

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOAN PAIGE, individually and as parent and	:	
natural guardian of TISHA PAIGE, an infant,	:	
and KISHIA HANIBLE, individually and as	:	
parent and natural guardian of DONTAY	:	
HANIBLE and QUINTRAL LOWRY, infants,	:	
on behalf of themselves and all other persons	:	
similarly situated,	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 99-CV-497
	:	
PHILADELPHIA HOUSING AUTHORITY,	:	
Defendant.	:	

MEMORANDUM

Green, S.J

March _____, 2002

Presently before the Court is Defendant Philadelphia Housing Authority’s Motion to Dismiss Plaintiffs Joan Paige’s and Kishia Hanible’s Second Amended Class Action Complaint, Plaintiffs’ Response, Defendant’s Reply and Plaintiffs’ Sur-reply. For the reasons set forth below, Defendant’s motion will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Presently before the Court is the Second Amended Class Action Complaint (the “Second Amended Complaint”) filed by Plaintiffs Joan Paige and Kishia Hanible (“Plaintiffs”)¹ challenging Defendant Philadelphia Housing Authority’s (“PHA”) alleged non-compliance with federal regulations intended to protect children residing in rent-subsidized housing in

¹Hereinafter, Plaintiffs Joan Paige and Kishia Hanible will be collectively referred to as “Plaintiffs” unless otherwise indicated.

Philadelphia, Pennsylvania from exposure to lead. Plaintiff Joan Paige brings this litigation on behalf of her minor child, Tisha Paige and Plaintiff Kishia Hanible brings this litigation on behalf of her minor children, Dontay Hanible and Quintral Lowry. In their Second Amended Complaint, Plaintiffs contend that as a result of PHA's failure to comply with the federal statutes and regulations governing the Section 8 Housing Assistance Payments Program (the "Section 8 Program"), codified at 42 U.S.C. § 1437f, their minor children were exposed to lead-based paint while residing in Section 8 housing and suffered and continue to suffer injuries. Plaintiffs seek declaratory, injunctive and other equitable relief, including medical monitoring on behalf of their minor children and on behalf of persons who reside, or who formerly resided, in the privately owned rental units subsidized through the Department of Housing and Urban Development's ("HUD") Section 8 Program.

The Section 8 Program is designed to provide "decent, safe, and sanitary dwellings for families of lower income." 42 U.S.C. § 1437. Under the program, local housing authorities, such as PHA, enter into annual contribution contracts with HUD. The housing authority uses the contribution contracts to enter into contracts with private landlords/owners to subsidize the rental payments of low income families who satisfy the criteria for Section 8 housing, such as Plaintiffs.

However, prior to the Section 8 housing property being certified as decent, safe and sanitary, the housing property must meet certain housing quality standards under the federal regulations governing the local public housing authority's administration of the program. The Lead Based Paint Poisoning Prevention Act, 42 U.S.C. § 4801 *et seq.*, the United States Housing Act of 1937, 42 U.S.C. § 1437 *et seq.*, and their implementing regulations, require the local housing

authority to perform certain acts in order to prevent lead-based paint exposure in children. Specifically, the regulations require Section 8 housing units to be inspected both initially and annually for the presence of lead-based paint.

The alleged facts of the above-captioned case are as follows: Plaintiffs Paige and Hanible moved into Section 8 housing units in April of 1994 and August of 1996, respectively. Their units were contaminated with old, deteriorating paint containing concentrations of lead many times higher than the limit established by HUD, and as a result of their exposure, their children were diagnosed as having lead poisoning and thus identified as having Elevated Blood Lead Levels (“EBL”).

Plaintiff Joan Paige originally brought suit against PHA, alleging PHA’s violation of the federal lead-based paint regulations, specifically 24 C.F.R. § 982.401(j)(4). Plaintiff alleged that because her child was identified as having an EBL, HUD regulation 24 C.F.R. § 982.401(j)(4) required that HUD conduct a lead inspection of the chewable surfaces of the Section 8 property prior to their occupying the Section 8 unit using an X-ray florescence (“XRF”) or other method approved by HUD. Plaintiff further averred that no landlord would agree to rent to her and her minor child since PHA passed the charge for XRF testing onto the landlord. Being unable to pay for the testing herself, Plaintiff Paige alleged that her Section 8 certificate expired for lack of use and that she was decertified from the program, thereby requiring her to pay the entire rent charge for her then current lead-contaminated Section 8 unit. As a result of being unable to pay the unsubsidized rent, Plaintiff Paige was evicted from her Section 8 unit, became homeless and was forced to reside in a shelter. Following the filing of her Complaint, PHA moved to dismiss Plaintiff’s Complaint. This Court denied the motion.

Thereafter, Plaintiff Paige sought leave of Court to file a First Amended Complaint in order to add a claim for violation of the Equal Protection Clause of the Fourteenth Amendment. The Court granted leave and Plaintiff filed the first Amended Complaint. The First Amended Complaint included § 1983 claims alleging violations of the: United States Housing Act, Lead Based Paint Poisoning Prevention Act and their implementing regulations; the Fair Housing Act; Section 504 of the Rehabilitation Act; the Americans with Disabilities Act (“ADA”); and the Equal Protection Clause of the Fourteenth Amendment.

PHA moved to dismiss Plaintiff Paige’s First Amended Complaint. The Court denied PHA’s motion by Memorandum Order, holding that Plaintiff had stated cognizable claims against PHA under § 1983, the Fair Housing Act, the Rehabilitation Act, the ADA, and the Equal Protection Clause of the Fourteenth Amendment.

In September 2000, HUD revised the regulations in the Section 8 Program concerning lead-based paint. Prior to September 2000, the general requirements for testing and inspections for Section 8 housing were embodied in 24 C.F.R. § 982.401, specifically § 982.401(j). Section 982.401(j) provided that in Section 8 units constructed prior to 1978 where children under 6 years old resided, when the housing authority was notified of a child with an EBL, the paint in the house was to be tested using an XRF or by laboratory analysis of paint samples. Following September 15, 2000, HUD replaced 24 C.F.R. § 982.401(j) with 24 C.F.R. Part 35, Subparts A, B, M and R (2000). Now, where the housing authority is notified of a child with an EBL in a Section 8 unit, the housing authority must conduct a “risk assessment” within 15 days of the notification, which includes a visual inspection, limited wipe sampling and any other activity as may be deemed appropriate. See 24 C.F.R. § 35.86.

Following the change in regulations, Plaintiff Paige sought leave to file a Second Amended Complaint to add a new class representative, request a remedy of medical monitoring and plead violations of the amended provisions of the federal lead-based paint regulations. The Court granted Plaintiff leave to file a Second Amended Complaint and on April 6, 2001, Plaintiffs filed their Second Amended Complaint, with Plaintiff Kishia Hanible joining as a plaintiff in the action.

Plaintiffs' specific legal claims in the Second Amended Complaint largely mirror the claims contained in the First Amended Complaint and are brought pursuant to 42 U.S.C. § 1983. Count I alleges claims for violations of the United States Housing Act, the Lead Based Paint Poisoning Prevention Act and their pre and post-September 2000 regulations. Count II alleges a claim for violation of the Fair Housing Act, codified at 42 U.S.C. § 3601, *et seq.*, which prohibits discrimination against the disabled in the rental of housing. Counts III and IV allege claims for discrimination under Section 504 of the Rehabilitation Act, codified at 29 U.S.C. § 794, *et seq.*, and Title II of the ADA, codified at 42 U.S.C. § 12132, *et seq.*, on the grounds that the minor plaintiffs are disabled and that they have been, or are being, excluded from participation in the Section 8 Program based on their alleged disabilities. Finally, Count V alleges a claim for violations of the Equal Protection Clause of the Fourteenth Amendment, on the ground that PHA treated the putative class members differently than it did non-class members. As individuals and as representatives of the class, Plaintiffs seek the following remedies: (1) a mandatory injunction requiring PHA to enforce the federal lead-based paint regulations; (2) a fund for medical monitoring; (3) an order directing PHA to issue Section 8 housing vouchers to class members and to reimburse the payment of unsubsidized rent to those who lost their Section 8 eligibility

and were thus terminated from the Section 8 Program due to PHA's alleged violations of the pre and post-September 2000 regulations; and (4) attorneys fees.

PHA moves to dismiss Plaintiffs' Second Amended Complaint in its entirety largely on the basis that Plaintiffs lack standing to obtain injunctive relief as to the pre and post-September 2000 regulations because the pre-September 2000 regulations have been superceded and because Plaintiffs have failed to allege any harm or any threat of future harm as a result of PHA's non-compliance with the post-September 2000 regulations. PHA also claims that Plaintiffs' Second Amended Complaint should be dismissed because it fails to state a cause of action under the Fair Housing Act, the Rehabilitation Act, the ADA, and the Equal Protection Clause of the Fourteenth Amendment. PHA also seeks dismissal because of Plaintiffs' alleged failure to join the Section 8 landlords as necessary and indispensable parties. Finally, PHA claims that Plaintiffs' remedy of medical monitoring should not be granted because Plaintiffs fail to state a claim upon which relief can be granted. In the alternative, PHA requests that the Court strike averments from the Second Amended Complaint pertaining to a Court-supervised fund because such a fund is inconsistent with class certification under Fed.R.Civ.P. 23(b)(2) and to strike averments pertaining to scienter standards because Plaintiffs have failed to plead the correct scienter standards to satisfy the burden of proof required for culpability under § 1983.

II. LEGAL STANDARD

As a unanimous Supreme Court in Swierkiewicz v. Sorema, N.A., 122 S.Ct. 992 (2002) decided,

[g]iven the Federal Rules' simplified standard for pleading, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). If a pleading fails to specify the allegations in a

manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim. See Conley, *supra*, at 48, 78 S.Ct. 99 (“The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits”).

Id. at 998-99.

As such, the court must accept as true all well pleaded allegations of fact, and any reasonable inferences that may be drawn from the plaintiff’s complaint. See Nami v. Fauver, 82 F.3d 63 (3d Cir. 1996). Yet, “a court need not credit a complaint’s ‘bald assertions’ or ‘legal conclusions’ when deciding a motion to dismiss.” Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997) (citations omitted). However, because granting such a motion results in a determination on the merits at an early stage of the plaintiffs’ case, the district court “must . . . construe the complaint in the light most favorable to the [plaintiff], and determine whether, under any reasonable reading of the pleadings, the [plaintiff] may be entitled to relief.” Colburn v. Upper Darby Twp., 838 F.2d 663, 664-65 (3d Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989).

III. DISCUSSION

A. Standing

Article III, § 2 of the United States Constitution limits federal jurisdiction to “Cases” or “Controversies.” See Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992). This case or controversy limitation places the burden on the plaintiff to allege that she has “such a personal stake in the outcome of the controversy’ as to warrant [her] invocation of federal-court

jurisdiction and to justify exercise of the court’s remedial powers on [her] behalf.” Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (citing Baker v. Carr, 369 U.S. 186, 204 (1962)) (footnote omitted). At an “irreducible constitutional minimum,” the plaintiff must be able to demonstrate

“(1) [she] has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envntl. Servs., 528 U.S. 167, 180-81 (2000) (citing Lujan, 504 U.S. at 560-61).

In its Motion to Dismiss, PHA contends that there is no “case or controversy” such that Plaintiffs’ claims fail to meet two out of the three elements of standing- injury in fact and redressability.² As to injury in fact, PHA avers that Plaintiffs have not pled facts sufficient to support an inference that Plaintiffs have suffered any injury-in-fact. Specifically, PHA contends that Plaintiffs lack standing to obtain injunctive relief or assert any claims for violation of the current federal housing regulations governing lead-based paint because neither Plaintiff has alleged ongoing harm or threatened future harm as a result of PHA’s actions or inactions. (See Def.’s Mot. to Dismiss at 10-11.) In response, Plaintiffs assert that they have alleged sufficient past and present statutory and regulatory violations such that the Court can infer that future violations threaten to continue, resulting in continued lead exposures and a compromised ability to obtain safe, lead-free Section 8 housing. (See Pls.’ Resp. at 25.)

Upon review of Plaintiffs’ Second Amended Complaint, the Court finds that Plaintiffs have recited allegations which establish injury in fact. Nevertheless, PHA raises an additional

²Although PHA does not discuss causation, it explicitly states that it does not concede this element of standing for Article III purposes. (See Def.’s Mot. to Dismiss at 11, n.7.)

argument with respect to Plaintiff Paige which the Court will address. Relying on the Supreme Court's decision in Lujan v. Defenders of Wildlife, which held that "some day intentions- without any description of concrete plans, or indeed any specification of when the some day will be- do not support a finding of the 'actual or imminent' injury [required for Article III standing]," 504 U.S. at 564, PHA argues that Plaintiff Paige lacks standing because she is no longer a Section 8 tenant and the possibility that she may become a Section 8 tenant sometime in the future is insufficient to satisfy the requirement of "actual or imminent" injury. (See Def.'s Mot. to Dismiss at 12-13.) Although this Court would readily agree that if Plaintiff Paige had never been a resident of or had never applied for Section 8 housing, the facts alleged in the Complaint would be insufficient to establish injury in fact. However, Plaintiff Paige is no longer a Section 8 tenant due to the alleged failure of PHA to comply with federal regulations governing lead-based paint. It seems wholly unfair and contra logic for PHA, who is alleged to be the proximate cause of Plaintiff losing her Section 8 status, to now use the loss of that status as a means to prevent Plaintiff from seeking redress. Accordingly, both the Paige and Hanible plaintiffs have sufficiently averred the injury in fact element of standing.

As to redressability, PHA contends that Plaintiffs' requested relief would not redress the harms of which Plaintiffs complain. (See Def.'s Mot. to Dismiss at 10.) Specifically, PHA contends that an injunction cannot provide Plaintiffs redress and advances the same arguments as posed regarding Plaintiffs' failure to establish injury in fact, namely, that injunctive relief will not provide redress to Plaintiff Paige because she is no longer a resident of Section 8 housing. Moreover, PHA avers that because Plaintiff Hanible did not allege that she ever paid

unsubsidized rent, neither reimbursements nor vouchers will redress her injuries. (See Def.'s Mot. to Dismiss at 14-15.)

Despite PHA's arguments, the Court finds that Plaintiffs sufficiently aver that the injuries suffered by them are redressable. Plaintiffs successfully claim that if PHA is required to abide by the regulations, lead-free Section 8 housing will become available to them. Since Plaintiffs have successfully averred the elements of standing, the Court will not dismiss Plaintiffs' Second Amended Complaint on this basis.

B. Injunctive Relief

PHA also attacks Plaintiffs' claims for injunctive relief on the following three grounds: (1) 24 C.F.R. § 982.401(j) was repealed, and thus, the Court cannot enforce compliance with that regulation through an injunction; (2) an injunction enforcing the post-September regulations based on PHA's pre-September conduct would be a retroactive application of law and even though Plaintiffs invoke the current regulation, 24 C.F.R. Part 35 (2000) as a source of injunctive relief, because their cause of action arises under PHA's conduct prior to the effective date of this regulation, any application of this regulation would also be a retroactive application of the law; and (3) Plaintiffs cannot cite any current regulation as a source for injunctive relief because they have failed to plead that PHA violated any current regulations. (See Def.'s Mot. to Dismiss at 15-16.) Plaintiffs respond by averring that they are not seeking retroactive relief. Rather, Plaintiffs assert that the relief requested seeks compliance with regulations in their current form.

In light of the notice pleading standard restated by the Supreme Court in Swierkiewicz, see supra Part III.A, it is not appropriate for the Court to make preliminary rulings and fashion relief prior to the development of a record which serves as a basis for imposing liability even

though the Complaint does set forth allegations which are sufficient to permit the matter to proceed. Therefore, until a more detailed factual record is developed, the Court cannot decide Plaintiffs' request for injunctive relief. However, Defendant is not precluded from raising this issue again at a later stage, after discovery and the development of a proper record.

C. 42 U.S.C. § 1983

Plaintiffs' claims arise under § 1983. Specifically, Plaintiffs allege that PHA's past and current violations of the United States Housing Act, the Lead Based Paint Poisoning Prevention Act and the federal lead-based paint regulations promulgated pursuant to these statutes have resulted in a violation of their rights under § 1983. Section 1983 imposes liability on anyone who, under color of state law, deprives a person of "any rights, privileges, or immunities secured by the Constitution and [federal] laws." Blessing v. Freestone, 520 U.S. 329, 340 (1997). Therefore, to seek redress under § 1983, a plaintiff must assert the violation of a federal right, not merely a violation of a federal law. See id. (citation omitted).

In determining whether a party has a cause of action under § 1983 arising out of the United States Housing Act, the Lead Based Paint Poisoning Prevention Act and their implementing regulations, a court must apply a two-pronged test: (1) whether Congress has foreclosed such enforcement of the statute in the enactment itself; and (2) whether the statute creates enforceable rights, privileges or immunities within the meaning of § 1983. See Wright v. Roanoke Redevelopment and Housing Auth., 479 U.S. 418, 423 (1987). As to the second prong, a court must evaluate whether: (1) the provisions are intended to benefit the plaintiff; (2) the provisions of the statute impose some binding or mandatory obligation on the state entity or whether those obligations are merely precatory in nature; and (3) the interest of the party seeking

redress under § 1983 is so vague and amorphous as to be beyond the competence of the judiciary to enforce. See Blessing, 520 U.S. at 340-41.

PHA avers that Plaintiffs' § 1983 claim fails because Plaintiffs have not alleged that PHA has violated any "specific term" of the current regulations with respect to Plaintiffs and that the specific HUD regulations upon which Plaintiffs rely as a source of relief, 24 C.F.R. § 982.401(j), is vague and ambiguous and therefore, cannot confer a federal right for § 1983 purposes. PHA asserts that this provision, which is alleged to have required PHA to pay for XRF testing in Section 8 rental houses owned by private landlords, did not expressly state who was responsible for paying for XRF tests, and as such, PHA argues that it could not have made a knowing acceptance of its obligations. PHA, therefore, challenges only the second prong of the test to establish a claim under §1983.³ Plaintiffs counter, asserting that they have pled violations of the current lead-based paint regulations and that those pleadings are sufficient under the pleading requirements pursuant to Fed.R.Civ.P. 8(a).

Plaintiffs' arguments are persuasive. Upon review of the Complaint, it is clear that Plaintiffs have alleged violations of practically every statutory provision related to the Section 8 Program, which in sum, allegedly deprives Plaintiffs of decent, safe and sanitary Section 8 housing because they have minor children with EBLs. Accordingly, the Court will deny PHA's motion seeking dismissal of Plaintiffs' § 1983 claim.

³PHA recognizes that the Court, in its August 9, 2000 Memorandum Opinion, recognized that Plaintiffs may pursue a cause of action under § 1983 because Congress has not specifically foreclosed such a cause of action under the United States Housing Act, the Lead Based Paint Poisoning Prevention Act and their implementing regulations. See Paige v. Philadelphia Housing Authority, No. 99-CV-497, 2000 U.S. Dist. LEXIS 11973, at *6-7 (E.D. Pa. 2000).

D. Fair Housing Act, Rehabilitation Act, Americans with Disabilities Act, and Equal Protection Claim

In Counts II, III, IV, and V of their Complaint, Plaintiffs claim that PHA has violated and continues to violate the Fair Housing Act, the Rehabilitation Act, the ADA and the Equal Protection Clause of the Fourteenth Amendment by charging Section 8 property owners and tenants for required housing inspections in violation of 24 C.F.R. § 982.405(e). As a result of PHA's alleged violations of the above-mentioned regulation, Plaintiffs claim that they have been, are being, and are at risk of being victims of housing discrimination and of being otherwise denied the benefits of the Section 8 Program.

PHA argues that Plaintiffs' claims under the Fair Housing Act, the Rehabilitation Act and the ADA should be dismissed because Plaintiffs have failed to allege that they are disabled under those statutes. Specifically, PHA claims that Plaintiffs have failed to allege that the minor Plaintiffs are disabled such that they suffer from a "physical or mental impairment that substantially limits one or more major life activities." See, e.g., 42 U.S.C. § 3602(h); 42 U.S.C. § 12102(2). PHA also asserts that even if the minor Plaintiffs are considered disabled, they fail to state a claim for discrimination by failing to allege specific instances of discrimination where they, as children identified with an EBL, were treated differently than non-EBL children. Finally, PHA argues that Plaintiffs' equal protection claim is misstated and therefore should be dismissed.

Despite PHA's attempt to take a "second bite at the apple," the Court finds, as in its previous Memorandum Opinion, that under the liberal notice pleading requirements in federal court, Plaintiffs' allegations are sufficient to support claims against PHA for violations of the Fair Housing Act, the Rehabilitation Act, and the ADA as well as Plaintiffs' discrimination and

equal protection claims. Accordingly, the Court will deny PHA's motion to dismiss these claims. Whether there will be facts to substantiate these allegations must be made at a later stage of the proceedings.

E. Failure to Join Indispensable Parties

PHA argues that Section 8 landlords are necessary and indispensable parties to the instant action and Plaintiffs' failure to join them as such requires the dismissal of Plaintiffs' discrimination claims in Counts II, III, IV, and V. (See Def.'s Mot. to Dismiss at 37.) Pursuant to Rule 19(a) of the Federal Rules of Civil Procedure, the threshold inquiry is whether a party is "necessary." See Wood & Locker, Inc. v. Doran & Associates, 708 F. Supp. 684, 689 (E.D. Pa. 1989). A party is necessary if either (1) the present parties will be denied complete relief in the absence of the party to be joined, or (2) the absent party will suffer some loss or be put at risk of suffering such a loss if not joined. See Fed.R.Civ.P. 19(a). If a party is determined not to be "necessary," the party is not "indispensable" to the action. See Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 404 (3d Cir. 1993). If the party is found to be necessary, and therefore, should be joined but joinder is not feasible because it would defeat jurisdiction, the court must determine under Fed.R.Civ.P. 19(b) whether "in equity and good conscience" the action should proceed without the absent party or whether the absent party is indispensable and the action should be dismissed. See Koppers Co. v. Aetna Cas. & Sur. Co., 158 F.3d 170, 175 (3d Cir. 1998) (footnote omitted) (citation omitted). The party raising the defense of failure to join an indispensable party has the burden to show that the person who is not joined is needed for a just adjudication. See Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1609.

The Court finds that PHA has not met this burden. In the Complaint, Plaintiffs allege that PHA's failure to comply with regulations, namely, their passing on the costs of required housing inspections in Section 8 properties where children with EBLs resided to Section 8 property owners and tenants in violation of 24 C.F.R. § 982.405(e), resulted in Section 8 landlords refusing to rent to them because of the charge associated with renting to those who had minor children with EBLs. (Sec. Am. Compl. ¶¶ 70, 72.) Therefore, PHA's argument, that Section 8 landlords are necessary and indispensable parties, is merely an attempt to shift the thrust of Plaintiffs' discrimination allegations, which are aimed solely at PHA's alleged failure to comply with the federal lead-based paint regulations, to the conduct of the Section 8 landlords. Accordingly, the Court will deny PHA's motion to dismiss Plaintiff's discrimination claims contained in Counts II, III, IV, and V.

F. Medical Monitoring

Plaintiff requests a mandatory injunction requiring PHA to fund a Court-established and Court-supervised fund for medical monitoring. As pled by Plaintiffs, medical monitoring is one of the remedies sought, but until a record has been developed and there has been a hearing as to the appropriate remedies to be applied, the Court can make no determination as to whether there is or is not liability and what remedies are appropriate. Therefore, at this time, the Court will defer ruling on Plaintiffs' request for medical monitoring.

G. Court-Supervised Funds

PHA requests that the Court strike Plaintiffs' demand for the establishment of a court-supervised fund on the basis that the fund, which is described by Plaintiffs as a repository for the requested injunctive relief, is nothing more than a transparent attempt to obtain monetary or

compensatory damages on a class-wide basis and is therefore, inconsistent with class certification under Rule 23(b)(2).⁴ Although the Court is aware of the significance of this issue, it is best to resolve this issue in conjunction with class certification. Therefore, I will defer ruling on Plaintiffs' request for court-supervised funds until a ruling is made on class certification, or thereafter.

H. **Scienter Standards**

Finally, PHA argues that Plaintiffs have pled incorrect scienter standards to satisfy the burden of proof required for culpability under § 1983, and as such, those scienter standards should be stricken from Plaintiffs' Second Amended Complaint. PHA asserts that the appropriate standard by which PHA is to be measured under § 1983 is "deliberate indifference," not "recklessness" "willfulness," "wantonness," "purposefulness" or "negligence" as pled by Plaintiffs. (See Sec. Am. Compl. ¶¶ 90, 104, 105.) Plaintiffs do not substantively respond to PHA's claim. Rather, they categorize PHA's argument as a premature Motion for Summary Judgment.

Under the standard recognized by the Supreme Court in Swierkiewicz, see *supra* Part III.A, Plaintiffs are not required to precisely plead the scienter standards at this stage of the litigation. The Court, therefore, will deny PHA's motion to strike the scienter standards in Plaintiffs' Second Amended Complaint and will defer making a determination as to whether the proper scienter standards can be met to a time following the close of discovery.

⁴Plaintiffs claim that the court-supervised funds would be for (1) medical monitoring and (2) to reimburse Section 8 tenants who have lost their Section 8 certificates and/or vouchers and have been forced to pay unsubsidized rent. Plaintiffs also request that PHA re-issue Section 8 housing certificates to Plaintiffs and to those who have been terminated from the Section 8 Program. (See Sec. Am. Compl. *ad damnum* clause ¶¶ (d)-(g).)

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOAN PAIGE, individually and as parent and	:	
natural guardian of TISHA PAIGE, an infant,	:	
and KISHIA HANIBLE, individually and as	:	
parent and natural guardian of DONTAY	:	
HANIBLE and QUINTRAL LOWRY, infants,	:	
on behalf of themselves and all other persons	:	
similarly situated,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	NO. 99-CV-497
	:	
	:	
PHILADELPHIA HOUSING AUTHORITY,	:	
Defendant.	:	

ORDER

AND NOW, this _____ March, 2002, upon consideration of Defendant's Motion to Dismiss Plaintiffs' Second Amended Class Action Complaint, Plaintiffs' Response, Defendant's Reply and Plaintiffs' Sur-reply, **IT IS HEREBY ORDERED** that Defendant's motion is **DENIED. IT IS FURTHER ORDERED** that Defendant shall file an Answer to Plaintiffs' Second Amended Class Action Complaint within **fifteen (15) days. IT IS FURTHER ORDERED** that the Deputy Clerk schedule a conference after the aforesaid Answer is filed.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.

