UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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Gregory B. Monaco, *etc.*, *et ano.*,

Plaintiffs, CV-98-3386 (CPS)

- against - MEMORANDUM OPINION AND ORDER

Sharon Carpinello, *etc.*, *et alia*,

Defendants.

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SIFTON, Senior Judge.

Plaintiffs Gregory B. Monaco, on behalf of himself and similarly situated individuals facing civil commitment, and the Mental Disability Law Clinic of Touro Law Center ("the Clinic") bring this class action for declaratory and injunctive relief against the following defendants: Sharon Carpinello, in her official capacity as Acting Commissioner of the New York State Office of Mental Health ("OMH"); Catherine Cahill, in her official capacity as Justice of the East Hampton Town Justice Court, on behalf of herself and all other local criminal court judges in New York State; Benjamin Chu, in his official capacity as the Director of the New York City Health and Hospitals Corporation ("HHC"); Mark Sedler, in his official capacity as Chairman of the Department of Psychiatry at University Hospital of the State University at Stony Brook; Kenneth Skodnek, in his official capacity as Chairman of Psychiatry at Nassau University

Medical Center ("NUMC"); Arnold Licht, in his official capacity as Director of the psychiatric unit of Long Island College Hospital; Alfred Tisch, in his official capacity of Sheriff of Suffolk County; and Martin Horn, in his official capacity of Commissioner of the New York City Department of Corrections.[1]

Plaintiffs allege violations of the Fourth Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983, as well as state law claims for false imprisonment negligence, and medical malpractice. As amended, the complaint contains two major components: 1) a challenge to the constitutionality of the practices of Cahill, Horn, and Tisch in unnecessarily keeping confined individuals found incompetent to stand trial for minor felonies and misdemeanors and those awaiting such a determination; 2) a challenge to the constitutionality of the procedures used by Chu, Sedler, Skodnek, and Licht to involuntarily hospitalize individuals deemed mentally ill.

Previously, I found it appropriate to certify a plaintiff class of all individuals who have been or will be: (1) charged

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[1] In a previous decision, this Court dismissed the claims against Licht and granted summary judgment in favor of four other defendants. In their fifth amended complaint, plaintiffs reasserted these claims against these defendants in order to preserve their right to appeal this Court's judgment. *See* 6 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1476 at 560 (2d ed. 1990).

with a minor felony or misdemeanor; (2) evaluated to determine whether or not they are competent to stand trial; and (3) found by court appointed psychiatrists to lack the capacity to stand trial and await a determination of the competency issue by the local criminal court.

I also found it appropriate to certify a subclass, to be represented by plaintiff Gregory Monaco, of all individuals who have been or will be: (1) charged with a minor felony or misdemeanor; (2) evaluated to determine whether they are competent to stand trial; (3) found by court appointed psychiatrists to lack the capacity to stand trial; and (4) confined to a local jail while awaiting a determination of the competency issue by the local criminal court.

Presently before the Court is plaintiff's request for a fairness hearing concerning the proposed settlement of claims seven through ten. Before such a hearing may be conducted I must first make a preliminary determination of fairness and must address the adequacy of the proposed notice to the class.

BACKGROUND

The relevant claims for relief reads as follows:

Seventh Cause of Action:

As a result of physicians at OMH and HHC operated facilities, Stony Brook and NUMC certifying individuals who have been evaluated for civil commitment purposes as dangerous because the physician believe that such individuals' clinical condition warrants in-patient care and treatment, defendants Carpinello, Chu, Skodnek, Sedler, and Licht are responsible for the confinement of non-dangerous individuals, which violates the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983.

Eighth Cause of Action:

By failing to examine and employ significant criteria related to the likelihood of causing harm when examining allegedly mentally ill individuals for civil commitment purposes, physicians at OMH and HHC operated facilities, Stony Brook and NUMC make clinical determinations that do not promise some degree of accuracy and such decisions result in the confinement of nondangerous individuals, both of which violate the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983.

Ninth Cause of Action:

By conducting clinical evaluations that frequently do not last more than five or ten minutes when examining allegedly mentally ill individuals for civil commitment purposes, physicians at OMH and HHC operated facilities, Stony brook, and NUMC make clinical determinations that do not promise some degree of accuracy and such decisions result in the confinement of nondangerous individual [sic], both of which violate the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983.

Tenth cause of Action:

By failing to apply the statutory criteria of the provisions of the New York Mental Hygiene Law pursuant to which the physicians act, physicians at HHC operated facilities, Stony Brook, and NUMC violated the procedural component of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983.

The plaintiffs and defendant Chu have agreed to settle these

claims for relief. Plaintiffs have provided a copy of the proposed settlement. It reads as follows:

> Definitions:
> 1. For the purposes of this Stipulation, "psychiatric emergency staff" refers to any physician assigned to the psychiatric emergency service at HHC who is authorized to involuntarily admit patients to HHC psychiatric units pursuant to article 9 of the New York Mental Hygiene Law.
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> Risk Assessment Form
> 2. HHC agrees to require psychiatric emergency staff to use a standard form to evaluate patients for involuntary civil commitment to any HHC facility. This form shall require psychiatric emergency staff to document any risk factors for danger to self or others.
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> 3. The parties agree that the Psychiatric Emergency Department Assessment From annexed hereto as Exhibit A satisfies the requirements of paragraph 2 above. HHC may revise this form, except that any revised form must require psychiatric emergency staff to document any risk factors for danger to self or others, and revisions may only be made after 30 days advance notice to plaintiff's counsel.
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> Training
> 4. HHC agrees to provide training for all current psychiatric emergency staff, and all new psychiatric emergency staff who begin working at psychiatric emergency services in HHC hospitals during the term of this Stipulation, on the following topics: a) the legal standards for involuntary civil commitment pursuant to Article 9 of the New York Mental Hygiene Law; b) risk factors relevant to evaluating whether a patient is dangerous to self or others; c) use of the HHC form described in paragraph 2 above; and d) the legal requirements for involuntary medication of patients. The training materials will convey that involuntary civil commitment decisions are legal determinations as well as clinical determinations. The training materials concerning involuntary medication will instruct staff to write involuntary medication orders consistent with the requirements of 14 N.Y.C.R.R. 527.8(c)(1), and will further instruct staff not to write medication orders that authorize the intramuscular administration of

psychotropic medication on a "PRN" basis for agitation alone.[2] This training shall be completed within 150 days of the date when this Stipulation is "so ordered" by the Court. HHC will provide plaintiffs' counsel with a copy of the final training materials that are described in this paragraph.

5. HHC agrees to provide additional in-person training for HHC hospital personnel responsible for direct supervision of psychiatric emergency staff, concerning their obligation to ensure that psychiatric emergency staff comply with Article 9 of the Mental Hygiene Law when making involuntary commitment decisions. This training shall be completed within 150 days of the date when this Stipulation is "so ordered" by the Court.

Monitoring

6. Three times during the term of this Stipulation, HHC will provide plaintiffs' counsel with copies of commitment certificates, and the form described in paragraph 2 above, for a systematically selected sample of 25 patients involuntarily committed during the previous three-month period, in the psychiatric emergency department at each of the following facilities: Bellevue Hospital Center, Kings County Hospital Center, and Elmhurst Hospital Center (for a combined total of 75 patients). The names and other personally identifiable information concerning individual patients and their family members and individual HHC staff members will be redacted from the files, and the files will not be disclosed by plaintiffs' counsel to any party other than the Court. If any such documents are filed with the Court for any reason they shall be filed under seal. These documents will provided at the end of the ninth month, fifteenth month and twenty-second month after this Stipulation is "so ordered" by the Court.

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[2] The forcible administration of medicine was not addressed in the complaint in this case. Plaintiff explains it requested access to HHC facilities in order to offer patient's legal services in connection with any wrongful determination of dangerousness. In this Court's December 20, 2002 Memorandum Opinion and Order the Court granted plaintiffs right of access. However, that decision was stayed pursuant to defendants' Rule 23(f) application to the Second Circuit. Accordingly, the Law Center filed a new suit entitled *Mental Disability Law Clinic v. Marcos*, 02-CV-6131, in which the Law Clinic sought access both to offer legal services in connection with any wrongful determination of dangerousness and in connection with any wrongful forcible medication of patients. Thereafter, the Second Circuit denied the defendants' application pursuant to 23(f). Accordingly, the parties are also in the process of settling the *Marcos* action.

7. HHC and plaintiffs' counsel shall review the documents provided pursuant to paragraph 6 above within 30 days of the date when the documents are produced. The purpose of this review will be to ensure that psychiatrists are appropriately using the form described in paragraph 2 above to assist them in making commitment determination. The parties agree that this review will not involve formally challenging in Court the propriety of involuntary commitment decisions that were made in individual cases.

8. After the parties complete each review described in paragraph 7 above, plaintiffs' counsel may request a meeting with HHC to discuss the results of the review. When plaintiffs' counsel requests such a meeting, plaintiffs' counsel shall send HHC's counsel a written summary of the issues that plaintiffs' counsel would like to discuss at the meeting. The meeting shall take place a reasonable time after HHC's counsel receives the written summary. For defendants, any such meeting would be attended by one or more attorneys from the Office of the Corporation Counsel; one or more attorneys from HHC's Office of Legal Affairs; and at least one supervisory or managerial staff member at HHC who: a) is involved in training or supervising psychiatric emergency staff at Bellevue Hospital Center, Kings County Hospital Center, or Elmhurst Hospital Center; b) works in a managerial position at HHC's central office in the Office of Behavioral Health or any successor office that is involved in implementing settlement; or c) is involved in corporate-wide training relating to this settlement. At any such meeting, the parties would discuss the results of the review, including whether any corrective action may be appropriate. On consent of plaintiffs and HHC, any such meeting could take place at the Courthouse and involve the Magistrate Judge assigned to this case, on a date convenient for the Court.

Jurisdiction

9. This Court shall retain jurisdiction over this Stipulation for the purposes of modification and enforcement until two years after the date on which it is "so ordered" by the Court. At the end of that time, the Court's jurisdiction shall end, the terms of this Stipulation shall expire, and all claims in this action against HHC shall be dismissed with prejudice. Nothing in this paragraph shall be construed as a limitation on

plaintiff's right to move to enforce the stipulation in accordance with ¶¶ 12 and 13 of this Stipulation, or of the parties' right to negotiate an extension of the agreement on consent of all parties to the Stipulation.

10. During the time when this Stipulation is in effect, plaintiffs agree not to file any new litigation seeking systemic relief against HHC or any of its hospitals pertaining to the subject matter of this action. Nothing in this Stipulation shall be construed as precluding any party from bringing an action or proceeding seeking systemic relief against HHC or any of its hospitals concerning the issue of involuntary medication at HHC. Plaintiff Mental Disability Law Clinic agrees that, if it is contemplating commencing any such action, it will provide counsel for HHC with at least 60 days prior notice concerning the contemplated action. Nothing in this Stipulation shall be construed as preventing plaintiff Mental Disability Law Clinic from filing a new action against HHC for systemic declaratory, injunctive or other equitable relief based on any claims arising after the expiration of the terms of this stipulation.

11. Plaintiffs shall discontinue with prejudice the action pending in this Court titled Mental Disability Law Clinic v. Marcos, 02-CV-6131 (CPS). A copy of the stipulation of discontinuance that shall be filed with the Court is attached as Exhibit B.

Enforcement

12. During the term of this Stipulation, plaintiffs may move to enforce Stipulation only if plaintiffs have evidence that HHC has a) substantially failed to require psychiatric emergency staff to use the form described in paragraph 2 above; b) substantially failed to complete the training required by paragraphs 4 and 5 above; or c) substantially failed to provide the documents, complete the review, or participate in the meetings described in paragraphs 6 through 8 above. Should plaintiffs move to enforce the Stipulation, defendants shall be considered to be in compliance with the Stipulation unless plaintiffs establish that defendants have substantially failed to comply with these requirements. Non-systemic violations of these requirements shall not form a basis for a motion for enforcement or a finding of non-compliance. In the event the Court finds that HHC has substantially failed

to comply with any of these requirements, it may grant relief that is appropriate to cure such non-compliance. Any such relief shall be narrowly drawn, and extend no farther than necessary to cure the non-compliance.

13. At least sixty (60) days prior to making any motion to enforce this Stipulation pursuant to paragraph 12 or this Stipulation, plaintiffs shall provide HHC with written notice of the nature, specifics and evidence of the claimed violation(s) of the Stipulation in order to give HHC an opportunity to cure such alleged violation(s). The parties shall thereafter attempt to resolve the allegation(s) of non-compliance within sixty (60) days of plaintiffs' counsel providing written notice consistent with the terms of this paragraph, plaintiffs may filed a motion in accordance with paragraph 9 of this Stipulation.

General Provisions

14. Nothing contained herein shall be deemed to be an admission by HHC or the City of New York of liability or the truth of any of the allegations set forth in the complaint, or that they have in any manner or way violated plaintiffs' rights, or the rights of any other person or entity, as defined in the constitutions, statutes, ordinances, rules or regulations of the United States, the State of New York, the City of New York, or any other rules, regulations or bylaws of any department or subdivision thereof.

15. This Stipulation is solely for the purposes of settlement, and does not reflect the positions of the parties in any other judicial or administrative action or proceeding. This Stipulation shall not be admissible in, nor is it related to, any other judicial or administrative action or proceeding or settlement negotiations, except that any party may use this Stipulation in connection with any subsequent action or proceeding brought o enforce this Stipulation.

16. Notwithstanding the provisions of this Stipulation, HHC reserves the right to implement, change, or otherwise alter or amend the procedures and requirements of this Stipulation if required by intervening changes in federal statute or regulation or State statute or regulation which are inconsistent with the terms of this Stipulation. HHC shall provide counsel for plaintiffs with written notification, by

facsimile or electronic mail with acknowledgment or receipt, of a required change at least 30 days prior the commencement of implementation, unless HHC is required to commence implementation of such a required change in less than thirty (30) days. If HHC is required to commence implementation of a required change in less than thirty (30) days, HHC shall provide such notice no later than seven (7) working days after learning thereof. Plaintiffs shall have the right to challenge whether the change is required by federal or State statute or regulations. Notwithstanding the above, HHC shall not be precluded from relying on a change in federal statute or regulation or State statute as the basis for defending against a motion to modify and/or extend the terms of this Stipulation

17. The City of New York further agrees to pay reasonable attorneys' fees incurred in connection with litigating plaintiffs' claims against HHC. Plaintiffs' counsel shall provide counsel for HHC with all time records supporting plaintiff's claim for attorneys' fees, and the parties shall attempt to resolve this issue through good faith negotiations. If the parties are unable to reach agreement on the amount of attorney's fees, plaintiffs may move in Court for reasonable attorneys' fees incurred in connection with litigating plaintiffs' federal claims against HHC, HHC may oppose the amount of fees sought in plaintiff's motion, and the Court shall decide the motion.

18. Notwithstanding the use of terms such as "approved" or "so ordered," the terms and conditions of this Stipulation shall be deemed effective, and the parties' obligations, rights and responsibilities shall commence, only when the Court's approval of this Stipulation in accordance with Rule 23(e) of the Federal Rules of Civil Procedure is final by appeal.

19. This Stipulation is final and binding upon plaintiffs and HHC, their successors and assigns.

Plaintiffs have also provided a copy of the proposed settlement agreement and the proposed notice. The proposed notice reads as follows:

> A class action lawsuit has been filed on behalf of all individuals in the counties of Kings, Queens and Richmond who are subject to civil commitment evaluations at New York City Health and Hospital Corporation ("HHC") hospitals, and also on behalf of the Mental Disability Law Clinic, Touro Law Center, which represents individuals facing involuntary hospitalization. The lawsuit challenges the way that HHC doctors examine patients to determine whether or not they should be hospitalized against their will. The lawsuit asserts that doctors do not really look at whether a patient is dangerous and will hospitalize patients who have a mental illness against their will when they are not dangerous, in order to treat them.
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> A settlement has been reached in this lawsuit. The settlement provides that doctors will receive training about how to examine whether or not a patient is dangerous. The settlement will also require doctors to look at specific items to help determine whether or not a patient is dangerous.
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> If you have any questions about this lawsuit or the settlement you can contact one of the lawyers working for the plaintiff: William Brooks, telephone number (631) 421-2244, extension 331.
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> A hearing will be held before the Honorable Charles P. Sifton on (*date*). It will be held at the United States Courthouse at 225 Cadman Plaza East, Brooklyn, NY 11201, courtroom (*number of courtroom*). The purpose of this hearing is to determine whether or not the settlement is fair and the court should approve the settlement. If you do not approve of the settlement you can appear on the date and time of the settlement hearing to state your objections to the court. You may also submit objections to Judge Sifton in writing on or before the hearing date.

The parties propose that HHC post the notice in English and Spanish in the psychiatric emergency rooms and admission units of the HHC facilities covered by this lawsuit. The parties also agree that HHC shall publish the notice in a quarter page

advertisement in both English and Spanish in the Daily News and El Diaro.

DISCUSSION

Preliminary Approval of Settlement

Preliminary approval of a proposed settlement is appropriate where it is the result of serious, informed, and non-collusive negotiations, where there are no grounds to doubt its fairness and no other obvious deficiencies (such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys), and where the settlement appears to fall within the range of possible approval. *Manual for Complex Litigation* § 30.41; *In re Medical X-Ray Film Antitrust Litigation*, 1997 WL 33320580, *6 (E.D.N.Y. 1997).

The proposed settlement does not appear to be collusive, given the lengthy and comprehensive negotiations surrounding it, and plaintiffs' attorney fees will be negotiated and determined by the parties at a later date. There is no monetary recovery at issue here; hence there is virtually no potential for the named plaintiffs to benefit from the settlement at the expense of the interests of the rest of the class.

In terms of the overall fairness, adequacy, and reasonableness of the settlement, a full fairness analysis is unnecessary at this stage; preliminary approval is appropriate where a proposed settlement is merely within the range of

possible approval. I note, however, that the factors to be considered in such an analysis include: (1) the complexity, expense and likely duration of the litigation, (2) the reaction of the class to the settlement, (3) the stage of the proceedings and the amount of discovery completed, (4) the risks of establishing liability, (5) the risks of establishing damages, (6) the risks of maintaining the class action through the trial, (7) the ability of the defendants to withstand a greater judgment, (8) the range of reasonableness of the settlement fund in light of the best possible recovery, and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974). Clearly, some of these factors, particularly the reaction of the class to the settlement, are impossible to weigh prior to notice and a hearing.

At this stage, brief consideration of these factors leads to the conclusion that the proposed relief awarded to class members under the settlement is within the range of possible approval. Plaintiffs contend that litigation on these claims would be complex and would require the plaintiffs to prove that HHC physicians make pretexutal assessments of dangerousness and that HHC confines non-dangerous individuals. Plaintiffs further content that proof would require the introduction of expert

testimony. I have little doubt that continued litigation of these claims would require the needless expenditure of resources in light of the settlement substantially providing for all that plaintiff demanded. The litigation has been pending for nearly eight years. Motions to dismiss and for class certification have been litigated and the parties have undergone substantial discovery. The plaintiffs therefore likely have adequate information to determine the adequacy of the settlement. Settlement obviates the risk that plaintiffs might be unable to prove that defendant's practices violate their right to due process. As regards the defendants' ability to withstand greater judgment, the risks of establishing damages and the reasonableness of the settlement fund, are not relevant in this case because plaintiffs seek no monetary damages. I note, that settlement on a suit which seeks only injunctive or declaratory relief does not bar individual members from brining subsequent claims for damages. Thus, considering these factors and the fact that the legal protections conferred on the class by the settlement correspond closely with the relief sought in the complaint and the equitable relief they sought and would likely have received had they been successful at trial, I make a preliminary determination that the settlement is fair.

Placement of Notice

Notice of compromise is mandatory in all class actions under

Federal Rule of Civil Procedure 23. 7B WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §1797, at 365 (2d ed. 1986). That notice must be given in "a reasonable manner" as the court directs. FED. R. CIV. PRO. 23(e)(1)(B). Where class members cannot be given individual notice, posting of notice in locations necessarily or likely frequented by the class members is sufficient. *Marisol A. ex rel. Forbes v. Giuliani*, 185 F.R.D. 152, 160 (S.D.N.Y. 1999) (Notice to plaintiff class of children in foster care was sufficient where notice was posted in foster care housing facilities, hospitals, family courts and a "host of facilities where children in the [plaintiff] class are routinely present.") *Van Horn v. Trickey*, 840 F.2d 604, 606 (8th Cir. 1988)(posting of proposed settlement in common areas of prison facility sufficient to provide notice to persons who are or will be confined within the facility).

I find that posting notices in locations within every emergency room and admission unit of every Health and Hospital Corporation facility covered by this lawsuit will reasonably guarantee that all individuals evaluated for commitment will provide reasonable notice to class members. The claim pertains to the procedures and standards by which individuals are evaluated for civil commitment. Members of the class will therefore pass through the HHC Emergency room or admission unit and have an opportunity to view the notices posted therein.

The parties have not addressed notice to those potential class members who were previously improperly evaluated for civil commitment. If these individuals can be easily identified, for example, through hospital records, they must be given individual notice. *See Eisen v. Carlisle & Jacqueline*, 417 U.S. 156 (1974)(interpreting former Rule 23(c)(2) to require that individual notice be sent to all class members where they are identifiable); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)(notice by publication violates due process where names and addresses are known). Accordingly, the parties are directed either to identify and notify each potential class member who was previously improperly evaluated for civil commitment or to file an affidavit explaining why the identities and addresses of these individuals cannot be easily ascertained. If these individuals names and addresses cannot be easily ascertained then notice by publication in both Spanish and English newspapers will suffice.

Content of Notice

Although no rigid standards govern the content of the notice, the form of notice must fairly apprise the prospective members of the class of the pendency of the class action, the terms of the proposed settlement, and the options that are open to them in connection with the proceedings, including the option

to withdraw from the settlement. *See Weinberger v. Kendrick*, 698 F.2d 61, 70-71 (2d Cir. 1982). Notices frequently identify a response period by the end of which class members must opt out. *See e.g., Id.* at 70-71.

I find that, with minor modification, the proposed notice meets these standards. Those modifications are as follows: First, the notice should indicate that class members will be bound by the settlement. Second, the notice should indicate that the lawsuit does not provide damages to any individual who may have had his or her rights violated, but only aims to correct an alleged practice that plaintiff's believe is unlawful. Third, the notice should specify that individuals who wish to opt-out or object may do so in writing, prior to the hearing date, by mailing an objection to the Clerk of the United States District Court, Cadman Plaza East, Brooklyn, NY 11201." Any objection must state that it is an "objection to the proposed settlement" and must contain the case name, "Monaco v. Stone" and the docket number, "98-CV-2286."

CONCLUSION

For the reasons set forth above, the settlement is preliminarily approved. The parties are directed to publish and mail notice of the settlement pursuant to the terms set forth in the accompanying order. Objections, requests for exclusion, and a

fairness hearing will also be conducted in accordance with the accompanying order.

SO ORDERED.

Dated : Brooklyn, New York
June 1, 2006

By: /s/ Charles P. Sifton (electronically signed)
United States District Judge