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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

AITA DARJEE on her own behalf and on behalf of her minor child N. D.; and ALMA SANCHEZ HARO on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THOMAS BETLACH, Director of the Arizona Health Care Cost Containment System, in his official capacity,

Defendant.

CV-16-00489-TUC-RM (DTF)

LODGED: PROPOSED RESPONSE TO RENEWED MOTION FOR CLASS CERTIFICATION

(Oral Argument Requested)

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AITA DARJEE on her own behalf and on behalf of her minor child N. D.; and ALMA SANCHEZ HARO on behalf of themselves and all others similarly situated, Plaintiffs, v. THOMAS BETLACH, Director of the Arizona Health Care Cost Containment System, in his official capacity, Defendant.	**CV-16-00489-TUC-RM (DTF)** **RESPONSE TO RENEWED MOTION FOR CLASS CERTIFICATION** **(Oral Argument Requested)**

Defendant Thomas Betlach, Director of AHCCCS, hereby responds in opposition to the Plaintiffs' Renewed Motion for Class Certification or, in the Alternative, to Take Plaintiffs' Motion Under Advisement and for Class Discovery ("Motion"). This Response is supported by the attached Declaration of Tara Lockner and other exhibits.

I. Background to this Motion

The Plaintiffs' July 22, 2016 Motion for Class Certification was denied because the two named Plaintiffs failed to demonstrate the prerequisites of commonality or typicality. Nothing has changed to warrant this Motion (which addresses only Count One, the "reasonable promptness" claim). The Plaintiffs do not seek to add new

plaintiffs. Their Memorandum in Support adds no new legal theory as to the merits. They do not link their (incorrect) assumption that there are new flaws in the AHCCCS computer system to some unlawful practice or policy of the Defendant. They fail to advise the Court that, even if their speculation as to computer flaws had any basis in fact, they know of no one who has been injured or not had her benefits restored.

As explained a year ago, the eligibility process at issue involves the interface between Medicaid, a "complex and highly technical regulatory program," *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 2387, 129 L. Ed. 2d 405 (1994), and "our Byzantine immigration laws and administrative regulations [,which] are second or third in complexity to the Internal Revenue Code." *Martinez v. Holder*, 2009 WL 413078, at *1 (9th Cir. 2009). There is obvious potential for error, both by computers and humans in the application of these requirements. Plaintiffs acknowledge at ¶¶ 48-50 of their Complaint that errors are made not only by the government but also by AHCCCS recipients who provide incomplete or inaccurate information.

Though DES and AHCCCS have worked diligently to reduce errors in this process, the Plaintiffs boldly allege the record now demonstrates a "sweeping problem with AHCCCS's computer system." This is simply not true. The 2015 computer problem was fixed, and there are no new computer problems. The remaining errors are caused by applicants and eligibility workers, and these errors are caught and corrected.

Plaintiffs do not inform the Court that ***whenever*** the system indicates a potential eligibility determination of FES (emergency-only) benefits, only a human being can "disposition" the case, and DES triple-checks any FES determination a worker thinks is

1 correct for accuracy, often on the same day and before any incorrect notice can go out.
2 If there is an error, it is caught and corrected. The very witness upon whose testimony
3 this Motion is premised testified that DES's process works and that ***all*** errors have been
4 corrected. *Ex. B, 145:15-23.* The Plaintiffs cannot identify ***anyone*** who has been, or is
5 likely to be, injured by the remaining human errors.

6 To put the issue in context, consider the errors Plaintiffs focus on between
7 December 2016 and August 2017. DES processes about 38,000 AHCCCS renewals a
8 month. *Dkt. 39-1, ¶ 5.* Immigrants constitute 13.5% of the country's population.
9 *http://www.migration policy.org/article/frequently-requested-statistics-immigrants-*
10 *and-immigration-united-states*. Applying this percentage to AHCCCS, DES processes
11 about 5,100 immigrant renewals a month and processed about **46,000** immigrant
12 renewals during December 2016-August 2017. Of these, 610 were initially incorrectly
13 changed from full benefits to emergency-only ("FES") benefits. *Exhibit A,*
14 *Declaration of Tara Lockner, attached hereto, ¶ 6*. Of these, **336** resulted in incorrect
15 notices that the person was eligible for FES. (Another 274 errors were caught before
16 any notice was sent.) Each of these 336 cases was further reviewed, and a notice that
17 each person was in fact eligible for full benefits was promptly sent and their benefits
18 did not change. *Id.*

19 The error rate of incorrect notices is thus less than 1% (336/46,000) of the
20 immigrant renewals DES processed between December 2016 and August 2017. By
21 contrast, the federal government allows a 3% margin of error in eligibility
22 determinations. *81 FR 40596-01, 2016 WL 3402966 (F.R.).* DES's Michael Farquhar
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testified the federal Centers for Medicare and Medicaid Services (CMS) audits medical assistance eligibility determinations for quality and "we get told which applications or what errors are being caused with Medicaid eligibility." He has not been told of any problems CMS has with the type of determinations at issue. *Ex. C, pp. 162:7-63:6.*

The Plaintiffs' Memorandum does not identify any practice or policy of the Defendant that causes the remaining errors or, much less, violates the law. The Memorandum implicitly admits the Plaintiffs can identify no such unlawful policy. Rather, their *only* discussion of an AHCCCS practice or policy is the suggestion that one should infer there is "*a system-wide practice and policy* ***embedded*** *in the HEAPlus computer system*: namely, the inability of the HEAPlus system to carry forward past, verified immigration information to a renewal application." *Dkt. 115, p. 17 (emphasis added).* In other words, they are contending that the computer system does not look back at the person's prior application and carry that information to the next application and the computer does not conveniently display summaries of past immigration status information received from the federal verification systems. As a result, eligibility workers must look up the underlying information in the person's file (where it can be found in any one of up to six different places).

There are a number of problems with this argument. First, the information *does* carry forward to auto-renewals. *Ex. B, 113:5-15; Ex. C, 97:9-10*. Second, the Plaintiffs do not argue the information is unavailable to the EW, only that the system should be enhanced to make the EW's job easier by using a hyperlink to avoid "having to spend extra keystrokes, mouse clicks to get back and forth to different applications." *Ex. C,*

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89: 15-17. The Plaintiffs provide no authority that requires the design they would prefer. Since the great majority of immigrant renewals are processed correctly, this "inconvenient" design hardly proves AHCCCS has a policy or practice to deny AHCCCS benefits to immigrants. Finally, the DES witness who would also prefer the more convenient display testified that the existing format is ***not*** causing errors:

> Q. [by Ms. Katz] Is it your understanding that because there's so many different places where information can be found that that's what is leading to some of the errors the caseworkers are making?
> THE WITNESS: No.
> Q. It isn't leading to the errors?
> A. No.

Exhibit B, 91/25-92/8. (He further testified he was told by his superiors at DES that the display he would prefer is not possible. *Id.* 93/7-20.)

The only real AHCCCS policy the Plaintiffs identify is the directive to triple-check any potential reduction from full benefits to FES to be sure such transfers are correct. *Exhibit F.* This practice alone contradicts the existence of the "policy and practice" the Plaintiffs choose to imagine. [1]

II. Class Certification Standard

As the Supreme Court has summarized, a plaintiff seeking certification of a class may not simply assert that class certification is appropriate.

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the

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[1] Plaintiffs also falsely, insinuate (*e.g. p. 2*) that they have shown that the 2015 computer problem continues. The display issue they raise has nothing whatever to do with the 2015 problem of not recognizing when the 5-year bar applied, a problem they ***know*** was fixed in 2015.

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> Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and that certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. Frequently that rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. [T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011) (citations and internal quotation marks omitted)(emphasis in original).

"[A] district court *must* consider the merits if they overlap with the Rule 23(a) requirements." *Ellis*, *supra,* 657 F. 3d at 981, citing *Wal–Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 351 (2011) and *Hanon v. Dataproducts Corp.,* 976 F.2d 497, 509 (9th Cir.1992) (emphasis in original). That is especially true when, as here, Plaintiffs' motion is premised on the "facts" they have newly discovered.

The required "rigorous analysis" of the record, however, demonstrates the Plaintiffs' Motion is factually unfounded, their class definition is overbroad, and they again fail to meet the prerequisites of Rules 23(a) and 23(b)(2).

III. The Motion has no Factual Merit; it is Based on Hearsay, Uninformed Speculation, and Inaccurate and Misleading Statements.

A. Hearsay

Many of Plaintiffs' exhibits are inadmissible hearsay and/or have not been authenticated. These include exhibits 1, 2, 11, 17, 18, 22, and 23 to the Katz Declaration (numbered as filed rather than as incorrectly listed in the Declaration).

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B. Speculation

The particular testimony of Marvin Hamman of DES, upon which the Plaintiffs' heavily rely for their claim of computer flaws, is sheer, unsubstantiated speculation. Mr. Hamman is not a computer or software designer. He supervises eligibility workers. He said the computer system "apparently" leads eligibility workers to make errors; he said this was an assumption on his part and he carefully used the word "apparently" several times. (*Ex. B, pp. 42-43, 54, 57, 59-61, 129, 162).* He admits he does not know if anything is wrong with the computer when this happens and could give no example of what he had in mind. *Id., 23:6-13.* He acknowledged, the computer's indication not to renew someone for full benefits can be a result of incorrect, missing or unverified information. *Id., 143:6-145:9.* He deferred to the DES "systems department" for greater insight. *Id., 23:14-19.*

Plaintiffs also deposed Michael Farquhar, who *does* analyze and test systems for DES to see if they work. Farquhar has worked on the HEAplus system. He testified he cannot say he's ever seen HEAplus fail to correctly recognize immigration status when there has been no interim change in the data. *Id., 123:20-124:7.*

*The computer **cannot** reduce anyone from full benefits to FES by itself. Ex. A, ¶ 13*. Moreover, DES requires any potential FES outcome to be reviewed pursuant to the procedures in Exhibit F, whereby any potential FES determination must be reviewed by an EW, then by his or her supervisor, and then by the local office management before the case can actually be "dispositioned" as FES. *Ex. B, 55-62; Ex. C. 101:8-20.* The concerns Hamman identified are, as discussed further below, matters of display,

not substantive issues of leaving out or misconstruing information that has been correctly input. Most importantly, when the question was put to him directly (by Ms. Katz), he testified the current format is ***not*** causing errors. *Ex. B, 91/25-92/8.*

C. Inaccurate or Misleading Statements.

The Plaintiffs' argument that verified immigration status information "should" be stored at the "person level" rather than at an "application level" (*Dkt. 115, p. 8*) is a complete red herring designed to suggest they can demonstrate the 2015 computer problem that failed to recognize when the 5-year bar to medical assistance applied is continuing. Whether information follows the person or the application, however, has ***nothing*** to do with the 2015 problem. If the latter still existed, the Plaintiffs would have abundant proof and would not need to make arguments such as this.

Their new argument is based on the testimony of Mr. Hamman. He testified he would like the system to display past immigration status information on the same screen as the renewal application that the EW is either reviewing or helping a customer complete. Instead, the EW has to look for the information by clicking onto one of six files in the person's folder that may have the prior immigration status. This, however, is simply a matter of display design and convenience, not a flaw that affects the substance of eligibility determinations.

If the eligibility worker fails to find a person's immigration status, this is not because the computer fails to store such information if it has been properly input. Hamman testified he did not believe people are mistakenly being determined eligible for FES benefits because the EW has to look a little harder for information.

1 In order to imply the agencies admit there are substantive system flaws, the
2 Plaintiffs quote statements out of context from the System Request document that
3 shows how AHCCCS and DES intend to improve the computer system. They quote (*p.*
4
5 *2*) the sentence that says:

6 > Every day, customers with an immigration status that allows the individual to
7 > receive full AHCCCS Medical Assistance coverage are converted from full
> benefits to Federal Emergency Services (FES),"[1] and that additional "[c]hanges to
8 > HEAplus are needed to **reduce/prevent** these incorrect decisions."

9 (Emphasis theirs.) The document, however, states just before this that "these incorrect
10 decisions" are made by DES workers, not the computer.

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12 > This System Request is to create an enhancement for the SAVE and VLP
> [immigration status] response summaries, denote when HEAplus should and
13 > should not run the immigration HUBS, *identify a correction needed to reduce the*
> *error **caused by workers** incorrectly changing customers from full to emergency*
14 > *services* and map immigration questions to individual verification factors.

15 *Dkt. 117-1, Ex. 1, p. AHC 2139.*

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17 The proposed changes to the system do not add information to, or subtract it
18 from, the applicant's file. They apply no new policy interpretation. They merely make
19 the EW's life easier by "enhanc[ing]" the display to show the SAVE and VLP response
20 summaries on a new "history screen to consolidate all SAVE/VLP responses in an easy
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22 to find location," instead of linking these responses "on an application level, which
23 requires workers to search through application history to verify potential
24 discrepancies." *Id*. As DES's Hamman testified, the present HEAplus configuration
25 may require somewhat more effort from the EW to find data rather than see it
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27 summarized, but this is not causing errors, let alone automatically.
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1 The misleading nature of the Plaintiffs' argument is shown in the case of
2 Plaintiff Sanchez Haro's 2017 renewal. Contrary to Plaintiffs' unsupported allegation
3 (p. 5) that "the computer failed to recognize her qualifying immigration status," the
4 problem in 2017 was caused because the person who corrected her case file in August
5 2016 failed to indicate the grant date of Ms. Sanchez Haro's battered alien status. *Dkt.*
6 *117-1, Ex. 5, last page*. When Sanchez Haro came up for renewal in March 2017, her
7 file contained a May 1, 2016, case note stating:
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10 **Per management, this client is a lawful permanent resident with battered**
11 **alien status and thus eligible for full MA, client was incorrectly switched to**
12 **FES, created change and reapproved full MA eff 5/1/16 . . .**
13 *Dkt. 117-1, Ex. 9, entry for 5/1/16*. The EW and her supervisor saw this but
14 nevertheless changed Sanchez Haro to FES. They did so because they could not
15 determine Sanchez Haro had a prior status of battered alien since the appropriate grant
16 date had not been checked in HEAplus the year before and the federal VLP system
17 showed Lawful Permanent Resident status with an entry date of 1/13/2015. *Id., entry*
18 *for 3/31/17*. The supervisor plainly noticed the "discrepancy" and should have
19 discussed it with "management." When someone did so, this error was caught and
20 corrected. Her benefits were restored and she was sent a notice on April 20, 2017,
21 prior to the effective date of the incorrect determination.
22
23 Despite this, the Plaintiffs conclude that Sanchez Haro's case is evidence that "the
24 HEAplus system did not properly store, save, or present the information when the case
25 came up for renewal." *Memorandum, p. 6*. Not so. Ms. Sanchez Haro's is instead a
26 classic example of human error(s). The computer cannot input its own data; it cannot
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account for any error there may have been in the information the federal VLP (Verify Lawful Presence) computer was providing; it cannot keep the EW from making a mistake.

The Plaintiffs' Memorandum misstates or distorts *many* other facts.

- They falsely claim (*p. 6*) Plaintiff Sanchez Haro "was left with emergency only benefits from March 28 through April 20, 2017." The March 28, 2017 notice of FES eligibility would not have taken effect until May 1. The mistake was corrected on April 20, 2017.
- They say (*p. 6*), "there remains no underlying fix," but they have identified no problem to fix. DES's Michael Farquhar, whose job is to analyze and test systems like HEAplus to see if they work, cannot say he's ever seen HEAplus fail to correctly recognize immigration status when there has been no interim change in the data. *Ex. C, 123:20-124:7.*
- When HEAplus and the federal verification systems do not match, this is not because of the computer. It is because of keying errors by customers, call center personnel, persons assisting the customer, or EWs. *Id., pp. 69:20-25, 141-42.* "Keying error is the first thing the reviewer looks for." *Id., 39:7-12.*[2]

[2] Unlike the AZTECS computer system, which the State uses for food stamp eligibility, where only state workers have access, any number of people have access to HEAplus (*Farquhar 55:3-11),* any one of whom can update or change information and mistype a name or ID number, omit something, or simply misunderstand information.

- They say *(p. 6)* there is no assurance that erroneous determinations will be caught, but they demonstrate no reason to believe this is true, and they ignore Hamman's testimony that all errors to date have been corrected.
- The Plaintiffs ignore the extent to which AHCCCS and DES reduce the possibility of human error by the triple layer of reviews any FES determination must pass, as set forth in Exhibit F.
- They say (*p. 14*) that this review process "identifies some but not all improper reductions, and only after the decisions go out," but they have no basis in fact for this statement.
- They say (*p. 17*) EWs sometimes cannot override the computer's potential FES determination, but they have no basis in fact for this statement either.
- They say repeatedly that the computer does not "properly" or "correctly" do something and "should" do something else, but they cite no authority as to what is proper or correct or why the computer should have been designed as they would like. For example, they say (*p. 8*) the computer does not "properly access and present" immigration status from prior applications, but they fail to show anything "improper" or "incorrect" about the access to, or presentation of, information on HEAplus. The computer's design simply requires the EW to review information available in the customer's file.
- They incorrectly say (*p. 11*) the inconvenience of the present design causes erroneous eligibility determinations, but Hamman flatly denied this. *Ex. B,*

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91:25-92:5. When asked what practical difference there is between storing information on an application level rather than the "personal" level, as Plaintiffs contend the computer "should," DES's Farquhar could not think of any. *Ex. C, 91:9-13*.

- The Plaintiffs say (*p. 9*) the system automatically reduces immigrants' benefits, but it ***cannot*** do this, and no FES determination can be made except by the EW after he or she has reviewed all the information in the customer's file and after that information has been checked again by the person's supervisor and then again by the office management. *Ex. A, ¶ 13l Ex. F.* [3]
- The Plaintiffs rely heavily on the opinion of DES's Hamman that the system "leads" EWs to make mistakes, without once acknowledging Hamman's repeated statements that this is his *assumption* based on what "*apparently*" happens (*Ex. B, pp. 42-43, 54, 57, 59-61, 129, 162).* Nor do they acknowledge that Mr. Hamman has no computer expertise, has no idea what could cause the computer to make errors, and could not give an example of how it would make an error automatically. *Id., pp. 59-61, 94, 153-55, 157.* He testified the changes he would like will improve eligibility determinations, *not*

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[3] The Plaintiffs cite (*p.9/20*) Hamman's testimony to suggest the computer automatically assigns people to FES with "no caseworkers [] involved." What he said is that, even if the computer indicates a potential FES outcome, the EW has to review it: "Q. Okay. And if it was an auto determination, do [the EWs] look to see if that determination was correct? A. Yes." Hamman discussed this procedure at length, opined that it does "what's needed," and has no suggestion to improve it. *Ex. B, pp. 55-61, 90:19-91:4.*

the computer, by giving the user pop-up warnings and additional displays of information. *Id., 94:11-18.*

- Farquhar can think of no improvements to make to the system beyond those AHCCCS is already considering in the pending System Request 392. *Ex. C, 145:8-20.*
- The Plaintiffs cite (*p. 8*) an interrogatory answer to suggest there is something improper if the computer does not "look back at prior immigration status for *each* immigrant at recertification," (emphasis added), but they omit the next sentence of the answer, the part that applies in this litigation: "HEAplus will look at the SAVE or VLP response for a prior qualified status when the immigration status is indicated as LPR, parolee, or battered alien and the individual is within the five-year bar period." *Katz. Ex. 13, interrogatory 16*.
- They say (p. 15) "the underlying problem" is that "the system cannot carry that [immigration status] eligibility information forward to the renewal application." But Mr. Farquhar testified this is wrong; the system "carries forward the data;" what it does not carry forward is a convenient summary of the SAVE and VLP responses. *Ex. C, 97:9-10. See also*, *Ex. B, 113:5-15*
- They say (*p. 9*) the supposed failure to "carry information forward" results in improper reductions, but Hamman testified it does not. *Hamman, 91/25-92/8*
- They speculate (*pp. 6,9*) with no basis at all as to how the hearsay in unauthenticated e-mails and Help Desk tickets should be interpreted.

- They say (*p. 13*) AHCCCS's computer system is "consistently causing qualified immigrants throughout Arizona to lose their benefits," but they have no basis in fact for this statement. This allegation is repeated at pages 14 and 16, each time without factual support.

In short, the Plaintiffs' claim of newly discovered evidence that supports this Motion is false. They have identified no sweeping computer problem. They ignore the fact that no one has been incorrectly determined without being promptly corrected. They misstate what happened with Ms. Sanchez Haro. They demonstrate no factual basis, new or otherwise, for class certification or for "class discovery."

IV. Plaintiffs Fail to Prove a Basis for Class Certification.

A. The Class Definition is Overbroad.

As they did a year ago, the Plaintiffs are asking the Court to ignore the work AHCCCS has done over the last two years in reexamining 8-10,000 individual cases. The Plaintiffs' proposed definition includes people whose eligibility was determined as long ago as January 2015. The Plaintiffs acknowledged in their complaint that over 3,500 such persons were "reinstated . . . to full-scope AHCCCS." *Dkt. 1, ¶ 40.* Hundreds more have followed. These people have no claim, and the Plaintiffs offer no reason why they should be included in the litigation.

Second, the Plaintiffs' original class definition included those whose benefits had been or would be "improperly" reduced. In their new definition, the Plaintiffs omit "improperly." Thus, by definition, they seek to include not only the thousands of persons whose benefits were reduced and restored, but additional thousands whose

benefits were reduced and who were thereafter confirmed ***not*** to be eligible for full benefits. The renewed Motion offers no rationale for including such people or reopening their cases through what they vaguely refer to as "class discovery."

B. The Plaintiffs Fail to Demonstrate Numerosity.

Even if they defined a manageable class and had some admissible evidence to support their argument, the Plaintiffs would still need to meet the four requirements of Rule 23(a): commonality, numerosity, typicality, and adequacy of representation. We respectfully submit they have not proved they meet any of these requirements.

As to numerosity, the Plaintiffs have identified three people whose benefits were incorrectly reduced. Full benefits were restored to each long ago. The Plaintiffs' Motion last year speculated "there could be hundreds of cases outstanding." (*Dkt. 6, p. 4.*) But none of these people materialized, and the Plaintiffs make no such allegation this year.

It is disingenuous and specious to contend that mistakes are being made without acknowledging that they are also being corrected. There simply is no group of persons who have been, or are likely to be, harmed by any policy or practice of the Director.

C. **The Plaintiffs Again Fail to Establish Commonality.**

Class relief is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 155 (1982). "Commonality is satisfied where the lawsuit challenges a

system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis,* 275 F.3d 849, 868 (9th Cir. 2001).

There might have been commonality when the computer problem was discovered in 2015 and it appeared many whose benefits were erroneously reduced could point to a common cause. That problem, however, was fixed on November 19, 2015. *Ex. A, ¶ 16.* AHCCCS demonstrated that the reasons erroneous reductions have occurred since 2015 were a) information from recipients that was incorrect, conflicting, or withheld and b) human error by eligibility workers and applicants, not an AHCCCS policy or practice. *Dkt. 39-1, ¶ 20-21.* The facts adduced in 2017 do not change this.

As the Court noted in its earlier ruling, the Plaintiffs have the burden to prove that there is some glue that "hold[s] the alleged reasons for all those [reductions] together." *Dkt. 86, p. 22*, *Citing Wal-Mart Stores, Inc*., 564 U.S. at 352. The Plaintiffs argue (p. 17) that this glue is found in "the inability of the HEAplus system to carry forward past, verified immigration information to a renewal application." However, as discussed above, the system does carry forward the information; what it does not do is display it in the way Plaintiffs would like.

The Plaintiffs nevertheless say (*p. 18*) their incorrect assumption represents a policy and practice that results in "automatic reductions in benefits, inability of caseworkers to find and save prior information in HEAplus, and inability for caseworkers to override incorrect HEAplus determinations." Even if their assumption about how the computer works were correct, their corollary arguments are each incorrect: the computer's design does *not* represent a policy or practice of the Director;

1 there are *no* automatic reductions to FES benefits; caseworkers *can* find and save prior
2 information; and caseworkers *can* indeed override an incorrect potential FES
3 determination by the system.
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5 The Plaintiffs have not established *any* policy or practice of the Director that
6 violates the law or is causing determination errors. The Complaint alleges the unlawful
7 policies and practices of the Director include "unnecessary" requests for individuals'
8 identification numbers or immigration status and the failure to properly use pre-
9 populated forms under the federal *ex parte* process. Complaint, ¶¶ 47-51. The
10 Plaintiffs' Renewed Motion does not argue the named Plaintiffs experienced any
11 violation of the *ex parte* process or unnecessary requests for interviews or information.
12 There continues to be no factual connection between the AHCCCS practices that the
13 Plaintiffs allege and their own cases.
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15 Ms. Lockner gives the date the 2015 computer problem was fixed. *Ex. A, ¶16.*
16 She explains that Darjee's reduction resulted from simple failures to key in data, not
17 computer error. Sanchez Haro's reduction was the result of conflicting information
18 from her that had to be resolved by information from the federal database, which
19 showed information that conflicted with what was available to DES and AHCCCS.[4]
20 Additional human error, not failure of the HEAplus system, occurred with Ms. Sanchez
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26 [4] Plaintiffs say there is no evidence of errors by applicants, but Sanchez Haro's case is full of them. *Ex. A, ¶ 29.* Another example is when she called DES on May 17, 2016, to ask about her benefits. The DES worker understood her to say she had only been a resident for two years, and Sanchez Haro did not correct her. *Ex. D hereto*.
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Haro's case in 2017, but it too was corrected. The Plaintiffs' examples show no single source of error, much less that the mistakes are pursuant to the Defendant's policies. There is no commonality here; each person's reduction in benefits is a unique story.

The Plaintiffs suggest this case is analogous to *M.K.B. v. Eggleston*, 445 F. Supp. 2d 400, 411 (S.D.N.Y. 2006), in which the plaintiffs showed dozens of individuals had been denied benefits for a variety of systemic reasons, including legally erroneous policies and directives to eligibility workers, staff who were "completely unfamiliar" with the legal requirements for eligibility, and a computer system that was designed so that "workers were often unable to open a case [] for a battered qualified alien." The plaintiffs in that case demonstrated evidence of each of these faults in detail for person after person whose benefits had been denied. They demonstrated that the defendants had been slow to recognize or correct these problems. There is nothing comparable in this case. Plaintiffs have identified no erroneous policies or directives, no unfamiliarity of EWs with legal requirements, no computer system that makes it impossible to process immigrant applicants, and no one whose benefits have been denied. To the contrary, the evidence shows AHCCCS and DES took immediate, effective steps to deal with the 2015 problem, to further train DES workers, and to reduce and prevent errors both by instituting the triple-check procedure that must be followed before anyone can be reduced to FES eligibility and by planning further enhancements to the HEAplus system through the pending System Request 392.

The Plaintiffs say (*p. 18*) they have "identified ample evidence of systemic errors in processing qualified immigrants' renewal applications" with "one, singular,

underlying cause: the HEAplus computer system." They have not. The most the evidence shows is that erroneous notices occur in less than 1% of immigrant renewals (336/46,000), due to the fact that human beings sometimes leave out information or put in information that is incomplete, incorrect, or unverified. All these errors were corrected. No one who received an incorrect FES notice before the mistake was corrected has complained to AHCCCS. *Ex. A, ¶¶ 6-7.*

The Plaintiffs cite (*p. 18*) Ms. Sanchez Haro's experience in 2017 as evidence that injunctive relief is necessary to "resolve the underlying problems in the HEAplus computer system," but they disregard what is shown by their own Exhibit 9. The system did not fail Sanchez Haro. An EW and her supervisor found information input by human beings and coming from the federal VLP system that was conflicting and they made the incorrect judgment that FES was appropriate. This was corrected prior to when the incorrect determination would have gone into effect. [5]

The Plaintiffs have failed to demonstrate a glue that holds the purported class together. There is no more commonality this year than there was when last year's motion was denied.

D. The Plaintiffs Again Fail to Establish Typicality

[5] Sanchez Haro experienced some confusion in early May 2017 at a pharmacy only because the separate PMMIS system, which displays AHCCCS eligibility to providers, had not been updated immediately. This was corrected within an hour by a phone call to AHCCCS.

The errors in this process cannot be traced to some flaw in the HEAplus system. Instead, the errors are idiosyncratic to each case, stemming from incomplete, inaccurate, or conflicting information; the failure of an applicant or eligibility worker to correctly key information into the computer; or the failure of an eligibility worker to find and accurately analyze available information.

The evidence the Court cited in ruling that the claims of the two named plaintiffs and the two putative class members the Plaintiffs cited are not typical even of each other has not changed. *Dkt. 86, p. 23.* The Named Plaintiffs are typical only in that 1) AHCCCS has restored their benefits and 2) human errors come in a wide variety of forms.

E. The Plaintiffs Fail to Establish Adequacy of Representation:

There are two parts to the adequacy of representation factor: "1) The representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Senter v. General Motors Corp.,* 532 F.2d 511, 525 (6th Cir.1976), *cert den,* 429 U.S. 870 (1976).

Here, the named Plaintiffs have had their benefits restored, and they have no impending threat of harm, since their future renewals are assured. *Ex. A, ¶¶ 28(d); Ex. C, 172:15-174:13.* They have no incentive to represent others.

Second, though Plaintiffs' counsel are competent, one must question their judgment in attempting to protect the purported class. When there was indeed a computer problem to be fixed in 2015, they did not bring this action. While they would

have the Court believe thousands were suffering, they waited almost a year and filed this action *after* the harm had been remedied. Now, they reurge this Motion, though they know AHCCCS and DES are doing an even better job than a year ago of catching and correcting mistakes that are made. And they ask to represent a) thousands whose benefits have already been restored and have nothing to gain from this litigation and b) thousands who are not eligible for full benefits. This seems more like a vendetta than an appropriate case for class certification.

V. The Plaintiffs Fail to Meet the Requirements of Rule 23(b)(2).

Finally, even if they had defined an appropriate class and were able to meet the requirements of Rule 23(a), the Plaintiffs would still have to meet the requirements of Rule 23(b)(2), which requires that they show that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Courts look at whether class members seek uniform relief from a "pattern or practice that is generally applicable to the class as a whole." *Rodriguez v. Hayes,* 591 F.3d 1105, 1125 (9th Cir. 2010).

These Plaintiffs have shown no pattern or practice. They have not suggested any injunctive relief that would prevent human error. They have not explained what value an injunction would have to the thousands whose benefits have been restored or a rationale for awarding relief to those who are not eligible for full AHCCCS benefits.

VI. The Alternative Motion for Class Discovery should be Denied.

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The tacit premise of this Motion is that there is a class of people whose benefits either a) were incorrectly reduced but not restored or b) will be incorrectly reduced but not restored. There are no such groups. Every person known to Defendant whose benefits were incorrectly reduced has been restored to full benefits, most of them in early 2016. Plaintiffs provide no evidence to the contrary. As to the future, DES uses a rigorous triple-check procedure whenever anyone who has full benefits might be transferred to FES benefits. *Ex. F.* This process ensures, to the extent reasonably possible, that applicants will not be reduced incorrectly to FES benefits. Plaintiffs' Motion is (as it was in 2016) silent as to any rationale for interrupting the ongoing process. They fail to explain what more could be accomplished by injunctive relief. Certifying the class proposed by the Plaintiffs would promote a huge waste of time and resources.

In the alternative, Plaintiffs' Memorandum in Support suggests that if the Court does not grant class certification, the Court should nonetheless allow unspecified "class discovery." This is simply a request for a fishing license. The Plaintiffs fail to explain what they think they would find, assuming they had the time and resources to reconstruct the particular facts and analyses that may have led to erroneous initial determinations for thousands of past cases or in the renewals that occur each month going forward. Since Plaintiffs do not dispute that past mistakes have been corrected or that new mistakes will be corrected on an ongoing basis, it is difficult to conceive of a justification for the massive burden such discovery would place on AHCCCS and

DES. As one can see from their requests for production 10-13 in Exhibit E hereto, Plaintiffs have in mind discovery that would be staggeringly burdensome.

The Memorandum in Support does not even attempt a justification for such discovery, so there is nothing more to respond to regarding the alternative motion. It should be denied for lack of good cause and for lack of any supporting legal argument.

CONCLUSION

Director Betlach requests that the Plaintiffs' Motion be denied.

RESPECTFULLY SUBMITTED this 29th day of September, 2017.

JOHNSTON LAW OFFICES PLC

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List of Exhibits to Defendant's Response to Renewed Motion for Class Certification

Exhibit A	Declaration of Tara Lockner (AHCCCS)
Exhibit B	Excerpts of Deposition of Marvin Hamman (DES)
Exhibit C	Excerpts of Deposition of Michael Farquhar (DES)
Exhibit D	Translation of Sanchez Haro phone call to DES, 5/17/16
Exhibit E	Plaintiffs' First Request for Production of Documents
Exhibit F	Health-e-Arizona Update 6/5/17

[same document as Ex. 15 to Katz Declaration and Exhibit 3 to Hamman Deposition]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 29, 2017, he electronically transmitted the foregoing Defendant's Response to Renewed Motion for Class Certification to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic filing to the following CM/ECF registrants:

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