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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 MOTION FOR CLASS CERTIFICATION** **(Oral Argument Requested)**

Defendant Thomas Betlach, Director of the Arizona Health Care Cost Containment System ("AHCCCS"), hereby responds in opposition to the Plaintiffs' Motion for Class Certification ("Motion"). This Response is supported by the Declaration of Tara Lockner ("Exhibit A") and exhibits thereto.

I. Class Certification Standard

As the Supreme Court has summarized, a plaintiff seeking certification of a class may not simply assert that class certification is appropriate.

> 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).

In this case, we are at the pleading stage. The Plaintiffs have established very little of what has "*in fact*" occurred that might justify class certification. They have implied thousands of people are suffering as a result of unlawful policies and practices of the Director when this is simply not true. They support their Motion with few facts and rely instead upon speculation and assumption that any erroneous reduction in benefits must be the Director's fault and something this Court can readily prevent. We counter here with detailed information about the Plaintiffs' and Ms. Nyirandekeyaho's cases, the process AHCCCS actually uses, and why occasional errors occur.

We respectfully submit that a "rigorous analysis" of the record available to the Court requires denial of the Plaintiffs' Motion. Their Motion can and should also be denied for their lack of standing, their overbroad class definition, and their failure to carry their burden under Rules 23(a) and 23(b)(2).

II. The Plaintiffs have No Standing

First, as argued in the Director's Motion to Dismiss, the Plaintiffs must affirmatively demonstrate they have standing. They must show the following:

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

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (quotation marks and citations omitted). "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly ... allege facts demonstrating' each element" of the standing analysis." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016), *as revised* (May 24, 2016) (citation omitted).

Ms. Darjee has no standing because the restoration of her benefits was "imminent if not complete" even before the Complaint was filed. Ms. Sanchez Haro has no standing, first, because she has failed to trace her claimed injury to *any* unlawful policy or practice of the Director. To the contrary, the evidence is that information she provided was conflicting and when DES checked this information with the SAVE computer system run by the United States Citizenship and Immigration Service there was no confirmation she had either met, or was exempt from, the 5-year ban on full Medicaid benefits required by 8 U.S.C. § 1613(b). *Ex.A*, ¶ *31*. Second, she has been retroactively restored to full benefits. "[W]e have repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013) (citations omitted) (emphasis in original). Ms.

Sanchez Haro cannot allege any certainly impending injury. Her injury has been redressed, and the declaratory and injunctive relief she seeks would not benefit her. Her claims for such relief are moot.

Nor does she have standing simply because she seeks to represent a class. She would have to first do more than simply allege that she had been harmed by the Director. But then she would have to show her claim is "inherently transitory," i.e. one that "would evade review, either by its very nature or by virtue of the defendant's litigation strategy." *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033, 1048 (9th Cir. 2014). Claims of incorrect reduction in benefits are *not* claims that evade review: every person whose benefits are reduced is sent a notice of that action, which includes prominent notice of the right to appeal the change in benefits and the right to continued full benefits while the appeal is pending. Moreover, AHCCCS has been engaged for months in periodically reviewing every reduction of an immigrant's benefits from full to emergency-only (FES) benefits. It is catching the errors and restoring people retroactively to full benefits even in the absence of an appeal. *Ex. A*, ¶ *19.* Had Ms. Sanchez Haro availed herself of this right, her benefits would not have been interrupted. And her benefits were restored because of this on-going review process, not because of any "litigation strategy." Since neither Plaintiff has shown any ongoing harm or impending threat of harm, they lack standing.

III. The Class Definition is Vague

"A judge faced with a motion for class certification must decide whether the record is sufficient to determine if the prerequisites of Rule 23 have been met and, if

so, how to define the class." *Manual for Complex Litigation Fourth*, § 21.14, p. 255 (2004). Class definition is "of critical importance." *Id.* § 21.122, p. 270.

Here, even if the Plaintiffs had standing, the class definition they propose is unworkable: "All immigrant residents of Arizona eligible for full-scope AHCCCS benefits who, on or after January 1, 2015, have been or will be required to recertify their eligibility for AHCCCS and whose benefits have been or will be improperly reduced from full-scope AHCCCS to emergency-only AHCCCS." *Dkt. 5.* This definition is vague and ambiguous. "Improperly reduced" could mean reductions that were erroneous on their merits or it could mean any reduction that followed a notice the Plaintiffs consider unlawful.

IV. The Class Definition is Indefinite and Overbroad and would make the Action Unmanageable.

Under either interpretation, the class definition is overbroad. The class would include thousands of persons who have already had full benefits restored. Worse, it would include thousands of persons who have been reconfirmed in the last ten months *not* to be eligible for full benefits.

A proposed class defined in terms of persons who suffered "improper" benefit reductions is fatally flawed. In order to determine who is in the class it would be necessary to sort through the facts and merits of thousands of persons' situations to ascertain whose benefits were indeed improperly reduced. It is simply incorrect for the Plaintiffs to say, "Once eligible for full-scope AHCCCS, they continue to be eligible." *Motion, p. 2.* As explained in the Director's Response to Motion for Preliminary

Injunction (pp. 7-8), there are many legal and factual reasons why immigration status may change and why each case must be examined each year. Each case is unique. While some, like Darjee's, may be easy for someone familiar with the Medicaid and immigration standards to determine, many others like Sanchez Haro's, are not at all.

> The problem with this proposed class definition is that the court could not determine whether any individual was a member of the class without hearing evidence on what would amount to the merits of each person's claim. Where that type of inquiry is needed to determine whether a person is a member of a class, the proposed class action is unmanageable virtually by definition.

Bledsoe v. Combs, 2000 WL 661094, *4 (S.D. Ind 2000). *See also Jamie S. v. Milwaukee Public Schools,* 668 F.3d 481, 498 (7th Cir. 2012) (lack of systemic failure would require "an inherently particularized inquiry into the circumstances of [each plaintiff's] case."). Under the Plaintiffs' class definition the case would have none of "the efficiency and economy of litigation" that is a "principal purpose" of class action procedure. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553 (1974).

If the Plaintiffs mean to define a class in terms of those who receive an improper notice, they cut an even wider swath. To identify such class members would not only require individual determinations of whose benefits were erroneously reduced, but would add a second layer of potential "impropriety" as to the notices these individuals received. Even persons correctly determined, *either for full benefits or for emergency services only*, would still – according to the Plaintiffs – be harmed if the Plaintiffs can establish any defect in the notice these persons received.

Under either interpretation of the ambiguous definition they propose, the Plaintiffs would be asking that the class include thousands who have no claim because their benefits have already been restored as well as additional thousands whom AHCCCS has determined to be *ineligible* for full benefits. They are implicitly asking the Court to ignore the work AHCCCS has done over the last year in reexamining thousands of cases and to instead reopen these cases.

Plaintiffs' counsel did not seek judicial relief in October 2015 when the computer problem was discovered. They waited until after that problem was fixed, after AHCCCS had spent ten months reexamining all cases of persons reduced from full to FES benefits since January 2014, and after AHCCCS had restored full benefits for every person found to have been reduced in error. As their Complaint alleges, AHCCCS restored benefits to over 3,500 people. Their Motion admits AHCCCS restored full benefits to an additional 67 persons who were brought to its attention over the ensuing months by attorney Anne Ryan. They admit "advocacy" on behalf of Ms. Darjee succeeded in restoring her benefits even before the Complaint was filed. Yet with Ms. Sanchez Haro, instead of making hers the 3,568th cooperative restoration, Plaintiffs' counsel chose to bring this action instead.

The Plaintiffs offer no reason or rationale for ignoring the last ten months of effort or for interrupting or replacing the ongoing process that has restored every person identified in the reexaminations AHCCCS has conducted. The Plaintiffs have not alleged that *anyone* AHCCCS reexamined and again found to be ineligible should

have been found eligible. They have not identified anyone whose benefits have not been restored.

Absent any evidence or even allegation that AHCCCS has acted incorrectly over the last ten months, certifying such a class promotes a waste of time and scarce resources. More importantly, if individuals cannot be determined to be class members except by a (third) extensive factual inquiry as to each person, the proposed class is unmanageable by definition.

V. The Plaintiffs Fail to Establish Commonality.

Even if they had standing and even if they defined a manageable class, the Plaintiffs would still need to establish they meet the requirements of Rule 23(a): commonality, numerosity, typicality, and adequacy of representation. We respectfully submit they have not shown they meet any of these requirements.

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). As the Plaintiffs note, "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 most persons whose benefits were erroneously reduced suffered from a common cause. That problem, however, was fixed last November. And, since then, AHCCCS has reexamined the eligibility of all immigrants

whose benefits were reduced since January 2014 from full to emergency-only. The errors have been identified, and all but a tiny fraction of people whose benefits were reduced erroneously for *any* reason have been restored to full benefits, and even the remaining fraction will have restored benefits by September 14, 2016. *Ex. A, ¶ 19.*

The reasons for these erroneous reductions were information from recipients that was incorrect, conflicting, or withheld and human error by eligibility workers – not an AHCCCS policy or practice. *Id., ¶ 20-21.*

> To show commonality, Plaintiffs must demonstrate that there are questions of fact and law that are common to the class. The requirements of Rule 23(a)(2) have "been construed permissively," and "[a]ll questions of fact and law need not be common to satisfy the rule." However, it is insufficient to merely allege any common question, for example, "Were Plaintiffs passed over for promotion?" Instead, they must pose a question that "will produce a common answer to the crucial question *why was I disfavored.*" ("What matters to class certification is not the raising of common 'questions' ... but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.")

Ellis v. Costco Wholesale Corp., 657 F.3d 970, 978 (9th Cir. 2011) (internal citation, alteration, and quotation marks omitted) (emphasis in original).

It is not enough for these Plaintiffs to merely allege a common question, "Were the putative class members erroneously reduced in eligibility?" The question is *why* they were reduced and whether the facts allow a common answer. The Plaintiffs grossly misstate the situation by saying, "All of the putative class members are eligible for the full-scope AHCCCS Medicaid program due to their immigrant status and limited incomes and resources." *Motion, 6.* Instead, we see that, of the post-computer fix reductions in benefits, over 77% were correctly found to be ineligible for these

benefits and that the legal and factual circumstances and issues that must be sorted out for each prospective class member vary widely. *Ex. A*, ¶¶ *19-21*. AHCCCS knows, as the Plaintiffs do not, the reasons for the errors that have occurred in the Plaintiffs' cases, and they have nothing to do with an unlawful policy or practice. The bottom line is there is no common cause for the errors that are made both by eligibility workers and by recipients. Nor would the injunction the Plaintiffs propose prevent such errors or provide a common answer to them.

"[A] district court *must* consider the merits if they overlap with the Rule 23(a) requirements." *Ellis, supra,* 657 F. 3d at 981, citing *Wal–Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 351 (2011) and *Hanon v. Dataproducts Corp.,* 976 F.2d 497, 509 (9th Cir.1992) (emphasis in original). Here, when the Plaintiffs allege that the Director's policies and practices are the cause of each person's problems, they cite their own allegations rather than evidence. As discussed in the Director's Motion to Dismiss, the Plaintiffs have not even properly alleged, much less established, *any* policy or practice of the Director that violates the law and is causing any errors. We have no more than vague allegations and untested declarations in the record from the Plaintiffs. This void is more than offset by the Declaration of Tara Lockner, which offers facts rather than theory and refutes the Plaintiffs' speculative assumptions.

For example, 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. Complaint, ¶¶ 47-51. The Motion suggests (p. 7) there are

common questions as the reasonable promptness issue because of "computer system errors and the failure to utilize the ex parte process." But the Plaintiffs know the computer problem was fixed months ago and neither Plaintiff (nor Ms. Nyirandekeyaho) suggests she was required to provide an alien identification number or her immigration status. Neither claims she was presented with a pre-populated form under the *ex parte* process. There is no factual connection between the AHCCCS practices that the Plaintiffs condemn and their own cases.

Ms. Lockner gives the date the computer problem was fixed. She explains that Darjee's and Nyirandekeyaho's reductions resulted from simple failures to key in data, not computer error. Sanchez Haro's 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. The Plaintiffs' examples show there is not a single source of error and that the errors do not stem from any unlawful practice or policy of the Director. There is no commonality here; each person's reduction in benefits is a unique story.

Similarly, the Plaintiffs make many arguments as to alleged defects in the AHCCCS notices, but they fail to specify how these defects violate the law other than to cite their own allegations and say the "totality" of these defects violates the law. Their Declarants, however, do not say anything to support these alleged defects, and they do not contend they were prejudiced in any way by the notices they received. Darjee says she got no notice. Sanchez Haro and Nyirandekeyaho say nothing about the notices, except for conclusory statements that they could not understand the notices.

In Ms. Nyirandekeyaho's case this was because the notice was in English, not Kirundi. The Plaintiffs correctly do not argue AHCCCS had an obligation to put her notice in Kirundi. So the issue as to notice reduces to Sanchez Haro's statements that she could not understand why her benefits were reduced. Especially since she contacted DES promptly to argue her benefits should not have been reduced, we submit one ambiguous, untested paragraph in her Declaration does not meet the Plaintiffs' burden to demonstrate commonality as to their notice allegations.

VI. The Plaintiffs Fail to Demonstrate Numerosity.

As to numerosity, the Plaintiffs have identified only three people whose benefits were incorrectly reduced. Each now has full benefits. The Plaintiffs' Motion speculates "there could be hundreds of cases outstanding and new cases each day." (Motion, p. 4.) In fact, there are not. AHCCCS has reexamined cases where benefits were reduced and those that were incorrectly reduced have been fully restored. *Ex. A,* ¶¶ *16-19*.

The Plaintiffs are undoubtedly correct there will be some additional errors. But they forget three things: 1) AHCCCS is already looking for and redressing these as they are identified, 2) each individual has an adequate remedy by appeal, and 3) the Plaintiffs have failed to connect any likelihood of these errors to an unlawful policy or practice of the Director. The Plaintiffs have failed to demonstrate there is a numerous group of people who will be affected by any unlawful practice or policy of the Director or that the errors that may occur can more effectively be handled by the Court than by the ongoing review and appeal processes.

VII. The Plaintiffs fail to Establish Typicality

"The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon, supra,* 976 F.2d at 508. If the Named Plaintiffs are typical of anyone, they are typical of the thousands of people whose benefits AHCCCS has already corrected. The Plaintiffs have not established any factual basis on which to conclude they as individuals were subjected to any unlawful policy or practice of the Director or that any such policies and practices threaten anyone else. On the record to date, there is no basis to believe Ms. Darjee's and Ms. Niyairandekeyaho's reductions in eligibility were anything other than human error. As to Ms. Sanchez Haro, her eligibility was reduced because the reliable information available from her and from the federal government at the time of renewal did not show her to be eligible.

If the Plaintiffs reply that these three are at least typical of people who received an unlawful notice, that also is, as discussed above, a much disputed argument that so far is based solely on one ambiguous paragraph in the Declaration of Sanchez Haro.

VIII. The Plaintiffs fail to Establish Adequacy of Representation:

There are two parts to the adequacy of representation factor: "1) The representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Senter v. General Motors Corp.,* 532 F.2d 511, 525 (6th Cir.1976), *cert den,* 429 U.S. 870 (1976). "A class representative must be part of

the class and 'possess the same interest and suffer the same injury' as the class members." *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977).

Here, the relief the purported class seeks would redress no injury or threatened injury to either of the Named Plaintiffs, so they are not adequate representatives of anyone whose benefits may have been incorrectly reduced and not restored. *See Ellis supra*, 657 F.3d at 978 (terminated employees' claims for discrimination in promotion were moot and they were not adequate representatives of existing Costco employees for whom injunction might afford relief). Nor do these Plaintiffs have any impending threat of harm. They have no incentive to represent others, since their own benefits have been fully restored.

Plaintiffs' counsel is certainly competent but may have two conflicts. First, just as they were able to get full benefits restored with no difficulty for 3,567 people, including Darjee, without litigation, so they could have done the same with Sanchez Haro. If they instead waited to notify AHCCCS of her case by means of the Complaint herein, they did her no favor and may well be responsible for the difficulties she describes while her case was being reexamined. Their choice to file this action instead is also in conflict with the interests of the thousands of individuals whose benefits have been restored. These people have nothing to gain from this litigation and, if their eligibility must be reopened to reexamine whether they were "improperly reduced" in benefits, they may lose benefits they are now enjoying.

IX. The Plaintiffs fail to Meet the Requirements of Rule 23(b)(2).

Finally, even if they had standing, had properly defined a manageable class, and were able to meet the requirements of Rule 23(a), the Plaintiffs would still have to meet the requirements of 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).

Here, the Plaintiffs cannot demonstrate the relief they request would be appropriate for the class as a whole. People like themselves whose benefits have been restored would derive no benefit from the relief the Plaintiffs seek. For others, those whose reductions were upheld when AHCCCS reexamined their cases, the requested injunction would merely serve to make ineligible persons eligible. The Plaintiffs do not explain why this makes sense or why the federal government would pay for such persons' services.

As to the notice issue, they seek to come within Rule 23(b)(2) by simply asking that the Director be ordered not to violate the law. *Id.*, *Request C.* But "an injunction to obey the law, [is] too vague to satisfy Rule 65(d)." *Vallario v. Vandehey*, 554 F.3d 1259, 1268 (10th Cir. 2009) (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, Director Betlach requests that the Motion for Class Certification be denied.

RESPECTFULLY SUBMITTED this 9th day of September, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 9, 2016, he electronically transmitted the foregoing Defendant's Response to Motion for Preliminary Injunction 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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