IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-23037-CIV-JORDAN/O'SULLIVAN

FLORIDA PEDIATRIC SOCIETY/THE FLORIDA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS; FLORIDA ACADEMY OF PEDIATRIC DENTISTRY, INC., et al.,

Plaintiffs,

vs.

ELIZABETH DUDEK, et al.,

Defendants.
_____/

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO REOPEN THE RECORD

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Plaintiffs Florida Pediatric Society, et al., file this memorandum in opposition to DCF's Suggestion of Mootness, or in the Alternative, Motion to Reopen Record on Liability, D.E. 1279, and Secretary Dudek's (AHCA) and Surgeon General Armstrong's (DOH) Motion to Reopen Record for Trial on Liability, D.E. 1281, collectively "Defendants' Motions."

INTRODUCTION

Defendants' Motions to reopen the trial record in this case are contrary to this Court's rulings as to how later-discovered evidence will be considered, are highly prejudicial to Plaintiffs, and are untimely. The Court should deny Defendants' Motions without prejudice to their introduction of such evidence at the remedy phase of these proceedings, as to such issues on which the Court makes findings of liability. This is the procedure that this Court established during the trial of this matter when Defendants repeatedly sought to present new witnesses or introduce evidence that had not been disclosed on witness and exhibit lists or in the Rule 26 exchange of information, and that had not been subject to discovery. The Court consistently and repeatedly denied Defendants' attempts to introduce such materials, noting that to rule otherwise would not only be unfair to Plaintiffs but would result in a never-ending proceeding.

It is hard to overstate the prejudice that Plaintiffs would face if Defendants' Motions were granted. Defendants' Motions are accompanied by nearly 250 pages of additional documents, including fourteen witness declarations, that Defendants would like admitted. Of course, none of this material has been subject to document discovery or depositions. Plaintiffs would have the right not only to conduct such discovery, but also to cross-examine such witnesses and to call other witnesses and introduce their own testimony as appropriate.[1] Essentially, Defendants are asking for an entirely new trial in the guise of a motion to reopen the record. The prejudice to

[1] In this opposition, Plaintiffs address only the motions to reopen, as none of this evidence is admitted at this time, and fully reserve their rights to object on evidentiary grounds to such evidence, conduct discovery, cross-examine the witnesses, and present contrary testimony.

Plaintiffs, a class of nearly two million Florida children who depend on Medicaid, could not be greater. Defendants' Motions also are untimely, coming approximately two and a half years after the close of trial and one week before the date this Court indicated it would issue findings of fact and conclusions of law.

Defendant DCF's motion to reopen is no more valid by being combined with a suggestion of mootness. The suggestion of mootness rests upon the admission of the declarations of DCF officials who simply predict that changes in their handling of beneficiaries' applications and eligibility have improved and opine that Plaintiffs "are not likely to experience interruptions in their period of continuous or protected Medicaid coverage." D.E. 1280-1 at 7.

ARGUMENT

I. DEFENDANTS' MOTIONS TO REOPEN ARE CONTRARY TO THE PROCEDURE ESTABLISHED BY THIS COURT AND THIS COURT'S RULINGS REGARDING LATER-DISCOVERED EVIDENCE

Defendants are essentially asking to re-try this case, filing nearly 250 pages of documents and affidavits just one week before the Court's decision is expected. *See* D.E. 1279-82 (Defendants' Motions and evidentiary submissions); 7/8/14 Draft Trial Tr. at 87:21-88:7 (Court informing parties to expect a decision by October 30). Such requests to add new evidence not properly disclosed were repeatedly made during trial, leading the Court to observe, "we've been through this time and again," 10/19/11 Draft Trial Tr. at 132:12-13, and adding, "[Defendants] just don't want me to put any limits on anything. . . . Every day there's a request to expand [the record]," *id*. at 134:12-16.

This Court properly and repeatedly denied these requests, for there must be a point at which the evidentiary record on liability issues is closed. As the Court noted:

> [I]n every action for prospective injunctive relief, either wholly or in part, there has to be a stopping point. Now, when it comes to the remedies phase, if there is one, I understand that you can put

> everything in up to date. But it seems to me that – and I understand what you're saying, and it makes some sense to me, but there still has to be a period which you say, okay, we're stopping here, or else [the other side] can do the same thing.

4/4/11 Trial Tr. at 6249:11-19 (emphasis added). And the Court has made it equally clear that the stopping point for the introduction of new evidence on liability issues has come and gone:

> And, again, there has to be some limitation, at least with regards to documents that were not turned over at the close of discovery, even those that weren't turned over through no fault of the parties, because they didn't exist. And there just – even in a case like this which is incredibly complex, difficult and forward looking there has to be some stopping point for the introduction of new documents that were not turned over before the close of discovery. . . . [W]ith regards to new documents, my ruling remains the same as it was when I didn't allow the defense to continue adding exhibits at a certain point. . . . And I think you and I have discussed a number of times whether the defense was willing to put any limits on when more new documents were going to be submitted, attempted to be introduced or the like. . . . [Y]ou weren't able to tell me that there was going to be any sort of cutoff. And at that point, my ruling was, well, there is going to be a cutoff and we're done.

10/19/11 Draft Trial Tr. at 131:6-132:23 (emphasis added); *see also id.* at 136:15-17 ("There has to be a cutoff somewhere for the addition of new exhibits. And prejudice is not the only issue to take into account in that respect.").

In a written order on July 7, 2011, the Court previously denied Defendants' motion to add five exhibits that were created after the trial began. *See* D.E. 1007 at 2. The Court's reasoning is equally applicable here. The Court explained that "the plaintiffs would be prejudiced if the new exhibits are allowed, as they presented their case in chief based on what discovery had been obtained prior to the beginning of trial." *Id.* And the Court said that, "if there is a judgment in favor of the plaintiffs on liability, I will hold a separate proceeding to determine what, if any, injunctive relief may be appropriate, and at that proceeding I will not bar the introduction of

evidence generated after the trial began or testimony about such evidence." *Id*. at 2-3. The Court also noted, once again, that "defendants, despite numerous opportunities to say that they will not try to add more new exhibits, have refused to acknowledge that there is any stopping point." *Id*. at 2.

Similarly, the Court previously denied Defendants' motion to add seven new witnesses, noting that the request was made "[s]ix weeks into trial, and near the conclusion of the plaintiffs' presentation of their case in chief[.]" D.E. 853 at 1. The Court explained that "plaintiffs would face substantial prejudice if the defendants were allowed to add seven witnesses at this late juncture." *Id*. at 3. For example, Plaintiffs would have to conduct extensive discovery, including depositions and document reviews. *See id*. The same reasoning applies to the additional testimony by declarations that Defendants now wish to add – at an even later juncture.

Defendants' counsel eventually acknowledged that the evidentiary record was closed, and they even assured the Court that they would stop trying to add new evidence, as reflected in the following exchange:

> THE COURT: See, months ago, I asked Ms. Daniel whether or not there was going to come a point where the defense was willing to tell me no more documents and then we could be done and I could rule one way or the other but you've never – you, the defense, has never been able to tell me that. So, every time we have a session, we have a new document. Mr. Bowden, there has got to be a stopping point somewhere. And prejudice is a critical factor but not the only factor.
>
> MR. BOWDEN: Yes, sir. And I fully understand and agree –
>
> THE COURT: No, you don't understand because you keep [trying] to put documents in. And your argument is always, there's no prejudice. But there's got to be a stopping point somewhere. But I guess for the defense, there isn't any, right? It just continues.
>
> MR. BOWDEN: No, I wouldn't say that now.

> THE COURT: Are you willing to stop today, or are there going to be new documents introduced in the next couple of weeks, too[?]
> MR. BOWDEN: Well, I can't say what my co-counsel –
>
> THE COURT: There you go. That's it. There's no stopping point. Ms. Daniel has confirmed that once before and you're not able to say that again today. It just doesn't stop.
>
> MR. BOWDEN: I'm not able to say it just because I'm not the lead lawyer on this case.
>
> THE COURT: I'll ask all of you together right now. All of you can speak. Let me know. Or if the defense's position is [ ] consistent as it's been before, then you reserve the right to keeping trying to add new documents as we go through the remainder of this trial.
>
> MS. DANIEL: We don't plan to add new documents. . . .
>
> THE COURT: This is it. These are the two documents, there are no others.
>
> MS. DANIEL: Yes, your Honor. . . . .
>
> THE COURT: . . . I need to know whether or not you're going to seek to introduce new documents or not on your side of the case.
>
> MS. DANIEL: We do not have any intention to produce any new documents other than the ones that Mr. Bowden has brought up today. . . . We will not be offering new documents other than what Mr. Bowden is bringing up today.

11/29/11 Draft Trial Tr. at 78:23-81:9 (emphasis added).

Defendants' Motions are not justified by the fact that there have been changes in certain aspects of the Florida Medicaid program during and after the trial. Government programs are not static, and recognition of that led the Court to put in place a procedure where Defendants would have their opportunity to put in updated testimony and documents (and Plaintiffs would have the opportunity for appropriate discovery and rebuttal of such evidence) during evidentiary hearings that would follow the Court's issuance of its findings on liability. *See infra* at 6-7. This is an

altogether proper approach, to which Defendants did not object at trial. *See* 1/25/12 Draft Trial Tr. at 96:24-25 ("[E]veryone has agreed that we need a separate phase on relief if there is a judgment adverse to defendants."); *see also* 12/15/11 Draft Trial Tr. at 82:3-6 ("[Defendants] position has been mainly throughout the case that we need or we're going to have a separate proceeding with regards to remedy.").

II. REOPENING THE RECORD WOULD GREATLY PREJUDICE PLAINTIFFS AND FURTHER DELAY THESE PROCEEDINGS

Reopening the evidentiary record on liability at this late stage – essentially conducting a new trial – would cause substantial prejudice. As the Court has explained, Defendants' evidence cannot simply be accepted at face value: Plaintiffs would require an opportunity to conduct discovery into Defendants' new testimony and documents, and they would be afforded a chance to gather their own affirmative evidence to contest Defendants' self-serving conclusion that all is now well in the Florida Medicaid system. *See, e.g.*, 10/19/11 Draft Trial Tr. at 136:16-18 ("Those documents are not stand-alone documents. There may be other things that the plaintiffs want to get or inquire about that are relevant to that document."); D.E. 1007 at 2 ("The defendants cannot unilaterally decide what discovery will result if they are allowed to add their proposed exhibits."). That process would result in significant delays. Moreover, Plaintiffs should be able to rely on the Court's statements that the window for supplementing the record on liability had closed.

By contrast, Defendants do not face prejudice from denial of the Motions. As noted above, the Court has explained that the parties will have the opportunity to present relevant evidence during the remedy phase. The nature of Defendants' proposed new evidence – such as the number of complaints received and changes in the DCF application form – are more appropriate, if at all, in determining remedial relief. The Court has made clear on several

occasions that such evidence might be relevant in shaping – and assessing compliance with – appropriate remedies. *See, e.g.*, 10/19/11 Draft Trial Tr. at 131:22-132:2 ("I will, to the extent that there is a hearing on remedies, depending on what happens with the liability phase, I will give both sides [ample] opportunity to provide up-to-date information, documents and exhibits to determine whether or not any relief is appropriate assuming of course that there is a remedies hearing in the case."); D.E. 1007 at 2-3 (court explaining that there will be a separate proceeding on remedies during which parties can submit evidence generated after trial).

III. DEFENDANTS HAVE NO LEGAL ENTITLEMENT TO REOPENING OF THE RECORD

Unsurprisingly, Defendants are unable to marshal any legal support for their motions to reopen the evidentiary record. "A motion to reopen to submit additional proof is addressed to [the trial court's] sound discretion." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971); *see also Jones v. City & County of S.F.*, 976 F. Supp. 896, 903 n.2 (N.D. Cal. 1997) ("For the purpose of having a manageable record upon which the Court can base its judgment, the Court exercises its discretion to treat the factual record as closed as of [a date certain]." (citing *Farmer v. Brennan*, 511 U.S. 825, 846 (1994)).

If there is anything to be learned from the two cases Defendants cite, it is that Defendants' Motions should be denied. First, Defendants offer a fifty-one-year-old breach of contract case from the Eastern District of Louisiana in which the court agreed to reopen the evidentiary record after trial – but only to gather evidence relevant to the remedy, which is precisely what this Court has said it will do. *See Caracci v. Brother Int'l Sewing Machine Corp. of La.*, 222 F. Supp. 769, 771 (E.D. La. 1963) ("[T]his court decided in the exercise of its sound discretion to reopen the case for the limited purpose of showing plaintiff's costs of operation in order that a net profit figure might be determined as the basis for the award of damages.").

Second, Defendants cite a case in which the court denied a motion to reopen the record after trial, explaining that it would be prejudicial to the parties to put them to the additional discovery and delay that would result if the motion were granted. *See In re United Refuse, LLC*, No. 04-11503, 2007 WL 1695332, *7 (E.D. Va. Bankruptcy Jun. 7, 2007) ("If the motion were granted, there would be, in essence, a separate trial on this particular matter. The [respondents] dispute [the movants'] interpretation of the proffered evidence . . . . Additional discovery by all parties would be necessary."). There is not a single case Defendants have identified that has allowed the extraordinary motion brought here – to allow fourteen new witness declarations and numerous documents – after the close of trial.

Defendants argue that their motions should be decided "in the interests of fairness and justice." D.E. 1281 at 16 (citing Moore's Federal Practice, § 59.13(3)(c) (3d ed. 2013)). Plaintiffs agree. Here, fairness and justice demand that Defendants' Motions be denied in light of the procedures established for consideration of new evidence in a separate hearing, the prior rulings of the Court, the delay in the proceedings for discovery and further trial sessions, and the untimeliness of the requests.

As this Court and others have made clear, "[e]very trial must end at some point." *Wells by Maihafer v. Ortho Pharmaceutical Corp*., 615 F. Supp. 262, 298 (N.D. Ga. 1985) (denying motion to re-open record after the Court had begun work on these findings of fact and conclusions of law); 11/29/11 Draft Trial Tr. at 79:11-12 ("[T]here's got to be a stopping point somewhere[.]"); 4/4/11 Trial Tr. at 6249:11-13 ("[I]n every action for prospective injunctive relief, either wholly or in part, there has to be a stopping point.").

IV. THE COURT SHOULD REJECT DEFENDANT DCF'S "SUGGESTION OF MOOTNESS"

This Court previously has considered – and appropriately denied – several suggestions of mootness by Defendants. First, Defendants argued that the Affordable Care Act's (ACA) temporary two-year increase in Medicaid reimbursement rates to Medicare levels mooted one aspect of Plaintiffs' case. *See* D.E. 1230; *see also* D.E. 1250. The Court, after full briefing and argument, rejected this suggestion, stating that Defendants "have a difficult burden to overcome" because "as everyone agrees, there is speculation about what Florida will do with respect to Medicaid rates on or after January 1, 2015[.]" D.E. 1236 at 2. The Court later rejected Defendants' mootness argument as it relates to ACA rate increases a second time. *See* D.E. 1270 at 1-2 (stating that Defendants "'bear[ ] a formidable burden of showing that it is absolutely clear the alleged wrongful behavior could not reasonably be expected to recur" and that Defendants had not met that burden because "[t]his temporary rate increase, paid for by federal dollars, ends on December 31, 2014, and as of today nobody knows whether the Florida Legislature will continue to fund the reimbursement rate increases in whole or in part past that date[.]" (citing *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726 (2013)). The wisdom of the Court so ruling is evident: the temporary increases required by the ACA will soon expire, and there has been no action taken by the state or federal government to continue these increases. Dismissal of this aspect of Plaintiffs' case would have been a travesty.

More recently, Defendants suggested that the case was moot because of Florida's move to managed care for Florida's Medicaid population. *See* D.E. 1267. At the hearing on this issue, Plaintiffs argued that managed care was a subject of the trial, with half of Florida children in HMO programs; that Medicaid fee-for-service schedules continue to determine the amount of compensation provided by managed care plans to physicians; and that it was completely

unproven that managed care – a program designed to save money, not improve care – would remedy the litany of statutory violations proven at trial. *See* 7/8/14 Hearing Tr. at 36, *et. seq*.; D.E. 1172 at ¶ 215 (Medicaid rates are 40% of Medicare rates for comparable services in both the fee-for-service and managed care contexts); *id*. at n.25 (explaining that most HMOs contract with the state to pay physicians at the state's fee-for-service level); *id*. at ¶ 473 (providing data on number of Medicaid-enrolled children in HMOs); *id*. at ¶ 476 (explaining how capitation rates are set and citing evidence that "Florida is one of the lowest paying states in terms of its managed care compensation"). Following the hearing, the Court denied the motion, explaining:

> Florida's managed care system will not be in full swing until approximately October 1, 2014. At this time, nobody knows whether or not the new managed care system will alleviate or solve the issues that plaintiffs have been complaining about for years. Without a developed factual record on how the managed care system is working (or not working), it is impossible to declare any part of this case moot.

See D.E. 1270 at 2-3.[2]

Now DCF (although not AHCA or DOH) suggests that Plaintiffs' case against DCF is moot because Named Plaintiffs have not had wrongful eligibility terminations, because there is a new computer system at DCF, because applications have been simplified, and because Plaintiffs "are not likely to experience interruptions in their period of continuous or protected Medicaid coverage." *See* D.E. 1279 at 9-13; D.E.1280-1 at 7.

[2] This Court noted that determining the effectiveness of the state's move to managed care involved several questions that required study. *See* 7/8/14 Hearing Tr. at 89:3-24 ("So, if the program is implemented at some point, and we have studies or findings about how well or how badly it's working, then it may be time to revisit the issue . . . . But I just want to let you know that the date of full implementation is not, for me, going to be a magical point with regards to mootness. I will want to know whether or not it's working."). Certainly, submitting information on the number of complaints received in a system implemented in the last couple of months hardly shows that systemic problems have been addressed.

First, whether or not the individual Named Plaintiffs continue to have eligibility problems does not determine the mootness of a class action. Once certified, a class action only becomes moot if the claims of the certified class are moot. *See Birmingham Steel Corp. v. Tennessee Valley Authority*, 353 F.3d 1331, 1342 n.11 (11th Cir. 2003) ("[O]nce certified, a class acquires a legal status separate from that of the named plaintiffs."); *Johnson v. Board of Regents of Univ. of Ga.*, 263 F.3d 1234, 1268 n.30 (11th Cir. 2001) ("[I]f a plaintiff had standing at the time of the complaint and at the time a class is certified, subsequent events that may moot her own claim . . . do not necessarily defeat her ability to continue to represent a class whose members still have live claims."); *see also U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) ("[M]ootness of the named plaintiff's individual claim after a class has been duly certified does not render the action moot." (citing *Sosna v. Iowa*, 419 U.S. 393 (1975)). In other words, this case involves a live, ongoing controversy for Article III purposes because each member of the class remains eligible for Florida Medicaid, contends that the Florida Medicaid system is non-compliant with federal law, and seeks a court order remedying that non-compliance. *See, e.g., Rich v. Fla. Dept. of Corrections*, 716 F.3d 525, 531 (11th Cir. 2013) (cited in Defendants' motion, *see* D.E. 1279 at 10) (denying motion to dismiss case on mootness grounds where plaintiff sought prospective injunctive relief to change state policy).

Second, the suggestion of mootness depends on the record being reopened and additional evidence being considered. Even if that evidence were considered, it would not meet the "formidable burden" of making "absolutely clear" that this case is moot as a result of a change by Defendants. *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013) (citation omitted); *see also City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its

power to determine the legality of the practice."). As evidence that the Florida Medicaid system now is complying with its legal requirements, Defendants boast that they received "only" 4,303 complaints between July 2013 and September 2014. *See* D.E. 1281 at 7. That is more than 285 complaints per month, or nearly ten per day. Even taking Defendants' submission at face value, it does not establish that the statutory violations established at trial have ended and will not recur. And Defendants may have "procured a new . . . computer system," D.E. 1279 at 2, but that does not assure that improper terminations and wrongful switching will not occur. Florida may have "adopted a streamlined Medicaid application," *id*. at 2, and that may be relevant in determining remedies, but it does not show that Florida's persistent failures – leading to a quarter of a million Medicaid-eligible children being unenrolled in the program – have disappeared and will not recur. Certain other changes discussed in Defendants' papers have not even gone into effect, and will not do so until November 2014. *See* D.E. 1279 at 3 (stating that some changes will not "go live" until then); *id*. at 4 (same).

Third, Defendants' self-serving opinions that plaintiffs are "not likely" to experience interruptions of eligibility or switching in the future are obviously insufficient to establish that these long-running violations of the Medicaid Act are permanently ended. If such assertions were sufficient, then the "formidable burden" of establishing that voluntary changes have completely eradicated a problem would be nothing more than an invitation for every defendant to – on the eve of decision – say that it has discovered the error of its ways and reformed. Fortunately, the law of mootness does not allow Defendants to so easily circumvent a federal case brought to ensure ongoing and complete compliance with federal law.

CONCLUSION

Defendants' arguments are a tacit admission that their past practices – whether with respect to eligibility determinations, switching, the application process or other aspects of Florida Medicaid – were not compliant with federal law. They expose how meaningless the "lay opinions" of Defendants' witnesses were, when given at trial several years ago, that issues had been fixed and prior problems no longer existed. The time for consideration of this latest round of similar assertions is the post-finding remedies phase, and the Court should proceed with making its findings of fact and conclusions of law based on the comprehensive evidence at trial.

For the foregoing reasons, Plaintiffs request that the Court deny the Suggestion of Mootness, or in the Alternative, Motion to Reopen Record on Liability, D.E. 1279, and the Motion to Reopen Record for Trial on Liability, D.E. 1281.

Dated: October 28, 2014

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 28, 2014, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Stuart H. Singer
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Florida Pediatric Society/The Florida Chapter of The American Academy of Pediatrics; Florida Academy of Pediatric Dentistry, Inc., et al. v. Thomas W. Arnold in his official capacity as Secretary of the Florida Agency for Health Care Administration, et al.

Case No. 05-23037-CIV-JORDAN/O'SULLIVAN
United States District Court, Southern District of Florida

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