06-55559

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KATIE A., by and through her next friend Michael Ludin, et al., Plaintiffs-Appellees, v. SANDRA SHEWRY, Director, California Department of Health Services, et al., Defendant-Appellant.	On Appeal from the United States District Court Central District of California No. CV 02-05662 AHM (SHx)

APPELLEES' OPPOSITION TO EMERGENCY STAY MOTION

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APPELLEES' OPPOSITION TO EMERGENCY STAY MOTION

I. DEFENDANTS HAVE FAILED TO DEMONSTRATE ANY EMERGENCY JUSTIFYING THIS STAY MOTION, NOR HAVE THEY INFORMED THIS COURT OF THE PARTIES' "COLLABORATIVE AND PRODUCTIVE" EFFORTS TO IMPLEMENT THE ORDER THEY NOW SEEK TO STAY.

Defendants/Appellants Diana Bonta, Director of the California Department of Health Services ("DHS") and Rita Saenz, Director of the California Department of Social Services ("DSS") (hereinafter "Defendants"), have filed an emergency motion to stay the Preliminary Injunction Order and subsequent orders in this case, pending the disposition of their appeal. Plaintiffs/Appellees ("Plaintiffs") respectfully request that this motion be denied. If Defendants still believe they risk injury, they should request that this appeal be further expedited, as this Court recently did in a closely related case. Ninth Circuit Order, May 24, 2006, *Emily Q. v. Shewry*, Case Nos. 06-55339, 06-55489 (allowing one week for Appellant's reply and scheduling argument for three weeks afterwards).

As discussed below, the contentions in Defendants' stay motion are puzzling in light of the many positive developments in the district court in the past two months. Because the pendency of the stay motion throws a pall over these proceedings, Plaintiffs agree that a rapid resolution of the motion is desirable. Plaintiffs request that the Court require that Defendants' reply, if any, be submitted no later than close of day tomorrow, Wednesday, July 26, 2006.

This case concerns essential mental health services that Defendants have denied to a plaintiff class of thousands of foster children who suffer from mental illness and emotional disturbance. Plaintiffs submitted more than 35 declarations

in support of their preliminary injunction motion. More than a dozen state and national experts attested to the efficacy of these services, known as wraparound and therapeutic foster care, and how they are covered by other state Medicaid programs. Family members and foster parents submitted declarations describing how class members have been denied these services, with devastating and long-term effects.

The preliminary injunction order issued on March 14, 2006, requires Defendants to work with Plaintiffs to develop a plan to deliver these services on a statewide basis. Two months ago, the parties informed the district court that despite "collaborative and productive efforts," its deadline of July 12 for statewide compliance "can not be met." Joint Status Report, May 23, 2006, at 2, Pl. Exh. 1, attached hereto. Since then, Plaintiffs have proposed that implementation proceed in phases over a period of several years. Declaration of Kim Lewis ("Lewis Decl."), ¶ 5, Pl. Exh. 2. The parties have made substantial progress in meetings regarding implementation of the injunction, including the exchange of comments on drafts of a state-wide notice which Defendants issued on June 30, 2006. Attachment A to Lewis Decl.

It is hard to make sense of Defendants' request to halt an implementation process that they themselves describe as "collaborative and productive." Joint Status Report at 2, Pl. Exh. 1. Certainly, Defendants will suffer no harm if this process continues while the appeal is pending. Their claim of injury because state employees have had to work hard to comply with a federal court order is scarcely colorable. Plaintiffs have already addressed Defendants' concern that the July 12

deadline is "unrealistic" by agreeing to phased implementation over several years. Lewis Decl., ¶ 5, Pl. Exh. 2. Their fears regarding contempt or the loss of federal funding are both speculative and unfounded. Decls of Lewis,¶¶ 6-9,11, Pl. Exh. 2 (Plaintiffs do not intend to seek contempt); Chris Koyanagi, Pl. Exh. 9 & 10. They raise no other factual grounds to support this stay motion. As discussed at greater length below, these claims, weak as they are, must be balanced against the manifest harm to thousands of low-income children in the foster care system who have already waited far too long for relief.

In addition, Defendants have been rather nonchalant about filing this motion for an emergency stay. More than four months ago, the District Court (Honorable A. Howard Matz) issued the preliminary injunction requiring Defendants to provide wraparound and therapeutic foster care. Order Granting Preliminary Injunction, March 14, 2006, Def. Exh. 2. More than three months ago, Defendants filed a notice of appeal, stating that they will file a motion for a stay and also "may file a motion to further expedite the appeal." Civil Appeals Docketing Statement, April 12, 2006.

On May 23, 2006, they filed a motion to vacate the briefing schedule set by this Court to allow themselves additional time to file their opening brief. Plaintiffs warned that if Defendants later sought a stay which was granted, a delay in the briefing schedule would severely prejudice the needy children in the Plaintiff class. Plaintiffs' Opposition to Motion to Vacate Briefing Schedule, at 2, filed with the Ninth Circuit, May 24, 2006. Plaintiffs also noted that "apparently, State Defendants have now lost all interest in expediting this appeal." *Id.* at 4.

Although Defendants have known since at least May 24, when the Joint Status Report was filed, that they could not comply with the July 12, 2006 deadline, they waited another two months to seek a stay - ten days after the deadline had run. Having delayed so long, they now designate this as an "emergency motion" pursuant to Circuit Rule 27-3. Had this stay motion been filed with their notice of appeal, or even their opening brief, this Court could have considered it on the regular motion calendar. No better example could be offered of how a party "has been unreasonably dilatory in seeking relief." Ninth Circuit General Order 6.4(b).

In *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984), this Court noted that a party's delay in seeking relief is "a factor to be considered" since "by sleeping on its rights, a plaintiff demonstrates the lack of need for speedy action." Defendants' delay in seeking a stay is yet another ground to deny their motion.

Finally, Defendants fail to explain what will happen in the next 21 days to justify an emergency filing under Circuit Rule 27-3. They do the Court a disservice by demanding an immediate response to their motion, when they failed to act for so many months.

II. THE BALANCE OF EQUITIES FAVORS PLAINTIFFS, NOT DEFENDANTS.

A. DEFENDANTS ARE NOT IRREPARABLY INJURED WHEN THEIR EMPLOYEES WORK HARD ON IMPLEMENTATION PLANS WHICH BENEFIT THE STATE AS WELL AS PLAINTIFF CHILDREN.

Defendants argue that the "emergency" which requires a stay is that staff

"have had their workloads increased substantially" as a result of meetings to plan how to implement the Preliminary Injunction Order. Emergency Motion for Stay ("Mot.") at 11. They argue that this has led to an "unwarranted waste and diversion of scarce and valuable public resources." Mot. at 7. *Accord*, Mot at 6, 11-12, 13, 14, 28, 20. Defendants complain that their staff has little time for other responsibilities and projects, some of which may also benefit the Plaintiff class. Mot. at 6-7. They complain about pre-existing staff shortages but fail to explain why they have not hired additional staff to comply with the Order. Mot. at 14 (DSS staff has not increased to keep pace with demand). Defendants fail to appreciate that "[a]lthough participation in the [Medicaid] program is voluntary, participating States must comply with certain requirements imposed by the Act." *Wilder v. Virginia Hosp. Assn.*. 496 U.S. 498, 502 (1990). Thus, Defendants' compliance with these federal mandates cannot take a back seat to other projects, however important they think they are.

Defendants also argue that the July 12, 2006 deadline for full statewide compliance in the Order is "unrealistic" and "too short to implement a quality program." Mot at 6, 13, 15, 30. They fail to inform the Court that Plaintiffs have proposed a general principle of phased implementation over several years, rather than full statewide compliance by July 12, 2006. This is a major concession which benefits Defendants. Lewis Decl., ¶ 5, Pl. Exh. 2.

The Joint Status Report also belies Defendants' claim of harm from the implementation process. Pl. Exh. 1. There, Defendants explained, "the departments and agency are working diligently to implement the court's Order in

a reasonable time frame while ensuring that high quality services are provided." Ex. 1 at 4. The parties agreed that the meetings were "productive." *Id.* at 2. After only two meetings, the parties reported that they "do not believe that the Court needs to appoint a Special Master in the instant case at the present time." *Id.* at 4-5. This represented a change in Plaintiffs' position, as they had requested appointment of a Special Master just a few months earlier. Far from harming defendant, the meetings between the parties have resulted in concessions on Plaintiffs' part which benefit Defendants significantly.

Underlying Defendants' repeated references to "scarce state resources" is the implication of the staff costs for implementation efforts, possible overtime costs, etc. Even assuming that these costs are substantial (a showing Defendants has failed to make), a stay would still not be warranted. In *Lopez v. Heckler,* 713 F.2d 1432, 1437 (9th Cir.), *rev'd in part on other grounds*, 463 U.S. 1328, 104 S.Ct. 10, 77 L.Ed. 2d 143 (1983), this Court considered a request to stay a preliminary injunction issued on behalf of needy social security beneficiaries. Even though the estimated cost to the federal government was more than $20 million per month in 1980, a figure that would be much higher in current dollars, this Court denied the stay. The *Lopez* court explained that "[f]aced with such a conflict between the financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor. *Accord, Rodde v. Bontá*, 357 F.3d 988, 999 (9th Cir. 2004) (preliminary injunction affirmed despite county's estimate of losses of $58 million annually). Even if the State is required to spend additional sums in the

absence of a stay, these costs cannot be compared to the irreparable injury to young class members who may go without needed treatment if a stay is granted, as discussed below.

B. DEFENDANTS' FEAR OF CONTEMPT AND THE LOSS OF FEDERAL FUNDING IS BOTH SPECULATIVE AND UNFOUNDED.

Defendants argue that without a stay, they face the "risk of contempt." Mot. at 7, 27, 28. Notably, they conceded two months ago that they would not be able to comply with the July 12, 2006 deadline in the preliminary injunction. If the fear of contempt for admitted non-compliance was alone sufficient to justify a stay, then every defendant could win an automatic stay merely by disobeying an injunction. Even if contempt is a serious possibility, a party must wait until it receives the contempt order and then appeal and seek a stay. *See, e.g., Lowthian v. U.S.*, 575 F.2d 1292, 1293 (9th Cir. 1978) (motion to stay order issuing subpoena duces tecum was "premature"; party must "refuse to produce the information and then [] appeal the judgment which follows the resulting contempt citation.")

More significantly, although the July 12, 2006 deadline has come and gone, Plaintiffs have not sought contempt, nor do they intend to. Lewis Decl., ¶ 11, Exh. 2. Had counsel for Defendants attempted to determine Plaintiffs' position on this issue prior to filing their motion, as the Circuit Advisory Committee Note to Rule 27-1 suggests, they would have discovered that contempt is not a serious possibility at this time.

Defendants also fear that the new services ordered by the district court are

"vague and ambiguous" and will not qualify for federal funding. Mot at 5-6. Accord, Mot. at 9, 10, 27. A federal regulation entitled "Federal Financial Participation" should put this fear to rest. 42 C.F.R. § 431.250(b)(2). This provides that federal financial participation "is available in expenditures for . . . payments made . . . for services provided within the scope of the Federal Medicaid program and made under a court order." *Id.* (emphasis added). Here, the district court has issued an order requiring Defendants to provide mental health services, which are unquestionably within the scope of the Medicaid program. Even assuming that Defendants are correct (which they are not) that the description in the Order alone is too vague to qualify for federal funding, this regulation will ensure reimbursement.

In addition, a close reading of the supporting declarations reveals that any funding concerns are premature. The federal agency, the Center for Medicare and Medicaid Services ("CMS"), has not denied any funding request. CMS indicated only that additional detail is needed and that the State has submitted its request in the wrong format. As part of their ongoing discussions, the parties have been working together to develop the necessary detail, including the detail listed in the new declarations submitted in the support of the stay motion. Mot. at 10, citing Lemus Decl., Pl. Exh. 7. In a recent meeting, Defendants agreed to submit a proper application for approval of an amendment to the State Medicaid Plan or the State's Medicaid waiver to add wraparound and therapeutic foster care as benefits. Lewis Decl. [1]

[1] Defendants requested that Plaintiffs provide additional detail about the services ordered by the district court. In response, Plaintiffs prepared an early,

Plaintiffs also have consulted with national experts in Medicaid funding who work with CMS on a regular basis and submitted declarations in support of the Preliminary Injunction. Koyanagi Decl., Pl. Exh. 9 & 10. These experts confirm that when wraparound and therapeutic foster care are provided as therapeutic mental health services, federal financial participation is available. Koyanagi Decl., ¶ 23-27. Defendants' fear of the loss of federal funding is unfounded.

C. PLAINTIFFS WILL BE IRREPARABLY INJURED IF A STAY IS GRANTED.

Defendants' claims of injury must be balanced against the pressing needs of class members, who are children and young adults who are both low-income and need mental health treatment that they have been denied. Defendants do not dispute, nor could they, the district court's thorough summary of the expert testimony regarding the medical necessity for wraparound and therapeutic foster care. Order at 16-18, Def. Exh. 2. *See, e.g.,* Pl. Exh. 3, Decl. of Dr. Eric Bruns (cited in Order at 17).

Instead, Defendants argue that the Plaintiff children will suffer no hardship from a stay because "there is no evidence that any member of the Plaintiff class has been denied a specific Medicaid-covered service that he or she was entitled to

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confidential document, which Defendants submitted to CMS. According to Defendants' employees, CMS responded that additional detail is needed. Lemus Decl., Def. Exh. 7 to Mot. This response was predictable - the draft which Plaintiffs prepared states on the first page that the State needs to define "provider qualifications, . . .billing codes, procedures and minimum documentation requirements." Lewis Decl., ¶ 6. In later discussions, Defendants' employees stated that CMS had told them they had made the request in the wrong format, and that the State was preparing to submit a state plan amendment to include the services in the district court's order. Lewis Decl., ¶ 9.

because it was not covered by Medi-Cal." Mot at 29. Defendants appear to have overlooked the many declarations from family members and foster parents that Plaintiffs filed in the district court. These attest to the denial of wraparound and therapeutic foster care to children such as "Charlie," an emotionally disturbed eight-year old subjected to prenatal drug exposure and early parental abuse. Burgess Decl., Pl. Exh. 4 A court-appointed expert had recommended wraparound services and therapeutic foster care for Charlie so that this boy could eventually be placed with his loving and committed grandmother. Id., ¶ 3-5. However, because wraparound services and therapeutic foster care were not available in his county, this young class member only deteriorated in foster care, "bounc[ing] from placement to placement for the next four years," each more restrictive and costly, only to end up in Metropolitan State Hospital, a state mental hospital. Lowe Decl., Pl. Exh. 13, ¶8-11.

Another typical class member is Kayla. In eighteen months in Merced County's foster care system, Kayla was shunted through 9 different residential placements and 11 psychiatric hospitalizations, including a group home in Redding, which was six hours away from her mother. Decl. of Vickie Centobie, Pl. Exh. 5, ¶¶ 1, 2 and 8. Rather then helping Kayla, each new placement contributed to her distress: in one she was beaten by older girls and in another she ran away and was raped while she wandered the streets. Id., at ¶¶ 8, 13. She continually attempted suicide and cut her arms with a knife and a razor. Id. at ¶¶6, 8, 15 and 22. Despite this history and a diagnosis of severe depression and other serious mental disorders, the local child welfare agency eventually told Ms.

Centobie that "there was nothing they could do for" her daughter and that "the only way Kayla would get the services she needed was through the probation department." Id. at ¶¶6, 8, 15, 17, 22, 33. Kayla is now in jail. *Id.* at ¶ 37. Like Kayla, many other foster children with high-level mental health needs are not provided with the services they desperately need. See, e.g., Decls of Dianne Magnatta, ¶¶1, 4, 23 ("Dusty"), Pl. Exh. 14; Andrea Dembrowsky, ¶ 12, Pl. Exh. 6 (for child who went through 15 placements in three years, the "only constants in Bobby's life since entering foster care has been that his mental disabilities will cause him to act out and he will be moved to another placement to repeat the cycle somewhere else"); Jackie Hardy, ¶¶ 28-29, Pl. Exh. 7 (twelve-year old girl finally placed with grandmother after 19 failed placements).

Defendants do not deny that children such as these would benefit from wraparound and therapeutic foster care, and that California fails to provide it to them. *See, e.g.,* Decls of Elias Lefferman, Pl. Exh. 11 (small wraparound program, waiting list); Kevin Scott, Pl. Exh. 19 (no wraparound program in his county); Mindy Watrous, Pl. Exh. 20 (barriers to establishing therapeutic foster care program)

In *Lopez v. Heckler,* 713 F.2d at 1437, another case involving individuals who were also poor and disabled, this Court stated, "the physical and emotional suffering shown by plaintiffs in the record before us is far more compelling than the possibility of some administrative inconvenience or monetary loss to the government." Here too, the emotional suffering of vulnerable foster children far outweighs the extra work imposed on some state employees. This Court should

not stay the preliminary injunction or halt the substantial progress the parties have made in implementing it.

III. DEFENDANTS CANNOT SATISFY THE FOUR-PART TEST FOR GRANTING A STAY PENDING APPEAL.

The United States Supreme Court has said that four factors determine whether a stay should issue from the appellate court. *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987). The factors are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Id.*

Defendants have not made the requisite showing for issuance of a stay.[2] First, Defendants have not made a strong showing that they are likely to succeed on the merits of the appeal. Second, as discussed above, Defendants have not proven that they will be irreparably injured absent a stay. That some State and County officials may have to work extra hours hardly constitutes severe and lasting injury. Third, as discussed above, issuance of the stay would, on the other hand, irreparably injure members of the plaintiff class since no subsequent court order can adequately compensate these children and youth for being denied the

[2] On June 15, 2006, the district court issued an order inviting the parties to comment on the status of wraparound services in Los Angeles County and on un unsolicited letter submitted to the court by the California Institute for Mental health. Def. Exh. 4, Order re: Plaintiffs' Motion re: Advisory Panel Plan. Although she has not appealed this order, Defendants has also requested that this Court stay the June 15 Order. Mot. at 15, 16, 29. The only ground for their request is that "inappropriate" to request their comments. Aside from the fact the fact that no appeal of the Order of June 15, 2006 is pending, it is inconceivable that Defendants could injured by such a benign request from the district court. This aspect of their stay motion is frivolous and should be denied.

mental health services they desperately need. Defendants' moving papers do not dispute the fact that thousands of class members are not receiving the mental health services to which they are entitled. Absent the new measures now underway, the situation will not improve. Fourth, the public interest lies in government accountability and improved health and welfare gained through a process that provides children and youth with necessary mental health services.

A. DEFENDANTS ARE UNLIKELY TO PREVAIL ON THE MERITS OF THE APPEAL.

The bulk of Defendants' motion for a stay re-hashes the arguments in Appellant's Opening Brief. Plaintiffs' answering brief is due in three weeks, on August 10, 2006. Rather than attempt to address each argument in full here, Plaintiffs offer these preliminary observations. First, Defendants' arguments are primarily procedural, focusing on the district court's alleged failure to made required findings. Mot at 25. However, this Court may still affirm a preliminary injunction "if the findings are sufficiently comprehensive and pertinent to the issues to provide a basis for decision or if there can be no genuine dispute about the omitted findings." *Federal Trade Comm'n*, 362 F.3d 1204, 1212 (9th Cir. 2004); *see also Manga Weld Sales Co. v. Magna Ally & Research Pty.*, 545 F.2d 668, 671 (9th Cir. 1976)(same).

Second, Defendants argue that wraparound and therapeutic foster care are not Medicaid covered services and that Plaintiffs failed to identify what components are covered. Mot at 8-9. Yet Defendants do not dispute the district court's findings that other states cover these same mental health services through their Medicaid programs. Order, Def. Exh. 2 at 15-16. *See also,* Decl. of Bruce

Kamradt, Pl. Exh. 8; David Nace, Pl. Exh. 16; Timothy Penrod, Pl. Exh. 17; Linda Redman, Pl. Exh. 18.

Finally, Defendants argue that the district court's order does not meet the Ninth Circuit's more "exacting" standard for injunctions against government agencies, requiring intentional misconduct. Mot. at 25. Yet this Court has repeatedly affirmed preliminary injunctions against both state and local agencies without requiring intentional misconduct. *See, e.g., Gregorio T. v. Wilson*, 59 F.3d 1002, 1004-05 (9th Cir. 1995) (Governor and other State officers enjoined from implementing various sections of Proposition 187); *Demery v. Arpaio*, 378 F.3d 1020, 1027-33 (9th Cir. 2004)(county sheriff enjoined from using a world-wide web camera in jail); *Harris v. Board of Supervisors, Los Angeles County*, 366 F.3d 754, 756-57 and 764-67 (9th Cir. 2004)(county officials enjoined from closing county rehabilitation hospital and eliminating 100 beds at another county hospital); *Cupolo v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078, 1080-86 (N.D. Cal 1997) (BART ordered to improve and repairs its elevators to make them accessible to individuals with mobility disabilities).

Defendants are unlikely to prevail on their legal claims.

B. ISSUANCE OF A STAY IS CONTRARY TO THE PUBLIC INTEREST.

"The public interest is a factor to be strongly considered" in whether to issue a stay of an injunction to assure that Medicaid recipients receive essential medical services. *Lopez,* 713 F.2d at 1437. This Court has cautioned that the "government must be concerned not only with the public fisc but also with the public welfare," adding that "[o]ur society as a whole suffers when we neglect the

poor, the hungry, the disabled, or when we deprive them of their rights or privileges." *Id.* Here, it is in the public interest to protect the legal rights of the plaintiff class, children with mental illness who are both poor and disabled.

A stay of the implementation efforts now underway is also contrary to the public interest because it will result in a waste of public funds. State employees from three agencies have worked long and hard on implementation of the Preliminary Injunction order and have made great progress. This work will be wasted if a stay is issued.

IV. DEFENDANTS FAILED TO ESTABLISH THAT SEEKING A STAY FROM THE DISTRICT COURT WAS NOT PRACTICABLE.

Defendants admit that they did not seek a stay from the district court, arguing that to do so was "impracticable." Mot. at 30, citing FRAP 8(a)(2)(A)(i). They argue that the district court "prejudged the issues" and that its order "demonstrates commitment to a particular resolution." Mot at 30. In support, they cite dicta in *Chemical Weapons Working Group v. Department of the Army*, 101 F.3d 1360, 1362 (10th Cir. 1996). The facts and outcome in that case support a denial of the stay. There, as here, appellants argued that seeking a stay from the district court was futile. The Tenth Circuit noted:

> [R]elief is sought predominantly on the basis of new evidence concerning events which occurred after the district court [order]. This evidence had not been considered by the district court. . . . We will not assume that the district court would not properly consider the new evidence if a motion for stay or other appropriate motion were presented to it in the first instance. . . . [Furthermore],

> the district court is the proper forum for presentation, testing and confrontation of new evidence. Only upon completion of the district court's factfinding role, should this court consider any relief pending appeal.

Ibid.

In this case, Defendants' arguments regarding irreparable injury are based on two new declarations that were never presented to the district court. Def. Exh. 7, Decl. of Barbara Lemus, dated July 17, 2006; Def. Exh. 8, Decl. of Susan Nisenbaum, dated July 10, 2006. These declarations concern developments which occurred after the March 14, 2006, preliminary injunction order. Since the district court has not had an opportunity to consider this new evidence, Defendants' stay motion should be denied on this ground alone.

Further, Defendants' excuse for not seeking a stay from the district court is their assumption that if it rejected their arguments against the injunction, it will also reject their request to stay the injunction. However, "it does not necessarily follow from the refusal to grant a preliminary injunction that the district court would also refuse injunctive relief pending appeal." *Chemical Weapons Working Group*, 101 F.3d at 1362, citing *Bayless v. Martine*, 430 F.2d 873, 879 n. 4 (5th Cir. 1970). Similarly, it does not necessarily follow that the grant of an injunction means that the district court will deny a request to stay that order. If such an assumption could be made, then a losing party would never have to seek district court review.

CONCLUSION

For all of the above reasons, Plaintiffs respectfully request that the emergency motion for a stay pending appeal be denied.

Dated: July 25, 2006

Respectfully Submitted,

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