IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

AMANDA D., et al. Plaintiffs, v. MARGARET WOOD HASSAN, et al., Defendants.	)	
THE UNITED STATES OF AMERICA, Plaintiff-Intervenor, v. THE STATE OF NEW HAMPSHIRE, Defendant.	)	1:12-CV-53-SM

UNITED STATES' REPLY TO DEFENDANTS' OPPOSITION TO AND IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION

The United States submits this reply to Defendants' Opposition and in support of the Plaintiffs' Renewed Motion for Class Certification. Plaintiffs filed this lawsuit because they have suffered unnecessary institutionalization due to the inadequacy of community supports in the operation of the state of New Hampshire's mental health delivery system, a failure which has long been acknowledged by the State. The presence of the Department of Justice ("the Department") as a Plaintiff-Intervenor in this case does not preclude certification.

The Court should certify a class in this matter because class actions are necessary and appropriate vehicles for achieving systemic reform in *Olmstead* cases and remain so after the Supreme Court's decision in *Wal-Mart v. Dukes*. Extensive briefing and evidence on the

question of class certification support the finding that the Plaintiffs have met their burden under Rule 23 of the Federal Rules of Civil Procedure, and Plaintiffs need not fully prove the merits of their claims to meet the class certification threshold. Defendants' attempts to paint a class of people with serious mental illness as individuals sharing no common interest in systemic mental health reform reveals a strained effort to see only trees in a forest. Under Defendants' logic, no class of individuals with disabilities would ever be certified. Such a result would be contrary to the intent of the Supreme Court in *Wal-Mart*. For the reasons set forth below, the Department urges the Court to certify a class in this matter.

I. Introduction

In lengthy papers currently before the Court, as well as initial briefing on this issue submitted last spring, the Parties have presented their arguments on the question of whether it is appropriate to certify a class in this matter. Plaintiffs persuasively argue that the Court should certify a class because the claims of the named plaintiffs and members of the putative plaintiff class all share common questions of fact and law that are susceptible to a common answer, as required by Rule 23 and *Wal-Mart v. Dukes*, 131 S.Ct. 2541 (2011). Plaintiffs are all individuals with serious mental illness who are unnecessarily institutionalized or are at serious risk of institutionalization in New Hampshire Hospital or Glencliff due to the State's failure to provide sufficient mental health services in the community. They assert, and the United States agrees, that an injunction requiring the State to provide mobile crisis services, Assertive Community Treatment ("ACT"), supported housing, and supported employment would resolve their claims in a single stroke. Defendants, meanwhile, shift the focus away from the State's policies which lead to unnecessary institutionalization and argue that the Plaintiff class fails to meet the commonality, typicality, adequacy, and cohesiveness requirements of Rule 23 because of

differences between class members' specific circumstances. Defendants also argue in their recent brief that the Court need not certify the class because the Department's intervention makes a class superfluous. As explained below, Plaintiffs' view of the law should prevail and the Department's presence should not impede class certification.

II. The Presence of the Department Does Not Make a Class Unnecessary

Defendants argue that the presence of the Department as an intervenor in this case makes class certification unnecessary. This position is based on the assumption that the interests of the Department and the Plaintiff class are identical and that the relief the two parties will seek could not diverge. While the Department and Plaintiffs each brought claims under the Americans with Disabilities Act ("ADA") and the Rehabilitation Act, they represent different interests. Furthermore, unlike the Plaintiffs, the Department did not bring a claim under the Pre-Admission Screening and Resident Review requirements of the Medicaid Act ("PASRR").

Differences between the interests represented by the Parties also weigh heavily in favor of certification. The Department represents national interests when litigating matters under the ADA. Charged with developing a national enforcement program, the Department seeks to take a consistent approach in its cases across the nation, while tailoring claims and remedies to the specific circumstances of any jurisdiction. This role is a privilege bestowed on the Department, which is afforded deference in its understanding of the ADA as the agency empowered to draft and interpret its regulations. *Olmstead v. L.C.*, 527 U.S. 581, 597-98 (1999). ("Because the Department is the agency directed by Congress to issue regulations implementing Title II, its views warrant respect." (citation omitted); *Pashby v. Delia*, 2013 WL 7911829, at *10 (4th Cir. 2013) ("Because Congress instructed the DOJ to issue regulations regarding Title II, we are especially swayed by the DOJ's determination"); *M.R. v. Dreyfus*, 663 F.3d 1100, 1117 (9th Cir.

2011) (deferring to DOJ's views regarding title II and its regulations, stating that "[a]n agency's interpretation of its own regulation is 'controlling unless plainly erroneous or inconsistent with the regulation.'") (citations omitted). Of course, this great responsibility comes with some constraints. For example, our *Olmstead* adult mental health practice is affected by the previous statements, positions, interpretations, and settlements entered by the Department in this area.[1] With regard to litigation decisions, such as the choice of experts and desirability of settlement, the Department is also required to use judgment directed toward serving national interests and cannot forfeit that discretion in an effort to meet the specific needs of class members in a particular case. The Plaintiffs, on the other hand, are unencumbered in their ability to pursue the remedies needed and desired by the class, and, indeed, are ethically required to further the interests of the class of individuals in any settlement or litigation. The distinctions between the Parties' interests and the Federal Rules both support class certification.

Regardless of these differences, the Court can and should enable the putative plaintiff class to represent its own interests. Even where the Department is engaged in the case, plaintiffs may represent a class unless, unlike here, Congress has explicitly precluded the claims from going forward on a parallel basis. Recently, a New York district court held that "the existence of

[1] In their brief, the Defendants imply that the United States has unfairly targeted New Hampshire for enforcement action. To support this claim they make a comparison between their *current* inpatient capacity and the *2006* inpatient capacity of other states in which the Department has conducted *Olmstead* enforcement. Defs.' Opp. at 18. Even if New Hampshire had compared inpatient capacity from the same year across states, the State would be missing the point. The critical question is not how many beds a jurisdiction has, rather it is the balance of institutional and community spending and the extent to which a state supports community services that reduce the need for inpatient treatment. New Hampshire Hospital's high readmission rates are evidence of the inadequacy of the needed community services. *See* New Hampshire 2010 Mental Health Outcome Measures, CMHS, Uniform Reporting System.

Furthermore, New Hampshire's comparison of its inpatient capacity to those of North Carolina and Virginia is completely irrelevant. The Department's investigation of North Carolina focused on segregation of adults in adult care homes, not inpatient psychiatric hospitals. The Department's investigation of Virginia focused exclusively on the state's developmental disabilities system and had nothing to do with individuals with mental illness.

the parallel government action does not bar certification of the class under Rule 23(b)(3)," in the context of an action under the Employee Retirement Income Security Act ("ERISA"). *In re Beacon Assocs. Litig.*, No. 09 Civ. 777, 2012 WL 1569827, at *13 (S.D.N.Y. May 3, 2012). The court was persuaded by the Department of Labor's argument that a *per se* rule prohibiting class certification where a parallel government suit exists would interfere with and undermine the private enforcement mechanisms in the statute. *Id.* at *12-13; s*ee also United States v. Local Union No. 3, Int'l Union of Operating Engineers*, 1972 WL 194, at *5 (N.D. Cal. July 18, 1972) ("There is no statute which precludes private suits from proceeding – even as class actions – simultaneously with pattern and practice suits brought by the United States pursuant to 42 U.S.C. § 2000e-6. … given that the possibility of the two proceedings at the same time would have occurred to the drafters of Title VII, it is only reasonable to expect Congress to have prohibited such simultaneous proceedings if it wanted to."). Like ERISA, the ADA provides for both government and private enforcement mechanisms which were carefully crafted by Congress. The Court should not interfere with this scheme. Only where the government had already obtained relief or class certification threatened to unravel a government settlement, neither of which is the case here, would certification of parallel suits be problematic. *See Beacon,* at *12-13. The putative plaintiff class and the Department represent distinct interests and the Court should certify the plaintiff class to ensure that both perspectives are represented, as allowed under the law and the Federal Rules.

Finally, even if the Parties did not represent different interests, the rights of the class to bring its claims under Rule 23 should not be undermined by the presence of the Department where, as here, all of the requirements of the Rule are met. The First Circuit has explained that "whether the action should be maintained as a class action depends on the *appropriateness* of

injunctive or corresponding declaratory relief with respect to the class as a whole." *Dionne v. Bouley*, 757 F.2d 1344, 1356 (1st Cir. 1985) (emphasis in original). Even where injunctive relief can be obtained without certifying a class, the court recognized that "other considerations may render a denial of certification improper." *Id*. One such situation described by the First Circuit is "where class certification does not impose any significant burden on the Court." *Id.* Here, where the Department will be proceeding with the litigation, discovery will continue at the same scale and the Parties will be moving toward trial at the same rate, whether or not the Plaintiff class is certified. Accordingly, the Court will not experience any additional burdens as a result of class certification. In fact, the case would become more complicated to manage if the Plaintiff class were certified only as to its PASRR claim, a claim not raised in the Department's Complaint. Under that scenario, the Department would proceed on two claims, the Plaintiff class would proceed on a third claim, and the named Plaintiffs would proceed on all three claims. Determinations regarding discovery and other litigation issues would be excessively complicated and time consuming. Class certification is appropriate under Rule 23 and it will result is a conservation of judicial resources during the remaining year of discovery.

III. Class Actions Are Appropriate under the ADA and *Olmstead,* and Remain So After *Wal-Mart*

Certification of a class ensures that those who are unnecessarily institutionalized or at risk of unnecessary institutionalization are before the court at the same time. Without the class action device, relief would only be afforded to individuals with the resources or wherewithal to retain private counsel, rather than to all those who are affected by the State policies at issue. Affording *Olmstead* relief on a piecemeal basis risks the distribution of one-time relief to those who have complained, in the order in which they complain. Moreover, piecemeal relief leaves in

place the very systemic deficiencies of a statewide service system that caused the unnecessary institutionalization in the first place, that are likely to be perpetuated in the future, and that violate the ADA.

Although the *Olmstead* case was not a class action, the Supreme Court's opinion suggested that class actions are appropriate vehicles to resolve injuries to people with disabilities when public entities are not administering services and programs in the most integrated settings. In *Olmstead*, two women with disabilities sought to live in the most integrated setting appropriate to their needs, in conformity with the requirements of the ADA and its implementing regulations. *See Olmstead v. L.C.*, 527 U.S. 581, 593 (1999). Only the named plaintiffs attained relief through their litigation and the Supreme Court intimated that class actions were the best private means of enforcing the right to be free from "unjustified institutionalization." It was not until the United States filed an *Olmstead* case on behalf of all of the individuals in Georgia's mental health system who were unnecessarily institutionalized or at risk of unnecessary institutionalization more than a decade later, that Georgia changed its funding policy which had favored institutions over services in the community. *See United States v. Georgia*, No. 1:10- 249 (N.D. Ga. Oct. 29, 2010) (order granting settlement affording systemic relief to remedy ADA violations). Recognizing that relief for those individuals who file complaints might not lead to a fair result for all those affected by a state policy, the *Olmstead* Court cautioned that courts should not "order displacement of persons at the top of the community-based treatment waiting list by individuals lower down who commenced civil actions." *Id.* at 606.

The *Olmstead* Court also suggested that class actions were appropriate vehicles to resolve claims in the context of its discussion of the state's affirmative defenses in an ADA integration case. There, the Court laid out a process by which a jurisdiction may raise a

fundamental alteration defense and argue that in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, "given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." 527 U.S. at 604. Accordingly, analysis of the fundamental alteration defense, if raised by the State here, would necessarily require looking beyond the individually-named Plaintiffs to the State's overall system serving thousands of other individuals with mental illness. The *Olmstead* Court recognized that it is imperative to consider the system and resources for serving people with disabilities as a whole, rather than dividing the system into innumerable subgroups, each of which must be considered and addressed separately. The Court's analysis supports the view that the members of the plaintiff class, despite the differences in their specific disabilities and current treatment needs (differences apparent in any class of people with disabilities), have a common contention susceptible to a single stroke resolution.

Where, as here, all class members can show that they suffer a common harm due to State policies, a class action remains appropriate under the *Wal-Mart* analysis. The Court in *Wal-Mart* instructed judges to carefully consider the question of commonality, particularly in a situation where a nationwide class sweeps in millions of plaintiffs whose claims are each based on the decisions of individual supervisors. 131 S.Ct. at 2555. However, this increased scrutiny was not intended to eliminate class actions. *See id.* at 2553-54 (providing example of circumstances in which class would be appropriate in employment discrimination case). Nor, as the Supreme Court recently clarified, was the intent to require that cases be fully proven at the class certification stage. *Amgen v. Connecticut Retirement Board*, 133 S. Ct. 1184, 1194-95 (2013) ("Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage."). Thus the Court has now reaffirmed the longstanding guidance provided in *Eisen v.*

Carlisle & Jacquelin, that "[c]lass certification hearings should not be mini-trials on the merits of the class or individual claims." 417 U.S. 156, 177-78 (1974); *see Amgen*, 133 S. Ct. at 1201.

Where plaintiffs share a common contention, *Wal-Mart* affirms that certification is appropriate, and courts have continued to certify classes like the one proposed here, including in *Olmstead* cases, since *Wal-Mart*. In *Pashby v. Cansler*, 279 F.R.D. 347 (E.D.N.C. 2011), *aff'd Pashby v. Delia*, 2013 WL 791829 (4th Cir. March 3, 2013), the court certified a class of plaintiffs with disabilities who challenged the State's termination of in-home personal care services via implementation of more restrictive eligibility rules. *Id*. at 351, 354. The plaintiffs asserted that the reduction or termination of in-home services would place them at risk of institutionalization in violation of *Olmstead* and sought to block the termination of benefits. *Id.* at 350, 355. The court concluded that plaintiffs had shown a common contention that "will resolve the claims of all potential plaintiffs, irrespective of their particular factual circumstances." *Id*. at 353.

As a court in the First Circuit recently explained when affirming class certification in a case involving children in the foster care system, *Wal-Mart* "provided guidance on how existing law should be applied to expansive, nationwide class actions that are very different from the case currently before the court." *Connor B. v. Patrick*, 278 F.R.D. 30, 33 (D. Mass 2012) (denying defendants' motion to decertify a class of children in foster care alleging harm due to diverse systemic deficiencies in the foster care system under the control of a single state agency). Here, like in *Connor*, Plaintiffs allege that the harm they suffer is caused by a failure in the administration of State services. Unlike the plaintiffs in *Wal-Mart*, Plaintiffs in this case share a common contention—that Defendants are not providing services in the most integrated setting

appropriate to class members' needs as required by the ADA—and this contention is "central to the validity" of each class member's ADA claim. *Wal-Mart*, 131 S. Ct. at 2551.

IV. Differences Between Ultimate Relief Afforded *Olmstead* Class Members Do Not Preclude Classes

Defendants incorrectly argue that individuals in the putative plaintiff class are not appropriate for inclusion in a class because their circumstances are not identical. Their arguments misunderstand the requirements of Rule 23 and the nature of mental illness. Plaintiffs have met their burden of showing, for example, that state policies are causing harm to putative class members who are currently institutionalized and others who are likely to be institutionalized in the future. Likewise, Plaintiffs have shown that a single injunction to expand the community services identified in their complaint will remedy the common harms, regardless of the specific mix of services each putative class member would need to avoid unnecessary institutionalization. If, as Defendants claim, any such distinctions inherently defeat class certification, then class actions involving people with disabilities under the ADA would be impermissible, a contention that has been rejected by multiple courts post-*Wal-Mart*.

Courts considering classes of individuals with disabilities must always face the question of whether inevitable differences between class members preclude certification. Having considered this very issue in post-*Wal-Mart* decisions, judges around the country have affirmed that the class requirements of commonality, typicality, and adequacy are not undermined by these unavoidable differences in classes involving people with disabilities. Most analogous to the case at hand is *Lane v. Kitzhaber*, 283 F.R.D. 587 (D. Or. 2012), a case in which plaintiffs sought class certification to challenge the defendants' failure to "plan, administer, operate and fund a system that provides employment services that allow persons with disabilities to work in

the most integrated setting." *Id*. at 595. The court rejected nearly identical arguments to those raised by Defendants here and found commonality even though the class members were not "identically situated." *Id*. at 598. In the *Lane* case discussed above, the court explained that, "Under defendants' interpretation, differences with respect to the needs and preferences of persons with disabilities would always preclude the certification of a class in virtually all ADA Title II cases." 283 F.R.D. at 598. As the Court in *Lane* made clear, after *Wal-Mart*, ADA cases may still proceed as class actions despite the inherent differences between individuals with disabilities. *Id.*

Lane is not the only post *Wal-Mart* case in which the court has certified a class of people with disabilities. For example, in *Oster v. Lightbourne*, 2012 WL 685808 (N.D. Cal. Mar. 2, 2012), the Court found commonality among the plaintiff class whose state in-home support services would be "limited, cut, or terminated" by 20 percent under a new state law, even though some individuals in the class may not actually be impacted by the reduction in services because of their ability to apply for supplemental hours. *Id*. at *1, *4-6. Similarly, an Indiana court recently found that the commonality prong was satisfied in a case related to prisoners with a range of mental illnesses who have been or will be held in segregation. *Indiana Protection and Advocacy Servs. Comm'n v. Comm'r, Indiana Dep't of Corr.*, 2012 WL 6738517, at *18 (S.D. Ind. Dec 31, 2012). A New York district court considering accommodations in emergency plans for people with a wide range of disabilities, from mobility impairments to mental illness, also found commonality. *Brooklyn Ctr. for Independence of the Disabled v. Bloomberg*, 287 F.R.D. 240, 249 (S.D.N.Y. 2012) ("In other words, "[a] court may find a common issue of law even though there exists some factual variation among class members' specific grievances.").

Moreover, courts have found that classes of individuals with disabilities meet the typicality prong of Rule 23. For example, in a recent case regarding accommodations for people with a range of mobility needs, the court found that plaintiffs met the typicality requirement for certification despite differences between class members' needs for mobility assistance. *Ault v. Walt Disney World Co.*, 692 F.3d 1212 (11th Cir. 2012) ("'Class members' claims need not be identical to satisfy the typicality requirement; rather, there need only exist 'a sufficient nexus ... between the legal claims of the named class representatives and those of individual class members to warrant class certification.'") (citations omitted). Variation between class members' disabilities and the reasonable accommodations needed did not preclude a finding of typicality in *Gray v. Golden Gate Nat'l Recreation Area*, 279 F.R.D. 501, 510 (N.D. Cal. 2011) ("Plaintiffs persuasively counter that classes of disabled individuals seeking reasonable accommodation have been certified without the need for individualized assessments of each alleged barrier, each class member's disability or the type of accommodation needed."), *reconsideration denied in part*, 866 F. Supp. 2d 1129 (N.D. Cal. 2011). Contrary to Defendants' contention, *Wal-Mart* has not been interpreted as requiring that plaintiffs be indistinguishable or need identical services or accommodations in order for a class to be certified.

Class members here seek a working system of community mental health services that will support their changing needs over time. Compl. ¶ 9. That is because mental illness is often characterized by periods of stability and periods during which more intensive services are necessary, occasionally including acute care. *See* Mental Health: A Report of the Surgeon General, 98-104 (1999). Thus, distinguishing between class members on the basis of their present, immediate needs fails to ensure that the appropriate relief is available to them over time. Because individual needs and circumstances change over time, courts have recognized that it is

appropriate to afford *Olmstead* relief not only to classes of individuals currently in institutions but also to classes of people who are at risk of being, but are not currently, institutionalized. *See, e.g., Pashby v. Delia*, 2013 WL 791829, at *9 (4th Cir. March 3, 2013); *M.R. v. Dreyfus*, 663 F.3d 1100, 1116-17 (9th Cir. 2011); *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1182 (10th Cir. 2003); *see also Ligas v. Maram*, 2006 WL 644474, at *5 (N.D. Ill. 2006).

Defendants fail to take into account this fundamental reality – the changing needs for services by a person over time. That is evident in Defendants' attempts to divide the class, for example, based on one person's current need for ACT and another's need for supportive housing. Defs.' Opp. at 34-44. Underlying this view of a divisible class is the assumption that mental illness is a static condition and an inappropriately inflexible vision of the mental health system. A system of supports that provides adequate mobile crisis, ACT, supported housing, and supported employment would meet the changing needs of people with serious mental illness in New Hampshire, whether they are individuals currently in NHH or Glencliff who need these services to transition to the community, or individuals in the community who need these services to avoid unnecessary institutionalization. *See* Sudders Aff. at ¶ 22-25.

Similarly, Defendants' attempt to silo the Plaintiffs based on the severity of their symptoms and diagnoses is misplaced. Defs.' Opp. at 20-27. Contrary to Defendants' assertions, periods of severe symptoms or challenging diagnoses do not preclude an individual from benefitting from community-based supports. In fact, these assertions themselves are evidence of the bias toward institutional care that continues to pervade New Hampshire's mental health system.[2] Evidence-based practices such as ACT and supported housing have effectively

[2] It is not surprising that the Defendants' affiants, who are employed by the very facilities that are at issue in this case and made the treatment decisions contradicted by Plaintiffs' experts, find fault with the Plaintiffs' expert opinions. Dr. De Nesnera's determination that for many individuals "NHH is the only appropriate form of treatment

been employed around the country to support individuals with serious mental illness, even those who had been hospitalized for decades and who have had severe symptoms. *See, e.g.*, Substance Abuse and Mental Health Services Administration. *Assertive Community Treatment: The Evidence* (2008); Substance Abuse and Mental Health Services Administration. *Permanent Supportive Housing: Building Your Program* 5-7 (2010). In fact, the Defendants' own Ten-Year Plan identified these services as critical to preventing hospitalization and enabling people to transition back to the community. *See* NH Dep't of Health and Human Servs., *Addressing the Critical Mental Health Needs of NH's Citizens: A Strategy for Restoration* 3-6 (Aug. 2008). It is ironic that Defendants assert that the presence of some individuals who have historically not succeeded in the community should destroy the class; Defendants' inadequate community services have contributed to the lack of success. Individuals who have not succeeded in community placements in the past, without the benefit of adequate community-based services, often do succeed when they have the benefit of that support.

The need for acute inpatient care is reduced by the availability of resources in the community which can prevent the escalation of a crisis. *See* Mental Health: A Report of the Surgeon General, 285-95 (1999). Thus, Defendants' argument that current emergency room use and wait times for admission to New Hampshire Hospital evidence a need for more hospital beds in New Hampshire assumes the continuing inadequacy of community supports. *See* Sudders Aff. at ¶ 13, 16. Defendants are merely pointing to the harms that have resulted from the exact failures at issue in this case. Defendants cannot use the negative effects of their own actions to oppose a class-based remedy to such failures.

– no matter what community-based services are available," De Nesnera Aff. at ¶ 22, is a striking affirmation of the institutional bias that persists.

New Hampshire's leaders, including newly-elected Governor Wood Hassan, have recognized the critical role that community services play in a functioning mental health system that does not resort to the unnecessary institutionalization of individuals with mental illness. The Governor recently acknowledged that the State mental health system is not meeting the needs for community-based services saying, "We can all agree that our mental health system is deeply strained… it is time to resume our efforts to repair our mental health system." Budget Address of Gov. Margaret Wood Hassan, Feb. 14, 2013; *see also* Riera Aff. at ¶ 15, 33. These statements echo the finding from the State's Ten-Year Plan that, "many individuals are admitted to New Hampshire Hospital because they have not been able to access sufficient services in a timely manner (a "front door problem") and remain there, unable to be discharged, because of a lack of viable community based alternatives (a "back-door" problem)." NH Dep't of Health and Human Servs., *Addressing the Critical Mental Health Needs of NH's Citizens: A Strategy for Restoration* 6 (Aug. 2008).

But, instead of recognizing the impact that these services can have in enabling success in the community, the Defendants fill page after page describing the symptoms and challenges of named and potential class members, whose very lives are being adversely affected by the strains on New Hampshire's mental health system. In particular, dissecting the medical records and psychotherapy notes[3] of courageous named plaintiffs who have come forward to seek relief on behalf of all those who, like them, have experienced unnecessary institutionalization is distasteful, to say the least. To echo some of the Governor's recent sentiments, New Hampshire is a better state than that. *See* Budget Address of Gov. Margaret Wood Hassan, Feb. 14, 2013.

[3] Even where it is permitted under HIPAA, the use of psychotherapy notes in legal proceedings is ethically fraught. *See* Paul Mosher and Peter P. Swire, "*The ethical and legal implications of* Jaffee v. Redmond *and the HIPAA medical privacy rule for psychotheraphy and general psychiatry*," Psychiatr. Clin. N. Amer. 25, 575-84 (2002); *see also* Mental Health: A Report of the Surgeon General, 438-49 (1999).

Having made a showing that there are questions common to the class that may be resolved through a single injunction, the Plaintiffs should be allowed to proceed as a class. *See Wal-Mart*, 131 S. Ct. at 2551; *Amgen*, 133 S. Ct. at 1191. The Court need not reach the merit of whether the Plaintiffs have proven their ADA claim. Plaintiffs have presented more than sufficient evidence to support a finding that they meet the requirements of Rule 23 and, therefore, a class is appropriate.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' renewed motion for class certification.

Dated: March 21, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2013, I electronically filed the United States' Reply to Defendants' Opposition to and in Support of Plaintiffs Motion for Class Certification, with the Clerk of the Court using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

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