UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HARRY DAVIS; RITA-MARIE GEARY; PATTY POOLE; and ROBERTA WALLACH, on behalf of themselves and all others similarly situated,	)	
Plaintiffs	)	
v.	)	12-CV-6134-CJS-MWP
NIRAV SHAH, individually and in his official capacity as Commissioner of the New York State Department of Health,	)	
Defendant	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

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PRELIMINARY STATEMENT

Defendant Shah opposes plaintiffs' Motion for Class Certification largely on the grounds that class certification is allegedly unnecessary. Resp. Mem. of Law (Resp.) (Dkt. #24). Defendant further alleges that one of the four proposed class representatives is not typical of class members. *Id.* at 2. Finally, defendant requests that should the class be certified, the definition be narrowly restricted to refer only to those who have received denials of their medically necessary compression stockings and orthopedic footwear. As set forth below, Defendant Shah is incorrect on all counts. The class proposed should therefore be certified.

ARGUMENT

I. The Class Meets All Prerequisites for Certification under Rule 23 and *Galvan* Does Not Apply.

The Response argues that class certification is unnecessary because the defendant promises to apply any Court-ordered relief to similarly situated individuals. Resp. at 3-4 (Dkt. # 24). The argument relies on *Galvan v. Levine*, 490 F.2d 1255 (2d Cir. 1973), which denied class certification as "largely a formality" where the district court had already decided the merits of the case, and the defendant had acknowledged the general applicability of the judgment and withdrawn the challenged policy while the class motion was pending. *Id.* at 1261.

A. The *Galvan* Approach has Been Rejected.

Galvan does not control the motion now before this Court. Plaintiffs have moved to certify the class pursuant to Rule 23(b)(2), which applies when " the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole…." Fed. R. Civ. P. 23(b)(2). "Rule 23(b)(2) was formulated precisely to allow for class actions where, as here, parties seek broad injunctive relief to vindicate the civil rights of a large class of individuals."

Dajour B. v. City of New York, No. 00CIV2044(JGK), 2001 WL 1173504, at *10 n.10 (S.D.N.Y. Oct. 3, 2001) (citation omitted). As the Rules Advisory Committee stated:

> This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class, and final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate.

Fed. R. Civ. P. 23 Advisory Committee Notes (1996). There is no dispute that the proposed class in this case falls squarely within Rule 23(b)(2).

Application of an additional "need" requirement, as suggested by Defendant Shah, "finds no support in Rule 23 and, if applied, would entirely negate any proper class certification under Rule 23(b), a result hardly intended by the Rules Advisory Committee." Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 4.19 (4th ed. 2002)). As noted by another New York federal district court:

> Defendants point out that the City may be relied upon to obey any final decree in this case, suggesting that it is therefore unnecessary to hold the action to be on behalf of a class. The same may be said, however, in the bulk of cases for which subdivision (b)(2) of Rule 23 was written. The least that can be said on the other side is that the rule plainly applies, that there is no discernible prejudice to defendants in applying it, and that plaintiffs are entitled to have the full scope of their decree made explicit and unmistakable.

Rodriguez v. Percell, 391 F. Supp. 38, 41 n.2 (S.D.N.Y. 1975); *see also, e.g.*, *Mendoza v. Lavine*, 72 F.R.D. 520, 523 (S.D.N.Y.1976) ("[I]t seems advisable to cautiously safeguard the interests of the entire class by ensuring that any order runs to the class as a whole…. Were this unnecessary, class certification pursuant to Rule 23(b)(2) would, arguably, never be necessary."); *Stenson v. Blum*, 476 F. Supp. 1331, 1336 (S.D.N.Y. 1979), *aff'd*, 628 F. 2d 1345 (2d Cir. 1980), *cert. denied*, 449 U.S. 885 (1980) (same).

Notably, more recent decisions by the Supreme Court call into question the approach used in *Galvan*. The Court recently reaffirmed the role of Rule 23(b)(2) in *Wal-Mart Stores v. Dukes*, stating:

> The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." … In other words, *Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class.*

_ U.S. _, 131 S. Ct. 2541, 2557 (2011) (citation omitted) (emphasis added); *see L.S. v. Delia*, No. 5:11cv354, 2012 U.S. Dist. Lexis 43822, at *28 (E.D.N.C. Mar. 29, 2012) (citing *Wal-Mart*, 131 S.Ct. at 2557, and stating, "[T]he necessity argument contradicts the language of recent Supreme Court precedent."); *cf. Floyd v. City of New York*, No. 08 Civ. 1034(SAS), 2012 WL 1868637, at *15-16 (S.D.N.Y. May 16, 2012) (citing *Wal-Mart* to certify (b)(2) class).

"Federal Rule of Civil Procedure 1 ... provides that the Rules 'govern the procedure in the United States District courts in *all* suits of a civil nature.'" *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) (emphasis in original). The Rules provide for certification of classes that meet the requirements of Rule 23(b)(2). *Id*. (affirming (b)(2) class over objection that certification was not needed). Defendant's argument should be rejected because it ignores the purpose of the Rule23(b)(2) class, is at odds with instruction from the Supreme Court, and would read (b)(2) out of existence.

B. Assuming for the Sake of Argument that *Galvan* is Viable, It does not Apply in this Case.

Galvan affirmed denial of a class as "unnecessary" where, prior to the entry of judgment, the state indicated that it understood the judgment would bind it with respect to all claimants, withdrew the challenged policy "even more fully than the Court ultimately directed," and promised not to reinstate it. 490 F.2d at 1261. Over the years, *Galvan* has been restrictively

applied, with courts focusing on whether four factors are present: (1) an affirmative statement from the government defendant that it will apply the relief across the board; (2) withdrawal of the challenged provision; (3) requested relief that is merely a declaration that the statute is unlawful; and (4) the unlikelihood that the plaintiffs' claims will become moot. *See Daniels v. City of New York*, 198 F.R.D. 409, 421 (S.D. N.Y.) (citations omitted), *reconsideration denied*, 199 F.R.D. 513 (S.D.N.Y. 2001).

Even assuming for the sake of argument that the Acting Director of the Division of Operations has the requisite authority to attest that the government agrees to be bound by any relief the Court orders, the remaining factors clearly are not met in this case.[1] The challenged provisions have not been withdrawn. As was the case when the Complaint was filed, the Department's regulations, with only a few exceptions, exclude orthopedic footwear and compression stockings from Medicaid coverage and plaintiffs allege that these exclusions violate the Medicaid Act, the Americans with Disabilities and Rehabilitation Acts, and the Due Process Clause of the Constitution. In these circumstances, class certification is not a mere formality. *See*, *e.g.*, *Dajour B.*, 2001 WL 1173504, at *10 (rejecting Medicaid director's argument that certification would be a formality where positive steps had not been taken to remedy the alleged violations of federal law); *Bishop v. New York City Dep't of Housing Preservation & Dev*., 141 F.R.D. 229, 240-41 (S.D.N.Y. 1992) (finding defendant's promise to apply relief to similarly situated persons fell short of the situation in *Galvan* because the state had not also taken steps to remedy the harm and "Plaintiffs need not show some extra element of necessity for class

[1] Defendant's counsel attests that the Defendant will abide by any order; however, it is well-established that assertions of counsel in a memorandum of law are not evidence. *See*, *e.g.*, *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (refusing to defer to agency counsel's litigating positions).

certification"). *Cf.* Resp. at 3 (citing *Galvan* and *Foreman v. Conn.*, 2003 WL 1056750, at *2 (D. Conn. Mar. 5, 2003), cases where the state withdrew the challenged policy prior to certification).

In addition, the plaintiffs do not merely seek a declaration of wrongdoing but also injunctive relief that will require Defendant Shah to take some affirmative steps to comply with the Medicaid Act, including promulgating an adequate coverage policy and providing adequate notices to individuals denied coverage. See Compl. ¶¶ 1, 13, 26, 40-41, 44, 53, 57, 151-169, Prayer for Relief (Dkt. # 1). In *Cutler v. Perales*, 128 F.R.D. 39 (S.D.N.Y. 1989), the Medicaid directors argued that class certification was not needed under *Galvan*. While acknowledging that the plaintiffs' request for relief did not specify new procedures or ask the court supervise implementation of the procedures, the court refused "to create a threshold of specificity of affirmative relief that plaintiff[s] must cross to qualify for class certification." *Id.* at 46. The class was certified because the case was "clearly aimed at affirmatively changing government practices and not merely condemning certain government conduct." *Id. See also, e.g., Boyland v. Wing*, No. 92CV1002, 2001 WL 761180 (E.D.N.Y. Apr. 6, 2001) (rejecting *Galvan* where relief would require affirmative reformulation of the City's program to assure conformity with federal law); *Reynolds v. Giuiliani*, 118 F. Supp. 2d 352, 391 (S.D.N.Y. 2000) (refusing to apply *Galvan* and certifying class where plaintiffs sought affirmative relief to compel defendants to comply with federal Medicaid law); *Mayer v. Wing*, 922 F. Supp. 902, 908 (S.D.N.Y. 1996) (finding need argument ignored plaintiffs' request for system-wide injunctive relief to align Medicaid procedures with federal law); *see also Conn. Dep't of Soc. Servs. v. Shalala*, No. 3:99CV2020, 2000 WL 436616, at *2-3 (D. Conn. Feb. 28, 2000) (rejecting *Galvan* because, notwithstanding prohibitory language in prayer for relief, plaintiffs were "not merely seeking to stop the

defendant's conduct, rather they are also seeking an order that the defendant start acting to correct the alleged problems and comply with" federal requirements).

Finally, the individual plaintiffs' claims could become moot if their Medicaid coverage and/or health conditions change. Numerous courts have cited such dangers of mootness as grounds for rejecting the necessity argument. *See, e.g., Greklek v. Toia*, 565 F.2d 1259, 1261 (2d Cir. 1977) (citing mootness concerns and affirming Medicaid class certification); *Reynolds*, 118 F. Supp. 2d at 391 (finding certification of Medicaid class was not a formality because "it will insure against the danger of this action becoming moot"); *Alston v. Coughlin*, 109 F.R.D. 609, 612 (S.D.N.Y. 1986) ("The plaintiffs' interest in averting the possibility of the action becoming moot, with the concomitant interest in judicial economy, makes class certification in this case more than an empty formality…."). *See also Daniels*, 199 F.R.D. at 514 (rejecting application of *Galvan* in part because, in the absence of a class, plaintiff's counsel would not be able to conduct privileged communications with class members).

In sum, *Galvan* is of questionable authority and, even if it does remain good law, this case is not like *Galvan*.[2] The plaintiffs have satisfied the requirements for certification under Rule 23, and the class should be certified as requested.

II. Plaintiff Geary is Typical of Proposed Class Members.

[2] Moreover, under cases decided since the 1970s, it is not at all clear that other individuals would benefit if the government's promise of future compliance were broken. *See U.S. v. Mendoza*, 464 U.S. 154, 162 (1984) ("We hold, therefore, that nonmutual offensive collateral estoppel simply does not apply against the Government in such a way as to preclude relitigation of issues…."); *N.H. v. Maine*, 532 U.S. 742, 755 (2001) (noting that judicial estoppel does not ordinarily apply to a government litigant); *Morel v. Giuliani*, 927 F. Supp. 622, 634 (S.D.N.Y. 1995) (finding allegation that *stare decisis* would protect subsequent plaintiffs "overstated the protection," and certifying class of public benefits recipients).

Defendant Shah argues that class certification should not be granted, because one of the four class representatives, Plaintiff Geary, is allegedly not typical of all others because the shoes she requires are not covered by Medicaid. Resp. at 2 (Dkt. # 24); Bick Aff., ¶ 16 (Dkt. # 24-1).

The typicality requirement of Rule 23(a)(3) "is satisfied when each class member's claim arises from the same course of events, and each class member makes a similar legal argument to prove the defendant's liability." *In re Drexel Burnham Lambert Group, Inc.*, 960 F. 2d 285, 291 (2d Cir. 1992). "Moreover, the mere presence of questions unique to the class representatives will not bar class certification." *In re TCW/DW North American Government Income Trust Securities Litigation*, 941 F. Supp. 326, 342 (S.D.N.Y. 1996) (citing *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F. 2d 176, 180 (2d Cir. 1990). Indeed, "it is settled that the mere existence of individualized factual questions with respect to the class representative's claim will not bar class certification[. . .]." *Baffa v. Donaldson, Lufkin & Jenrette Securities Corp.*, 222 F. 3d 52, 59 (2d Cir. 2000); *see also Caridad v. Metro-N. Commuter R.R.*, 191 F. 3d 283, 293 (2d Cir. 1999) (typicality does not require the factual backgrounds of plaintiffs and class members to be identical). Certification is only barred where the named plaintiffs are "subject to unique defenses which threaten to become the focus of the litigation." *Baffa*, 222 F. 2d at 59. "The test is whether the defenses will become the focus of the litigation, thus overshadowing the primary claims, and prejudicing other class members." *Oscar, v. BMW of North America, LLC*, 274 F.R.D. 498, 508 (S.D.N.Y. 2011) (internal quotations omitted).

Rita-Marie Geary is one of four named plaintiffs in this class action. Defendant Shah does not dispute the typicality of any of the other three named plaintiffs and, on this basis alone, this Court should find the typicality requirement has been met.

As to Ms. Geary, it is true that Acting Director Bick attests that open-toed shoes are not covered by Medicaid. Bick Aff. ¶ 20 (Dkt. # 24-1). However, this attestation exemplifies the typicality of her claim: she was unable to receive her shoes from the supplier because coverage was not available; she was not furnished with a written notice setting out the reason for the denial of her claim; she was denied the opportunity to challenge defendant's actions through the fair hearing process; and she was denied the opportunity to modify her request in order to meet defendant's coverage standards. Whether Ms. Geary requires open-toed shoes, and whether defendant might otherwise cover shoes for her remain questions of fact that do not affect the full illegality of defendant's actions. As one of four named Plaintiffs where defendant has not challenged the typicality – or indeed anything else – of these plaintiffs, any factual differences between Plaintiff Geary and other class members does not rise to the level of "defenses which threaten to become the focus of the litigation."

III. The Class Definition Should Not be Modified.

Acting Director Bick asserts that plaintiffs' proposed class definition is "ambiguous." Bick Aff. ¶ 13 (Dkt. # 24-1). He would modify the proposed definition in two ways: First, he would limit "denied, delayed, disrupted, or reduced," simply to "denied"; second, he would eliminate altogether "by Defendant directly or through his agents or assigns." *Id.*, ¶ 7. Defendant's counsel adopts the recommendations without argument. Resp. at 2 (Dkt. # 24).

The class definition should provide "[a] sufficient basis upon which to determine the scope of the class and the propriety of permitting plaintiffs to represent all or a part of it." *Thomas S. by Brooks v. Flaherty*, 902 F. 2d 250, 254 (4th Cir. 1990) (quoted in Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 6.14 (4th ed. 2002)). A definable class protects absent class members by identifying who is entitled to relief and protects defendants by

identifying who is bound by any relief granted. *Newberg*, § 3.1. Rule 23(b)(2) often applies to classes "whose members are incapable of specific enumeration." Fed. R. Civ. P. 23 1966 Advisory Committee Note. Thus, "class descriptions based on the harm allegedly suffered by plaintiffs are acceptable in class actions seeking only declaratory and injunctive relief under Rule 23(b)(2)." *Floyd v. City of New York*, 2012 WL 1868637, at *11 (S.D.N.Y. 2012).

The proposed restriction of "denied, delayed, disrupted, or reduced" to "denied" fails to capture both the full scope of defendant's actions and the full scope of plaintiffs' harms. Although plaintiffs have been unable to obtain medically necessary compression stockings and orthopedic footwear, none has received a denial compliant with 42 U.S.C. § 1396a(a)(3) and 42 C.F.R. § 431.210. None have received timely and adequate notice of the limitations in their services and none have been informed of their right to challenge defendant's actions through a fair hearing. *See* Davis Decl. ¶¶ 25-28; Poole Decl. ¶ 11; Geary Decl. ¶¶ 9-12; Wallach Decl. ¶¶ 12-14; Hale Decl. in Supp. of Prelim. Inj. ¶¶ 10-12 (Dkt. # 1). Defendant's actions have thwarted plaintiffs' and proposed class members' access to services in ways that do not comport with the technical term of art "denied" standing on its own. The full phrase "denied, delayed, disrupted, or reduced" is therefore required to identify all those harmed by defendant's actions.

The proposed modification also fails to encompass the precise claims contained in the complaint. Acting Director Bick asserts that "the gravamen" of plaintiffs' complaint is N.Y. Soc. Serv. L. § 365-a(2)(g)(iii) and (iv). (Dkt. # 24-1, ¶ 15). To the contrary, plaintiffs' complaint addresses not only the illegality of the challenged statute under the federal Medicaid Act, but also the illegality of defendant's actions in implementing the statute, as well as violations of the ADA and Rehabilitation Act, and of Plaintiffs' and proposed class members' Constitutional rights to Due Process. Complaint, ¶¶ 151-169 (Dkt. # 1). In implementing the

challenged statute, defendant issued new regulations, 18 N.Y.C.R.R. § 505.5(g)(1) and (2), and implemented them through a series of *Medicaid Updates* and *Provider Updates for Pharmacy and DME [Durable Medical Equipment] Providers*. Complaint ¶¶ 68-70; Hale Decl. in Supp. of Prelim. Inj., ¶¶ 9-11 (Dkt. # 1). These *Updates* inform DME suppliers of the new restrictions on coverage of orthopedic footwear and compression stockings, and direct them to cover these items only in certain statutorily defined exceptions. Thus, defendant has assigned responsibility for making coverage determinations to suppliers. In similar situations, courts have found that the state agency cannot absolve itself of its statutory and Constitutional obligations by assigning responsibility to outside entities. *See, e.g., Catanzano by Catanzano v. Dowling*, 60 F. 3d 113 (2d Cir. 1995) (notice and hearing required where certified home health agency, as state actor, reduces or terminates a recipient's aide services). Thus, the phrase "by Defendant directly or through his agents or assigns" accurately reflects defendant's actions and properly identifies class members by the ways in which they have been harmed.

CONCLUSION

Plaintiffs have met – and defendant has not challenged – all the requirements for class certification under Rule 23(b)(2). Based upon the complaint, the record in the case, and briefing on class certification, the case is now ready for determination of the Motion for Class Certification. We respectfully request that the class therefore be certified.

Dated: Rochester, New York
September 14, 2012

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Geoffrey Hale, hereby certify that, on the 12th day of September, 2012, I filed the foregoing Reply Memorandum in Support of Plaintiffs' Motion For Class Certification with the Clerk of the District Court for the Western District of New York via the CM/ECF system, which sent notification of such filing to Assistant Attorney General Richard Benitez at richard.benitez@ag.ny.gov., attorney for the defendant.

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