Ellen Sue Katz, AZ Bar. No. 012214
WILLIAM E. MORRIS INSTITUTE FOR JUSTICE
3707 North Seventh Street, Suite 220
Phoenix, AZ 85014-5095
(602) 252-3432
eskatz@qwestoffice.net

Martha Jane Perkins
NATIONAL HEALTH LAW PROGRAM
200 North Greensboro St., Suite D-13
Carrboro, NC 27510
(919) 968-6308 (x101)
perkins@healthlaw.org

Corilee Racela
NATIONAL HEALTH LAW PROGRAM
3701 Wilshire Blvd., Suite 750
Los Angeles, CA 90010
(310) 204-6010
racela@healthlaw.org

Attorneys for Plaintiffs

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' REPLY IN FURTHER SUPPORT OF OBJECTIONS TO REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

ORAL ARGUMENT REQUESTED

Plaintiffs submit this Reply in Further Support of their Objections to the Magistrate Judge's Report and Recommendation.[1]

[1] The Defendant suggests that Plaintiffs do not "object to denial of their" Motion for Class Certification and Motion for Preliminary Injunction. However, the Magistrate Judge did not deny these motions but rather found them "moot." Plaintiffs expect that if this Court grants their objections and all or part of the Magistrate Judge's

I. The Reasonable Promptness Claim (Count I) Concerns Processing Errors Caused by Defendant's Policies and Practices

For a failure to state a claim, the Court must look at the allegations in the Complaint. AHCCCS has an obligation to process all recertifications of immigrant eligibility for medical benefits pursuant to the Medicaid Act requirements, including 42 U.S.C. § 1396a(a)(8). The facts in Plaintiffs' Complaint are that Defendant admitted that his systemic improper processing of immigrant recertifications for full medical coverage resulted in over 3500 erroneous decisions. Complaint ¶ 40. Plaintiffs further allege that, despite Defendant's claims, the processing errors continue and have not been fixed. *Id*. ¶ 41. As illustrated by Plaintiffs' cases, systemic problems persist and continue to cause the improper processing of immigrant recertifications that result in severe reductions in Medicaid coverage into 2016. Compl. ¶¶ 8, 41, 58-59, 70, 75. The facts show that there continue to be approximately 60 incorrect recertification denials of full-scope medical benefits for immigrants, across the State, each month. Docket No. 75, page 2.

Plaintiffs allege that Medicaid applications and recertifications are processed in the Healthe-Arizona Plus or "HEAPlus" computer system. Compl. ¶ 43. Food stamp applications and recertifications are processed through the AZTECS computer system. *Id*. ¶ 42. The Complaint also alleges that the Arizona Department of Economic Security ("DES") caseworkers, who process eligibility for both medical coverage and food stamps, continued to find Plaintiffs eligible for food stamps at their recertification even as their full-scope Medicaid was denied (and even though both programs apply the same immigration status rules). *Id*. ¶¶ 24-25, 42-44, 68, 77.[2] Additional facts in the Complaint

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Recommendation and Report is reversed, the case will be remanded back to the Magistrate Judge for further proceedings that would include Plaintiffs' Motions for Class Certification and Preliminary Injunction.

[2] Defendant again incorrectly claims the "allowable error rate" allows him to continue incorrect reduction of Medicaid benefits for the immigrant. *See* Def. Resp. at 11, Docket 78. The error rate in the prior regulation concerns when the federal government will reimburse the state for its Medicaid costs based on quality reviews of cases and has nothing to do with the claims in this case and whether Defendant's current policies and practices violate the Medicaid Act. Moreover, the current regulation, 42

state that each Plaintiff previously gave Defendant her immigration card and immigration number, a number that is like a Social Security number and does not change. Each Plaintiff alleged that her immigration status had not changed from her previous recertification. Compl. ¶¶ 48, 57, 73. The Complaint alleges that there is no dispute that both Plaintiffs continued to be eligible for full-scope AHCCCS. *Id.* ¶¶ 56-59, 72-77. Because eligibility for food stamp benefits are determined using a different computer system, a reasonable inference is that there are systemic issues with the computer system that determines AHCCCS medical coverage.

A. The Complaint Pleads Facts, Not Legal Conclusions

Defendant argues that Plaintiffs have not pled sufficient facts to survive the motion to dismiss.[3] This is not correct. Plaintiffs claim that Defendant is not processing immigrant recertifications pursuant to the *ex parte* review process required by 42 C.F.R. § 435.916(a) and (b) (requiring the state agency to recertify eligibility without requiring information from the individual if able to do so based on reliable information contained in the individual's case file or other information available to the agency). As alleged by Plaintiffs, the regulation intended to reduce errors at recertification and lessen the burden on beneficiaries to submit duplicative and unchanging information. Compl. ¶ 32. Plaintiffs allege that, because each of them gave AHCCCS their immigration card and number and their immigration status had not changed from the prior recertification, there was no missing information and eligibility could have and should have been determined based on available information. And had AHCCCS properly utilized the *ex parte* process it would have found each person continued to be eligible for medical coverage, either by reviewing the current information in their AHCCCS medical case or looking into their

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C.F.R. § 431.865, pertains to giving Medicaid benefits to persons *ineligible* for benefits, not, as here, failing to provide benefits to immigrants who are *eligible* for full-scope Medicaid benefits. Defendant does not get a "pass" on the improper processing of immigrant benefits.

[3] In several places, Defendant states purported facts that are not in the Complaint and are incorrect. As an example, Defendant states that Plaintiffs' counsel discovered a computer problem in August 2015. Def. Resp. at 2, Docket No. 78.

food stamp case. *Id*. ¶¶ 50, 57, 68, 73, 77

Plaintiffs claim that system-wide improper decisions continue because the Defendant fails to implement the *ex parte* process. Compl. ¶ 51. Defendant simply ignores the policy and practice reasons that cause the improper decisions.

Plaintiff Sanchez Haro's facts are used to illustrate the problem. Plaintiff Sanchez Haro states that at the time of her recertification in 2016 when she asked the agency why her medical benefits were reduced, she was told she was denied full-scope medical coverage because she had not been a legal permanent resident for 5 years and that the law had changed in 2016. *Id.* ¶ 76. Plaintiff also alleges that application of the 5-year legal permanent resident requirement was not proper, but that it is not a new concern; Defendant admitted to Plaintiffs' counsel that improper imposition of the 5-year status requirement was one of the errors being made by the Medicaid HEAPlus computer system. *Id.* ¶ 45.[4] The only way for an agency employee to know that Ms. Sanchez Haro was found ineligible for full medical coverage because she had not been a legal permanent resident for 5 years is because that was what the HEAPlus computer system was reporting. *Id.* ¶ 43. Had the eligibility caseworker who initially processed the recertification in 2016 used the *ex parte* process and either reviewed the information already in the AHCCCS case file on the HEAPlus computer system or the food stamp case file on the AZTECS computer system, he or she would have found that Ms. Sanchez Haro was not required to meet the 5-year status limit. That correct determination already had been made in 2015 when Ms. Sanchez Haro presented her legal permanent resident

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[4] The one computer issue AHCCCS stated it had identified was that when a refugee became a legal permanent resident status ("LPR"), the HEAPlus computer only recognized the person as a LPR and then looked to see if the person had 5 years in status. There was no recognition by the computer that the person was previously a refugee and did not need to meet the 5 years in LPR status requirement. Compl. ¶¶ 24-25, 45. The same issue arises with Ms. Sanchez Haro. She came to the U.S. before 1996 and was a victim of domestic violence and did not need to meet the 5-year status requirement. *Id*. ¶¶ 9, 26-27, 73. Her recertification for medical benefits was properly processed in 2015. Then in 2016, the 5-year requirement was improperly applied by the HEAPlus computer system. *Id*. 74 -77.

card and was subsequently found eligible for both food stamps and medical coverage a few months later. *Id*. ¶¶ 42-43, 72-75, 77.[5] Plaintiffs also have alleged that the *ex parte* process is not followed because Defendant does not treat immigration numbers like Social Security numbers and instead allows workers to ask for the immigration information at recertification, even when this number is in the case file. Compl. ¶ 48.

Despite these specific examples of the ways Defendant fails to properly utilize the *ex parte* process, Defendant incorrectly argues that at this early pleading stage, Plaintiffs must be able to state what happened to make the HEAPlus computer system produce incorrect denials. The parties are not at the summary judgment stage of the litigation, discovery has not occurred and Plaintiffs' are not required to "prove" their claims. "Even in this post-*Iqbal/Twombly* era, in reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court neither assesses the legal feasibility of the complaint nor does it weigh the evidence which might be offered at trial." *Ansley v. Lake*, Case No. CIV-14-1382-D, 2016 WL 951690 *2 (W.D. Okla. March 9, 2016) (citing *Skinner v. Switzer*, 562 U.S. 521, 529-30 (2011)). *See Horizon Community Bank v. Land Bridge, LLC*, Case No. CIV-11-08017, 2011 WL 5600546 at * 2 (D. Ariz. Nov. 17, 2011) (claims that challenged the accounting and whether two defendants were married are questions to be decided later in litigation and not on a motion to dismiss where plaintiffs' facts are to be taken as true); *Street v. Wachovia Mortgage, et al.*, Case No. CIV-12-02309, 2013 WL 135376 at *3 (D. Ariz. Jan. 13, 2013) (at motion to dismiss stage the court does not weigh the evidence). At the motion to dismiss stage, Plaintiffs need only state a facially "plausible" claim that allows the Court to draw the reasonable inference that Defendant is liable for the misconduct alleged. *See* Plaintiffs' Objections, at 10, Docket No. 77. As

[5] Defendant claims that "[u]p to half of immigrants have changes during a year that may affect their eligibility." Def. Resp. at 6 (citing 77 FR 17144-01). The correct citation to this proposition is 76 Fed. Reg. 51180 (2011). Notably, the statistic of "33-50%" refers to an estimate for the entire Medicaid population - not just immigrants - who may experience *any* change that would impact eligibility, including a variety of factors such as income and address changes, not just immigration status. Defendant's implication that up to 50% of immigrants experience a change in immigration status is both unsupported and outside the allegations in the Complaint.

explained in their objections and this reply, Plaintiffs have satisfied this requirement.

For purposes of a motion to dismiss, Plaintiffs are entitled to the inference that Defendant's policies are resulting in approximately 60 immigrants each month improperly losing full-scope Medicaid coverage and that the Defendant is improperly denying immigrants full-scope medical eligibility by not relying on information already in its own files to make *ex parte* recertification decisions. The Magistrate Judge failed to give Plaintiffs *any* inferences concerning this claim and did not apply the correct legal standard in evaluating Count I of the Complaint. This Court should find that Plaintiffs stated a claim for relief.

While Defendant proposes an alternative explanation, at this stage of the litigation, even if the Court would find the parties' claims are equally plausible, the Plaintiffs would survive a motion to dismiss. *Starr v. Baca*, 652 F.3d 1202, 1216-17 (9th Cir. 2011).

Finally, even assuming for the sake of argument that the Defendant's arguments were correct, the proper action by the Court would not be to dismiss the Plaintiffs' claim, but rather to give them an opportunity to amend. *See Polich v. Burlington Northern, Inc.*, 942 F.2d 1476, 1472 (9th Cir. 1991) (finding that, unless it is "clear" that a complaint could not be saved by amendment, leave to file an amended complaint should be granted).

B. The *Romano* Decision Is Relevant

Defendant is critical of *Romano v. Greenstein*, No. 12-469, 2012 WL 1745526 (E.D. La. 2012), *aff'd*, 721 F.3d 373 (5th Cir. 2013), arguing it does not have an active citation history. In *Romano*, the state Medicaid agency failed to use the appropriate seven-step sequential analysis to determine plaintiff's eligibility. The court found that, in failing to use the proper analysis, the agency violated the reasonable promptness requirement. *Id*. at *8. Plaintiffs' claim here is analogous; Defendant failed to use the appropriate *ex parte* redetermination process to determine Plaintiffs' continued eligibility. Compl. ¶¶ 32, 48, 48-51. Moreover, the lack of subsequent citation, does not lead to the conclusion that the case can be ignored. Notably, amendments to the Patient Protection

and Affordable Care Act ("ACA") were added specifically to correct any misunderstanding that Medicaid (called "medical assistance" in the Act) did not include "care and services." Defendant ignores the ACA amendment and subsequent cases relying on that amendment, which directly contradict his claim that reasonable promptness only applies to the termination of all benefits and waiting lists. Plaintiffs' Objections at 10-13, Docket No. 77.

II. The Eligibility Notice Claim (Count II) Properly States a Claim

Plaintiffs claim that an eligibility notice that only tells the immigrant recipient that he or she is no longer eligible for full scope medical coverage because "your immigration status does not let you get full medical services," is unlawful under the requirements of the Medicaid Act and constitutional due process. The notice fails to provide adequate information about the reason for the change in medical coverage so that the recipient can both understand the reason for the change and decide whether the agency is correct. As alleged in the complaint, the problem with the boilerplate notice is exemplified by Plaintiff Sanchez Haro. Defendant only told her that she could not continue to get full medical coverage because her immigration status did not allow it, but her immigration status had not changed in the last year. Compl. ¶ 73. Plaintiff Haro alleged that she did not understand why her medical benefits were being reduced. *Id*. ¶ 75. *See* Plaintiffs' Objections at 19-20, Docket No. 77.

Defendant does not address the dispositive authority Plaintiffs rely on that the notice is deficient and instead takes snippets from cases from other state and federal jurisdictions. Defendant also incorrectly claims Plaintiffs have not stated how the notice violates the Medicaid Act and constitutional due process. This is not correct. *See* Compl. ¶ 53 (lack of adequate information for the reason for the action); ¶ 55 (the failure to tell the recipient that they can look at their complete file; failure to explain how to continue to obtain benefits during the hearing process; failure to make the rules and policies available to the recipient as required by the federal regulations set forth in paragraphs 36-38 of the Complaint).

The requirement for adequate information of the reason for the agency action in the notice has been incorporated into the Medicaid regulations. *See, e.g., K.W. v. Armstrong*, 789 F.3d 962, 971 (9th Cir. 2015) (notice required by Medicaid regulation, 42 C.F.R. § 431.210, must contain the reasons for the state's intended action, including specificity about why plaintiffs' home-care budgets were reduced). Plaintiffs cited 42 C.F.R. § 431.210 in paragraph 36 of the Complaint but Defendant faults Plaintiffs for not stating that when they claimed the noticed lacked "meaningful information" that they were referring to the requirement that the agency provide adequate information for the agency action under § 431.210. A reasonable inference, the inference Plaintiffs are entitled to receive, is that when Plaintiffs stated the notice lacked meaningful information it was because the notice failed to adequately describe the reasons for the agency action as required by § 431.210.

Similarly, Plaintiffs cited *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970), holding that constitutional due process requires an "adequate notice detailing the reasons for a proposed [action]" to protect recipients from agency action "resting on incorrect or misleading factual premises or on misapplication of rules to policies of the facts of particular cases." Compl. ¶ 33. Courts have found that notices similar to the one at issue here violate constitutional due process. *See, e. g., K.W.*, 789 F.3d at 974 (budget notices must detail specific reasons the recipient's budget was decreased); *Ortiz v. Eichler*, 794 F.2d 889, 893-94 (3rd Cir. 1986) (specific calculations used to determine eligibility required in notice). A reasonable inference, the inference Plaintiffs are entitled to receive, is that the boilerplate notice at issue lacked the requisite specificity under due process and thus, Plaintiffs set forth a claim under the constitutional due process clause.

The Magistrate Judge incorrectly failed to give *any* inferences to Plaintiffs in his Recommendation on the notice claim. With these inferences, Plaintiffs have stated a claim for relief on the notice claim.

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III. Defendant Waived His Right to Object to the Magistrate Judges Finding that Plaintiffs' Claims Met the Evading Review Standard

Defendant argues without any authority that because a recertification and thus use of the defective notice occurs yearly, this time period does not satisfy the evading review standard. Def. Resp. at 14, Docket No. 78. Because the Magistrate Judge concluded Plaintiffs had met the transitory requirement, and Defendant did not object to this finding when he filed his objection, Defendant has waived his argument. *Turner v. Duncan*, 158 F.3d 449, 455 (9th Cir. 1998).[6]

Conclusion

For all the above reasons as well as those in their Objections, Plaintiffs request that this Court reverse the Magistrate Judge's Report and Recommendation and find that for both counts in the Compliant, Plaintiffs have standing, their claims are not moot and they stated a claim. 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. Finally, any remand should include that Plaintiffs' Motion for Class Certification and Motion for Preliminary Injunction are not moot.

Respectfully submitted this 19th day of December 2016.

NATIONAL HEALTH LAW PROGRAM
WILLIAM E. MORRIS INSTITUTE FOR JUSTICE

By /s/Ellen Sue Katz
Ellen Sue Katz
Attorneys for Plaintiffs

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[6] This case easily satisfies the transitory requirement. Evading review means that the underlying action is expected to run its course before the appeals court or the Supreme Court can give the case full consideration. *Alaska Center for the Environment v. U.S. Forest Service*, 189 F.3d 851, 855 (9th Cir. 1999) (citations omitted) (holding a two year permit is "too short to allow full litigation before the permit expires."); *Hubbart v. Knapp*, 379 F.3d 773, 777-78 (9th Cir. 2004) (two year term of commitment is too short for full review by the federal courts).

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December 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:

Logan Johnston
Johnston Law Offices PLC
1402 East Mescal Street
Phoenix, Arizona 85020-1420
ltjohnston@live.com

Attorney for Defendant Betlach

Ellen Sue Katz