# UNITED STATES DISTRICT COURT

## WESTERN DISTRICT COURT WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

2006 MAR 23 PM 4: 32

CLERK, U.S. DISTRICT COURT WESTERN DISTRICT OF TEXAS

ALFRED E. EHM, pro se

Plaintiff,

Civil Action No. SA: 06-CA-0103 (RF)

BOARD OF TRUSTEES of the SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY,

v.

Defendant.

### RESPONSE TO PLAINTIFF'S MOTION FOR ORDER DETERMINING THAT ACTION BE MAINTAINED AS CLASS-ACTION

#### TO THE HONORABLE UNITED STATES DISTRICT COURT:

Defendant, BOARD OF TRUSTEES OF VIA METROPOLITAN TRANSIT AUTHORITY OF SAN ANTONIO ("Board of Trustees"), files this Response to Plaintiff's Motion for Order Determining That Action Be Maintained as Class-Action ("Motion"). For the reasons that follow, the Court should deny Plaintiff's motion or hold it in abeyance pending resolution of the pending Motion to Dismiss (Docket No. 4) and full briefing on the merits.

1. On February 27, 2006, Defendant filed the pending motion to dismiss pursuant to Rule 12(b). In its motion, Defendant demonstrates that the Court is without *in personam* jurisdiction over the Defendant because the Board is not the proper party defendant and because, even if the Board were a proper defendant, Plaintiff failed to effect proper service of process on it. *See* Docket No. 4, at 2-3. Defendant also established in its motion that Plaintiff's Original Complaint states no claim upon which relief may be granted and is subject to dismissal for this reason as well. *Id.* at 4-10. Pursuant to Civil Procedure Rule 12(b)(2), (5), (6), and (7),

Defendant asked that the Court dismiss this frivolous suit and award Defendant its costs and fees of defense. FED. R. CIV. P. 12(b)(2), (5), (6), and (7).

- 2. Plaintiff responded on March 10, 2006, asserting a number of misplaced arguments in response. Docket No. 7. Because the arguments raise no issues that require additional briefing, Defendant elected not to file a Reply brief.
- 3. However, on March 17, 2006, Plaintiff filed the motion now before the Court, asking it to certify the matter as a class action under FED. R. CIV. P. 23(a), (b). Because the Court has not yet decided the pending challenge to its jurisdiction over Defendant or determined that the Complaint does state a cognizable cause of action against it, Plaintiff's motion is premature. As a result, Defendant elects not to respond on the merits at this time, choosing not to waste the resources of Defendant or the Court in responding fully to the specious arguments for class certification raised in the motion to certify.
- 4. Should the Court decide to take up the motion to certify as a class action prior to ruling on the motion to dismiss, Defendant reserves the right to respond fully upon direction from the Court.
- 5. Based upon these factors, Defendant responds to Plaintiff's motion to certify, asking the Court to deny Plaintiff's motion at this time. If the Court finds it more equitable to do so, it should deny the motion without prejudice to re-filing, upon the Court's resolution of the pending jurisdictional issues. In the alternative, Defendant asks that the Court hold the motion to certify under Rule 23 in abeyance pending resolution of the 12(b) motions.

#### **CONCLUSION**

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully requests the Court deny Plaintiff's Motion for Order Determining That Action Be Maintained as Class-Action,

resolve the merits of the pending Motion to Dismiss (Docket No. 4), and award Defendant any further relief to which it is otherwise justly entitled.

Respectfully submitted,

Howard Newton

Texas State Bar No. 14977500

Andrew J. Yoder

Texas State Bar No. 24051552

COX SMITH MATTHEWS INCORPORATED

112 E. Pecan Street, Suite 1800

San Antonio, Texas 78205

Tel: (210) 554-5500

Fax: (210) 226-8395

COUNSEL FOR DEFENDANT, BOARD OF TRUSTEES OF THE METROPOLITAN RAPID TRANSIT AUTHORITY OF SAN ANTONIO

#### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Response to Plaintiff's Motion for Order Determining That Action be Maintained as Class-Action was served on Plaintiff, proceeding *pro se*, this 23<sup>rd</sup> day of March, 2006, via certified mail, return receipt requested:

Alfred E. Ehm 170 Carousel Drive San Antonio, TX 78227-4712

Andrew J. Yoder