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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

AITA DARJEE on her own behalf and on behalf of her minor child N. D.; and ALMA SANCHEZ HARO on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

THOMAS BETLACH, Director of the Arizona Health Care Cost Containment System, in his official capacity,

Defendant.

CV-16-00489-TUC-RM (DTF)

DEFENDANT'S RESPONSE TO PLAINTIFFS' OBJECTION TO REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Thomas Betlach, Director of the Arizona Health Care Cost Containment System (AHCCCS), responds to the Plaintiffs' Objections to the Report and Recommendation ("Report") of Magistrate Judge Thomas Ferraro (*Dkt. 74*). In support of his Response, Director Betlach incorporates by reference his Motion to Dismiss (*Dkt. 35*), his Reply in Support of Motion to Dismiss (*Dkt. 49*), and his Response to Plaintiffs' Renewed Motion to Strike Supplemental Declaration of Tara Lockner (*Dkt. 63*).

BACKGROUND

AHCCCS has over 1,800,000 recipients for whom eligibility must be renewed annually through personnel at the Arizona Department of Economic Assistance (DES).

DES workers make occasional errors in their renewal determinations because Medicaid and immigration laws are complex. In addition, information and documentation from recipients is not always consistent or complete.

In August 2015, Plaintiffs' counsel discovered a computer programming error that had caused the AHCCCS eligibility of some persons to be incorrectly renewed to cover only emergency services, rather than full benefits. They informed AHCCCS in October 2015, and AHCCCS quickly restored full benefits to approximately 3,500 individuals whose benefits had been incorrectly reduced. *Dkt. 1, ¶ 40.*

The benefits of the Named Plaintiffs were also fully restored - prior to suit being filed for one (*Id., ¶ 59)* and in August 2016 for the other. *Dkt. 33*. Neither Plaintiff claimed to be a victim of the computer problem. They alleged that unlawful policies and practices of the Director were at fault. They sued on the theory that the Director violates two Medicaid statutes, 42 U.S.C. § 1396a(a)(8), which requires that he act with "reasonable promptness" in determining whether people are eligible for Medicaid, and 42 U.S.C. § 1396a(a)(3), which requires that he provide fair hearings when a claim for assistance is denied or not acted upon with reasonable promptness.

After hearing five hours of argument on the parties' motions to dismiss, for class certification, and for preliminary injunction, the Magistrate Judge recommended that the case be dismissed and that all other motions be denied as moot. The Plaintiffs object to dismissal but do not argue that the Court should certify a class or enter an injunction. They also seek leave to amend, and they object to the Second Declaration of Tara Lockner of AHCCCS. Their objections should be denied.

I. THE PLAINTIFFS FAILED TO STATE A "REASONABLE PROMPTNESS" CLAIM.

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (internal citations and quotation marks omitted). Mere conclusions couched as factual allegations are not sufficient to state a cause of action. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

The "reasonable promptness" statute, 42 U.S.C. § 1396a(a)(8), does not apply to this case. That statute requires state plans to "provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals." The statute applies to initial eligibility applications, not renewals, and deals with timeliness rather than decisions as to the part(s) of Medicaid for which a person may be eligible. The implementing rules and cases reflect this. *E.g. 42 C.F.R. § 935.912* ("Timely determination of eligibility") (requiring application to be decided within 45 or 90 days); *Sobky v. Smoley*, 855 F.Supp. 1123, 1148 (E.D. Cal. 1994) (statute intended to prohibit waiting lists); *Wilson v. Gordon*, 822 F.3d 934 (6th Cir. 2016) (failure to decide initial applications for Medicaid within 45 and 90-day limits).

The Director complies with this statute. AHCCCS provides an opportunity to apply for medical assistance and furnishes assistance with reasonable promptness. The

Plaintiffs do not allege any problems with their initial eligibility determinations; they allege a failure, years later, to correctly renew their 2016 eligibility.

Here, AHCCCS readily admitted that a 2015 computer problem and DES worker errors had caused improper reductions in benefits. *Dkt. 1, ¶¶ 40 and 45.* The Complaint alleges vaguely that "improper reductions" continue (*Id., ¶ 41*) but does not allege the computer problem is ongoing. [1]

The Plaintiffs instead attribute their reductions to unlawful AHCCCS "policy and practices" of the Director. First, at ¶ 46, they cite AHCCCS rule A.A.C. R9-22-306(c), which requires AHCCCS to use information it deems "reliable" and, if necessary, to send a pre-populated form to recipients for additional information. The Complaint alleges the ambiguous conclusion that, "This rule is not as comprehensive as the federal regulation *or* is not implemented consistent with the federal requirements." (Emphasis added.) They cite no facts to support either theory. A comparison of the language of the AHCCCS rule with the federal rule at 42 C.F.R. § 435.916(a)(2)-(3) shows the rules are substantially identical. The Complaint does not explain how implementation of the AHCCCS rule is "[in]consistent with" federal law.

The other theory of the First Cause of Action is found at ¶¶ 47-50, where the Complaint alleges "AHCCCS policies and practices allow the agency to ask about such matters as the person's immigration status and alien number." The Plaintiffs allege

[1]It would have been a Rule 11 violation to do so. *Dkt. 74, p. 34/5-6 and 34/25* (plaintiffs' counsel admitting at the hearing that they were told of the problem's fix); *Dkt. 39-1, ¶ 14* (giving the date it was fixed).

there is no "need" for this information and contend these requests are "unnecessary" because the information could allegedly be found elsewhere. ¶ 50. They claim these unnecessary requests can elicit incorrect information from AHCCCS recipients. ¶¶ 48-50. Again, however, these are mere conclusions.

Alien identification numbers and information about immigration status are not unnecessary or improper to request. There are many reasons why such information may be necessary. The eligibility determination that is being renewed may itself have been incorrectly decided. Grants of asylum may be terminated. 8 USC 1158(c)(2). Refugee status may be revoked. 8 USC 1157(c)(4). Lawful permanent residence may be rescinded. 8 USC 1256. Qualified aliens must meet various conditions of eligibility. 8 USC 1612. Up to half of immigrants have changes during a year that may affect their eligibility. *77 FR 17144-01.*

A ¶ 51, the Complaint summarizes: "AHCCCS policy and practices fail to process recertifications for immigrants pursuant to the [federal] *ex parte* process [42 C.F.R. § 435.916(a) and (b)]." This conclusory allegation, too, lacks any supporting facts as to how federal law has been violated, either generally or as to the Plaintiffs. Neither Plaintiff suggests she was required to provide an alien identification number or her immigration status as part of the renewal. Neither claims she was presented with a pre-populated form under the *ex parte* process. Neither claims she was interviewed. There is simply no factual connection between the AHCCCS practices that the Plaintiffs assume exist and their own cases.

The allegation that AHCCCS processes "allow" errors to occur also fails to state any violation of law. The Plaintiffs cite no authority to suggest that any Medicaid program must or can be run without error. Indeed, errors in this process are recognized to be inevitable. As the Complaint acknowledges at ¶ 32, the federal government designed its *ex parte* procedures to "cut down on errors that occur at recertification." "The law requires full compliance absent what is hoped will be minimum human error." *Robertson v. Jackson*, 766 F. Supp. 470, 476 (E.D.Va.1991), *aff'd*, 972 F.2d 529 (4th Cir.1992). The federal government allows states a 4% margin of error in determining eligibility. 45 FR 6326-01(1980).

Applying the plausibility standard set forth in *Ashcroft, supra*, the Plaintiffs failed to allege facts from which the Court could draw a reasonable inference that AHCCCS did *anything* pursuant to an unlawful practice or policy. The Complaint alleged nothing more than the impermissible "sheer possibility" that reductions resulted from unlawful conduct. Even this possibility is not tied either to the "reasonable promptness" requirement or to the Plaintiffs' cases.

The Plaintiffs tried to argue (*Dkt. 38, p. 7*) that AHCCCS, as a matter of policy or practice, "fails to consult available data sources that would lead to correct eligibility determinations," e.g. as to Sanchez Haro and Darjee. To the contrary, the AHCCCS rules and policies they refer to (*Dkt. 1, ¶¶ 47-51*) explicitly ***require*** eligibility workers to consult the very databases the Plaintiffs claim AHCCCS policy says to disregard. [2] If

[2] A.A.C. R9-22-304.A, 306.A.12, and 306.C.1 all ***require*** use of electronic data matches. The policies in the eligibility manual repeatedly ***require*** use of the federal

indeed any eligibility worker failed to check the available databases, this was the eligibility worker's mistake and was ***contrary to*** AHCCCS policy and practice.

The Plaintiffs also argued (*Id., p. 13*) that Ms. Sanchez Haro's benefits were reduced "because of AHCCCS' improper requirement that an immigrant be a LPR [Lawful Permanent Resident] for 5 years." This theory was apparently based on what she was told when she called DES to challenge the reduction. *Dkt. 1, ¶ 76*. But this, too, is ***not*** AHCCCS policy. Policy 524.B says in pertinent part, "Noncitizens who have the status of LPR, Parolee or Battered Alien must also meet one of the additional conditions below to get full services MA: - Has been a qualified noncitizen for at least five years." The policy states an LPR must have completed (past tense) the 5-year bar period, not that she must complete such a period while an LPR. If Ms. Sanchez Haro's status was changed for the reason expressed by the DES personnel, then this was an error that was ***contrary to*** AHCCCS policy. Based on the Complaint's allegations and the Plaintiffs' arguments, applying the *Ashcroft* standard, it is more plausible that the Plaintiffs' reductions in benefits are examples of the "worker errors" the Plaintiffs allege (*Dkt. 1, ¶ 40*), rather than of any unlawful practice or policy.

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databases, e.g. Policy 1401 says the very first step in the renewal process is to check the various databases ("hubs"), "Before the end of each customer's eligibility period, AHCCCS and DES use eligibility data from the prior application and the Federal and State Hubs to determine eligibility. *If there is enough information available to determine that the customer is still eligible, an approval letter is sent*." Policy 524.B adds, "Proof [of eligibility is]: A SAVE VIS [federal database] response showing a qualified status. *If unable to verify the person's status through SAVE VIS,* the following documents can be used . . ." *Dkt. 13, Ex. B (emphasis added)*; https://www.healthearizonaplus.gov/PolicyManual/EligibilityPolicyManual/index.html#page/MA/MA1400/MA1401.1401_General_Information_about_Renewals.html.

The Complaint's legal theory is that reasonable promptness "implies" that "assistance may not be terminated until a person is *properly* found ineligible." (*Dkt. 1, ¶ 18*, emphasis in original.) The Plaintiffs rely upon 42 C.F.R. § 435.930(b), which says a state must cover a person until they are *ineligible* (for *any* benefits). Certainly, several cases have held that termination of all Medicaid benefits without first determining the person's eligibility for other categories of Medicaid is unlawful. *E.g.*, *Crippen v. Kheder*, 741 F.2d 102, 106–07 (6th Cir. 1984). However, neither the reasonable promptness statute nor 42 C.F.R. § 435.930(b) makes mistaken reductions in eligibility that do not terminate the person's coverage a violation of these laws. [3]

If the Plaintiffs' theory were correct, *every* mistaken determination of benefits would violate 42 C.F.R. § 435.930(b) and there would be legions of cases citing reasonable promptness and this rule as reasons why such mistakes were unlawful. Instead, only one case in the history of Medicaid even hints that reasonable promptness requires error-free renewals of benefits: *Romano v. Greenstein,* 2012 WL 1745526 (E.D. La. 2012), *aff'd*, 721 F.3d 373 (5th Cir. 2013). In that case, the Louisiana Medicaid agency incorrectly terminated the plaintiff's eligibility for Medicaid. The court reasoned:

[3] The federal government provides no support for the Plaintiffs' theory. Its discussion of erroneous terminations does not even mention 42 C.F.R. § 435.930(b). It says instead: "If there is a pattern of incorrect terminations, the Medicaid agency is responsible for taking corrective action. *Beneficiaries also have the right to appeal any termination that they believe is erroneous, as described in § 431.220*." *77 FR 17144-01, 17183-17184 (emphasis added).*

> A Medicaid regulation implementing [the reasonable promptness] statute provides that "[t]he agency must ... continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible." 42 C.F.R. § 435.930(b). This provision implies that assistance may not be terminated until an individual is *properly* found ineligible.

2012 WL 1745526, at *8 (footnotes omitted) (emphasis in original).

On appeal, the Fifth Circuit did not consider or comment on the merits. By its own logic, *Romano* does not apply here, since neither Plaintiff was found ineligible or terminated. The *Romano* court supported its reasoning by citing two cases in which, like *Crippen*, *supra*, all benefits were terminated without determining whether the person qualified for other eligibility categories. Neither case held that a mistaken determination where the person continued to be eligible for Medicaid violated 42 C.F.R. § 435.930(b). No court has followed *Romano*; yet, this case is the sole basis for the First Claim. The Plaintiffs seek to extend *Romano* to mean something neither the rule nor the reasonable promptness statute says or implies.

In short, the First Cause of Action fails to state a claim because it alleges conclusions rather than facts; it fails to tie the Plaintiffs to the "policies and practices" they incorrectly assume; and there is no legal support for the theory that what Plaintiffs describe is a "reasonable promptness" violation.

II. THE PLAINTIFFS FAILED TO STATE A CLAIM FOR UNLAWFUL NOTICE.

The Director provides due process, and he complies with 42 U.S.C. § 1396a(a)(3), as well as with the Medicaid rules at 42 C.F.R. § 431.200 et seq. and the state rules regarding notice and rights to appeal at A.A.C. R9-34-101 et seq. The

Plaintiffs do not allege he violates either the federal or state rules. As the Magistrate Judge notes, they merely make the conclusory allegation that "Defendant Betlach's written eligibility notice, as described herein, violates" due process and 42 U.S.C. § 1396a(a)(3)." *Dkt. 1, Second Claim for Relief, ¶ 5*. What they alleged and "described herein" failed to identify any legal requirement the Director had violated.

The Complaint provides almost no facts regarding the notice issue. Ms. Darjee contends she did not get a notice of reduced benefits. (The Plaintiffs do not allege it is the practice or policy of AHCCCS not to send such notices.) They attach a form of notice as an exhibit to their complaint (*Dkt. 13, Ex. A*), though it is undisputed that this is *not* the notice that AHCCCS sent to either of the Plaintiffs. [4] The *only* facts that support the Complaint's notice allegations are those alleged at ¶¶ 75-76 of the Complaint regarding the notice Ms. Sanchez Haro received. And the ***only*** thing Ms. Sanchez Haro alleges about the notice is that she "did not understand" it and her daughter "could not help her understand why she was not eligible for full-scope AHCCCS benefits." *Id.*, ¶ 75.

The Complaint does not allege that this notice was untimely or failed to contain the information required by 42 C.F.R. §431.210 or 42 C.F.R. §431.230 (regarding the right to continued services upon filing of an appeal). It does not allege Ms. Sanchez Haro failed to receive a notice in Spanish, so language was presumably not an issue. It

[4] *See Dkt. 48, p. 12, n. 3*. The Plaintiffs' Objections nevertheless continue to argue (p. 19) that the notice Ms. Sanchez Haro received lacked an explanation of what emergency services are, although they have admitted this is incorrect. *Id.*

does not allege she could not understand the notice's description of emergency-only services, her right to appeal, or her right to continued services if she did appeal.

For all the Complaint alleges, her subjective inability to understand the notice simply meant she believed she was entitled to full benefits and could not understand the notice because it was a mistake. We know she understood that her benefits had changed and that she could question the change because she alleges she called the number on the notice to ask why her benefits had changed. *Dkt. 1, ¶ 76.* The Plaintiffs' Objection argues "the recipient cannot determine [from the notice] the reason for the agency action and 'whether AHCCCS made a mistake,'" (*Dkt. 74, p. 19),* but Ms. Sanchez Haro knew her immigration status had not changed and therefore believed a mistake had been made as to her Medicaid eligibility.

"Notice under the Due Process Clause need only be 'reasonably calculated ... to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *English v. D.C.*, 717 F.3d 968, 973 (D.C. Cir. 2013), citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). "In order to successfully establish a denial of due process, there must be a showing of procedural unfairness." *Bullock v. Dep't of Air Force*, 6 F. App'x 856, 860 (Fed. Cir. 2001). Where it is clear the individual knew why an action had been taken and could show no prejudice from lack of greater detail, she fails to show a violation of due process. *Hopkins v. Department of Human Services*, 802 A.2d 999, 2002 ME 129 (2002) (plaintiffs could show no prejudice from failure to provide detailed information regarding Medicaid termination).

Ms. Sanchez Haro does not contend she was harmed or prejudiced in any way by the notice or that it erroneously deprived her of her rights. She demonstrates no procedural unfairness. To the contrary, she was informed of her right to appeal and receive continued benefits if she disagreed with the reduction in her benefits and she was given an opportunity to be heard "at a meaningful time and in a meaningful manner" to argue that her immigration status had not changed and that the reduction in benefits was therefore erroneous. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

As the Magistrate Judge notes, the Complaint depends upon conclusory allegations that the notice was "confusing" and not "meaningful" or should have done more, but it fails to specify any rule, state or federal, that the Director violated. It also fails to show the Plaintiffs were prejudiced or denied due process. The notice allegations therefore failed to state a claim.

III. THE PLAINTIFFS LACKED STANDING AND/OR THEIR CLAIMS WERE MOOT.

For the Court to have jurisdiction, the Plaintiffs must demonstrate standing.

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (quotation marks and citations omitted).

Ms. Darjee failed to meet this standard. First, as discussed above, she did not allege facts that traced an injury to any illegal policy or practice of the Director. Second, she was not suffering any injury in fact that could be redressed by a favorable decision. After receiving notice that her eligibility had been reduced to emergency-only services, she sought legal assistance. *Dkt.1, ¶ 59*. Her advocates notified AHCCCS that it made a mistake. AHCCCS agreed. She admits restoration of her family's benefits was already "imminent if not complete" when she filed suit. *Id.*

Because her benefits were already fully restored and she claimed no injury from the allegedly defective notice that had informed her of reduced benefits, she had no standing. She had no injury that the relief she requested would have redressed. Nor did she have any threatened injury, since "threatened injury must be *certainly impending* to constitute injury in fact, and [a]llegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA,* 133 S. Ct. 1138, 1148 (2013) (citations and quotation marks omitted) (emphasis in original).

Even if she had had standing, her claims became moot when her benefits were restored for the same reasons as did Ms. Sanchez Haro's, as discussed below.

Ms. Sanchez Haro's claims became moot when her benefits were fully restored. She, like Ms. Darjee, claimed no injury from the allegedly defective notice. She is not suffering any present harm. The relief the complaint sought would not redress any injury she suffered: she already enjoys full AHCCCS benefits, and a new notice informing her of the (rescinded) reduction of her benefits would be of no benefit to her.

The Plaintiffs argue that, because a motion to certify a class was pending when her benefits were restored, she comes within a "limited exception" to mootness. That exception applies when "the claims raised are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires." *Clapper*, *supra*, 133 S. Ct. at 1530–31 (quotation marks and citations omitted).

An inherently transitory claim is one that "would evade review, either by its very nature or by virtue of the defendant's litigation strategy." *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1048 (9th Cir. 2014). If the "transitory nature of the conduct giving rise to the suit would effectively insulate defendants' conduct from review," certification "potentially" relates back to the filing of the complaint. *Id.*

Here, the Plaintiffs cannot (and do not) claim the restoration of their benefits was the result of any "litigation strategy." That AHCCCS has been restoring anyone whose benefits were incorrectly since late in 2015 is undisputed. Plaintiffs' cases were reviewed as soon as they notified AHCCCS of possible mistakes.

Nor are AHCCCS changes in eligibility inherently transitory claims that are insulated from review. A change in eligibility is for a full year; there is more than adequate time to challenge it legally. Nor is an incorrect change in eligibility likely to evade review. The notice that tells the recipient her benefits are being reduced tells her she will only be eligible for emergency services, and it attaches a form of appeal and explains the right to receive automatic continuation of full benefits pending the

outcome of an appeal. *Dkt. 13, Ex. A.* Ms. Sanchez Haro plainly had time and an effective means to seek review but chose this action instead.

Finally, even if Ms. Sanchez Haro could have demonstrated her claims were transitory and likely to evade review, she would also have to show a reasonable expectation that she will be subject to the same action in the future. *Spencer v. Kemna*, 523 U.S. 1, 17 (1998). She alleges no basis to expect that the erroneous determination made in 2016 will occur again. In this regard, she does not allege when or why her benefits were reduced once before. Nor does the Complaint allege any facts as to why the Darjees' benefits were reduced in 2015 or why or when two other, unidentified persons allegedly had their benefits reduced twice. *Dkt. 10, ¶ 17.* [5]

The Plaintiffs' notice claims are also moot. Absent a reasonable expectation of another reduction in benefits, neither Plaintiff has a reasonable expectation of receiving another notice. Moreover, AHCCCS notices are not static. The Plaintiffs' notices were, for instance, more informative than the form of notice they alleged in their complaint. *Dkt. 48, p. 12.* There is no basis to assume what any future notice will say or not say.

[5] Ms. Sanchez Haro's situation is not at all comparable to the plaintiffs the Objection cites in *Barry v. Lyons*, 834 F.3d 706 (6th Cir. 2016) and *Harris v. Bd. of Supervisors, Los Angeles Cty.*, 366 F.3d 754 (9th Cir. 2004). In *Barry*, the bizarre pattern of problems the plaintiffs had faced allowed a reasonable expectation of repetition. In *Harris*, the Ninth Circuit held chronically ill individuals sufficiently alleged an "imminent threat of concrete injury" from closure of a clinic upon which the plaintiffs relied for their health care when the County was without means to absorb the plaintiffs elsewhere. Ms. Sanchez Haro can show no similar likelihood. The Objections' argument (p. 8) that she need only show a possibility of repetition is simply incorrect.

The cases Plaintiffs depend upon for the proposition that the AHCCCS notices should have more information are, as the Magistrate Judge notes, all cases in which the plaintiffs had at least stated a claim for an underlying violation of law. If the Plaintiffs are suggesting they have a cause of action for "defective" notices regardless whether their underlying "reasonable promptness" claim is viable and in the absence of any prejudice from the notice, they cite no case to support such an analysis.

Nor would such an argument make sense. If the Plaintiffs have no underlying reasonable promptness claim, then requiring a new notice about lawful reductions in their benefits would serve no purpose. And, since these Plaintiffs' benefits have been fully restored, a new notice would serve no purpose under any circumstances. Since the Plaintiffs can show no reasonable likelihood of further reductions of benefits, they have no reasonable likelihood of receiving another notice. What such a notice would say one or several years from now is a matter of pure speculation in any event. The notice claims are moot.

The Magistrate Judge correctly concluded that Ms. Darjee lacked standing and that her claims were moot and that Ms. Sanchez Haro's claims are moot.

IV. AMENDMENT WOULD BE FUTILE.

"Dismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051 (9th Cir. 2008). The Magistrate Judge recommends that the Complaint herein be dismissed with prejudice because the Plaintiffs cannot cure their standing and mootness problems. Both Plaintiffs have full AHCCCS benefits. They have demonstrated no

reasonable expectation of any future injury. A new notice giving a "better" explanation of the reason for their reductions in benefits would be meaningless. The two Plaintiffs simply have no actual, ongoing controversy with the Director. They say they would "provide additional facts" (*Dkt. 74, p. 18*), but nothing will change the fact that Ms. Darjee has no standing and both Plaintiffs' claims are moot.

Amendment would therefore be futile. The dismissal of Plaintiffs' complaint should be with prejudice, as recommended by the Magistrate Judge.

V. THE LOCKNER DECLARATION SHOULD BE PART OF THE RECORD.

Since the Plaintiffs do not object to denial of their motions for class certification and preliminary injunction, the only reason for them to object to the Second Declaration of Tara Lockner is to try to keep her facts out of the record. For the reasons stated in his Response to Plaintiffs' Renewed Motion to Strike Supplemental Declaration of Tara Lockner (*Dkt. 63*), the Director asked the Magistrate Judge to reconsider his first inclination (*Dkt. 69, p. 66*) to strike the Declaration. *Id., p. 132*. The Magistrate Judge did not rule but now recommends dismissing the case and denying the pending motions, including Plaintiffs' motion to strike, as moot.

The Supplemental Declaration created no prejudice to the Plaintiffs. Its facts are relevant and undisputed. They are part of the record and should remain so.

CONCLUSION

The Plaintiffs' Objections to the Magistrate Judge's Recommendation should be overruled. The case should be dismissed with prejudice as recommended.

RESPECTFULLY SUBMITTED this 22nd day of November, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 22, 2016, he electronically transmitted the foregoing Response to Plaintiffs' Objection to Report and Recommendation of Magistrate Judge to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic filing to the following CM/ECF registrants:

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