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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.

No. CV 16-00489 TUC-RM (DTF)

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR CLASS CERTIFICATION, OR IN THE ALTERNATIVE, TO TAKE PLAINTIFFS' MOTION UNDER ADVISEMENT AND FOR CLASS DISCOVERY

INTRODUCTION

Defendant's response concedes that, during a recent eight month period this year, *610* immigrants had their medical benefits improperly reduced from full to emergency only services, including 336 who received an incorrect notice that their benefits would be reduced to emergency only. Lockner Decl., ¶ 6, Doc. 124-1. Indeed, the Arizona Health Care Cost Containment System's ("AHCCCS") log of improper reductions—which Defendant fails to address in its response—demonstrates that these improper reductions are

a nearly daily occurrence, and routinely occur without caseworker involvement. *See* Katz Third Decl., Exh. 2, Doc. 117-1 (pages 295-2 through 309-2 where "auto-job" is noted in the right column). Yet Defendant contends that this evidence is insufficient to support class certification because, according to Defendant, none of these people were injured because benefits were "quickly" restored as a result of Defendant's review process.

Notably, that review process was only initiated after this litigation was filed and there is no guarantee that it will continue. Moreover, Plaintiffs dispute Defendant's bald factual assertions that no one was injured and requests the chance to investigate the basis for those claims (*e.g.*, Who are the 610 individuals? How long is "quickly"? Did any individuals who received a notice, delay or skip an appointment as a result? Defendant's response provides no clarity.). But even so, those factual disputes, at best, go to Plaintiffs' ultimate ability to prove liability at summary judgment or at trial; they do not defeat class certification at this stage of the litigation. Instead, the undisputed fact that Defendant has already identified, and continues to identify on a daily basis, immigrants whose benefits are improperly reduced, demonstrates that there are common questions of fact and law that make class certification appropriate. Finally, given the vulnerable population harmed by the reductions,[1] the continuing improper reductions of benefits and Defendant's refusal to formally agree to a review process that includes AHCCCS staff before any reduction notices are sent, class certification is not only appropriate, but is acutely needed in this case. *See Sister of Notre Dame de Namuv v. Garnett-Murphy*, 2012 WL 2050377 at 13 (June 6, 2012, No. C10-01807 HRC, N.D. Cal.) (remediation efforts do not guarantee harm will not occur and injunction provides additional benefit that voluntary efforts do not provide).

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[1] The immigrants harmed often do not speak English, do not understand the medical system and the notices they are sent and cannot assert and protect their rights. Ryan Decl., ¶ 21, Doc. 10. By the time Ms. Ryan's program and the Institute understood there was a systemic problem, over 3,600 immigrants had their medical benefits improperly reduced. Complaint, ¶ 40, Doc. 1.

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ARGUMENT

Plaintiffs request certification of a class defined as:

> All immigrant residents of Arizona eligible for full-scope Arizona Health Care Cost Containment System ("AHCCCS") benefits who, on or after January 1, 2015, have been or will be required to recertify their eligibility for AHCCCS through the Health-e-Arizona Plus computer system and whose benefits have been or will be reduced from full-scope AHCCCS to emergency-only AHCCCS.

Defendant first contends that the class definition is overbroad because it includes people who are confirmed "***not*** to be eligible for full benefits." Response at 17, Doc. 128 (emphasis in original). But, this argument ignores that the class is expressly limited to individuals who *are* "eligible for full-scope [AHCCCS]," but whose benefits are nonetheless reduced. Thus, the class definition is properly limited to individuals who have had benefits reduced, despite being eligible.

The remainder of Defendant's response amounts to an argument that Plaintiffs have failed to prove their underlying claims on behalf of the class. But sufficient proof "to prevail on the merits . . . is not a prerequisite to class certification." *Amgen, Inc., v. Connecticut Retirement Plan and Trust Funds,* 568 U.S. 455, 459 (2013). The Supreme Court was careful to explain that under *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Id.* at 466.[2] Instead, all Plaintiffs must show is that "questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Id.* at 459.

Accordingly, as described below, while Plaintiffs strongly disagree with Defendant's assertion that its ongoing review process is adequate and that none of the hundreds of immigrants have been harmed by the ongoing reductions in benefits,

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[2] Although in *Amgen* the Court's discussion related to Rule 23 (b)(3), the Ninth Circuit has held that the same analysis applies to other sections of Rule 23 that have a less demanding standard to meet. *Stockwell v. City and County of San Francisco,* 749 F.3d 1107, 1113 (9th Cir. 2014).

Defendant's assertion nonetheless represents a common answer to the common question presented in Plaintiffs' motion. At the class certification stage, that is all that is required. *See Just Film, Inc. v. Buono*, 847 F.3d 1108, 1122 (9th Cir. 2017) ("Plaintiffs' position . . . may or may not prevail, but that is a merits question not appropriately addressed at the class certification stage.").

I. Commonality--the HEAPlus Computer System Consistently Fails to Properly Determine Immigrant Eligibility for All Class Members

Defendant first contends that class certification is inappropriate because, in his view, all of the improper reductions in benefits are caused by isolated caseworker errors or mistakes that lack a common thread. But Defendant's position mischaracterizes the Health-e-Arizona Plus ("HEAPlus") issues as mere "display" problems, or questions of convenience for the caseworker, and ignores the significant evidence set out in Plaintiffs' opening brief that HEAPlus not only generates automatic errors without caseworker involvement, but also actively encourages caseworker errors. Plaintiffs' Memo., Doc. 119 at 8-13.

In fact, according to every witness to testify in this case, including Ms. Tara Lockner, eligibility at renewal always begins with an automatic process within the HEAPlus computer system. *See id.*; Lockner Decl. ¶ 9, Doc. 124-1. Plaintiffs "common contention" is that the cause of these improper determinations is the HEAPlus computer system, which starts with the improper immigration determinations during the automatic process, before any caseworker involvement. Katz Fourth Decl., Exh. 24, Farquhar Dep. at 31:21- 33.[3] As described in Plaintiffs' opening brief, that automatic error at the outset sometimes results in an automatic disposition to emergency benefits, and in other cases persists even when a caseworker gets involved later on. Doc. 119 at 8-13.

But the fact that some cases are dispositioned automatically, while some pass

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[3] Mr. Farquhar was deposed on September 18, 2017, after Plaintiffs' opening brief was filed.

through the hands of caseworkers does not defeat commonality, as Defendant asserts. Indeed, "Plaintiffs need not show . . . that every question in the case, or even a preponderance of questions, is capable of class wide resolution. So long as there is even a single common question, a would-be class can satisfy the commonality requirement of Rule 23(a)(2)." *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) (internal citations and quotations omitted). Accordingly, commonality exists even if "the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class." *Id.* (internal citations and quotations omitted). The question of whether HEAPlus is properly determining immigrant eligibility when processing renewal applications, is thus a common question of fact that supports class certification.

Finally, Plaintiffs and the putative class have suffered, and are at risk of suffering, the same injury—the improper determination that they are eligible only for emergency benefits—which separately supports commonality. That is true even if some, or even many of the class members as Defendant contends, have not suffered serious harm as a result. *See Parsons*, 754 F.3d at 678 (finding commonality based on class members' exposure to the same risk even though that risk "may ultimately result in different future harm for different [class members]—ranging from no harm at all to death," because "every [class member] suffers exactly the same constitutional injury"). Accordingly, because the putative class members all suffer the same legal injury—denial of federally protected Medicaid benefits—there are common questions that warrant class certification.

A. Defendant Ignores Evidence of Errors in the Auto-Renewal Process

Relying solely on the declaration of Tara Lockner, Defendant asserts that the HEAPlus computer system cannot reduce benefits without human intervention. But Defendant simply ignores evidence that auto-renewal errors are common. Most notably, the log of improper reductions compiled by AHCCCS repeatedly references "auto-job" errors. *See* Katz Third Decl., Exh. 2, Doc. 117-1 (pages 295-2 through 309-2 where "auto-job" is noted in the right column). Defendant does not discuss this evidence in his response at all, and asserts in passing that the Court should entirely disregard this document because

it is hearsay and lacks foundation. But Mr. Hamman described AHCCCS's process for generating this log, Katz Third Decl., Exh. 10, Hamman Dep. at 27-31, Doc. 117-1 and party-admissions and business records, of course, are admissible. Fed. R. Evid. 803.[4]

Nor does Defendant seriously contend with the additional evidence that the HEAPlus computer system is automatically reducing benefits. Mr. Hamman, Mr. Farquhar, and Ms. Lockner all consistently testified that the HEAPlus system is *supposed* to make an immigration eligibility determination based on the available information by checking the federal VLP ("verify lawful presence") hub to see if there was a change in immigration status. This is called the automatic process or "auto-job." If there are no changes to immigration status, the case *should* auto disposition with no worker intervention, Fourth Katz Decl., Exh. 24, Farquhar Dep. at 33:19-25, and the immigrant "should have continued with the same status." *Id.* at 60:2-6.

But the evidence shows there is a big gap between what the system "should" do and what it actually does. Defendant relies heavily on Mr. Farquhar's testimony.[5] But Mr. Farquhar admitted that if there are no changes in immigrant status, the information "should" carry forward to the HEAPlus generated application, but he cannot confirm that it happens in all cases. *Id.* at 65:18-66:1-5. He also acknowledged that not all of the immigration information is carried forward. *Id.* at 98:9-15. Moreover, Mr. Farquhar also

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[4] Defendant failed to identify the specific evidentiary issues with each document and, thus, his purported objections have no merits. *Avevalo v. Hyatt Corp.*, 2013 WL 2042555 at 3 (CV 12-7054 JGB VBKx) (May 13, 2013, C.D. Cal. At 3) (Court need not consider boilerplate and blanket objections to evidence where party failed to provide analysis for specific items of evidence). Regardless, at a minimum, Plaintiff should be offered an opportunity to complete discovery in order to lay further foundation for this document, beyond Mr. Hamman's testimony.

[5] Defendant contends that Mr. Farquhar's testimony should be given more weight than Mr. Hamman's. Response at 8, Doc. 128. But Mr. Farquhar is a "business analyst," and like Mr. Hamman, Mr. Farquhar has had no formal education on computer systems or databases, Fourth Katz Decl., Exh. 24, Farquhar Dep. at 7: 5-11, 10: 4-17, and only an initial training on immigrant eligibility. *Id.* at 128:10-129:8. Moreover, as described in the text, Mr. Farquhar's testimony confirms ongoing HEAPlus problems.

1 described that even when there are no changes in immigration status, there are cases where
2 the person is "displaying emergency services and they should be full services." *Id.* at
3 61:17–62:1-8. In fact, he gave an example where the immigrant met the 5 year status
4 requirement, but he got "conflicting results" between the *external* SAVE response from the
5 federal database, which showed eligibility for full medical, while the *internal* HEAPlus
6 results showed eligibility for emergency only services. *Id.* at 26:6-27:20. In that case, he
7 submitted a ticket to the vendor Social Interest Solutions ("SIS") because he "could not
8 find the cause for HEAPlus giving me emergency services." *Id.* at 28:2-17. That is, there
9 was no "keying" error, by a caseworker or anyone else: the error was solely within
10 HEAPlus and occurred despite the review process and internal workarounds that Defendant
11 now contends are sufficient.

12 Mr. Hamman likewise acknowledged that the system was not carrying immigration
13 information forward, and even requested that the system be changed; but he was not clear
14 why that had not happened. Katz Third Decl., Exh. 10, Hamman Dep.at 92:9-93:2, Doc.
15 117-1. He also described how the auto renewal process was making incorrect immigration
16 determinations. *Id.* at 22:15-23, Doc. 117-1. Because of these "system" problems, tickets
17 are written up and sent to the vendor, SIS. *Id.* at 23:20-24:22. Although Plaintiffs
18 described several examples of these tickets in their opening brief, Doc. 119 at 11-13, Doc.
19 117-1, Exhs. 16-19, 21, Defendants did not address them, instead incorrectly asserting
20 that every error that has occurred is simply a "keying" error.

21 Moreover, Mr. Farquhar also knows that qualified immigrants receive different
22 eligibility determinations, keeping their eligibility for food stamps but getting transferred
23 to emergency medical. Fourth Katz Decl., Exh. 24, Farquhar Dep. at 53:23-54:8. He also
24 understands that in the AZTECS computer system that processes applications and
25 recertifications for food stamps, immigration information only needs to be entered one
26 time. All the immigrant information "gets locked down once determination for eligibility
27 has been done the first time . . . So when it comes to renewal . . . if there's no change in
28 your immigration status, they [the caseworker] don't have to touch the screen." *Id.* at 56:

1 7-25 -57:1-15.

2 **B. Defendant Ignores Evidence that HEAPlus Errors Continue When the**
3 **Caseworkers Take Over Cases**

4 When the HEAPlus system does not automatically determine eligibility, the case
5 goes to a DES case worker or eligibility worker. While there are sometimes "keying
6 errors," Mr. Farquhar explained that those errors are the "first thing we try and go back and
7 look for," and are quickly resolved at the help desk. Fourth Katz Decl., Exh. 24, Farquhar
8 Dep. at 39:7-11, 40:2-7. Plaintiffs acknowledge that, of course, keying errors will
9 sometimes occur. These are not the focus of Plaintiffs' motion and Defendant's repeated
10 efforts to portray these benefit reductions as hapless mistakes is a red herring.

11 In fact, Defendant does nothing to rebut Plaintiffs' evidence that caseworkers often
12 recognize that the computer is producing the wrong result, but cannot resolve the issue.
13 Plaintiffs' Memo. at 11-13, Doc. 119, Doc 117-1, Exhs. 16-19, 21. Mr. Farquhar confirmed
14 that this is a problem, describing help desk tickets where the case worker realized that even
15 though there were no changes in immigration status, the HEAPlus computer system
16 incorrectly "is displaying emergency services and they should be full services." Fourth
17 Katz Decl., Exh. 24, Farquhar Dep. at 61:17-62:1-8. Defendant does not refute any of these
18 examples and does not submit other evidence showing these tickets are not illustrative of
19 the computer errors.

20 Nor did Defendant acknowledge the evidence that the HEAPlus system leads them
21 to the wrong result. *See* Doc. 119 at 8 (citing Katz Third Decl. Exh. 10, Hamman Dep. at
22 42:11-24, Doc. 117-1. "Mr. Hamman's testimony that 'the system is leading [caseworkers]
23 to an FES [emergency] decision when it should be a full service,' because 'it's not
24 evaluating the immigration information correctly.'"). Mr. Farquhar reaffirmed this
25 problem, describing that "some of our newer workers don't have all the knowledge and
26 skill behind eligibility" and if the computer does not lead them "down the path," the worker
27 can "wind up doing some harm by reducing" the level of service. Katz Fourth Decl., Exh.
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24, Farquhar Dep. at 127:21- 128:5.[6]

Defendant attempts to rebut this evidence by asserting that Marvin Hamman's testimony is based on speculation, Doc. 128 at 8, but Mr. Hamman supervises the daily review of all the cases where DES has or intends to reduce medical eligibility and is very familiar with the computer problems case workers have raised. Katz Third Decl. Exh. 10, Hamman Dep. at 21: 6-13, 25:5-22, 27:13-14, Doc. 117-1. Defendant also misstates the testimony of Mr. Farquhar, who stated that he has not reviewed all the medical applications and cannot say that he has not seen cases where the immigrant previously was found eligible for full medical benefits based on meeting the 5 year status requirement and then was screened eligible for only emergency benefits. Katz Fourth Decl., Exh. 24, Farquhar Dep. at 123:11-25-124:1-7. His lack of surety is of no consequence because the record is replete with examples of immigrants entitled to full medical benefits who are improperly transferred to emergency only benefits. Plaintiffs' Memo. at 10-13 and Exhibits cited therein, Doc. 119.

II. Sanchez Haro's Case Is Typical

Plaintiff Sanchez Haro has experienced multiple reductions in benefits, each typical of the problems created by HEAPlus. Defendant attempts to discount Ms. Sanchez Haro's experience by reciting various "inconsistencies" in Sanchez Haro's applications, but that argument misses the point. First, as described above, there should be no need for an applicant, such as Sanchez Haro, or a case worker on her behalf, to continually input and edit immigration status when it has not changed.[7] Thus, even if Defendant was correct about

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[6] Mr. Farquhar also testified about another way that the HEAPlus system can lead to an incorrect result: he acknowledged that if certain immigration questions are not answered, HEAPlus treats the answer as a "no," which can cause the case to improperly screen the individual for emergency only benefits. *Id*. at 103:21-25; 104; 105:1-4. He conceded that even if Homeland Security verified qualified immigration status, if the questions are not answered in HEAPlus, "it can cause people to wind up getting emergency services," even when their immigration status has not changed and has been verified externally. *Id.* at 107:1-14.

[7] It is disingenuous for Ms. Lockner to claim it is not AHCCCS policy to ask about immigration at renewal, Lockner Decl. ¶ 29, Doc. 124-1, when the examples she gives for

the inconsistencies in her applications—and he is not—HEAPlus's flawed design is responsible for requiring repeated verification from the applicant instead of carrying forward previously verified information.

Moreover, Defendant's argument misconstrues Ms. Sanchez Haro's applications in 2016 and 2017.[8] First, Defendant continues to point to purported inconsistencies as far back as 2010 as the cause for her improper reduction in 2016. Lockner Decl. ¶ 29(a), Doc. 124-1. But, Ms. Haro's immigration status was verified in 2015 when she first became an LPR because she continued to receive full medical benefits. Sanchez Haro Decl.¶¶ 3, 5, Doc. 11. Accordingly, in 2016 when she re-certified, HEAPlus should only have looked at the most recent application, the one from 2015; it should never have looked back at the earlier applications or immigration status information.[9] In other words, if Defendant is correct that the earlier immigration statuses from 2010, 2012, and 2014 created an "inconsistency" within HEAPlus, when processing Ms. Haro's 2016 application, that is yet more evidence

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Ms. Sanchez Haro's purported incorrect responses over several years are answers to direct questions from AHCCCS about her immigration status. Moreover, Plaintiff has stated that all her renewals are initiated by DES asking her to come to the office and answer questions. Katz Third Decl., Exh. 8. Doc. 117-1. Defendant's reference to a telephone call where Plaintiff's "residence" is discussed, Response at 18 n.4, Doc. 128, is obviously a discussion about her legal permanent residence, and occurred *after* her benefits had already been reduced. Indeed that is the reason Ms. Sanchez Haro made the call: to ask about the reason for the reduction. Thus, her answer, even if "inconsistent" was not the *cause* of that reduction.

[8] Defendant's counsel's explanation of the reason for Plaintiff Sanchez Haro's improper transfer in March 2017 is entitled to no consideration. *Multimedia Patent Trust v. Apple, Inc.*, 2013 WL 173966 (Jan. 16, 2013, No. 10-CV-2618-H (KSC) S.D. Cal) (argument of counsel is not evidence).

[9] There was no new information or new documents for Ms. Sanchez Haro to produce in 2016. Years earlier, Ms. Sanchez Haro's immigration attorney had produced numerous documents that Ms. Sanchez Haro entered the U.S. before 1996 and had continued to live in the U.S. that were in her case file. Second Katz Decl., ¶ 3, Exh. D, at 2-3, Docs. 46-46-1. Nor was there a need for a "hand written verification of when her battered alien status was granted" because AHCCCS had a copy of the approval notice in its case file. *Id.* at 1. Also, in the file was an e-mail from DES workers confirming that Ms. Sanchez Haro had established continuous residency. *Id*. at 4. Ms. Lockner tries to make it look like this was a complicated case when it was not.

that the computer system is not carrying forward the correct immigration information.

Once the 2016 error was corrected, Defendant assured Plaintiffs, and this Court, that the problem was fixed. Indeed, Ms. Sanchez Haro's immigration status and her eligibility for full benefits was stored in HEAPlus at that time. That is, in 2016, HEAPlus had all the information it needed to screen Ms. Sanchez Haro eligible for full benefits, including the "grant date" described by Ms. Lockner. Plaintiffs' Memo., Doc. 119 at 4-5, and Exhibits cited therein. But, as described in Plaintiffs' opening brief, her benefits were again reduced in 2017. Ms. Lockner now asserts that the 2017 improper reduction occurred because Ms. Sanchez Haro's grant date when she became a battered immigrant was not noted in HEAPlus. But, when the 2016 error was corrected, HEAPlus had verified her immigration status, including the date she was granted battered immigrant status, and it was precisely that information that was used to re-establish her eligibility for full benefits in 2016. *See* Plaintiffs' Memo., Doc. 119 at 4-5. Where did that information go? The HEAPlus system did not store and carry forward that information although it had her immigration document. Those are failures of the system.

This case is also typical of the class in that it highlights the ineffectiveness of Defendant's current work around and review process. As explained in Plaintiffs' opening brief, while there is a review of all immigrant cases HEAPlus intends or has reduced to emergency only benefits, review does not catch all the improper reductions, with Ms. Sanchez Haro being one example. Plaintiffs' Memo. at 11-12, Doc. 119. Although, as Defendant emphasizes, there were comments in Ms. Sanchez Haro's case history, multiple layers of reviewers nonetheless concluded that "per LPR card in HEA documents, Alma has LPR status, but five-year ban not met. FES correct category." Katz Third Decl., Exh. 9, Doc. 117-1. The fact that the HEAPlus system did not properly store, save, or present the complete immigration information when Ms. Sanchez Haro's case came up for renewal, undermined the integrity not only of the initial application process, but also of the "triple check" review that Defendant's emphasize.

Finally, Defendant's claim that Ms. Sanchez Haro was not injured by the reduction

of emergency benefits is false. On May 9, 2017, Ms. Sanchez Haro was denied a prescription medication because her pharmacy was told she did not have full AHCCCS. Katz Fourth Decl., ¶4. Moreover, as described above, it is the legal injury—the denial of Medicaid benefits to which she is entitled—that matters for class certification. *Parsons*, 754 F.3d at 678.

3. Numerosity

Plaintiffs easily satisfy numerosity. By Defendant's own admission hundreds of individuals have had their benefits improperly terminated. Such a large number is more than adequate to satisfy this requirement. Nonetheless, Defendant appears to argue that the class should not be certified because the hundreds of individuals who have lost benefits make up a small percentage of the total population of Medicaid beneficiaries. But there is no authority whatsoever for evaluating numerosity on a percentage basis, and Defendant cites nothing to support this novel argument.[10] Nor does Defendant receive a free pass because the federal government has decided that it will not withhold federal funds from a state Medicaid agency until the state's *excess* payment error rate hits 3%. 81 FR 40596-01, 2016 WL 3402966. First, the judicial standards for class certification are entirely unrelated and distinct from the federal agency's policy determinations concerning funding thresholds. Moreover, the regulation at issue concerns state errors that result in *excess* payments to individuals who are not eligible for benefits. It does not relate to the circumstances here where the state is incorrectly withholding benefits from qualified, eligible individuals. Defendant's obligation to properly process renewals, and the Court's class certification analysis, are simply not impacted by the federal government's process to withhold federal funds.

4. Adequate Representation

The final prong of Rule 23(a), the "adequate representation" factor, requires the

[10] Beyond the irrelevance of the numbers and the hypothetical calculations, Defendant relies on numbers from the Migration Policy Institute that concern "all" immigrants, not just qualified immigrants. Response at 3, Doc. 128.

1 Court to find that the "representative parties will fairly and adequately protect the interests
2 of the class." Fed. R. Civ. P. 23(a)(4). The Ninth Circuit asks two questions: "(1) Do the
3 representative plaintiffs and their counsel have any conflicts of interest with other class
4 members, and (2) will the representative plaintiffs and their counsel prosecute the action
5 vigorously on behalf of the class?" *Staton v Boeing, Co.,* 327 F.3d 938, 957 (9th Cir. 2003
6 (citations omitted); *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1020 (9th Cir. 1998)

7 Defendant concedes there are no conflicts but instead claims, with no legal support,
8 that Plaintiffs' benefits were restored, their "future renewals are assured" and accordingly,
9 "[t]hey have no incentive to represent others." Response at 21, Doc. 128. This is similar
10 to what Defendant claimed in response to Plaintiffs' initial motion for class certification
11 and it was proved false concerning Plaintiff Sanchez Haro and for over 600 other qualified
12 immigrants in a recent 8 month period. Katz Third Decl., Exh. 2, Doc. 117-1. Finally,
13 while conceding Plaintiffs' counsel are "competent," and again, without any legal or
14 factual support, Defendant makes disparaging and unsupported statements about counsels'
15 motives. Plaintiffs and their counsel have demonstrated that they will vigorously prosecute
16 this case on behalf of the class.

17 **5. Plaintiffs' Claims Satisfy Rule 23(b)**

18 Finally, Plaintiffs must also satisfy one subdivision of Rule 23(b). This lawsuit
19 meets the requirement of Rule 23(b)(2) that "the party opposing the class has acted or
20 refused to act on grounds generally applicable to the class, thereby making appropriate
21 final injunctive relief or corresponding declaratory relief with respect to the class as a whole
22 . . ." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) "does not require . . .[the court] . . . to examine
23 the viability or bases of class members' claims for declaratory and injunctive relief, but
24 only to look at whether class members seek uniform relief from a practice applicable to all
25 of them." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010). As Plaintiffs discussed
26 in their opening brief, this is the classic case for class certification. Plaintiffs' Memo. at
27 23, Doc. 119.

28 Defendant claims injunctive relief would not prevent the improper transfers. That

1 simply is not true. An injunction would require Defendant to implement changes to the
2 HEAPlus system to reduce and prevent errors. To date, although AHCCCS has been aware
3 of several changes to the HEAPlus system that would help alleviate these problems for
4 over a year, including those described in the System Request 392, Katz Third Decl., Exh.
5 1, Doc. 117-1, it has not implemented those changes. An injunction would ensure that the
6 changes were not only implemented, but maintained. Absent an injunction, all remedies or
7 changes to the HEAPlus system are voluntary.

8 **III. In the Alternative, the Court Should Allow Plaintiffs to Conduct Class**
9 **Discovery**

10 As demonstrated above and in Plaintiffs' initial memo, the evidence produced to-
11 date is more than enough to satisfy Plaintiffs' burden under Rule 23(a). Plaintiffs
12 acknowledge, however, that discovery is still ongoing. For instance, several knowledgeable
13 employees of DES and AHCCCS have yet to be deposed. The parties also have unresolved
14 discovery disputes that include whether Defendant should have to respond to class
15 discovery. Discovery concerning the HEAPlus computer system also has not been
16 produced. While Plaintiffs seek certification of the class, the evidence presented with this
17 motion demonstrates that there is a serious factual question regarding the problems in the
18 HEAPlus system and the ways that computer system is affecting qualified immigrants.
19 Accordingly, Plaintiffs request, in the alternative, that the Court take the Motion for Class
20 Certification under advisement and allow Plaintiffs to conduct class discovery prior to the
21 Court's ruling.

22 Defendant objects to the class discovery and refers to three production requests,
23 claiming they are burdensome. Response at 23-24, Doc. 128. Defendant did not object to
24 the production requests as burdensome and this objection is waived. Katz Fourth Decl.,
25 Exh. 26. *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir.
26 1992) (failure to object to discovery within time period constitutes a waiver of the
27 objection). Moreover, Defendant's objection is not well taken. Defendant contends that the
28 Court should deny Plaintiffs' motion because Plaintiffs "know of no one who has been

injured or not had her benefits restored," (apparently ignoring Plaintiff Sanchez Haro) but objects to providing any identifying information about the hundreds of individuals that it has identified as having had their benefits reduced. Similarly, Defendant relies on Ms. Lockner's assertion that "no one has complained" about their benefits being reduced, (apparently ignoring Plaintiff Sanchez Haro again) while objecting to providing Plaintiffs with an evidentiary basis for those assertions. At a minimum, fairness requires allowing Plaintiffs to investigate these claims.

Conclusion

For the reasons stated above, the Plaintiffs ask this Court to certify this case as a class action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2) and pursuant to Rule 23(g) and to appoint the following law firms to represent the class: the William E. Morris Institute for Justice and the National Health Law Program. In the alternative, Plaintiffs ask this Court to take the Motion for Class Certification under advisement and allow Plaintiffs to conduct class discovery.

Respectfully submitted this 11th day of October 2017.

NATIONAL HEALTH LAW PROGRAM

WILLIAM E. MORRIS INSTITUTE FOR JUSTICE

By /s/ Ellen S. Katz

Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October 2017, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal to the following CM/ECF Registrants:

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