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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)** **DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT and RESPONSE TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT**

Defendant hereby replies in support of his motion for summary judgment (*Doc. 228*) and in response to Plaintiffs' cross-motion for summary judgment on Count Two, as argued in their Unified Memorandum (*Doc. 241*). This response and reply are supported by Defendant's Response to Plaintiffs' Statement of Material Facts of today's date (*Doc. 249*), the exhibits attached thereto, and Defendant's Statement of Facts and exhibits supporting his motion for summary judgment (*Doc. 229*).

I. INTRODUCTION.

In August 2017, Judge Marquez found that Plaintiffs had not even raised a serious question of likelihood of success on the merits of their claims of a reasonable

promptness violation. *Doc. 86, pp. 13-18*. In February 2018, this Court denied Plaintiffs' renewed motion for class certification, finding the Plaintiffs were unable to support their reasonable promptness claims:

> Plaintiffs have not affirmatively demonstrated that Defendant fails to furnish medical assistance with reasonable promptness. Plaintiffs' argument that they meet the statutory requirement by showing wrongful benefit reduction is without legal support. Even assuming such evidence satisfied the statutory requirement Plaintiffs have failed to affirmatively demonstrate that incorrect eligibility determinations are not corrected with reasonable promptness. Plaintiffs' allegation of a "sweeping problem with AHCCCS's computer system" is unsupported.

Doc. 172, 2-3.

This ruling still applies. The evidence is that people with full AHCCCS benefits ***cannot*** be reduced to emergency-only (FES) benefits except by human error, that the mistakes in Plaintiffs' cases were due to human error, and that Defendant is successfully reducing such errors and correcting them before they have any effect. As to the two Plaintiffs, even the risk of human error has been effectively eliminated because both individuals have been determined eligible for full benefits, and their future renewals can only be "dispositioned" by experts at DES who know this.

Refusing to accept this evidence, Plaintiffs contend it is "plain" they are still threatened. *Doc. 241, 18.* Their massive response, however, says almost nothing about the likelihood that their future renewals will not be handled correctly and even less about how this would violate reasonable promptness. They instead dwell on how they think the AHCCCS computer should function, offering 1056 pages of misstatement, distortion, and misleading argument. Their claims are groundless and moot.

II. AHCCCS ELIGIBILITY RENEWALS ARE CORRECT AND TIMELY.

In 2016, eligibility workers (EWs) mistakenly reduced Plaintiffs to FES benefits by failing to thoroughly review the Plaintiffs' files to see that they were eligible for full benefits. *Doc. 39-1, ¶¶ 30-31*. When Darjee's eligibility was corrected, her file was noted to show full eligibility, and she has had no problem since. When Sanchez Haro's eligibility was corrected in 2016, her file was also noted to show her full eligibility. Despite this, her unusual status (battered alien who has been in this country since before August 1996) defied a quick end to errors. Twice in 2017, EWs again failed to thoroughly review her file. Both times, however, review procedures caught and corrected the mistakes, and she received notices that she was entitled to full benefits well before there was any change in her benefits. Since 2016, Plaintiffs' benefits have been determined correctly and within the 45 days required by 42 C.F.R. § 435.912(c)(3).

Plaintiffs fail to show that timely correcting mistakes before they have ***any*** effect on the person's benefits is a violation of the requirement that eligibility determinations be made with reasonable promptness. Unlike *Unan v. Lyon*, 853 F.3d 279 (6th Cir. 2017), in which summary judgment was denied because there was evidence of continuing systemic computer problems, the AHCCCS computer is not determining people's eligibility and what human errors occur are being corrected before they have any effect.

Plaintiffs cite irrelevant authority. No one in this case was denied benefits by being placed on a waiting list after being found fully eligible, as in *Jefferson v.*

Hackney, 406 U.S. 535, 544–45 (1972). They cite 42 U.S.C. § 1320b-7(d)(4)(A), which requires that immigrants be given a reasonable opportunity to supply additional documentation, but that has nothing to do with this case. Nor has there been any violation of 42 C.F.R. § 435.930, which requires Defendant "to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible." That rule is not violated by timely, corrected eligibility determinations. [1] Other cases Plaintiffs cite either have nothing to do with Medicaid (e.g. *M.K.B. v. Eggleston*, 445 F.Supp.2d 400 (S.D.N.Y. 2006)) or merely find plaintiffs stated a claim (e.g. *Lewis v. New Mexico Dep't of Health*, 94 F. Supp. 2d 1217, 1236 (D.N.M. 2000).

Nor is there any "law of the case" issue here. Judge Marquez did not rule that errors corrected before they have any effect violate any Medicaid laws. The evidence for this motion did not exist at the time of Defendant's motion to dismiss. Plaintiffs may have stated a claim, but they have no basis for the injunctive relief they seek.

A. Plaintiffs' Response Abandons Most of the Complaint's Theories and Tries to Invent New Forms of Harm.

The complaint alleged a variety of ways AHCCCS violates 42 U.S.C. § 1396a (a)(8), which requires AHCCCS to determine eligibility with "reasonable promptness." Defendant's Motion for Summary Judgment explained why these theories were without

[1] *Compare, e.g. Crippen v. Kheder*, 741 F.2d 102, 106 (6th Cir. 1984) (state terminated person's Medicaid eligibility on losing SSI eligibility without determining whether she qualified for other Medicaid programs); *Salazar v. D.C.*, 954 F. Supp. 278, 327 (D.D.C. 1996) (state terminated or suspended benefits when it failed to process recertifications of benefits within 45 days); *Sobky v. Smoley*, 855 F. Supp. 1123, 1148 (E.D. Cal. 1994) (state put people on waiting lists).

merit. *Doc. 228, 3-6.* In response, Plaintiffs casually say they need not defend these theories; the only one they choose to defend is the allegation that the computer does not work properly. *Doc. 241, 30, n. 13.*

So, they claim the AHCCCS HEAplus computer causes, directly or indirectly, all eligibility errors. They continue to say the 2015 problem was not fixed, and they ignore the fact that the computer cannot do what they want to believe it does. They refuse to accept the fact that Defendant's efforts to reduce and correct errors have been so successful that in 2018, out of thousands of immigrant renewals, ***no one*** has received an incorrect renewal determination that was not timely corrected. *Def's. Response to Plts.' SOF, Exhibit A, ¶3; Id., Ex. F (Rackley 150:3-151:8).*

Rather than acknowledge this success, Plaintiffs make a new argument that harm occurs the moment a person receives an incorrect notice of benefit reductions because she will choose to stop receiving benefits immediately, *before* she gets a corrected notice and *before* her benefits change. The sole support for this theory is misstatement of Sanchez Haro's Declaration. Plaintiffs assert:

> Ms. Sanchez Haro, for instance, immediately stopped attending doctors' appointments following the receipt of her April 2016 letter, even though her benefits were not scheduled to end until May 1. It is a more than reasonable inference that many of the hundreds of immigrants who have received an inaccurate notice have likewise delayed seeking care and medications or skipped appointments—even if their benefits were eventually corrected. Pls.' SOF ¶ 140.

Doc. 241, 11. The Statement of Facts refers to Sanchez-Haro's Declaration, which says, "I have not seen a doctor at El Rio ***since*** April." *Doc. 242-3, Ex. 28, ¶ 20* (emphasis added). *See also Doc. 239, ¶ 139* ("***After*** *her benefits were cut off,* Ms.

Sanchez Haro was not able to pay for her medications.") She says not a word in her Declaration about delaying care, skipping appointments, or foregoing medications as soon as she got the incorrect notice or before her benefits were to change on May 1.

In a similar vein, Plaintiffs try to create an issue of fact as to whether Sanchez Haro's benefits were reduced in early 2017. *Doc. 241,8, 10, 19.* The error in Sanchez Haro's March 2017 renewal was corrected on April 20 before it would have taken effect on May 1, 2017. *Doc. 124-1, ¶ 29(f).* A different computer system ("PMMIS") did not immediately register the correction, so, when Sanchez Haro went to a pharmacy in early May, the pharmacy checked PMMIS and thought she was not eligible for her prescription. *Id.* Within an hour, the problem was solved. *Id.* Plaintiffs say these facts present a genuine dispute as to whether the mistaken eligibility determination was "quickly corrected" and whether Sanchez Haro's benefits were reduced and her assistance "terminated." *Doc. 241, 18.* There is no genuine dispute about either. Her benefits were not reduced or terminated. Her eligibility was correctly and timely determined. Plaintiffs offer no authority to suggest that an hour's wait at a pharmacy because of a different issue, though regrettable, is a violation of the requirement to determine eligibility with reasonable promptness.

B. There Is No Flaw in the HEAplus Computer.

For want of an unlawful policy or practice, the Plaintiffs' theory has reduced to a mantra that the AHCCCS computer "causes errors" in eligibility renewals. This is bald misstatement. The evidence is that the HEAplus computer works, just not in the way Plaintiffs' counsel think it could or "should." It does what it was built to do with

the information that people and other computers provide. Plaintiffs provide no expert to support their theory that the AHCCCS computer does not work. No other witness supports this theory either. They cite no authority that requires the computer to be built to satisfy the wishes of their counsel. Moreover, none of their alleged "flaws" would be a violation of law even if it were real because ***people*** disposition AHCCCS renewals.

1. Comparing the HEAplus and AZTECS Computers Has No Merit.

Plaintiffs say it is reasonable to infer that HEAplus "causes" eligibility determination errors (for Medicaid) that the AZTECS computer does not (for food stamps). First, they fail to establish their premise that the HEAplus computer causes any erroneous determinations; humans make the AHCCCS determinations. Second, they do not show people never make mistakes using AZTECS. Third, the two computers are different in function, context, and logic. *Doc. 241, 21, n. 9.* Plaintiffs cite no test where the same person used both computers to analyze the same data against the same criteria and reached different results. [2]

2. HEAplus Can Only Reduce Benefits in Instances that Do Not Apply.

Plaintiffs' quibbling about what they think the computer should do or do differently and whether EWs really make mistakes does not create issues of fact. The HEAplus computer cannot make the mistakes Plaintiffs allege. It is programmed not to

[2] Sanchez Haro says in October 2017 she expected continued food stamps and medical benefits. *Doc. 239, ¶¶ 171-74.* Indeed, there should have been no change. There was a change in AHCCCS benefits only because Jorge Quevedo admits he failed to review her file thoroughly or have his supervisor review his decision. *Doc. 229-11.*

change a person from full benefits to emergency-only benefits, except in circumstances that do not apply to Plaintiffs. *Doc. 124-1, ¶ 13; Doc. 249, Ex. A, ¶¶ 8-9.*

The Plaintiffs cannot deny this, so they argue about the circumstances that do not apply. They mistakenly argue that "auto-job" and "AAA" entries in the DES log of instances in which eligibility changed from full benefits to FES show the computer can automatically reduce eligibility. The auto-job entries, however, are persons who were given 90 days of conditional, full eligibility to provide evidence, pursuant to 42 U.S.C. § 1320b–7(d)(4)(A). *Doc. 214-1, at 8 (237:8-240:14).* If the person does not respond, the conditional eligibility ends and the computer automatically reduces the person to FES. *Doc. 249, Ex. A, ¶ 8.* The Plaintiffs' incorrect speculation about "auto-jobs" is based on a statement from Brenda Rackley that DES is still looking into a few entries that she did not identify, for reasons she could not explain. This does not create a genuine issue of fact. [3]

Moreover, the auto-job and AAA cases are reviewed by DES's research and analysis group and by Deborah Bailey to be sure they, too, are correctly determined. *Doc. 229-6* (*Rackley, 101:13-102:25); Doc. 249 (Bailey 119:14-120:2).* These cases have nothing to do with the human errors made in Plaintiffs' cases.

[3] Plaintiffs' also cite the fact that DES's Lisa Greenfield says auto-job cases show up on the DES daily log of cases reduced from full to FES benefits. That has never been disputed; the log lists all reductions. They also continue to cite Marvin Hammon's discredited speculation about what he "assumed" or what he thought "apparently" seemed to happen, even though he made clear the computer had ***not*** led to anyone being denied benefits and he deferred to "systems" specialists like Michael Farquhar, who testified there was nothing wrong with the computer. *See Doc. 128, p. 7-8*. "AAA" entries are cases processed by an EW. *Doc. 249, Ex. A, ¶8.*

3. Plaintiffs' Other Computer Theories Have No Merit.

Plaintiffs speculate (*Doc. 241, 23*) that a fact-finder could "easily conclude" HEAplus is causing errors because it requests immigration status on each renewal from the SAVE and VLP "hub" computers. They say doing this violates AHCCCS policy and creates the opportunity for more errors. The policy they refer to says verifying immigration status on each renewal does not "need" to be done if there has been no change in the status; it does not prohibit verification. Making these hub checks is not a flaw in how HEAplus operates. Any errors that may result from "unnecessary" checks with the hubs are due to the information from the hubs or its handling by EWs.

Next, they argue (*Doc. 241, 24*) once again that AHCCCS never fixed the problem with the programming in 2015, despite repeated testimony that the problem was fixed on November 19, 2015 and has not been seen since. *E.g. Doc. 249, Ex. E, Lockner 65:11-67:25.* The Plaintiffs' only bases for disputing this are 1) AHCCCS witnesses "did not know precisely what changes were made to the underlying code" and 2) a DES witness testified there were instances when "LPR status did override the prior refugee status and caused errors." In the testimony following Plaintiffs' excerpt, the DES witness made exactly AHCCCS's point: the LPR status (from the hubs) may continue to conflict with the refugee status information in HEAplus, but this is *not* something the computer resolves. *Doc. 249, Ex. D, (DES 111:17-115:15).* It is the eligibility worker, not the computer, who makes the benefit determination.

Next, Plaintiffs say the computer should not predict FES status for applicants who choose not to say they have qualified status. The problem, they say, is that

questioning immigration status is sometimes "unnecessary" and creates another opportunity for an EW to make a wrong decision. This is not a flaw in the computer. Nor is this a "problem" that has anything to do with Plaintiffs' renewals.

Next, they say the computer is at fault because it does not specifically ask about exemptions to the 5-year bar and does not lock down a status once it has been achieved. *Doc. 241, 25-26.* That the computer is programmed to force the EW to review the file to determine the person's status does not make it flawed. This is simply another variation on the Plaintiffs' implicit premise that human error can be eliminated by a perfect computer. That time has not yet come. In the meantime, HEAplus does what it is built to do and it is being enhanced to make the EWs' work easier.

Next, they say a reasonable fact-finder could conclude that "requiring caseworkers to double check and correct known computer errors contributes to the continuing stream of incorrect benefit reductions." *Id., 26.* There are, however, no "computer errors" that caseworkers have to correct. What they double-check is the person's file to determine the proper eligibility category.

Next, Plaintiffs condemn the HEAplus system because it seeks data from the federal and state "hub" computers regarding immigration status. *Id., 27-28.* The Plaintiffs posit a number of ways the computer might make the EW's job easier and they admit AHCCCS is making some of these changes in the System Request 392 enhancement of the computer. None of this means the computer is flawed or causes incorrect determinations, either generally or in Plaintiffs' cases.

Next, they say one can reasonably infer that AHCCCS policies and practices "contribute" to errors because the computer is not programmed to analyze whether a person may have multiple qualifying statuses. *Id., 28.*[4] The rare person with more than one qualifying status is simply a special case of the fact that the computer does not do everything and is an example of why no reductions are made except by a human being who has to review the person's file to be doubly sure the determination is correct.

In short, Plaintiffs offer no expert opinion regarding any problem or flaw with the HEAplus computer. They simply give their ideas of how the computer might be more helpfully designed. The fallacy in their position is the premise that the HEAplus computer must or "should" do things it was not programmed to do. They have not shown the changes they want are feasible, cost-effective, or required by reasonable promptness. *Nor are such changes necessary to protect their benefits.* They fail to establish that the computer causes renewal determinations to be untimely or incorrect.

III. PLAINTIFFS' CLAIMS ARE MOOT.[5]

> The purpose of an injunction is to prevent future violations, and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the *mere possibility* which serves to keep the case alive. . . . To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations.

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[4] Sanchez Haro has two qualifying statuses; multiple witnesses have noted how unusual her case is. *Doc. 249, Ex. G* (*Swenson 135:5-24) and Ex. C (Bailey,58:17-59:21); Doc. 229-11 Quevedo 172:10-19.*

[5] Defendant withdraws the argument that Plaintiffs lack standing to pursue Count One.

United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953) (emphasis added). By these criteria, AHCCCS intends (and always did) to comply with reasonable promptness; it has taken effective steps to eliminate erroneous reductions in benefits; and Plaintiffs' incorrect renewals were a matter of mistake, not policy or practice. No injunction Plaintiffs have proposed would protect them more effectively from future errors than the measures Defendant already has in place.

Even the cases Plaintiffs cite make clear, "[T]he 'wrongful behavior' at issue is not *any* erroneous assignment of a non-citizen to ESO Medicaid. The law does not require that a state Medicaid agency implement a flawless program." *Unan*, 853 F.3d at 288 (citations omitted) (emphasis in original). For all their arguments about the computer not doing what they would like and attributing simple mistakes to "policy or practice," they fail to show more than a speculative "mere possibility" that their future benefits will not be promptly and correctly renewed. [6]

"If a 'live' controversy no longer exists, the claim is moot." *ACLU of Nev. v. Lomax*, 471 F.3d 1010, 1016 (9th Cir. 2006). Darjee and Sanchez Haro cannot deny that future mistakes in handling their renewals are virtually impossible and that their continued eligibility for full AHCCCS benefits is assured. Their only responses are that these facts should be ignored because 1) the safeguards that apply to Plaintiffs' renewals are a "bare assertion" (*Doc. 241, 3-10*), 2) "voluntary cessation" cannot moot

[6] Similarly, to obtain declaratory relief, a plaintiff must show "a very significant possibility of future harm; it is insufficient ... to demonstrate only past injury." *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir.1996).

a case (*Id. 10-12*), and 3) Defendant is "picking off" the Plaintiffs as potential representatives of a class action. *Id., 12-15*. None of this is correct.

A. Defendant's Remedial Efforts Have Been Successful.

AHCCCS fixed the computer error Plaintiffs discovered in 2015. It corrected thousands of errors. *Doc. 1, ¶ 40.* As part of that fix, the HEAplus computer was reprogrammed so that only an EW can reduce a person's benefits. The computer analyzes the information it is provided and then predicts a status, which the EW must compare to other information in a person's file. The EW makes the "disposition."

EWs have received additional training. DES created a triple-review process, including a special research and analysis unit of eligibility experts, for ***every*** case in which a person may be reduced from full to FES benefits, and DES's best EW, Deborah Bailey, reviews *all* reductions. *Doc. 249,Ex. F* (*Rackley 84:16-21).* These are facts, not mere "assertions."

While some errors continue to be made, they are virtually always caught and corrected before anyone's benefits are affected. From January 1, 2017 through November 30, 2017, out of approximately 60,000 immigrant renewals EWs initially erroneously dispositioned 685 customers as FES (62/month). *Doc. 164-1, ¶¶ 11-12.* Of these, all but five were corrected before a reduction in benefits would have taken place. *Id.* Dareth Cox's analysis to this effect was confirmed by Brenda Rackley of DES. *Doc.* 249, *Ex. F* (*Rackley 150:3-151:8) and Ex. H).* ***No one*** in 2018 has failed to get a timely, correct renewal. *Doc. 249 (2d Cox Decl., ¶ 3).* The Plaintiffs offer no evidence to the contrary. They instead grossly misstate the statistical evidence by

looking only at the small subset who were (initially) reduced from full to FES benefits, ignoring the fact that all but five of these were timely corrected. *Doc. 239, p. 62*.

Notably, the Plaintiffs' Memorandum does not explain why or how either Plaintiff might be erroneously reduced to FES benefits in the future. Plaintiffs do not dispute the fact that their renewals are being handled by Ms. Bailey or that she knows they are both eligible. If there were a basis to complain about Ms. Bailey's ability to correctly process their cases from now on, we would have heard it. There is none. The possibility that an errant EW disposition will be made, much less that it will escape review and correction within DES, no longer exists.

In fact, the Plaintiffs' only criticism of the *status quo* in their cases is the disingenuous statement that their files are "locked" by DES and "other [DES] employees can still edit the cases" that are locked. The Plaintiffs, however, know that "other employees" have access to deal with the locked files of DES personnel, not to do anything regarding the Plaintiffs' cases. *Doc. 249, Ex. C (Bailey 39:14-19).* They know only Ms. Bailey is authorized to change data in the Plaintiffs' files.

Ironically, even this criticism evaporates now that enhancements to the HEAplus computer through the SR392 process went into effect on June 28, 2018. *Doc. 249 Ex. I.* To reduce EW errors, the SR392 process has implemented a pop-up warning on the computer to any EW who is about to reduce someone's benefits. If the EW continues to think FES is the correct disposition, the computer automatically transfers the file to the special DES unit of experts backed up by Ms. Bailey. *Id.* As a result of this change, Plaintiffs' files are no longer locked.

Plaintiffs' eligibility for full benefits is now well known and fully documented in their files. It is inconceivable that the special unit and Ms. Bailey would uphold a reduction. Thus, there is no "reasonable chance of the dispute arising again between the government and the same plaintiff." *Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1175 (9th Cir. 2009); *ACLU of Nevada v. Lomax*, 471 F.3d 1010, 1018 (9th Cir. 2006) (requiring showing same plaintiff will be subjected again to the same conduct). "If a plaintiff has "already ... received everything to which [he] would be entitled, i.e., the challenged conditions have been remedied, then these particular claims are moot absent any basis for concluding that [this] plaintiff[ ] will again be subjected to the same wrongful conduct by this defendant." *Parr v. L & L Drive-Inn Rest.*, 96 F. Supp. 2d 1065, 1087 (D. Haw. 2000).

Plaintiffs nevertheless argue "the inference is Plaintiffs have [sic] and will continue to experience benefit reductions." *Doc. 241, 31.*

> The same improper computer programing is still in place, and . . . will continue to *screen* Sanchez Haro for FES benefits. Pls' SOF ¶ 334. . . . Accordingly, the Court could issue an injunction requiring Defendant to alter the manner the computer system processes renewal applications, and there remains a present controversy as to which effective relief can be granted. *See Church of Scientology of California v. U.S.*, 506 U.S. 9, 12 (1992) (a case is moot only when it is "impossible" for the court to grant any effectual relief).

Doc. 241, 11, n.6 (emphasis added).

This "inference" of continued reductions has no merit. The screening is merely a prediction and is not the issue. Plaintiffs have not established that any computer alterations are necessary or would prevent human error even if they were made.

Sanchez Haro attempts to analogize her case to *Barry v. Lyon*, 834 F.3d 706, 713 (6th Cir. 2016), in which the plaintiff had to repeatedly prove he was not disqualified from receiving food stamps because the state incorrectly believed he was the subject of outstanding criminal warrants. The judge determined he was entitled to injunctive relief because the state continued to show an outstanding warrant for his arrest even after the several hearings and despite years to correct the continuing error. By contrast, AHCCCS corrected its 2016 mistake and Sanchez Haro's eligibility has been correctly and timely determined ever since. That two of these determinations entailed *internal* confusion (that did not affect her benefits) does not negate the facts that her records state she is eligible for full benefits and any danger of further mistakes was resolved in 2017, in a way the danger to Barry was not.

B. No Exception To Mootness Applies.

Plaintiffs say exceptions to mootness apply to their case because AHCCCS is voluntarily ceasing its wrongful conduct and because AHCCCS is trying to pick them off as plaintiffs. They argue, "the government cannot escape the pitfalls of litigation by simply giving in to a plaintiff's individual claim without renouncing the challenged policy, at least where there is a reasonable chance of the dispute arising again between the government and the same plaintiff." *Citing, Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1175 (9th Cir. 2009).

1. AHCCCS is Not Ceasing Any Wrongful Conduct.

Their "voluntary cessation" argument assumes they have established some act or policy that violated reasonable promptness and needed to end. They have not. (The

2015 problem did not affect them and was resolved long before this suit was filed.) Their cases are moot, ***not*** because AHCCCS is voluntarily "ceasing" an improper practice, but because Plaintiffs are in no jeopardy of future reduction in benefits even from human error. No wrongful policy or practice is being renounced. AHCCCS is not "work[ing] toward lawful behavior" (*Doc 241, 12*). Its behavior has always been lawful. It is simply making human error less likely.

Plaintiffs state (*Id., 11*) they have "presented evidence that supports the conclusion that the harms are likely to continue," but AHCCCS has prevented even potential harm in all but five cases since December 2016. As the court stated in *Rosemere,* "To demonstrate the Plaintiffs' claims were moot, the EPA must demonstrate why repetition of the wrongful conduct is highly unlikely." 581 F.3d at 1173; see also *Luckie v. EPA,* 752 F.2d 454, 459 (9th Cir.1985) (case moot when there was "very little chance" of repetition of wrongful conduct). It is indeed "***highly*** unlikely" in this case that Plaintiffs will ever be reduced to FES benefits. There is "***very*** little chance" of this "dispute arising again between the government and the same plaintiff[s]." *See also, Arrunategui v. ConocoPhillips Co.,* , 2010 WL 11509052, at *5 (C.D. Cal. Feb. 23, 2010) ("the Court finds that there is no likelihood of Plaintiffs suffering the same injury again in the future. Without the existence of such an imminent threat of recurrence, the Court holds that summary judgment is GRANTED in favor of ConocoPhillips as to Plaintiffs' claims for injunctive and declaratory relief.")

2. AHCCCS is Not "Picking Off" the Plaintiffs.

The Plaintiffs say their claims cannot be moot because they have been "picked off" to avoid a class action. "Picking off" usually occurs at the beginning of a case or on the eve of a hearing on the motion for class certification. *See Unan*, 853 F.3d at 286. Here, a motion to certify a class has been denied twice, the second time on even more grounds than the first. Defendant waited until discovery had closed so there would be no claim Plaintiffs had not had an opportunity to prove there is "a reasonable chance of the dispute arising again between the government and the same plaintiff." The more time Plaintiffs spent litigating, the better their protections became.

Plaintiffs cannot have it both ways: they want the Court to believe AHCCCS has a policy and practice to deny hundreds or thousands of immigrants their Medicaid benefits; yet when the evidence shows to the contrary that AHCCCS corrects its errors, both generally and as to the Plaintiffs, they condemn these efforts as a "litigation strategy." AHCCCS has been trying since 2015, long *before* this suit was filed, to reduce and correct eligibility errors. Success in these efforts is not a litigation strategy.

C. The Pending Renewed Motion for Class Certification is Irrelevant.

Prior to class certification, the Plaintiffs' cases are judged on their own merits. They "must [have] a case or controversy at the time . . . the class action is certified by the District Court pursuant to Rule 23." *Sosna v. Iowa*, 419 U.S. 393, 402–03 (1975). Meritless claims do not survive simply because the plaintiff originally sought to represent a class. Though a plaintiff whose claim is moot *may* still be permitted to

appeal denial of class certification, she may not further contest the merits of a case until a class is certified. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980).

IV. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON COUNT TWO.

A. Sanchez Haro Did Not Contest the Mootness of Her Claim.

Judge Marquez's reasoning in denying Plaintiffs' motion for preliminary injunction on their due process claim continues to apply:

> Plaintiffs claim their benefit reductions are attributable to Defendant's unlawful policies and the programming of the HEAPlus computer system. Since they have not shown a likelihood of succeeding on either of those theories, they have not shown it is likely their benefits will be reduced.

Doc. 86, p. 18. If there is a law of the case issue involved in this motion, this is where it is. Absent a likelihood of needing a notice, speculation about getting an "insufficient" notice is irrelevant. The Motion for Summary Judgment followed this logic, arguing that, "Since there is now no further danger that her benefits will be improperly reduced, any issue over the content of a future notice of such a reduction is also moot." *Doc. 228, 12*.

Plaintiffs fail to respond to this argument, and it should be deemed conceded. *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F.Supp.2d 1125, 1132 (C.D.Cal.2011) ("failure to respond in an opposition brief to an argument put forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue"); *Scott v. City of Phoenix*, No. CV–09–0875–PHX–JAT, 2011 WL 3159166, at *10 (D.Ariz. Jul. 26, 2011) (failure to oppose argument constituted waiver).

Even if Sanchez Haro tried to contest the mootness of her notice claim, she could not. As Judge Marquez has also already noted, it is not enough for Sanchez Haro to allege a "possible" injury regarding notice. *Doc. 85, 10,* c*iting Whitmore v. Arkansas,* 495 U.S. 149, 158 (1990). She cannot establish a reasonable likelihood she will receive a future notice of reduction of her eligibility to FES. The confusion over her eligibility has been dispelled. Her file clearly states she is eligible for full benefits, and her future renewals can only be handled by DES personnel who know she is eligible. The "allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 189 (2000); *Luckie v. E.P.A.,* 752 F.2d 454, 459 (9th Cir. 1985) (finding claim moot where there was "no reasonable expectation of recurrence").

B. AHCCCS Notices Comply with Due Process and Medicaid Requirements.

DES sends the notice that is shown at Doc. 229-16 to persons who are found eligible for FES benefits. Beginning June 1, 2018, anyone whose benefits are reduced from full to FES benefits forward will get notices with similar explanations of their immigration status as supplements to that form. The supplement explains:

> You can get emergency services coverage only. You cannot get full medical services because of your immigration status. You have NOT been a Lawful Permanent Resident, or an immigrant with Humanitarian Parolee status, or a battered non-citizen for 5 or more years, OR you are NOT a Lawful Permanent Resident, an Immigrant with Humanitarian Parolee status, or a battered non-citizen who has lived in the US continuously since August 22, 1996; OR you are NOT a Lawful Permanent Resident, or an immigrant with Humanitarian Parolee status, or a battered noncitizen who is a member of the United States Armed Forces or the spouse or dependent child of a member of the United States Armed

> Forces; OR you do NOT or have NOT had an immigration status of Refugee or Asylee, Afghan or Iraqi special immigrant, Cuban-Haitian entrant, conditional entrant, Hmong or Laotian highlander, victim of trafficking, American Indian born in Canada, foreign born member of a U.S. Indian tribe, or immigration deportation or removal has been withheld.

Doc. 249, Ex. A (2d Cox Decl.) ¶ 5 and Id., Ex. B. This language will be merged into the regular notice shortly. *Id.*

These documents meet the requirements of 42 C.F.R. §§ 431.210 (*listed at Doc 228, p. 12.)* They state the action AHCCCS has taken and the reason for finding the person ineligible for full benefits. They state the legal citations supporting the determination, how the person may request a hearing, how the person may request benefits to be continued pending appeal, and the right to examine and copy one's case file as well as the documents and records to be used by the state at the hearing. Less specific content than this was upheld in *Unan*, 853 F.3d at 291-291.[7]

Sanchez Haro claims the notice sent to her on October 12, 2017 violated her rights, but that notice was superseded by a corrected notice that made the first notice a nullity. Moreover, she knew her benefits were not changing, and she raised no issue as to the October 2017 notice or its content until July 9, 2018. *Doc. 242-2, Ex. 12*.

To the extent she complains she could not understand from that notice why her benefits were being reduced, the supplement would – ***if she were ever to receive it*** -

[7] There, a notice that the applicant was "denied full Medicaid coverage because we did not have information about your immigration status that showed you qualified for full Medicaid, or, according to the information we did have about your immigration status, you were not eligible for full Medicaid" was held to "clearly indicate the reason for the denial of full Medicaid coverage."

answer that question. She would see that AHCCCS was saying she was not a lawful permanent resident, did not have battered alien status, and had not been in this country since before August 1996 – all of which she would immediately recognize as incorrect.

Plaintiffs cite cases in which courts required notices to provide financial calculations of child support payments, *Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992); maximum household income allowed for eligibility, *Rodriguez By & Through Corella v. Chen*, 985 F. Supp. 1189, 1193 (D. Ariz. 1996); or annual service budgets, *K.W. ex rel. D.W. v. Armstrong*, 298 F.R.D. 479, 494 (D. Idaho 2014), *aff'd*, 789 F.3d 962 (9th Cir. 2015). When the state uses mathematical calculations as the basis of its decision, it can transfer the numbers to a notice. In *Barnes*, for instance, the plaintiff "proposed concise explanatory statements that could likely be added to notice forms with a keystroke." 980 F.2d at 579.

Explaining the case by case intersection of immigration laws and Medicaid eligibility, such as Sanchez Haro's 2016 status, at the required sixth-grade level [8] is a different order of difficulty. [9] Doing this has not been required in any case cited by Plaintiffs.

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[8] AHCCCS requires its contractors' written material to be at a "6th grade reading level as measured on the Flesch-Kincaid scale." *AHCCCS Contractors' Operations Manual* § 404, available at https://www.azahcccs.gov/PlansProviders/Downloads/RFPInfo/YH18 /Req ForProp/RFPYH18_ACOM_404.pdf.

[9] As one commentator writing about HIPAA consent forms has observed, "First, I doubt that anyone in the federal bureaucracy can write a consent form at a sixth-grade reading level; anyone who recommends that kind of writing should be required to provide an example. Second, on the basis of Rudolf Flesch's Reading Ease Score, a consent form written at a sixth-grade level would have to average about 14 words per

"Notice must be reasonably calculated to apprise the claimants of the action taken and afford them an opportunity to present their objections." *Rodriguez,* 985 F. Supp. at 1194, *citing Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 313 (1950). The only question is whether Sanchez Haro is entitled to an injunction to compel AHCCCS to give her the form of notice she says ***she*** would understand if her benefits were ever reduced again. The answer should be "No." Such a reduction is not going to happen, but, even if it did, the AHCCCS notice would give her adequate, meaningful, and timely notice of the agency's action and how to appeal it.

CONCLUSION

Defendant determines immigrant eligibility renewals with "reasonable promptness." Neither Plaintiff has a reasonable likelihood of having her benefits reduced or of getting a notice of such reduction in the future. Their claims for injunctive and declaratory relief are unfounded and moot.

Defendant is entitled to summary judgment.

RESPECTFULLY SUBMITTED this 6th day of August, 2018.

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sentence and 139 syllables per 100 words. Since consent forms are a combination of both legal and medical jargon, writing to meet that criterion is virtually impossible. *Compliance Vs. Communication: Readability of HIPAA Notices*, M. Hochhauser, *Clarity*, No. 50, Nov. 2003.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 6, 2018, he electronically transmitted the foregoing 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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