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

MELISSA WILSON, et al., individually and on behalf of all others similarly situated, Plaintiffs, v. WENDY LONG, et al., Defendants.	Civil Action No. 3:14-CV-01492 Judge Campbell Magistrate Judge Newbern

PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTION TO DECERTIFY THE CLASS AND DISMISS THE CASE

INTRODUCTION

At issue in this case is whether Defendants (hereinafter the "State")—the single state agency in charge of administering the TennCare program—have ensured that all persons who seek to enroll in Medicaid will receive a reasonably prompt determination, and if not, that they will receive a fair hearing. Compl. (Doc. No. 1) ¶¶ 152, 157, 162. This Court preliminarily concluded that the State is failing to meet its obligations to ensure a timely application process and fair hearing and, on these grounds, certified a class (Doc. No. 90) and entered a preliminary injunction order (Doc. No. 91). That Order compels the State to provide anyone whose application is not acted upon with reasonable promptness with a fair hearing within 45 days after receiving proof of the delayed application. Prelim. Inj. Order at 8–9.

The State now argues that the class must be decertified and the case dismissed because two things have changed since the case was filed: First, "CMS [has] beg[u]n routinely and systematically providing the State with data concerning Medicaid applications it was unable to adjudicate . . . ." State Br. at 4. Second, "in compliance with" this Court's preliminary

injunction order, "the State established a delayed application appeals process" to provide a fair hearing. *Id.* Neither of these grounds, however, shows that the class now fails to meet the Rule 23 numerosity and typicality requirements, as the State contends in its Motion to Decertify.

The State never once indicates that the delays in processing TennCare applications no longer routinely stretch beyond the 45 or 90 day deadlines—the violations that motivated the PI Order in the first place. Instead, the State carefully states that *either* persons are receiving decisions in 45 days *or* they are able to request a fair hearing from the State and access the process the State set up in response to the preliminary injunction order. This is little more than arguing that the case is moot because the State is complying with this Court's order.

Additionally, while the State argues that the new systematic communication between CMS and TennCare destroys typicality, the class was never premised on the *reason* for TennCare's failure to render a timely decision (i.e., the lack of communication between CMS and TennCare) but rather on TennCare's failure to render a timely decision or provide a hearing. This "change" in circumstances is in any event irrelevant given the Court's finding that TennCare already had the ability to get this information from CMS. *See* Prelim. Inj. Order at 7 ("[T]here is no legal or factual barrier preventing the State from obtaining information about particular individuals from the Federal Exchange.").

While Plaintiffs sincerely hope the factual bases for this action have improved in the more than two years since this action was filed, the main problem highlighted by this lawsuit remains true: Tennessee is the only state that refuses to process Medicaid applications for many eligibility categories, and persons continue to experience unacceptable delays in receiving a decision on their Medicaid applications. Plaintiffs respectfully submit that the State has failed to

justify revisiting the Court's order certifying the instant class, much less justify a determination that the entire action is moot.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

This case arises out of the State's systematic failure to process TennCare (Medicaid) applications within 45 days, or 90 days if based on a disability, as required by federal law. Two years ago the Court certified the case as a class action and entered a preliminary injunction order that partially mitigated Plaintiffs' legal harm by requiring a fair hearing be provided to them if their applications were in fact not being processed in a timely manner. (Doc. Nos. 90, 91.) The class certified by the Court is defined as:

> 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 Cert. Order at 8.

The State appealed the preliminary injunction order (Doc. No. 97), arguing (1) that the case was moot because the Named Plaintiffs received relief before the class was certified and the preliminary injunction was entered, and (2) that Plaintiffs had not demonstrated a likelihood of success on their claims that the State was violating the Medicaid Act and the Due Process Clause. (Doc. No. 105 ¶ 3.) The Sixth Circuit rejected these arguments, finding that the class claims were not moot, that Plaintiffs had demonstrated a likelihood of success on their claims under the Medicaid Act and Due Process Clause, and that the district court did not abuse its discretion in issuing a preliminary injunction. *Wilson v. Gordon*, 822 F.3d 934 (6th Cir. 2016).

The State did not seek a stay of the preliminary injunction pending appeal. Rather, it announced soon after the entry of the preliminary injunction order that, rather than provide fair

hearings to the vast majority of class members who presented proof of a delayed application, the State would adjudicate their eligibility within the time limits imposed by the preliminary injunction order for holding such hearings. Declaration of Wendy Long (Doc. No. 105-2) ¶¶ 2-4 (Feb. 25, 2015). Defendants reported that, by June 1, 2015, they had received over 23,500 unduplicated requests for delay appeals. Declaration of Samuel Brooke (Doc. No. 124-2) ¶ 5 (Oct. 7, 2015).

The State has admitted to multiple problems with guaranteeing that applicants who requested a fair hearing either received a fair hearing or a determination before the 45- or 90- day deadline required by the Court's preliminary injunction order. After requests from Plaintiffs' counsel, the State admitted that some applicants who had requested a fair hearing had neither received a fair hearing nor a determination within 45 days. Declaration of Wendy Long (Doc. No. 109) ¶ 2 (Mar. 16, 2015). This problem involved as many as 1,183 cases. Tr. of Rule 30(b)(6) Dep. at 26:23-27:10 (May 5, 2015), attached as Ex. A to Zampierin Decl. filed herewith. In its most recent declaration, the State identifies thirteen additional cases from August 2015 where requests for a fair hearing were not resolved within the 45-day limit. Declaration of Kim Hagan (Doc. No. 166) ¶ 7 n.1.

The State also began receiving additional information from CMS on all "pended" applications that the federal exchange had flagged as having data inconsistencies. The State's plan to address "mitigation strategies and operational workarounds . . . until the state is fully in compliance with federal statutory and regulatory requirements," approved by CMS in May 2016 (the "Mitigation Plan"), includes some details about this process. (Doc. Nos. 166-1, 166-2.) However, the Mitigation Plan does not include any timeline for resolving inconsistencies and

issuing decisions on the application or purport to change any of the deadlines in federal law.[1] The State has moreover indicated that its current process does not ensure that determinations are made within 45 or 90 days of the person's application through the federal exchange. Tr. of Rule 30(b)(6) Depo. (Doc No. 124-2) at 71:4–72:13 (May 5, 2015).[2]

At this time, Plaintiffs' class counsel are without even the most basic of data regarding Defendants' compliance with the preliminary injunction order that was intended to remedy the State's failure to process TennCare applications in a timely manner. Plaintiffs' class counsel are also without information regarding the ongoing number of persons still periodically (if briefly) within class who have or will benefit from that Order. Plaintiffs have asked Defendants repeatedly for updated information about how the preliminary injunction implementation is proceeding, including how many applications they are adjudicating through the process they created to comply with the Order. *See* Memo. in Supp. of Pls.' Third Mot. to Compel (Doc. No. 125) at 1–2. Plaintiffs have additionally asked for basic information regarding the number of persons who are still being "pended" at the federal exchange and referred to the State, whose applications are not being resolved in 45 or 90 days—the bedrock of Plaintiffs' claims. *Id.* at 2–3. Defendants have steadfastly refused to produce that information, and as of this date the Court has not addressed this dispute on the merits. *See* Order dated Aug. 24, 2016 (Doc. No. 160) at 3 (denying motion as moot without prejudice); Pls.' Mot. for Review (Doc. No. 161).

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[1] CMS can only waive compliance with provisions of the Medicaid Act on terms and through a process that does not exist here. *See* 42 U.S.C. § 1315; *Beno v. Shalala*, 30 F.3d 1057, 1068 (9th Cir. 1994); *Newton-Nations v. Betlach*, 660 F.3d 370, 383 n.5 (9th Cir. 2011). The Mitigation Plan does not give federal sanction to the State's violations of federal requirements, but as its title indicates, merely tries to lessen the harm caused by the State's noncompliance.

[2] The State now asserts that it "has been able to create an efficient and streamlined eligibility process to adjudicate these inconsistency cases and provide the applicant with an eligibility determination *within 45 days of receiving the application information from CMS*." Hagan Decl. ¶ 4 (emphasis added). It *does not* assert that it is actually processing these applications within 45 days of the application date.

LEGAL STANDARD

Once a class has been certified, "decertification and modification should theoretically only take place after some change, unforeseen at the time of the class certification, that makes alteration of the initial certification decision necessary." 3 William B. Rubenstein et al., Newberg on Class Actions § 7:34 (5th ed. 2013). "Thus, while a district court has broad discretion to make decertification decisions, "decertification is a 'drastic step,' not to be taken lightly." Newberg on Class Actions § 7:37; *see also id.* § 7:38; *Glazer v. Whirlpool Corp.*, No. 1:08WP65001, 2014 WL 7781167, at *1 (N.D. Ohio Oct. 28, 2014) ("[D]ecertification is a drastic measure . . . not to be taken lightly or without definitive, material alteration of the law or facts."). Accordingly, "[p]rior to decertification, the Court must consider all options available to render the case manageable," including modification. *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 554 (E.D. Va. 2000); *see also In re Urethane Antitrust Litig.*, No. 04-1616-JWL, 2013 WL 2097346, at *2 (D. Kan. May 15, 2013) ("[I]t is an extreme step to dismiss a suit simply by decertifying a class, where a 'potentially proper class' exists and can easily be created.") (quoting *Woe v. Cuomo*, 729 F.2d 96, 107 (2nd Cir. 1984)).

ANALYSIS

A. The Class Satisfies the Rule 23 Numerosity Requirement Because Joinder Remains Impracticable.

Defendants first argue that Rule 23(a)(1)'s requirement of impracticability of joinder is no longer satisfied because the class purportedly has no members. The State reaches this conclusion by arguing that, since entry of the preliminary injunction, every applicant *either* receives a determination reasonably promptly *or* is given the "opportunity for a fair hearing" due to the State's compliance with the preliminary injunction. *See* State Br. at 7; Hagan Decl. ¶ 8.

In its original order, the Court correctly found that numerosity was met due to "the large numbers of persons applying for Medicaid in Tennessee, the geographic scope of the potential class, and the likely inability of the economically disadvantaged potential class members to bring individual lawsuits." Class Cert. Order at 3. Moreover, it found that "[t]he alleged problem is systemic and operational, so it potentially affects all Medicaid applicants." *Id.* These factors have not changed.

Defendants' arguments and evidence are lacking in two critical ways that require this Court deny their Motion. First, the State has not shown that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur; Plaintiffs' class claims cannot have been rendered moot because the State is now providing the mechanism to request a hearing—a process that they admit has been established "in compliance with the injunction.". State Br. at 4. Second, the State has not argued that all applicants who are delayed are immediately given the opportunity for a fair hearing. Those applicants thus become members of the class from the point at which their applications are beyond the 45- or 90-day deadlines until the time they receive a hearing or an adjudication of their application. However, even if this Court finds that the class is without members because of the State's compliance with the preliminary injunction, the proper remedy would be to modify the class definition rather than decertifying the class.

1. Compliance with the preliminary injunction cannot moot the class' claims.

Defendants argue that every applicant will *either* receive a reasonably prompt decision *or* will be able to request the fair hearing ordered by this Court.[3] But Defendants' compliance with

[3] Plaintiffs cannot ascertain the veracity of the State's assertion until Defendants respond to discovery. Indeed, as noted above, there are examples of categories of people who were *not* getting timely decisions or hearings. *See supra* at 3–4 (citing Declaration of Wendy Long (Doc.

the preliminary injunction—which requires cessation of the State's unlawful practice of failing to provide fair hearings to those whose applications were delayed—cannot moot class members' claims. Cessation of wrongful behavior "ordinarily does not deprive a federal court of its power to determine the legality of the [challenged] practice." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 169-170 (2000). Rather, the party asserting mootness bears the "formidable burden" of showing that it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur," *A. Philip Randolph Inst. v. Husted*, --- F.3d ----, No. 16-3746, 2016 WL 5328160, at *10 (6th Cir. Sept. 23, 2016) (quoting *Laidlaw*, 528 U.S. at 190), and that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation," *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979). If the law required otherwise, "the courts would be compelled to leave the defendant free to return to his old ways." *Laidlaw*, 528 U.S. at 189 (quotation and alterations omitted).

This is necessarily true of compliance with a preliminary injunction, as dismissal based on compliance would eliminate the very protections the Court determined were appropriate in the first instance. *See LaPeer Cty. Med. Care Facility v. Mich.*, No. 1:91-CV-333, 1992 WL 220917, at *7 (W.D. Mich. Feb. 4, 1992) ("Compliance with the provisions of a preliminary injunction . . . does not render moot [plaintiffs'] underlying claims [because] [i]f the injunction is dissolved without a decision on the merits, there is nothing to keep defendants from resuming the activity that had been restrained by the preliminary injunction."); *see also Phillips v. Mabus*, 894 F. Supp. 2d 71, 84-85 (D.D.C. 2012) (finding compliance with stipulated preliminary injunction did not render claims moot); *Courthouse News Serv. v. Jackson*, Civ. A. No. H-09-1844, 2009 WL 4927549, at *1 (S.D. Tex. Dec. 18, 2009) (holding defendants' verbal assurances of

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No. 109) ¶ 2 (Mar. 16, 2015); Tr. of Rule 30(b)(6) Dep. at 26:23-27:10 (May 5, 2015); Hagan Decl. at 7 n.1.

compliance with preliminary injunction order do not render claims moot or foreclose possibility of permanent injunctive relief); *United States v. Gregg*, 32 F. Supp. 2d 151, 158–59 (D.N.J. 1998) ("[A]n enjoined party ought not to be rewarded merely for doing what the court has directed.") (quoting 11A Charles A. Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice and Procedure, § 2961 at 405 (1995)), *aff'd*, 226 F.3d 253 (3d Cir. 2000); *Walling v. Harnischfeger Corp.*, 242 F.2d 712, 713 (7th Cir. 1957) (refusing to dissolve permanent injunction solely on the basis of defendants' compliance and finding that "[c]ompliance is just what the law expects.").

The State has not met this "formidable burden." Its actions to set up a process for class members to request a fair hearing are not "voluntary" but mandated by the preliminary injunction order. Furthermore, the State has represented that the policies governing the provision of fair hearings to members of the class, contained in a document named the "Delayed Application Appeals Deskguide," are "*subject to revision at any time*." (Doc. No. 124-1 at 5 (emphasis added)).[4] Thus, the Plaintiff class is at risk of not receiving fair hearings or adjudications of their applications without the preliminary injunction, and their claims cannot be considered moot. *See Husted*, 2016 WL 5328160, at *10 (Because the change at issue "was issued pursuant to the Secretary's 'directive,' rather than any legislative process" a return to the allegedly wrongful behavior would not be "particularly burdensome."); *Austin v. Wilkinson*, 502 F. Supp. 2d 660, 666 (N.D. Ohio 2006) (voluntary cessation exception "squarely applies" and renders case justiciable when agency retains discretion to change policy in the future).

[4] The Mitigation Plan (Doc. No. 166-1) relied upon by the State does not address or mention either the State's obligation to provide these fair hearings or the process that the State set up to process fair hearing requests.

Moreover, this Court should not find the case moot because Defendants have not accepted responsibility for the alleged violations of 42 U.S.C. §§ 1396a(a)(3) and (a)(8) and the Due Process Clause at issue in this case. They have contested this issue in their briefing on the Preliminary Injunction, in their original Motion to Dismiss, and on appeal. Because they have not admitted such responsibility, their compliance with the terms of the preliminary injunction order should not be seen to moot class members' claims. *See Gary Panthers Project Fund v. Thompson*, 273 F. Supp. 2d 32, 36 (D.D.C. 2002) (finding defendants' compliance with preliminary injunction did not moot plaintiffs' claims because, *inter alia*, defendants failed to confess error regarding their past conduct and continued to assert their past actions were lawful); *Gregg*, 32 F. Supp. 2d at 158–59 (case not moot in light of defendants' assertions that their conduct did not violate statute and that they should not be subject to any legal consequences as a result of their actions).

The sole case Defendants cite to support their argument for decertification based on a class with no members is inapposite. *See* State Br. at 7–8 (citing *Thompson v. Linvatec Corp.*, No. 6:06-CV-00404(NPM/GJD), 2010 WL 2560524 (N.D.N.Y. June 22, 2010)). In *Thompson*, the court decertified the class because discovery revealed that no members had ever fit the class definition. *See Thompson*, 2010 WL 2560524, at *6–7 ("What the court ultimately determines from the depositions and other submitted materials is that the five named defendants alone cannot satisfy the requirements of class certification, as even they do not fall under the definition of a class member as the court has clarified and defined it."). In contrast, the State does not argue here that there were never any members in the class, but only that Defendants' subsequent actions to comply with this Court's preliminary injunction order have changed the makeup of this class. Such arguments cannot moot the claims of the plaintiff class and empty the certified

class of its members unless the State meets the foregoing standard for mootness in cases of voluntary cessation. *See Santillan v. Gonzales*, No. C 04-02686 MHP, 2005 WL 1592872, **4–10, *13 (N.D. Cal. July 1, 2005) (rejecting defendants' motion to decertify because they had not met the standard for showing mootness in light of voluntary cessation, and, "[w]ithout dismissal of class member claims, numerosity remains unchanged.").

2. Class members exist who are not given an opportunity for a fair hearing immediately after their applications are delayed.

The State has presented no argument or evidence that would indicate that all class members have been eliminated. In its brief, the State only represents it is *allowing* applicants who are delayed beyond the deadlines of 45 or 90 days to *request* a fair hearing—not that there are no delays beyond those time periods or that the State is actually *providing* a fair hearing or adjudication to all applicants immediately when the 45- or 90-day deadlines pass. Once an application is delayed and the applicant requests a fair hearing, TennCare alleges that it either (1) provides the applicant a fair hearing, 45 (or 90) days after TennCare receives proof that their application has been delayed; (2) provides the applicant a decision on their application during this 45- (or 90-) day period before TennCare must give them a fair hearing; or (3) dismisses the appeal where TennCare does not believe that proper proof of application has been provided within 15 days. Hagan Decl. ¶¶ 6–7.

The class certification order states that persons with delayed applications are members of the class if they "have not been given the opportunity for a 'fair hearing' by the State Defendants." Class Cert. Order 8. Evaluating whether an individual class member has "the opportunity for a fair hearing" and is thus a member of the class cannot be satisfied simply by pointing to a generally available process set up for applicants to request such hearings. It must be determined by looking at records to see if an individual had an opportunity to be heard. An

opportunity for a fair hearing must necessarily mean the ability to appear at a hearing to present any claims and defenses. *Cf.* Black's Law Dictionary (10th ed. 2014) (defining "opportunity to be heard" as "[t]he chance to appear in a court or other tribunal and present evidence and argument before being deprived of a right by governmental authority."); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) ("'[T]he opportunity to be heard' . . . is an opportunity which must be granted at a meaningful time and in a meaningful manner.").[5] The State itself has indicated that its goal was not to provide these hearings to all class members, but rather to provide eligibility determinations in order to "moot[] the need for a hearing required by the Preliminary Injunction." Long Decl. (Doc. No. 109) ¶ 3 (Mar. 16, 2015).

Thus, class members exist whose applications have been pending 45 or 90 days without a decision, and they remain members until such time as a fair hearing is conducted or their application is actually adjudicated. As both this Court and the Sixth Circuit have recognized, class membership here is inherently transitory and thus continually in flux. *See* Class Cert. Order 6–7; *Wilson v. Gordon*, 822 F.3d 934, 947 (6th Cir. 2016). Until the State shows that

[5] Even if "the opportunity for a fair hearing" could be satisfied by something short of a hearing—such as by guaranteeing that the individual has access to the process set up by the State to comply with the preliminary injunction—members of the class would still exist. Individual class members are not granted access to this appeals process immediately and automatically when their application is delayed. The State provides no direct, affirmative notice of the process it is now administering pursuant to the preliminary injunction to those whose applications are delayed. *See* Hagan Decl. ¶ 6(a) (describing process to initiate delay appeal but not mentioning notice). At a minimum, for an "opportunity" to be meaningful, affirmative *notice* of that opportunity must be provided. *See Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970). Furthermore, there are individuals whose requests for fair hearings are denied because they are unable to provide proof of application that is deemed acceptable by the State. *See* LaRowe Decl. (Doc. No. 135-11) ¶ 12 (describing attempts of Kimberly P. to provide proof of application and obtain access to the fair hearing appeal process); Hagan Decl. ¶ 6(e) ("TennCare will open a delayed application appeal" only after "discovery (or receipt) of proof of an application."). Plaintiffs do not dispute the propriety of such a proof of application requirement, but point out that such a requirement means that all individuals who are delayed do not have immediate access to the fair hearing process.

TennCare applicants consistently are not delayed beyond 45 or 90 days, there will be a continual ebb within the Class—as new persons go beyond the 45- and 90-day threshold and enter the class—as well as a continual flow—as those class members eventually receive a determination or hearing. The State's suggestion that there are no remaining class members is disingenuous at best.

3. This Court Has Discretion To Modify the Class Definition.

Finally, assuming *arguendo* that the State's compliance with the preliminary injunction has somehow rendered the class without members, the appropriate remedy is not to decertify and dismiss, but to modify the class definition. *See In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 302 F.R.D. 448, 459 (N.D. Ohio 2014) (noting decertification is "drastic step" and modification is preferred) (citations omitted). The Court has broad discretion to modify the class definition. *See Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007) ("[D]istrict courts have broad discretion to modify class definitions, so the district court's multiple amendments merely showed that the court took seriously its obligation to make appropriate adjustments to the class definition as the litigation progressed."); *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1213–15 (6th Cir. 1997) (amending class definition *sua sponte* to encompass named plaintiffs and those similarly situated).

The Court granted the preliminary injunction as an interim measure to mitigate the harm stemming from the State's ongoing violation of the prompt processing requirement of 42 U.S.C. § 1396a(a)(8), resulting in the Plaintiffs facing long delays to obtain a decision on their applications and to access healthcare. As such, it did not purport to be a complete or final response to those violations. In the exigencies that existed when the order was entered, the order countenanced a situation in which the hearing relief afforded by the preliminary injunction

would not be available until after an applicant had already suffered a violation of the prompt processing statute. The state's argument for decertification and dismissal would use the Court's class definition to permanently deprive plaintiffs of an opportunity to prevent a violation of section 1396a(a)(8) in the first place. For the reasons contained herein, Plaintiffs do not believe the case law supports that argument, but if the Court disagrees, the class definition should be revised to avoid such an unjust result.

Again, the State is *not* arguing that the illegal delays complained of in this action have uniformly ended.[6] Rather, it argues—albeit incorrectly—that no class members remain because the state is providing all applicants with delayed applications the "opportunity for a 'fair hearing'" by allowing them to request such hearings through the process set up in compliance with this Court's preliminary injunction order. In the event the Court is satisfied with the State's position, it should modify the class definition by striking the language related to being denied a fair hearing and define the class as: "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)." This modified definition would continue to encompass all those whose applications were unlawfully delayed, and would more closely hue to the definition originally proposed by Plaintiffs.[7] *See* Class Cert. Order at 1.

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[6] Even if they did so argue, Plaintiffs would be entitled to discovery before dismissal would be warranted. *Gilbert v. Ferry*, 401 F.3d 411, 415 (6th Cir.), *on reh'g in part*, 413 F.3d 578 (6th Cir. 2005); *Williamson v. Tucker*, 645 F.2d 404, 413–14 (5th Cir. 1981).

[7] Plaintiffs originally proposed including a requirement that the class members had "contacted the Tennessee Health Connection or its successor entity for assistance with that application." Class Cert. Order at 1. This part of the definition was intended to address the State's concern that they had no way of identifying the members of the class in order to provide them with relief. Because the State now receives information about the applications that are pended "on a routine and systematic basis," Hagan Decl. ¶ 4, there is no need for such a requirement in the definition.

B. The Class Satisfies the Rule 23(a)(3) Typicality Requirement Because Named Plaintiffs' Claims Are Still Typical of the Class.

The Court previously found that Plaintiffs' claims are typical because they "arise from the same practice and course of conduct that give rise to the claims of other potential class members," and because "[t]he declaratory and injunctive relief which Plaintiffs seek would apply to all Medicaid applicants - requiring Defendants to adjudicate applications within the 45 and 90 day time periods or, if the applications are delayed beyond these time periods, requiring Defendants to provide a fair hearing opportunity." Class Cert. Order at 5. Defendants do not dispute in their Motion that the practice and course of conduct that gave rise to Plaintiffs' claims—the unreasonable delays caused by the State's administration of the Medicaid Program[8]—still exist today.

Rather, the State argues that its practices related to current TennCare applicants are different than those applied to the Named Plaintiffs because, since the Court's class certification and preliminary injunction orders, CMS has been routinely providing the State with data about Medicaid applicants. It also contends TennCare has been complying with the PI by setting up a process to allow those with delayed applications to request a fair hearing. Neither of these grounds shows that Plaintiffs' claims are no longer typical of the class.

As noted above in part A(1), *supra*, any actions the State has taken to provide a process for Plaintiffs to request a fair hearing were pursuant to the preliminary injunction order; this cannot form the basis for any claim that their "voluntary" actions have changed the situation for

[8] Class Cert. Order at 1 ("Plaintiffs' claims arise from the State's Medicaid program (TennCare) and the State's responsibilities in administering that program.")); Prelim. Inj. Order at 1 ("More specifically, the Plaintiffs allege that the Defendants have unreasonably delayed adjudications of their applications for medical assistance through TennCare, and have failed to provide fair hearings on the delayed adjudications."); *id.* at 2–3 (highlighting that Defendants' violations were evidenced by the declarations of Named Plaintiffs and other declarants who noted that their applications had been pending with no decisions for months).

class members by providing them with the ability to request hearings and thereby rendered named Plaintiffs' claims atypical.

Additionally, such a change in the reasons for the delays or TennCare's ability to remedy them does not render Plaintiffs' claims atypical. The Court based its typicality findings on the fact that Plaintiffs were delayed and that Plaintiffs' requested remedies could provide classwide relief, not on any argument that such delays were caused by TennCare's inability to systematically access Plaintiffs' applications. *See Santillan*, 2005 WL 1592872, at *5 ("The linchpin of the class definition is the *fact* of the failure to issue evidence of LPR status, not the precise *causes* of that failure."). The Court *did not* rely on the fact that TennCare was not receiving consistent information from CMS, and instead noted that "there is no legal or factual barrier preventing the State from obtaining information about particular individuals from the Federal Exchange." Prelim. Inj. Order at 7. The Court's definition included *anyone* with a delayed application, no matter the cause, as it included individuals who applied directly to TennCare and thus did not involve CMS in any way. Class Cert. Order at 9; *Wilson v. Gordon*, 822 F.3d 934, 955 (6th Cir. 2016) ("[T]he class certified by the district court does not specify that only those who apply for MAGI categories of Medicaid are included; the class includes anyone who has applied for Medicaid and has not received a fair hearing on their delayed applications."). Thus, any changes to the ways in which TennCare is receiving information from CMS are irrelevant to the class definition and do not make Plaintiffs' claims atypical.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask the Court to deny Defendants' Motion to Decertify the Class and Dismiss the Case.

DATED this October 3, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day a true and correct copy of the foregoing has been filed with the Court through the CM/ECF filing system, and that by virtue of this filing notice will be sent electronically to all counsel of record, including:

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