

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

<p>Kevin Scott Karsjens, David Leroy Gamble, Jr., Kevin John DeVillion, Peter Gerard Lonergan, James Matthew Noyer, Sr., James John Rud, James Allen Barber, Craig Allen Bolte, Dennis Richard Steiner, Kaine Joseph Braun, Christopher John Thuringer, Kenny S. Daywitt, and Bradley Wayne Foster,</p> <p style="text-align: center;">Plaintiffs,</p> <p>v.</p> <p>Lucinda Jesson, Dennis Benson, Kevin Moser, Tom Lundquist, Greg Carlson, and Ann Zimmerman, in their individual and official capacities,</p> <p style="text-align: center;">Defendants.</p>	<p>Court File No. 11-cv-03659 (DWF/JJK)</p> <p><b>PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF AMENDED MOTION FOR CLASS CERTIFICATION PURSUANT TO FED. R. CIV. P. 23(b)(2)</b></p>
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**INTRODUCTION**

Pursuant to Fed R. Civ. P. 23(b)(2), Plaintiffs move to certify a class consisting of: “All patients currently civilly committed in the Minnesota Sex Offender Program pursuant to Minn. Stat. § 253B.”

The above-named Plaintiffs are all civilly committed pursuant to Minn. Stat. § 253B. Plaintiffs have alleged in their Amended Complaint that Defendants: 1) fail to provide adequate treatment, 2) deny the right to be free from punishment, 3) deny less-restrictive alternatives, 4) deny the right to be free from inhumane treatment, 5) deny the right to religious freedom, 6) unreasonably restrict speech and association, 7) conduct

unreasonable searches and seizures, 8) unconstitutionally apply section 253B, 9) violate court-ordered treatment, and 10) have committed breach of contract. These claims are suitable for class certification under Rule 23(b)(2). Not only are the requisites of Rule 23(a) - numerosity, commonality, typicality and adequacy of representation - plainly met but Defendants have acted or refused to act on grounds generally applicable to all members of the class, thereby making injunctive relief appropriate for the class as a whole.<sup>1</sup> As such, class certification should be granted.

### **FACTUAL BACKGROUND**

The Plaintiffs and the proposed Class members (currently numbering over 600) are all civilly committed pursuant to Minn. Stat. § 253B.

#### **1. The MSOP Treatment Program**

The MSOP is a treatment program with prison-like facilities in Moose Lake, MN and St. Peter, MN. The Moose Lake facility houses patients in the first two phases of the treatment program and the St. Peter facility houses patients in the third and final stage of the program as well as alternative programs for cognitively impaired patients. *Karsjens et al., v. Jesson, et al.*, 11-CV-0359 (DWF/JSM) (“*Karsjens Complaint*”) at ¶ 58. All persons civilly committed under Minnesota law enter the MSOP treatment program. *Id.*

The MSOP treatment program is broken out into three phases. *Id.* at ¶ 64. Each person committed to the MSOP must start in Phase I of treatment and complete the two subsequent phases in order to be considered for provisional discharge from the MSOP. In

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<sup>1</sup> Plaintiffs have identified one or more class representatives who have suffered injury under each Count set forth in the First Amended Complaint.

Phase I, patients must comply with the MSOP facility's rules and learn basic treatment concepts. *Id.* Over half of all MSOP Patients are in Phase I. *See* Sex Offender Civil Commitment in Minnesota – Conference Materials, Minnesota Sex Offender Program Presentation, *available at* [http://www.dhs.state.mn.us/main/groups/agencywide/documents/pub/dhs16\\_166449.pdf](http://www.dhs.state.mn.us/main/groups/agencywide/documents/pub/dhs16_166449.pdf) (last visited Jun. 27, 2012) (“Minnesota Conference Materials”). No sex offender specific treatment is provided in Phase I. *See* Office of the Legislative Auditor, State of Minnesota, Evaluation Report: Civil Commitment of Sex Offenders (March 2011) at 42 (citing Minn. Stat. § 253B.18, subd. 1) *available at* <http://www.auditor.leg.state.mn.us/ped/pedrep/ccso.pdf> (“Legislative Auditor Report”).

In Phase II, patients must discuss their sexual offenses and patterns of sexual abuse. *Karsjens* Complaint at ¶ 64. In Phase III, which takes place at the St. Peter facility, the program focuses on community reintegration. *Id.* This third phase consists of MSOP Supervised Integration, in which patients live in a secure area within the St. Peter Facility. *Id.* Patients may take accompanied outings off campus, and Community Preparation Services, in which patients live on campus in a house that is not within the secure perimeter. *Id.* Throughout Phase III, patients are electronically monitored. *Id.*

The MSOP treatment program was designed to be completed within 32 months. *Matter of Linehan*, 557 N.W.2d 171, 188 (Minn. 1996). As of January 1, 2012, 64% of MSOP patients were in Phase I, 24% were in Phase II, and 12% were in Phase III. *See* Minnesota Conference Materials. No one has ever completed the program in 32 months, and in fact, most class members have already spent more than 32 months in Phase I.

Currently, 75% of MSOP patients have been civilly committed to the MSOP for between three years and ten years or more. *Id.* Although it has been in existence since 1993, it was not until February of 2012 that the first patient in the history of the MSOP was deemed to have completed the treatment program, after commitment to the program for more than 18 years, and be ready for provisional discharge. *See* Paul McEnroe, *First Sex offender from state program is granted release*, STAR TRIBUNE (Feb. 3, 2012), <http://www.startribune.com/local/stpaul/138669904.html>. Despite that patient completing over 18 years of treatment within MSOP, he is still subject to intensive treatment as a provision of his discharge. *Id.*

Although there is a statutorily established option for a less restrictive alternative treatment program, no such options have ever been available as no less restrictive alternatives exist. *See* Legislative Auditor Report, at 42 (citing Minn. Stat. § 253B.18, subd. 1).

The current treatment program has serious constitutional deficiencies including, among other things, a low number of treatment hours provided, insufficient staffing, insufficient staff training, inadequate conditions of confinement, inadequate medical treatment, and a failure to progress Plaintiffs and proposed Class members through treatment. *See Karsjens* Complaint at ¶¶72-83. For example, Plaintiffs and Class members receive fewer hours of treatment per week than any other adult inpatient sex offender treatment program in the state, including the program at the Minnesota Department of Corrections (“DOC”). Legislative Auditor Report at 62.

Plaintiffs and Class members are not required to participate in treatment and there is a separate living unit at the Moose Lake facility for those who do not participate in treatment. *Id.* at 78. More than 50 people currently are housed in a separate unit for non-participation. But if the treatment program did not have such serious problems, essentially being a futile exercise, Plaintiffs allege that many of these patients would choose to take part in treatment in order to progress through the program.

## **2. Living Conditions at the MSOP**

Defendants have subjected the Plaintiffs and proposed Class members to punitive policies, practices, and procedures during their civil commitment to the MSOP. Since 2008, the MSOP has largely operated under policies and procedures akin to those of the Minnesota DOC. *Karsjens* Complaint at ¶ 69. Many of the MSOP's policies and procedures impermissibly exceed the boundaries of what is necessary for treatment and security and certainly do not foster the therapeutic environment upon which the civil commitment scheme was founded and defended against previous legal challenges. Instead, these policies and practices have created an environment that does not foster rehabilitation. *See id.* at ¶ 71; *see also* Legislative Auditor Report at 68.

The MSOP facility at Moose Lake is laid out similarly to many prisons with cell units facing into a central courtyard where Plaintiffs and Class members may be observed from one central station. *Karsjens* Complaint at ¶ 106. MSOP staff wear guard-style uniforms. *Id.* The newly designed and constructed living unit, Complex One, is designed like a correctional facility. *Id.* In fact, when Complex One was constructed, the MSOP obtained waivers from the Minnesota Department of Health so it would not have to

comply with statutorily required living standards for state hospitals. *Id.* at ¶ 111. The waivers allowed the MSOP facility at Moose Lake to provide springless beds, smaller cells with inadequate space between beds, inoperable windows in cells, smaller windows in cells, and a more prison-like setting as opposed to any sort of therapeutic environment. *Id.* The State's approval of these waivers resulted in the current cells in which Plaintiffs and Class members reside. Plaintiffs and Class members are double bunked in 9.5 x 15 ft. wet cells consisting of two metal bed frames that are only 30 inches apart, small stainless steel desks, and a stainless steel toilet/sink combination unit fixed into the cell. *Id.* at ¶ 112. Plaintiffs and Class members are locked in these cells daily from approximately 9:45 p.m. until 6:25 a.m. *Id.* at ¶ 114.

Currently, Plaintiffs and Class members are subject to unnecessary pat searches of the body, unclothed body searches, and body cavity searches without reasonable suspicion being established. *Id.* at ¶ 118. Plaintiffs and Class members may be pat-searched or wand-searched at any time for no reason. *Id.* Plaintiffs and Class members are also subject to strip searches upon entry to the High Security Area ("HSA") and any time they leave or enter the secure perimeter of the MSOP facility. *Id.* at ¶ 119.

When Plaintiffs and Class members leave the secure facility they are placed in handcuffs, leg irons and a black box, complete with waist-chain. *Id.* at ¶ 126. They are then pushed in a wheel chair to the transport vehicle where they are placed into a small cage inside the van. *Id.* They are subject to these same restraints when they suffer a medical emergency and need to leave the secure facility via ambulance. *Id.* The use of such obvious and severe restraints in public is patently untherapeutic.

Plaintiffs and Class members are also subject to regular random room searches in addition to any searches of their rooms based on any reasonable suspicion. *Id.* at ¶ 121. Plaintiffs and Class members are not allowed to observe the searches or be present during their performance. *Id.*

MSOP's main disciplinary tool appears to be Behavior Expectation Reports ("BER"). *Id.* at ¶ 90. Plaintiffs and other Class members are expected to follow the Behavioral Expectations Handbook. *Id.* Behavioral violations are categorized as either Minor Rule Violations or Major Rule Violations. *Id.* at ¶ 91. However, the handbook is exceedingly vague about what constitutes a minor or major rule violation and what the disciplinary consequences are for different violations. *Id.* Furthermore, and likely a result of their vagueness, the BERs are not applied consistently by MSOP staff. *Id.* at ¶ 95. Receiving BERs directly affects a patient's progression in treatment and disciplinary restrictions cause at least a six month delay in progression in treatment. *Id.* at ¶ 100.

The HSA is also used as a disciplinary measure at MSOP. HSA is a solitary confinement unit. *Id.* at ¶ 101. Plaintiffs and Class members are held in the HSA when MSOP staff determines they need to be placed on Protective Isolation Status. Plaintiffs and Class members can be placed in HSA until MSOP staff determines they have regained behavioral control. *Id.* at ¶ 102. While in HSA, Plaintiffs and Class members are only allowed out of their cell for one hour per day. *Id.* Plaintiffs and Class members are kept in HSA much longer than is necessary, and it is used as a punitive measure rather than a behavioral control measure. *Id.* at ¶ 103.

Plaintiffs and Class members are forced, at their own expense, to mail property that MSOP deems contraband outside the facility or the property is destroyed. *Id.* at ¶ 132. If Plaintiffs and Class members possess property that is considered contraband, that property is confiscated. *Id.* at ¶ 104. Plaintiffs and Class members may then submit a request to appeal the denial of their property, but such requests take MSOP ten business days to handle. *Id.* By the time that request has been processed, the property has been destroyed. *Id.* Plaintiffs and Class members must submit at least two requests before they may file a grievance, which is well beyond the ten day period. *Id.*

Plaintiffs' and Class members' visitation with their family and friends is limited. *Id.* at ¶ 139. Visitors must be pre-approved for visitation, submit to a criminal background check and a pat search upon entry to the visiting area. *Id.* Contact between Plaintiffs and Class members and a visitor is limited to one hug at the beginning and end of each visit. *Id.* Smoking is not permitted during visitation and no food is allowed during visits. *Id.* Plaintiffs and Class members are strip searched after visitation. *Id.* MSOP routinely denies access to visitors and limits the size of a Plaintiff's and Class member's visiting list as well as the number of visitors at one time. *Id.*

The MSOP phone system is the only phone system Plaintiffs and Class members are allowed to use. *Id.* at ¶ 149. Despite existing technology that is virtually free to use, the state charges Plaintiffs approximately 32 to 39 cents a minute to use the phone and they cannot use 800 numbers to conduct business. *Id.* at ¶ 149- 150. Calling cards are prohibited. *Id.* at ¶ 150. Plaintiffs and Class members are very limited in the number of phone calls they are allowed to make.



MSOP staff monitors the Plaintiffs and Class members who visit with clergy and religious volunteers. *Id.* at ¶ 154. Plaintiffs and Class members are only allowed five religious items in their personal property, and Defendants limit the types of religious items Plaintiffs and Class members may have. *Id.* at ¶ 156.

### **PROCEDURAL BACKGROUND**

Over the last several years, a number of patients civilly committed to the MSOP filed federal complaints against various state employees associated with the MSOP. The *pro se* complaints generally allege violations of the patients' civil rights pursuant to 28 U.S.C. § 1983 and other statutes. On January 20, 2012, at the request of the Minnesota Federal Bar Association's *Pro Se* Project, Gustafson Gluek PLLC agreed to appear in two of these cases, *Thompson v. Ludeman, et al.*, 11-CV-01704 (DWF/JJK) and *Karsjens et al., v. Jesson, et al.*, 11-CV-0359 (DWF/JSM). The *Karsjens* case was initially filed on December 21, 2011 as a proposed class action. The *Thompson* case was filed on June 27, 2011; an Amended Complaint was filed on Aug. 2, 2011 [*Thompson* Dkt. # 9]. On January 11, 2012, Magistrate Judge Keyes issued a Report and Recommendation in the *Thompson* case in response to the Defendants' Motion to Dismiss [Dkt. # 39]. The Report and Recommendation found that some of the claims should survive the motion to dismiss.

After Gustafson Gluek PLLC appeared in *Karsjens* and *Thompson*, on January 25, 2012, Chief Judge Davis issued an Order [*Karsjens* Dkt. #142] staying all of the *pro se* MSOP cases with the exception of the *Thompson* and *Karsjens* actions pending the resolution of the outstanding Motion for Class Certification filed in the *Karsjens* case

[Dkt. # 24]. On February 6, 2012, Chief Judge Davis issued an Amended Order [Dkt. # 145] applying the stay to additional MSOP cases that were unintentionally omitted from his previous order. On February 8, 2012, Judge Frank issued an Order [*Karsjens* Dkt. #146] staying the *Thompson* litigation until further notice, and setting a deadline of February 29, 2012 for filing an Amended Complaint in the *Karsjens* action. The First Amended Complaint in the *Karsjens* case was filed on March 15, 2012 [*Karsjens* Dkt. #151]. Currently, there are more than 65 cases subject to the Court's stay.

### ARGUMENT

Plaintiffs' Amended Complaint makes allegations that concern all of the individuals civilly committed in the MSOP. Because Plaintiffs satisfy Rule 23(a) and (b)(2), their motion for class certification should be granted.

A class action serves to conserve the resources of the court and the parties by permitting an issue that may affect every class member to be litigated in an economical fashion. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 155 (1982). A Rule 23(b)(2) class action allows for a single injunction or declaratory judgment that provides relief to all class members. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2557 (2011).

#### **1. Plaintiffs Have Met the Requirements of Rule 23(a)**

Rule 23 of the Federal Rules of Civil Procedure governs class certification.

To be certified as a class, plaintiffs must meet all of the requirements of Rule 23(a) and must satisfy one of three subsections of Rule 23(b). The Rule 23(a) requirements for class certification are: (1) the putative class is so numerous that it makes joinder of all members impracticable; (2) questions of law or fact are common to the class; (3) the class representatives' claims or defenses are typical of the claims or defenses of

the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

*In re St. Jude Med., Inc.*, 425 F.3d 1116, 1119 (8th Cir. 2005) (citing Fed. R. Civ. P. 23(a)) (citations omitted).

When considering a motion for class certification, a court need not address whether the plaintiff has a cause of action because “a decision to certify a class is far from a conclusive judgment on the merits of the case.” *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604, 613-614 (8th Cir. 2011) (citation omitted). At the class certification stage, the only requirement is that the elements of Rule 23 are met. *Bennett v. Nucor Corp.*, 656 F.3d 802, 814 (8th Cir. 2011).

The party seeking class certification “car[ri]es the burden of proof regarding Rule 23’s requirements.” *City of Farmington Hills Employees Ret. Sys. v. Wells Fargo Bank, N.A.*, Civ. No. 10-4372 (DWF/JJG), 2012 WL 1021679 at \*3 (D. Minn. March 27, 2012) (citing *In re Workers’ Comp.*), 130 F.R.D. 99, 103 (D. Minn. 1990)). When a question arises as to whether certification is appropriate, the court should give the benefit of the doubt to approving the class. *In re Worker’s Comp.*, 130 F.R.D. at 103 (citation omitted); *see also Harju v. Olson*, 709 F.Supp.2d 699, 734 (D. Minn. 2010).

**a. Numerosity**

Rule 23(a) requires that “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1).

Rule 23(a)’s first requirement is that joinder of all class members is impracticable because the class is too numerous. *See* Fed.R.Civ.P. 23(a)(1). The Eighth Circuit has not established any rigid rules regarding the

necessary size of a class and the question of what makes joinder impracticable depends on the facts of each case.

*Sonmore v. CheckRite Recovery Services, Inc.*, 206 F.R.D. 257, 261 (D. Minn. 2001).

Here there is no question that Rule 23(a)(1) is satisfied. Courts in this district have certified classes that consisting of fewer individuals than would be included in the present Class. Classes have been certified ranging from about 540 class members in *Kimball v. Fredrick J. Hanna & Associates, P.C.*, 2011 WL 3610129 at \*3 (D. Minn., Aug. 15, 2011) to as few as 250-300 individuals. *In re Worker's Comp.*, 130 F.R.D. at 104 (citing *Bowman v. National Football League*, 402 F.Supp. 754, 756 (D. Minn. 1975)).

Approximately 600 individuals fit the proposed class definition and those individuals face an identical process for treatment, living conditions, and potential release. Furthermore, many MSOP patients have expressed a desire to pursue the claims in this case on a class basis. Here, Plaintiffs have satisfied Rule 23(a)(1).

**b. Commonality**

Rule 23(a)(2) requires that “there are questions of law or fact common to the class.” *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2550-1 (citing Fed. R. Civ. P. 23(a)(2)).

The Supreme Court recently clarified the commonality requirement, stating:

Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury . . . . [The class members’] claims must depend upon a common contention . . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

*Id.* at 2551 (2011) (quotation omitted). This case presents precisely that situation.

Although “not every question of law or fact must be common to every member of the class, “the commonality requirement is met” if the questions linking the class members are substantially related to the resolution of the litigation even though the individuals are not identically situated.” *Workers’ Comp.*, 130 F.R.D. at 104. *See also, e.g., In re Lutheran Broth. Variable Ins. Products Co.* Civ. No. 99-MD-1309 (PAM/JGL), 2004 WL 909741 at \*1 (D. Minn. April 28, 2004), *Sales Practices Litig., Paxton v. Union Nat’l Bank*, 688 F.2d 552, 561 (8th Cir. 1982) (holding that commonality “may be satisfied, for example, where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated.”(citation omitted)).

The Plaintiffs have identified questions that are common to all Class members:

- a. Whether Defendants violated Plaintiffs’ and Class members’ Due Process rights protected by the Fourteenth Amendment to the United States Constitution by failing to provide a realistic opportunity to earn their discharge from the MSOP;
- b. Whether Defendants violated Plaintiffs’ and Class members’ Due Process rights protected by the Fourteenth Amendment to the United States Constitution by failing to provide a less restrictive confinement option as provided for by Minn. Stat. §253B;
- c. Whether Defendants violated Plaintiffs’ and Class members’ Due Process rights protected by the Fourteenth Amendment to the United States Constitution by creating an unnecessarily punitive environment;
- d. Whether Defendants violated Plaintiffs’ and Class members’ rights to be free from unreasonable searches and seizures as protected by the Fourth Amendment to the United States Constitution;
- e. Whether Defendants violated Plaintiffs’ and Class members’ rights to freedom of expression, speech, and religious exercise as protected by the First Amendment to the United States Constitution;

- f. Whether Minnesota’s civil commitment laws are unconstitutional as applied to Plaintiffs and Class members;
- g. Whether Defendants violated the court-ordered treatment directive for Plaintiffs and Class members; and
- h. Whether Defendants’ failure to satisfy their obligations to Plaintiffs and Class members under the Consent for Participation in Sex Offender Treatment constitutes a breach of contract.

However, “[w]hat matters to class certification ... is not the raising of common ‘questions’—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.” *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551 (citation omitted, emphasis in original). The proposed Class members allege the same injuries endured by all Class members—namely, lack of adequate treatment, inadequate conditions of confinement, and violation of their constitutional rights. As such, resolution of the Plaintiffs’ claims will necessarily remedy the injuries suffered by all potential Class members. Plaintiffs have identified one or more Class representatives who have suffered injury under each Count set forth in the First Amended Complaint.<sup>2</sup>

The injuries alleged by the Plaintiffs are all capable of classwide resolution and any adjudication by the Court would affect the whole Class. Given the numerous common questions and common injuries remediable by common action, Plaintiffs have satisfied Rule 23(a)(2).

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<sup>2</sup> It is a distinction without a difference that some potential class members are housed in different units or in St. Peter instead of Moose Lake, because all of the patients are subject to the same MSOP policies.

**c. Typicality**

Rule 23(a) also requires that, in order for a class to be certified, the claims or defenses of the class representative must be typical of the other members of the class. Fed. R. Civ. P. 23(a)(3). “This requirement is generally considered to be satisfied if the claims or defenses of the representatives and the members of the class stem from a single event or are based on the same legal or remedial theory.” *Paxton*, 688 F.2d at 561-62 (citation omitted). Commonality and typicality tend to merge because both “serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.” *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551, n.5 (quoting *Gen. Tel. Co.*, 457 U.S. at 157-58 n.13).

In the present case, Plaintiffs’ claims stem from the same legal theory, challenge the same alleged conduct that affects all members of the Class, and seek the same broad legal remedies. Therefore, Plaintiffs have satisfied Rule 23(a)(3).

**d. Adequacy**

Rule 23(a)(4) requires plaintiffs to establish that the “representative parties will fully and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). “In order to satisfy the adequacy requirement, Plaintiff must show that (1) the representative and its attorneys are able and willing to prosecute the action competently and vigorously and (2) each representative’s interests are sufficiently similar to those of the class that it is unlikely that their goals and viewpoints will diverge.” *City of Farmington Hills*

*Employees Ret. Sys. v. Wells Fargo Bank, N.A.*, Civ. No. 10-4372 (DWF/JJG) 2012 WL 1021679 at \*4 (D. Minn. March 27, 2012) (citing *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 692 (D. Minn. 1995)). Here, Plaintiffs and their appointed counsel aptly satisfy this requirement.

There is no doubt that Plaintiffs will vigorously prosecute their claims. The fact that they filed a *pro se* complaint proves the vigor of their commitment to this case. Indeed, this action may be all that separates them from a lifetime of confinement. Here, the Plaintiffs have amply demonstrated that they are willing to work diligently to protect the interests of the class – particularly in light of the fact that all other similar cases are stayed pending the resolution of this matter. Plaintiffs have freely accepted the substantial responsibility by being the face of this litigation and advancing this case for all MSOP patients. They have actively engaged in all stages of this case. For instance:

- Plaintiffs and counsel have had several in-person and regular weekly telephonic conferences to discuss the case developments;
- Plaintiffs have provided Counsel with thousands of pages of documents (from both Plaintiffs and other patients) supporting the claims alleged on behalf of themselves and the Class;
- Plaintiffs have established and distributed a newsletter for all potential Class members updating them on case developments; and
- Plaintiffs have established clear communication channels within all units at MSOP to address questions or concerns from other Class members regarding this case.

Likewise, the undersigned counsel has demonstrated their determination to vigorously prosecute this case. At the request of the Minnesota Federal Bar Association's *Pro Se* Project, Dan E. Gustafson and the law firm of Gustafson Gluek PLLC agreed to



undertake representation of the Plaintiffs in this purported class action. Mr. Gustafson has over twenty years of experience in class action litigation, has been appointed lead counsel or co-lead counsel in many cases and has represented numerous classes in litigation during those years. Gustafson Gluek PLLC has expended substantial time and resources researching the history of the case, the potential claims of Plaintiffs and members of the putative Class, have consulted experts and developed legal theories to support their claims and their demands. Counsel also has experience with the substantive law at issue here by prosecuting claims on behalf of other MSOP patients. *See, e.g., Beaulieu v. Minn. Dept. of Human Svcs.*, 798 N.W.2d 542 (Minn. App. 2011) (review granted July 19, 2011). Gustafson Gluek, PLLC has indicated that it will commit the time and resources necessary to litigate this case. As such, Dan E. Gustafson and Gustafson Gluek PLLC, as well as the above-named Plaintiffs, are qualified, able and willing to competently and vigorously represent the Class.

With respect to the adequacy prong, the Plaintiffs' interests are sufficiently similar to those of the Class and it is unlikely that their goals and viewpoints will diverge. The interests of Plaintiffs and the proposed Class members are certainly aligned in this case: they share the common goal of being housed in a humane therapeutic environment while receiving adequate treatment that gives them a realistic opportunity for release. Plaintiffs' goals and viewpoints are unlikely to diverge from those of the remainder of the Class. Because the proposed Class representative's interests are sufficiently similar to those of

the Class, and because Plaintiffs and their counsel are able and willing to competently and vigorously prosecute this action, the Plaintiffs have satisfied Rule 23(a)(4).<sup>3</sup>

## **2. Plaintiffs Have Met the Requirements of Rule 23(b)**

Even if a plaintiff meets all of the prerequisites set forth in Rule 23(a), he or she must also satisfy one or more of the conditions set forth under Rule 23(b). Fed. R. Civ. P. 23(b); *see also General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982); *Harju*, 709 F.Supp.2d at 734. Plaintiffs easily satisfy the Rule 23(b)(2) requirements.

Certification may be established under Rule 23(b)(2) if the prerequisites of subdivision (a) are satisfied and if “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . .” *Harju v. Olson*, 709 F.Supp.2d 699, 735 (D. Minn. 2010) (citing Fed. R. Civ. P. 23(b)(2)).

Rule 23(b)(2) should only be used for class certification when a single remedy will provide relief to each class member. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2546. The primary remedy sought must be declaratory or injunctive in nature. *In re St. Jude Med.*, 425 F.3d at 1121. In a Rule 23(b)(2) class, the claims made by the class need to be “cohesive” because there is no provision for unnamed class members to opt out of the

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<sup>3</sup> The Court should appoint Gustafson Gluek PLLC as Class Counsel and the following Plaintiffs as Class Representatives: Kevin Scott Karsjens, David Leroy Gamble, Jr., Kevin John DeVillion, Peter Gerard Lonergan, James Matthew Noyer, Sr., James John Rud, James Allen Barber, Craig Allen Bolte, Dennis Richard Steiner, Kaine Joseph Braun, Brian Keith Hausfeld, Christopher John Thuringer, Kenny S. Daywitt, and Bradley Wayne Foster. For a list of the specific Class Representatives who suffered injuries under specific counts, see the Affidavit of Daniel E. Gustafson, Exhibit A.

litigation. *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1036 (8th Cir. 2010). A cohesive Rule 23(b)(2) class is one in which injuries to the class as a whole predominate over any individual injuries. *In re St. Jude Med.*, 425 F.3d at 1122. “The members of a (b)(2) class are generally bound together through preexisting or continuing legal relationships...” *Id.* (internal quotation omitted).

In the present case, Plaintiffs’ First Amended Complaint alleges that Defendants’ acts and omissions regarding the Plaintiffs and Class members constitute serious statutory and constitutional violations generally applicable to the Class. The Plaintiffs and Class members are seeking injunctive and declaratory relief as a remedy for these violations.

Furthermore, any injunctive or declaratory relief will provide a remedy to all Plaintiffs and Class members because they are all civilly committed to the MSOP. All Plaintiffs and Class members must participate in the same ineffective treatment in order to have any hope of progressing through the MSOP’s phased program and having any opportunity for release. All Plaintiffs and Class members must complete their civil commitment in the MSOP’s current facilities because there is not a less restrictive alternative. Finally, all Plaintiffs and Class members are subject to the same disciplinary and punitive policies, practices, and procedures during their civil commitment to the MSOP. The injuries the Class alleges are all a direct consequence of their status as civilly committed persons under Minn. Stat. § 253B. The standard of cohesiveness set forth in *In re St. Jude Medical* is certainly met because the Class members all have the legal status of civil committees to the MSOP.

As discussed above, there are currently over 65 stayed cases that have been filed over the last year by various civil committees from the MSOP – and the number of similar cases filed by MSOP patients continues to grow. These cases all assert similar claims to those asserted in this case. The most efficient way to resolve this case, as well as the over 65 stayed cases, is through a Rule 23(b)(2) class because, as stated in *Avritt*, class members cannot opt out of any settlement or judgment. *Avritt*, 615 F.3d at 1036. A resolution of this case will naturally resolve many of the legal claims in the stayed cases. As a result, a Rule 23(b)(2) class will eliminate the danger of inconsistent verdicts, which would otherwise be the outcome of individual resolution of the stayed cases. This is a great benefit to both the Court and the State, which may otherwise need to enforce inconsistent and potentially conflicting results in each of the stayed cases.

**CONCLUSION**

WHEREFORE Plaintiffs respectfully request that this Court enter an order certifying the requested Class, appointing Gustafson Gluek PLLC as Class Counsel and appointing the above-named Plaintiffs as Class Representatives.

Dated: June 28, 2012

Respectfully Submitted,

s/Daniel E. Gustafson

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