UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

Civil Action No. 5:11-cv-00273-BO

HENRY PASHBY, ANNIE BAXLEY, MARGARET DREW, DEBORAH FORD, MELISSA GABIJAN, MICHAEL HUTTER, JAMES MOORE, LUCRETIA MOORE, AYLEAH PHILLIPS, ALICE SHROPSHIRE, SANDY SPLAWN, ROBERT JONES, REBECCA PETTIGREW, Plaintiffs, v. ALDONA WOS, 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 TO AMEND AND SUPPLEMENT COMPLAINT**

NOW COMES Defendant, Aldona Wos, in her official capacity as Secretary of the North Carolina Department of Health and Human Services ("Department"), by and through Lisa Corbett, Amar Majmundar, Iain Stauffer, Charles G. Whitehead, Special Deputies Attorney General, and Olga E. Vysotskaya de Brito, Assistant Attorney General, and hereby submits this response in opposition to Plaintiffs' motion to amend and supplement their first amended complaint.

STATEMENT OF THE CASE

Plaintiffs filed a complaint and motion for preliminary injunction on 31 May 2011 to prohibit Defendant from implementing amended eligibility requirements for the provision of optional in-home Medicaid services to Medicaid recipients known as personal care services

("PCS"). [DE 1] Plaintiffs filed a motion for class certification on 6 June 2011 [DE 25], and an amended complaint on 11 July 2011. [DE 44] With its pleadings, Plaintiffs contended that the alleged comparability issues associated with Clinical Coverage Policy 3E ("Policy 3E") between PCS provided to recipients living in the community, and PCS provided to recipients residing in licensed Adult Care Homes ("ACH"), constituted a violation of the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act, and the Social Security Act. Plaintiffs further contended that the coverage notices sent to them were insufficient.

This Court entered an Order on 8 December 2011 to grant Plaintiffs' motion to certify class, motion for leave to file declarations, and motion for a preliminary injunction. [DE 88] On 9 December 2011, Defendant gave notice of appeal to the U.S. Court of Appeals for the Fourth Circuit. [DE 90] On 18 January 2012, Plaintiffs filed a motion to enforce the Order granting preliminary injunction. [DE 102] On 1 March 2012, this Court entered an Order clarifying the 8 December 2011 Order granting the preliminary injunction. [Doc 115] On 6 March 2012, the Court of Appeals granted Defendant's Motion for a Stay of the 8 December 2011 Order. [DE 116] On 5 March 2013, the U.S. Court of Appeals for the Fourth Circuit issued a published opinion, affirming the District Court's class certification, preliminary injunction, and remanded the matter to this Court to "clarify its order," describe the enjoined conduct in "reasonable detail" and address the issues of security. [DE 117] Formal mandate of the U.S. Court of Appeals for the Fourth Circuit issued on 10 April 2013. [DE 121] On remand, this Court issued an Order clarifying terms of its preliminary injunction and the issue of security. [DE 142] On 26 April 2013, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, Defendant filed a motion to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction premised upon the

contention that this matter has been rendered moot by the termination of Policy 3E on 31 December 2012. [DE 128] Within hours after Defendant's motion to dismiss was filed, on 26 April 2013 Plaintiffs filed motions seeking leave to amend and supplement their first amended complaint to:

1. Add new facts;
2. Add new claims challenging new policy 3L "as implemented;" and
3. Add an issue regarding the N.C. General Assembly appropriations bill that established a temporary, short-term "Transitions to Community Living Fund" to assist adult care homes with serving individuals for whom community living has not yet been arranged during the transition period, N.C. Sess. Law 2012-142 §§10-23A(d-j). [DE 131, 132, 133]

Defendant opposes Plaintiffs' motion for multiple reasons set forth in this Memorandum.

BACKGROUND

Plaintiffs alleged that Policy 3E was a facially illegal policy that violated the ADA, the Rehabilitation Act, and the Medicaid Act. [DE 44, ¶ 6] Plaintiffs motion for a preliminary injunction specifically prayed the court to enjoin Defendant from implementing "the provisions of In Home Care for Adults (IHCA) Clinical Policy 3E to terminate from eligibility for in home Personal Care Services (PCS) those Medicaid recipients over the age of 20 who meet the state agency's criteria to receive in home PCS prior to June 1, 2011, but do not meet the state agency's new criteria to receive in home assistance, IHCA, effective June 1, 2011." [DE 14] By Order on 8 December 2012 Order, the Court granted Plaintiffs' request, stating that "Plaintiffs' Motion for Preliminary Injunction is also GRANTED. Defendant is hereby prohibited from *implementing*

ICHA Policy 3E." [DE 115] (emphasis added). With the 1 March 2012 Order granting Plaintiffs' motion to enforce the 8 December 2011 Order, this Court indicated that "Plaintiffs were granted such relief in this Court's order entered December 7, 2011, wherein the Court stated that an injunction would only require *Defendant continue to provide for in-home PCS for those Plaintiffs who were found to be entitled to such benefits prior to June 1, 2011*." [DE 115] (emphasis added) On 5 March 2013, the U.S. Court of Appeals for the Fourth Circuit affirmed the preliminary injunction, but pursuant to Rule 65 of the Federal Rules of Civil Procedure, remanded the matter back to the District Court for clarification on "prohibit[ing] the DHHS from implementing Policy 3E" and the issue of "which eligibility requirements should apply to individuals who sought in-home PCS after IHCA Policy 3E went into effect on June 1, 2011." Pashby v. Delia, 709 F.3d 307, 331 (4th Cir. N.C. 2013); [DE 117] Pursuant to that mandate, this Court issued an Order clarifying its preliminary injunction terms. [DE 142]

Meanwhile, the North Carolina General Assembly enacted "[t]he Current Operations and Capital Improvements Appropriations Act of 2012", which specified that all adult Medicaid recipients satisfy the same eligibility requirements to receive PCS, irrespective of their place of residence. 2012 N.C. Sess. Laws 142, sec. 10.9F.(c). On 30 November 2012, CMS approved the Department's State Plan Amendment ("SPA") that set forth the same PCS functional eligibility criteria for all Medicaid recipients 21 years or older, irrespective of the recipients' residence. ("SPA 12-013") In its approval letter, CMS stated that "[t]his SPA revises the personal care services (PCS) benefit to make the eligibility criteria for receipt of PCS the same irrespective of setting." (Department's Exhibit 1) CMS further concluded that "...SPA is now in compliance with 42 CFR 440.240 concerning comparability of services. The SPA is also in compliance with

42 CFR 440-230 concerning sufficiency of the benefit." (Id.) The Department drafted Clinical Coverage Policy 3L ("Policy 3L") to implement the eligibility requirements set out in N.C. Sess. Law 2012-142 and SPA 12-013. [DE 134-2] Subsequently, Policy 3E was terminated on 31 December 2012. Policy 3L has been in effect since 1 January 2013, and in keeping with the mandates of the General Assembly, requires the same PCS eligibility criteria for Medicaid recipients residing in an ACH, and in-home settings. [DE 134-2]

In their motion to amend and supplement their complaint, Plaintiffs acknowledge the facial comparability of Policy 3L eligibility criteria for ACH and in-home Medicaid recipients, but allege that Policy 3L is deficient "as implemented." [DE 131, 133] Plaintiffs argue that their proposed supplemental complaint features "many of the same legal and factual issues", is not prejudicial, not futile, and generally conforms with a typical application of Rule 15(d), Fed R. Civ. P. [DE 132] Defendant disagrees with Plaintiffs' position, and respectfully requests this Court to deny Plaintiffs' motion to amend or supplement.

ARGUMENT

A Plaintiff has an absolute right to amend their complaint once at any time before the defendant has filed a responsive pleading. Fed.R. Civ. P. 15. In the instant matter, Plaintiffs already exercised their right with the filing of their Amended Complaint on 11 July 2011. [DE 44] Subsequent amendments and supplementation require that plaintiffs first seek leave of court or obtain the opposing party's written consent before filing another amended complaint, understanding that leave to amend "shall be freely given when justice so requires." Manuel v. Gembala, 2011 U.S. Dist. LEXIS 94421, 4-5 (E.D.N.C. July 27, 2011); see Rule 15, Fed. R. Civ. P. The standards for granting motions to amend and motions to supplement are liberal, and

substantially the same. See Franks v. Ross, 313 F.3d 184, 198 n.15 (4th Cir. 2002). As with motion to amend pleadings, grant of an application to supplement under Rule 15(d), Fed. R. Civ. P., is left to the court's sound discretion. United States v. Sherwood Distilling Co., 235 F. Supp. 776, 782 (1964), aff'd per curiam, 344 F.2d 964 (4th Cir. 1965), Banks v. York, 448 F. Supp. 2d 213, 214 (D.D.C. 2006).

While motions to amend and supplement are freely given, the generosity of Rules 15(a) and 15(d) is not without limits. Separate and distinct cause of action should not be allowed under the guise of a supplemental or amended pleading. "[T]he supplemental pleading is merely a continuation of the complaint, justifying other or further relief than that sought in the original complaint. But this rule does not in our opinion permit a party to introduce a distinct new cause of action into the case if the weight of authority is to be followed." General Bronze Corp. v. Cupples Products Corp., 9 F.R.D. 269, 270 (D. Mo. 1949)(internal citations omitted). As a further limitation, leave to amend or supplement should be given only in the absence of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility of the amendment." Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962); see Edwards v. City of Goldsboro, 178 F.3d 231, 242 (4th Cir. 1999).

I. PLAINTIFFS' CLAIMS WERE RENDERED MOOT BY THE TERMINATION OF POLICY 3E, AND THEY SHOULD NOT NOW BE PERMITTED TO AMEND THAT DEFUNCT CLAIM TO ADD A NEW AND SEPARATE CAUSE OF ACTION.

Generally, the thrust of Plaintiffs' original and first amended complaint is the alleged lack in comparability of Policy 3E's eligibility criteria for Medicaid recipients residing in-home as compared to those residing in an ACH. Plaintiffs have exclusively contended that those alleged comparability issues warranted enjoinment from policy implementation. [DE 44] As fully delineated in Defendant's motion to dismiss, Policy 3E was replaced with Policy 3L effective 1 January 2013. [DE's 128, 129, 146] In contrast to the Plaintiffs' facial challenge to Policy 3E, the newly enacted Policy 3L contains uniform and comparable eligibility standards for PCS provided to recipients living in the community and those residing in an ACH. With implementation of Policy 3L, Plaintiffs have received the exact relief they specifically sought in their action - the termination of Policy 3E. Therefore, Plaintiffs' current action against the Department is moot, and should be dismissed with prejudice for lack of subject matter jurisdiction.

In light of that posture, Plaintiffs now ask this Court for leave to supplement their first amended complaint to add new facts, new grievances, questions regarding appropriations made by the General Assembly, claims regarding the "implementation" of the new policy 3L, and challenge the sufficiency of notices issued to PCS recipients under that new policy.[1] [DE 132, 133] Although they chose to employ the words "amended" and "supplemental" in their amendment motions, it is evident that Plaintiffs are instead asserting a new claim, challenging a new policy, on a new legal theory, that necessarily demands new class members. Specifically,

[1]The U.S. Court of Appeals for the Fourth Circuit found that due process requirements for notices issued under Policy 3E were satisfied. Pashby v. Delia, 709 F.3d 307 (4th Cir N.C. 2013).

instead of addressing the facially incomparable eligibility criteria of Policy 3E, Plaintiffs are attempting to swap their original action for a challenge of the "implementation" of Policy 3L. Plaintiffs' attempt to exploit the vacant shell of their moot action, to midwife entirely new litigation, should be denied by this Court.

II. PLAINTIFFS' MOTION AND PROPOSED AMENDED AND SUPPLEMENTAL COMPLAINT REVEAL AN ENTIRELY SEPARATE AND DISTINCT CAUSE OF ACTION. [2]

While leave to permit supplemental pleading is favored, it cannot be used to introduce a "separate, distinct and new cause of action." Graham v. Stansberry, 2008 U.S. Dist. LEXIS 64067, 9-10 (E.D.N.C. Aug. 19, 2008); Berssenbrugge v. Luce Mfg. Co., 30 F. Supp. 101, 102 (D. Mo. 1939); Planned Parenthood of Southern Arizona v. Neely, 130 F.3d 400, 402 (9th Cir. 1997); see also, 6A Wright, Miller, & Kane, Federal Practice and Procedure: Civil 2D § 1509 (1990) (noting that leave to file a supplemental pleading will be denied when "the supplemental pleading could be the subject of a separate action"). Under the title of "second amended and supplemental complaint," Plaintiffs seek to introduce a new and separate action to challenge portions of the Department's Policy 3L implementation practices, and selected portions of the North Carolina General Assembly's nondiscretionary budget appropriations. Since Plaintiffs' entire original claim revolved around the issues of PCS terminations due to alleged lack of comparability in Policy 3E eligibility criteria, attempts to add "as implemented" challenges to

[2]While Plaintiffs entitled their motion as "motion to amend and supplement," they only nominally "supplement" their existing claim by adding the new Policy 3L, and the General Assembly's budget appropriations, to their previous Policy 3E challenges. "Facts accruing after the suit is brought may not be inserted by way of amendment but must be added by supplemental pleading. See Fed. R. Civ. P. 15(d)." Young-Henderson v. Spartanburg Area Mental Health Center, 945 F.2d 770, 775 (4th Cir. S.C. 1991).

Policy 3L, which is facially proper, constitute a distinct and unrelated lawsuit. If at all, Plaintiffs' challenges to Policy 3L and the General Assembly's appropriations should be prosecuted in a separate action.

A. Plaintiffs' First Amended Complaint. [DE 44]

Plaintiffs' current class action complaint claims that because of a lack in comparability in PCS eligibility requirements under Policy 3E "...effective June 1, 2011, PCS coverage will be terminated for about 3,500 to 4,000 elderly, blind, or disabled North Carolina citizens who rely on these services to live safely in their homes and communities." [DE 44, ¶ 1] Plaintiffs correspondingly defined their respective class as "all current or future North Carolina Medicaid recipients age 21 or older who have, or will have, coverage of PCS denied, delayed, interrupted, terminated, or reduced by Defendant directly or through his agents or assigns as a result of *the new eligibility requirements for in-home PCS and unlawful policies contained in Defendant's Clinical Coverage Policy 3E*." [DE 44, ¶ 14 (emphasis added)] Plaintiffs' named class representatives were all alleged to have received letters in June 2011 informing them that their PCS would be *terminated under Policy 3E*. [DE 44, ¶¶ 48-123] With their 26 April 2013 motion to amend and supplement complaint, Plaintiffs explicitly admit that they "filed this civil action on May 31, 2011 *seeking to enjoin changes in the N.C. Medicaid PCS program under Clinical Policy 3E*, which took effect on June 1, 2011." [DE 131, ¶ 1 (emphasis added)] As Plaintiffs further admitted during 17 November 2011 hearing before this Court: "[t]he specific change that we're challenging was a restriction in eligibility criteria." In response to the Court's inquiry "if the new plan that comes next March is adequate and to your satisfaction, then there won't be any dispute?", Plaintiffs responded with "[t]hat's correct, your Honor." (Department's

Exhibit 2, pp 8-9, 27). From this exchange, it is apparent that this Court and Plaintiffs contemplated that the issues of this action related exclusively to the eligibility criteria set out in Policy 3E.

B. Plaintiffs' Proposed Amended and Supplemental Complaint. [DE 133]

Policy 3E, which Plaintiffs sought to enjoin in their action, was terminated on 31 December 2012. Since Plaintiffs received the relief they sought in their lawsuit, i.e., termination of Policy 3E, their action became moot as of 1 January 2013. In their motion to amend and supplement complaint, Plaintiffs concede that (1) "the N.C. General Assembly enacted new legislation requiring DHHS to change the PCS program to make the *eligibility requirements uniform across all settings* effective Jan 1, 2013. N.C. Session Laws 2012-142§ 10.9F.(c)", and (2) "[e]ffective January 1, 2013, Defendant issued *Clinical Policy 3L, which purported to make eligibility requirements for Medicaid coverage of PCS uniform across all settings*." [DE 131, ¶¶ 6-7 (emphasis added)] Moreover, of all the named plaintiffs, only Mr. Robert Jones has been assessed under Policy 3L. According to Plaintiffs, Mr. Jones' PCS terminated on 3 April 2013, and that decision has been promptly appealed. [DE 133, ¶ 127] However, there has been no allegation, or even suggestion, that Mr. Jones' PCS were terminated due to his status as an in-home, rather than ACH PCS recipient. Given that the only named Plaintiff to undergo assessment under 3L has not demonstrated that he was prejudiced by virtue of his residence, it is difficult to decipher how Plaintiffs' new claims can be harmonized with their original claims.

The specific aspects of Policy 3L implementation that Plaintiffs now complain about in their proposed complaint include: different wording on referral and assessment forms; meal

preparation specifics; medical records' review practices; absence of written notices of the assessments for in-home PCS providers; general "liberal interpretation" of PCS eligibility for ACH under policy 3L; retroactive prior approvals and delayed effective date of terminations for ACH; use of certified mail for PCS termination and denial notices; and, encouragement of appeals for ACH providers. [DE 133, ¶ 204] Plaintiffs inappropriately conflate their facial challenges to the terminated Policy 3E with their new concerns about the implementation of Policy 3L, and short-term appropriations made by the General Assembly. These issues cannot be reconciled with those that formed the basis of Plaintiffs' original complaint, and Plaintiffs should be prevented from exploiting that original complaint as a conveyance for their newly developed grievances and theories.

C. Crucial Differences Between Plaintiffs' Current and Proposed Complaints Reveal A Separate and Distinct Action That Should Be Filed and Tried Separately.

The most obvious and crucial difference between Plaintiffs' first amended complaint and their proposed second amended and supplemental complaint is the Policy that is being challenged. The predicate to Plaintiffs' action was that Policy 3E facially lacked comparability for those Medicaid recipients who lived in the community. That alleged failure was resolved on 1 January 2013 with the implementation of Policy 3L. Plaintiffs now complain about the entirely new policy, which was found by CMS to have met the comparability and sufficiency requirements of Medicaid. (Department's Exhibit 1) Further, Policy 3L features unambiguous language that ensures that functional eligibility criteria are the same irrespective of setting, and addresses the alleged lack of comparability of PCS for in-home and ACH recipients. Therefore, Plaintiffs' purported supplemental complaint challenging Policy 3L necessarily delineates a new

and distinct cause of action. See Planned Parenthood v. Neely, 130 F.3d 400, 402 (9th Cir. Ariz. 1997) (holding that "although both the original suit and the supplemental complaint sought to challenge Arizona's parental consent law, the supplemental complaint challenged a different statute than the one that had been successfully challenged in the original suit.") Plaintiffs' supplemental complaint involving a challenge to an entirely new policy should become the subject of a new, separate lawsuit. See e.g.,Planned Parenthood v. Neely, 130 F.3d 400 (9th Cir. Ariz. 1997); Schwarz v. City of Treasure Island, 544 F.3d 1201, 1229 (11th Cir. Fla. 2008) (district court did not abuse its discretion by refusing to allow operator and residents of halfway houses to expand the scope of their lawsuit by asserting an entirely new theory of recovery more than year after filing their lawsuit, particularly since residents could have raised the new claims in another lawsuit); Trilink Saw Chain, LLC v. Blount, Inc., 583 F. Supp. 2d 1293, 1329 (N.D. Ga. 2008) (motion for leave to supplement plaintiff's complaint under Fed. R. Civ. P. 15(d), 16(b), was not well taken when it would have delayed resolution of the current claims, but that was entitled to pursue the new claims against the defendant manufacturer in a new proceeding).

Secondly, the nature of alleged violations accompanying Policies 3E and 3L is different, and require different factual and legal analysis. The "as written" or facial nature of Plaintiffs' challenge to Policy 3E is distinct from alleged "as implemented" nature of Plaintiffs' claims regarding Policy 3L. Necessarily, discovery for "as implemented" deficiencies would differ significantly (with greater detail-oriented and more extensive discovery) from discovery of the alleged "as written" deficiencies under the terminated Policy 3E. It is unduly burdensome and inefficient to conflate the two into one action, where these issues are best handled in separate lawsuits.

Third, as explained in a greater detail in Defendant's contemporaneous response to Plaintiffs' motion to amend class certification, there exist critical differences in class definitions and eligible class member lists in the current and proposed supplemental complaints. The former implicates individuals who were adversely terminated under Policy 3E due to a facial lack of comparability, whereas the later implicates a case-by-case analysis of individuals who were denied, or limited access PCS due to written or unwritten shortcomings of Policy 3L "as implemented." Again, conjoining these two class definitions and class lists is unduly burdensome, and is better handled by way of separate actions.

Finally, the questions of law and fact presented by Policy 3E "as written," and Policy 3L "as implemented," are not reasonably interconnected, and should not be combined into a single lawsuit. As Plaintiffs succinctly stated to the Court, their original complaint simply alleged that "[a]s of June 1 the policy now says, we will serve you in an adult care home and we will not serve you in your own home. You must go into an adult care home for us to now serve you." (Department's Exhibit 2, p 21) Plaintiffs correctly concede in their motion to supplement that Policy 3L expresses no such language or requirement. CMS has directly recognized that the SPA setting forth current PCS functional eligibility requirements comports with comparability and sufficiency requirements. Thus, unlike the legal framework surrounding Policy 3E, Policy 3L is subject to Chevron deference, and should be analyzed under an entirely different set of legal criteria. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Similarly, there is no suggestion that General Assembly's short-term temporary appropriations of $39,700,000 or any other act of legislative appropriations were in any way raised or considered in Plaintiffs' original action. Because of lack of reasonable connection between the facts and legal

issues raised in Plaintiffs' current and proposed amended and supplemental complaints, it is apparent that Plaintiffs are instead asserting a separate and distinct claim. This attempt to raise a new claim under a guise of supplementation or amendment should not be permitted.

III. PLAINTIFFS' PROPOSED SECOND AMENDED AND SUPPLEMENTAL COMPLAINT IS PREJUDICIAL, FUTILE, AND OTHERWISE INAPPOSITE TO THE RATIONALE OF RULE 15 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

A motion to supplement a pleading should be denied where "'good reason exists . . . such as prejudice to the defendants.'" Franks v. Ross, 313 F.3d 184, 198 n.15 (4th Cir. 2002)(internal citation omitted). Undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, futility of the amendment and other relevant factors should be considered in evaluation as to whether a good cause for denying the requested amendment or supplementation exists. Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962); see Edwards v. City of Goldsboro, 178 F.3d 231, 242 (4th Cir. 1999); Johnson v. Oroweat Foods Co., 785 F.2d 503, 509 (4th Cir. 1986).

Plaintiffs' motion to file amended or supplemental complaint should be denied as the requested supplementation is unfairly prejudicial to the Department, unnecessarily complicates matters, delays adjudication, is futile and cuts across the objectives of Rule 15, Fed. R. Civ. P. Given the termination of Policy 3E (the very remedy Plaintiffs sought in their original lawsuit), this sought-after supplementation is unfairly prejudicial to the Department as no valid or live controversy actually remains between the parties. As submitted supra, Plaintiffs' purported supplementation amounts to a new and distinct cause of action. "Allowing plaintiff the

opportunity to supplement his complaint to include the new claims would unnecessarily complicate the matter and cause defendants undue prejudice. The court notes that plaintiff may file his supplemental claims in a separate action." Graham v. Stansberry, 2008 U.S. Dist. LEXIS 64067, 11-12 (E.D.N.C. Aug. 19, 2008); see Al-Ra'Id v. Ingle, 69 F.3d 28, 33 (5th Cir. 1995) (upholding the denial of motions to supplement which stated "additional causes of action against additional defendants" where the district court noted that the plaintiff could re-file complaints as new actions). Plaintiffs' motion to amend and supplement is further unfairly prejudicial because it penalizes the Department for its attempts to cure the comparability issue surrounding Policy 3E.

Relying upon Hjelle v. Brooks, 424 F. Supp. 595 (D. Alaska 1976) and Pimentel v. Dreyfus, 2011 U.S. Dist. LEXIS 29850 (W.D. Wash. Mar. 22, 2011), Plaintiffs argue that "supplementing the complaint to reflect the fact that the policy Plaintiffs' [sic] originally challenged has been replaced is a typical application of Rule 15(d)". [DE 132] But neither of the cited cases stands for that proposition. The decision in Hjelle addresses the merits of the doctrine of "federal abstention by stipulation of parties," which is wholly inapplicable to the case at hand, and in no way implies that supplementation of the complaint to replace the policy that is challenged is an appropraite application of Rule 15. 424 F. Supp. 595 (D. Alaska 1976) (dismissing plaintiffs' amended complaint in favor of full state adjudication pursuant to Younger abstention principles). Plaintiffs appear to refer to a concurring opinion in Hjelle, which is contrary to their stated position. The concurring opinion, in fact, would have dismissed plaintiffs' cause of action after concluding that the amendment to the complaint that espoused a challenge to a new regulatory scheme was in reality "a new cause of action" and not a

supplemental complaint. 424 F. Supp. 595, 601-603 (D. Alaska 1976). Pimentel, likewise, does not hold that replacement of a challenged policy is a typical application of Rule 15. 2011 U.S. Dist. LEXIS 29850 (W.D. Wash. Mar. 22, 2011). In that case, the Washington DSHS sought a reconsideration of the Court's prior injunction based upon new legislation that reduced, rather than eliminated, food assistance program to immigrants. There, the Washington District Court disagreed with the defendant that such a legislative change affected the validity of the court's previous preliminary injunction, and with defendant's consent, allowed plaintiff to supplement their pleading. 2011 U.S. Dist. LEXIS 29850 (W.D. Wash. Mar. 22, 2011) Clearly, contrary to legislative attempts to circumvent an issue at heart of preliminary injunction in Pimentel, SPA 12-013 and Policy 3L cure the alleged lack of comparability in eligibility requirements. Thus, the rationale of a non-binding opinion in Pimentel is wholly inapplicable here.

Moreover, Plaintiffs' supplemental allegations concerning the "as implemented" deficiencies of Policy 3L are futile, as Plaintiffs have failed to plead additional facts stating a valid claim for relief. Plaintiffs failed to show that any class member has suffered any harm from the alleged Policy 3L violations. Indeed, Plaintiffs' complaint reveals that named Plaintiffs Pashby, Baxley, Drew, Ford, Gabijan, Hutter, Willis, recently deceased James Moore, Phillips, Shropshire, Splawn and Pettigrew were neither evaluated under Policy 3L, nor suffered terminations as a result of any alleged Policy 3L shortcomings. [DE 133, ¶¶ 50- 137] Moreover, while a single named Plaintiff, Mr. Jones, was alleged to have been denied or terminated PCS recently, no factual information was pled to suggest that his termination was in any way due to Policy 3L comparability problems. Additionally, General Assembly is not a party to this action. Thus, with respect to the allegations regarding the appropriations made by the General Assembly,

Plaintiffs have demonstrated no harm to them, or even how Defendant is responsible for the actions of our State's legislature. Those claims are simply no properly before this Court. As such, Plaintiffs' supplemental complaint, if allowed, would be subject to dismissal under Rules 12(b)(1),(2) and (6) of Fed R. Civ. P., and is futile.

Finally, Plaintiffs' motion to amend and supplement does not serve the main goal of Rule 15(d), which is to promote judicial efficiency. Keith v. Volpe, 858 F2d 467, 473 (9th Cir 1988). Here, an economical and expeditious disposition of the parties' dispute will not be achieved by permitting Plaintiffs to supplement their pleading. In fact the opposite is true: if the requested supplementation is allowed, litigation will start anew: a new class will have to be defined, a new class list would need to be compiled, all class members would need to be notified, new responsive pleadings and motions would need to be filed and adjudicated, different injunctive relief would be sought, and, new appeals would likely need to be undertaken.

Additionally, the proposed supplemental complaint compounds and complicates issues by commingling two different policies, with diverse types of challenges. The net result necessarily is the creation of at least two different types of class members, seeking vastly disparate types of relief. The diversity of legal and factual issues implicit in Plaintiffs' supplemental complaint outweighs any potential claims regarding the virtue of disposing of this claim in one action. Plaintiffs' challenges to Policy 3L "as implemented" would be most expeditiously and economically served in a separate lawsuit. See Mitchell v RKO Rhode Island Corp., 148 F Supp 245 (Mass DC 1956) (concluding that any advantage which might normally be gained by disposing of the whole controversy in a single trial would be outweighed by the difficulties

which would here be involved there had been changes in the corporate identity and the nature of the business of certain of the defendants, and that there had been changes in industry practice, so that the difficulty of trying both the original and the supplemental proceedings in a single litigation would be increased). Moreover, Plaintiffs have cited to no obstacles in pursuing redress for their alleged Policy 3L allegations through a new action. In the interest of judicial efficiency, and in the absence of such obstacles, the filing of a new complaint to address the new legal challenges is appropriate. See Planned Parenthood v. Neely, 130 F.3d 400 (9th Cir 1997).

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Plaintiffs' motion to amend and supplement be denied.

Respectfully submitted this the 17th day of May 2013.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this day, 17 May 2013, I electronically filed the forgoing **DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND AND SUPPLEMENT COMPLAINT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: John R. Rittelmeyer, Douglas S. Sea, Sarah Somers, Elizabeth Edwards, Martha J. Perkins, Jennifer L. Bills, attorneys for Plaintiffs, and I hereby certify that I have mailed the document to the following non CM/ECF participates: none.

This the 17th day of May, 2013.

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