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UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

PEG BALL, CREE JAMES, a minor )  
person by and through her )  
grandfather and guardian, BENNIE )  
JAMES, JEANNE SPINKA, VENNETTA )  
GRAHAM, COLLIN PHELAN, a minor )  
person by and through his mother )  
KIM BOWMAN, JUDETH HINTON, and )  
VIRGINIA HASKELL, as individuals )  
and as representatives of a class )  
of persons similarly situated, )  
 )  
Plaintiffs, )  
v. )  
 )  
PHYLLIS BIEDESS, Director of the )  
Arizona Health Care Cost )  
Containment System, THE ARIZONA )  
HEALTH CARE COST CONTAINMENT )  
SYSTEM ADMINISTRATION, and the )  
STATE OF ARIZONA, )  
 )  
Defendants. )

No. CIV 00 - 67 TUC ACM  
**PLAINTIFFS' STATEMENT  
OF MATERIAL FACTS IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT**

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1 in the State who are supposed to deliver a specific package of  
2 managed care to beneficiaries in return for a monthly capitation  
3 payment from AHCCCS. Source: Id.

4 7. There is one program contractor in each Arizona county  
5 except for Maricopa County, which has three program contractors.  
6 Source: Id.

7 8. The program contractor for developmentally disabled  
8 beneficiaries is the Division of Developmental Disabilities (DDD)  
9 in the Department of Economic Security (DES). Source: Id.

0 9. The monthly capitation payment is a blended rate  
1 including weighted costs of nursing facility, HCBS, acute medical  
2 care, behavioral health, and case management services. Source: Id.

3 10. The rates are based on AHCCCS fee-for-service rates,  
4 program contractor financial statements, service utilization data  
5 and historical trends. Source: Id.

6 11. ALTCS is funded by federal (Medicaid program, S.S.A.  
7 Title XIX), state and county monies. Source: Id.

8 B. FACTS CONCERNING THE NAMED PLAINTIFFS AND OTHER CLASS MEMBERS

9 Peg Ball

0 12. Plaintiff Ball is quadriplegic and wheelchair bound. She  
1 requires total assistance with activities of daily living and is  
2 dependent on a ventilator because she stops breathing at night.  
3 Source: Id. Source: Declarations of Peg Ball, Feb. 7, 2000 and  
4 June 8, 2000 (Appendices 1 and 2).

5 13. Ms. Ball's ALTCS care plan prescribed approximately 50  
6 hours of HCBS services per week. However, her ALTCS contractor,  
7

1 Pima Health Systems frequently failed to provide home care workers  
2 to carry out her care plan. Source: Id.

3 14. In the year prior to the filing of this lawsuit,  
4 plaintiff Ball received none of her prescribed services on  
5 weekends, and was forced to get by on only 31 of the 50 hours of  
6 attendant care services prescribed for her during the week.  
7 Source: Id.

8 15. Shortly before this lawsuit was filed, plaintiff's weekday  
9 morning and evening worker resigned. She told plaintiff that she  
10 could not afford to work for Pima Health Systems any more, because  
11 she was classified as a "spot" employee. Source: Id.

12 16. "Spot" employees for Pima Health System receive a rate of  
13 pay lower than regular employees (\$7.42 hour), and do not receive  
14 county benefits such as health and dental insurance, paid  
15 vacations, holidays or sick time. Source: Id.

16 17. In May 1997, Ms. Ball was forced to go into a nursing  
17 home, Posada del Sol, for lack of an HCBS caregiver. Source: Id.

18 18. Peg Ball was never been given a notice of denial or right  
19 to appeal when her HCBS attendant care services were not provided.  
20 Source: Id.

21 Cree James

22 19. Cree James is a disabled child who uses a wheelchair for  
23 ambulation. She requires constant supervision, and assistance with  
24 all activities of daily living, including feeding and toileting.  
25 Source: Declaration of Catherine James (Appendix 3).

26 20. Plaintiff James has been determined eligible for ALTCS

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1 through the Division of Developmental Disabilities (DDD) since  
2 1993. Since 1997, her care plan has provided for her to receive 60  
3 hours of attendant care per month, as well as respite care.  
4 Source: Id.

5 21. Plaintiff James and her family have had difficulty  
6 obtaining and keeping HCBS care workers. Staff lacked training,  
7 have repeatedly quit without notice, and refused to adhere to set  
8 schedules. For significant periods of time, no attendant care  
9 workers have been provided. Source: Id.

0 22. Cree James' grandparents have never received a written  
1 notice from their HCBS contractor that attendant care services  
2 would not be provided. Source: Id.

3 Jeanne Spinka

4 23. Jeanne Spinka is a 47 year old quadriplegic who lives  
5 with her 82 year old mother in Phoenix. She requires assistance  
6 with all activities of daily living, including bathing, dressing  
7 and toileting. She has to be lifted out of bed and into the  
8 wheelchair with a Hoyer lift. Source: Declaration of Jeanne Marie  
9 Spinka (Appendix 4).

0 24. Plaintiff Spinka's HCBS care plan prescribes 40 hours of  
1 attendant care per week. When the complaint was filed, Ms. Spinka  
2 was receiving only 25 hours of attendant care per week. HCBS case  
3 workers told her that there were no attendants available. Source:  
4 Id.

5 25. ALTCS has given plaintiff Spinka no written notice or  
6 appeal rights with respect to its failure to provide her with

1 attendant care services prescribed in her HCBS care plan. Source:  
2 Id.

3 26. ALTCS case workers have told the Spinkas that if they  
4 cannot get along with the attendant care hours received, the  
5 alternative is for Jeanne to move into a nursing home. Source:  
6 Id.

7 Vennetta Graham

8 27. Plaintiff Vennetta Graham has a leak of brain fluid,  
9 seizures, tremors and paralysis in her left hand, and is blind in  
10 her right eye. She lives in Tucson with her 43 year old son  
11 Gregory, who is mentally disabled. Source: Declaration of  
12 Vennetta Graham (Appendix 5).

13 28. Ms. Graham's ALTCS care plan called for her to receive 4  
14 hours of attendant services per week. She almost never received  
15 all of the prescribed services. Home care workers quit because  
16 they thought the work was too hard, because Ms. Graham complained  
17 about theft, and for other reasons. Source: Id.

18 29. Pima Health System did not give Ms. Graham a written  
19 notice of denial or of her right to appeal when they failed to  
20 provide attendant care workers to carry out her care plan. Source:  
21 Id.

22 Collin Phelan

23 30. Collin Phelan is a 4 year old boy who suffered a brain  
24 injury that left him with quadriplegia, a seizure disorder, and  
25 psycho-motor delays. He requires total care. Source: Declaration  
26 of Kimberly A. Bowman (Appendix 6).

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1           31. Collin was authorized in July of 1998 for 720 hours per  
2 year of respite care and 740 hours of personal  
3 attendant/habilitation care through the DDD. Although these  
4 services were authorized, no service was provided to Collin until  
5 February 2000. Source: Id.

6           32. DD has never given Collin's mother an explanation why he  
7 was not receiving the authorized services. She has never received  
8 a written denial notice or an explanation of grievance and appeal  
9 rights. Source: Id.

0 Grace Collier

1           33. Grace Collier used a wheelchair for mobility because she  
2 was unable to walk. She could not turn in bed, transfer from bed  
3 to wheelchair, bathe, toilet, change her diaper, dress, and  
4 transfer from wheelchair to bed. She needed assistance with all  
5 activities of daily living. Source: Declaration of Grace Collier  
6 (Appendix 7).

7           34. Grace Collier's HCBS care plan prescribed 17.5 hours per  
8 week of attendant care services, but they were eventually increased  
9 to 31.5 hours per week. Source: Id.

0           35. Throughout her participation in the HCBS program, Ms.  
1 Collier experienced problems receiving attendant care services.  
2 Pima Health System, her ALTCS contractor, repeatedly failed to  
3 provide attendants, leaving her stranded in bed without care.  
4 Source: Id.

5           36. Ms. Collier was never given written notice of the denial  
6 of services or written notice of appeal rights with respect to the

1 failure of ALTCS and Pima Health System to provide the HCBS  
2 attendant care services in her care plan. Source: Id.

3 37. After this lawsuit was filed, Grace Collier was moved to  
4 a nursing home, where she died on January 28, 2001. Source:  
5 Notice of Death of Plaintiff Grace Collier, March 26, 2001.

6 Judeth Hinton

7 38. Judeth Hinton uses a wheelchair for mobility because she  
8 is unable to walk. She needs assistance with all activities of  
9 daily living, including transferring from bed to wheelchair to  
10 toilet. Source: Source: Declarations of Judeth Hinton, July 28,  
11 2000 and May 30, 2001 (Appendix 8).

12 39. Plaintiff Hinton initially qualified for HCBS under the  
13 ALTCS program in May 1999. Her care plan specified 35 hours per  
14 week of in-home attendant care services; however, her case worker  
15 said that because no attendants were available she would have to go  
16 into a nursing home. She refused. Source: Id.

17 40. Subsequently, she was provided with only 21 hours of home  
18 care per week. On about 10 occasions, the attendant failed to  
19 return in the evening, so that she was left in her wheelchair all  
20 night. Source: Id.

21 41. In August 1999, plaintiff Hinton's services ended on two  
22 days notice because the provider did not have enough attendants.  
23 For two days Judeth Hinton had no HCBS attendant care services.  
24 Source: Id.

25 42. In March 2000, Ms. Hinton's attendant was sick and  
26 although the HCBS program contractor was informed, they sent no one

1 all day to help plaintiff get out of bed, eat and take medications.

2 Source: Id.

3 43. Plaintiff Hinton has never been given written notice of  
4 the denial of services or written notice of her appeal rights with  
5 respect to the failure of ALTCS and Pima Health System to provide  
6 prescribed HCBS home care services. Source: Id.

7 Virginia Haskell

8 44. As a result of her disabilities, Virginia Haskell is not  
9 able to walk, to toilet, to prepare her meals, to get in and out of  
0 bed, or to enter or leave the house without assistance. She uses a  
1 wheelchair. Source: Declaration of Virginia Haskell (Appendix 9).

2 45. Ms. Haskell has been eligible for the ALTCS program since  
3 approximately 1995, and has a care plan that specifies she should  
4 receive 10 hours of home care services per week. Source: Id.

5 46. In January 2000, Ms. Haskell's provider Lutheran Health  
6 Care stopped contracting for HCBS services with the ALTCS program  
7 contractor. No replacement was provided for three weeks. A new  
8 attendant who was not a CNA was sent by the program contractor on  
9 April 3, 2000. She never came again, saying that Ms. Haskell's needs  
0 were too great for her. Source: Id.

1 47. Plaintiff Haskell was never given notice that her  
2 services would be suspended, or that she had a right to appeal when  
3 the certified nursing assistant services were terminated by the  
4 ALTCS contractor. Source: Id.

5 Updates on Named Plaintiffs' Home Care Services

6 48. After this lawsuit was filed, defendants continued to

1 fail to provide all of the HCBS services specified in the named  
2 plaintiffs' care plans. This failure is clearly seen in charts  
3 compiled by ALTCS from periodic reports they requested from  
4 plaintiffs' program contractors. Source: Defendants' Initial  
5 Disclosures, Attachment J; Defendants' First Supplemental  
6 Disclosures.

7 Camilla Hovley

8 49. Camilla Hovley is a 4 year old with cerebral palsy who  
9 has received HCBS services from DDD since December 1997. Source:  
10 Declaration of Betsy Custard (Appendix 10).

11 50. DD has tried on several occasions to reduce Camilla's  
12 respite services but each time her mother, Betsy Custard, has  
13 protested. Source: Id.

14 51. On January 21, 2001, Betsy Custard attended a meeting at  
15 which Mark Smith from the Prescott DDD office spoke. She states  
16 that Mr. Smith said DDD District III was operating on a 3.6 million  
17 dollar deficit that would be resolved by reducing or terminating  
18 ALTCS/DDD services in District III. Source: Id.

19 Megan Gregory

20 52. Megan Gregory is a child with serious behavioral health  
21 problems who received inpatient services at the Arizona Children's  
22 Home in Tucson from March 3, 2000 to July 29, 2000. Source:  
23 Declaration of Angela Howell (Appendix 11).

24 53. Upon her discharge from the institution, Angela was  
25 determined eligible for ALTCS HCBS services. Her mother, Angela  
26 Howell, requested person care services to assist with activities of

1 daily living. Source: Id.

2 54. The ALTCS contractor, Pima Health System refused to  
3 provide any services to Megan, stating that it was only required to  
4 provide services based on physical needs, until she filed an appeal  
5 on November 1, 2000. Source: Id.

6 55. In December 2000, PHS agreed to provide personal care  
7 services to Megan 3 times a week, but in fact did not begin to  
8 provide services until after February 6, 2001. Until after that  
9 time PHS had no personal care worker available. Source: Id.

0 Michael G. Buchelerers

1 56. Michael G. Buchelerers is a 34 year old quadriplegic who  
2 is eligible for HCBS services from ALTCS. Source: Declaration of  
3 Michael G. Buchelerers (Appendix 12).

4 57. When Mr. Buchelerers' caregiver left in December 2001 to  
5 pursue a more lucrative position, he was told by his program  
6 contractor, PHS, that no one was available to fill his shifts.  
7 Source: Id.

8 58. Mr. Buchelerers set out to locate his own caregiver, but  
9 found that PHS delays in training and starting employment caused  
0 applicants to reject the job. Applicants also went to other jobs  
1 that paid more per hour or involved less responsibility for similar  
2 hourly wages. Source: Id.

3 Anderson Reid

4 59. Anderson Reid is a 44 year old quadriplegic residing in  
5 Tempe, Arizona, who has been eligible for ALTCS HCBS since the  
6 beginning of the program. Declaration of Anderson Reid (Appendix  
7

1 13).

2 60. Mr. Reid's ALTCS contractor, Maricopa Managed Care, has  
3 had ongoing problems finding and training attendants to carry out  
4 his care plan. There is rarely any back up staff when his regular  
5 attendant doesn't show up. Source: Id.

6 61. Once when the program contractor could not staff his  
7 case, Mr. Reid was told by the program contractor to "get a family  
8 member to do it [his bowel care]," and on another occasion he was  
9 forced to go into a nursing home. Source: Id.

10 62. The program contractor has never given Mr. Reid written  
11 notice or right to appeal when services are not provided. Source:  
12 Id.

13 Katherine Allen

14 63. Katherine Allen is a 5 year old child who has severe  
15 cerebral atrophy with numerous medical complications that cause her  
16 to need total care. She has been determined by her HCBS case  
17 worker to need 248 hours of skilled nursing services and 60 hours  
18 of respite services per month. Source: Declaration of Michele  
19 Allen (Appendix 14).

20 64. Due to the lack of providers, Katherine Allen has never  
21 received the full amount of authorized services from ALTCS. This  
22 has caused her and her family inconvenience and hardship.

23 65. Katherine's parents have never received a written notice  
24 from their HCBS contractor that the authorized amount of nursing  
25 and respite care services would not be provided for her.

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1 C. FACTS CONCERNING LACK OF HOME CARE SERVICES FOR HCBS  
2 BENEFICIARIES

3 66. Both of the major ALTCS program contractors had, and  
4 continue to have, long lists of beneficiaries waiting for home care  
5 workers to fill their care plans. Pima Health System had waiting  
6 lists of 125 beneficiaries without attendant care services on  
7 February 2, 2001, and 216 beneficiaries on April 24, 2001. Source:  
8 Memoranda of Karen Fields, PHS&S Administrator, February 2, 2001  
9 and April 24, 2001. Maricopa Long Term Care (MLTC) had a waiting  
0 list of 166 on December 28, 1998 and a waiting list of 205 on  
1 November 12, 1999. Source: Letters from MLTC to A. Shafer,  
2 Attachment K to Def's Initial Disclosures.

3 67. ALTCS' own investigations of specific beneficiary cases  
4 found that sufficient services were not provided by the program  
5 contractors. Source: Deposition of Susan Kay Luark, 11, 13:15.

6 68. The ALTCS Clinical Quality Manager believes based on her  
7 experience with AHCCCS that shortage of attendant care workers is a  
8 systemic problem. Source: Id., 42-43.

9 69. A comprehensive Community Based Report was prepared in  
0 1998 by a committee of program contractors, ALTCS providers, AHCCCS  
1 staff, aging and adult administration staff, DD staff and others.  
2 The Community Based Report stated that there appeared to be a  
3 shortage of home care workers in the paraprofessional category.  
4 Source: Deposition of Alan Shafer, 134-135.

5 70. ALTCS management is aware that there have been complaints  
6 about members not getting particular service their HCBS care plans.

1 Source: Id., 32:15-22.

2 71. A Quality of Care Research Form prepared by ALTCS lists  
3 34 cases complaining that HCBS services were lacking.  
4 Approximately 62% of the complaints concerned lack of attendant  
5 care services. Several complainants had experienced a total lack  
6 of care for several months at a time. Source: Defendant's Response  
7 to Plaintiffs' 3rd Request For Production of Documents, No. 7;  
8 Declaration of Cathleen M. Dooley, July 23, 2001 (Appendix 16).

9 72. The ALTCS Case Management Service Review (CMSR) sample  
10 case files reviewed for FY 1999 produced the following examples of  
11 lack of services: for Cochise County, no providers in the area had  
12 attendant care staff available; for Ventana, case manager could not  
13 find a provider for homemaker services; for APIPA, 2 cases in the  
14 sample had inadequate hours of attendant care; and for Maricopa  
15 Managed Care, 3 cases in the sample involved unavailable workers.  
16 Source: CMSR reports for FY 1999 reviewed at AHCCCS offices, April  
17 3, 2001.

18 73. ALTCS tells case managers to provide beneficiaries with  
19 substitute services when home care workers are not available, but  
20 such substitute services are usually shorter and different in kind  
21 from the unavailable HCBS services. They do not meet the standard  
22 for quality care. Source: Deposition of Susan Kay Luark, 96-99,  
23 144.

24 74. Urban paraprofessional home care agencies provide more  
25 than twice the hours of service per client per month than rural  
26 agencies. Source: AHCCCS Community Based Project Provider Survey

1 Report, draft 9/23/99.

2 75. Community Psychological and Education Services, a Tucson  
3 ALTCS provider, had a 50-55% turnover in health care personnel in  
4 FY 2001. A recent study by the Arizona Association of Providers  
5 For People With Disabilities yielded annual turnover rates of 42-  
6 175% throughout rural and urban Arizona. Source: Declaration of  
7 Tom Schramski (Appendix 17).

8 76. Executive Directors of social service agencies in both  
9 Phoenix and Tucson that assist disabled individuals to live  
0 independently have testified that the lack of home care services  
1 for HCBS beneficiaries forces some beneficiaries out of the  
2 community and into nursing homes. Source: Declaration of Phil  
3 Pangazio (ABIL) (Appendix 18) and Declaration of Ann Meyer (DIRECT)  
4 (Appendix 19).

5 D. FACTS CONCERNING INADEQUACY OF ALTCS HCBS PAY FOR HOME CARE  
6 WORKERS

7 77. It is common for HCBS providers to complain that they are  
8 being paid less than home care providers in the private market.  
9 Source: Deposition of Alan Shafer, 53. 66.

0 78. A survey of agencies that provide paraprofessional  
1 services "indicated that [almost all] have difficulty recruiting  
2 staff. . . . Recruiting and retention issues are related to lower  
3 wages, a limited ability to provide benefits, and competitive  
4 market/low unemployment." Source: AHCCCS Community Based Project  
5 Provider Survey Report, draft 9/23/99.

6 79. The ALTCS Clinical Quality Manager thought that HCBS  
7

1 rates might be too low to provide quality care and communicated  
2 this to the ALTCS Manager. Source: Deposition of Susan Luark, 12-  
3 13, 17.

4 80. Brian Lensch, Director of the Division of Developmental  
5 Disabilities (DD), has said on a number of occasions in meetings  
6 with ALTCS that the deficiencies in services DDD provides result  
7 from the fact that AHCCCS does not pay them enough to pay for  
8 respite care, attendant care, and personal care workers. Source:  
9 Id., 56-57.

10 81. A DDD rate study stated a concern that reimbursement for  
11 services did not on average cover the actual costs of providing  
12 service, and resulted in a high rate of staff turnover because  
13 wages were not adequate. DES, DDD Design Team Report No. 4, Rate  
14 Structure Recommendations, July 19, 1999.

15 82. Community Psychology & Education Services, a DDD provider  
16 in Pima, Maricopa, Cochise and Graham Counties provides very  
17 limited attendant care services through DDD because of "the very  
18 low rates." Demand as of June 4, 2001 was for at least 100 home  
19 care positions in those four counties, and there are "at least  
20 several hundred individuals with disabilities and their families  
21 that go without services as a result." Source: Declaration of  
22 Thomas G. Schramski (Appendix 17).

23 83. Pima Health System (PHS), the ALTCS program contractor  
24 for Pima County, hires its own attendant care workers (ACWs)  
25 directly rather than using a provider agency. In May 2000, after  
26 this lawsuit was filed, Pima Health System raised its hourly rates

1 for ACWs from \$7.42 to \$8.50 per hour. ACW workers are classified  
2 by PHS as temporary, part time workers and they receive no job  
3 benefits. Source: Memo of Karen Fields, April 24, 2001.

4 84. Pima County ACWs are not paid for their time as they  
5 travel from one patient's home to another during the day. Source:  
6 Declaration of Sally Hart (Appendix 28).

7 85. After this lawsuit was filed, AHCCCS raised the portion  
8 of its FY 2001 ALTCS capitation rate relevant to attendant care  
9 worker services by 10%. The reason for this increase was  
0 information received from the program contractors about the  
1 shortage of workers, turnover, and the actual wages they were  
2 paying. Source: Deposition of Mark Hoyt, 64.

3 86. Although the portion of the FY capitation rate relevant  
4 to ACWs was increased by AHCCCS, Pima Health System did not raise  
5 the hourly wages of its ACWs during FY 2001. Memo of Karen Fields,  
6 April 24, 2001.

7 E. HOME CARE SERVICES ARE MORE READILY AVAILABLE TO PATIENTS WITH  
8 MEDICARE AND PRIVATE INSURANCE

9 87. ALTCS reimbursement rates for home care providers have  
0 traditionally fallen below rates paid by Medicare and private  
1 insurers. Source: Declaration of Susan Brenton, Arizona Ass'n For  
2 Home Care, ¶ 4 (Appendix 20).

3 88. Many home health agencies in business today cannot afford  
4 to contract with ALTCS. As a result, many Arizona residents will  
5 not receive proper care or will be forced into other institutional  
6 settings such as nursing homes. Source, Id., ¶ 9.

1           89. A home care worker who is paid by both Medicare and ALTCS  
2 receives \$1.00 more per hour because of the Medicare eligibility.  
3 It would be an extreme hardship for her if she did not receive the  
4 higher rate due to Medicare. Source: Declaration of Michelle  
5 Olson, ¶ 6 (Appendix 21).

6           90. Allan D. Bogutz, a private guardian and conservator in  
7 Tucson, is able to arrange adequate home care services for his  
8 ward/beneficiaries with private funds, private insurance and  
9 Medicare. Source: Declaration of Allan D. Bogutz, ¶ 5 (Appendix  
10 22).

11           91. Foundation For Senior Living, a large provider of home  
12 care services in Maricopa and Mohave counties, stopped supplying  
13 attendant care services to ALTCS because the rates paid were too  
14 low. The rates paid by ALTCS program contractors for home care  
15 services other than attendant care are the lowest that the provider  
16 receives. Source: Declaration of Guy Mikkelsen, ¶¶ 7, 11  
17 (Appendix 23).

18           92. Banner Home Health, another large home care agency in  
19 Maricopa County dropped out of the ALTCS program at the end of  
20 calendar year 2000. Source: Id., ¶ 7.

21           93. The hourly rates charged by providers of home care  
22 services in Maricopa county for private pay patients are  
23 considerably higher than the rates paid by ALTCS contractors.  
24 Source: Id., ¶ 12.

25           94. Foundation For Senior Living is unable to hire and retain  
26 sufficient numbers of home care workers to meet HCBS needs at the

1 low rates paid by ALTCS program contractors. The Foundation was  
2 short 50 FTE employees for HCBS work in April 2001. Source: Id.,  
3 ¶ 14.

4 F. FACTS CONCERNING INADEQUATE MONITORING AND ENFORCEMENT BY ALTCS

5 95. ALTCS does not collect encounter data showing the gap  
6 between home care services prescribed for HCBS beneficiaries in  
7 their care plans and services actually provided by program  
8 contractors. (It does collect this data for the 3% of HCBS  
9 beneficiaries in the fee for service programs). Source: Deposition  
0 of Alan Shafer, 17:15-18, 18:2-13, 67:16-25, 117:8, and Deposition  
1 of Mark Hoyt, 15:17-24.

2 96. The ALTCS Manager has been told that program contractors  
3 have waiting lists for HCBS attendant care services. Source:  
4 Deposition of Alan Shafer, 115:4, and Defendant's Response to  
5 Plaintiffs' 3rd RFP No. 15.

6 97. ALTCS relies on quality of care complaints for  
7 information about gaps in home care service delivered to  
8 beneficiaries by program contractors. Source: Deposition of Alan  
9 Shafer, 19:14-20:5.

0 98. The Member Handbooks given to ALTCS recipients make no  
1 mention of a process for complaining to ALTCS about gaps in  
2 services. Instead they instruct recipients to talk to their case  
3 managers who work for the program contractors if they have  
4 problems. Source: Deposition of Susan Kay Luark, 77:5-6.

5 99. Most complaints do go to the program contractors, not to  
6 AHCCCS. Source: Id., 63:13-15.

1           100. A quadriplegic HCBS beneficiary attempted to complain  
2 after he was left alone all day when his attendant care worker  
3 could not come. His case manager's supervisor refused to tell him  
4 how to lodge a complaint, and he was forced to drop the matter.  
5 Source: Declaration of Michael A. Rembis, ¶ 5 (Appendix 24).

6           101. No quality of care complaints from beneficiaries about  
7 lack of services have been received by the ALTCS Manager. Source:  
8 Declaration of Alan Shafer, 33:5.

9           102. The Case Management Service Review (CMSR) is another kind  
10 of program contractor monitoring that is cited by ALTCS. Source:  
11 Id., 25:13-15.

12           103. The CMSR is a random sampling conducted of ALTCS files  
13 for a particular program contractor. The sample size is said to be  
14 statistically valid, but it combines both the nursing facility and  
15 HCBS beneficiaries so it is too small to be valid for problem  
16 unique to HCBS such as lack of services. Source: Id., 42:13-18.

17           104. The sample size for the 1999 CMSR performed by ALTCS of  
18 Maricopa Managed Care consisted of 96 members out of a total of  
19 9,000 members receiving services from that program contractor.  
20 Source: Declaration of Cathleen M. Dooley, July 31, 2001 (Appendix  
21 25).

22           105. The CMSR "is not a review of the unavailability of  
23 services." Its focus is whether case managers are taking action  
24 with respect to particular problems in specific cases at the time  
25 of the survey, not whether there is a systemic problem as to lack  
26 of workers. Source: Id., 41:1-15, and Defendant's Response to

1 Plaintiffs' 3rd RFP, No. 4.

2 106. In FY 2000, the CMSR was changed to eliminate question  
3 number 28 from the CMSR FY 1999, which was the only inquiry as to  
4 whether services in the care plan were actually being provided.  
5 Source: Case Management Service Review Reports reviewed at AHCCCS  
6 offices, April 3, 2001.

7 107. Another kind of review of program contractors performed  
8 by ALTCS periodically is the Operational and Financial Review  
9 (O&FR). The protocol for this review finds no deficiency in a  
0 shortage of home care workers because it assumes a shortage. Even  
1 when the review shows that services are not available the O&FRs  
2 still give program contractors a full compliance ("FC") rating.  
3 Source: O&FRs for Pima, Cochise, Pinal and Yavapai counties,  
4 Defendant's Response to Plaintiffs' 3rd RFP, No. 1.

5 108. ALTCS admits its policy is to let the plans self-monitor  
6 as to whether they are providing the services prescribed for  
7 enrollees. Source: Deposition of Alan Shafer, 118:17-22.

8 109. The ALTCS Manager, Alan Shafer, admitted that he does not  
9 know a lot about the extent to which individual care plans for HCBS  
0 services are not being filled by program contractors. Source:  
1 Id., 29:13-15.

2 110. ALTCS policy makers believe and accept that in managed  
3 care there "is always going to be a difference between what you,  
4 maybe, authorized versus what's been received. Sometimes more,  
5 sometimes less." Source: Id., 13:24-25, 19:1-4.

6 112. No corrective action plan concerning the unavailability  
7

1 of attendant care services was imposed by ALTCS on any program  
2 contractor during the year after this lawsuit was filed. Source:  
3 Id., 34:23.

4 113. No penalty or poor performance rating for failure to fill  
5 care plans has been given to a program contractor by ALTCS within  
6 the last two years. Source: Id., 141:1-5.

7 114. "Placement decisions are made by the long-term care  
8 program contractors who have financial incentives to place people  
9 at the lowest level of care. . . . [t]he capitation rate setting  
10 methodology provides financial incentives to deliver care at the  
11 lowest appropriate level." Source: The Arizona Health Care Cost  
12 Containment System: Thirteen Years of Managed Care in Medicaid,"  
13 Nelda McCall for the Henry J. Kaiser Family Foundation, July 1996.

14 115. "AHCCCS has . . . tried to secure the lowest possible  
15 [capitation] rates . . ." Source: Id., 23.

16 116. Program contractors that make a large profit in one year  
17 on their HCBS contracts are allowed to keep the profit, although  
18 ALTCS might not increase their capitation payment for the next year  
19 as much. Source: Deposition Of Alan Shafer, 22:1-2.

20 117. Both Maricopa and Pima counties made profits (with  
21 margins of 5 to 7 %) on their contracts in 1999 and 2000. Source:  
22 Defendants' Response to Plaintiffs' 3rd RFP, No. 13.

23 118. Pima County was allowed by ALTCS to transfer more than 5  
24 million dollars from its ALTCS program to other county programs in  
25 2001. Source: Letter of January 4, 2001 from Anne Winter, AHCCCS  
26 Financial Manager.

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1 119. Program contractors can increase the profit on their  
2 ALTCS contracts by providing fewer services. Source: Deposition  
3 of Mark Hoyt, 45:1-3, 22-23, and Deposition Of Alan Shafer, 86:2-9.

4 G. STANDARDS FOR MONITORING BY MEDICAID MANAGED CARE PROGRAMS

5 120. A major, six year study of states operating managed care  
6 Medicaid programs under the Section 1115 research and demonstration  
7 language was funded by HCFA. Although Arizona was not one of the  
8 states studied, the general structure of AHCCCS is the same as the  
9 newer programs that were studied, and the conclusions drawn about  
0 such programs are equally applicable to AHCCCS. "Reforming  
1 Medicaid: The Experiences of Five Pioneering States With Mandatory  
2 Managed Care and Eligibility Expansions," Mathematica Policy  
3 Research, Inc., P.O. Box 2393, Princeton, N.J. 08543-2393 (609)  
4 799-3535 (April 30, 2001).

5 121. The Executive Summary of the Mathematica report  
6 repeatedly states as one of its primary recommendations that  
7 Medicaid managed care programs must thoroughly monitor and enforce  
8 service requirements:

9 "States should focus more on assessing plans'  
0 capacity to deliver adequate care and on monitoring plan  
1 performance than on such plan features as for-profit  
2 status, use of capitation to pay physicians, or the  
3 proportion of an HMO's enrollees that are Medicaid  
4 covered." (xvi)

5 "The states assigned additional resources to these  
6 tasks [monitoring] as the demonstrations entered their  
7 third and fourth years, but the lack of good encounter  
8 data continued to limit their ability to assess the  
9 quality of care. . . . Over time, however, as the states  
0 recognized the value of using both sanctions and a  
1 collaborative approach, the [regulatory and partnership]  
2 approaches [to monitoring] converged." (xx, xxi)

1           “Monitoring of plans and dissemination of findings  
2 is critical for both quality assurance and informed  
3 beneficiary choice. Under a managed care system,  
4 responsibility for providing adequate access to care and  
5 adequate quality of care resides with the HMOs. However,  
6 the state must ensure that plans meet the state’s  
7 performance standards. Oversight requires that the state  
8 ensure plans have adequate grievance procedures and  
9 encounter-based measures of quality of care, that quality  
10 assurance data be supplied to the state, and that the  
11 state make these indicators publicly available in a  
12 usable format.” (xxxii)

13 Source: Id.

14           122. A study of AHCCCS funded by the Kaiser Family Foundation  
15 concluded with strong recommendations for monitoring PCs to prevent  
16 under servicing of beneficiaries:

17           Quality assurance activities require early and  
18 concerted energy. Important areas include: activities  
19 to detect underutilization of services, . . . (28)

20           In a capitated medical care program, it is of  
21 special importance to assure that beneficiaries are  
22 receiving appropriate treatment. (29)

23 Source: The Kaiser Family Foundation Report, “The Arizona Health  
24 Care Cost Containment System: Thirteen Years of Managed Care in  
25 Medicaid,” Nelda McCall, (July 1996).

26           123. On March 15, 1999, the Auditor General of Arizona issued  
27 a report on “the care provided to elderly and disabled persons  
28 receiving services under . . . (ALTCS).” that identified “some  
improvements [in AHCCCS responsibilities] that could better ensure  
home health clients receive quality care .” The Auditor General  
found:

AHCCCS also conducts annual operational and financial  
reviews of program contractors and measures client  
satisfaction, but some additional process improvements  
may be needed. Specifically, AHCCCS has not taken

1 progressive enforcement actions when it has identified  
2 repeated problems with quality-of-care issues. In  
3 addition, although AHCCCS conducts client satisfaction  
4 surveys, the surveys could be more useful if they were  
5 distributed to a random sample of clients and results  
6 were analyzed based on the setting within which the  
7 client resides. However, AHCCCS indicated that regularly  
8 analyzing survey results by client groups would be  
9 prohibitive with current resources since the sample size  
0 would need to be substantially increased.

6 Source: "Home Health Care Regulation and Expenditures," Report to  
7 the Arizona Legislature by Douglas R. Norton, Auditor General,  
8 State of Arizona Office of the Auditor General (March 1999), Audit  
9 Report Summary, iv.

0 124. The Auditor General also identified deficiencies in  
1 AHCCCS' complaint investigation process:

2 AHCCCS does not routinely use its quality-of-care  
3 concerns database to generate reports by provider and  
4 provider type to analyze specific problems discovered  
5 during complaint investigations. Doing so could enable  
6 AHCCCS to better identify problem agencies. In addition,  
7 AHCCCS could identify problems with home health services  
8 in general and develop additional procedures to address  
9 those problems.

7 Source: Id., 22.

8 125. Defendant's actuary testified that to establish  
9 actuarially sound capitation rates, data showing whether services  
0 provided in care plans of program contractors are actually being  
1 provided by the program contractors should be considered.  
2 Currently capitation rates are based on financial reports from  
3 contractors and data from them about only the health services that  
4 were utilized. Dep. of Hoyt, 15:17-24, 70:5-11.

5 H. FACTS CONCERNING ALTCS' CALCULATIONS OF CAPITATION RATES

1           126. For the contract year October 1, 2000 through September  
2 30, 2001 (CYE01), the overall rate of increase for the ALTCS  
3 Elderly and Physically Disabled (non-ventilator dependant) program  
4 statewide was 2.8%. Source: Letter of Deputy Director Branch  
5 McNeil to HCFA of September 1, 2000.

6           127. For the upcoming contract year, October 1, 2001 through  
7 September 30, 2001 (CYE02), the overall rate of increase statewide  
8 is 4.3%. Source: Letter of Deputy Directory Branch McNeil to HCFA  
9 of August 31, 2001.

10           128. For both the CYE01 and the CYE02 revisions of the rates,  
11 AHCCCS requested its actuarial firm "revisit the methodologies used  
12 in calculating several of the service components within the long  
13 term care capitation rates." Source: Letters of August 31, 2000  
14 and August 31, 2001 from Mark S. Hoyt to Phyllis Biedess.

15           129. The rate for each of the 19 services components  
16 comprising the HCBS Rate is only one factor in establishing the  
17 HCBS rate. Source: Defendants' Response to Plaintiffs' 4<sup>th</sup>  
18 Production of Document Request of May 23, 2001, page 5.

19           130. The HCBS per member per month rate is only one component  
20 of the ALTCS net capitation rate. The net capitation rate is  
21 calculated by adding seven different components. These are figures  
22 derived for monthly costs of providing services for: Nursing  
23 Facility care, HCBS Home care, HCBS Community care, and Acute care,  
24 and then adding payments for Case Management,  
25 Administration/Profit, Risk/Contingency and finally, adjusting the  
26 rate for a share of cost factor. Source: Letters of August 31,

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28

1 2000 and August 31, 2001 from Mark S. Hoyt to Phyllis Biedess.

2 131. For Maricopa County in CYE01 for non-ventilator dependent  
3 ALTCS clients, the HCBS rates were developed primarily from the  
4 financial information of the program contractor from the previous  
5 year. Source: Letter of August 31, 2000 from Mark Hoyt to Phyllis  
6 Biedess.

7 132. For CYE01, in Maricopa County, the HCBS Home component  
8 was increased by 3%, the HCBS community component was increased 4%  
9 and a one time increase of 10% was applied to Home Health Aide,  
0 Personal Care, Attendant Care services "where specific wage  
1 increase were warranted" within the HCBS component. For HCBS  
2 services in all other counties of Arizona, the HCBS component were  
3 increased by 8.2%. For CYE01 in all other counties, the HCBS  
4 component was not divided into in-home vs. community settings.  
5 Source: Id.

6 133. These CYE01 HCBS component increases did not result in a  
7 direct increase of the 10% or 8.2% in the net capitation rate  
8 actually paid to program contractors to provide these services to  
9 HCBS recipients. The overall increase in the ALTCS capitation rate  
0 for Maricopa County in CYE01 ended up only being a 2.3% increase  
1 over the previous year. Source: Id.

2 134. The CYE01 net capitation rate was not a fixed payment  
3 that the program contractors received. Instead, the program  
4 contractors who bid on whether they will provide these services in  
5 Maricopa County were to provide the services within a rate range of  
6 minus 5 percent to plus 3% of the established capitation rate.

1 Source: Id.

2 135. The rates established for the upcoming contract year also  
3 follow this pattern. For CYE02, HCBS per member per month rates in  
4 all counties in Arizona were calculated at an increased rate of  
5 15.3%. Source: Letter of August 31, 2001 of Mark Hoyt to Phyllis  
6 Biedess. However, the overall Maricopa County increase in the net  
7 capitation rate for ALTCS services in CYE02 was 11%, and varied for  
8 each of the 3 contractors in Maricopa County. Source: Id.

9 136. The overall rate increase for the rest of the counties in  
10 Arizona for CYE02 was only 2%, with increases varying by county and  
11 ranging from -1% to 7%. Source: Id.

12 137. Based on the consultants' recommendations, AHCCCS adopted  
13 HCBS Fee for Service rates which increased rates for attendant care  
14 services by 22.7%. Source: Defendants' Response to Plaintiffs' 4<sup>th</sup>  
15 Production of Document Request of May 23, 2001, page 5.

16 138. In CYE01, Attendant Care services alone comprised  
17 approximately 67% in Pima County and 61% in Maricopa County of all  
18 home per member per month HCBS costs. Source: HCBS Rate  
19 Financials dated March 27, 2001 submitted by Mark Hoyt, attached to  
20 letter of August 24, 2001 from Logan Johnston to Sally Hart.

21 139. AHCCCS is requiring the program contractors demonstrate  
22 that 11.7% percent of the increase will be passed through to HCBS  
23 providers, but with no specification that it is the attendant care,  
24 personal care, homemaker and respite care service providers which  
25 will be the HCBS service providers who receive the increase.  
26 Letter of August 31, 2001 of Mark Hoyt to Phyllis Biedess.

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1 140. There is no written plan or protocol for how AHCCCS will  
2 monitor the pass through requirement and AHCCCS has failed to  
3 specify what portion of the 11.7% increase must be passed through.  
4 Source: Deposition of Branch McNeil, 94, 96. AHCCCS has no  
5 expectation that there will be specific pass-throughs for  
6 categories of workers. Id. at 96:15-20.

7 141. AHCCCS' utilization rate estimate for calculation of the  
8 ALTCS capitation payment is based upon last year's claims and  
9 encounter data as reported by the program contractors. Source:  
0 AHCCCS' Fiscal Impact Estimate of 5/23/2001.

1 I. FACTS ABOUT EP&P STUDY AND COST DATA

2 142. AHCCCS implemented its HCBS payment rates in 1989 based  
3 upon limited data from other states, and since 1989, those rates  
4 have been updated primarily based on inflation. Source:  
5 Defendants' Response to Plaintiffs' 4<sup>th</sup> Production of Document  
6 Request of May 23, 2001.

7 143. In 2001, AHCCCS hired the consulting firm, EP&P, Inc. to  
8 conduct a cost survey for each HCBS service. Source: Id.

9 144. Prior to this survey, AHCCCS "had no information on the  
0 cost of these providers." Source: Deposition of Yvonne Powell,  
1 38:12-13.

2 145. AHCCCS could not rely on the survey results to establish  
3 actual costs of services to calculate its rates both because of a  
4 low response rate (only 59 out of 180 providers responded to the  
5 survey) and because many of the providers who did respond could not  
6 report their costs on a service specific basis. Source:  
7

1 Defendants' Response to Plaintiffs Fourth Production of Documents  
2 Request, HCBS Cost Survey for AHCCCS Rates effective 10/1/01 of May  
3 23, 2001, and Dep. of Powell, 81:4-5 and 155-159.

4 146. EP&P ultimately recommended rate increases based upon  
5 either of two models, resulting in AHCCCS adopting significant  
6 increases to the fee-for-service rates paid for attendant care,  
7 personal care, homemaker and respite care. Source: Dep. of  
8 Powell, 71:12-15. Defendants' Response to Plaintiffs 4<sup>th</sup> Production  
9 of Document Request of 5/23/01, Page 5.

10 147. Model 1 (the "independent" model) was an estimated cost to  
11 provide the services taking Bureau of Labor Statistics data to  
12 establish the direct wage, inflating it to a current rate and then  
13 adding 30% to account for employee related expenses, adding a  
14 factor for travel time, time writing notes, downtime, mileage and  
15 administrative overhead. Source: Dep. of Powell, 53:15-22.

16 148. Model 2 took the current rate fee for service rate AHCCCS  
17 paid for these services and increased it by 30% for employee  
18 related expenses. Source: Id. at 40:8-20.

19 149. AHCCCS' rate setting consultant recommended that in order  
20 to assure adequate rate settings in the future, AHCCCS should  
21 require cost reporting from their providers on a service specific  
22 basis and periodically incorporate that information into the rate  
23 setting process. Source: Dep. of Powell, 80:21 - 81:12; 86:18--  
24 87:1.

25 Dated: October 8, 2001

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