

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

STATE OF TEXAS,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 5:13-CV-00255-C
)	ECF
EQUAL EMPLOYMENT)	
OPPORTUNITY COMMISSION, <i>et al.</i> ,)	
)	
Defendants)	

NOTICE

The State of Texas amended its complaint after the Equal Employment Opportunity Commission (EEOC) moved to dismiss the original pleading. Dckt. No. 15 (motion to dismiss); Dckt. No. 24 (amended complaint). That same day, the State also filed an opposition to the EEOC’s motion to dismiss, Dckt. No. 25 (Opp.), notwithstanding the fact that the amended complaint superseded its predecessor (which was the target of the motion), *see King v. Dogan*, 31 F.3d 344, 346 (5th Cir.1994). The State explained the decision to file an opposition in a footnote, volunteering that it “construes EEOC’s motion to dismiss . . . to apply equally to the [amended complaint].” Opp. at 1 n.1. While it may be that a defendant in this circumstance can choose to have a court treat its motion to dismiss as if it were directed to the amended complaint, 6 Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 1476 (3d ed. 2013 Supplement) (stating that a defendant might make such an election if it did not think that the amended complaint cured the defects in the original complaint), that proposition is not certain, *see Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 302 (5th Cir. 1989). In any case, the

choice belongs to the defendant, not the plaintiff. If it were otherwise, a plaintiff could amend its complaint in an effort to cure defects identified in the motion to dismiss, rely on the amended complaint to oppose the motion, *see, e.g.*, Opp. at 11, and then invoke this motion to dismiss preclusion doctrine to prevent a defendant from addressing the new complaint. But this, of course, is not the system that we have. Accordingly, because the State's amended complaint renders the original complaint a nullity, defendants submit this notice of their intention to file a motion to dismiss addressed to the State's amended complaint.

DATED this 25th Day of March, 2014

Respectfully submitted,

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s/ Justin M. Sandberg

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CERTIFICATE OF SERVICE

I hereby certify that, on March 26, 2014, a true and correct copy of the foregoing was served by CM/ECF on:

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