UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HARRY DAVIS; RITA-MARIE GEARY; PATTY POOLE; and ROBERTA WALLACH, on behalf of themselves and all others similarly situated,

Plaintiffs,

-vs-

NIRAV SHAH, individually and in his official capacity as Commissioner of the New York State Department of Health,

Defendant.

RESPONSE MEMORANDUM OF LAW

12-CV-6134 CJS

INTRODUCTION

Plaintiffs' have moved this court for class certification. However, the defendant respectfully submits that class certification is unnecessary because he will apply statewide any Court ordered prospective relief to the plaintiffs. Here, three (3) of the four (4) plaintiff's obtained prospective relief from the New York State Department of Health (docket # 15; Roberta Wallach excluded). Subsequently, upon mutual agreement between the parties, additional individuals have been provided prospective relief pursuant to court order (docket # 19). By further agreement between the parties, the merits of this case will quickly be before the Court for final adjudication obviating the need for class certification (See, dockets # 20: Certification argument date 11/15/12 and # 22: Dispositive Motion Papers in October 2012 with follow-up responses/replies).

If the Court, in its exercise of discretion, does certify a class, then the Department respectfully requests that the proposed class definition be modified as described in DOH Director Jonathan Bick's accompanying Affidavit. Lastly, the claims of plaintiff and proposed class representative Rita-Marie Geary do not appear to be typical of all others in the proposed class as described in DOH Director Jonathan Bick's accompanying Affidavit at ¶¶ 16-21. See also, Baffa v. Donaldson, Lufkin & Jenrette Securities Corp., 222 F.3d 52, 59 -60 (C.A.2 (N.Y.),2000) (Class certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation).

ARGUMENT

CERTIFYING THE CLASS PROPOSED BY PLAINTIFF IS UNNECESSARY TO AFFORD RELIEF TO SIMILARLY SITUATED MEDICAID RECIPIENTS.

The Court maintains discretion concerning class certification even after a rigorous examination of the record pursuant to Rule 23. Courts have held that class certification is inappropriate where it is unnecessary to advance the efficiency goals of the class action mechanism specifically when only injunctive and/or declaratory relief is sought. This Court in Tremblay v. Riley, 917 F.Supp. 195, 202 (Hon. D. Larimer, W.D.N.Y.,1996) aptly stated: "[T]he Second Circuit has held that a district court may deny a motion to certify a class where the prospective benefits of declaratory and injunctive relief would benefit all members of proposed class to such an extent that class certification would not further implementation of the judgment. Davis v. Smith, 607 F.2d 535, 540 (2d Cir.1978).

The archetype for application of this so-called 'non-necessity' doctrine is an action seeking declaratory or injunctive relief against state officials on the ground that a statute or administrative practice is unconstitutional." Galvan v. Levine, 490 F.2d 1255, 1261 (2d Cir.1973), *cert. denied*, 417 U.S. 936, 94 S.Ct. 2652, 41 L.Ed.2d 240 (1974).

As another example, the Court in Foreman v. State of Connecticut, 2003 WL 1056750, 1 -2 (D.Conn., 2003) stated: "The Court need not consider the parties' arguments for and against class certification based upon the plaintiffs' ability to meet the requirements of Fed.R.Civ.P. 23, as the Court finds that class certification is not warranted pursuant to Galvan v. Levine, 490 F.2d 1255 (2d Cir.1973). In Galvan, the Second Circuit held that when a plaintiff seeks class certification for the purpose of seeking injunctive and declarative relief of a prohibitory nature, based on the alleged unconstitutionality of an administrative practice, “class action designation is largely a formality” and unnecessary. See Galvan, 490 F.2d at 1261. The Court reasoned that “what is important in such a case for the plaintiffs ... is that the judgment run to the benefit not only of the named plaintiffs but of all other similarly situated.” Id. The Court found that this concern had been met where the State recognized that any judgment would bind it in the future as to potential class members and where it had already withdrawn the challenged policy. Id.

Galvan has been clarified by subsequent Second Circuit decisions:

> [T]he Galvan rule is narrow and only applies to those specific cases in which the plaintiffs suing a governmental agency seek only prospective injunctive relief ... the Second Circuit has modified Galvan and has directed the district courts to focus on the more

> relevant criteria of the defendant's admission to the exercise of a "policy," its accession to "the identity of issues as to all potential class litigants," and the declaration of its intention to abide by the ruling of a single action.

Here, it is undisputable that there exists a specific policy governing Medicaid coverage for orthopedic footwear and compression stockings. The defendant also acknowledge that he will apply any relief awarded to similarly situated individuals -- or is otherwise obligated by law to apply the same relief to similarly situated individuals. Wherefore, class certification is unnecessary and should sensibly be denied.

CONCLUSION

Based on the aforementioned reasons and accompanying Affidavit, the application for class certification should be dismissed as a matter of law.

Dated: August 17, 2012
Rochester, New York

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CERTIFICATE OF SERVICE

I certify that on August 17, 2012, I electronically filed the foregoing Memorandum of Law, with the Clerk of the District Court using CM/ECF system, which sent notification of such filing to the following:

1. Bryan D. Hetherington: bhetherington@empirejustice.org
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And, I hereby certify that I have mailed, by the United States Postal Service, the document to the following non-CM/ECF participant(s):

1. N/A

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