**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 05-23037-CIV-JORDAN/MCALILEY**

**FLORIDA PEDIATRIC SOCIETY/ THE FLORIDA CHAPTER OF THE AMERICAN ACADEMY OF PEDIATRICS, et al.**

**Plaintiffs,**

**vs.**

**ELIZABETH DUDEK, in her official capacity as the Secretary of the Agency for Health Care Administration, et al.,**

**Defendants.**
_____/

**DEFENDANTS' CORRECTED[1] REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO REOPEN THE RECORD AND DCF'S SUGGESTION OF MOOTNESS, OR IN THE ALTERNATIVE, MOTION TO REOPEN RECORD ON LIABILITY**

Defendants, the official capacity agency heads of the Department of Health (DOH), the Agency for Health Care Administration (AHCA), and the Department of Children and Families (DCF), submit the following reply to Plaintiffs' Opposition to Defendants' Motions to Reopen the Record. Defendants' requests for relief should be granted for the reasons set forth below.

**I. Contrary to Plaintiffs' assertions about DCF's Suggestion of Mootness, the new computer system driven automated solutions fully resolve any issues on DCF's part with respect to continuous eligibility or switching**.

Plaintiffs' efforts to marginalize or minimize the significant changes that have occurred in DCF's Medicaid eligibility determination process [D.E. 1283, pp. 10-12] since December 16, 2013, completely ignore the fact that now there is a "computer fix" to what was previously a

[1] / The document was corrected to reflect December 16, 2013, on page 1; to add a footnote reference to the pinpoint cite to *Harris v. Thigpen*, at page 3; to correct the year in the citation to *Friends of the Everglades* at page 6; and to correct the case name for *Summit Medical Associations, P.C.*, at page 6.

relatively small incidence of worker error regarding continuous eligibility. With the computer fix there is no possibility of inappropriate early termination of Medicaid coverage during the continuous eligibility period. Plaintiffs previously criticized DCF for not implementing a computerized system for monitoring continuous eligibility, Plaintiffs' Corrected Proposed Findings of Fact and Conclusions of Law, D.E. 1172 pp. 122-123; yet now that DCF has finally been able to do so (because of money available for a new computer system that is compliant with the ACA[2]), Plaintiffs argue that their claims against DCF are not moot. It is clear that Plaintiffs believe that no effort by Defendants will ever be enough - even if they receive what they stated was necessary.

Also, Plaintiffs seem to suggest that all of the extremely small number of complaints or issues (4,303) received by AHCA between July 2013 and September 2014, are related in some way to issues of continuous eligibility and switching. D.E. 1283, p. 12. That is not the case. Further, Plaintiffs miss two very important points. They make much ado over the fact that AHCA receives on average 10 reports of issues or complaints a day and 285 complaints or issues per month relating to the Statewide Medicaid Managed Care Program. *Id*. These numbers would have more significance if the Florida Medicaid Program had perhaps 1,000 children. That is not the case. As this Court may recall, at the time of trial, the Florida Medicaid program covered approximately **1.7 million children**. [Testimony of E. Kidder, 6/2/11, 7018:16-18]. All of the complaints or reports of issues received by AHCA related to adults and children and included a myriad of complaints and issues many of which have nothing to do with accessing care or Medicaid eligibility determinations. Dec. of A. Riddle, D.E. 1282-1, p. 2; Dec. of D. Rogers, D.E. 1282-4, p. 3. And, on any given day, if every complaint or issue reported related to

[2] / The Patient Protection and Affordable Care Act (Pub. L. 111-148, enacted on March 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010 (Pub. L. 111-152, enacted on March 30, 2010), are together referred to as the Affordable Care Act of 2010 (ACA).

a child, the average of 10 complaints would represent .0000005 % of the child Medicaid population (10 ÷1,700,000). In any given month, the average of 285 complaints or issues would represent .001676 % of the child Medicaid population (if all of the complaints or issues were reported on behalf of children, which they are not). And overall, the 4,303 complaints or issues represent just .25% of the Medicaid child population (and these are not all complaints and not all related to children). **These numbers are not merely low, but astoundingly low**.

And, contrary to what Plaintiffs seem to believe, the status of the law does not require perfection of the Medicaid system. *See, e.g., Harris v. Thigpen*, 941 F.2d 1495, 1520 N. 36 (11th Cir. 1991) ("Although the prison obviously has a responsibility to use its best efforts to prevent the attacks upon A and C, as the parties have acknowledged, no system is perfect."); *Mayor v. Toia*, 419 F. Supp. 1161, 1164 (S.D.N.Y. 1976)("No welfare system is perfect, and mathematical perfection cannot be attained, but the system does not thereby become objectionable provided it reasonably approximates the underlying requirements). *Accord*, 42 U.S.C. § 1396c(2) (requiring substantial compliance in the administration of the Medicaid State Plan); *Lewis v. Casey*, 518 U.S. 343, 344 (1996) (noting that inadequacies in prison library system had to be "widespread enough to justify systemwide relief").

Here DCF has implemented a computer fix to issues about which Plaintiffs complained. Also, the implementation of changes required by the ACA in the determination of Medicaid eligibility based on family related income have minimized the need to move children between coverage categories (as was the experience of S.M.). Children whose eligibility is based on family income typically only experience changes now when they age out of a coverage category. This change in eligibility determinations, driven by implementation of a change in federal law, eliminates the possibility that DCF is responsible for any "switching."

Plaintiffs concede that **no named Plaintiff** has experienced switching under the new eligibility determination system, but argue that this does not moot the case. D.E. 1283, p. 11. However, DCF has not simply enhanced the process of Medicaid eligibility determinations for the named Plaintiffs. Rather, changes have been made to the way that determinations are made for all applicants whose eligibility is based on family income. And this Court may not award relief on an issue about which there is no proof of actual harm experienced by the representative Plaintiffs. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 356-358 (1996) (the award of injunctive relief must be narrowly tailored to the actual harms experienced by the representative plaintiffs). If the named Plaintiffs are not experiencing ongoing harm due to eligibility determinations, it would be inappropriate to award class-wide relief relating to eligibility determinations.

## II. All of the facts and circumstances support reopening the record at this time.

### A. Plaintiffs fail to establish any prejudice in reopening the record, where they concede that the evidence at issue may be submitted prior to judgment.

Although Plaintiffs assert that they are prejudiced by the motions to reopen the record, D.E. 1283, p. 6, when one looks beyond the rhetoric they have not shown any prejudice. The issue framed by the Motion to Reopen the Record (and the Alternative Motion to Reopen the Record filed by interim Secretary Carroll) **is not whether** Defendants will be afforded an opportunity to present evidence about the many changes that have occurred in the Florida Medicaid Program and in Medicaid eligibility determinations before the Court provides a remedy to Plaintiffs. Clearly, as Plaintiffs concede, Defendants will be afforded this opportunity. D.E. 1283, pp. 2-6. **The sole issue is <u>when</u> Defendants must be afforded that opportunity**. At the time that the Court contemplated a separate remedy phase, more than two and a half years ago (and during a trial that spanned two years and two months), the parties could not have known that so much time would elapse before this matter resulted in proposed findings of fact and

conclusions of law. However, that is what has happened, and there have been substantial changes that radically affect whether this Court will ever need to get to the issue of remedy. That being so, it makes more sense to take evidence on those substantial changes first, and then have a more focused remedy proceeding on remedy, if it is even necessary to do so.

Likewise, there can be no serious argument whether discovery will be required on both the substantial changes that have been made to the Medicaid Program and how those changes have affected the individual plaintiffs and the class they purport to represent. Surely Plaintiffs have not anticipated that Defendants would be able to provide current evidence at the remedy phase without Plaintiffs being entitled to any discovery. The only issue is whether that discovery occurs now or after Findings of Fact or Conclusions of Law are issued. Defendants' proposal ensures a more orderly record, avoids the necessity of a "merits-like" trial on remedy, and allows for a remedy phase that is narrowly focused on any harms Plaintiffs are able to prove arise from ongoing violations of federal law (if any such harm exists).

**B. Plaintiffs are not entitled to any relief if the record does not establish an ongoing violation of federal law.**

This Court's jurisdiction to award either prospective declaratory or injunctive relief requires an ongoing violation of federal law. Otherwise, neither *Ex Parte Young*, 209 U.S. 123 (1908), nor the Eleventh Amendment to the United States Constitution afford a basis for **any** relief.[3] See *Green v. Mansour*, 474 U.S. 64 (1985) (finding that notice type relief and a

[3] / To the extent that Plaintiffs rely on 42 U.S.C. §1396a(a)(30)(A) and *Ex Parte Young* in bringing this action, there is a case pending before the U.S. Supreme Court which may affect the outcome. On October 2, 2014, the Court granted certiorari review to consider the following issue: "Does the Supremacy Clause give Medicaid providers a private right of action to enforce § 1396a(a)(30)(A) against a state where Congress chose not to create enforceable rights under that statute?" *Armstrong v. Exceptional Child Center, Inc.*, Case No. 14-15, Order Granting Certiorari Review issued on 10/2/2014.

One of the issues raised by Petitioners in *Armstrong* is whether, in the absence of a threatened enforcement action, Respondents may seek to enforce a federal statute in a manner that Congress did not authorize. Brief on Certiorari Request, No. 14-15, 7/2/2014, at p. 23. Defendants argue for a change of law here, for the same reasons as are stated by Chief Justice Roberts in his dissent in *Douglas v. Indep. Living Ctr. of S. California, Inc.*, 132 S. Ct. 1204,

declaratory judgment regarding prior acts was not available and was barred by the Eleventh Amendment in the absence of a continuing violation of federal law); *Friends of Everglades v. South Fla. Water Mgmt. Dist.*, 570 F.3d 1210 (11th Cir. 2009) (*Ex Parte Young Doctrine* provides an exception to Eleventh Amendment immunity for lawsuits against state officials as long as the plaintiffs seek only prospective injunctive relief to stop ongoing violations of federal law); *Taylor-Tillotson v. Fla. Dept. of Children & Families Circuit 15*, No. 12-81364-CIV, 2013 WL 6050968, at *4 (S.D. Fla. Nov. 14, 2013) (noting that, in the absence of an ongoing violation of federal law, a federal court cannot issue a declaratory judgment).

In the absence of an ongoing violation, this Court lacks jurisdiction to award any relief of any kind to Plaintiffs. *Accord Summit Medical Assoc., P.C. v. Pryor,* 180 F.3d 1326, 1337 (11th Cir.1999) (“a plaintiff may not use the [Ex parte Young ] doctrine to adjudicate the legality of past conduct.").[4] Relief is only proper after conclusion of the remedy phase. That being so, Plaintiffs can hardly argue prejudice if the evidence on whether there continues to be an ongoing violation of federal law is presented now, rather than after issuance of Findings of Fact and Conclusions of Law predicated on an extremely stale record.

**III. Plaintiffs' cases support reopening the record.**

Regarding the merits of the motion to reopen the record, the cases cited by Plaintiffs support Defendants' motions to reopen the record. In *Wells v. Ortho Pharmaceutical Corporation*, 615 F. Supp. 262 (N.D. Ga. 1985), cited by Plaintiffs at D.E. 1283, p. 8, the court stated: "Even if the Court were to reopen the evidence, the Court's review of these [three]

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1213 (2012), that, since plaintiffs are not threatened with or subject to an enforcement action like the one in *Ex Parte Young*, but rather seek a private cause of action that Congress chose not to provide, there is no constitutional basis for Plaintiffs' claims brought under 42 U.S.C. §1396a(a)(30)(A).

[4] / For example, if Plaintiffs intend to seek retrospective relief in the remedy phase to obtain "back pay" for past Medicaid payments, that would violate the Eleventh Amendment and *Ex Parte Young*. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (finding that court of appeals "was wrong in holding that the Eleventh Amendment did not constitute a bar to that portion of the District Court decree which ordered retroactive payment of benefits found to have been wrongfully withheld").

articles suggests that the outcome of the case would be unchanged." *Wells v. Ortho Pharmaceutical Corporation*, 615 F. Supp. at 298 n. 48. Also, in *Wells*, the motion to reopen was filed after the court announced its decision in the case. *Id.*, pp. 266, 298 ("defendant moved the Court to reopen the evidence and to reconsider its announced decision . . ."). *See also Carraci v. Brother Intern. Sewing Machine Corp. of La.*, 222 F. Supp. 769 (E.D. La. 1963), *aff'd by* 341 F.2d 377 (5th Cir. 1965) (the Court granted the request to reopen the record, where, as is the case here, it was filed before any indication of the court's decision). In the instant case, Defendants don't seek to burden this Court with the trivia of three articles (which is what was at issue in the motion to reopen filed in *Wells*), and have not delayed until after a decision is made to file the motions to reopen. Rather, Defendants seek to present extensive evidence of radical and substantial changes that are likely to be outcome dispositive and have requested the authorization to do so prior to any pronouncement by the Court of a decision.

In *Jones v. City and County of San Francisco*, 976 F.Supp. 896 (N.D. Cal. 1997), cited by Plaintiffs at page 7 of D.E. 1283, the court explained that the Supreme Court's holding in *Farmer v. Brennan*, 511 U.S. 825, 846 (1994), "does not require the Court to incessantly delay its issuance of judgment." *Jones*, 976 F.Supp, at 903 n. 2. In the instant case, Defendants do not seek to delay the issuance of judgment. Rather, they seek only to present evidence now, that the Court has indicated it will consider later (after issuing findings of fact and conclusions of law), but before any judgment shall issue. In *Farmer v. Brennan*, 511 U.S., 846, the Court found that, at the discretion of the trial court, the parties could rely on facts that postdated pleadings and pretrial motions to establish whether plaintiff was entitled to relief.

Finally, in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971), the Supreme Court stated: "[W]e cannot say that the judge abused his discretion or stressed too

much the value of avoiding reopening a trial to litigate matters that HRI had an opportunity, but neglected, to litigate." It was the fact that simple neglect precluded the ability of HRI to litigate the issues that prompted the Court in *Zenith Radio Corp.* to conclude that there was no abuse of discretion in denying the request to reopen the record. The case at bar does not involve any neglect or lack of diligence. Rather, as Plaintiffs have noted in their response, first Defendants were prevented on several occasions during the trial from presenting current evidence in a case that was tried based on fact discovery that largely closed in 2008.

Now, it has been two and a half years since the close of the trial, and in that time, there have been many developments arising from implementation of the ACA (including the implementation of enhanced primary care rates which will facilitate analysis of the impact of increases in rates on provider participation); the implementation of the Managed Medicaid Assistance Program between May and August 2014, pursuant to approval by the United States Department of Health and Human Services; and the ability to leverage the need for a computer system capable of determining Medicaid eligibility under the new family related income standards described in the ACA and required to be implemented effective January 2014 to also obtain a "computer fix" for any issues with continuous eligibility (although the record fell far short of establishing systemic issues with continuous eligibility). These are not developments that could have been presented during the trial, as they had not yet occurred.

The new developments clearly affect the outcome of this case. *See In re United Refuse, L.L.C.*, No. 04-11503-RGM, 2007 WL 1695332 *3 (E. D. Va. Bankruptcy Jun. 7, 2007), *citing Ramsey v. United Mine Workers of America*, 481 F.2d 742 753 (6th Cir. 1973). The motions to reopen were both filed before any indication of the Court's rulings. *Carraci*; *In re United Refuse, L.L.C.*, 2007 WL 1695332 *3. Plaintiffs have not shown any undue prejudice from granting this

motion. *Id.*. The evidence to be presented is not cumulative. *Id.* For all of these reasons, the motions to reopen the record should be granted.

**IV. Reopening the record now, before issuance of proposed findings of fact and conclusions of law, will allow an orderly remedy phase should one even be necessary.**

As *Lewis v. Casey,* 518 U.S. 343 (1996), recognizes, the scope of remedy in class actions is driven by the scope of issues on which the Plaintiffs prove harm at the liability phase. *See also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 204, (2000) ("relief against prospective harm is traditionally afforded by way of an injunction, the scope of which is limited by the scope of the threatened injury"); *Walters v. Edgar*, 973 F. Supp. 793, 798 (N.D. Ill. 1997), *aff'd*, 163 F.3d 430 (7th Cir. 1998) (noting that the Supreme Court in *Lewis v. Casey* "held that named plaintiffs in a class action must not only allege but prove that they suffered actual injury of the type for which they seek a remedy"). The remedy phase (if it is even necessary) should not ordinarily be another full blown trial on the merits. Yet, if the record is not reopened on liability, that is exactly what will be necessary, and Defendants particularly will be prejudiced by that process. They will at once have to present evidence on what an appropriate remedy should be, without having the benefit of a determination based on current evidence that there are any ongoing violations of federal law. It is for this reason that Defendants seek to have the record on liability reopened so that the Court may determine now two and a half years after the close of trial, and after many significant and substantial changes have occurred, whether a finding of liability on any of Plaintiffs' claims is appropriate.

Further, the burden of proof on whether there exists an ongoing violation of federal law should remain with Plaintiffs. To issue an order on liability in favor of Plaintiffs, based on a stale record, would have the effect of essentially shifting the burden to Defendants at the remedy stage to prove why no relief is appropriate (because there is no ongoing violation). However,

due process demands that the burden of proving an ongoing violation remain with Plaintiffs. *Accord, Bray v. Safeway Stores, Inc.*, 392 F. Supp. 851 (N.D. Cal. 1975) (in an antitrust action, Court found that Plaintiff bore the burden of demonstrating an ongoing violation of antitrust laws); *Sierra Club v. Cripple Creek & Victor Gold Min. Co.*, No. 00-CV-02325-MSK-MEH, 2006 WL 2882491, at *17 (D. Colo. Apr. 13, 2006) (finding that the Sierra Club failed to meet its burden of establishing ongoing claims).

**Conclusion**

For the foregoing reasons, the Court should reopen the factual record on liability to determine whether it continues to have jurisdiction to consider any non-moot claims brought against interim Secretary Carroll. Even if the Court should determine that the claims against interim Secretary Carroll are not moot, the Court should reopen the stale record on liability to take evidence on the many changes made in the past year to Medicaid eligibility determinations based on implementation of the ACA and DCF's acquisition of a new Medicaid Eligibility System to determine whether there are any ongoing violations of federal law.

Additionally, the Court should exercise its discretion to reopen the record on liability to take evidence on the impact that the implementation of MMA, including the implementation of the CMSN MMA, has had on whether Plaintiffs may prove any cause of action against Defendants. Appropriate discovery will be required before any hearing on these issues. In light of the substantial change in circumstances and the staleness of the evidence, only reopening the record to permit the submission of current facts would justify any relief to Plaintiffs at the remedy stage (should a remedy stage be appropriate).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been served by Notice of Electronic Filing on Stuart H. Singer, Esq., Carl E. Goldfarb, Esq., Damien J. Marshall, Esq., and Sashi Bach Boruchow, Esq., Boies, Schiller & Flexner LLP, 401 East Las Olas Blvd., Suite 1200, Fort Lauderdale, FL 33301, and Robert D.W. Landon, III, Esquire, Kenny Nachwalter, P.A., 201 South Biscayne Boulevard, 1100 Miami Center, Miami, Florida 33131-4327; and by United States Mail on Benjamin D. Geffin, Esq., Public Interest Law Center of Philadelphia, 1709 Benjamin Franklin Parkway, Second Floor, Philadelphia, PA 19103; and Louis W.

Bullock, Esq., Bullock, Bullock, & Blakemore, 110 W. 7th Street, Tulsa, Oklahoma 74112, on October 31, 2014.

/s/ Stephanie A. Daniel
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