

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF ZUNI, on behalf of itself)
and all others similarly situated,)

Plaintiff,)

v.)

Case No. CIV 01-1046 LH/LFG

UNITED STATES OF AMERICA;)
MICHAEL O. LEAVITT, Secretary of the)
United States Department of Health and)
Human Services; and)
CHARLES W. GRIM, Director of the)
Indian Health Service, United States)
Department of Health and Human Services,)

Defendants.)

**PLAINTIFF’S OPPOSITION TO THE
DEFENDANTS’ MOTION
TO STAY BRIEFING ON PLAINTIFF’S
MOTION FOR CLASS CERTIFICATION
AND TO STAY DISCOVERY**

In an effort to preempt this Court’s Initial Scheduling Order and the defendants’ opportunity at the upcoming April 20, 2005 scheduling conference to discuss an appropriate case management regime with Magistrate Garcia, the defendants have moved to radically alter the structure of this four-year old case with a casual schedule that does nothing to promote “the just, speedy and inexpensive determination” of this action. Fed. R. Civ. P. 1. For the reasons discussed below, the defendants’ motion should be denied.¹

¹ Despite filing its motion three days before the deadline for the Government to respond to the pending class certification motion, and 10 days before the deadline to file its Answer, the Government has not requested expedited consideration. Nor is there grounds for such extraordinary relief. As explained in this Memorandum, there is no urgency compelling a further delay in the Government’s Answer, and the plaintiff though undersigned counsel has consistently

INTRODUCTION

1. Nature of the action. This case is the mirror image to existing litigation in this district captioned *Ramah Navajo Chapter, Oglala Sioux Tribe and Pueblo of Zuni v. Norton*, No. 90-0957 LH (“*Ramah*”). As in *Ramah*, this case is brought as a class action to recover damages for the defendants’ failure to pay the full amounts promised in contracts awarded under the Indian Self-Determination Act, 25 U.S.C. § 450 *et seq.* (ISDA). Whereas *Ramah* involves contracts awarded by the Department of the Interior’s Bureau of Indian Affairs (BIA), this action involves contracts awarded by the Department of Health and Human Services’ Indian Health Service (IHS). In both cases, the particular issue presented involves the failure of the Government to pay the “contract support cost” amounts the ISDA mandates must be paid to contractors under 25 U.S.C. § 450j-1(a)(2). These issues are hardly new to the defendants, for “contract support cost” litigation has multiplied over the past decade.² In just the *Ramah* case the Government has been

advised Government counsel, both before and after filing its class motion, of the plaintiff’s non-opposition to a reasonable enlargement of time for the Government to respond. Had the Government simply filed an unopposed motion to extend the time to file its response to the class motion, and then timely filed its Answer, the larger issues of case management presented by the Government’s Motion to Stay could have been resolved in an orderly manner, either at the Magistrate’s April 20 scheduling conference or at the Status Conference the Court requested in its March 17, 2005 Order (Dkt. No. 32). Indeed, this is the alternative relief the plaintiff proposes in the Order attached hereto.

² See, e.g., *Cherokee Nation of Oklahoma and Shoshone-Paiute Tribes of the Duck Valley Reservation v. Leavitt*, 543 U.S. ___, 125 S.Ct.1172 (Mar. 1, 2005), *aff’g Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075 (Fed. Cir. 2003) and *rev’g Cherokee Nation of Oklahoma v. Thompson*, 311 F.3d 1054 (10th Cir. 2002); *In re Seldovia Village Tribe*, IBCA No. 3862, 03-2 BCA 32,400 (IBCA Oct. 20, 2003); *Norton Sound Health Corp v. Thompson*, 2003 WL 264717 (9th Cir. Feb. 6, 2003) (unpub’d); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306 (D. Or. 1997), *modified* 999 F. Supp. 1395 (1998), *on remand*, 58 F.

required to pay combined class damages exceeding \$105 million in two partial settlements, with additional claims currently awaiting resolution by this Court. *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303 (D. NM 2002); *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D. NM 1999).

This case is also a mirror image – but in the form of a class action – to most of the identical individual Tribal claims the Supreme Court only four weeks ago resolved squarely against IHS in *Cherokee Nation v. Leavitt*, 543 U.S. ___, 125 S. Ct. 1172 (Mar. 1, 2005) (“*Leavitt*”). In that case the Supreme Court confronted the same circumstances presented here, determined that “the Government’s promises are legally binding,” and held the United States liable in damages for IHS’s failure to pay the full amount of the contract support costs specified in the ISDA in fiscal years 1994 through 1997. *Id.* at 1175.

Further, this Circuit, in determining precisely what those full contract support costs are, conclusively determined years ago in *Ramah* that the Government’s methodology in the 1990s for determining most of those costs (called “indirect” contract support costs) was contrary to law, rendering the Government liable in damages for the undercalculated amount. *Ramah Navajo*

Supp. 2d 1191 (1999), *rev’d sub nom. Shoshone-Bannock Tribes of the Fort Hall Reservation v. Thompson*, 279 F.3d 660 (9th Cir. 2002); *Babbitt v. Oglala Sioux Tribal Public Safety Dep’t*, 194 F.3d 1374 (Fed. Cir. 1999); *California Rural Indian Health Bd., Inc. v. Shalala*, No. CV-96-03526-DLJ (N.D. Cal.); *Appeals of Alamo Navajo School Bd., Inc. and Miccosukee Corp.*, Nos. 3463-3466 and 3560-3562, 98-2 BCA ¶¶ 29,831 and 29,832, slip op. at 5, 20-21, 1997 WL 759441 (IBCA Dec. 4, 1997), *appeal voluntarily dismissed in part sub nom. Babbitt v. Alamo*, 185 F.3d 880, (Fed. Cir. 1998) (unpub’d), and *rev’d in part sub. nom Babbitt v. Miccosukee*, 217 F.3d 857 (Fed. Cir. 1999) (unpub’d); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997); *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996).

Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997). In short, the issues presented in this case are not new to the Government. Indeed, as a consequence of years of litigation, one Supreme Court decision and several appellate court decisions, the Government's liability for the bulk of the claims presented here against IHS is now firmly established. Case management should fairly reflect this unusual posture and correspondingly condense, rather than elongate, the pretrial life of this action.

2. Proceedings to date. The Pueblo of Zuni filed this action on September 10, 2001. Dkt. No. 1. On November 13, 2001 this Court granted the Government's unopposed request for an extension to December 13, 2001 (an additional 30 days) to Answer, above and beyond the initial 60 days permitted under Rule 12(a). Dkt. No. 3. The additional time was requested "to fully research the legal and factual issues raised" in the Complaint. Dkt. No. 2, at 2. On November 20, 2001 Magistrate Garcia issued an Initial Scheduling Order, requiring *inter alia* a provisional discovery plan within six weeks. Dkt. No. 4. On December 12, 2001 the plaintiff filed its First Amended Complaint. Dkt. No. 5. On December 21, 2001 the plaintiffs filed an unopposed motion to stay all proceedings pending the outcome of the *Leavitt* litigation (one portion of which was then pending in the Tenth Circuit). Dkt. No. 6. In contemplation that the stay would be lifted once that litigation was resolved, the Government simultaneously filed another motion for a second enlargement of time to answer or otherwise respond to the amended complaint. Dkt. No. 7. The motion requested "that they [the defendants] be permitted to answer or otherwise respond to the Amended Complaint within twenty days after the Court enters an order denying the stay," *id.* at 2.

The Court granted the Government’s motion for a second extension on December 28, 2001 (Dkt. No. 9), 108 days after service of the Complaint on the defendants. On the same day the Court entered the stay. Dkt. No. 8. Although the Supreme Court’s decision in *Leavitt* was announced March 1, 2005, this Court did not lift the 2001 stay until 16 days later, on March 17, 2005. Dkt. No. 32. Under the terms of the Order granting the Government’s second requested extension (Dkt. No. 9), the extended deadline to file the Government’s Answer therefore expires April 6, 2005.

The Government now indirectly³ requests an additional 45-day, third extension of time to “either file a motion to dismiss or an answer” (Motion for Stay, at 10), on top of the extended 108 days afforded prior to the stay, the over three years during which this case was stayed, the additional two weeks afforded since the event triggering the end of the stay (the decision in *Leavitt*), and the 20 additional days after the lifting of the stay. That is simply too much: the Government would mislead the Court into believing the defendants seek merely one additional 45-day extension on top of the “normal” 60 days afforded under Fed. R. Civ. P. 12(a)(3) (*see* Motion for Stay, at 10), but that is demonstrably not true. In truth, the Government seeks 45 days on top of the 144 days it will have already enjoyed before the entry of the 2001 stay and after the Supreme Court’s March 1, 2005 decision in *Leavitt*.

³ We say “indirectly” because neither the title of the Government’s Motion for Stay nor the proposed Order actually identifies this requested relief, which instead is buried on page 10 of the supporting Memorandum. Of course, if only the requested stay of class proceedings and merits discovery were entered, without more, the Government’s failure to file within the current April 6, 2005 deadline set by this Court’s December 28, 2001 Order would place the Government in default.)

ARGUMENT

1. The Government offers no compelling reason for deferring the deadline to Answer the Amended Complaint.

Nothing new has happened, and no new reason is offered (in terms of extraordinary workload or other unexpected developments) to explain why the Government, after having benefitted not only from the generous time-frame indicated here, but also the accumulated knowledge and familiarity with all aspects of this litigation gained from years of litigation in this Circuit, the Federal Circuit, and the Supreme Court on identical issues – including years to explore so-called jurisdictional issues (including searching IHS’s own files to confirm that, as noted in the Amended Complaint, the plaintiff has actually met the Contract Disputes Act’s presentment requirement) – the Government cannot at long last file a timely and straightforward Answer.

An Answer is a simple, but important, document. It forces the defendants to admit undisputed allegations of fact and to disclose all of their potential defenses. It is key to the early joinder of issues so necessary to the proper shaping of the case for pretrial purposes. It is, in short, as important for the Court’s informed management of the case as it is to the plaintiff’s right to learn how the Government plans to respond to the suit. Indefinitely delaying the Government’s Answer, as the Government now proposes, thus seriously prejudices the plaintiff’s ability to move this case forward. It permits defense by ambush as the Government picks and chooses what it will next advance in the guise of so-called “jurisdictional” defenses. It blocks the plaintiff from moving forward on claims that are surely now conclusively established against the

Government, thanks to *Leavitt* and *Ramah Navajo Chapter v. Lujan*. And it delays, potentially by months, the entry of an effective and comprehensive case management regime.

The Government's main reasoning invokes the proposition that genuine "jurisdictional" issues are best addressed early on. True enough. But that proposition is hardly a justification for a whole new way of litigating cases that is nowhere specified in the Federal Rules, calling for a special, first round of responsive pleadings from a defendant to test the Court's jurisdiction while everything else is stayed (or, more accurately, a special 45-day waiting period while the defendant considers whether to contest any jurisdictional aspect of the Complaint, followed by an open-ended enlargement of that waiting period as everything else remains on hold while the parties pursue full briefing and await a decision on any motion the defendant might decide to file).

Wisely, the Federal Rules do not require, or even suggest, such a phased approach to litigation, much less a blanket stay while the Government casually decides whether to file such a motion. Rule 12(b) instead grants the Government the option either to assert its jurisdictional defenses in its Answer or to plead them by separate motion; it certainly does not give the Government the right to call an instant halt to all proceedings by the mere contemplation or filing of a motion, be it "jurisdictional" or otherwise. That is the usual practice in the federal courts, and the Government offers no special justification for such a radical departure from the Rules in this particular case. To the contrary, from the face of the Complaint, the multitude of other "contract support cost" litigation, and the jurisdictional provisions of the ISDA, jurisdiction would appear to be unassailable. 25 U.S.C. § 450m-1(a), (d) (also incorporating the Contract

Disputes Act, 41 U.S.C. § 601 *et seq.*). Thus while some cases might call for a suspension of other matters pending a special inquiry into jurisdictional issues, this is not one of them.⁴

The Government's proposal to stop this case for several months is particularly inapt where, as here, the courts in *Leavitt* and *Ramah Navajo Chapter v. Lujan* have already resolved

⁴ The cases the Government cites do not support its rewrite of the Federal Rules. For instance, in *U.S. ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 138, 1048 (10th Cir. 2004) (quoted at Motion to Stay, at 7), the district court addressed the relevant "jurisdictional" issue within a larger summary judgment motion, not some special separately-protected threshold proceeding that stopped all other development of the case. 389 F.3d at 1047-1048. When the Tenth Circuit spoke of giving "priority" to "[q]uestions of jurisdiction," *id.* at 1048 (quoting *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 (2000)) it was explaining its own decision to address the district court's ruling on jurisdiction. *Id.* ("we must begin with its [the district court's] conclusion that Grynberg failed to meet the jurisdictional requirements of [the False Claims Act]") (emph. added). Even in the appellate setting the rule is not hard and fast, as demonstrated in *Vermont Agency*, 529 U.S. at 778-779 (explaining that, while the Court usually first considers jurisdictional issues, in litigation against a State it is better first to address issues of statutory interpretation to determine if an underlying cause of action exists). The Government similarly misuses *Payton v. USDA*, 337 F.3d 1163 (10th Cir. 2003) (Motion to Stay, at 7). Just as in *Grynberg*, in *Payton* the district court entered a single ruling addressing both jurisdictional issues and the merits (finding both lack of jurisdiction and, in the alternative, agency compliance with the Administrative Procedures Act). 337 F.3d at 1167. It was only in deciding the appeal that the Tenth Circuit said it would address the jurisdictional issue first. *Id.* As for *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) (Motion to Stay, at 8), the issue presented there concerned whether "a nonparty witness can challenge the court's lack of subject-matter jurisdiction in defense of a civil contempt citation [by taking an appeal from a contempt order] notwithstanding the absence of a final judgment in the underlying action." *Id.* at 76. The case had nothing to do with the issue the Government presents here. Indeed, the Court specifically noted that in the course of discovery a district court ought not to permit a non-party witness to raise other jurisdictional issues even if those issues ultimately meant the case would be dismissed, necessarily implying that jurisdictional issues can appropriately arise and be addressed at the beginning, middle or even end of any litigation. *Id.* at 76-77. In short, the cases the Government cites do not stand for the broad proposition that district courts have an affirmative duty to stop everything at the beginning of every suit because they first "must consider their jurisdiction at the outset of every case," Motion to Stay, at 8.

most of the key liability issues against the Government – a fact that makes particularly unhelpful the Government’s reliance on an unpublished decision from the Eastern District of Louisiana, where it remained to be seen “whether [the plaintiff] has any valid claims,” *see* Motion to Stay, at 8, quoting Order from *Ladd v. Equicredit Corp.*, No. 00-2688 (E.D. La.) (2001). If anything, the current legal landscape warrants not retarding, but expediting, the pre-trial schedule.

In sum, the Government’s stated desire possibly to move to dismiss to raise perceived jurisdictional issues that might impact the distant margins of this case is no justification for delaying the filing of an Answer nor the orderly forward movement of the balance of the case.⁵ The Government’s request to defer its Answer or other responsive pleading beyond April 6 for an additional 45 days, and to stay everything else in this case indefinitely thereafter until any jurisdictional motion it might file on any aspect of this case is decided, should be denied.

2. The Government’s motion to stay all class proceedings should be denied.

In the second prong of its effort to derail this case, the Government focuses on the class motion proceedings, asking the Court to stay all such proceedings until its nonexistent “jurisdictional” motion is filed (within 45 days) and then decided (within an unknowable period thereafter), to be followed by an 80-day class discovery period stretching into next Fall. Here, too, no good reason is offered for suspending the development of this case in this manner, again based upon phantom jurisdictional issues.

⁵ Of course, the Government is always free to raise the issue anew if, upon filing a real motion that indeed strikes at the heart of the Court’s jurisdiction, the Government can make the necessary extraordinary showing that an order staying other proceedings would at that point be appropriate.

And “phantom” they are. The Government does not dispute that the Pueblo of Zuni had self-determination contracts. Nor does it dispute that under those contracts IHS failed to pay the full contract support cost amounts that even IHS acknowledged at the time went unpaid. Indeed, IHS’s own data documents the underpayments with precision, just as that data documents the annual underpayments suffered by hundreds of other Tribal contractors. *See, e.g.*, Exhibit 10 to Affidavit of Dr. David Trigg Mather in Support of Plaintiff’s Motion for Class Certification (“Mather Affidavit”) (Dkt. No. 34) at 22, 49-51 (“Indian Health Service Contract Support Cost Data” (1999)) (IHS report identifying, *inter alia*, the Pueblo of Zuni’s underfunded amounts); Exhibit 7 to Mather Affidavit at 14, 31-32, 52 (ANNUAL REPORT TO CONGRESS ON TRIBAL CONTRACT COSTS ASSOCIATED WITH INDIAN SELF-DETERMINATION CONTRACTS, MARCH 1991) (IHS report depicting, *inter alia*, contract funding data for the Pueblo of Zuni); Exhibit 8 to Mather Affidavit, at 14 (ANNUAL REPORT TO CONGRESS ON TRIBAL CONTRACT COSTS ASSOCIATED WITH INDIAN SELF-DETERMINATION CONTRACTS, MARCH 1992) (same). This is not guesswork. Nor is there any basis for arguing that the CDA’s requirements have not been met when, as alleged in the Complaint, claims for damages over those underpayments were submitted to IHS in advance of the commencement of this litigation, under a provision permitting Zuni after 30 days to deem the administrative claim denied by operation of law. 41 U.S.C. § 605(c)(5). All this is in the Government’s possession.

The plain fact here, as it was in *Ramah Navajo Chapter*, is that IHS engaged in a common practice, detailed in the class certification motion (Dkt. No. 26), of denying full funding to nearly

all Tribal contractors for a variety of reasons, all of which the Supreme Court or the Tenth Circuit roundly rejected in *Leavitt* and *Ramah Navajo Chapter*.

What the Government is really arguing is not that there exists a jurisdictional defect, but that Zuni may prove not to be a proper class representative on some aspect of the claims presented. But that is a class issue, not a jurisdictional issue, and one which only underscores the importance of moving forward with class discovery and a decision on the class motion. If there is a question about the “adequacy” component of Rule 23(a), mutual class discovery is the way to resolve that question – not a shut down of that very discovery. And if, at the end of the day, the Court concludes there are indeed aspects of the class claims this plaintiff for some reason cannot adequately represent, the Court retains the discretion (assuming all other Rule 23 requirements have been met) to substitute another class representative for that claim.⁶ In short, the answer is

⁶ “An order embodying a determination [to certify a class] can be conditional; the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type.” Fed. R. Civ. P. 23 Advisory Committee Notes (explaining subdivision (c)(1)).

In this connection, the Government’s statement that the possible lack of a current “indirect cost rate” might defeat Zuni’s adequacy on some claim (*see* Motion to Stay, at 11 (referring to OMB Circular A-87)), although more appropriately made elsewhere when and if the issue is joined, is plainly wrong. First, nowhere does the ISDA command that Tribal contractors must have “indirect cost rates,” much less current rates, in order to be paid the “contract support costs” which 25 U.S.C. § 450j-1(a)(2) declares “shall be added” to the contract. Second, even the Government’s defective system for paying contract support costs contemplates payment under rates applicable to earlier years. *See, e.g.*, IHS Circular No. 2004-03, at 10 (¶ 5.A.(2)(c)(i)) (accepting indirect cost rates that are not “more than three years old”), reproduced as Exhibit 6 to the Mather Affidavit. Third, payment under these rates is the very issue this Circuit determined to be illegal in *Ramah Navajo Chapter*. The very suggestion of a problem here only serves to underscore how thin is the ice on which the Government treads in seeking to avoid that case and *Leavitt*.

not to stay class proceedings, but to advance them under an appropriate schedule, including a brief discovery period.

In this last respect, only a minimal discovery period should be necessary. On the Government's side, virtually all of the information regarding the Pueblo of Zuni's claims are already in the Government's possession: its contracts; its contract amendments; its annual funding agreements; its payment history; its recorded annual shortfalls; its indirect cost rate agreements; its annual independently-certified audits; and its CDA claims and supporting exhibits. Under these circumstances, it is difficult to conceive of a legitimate excuse for months of Government discovery against the Pueblo. (Indeed, under the circumstances, a protective order against such discovery might well be in order.)⁷

As for the plaintiff's class discovery needs, this case is not proceeding in a vacuum: the portion of the *Leavitt* case that commenced in Oklahoma (*Leavitt and Shoshone Paiute Tribes v. Shalala*, No. 99-92 (E.D. Okla.)) began as a class action, and thus the parties have the fruits of all the discovery secured there (taken during a compressed 30-day class discovery period). (Although the Court there exercised its discretion to deny class certification, 199 F.R.D.357

⁷ The Government alludes to a need for discovery against "absent class members," *i.e.* some of the hundreds of other Tribal contractors that were underpaid under IHS's same illegal scheme. Motion to Stay, at 12. But absent a specific "demonstration of need," courts do not permit such absent non-parties to be subjected to a defendant's discovery; were it otherwise, the whole point of a class action would be defeated. Manual for Complex Litigation (Fourth) § 21.14 (2004); *see also* Alba Conte and Herbert B. Newberg, *Newberg on Class Actions*, § 16:2 (4th ed. 2002) (noting court's discretion to "limit discovery requests. . . or to deny discovery altogether" of absent class members). Moreover, as with the plaintiff Pueblo of Zuni, the Government already has all of the key documents pertaining to the absent class members claims.

(E.D. Okla. 2001), the stated reasons for that denial have now been firmly rejected by the Supreme Court.) Finally, the parties have the fruits of discovery already undertaken in the currently-stayed *Tunica* action (which asserts *Ramah Navajo Chapter*-type miscalculated indirect cost claims against IHS, and thus overlaps a small portion of this action). *Tunica-Biloxi Tribe v. United States*, No. 02-2413 (D.D.C.). Little new will be learned in yet another extended discovery period covering the same territory.

Although the plaintiff opposes a blanket stay of all class proceedings, plaintiff recognizes that some minimal discovery might be warranted, and that the parties ought to be afforded some mutual opportunity in this respect. Accordingly, plaintiff proposes that the Court: (1) grant the Government an additional 60 days in which to oppose the motion for class certification (generously giving the Government a total of 80 days from service of the motion), with all class discovery to be completed within 45 days of that extended period, and (2) grant the plaintiff 30 days from receipt of the Government's response to file a reply in support of its motion for class certification.

3. The Court should direct the parties to explore settlement.

This case cries out for aggressive management oriented toward settlement. The defendant agency has had its day in court more than once. It lost. The Supreme Court has spoken. By resisting settlement opportunities the Government not only risks sanctions for pressing unmeritorious defenses and advancing delay tactics, it seriously undermines the Government's trust responsibility to protect and advance the interests of Indian Tribes. At least in the setting of contract support cost litigation, IHS's sister agency the BIA has to its credit recognized the

Government's liabilities, and in the *Ramah* case entered into reasonable partial settlements that dispensed with additional years of litigation. The same should follow here, for the plaintiff's claims involve the same underpayments, to the same Tribes, under the same statute. Indeed, unlike the context for the *Ramah* settlements, here the Supreme Court has without equivocation unanimously established the Government's liability. These are the ideal conditions necessary to move this case from the litigation track to a settlement track.

Consistent with Fed. R. Civ. P. 16(c)(9) and Local Rule 16.2, Judge Garcia's March 11 Scheduling Order calls for the parties at the upcoming Scheduling Conference to "discuss settlement prospects and alternative dispute resolution possibilities." Local Rule 16.2 mandates a settlement conference to be attended by authorized party representatives. Given the unusual posture of this case and the considerable appellate and Supreme Court developments affecting nearly every aspect of the claims presented, the plaintiff respectfully suggests that the parties be actively encouraged into settlement discussions at the earliest reasonable opportunity for the Court.

CONCLUSION

For the foregoing reasons, plaintiff respectfully suggests that the defendants' motion to stay briefing on plaintiff's motion for class certification be denied. In lieu thereof: (1) the defendants should be afforded an additional 60 days from March 28, 2005, in which to respond to the motion, (2) the parties should be directed to complete class discovery within 45 days after March 28, 2005, and (3) the plaintiff should have 30 days from receipt of the defendants' response to file its reply in support of its motion for class certification.

Plaintiff further respectfully suggests that (1) the defendants' motion to stay other discovery be denied, (2) the defendants' unstated motion reflected in its lodged proposed Order for an additional 45 days to answer or otherwise respond to the Amended Complaint be denied, and (3) the defendants' unstated motion reflected in its lodged proposed Order to vacate this Court's March 11, 2005 Scheduling Order be denied.

Respectfully submitted this 29th day of March 2005.

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CERTIFICATE OF SERVICE

I hereby certify that I mailed, or caused to be mailed, a true and correct copy of the following documents:

1. Plaintiff's Response to Defendants' Motion and Incorporated Memorandum to Stay Briefing on Plaintiff's Motion for Class Certification and to Stay Discovery
2. Proposed Order

to the following attorney of record this 29th day of March 2005:

Rachel J. Hines, Trial Attorney
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