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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EMILY Q. et al.,

Plaintiffs,

v.

SANDRA SHEWRY,

Defendant.

CASE NO. CV 98-4181 AHM (AJWx)

PLAINTIFFS' FURTHER BRIEFING IN RESPONSE TO MINUTE ORDER DATED DECEMBER 21, 2010

Honorable A. Howard Matz

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INTRODUCTORY STATEMENT

Special Master Richard Saletta recommended that the Court extend jurisdiction of this case for one year until December 31, 2011, with the proviso that the State could request an earlier end to jurisdiction if it is able to demonstrate that it has complied with Point 9 of the Nine-Point Plan and exit criteria approved by this Court on April 23, 2009. Seventh Report in Response to Court's Order Appointing Special Master, Docket ("Dkt.") No. 610-1 at 18. At the status conference on December 16, 2010, the Court did not adopt the Special Master's recommendation about extending jurisdiction for one more year, or even earlier if the State demonstrates compliance. Transcript of December 16, 2010 Status Conference ("Transcript") at 8:9-14, 22:3-13. Instead, the Court proposed that jurisdiction might terminate in a matter of months, ultimately settling on an extension of four months and a termination date of May 6, 2011. *Id.* at 9:10-11, 11:19-12:17, 22:3-13; Minute Order dated Dec. 21, 2010, Dkt. No 618. The Court invited further briefing from the parties as to whether they accept, reject or suggest modifications to this proposal. Transcript at 21:20-22:2.

Plaintiffs share the Court's concern that this case not linger on interminably. There is, however, nothing talismanic about the precise date when jurisdiction ends. The more important consideration is whether the State has adopted the necessary measures to ensure that most class members throughout California will receive TBS or equivalent mental health services in the future when medically necessary. After many years of effort, a structure has finally been developed to assess whether counties provide adequate Therapeutic Behavioral Services ("TBS"). This structure is founded on a certification by the Special Master that counties are in compliance with the Judgment. Eight counties are about to be certified, and up to 16 others are or will seek certification. Although the process is close to completion, certification does not occur overnight. While Plaintiffs are hopeful that certifications could be completed in four months, it would be a great

loss to interrupt this process in mid-stream if it is not completed by May 6. As Plaintiffs discuss below, any plans by the State to take over these complex responsibilities must be carefully scrutinized to ensure that they do not slow or arrest the momentum that this process has generated.

Additionally, the Court's proposal for a four month extension seemed to be premised in part on the possibility that Plaintiffs could "reopen the judgment" if the "State fell down on the job . . . after the Court no longer has jurisdiction." Transcript at 10:6-11:3. *See also*, Transcript at 20:13-17. Plaintiffs are not nearly as sanguine as the Court about the prospects of reopening the judgment in the future. To the extent that this is not a viable option, the Court may accordingly want to reconsider whether jurisdiction should end even if the certification process is incomplete.

I. Regardless of When the Court Terminates Jurisdiction of this Lawsuit, the State Should Ensure that All of the Large and Medium-Sized Counties Have a Sustained Commitment to TBS Utilization, Quality, Performance, Training and Family Engagement.

Regarding termination of jurisdiction, the Court has stated that "I do not feel rigidly bound to Point 9 of the exit plan in the sense that there has to be clear, indisputable, statistically unimpeachable data showing that at least 18 Level 2 counties have reached compliance." Transcript at 7:3-10. However, the issue of the extent to which the State should comply with Point 9 of the exit plan raises distinctly different considerations than the issue of when jurisdiction should terminate.

The core element of Point 9 of the Nine-Point Plan is a comprehensive process for certifying the ability of individual counties to deliver TBS. This process is not just about TBS utilization rates or rigid adherence to "unimpeachable" data measures. To the contrary, "certification requires a finding from the Special Master that the MHPs [county mental health plans] also meet five

additional criteria relating to quality, data reporting, engagement, outreach, and training." Special Master's 7th Report, Dkt No.610-1 at 13. Certification offers a framework for the counties, the California Department of Mental Health (CDMH) and the Special Master to reach consensus regarding the following points:

- Whether an MHP has "implemented quality TBS, engaged other key local stakeholders and policy leaders, engaged with professional staff and contract providers, and engaged with local family members and youth. . . ." Exit Plan, Dkt. No. 571-3 at 11.
- Whether an MHP provides "TBS-equivalent services, such as one-to-one behavioral intervention programs" that may enable it to meet the 4% benchmark. *Id.* at 11-12. The parties spent considerable time developing and publicizing the criteria for TBS-equivalent services and the response from the counties has just taken off in recent months. Counties are self-critically examining their own services and affirmatively seeking dates for the Special Master to come to review their cases. The review process itself has been a rewarding and educational process for the counties, which are better able to identify the core elements of behavior support even when embedded or labeled as other services, such as wraparound.
- Whether an MHP has committed sufficient resources and revised its delivery system so that it is at least "on a trajectory to reach the 4% benchmark by June 30, 2012." *Id.* at 13. As with the criteria for TBS-equivalent services, the parties and the Special Master spent considerable time developing the criteria for certification on this basis, and explaining it to the counties. These criteria are reflected in the Exit Plan approved by the Court 18 months ago, and have also been publicized in a letter to the counties. Dkt 571-3 at 12-13.

From this review of the certification process, it is clear that the 4% benchmark is only one part of a broader examination addressed to sustainability and capacity. In fact, the option for certification based on trajectory focuses

primarily on commitment and capacity, rather than numerical quotas. In sum, the certification process itself is a means to engage counties and improve access to TBS for class members.

Due to unavoidable delays, the Special Master is only at the beginning of this certification process. He anticipates that he will provisionally certify 8 counties by January 31, 2011. 7th Report, Dkt No. 610-1 at 16-17. He anticipates that within the next 6 months, **an additional 16 MHPs will request certification** based on TBS equivalent services and/or being on a trajectory.[1] *Id.* It is possible that he could complete a number of these additional certifications in four months. But if he and his staff cannot do so, serious consideration must be given to the impact on the counties of interrupting the certification process in mid-stream. Plaintiffs are concerned that it will undercut the credibility and perceived integrity of this process if the Special Master's certification process is stopped before he has an opportunity to review these additional 16 counties.

Plaintiffs are fully aware that Point 9 of the exit plan contemplated that in January 2011, CDMH "shall assume responsibility for certifying MHPs." Dkt

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[1] In his Seventh Report to the Court, the Special Master stated: "Eight additional MHPs have indicated to the Special Master that they will have met or exceeded the 4 percent benchmark through a combination of TBS utilization data and TBS equivalent services by June 30, 2011. These MHPs include San Mateo, Sonoma, Sacramento, San Diego, San Bernardino, Santa Cruz, Monterey, and Butte. I expect that several additional MHPs not listed here will also request certification by the Special Master during this same period. … And, six MHPs have notified me that they will be requesting certification during the latter part of fiscal year 2010/11, based on a combination of TBS utilization data, determination of TBS equivalency, and/or being on a trajectory to reach the 4 percent TBS utilization benchmark no later than June 30, 2012. At this time the exact number is not confirmed but the following MHPs have indicated interest in being considered: Los Angeles, Riverside, Placer/Sierra, Tulare, Merced, and Kern." Dkt No.610-1 at @. [page 17] It is not clear who will conduct these reviews after jurisdiction terminates.

571-3 at 15. Presumably, CDMH is in the process of providing the Court with a plan to accomplish this. However, the exit plan also contemplated that most of this work would already have been done, since 2/3 of the medium and large MHPs (18 of the 27) should have been certified before CDMH took on this task. In addition, the exit plan assigned other tasks to CDMH in the first year after termination of jurisdiction, including continuing to monitor counties to make sure they maintain their trajectory.

As of this date, it is questionable whether CDMH can take on so many new and expanded certification responsibilities, in addition to its other tasks under the exit plan. For example, at the hearing before this Court on March 12, 2009, the Court and the parties engaged in extensive discussion of what was realistic to expect of CDMH in 2011 after jurisdiction terminated.[2] In particular, CDMH has ongoing monitoring responsibility to ensure that children have access to the mental health services to which they are entitled throughout the state and not just in 18 of the large and medium-sized MHPs. Despite all the progress in some counties, class members in other counties, such as Kern (1.17%), Tulare (1.53%) or San Bernardino (2.16%), are currently unable to receive TBS or comparable services when needed. *See* DHCS' and CDMH's Response to Special Master's Seventh Report, Dkt. No. 615 at 14. In counties such as these that have not already attained a sustained commitment to utilization, quality, performance, training, and engagement, class members still do not have reasonable access to TBS or equivalent intensive mental health services.

After the parties first reached agreement on the Nine-Point Plan, which the Court approved and adopted on November 14, 2008 (Dkt. Nos. 544 and 552), the Special Master reported, "these nine points represent a coherent plan capable of

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[2] Plaintiffs' counsel reviewed a reporter's draft of the transcript of this hearing but was unable to locate a certified copy of the transcript of this hearing for submission with this reply. Counsel intend to lodge a certified copy as soon one can be obtained.

resolving the long-standing issues" in this lawsuit and the "proposed plan is likely to produce meaningful, measurable, and lasting solutions for the Emily Q. class." Dkt. No. 544 at 5. The certification requirements in Point 9 are an integral part of this "coherent plan." Because certification involves far more than a numerical benchmark, this Court should ensure that the Special Master is permitted to complete the certification process for as many counties as possible, up to the 18 required in the exit plan. Otherwise, there is a serious risk that many of the gains of the past few years could be lost.

II. The Court Should Retain Jurisdiction of This Case Until Such Time as the State Demonstrates that Most Members of the Class Are Likely to Receive TBS or Equivalent Mental Health Services When Medically Necessary.

This then leads to the separate question of how much longer the Court should retain jurisdiction of this lawsuit. While the State undoubtedly wishes to be free from judicial supervision, it may have underestimated the benefits of a court order. The judgment in this case commands the respect of others. The judgment has resulted in the commitment of considerable time and effort by a number of dedicated State officials, such as Sean Tracy of the CDMH. The judgment has also resulted in the necessary appropriation of funds for TBS by the Legislature. And the judgment has given CDMH and the Special Master added authority to press for changes at the county level. Though nonparties to this lawsuit, the MHPs are bound to comply with the terms of the judgment. *See Emily Q. v. Bontá*, 208 F. Supp.2d 1078, 1093 (C.D.Cal. 2001). All this could potentially be lost once there is no longer a judgment in this case. At a minimum, the State must therefore demonstrate to the Court how it expects to compensate for this loss in terms of ongoing commitments by the State executive branch (a new administration), the State Legislature and the MHPs.

The Court remarked at the recent hearing that "something in the range

perhaps of 15 to 16" medium and large counties "are in compliance."[3] Transcript at 7:11-20. Plaintiffs fear that this view is unduly optimistic. According to the most recent available data from CDMH for the medium and large Level 2 MHPs, only eight of these MHPs currently exceed the 4% benchmark for TBS and equivalent services and another MHP, San Diego, is close to the 4% benchmark. Exhibit 4 to Declaration of Sean Tracy, Dkt. No. 616 at 36. Only two other Level 2 MHPs, Sacramento and San Mateo, even exceed a 3% utilization rate. *Id.* Meanwhile, the Special Master was only willing in December to give "provisional 4 percent benchmark certification" for eight MHPs (the same ones identified by CDMH). 7th Report, Dkt. No. 610-1 at 16 and17.

Plaintiffs' view that only 8 counties are in compliance is not based on a rigid insistence on "scrubbed" and unimpeachable data. The counties and CDMH do not have ANY data to suggest that more than 8 counties are in compliance, whether the data is verifiable or not. The ONLY data available is that produced with Mr. Tracey's declaration, as noted above.

Plaintiffs recognize that another eight MHPs have self-reported that they will meet or exceed the 4% benchmark through a combination of TBS and equivalent services by June 30, 2011. 7th Report at 17. Unfortunately, there is nothing before the Court, the Special Master, CDMH or Plaintiffs to back up these self-reports. Plaintiffs have already discussed the certification process, which involves more than merely checking off utilization rates. It may be that by the end of April 2011, these and other counties are able to produce any data (even if it is

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[3] The Court appears to believe that the data will become available by the end of March. *See* Transcript at 11:17-12:12. Plaintiffs question whether the data will be available by that date and, even if the data is available, that it will show that 18 or close to 18 MHPs have met the 4% benchmark. Depending upon the statistics, the Court should not be so quick to terminate jurisdiction in May especially if the situation has not improved significantly by then in such populous counties as Los Angeles, Alameda, Riverside, San Bernardino and Fresno.

not scrubbed and verified) and achieve certification. However, until this occurs, it is not accurate to assume that 15 to 16 counties have been certified as being in compliance.

The conclusion of the Special Master was that "the proposed tipping point for TBS sustainability has not been reached and may not be reached for some time" and for that reason he recommended that the Court continue jurisdiction "until such time as this benchmark is reached in the minimum set of 18 Level II MHPs." *Id.* Plaintiffs agree with the Special Master that the "proposed tipping point for TBS sustainability" involves a minimum of 18 Level 2 MHPs and that the Court should retain jurisdiction of the case until this tipping point has been achieved. The structure is in place, a structure that has taken years to develop, and compliance is very close. However, no matter how one massages the data, it is unlikely that sufficient counties will achieve compliance within the next few months. If this occurs, Plaintiffs urge the Court to allow a few more months to let the process run to completion.

Nevertheless, Plaintiffs concur with the Court's views that sustainability "can't warrant perpetual jurisdiction" and that Mr. Saletta cannot "always be around to shore up the potential breaches in the wall." Transcript at 20:2-10. Plaintiffs attach less importance to the exact date when jurisdiction of this case ends and more importance to whether the State has made the necessary commitments to ensure that most class members will receive TBS or equivalent services in the future. However, some brief additional time may be required to complete pending certifications and ensure a smooth transition when CDMH takes over from the Special Master.

In addition, the termination order itself will be a critically important document moving forward. The Order will be closely examined by counties and other stakeholders, some of whom may look for a sign that CDMH is no longer committed to TBS or ensuring access to it. Consequently, the Order must clearly

explain that CDMH remains committed to continuing its support of TBS.

III. CDMH Must Provide a Detailed Plan for a Transfer of Responsibility From the Special Master in Dealing with the Counties.

Terminating jurisdiction will mean an end to the services of the Special Master, who, as the Court observed, has been "remarkably effective." Transcript at 6:5; *see also* 9:22-23 ("Mr. Saletta has been a terrifically effective go-between between the counties and the State"). For 2011 the Special Master had proposed that he continue to "certify county MHPs meeting or exceeding the 4 percent benchmark and provide notice of determination of TBS equivalent services, and determine trajectory to achieve compliance by June 2012." Dkt. No. 610-1 at 18. Plaintiffs have been informed that the Special Master will continue to perform such activities for the next few months but what happens afterwards? The Court has stated that:

> I think there are a couple of things that need to be achieved and put into place. One is clarification that some of the responsibilities of Mr. Saletta, and Mr. Saletta and his team alone, have been carrying out, especially those dealing with the counties, the site inspections, the interviews, the data collection and scrubbing, working with APS to convert the promising data into ascertainable and perhaps verifiable data, that series of responsibilities has to clearly be undertaken and committed to by the State. I have read what the State intends to do, has already accomplished and intends to continue doing, but I don't see that as being sufficiently clear to warrant completion of jurisdiction.

Transcript at 8:21-9:9.

The Court has already asked CDMH to provide a more detailed plan for how it will assume the responsibilities currently handled by the Special Master. Transcript at 15:2-9. The Court asked for a plan that "would extend to the ongoing future the progress and the accomplishments that he and his team have

been responsible for in dealing with the counties." *Id.*, 9:25 – 10:3. Plaintiffs concur with the Court's belief that "this transfer of responsibility in dealing with the counties [is] very important." Id. 14:16-20.

Before jurisdiction terminates, CMDH 's plan must address several key issues, including the status of Los Angeles County and the apparent lack of progress in many medium and large counties with significant low-income and rural populations, such as those in San Joaquin Valley."

Los Angeles County is important because it represents almost one third of the state Medicaid population and is looked to a bellwether by other counties. Although Los Angeles has made progress, it is still far below the 4% benchmark. This is not a minor discrepancy, as in some counties that need to add only a handful of clients to meet the 4% mark. Los Angeles must expand its services by 800 children – adding a third to its present capacity. Los Angeles might meet the certification criteria if the Special Master finds that it is on a trajectory to reach 4% by June 2012. Plaintiffs are hopeful that the Special Master will be able to complete this certification within the next four months. However, if the Special Master finds that Los Angeles does not have the capacity and commitment to stay on trajectory, then CDMH's plan must explain how it will accomplish what the Special Master himself was unable to do in the limited time allowed him: ensure that Los Angeles 's progress is sustainable and will continue.

A second issue to be addressed in CDMH's plan is the lack of progress in medium and large counties in the San Joaquin Valley, all of which are stuck below 2% in their TBS utilization rates. These include Fresno (1.9%), Tulare (1.53%), Kern (1.17%), San Joaquin (1.07%) and Merced (.82%). Ex. 4 to Tracey Decl., Dkt No. 616 at 36. The issue for these counties is not compliance with a technical benchmark requirement. The issue is the inequity of denying services to their large rural populations of low-income children, many of whom already face barriers to care because they are Asian-American, Latino and/or non-English speakers. For

these counties to be on a par with the many other counties that are approaching 4% utilization, they would have to double their current capacity and add a combined total of 531 new TBS clients. CDMH's plan must address how it will resolve this thorny issue, especially without the assistance of the Special Master.

IV. Once the Court Terminates Jurisdiction of this Case, Plaintiffs Are Not Likely to Be Able to Reopen the Judgment Even If Many Class Members Cannot Again Receive TBS or Equivalent Mental Health Services in the Future.

To mitigate the possible adverse consequences of terminating jurisdiction of this case within the next few months, the Court has raised the possibility that Plaintiffs might be able to try to "reopen the judgment" if the "State fell down on the job. . .after the Court no longer has jurisdiction." Transcript at 10:6-11:3. The Court specifically cited Rule 60(b)(2) and (3) of the Federal Rules of Civil Procedure, adding that "[t]here may be other subsections of 60(b). . .that would entitled any litigant to come back in court and ask the Court to reopen the judgment." *Id.* at 11:4-12. Since the December 16 status conference, Plaintiffs' counsel has researched the six different subsections of Rule 60(b). Based upon this research, it does not appear that any subsection of Rule 60 would allow Plaintiffs to reopen the judgment in this case.

In general, Rule 60 "attempts to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice should be done." *Delay v. Gordon*, 475 F.3d 1039, 1044 (9th Cir. 2007), *quoting* 11 Charles Alan Wright, Arthur R. Miller & Marty Kay Kane, *Federal Practice and Procedure* § 2851 (2d ed. 1995). Under Rule 60(b), a court "may relieve a party or its legal representative from a final judgment, order, or proceeding . . ." Fed.R.Civ.P. 60(b).

If the State falls down on the job in the future and large numbers of class members are unable to receive TBS when medically necessary, Plaintiffs will not

be moving to be relieved from the final judgment in this case. On the contrary, Plaintiffs would want to reinstate the final judgment and so would instead move to be relieved from the anticipated upcoming order wherein the Court terminates its jurisdiction over this case.

Among the grounds for relief from a court order are "mistake, inadvertence, surprise, or excusable neglect" and "the judgment is void." Fed.R.Civ.P. 60(b)(1) and (4). Neither of these grounds could possibly form the basis for a motion by Plaintiffs to reopen the judgment in this case. Nor could Plaintiffs conceivably move to reopen the judgment on the grounds that "the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." *See* Fed.R.Civ.P. 60(b)(5).

While the Court has mentioned Rule 60(b)(2) as a possibility [Transcript at 11:9-10], subsection (b)(2) only allows for a motion on the basis of "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)." Fed.R.Civ.P. 60(b)(2). "Cases construing 'newly discovered evidence,' either under 60(b)(2) or Rule 59, uniformly hold that evidence of events occurring after the trial is not newly discovered evidence within the meaning of the rules." *Corex Corp. v. United States*, 638 F.2d 119, 121 (9th Cir. 1981); *see also Fantasyland Video, Inc. v. County of San Diego*, 505 F.3d 996, 1005 (9th Cir. 2007)("The declaration is not 'newly discovered evidence' under Rule 60(b)(2) because it discusses evidence that was not in existence at the time of the judgment"). Any motion by Plaintiffs to reopen the judgment in this case would be based on what the State and counties do in the future in terms of providing TBS to class members. Such a motion could not therefore be brought pursuant to Rule 60(b)(2).

At the recent status conference, the Court alluded to Rule 60(b)(3) as another possibility. Transcript at 11:9-10. Subsection (b)(3) authorizes a motion to be

relieved from an existing court order on the grounds of "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Fed.R.Civ.P. 60(b)(3). To prevail under this subsection, "the moving party must prove by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or other misconduct and the conduct complained of prevented the losing party from fully and fairly presenting the defense." *De Saracho v. Custom Food Machinery, Inc.*, 206 F.3d 874, 880 (9th Cir.), *cert. denied*, 531 U.S. 876, 121 S.Ct. 183, 148 L.Ed.2d 126 (2000); *accord, Casey v. Albertson's Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004). "Rule 60(b)(3) 'is aimed at judgments which were unfairly obtained, not at those which are factually incorrect.'" *De Saracho*, 206 F.3d at 880, *quoting In re M/V Peacock*, 809 F.3d 1403, 1405 (9th Cir. 1987). Moreover, subsection (b)(3) "permits relief only when the fraud was committed by 'an adverse party.'" *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1102 (9th Cir. 2006).

Although the parties differ on how much longer the Court should retain jurisdiction over this case, these are good faith differences. Plaintiffs have absolutely no reason to suspect that the State has engaged in fraud, misrepresentation or other misconduct. Indeed, the Court recently "salute[d] the State" and recognized "how much progress the State has made." Transcript at 6:14-19. Under these circumstances, Plaintiffs will not then be able to avail themselves of Rule 60(b)(3) in the event that the expected "future usage and compliance with and implementation of TBS got stopped in the tracks and the train headed off in a different direction." *See* Transcript at 11:6-9.

Apart from subsections (b)(2) and (3), the only remaining ground for a Rule 60 motion by Plaintiffs might be subsection (b)(6) – "any other reason that justifies relief." *See* Fed.R.Civ.P. 60(b)(6). Rule 60(b)(6) is "'used sparingly as an equitable remedy to prevent manifest injustice' and 'is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent

or correct an erroneous judgment.'" *Latshaw*, 452 F.3d at 1103 (citations omitted); *accord*, *Harvest v. Castro*, 531 F.3d 737, 749 (9th Cir. 2008). It is difficult to imagine how Plaintiffs could ever qualify for relief under Rule 60(b)(6).

Even assuming *arguendo* that Plaintiffs might be able to bring a motion to reopen the judgment under one or more subsections of Rule 60, Plaintiffs would have little time to bring such a motion. A motion under Rule 60(b)(2) and (3) "must be made. . .no more than a year after the entry of the judgment or order or the date of the proceeding." Fed.R.Civ.P. 60(c). A motion under Rule 60(b)(6) "must be made within a reasonable time." Fed.R.Civ.P. 60(c); *see also Lal v. State of California*, 610 F.3d 518, 524 (9th Cir. 2010). Thus, Plaintiffs would be able to move to reopen the judgment in this case only if the State suddenly fails to perform its legal obligations soon after jurisdiction has been terminated. These problems are not likely to emerge within such a short period of time. To the best knowledge of Plaintiffs' counsel, reopening the judgment does not appear to be a viable option once jurisdiction of this case is terminated. Perhaps, the Court has some other procedural device in mind.

Dated: January 7, 2011

Respectfully Submitted,

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