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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' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

In Defendant Betlach's Motion to Dismiss, he claims (1) both counts in Plaintiffs' Complaint fail to state a claim upon which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and (2) if the Complaint does state a claim, the Court lacks jurisdiction for Count I of the Complaint because Plaintiffs "lack standing"

and their claims are moot under Rule 12(b)(1).[1] Defendant is incorrect on all his assertions.

I. Plaintiffs State a Claim Upon Which Relief May Be Granted

Defendants' argument fails to encompass and then misapplies the full standard for dismissing a complaint for failure to state a claim and his motion to dismiss should be denied. Plaintiffs' complaint contains ample factual allegations that state a facially plausible claim.

When ruling on a Rule 12(b)(6) motion dismiss, the review is based on the contents of the complaint and must contain sufficient factual allegations to state a facially plausible claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Buckey v. Cty. of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1992). A claim is facially plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678. The Federal Rules of Civil Procedure generally require only "a plausible short and plain statement of the plaintiff's claim, not an exposition of his legal argument." *Skinner v. Switzer*, 562 U.S. 521, 530 (2011). "All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Buckey*, 968 F.2d at 794. A well-pleaded complaint may proceed "even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (internal quotations omitted).

In *Starr v. Baca*, the Ninth Circuit clarifies two guiding principles in interpreting Supreme Court precedence on the pleading standard. 652 F.3d 1202, 1216 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2101 (2012). First, to be entitled to the presumption of truth, allegations in a complaint cannot simply recite the elements of a cause of action;

[1] In the second part of Defendant Betlach's motion, he fails to refer to or provide any factual or legal support concerning Plaintiffs' standing to challenge the eligibility notice in Count II of the Complaint. Defendant only addresses Count I of the Complaint concerning eligibility determinations. Having failed to challenge Plaintiffs' standing for Count II in his motion, he should not be able to raise it in his response.

they must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively. *Id.* Second, "the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party" to litigate the claims. *Id*. The Ninth Circuit further offers direction in the event that the parties' explanations are equally plausible:

> If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6). Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *im*plausible. The standard at this stage of the litigation is not that plaintiff's explanation must be true or even probable. The factual allegations of the complaint need only 'plausibly suggest an entitlement to relief.'

Starr, 652 F.3d at 1216-17. As shown below, Plaintiffs easily satisfy this standard.

A. Plaintiffs have stated a claim that their statutory right to medical assistance has been violated

Plaintiffs in Count I of the Complaint make factual allegations that plausibly suggest an entitlement to relief. *See Starr*, 652 F.3d at 1216. They claim that Defendant improperly reduced their benefits in violation of the reasonable promptness requirement in the Medicaid Act, 42 U.S.C. § 1396a(a)(8). Plaintiffs' factual allegations—in particular, their reduction of benefits in 2016, the protracted period of time they have gone without access to medical assistance, and the continuing receipt of other government benefits—allow the court to draw the reasonable inference that Defendant is liable for the misconduct alleged and his Motion to Dismiss should be denied.

1. Defendant failed to furnish medical assistance with reasonable promptness

Defendant readily acknowledges § 1396a(a)(8) includes a requirement to "furnish [] assistance (whether defined in terms of eligibility determinations *or actual services*) with reasonable promptness." Def. Motion at 4 (emphasis added). The plain language of

the statute requires that medical assistance "shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8). However, Defendant's argument that Plaintiffs' Complaint "alleges a failure to make determination *correctly*, rather than failure to complete them *promptly*" is the exact reason his Motion to Dismiss should be denied. Def. Motion at 4. Plaintiffs indeed allege that Defendant must make correct eligibility determinations. Compl. ¶ 41. The Act is clear on this point and in order to comply with § (a)(8) Defendant must furnish medical assistance, meaning actual services, to *eligible individuals* such as Plaintiffs and class members. The case Defendant cites, *Sobky v. Smoley*, 855 F. Supp. 1123, 1147 (E.D. Ca. 1994), concludes this as well.

"[T]he reasonable promptness clause is clearly intended to benefit eligible individuals," and as such Plaintiffs are intended beneficiaries of § 1396a(a)(8). *Romano v. Greenstein*, 721 F.3d 373 (5th Cir. 2013) (failure to consider all the relevant evidence and to use appropriate sequential evaluation violated § 1396a(a)(8)). The state must continue to furnish Medicaid to all eligible individuals until they properly are found to be ineligible. 42 C.F.R. § 435.930(b); *see also Romano v. Greenstein*, No. 12-469, 2012 WL 1745526 (E.D. La. May 16, 2012), *aff'd*, 721 F.3d 373 (5th Cir. 2013) (holding that the state agency violated a Medicaid beneficiary's right under § (a)(8) to receive Medicaid until properly found to be actually ineligible when it improperly terminated a disabled woman without reviewing all evidence in her file and using the proper sequential analysis). Plaintiffs allege that Defendant is violating § (a)(8) because he is not furnishing them with the medical assistance and actual services they are eligible for. Instead, their emergency-only AHCCCS excludes essential care such outpatient visits and medication because of Defendant's improper processing of their cases.

While much of the case law on this provision focuses on the timeliness of a decision, Supreme Court cases support the argument that AHCCCS must make decisions correctly so that eligible individuals get all of the coverage they are entitled to. *King v. Smith*, 392 U.S. 309, 333 (1968) ("In denying AFDC assistance to appellees on the basis

of this invalid [man in the house] regulation, Alabama breached its federally imposed obligation to furnish aid to families "with reasonable promptness to all eligible individuals….'"); *Townsend v. Swank*, 404 U.S. 282, 285-86 (1971) (the "all eligible" provision limits federal agency discretion to interpret the statute in ways that would deny eligibility to students who were eligible under the terms of the federal statute); *cf. Jefferson v. Hackney*, 406 U.S. 535, 544-45, 92 S.Ct. 1724, 1730-31 (1972) (adverse ruling but relevant discussion). These cases make it clear that the "all eligible" requirement was originally placed in the AFDC statute to prevent waiting lists and denying assistance to persons who are eligible. The provision made AFDC an entitlement – Congress imported it into Medicaid**.** *See Jefferson*, 406 U.S. 544-45.

Defendant does not dispute that, in response to an October 2015 letter from Plaintiffs' counsel, AHCCCS "readily admitted" the computer programming and case worker errors and over "the next few months" reexamined the cases of "thousands of immigrants whose eligibility has been reduced from full to emergency benefits." Def. Motion at 2. In those months of review, AHCCCS openly acknowledges that it made improper reductions in 3,500 cases. *Id.* Defendant claims that the AHCCCS "fixed" the computer error. Def. Motion at 2. However, in the Complaint, Plaintiffs do not state that the computer errors have been fixed or remedied. For purposes of this part of the motion, Defendant may not go beyond the Complaint to assert additional facts.

In fact, the Plaintiffs allege that the improper AHCCCS reductions continue because their own benefits have been reduced several months into 2016. Compl. ¶ 41. Plaintiff Aita Darjee's family's AHCCCS benefits were restored in 2015 after they were improperly cut, yet her AHCCCS benefits were again reduced to emergency-only in July 2016, even though they remained eligible for full-scope benefits. Compl. ¶¶ 58-59. Likewise, Plaintiff Alma Sanchez Haro also had her AHCCCS reduced to emergency-only in April 2016. *Id.* ¶ 75. Plaintiffs claim that because of systemic computer, case worker or other processing errors that AHCCCS failed to correct during the nine months after counsel's letter, their benefits were improperly reduced. Because Defendant heads

the single state agency in charge of administering AHCCCS benefits it is more than plausible that he is liable for depriving Plaintiffs of the medical assistance in violation of § (a)(8).

2. Defendant is not complying with federal regulations to recertify AHCCCS using available information

Plaintiffs claim that Defendant is reducing benefits of eligible individuals because AHCCCS is failing to process the recertifications properly. Contrary to Defendant's assertion in his Motion, Plaintiffs do not dispute that in order to establish AHCCCS eligibility Defendant is required to collect and retain information on their immigration status. *See* Def. Motion at 5-6. Plaintiffs' allegation is that the Defendant *already has* all of their immigration information on file or within reach and he was required to use that information to recertify their full-scope AHCCCS benefits. Compl. ¶¶ 50, 56-57, 72-73. If their immigration status was in question, Defendant had access to other government databases that would have confirmed their current status. *See* Compl. ¶¶ 32, 43-52. Federal regulation requires that Defendant "*must* make a redetermination of eligibility *without* requiring information from the individual" or by accessing "more current information available to the agency" including local and federal databases accessed by the agency. 42 C.F.R. § 435.916(a) (emphasis added); *see also* Ariz. Admin. Code R9-22-306(c). The Department of Economic Security ("DES") processes applications for both AHCCCS and the Supplemental Nutrition Assistance Program ("SNAP" or food stamps) so eligibility workers have access to the case files and databases for both programs. Compl. ¶ 42-43.

Plaintiffs allege that Defendant violated this regulation because AHCCCS already has their immigration status information and could have confirmed it by accessing DES and its own case files and other DES or federal databases.[2] Compl. ¶¶ 45-46. Both of the

[2] Defendant's claim that "[u]p to half of immigrants have changes during a year that may affect their eligibility" is inaccurate and misleading. Def. Motion at 6. The correct citation to this proposition is 76 Fed. Reg. 51180, and the statistic of "33-50%" refers to an estimate for the entire Medicaid population, not just immigrants, who may experience

named Plaintiffs continue to receive other government benefits, namely food stamps, worked in another computer program, also administered by the DES that requires and retains immigration information. Compl. ¶¶ 68, 77. It is therefore plausible that AHCCCS is failing to check other available case files and databases for accurate immigration status information in violation of 42 C.F.R. § 435.916.

3. Defendant's alternative explanation does not render Plaintiffs' explanation implausible

Plaintiffs allege that, in violation of § 1396a(a)(8), Defendant continues to deprive immigrants of the medical assistance they are eligible for, and that these problems are systemic and continuing because they each experienced reductions in benefits *after* Defendant acknowledged there were computer programming and case worker errors, including requiring a 5-year status requirement for immigrant when one did not apply. Compl. ¶¶ 41, 45, 59, 75. Plaintiffs' allegations in the Complaint are factual and not conclusory because they are based on their experience: that AHCCCS incorrectly gave them emergency-only eligibility; that his actions reduced their benefits and deprived them of access to the benefits and medical assistance they are entitled to; and that he is failing to consult available data sources that would lead to correct eligibility determinations. These factual allegations, taken as true, give a plausible claim to relief and Defendant's Motion to Dismiss should be denied. *See Iqbal*, 556 U.S. at 679.

Defendant's alternative explanation is not so convincing that the Plaintiffs' explanation is implausible. "The standard at this stage of the litigation is not that plaintiff's explanation must be true or even probable." *Starr*, 652 F.3d at 1216-17. Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is *implausible*. *Id.* at 1216. Defendant offers an explanation that "[e]rrors in this process are recognized to be

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any change that would impact eligibility, including a variety of factors such as income and address changes, not just immigration status. As stated, Defendant appears to imply that up to 50% of immigrants experience a change in immigration status, which is both unsupported and outside the statements in the Complaint.

inevitable" and that the Plaintiffs' incorrect eligibility determinations may have been such an error, but that his policy or practice does not violate the law. Def. Motion at 7, 14. Defendant admits that AHCCCS identified a systemic error that caused thousands of immigrants to lose their eligibility in 2015 and offers an unsubstantiated statement outside the confines of the Complaint that the error was purportedly "fixed." Def. Motion at 2. Defendant has not shown that it is *implausible* that the systemic errors are continuing to affect immigrants in 2016, as evidenced by Plaintiffs' AHCCCS cases. Therefore, Defendant's Motion to Dismiss based on the failure to state a claim should be denied.

B. Plaintiffs have stated a claim that Defendant's eligibility notices violate statutory and constitutional requirements

Plaintiffs claim in Count II of the Complaint that the AHCCCS notices to Plaintiffs and class members violate due process and statutory notice requirements because the notices fail to adequately explain the agency action or the reasons for that action, they do not give the specific laws and regulations relied on to make the decision, and they do not adequately explain the person's rights on appeal. Compl. ¶¶ 53-55.

Defendant incorrectly claims that Plaintiffs make only conclusory allegations concerning the defective eligibility notices. In the Complaint, Plaintiffs state that AHCCCS sends out a "Benefits and Services" notices when an AHCCCS beneficiary's medical eligibility has been changed from full-scope AHCCCS to emergency-only AHCCCS The notice states the person's "Medical Assistance Changed" and that each person's "full medical services" will "stop" and "Federal Emergency Services" will "start." The reason for this action is "your immigration status does not let you get full medical services." Compl. ¶ 53. AHCCS fails to state the beneficiary's purported immigration status and which qualifying immigration statuses would be eligible for full-scope AHCCCS. There is no explanation of what "emergency" medical services are and how they compare to "full" medical services. *Id*. These omissions are critical because all these persons previously received full-scope AHCCCS. Plaintiffs claim that because of

the lack of factual basis in the notice, the notice does not comply with the Medicaid Act requirements or constitutional due process.

This notice also is sent when an applicant is initially found eligible for emergency-only AHCCCS. Compl. ¶ 54. In this case, the notice states "Medical Assistance Approved - Federal Emergency Services Only." The reason provided is "[y]ou cannot get full medical services because of your immigration status." The beneficiary's purported immigration status and which qualifying immigration statuses that would be eligible for full AHCCCS are not provided. The notice states, "You can get emergency services coverage only" but there is no explanation of what "emergency services" means and how it differs from full AHCCCS.

Plaintiffs' facts illustrate the practical result of the defective eligibility notice. Plaintiff Darjee and her family came to the U.S. as refugees from Nepal in 2011 and were eligible for full-scope medical benefits without meeting a 5-year status requirement. Compl. ¶ 25, 56. In 2012 they became lawful permanent residents ("LPR"). In 2015 and again in 2016 with no change in their immigration status, AHCCCS improperly reduced their medical benefits to emergency-only benefits. *Id*. ¶¶ 57-59. Plaintiff Sanchez Haro received her immigration card because she was a victim of domestic violence. *Id.* ¶ 72. In 2015, she became an LPR. *Id.* ¶ 73. In April 2016, she received the eligibility notice that her medical benefits were reduced but she did not understand the notice. *Id.* ¶ 75. That is not surprising because all AHCCCS told her (and would have told the Darjees if they had received the notice), was that her immigration status did not allow her to get full-scope medical services. But just like the Darjees, her immigration status had not changed in the last year and the notice failed to provide sufficient and meaningful information to test the accuracy of the decision. *Id*. ¶¶ 56-57, 72-73.

Defendant ignores these facts and instead makes the claim with no factual support that the problem is not with the notice but that "Plaintiff's inability to understand the notice simply means she believed she was entitled to full benefits." Def. Motion at 10. Plaintiff Sanchez Haro stated she did not understand the notice and her statement must be

accepted as true. Plaintiffs have stated sufficient facts to plausibly claim that the notice violated the Medicaid Act and constitutional due process requirements.

Federal law and constitutional protections place the obligation on AHCCCS to provide notices that protect the claimants' property interests in their medical benefits. Due process requires a meaningful explanation of the reasons for the agency action so the recipient can both understand what has happened and make an informed decision whether to challenge the agency decision. In *Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992), the Ninth Circuit examined what information was necessary to explain why child support payments the state collected were not given to the custodial parent. The court concluded that the conclusory statement that "any money that was collected was not current support" did not provide meaningful notice of why that child support was not sent to the parent. The court held due process required the state provide the parents with sufficient and specific information to determine if they were receiving the support they were entitled to receive. Namely, the court required the state to provide the date of each child support collection, the amount collected, and a specific reason for denial of each pass through, all of which the agency maintained in its system and could add to the notice. *Barnes*, 980 F.2d. at 577-579.

It also is insufficient to list in general those changed circumstances that may have affected the claimant's eligibility. Due process requires individualized facts. *K.W. v. Armstrong*, 298 F.R.D. 479, 489-491 (D. Idaho 2014), *aff'd*, 789 F.3d 962 (9th Cir. 2015). The agency must provide meaningful information "detailing" the reason for the action so the claimant can determine the correctness of the decision and whether to appeal. *Rodriguez v. Chen*, 985 F.Supp. 1189, 1193-94 (D. Ariz. 1996). In *Rodriquez*, the court held statements that claimant "is now in a new category for his age and no longer eligible due to household excess income" and "net income exceeds maximum allowable" were vague and failed to provide "any basis upon which to test the accuracy of the decision." *Id.* at 1194.

Plaintiffs claim that the AHCCCS eligibility notice that only informs a person that

his or her immigration status does not qualify them for full-scope AHCCCS with no explanation of what the person's purported immigration status is or what the qualifying immigration statuses are, is no less defective than the notices in *Barnes* or *Rodriquez*.[3]

II. Plaintiffs Have Standing and Their Claims Are Not Moot (Count I)

Defendant incorrectly claims that Plaintiffs do not have standing to challenge the reduction of their medical services in Count I of the Complaint and that their claims are moot.

A. Plaintiffs have standing

In a class action, standing is satisfied if at least one named plaintiff meets the requirements. Fed. R. Civ. Proc. 23(a); *Ellis v. Wholesale Corp.*, 657 F.3d 970, 978 (9th Cir. 2011). Standing is determined at the time the complaint was filed. *Am. Civil Liberties Union of Nevada v. Lomax*, 471 F.3d 1010, 1015 (9th Cir. 2006). "[S]tanding requires that (1) the plaintiff suffered an injury in fact, i.e., one that is sufficiently concrete and particularized and actual or imminent,…(2) the injury is fairly traceable to the challenged conduct, and (3) the injury is likely to be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks omitted). Both the named Plaintiffs have suffered real injuries because Defendant improperly reduced their AHCCCS from full-scope to emergency-only coverage, and their injuries can be redressed by Defendant.

1. Defendant's challenged actions are the cause of Plaintiffs' harm

Defendant summarily and incorrectly concludes that Plaintiff Darjee had no standing to challenge AHCCCS' processing of the eligibility decisions because the family's case was being examined or had been corrected at the time of the filing of the Complaint.[4] The Darjees had standing because they suffered an injury in fact: their AHCCCS benefits were incorrectly reduced to emergency-only coverage. Compl. ¶ 59. This was the second time in two years their medical benefits had been reduced to

[3] Plaintiffs raised other deficiencies with the eligibility notice in the Compl.¶ 55.

[4] If anything, the restoration of the Darjees' benefits would raise a question of mootness, not standing, which Plaintiffs address and refute in Section II (B), *infra*.

emergency-only and they feared this would happen again. *Id.* ¶¶ 58, 70. However, the fact that their urgent medical need required immediate legal aid advocacy for the Darjees' benefits does not negate that they had suffered an injury in fact and could not access routine yet vital medical care. *Id.* ¶¶ 59, 62, 66.

Plaintiff Sanchez Haro similarly had an injury in fact when her AHCCCS benefits were incorrectly reduced from full-scope to emergency-only coverage. Defendant makes the assertion that Plaintiff Sanchez had no standing. He claims without any reference to the factual claims in the Complaint that she does not trace her claimed injury, the loss of full-scope medical benefits, to any unlawful policy or practice of Defendant. Defendant is incorrect.

In fact, he does not dispute that AHCCCS was incorrect to reduce her benefits from full-scope to emergency-only. Plaintiffs' Complaint details Plaintiff Sanchez Haro's injuries. Specifically, Defendant incorrectly reduced her benefits to emergency-only benefits and she could not understand from her notice what about her immigration status made her ineligible. As a result of Defendant's action, she went without her medication for two to three weeks because she could not afford to pay for it. Compl. ¶81. The time without her medications impacted her health and well-being; she was "very depressed and suicidal." She also could not see her doctor and became very stressed over her lack of access to care. *Id.* ¶¶ 75, 76, 80, 82. Defendant ignores these facts that clearly establish Plaintiff Sanchez Haro's standing.

In the Complaint, Plaintiffs plead that her loss of medical care was directly caused by Defendant's processing of her recertification. Ms. Sanchez Haro received medical assistance through AHCCCS for many years. In 2003, she received an immigration card because she was a victim of domestic violence under the Violence Against Women Act or "VAWA" and as a result of this immigration status she was eligible for full-scope AHCCCS. *Id.* ¶ 72. In January 2015, Ms. Sanchez Haro became a legal permanent resident ("LPR"). From at least 1991 to when she received her LPR card in 2015, she lived and maintained her residency in Tucson. *Id.* ¶ 73. Plaintiff Sanchez Haro

recertified for her food stamps and AHCCCS in 2015 and was found eligible for both food stamps and full-scope AHCCCS. *Id.* ¶ 74. When AHCCCS reduced her benefits in April 2016, they told her it was because she had not been an LPR for 5 years. *Id.* ¶ 76. Since she entered the U.S. prior to 1996, she was not required to meet the 5-year status requirement. *Id.* ¶ 27.

Plaintiffs adequately plead that Ms. Sanchez Haro had her medical benefits reduced because of AHCCCS' improper requirement that an immigrant be an LPR for 5 years, one of the specific policies or practices that Plaintiffs challenge. It does not matter if this improper requirement was imposed by computer programming or case processing errors. What is important for this motion is that Plaintiffs plausibly claim that Defendant imposed the very policy and practice that Plaintiffs challenge to deny Ms. Sanchez Haro her full-scope medical benefits.

2. Defendant's improper processing of Plaintiffs' recertifications for medical assistance caused them harm

The second prong of the *Lujan* analysis is to trace Plaintiffs' injury to Defendant's challenged conduct. *Lujan*, 504 U.S. at 560. Plaintiffs claim that the application of the improper status requirement lead directly to Plaintiffs' harm, the loss of needed medical services. Because Defendant is the director of the single state agency charged with administering the Medicaid program in Arizona, Plaintiffs' injuries—the reduction of full-scope medical assistance—can be fairly traced directly to him. Plaintiffs plead the facts that Ms. Sanchez Haro had no change in her immigration status from the prior year. Compl. ¶ 9. Immigrants who entered the U.S. prior to 1996 do not have to meet the 5-year status residency requirement. *Id.* ¶ 27. Yet, AHCCCS admitted it improperly imposed the 5-year residency requirement on immigrants who did not need to meet this requirement. *Id.* ¶ 45.[5] Once Plaintiffs' AHCCCS benefits were reduced to emergency-

[5] As previously noted, Plaintiffs did not plead that the AHCCCS has corrected the computer programming issues. Rather, Plaintiffs plead that AHCCCS admitted to the computer programming issues. Compl. ¶ 40. For this motion, Plaintiffs' facts must be accepted as true.

only AHCCCS, they could no longer access necessary medical care such as doctors' visits and prescription medication. Compl. ¶¶ 62, 65, 67, 80-83. Plaintiff Sanchez Haro went without her medications for two to three weeks and it was "horrible for [her.] [She] was trembling, shaking, vomiting and [her] head burned. [She] was suicidal and very depressed." *Id.* ¶ 82. When the Complaint was filed, she feared her pharmacy would stop giving her her medications, which unfortunately but predictably happened. Second Declaration of Alma Sanchez Haro in Support of Plaintiffs' Motion for Class Certification and Motion for Preliminary Injunction, ¶ 10, Docket No. 33. Once the pharmacy stopped filling her prescriptions, she again went without insulin and other medications and "felt dizzy, nauseous and sweat[ed] a lot. [She] felt desperate and had thoughts of killing [herself]." *Id.* Plaintiffs' facts clearly establish that AHCCCS' improper reduction of Ms. Sanchez Haro's medical benefits directly caused her harm and she had standing to bring this case when the Complaint was filed.[6]

3. There is a live controversy between the parties that can be redressed by Defendant

Defendant also incorrectly claims with no factual or legal support that Ms. Sanchez Haro would not benefit from declaratory and injunctive relief. Because she, as well as the Darjees, were recipients of AHCCCS at the time the complaint was filed, they have standing to seek injunctive and declaratory relief. *See, e.g., Walsh v. Nevada Dept. of Human Resources*, 471 F.3d 1033 (9th Cir. 2006) (plaintiff who was no longer employed by employer and did not state she wanted to return did not have standing to seek policy changes regarding disability discrimination). Moreover, because the Darjees and Ms. Sanchez Haro continue to be recipients of medical coverage and subject to AHCCCS recertifications and receipt of AHCCCS eligibility notices every year, the relief sought in this case will benefit them. Significantly, Defendant does not refer to let alone dispute one of these facts set forth in Plaintiffs' Complaint.

[6] Similarly, Plaintiffs plead facts that showed the Darjees were unable to access needed medical care once their medical benefits were reduced. Compl. ¶¶ 62-67.

B. The claims in this case are not moot

Defendant argues that once AHCCCS restored Plaintiff Sanchez Haro to full-scope benefits after this case was filed, her claims became moot. A case becomes moot only when there is no case or controversy between the parties, which occurs only when there is no "live" issue or the parties lack a cognizable interest in the outcome of the case. *Chafin v. Chafin*, 133 S.Ct. 1017, 1023 (2013) (citations omitted). A case is moot only if it is "impossible" for the court to grant any effectual relief. Thus, "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id*. (citation omitted). As AHCCCS recipients, the Plaintiffs and class members have a personal interest to ensure that AHCCCS remedies its policies and practices, recertifies immigrant eligibility according to federal law, and uses eligibility notices that comply with the Medicaid Act and due process. Thus, because of their continued personal interest in the case as immigrant AHCCCS recipients this Court can grant relief to the Plaintiffs and the class and their claims are not moot.

Defendant fails to explain how the claims in this case are moot. His only argument is his claim that Plaintiff Sanchez Haro's claim is not "transitory" where the trial court will not have enough time to rule on a motion for class certification before the claim is moot. Without any legal authority, Defendant claims Ms. Sanchez Haro's claims are not transitory because she has administrative appeal rights, she must assert those rights, and if she does not, the administrative remedies "preclude any theory" that the claim is capable of evading review. Defendant is wrong. The Sixth Circuit recently rejected such an assertion in a case that challenged Michigan's determinations that a recipient was a "fleeing felon" (a criminal-justice disqualification) and not eligible for food stamps. *Barry v. Lyon*, No. 15-1390, 2016 WL 4473233 (6th Cir. Aug. 25, 2016). In *Barry*, the state claimed the plaintiff failed to request an administrative hearing or to take other steps to correct the erroneous warrant. The court disagreed. "[T]he state's attempt to abdicate responsibility [is] unpersuasive. The plaintiffs were injured at *the time* the agency denied or terminated their food stamps and provided inadequate notice."

Barry, at *9 (emphasis in original).

Even if this Court decided the Plaintiffs' claims in Count I of the Complaint are moot, there is an exception to mootness that would apply. There is an exception to mootness where the claims are "capable of repetition, yet evading review." *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1090 (9th Cir. 2011). The Ninth Circuit defines "transitory" as one that evades review either "by its very nature" or by "virtue of the defendant's litigation strategy." *Pitts*, 653 F.3d at 1091. In *Pitts*, the Ninth Circuit reviewed the relevant case law on mootness in class cases:

> [E]ven if the district court has not yet addressed the class certification issue, mooting the putative class representative's claims will not necessarily moot the class action. '[S]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.' *McLaughlin*, 500 U.S. at 52, 111 S.Ct. 1661 (internal quotation marks omitted). An inherently transitory claim will certainly repeat as to the class, either because '[t]he individual could nonetheless suffer repeated [harm]' or because 'it is certain that other persons similarly situated' will have the same complaint. *Gerstein*, 420 U.S. at 110 n.11, 95 S.Ct. 854. In such cases, the named plaintiff's claim is 'capable of repetition, yet evading review,' *id*., and 'the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution,' *McLaughlin*, 500 U.S. at 52, 111 S.Ct. 1661; *see also Geraghty*, 445 U.S. at 398, 100 S.Ct. 1202; *Sosna*, 419 U.S. at 402 n.11, 95 S.Ct. 553. **Application of the relation back doctrine in this context thus avoids the spectre of plaintiffs filing lawsuit after lawsuit, only to see their claims mooted before they can be resolved.**

Id. at 1089-90 (emphasis added).

Defendant Betlach dismisses Plaintiffs' fear that their benefits will be reduced in the future. The potential for reoccurrence need not be probable rather is it sufficient if the person could possibly find herself in the same situation she faces when the lawsuit was filed. *Honig v. Doe*, 484 U.S. 305, 319 n.6 (1988). Plaintiffs have plead facts that

AHCCCS on repeat occasions has improperly reduced medical benefits. Plaintiff Sanchez Haro worries that AHCCCS will reduce her benefits again. Second Sanchez Haro Decl., ¶ 13. Her fears are well-founded because the Plaintiff Darjee and her family had their benefits improperly reduced two times, Compl. ¶ 58, and they continue to worry that the family's benefits will be reduced another time. *Id.* ¶ 70. Other immigrants had their medical benefits improperly reduced 2 times in a 3-month period this year. Declaration of Anne Ryan in Support of Plaintiffs' Motion for Class Certification and Motion for Preliminary Injunction, ¶ 17, Docket No. 10. In this situation where there have been unjustified repeat reductions in the past, if it is reasonable to expect that the Plaintiffs and class members could expect difficulties in the future. *Barry*, 2016 WL 4473233 at *9. Just as in *Pitts*, the exception to mootness would apply in this case to avoid the spectre of plaintiffs filing lawsuit after lawsuit only to see their claims mooted before they can be resolved. 653 F.3d at 1090. Defendant fails to comprehend that Plaintiffs and the class want Defendant Betlach to remedy his improper systemic policies and practices now for everyone affected.

Conclusion:

For all the above reasons, Plaintiffs request that this Court deny Defendant's Motion to Dismiss in its entirety. If the Court determines that any of Defendant's assertions have merit, Plaintiffs request that the Court allow them to file an amended complaint.[7]

Dated this 9th day of September 2016.

NATIONAL HEALTH LAW PROGRAM

WILLIAM E. MORRIS INSTITUTE FOR JUSTICE

By /s/Ellen Sue Katz
Ellen Sue Katz

Attorneys for Plaintiffs

[7] When a motion to dismiss is granted, leave to file an amended complaint is proper unless it is clear that the complaint could not be saved by any amendment. *Polich v. Burlington Northern, Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991).

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September 2016, 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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