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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)

RESPONSE TO PLAINTIFFS' EXPLANATION/ARGUMENT BASED ON NEWLY PRODUCED DOCUMENTS

Defendant hereby responds to the Plaintiffs' Explanation/Argument Based on Newly Produced Documents. This Response is supported by the Declaration of Dareth Cox, filed herewith.

I. Numbers of Persons Affected by the Errors at Issue

The Plaintiffs argue a sentence in Exhibit 31 that says there have been instances "where the error [in reducing someone from full to emergency-only (FES) benefits] was not identified or corrected prior to the effective date of improper transition" shows DES does not quickly catch its mistakes and there is a systemic problem. Not so.

There have been only five such instances. *Cox Declaration*, ¶ *11*. To put this number in context, DES processed approximately 46,000 immigrant renewals in December 2016 – August 2017. *Doc. 128, p. 3*. Each of these had to be "dispositioned" by an eligibility worker as being eligible for full benefits or FES. Of these 46,000 manual renewals, 610 people were incorrectly reduced from full to FES benefits. Of the 610, 336 were sent a notice of reduced benefits; the other 274 errors were caught before notices were sent out. ***All but 5 of these 336 received the corrected notice of full benefits before the date on which any change in benefits would have occurred***. And from August 21-November 22, 2017, another 156 people were identified who were incorrectly changed from full to FES services. ***All*** these 156 individuals had their eligibility corrected before any reduction in benefits took effect. *Id.*

Thus, the error rate for the mistake at issue is about 1.3% (610/46,000), rather than the "sweeping problem" the Plaintiffs allege. Few errors were made and 761 out of 766 were corrected before the person's eligibility changed. The number who ***may*** have been harmed is therefore on the order of 5 out of 61,000 renewals (46,000 for December-August and perhaps another 15,000 for August-November).

II. Sanchez Haro's October 2017 Application

Sanchez Haro went to a DES office on October 12, 2017 to make a change to Nutritional Assistance (NA) eligibility for herself, her daughter, and her granddaughter. *Id.*, ¶ *2*. The DES eligibility worker ran an application for Medical Assistance with the NA application. Because a change was being processed, the HEAplus system

automatically submitted the applicants' names to the federal Verified Lawful Presence (VLP) system. *Id., ¶ 3.*

The VLP system provides the most current immigration status information. It reported that Ms. Haro was a lawful permanent resident and had a grant of, and an entry date for, that status of 1/13/2015. *Doc. 155-1, Ex. 28.* This VLP information carries forward on the HEAplus application. The VLP system, however, does not provide information on prior Battered Non-Citizen status. VLP reported Sanchez Haro had not met the 5-year bar. *Id., p. 1.* The 2015 date from VLP automatically caused HEAplus to screen Ms. Sanchez Haro as being ***potentially*** eligible only for FES because the 2015 grant date appears inconsistent with whether she has met the 5-year bar and is eligible for full benefits. *Exhibit A, ¶ 5.*

At this point, the computer ***could not*** reduce her benefits; it was an eligibility worker's responsibility to decide how to disposition her case after reviewing the information in her file.[1] Among other things, the case notes from her prior application in February 2017 made sure to state, "SHE IS ELIGILE FOR FULL COVERAGE." *Doc. 117-1, at 130*. The EW nevertheless incorrectly decided to reduce Sanchez Haro's eligibility to FES, and we do not know if he took this decision to his supervisor for review, as required by DES policy and procedure *(Doc. 124-7).*

[1] Plaintiffs' counsel in her reply argument on December 14 stated that it was only after this case was filed that AHCCCS made it impossible for the computer to automatically reduce someone from full benefits to FES. That too is incorrect. The system has been programmed this way since November 19, 2015. *Id., ¶ 13.*

The Plaintiffs' unsupported conclusion that, "The source of the problem is that the immigration information that the Defendant entered into the HEAplus computer system continues to generate an incorrect determination because of the computer system's own flaws and functions" has no basis at all. *Doc. 154, p. 2.* The HEAplus system generated correct information. The application summary shows Sanchez Haro's grant date as 1/13/2015, as reported by the VLP system. *Doc. 154-1 at 6-9.* The computer is not keyed to show she has a verified continuous U.S. residence since 1996 because such residence has never in fact been verified by AHCCCS (and does not need to be because of her full benefit eligibility on other grounds). *Ex. A, ¶ 4.*

More importantly, the computer did not make the eligibility determination. The incorrect disposition was made by the eligibility worker who failed to note the information in her file that showed she was eligible for full benefits. As DES's Michael Farquhar testified on September 18, 2017, any EW who reviewed the case note quoted above should find her eligible for full benefits. *Doc. 124-4, 173:11-174:13.* This worker simply didn't. And either he compounded his error by not taking the application to his supervisor for review, or the supervisor also made a mistake.

The new evidence regarding Sanchez Haro's case therefore does nothing to show a common issue of fact or law to support certification of a class. Each time she has been incorrectly determined has been because of a different kind of human error.

III. The Allegation of "Continuing System-Wide Errors"

We note the irony of Plaintiffs' Reply in support of their Renewed Motion for Class Certification, which argues at fn. 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).

Plaintiffs evidently think a different standard applies to them. Though they have sought ever more discovery and repeated discovery extensions on the theory that they will find an expert who will find something wrong with the HEAplus system, their renewed motion depends solely on ***their counsel's*** "explanation/argument." Their self-serving analysis is not supported by anyone else and is wrong every time.

For example, Plaintiffs argued at length at the hearing that a Help Desk ticket (*Doc. 117-1, Exhibit 19*) shows the HEAplus computer system provided an incorrect "actual result" versus the "expected [correct] result." This is yet another incorrect "explanation." As Ms. Cox's Declaration *(¶ 17*) states, on investigation the incorrect "actual result" was caused by an eligibility worker who had made a change in the AHCCCS applicant's file in 2016 but did so by working from a 2014 application rather than one showing the then-correct information. *Ex. A to Cox Declaration*. Once that out-of-date information was keyed into the system, it appeared at the next auto-renewal of the applicant. The computer used the information it was given.

Regardless how many times the Plaintiffs' attorneys announce they can show the system does not work and that many people are suffering, discovery continues to disprove these assertions. The ***evidence*** is that 1) DES and the system correctly process the overwhelming majority of AHCCCS immigrant renewals, 2) human error is the common denominator when mistakes occur, 3) and the mistakes are corrected.

The Plaintiffs fail to show the Director has any policy or practice that violates the law. Their argument that his policy is to use a faulty computer system is frankly absurd.

The Plaintiffs' burden under Rules 23(a) and 23(b)(2) is to "affirmatively demonstrate" a problem for which there is a common answer by means of the injunctive relief they seek. The Plaintiffs failed to meet this burden, and their incorrect interpretations of the most recent discovery do nothing to change that. Even if the *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014) "risk of harm" analysis applied beyond Eighth Amendment prisoner cases, the risk here of human error by eligibility workers is not something AHCCCS or the Court can eliminate.

RESPECTFULLY SUBMITTED this 29th day of December, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 29, 2017, he electronically transmitted the foregoing Defendant's Response to Explanation/Argument Based on Newly Produced Evidence 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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