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CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE, FLORIDA

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

LUIS CRUZ and NIGEL DE LA TORRE,

Plaintiffs,

v.

Case No.
3:10-cv-725-J-99TJC-JBT

THOMAS ARNOLD, in his official capacity as Secretary, Florida Agency for Health Care Administration, and

DR. ANA VIAMONTE ROS, in her official capacity as Surgeon General, Florida Department of Health,

Defendants.

PLAINTIFFS LUIS CRUZ AND NIGEL DE LA TORRE'S MOTION FOR PRELIMINARY INJUNCTION AND EXPEDITED HEARING AND ATTACHED MEMORANDUM OF LAW

Pursuant to Fed. R. Civ. P. 65, individual Plaintiffs Luis Cruz and Nigel De La Torre, through their counsel, move for a preliminary injunction to enjoin Defendants from denying them Medicaid home and community-based services ("HCBS"), in order to prevent Plaintiffs Cruz and De La Torre's unnecessary institutionalization in a nursing home. Due to the emergency nature of their situations, Plaintiffs Cruz and De La Torre further move for an expedited hearing. As grounds therefore, Plaintiffs Cruz and De La Torre state the following in support of their motion.

LUIS CRUZ

1. Mr. Cruz filed a motion to be a named plaintiff in this action on January 27, 2010. He was born in 1957. He was in a car accident on March 6, 1992, when he was 34 years old and required hospitalization for about a year for a spinal cord injury.

2. He is a qualified person with a disability in that he has quadriplegia (C-2/C-7), is paralyzed from the neck down, cannot use his hands or fingers, and uses a wheelchair to get around.

3. Mr. Cruz lives alone in an accessible apartment in Miami, Florida with a shower that has a bench attached to the wall for him to sit on. He requires assistance with all of his activities of daily living, including help transferring from and to bed and from and to a toilet. He also requires assistance bathing, cooking, and shopping for food. He wears a special condom catheter which connects to a urinary bag.

4. He has lived in the community since the accident on March 6, 1992. He was married on January 17, 1992 and divorced five years later. For nearly five years after he became paralyzed, Mr. Cruz lived in institutions. He was in Florida's Adult Congregate Living Facilities and was in a mental hospital for severe clinical depression. In the Adult Congregate Living Facilities, he was forced to share a room with four or five persons and had no privacy whatsoever. He knows what it is like to live in an institution

5. He desires to continue to reside in his own apartment and community instead of having to enter a nursing facility. If he went into a nursing facility, he will not be able afford to

pay rent and will lose this apartment. There are very few accessible apartments that he can afford, and he does not want to lose this apartment in which he has resided for the past 12 years.

6. Mr. Cruz is eligible for, and receives, Medical Assistance, and he applied to Defendants for Spinal Cord Waiver services in January, 2006, and has been on a waiting list since then.

7. Since February, 2010, Mr. Cruz has been hospitalized about five times and Florida's Medical Assistance paid for these hospitalizations. On two hospitalizations, he was a patient for about 40 days and again for 30 days, because he developed a decubitus ulcer, a/k/a a bedsore. He is presently hospitalized because his leg got caught in his wheelchair and he fell out of the wheelchair, fracturing his tibia. All of his hospitalizations were either a direct or indirect result of not receiving adequate in-home health care services.

8. While he was hospitalized in March, 2010, he telephoned Defendants' Spinal Cord Injury Waiver program and requested services. He spoke to Beth Herra. She told him that there were no funds available in the Waiver, but if he went into a nursing home for 90 days, he would receive Waiver services. During another hospitalization he telephoned Defendants' Medicaid Waiver office regarding the availability of waiver services, but no one could tell him when Waiver services would be provided in the community if he did not enter a nursing home.

He will not enter a nursing home and wants to continue to reside in the community and could with appropriate waiver services provided with Medicaid funds.

9. Presently, Defendants' Medicaid program pays HealthMed, a private home-health agency, for some assistance with his daily living. Specifically, he receives one hour per day of skilled nursing care and two hours per day of home health aide services. However, these are not

sufficient to meet many of his living activities. He has been informed that after his current hospitalization, he will receive an increase of one hour per day of home health services. While this increase will help, it will still not be sufficient.

10. Mr. Cruz needs help with the following activities with the approximate time each requires: transferring from bed to wheelchair (about 5 -10 minutes); transferring from wheelchair to toilet (another 5 - 10 minutes); his toileting needs take about 30 to 50 minutes; shaving (10 minutes); feeding (each meal is between 30 - 45 minutes); condom catherization and urinary bag (several times a day for between 20 -30 minutes); dressing (AM about 45 minutes and PM about 20 minutes); and range of motion exercising (1½ hours a day). He also needs help with housekeeping, including sweeping, mopping, washing dishes (1 hour); meal preparation (three times a day); shopping for groceries; laundry (because his urinary catheter leaks, his clothes need to be washed frequently).

11. Mr. Cruz does not have any family or other informal support to assist with any of these activities of daily living. Because he does not receive an adequate number of hours of assistance, he has, on occasion, fallen from his wheelchair and has had to stay on the floor until the next day when someone arrived to assist him. On one occasion, he slept on the bathroom tile floor for about 36 hours when the person who was scheduled to provide assistance did not show up. He has also slept in his wheelchair and has urinated on himself when, on occasion, his leg bag was not emptied, and it overflowed because no one was available to assist him.

12 He desperately does not want to go into a nursing home but wants to continue residing in the community where he has an active life. Without community-based Spinal Cord Waiver services, he is at significant risk of being institutionalized.

13. Mr. Cruz thrives in the community and has volunteered with Park and Recreation officials from several counties to train their employees about how to interact with people with spinal cord injuries and also with children who have mental illnesses. He has volunteered with an aquatic program for people with disabilities by showing them how they could swim and to overcome their fears of swimming. He has also given seminars for medical and physical therapy students at the University of Miami and Florida International University for their fertility programs.

14. He socializes with neighbors and friends and enjoys going out for meals and movies. He visits friends and watches sports with them on television.

15. Despite Defendants knowing that he is at significant risk of institutionalization, he has not been offered Spinal Cord Injury waiver services with sufficient hours of personal care assistance so he could remain safely in the community.

16. He has been eligible for both Florida's Medicaid nursing home services and Waiver services since he broke his spine, and he still meets Florida's level of care for nursing home eligibility.

NIGEL DE LA TORRE

17. Nigel De La Torre filed a motion to be a named plaintiff in this action on January 27, 2010. He was born in Cuba in 1983, and is twenty-seven years old. Mr. De La Torre came to the United States in 1991 with his mother and brother, and they live in Miami, Florida.

18. In July, 2007, Mr. De La Torre was shot and robbed. As a result of the shooting Mr. De La Torre is paralyzed. He is a qualified person with a disability, because he has quadriplegia, is paralyzed from the chest down, and cannot use his arms or his fingers. He uses a

motorized wheelchair for ambulation and lives in an apartment with an accessible bathroom.

19. During his five month hospitalization in Jackson Memorial Hospital in Miami, his mother applied for the Spinal Cord Injury Waiver services in October, 2007. He has been on Defendants' "wait list" for in-home Spinal Cord Waiver services for nearly two and a half years.

20. On a number of occasions, he has telephoned and contacted the Florida Spinal Cord Injury Waiver, because he desperately needs Waiver services. On May 12, 2010, he telephoned the Spinal Cord Waiver program and was told that they have no funds to provide him with Waiver services. They told him they would send something in writing to him but they did not, and he has not heard from them since this telephone conversation.

21. He receives personal care assistance for one hour in the morning and one at night from Nurse Care, a private home health agency under contract with and reimbursed by Florida's Medical Assistance state agency. Mr. De La Torre's Nurse Care coordinator is Ms. Rosie Nieves, with whom he has regularly discussed his need for more personal care assistance. Ms. Nieves has told him that he needs "much more help" than Medical Assistance's Nurse Care can provide, including homemaker and respite services, and skilled care to change his catheter and suppository.

22. Besides the two hours per day of paid personal care assistance he receives from Nurse Care, his mother has in the past provided many more hours of such care, including changing his catheter three times per day and administers the suppository every other day.

23. His mother plans to move to Spain imminently, where his step-father has lived for four months. His brother, who is 21 years old, has enlisted in the Marines and is waiting to be called up. Mr. De La Torre will have no one to provide the care he needs and will be at

imminent risk of going into a nursing facility, even though he does not want to.

24. Mr. De La Torre needs help with all of his activities of daily living. He is 200 pounds and six foot one inch tall. Based on his size, he is not easy to lift or transfer. Although his mother has often helped with transferring him to and from his wheelchair to his bed, when no one else is available to help, she has injured her back and elbow as a result of her assisting me. Also, it has been very difficult for his mother to turn him at night, so Mr. De La Torre does not develop bed sores.

25. He requires assistance with: transfering from bed to shower chair and then back to bed (20 minutes); showering and being washed (30-45 minutes); shaving (10-15 minutes); brushing teeth and other oral hygiene (15 minutes); skin maintenance (5 minutes); feeding (each meal about 30-45 minutes); bowel program (1½ hour); catheter (several times per day); dressing in AM (30-45 minutes) and in PM (20 minutes); transferring in PM and after shower in AM (20 minutes); and range of motion exercises (45 minutes). He wants to stand in a "Standing Frame" machine for an hour per day and this requires assistance transferring (about 20 minutes).

26. When his mother has moved, he will need help with housekeeping, meal preparation, laundry, and grocery shopping. These activities will take a few hours.

27. Even though he has a Medicaid reimbursed personal attendant for one hour in the morning and one hour in the evening from Nurse Care, two hours a day is not adequate to meet his needs and to assist him.

28. At times during the day, when his mother was at work and no one was available to provide assistance, Mr. De La Torre's bladder filled and he was not able to have it catheterized. He has had one urinary tract infection and is very afraid of contracting it again.

29. During the day, he needs assistance transferring from his wheel chair to the toilet so he can have a bowel movement. If no one is available and he has a bowel movement, he has sat in soiled clothing until his mother returned home from work.

30. When no one is available to assist him during the day, Mr. De La Torre is unable to prepare lunch, take medication in the order that is prescribed, or go to medical appointments, as well as other activities of daily living.

34. Mr. De La Torre very much enjoys living in the community. With friends, he goes to the movies, malls, and numerous other activities, including fishing. Friends visit him, and they play dominoes and watch movies on the television.

35. Mr. De La Torre does not want to live in a nursing home. He is very young and very much enjoys the freedom he has living in the community.

36. When his mother moves to Spain, he is very afraid that he will have to go into a nursing facility to receive the same services he could receive through the Spinal Cord Injury Waiver in the community. Without community-based Spinal Cord Waiver services, he fears he is at significant risk of being institutionalized, even though he desperately does not want to reside in a nursing facility. Despite the Waiver officials knowing that he is at imminent risk of institutionalization, they have not offered him any increased services so he could remain in the community.

37. Unfortunately, Spinal Cord Injury Waiver services have not been made available, even though he applied for these services and has been on a waiting list. On May 12, 2010, he telephoned the Spinal Cord Medicaid Waiver office regarding waiver services, but no Waiver services have been provided and no one could tell them when services would be provided for

him in the community. Defendants' Medicaid program will only provide the services he requires by paying for his institutionalization in a nursing facility.

38. Defendants' refusal to offer Mr. Cruz and Mr. De La Torre adequate services in the community and, instead, requiring them to enter a nursing facility to receive those services, is a violation of both the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA"), and the Rehabilitation Act of 1973, 29 U.S.C. § 794a ("Section 504"), and their implementing regulations, in particular the "integration mandate," which requires that "a public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R.§ 35.130(d).

WHEREFORE Plaintiffs Cruz and De La Torre seek a preliminary injunction to enjoin Defendants from denying them Waiver services in the community to assist them with their daily living activities.

PLAINTIFFS LUIS CRUZ AND NIGEL DE LA TORRE'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

I. Plaintiffs Meet the Standards for Preliminary Injunctive Relief

The criteria for granting a preliminary injunction are "(1) it has a substantial likelihood of success on the merits, (2) the movant will suffer irreparable injury unless the injunction is issued, (3) the threatened injury to the movant outweighs the possible injury that the injunction may cause the opposing party, and (4) if issued, the injunction would not disserve the public interest" before the district court may grant such relief. *Horton v. St. Augustine*, 272 F. 3d 1318, 1326 (11th Cir. 2001) (citing *Siegel v. LePore*, 234 F. 3d 1163, 1176 (11th Cir. 2002), *see also Int'l Cosmetics Exch. v. Gapardin Health & Beauty, Inc.* 303 F. 3d 1242, 1246 (11th Cir. 2002) (citing *Levi Strauss & Co. Sunrise Int'l Trading Inc.*, 51 F3d 982,985 (11th Cir. 1995)).

While a typical preliminary injunction seeks to maintain the status quo, injunctions to enjoin violations of civil rights statutes are treated differently. The Eleventh Circuit, quoting *Marable v. Walker*, 704 F. 2d 1219, 1221 (11th Cir. 1983)(race discrimination under Civil Rights Act of 1964), stated that "injunctive relief should be structured to achieve the twin goals of insuring that the [civil rights] Act is not violated *in the future* and removing any lingering effects of past discrimination." *Sec'y, U.S. Dept. of Housing and Urban Dev. v. Blackwell*, 908 F.2d 864, 874 (11th Cir. 1990)(emphasis added). The Fifth Circuit, before the establishment of the Eleventh Circuit,[1] had set out the standard for "affirmative" relief. In *United States v. West Peachtree Corp.*, 437 F. 2d 221,229 (5th Cir. 1971) (Federal Fair Housing Act), the Court set out the general parameters of appropriate injunctive relief in a Florida housing civil rights action.

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[1] In *Bonner v. City of Prichard,* 661 F. 2d 1206, 1209 (11th Cir. 1981)(en banc), the Eleventh Circuit adopted as binding precedent all decisions from the former Fifth Circuit which were issued prior to October 1, 1981.

West Peachtree was then followed as a "model" in *United States v. Jamestown Center-in-the Grove Apts*, 557 F. 2d 1079, 1080 (5th Cir. 1977) (Federal Fair Housing Act) and *United States v. Reddoch*, 467 F. 2d 897,899 (5th Cir.1972) (Federal Fair Housing Act).

In such cases, the plaintiff bears the heightened burden of establishing her/his right to preliminary injunction relief to affirmatively insure the rights are not violated in the future. *Cf Mercedes-Benz U.S. Int'l Inc. v Cobasys, LLC*, 605 F.Supp. 2d 1189, 1196 (N.D. Ala.2009), *Verizon Wireless Pers. Commc'n LP v. City of Jacksonville, Fla.*, 670 F. Supp 1330, 1346 (M.D. Fla. 2009) and *OM Group, Inc. v. Mooney*, 2006 WL 68791, at *8-9 (M.D. Fla. Jan. 11, 2006).

II. Substantial Likehood of Success on the Merits

Because the "a strong likelihood of success on the merits" criterion in the instant action raises the same legal issues analyzed in this Court's July 9, 2010 Opinion in *Haddad v. Arnold and Ros*, 2010 WL ______ (M.D. Fla. July 9, 2010)(issued in support of its June 23, 2010 Order granting a preliminary injunction), Plaintiffs Cruz and De La Torre rely on both the July 9, 2010 Opinion and incorporate by reference the legal arguments made by Ms. Haddad in her memorandum of law in support of her motion for a preliminary injunction. Plaintiffs Cruz and Torre raise the same very strong likelihood of ultimate success on the merits under the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. ("ADA"), and the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) ("Section 504"), as Miss Haddad.

Preliminarily, there cannot be a dispute that both Mr. Cruz and Mr. De La Torre are persons who have disabilities protected by both the ADA and Section 504, in that they both have impairments in activities of daily living, including walking, toileting, transferring, feeding, bathing, and require assistance in shopping, laundry, cleaning, and food preparations. Second,

they are also "qualified" persons for community-based services, in that they can "handle or benefit from community settings," have lived with their disabilities for years, and obviously do not oppose community placement. *Olmstead v. L.C. ex rel Zimring*, 527 U.S. 581, 601-603 (1999). Indeed, the Supreme Court noted that states "are required" to provide community-based treatment for qualified persons who do not oppose it unless the State can establish an affirmative defense. *Id.* at 607.

Both the ADA and Section 504, as well as the Supreme Court's *Olmstead* decision, prohibit unnecessary institutionalization as a form of unjustified discrimination that Congress intended to end. Both Messrs. Cruz and De La Torre are, for different reasons, at imminent risk of such institutionalization. Since February, 2010, Mr. Cruz has had numerous hospitalizations associated with his receiving inadequate hours of personal attendant services (e.g., decubitus ulcer Stage IV, and related wound care). Without adequate care in the community, he runs a significant risk of developing more decubitus ulcers which are potentially life-threatening. He cannot physically continue running such risks. Without adequate personal attendant care services, he will have no option than going into a nursing home. Similarly, Mr. De La Torre is at imminent risk of requiring such institutionalization. Because his mother has provided extraordinary care and services, including emptying his catheter several times a day, doing his suppositories, shopping, laundry, turning him at night, Mr. De La Torre has patched together enough care to stay out of a nursing home. However, his mother plans imminently to move to Spain and to join her husband. When this occurs, Mr. De La Torre will not have anyone available to provide many of the unpaid services his mother has provided. He will not have an option other than to go into a nursing facility.

It is the mere risk of institutionalization of an individual with a disability which supports a claim that both Title II of the ADA and Section 504 have been violated. In the present case, Mr. Cruz was told he would have to enter a nursing facility for 90 days before he would be eligible to receive Waiver services, and Mr. De La Torre was told there were no funds for community-based services. Obviously, Defendants' policy forces Plaintiffs to physically enter the nursing facility as a condition of receiving the same services they could receive in the community.

The Tenth Circuit, in *Fisher v. Oklahoma Health Care Authority*, 334 F.3d 1175 (10th Cir. 2003), rejected the defendants' challenge that plaintiffs could not make an integration mandate challenge until they were placed in the institution. That rejected claim was very similar to what counsel for the Defendants in *Haddad* made at oral argument. However, the Tenth Circuit reasoned that the protection of the integration mandate:

> would be meaningless if plaintiffs were required to segregate themselves by entering an institution before they could challenge an allegedly discriminatory law or policy that threatens to force them into segregated isolation.... [N]other in the *Olmstead* decision supports a conclusion that institutionalization is a prerequisite to enforcement of the ADA's integratiton requirements. *Id.* at 1181.

There is no question that Messrs. Cruz and De La Torre are at significant imminent risk of requiring such institutionalization. Another fall or decubitus ulcer and Mr. Cruz's risk increases, and when Mr. De La Torre's mother moves to Spain, he too will have no option but to be institutionalized. Clearly, Congress did not intend that a person must wheel into the nursing facility in order to demonstrate to the State they want community-based services instead of institutional services.

In *Fisher*, the Court concluded that "*Olmstead* does not imply that disabled persons ...

stand imperiled with segregation, may not bring a challenge to the state policy under the ADA's integration regulation without first submitting to institutionalization." *Id.* at 1182. *See also*, *M.A.C. v. Betit*, 284 F.Supp. 2d 1298, 1309 (D.Ut. 2003)(adopting *Fisher's* position that a plaintiff need not currently be institutionalized to bring an integration claim); *Brantly v. Maxwell-Jolly*, 2009 WL 2941519, *7 (N.D. Cal. Sep. 10, 2009)(allowing plaintiffs to bring title II claim that reduction in services would put individuals currently residing in community at risk of institutionalization).

Both Mr. Cruz and Mr. De La Torre request increased services in the community, whether Defendants increase the number of hours they presently receive as Home Health Aide services, authorize Spinal Cord Injury Waiver services, or provide services under Defendants' Personal Care Option program. All three are federally-funded Medicaid services, and personal attendant care services are provided under each of them: Home Health Services are pursuant to 42 U.S.C. § 1396a(a)(10) and 42 CFR 440.70(b)(2),[2] the Medicaid Spinal Cord Injury Waiver is pursuant to 42 U.S.C., § 1396n, and the Personal Care Option is at 42 U.S.C. § 1396d(24), 42 CFR § 440.167. Defendants provide personal attendant care services under all three of them.

Providing Messrs. Cruz and De La Torre community-based services under any of the federal programs would be a reasonable modification. Under Home Health, Defendants have set an arbitrary cap of four visits a day by a combination of nurse and home health aide, a/k/a personal attendant. AHCA Home Health Handbook, 2-13 (July 2008). Under the federal standards, no such cap exists. Therefore, modifying this number is not prohibited by any federal bar. Similarly, increasing the number of people in the Spinal Cord Injury Waiver to include

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[2] Miss Haddad had not been receiving any personal attendant care services, and Defendants never offered her Home Health services.

Messrs. Cruz and De La Torre is encouraged by the federal agency. The federal Medicaid office has written that "[i]f other laws (e.g., ADA) require the State to serve more people, the State may ... request an increase in the number of people permitted under the HCBS waiver." CMS, Olmstead Update No. 4. at 4 (Jan. 10, 2001) available at www.cms.hhs.gov/smdl/downleads/ smd011001a.pdf. Similarly, under the Personal Care Option, Defendants limit these services to people in assisted living facilities. Because Messrs. Cruz and De La Torre reside in their own apartments, they do not fit Defendants' category. However, the federal regulations for this program clearly require that these services be offered to people in their own homes, before they are provided to people not in their own homes.

Such reasonable modifications of programs to avoid an ADA and Section 504 violation are widely recognized. For example, in *Radasqewski v. Maram*, 383 F. 3d 599, 611 (7th Cir 2004), the Court reasoned that:

> The integration mandate may well require the State to make reasonable modifications to the form of existing services in order to adapt them to community integrated settings.... If variations in the way services were delivered in different settings [home vs. institution, or assisted living facility vs. an apartment] were enough to defeat a demand for more community integrated care, then the integration mandate of the ADA and the Rehabilitation Act would mean very little.

III. <u>Irreparable Injury</u>

Messrs. Cruz and De La Torre will suffer precisely the harms the Supreme Court in *Olmstead v. L.C. ex rel Zimring*, 527, U.S. 581, 600-01, held violated the ADA:

> First, institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.... Second, confinement in an instituion severely dimishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment. Dissimilar

> treatment correspondinly exists in this key respect in order to receive medical services, person [with disabilities] must because of thos disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without [these] disabilities can receive the medical services they need without similar sacrifice.

Messrs. Cruz and De La Torre have both lived in the community. They have both demonstrated they are capable of residing in and benefiting from residing in the community. Mr. Cruz has demonstrated he can contribute to the community with his volunteering activities. Similarly, institutionalization of both will be severely detrimental to both. Mr. Cruz five years of living in institutions and Mr. De La Torre is a very young man who has an active social life with many friends. Mr. Cruz will lose the accessible apartment in which he has resided for 12 years, and they both will suffer isolation and confinement in nursing homes which are comprised only of disabled people, most of whom are significantly older than Mr. De La Torre. They both will suffer the "unwarranted assumptions" that they could not reside in the community, despite their having done so for so many years with quadriplegia.

If a preliminary injunction is not issued, Plaintiffs Cruz and De La Torre will suffer irreparable injury. They both will have no option other than to enter to a nursing home and suffer discrimination *Olmstead* found violated the ADA.. Such discrimination and irreparable injury are unnecessary and can be avoided.

As this Court noted in *Haddad v. Arnold and Ross*, (M.D. Fla. July 9, 2010) Case No. 3:10-cv-414-J-99MMH-TEM), the irreparable injury includes more than the legal violation of civil rights under the ADA and Section 504. The irreparable injury is that the plaintiff(s) will be institutionalized in a setting that demeans them by taking away their independence and dignity. As this Court noted, citing *Katie A. v. L.A. County*, 481 F.3d 1150, 1156-57 (9th Cir. 2007), "the

requirement that Plaintiff first enter a nursing home in order to be transitioned out sometime thereafter presents Plaintiff with exactly the kind of uncertain, indefinite institutionalization that can constitute irreparable harm. *See also*, *Long v. Benson*, 2008 WL 4571903 at *2 (irreparable injury caused by forcing plaintiff to re-enter nursing facility) and *McMillian v. McCimon*, 807 F. Supp. 475,479 (C.D. Ill. 1992)("possibility that the plaintiffs would be forced to enter nursing homes constitutes irreparable harm that cannot be prevented or fully rectified by a judgment later").

Messrs. Cruz and De La Torre both currently reside in accessible apartments. Mr. Cruz has been in the same apartment for twelve years. If he is forced to enter a nursing home, even for a short time, he will not be able to afford to pay the rent or be assured that this apartment will be available after he would leave the nursing facility. Mr. De La Torre's housing is also precarious, because before she moved to Spain his mother shared this apartment with him. If he were to be forced to enter a nursing home, the payments for his apartment will be jeopardized.

Accessible, affordable housing is in dire short supply. People with disabilities have great difficulty finding apartments that come close to meeting their accessibility needs. If Messrs. Cruz and De La Torre were to leave their present apartments, it is highly likely that they will not be able to find and afford an accessible unit when they were to leave the nursing facility.

IV. Balance of Hardships

The Court must weigh the harm to Plaintiffs Cruz and De La Torre against possible damage to Defendants. *Micshel-Trapaga v. City of Gainesville,* 907 F. Supp. 1508, 1513 (N.D. Fla. 1995). While Plaintiffs Cruz and De La Torre are threatened with institutionalization, Defendants' only possible damages are monetary. Defendants' Medicaid will pay for either their

nursing home residence ($206.09 per day[3]) or incrementally increase the hours of home-based personal attendant care services they presently receive. The difference in money between the nursing home and increased community-based attendant care services is staggering: the going rate that attendants are paid is about $11 an hour.[4] If Messrs. Cruz and De La Torre would each receive an increase in hours so they receive a total of 10 hours per day of assistance, that is still far below the nursing home reimbursement. Particularly, when Defendants are already paying for a about 3 hours of personal attendant care for Cruz and 2 hours for De La Torre, to increase the hours to meet their needs does not rise to a significant hardship.

Presently, Messrs. Cruz and De La Torre receive their hours of personal attendant care services pursuant to Defendant's Home Health Services. These services are pursuant to 42 U.S.C. § 1396a(a)(10) and 42 CFR 440.70(b)(2).[5] For Messrs. Cruz and De La Torre, Defendants could authorize to increase their personal attendant services by increasing the number of hours of home health services that they presently receive in order to meet their needs. Defendants could also provide adequate personal attendant care services under its Medicaid Spinal Cord Waiver, 42 U.S.C., § 1396n, or Medicaid personal care services option, 42 U.S.C. § 1396d(24) 42 CFR § 440.167

In the accompanying motion and supporting sworn declarations, both Cruz and De La Torre enumerate on the activities they require assistance with and the inadequate hours of attendant care services they presently receive. As a result, Mr. Cruz has been hospitalized in

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[3] Florida's Medicaid Nursing Homes January, 2010 Rate Semester Initial Per Deims.

[4] Plaintiffs believe that Defendants reimburse the Home Health Agency $17.50 anr hour, but the personal care assistant receives, at the most, only about $11 an hour.

[5] Miss Haddad had not been receiving any personal attendant care services, and Defendants never offered her Home Health services.

2010 alone for a total of several months. Defendants presumably reimbursed the hospitals significant sums of Medicaid funds for hospitalizations that might have been avoided if Mr. Cruz had been receiving appropriate hours of personal attendant care services. Regardless, the two to four hours per day which he receives personal attendant care services falls far short of the activities he requires assistance with and the amounts of time assistance for these activities requires.

Mr. De La Torre has been receiving two hours a day and has not been institutionalized solely because his mother has provided untold hours of unpaid assistance. Now, she is moving to Spain and without her, Mr. De La Torre will not imminently have anyone to make up the hours his mother has provided.[6]

As this Court found with regards to Ms. Haddad, simply in monetary terms, the harm to Plaintiffs here clearly outweighs any harm to Defendants. *See, e.g* *Kansas Hosp. Ass'n v. Whiteman*, 835 F. Supp. 1548, 1552-53 (D.Kan. 1993) (threatened injuries to plaintiffs outweighed any harm to defendant that would result from issuing the temporary restraining order because changing Medicaid coverage "significantly alters the status quo to the detriment of the individual plaintiffs, while its positive budgetary impact on state coffers is negligible in a relative sense").

The balance of hardships clearly favors Plaintiffs Cruz and De La Torre. All that they are asking is that Defendants spend less of their Medicaid funds and permit them to continue to reside in their home with the personal attendants they needs to accomplish her activities of daily living. If Plaintiffs must go to a nursing facility, Defendants will expend more Medicaid funds

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6 Currently, Mr. Torre's younger brother has enlisted and is waiting to be called up to the Marines.

than they would were they to provide Plaintiffs with services in the community.

Plainly, the balance of hardships tips in favor of Plaintiffs Cruz and De La Torre to avoid their unnecessary institutionalization in a nursing home.

V. The Public Interest

As this Court noted in its *Haddad* decision, "the public interest favors preventing the discrimination that faces Plaintff[s] so that [they] may avoid unnecessary institutionalization." Supra at 38. As with Ms. Haddad, the public interest favors upholding the mandates of the ADA and Section 504. The public interest will be served by an order granting a preliminary injunction for Plaintiffs given the strong public policy expressed in the ADA and Section 504. Congress found that discrimination against people with disabilities is a serious and pervasive social problem, and that people with disabilities have been subjected to a history of purposeful unequal treatment and relegated to a position of political powerlessness based on characteristics that are beyond the control of such individuals and resulting from stereotypical assumptions not truly indicative of the individual ability of such persons to participate in and contribute to society. 42 U.S.C. §12101. The purpose of the ADA's passage was to provide a clear and comprehensive national mandate for elimination of discrimination against individuals with disabilities.

Accordingly, it serves the public interest to issue the requested preliminary injunctive relief.

VI. Waiving the Bond Requirement

Plaintiffs should be exempted from the bond requirement of Fed. R. Civ. P.65(c). The amount of required security is within the discretion of the trial court. *Bell South,* 425 F.3d at 971; *Caterpillar, Inc. v. Nationwide Equipment,* 877 F.Supp. 611, 61 7 (M.D. Fla. 1994); *Baldree v.*

Cargill, Inc., 758 F.Supp. 704 (M.D. Fla. 1990), *aff'd*, 925 F.2d 1474 (11th Cir. 1991). The court may also waive all payment.

Courts have used their discretion to waive the bond requirement for indigent plaintiffs. *E.g., Bass v. Richardson*, 338 F. Supp. 478, 490 (E.D.N.Y. 1971) ("It is clear that indigents, suing individually or as class plaintiffs, ordinarily should not be required to post a bond under Rule 65(c)"); *Denny v. Shealth & Social Serv. Bd. of State of Wis.*, 285 F. Supp. 526, 527 (E.D. Wis. 1968) ("Poor persons ... are by hypothesis unable to furnish security as contemplated in Rule 65(c), and the court should order no security in connection with the preliminary injunction."). *See also Maine Ass'n of Interdependent Neighborhoods*, 647 F. Supp. at 1319 (court granted waiver of bond, noting impecunious status of plaintiffs, and based on plaintiff's strong case on the merits).

Plaintiffs Cruz and De La Torre are indigent and seek injunctive relief to receive services in the community that Defendants already provide in nursing homes. The case implicates the public interest and the balance of hardships tips sharply in favor of Plaintiffs. This Court should not require Plaintiffs Cruz and De La Torre to give security.

VII. Conclusion

For the reasons and on the authority cited above, Plaintiffs Cruz and De La Torre respectfully request that this Honorable Court grant their preliminary injunctive relief. They have demonstrated a substantial likelihood of success on the merits; that they will suffer irreparable injury in the event emergency relief is denied; and that the balance of hardships tips in their favor.

Dated this 17th day of August, 2010.

Respectfully submitted,

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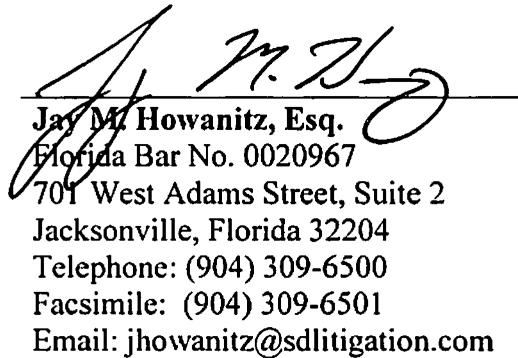

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