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. DARIN GORDON, et al., Defendants.	Civil Action No. 3:14-CV-01492 Judge Campbell Magistrate Judge Bryant **PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Defendants object to class certification by arguing that commonality, typicality, and numerosity have not been established, and by further arguing that Defendants have not acted "generally" such that class-wide relief is appropriate under Rule 23(b)(2). Underlying each argument is a basic assertion that the specific reason for each putative class member's delay must be individually examined, and the specific reason for a delay will vary across the class. Defendants' argument entirely mischaracterizes the nature of this case and the relief Plaintiffs seek. These arguments do not stand in the way of class certification.

Plaintiffs do not seek actual enrollment in TennCare. Rather, they seek only the "reasonably prompt" determination of eligibility to which every TennCare applicant is entitled under 42 U.S.C. § 1396a(a)(8). They further seek the ability to have a hearing upon the failure to provide a reasonably prompt determination as secured by § 1396a(a)(3).

Plaintiffs seek this relief from the single state agency that is legally charged to provide it: the TennCare Bureau. 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10. It is Defendants' refusal to ensure that a determination is made within the "reasonably prompt" time limits (90 days for applications based on disability, 45 days for all others), and to provide a hearing

when that determination is not made, that are proximately causing Plaintiffs' harm.

Defendants may remedy Plaintiffs' harm by making these legally-mandated determinations, and by providing these legally-required hearings. This relief does not require Defendants to modify in any way the procedure that they represent has been working for the "vast majority of applicants," Defs.' Br. in Opp. to Class Cert. 5 (hereinafter "DBOCC"). It merely requires them to address the failings of that system for the individuals for whom that system is not working.

As explained more fully below, certification is warranted and Defendants' contentions to the contrary are erroneous.

STATEMENT

Plaintiffs seek to certify a class, referred to as the "Delayed Adjudication Class," which is defined as:

> 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,[1] and who have contacted the Tennessee Health Connection or its successor entity for assistance with that application.

This class covers all applicants who have not received a timely determination and who have contacted the Tennessee Health Connection, not simply those who have applied through the federally-facilitated Marketplace ("FFM").[2]

Before this lawsuit was filed, consumer advocates referred over 200 individuals who were experiencing problems enrolling in health insurance to TennCare. Hagan Decl. ¶¶ 5–6

[1] Plaintiffs would not oppose modifying the phrase "in a timely manner" to "in 45 days, unless the basis for eligibility is based on disability in which case 90 days,". *See Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 619 (6th Cir. 2007) ("[D]istrict courts have broad discretion to modify class definitions").

[2] Tennessee has continued to accept applications directly for its Medicare Savings Program (MSP) and the CHOICES home and community-based services program for older adults and adults with disabilities.

(ECF No. 53). TennCare was able to enroll a "majority" of these individuals in either CoverKids or TennCare, and determined that some were ineligible for both programs. *Id.* ¶ 7.

After the filing of this case, Defendants immediately solicited relevant information for the named and initials-only Plaintiffs, which Plaintiffs' counsel promptly provided. Zampierin Decl. ¶ 2. Shortly thereafter, Defendants began enrolling Plaintiffs into TennCare; at this time all named Plaintiffs are enrolled. Hagan Decl. ¶ 13.[3] Defendants also reached out to Plaintiffs' counsel and agreed that if other individuals came to Plaintiffs' counsel's attention, Defendants would attempt to process them as well. Hagan Decl. ¶ 12; Zampierin Decl. ¶ 3. They represented that, for now, they would attempt to resolve only the first 100 applications, and they asked that Plaintiffs' counsel not publicize broadly that this was happening. Hagan Decl. ¶ 12; Zampierin Decl. ¶¶ 3–4. Pursuant to this, Plaintiffs' counsel have been referring members of the potential class who have been delayed over the statutory period to Defendants, and have identified 57 TennCare applications to Defendants, involving 89 individuals, 19 of whom are newborns and 70 of whom are other children or adults. Zampierin Decl. ¶ 5. This includes two CHOICES applicants and two MSP applicants. *Id.* These 89 individuals have also been delayed for months without a determination on their applications.[4] Seventeen of the newborns have been enrolled through this process, including the five named Plaintiffs, and fifteen of the non-newborns have been enrolled, including the six named Plaintiffs. Zampierin Decl. ¶ 6.

[3] Since submission of the Hagan declaration, the remaining Plaintiffs T.V. and D.A. have been enrolled.

[4] *See, e.g.*, LeCompte Decl. ¶ 2, ¶ 11 (waited five months before enrollment); Simpson Decl. ¶5, ¶ 21 (Raymond Simpson waited 170 days before enrollment); M.A.B. Decl. ¶ 7, ¶ 12 (waited 220 days before enrollment); J.M. Decl. ¶ 3 (has waited 205 days for a determination); Murphy Decl. ¶ 2 (has waited 8 months for a determination); Corbin Decl. ¶ 4 (has waited 97 days for a determination); J.F. Decl. ¶ 6 (has waited 216 days for a determination).

ARGUMENT

I. The Putative Class is Sufficiently Definite Based on Objective Criteria, and Legal and Factual Issues are Common to the Class.

Defendants argue that certification is inappropriate because membership in the class will require an individualized determination of whether an application is "timely." DBOCC 1–2, 7–10. And, while Defendants recognize that federal law provides standard metrics for timeliness—namely, 45 days for all applications except for 90 days for those based on disability, 42 C.F.R. § 435.912(c)(3)—and Defendants do not object to these measures. Rather they insist that to qualify as a class member, one must additionally show that no "unusual circumstances" exist that might excuse a determination in excess of the time limits. *See* § 435.912(e); *see also* DBOCC 1, 8–10. Defendants frame this primarily as an issue related to commonality, but also suggest that it relates to definiteness. Neither argument is valid.

A. The Putative Class is Sufficiently Definite and Based on Objective Criteria

A class must be defined with "objective criteria" "so that it is administratively feasible for the court to determine whether a particular individual is a member." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537–38 (6th Cir. 2012) (citations omitted). The definition proposed by Plaintiffs is objective. To ascertain if a person is within the class, all one needs to know is (1) whether the person applied for TennCare; (2) when the person applied for TennCare; (3) the claimed basis for applying for TennCare (*i.e.*, based on a disability or not); and (4) whether the person contacted TNHC for assistance. Knowing these four facts, and calculating timeliness as 90 days if the basis for eligibility is a disability, otherwise 45 days, is an objective measure.

Defendants complain repeatedly that they cannot get information related to pending applications. Long Decl. at ¶ 3(h); Defs.' Opp. to Mot. for Prelim. Inj. 32. However, it is also administratively feasible to determine if any particular individual is a class member. While the Defendants may not be able to obtain the answer in an automated fashion, they concede that the existence of, date of, and basis for an application is knowable, as they must. *See* Long Decl. ¶ 15; Hagan Decl. ¶ 5 (noting reaching out "to the applicant and the FFM" to try to resolve cases). *See also* Clifton Decl. 14 (noting that FFM can verify existence of application and application date with an application number, or with a name and date of birth of the applicant). *See Young*, 693 F.3d at 540 ("[T]he need to manually review files is not dispositive.").

The class is defined with objectivity, and certainty is not an issue.

B. Common issues predominate

To establish commonality, Plaintiffs need not show that the claim of every class member is *identical*, but rather that "[t]he 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." *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838, 852 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014) (emphasis added, quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)). The critical question is the "capacity of the classwide proceeding to generate common *answers* apt to drive resolution of the proceeding." *Dukes*, 131 S. Ct. at 2551 (emphasis in original). In this case, common contentions will clearly be resolved in one stroke. The class members' applications either have been pending beyond the federal time limits or they have not; the class members whose

applications have been pending beyond the time limits have either been given the opportunity for a hearing to contest the delay or they have not.

Defendants' primary response to all aspects of this case, including the motion for class certification, is that they have no responsibility here – the problem is all with the FFM.[5] However, as Plaintiffs explain in their preliminary injunction briefing, it is the Defendants who have failed to implement the Affordable Care Act and have continued to use the federal Marketplace long past the date when they said that they would make application decisions themselves. For purposes of class certification, the legitimacy of this contention is not yet at issue, *see In re Whirlpool Corp.*, 722 F.3d at 851–52. Nevertheless, it cannot be credibly disputed that the resolution of that defense "will resolve an issue that is central to the validity of each one of the claims in one stroke"—Defendants' responsibility for ensuring prompt adjudications, and providing hearings when a determination has not been made promptly, for all applicants. *Dukes*, 131 S. Ct. at 2551.

Defendants further argue in their opposition to Plaintiffs' Motion for Preliminary Injunction that any delays that may exist are legally excusable because they are the result of unusual circumstances—specifically, they contend the roll-out of the ACA constituted "an administrative or other emergency beyond the agency's control." *See* 42 C.F.R. § 435.912(e); Defs.' Br. in Opp. to Prelim. Inj. 27–29; *see also* DBOCC 9. Unusual circumstances neither exist nor require individualized determinations that will preclude class certification, *see infra* pp. 10-11, but this highlights another critical point of contention that will have classwide implications. *Dukes*, 131 S. Ct. at 2551; *See also Blankenship v. Sec'y of HEW*, 587 F.2d 329, 332 n.4 (6th Cir. 1978) ("The issues of statutory and constitutional unreasonableness are

[5] They offer no explanation why they should be excused for failing to promptly process CHOICES and MSP applicants.

therefore common to all members of the class, and the claims advanced by the named plaintiffs in this regard are typical of the class.").

Defendants finally object that there is likely too much variation among the class members because reasons other than bureaucratic malfeasance might explain why some particular individuals' applications were not adjudicated within 45 or 90 days. DBOCC 9–10; *see* 42 C.F.R. § 435.912(e)(1) (justifying delay "[w]hen the agency cannot reach a decision because the applicant or an examining physician delays or fails to take a required action."). This argument "has been raised and rejected in other cases involving welfare benefits," and misconstrues what is required to establish commonality. *See Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 389 (S.D.N.Y. 2000) (collecting cases) (certifying a class of applicants raising claims under, *inter alia*, § 1396a(a)(8)).

Class certification "start[s] from the premise that there need be *only one common question* to certify a class," even if an individual class member's circumstances may present other unique defenses. *In re Whirlpool Corp.*, 722 F.3d at 853 (emphasis added). Certainly an argument can be made that if a plaintiff is subjected to a unique defense that does not apply to the class as a whole and that would be a major focus of the litigation, he or she may not be qualified to be a class representative. *See, e.g.*, *Beck v. Maximus, Inc.*, 457 F.3d 291, 301 (3d Cir. 2006). But the opposite does not follow. The fact that "plaintiffs' claims would be subject to varied defenses" does not warrant denying certification. *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877, 884 (6th Cir. 1997).

In the instant case the core allegations relate to the refusal by Defendants to ensure that TennCare applications are adjudicated reasonably promptly. Commonality is satisfied because

answers to these issues will resolve a central issue to every class member's claims "in one stroke." *Dukes*, 131 S. Ct. at 2551.

II. Plaintiffs' Claims that TennCare is Responsible to Provide Prompt Determinations and a Hearing are Typical of the Claims of the Class

Defendants next argue that the claims of the Plaintiffs[6] are not typical to the class, again asserting that the problem being experienced by the non-newborn Plaintiffs lies solely with the Federal Marketplace (specifically claiming that it is due to "discrepancies between the application and data from the Data Services Hub"). DBOCC 17–18. Defendants are mistaken for two reasons.

First, TennCare may be in many instances exclusively responsible for the delays Plaintiffs have suffered. Some Plaintiffs were told by the FFM that their application had been sent to TennCare, but they heard nothing from TennCare on when or how they could be enrolled. *See* Mossa Decl. ¶ 6 (ECF No. 1-5); Wilson Decl. ¶ 5 (ECF No. 1-8); D.P. Decl. ¶ 3 (ECF No. 1-1). Defendants acknowledge that they received files from the FFM for four of the plaintiffs. Hagan Decl. ¶ 14. For S.V., the delay was attributed to a mistake made by a DHS worker. *Id.* ¶ 13. In each case, the delay is attributable to the Defendants. Furthermore, other individuals applying for the CHOICES and MSP program are not routed through the Federal Marketplace, yet they too are facing delays in excess of the statutory and regulatory proscriptions. LeCompte Decl. ¶ 2, ¶ 11 (waited five months before enrollment); Simpson Decl. ¶ 5, ¶ 21 (waited 170 days before enrollment); M.A.B. Decl. ¶ 7, ¶ 12 (waited 220 days before enrollment).

[6] The Court may consider all Plaintiffs in this analysis, as the Plaintiffs were not moot at the time that class certification was filed. *See infra* pp. 16–20; *Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620, 625 (6th Cir. 2005).

However, it does not matter to Plaintiffs' claims whether Defendants' or the FFM's actions contributed more substantially to the delay. While it may be true in some instances that the Federal Marketplace could have done more to help class members get processed, this does not absolve Defendants of their independent responsibility for timely processing eligibility determinations and remedying the Plaintiffs' harm. Each Plaintiff and each class member has applied to the TennCare system, and each has been subjected to TennCare's adamant refusal—as exhibited even in their papers—to ensure that the applications are resolved within the statutory and regulatory time frames. Thus while there may be unique factors that resulted in each class member getting to the situation they are now in, "a sufficient relationship exists between the injury of the named plaintiff[s] and the conduct affecting the class"—TennCare is abdicating responsibility to ensure that all its applicants are treated fairly and properly. *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007).

"In government benefit class actions, the typicality requirement is generally satisfied when the representative plaintiff is subject to the same statute, regulation, or policy as class members." *Carr v. Wilson-Coker*, 203 F.R.D. 66, 75 (D. Conn. 2001) (quoting 5 *Newberg on Class Actions*, § 23.04 (3d ed. 1992) (citations omitted)). That requirement is satisfied here. Plaintiffs seek, through this lawsuit, to hold Defendants responsible for complying with the time limits applicable to all applicants, and to provide a remedy for their violations of this requirement.

III. Final Injunctive Relief is Appropriate Respecting the Class as a Whole, Pursuant to Rule 23(b)

Defendants further argue that "final injunctive relief or corresponding declaratory relief is [not] appropriate respecting the class as a whole" because, they contend, they have not acted on grounds that apply generally to the class, arguing that case-by-case

determinations will be necessary. Fed. R. Civ. P. 23(b)(2); DBOCC 9–13. This argument is erroneous.

As noted above, Defendants are acting in a manner that applies generally to the class. Defendants are refusing to ensure that TennCare applications are adjudicated reasonably promptly as defined by federal regulation, *i.e.*, within 90 days if based on a disability or otherwise in 45 days.[7] They furthermore are refusing to provide any sort of hearing on the failure to adjudicate the claims within these time periods. An injunction prohibiting them from continuing to defy these federal requirements would provide classwide relief. It may not ensure enrollment in TennCare, but that is not the Plaintiffs claim—Plaintiffs and the class they represent seek only a prompt determination, and a hearing if no prompt determination is rendered.

Defendants nevertheless argue that individualized considerations would be present, specifically the exceptions listed in 42 C.F.R. § 435.912(e)(1), thereby requiring different injunctions for different members. *See* DBOCC 11. This, of course, is not what Plaintiffs are seeking, and would not be required.

Moreover, § 435.912(e)(1) does not preclude certification of this class under Rule 23(b)(2). To claim this as a justification for not adjudicating an application within 45 or 90 days, "[t]he agency must [have] document[ed] the reasons for delay in the applicant's case record," and if it has not done so it cannot then claim any harm on this basis. 42 C.F.R.

[7] Defendants' citation to *Rosie D. v. Romney*, 410 F. Supp. 18, 27 (D. Mass 2006) is misleading. The issue presented in *Rosie D.* was the "reasonably prompt" provision of medical services, *id.* at 22, which is not governed by the clear timeliness standards under 42 C.F.R. § 435.912 but rather governed by §441.56(e). *Id.* at 27. These regulations establish only an "outer limit of 6 months" to provide reasonably prompt treatment after a request, and, as the court noted, timeliness clearly depends on the nature of the services sought. *Id.* Nevertheless, the court certified the class, *id.* at 22, and issued permanent injunctive relief because Defendants failed to provide services with reasonable promptness. *Id.* at 55.

§ 435.912(f); *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993). Nor can Defendants be heard to complain that it is not their fault for failing to document the delays since they are a determination state; the "agency" is responsible for making these notations, § 435.912(f), and it may not shift the burden to the blameless applicants and still comply with 42 U.S.C. § 1396a(a)(8)'s requirements. Of course, workarounds could also be created to avoid further delay, including deciding eligibility based on an attestation from the applicant. *See* 42 C.F.R. § 435.945 (authorizing attestations); *see also* Medicaid Program Eligibility Changes Under the ACA, 77 Fed. Reg. 17144, 17173 (Mar. 23, 2012) (stating that if a State chooses to not use attestations and use data matching before determining eligibility, it is subject to the timeliness standards).

Simply put, Defendants' arguments that some applicants may be to blame for some of the delay is simply a red herring to shift the focus away from their own refusal to ensure that TennCare applicants get timely determinations and be given an opportunity for a hearing when one is requested after the deadline is missed.[8] *See Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) ("[C]lass relief is consistent with the need for case-by-case adjudication," as it was "unlikely that differences in the factual background of each claim will affect the outcome of the legal issue.").

Defendants' arguments that the proposed preliminary injunction order should preclude class certification also are not well taken. DBOCC 11–12. The proposed order (ECF No. 4-2) seeks one uniform injunction—enjoining TennCare from refusing to abdicate its responsibility to ensure timely determinations and to provide hearings—in three steps. First, that the named

[8] Certainly there should be no dispute that an injunction requiring that a hearing be required after 45 or 90 days would be appropriate, since a core purpose of the hearing would be to ascertain if the application was in fact delayed. 42 C.F.R. § 431.241(a).

plaintiffs (who, of course, are now known to Defendants) have their claims adjudicated in 48 hours after entry of the order. Second, that any future class members (who are not necessarily immediately known to Defendants) who identify themselves to TennCare receive a determination within 72 hours. And finally, that a remedial plan be developed to help identify additional class members so they too many benefit from the injunction. *Id. Dukes* does not prohibit a reasonable and staged scheme to effectuate an injunction, which is what Plaintiffs have proposed. The key point from *Dukes* is that Defendants' "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," which is true here. 131 S. Ct. at 2557; *see* DBOCC 11.

Finally, Defendants' citations to *Romberio v. Unumprovident Corp.*, 385 F. App'x 423 (6th Cir. 2009) and to *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481 (7th Cir. 2012) are inapposite. *Romberio* did not, as the plaintiffs in the case attempted to argue, challenge "'uniform policies and practices' for reviewing and deciding disability insurance claims,"[9] but rather described the case as a challenge to a "group of loosely-defined practices that were not applied uniformly to a discrete, easily-defined class of individuals." 385 F. App'x at 430-31. More significant, *Romberio* challenged the actual determinations that the plaintiffs and class members were not entitled to disability insurance claims, which necessarily involved complicated individualized considerations. *Id.* at 531. Similarly, *Jamie S.* involved a class definition including, in significant part, "disabled students who may have been eligible for special education but were *not identified* and *remain unidentified*," with the court concluding that the identification process was a "complex, highly individualized task" that involved "the application of trained and particularized professional educational judgment." *Jamie S.*, 668

[9] *See* DBOCC 12 (quoting *Romberio*, 385 F. App'x at 430).

F.3d at 495–96. These cases have no bearing here, where the question is straightforward for all class members: whether a determination was made in a timely manner and whether a hearing was available, not if any determination of eligibility was proper.

IV. Numerosity

Defendants also argue that the admission by Defendant Gordon, combined with common-sense understandings and the geographic scope of this problem, is insufficient to establish numerosity. DBOCC 13–17. Defendants' position is belied by the very evidence they have submitted.

Defendants criticize Plaintiffs for truncating the quotation from Defendant Gordon. DBOCC 14. To be clear, then, the full paragraph, reproduced below, ties the FFM's failure to Tennessee specifically (not just nationwide) by noting that "the State often does not receive timely eligibility decisions from the FFM."

> Owing to the FFM's flawed launch and ongoing operational challenges, neither of these two assumptions reflect the currently reality. As numerous case examples from Tennessee and other states illustrate, the FFM is not always determining eligibility within the timeframes described in the federal rules. Even in those instances in which the FFM accurately determines eligibility and renders a timely decision, the FFM does not transmit denial information to the State. Consequently, *the State often does not receive timely eligibility decisions from the FFM*—and the State lacks a feedback mechanism with the FFM allowing it to close the HPE enrollment period in such cases.

Letter from Gordon to Mann 1-2 (July 14, 2014) (ECF No. 2-2 at 62 of 68) (emphasis added).

Moreover, Gordon concedes that a "small percentage of applicants have had difficulty completing the enrollment process." ECF No. 4-1 at 49 of 125. As Tracey Purcell explains, the State receives an enormous volume of TennCare applications: "historically the State has received hundreds of thousands of applications each year." ECF No. 55 at 17 of 21. Thus, Gordon's reference to a "small percentage" is likely thousands of cases. Even .1% of 100,000 applications would be 100 class members.

In opposition to Plaintiffs' motion for preliminary injunction, Defendants submitted the declaration of Kim Hagan, the Eligibility Policy Administrator for the TennCare Division of Member Services. Hagan notes that Defendants have "established an informal process to attempt to troubleshoot specific cases that have been brought to the State's attention by Plaintiffs' counsel or other advocacy groups in which an applicant has alleged some problem navigating the FFM eligibility process." Hagan Decl. ¶ 5. "TennCare has received over two hundred inquiries regarding applicants through this informal process," and has been able to resolve only a "majority" of these cases. *Id.* ¶¶ 6-7. Hagan goes on to explain that "working through this informal process," it is her experience that there are "any number of reasons" why applications "may be pending at the FFM for more than 45 days." *Id.* at 8. Thus, Hagan's declaration also establishes that the numerosity requirement is met.

Hagan's declaration goes on to describe a new process worked out between the parties, as a concession to permit the parties to agree to a briefing schedule on Plaintiffs' motions for preliminary injunction and class certification. As Hagan explains:

> After the lawsuit was filed, the State did agree to provide individualized help for the named Plaintiffs and up to 100 total applications that Plaintiffs' counsel would bring to the State's attention to see if the State could resolve their applications. Specifically, for those named Plaintiffs who were newborn children of non-TennCare mothers, the State agreed to immediately provide Plaintiffs' counsel with an application for a new presumptive eligibility program for newborns the State is working with CMS to get approved and that the State has decided to implement in anticipation of that approval. Upon return of that application, the State agreed to enroll any newborn found eligible. The State also agreed to ask CMS to provide us with the individual case files of the other named Plaintiffs so that we can review those files and attempt to resolve any discrepancies (such as income discrepancies) that might be holding up a final adjudication of eligibility by the federal exchange and to provide a final decision on those Plaintiffs' eligibility.

Hagan Decl. ¶ 12. Pursuant to this agreement Plaintiffs' Counsel have identified 57 TennCare applications to Defendants, involving 87 individuals, 19 of whom are newborns and

70 of whom are other children or adults. Zampierin Decl. ¶ 5. These individuals are all indisputably class members. Furthermore, Plaintiffs' counsel agreed, at the request of the State, to not "publicize" this agreement, and thus Plaintiffs' counsel has only been passively receiving information about new class members. *Id.* ¶ 4. Membership in the class will continue to grow, and thus new members will continue to be identified over time.

Given these actual class members, there is a "presumption that joinder is impracticable," which Defendants have not refuted. *City of Goodlettsville v. Priceline.com, Inc.*, 267 F.R.D. 523, 529 (M.D. Tenn. 2010) (citation omitted) ("[T]he plaintiff whose class is [40 individuals] or larger should meet the test of Rule 23(a)(1) on that fact alone."). That presumption is further bolstered by the geographic dispersion of class members throughout the State, and the economic status of class members, both of which make joinder or individual lawsuits especially impracticable. *See Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993) ("They are also economically disadvantaged, making individual suits difficult to pursue."); *McDonald v. Heckler*, 612 F. Supp. 293, 300 (D. Mass. 1985) ("These individuals claim to be disabled and of low income. It is therefore impracticable for these persons to bring individual lawsuits challenging the Secretary's policies."), *modified on other grounds*, 795 F.2d 1118 (1st Cir. 1986). Plaintiffs have provided sufficient evidence to warrant finding numerosity is satisfied.

V. The Named Plaintiffs May Continue to Represent the Putative Class

Finally, Defendants suggest that class members who have been enrolled in TennCare after the litigation commenced are now moot and may not represent the class or proceed in the case. DBOCC 18. Though the named Plaintiffs have received coverage, the Court retains jurisdiction to hear this case, and named Plaintiffs can continue to represent the Delayed Adjudication Class.

The Supreme Court has clearly stated: "Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). Once a class certification has been ruled upon and there is an ongoing controversy between the class itself and defendants, the mooting of a named plaintiff's claim does not moot the case. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 403–04 (1980) (discussing and expanding *Sosna v. Iowa*, 419 U.S. 393 (1975)).

In light of this, various courts of appeal, including the Sixth Circuit, have created remedies to ensure that a defendant who is facing a class action may not "opt out" by trying to moot the named plaintiffs' claims only. For example, in *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), the Court emphasized that "where a motion for class certification has been pursued with reasonable diligence and is then pending before the district court"; otherwise, the entire class action mechanism would be "at the mercy of a defendant, even in cases where a class action would be most clearly appropriate." *Id.* at 400 (internal quotations omitted) (citing *Susman v. Lincoln Am. Corp.*, 587 F.2d 866, 870 (7th Cir. 1978), *cert. denied*, 445 U.S. 942 (1980); *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1051 (5th Cir.1981)).

The Sixth Circuit reaffirmed this logic in *Carroll v. United Compucred Collections, Inc.*, 399 F.3d 620 (6th Cir. 2005). *Carroll* involved an offer of judgment under Rule 68 of the Federal Rules of Civil Procedure. The Court rejected defendants' arguments of mootness, explaining that "the [*Brunet*] court suggested that it would be inappropriate to hold that a case

was mooted by a settlement offer made to a named plaintiff when a motion for class certification was pending," and holding the same. *Carroll*, 399 F.3d at 625. Other courts in the Sixth Circuit have ruled similarly. *See Stewart v. Cheek & Zeehandelar, LLP*, 252 F.R.D. 384, 386 (S.D. Ohio 2008) (defendant may not "opt out" of class action by providing named plaintiffs relief "so long as the plaintiffs have not been dilatory in bringing their certification motion."); *Am. Copper & Brass, Inc. v. Lake City Indus. Products, Inc.*, No. 1:09-CV-1162, 2012 WL 3027953, at *3 (W.D. Mich. July 24, 2012) (excusing two-week delay in filing for class certification by relating back to complaint filing, and applying *Carroll*); *Hrivnak v. NCO Portfolio Mgmt., Inc.*, No. 1:10-CV-646, 2010 WL 5392709, at *7 (N.D. Ohio Dec. 22, 2010) ("defendant *cannot* unilaterally moot a plaintiff's case") (emphasis in original). *Cf. Sanchez v. Verified Pers., Inc.*, 11-2548-STA-CGC, 2012 WL 1856477, at *5 (W.D. Tenn. May 21, 2012) (dismissing because of lack of diligence). Various courts of appeal have ruled the same. *Weiss v. Regal Collections*, 385 F.3d 337, 349 (3d Cir. 2004); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 921 (5th Cir. 2008); *Primax Recoveries, Inc. v. Sevilla*, 324 F.3d 544, 546-47 (7th Cir. 2003).

Moreover, the Supreme Court has noted an exception to mootness where, as here, the nature of plaintiffs' claims are inherently transitory. These determinations, by law, should be done quickly—within 45 days or 90 days depending on the basis for the application. 42 U.S.C. § 1396a(a)(8); 42 C.F.R. 435.912(c)(3). At the time an application is delayed beyond this time, it is unclear how much longer any application will be pending; Defendants have the means by which to provide coverage, and thus unilaterally provide relief, at any time before the Court is able to rule on the class certification motion. *See Robidoux v. Celani*, 987 F.2d 931, 938–39 (2d Cir. 1993) ("Appellants' claims are inherently transitory since the

Department will almost always be able to process a delayed application before a plaintiff can obtain relief through litigation."); *see also Gawry v. Countrywide Home Loans, Inc.*, 395 F. App'x 152, 158–59 (6th Cir. 2010) ("[T]he crux of the 'inherently transitory' exception is the uncertainty about the length of time a claim will remain alive." (quoting *Olsen v. Brown*, 594 F.3d 577, 582 (7th Cir. 2010), *cert. denied*, 130 S. Ct. 3478 (2010)). It is thus "by no means certain that any given individual, named as plaintiff," would have an application pending "long enough for a district judge to certify the class." *Gerstein v. Pugh*, 420 U.S. 103, 110, n.11 (1975); *see also Geraghty*, 445 U.S. at 398–99; *Swisher v. Brady*, 438 U.S. 204, 213 (1978); *Haro v. Sebelius*, 747 F.3d 1099, 1110 (9th Cir. 2014); *Olsen v. Brown*, 594 F.3d 577, 583 (7th Cir. 2010), *Weiss*, 385 F.3d at 349. Without any change to Defendants' current policies and procedures, the class will continue to grow as new people apply and are delayed, and to shrink as Plaintiffs' counsel identify needy applicants up to the 100 limit established by the Defendants.

In the instant case, Plaintiffs diligently sought class certification, filing the motion when they filed the complaint and seeking an expedited resolution of the motion. (*See* ECF Nos. 2 (motion), 6 (request to expedite), 24 (joint schedule)). At the time of filing, Plaintiffs' TennCare applications had been pending for many months, far in excess of the authorized periods.[10] Plaintiffs had called the TNHC repeatedly to ask for the status of their pending applications but never received an answer about their eligibility.[11] Plaintiffs' counsel even brought some of these cases directly to the attention of the TennCare Bureau before filing, and

[10] *See* M.M. Decl. ¶ 3 (194 days); T.V. Decl. ¶ 2 (180 days); Wilson Decl. ¶ 4 (163 days); J.P. Decl. ¶ 2 (168 days); Mossa Decl. ¶ 6 (155 days); Reynolds Dec. ¶ 3 (154 days); L.G. Decl. ¶ 4 (147 days); and D.P. Decl. ¶ 3 (146 days).
[11] *See* M.M. Decl. ¶ 6, ¶ 7; T.V. Decl. ¶ 7, ¶ 8, ¶ 10; Wilson Decl. ¶ 6, ¶ 7; J.P. Decl. ¶ 5, ¶ 11; Mossa Decl. ¶ 7, ¶ 10; Reynolds Decl. ¶ 6, ¶ 8; L.G. Decl. ¶ 5, ¶ 7; D.P. Decl. ¶ 3, ¶ 6.

even then TennCare did not adjudicate the claims. Hagan Decl. ¶ 11. It was only after Plaintiffs filed suit that Defendants suddenly adjudicated Plaintiffs' TennCare applications.

The named Plaintiffs, whose applications have now been processed, greatly welcome finally being able to have the health care coverage they should have received months ago, but each also recognizes that the problems they faced are not unique, and many others are suffering and need help.[12] The problems of the class are continuing, as exhibited by Plaintiffs' counsel having sent 89 applicants to TennCare's attention since filing suit. Zampierin Decl. ¶ 5. In this context, *Carroll* and *Brunet* instruct that the efforts by Defendants to enroll the named Plaintiffs cannot be found to moot the class action. Rather, an exception to the mootness doctrine is recognized in this situation to permit named Plaintiffs to continue to represent the class. *Carroll*, 399 F.3d at 625; *Burnett*, 1 F.3d at 400.[13] The Court should grant Plaintiffs' motion for class certification, relating back the certification to the date that Plaintiffs filed their motion. *See Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991); *Weiss*, 385 F.3d at 346–49.

[12] *See* Wilson Decl. ¶ 13; Mossa Decl. ¶ 11; D.P. Decl. ¶ 9; M.M. Decl. ¶ 12; L.G. Decl. ¶ 11; Reynolds Decl. ¶ 13; J.P. Decl. ¶ 17; T.V. Decl. ¶ 16.

[13] Alternatively, the Court should permit the substitution of new class members prior to ruling on class certification. *See Phillips v. Ford Motor Co.*, 435 F.3d 785, 787 (7th Cir. 2006) ("Unless jurisdiction never attached, . . . or the attempt to substitute comes long after the claims of the named plaintiffs were dismissed, . . . substitution for the named plaintiffs is allowed." (citations omitted)); *M.K.B. v. Eggleston*, 05 CIV. 10446(JSR), 2006 WL 3230162 (S.D.N.Y. Nov. 7, 2006) ("[E]ven if both named representatives were not adequate for that purpose, the remedy would be to appoint another member of the class as class representative. There is not the slightest suggestion that such an additional representative could not be found." (citations omitted)).

DATED this 21st day of August, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that 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, this 21st day of August, 2014.

/s/ Christopher Coleman