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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

PLAINTIFFS' OBJECTIONS TO REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

ORAL ARGUMENT REQUESTED

Plaintiffs respectfully object to the Magistrate Judge's Report and Recommendation that granted Defendant's Motion to Dismiss on both Counts of the Complaint for lack of standing and failure to state a claim and denied as moot Plaintiffs' motion to strike supplemental declaration. Plaintiffs incorporate their Response to the

Motion to Dismiss, Docket No. 38 into these objections. The Court's review of the Magistrate's Report and Recommendation is *de novo*. 28 U.S.C. § 636(b)(1)(c).

BACKGROUND

Plaintiffs are immigrants who are eligible for full-scope Medicaid under the Arizona Health Care Cost Containment System ("AHCCCS") program. Docket No. 1; Complaint ¶¶ 56, 72-73. They are qualified immigrants under federal law because they entered the U.S. before 1996 or have an immigration status such as refugee that allows them to receive public benefits and to continue to receive those benefits after they become a legal permanent resident without meeting the 5-year status requirement. 8 U.S.C. §§ 1613(a) and (b), 1641(c); Compl. ¶¶ 24-27. AHCCCS is responsible for processing applications and recertifications for medical assistance and in most cases has delegated this eligibility process to the Arizona Department of Economic Security ("DES"). *Id.* ¶ 23. Throughout these objections, Plaintiffs will refer to AHCCCS as the agency processing the recertifications.

Under the Medicaid program, recipients must recertify or renew their eligibility for benefits each year. *Id.* ¶ 31. When Plaintiffs recertified for their medical benefits in 2016, Plaintiffs claim AHCCCS improperly transferred them to emergency-only benefits in violation of the reasonable promptness requirement of the Medicaid Act. *Id.* ¶¶ 59, 75. Emergency medical services provide severely limited services and do not include medications, routine testing or doctor visits. *Id.* ¶¶ 29, 63, 80. The reasonable promptness claim is Count I of the Complaint.

Plaintiffs also claim when AHCCCS notified them of the improper transfer to emergency-only care, AHCCCS sent Plaintiffs an eligibility notice that did not comply with the Medicaid Act or constitutional due process because the notice failed to provide an adequate explanation of the reason for the reduced benefits. *Id.* ¶¶ 52-53. The notice claim is Count II of the Complaint.

In addition, Plaintiffs requested that the Magistrate Judge strike a supplemental declaration of Defendant's employee Defendant submitted without leave of court after

the briefing had closed on the eve of the hearing. Docket Nos. 62 and 64.

ARGUMENT

I. The Magistrate Judge Erred in Concluding There Was No Case or Controversy Because Plaintiffs Either Did Not Have Standing When the Complaint was Filed or Their Claims Became Moot

Plaintiffs object to the Magistrate Judge's Report and Recommendation ("Recommendation") on both issues of standing and mootness.

A. Both Plaintiffs Had Standing When the Complaint was Filed

Plaintiffs agree with the Magistrate Judge's finding that Plaintiff Sanchez Haro had standing on both Counts. However, Plaintiffs object to the Magistrate Judge's Recommendation at p. 7 that Plaintiff Aita Darjee did not have standing on the basis that restoration of her benefits was imminent if not complete when the Complaint was filed. 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). Plaintiffs are presumed to have standing if they seek injunctive relief when they are the direct object of the administrative action challenged as unlawful. *Los Angeles Haven Hospice v. Sebelius*, 638 F.3d 644, 655 (9th Cir. 2011) (citing *Lujan*, 504 U.S. at 561-62, that when the person challenging the legality of governmental action is the object of the action, "there is ordinarily little question that the action . . . has caused him injury and that a judgment preventing or requiring action will redress it.").

For Plaintiff Sanchez Haro, the Magistrate Judge concluded she had standing to assert both claims when the Complaint was filed but that both claims became moot when Defendant restored her to full-scope benefits. Docket No. 72, p. 7. However, for Plaintiff Darjee, the Magistrate Judge concluded she did not have standing to assert either claim

when the Complaint was filed. *Id*. The Magistrate Judge also found that Plaintiffs failed to show that it is likely that their injury will be redressed by a favorable decision. *Id*. pp. 6-7. Plaintiffs object to all three conclusions because they are incorrect.

It is undisputed that Plaintiffs and the putative class have a property interest in the Medicaid benefits and to continued receipt of those benefits. *See Matthews v. Eldridge*, 424 U.S. 319, 333 (1976); *K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962, 972-73 (9th Cir. 2015). There also is no question that Plaintiffs have the statutory and constitutional due process right to a meaningful and adequate notice of any adverse action by AHCCCS. *Goldberg v. Kelly*, 397 U.S. 254 (1976); *K.W.*, 789 F.3d at 972-73. The denial of due process in a notice is an injury in its own right, regardless of the merits of the underlying substantive action or outcome of the hearing. *Carey v. Piphus*, 435 U.S. 247, 266 (1978).

The Magistrate Judge's conclusion that the Darjees' claim did not exist when the Complaint was filed is incorrect. The Darjees satisfy the first prong of the *Lujan* test for standing because they suffered an injury in fact: their AHCCCS benefits were incorrectly reduced to emergency-only coverage and they challenged the reduction. Compl. ¶ 59. Although they are presumed to have standing, *Haven Hospice*, 638 F.3d at 655, the recommendation fails to give them the presumption. This was the second time in the last year their medical benefits had been reduced to emergency-only and they feared this would happen again. Compl. ¶¶ 8, 58, 70. 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 and traced their injuries to Defendant's actions. *Id.* ¶¶ 59, 62, 66. The issue of AHCCCS reinstating the Darjees' full medical benefits may go to whether their claim is moot, but it does not affect their standing. *See Barry v. Lyon*, 834 F.3d 706, 715 (6th Cir. 2016) (injury occurs at the time agency denied or terminated food stamps and provides

inadequate notice).[1]

Plaintiff Aita Darjee is a 30-year-old female living in Tucson with her husband and minor child. Two times in one year AHCCCS reduced her, her husband and one child's medical benefits to emergency-only. Compl. ¶¶ 58-59. They are refugees from Nepal. *Id.* ¶ 56. Her husband has uncontrolled diabetes, asthma, high blood pressure and high cholesterol. *Id*. ¶ 60. When AHCCCS reduced their medical benefits to emergency-only they could not access needed medical care. *Id*. 60-66. They cannot afford to pay for medications and doctor appointments without full-scope AHCCCS and without his medications, he becomes dizzy, angry and his heartbeat goes up. *Id*. ¶ 63. The thought of not being able to see their doctors and getting their prescriptions caused them a lot of worry. *Id.* ¶ 69. Although legal aid advocacy in the Darjees' case resulted in the restoration of their benefits, they went approximately 20 days without access to full medical care, including necessary medications, which caused them immense anxiety. *Id.* Although their medical benefits were reduced, they continued to be eligible for food stamps. *Id.* ¶ *68.* Their food stamp eligibility, which has the same immigration status requirements, was worked in a different computer system than the system used for determining medical eligibility but was worked by the DES workers. *Id.* ¶¶ 42-44.

The second prong of the *Lujan* analysis is to trace Plaintiffs' injury to Defendant's challenged conduct. *Lujan*, 504 U.S. at 560. Plaintiffs plead that their loss of medical care was directly caused by Defendant's improper processing of their recertifications for benefits. Plaintiffs claim that Defendant's processing of the immigrant recertifications violates federal law. Compl., First Claim for Relief. 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.

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[1] The fact that the Darjees did not receive a notice whatsoever is in itself a violation of due process and Medicaid regulations. Compl. ¶¶ 35-36, 62; 42 C.F.R. §§ 435.919 (notice required during annual redeterminations); §§ 431.206(b), 431.210 (notice requirements generally); § 431.211 (notice must be provided 10 days in advance of any state action).

Plaintiff Darjee and her family came to the U.S. as refugees from Nepal in 2011 and in 2012 they became legal permanent residents and provided the agency with their immigration cards and numbers. Compl. ¶¶ 56-57. Because they entered the U.S. as refugees, they are not required to meet the 5-year status requirement when they became legal permanent residents. 8 U.S.C. § 1613(b): Compl. ¶ 25. Despite no change in their immigration status and their continued eligibility for full medical benefits, AHCCCS reduced them to emergency-only benefits in July 2016 for the second time in one year. Id. ¶¶ 58-59. Because the Darjees are still getting food stamps and DES (AHCCCS) had their correct immigration status information, their AHCCCS injury must be traced back to the Defendant, thus satisfying the second prong of *Lujan*.

The third requirement is redressability. The Magistrate Judge's Recommendation at pp. 6-7 that Plaintiffs have not shown their injuries will be redressed by a favorable decision is incorrect. Both Plaintiffs were recipients of AHCCCS when the Complaint was filed, continue to be recipients and will benefit from declaratory and injunctive relief and thus, continued to have standing to seek relief. Plaintiffs cited *Walsh v. Nevada Dept. of Human Resources*, 471 F.3d 1033 (9th Cir. 2006) for this proposition. In *Walsh*, the court found that plaintiff who claimed employment discrimination but was no longer employed by employer and did not state she wanted to return to defendant's employment, met the first two prongs of the standing requirement but not the third because she would not benefit from the policy changes sought as relief. *Id*. at 1037. In this case, because both Plaintiffs 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, i.e., enjoining the improper reductions in immigrant medical coverage at recertification and use of the defective notices will benefit them. *Barry v. Lyon*, 834 F.3d 706, 715 (6th Cir. 2016) (finding that although plaintiff had his food stamp benefits restored at the time of oral argument, plaintiff could reasonably expect to encounter additional difficulties with his benefits, based on the repeated problems he had faced in the past). Finally, the Ninth Circuit has not placed such high barriers to standing when

medical care is at issue. As an example, in *Harris v. Board of Supervisors, Los Angeles County*, 366 F.3d 754, 761 (9th Cir. 2004), the court held individuals who relied on county health care system had standing to challenge the closure of a facility even though they were not in the facility at the time and had only shown a "risk or threat of injury." Thus, both Plaintiffs satisfy the *Lujan* standing requirements.

B. Plaintiffs' Claims Did Not Become Moot When Their Benefits Were Reinstated

Plaintiffs object to the Magistrate Judge's Recommendation that the Plaintiffs' claims are moot because he used an incorrect legal standard and failed to correctly assess the applicable exceptions to the mootness doctrine. The burden on Defendant to show mootness is a "heavy one." *Barnes v. Healy*, 980 F.2d 572, 580 (9th Cir. 1992). The Magistrate Judge incorrectly concludes that both claims became moot once full-scope medical benefits were reinstated in their cases even though Plaintiffs continue to be AHCCCS beneficiaries, must continue to recertify or renew their eligibility for benefits, and at recertification are subject to the defective notice. In arriving at this conclusion, he claims Plaintiffs failed to cite authority that because she continued to be an AHCCCS recipient, her claims were not moot. Recommendation at p. 9. However, Plaintiffs cited *Barry*, 834 F.3d at 715, where the court held that although state agency had provided plaintiff food stamps by the time of oral argument, because he could reasonably be expected to encounter problems in the future, his claim was not 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 putative 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 concrete personal interest in the case as immigrant AHCCCS recipients this Court can grant relief to the Plaintiffs and the putative class and their claims are not moot.

Even if this Court concluded Plaintiffs' claims are moot, there is an exception to mootness that applies here because 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:

> 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.

The Magistrate Judge assumes Plaintiffs' claims satisfy the transitory requirement but incorrectly concludes Plaintiffs have not established the expectation that they will be subject to the challenged action again. Recommendation at pp. 8-9. The potential for reoccurrence need not be probable rather it is sufficient if the person could possibly find herself in the same situation she faced when the lawsuit was filed. *Honig v. Doe*, 484 U.S. 305, 319 n.6 (1988). In this case the "capable of repetition" factor has already materialized, even after the Defendant's alleged computer fix. Plaintiffs have pleaded facts that AHCCCS on repeat occasions has improperly reduced immigrant medical benefits at recertification. Compl. ¶¶ 8, 41. Plaintiff Sanchez Haro worries that AHCCCS will reduce her benefits again. Second Sanchez Haro Decl., ¶ 13; Docket No. 33. Her fears are well-founded because Plaintiff Darjee and her family had their benefits improperly reduced two times in one year, Compl. ¶¶ 8, 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. Compl. ¶ 41; Declaration of Anne Ryan, ¶ 17, Docket No. 10. In this situation where there have been unlawful repeat reductions in medical benefits at recertification for eligible immigrants, it is reasonable to expect that the Plaintiffs and class members could expect difficulties in the future and be subject to the defective notices. *Barry*, 834 F.3d at 716 (ruling that even a plaintiff who had left the state still had standing because "the chain of potential events does not have to be air-tight or even probable to support the court's finding of non-mootness" and that "it is sufficient that [Plaintiff] Copeland *possibly* could have found herself once again in the same situation she faced when this suit was filed." (emphasis in original). 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.

The Magistrate Judge's conclusion that although Plaintiffs continue to be eligible for Medicaid and will have to recertify their benefits, Plaintiffs "do not have a reasonable expectation that they will be subject to the improper reduction in benefits," relied on *Wilson v. Gordon*, 822 F.3d 934 (6th Cir. 2016). The facts in that case are easily distinguishable. In *Wilson*, the plaintiffs challenged the application process, not the recertification process Plaintiffs challenge in this case. *Id*. at 940-41. Since there was no claim in *Wilson* that the recertification process was faulty, the court concluded that it was not likely that the failures in the application process would appear in the recertification process. *Id.* at 951. In this case, Plaintiffs challenge the recertification process and the eligibility notice, both of which Plaintiffs will encounter at their next recertification. Compl. ¶¶ 31, 52-53.

Finally, the Recommendation at page 7 fails to address the separate notice claim except to state that it is moot because Plaintiffs were reinstated to full-scope benefits. As explained above, at their next recertification, Plaintiffs may be subject to the improper reductions in medical services and thus, the inadequate notice. As with the Defendant's

recertification policies and practices, the eligibility notice claim is not moot, or if moot, is capable of repetition yet evading review. *Barry*, 834 F.3d at 715-716.

II. The Magistrate Judge Erred in Concluding that Plaintiffs Failed to State a Claim for Both Counts of the Complaint

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. *See also*, *Manzarek v. St. Paul Fire and Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) (court must construe all factual inferences in the light most favorable to plaintiff). 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). Finally, when plaintiff and defendant present equally plausible explanations, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6). *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2101 (2012).

A. The Recommendation that the Count I Reasonable Promptness Claim Is Not Authorized by Plain Language of the Statute Is Incorrect and Should Be Rejected

Plaintiffs object to the Magistrate Judge's conclusion in the Recommendation that Count I of the Plaintiffs' Complaint be dismissed for failure to state a claim on three grounds. First, the Magistrate Judge's interpretation of the Medicaid Act's reasonable promptness claim (§ 1396a(a)(8)) is incorrect and is unsupported by either the plain

language of the statute or case law. Second, Plaintiffs further object to the inclusion of the Magistrate Judge's reasoning behind his reasonable promptness because it appears to be dicta that is not in accord with statutory or case law standards and should not be accepted by this Court. Third, the Magistrate Judge's Recommendation fails to construe inferences in the light most favorable to Plaintiffs.

1. Contrary to the Recommendation's Conclusion, the Reasonable Promptness Claim in 42 U.S.C. § 1396a(a)(8) Applies to the Scope of Medical Care and Services

The Magistrate Judge erred in the conclusion that Plaintiffs' claim in Count I (reasonable promptness) is not covered by the plain language of the Medicaid Act. Recommendation at p. 13. The Magistrate Judge's reasoning that the reasonable promptness statute was enacted solely to prevent waiting lists or termination cases, whether for new applications or for services, is wrong.

The Medicaid Act requires that "medical assistance . . . shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 1396a(a)(8). On March 23, 2010, Congress amended the Medicaid Act to define "medical assistance" to include "payment of part or all of the cost of . . . care and services, or the care and services themselves, or both." 42 U.S.C. § 1396d(a) (as amended by the Patient Protection and Affordable Care Act, Pub.L. No. 111-148, 125 Stat. 119 at § 2304 (March 23, 2010)). This 2010 amendment was intended to quash a line of cases that questioned whether § 1396a(a)(8) included the provision of medical services.[2] Numerous courts have since

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[2] The House Committee Report states in full:

> Sec. 1781. Technical corrections . . . Section 1905 of the Social Security Act. Section 1905(a) of the Social Security Act defines the term "medical assistance." The term is expressly defined to refer to payment but has generally been understood to refer to both the funds provided to pay for care and services and to the care and services themselves. The Committee, which has legislative jurisdiction over Title XIX of the Social Security Act, has always understood the term to have this combined meaning. Four decades of regulations and guidance from the program's administering

considered the 2010 amendment and concluded that states must provide or ensure the actual provision of services. *See A.H.R. v. Wash. State Health Care Auth*., 2016 WL 98513, at * 12 (W.D. Wash. Jan. 7, 2016) (in challenge to insufficient nursing hours for children, court agreed that Congress intended to clarify that where the Medicaid Act refers to the provision of services, a state is required to provide the services); *Dunakin v. Quigley*, 99 F.Supp.3d 1297, 1331 (W.D. Wash. 2015) (in challenge to insufficient medical services, screenings and evaluations, court rejected defendant's argument that medical assistance meant only payment); *John B. v. Emkes*, 852 F.Supp.2d 944, 951 (M.D. Tenn. 2012) (same).

> agency, the Department of Health and Human Services, have presumed such an understanding and the Congress has never given contrary indications.
>
> Some recent court opinions have, however, questioned the longstanding practice of using the term "medical assistance" to refer to both the payment for services and the provision of the services themselves. These opinions have read the term to refer only to payment; this reading makes some aspects of the rest of Title XIX difficult and, in at least one case, absurd. If the term meant only payments, the statutory requirement that medical assistance be furnished with reasonable promptness "to all eligible individuals" in a system in which virtually no beneficiaries receive direct payments from the state or federal governments would be nearly incomprehensible.
>
> Other courts have held the term to be payment as well as the actual provision of the care and services, as it has long been understood. The Circuit Courts are split on this issue and the Supreme Court has declined to review the question. To correct any misunderstandings as to the meaning of the term, and to avoid additional litigation, the bill would revise section 1905(a) to read, in relevant part: "The term 'medical assistance' means payment of part or all of the cost of the following care and services, or the care and services themselves, or both." This technical correction is made to conform this definition to the longstanding administrative use and understanding of the term. It is effective on enactment.
> H.R. REP. NO. 111-299, at 649-50, § 1781, 2009 WL 3321420 (Leg. Hist.) (Oct. 14, 2009).

Case law around the 1396a(a)(8) reasonable promptness requirement demonstrates that the provision covers more than wait-lists for application or services. Instead, reasonable promptness includes timely access to medical assistance, both in the application and eligibility context, and also in barriers to getting the care to which the beneficiary is entitled. *See, e.g., O.B. v. Norwood*, ___ F. 3d ___, 2016 WL 5335494 at *4 (7th Cir. Sept. 23, 2016) (requiring state to provide home nursing to eligible children despite nursing shortage. "And remember that the Medicaid Act requires the state to provide the required services with reasonable promptness."); *Rosie D. v. Romney*, 410 F. Supp. 2d 18 (D. Mass. 2006) ("The fact that Defendants provide some services does not relieve them of the duty to provide all *necessary* services with reasonable promptness.").

In this case, Plaintiffs cannot timely access the full array of benefits they are entitled to because Defendant failed to provide full-scope AHCCCS medical benefits to eligible immigrants at recertification. The Magistrate Judge incorrectly rejected Plaintiffs' reasonable promptness claim, in part, because "some scope of Medicaid was at all times furnished to Plaintiffs" so they were not subject to delay and were not altogether terminated from the AHCCCS program. Recommendation at p. 13. This reasoning also does not follow the reasonable promptness case law, such as in the scope of benefits cases where courts have found a reasonable promptness violation in being deprived to all the covered medical services to which an eligible Medicaid recipient is entitled. Rather, Defendant is violating the reasonable promptness requirement because he is not furnishing all of the medical assistance to which Plaintiffs are entitled when their benefits are reduced to emergency-only AHCCCS, including the most needed medical services on a daily basis, prescriptions and doctor visits. Compl. ¶¶ 28-29, 62, 80. Moreover, contrary to the Recommendation, Plaintiffs provided evidence of significant agency delay in providing benefits. Defendant reduced Plaintiff Sanchez Haro's medical benefits in April 2016 and when this case was filed the latter part of July 2016, her emergency-only benefits were still in effect. Compl. ¶¶ 72-85. This over three month period certainly constituted a delay in timely access of receipt of full-scope benefits for Plaintiff.

Thus, Plaintiffs' reasonable promptness claim is a legally cognizable claim properly pleaded in the Complaint and the Magistrate Judge erred in Recommending dismissal for failure to state a claim.

2. The Court should reject as dicta the incorrectly reasoned section on reasonable promptness

In the event that this Court decides to adopt any part of the Magistrate Judge's Report and Recommendation, Plaintiffs object to the inclusion of the reasonable promptness interpretation because it is dictum and it is not correctly reasoned specifically page 13 of the Recommendation, lines 4 through 24. "Dicta in normal judicial parlance are statements of a court not necessary to its resolution of the case before it; holdings consist in the rules disposing of the case." *Bradley v. Henry*, 428 F.3d 811, 817 (9th Cir. 2005). The Magistrate Judge's reasoning in this section, in addition to being legally incorrect, appears not to be dispositive to his ultimate recommendation. Rather, he recommends dismissal on other grounds because "[r]egardless, however, as explained below the Court also determines that Plaintiffs have failed to sufficiently alleged [sic] facts that support the theory that the reduction of AHCCCS benefits was a result of a policy or practice of the Director . . . ." Recommendation at p. 13. While Plaintiffs also object to that portion of the Magistrate Judge's Recommendation, that statement is the dispositive reasoning he used to recommend dismissal, making his incorrect analysis that § 1396a(a)(8) only applies to wait-lists unsupported dicta. Whether Plaintiffs pleaded sufficient facts as to whether their improper reductions were because of a policy or practice that violated the Medicaid Act's reasonable promptness requirement is a different inquiry than whether the claim is legally cognizable. The Court's decision on whether Plaintiffs sufficiently stated a reasonable promptness claim is not based on the Magistrate Judge's flawed analysis of reasonable promptness being applicable to only wait-lists. Because his reasonable promptness analysis in the Recommendation, particularly at lines 4 through 13 on page 13, are legally incorrect for the reasons given in Section II.A.1. of this brief, *supra*, it should be rejected and deleted.

3. The Recommendation fails to construe inferences in the light most favorable to Plaintiffs

The Magistrate Judge recommends dismissing Count I of the Complaint for failure to state a claim by making inferences against the legal standard. "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. The Recommendation concludes initially that Plaintiffs have "not sufficiently alleged a previously admitted 2015 computer problem is currently on going." Recommendation at p. 14.[3] In their Complaint, Plaintiffs stated that after counsel sent AHCCCS a letter concerning the improper immigrant recertifications that in response "AHCCCS admitted the eligibility errors were caused by its computer systems and worker errors." Compl. ¶ 40. The Magistrate Judge takes this statement out of context and concludes Plaintiffs' use of the word "were" "suggests knowledge that the computer problem had been fixed. . . ." Recommendation at p. 14. This is one of several places where the Recommendation fails to construe inferences in the light most favorable to Plaintiffs. Using the correct standard, the Magistrate Judge must accept Plaintiffs' allegations as true that the problems are on-going.

The basis for Plaintiffs' Complaint is that although AHCCCS admitted that it found over 3,500 improper reduction of benefits in 2015, Plaintiffs alleged that the improper processing errors continue into 2016 as demonstrated by Plaintiffs' own cases. Compl. ¶ 40-41, 59, 75; *see also* Plaintiffs' Response to Motion to Dismiss, Docket No. 38, at p. 5 (challenging Defendant's assertion that the computer problem had been fixed because the reduction of benefits continues and that the Defendant should not be allowed to assert additional facts). That the improper processing continued is undisputed; Defendant's council stated at the hearing that an additional 700 immigrant cases were improperly reduced, which averages about 60-70 per month in 2016. Docket No. 69, p. 12, lines 8-9. The Recommendation's narrow focus on Plaintiffs' use of the word "were"

[3] Plaintiffs pleaded that AHCCCS admitted to the computer programming issues. Compl. ¶ 40. Plaintiffs did not plead the computer system was fixed. For a motion to dismiss, Plaintiffs' facts must be accepted as true.

to mean Plaintiffs acknowledge that the computer problems were fixed ignores the rest of the Complaint and Plaintiffs' repeated arguments that Plaintiffs do not accept that the computer problem was fixed and that cases like Plaintiffs' continue even after the purported "fix" was allegedly implemented. Compl. ¶¶ 59, 75. This focus fails to construe the facts that Plaintiffs allege in the light most favorable to the Plaintiffs, namely that Defendant's policies and practices, including, but not limited to, computer problems continue to harm putative class members because AHCCCS itself admits to persistent reduction of benefits for eligible immigrants.

The Magistrate Judge then concludes that if there is no longer a computer problem, then the reasonable promptness claims would need to be based on other claims in the Complaint. He concludes Plaintiffs have not provided sufficient facts to show that they were injured by the actions of Defendant.

While Plaintiffs assert they meet the pleading requirements for this claim, if this Court disagrees, they are willing to submit an amended complaint that provides more specificity and factual detail concerning Defendant's policy and practices on how recertification cases are processed and how those policies and practices are linked to and impacted Plaintiffs and the putative class.

Plaintiffs claim the Medicaid Act requires that state agencies use an "*ex parte*" review process for recertifications and "must make a redetermination of eligibility *without requiring information from the individual* if able to do so based on reliable information contained in the [case file] or other more current information available to the agency, including but not limited to information accessed through data bases…." 42 C.F.R. § 436.916(a)(2) (emphasis added). If the available information is not sufficient to determine eligibility, then the agency must use a "pre-populated renewal form" that only seeks the information missing. 42. C.F.R. § 435.916(a)(3). For these cases, an in-person interview is not required. 42. C.F.R. § 435.916(a)(3)(iv). The purpose of the *ex parte* review process is to cut down on errors that occur at recertification, lessen the burden on beneficiaries to submit duplicative or unchanging information, and reduce the number of

eligible persons who are terminated improperly from full-scope Medicaid.

Plaintiffs' allegation is that the Defendant already has all of their immigration information on file or within reach for other public benefits programs and he was required to use that information to recertify their full-scope AHCCCS benefits. Both Plaintiffs gave AHCCCS their immigration number and card and their immigration status had not changed in the last year. Compl. ¶¶ 57, 73. Plaintiffs also claimed that AHCCCS does not treat immigration numbers like social security numbers in its policies concerning when information needed to be requested at recertification. *Id*. ¶ 48. It is therefore plausible that AHCCCS practices are failing to implement the *ex parte* process so that computer and case worker errors do not improperly reduce the medical benefits for immigrants at recertification. This problem is highlighted by the fact that the Plaintiffs' food stamp cases worked in another computer system by DES case workers are processed properly and eligibility for food stamps continues. *Id*. ¶¶ 68, 77.

Plaintiffs allege that 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 immigrants when one did not apply. Compl. ¶¶ 41, 45, 59, 75. Although Plaintiff Sanchez Haro was told she could not get full medical benefits because she had not been a legal permanent resident for 5 years and the law had changed in January 2016, *id*. ¶ 76, she was not subject to the 5-year status requirement because she entered the U.S. before 1996. *Id*. ¶¶ 27, 73; 8 U.S.C. § 1613 (a). 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 information in their case files or in their food stamp files or in other data sources that would lead to correct eligibility determinations.

For the above reasons, Plaintiffs have pleaded sufficient facts for this claim. In the alternative, if this Court finds that Plaintiffs in Count I fail to state a claim, Plaintiffs

reiterate their request for leave to file an amended complaint to provide additional facts. *See* Plaintiffs' Response to Motion to Dismiss, Docket No. 38, at p. 17. 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).[4] It is not clear that the Complaint could not be saved by amendment and so leave to amend should be granted.

B. The Magistrate Judge's Recommendation on the Due Process Notice Claim Fails to Properly Analyze the Evidence and Apply Controlling Authority

Plaintiffs object to the Magistrate Judge's legal conclusion that Plaintiffs failed to state a claim that the Defendant's eligibility notice violated the Medicaid Act and constitutional due process. Recommendation at pp. 15-17. The Magistrate Judge makes three errors in evaluating Plaintiffs' notice claim. First, the Recommendation fails to consider the notices under the correct legal standard. Second, the Recommendation fails to consider all the relevant facts pleaded and to accord the reasonable inference that Plaintiff Sanchez Haro did not understand the notice. Third, despite the above two errors, the Magistrate Judge then misclassifies that Plaintiffs' claim that the information in the notice is legally inadequate is "at bottom, legal conclusions." Recommendation at p. 17.

The heart of Plaintiffs' due process claim is when Defendant reduced their benefits from full to emergency-only medical services, Defendant then sent a benefits notice that failed to provide adequate information for the reason for the action. Compl. ¶ 53. Plaintiffs claim that the "Benefits and Services" notice that AHCCCS sends to recipients when an immigrant's medical eligibility has been reduced from full-scope AHCCCS to emergency-only AHCCCS is a "boilerplate notice" that states the person's "Medical Assistance Changed." *Id.* ¶ 52. The notice states each person's "full medical services" will "stop" and "Federal Emergency Services" will "start." The reason given for this

[4] There are additional AHCCCS policies that Plaintiffs would rely on to show the manner in which AHCCCS processes immigrant recertifications does not comply with the reasonable promptness requirement.

action is "your immigration status does not let you get full medical services." *Id.* ¶ 53. In the Recommendation, the Magistrate Judge does not even refer to this statement in the eligibility notice. This omission taints the rest of his analysis.

In the Complaint, Plaintiffs claim the notice violates constitutional due process and the Medicaid Act requirements because there is no explanation about the reason the recipient's immigration status no longer qualifies them for full AHCCCS. Compl. ¶ 53. The phrase "your immigration status does not let you get full medical services" could mean any number of things. Did AHCCCS change which immigration statuses qualify for full-scope benefits? Did the beneficiary's immigration status on file change from what the beneficiary last reported? These ambiguities are critical because on its face the notice is unclear what the basis of AHCCCS' decision to reduce benefits is. Furthermore, the Plaintiffs and the putative class members previously received full-scope AHCCCS based on their immigration status so it would not be patently obvious what the phrase means. *See Id.* ¶¶ 58-59, 74-75. Plaintiffs claim that because of the lack of factual content in the notice that the recipient cannot determine the reason for the agency action and "whether AHCCCS made a mistake" in violation of the Medicaid Act and constitutional due process. Compl. ¶¶ 53 *Id.* Second Claim for Relief. If a recipient does not understand the agency's decision, then they cannot decide whether to appeal and how to prepare for a hearing if an appeal is pursued. In addition, the notice fails to provide an adequate and meaningful explanation of the change in benefits. *Id.* There is no explanation of what "emergency" medical services are and how they compare to "full" medical services. AHCCCS also fails to state the beneficiary's purported immigration status and which qualifying immigration statuses would be eligible for full-scope AHCCCS.

As an example of why the phrase and notice are impermissibly vague, Plaintiff Sanchez Haro entered the U.S. before 1991, was a domestic violence victim, became a legal permanent resident in early 2015 and when she recertified her medical benefits later in 2015 she was found eligible for food stamps and full-scope medical coverage. *Id.* ¶¶ 72-75. Subsequently, in April 2016 AHCCCS reduced her medical benefits and sent her

the challenged eligibility notice that her medical assistance was changed because of her immigration status although her immigration status had not changed and she continued to be eligible for food stamps. *Id.* ¶¶ 75,77.[5]

Plaintiffs object to the Magistrate Judge's reasoning that because Ms. Sanchez Haro contacted AHCCCS when she did not understand the notice she therefore "was given enough information in the notice to take action." Recommendation at p. 17. This conclusion uses the wrong standard and is contrary to longstanding due process principles, as well as the plain language notice requirements in federal regulation. Medicaid regulation clearly states that notices must contain the action the AHCCCS intends to take and "reasons for the intended action." 42 C.F.R. § 431.210. The burden is on the state to explain their reasons, *not* on the beneficiary to take a secondary action to find out what the notice means. 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, make an informed decision whether to challenge the agency decision and if there is an appeal, be able to prepare a defense for the hearing.

Plaintiffs rely on several controlling cases where similarly deficient notices were found unlawful. 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 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

[5] Plaintiff Darjee's facts also show the inadequacy of the notice. She entered the U.S. as a refugee and became a legal permanent resident in 2012. Compl. ¶¶ 56-57. In 2015 and 2016, AHCCCS reduced her medical benefits because of her immigration status but her immigration status had not changed since 2012 and she continued to be eligible for food stamps. *Id.* ¶¶ 58-59, 68. Although she did not receive a notice, had she received the boilerplate notice, it would not have provided her adequate information to understand the reason for her change in medical eligibility. Regardless whether Plaintiff Darjee had standing, her facts are relevant to Plaintiffs' claims.

required the state provide the parents with sufficient and specific information to determine if they were receiving the support they were entitled to receive. *Id*. at 577-579.

Moreover, it is well recognized that if the agency takes action because of changed circumstances that may affect the claimant's Medicaid eligibility, due process requires the agency provide the person with individualized facts. *K.W. ex rel. D.W. v. Armstrong*, 298 F.R.D. 479 (D. Idaho 2014), *aff'd*, 789 F.3d 962, 974 (9th Cir. 2015) (state Medicaid agency must provide meaningful information "detailing" the reason for the change in budget that reduced services 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) (AHCCCS's statement 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. *See also Barry*, 834 F.3d at 716 (food stamp notice that informed recipient that she "is not eligible for assistance due to a criminal justice disqualification" violated constitutional due process).

For the sufficiency of the allegations set forth in Complaint, the Magistrate Judge was required to accept Ms. Sanchez Haro's statement as true that she did not understand the notice. *Buckey*, 968 F.2d at 794. In the Complaint, Plaintiffs state Ms. Sanchez Haro received the notice that she was no longer eligible for full-scope AHCCCS but "[s]he did not understand the notice. She asked her daughter to help her understand but her daughter could not help her understand why she was not eligible for full-scope AHCCCS." Compl. ¶ 75. Based on these facts, Plaintiffs claim that the AHCCCS boilerplate 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 and the factual basis for the change in their eligibility, is no less defective than the notices in *Barnes, Rodriquez or Barry*.[6]

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

Although, the Magistrate Judge concedes Plaintiff Sanchez Haro states that she "did not understand the notice" and did not "understand why she was not eligible for full scope AHCCCS," he recommends that she had to state specifically what in the notice she did not understand. Since all she was told was "your immigration status does not let you get full medical services," a reasonable inference is that she did not understand what about her immigration status made her ineligible for full Medicaid. This reasonable inference is warranted because Plaintiff's immigration status had not changed since the prior year when she recertified for her medical benefits and her immigration status continued to allow her to receive food stamps. Compl. ¶¶ 72-75. The Magistrate Judge erred when he did not give Plaintiffs this reasonable inference.

The Magistrate Judge also incorrectly concludes that because Ms. Sanchez Haro contacted the agency to ask about her change in benefits, she had sufficient information to take action. Information on contacting the agency does not remedy an inadequate notice of the reason for the agency action. *Rodriquez*, 985 F.Supp. 1195, (citing *Vargas v. Trainor*, 508 F.2d 485 (7th Cir. 1974) to conclude that reliance on a telephone number and case worker to explain the factual basis of the agency action is insufficient). Moreover, the denial of due process is no less a deprivation because of the right to appeal. "It would be illogical if the availability of a hearing deprived plaintiffs of their right to receive the notice they need to challenge benefits reduction at the hearing." *K.W.*, 789 F.3d at 973-74. The Court should reject this conclusion as violating controlling case law.

Despite the above errors, the Magistrate Judge then concludes that Plaintiffs' claim that the information ion the notice is not "meaningful" is "at bottom, legal conclusions." Recommendation at p. 17. As explained above, Plaintiffs stated sufficient facts to refute a failure to state claim. Although Plaintiff relied on controlling Ninth Circuit notice cases, the Magistrate Judge was not "convinced" because the cases were "after the pleading stage." Recommendation at p. 17. Plaintiffs object on the grounds that it is too narrow of an application of these cases. These cases are dispositive authority

for Plaintiffs' claim that adequate information must be provided in the AHCCCS eligibility notice and a single statement that a person's "immigration status" without additional factual detail does not satisfy the statutory or constitutional due process requirements. Based on this authority, the Court should find Plaintiffs have stated a claim in Count II that Defendant's eligibility notice is deficient.

Finally, the Magistrate Judge is correct that in addition to the specific claim about the inadequate reason for the agency decision, Plaintiffs listed several other portions of the notice that Plaintiffs claim violated federal law but did not provide any specific factual detail in the Complaint or specifically state which Medicaid Act provisions were violated. Recommendation at pp. 16-17; Compl. ¶ 55. Although Plaintiffs contend that Defendant was fully apprised of the deficiencies in the challenged notice and could prepare a defense, if this Court does not find Plaintiffs stated a claim under the above legal authority or that Plaintiffs are not entitled to the reasonable inferences from the relevant facts described above, then, in the alternative, Plaintiffs request that they be allowed to file an amended complaint where they explain in more detail what Plaintiff Sanchez Haro did not understand about the reason for the change in her medical assistance and the factual basis for her other complaints about the defective notice and the specific statutory cites at issue. As noted above, 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*, 942 F.2d at 1467. It is not clear that the Complaint could not be saved by amendment and so leave to amend should be granted.

III. Plaintiffs' Motion to Strike Supplemental Declaration of Tara Lockner Filed on October 3, 2016

At the October 4, 2016 hearing on Defendant's Motion to Dismiss and Plaintiffs' Motions for Class Certification and Preliminary Injunction, Plaintiffs' counsel made an

oral motion to strike the Supplemental Declaration of Tara Lockner, Docket No. 57 filed on October 3, 2016. Docket No. 69, pp. 65-66.[7]

It appeared that the Magistrate Judge intended to strike the declaration.

> THE COURT: Well, then, in fairness really I ought to strike it. I mean, I can't give – I have to treat both sides fairly. I mean, I basically felt like the matter should stand the way it is, and to file something immediately before is not – is not the way to proceed and I understand you were just responding but I think their point is well taken. There was no motion, it was just submitted. I do have it but I haven't reviewed it because I wanted to bring it up.

Docket No. 69, pp. 66-67

When the hearing minutes were filed, there was no ruling on the supplemental declaration. Docket No. 58. To protect the record, Plaintiffs filed a Renewal of Oral Motion to Strike Defendant's Supplemental Declaration of Tara Lockner. Docket No. 62. Subsequently, Defendant agreed in another pleading that the Magistrate had ruled on Plaintiffs'' oral motion, stating "Plaintiffs successfully moved to strike a supplemental declaration of facts from Defendant's witness ..." Memorandum in Support of Motion to Strike Portion of Plaintiffs' Oral Argument, Docket No. 59, in footnote 1, page 2.

Instead of conceding that it was his understanding the Court had appeared to rule on the oral motion to strike the supplemental declaration as he had done in Docket No. 59, in his reply to Plaintiffs' Renewal of Oral Motion to Strike Defendant's Supplemental Declaration of Tara Lockner, Defendant argued the merits of the untimely filed supplemental declaration. Docket No. 63. Defendant provided no reason why he did not request leave to file the declaration or why the declaration of his employee was filed on the eve of the hearing. The prejudice to Plaintiffs is obvious as the supplemental

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[7] The Magistrate Judge previously denied Plaintiffs' Expedited Motion to File a Sur-Reply to Defendant's Motion to Dismiss, stating the briefing on the pending motions was closed. Docket No. 56. In disregard of the court's ruling, Defendant filed the supplemental declaration without seeking leave of court.

declaration intends to provide new information on Defendant's processing of the immigrant recertifications for medical benefits. The fact that Plaintiffs questioned the lack or veracity of Defendant's evidence is not a lawful justification for Defendant to file a pleading without leave of Court after the briefing was closed. Courts routinely grant a motion to strike evidence filed without leave of Court after the briefing is closed. *See, e.g., Davison Design & Development, Inc. v. Riley*, 2013 WL 1222691 (N.D. Ca. 2013) (supplemental declaration). Although the Magistrate Judge's report recommends the request to strike the supplemental declaration is moot, it is not moot because the declaration is still in the case record and Defendant may refer to it. Because the declaration was filed after the briefing closed, the Court should strike the declaration and not allow it to be relied on by Defendant.

Conclusion

For all the above reasons, Plaintiffs request that this Court reverse the Magistrate Judge's Recommendation that Plaintiffs lack standing and their claims are moot in Counts I and II and that Plaintiffs fail to state a claim for both counts. In the alternative, if the Court finds Plaintiffs failed to state a claim for either count, Plaintiffs request leave to file an amended complaint. In addition, Plaintiffs request that the Court strike the supplemental declaration of Defendant's employee Tara Lockner, Docket No. 57.

Respectfully submitted this 7th day of November 2016.

NATIONAL HEALTH LAW PROGRAM

WILLIAM E. MORRIS INSTITUTE FOR JUSTICE

By /s/Ellen Sue Katz
Ellen Sue Katz
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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November 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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