating that Plaintiffs intended to file a motion for class certification that same day and asked Defendants to provide their position on the motion by 5:00 p.m. EST. Defendants responded promptly via email and

Preliminary Injunction, ECF No. 84, there are a range of problems with Plaintiffs' claims in this case. All of their claims are either non-justiciable, should be dismissed because Plaintiffs lack standing or, for other reasons, the Court lacks jurisdiction to review them, or they fail to state a claim upon which relief can be granted. *See id.* at 11-34. It is thus premature to consider Plaintiffs' request to certify a class before Defendants have had an opportunity to respond to the Complaint and the Court has had an opportunity to assess the viability of Plaintiffs' claims based on a dispositive motion. *See Wade v. Kirkland*, 118 F.3d 667, 670 (9th Cir. 1997) (noting that it may be appropriate "to resolve a motion for summary judgment or motion to dismiss prior to ruling on class certification"); *Cornilles v. Regal Cinemas, Inc.*, No. 00-173-AS, 2000 WL 1364236, at *1 (D. Or. Sept. 12, 2000) ("Before transforming this case into a class action, a determination of the alleged merits of the action would benefit the court, the parties, and the potential parties.").

Class certification is a significant decision that should not be rushed as it has important implications for the conduct of the case. Accordingly, there are "many valid reasons that may justify deferring the initial certification decision," and "[t]ime may be needed to gather information necessary to make the certification decision." *See* Fed. R. Civ. P. 23(c)(1)(a) advisory committee's note to 2003 amendment; *see also Roskelley v. Collection Bureau, Inc.*, No. 1:18-CV-00561-CWD, 2019 WL 5053260, at *6 (D. Idaho Oct. 8, 2019). Among other things, Defendants should be given at least some time to evaluate and investigate the allegations

stated that Defendants opposed the motion. Plaintiffs made no attempt to telephonically meet and confer as required by Local Rule 7-1(a)(1)(A). Nonetheless, Plaintiffs represented in their motion that they "made a good faith effort to resolve the dispute" in "accordance with Local Rule 7-2." ECF No. 44 at 1. This Court may want to consider requiring Plaintiffs to comply with the Local Rules and re-file their premature motion for class certification. *See* Local Rule 7-1(a)(3) ("The Court may deny any motion that fails to meet this certification requirement.").

of each of the named Plaintiffs, including the basis of their alleged harms and standing, the typicality of their claims, and their adequacy to represent a class. *See, e.g., Grodzitsky v. Am. Honda Motor Co., Inc.*, No. 2:12-cv-1142, 2013 WL 690822, at *10 (C.D. Cal. Feb. 19, 2013) (determining whether matter should proceed as a class action is premature where “Defendant has yet to file an answer”); *cf. Shein v. Canon U.S.A., Inc.*, No. 08-07323, 2009 WL 3109721, at * 10 (C.D. Cal. Sept. 22, 2009).

Here, Plaintiffs have not provided basic information about the named Plaintiffs that must be obtained if Defendants are to have any opportunity to investigate their allegations before responding to those allegations in briefing on Plaintiffs’ motion for class certification. On November 2, 2019, at the hearing on Plaintiffs’ motion for a temporary restraining order, the Court granted Plaintiffs’ Motion to Proceed Under Pseudonym before Defendants had an opportunity to file a response to that motion. *See* TRO Hearing Tr. 6:25-7:1. The Court noted at that time: “If at some later time the defendants want me to reconsider, you certainly have leave to ask me to reconsider, but for purposes of today’s hearing, that motion is granted.” *Id.* 7:2-7:5.

On November 8, 2019, Defendants contacted Plaintiffs and noted that Defendants’ decision on whether to ask the Court to reconsider would depend in part on whether Plaintiffs would agree to disclose some basic information, such as the names of the pseudonymous Plaintiffs, that Defendants would need to defend this lawsuit. Defendants followed up with Plaintiffs several times during the week of November 11, and emphasized that Defendants needed to be able to evaluate the allegations of the pseudonymous Plaintiffs before responding to Plaintiffs’ Motion for a Preliminary Injunction. However, Plaintiffs refused to provide the names of the pseudonymous Plaintiffs before Defendants’ deadline to respond to Plaintiffs’ Motion for a Preliminary Injunction, and to date still have not provided the names.

This information would have been helpful to Defendants' response to the preliminary injunction motion, and it is essential to addressing the motion for class certification. As noted in Defendants' response, ECF No. 84 at 35 n.10, Plaintiffs had alleged that they had consular interviews scheduled for the first week of November and had used this fact to argue for a temporary restraining order at the November 2, 2019 TRO hearing. *See, e.g.*, ECF No. 7, Motion for Temporary Restraining Order, at 2; ECF No. 34, Hearing Tr. 18:18-25. However, in their motion for a preliminary injunction, Plaintiffs admit that they already had requested to postpone those interviews before that hearing took place. *See* PI Mot. 36-37 & n.51; *see also* ECF No. 55, Decl. of John Doe #1, ¶ 14 ("On November 1, 2019, we asked the Consulate to postpone the interview."); ECF No. 60, Decl. of Brenda Villarruel, ¶ 10 ("On or about October 30, 2019 my husband was told via phone that he could cancel his interview or reschedule his interview . . . We are hoping that he will be able to reschedule his interview in the next few months.").

Defendants must have an opportunity to investigate Plaintiffs' allegations, including those of the pseudonymous Plaintiffs, before responding to Plaintiffs' Motion for Class Certification. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (Rule 23 "is not a mere pleading standard," and a party seeking class certification "must affirmatively demonstrate compliance with the Rule"). In responding to Plaintiffs' motion, Defendants will need to brief, among other things, whether Plaintiffs' claims are typical of the proposed class and whether they will fairly and adequately represent the class. Fed. R. Civ. P. 23(a). Defendants should not be limited to Plaintiffs' mostly anonymous allegations, without any ability to investigate or test the veracity of those allegations, when responding to the motion for class certification.

Plaintiffs' request that the Court certify a nationwide or worldwide class before Defendants have had an opportunity to respond to the Complaint or even obtain basic information about who is bringing this lawsuit is an attempt to evade recent Ninth Circuit

decisions criticizing and narrowing nationwide injunctions where, as here, Plaintiffs have not shown that the alleged harm could not be remedied by a narrower injunction that addresses the actual parties who have brought suit. *See, e.g., East Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029-1030 (9th Cir. 2019); *City and County of San Francisco v. Trump*, 897 F.3d 1225, 1244 (9th Cir. 2019). The motion for a preliminary injunction can fully remediate the alleged injury without requiring rushed class action certification proceedings. Indeed, Plaintiffs admitted in providing Defendants only hours of notice of the coming class certification motion that their motivation in filing so quickly and without a full meet and conferral process was to encourage this Court to issue improper nationwide relief in response to their motion for a Preliminary Injunction. As Plaintiffs stated in their November 8 email: “Plaintiffs are filing the motion for class certification so that the court understands the full scope of relief that is necessary, particularly in light of Defendants’ arguments at the TRO hearing that the court should limit the scope of relief to the named plaintiffs only.”

Here, without knowing who the Plaintiffs are, Defendants cannot adequately assess or respond to Plaintiffs’ allegations of harm or their class allegations. On November 15, 2019, the Parties conferred telephonically and Plaintiffs proposed releasing the names of the pseudonymous Plaintiffs and other information subject to a protective order. Plaintiffs agreed to provide a draft protective order by today, Monday, November 18, 2019, but as of this filing, have not done so. Defendants should have a reasonable amount of time to assess Plaintiffs’ allegations after receiving their names and other basic information before having to respond to Plaintiffs’ Motion for Class Certification. Even if Plaintiffs were to provide this information today, Defendants would have limited time to investigate their allegations before the current deadline for Defendants’ response.

In addition, by filing their motion for class certification on November 8, 2019, Plaintiffs ensured that, without an extension, Defendants' response would be due at the same time as a range of conflicting deadlines. Under Local Rule 7-1(e), Defendants' response to the motion for class certification is due within 14 days, by Friday November 22, 2019. This is the same date the Court previously set for the expedited hearing on Plaintiffs' Motion for a Preliminary Injunction. *See* ECF No. 32. Because Defendants' counsel is located in Washington, D.C., counsel will also need to travel from Washington, D.C., to Portland, Oregon on the day before the hearing.

Defendants have had and will have several other deadlines in this case during this same 14-day time period between November 8 and November 22, 2019. After Plaintiffs filed their Motion for a Preliminary Injunction on Friday, November 8, 2019, Defendants had four business days to draft and file a response by the Court-ordered deadline of November 15, 2019. *See* ECF Nos. 32, 46. In the meantime, Plaintiffs also filed a Motion to Compel Administrative Record on Monday, November 11, 2019 (the federal Veterans Day holiday), ECF No. 68, and requested expedited hearing, which required Defendants to spend the next two days briefing their response. ECF No. 76. On Friday, November 15, 2019, the Court granted, in part, the Motion to Compel Administrative Record, and set a deadline of this Wednesday, November 18, 2019—two days from today—for Defendants to collect and produce certain documents. ECF No. 83. Given these competing deadlines, Defendants have had limited time to review and prepare a response to Plaintiffs' class certification motion.

For these reasons, Defendants request a reasonable 14-day extension of time, up to and including December 6, 2019, to respond to Plaintiffs' Motion for Class Certification, ECF No. 44. Further, Defendants reserve the right to seek additional time in the event the issues regarding the identities of the anonymous Plaintiffs are not resolved or if more time is needed to determine whether they are appropriate class representatives. Because Defendants' counsel attending the

preliminary injunction hearing will be traveling on Thursday, November 21, 2019, Defendants respectfully request a ruling on this motion by Wednesday November 20, 2019, so that Defendants can make appropriate arrangements.

DATED: November 18, 2019

Respectfully submitted,

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