UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
Southern Division

Civ. No. 7:08-CV-57-H

DEVON TYLER MCCARTNEY, a minor child, by his mother Penny McCartney, ERIC CROMARTIE, a minor child, by his mother Selena McMillan, and KATIE TIPTON, a minor child, by her father Greg Tipton, individually and on behalf of all others similarly situated, Plaintiffs, v. DEMPSEY BENTON, Secretary, North Carolina Department of Health and Human Services, in his official capacity, Defendant.	**OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Defendant respectfully submits this Opposition to Plaintiffs' Motion for Class Certification. Defendant opposes plaintiffs' motion on both procedural and substantive grounds.

PROCEDURAL OBJECTIONS

First, class certification should be held in abeyance at least until such time as the Court has had an opportunity to rule upon defendant's Motion to Dismiss. Particularly since that motion involves, in substantial part, the issue of whether this Court has subject matter jurisdiction over the claims against defendant Benton in his official capacity, to require defendant Benton to participate in this litigation until the jurisdictional issues are resolved would undermine the very essence of the Eleventh Amendment immunity being asserted in his motion.

Second, aside from the jurisdictional considerations, it would facilitate judicial economy if the Court were to defer considering the issue of class certification until it has ruled on defendant's Motion to Strike, which seeks the Court's ruling on the propriety of its considering much of plaintiffs' evidence submitted in support of the motion. Plaintiffs bears the burden of showing that the class complies with Rule 23. *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 65 n.6 (4th Cir. 1977) (en banc) ("It is well-settled in this jurisdiction that the proponent of class certification has the burden of establishing the right to such certification under Rule 23."; *see also Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311 (4th Cir. 2006). Whether the evidence offered in support of the Rule 23 factors is actually to be considered is a paramount concern to defendant's opposition. Were the exhibits that defendant has moved to strike to be considered by the Court, the length and complexity of defendant's opposition would escalate greatly. Conversely, should the motion to strike be granted, it would be a fairly simple matter to show the Court that in the remaining evidence plaintiffs have produced virtually nothing in support of certification. Similarly, were the motion to strike to be granted, it would be much simpler to show the near-total lack of support for the factors of typicality and commonality. Therefore, quite clearly it would conserve scarce judicial resources if this Court were to defer considering class certification until some appropriate time after ruling on defendant's Motion to Strike.

Third, because of the jurisdictional objection and the lack of a ruling on defendant's Motion to Strike, defendant cannot assess the extent to which discovery would be necessary in opposing plaintiffs' motion. Particularly in light of the ambiguous declarations plaintiffs have seen fit to file in support of their motion, *see* Motion to Strike, if that motion were denied, considerable discovery would likely be required to see what exactly plaintiffs and their witnesses have to say about facts

germaine to the issues of typicality and commonality. It would make sense to defer consideration of plaintiffs' motion until such time as the pleadings are complete. Then the Court would be in a better position to consider defendant's discovery need on plaintiffs' motion along with other pre-trial matters at its Rule 16 conference.

SUBSTANTIVE OBJECTIONS

In the event the Court declines to postpone considering plaintiffs' motion, defendant opposes class certification for the following reasons. First, to mount what plaintiffs call a challenge to "the lack of basic due process protections for Medicaid recipients," (Amended Complaint ¶ 1), to properly represent a class plaintiffs should at least be able to show that they themselves have lost something in which they have a protected property interest, enforceable under § 1983 against defendant Benton. However, as set forth in defendant's Memorandum in Support of Motion to Dismiss, incorporated herein by reference, no plaintiff has completed procedural review of his or her appeal of an adverse determination of entitlement to medical assistance. In some instances, the plaintiffs have not even begun the appellate process or, once begun, have withdrawn from it. Therefore, no named plaintiff is in a position to represent a class of persons who have completed the "process" in order to complain that they were deprived of something because the process was not "due."

For example, plaintiffs are not yet (and may never be) able to complain that they lost something at the conclusion of an unfair hearing because of the unfairness of the hearing. Similarly, plaintiffs are not yet (and may never be) able to complain that their hearing was not *de novo*. *See* Memorandum in Support of Class Certification, p. 2.

Second, plaintiffs are all children. There are different services under the Medicaid Act for adults and children, and even within the ranks of children there are a variety of services and service

placements. *See* amended complaint ¶ 2. Plaintiffs' proposed class should be limited to children who have applied for Community Support Services ("CSS") or the Community Alternatives Program for the Mentally Retarded/Developmentally Disabled ("CAP-MR/DD"). There is no basis for plaintiffs to represent a class of persons engaged in inpatient psychiatric care, for example. And plaintiffs are not in a position to complain about issues arising when a medicaid recipient changes from one authorized provider to another.

Third, although plaintiffs seek to represent a class of persons whose services have been reduced or terminated, plaintiffs' personal claims involve only having requests for medical assistance denied. They cannot, therefore, properly represent a class of persons whose benefits have been reduced or terminated. Among other things, Medicaid applicants do not have the same constitutional rights to medical assistance as do recipients. Thus, the questions of due process of law presented by the plaintiffs differ substantially from those that might be presented by the absent class members Lacking a common legal claim alone is grounds to deny class certification.

Fourth, although defendant concedes the total class of medicaid recipients is quite large, it is not at all clear from the information provided by plaintiffs in support of their motion how many children - like plaintiffs - have applied for CSS or CAP-MR/DD, been denied the requested medical assistance, and not completed the appeal process provided by law. Worse, as explained somewhat in defendant's Motion to Strike, exhibits H, I, J and K to Plaintiffs' Motion for Class Certification, those exhibits do not support plaintiffs' class certification claims. Even as to numerosity, other than Exhibit K, which describes one example in support of the allegations of ¶ 144 of the amended complaint and another example in support of the allegations of ¶ 153, the exhibits are too vague and untrustworthy to support a finding by this Court about how numerous the purported class is. As far

as can be gleaned from the exhibits, the declarants may have personal knowledge of only a handful of persons with a claim similar to plaintiffs' claims.

Finally, just reading the personal factual allegation of the named plaintiffs in the amended complaint shows how silly it is for plaintiffs to argue that their claims are typical of those of class members. They are not even typical as to *each other*. Plaintiff Tipton participates in CAP-MR/DD, with a different coverage period and services than the others. Alone among the three, Plaintiff Cromartie has a complaint about not receiving mail in a timely fashion. Alone among the three, Plaintiff McCartney has no appeal pending and withdrew the only appeal he initiated. Alone among the three, Plaintiff McCartney has not made a request for services at this time. The thing plaintiffs *do* share in common is that none of them has appealed a denial of medical assistance through the appellate process. That hardly qualifies them to represent a class claiming to have been deprived of a property right without a fair hearing and without due process.

Should the Court take up class certification at this time, for the foregoing reasons plaintiffs' motion for class certification should be denied.

Respectfully submitted, this the 2nd day of July, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, 2 July 2008, I electronically filed the foregoing **OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Douglas Sea, Jane Perkins and Sarah Somers, attorneys for Plaintiff, and I hereby certify that I have mailed the document to the following non CM/ECF participates: none.

/s/ Ronald M. Marquette
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Special Deputy Attorney General