IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LENIL COLBERT, CONSTANCE GRAY, ERNEST REEVES, KENYA LYLES, and DWIGHT SCOTT, for themselves and all others similarly situated,	)	Class Action
Plaintiffs,	)	07 C 4737
v.	)	Judge Joan Lefkow
ROD R. BLAGOJEVICH, in his official capacity as Governor of the State of Illinois, et al.	)	Magistrate Valdez
Defendants.	)	

DEFENDANTS' JOINT MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION TO MAINTAIN A CLASS ACTION

Defendants Rod R. Blagojevich, in his official capacity as Governor of the State of Illinois, Carol L. Adams, in her official capacity as Secretary of the Illinois Department of Human Services, Barry S. Maram, in his official capacity as Director of the Illinois Department of Healthcare and Family Services, and Eric E. Whitaker[1], in his official capacity as Director of the Illinois Department of Public Health, (herein after "the Defendants"), respond in opposition to Plaintiffs' Motion to Maintain a Class Action as follows:

BACKGROUND

The five named plaintiffs are alleged to be Medicaid-eligible individuals with a variety of disabilities. Lenil Colbert is identified as a 35 year old man who has seizures, is partially paralyzed and uses a wheelchair. (Complaint, ¶ 13-14). Constance Gray is a 49 year old woman who has asthma, chronic obstructive pulmonary disease and sometimes uses a wheelchair for

[1] The Current Director of the Illinois Department of Public Health is Damon T. Arnold, M.D. MPH.

mobility. (Complaint, ¶ 26-27). Ernest Reeves is a 56 year-old man who is paralyzed with a spinal cord injury and confined to a wheelchair. (Complaint, ¶ 34-35) Kenya Lyles is a 32 year old woman who has seizures, high blood pressure and receives dialysis for kidney failure. (Complaint, ¶ 45-46) Dwight Scott is a 54 year old man who is paralyzed on the left side of his body and uses a wheelchair. (Complaint, ¶ 56-57). None of the named Plaintiffs is alleged to suffer from a mental or developmental disability. The named plaintiffs are currently residing or have resided in private nursing facilities. Two of the five named plaintiffs have been or will shortly be placed into a community setting.

Lenil Colbert is expected to be discharged from his nursing facility and return to an apartment in the community on April 15, 2008. Mr. Colbert had started looking for independent living arrangements as early as September 9, 2006. In February of 2007, plaintiff Colbert was progressing with his discharge plans with an anticipated 30 to 90 day discharge date. And even in March of 2007, plaintiff Colbert met with Access Living to obtain assistance in locating housing. Then on April 11, 2007, plaintiff Colbert was given approval to live in the community. Mr. Colbert's records indicate he has applied for various housing options and has been waiting for approval. (See Exhibit "A").[2]

Plaintiff Constance Gray's M.D.S. Reports indicate that from August of 2006 to October of 2007, she did not express or indicate a desire to return to the community. (See Exhibit "B") Also, there is nothing in her facility records that indicate that she is capable of living in the

[2] The exhibits being used in Defendants' Response are subject to the Agreed Protective Order ("APO"), entered by this court on February 5, 2008. In an attempt to comply with the APO, Defendants will not electronically file any exhibit. Defendants will submit to the court in chambers and to all counsel of record a separate Table of Contents with all documents relied on for this Response.

community.

On October 15, 2007, Earnest Reeves was discharged from his nursing facility and returned home. In fact, as early as March 29, 2007, Mr. Reeves was visited by Access Living to begin planning for return to the community. (See Exhibit "C").

The records for Plaintiff Lyles indicate that on November 6 and 8, 2006, she made contact with Access Living to get help finding an apartment. There is no indication in the records that there was any success with that endeavor. In fact, in the social service quarterly notes dated August 25, 2007, and November 27, 2007, no discharge plans were in place. Despite what Ms. Lyles may have indicated earlier, beginning in May of 2007, section "Q1" of the M.D.S. Reports, reflect that Ms. Lyles has not expressed or indicated a preference to return to the community and has an uncertain discharge status.[3] (See Exhibit "D")

The records for Dwight Scott indicate that, from May through August of 2006, he was not a candidate for discharge. On June 19, 2007, his family "requested alternative placement in Renaissance Nursing Home only." The records indicate the facility has been following up with the new facility as to the availability of a bed. There is nothing in the records to indicate that Mr. Scott is a candidate for discharge to the community at this time. (See Exhibit "E") Further, all the named Plaintiffs agreed to enter their respective nursing facilities. (See Exhibit "F")

Plaintiffs move to certify a class consisting of: (1) "all Medicaid-eligible adults with disabilities in Cook County, Illinois; (2) who are being, or may in the future be, unnecessarily-confined to nursing facilities; and (3) with appropriate support and services may be able to live in

[3] The information gathered from records designated as GLEN, OPHC, CGG, CGL and REN were obtained pursuant to subpoenas served on the named plaintiffs' nursing facilities and only consist of the information provided up to the date of complying with the subpoena..

a community setting."

Plaintiffs seek relief under the Americans with Disabilities Act ("ADA"), 42 U.S.C.§ 12132, the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), the Social Security Act 42 U.S.C. §§ 1396-1396v and the Nursing Home Reform Act, 42 U.S.C. § 1396a(a)(28)(A). Plaintiffs allege that they seek this relief because they have been needlessly and systematically institutionalized and isolated in nursing facilities and denied the opportunity to live in integrated settings in their communities, in violation of federal law and the decision of the U.S. Supreme Court in *Olmstead v. L.C.,* 527 U.S. 581 (1999).

LEGAL STANDARD FOR CLASS CERTIFICATION

For a class to be certified, the party seeking certification must satisfy each of the four elements of Rule 23(a) and at least one of the three elements of Rule 23(b). *See* Fed.R.Civ.P. 23. The four requirements of Rule 23(a) are: "(1) the class is so numerous that joinder of all members is impracticable ("numerosity"); (2) there are questions of law or fact common to the class ("commonality"); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class ("typicality"); and (4) the representative parties will fairly and adequately protect the interests of the class ("adequacy")." Fed. R. Civ. P. 23(a). Plaintiffs have also alleged that this action qualifies for class certification under Rule 23(b)(2) - that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief to the class as a whole." Fed.R.Civ.P. 23(b)(2).

"[A] district court has broad discretion to determine whether certification of a class is appropriate." *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993).

However, a class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of" Rule 23 are satisfied. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147,161 (1982). "[T]he party seeking class certification assumes the burden of demonstrating that certification is appropriate." *Retired Chicago Police Ass'n*, 7 F.3d at 596. Because class certification often involves considerations that are enmeshed in the factual and legal issues comprising the Plaintiffs' cause of action, a court sometimes must look behind the pleadings before deciding certification. *Falcon*, 457 U.S. at 160. As such, Rule 23 does not require a court to accept as true all of the complaint's allegations. *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001); *see also Iosello v. Lawrence*, Case No. 03 C 987, 2005 WL 2007147, at *5 (N.D. Ill. Aug. 18, 2005) (Plaintiff may not rest on mere conclusory allegations and must make a minimal factual showing that the conditions for certification exist).

ARGUMENT: CLASS CERTIFICATION MUST BE DENIED

A. Plaintiffs' Proposed Class Lacks Definiteness.

It is axiomatic that for a class action to be certified a sufficiently definite "class" must exist. *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981); *Wallace v. Chicago Housing Auth.*, 224 F.R.D. 420, 425 (N.D. Ill. 2004). The class must be sufficiently defined so that the class is identifiable. *Oshana v. Coca-Cola Co.*, 225 F.R.D. 575, 580 (N.D. Ill. 2005). A sufficiently definite class exists if its members can be ascertained by reference to objective criteria. *Wallace*, 224 F.R.D. at 425. Furthermore, the class definition must be sufficiently precise to make it administratively feasible for the court to determine whether a particular individual is a member of the proposed class. *Id.*

Plaintiffs' proposed class is unclear and confusing in the following respects: 1) the

proposed class definition fails to define the relevant characteristics of the proposed class; 2) fails to identify the specific services the Plaintiffs are allegedly being denied; and 3) fails to delineate the specific relief sought by the class. These deficiencies should lead to denial of class certification.

To determine who will be in this proposed class, the Court must look at the claims raised by the Plaintiffs in their complaint. Those claims are:

> Defendants have violated Plaintiffs' and others' rights under federal law by: (a) conditioning receipt of long-term services on people with disabilities entering and remaining in unnecessarily segregated and institutionalized settings; (b) failing to ensure that nursing facility residents are assessed for community long-term care services, both at admission and regularly thereafter; (3) failing to inform nursing facility residents of home- and community-based long-term care options and alternatives; and (d) failing to provide nursing facility residents with sufficient, meaningful community-based long-term care, services and supports to reasonably accommodate those residents who can benefit from community life. (Complaint, ¶ 8).

As they apply to the purported class, these claims are vague and ambiguous, making a determination as to who is in the class impossible. The Plaintiffs' references to "community-based long term care" does not give the court sufficient information to determine the make-up of the proposed class, as it is difficult, at best, to determine the services that are allegedly being denied Plaintiffs and others similarly situated. First and foremost, there are numerous services encompassed in the generic designation of "long-term care" services which are administered through DHS, HFS, and DPH that could be applicable to a class of disabled individuals. Plaintiffs' failure to identify the specific services or group of services they have allegedly been denied makes it impossible to define a class, because it is not known exactly what services are at issue. Furthermore, Plaintiffs' claims are contradictory as to whether or not these undefined

"long term care services" are actually being provided to disabled individuals such as Plaintiffs.

While the named Plaintiffs appear to claim that they can only access long-term care services in a nursing home setting, the Plaintiffs also recognize that "[d]efendants provide funding for disability services in the community for a limited number of people situated similarly to [Plaintiffs] without conditioning receipt of such services on placement in a nursing facility." (Complaint, ¶15, 28, 36, 47, 58) Moreover, the Plaintiffs admit that "[d]efendants also provide in-home and community services to people who would otherwise qualify for nursing facility services.…[U]nder these programs, people with disabilities live independently with community-based supports and services, including healthcare, personal attendant care, and other long-term care services otherwise found in nursing facilities." (Complaint, ¶ 93) Finally, the Plaintiffs assert that for some individuals, "[d]efendants contract with private home health agencies to provide in-home community long-term care…" and that where individuals "with disabilities served in the community hire their own care givers and attendants…[their] wages are paid by Defendants." (Complaint, ¶ 94) While the Plaintiffs frequently use various iterations of the term "long-term care services," they never define it. Without certainty as to what services are being denied, it is impossible to define a class.

An additional point of confusion in defining the class concerns housing. The Defendants are unclear as to what Plaintiffs mean by "housing." Neither the Complaint nor the Memorandum in Support to Maintain a Class Action, defines or states whether the Plaintiffs are seeking subsidized housing, rent, rent assistance of some kind, for the State to build or provide housing or some other form of housing. Further, it is not clear whether the Plaintiffs are claiming that they are entitled to housing and not receiving it. It is also unclear whether they

seek assistance in locating such housing. On the one hand, the Complaint alleges Plaintiffs have their own housing but lack services. Plaintiffs generally state that many individuals have to seek admission to nursing facilities from their personal homes because they lack access to in-home healthcare. On the other hand, the Complaint suggests Plaintiffs lack adequate housing **and** services. For example, the Plaintiffs state that many individuals "lack resources to obtain community services and housing on their own." (Complaint, ¶ 98, 99) While it is alleged that the named Plaintiffs wish to live in the community, the class definition is not clear whether or not the Plaintiffs already have housing in which to receive community-based services or whether they are claiming the Defendants are responsible for either assisting them in locating housing or for providing and paying for their housing. It would be impossible for this court to ascertain whether or not the provision of housing itself is a part of the class definition. Because the Complaint fails to distinguish the nature of the "long term community services" sought and further fails to clarify whether Defendants are responsible for obtaining and providing housing, the class definition is vague and the Motion for Class Certification should be denied.

Additional problems arise with the definiteness and breadth of the class when you look at the phrase "Medicaid-eligible adults with disabilities." First, the term "disability" with respect to an individual as defined by the ADA and stated in *Olmstead* is "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Olmstead*, 527 U.S. at 589. As the definition is applied in this instant matter, the proposed class could include individuals who are currently maintaining class actions against these same defendants in *Ligas v. Maram,* No. 05-C-4331 (involving individuals with developmental

disabilities) and *Williams v. Blagojevich,* 05-C-4673 (involving individuals who have been diagnosed with mental illness). The class definition and relief sought in those cases is much different than what is proposed in this case, which purportedly involves individuals with physical disabilities resulting from a traumatic injury or medical illness. If this court were to grant class certification under the definition offered by the Plaintiffs, the classes in *Ligas* and *Williams* could be included in this case or at a minimum would overlap. That result could create inconsistent holdings among the three cases. It is unmistakable that the class definition proposed by Plaintiffs is not clear, and their motion should be denied.

B. Plaintiffs Have Failed to Establish Commonality.

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." A "common nucleus of operative fact" is generally sufficient to show a common question of fact. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). Although some factual variation between the class members' claims will not preclude certification, *see id.* at 1017, members of a proposed class must share "a common issue the resolution of which will advance the litigation." *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998).

In their motion, Plaintiffs assert that they satisfy the commonality test because "The proposed class members are Medicaid-eligible adults with disabilities who, as a result of Defendants' system-wide practices, are or in the future may be unnecessarily and unlawfully confined to nursing facilities." *See* Class Cert. Mem., p. 6. That allegation, however, is insufficient to satisfy the commonality requirement because that allegation and its factual basis do not apply to the entire proposed class.

As stated above in the introduction, each of the named Plaintiffs is disabled because of a

traumatic injury or medical illness. Their progress and abilities have been assessed on a regular basis by the facilities as their M.D.S. evaluations show. (See Exhibits "B", "D", and "G"[4]) Each has been evaluated upon admission, readmission, quarterly and yearly. This information is then used to determine progress and advancement towards discharge. There is no single common element of fact observed in any of the records reviewed that could be deemed common to the entire class. (See above Background Section and Exhibits "A" through "F") The Court has sufficient evidence to infer that the named Plaintiffs have not been damaged as alleged.

District courts have denied class certification in cases of this nature by stating, "a generalized claim for injunctive and declaratory relief to remedy alleged systematic failures in a state's delivery of legally-mandated services does not present a sufficient 'common question of law or fact' for purposes of Rule 23(a)(2)." *Bill M. v. Nebr. Dept. of Health and Human Services Finance and Support*, Case No. 4:03-cv-03189 2007 WL 2068187 *5 (D. Neb. July 17, 2007); *see also J.B. v. Valdez*, 186 F.3d 1280, 1289 (10th Cir. 1999) (declining to find that an allegation of a systematic violation of the law automatically satisfies Rule 23(a)(2), and affirming denial of class certification on commonality grounds).

Further, where as here the diversity of the proposed class would require the Court to engage in individual determinations to decide class membership, commonality does not exist. *See, e.g., Metcalf v. Edelman*, 64 F.R.D. 407, 409-10 (N.D. Ill. 1974) (no commonality where

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[4] The MDS Reports that were produced during the limited class discovery are voluminous. To attach each report as exhibits would be impractical. As such, Exhibit "G" consists of MDS Report Tracking Forms, Discharge Forms, Reentry Forms and in Part 5 of Exhibit "G," page 1 of several MDS Reports, to represent categories of assessments that were performed for each named Plaintiff. If the Court would like to review every MDS Report, except those already provided in Exhibits "B" and "D", the Defendants will provide them.

separate adjudications are necessary to determine if a particular Plaintiff is being deprived of a livelihood compatible with health and well-being and is thus a member of the class); *see also, Fuzie v. Manor Care, Inc.* 461 F.Supp. 689, 700 (N.D. Ohio, 1977) ("action challenging private nursing home's transfer or discharge of medicaid patients could not be maintained as class action where there was no common question of law inasmuch as basis for transfer or discharge of patients was dependent upon individual circumstances and there was no common element of fact except that all proposed class members were medicaid patients."); *see also* 7A C. Wright & A. Miller, FEDERAL PRACTICE & PROCEDURE 3D § 1763 ("common questions may not be found when the decision regarding the propriety of injunctive or declaratory relief turns on a consideration of the individual circumstances of each class member or when the defendant has not engaged in a common course of conduct toward them"). As seen above, the named Plaintiffs all present with different medical issues that affect what treatment is appropriate. Given the variety of medical issues or conditions that affect treatment options, individual determinations are likely, if not inevitable, with this proposed class definition.

C. Plaintiffs Have Failed to Establish Typicality.

Rule 23(a)(3) requires that the claims or defenses of the representative parties be "typical of the claims or defenses of the class." A Plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory. *Keele v. Wexler*, 149 F.3d 589, 595 (7th Cir. 1998). The typicality inquiry is closely related to the commonality inquiry. *Id*.

Although factual distinctions between the named Plaintiffs' claims and those of other class members will not alone show a lack of typicality, the named representatives' claims

nevertheless must have the same essential characteristics as the claims of the class at large. *Retired Chicago Police Ass'n*, 7 F.3d at 597; *De LaFuente v. Stokely-Van Camp, Inc.,* 713 F.2d 225, 232 (7th Cir. 1983). "If proof of [the Plaintiff's] claims would not necessarily prove all of the proposed class members' claims," the Plaintiff fails to satisfy the typicality prong of Rule 23(a). *Ruiz v. Stewart Associates, Inc.,* 167 F.R.D. 402, 405 (N.D. Ill. 1996) (internal quotations and citations omitted).

Plaintiffs claim "the named Plaintiffs' interests are entirely coextensive with those of the class because they are Cook County residents who have been placed in nursing facilities despite their ability to live in the community, have a genuine concern with the outcome of this class action, and they share the same claims as the class members as well a strong interest in securing declaratory relief." *See* Class Cert. Mem., p. 9. This is faulty reasoning because the records indicate that the named Plaintiffs' claims lack typicality.[5] As stated above, the named Plaintiffs' situation are not typical of the other proposed class members. (See Background Section above.)

Plaintiffs' proposed class definition which limits the class to "Medicaid-eligible adults with disabilities in Cook County, Illinois," is problematic, in that the proposed class is limited to only those class members in Cook County. Plaintiffs are seeking relief from State officials, and because we know that the Medicaid rules generally have to be applied the same way across the state, limiting the class to Cook County residents is inappropriate. If this court were to grant

[5] At the time of filing of this response, Mr. Colbert is scheduled to be discharged and move into an apartment on April 15, 2008. (See Exhibit "A"). Mr. Reeves was discharged from his nursing facility on October 15, 2007, and is living at home. (See Exhibit "C"). Mr. Scott, pursuant to the family's request is moving to another facility. (See Exhibit "E"). For the remaining named Plaintiffs, their housing situation in the community is less clear. (See Exhibits "B" and "D")

class certification under the limited definition offered by the Plaintiffs, residents in other counties would then be left to their own devices to pursue alleged relief in other districts or possibly no relief what so ever. To limit the class to Cook County could create potential inconsistent holdings and force the State Defendants to defend numerous other cases.

Just as Plaintiffs' proposed class definition lacks definiteness and fails the commonality requirement, it fails the typicality requirement. Plaintiffs' overbroad class definition exposes numerous factual and legal differences between the named Plaintiffs and other members of the proposed class. The proposed class contains individuals who have moved to the community as well as those who were approved to move to the community but still need to find a place to reside. It also includes those who may not be ready for discharge to the community. Further, because each named Plaintiff has a specific medical condition, determination as to when they can return to the community can only be done on a case by case analysis.

Given these differences, the named Plaintiffs' claims do not have the same essential characteristics as the claims of the rest of the proposed class. Proving the named Plaintiffs' claims would not necessarily prove the claims of *all* proposed class members, which is what the typicality prong requires. *See Iosello*, 2005 WL 2007147, at *5 (Plaintiffs failed to satisfy typicality requirement where Plaintiffs did not establish that "the allegations of systematic disclosure violations, false or misleading representations, and payment violations apply to the proposed class of *all* . . . consumers"). "Courts faced with an overbroad class definition may deny certification for want of typicality." *Williams v. Ford Motor Co.*, 192 F.R.D. 580, 586 (N.D. Ill. 2000) (quoting *McGarvey v. Citibank (South Dakota) N.A.,* 1995 WL 404866, at *4 (N.D. Ill. July 5, 1995). In this case, Plaintiffs' overbroad class definition warrants denial of class

certification for lack of typicality. *See Ruiz*, 167 F.R.D. at 405.

D. The Class Definition Creates Antagonism Between the Named Plaintiffs and Potential Class Members.

Rule 23(a) also requires that the named Plaintiffs be able to adequately represent the interests of the entire class, and that their interests not be antagonistic to the class interests. *See Retired Chicago Police Ass'n*, 7 F.3d at 598. The problem of potential conflicts between class members is of particular concern where, as here, Plaintiffs seek Rule 23(b)(2) certification, because class members are not allowed to opt out of a Rule 23(b)(2) class action. *See id*.

As noted above, the Court in *Olmstead* limited the states' obligation to provide community services to those "persons who do not oppose such treatment." 527 U.S. at 607. By including in the class definition persons who could oppose community placement, as well as those who have no support from family and friends in the community to assist in providing housing, the proposed class creates antagonism between those named Plaintiffs who want to move from the nursing facilities to community settings, and potential class member who do not want or lack the support to move from their current placements. To grant Plaintiffs' requested relief could impact negatively on those class members who do not or cannot move to the community because they would not have the support of family and friends to thrive in the community. Given this antagonism, the named Plaintiffs cannot adequately represent the interests of the entire class, and they fail to satisfy the adequacy prong of Rule 23(a).

E. Plaintiffs Fail to Show That Defendants Have Acted or Refused to Act on Grounds Generally Applicable to the Class.

Plaintiffs' Motion to maintain a class action should be denied because they are unable to satisfy the requirements of Rule 23(b)(2). Rule 23(b)(2) requires that "the party opposing the

class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2). Plaintiffs assert that they have satisfied Rule 23(b)(2), because the "proposed class is comprised of Medicaid-eligible individuals with disabilities who seek declaratory and injunctive relief to remedy Defendants' class-wide civil rights violations." Pl. Memo in Support of Mot. To Maintain Class at 13. A court may make whatever factual and legal inquiries are necessary in determining whether the requirements of Rule 23 (b)(2) are met. *See Szabo*, 249 F.3d at 675-676. In this case, the facts do not support Plaintiffs' conclusion that the requirements have been met.

Plaintiffs fail to state what practice or policy of the Defendants has not been complied with or applied to the proposed class. A review of the records shows that the named Plaintiffs are evaluated and assessed; they are aware of the opportunity to return to the community; they are given assistance to find living arrangements in the community; and some in fact, have been placed in the community where they are provided services. (See the previously marked Exhibits related to the named Plaintiffs.) Based on these records, it is evident that the Defendants have not denied the Plaintiffs the opportunity to be evaluated and be placed in the community. Therefore, it cannot be inferred that the Defendants have not acted or refused to act on grounds generally applicable to the class in violation of *Olmstead.* As such, this court should deny the Plaintiffs' Motion to Maintain a Class Action.

WHEREFORE, the Defendants respectfully request this honorable Court deny the Plaintiffs' Motion to Maintain a Class Action and grant Defendants all other appropriate relief.

Dated: April 14, 2008

Respectfully submitted,

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