IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BRIAN A., by his next friend, Bobbi Jean Brooks; TRACY B., by her next friend, Pamela Pallas; JACK and CHARLES C., by their next friend, Linda Lloyd; AMY D., by her next friend, Frank Koon; DENISE E., by her next friend, Linda Lloyd; CHARLETTE F., by her next friend, Juanita Veasy; and TERRY G., by her next friend, Carol Oldham on their own behalf and on behalf of all others similarly situated,	)	Civil Action No. 3-00-0445 Judge Campbell Magistrate Brown
Plaintiffs,	)	
--against--	)	
PHIL BREDESEN, Governor of the State of Tennessee; and VIOLA MILLER, Commissioner of the Tennessee Department of Children's Services,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT

Plaintiffs respectfully submit this Memorandum of Law in Support of Plaintiffs' Motion for Leave to File a Supplemental Complaint pursuant to Fed. R. Civ. P. 15(d). As set forth fully herein, Plaintiffs' motion should be granted, and the Supplemental Complaint should be deemed filed as of the date of this motion.

PRELIMINARY STATEMENT

Plaintiffs seek leave to file a Supplemental Complaint in this action to address the imminent risk of harm faced by Supplemental Plaintiffs (all of whom are *Brian A.* class members), and similarly situated *Brian A.* class members, from Section 30 of Tennessee Public

Chapter No. 531, which added a new subsection (f) to Tennessee Code Annotated ("T.C.A.") §37-2-205 and became effective on July 7, 2009. The new law, also known as the "Over-Commitment Law," establishes a pre-set limit on the number of children committed to the Tennessee Department of Children's Services ("DCS") for whom the state will allocate resources. The Over-Commitment Law limits the number of child commitments in each county based purely on the county's child population and a pre-set figure called the "average state commitment rate per thousand children." If the limit is exceeded in a county – as a result of the commitment decisions of the Juvenile Court judge(s) employed by that county – the county must pay the state's "actual daily cost" for foster care for each child committed beyond the limit, for as long as that child remains in state custody.

As set forth in detail in Plaintiffs' proposed Supplemental Complaint (attached hereto as Exhibit A), the intended and inevitable result of the Over-Commitment Law is to pressure Juvenile Court judges to commit fewer children to DCS custody in order to save state funds. The new law was developed by DCS and targets certain Juvenile Court judges who DCS believes are "over-committing" children, even though DCS initiates nearly all petitions seeking the commitment of children to DCS custody as dependent and neglected, and even though DCS has the ability to seek *de novo* review on appeal of any commitment decision it believes is improper or unlawful.

Fundamental due process requires that commitment decisions are based entirely on the facts of each child's case, and the Consent Decree specifically requires Defendants to ensure this protection for *Brian A.* class members. However, the Over-Commitment Law affects and interferes with judges' decision-making by injecting into individual commitment decisions a numbers game of how many children have already been committed to DCS custody in a

particular county and whether the county can provide resources for foster care if the pre-set limit is exceeded. The pre-set numbers established in the Over-Commitment Law have nothing to do with the factors affecting commitment decisions in any particular county, much less the facts of a child's case, placing children at significant imminent risk of harm. In at least one "high commitment" county targeted by the Over-Commitment Law, commitment decisions are in fact being affected by the new law and children are being treated differently – to their detriment – as a result.

In addition, the intended and inevitable result of the Over-Commitment Law is to excuse the *Brian A.* Defendants from their binding obligation under the *Brian A.* Consent Decree to provide *all* resources (including financial) to implement the decree for *all* foster children in DCS custody. The Over-Commitment Law establishes a pre-set limit on resource allocation for foster children in DCS custody, regardless of how many abused and neglected children are actually committed.

Plaintiffs amply satisfy the liberal standards under Fed. R. Civ. P. 15(d), which strongly favor this Court using its broad discretion to grant Plaintiffs leave to file their Supplemental Complaint – here with supplemental plaintiffs, facts and claims. *First*, each of the Supplemental Plaintiffs has Article III standing to assert new facts and bring claims concerning the Over-Commitment Law.[1] As of the date of this filing, each Supplemental Plaintiff is a *Brian A.* class member who has been removed from his or her home, placed in the legal custody of DCS and awaits a commitment hearing before a Juvenile Court judge. The Over-Commitment Law

[1] In a decision and order dated October 15, 2009, this Court found that Plaintiffs "have raised substantial legal claims" concerning the Over-Commitment Law, but denied Plaintiffs' Motion for a Temporary Restraining Order, or, in the alternative, a Preliminary Injunction, because it viewed claims against the Over-Commitment Law to be "new claims" for purposes of standing, and found the Named Plaintiffs in the 2000 *Brian A.* Complaint lacked a personal stake in challenging the new law. *See* Memorandum, Docket No. 330, at 5–6.

unlawfully affects the decisions made at these hearings. Thus, these Supplemental Plaintiffs – and all similarly situated class members – have a direct and personal stake in the new claims.[2]

Second, the supplemental facts and claims are intimately related to the original Complaint in this matter ("Original Complaint") and to the *Brian A.* Consent Decree. The core allegations in the Original Complaint and Plaintiffs' Supplemental Complaint concern the same issue – the failure of Defendants to provide adequate resources and services to meet their legal obligations to foster children in DCS custody. *See, e.g.*, Original Complaint, Docket No. 1, ¶ 9 ("Defendants have failed to provide the leadership, support, and resources necessary to adequately protect and care for the Plaintiff children as required by law.").

Likewise, the Consent Decree expressly requires that "[D]efendants shall commit all necessary resources (administrative, personnel, financial and otherwise) to implement all provisions of the Settlement Agreement." *See* Consent Decree at § I(A)(13). The Consent Decree also provides specific protection to Plaintiff children from any actions, practices or policies of Defendants that interfere with the capacity of judges to make case-specific decisions concerning efforts to preserve families, the removal of children from their families, and the commitment of children to DCS custody. The Consent Decree further provides specific protection to Plaintiff children from any interference by Defendants with their constitutional and

[2] The time frame during which the Supplemental Plaintiffs and all similarly situated *Brian A.* class members face imminent risks of harm due to the Over-Commitment Law is remarkably short. Under Tennessee law, a petition seeking commitment of a child as dependent and neglected must be filed within 48 hours after the child is removed from his or her home. *See* T.C.A. § 37-1-115(a)(2). A Juvenile Court then authorizes temporary placement of the child in DCS legal custody pending a commitment hearing, which must take place with 72 hours after removal. *See* T.C.A. § 37-1-117. *This means that the Supplemental Plaintiffs' commitment hearings will take place within as little as 24 hours of the filing of this Motion for Leave to File a Supplemental Complaint.* Given the extremely brief time during which the Supplemental Plaintiffs and all similarly situated *Brian A.* class members have a live, personal stake in the new claims regarding the Over-Commitment Law, Plaintiffs respectfully request that if this Court grants leave under Rule 15(d), it also deem the Supplemental Complaint filed as of the date of this motion. Otherwise, Plaintiffs' new claims can not be decided on their merits. *See* discussion *infra* Section II.

other legal rights, including their right to a fair hearing, in any judicial proceedings while in DCS custody. Plaintiffs' Supplemental Complaint alleges Defendants' non-compliance with and contempt of these provisions as a result of the Over-Commitment Law.[3]

Third, this Court has continuing jurisdiction to ensure compliance with the terms of the Consent Decree for as long as it remains in effect. Therefore, Plaintiffs' supplemental claims to enforce the Consent Decree fall squarely within this Court's ongoing jurisdiction. This presents an even stronger case for permitting Plaintiffs to file their Supplemental Complaint, as it supports judicial economy and convenience to allow the merits of these *Brian A.*-related claims to be heard by the Court most familiar with the Consent Decree.

Finally, no factors that would prevent a court from freely granting a supplemental pleading under Rule 15(d) – undue delay, bad faith, dilatory tactics, undue prejudice or futility – are present here. Defendants will not be prejudiced if Plaintiffs are granted leave to file their Supplemental Complaint. The Supplemental Complaint alleges violations by the same two Defendants as the Original Complaint – the DCS Commissioner and the Governor, in their official capacities. Not only are Defendants aware of the Over-Commitment Law but, as alleged in the Supplemental Complaint, DCS developed and supported the legislation. Moreover, Plaintiffs have timely sought leave to file their Supplemental Complaint to challenge the Over-Commitment Law, which first became effective in July of 2009. Additionally, Plaintiffs' Supplemental Complaint is far from futile – this Court found that Plaintiffs "have raised substantial legal claims" concerning the Over-Commitment law. Memorandum, Docket No. 330, at 6.

[3] The reference in § I(A)(12) of the Consent Decree to "constitutional and other legal rights, including their rights to fair hearings" invokes standards for constitutional violations under federal case law, and Plaintiffs' Supplemental Complaint alleges that the Over-Commitment Law violates Plaintiffs' rights to due process and equal protection under the Fourteenth Amendment to the U.S. Constitution. *See* Supplemental Complaint ("Supp. Compl."), ¶¶ 77–83, 96–99, attached hereto as Exhibit A.

For all these reasons, as set forth fully below, Plaintiffs respectfully request that this Court use its broad discretion under Fed. R. Civ. P. 15(d) to grant Plaintiffs leave to file a Supplemental Complaint to enforce the Consent Decree, and deem Plaintiffs' Supplemental Complaint filed as of the date of this motion.

FACTUAL BACKGROUND

Plaintiffs are a class of all foster children who are or will be in the legal custody of the DCS.[4] Plaintiffs filed this action on May 10, 2000, under 42 U.S.C. § 1983, alleging that Defendants' "systemic failure" to provide children in DCS custody "with legally required services has subjected the Plaintiff children to significant harm and threatened their safety and well-being, in violation of their rights under the United States Constitution, federal statutes, and federal common law." Original Complaint, Docket No. 1, ¶ 2. The Original Complaint sought "declaratory and injunctive relief against Defendants to stop these continued violations and to ensure that Defendants adequately care for and protect children in state custody as required by law." *Id*. It details the resources and services that the State of Tennessee is obligated to provide to children in its custody. *See id*. ¶¶ 131–214.

On July 27, 2001, this Court approved the parties' agreement settling Plaintiffs' claims and entered a Consent Decree which required comprehensive reform of the child welfare system in Tennessee. *See* Docket No. 112. On January 13, 2009, the Court signed a Modified Settlement Agreement. *See* Docket No. 289. All parties approved all terms of the Consent

[4] *See* Consent Decree at § I(B) ("'Foster children' shall mean all children who are or will be in the legal custody of [DCS], excluding children who are or will be in the legal custody of [DCS] upon an allegation or adjudication of a delinquent or criminal act. Children who are or will be in the custody of [DCS] upon an allegation or adjudication of an unruly or status offense shall be included in the class, and children who are or will be in the custody of [DCS] upon an allegation of a delinquent or criminal act and which allegation is subsequently dropped or fails to result in an adjudication of a delinquent or criminal act and who remain in the legal custody of [DCS], shall be included in the class.").

Decree and Modified Settlement Agreement (collectively, the "Consent Decree"). The Consent Decree contains all of the terms and provisions currently operative in this matter.

As stated in the Consent Decree, "[t]his court shall have continuing jurisdiction of this action to ensure compliance with the terms of this Settlement Agreement for as long as the Settlement Agreement remains in effect." Consent Decree at Preamble ¶ C. The Consent Decree specifically states that "[a]ll of the provisions in this Settlement Agreement are separately and independently enforceable, as set forth in this Settlement Agreement." *Id*. at § XVIII(A)(1). Among those provisions are the following:

- [C]hild welfare decision-makers must have the capacity to make determinations as to when making efforts to preserve the biological family, or leaving the child with that family, is neither safe for the child nor likely to lead to an appropriate result for the child. (*Id*. at § I(A)(2)).

- All parties in judicial proceedings involving neglect, abuse, unruly and delinquency should be provided with a fair hearing and their constitutional and other legal rights should be enforced and recognized. (*Id*. at § I(A)(12)).

- Except where a particular provision of this Settlement Agreement establishes a specific limit on the resources required to be allocated, defendants shall commit all necessary resources (administrative, personnel, financial and otherwise) to implement all provisions of the Settlement Agreement. (*Id*. at § I(A)(13)).

Pursuant to § I(A)(13) of the Consent Decree, Defendants must allocate and provide the resources required for the care of all *Brian A.* class members, such as the resources required to provide: assessments and case planning (*see id.* at §§ VI(D); VII); a reasonable and appropriate education (*see id.* at § VI(E)); diligent searches for parents and relatives (*see id.* at § VIII(C)); placements for foster children, including the daily cost of care in foster homes or, in certain circumstances, placements in certain facilities (*see id.* at §§ IX(D), (E)); the cost of front line

case managers and supervisors to monitor the safety, well-being and permanency of foster children (*see id.* at § V); and independent living services for eligible children (*see id.* at § VI(I)).

In late 2008, DCS was instructed by the administration of Tennessee Governor Bredesen to find ways to reduce the agency's budget for fiscal year 2010. DCS determined it could achieve these required budget reductions by decreasing the number of children committed to DCS custody. As a result, DCS developed, proposed and supported legislation designed to influence Juvenile Court judges in what DCS perceived to be "high-commitment" counties to commit fewer children to DCS custody. That legislation became the Over-Commitment Law, which was signed into law by Governor Bredesen on behalf of the executive branch of the state's government. *See* Supplemental Complaint ("Supp. Compl."), ¶¶ 62–65, attached hereto as Exhibit A. It became effective on July 7, 2009. The law provides, in pertinent part:

> (f)(1)(A) Notwithstanding any state law to the contrary, the Department of Children's Services shall allocate resources for children placed in state custody based on a county's child population and the average state commitment rate per thousand children. In fiscal years 2009-2010 and 2010-2011 the department shall pay for a county's commitments of dependent and neglected children and delinquent children until such commitments exceed three hundred percent (300%) of the state average commitment rate.
>
> (B) When a county exceeds the limit on either dependent and neglected children or delinquent children established in subdivision (f)(1)(A), the county shall be billed for the actual daily cost to the state for the duration of the length of stay of such child in state custody.

T.C.A. § 37-2-205(f).

The Over-Commitment Law establishes a maximum pre-set number of children in DCS custody for whom Defendants will allocate resources. Past that number, the state has no obligation to allocate resources or funding, regardless of how many children actually enter DCS custody and require services. The statewide average commitment rate and the pre-set commitment limits established for each county under the law fail to take into account:

- the fact that nearly all commitments to DCS custody as dependent or neglected are the result of petitions that DCS itself files, seeking such custody;

- the fact that DCS can challenge any commitments it believes to be improper by seeking a *de novo* appeal of those decisions;

- the factors contributing to commitment numbers and rates in any given county or community, including poverty and abuse rates, and the prevalence of certain drug problems such as methamphetamine production and use;

- the great disparities among counties in the provision by DCS of services designed to keep children safe in their homes, and to avoid removal and placement into custody;

- the fact that a county with a low commitment rate but longer average length of stay requires more state funds than a county with a high commitment rate but shorter average length of stay;

- the fact that, in rural counties with small populations of children, a very small number of additional commitments can make a drastic change in their commitment rates and expose them to severe financial liability under the law;

- the fact that, at the time of its passage, most counties' FY 2010 budgets had already been finalized and no money had been allocated for the daily cost of care of any number of foster children over the pre-set limits; and

- the counties' varying abilities or inabilities to pay the state's entire share of the daily cost of foster care for any "excess" children.

See Supp. Compl., ¶¶ 66–74, 80–81.

On September 9, 2009, Plaintiffs brought a Motion for a Temporary Restraining Order or, in the Alternative, a Preliminary Injunction seeking to enjoin the Over-Commitment Law and enforce the Consent Decree. *See* Docket No. 296 and Docket No. 324. On October 15, 2009, following expedited discovery and a hearing on Plaintiffs' Motion, this Court found that Plaintiffs "have raised substantial legal claims" about the Over-Commitment Law, but denied Plaintiffs' Motion for lack of standing. Memorandum, Docket No. 330, at 6. This Court viewed Plaintiffs' claims concerning the Over-Commitment Law as "new claims" for purposes of Article

III standing, and found the original Named Plaintiffs in this action had no personal stake in challenging the Over-Commitment Law. *Id*. at 5–6.

ARGUMENT

I. THIS COURT SHOULD GRANT PLAINTIFFS LEAVE TO FILE A SUPPLEMENTAL COMPLAINT UNDER FED. R. CIV. P. 15(d).

To ensure the determination of Plaintiffs' claims on their merits, Plaintiffs respectfully request that this Court use its broad discretion under Fed. R. Civ. P. 15(d) to grant Plaintiffs leave to file a Supplemental Complaint to enforce the Consent Decree. This Supplemental Complaint will add: (a) factual allegations regarding the Over-Commitment Law; (b) Supplemental Plaintiffs in the legal custody of DCS who are awaiting their commitment hearing before a Juvenile Court judge and who are therefore subject to imminent risk of harm as a result of the Over-Commitment law; and (c) new claims for violations of Plaintiffs' rights under the Consent Decree and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution.

A. The Court Has Broad Discretion Under Fed. R. Civ. P. 15(d) To Permit Plaintiffs To File A Supplemental Complaint In This Action.

Fed. R. Civ. P. 15(d) provides that "on motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d); *see also Torrez v. McKee*, No. 1:06-cv-903, 2007 WL 3347618, at *1 (W.D. Mich. Nov. 9, 2007) (Rule 15(d) is the appropriate vehicle for supplementing a complaint to reflect events that occurred after its filing). "[A] supplemental pleading may include new facts, new claims [and] new defenses." *Stewart v. Shelby Tissue, Inc*., 189 F.R.D. 357, 361 (W.D. Tenn.

1999); *see also Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988) ("The clear weight of authority . . . permits the bringing of new claims in a supplemental complaint to promote the economical and speedy disposition of the controversy."). Moreover, "[s]upplemental pleadings may be used to bring in additional parties when the subsequent events alleged in the new pleadings make it necessary." *Stewart*, 189 F.R.D. at 361; *see also Griffin v. County Sch. Bd.*, 377 U.S. 218, 226–27 (1964) (Rule 15(d) permits supplemental pleadings to include the addition of new parties in order "to achieve an orderly and fair administration of justice.").

The granting of a motion to file a supplemental pleading is within the broad discretion of the trial court. *See Stewart*, 189 F.R.D at 362. Permitting a party to supplement a pleading furthers "the policy of deciding a complaint on its merits rather than dismissing it on technical reasons." *Id*. at 359 (citing Foman v. Davis, 371 U.S. 178, 181–82 (1962)). Therefore, "as a general rule, applications for leave to file a supplemental pleading are normally granted." *Stewart*, 189 F.R.D. at 362 (citing McHenry v. Ford Motor Co., 269 F.2d 18, 25 (6th Cir. 1959)); *see also Keith*, 858 F.2d at 473 (as "a tool of judicial economy and convenience," application of Rule 15(d) is "favored" and supplemental pleadings should be allowed "as of course") (quoting New Amsterdam Casualty Co. v. Waller, 323 F.2d 20, 28–29 (4th Cir. 1963), *cert. denied*, 376 U.S. 963 (1964)); *Chapman v. Michigan*, No. 06-10126, 2007 WL 172537, at *2 (E.D. Mich. June 19, 2007) (the Court will "liberally" grant leave to file a supplemental pleading); *Percival v Granholm*, No. 06-12485, 2008 WL 1455677, at *1 (E.D. Mich. April 9, 2008) (same).

The standard for granting leave to supplement under Rule 15(d) is the same as the standard governing leave to amend under Rule 15(a). *See, e.g., Spies v. Voinovich*, 48 Fed. Appx. 520, 527 (6th Cir. 2002) (attached hereto as Exhibit B) (the "same standard of review and rationale apply"); *Harrison v. Burt*, No. 2:07-CV-11412, 2008 WL 4058288, at *1 (E.D Mich.

Aug. 28, 2008) (same). Courts have construed Rule 15(a) liberally in favor of permitting amendment. *See, e.g., Greenberg v. Life Ins. Co. of Va.,* 177 F.3d 507, 522 (6th Cir. 1999) (leave to amend a pleading under Rule 15(a) should be "freely given" to "reinforce the principle that cases should be tried on their merits rather than the technicalities of pleadings") (quotations omitted); *Marks v. Shell Oil Co.*, 830 F.2d 68, 69 (6th Cir. 1987) (court's discretion in granting leave to amend is limited by Rule 15(a)'s "liberal policy of permitting amendments to ensure the determination of claims on their merits"). The Supreme Court articulated this liberal standard in *Foman v. Davis*:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.-the leave sought should, as the rules require, be "freely given."

371 U.S. at 182. Thus, "[w]hen there is a lack of prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is abuse of discretion to deny [the] motion." *Harrison*, 2008 WL 4058288 at *1 (citing Hurn v. Ret. Fund Trust of Plumbing Indus., 648 F.2d 1252, 1254 (9th Cir. 1981)).

B. Allowing Plaintiffs Leave To File Their Supplemental Complaint Is Necessary And Appropriate In This Case.

For reasons discussed below, this Court should use its broad discretion under Rule 15(d) to grant Plaintiffs leave to file their supplemental pleading.

1. Supplemental Plaintiffs Have Standing To Bring New Claims Regarding The Over-Commitment Law.

Each of the Supplemental Plaintiffs has Article III standing to assert new facts and bring new claims concerning the Over-Commitment Law. As of the date of this filing, each

Supplemental Plaintiff is a *Brian A.* class member who has been removed from his or her home, placed in the legal custody of DCS and awaits a commitment hearing before a Juvenile Court judge. *See* Supp. Compl., ¶¶ 7, 16–26. These Supplemental Plaintiffs – and all similarly situated class members – are subject to the imminent risk of harm that the Over-Commitment Law will unlawfully affect the judicial decision-making at these hearings and, therefore, they have a direct and personal stake in the new claims. *See, e.g., Rosen v. Tenn. Comm'r of Fin. & Admin.*, 288 F.3d 918, 928 (6th Cir. 2002).

2. The Facts And Claims In Plaintiffs' Supplemental Complaint Are Directly Related To The Original Complaint And The Consent Decree.

Motions to supplement under Rule 15(d) "can be brought at any time the action is before the trial court." *Stewart*, 189 F.R.D. at 362. Therefore, supplemental complaints may be filed to allege new claims based on distinct events in matters which have reached final disposition or, as here, where consent decrees have been entered. *See, e.g., Griffin,* 377 U.S. at 218 (approving a supplemental complaint under Rule 15(d) after district court entered final judgment because the subsequent transactions were alleged to have occurred as a part of continued efforts to circumvent a prior holding); *Keith,* 858 F.2d at 473–76 (where court approved consent decree and retained jurisdiction to ensure that the terms of the decree were fulfilled, plaintiffs were properly permitted to file supplemental complaints under Rule 15(d) bringing new claims and adding new defendants); *United States v. Indiana,* No. 2:96-CV-095, 2009 WL 3067087, at *2–5 (N.D. Ind. Sept. 18, 2009) (plaintiffs permitted to file supplemental complaint under Rule 15(d) adding several new claims eight years after consent decree had been entered); *Habitat Educ. Ctr., Inc. v. Kimbell,* 250 F.R.D. 397, 402 (E.D. Wis. 2008) (plaintiffs permitted to file supplemental complaints under Rule 15(d) to enforce ongoing injunction); *Raduga USA Corp. v. U.S. Dep't of State,* 440 F. Supp. 2d 1140, 1150–52 (S.D. Cal. 2005) (plaintiffs permitted to file

supplemental complaint under Rule 15(d) adding new defendants and requesting further relief after court entered final judgment); *Rosen v. Tenn. Com'r of Fin. and Admin*., 280 F. Supp. 2d 743, 755 (M.D Tenn. 2002) (after remand from the Sixth Circuit for lack of standing, plaintiffs permitted to file supplemental complaints adding new named plaintiffs and legal claims after consent decree had been entered), *opinion set aside on other grounds*, 2003 WL 22383610 (M.D. Tenn. Oct. 14, 2003); *Poindexter v. La. Fin. Assistance Comm'n*, 296 F. Supp. 686, 688–89 (E.D. La. 1968), *aff'd sub nom. La. Educ. Comm'n for Needy Children v. Poindexter*, 393 U.S. 17 (1968) (after entry of final decree declaring a state statute unconstitutional, court permitted supplemental complaint under Rule 15(d) which added new defendants and challenged subsequent legislation of the same type).

Under these circumstances, supplemental pleadings should be permitted where "some relationship" exists between the newly alleged matters and the subject of the original action. *Keith*, 858 F.2d at 474; *see also Habitat*, 250 F.R.D. at 402 (court should permit supplemental pleading for post-judgment events so long as they bear some relationship to the original pleading) (quotation omitted); *Indiana*, 2009 WL 3067087, at *3 (same).

The facts and claims in Plaintiffs' Supplemental Complaint are directly related to the original civil rights action that was filed in this case, and to the *Brian A.* Consent Decree. It includes Supplemental Plaintiffs who are *Brian A.* class members subject to imminent risk of harm as a result of the Over-Commitment Law, and adds new claims against the same Defendants. The core allegations in the Original Complaint and Plaintiffs' Supplemental Complaint concern the same issue – the failure by Defendants to provide adequate services and resources to meet their legal obligations to children in DCS custody. *See* Original Complaint, Docket No. 1, ¶¶ 2, 7–9, 22, 65, 69; Supp. Compl., ¶¶ 10, 27–30, 64. By its plain terms, the

Over-Commitment Law arbitrarily cuts off state funding for those very resources and services for certain class member children, in violation of the Consent Decree. Because Plaintiffs' new claims regarding the Over-Commitment Law are related to the "focal point" of Plaintiffs' original action, the Original and Supplemental Complaints "are appropriately linked." *Indiana*, 2009 WL 3067087, at *4 (citing Keith, 858 F.2d at 474).

Moreover, through their Supplemental Complaint, Plaintiffs are seeking to enforce the Consent Decree, which explicitly protects Plaintiffs from the intended and inevitable effect of the Over-Commitment Law. *See, e.g.*, *Habitat*, 250 F.R.D. at 402 (plaintiffs may file supplemental complaints "to enforce ongoing injunctions or consent decrees"). The Supplemental Complaint alleges that the Over-Commitment Law has subjected *Brian A.* class members to imminent risk of harm and violated several specific provisions of the Consent Decree:

- By pressuring Tennessee's Juvenile Court judges to consider factors other than children's individual circumstances when making commitment decisions, the Over-Commitment law violates the plain terms of § I(A)(2) of the Consent Decree, which requires that "child welfare decision-makers . . . have the professional capacity to make determinations as to when making efforts to preserve the biological family, or leaving the child with that family, is neither safe for the child nor likely to lead to an appropriate result for the child." Consent Decree § I(A)(2).[5]

- By pressuring Tennessee's Juvenile Court judges to consider factors other than children's individual circumstances when making commitment decisions, and by causing similarly situated children to be categorized and treated differently based on considerations entirely unrelated to their case-specific facts, the Over-Commitment Law violates the rights of Plaintiff Children to due process and equal protection of the law. This directly violates § I(A)(12) of the Consent Decree, which requires that Plaintiff Children are "provided a fair hearing and their constitutional and other legal rights should be enforced and recognized."

- By directing DCS to "allocate resources for children placed in state custody" according to an "average state commitment rate" rather than according to the actual need for services for all foster children in DCS custody in each county, the Over-Commitment Law arbitrarily cuts off funding for children who are committed to state

[5] In its October 15, 2009 Memorandum, this Court specifically found that "[d]ecision-makers in this case include juvenile court judges who decide whether to commit children to DCS custody." Memorandum, Docket No. 330, at 2 n.2.

> custody after a county exceeds a pre-set level. This directly violates § I(A)(13) of the Consent Decree, which sets forth DCS's unconditional obligation to fund care for children in custody: "Except where a particular provision of this Settlement Agreement establishes a specific limit on the resources required to be allocated, defendants shall commit all necessary resources (administrative, personnel, financial and otherwise) to implement all provisions of the Settlement Agreement." Consent Decree § I(A)(13).

Thus, Plaintiffs' new claims clearly have a "close enough affiliation to the original action and to the consent decree to properly come within the scope of Rule 15(d)." *Indiana*, 2009 WL 3067087, at *4.

3. This Court Has Ongoing Jurisdiction Over *Brian A*. To Ensure Compliance With The Terms Of The Consent Decree.

Where a court has "expressly reserved its jurisdiction over later developments, an even stronger case is presented [] for permitting a supplemental complaint." *Keith*, 858 F.2d at 474; *cf. Planned Parenthood of S. Ariz. v. Neely*, 130 F.3d 400, 402–03 (9th Cir. 1997) (finding abuse of discretion where district court allowed plaintiffs who had prevailed in enjoining the enforcement of a state abortion statute to supplement the original complaint to challenge the constitutionality of a revised version of the statute because the district court had not retained jurisdiction).

This Court has continuing jurisdiction under the Consent Decree to ensure compliance with its terms. *See* Consent Decree at Preamble, ¶ C. Thus, this Court is in the best position to determine the merits of Plaintiffs' new claims alleging violations of the Consent Decree.

4. Allowing Plaintiffs' Supplemental Claims Furthers Judicial Economy.

Courts have highlighted judicial economy as a key factor in allowing the supplementation of pleadings under Rule 15(d). *See, e.g., Indiana*, 2009 WL 3067087, at *5 (permitting supplemental complaint with new claims after consent decree had been entered to "avoid the cost, delay and waste of separate actions") (quoting New Amsterdam Casualty Co. v. Waller,

323 F.2d 20, 28-29 (4th Cir. 1963)); *Keith*, 858 F.2d at 473 (same). This Court has maintained jurisdiction over this case since it was filed nine years ago, and therefore is familiar with the long-standing dispute between the parties, the terms of the Consent Decree, and the litigation as a whole. As is the case here, "[t]o force plaintiffs to file [a] new lawsuit[] to litigate what are essentially continuations of their original suit[] would waste judicial resources." *Habitat*, 250 F.R.D. at 402. Accordingly, this factor weighs heavily in favor of allowing Plaintiffs' Supplemental Complaint.

5. Defendants Will Not Be Unduly Prejudiced By Allowing Plaintiffs To File Their Supplemental Complaint.

Absent undue delay, bad faith, dilatory tactics, undue prejudice to the other party, or futility, Rule 15(d) motions should be freely granted. *See, e.g., Foman*, 371 U.S. at 182; *Stewart*, 189 F.R.D. at 362. None of those factors are present here. Defendants will not be unduly prejudiced by the filing of Plaintiffs' Supplemental Complaint. The Supplemental Complaint alleges violations by the same two Defendants as the Original Complaint – Defendants proposed, developed and supported the Over-Commitment Law, and the Governor signed the legislation into law on behalf of the executive branch. *See* Supp. Compl., ¶¶ 9, 62, 65. In addition, allowing Plaintiffs' supplemental pleading will not delay proceedings in this matter or result in costly discovery, as this Court has ongoing jurisdiction over the alleged violations of the Consent Decree and evidence produced in connection with Plaintiffs' previous Motion for Preliminary Injunction can be used by the parties to litigate the claims in the Supplemental Complaint. Nor is Plaintiffs' Supplemental Complaint futile or brought in bad faith. As this Court has already recognized, Plaintiffs "have raised substantial legal claims" about the Over-Commitment Law. Memorandum, Docket No. 330, at 6.

Moreover, Plaintiffs have timely sought leave to file their Supplemental Complaint. The Over-Commitment Law went into effect in July of 2009, Plaintiffs brought their initial Motion for Preliminary Injunction to enjoin the new law on September 9, 2009, and the Court denied that Motion on October 15, 2009 – less than a month ago. Thus, Plaintiffs have brought their Rule 15(d) motion "within a reasonable period of time" and have not unreasonably delayed in seeking to supplement their pleadings. *Stewart*, 189 F.R.D. at 362.

In sum, no factors undermine the extremely strong case in support of granting Plaintiffs leave to file their Supplemental Complaint under Rule 15(d).

II. IF PLAINTIFFS ARE GRANTED LEAVE UNDER RULE 15(d), THIS COURT SHOULD DEEM THE SUPPLEMENTAL COMPLAINT FILED AS OF THE DATE OF THIS MOTION.

Plaintiffs respectfully request that if this Court grants leave under Rule 15(d), the Court's order should also deem the Supplemental Complaint filed as of the date of this motion. Otherwise, it will be impossible for Plaintiffs' new claims to be heard on their merits, which is precisely what Rule 15(d) seeks to avoid. *See, e.g.*, *Stewart*, 189 F.R.D. at 359 (fundamental purpose for permitting a party to supplement a pleading is "the policy of deciding a complaint on its merits rather than dismissing it on technical reasons") (citing Foman, 371 U.S. at 181–82).

The window during which the Supplemental Plaintiffs and all similarly situated *Brian A.* class members have a live, personal stake in the new claims regarding the Over-Commitment Law is extremely short. The Supplemental Plaintiffs are in DCS legal custody, and all are the subject of a dependent and neglect petition filed seeking their commitment to DCS custody and are awaiting their commitment hearing before a Juvenile Court judge. Under Tennessee law, a dependent and neglect petition must be filed within 48 hours after a child is removed from his or her home, and a commitment hearing must take place within 72 hours after removal. *See* T.C.A.

§§ 37-1-115(a)(2); 37-1-117. *This means that all of the Supplemental Plaintiffs will have their commitment hearings within at little as 24 hours of the filing of this motion.* The Over-Commitment Law, as alleged in Plaintiffs' Supplemental Complaint, unlawfully affects judicial decision-making at these hearings. Therefore, if this Court does not deem the Supplemental Complaint filed as of the date of this motion, by the time this Court is able to grant leave, the commitment hearings of the Supplemental Plaintiffs will have already occurred, and all similarly situated *Brian A.* class members will be deprived of an opportunity to have the merits of their claims heard.

Here, Plaintiffs have properly submitted their Supplemental Complaint with this request for leave, providing notice to Defendants of the substance of their supplemental facts, claims and plaintiffs. Courts have frequently granted relief under Rule 15 with the new pleading deemed filed as of the date of the motion requesting leave. *See, e.g., Shillman v. United States,* No. 99-3215, 2000 WL 923761, at *6 (6th Cir. 2000) ("If a motion to amend is granted, the complaint is deemed amended as of the date the proponent of the amendment sought leave to amend, and not when the request is actually granted.") (attached hereto as Exhibit C); *Moore v. Indiana*, 999 F.2d 1125, 1131 (7th Cir. 1993) (amended complaint deemed filed as of the date of request for leave because "a party has no control over when a court renders its decision regarding the proposed amended complaint"); *Mayes v. AT&T Info. Sys., Inc*., 867 F.2d 1172, 1173 (8th Cir. 1989) (amended complaint "deemed filed" when motion to amend was filed); *Rademaker v. E.D. Flynn Export Co*., 17 F.2d 15, 17 (5th Cir. 1927) (a motion to amend "stands in the place of an actual amendment"); *Buller Trucking Co. v. Owner Operator Indep. Driver Risk Retention Group, Inc*., 461 F. Supp. 2d 768, 776–77 (S.D. Ill. 2006) (for purposes of removal under Class Action Fairness Act, class action was deemed commenced on filing date of request for leave to

amend complaint to assert class action allegations because "the settled rule in both federal and state court is that a complaint is deemed filed as of the time it is submitted to a court together with a request for leave to file the amended pleading"); *Wallace v. Sherwin Williams Co.*, 720 F. Supp. 158, 159 (D. Kan. 1988) (plaintiff's amended complaint was effectively filed when motion for leave was filed because "[t]o hold otherwise would punish plaintiff and other similarly situated plaintiffs for the court's unavoidable delay in issuing an order granting leave to amend a complaint").

Thus, this Court should use its broad discretion under Rule 15 to deem the Supplemental Complaint filed as of the date of this motion.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court issue an order: (1) granting Plaintiffs' motion for leave to file their Supplemental Complaint in this action; and (2) deeming Plaintiffs' Supplemental Complaint filed as of the date of this motion.

DATED: November 9, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Laura Mumm, hereby certify that, on November 9, 2009, a true and correct copy of Plaintiffs' Memorandum of Law in Support of Motion for Leave to File Supplemental Complaint, and the exhibits attached thereto, have been served on Defendants' counsel, Douglas E. Dimond, Esq., Office of the Attorney General, Cordell Hull Building, Ground Floor, 425 Fifth Avenue North, Nashville, Tennessee 37247, electronically by operation of the Court's electronic filing system and by email to Doug.Dimond@ag.tn.gov.

DATED: November 9, 2009

Laura Mumm