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United States District Court,
S.D. New York.

Joseph HAYDEN, et al., Plaintiffs,
v.
George PATAKI, Governor of the State of New York, and Carol Berman, Chairperson, New York State Board of Elections, Defendants.

No. 00 Civ. 8586(LMM). | June 14, 2004.

Opinion

MEMORANDUM AND ORDER

MCKENNA, J.

***1** Joseph Hayden, Lumumba Akinwole–Bandele, Wilson Andino, Gina Arias, Wanda Best–Deveaux, Carlos Bristol, Augustine Carmona, David Galarza, Kimalee Garner, Mark Graham, Keran Holmes III, Chaujuantheyia Lochard, Steven Mangual, Jamel Massey, Stephen Ramon, Lillian M. Rivera, Nilda Rivera, Mario Romero, Jessica Sanclemente, Paul Satterfield and Barbra Scott, on behalf of themselves and all others similarly situated ("plaintiffs"), bring this purported class action against George Pataki, Governor of the State of New York and Carol Berman, Chairperson of New York State Board of Elections ("defendants") pursuant to 42 U.S.C. § 1983 seeking to invalidate New York Constitution Article II, § 3 and New York Election Law § 5–106(2) on federal constitutional grounds and as violative of the Voting Rights Act of 1965.

Plaintiffs allege that these provisions "unlawfully deny suffrage to incarcerated and paroled felons on account of their race" in violation of the United States Constitution, the Voting Rights Act of 1965 and customary international law. (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Judgment on the Pleadings ("Pl.Mem.") at 2.) Plaintiffs seek declaratory and injunctive relief enjoining defendants from implementing and enforcing § 5–106(2). Currently pending before the court is defendants' motion for judgment on the pleadings brought pursuant to Federal Rule of Civil Procedure 12(c). For the reasons set forth below defendants' motion is granted.

BACKGROUND

Plaintiffs are black and latino individuals who have been convicted of felonies under the laws of the state of New York and were or are currently incarcerated in the New York prison system or on parole. (Am.Comp.¶¶ 5–25.) Pursuant to § 5–106(2), as incarcerated or paroled felons, plaintiffs are not permitted to vote in state or federal elections.

The state of New York has barred incarcerated felons and parolees from voting for over one hundred and seventy years. In 1821 New York adopted a constitutional amendment which stated: "Laws may be passed excluding from the right of suffrage persons who have been, or may be, convicted of infamous crimes." N.Y. Const. (1821), art. II, § 2. New York's current Constitution, adopted in 1938, contains language that has remained unaltered since 1894 and provides: "The Legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime." N.Y. Const. (1938), art. II., § 3. It is from this language that the State of New York created its felon disenfranchisement statute. New York Election Law § 5–106(2) provides:

> No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole. The governor, however, may attach as a condition to any such pardon a provision that any such person shall not have the right of suffrage until it shall have been separately restored to him.

***2** The most significant amendment to the statute since its enactment occurred in the 1970's. Pursuant to New York Laws of 1971, c. 310 § 1, the Legislature amended former New York Election Law § 152, the predecessor to § 5–106, to eliminate disqualification after a felon served his or her maximum sentence or had been discharged from parole. This change was made, according to the Senate Sponsor, because the Legislature decided that "the general philosophy of corrections" is not "to continue punishment after a person has accounted." (Defendants' Memorandum of Law in Support of Motion for Judgment on the Pleadings at 4 (quoting 1971 N.Y.S. Legis. Ann.

201) .) At the time of enactment, this amendment was supported by various civil rights organizations in New York including the Citizens Union, The Legal Aid Society Prisoner's Rights Project and the New York Civil Liberties Union, as well as the Association of the Bar of the City of New York. (Affirmation of Joel Graber ("Graber Aff.") Exs. A & B.)

Plaintiffs contend that New York Constitution Article II, § 3 and § 5–106(2) "violate the Equal Protection Clause of the Fourteenth Amendment, based on an unlawful statutory classification (first claim); the Due Process Clause of the Fourteenth Amendment (second claim); the Equal Protection Clause, based on intentional race discrimination (third claim); the Civil Rights Acts of 1957 and 1960, codified at 42 U.S.C. § 1971 (third claim); Section 2 of the Voting Rights Act of 1965, based on § 5–106(2)'s disproportionate impact on incarcerated and paroled Blacks and Latinos (fourth claim); Section 2 of the Voting Rights Act of 1965, based on § 5–106(2)'s dilution of the voting strength of Blacks and Latinos and certain minority communities in New York State (fifth claim); the First Amendment (sixth claim); and Customary International Law (seventh claim)." (Pl. Mem. at 2–3.)

DISCUSSION

I. Standard of Review

When deciding a motion for judgment on the pleadings under Rule 12(c), the court must " 'apply the same standard as that applicable to a motion under Rule 12(b)(6), accepting the allegations contained in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party." ' *Ziemba v. Wezner,* 366 F.3d 161, 163 (2d Cir.2004)(quoting *Burnette v. Carothers,* 192 F.3d 52, 56 (2d Cir.1999)).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle plaintiff to relief. *Conley v. Gibson,* 355 U.S. 41, 45–46 (1957). However, conclusory allegations that merely state the general legal conclusions necessary to prevail on the merits and are unsupported by factual averments will not be accepted as true. *See De Jesus v. Sears, Roebuck & Co., Inc.,* 87 F.3d 65, 70 (2d Cir.1995), *cert. denied,* 519 U.S. 1007 (1996) ("A complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6).").

II. Equal Protection Under the Fourteenth and Fifteenth Amendments

***3** Plaintiffs argue that their Amended Complaint sufficiently alleges a claim under the Fourteenth and Fifteenth Amendments because "New York State's extensive history of racial discrimination in voting dates as far back as the State's provisions in its constitution regarding suffrage" and "[t]hroughout the New York Constitutional Conventions addressing the right of suffrage, the framers made explicit statements of intent to discriminate against minority voters." (Am.Comp.¶ 41.) The disenfranchisement of felons, plaintiffs contend, "was one aspect of this effort to deprive minorities of the right to vote." (*Id.* ¶ 42.)

The Supreme Court has held that the language of section 2 of the Fourteenth Amendment expressly allows a state to prohibit felons from voting.[1] *Richardson v. Ramirez,* 418 U.S. 24, 55 (1974) ("[section 1 of the Fourteenth Amendment], in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement"). However, that does not mean states can pass disenfranchisement statutes for the purpose of discriminating against any particular class of persons based on race. *See Hunter v. Underwood,* 471 U.S. 222 (1985) (holding Alabama's disenfranchisement statute unconstitutional under the Equal Protection Clause because it was clearly enacted with the intent to discriminate against blacks). Therefore, a state law that is racially neutral on its face will violate the Fourteenth and Fifteenth Amendments only if its enactment was motivated by discriminatory intent. *See Village of Arlington Heights v. Metro Hous. Dev. Corp.,* 429 U.S. 252, 264–65 (1977) (holding that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause"); *see also Romeu v. Cohen,* 265 F.3d 118, 133–34 (2d Cir.2001) ("Only intentional discrimination is barred by these amendments."). Accordingly, plaintiffs' equal protection challenge will survive defendants' motion for judgment on the pleadings only if plaintiffs sufficiently allege that New York's decision to disenfranchise incarcerated and paroled felons was motivated by discriminatory intent.

[1] In fact, at the time the Civil War Amendments (Fourteenth and Fifteenth Amendments) were enacted "29 [out of 36] States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes." *Richardson v. Ramirez,* 418 U.S. 24, 48 (1974). Therefore, the prevalence of this practice prior to these Amendments being passed "indicates that felon disenfranchisement was not an attempt to evade the requirements of the Civil War Amendments or to

perpetuate racial discrimination forbidden by those amendments." *Baker v. Pataki,* 85 F.3d 919, 928 (2d Cir.1966)(opinion of Mahoney, J.).

A. ***Discriminatory Intent***

Plaintiffs allege that "New York State and governmental jurisdictions within the state have historically used a wide variety of mechanisms to discriminate against minority voters in violation of the Constitution and laws of the United States, including, *inter alia,* literacy tests, English-only election procedures, and racially discriminatory rules for purging voters from registration lists." (Am.Comp.¶ 39.) Plaintiffs claim that throughout New York's Constitutional Conventions beginning in 1777 "framers made explicit statements of intent to discriminate against minority voters" and "created certain voting requirements that expressly applied only to racial minorities." (*Id.* ¶¶ 41–42 .)

***4** In their Amended Complaint plaintiffs describe at length how laws were enacted in the early to mid–1800s creating onerous voting requirements, such as racially discriminatory property qualifications, in an effort to deny suffrage to blacks. (*Id.* ¶ 43–48, 50, 54.) However, just because some laws were enacted in the early to mid–1800s with the intent to discriminate against blacks and other minorities does not necessarily mean New York Constitution Article II, § 3 and § 5–106(2) or their predecessors were similarly enacted with such intent. The majority of allegations that plaintiffs provide in the Amended Complaint to show New York State sought to disenfranchise felons for the purpose of discriminating against blacks and other minorities are entirely conclusory in nature. In fact, the only factual allegation that could possibly support a finding of discriminatory intent is plaintiffs' allegation that during the 1846 Constitutional Convention the delegates were "[a]dvocating for the denial of equal suffrage" and they "continued to make explicit statements regarding Blacks' unfitness for suffrage including a declaration that the proportion of 'infamous crime' in the minority population was more than thirteen times that in the white population."[2] (Am.Comp.¶ 51.) However, this one allegation is simply an insufficient basis, even under the liberal standards of a Rule 12(c) motion, from which to draw the inference that these provisions or their predecessors were enacted with discriminatory intent.[3]

[2] The Amended Complaint seems to suggest that the term "infamous crime" was added to the New York State Constitution after 1846 as a result of the debates at the 1846 Constitutional Convention. However, the State legislature had been empowered to enact laws excluding from the right of suffrage those who had been convicted of "infamous crimes" since 1821. *See* N.Y. Const. (1821), art. II, § 2 ("Laws may be passed excluding from the right of suffrage persons who have been, or may be, convicted of infamous crimes.").

[3] Plaintiffs attempt to analogize their case to *Hunter v. Underwood* where the Supreme Court invalidated part of the Alabama Constitution relating to the disenfranchisement of persons convicted of, among other offenses, "any crime ... involving moral turpitude" as violative of the Equal Protection Clause. 471 U.S. 222, 233 (1985). There the Court found that because the disenfranchisement of blacks was a major purpose behind Alabama's 1901 Convention during which this provision was adopted, and because this provision would not have been enacted in absence of the racially discriminatory motivation, it was held unconstitutional. *Id.* 229–233. However, the facts of this case are very different from *Hunter.* First, in *Hunter* the Court invalidated a statute that denied suffrage to those who had committed certain misdemeanors, not felonies. Second, the plaintiffs in *Hunter* provided strong factual support showing a long history of racial discrimination including actual testimony of specific discriminatory statements made during the 1901 Constitutional Convention where a "zeal for white supremacy ran rampant". *Id.* at 229. Here, plaintiffs have not alleged any such facts with respect to the enactment of New York Constitution Article II, § 3 and § 5–106(2) or their predecessors.

B. ***Disenfranchising Only Felons Incarcerated or on Parole***

Plaintiffs also contend that "New York's non-uniform practices of disenfranchising only those felons sentenced to incarceration or serving parole are neither compelling nor rational" and thus violate the Equal Protection Clause of the Fourteenth Amendment. (Pl. Mem. at 21.)

While plaintiffs are correct that section 2 of the Fourteenth Amendment does not remove "all equal protection considerations from the state-created classifications denying the right to vote to some felons while granting it to others," *see Williams v. Taylor,* 677 F.2d 510, 516 (5th Cir.1982) (finding that "[n]o one would contend that section 2 permits a state to disenfranchise all felons and then re-enfranchise only those who are, say, white"), it is also true that "equal protection does not mean that a state must treat all persons identically." *Id.* Equal Protection simply "demands that when the state draws distinctions between similarly situated individuals it must show that the distinction is rational, not arbitrary." *Id.* (citing *Stanton v. Stanton,* 421 U.S. 7, 14 (1975)).

Here, as explained in the Bill Memorandum to the 1971 amendment of § 5–106(2), the New York State Legislature's justification for the proposed amendment was that disenfranchising felons after they had served their maximum term of imprisonment or were released from parole was inconsistent with the primary concerns of the penal system, which is rehabilitation of the offender. (*See* Graber Aff. Ex. A at 8 ("It is inconsistent with the general philosophy of corrections to continue punishment after a person has accounted.").) And, as evidenced by the letters written in support of the amendment, many New York civil rights organizations thought this was at least a step in the right direction. (*Id.* at 12; *see also* Ex. B at 28–31, 35–36.) Furthermore, distinguishing between felons who are incarcerated or on parole with those serving suspended sentences or probation is entirely rational. Parole is "[t]he release of a prisoner from imprisonment before the full sentence has been served" and is "usually granted for good behavior on the condition that the parolee regularly report to a supervising officer." *Black's Law Dictionary* (8th ed.2004). "Parole is not freedom." *Id.* Alternatively, probation is "[a] court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison." *Id.* Therefore, while both felons on parole and felons on probation are released into society, parolees are still technically serving a prison sentence, just in the outside world. Denying suffrage to those who have received more severe punishments, such as a term of incarceration, and not to those who have received a lesser punishment, such as probation, is certainly not arbitrary. Furthermore, the determination of whether to sentence a felon to prison as opposed to probation is a decision made by a sentencing judge after consideration of many factors including the nature of the crime and the criminal history of the defendant. Where a more severe punishment is warranted it is entirely rational that that person should lose more rights and vice versa.[4]

[4] Plaintiffs allege that blacks and other minorities are prosecuted, convicted, and sentenced to terms of incarceration at a much higher rate than whites convicted of similar crimes. (Am.Comp.¶¶ 61–68.) Even if this contention is correct, whether convictions and sentencing determinations are made in a discriminatory fashion is not an issue that can be resolved by challenging New York's election laws.

***5** Accordingly, plaintiffs' claims challenging New York Constitution Article II, § 3 and § 5–106(2) under the Fourteenth and Fifteenth Amendments are dismissed.

III. Voting Rights Act of 1965, 42 U.S.C. § 1973

Plaintiffs' claims under Section 2 of the Voting Rights Act of 1965, codified at 42 U.S.C. § 1973, must be dismissed in light of the Second Circuit's recent holding in *Muntaqim v. Coombe,* 366 F .3d 102 (2d Cir.2004). There the Second Circuit held that " § 1973 cannot be used to challenge the legality of § 5–106." *Id.* at 104.

IV. Civil Rights Act of 1957 and 1960, 42 U.S.C. § 1971

Plaintiffs argue that New York's felon disenfranchisement statute violates the Civil Rights Acts of 1957 and 1960, codified at 42 U.S.C. § 1971(a)(1), § 1971(a)(2)(A) and § 1971(a)(2)(B). However, as the majority of courts addressing civil rights claims brought under § 1971 have held, this section does not provide for a private right of action and is only enforceable by the United States in an action brought by the Attorney General. *See* 42 U.S.C. § 1971(c); *see also McKay v. Thompson,* 226 F.3d 752, 756 (6th Cir.2000) ("section 1971 is enforceable by the Attorney General, not by private citizens"); *Mixon v. State of Ohio,* 193 F.3d 389, 407 (6th Cir.1999) (42 U.S.C. § 1971 "is not part of the enforcement provisions of the Voting Rights Act and only the Attorney General can bring a cause of action under this section."); *Gilmore v. Amityville Union Free Sch. Dist.,* 305 F.Supp.2d 271, 279 (E.D.N.Y.2004) (the provisions of section 1971 "are only enforceable by the United States of America in an action brought by the Attorney General and may not be enforced by private citizens"); *Cartagena v. Crew,* No. 96 Civ. 3399, 1996 U.S. Dist. LEXIS 20178, at *13 n.8 (E.D.N.Y. Sept. 5, 1996) ("To the extent that plaintiffs allege a cause of action under 42 U.S.C. § 1971 in their memorandum of law, such claim is precluded since a private right of action has not been recognized under this section."); *Willing v. Lake Orion Community Sch. Bd. of Trustees,* 924 F.Supp. 815, 820 (E.D.Mich.1996) ("Section 1971 is intended to prevent racial discrimination at the polls and is enforceable by the Attorney General, not by private citizens."); *Spivey v. Ohio,* 999 F.Supp. 987, 996 (N.D.Ohio 1998) ("The terms of § 1971(c) specifically state that the Attorney General may institute a civil action to remedy a violation of the Voting Rights Act. An individual does not have a private right of action under § 1971."). *But see Schwier v. Cox,* 340 F.3d 1284, 1297 (11th Cir.2003) ("the provisions of section 1971 of the Voting Rights Act may be enforced by a private right of action under § 1983").

Regardless, even if plaintiffs could assert a private right of action under § 1971, their claim would still fail since they are not "otherwise qualified to vote." *See Texas Supporters of Workers v. Strake,* 511 F.Supp. 149, 155 (S.D.Tex.1981) (citing *Richardson v. Ramirez,* 418 U.S. 24 (1974) (holding that plaintiffs, convicted felons who had not been pardoned, did not possess one of the prerequisites to asserting a § 1971 cause of action: they were not "otherwise qualified to vote" because the "constitutionality of disenfranchising convicted felons has

been firmly established")). Accordingly, plaintiffs' claim under 42 U.S.C. § 1971 must be dismissed.

V. First Amendment

***6** Plaintiffs also contend that New York Constitution Article II, § 3 and § 5–106(2) violate their rights guaranteed under the First Amendment. However, the case law is clear that the First Amendment does not guarantee felons the right to vote. *See Farrakhan v. Locke,* 987 F.Supp. 1304, 1314 (E.D.Wash.1997) *rev'd in part on other grounds,* 338 F.3d 1009 (9th Cir.2003) (holding that in order to uphold a First Amendment claim "the Court would have to conclude that the same Constitution that recognizes felon disenfranchisement under § 2 of the Fourteenth Amendment also prohibits disenfranchisement under other amendments.... The Court is not inclined to interpret the Constitution in this internally inconsistent manner or to determine that the Supreme Court's declaration of the facial validity of felon disenfranchisement laws in *Richardson v. Ramirez* was based only of the fortuity that the plaintiffs therein did not make their arguments under different sections of the Constitution"); *Johnson v. Bush,* 214 F.Supp.2d 1333, 1338 (S.D.Fl.2002) *rev'd in part on other grounds* 353 F.3d 1287 (11th Cir.2003) ("it is clear that the First Amendment does not guarantee felons the right to vote"). Accordingly, plaintiffs' claim under the First Amendment is also dismissed.

VI. Due Process Under the Fourteenth Amendment

Plaintiffs argue that disenfranchising felons without notice violates the Due Process Clause of the Fourteenth Amendment. (Pl. Mem. at 45.) Plaintiffs claim that "New York courts regularly pronounce sentences after trial and accept guilty pleas from defendants without providing notice that a sentence including a term of incarceration will automatically lead to a termination of their voting rights" and if the Court does not invalidate the disenfranchisement statute this practice will continue. (*Id.* at 46.)

First, as defendants point out, criminal defendants are advised by counsel throughout the plea bargaining and sentencing phases of a criminal prosecution. Second, the real remedy to this claim, as plaintiffs argue, is a statutory requirement that sentencing judges advise criminal defendants of all the rights they might lose, including their right to vote, if they were to plead guilty to a criminal charge. However, even if this suggestion has merit, plaintiffs' challenge to the election laws is misguided. What plaintiffs are essentially suggesting is a proposed change to New York's criminal procedure laws. A federal district Court is not the proper venue to suggest an amendment to state statutory law since this Court obviously could not direct the New York State legislature to institute a new criminal procedure law. Accordingly, there is no real basis for plaintiffs' due process claim nor an appropriate judicial remedy.

VII. Treaties and Customary International Law

Finally, plaintiffs allege, pursuant to 28 U.S.C. § 1331 that New York Constitution Article II, § 3 and § 5–106(2) violate customary international law, Article 5, Section (c) of the Convention on the Elimination of All Forms of Racial Discrimination ("CERD") and Article 25 of the International Covenant on Civil and Political Rights ("ICCPR"), because felons are "denied the enjoyment of guaranteed political rights, such as the right to vote and participate in the political process." (Am.Comp.¶¶ 97–98.)

A. *Customary International Law*

***7** Customary international law alone does not provide a cause of action in federal court in the absence of a federal statute. *See Kadic v. Karadzic,* 70 F.3d 232, 246 (2d Cir.1995) (citing *Tel–Oren v. Libyan Arab Republic,* 726 F.2d 774, 778 (D.C.Cir.1984) (Edwards, J. concurring) ("The law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations.")); *see also Friedman v. Bayer Corp.,* No. 99–CV–3675, 1999 WL 33457825, at *3 (E.D.N.Y Dec. 15, 1999) (citing *In Re Estate of Ferdinand Marcos, Human Rights Litigation,* 25 F.3d 1467, 1475 (9th Cir.1994) ("Like international treaty law, customary international law prescribes norms of conduct among nations but does not create private rights of action for individuals.")); *White v. Paulsen,* 997 F.Supp. 1380, 1383 (E.D.Wash.1998) (holding that the law of nations itself does not give rise to a private right of action because " 'international law does not require any particular reaction to violations of law.... Whether and how the United States wishes to react to such violations are domestic questions"). Because plaintiffs have not provided any statutory basis upon which this court has jurisdiction under 28 U.S.C. § 1331 to remedy an alleged violation of customary international law, this claim must be dismissed.

B. *Treaties of the United States: ICCPR and CERD*

With respect to plaintiffs' claims under the ICCPR and the CERD, "the United States expressly declared upon ratification that 'the provisions of the Convention are not self-executing." ' *United States v. Perez,* No. 3:02 Cr 7, 2004 U.S. Dist. LEXIS 7500, at *52 (D.Conn. Apr. 29, 2004) (citing International Convention on the Elimination

of All Forms of Racial Discrimination, adopted by the U.N. General Assembly Dec. 21, 1965, 660 U.N.T.S. 195 (ratified by the United States June 24, 1994); U.S. Senate Resolution of Advice and Consent to Ratification of the CERD, 140 Cong. Rec. S7634–02 (June 24, 1994); *see also* U.S. Senate Resolution of Advice and Consent to Ratification of the ICCPR, 138 Cong. Rec. S4781, S4783 (daily ed. Apr. 2, 1992) (declaring that "the provisions of articles 1 through 27 of the Covenant are not self-executing.")); *see also White,* 997 F.Supp. at 1386 (holding that no court that has considered the ICCPR has found it to be self-executing). Therefore, "[t]he United States thus clarified that the ICCPR and the CERD did not create a private right of action enforceable in U.S. courts." *Perez,* 2004 U.S. Dist. LEXIS 7500, at *52 (citing *Flores v. Southern Peru Copper Corp.,* 343 F.3d 140, 163 (2d Cir.2003) ("Self-executing treaties are those that 'immediately create rights and duties of private individuals which are enforceable and [are] to be enforced by domestic tribunals.' Non-self-executing treaties 'require implementing action by the political branches of government or ... are otherwise unsuitable for judicial application." ') (citations omitted)). Accordingly, this Court does not have the authority under § 1331 to hear plaintiffs claims under the ICCPR or CERD.

CONCLUSION

***8** For the reasons set forth above defendants' motion for judgment on the pleadings is granted.[5]

[5] In the wake of the Second Circuit's decision in *Muntagim v. Coombe,supra,* plaintiffs have moved for voluntary dismissal of their third claim in part and their fourth and fifth claims in their entirety, without prejudice. Defendants have opposed voluntary dismissal unless it is with prejudice. In view of the above, the application for dismissal without prejudice is denied as moot.

Plaintiffs' motion for class certification is also denied as moot.

SO ORDERED.