**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**JACKSONVILLE DIVISION**

Chianne D., et al.,

Plaintiffs,

v. Case No. 3:23-cv-985

Jason Weida, et al.,

Defendants.
_________________________________/

# Plaintiffs' Reply in Support of their Amended Motion for Class Certification

The glue that holds this class together is the uniformity of what the notices omit: any case-specific information that explains the basis for Defendants' eligibility determination such as the income, household size, and income standard used or description of the relevant eligibility categories and requirements. The central question in this case is whether, without that information, the notices state the "specific reasons" for an action, 42 C.F.R. § 431.210(b), or are "of such nature as reasonably to convey the required information." *Mullane v. Cent. Hanover Bank & Tr., Co.*, 339 U.S. 306, 314 (1950). While there are also common fact questions, these legal questions are enough to support certification on their own: a foundational rule for Rule 23(b)(2) classes is that one common question suffices to establish commonality and need not predominate over questions subject to individualized proof. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 (11th Cir. 2009). Given the uniformity of the omissions, Defendants' efforts to manufacture dissimilarities in the language that *is* included is both ineffectual and

irrelevant in a Rule 23(b)(2) class.

## I. Plaintiffs have standing.

Defendants do not contest the standing of A.V., Kimber, or K.H. For their part, C.D. and Chianne suffered significant harm from receipt of the April 24, 2023 notice: confusion, frustration, an inability to plan for C.D.'s transition in health insurance causing a gap in coverage, skipped doctor's appointments, deteriorating health, and medical bills. Moreover, Chianne withdrew her own hearing request because she never received notice that she might still be eligible for postpartum coverage. *See* Dkt. 85 at 10-13. Further, as will be explained in Plaintiffs' Response to Defendants' Motion to Dismiss, C.D. and Chianne have standing under *Turner v. Ledbetter*, 906 F.2d 606 (11th Cir. 1990), and the "inherently transitory" exception to class mootness.

## II. Subclass A is adequately defined and Kimber, K.H., and A.V. are Subclass A representatives.

Kimber, K.H., and A.V. represent Subclass A because they each received a notice that contained reason codes that simply do not identify which of the various Medicaid eligibility requirements DCF believed they did not meet. To be Medicaid eligible in Florida, individuals must establish that they meet various "technical requirements," such as age and residency, as well as have income and, for some groups, assets under the applicable limit.[1] Plaintiffs' proposed Subclass A definition refers to these technical,

[1] *See* Economic Self Sufficiency Program Policy Manual ("ESS Manual") §§ 230.0102-230.0103, 240.0103 (2023), https://www.myflfamilies.com/sites/default/files/2023-02/200.pdf (describing eligibility requirements for Family-Related and SSI-related categories); *id.* §§ 1430.000-1440.000, https://www.myflfamilies.com/sites/default/files/2023-05/1430.pdf (defining "technical requirements").

income, and asset requirements collectively as "eligibility factors." Thus, reason codes that do not mention income, assets, or any technical requirement whatsoever fall within Subclass A. Subclass B reason codes, on the other hand, *do* identify an eligibility factor, namely income. What defines a Subclass A reason code is that it lists neither income nor any other Medicaid eligibility requirement at all.[2] Subclass A is, therefore, adequately defined because whether a reason code mentions any "eligibility factors" is an "objective criteria" that can be used to identify class members. *See Scoma Chiropractic, P.A. v. Dental Equities, LLC*, No. 2:16-cv-41, 2021 WL 6105590, at *10-11 (M.D. Fla. Dec. 23, 2021).

Applying this definition, the reason code "YOU OR A MEMBER(S) OF YOUR HOUSEHOLD REMAIN ELIGIBLE FOR MEDICAID UNDER A DIFFERENT COVERAGE GROUP," falls within Subclass A because it fails to identify any eligibility factor whatsoever. As Defendants acknowledge, this "coverage group" reason code does not mention an eligibility factor. *See* Dkt. 93 at 4 (citing to A.V.'s May 16, 2023 termination notice, Dkt. 2-5 at 12, and conceding that "the reason code did not refer to an eligibility factor"). Thus, the notices received by Kimber, K.H., and A.V. place them squarely within Subclass A.

[2] The reason codes Defendants cite on page 11 are not encompassed by Subclass A because each identifies *some* eligibility factor used in the decision: child support cooperation, whether the enrollee is alive, or whether an enrollee requested that coverage end. *See* Dkt. 93 at 11. District courts have discretion to modify proposed class definitions. *See Fisher v. Ciba Specialty Chems. Corp.*, 238 F.R.D. 273, 300 (S.D. Ala. 2006) (collecting cases and noting that a class definition may require "ongoing refinement and give-and-take"). For the sake of clarity, the Court, therefore, may amend the class definition to expand the list of "eligibility factors" and/or define "eligibility factors" based on reference to ESS Manual technical requirements and income and assets. Such a modification would resolve any remaining concerns about reason codes Defendants reference as not clearly in or out of Subclass A.

Defendants nonetheless suggest that Kimber, K.H., and A.V. are not representatives of Subclass A because this reason code does not appear anywhere on Docket 47-3. Not so. A reason code's failure to identify an eligibility factor is the requisite criterion to fall within the definition of Subclass A—a criterion which the "coverage group" code undisputedly satisfies.

Docket 47-3 does not change this. Plaintiffs previously submitted Docket 47-3 to show how the objective criteria in the Subclass A definition apply to particular reason codes. Temporally, however, Docket 47-3 reflects reason codes that DCF employed "between February 2017 and January 2019." Dkt. 47-3 at 3. Apparently, DCF has modified some reason codes since then. DCF's interrogatory responses and discovery documents identify the "coverage group" reason code received by Plaintiffs as number 227. *See* Ex. 1, DCF's Am. Resp. to Pls.' First Interrogatories at 11-12; Ex. 2, Medicaid Closure Codes: Error Prone Codes (DCF-2046). Notably, reason code 227 *is* highlighted on Docket 47-3, though with slightly different phrasing: "WE REVIEWED YOUR CASE, YOU ARE STILL ELIGIBLE FOR MEDICAID, BUT IN A DIFFERENT MEDICAID COVERAGE TYPE." Dkt. 47-3 at 2.

The fact that code 227 has been associated with both the "coverage type" language listed on Docket 47-3 and the "coverage group" language in Plaintiffs' notices does not render the class definition vague. Rather, it underscores the wisdom of using a Subclass A definition that captures this kind of non-material variation in language instead of relying on a static list of reason codes. In short, the Subclass A definition is not defined "in terms so vague as to be indeterminate," *Cherry v. Dometic Corp.*, 986 F.3d

1296, 1303 (11th Cir. 2021), but rather uses objective criteria that can be applied to a fluctuating list of reason codes to identify which are in and which are out.

### III. Plaintiffs have established commonality for the due process claim.

Relying on Rule 23(b)(3) classes, Defendants make a broadside attack on commonality in due process cases, essentially asking this Court to conclude that the "totality of the circumstances" analysis precludes commonality. Were that so, classes challenging notices under the due process clause would be rare. But they are not. *See* Dkt. 85 at 20-21; *see also Barry v. Corrigan*, 79 F. Supp. 3d 712, 731 (E.D. Mich. 2015). That is because, as Defendants must concede, "[t]he question is . . . whether the notice is reasonably calculated to apprise intended recipients, *as a whole*, of their rights." *Jordan v. Benefits Rev. Bd. of U.S. Dep't of Lab.*, 876 F.2d 1455, 1459 (11th Cir. 1989) (emphasis added). Because questions regarding the totality of the circumstances are asked in terms of "recipients, as a whole" they will generate class-wide answers. *Id.* And for a Rule 23(b)(3) class, that is enough: "[A]ll that is required is the identification of one common question."[3] *Meza v. Marstiller*, No. 3:22-cv-783, 2023 WL 2648180, at *9 (M.D. Fla. Mar. 27, 2023).

[3] "[I]t is important that courts insist on the proper treatment of different types of classes." *AA Suncoast Chiropractic Clinic, P.A. v. Progressive Am. Ins. Co.*, 938 F.3d 1170, 1174 (11th Cir. 2019). Yet, each case Defendants cite concerned a 23(b)(3) class and applied the predominance standard. *See Pop's Pancakes, Inc. v. NuCO2, Inc.*, 251 F.R.D. 677 (S.D. Fla. 2008); *O'Neil v. The Home Depot U.S.A.*, *Inc*, 243 F.R.D. 469 (S.D. Fla. 2006); *Marko v. Benjamin & Bros.*, *LLC*, No. 6:17-cv-1725, 2018 WL 3650117 (M.D. Fla. May 11, 2018) (Kelly, Mag.); *Howard v. Cook Cnty. Sheriff's Off.*, 989 F.3d 587 (7th Cir. 2021). In *Marko*, the plaintiffs included a request for a (b)(2) class, but the court's decision did not acknowledge the (b)(2) standard and applied the predominance test.

### A. Defendants' notices uniformly omit case-specific information raising common legal and factual questions.

Defendants contend that the whole notice is relevant to Plaintiffs' claims. Dkt. 93 at 4. Plaintiffs agree and in their motion analyzed the notices as a whole and—contrary to Defendants' "hodgepodge" characterization, *see* Dkt. 93 at 19-20—have focused their claim on the notices' uniform omissions: no description of what facts DCF relied on, no description of the standard or criteria against which eligibility is measured, and no description of the various Medicaid eligibility categories. Dkt. 85 at 5, 18-19. Defendants do not contest the uniformity of these aspects of the notices. And numerous factual questions susceptible to class-wide proof will inform whether these omissions are "reasonably calculated," such as: Do the notice templates have placeholders for case-specific information? Why not? Could DCF add placeholders?

Defendants suggest dissimilarities among Subclass A's notices by pointing to language referencing income in A.V.'s notice. Dkt. 93 at 4. First, this reference does not cure the common omissions identified above. Second, this language does not clarify the eligibility factor used to find A.V. ineligible. According to Defendants, the language indicates that A.V.'s "Medicaid benefits would terminate, but also that she would be enrolled in the Medically Needy program" starting in June 2023. *Id.* But the language they cite refers to "your" income, and the placement on the page is confusing about who "your" is: the language appears underneath a section describing eligibility of other household members (A.C. and L.V.). *See* Dkt. 2-5 at 9. Moreover, the only "Reason[s]" supplied underneath A.V.'s name are that "YOU ARE RECEIVING THE SAME

TYPE OF ASSISTANCE FROM ANOTHER PROGRAM" and "YOU OR A MEMBER(S) OF YOUR HOUSEHOLD REMAIN ELIGIBLE FOR MEDICAID UNDER A DIFFERENT MEDICAID COVERAGE GROUP." *Id.* at 11-12. This notice hardly makes clear A.V. is ineligible, let alone why. Individuals in Subclass A, whose reason codes likewise identify no factor at all, share common questions of fact about the effect of that omission, even when looking at the notice as a whole.

Defendants also point to variations in the reason codes covered by Subclass A. *See* Dkt. 93 at 18. But by definition, each of those reason codes shares the same feature: they fail to identify an eligibility factor DCF used to make its decision. They are thus materially similar for purposes of commonality. *See, e.g.*, *Dozier v. Haveman*, No. 2:14-CV-12455, 2014 WL 5483008, at *22 (E.D. Mich. Oct. 29, 2014) (finding commonality where class members received "comparable" notices even though the notices contained varying determinations about each recipient's Medicaid coverage); *see also Allapattah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1260-61 (11th Cir. 2003), *aff'd sub nom. Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) (approving class certification of breach of contract claims where contracts were "materially similar"); *Bennett v. Boyd Biloxi, LLC*, No. CV 14-0330, 2016 WL 2743527, at *2 (S.D. Ala. May 11, 2016) (finding commonality where telephone communications contained "the same or materially similar language"); *H & T Fair Hills, Ltd. v. All. Pipeline L.P.*, No. 19-CV-1095, 2021 WL 2526737, at *6 (D. Minn. June 21, 2021) (finding commonality where contract language was not uniform but was "materially similar"); *Taqueria El Primo LLC v. Ill. Farmers Ins. Co.*, 577 F. Supp. 3d 970, 996 (D. Minn. 2021) (certifying class of insurance purchasers

where "substantially similar policy language" and the same laws applied to every policyholder).

**B. Call center communications do not defeat commonality.**

Defendants also point to information purportedly available through the call center and note the obvious: phone communications will vary person to person. Dkt. 93 at 12. The common legal question for purposes of Plaintiffs' due process claim, however, is whether, in light of that inevitable variation, Defendants' choice to rely on the call center—rather than the written notice—as the only potential source of case-specific information is "reasonably certain to inform those affected." *Mullane*, 339 U.S. at 315; *accord Grayden v. Rhodes* 345 F.3d 1225, 1242 (11th Cir. 2003) (applying *Mullane's* reasonably calculated standard to evaluate adequacy of method of providing notice).

In addition to this common legal question, there are numerous factual questions susceptible to class-wide proof that bear on whether this choice is reasonable or not: What are the call center hours? What are the wait times and abandonment rates? What case specific information is visible to the call center staff? What training do they receive on how to interpret it and communicate it? In short, the Court can readily analyze on a class-wide basis whether, "under all the circumstances . . . [t]he means [Defendants] employ[]," to communicate the reasons for Medicaid ineligibility are those that someone "desirous of actually informing" an enrollee "might reasonably adopt." *Mullane*, 339 U.S. at 315.

**C. Defendants' standardized practice satisfies commonality, notwithstanding individual factual variations.**

Defendants reach further afield, urging that factual differences in how class members respond to the challenged notices overcome commonality. *See* Dkt. 93 at 5-8. But those variations cannot defeat commonality here because, as explained above, the due process claim turns on whether *Defendants'* policies and practices for generating notice are adequate as a whole, not on class members' individual or subjective responses. *See Crawley v. Ahmed*, No. 08-14040, 2009 WL 1384147, at *12 (E.D. Mich. May 14, 2009) (certifying class and finding "factual variations" between class members who were terminated from Medicaid without meaningful notice did not affect resolution of the proposed legal question); *Lightfoot v. District of Columbia*, 246 F.R.D. 326, 337 (D.D.C. 2007) ("Plaintiffs do not need to demonstrate that particular individuals were deprived due process but rather that, as applied to the class as a whole, the [Defendant] did not afford adequate due process"). Nor does the Court have to address whether each class member remains eligible. *See Fuentes v. Shevin*, 407 U.S. 67, 87 (1972) ("The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing."); *Kapps v Wing*, 404 F.3d 105, 116-17 (2d Cir. 2005) ("[I]n cases involving the termination of benefits, federal courts do not ask whether the plaintiffs are . . . no longer eligible. Instead, the focus . . . is on the adequacy of the procedures used to make that determination.").

Likewise, factual variations in whether absent class members lost or eventually regain coverage do not erase the common questions. *See Warth v. Seldin*, 422 U.S. 490, 502 (1975) (Plaintiffs do not need to show "that injury has been suffered by other, unidentified members of the class…"). Indeed, this Court recently rejected a similar

argument in *Meza*, explaining that "[w]hile the ramifications resulting from the lack of coverage . . . may differ among class members, given that Plaintiffs do not seek damages in this action, these factual differences do not preclude certification of the class." 2023 WL 2648180, at *10; *see also Hernandez v. Medows*, 209 F.R.D. 665, 671 (S.D. Fla. 2002) (finding commonality despite fact that, following the denial without notice, "different factual scenarios occur: some recipients eventually receive the drug after a period of delay, and some receive a generic or other substitute; some recipients receive no medication"). Commonality is satisfied here.

## IV. Plaintiffs' claims are typical of the class and the definitions are not overbroad.

Plaintiffs' claims are typical of the class because, like each class member, DCF failed to specify in their notice the specific reasons why they were not eligible for Medicaid coverage. Even if Plaintiffs received different reason codes from other class members, their claims arise from the same practice and the same legal theory—the uniform omissions of necessary case-specific information renders the notices inadequate under the Medicaid Act and due process clause. *See Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) (finding typicality "may be satisfied despite substantial factual differences . . . when there is a 'strong similarity of legal theories.'"). Thus, through Plaintiffs' claims, the Court can resolve the claims of other class members whose notices likewise did not provide any case-specific information.

A.V., for example, lost coverage in May 2023 after receiving a notice that contained only Subclass A reason codes, offering her family no clue whatsoever why

DCF believed she was not eligible. *See* Affidavit of Jennifer V., Dkt. No. 2-5, Ex. A. When her coverage was not restored through this litigation, she attempted to regain coverage by submitting a new Medicaid application. This time, she received a notice with Subclass B reason codes, stating she was ineligible due to her family's income, but not specifying the household income or applicable income standard. Dkt. 85-2 at 5. Yet, after receiving this notice, A.V. still could not identify Defendants' error and restore her coverage.[4] Thus, her claim is typical of individuals in both Subclasses because, absent the requisite case-specific information, neither the Subclass A nor the Subclass B reason code she received allowed her family to identify and correct the error DCF was making in determining her eligibility.

Factual variances in how people react to this uniform omission of case-specific information simply do not defeat typicality in a 23(b)(2) class. *See J.M. ex rel. Lewis v. Crittenden*, 337 F.R.D. 434, 450 (N.D. Ga. 2019) (typicality met based on form notice though one named plaintiff experienced no coverage gap). Nor do those factual variances render the class definition overbroad. Relying on cases discussing the Rule 23(b)(3) predominance requirement, Defendants assert that Plaintiffs must demonstrate an "error rate" on behalf of the class or meet some other (unspecified) threshold showing regarding the proportion of injured vs. uninjured class members. Dkt. 93 at 14-15. Not so. In a much more analogous case, *Barry v. Lyon*, the Sixth Circuit addressed a class challenging

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[4] DCF was incorrectly counting the standard filing unit for A.V.'s household, and therefore, applying too low of an income standard. It was only through discovery in this case that Plaintiffs' counsel could determine what income and income standard DCF relied upon to determine eligibility. *See* Pls.' Am. Mtn. for Class Certification, Dkt. 85, at 9-10.

SNAP disqualification notices based on felony convictions. 834 F.3d 706, 722 (6th Cir. 2016). It concluded that even where "the subclass includes persons who are actually felons . . . [and who] lack substantive claims, [they] could still advance a due process argument," and their inclusion on the class "does nothing to undermine the district court's class certification." *Id.* In any event, the record demonstrates that the confusion and frustration stemming from the notices is widespread: Defendants themselves have, for years, been "well aware that notices sent to beneficiaries generate confusion" and "are considered to be not sufficiently explicit in terms of an explanation."[5] Thus, Plaintiffs are well-positioned to represent the class of individuals confused by the lack of explanation in the notices.

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Respectfully submitted,

By: /s/ *Sarah Grusin*

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[5] *State Health Access Data Assistance Center (SHADAC), Medicaid Eligibility, Enrollment, and Renewal Processes and Systems Study: Case Study Summary Report – Florida*, 12-13 (Oct 19, 2018), https://www.macpac.gov/wp-content/uploads/2018/11/Florida-Summary-Report.pdf.