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

MELISSA WILSON, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	**No. 3:14-cv-1492**
WENDY LONG, in her official capacity as Deputy Commissioner of the Tennessee Department of Finance & Administration and Director of the Bureau of TennCare, *et al.*,	)	**Judge Campbell** **Magistrate Judge Newbern**
	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DECERTIFY THE CLASS AND DISMISS THE CASE

Defendants (the "State") respectfully submit this reply in support of their motion to decertify the class and dismiss the case.

I. THE CLASS NO LONGER HAS ANY MEMBERS.

Plaintiffs' opposition to the State's Motion fails to identify anyone who satisfies the criteria for membership in the Class adopted by the Court in its class certification order. Instead, Plaintiffs argue that the Court need not decertify the class because the State has not satisfied the requirements for a dismissal based on mootness arising from voluntary cessation of conduct. *See* Plaintiffs' Response in Opposition to Defendants' Motion to Decertify the Class and Dismiss the Case at 7–11 (Oct. 3, 2016), D.E. 171 ("Plaintiffs' Opp'n"). This argument is a non-sequitur. The State's motion is not premised on an assertion that class members' claims are moot; it is premised on the fact that there are no class members in the first place. Plaintiffs complain that

the State's motion focuses on the fact that all TennCare applicants whose applications have been delayed beyond 45 (or 90 days in the case of disability applicants) either have their applications adjudicated or receive a hearing within 45 days of submitting proof documenting a delayed application. *See id.* at 2. But the Court's Class definition limits membership to applicants who *both* "have not received a final eligibility determination in 45 days (or in the case of disability applicants, 90 days), *and* who have not been given the opportunity for a 'fair hearing' by the State Defendants after these time periods have run." Class Certification Order at 8 (Sept. 2, 2014), D.E. 90 ("Class Certification Order") (emphasis added). The fact that every delayed applicant who appeals either has his application adjudicated or receives a fair hearing within the 45- or 90-day period set by the Court demonstrates that there are no delayed applicants "who have not been given the opportunity for a 'fair hearing,' " and thus no applicants who are members of the Class defined by the Court.

Plaintiffs nevertheless argue that individuals whose delayed adjudication appeals are pending satisfy the criteria for membership in the class from the time their application is delayed beyond 45 or 90 days up until the point when the hearing takes place or the underlying TennCare application is adjudicated. *See* Plaintiffs' Opp'n at 11–14. This argument also fails for it conflates the "opportunity" for a hearing with actually receiving one. Plaintiffs' contorted interpretation effectively reads the requirement that an individual be denied the opportunity for a fair hearing out of the Court's Class definition, expanding the Class to encompass anyone whose TennCare application was delayed without regard to whether he or she received the opportunity for a fair hearing. Plaintiffs ultimately give the game away when they ask the Court, in the alternative, to amend the definition to achieve that result. Simply put, the Class definition adopted by the Court is different from, and narrower than, the definition the Plaintiffs desire.

The State offers all individuals whose TennCare applications have been delayed beyond 45 or 90 days the "opportunity" for a hearing in accordance with the process described in detail in the Declaration of Kim Hagan ¶ 6 (Sept. 16, 2016), D.E. 166 ("Hagan Decl."). Plaintiffs argue that "simply . . . pointing to a generally available process", Plaintiffs' Opp'n at 11, is not sufficient to establish that all delayed applicants have the opportunity for a hearing, but the State has not rested solely on the existence of this generally available process. Rather, the State has also shown that under this process, every delayed applicant who appeals and has not received a final eligibility determination in 45 or 90 days in fact receives a hearing within the prescribed time period. Hagan Decl. ¶¶ 7–8.

Plaintiffs point to problems the State experienced in the early months of the rollout of the delayed adjudication hearing process, *see* Plaintiffs' Opp'n at 4, but the undisputed evidence in the record demonstrates that those problems were completely resolved by May 2015, and the process has operated smoothly ever since. Hagan Decl. ¶¶ 7–8. Plaintiffs also highlight the fact that hearings were not held within the 45-day period in 13 cases from over a year ago, but that one-time problem was the result of the Call Center's good faith effort to assist the applicants by awaiting additional information before referring the cases to the appeals unit. *Id*. ¶ 7 n.1. "The appeals unit promptly resolved the appeals upon receipt, the Call Center has been instructed that it may not delay referrals while it awaits additional information, and this problem has not recurred since then." *Id*. These long past issues do not change the fact that there are no delayed applicants *today* who do not either have their applications adjudicated or receive a hearing within the 45-day period.

It is telling that Plaintiffs have presented no evidence of any delayed applicant who meets the criteria established by the Court for membership in the class. Plaintiffs blame the absence of

evidence on the Court's denial of their motions to compel, *see* Order (Aug. 24, 2016), D.E. 160, *aff'd*, Order (Oct. 4, 2016), D.E. 173, but nothing in the Court's orders has precluded Plaintiffs from taking discovery over the past two years. If the circumstances on the ground had not changed dramatically such that applicants are no longer facing delays like those that confronted the named Plaintiffs, Plaintiffs' counsel surely would be able to identify individuals with current, ongoing application problems, yet they have not identified a one.

Finally, Plaintiffs' contention that the State will not continue providing delayed application appeals if the class is decertified and the case dismissed is without any basis in fact. The State has worked diligently since the entry of the preliminary injunction to not just comply with the terms of that injunction but to go above and beyond its requirements. As Plaintiffs acknowledge, *see* Plaintiffs' Opp'n at 3–4, the State has voluntarily created an administrative process whereby the State attempts to provide an adjudication of every delayed application on appeal rendering moot the need for a fair hearing. The State has devoted thousands of hours to creating and refining the delayed application appeal process and has hired hundreds of new employees to process delayed application appeals. *See* Declaration of Wendy Long ¶ 5 (Feb. 25, 2015), D.E. 105-2. As importantly, the delayed application appeal process is not merely reflected in an internal desk guide, as Plaintiffs have suggested, but has been codified into TennCare's rules. *See* TENN. COMP. R. & REGS. 1200-13-19-.01 *et. seq.* Plaintiffs ignore these facts entirely in suggesting that the State could cease providing these appeals at any time should the Court decertify the Class. To the contrary, the State has built a permanent, long-term process and is fully committed to providing applicants who allege there has been a delay in processing their TennCare applications either a timely adjudication of that application or a fair hearing on the reason for the delay.

II. THE COURT SHOULD NOT EXPAND THE CLASS.

The Court should reject Plaintiffs' alternative request to *broaden* the Class definition by striking the requirement that an individual must be denied the "opportunity for a fair hearing" to be included within the Class. Even before certification, courts generally decline proposed amendments that have the effect of significantly expanding the class. *See, e.g.*, *Muhammad v. PNC Bank, NA*, 2016 WL 5843477, at *3 (S.D. W. Va. Oct. 4, 2016) ("The plaintiff . . . has not cited, and the court has not located, any authority requiring a district court to rewrite a class definition and redraw a class boundary submitted by the plaintiff's counsel to drastically expand the class to encompass individuals excluded by the plain terms of the proffered class definition."); *Fisher v. Ciba Specialty Chems. Corp.*, 238 F.R.D. 273, 300 (S.D. Ala. 2006) (same). *A fortiori*, a drastic expansion of the definition adopted by the Court after more than two years of litigation is disfavored. In each of the cases relied upon by Plaintiffs, the Court *narrowed* the definition to account for changed facts and circumstances.

Here Plaintiffs ask the Court to dramatically expand the Class definition more broadly than even the definition they originally proposed that the Court rejected as "not sufficiently concise." Class Certification Order at 8. The Court should reject this suggested modified definition just as it rejected its narrower version two years ago by limiting the Class to individuals who have been denied the opportunity for a fair hearing. The absence of that opportunity was the fundamental lynchpin in the Court's analysis of the commonality and typicality requirements for class certification. Indeed, the *only* common question the Court found to exist was whether applicants "whose adjudication was delayed for 45 days (or 90 days for disability applicants) were provided an opportunity for a fair hearing." *Id*. at 4. That question is not common to the new class proposed by Plaintiffs.

III. THE CLAIMS OF THE NAMED PLAINTIFFS ARE NO LONGER TYPICAL OF ANY CLAIMS THAT CURRENT TENNCARE APPLICANTS MAY HAVE.

Plaintiffs do not deny that the system for adjudicating TennCare applications and for providing administrative appeals to individuals whose applications have been delayed is completely different from the system encountered by the named Plaintiffs. Under the governing precedents, it follows that the named Plaintiffs' claims are not typical of any claims that TennCare applicants today may have. "A claim is typical if 'it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.' " *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (quoting *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996)). The current "practice" or "course of conduct" simply is not the same as the system that was in place when the named Plaintiffs applied.

Plaintiffs seek to avoid this conclusion by arguing that the typicality requirement is satisfied to the extent applicants today experience unreasonable delays in the adjudication of their TennCare applications. *See* Plaintiffs' Opp'n, at 15–16. To the contrary, typicality requires much more than the same general complaint leveled against two very different systems. As the Sixth Circuit has explained, "[a] necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members." *Sprague v. General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (quoting *In re American Med. Sys., Inc.*, 75 F.3d at 1082). Where "[a] named plaintiff who proved his own claim would not necessarily have proved anybody else's claim," the typicality requirement is not met. *Id.* Proof that the system in place in 2014 violated the rights of the named Plaintiffs is completely

irrelevant to the question whether the very different system in place today violates the rights of current applicants.

CONCLUSION

For the foregoing reasons, and those set forth in the State's Memorandum in Support of Its Motion to Decertify and Class and Dismiss the Case, we respectfully submit that the class should be decertified, the preliminary injunction should be vacated, and the case should be dismissed.

October 13, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of Defendants' Reply in Support of Their Motion to Decertify the Class and Dismiss the Case was served upon the following counsel of record on this 13th day of October, 2016 via the Court's Electronic Case Filing system:

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