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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Aita Darjee, on her own behalf and on behalf of her minor child N. D.; and Alma Sanchez Haro, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

Thomas Betlach, Director of the Arizona Health Care Cost Containment System, in his official capacity,

Defendant.

No. CV 16-00489 TUC-RM (DTF)

LODGED: PROPOSED PLAINTIFFS' MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR CLASS CERTIFICATION, OR IN THE ALTERNATIVE, TO TAKE PLAINTIFFS' MOTION UNDER ADVISEMENT AND FOR CLASS DISCOVERY

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Introduction

Plaintiffs are qualified immigrants who participate in Arizona's Medicaid program, the Arizona Health Care Cost Containment System ("AHCCCS"). These immigrants are entitled to full AHCCCS. Once eligible for full-scope AHCCCS, they continue to be eligible for full benefits. Nonetheless, Plaintiffs, and other qualified immigrants throughout Arizona, have had, and continue to have, their Medicaid benefits

reduced from full benefits to emergency-only benefits as a result of Defendant's failure to ensure that its computer system Healthe-Arizona Plus ("HEAPlus") properly determines qualified immigration status for immigrants at the time their medical benefits are up for renewal/recertification.

Plaintiffs moved unsuccessfully for class certification at the outset of the case, prior to any formal discovery. But with the benefit of time and discovery, the record now undermines several representations made by the Defendant at the outset of this case. Most importantly, contrary to Defendant's assertion that the computer error was an isolated incident that had been resolved in November 2015, *see* Doc. 86 at 8, documents produced by Defendant and the Arizona Department of Economic Security ("DES"), the state agency that processes most of the medical assistance applications and renewals for AHCCCS, reveal that "[e]very day, customers with an immigration status that allows the individual to receive full AHCCCS Medical Assistance coverage are converted from full benefits to Federal Emergency Services (FES),"[1] and that additional "[c]hanges to HEAplus are needed to **reduce/prevent** these incorrect decisions." (emphasis added). Third Declaration of Ellen Katz in Support of Plaintiffs' Renewed Motion for Class Certification, ("Katz Third Decl."), Ex. 1 (System Request). Furthermore, new testimony and documents show that the number of individuals whose benefits have been improperly reduced since December 2016 is over 580. Katz Third Decl., Ex. 2 (AHCCCS Log). While discovery is not yet complete, the new evidence produced to-date describes a sweeping problem with AHCCCS's computer system that has already impacted hundreds of qualified immigrants since December 2016 and which continues to improperly reduce benefits on a daily basis. This additional evidence necessitates revisiting the Court's prior ruling and certifying a class.

In the alternative, Plaintiffs ask that this Court to defer judgment on this motion and direct the parties to complete class discovery.

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[1] Federal Emergency Services is the statutory term for emergency medical services.

BACKGROUND

I. The Prior Ruling on Plaintiffs' Motion for Class Certification

Plaintiffs filed suit in July 2016 and, on the same day, moved for class certification. Docs. 1, 5, 6. The parties submitted declarations and documents obtained through public records requests, but no discovery had been conducted. This Court denied Plaintiffs' Motion for Class Certification on March 31, 2017. Doc. 86. The same day, the Court denied Defendant's Motion to Dismiss, Doc. 85. Subsequently, the parties began discovery.

The Court's decision denying Plaintiffs' motion was, accordingly, based on the limited record available at the outset of this litigation. At that time, the Court had before it a collection of affidavits, including from Plaintiffs, a putative class member, and Tara Lockner, an employee of AHCCCS. The Court, relying on that limited record, concluded that the same deficiency in that record defeated both the commonality and typicality factors: namely, that Plaintiffs did "not know the reasons their benefits were reduced," and that there appeared to be a combination of unrelated computer errors and human errors. Doc. 86 at 23. The Court noted further that while the record did demonstrate a widespread "past" computer error, it was devoid of any evidence of "an ongoing error," suggesting the remaining errors were discrete human errors. *Id.* at 14, 21. For support, the Court noted that Lockner attested that the computer flaw was corrected on November 19, 2015 and that, while "AHCCCS works with case workers . . . it cannot do anything else to prevent such errors." *Id.* at 9 (citing Lockner Decl. ¶¶ 30(d), 32). Relying on this evidence, the Court found that Plaintiffs had not established the "glue holding the alleged reasons for all those [reductions] together." Doc. 86 at 22.

The new evidence produced so far in discovery paints an entirely different picture.

II. Newly Discovered Evidence

A. Sanchez Haro's Benefits Are Reduced Again in 2017

First, the evidence shows that the improper reductions are still ongoing. Plaintiff Sanchez Haro had her own benefits reduced again on March 28, 2017. As this Court is

aware, in 2003, Ms. Sanchez Haro received an immigration card and was eligible for full medical benefits, Sanchez Haro Decl., Doc. 11, ¶ 2, because her status as a victim of domestic violence gave her qualified immigration status. 8 U.S.C. ¶ 1641(c). In January 2015, she became a legal permanent resident ("LPR"). *Id*. ¶ 3. Pursuant to federal law and AHCCCS policy, a person who is a LPR, generally, must wait 5 years before becoming eligible for full Medicaid benefits. But there are exceptions to that 5-year requirement, one of them is persons like Ms. Sanchez Haro who was in the battered immigrant category for 5 years. *See* https://healthearizonaplus.gov/PolicyManual/EligibilityPolicyManual/index.html#page/MA/MA500/MA0524.B_Other_Conditions_for_LPRs_Parolees_and_Batter.html. Accordingly, Ms. Sanchez Haro was exempt from the 5-year wait for full Medicaid benefits; yet, her benefits were improperly reduced in April 2016. Sanchez Haro Decl., Doc. 11, ¶ 6. When the Court ruled on the initial class certification motion, that was Sanchez Haro's only benefit reduction in the record. And while Sanchez Haro described her worry that Defendant would reduce the benefits again, *see* Suppl. Sanchez Haro Decl., Doc. 33 ¶ 13, the Court concluded there was no evidence that there was an ongoing computer problem. Doc. 86 at 21.

On March 28, 2017, Plaintiff Sanchez Haro's benefits once again were reduced to emergency only benefits. Katz Third Decl., Ex. 3, March 28, 2017 Decision (showing eligibility only for emergency medical services). This reduction occurred despite the fact that AHCCCS had accurate and verified immigration information that Ms. Sanchez Haro was eligible for full medical coverage. In August 2016 after this case was filed, Tara Lockner, Defendant's primary witness in this case, submitted a request to the United States Citizenship and Immigration Services ("USCIS") to verify Ms. Sanchez Haro's immigration eligibility. USCIS faxed AHCCCS documentation confirming that Ms. Sanchez Haro had an "approved I-360 VAWA [Violence Against Women Act] self-petition as of 4/20/2003" that exempted her from the 5-year LRP requirement. Katz Third Decl., Ex. 4, USCIS Verification to AHCCCS dated August 18, 2016 at 5. The report also documented that on January 13, 2015, she became a LPR. *Id*. at 2. Based on

this information, Defendant reinstated Ms. Sanchez Haro to full medical coverage.[2] Her verified immigration information was entered into the HEAPlus system by an AHCCCS employee. Katz Third Decl., Ex. 5, Sanchez Haro HEAPlus Eligibility Summary dated August 19, 2016, (listing LPR Status, Alien Number and immigration status as "Battered-Non Citizen" on HEAPlus).

Having verified her immigration status and approved her for full medical coverage in 2016, if the computer system were fixed, that should have been the end to Plaintiff's problems. Yet, with no uncertainty regarding Ms. Sanchez Haro's immigration status, her benefits were reduced again in March 2017 when AHCCCS processed her renewal application. That reduction occurred despite the fact that Sanchez Haro reported no change in her immigration status: indeed in the notice of renewal, AHCCCS did not request her immigration information but only sought updated income information. *See* Katz Third Decl., Ex. 6, Sanchez Haro March 11, 2017 Notice of Renewal. Given the prior verification, there was no need to ask about Ms. Sanchez Haro's immigration status at all. Moreover, her February 2017 application summary reported her immigration status as an LPR with "Battered Non-Citizen" status. *See* Katz Third Decl., Ex. 7, Sanchez Haro Submitted Application Summary prepared on February 19, 2017 at 3. And when Ms. Sanchez Haro attended the interview at the DES office, although she was asked about her LPR status, she was told by a DES caseworker that her benefits would stay the same because there were no changes. Katz Third Decl., Ex. 8, Sanchez Haro Resp. to Def.'s Interrogatory No. 8. Nonetheless, despite the caseworker's assurances and all of the evidence in the HEAPlus computer system, the computer failed to recognize her qualifying immigration status and her benefits were reduced to emergency-only services on March 28, 2017. Katz Third Decl., Ex. 3, Sanchez Haro's March 28, 2017 Decision.

Currently, any transfer from full to emergency medical benefits for immigrants is

[2] Plaintiffs' counsel also discussed with Defendant's counsel that there was documented evidence in her case file that Plaintiff had entered the U.S. before 1996, which is another basis for an exemption from the 5 year LPR requirement. Katz Third Decl., ¶2; Sanchez Haro Decl., Doc. 11, ¶4.

reviewed by DES supervisory staff. But the DES supervisor who reviewed Ms. Sanchez Haro's benefit reduction actually approved the reduction in benefits based on HEAPlus's flawed presentation of Ms. Sanchez Haro's immigration status. On March 28, 2017, that reviewer noted that "per LPR card in HEA documents, Alma has LPR status, but five-year ban not met. FES correct category." Katz Third Decl., Ex. 9.[3] That is, although Ms. Sanchez Haro's immigration status had been validated, including through a fax from USCIS only seven months before, the HEAPlus system did not properly store, save, or present the information when the case came up for renewal.

Ms. Sanchez Haro's case ultimately received another level of review, which did correct the problem, but it appears that her case was only specially reviewed by AHCCCS because she is a Plaintiff in this case. *See* Katz Third Decl., Ex. 10, Hamman Dep. at 119:8-14. As a result of that special review, on April 20, 2017, Tara Lockner went into the HEAPlus system and prepared a "change application" for Ms. Sanchez Haro in order to reinstate her full benefits. Katz Third Decl., Ex. 12. Even with the special review process, Ms. Sanchez Haro was left with emergency only benefits from March 28 through April 20, 2017.

As Plaintiff Sanchez Haro's experience demonstrates, while the first-round manual review process is catching many computer errors, it does not catch them all. *See* Katz Third Decl., Ex. 10; Hamman Dep. at 36-37 (describing the second round of review as a "random check" of cases and noting no additional review for cases that are not selected for that random review). Accordingly, there remains no underlying fix. In fact, as recently as July 21, 2017, DES employees acknowledged that Ms. Sanchez Haro "is having issues consistently with immigrations [sic] due to the class action code not showing Prima Facie." Katz Third Decl., Ex. 11. In other words, the HEAPlus system is not storing and displaying her immigration information correctly, causing recurring problems, which can only be corrected manually. But, there are no assurances that

[3] This was exactly the reason DES gave her for reducing her to emergency-only benefits in April 2016. Sanchez Haro Decl., Doc. 10, ¶7.

AHCCCS and DES will continue to manually review each case where benefits are reduced, particularly for individuals not named as plaintiffs in this litigation.

B. Hundreds of Individuals Have Had Their Benefits Improperly Reduced Since December 2016

Ms. Sanchez Haro's experience with the HEAPlus system is not unique. New testimony and documents produced in discovery demonstrate that these HEAPlus errors have continued unabated, despite Defendant's prior representations that the computer problem had been "fixed" in November 2015, and that the remaining errors were isolated human error.

As a result of this litigation, DES and AHCCCS began tracking, on a daily basis, the number of qualified immigrants improperly reduced to emergency only benefits. *See* Katz Third Decl., Ex. 10; Hamman Dep. at 21:6-13, 25:5-9, 27:13-14 (the list is "being generated because – in relationship to the lawsuit.").[4] Marvin Hamman, the DES employee supervising the daily tracking and manual review of FES cases, testified that, between December 2016 and August 17, 2017, there were more than 400 "[c]ases that were determined to be incorrectly moved from full service to FES." *Id*. at 30:3-25. Following Mr. Hamman's deposition, DES produced a log that shows that between December 5, 2016 and August 21, 2017 the number of improper reductions is actually closer to 600. Katz Third Decl. Ex. 2, AHCCCS Log (listing by date approximately 580 cases where benefits were improperly reduced). These errors are not isolated in time: they span several months and, as reflected in the logs, occur on a nearly daily basis. *Id*.

C. The HEAPlus Computer System does not Maintain Immigration Information on an Individual Level but only on an Application Level that does not Properly "Carry Forward" the Information

The new evidence also shows that, as in Sanchez Haro's case, these errors are occurring despite the fact that AHCCCS and DES have accurate, verified immigration information on file in the HEAPlus system, from prior applications. The underlying

[4] Because there is no court order requiring these reviews, Defendant could cease them at any time.

problem is that, despite the fact that the immigration information is stored in the computer system with each application for benefits, HEAPlus does not have a mechanism "to look back at prior immigration status for each immigrant at recertification." Katz Third Decl., Ex. 13, Def.'s Resp. to Interrogatory No. 16. When HEAPlus does not properly retrieve and present an individual's immigration status from prior applications, the computer system determines there is no qualifying immigration status, and the individual is deemed eligible for emergency services only. Put another way, immigration information is stored separately, in each application for renewal; it is not tied to an individual person's profile in the HEAPlus program. As a result, when HEAPlus considers a renewal application, it does not properly access and present the verified immigration status from the prior applications, leading to errors. As Mr. Hamman, stated at his deposition "the system is leading [caseworkers] to an FES [emergency] decision when it should be a full service," because "it's not evaluating the immigration information correctly." Katz Third Decl., Ex. 10; Hamman Dep. at 42:11-24.

This is not an unknown problem. Within two months of this lawsuit being filed, DES staff prepared a "system request" proposing changes to the HEAPlus system to resolve the problems. Katz Third Decl., Ex. 14. That request described how within HEAPlus, verified immigration statuses "are currently stored at an application level." *Id.* at 01771. As a result, while the information should be available when the "Auto Renewals are created," the computer system prevents the "verified [immigration] status data," from being "carried forward," to the "response summary," generated by the HEAPlus system. *Id.* *See also*, Katz Third Decl., Ex. 10; Hamman Dep. at 67:10-25 (HEAPlus prepares the "summary"). The system request explained that to fix this problem the verified "SAVE or VLP immigration responses need to follow the customer on a person level and not be stored only on an application level." Katz Third Decl., Ex. 14 at 01770. But those changes have not been implemented. Katz Third Decl., Ex. 13, Def.'s Resp. to Interrogatory No. 17 (noting that the request "is still under review and has not been submitted for approval.").

In contrast to the HEAPlus system, renewals for food stamps are determined using the older AZTECS computer system. Katz Third Decl. Ex, 10; Hamman Dep. at 82:12-17. Both Plaintiffs, although they were transferred to emergency medical benefits through the HEAPlus system, continued to properly receive food stamps. Darjee Decl., Doc. 12, ¶16; Sanchez Haro Decl., Doc. 11, ¶ 9. Mr. Hamman's explanation for the difference in result was that, in the AZTECS system, the immigration information is kept on a person level, which means that, unlike HEAPlus, "[o]nce immigration information is verified, it doesn't have to be re-verified." Katz Third Decl. Ex. 10; Hamman Dep. at 101:4-102:5. [5]

This failure to properly "carry forward" immigration eligibility information within HEAPlus results in improper reductions of Medicaid benefits through several mechanisms. First, it results in the auto-renewal process reducing immigrants' benefits automatically. The HEAPlus system automatically begins a renewal application without the involvement of a caseworker, by looking at "all of the information available," including "immigration status." *Id.* at 11:13-12:8. If the auto-renewal does not need any additional information (*i.e.*, updated income information), the renewal is processed automatically, without any involvement of a caseworker. *Id.* In those automatic cases, however, HEAPlus routinely fails to pull the past immigration information forward, causing the computer system to register that the individual has no qualifying immigration status on file; and without identifying a qualifying status, HEAPlus automatically determines that the individual is eligible for emergency benefits only. *See Id.* at 23:5-8. When erroneous reductions occur during auto-renewals, this cannot be blamed on the caseworkers, because no caseworkers were involved. Katz Third Decl., Ex. 2, AHCCCS Log (listing, *inter alia*, "auto-job" renewal applications that resulted in improper

[5] DES staff have expressed concern about the HEAPlus system. *See, e.g.*, Katz Third Decl. Ex. 22, July 21, 2017 e-mail between DES staff, noting that "[t]here's probably nothing that can be said, at this point, to AHCCCS which will change their opinion of HEA+ or desire to replace it… but [Jim] is willing to keep fighting for that."). *See also*, Katz Third Decl. Ex. 23, July 12, 2017 DES e-mail noting the processing of "auto-job" improperly moving full service approvals to FES, causing a problem for refugees and this issue should be added to the 392 system request.

reductions from full benefits to emergency-only).

Second, the HEAPlus system is causing the same error, even when caseworkers are involved. As Mr. Hamman explained, a caseworker is sometimes involved to verify *other* eligibility information, such as the income information in Ms. Sanchez Haro's case. Katz Third Decl., Ex. 10; Hamman Dep. at 143:6-12. In those cases, the HEAPlus should automatically carry forward the immigration information, without any additional steps from the caseworker. *Id.* at 52:16-21. As noted above, however, the HEAPlus system does not pull the immigration information forward correctly, but rather prompts the caseworker to deem an immigrant eligible for emergency benefits. *Id.* at 42:11-24 ("the system is leading [caseworkers] to an FES decision when it should be a full service," because "it's not evaluating the immigration information correctly." *id.* at 92:9-21). The only solution to this problem, currently, is for caseworkers to try to override the inaccurate HEAPlus determination. *Id.* at 51:24-25 (in the current system caseworkers must "double-check[] a system that should have already made that determination."). Defendant previously asserted that caseworkers were introducing errors themselves, because they did not properly "update" the HEAPlus system or did not understand how to properly document immigration status. *See* Lockner Decl., Doc. 33, ¶¶ 30-32. But the evidence undermines that assertion. Once HEAPlus concludes that an applicant is eligible for emergency only benefits, to prevent the improper reduction, the caseworker must scour several databases to find immigration information and manually override the computer's improper determination. *Id.* at 52:2-6 ("we can't trust that the system is saying that FES is the correct determination and we have to double-check in all these different places to make sure that we have uncovered any possibility of eligibility.").

This complicated work-around of checking immigration status information in several places was formalized in a April 19, 2016 News Flash, Katz Third Decl., Ex 20 ("look for information that supports the full AHCCCS Medical Assistance status in all systems available to you.") and the June 5, 2017, policy notification, which was "necessary due to continuing errors where customers are incorrectly dispositioned for

FES rather than full AHCCCS benefits." Katz Third Decl., Ex. 15. The policy directs caseworkers to conduct their own investigation in no less than six different data sources to determine "whether the customer was previously eligible for full services MA [medical assistance]." *Id.* If while scouring the various records, the caseworker finds that a *prior* application or *prior* SAVE run identifies the person as eligible for full medical, the caseworker must then carefully compare the information on the current application with the prior application to identify any differences, including typographical errors in how information was "keyed into HEAPlus." *Id.* But as Mr. Hamman explained, the caseworker should never have to engage in this process: the HEAPlus system should automatically carry this information forward. In short, the involvement of a caseworker at all in re-verifying immigration status during the benefits renewal process is a result of the HEAPlus computer error, because that process should occur automatically. Katz Third Decl., Ex. 10; Hamman Dep. at 54:11-25, 57:3-9, 82:2-3 ("all renewals should be handled as auto renewal").

This "scour the record" work-around does not solve the underlying problem and is continuing to result in improper reductions. Indeed, the log of improper benefit reductions shows that they are continuing steadily, even after the June 5, 2017 policy. Katz Third Decl., Ex. 2, (AHCCCS Log) (documenting over 150 improper benefit reductions between June 6, 2017 and August 21, 2017). Moreover, as in Ms. Sanchez Haro's case, HEAPlus does not save and store all of the prior immigration information accurately, which means that even when a caseworker does find immigration information by scouring these various databases, the HEAPlus system still leads the caseworker to an improper reduction. *See* Katz Third Decl., Ex. 9, (caseworker conducting daily review relied on the "HEA documents" to determine that Ms. Sanchez Haro was only eligible for emergency benefits). Indeed, DES caseworkers also have submitted "tickets" (which are internal requests for assistance from the DES help desk) describing how HEAPlus does not automatically update or store the individual's information within the HEAPlus system. *See, e.g.*, Katz Third Decl., Ex. 21 at 02216 ("Member will not verify in

HEAplus and is screening for FES…has met 5 year bar based on entry & grant date."); Ex. 16 at 01801 (immigration not updated in HEAplus). As a result, even though an individual has verified their immigration status, that information is not displaying within HEAPlus.

Other tickets from DES caseworkers demonstrate further problems with the current work-around, even when caseworkers are able to identify accurate, prior immigration information by scouring past applications, because they frequently are unable to change HEAPlus's automatic determination. For instance, in one ticket, dated March 24, 2017, an application was improperly deemed emergency-only by HEAPlus, despite the fact that "the last application in the chain has all the correct info." Katz Third Decl., Ex. 17. The caseworker was advised that "we will be unable to go back to the previous FES [emergency only] disposition and correct it." *Id*. That is, because the FES error had already happened, there was no longer a way to correct the error. The only work-around that was available was to "notate the application as a reminder to future EW's [eligibility workers] that they are refugees and they are intended to be Full MA [medical assistance]." *Id.* In other words, the only solution in the current HEAPlus system is to leave a note that, if found, would alert future caseworkers to ignore and override the inaccurate HEAPlus determination. *Id*.; Katz Third Decl., Ex. 10; Hamman Dep. at 128:5-23. Similarly, in another ticket from March 24, 2017, "the applicant was screened into FES (emergency) when they should have gotten full MA" and the caseworker could not correct the error. Katz Third Decl., Ex. 18. As Mr. Hamman described, these are just a few examples: "the system is continually wanting to say that they need to be in FES." Katz Third Decl., Ex. 10; Hamman Dep. at 128:9-10.

In short, there is evidence that HEAPlus is not a properly functioning computer system, and plainly, the "error" was not resolved in November of 2015, as Defendant previously claimed. Moreover, this new evidence shows that so-called caseworker "errors" are directly linked to the HEAPlus system, and it is only by caseworkers purposefully overriding the computer program, that proper determinations can,

sometimes, be reached.

3. HEAPlus, Not Applicants, Is the Source of This Problem

Finally, recent testimony suggests that, contrary to Ms. Lockner's prior declaration, these reductions are caused by the problems with HEAPlus and are not the result of conflicting information provided by the applicants. As described above, for a renewal, the immigration information should be automatically carried forward on a personal level, without the need for additional input from the applicant (or the caseworker). Furthermore, Mr. Hamman specifically disavowed that applicants were the cause of any of the hundreds of benefit reductions:

> Q: Is it ever the case that some of the information already in the system is found to be incorrect and, therefore, in conflict with the information in the present application?
> A: I have not observed that.

Katz Third Decl., Ex. 10; Hamman Dep. at 143:24-144:3. Mr. Hamman went on to explain that the source of the inconsistencies is the computer system, not the applicants:

> Q: . . . Can you give me an example of the sort of incorrect information that is referred to here, if you know?
> A: That would be information that the system has in there that the customer's immigration information is not correct.
> Q: And could that be because the customer gave incorrect information to the eligibility worker?
> A: Not on renewal.
> Q: So, what would by the source of incorrect information on a renewal?
> A: The system.

Id. at 156:6-17. An example of this error is exemplified in a Help Desk ticket dated September 22, 2016. Katz Third Decl., Ex. 19 (noting that "[t]he HEAplus auto renewal process copied forward the incorrect immigration status from application."). In summary, the evidence produced to date shows that the HEAPlus system's failure to carry forward prior, verified immigration information is consistently causing qualified immigrants throughout Arizona to lose their benefits.

D. Changes to HEAPlus Are Necessary to Resolve Improper Transfers

AHCCCS and DES are fully aware that HEAPlus is the source of this problem: The joint "System Request," explains that "[e]very day, customers with an immigration status that allows the individual to receive full AHCCCS Medical Assistance coverage are converted from full benefits to Federal Emergency Services (FES)," and that "Changes to HEAplus are needed to **reduce/prevent** these incorrect decisions." Katz Third Decl., Ex. 1 (emphasis added). Thus, it is only through a systematic fix of the HEAPlus system that these errors can be "prevent[ed]."

As discussed above, Plaintiffs acknowledge that AHCCCS and DES have proposed several stop-gap measures to mitigate the errors caused by HEAPlus. There is presently a daily review system in place, which identifies some, but not all improper reductions, and only after the decisions go out. AHCCCS and DES have also issued several bulletins and trainings to aid caseworkers in the "scour the record" work around. *See e.g.* Katz Third Decl., Ex. 20, News Flash 16-0009M; Katz Third Decl., Ex. 15, June 5, 2017 policy. And while that change and several others have been proposed in the System Request, they have not been implemented. Katz Third Decl., Ex. 13, Def.'s Response to Interrogatory 17. Plaintiffs believe these are good ideas and understand that there are likely many ways to improve the overall functioning and efficiency of HEAPlus.

But, at bottom, these efforts are only work-arounds. *See* Katz Third Decl., Ex. 10; Hamman Dep. at 42:2-24. They will not solve the underlying problem: HEAPlus does not recognize when an individual has a verified immigration status stored in a prior application or elsewhere on the system and cannot carry that eligibility information forward to the renewal application. Until that problem is squarely addressed, individuals continue losing Medicaid benefits on a daily basis.

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DISCUSSION

I. New Evidence Supports Class Certification

A. Legal Standard

Rule 23(c)(1), requires a district court to make a class determination "[a]s soon as practicable after the commencement of an action." Fed. R. Civ. Pro. 23(c)(1)(A). Often, as in this case, this means the Court may be required to decide whether a class action can be maintained before discovery is completed. Accordingly, Rule 23(c)(1)(C) permits the Court to alter or amend that determination before final judgment "if, upon fuller development of the facts, the original determination appears unsound." Fed.R.Civ.P. 23(c)(1) advisory committee's note. This Court, therefore, has broad discretion and may "revisit the order at any time before final judgment." *Kamar v. RadioShack Corp.*, 375 F. App'x 734, 737 n. 7 (9th Cir. 2010) (citing *Armstrong v. Davis*, 275 F.3d 849, 871 n. 28 (9th Cir. 2001).

B. Court Should Grant Class Certification

Plaintiffs request certification of a class defined as:

> 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 through the Health-e-Arizona Plus computer system and whose benefits have been or will be reduced from full-scope AHCCCS to emergency-only AHCCCS.

The new evidence developed since the Court's previous ruling warrants granting class certification. Rule 23(a) has four requirements: (1) numerosity; (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. *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). Plaintiffs rely on Rule 23(b)(2), because declaratory and injunctive relief is appropriate respecting the class as a whole.

The record is now replete with evidence of a system-wide computer problem that is consistently causing qualified immigrants to lose full Medicaid benefits. A computer system problem affecting hundreds of individuals is precisely the kind of common problem, with common answers, that is properly addressed through a class action and the record now clearly satisfies each of the requirements of Rule 23.

1. Commonality

Plaintiffs satisfy the commonality requirement by "demonstrate[ing] that the class members 'have suffered the same injury.'" *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 349-350 (2011) (quoting *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982)), and that the claim depends upon a common contention that "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350.

While there must be a common core, Rule 23(a)(2) is "construed permissively," and "*all* questions of law or fact need not be common to satisfy the rule." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)) (emphasis added); *Staton v. Boeing, Co.*, 327 F.3d 938, 953 (9th Cir. 2003). The test is qualitative rather than quantitative and one significant issue common to the class may be sufficient. *Hanlon*, 150 F.3d at 1019. Indeed, commonality is satisfied by showing either "shared legal issues with divergent factual predicates," or "a common core of salient facts coupled with disparate legal remedies." *Id.* In particular, "commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong*, 275 F.3d at 868. Finally, while plaintiffs must show that "*questions* common to the class predominate," Plaintiffs need not show that "those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455, 459 (2013). Accordingly, courts may not "engage in free-ranging merits inquiries at the certification stage." *Id.* at 466.

The new evidence produced to-date requires a different result than the Court's prior ruling. As described above the record demonstrates a system-wide practice and policy embedded in the HEAPlus computer system: namely, the inability of the HEAPlus system to carry forward past, verified immigration information to a renewal application. The evidence demonstrates that while this problem may manifest in several ways (*i.e.*, automatic reduction in benefits, inability for caseworkers to find and save prior information in HEAPlus, and inability for caseworkers to override incorrect HEAPlus determinations), the underlying core of the problem is HEAPlus's failure to track immigration status by individual, not application. Indeed, AHCCCS and DES themselves group these individuals together on their daily logs because of the common problem. *See* Katz Third Decl., Ex. 2, AHCCCS Log. Thus, the record now amply supports finding that the existence of a "common core of salient facts."

This evidence is more than enough to meet the commonality requirement. Indeed, in *M.K.B. v. Eggleston*, 445 F. Supp. 2d 400 (S.D.N.Y. 2006) the court certified a class of immigrants whose public benefits had been improperly terminated, even though it found multiple, distinct causes for those benefit reductions. Specifically the court found that "[i]n addition to the problems caused by inadequate training, manuals, and directives, battered qualified aliens have also partly been unlawfully denied benefits because of flaws in the design of the City's computer system." *Id.* at 412. The court concluded that the evidence established that "class members share common issues of law and fact: defendants erroneously and systemically fail to provide public benefits to members of the class as a result of flaws in computer systems, erroneous policy bulletins and directives, and inadequate training." *Id.* at 441. Defendants in *MKB* argued that the unique circumstances of each denial defeated commonality, but the court, relying on Second Circuit precedent flatly rejected that argument, concluding that the commonality requirement was satisfied because "plaintiffs are alleging that defendants have failed to properly administer benefits due to systemic errors." *Id.* at 442. (*citing Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997)).

Indeed, courts have routinely approved classes of beneficiaries based on allegations of systemic errors. *See, e.g.*, *K.W. ex rel. D.W. v. Armstrong*, 298 F.R.D. 479, 486 (D. Idaho 2014), *aff'd sub nom. K.W. ex rel. D.W. v. Armstrong*, 789 F.3d 962 (9th Cir. 2015) ("Plaintiffs challenge IDHW's generic method for making budget decisions, the forms IDHW uses to notify people of those decisions, and IDHW's system for handling budget appeals. These system-wide challenges avoid the type of individualized inquiries that destroy commonality."); *In re D.C.*, 792 F.3d 96, 100 (D.C. Cir. 2015) (approving class of Medicaid beneficiaries presenting common questions of whether the District "fail[s] to offer sufficient discharge planning" or "fail[s] to inform and provide [nursing facility residents] with meaningful choices of community-based long-term care alternatives to nursing facilities," because those questions "could represent the sort of systemic failure that might constitute a policy or practice affecting all members of the class in the manner Wal–Mart requires for certification.").

Here, not only have Plaintiffs identified ample evidence of systemic errors in processing qualified immigrants' renewal applications, but they have presented evidence that those systemic errors have one, singular, underlying cause: the HEAPlus computer system. This is more than enough to satisfy the commonality requirement.

Further bolstering the commonality factor is the fact that the problems Plaintiffs have identified are not only *amenable* to a common solution, but in fact *require* a common, system-wide solution. Plaintiffs seek injunctive and declaratory relief that resolves the underlying problems in the HEAPlus computer system. It would be impossible to resolve the computer problem only as to the named Plaintiffs. In fact, that approach has already failed. When Plaintiff Sanchez Haro's benefits were improperly reduced in April 2016, a supervisor personally went into Sanchez Haro's application and updated her immigration information, after receiving documentation from USCIS. Katz Third Decl., Ex. 4 (USCIS verification); Ex. 5 (Sanchez Haro Eligibility Summary, created on August 19, 2016). Nonetheless, Sanchez Haro's benefits were again reduced in March 2017. Accordingly, individualized remedies are simply inapplicable here: only

a global fix to the HEAPlus computer system will remedy the underlying problem. This need for system-wide changes is an independent basis for finding commonality. *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 239 F.R.D. 9, 26 (D.D.C. 2007) (noting that class actions that seek injunctive or declaratory relief by their very nature present common questions of law and fact.).

2. Typicality

The "typicality" factor requires that the claims or defenses of the representatives must be typical of the claims or defenses of the class. Fed. R. Civ. P. 23(a)(3). Commonality and typicality "tend to merge," *Falcon*, 457 U.S. at 157 n. 13, and this case is no exception. As the discussion above demonstrates, the named Plaintiffs' claims, like all immigrants who submit renewal applications through HEAPlus, arise from the computer system's flawed processing of those applications.

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." *Ellis*, 657 F.3d at 984 (citations and internal quotations omitted). Under the rule's "permissive standards," *Hanlon*, 150 F.3d at 1020, the Ninth Circuit does not "insist that the named plaintiffs' injuries be identical with those of the other class members . . . ." *Armstrong*, 275 F.3d at 869. Rather,

> [a]s long as the named representative's claim arises from the same event, practice, or course of conduct that forms the basis for the class claims, and is based upon the same legal theory, varying factual differences between the claims or defenses of the class and the class representative will not render the named representative's claim atypical.

Jordan v. County of Los Angeles, 669 F.2d 1311, 1321 (9th Cir. 1982), *vacated and remanded on other grounds*, 459 U.S. 810 (1982).

The typicality requirement is easily satisfied here. The named Plaintiffs have suffered the same injury as each member of the proposed class: an improper reduction in Medicaid benefits. Moreover, Plaintiffs' reductions of benefits resulted from the same

alleged course of conduct, namely the Defendant's continued use of the HEAPlus system for processing immigrant renewal applications. The record now flatly refutes Defendant's earlier assertions that conflicting information or caseworker error are independent causes of Plaintiffs' injuries. In fact, both the conflicting information and caseworker errors are driven by HEAPlus's failure to store and present immigration information correctly. That failure then causes the system to either automatically identify an inconsistency, despite no change in the applicant's immigration information, or forces a caseworker to scour the databases for immigration information in order to override the computer's erroneous determination. At bottom, all of the reductions experienced by the named Plaintiffs and the putative class members stem from the HEAPlus computer system's inability to pull up an applicant's already verified immigration information. Accordingly, the "named representative's interests are aligned with those of the class," assuring that Plaintiffs who are already "vigorously pursu[ing their] own interests will necessarily advance the interests of the class." *Jordan*, 669 F.2d at 1321.

3. Numerosity

Rule 23(a)(1), requires the class to be so numerous that joinder of all parties is impracticable. *Hanlon,* 150 F.3d at 1019, *quoting* Fed. R. Civ. P. 23(a)(1). Impracticability refers to the difficulty or inconvenience of joining all members of the class. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964); *see Jordan*, 669 F.2d at 1319 ("[W]here a class is large in numbers, joinder will usually be impracticable.").

Class size alone justifies class certification. Based on the testimony of Mr. Hamman and the documents produced in this case, hundreds of immigrants have had their benefits improperly reduced. The Ninth Circuit has upheld class certification in cases involving far fewer individuals than are affected here. Indeed, the Ninth Circuit has found the numerosity requirement is satisfied where there are fewer than 100 class members. *See, e.g.*, *Harik v. California Teachers' Ass'n*, 326 F.3d 1042, 1052 (9th Cir. 2003) (finding "judicial economy served" by certifying 60-member class where plaintiffs

sought only prospective relief); *Jordan*, 669 F.2d at 1319 (stating inclination "to find the numerosity requirement . . . satisfied solely on the basis of the number of ascertained class members, i.e. 39, 64, and 71"); *Tietz v. Bowen*, 695 F. Supp. 441, 445 (N.D. Cal. 1987), *aff'd*, 892 F.2d 1046, (9th Cir. 1990) (finding a class of 27 retirees so numerous that joinder of all members was impracticable).

The difficulties and inefficiencies of joinder likewise support class certification in this case. The Ninth Circuit considers other factors demonstrating impracticability, including geographic diversity of class members, the inability of individual claimants to institute separate suits, the inclusion of unknown individuals who will be affected in the future, and whether the plaintiffs' requests are for injunctive or declaratory relief. *Jordan*, 669 F.2d at 1319. All of these factors are present in this case. First, seeking declaratory and injunctive relief through a class promotes judicial economy compared to joinder or individual suits. *See Escalante v. Cal. Physicians' Serv.*, 309 F.R.D. 612, 618 (C.D. Cal. 2015) ("[E]ven presuming a class of 19, numerosity is met. Because Plaintiff in this case is requesting declaratory and injunctive relief, allowing a class action to be brought would be in the interests of judicial economy."). Second, members of the class, qualify for AHCCCS because they live at or below the federal poverty level and therefore, are by definition persons lacking the financial means to pursue separate legal actions. *Id.*; *see, e.g.*, *Lynch v. Rank*, 604 F.Supp. 30, 36 (N.D. Cal. 1984) (finding joinder "is not feasible because of geographic factors, and because members of the class, who are by definition poor and disabled, do not have the economic means to pursue remedies on an individual basis."), *aff'd*, 747 F.2d 528 (9th Cir. 1984). The numerosity and impracticability of joinder requirements are clearly met in this case.

4. Adequate Representation

The final prong of Rule 23(a), the "adequate representation" factor, requires the Court to find that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Ninth Circuit asks two questions: "(1) Do the representative plaintiffs and their counsel have any conflicts of interest with other

class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton*, 327 F.3d at 957 (citations omitted); *Hanlon*, 150 F.3d at 1020.

With regard to the first of the two adequacy questions, neither the named Plaintiffs nor their counsel have any conflicts of interest with other class members. The named Plaintiffs and class members raise similar claims giving rise to numerous common questions of law. They seek the same relief. Similarly, Plaintiffs' counsel has no interest in conflict with other class members.

Second, the representative Plaintiffs and their counsel will vigorously pursue this case on behalf of the entire class. "Although there are no fixed standards by which 'vigor' can be assayed, considerations include competency of counsel . . . ." *Hanlon*, 150 F.3d at 1021. Plaintiffs' counsel, Ellen Katz, with the William E. Morris Institute for Justice, is experienced in class action and complex litigation, in particular, involving Social Security Act beneficiaries. A representative sample of cases in which Plaintiffs' counsel has acted as lead counsel include: *Newton-Nations v. Betlach*, 660 F.3d 370 (9th Cir. 2011); *Wood v. Betlach*, CIV 3:12-080898 PCT-DGC; *Padilla v. Rogers*, CV 02-176 TUC FRZ; *Brancatelli v. Berns*, CIV 04-421 TUC WBD. Declaration of Ellen Katz in Support of Plaintiffs' Motion for Class Certification ("Katz Decl."), Doc. 13, ¶ 7; Jane Perkins, with the National Health Law Program, is experienced in Medicaid and complex litigation, in particular, involving Social Security Act beneficiaries. Declaration of Jane Perkins in Support the Plaintiffs' Motion for Class Certification ("Perkins Decl.") Doc. 8 ¶ 5. Sarah Grusin with the National Health Law Program has experience litigating complex federal civil rights actions, including § 1983 cases and *Monell* policy and practice claims. Grusin Declaration in Support of Plaintiffs' Renewed Motion for Class Certification, ("Grusin Decl.") ¶¶ 6-7.

A representative sample of cases in which Plaintiffs' counsel has acted as lead counsel include: *Davis v. Shah*, 821 F.3d 231 (2d Cir. 2016), aff'g in part & vacating in part, 2013 WL 6451176 (W.D. N.Y. Dec. 9, 2013); *Wilson v. Gordon*, 822 F.3d 934 (6th

Cir. 2016), *aff'g*, 2014 WL 4347807 (M.D. Tenn. Sept. 2, 2014); *K.C. v. Wos*, 716 F.3d 107 (4th Cir. 2013), *aff'g*, 2013 U.S. Dist. LEXIS 43822 (E.D.N.C. Mar. 29, 2012) (preliminary injunction requiring Medicaid due process in managed care program); *Newton-Nations v. Betlach*, 660 F.3d 370 (9th Cir. 2011); *McCartney v. Cansler*, 608 F.Supp.2d 694 (E.D.N.C. 2009), *aff'd*, 382 Fed.App'x 334 (4th Cir. 2010: *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006). Additional cases and experience are cited in Perkins Decl. Doc. 8, ¶ 5.

5. Plaintiffs' claims satisfy Rule 23(b)

Finally, Plaintiffs must also satisfy one subdivision of Rule 23(b). This lawsuit meets the requirement of Rule 23(b)(2) that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . ." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) "does not require . . .[the court] . . . to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010).

As discussed previously, the Defendants' flawed HEAPlus system is the same throughout the state and has equal application to all class members. The Plaintiffs allege that the Defendants have refused to act in compliance with federal law on grounds generally applicable to the class. Plaintiffs ask the Court to enter final injunctive and declaratory relief with respect to the class as a whole. This is precisely the kind of situation for which certification of a class under Rule 23(b)(2) is appropriate. *See Elliot v. Weinberger*, 564 F.2d 1219, 1228 (9th Cir. 1997), *aff'd in part and rev'd in part on other grounds sub nom., Califano v. Yamasaki*, 442 U.S. 682 (1979). This action should be certified pursuant to Rule 23(b)(2).

C. The Court Should Designate Plaintiffs' Counsel as Class Counsel Pursuant to Rule 23(g)(1)

When a class is certified, the court must appoint class counsel, Fed. R. Civ. P.

23(g)(1), and the class certification order must list these counsel, Fed. R. Civ. P. 23(c)(1)(B). The court considers four factors in appointing class counsel:

(i) the work counsel has done in identifying or investigating potential claims in the action;
(ii) counsel's experience in handling class actions, other complex litigation and the types of claims asserted in the action;
(iii) counsel's knowledge of the applicable law; and
(iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

Pursuant to these four factors, Plaintiffs' counsel qualify for appointment in this case. As reflected by the Complaint, briefing, and discovery conducted, Plaintiffs' counsel has committed extensive time and resources to investigating and analyzing Plaintiffs' claims. Counsel is very experienced in class actions and complex litigation and has extensive knowledge of discrimination and benefits law. *See* Katz Decl., Doc. 13 ¶¶ 7-8; Perkins Decl., Doc. 8 ¶¶ 5-6; Grusin Decl. ¶¶ 6-7. The Court should appoint Plaintiffs' counsel as class counsel in its class certification order.

II. In the Alternative, the Court Should Allow Plaintiffs to Conduct Class Discovery

As demonstrated above, the evidence produced to-date is more than enough to satisfy Plaintiffs' burden under Rule 23(a). Plaintiffs acknowledge, however, that discovery is still ongoing. For instance, several knowledgeable employees of DES and AHCCCS have yet to be deposed. The parties also have unresolved discovery disputes that include whether Defendant should have to respond to class discovery. Accordingly, not all relevant documents and testimony have been produced. While Plaintiffs seek certification of the class, the evidence presented with this motion demonstrates that there is a serious factual question regarding the problems in the HEAPlus system and the ways that computer system is affecting qualified immigrants. Accordingly, Plaintiffs request, in the alternative, that the Court take the Motion for Class Certification under advisement and allow Plaintiffs to conduct class discovery prior to the Court's ruling.

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Conclusion

For the reasons stated above, the Plaintiffs ask this Court to certify this case as a class action pursuant to Fed. R. Civ. P. 23(a) and 23(b)(2) and pursuant to Rule 23(g) and to appoint the following law firms to represent the class: the William E. Morris Institute for Justice and the National Health Law Program. In the alternative, Plaintiffs ask this Court to take the Motion for Class Certification under advisement and allow Plaintiffs to conduct class discovery.

Respectfully submitted this 15th day of September 2017.

NATIONAL HEALTH LAW PROGRAM

WILLIAM E. MORRIS INSTITUTE FOR JUSTICE

By /s/ Ellen S. Katz

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of September 2017, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal to the following CM/ECF Registrants:

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