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

MELISSA WILSON, *et al.*, ***Plaintiffs,*** **v.** **WENDY LONG, in her official capacity as Deputy Commissioner of the Tennessee Department of Finance & Administration and Director of the Bureau of TennCare, *et al.*,** ***Defendants.***	**No. 3:14-1492** **Judge Campbell** **Magistrate Judge Newbern**

MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION TO DECERTIFY THE CLASS AND DISMISS THE CASE

The processes employed by Defendants (the "State") and the Federal Centers for Medicare and Medicaid Services ("CMS") for the adjudication of Medicaid applications and the consideration of delayed application appeals have changed dramatically since this Court certified the class more than two years ago. As a result of these changes, the Plaintiff class no longer has any members, and any claim that Tennessee Medicaid applicants may have today bears no resemblance to the claims asserted by the named Plaintiffs two years ago. In these circumstances, the class must be decertified, both because it no longer satisfies the numerosity requirement imposed by Rule 23(a)(1) and because it no longer satisfies the typicality requirement imposed by Rule 23(a)(3). And, because the named Plaintiffs' claims are all moot, in the absence of a certified class the case must be dismissed.

STATEMENT

This action was filed more than two years ago during the initial months following the effective date of the Affordable Care Act. The named Plaintiffs all alleged that they had filed Medicaid applications with the Federal Exchange months earlier and had received no response. They further alleged that the State refused to accept appeals challenging the Federal Exchange's failure to resolve their Medicaid applications with reasonable promptness. *See generally* Complaint (July 23, 2014), D.E. 1 ("Compl."). Based on these allegations, the named Plaintiffs asserted claims against the State under 42 U.S.C. § 1983 for violations of the Medicaid Act and the Due Process Clause of the Fourteenth Amendment. Compl. ¶¶ 151–63. On the same day they filed the Complaint, Plaintiffs moved for class certification and a preliminary injunction. Plaintiffs' Motion for Class Certification (July 23, 2014), D.E. 2; Plaintiffs' Motion for Preliminary Injunction (July 23, 2014), D.E. 4.

Prior to the filing of this lawsuit, the State had no information concerning Medicaid applications submitted to the Federal Exchange (also known as the Federally Facilitated Marketplace (FFM)). Declaration of Kim Hagan ¶ 2 ("2016 Hagan Decl.") (filed herewith); *see also* Declaration of Wendy Long ¶ 3(h) (Aug. 14, 2014), D.E. 54. In July 2014, days before the Complaint was filed, the State learned for the first time that certain Medicaid applications submitted to the FFM were not being processed by the Federal Exchange. 2016 Hagan Decl. ¶ 2. But the State had no information whatever concerning these "pended" applications that would enable it to even identify the applicants, much less adjudicate the applications.

After the Complaint was filed, Plaintiffs initially requested an expedited hearing on their motions for a preliminary injunction and class certification, but they agreed to withdraw that request as part of a broader agreement with the State. *Id.* ¶ 3. Under the terms of the deal,

Plaintiffs agreed to litigate their motions on an ordinary schedule and provide the State with the information it needed to adjudicate the TennCare applications of each of the named Plaintiffs and up to 100 total delayed applications. *Id*. In exchange, the State agreed that it would seek information from CMS that would enable it to adjudicate the TennCare applications, and if CMS provided the necessary information, the State would itself determine whether the named Plaintiffs and other individuals identified by Plaintiffs' counsel were eligible for TennCare and enroll those who qualified. *Id.*; *see also* Declaration of Kim Hagan ¶ 12 (Aug. 14, 2014), D.E. 53; Declaration of Sara Zampierin ¶ 3 (Aug. 21, 2014), D.E. 70-1 (Plaintiffs' counsel acknowledging arrangement).

On an ad hoc basis, CMS did provide the State with two very limited "special flat files" that contained application information on only 60 individuals (including the named Plaintiffs), and as a result, the State was able to adjudicate their eligibility in August 2014. 2016 Hagan Decl. ¶ 3. But at that time, there was no procedure in place for the FFM to systematically and routinely provide information to the State concerning "pended" applications that would enable the State to adjudicate eligibility in cases in which the FFM was unable to do so. *Id*.

In its September 2, 2014, class certification order, the Court defined the class in this case as follows:

> All individuals who have applied for Medicaid (TennCare) on or after October 1, 2013, who have not received a final eligibility determination in 45 days (or in the case of disability applicants, 90 days), and who have not been given the opportunity for a "fair hearing" by the State Defendants after these time periods have run.

Class Certification Order at 8 (Sept. 2, 2014), D.E. 90 ("Class Certification Order"). On the same day, the Court issued a preliminary injunction directing the State "to provide the Plaintiff Class with an opportunity for a fair hearing on any delayed adjudication." Preliminary Injunction Order at 8 (Sept. 2, 2014), D.E. 91 ("PI Order") (footnote omitted). Under the terms

of the injunction, the State must provide a hearing within 45 days to any class member who requests one and provides proof that he or she submitted a TennCare application more than 45 days earlier (or 90 days in the case of an application based on disability). *Id.* at 8–9. The Court explained that these hearings are "for the purpose of determining the cause of the delay, not to appeal a denial of a claim." Class Certification Order at 4.

CMS began routinely and systematically providing the State with data concerning Medicaid applications it was unable to adjudicate in the Fall of 2014, after the Court entered the preliminary injunction in this case. 2016 Hagan Decl. ¶ 4. Using this data, the State "developed a manual process to resolve applications with data inconsistencies that had been pended at the FFM as a result of such inconsistencies." 2016 Hagan Decl., Exhibit A, CMS Approved Mitigation Plan ¶ 10 (Apr. 17, 2016). In addition, in compliance with the injunction, the State established a delayed application appeals process that guarantees a hearing, within 45 days, to any class member who requests one and provides proof that he or she submitted a TennCare application more than 45 days earlier (or 90 days in the case of an application based on disability). 2016 Hagan Decl. ¶¶ 6–7.[1]

As a result of the State's implementation of these processes and the CMS Approved Mitigation Plan, the facts on the ground today bear no resemblance to the facts alleged in the original complaint filed during the summer of 2014. At that time, Medicaid applicants like the named Plaintiffs whose applications had been "pended" indefinitely by the FFM had no recourse whatsoever with the State—the State literally did not know they existed and had no ability to assist them because it did not have access to any information concerning their Medicaid

[1] In the vast majority of delayed application appeals, the hearing on the cause of the delay ends up being unnecessary because the State is able to adjudicate the underlying application before the 45-day deadline, thus mooting the dispute.

applications. Medicaid applicants whose applications are "pended" by the Federal Exchange today do receive State assistance because CMS now provides the State with information concerning these applications on a routine and regular basis and the State adjudicates them. And in the event of any delay, unlike the named Plaintiffs, Medicaid applicants have access to a State administrative appeal system. Indeed, as a result of these changes, today there are no longer any applicants who are members of the Plaintiff class: every Medicaid applicant either "receive[s] a final eligibility determination in 45 days (or in the case of disability applicants, 90 days)" or is "given the opportunity for a 'fair hearing' by the State Defendants after these time periods have run," Class Certification Order at 8, and thus does not satisfy the criteria the Court established for membership in the class. *See* 2016 Hagan Decl. ¶ 8.

The State appealed the preliminary injunction, and a divided panel of the Sixth Circuit affirmed. *See Wilson v. Gordon*, 822 F.3d 934 (6th Cir. 2016). Prior to noticing the appeal, the State had moved to dismiss the original complaint for failure to state a claim. *See* Defendants' Motion to Dismiss (Aug. 14, 2014), D.E. 48. On March 12, 2015, the Court issued an order stating that "[g]iven the appeal, which raises issues that may affect this Motion, Defendants' Motion is denied without prejudice to being re-filed once the appeal is concluded." Order (Mar. 12, 2015), D.E. 108.

ARGUMENT

I. THE COURT IS OBLIGATED TO DECERTIFY THE CLASS WHEN, DUE TO CHANGED FACTUAL CIRCUMSTANCES, CLASS CERTIFICATION REQUIREMENTS ARE NO LONGER SATISFIED.

FED. R. CIV. P. 23(c)(1)(C) provides that "[a]n order that grants or denies class certification may be altered or amended before final judgment." The Sixth Circuit has emphasized that district courts have a "continuing obligation to ensure that the class certification

requirements are met." *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011); *see also Binta B. ex rel. S.A. v. Gordon*, 710 F.3d 608, 618 (6th Cir. 2013) ("a district court's responsibilities with respect to Rule 23(a) do not end once the class is certified.") And if it becomes clear that one or more of the Rule 23(a) prerequisites to class certification is no longer satisfied, the Court must decertify the class. *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1214 (6th Cir. 1997) ("[A]s long as the court retains jurisdiction over the case 'it must continue carefully to scrutinize the adequacy of representation and withdraw certification if such representation is not furnished.' ") (citation omitted); *see also Sutton v. Hopkins Cty.*, 2007 WL 119892, at *2 (W.D. Ky. Jan. 11, 2007) ("the district court is charged with the *duty* of monitoring its class decisions in light of the evidentiary development of the case [and] *must* define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts") (emphases added) (internal quotation marks and citations omitted).

II. THE CLASS NO LONGER SATISIFES THE RULE 23(a)(1) NUMEROSITY REQUIREMENT BECAUSE IT HAS NO MEMBERS.

Two years ago, the Court premised its numerosity conclusion on its finding that "[t]he alleged problem is systemic and operational, so it potentially affects all Medicaid applicants." Class Certification Order at 3. Under the system in place at the time, an unknown number of TennCare applicants were experiencing indefinite delays in the adjudication of applications submitted to the Federal Exchange. Moreover, because CMS was not providing information concerning these applications to TennCare, the State could not itself adjudicate these applications nor did it have any procedure in place under which applicants could seek a fair hearing to challenge the delay. Focusing on these "systemic and operational" problems, the Court certified a class of TennCare applicants who satisfy two criteria: (i) they must "not [have] received a final eligibility determination in 45 days (or in the case of disability applicants, 90

days)," and (ii) they must not "have . . . been given the opportunity for a 'fair hearing' by the State Defendants after these time periods have run." Class Certification Order at 8.

As explained above, the "systemic and operational" problems the Court referenced have been resolved by the implementation of the CMS Approved Mitigation Plan, and as a result, there are no applicants who satisfy the two criteria that the Court adopted for membership in the class. Every Medicaid applicant either "receive[s] a final eligibility determination in 45 days (or in the case of disability applicants, 90 days)" or is "given the opportunity for a 'fair hearing' by the State Defendants after these time periods have run," Class Certification Order at 8. *See* 2016 Hagan Decl. ¶ 8.

By definition, a class without members is *not* "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1); *see also* CHARLES ALAN WRIGHT ET AL., 7A FEDERAL PRACTICE & PROCEDURE § 1762 (3d ed. 2012) ("Of course, if there are no members of the class other than the named representatives, then Rule 23(a)(1) obviously has not been satisfied."). In these circumstances, the class must be decertified.

The court in *Thompson v. Linvatec Corp.*, 2010 WL 2560524 (N.D.N.Y. June 22, 2010), considered a closely analogous situation. Five sales representatives who had been fired brought a class action suit on behalf of 70 unnamed sales representatives against their former employer for various violations of the Employee Retirement Income Security Act. *Id.* at *1, *6. The court had redefined the class to consist of former sales representatives whose employment was involuntarily terminated, who were not offered employment, and who did not receive severance benefits from the employer. *Id.* at *5. But it was later revealed that the 70 unnamed employees had actually accepted offers of employment and the five named plaintiffs had rejected offers of employment for personal reasons. *Id.* at *6. Thus, the court found, "[b]ased on the information

now before it . . . the class would contain no members." *Id*. at *5. In these circumstances, the court held that "the plaintiffs do not satisfy the numerosity requirements for class certification," *id.* at *6, and as a result, "the court finds that it is now *compelled* to grant defendants' motion to decertify the class." *Id*. at *7 (emphasis added). This Court should do likewise.

III. THE CLASS NO LONGER SATISIFES THE RULE 23(a)(3) TYPICALITY REQUIREMENT BECAUSE ANY CLAIMS THAT CURRENT MEDICAID APPLICANTS MAY HAVE DO NOT ARISE FROM THE SAME PRACTICE OR COURSE OF CONDUCT THAT GAVE RISE TO THE PLAINTIFFS' CLAIMS.

Two years ago, the Court found that the named Plaintiffs' claims were typical of the claims of the class because they "arise from the same practice and course of conduct that give rise to the claims of other potential class members . . . ." Class Certification Order at 5; *see also Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) ("A 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.' ") (quoting *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996)). As explained in the Court's preliminary injunction order, the "practice and course of conduct" giving rise to the named Plaintiffs' claims consisted of the State's failure to assist Medicaid applicants like the named Plaintiffs whose applications had been "pended" indefinitely by the FFM and its failure to provide fair hearings where such applicants could challenge the delayed adjudication. *See* PI Order at 2–3 (summarizing the circumstances giving rise to Plaintiffs' claims).

Medicaid applicants today are not subject to this "practice and course of conduct." As demonstrated above, Medicaid applicants whose applications are "pended" by the Federal Exchange today do receive State assistance because CMS now provides the State with information concerning these applications on a routine and regular basis and the State adjudicates them. *See* 2016 Hagan Decl. ¶¶ 4–5 & Exhibit A, CMS Approved Mitigation Plan

¶ 10. And unlike the named Plaintiffs, Medicaid applicants today have access to a comprehensive State administrative appeal system that provides a fair hearing to any applicant who provides proof that he or she submitted a TennCare application that was not adjudicated within 45 days (or 90 days in the case of disability applications). *See id*. ¶¶ 6–8.

In sum, any claims that TennCare applicants today may have do not arise from the same practice or course of conduct that gave rise to the named Plaintiffs' claims, and the named Plaintiffs' claims are thus no longer typical. Where subsequent factual developments lead the Court to find that "Rule 23(a)(3)'s typicality prerequisite is no longer satisfied," courts "will decertify the Plaintiff class . . . ." *Powell v. Tosh*, 2013 WL 4418531, at *10 (W.D. Ky. Aug. 2, 2013). This Court should do likewise.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should decertify the class. And because it is undisputed that "all eleven named plaintiffs' individual claims became moot before the district court certified the class," *Wilson*, 822 F.3d at 942, the Court should also vacate the preliminary injunction and dismiss the case.

September 16, 2016

Herbert H. Slatery III
Attorney General and Reporter

Linda A. Ross, TN BPR #4161
Deputy Attorney General

Carolyn E. Reed, TN BPR #022248
Senior Counsel

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 20207
Nashville, TN 37202
(615) 741-1771

Respectfully submitted,

/s/ Michael W. Kirk
Michael W. Kirk
Nicole J. Moss

COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
mkirk@cooperkirk.com

Counsel for the Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record on this 16th day of September, 2016 via the Court's Electronic Case Filing system.

/s/ Michael W. Kirk
Michael W. Kirk