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

MELISSA WILSON, *et al.*, ***Plaintiffs,*** **v.** **DARIN GORDON, in his 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 Bryan**

DEFENDANTS' MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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DEFENDANTS' MEMORANDUM IN OPPOSITION
TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs have asked the Court to certify a class consisting of:

> All individuals who have applied for TennCare on or after October 1, 2013, who have not received a final eligibility determination in a timely manner, and who have contacted the Tennessee Health Connection or its successor entity for assistance with that application.

Plaintiffs' Motion for Class Certification ("Pls.' Class Cert. Mot."), D.E. 2, at 1. The motion must be denied because Plaintiffs have failed to carry their burden of proving that each of the demanding prerequisites of FED. R. CIV. P. 23(a) and (b)(2) has been satisfied.

First, class certification would be inappropriate in this case because an individual assessment of the circumstances surrounding each application must be conducted in order to determine whether each individual applicant is in the class or is entitled to relief. Specifically, it would be necessary to determine (i) when the application was submitted to the federal Exchange

(information the State does not have), (ii) what caused any delay in adjudication (for example, whether the delay was caused by the need to obtain verification or other documentation from the applicant, which tolls the regulatory time period for adjudicating an application), and (iii) whether the applicant had contacted the Tennessee Health Connection ("TNHC"), before it could even be determined that any given individual was properly part of the class. Accordingly, the proposed class does not satisfy either the commonality prerequisite imposed by Rule 23(a)(2) or Rule 23(b)(2)'s demand that a class be homogeneous enough that "a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011).

Moreover, Plaintiffs have produced no evidence supporting their assertion that a "substantial" number of individuals both (i) have not received a timely TennCare eligibility determination and (ii) have contacted TNHC, TennCare's call center, for assistance with their application. It is settled that Rule 23(a)'s numerosity requirement will not be satisfied when Plaintiffs provide the Court with nothing more than "bare speculation" concerning the number of persons with the same claim as Plaintiffs. *Golden v. City of Columbus*, 404 F.3d 950, 966 (6th Cir. 2005).

Finally, while Plaintiffs ask this Court to certify a class consisting of all individuals who have failed to have their applications for TennCare timely adjudicated and have contacted TNHC, the injuries alleged by Plaintiffs themselves are narrow and idiosyncratic compared to the potentially quite diverse experiences of all the individuals who might fall within the expansive contours of this proposed class. Plaintiffs have thus failed to show that certification of such a broad class would satisfy Rule 23(a)(3)'s typicality requirement.

STATEMENT

The federal Medicaid program, originally "created in 1965 under Title XIX of the Social Security Act, . . . pays for medical and health-related assistance for certain low-income individuals and families." *Caremark, Inc. v. Goetz*, 480 F.3d 779, 783 (6th Cir. 2007). Prior to January 1, 2014, Medicaid was "administered [solely] by the states but financed with both state and federal funds." *Id.* Tennessee's Medicaid program, known as TennCare, currently serves approximately 1.2 million enrollees. Declaration of Darin Gordon at ¶¶ 1-2.

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 26 & 42 U.S.C.) (hereinafter "Affordable Care Act" or "ACA"), made several significant changes to the Medicaid program that became effective January 1, 2014. First, Congress instructed the Secretary of Health and Human Services, acting through the Centers for Medicare and Medicaid Services ("CMS"), to participate directly in the administration of the Medicaid program by establishing and operating a federal Exchange, known as the federally-facilitated marketplace ("FFM") or HealthCare.gov. Among other responsibilities, the FFM must accept and adjudicate applications for enrollment into Medicaid when designated to do so by the State. *See* 42 U.S.C. §§ 18031, 18041, 18083(a). Second, the ACA required the use of a new methodology, known as Modified Adjusted Gross Income ("MAGI"), for calculating income and financial eligibility for most categories of Medicaid. *See id.* § 1396a(e)(14).[1]

[1] Certain Medicaid eligibility categories for "individuals eligible because of other aid or assistance, elderly individuals, medically needy individuals, and individuals eligible for Medicare cost-sharing" are not subject to the new MAGI rules. 42 U.S.C. § 1396a(e)(14)(D). These are known as "non-MAGI categories." Issues concerning non-MAGI eligibility are not before the Court in this case.

Finally, the ACA also revised the process for applying for Medicaid by (i) mandating the creation of a streamlined application that could be used to apply for a number of health care assistance programs including Medicaid, *see* 42 U.S.C. § 18083(b); and (ii) requiring both states and the federal government to determine eligibility using data that could be queried electronically from agencies such as the Internal Revenue Service and the Social Security Administration, *see id*. § 18083(c); *see also* 42 C.F.R. § 435.949. To facilitate this process, CMS created the Data Services Hub, which CMS describes as "provid[ing] one connection to the common federal data sources needed to verify consumer application information for income, citizenship, immigration status, access to minimum essential coverage, etc." *See* Kathleen Sebelius, *What's Working in the Marketplace: The Data Services Hub* (Oct. 26, 2013), www.hhs.gov/digitalstrategy/blog/2013/10/marketplace-data-services-hub.html (last visited Aug. 14, 2014). When a discrepancy arises between the data obtained from the Data Services Hub and the individual's application (for example, a discrepancy concerning the applicant's income), the FFM will request that the applicant submit verification documentation (for example, copies of pay stubs). Obviously, while the FFM awaits the submission of requested documentation, the processing of the application cannot go forward, and that time period is disregarded for purposes of assessing the timeliness of an eligibility adjudication. *See* 42 C.F.R. § 435.912(c) & (e).

In order to implement these new requirements, the State has made some changes to the TennCare application process. Before ACA implementation, Medicaid applications were processed by the State's Department of Human Services ("DHS") utilizing an eligibility computer system known as ACCENT. Because ACCENT is not capable of performing eligibility determinations under the new ACA-required MAGI rules and because the State's new eligibility computer system (known as Tennessee Eligibility Determination System ("TEDS")) is

not yet operational, *see* Declaration of Tracy Purcell (hereinafter "Purcell Decl.") at ¶ 12, all TennCare applications requiring MAGI eligibility determinations must be submitted for adjudication to the FFM. CMS approved the use of "the FFM to receive and process [all MAGI] applications on the state's behalf . . . as a short-term measure, not a long-term solution." Letter from Cindy Mann of CMS to Darin Gordon of TennCare at 3 (June 27, 2014) (attached as Ex. 14 to the Declaration of Samuel Brooke ("Brooke Decl."), D.E. 4-1). When TEDS becomes operational, the State will begin adjudicating MAGI eligibility on all TennCare applications—both those submitted directly to TennCare and those submitted to the FFM and referred by the FFM to the State. *See* Purcell Decl. at ¶ 17.

The process currently in place for TennCare enrollment is working for the vast majority of applicants. *Id.* at ¶ 19. Between January 1, 2014 and the end of June, the FFM approved approximately 89,000 applicants from Tennessee in MAGI categories and the State took the needed action to assure these individuals were enrolled in TennCare. In addition, TennCare enrolled approximately 27,000 non-MAGI enrollees and 19,000 deemed newborns pursuant to 42 C.F.R. § 435.117(a). Indeed, the number of new enrollees added to TennCare's rolls in the first quarter of 2014 is the third highest in TennCare's 20-year history. *Id.* Enrollment in TennCare has risen at a greater percentage rate than even the rate in some states that expanded their Medicaid programs. CMS reports that as of April Tennessee had an enrollment increase rate of 6% over pre-ACA enrollment numbers, while the average rate change for non-expansion states like Tennessee is 2.4%—less than half the rate of increase that Tennessee has achieved. *See* Purcell Decl., Ex. B (CMS Enrollment Percentage Change Chart for April) at 3.

While there are eleven named plaintiffs, nine of them have already been enrolled in TennCare, and their claims are therefore moot. Declaration of Kim Hagan ("Hagan Decl.") at

¶ 13. The question this Court faces, then, is whether the remaining two Plaintiffs—D.A. and T.V.—can bring suit on behalf of the expansive class they seek to certify. *See Mosley v. Hairston*, 920 F.2d 409, 414 (6th Cir. 1990) ("The issue of mootness implicates the court's subject matter jurisdiction inasmuch as federal courts are limited by Art. III of the Constitution to deciding cases and controversies. This requirement refers to 'live' controversies, those that persist in 'definite and concrete' form even after intervening events have made some changes in the parties' circumstances.").

ARGUMENT

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamaski*, 442 U.S. 682, 700-01 (1979). In order to invoke this exception, Plaintiffs bear the burden of proving that

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a). Additionally, Plaintiffs must prove that the class satisfies one of the requirements of Rule 23(b)—here, that "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."

Because the party proposing certification seeks to litigate in a way that departs from "the usual rule," *Califano*, 442 U.S. at 700, it is his burden to "affirmatively demonstrate his compliance with [Rule 23]—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 131 S. Ct. at 2551 (emphasis in original). And "[g]iven the huge amount of judicial resources expended by class actions, particular care in their issuance is required." *Pipefitters Local 636 Ins. Fund v.*

Blue Cross Blue Shield of Mich., 654 F.3d 618, 630 (6th Cir. 2011). Accordingly, a class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). Plaintiffs' attempt to carry their burden does not withstand this rigorous analysis. Plaintiffs have failed to satisfy no fewer than four of Rule 23's demanding prerequisites, any one of which is sufficient to compel denial of their motion.

I. PLAINTIFFS HAVE NOT PROVEN COMMONALITY.

Plaintiffs bear the burden of proving that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). This commonality requirement serves to ensure that "[i]t is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue," increasing the likelihood that classwide adjudication will "save[] 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." *Califano*, 442 U.S. at 701. While "there need only be one question common to the class," not "every common question . . . will suffice," since "at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality." *Sprague v. General Motors Corp.*, 133 F.3d 288, 397 (6th Cir. 1998). "What we are looking for is a common issue the resolution of which will advance the litigation." *Id.* Moreover, "[t]hat common contention . . . must be of such a nature that it 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." *Wal-Mart*, 131 S. Ct. at 2551.

Plaintiffs point to a number of questions of law and fact that they assert are common to the entire putative class, *see* Plaintiffs' Memorandum in Support of Their Motion for Class Certification, D.E. 3 ("Pls.' Class Cert. Mem."), at 15-16, but the Supreme Court has emphasized

that "what matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart*, 131 S. Ct. at 2551 (emphasis in original). Here, on the basic question of whether adjudication of each individual application was untimely, dissimilarities abound and each applicant's case must be examined individually.

By defining the proposed class in terms of applicants who failed to receive a "timely" adjudication, Plaintiffs presumably mean to incorporate 42 U.S.C. § 1396a(a)(8)'s requirement that applications for Medicaid be adjudicated with "reasonable promptness." But because an inquiry into whether any particular applicant has received a "reasonably prompt" adjudication is by its nature contextual, *cf. Rosie D. v. Romney*, 410 F. Supp. 2d 18, 27 (D. Mass. 2006) (observing that "[a] reasonable promptness violation may . . . turn on the nature of the services provided"), the assessment of whether each purported class member has or has not received a timely adjudication must proceed case-by-case. The inherently individualized nature of this inquiry makes it singularly unfit for classwide resolution.

Other courts have rejected attempts to pursue on a classwide basis claims that critically depend on a "reasonableness" inquiry like this one. In *Crosby v. Social Security Administration*, 796 F.2d 576 (1st Cir. 1986), for example, frustrated social security applicants sued the Social Security Administration for allegedly violating their statutory right to a hearing on their claims within "a reasonable time." The plaintiffs also sought to certify a class of all claimants who similarly "have not had a hearing held within a reasonable time . . . ." *Id.* at 578. The First Circuit rejected this amorphous class definition, reasoning that "what is unreasonable must

necessarily vary from claimant to claimant." *Id.* at 580; *see also Davoll v. Webb*, 160 F.R.D. 142 (D. Colo. 1995) (Class certification is inappropriate for a proposed class of disabled police officers allegedly suffering ADA violations since "[t]he determination of whether a person has [a] disability [under the ADA] is to be decided on a case-by-case basis."). Indeed, courts generally conclude that inquiries of this type are so acutely individualized that the proposed classes in question are incapable of being definitely ascertained—a requirement that some courts, including the Sixth Circuit, find implied by the terms of Rule 23. *See Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532 (6th Cir. 2012) (concluding that a "class definition must be sufficiently definite" and noting that "[c]ourts have found [this prerequisite] lacking in a class definition that contains claimants who did not have a hearing 'within a reasonable time' "); *Crosby*, 796 F.2d at 580 ("Because the standard of 'within a reasonable time' makes class members impossible to identify prior to individualized fact-finding and litigation, the class fails to satisfy one of the basic requirements for a class action under Rule 23 . . . .").

Plaintiffs attempt to sweep aside Section 1396a(a)(8)'s contextual "reasonable promptness" standard, relying on 42 C.F.R. § 435.912(c)'s requirement that eligibility generally should be determined within 45 days. This gambit fares no better, for that regulation is not as general and inflexible as Plaintiffs would have it. It does indeed require an applicant's eligibility be determined, in the ordinary course, within 45 days, but it also provides that this deadline does not apply "in unusual circumstances, for example . . . [w]hen the agency cannot reach a decision because the applicant . . . delays or fails to take a required action, or [w]hen there is an administrative or other emergency beyond the agency's control." 42 C.F.R. § 435.912(e).

Delay in the adjudication of Medicaid applications is often attributable to the need to obtain additional information—documentation verifying income, citizenship, or immigration

status, for example. *See* Declaration of Wendy Long (hereinafter "Long Decl.") at ¶ 3(h). Such delays do not render adjudication untimely. Compounding the diversity, there "are approximately 50 different eligibility 'pathways' into Medicaid," ELICIA J. HERZ ET. AL., CONG. RESEARCH SERV., MEDICAID CHECKLIST: CONSIDERATIONS IN ADDING A MANDATORY ELIGIBILITY GROUP at 1 (2010) (attached as Ex. 2 to the Brooke Decl., D.E. 4-1), and each involves different eligibility criteria that in turn give rise to different potential obstacles to eligibility adjudications. Determining the eligibility of a newborn child born to a mother already on TennCare is a very different exercise than determining the eligibility of a low income pregnant woman, an individual with disabilities, or a child born to an undocumented immigrant. *See* Purcell Decl. at ¶ 6.

The important point for present purposes is that the question whether an adjudication was untimely is not one that is "capable of classwide resolution," *Wal-Mart*, 131 S. Ct. at 2551, but rather one that requires individual case-by-case review. The applicability of the exceptions to the 45-day rule is "central to the validity of each one of the claims" in this case, and it is not an issue that can be "resolve[d] . . . in one stroke." *Id.* Plaintiffs have failed to demonstrate the existence of "a common issue the resolution of which will advance the litigation." *Sprague*, 133 F.3d at 397.

II. PLAINTIFFS HAVE NOT PROVEN THAT THE RELIEF THEY SEEK WOULD APPLY UNIFORMLY TO THE CLASS AS A WHOLE.

Even if a plaintiff establishes that the requirements of Rule 23(a) are satisfied, she "must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013). Here, Plaintiffs have invoked Rule 23(b)(2), so they must prove that the State has "acted or refused to act on grounds that apply generally to the class, so that . . . injunctive . . . or corresponding declaratory relief is appropriate respecting the

class as a whole." FED. R. CIV. P. 23(b)(2). Plaintiffs characterize these requirements as easy to meet, arguing that this is the type of case that is "particularly well-suited for 23(b)(2) treatment." Pls.' Class Cert. Mem. at 18 (quoting *Senter v. General Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976)). The Supreme Court has taken a different view, holding that where, as here, an individualized determination must be made before relief may be provided to each member of the proposed class, the class may not be certified pursuant to Rule 23(b)(2). *See Wal-Mart*, 131 S. Ct. at 2557-61. *See also Romberio v. Unumprovident Corp.*, 385 F. App'x 423, 442 (6th Cir. 2009) (unpublished) ("[W]here individualized determinations are necessary, the homogeneity needed to protect the interests of absent class members is lacking.").

Specifically, the Court explained, "[t]he 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.' " *Wal-Mart*, 131 S. Ct. at 2557 (citation omitted). Plaintiffs cannot satisfy this requirement because, as described above, an individualized review of the circumstances surrounding the consideration of each TennCare application will be necessary before it may be determined that adjudication of the applicant's case was not timely such that some relief is available. It is telling that Plaintiffs seek *different* relief for the named Plaintiffs than they do for the proposed class. *Compare* Proposed Preliminary Injunction Order, D.E. 4-2, at ¶ A (individual relief sought for named Plaintiffs), *with id*. at ¶¶ B-D (systemic relief sought for class). The difference arises because the individual circumstances of the named Plaintiffs will be litigated in this Court, whereas it will be necessary to build from scratch a new process for adjudicating the individual claims of all other members of the proposed class. *See id*. at ¶ D (requesting that the Court order the parties to attempt to agree upon a "remedial plan" to identify which applicants are entitled to relief). Plaintiffs admit

that it will be necessary to consider "[e]vidence" to determine in each case whether the applicant is entitled to relief. *Id*. at ¶ B. In fact, this is precisely the type of individualized relief that both the Supreme Court and the Sixth Circuit have rejected as inconsistent with the very nature of a Rule 23(b)(2) class. *See Wal-Mart*, 131 S. Ct. at 2558 ("Permitting the combination of individualized and classwide relief in a (b)(2) class is . . . inconsistent with the structure of Rule 23(b)."); *Romberio*, 385 F. App'x at 432-33.

Plaintiffs attempt to conceal the individualized nature of the relief they seek by broadly defining the class to include any applicant who did not "receive[] a final eligibility determination in a timely manner," Pls.' Class Cert. Mot., D.E. 2, at 1, and arguing that the State has "not remedied this situation by adjudicating these applications," Pls.' Class Cert. Mem., D.E. 3, at 18. The Sixth Circuit rejected this tactic in *Romberio* in the course of reversing the certification of a class challenging an insurance company's "uniform policies and practices" for reviewing and deciding disability insurance claims. 385 F. App'x at 430. The Sixth Circuit held that class certification under Rule 23(b)(2) was inappropriate because an individualized review would be required "to distinguish between the set of individuals whose claims were properly denied for valid medical reasons and the set of individuals whose claims were improperly denied." *Id*. at 431. Likewise, the Seventh Circuit recently explained:

> That the plaintiffs have superficially structured their case around a claim for class-wide injunctive and declaratory relief does not satisfy Rule 23(b)(2) if as a substantive matter the relief sought would merely initiate a process through which highly individualized determinations of liability and remedy are made; this kind of relief would be class-wide in name only . . . .

Jamie S. v. Milwaukee Pub. Schools, 668 F.3d 481, 499 (7th Cir. 2012); *see also Gulino v. Board of Educ.*, 907 F. Supp. 2d. 492, 508 (S.D.N.Y. 2012) ("Although Plaintiffs characterize these requested injunctions as classwide, the injunctions they seek . . . are precisely the type of

individualized relief the Supreme Court found to be outside the ambit of class certification under (b)(2).”). So too in this case: an individualized review will be necessary to determine whether each applicant’s case has been timely adjudicated, a review that will necessarily entail inquiry into how long the application has been pending and what caused any delay in adjudicating it. *Cf. Crosby*, 796 F.2d at 580 (“[T]he determination of whether the right to a reasonably timely ALJ hearing and decision has been violated can be made only on a case-by-case basis.”).

Like Plaintiffs in this case, the *Romberio* plaintiffs sought an injunction requiring the company “to provide a full and fair review . . . of all claims for benefits under the plan that have been denied.” 385 F. App’x at 433 (alteration in original). The Court of Appeals held that where the defendant must “provide the very relief requested (i.e., re-review) in order to determine whether any individual was, in the first instance, a class member, and, in the second instance, entitled to relief for an *improper* denial or termination of benefits[,] [c]lass certification . . . was an abuse of discretion.” *Id*. That is precisely the situation in this case. Accordingly, class certification should be denied as inconsistent with the requirements of Rule 23(b)(2).

III. PLAINTIFFS HAVE NOT PROVEN NUMEROSITY.

The fundamental obstacle facing the Plaintiffs in meeting their burden of satisfying the numerosity requirement of Rule 23 is that they must prove not only that a substantial number of individuals’ applications have been pending with the FFM for more than 45 days but also that the delay in reaching a final eligibility determination for each of those individual applications constituted a failure to act with reasonable promptness. Plaintiffs fail to clear this obstacle.

Rule 23(a) “does not set forth a mere pleading standard.” *Wal-Mart*, 131 S. Ct. at 2551. Rather, Plaintiffs bear “the positive burden of showing that the circumstances surrounding the case justify a determination . . . that the number [of class members] is so large that it would be

impracticable to join all the parties." *Cash v. Swifton Land Corp.*, 434 F.2d 569, 571 (6th Cir. 1970). While "the exact number of class members need not be pleaded or proved, impracticability of joinder must be positively shown, and cannot be speculative." *Golden v. City of Columbus*, 404 F.3d 950, 965-66 (6th Cir. 2005). Satisfaction of Rule 23's numerosity requirement must be "actual, not presumed," *Falcon*, 457 U.S. at 160, so as to avoid "unnecessarily depriving members of a small class of their right to a day in court to adjudicate their own claims," *Marcus v. BMW*, 687 F.3d 583, 595 (3d Cir. 2012).

Plaintiffs candidly admit that "[t]he precise size" of the class they seek to certify "is unknown," but they nevertheless assert that "common sense would countenance that the class size is substantial." Pls.' Class Cert. Mem. at 13; *see also id*. ("[I]t is logical to assume that many more [unnamed members of the putative class] also exist."). But the Plaintiffs may not merely "assume" the existence of sufficient numbers, and there is no evidence whatever in the record to support their speculation that the proposed class is numerous.

The only evidence cited by Plaintiffs in support of their numerosity claim, a truncated quotation from a letter from TennCare Director Darin Gordon to CMS, does not suffice. Plaintiffs assert that Mr. Gordon "complains that there are 'numerous case examples from Tennessee' that are not being resolved" on a timely basis. *Id*. (quoting Letter from Darin Gordon to Cindy Mann at 1 (July 14, 2014) (attached as Ex. 5 to the Brooke Decl., D.E. 2-2)). In fact, Mr. Gordon stated that "the FFM is not always determining eligibility within the timeframes described in the federal rules," and that this failure was borne out by "numerous case studies in Tennessee *and other states*." Letter from Darin Gordon to Cindy Mann at 1 (July 14, 2014) (attached as Ex. 5 to the Brooke Decl., D.E. 2-2) (emphasis added). The existence of numerous examples of missed deadlines *nationwide* does not establish that there are numerous examples *in*

Tennessee. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267-68 (11th Cir. 2009) (finding that district court abused its discretion in finding the numerosity requirement satisfied for a proposed class of Florida-based employees of T-Mobile, despite evidence that the number of sales-associates employed by T-Mobile nationwide was "in the thousands," because the plaintiffs had not offered "a shred of Florida-only evidence").

Plaintiffs argue that they have identified at least "[t]en individuals" in the proposed class—themselves—and that "it is logical to assume that many more also exist." Pls.' Class Cert. Mem. at 13. Whether this assumption is logical is open to debate; whether it satisfies Plaintiffs' "positive burden" of showing numerosity, *Cash*, 434 F.2d at 571, is not. Plaintiffs' surmise that "common sense would countenance that the class size is substantial" constitutes precisely the type of "bare speculation" that fails to demonstrate numerosity. *See Golden*, 404 F.3d at 966.

The Sixth Circuit's decision in *Golden* is closely on point. The plaintiff there sought certification of a "putative class of plaintiffs consist[ing] of tenants in Columbus whose water service was or will be terminated because of the landlord's or prior tenant's indebtedness." *Id*. But the only evidence of numerosity she submitted was the number of renters in the City. The Sixth Circuit held that this was insufficient to establish numerosity because "Golden does not allege that *all* tenants in Columbus are at risk of constitutional harm, only those whose predecessors or landlords are indebted to the City." *Id*. Because the plaintiff did not present any evidence that the relevant subset of all tenants in the City was numerous, the Court held that she had failed to meet her burden to prove numerosity. *Id*.; *see also Alkire v. Irving*, 330 F.3d 802, 820 (6th Cir. 2003) (wherein plaintiffs "postulate[]" that hundreds of people might be

unconstitutionally incarcerated for failure to pay civil debts or court costs rejected as "speculative" where jail records revealed only nine).

Likewise in this case, Plaintiffs do not allege that all TennCare applicants have had their adjudications delayed. They simply speculate, without evidence, that the number of delayed applicants is substantial. Moreover, even if the evidence demonstrated that a substantial number of applicants had not received a final eligibility determination from the FFM within 45 days or more, that would not prove that a substantial number of individuals fall within the proposed class. To be untimely under the relevant federal regulation, as is required for an individual to be part of the proposed class, a final eligibility determination must be issued more than 45 days after the application was submitted *and* the delay must not be attributable to any failure by the applicant to take a required action or any administrative or other emergency beyond the control of the State or the FFM. *See* 42 C.F.R. § 435.912(e).

The Third Circuit recently turned away a similar attempt to satisfy the numerosity requirement. In *Marcus*, the plaintiff—a dissatisfied purchaser of new tires designed to run even when flat—sought to bring a class action on behalf of "all purchasers and lessees of certain model-year BMWs equipped with [the new tires] sold or leased in New Jersey with tires that 'have gone flat and been replaced.' " 687 F.3d at 588. The plaintiff's only evidence of numerosity was the number of BMWs sold or leased nationwide, together with the number of nationwide customer complaints about the new tires. Based on this evidence, the plaintiff opined—as Plaintiffs do, here—that "common sense indicates that there will be at least 40" people in the class. *Id.* at 595-96. The Third Circuit found wanting this attempt to lean so heavily on common sense. "[I]n the absence of direct evidence, a plaintiff must show sufficient circumstantial evidence specific to the products, problems, parties, and geographic areas actually

covered by the class definition . . . . Only then may the court rely on 'common sense' to forgo precise calculations and exact numbers." *Id.* at 596. Plaintiffs' argument for numerosity, in the instant case, fails for similar reasons. They have not offered any evidence of the number of Tennessee residents who have sought TennCare benefits but not received a timely determination. Accordingly, they have failed to meet their "positive burden of showing . . . that the number [of class members] is so large that it would be impracticable to join all the parties." *Cash*, 434 F.2d at 571.

IV. PLAINTIFFS HAVE NOT PROVEN TYPICALITY.

Plaintiffs' proposed class cannot be certified for one final reason. Rule 23(a) requires Plaintiffs to prove that the named Plaintiffs' claims are "typical of the claims . . . of the class." FED. R. CIV. P. 23(a)(3). This prerequisite ensures that "a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (quoting *Sprague*, 133 F.3d at 399). "[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." *In re American Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996). As the Sixth Circuit has put the point, "[t]he premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." *Sprague*, 133 F.3d at 399. Here, Plaintiffs' claims and the purported class's claims go in myriad different directions.

While Plaintiffs propose to certify an expansive class consisting of all TennCare applicants who have not received a timely eligibility determination and who have contacted TNHC, Plaintiffs themselves actually each fall into two much narrower categories. Based on the

allegations in the Complaint and supporting Declarations, the adult Plaintiffs appear to be applicants from whom the FFM sought additional documentation to resolve discrepancies between their applications and the data obtained from other federal databases. The newborn infants are all children born to mothers who were not enrolled in TennCare. The number of individuals who fall into these two categories is unknown; what is known is that each of the named plaintiffs is numbered among them.

Moreover, because nine of the Plaintiffs have now been enrolled in TennCare—including all five of the infant plaintiffs—their claims are now moot, as discussed above. This leaves just two plaintiffs—T.V. and D.A.—to shoulder the burden of typifying the claims of the entire class. Since both of these plaintiffs in fact fall into the narrow category of individuals whose applications have become stalled due to discrepancies between those applications and information from the Data Services Hub, at most these Plaintiffs' claims are typical of those persons who (i) applied for TennCare through the FFM in a MAGI-based eligibility category on or after October 1, 2013; (ii) did not receive a final eligibility determination from the FFM in a timely manner; (iii) contacted the TNHC or its successor entity for assistance with that application; and (iv) upon the FFM's request has submitted income verifications to the FFM. Yet even that more narrowly drawn class is defective for all the reasons described previously and therefore cannot be certified.

CONCLUSION

For the reasons stated herein, defendants respectfully request that this Court deny Plaintiffs' Motion for Class Certification.

August 14, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record on this 14th day of August, 2014, via the Court's Electronic Case Filing system.

s/Michael W. Kirk