

# Exhibit B

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
SAN ANGELO DIVISION**

S.D., on behalf of herself and all others  
similarly situated, *et al.*,

Plaintiffs,

v.

Cherie Townsend, in her official capacity as  
Executive Director of the Texas Youth  
Commission, *et al.*,

Defendants.

Civil No. 6:09-CV-012-C

Hon. Sam R. Cummings

**PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION AND  
MEMORANDUM IN SUPPORT THEREOF**

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Hon. Sam R. Cummings

**PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION AND  
MEMORANDUM IN SUPPORT THEREOF**

Plaintiffs hereby move for certification, pursuant to Rules 23(a) and (b)(2) of the Federal Rules of Civil Procedure, of a class defined as: "all girls and young women who are now or in the future will be confined in Brownwood State School." Plaintiffs request that Plaintiffs' counsel be appointed to represent the certified class, pursuant to Rule 23(g) of the Federal Rules of Civil Procedure. Plaintiffs submit this memorandum in accordance with LR 23.2 of the Local Civil Rules of the United States District Court for the Northern District of Texas.

**INTRODUCTION**

Since the denial of Plaintiffs' motion for class certification on June 10, 2009, two new Plaintiffs were added to this litigation to replace Plaintiffs who were released from the Brownwood State School, officially known as the Texas Youth Commission's Ron Jackson State Juvenile Correctional Complex ("TYC-Brownwood"), over the course of the past year. The Second Amended Complaint, filed pursuant to leave granted by this

Court, includes new named Plaintiffs S.D. and B.P., who seek to represent a putative class of girls confined at TYC-Brownwood. The Court's June denial of class certification was predicated on the disciplinary history of previous Plaintiff H.C., who, along with other previous Plaintiffs, is no longer incarcerated at TYC-Brownwood and thus is no longer able to serve as a named Plaintiff in this action seeking solely declaratory and injunctive relief. *See* Doc. 79 at 7-8. In light of the central role Plaintiff's disciplinary history played in the Court's earlier certification analysis, the addition of new Plaintiffs S.D. and B.P., whose disciplinary records are exemplary, justifies this renewed effort to seek certification.

This civil rights action challenges TYC's policies and practices with respect to: (1) the imposition of punitive solitary confinement on incarcerated girls in the absence of any immediate threat of physical injury—including the use of force in restraining and bringing girls to the Security Unit and in controlling them during their time in isolation; and (2) the unwarranted use of intrusive body searches, including strip searches.

Plaintiffs allege that these practices, which are codified in official policy and practiced at TYC-Brownwood, are injurious to girls and inhibit their rehabilitation; and that by maintaining such policies and practices, TYC violates the girls' rights under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution. Plaintiffs further allege that such policies and practices violate customary international law, including laws extending special protections to children, and those prohibiting torture and other forms of cruel, inhuman, or degrading treatment or punishment.

As set forth below, Plaintiffs satisfy the legal requirements for class certification and request that the class be certified.

## RELEVANT FACTS AND ARGUMENT

Specific facts and argument in support of class certification are discussed below in the order suggested by LR 23.2.

### A. Applicable Sections of Rule 23

Plaintiffs seek class certification pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. **Rule 23(b)(2)** provides for certification when “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.” Here, Plaintiffs do not seek monetary damages; nor do they bring any individual claims. Rather, they seek purely injunctive and declaratory relief on behalf of the putative class that would remedy unlawful policies and practices with respect to the imposition of punitive solitary confinement and the use of unwarranted strip-search procedures at TYC-Brownwood. These policies and practices affect *all* girls at the facility because all are at risk of being placed in solitary confinement for minor misbehavior or arbitrary reasons, for behavior driven by mental illness that they cannot control, or for expressing legitimate mental health needs. *See, e.g.,* Second Am. Compl. ¶¶ 1, 8, 10, 16, 17, 24, 26, 35.

Defendants have previously argued that certification under Rule 23(b)(2) is not appropriate because the majority of girls at TYC-Brownwood do not face future harm as a result of the policies and practices challenged in this lawsuit—or specifically, they argue that not all girls are sent to the Security Unit or subjected to strip searches. However, Defendants’ own data illustrate that the experience of being placed in solitary confinement is routine at TYC-Brownwood and has consistently affected a substantial

majority of the putative class.<sup>1</sup> And while routine strip searches were ostensibly suspended at TYC-Brownwood after this action was filed, this change in practice does not appear to have been codified at the TYC policy level; indeed, as recently as June 2009, *all* girls referred to the Security Unit were forced to removed their underwear while being observed by security staff, a procedure as degrading and legally problematic as an actual strip search. *See* Second Am. Compl. ¶ 35; App. to Pl.’s Mot. for Leave to Amend at 10, 17, 24-25, 32, 39. Discovery and expert testimony demonstrate that referrals to the Security Unit for arbitrary, spurious, and insufficient reasons are legion at this facility, meaning that no girl can predict or control her own placement in solitary confinement and the attendant risk of being subjected to such intrusive search procedures. *See* App. to Pl.’s Mot. for Leave to Amend at 11-12, ¶ 9. This is particularly true for the overwhelming number of girls at TYC-Brownwood who have serious psychiatric illness and, as a result, may be prone to impulsivity and irrational behavior. *See generally id.* at 2-6, ¶¶ 7-30.

Defendants’ notion of harm is also flawed. For the purposes of prospective, injunctive relief, the threatened harm need never materialize; it is the risk itself that violates the Constitution. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993) (“[I]t would

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<sup>1</sup> Even the limited monthly incident report data produced by Defendants thus far make abundantly clear that referrals and admissions to solitary confinement in the Security Unit, for a range of reasons, are staggeringly common at TYC-Brownwood. *See* Docs. 66-6 to 66-12. The June 2008 SAS Report, for example, indicates 1078 referrals and 381 admissions to the isolation unit—an astonishing number for a facility that confines no more than 150 girls at any given time. *See* D.E. 66-6 at 50. Those 381 admissions involved 93 different girls. *See* Doc. 76-3, Declaration of Eliza Reshefsky, ¶ 4. It would appear that almost two-thirds of the Brownwood population spent at least some time in the Security Unit in June 2008. *Id.* Defendants have not asserted that June 2008 was an unusual month at TYC-Brownwood; in fact, they have used June 2008 repeatedly as a prototypical month in their own previous briefing opposing certification. *See, e.g.,* Doc. 71 at 11.

be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.”); *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982) (certifying a Rule 23(b)(2) juvenile conditions case where all the incarcerated children “were in danger of being subjected” to the deficient practices). Because all girls at TYC-Brownwood are at risk of being sent to isolated confinement in the Security Unit, injunctive relief that would reduce or eliminate that risk in specific circumstances—*e.g.*, when there is no imminent threat of assaultive behavior—would redound to the benefit of all putative class members. This lawsuit, then, is a paradigmatic Rule 23(b)(2) case because it seeks to enjoin policies and practices of a government agency that are harmful to all members of the proposed plaintiff class. *See, e.g., DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 284 (W.D. Tex. 2007). Certification pursuant to Rule 23(b)(2) is appropriate.<sup>2</sup>

**B. Specific Factual Allegations Concerning the Proposed Class**

Specific factual allegations required by LR 23.2, and related legal arguments, are set forth below.

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<sup>2</sup> In responding to an earlier certification motion in this case, Defendants argued that certification is not appropriate because Plaintiffs’ requested injunctive relief is not specific enough to satisfy Fed. R. Civ. P. 65(d). *See* Doc. 71 at 21. However, Rule 65(d) calls for specificity in the contents of “orders granting an injunction,” not in a plaintiff’s prayer for relief. In fact, such a requirement is inconsistent with the Supreme Court’s direction in *Lewis v. Casey*, 518 U.S. 343, 362-63 (1996) (finding that a state defendant is entitled to an opportunity to participate meaningfully in the development of a final remedial plan before one is imposed by the court). Although specificity is not required at this stage, as a starting point Plaintiffs would propose an injunction that, *inter alia*, would prohibit placement in solitary confinement when there is no imminent risk of physical harm from the youth’s behavior, and would curtail such confinement when the youth becomes able to control that behavior.

**1. Approximate Number of Class Members**

Plaintiffs satisfy the numerosity requirement of **Rule 23(a)(1)**. At any one time, the class consists of approximately 100-150 girls, equal to the population of girls confined at TYC-Brownwood. *See* Doc. 45-3, Dec. 19, 2009 Adamski Aff. ¶ 3. The class also includes an unknown number of girls who will be confined in TYC-Brownwood in the future and will be subjected to the challenged policies if they are not changed. The number of girls in TYC-Brownwood at any given time fluctuates slightly as some girls are released and others are newly confined. This fluctuation is likely to continue. Therefore, the class is sufficiently numerous to render joinder impracticable and satisfies the requirements of Rule 23. *See James v. City of Dallas*, 254 F.3d 551, 570 (5th Cir. 2001) (finding no abuse of discretion when district court certified a class based on allegation in complaint that class had 100 members); *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 620 (5th Cir. 1999) (holding that district court did not abuse its discretion in certifying a class that had between 100 and 150 members; citing with approval Herbert Newberg & Alba Conte, 1 *Newberg on Class Actions* § 3.05, at 3-25 (3d ed. 1992), which notes that a class of 40 raises a presumption that joinder is impractical).

**2. Class Definition**

The class is defined as “all girls and young women who are now or in the future will be confined in Brownwood State School.”

**3. Characteristics Common to the Class**

Plaintiffs and members of the putative class are all confined, or will be confined, at the same youth prison. All are between the ages of ten and nineteen. *See* Tex. Fam.

Code Ann. § 51.02; SB 103, 2007 Leg., 80th Reg. Sess. (Tex. 2007). By virtue of their confinement at TYC-Brownwood, all members of the class are subject to TYC and institution-specific policies and practices related to security program, use of force, disciplinary consequences, suicide alert, and youth searches—all of which are challenged in this lawsuit. Based on Defendants’ own statements, approximately 70 percent of putative class members are taking medications for psychiatric disorders, Adamski Dep. 134: 23, June 4, 2009; and at least 80 to 90 percent have a history of post traumatic stress disorder as a result of rape or sexual abuse, App. to Pl.’s Mot. for Leave to Amend at 3, ¶ 12.

Neither Plaintiffs nor the unnamed class members have a financial incentive, as this suit seeks only injunctive relief. In any event, any individual girl may file her own claim for damages based on Defendants’ conduct regardless of the outcome of this suit for injunctive and declaratory relief. *See Hiser v. Franklin*, 94 F.3d 1287, 1291 (9th Cir. 1996) (“[T]he general rule is that a class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damage claims by class members, even if based on the same events.”).

#### **4. Common Questions of Law and/or Fact**

Plaintiffs satisfy the **Rule 23(a)(2)** commonality requirement for class certification. A single common question suffices to support class certification under this requirement. Herbert Newberg & Alba Conte, 1 *Newberg on Class Actions* § 3.12, at 3-69 (3d ed. 1992). In earlier briefing, Defendants have suggested that the facts underlying class members’ claims must be virtually identical to satisfy commonality. Yet the Fifth Circuit has expressly stated that “the interests and claims of the various plaintiffs need not be

identical.” *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993) (internal citation omitted). Plaintiffs must merely allege that common questions of law or fact exist. *James*, 254 F. 3d at 570. The commonality test is met “where there is at least one issue, the resolution of which will affect all or a significant number of the putative class members.” *Mullen*, 186 F.3d at 625 (quoting *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997)).

In this case, virtually every material issue of fact and law is common to the class. As to questions of fact, this lawsuit asserts that all girls in TYC custody, including both of the named Plaintiffs, have experienced, or are at risk of experiencing, solitary confinement in the Security Unit and intrusive search procedures, including strip searches. As noted above, the experience of being placed in solitary confinement in the Security Unit is so common that it is likely to be shared by virtually all girls at the facility at some point during their time at TYC-Brownwood. *See supra* note 1. Per current TYC policy, all girls are subjected to intrusive body searches regardless of their individual disciplinary histories. Such searches are conducted no less than twice per month, as well as after girls receive visits, after each day’s attendance at school, and at other times, even in the absence of probable cause to believe that a girl possesses contraband.<sup>3</sup> Moreover, the nominal suspension of routine strip searches after the filing of this lawsuit has not been codified by regulation, permitting a reversion at any time to the previous practice, to which all class members are vulnerable. Second Am. Compl. ¶ 35. To illustrate this, as recently as June 2009, all girls were forced to remove their bra and underwear upon

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<sup>3</sup> *See* Texas Youth Commission General Administrative Policy § 97.9, available at <http://austin.tyc.state.tx.us/Cfinternet/gap/97/gap979.htm>.

arrival in the Security Unit, which was experienced by many girls as a visual strip search. *See supra* at 4.

Legal questions common to the class include whether the existence and execution of these policies and practices violate girls' rights under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution, and whether they violate customary international law. Plaintiffs allege that even a single application of these practices to a girl is unlawful; Plaintiffs' legal claims do not turn on the notion that a girl is repeatedly subject to the challenged practices. Even so, as demonstrated *supra*, the great majority of girls are likely subjected to the challenged practices on numerous occasions during their time at TYC-Brownwood. Commonality of conditions, combined with the difficulties inherent in individual prisoner litigation (and the youth of these prisoners), makes class certification "an especially appropriate vehicle" in civil rights actions such as this one, which seek declaratory relief for prison reform. *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980); *see also Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001); *Hassine v. Jeffes*, 846 F.2d 169, 178 (3d Cir. 1988).

**C. Typicality of Plaintiffs and Adequacy of Representation**

Plaintiffs satisfy both the typicality and adequacy requirements of **Rule 23(a)(3)** and **Rule 23(a)(4)**. Questions of typicality and adequacy of representation tend to merge, since both requirements concern the protection of interests of unnamed class members. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). "[T]he critical inquiry [with regard to typicality] is whether the class representative's claims have the same essential characteristics of those of the putative class." *James*, 254 F.3d at 571. That inquiry is satisfied here because each named Plaintiff's claims arise from the same course

of conduct as the claims of the putative class members and are based on the same legal theories as the claims of the class, namely, that specific policies and practices employed at TYC-Brownwood constitute violations of domestic and international law.

By the time Defendants filed their opposition to the last motion for class certification, only one named Plaintiff, H.C., was still being held at TYC-Brownwood. Defendants' opposition, and this Court's subsequent ruling denying certification, relied principally on the contention that H.C. had a particularly troublesome disciplinary history that gave rise to unique defenses that could be leveled against her, thereby making her claims atypical and rendering her an inadequate class representative. *See* Doc. 71. at 14-16; Doc. 79 at 7-8. H.C. is no longer a named Plaintiff in this litigation. Replacing her are Plaintiffs S.D. and B.P., whose disciplinary records at TYC-Brownwood are exceptionally good by any standards.<sup>4</sup> Plaintiff S.D. has been at TYC-Brownwood since early 2007. In that time, she has never had a Category 1 rule violation and has never done anything violent. Notwithstanding that, she has been placed in solitary confinement in the Security Unit about 10 to 15 times for actions such as directing profanities at staff, not following staff instructions, and trying to make a hotline call. *See* Second Am. Compl. ¶ 8; App. to Pl.'s Mot. for Leave to Amend at 17. Similarly, Plaintiff B.P. has been at TYC-Brownwood since October 2006. In her nearly three years at the facility, she has been placed in solitary confinement only a handful of times, and she has never done anything violent. *See* Second Am. Compl. ¶ 15; App. to Pl.'s Mot. for Leave to Amend at 14. Last year, both S.D. and B.P. were selected to serve as a Youth

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<sup>4</sup> Plaintiffs' counsel served document requests seeking the disciplinary and medical files of both S.D. and B.P., and a number of other girls who executed valid releases, well in advance of the July 20-21, 2009 expert visit. Defendants have thus far declined to produce these files.

Ombudspersons for the Brownwood facility by Shalonda Grant in the TYC Office of the Independent Ombudsman. *Id.* at 17, 14. Recently they were both removed from this position, which they believe may be connected to their participation in this lawsuit. *Id.*

Based on these histories, S.D. and B.P. cannot be characterized as violent or assaultive, and have never posed a serious threat to anyone's physical safety or institutional operations. And yet, they have both spent time in the Security Unit, to their detriment.

For example, in late May 2009, Plaintiff S.D. was sent to solitary confinement for sleeping with the covers over her head. Staff instructed her to remove the covers, but she was asleep and did not respond immediately. Staff then pulled her from the bed and violently restrained her, causing a large bruise on her leg. S.D. was brought to the Security Unit and left handcuffed in a cell for refusing to "change over"—or agree to remove her bra and panties in front of security staff. While still cuffed, S.D. was again violently restrained for being unable to shift her arm position, as requested by staff. She was then left crying on the floor for about 30 minutes. S.D. eventually agreed to "change over" and removed her bra and panties while staff stood in the door and watched. She felt humiliated by the experience, and the violent restraints triggered memories of her childhood sexual abuse. Ultimately, S.D. spent approximately 20 hours in solitary confinement on this admission, during which time she did not leave her cell except to shower. *See* Second Am. Compl. ¶¶ 10-11; App. to Pl.'s Mot. for Leave to Amend at 17.

Plaintiff B.P. was strip searched and then admitted to solitary confinement for being caught with candy after visitation. The experience triggered her painful memories of being molested. On another occasion, B.P. was placed in solitary confinement after

staff read her mail without authorization and interpreted something she wrote as being suicidal. She was held in isolation on “Suicide Alert” for 24 hours until a psychologist finally came to speak with her and determined that she was not suicidal. The experience made B.P. feel mistreated and powerless, “like an animal in a cage.” Second Am. Compl. ¶¶15-17; App. to Pl.’s Mot. for Leave to Amend at 14. Although she has tried to stay out of trouble during her time at Brownwood, B.P. remains fearful that she could be sent to solitary confinement for a minor or pretextual reason, because such referrals happen all the time. Indeed, staff constantly use the threat of solitary confinement as a way to control girls’ behavior. *Id.* ¶ 17.

As detailed above, both S.D. and B.P. have been referred and admitted to the Security Unit in absence of any threat to physical safety; both girls experienced solitary confinement there as degrading, stressful, and depressing; both girls have been subjected to strip searches without any legitimate cause; both girls have been placed in mechanical restraints without provocation; and both girls have a history of sexual abuse that is exacerbated by the TYC policies and practices challenged in this case. Their claims are utterly typical of the class-wide allegations that underlie the unitary request for injunctive relief on behalf of all girls who are now or will be incarcerated at TYC-Brownwood. Finally, Plaintiffs have retained counsel with substantial experience prosecuting claims concerning civil rights, conditions of confinement, and in representing class actions. *See* Doc. 38 at 6-8. Plaintiffs’ counsel are providing their services *pro bono*, so Plaintiffs and the putative class bear no financial responsibility for funding this action. *See* LR 23.2(c). Both typicality and adequacy of representation are satisfied here.

**D. Class Notice**

If this Court determines in its discretion that notice of certification should be made to all class members, Plaintiffs propose that notice to girls currently held in TYC-Brownwood be accomplished by means of a one to two page document, delivered to girls by TYC staff, explaining in terms intelligible to children that a lawsuit has been filed and that class certification has been granted. This notice should include the names and contact information of Plaintiffs' counsel. Additional notice may be made to the class members' guardians via a notice posted prominently on the TYC website. If this Court deems it necessary, notice may also be mailed to each guardian individually, utilizing the records of children's guardians and their addresses maintained by TYC. If so ordered, Plaintiffs are prepared to submit to the Court a security deposit covering estimated photocopying costs and bulk mail postage costs.

**E. Discovery**

The parties have been engaged in discovery pursuant to the schedule set by the Court's Initial Scheduling Order and the revised Modified Scheduling Order, jointly proposed by the parties. *See* Docs. 50, 78. At this time, Plaintiffs do not believe that any additional discovery is necessary for the Court to render a ruling on the instant motion. Plaintiffs request that should the Court find that further information is required before ruling, Plaintiffs be allowed thirty days to carry out such discovery.

**F. Attorneys' Fees**

Plaintiffs' counsel represents Plaintiffs and the putative class on a *pro bono* basis. Pursuant to the Civil Rights Attorney's Fee Award Act, 42 U.S.C. § 1988(b), attorneys' fees may be awarded to a prevailing plaintiff's counsel in a civil rights case

brought under 42 U.S.C. § 1983. Should Plaintiffs prevail, Defendants will be responsible for fees. No financial burden will be placed on the Plaintiff class.

**CONCLUSION**

For the foregoing reasons, Plaintiffs' Renewed Motion for Class Certification pursuant to Fed. R. Civ. P. 23(a) and (b)(2) should be granted, and Plaintiffs' counsel should be appointed to represent the certified class pursuant to Rule 23(g).

DATE: August 21, 2009

Respectfully submitted,

/s/ Gretchen S. Sween

Lenora M. Lapidus (admitted *pro hac vice*)

Emily J. Martin (admitted *pro hac vice*)

Mie Lewis (admitted *pro hac vice*)

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

WOMEN'S RIGHTS PROJECT

125 Broad St., 18<sup>th</sup> Floor

New York, NY 10004

Telephone: (212) 519-7848

Fax: (212) 549-2580

jehrlich@aclu.org

llapidus@aclu.org

mlewis@aclu.org

emartin@aclu.org

Lisa Graybill

Texas State Bar No. 24054454

Gouri Bhat (admitted *pro hac vice*)

AMERICAN CIVIL LIBERTIES UNION OF TEXAS

P.O. Box 12905

Austin, TX 78711

Telephone: (512) 478-7300

Fax: (512) 478-7303

lgraybill@aclutx.org

Steven M. Watt (admitted *pro hac vice*)

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

HUMAN RIGHTS PROGRAM

125 Broad St., 18<sup>th</sup> Floor

New York, NY 10004

Telephone: (212) 519-7870

Fax: (212) 549-2580

swatt@aclu.org

Elizabeth Alexander (admitted *pro hac vice*)

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

NATIONAL PRISON PROJECT

915 15<sup>th</sup> St, 6<sup>th</sup> Fl.

Washington, D.C. 20005

Telephone: (202) 393-4930

Fax: (202) 393-4931

ealexander@npp-aclu.org

Deborah LaBelle (admitted *pro hac vice*)  
221 N. Main St., Ste. 300  
Ann Arbor, MI 48104  
Telephone: (734) 996-5620  
Fax: (734) 769-2196  
deblabelle@aol.com

Steven R. Daniels  
Texas State Bar. No. 24925317  
Gretchen S. Sween  
Texas State Bar No. 24041996  
DECHERT LLP  
301 West 6th Street, Suite 1850  
Austin, TX 78701  
Telephone: (512) 394-3000  
Fax: (512) 394-3001  
steven.daniels@dechert.com  
gretchen.sween@dechert.com

Robert A. Cohen (admitted *pro hac vice*)  
Erika B. Gellert (admitted *pro hac vice*)  
DECHERT LLP  
1095 Avenue of the Americas  
New York, NY 10036  
Telephone: (212) 698-3500  
Fax: (212) 698-3599  
robert.cohen@dechert.com  
erika.gellert@dechert.com

**CERTIFICATE OF CONFERENCE**

In accordance with Local Rule 7.1(b), the undersigned hereby certifies that this motion is opposed. In early August, Gouri Bhat attempt to confer by telephone with Defendants' counsel, Bruce Garcia, who informed her that he was not available to discuss the matter. On August 17, 2009, Ms. Bhat followed-up with Defendants' counsel Bruce Garcia by e-mail to apprise him of the relief that Plaintiff seeks through the instant motion and asked for an opportunity to confer. On August 18, 2009 counsel for Defendants responded that Defendants oppose this motion.

/s/ Gretchen S. Sween

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on August 21, 2009, I electronically filed the foregoing with the Clerk of Court as Exhibit B attached to Plaintiff's Motion for Leave to Amend the Complaint and to Join Plaintiffs. The CM/ECF system will send a notification of such filing to all counsel of record who have registered in accordance with the Local Rules. I further certify that a courtesy copy of the foregoing was sent to Bruce Garcia, Assistant Attorney General and the Attorney in Charge for Defendants, by first-class U.S. mail.

/s/ Gretchen S. Sween