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

MELISSA WILSON, *et al.*, *Plaintiffs*, v. 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*., *Defendants*.	No. 3:14-cv-1492 Judge Collier Magistrate Judge Newbern

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

Pursuant to the Court's request at the hearing on Defendants' Motion to Decertify the Class and to Dismiss the Case, D.E. 164, Defendants (the "State") respectfully submit this supplemental brief in support of their motion.

I. THE CLASS SHOULD BE DECERTIFIED BECAUSE IT CONTINUES TO FAIL TO SATISFY THE NUMEROSITY AND TYPICALITY PRE-REQUISITES.

The State argued in its briefing in September 2016 on its Motion to Decertify the Class and Dismiss the Case, D.E. 164, 165, and 177, that due to the change of circumstances from when the Class was certified, the Plaintiff Class no longer has any members, and any claim that TennCare applicants may have today bears no resemblance to the claims asserted by the named Plaintiffs almost three years ago. The State relied upon the Declaration of TennCare's Director of Member Services, Kim Hagan, D.E. 166 ("2016 Hagan Decl."), which Plaintiffs have not disputed, to document the significant changes that have taken place since the Plaintiff Class was

certified. In particular, Ms. Hagan explained how, with one minor exception in August 2015, *every* appeal request since May 2015, when TennCare implemented the current delayed application appeals process, has either been resolved or gone to hearing within 45 days. *See id.* ¶ 8. Critically, Plaintiffs do not dispute this point. Moreover, it remains the case today. Since the State filed Ms. Hagan's declaration in September 2016, *every* individual who has filed a delayed application appeal has had that appeal resolved in one of the following ways: (i) the appeal was closed because TennCare adjudicated the delayed application prior to the expiration of 45 days from the date TennCare found proof (or the appellant submitted proof) that an application had been delayed beyond the required timelines; (ii) the appeal was closed because the appellant was already receiving the highest level of TennCare or CoverKids coverage when the appeal was filed and the appellant was not applying for Long Term Services and Supports ("LTSS"); (iii) the appeal was closed because there was no proof that a TennCare application had in fact been delayed; or (iv) the appellant was granted a fair hearing within 45 days from the date TennCare found (or the appellant submitted) proof of a delay. *See* Declaration of Kim Hagan ¶ 3–4 ("2017 Supp. Hagan Decl.") (filed herewith).

As Ms. Hagan also has explained, and Plaintiffs do not dispute, the current delayed application appeals process did not exist when the Court certified the Plaintiff Class. *See* 2016 Hagan Decl. ¶ 6. It is also undisputed that the current process for receiving and adjudicating applications pended by the Federal Exchange due to a need to verify the applicant's income and/or citizenship did not exist when the Plaintiff Class was certified, and that TennCare now operates an eligibility process to adjudicate these pended applications and provide applicants with an eligibility determination within 45 days of receiving the cases from the Federal Exchange. *See* 2017 Supp. Hagan Decl. ¶5.

The undisputed fact that *every* individual requesting a delay appeal has that appeal resolved or receives a fair hearing within 45 days means there are *no* individuals who meet the Class Definition, which requires that a class member must (i) "not [have] received a final eligibility determination in 45 days (or in the case of disability applicants, 90 days)," and (ii) "not [have] 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. As previously noted, a class without members cannot meet Rule 23(a)(1)'s numerosity requirement.

The undisputed fact that the application process and the delayed application fair hearing process have changed so dramatically since the Plaintiff Class was certified and since the Court found the named Plaintiffs' claims were typical of the claims of the class means the typicality requirement of Rule 23(a)(3) also is no longer met. Class representative's claims that they had no access to a state fair hearing process when they experienced a delay in the adjudication of their TennCare application is not true of a single applicant today.

II. THE COURT SHOULD NOT EXPAND THE CLASS DEFINITION.

While Plaintiffs concede that every individual who has proof of a delayed application either has that application resolved or gets a fair hearing within 45 days, they urge the Court 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. Amending the class definition in the manner Plaintiffs suggest would be inappropriate given the close tie between potential delays and the remedy provided for in the Medicaid Act for addressing the inevitable glitches and circumstances that will result in some number of applications going beyond the 45-day or 90-day processing goals—the opportunity for a fair hearing after those deadlines have passed. *See* 42 U.S.C. §1396a(a)(3).

In Tennessee, the State and Federal Exchange receive approximately 31,000 applications every month (without counting applications denied by the Federal Exchange for which the State has no information). *See* 2017 Supp. Hagan Decl. ¶ 7. Given this volume of applications, some delay is inevitable, but the percentage of delayed applications is vanishingly small, *see id.* ¶ 9 (explaining how the number of delayed applications is almost certainly less than 1 percent of all applications filed), and the fair hearing process ensures that the few applicants who experience a delay may raise the issue with the State and get it resolved promptly.

Judge Campbell, in certifying the Class, recognized the link between the alleged problem (a delayed adjudication) and the remedy for that problem (providing an opportunity for a fair hearing), and reasonably tied the delay in adjudication and the fair hearing process together in the class definition. Plaintiffs' proposed revision, in contrast, treats every delay, regardless of how minor and irrespective of the reason for the delay, as grounds for a federal lawsuit regardless of whether the State provides an adequate and prompt remedy.

Finally, Plaintiffs' proposed expansion is especially inappropriate in light of the fact that there is no named Plaintiff with a live claim of any kind, and the mooted claims of the original named Plaintiffs are not typical of those of the proposed expanded class. Unlike the expanded class, the original named Plaintiffs had no available remedy whatsoever when the Federal Exchange failed to adjudicate their Medicaid applications.

III. THE STATE HAS SHOWN THAT IT WILL CONTINUE TO OFFER FAIR HEARINGS IF THE CASE IS DISMISSED.

Plaintiffs, relying on the voluntary cessation line of cases, argue that the State is obliged to show that if the class is decertified and the case dismissed, it will not reinstate the pre-September 2014 system and cease providing the opportunity for a state fair hearing to individuals experiencing a delay in the adjudication of their TennCare applications. For the reasons previously stated during oral argument, the voluntary cessation standard does not apply to a motion to decertify the class because numerosity and typicality are no longer satisfied. The State's motion is not premised on a theory that class members' claims are moot. Rather, the State has demonstrated that the class itself is empty—there are no individuals who satisfy the class definition and therefore no individuals with claims in this case, moot or otherwise.

But even if the Court disagrees and looks to the mootness line of cases to resolve the State's motion, the State meets the "formidable burden" of showing that its "allegedly wrongful behavior could not reasonably be expected to recur." *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 712 (6th Cir. 2016).

As an initial matter, Plaintiffs fail to acknowledge in their briefing that a greater solicitude is owed by the Court to the State's cessation of allegedly wrongful conduct than to similar action by private parties when evaluating whether the behavior will recur. *See Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 981 (6th Cir. 2012); *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990). The Director of TennCare, Dr. Wendy Long, has acknowledged the State's legal obligation to provide applicants experiencing a delay with an opportunity to appeal and unequivocally committed to "continuing to make the delayed application appeal process available to TennCare applicants regardless of whether the preliminary injunction that was entered in September of 2014 is still in effect or not." Declaration of Wendy Long ¶ 3

("2017 Long Decl.") (filed herewith). With no contrary evidence in the record, the Court has "no reasonable basis for refusing to take the State at its word." *Cooey v. Strickland*, 588 F.3d 921, 923 (6th Cir. 2009).

Further, all of the evidence confirms that the State's commitment to continuing to provide a delayed application appeals process is real and that the State's failure to provide a fair hearing process will not recur. As Dr. Long testified, the State expended thousands of staff hours to develop, implement, and oversee the current process, and has hired and trained hundreds of new eligibility workers. 2017 Long Decl. ¶ 2. Common sense dictates that the State will not squander this time and effort simply because it is no longer under an injunction requiring it to provide a fair hearing process. This is particularly true because the reason the State did not provide delayed application appeals prior to the fall of 2014—CMS's failure to provide the State information on pended applications—is no longer true. *See* 2016 Hagan Decl. ¶ 4. Plaintiffs do not dispute that the State now routinely and systematically receives pended application information from CMS that it uses to process delayed application appeals and adjudicate these applications. The State has no incentive now that it is receiving this information to dismantle its extremely successful delayed application appeals process, and Plaintiffs have no reasonable basis to suggest that the State, despite acknowledging that it now has the ability to provide these hearings, would willfully violate federal law and fail to do so.[1] *Cf. Frew v. Hawkins*, 540 U.S. 431, 442 (2004) (recognizing that "the officials of the State must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities.").

[1] Plaintiffs disagreement with the State's position that the State was unable to provide hearings until CMS began routinely and systematically providing it with pended application information is irrelevant because whether as a factual matter, the State could have provided such hearings before the preliminary injunction was entered or not, the State does not dispute that it can provide those hearings now based on the information it receives from CMS.

Plaintiffs also argue that compliance with the injunction alone is not sufficient to moot the case. Without waiving any arguments regarding Plaintiffs' analysis, the asserted principle simply does not apply in this case. Plaintiffs ignore that the State has done far more than simply comply with the preliminary injunction. The State has voluntarily developed an administrative process that attempts to provide applicants who have requested a delayed application hearing an actual eligibility determination on their pending Medicaid application. *See* Declaration of Wendy Long ¶¶ 2–4 (Feb. 25, 2015), D.E. 105-2. The State has also codified the delayed application appeals into TennCare's rules. *See* TENN. COMP. R. & REGS. 1200-13-19-.01 et. seq. These rules cannot be changed without complying with TENN. CODE ANN. Title 4, Ch.5, Pt. 2, which among other things requires review by the attorney general for legality and constitutionality, *see* TENN. CODE. ANN. § 4-5-211, and public notice and a rulemaking hearing, *see id.* § 4-5-202.

As importantly, in a clear demonstration of its commitment to the delayed application appeal process and proof that the failure to offer a state fair hearing process will not recur, the State is building a delayed application appeals process into its new computer eligibility system, TEDS. *See* 2017 Long Decl. ¶ 2. The State would not be taking these expensive, permanent and long-term steps if it were not committed to offering these state fair hearings.

The factors detailed above differentiate the situation in this case from the cases cited by Plaintiffs in which courts found that a party had failed to meet its burden of showing that allegedly wrongful behavior could not reasonably be expected to recur. For example, unlike in *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 713 (6th Cir. 2016), this is not a situation where the State could easily and without significant burden switch back to its prior procedures. The current appeals process has been in the making for several years, is reflected in TennCare

rules, and will be enshrined in the State's eligibility system. The situation here is far more similar to the circumstances described in *Los Angeles Cty. v. Davis*, 440 U.S. 625, 631 (1979), where the Court did find the burden of demonstrating mootness was met. The Court cited to unique conditions that are no longer present, *id.* at 632, the creation of new, successful procedures to comply with the law, *id.*, and the fact that compliance with the injunction provided complete redress, *see id.* at 633. All of these factors are present here. Because the alleged misconduct on the part of the State—failing to offer fair hearings on delayed adjudications of TennCare applications—took place because of unique circumstances that are not likely to recur, there is no reason to believe that the State would replace its functioning, successful, delayed appeals process if the injunction is dissolved. The State has gone to tremendous burden to create the current delayed application appeal process, and this process has been successfully operated to ensure that *every* individual with proof of a delayed application gets that application resolved or gets a fair hearing on the reason for the delay in adjudication.

CONCLUSION

For the foregoing reasons, and those set forth in the State's prior briefing 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.

May 11, 2017

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 11th day of May, 2017 via the Court's Electronic Case Filing system:

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