IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ROGER W. ANDERSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 3:83cv0481AS
v.	)	
	)	<u>Class Action</u>
EVAN BAYH, et al.,	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF CLASS ACTION AND CONTEMPT MOTION SETTLEMENT

June 8, 1996

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facilities independently. Finally, by the time final accord was reached on settlement, class counsel had literally hundreds of correspondence and face-to-face visits with class members. Defendants, of course, were intimately familiar with the facts in the case. Thus, to borrow a phrase from Chief Judge Sharp's opinion in *Parents for Equal Edu.*, "[c]ertainly, the discovery gave the lawyers for all the parties a clear insight into the factual presentations that were to be made for all the parties." 728 F. Supp. 1373, 1375 (N.D. Ind. 1990).

D. THE PRISON LITIGATION REFORM ACT OF 1995, DOES NOT AFFECT THE CURRENT PROCEEDING IN THIS CASE.

The Prison Litigation Reform Act of 1995 (PLRA), was enacted on April 26, 1996. The relevant part of the Act which in any way may apply to this particular proceeding is its section 802. It provides:

> Prospective relief, in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. *The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.* The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

PLRA § 802(a)(1)(A) (emphasis added).[7] Section 802(c)(1), provides that in approving settlements and entering a consent decree, the court must comply with the requirements of subsection (a), quoted above.

In this case, the only possible implication of section 802(a) is that it may be construed to require an actual finding by the Court that Defendants have actually violated prisoners' federal rights.[8] Defendants, obviously, would not consent to such a finding.[9] Construing § 802(a) to require such a finding, would require a full-blown trial to be held in every case to determine whether the defendants have actually violated prisoners' federal rights. That defeats settlement which is contemplated by the PLRA.

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[7]Subparagraphs 802(a)(1)(B) and (C), provide additional restrictions. While Plaintiffs believe those restrictions are outright unconstitutional, they are not implicated in this proceeding:

Subparagraph (B) provides that a federal court may not require any remedy for constitutional violations if the remedy violates the state law. That subsection is unconstitutional because it imposes state law restrictions as a limit on constitutional rights. Nevertheless, there is no allegation in this case that the Entry imposes duties on Defendants which exceed their state law authorities.

Subparagraph (C), deals with court orders directing construction of prisons or raising taxes to do so. Those issues are not presented in this case.

[8]In other respects, section 802(a) does not change the existing legal requirements. Federal courts have always limited the relief granted against state officials to the remedies available for violation of federal law. *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89 (1984). Further, federal courts have always limited the relief to the least intrusive means necessary to correct the violation of the federal rights, especially in prison cases.

[9]It is the undersigned counsel's understanding that Defendants would not object to a finding that this settlement is narrowly drawn, extends no further than necessary to correct the constitutional problems alleged by Plaintiffs, and is the least intrusive means necessary to correct the constitutional problems alleged by Plaintiffs. Defendants, however, would not consent, and in fact vigorously contest, that they have violated prisoners' federal rights.

In the context of a proceeding for approval of a settlement decree the court need not conduct a full-blown trial to determine whether the defendants have actually violated federal law. Instead, the Court should apply the same test applied to determine whether the case present legitimate questions of federal law. For example, such tests are applied to determine whether a case presents a substantial federal claim warranting federal jurisdiction. *See The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1951) ("if the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad"). Obviously, if a court has the power to approve a settlement, it cannot logically be required to conduct a full-blown trial before such an approval. (That defeats the purpose of settlement). After all, in approving a settlement agreement, "'the court must not decide unsettled legal questions; any illegality or unconstitutionality must appear as a legal certainty on the face of the agreement before a settlement can be rejected on this basis.'" *Isby*, 75 F.3d at 1197 (quoting *Armstrong*, 616 F.2d at 320).

Therefore, Plaintiffs respectfully request that, in approving the Agreed Entry, the Court find:

> The relief granted by this settlement is narrowly drawn, extends no further than necessary to remedy Plaintiffs' substantial federal claims regarding violations of their federal rights, and is the least intrusive means necessary to correct Plaintiffs' substantial federal claims regarding violations of their federal rights.

Plaintiffs expect that this proposed finding, as supported by the record, would be acceptable to Defendants.[10]

Because the proposed language disposes of any concerns regarding the application of the PLRA in the context of the pending proceeding, Plaintiffs have not fully presented their argument that the PLRA is unconstitutional and that it cannot be retroactively applied to a pending case such as this one. In the event this Court wishes to reach those issue, Plaintiffs request a further opportunity to brief the issues and a trial to prove violations of federal law.

Alternatively, the Court should find that the PLRA is not applicable to the instant proceeding, because this proceeding involves a resolution of Plaintiffs' contempt motion as opposed to a settlement on the merits. The same rules which apply to a determination of a case-in-chief, in an original proceeding, do not apply to a determination of a contempt motion. *Compare McChristion v. Duckworth*, 610 F. Supp. 791 (N.D. Ind. 1985), *aff'd in part and rev'd in part on other grounds*, 978 F.2d 1261 (7th Cir. 1992) (table) (applying constitutional standards to decide a claim presented in an original case); *with Kindred v. Duckworth*, 9 F.3d 638 (7th Cir. 1993) (deciding the same claim brought in a contempt proceeding based on contract standards as opposed to constitutional standards applicable in an original case).

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[10]We do not mean to preempt Defendants on this issue. The Court has given Defendants an opportunity to respond to this paper if they so wish.

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CAUSE NO. 3:83-cv-481AS

ROGER W. ANDERSON,

Plaintiff,

v.

EVAN BAYH, et al.,

Defendants.

ENTRY FOR March 28, 1997

REPORT AND RECOMMENDATION

This class action, originally brought in 1983, challenges the conditions of confinement at the Westville Correctional Center ("WCC"), a penal facility operated by the Indiana Department of Correction ("DOC") in Westville, Indiana. The parties initially reached a settlement, and their agreement, in the form of an Agreed Entry, was approved by the court in 1989. Through their subsequent monitoring efforts, class counsel concluded that defendants were not complying with the Agreed Entry in a number of areas. On May 27, 1994, plaintiffs filed a motion to hold defendants in contempt. Renewed negotiations eventually led to another settlement but, before the second Agreed Entry became eligible for court approval, Congress passed the Prison Litigation Reform Act, Pub. L. 104-134, §§ 801, 802 (1996) (amending 18 U.S.C. § 3626) ("PLRA"), which became effective on April 26, 1996. The undersigned

237

conducted a fairness hearing on May 21, 1996, and the parties have since completed briefing. Arguing that compliance with the requirements of the PLRA has not been demonstrated, defendants now oppose approval of the Agreed Entry. For their part, plaintiffs maintain that approval of the Agreed Entry is appropriate and that defendants' construction of the PLRA would render it unconstitutional. For the reasons which follow, it is recommended that the proposed Agreed Entry not be approved.

Procedural History

This case was commenced on October 19, 1983, with the filing of a *pro se* complaint by Roger W. Anderson, Jr., an inmate at the WCC. On March 14, 1986, Judge Sharp certified a plaintiff class under Rule 23(b)(2) of the Federal Rules of Civil Procedure, with the class consisting of "[t]hose prisoners who are, or may be in the future, confined at the Westville Correctional Center. . . ." After the parties had conducted a substantial amount of discovery, settlement negotiations began in July 1988. The negotiations culminated in a settlement which was approved by the court on April 4, 1989.

In accordance with the original agreed entry, class counsel engaged in monitoring its implementation at the WCC. Based upon their belief that conditions at the WCC had deteriorated, plaintiffs filed a motion to hold defendants in contempt on May 27, 1994. The motion asserted that the WCC's Psychiatric Unit was understaffed in several critical positions and that restraints and seclusion were used excessively on the unit. According to plaintiffs, additional areas of non-compliance on the Psychiatric Unit included failure to provide privacy in the toilet area, inadequate therapy space and inadequate ventilation, and a lack of timely due process hearings for prisoners transferred to the Unit. Plaintiffs also claim, with the exception of services provided by the behavioral clinicians, less than one half the agreed psychiatric and psychological coverage was being provided to general population prisoners. With respect to medical care, plaintiffs claimed that defendants had failed to live up to the agreement by not providing four full-time physicians and an adequate number of nurses, and by taking other measures which obstructed plaintiffs' access to health care. Plaintiffs also complained that prisoners housed in 8 Dorm, a dormitory located in the WCC's General Services Complex, were not provided with recreation, and that defendants had yet to complete agreed asbestos clean-up in the WCC's power plant and in one of the housing complexes. At the time plaintiffs filed their contempt motion, they informed defendants of several additional areas of concern which they had identified as constitutional violations at the WCC. The parties agreed to participate in a court-sponsored settlement effort to resolve those issues, and the new Agreed Entry (the "Agreed Entry" or the "Entry") was the result. The court subsequently approved the parties' proposed notice of the settlement on March 29, 1996, and conducted a final hearing for the purpose of receiving testimony from selected class members on May 21, 1996.

Summary of Proposed Agreed Entry

Medical Care. The Agreed Entry requires defendants to provide adequate medical care services to the WCC prisoner population, (Agreed Entry ¶ I(A)(1) at 1), and provides that the medical care policies and procedures adopted at the WCC shall be "generally in conformance with the National Commission on Correctional Health Care . . . guidelines as they currently exist except as otherwise provided in [the] Entry." (*Id.* ¶ I(C),at 2-3.) In addition, it obligates defendants to "employ sufficient staff members to fulfill the obligations set forth" in the Entry, (*id.* ¶ I(A)(1) at 1), and it describes the duties and responsibilities of various medical staff members, including a health services administrator, medical director, physicians and other primary care providers, and nurses. (*Id.* ¶ I(A)-(E) at 1-6.)

The Agreed Entry further requires defendants to conduct a daily sick call, except on weekends and holidays. Sick call clinics must be conducted in satellite infirmaries by an on-site nurse or physician's assistant. According to the Entry, all requests for health care services must be reviewed within one working day of the submission of the request, and "all prisoners who describe a medical complaint or symptoms (as contrasted to a request for medical information, tests or results) shall be seen at sick call by a nurse within two (2) working days of the review of their request for health care services." (*Id.* ¶ I(F) at 6-7.) "Patients needing to see a physician shall be seen within a medically acceptable time frame, not to exceed five (5) working days." (*Id.* ¶ I(G)(1) at 7-8.) The Entry requires that medical decisions of staff physicians and outside specialists not be revised or overturned except by a licensed medical doctor. In all instances where a medical decision has been revised or overruled, defendants are required to create a record of the decision. (*Id.* ¶ I(H)(2)-(3) at 8.)

In addition, the Agreed Entry mandates that defendants "develop and implement a program for the care of chronic care prisoner patients including, but not limited to, those prisoners who are diabetic, asthmatic, HIV+, TB+, hypertensive, and epileptics." (*Id.* ¶

I(L)(1) at 9-10.) Defendants are also required to develop individualized treatment plans for patients and evaluate the plans on a periodic basis. (*Id.* ¶¶ I(L)(2)-(4) & (M) at 10-11.)

Under the Agreed Entry, defendants are required to implement a tuberculosis prevention and control program, which would include "surveillance for infectious and active diseases, provisions for chemoprophylaxis against tuberculosis and provisions for management of active illness." (*Id.* ¶ I(R)(1) at 14.) This program, which has been approved by the Indiana State Department of Health, is "generally consistent with the recommendations of the Centers for Disease Control and Prevention (CDC)." Any changes in the program must "be consistent with the CDC's recommendations as they evolve." (*Id.* ¶ I(R)(2) at 14.) WCC staff will be required to "maintain statistical records describing the numbers of prisoners and staff members tested, the prevalence of infection in the population, and the incidents of both conversion and active illness." (*Id.* ¶ I(R)(3) at 15.)

The Agreed Entry further requires defendants to provide "[p]risoners at WCC [with] immediate access to urgent and emergent care 24 hours a day." (*Id.* ¶ I(S)(1) at 15.) The Entry also includes provisions concerning medical emergencies and mandates that defendants develop a Medical Emergency Protocol for handling urgent and medical situations. (*Id.* ¶ I(S)(3) at 15.) All licensed health care staff must maintain current certification in cardiopulmonary resuscitation, and "[a] reasonable number of custody staff in each housing complex on each work shift shall also be certified in CPR." (*Id.* ¶ I(S)(1) at 15.) Defendants must also maintain a "crash cart" for use in medical emergencies and "an ongoing arrangement with a local ambulance service and a local hospital." (*Id.* ¶ I(S)(5) at 16.) Further, defendants must "make provisions for facilitating the transfer of prisoners suffering from a medical urgency or emergency to a hospital," (*id.* ¶ I(S)(4) at 16), and periodically educate medical personnel, as well as custody and supervisory staff, concerning the Medical Emergency Protocol. (*Id.* ¶ I(S)(3) at 15-16.) Lastly, the Entry mandates services and procedures in several miscellaneous areas, including age-appropriate medical intervention, medication distribution, maintenance of adequate medical records, and the operation and administration of an infirmary and self-care unit. (*Id.* ¶¶ I(J)-(K) and (O)-(P) at 9 and 12-13.)

Mental Health Care for General Population. The Agreed Entry requires defendants to "maintain a mental health program for general population prisoners," and retain a mental health services supervisor having administrative responsibility for the program. (*Id.* ¶ II(A) at 16.) Under the Entry, defendants must develop and implement a comprehensive set of written policies and procedures for the delivery of mental health care services, including "a systematic program for screening and evaluating prisoners in order to identify those who require mental health treatment," access to treatment, the participation of adequate numbers of trained mental health professionals, maintenance of accurate, complete and confidential mental health treatment records, "appropriate prescription and administration of psychotropic medication," and "a basic program for the identification, treatment, and supervision of prisoners with suicidal tendencies." (*Id.* ¶ II(A)(1)(a)-(f) at 16-17.) The Entry further requires defendants to "employ sufficient mental health care staff members to fulfill [their] obligations," (*id.* ¶ II (B)(1) at 17), and it prohibits defendants from using staff personnel from the psychiatric unit to meet mental health care staffing needs for the rest of the institution. (*Id.* ¶ II(B)(2) at 18.)

Psychiatric Unit. The Agreed Entry requires defendants to "provide adequate mental health care services to prisoners assigned to the Psychiatric Unit at WCC," (*id.* ¶

III(A)(1) at 18), and it sets forth a comprehensive list of duties and responsibilities for various staff members. (*Id.* ¶ III(A)-(E) at 18-22.) The Entry also prescribes detailed procedures for transferring prisoners to the Psychiatric Unit, and requires prompt and orderly transfer of prisoners who are discharged from the Unit. (*Id.* ¶¶ III(L)(2)-(3) at 28.) The Entry further requires that individualized treatment plans be developed and implemented and provides that a psychiatrist must evaluate each patient and review his medication at least once each month. (*Id.* ¶ III(G) at 23.) The Entry also provides for access to medical care by prisoners at the Psychiatric Unit, and requires that they be provided with over-the-counter medications at the DOC's expense. (*Id.* ¶¶ I(Q) at 13-14 & III(H)(1)-(2) at 23.)

The Entry also sets forth comprehensive procedures for forced administration of antipsychotic medication, and requires that forced medications exceeding a period of five consecutive days be approved by an outside psychiatrist. (*Id.* ¶ III(J)(2) at 25-26.) Outside psychiatrists must be selected from a list prepared by the District Branch of the American Psychiatric Association and generally "may not have been employed by the [WCC] within the two years immediately preceding the selection." (*Id.* ¶ III(J)(3) at 26-27.) The Entry further requires defendants to maintain "[a] separate written log or other central record of all instances of forced medication," (*id.* ¶ III(J)(4) at 27), and it requires defendants to maintain "[a] separate written log or other central record of all instances of the use of mechanical restraints." (*Id.* ¶ III(K)(3) at 27.) Segregation of mentally ill prisoners, except for legitimate clinical purposes, is prohibited. (*Id.* ¶ III(M) at 28-29.)

Under the Agreed Entry, defendants must provide each prisoner housed in the Psychiatric Unit with a minimum of 50 sq. feet of dormitory space and 32 sq. feet of day room space. Prisoners in the Unit must have access to a multi-purpose recreation room a minimum of five days per week, and must be allowed outdoor recreation at least five days per week, weather permitting. (*Id.* ¶ III(I)(1) at 23.) The Entry further incorporates detailed provisions concerning recreation requirements for prisoners in restraints or seclusion. (*Id.* ¶¶ III(I)(1)-(2) at 23-24.)

Staffing Issues. The Entry does not include specific staffing requirements, but does require defendants to employ sufficient staff members to fulfill their obligations under the Entry. (*Id.* ¶ I(A)(1) at 1 (Medical Care): ¶ II(B)(1) at 17 (Mental Health Care for General Population): ¶ III(A)(1) at 18 (Psychiatric Unit)).

Recreation. The Entry maintains essentially the same rights to recreation which were included in the original Agreed Entry. More particularly, it provides that "[a]ll general population prisoners shall have access to the gymnasium and/or outdoor recreation area (weather permitting) at least six (6) days per week." (*Id.* ¶ IV(A) at 29.)

Facilities. The Agreed Entry sets forth various new requirements in the areas of security, fire safety, sanitation, insect and rodent extermination, plumbing, building maintenance, asbestos, and access for disabled prisoners. (*Id.* ¶ IV(B)-(D) at 29-34.)

Violence. Under the Agreed Entry, defendants are required to undertake reasonable and appropriate measures to assure that prisoners are adequately protected from physical assault by other prisoners when traveling in the prison's underground tunnels, assure that adequate correctional and supervisory staff are assigned to prisoner housing units, identify and manage gang-related activities, and maintain fixtures affecting prisoner security in proper operating conditions. (*Id.* ¶ V(A)-(D) at 34.)

Disciplinary Segregation Unit. Prisoners in the Disciplinary Segregation Unit shall be housed one prisoner per cell. (*Id.* ¶ VII(A) at 40.) Disciplinary segregation prisoners must be allowed six days of recreation per week, and the recreation must occur during reasonable hours. If the weather is cold, defendants shall provide prisoners with warm clothing for their recreation period. (*Id.* ¶ VII(B) at 40-41.) Under the Agreed Entry, access to medical and psychiatric care by disciplinary segregation prisoners shall be substantially similar to that provided to other prisoners. In addition, defendants are required to "conduct daily sick call, except on weekends and holidays, in the Segregation Unit, with assessments to be done by the nursing staff and appropriate follow-up care to be provided on a case-by-case basis." (*Id.* ¶ I(G) at 7.)

Legal Access. Under the Agreed Entry, prisoners must be "provided legal access which is adequate and sufficient as defined by statute and applicable case law." (*Id.* ¶ VIII at 41.) All law libraries must be open a reasonable number of hours five days a week, be staffed by trained law clerks, and be kept updated with various listed legal resources. (*Id.* ¶¶ VIII(A)-(E) at 41-42.)

Meals. All prisoners shall receive daily nutritional requirements as determined by a dietitian and, in the event of lockdown, prisoners shall be provided at least two meals per day. (*Id.* ¶¶ IX(A)-(B) at 42.)

Monitoring and Enforcement. The Agreed Entry embodies comprehensive monitoring and reporting requirements. "Beginning three (3) months after the [date of approval of the Agreed Entry] Defendants shall provide Plaintiffs' counsel with written progress reports detailing the steps taken to comply with the respective provisions of the [Entry]. Such reports shall be submitted on a quarterly basis for the first year and on a semi-annual basis thereafter." Under the Agreed Entry, defendants may move to vacate the judgment and terminate jurisdiction upon a showing of substantial compliance not less than two years from the date judgment is entered. The parties are to agree upon a schedule to implement expeditiously the various provisions of the Entry. A party seeking to modify the Entry must notify opposing counsel in advance. The parties must then attempt to resolve all disputes prior to any report to the court. (*Id.* ¶¶ XI(A)-(C) at 45.) Within six weeks of the date of court approval, defendants are required to make all WCC staff and other persons charged with the implementation of the Entry aware of its existence, its terms, and the necessity for strict compliance. Defendants must then periodically review the terms of the Entry with those persons charged with its implementation. During the monitoring phase, plaintiffs' counsel and their staff shall have reasonable access to documents, facilities, personnel, and WCC prisoners. (*Id.* ¶ XI(D)-(F) at 46-47.)

Application of the PLRA

In general, a court may not approve of any class action settlement unless it determines that the settlement is lawful, fair, reasonable, and adequate. *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985); *Gautreaux v. Pierce*, 690 F.2d 616, 631 (7th Cir. 1982); *Armstrong v. Board of Sch. Directors*, 616 F.2d 305, 313 (7th Cir. 1980). However, when a proposed class action settlement provides for prospective or non-monetary relief with respect to prison conditions, the newly enacted PLRA imposes additional requirements. Under § 3626(c)(1), a court may not "enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a)." That subsection provides:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

18 U.S.C. § 3626(a)(1)(A). Under this provision, a court may not approve a settlement providing for prospective relief without expressly finding that the proposed relief (a) is "narrowly drawn;" (b) "extends no further than necessary to correct the violation of the Federal right;" and (c) is the "least intrusive means necessary to correct the violation of the Federal right."

Defendants initially contend that a court must find, or the parties must agree, that there has been a violation of a "Federal right" before the court can approve a consent decree. Defendants point out that they have not admitted or acknowledged such a violation, and that the "terms of the proposed Agreed Entry expressly negate the factual predicates now necessary as findings under the PLRA."[1] Thus, the defendants assert that "[t]he Court cannot make the necessary findings and conclusions in this case." (Defts' Brief on Proposed Agreed Entry at 2.)

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[1]The proposed Agreed Entry recites the following:

> The parties, having agreed that settlement of this class action is in the best interests of all concerned, but without admitting or acknowledging that the defendants are liable or that any existing conditions at the Westville Correctional Center violate any Indiana or United States constitutional or statutory law, hereby submit to the court the following terms which shall constitute the judgment of the Court in this action with respect to the plaintiffs' claims for injunctive relief. . . ."

(Agreed Entry at 1.)

The plaintiffs argue that the PLRA does not mandate a specific finding that defendants have actually violated prisoners' federal rights and only requires that the relief be "aimed at addressing violations of federal rights." (Plfs' Reply to Defts' Brief on Proposed Agreed Entry at 3.) Plaintiffs point out that, in the absence of an unlikely stipulation, the construction advocated by defendants would necessitate a full-blown trial to determine liability. "Conducting an adversarial, evidentiary trial," according to plaintiffs, "would defeat the purpose of settlement which is plainly contemplated by the PLRA. . . ." *Id.*

While the PLRA does not expressly require a "finding" that a federal right has been violated, the need for such a determination is certainly implied. *See Williams v. Edwards*, 87 F.3d 126, 133 (5th Cir. 1996) (advising district court that "if it should find a violation of a 'Federal right,' then any remedy it might fashion must conform to the standards set forth in the [PLRA]"); *James v. Lash*, 949 F.Supp. 691, 693 (N.D. Ind. 1996) (observing that similar language in § 3626(b)(3) "seems to clearly and unambiguously require a finding of a current or ongoing violation of a federal right"); *Benjamin v. Jacobson*, 935 F.Supp. 332, 351-352 (S.D.N.Y. 1996) (noting that "[w]hat Congress has done here that has changed the law significantly is to apply the standards for a litigated judgment to all judgments including those entered on consent"). As a practical matter, a court cannot find that the prospective relief "extends no further than necessary to *correct the violation* of the Federal right," and it cannot find that the prospective relief is "the least intrusive means necessary to *correct the violation* of the Federal right," in the absence of a *violation* to correct. The determination that there has been a violation of a plaintiff's federal rights informs and gives meaning to the other required findings. A judicial pronouncement that the relief "extends no further than necessary" and is "the least intrusive means necessary" can only be made after a determination that there has been a violation and only after the violation is considered in relation to the proposed prospective relief.

Plaintiffs argue, nevertheless, that the original consent decree in this case, being a "federal court order," created a "'Federal right,'" the violation of which is addressed by the new Agreed Entry. This argument is unavailing. Such a construction, which would equate the term "Federal right" with the prospective relief granted by a federal court, would make no sense – as if to say, "The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correction the violation of the [prospective relief], and is the least intrusive means to correct the violation of the [prospective relief]." *See Plyler v. Moore*, 100 F.3d 365, 370 (4th Cir. 1996) (rejecting a similar argument in the context of 18 U.S.C. § 3626(b)(2), the PLRA's decree termination provision). Moreover, even assuming that the original Agreed Entry in this case created a "Federal right," the prospective relief reflected in the second (proposed) Agreed Entry is not directed to the enforcement of any "Federal right" created by the original Agreed Entry. The second Agreed Entry, rather, embodies a separate settlement agreement. In addition, the second Agreed Entry includes prospective relief in many areas not addressed in plaintiffs' motion for contempt, and it cannot be said that it "extends no further than necessary" to correct the violation of any "Federal right" allegedly created by the original Agreed Entry. Accordingly, the court concludes that the term "Federal right" as used in § 3626(a)(1)(A) does not include rights, if any, conferred by the original consent decree.[2]

Ultimately, it is clear that the proposed Agreed Entry cannot be approved under the requirements of the PLRA. There is no basis on the present record to find that the "Federal right" of a particular plaintiff or plaintiffs has been violated, regardless of whether the "Federal right" would be one arising out of the Constitution, a federal statute, or a consent decree. Nor can the court find that the proposed Agreed Entry, which plaintiffs have elsewhere described as having a "broad sweep" and encompassing "almost all facets of the conditions of confinement at the WCC," (Plaintiffs' Memorandum in Support of Class Action and Contempt Motion Settlement at 10), is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right."

The Agreed Entry, for example, requires that the medical care policies and procedures adopted at the WCC be "generally in conformance with the National Commission on Correctional Health Care . . . guidelines," (Agreed Entry ¶ I,(C) at 2-3), but there is nothing to suggest that medical care policies and procedures which do not conform to those guidelines would amount to a violation of plaintiffs' rights. Similarly, nothing in the Constitution could conceivably require the appointment of a registered nurse as nursing supervisor, a chief

[2]It should be noted that the original Agreed Entry, along with any "Federal right" which may have been created by it, would be subject to termination under § 3626(b)(2), in the absence of the same findings which are required for approval of a consent decree under 3626(a)(1). Section 3626(b)(2) provides:

> In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

psychiatrist or a director of the Psychiatric Unit. (*Id.* ¶ III at 19.) There is, moreover, no constitutional requirement that the daily nutritional needs of prisoners be determined by a dietitian. (*Id.* ¶ IX, at 42.) Nor does the Constitution demand that prisoners in disciplinary segregation have access to outdoor recreation at least six days per week between the hours of 8:00 a.m. and 9:00 p.m. (*Id.* ¶try VII at 40.) There is likewise no constitutional mandate that prisoners in protective custody be allowed to enroll in correspondence courses, have daily access to a book cart or have a minimum of three hours per day access to a day room. (*Id.* ¶ XI, at 35, 38-39.) These provisions of the proposed Agreed Entry are the product of lengthy and detailed negotiations, but they go well beyond correcting any conceivable violation of plaintiffs' federal rights.

Constitutional Issues

Plaintiffs begin their constitutional assault upon § 3626(a)(1)(A) by asserting that the construction which the court has adopted transgresses the Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Relying extensively upon *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), plaintiffs argue that the statute usurps the sovereignty of the states by restricting their ability to enter into settlement agreements, or more particularly, by "directing state government to admit to wrongdoing before they can enter into a consent decree in prisoner litigation." (Plaintiffs' Reply to Defendants' Brief on Proposed Agreed Entry at 8.)

In *New York*, the Supreme Court held that the so-called "take title" provision of the Low-Level Radioactive Waste Policy Act was outside Congress' enumerated powers and inconsistent with the Tenth Amendment because it offered state governments a choice of either accepting ownership of radioactive waste or regulating according to the instructions of Congress. The Court noted that a state could not decline to administer the federal program provided in the Act and that regardless of which path a state chose, it was forced to follow the direction of Congress. In effect, a State government was offered "no option other than that of implementing legislation enacted by Congress." *Id.* at 176-77, 112 S.Ct. at 2428-29. As the Court observed, "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* at 161, 112 S.Ct. at 2420 (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288, 101 S.Ct. 2352, 2366, 69 L.Ed.2d 1 (1981)).

That is not the situation here. Fundamentally, § 3626(a)(1)(A) prohibits a court from approving prospective relief in the absence of certain findings. The provision is directed to the courts, not the states, and it does not force states to implement federal legislation. The fact that a state may be left with a choice of either admitting liability to gain court approval of a settlement or proceeding to trial does not somehow compel the state to adopt a federal regulatory program or commander state legislative processes. The PLRA cannot be said to usurp state sovereignty, and the Tenth Amendment is not violated.

The plaintiffs further contend that the construction of § 3626(a)(1)(A) adopted here would violate the Equal Protection Clause of the Fifth Amendment. In general, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985); *Pryor v. Brennan*, 914 F.2d 921, 923 (7th Cir. 1990). However, if the statute employs a suspect classification or burdens the exercise of a fundamental right, it is subjected to strict scrutiny and will be sustained only if it is suitably tailored to serve a compelling state interest. *City of Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254. In this case, plaintiffs assert that the PLRA and § 3626(a)(1)(A) in particular impinge upon or burden prisoners' right of court access "by making their litigation more difficult, costly and burdensome than that of other civil right litigants." Because the provisions do not serve a compelling governmental interest, plaintiffs argue, they fail the strict scrutiny test.

It is well-established that prisoners have a fundamental right of access to the courts. *Lewis v. Casey*, ___ U.S. ___, 116 S.Ct. 2174, 2179, 135 L.Ed.2d 606 (1996); *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). The right of access, however, is merely "the right to bring to court a grievance that [an] inmate wish[es] to present," *Lewis*, 116 S.Ct. at 2181; the Supreme Court has expressly disclaimed any notion in its precedents that the right of access includes a right "to litigate effectively once in court." *Id.* Section 3626(a)(1)(A) does not in any way impede prisoners' ability to file civil actions challenging the conditions of their confinement. In rejecting a similar claim that § 3626(b)(2), the PLRA's consent decree termination provision, impinged on prisoners' right of access, the court in *Plyler* observed that "by its terms § 3626(b)(2) neither prohibits prisoners from filing civil suits challenging the conditions of their confinement nor impedes their ability to do so." 100 F.3d at 373. The inmates in *Plyler* also claimed that § 3626(b)(2) burdened a fundamental right to enforce the successful result of a civil suit by prohibiting them from enforcing the terms of a consent decree. To this, the court responded: "[T]he Inmates have confused the right of access to the courts with the scope of the available substantive relief. Under the PLRA, the Inmates remain free to bring civil rights actions challenging the constitutionality of conditions . . . in prisons and are entitled to enforce judgments rendered on those claims." *Id.* In *Benjamin*, a case which also involved a challenge to § 3626(b)(2), the court stated: "The provisions granting immediate termination of prospective relief in the PLRA do not implicate this right of initial access to commence a lawsuit. Therefore, strict scrutiny is inappropriate." 935 F.Supp. at 351-52. In *Roller v. Gunn*, ___ F.3d ___, No. 96-6992, 1997 WL 66703 (4th Cir. Feb. 19, 1997), the court rejected a claim that the PLRA amendments to 28 U.S.C. § 1915, which subject prisoners to liability for fees and costs on appeal, violate a prisoner's right of access. There, the court stated: "[T]he right of access to federal courts is not a free-floating right, but rather is subject to Congress' Article III power to set limits on federal jurisdiction. Indeed, Congress is neither 'constitutionally required to create Article III courts to hear and decide cases within the judicial power of the United States,' nor to vest those courts that are created 'with all the jurisdiction it was authorized to bestow under Article III.'" *Id.* at *4 (quoting *Palmore v. United States*, 411 U.S. 389, 400-01, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973)); *see Hampton v. Hobbs*, 106 F.3d 1281 (6th Cir. 1997) (same). In *Zehner v. Trigg*, ___ F.Supp. ___, No. H-74-230, 1997 WL 16504 (S.D. Ind. Jan. 15, 1997), Judge Lozano held that the PLRA's "physical injury" requirement, 42 U.S.C. § 1997e(e), did not transgress prisoners' right of access because it did not "burden plaintiffs' ability to bring a new civil action." *Id.* at *13. In that case, the court stated:

> The First Amendment right to petition the government for redress of grievances focuses on procedural impediments to the exercise of existing

> rights. It does not prevent a court from holding that a plaintiff has no remedy at law for the injuries he may allege . . . . By the same token, the constitutional right of access to the courts does not prevent Congress from enacting legislation that changes the substantive rules of law that apply in the courts.

Id. at *13 (citing *Bowman v. Niagara Mach. & Tool Works, Inc.*, 832 F.2d 1052, 1054 (7th Cir. 1987)). The same principles apply here. The plaintiffs in this case, like the inmates in *Plyler*, have confused the right of access with the scope of the available relief. Section 3626(a)(1)(A) clearly does not burden a fundamental right. Because prisoners otherwise do not constitute a suspect class, *Pryor*, 914 F.2d at 923, the strict scrutiny analysis urged by plaintiffs is inapplicable.

Plaintiffs maintain, nonetheless, that § 3626(a)(1)(A) fails under the rational basis test. Legislation "neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity," *Heller v. Doe by Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 2642, 125 L.Ed.2d 257 (1993), and "a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* *Scariano v. Justices of Supreme Court of Ind.*, 38 F.3d 920, 924 (7th Cir. 1994). The Supreme Court has emphasized that rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 2100-01, 124 L.Ed.2d 211 (1993), and it does not authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976) (per curium). A classification "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Communications*, 508 U.S. at 313, 113 S.Ct. at 2101. Moreover, "'[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." *Heller*, 509 U.S. at 321, 113 S.Ct. at 2643 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351 (1973)).

Relying on the Supreme Court's decision in *Romer v. Evans*, ___ U.S. ___ 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), plaintiffs argue that Congress was "motivated by animus toward the class of prisoners" when it enacted the PLRA and that § 3626(a)(1)(A) thus lacks a rational basis. In *Romer*, the Court held that "Amendment 2" to the Colorado Constitution violated the Equal Protection Clause of the Fourteenth Amendment. Amendment 2 prohibited "all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons or gays and lesbians." *Id.* at ___, 116 S.Ct. at 1623. In concluding that the Colorado amendment failed the rational basis test, the Court stated:

> First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.

Id. at ___, 116 S.Ct. at 1627.

The PLRA does not compare with the enactment condemned in *Romer*. The PLRA, unlike Colorado's Amendment 2, does not impose a "broad and undifferentiated disability" upon prisoners, and its scope is entirely consistent with its apparent purposes. Section 3626(a)(1)(A) does not prevent prisoners from applying to the courts for enforcement of their federal rights. It does say, under the construction adopted here, that a court will not be permitted to approve prospective relief in civil actions challenging prison conditions without determining that the prisoners' federal rights have been violated. This limitation focuses upon a court's authority to grant a specific form of relief in a particular type of civil action. It is an apparent product of concern that the federal courts had overstepped their authority in overseeing prison reform litigation; that the courts were approving broad consent decrees without any indication that the conditions they addressed violated the constitutional rights of a particular prisoner; and that the decrees had developed lives of their own, with the courts insinuating themselves into the minutiae of state and local prison management. In the PLRA, and § 3626(a)(1)(A) in particular, Congress apparently sought to ensure that judicial intrusions into the management and operation of prisons were limited in scope and justified by certain specific findings. As the court in *Plyler* found, "Congress has a legitimate interest in preserving state sovereignty by protecting states from overzealous supervision by the federal courts in the area of prison conditions litigation." 100 F.3d at 374. Section 3626(a)(1)(A) is rationally related to that legitimate interest. *Jensen v. County of Lake*, ___ F.Supp. ___, No. H-74-230, 1997 WL 101991 *7-8 (N.D. Ind. Mar. 5, 1997); *Benjamin*, 935 F.Supp. at 354; *see also Roller*, ___ F.3d at ____, 1997 WL 66703 at *6.

Lastly, plaintiffs contend that the court's construction of § 3626(a)(1)(A) would violate the separation of powers doctrine. Relying on *United States v. Klein*, 80 U.S. (13 Wall.) 128, 20 L.Ed 519 (1871), plaintiffs argue that the PLRA unconstitutionally prescribes rules of decision. *Klein* involved a suit by the administrator of the Estate of V.F. Wilson, a former rebel sympathizer whose cotton had been sold by treasury agents during the War Between the States.

Klein's action, which sought to recover the sale proceeds from the United States, was based on the Abandoned and Captured Property Act of March 3, 1863, 12 Stat. 820. The Act authorized noncombatant property owners to sue in the Court of Claims to recover the proceeds of property which had been sold, upon proof, *inter alia*, that they had "never given any aid or comfort to the present rebellion. . . ." On December 8, 1863, President Lincoln issued a proclamation granting a full pardon, with restoration of all rights of property, to "certain persons who had been engaged in the rebellion [and who] desired to resume their allegiance and reinaugurate local State government within and for their respective States." 80 U.S. (13 Wall.) at 131. The pardon was given "upon condition that every such person shall take and subscribe a prescribed oath of allegiance. . . ." *Id.* at 132. Before his death in 1865, Wilson had taken the loyalty oath. In 1869, the Court of Claims decided that Wilson had been entitled to receive the proceeds of his cotton and awarded $125,000 to Klein, the administrator. On July 12, 1870, while the case was on appeal to the Supreme Court, Congress enacted legislation which provided that "no pardons . . . granted by the President . . . shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States. . . ." 16 Stat. at Large, 235. The law further provided that the granting and acceptance of such a pardon would be deemed conclusive evidence that the recipient gave aid and comfort to the rebellion, and that "on proof of such pardon and acceptance, which proof may be heard summarily on motion or otherwise, the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant." *Id.*

In declaring this proviso unconstitutional, the Supreme Court observed:

> It is evident . . . that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of

> decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.
>
> It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

80 U.S. (13 Wall.) at 146.[3]

The PLRA does not, as plaintiffs maintain, parallel the circumstances which the court confronted in *Klein*. Unlike the legislative proviso in *Klein*, the PLRA makes no attempt "to prescribe a rule for the decision of a cause in a particular way." 80 U.S. (13 Wall.) at 146. Although § 3626(a)(1)(A) prohibits a court from approving prospective relief in the absence of a finding that the relief is no greater than necessary to correct the violation of a federal right, it does not purport to state how much relief is more than necessary, and it does not prevent a court from approving a particular form of prospective relief if it can make the required findings. In passing the PLRA, Congress has done nothing more than change the law applicable to pending cases without mandating a particular outcome. *See Robertson v. Seattle Audubon Society*, 503 U.S. 429, 438, 112 S.Ct. 1407, 1413, 118 L.Ed.2d 73 (1992) (holding that statute did not violate separation of powers where it "compelled changes in law, no findings or results under old law"); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 405, 100 S.Ct. 2716, 2736, 65 L.Ed.2d 844 (1980); *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993); *Berning v. A.G. Edwards & Sons, Inc.*, 990 F.2d 272, 278-79 (7th Cir. 1993); *Henderson v. Scientific-Atlanta, Inc.*, 971 F.2d 1567, 1573 (11th Cir. 1992). The PLRA,

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[3]Though not pertinent here, the court also found that the rule prescribed by the proviso was "liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive." *Klein* 80 U.S. (13 Wall.) at 147.

therefore, does not violate the principles established in *Klein*. *See Plyler*, 100 F.3d at 372; *Benjamin*, 935 F.Supp at 349-50.

In a related argument, plaintiffs maintain that the PLRA's restrictions on remedies available in constitutional cases violate the doctrine of separation of powers by usurping the Article III authority of federal courts. In this regard, plaintiffs complain that the Act would "make prison conditions litigation so burdensome that it cannot be pursued effectively," and would require periodic constitutional hearings merely to effectuate this court's existing decree, and thus "impermissibly undermine[] the court's authority to effectuate the remedial purpose of its lawful orders." (Plaintiffs' Reply to Defendants' Brief on Proposed Agreed Entry at 26-27.) According to plaintiffs, "[t]he bottom line is that the PLRA is calculated to make effective implementation of relief in prison conditions litigation a practical impossibility." (*Id.* at 26.)

While "Congress cannot tell courts how to decide a particular case, . . . it may make rules that affect classes of cases." *Lindh v. Murphy*, 96 F.3d 856, 872 (7th Cir. 1996) (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, ___, 115 S.Ct. 1447, 1452-53, 131 L.Ed.2d 328 (1995)). Indeed, there can be no question that Congress has "ample power to adjust the circumstances" under which a remedy is deployed. *Lindh*, 96 F.3d at 872. The PLRA does not prevent an award of injunctive relief to remedy a constitutional violation. Section 3626(a)(1)(A), however, does require plaintiffs to prove their claim, and the court to so find, before prospective relief can be granted. Such a restriction does not transgress the separation of powers doctrine. *See Zehner*, at *10-12; *Benjamin*, 935 F.Supp. at 350.

Petition for Attorney's Fees and Expenses

Plaintiffs have submitted a petition for attorney's fees and expenses based on the assumption that the Agreed Entry would be approved. To qualify for attorney's fees under 42 U.S.C. § 1988, however, the plaintiffs must be a "prevailing party." Plaintiffs may be considered "prevailing parties" under § 1988 "'if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.'" *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)). *See Farrar v. Hobby*, 506 U.S. 103, 111-12, 113 S.Ct. 566, 573, 121 L.Ed.2d 494 (1992); *Balark v. City of Chicago*, 81 F.3d 658, 664 (7th Cir. 1996). In this case, however, plaintiffs have not prevailed on their motion for contempt which sought to enforce the original Agreed Entry and, for the reasons already discussed, the court cannot approve the new Agreed Entry on the basis of the present record. Absent a favorable disposition of their motion for contempt or the approval of the new Agreed Entry, plaintiffs cannot be considered prevailing parties under § 1988. *See Cady v. City of Chicago*, 43 F.3d 326 (7th Cir. 1994). Accordingly, plaintiff's petition for attorney's fees and expenses must be denied as premature.

Conclusion

For the foregoing reasons, it is **RECOMMENDED** that plaintiffs' request for approval of the proposed Agreed Entry be **DENIED**, and that their petition for attorney's fees and expenses be **DENIED** as premature.

NOTICE IS HEREBY GIVEN that within ten (10) days after being served with a copy of this recommended disposition a party may serve and file specific, written objections to the proposed findings and/or recommendations. Fed.R.Civ.P. 72(b). FAILURE TO FILE OBJECTIONS WITHIN THE SPECIFIED TIME WAIVES THE RIGHT TO APPEAL THE DISTRICT COURT'S ORDER. See *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Lerro v. Quaker Oats Co.*, 84 F.3d 239 (7th Cir. 1996); *Lockert v. Faulkner*, 843 F.2d 1015 (7th Cir. 1988); *Video Views, Inc. v. Studio 21 Ltd.*, 797 F.2d 538 (7th Cir. 1986).

Dated this 28th day of March, 1997.

Robin D. Pierce, U.S. Magistrate Judge

cc: Judge Sharp
Magistrate Pierce