UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Kevin Scott Karsjens, David Leroy Gamble, Jr., Kevin John DeVillion, Peter Gerard Lonergan, James Matthew Noyer, Sr., James John Rud, James Allen Barber, Craig Allen Bolte, Dennis Richard Steiner, Kaine Joseph Braun, Brian Christopher John Thuringer, Kenny S. Daywitt, and Bradley Wayne Foster,

Plaintiffs,

vs.

Lucinda Jesson, Dennis Benson, Kevin Moser, Tom Lundquist, Greg Carlson, and Ann Zimmerman, in their individual and official capacities,

Defendants.

Civil File No. 11-cv-3659 (DWF/JJK)

STATE DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

INTRODUCTION

The named Plaintiffs are thirteen individuals who are indeterminately civilly committed residents of the Minnesota Sex Offender Program ("MSOP"). The named Plaintiffs have sued six State officials in their official and individual capacities under 42 U.S.C. § 1983, alleging violations of their federal and state constitutional and statutory rights. Plaintiffs now bring their Amended Motion For Class Certification. As demonstrated below, this Court should deny Plaintiffs' Amended Motion for Class Certification because they have not shown that each of the requirements of Rule 23 of the

Federal Rules of Civil Procedure have been met. The Motion is premature as no facts have been developed to support a broad class certification at this early stage .

State Defendants reiterate that they remain willing to stipulate to a Rule 23(b)(2) class certification for settlement purposes at this early stage in order to facilitate a full and fair settlement. Plaintiffs simply fail to articulate any reason why entering into such a stipulation is insufficient, particularly when the State Defendants have agreed to engage in structured settlement discussions and have yet to file a responsive pleading. Thus, class certification at this point and without the benefit of discovery is premature at best.

STATEMENT OF FACTS

I. ALLEGATIONS IN THE AMENDED COMPLAINT.

The named Plaintiffs are clients civilly committed to the MSOP. (*Karsjens* Amended Compl. pp. 5-7, Doc. No. 151.) Plaintiffs each make the conclusory claim that they "[have] been and [continue] to be injured by the acts and omissions of Defendants." *Id.* Plaintiffs' claims against the State Defendants make the same blanket allegation that each of the Defendants "implemented, retained and carried out policies through the MSOP that violated the constitutional, statutory, and common law rights of Plaintiffs and class members." *Id.*, pp. 5-8. Plaintiffs do not allege facts as to the role each Defendant played in any alleged constitutional act and do not identify what particular policy or policies were implemented or carried out by the State Defendants in their capacity as supervisors that caused each Plaintiff actual harm. *Id.*

Plaintiffs' Amended Complaint begins with the alleged history and politics surrounding Minnesota's civil commitment statutes dating back to 1939. *Id.*, pp. 12-14.

Very little of these allegations describe circumstances of conditions that have specifically and adversely affected the Plaintiffs. These facts, therefore, are of marginal relevance to their claims. Plaintiffs further set forth allegations concerning the civil commitment process for sex offenders in Minnesota. *Id.*, pp. 14-17. Here again, Plaintiffs make no allegations that there constitutional rights were violated by these set of circumstances and have little relevance to their claims.

The allegations in Plaintiffs' Amended Complaint can be placed into two main categories: (1) inadequate treatment, and (2) unconstitutional conditions of confinement. Under the inadequate treatment category, Plaintiffs allege that the MSOP does not provide for less restrictive alternatives to civil commitment as do civil commitment programs in Texas, Wisconsin, and New York. *Id.* 17-18. Plaintiffs further allege that they do not receive adequate treatment best adapted in accordance with contemporary professional standards because Plaintiffs and putative class members receive no more than six or seven hours per week of treatment per week, which is at the low range of treatment hours provided by other sex offender civil commitment programs. *Id.* 21-22. Plaintiffs further allege that clients at the MSOP are not provided with individual treatment by a licensed psychiatrist or psychologist, treatment plans are not detailed, and the MSOP has inadequate staffing levels. *Id.* 22-24. Plaintiffs contend that the MSOP is not accredited by an independent medical accreditation society, are billed a per diem rate for individual treatment regardless of individual needs, and that Plaintiffs and putative class members who have health insurance cannot use that coverage to pay for treatment costs at the MSOP. *Id.* 25. Finally, Plaintiffs allege that the MSOP is not releasing

civilly committed sex offenders from the Program because of political considerations, and not professional judgment. *Id.* 44-45.

With respect to conditions of confinement, Plaintiffs contend that since Defendant Dennis Benson took over as Executive Director of the MSOP in 2008, numerous new policies were implemented that restricted many of the "rights" Plaintiffs and putative class members previously enjoyed. *Id.* p. 19. Plaintiffs further contend that while State Defendants categorized behavioral violations as either minor or major rule violations, the descriptions of such behavioral violations are unclear. *Id.* p. 26. Plaintiffs assert that MSOP staff do not consistently apply behavioral expectations to Plaintiffs and putative class members. *Id.* 27. Plaintiffs allege that they are allowed to appeal corrective behavioral actions imposed, but are not allowed to present evidence or cross-examine witnesses. *Id.* pp. 27-28. Plaintiffs list a number of alleged punitive policies and practices at the MSOP without specifying a particular policy or how each of the named State Defendants were involved in the alleged punitive acts. *Id.* pp. 29-30.

Plaintiffs make specific allegations with respect to their claim that the policies, procedures, and practices of the State Defendants have led to a non-therapeutic environment at the MSOP. *Id.* pp. 30-42. Plaintiffs complain about the physical layout of the MSOP Moose Lake Facility in that it was not designed with therapeutic goals in mind. *Id.* p. 31. Plaintiffs cite to two incidents of assault by a roommate in alleging that they and putative class members are subjected to unsafe double-bunking. *Id.* pp. 32-33.

Plaintiffs complain about various policies relating to clothed and unclothed body searches made without reasonable suspicion and "cell" searches as a "punitive exertion of

authority on Plaintiffs and class members." *Id.* pp. 33-34. Plaintiffs contend that they are subject to physical restraints when leaving the secured facility. *Id.* pp. 35-36. Plaintiffs also complain about restrictions placed on their personal freedom, alleging that their personal property is restricted, that items deemed to be contraband are confiscated by MSOP staff, and that they are not allowed access to the Internet. *Id.* pp. 37-38. Plaintiffs further claim that visitation is severely restricted, that vocational work assignments are limited to menial labor, that they are provided an inadequate diet, and that Plaintiffs and putative class members are charged exorbitant rates for using telephones. *Id.* pp. 38-41. Plaintiffs contend that the State Defendants monitor Plaintiffs and class members when they speak to clergy or religious volunteers, that Plaintiffs and putative class members are not provided with Kosher or Halal meals, and that they are only allowed to possess five religious items and may only attend a religious feast once per year. *Id.* p. 42.

With respect to release from civil commitment, Plaintiffs allege that they may only be released through a statutory process for reduction in custody, and there have only been two MSOP patients that have ever been placed on provisional discharge as compared to a greater number of provisionally discharged patients from other programs in different states. *Id.* pp. 43-45.

II. THE MSOP TREATMENT PROGRAM.

In 1993, the Minnesota Legislature enacted legislation requiring the Commissioner of Human Services to establish and maintain a secure facility for sex offenders. *See* 1993 Minn. Laws Ch. 1, art. 7, § 28, codified at Minn. Stat. § 246B.02 (2010). In response, the Commissioner developed a program to provide treatment to persons committed by the

courts as sexual psychopathic personalities or sexually dangerous persons under the Minnesota Civil Commitment and Treatment Act. *See* Minn. Stat. § 246B.02; Minn. Stat. Ch. 253B. "Sexual Psychopathic Personalities" are persons whose conduct evidences "an utter lack of power to control the persons' sexual impulses… ." Minn. Stat. § 253B.02, subd. 18b (2010). "Sexually Dangerous Persons" are persons who have "engaged in harmful sexual conduct," and because of their history and mental condition, are "likely to engage in acts of harmful sexual conduct … ." Minn. Stat. § 253B.02, subd. 18c (2010).

The Program must assess every client and develop and implement an individual written treatment plan. Minn. R. 9515.3030, subps. 1, 4. The plan must identify the client's needs and establish goals. *Id.* at subp. 4. Treatment services must "address an individual's sex offense behaviors and remediation, and include, as applicable related topics such as deviant sexual arousal patterns, assaultive behaviors, human sexuality, victimization issues, re-offense prevention, and interpersonal relationships." Minn. R. 9515.3040, subp. 1A. Consequently, treatment at the MSOP is individualized to each particular client based on their assessed behaviors and risks. (Affidavit of Jessica Geil ("Geil Aff.") ¶ 5, Ex D pp. 1-2.) As stated in the MSOP's Program Theory Manual, the MSOP uses a phase system to provide sex offender treatment *Id.* ¶ 2, Ex. A p. 14. In Phase 1, clients focus on complying with rules and policies and learn basic treatment concepts. (*Karsjens* Amended Compl. p. 18.) Clients in Phase 1 do not directly address their sexual offending because interpersonal skills and appropriate motivations need to be developed in preparation for the challenges they will face in Phase 2. (Geil Aff. ¶ 2, Ex.

A pp. 15-16.) In Phase 2, clients explore issues relating to their sexual offending using various tools not available to clients in Phase 1. *Id.* pp. 16-17 In Phase 3, clients focus on reintegration into the community through application of the skills learned in Phases 1 and 2 and monitored outings off campus. *Id.* pp. 17-18. There is also an Alternative Program at the St. Peter facility that provides differing treatment to those with low cognitive skills. *Id.* pp. 31-32. Although treatment is offered to civilly committed sex offenders, participation in treatment is voluntary, and there are clients who choose not to participate in sex offender treatment. (Geil Aff. ¶ 5 Ex. D p. 2; Plt's Mem. in Supp. of Class Cert., p. 5..) Those clients choosing not to participate in treatment are separately housed within the Moose Lake Facility. (Plt's Mem. in Supp. of Class Cert. p. 5.) Privileges, for example available vocational work hours, are generally fewer for those clients who choose not to participate in treatment or who do not consistently participate as opposed to treatment participants as such privileges are directly linked to treatment progress. (Geil Aff. ¶ 3, Ex. B p. 3.) Additionally, clients in different phases of treatment, those in Phase 3 for example, are not subject to various restrictions such as wearing of restraints when outside the secured perimeter. *Id.* ¶ 4, Ex. C p. 2.

In addition to treatment requirements, the legislature required the Commissioner to adopt rules to govern the operation, maintenance, and licensure of secured treatment facilities operated by the MSOP. Minn. Stat. § 246B.04, subd. 1 (2010). Pursuant to the rule making authority, the Commissioner promulgated numerous rules governing the operation, maintenance, and licensure of the program. *See* Minn. R. 9515.3000 to 9515.3110 (2010). These rules require the Program to develop and follow written

policies and procedures regarding data privacy, treatment outcomes, prevention of abuse and predation among residents, response to allegations of criminal acts committed by facility patients, monitoring for contraband, and providing for a safe environment for staff, program participants, and visitors. Minn. R. 9515.3040, subp. 2. The Program must "maintain a secure and orderly environment that is safe for [patients] and staff and supportive of the treatment program." Minn. R. 9515.3080, subp. 1. Consequently, the MSOP is authorized to redress an individual client's disruptive behavior through imposition of restrictions that are in proportion to the behavioral violation. Minn. R. 9515.3090.

III. PROCEDURAL HISTORY.

The State Defendants concur with Plaintiffs' recitation of the procedural history in this matter.

ARGUMENT

IV. PLAINTIFFS BEAR THE BURDEN OF PROVING THAT ALL REQUIREMENTS OF RULE 23 ARE MET.

To obtain class certification, Plaintiffs bear the burden of showing that the requirements of Rule 23 are met. *Coleman v. Watt*, 49 F.3d 255, 258 (8th Cir. 1994). A class action "may only be certified if the trial court is satisfied, after a *rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied. *General Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982) (emphasis added). Though class certification is not the time to address the merits of the parties' claims and defenses, a "rigorous analysis" under Rule 23 must include an examination of what the parties would be required to prove at trial.

See Elizabeth M. v. Montenez, 458 F.3d 779, 786 (8th Cir. 2006). Thus, an evaluation of the underlying claims may entail some overlap with the merits as the court may also be called upon to resolve disputes concerning the factual setting for the case. *Wal-Mart Stores, Inc. v. Dukes,* --- U.S. ---, 131 S.Ct. 2541, 2551 (2011); *see also Blades v. Monsanto Co.,* 400 F.3d 562, 566 (8th Cir. 2005). This Court retains broad discretion to determine whether the Rule 23 criteria are met. *In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, 201 F.R.D. 456, 458 (D. Minn. 2001).

In making its determination, the Court requires sufficient information to form a reasonable judgment. Accordingly, Plaintiffs' pleading must set forth sufficient facts because "'without reasonable specificity the court cannot define the class, cannot determine whether the representation is adequate, and the [defendant] does not know how to defend.'" *Coleman*, 49 F.3d at 258-59. So for example, bare allegations that discrimination had occurred were not sufficient to support certification of a class in employment discrimination cases. *Falcon*, 457 U.S. at 157, 102 S. Ct. at 2370; *East Texas Motor Freight Sys. Inc. v. Rodriguez*, 431 U.S. 395, 405-06, 97 S. Ct. 1891, 1897-98 (1977). In addition, the Court may go beyond the pleadings and consider documentary evidence submitted by the parties to determine whether Rule 23 requirements have been met. *Bishop v. Comm. on Prof. Ethics*, 686 F.2d 1278, 1288 (8th Cir. 1982); *Caroline C. by Carter v. Johnson*, 174 F.R.D. 452, 459 n.7 (D. Neb. 1996). "A court of appeals may permit an appeal from an order granting or denying class-action certification… ." Fed. R. Civ. P. 23(f).

As shown below, the allegations here are so broadly stated that this Court simply cannot perform the rigorous Rule 23 analysis that *Falcon* and *Elizabeth M.* contemplate.

V. PLAINTIFFS' CLASS ALLEGATIONS DO NOT SATISFY RULE 23 REQUIREMENTS.

Rule 23(a) provides that no class can be certified unless the court determines that: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." As shown below, Plaintiffs have failed to meet these requirements at this early stage of litigation.

A. Plaintiffs Have Failed To Demonstrate That The Class Is So Numerous That Joinder Is Impracticable.

Rule 23(a)(1) first requires that Plaintiffs show that the proposed class is "so numerous that joinder of all members is impracticable." *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 559 (8th Cir. 1982). No absolute or arbitrary number satisfies the numerosity requirement, *id.* at 559; rather, "what constitutes impracticability depends upon the facts of each case." *In re Lutheran Bhd. Variable Ins. Products Co.*, 201 F.R.D. at 458.

Here, Plaintiffs' motion defines the class as "all patients current civilly committed in the MSOP pursuant to Minn. Stat. § 253B." Plaintiffs assert that they meet the numerosity requirement because there are approximately 600 patients of the Program, who reside at either the St. Peter or Moose Lake sites. The total number of potential class members at these facilities is undoubtedly numerous.

However, the fact that potential class members are all civilly committed to the MSOP means that each class member can be easily identified for purposes of joinder. Joinder is practicable when most class members were residents of the state and could be identified. *See Hum v. Dericks*, 162 F.R.D. 628, 634 (D. Haw. 1995) (holding that the numerosity requirement was not met when proposed class consisted of 200 individuals, most of whom lived in state and could be identified). In this case, all of the potential class members as defined by Plaintiffs are current residents of the Program who are easily identified. Also, judgment for the Plaintiffs will in effect secure injunctive relief to the benefit of the all other MSOP clients, making joinder feasible in accordance with Fed. R. Civ. P. 19[1]. Accordingly, joinder is a practicable and feasible alternative to class certification in this case.

Because MSOP clients can be readily identified and the same injunctive remedy will be available to all clients who are similarly situated if the named plaintiffs prevail on the merits, joinder of the remaining clients currently at the MSOP is a practicable alternative if Plaintiffs desire to have a method of broadly applying policy changes to all MSOP clients at this stage of litigation.

[1] It should be noted that several courts have called into question the need for a class when the constitutionality of a regulation or policy is challenged in an action for injunctive relief. *See, e.g., Forts v. Ward*, 621 F.2d 1210, 1217-18 (2d Cir. 1980) (finding class certification unnecessary in action for injunctive and declaratory relief against correctional facility); *Sanford v. R.J. Coleman Realty Co., Inc.*, 573 F.2d 173 (4th Cir. 1978) (finding class certification unnecessary in action for injunctive relief in housing discrimination case); *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir. 1972) (finding that where constitutionality of rules and regulations are at issue, "[n]o useful purpose would be served by permitting this case to proceed as a class action") *judgment vacated on other grounds*, 409 U.S. 815 (1972).

B. Common Issues Of Law And Fact Are Insufficient To Satisfy Rule 23(a).

Plaintiffs have also failed to show that there are questions of law or fact common to the entire class. The class action procedure is appropriate when "issues involved are common to the class as a whole" and when such issues "turn on questions of law applicable in the same manner to each member of the class." *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979). Rule 23 is thus satisfied when the legal question "'linking the class members is substantially related to the resolution of the litigation.'" *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995) (quoting *Paxton*, 688 F.2d at 561). In other words, class certification is appropriate when "the main point of contention" for all class members is the same. *Id*. That common contention must be of such a nature that it is capable of class-wide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. *Dukes,* 131 S.Ct. at 2551. Class members are not required to be identically situated, nor must every question of law or fact be common to every member of the class. *Paxton,* 668 F.2d at 561. However, "[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers." *Dukes,* 131 S.Ct. at 2551 (quotation omitted).

In this case, there are several dissimilarities that impede identifying common answers with any degree of specificity. Plaintiffs recite a list of what they identify as common issues applicable to all putative class members. (Plt's Mem. in Supp. of Mot. for Class Cert. pp. 13-14, Doc. No. 173.) But the Amended Complaint only generally

describes the level of treatment offered and restrictions imposed without sufficient facts as to the differing levels of individual treatment offered and privileges given to various sub-groups within the MSOP. As set forth in the facts above, the treatment provided at the MSOP is individualized based on a client's particular assessment and particular Phase of treatment, yet Plaintiffs make no showing as to how the level of treatment they receive in Phase 1 of a three-phase Program is typical of, and thus inadequate, to all other treatment participants, nonparticipants[2], or those clients in the Alternative Program at the St. Peter facility. Moreover, the level of privileges gained by an individual client is dependent, in part, on their level of treatment participation. Consequently, the applicable Policies governing these differences are applied differently to these various sub-groups[3]. Given the variety of members of the potential class as well as their individualized treatment needs, Plaintiffs' general assertion that they all are confined in the same Program with the same policies is insufficient to meet the commonality requirement. *See Baldridge by Stockley v. Clinton*, 139 F.R.D. 119, 127 (E.D. Ark. 1991) (decertifying class of persons with a developmental disability challenging housing in residential institutions after finding, among other things, that residents' allegations of "common habilitation plan rules and regulations, common incident/death/abuse/neglect procedures . . . common need for protection from harm . . . common training provided to staff" did not

[2] Several MSOP clients who do not participate in treatment and are plaintiffs with stayed cases have recently filed with the court *pro se* motions opposing class certification on the basis that they are dissimilar to the Plaintiffs and as an alternative should be granted sub-class status.

[3] Of course, impediments to class certification may possibly be cured by sub-classing under Rule 23 (c)(4) or (c)(5). *See Amchem Products Inc., v. Windsor,* 521 U.S. 591, 626-27 (1997). Plaintiffs in this case have not clearly identified potential subclasses here.

show that they shared the necessary common deprivation to satisfy Rule 23's commonality requirement).

Similarly, Plaintiffs' conclusory allegations concerning substantive and procedural due process violations, combined with inadequate treatment claims raises Rule 23 issues because resolution of these claims will involve differing legal standards. For example, an analysis of an inadequate treatment claim requires a determination that the state action was so arbitrary and egregious as to shock the conscience. *Strutton v. Meade,* 668 F.3d 549, 557-58 (8th Cir. 2012). On the other hand, substantive due process claims relating to various conditions of confinement such as use of restraints requires a finding that professional judgment was not used. *See Youngberg v. Romeo,* 457 U.S. 307, 324 (1982). Additionally, several of Plaintiffs' claims such as inadequate medical care and inadequate diet for example require individualized findings of actual injury. *Senty-Haugen v. Goodno*, 462 F.3d at 889 (in order to make out a violation of the Eighth Amendment prohibition against cruel and unusual punishment arising from inadequate medical attention, an inmate must show "deliberate indifference" to a "serious illness or injury.") (citation omitted); *Wishon v. Gammon,* 978 F.2d 446, 449 (8th Cir. 1992) (inmate failed to provide evidence that his health suffered as a result of inadequate diet).

Given the differing facts and legal standards in this matter, certifying a single class seeking broad injunctive relief that has the potential of broadly affecting a state agency's functioning would not promote judicial economy. *See Elizabeth M.,* 458 F.3d at 788 (vacating district court's order certifying class in action against state hospitals because of differing legal standards, the individualized nature of substantive due process inquiries,

and failure to identify specific policies under attack). In the absence of specific identification of common issues, the class cannot be certified.

C. Plaintiffs' Claims Are Not Typical Of Class Claims.

The typicality requirement of Rule 23(a) is intended to evaluate whether plaintiffs' particular claims are factually similar to those of the putative class members. A class member "must be part of the class and 'possess the same interest and suffer the same injury'" as other class members. *Falcon*, 457 U.S. at 156, 102 S. Ct. at 2370. The burden is fairly easy to meet so long as other class members have claims similar to the named plaintiffs. *See Alpern v. UtiliCorp United, Inc.,* 84 F.3d 1525, 1540 (8th Cir. 1996). However, the presence of a common legal theory does not establish typicality when proof of a violation requires individualized inquiry. *Elizabeth M.,* 458 F.3d at 787. "The proper inquiry is whether other members of the class have the same or similar injury, whether the action is based on conduct not special or unique to the named plaintiffs, and whether other class members have been injured by the same conduct." *Bublitz v. E.I. dupont de Nemours & Co.,* 202 F.R.D. 251, 257 (S.D. Iowa 2001) (citation omitted).

Plaintiffs in this matter have not and cannot demonstrate that other members of the purported class have sustained the same or similar injury based on the same or similar conduct by the State Defendants. As stated above, the individualized treatment offered to clients in different phases of the Program and the dissimilar application of privileges and restrictions that depend on phase and factual circumstances negates a conclusion that all class members incur the same or similar injury. As such, Plaintiffs' general allegations in their Amended Complaint that all class members are offered the same or similar

inadequate treatment as they receive or are subject to the same or similar alleged unconstitutional conditions are insufficient to demonstrate same or similar injury. *See Paxton*, 688 F.2d at 562 (noting that typicality requires "something more than general conclusory allegations that unnamed blacks have been discriminated against"); *Belles v. Schweiker*, 720 F.2d 509, 515 (8th Cir. 1983) (finding no typicality where "Belles cannot identify any other person who has been subjected to the same or similar treatment as she has. She only speculates that such is the case."). Indeed, not even the named Plaintiffs have each suffered the same or similar injuries on each of their claims. Plaintiffs have made little to no showing that clients in Phases 2 and 3 and nonparticipants in treatment suffered the same or similar injuries as these Phase 1 Plaintiffs. *Hancock*, 933 F. Supp. at 1468 (finding no typicality where plaintiffs did not show that there is "anyone, let alone a class of individuals, besides the named plaintiffs, whose constitutional rights have been violated"). Other than their conclusory assertions that all clients have restrictions placed on them, Plaintiffs have made no showing that their claims are typical. Therefore, the class as currently proposed by Plaintiffs cannot be certified at this juncture.

D. The Plaintiffs Are Not Adequate Representatives.

Plaintiffs, as participants in Phase 1 of treatment at the Moose Lake Facility, cannot adequately represent the interests of the proposed class in this matter. The Court has the task of determining whether the named Plaintiffs satisfy all the requirements of Rule 23(a) and Rule 23(b)(2) with respect to the causes of action asserted. *Elizabeth M.,* 458 F.3d at 786. Rule 23(a)(4) demands that "the representative parties will fairly and adequately protect the interests of the class." Two factors measure adequate

representation: (1) plaintiffs' counsel must be competent to pursue the action; and (2) the representatives must not have interests that are antagonistic to those of the proposed class. *In re Workers' Comp.*, 130 F.R.D. 99, 107 (D. Minn. 1990).

In this case, the named Plaintiffs are not proper representatives because an inherent conflict exists between Plaintiffs and other proposed class members. Plaintiffs' claims regarding behavioral corrections, inadequate treatment, and the restrictions placed on them, are in direct conflict with the interests of clients who are subject to fewer restrictions because they have advanced in treatment and who live in units with others who have similarly advanced in treatment. Certainly, the named Plaintiffs do not adequately represent those clients who do not participate in treatment or who, because of low cognitive functioning, have different treatment needs in the Alternative Program. Thus, class certification, if granted, would adversely affect those who are in different Phases of treatment and not subject to the same or similar restrictions as those clients in Phase 1. This conflict "goes to the very subject matter of the litigation" – the quality of care of Plaintiffs – and therefore should "defeat [Plaintiffs'] claim to representative status." *Jenson v. Cont'l Fin. Corp*., 404 F. Supp. 806, 811 (D. Minn. 1975).

Because clients in the Program are subject to different restrictions based on the unit they reside in or what Phase of treatment they are in, the viewpoints and goals of Plaintiffs and other class members will likely diverge. Hence, Plaintiffs cannot adequately represent the interests of all persons civilly committed to the MSOP[4].

[4] State Defendants take no issue with opposing counsel's competency to pursue this action should class certification be granted.

E. Plaintiffs Cannot Satisfy Rule 23(b) Requirements.

Plaintiffs' showing for class certification must not only satisfy Rule 23(a) requirements, but Rule 23(b) requirements as well. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614, 117 S. Ct. 2231, 2245 (1997). As discussed above, Plaintiffs have made no showing that the State Defendants have acted or refused to act in a manner "generally applicable" to the entire class. Plaintiffs have not identified any particular policies that affect all of the class members in the same or similar manner. Plaintiffs have failed to meet the requirements of Rule 23(b)(2).

CONCLUSION

Based upon the foregoing, the State Defendants respectfully request that this Court deny Plaintiffs Motion for Class Certification at this stage of the litigation.

Dated: July 13, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH LOCAL RULE 7.1(D)

The undersigned certifies that the Brief submitted herein contains 4,806 words and complies with the type/volume limitations of the Local Rules for the United States District Court, District of Minnesota 7.1(d). This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.

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