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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

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

Plaintiffs,

v.

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

Defendant.

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

RESPONSE TO PLAINTIFFS' OBJECCTIONS TO REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

Director Thomas Betlach hereby responds to Plaintiffs' Objections to the Report and Recommendation of the Magistrate Judge regarding Plaintiffs' Renewed Motion for Class Certification or, in the Alternative, to Take Plaintiffs' Motion Under Advisement and for Class Discovery ("Renewed Motion").

The Plaintiffs' Renewed Motion seeks class certification only as to Count 1, the claim that Defendant is not furnishing medical assistance with "reasonable promptness" as required by 42 U.S.C. § 1396a(a)(8) and 42 C.F.R. § 435.930(b), which they say "*implies* that assistance may not be *terminated* until a person is properly found ineligible." *Doc. 1, ¶¶ 17-18 (emphasis added).* Judge Ferraro recommends denying the

motion because it fails to demonstrate the Rule 23 requirements of commonality, typicality, numerosity, or the applicability of relief under Rule 23(b)(2) and also because it fails to show evidence of a Medicaid violation. He is correct, and the Plaintiffs' Objections should be overruled.

I. PLAINTIFFS' BURDEN

As the Supreme Court has summarized, a plaintiff seeking certification of a class may not simply assert that class certification is appropriate. She must "affirmatively demonstrate" ***facts*** that meet the standards of Rule 23.

> Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon* that sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question, and that certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. Frequently that rigorous analysis will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. [T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (citations and internal quotation marks omitted, emphasis in original).

II. BACKGROUND OF THE RENEWED MOTION AND OBJECTIONS

In October 2015, Plaintiffs' counsel notified AHCCCS of an apparent problem some immigrants were having with renewals of their eligibility for AHCCCS benefits. *Doc. 1, ¶ 40*. AHCCCS investigated, found a computer problem, fixed it in November 2015, and spent three months going back through the cases of every person who had

ever had full AHCCCS benefits since January 1, 2014 but who later was reduced to emergency-only ("FES") benefits. *Doc. 124-1, ¶¶ 14-16, 18.* AHCCCS reinstated full benefits for some 3,500 people. *Id., ¶18.* AHCCCS kept Plaintiffs' counsel advised of its efforts, and Plaintiffs' counsel continued to bring a small number of additional cases to AHCCCS's attention during 2016. *Doc. 10, ¶¶8, 25.* AHCCCS promptly reinstated anyone whose benefits had been incorrectly reduced. Nevertheless, on July 22, 2016, two Plaintiffs filed this suit.

The Plaintiffs moved for class certification the same day. They sought no discovery and successfully opposed the limited discovery Defendant sought. Their motion was denied. They then engaged in extensive discovery and, on September 15, 2017, renewed their motion. *Doc. 115.* In December 2017, they added "Supplemental Documents and Explanation/Argument Based on Newly Discovered Documents . . . ." *Doc. 154.* Now, their Objections add evidence that was not in the record before Judge Ferraro. If all this evidence fails, they argue they should be permitted to obtain discovery related to the thousands of renewals since January 2015 that AHCCCS and DES have already double-checked, in the implicit hope of finding something that will justify renewing their motion yet again.

At each stage of the case, the Plaintiffs have made allegations they cannot support.[1] The Renewed Motion maintains there is a "sweeping problem" with the

[1] For example, Plaintiffs' complaint alleged a series of supposed reasons why AHCCCS violates federal Medicaid law. *Doc. 1, at ¶¶ 46-51.* Their Renewed Motion, however, no longer discusses these theories and does not even mention the "reasonable

AHCCCS computer system and that "hundreds of individuals have had their benefits improperly reduced since December 2016." *Doc. 115, at 2 and 7.* This is simply not true, and they know it.

First, during this period, as discussed below, all but five mistakes were corrected *before* any change in benefits took effect. Plaintiff Sanchez Haro was one of these five persons, and the mistake in her case was corrected *before* any benefit was denied her. We do not know about the other four, though we know none of them has complained to AHCCCS. *Doc. 124-1, Ex. A, ¶¶ 6-7; Doc. 164-1, ¶11.*

Second, though the Plaintiffs may think the design of the AHCCCS computer "should be" more user-friendly, they have failed to supply any authority that requires a different design or to find any defective function in the computer. They asked that discovery be extended twice so an expert could prepare an opinion about the AHCCCS computer but then admitted on March 13, 2018 that they have no expert opinion to disclose. *Doc. 200, at 4.* (If Plaintiffs really had evidence of the sweeping problem they claim, they would be renewing their motion for a preliminary injunction to prevent the massive suffering they assert.) Their Objections and Renewed Motion are based on a quilt of inaccurate and misleading arguments that Judge Ferraro correctly shredded.

III. STANDARD OF REVIEW

The district court reviews a magistrate judge's ruling on a non-dispositive pretrial ruling under the clearly erroneous or contrary to law standard. Fed. R. Civ. Pro.

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promptness" requirement under Medicaid. Instead, the Plaintiffs' case has reduced to a relentless *search* for issues with the AHCCCS/DES ("HEAplus") computer.

72(a); *Osband v. Woodford*, 290 F.3d 1036, 1041 (9th Cir.2002); *Grimes v. City of San Francisco*, 951 F.2d 236, 240–41 (9th Cir.1991).

IV. THE EVIDENCE SHOWS THE COMPUTER CANNOT DO WHAT PLAINTIFFS ALLEGE, AND THERE IS NO CLASS OF PEOPLE WHO HAVE BEEN DENIED REASONABLY PROMPT ELIGIBILITY DETERMINATIONS.

The Renewed Motion does not identify any practice or policy of the Defendant that violates Medicaid's "reasonable promptness" requirement. Moreover, as Judge Ferraro notes, there is no evidence that anyone has been denied eligibility or has been delayed in receiving a correct eligibility determination or the benefits for which he or she was eligible. The evidence is instead that the mistakes that could turn into such harm are corrected before this can happen.

The fact is that determining who qualifies for which AHCCCS benefits under the nation's "Byzantine" immigration laws (*Martinez v. Holder*, 2009 WL 413078, at *1 (9th Cir. 2009)) is often difficult. In addition, though the HEAplus computer does what it is programmed to do, the information it receives from applicants themselves, from eligibility workers (EWs), and even from the federal SAVE and VLP computers that supply current immigration status is sometimes incomplete or conflicting.

AHCCCS and DES process the overwhelming majority of renewals without delay or loss of benefits. Mistakes happen, but they are counter to, not representative of, a AHCCCS practice or policy. The only real AHCCCS policy the Plaintiffs identify is the directive to triple-check any potential reduction from full benefits to FES to be sure such decisions are correct. *Doc. 124-7.*

A. The Computer Does Not Reduce Immigrant Renewals from Full to Emergency-only Benefits.

Throughout their Objections the Plaintiffs incorrectly state that the HEAplus computer "determines" or "decides" cases that reduce a person from full to FES benefits. The computer ***cannot*** do this; it can only make a tentative prediction of a person's renewal category based on the information it has. *Doc. 124-1, ¶ 13*; *Ex. A hereto, p. 175:4-14.* If the information predicts FES status, the computer is programmed to stop and "pend" the case for an EW to take over. Only the EW staff can sift through the available information and make a determination ("disposition") reducing a person to FES benefits. *Doc. 124-1, ¶ 13.* [2]

Human error causes the mistaken determinations that occur. *Id., ¶ 21.* DES triple-checks every FES determination by an EW, often on the same day and before any incorrect notice can go out. *Doc. 124-7.* If there is an error, it is caught and corrected. The very witness upon whose testimony Plaintiffs place such heavy

[2] The Plaintiffs mistakenly argue that approximately 100 "auto-job" entries in the log that DES keeps of cases where eligibility was changed from full benefits to FES show the computer does automatically reduce eligibility. *Doc. 198, at 8, 22*. They fail to understand that these "auto-job" entries are cases of persons who had previously asserted they were eligible for full benefits but, because they lacked sufficient evidence of this, were given a reasonable opportunity of 90 days of "conditional" full eligibility to provide the necessary evidence, pursuant to 42 U.S.C. § 1320b–7(d)(4)(A). *Ex. B, 239:8-240:14.* When the person fails to respond in 90 days, the conditional eligibility ends and the computer automatically and correctly reduces the person to FES. The DES log captures all cases of reduction from full to FES benefits, so these reductions appear too. But these "auto-jobs" involve no analysis, "determination," or "decision" by the computer of the person's qualifications; otherwise, the application would have pended and been decided by an EW.

reliance, DES's Marvin Hamman, testified that DES's process works and that ***all*** errors have been corrected. *Doc. 124-3; Doc. 145:15-23.* AHCCCS also spot-checks these determinations. *Ex. B, 223:7-14.* The upshot is that neither AHCCCS, DES, nor the Plaintiffs have found ***anyone*** who has been injured by this process.

Admittedly, Plaintiff Sanchez Haro's case has been a challenge, but *not* because the computer did anything wrong and *not* because she is in any way typical of others. AHCCCS has found no trend of repeated erroneous reductions. *Ex. B, 199:6-17 and 222:6-11.* As the Plaintiffs' own descriptions of Sanchez Haro's history (*Doc. 198, at 5-6 and 9-10*) show, her background is unusual and complicated.[3] Even veteran eligibility workers find her case difficult to unravel.[4]

The errors in Sanchez Haro's case are different each time, due either to her own inconsistent information (2016), an EW mistakenly analyzing the available information and inexplicably failing to apply the obvious written direction "from management" in her case notes that she is eligible for full benefits (March 2017), or Mr. Quevado's failures in October 2017 to correctly analyze her case take it to his supervisor before reducing her to emergency-only status. As Judge Ferraro notes, the 2017 errors were

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[3] Ms. Sanchez Haro is a self-reported battered alien who claims to have lived in the United States continuously since before August 1996, who achieved Legal Permanent Resident status in 2015, according to the federal computers that provide immigration status, and who has provided AHCCCS information that is sometimes inaccurate or conflicting. *Doc. 124-1, ¶ 29; Doc. 164-1, ¶¶ 2-9.*

[4] Jorge Quevado, the DES eligibility worker who incorrectly determined her eligible only for FES benefits in October 2017, is the most senior EW in his office and had a 97% accuracy record in his 2017 determinations. He has only seen one or two cases like Sanchez Haro's in his 18 years on the job. *Ex. C,151:3-12; 83:5-14; 172:10-19.*

promptly corrected before any change in her benefits took effect, precluding any claim that she did not receive her determination or her benefits with reasonable promptness. Moreover, given the repeated errors, DES has "locked down" Sanchez Haro's case so that only its most experienced personnel can process her eligibility in the future. *Ex. E, 24:16-25:2* (Darjee's case also locked).

Plaintiffs try to take advantage of the fact that AHCCCS, DES, and SIS are working on ways to enhance the computer system. They argue these planned enhancements show in retrospect that the computer could have been designed differently to make the EWs' jobs easier. The Plaintiffs imply these enhancements are intended to fix a problem with the computer, but as Judge Ferraro notes, the Plaintiffs fail to admit the enhancement documents state their purpose is to prevent or reduce errors "caused by workers incorrectly changing customers from full to emergency services." *Doc. 172, at 9-10.*

Similarly, Judge Ferraro correctly rejects the Plaintiffs' argument about a handful of comments or questions DES personnel have raised in e-mails, "tickets" to the Help Desk, or testimony about whether the computer is operating correctly because Plaintiffs fail to show that any of these items were resolved by a conclusion that there was a problem with the computer. *Id.* Judge Ferraro explained his findings as to three of these in detail. *Doc. 172, at pp. 8-9 and 10:5-16.*

Plaintiffs try to argue that one can infer some problem with the HEAplus computer because the "AZTECS" computer that processes food stamp applications is "better," but they offer no evidence of this, much less that the two computers can be

compared for processing the same information against the same criteria. All they show is that the two computers process information differently.

B. AHCCCS and DES Catch and Correct Initial Mistakes

The Plaintiffs do not deny the efforts that AHCCCS and DES have made to find and correct any errors. They simply condemn the efforts as inadequate and something the agencies could stop at any time.

The numbers discussed above belie the allegation of inadequacy. It is deliberately misleading to contend that hundreds are being "subject[ed]" to incorrect "benefit reductions." *Doc. 198, at 2.* The Plaintiffs ***know*** this is not so because the mistaken eligibility determinations are corrected and new notices are sent out before the person's eligibility changes. [5]

The Plaintiffs' speculation that AHCCCS and DES may abandon their efforts to catch and correct erroneous determinations has no basis. It ignores the huge efforts the agencies have made reviewing these cases for error ever since the 2015 problem was discovered. It also ignores the testimony of individuals from both DES and AHCCCS that the existing triple-level review process will not end until the system enhancements show they have reduced worker error as much as is possible. [6]

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[5] Similarly, they say Sanchez Haro suffered a reduction in benefits in early 2017, but she did not. They ***know*** the mistaken determination in her case was corrected on April 20, 2017, before any change in her eligibility would have taken effect on May 1, 2017.

[6] As AHCCCS's Julie Swenson testified, "I anticipate that we will keep both [the system enhancements and the daily reviews] until we are sure that it's working to the level we need it to. We really do not want this to continue to happen. This is not a good thing for anybody. We don't like making incorrect decisions." *Ex. D, 196:6-10.*

C. Other Incorrect or Misleading Statements by Plaintiffs

There are a number of other statements in the Objections that are incorrect or misleading. Many of these are answered at pages 8-15 of Defendant's Response to the Renewed Motion. *Doc. 123*. The more notable examples are summarized below:

1) Plaintiffs dwell on the statements of Marvin Hamman at DES without acknowledging he is not knowledgeable about computer systems, he repeatedly made clear he was "assuming" conclusions from what "apparently" seemed to be happening, and he deferred to "systems" personnel for real answers. Plaintiffs fail to acknowledge Hamman testified that all mistaken determinations had been corrected, and he said the "apparent" computer issues he noted were ***not*** causing these errors anyway. The DES systems person, Michael Farquhar, did not support Hamman's assumptions and found no flaw in the computer. *Doc. 172, at 8-9.*

2) Plaintiffs repeatedly say EWs cannot "override" the computer's allegedly incorrect "determinations." *Doc. 198, at 4.* But no "override" of the system is involved when EWs determine a person to be eligible for full benefits. What the EW cannot do in some instances is change the computer's "back-end" information that only the computer company (SIS) has access to. But the fact that an EW cannot, for instance, change the "grant date" the computer receives from federal databases in no way prevents the EW from finding the applicant's grant date and correctly applying it to the application at hand.

3) Plaintiffs say the computer "will always generate the wrong eligibility determination for individuals like Ms. Sanchez Haro." *Id., at 5.* Again, the computer

does not "generate determinations" reducing people from full to FES benefits. It shows the EW a predicted outcome based on the information provided. After reviewing the more complete information in the person's file, the EW makes the determination.

4) Plaintiffs say if a person refuses to answer questions about their immigration status, the computer is programmed to treat this as if the person had said he or she did not qualify for full benefits. *Id*. But, if the person had full benefits before, the computer pends the application and an EW takes over to investigate the inconsistency. Only the EW can "disposition" such a case.

5) Plaintiffs incorrectly argue the computer system does not carry information forward from prior applications to the next auto-renewal. However, information *does* carry forward to auto-renewals. *Doc. 124-3, 113:5-15; Doc. 124-4, 97:9-10*. More importantly, Plaintiffs do not argue information is unavailable to the EW, only that the system should be enhanced to make the EW's job easier by using a hyperlink to avoid "having to spend extra keystrokes, mouse clicks to get back and forth to different applications." *Id., 89: 15-17*. The Plaintiffs provide no authority that requires this computer design.

6) Plaintiffs mention the separate AHCCCS "PMMIS" computer system that keeps track of member eligibility for use, among other things, by providers to check a person's coverage. They insinuate something may be wrong with it, but there is no issue about the PMMIS computer in this case. (There was a delay in posting Sanchez Haro's eligibility on PMMIS in May 2017, but this was resolved immediately by a phone call from her attorney.)

IV. THE LEGAL ANALYSIS UNDER RULE 23

As the Court found in March 2017, there is no commonality or typicality even among the experiences of the two plaintiffs and the two others they identified as putative class members. Those facts have not changed. Nor has the additional discovery demonstrated any group of people that the two Plaintiffs represent.

A. The Class Definition is Overbroad.

The Plaintiffs' proposed class definition would include all immigrants whose eligibility was ever reduced from full benefits to FES since January 2015. AHCCCS has already reexamined all these cases. Moreover, the Plaintiffs acknowledge in their complaint that over 3,500 of these people were long ago "reinstated . . . to full-scope AHCCCS." *Doc. 1, ¶ 40*. Hundreds more have followed. These reinstated people have no claim, and the Plaintiffs offer no reason why they should be in the litigation.

Second, the Plaintiffs' original class definition included those whose benefits had been or would be "improperly" reduced. In their new definition, the Plaintiffs omit "improperly." Thus, they seek to include not only the thousands of persons whose benefits were reduced and already restored, but additional thousands whose benefits were reduced and who were reconfirmed ***not*** to be eligible for full benefits. The renewed Motion offers no rationale for including such people or reopening their cases through what Plaintiffs vaguely refer to as "class discovery."

B. The Plaintiffs Fail to Demonstrate Numerosity.

Even if they defined a manageable class and had some evidence to support their argument, the Plaintiffs would still need to meet the requirements of commonality,

numerosity, and typicality in Rule 23(a). As Judge Ferraro concluded, they have not affirmatively demonstrated that they meet any of these requirements.

As to numerosity, the Plaintiffs have identified three people whose benefits were incorrectly reduced. Full benefits were restored to each long ago. The Plaintiffs' original motion speculated "there could be hundreds of cases outstanding." (*Doc. 6, p. 4.*) But none of these people materialized, and the Plaintiffs do not reassert this allegation. It is disingenuous for the Plaintiffs to contend that mistakes are being made without acknowledging that they are also being corrected. There simply is no group of persons who have been, or are likely to be, harmed by any policy or practice of the Director (or by any alleged flaw in the computer).

C. **The Plaintiffs Again Fail to Establish Commonality.**

Class relief is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 155 (1982). "Commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001).

There might have been commonality when the computer problem was discovered in 2015 and it appeared many whose benefits were erroneously reduced could point to a common cause. That problem, however, was fixed on November 19, 2015. *Doc. 124-1, ¶ 16.* AHCCCS demonstrated that the reasons erroneous reductions have occurred since 2015 were a) information from recipients that was

incorrect, conflicting, or withheld and b) human error by eligibility workers and applicants, ***not*** an AHCCCS policy or practice. *Doc. 39-1, ¶ 20-21.* The facts discovered subsequently do not change this.

As the Court noted in its earlier ruling, the Plaintiffs have the burden to prove that there is some glue that "hold[s] the alleged reasons for all those [reductions] together." *Doc. 86, p. 22, citing Wal-Mart Stores, Inc*., 564 U.S. at 352. The Plaintiffs have not established *any* policy or practice of the Director that violates the law or is causing determination errors, only a computer design they think could be improved. Thought the Complaint alleges the unlawful policies and practices of the Director include "unnecessary" requests for individuals' identification numbers or immigration status and the failure to properly use pre-populated forms under the federal *ex parte* process (Doc. 1, ¶¶ 47-51), the Plaintiffs' Renewed Motion does not argue the named Plaintiffs experienced any violation of the *ex parte* process or unnecessary requests for interviews or information. There continues to be no factual connection between these alleged AHCCCS practices and their own cases.

The Renewed Motion argues they have now "identified ample evidence of systemic errors in processing qualified immigrants' renewal applications" with "one, singular, underlying cause: the HEAplus computer system." *Doc. 198, 18.* As discussed above, all Plaintiffs have shown is that the computer does carry display information as they would like, and even DES's Marvin Hamman testified the display issues are not causing errors in determinations.

As AHCCCS's Tara Lockner explained, Darjee's reduction resulted from simple failures to key in data, not computer error; Sanchez Haro's 2016 reduction was the result of conflicting information from her that had to be resolved by information from the federal database, which showed information that conflicted with what was available to DES and AHCCCS; and human error, not failure of the HEAplus system, occurred again with Ms. Sanchez Haro's case in March 2017. *Doc. 124-1, ¶¶ 16, 28, 29.*[7] The error in Sanchez Haro's case in October 2017 occurred when she reported changes to her food stamp eligibility and the worker inexplicably ran medical assistance at the same time. There was no computer error; the EW failed to review the case notes that plainly told him to afford full AHCCCS eligibility. *Doc. 164-1, ¶¶ 2-9.* The EW also failed to have his supervisor review the disposition. *Ex. C, 172.*[8]

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[7] Plaintiffs say there is no evidence of errors by applicants, but Sanchez Haro's case is full of them. *Doc. 124-1, ¶ 29.* Another example is when she called DES on May 17, 2016, to ask about her benefits. The DES worker understood her to say she had only been a resident for two years, and Sanchez Haro did not correct her. *Doc. 124-5.*

[8] Because a change was being processed, the HEAplus system automatically submitted Sanchez Haro's name to the federal Verified Lawful Presence (VLP) system. *Id., ¶ 3.* The VLP system provides the most current immigration status information. It reported that Ms. Haro was a lawful permanent resident and had a grant of, and an entry date for, that status of 1/13/2015. *Doc. 155-1, Ex. 28.* This VLP information carries forward onto the HEAplus application. The VLP system, however, does not provide information on prior Battered Non-Citizen status. VLP reported Sanchez Haro had not met the 5-year bar. *Id., p. 1.* The 2015 date from VLP thus automatically caused HEAplus to screen Ms. Sanchez Haro as being ***potentially*** eligible only for FES because the 2015 grant date appears inconsistent with whether she had met the 5-year bar and is eligible for full benefits. *Doc. 164-1, ¶ 5.* At this point, the computer ***could not*** reduce her benefits; it pended the application for an EW to decide how to disposition her case after reviewing the information in her file. Among other things, the case notes from her prior application in February 2017 made sure to state, "SHE IS ELIGILE FOR FULL COVERAGE." *Doc. 117-1, at 130.* The EW nevertheless incorrectly decided to reduce Sanchez Haro's eligibility to FES, and he failed to take

These cases show no single source of error, much less any evidence that the mistakes are pursuant to Defendant's policies or a computer flaw. There is no commonality here; each person's reduction in benefits is a unique story.

The Plaintiffs' unsupported conclusion that, "The source of the problem is that the immigration information that the Defendant entered into the HEAplus computer system continues to generate an incorrect determination because of the computer system's own flaws and functions" has no basis at all. *Doc. 154, p. 2.* The HEAplus system generated correct information. The application summary shows Sanchez Haro's grant date as reported by the VLP system. *Doc. 154-1 at 6-9.* The computer is not keyed to show she has a verified continuous U.S. residence since 1996 because such residence has never in fact been verified by AHCCCS (and does not need to be because of her full benefit eligibility on other grounds). *Doc. 164-1, ¶ 4.*

More importantly, the computer did not make the eligibility determination. The incorrect disposition was made by the eligibility worker, Jorge Quevedo, who was reprimanded for how he processed the case. *Ex. C. 15:10-18:7.* As DES's Michael Farquhar testified on September 18, 2017, any EW who reviewed the case note quoted in footnote 8 above should find her eligible for full benefits. *Doc. 124-4, 173:11-174:13.* This worker simply didn't. And he compounded his error by not taking the application to his supervisor for review. The new evidence regarding Sanchez Haro's

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this decision to his supervisor for review, as required by DES policy and procedure *(Doc. 124-7). Ex. C hereto, 162:17-163:10.*

case therefore does nothing to show a common issue of fact or law to support certification of a class. Each time she has been incorrectly determined has been because of a different kind of human error.

The Plaintiffs suggest this case is analogous to *M.K.B. v. Eggleston*, 445 F. Supp. 2d 400, 411 (S.D.N.Y. 2006), in which the plaintiffs showed dozens of individuals had been denied benefits for a variety of systemic reasons, including legally erroneous policies and directives, staff who were "completely unfamiliar" with the legal requirements for eligibility, and a computer system that was designed so that "workers were often unable to open a case [] for a battered qualified alien." The plaintiffs in that case demonstrated evidence of each of these faults in detail for person after person whose benefits had been denied. They demonstrated that the defendants had been slow to recognize or correct these problems.

There is nothing comparable in this case. Plaintiffs have identified no erroneous policies or directives, no unfamiliarity of EWs with legal requirements, no computer system that makes it impossible to process immigrant applicants, and no one whose benefits have been denied. To the contrary, the evidence shows AHCCCS and DES took immediate, effective steps to deal with the 2015 problem, to further train DES workers, and to reduce and prevent errors both by 1) instituting the triple-check procedure that must be followed before anyone can be reduced to FES eligibility, 2) more training, and 3) planned enhancements to the system through the pending System Request 392.

Given the lack of evidence of anyone being denied prompt eligibility determinations, the Plaintiffs for the first time in this case, in their Reply in support of the Renewed Motion, suggested it is enough that putative class members "are *at risk* of suffering, the same injury—the improper determination that they are eligible only for emergency benefits." *Doc. 132, at 6 (emphasis added).* As support for this new theory, they cite *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014). *Parsons*, however, construed prisoners' constitutional rights under the Eighth Amendment, not statutory rights under Medicaid laws. We find no Ninth Circuit decision that applies *Parsons* to Medicaid, and *Parsons* itself has been roundly criticized, including by six justices of the Ninth Circuit in *Parsons v. Ryan*, 784 F.3d 571 (2015).

Moreover, this latest formulation of what they call the "same injury," i.e. improper determinations, simply asks whether the class members have "all suffered a violation of the same provision of law," which *Wal-Mart* forbids. *Wal-Mart*, 564 U.S. at 350. Where, the issue is human error, not a systemic policy or practice, there is no basis for class certification. [9]

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[9] The Supreme Court's decision in *Tyson Foods* confirmed that claims that require inquiry into the circumstances of each class member are not capable of class-wide resolution. "An individual question is one where "members of a proposed class will need to present evidence that varies from member to member," while a common question is one where "the same evidence will suffice for each member to make a *prima facie* showing [or] the issue is susceptible to generalized, class-wide proof." *Tyson Foods*, 136 S. Ct. at 1045 (2016)(citation omitted). *Tyson* confirmed (at 1048) it is not enough to merely be similarly situated to another who has a claim. "Since the Court [in *Dukes*] held that the employees were not similarly situated, none of them could have prevailed in an individual suit by relying on depositions detailing the ways in which other employees were discriminated against by their particular store managers."

And, even if "risk" of incorrect determinations were a sufficient test of a sufficient injury, the fact that all but five of these errors were caught and corrected before the person's eligibility was adversely affected indicates the system is *working* and that applicants have an infinitesimal risk of actually having their benefits incorrectly reduced. Even *Unan v. Lyon,* 853 F. 3rd 279, 288 (6th Cir. 2106), on which the Plaintiffs rely, notes that "Perfect compliance with such a complex set of requirements is practically impossible, and we will not infer congressional intent that a state achieve the impossible."

The Plaintiffs have failed to demonstrate a glue that holds the purported class together. There is no more commonality this year than there was when the original motion was denied. Each person's (temporary) reduction in benefits is a unique story.

D. The Plaintiffs Again Fail to Establish Typicality

The errors in this process cannot be traced to some flaw in the HEAplus system. Instead, the errors are idiosyncratic to each case, stemming from incomplete, inaccurate, or conflicting information; the failure of an applicant or eligibility worker to correctly key information into the computer; or the failure of an eligibility worker to find and accurately analyze available information.

The evidence the Court cited in ruling that the claims of the two named plaintiffs and the two putative class members the Plaintiffs cited are not typical even of each other has not changed. *Doc. 86, p. 23.* The Named Plaintiffs are typical only in that 1) AHCCCS has restored their benefits and 2) human errors come in a variety of forms.

E. The Plaintiffs Again Fail to Meet the Requirements of Rule 23(b)

The Plaintiffs also fail under Rule 23(b)(2), which requires that they show that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Courts look at whether class members seek uniform relief from a "pattern or practice that is generally applicable to the class as a whole." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010). These Plaintiffs have shown no pattern or practice, only a variety of mistakes by applicants and EWs peculiar to the facts of the various applications.

The Plaintiffs fail to explain how the injunction they request to prevent AHCCCS from determining anyone to be eligible only for FES benefits would help the situation or even make sense. They admit some errors are "inevitable." *Doc. 198, at 12.*[10] The Plaintiffs fail to explain, either through expert testimony or their own speculation, how this amount of human error can be eliminated, much less how the Court could fashion an injunction that would accomplish this. As one witness put it, "There is no way to lock down every possible worker or customer error." *Ex. Swenson 115:25-116:1.*

V. THE ALTERNATIVE MOTION FOR CLASS DISCOVERY SHOULD BE DENIED.

[10] The federal government allows a 3% margin of error in eligibility determinations. *81 FR 40596-01, 2016 WL 3402966 (F.R.).* Here, the erroneous initial determinations are slightly over 1% of immigrant renewals, and the more relevant figure of final determinations is 5 out of approximately 61,000.

The tacit premise of the Renewed Motion and Objections is that there is a class of people whose benefits either a) were incorrectly reduced but not restored or b) will be incorrectly reduced but not restored. There are no such groups. After investigation, every person known to Defendant whose benefits were incorrectly reduced has been restored to full benefits, most of them in early 2016. As to the present and future, DES uses a rigorous triple-check procedure whenever anyone who has full benefits might be transferred to FES benefits. This process ensures, to the extent reasonably possible, that applicants will not be reduced incorrectly to FES benefits.

Plaintiffs' Motion offers no rationale for interrupting the ongoing process. They fail to explain what more could be accomplished by injunctive relief. Certifying the class proposed by the Plaintiffs would create a staggering burden for AHCCCS and DES. Thousands of pages of documents and eight depositions have been entailed in the two Plaintiffs' cases; multiply this by the thousands of immigrants whose eligibility has been renewed since January 2015 and AHCCCS and DES would have to divert scores of people full-time to retrieve, redact, produce, review again, and answer questions about all these cases.

The "class discovery" Plaintiffs request is simply a request for a fishing license. They fail to explain what they think they would find or how likely it is there is anything to find, even assuming they had the time and resources to reconstruct the particular facts and analyses that led to the particular determinations in thousands of cases. Since Plaintiffs do not dispute that past mistakes have been corrected or that new mistakes are being corrected on an ongoing basis, it is difficult to conceive of a

justification for the disproportionate burden such discovery would place on AHCCCS and DES. The Magistrate Judge's recommended denial of this motion is correct.

CONCLUSION

After patiently hearing and examining the Plaintiffs' arguments for a second time, Judge Ferraro found the Plaintiffs' Renewed Motion for Class Certification deficient on all grounds except adequacy of representation. His factual findings are not clearly erroneous. His legal analysis is not contrary to law. He has correctly cut to the heart of the analysis in emphasizing that Plaintiffs have failed to affirmatively demonstrate the existence of any class of people they represent whose rights to reasonable promptness in the determination of their Medicaid eligibility have been violated. The Plaintiffs' Objections should be overruled.

RESPECTFULLY SUBMITTED this 23rd day of March, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 23, 2018, he electronically transmitted the foregoing Response to Plaintiffs' Objections to the Clerk's Office using the ECF System for filing and transmittal of a Notice of Electronic filing to the following CM/ECF registrants:

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