UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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| HANS BRUNS, on behalf of himself and other similarly situated individuals<br><br>Plaintiffs,<br><br>v.<br><br>MARY MAYHEW, Commissioner, Maine Department of Health and Human Services,<br><br>Defendant. | ) | Civil Action No. 1:12-cv-00131-JAW |

**Plaintiff's Reply Memorandum in Support of Motion for Class Certification**

In this action, the Plaintiff seeks to enjoin a state law that denies full MaineCare benefits to individuals solely based upon their alienage or immigration status. To accomplish this, the Plaintiff has requested that this Court certify a class consisting of those persons whose full MaineCare benefits terminated as of October 1, 2011 [the date the law took legal effect] due to the challenged state law, P.L. 2011, ch. 380, § KK-4, and to also include within the class similarly situated individuals who, subsequent to October 1, 2011, are denied full MaineCare benefits based upon the same challenged state law.

The Defendant seeks to limit the class to only those individuals whose benefits were terminated on October 1, 2011, and to exclude those whose benefits are denied after October 1, 2011. Individuals described in the class whose benefits are or will be denied after October 1, 2011, are in the exact same legal position as those whose benefits were terminated on October 1, 2011; therefore, they should be likewise included in the class. Defendant's argument, if adopted,

would undermine the purposes of a class action under Federal Rule of Civil Procedure 23(b)(2). Because Plaintiffs satisfy all the required elements for class certification, this Court should grant Plaintiff's Motion for Class Certification.

## BACKGROUND

Hans Bruns, and all those similarly situated, had their full MaineCare benefits terminated on October 1, 2011. For Mr. Bruns, this meant that he lost access to treatment for his cancer and is now limited to only "emergency" MaineCare. Those individuals who apply for MaineCare after October 1, 2011, and are otherwise found eligible for MaineCare but for their alienage or immigration status will, like Hans Bruns, receive only "emergency" MaineCare and not full MaineCare. The same legal action of the Defendant affects all these individuals in the exact same manner.

The Plaintiff has requested certification of a class consisting of all non-citizens residing in the State of Maine (1) who had their full MaineCare benefits terminated effective October 1, 2011, because of their alienage and immigration status and have not subsequently had their MaineCare benefits reinstated, or (2) who would in the future be eligible for full MaineCare benefits, but for their alienage or immigration status. The Defendant, while conceding that the first group meets all the requirements for certification as a Rule 23 (b)(2) class, nevertheless argues that the second group is not appropriate for inclusion in the class. Because there is no practical or legal distinction between the two groups, Plaintiff requests that this Court reject Defendant's argument and certify the class as proposed.

## ARGUMENT

The Defendant argues against including in the class individuals who have not yet been denied assistance. Apparently, the Defendant seeks to draw a line between those who had the

full MaineCare benefit prior to October 1, 2011, and then lost it as of October 1, 2011, and those who apply for full MaineCare after October 1, 2011, and are found otherwise eligible, but similarly do not receive full MaineCare. It is virtually impossible see the practical differences between these two groups: both are denied full MaineCare solely due to their alienage or immigration status.

**A. Drawing a line between those who lost their full MaineCare on October 1, 2011, and those who are denied full MaineCare after October 1, 2011, is counter to class action jurisprudence.**

This Court and many other courts have routinely certified classes to include both current and future recipients of benefits. In *Van Meter v. Mayhew*, 272 F.R.D. 274 (D. Me. 2011), this Court certified a class that included those who "in the future will be . . . eligible for and enrolled in MaineCare." *Id.* at 276, 284. *See also Rancort v. Concannon*, 207 F.R.D. 14 (D. Me. 2002) (certifying class to include individuals who are "current and future recipients" of MaineCare); *Risinger v. Concannon*, 201 F.R.D. 16 (D. Me. 2001) (certifying class to include "all current and future recipients" of MaineCare who would be denied services); *Curtis v. Commissioner*, 159 F.R.D. 339 (D. Me. 1994) (certifying class of current and future Food Stamp recipients).

Consideration and inclusion of those who will in the future suffer the identical injury is a factor that supports the numerosity requirement of Rule 23. See 1 NEWBERG, H., NEWBERG ON CLASS ACTIONS, § 3:17 at 265 (4th ed. 2002). *See also Weaver v. Regan*, 701 F. Supp. 717, 721 (W.D. Mo. 1988) (finding numerosity satisfied in Medicaid case because class included future class members); *Bruce v. Christian*, 113 F. R.D. 554, 557 (S.D.N.Y. 1986) (finding impracticality where class individuals would be affected in the future); *Smith v. Heckler*, 595 F. Supp. 1173, 1186 (E.D. Cal. 1984) (including in numerosity analysis those who may, in the future, be denied disability status under certain challenged social security regulations). The point

is that if the proposed class succeeds on the merits of this claim, then the resulting benefits will inure to those in the future. *Brown v. City of Barre*, 2010 U.S. Dist. LEXIS 131709 (D.C. Vt., December 13, 2010).

Notwithstanding this long jurisprudential history, Defendant chose to rely on a single case, not cited by any other authority, for the proposition that those who in the future may be denied eligibility are not appropriate for inclusion in the class. Def.'s Opposition at 6, *citing Unthaksinkun v. Porter*, No C11-0588JLR, 2011 WL 4502050 (W.D. Wash. Sept. 28, 2011).[1]

Perhaps the issue is one of semantics, as the court in Washington seemed to focus on the fact that the part of the class comprised of individuals who would be eligible in the future was not sufficiently defined to be those who actually apply for and are denied benefits. *Unthaksinkun*, 2011 WL 4502050, at *27 ("This portion of the proposed equal protection class is not restricted to individuals who will apply for and will be denied benefits; it includes those who will never apply for Basic Health benefits, regardless of the citizenship eligibility requirements."). For clarity, in the event this Court finds necessary, Plaintiffs support amending the class definition to include those who in the future apply for and are denied full MaineCare benefits solely due to their alienage or immigration status. Amending the class definition will overcome the Defendant's argument while ensuring that similarly situated future applicants have the same protection when they are denied benefits as a result of the elimination of full MaineCare coverage based on alienage or immigration status alone.

To be clear, the MaineCare recipient who is a diabetic and is denied insulin on October 1, 2011, is in the exact same position as the MaineCare recipient who is denied those benefits on October 2, 2011, or September 1, 2012. Therefore, to adopt Defendant's argument that the class

[1] Under Defendant's theory, Plaintiffs who apply for and are found eligible for "emergency" MaineCare after October 1, 2011, and who are thus denied "full" MaineCare would need to file new actions with this Court, thus defeating the central purposes of class actions.

may not be defined to include those whose full MaineCare benefits are denied subsequent to October 1, 2011, for the exact same reason as those who have their benefits denied prior to October 1, 2011, would undermine class action jurisprudence and result in multiple lawsuits raising the exact same claims brought on behalf of subsequently identified plaintiffs.

**B. The relief sought for class members is the same.**

As explained above, each class member is or will be a recipient of MaineCare. Each will be limited to "emergency" MaineCare solely due to his or her immigration status or alienage. Each class member seeks the exact same relief, i.e., to receive full MaineCare benefits. Nevertheless, the Defendant argues that the Plaintiff seeks separate relief for the members of the class, i.e. some class members' benefits were wrongfully terminated and would have to be restored, while those who were wrongfully denied after October 1, 2011, would get benefits they never had. Defendant posits this as "affirmative" action verses "inaction." Def.'s Opposition at 7. Again these distinctions are without substance. The denial of full MaineCare to new applicants is certainly *action.* Those individuals who apply for MaineCare in the future and are denied full benefits will be harmed by the same action taken by the State as those who have already lost their benefits - the elimination of full MaineCare eligibility for individuals based on alienage or immigration status. If this Court finds the challenged state law unconstitutional and orders the application of the law enjoined, then those who have had their benefits terminated and those who have had those same benefits denied will benefit equally in that each will receive full MaineCare, rather than "emergency" only MaineCare. The relief requested benefits all Plaintiffs similarly. Unlike the case relied upon by the Defendant, *Elizabeth M. v. Montenez*, 458 F.3d 779, 785 (8th Cir. 2006), Def.'s Opposition at 7, the instant case does not involve "sweeping injunctive relief" requiring the district court "to mandate and monitor detailed programs

governing nearly every facet of the State's operation of the three residential facilities." Nor does this case involve a "broad array of claims and prayers for relief" that makes class relief difficult. In the instant case, the same injunctive relief benefits all class members equally.

**C. This Court need not reach the legal merits of this case to define the class.**

It is well settled that the initial inquiry into whether to certify a class does not involve an examination of the merits. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974); *Coffin v. Bowater*, 228 F.R.D. 397 (D. Me. 2005). The Defendant argues that the class definition should be refined to limit its application to those who receive state medical assistance under 22 M.R.S. § 3762(3)(B)(2), rather than to those who receive MaineCare under the State's Medicaid program. P.L. 2001, ch. 450, § C-2. Def.'s Opposition at 8. This begs the legal question at issue in this case: whether the Plaintiffs are entitled to the same benefits under the State's Medicaid program as citizens are entitled to receive. In part, to make this determination, this Court must determine what the Maine Legislature meant when it enacted 22 M.R.S. § 3762 (3)(B)(2), which provides that "eligibility for the TANF and Medicaid programs for these categories of noncitizens must be determined using the criteria applicable to other recipients of assistance from these program." To do this analysis necessarily entails an examination of the merits of the Plaintiffs' claims and, as such, is not appropriate at this stage.

**CONCLUSION**

For the reasons stated herein, Plaintiffs request that this Court certify this action as a class action, with the minor change set forth above on page 4.

Dated: May 25, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 25, 2012, I electronically filed Plaintiff's Reply Memorandum in Support of Motion for Class Certification with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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