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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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Aita Darjee, et al.,	No. CV-16-00489-TUC-RM (DTF)
Plaintiffs,	**ORDER**
v.	
Thomas Betlach,	
Defendant.	

Pending before the Court are Plaintiffs' Motion for Preliminary Injunction (Doc. 15) and Motion for Class Certification (Doc. 5). Defendant Responded (Docs. 39, 40), and Plaintiffs Replied (Docs. 45, 51). The Parties filed numerous declarations in support of their papers.

Also pending before the Court are Defendant's Motion to Strike Portion of Plaintiffs' Oral Argument (Doc. 59), Plaintiffs' Motion to Strike Declaration (Doc. 62), and Plaintiffs' Motion to Strike New Argument in Defendant's Reply (Doc. 65). The Court now resolves these motions.[1]

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[1] The referral of this matter to Magistrate Judge D. Thomas Ferraro is withdrawn as to these motions only.

BACKGROUND

I. Procedural Background

On July 22, 2016, Plaintiffs filed this putative class action to address the alleged improper reduction of immigrant Medicaid beneficiaries' health benefits. *See* Compl., Doc. 1. On the same date, Plaintiffs filed their Motion for Class Certification, seeking to certify a class of immigrant Medicaid beneficiaries whose full-scope health benefits were improperly reduced to emergency-only benefits. Pls.' Mot. Class Certification 1–2, Docs. 5 & 6. On July 27, 2016, Plaintiffs filed their Motion for Preliminary Injunction, seeking to prevent Defendant from further reducing the benefits of eligible immigrant beneficiaries and to prevent Defendant from sending notices which violate due process. Pls.' Mot. Prelim. Inj. 1–2, Docs. 15 & 20.[2]

On August 9, 2016, the Court referred this matter to Magistrate Judge D. Thomas Ferraro for all pretrial proceedings and report and recommendation. Order 1, Doc. 27. On August 29, 2016, Defendant filed a Motion to Dismiss, asserting that Plaintiffs lacked standing or their claims were moot, or, alternatively, the Complaint failed to state a claim. Def.'s Mot. Dismiss 1–2, Doc. 35. Judge Ferraro heard oral argument on all three pending motions. Order 1, Doc. 43; *see* Tr. of Oral Arg., Oct. 4, 2016, Doc. 69.

Judge Ferraro issued his Report and Recommendation on October 25, 2016. R. & R., Doc. 72. Judge Ferraro recommended granting Defendant's Motion to Dismiss, dismissing the Complaint with prejudice, and denying Plaintiffs' pending motions as moot. *Id.* at 18. In a separate Order filed today, this Court granted in part and denied in part Defendant's Motion to Dismiss, thereby making it necessary to address Plaintiffs' other pending motions.[3]

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[2] All subsequent citations to Plaintiffs' Motion for Class Certification and Motion for Preliminary Injunction will be to the memorandum of points and authorities in support of each motion. *See* Docs. 6 & 20.

[3] It is proper to reach Plaintiffs' pending motions because at least one Plaintiff has standing for each claim. *See Atay v. Cty. of Maui*, 842 F.3d 688, 696 (9th Cir. 2016) ("As a general rule, in an injunctive case this court need not address standing of each plaintiff if it concludes that one plaintiff has standing." (internal quotation marks and citation omitted)); *Melendres v. Arpaio*, 784 F.3d 1254, 1261–62 (9th Cir. 2015) (if

II. Medicaid Framework

In 1965, Congress created the Medicaid program by adding Title XIX to the Social Security Act. 42 U.S.C. §§ 1396–1396w-5. The purpose of Medicaid is to enable each state "to furnish . . . medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." *Id.* § 1396-1. To participate in Medicaid, a state must implement the program through a state plan which has been submitted to and approved by the Secretary of the U.S. Department of Health and Human Services. *Id.* §§ 1396-1, 1396a(b). Arizona participates in Medicaid through the program known as Arizona Health Care Cost Containment System ("AHCCCS"). Ariz. Rev. Stat. §§ 36-2901 *et seq*.

State plans must "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." 42 U.S.C. § 1396a(a)(8). Regulations implementing state Medicaid plans, such as AHCCCS, require that states "[c]ontinue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible." 42 C.F.R. § 435.930(b). Generally, immigrants who enter the United States after August 22, 1996 are not eligible for Medicaid unless they have been "qualified aliens" for 5 years, as that term is defined in the code. 8 U.S.C. § 1613(a). Certain immigrants are exempt from this requirement, including refugees and victims of domestic battery. *Id.* §§ 1613(a)–(b), 1641(c).

The eligibility of a Medicaid beneficiary must be renewed every 12 months. *Id.* § 435.916(a). Recertification is required to be done through an *ex parte* process, whereby a state makes the eligibility redetermination without requiring information from the beneficiary, if able to do so based upon reliable information already available to the state. *Id.* § 435.916(a)(2). If a state cannot make the eligibility redetermination based upon

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at least one named plaintiff has standing, the court may consider whether the plaintiff has representative capacity under Rule 23(a)).

available data, it must send the beneficiary a "pre-populated renewal form" requesting only the information needed to renew eligibility. *Id.* § 435.916(a)(3). The Arizona Department of Economic Security ("DES") processes most of the annual renewals of AHCCCS benefits. Lockner Decl. ¶ 4, Doc. 39-1. Renewals are processed via the HEAPlus computer system. *See id.* ¶¶ 9–10.

Due process prohibits states from terminating Medicaid beneficiaries' health benefits without adequate notice and a fair hearing. *See Goldberg v. Kelly*, 397 U.S. 254 (1970); *Perry v. Chen*, 985 F. Supp. 1197 (D. Ariz. 1996). Federal regulations require notices to (1) state what action the agency intends to take; (2) provide "a clear statement of the specific reasons supporting the intended action"; (3) state the specific regulations that support the intended action; and (4) provide an explanation about the beneficiaries' right to a hearing. 42 C.F.R. § 431.210.

III. Factual Background

A. Plaintiffs' Claims

Plaintiffs allege two Counts in their Complaint. In Count 1, Plaintiffs allege violations of the "reasonable promptness" provision contained within 42 U.S.C. § 1396a(a)(8). Compl. 17–18. Plaintiffs' allegations suggest two theories to support such violations. First, Plaintiffs allege the existence of a computer programming error which is causing the improper reduction of beneficiaries' full-scope benefits to emergency-only benefits. *Id.* ¶¶ 40, 42–45. Second, Plaintiffs allege that Defendant maintains a policy of violating the federal *ex parte* process in the following ways: he permits case workers to request beneficiaries' alien numbers at each renewal, although the number remains the same for life and would not need to be checked; and he permits case workers to request beneficiaries' non-citizen status at each renewal, although that information is readily accessible in available databases. *Id.* ¶¶ 40, 47–51. These alleged policies lead to unnecessary errors and the improper reduction of benefits. In all cases of reduction, the beneficiary is not promptly receiving the medical services to which he or she is entitled, in violation of § 1396a(a)(8).

In Count 2, Plaintiffs allege a violation of due process stemming from the alleged inadequacy of the notices Defendant sends to those whose benefits are reduced. *Id.* at 18. Plaintiffs allege the notices lack meaningful information (e.g., a definition of emergency-only benefits and a comparison to full-scope benefits), contain legal citations without explanation, and incorrectly state that the beneficiary can review portions of their case file. *Id.* ¶¶ 52–55.

B. Declarations of Plaintiffs and Putative Class Members

In support of their Motion for Preliminary Injunction and Motion for Class Certification, Plaintiffs submitted the declarations of both named Plaintiffs, as well as the declarations of putative class members Stephanie Nyirandekeyaho and Adam Humed.

1. Plaintiff Aita Darjee

Aita Darjee is a 30-year-old woman who lives in Tucson, Arizona, with her husband, her two minor children, and her parents-in-law. Darjee Decl. ¶ 1, Doc. 12. In 2011, Darjee and her family came to the United States as refugees from Nepal. *Id.* ¶ 2. As refugees, Darjee and her family immediately received full AHCCCS benefits. *Id.* In 2012, Darjee, her husband, and one of her children became legal permanent residents. *Id.* ¶ 4. Darjee gave DES their resident cards, which bore their respective immigration numbers. *Id.* ¶ 5. The change to legal permanent resident status did not affect their full AHCCCS benefits. *Id.* ¶ 4.

In June 2015, the Darjee family received a notice that their benefits had been reduced to emergency-only benefits. *Id.* ¶ 7. Their benefits were eventually restored. *Id.* Near July 1, 2016, the Darjee family's benefits were again reduced to emergency-only benefits. *Id.* ¶ 6. The Darjee family did not receive a notice explaining the reduction of their benefits; they learned about the reduction when the doctor's office called and cancelled an appointment because it was not covered by their emergency-only benefits. *Id.* ¶ 10.

Darjee suffers from frequent cold symptoms and a gastric problem. *Id.* ¶¶ 12–13. Her husband has several medical conditions, including diabetes, high blood pressure,

high cholesterol, and asthma. *Id.* ¶¶ 8–9. One of Darjee's children has allergies and must see a doctor before starting school. *Id.* ¶ 14. All three take medications for their respective conditions, and they fear for their health if their medications are not covered by AHCCCS. *Id.* ¶¶ 8, 13–15, 17. Even if their benefits are restored, they fear future reductions. *Id.* ¶ 18.

2. Plaintiff Alma Sanchez Haro

Alma Sanchez Haro is a 48-year-old woman who lives in Tucson with her daughter. Sanchez Haro Decl. ¶ 1, Doc. 11. Sanchez Haro's status as a victim of domestic violence qualifies her for full AHCCCS benefits, which she received almost continuously from 2003 to 2016. *Id.* ¶¶ 1–2, 8. In January 2015, Sanchez Haro became a legal permanent resident. *Id.* ¶ 3. She gave DES her resident card, which bore her immigration number. *Id.*

In April 2016, Sanchez Haro received an AHCCCS notice informing her that she was no longer eligible for full-scope benefits. *Id.* ¶ 6. Although the notice was in Spanish, neither Sanchez Haro nor her daughter could understand why Sanchez Haro was no longer eligible for full benefits. *Id.* Sanchez Haro called the phone number printed on the notice and spoke with someone regarding the reduction. *Id.* ¶ 7. The person informed Sanchez Haro that she did not qualify for full benefits because she had not been a legal permanent resident for 5 years. *Id.* Sanchez Haro told the person she had received full benefits for years, and was told in response that the law had changed in January 2016. *Id.*

Sanchez Haro has several medical conditions, including severe depression, anxiety, diabetes, high blood pressure, high cholesterol, and muscle cramps. *Id.* ¶¶ 10–12, 14–15. She takes medications for these issues. *Id.* ¶ 13. As of July 2016, Sanchez Haro was stressed because she was unable to see any of her doctors and was forced to go 2-3 weeks without her medications. *Id.* ¶¶ 16–24. On August 22, 2016, Sanchez Haro learned that her benefits were restored, although she still worries that Defendant will change his mind and reduce them again. Suppl. Sanchez Haro Decl. ¶¶ 3, 13, Doc. 33.

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1 **3. Putative Class Member Stephanie Nyirandekeyaho**

2 Stephanie Nyirandekeyaho is a 53-year-old woman who lives with her son in
3 Phoenix, Arizona. Nyirandekeyaho Decl. ¶ 1, Doc. 14. In April 2015, Nyirandekeyaho
4 and her two sons came to the United States as refugees from the Congo. *Id.* ¶ 2. After
5 arriving in Phoenix, Nyirandekeyaho gave DES her I-94 card, which bore her
6 immigration number and information regarding her refugee status. *Id.* ¶ 4. As refugees,
7 Nyirandekeyaho and her sons immediately received full AHCCCS benefits. *Id.* ¶¶ 2, 5.

8 Nyirandekeyaho received an AHCCCS notice dated July 7, 2016. *Id.* ¶ 6.
9 Nyirandekeyaho, who speaks Kirundi, could not understand the notice, which was in
10 English. *Id.* ¶¶ 2, 6. She went to the DES office for help, but the DES worker who
11 assisted her did not speak Kirundi and did not use an interpreter. *Id.* ¶ 7. Nyirandekeyaho
12 was unable to understand the worker's explanation of the notice, but she understood that
13 she needed to go back to the DES office on August 15. *Id.* Nyirandekeyaho then took the
14 notice to her case worker, who explained that Nyirandekeyaho's benefits had been
15 reduced to emergency-only benefits. *Id.* ¶ 8.

16 Nyirandekeyaho has a heart condition, swollen legs, and constant severe pain
17 throughout her body. *Id.* ¶¶ 11–12, 14. She takes medications for these issues. *Id.* ¶ 13.
18 She cannot afford to pay for her medications or for visits to the doctor. *Id.* ¶ 15. She is
19 very worried about her future health if her AHCCCS benefits are not restored and thinks
20 she will die if they are not. *Id.* ¶¶ 15–20. Even if her benefits are restored, she is fearful
21 they will be reduced again. *Id.* ¶ 21.

22 **4. Putative Class Member Adam Humed**

23 Adam Humed is a 54-year-old man who lives in Tucson with his wife, two
24 daughters, and son. Humed Decl. ¶ 1, Doc. 32. In June 2015, Humed and his family came
25 to the United States as refugees from Sudan. *Id.* ¶ 2.

26 Soon after their arrival in Arizona, Humed and his family applied with DES for
27 AHCCCS benefits and food stamps. *Id.* ¶ 3. They received AHCCCS benefits and food
28 stamps immediately. *Id.* In May 2016, Humed received a notice informing him that his

family needed to renew their AHCCCS benefits and food stamps. *Id.* ¶ 4. Humed went to the DES office to renew their benefits and was told that his family's AHCCCS benefits and food stamps were active through April 2017. *Id.* ¶ 5.

Humed suffers from diabetes. *Id.* ¶¶ 6, 12. In either June or July 2016, he scheduled an appointment with his primary care doctor because he was feeling sick and was almost out of the test strips used to test his blood sugar. *Id.* Humed was informed at the doctor's office that the office's system indicated Humed did not have AHCCCS benefits, and that Humed would need to pay $75 to see the doctor. *Id.* ¶ 7.

Humed went to the DES office and was informed that his AHCCCS benefits were valid through April 2017. *Id.* ¶ 9. He does not know why his AHCCCS benefits were changed while his food stamps continue without issue. *Id.* ¶ 10. Although two of his children had their AHCCCS benefits restored, Humed, his wife, and one of his daughters cannot go to the doctor. *Id.* ¶ 11. Humed is unable to work, and he worries because he is very sick and his family cannot afford to pay for medical care. *Id.* ¶¶ 13–15.

C. Declaration of Tara Lockner

Defendant submitted the declaration of Tara Lockner in support of his oppositions to both of Plaintiffs' motions.[4] Lockner is AHCCCS's Program Support Administrator in the Division of Member Services. Lockner Decl. ¶ 1.

According to Lockner, the Morris Institute brought cases of improper benefits reduction to AHCCCS's attention in late 2015. *Id.* ¶ 12. AHCCCS investigated the issue and found that the improper reductions were caused by a combination of a computer system flaw and human error. *Id.* ¶ 13. The computer flaw was corrected on November 19, 2015. *Id.* ¶ 14. AHCCCS continuously works with DES staff to reduce human errors and has determined that errors are not concentrated among particular workers. *Id.* ¶¶ 15, 21. Lockner further asserts that errors are also caused by beneficiaries who provide

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[4] Defendant also submitted a supplemental declaration from Lockner. *See* Doc. 57. As discussed below, the supplemental declaration must be stricken from the record. The Court does not consider it in resolving the pending motions.

incomplete or inconsistent information.[5] *Id.* ¶ 20.

According to Lockner, AHCCCS complies with the *ex parte* process mandated by federal law. *Id.* ¶¶ 7–11. If the HEAPlus system contains information sufficient to process the renewal application automatically, then benefits are automatically renewed and a "no response required renewal" letter is sent to the beneficiary. *Id.* ¶ 9. If there is unverified or inconsistent information in the HEAPlus system, the beneficiary is sent a "response required renewal" letter, which informs the beneficiary of what information is on file and what additional information is needed. *Id.* ¶ 10.

Finally, Lockner provides information regarding what caused Plaintiffs' and the putative class members' benefits reductions. In Darjee's case, additional verification of her immigration status was required, but the case worker apparently did not complete the verification. *Id.* ¶ 30(b). Nyirandekeyaho's case involved a similar error, as a case worker failed to update the HEAPlus system to recognize her as an exempt refugee. *Id.* ¶ 32. Lockner asserts AHCCCS works with case workers to ensure they understand how to properly handle these situations, but it cannot do anything else to prevent such errors. *Id.* ¶¶ 30(d), 32. In Sanchez Haro's case, she provided conflicting information regarding her immigrant status, and physical examination of her documentation was required for verification. *Id.* ¶ 31(a)–(d). In Humed's case, he failed to provide information needed to complete the renewal process, and he had previously reported being a female with no social security number. *Id.* ¶ 33.

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[5] Beneficiaries are obligated by law to report changes in circumstances which may affect their eligibility. 42 C.F.R. § 435.916(c). All reported changes to immigration status require verification by AHCCCS, whether or not a past immigration status was verified. Lockner Decl. ¶ 26. Defendant argues that beneficiaries sometimes report inaccurate or incomplete information, which makes it impossible for AHCCCS to automatically renew their benefits. *Id.* ¶¶ 13, 20, 23.

MOTIONS TO STRIKE

I. Plaintiffs' Motion to Strike New Argument in Defendant's Reply

Judge Ferraro heard oral argument on October 4, 2016, regarding, among other things, Plaintiffs' pending Motion for Class Certification. Defendant moved to strike a portion of Plaintiffs' oral argument relating to class "manageability." Doc. 59. Plaintiff filed a response, arguing that Defendant's analysis was contrary to Ninth Circuit precedent. Doc. 61. In Defendant's reply, he responded to Plaintiff's manageability analysis and further argued that Plaintiffs' claims are moot because there is no live controversy. Doc. 64.

According to Plaintiffs, the mootness argument should be stricken because it was not properly raised in Defendant's motion to strike. Doc. 65. Alternatively, Plaintiffs request leave to file a sur-reply to Defendant's motion to strike. *Id.* Defendant filed a response, arguing that he raised mootness at the beginning of this action and has consistently maintained his position. Doc. 67.

In the cases cited by Plaintiffs, the offending party used a reply brief to raise an issue for the first time in the action. *See In re Rains*, 428 F.3d 893, 902 (9th Cir. 2005) (defendant did not raise due process claim before bankruptcy court at all and did not raise it before the district court until he filed his reply brief); *Leisure Concepts, Inc. v. Cal. Home Spas, Inc.*, No. 2:14-CV-388-RMP, 2015 WL 12520975, at *1–*2 (E.D. Wash. Apr. 22, 2015) (where defendant's motion to dismiss challenged only a typographical error, it was improper to challenge the merits of plaintiff's complaint in reply brief). Here, Plaintiffs were aware of Defendant's mootness claim, which he raised months earlier in his Motion to Dismiss. Plaintiffs suffer no prejudice from the argument, which the Court need not consider in resolving Defendant's motion to strike. Accordingly, Plaintiff's motion to strike is **denied**, as is their request for leave to file a sur-reply.

II. Defendant's Motion to Strike Portion of Plaintiffs' Oral Argument

During the October 4 hearing, Plaintiffs argued that class "manageability" is not a proper consideration for Fed. R. Civ. P. 23(b)(2) class actions in the Ninth Circuit.

Defendant made an oral motion to strike Plaintiffs' argument because it was not raised in Plaintiffs' briefing. Judge Ferraro took the motion under advisement. Defendant later filed a memorandum in support of his oral motion, arguing the Court should (1) treat the issue as conceded in Defendant's favor, or (2) treat Defendant's memorandum as additional briefing for Plaintiff's class certification motion. Doc. 59.

The Court may not disregard binding Ninth Circuit precedent. *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001) ("A district court bound by circuit authority . . . has no choice but to follow it . . . ."). If Plaintiffs are correct that Ninth Circuit authority precludes the Court from considering class manageability, then it would be improper to do so based upon a finding that Plaintiffs waived the issue. The issue would be better addressed in the Court's analysis of Plaintiffs' Motion for Class Certification. However, as described below, Plaintiff's class certification motion is denied on other grounds, thus mooting the manageability issue. Defendant's motion is therefore **denied**.

III. Plaintiffs' Motion to Strike Defendant's Supplemental Declaration

Defendant filed the Supplemental Declaration of Tara Lockner on October 3, two weeks after the deadline for filing reply briefs and one day before the hearing on the various pending motions. *See* Doc. 57. Plaintiffs made an oral motion to strike the declaration and later filed a written memorandum renewing the motion. Doc. 62. Plaintiffs claim they would be prejudiced if the Court considers the declaration. *Id.*

Defendant responded, arguing that Plaintiffs are not prejudiced because the declaration contains facts Plaintiffs requested in their reply briefs; the Court must consider the declaration in order to have as full a picture as possible; and because Plaintiffs want the Court to consider their new class manageability argument, the Court, in fairness, should also consider the supplemental declaration. Doc. 63.

Defendant provides no excuse for the late filing of Lockner's supplemental declaration. Plaintiffs' claim that the original declaration is "vague" did not provide authorization for Defendant to offer more detail after the briefing deadlines. And while Defendant maintains Plaintiffs are not prejudiced because, essentially, he gave them what

they wanted, he ignores the fact that Plaintiffs had no opportunity to respond or to meaningfully analyze the declaration prior to the hearing. Nor is the Court persuaded by Defendant's "fairness" argument. There is a clear difference between ignoring potentially binding precedent and penalizing a party for filing evidence after a fixed deadline.

Plaintiffs' motion is **granted**. *See Carson Harbor Vill. v. Cnty. of L.A.*, 433 F.3d 1260, 1263 n.3 (9th Cir. 2006) (district court did not abuse its discretion by refusing to consider late-submitted declarations).

MOTION FOR PRELIMINARY INJUNCTION

I. Legal Standard

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008). A plaintiff seeking a preliminary injunction must show (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of a preliminary injunction, (3) that the balance of equities tips in its favor, and (4) that a preliminary injunction is in the public interest. *Id.* at 20. If elements (2) and (4) are satisfied, "serious questions going to the merits and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (internal quotation marks omitted). A "serious question" is one on "which the moving party has a fair chance of success on the merits." *Sierra On-Line, Inc. v. Phx. Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984) (internal quotation marks and citation omitted). A preliminary injunction order binds the parties; their officers, agents, servants, employees, and attorneys; and "other persons who are in active concert or participation" with the parties or their officers, agents, servants, employees, and attorneys; so long as actual notice is received. Fed. R. Civ. P. 65(d)(2).

II. Discussion

Plaintiffs seek a preliminary injunction (1) enjoining Defendant from transferring immigrants who are eligible for full-scope AHCCCS benefits to emergency-only AHCCCS benefits when their eligibility is renewed; (2) enjoining Defendant from

sending Medicaid beneficiaries a Benefits and Services notice which violates the Medicaid Act and due process; and (3) requiring Defendant to prospectively reinstate full-scope benefits to all immigrants who were sent or received the allegedly deficient eligibility notice until a lawful proper notice is sent to each person. Pls.' Mot. Prelim. Inj. 2.

A. Plaintiffs' "Reasonable Promptness" Claim

"The first factor under *Winter* is the most important—likely success on the merits." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citing *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014)). If plaintiff fails to satisfy this threshold inquiry, examination of the remaining *Winter* elements is unnecessary. *Id.* (citing *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 944 (9th Cir. 2013).

Plaintiffs argue Defendant improperly reduces benefits "due to his unlawful policies and/or programming of the computer eligibility system." Pls.' Mot. Prelim. Inj. 11. Defendant informed Plaintiffs' counsel in late 2015 that the reduction of benefits was caused by computer programming and worker errors. *Id.* Plaintiffs argue on information and belief that a continuing programming error is evidenced by the fact that food stamp applications, which are processed by the AZTECS computer system, are properly processed whereas Medicaid benefits are improperly reduced under the HEAPlus computer system. *Id.* at 12.

Plaintiffs also argue that the Arizona regulation implementing the federal *ex parte* process is not as comprehensive as the federal regulation or is not implemented consistent with federal law. *Id.* Although the Arizona regulation requires the case worker to verify immigration status via available databases, Defendant's policies allow the agency to ask about immigration status and alien numbers. *Id.* at 13. Plaintiffs argue on information and belief that Defendant's policy manual evidences the existence of such a policy. *Id.* The manual contains a list of information that does not need to be obtained from a beneficiary at renewal; omitted from this list is an alien number, which is similar to a social security

number and remains the same for life. *Id.* On information and belief, Plaintiffs argue that Defendant's case workers ask for alien numbers at renewals although the numbers are readily available to the workers via federal and local databases. *Id.* Similarly, although the manual lists "non-citizen status" as not needing verification unless there was a change in immigration status, Defendant's policies allow case workers to ask about immigration status at each renewal. *Id.* at 13–14. These policies lead to eligibility renewal errors. *Id.* at 14.

Defendant argues that Plaintiffs cannot show a likelihood of success because the "reasonable promptness" statute and its implementing regulations are intended to prevent waiting lists and thus do not "imply that a mistaken reduction in eligibility that does not terminate the person's coverage violates the law." Def.'s Opp'n to Pls.' Mot. Prelim. Inj. 5–6. Additionally, according to Defendant, Plaintiffs' claim is doubly defective; they make only conclusory allegations of Defendant's policies, and they fail to allege facts which connect any of those alleged policies to Plaintiffs' injuries. *Id.* at 6.

Defendant further argues the computer error was corrected, and he denies the existence of any policy that is causing errors on renewals. *Id.* at 7. Human errors on the case workers' part accounts for most eligibility errors—presently around 60 per month, much less since the computer error was fixed—and those cannot realistically be enjoined. *Id.* The risk of human error should be expected, given the particular complexity of Medicaid law and the fact Defendant's case workers annually process more than 1.2 million renewals. *Id.*

Plaintiffs have not shown a likelihood of succeeding on the merits of their reasonable promptness claim, nor have they raised a serious question as to the merits.[6] First, Plaintiffs argue a computer programming error is presently causing improper benefit reductions. They rely on Defendant's late-2015 admission of a programming

[6] In denying Defendant's Motion to Dismiss, the Court found that Plaintiffs stated a claim for violation of the reasonable promptness statute because the Complaint plausibly alleged the existence of a continuing computer error. That finding has no bearing here. The burden is on Plaintiffs to show a likelihood of success, not on Defendant to show Plaintiffs failed to plausibly allege a claim.

error, which caused the computer system to not recognize beneficiaries' exempt status in certain situations. Ryan Decl. ¶¶ 6, 10, Doc. 10. In response, Defendant asserts the programming error was corrected on November 19, 2015. Lockner Decl. ¶¶ 13–14. Relying on an email from Lockner, Plaintiffs argue in their reply "that the November 'fix' appears to be a change to look at [a database called] SAVE and that [Lockner] was struggling with how to analyze the cases." Pls.' Reply in Supp. Mot. Prelim. Inj. 11. However, the email does not contradict Lockner's assertion that the programming error was fixed. *See* Suppl. Katz Decl., Ex. F, Doc. 46.

Plaintiffs' comparison of the HEAPlus system to the AZTECS system is no more persuasive. Plaintiffs' argument is based on the declaration of attorney Anne Ryan, who stated that she represented 67 beneficiaries and "noticed *in some cases* that even though the refugee's AHCCCS case had been improperly changed to emergency only AHCCCS based on immigration status, the person remained eligible for food stamps which also requires a qualified immigration status." Ryan Decl. ¶¶ 8, 16 (emphasis added). She does not claim, as Plaintiffs do in their motion, that "thousands of immigrants" whose benefits were reduced were properly found eligible for food stamps. Pls.' Mot. Prelim. Inj. 12. None of Plaintiffs' evidence supports the continued existence of the computer error.

Second, Plaintiffs argue that the Arizona rule implementing the *ex parte* process "[1] is not as comprehensive as the federal regulation or [2] is not implemented consistent with the federal requirements[.]" Pls.' Mot. Prelim. Inj. 12. Plaintiffs do not elaborate on the first point. The federal regulation requires states to "make a redetermination of eligibility without requiring information from the individual if able to do so based on reliable information contained in the individual's account or other more current information available to the agency, including but not limited to information accessed through any data bases accessed by the agency . . . ." 42 C.F.R. § 435.916(a)(2). The implementing Arizona law requires the state to "renew eligibility without requiring information from the individual if able to do so based on reliable information available to the agency, including through an electronic data match." Ariz. Admin. Code § R9-22-

306(C)(1). Although the wording varies somewhat, the Arizona law appears substantially identical to the federal regulation.

As to the second point, Plaintiffs have not shown they are likely to prove Defendant maintains policies which violate the federal *ex parte* process. Plaintiffs submitted an excerpt from Defendant's policy manual, which admittedly omits "alien number" from the list of information that is not required to be verified at renewal. *See* Katz Decl., Ex. C. The omission, however, does not by itself show it is likely that Defendant's case workers routinely request alien numbers at eligibility renewals, and that such requests cause renewal errors. Furthermore, Plaintiffs' allegation of a policy of violating the *ex parte* process is not supported by any of the Plaintiffs' and putative class members' declarations. Each declarant undoubtedly experienced hardship and stress from their loss of benefits, but *none* of them claim Defendant's case workers improperly requested their alien numbers or immigration status at the time of benefit renewal. *See* Sanchez Haro Decl., Darjee Decl., Nyirandekeyaho Decl., & Humed Decl. Contrary to Plaintiffs' allegations, Defendant maintains that AHCCCS policies *do not* allow staff to inquire as to immigration status and alien identification numbers when that information is available to the case worker. Lockner Decl. ¶ 26.

Plaintiffs principally rely on Ryan's declaration in arguing they are likely to prevail. *See* Pls.' Mot. Prelim. Inj. 11–14. Ryan's assertions that Defendant's policies violate the *ex parte* process are made in the abstract, without a single example of any person being subjected to those policies. Her primary allegations of unlawful policies are made on information and belief. *See* Ryan Decl. ¶¶ 13 ("On information and belief, [the alien number] is inputted in the AHCCCS system . . . . When case workers subsequently request the alien number at recertification, incorrect numbers are sometimes obtained or inputted into the computer system causing errors . . . ."), 14 ("On information and belief, AHCCCS routinely asks about immigration status for immigrants at recertification causing errors although this information is in the case file or could be checked through [a database called] SAVE by using the alien number."). The Court does not entirely

discount Ryan's belief, but it does not by itself show a likelihood that such policies exist. Defendant's evidence is in conflict with Ryan's general allegations; again, he presents evidence that AHCCCS policies do not permit unnecessary requests for immigrant status information. Lockner Decl. ¶ 26.

Plaintiffs' reply attacks the credibility of parts of Lockner's declaration and asserts that other parts support their motion. Plaintiffs argue that Lockner admits to violations of the *ex parte* process by stating that beneficiaries "must file a renewal application" in order to renew their benefits. Pls.' Reply in Supp. Mot. Prelim. Inj. 7 (quoting Lockner Decl. ¶ 8). This appears to be nothing more than poor phrasing on Lockner's part. The remainder of the declaration makes clear that the "renewal application" is completed and filed by AHCCCS without contacting the beneficiary, if possible. Lockner goes on to state that, if the HEAPlus system contains sufficient information to renew a beneficiary's benefits, the benefits are automatically renewed and a "no response required renewal" is sent to the beneficiary. Lockner Decl. ¶ 9. If the HEAPlus system does not contain information sufficient to renew the application, the beneficiary is sent a "response required renewal" letter, which informs the beneficiary which information is on file and what additional information is required for renewed eligibility. *Id.* ¶ 10. The foregoing is consistent with the *ex parte* process.

Plaintiffs also argue that an internal "News Flash," which informed case workers how to ask about immigration status on renewals, supports their assertion that Defendant violates the *ex parte* process. *See* Lockner Decl., Ex. F. However, the News Flash was issued "to provide important information to staff *about customers moving from full* [*AHCCCS*] *Medical Assistance to Federal Emergency Services (FES) only*." *Id.* (emphasis added). The applicability of the information is limited to beneficiaries who may lose benefits, which means it applies where there was insufficient information in the HEAPlus system to automatically complete the renewals.

The Ninth Circuit has said:

> A verified complaint or supporting affidavits may afford the basis

> for a preliminary injunction; but if the facts so appearing consist largely of general assertions which are substantially controverted by counter-affidavits, a court should not grant such relief unless the moving party makes a further showing sufficient to demonstrate that he will probably succeed on the merits.

K-2 Ski Co. v. Head Ski Co., 467 F.2d 1087, 1088–89 (9th Cir. 1972) (internal citation omitted). That is precisely the situation here. The general allegations of unlawful policies contained in Plaintiffs' declarations, which alone are insufficient to show a likelihood of success, are substantially controverted by Lockner's declaration. Without more, Plaintiffs have failed to show even a "serious question" as to the merits of their reasonable promptness claim.

B. Plaintiffs' Due Process Claim

"A plaintiff seeking a preliminary injunction must establish . . . that he is likely to suffer irreparable harm in the absence of preliminary relief . . . ." *Winter*, 555 U.S. at 20. Irreparable harm must be *likely*, not merely possible. *Id.* at 22; *Enyart v. Nat'l Conference of Bar Exam'rs, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011). Plaintiffs claim their benefit reductions are attributable to Defendant's unlawful policies and the programming of the HEAPlus computer system. Since they have not shown a likelihood of succeeding on either of those theories, they have not shown it is likely their benefits will be reduced. Receipt of the notices is inextricably tied to the reduction of benefits; therefore, Plaintiffs also have not shown they are likely to receive the reduction notices again.

III. Conclusion

Plaintiffs have not shown a likelihood of success on the merits of their reasonable promptness claim. Nor have they shown, as it relates to their due process claim, a likelihood of irreparable injury in the absence of injunctive relief. Their motion must therefore be **denied**.

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MOTION FOR CLASS CERTIFICATION

I. Legal Standard

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)). Federal Rule of Civil Procedure 23 contains two sets of requirements for class certification, set forth in Rule 23(a) and (b). "In order for a class action to be certified, the plaintiffs must establish the four prerequisites of [Rule] 23(a) and at least one of the alternative requirements of [Rule] 23(b)." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

Rule 23(a) has four requirements: (1) numerosity, i.e., "the class is so numerous that joinder of all members is impracticable;" (2) commonality, i.e., "there are questions of law or fact common to the class;" (3) typicality, i.e., "the claims or defenses of the representative parties are typical of the claims or defenses of the class;" and (4) adequacy of representation, i.e., the named parties "will fairly and adequately protect the interests of the class." *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). In addition, plaintiffs must also satisfy at least one of the grounds specified under Rule 23(b). Here, Plaintiffs rely on Rule 23(b)(2), which requires them to show that declaratory or injunctive relief is appropriate respecting the class as a whole.

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule[.]" *Wal-Mart Stores, Inc.*, 564 U.S. at 35. Before certifying a proposed class, courts must engage in a "rigorous analysis," which often requires some evaluation of the merits of plaintiffs' claim. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (citing *Wal-Mart Stores, Inc.*, 564 U.S. at 350–51). "Although some inquiry into the substance of a case may be necessary . . . it is improper to advance a decision on the merits to the class certification stage." *Staton v. Boeing Co.*, 327 F.3d 938, 954 (9th Cir. 2003) (quoting *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir. 1983)).

II. Discussion

Plaintiffs move to certify the following proposed class:

> All immigrant residents of Arizona eligible for full-scope Arizona Health Care Cost Containment System ("AHCCCS") benefits who, on or after January 1, 2015, have been or will be required to recertify their eligibility for AHCCCS and whose benefits have been or will be improperly reduced from full-scope AHCCCS to emergency-only AHCCCS.[7]

Pls.' Mot. Class Certification 1–2.

Plaintiffs have not met their burden with respect to the commonality and typicality requirements. Because class certification requires Plaintiffs to meet all four requirements of Rule 23(a), the Court does not analyze whether Plaintiffs satisfy numerosity and adequacy of representation.

A. Commonality

"[C]ommonality requires that the class members' claims depend upon a common contention such that determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke." *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1164–65 (9th Cir. 2014) (quoting *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012)) (internal quotation marks omitted). This requirement is construed permissively and is satisfied by a single common question. *Wal-Mart Stores, Inc.*, 564 U.S. at 359 (citations omitted); *Hanlon*, 150 F.3d at 1019.

Plaintiffs argue the putative class members are all eligible for full-scope Medicaid benefits due to their immigration status and limited financial resources; they had or will have their benefits improperly reduced as a result of Defendant's unlawful policies or flawed computer system; and they are subject to receiving deficient boilerplate notices after having their benefits reduced. Pls.' Mot. Class Certification 6–7. They further argue

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[7] At oral argument, Plaintiffs proposed removing the term "improper" from the class definition to address Defendant's concern that inclusion of the term would require the Court to determine whether each class member was properly or improperly transferred to emergency-only benefits. Tr. of Oral Arg. 98, Oct. 4, 2016; Doc. 61, 2–3 ("Plaintiffs continue to suggest this modification to the class definition.")

that the foregoing facts raise the following common questions:

> 1. Whether Defendant Betlatch's improper reduction of medical benefits for immigrants eligible for full-scope AHCCCS to emergency only benefits at recertification because of computer system errors and the failure to utilize the *ex parte* process violates the Defendant's obligation to process recertifications for immigrants with reasonable promptness pursuant to 42 U.S.C. §1396a(a)(8).
>
> 2. Whether Defendant Betlatch's Benefits and Services eligibility notice that informs individuals of their eligibility for emergency services violates the Due Process Clause of the U.S. Constitution, U.S. Const. Amend. XIV, and the Medicaid Act, 42 U.S.C. § 1396a(a)(3).

Id. at 7.

As the Supreme Court has noted, "'[a]ny competently crafted class complaint literally raises common questions.'" *Wal-Mart Stores, Inc.*, 564 U.S. at 349 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–32 (2009)). What matters more than raising common questions is the "'capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *Id.* at 350 (quoting Nagareda, *Class Certification*, *supra*, at 132) (emphasis added).

Here, proof of commonality necessarily overlaps with Plaintiffs' merits contention that Defendant maintains a defective computer system and a policy of violating the federal *ex parte* process. *See Wal-Mart Stores, Inc.*, 564 U.S. at 352. Plaintiffs' evidence suggests only that there was a *past* computer error. Their claim of an ongoing error finds no support in any of the submitted declarations.

Likewise, Plaintiffs' anecdotal evidence does not support their claim that Defendant fails to utilize the *ex parte* process; neither Plaintiffs nor the putative class members assert that Defendant's case workers requested their alien number or immigration status at the time of benefit renewal. Plaintiffs' only evidence of a policy of violating the *ex parte* process is Ryan's declaration. Again, though, her primary allegations are on information and belief, and she provides no example of any person

being subjected to such a policy.

In short, Plaintiffs have not shown that a class proceeding will generate common answers. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014) (named plaintiffs "must actually *prove*—not simply plead—that their proposed class satisfies each requirement" (emphasis in original)). They have shown only that each putative class member had their benefits reduced. "Without some glue holding the alleged *reasons* for all those [reductions] together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question" *why were my benefits reduced*. *Wal-Mart Stores, Inc.*, 564 U.S. at 352 (emphasis in original).

There is overlap between commonality and the merits on the second question as well. Plaintiffs assert that Defendant sends "boilerplate" notices to all beneficiaries who have their benefits reduced. Pls.' Mot. Class Certification 7. Plaintiffs rely on Sanchez Haro's assertion that she could not understand the notice. Sanchez Haro Decl. ¶ 6. They also submitted a copy of a notice, which they claim is "standard." *See* Katz Decl. ¶ 2 & Ex. A. Defendant's evidence is substantially in conflict. He submitted the notice that was actually sent to Sanchez Haro. *See* Ex. B, Doc. 39-3. Sanchez Haro's notice, which was sent in April 2016, contains more information than the notice submitted by Plaintiffs, which was sent to an unknown recipient in June 2016. The evidence thus shows different notices being sent within a short window of time. Under these circumstances, Plaintiffs have failed to show that the legality of the notices may be determined for the entire class at once.

B. Typicality

"Under the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. The test of typicality is "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by

the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

Plaintiffs argue that the typicality requirement is "easily satisfied" because the named Plaintiffs allege similar injuries, i.e., inability to seek healthcare due to the improper reduction of their benefits. Pls.' Mot. Class Certification 8. The Court disagrees. As established by their declarations, the Plaintiffs and putative class members do not know the reasons their benefits were reduced. And, Ryan's declaration only speculates as to a cause for the reductions. Defendant, on the other hand, submitted evidence showing that the named Plaintiffs' claims, and the two putative class members' claims, are not typical of each other.

Darjee's injury was caused by a case worker's failure to verify her immigration status. Lockner Decl. ¶ 30(b). Sanchez Haro's injury occurred because she provided conflicting information regarding her immigrant status, and she also appears to have been subjected to the acknowledged computer error. *Id.* ¶ 31(a)–(b). In Nyirandekeyaho's case, a case worker failed to update HEAPlus to recognize that she was exempt from the 5-year requirement. *Id.* ¶ 32. Finally, Humed's benefits were discontinued because he failed to provide necessary information on renewal, and he had previously reported that he was a female without a social security number. *Id.* ¶ 33. The foregoing suggests to the Court that the class was not injured "by the same course of conduct." Some beneficiaries' injuries were indeed caused by case worker errors, but other injuries appear to be a result of the beneficiaries' own inadvertence. The typicality requirement is not satisfied under these circumstances.

III. Conclusion

Plaintiffs have not satisfied all requirements of Rule 23(a). The motion must be **denied**.

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Accordingly,

IT IS HEREBY ORDERED:

1. The referral to Magistrate Judge D. Thomas Ferraro for pretrial proceedings and report and recommendation, in accordance with the provisions of 28 U.S.C. § 636(b)(1) and LRCiv. 72.1 and 72.2, is withdrawn for the Motions to Strike (Docs. 59, 62, 65), Plaintiffs' Motion for Preliminary Injunction (Doc. 15), and Plaintiffs' Motion for Class Certification (Doc. 5), but shall otherwise continue in full force and effect.

2. Plaintiffs' Motion to Strike New Argument in Defendant's Reply (Doc. 65) is **denied**.

3. Defendant's Motion to Strike Portion of Plaintiffs' Oral Argument (Doc. 59) is **denied**.

4. Plaintiffs' Motion to Strike Defendant's Supplemental Declaration (Doc. 62) is **granted**. The Supplemental Declaration of Tara Lockner (Doc. 57) shall be stricken from the record.

5. Plaintiffs' Motion for Preliminary Injunction (Doc. 15) is **denied**.

6. Plaintiffs' Motion for Class Certification (Doc. 5) is **denied**.

Dated this 31st day of March, 2017.

Honorable Rosemary Márquez
United States District Judge