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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

**PLAINTIFFS' EMERGENCY EX PARTE
MOTION FOR ENFORCEMENT OF
PRELIMINARY INJUNCTION**

**IMMEDIATE RULING REQUESTED
PRIOR TO JULY 1, 2009**

1 Plaintiffs hereby move this Court for an emergency *ex parte* order for enforcement of its
2 previously issued preliminary injunction, to ensure State Defendants' immediate compliance and to
3 preserve the currently effective status quo rates after July 1, 2009. Plaintiffs request an immediate ruling
4 in order to ensure implementation of that injunction, and to avoid the irreparable harm that will
5 otherwise result.

6 State Defendants have represented to Plaintiffs that they do not interpret this Court's injunction,
7 which prohibits the implementation of California Welfare and Institutions Code § 12306.1(d)(6), to
8 invalidate the State's approval of rate decreases submitted by counties pursuant to the State's
9 instructions as to how counties should implement § 12306.1(d)(6). State Defendants therefore
10 apparently intend to permit those rate reductions to go into effect on July 1. That interpretation would
11 flout both the terms and the purposes of this Court's injunction. Indeed, it would allow the precise
12 illegal conduct that the injunction was intended to prohibit: the reduction of Medicaid payment rates
13 based on the enactment of § 12306.1(d)(6) without any consideration of the factors set forth in 42 U.S.C.
14 § 1396a(a)(30)(A) ("Section 30(A)"). In order to prevent this circumvention, Plaintiffs ask this Court
15 immediately to enjoin State Defendants from giving effect to rate decreases submitted and approved in
16 implementation of § 12306.1(d)(6), and to communicate to counties that rates in effect prior to such
17 submissions (that is, rates *currently* in effect) will be reinstated unless and until a new rate change
18 request is filed and approved. This order is necessary in order to preserve the status quo.

19 Through two official communications in April and May of this year, the State instructed counties
20 that § 12306.1(d)(6) had rescinded approvals of all rates above \$10.10 (\$9.50 in wages and \$0.60 in
21 benefits) and required submission of rate change requests. In accord with this instruction, and based on
22 the enactment of § 12306.1(d)(6), some counties submitted requests that reduced IHSS provider wages
23 and benefits, and the State (apparently) approved those rate decreases.¹ Now, rather than communicate
24 to the affected counties that its prior instructions were invalid because the statute was unlawful, and that
25 the approvals of the requests submitted in implementation of § 12306.1(d)(6) are no longer effective,

26 _____
27 ¹ As set forth in the Declaration of Debra Roth submitted contemporaneously with Plaintiffs'
28 Motion for a Preliminary Injunction, Plaintiffs' request for information regarding the State's receipt and
approval of rate change requests was denied. Roth Decl. ¶2.

1 State Defendants apparently take the position that these approvals will remain in effect, permitting the
2 scheduled wage decreases to take place on July 1, 2009, in contravention of this Court's order to the
3 contrary.

4 To be clear: this is *not* the same issue as the question, discussed at the June 25 hearing, whether
5 Fresno County may proceed with a separate and independent rate change request based on its purported
6 realignment funds shortfall. This Court declined to address that question, on the ground that the issue
7 was not before it. State Defendants have misinterpreted this Court's decision as leaving undecided the
8 question whether rate change requests submitted as part of the implementation of § 12306.1(d)(6) and
9 approved by the State as part of that implementation remain in effect despite the Court's injunction.

10 BACKGROUND

11 1. Implementation of § 12306.1(d)(6)

12 On April 2, 2009, the California Department of Social Services ("CDSS"), which administers the
13 IHSS program, issued All-County Letter 09-19 with the stated purpose of informing counties about the
14 enactment of Welfare and Institutions Code § 12306.1(d)(6). Leyton Supp. Decl., Ex. A at 1.² The first
15 paragraph of that All-County Letter stated: "*This letter will inform counties how this change will be*
16 *implemented.*" *Id.* (emphasis added). It stated that no rate changes would take effect without approval
17 of CDSS and the California Department of Health Services ("CDHS"), and instructed counties to
18 "submit a PA Rate Request to reduce the wages and health benefits to the \$10.10 level" by May 1, 2009
19 in order for the new rate to take effect on July 1, 2009. *Id.*, Ex. A at 2.

20 Following the issuance of All-County Letter 09-19, in communications with the federal
21 Department of Health and Human Services over whether the State was in compliance with the federal
22 American Recovery and Reinvestment Act of 2009, the State took the position that, based on the
23 enactment of § 12306.1(d)(6), "the State's conditional approvals of the PA rates are no longer effective
24 and each of the counties in question will need to request the State's approval of another PA rate."
25 Leyton Supp. Decl., Ex. C at 4. The State explained:

26 _____
27 ² This All-County Letter was previously submitted to this Court as Exhibit N to Plaintiffs'
28 Request for Judicial Notice in Support of Preliminary Injunction. This Court granted Plaintiffs' request
for judicial notice. Order Granting Plaintiffs' Motion for a Preliminary Injunction at 2 n. 2.

1 **(2) SEIU has not refuted the State's assertion that its conditional approval of the counties' wages and benefits has been abrogated by the impending July 1 reduction.**

2 SEIU claims that an All County Letter issued by the State to the counties on April 2, 2009 (No. 3 09-19) does not reflect that the approval for their rate packages has been abrogated. While we 4 disagree with SEIU's spin on the All County Letter, the State is currently working on amending 5 that All County Information Notice to more clearly inform the counties of the effect of the 6 impending July 1 reduced appropriation.

7 Regarding SEIU's question about the effect of the lack of approval of the counties' rate 8 packages, as the State has already noted, since state funding to support the wage amounts in the 9 counties' labor agreements is not available as of July 1, 2009, *the PA rates, which are based 10 upon the amount of state funding appropriated, are not approved as of July 1, 2009, and the 11 counties will need to submit new rate packages for approval.*

12 Leyton Supp. Decl., Ex. D at 2 (emphasis added).

13 Subsequently, on May 1, 2009, CDSS issued All-County Information Notice I-34-09. Leyton 14 Supp. Decl., Ex. B.³ The first paragraph of that Information Notice recited the following:

15 The purpose of this All-County Information Notice (ACIN) is to provide counties with 16 updated information regarding *the processing of Public Authority (PA) Rate Change 17 Request to reflect the reduction in the statutory maximum amount in which the state will 18 participate from \$12.10 to \$10.10, effective July 1, 2009.*

19 *Id.* at 1 (emphasis added). The Information Notice further instructed that "Counties currently providing 20 wages and individual health benefits above \$10.10 must submit a PA Rate Change Request to reflect the 21 change in the maximum amount in which the state will participate." *Id.* It also postponed the applicable 22 submission deadline to June 1, 2009. *Id.*

23 In reliance upon these communications, twelve counties have submitted rate change requests to 24 reflect or respond to § 12306.1(d)(6)'s decrease in state participation. Order Granting Plaintiffs' Motion 25 for a Preliminary Injunction at 4:22-26.

26 2. This Court's Injunction

27 Following briefing and a hearing, this Court issued a written Order Granting Plaintiffs' Motion 28 for a Preliminary Injunction on June 26, 2009. In issuing this injunction, this Court found that Plaintiffs 29 had demonstrated a likelihood of success, based on State Defendants' failure to consider the impact of 30 rates reduced pursuant to § 12306.1(d)(6) on the factors set forth in Section 30(A). The Court further

³ This All-County Information Notice was previously submitted as Exhibit O to Plaintiffs' Request for Judicial Notice, which this Court granted. *See* note 2 *supra*.

1 found that “immediate and irreparable harm” would result without an injunction. Order Granting
2 Plaintiffs’ Motion for a Preliminary Injunction at 10:25.

3 In finding irreparable harm, this Court reasoned that the wage reductions that would result from
4 the implementation of § 12306.1(d)(6) would leave many IHSS consumers without IHSS assistance,
5 causing harm that would include unnecessary institutionalization. *Id.* at 10:25-11:10. This Court further
6 found that irreparable harm would befall IHSS providers in the absence of the requested injunction.
7 *Id.* at 11:11-21.

8 This Court concluded: “As set forth in the separately filed preliminary injunction, Defendants are
9 enjoined and restrained *from implementing California Welfare and Institutions Code § 12306.1(d)(6)*
10 without first conducting the analysis required by Section 30(A), as described in *Orthopaedic Hospital.*”
11 *Id.* at 12:13-17 (emphasis added); *see also* Preliminary Injunction 1:24-28.

12 3. Communications Regarding Implementation of Injunction

13 After issuance of the Preliminary Injunction, Plaintiffs’ counsel wrote to counsel for State
14 Defendants asking for the issuance of an all-county communication stating that All-County Letter 09-19
15 and All-County Information Notice I-34-09 were rescinded; that the rate reductions submitted and
16 approved pursuant to § 12306.1(d)(6) were disapproved and could not be implemented; and that rates
17 previously in effect remained in effect for those counties. Leyton Supp. Decl., Ex. E.

18 Later the same day, counsel for State Defendants responded that they would issue an All-County
19 Information Notice stating that this Court had enjoined the implementation of § 12306.1(d)(6).
20 However, State Defendants would not agree to rescind the prior all-county communications or to inform
21 counties that rate decreases submitted and approved as part of that implementation were
22 “disapproved.” Leyton Supp. Decl., Ex. F. State Defendants explained:

23 Plaintiffs did not seek an injunction that would require CDSS to disapprove these Requests
24 submitted by counties, and during oral argument, the court specifically declined to issue such an
25 injunction on the ground that it was not before it. Therefore, there is no basis for your request
26 now. Finally, CDSS does not have the authority to tell counties what level of wages and benefits
27 they should pay to IHSS providers; that is determined through collective bargaining between the
28 union and the county.

Id.

ARGUMENT

1
2 There is no dispute that the rate change requests at issue were prompted by the enactment of
3 § 12306.1(d)(6), and were submitted to and approved by the State pursuant to the process the State
4 established for implementation of § 12306.1(d)(6). The State instructed counties that § 12306.1(d)(6)
5 had rescinded approval of rates above \$10.10 and required submission of new rates, and that counties
6 that did not reduce their rate to below \$10.10 before June 1, 2009 would be responsible for paying what
7 had been the State's share beginning July 1, 2009. Counties submitted rate change requests, including
8 proposed rate decreases, in compliance with those instructions.

9 Yet rather than acknowledging that the process it established and the approvals it issued pursuant
10 to that process were invalid because they were based on an unlawful enactment, State Defendants
11 apparently take the position that rate decreases submitted and approved in implementation of
12 § 12306.1(d)(6) remain in effect and unaffected by this Court's injunction.

13 Under State Defendants' construction of this Court's order, all counties that have submitted rate
14 decrease requests in implementation of § 12306.1(d)(6) would need to affirmatively ask the State to
15 rescind approval of their previously submitted rate changes.⁴ In counties that fail to do so, State
16 Defendants would apparently pay the reduced wages to IHSS providers. At best, State Defendants'
17 interpretation of the injunction threatens to cause confusion and chaos regarding which rate is effective
18 in counties that submitted rate change requests based on § 12306.1(d)(6). At worst, State Defendants'
19 construction threatens to leave in place the exact irreparable injury that the preliminary injunction seeks
20 to prevent.

21 The Court's injunction was premised on clear Ninth Circuit authority prohibiting reductions in
22 Medicaid payment rates without consideration of the impact of those reduced rates on the Section 30(A)
23 factors. *See California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 850 (9th Cir. 2009);

24
25 ⁴ This may require a vote of the Boards of Supervisors in some affected counties, presumably at
26 their next regular meeting. Then, State Defendants would need to review and approve the rate change
27 request and alter the payroll system, a process that, in conjunction with the attempted implementation of
28 § 12306.1(d)(6), took approximately 30 days. Therefore, it is quite likely that even if counties
immediately begin the process of rescinding their rate reductions, it could take a month or two before
wage levels would be restored to the pre-July 1 status quo.

1 *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1496 (9th Cir. 1997). Allowing the rate reductions at issue
2 to take effect – despite State Defendants’ admitted failure to conduct the required analysis under Section
3 30(A) prior to the enactment of § 12306.1(d)(6) – would thus completely thwart the purpose of the
4 injunction. State Defendants’ current position is simply a continuation of their misguided belief that
5 they have no responsibility for ensuring compliance with Section 30(A).

6 As Plaintiffs have previously explained, State Defendants cannot abdicate this responsibility.
7 The Medicaid Act requires that a single state agency (DHCS) be responsible for the administration of the
8 State’s Medicaid program, precisely to avoid questions as to which entity is responsible. *See* 42 C.F.R. §
9 431.10.⁵ And as State Defendants admitted in their opposition to Plaintiffs’ request for a preliminary
10 injunction, CDSS and DHCS approve IHSS rates before they become effective.⁶ It is thus clear that the
11 State Defendants *can* and *must* ensure compliance with the Medicaid Act in these circumstances, and it
12 is equally clear that the Court’s injunction was intended to require that they do just that. *See Schering*
13 *Corp. v. Illinois Antibiotics Co.*, 62 F.3d 903, 906-07 (7th Cir. 1995) (“narrow literalism” may not be
14 used by defendant to evade obligations under injunction).

15 Moreover, the purpose of a preliminary injunction is to maintain the status quo pending a hearing
16 on the merits. *See Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa County*,
17 550 F.3d 770, 776 (9th Cir. 2008). Here, the status quo that the injunction was intended to preserve is
18 the rates in effect before July 1, not the lower wage rates that would become effective on July 1 in some
19 counties because of § 12306.1(d)(6) – a provision the Court has found will likely be held invalid. In
20 other words, the injunction was intended to preserve the situation that would have existed as if
21 § 12306.1(d)(6) had never been enacted.

22
23
24 ⁵ *See also id.* § 431.10(e) (“The agency must not delegate, to other than its own officials,
25 authority to . . . [e]xercise administrative discretion in the administration or supervision of the plan
26 If other State or local agencies or offices perform services for the Medicaid agency, they must not have
27 the authority to change or disapprove any administrative decision of that agency, or otherwise substitute
their judgment for that of the Medicaid agency with respect to the application of policies, rules, and
regulations issued by the Medicaid agency”).

28 ⁶ Further, Defendant State Controller actually issues the paychecks to the IHSS providers.

1 When an injunction is issued, the enjoined party has the responsibility to comply with that
2 injunction including by rescinding any unlawful instructions it has previously given. *See Armstrong v.*
3 *Schwarzenegger*, 2007 WL 2694243, at *6 (N.D. Cal. Sept. 11, 2007) (Wilken, J.) (defendants violated
4 injunction where, among other things, they failed to inform staff about resources available as result of
5 injunction); *Landmark Legal Found v. EPA*, 272 F.Supp.2d 70, 78-79 (D.D.C. 2003) (EPA did not
6 substantially comply in good faith with injunction where officials did not adequately advise relevant
7 employees of their responsibilities under the order). For example, if a State statute authorized the
8 demolition of a building, and pursuant to this statute officials had instructed a wrecking company that it
9 could demolish a particular building, but that demolition was subsequently enjoined, the State would be
10 obligated to contact the wrecking company and cancel the demolition. *See Fortytune v. American Mult-*
11 *Cinema, Inc.*, 364 F.3d 1075, 1087 (9th Cir. 2004) (injunction need not detail precisely how to comply).
12 Under State Defendants' reasoning, however, they could permit the demolition to go forward because
13 they would lack the authority or reason to tell the wrecking company that the demolition could no longer
14 take place. State Defendants' interpretation of the injunction threatens to leave in place the entirety of
15 the harm that this Court's preliminary injunction seeks to prevent.

16 Despite State Defendants' misunderstanding, this is *not* the same issue that this Court declined to
17 decide after discussion at its June 25 hearing: whether the State may approve a rate change request
18 submitted by a county based on a justification that is separate from and independent of § 12306.1(d)(6)
19 without conducting a Section 30(A) analysis. Rather, Plaintiffs seek an order that simply makes clear
20 that rate change requests submitted and approved *in implementation of § 12306.1(d)(6)* no longer have
21 force and effect.⁷

22
23
24 ⁷ Because this Court has preliminarily enjoined § 12306.1(d)(6), invalidation of rate requests
25 submitted in implementation of § 12306.1(d)(6) may not cost the counties any additional funds (or, if
26 there is any increase, it is likely to be very modest). That is because those counties that had submitted
27 rate change requests but were still planning to pay above \$10.10 in wages and benefits would have had
28 to cover the entire non-federal share above \$10.10; instead, they will now receive funds to cover the
State's share of the amount above \$10.10. In addition, the enhanced federal Medicaid match will mean
that counties pay in total just 12-13% of IHSS provider wages, Jimenez Supp. Decl. ¶4, so even those
counties that had planned to reduce their rates to \$10.10 will pay only a modest share of the rate above
that amount.

1 **CONCLUSION**

2 For these reasons, Plaintiffs respectfully request that the Court declare that all PA Rate Change
3 Requests submitted pursuant to the process established by the implementation of Welfare and
4 Institutions Code § 12306.1(d)(6) are invalid, and enjoin the State Defendants from giving effect to
5 approvals all such PA Rate Change Requests. Plaintiffs further respectfully request that the Court order
6 the State Defendants to immediately inform counties that submitted PA Rate Change Requests pursuant
7 to the State Defendants' directives regarding § 12306.1(d)(6) that (1) § 12306.1(d)(6) has been enjoined,
8 and (2) that existing rates will remain effective unless and until new PA Rate Change Requests are
9 submitted and approved.

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11 Dated: June 29, 2009

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