UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

OSCAR SALAZAR, *et al.*, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE DISTRICT OF COLUMBIA, *et al.*, Defendants.	Civil Action No. 93-452 (GK) *In Forma Pauperis*

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR MODIFICATION OF THE SETTLEMENT ORDER

Respectfully submitted,

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TABLE OF CONTENTS

PAGE

INTRODUCTION

Plaintiffs have moved the Court for relief for the plaintiff class to address the systemic violations of their statutory and due process rights regarding the processing of Medicaid applications and renewals. Plaintiffs' Motion for Modification of the Settlement Order (ECF No. 2093), February 9, 2016 ("Pl. R60 Br.").

Defendants claim that the systemic problems that existed in 2015 have now largely been cured (The District of Columbia's Opposition to Plaintiffs' Motion for Modification of the Settlement Order (ECF No. 2097), February 26, 2016 ("Def. Opp."), pp. 1-2), except for "four root causes of the stuck/malformed defect in [application processing]" (Schlosberg 2d Decl. (ECF No. 2091-1), para. 6)); except that there is still no on-line processing of Medicaid renewals (*id*., para. 12); except that there is a need for greater training of employees (*id*., para. 20); and except for the need to improve the processing of hard copy documents and service to Medicaid applicants and recipients who visit Economic Security Administration (ESA) service centers (*id*., paras. 18-20). Defendants present no reports, data, or statistics about the processing of Medicaid applications and renewals. Instead, defendants' factual showing is based entirely on the declaration of Medicaid Director Claudia Schlosberg. Def. Ex. J.

Plaintiffs show below that their motion is legally well-founded. Plaintiffs further show, based on an analysis of defendants' evidence and recent evidence from Medicaid advocates and recipients, that the systemic problems with the processing of Medicaid applications and renewals have not been cured. Moreover, even assuming *arguendo* that defendants have cured entirely the systemic problems with the processing of Medicaid applications and renewals, injunctive relief and court oversight are necessary to ensure continued compliance with federal law.

ARGUMENT

I. PARAGRAPH 71 SPECIFICALLY GIVES THIS COURT AUTHORITY, ON MOTION, TO MODIFY THE SETTLEMENT ORDER

Plaintiffs showed in their opening brief that the parties agreed in paragraph 71 of the Settlement Order (ECF No. 663) that "either party shall have the right to move the Court for modification of this Order at any time for any reason." Pl. R60 Br. 2-3. Plaintiffs further showed (*ibid.*) that the Court of Appeals has confirmed the meaning of this term of the Settlement Order: "Paragraph 71 of the Settlement Order provides for modification 'at any time for any reason.'" *Salazar v. District of Columbia*, 633 F.3d 1110, 1122 (D.C. Cir. 2011).

Defendants do not dispute the plain language of paragraph 71 of the Settlement Order. In fact, they do not mention it at all. Therefore, defendants concede that the Court has jurisdiction to modify the Settlement Order under paragraph 71.

II. RULE 60(b)(5) GIVES THIS COURT AUTHORITY TO MODIFY THE SETTLEMENT ORDER

Rule 60(b) of the Federal Rules of Civil Procedure set forth six grounds under which a party may move the court for relief from an order, final judgment, or other proceeding. One of these grounds, in Rule 60(b)(5), is applicable to the instant motion: "applying it prospectively is no longer equitable." In *Rufo v. Inmates of Suffolk County*, 502 U.S. 367, 393 (1992), the Supreme Court set forth a two-part standard for Rule 60(b)(5); a party seeking modification of a consent decree bears the burden of establishing: (1) that a significant change in facts or law warrants revision of the decree, and (2) that the proposed modification is suitably tailored to the changed circumstance. Plaintiffs meet these requirements.

A. PLAINTIFFS DO NOT SEEK TO RELITIGATE TERMINATED PROVISIONS OF THE SETTLEMENT ORDER

Rule 60(b)(5) allows relief if "applying [the judgment] prospectively is no longer equitable." Defendants make no claim that the Settlement Order lacks prospective effect. Instead,

defendants incorrectly reframe plaintiffs' motion into a request for relief from this Court's February 24, 2009 and October 18, 2013 Orders to assert these orders lack prospective application.[1] Def. Opp. 4-10. However, plaintiffs do not challenge those Orders. Instead, plaintiffs seek modification of the Settlement Order, granting additional injunctive relief, based on the new factual circumstances. Plaintiffs have shown in our briefs in support of our motion for a preliminary injunction and in our opening brief on this Rule 60(b) motion that defendants have committed widespread violations of the rights of class members to timely processing of Medicaid applications their due process rights at renewal. Pl. R60 Br. (ECF No. 2093), pp. 6-14; Pl. PI Br. (ECF No. 2070), pp. 10-32; Pl. PI Reply Br. (ECF No. 2083), pp. 8-17; and exhibits cited therein.

The Settlement Order has prospective effect since it compels future actions by defendants (*e.g.*, "[d]efendants shall provide or arrange for the provision of early and periodic, screening, diagnostic and treatment services (EPSDT) when they are requested by or on behalf of children" (ECF No. 663, para. 36)) and provides for continuing court supervision (*e.g.*, *id.*, paras. 41 and 47: requiring periodic reports to the Court; *id.*, para. 79: "[t]he Court shall retain jurisdiction of this matter to make any necessary orders enforcing or construing this Order"). *See Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1139 (D.C. Cir. 1988). Thus, contrary to defendants' argument (Def. Opp. 4), the threshold inquiry under Rule 60(b)(5), that the order has prospective effect, is met.

[1] Defendants claim to cite a "wealth of authorities standing for the proposition that a court lacks jurisdiction over terminated portions of a consent decree." Def. Opp. 6. Plaintiffs have previously shown that these cases are inapplicable to the present situation. *See* Plaintiffs' Reply Memorandum in Support of Their Motion for a Preliminary Injunction Concerning District of Columbia Medicaid Applications and Renewals, January 29, 2016, ECF No. 2083 ("Pl. PI Reply Br."), p. 5, n. 6. For example, in *Bobby M. v. Chiles*, 907 F. Supp. 368, 371, 371, n. 8 (N.D. Fla. 1995) (cited at Def. Opp. 10), the court terminated a consent decree when, unlike here, "there is universal agreement that its underlying purpose has been achieved."

B. SIGNIFICANT CHANGED CIRCUMSTANCES JUSTIFY MODIFICATION OF THE SETTLEMENT ORDER

Plaintiffs showed in our preliminary injunction papers and in our opening brief on this Rule 60(b) motion that defendants are in violation of the standards applicable to the timely processing of Medicaid applications and the protection of due process upon Medicaid renewal. Pl. R60 Br. (ECF No. 2093), pp. 6-14; Pl. PI Br. (ECF No. 2070), pp. 10-32; Pl. PI Reply Br. (ECF No. 2083), pp. 8-17; and exhibits cited therein. We further showed that these widespread violations were a significant change in circumstances justifying Rule 60(b) relief. Pl. R60 Br. 6-14.

In response, defendants argue that the changed factual circumstances which plaintiffs allege, are not sufficient to establish a basis for modification under Rule 60(b)(5) because defendants' violations of federal law concerning the processing of Medicaid applications within 45 days and timely and adequate advance notice prior to termination of Medicaid benefits upon renewal were foreseeable. Def. Opp. 11-15.

1. Defendants' Failure to Comply with Federal Law Concerning Timely Processing of Medicaid Applications Was Not Foreseeable

Under the Supreme Court's decision in *Rufo, supra*, 502 U.S. at 385, "[ordinarily], * * * modification [of a consent decree] should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." Defendants argue that, in light of the Settlement Order's provisions allowing piecemeal termination of separate sections at different times, the District's noncompliance with federal law requiring it to process applications within 45 days "does not amount to a changed circumstance * * * because it [non-compliance] is not an unanticipated development[]," as required under *Rufo* and subsequent decisions. Def. Opp. 11. Defendants contend that since there is no explicit provision of the Settlement Order allowing re-opening of terminated sections if defendants begin to violate the law again, the parties understood

"that if Plaintiffs believed that noncompliance by the District recurred while other Sections [of the Settlement Order] remained active, whatever remedies plaintiffs would have would lie outside this lawsuit." *Id*., p. 12. Defendants' argument about the meaning of the Settlement Order ignores paragraph 71. Paragraph 71 gives plaintiffs the right to move the Court for modification "at any time for any reason." This broad opportunity to seek modification of the Settlement Order includes the right to seek relief when facts arise showing that the defendants have returned to violating aspects of federal law that were part of the Amended Complaint and the Settlement Order.

Moreover, even assuming *arguendo* that the parties could have anticipated that defendants might, after meeting the performance standard in the Settlement Order, again begin to fail systemically to process applications within 45 days, this is not the end of the analysis. Under *Rufo*, "[l]itigants are not required to anticipate every exigency that could conceivably arise during the life of a consent decree [in order to warrant modification of a consent decree]." 502 U.S.at 385. As the Court of Appeals for this Circuit has explained (*United States v. Western Electric Co*., *Inc*., 46 F.3d 1198, 1205 (D.C. Cir. 1995)):

> Rule 60(b)(5) does not foreclose modifications based on developments that, in hindsight, were things that "could" happen. If the rule were so restricted, it would never be successfully invoked: whatever actually occurs after entry of the decree is necessarily something that could have occurred. The focus of Rule 60(b)(5) is not on what was possible, but on what the parties and the court reasonably anticipated. *Rufo* illustrates as much. The *Rufo* decree governed the county's building of a new jail and required the jail to provide single-cell occupancy, but a rapid increase in the jail population beyond projections—certainly something that was possible, something the parties knew could occur—rendered the new facility unable to accommodate the detainees on those terms. 502 U.S. at 375–76, 112 S.Ct. at 756. The Supreme Court nevertheless held that the increase in the jail population, if unanticipated, would qualify under Rule 60(b)(5) as an unforeseen change in circumstances. *Id*. at 385, 112 S.Ct. at 761.

Thus, "the [fact] that the events were theoretically foreseeable does not foreclose a modification" because "the issue is whether the parties *actually* anticipated the events giving rise to the

modification request * * *" (emphasis in original). *Thompson v. U.S. Department of Housing & Urban Development*, 404 F.3d 821, 828 (4th Cir. 2005).

Here, it is beyond dispute that, in 1998, the parties did not anticipate the passage of the Affordable Care Act ("ACA") in 2010. According to defendants, "[i]t is no understatement to say that the ACA has transformed Medicaid, particularly in how states determine the eligibility of individuals who initially apply for benefits or during annual renewal of eligibility." Def. PI Opp., ECF No.2077, p. 5. Implementing the ACA is the apparent cause of the District's inability to process timely and accurately applications and renewals for a large number of people. The combination of these changed circumstances is both actually unanticipated and substantial. Two years ago, this Court found in this case, that "pursuant to Fed. R. Civ. P. 60(b)(5), * * * the passage of the ACA has created a 'significant change in circumstances' * * *." *Salazar v. District of Columbia*, *supra*, 991 F. Supp. 2d at 37. While the Court's conclusions related to the renewal of Medicaid (*id*. at 38), it applies equally to the reasonable anticipation that the rights of applicants would be adequately protected when Medicaid applications were processed following the ACA.

2. Defendants' Failure to Comply with Due Process and Federal Law Concerning Timely Notice of Termination at the Time of Medicaid Renewal Was Not Foreseeable

Defendants claim that the District's failure to comply with federal law and regulations concerning renewals since the Court vacated Section III of the Settlement Order does not constitute changed circumstances sufficient to warrant relief under Rule 60(b)(5), as required by the Supreme Court's rulings in *Rufo v. Inmates of Suffolk County Jail, supra*, and subsequent opinions, because such failure was predictable. Def. Opp. 11-15. As a preliminary matter, as we showed above (pp. 4-6), the fact that defendants' future violations of the law were conceivable does not mean that they were actually anticipated, as required under *Rufo*. 502 U.S. at 385.

Moreover, "the parties should be charged with notice of those events that reasonably prudent litigants would contemplate when negotiating a settlement" (*id*. at 406), not at the time that a portion of a consent decree is vacated, when no negotiation is involved.

In any event, there is no support in the record that defendants' widespread violation of Medicaid beneficiaries' due process rights was anticipated. Defendants cite the Court's statement in its 2013 opinion terminating Section III that, "implementation will undoubtedly be both rocky and fairly long in coming" (*Salazar v. District of Columbia*, *supra*, 991 F. Supp. 2d at 37) to imply that the Court and plaintiffs were aware that defendants would fail to comply with the due process requirements for advance notice prior to terminating Medicaid coverage at renewal. Def. Opp. 14. However, the Court's 2013 opinion shows the opposite. The Court granted defendants' motion to terminate Section III and denied plaintiffs' request for discovery largely because it found that the due process rights of Medicaid beneficiaries would be protected by defendants under the ACA and its implementing regulations (991 F. Supp. 2 at 38-39):

> Plaintiffs' counsel has failed to identify any tangible fact or law that suggests those [due process] rights will not be adequately protected in this transitional year. * * * Defendants' counsel represented at oral argument that the "safe harbor" provisions apply to all those who will be evaluated between October 2013 and December 2013, thus providing Plaintiffs with the "binding representation" they sought in their Opposition that the regulations would be interpreted and applied in that fashion by the District of Columbia government. * * * [T]he ACA regulations provide multiple safeguards to ensure that no members of the plaintiff class whose eligibility must be renewed in 2013 will be denied due process. * * * As to the due process rights of the class members between March 2014 and October 2014, Plaintiffs acknowledge that the ACA "continues and reinforces . . . due process protections." * * * [T]he ACA regulations are <u>more</u> protective of due process that the current Consent Order. [emphasis in original; internal citations omitted]

The Court made these findings based, in part, on numerous representations made by defendants concerning the District's capacity to implement the ACA within certain time frames. Defendants told the Court that the District would "fully transition [] and integrate[] [all Medicaid recipients] into the DC Health Link" by October 1, 2014, and retire ACEDS. Defendants' Motion for Modification of the January 25, 1999 Consent Order and Related Order of August 8, 2000,

Sept. 20, 2013 (ECF No. 1870), p. 9. This did not occur. Defendants now state that ACEDS will not be retired until 2018. Schlosberg 1st Decl. (ECF No. 2077-1), paras. 15, 57. Defendants stated that the District would implement passive renewal functionality for all Medicaid beneficiaries by October 2014. Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Modify the Consent Order; Opposition to Plaintiffs' Motion for Discovery; and Opposition to Plaintiffs' Motion for a Stay of Section III to Permit Discovery, Oct. 7. 2013 (ECF No. 1879), p. 12. This also has not occurred. Non-MAGI recipients, who make up about 30% of the Medicaid population (Schlosberg 1st Decl., para. 57), will not have passive renewal, but will continue to be required to submit the pre-ACA recertification form, for an indefinite period of time (Pl. Ex. 21 (ECF No. 2070-19), DHCF FOIA Response, No. 1(c)). Neither the Court nor plaintiffs could have actually anticipated that each of these representations would turn out to be incorrect, and that the transition to the ACA would result in a significant number of class members losing their Medicaid benefits at renewal without adequate advance notice, as plaintiffs' evidence has subsequently demonstrated. Pl. R60 Br. 7-14; Pl. PI Reply Br. (ECF No. 2083), pp. 10-13; Pl. PI Br. (ECF No. 2070), pp. 22-32; and exhibits cited therein.

C. PLAINTIFFS' MOTION DOES NOT DENY DEFENDANTS THE BENEFIT OF THE BARGAIN NOR IS INCONSISTENT WITH SEPARATION OF POWERS

Defendants also assert that granting plaintiffs' motion would deny them the "benefit of the bargain" (Def. Opp. 10) and would be contrary to separation of powers doctrine because such a further injunctive order would be "incompatible with the goal of restoring responsibility over state executive functions [to the District of Columbia] as quickly as possible" (Def. Opp. 6). First, part of the "bargain" negotiated by both parties was the right to return to the Court on motion and seek modification of the injunctive order "at any time for any reason." ECF No. 663, para. 71. Although defendants met the standard for timely application processing in 2009 (Pl. Ex. 44), and

were granted relief from the recertification provisions of the Settlement Order in 2013 without demonstrated compliance (*Salazar v. District of Columbia*, *supra*, 991 F. Supp. 2d at 38-39), the facts show that they now are in violation of requirements of federal law.

Second, *Horne v. Flores*, 557 U.S. 433, 450 (2009), the very case cited by defendants in support of the claim that no federal court oversight is necessary here states: "It goes without saying that federal courts must vigilantly enforce federal law and must not hesitate in awarding necessary relief." The Supreme Court explained that "'federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation.'" (quoting *Milliken v. Bradley*, 433 U.S. 267, 282 (1977)). 577 U.S. at 450. "'If [a federal consent decree is] not limited to reasonable and necessary implementations of federal law,' it may 'improperly deprive future officials of their designated legislative and executive powers'" (quoting *Frew v. Hawkins*, 540 U.S. 431, 441 (2004)), *Horne v. Flores*, *supra*, 557 U.S. at 450. In contrast to the types of orders being discussed in *Horne v. Flores*, here, plaintiffs allege federal law violations with respect to application processing and protection of due process rights at the time of Medicaid renewal. Moreover, the injunctive order that plaintiffs request only seeks to enforce federal and constitutional requirements and ends federal court oversight as soon as defendants demonstrate compliance with the federal law standards protecting Medicaid applicants and recipients. Thus, the relief sought by plaintiffs is directly consistent with the Supreme Court's ruling in *Horne v. Flores* and *Frew v. Hawkins*.

III. THE EPSDT PROVISIONS OF THE SETTLEMENT ORDER DEPEND UPON TIMELY PROCESSING OF MEDICAID APPLICATIONS AND THE PROTECTION OF DUE PROCESS AT MEDICAID RENEWAL FOR CHILDREN UP TO AGE 21

Defendants claim that plaintiffs "have come forward with no evidence or even a proffer concerning the extent to which children who would be entitled to EPDST services * * * are

affected by the eligibility issues." Def. Opp. 8. However, it is common sense that a child cannot obtain any EPSDT service when he or she lacks Medicaid eligibility. *See* Pl. R60 Br. 17-18.

Defendants assert that "children entitled to EPSDT services are only one segment of the overall Medicaid population." Def. Opp. 8. In fact, children eligible for EPSDT make up 40% of the District of Columbia Medicaid population. In 2014, the most recent year for which defendants reported to the Centers for Medicare and Medicaid Services (CMS) about the EPSDT population in the Form 416, there were 98,350 children eligible for Medicaid. ECF No. 2039-1, line 1a. As of October 2014, there were a total of 247,850 people on DC Medicaid.[2] Pl. Ex. 61, column 1, attached (98,350/247,850 = 40%). Thus, children make up a large proportion of all people on Medicaid in the District of Columbia. The systemic problems which plaintiffs have shown affect children, just as they affect adults.

Defendants are wrong when they argue (p. 8) that "whether an initial application for Medicaid benefits is processed within 45 days has no bearing on the District's ability to achieve an adequate participant ratio for well-child visits * * *." A child who has no Medicaid coverage because her family's application is not decided within 45 days cannot obtain a well-child visit during the period she goes without benefits. Similarly, a child whose Medicaid coverage lapses because her Medicaid renewal was not processed by defendants cannot obtain a well-child visit. This has a direct effect on the participant ratio for well-child visits. However, not only the delivery of well-child visits is affected by the systemic problems in processing Medicaid applications and renewals: a child will be unable to obtain any medical treatment or prescriptions during the time that she has no active Medicaid coverage due to violations by defendants. *See* Settlement Order, ECF No. 663, para. 36 (defendants must provide EPSDT services "when they

[2] This figure is based on subtracting the non-Medicaid Alliance enrollment of 15,429 from the overall DHCF enrollment of 263,279. Pl. Ex. 61, column 1.

are requested by or on behalf of children"). In the declarations submitted in support of the motion for a preliminary injunction and the Rule 60(b) motion, plaintiffs have shown that at least 14 children did not have access to Medicaid and therefore to EPSDT services due to defendants' failures to timely process applications or Medicaid renewals. *See* Bread for the City Decl. (ECF No. 2070-22), para. 11 (after applying five times, nearly two years later, teenager remains without coverage); Whitman-Walker Health Decl. (ECF No. 2070-23), para. 11a (despite submission of form, child's coverage was terminated without notice); para. 11(b) (same); para. 11(c) (child's renewal processed six months after recertifying); Legal Aid Decl. (ECF No. 2070-24), para 6(b) (children unable to access medical or dental care after their eligibility was terminated without notice), para. 6(c) (child's coverage terminated without notice), para. 6(e) (child with serious health conditions was unable to receive treatment), para. 15(b) (after four trips to service center, child's renewal still not processed, resulting in out-of-pocket dental expenses), Ayala-Carranza Decl. (ECF No. 2070-27), paras. 1-11 (parent paid for expensive medication for son's kidney infection and accumulated thousands of dollars in bills); Jackson Decl. (ECF No. 2070-30), paras. 6, 12 (parent struggled to pay for medications for two children during gap in coverage); Rizio Decl. (ECF No. 2070-47), paras. 6-23 (child unable to receive medical attention and medication); Sharon 1st Decl. (ECF No. 2093-1), paras. 4-16 (child waited for over two months for application to be processed to access Medicaid coverage). With this brief, plaintiffs are submitting examples of seven more children who went without Medicaid eligibility, and thus without access to EPSDT services, due to defendants' failures in processing Medicaid applications and renewals. Declaration of Chelsea Sharon, March 8, 2015 ("Sharon 2d Decl."), Pl. Ex. 62, para. 8 (due to delayed application processing, two children could not access medical care), para. 9 (two children still awaiting coverage despite receiving approval notice), para. 12 (child lost coverage due to "system error"); Declaration of Maria Zamora, February 29, 2016 ("Zamora Decl."), Pl. Ex. 68,

paras. 3-7 (despite timely submission, three-year old's coverage was terminated resulting in parent incurring bills for treatment at emergency room); Declaration of Zulma Ledesma, March 1, 2016 ("Ledesma Decl."), Pl. Ex. 69, paras. 9-18 (due to incorrect notice and form sent to family, coverage of six-year old child terminated).

Therefore, the failure to process Medicaid applications and renewals in accordance with law has a direct and harmful impact on the delivery of EPSDT services to children.

IV. DESPITE DEFENDANTS' RECENT ACTIONS, MEDICAID APPLICANTS AND RECIPIENTS CONTINUE TO EXPERIENCE DELAYS IN PROCESSING APPLICATIONS AND WRONGFUL TERMINATIONS AT RENEWAL

Defendants argue that changed circumstances do not exist to justify a modification of the Settlement Order because the District has largely improved its practices for processing Medicaid applications and renewals. Def. Opp. 11-15. We show below that defendants' recent actions have not been sufficient to obviate the need for injunctive relief.

A. DEFENDANTS HAVE NOT SHOWN THAT THEY ARE PROCESSING MEDICAID APPLICATIONS WITHIN 45 DAYS OR THEY WILL BE ABLE TO DO SO CONSISTENTLY IN THE FUTURE

In support of the claim that the timely processing of Medicaid applications has improved, defendants rely on the narrative declaration of Medicaid Director, Claudia Schlosberg. Def. Ex. J. Defendants do not provide reports or data, similar to the evidence submitted with plaintiffs' motion for a preliminary injunction which defendants supplied in response to FOIA requests (*e.g.*, Pl. Exs. 1-4, 11-17, 21-23), that show that Medicaid applications are now being determined in accordance with the 45-day standard. For example, defendants state that weekly reports are created to assist ESA staff in "resolv[ing] the longest pending applications on a priority basis" (Schlosberg 2d Decl., para. 8), but do not produce any such reports.

Defendants claim that they have made progress in reducing the backlog of Medicaid applications with the technological stuck/malformed defect from 1,408 cases on January 11, 2016,

to 67 cases as of February 23, 2016, "by using CMS-approved protocols." Schlosberg 2d Decl., para. 5; *see also* Def. Opp. 3, 13. CMS required defendants to check manually the document scanning system operated at DHS service centers (DIMS) to see if the applicants who had been asked to submit additional documents by defendants had done so (Def. Ex. G (ECF No. 2077-7), pp. 2,4 (Buckets 9, 15)) prior to denying the application. For other types of delayed applications, where the applicant had not yet been asked to provide any additional documents by defendants, CMS instructions required defendants to send notices to the applicants allowing them at least 15 days to supply the documents (*id*., pp. 2-3, 5 (Buckets 10, 14, 17)), prior to denying the application. Without documents or further information from defendants, it is not possible to ascertain whether these instructions were followed for the 1,408 cases pending over 45 days on January 11, 2016.

Moreover, it is not possible to ascertain from defendants' evidence that defendants have put in place a durable remedy to ensure that Medicaid applications will be decided within 45 days. Defendants admit that that four of the root causes for the stuck/malformed defect in the District of Columbia computer system remain unresolved and that several new applications are still affected by those defects every day. Schlosberg 2d Decl., para. 6; Def. Opp. 3. While defendants claim that they are relying on reports from their computer system regarding the numbers of pending applications to avoid backlogs (Schlosberg 2d Decl., para. 8; Def. Opp. 3), the record shows that these reports have been inaccurate in the past. Ms. Schlosberg admitted in her first declaration that "pending application reports" from the computer system had proved inaccurate before (Schlosberg 1st Decl. (ECF No. 2077-1, para. 66)):

> Since the system launched, the District has monitored pending applications in DC Health Link through a "pending application" report. In April 2015, after multiple system updates, the District discovered that the report utilized to monitor pending applications was no longer accurate. [emphases added]

At the December 2015 MCAC meeting, defendants admitted that, as of January 2015, "[o]riginal reports indicated less than 200 applications crossing 45 days processing, addressed in weekly reports," but by March-April 2015, "[n]ew queries [of the computer system] indicated 12,000 potentially problematic" applications pending over 45 days. Pl. Ex. 1 (ECF No. 2070-2), "Timeline," p. 3.

Plaintiffs showed in their opening brief (Pl. R60 Br. 8-9) and preliminary injunction papers (ECF No. 2070, pp. 14-17; ECF No. 2083, p. 10, 13-15), and the evidence cited therein, that, in addition to the applications identified in reports from defendants' computer systems as pending over 45 days, numerous Medicaid applications submitted at ESA service centers are lost or misplaced and not processed within 45 days. Plaintiffs showed that the application of Ms. Yimer, submitted at an ESA service center on September 16, 2015, was not entered into the District's computer system as received until over two months later, on November 23, 2015, after the intervention of a Legal Aid attorney. Sharon 1st Decl. (ECF No. 2093-1), paras. 4-14. In response, Ms. Schlosberg states that "resource availability has resulted in delayed data entry" of case documents in some cases, like the case of Ms. Yimer. Schlosberg 2d Decl., para. 20(a). However, the evidence submitted by plaintiffs shows that this "delayed data entry" of application and renewal documents is widespread and that there is a significant backlog of documents to be scanned. *See* ESA Operations and Data Cleanup Dashboard, June 3, 2014, Pl. Ex. 42 (ECF No. 2070-40), p. 20 (noting that files scanned into DIMS could not always be found in DC Health Link, resulting in "ESA staff asking customers to send in documentation that has already been provided"). The testimony of Medicaid advocates who assist Medicaid beneficiaries on a daily basis demonstrates that lost or misplaced paperwork is a substantial problem. *See, e.g.*, Loubier Decl., Pl. Ex. 27 (ECF No. 2070-25), para. 9; Bread for the City Decl., Pl. Ex. 24 (ECF No. 2070-22), para. 11; Legal Aid Decl., Pl. Ex. 26 (ECF No. 2070-24), paras. 5, 17. Moreover,

independent audits of ESA for the SNAP (Food Stamps) program show that ESA case workers are not timely scanning documents into DIMS (*see* Pl. Exs. 5-7, 9, 10 (ECF Nos. 2070-6 to 2070-8, 2071-1 to 2071-4)) the same document scanning system used by Medicaid (Schlosberg 1st Decl., para. 59).

Medicaid applicants continue to be affected by defendants' inability to keep track of paper applications submitted at service centers. On November 24, 2015, Ms. Flores Rivas submitted an application for Medicaid benefits for her two minor children and has a receipt for the visit. Sharon 2d Decl., Pl. Ex. 62, para. 8; *see also* Exhibit 2, CS 106 attached thereto. Over three months later, she has received no written decision. Even with the assistance of a Legal Aid lawyer, Ms. Flores Rivas has received conflicting information about the status of her application. DC Health Link Customer Service found a record of application only for her son and not for her daughter and also found an approval for her son. The ESA Customer Service, whom she was told to contact next, saw no record of any application for either her daughter or her son and no record of any approval for her son. *Id*., para. 8(e). To date, Ms. Flores Rivas has not received a notice of DHS's determination concerning her children's application and they cannot access Medicaid benefits. *Id.*, para. 8(g).

B. DEFENDANTS HAVE NOT SHOWN THAT THEY ARE PROCESSING ALL MEDICAID RENEWALS IN COMPLIANCE WITH DUE PROCESS REQUIREMENTS OR THAT THEY WILL BE ABLE TO DO SO CONSISTENTLY IN THE FUTURE

Rather than addressing the dozens of examples of individuals losing coverage due to defendants' failure to process renewal forms, defendants claim that the Medicaid renewal program is "working well" (Def. Opp. 14) based solely on passive renewals, pointing to the fact that over 60% of beneficiaries were passively renewed for February 2016. However, defendants avoid reporting the percentage of those who had to renew manually and lost their coverage. With their preliminary injunction motion, plaintiffs submitted data showing that 3 in 10 households,

who had to renew manually, lost coverage in 2015 due to the claimed failure to submit a renewal form. Rivers Decl., Pl. Ex. 33 (ECF No. 2070-31), para. 15 and Tables 1 and 2 attached thereto. Defendants submit no data suggesting that this percentage has improved in the beginning months of 2016.[3] On the other hand, plaintiffs have shown that numerous Medicaid recipients have lost Medicaid coverage at renewal even though they promptly returned their renewal form or they never received any notice of the requirement to renew. *See* Pl. PI Br. (ECF No. 2070), pp. 17-32; Pl. PI Reply Br. (ECF No. 2083), pp. 10-13; Pl. R60 Br. (ECF No. 2093), pp. 9-15; and exhibits cited therein.

Defendants insist (p. 14) that "the crux of plaintiffs' complaints with respect to renewals was that the District had temporarily ceased conducting passive renewals," but this is not the case. Instead, plaintiffs contended that the cessation of passive renewals would exacerbate the already endemic problems with manual renewals—namely, the failure to process renewal forms accurately and timely. Pl. PI Br. (ECF No. 2070), pp. 22-28; Pl. PI Reply Br. (ECF No. 2083), pp. 10-17.

Defendants also admit that renewals still cannot be submitted online. Schlosberg 2d Decl., para. 12. When online renewals were functioning, 85% or more of those who submitted renewal forms each month from January to September 2015 did so online. Pl. Ex. 41 (ECF No. 2070-39), p. 4. Many recipients are unable to do so over the telephone. *See* Whitman-Walker Decl. Pl. Ex. 25 (ECF No. 2070-23), para. 10 ("ESA Customer Service Line Staff indicate that they are not authorized to complete the renewal process over the phone but customers must walk into a service center"); Declaration of Albert Tillman, March 4, 2016 ("Tillman Decl."), Pl. Ex. 66, para. 6; L.

[3] The data submitted by plaintiffs with their preliminary injunction motion was provided at the December 2015 MCAC meeting. Pl. Ex. 1 (ECF No. 2070-2), cited in Pl. Ex. 33 (ECF No. 2070-31). No similar more recent data was provided by defendants at the January or February 2016 MCAC meetings.

Jackson Decl., Pl. Ex. 71, paras. 5-7. These two factors contribute to the increased flow of those coming into the service centers and the risk of paperwork being lost or untimely processed.

There appear to be continuing problems in the transmission of data between ACEDS and MMIS so that Medicaid coverage for recipients who have been renewed is not active.[4] The three-year-old daughter of Maria Zamora lost coverage because her Medicaid coverage—while active in ACEDS—never became active in MMIS. Sharon 2d Decl., Pl. Ex. 62, para. 11. Despite several visits and calls to the ESA service center, Ms. Zamora and her husband were unable to resolve the problem on their own. Zamora Decl., Pl. Ex. 68. Although they were told that their daughter's Medicaid was active, the child went without coverage for several months, requiring them to incur bills for her care. *Ibid.* Another Legal Aid client had no active Medicaid benefits after renewing due to a "system error" which caused a loss of coverage for her child. Sharon 2d Decl., para. 12.

Medicaid recipients continue to see their coverage terminated at renewal without timely and adequate advance notice. *See* Sharon 2d Decl., Pl. Ex. 62, paras. 2-6; Declaration of Jeremy Padow, March 9, 2016 ("Padow 2d Decl."), Pl. Ex. 63, paras. 2-3, 7-11. The following are a few recent representative examples:

- In January 2016, Ms. Zulma Ledesma received an outdated M1 renewal form in the mail for her family. Ledesma Decl., Pl. Ex. 69, paras. 1- 9. Her husband submitted the renewal form in person at a service center for himself and their daughter in February 2016, but discovered through a Legal Aid attorney that his coverage and his daughter's had been terminated on February 1, 2016. *Id*., paras. 10-12. Following the attorney's intervention, Ms. Barrera's husband submitted a D1 renewal form, and he and his daughter received written notice on February 29, 2016, that their Medicaid renewal had been approved. *Id*., paras. 5, 13-20.

[4] "[O]nce an eligibility determination has been completed by a worker using ACEDS and authorized by a supervisor, the eligibility data is transmitted from ACEDS to MMIS. * * * MMIS * * * processes requests for reimbursement from health care providers that serve Medicaid recipients." *Salazar v. District of Columbia,* 954 F. Supp. 278, 299 and n. 38 (D.D.C. 1996).

- Albert Tillman lost his Medicaid coverage despite having timely submitted his recertification form in person at a service center and received written confirmation from DHS that it had been received. Tillman Decl., Pl. Ex. 66, paras. 1-4. Mr. Tillman discovered that his coverage had been terminated in February 2016, when he attempted to obtain his medication at a pharmacy. *Id*., para. 5. After several attempts to call the DHS customer service telephone line, Mr. Tillman contacted plaintiffs' counsel, who intervened on his behalf. *Id*., paras. 6-7. Mr. Tillman's Medicaid coverage was restored. *Id.*, para. 7.

- Sylvester Cole, Jr. timely submitted his recertification form in November 2015, yet received a notice in January 2016 informing him that his Medicaid coverage would be terminated for failure to return the form, which Mr. Cole believed to be in error. Declaration of Sylvester Cole, March 6, 2016 ("Cole Declaration"), Pl. Ex. 67, paras. 1-3. In February 2016, Mr. Cole was admitted to a hospital, where he discovered that his coverage had been terminated. *Id*., paras. 2-3. An inquiry to DHS by plaintiffs' counsel revealed that DHS could not find the form. Padow 2d Declaration, Pl. Ex. 63, paras. 2-3. Mr. Cole's Medicaid coverage was reinstated only after he went in person to a service center to submit a new recertification form. Cole Decl., Pl. Ex. 67, para. 5.

- Jacqueline McKisic's Medicaid coverage was terminated without notice despite her having timely submitted her recertification form. Padow 2d Decl., Pl. Ex. 63, paras. 6-7. She has been forced to borrow money to pay for her medication out-of-pocket. *Id*., para. 8.

Defendants assert that the "District is unaware of any issue, technological or otherwise, that is impeding the processing and mailing of notices." Schlosberg 2d Decl., para. 16. However, defendants do not claim that they have conducted any investigation into this problem, despite advocates' requests to do so. *See* Sharon 1st Decl. (ECF No. 2093-1), p. CS 063 (e-mail to Ms. Schlosberg) ("Legal Aid has now seen several individuals who have not received renewal forms, even though DHCF's system indicates were mailed, I would encourage the agency to reach out to the technological experts to see if there might be a defect that is, of yet, unidentified"). Defendants' unwillingness to investigate this issue belies their claim to be "proactively identifying technological issues," which they insist makes judicial supervision unnecessary. Def. Opp. 1-2.[5]

[5] Defendants represented that, although many cases between May and October 2015 were affected by a mailing address problem that eliminated a "0" from the second address line (Schlosberg 1st Decl. (ECF No. 2077-1), para. 64, Pl. Ex. 1 (ECF No. 2070-2), p. 3), the impacted cases had all (continued…)

Moreover, beneficiaries also continue to receive inadequate and confusing notices, despite defendants' representation that an "enhanced quality oversight protocol" is in place to ensure that notices are accurate and "adhere[] to policy guidelines." Schlosberg 2d Decl., para. 17; *see also* Def. Opp. 4. The following are a few representative examples:

- MeLissa Gordon did not receive a Medicaid renewal form in the mail prior to receiving a notice in December 2015 that she and her daughter would be terminated for failure to return the form. Sharon 1st Decl., ECF No. 2093-1, para. 18. Ms. Gordon herself was not subject to renewal, although her daughter was. *Id*., CS 065 (e-mail from DHCF General Counsel Sheryl Johnson). Therefore the notice threatening to cut off her benefits for failure to submit a renewal form was erroneous.

- Karla Ayala-Carranza did not receive a Medicaid renewal form in the mail prior to her family's eligibility end date of January 31, 2016. Sharon 1st Decl., paras. 31-36.

- Zulma Ledesma did not receive a D1 renewal form in the mail prior to her family's eligibility end date, even after her husband went to an ESA service center to request the form. Sharon 2d Decl., para. 5. As a result, their coverage lapsed at the end of January 2016 for several weeks. *Ibid*.

- Leslie Jackson, received five separate notices warning her of her and her minor son's impending termination, each with inconsistent information concerning the date the renewal form was due. L. Jackson Decl., Pl. Ex. 71, paras. 3-9, 15. Because she is receiving different information from DC government employees and has not received a written notice, she is unsure whether her child has coverage. *Id*., paras. 3, 11-15.

- Larry Campbell, who suffers from liver disease, high blood pressure, and diabetes, recently received a notice informing him that his Medicaid coverage will be terminated in April 2016, but provided no reason for the termination. Declaration of Larry Campbell, March 7, 2016, Pl. Ex. 70, paras. 3, 6.

- Lisseth Rodriguez, who was passively renewed in July 2015, was unaware that she was re-approved for Medicaid because she never received a notice informing her that she had Medicaid coverage. Sharon 2d Decl., Pl. Ex. 62, para. 6.

- Client 1 timely submitted her recertification form nearly two months in advance of her renewal date, but received an incorrect notice, stating that her coverage would be

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been redressed. However, a Legal Aid client never received an approval notice because it was sent to incorrect mailing address (missing a "0" on the second address line) and was never sent a corrected notice. Sharon 2d Decl., Pl. Ex. 62, para. 6. Although this client luckily missed only an approval notice, this raises questions about District's claim that it has completely rectified all cases affected by the mailing error.

terminated for failure to submit a recertification. Declaration of Jocelyn Blier, March 7, 2016, Pl. Ex. 64, paras. 5-6.

- Client 2 and her child, client 3, timely submitted renewal forms but received an incorrect notice stating that their coverage would be terminated after her renewal had been approved. Declaration of Ashley Connelly, March 7, 2016, Pl. Ex. 65, paras. 5-8.

Defendants do not contest that the D1 30-day notice incorrectly advises Medicaid beneficiaries that they can renew online when in fact they cannot. Pl. PI Reply Br. (ECF No. 2083), p. 17; Pl. Ex. 46. Such incorrect notices cause people to waste their time online, before coming to the conclusion that the only way to renew is by going in person to a service center. *See, e.g.*, Ledesma Decl., Pl. Ex. 69, para. 8. Unfortunately, even those beneficiaries who renew in person at service centers often have to go back multiple times, miss work, and stand in line for hours. *See, e.g.*, Zamora Decl., Pl. Ex. 68, paras. 4-5; Ayala-Carranza Decl. (ECF No. 2070-27), Pl. Ex. 29, paras. 1-10. Thus, the every-day experience of beneficiaries is not, as defendants claim, that "the District's process for conducting annual renewals of Medicaid benefits is working well." Def. Opp. 14.

There appears to be a significant discrepancy in the most important notice given to a Medicaid recipient at renewal: the deadline for submitting the renewal form. Ms. Schlosberg states that recipients who must manually renew are notified in the D1 Renewal Form "of the need to provide additional information within 60 days to allow a determination of continuing eligibility." Schlosberg 2d Decl., para. 11. Later in the same Declaration, Ms. Schlosberg states that the renewal form for Ms. Ayala-Carranza was correct in telling her that she must renew in 30 days rather than 60 days. *Id.*, para. 20(e). However, the Deputy, DPO (DHS), stated in an electronic mail message that the actual deadline for submission is 60 days, as set forth in paragraph 11 of Ms. Schlosberg's 2d Declaration: "Medicaid renewal deadline [for Ms. Ayala-Carranza] is 01/31/16. The forms will usually have an earlier deadline date to encourage our customers to complete and return them timely." Sharon 1st Decl. (ECF No. 2093-1), p. CS 077.

Ms. Schlosberg also acknowledges that DHS staff may provide confusing messages to beneficiaries and that DHS and DHCF, the agencies that communicate with beneficiaries, have a different "understanding of the need to renew for categorically eligible customers." Schlosberg 2d Decl., paras. 20(b)-(c). Ms. Schlosberg suggests this is a problem of low-level caseworkers who need more training (*id*., para. 20(c)): "DHS is identifying caseworkers who need additional Medicaid policy training." However, the information in the Sharon Declaration makes clear that this is occurring at a higher level and is a more endemic problem. ECF No. 2093-1, paras. 4-41. The conflicting information about Ms. Gordon's need to renew her Medicaid eligibility was provided by two management-level analysts within the agencies (Anthony Proctor and Beverly Wilder). *See also* L. Jackson Decl., Pl. Ex. 71, paras. 10-15.

These examples are typical of the problems that advocates have been raising for months and that exemplify the wide gap that exists between stated policy and actual practice. Defendants appear to acknowledge that a serious and systemic issue exists with timely processing of the paperwork for Medicaid applications and renewals by service centers, since they have engaged the services of a consulting firm to "improve ESA Service Center wait times, eligibility timeliness, and document processing." Schlosberg 2d Decl., para. 18. However, the expected improved business processes will only *start* to be implemented between June and December 2016. *Id.*, para. 19. Even if successful, it will likely be many more months until they become fully operational and are consistently followed at all service centers. Actual improvements will likely not be seen until 2017. The same can be said of DHS's "mobile training team[,]" which defendants state "will provide instructions [to service center staff] for avoiding technical issues * * * [and] improved guidelines for documenting activity in case narratives" at some future unspecified date. *Id*., para. 9. In the meantime, without the relief sought by plaintiffs, applicants

and beneficiaries will continue to experience irreparable harm caused by delays and wrongful terminations.

V. PLAINTIFFS' PROPOSED MODIFICATION IS REASONABLY TAILORED

Defendants contend that the proposed modification is "not at all reasonably tailored." Def. Opp. 15. *See Rufo v. Inmates of Suffolk County*, *supra*, 502 U.S. at 391. However, plaintiffs' proposed modification is directly tied to defendants' violations. Plaintiffs seek an order requiring defendants to protect the rights of Medicaid applicants and recipients until defendants can demonstrate to the Court that they have come into compliance with constitutional and federal statutory law. *See Evans v. Fenty*, 701 F. Supp. 2d 126, 165 (D.D.C. 2010) ("[A] federal consent decree must spring from, and serve to resolve, a dispute within the court's subject-matter jurisdiction; must come within the general scope of the case made by the pleadings; and must further the objectives of the law upon which the complaint was based" (quoting *Frew v. Hawkins*, *supra*, 540 U.S. at 437)); *see also United States v. Western Electric Co.*, *supra*, 46 F.3d at 1207 (recognizing a district court's "considerable discretion" in fashioning a Rule 60(b)(5) modification). Defendants provide no explanation for why the relief of granting eligibility to any Medicaid applicant pending over 45 days and renewing any Medicaid recipient not passively renewed by defendants until defendants make a showing that they are complying with constitutional and federal statutory law regarding the processing of applications and renewals "paint[s] with too broad a brush" and is "untailored," except to assert that they are acting in good faith. Def. Opp. 15, 16. Although defendants may be acting in good faith, members of the plaintiff class are suffering real and substantial harm.

VI. IN THE ALTERNATIVE, THE MODIFICATION IS WARRANTED UNDER RULE 60(b)(6)

If the Court finds that the standards for relief under Rule 60(b)(5) have not been met, plaintiffs seek relief under Rule 60(b)(6). In response, defendants argue that extraordinary

circumstances do not exist because "[p]laintiffs are not without a forum to litigate their allegations" and because "the state of the District's implementation of the ACA's eligibility framework does not approach the extraordinary circumstances required to permit relief." Def. Opp. 17. We have shown above (p. 2) that paragraph 71 of the Settlement Order allows plaintiffs to seek relief in this lawsuit, not in a separate forum. Contrary to defendants' claims, the widespread failures to comply with the 45-day processing rule for applications and the failure to protect due process rights at Medicaid renewal are "extraordinary circumstances" providing this Court with the basis to exercise its discretion and order injunctive relief.

Defendants also argue (Def. Opp. 7) that *Hadix v. Caruso*, 461 F. Supp. 2d 574 (W.D. Mich. 2006), where a district court granted Rule 60(b)(6) relief after portions of a consent decree had terminated (Pl. R60 Br. 16-17), does not apply because the processing of Medicaid eligibility has "little, if anything to do with the active provisions of the Settlement Order." We have shown above (pp. 9-12) that eligibility issues are directly related to a child's ability to access any EPSDT services.

In short, defendants have shown no reason for the Court to refrain from acting under Rule 60(b)(6) if it finds that Rule 60(b)(5) does not apply.

VII. IN THE ALTERNATIVE, THE COURT HAS AUTHORITY TO MODIFY THE SETTLEMENT ORDER UNDER THE *UNITED SHOE* STANDARD

United States v. United Shoe Machinery Corp., 391 U.S. 244, 251-252 (1968) holds that modification of a consent decree is necessary to "achieve [its intended] result" when conditions have impeded it from "achiev[ing] its 'principal objects.'" Defendants dismiss the applicability of the *United Shoe* standard (Def. Opp. 4, n. 2), by citing *Pigford v. Veneman*, 292 F.3d 918, 925 (D.C. Cir. 2002), for the proposition that "[t]he D.C. Circuit applies *Rufo* to modification requests sought by plaintiffs, and this Court should follow suit." However, even after *Pigford v. Veneman*, this Court noted that the conflicting case law in the District of Columbia Circuit is a "thorny

issue." *Cook v. Billington*, No. Civ. A. 82–0400 (GK), 2003 WL 24868169, at *3 (D.D.C. Sept. 8, 2003). More recently, three members of the Supreme Court have indicated that the *United Shoe* standard applies when the beneficiary of an injunction seeks modification. *See Salazar v. Buono*, 559 U.S. 700, 741-742 (2010) (Stevens, J., dissenting, joined by Ginsburg, J. and Sotomayor, J.) (in their dissent to the plurality opinion, which does not mention *Rufo* nor the applicable standard, these Justices note that "[w]hen the beneficiary of an injunction seeks relief 'to achieve the purposes of the provisions of the decree,' a district court has the authority to 'modify the decree so as to achieve the required result with all appropriate expedition'" (emphasis added; internal citations omitted) (citing *United Shoe*)).

In any event, plaintiffs showed that they are entitled to relief under the *United Shoe* standard (Pl. R60 Br. 13-15) and defendants have made no rebuttal to that showing. If the Court finds that Rule 60(b) does not apply, it should grant relief under the *United Shoe* standard.

VIII. DEFENDANTS' CLAIMS OF RECENT REFORMS TO THEIR PRACTICES IN PROCESSING MEDICAID APPLICATIONS AND RENEWALS ARE NOT SUFFICIENT TO DEFEAT INJUNCTIVE RELIEF

Plaintiffs have shown that, despite defendants' claimed improvements, challenges continue to exist in the processing of Medicaid applications and renewals. There are "four remaining root causes of the stuck/malformed defect in [application processing]," (Schlosberg 2d Decl., para. 6); there is still no on-line processing of Medicaid renewals (*id*., para. 12); defendants admit the need for greater training of employees (*id*., para. 20); recipients frequently receive no notice or contradictory notices from defendants (*see* pp. 17-22 above); and defendants admit the need to improve the processing of hard copy documents and service to Medicaid applicants and recipients who visit ESA service centers (Schlosberg 2d Decl., paras. 18-20).

However, even assuming, *arguendo*, that the backlog of Medicaid applications and renewals has been almost completely resolved, as defendants claim, this does not show that any

future backlogs will be resolved in a timely manner absent court oversight. Far from showing that Court oversight is unnecessary, defendants' actions show that court involvement has been the most effective tool for resolving these issues. Prior to the filing of the preliminary injunction motion, the District had made only moderate progress in reducing the application backlog from March-April 2015, when it was allegedly first discovered (Schlosberg 1st Decl. (ECF No. 2077-2), para. 66) to December 2015. After this nine-month period, there were still close to 5,000 Medicaid applications in the backlog. Pl. Ex. 1 (ECF No. 2070-2), p. 3. After the filing of the preliminary injunction motion, the District has allegedly been able to resolve the thousands of remaining cases in just over one month's time. Plaintiffs submit that it is unlikely that defendants would have acted with such haste in the absence of court oversight.

Over six decades ago, the Supreme Court cautioned that the courts must be wary of "protestations of repentance and reform" in the face of court action: "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States v. Oregon State Medical Society*, 343 U.S. 326, 333 (1952). We therefore submit that even if the Court accepts all of defendants' claims of improvements court oversight is necessary to provide a means for the plaintiff class to obtain information about the processing of Medicaid applications and renewals by defendants and to obtain prompt relief to resolve problems when they occur.

CONCLUSION

For the reasons set forth above and in plaintiffs' opening brief, and in plaintiffs' briefs in support of a preliminary injunction (ECF Nos. 2093, 2083, 2070), plaintiffs request that this Court enter an order granting injunctive relief to protect the rights of the plaintiff class regarding Medicaid applications and renewals.

Respectfully submitted,

/*s*/ Zenia Sanchez Fuentes

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March 9, 2016

TABLE OF EXHIBITS

Number	ECF No.	Description
1	2070-2	DC Health Link MCAC Update, December 10, 2015 ("December MCAC Presentation")
2	2070-3	DHCF Response to DC Legal Aid Society FOIA Request, DCAS Top Priorities and Risks, dated August 8, 2015 ("August 2015 DCAS Update")
3	2070-4	DHCF Response to DC Legal Aid Society FOIA Request, DCAS Top Priorities and Risks, dated June 15, 2015 ("June 2015 DCAS Update")
4	2070-5	DHCF Response to DC Legal Aid Society FOIA Request, DCAS Top Priorities and Risks, dated April 21, 2015 ("April 2015 DCAS Update")
5	2070-6	ESA Response to DC Legal Aid Society FOIA Request, Food and Nutrition Service Program Access Review of H Street Service Center, July 2, 2015
6	2070-7	ESA Response to DC Legal Aid Society FOIA Request, Food and Nutrition Service Program Management Evaluation Process FY 2015 Review, April 2, 2015
7	2070-8	ESA Response to DC Legal Aid Society FOIA Request, Food and Nutrition Service Audit Report, March 23, 2015
8	2070-9	Wesley Rivers and Chelsea Sharon Testimony to the District of Columbia Council's Committee on Health and Human Services on March 12, 2015
9	2071-1 (Part A) 2071-2 (Part B)	ESA Response to DC Legal Aid Society FOIA Request, District of Columbia Office of Quality Assurance and Analysis, Anacostia Service Center FY 2014 Management Evaluation Report, November 6, 2014
10	2071-3 (Part A) 2071-4 (Part B)	ESA Response to DC Legal Aid Society FOIA Request, District of Columbia Office of Quality Assurance and Analysis Program Access Review, H Street Service Center, September 23, 2014
11	2070-10	DHCF Response to DC Legal Aid Society FOIA Request, DCHL MAGI Renewals: Contingency Plan Presentation, May 22, 2015
12	2070-11	DHCF Response to DC Legal Aid Society FOIA Request, Internal Agency E-mail Communications, April 2015
13	2070-12	ESA Response to DC Legal Aid Society FOIA Request, DCAS Improvement Team Status, June 24, 2015
14	2070-13	ESA Response to DC Legal Aid Society FOIA Request, DCAS Improvement Team Status, May 19, 2015
15	2070-14	ESA Response to DC Legal Aid Society FOIA Request, ESA Operations and Data Cleanup Dashboard, May 13, 2014
16	2070-15	DHCF Response to DC Legal Aid Society FOIA Request, E-mail Communications Between CMS and DHCF, January 2015
17	2070-16	DHCF Response to DC Legal Aid Society FOIA Request, E-mail Communications Between DHS and DHCF, August to September

Number	ECF No.	Description
		2015
18	2070-17	E-mail from Legal Services Providers to ESA Staff with Examples
19	2071-5 (Part A) 2071-6 (Part B)	Closing the Gap Between Policy and Reality: Preventing Wrongful Denials and Terminations of Public Benefits in the District of Columbia, DC Legal Aid, May 22, 2015
20	2070-18	Plaintiffs' FOIA Request to DHCF, October 27, 2015
21	2070-19	DHCF FOIA Response ("DHCF FOIA Response"), December 3, 2015
22	2070-20	DHS FOIA Response, December 4, 2015
23	2070-21	Health Link MAGI Medicaid Processing MCAC Update, October 28, 2015 ("October MCAC Presentation")
24	2070-22	Declaration of Dr. Randi Abramson, December 17, 2015 ("Bread for the City Decl.")
25	2070-23	Declaration of Katie Nicol, December 17, 2015 ("Whitman-Walker Decl.")
26	2070-24	Declaration of Jennifer Mezey, December 18, 2015 ("Legal Aid Decl.")
27	2070-25	Declaration of Erin Loubier, December 17, 2015 ("Loubier Decl.")
28	2070-26	Declaration of Danielle Moise, December 17, 2015 ("Moise Decl.")
29	2070-27	Declaration of Karla Ayala-Carranza, December 16, 2015 ("Ayala-Carranza Decl.")
30	2070-28	Declaration of Tina Nelson, December 21, 2015 (Legal Counsel for the Elderly Decl.")
31	2070-29	Declaration of Fonda Carroll, December 16, 2015 ("Carroll Decl.")
32	2070-30	Declaration of Teri Jackson, December 14, 2015 ("Jackson Decl.")
33	2070-31	Declaration of Wesley Rivers, December 21, 2015 ("Rivers Decl.")
34	2070-32	Declaration of Jeremy Padow, December 21, 2015 ("Padow Decl.")
35	2070-33	Short Medicaid Renewal Form, provided in FOIA Response from DHCF to Plaintiffs' Request No. 2, December 3, 2015 ("Short Renewal Form")
36	2070-34	Sample Medicaid Renewal Form, M1, provided in FOIA Response from DHS to Plaintiffs, December 4, 2015
37	2070-35	Waiver Request from Claudia Schlosberg to CMS, June 4, 2015, provided in FOIA Response from DHCF to Plaintiffs, December 3, 2015
38	2070-36	Letter from CMS to Claudia Schlosberg to CMS, November 20, 2015, provided in FOIA response from DHS to Plaintiffs, December 4, 2015
39	2070-37	DHCF Medical Assistance Information Webpage, available at http://dhcf.dc.gov/page/medical-assistance-programs-information-andeligibility, downloaded on December 14, 2015

Number	ECF No.	Description
40	2070-38	DHCF FAQ Renewal Changes for Medicaid Members in 2014
41	2070-39	Response to DC Legal Aid Society FOIA Request Renewal Metrics Report, October 2015
42	2070-40	ESA Response to DC Legal Aid Society FOIA Request, ESA Operations and Data Cleanup Dashboard, June 3, 2014
43	2070-41	Order Defining Plaintiff Class, November 3, 1994, ECF No. 100
44	2070-42	Minute Order, February 24, 2009
45	2070-43	ESA Response to DC Legal Aid Society FOIA Request Federal Status Check Presentation, May 18, 2015
46	2070-44	ESA Response to DC Legal Aid Society FOIA Request, Sample D1 30-Day Notice
47	2070-45	ESA Response to DC Legal Aid Society FOIA Request, ESA Operations and Data Cleanup Dashboard, June 5, 2014
48	2070-46	Declaration of Vera Edmonds, December 21, 2015 ("Edmonds Decl.")
49	2070-47	Declaration of Melissa Rizio, December 22, 2015 ("Rizio Decl.")
50	2083-1	Cancellation Notice of ESA Business Process Enhancement Stakeholder Group, January 13, 2016
51	2083-2	Electronic mail to Kathleen Millian from Wayne Turnage re MCAC Changes, January 27, 2016
52	2083-3	MCAC Agenda Provided by DHCF, January 27, 2016
53	2083-4	2016 Kaiser Commission Report, Medicaid and CHIP Eligibility, Enrollment, Renewal, and Cost-Sharing Policies as of January 2016: Findings from a 50-State Survey
54	2082	Proposed Declaration of Chelsea Sharon of the DC Legal Aid Society, subject to the Motion for Leave
55	2083-5	DHCF Response to DC Legal Aid Society FOIA Request, DCAS Powerpoint, May 26, 2015
56	2083-6	DHCF Response to DC Legal Aid Society FOIA Request, DC Access System, CMS Year 2 Consult, January 23, 2015
57	2093-1	Declaration of Chelsea Sharon, January 29, 2016, with exhibits
58	2093-2	Excerpt of Transcript of Status Conference, October 22, 2015, cover and pp. 1-20
59	2093-3	Excerpt of Transcript of Status Conference, December 10, 2015, cover and pp. 1-10
60	2093-4	Cancellation Notice of ESA Business Process Enhancement Stakeholder Group, February 10, 2016
EXHIBITS BEING SUBMITTED WITH THIS REPLY BRIEF		
61		MCAC February 2016 Enrollment Report
62		Declaration of Chelsea Sharon, March 8, 2016 ("Sharon 2d Decl.")

Number	ECF No.	Description
63		Declaration of Jeremy Padow, March 9, 2016 ("Padow 2d Decl.")
64		Declaration of Jocelyn Blier, March 7, 2016 ("Blier Decl.")
65		Declaration of Ashley Connelly, March 7, 2016 ("Connelly Decl.")
66		Declaration of Albert Tillman, March 4, 2016 ("Tillman Decl.")
67		Declaration of Sylvester Cole, Jr., March 6, 2016 "(Cole Decl.")
68		Declaration of Maria Zamora, February 29, 2016 ("Zamora Decl.")
69		Declaration of Zulma Ledesma, March 1, 2016 ("Ledesma Decl.")
70		Declaration of Larry Campbell, March 7, 2016 ("Campbell Decl.")
71		Declaration of Leslie Jackson, March 9, 2016 ("L. Jackson Decl.")