UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

5:17-cv-00581-FL

MARCIA ELENA QUINTEROS HAWKINS, ALICIA FRANKLIN and VANESSA LACHOWSKI on behalf of themselves and all others similarly situated, Plaintiffs, v. MANDY COHEN, in her official capacity as Secretary of the North Carolina Department of Health and Human Services, Defendant.	**DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

NOW COMES DEFENDANT Mandy K. Cohen (hereinafter referred to as Secretary Cohen), by and through undersigned counsel, and files this Response in Opposition to Plaintiffs' Motion for Class Certification.

INTRODUCTION

On December 21, 2017, Plaintiffs moved to certify a statewide class of plaintiffs pursuant to Federal Rule of Civil Procedure 23(a), (b)(2), defined as:

> Subclass One: All individuals whose Medicaid coverage was, is or will be terminated or interrupted, effective January 1, 2014 or later, by Defendant Secretary of the North Carolina Department of Health and Human Services (DHHS), or any of her employees, contractors, agents, or assigns, without first making an individualized determination of ineligibility categories and without first sending the beneficiary at least 10-day prior written notice of the termination of Medicaid that describes the specific reasons for the termination, the specific regulation supporting the termination, and the right to a pre-termination hearing.

> Subclass Two: All individuals for whom Medicaid coverage was, is or will be terminated or interrupted, effective January 1, 2014 or later, by Defendant Secretary of the North Carolina Department of Health and Human Services (DHHS), or any of her employees, contractors, agents, or assigns, without first making an individualized determination of ineligibility categories and without accommodating the beneficiary's disability during the eligibility redetermination process.
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> Subclass Three: All individuals for whom Medicaid coverage was, is or will be terminated or interrupted, effective January 1, 2014 or later, by Defendant Secretary of the North Carolina Department of Health and Human Services (DHHS), or any of her employees, contractors, agents, or assigns, without first making an individualized determination of ineligibility categories and without communicating during the redetermination process in the beneficiary's primary language where the beneficiary has limited English proficiency.

[DE 18, pp. 1-2]

The proposed class of Plaintiffs are represented in this action by four (4) individual named Plaintiffs. Plaintiff Marcia Elena Quinteros Hawkins (hereinafter "Hawkins"). Plaintiffs allege that she speaks Spanish and does not understand English." DE 12, ¶ 77. Plaintiffs allege that Hawkins went to or telephoned Mecklenburg County DSS on multiple occasions. See, DE 12, ¶¶ 82, 88, 90, and 95. Plaintiffs allege that Hawkins received a notice on June 30, 2018 indicating that her Medicaid coverage had been renewed through June 30, 2018 and that the notice was in English. DE 12, ¶ 83. Plaintiffs further allege that Hawkins Medicaid coverage was terminated without notice on July 31, 2017 and that Hawkins was unaware of this until she tried to refill a prescription on Aug. 9, 2017. DE 12, ¶¶ 85, 87-88. Plaintiffs then allege that on Sept. 20, 2017, after being told by DSS that her Medicaid would be reinstated, DSS sent Hawkins a notice that her Medicaid would again stop on Oct. 31, 2017 and that the notice was in English. DE 12, ¶ 90. On Oct. 26, 2017, Hawkins went to get a flu shot and could not, because she was told that she had no Medicaid coverage. DE 12, ¶ 94. Hawkins went back to Mecklenburg County DSS (the complaint is again silent about whether she requested or was provided language services), and was told that

NCFast had put a hold on her Medicaid for the month of October, "again suspending her Medicaid without any notice." DE 12, ¶ 95.

Plaintiff Alicia Franklin (hereinafter "Franklin") allegedly "suffers from a mild intellectual disability." DE 12, ¶ 100. Franklin "received Social Security disability benefits until 2015 when her benefits stopped because she was able to return to work despite her disability." DE 12, ¶ 100. Plaintiffs allege that on Sept. 5, 2017, Mecklenburg County DSS mailed a request to Franklin asking for information for the annual redetermination of her eligibility. The form "was written in complex language Ms. Franklin could not understand." DE 12, ¶¶ 102-103. According to Plaintiffs, "Mecklenburg DSS was aware of Ms. Franklin's disability but made no effort to telephone Ms. Franklin to explain the notice to her or to offer her assistance." DE 12, ¶ 104. Plaintiffs allege that Franklin went to DSS and talked to a caseworker. DE 12, ¶ 106.

Plaintiffs allege that on October 11, 2017, Mecklenburg County DSS sent written notice to Franklin that her Medicaid would stop on Oct. 31, 2017 due to her failure to provide the previously requested information. It is alleged that the "notice contained confusing, contradictory information about the reason for the termination, cited inapplicable and obsolete regulations to support the decision, and was written in complex language that Ms. Franklin could not understand." DE 12, ¶ 107. "Mecklenburg DSS made no effort to telephone Ms. Franklin to explain the termination notice to her." DE 12, ¶ 110.

Plaintiff Vanessa Lachowski (hereinafter "Lachowski") is allegedly totally disabled due to severe spina bifuda. DE 12, ¶ 115. On Dec. 31, 2016, Lachowski's Medicaid coverage was allegedly terminated without notice. DE 12, ¶ 120. Her Medicaid coverage was reinstated after approximately ten (10) days. DE 12, ¶ 123. As of the date of the filing of the Corrected Amended Complaint, Lachowski was still receiving Medicaid coverage, although she was due to have her

Medicaid eligibility reviewed by Dec. 31, 2017. DE 12, ¶ ¶ 124-125.

Plaintiff Kyanna Shipp (hereinafter "Shipp") allegedly suffers from severe epilepsy and needs medication to control her seizures. DE 12, ¶ 130. Until Nov. 30, 2017, Shipp was enrolled in Medicaid based on being under 19 years old. DE 12, ¶ 132. Plaintiffs allege that Shipp was terminated from Medicaid coverage without notice on Nov. 30, 2017 because she turned 19 years old. DE 12, ¶ 138.

On behalf of themselves and the proposed class, the four named plaintiffs seek injunctive and declaratory relief that would apply to the class as a whole. DE 18, p. 16. As set forth below, this Court should deny certification because they cannot meet the requirements of Federal Rule of Civil Procedure 23(a). In the alternative, the proposed class should be narrowed to exclude plaintiffs who allegedly have the potential to have their Medicaid coverage interrupted or terminated as some undefined future time. Also in the alternative, this Court should not rule on the remaining plaintiffs' motion until defendant has had the opportunity to conduct class discovery.

STANDARD OF REVIEW

"The burden of establishing that a case meets the requirements for class certification under the Rule rests on the party seeking certification." *In re A.H. Robins Co.*, 880 F.2d 709, 728 (4th Cir. 1989). The assessment required for class certification "is the responsibility of the District Court, which is to make its decision after 'a rigorous analysis' of the particular facts of the case." *Id.*, quoting *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468, 471-72 (5th Cir. 1986). Federal Rule of Civil Procedure 23 sets forth a two-part test that plaintiffs must satisfy to demonstrate that their claims are suitable for class resolution. First, the plaintiffs bear the burden of establishing that the proposed class satisfies all four prerequisites contained in Rule 23(a): (1) the class is so numerous that joinder of all members is impracticable (numerosity); (2) there are questions of law

or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy of representation). Fed. R. Civ. P. 23(a); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (June 20, 2011); *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 318-19 (4th Cir. 2006).

Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b). *See Gunnells v. Healthplan Servs.*, 348 F.3d 417, 423 (4th Cir. 2003). Here, plaintiffs rely on Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b). Certification under Rule 23(b)(2) does not allow individuals to opt out of the class, so the result is binding on all members. *A.H. Robins Co.*, 880 F.2d at 728.

In addition to this express two-step analysis, there are two implicit requirements contained within Rule 23. First, the plaintiffs must have standing. *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 188 (4th Cir. 1993); *see also Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (5th Cir. 2000) ("Without individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of a class."). Second, the class definition must be "precise, objective and presently ascertainable." *Crane v. Int'l Paper Co.*, 2005 U.S. Dist. LEXIS 15590, 2005-01 Trade Cas. (CCH) P74, 789 (D.S.C. Apr. 19, 2005), quoting Manual for Complex Litigation, Fourth, § 21.222 (FJC 2004); *see also Bratcher v. Nat'l Standard Life Ins. Co.*, 365 F.3d 408, 413 (5th Cir. 2004) ("A precise class definition is necessary to identify properly 'those entitled to relief, those bound by the judgment, and those entitled to notice.'" Moore's Federal Practice § 23.21[6], at 23-62.2 (3d ed. 2003)). Plaintiffs cannot satisfy these

basic minimum requirements for establishing a claim suitable for class resolution. Failure to meet any one of these requirements mandates denial of the motion for class certification.

ARGUMENT

I. Plaintiffs Do Not Meet The Requirements Of Rule 23(a).

As the Supreme Court recently reiterated in *Wal-Mart*, "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" 564 U.S. at 348, 131 S. Ct. at 2550; 180 L. Ed. 2d at 388-389, quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979). "In order to justify a departure from that rule, 'a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.'" *Id.*, quoting *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977). The purpose of Rule 23(a) is to ensure "that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate." *Id.* The requirements of Rule 23 "effectively 'limit the class claims to those fairly encompassed by the named plaintiff's claims.'" *Id.*, citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 156, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982) (quoting *General Telephone Co. of Northwest v. EEOC*, 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980)).

"The requirements of Rule 23(a) are familiar: numerosity of parties, commonality of factual or legal issues, typicality of claims and defenses of class representatives, and adequacy of representation." *Thorn*, 445 F.3d at 318-319. In their motion for class certification, Plaintiffs assert, without any supporting evidence, that they share questions of law and fact common and typical to the class, and seek the same relief as do all class members.

As courts have noted, "the final three requirements of Rule 23(a) 'tend to merge, with commonality and typicality serving as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Lienhart v. Dryvit Sys.*, 255 F.3d 138, 147 (4th Cir. 2001), citing *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 337 (4th Cir. 1998), quoting *Falcon*, 457 U.S. at 157 n.13.

Plaintiffs cite the Eastern District of North Carolina's decision in *Rodger v. EDS*, 160 F.R.D. 532 (1995) for the proposition that the commonality factor should be "liberally construed." Defendant submits that the Supreme Court's more recent decision in *Wal-Mart* is more persuasive authority. In *Wal-Mart*, the Supreme Court found 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*, 564 U.S. at 350, 131 S. Ct. at 2551; 180 L. Ed. 2d at 390 (emphasis added) (quoting *Nagreda, Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 132 (2009)). Similarly, a question is not common "if its resolution 'turns on a consideration of the individual circumstances of each class member.'" *Thorn*, 445 F. 3d at 319, quoting 7A Wright, Miller & Kane, Federal Practice and Procedure § 1763 (3d ed. 2005). Applying this analysis to the causes of action asserted herein shows that the proposed class does not meet the interrelated Rule 23(a) factors of commonality and typicality.

A. The named Plaintiffs' claims do not share commonality or typicality with other members of the class who have allegedly had their Medicaid coverage terminated in the past.

Plaintiffs argue that the proposed class should be defined as "[a]ll individuals whose Medicaid coverage was, is, or will be interrupted or terminated effective January 1, 2014 or later, by Defendant Secretary of the North Carolina Department of Health and Human Services (DHHS), or any of her employees, contractors, agents, or assigns, without first making and individualized determination of ineligibility under all Medicaid categories." Plaintiffs' Motion for Class Certification, p. 1. Plaintiffs then seek to divide the class into three (3) subclasses, broken down as individuals who suffered the aforementioned harm and whose Medicaid coverage was, is, or will be interrupted:

> without first sending the beneficiary at least 10-day prior written notice of the termination of Medicaid that describes the specific reasons for the termination, the specific regulation supporting the termination, and the right to a pre-termination hearing.
>
> without first making an individualized determination of ineligibility categories and without accommodating the beneficiary's disability during the eligibility redetermination process.
>
> without first making an individualized determination of ineligibility categories and without communicating during the redetermination process in the beneficiary's primary language where the beneficiary has limited English proficiency.

DE 18, ¶¶ 1-2

Of the four named Plaintiffs, it is alleged that for Hawkins, Franklin and Shipp, each Plaintiff's "health is suffering, and she is in serious risk unless her Medicaid is reinstated." DE 12, ¶¶ 99, 114, 139. As for the fourth named Plaintiff, Lachowski, although Plaintiffs allege that her Medicaid coverage was improperly terminated, she is currently receiving Medicaid coverage and is due to have her Medicaid eligibility reviewed again. DE 12, ¶ 125.

As set forth above, Plaintiffs' proposed class is "all individuals whose Medicaid coverage ***was, is, or will be*** interrupted or terminated effective January 1, 2014 or later." This proposed class envisions individuals whose Medicaid coverage may have been terminated as some point in the past ("***was*** interrupted or terminated"), but who may have: had their Medicaid coverage reinstated; proven to actually be ineligible for Medicaid and never been reinstated; secured other coverage; or, no longer required Medicaid coverage through the North Carolina Medicaid Program by virtue of a change in circumstances such as death or moving to another state.

The case of *J.B. v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999) is illustrative of a similar situation in which the proposed class certification was denied for lack of commonality. In *Valdez*, plaintiffs alleged that the state Defendants failed to provide protections and therapeutic services required under the ADA, Medicaid, and the Rehabilitation Act, among other federal statutes. *Id.* The U.S. District Court denied class certification because of divergent factual circumstances as to each of the named plaintiffs and the purported class members, and the Tenth Circuit affirmed, holding that "no common factual link joins these plaintiffs." *Id.* at 1289. Specifically, the plaintiffs sought to "certify a class of *all* children in state custody who 'have any form of mental and/or developmental disability for which they require some kind of therapeutic services or support.'" *Id.* at 1290 (emphasis in original). The Tenth Circuit noted that [t]his broad definition would include not just children whom New Mexico improperly denied assistance, but also children who actually receive all services required under the ADA and Rehabilitation Act. Children receiving appropriate services have no claim under these statutes." *Id.*

In this case, the Plaintiffs have failed to establish commonality or typicality with the entire class. The 3 named Plaintiffs who are allegedly off of Medicaid are seeking to be reinstated. However, the proposed class of all individuals whose coverage was terminated, includes

individuals who no longer need relief. Plaintiffs themselves concede that the fourth named Plaintiff, Lachowski, was reinstated after 10 days. DE 12, ¶ 123. Moreover, as set forth above, one of the two conditions that are implicit in the Rule 23 analysis is that the class definition must be "precise, objective and presently ascertainable." *Crane v. Int'l Paper Co.*, 2005 U.S. Dist. LEXIS 15590, 2005-01 Trade Cas. (CCH) P74, 789 (D.S.C. 2005), quoting Manual for Complex Litigation, Fourth, § 21.222 (FJC 2004); *see also Bratcher v. Nat'l Standard Life Ins. Co.*, 365 F.3d 408, 413 (5th Cir. 2004). The proposed class of all individuals whose coverage was terminated sometime between January 1, 2014 and the present, is most definitely not a precise, objective or presently ascertainable group.

B. Plaintiff Lachowski Lacks Standing To Bring This Action, and Therefore Cannot Be Representative of Putative Class Members Whose Medicaid Coverage "will be terminated or interrupted, effective January 1, 2014 or later

Article III of the Constitution limits the jurisdiction of the federal courts to the consideration of "cases" and "controversies." U.S. Const. art. III, § 2. In order for the class to be certified, the named plaintiffs must conclusively demonstrate that they have standing to bring the complaint. The "irreducible constitutional minimum of standing," rooted in Article III's case-or-controversy requirement, consists of three elements: (1) an "injury in fact," by which is meant "an invasion of a legally protected interest"; (2) "a causal connection between the injury and the conduct complained of"; and (3) a likelihood that "the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed.2d 351 (1992).

"'The rule in federal cases is that an actual controversy must be extant at all stages of review.'" *Id.*, quoting *Steffel v. Thompson*, 415 U.S. 452, 459 n.10, 39 L. Ed. 2d 505, 94 S. Ct. 1209 (1974). The Supreme Court has stated that "Article III requirements must be met 'at the time

the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23.'" *Id.*, quoting *Sosna v. Iowa*, 419 U.S. 393, 402, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975). It is "essential that named class representatives demonstrate standing through a 'requisite case or controversy between themselves personally and [defendants],' not merely allege that 'injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Id.*, quoting *Blum v. Yaretsky*, 457 U.S. 991, 1001 n.13, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982) (citations omitted).

At the outset, the injury that Plaintiff Lachowski is alleged to have suffered is not clear. The Corrected Amended Complaint states that Plaintiff Lachowski "began receiving Medicaid services under the Community Alternative Program for Disabled Adults (CAP-DA). Ms. Lachowski had waited over a year on the waiting list for this program, under which Medicaid increased the amount of her personal care services significantly to almost 30 hours per week. This increase in services has been of great benefit to Ms. Lachowski's health and well-being." D.E. 12, ¶124.

It appears from the Corrected Amended Complaint, that the injury-in-fact that Plaintiff Lachowski could have suffered was the possibility that her Medicaid benefits might have been terminated effective December 31, 2017. D.E. 12, ¶¶ 125-27. Indeed, the operative facts alleged in the Corrected Amended Complaint confirm that Plaintiff Lachowski was eligible, and was to remain eligible, for Medicaid for at least two more months. D.E. 12, ¶¶ 124-25.

To the extent that the injury at issue is the possibility that Plaintiff Lachowski might lose her Medicaid eligibility at some future date, Plaintiff Lachowski lacks standing to bring a claim because she has not suffered an "injury-in-fact." The Plaintiff must show that she is "under threat of suffering" an injury that is "actual and imminent, not conjectural or hypothetical." *Summers v.*

Earth Island Inst., 555 U.S. 488, 455 (2009). Plaintiff Lachowski does not allege an actual injury-in-fact, and the pleading adopts a conjectural and hypothetical posture: "*If* Ms. Lachowski's Medicaid is terminated again, her personal care services will stop again. Also, *if* she loses her Medicaid coverage, Ms. Lachowski will be terminated from the CAP-DA program. *If* that occurs, she is *likely* to have to wait another year or more on the waiting list to get CAP-DA services again." D.E. 12, ¶ 128 (*emphasis added*). This conjectural and hypothetical threat is precisely of the kind contemplated by the Supreme Court in *Summers*. Plaintiff Lachowski is asking the Court to imagine the circumstances that could arise that could lead to an injury-in-fact.

Moreover, as stated above, the Corrected Amended Complaint confirms that Plaintiff Lachowski was eligible and receiving Medicaid benefits at the time the Corrected Amended Complaint was filed and, upon information and belief, remains eligible and receiving Medicaid benefits at present. Therefore, Plaintiff Lachowski fails the first element of standing analysis by failing to allege that she has suffered an "injury-in-fact" which is both: (a) "concrete and particularized"; and (b) "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. 555, 560 (1992). Thus, Plaintiff Lachowski is the only representative of a class of individuals who are currently receiving Medicaid benefits and who are scheduled for redetermination of eligibility as required by federal regulations. This class of individuals (currently eligible Medicaid beneficiaries with eligibility redeterminations pending) has suffered no injury-in-fact, and therefore lacks Article III standing.

The argument that Plaintiff Lachowski is representative of a putative class of individuals who might someday suffer harm does not meet the requirements for actual or imminent harm ("Such "some day" intentions -- without any description of concrete plans, or indeed even any specification of *when* the some day will be -- do not support a finding of the "actual or imminent"

injury that our cases require.") *Id*. at 564. Accordingly, Plaintiff Lachowski does not have a case or controversy arising under Article III, and lacks standing to serve as a class representative in this action.

Given that Plaintiff Lachowski lacks standing as a Plaintiff in this case, the Plaintiffs do not have a representative plaintiff for the members of the proposed class whose Medicaid coverage ***will be*** interrupted or terminated at some future point. Therefore, should this Honorable Court determine to certify a class in some manner, it should exclude the undefined and imprecise class of individuals whose Medicaid coverage may be terminated. *See Prado-Steiman v. Bush*, *supra* ("Without individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of a class.").

C. The named Plaintiffs' claims require individualized inquiries into the circumstances of their respective terminations from Medicaid coverage, therefore their claims lack the requisite commonality and typicality.

All four of the named Plaintiffs reside in Mecklenburg County and have dealt with Mecklenburg County DSS regarding their Medicaid coverage. Although Plaintiffs allege that they all suffered a similar injury, i.e. being terminated from Medicaid coverage without notice, a review of the precipitating factors requires an examination of what Mecklenburg County DSS (hereinafter "Mecklenburg DSS") allegedly did in error, or failed to do.

For Plaintiff Hawkins, it was alleged that she spoke Spanish and did not understand English, yet a notice of renewal and notice of termination from Mecklenburg DSS were in English. D.E. 12, ¶¶ 77, 83, 92. Hawkins also had multiple communications with Mecklenburg DSS, although no facts were plead suggesting that Mecklenburg DSS made special accommodations for her being limited English proficient. D.E. 12, ¶¶ 82, 88, 89, 90, 95.

For Plaintiff Franklin, it was alleged that she had a mild intellectual disability, of which Mecklenburg DSS was aware. D.E. 12, ¶¶ 100, 104. Mecklenburg DSS allegedly mailed a request for information form to the wrong address, which was written in complex language. D.E. 12, ¶¶ 103-05. Mecklenburg DSS allegedly, despite being aware of Franklin's mild intellectual disability, did not help Franklin understand what information she needed to provide for the annual redetermination of her eligibility. D.E. 12, ¶¶ 102, 105-06. Mecklenburg DSS then sent Franklin a notice that her Medicaid coverage would stop, which notice was confusing and contained contradictory or inapplicable information. D.E. 12, ¶ 107.

Although Plaintiff Lachowski is currently receiving Medicaid, it is alleged that when her coverage was previously terminated, her mother was unable to contact anyone at Mecklenburg DSS. D.E. 12, ¶ 122. Lachowski's Medicaid coverage was actually reinstated after 10 days. DE 12, ¶ 123. Plaintiffs allege that Lachowski has not received a renewal form or any other communication from Mecklenburg DSS regarding renewing her Medicaid. D.E. 12, ¶ 125.

Plaintiffs allege that Mecklenburg DSS did not request any information from Plaintiff Shipp before her Medicaid stopped. D.E. 12, ¶ 135. Plaintiffs also allege that Mecklenburg DSS made no effort to determine whether Shipp was disabled or eligible as a 19 or 20 year old before her Medicaid coverage stopped. D.E. 12, ¶ 136-137.

Although Plaintiffs seek to establish commonality and typicality based on the termination of Medicaid coverage, it can be seen from the pleadings that the circumstances leading up to and following the termination of the Plaintiffs are quite different. Take for example individuals in the proposed class who may have been dropped due to the failure of a particular county DSS to redetermine their Medicaid eligibility in a timely manner. For most Medicaid beneficiaries, eligibility is required to be redetermined every twelve months, unless there is a change in

circumstances affecting eligibility before then. 42 C.F.R. §435.916(a)(1), (b), (d). According to the exhibits attached to the Declaration of Douglas Sea in Support of Plaintiffs' Motion for Class Certification, not all of the county DSS offices in North Carolina have Medicaid recertifications that are past due. DE 24, Exhibit 3-4. To the extent that members of the proposed class are alleged to have had their Medicaid coverage terminated due to the failure of the county DSS office to completed the redertermination/recertification in a timely manner, this does not involve every county in North Carolina. Aside from the county DSS offices, the circumstances of the termination may vary. Unlike the other 3 named Plaintiffs, Lachowski was able to have her Medicaid coverage reinstated. DE 12, ¶ 123. This demonstrates how the factors that precipitated each Plaintiff's termination from Medicaid coverage, and those following the termination, will need to be examined on an individual basis.

"The presence of a common legal theory does not establish typicality when proof of a violation requires individualized inquiry." *Elizabeth M. v. Montenez*, 458 F.3d 779, 787 (8th Cir. 2006) quoting *Parke v. First Reliance Std. Life Ins. Co*., 368 F.3d 999, 1004-05 (8th Cir. 2004), *see also Hohider v. UPS*, 574 F.3d 169, 197 (3d. Cir. 2009) ("As discussed, the individualized inquiries necessary to determine whether UPS has engaged in a pattern or practice of unlawful discrimination under the ADA render certification of this class improper, even if plaintiffs were to seek solely injunctive or declaratory relief."). Even the Plaintiffs' attempt to break the class down into subclasses does not take into account how the conduct of the various county DSS offices will need to be examined. Therefore, the Motion for Class Certification should be denied.

II. In The Alternative, Further Development Of The Record Is Necessary Before The Court Can Rule On Plaintiffs' Motion For Class Certification.

At the class certification phase, "the district court must take a 'close look' at the facts relevant to the certification question and, if necessary, make specific findings on the propriety of certification." *Thorn*, 455 F.3d at 319, quoting *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004). Plaintiffs have not established an evidentiary record sufficient for this court to make specific findings as to the class allegations. Even if plaintiffs make the necessary *prima facie* showing, which they have not done here, defendant must then have the opportunity to submit affidavits to counter plaintiffs' evidence and seek class discovery. Should material facts remain in dispute, a hearing may be warranted. *See, e.g., Satterwhite v. City of Greenville*, 578 F.2d 987, 998 (5th Cir. 1978), *vac. and remanded on other grounds*, 445 U.S. 940, 100 S. Ct. 1334, 63 L. Ed. 2d 773 (1980) ("Although, in rare instances, maintainability may be determined on the basis of the pleadings, if there is any genuine doubt with respect to the propriety of a class action, a preliminary evidentiary hearing is essential.") (internal quotations omitted). In this case, certification on the pleadings alone would be premature and contrary to the requirements of Rule 23(a). This court should deny the motion for class certification or, in the alternative, refrain from ruling on the motion for class certification until the parties can complete discovery on the class issues.

CONCLUSION

Plaintiffs' request to certify a class defined as "[a]ll individuals whose Medicaid coverage was, is, or will be interrupted or terminated effective January 1, 2014 or later, by Defendant Secretary of the North Carolina Department of Health and Human Services (DHHS), or any of her employees, contractors, agents, or assigns, without first making and individualized determination of ineligibility under all Medicaid categories" should be denied.

Plaintiffs request to have the class broken down into three (3) subclasses, based upon individuals who suffered the aforementioned harm and whose Medicaid coverage was, is, or will be interrupted:

> without first sending the beneficiary at least 10-day prior written notice of the termination of Medicaid that describes the specific reasons for the termination, the specific regulation supporting the termination, and the right to a pre-termination hearing.
>
> without first making an individualized determination of ineligibility categories and without accommodating the beneficiary's disability during the eligibility redetermination process.
>
> without first making an individualized determination of ineligibility categories and without communicating during the redetermination process in the beneficiary's primary language where the beneficiary has limited English proficiency should also be denied.

Plaintiffs have failed to meet their burden of establishing commonality and typicality among the class. The proposed class includes individuals who no longer need relief and would in no way benefit from the requested declaratory and injunctive relief.

As for the members of the class who are allegedly at risk of being terminated from Medicaid coverage at some point in the future, the Plaintiffs do not have a representative plaintiff who has standing to bring this lawsuit.

Finally, given the disparity of factual circumstances concerning the plaintiffs' dealings with their particular county DSS offices, class certification is not appropriate here. Plaintiffs' motion should be denied.

Alternatively, should this Honorable Court decide to grant class certification, it is respectfully requested that the class definition be narrowed in accordance with the arguments set forth above.

Respectfully submitted this 9th day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to the following:

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This the 9th day of February, 2018.

s/Thomas J. Campbell
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