

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

STACY FOSTER, et al.,

Plaintiffs,

v.

COMMONWEALTH OF  
MASSACHUSETTS, et al.,

Defendants.

C.A. No. 1:18-CV-10354

**JOINT SUBMISSION ON CLASS CERTIFICATION**

Plaintiffs Stacy Foster, Jamie Kimball, Jonathan Riley, and Nicole Westcott, and the Defendants (“Commonwealth Defendants”) hereby respond to the Court’s May 9, 2019 order that “counsel shall jointly propose a schedule for filing a motion for class-certification or shall set forth any reasons the question of class-certification and appointment of class counsel should not be addressed promptly.” ECF No. 44 (citing Fed. R. Civ. P. 23(c)(1)). Rule 23(c)(1)(A) provides that the Court must determine whether to certify the action as a class action “[a]n early practicable time,” but the parties agree that class certification and appointment of class counsel at this time is not practicable for primarily two reasons.

First, since the parties filed their joint motion for stay on May 8, 2019, along with a copy of the status report that the parties filed with the Supreme Judicial Court, ECF No. 43, the parties have made further progress toward negotiating the broad outlines of a procedural mechanism for resolving certain claims in the Amended Complaint on behalf of the putative class of nearly 40,000 individuals. The proposed settlement mechanism under discussion would entail, inter alia, Plaintiffs filing in state court a class action seeking relief regarding certain of Plaintiffs’

claims, including exactions for which the Commonwealth Defendants agree that *Nelson v. Colorado*, 137 S. Ct. 1249 (2017), requires the return of money paid by class members (e.g., probation fees and victim-witness fees) under certain circumstances; the parties jointly seeking certification of the putative class in the state action; and the parties working cooperatively to use the state class action to implement a fair and efficient class remedy.

If the parties proceed with this proposed settlement mechanism under discussion, class certification in this federal action could result in two separate classes asserting the same claims. Deferring class certification in this action until, at a minimum, after the parties have concluded these negotiations would benefit the parties, facilitate a negotiated resolution of certain of Plaintiffs' claims, and conserve judicial resources. *See Taunton Gardens Co. v. Hills*, 557 F.2d 877, 879 (1st Cir. 1977) (holding that "as a question of power, the district court ha[s] discretion to stay this suit pending resolution of another which, 'even if it should not dispose of all the questions involved, would certainly narrow the issues in the pending cas[e] and assist in the determination of the questions of law involved'" (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 253-54 (1936)); *Thakkar v. United States*, No. 18-cv-11323-MPK, 2019 WL 1993782 (D. Mass. May 6, 2019) (following *Taunton Garden Co.* and issuing stay).

Second, the parties anticipate that, if they proceed with the proposed settlement mechanism under discussion to resolve the agreed-upon claims, Plaintiffs' claim regarding forfeited money and property would remain in dispute, and the parties would continue to litigate that claim in the federal case. In that event, the Commonwealth Defendants anticipate moving to dismiss the remaining claims against them on numerous grounds, including sovereign immunity, preemption, and failure to state a claim. The parties agree that motions to dismiss should continue to be stayed until at least October 10, 2019, as currently ordered by the Court. ECF No.

44. The Commonwealth Defendants’ position is that certifying a federal class action before resolving motions to dismiss would be premature and could be deemed as waiver of the immunities that may protect the Commonwealth Defendants from having to defend against such claims in federal court. *See, e.g., Consejo de Salud de la Comunidad de la Playa de Ponce, Inc. v. Gonzalez-Feliciano*, 695 F.3d 83, 103 (1st Cir. 2012); *Paul N. Howard Co. v. P.R. Aqueduct Sewer Auth.*, 744 F.2d 880, 886 (1st Cir. 1984).

Because proceeding with class certification before these procedural and legal issues are resolved is not “practicable,” the Court need not take action on class certification at this time under Fed. R. Civ. P. 23(c)(1). Indeed, this Court has considerable discretion in setting the timing of class certification. Rule 23(c)(1)(A) was amended in 2003 to change “as soon as practicable” to “[a]t an early practicable time” in order to give courts flexibility in the timing of class certification. *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1807 (2018). The Supreme Court has emphasized the “greater leeway” that the current version of the rule provides district courts regarding class certification and the appointment of class counsel:

Before the amendment [in 2003], Rule 23(c) encouraged district courts to issue certification rulings “as soon as practicable.” The amendment changed the recommended timing target to “an early practicable time.” The alteration was made to allow greater leeway, more time for class discovery, and additional time to “explore designation of class counsel” and consider “additional [class counsel] applications rather than deny class certification,” thus “afford[ing] the best possible representation for the class.”

*Id.* (quoting Advisory Committee’s 2003 Note on Fed. R. Civ. P. 23(c)(1)(A) and (g)(2)(A)).

Even before the 2003 amendment, courts acknowledged that “the word ‘practicable’ allows for wiggle room—enough to make the order of disposition of motions for ... class certification a question of discretion for the trial court.” *Curtin v. United Airlines, Inc.*, 275 F.3d 88, 92 (D.C. Cir. 2001) (internal citations and quotation marks omitted). “It is ‘well-settled, that absent

prejudice to the plaintiff, a court may decide a defendant's [dispositive motion] in a putative class action before taking up the issue of class certification.'" *BookLocker, Inc. v. Amazon.com, Inc.*, 650 F. Supp. 2d 89, 97 n.3 (D. Me. 2009) (quoting *Good v. Altria Grp., Inc.*, 231 F.R.D. 446, 447 (D. Me. 2005)) (further internal quotations marks and citation omitted; brackets in original).

For the foregoing reasons, the parties respectfully request that the current stay of proceedings include a stay concerning the issues of class certification and appointment of class counsel. The Commonwealth Defendants specifically request that motions for class certification not be addressed before the anticipated motions to dismiss are resolved, and at this time, Plaintiffs take no position on that scheduling matter.

Respectfully submitted,

Plaintiffs	Defendants
<p>STACY FOSTER, JAMIE KIMBALL, JONATHAN RILEY, and NICOLE WESTCOTT,</p> <p>By their Attorneys</p> <p><u>/s/ William W. Fick</u> DANIEL N. MARX, BBO# 674523 WILLIAM W. FICK, BBO# 650562 Fick &amp; Marx LLP 24 Federal Street, 4th Floor Boston, MA 02110 (857) 321-8360 dmarx@fickmarx.com wfick@fickmarx.com</p> <p>LUKE RYAN, BBO# 664999 Sasson, Turnbull, Ryan &amp; Hoose 100 Main Street, Third Floor Northampton, MA 01060 (413) 586-4800 lryan@strhlaw.com</p> <p>Date: June 13, 2019</p>	<p>COMMONWEALTH OF MASSACHUSETTS; CHARLIE BAKER, Governor; DEBORAH B. GOLDBERG, Treasurer; JONATHAN S. WILLIAMS, Administrator of the Trial Court; EDWARD DOLAN, Commissioner of Probation; MAURA HEALEY, Attorney General; KERRY GILPIN, Massachusetts State Police Superintendent; DANIEL BENNETT, Secretary of the Executive Office of Public Safety and Security; JONATHAN BLODGETT, Essex County District Attorney; DAN CONLEY, Suffolk County District Attorney; TIMOTHY J. CRUZ, Plymouth County District Attorney; MICHAEL MORRISSEY, Norfolk County District Attorney; MICHAEL D. O'KEEFE, Cape and Islands District Attorney; THOMAS M. QUINN III, Bristol County District Attorney; MARIAN T. RYAN, Middlesex County District Attorney; PAUL J. CACCAVIELLO, Berkshire County District Attorney; ANTHONY GULLUNI, Hampden County District Attorney; DAVID E. SULLIVAN, Northwestern District Attorney; and JOSEPH D. EARLY, JR., Worcester County District Attorney,</p> <p>By their Attorneys</p> <p>MAURA HEALEY ATTORNEY GENERAL</p> <p><u>/s/ Anne Sterman</u> Anne Sterman, BBO# 650426 Katherine B. Dirks, BBO# 673674 Assistant Attorneys General Government Bureau/Trial Division One Ashburton Place, Room 1813 Boston, MA 02108 (617) 727-2200 anne.sterman@mass.gov katherine.dirks@mass.gov</p> <p>Date: June 13, 2019</p>

**CERTIFICATE OF SERVICE**

I, Katherine B. Dirks, Assistant Attorney General, hereby certify that I have this day, June 13, 2019, served the foregoing document upon all parties of record, by electronically filing to all ECF-registered parties and by sending a copy, first-class mail, postage prepaid to all unregistered parties.

/s/ Katherine B. Dirks  
Katherine B. Dirks