**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**WACO DIVISION**

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| **ALBERT J. TURK, M.D. and SHELLEY TURK, R.N.,** | § | |
| | § | |
| ***Plaintiffs,*** | § | |
| | § | |
| **v.** | § | |
| | § | |
| **SOMERVELL COUNTY HOSPITAL DISTRICT and RAY REYNOLDS, INDIVIDUALLY, and IN HIS CAPACITY AS CHIEF EXECUTIVE OFFICER OF GLEN ROSE MEDICAL CENTER-SOMERVELL COUNTY HOSPITAL DISTRICT,** | § | **Case No. 6:15-cv-00231-RP** |
| | § | |
| ***Defendants.*** | § | |

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS**

TO THE HONORABLE JUDGE ROBERT PITMAN:

COME NOW, ALBERT J. TURK, M.D. and SHELLEY TURK, R.N., and make the following response to the Motion for Judgment on the Pleadings (Document No. 121), filed by SOMERVELL COUNTY HOSPITAL DISTRICT and RAY REYNOLDS in his OFFICIAL CAPACITY (hereinafter, Government Defendants) as follows:

**1. Motion Violates Rule 12(c) Prohibition on "Delaying Trial"**

The timing of this motion strongly suggests that the Government Defendants' objective in filing it was to additionally burden the Plaintiffs, distract from trial preparation and to specifically delay trial on the merits. Indeed, at FN 4 of the pending motion, the Defendants raise the prospect of "an immediate interlocutory appeal" in **bold** letters. An interlocutory appeal to

the Fifth Circuit Court of Appeals obviously cannot be accomplished by the reset trial date of November 5, 2018.

Rule 12(c) provides that "after the pleadings are closed, ***but within such time as not to delay the trial***, any party may move for judgment on the pleadings." *See* Fed. R. Civ. P. 12(c). Plaintiffs respectfully suggest that waiting from **the original answer date of October 23, 2015, until August 16, 2018,** to file a motion for the purpose of "setting up" an interlocutory appeal, violates the plain text of Rule 12(c), as to when such a motion *may not be filed.* A 12(c) Motion may not be filed when the reason is to delay a trial.

**2. Motion Violates Scheduling Order From a Year Ago**

Pursuant to Local Rule CV-7(c), Rule 12(c) Motions are "dispositive motions" The deadline for dispositive motions was set forth in the Second Agreed Revised Scheduling Order (Document No. 76) as **August 31, 2017**, almost exactly one year ago. Pursuant to Rule 16 of the Federal Rules of Civil Procedure, the Court's schedule, "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). Diligence of the movant is the primary focus for modifying the schedule. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992).

In this instance, Government Defendants did not even ask for leave to file the pending dispositive motion a year late, nor did they show any reason for the late filing or even mention the long ago expired dispositive motion deadline[1].

[1] Defendants rely on one Texas appellate authority to support the proposition that a hospital district should be considered an "arm of the state" rather than a "person" under 42 U.S.C. § 1983. That citation is *May v. Nacogdoches Memorial Hospital*, 61 S.W2d 623 (Tex. App. Tyler 2001, no pet.). This is a **17-year-old citation** that Defendants could have referenced at any time during the multi-year pendency of this lawsuit.

Filing this dispositive motion so remarkably late was a gross violation of the Scheduling Order. There is no doubt that Government Defendants were aware of the "dispositive motions" deadline of August 31, 2017, as that is the very date they filed their comprehensive summary judgment motions (Document No. 87 and No. 88) attacking all claims of both Plaintiffs. Those motions were completely denied (Document No. 118). This Court need not tolerate obvious gamesmanship of this sort. *See, Kogel v. Government Employees Insurance Company*, 2017 WL 3149919 (E.D. Cal 2017) [Eastern District of California denied a late-filed filed Rule 12(c) Motion for Judgment on the Pleadings specifically on timeliness grounds, and declined to reach the merits.]

3. **Multiple Decisions of This Court Hold That A Hospital District Is A "Person" Subject To Suit Under 42 U.S.C. §1983**

As they must, Government Defendants acknowledge that they are asking this Court to ignore at least three prior decisions of the Western District on the question of whether a Hospital District is a "person" subject to suit under 42 U.S.C. §1983. At page 5 of their Motion, Government Defendants cite as follows:

> "See e.g., *Rodriguez v. Bexar County Hospital Dist.*, 2015 WL 7760209, at *37, Civ. No. SA-14-CA-861-OG (W.D. Tex. Nov. 30, 2015); *Aguiar v. Whiteley*, 2016 WL 502199, Civ. No. SA-15-CV-14 DAE (HWB) (W.D. Tex. 2016)."

These decisions from this Court are from 2015 and 2016, all post-dating *May v. Nacogdoches Memorial Hospital*, 61 S.W2d 623 (Tex. App. Tyler 2001, no pet.), the seventeen year old case cited as sole authority by Government Defendants in support of their Eleventh Amendment immunity claim. The more recent federal precedent from this Court should be followed.

**4. A Lesser Governmental Entity With Its Own Taxing Authority And Its Own Governing Body Is Not an "Arm of the State"**

The great weight of federal and state authorities demonstrate that a lesser governmental entity with its own taxing authority and its own governing body is not an "arm of the state". In *Alden v. Maine*, 527 U.S. 706, 720-729 (1999), the Supreme Court of the United States affirmed dismissal of a federal lawsuit against the State of Maine itself that alleged violations of the Fair Labor Standards Act. However, the Supreme Court explained that Eleventh Amendment immunity does not bar suit against "lesser entities" such as a municipal corporation or other governmental entity that is not an "arm of the state." *Id* at 756.

The Supreme Court of Texas recognized this distinction in *Hoff v. Nueces County,* 153 S.W.3d 45 (2004), in which it held that a Texas county was not an "arm of the state". In *Hoff,* the Texas Supreme Court reversed the Corpus Christi Court of Appeals, noting that the Corpus Christi Court of Appeals "confused the character of counties for purposes of the immunity doctrines under Texas law with the treatment of a county for purposes of Eleventh Amendment immunity." These are distinct and different inquiries.

Similarly, the Fifth Circuit held that a Mississippi school district is not an "arm of the state" in *Black v North Panola School Dist.* 461 F3d. 548 (5th Cir. 2006). Also, according to the Texas Supreme Court, a Texas school district, under Texas law is more like a city or county than an "arm of the state". None of them are entitled to Eleventh Amendment immunity to federal claims. *San Antonio Independent School District. v. Mckinney 936 S.W.2d 279 (Tex. 1996).*

Plaintiffs respectfully contend that *May v. Nacogdoches Memorial Hospital*, 61 S.W2d 623 (Tex. App. Tyler 2001, no pet.) was simply wrongly decided on the Eleventh Amendment

issue, against the great weight of state and federal authority. Because it is incorrectly decided, and inconsistent with controlling law, it should not be followed by this Court.

**5. The Court Should Hesitate to Entertain a Rule 12(c) Motion Once Discovery Has Closed**

A Rule 12(c) motion addresses only a plaintiff's pleadings, assuming them to be true and drawing inferences in the plaintiff's favor. As to pleadings, this kind of motion addresses whether a claim is, "plausible". This is generally a "threshold inquiry" conducted after an answer is filed and before discovery commences, because ignoring the panoply of facts developed during discovery makes little sense. Once the parties have invested substantial resources in discovery, the First Circuit Court of Appeals noted in *Grajales v. Puerto Rico Ports Authority*, 682 F.3d 40, 45-46, that a district court should hesitate to entertain a Rule 12(c) Motion.

**6. Plaintiffs Have Not Pled Themselves Out of This Case on the Face of Their Pleadings**

Rule 12(c) is generally applicable to a case where the Plaintiff's allegations on the face of the pleadings demonstrate an "airtight defense". *Richards v. Mitcheff*, 696 F.3d 635, 637-638 (7th Cir. 2012). No such airtight defense is set forth by the pleadings in this case.

**7. Any Deficiency in Plaintiffs' Pleadings Leading to Dismissal or Partial Dismissal Should be Followed by Leave to Amend**

For the reasons set forth above, the pending motion under Rule 12(c) should not be reached, and if reached should be fully denied on the merits. If the Court address the sufficiency of the Plaintiffs' pleadings and finds it appropriate to dismiss all or any of the claims as insufficiently pled, the Court should grant leave to amend, which the Plaintiffs hereby respectfully request.

Under the federal rules, a dismissal for failure to meet pleading requirements is usually met with leave to amend to attempt to cure the pleading deficiency by, for example, pleading more facts. *See*, *Great Plains Trust Co. v. Morgan Stanley Dean Writer & Co.*, 313 F.3d 305, 329 (5th Cir. 2002) ("District Courts often afford plaintiffs at least one opportunity to cure pleadings deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal."); *see also*, *United States ex rel. Adrian v. Regents of the Univ. Of Cal.*, 363 F.3d 398, 403 (5th Cir.2004) ("Leave to amend should be freely given, and outright refusal to grant leave to amend with a justification…is considered an abuse of discretion." (Internal citation omitted)). In this circumstance, the Court should grant leave to amend unless the allegation of other facts consistent with the challenged pleadings could not possibly cure the deficiency. *Schereiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

**8. Plaintiffs Do Not Seek Monetary Damages Under the Texas Constitution**

Defendants assert that Plaintiffs seek monetary damages under the Texas Constitution. No such relief is sought.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document was served upon all counsel of record in accordance with F.R.C.P. 5(b) via electronic filing, on the 30th day of August 2018, as follows:

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