STATE OF MICHIGAN
MICHIGAN SUPREME COURT

TRIAL LAWYERS ASSOCIATION OF WAYNE COUNTY JUVENILE COURT; SUE E. RADULOVICH P.C.; SUE E. RADULOVICH, as Next Friend of NADIA E., a Minor; SUE E. RADULOVICH, as Next Friend of TOMMIE P., a Minor; DEBORAH TRENT; DEBORAH TRENT, as Next Friend of TONY B., a Minor; MURIEL SHILLINGFORD; MURIEL SHILLINGFORD, as Next Friend of KIMBERLY S., a Minor; JEREMY BRAND; JEREMY BRAND, as Next Friend of NAOMI S., a Minor; JEREMY BRAND, as Next Friend of KYISHIA R., a Minor, JEREMY BRAND, as Next Friend of TERRI N., a Minor; SYDNEY L. RUBY; SYDNEY L. RUBY, as Next Friend of CLARENCE S., a Minor; SYDNEY L. RUBY, as Next Friend of WILLIAM and WESLEY D., Minors; PATRICK DEVINE; PATRICK DEVINE, as Next Friend of JUSTIN S., on behalf of themselves and all others similarly situated,

Plaintiffs,

vs. Docket No. 133616

HON. MARY BETH KELLY, CHIEF JUDGE THIRD JUDICIAL CIRCUIT COURT, in her official administrative capacity; THIRD JUDICIALCIRCUIT COURT, jointly and severally,

Defendants.

____/

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PLAINTIFFS' REPLY TO DEFENDANTS' BRIEF IN SUPPORT OF ANSWER TO PLAINTIFFS' COMPLAINT FOR SUPERINTENDING CONTROL

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I. INTRODUCTION

A) DEFENDANTS IGNORE CRITICAL LEGAL ARGUMENTS.

Defendants completely ignore several critical legal arguments raised by Plaintiffs. For example, in arguing that the right to counsel in child protective proceedings is statutory, not constitutional, **[Def. Brief, p. 34, fn 17]**, Defendants cite *In re AMB*, 248 Mich App 144; 640 NW 2d 262 (2001), without acknowledging *In re EP*, 234 Mich App 582; 595 NW 2d 167 (1999), which clearly attributes the right to assistance of counsel in child protective proceedings to the constitutional right to due process,[1] or the *AMB* court's misapplication of *In re EP.*[2] Nor do they acknowledge or respond to the cases from other jurisdictions that have explicitly recognized such a constitutional right.[3] They further ignore the legal authority which has found systemic violations of the constitutional right to effective assistance of counsel can occur under circumstances very similar to the juvenile court appointment system implemented by Defendants in this case. [4]

Further, Defendants criticize Plaintiffs' reliance on *Recorder's Court Bar Association v Wayne County Circuit Court*, 443 Mich 110; 503 NW 2d 885 (1993), but fail to understand the argument. (Defs. Brief pp. 37-39). Plaintiffs cite *Recorder's Court*, not for a holding of ineffective assistance per se, but rather to point out that the flat fee system found unreasonable by this Court in that case, in part because it created financial disincentives for attorneys to provide effective assistance, *Recorder's Court* at 115, is analogous to the flat fee system created by Defendants in this case. By extension, other courts that have addressed the specific issue of juveniles' rights to effective assistance have looked at the reasonableness of the compensation to court appointed

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[1] As fully discussed in *Brief in Support of Plaintiff's Complaint* (hereinafter *"Plaintiffs' Brief"*), pp. 26-30 and cases cited therein, *In re EP* clearly attributes the juvenile's right of assistance of counsel to the constitutional right to due process.

[2] See *Plaintiffs'Brief,* p. 27, fn 30.

[3] See *Plaintiffs'Brief,* pp. 26-30 and cases cited therein.

[4] See *Plaintiff's Brief,* pp. 38-39 and cases cited therein, in particular *New York County Lawyers' Association (NYCLA) v New York*, 196 Misc 2d 761; 763 NYS 2d 397 (NY Sup Ct 2003).

counsel, which Defendants have completely ignored.[5]

Defendants further rely on the contract system that was implemented in Genesee County in 2004 as support for such a system in Wayne County. (Defs. Brief p.4; **Def. Exh. F**) It is noteworthy that there is currently pending a constitutional challenge to a similar contract system used in Genesee County, among others, for the appointment of counsel for adult indigent criminal defendants.[6]

B) DEFENDANTS' AFFIDAVITS SHOULD BE DISREGARDED.

Defendants present to this Court numerous legal arguments based on factual assertions, claims, innuendos and conclusions, as set forth in their *Brief* and Affidavits, which are neither credible nor supported by the record to date. Defendant's submissions are, indeed, so misleading that they should be disregarded.[7] However, at a minimum, they reveal numerous relevant factual questions that require resolution in order for this Court to fully and fairly adjudicate this matter.[8]

Six of the Affidavits in support of Defendants' position contain numerous *unspecified* charges against the Plaintiffs, vague generalizations regarding each contractor "group's" ability to effectively represent the children, and "facts" being sworn to by the affiants, on behalf of organizations, which are *not from their own personal knowledge,* but rather from the purported experiences of unidentified third persons.[9] In addition, presumably in support of their assertions, Defendants attach several pages of computer-generated docket printouts which allegedly show that

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[5] See *Plaintiff's Brief,* pp. 34-39 and cases cited therein

[6] *Duncan, et al v. State of Michigan, et al.,*CA No. 07-242-CZ, (Ingham Co. Circuit Court, filed 2/22/07).

[7] The factual inaccuracies and misstatements are identified in the attached Affidavits. **[Exh. 35, 36, 39-42; Brand Supp. Aff't, ¶¶ 9-14, 18, 19, 22-24; Devine Aff't, ¶¶ 6-12; Radulovich Supp. Aff't, ¶¶ 6-9, 12, 18-22; Ruby Aff't, ¶ 9-14; Shillingford Supp. Aff't, ¶¶ 6-10, 12,-15; Trent Supp. Aff't, ¶¶ 9-21]**.

[8] Plaintiffs' *Motion for Immediate Consideration,* filed along with their Complaint for Superintending Control, seeks guidance from the Court regarding the issue of discovery and a discovery schedule.

[9] It is axiomatic that an affidavit must "… be made on the basis of personal knowledge and must set forth with particularity such facts as would be admissible as evidence…*Durant v Stahlin,* 375 Mich 628; 135 NW 2d 392(1965)…Opinions, conclusionary denials…, and inadmissible hearsay…" are not sufficient. *SSC Associates Ltd Partnership v General Retirement System of City of Detroit,* 192 Mich App 360, 364; 480 NW 2d 275 (1991). Defendants' affidavits set forth numerous unspecified, conclusory, general factual assertions as well as inadmissible hearsay and opinions. See for example: **Def. Exh. C, Child Advocacy Program ("CAP"), ¶¶ 3, 6; Def. Exh. E, Mays, ¶¶ 8, 15, 17**; **Def. Exh. H, Gruber, ¶¶ 6, 7.** Especially problematic are the two Affidavits submitted by "groups" (**Def. Exhs. C, "CAP"** and **D, "Child & Family Law Center" ("CFLC")**) as opposed to individual persons, one of which is signed by two people (**Def. Exh. D**). As such, this Court cannot properly rely upon them. See also **Def.**

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210 "substitutions" appear in the court records during a self-selected two week period (April 17-21, 2006 and August 7-11, 2006). **[Def. Exhs. A, I; Kelly Aff't ¶¶ 12-13, Kost Aff't ¶ 19, and attachments].** The inaccuracies and mischaracterizations of this portion of the Kelly affidavit are clearly demonstrated in the attached Affidavits.[10]

II. THE CLEAN HANDS DOCTRINE DOES NOT APPLY IN THIS CASE

In addition to the Defendants' factual inaccuracies, they have completely misapplied the "clean hands" doctrine, which bars actions in equity by plaintiffs whose claims are "tainted with *inequitableness* or *bad faith* relative to the matter in which [they] seek[] relief." *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW 2d 529 (1975). In *Stachnik*, the inequitable/bad faith act by the plaintiffs was intentionally misrepresenting that they were purchasing land on behalf of their employer, when they actually intended to purchase it for their personal use.[11]

Defendants' reliance on *Rose v Nat'l Auction Group, Inc*, 477 Mich 453; 646 NW 2d 455 (2002) is misplaced, where this Court found unclean hands when the plaintiff was involved in blatantly unethical conduct that gave rise to his claim. *Id* at 466-467. The Plaintiffs' alleged "unclean hands" conduct in this case, i.e., frequent or "excessive" substitutions is simply not the kind of egregious misconduct to which the doctrine of unclean hands applies (i.e., fraud, collusion, unethical conduct, etc.). *First*, the substitutions by the Plaintiff Attorneys always conformed with MCR 3.915(D)[12] *Second*, Defendants misrepresent the nature and frequency of substitutions.[13]

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Exh. I, Aff't of Kost, which is filled with speculation and hearsay, **[¶¶ 14, 18]**

[10] **Exh. 35, 36, 39-42; Brand Supp. Aff't, ¶¶ 9-14, 18, 19, 22-24; Devine Aff't, ¶¶ 6-12; Radulovich Supp. Aff't, ¶¶ 6-9, 12, 18-22; Ruby Aff't, ¶ 9-14; Shillingford Supp. Aff't, ¶¶ 6-10, 12,-15; Trent Supp. Aff't, ¶¶ 9-21**.

[11] In applying the doctrine in that case where the plaintiffs sued for specific performance of the agreement, this Court said, " In determining whether the plaintiffs come before this Court with clean hands, ***the primary factor to be considered is whether the plaintiffs sought to mislead or deceive the other party, not whether that party relied upon plaintiff's misrepresentations***." *Id* at 387. [Emphasis added.]

[12] **[Exhs. 35, 36, 40-42, Brand Supp. Aff't, ¶ 16; Devine Aff't, ¶ 10; Ruby Aff't, ¶ 8; Shillingford Aff't, ¶ 14; Trent Supp. Aff't, ¶ 7]**.Furthermore, if the previous system created too many conflicting court schedules which made it physically impossible for the same attorney to appear in two different courtrooms at the same time, then the solution would have been to revamp the way in which those hearings were being scheduled, not to replace the entire system with one that is in violation of the law and the children's rights.

Third, the court orders to turn over documents were impossible to comply with because they **did not name new counsel** to whom documents should be supplied. Further, Plaintiffs questioned then and challenge now the Court's legal authority to issue those orders. *Fourth*, with respect to the assertion that Plaintiff Attorneys continue to appear of behalf of children from whom they have been removed as counsel, Plaintiffs assert that such conduct results from the dedication they have to their clients. Many children have expressly requested that the Attorney Plaintiffs continue to represent them (without payment for such services), and some Attorney Plaintiffs' names continued to appear as counsel of record beyond the date of the removal orders. **[Pl. Exhs. 10, 11, 12, Statements Re: Representation; Complaint, ¶ 59(d)]**[14]

Moreover, even assuming arguendo that Defendant's position has any merit, the solution is for the court to more effectively enforce the requirements already in place under the Michigan Juvenile Code, MCLA §712A.17d, and the Michigan Court Rules, particularly MCR 3.915(B)(a) and (D)(2). If in fact there was attorney misconduct, then it was the obligation of the Defendant Court to take the steps to remedy that misconduct through the appropriate channels under the Michigan Court Rules or within the State Bar of Michigan.

III. THE NEW "GROUP" REPRESENTATION SYSTEM RESULTS IN EQUAL OR GREATER SUBSTITUTIONS WITH NO ACCOUNTABILITY

Defendants' assert "excessive" substitutions under the individual attorney appointment system. **[Def. Brief, pp. 4, 9-11; Def. Exh. A, ¶¶ 12-13; Def. Exh. I Attachment]** However, under

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[13]**[Exhs. 35, 36, 39-42; Brand Supp. Aff't, ¶¶ 9-14, 18, 19, 22-24; Devine Aff't, ¶¶ 6-12; Radulovich Supp. Aff't, ¶¶ 18-20; Ruby Aff't, ¶¶ 9-12; Shillingford Supp. Aff't, ¶¶ 12-14; Trent Supp. Aff't, ¶¶ 9-10, 16-21]**. Moreover, he 210 "substitutions" contain numerous duplications and references to the same hearings on the same dates, showing that nowhere near that number of substitutions actually occurred. **[Def. Exh. I, attachment]**

[14] Also, as the primary complainants in this matter, the Minor Plaintiffs are in no way associated with any of the alleged conduct complained of by the Defendants. Denial of relief to Minor Plaintiffs based on alleged conduct of Plaintiff Attorneys would preclude the ability of the children to assert and obtain relief for violations of their constitutional rights to the effective assistance of counsel. The clean hands doctrine cannot be applied where such application would result in further inequity. *Schauffler v Brewery and Beer Distributor Drivers*, 162 F. Supp 1, 10 (ED Penn, 1958) [The defense of unclean hands is "only applicable where there is unconscionable conduct and an adequate showing of corrupt intent, that the maxim is not applicable where an inequitable result would be reached by following it, and that one who comes into a

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the new "group" appointment system, substitutions of individual attorneys continue with equal or greater frequency, with far less accountability or judicial oversight.[15] Although Defendants assure this Court, both in their Brief and their attached Affidavits,[16] that each group "assigns" individual attorneys to represent individual children, the undisputed fact remains that under the new "group" assignment system, the court records recognize only the "group" itself as the attorney of record, so there is no judicial control, no accountability, no way for the Court to effectively monitor or even keep track of the actual number of substitutions that occur within the respective "groups."[17]

IV. "SPECIAL CIRCUMSTANCES' MOTION IS INADEQUATE LEGAL REMEDY

Superintending control is only appropriate where there is no other adequate legal remedy. MCR 3.302. Justice Boyle in *Recorder's Court, supra,* held that an extraordinary fee mechanism was *not* an adequate remedy where the fee system created "systemic unreasonableness," and even where an attorney receives the fee by application or on appeal, "all they would have to look forward to is another appeal after the next assignment because the underlying problem would remain unchanged." *Id* at 135.[18]

Defendants cite *Bennett v School Dist. of City of Royal Oak*, 10 Mich App 265 (1968) to

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court of equity is not required to come in with spotless hands.")

[15] This is dramatically exemplified by Defendants' admission that in the case of the *Robertson-Hensley* family, (referred to in the Affidavits of both Plaintiff Brand **[Pl. Exh. 30, ¶¶ 15-21]** and Regina Daniels Thomas **[Def. Exh. G, ¶¶ 11-13]**), three (3) different individual attorneys appeared on behalf of the children at four (4) hearings over less than a 3-month time period. It is noteworthy that these substitutions will presumably not appear on the docket printout as "substitutions," because the only "attorney of record" identified is the "group," (LADA in this case), thereby creating the false impression that there were no substitutions. Even more striking is that in Minor Plaintiff Terri N's case, where after her LGAL Brand was removed in January 2007, **[Exh. 12],** at *the hearing which occurred on April 10, 2007*, *a* ***substitute*** *appeared for MCLC.* **[Def. Exh. I, attached to Kost Aff't. See also Exh. 35, Brand Supp. Aff't, ¶ 26 and Devine Aff't, ¶¶ 11-12].**

[16] **[Def. Brief, pp. 30-31; Def. Exhs. C-E, G, H; "CAP" Aff't," ¶ 5; "CFLC" Aff't ¶¶ 23, 25; Mays Aff't, ¶ 9; Thomas Aff't, ¶ 6; Gruber Aff't, ¶ 4]**

[17] Under the "group" contract system, as long as someone from the "group" appears at the hearing for the child, it matters not which individual attorney it is. Thus, the Court has relieved itself of all responsibility to inquire on the record whether substitute counsel is adequately prepared to represent a child, thereby subverting the requirements of MCR 3.915(D)(2) and, instead, accepts with blind faith that any group members, regardless of the group's size or caseload, will be automatically familiar with the case and prepared to proceed. This has already been shown not to be true in the Robinson-Hensley case, as summarized in the Affidavit of Plaintiff Brand, **[Pl. Exh. 31, ¶¶ 15-21]**. This is also exemplified by the facts presented to this Court by Defendants themselves, e.g., **Def. Exhs. D (¶ 26), H (¶ 11).** See also, *Plaintiffs' Brief* pp. 25, 40-4 and **Exhs. 35, 36; Brand Supp. Aff't, ¶ 26; Devine Aff't, ¶¶ 11-12.**

argue that Plaintiffs have not exhausted their remedies under LAO 2006-08 §III.D.3 (the "special circumstances" motion). In *Bennett,* however, unlike here, the plaintiff seeking superintending control had available to him a statutory right to a post-suspension hearing, with the right to appeal, which adequately protected his rights.[19] On the contrary, in this case, a "special circumstances" motion cannot properly challenge the validity of LAO 2006-08, the legal authority of the Chief Judge to remove individual attorneys to begin with, or the systemic violations of children's rights, and the Court of Appeals does not have jurisdiction to hear such challenges.[20]

While Defendants attempt to distinguish their case from *Recorder's Court* by pointing out that a "special circumstances" motion can deal with more than one removal at a time, this does not change the fact that such motions do not and cannot challenge the general practice of the court promulgated by LAO 2006-08 claimed in the present action.[21]

Moreover, with respect to the Defendants' asserted "objective" criteria for determining "special circumstances," when Attorney Christina Vadino moved to be retained as LGAL on behalf of her minor client, Jalen R., who she had been representing for nearly two years (having appeared at numerous hearings on his behalf and having visited with him on numerous occasions), her request was denied. **[Def. Exh. B, attached Transcript]** It is apparent from a review of the transcript[22] that Defendant Kelly's ruling was based almost exclusively on the fact that Ms. Vadino missed two

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[18] See *Plaintiffs' Brief,* pp. 46-49. See also **Exh. 39, Radulovich Supp. Aff't, ¶¶ 8-9.**
[19] Defendants also assert that Radulovich failed to exhaust available remedy by not seeking leave to appeal denial of her motion. **[Def. Brief p. 8].** Plaintiffs address the inadequacy of this "remedy" due to the Court of Appeals' lack of jurisdiction to hear challenges to the general practices of lower courts. See *Plaintiff's Brief* pp. 13-14
[20] See *Lapeer County Clerk v Lapeer Circuit Judges,* 465 Mich 559; 640 NW2d 567 (2002) and *Plaintiffs' Brief* p. 48 for discussion regarding former attorney's lack of standing to assert the rights of children. See also argument *infra* regarding Plaintiff Attorneys' standing to assert rights of Plaintiff Children as Next Friends.
[21] See *Plaintiffs' Brief* pp. 13-14 for full discussion of Michigan Supreme Court's exclusive jurisdiction.
[22] Although Chief Judge Kelly states that she denied Ms. Vadino's Motion because of the "…relatively short duration of the representation," **[Def. Exh. B, Transcript p. 6],** it is also true that Judge Kelly has granted other motions in cases where the representation was for much less time, such as Ms. Vadino's other case involving Sharita and Tierra. **[Def. Exh. B, Transcript p. 11-13].**

hearings over the nearly 2-year period[23]. **[Exh. B, Tr. pp. 5-6].**

Defendants also rely on the assertion that of the 97 "special circumstances" motions that have been filed, only 29 (30%) of them have been denied.[24] (Defendants' Brief, pp. 6-9). However, this statistic is both misleading and irrelevant. It is misleading because it appears to completely disregard the blanket denial of Plaintiff Radulovich's motion, on January 30, 2007 **[Pls. Exh. 28]** with respect to 23 of her cases on behalf of 35 minor children.[25] **[Pls. Exh. 29].** It is irrelevant, because it disregards the fact that, regardless of how few or how many such motions were granted or denied, *the court did not have the legal authority to remove one child's attorney/LGAL without showing good cause on the record as required by MCLA §712A.17c(9).*[26]

<u>V. THE DOCTRINE OF LACHES DOES NOT BAR THIS CASE</u>

The Defendants assertion of laches and their presentation of facts in support of this defense are, again, inaccurate and misleading. The way in which this new system was to be administered was not clear in late 2006, and the Plaintiffs properly filed their Complaint following due diligence in expressing their concerns to the Defendants, doing extensive legal research on the proper forum for such a legal challenge, and gathering information on the contracts in order to determine whether a claim had accrued. Furthermore, while the Defendants indicate that they could have avoided "prejudice" by ceasing contract activities and removal orders if the Plaintiffs had filed their complaint earlier, the facts show that the Defendants were well aware of the forthcoming challenge and chose to increase the potential prejudice.

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[23] She had arranged for substitute counsel at one hearing and did not appear the other because she did not receive notice.

[24] Another factual question that is raised by Defendants' Brief, pp.6-10, and attachments (Exh. B, Cucinella Affidavit), is whether the 29 motions that were denied by the court were actually single motions filed by attorneys involving multiple cases/children, or involved only 29 children.

[25] Another glaring example of the massive confusion being created by Defendants' "group" contract system, and the misleading nature of Defendants' factual assertions to this Court, is that on January 9, 2007, (3 weeks *prior* to the issuance of her January 30 Opinion **[Pls. Exh. 28]),** Chief Judge Kelly *orally* granted Plaintiff Radulovich's motion as to approximately 29 of the 35 children she was previously representing, and then, on January 30 issued her written Opinion denying her Motion in total. **[Exh. 28]** Even after Defendant Chief Judge Kelly purportedly *granted* whatever motions she claims to have granted, Defendant Court's computer system continues to treat the attorneys as having been removed and continues to issue Orders of Removal on those same cases. **[Exh. 39, Radulovich Supp'l Aff't, ¶¶ 5-7].**

A. PLAINTIFFS EXERCISED DUE DILIGENCE IN ASSERTING THEIR CLAIM AND/OR ANY POSSIBLE DELAY IS ESCUSED OR EXPLAINED.

For laches to apply, Defendants must prove not only delay and prejudice, but lack of due diligence by the Plaintiffs. *Regents of the University of Michigan v State Farm Mut Ins Co*,[27] 250 Mich App 719, 734; 650 NW 2d 129 (2002), *Eberhard v. Harper-Grace Hospitals*, [28] 179 Mich App 24, 38; 445 NW 2d 469 (1989), *In re Estate of Crawford*, 115 Mich App 19, 26; 320 NW 2d 276 (1982). "Laches is concerned mainly with the question of the inequity of permitting a claim to be enforced and depends on whether the plaintiff has been wanting in due diligence." *Crawford* at 26.

In the present action, Plaintiff Attorneys have publicly voiced their concerns as early as April 2006. **[Exhs. 36, 38, 39, 43; Devine Aff't, ¶ 14; Owdziej Aff't, ¶ 9; Radulovich Supp. Aff't, ¶¶ 10-11; Media]** Plaintiffs have also attempted to obtain copies of the contracts in order to assess the impact on children's rights, to no avail. **[Pl. Exh. 5]** In pursuing their concerns of the new contract system and filing the Complaint when such action ceased to be productive, the Plaintiffs have exercised due diligence.

Furthermore, for a claim of laches to succeed, the delay must be unexcused or unexplained. *Public Health Dept v Rivergate Manor*, 452 Mich 495, 507; 550 NW 2d 515 (1996). In the case *In re Estate of Zsenyuk*, unpublished opinion per curiam of the Court of Appeals, issued May 16, 2006 (Docket No. 265080); 2006 WL 1329149, the Court of Appeals rejected the defense of laches where the plaintiff's claim had been fraudulently concealed by his parents (against whose estate he brought the claim) after over thirty years. Here, the Plaintiffs experienced several obstacles that prevented an

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[26] As fully discussed in *Plaintiffs' Brief*, pp. 16-23.
[27] In *Regents*, the plaintiff (a health care provider operated by the university's regents) sought payment from two no-fault automobile insurance companies for treatment of a man who died in 1991 as a result of serious injuries from an automobile accident. After several years of negotiating with the first insurer, State Farm, 1991-1998, the plaintiffs filed against the second insurer, Travelers Insurance in 1998. *Id* at 723-724. The Court of Appeals rejected Travelers' laches claim because the plaintiffs had exercised due diligence. *Id* at 734.
[28] The Court of Appeals, including (of which Marilyn Kelly was a panelist on this case) found reversible error where the trial court considered only passage of time and prejudice and failed to considered whether the plaintiff was lacking in due diligence. *Id* at 39.

earlier filing. Throughout the entire time period during which the court was making its plans to introduce the new "group" contract system, it was never known with certainty, until the "group" contracts were actually awarded and the Orders of Removal started to be issued in mid-to-late November 2006, exactly how the new system was going to impact the ability to adequately represent the children. **[Exhs. 5, 36; FOIA Requests; Devine Aff't, ¶ 15]** Before taking the extraordinary step of seeking superintending control from this Court, it was necessary to thoroughly research and investigate both the legal and factual bases for such a claim. These circumstances demonstrating due diligence, both excuse and explain any delay claimed by the Defendants and preclude the application of laches. **[See also Exh. 37, Hurwitz Aff't]**

B. DEFENDANTS WERE AWARE THAT THE PLAINTIFFS WERE PREPARING A LEGAL CHALLENGE.

Defendants claim that they would have ceased moving forward with the new system had the Plaintiffs filed in October 2006,[29] but such a statement is disingenuous and misleading. Defendants were aware of the Plaintiffs' intent to challenge to the system, **[Exhs. 5, 38, 43; FOIA Requests; Owdziej Aff't ¶ 9; Media]**, and were fully informed as to the nature of the claim. They nonetheless chose to continue their activities and increase the potential prejudice against themselves.[30]

In addition to the concerns expressed since April 2006 **[Exhs. 36, 38, 39, 43; Devine Aff't, ¶ 14; Owdziej Aff't, ¶ 9; Radulovich Supp. Aff't, ¶¶ 10-11; Media]**, throughout the entire time that Defendant Court was taking steps to implement the new system, until November, 2006, the individual attorneys were repeatedly reassured that although new contracts were being awarded, the individual attorneys would not be removed from the cases to which they had already been appointed.

[29] See *Defendants Brief* p. 16 and **Def. Exh. I, Kost Aff't ¶ 14**.

[30] Yet another example of the misleading nature of the Defendants' "facts" is the way that the calculations are presented regarding resources expended. For example, Defendants claim that "..1800 employee hours have been spent between November 2006 and April 2007 to implement the new system." **[Def. Brief, p. 5; Exh. I, Kost Aff't ¶¶ 14-15].** *Yet, they do not explain how many of those hours/resources were spent issuing unlawful Orders of Removal in the beginning of April, 2007, on the eve of the filing of this action, or, how much of the court's resources were spent negotiating the contract with the Juvenile Law Group, effective April 16, 2007. Nor do they distinguish the time spent entering into*

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[Exhs. 35, 36, 39, 41, 42; Brand Supp. Aff't, ¶ 10; Devine Aff't, ¶ 13; Radulovich Supp. Aff't, ¶ 11; Shillingford Aff't ¶ 5; Trent Supp. Aff't, ¶ 5] By December 2006, the Court was notified that the Plaintiffs had retained counsel. **[Pl. Exh. 5]** Moreover, the timing of the issuance of a "gag order" to Court personnel, on March 23, 2007 **[Exh. 44]**, the mass issuance of hundreds of Orders of Removal starting on April 5, 2007, within days of the filing of this action **[Pl. Exh. 16b]**, and the entry belie the Court's claim of surprise.[31]

VI. PLAINTIFF ATTORNEYS HAVE STANDING TO ASSERT CLAIMS OF PLAINTIFF CHILDREN AS THEIR NEXT FRIENDS

As of the filing of the *Reply Brief in Support of Plaintiffs' Complaint for Superintending Control*, Plaintiffs have also filed *Petitions for Appointment of Next Friend* on behalf of all of the Plaintiff Children and a *Motion for Appointment* in compliance with Michigan Court Rule 2.201(E)(2). Therefore, the Plaintiff Attorneys have standing to assert the claims of the Plaintiff Children as their Next Friends.[32]

Respectfully submitted,

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contracts from the time spent issuing Removal Orders. Furthermore, Defendants fail to point out how the expenses of implementing LAO 2006-08 are distinguished from the prior method of appointing counsel.

[31] Indeed, Defendants entered a contract with Juvenile Law Group that became effective on April 16, 2007, ***six days after*** the Plaintiffs filed their Complaint. This certainly contradicts the Defendant's claim that they would have ceased activity had the Complaint been filed earlier.

[32] In the event that this Court should deny such a motion, the Plaintiff Attorneys would still have standing as having suffered an injury in fact (removal from their assignments without good cause, economic loss, interference with property interest and ethical dilemma as described in Count V of the *Complaint*), there is a causal connection between the injury and the conduct complained of, the injury will likely be redressed by a favorable decision, the Plaintiff Attorneys have a close relationship with the Plaintiff Children as their former attorneys and/or L-GALS (see e.g., "Statements Regarding Representation, **[Pl. Exhs. 10, 11, 12]**) and there is a hindrance to the children's ability to protect their own interest in effective representation because they are minors and their newly appointed "group" counsel have an inherent conflict of interest that prevents them from asserting the claims at bar on behalf of these children. *Kowalski v Tesmer*, 543 US 125; 125 S Ct 564 (2004), *Michigan Chiropractic Counsel v Commissioner of the Office of Financial and Insurance Services*, 475 Mich 363; 716 NW 2d 561 (2005).