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9 Attorneys for Plaintiffs

10 UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 11 SAN FRANCISCO/OAKLAND DIVISION

12 MIKESHA MARTINEZ, by and through her)
 husband and next friend Carlos Martinez, LYDIA)
 13 DOMINGUEZ, ALEX BROWN, by and through)
 his mother and next friend Lisa Brown, DONNA)
 14 BROWN, CHLOE LIPTON, by and through her)
 conservator and next friend Julie Weissman-)
 15 Steinbaugh, HERBERT M. MEYER, LESLIE)
 GORDON, CHARLENE AYERS, WILLIE)
 16 BEATRICE SHEPPARD, and ANDY)
 MARTINEZ, on behalf of themselves and a class)
 17 of those similarly situated; SERVICE)
 EMPLOYEES INTERNATIONAL UNION)
 18 UNITED HEALTHCARE WORKERS WEST;)
 SERVICE EMPLOYEES INTERNATIONAL)
 19 UNION UNITED LONG-TERM CARE)
 WORKERS; SERVICE EMPLOYEES)
 20 INTERNATIONAL UNION LOCAL 521; and)
 SERVICE EMPLOYEES INTERNATIONAL)
 21 UNION CALIFORNIA STATE COUNCIL,

22 Plaintiffs,

23 v.

24 ARNOLD SCHWARZENEGGER, Governor of)
 the State of California; JOHN A. WAGNER,)
 25 Director of the California Department of Social)
 Services; DAVID MAXWELL-JOLLY, Director)
 26 of the California Department of Health Care)
 Services; JOHN CHIANG, California State)
 27 Controller; FRESNO COUNTY; and FRESNO)
 COUNTY IN-HOME SUPPORTIVE SERVICES)
 28 PUBLIC AUTHORITY,

Defendants.

Case No. C 09-02306 CW

CLASS ACTION

**PLAINTIFFS' EX PARTE MOTION TO
 SHORTEN TIME FOR MOTION FOR A
 PRELIMINARY INJUNCTION SO THAT
 RELIEF CAN BE GRANTED BEFORE
 JULY 1, 2009, OR, IN THE
 ALTERNATIVE, FOR A TEMPORARY
 RESTRAINING ORDER PENDING A
 RULING ON PRELIMINARY
 INJUNCTION**

1 Pursuant to Local Rule 6-3, Plaintiffs hereby move this Court for an *ex parte* order shortening the
 2 time in which to hold a hearing on their Motion for a Preliminary Injunction to permit the Court to grant
 3 relief prior to July 1, 2009.¹ In the alternative, if the Court is unable to hear the preliminary injunction
 4 motion and issue a ruling by July 1, Plaintiffs move for a temporary restraining order pending a ruling
 5 on the preliminary injunction motion.

6 Absent such relief, the challenged actions in this case will take effect on July 1, 2009, reducing
 7 the wages paid to In-Home Supportive Services (“IHSS”) providers who provide in-home assistance to
 8 low-income elderly and disabled individuals through California’s Medi-Cal program. These wage cuts
 9 will cause immediate and substantial harm to some of California’s most vulnerable populations,
 10 including both IHSS providers and the IHSS consumers for whom they care. IHSS providers will suffer
 11 significant losses in wages, which may not be remedied after the fact because of the State’s
 12 constitutional immunity. In addition, many IHSS providers will be forced to reduce their hours or quit
 13 their jobs altogether, and many IHSS consumers will be forced into institutional facilities or will remain
 14 in their homes and go without much-needed care, at serious risk to their health and well-being.

15 I.

16 In this action, Plaintiffs seek an injunction prohibiting the State’s implementation of California
 17 Welfare and Institutions Code Section 12306.1(d)(6) (“Section 12306.1(d)(6)”), which will reduce the
 18 maximum amount of the wages and benefits of IHSS providers for which the State will share costs by
 19 two dollars per hour. Section 12306.1(d)(6) will, absent relief by this Court, become effective on July 1,
 20 2009. Plaintiffs also seek an injunction prohibiting Defendants Fresno County and the Fresno County
 21 IHSS Public Authority from implementing a reduction in the wages and benefits of IHSS providers
 22 effective July 1, 2009. Plaintiffs contend that the challenged conduct will violate the Medicaid Act, 42
 23 U.S.C. §1396a(a)(30)(A), the Americans with Disabilities Act, 42 U.S.C. §12132, and the Rehabilitation
 24 Act, 29 U.S.C. §794(a).

25 California’s IHSS program provides assistance with the tasks of daily living – for example,
 26 bathing, dressing, feeding, and bowel and bladder care – to low-income elderly and/or disabled persons

27 _____
 28 ¹ Plaintiffs’ attempts to obtain a stipulation to the time change were unsuccessful. Leyton Decl.
 ¶6.

1 “who cannot safely remain in their homes or abodes of their own choosing unless these services are
2 provided.” Cal. Welf. & Inst. Code §12300. By providing this assistance, the IHSS program prevents
3 the unnecessary institutionalization of these individuals.

4 The IHSS program is administered by counties, but individual consumers hire and fire their own
5 providers. *Id.* §12301.6. Consumers can have difficulty finding IHSS providers, in part because of the
6 nature of the work, which is often difficult and can be unpleasant. *See, e.g.,* Billops Decl. ¶2; Calhoun
7 Decl. ¶8; Weissman-Steinbaugh Decl. ¶6.²

8 The rates paid to IHSS providers vary by county and are funded by a combination of federal,
9 state, and county funds. The State has delegated to the counties the authority to propose a rate, but the
10 rates are subject to, and do not take effect without, approval by the State. *Id.* §12306.1(a)-(b); Pl. RJN,
11 Ex. N. The federal government pays a certain percentage; of the remaining cost, the county pays 35
12 percent and the state pays 65 percent up to the current statutory cap of \$12.10 per hour, above which the
13 State will not share any of the costs. Cal. Welf. & Inst. Code §§12306, 12306.1(c)-(d).

14 Section 12306.1(d)(6) will, effective July 1, 2009, reduce that statutory cap by two dollars, to
15 \$10.10 (\$9.50 in wages and \$.60 in benefits). At present, IHSS providers in many counties are paid
16 wages that exceed \$9.50 per hour and/or a combination of wages and benefits that exceed \$10.10 per
17 hour. Golubock Decl., Ex. B.

18 II.

19 Plaintiffs filed this action as soon as it became clear that legal action was necessary to prevent
20 the devastating IHSS wage cuts. When Section 12306.1(d)(6) was enacted, the Legislature provided that
21 the cuts – along with several other budget cuts and tax increases – would not take effect if the Treasurer
22 and the Director of Finance determined that California would receive a certain amount of federal
23 stimulus funds. *See* Cal. Gov’t Code §99030; Budget Act of 2009, Senate Bill X3 No. 1, §8.30. The
24 determination that the requisite amount of funds would not be received was made on March 27, 2009.
25 Pl. RJN, Exs. L, M. The California Department of Social Services (“CDSS”), which administers the
26

27 ² With the exception of the Declaration of Stacey Leyton, all citations to supporting papers refer
28 to papers submitted in support of Plaintiffs’ Motion For A Preliminary Injunction, filed today under
separate cover.

1 IHSS program, subsequently notified the counties that any county currently paying wage and benefit
2 rates above the newly reduced maximum amount must, by June 1, 2009, submit a request to reduce this
3 amount to ensure approval of the requested rate prior to July 1, 2009, the effective date of Section
4 12306.1(d)(6). Pl. RJN, Exs. N, O.

5 Although the Treasurer and Director of Finance issued their determination at the end of April
6 2009, the fate of Section 12306.1(d)(6) still remained unclear. On May 5, 2009, an official at the U.S.
7 Department of Health and Human Services (“HHS”) issued a letter concluding that implementation of
8 Section 12306.1(d)(6) would violate a provision of the American Recovery and Reinvestment Act of
9 2009 (“ARRA”). Golubock Decl., Ex. D. On May 20, 2009, however, another HHS official overruled
10 this determination, thereby clearing the way for Section 12306.1(d)(6) to take effect. *Id.*, Ex. E.
11 Plaintiffs filed this lawsuit a few days later.

12 At least 12 counties that currently pay wages greater than \$9.50 per hour have submitted, by the
13 June 1, 2009 deadline, Rate Change Requests to CDSS to reduce those wages effective July 1, 2009,
14 making clear that imminent harm will result if Section 12306.1(d)(6) is not enjoined. McDevitt Decl.
15 ¶¶2-4 & Ex. A; Nam Decl. ¶¶2, 4-6, 9; Roth Decl. ¶¶4(b), 5(a), (b), (e), 6. Plaintiffs filed the pending
16 preliminary injunction motion three days after the State’s June 1 deadline for submission of Rate
17 Change Requests.

18 III.

19 Plaintiffs’ preliminary injunction motion demonstrates that the wage cuts must be enjoined
20 because they contravene federal law in a several ways. As a threshold matter, they violate procedural
21 requirements of the Medicaid Act. *See* 42 U.S.C. §1396a(a)(30)(A). In April of this year, the Ninth
22 Circuit re-affirmed that, when the State seeks to change payment rates under the Medi-Cal program, the
23 Medicaid Act requires that it first conduct a reasoned analysis of the impact of those cuts to ensure that
24 they are consistent with the level of care required under the Act. *See California Pharmacists Ass’n v.*
25 *Maxwell-Jolly*, 563 F.3d 847 (9th Cir. 2009). Under this clear Ninth Circuit precedent, cuts enacted for
26 purely budgetary reasons violate the Act. Because the Defendants failed to conduct any analysis of the
27 impact of the cuts at issue prior to their enactment, the cuts must be enjoined.

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1 That dispositive threshold point aside, the cuts also violate the Medicaid Act's substantive
2 guarantees of access to services and quality of care because the rates were not set to ensure IHSS
3 recipients will have adequate access to quality in-home assistance and they will have difficulty finding
4 providers at the reduced rates, *See* 42 U.S.C. §1396a(a)(30)(A). The cuts also constitute unlawful
5 discrimination under the Americans with Disabilities Act ("ADA") and Rehabilitation Act: Some IHSS
6 consumers will be unable to find providers at the reduced rates, which will force disabled individuals
7 who are otherwise capable of living in their own homes into institutional facilities to obtain the services
8 now provided through the IHSS program.. *See* 42 U.S.C. §12132; 29 U.S.C. §794(a); *Olmstead v. L.C.*
9 *ex rel. Zimring*, 527 U.S. 581 (1999).

10 As explained in Plaintiffs' Memorandum in Support of Motion for a Preliminary Injunction and
11 and dozens of supporting declarations from IHSS providers, IHSS consumers, and experts in public
12 health and economics, IHSS providers and consumers will be substantially harmed if relief is not granted
13 before July 1, 2009. In many counties that currently pay wages and/or benefits above the newly reduced
14 maximum amount, Section 12306.1(d)(6) will, absent relief from this Court, cause IHSS providers'
15 wages and benefits to drop significantly from their current levels. IHSS providers, many of whom are
16 already barely subsisting on their current wages, will suffer from this reduction in wages. Those who
17 elect to remain IHSS providers may be forced to choose between paying for food, housing, or health
18 care. And the Eleventh Amendment will preclude this Court from ordering monetary relief for an
19 unlawful wage cut after the fact.

20 In addition, IHSS consumers will suffer if the cuts are not enjoined. Many providers will leave
21 IHSS service for other work, forcing consumers – who will be unable to find replacement providers at
22 the reduced wage rate – to be deprived of critical IHSS services or be forced into nursing homes.

23 IV.

24 Because the challenged action will take effect on July 1, 2009, several days prior to the earliest
25 hearing date for Plaintiffs' preliminary injunction motion under the regular schedule, Plaintiffs hereby
26 move to shorten time for a hearing for Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs
27 request a schedule that would, if the Court concludes that Plaintiffs' Motion For A Preliminary
28 Injunction should be granted, permit the Court to order relief prior to July 1, 2009. Because lead

1 counsel for Plaintiffs will be out of town from June 18-24 (Leyton Decl. ¶8), Plaintiffs respectfully
2 request that the Court not set a hearing during that time period.

3 Plaintiffs propose the following schedule:

4 Defendants' opposition papers due June 18, 2009. (This would give the defendants the
5 same two weeks to file an opposition that they would have under the regular motion schedule.)

6 Plaintiffs' reply papers due June 24, 2009

7 Hearing date June 26, 2009.

8 **V.**

9 If the Court's calendar does not permit the Court to hold a hearing and rule on the Motion for a
10 Preliminary Injunction before July 1, 2009, then, Plaintiffs request, in the alternative, that the Court
11 issue a temporary restraining order, pending a hearing on the preliminary injunction motion, that
12 prohibits Defendants from implementing California Welfare and Institutions Code §12306.1(d)(6),
13 including by approving or implementing any county IHSS rate decreases adopted pursuant to Section
14 12306.1(d)(6). As demonstrated by Plaintiffs' Motion for a Preliminary Injunction and the supporting
15 declarations and exhibitst, the standards for issuance of a temporary restraining order – a likelihood of
16 success on the merits, a likelihood of irreparable harm in the absence of preliminary relief, that the
17 balance of equities tips in their favor, and that an injunction is in the public interest – are easily met here.
18 *See Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009).

19 **CONCLUSION**

20 For the foregoing reasons, the Court should grant Plaintiffs' motion to shorten time and set a
21 schedule so that the Court can hear and rule on the preliminary injunction motion prior to July 1, 2009
22 or, in the alternative, the Court should issue a temporary restraining order pending its ruling on the
23 preliminary injunction motion..

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Dated: June 4, 2009

Respectfully submitted,

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SCOTT KRONLAND (SBN 171693)
STACEY M. LEYTON (SBN 203827)
PEDER J. THOREEN (SBN 217081)
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By: /s/ Stacey M. Leyton
Stacey M. Leyton

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9 Attorneys for Plaintiffs

10 UNITED STATES DISTRICT COURT

11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

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 27 Controller; FRESNO COUNTY; and FRESNO)
 COUNTY IN-HOME SUPPORTIVE SERVICES)
 28 PUBLIC AUTHORITY,

Defendants.

Case No. C 09-02306 CW

CLASS ACTION

DECLARATION OF STACEY M. LEYTON IN SUPPORT OF PLAINTIFFS' EX PARTE MOTION TO SHORTEN TIME ON THEIR MOTION FOR A PRELIMINARY INJUNCTION SO THAT RELIEF CAN BE GRANTED BEFORE JULY 1, 2009, OR, IN THE ALTERNATIVE, FOR A TEMPORARY RESTRAINING ORDER PENDING A RULING ON PRELIMINARY INJUNCTION

1 I, Stacey M. Leyton, declare as follows:

2 1. I am a member of the bar of this Court and lead counsel for Plaintiffs in this action. I
3 make this declaration in support of Plaintiffs' Motion to Shorten Time on Plaintiffs' Motion for a
4 Preliminary Injunction, or, in the Alternative, for a Temporary Restraining Order Pending a Ruling on
5 Preliminary Injunction.

6 2. In this action, Plaintiffs seek an injunction prohibiting the State's implementation of Cal.
7 Welf. & Inst. Code §12306.1(d)(6) ("Section 12306.1(d)(6)"), which will reduce the maximum amount
8 of the wages and benefits of In-Home Supportive Services ("IHSS") providers for which the State will
9 share costs by two dollars per hour, effective July 1, 2009. As explained in the accompanying motion
10 papers, the wages and/or benefits of IHSS providers in several counties will be reduced on July 1, 2009,
11 absent relief by this Court.

12 3. Plaintiffs today are filing and serving their Motion for a Preliminary Injunction in this
13 matter. Pursuant to Local Rule 7-2(a), unless otherwise ordered by the Court, a motion must be filed
14 and served not less than 35 days before the noticed hearing date. Accordingly, absent relief on this
15 motion, Plaintiffs' Motion for a Preliminary Injunction cannot be set for hearing in time for relief to be
16 granted before July 1, 2009.

17 4. As described in Plaintiffs' memorandum and declarations in support of the Motion for a
18 Preliminary Injunction: IHSS providers and consumers will be substantially harmed if Section
19 12306.1(d)(6) is implemented on July 1, 2009. In many counties that currently pay wages and/or
20 benefits above the newly reduced maximum amount, Section 12306.1(d)(6) will, absent relief from this
21 Court, cause IHSS providers' wages and benefits to drop significantly from their current levels. IHSS
22 providers, many of whom are already barely subsisting on their current wages, will suffer from this
23 reduction in wages. Those who elect to remain IHSS providers may be forced to choose between paying
24 for food, housing, or health care. Many will leave IHSS service for other work. IHSS consumers whose
25 providers quit as a result of the wage reduction will be substantially harmed by the loss of a provider
26 with whom, in many cases, they have formed a close relationship. In addition, many such consumers
27
28

1 will be unable to replace their provider, and will either be deprived of critical IHSS services or be forced
2 into nursing homes.

3 5. The challenged action will take effect on July 1, 2009, several days prior to the earliest
4 hearing date under the regular schedule.

5 6. Plaintiffs attempted to obtain a stipulation from Defendants to avoid the need to file an ex
6 parte motion to shorten time but were unable to do so. On June 2, 2009, I spoke with Susan Carson of
7 the California Attorney General's office, counsel for Defendants Schwarzenegger, Wagner, Maxwell-
8 Jolly, and Chiang. I informed her of our intent to file this motion, and she informed me that the State
9 Defendants would oppose a motion to shorten time. On June 3, 2009, I spoke with Bill Mar in the
10 Fresno County County's office, who informed me that Mike Woods at McCormick Barstow LLP would
11 be representing Defendants Fresno County and Fresno County IHSS Public Authority. I informed Mr.
12 Mar of our intent to file this motion and asked that he tell Mr. Woods to contact me. I also left a
13 telephone message for Mr. Woods and sent him an electronic mail message stating the same. I have not
14 received any response from Mr. Woods as of the filing of this declaration.

15 7. There have been no previous time modifications in this case.

16 8. Due to longstanding prior commitments, I will be out of town from June 18-24, 2009
17 speaking at a major conference in Washington, D.C. and then representing clients at a preliminary
18 injunction hearing in Denver, Colorado in another case in which I am representing challengers to a state
19 constitutional amendment that will restrict the electoral activity of public employee unions.
20 Accordingly, Plaintiffs request that the Court not set the preliminary injunction hearing on one of those
21 dates.

22 9. I declare under penalty of perjury that the foregoing is true and correct.

23
24 Executed this 4 day of June 2009, at San Francisco, California.

25
26 /s/ Stacey M. Leyton
27 Stacey M. Leyton