UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERETT HADIX, et al.,	)	
	)	
Plaintiffs,	)	
	)	**Case No. 4:92-CV-110**
v.	)	
	)	**HONORABLE RICHARD A. ENSLEN**
PATRICIA CARUSO, et al.,	)	
	)	
Defendants.	)	
	)	

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR ORDER TO SHOW CAUSE

I. INTRODUCTION

On January 12, 2006, the Court accepted, with significant modifications, Defendants' Plan to comply with the Injunction issued by the Court on October 19, 2005. Defendants subsequently filed their Plan pursuant to that Order. Defs.' Health Care Plan Submitted Pursuant to the Court's Prelim. Inj. of October 19, 2005, as Amended by the January 12, 2006 Court Order, Jan. 23, 2006 (Dkt. No. 1954) ("Defs.' Plan"). In several critical respects, however, Defendants have not satisfied the obligations spelled out in Defendants' Plan, and accordingly they should be adjudged in civil contempt of court. Plaintiffs therefore ask that the Court issue an order to show cause Defendants should not be held in civil contempt for their failures to come into compliance with the following sections of Defendants' Plan:

1. Defendants have failed to enhance their mortality review process through the use of outside professional reviewers. Defs.' Plan at 2.

2. Defendants have failed to explore available options to obtain autopsy reports in all deaths. *Id.*

at 13.

3. Defendants have failed to require that Dr. Middlebrook attend bi-monthly meetings with the CMS Associate Medical Officer, the JMF Medical Officer and the dialysis patients' primary provider. *Id*. at 15-16.

4. Defendants have failed to assure that there is a prompt review of all specialist reports (both hand-written and dictated) so that any urgency noted by the specialist can be acted upon immediately by the facility providers. *Id.* at 15.

5. Defendants have failed to expand the MSP staff at JMF to five providers. *Id.* at 22.

6. Defendants have failed to provide that orders for medications and laboratory studies are entered in Serapis at DLW. *Id.*

7. Defendants have failed to assure the employment of a nephrologist or a board-certified internist to provide sufficient hours of service at the dialysis unit so that the total hours of physician services at that unit are equal to a regular work week for a full-time medical provider. *Id.* at 25.

Plaintiffs accordingly request that the Court issue an order requiring Defendants to show cause at the scheduled October 11, 2006 hearing why Defendants should not be adjudged in civil contempt and sanctions imposed to compel their compliance.

II. THE FACTUAL BASIS FOR PLAINTIFFS' REQUEST FOR AN ORDER TO SHOW CAUSE

A. The Mortality Review Process

Defendants' Plan promises that they will "enhance their mortality review process through the use of outside professional reviewers who will provide a timely and complete review of all

patient deaths occurring in a *Hadix* facility." *Id*. at 2. Defendants have failed to do so. Defendants' May 2006 Compliance Report indicates that Defendants are not in compliance with that requirement; had in fact made virtually no progress on this issue; and had no plans to come into compliance:

> While the Defendan[ts] have not ruled out the use of an outside agency [to conduct mortality reviews], it has become apparent that prior to following through with outside reviewers the Department needs to streamline the internal review process so that the review occurs closer to the event.

Revised Defs.' May 1, 2006 Compliance with the Court-Approved Health Care Plan, May 3, 2006 (Dkt. No. 2014) ("Defs.' May Compliance Report") at 2. Defendants' next compliance report does not address the status of compliance with this requirement at all. *See* Defs.' July 1, 2006 Health Care Compliance Report, July 7, 2006 (Dkt. No. 2051) ("Defs.' July Compliance Report"). Most significantly, Barbara Hladki, Defendants' Health Care Coordinator, stated on August 30, 2006 that she believed that "it is not being aggressively pursued at this time." Attach. 1, Hladki Response to Alexander Questions, Aug. 30, 2006 at unnumbered 3.

B. Autopsy Reports

Defendants' Plan provides that Defendants will "pursu[e] other options to be able to obtain an autopsy in all cases." Defs.' Plan at 13. Neither Defendants' May Compliance Report nor Defendants' July Compliance Report avows that any other options are being pursued. *See* Defs.' May Compliance Report at 6; Defs.' July Compliance Report at 5. Ms. Hladki indicated that she had no knowledge of any activities to bring Defendants into compliance with this requirement. Attach. 2, Memorandum from Hladki to Alexander, Aug. 30, 2006. Plaintiffs' counsel asked Defendants' counsel to supply any additional information on this subject and

Defendants have not responded.

C. Bi-Monthly Meetings with Dr. Middlebrook

Defendants' Plan requires that Dr. Middlebrook, the nephrologist who provides consulting specialty services for the dialysis unit, attend bi-monthly meetings with the CMS Associate Medical Director, the JMF Medical Officer, and the dialysis patients' primary provider. Defs.' Plan at 15-16. Defendants admit that Dr. Middlebrook has not attended such a meeting since March 31, 2006–more than five months ago. Attach. 1 at unnumbered 2.

D. Processing of Hand-Written Specialist Reports

Defendants' Plan states that "Defendants shall ensure that there is a prompt review of all specialist reports (both hand-written and dictated) so that any urgency noted by the specialist can be acted upon immediately by the faculty providers. Defs.' Plan at 15. This provision followed from the concern of Dr. Cohen that specialist requests for follow-up services were not being processed by the medical contractor, Correctional Medical Services ("CMS") unless they were written. *See* Revised and Redacted Third Report of the Associate Monitor, Sept. 12, 2005 at 57 ("CMS should not 'pend' consultation while awaiting dictated consults when the consultant has written or called the MSP with specific recommendations.").

Notwithstanding the Injunction, Defendants' May and July Compliance Reports continue to report that some consultation requests are not acted upon because CMS decides to wait for a dictated report from the consultant. Defs.' May Compliance Report at 8 (stating that in March 2006 four requests from specialists were "pended" for dictation); Defs.' July Compliance Report at 6 (stating that in May 2006 four requests from specialists were "pended" for dictation). This is obviously not accidental non-compliance; the CMS staff who "pend" and deny consultation

requests must know that the Injunction prohibits this behavior, yet CMS continues to engage in it, albeit in a reduced number of cases. In light of the deliberate nature of the violation, Defendants have failed to achieve substantial compliance with this requirement.

E. Expanded Staffing at JMF

Defendants' Plan requires the provision of four physicians and one mid-level MSP[1] to serve JMF. Defs.' Plan at 22. Neither of Defendants' Compliance Reports addresses this specific requirement and, at the time of the meeting between Dr. Cohen and the parties on August 16, 2006, Dr. Cohen reported that, aside from the part-time physician coverage for the dialysis unit, the only MSP coverage at JMF consisted of two physicians and one mid-level practitioner who has significant restrictions on the scope of medical services that she can provide.[2] Further, Dr. Cohen viewed the staffing shortages at JMF as the most critical of the *Hadix* medical staff shortages. Subsequently Ms. Hladki indicated that a third physician has now become a permanent full-time employee. Attach. 1 at unnumbered 2. The only other physician staff at JMF is the new internist to assist in the dialysis unit, who is reported as working a minimum of twenty hours a week. *Id.* at unnumbered 3.[3] Accordingly, Defendants have clearly failed to increase the number of physicians to four and also lack the services of an unrestricted mid-level provider that is required under Defendants' Plan.[4]

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[1] Mid-level providers are either physician's assistants or nurse practitioners.

[2] This MSP is not able to see patients with certain communicable diseases.

[3] A full-time physician works a forty-hour week, with a lunch break. Attach. 2.

[4] Plaintiffs note that they are not "double-counting" Defendants' acts of contempt. Although Defendants arguably could also obtain substantial compliance with this provision if they fully complied with the staffing requirements for the dialysis unit (*see* Section II.G, *infra*),

F. Medication and Laboratory Orders at DLW

Defendants' Plan, as required by the Court's Order of January 12, 2006, requires that all medication and laboratory studies orders at DLW must be entered into Serapis. Defendants' Compliance Reports acknowledge that to date Defendants have not complied. Indeed, Defendants' May Compliance Report indicates that Defendants will not even start compliance efforts related to this requirement until all of the ambulatory services are fully converted to Serapis use. Defs.' May Compliance Report at 12. Given that the ambulatory conversion was not reported as complete in Defendants' July Compliance Report,[5] it is not surprising that this report also indicates that nothing has been done to implement this requirement. Defs.' July Compliance Report at 9. Indeed, apparently Defendants do not consider themselves required to follow this provision of Defendants' Plan, as Ms. Hladki responded on this issue as follows:

> Labs and meds ordered while prisoners are inpatients in DWH or C Unit are not ordered in SERAPIS. As was explained in the Plan, this is an inpatient unit and the SERAPIS record is not designed for inpatients. Also there is no target date for completing the SERAPIS conversion in the Plan.

Attach. 1 at unnumbered 1.

G. FTE-Equivalent Physician for the Dialysis Unit

Another provision of the Defendants' Plan that the Court added in its January 12, 2006 Order is the requirement that Defendants employ a nephrologist or Board-certified internist to provide services in the dialysis unit. The Court further ordered, and the Plan now provides, that

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Defendants could comply with this provision by increasing staffing for JMF without necessarily curing the violation in the staffing of the dialysis unit.

[5] Defs.' July Compliance Report at 3.

the total hours of services of this additional physician, together with the hours actually worked by Deon Middlebrook, M.D., shall amount to at least a FTE-equivalent physician position. Defs.' Plan at 25. Defendants' May Compliance Report indicated that Dr. Middlebrook had hired an additional nephrologist to work with him and was also "developing" two contracts with internists. Defs.' May Compliance Report at 12-13. Defendants' July Compliance Report again reports that Dr. Middlebrook has hired a nephrologist partner and that a 3/4's-time internist is providing services to the dialysis unit. Defs.' July Report at 9. It thus does not specifically discuss whether the Court's requirement of an FTE-equivalent has been met. Ms. Hladki's responses indicate that the internist works "at least twenty hours a week" and that Dr. Middlebrook or his partner spends "at least 8-12 hours per month" in the dialysis unit. Attach. 1 at unnumbered 3. Eight hours per month translates to slightly less than two hours per week, so the total physician time guaranteed by Defendants is less than twenty-two hours per week.[6]

III. THE LEGAL BASIS FOR HOLDING DEFENDANTS IN CIVIL CONTEMPT

The relevant standards for adjudging a party in civil contempt are well-known. A court has the "inherent power to enforce compliance with [its] lawful orders through civil contempt." *Spallone v. United States,* 493 U.S. 265, 276 (1990) (quoting *Shillitani v. United States,* 384 U.S. 364, 370 (1966)). Further, "a contempt proceeding does not open to reconsideration the legal or factual basis of the [disobeyed] order." *Maggio v. Zeitz,* 333 U.S. 56, 69 (1948).

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[6] *See* Attach. 2 (A full-time physician works forty hours per week with a lunch break). Presumably the lunch break is no longer than one hour and probably shorter, so 3/4's time cannot require less than 30 hours a week. This admission demonstrates the inaccuracy of Defendants' claim in the July Compliance Report that they had hired a 3/4's time physician, contrary to the Court's expectation in the January 12, 2006 Order that "the data presented will be accurate" in the required Compliance Reports.

Plaintiffs are required to prove by clear and convincing evidence that Defendants violated a definite and specific order of the Court. It is also Plaintiffs' burden to make a *prima facie* showing of a violation of the Court's orders. Once that showing is made, however, it is Defendants' burden to prove an inability to comply with the order. *Glover v. Johnson,* 138 F.3d 229, 244 (6th Cir. 1998). The court of appeals in *Glover* quoted with approval from its earlier decision in the same case:

> [T]he test is not whether defendants made a good faith effort at compliance but whether "the defendants took all reasonable steps within their power to comply with the court's order."
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> [G]ood faith is not a defense to civil contempt. Conversely,
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> > impossibility would be a defense to contempt, but the Department has the burden of proving impossibility, and that burden is difficult to meet. Although diligence is relevant to the question of ability to comply, the Department's evidence of diligence alone does not satisfy that burden.

Id., citing *Glover v. Johnson,* 934 F.2d 703, 708 (6th Cir. 1991).

Just as good faith is not a defense to civil contempt, neither is evidence that Defendants did not act willfully in violating the Court's orders; the question of a party's intent in violating an order is irrelevant to whether or not a contempt citation should be imposed. *Rolex Watch U.S.A., Inc. v. Crowley,* 74 F.3d 716, 720-21 (6th Cir. 1996) (affirming judgment of civil contempt). While, as noted above, a defense of impossibility of compliance is theoretically available to Defendants, to establish such a defense, Defendants must show, categorically and in detail, why they are unable to comply with the Court's Order. *Id.* at 720.

Plaintiffs have met their burden of demonstrating a *prima facie* violation of the Court's order by showing evidence, consisting of admissions from Defendants' own compliance reports

and responsible staff, that Defendants are in violation of the Order. Whether Defendants could establish the difficult defense of impossibility must necessarily await the hearing.

Defendants suggest that because the order requiring Defendants to provide a mechanism for ordering laboratory studies and medications in Serapis had no deadline, they cannot be in contempt. This is also clearly not the law. *See Bambu Sales, Inc. v. Ozak Trading Inc.,* 58 F.3d 849, 853 (2d Cir. 1995) ("Like any court order, however, the August 30 order plainly contemplated prompt compliance[.]"). Further, Defendants' argument founders on basic principles. None of the provisions of Defendants' Plan have specific compliance dates, yet Defendants understood in all other cases that they were required to comply with the order. Accordingly, there is no question but that Defendants' Plan has the requisite specificity because Defendants' actions have shown that they understood their obligations for provisions that were identical in relevant characteristics.

Thus, the only defense available for Defendants would be impossibility, a defense that would be particularly difficult to establish in light of Defendants' acknowledged decision not to do anything to comply with the order. Similarly, Defendants' statement that procurement of outside reviewers to conduct autopsies for unexpected deaths is not being "aggressively pursued" (Attach. 1 at unnumbered 3) also precludes a defense of impossibility for that provision.

IV. THE NEED FOR A CIVIL CONTEMPT CITATION

A. Outside Mortality Review and Provisions for Autopsies of Unexplained Deaths

Over and over both the MDOC and CMS have proven themselves incapable of providing meaningful supervision and quality assurance, including during the May 2006 disaster when only the serendipitous inspection by Dr. Cohen prevented an even longer interruption in critical

chronic medications. Letter from Cohen to Court, June 5, 2006 at 1 (Dkt. No. 2035) (referring to "ongoing critical failure of the pharmacy system" that resulted in a large number of prisoners with chronic diseases not receiving their medications for five days; noting that when he toured, staff had known about pharmacy problems since at least May 19, 2006, but pharmacy "staff were making no efforts to address this issue"; while many prescriptions were being filled at a commercial pharmacy, no systematic solution was being attempted; also noting that he learned of the crisis from prisoners because staff did not inform him). For that reason, assurance of some basic supervision and oversight of the system requires that autopsies be performed in unexpected deaths and that outsiders be involved in mortality reviews. The Third Report of the Associate Monitor also makes clear that it is critical that the Court's Order of January 12, 2006 be fully enforced. As Dr. Cohen notes in the Third Report:

> An effective program of MSP supervision by CMS has not yet been developed. (p. 3).[7]
>
> Although the crisis in MSP staffing and severe deficiencies in quality of care [were] acknowledged by MDOC staff in March, 2005, the actual full time medical staff available to C-Unit, DWH and the DWH ER decreased this spring, exacerbating a dangerous situation. The Regional Medical Director for the Jackson Region, although based at [Duane] Waters Hospital, did not recognize these serious ongoing problems and made no effort to identify the source of the problems or to correct them. The CMS Medical Director, Dr. Austin, although responsible for supervising the MSP staff in the *Hadix* facilities, did not supervise the C-Unit or DWH staff. The Nursing administrators at DWH and C-Unit told me that they were aware of the problems, and agreed that the problems had serious implications for patient care, but

[7] All page references in this Section not otherwise identified refer to the Revised and Redacted Third Report of the Associate Monitor, Sept. 12, 2005.

> they did not have any solutions. . . . The Medical Director did nothing to resolve these problems. (p. 13).
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> The administrative review performed by Drs. Austin and Naylor failed to make any minimal inquiry into Patient #3's [a patient who subsequently died] obviously severely compromised state, and they made no effort to have him examined, to have the cause of his arm swelling identified, and to make sure that his pain was relieved. (p. 29).
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> An autopsy should have been performed. Patient #8 was a 70 year old man with a severely infected swollen painful foot who was having internal bleeding. He had coronary artery disease, diabetes, hypertension, gout, and had a severe MRSA infection of his leg. He was bleeding internally, and he was allowed to die without any treatment. (p. 50).

Simply stated, the current leadership cannot be trusted to review patient deaths to identify serious failures of care, and it is critical to enforce the provisions requiring steps for outside review of prisoner deaths.

B. Meetings with Dr. Middlebrook

Dr. Cohen's Report also makes clear why gaining some level of accountability from Dr. Middlebrook is so critical:

> On March 29, four and a half months after an urgent renal consult was requested by CMS, Patient #3 was finally seen by Dr. Middlebrook via telemedicine. Dr. Middlebrook's consultation was minimal. He did not review any laboratory studies. He did not request to know the patient's blood pressure, he did not ask the patient any questions. He recommended an additional diuretic, and requested a follow-up visit in three weeks.
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> ***
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> On April 20, 2005, Patient #3 was brought to Foote Hospital *in extremis.* (pp. 27-28).
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> Dr. Middlebrook, the nephrologist received 25% of his positive

> score on [the audit of the dialysis unit] for writing a monthly note, and for obtaining the "urea reduction ratio." This gives Dr. Middlebrook too much credit for just "showing up."
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> The results of the July audit were to be addressed by Dr. Mathai at a special meeting with Dr. Middlebrook, the nephrologist, on July 22, 2005. That meeting was cancelled by Dr. Middlebrook. As of August 4, Dr. Middlebrook had not met with Dr. Middlebrook to discuss these issues (pp. 5-6).

It is apparent that Dr. Middlebrook will never attend these meetings regularly unless Defendants are coerced to take action on this issue.

C. Pending Reports for Dictation

Defendants' casual assumption that they can simply ignore a court order with which they disagree mirrors their continuing indifference to the consequences of delaying specialty care:

> The MSP 30 day review of pending consultations is a failed system.
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> At the present time CMS specialists fill out a handwritten consultation form at the time of their evaluation, and then dictate a formal consultation, which is typed and sent to the facilities. There is often a substantial delay in receipt of the typed dictations, yet it is the policy of CMS MSPs not to review hand written consultation requests. It is also the policy of CMS not to honor their own specialist's requests for diagnostic testing until the typed consult is received.
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> This system is designed to delay necessary consultations, and is hazardous to the health of patients. (pp. 9-10).

The Third Report of the Associate Monitor also pointed to the case of Patient 2, whose diagnosis of colon cancer was delayed by this policy:

> Two weeks later, Patient #2 was seen by Dr. Ilyas Hussain, the gasterenterologist. Dr. Hussain <u>did not examine</u> Patient #2's <u>rectum</u>. He recommended that Patient #2 have a colonoscopy, "for further evaluation." He wrote out this

> consultation request on the 409 form, which was returned to SMT. A consultation request for the colonoscopy was faxed to CMS, but was pended by CMS while they waited for Dr. Hussain's dictation. The colonosopy was finally scheduled for July 12, 2004. (p. 21).

Patient #2 thereafter endured additional delay in great pain at SMT while his anal lesion drained copious amounts of foul-smelling liquids. In September 2004, he was diagnosed with locally invasive advanced squamous cell cancer. Accordingly to Dr. Cohen, Patient #2's prognosis might have been significantly better if he had been referred directly to a colorectal surgeon in April. *Id.* at 23-24. Defendants' continued practice of delaying hand-written consults must be eliminated root and branch.

D. Expand JMF Staff

The fact that Defendants have failed to implement this requirement in full is even more inexplicable in light of Dr. Cohen's more recent findings of a staffing crisis. *See* letter from Cohen to Court, Aug. 14, 2006 at unnumbered 2 (Dkt. No. 2088) ("Specifically, there is a critical shortage of medical staff at JMF, and serious medical staff shortages throughout the medical program. This is an emergency situation which has gone on for too long and is having an extremely adverse effect on patient care.").

E. Medications and Laboratory Orders in Serapis at DLW

The Third Report also explains why this provision of Defendants' Plan is critical:

> Medications ordered on paper which are faxed or delivered to the pharmacy are not included in the SERAPIS system. . . . Laboratory tests not ordered in SERAPIS are not available in the computer system, but they are printed out and are present in the paper medical record.
>
> ***
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> At the present time, the MSP and nursing staff at SMT, JMF, and

> RGC use both systems. Because of the concurrent use of two systems, the medical records are voluminous, difficult to use, and not in chronological order. . .
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> ***
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> There must be a unified medical records system. The SERAPIS system may be adequate, and if it is used, it must have a direct interface/order entry function into the pharmacy system so that all medication information will be current and correct. (pp. 8-9).

Dr. Cohen's Third Report also documents a specific instance of probable harm from this deficiency:

> The pharmacy computer system at DWH failed to identify a well described Class D drug/drug interaction, and this inappropriate prescribing may have been responsible for Patient #1's[8] persistent weight loss, and abdominal pain. (p. 19).

This requirements remains critical.

F. Full-time Physician in the Dialysis Unit

The seriously ill dialysis patients, many with extremely serious medical problems, deserve the attention that the Court required when it modified Defendants Plan. As the Third Report notes:

> A large dialysis unit, currently serving approximately 75 patients with end stage renal failure was established in JMF in 2004. These men have developed kidney failure secondary to hypertension, diabetes, AIDS, and chronic intravenous drug use. [Their] medical problems are often exacerbated by dialysis, and they require substantial complex internal medicine care. . . . There has been inadequate support by Dr. Middlebrook's nephrology group for the patients with renal failure cared for at JMF, and throughout the Hadix facilities,

[8] Patient 1 had advanced HIV, chronic hepatitis, cirrhosis and some degree of pancreatitis.

which need him for renal consultation. (p. 53).[9]

Accordingly, all of the failures of Defendants to abide by the approved Plan are significant and deserve enforcement through the mechanism of civil contempt.

V. THE PENALTY FOR DEFENDANTS' CONTEMPT

It should first be noted that imposition of contempt sanctions does not require that the Court again make the findings required by the Prison Litigation Reform Act, pursuant to 18 U.S.C. § 3626(a)(1), for the initial imposition of relief. *Jones-El v. Berge,* 374 F.3d 541, 545 (7th Cir. 2004) (district court order enforcing provisions of previously-entered consent decree did not constitute "prospective relief" for purposes of § 3626(a)(1)); *Essex Co. Jail Annex Inmates v. Treffinger,* 18 F. Supp. 2d 445, 462 (D.N.J. 1998) (contempt power is not limited by provisions of § 3626(a)).

Plaintiffs accordingly propose that the Court cite Defendants for civil contempt for each of the above failures and that the Court further impose coercive sanctions of prospective fines of $200 per day for each violation of Defendants' Plan found by the Court.

CONCLUSION

For the above reasons, Plaintiffs ask that the Court issue the requested order to show cause, to be heard at the hearing now scheduled for October 11, 2006.

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[9] *See also* Section IV.B, *supra*.

Respectfully submitted,

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