**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF RHODE ISLAND**

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| **CASSIE M., by her next friend KYMBERLI IRONS, *et al.*,** | ) | |
| **Plaintiffs,** | ) | |
| **v.** | ) | **Class Action** |
| | ) | **Civil Action No. 1:07-cv-00241-ML-LDA** |
| **LINCOLN D. CHAFEE, in his official capacity as Governor of the State of Rhode Island, *et al.*,** | ) | |
| **Defendants.** | ) | |

**PLAINTIFF TERRENCE T.'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO THE CLAIMS ASSERTED ON BEHALF OF TERRENCE T. AND RULE 56(d) MOTION FOR ADDITIONAL DISCOVERY PRIOR TO ANY DECISION ON SUMMARY JUDGMENT**

Named Plaintiff Terrence T. ("Plaintiff" or "Terrence") respectfully submits this Response in Opposition to Defendants' Motion for Summary Judgment with Respect to the Claims Asserted on Behalf of Terrence T. (Dkt. No. 334) (the "Motion"). Plaintiff requests that, pursuant to Federal Rule of Civil Procedure 56(d), the Court deny the Motion or defer considering it until such time as Plaintiff has been allowed to take additional discovery in order to present facts essential to justify his opposition to the Motion.

## PRELIMINARY STATEMENT

Five days after Named Plaintiff Terrence T. turned 18, the Department of Children, Youth, and Families ("DCYF") moved to terminate its involvement with him. Terrence was released from custody despite the objection of his Court Appointed Special Advocate ("CASA") and his near total lack of independent living skills. This makes Terrence the twelfth named

plaintiff to exit from Defendants' custody since this lawsuit was filed more than six years ago. Defendants now move to dismiss Terrence's claims as moot. As the Supreme Court has noted, however, the mootness doctrine "is riddled with exceptions." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 n.11 (1980). One such exception—the relation back doctrine—allows a federal court to retain jurisdiction over a plaintiff's claims for the purpose of class certification even though the plaintiff's personal dispute has faded. This doctrine saves Terrence T.'s claims for two reasons.

First, the relation back doctrine applies if a defendant moots the plaintiff's claims to prevent the plaintiff from certifying a class. Here, a DCYF reviewer recently determined that Terrence was not ready to live on his own, and Terrence's CASA objected to his exit from custody. Further, as of January 2013, more children over 18 remained in DCYF custody than the total number of children who aged out during all of federal fiscal year 2012. The available evidence thus suggests that Terrence should not have been released from DCYF custody and that Defendants likely terminated their involvement with Terrence to remove him from the case. Without additional discovery, however, Plaintiff "cannot present facts essential" to proving that Defendants terminated their involvement with Terrence in order to moot his claims. Fed. R. Civ. P. 56(d). For that reason, Plaintiff asks the Court to deny the Motion or defer considering it until Plaintiff can take additional discovery. In particular, Plaintiff requests the following:

- Terrence T.'s case file from January 18, 2013 through the present;
- a deposition of Jennifer Kelly, Terrence's CASA; and
- all records, including transcripts, from any Family Court proceedings involving Terrence T. from January 18, 2013 through July 9, 2013.

This discovery is limited in scope, could not have been completed before the fact discovery deadline, and is necessary to Plaintiff's opposition to Defendants' Motion. Therefore, the Court should grant Plaintiff's Rule 56(d) request.

Second, the relation back doctrine also applies if the plaintiffs' claims are "inherently transitory" such that any given plaintiff's claim is unlikely to survive long enough to certify a class. In Rhode Island, the median length of stay for children in foster care is 13.9 months, and more than six years have already passed without any certain date for a decision on class certification. It is thus unlikely that any Plaintiff will be in foster care long enough to certify a class. Further, although Defendants argue that the Court has already decided this issue, the ruling they refer to relied on Plaintiffs' ability to join new plaintiffs and occurred two years ago, before this Court directed that summary judgment or a trial be held on the individual named plaintiffs prior to any ruling on class certification. Given the length of time it has taken to complete discovery on the current Named Plaintiffs, it is no longer feasible to add new class representatives in order to solve the problem arising from the constant flow of plaintiffs out of the foster care system. Plaintiff's claims, therefore, are "inherently transitory" and the relation back doctrine requires that Defendants' Motion be denied.

## ARGUMENT

### I. Limited Additional Discovery Is Essential for Plaintiff's Opposition to the Motion

Under the relation back doctrine, federal courts retain jurisdiction over a plaintiff's claims for class certification purposes if the defendant intentionally moots the plaintiff's individual claims to prevent class certification. *E.g.*, *Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004); *Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620, 624-25 (6th Cir. 2005). As the Supreme Court has stated:

> Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant[] . . . before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

*Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Here, as explained below (*see* § I.A *infra*), Plaintiff has reason to believe Defendants terminated their involvement with him in order to "pick off" his claims. Plaintiff, however, requires additional discovery on this issue.

When a party "cannot present facts essential to justify its opposition" to a motion for summary judgment, Rule 56(d) allows the court to deny the motion, or defer considering it, so that the necessary discovery can be completed. Fed. R. Civ. P. 56(d)(1).[1] As the First Circuit recently held, a party requesting relief under Rule 56(d) must, (i) indicate how the requested discovery "would influence the outcome" of the motion; (ii) provide the court with "a plausible basis" for believing that the discovery can be taken "within a reasonable time;" and (iii) explain his "current inability to adduce the facts essential" to opposing the motion. *Nieves-Romero v. United States*, 715 F.3d 375, 381 (1st Cir. 2013). If the party meets the requirements of Rule 56(d), "a strong presumption arises in favor" of allowing the required discovery. *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 47 (1st Cir. 1999) (quoting *Resolution Trust Corp. v. North Bridge Assocs.*, 22 F.3d 1198, 1203 (1st Cir. 1994)).[2]

Here, Plaintiffs request the following discovery:

- Terrence T.'s case file from January 18, 2013 through the present;

[1] A party moving pursuant to Rule 56(d) must provide an "affidavit or declaration [showing] that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d). Such a declaration accompanies this Memorandum of Law. (*See* Decl. of Miriam Ingber in Supp. of Pl. Terrence L.'s Rule 56(d) Mot. for Additional Disc. Prior to any Decision on Summ. J. (the "Ingber Decl.") (filed concurrently)).

[2] *Simas* addressed Rule 56(f), which is the predecessor to Rule 56(d). "[T]he textual differences between current Rule 56(d) and former Rule 56(f) are purely stylistic." *Jones v. Secord*, 684 F.3d 1, 5 n.2 (1st Cir. 2012).

- a deposition of Jennifer Kelly, Terrence's CASA; and
- all records, including transcripts, from any Family Court proceedings involving Terrence T. from January 18, 2013 through July 9, 2013.

As set forth below, Plaintiff's Rule 56(d) request for additional discovery meets all of the requirements set out by the First Circuit. The requested discovery will influence the outcome of the Motion because it will likely allow Plaintiff to demonstrate that Defendants terminated their involvement with Terrence T. in order to remove him from this action. Further, because the scope of the requested discovery is limited, the parties can complete it within three weeks. Finally, because Defendants moved to terminate their involvement with Terrence after the parties' agreed fact cut-off date, Plaintiffs have not yet had an opportunity to take the requested discovery.

### A. The Requested Discovery Will Likely Demonstrate That Defendants Terminated Their Involvement With Terrence T. in Order To Moot His Claims

Plaintiff has good reason to believe that Defendants chose to release Terrence from DCYF custody in order to moot his claims in this litigation. However, only Defendants have access to Terrence's up-to-date case file and documents from recent family court hearings, including the hearing at which Terrence was released from custody over his CASA's objection. In order to oppose Defendants' Motion, Plaintiffs are entitled to equal access to these documents and to a deposition of Terrence's CASA to determine the reason for that objection.

Notably, Jennifer Kelly, Plaintiff's CASA, objected on the record at the family court hearing to Terrence's exit from DCYF custody. This suggests not only that DCYF could have kept Terrence in custody past his eighteenth birthday, but also that Ms. Kelly believed that DCYF should have done so. Indeed, the most recent publicly available data shows that in January 2013, 121 children over the age of 18 remained in DCYF custody, compared to 112 children who aged out of custody during federal fiscal year 2012. (Ex. 2 to Ingber Decl. at

PLTF0034087, 89). In total, in 2012, 7.1% of children in DCYF custody were 18 years old or older. (*Id.* at PLTF0034087). Similarly, in January 2012, 114 children (6.9% of the total) over the age of eighteen remained in DCYF custody, compared to 129 children who aged out of custody in federal fiscal year 2011. (Ex. 3 to Ingber Decl. at PLTF0028596, 98).

Further, as recent documents from Terrence's case file demonstrate, DCYF was well aware that Terrence lacks the necessary skills to live independently. For example, as of May 2013, he had not completed the life skills classes required by DCYF. (Ex. 4 to Ingber Decl. at TT000011412). Indeed, DCYF itself determined in September 2012 that Terrence was "not adequately prepared to live independently." (Ex. 5 to Ingber Decl. at TT000009286). Additionally, Terrence is far from completing high school and, as of January 8, 2013, was failing several classes in the tenth grade. (Ex. 6 to Ingber Decl. at TT000009742). Terrence has also struggled with substance abuse problems and does not have a driver's license. (Ex. 4 to Ingber Decl. at TT000011414; Ex. 5 to Ingber Decl. at TT000009286). As of May 13, 2013, he had a part-time job at a fast food restaurant, but was only working five hours a week and that was "not going well." (Ex. 4 to Ingber Decl. at TT000011414).[3]

These facts strongly suggest that Terrence was released from foster care in order to moot his claims. The requested discovery is essential to developing a full factual record on this issue.

[3] Terrence may also be entitled to stay in custody until age 21 since he may meet the statutory definition of a child with a "serious emotional disturbance." R.I. Code R. § 14-1-700.0240. In Rhode Island, a "seriously emotionally disturbed" child is "[a]ny person under the age of twenty-one (21) years who began to receive services from the department prior to attaining eighteen (18) years of age and has continuously received those services thereafter who has been diagnosed as having an emotional, behavioral or mental disorder under the current edition of the Diagnostic and Statistical Manual and that disability has been on-going for one year or more . . . and the child is in need of multi-agency intervention . . . ." R.I. Gen. Laws § 42-72-5(b)(24). Terrence has received the necessary diagnoses in the past, and has received services in an out-of-home placement for many years. (Ex. 7 to Ingber Decl.; Ex. 8 to Ingber Decl.; Ex. 5 to Ingber Decl. at TT000009286). Additional discovery would allow Plaintiff to determine whether Terrence is in need of multi-agency intervention.

Terrence's complete and up-to-date case file will provide Plaintiff with information currently available only to Defendants about Plaintiff's status leading up to his exit from custody and may very well bolster the evidence suggesting Terrence should have remained in care. The case file may also show that Terrence's caseworker or other DCYF personnel close to Terrence had misgivings about DCYF's decision to terminate Terrence's case. A deposition of Ms. Kelly, Terrence's CASA, will reveal the reasons why she objected to his exit from custody. In addition, she will likely have information about the frequency with which DCYF allows children in Terrence's circumstances to remain in custody past the age of 18. Finally, the records from the family court will provide complete information about the proceedings related to Terrence's exit from custody. All of this information is critical to determining whether DCYF released Terrence from custody in order to moot his claims.

**B. The Requested Discovery Can Be Completed Within Three Weeks**

Plaintiff requests only limited discovery. The requested portion of Terrence's case file spans approximately six months and transcripts are requested from only a small number of family court hearings (possibly only one). The requested deposition will last less than a day, and Plaintiffs will request an expedited transcript. Given the limited scope and minimal burden of the requested discovery, Plaintiffs believe that it can be completed expeditiously, within no more than three weeks.

**C. Plaintiff Is Currently Unable To Provide the Evidence Necessary To Oppose the Motion**

In order to justify Plaintiff's current inability to marshal the evidence needed to oppose the Motion, Plaintiff must show that he exercised "due diligence in pursuing discovery" both before and after Defendants moved for summary judgment. *Velez v. Awning Windows, Inc.*, 375 F.3d 35, 40 (1st Cir. 2004). Here, all of the discovery Plaintiff requests was unavailable until

after the close of fact discovery on May 31, 2013. (Ingber Decl. ¶ 8). Indeed, the parties agreed that discovery would be limited to facts occurring on or before January 18, 2013. (Ex. 1 to Ingber Decl., p. 2). To determine if Defendants attempted to moot Terrence's claims, Plaintiffs need discovery regarding why Defendants sought to terminate their involvement with Terrence—a decision Defendants made after the agreed upon January 18, 2013 fact cut-off and the May 31, 2013 fact discovery deadline. The discovery Plaintiffs now request simply did not exist earlier.

## II. The Motion Should Be Denied Because Terrence T.'s Claims Are Inherently Transitory

The relation back doctrine also applies to "inherently transitory" claims.[4] A claim fits within the "inherently transitory" exception if "[i]t is by no means certain that any given individual, named as plaintiff" would have their claims survive "long enough for a district judge to certify the class" and there is a "constant . . . class of persons suffering" from the complained of injuries. *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975). As the First Circuit has explained, the plaintiffs' claims are inherently transitory if there is "a realistic threat" that "no trial court" will be able to grant a motion for class certification "before a named plaintiff's individual claim becomes moot." *Cruz v. Farquharson*, 252 F.3d 530, 535 (1st Cir. 2001).[5]

"[T]he essence" of the inherently transitory inquiry "is uncertainty about whether a claim will remain alive for any given plaintiff long enough for a district court to certify the class."

[4] The First Circuit has occasionally stated that that a party "ordinarily cannot" oppose a summary judgment motion on the merits and "after his opposition is rejected" seek additional discovery pursuant to Rule 56(d). *Nieves-Romero*, 715 F.3d at 381; *see also C.B. Trucking, Inc. v. Waste Mgmt., Inc.*, 137 F.3d 41, 44 (1st Cir. 1998). However, these cases are not applicable here because in them, a party opposed summary judgment and simultaneously sought additional discovery on the same legal issue. Here, Plaintiff proposes two independent grounds, each adequate by itself to support the Court's denial of the Motion.

[5] Defendants cite *Marek v. Rhode Island*, 702 F.3d 650, 655 (1st Cir. 2012), for the "inherently transitory" standard. That case, however, focuses on the "capable of repetition yet evading review" exception to the mootness doctrine—an exception wholly "distinct" from the "inherently transitory" exception. *Olson v. Brown*, 594 F.3d 577, 583 (7th Cir. 2010).

*Olson v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010); *see also Gawry v. Countrywide Home Loans, Inc.*, 395 F. App'x 152, 158-59 (6th Cir. 2010). Thus the "inherently transitory" exception has been applied even where "there are certainly individuals whose claims will not expire" before certification. *Thorpe v. Dist. of Columbia*, 916 F. Supp. 2d 65, 67 (D.D.C. 2013). The exception has also been applied where, though some individual's claims might survive long enough to reach a certification decision, "the odds" "are rather small." *Amador v. Andrews*, 655 F.3d 89, 101 (2d Cir. 2011). And the exception has also been applied where the life of a claim "cannot be determined at the outset and is subject to a number of unpredictable factors." *Olson*, 594 F.3d at 582.

Here, the fluid nature of foster care, combined with the more than six years that have already elapsed since this case was filed and the fact that class certification is still a long way from being decided, means that it is unlikely any given plaintiff will survive long enough to certify a class.

Moreover, in Rhode Island, a "number of unpredictable factors" control how long a child remains in DCYF custody. These factors include the number and array of adoptive homes and the availability of services for foster children and their biological parents. It is impossible to predict how long any child will remain in foster care before they exit custody, and it is thus impossible to predict how long their individual claims will survive. What is clear is that the foster care population in Rhode Island is extremely fluid, with a median length of stay of 13.3 months as of federal fiscal year 2011. (Pl. Terrence T.'s Statement of Undisputed Facts in Supp. of Pl. Terrence T.'s Resp. in Opp'n to Defs.' Mot. for Summ. J. with Respect to the Claims Asserted on Behalf of Terrence T. ("PSUF") ¶ 5).

Plaintiffs' experience in this action bolsters this point. Six years ago, when this action began, there were 10 named plaintiffs with live claims. Dkt. No. 1. A year and a half ago, Plaintiffs amended the complaint, adding five new plaintiffs. Am. Compl., Dkt. No. 115. However, 11 of 15 named plaintiffs have already exited custody and left this case, with 10 being adopted and one aging out.[6] In addition to Terrence, who has already turned 18, another Named Plaintiff, Tracy L., will turn 18 this month. (PSUF ¶ 6). Only two other children are currently Named Plaintiffs and both are free for adoption with a permanency goal of adoption. (PSUF ¶¶ 7-8).

Despite this evidence, Defendants cite to three cases that they argue demonstrate Terrence T.'s claims are not "inherently transitory." Each is inapposite. The first is *31 Foster Children v. Bush*, 329 F.3d 1255, 1263 (11th Cir. 2003). That opinion, however, dismissed the plaintiffs' claims as moot without considering whether the relation back doctrine, or any other mootness exception, applied. *Id.* Defendants also cite two district court opinions that considered whether the plaintiffs' claims were inherently transitory and thus should not be dismissed as moot: *D.G. ex rel. Stricklin v. Henry*, 2009 WL 1011595 (N.D. Okla. 2009) and *Carson P. ex rel Foreman v. Heineman*, 240 F.R.D. 456 (D. Neb. 2007). But in those cases, unlike this one, a class certification decision was imminent when the mootness issue was raised. In *D.G.* the court planned to hold a certification hearing in three weeks, and in *Carson P.* the court decided the mootness issue and class certification simultaneously. *D.G.*, 2009 WL 1011595 at *2; *Carson P.*,

[6] On April 29, 2009, the Court dismissed the claims of three Named Plaintiffs after their adoptions. Order, Dkt. No. 63. On July 20, 2011, the Court dismissed the claims of five additional Named Plaintiffs after their adoptions. Mem. & Order, Dkt. No. 101. The Court dismissed Alex C.'s claims on July 31, 2012 after he was adopted. Order, July 31, 2012, Dkt. No. 153; Stipulation, July 30, 2012. The Court dismissed David T.'s claims on October 1, 2012 after he reached the age of majority. Text Order, Oct. 1, 2012; Stipulation, Sept. 28, 2012, Dkt. No. 173. The Court dismissed Jared C.'s claims on May 7, 2013 after he was adopted. Order, May 7, 2013; Stipulation, May 3, 2013, Dkt. No. 312.

240 F.R.D. at 510. In contrast, here class certification has not been decided for over six years and a trial is scheduled in October before any decision on class certification.[7]

Indeed, the long period that has passed without any ruling on class certification strongly supports a finding that Terrence T.'s claims are "inherently transitory." For example, in *Amador* and *Olson* the circuit courts applied the relation back doctrine in part because the plaintiffs could not file suit until they exhausted administrative remedies, causing a significant time lapse before class certification could be decided. *Amador*, 655 F.3d at 101; *Olson*, 594 F.3d at 583. Similarly, in *Comer v. Cisneros* the Second Circuit applied the relation back doctrine because of the "fluid composition" of the public housing population and the district court's two-year delay before deciding class certification. *Comer v. Cisneros*, 37 F.3d 775, 797 (2d Cir. 1994).

The Court's staging of this case also affects the viability of adding new plaintiffs to replace those that leave foster care custody. When the Court last considered the inherently transitory issue in connection with its motion to dismiss ruling, the Court refrained from deciding whether the relation back doctrine applied.[8] *Sam M. ex rel. Elliott v. Chafee*, 800 F. Supp. 2d 363, 373 (D.R.I. 2011). Instead, the Court noted that certain of the disputes between Defendants and some Plaintiffs had dissipated and dismissed those Plaintiffs from the case. In doing so, the Court acknowledged Plaintiffs' "inherently transitory" argument, but dismissed those Plaintiffs anyway because doing so did not result in the dismissal of the entire case and because Plaintiffs asserted that they would add new plaintiffs.

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[7] Plaintiffs have filed a motion and asked the Court to decide class certification prior to this trial. (Dkt. No. 348).

[8] Even had the Court decided the "inherently transitory" issue, its July 20, 2011 ruling was not a final decision and thus does not constitute law of the case. *Negron-Almeda v. Santiago*, 579 F.3d 45, 51 (1st Cir. 2009) ("It is true that '[i]nterlocutory orders . . . remain open to trial court reconsideration, and do not constitute law of the case.'" (quoting *Perez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 42 (1st Cir. 1994)).

Adding new plaintiffs, however, is no longer feasible. Discovery on the current Named Plaintiffs has taken 16 months to complete, and the Court has now set a trial date that is two months away. Dkt. No. 343. Adding new named plaintiffs at this late stage would require a postponement of the current trial date, delaying a decision on class certification further. But even postponing the trial fails to solve the problem. Because of the fluidity of Rhode Island's foster care system, it is impossible to predict whether any of the new plaintiffs would survive for the extended period required to conduct discovery on their individual experiences. Adding new plaintiffs would thus lead to an endless cycle of additions and dismissals without any certainty that the parties would ever reach a decision on class certification.

In any case, because of the length of time that has lapsed since this case was filed, and because "[t]he length of" a child's stay in foster care "cannot be ascertained at the outset, and it may be ended at any time" by a child's adoption, reunification, guardianship, or aging out. "It is by no means certain that any given individual, named as plaintiff, would be in" foster care "long enough for a district judge to certify the class." *Gerstein*, 420 U.S. at 110 n.11 (1975). Thus, the inherently transitory exception applies and the Motion should be denied.

## CONCLUSION

For all the reasons stated herein, Plaintiffs respectfully request that Defendants' Motion for Summary Judgment with Respect to the Claims Asserted on Behalf of Terrence T. be denied and that Plaintiff's Rule 56(d) Motion for Additional Discovery Prior to any Decision on Summary Judgment be granted.

DATED: August 5, 2013

RESPECTFULLY SUBMITTED:

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**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on August 5, 2013, I electronically filed the foregoing document with the United States District Court for the District of Rhode Island, and it is available for viewing and downloading from the ECF system for all counsel of record. I further certify that on this day I caused to be served, via ECF, a copy of said document to the attorneys of record listed below:

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