IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Case No.: 5:17-cv-00581-FL

MARCIA ELENA QUINTEROS HAWKINS, ALICIA FRANKLIN, VANESSA LACHOWSKI, and KYANNA SHIPP on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

MANDY COHEN, in her official capacity as Secretary of the North Carolina Department of Health and Human Services,

Defendant.

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

The named Plaintiffs have moved the Court to certify this case a class action pursuant to Fed. R. Civ. P. Rules 23(a) and (b)(2). The class should be defined as: All individuals whose Medicaid coverage was, is, or will be interrupted or terminated, effective January 1, 2014 or later, by Defendant Secretary of the North Carolina Department of Health and Human Services (DHHS), or any of her employees, contractors, agents, or assigns, without first making an individualized determination of ineligibility under all Medicaid eligibility categories. The proposed class is made up of three subclasses defined as follows:

Subclass One: All individuals whose Medicaid coverage was, is, or will be terminated or interrupted, effective January 1, 2014 or later, by Defendant Secretary of the North Carolina Department of Health and Human Services (DHHS), or any of her employees,

contractors, agents, or assigns, without first making an individualized determination of ineligibility under all Medicaid eligibility categories and without first sending the beneficiary at least 10-day prior written notice of the termination of Medicaid that describes the specific reasons for the termination, the specific regulation supporting the termination, and the right to a pre-termination hearing.

Subclass Two: All individuals for whom Medicaid coverage was, is, or will be terminated or interrupted, effective January 1, 2014 or later, by Defendant Secretary of the North Carolina Department of Health and Human Services (DHHS), or any of her employees, contractors, agents, or assigns without first making an individualized determination of ineligibility under all Medicaid eligibility categories and without accommodating the beneficiary's disability during the eligibility redetermination process.

Subclass Three: All individuals for whom Medicaid coverage was, is, or will be terminated or interrupted, effective January 1, 2014 or later, by Defendant Secretary of the North Carolina Department of Health and Human Services (DHHS), or any of her employees, contractors, agents, or assigns, without first making an individualized determination of ineligibility under all Medicaid eligibility categories and without communicating during the redetermination process in the beneficiary's primary language where the beneficiary has limited English proficiency.

Undersigned counsel have also moved the Court to appoint them as class counsel for the class and subclasses pursuant to Fed. R. Civ. P. Rule 23(g).

**BACKGROUND**

The class is composed of tens of thousands of low-income children, parents, and aged, blind and disabled adults in North Carolina whose Medicaid benefits have been or will be

terminated by the Defendant without a determination they are no longer eligible for Medicaid. These terminations are the result of written policies and procedures and systemic practices challenged as inconsistent with the federal Medicaid Act, the Due Process Clause of the Fourteenth Amendment, the Americans with Disabilities Act (ADA), and Section 1557 of the Affordable Care Act (ACA § 1557). Amended Compl. ¶¶ 51-76, 140-53. Plaintiffs seek declaratory and injunctive relief. *See id.* § IX.

For most Medicaid beneficiaries (persons receiving Medicaid benefits), eligibility is required to be redetermined every twelve months, unless there is change in circumstance affecting eligibility before then. 42 C.F.R. § 435.916(a)(1), (b), (d). In North Carolina, the twelve-month review of continuing eligibility for persons receiving Medicaid is often called "recertification." Declaration of Douglas Sea in Support of Motion for Class Certification (Sea Decl.) ¶ 28, Ex. 18.

Members of proposed Subclass One had Medicaid coverage interrupted or terminated without adequate and timely prior written notice or the right to a pre-termination hearing as required by the Medicaid Act and due process. During 2014, DHHS required county Departments of Social Services (DSSs) to convert Medicaid cases to a new eligibility computer system called NCFAST. The conversion to NCFAST and other factors resulted in a very large number of cases in which the county DSSs have failed to timely complete the required annual redetermination of Medicaid eligibility. Sea Decl. ¶¶ 27-32, Exs. 17-22. With rare exceptions, a notice of Medicaid termination must be mailed at least ten days before the end of the month in order to be effective at the end of that month. 42 C.F.R. § 431.211. Absent timely action by the county DSS, NCFAST is programmed to automatically terminate Medicaid coverage at the end of the twelve-month period regardless of whether the beneficiary is still eligible for Medicaid.

Sea Decl. ¶ 27 Ex. 17. NCFAST generates reports showing the number of "past due" annual Medicaid eligibility reviews ("recertifications") for each county DSS as of the date of the report. Sea Decl. ¶¶ 13-26, Exs. 3-16. A sample of these reports confirm that, since July 2016, county DSSs across the state have repeatedly failed to either timely complete the eligibility review (before the end of the last month of the twelve-month eligibility certification period) or take action to extend Medicaid coverage until the review was completed. *Id.* The number of such "past due" cases in this sample of reports alone includes over 10,000 N.C. Medicaid beneficiaries. *Id.* In every one of these cases, NCFAST, the DHHS computer system, automatically terminated Medicaid coverage without any written notice to the family, let alone the opportunity for a hearing before their Medicaid ended. Sea Decl. ¶¶ 27-32, Exs. 17-22. In addition, for the tens of thousands who did receive written notice before their Medicaid terminated, the form used by the agency fails to contain information required by due process and federal Medicaid regulations. Sea Decl. ¶ 33, Ex. 23; Amended Compl. ¶¶ 73, 75.

Members of the Subclass Two had Medicaid coverage interrupted or terminated due to redetermination procedures and practices that failed to reasonably accommodate their disabilities. For example, where a Medicaid beneficiary alleging a disability preventing work who has not yet been determined to be disabled loses her eligibility for Medicaid under a Medicaid category not requiring proof of disability, DHHS policy instructions prohibit determination of whether the individual is eligible for Medicaid based on disability before terminating her Medicaid benefits. Sea Decl. ¶ 34, Ex. 24 at 22. This policy causes class members to be terminated from Medicaid without consideration of their eligibility under all Medicaid categories. In addition, the notice of termination in these cases does not notify the person alleging disability that Medicaid eligibility based on disability was not considered, nor of

the right to appeal and obtain a pre-termination hearing on whether she qualifies for Medicaid based on disability, nor of the right to reapply for Medicaid based on her disability. Sea Decl. ¶ 35, Ex. 25.

Members of Subclass Three had Medicaid coverage interrupted or terminated due to systemic redetermination procedures and practices that resulted in failure to communicate with them in their primary language. This violated their rights under Section 1557 of the Affordable Care Act.

DHHS's challenged policies and practices continue to threaten the Plaintiff class with irreparable harm. Terminations of Medicaid coverage place the health of class members at immediate risk. Without Medicaid coverage, class members are unable to timely access necessary medical treatments or prescription drugs. Hundreds of thousands of current N.C. Medicaid beneficiaries are threatened with the loss of their health coverage in the future as a result of these ongoing violations of federal law.

## ARGUMENT

The party seeking class certification bears the burden of proof. *In re Panacryl Sutures Prod. Liab. Cases*, 263 F.R.D. 312, 318 (E.D.N.C. Nov. 13, 2009). As the moving party, the Plaintiffs must satisfy the four provisions of Rule 23(a) and one subdivision of Rule 23(b). *See, e.g.*, *Lukenas v. Bryce's Mountain Resort, Inc.*, 538 F.2d 594, 595 n.2 (4th Cir. 1976). "However the trial court does not examine the merits of the underlying claims when it decides a motion for class certification." *Sanchez-Rodriguez v. Jackson's Farming Co. of Autryville*, No. 7:16-CV-28-D, 2017 WL 396667, at *2 (E.D.N.C. Jan. 27, 2017) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974)).

The Court should "'give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case best serve the ends of justice for the affected parties and . . . promote judicial efficiency.'" *Id.* (quoting *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003) (additional citations omitted)).

A. Rule 23(a)(1): Numerosity

Rule 23(a)(1) requires the class to be so numerous that joinder of all parties is impracticable. "There is no specified or minimum number of plaintiffs needed to maintain a class action." *L.S. by and through Ron S. v. Delia*, No. 5:11-CV-354-FL, 2012 WL 12911052, *6 (E.D.N.C. Mar. 29, 2012) (citing *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984)). For example, classes of 18 and 74 persons have been found to satisfy the requirement. *See Brady v. Thurston Motor Lines*, 726 F.2d 136 (4th Cir. 1984) (class of 74 persons is "well within the range appropriate for class certification"); *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967) (class of 18 members); *see also Rodger v. Elec. Data Sys.*, 160 F.R.D. 532, 535-36 (E.D.N.C. 1995) (certifying class of at least 57 individuals and citing *In Re Kirschner Med. Corp. Sec. Litig.*, 139 F.R.D. 74, 78 (D. Md. 1991), as holding that a class of as few as 25-30 members raises a presumption that joinder would be impracticable). "Additionally, where the relief sought for the class is injunctive and declaratory in nature, more speculative representations as to the size of the class suffice as to numerosity requirement." *L.S.*, 2012 WL 12911052 at *6 (citing *Doe v. Charleston Area Med. Ctr., Inc.,* 529 F.2d 638, 645 (4th Cir. 1975)).

Here, the number of class members easily meets the numerosity test. There are currently over 2.2 million persons receiving Medicaid in North Carolina. Sea Decl. ¶¶ 11, 12, Exs. 1-2. All of those persons are subject to the annual eligibility redetermination process challenged in the

complaint. As discussed *supra* at pp. 3-4, well over 10,000 Medicaid beneficiaries have been terminated with no notice at all and are in Subclass One. Of the 2.2 million Medicaid beneficiaries in North Carolina, 438,000 are classified as aged, blind, or disabled. Sea Decl. ¶ 1, Ex. 1. In 2016, 73,204 persons in North Carolina filed claims for SSI disability benefits (which requires very low income and assets). Sea Decl. ¶ 38, Ex. 28. It is therefore reasonable to believe that there are at least 1000 members of Subclass Two. *Id.* According to the Migration Policy Institute, in 2015, the total number of individuals with limited English proficiency in North Carolina was 444,700. Sea Decl. ¶ 36, Ex 26. In the same year, the number of individuals in N.C. that spoke another language at home living at or below the poverty level was 264,656. Sea Decl. ¶ 37, Ex. 27. Therefore, it is very likely that there are at least 1000 members of Subclass Three. The defined class therefore includes thousands of North Carolinians from across the state. *See* H. Newberg & A. Conte, 5 NEWBERG ON CLASS ACTIONS § 23.02 (4th ed. 2002) ("Courts generally have not required detailed proof of class numerousness in government benefit class actions when the challenged statutes or regulations are of general applicability to a class of recipients, because those classes are often inherently very large.").

Additionally, the named plaintiffs seek to represent Medicaid beneficiaries that are threatened with loss of their Medicaid coverage unlawfully in the future based on the allegations in the Amended Complaint, a factor which substantiates the numerosity of the class and the impracticability of joining individual claims. *See* 1 NEWBERG ON CLASS ACTIONS § 3:17 at 265; *see also, e.g.*, *Weaver v. Reagen,* 701 F. Supp. 717, 721 (W.D. Mo. 1988) (finding numerosity satisfied in a Medicaid case because class included future members); *Pashby v. Cansler*, 279 F.R.D. 347, 353 (E.D.N.C. 2011) (quoting *Bruce v. Christian*, 113 F.R.D. 554, 557 (S.D.N.Y. 1986) and finding numerosity because "the fluid composition of the [Medicaid recipient]

population is particularly well suited for status as a class because while the identity of the individuals involved may change, the nature of the harm and the basic parameters of the group affected remain constant") (brackets in original)).

Moreover, the impracticability requirement of Rule 23 does not focus solely on a numerical test. *Ballard v. Blue Shield of S.W. Va.*, 543 F.2d 1075, 1080 (4th Cir. 1976). Relevant considerations of impracticability include geographic dispersal of class members, limited financial resources of class members, and the negative impact on judicial economy if individual suits are required. *Sanchez-Rodriguez*, 2017 WL 396667, *2 (finding numerosity where class included approximately 135 individuals, but also noting the class members "are geographically dispersed, lack sophistication, and are non-English speaking migrant workers."). Here, the class consists of individuals across the State of North Carolina who qualify for Medicaid based on their low income. Class members necessarily lack the financial means to hire an attorney and pursue individual legal actions on their behalf. *See Carr v. Wilson-Coker*, 203 F.R.D. 66, 73 (D. Conn. 2001) (citation omitted) (finding joinder impractical when "many of the class members . . . by reason of ignorance, poverty, illness, or lack of counsel, may not . . . [be] in a position to seek [a hearing] on their behalf" or obtain information concerning their rights). Certification of this case as a class action also promotes judicial economy by assuring that the Defendant is not subjected to various rulings by differing courts in instances where recipients would be able to file individual legal actions.

Because the joinder of all members is impractical due to the substantial class size, the class is geographically dispersed, the class composition is fluid, and joinder of the class advances judicial economy, the defined class meets the requirements of Rule 23(a)(1).

B. Rule 23(a)(2): Commonality

Rule 23(a)(2), the "commonality" factor, requires there to be a common thread among all class members, namely "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "The requirement of commonality can be satisfied by just a single common question of law or fact." *L.S.*, 2012 WL 12911052, *7 (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011)); *Sanchez-Rodriguez*, 2017 WL 396667, *2 ("[A] single common question is sufficient to satisfy the rule.").

The commonality factor has been "liberally construed," and courts have given it a "permissive application so that common questions have been found to exist in a wide range of contexts." *Rodger*, 160 F.R.D. at 537 (citation omitted). Moreover, the Rule "does not require that all, or even most issues be common, nor that common issues predominate, but only that common issues exist." *Beaulieu v. EQ Indus. Servs.*, 2009 U.S. Dist. LEXIS 133023, *33 (E.D.N.C. April 20, 2009) (quoting *Central Wesleyan College v. W.R. Grace & Co.,* 143 F.R.D. 628, 636 (D.S.C. 1992)).

Nevertheless, highly generalized allegations will not do. The Supreme Court has clarified that, to satisfy this factor, the plaintiff must "demonstrate that the class members 'have suffered the same injury,'" *Wal-Mart*, 131 S.Ct. at 2551 (quoting *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 156 (1982)). Specifically, the claim must "depend upon a common contention" that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2545; *cf. Martin v. State Farm Mut. Auto. Ins. Co*., 809 F. Supp. 2d 496, 501 (S.D. W. Va. 2011).

Significantly, when "the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action," the commonality requirement

has been described as "easily met." 1 NEWBERG ON CLASS ACTIONS § 3.10 (3d ed. 1992). And, the Supreme Court has stated:

> Class relief is "particularly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." [citation omitted] For in such cases, the class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23.

*Falcon*, 457 U.S. at 155 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)); *see Pashby*, 279 F.R.D. 347, 353 (finding commonality met because "a determination that Defendant did or did not comport with due process will affect all putative class members in the same manner, … irrespective of their particular factual circumstances."); *see also Marisol A. v. Giuliani,* 126 F.3d 372, 376 (2d Cir. 1997) (finding commonality and typicality requirements satisfied where each class member's claim arose from the same course of events, and each class member was making essentially the same legal and factual arguments to prove the government official's liability); *Hernandez v. Medows***,** 209 F.R.D. 665, 671 (S.D. Fla. 2002) (finding that, despite having 19 separate legal questions, the "overriding common issue of law and fact" whether the Defendant violated the Medicaid Act and regulations, and the Due Process Clause, by failing to ensure adequate notice and fair hearing rights on a uniform basis was sufficient to meet the commonality requirement for class certification); *Susan J. v. Riley*, 254 F.R.D. 439, 460-61 (M.D. Ala. 2008) (finding commonality and typicality where class of disabled persons receiving Medicaid benefits were adjudged ineligible and/or denied services without notice and opportunity for hearing). Likewise, "actions combining challenges to uniform practices with requests for declaratory, or injunctive relief, by their very nature deal with common questions of law and fact." *Hernandez*, 209 F.R.D. at 671 (citing *Haitian Refugee Center, Inc. v. Nelson,* 694 F. Supp. 864, 877 (S.D. Fla. 1988)).

In this case, the common questions of law and fact are whether the Defendant and her agents have terminated Medicaid benefits under uniform procedures and systemic practices which violate the federal Medicaid Act, the Americans with Disabilities Act, Section 1557 of the Affordable Care Act, and the Due Process Clause of the Fourteenth Amendment. Amended Compl. ¶¶ 14, 51-76, 140-153; *see Melanie K. v. Horton*, 2015 U.S. Dist. LEXIS 36062, *13-14 (N.D. Ga. March 23, 2015) ("[Courts] throughout the country routinely certify classes of public benefits applicants in similar cases seeking to challenge a policy, custom, or practice in the administration of . . . benefit programs."). Here, all members of the Plaintiff class have experienced or will experience the same injury—termination of their Medicaid coverage. Resolving whether Defendant's challenged policies and practices exist, whether they cause terminations of Medicaid, and whether these policies and practices violate federal law will resolve the issues central to this case. *Wal-Mart*, 131 U.S. at 2545. Additionally, the complaint seeks uniform declaratory and injunctive relief for all class members, further evidencing the commonality of the legal claims. Amended Compl. § IX; *see Council of Greater Washington*, 239 F.R.D. at 26. In addition, the members of each subclass bring common experiences and factual allegations to the Court, along with identical legal claims. *See supra* pp. 1-2. The class therefore satisfies the commonality requirement of Rule 23(a)(2), and the Court's determination of the truth or falsity of their contentions will resolve their claims "in one stroke." *Wal-Mart*, 131 U.S. at 2545.

C. Rule 23(a)(3): Typicality

Rule 23(a)(3), the "typicality" factor, says the claims or defenses of the representative parties must be typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). "Typicality does not mean identicalness." *Woodward,* 191 F.R.D. at 505. Rather, "[t]he

prerequisites are only that plaintiffs' claims be common, and that class representative not have an interest that is antagonistic to that of the class." *Sanchez-Rodriguez,* 2017 WL 396667, *3. Accordingly,

> A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns, which underlie individual claims.

1 NEWBERG ON CLASS ACTIONS § 3.13 (3d ed. 1992) (footnotes omitted). "In government benefit class actions, the typicality requirement is generally satisfied when the representative plaintiff is subject to the same statute, regulation, or policy as class members." *Carr*, 203 F.R.D. at 75 (quoting NEWBERG); *Rodger*, 160 F.R.D. at 538 (stating that courts "will generally look to the defendant's alleged conduct and the legal theory advanced by the plaintiff to determine whether certification is appropriate. . . . A court may determine that the typicality requirement is satisfied even when the plaintiffs' claims and the claims of the class members are not identical.")

Typicality is met in this case because "as go [] the claim[s] of the named plaintiff[s], so go the claims of the class." *Pashby*, 279 F.R.D. at 354. The named plaintiffs assert that their Medicaid has been terminated or is at imminent risk of being terminated (or both) by the Defendant and her agents pursuant to policies and practices in violation of the Medicaid Act, the Americans with Disabilities Act, Section 1557 of the Affordable Care Act, and the Due Process Clause of the Fourteenth Amendment. *See* Amended Compl. ¶¶ 140-53 (describing legal claims). The named Plaintiffs' factual allegations are also typical of and arise from the same policies and practices challenged on behalf of the class. *Compare id.* at ¶¶ 51-76 with ¶¶ 77-139. Defendant and her agents have implemented a statewide computer system that is programmed to automatically terminate Medicaid coverage for beneficiaries without notice regardless of

whether the beneficiary is still eligible for Medicaid when Defendant's agents have been unable to process eligibility reviews in a timely manner. *Id.* at ¶¶ 51-64; Sea Decl. ¶¶ 13-32, Exs. 3-22. Three of the named plaintiffs are alleged to have lost Medicaid due to this systemic due process violation. Amended Compl. at ¶¶ 87, 90, 119-20, 132-34, 138.

Defendant has a written policy that prohibits determination of whether a Medicaid recipient is still eligible for Medicaid based on an alleged disability before terminating his or her Medicaid benefits. *Id.* at ¶¶ 67-69; Sea Decl. ¶ 34, Ex. 24. Two of the named plaintiffs are alleged to have lost Medicaid as a result of this challenged policy. *Id.* at ¶¶ 86, 91, 136. When Defendant does send notices informing beneficiaries their Medicaid will be terminated, the notice is alleged to be inadequate. *Id.* at ¶¶ 69, 71-75, Sea Decl. ¶¶ 33, 35, Exs. 23, 25. Two named Plaintiffs are alleged to have received inadequate notice. *Id.* at ¶¶ 92-93, 107-09.

Defendant is alleged to have engaged in other systemic practices that result in improper Medicaid terminations for members of Subclasses Two (persons with disabilities) and Three (persons with limited English proficiency), including failure to permit beneficiaries to elect to receive information and complete the redetermination via electronic or telephonic means, requesting information the agency already has or does not need, not permitting beneficiaries with disabilities assistance or adequate time to provide requested information, and failure to communicate in the beneficiary's language. *Id.* at ¶¶ 71, 74, 76. Two named plaintiffs are alleged to have lost Medicaid as a result of these practices. *Id.* at ¶¶ 89, 92, 102-110. All four of the named plaintiffs are persons with disabilities. *Id.* at ¶¶ 78-80, 100, 115, 130-31. One of the named plaintiffs is a person with limited English proficiency. *Id.* at ¶ 77.

In sum, Rule 23(a)(3) has been met.

D. <u>Rules 23(a)(4) and 23(g): Adequacy of Representation</u>

The final prong of Rule 23(a) requires the Court to find that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Fourth Circuit looks for two separate requirements: named plaintiffs whose interests are not antagonistic to the class and adequate counsel. *See Woodward,* 191 F.R.D. at 506 (citations omitted).

The named Plaintiffs do not have interests antagonistic to the class as a whole. The individual plaintiffs have sworn to "fairly and adequately represent the interests of all class members" and to "zealously prosecute this lawsuit" so as to obtain the requested relief for all class members and not just themselves. *See* Hawkins Dec. ¶¶ 4-5; Franklin Dec. ¶¶ 4-5; Lachowski Dec. ¶¶ 4-5; Shipp Dec. ¶¶ 4-5. The named plaintiffs have also sworn that they know of no conflict between the named plaintiffs and the interests of the class as a whole. *See* Hawkins Dec. ¶¶ 7; Franklin Dec. ¶¶ 7; Lachowski Dec. ¶¶ 7; Shipp Dec. ¶¶ 7. The requested relief further evidences the lack of conflict between the named Plaintiffs and the unnamed class members as all of the claims in the case involve the same policies and course of conduct by the Defendant, and the Plaintiffs only seek injunctive and declaratory relief. Amended Compl. § IX. Each class representative wants all class members to receive a determination of ineligibility, reasonable access to their caseworker and the information they need to maintain eligibility, and due process before Medicaid benefits are terminated.

Charlotte Center for Legal Advocacy and the National Health Law Program will adequately represent the interests of all class members. Counsel is "qualified, experienced, and able to vigorously conduct the proposed litigation," as they are subject matter experts in federal Medicaid law and very experienced class action litigators. *See* 1 NEWBERG ON CLASS ACTIONS § 3.22. Plaintiffs' counsel have been working steadily and competently to investigate and identify the claims in this case. The law firms representing the Plaintiffs have each committed the

necessary resources to adequately represent the class. The attorneys from each of these firms are very experienced in prosecuting class action litigation on behalf of Medicaid recipients. *See generally* Decls. of Douglas Sea and Jane Perkins in Supp. of Class Certification. Lead counsel is Charlotte Center for Legal Advocacy, through Douglas S. Sea. Mr. Sea has practiced law in North Carolina since 1980 and is the Program Director of the Family Support and Health Care program at Charlotte Center for Legal Advocacy, specializing in eligibility for and access to public benefits programs, particularly the Medicaid program. *See* Sea Decl. ¶ 3. Mr. Sea has participated in at least thirteen federal and state class action cases against government agencies, most of them as lead counsel. *Id*. at ¶ 5. Mr. Sea has been a speaker for at least fifty continuing legal education events, mostly on issues of Medicaid or complex litigation. *Id.* at 6.

Additionally, the National Health Law Program, through Jane Perkins, is serving as class counsel. Perkins Dec. ¶ 2. Ms. Perkins has participated in more than forty complex and/or class action cases in the federal district and circuit courts of appeals, spoken at well over 200 continuing legal education events on Medicaid and federal court procedure, and published more than sixty articles on Medicaid, health law, and federal court access. *Id.* at ¶¶ 5-6. This Court has previously noted that proposed class counsel have "extensive experience" in the areas of law at issue in this case and are qualified to serve as class counsel. *L.S.*, 2012 WL 12911052, *8. The requirements of Rule 23(a)(4) and Rule 23(g) are met.

E. Rule 23(b)(2)

The Plaintiffs must also satisfy one subdivision of Rule 23(b). This lawsuit squarely meets the Rule 23(b)(2) requirement that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

Indeed, "Rule 23(b)(2) class actions were designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons. . . ." 1 NEWBERG ON CLASS ACTIONS § 4.11 (3d ed. 1992) (footnotes omitted).

As discussed above, Defendants' illegal policies and practices concerning the termination of Medicaid coverage affects thousands of similarly situated Medicaid recipients across North Carolina. The Defendant's policies and practices have already harmed or threaten in the future all class members, and the Plaintiffs are seeking injunctive and declaratory relief that would apply to the class as a whole. *Wal-Mart*, 131 S. Ct. at 2557 (holding that Rule 23(b)(2) is met "when a single injunction or declaratory judgment would provide relief to each member of the class"); Amended Compl. § IX. Because the Defendants' policies and practices affect the class members in the same way (the termination of their Medicaid benefits) this action should be certified pursuant to Rule 23(b)(2). *See Gratz v. Bollinger*, 539 U.S. 244, 267-68 (2003) (affirming (b)(2) class certification and noting that certification saved resources of both the court and the parties); *Carr,* 203 F.R.D. at 75 (certifying (b)(2) class because Medicaid plaintiffs sued the commissioner of the single state agency charged with administering Medicaid services and continuance of the commissioner's policies might require injunctive relief).

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court order that the proposed Plaintiff Class meets the requisites of Rule 23(a) and (b)(2); certify this action as a class action, with the class defined as Plaintiff has proposed above; and appoint undersigned counsel at the Charlotte Center for Legal Advocacy and National Health Law Program as Class Counsel pursuant to Rule 23(g).

Dated: December 21, 2017 Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on this day, I served a true copy of the Plaintiffs' Memorandum in Support of Motion for Class Certification upon the Defendant's attorney via electronic means through the CM/ECF system to:

Thomas Campbell
Special Deputy Attorney General
N.C. Department of Justice

This the 21st day of December 2017.

/s/ Douglas Stuart Sea