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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

LESLIE NAPPER, JANET FISCHER, JACQUIE EICHHORN-SMITH, TED YANELLO, and LYNDA MANGIO, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

COUNTY OF SACRAMENTO; BOARD OF SUPERVISORS OF THE COUNTY OF SACRAMENTO; County Supervisor ROGER DICKINSON; County Supervisor JIMMIE YEE; County Supervisor SUSAN PETERS; County Supervisor ROBERTA MACGLASHAN; County Supervisor DON NOTTOLI; SACRAMENTO COUNTY DEPARTMENT OF BEHAVIORAL HEALTH SERVICES; ANN EDWARDS-BUCKLEY, Director, Department of Behavioral Health Services; MARY ANN BENNETT, Mental Health Director,

Defendants.

Case No. 2:10-CV-01119-JAM-EFB

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Date: July 21, 2010
Time: 9:30 a.m.
Place: Courtroom 6, 14th Floor
Judge: Hon. John A. Mendez

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I. INTRODUCTION

Each of the arguments set forth in Defendants' Opposition to Plaintiffs' Motion for Class Certification ("Opp.") is easily met, and the Court should therefore certify a class according to the modified (and slightly narrowed) definition described herein.

Defendants argue that the proposed class definition is too broad; to meet this objection, Plaintiffs suggest a narrowed class consisting of "all current and future *adult* recipients of MediCal funded *outpatient* mental health services in the County of Sacramento" (modifications italicized). Defendants all but concede that such a narrowed class consisting of those putative class members is sufficiently narrow to warrant class certification.

Plaintiffs claim that class certification is "unnecessary" because complete injunctive relief may be granted without certification of a class. In response to this argument, Defendants reiterate that they have moved for class certification in an abundance of caution, so that the Court is provided with the tools it may feel necessary to grant complete relief. If the Court agrees with Defendants that complete injunctive relief does not require class certification, Plaintiffs agree that class certification could be deferred, although it is certainly warranted at this time.

Defendants' remaining objections are easily disposed of. The claims that certification would be "premature" or "not warranted" are both based on the overbreadth argument; with respect to the narrowed class defined below, there can be no question that Defendants have acted in a manner generally applicable to the class under Rule 23(b)(2) of the Federal Rules of Civil Procedure. Finally, the argument that the named Plaintiffs "do not adequately represent the class" is really an argument that *no* class member has suffered any injury. Plaintiffs easily refute this argument, both here and in their opening and reply briefs in support of the motion for preliminary injunction. This Court should therefore certify the proposed class, appoint Plaintiffs' counsel to represent the class, and dispense with any notice to class members prior to judgment or settlement.

II. ARGUMENT

A. This Court May Narrow the Proposed Cla ss Definition So That It Includes Only Adult Recipients of Outpatient Services.

Defendants assert that a class consisting of "all current and future recipients of MediCal funded mental health services in the County of Sacramento" is overbroad because it includes minors, persons receiving inpatient services, and persons who may never be affected by the redesign of outpatient services. Opp. at 4-5. Having considered these objections, Plaintiffs agree to narrow the class definition to "all current and future *adult* recipients of MediCal funded *outpatient* mental health services in the County of Sacramento" (modifications italicized). These modifications will prevent minors and persons who will *never* receive outpatient services from being swept into the class. Plaintiffs do not agree, however, that the class should exclude *future* recipients of outpatient services. Undoubtedly some persons who are currently minors and/or currently receiving inpatient services will one day become recipients of adult outpatient services; these individuals will surely be harmed by the system redesign that is the focus of this lawsuit, and deserve to be protected from it.

Courts have discretion to redefine a class under appropriate circumstances to bring the action within Rule 23. Fed. R. Civ. P. 23(d)(4). In particular, it is well-settled that a court may modify, narrow or change a class definition when appropriate. *Armstrong v. Davis*, 275 F.3d 849, 872 n.27 (9th Cir. 2001) ("Where appropriate, the district court may redefine the class . . ."); *Penk v. Oregon State Bd. of Higher Ed.*, 816 F.2d 458, 467 (9th Cir. 1987) (upholding the district court's redefining of the class). District courts may do so even when the proposed class is redefined in a plaintiff's reply briefing in support of class certification. *See In re TFT (Flat Panel) Antitrust Litig*, 2010 WL 1286478, at *1 (N.D. Cal. Mar. 28, 2010); *Greenwood v. Compucredit Corp.*, 2010 WL 291842, at *3 (N.D. Cal. Jan. 19, 2010); *White v. E-Loan, Inc.,* 2006 WL 2411420, at *1 n.2 (N.D. Cal. Aug. 18, 2006).

Here, it is appropriate to narrow Plaintiffs' proposed class, and a class consisting of "all current and future adult recipients of MediCal funded outpatient mental health services in the County of Sacramento" is sufficiently narrow to warrant class certification. Defendants readily

admit that "the restructured service delivery system is the Adult Outpatient Mental Health Services system." Opp. at 4. Defendants also acknowledge that implementation of its new "Adult Outpatient Mental Health Services" system will affect "all consumers receiving services in the outpatient system." Opp. at 3. Defendants therefore cannot dispute that a class consisting of individuals affected by a change in that system is sufficiently narrow. *See Alliance to End Repression v. Rochford*, 565 F.2d 975, 978 (7th Cir. 1977) (scope of the proposed class is defined by the policies of the defendants).

Moreover, Defendants will not be prejudiced by certification of a class consisting of these individuals. Throughout Plaintiffs' opening memorandum in support of this motion, Plaintiffs argue that MediCal recipients in Defendants' outpatient system, not the entire mental health system, will be impacted by the proposed change in policy. This Court therefore has sufficient information to reach a decision on class certification.

B. Certification of This Narrow Class of Plaintiffs Under Rule 23(b)(2) Is Appropriate Because All Class Members Are Threatened by the County's Restructuring of Outpatient Mental Health Services.

Arguing that Plaintiffs' proposed class definition is overbroad, Defendants contend that this class may not be certified under Rule 23(b)(2) because not every class member will be injured by their restructured system. Opp. at 7. As explained above, this Court may narrow the class to include only those members who will be aggrieved by Defendants' conduct. Once it does so, Defendants' arguments against certification under Rule 23(b)(2) must fail.

As Defendants note, Plaintiffs bringing an action under Rule 23(b)(2) need only show that defendants have acted or refused to act on grounds generally applicable to the class, so that injunctive relief or declaratory relief is appropriate for the whole class. Fed. R. Civ. P. 23(b)(2). Here, the proposed redefined class fits squarely within the ambit of subdivision (b)(2). By Defendants' own admission, every putative class member will be affected by the transition from contractor-operated to County-operated adult mental health system. Opp. at 3-4. These putative class members therefore have standing to pursue injunctive and declaratory relief. Class certification is therefore appropriate under Rule 23(b)(2).

C. All Plaintiffs Have Been Injured or Are in Imminent Danger of Being Injured by Defendants' Proposed Redesign.

Plaintiffs have standing to sue in federal court if they meet a three-part test: injury in fact, causation, and redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Defendants do not dispute causation and redressability, focusing solely on the contention that no "injury in fact" has occurred.

Of course, a plaintiff need not wait until he or she has already been injured in order to assert entitlement to class-wide relief; it is sufficient that the plaintiff be in immediate danger of sustaining "some direct injury as a result of the challenged statute or official conduct." *Armstrong*, 275 F.3d at 860. In their opening and reply briefs in support of their motion for preliminary injunction, Plaintiffs have abundantly demonstrated the imminent harm threatened by the County's system redesign. The declarations of Drs. Stoneking and Risley established the threatened impacts on Plaintiffs' physical and mental health, the risk of homelessness, and the risk of institutionalization. A plaintiff does not need to wait until he or she is institutionalized to bring a claim for relief under the ADA's integration mandate. *Fisher v. Okla. Health Care Auth.,* 335 F.3d 1175, 1179 n.3 (10th Cir. 2003).

Moreover, some class members have already suffered harm due to the County's poor planning and incomplete or inadequate communications to consumers. For example, as detailed in the Declaration of Uma Zykofky submitted by Defendants in opposition to the motion for preliminary injunction, a number of class members were given inaccurate information when they called the County to inquire about the proposed changes in their care, and "expressed distress about the change." Zykofsky Decl. (Dkt. No. 89) at 10:17-26.

D. Class Certification Is Not Premature Wh en This Court Has All the Evidence It Needs to Decide Plaintiffs Motion for Class Certification.

Defendants contend that it is inappropriate to certify a class before they have been afforded the opportunity to conduct additional discovery relating to Plaintiffs' claims, and seek to delay a decision on the certification of a class until after a decision is reached on the merits of this case. Such a delay is inappropriate. Generally, class certification is not delayed pending a

decision on the merits, but only when there is a need to develop a sufficient evidentiary record for the court to decide whether class certification is warranted. *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975) (class certification can be granted if the court has sufficient material before it to determine the nature of the allegations and to determine whether the requirements of Rule 23 are met). There is more than a sufficient evidentiary record to determine the nature of Plaintiffs' claims and that the Rule 23 requirements have been met.[1]

Defendants give only the faintest indication of the further discovery that is supposedly needed, and make almost no effort to demonstrate why that evidence is needed for the class certification inquiry. Further, Rule 23(c)(1) of the Federal Rules of Civil Procedure provides that a decision on a motion for class certification should be reached as early as practicable. Defendants fail to explain why this Court should depart from the Federal Rules of Civil Procedure, and Plaintiffs' motion is therefore timely.

E. Classwide Relief Is A ppropriate to Prot ect Putative Class Membe rs and to Facilitate Enforcement of Any Judgment This Court May Enter.

Plaintiffs demonstrated in this Reply and their Memorandum in Support for Class Certification that the proposed class, as redefined above, meets the requirements of Rule 23. In fact, Plaintiffs showed that class certification provides a more efficient and consistent mechanism for adjudicating challenges to the Defendants' county-wide policy that will result in the loss of outpatient mental health services than numerous individual actions. Defendants, however, contend that all putative class plaintiffs would benefit from a favorable outcome in this case and the resulting injunctive and declaratory relief, and therefore class certification is unnecessary.

This assertion ignores the potential limitations of the scope of a preliminary injunction, which Plaintiffs detailed in their Memorandum in Support of Class Certification. *See* Pl's Mem. of Points and Authorities In Support of Mot. For Class Certification at 2-4; *see also Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1984) ("Without a properly certified class, a court cannot

[1] Even if more discovery is needed by the Defendants, the proper resolution is not to deny the motion for class certification. A class may be certified and additional discovery allowed. *See Hickey v. City of Seattle*, 236 F.R.D. 659, 662 (W.D. Wash. 2006) (certifying the class while granting additional discovery).

grant relief on a class-wide basis"); *accord*, *Paige v. California*, 102 F.3d 1035, 1039 (9th Cir. 1996). Without class certification, the Defendants may object to the scope of this Court's order and nonparties may have difficulty enforcing any order entered by this Court. In particular, if rulings are limited to the named Plaintiffs in this case, nonparties might not be able to invoke the judgment, but might be required to instigate new litigation if the Defendants did not adhere to the judgment. *See* 2 Newberg, Class Actions (4th ed. 2002) § 5.03. The cost of beginning new proceedings for those nonparties may be prohibitive, especially given that Plaintiffs seek to represent individuals who lack resources and may have deteriorating mental conditions as a result of Defendants' policies, which create barriers to pursuing litigation.

If Defendants stipulate that they are willing to make systematic changes to prevent the across-the-board reductions in adult outpatient mental health services in response to an injunction issued on behalf of Plaintiffs, or if the Court otherwise determines that complete relief may be granted without certification of a class, then class certification could be deferred, even though Plaintiffs believe there is no substantial reason for doing so. Otherwise, class certification is appropriate at this time, and Plaintiffs have made a sufficient showing to warrant class certification.

III. CONCLUSION

For the foregoing reasons, Plaintiffs have satisfied all of the requirements of Rule 23(a) and 23(b)(2). Plaintiffs respectfully request that the Court certify the proposed class, as amended, appoint Plaintiffs' counsel to represent the class and dispense with any requirement of notice to class members prior to judgment or settlement.

Dated: July 14, 2010

COOLEY LLP

By: /s/
William S. Freeman

Attorneys for Plaintiff

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