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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)

REPLY IN SUPPORT OF MOTION TO DISMISS

Replying in support of his Motion to Dismiss, Director Betlach states as follows.

I. The First Claim for Reasonable Promptness Fails to State a Claim.

A. This is not a Reasonable Promptness Case.

The plain language of the reasonable promptness statute, 42 U.S.C. § 1396a(a)(8), has to do with providing opportunity to apply for Medicaid and timely determinations of eligibility. The implementing rules and cases construing reasonable promptness reflect this. 42 C.F.R. § 935.912 ("Timely determination of eligibility") (requiring application to be decided within 45 or 90 days). *Sobky v. Smoley,* 855 F.Supp. 1123, 1148 (E.D. Cal. 1994) (reasonable promptness statute intended to prohibit waiting lists). *See also Wilson*

1 *v. Gordon*, 822 F.3d 934 (6th Cir. 2016), in which Plaintiffs' counsel represented the
2 plaintiffs (failure to decide initial applications for Medicaid within 45 and 90-day limits).
3 The Complaint, however, alleges (¶ 18) that reasonable promptness "implies"
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5 that "assistance may not be terminated until a person is *properly* found ineligible."
6 (Emphasis in original.) The plain language of 42 C.F.R. § 435.930(b) simply says a
7 state must cover a person until they are *ineligible* (for *any* benefits). *See e.g., Crippen*
8 *v. Kheder*, 741 F.2d 102, 106–07 (6th Cir. 1984) (wrongly terminating Medicaid
9 without determining the person's eligibility for other categories of Medicaid). Neither
10 the reasonable promptness statute nor 42 C.F.R. § 435.930(b) makes mistaken
11 reductions in eligibility that do not terminate the person's coverage a violation of these
12 laws. If they did, *every* mistake in a determination of benefits would violate 42 C.F.R.
13 § 435.930(b) and there would be many, many cases citing it and the reasonable
14 promptness statute as reasons to find the determination unlawful. [1]
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17 Instead, only one case in the history of Medicaid supports the theory that
18 reasonable promptness was intended to require error-free renewals of benefits, as
19 opposed to timely initial determinations and provision of services. In *Romano v.*
20 *Greenstein,* 2012 WL 1745526 (E.D. La. 2012), *aff'd*, 721 F.3d 373 (5th Cir. 2013), the
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23 [1] The federal government provides no support for the Plaintiffs' theory. Its discussion of erroneous terminations does not even mention 42 C.F.R. § 435.930(b). It says instead: "If there is a pattern of incorrect terminations, the Medicaid agency is responsible for taking corrective action. Beneficiaries also have the right to appeal any termination that they believe is erroneous, as described in § 431.220. " *Medicaid Program; Eligiblity Changes Under the Affordable Care Act of 2010, 77 FR 17144-01, 17183-17184*.
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Louisiana Medicaid agency incorrectly determined the plaintiff was no longer eligible for Medicaid. The court reasoned:

> A Medicaid regulation implementing [the reasonable promptness] statute provides that "[t]he agency must ... continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible." 42 C.F.R. § 435.930(b). This provision implies that assistance may not be terminated until an individual is *properly* found ineligible.

2012 WL 1745526, at *8 (footnotes omitted) (emphasis in original). On appeal, the Fifth Circuit did not consider or comment on the merits.

On its face and by its own logic, *Romano* does not apply here, since neither Plaintiff was found ineligible or terminated. The Plaintiffs seek to extend the decision to renewal errors, but no court has held that reasonable promptness or 42 C.F.R. § 435.930(b) reaches incorrect categorization of benefits. The *Romano* court supported its conclusion by citing two cases, like *Crippen, supra,* in which all benefits were terminated without determining whether the person qualified for other eligibility categories. Neither case held that a mistaken determination where the person continues to be eligible for Medicaid violates 42 C.F.R. § 435.930(b). The Plaintiffs misread *Romano* to mean something neither the rule nor the reasonable promptness statute says or implies. The Plaintiffs' remedy was to appeal pursuant to the rights afforded them under 42 U.S.C. § 1396a(a)(3), not to make a claim over reasonable promptness.

B. The Plaintiffs' Explicit Reasonable Promptness Theories Fail.

At ¶¶ 46-51, the Plaintiffs offer vague (and incorrect) conclusory allegations that AHCCCS "policies and practices" are either not as "comprehensive" as the federal rules or are applied "inconsistent with" federal rules because they "allow" eligibility

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workers to ask about alien identification numbers and immigration status, which induces recipients to make errors in their own submissions to AHCCCS.

First, the Complaint fails to tie these allegations to either of the Plaintiffs. The Response does not deny this. Neither Plaintiff alleges that AHCCCS asked for their alien identification numbers or their immigration status or sent them a pre-populated request for further information under the *ex parte* procedures. [2]

Second, the Response argues (p. 7) that AHCCCS, as a matter of policy or practice, "fails to consult available data sources that would lead to correct eligibility determinations," e.g. as to Sanchez Haro and Darjee. To the contrary, AHCCCS rules and policies explicitly ***require*** eligibility workers to consult the very databases the Plaintiffs claim AHCCCS policy says to disregard. [3] Thus, if any eligibility worker failed to check available databases, this was simply the eligibility worker's mistake and was contrary to, not evidence of, AHCCCS policy and practice.

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[2] The Complaint incorrectly alleges the *ex parte* system "must" be followed, omitting the rest of the sentence in 42 C.F.R. 435.916(b): "*if sufficient information* [which must be "reliable" information per 42 C.F.R. 435.916(a)] *is available to do so.*" (Emphasis added.)

[3] A.A.C. R9-22-304.A, 306.A.12, and 306.C.1 all ***require*** use of electronic data matches. The Complaint cites (¶¶ 30, 47-49) policies in the eligibility manual. These too repeatedly ***require*** use of the federal databases, e.g. Policy 1401 says, "Before the end of each customer's eligibility period, AHCCCS and DES use eligibility data from the prior application and the Federal and State Hubs to determine eligibility. If there is enough information available to determine that the customer is still eligible, an approval letter is sent." Policy 524.B adds, "Proof [of eligibility is]: A SAVE VIS response showing a qualified status. If unable to verify the person's status through SAVE VIS, the following documents can be used . . ." *Dkt. 13, Ex. B*; https://www.healthearizonaplus.gov/PolicyManual/EligibilityPolicyManual/index.html#page/MA/MA1400/MA1401.1401_General_Information_about_Renewals.html.

Third, the Response (p. 13) argues that Ms. Sanchez Haro's benefits were reduced "because of AHCCCS' improper requirement that an immigrant be a LPR [Lawful Permanent Resident] for 5 years." This theory is apparently based on what she was told when she called DES to challenge the reduction. *Complaint, ¶ 76*. But the Plaintiffs know this, too, is ***not*** AHCCCS policy. Policy 524.B says in pertinent part, "Noncitizens who have the status of LPR, Parolee or Battered Alien must also meet one of the additional conditions below to get full services MA: ● Has been a qualified noncitizen for at least five years." The policy correctly states an LPR must have completed (past tense) the 5-year bar period, not that she has to complete such a period while an LPR. If indeed Ms. Sanchez Haro's status was changed for the reason expressed by the DES personnel, then this was an error ***contrary to*** AHCCCS policy.

Plaintiffs simply fail to state any claim for violation of reasonable promptness. [4]

C. The Response's Suggestion of a Theory that the 2015 Computer Error was not Fixed is Implausible and cannot save the First Claim for Relief.

The main thrust of the Response on the First Claim is that the Plaintiffs have not admitted (p. 5) the October 2015 AHCCCS computer problem was fixed and therefore their Complaint is susceptible of a reading that this computer problem may have caused the reductions in Plaintiffs' benefits. This argument does not pass the Supreme Court's plausibility test. The Plaintiffs say their complaint may survive even if proof of what it

[4] Paragraphs 42-44 allege, on information and belief, that the AHCCCS computers may come to different results than food stamp determinations for the same individual. This also proves nothing. Plaintiffs do not allege that the food stamp eligibility process is itself error-free, much less that eligibility for food stamps automatically meets Medicaid's immigration requirements for non-citizen recipients.

alleges is "improbable" or recovery seems "very remote and unlikely." But the predicate for such survival is two-fold: the complaint must be "well-pleaded," and the allegation must be "plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). This Complaint fails both tests, since, as discussed above, there is no well-pleaded allegation of a violation of reasonable promptness.

Their computer error theory is that eleven months ago AHCCCS admitted that a computer problem and worker errors had caused some people's full benefits to be incorrectly reduced. It thereupon restored 3,500 people to full benefits, but, so the Plaintiffs now suggest, it did not fix the problem. If the Plaintiffs believed this, it would have been easy and logical to allege it. Indeed, it is *implausible* that they would not have directly alleged such a blatant ongoing problem, especially given how vague their other allegations of unlawful "policies and practices" are. Instead, they carefully alleged (¶ 45) only that AHCCCS had admitted that there "were" problems, not that they continued.

It is further *implausible* that counsel did not ask AHCCCS if the problem had been fixed. If AHCCCS had refused to answer or, worse yet, said the problem was continuing, it is again *implausible* that counsel would not have alleged this. But the Complaint alleges "as 2016 progressed, AHCCCS improperly reduced the medical benefits for some immigrants a second time." *Complaint, ¶ 41*. The Complaint does not attribute these errors to the computer problem.

That it is *implausible* that the computer error continues is underscored by the Complaint's lengthy, detailed descriptions of the difficulties the two Plaintiffs

experienced during the time each was reduced to emergency-only services. It is simply neither *plausible nor credible* that Counsel believe "thousands" of people (¶¶ 12(a) and 44) might be suffering similar difficulties month after month, caused by an admitted-but-never-fixed computer error, and yet they did nothing about the issue until Ms. Sanchez Haro and Ms. Darjee appeared. The Complaint does not allege they were victims of computer error. Even now, the Response (p. 5) says only, "Plaintiffs claim that because of systemic computer, case worker ***or*** other processing errors that AHCCCS failed to correct during the nine months after counsel's letter, their benefits were improperly reduced." Their Complaint does not allege even this. We submit they word this argument so carefully and ambiguously because they know it would violate Rule 11 to allege that a problem they ***know*** was fixed continues.

> Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief."

Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (internal citations omitted).

If Counsel believed the computer error had not been fixed, it is *implausible* they would not allege this clearly, either in the Complaint or the Response. Instead, at best, the Plaintiffs are asking the Court to read into their Complaint a "sheer possibility" that the Director refused or was unable to reprogram the AHCCCS computers. This is something the Plaintiffs pointedly do not allege and for which they offer no factual predicate.

Moreover, this would not be a reasonable promptness issue even if it were true.

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II. The Second Claim fails to State a Claim regarding AHCCCS Notices.

Neither the Complaint nor the Response identifies any Medicaid rule the Director violates. [5] The Response does not deny that the supposed notice defects alleged at ¶ 55 of the Complaint are not issues that either Plaintiff raised. Indeed, the *only* allegation either Plaintiff makes as to notice is Ms. Sanchez Haro's that she could not understand her notice. She fails to allege what she could not understand, other than the conclusion that her immigration status did not qualify her for full benefits (*Complaint, ¶ 75*). Failing to specify any violation of 42 U.S.C. § 1396a(a)(3) or of 42 C.F.R. § 431.220, the rule that governs the content of Medicaid notices, the Plaintiffs' Second Claim reduces to a one-sentence subjective claim of lack of understanding that is ambiguous as to what was not understood or why.

The notice the Plaintiffs argue (*Dkt. 13, Ex. A*) is *not* the notice AHCCCS sent either Plaintiff. The *only* facts that support the Complaint's notice allegations are those alleged at ¶¶ 75-76. We know Sanchez Haro was advised of the change in her benefits and what the effect would be. We know the notice told her where she could ask questions because she did so. She does not allege the notice failed to inform her of her rights to appeal and continued benefits if she disagreed with the determination. If she understood these rights, "the principal issue regarding the procedural protections

[5] Instead, the Response improperly argues supposed defects in the notice they attached to their class certification motion. *Dkt. 13, Ex. A*. That document is not only outside the pleadings but it is also, as they know, ***not*** the form of notice that was sent to either Plaintiff. The Response also argues (p. 9) about notices to persons initially found eligible for emergency-only services. *See ¶ 54 of the Complaint*. This group does not include either Plaintiff, and the argument is wholly irrelevant to this case.

afforded Appellant is whether he knew or reasonably should have known that a contested case proceeding . . . was available to him to challenge the disputed action . . . .” *English v. District of Columbia,* 717 F.3d 968, 972 (D.C. Cir. 2013).

Ms. Sanchez Haro does not allege she did not understand a contested case proceeding was available to her. She does not allege she was harmed or prejudiced in any way by the notice or that it erroneously deprived her of her rights. Based on her own allegations, there is no violation of Medicaid or due process requirements.

III. The Plaintiffs' Claims are Moot and the Plaintiffs Lack Standing.

The Plaintiffs fail the second prong of the three standing requirements established by *Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560–61 (1992): they have not traced their injury to *any* unlawful policy or practice of the Director. They allege a computer error existed in 2015 but they do not allege, as they would if they believed it to be true, that the Director failed to fix that problem. They admit eligibility worker and recipient errors cause eligibility determination errors; they misstate AHCCCS rules and policies as standing for the exact opposite of their content; and they try to equate food stamp eligibility with Medicaid eligibility. They admit the Director is restoring benefits whenever he finds anyone whose eligibility was incorrectly determined.

They also fail the third prong of the standing test: Their injuries would not be redressed by a favorable decision in this case because the Director has already restored them to full benefits, and any future claims are entirely speculative.

For these same reasons, the Plaintiffs' claims are also moot. Both Plaintiffs have been restored to full AHCCCS benefits. Neither Plaintiff establishes “a reasonable

expectation that the same complaining party [will] be subject to the same action again," *Spencer v. Kemna,* 523 U.S. 1, 17 (1998).[6] Since the Plaintiffs fail to state a claim as to any AHCCCS policy or practice that caused their problems, neither Plaintiff would benefit from the relief they seek. Even if they could show a reasonable expectation they would again be subject to worker error, worker errors are not something the relief requested would prevent.

The Motion to Dismiss contends the availability of an adequate, prompt administrative and judicial remedy means incorrect eligibility determinations are not inherently likely to evade review. The Response answers (pp. 16-17) by raising the "spectre of plaintiffs filing lawsuit after lawsuit, only to see their claims mooted before they can be resolved." *Barry v. Lyon*, __F.3d __, 2016 WL 4473323 (6th Cir. 2016). This argument has two flaws. First, individual appeals moot these claims with more effective relief than a class action affords. If Sanchez Haro had filed an appeal, she would have received complete relief months before filing this case *and would have avoided any interruption in her benefits.* Second, the merits of one's claim would have to be decided in the class action to determine if one was "improperly" reduced in benefits and entitled to relief. That process would take longer and be without continued benefits prior to the Court's decision on the merits of each individual claim.

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[6] The Complaint alleges no facts as to why Darjee's benefits were reduced in 2015. The Response cites the Declaration of Anne Ryan (*Dkt. 10*) for the proposition that "other immigrants" had their benefits reduced twice in a 3-month period this year. Ms. Ryan says there were two unnamed people whose benefits were reduced for unidentified reasons twice in a year, one of whom had this happen twice within 3 months.

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In this case, if an erroneous determination is made, individuals *are* afforded the opportunity to be heard that the plaintiffs in *Wilson*, for example, were not. The individual can automatically continue her benefits by filing a timely notice of appeal. No such claim is either transitory or inherently capable of evading review. Where the individual has administrative and judicial remedies that protect her, her claim would not be of uncertain, short duration so that it would somehow be resolved before a federal court could certify a class of such persons, if reason for one were to exist.

As to notice, "[T]he first question in any case in which a violation of procedural due process is alleged is whether the plaintiffs have a protected property or liberty interest and, if so, the extent or scope of that interest." *Nozzi v. Housing Authority of City of Los Angeles,* 806 F.3d 1178, 1190 (9th Cir. 2015) (citation omitted). Since the Plaintiffs' benefits have been restored, there is no controversy over a property interest that has not been redressed. The Plaintiffs claim no independent injury, harm, or prejudice from notice of their determinations. If the Plaintiffs can show no "reasonable likelihood" of further reductions of benefits, they also have no reasonable likelihood of receiving another notice of such a reduction. The notice claims are moot.

CONCLUSION

Far from being a case that states a claim for "improper systemic policies and practices" (*Response, p. 17*), this Complaint fails to allege any reasonable promptness issue. The AHCCCS notices comply with Medicaid rules and due process. The Plaintiffs lack standing, and their claims are now moot. The Complaint should be dismissed.

RESPECTFULLY SUBMITTED this 19th day of September, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 19, 2016, he electronically transmitted the foregoing Reply in Support of Defendant's Motion to Dismiss 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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