

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

Lynn E., by her guardian)
Barry Ellsworth; Kenneth R.,)
By his guardian, Tri-County CAP, Inc./GS;)
Sharon B., by her guardian, Office of)
Public Guardian, Inc.; Amanda D., by)
her guardian, Louise Dube; Amanda E.,)
By her guardian, Office of Public)
Guardian, Inc.; and Jeffrey D.,)
on behalf of themselves and all)
others similarly situated,)

Civ. No. 1:12-cv-53-LM

Plaintiffs,)
United States of America,)
Plaintiff-Intervenor)

v.)
John H. Lynch, Governor of the State of)
New Hampshire; Nicholas A. Toumpas,)
Commissioner, New Hampshire)
Department of Health and Human)
Services; Nancy L. Rollins,)
Associate Commissioner, New Hampshire)
Department of Health and Human Services,)
Community Based Care Services;)
Mary Ann Cooney,)
Deputy Commissioner, New Hampshire)
Department of Health and Human Services)
Direct Programs/Operations; Erik G. Riera,)
Administrator, New Hampshire Bureau of)
Behavioral Health,)

Defendants.)

**PLAINTIFFS' OBJECTION TO DEFENDANTS'
MOTION TO STRIKE**

I. Introduction

On February 9, 2012, the plaintiffs filed their Class Action Complaint (Doc. 1), placing the defendants on notice of their intent to seek certification of a class of individuals with serious mental illness who are institutionalized in New Hampshire Hospital or the Glencliff Home or at serious risk of institutionalization in these facilities. After conferring with the defendants in early March, the plaintiffs filed their Motion (Doc. 19) and Memorandum in Support of Class Certification on March 23, 2012 (Doc. 19-1) (hereafter "plaintiffs' Motion"). Without speaking with plaintiffs' counsel or requesting an extension of time to submit their opposition, on April 6, 2012, the defendants filed an Objection (Doc. 25), requesting that the Court deny the plaintiffs' Motion outright, or alternatively, indefinitely delay the time for responding to the Motion, for the reasons set forth in the defendants' Motion to Strike (Doc. 24).

As set out in the Opposition below, the defendants' Motion to Strike is improper under the Federal Rules of Civil Procedure 12. Discovery is neither necessary nor appropriate, since the evidence already before the Court is sufficient to determine that the requirements of Rule 23 are satisfied. The defendants misapprehend the meaning and impact of the Supreme Court decision in *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011), ignore long-standing case law interpreting Rule 23 requirements for civil rights actions seeking only injunctive relief, and adopt a view so extreme as to virtually preclude all injunctive class actions on behalf of persons with disabilities under the ADA's integration mandate. As a result, the purpose and the scope of defendants' discovery proposal is misplaced and grounded not in factual issues, but in legal questions that can be resolved by the Court without further delay. Therefore, as set forth in the plaintiffs' Reply to the

defendants' Objection, the Court should promptly set a date for oral argument on the Motion.

II. Defendants' Motion to Strike is Improper and Should Be Denied.

The defendants seek to strike the plaintiffs' Motion altogether. Defs' Motion at 2. This request is plainly inconsistent with the Federal Rules of Civil Procedure. Since the plaintiffs' Motion is not a pleading under Fed. R. Civ. P. 7(a), Fed. R. Civ. P. 12(f) governing motions to strike does not apply.

Under Rule 12(f), a “court may strike from a *pleading* an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f) (emphasis added). “By its terms, Rule 12(f) does not authorize the court to strike [non-pleadings].” *Dartmouth Hitchcock Medical Center v. Cross Country Travcorps, Inc.*, 2009 WL 4738192, at *1 (D.N.H., Dec. 4, 2009); *see also Wamala v. Nashua*, 2010 WL 2720595, at *1 (D.N.H., July 6, 2010) (stating that a motion to strike a motion for an extension of time is improper “because a motion to strike pertains only to ‘redundant, immaterial, impertinent, or scandalous matter’ that appears in a pleading.”) (quoting Fed. R. Civ. P. 12(f); citing *Arista Records LLC v. Does 1-27*, 584 F. Supp. 2d 240, 256 n. 20 (D. Me. 2008))).

The Rules define “pleadings” as a complaint or third-party complaint; an answer to a complaint, a third-party complaint, a counterclaim, or a cross-claim; and, “if the court orders one, a reply to an answer.” Fed. R. Civ. P. 7(a)(1-7)); *see National Union Fire Insurance Co. v. NGM Insurance Co.*, 2011 WL 5520960, at *2 (D.N.H., Nov., 14, 2011) (“Pleadings are complaints, answers, and replies to answers. To the extent NGM intended to rely on Federal Rule of Civil Procedure 12(f), that rule is inapplicable . . .”).

Therefore, “motions, briefs, and memoranda may not be attacked by a motion to strike.”

2 James Moore, et al., MOORE'S FEDERAL PRACTICE § 12.37[2] (3rd ed. 2008)

(“Only material included in a ‘pleading’ may be the subject of a motion to strike, and courts have been unwilling to construe the term broadly.”).

Finally, motions to strike “are generally viewed with disfavor and infrequently granted.” *Members of the Beede Site Group v. Covanta Haverhill, Inc.*, 2011 WL 5975452, at *1 n.1 (D.N.H., Oct. 21, 2011). Under a plain reading of Federal Rule of Civil Procedure 7(a), and prevailing case law interpreting the Rule, the plaintiffs’ Motion is not a pleading. Therefore, pursuant to Federal Rule 12(f), the defendants’ Motion to Strike is improper and should be denied.¹

III. Defendants’ Fundamentally Misconstrue the Requirements for Class Certification.

The defendants argue that the plaintiffs’ Motion fails to satisfy all four of the elements of Rule 23(a) as well as the requirements of Rule 23(b)(2). Defs’ Mem. at 5-12. Their argument on numerosity is wholly without merit, does not depend on the discovery of unknown facts, and should be rejected without more.² Similarly, their argument on

¹ Although the defendants’ Motion to Strike must be denied, the Court should consider – and reject -- their arguments on the merits of class certification for two reasons. First, the defendants’ Objection specifically requests relief on the merits through the denial of the plaintiffs’ Motion, *see* Objection at 3, relying on the substantive arguments set forth in their Memorandum in Support of the Motion to Strike. *See* Objection at 2, n.1 and 3, ¶ 9 (“No separate memorandum of law is necessary because Defendants *adequately* set out

² The defendants do not challenge the fact that there are thousands of putative members of the class, since they themselves admit more than 2,000 persons *each year* just to the New Hampshire Hospital (NHH). Rather, they rather incredibly argue that joinder of all of these thousands of individuals is not impracticable, because they all reside somewhere in the State of New Hampshire. Defs’ Mem. at 8-9. Putting aside the reality that all class members have serious mental illness, many do not have guardians, and even the defendants do not know where all of them reside at a given point in time, the impracticability of joinder under Rule 23(a) is evident on its face. *Advertising Special Nat. Ass’n v. Federal Trade Comm’n*, 238 F.2d 108, 119 (1st Cir. 1956) (impracticability of joinder strengthened by fact that class membership is not fixed but number changes from year to year); *Van Meter*, 272 F.R.D. 274, 282 (D. Me. 2011) (class contained present and future nursing home residents whose chronic disabilities and segregation made the maintenance of separate actions impractical).

adequacy of representation is misplaced, unsupported by information already in the possession of the defendants, not dependent on unknown facts, and contrary to a long line of similar ADA class certification decisions involving persons with disabilities.³ See plaintiffs' Motion, Exhibits 8 and 9 (Docs. 19-9 and 19-10). The only serious argument proffered by the defendants pertains to the commonality and typicality requirements of the Rule, in light of *Wal-Mart*. Mem. at 5-8. However, because the defendants misinterpret *Wal-Mart*, particularly as applied to civil rights cases seeking injunctive relief, their arguments should be rejected.

A. Individual Differences between Class Members Do Not Preclude Findings of Commonality and Typicality Sufficient to Satisfy Fed. R. Civ. P. 23(a)(2) and (3).

The defendants focus their challenge to class certification on the commonality and typicality prongs of the Rule. See Fed. R. Civ. P. 23(a)(2) and (3). They claim that because individual class members have different disabilities, have different treatment teams and treatment plans, live in different institutions, and have different guardians, these differences preclude class certification even in a civil rights action seeking only declaratory and injunctive relief. Nevertheless, they concede, as they must, that the

³ Although the defendants operate both NHH and the Glencliff Home (Glencliff), although they confine thousands of persons each year in these facilities, and although they allegedly have medical records containing treatment plans, service recommendations, and the treatment preferences of all of the persons admitted into these facilities, they offer no information to substantiate their somewhat disingenuous claim that individuals want to remain institutionalized or must be institutionalized, despite a sufficient capacity of community services. Defs' Mem. at 9.

There is no requirement, under Rule 23(a)(4) nor *Wal-Mart*, that the plaintiffs present evidence in the possession of the defendants to demonstrate what the defendants already know or should know. Rather, courts routinely certify classes of persons with disabilities seeking community services under the integration mandate of the ADA. *Bryson v. Stephen*, No. 99-CV-558-SM (D.N.H., June 26, 2000) (certifying a class of individuals with acquired brain injury who were institutionalized, or likely to be placed in an institution, in the absence of community-based services); *Rolland v. Cellucci*, 1999 WL 34815562 (D. Mass., Feb. 2, 1999), motion to decertify denied on appeal, *sub nom. Voss v. Rolland*, 592 F.3d 242, 247 n.9, 251 (1st Cir. 2010). See also Ex. 8 (Doc. 19-9).

commonality (and presumably the typicality) test is met, even after *Wal-Mart*, where "there is a common answer to the allegedly common question of whether the State is violating the ADA and the Rehabilitation Act 'by failing to provide community mental health services needed to avoid unnecessary institutionalization at New Hampshire Hospital and the Glenclyff nursing home.'" Defs' Mem. at 6. Because there is such a common answer, in the form of a single injunction to expand community services needed to prevent institutionalization, the commonality prong is satisfied.

In the context of ADA, institutional conditions, and other system reform cases on behalf of persons with disabilities, courts have long employed an analysis of commonality and typicality requirements where individual differences concerning the persons' disabilities, support needs, and professional recommendations are acknowledged, but not determinative of, class certification. *See Boulet v. Cellucci*, 107 F. Supp. 2d 61, 81 (D. Mass. 2000) (class of persons with intellectual disabilities waiting for community support services shared a common legal theory despite differences in medical and support needs of each individual); *Rolland*, 1999 WL 34815562 at *7 (individual differences between class members' needs, services, and facilities does not defeat commonality); *Armstrong v. Davis*, 275 F.3d. 849, 868 (9th Cir. 2001), *cert denied*, 537 U.S. 812 (2002) ("Commonality is satisfied where the [ADA] lawsuit challenges a system wide practice or policy that affects all of the putative class members"); *Van Meter v. Harvey*, 272 F.R.D. at 282 (finding commonality in case involving persons with disabilities segregated in nursing facilities, where the state agency's "course of conduct" presents questions common to all class members, implicates a common set of federal statutes, and the class seeks relief from systemic barriers to proper treatment); *Risinger v.*

Concannon, 201 F.R.D. 16, 20 (D. Me. 2001) (court need not make individual determinations of eligibility before certifying a client of youth with mental impairments who alleged a systemic pattern of failure to provide needed evaluations and services); *Christina A. ex rel. Jennifer A. v. Bloomberg*, 197 F.R.D. 664, 667-68 (D. S.D. 2000) (the fact that prison conditions, policies and procedures “affect plaintiffs differently does not defeat the commonality of their claims”); *see also*, *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001); *Fields v. Maram*, 2004 WL 1879997 at * 7, n.8 (N.D. Ill. Aug. 17, 2004).

Contrary to the defendants’ assertions, the Supreme Court in *Wal-Mart* did not alter the longstanding legal requirement that a proposed class share at least one common question of law or fact, but rather confirmed that, for purposes of establishing commonality, “even a single question will do.” 131 S.Ct. at 2556. Nor did the Court suggest that a common contention could only be established by a class of persons sharing the exact characteristics and a complete identity with one another. Rather, the Court considered an unprecedented nationwide class action, where it found “nothing to unite all of the plaintiffs’ claims,” no evidence that the same employment practices “touched and concerned all members of the class,” and members whose potential entitlement to monetary damages required an individualized analysis to determine liability. *Id.* at 2557.

In the present case, the plaintiffs have produced significant evidence – much of it the defendants' own reports, data and concessions -- of not only a common legal violation, but also a common injury: unnecessary institutionalization and the discriminatory segregation of persons with serious mental illness that equally applies to all persons at NHH and Glencliff who would "benefit" from the remedial services requested in the Complaint. *See Olmstead v. L.C.*, 527 U.S. 581, 601-02 (1999) (finding

a violation of the ADA for institutionalized persons who can 'handle and benefit from' community services). The defendants' own information confirms that this common injury is the result of the actions and inactions of the defendants, specifically the planning, funding and operation of the State's mental health system – a system whose lack of the requested community services negatively impacts all persons at NNH and Glenclyff or at serious risk of admission to these facilities. The harms that result from unnecessary institutionalization occur not just at a point in time, but in an ongoing and prospective way, injuring class members presently admitted to NHH and Glenclyff as well as those who have experienced repeated institutionalization and remain at serious risk of institutionalization in these facilities.

Neither an assessment of commonality for the purposes of class certification nor even a determination of liability under federal law require the Court to evaluate the individual clinical conditions, treatment needs, nor living preferences of each one of the thousands of persons with serious mental illness in New Hampshire who are admitted to, or at serious risk of being admitted to, NHH and Glenclyff. Such a requirement would eviscerate the availability of certification of classes of institutionalized persons, and class wide determinations of liability under the ADA's integration mandate. Rather, this Court can determine that a violation of federal law has occurred, and remedy that common legal violation, without the type of individualized liability determinations at issue in *Wal-Mart*. It is both unnecessary and unrealistic to suggest that the plaintiffs' must affirmatively prove and the Court must consider that each individual class members' treatment needs

or preferences are identical.⁴ This is not the standard of proof required for class certification before or after *Wal-Mart*.

Class action cases interpreting *Wal-Mart* have concurred with this assessment, finding the commonality may exist even where class members are not identically situated. *See, e.g., Churchill v. Cigna Corp.*, 2011 WL 3563489 (E.D. Pa., Aug. 12, 2011) (plaintiff class denied the benefit of treatment for Autism Spectrum Disorder stated common claims as well as “common answer apt to drive the resolution of the litigation” regardless of their different conditions, treatment needs, and abilities to benefit from ABA therapy. *Id.* at *4 (citing *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2551 (2011))); *Connor v. Patrick*, 272 F.R.D. 288, 296 (that harms suffered by unnamed class members differs from that experienced by named plaintiffs does not undermine commonality or typicality); *D.L. v. District of Columbia*, 2011 WL 5559927 at *7 (D.D.C., Nov. 16, 2011) (the reasons for class members’ common injury – denial of a Free and Appropriate Public Education (FAPE) – do not have to be common to all members of the class.); *George Lussier Enterprises, Inc.*, 2001 WL 920060 at *3 (D.N.H., Aug. 3, 2011) (“The reality that differing fact patterns underlie the claims of individual class members will not necessarily prevent a finding of commonality so long as class members have at least one issue in common”).

Similarly, where named plaintiffs are adversely affected by the same facilities, policies and practices as absent class members, typicality is satisfied, regardless of the manner in which they have been injured. *Neff v. VIA Metropolitan Transit Authority*, 179

⁴ Contrary to the defendants’ suggestion, individual preferences and professional treatment recommendations are not static in nature, nor made in isolation. The existence and availability of sufficient community-based services alters both professional perceptions of the need for institutionalization and the preferences of individuals and guardians for community care.

F.R.D, 185, 194 (W.D. Tex. 1998); *see also*, *D.G. ex. Rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1199 (10th Cir. 2010) (“[T]ypicality exists where, as here, all class members are at risk of being subjected to the same harmful practices, regardless of any class member’s individual circumstances.”); *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 58 (3rd Cir. 1994) (“Where an action challenges a policy or practice, the named plaintiffs suffering one specific injury from the practice can represent a class suffering other injuries, so long as all the injuries are shown to result from the practice.”) (quoting *Falcon*, 457 U.S. at 157-59).

In the instant case, the Court will not be deciding the treatment plan for each class member. Nor will the Court be issuing individualized injunctions detailing the treatment needs of each class member or displacing New Hampshire’s treatment planning process.⁵ Instead, in order to redress the harm of unnecessary institutionalization and to remedy ongoing discrimination against the class as a whole, the plaintiffs seek a single injunction ordering the defendants to make available community-based mental health services to avoid unnecessary segregation in NHH and Glencliff. This is the single answer to the common question in this lawsuit. Such an order would provide meaningful alternatives to institutionalization and benefit all persons who may be institutionalized or at risk of unnecessary institutionalization, regardless of their particular treatment needs. It also will reduce the risk that class members must experience repeated or prolonged segregation in the future, as a consequence of inadequate community mental health services. For these reasons, the plaintiffs have clearly demonstrated that the proposed

⁵ New Hampshire has a treatment and service planning process described in state regulations and policy. The state process, subject to the system-wide relief sought in this litigation, will be the method for rendering treatment recommendations that reflect the individual needs, services, and preferences of class members.

class satisfies requirements for commonality and typicality under Rule 23, and that they share the kind of common contention that is capable of being answered by class wide injunctive relief.

B. The Defendants' Interpretation of *Wal-Mart* and the Level of Cohesion Required to Satisfy Rule 23(b)(2) Is Contrary to Decades of Established Case Law and Effectively Would Preclude the Certification of All Class actions on Behalf of Persons with Disabilities.

The defendants also challenge the cohesiveness of the proposed class under Fed. R. Civ. P. 23(b)(2). Defs' Mem. 10-12. They note that after *Wal-Mart*, the class' injury must be able to be remedied by a single injunction, rather than a separate injunction for each class member. *Wal-Mart*, 131 S.Ct. at 2557. Since the plaintiffs' only are seeking a single injunction to remedy the violation of the ADA and Rehabilitation Act, through the expansion of community services, Rule 23(b)(2)'s requirements are satisfied.⁶

Rule 23(b)(2) does not demand that each and every member of the class have been injured by a defendant's conduct, and certainly not in exactly the same manner, in order to make injunctive relief appropriate on behalf of the class as a whole. *See* Fed. R. Civ. P. 23(b)(2), 1966 Amendment Advisory Committee Note (certification is appropriate if the defendant's action or inaction "has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class."); *see also, Baby Neal v. Casey*, 43 F.3d 48, 56 (3rd Cir. 1994) ("[C]lass members can assert such a single common complaint even if they have not all suffered actual injury; demonstrating that all class members are subject to the same harm will suffice.")(emphasis in original); *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677

⁶ As noted in subsection III(A) and n. 5 *supra*, decisions concerning each individual's needs for community services will not be made by this Court through individual injunctions.

(7th Cir. 2009) (“[A] class will often include persons who have not been injured by the defendant’s conduct...Such a possibility or indeed inevitability does not preclude class certification.”); *Connor B. v. Patrick*, 272 F.R.D. at 296 (“Defendants demand evidence of the harm that has befallen each member comprising this putative class, but actual injury to absent class members need not be proven at this stage”).

Similarly, class certification under Rule 23(b)(2) does not require that all class members need or seek exactly the same community services in order for injunctive relief to be appropriate on behalf of the class as a whole. Such an extreme interpretation of the Rule would preclude the certification of any class of individuals with different health conditions, disabilities or individual circumstances.⁷ It would simultaneously eviscerate nearly fifty years of class certification decisions in disability and health care civil rights litigation. *See* Exs. 8 and 9 to the plaintiffs' Motion. Neither *Wal-Mart* nor any reasonable construction of cohesiveness suggests such a radical result, which is precisely what the defendants demand.

The defendants also assert that the named plaintiffs are seeking relief that is different from or inconsistent with the interests of the class. To the contrary, an injunctive order requiring the development of sufficient community services to avoid unnecessary institutionalization will increase the availability of integrated treatment options for all persons with serious mental illness, and prevent the admission of those for

⁷ Ironically, the defendants suggests that certification under Rule 23 (b)(2) also may be inappropriate because not all the ‘community-based care modalities’ sought by the class are in fact “more ‘integrated’ for the class members than care at New Hampshire Hospital and Glenclyff.” Defs' Mem at 6. Yet these same remedial services are described by the State as effective, insufficiently available, and requiring expansion within its own purported “Olmstead” plan in order to promote integrated community living. *See* Plaintiffs' Motion, Ex. 2, Addressing the Critical Mental Health Needs of NH’s Citizens: A Strategy for Restoration (August 2008) (Doc. 19-3).

whom institutional care is unnecessary and therefore discriminatory in nature. It will not preclude the availability of institutional care for those who still may choose or require it.⁸

Therefore, the plaintiffs' Motion satisfies the requirements of Rule 23(b)(2).

IV. Defendant's Request for Discovery Is Grounded in a Significant Misunderstanding of the Applicable Legal Standards for Class Certification, Rendering Discovery Unnecessary to Resolve the Plaintiffs' Motion.

In their Motion to Strike, the defendants assert that Rule 23 requires, and they therefore are entitled to discover, "...the needs and wants of the class..." Defs' Mem. at 7. In fact, defendants propose that the Court must determine whether each individual class member shares the same goals and preferences as the named plaintiffs, whether they have the same service needs and even whether each individual class member is unnecessarily institutionalized. *Id.* In order to obtain this information, the defendants seek to wipe out the plaintiffs' Motion at least for now, or alternatively, an indefinite stay of the Motion while they complete discovery and after a pre-trial order is entered. This request for discovery and delay should be denied for several reasons.

First, as noted above, the defendants' discovery request is grounded in an erroneous interpretation of the requirements of Rule 23. It assumes the need to establish that each class members' disabling condition, treatment needs, service recommendations, and service preferences are identical, which is clearly not required for class certification under Rule 23. Even if it were somehow possible to discover this information at any given point in time, any potentially responsive records of class members' institutionalization, individual service needs, and discharge preferences already are in the custody and control of the defendants or their agents. Moreover, as the defendants'

⁸ Thus, unlike the case cited by the defendants, *see* Defs' Mem. at 11, where the injunction sought would deny class members information that they wanted, here the requested injunction to expand community services would not deny class members any preferred treatment option.

records will reveal, these needs, preferences, and treatment recommendations change over time, so that no point-in-time discovery can answer these questions with enduring confidence. Most importantly, the nature and scope of this discovery request is based upon an erroneous interpretation of law and the resulting standards of proof required for class certification, a legal issue which can and should be resolved by this Court without the need for additional fact discovery. Thus, the Court should first determine if it will deviate from the long line of class certifications decisions⁹ that have held that individual differences, even if they do exist, do not undermine commonality or typicality in a civil rights case challenging a system-wide violation of federal law and seeking a system-wide injunction to remedy that violation.

Second, to support their discovery request and the corresponding indefinite extension of time, the defendants list a number of cases which are largely inapposite, dealing with class certification standards under Rule 23(b)(3), claims which focus primarily on monetary versus injunctive relief, or decisions that are procedurally distinguishable from the instant case.¹⁰

⁹ See cases discussed in Section III, *supra* and the Memorandum in Support of the Plaintiffs' Motion for Class Certification at 11-21.

¹⁰ For instance, the defendants cite *Coll. Of Dental Surgeons of Puerto Rico v. Connecticut Gen. Life Ins. Co.*, 585 F.3d 33, 41 (1st Cir. 2009) for the principal that the First Circuit “virtually command[s] certification discovery prior to a certification decision.” Def. Mem. at 4. Yet this case concerns the jurisdictional authority of a federal court to entertain removal of the case under the Class Action Fairness Act - an analysis that depends upon the clarity and articulation of class allegations in the moving party’s complaint. No motion for class action had been filed or was otherwise pending at the time of this decision. Nor did the court pass judgment on the adequacy of the pleading or the proposed class as defined, noting instead that these matters were more properly decided in the context of any class action process. *Id.* at 40-42. Although the First Circuit has concluded that courts “may probe behind the pleadings...to assess whether the proposed class meets the legal requirements for certification,” it clearly did not mandate that district courts make evidentiary findings at the certification stage. *In Re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 17, 26 (1st Cir. 2008) (emphasis added)(citations omitted) (examining plaintiffs’ evidentiary burden in demonstrating that questions of law or fact predominate under Rule 23(b)(3)). Rather, it noted that such measures may be called for where a novel legal theory was at issue. *Id.* at 26.

It is well established that plaintiffs bear the burden of demonstrating class certification is appropriate, and that courts must conduct a “rigorous analysis” of the prerequisites of Rule 23 before certifying a class. *Smilow v. Sw. Bell Mobile Sys., Inc.*, 232 F.3d 32, 38 (1st Cir. 2003) (citing *General Tel. Co. of Sw., v. Falcon*, 457 U.S. 147, 160-161(1982)).¹¹ *Wal-Mart* reaffirms, rather than alters, this standard. 131 S. Ct. at 2557. *See also, Connor B.*, 2011 WL 5513233 * 4 (concluding *Wal-Mart’s* rationale for a rigorous analysis of commonality overlapping with the merits of plaintiffs’ claims does not apply where the “alleged violations flow from structural infirmities within a unified child welfare system and where there is no requisite showing of common intent”); *D.L.*, 2011 WL 5559927 * 7 (“Defendants’ liability in this case does not hinge on their state of mind when they denied disabled children a FAPE, or on any particular cause. Therefore, while defendants are correct that ‘class members’ denial of a FAPE occurred for a multitude of different reasons,’ the reasons for that common injury do not also have to be common to all members of the class”).

The plaintiffs’ Complaint and class memo sets forth well-established legal claims in the context of a highly detailed pleading, offering significant documentation of defendants’ underinvestment in its community mental health system, and its long standing failure to provide the community-based services that could prevent the repeated and prolonged institutionalization of persons with serious mental illness. *See, e.g.,* Pls’ Mem. Exs. 1-8. This evidence is sufficient for the Court to conduct a rigorous analysis

¹¹ Courts discharge this responsibility with considerable discretion and are subject to reversal only for abuse of discretion or the incorrect application of law.

and to determine that the prerequisites of Rule 23 are satisfied.¹² The defendants' objections to certification grossly mischaracterize applicable law and ignore decades of case law on the certification of injunctive civil rights cases. As a result, defendants' suggestion that it be allowed to discover each individual class member's needs, conditions, preferences, and treatment recommendations is misplaced and unnecessary for purposes of establishing that the requirements of Rule 23 are met and that a class should be certified in this matter.

V. Conclusion

For the reasons set forth above, the defendant's Motion to Strike is improper under the Federal Rules of Civil Procedure and should be denied. Similarly, their demand for class-based discovery is based upon a fundamental misunderstanding of the issues in this case and the implications of the Supreme Court's decision in *Wal-Mart*. The defendants have had a reasonable opportunity to respond to the plaintiffs' Motion, and effectively have set forth their substantive arguments in opposition to the Motion in their Motion to Strike. Therefore, as set forth in the plaintiff's Reply to Defendants' Objection to Class Certification, the Court should consider the issues joined and promptly resolve the plaintiffs' Motion, setting argument on the Motion at the soonest available date on the Court's calendar.

In accordance with LR 7.1(a)(2) plaintiffs state that because all authorities and arguments are cited herein, no supporting memorandum of law is necessary.

¹² The plaintiffs' legal contentions regarding the necessity of class members' institutionalization, and the potential for community supports to avoid such admissions, will be the subject of both fact and expert discovery on the merits, and ultimately will form the crux of the parties' evidence at trial. The merits and ultimate success of these legal claims are questions that cannot and need not be resolved at the class certification stage.

Dated: April 20, 2012

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Respectfully submitted,

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