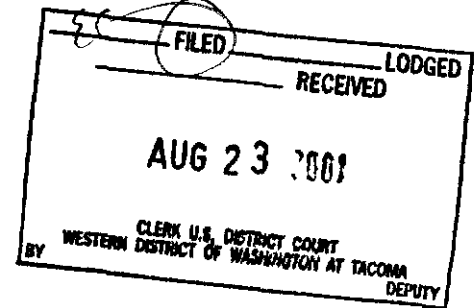


The Honorable Franklin D. Burgess



CV 99-05577 #00000159

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

The ARC of Washington State, Inc., a
Washington Corporation, on behalf of
its members, et al.,

Plaintiffs

vs.

Lyle Quasim, in his official capacity as
the Secretary of the Washington
Department of Social & Health
Services, et al.,

Defendants,

and

Sharon Allen, et al.

Proposed Intervenors.

Civil Cause No. C99-5577FDB

Memorandum In Support of Motion To
Decertify Or To Modify The Class

I. INTRODUCTION

Proposed intervenors, Sharon Allen, et al., request that the Court decertify the class as currently defined and decline to approve the class as defined in the proposed settlement filed in this case on August 16, 2001. Alternatively, proposed intervenors request that the Court modify the class to remove class members in Allen, et al v Western State Hospital, et al., Cause No. C99-5018RJB ("Allen") from the Arc class. The terms of the proposed settlement in Arc conflict with the Allen settlement and thus

1 decertification or alternatively, modification of the class is warranted

2 **II.Relevant Facts**

3 A Arc, et al v Quasim, et al

4 On October 9, 1999 three individually named plaintiffs and the Arc of Washington filed a class
5 action seeking injunctive and declaratory relief Plaintiffs did not adequately plead class allegation in
6 their Complaint as they failed to include allegations regarding adequacy of counsel under Fed R Civ
7 P 23(a)(4) See Complaint at 11 They also failed to file a Motion for Class Certification Defendants
8 filed a Motion to Strike the class allegations from the Complaint See Defendants' Motion to Strike
9 Class Allegations On September 15, 2000, the Court denied defendants' Motion to Strike and
10 interpreted plaintiffs' Opposition to defendants' Motion to Strike as a Motion for Class Certification and
11 ordered defendants to respond as such Order Denying Defendants' Motion to Strike Class Allegations,
12 9/15/01, slip op at 2 On December, 22, 2000 a class was certified under Rule 23(b)(2) defined as

13 all developmentally disabled persons in the State of Washington who 1) meet the
14 medical and financial requirements for eligibility for ICF-MR services, 2) have applied
15 for HCB services, and 3) have not received HCB waiver services or not received them
16 with reasonable promptness, and individuals who will be similarly situated in the future

17 Order Granting Plaintiffs' Motion to Maintain Class Action, slip op at 6

18 On November 17, 2000, the Court denied plaintiffs' Motion for Partial Summary Judgment The
19 Court found that it could "find no evidence that the named individual plaintiffs have in fact claimed to
20 be on the waiver They cannot without amending their Complaint and submitting affidavits take the
21 shortcut of claiming that the State has in fact already placed them on the waiver but improperly forgotten
22 them " Order Denying Plaintiffs' Motion for Partial Summary Judgment, 11/17/01, slip op at 8 In the
23 Complaint, plaintiffs alleged that the named plaintiffs were waiting for services See Complaint, ¶¶ 17-
24 24

25 On April 27, 2001, the existing parties in this case signed a proposed settlement which was filed
26 with the Court on August 16, 2001 See Settlement Agreement, Release, & Order of Stay ("Settlement")
27 As part of this proposed settlement, the parties agreed that plaintiffs would file a Motion asking the
28 Court to redefine the class to include

all DDD clients who are eligible for ICF/MR and/or HCBS waiver services administered by DDD in the State of Washington and who are not receiving all of the services they need with reasonable promptness and those who may become similarly situated in the future prior to December 31, 2006, and the following class representatives: Guadalupe Cano, by and through her guardian, Delia C. Cano, Olivia L. Murguia, by and through her guardian Teri L. Hewett, Lorianne V. Ludwigson, by and through her guardians, Donald and Sheryl Ludwigson.

Settlement, ¶ 2.3

In the proposed settlement, the parties have agreed that the named plaintiffs are now on the waiver and receiving all of their services. See id., § 8.1

The proposed settlement also included a provision for "Covered Claims" which waives the rights of all class members to bring virtually any type of claim in any way related to the Arc Complaint, including, but not limited to, damages claims and claims for injunctive relief, including claims under Medicaid and Title II of the ADA, for at least six years. See id., ¶ 2.11

The terms of the proposed settlement also stipulate that \$14 million for the current biennium and an undetermined amount in the future would be sufficient to settle the claims of the plaintiff class and those similarly situated in the future. Id., ¶¶ 4.1-4.17. However, by defendants' own estimates, this figure is inadequate. Decl. of Stroh, ¶¶ 32-35, exs. 14-16. DDD stated that "the total increased costs to provide the service and support needs of all FY 2001 caseload exceeds \$262.6 million General Fund-state dollars (\$447 million total)." Id., ¶ 32, ex. 14. To intervenors' knowledge, plaintiffs did not seek the advice of experts in determining the proposed scope of relief for the plaintiff class, which includes Allen class members. Id., ¶-- The proposed settlement also includes a provision awarding plaintiffs attorneys' fees and costs in the amount of \$303,441.04 and the ability to obtain additional fees of up to \$50,000 during the pendency of the settlement. Settlement, ¶¶ 5.1-5.3

B. Allen, et al. v. Western State Hospital, et al.

Allen was filed in federal court on January 12, 1999 by seven individually named plaintiffs on behalf of themselves and those similarly situated and by two organizational plaintiffs, including the Washington Protection and Advocacy System ("WPAS") seeking injunctive and declaratory relief for violations of the plaintiffs' rights under the Fourteenth Amendment of the United States Constitution and other federal laws, including, but not limited to the Americans with Disabilities Act ("ADA") due

to inadequate care at Western State Hospital ("WSH") as well as in the community. The defendants in Arc are also defendants in Allen. See Arc Complaint, Allen Complaint, 1/12/99, attached as ex 1

On May 18, 1999, the Honorable Robert J. Bryan certified Allen as a class action. The class was defined to include

individuals with developmental disabilities 1) who presently reside at Western State Hospital, 2) who have been discharged from Western State Hospital after June 1, 1997, to residential habilitation centers, or community living arrangements funded, operated, or licensed by the defendants, and 3) who will be admitted Western State Hospital in the future.

Order Certifying Class Action, slip op. at 11, attached hereto as ex 2

The Allen class currently includes over 200 individuals and is expected to continue to grow. See Decl. of Stroh, ¶ 12. The Allen class members include individuals who are currently admitted to WSH, and are in need of appropriate supports funded under the Home and Community Based Services ("HCBS") Waiver or as Intermediate Care Facilities ("ICFs") for individuals with developmental disabilities. See Decls. of Gardner, ¶10 and Beasley, ¶11. The class also includes individuals who have been at WSH, but who currently reside at residential habilitation centers ("RHCs") which are licensed as ICFs or in community programs contracting with DDD, most of which are funded through the HCBS or as ICFs. See Decls. of Gardner, ¶11 and Beasley, ¶10. Allen class members either are currently not getting all of the services that they need with reasonable promptness or are likely to be similarly situated in the future. See Decls. of Gardner, ¶14 and Beasley, ¶14. Therefore, most Allen class members are also members of the Arc class. Additionally, most if not all, Allen class members are or will be members of the proposed class in the Arc settlement. Thus, the Arc class under either the current or new proposed definition in the proposed settlement effectively encompasses virtually the entire Allen class.

On December 2, 1999, the Honorable Robert J. Bryan signed an Agreed Order in Allen. See Agreed Order on Joint Motion to Stay Proceedings, slip op. ("Agreed Order"), attached as ex 3. The Allen settlement resolved the claims raised in the Allen Complaint including, but not limited to, claims under the ADA that individuals should be served in the most integrated setting appropriate to their individual needs. See id. Additionally, plaintiffs filed a motion to amend the Complaint to include Medicaid claims to ensure the provision of adequate community services. Decl. of Stroh, ¶8, ex 5. This

1 Motion was pending at the time the case settled and therefore, the Court did not rule on it Id The
 2 essence of this claim was to ensure that Allen class members were not unnecessarily admitted to WSH,
 3 but rather provided with all of their medically necessary services in the community Id

4 The Allen settlement stays plaintiffs claims while requiring defendants to complete three phases
 5 of implementation to improve community supports and services at WSH for the Allen class Agreed
 6 Order at 3 If plaintiffs in Allen believe that defendants are not complying with the terms of the
 7 settlement, their only remedy is to lift the stay and try the case Id Additionally, the Allen settlement
 8 preserves all of the Allen class members claims, including, but not limited to claims for damages Id

9 Under Allen, there must also be a process at WSH “for ensuring that discharges occur promptly
 10 and that linkages are made with community services ”Id Attachment 1 at 5-6 In addition, Phase Two
 11 of Allen requires specific medically necessary services for class members living in the community. See
 12 id at 9-12 For example, the Allen settlement requires that defendants provide additional residential
 13 staff to support class members in their homes during a crisis See id Additionally, it provides for 18
 14 community-based diversion beds Id at 10 Allen also requires the creation of residential placements
 15 for class members Id at 11

16 WPAS, an organizational plaintiff in Allen, is the designated protection and advocacy system
 17 for the state of Washington See Decl of Stroh, ¶ 31, exs 1-3 As such, WPAS has the authority and
 18 is mandated to pursue any necessary remedies, including legal action, on behalf of individuals with
 19 developmental and other disabilities to redress any rights violations Id , ¶ 4, 42 U S C § 6042, 45
 20 C F R § 1386.21 The Governor of Washington has guaranteed WPAS’ ability to meet its federal
 21 obligations including, but not limited to, its authority to pursue any necessary remedies including legal
 22 action Decl of Stroh, ¶5, ex 4

23 The proposed settlement in Arc conflicts with and thus, potentially impairs the rights of the Allen
 24 class members in a number of significant ways One conflict is the “Covered Claims” provision of the
 25 proposed settlement in Arc This provision waives claims specifically preserved in the Allen settlement
 26 See Agreed Order at 3, Settlement, § 2.11 Additionally, if plaintiffs need to lift the stay in Allen, they
 27 may be precluded from trying their ADA and proposed Medicaid claims because of the claim waiver

1 provision in Arc

2 The legislature appropriated over \$14 million to fund Phase Two of the settlement in order to
 3 provide adequate community-based services for Allen class members Decl Stroh, ¶36, ex 17 Under
 4 the terms of the settlement defendants must continue to seek such funding each year See Agreed Order
 5 The Arc proposed settlement only requires defendants to ask the Governor to seek \$14 million in the
 6 2002 Supplemental Budget and an undetermined amount to maintain these increased services for the
 7 2003-2005 biennium Id., ¶ 4 1 The parties will try to reach agreement on an additional sum of money
 8 and defendants may recommend it to the Governor for the 2003-2005 biennium Id., ¶ 4 2 The sum of
 9 \$14 million is insufficient for the Allen class, as their costs of care tend to be high See Decls of
 10 Gardner, ¶15 and Beasley, ¶15

11 Proposed intervenors met and corresponded with plaintiffs to discuss concerns and
 12 considerations regarding the potential settlement including the preclusive and binding effects of the
 13 proposed language on unnamed class members and requested an opportunity to comment on drafts
 14 Decl of Stroh, ¶¶ 14-17, exs 6,7 On April 25, 2001, plaintiffs provided proposed intervenors with a
 15 draft of defendants' proposed settlement agreement and assured proposed intervenors they would have
 16 time to comment on future drafts Id. at ¶ 17, ex 7 On April 30, 2001, WPAS learned of the final
 17 settlement Id. at ¶¶ 16-17, ex 7 On May 1, 2001, proposed intervenors sent a letter to plaintiffs, setting
 18 forth in detail proposed intervenors' serious concerns regarding the settlement Id. at ¶ 17, ex 7

19 Beginning on June 15, 2001, proposed intervenors corresponded with plaintiffs and defendants
 20 stating their intention to preserve their rights and to intervene if their interests remain neglected Id. at
 21 ¶¶ 18, 20, exs 8, 11 Plaintiffs were willing to exclude the Allen class members from the Settlement,
 22 but defendants refused See id., ¶¶ 19, 21, exs 9, 10, 12, & 13 In order to protect the interests of the
 23 Allen class as well as WPAS' organizational rights, proposed intervenors filed a Motion for Limited
 24 Intervention, an Opposition to the parties' Motion for Preliminary Approval of Settlement, and this
 25 Motion to Decertify or Modify the Class

26 III. Legal Argument

27 Under Fed R Civ P 23(c)(1), a court may amend, alter, or decertify a class prior to entry of

1 final judgment on the merits or approval of a settlement where there are new facts or there is other good
 2 cause demonstrating that the grounds for class certification are no longer satisfied O'Connor v Boeing
 3 North American, Inc., 197 F R D 404, 410 (C D Cal 2000) The standard to review a motion to
 4 decertify or modify a class is the same as to evaluate a motion for class certification Id Class
 5 certification is "inherently tentative" and courts must reassess whether the class continues to meet the
 6 requirements for class certification Officers for Justice v Civil Service Comm'n of City and County
 7 of San Francisco, 688 F 2d 615, 633 (9th Cir 1982) While determination of whether to decertify or
 8 modify the class is within the sound discretion of the Court, the Court "must conduct a 'rigorous
 9 analysis' into whether the prerequisites of Rule 23 are met " O'Connor, 197 F R D at 409,(*quoting*
 10 Valentino v Carter-Wallace, Inc , 97 F 3d 1227, 1231 (9th Cir 1996))

11 As discussed below, there is good cause to decertify the class or alternatively, modify the class
 12 so as to exclude the Allen class from the existing Arc class

13 1. The Representative Plaintiffs Do Not Adequately Represent the Class

14 Among other requirements, a class action must satisfy all four prongs of Fed R Civ P 24(a),
 15 including Rule 23(a)(4), which requires adequate representation by class counsel and the named
 16 plaintiffs of the unnamed class members Rule 23(a)(4) requires that the attorneys representing the class
 17 must *qualified and competent and that the class representatives not have antagonistic or conflicting*
 18 *interests with the unnamed members of the class* Lerwill v Inflight Motion Pictures, Inc., 582 F 2d 507,
 19 512 (9th Cir 1978), Rodriguez v Carlson, 166 F R D 465, 473 (E D Wash 1996) If the named
 20 plaintiffs and/or class counsel are unable to do this, the class must be decertified or modified at the point
 21 which that representation becomes inadequate See, e g, Zenith Laboratories, Inc v Carter-Wallace, Inc ,
 22 64 F R.D 159, 168 (D N J 1974) *aff'd*, 530 F 3d 508 (3d Cir 1976)

23 a. There Are Irreconcilable Conflicts Between the Class Representatives and the 24 Unnamed Class Members

25 In order for the named plaintiffs to adequately represent the class, their interests must coincide
 26 with those of the unnamed class members See Gen Tel Co of Southwest v Falcon, 457 U S 147,
 27 157-58 (1982) When the named plaintiffs are not similarly situated to the class members, whether as

a result of having a different claims or seeking different relief, the named plaintiffs cannot act as adequate representatives for the class Hanlon v Chrysler Corp., 150 F 3d 1011, 1020 (9th Cir 1998), Lerwill, 582 F 2d at 511-512. Additionally, the representative plaintiffs must actually be members of the class they seek to represent Gen Tel Co of Southwest, 457 U S at 156. Conflicts between class members can also defeat the adequacy of representation requirement of Rule 23(a)(4) Amchem Products, Inc v Windsor, 521 U S 591, 626, 117 S Ct 2231, 2251 (U S Pa 1997). Such conflicts include situations where the class representatives seek relief that favors some class members over others. See Paynes v Travenol Laboratories, Inc., 673 F 2d 798, 810-811(5th Cir 1982).

In this case, there are serious and irreconcilable conflicts between the named plaintiffs and the unnamed class members, particularly the Allen class members who are members of the Arc class. First, the terms of the settlement in Arc are antagonistic to the Allen class members who are members of the Arc class. One significant conflict is the "Covered Claims" provision of the proposed settlement in Arc. This provision waives a broad range of legal claims specifically preserved in Allen, including, but not limited to, claims for injunctive relief and damages and specifically allows plaintiffs to lift the stay at any time if they believe that defendants are not complying with the settlement. If the Arc settlement is approved, the Allen class may be precluded, if they need to lift the stay, from trying their ADA and proposed Medicaid claims.

Moreover, §11.3 of the proposed settlement in Arc states that the settlement supersedes any other prior agreement made by the parties. Since defendants in Arc are also defendants in Allen and Allen class members are members of the Arc class, this provision could be construed to supersede the Allen settlement and leave the Allen class with no remedy should the defendants fail to comply with the Allen settlement.

The legislature appropriated over \$14 million to fund Phase Two of the settlement in order to provide adequate community-based services for Allen class members. Under the terms of the settlement defendants must continue to seek such funding each year. Under the Arc proposed settlement, defendants are only required to ask the Governor to seek \$14 million in the 2002 Supplemental Budget and an undetermined amount to maintain these increased services for the 2003-2005 biennium. The parties

will try to reach agreement on an additional sum of money and defendants may recommend it to the Governor for the 2003-2005 biennium. The sum of \$14 million is insufficient for the Allen class, as their costs of care tend to be high.

The named plaintiffs in Arc also fail to adequately represent the unnamed plaintiffs, including the Allen class members, in that they do not have the same claims as the class members. There are at least two groups of individuals in the class: those already on the waiver and seeking access to the services to which they are entitled, and those not on the waiver. These groups have different interests. At the time the class was certified, the named plaintiffs were not on the waiver. See Order Denying Plaintiffs, Motion for Partial Summary Judgment and Granting in Part Defendants' Motion for Summary Judgment, 11/17/00, slip op. at 8¹

Thus, the named plaintiffs were not members of the class whom they purported to represent and therefore, did not adequately represent the interests of the unnamed class members who are already on the waiver, including the Allen class members.² Now, as a result of the settlement, all the named plaintiffs are on the waiver and receiving all of their services, and therefore cannot purport to represent the unnamed class members who are waiting for services. This inherent conflict necessitates that the class be decertified, or alternatively, redefined to exclude the Allen class members.

2. Class Counsel Has A Conflict Of Interest With The Class

Plaintiffs' counsel cannot serve the class adequately when there are conflicts of interest between class counsel and the class whom they represent. Munoz v. Arizona State University, 80 F.R.D. 670 (D. Ariz. 1978). A conflict exists where a settlement agreement fails to provide meaningful relief for absent class members, yet provides attorneys fees and more substantial relief to the named plaintiffs. Id. at 671-72, see also Clement v. American Honda Finance Corp., 176 F.R.D. 15, 24-25 (D. Conn. 1997). A

¹ Court found that it "can find no evidence that the named individual plaintiffs have in fact claimed to be on the waiver. They cannot without amending their complaint and submitting revised affidavits take the shortcut of claiming that the state in fact has already placed them on the waiver but improperly forgotten them." See Order Denying Plaintiffs' Motion for Partial Summary Judgment and Granting in Part Defendants' Motion for Summary Judgment, 11/17/00, at slip op. 8

² It is unclear from the class definition whether it includes individuals on the waiver. However, it is clear that it does include those waiting for services. See Order Granting Plaintiffs' Motion to Maintain Class Action

1 conflict also exists where the negotiation of attorneys' fees and class relief is done simultaneously
 2 Munoz, 80 F R D at 671 The presence of such conflicts warrants decertification of the class Id at
 3 672

4 Here, there is a conflict of interest between plaintiffs' counsel and the unnamed class members
 5 as plaintiffs' counsel negotiated their specific fees simultaneously with the rest of the proposed
 6 settlement See Settlement, ¶¶ 5 1-5 3 Furthermore, the attorneys' fees are virtually the only certain
 7 provision of the proposed settlement obtained for plaintiffs The only other certain provision is the
 8 "Covered Claims" portion of the proposed settlement which is detrimental to the plaintiff class,
 9 particularly the Allen class members

10 3. New Facts Necessitate Decertification or Alternatively, Modification of the Class

11 Even if there were adequate representation at the time the class was certified, new facts exist that
 12 now render that representation inadequate See O'Connor, 197 F R D at 410 Specifically, since the
 13 time that the class was certified, the parties agreed to the proposed settlement which, as discussed above,
 14 conflicts with the Allen settlement and directly interferes with the rights of the Allen class members and
 15 raises inherent conflicts between counsel and the class members These new facts necessitate
 16 decertification or alternatively modification of the class so as to exclude the Allen class members from
 17 the Arc class

18 4. Class Counsel Has Failed Vigorously Prosecute This Case

19 Under Fed R Civ. P 23(a)(4), class counsel must be qualified and vigorously prosecute the
 20 action on behalf of the class Hanlon, 150 F 3d at 1021 Errors or omissions made in representation of
 21 the class by class counsel is grounds for decertification or modification of the class Wrighten v
 22 Metropolitan Hospital, Inc., 726 F 2d 1346, 1351-52 (9th Cir 1984)(denial of class certification upheld
 23 due to inadequacy of class counsel including failure to file timely motion for class certification), see also
 24 Key v Gillette Co, 782 F 2d 5, 6 (1st Cir 1986), Munoz, 80 F R D at 671 Failure to properly define
 25 a class is also a fatal error Dunn v Midwest Buslines, 94 F R D 170, 172 (E D Ark 1982)

26 Class counsel here, have repeatedly failed to prosecute this case vigorously For example, they
 27 improperly agreed to a settlement that unfairly compromised the rights of the Allen class members by

1 waiving claims explicitly preserved in the Allen settlement See, e.g., Roberts v Heim, 1991 WL 427888
 2 at 5 (N D Cal 1991), see also National Super Spuds v N Y Mercantile Exchange, 660 F 2d 9, 21 (2d
 3 Cir 1981)(In b(2) classes, class counsel cannot waive claims of unnamed class members as part of
 4 settlement) Since the Arc class is certified under Rule 23(b)(2), there is no right for the unnamed
 5 plaintiffs to opt-out of the class, therefore, counsel had no legal authority to enter into a settlement which
 6 improperly released claims of the unnamed class members In doing so, they did not adequately protect
 7 the rights and interests of the unnamed class members, particularly those of the Allen class

8 The inadequacy of class counsel in prosecuting this case is further demonstrated by their failure
 9 to adequately plead class allegations in the Complaint and their failure to move for class certification
 10 The Court acknowledged class counsel failure, stating that “[p]laintiffs clearly failed to comply with the
 11 requirements of Local Rule CR 23(f)(3) ”Id Plaintiffs’ counsel also failed to properly define the class,
 12 as the representative plaintiffs are inadequate See Dunn, 94 F R D at 172-73

13 Class counsel’s repeated failure to vigorously represent the class have rendered them inadequate
 14 legal representatives of the class and thus, the class should be decertified or alternatively, modified

15 **B. Decertification Or Modification Is Necessary To Ensure That The Allen Class**
 16 **Will Not Be Prevented From Litigating Their Claims**

17 Summary judgment of some or all of the named plaintiffs’ claims supports decertification or
 18 modification of the class so that the class members are not harmed by the loss of their ability to pursue
 19 those claims independently See East Texas Motor Freight System v Rodriguez, 431 U S 395, 402 (U S
 20 Tex 1977), see also Mayfield v Meese, 704 F Supp 254, 258 (D D C 1988)

21 Here, the Court previously entered a partial summary judgment order Order Denying Plaintiffs’
 22 Motion for Partial Summary Judgment and Granting Defendants’ Motion for Summary Judgment,
 23 11/17/00, slip op If the class in this case is not decertified or at least modified to exclude the Allen class
 24 members, the Allen class is at risk of being barred from litigating their ADA and proposed Medicaid
 25 claims

26 Additionally, the class, as defined by the proposed settlement, appears to include individuals who
 27 are both on and not on the waiver, yet none of the named plaintiffs, at the time the Complaint was filed

1 and the class was certified, were on the waiver To the extent this factual difference influenced the
2 partial summary judgment Order, the class should be decertified because individual on the waiver are
3 harmed by the summary judgment that was based upon named plaintiffs with different factual claims.

4 The named plaintiffs and class counsel have not and are continuing not to provide adequate
5 representation to the unnamed class members, including the Allen class, who are a subclass of the class
6 certified in Arc Therefore, the class should be decertified or alternatively, modified to exclude the Allen
7 class members

8 IV. CONCLUSION

9 For the forgoing reasons, proposed intervenors' Motion to Decertify or Modify the Class should
10 be granted

11 DATED this 23rd day of August, 2001

12 Respectfully submitted,

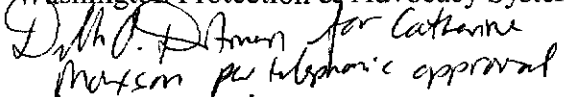
13 Sharon Allen, et al
14 Intervenor

15 

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