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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 IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs submit this Reply in Further Support of their Motion for Preliminary Injunction. The criteria for a preliminary injunction is a (1) likelihood of success on the merits; (2) likelihood of irreparable injury; (3) balance of hardship favoring the plaintiffs;

and (4) the public interest. *Winter v. National Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2000). In the Ninth Circuit, a stronger showing on one element may offset a weaker showing on another. *Rodde v. Bunta*, 357 F.3d 988, 994 (9th Cir. 2004).

I. Plaintiffs Have Demonstrated a Likelihood of Success on the Merits

A. Defendant's Recertification of Immigrant Eligibility for Medical Benefits

Plaintiffs' claim that their reduction from full-scope Arizona Health Care Cost Containment System ("AHCCCS") benefits to emergency-only benefits is a violation of § 1396a(a)(8) and 42 C.F.R. § 435.930 is likely to succeed on the merits because they were and continue to be eligible for full-scope benefits and were only reduced to emergency services because of Defendant's wrongful actions.

In reviewing Defendant's Response, there are many assertions made by Defendant's counsel that have no support in the record. *See, e.g.*, pages 7-8, paragraph on hypothetical "circumstances." In addition, AHCCCS submits the Declaration of Tara Lockner, but on close inspection, much of what she says is based on hearsay, is vague, contradicted by case records and fails to respond to Plaintiffs' claims.

Reasonable promptness as it is defined in the Medicaid Act means that Defendant must furnish Medicaid services to eligible individuals. 42 U.S.C. § 1396a(a)(8). Defendant's argument that "[t]o the extent [§ (a)(8)] applies to eligibility determinations rather than services, it was intended, as its plain language states, to require timeliness" is unsupported and incomplete. Eligibility for and furnishing of medical services are necessarily linked: Medicaid services cannot be provided without a first finding of Medicaid eligibility. The case Defendant relies on, *Sobky v. Smoley*, 855 F. Supp. 1123, 1147 (E.D. Cal. 1994), finds that § (a)(8) refers to "furnishing Medicaid" not merely processing applications.

Federal regulation requires Defendant to maintain Medicaid eligibility until the Plaintiffs and class members are found to be actually ineligible. 42 C.F.R. § 435.930(b); *see Romano v. Greenstein*, No. 12-469, 2012 WL 1745526 at *8 (E.D. La. May 16,

2012), *aff'd*, 721 F.3d 373 (5th Cir. 2013). Plaintiffs and putative class member Nyirandekeyaho have been and continue to be eligible for full-scope AHCCCS services, a fact that Defendant does not dispute. *See* Def.'s Response to Motion for Prelim. Inj. at 2-3 ("Def. Resp."); Declaration of Tara Lockner ("Lockner Decl.") ¶¶ 30(c), 31(c), 32. Defendant argues that *Romano* should not be persuasive because no court has followed *Romano*. The Fifth Circuit affirmed *Romano* only three years ago, and it remains good law and a valid interpretation of § (a)(8) and § 435.930. *See* 721 F.3d 373 (5th Cir. 2013). The *Romano* decision tracks the long settled precedent on reasonable promptness set forth in cases like *King v. Smith*, 392 U.S. 309 (1968); *Townsend v. Swank*, 404 U.S. 282 (1971) and *Jefferson v. Hacknay*, 406 U.S. 535 (1972), explained in Plaintiffs' Memorandum in Support of the Motion for Preliminary Injunction, pages 10-11 ("Plaintiffs' Memo") and thus is well settled law. *Romano* is on point with the case Plaintiffs present and no court has disagreed with or questioned the holding.

Defendant also argues that cases where individuals are not found eligible for *any* benefits are not dispositive to the instant case. He is wrong. It follows from § 435.930(b) that because Plaintiffs are eligible for full-scope Medicaid benefits, they cannot be removed from those benefits unless or until they are properly found ineligible for full-scope benefits. *See Crippen v. Kheder*, 741 F.2d 102, 106-07 (6th Cir. 1984); *Romano*, 2012 WL 1745526 at *8 (finding that Medicaid Act requires the state agency to provide Medicaid assistance to all who are eligible). In law and in fact, reduction from full-scope AHCCCS to emergency-only services is tantamount to losing coverage for necessary medical assistance. The Medicaid Act and its implementing regulations define medical assistance to include a full and comprehensive range of medical services, including but not limited to doctor's visits, outpatient procedures, physical or mental-health therapies, prescription medications, durable medical equipment. 42 U.S.C. § 1396d(a); 42 C.F.R. § 440.1 *et seq.* In contrast, emergency-only benefits only cover medical conditions with "sudden onset" that have acute symptoms that without "immediate" medical attention would place the person's health in serious jeopardy, could cause serious impairment of

bodily functions, or serious dysfunction of a bodily organ or part. 42 C.F.R. § 440.255(b); A.A.C. R9-22-217(A). Thus, Medicaid beneficiaries with emergency-only benefits cannot go to the doctor if they have a cold and they cannot get chemotherapy if they have cancer because these conditions do not qualify as "emergencies."

Defendant admits that by his actions he improperly placed Plaintiffs and thousands of other immigrants in restricted scope benefits. Def. Resp. at 2; Lockner Decl. ¶¶ 16, 19. He admits that these improper reductions are ongoing to the present time and some currently reviewed cases will not have their benefits reinstated until a projected date of September 14. Def. Resp. at 2; Lockner Decl. ¶ 19. He does not suggest any plan to stop the improper reductions from happening in the first place and his attorney claims there are "60 erroneous determinations per month." Def. Resp. at 8. Instead, he asks this Court to allow the current process to continue outside the Court's oversight where immigrants continue to improperly lose their full-scope benefits and in the future AHCCCS may review the case and may determine the person should be reinstated to full benefits. It is Defendant's obligation to properly recertify or renew AHCCCS beneficiaries in the first instance, his responsibility to know and understand the immigration laws as they apply to recipients of Medicaid, and his obligation to ensure that AHCCCS's systems operate pursuant to the Medicaid Act requirements.

In defense of his admission that thousands of immigrants have improperly lost, are losing and will continue to improperly lose full-scope benefits, Defendant argues that errors (he calls them "mistakes") are bound to happen. He blames this on the purported "complexity" of the renewal process and immigrants' eligibility for Medicaid. The argument is not supported by the facts in this case.

The questions asked to determine eligibility for immigrants are finite. This is shown by the questions on the combined AHCCCS and Arizona Department of Economic Security ("DES") paper application for cash assistance, food stamps, medical benefits, as well as other programs. Second Declaration of Ellen Sue Katz ("Second Katz Decl."), Exh. E. The questions on the paper application for citizens and immigrants are:

(1) is the person a U.S. citizen or U.S. National; (2) if no, what is the person's immigration status, with 24 options, including refugee, battered spouse, child and parent and other; (3) what immigration document does the person have; (4) what is the person's immigration document number; and (5) has the person lived in the U.S. since August 22, 1996. *Id.* That the information needed to determine immigrant eligibility can be reduced to 5 questions contradicts AHCCCS' claims of complexity.[1] The fact that DES was able to use this same information and correctly recertify Plaintiffs and class member Nyirandekeyaho for food stamps, belies AHCCCS' claims that continued erroneous reductions of medical services are a result of recertification "complexities" and should be accepted by the public and this Court.

Not only is the information needed to determine immigrant eligibility discrete, but AHCCCS in an October 20, 2015, news flash concerning the improper reductions of immigrant benefits, admitted that: "It is very rare for a customer to change from full AHCCCS Medical Assistance to FES [emergency only services]." Lockner Decl., Exh. E.[2] In the October 20, 2015 news flash, AHCCCS admitted that staff may need to look at older applications to determine immigration status and that if a "customer has declared a different status (like "other") than on a previous application, the customer may be incorrectly screening for [emergency services]." *Id.*

The reason for the required *ex parte* review process is to simplify the renewal process, to lower errors and to maintain recipients' benefits uninterrupted. That is why the agency is required first to look at the case file and use the evidence in the file without continually going back to the recipient and asking them unnecessary questions. Regardless, Defendant may not reduce or delay access to Medicaid services for which the Plaintiffs and the class are eligible because he claims the recertification process is

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[1] There also is an online application that requests the same information. www.azahcccs.gov; www.azdes.gov.

[2] Ms. Lockner's declaration references several documents. For the news broadcasts, AHCCCS fails to provide a website where these documents are located and available to the public.

complicated. *See Sobky*, 855 F. Supp. at 1147 ("Under 42 C.F.R. § 435.930, administrative procedures may not delay a state's provision of services.") Defendant never properly found Plaintiffs or the thousands of other immigrants to be ineligible because they never stopped being eligible. That is why their reduction of benefits are incorrect.

Plaintiffs do not disagree that AHCCCS can request an immigration number. Indeed, Plaintiffs and class member Nyirandekeyaho each stated they gave AHCCCS their immigration number. Declaration of Aita Darjee ("Darjee Decl."), ¶ 5, Docket No. 12; Declaration of Alma Sanchez Haro ("Sanchez Haro Decl."), ¶3, Docket No. 11; Declaration of Stephanie Nyirandekeyaho ("Nyirandekeyaho Decl."), ¶ 4, Docket No. 14. No one disputes a person's immigration status may change in rare circumstances, although his or her immigration number does not. But Plaintiffs and Ms. Nyirandekeyaho did not have a change in immigration status since their prior recertifications. Darjee Decl., ¶ 5; Sanchez Haro Decl., ¶ 3; Nyirandekeyaho Decl., ¶ 4.

A review of Ms. Lockner's declaration does not establish compliance with the reasonable promptness requirement as required by 42 U.S.C. § 1396a(a)(8) and 42 C.F.R. § 435.930.. First, Ms. Lockner is not an employee of the DES, and has no firsthand information on what DES eligibility workers are doing. She does not explain the training for case workers on immigrant eligibility. Ms. Lockner's declaration references several documents but does not provide a website where these "news flashes" are located and available to the public. There is no explanation concerning how these documents were communicated to DES caseworker staff. In addition, her declaration references many statistics but, here as well, there is no underlying documentation provided or reference to where this information can be found on the AHCCCS website.

In addition, she never refers to the *ex parte* process by name or states that AHCCCS utilizes it. Much of Ms. Lockner's declaration is deliberately vague and is not specific to initial applications or recertifications. In ¶ 19, she does not state that AHCCCS is reviewing every immigrant case where benefits were reduced to emergency-

only since January 2016, like she stated for the prior period. Lockner Decl. *Compare* ¶ 16 and ¶19. Nor does she explain what the reviews entailed or say how workers were trained to ensure uniform application of the review process.

Ms. Lockner's statements that describe Defendant's policy and practices show they are in violation of the federal Medicaid recertification regulation. In her declaration, Tara Lockner, states that every year AHCCCS beneficiaries "must file a renewal application" in order for their benefits to continue. Lockner Decl. ¶ 8. This policy of requiring an "application" in every case violates 42 C.F.R. § 435.916(a), which states that Defendant must undertake an *ex parte* review of available information before asking a beneficiary for information. Her claim that when a "person's application requires additional information to complete," the caseworker will go through a convoluted process to determine continued eligibility does not start with reviewing the case file. *Id.* ¶ 7. Furthermore, if Defendant sends a "response required renewal letter" detailing what information is on file and what additional information is necessary to recertify AHCCCS benefits, then the letter AHCCCS sends Plaintiffs and class members should have their correct immigration status information, including their immigration number in it because they had full-scope AHCCCS benefits before 2016. Lockner Decl. ¶ 10. Finally, Ms. Lockner's statement in ¶ 26 that staff do not ask about "immigration status and alien identification numbers" when the information is in the case file is hearsay and conflicts with records AHCCCS produced.

AHCCCS' April 19, 2016, News Flash has the recertification process backwards for immigrants. Lockner Decl., Exh. F. The process starts with an interview of the beneficiary and during the interview questions about the immigrant's status are asked. Only if the person at renewal selects "other" or does not want to provide information does the case workers look for an immigration number or status in the case file or other DES/AHCCCS databases although those are the first places the caseworker is supposed to look. Finally, Ms. Lockner's statement that AHCCCS automatically renews eligibility in 60% of all cases has no relevance to this case. *Id.* ¶ 25. The concern here is with

immigrant recertification and the ongoing problems with Defendant improperly converting immigrant recipients from full to emergency only Medicaid coverage.

Ms. Lockner's explanation of Plaintiffs' cases does not contradict that Defendant's administration of the AHCCCS program violates the reasonable promptness requirement. Despite what AHCCCS now claims are conflicting immigration status information in prior years (2010, 2012, 2014 and 2015) by Plaintiff Sanchez Haro, Lockner Decl., ¶ 31, she was repeatedly found eligible for and received full-scope AHCCCS during each of those years and was found eligible for food stamps in each prior year and again in 2016. Sanchez Haro Decl., ¶¶ 1-3, 5 and 9. AHCCCS appears to be going back into her case file to search for any inconsistencies that, if they occurred, no one found significant at the time but that it now tires to use to justify its improper reduction in benefits. Also, the multiple applications that Ms. Lockner describes AHCCCS required of Ms. Sanchez Haro including 2 applications in 2012 show that Defendant is not utilizing the immigration information already in her case file or the *ex parte* process. *See* Lockner Decl. ¶ 31. Ms. Sanchez Haro provided AHCCCS information that she was a battered immigrant that she had been in the United States prior to 1996, and that in January 2015, prior to her recertification in 2015, she became a legal permanent resident ("LPR"). Sanchez Haro Decl. ¶¶ 2-3.

In fact, information available from a federal database, SAVE, to AHCCCS indicated that Ms. Sanchez Haro was an eligible immigrant. Lockner Decl. ¶ 31(b). Defendant's policy was to require "proof from SAVE in her case record to validate the authenticity of the documents she had provided." Lockner Decl. ¶ 31(b). 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. 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. 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. The two relevant questions were: (1) what is Ms. Sanchez Haro's immigration status and (2) did she enter the U.S before 1996 and continue to live in the U.S. since then and as explained, all this information was in the AHCCCS file. Second Katz Decl., ¶ 3, Exh. D, pages 1-4.

Ms. Lockner's explanation for Plaintiff Darjee fails to explain why the family lost their full medical benefits in 2015. Between 2015 and 2016, nothing changed in their immigration status so all the relevant information concerning their immigration status should have been available to staff to recertify *ex parte*. There is no explanation about what information "was keyed" into HEAPlus and the "additional verification" needed. Lockner Decl., ¶ 30(b). Ms. Lockner's explanation is vague. *Id.* In several places, Ms. Lockner refers to information that needed to be "keyed" into HEAPlus. *Id.* ¶¶ 20, 26, 30(b), 32. The HEAPlus computer system does not appear set up to automatically upload the immigration number and immigration status for the immigrants at recertification as it should under the *ex parte* process.

Ms. Lockner's explanation of Ms. Nyirandekeyaho's case is puzzling. Ms. Lockner claims that someone input that Ms. Nyirandekeyaho was an LPR on some undisclosed date. *Id.* at ¶ 32. Because Ms. Nyirandekeyaho entered the U.S. as a refugee, the computer system should have noted that immigration status and carried it forward. Nyirandekeyaho Decl., ¶ 4. Ms. Lockner's statement that someone "found an earlier application" shows that the relevant information is not being used as it should be for the *ex parte* process. Lockner Decl. ¶ 32. Finally, refugees who become LPRs do not need to meet the 5 year status requirement, U.S.C. § 1613(b), and so the computer should have realized that she was a refugee and caught that issue if the computer program actually was re-programmed as AHCCCS clams.

Finally, Ms. Lockner never explains any specifics for the review that AHCCCS claims it conducts on the cases where the immigrants had their full-scope medical

benefits reduced to emergency-only benefits. Specifically, she does not disclose what AHCCCS looks for when it reviews the cases; what information in the case file may result in a reinstatement of full benefits; what information in the case file may result in a finding that the reduction was proper; whether it looked to see if the information needed or requested was already in the case file; what it does if there is an unanswered request for information when the information is in the case file or could have been located in another case file, such as the food stamp file. This is information AHCCCS never provided Plaintiffs' attorneys and information it has not provided in this litigation. Second Katz Decl., ¶ 4.

The combination of AHCCCS' concession that it is rare for an immigrant to go from full-scope AHCCCS to emergency only AHCCCS and its failure to inform Plaintiffs' counsel or this Court concerning any particulars of its case reviews supports the conclusion that its initial examinations that found many of the reductions in benefits proper is questionable. The fact that 60 erroneous determinations persist each month bears out this problem.

The law requires that Defendant must maintain Plaintiffs' and the classes' full-scope AHCCCS eligibility through the recertification process unless and until they are properly found ineligible. Here, Defendant is violating § 435.930(b) because he is reducing their AHCCCS benefits not only without a proper finding of ineligibility, but in the absence of any triggering event. In each case presented to the Court, nothing concerning the person's immigration status changed in the last year since their prior eligibility determination. Plaintiffs and putative class members are losing full-scope benefits for no apparent reason other than the systemic programming and caseworker errors that Defendant admits.

The Institute obtained some internal AHCCCS documents pursuant to a public records request. Second Katz Decl., ¶ 2. In an e-mail to herself on February 10, 2016, Ms. Lockner states the following:

> ***
>
> Suggestion moving forward:
>
> Don't know how to best analyze this group; don't have expertise to know what to look for/capacity to figure out what to look for. Suggestion to create query to identify on a regular basis. Knowledgeable as to identity and send examples to SIS with specific examples and background of what they saw; may be able to get under this while fixing the errors at the same time.
>
> November fix was a change to look at SAVE results for the PID. System will look at the SAVE results for that person. If there's no SAVE results, there's nothing to look at, but system is also looking at other data as well for the person.
>
> ***

Second Katz Decl., Exh. F. Ms. Lockner's statements show that the November "fix" appears to be a change to look at SAVE and that she was struggling with how to analyze the cases. This admission is from the person AHCCCS holds out as in charge and knowledgeable. This e-mail supports Plaintiffs' claims on reasonable promptness.

Finally, Defendant incorrectly continually claims that "mistakes" in the renewal process are "anticipated" by the courts citing *Robertson v. Jackson*, 766 F.Supp. 470, 476 (E.D. Va. 1991) *aff'd*, 972 F.2d 529 (4th Cir. 1992). *Robertson* was a food stamp timeliness processing case where the state agency was found in violation of the federal statutory timeframes. It was in the order for relief agreed to by the parties that for a few months, an allowable timeliness error rate was provided. *Cf. Woodrow v. Concannon*, 942 F.2d 1385, 1388 (9th Cir. 1991) ("Impossibility of perfect compliance, then may be a defense to contempt, but it does not preclude an injunction requiring compliance with the regulation when a pattern of non-compliance has been shown to have existed."). In contrast in this case, Defendant's statistics show an error rate during 2014 and 2015 of *60%* (3500 cases out of 5,900) and in 2016, an error rate of at least 22% because not all the cases have been reviewed and new cases continue to arise. *See* Lockner Decl., ¶¶ 16, 19. He also claims the federal government "anticipates" errors citing the proposed rule on quality reviews for payment by the federal government. 81 FR 40596-01, 2016 WL

3402966. The quality reviews are based on samplings of 200-300 cases in various categories each year to see if the state properly paid for medical services. These quality reviews and any proposed allowable error rates are not relevant to this case.

At this stage of the litigation, Plaintiffs have shown a probability of succeeding on the merits of their reasonable promptness claim and at the least raise serious legal questions that it is likely that Defendant is violating the reasonable promptness provision in the Medicaid Act. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1131 (9th Cir. 2011),

B. Defendant's Eligibility Notice

Plaintiffs in their Memorandum in Support of Motion for Preliminary Injunction, at 14-18, and in their Response to Defendant's Motion to Dismiss, at 8-11, go step-by-step through the defects in the eligibility notice that AHCCCS sent to immigrants it found eligible for emergency-only services and provides analyzed and dipositive case law in support and those pleadings are incorporated into this Reply.[3] Defendant argues that the cases Plaintiffs cite only pertain to notices where calculations are involved and that more specificity than is found in Defendant's eligibility notice "has not been required outside the computation context." Def. Resp.at 12. He does not cite one federal court decision where a vague eligibility notice was approved by a court. Instead, Defendant refers to *Hopkins v. Department of Human Services*, 802 A.2d 99 (Sup. Ct. Maine 2002), where the issue as well concerned calculations of countable income. In *Hopkins*, plaintiffs claimed that the state's defective notice made them unable to prepare a defense and offer evidence at the administrative hearing. While the court found the notice was defective, it found that since the state's calculations presented at the hearing were correct, there was

[3] Plaintiffs attached an eligibility notice to the Declaration of Ellen Sue Katz, Exh A, Docket No. 13. In that notice dated May 12, 2016, there is no definition of an emergency condition. In the 3 notices AHCCCS produced that it claims it sent Plaintiffs and the class member, Lockner Decl., Exhs. B, C and D, there is a section with the definition of an emergency medical condition but nothing about what services the person is entitled to receive. The notices are the same in all other respects. AHCCCS appears to be sending two versions of the defective eligibility notice.

no prejudice. *Id.* at 1004. *Hopkins* is in direct conflict with the dispositive rulings in *K.W. v. Armstrong*, 789 F.3d 962 (9th Cir. 2015); *Barnes v. Healy*, 980 F.2d 572, 579 (9th Cir. 1992); *Rodriquez v. Chen*, 985 F.Supp. 1189 (D. Ariz. 1996), discussed in Plaintiffs' Reply PI Memo. at 14-17, and relied upon by Plaintiffs and incorporated into this Reply.

There are numerous federal cases that enjoined the use of notices that provided insufficient information to the recipient. *See, e.g., Febus v. Gallant*, 866 F.Supp. 45 (D. Mass. 1994). In *Febus*, the state agency ran a computer program to see if recipients were getting benefits in nearby states. If the computer found a match, a termination notice was sent stating "you and/or a household member are living outside of Massachusetts and do not intend to return soon." The court found this was a misleading reason for action because the "actual" reason was the computer match and violated federal law and constitutional protections. The court noted that in a significant number of cases, the termination was not justified, the supposed "match" produced a false positive and the state failed to confirm there was actual receipt of benefits in the other state. *Id.* at 46-47. The court ordered reinstatement of those who were sent the defective notice and noted that the state could promptly review the cases. Plaintiffs claim AHCCCS' eligibility notice is analogous to the notice in *Febus*.

Another case is *Barry v. Lyons*, No. 15-1390, 2016 WL 4473233 (6th Cir. Aug. 25, 2016), where the Sixth Circuit recently held a food stamp notice that only informed the person: "You or a member of your group is not eligible for assistance due to a criminal disqualification" violated constitutional due process. The court did not address statutory defects in the notice, *id.* at *10 although the district also had found the notice violated federal law. *Barry v. Corrigan*, 79 F.Supp.3d 712 (E.D. Mich. 2015). An agency only telling someone they have a "criminal disqualification" is no different than only telling someone their "immigration status" precludes full medical benefits.[4] Plaintiffs

[4] Defendant's arguments are surprising because Ms. Lockner states AHCCCS is going to revise the eligibility notices. Lockner Decl. ¶ 27. Defendant appears to agree that

have shown a probability of success or at least raised serious legal questions that AHCCCS' eligibility notice violates the Medicaid Act and constitutional protections. *Alliance*, 632 F.3d at 1131.

II. Plaintiffs Have Demonstrated Irreparable Injury

Plaintiffs fully explained the harm they have suffered and will suffer in the future if Defendant's conduct is not enjoined in Plaintiffs' Memo. at 6-9. Defendant utterly fails to contradict this persuasive and credible evidence. He claims with no factual basis or legal support Plaintiffs are not suffering irreparable harm and are not likely to. Before the Complaint was filed, 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." Compl. ¶ 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, ¶ 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*.

Finally, Defendant repeats his claim that Plaintiff Sanchez Haro should have filed an appeal. The Ninth Circuit has rejected such a claim. *K.W.*, 789 F.3d at 973-74 ("It would be illogical if the availability of a hearing deprived the Plaintiffs of their right to receive the notice they need to challenge benefits reductions at the hearing.").

III. The Balance of Hardship and Public Interest Favor Plaintiffs

Defendant objects to an injunction prohibiting him from reducing qualified immigrants at recertification to emergency-only benefits. He apparently does not object to the injunction on use of the defective notices. He claims that the Court should maintain the status quo of allowing AHCCCS to continue to improperly reduce

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the notice is defective and must be changed in the manner requested by Plaintiffs' counsel prior to this litigation, Second Katz Decl. ¶ 5, and in this litigation. The question is whether those changes will be adequate to bring the notice into compliance with federal law and constitutional protections.

immigrants to emergency-only benefits; reexamine the cases in the future and further in the future restore benefits to those persons where AHCCCS thinks a mistake was made, all outside the review of this Court.

AHCCCS has not come forward with a plan to stop the improper reductions in medical benefits in the first place. Having conceded that he is unable to stop the improper reductions, this Court should enjoin him from continuing to improperly reduce immigrant benefits. His continual suggestion that the victims should file appeals tries to unlawfully shift responsibility to the victims and away from him and has been rejected by the Ninth Circuit. *K.W.*, 789 F.3d at 973-74. Until Defendant sends out lawful eligibility notices and is able to fully comply with reasonable promptness requirement and utilize the *ex parte* process, he should be enjoined from reducing immigrants' benefits.

As explained in section I (A) above, AHCCCS has failed to explain what its review process entails and how it is sufficient. Ms. Sanchez Haro's case shows this problem. AHCCCS informed her in a notice dated April 12, 2016, that her medical benefits would be reduced. Lockner Decl., Exh. C. This litigation was filed on July 22, and Defendant was served on July 27, *15* weeks after her benefits were reduced. Docket No. 21. During this time period, either AHCCCS did not review her case at all, or reviewed it and concluded she was not eligible. Either fact pattern supports the need for an injunction in this case. As discussed on pages 8-9 in this Reply, Ms. Lockner's declaration deliberately does not give dates and is very vague concerning any review AHCCCS conducted of Ms. Sanchez Haro's 2016 recertification. As shown in those same pages, Ms. Sanchez Haro's case was not complicated and AHCCCS had all the information it needed in its files to properly recertify her benefits.

The balance of harms disproportionately and gravely impacts Plaintiffs. Defendant's eventual eligibility correction and retroactive restoration of full-scope AHCCCS benefits in these cases does not excuse the unlawful practices or mitigate the harm Plaintiffs and class members have suffered or will suffer while AHCCCS allows the improper reductions to continue, reviews the cases at some undefined later date using

some undefined process, and corrects those cases where it finds the reduction was improper. After the unlawful reduction and pending an eligibility correction, Plaintiffs and class members are unable to access care unless they can pay for it out-of-pocket or can find other charitable assistance. Compl. ¶¶ 62-63, 81. As AHCCCS-eligible individuals, they, by definition, have low income and cannot afford to pay for out of pocket for doctors or medications. *Id.* ¶¶ 66, 81. As the District Court in *Sobky* found, "[f]or anyone in immediate need of medical treatment, the value of medical services provided in the future is less than the value of medical services provided when needed, particularly when the need is great." *Sobky*, 855 F. Supp. at 1142.

Plaintiffs cited several cases in support of its request that AHCCCS reinstate benefits to persons who received the defective notice. Plaintiffs' Memo, pages 20-21. Defendant ignores these cases and without any legal authority claims that reinstatement is not appropriate relief. Here as well, the Ninth Circuit has rejected Defendant's position. In *K.W.*, 789 F.3d at 974-75, the court granted a classwide injunction for prospective relief by "restoring class members to the individualized budgets they had prior to the Defendant's defective 2011 Budget Notice."

IV. The Requested Relief is Not Overbroad

Defendant claims this requested injunction is not tailored to the violations. He claims persons who are not eligible for benefits might receive them. As explained above, in *K.W.* the court granted just this type of relief. *Id*. Moreover, he does not suggest a narrower injunction.

Conclusion

For all the above reasons, as well as those in Plaintiffs' Memorandum in Support, this Court should enjoin Defendant from using its defective eligibility notice and from reducing immigrant eligibility from full-scope medical benefits to emergency-only benefits until Defendant has a fully compliant reasonable promptness policy and procedure in place that this Court has approved, staff have been adequately trained on the policy and procedure and Defendant has developed a lawful eligibility notice. In the

alternative to immediate reinstatement for the immigrants whose cases AHCCCS has reviewed and found not eligible for full benefits, this Court should order Defendant to explain in detail the uniform policy and process he used to review the cases and explain the factors that allowed for reinstatement and those that did not. If Defendant cannot produce this information, then this Court should order reinstatement to those immigrants reduced to emergency-only benefits until Defendant has a fully compliant reasonable promptness policy and procedures and lawful eligibility notice in place.

Respectfully submitted this 19th 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

CERTIFICATE OF SERVICE

I hereby certify that on the 19th 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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