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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**MIKESHA MARTINEZ, by and through
her husband and next friend Carlos
Martinez, et al.,**

Plaintiffs,

v.

**ARNOLD SCHWARZENEGGER,
Governor of the State of California, et al.,**

Defendants.

CV 09-2306 CW

**STATE DEFENDANTS' OPPOSITION
TO PLAINTIFFS' MOTION FOR CIVIL
CONTEMPT SANCTIONS AND A
FURTHER MORE SPECIFIC
INJUNCTION**

Date: TBD
Time: TBD
Courtroom: 2
Judge The Honorable Claudia Wilken
Trial Date TBD
Action Filed: May 26, 2009

INTRODUCTION

Ignorant of how the entire process for payment to IHSS providers works, plaintiffs are here again asking this court to micromanage the process. There is no need for the court to do so. Since the issuance of the Amended Preliminary Injunction – in which the court ordered entirely different relief from the original Preliminary Injunction over two weeks later—State defendants have worked diligently to ensure that IHSS providers would be paid at the pre-July 1st level of wages and benefits. Indeed, given that this court gave State defendants *less than 24 hours* to accomplish all parts of the Amended Preliminary Injunction, State defendants did remarkably well to comply with the order. However, now that plaintiffs realize what their delay in bringing this lawsuit has wrought, they ask the court for a “further more specific injunction.” Had plaintiffs filed this suit in April when they knew that section 12306.1(d)(6) would be implemented,¹ this court and State defendants would have had ample time to brief the issues and to implement any preliminary injunction this court issued. Instead of acknowledging their delay, plaintiffs continue to blame State defendants for their inability to accomplish what plaintiffs intend to have happen—ignoring how the payment system works and the State’s role in that process. State defendants are not in violation of the Amended Preliminary Injunction, and therefore, once again plaintiffs’ motion for civil contempt sanctions should be denied. As for the Motion for a Further More Specific Injunction that should be denied as well.

RELEVANT FACTS

This court issued its original Preliminary Injunction on late Friday afternoon, June 26, 2009. On Tuesday, June 30th –the second business day thereafter – DSS issued an All-County Information Notice (ACIN), notifying counties (the entities that not only negotiate with the union the level of wages, but also administer the IHSS program) of the injunction. The original injunction was clear: Section 12306.1(d)(6) was enjoined until State defendants did an analysis

¹ On March 27, 2009, the State Treasurer confirmed that section 12306.1(d)(6) would be implemented given the condition set in Government Code section 903030??? that if the State did not receive more than \$10 billion in stimulus funds from the federal government, section 12306.1(d)(6), as well as other budget cuts, would go into effect. Nothing precluded plaintiffs from bringing suit immediately after that.

1 required under *Orthopaedic Hosp. v. Beshe*. Section 12306.1(d)(6) reduced the State's
 2 contribution to IHSS providers' wages and benefits from \$12.10 per hour to \$10.10 per hour. *It*
 3 *does not dictate the level of providers' wages and benefits at all*. Plaintiffs recognizing this, filed
 4 on Monday, June 29th (the next court day after the Preliminary Injunction was issued) an
 5 Emergency Motion to Enforce the Preliminary Injunction which this court summarily denied.

6 The following week, plaintiffs filed a Motion to Civil Contempt Sanctions, or a More
 7 Specific Injunction, this court issued an Amended Preliminary Injunction late Tuesday afternoon,
 8 July 13th, and ordered State defendants to comply with its terms by 5:00 p.m. the next day, July
 9 14th. In its Order Clarifying Injunction and Denying Plaintiffs' Motion for Civil Contempt
 10 Sanctions, this court stated: "Apparently, the Court's order was not sufficiently specific." Order
 11 at 5. Accordingly, the court "clarified its order.

12 In its order, this court noted that only nine counties had sought to return to pre-July 1st
 13 levels. *Id.* Four counties had not submitted Rate Change Requests after the original Preliminary
 14 Injunction was issued and two had submitted Requests to pay a higher rate than pre-July 1st level.
 15 In order to determine what these six counties wanted to do, DSS staff contacted them on July 14th.
 16 Carroll Decl. ¶ . Three counties, agreed to return to pre-July 1st levels of wages and benefits.
 17 Santa Barbara County did not, citing a separate and distinct basis for reducing its level of wages
 18 and benefits, the loss of realignment funds. Fresno County had already submitted a second Rate
 19 Change Request based on an alternative basis to the enactment of section 12306.1(d)(6) which
 20 had been approved prior to July 1st. Carroll Decl. ¶ 5.²

21 Of the two that had submitted Requests to pay higher wages and benefits, Calaveras County
 22 informed DSS that it would pay pre-July 1st rates, not the higher rate set forth in its latest Rate
 23 Change Request. Contra Costa County informed DSS that it wanted to pay the level of wages
 24

25 ² Plaintiffs' counsel goes to extraordinary levels an attempt to prove that Fresno's second
 26 Rate Change Request was not valid. This is nothing more than form over substance. However,
 27 on July 16th, SEIU sought and obtained a Temporary Restraining Order against Fresno County,
 28 preventing the county from reducing its level of wages and benefits. Fresno has requested that
 DSS make this change. Carroll Decl. ¶ . State defendants request that this court take judicial
 notice of the Fresno County Superior Court order, attached hereto. Fed. R. Evid. 201(d).

1 and benefits set forth in its most recent Request.³ Carroll Decl. ¶ 4.

2 Also, in response to the Amended Preliminary Injunction, DSS submitted a “work order” to
 3 notify Electronic Data Systems (EDS) (which administers the Case Management, Information and
 4 Payrolling System (CMIPS) program), requesting that it change the system to reflect the pre-July
 5 1st wage levels for the 12 counties which rates would change. Carroll Decl. ¶ 6. EDS informed
 6 DSS that it would take until June 23rd to process all the changes.⁴ Given Fresno County’s most
 7 recent request, DSS has included that county in its work order to EDS and that rate change will be
 8 effective July 23rd with the others. Santa Barbara County has notified DSS that it is not yet clear
 9 whether it file a Rate Change Request based a loss of realignment funding. Carroll Decl. ¶ 10.

10 Since the change to pre-July 1st wage levels could not take effect in CMIPS until June 23rd,
 11 that left the issue of how to pay providers the pre-July 1st level of wages for the July 1-15 pay
 12 period. Counties are responsible for making supplemental payments, DSS notified them in the
 13 July 14th letter how to make these payments. Thereafter, on July 15 and 16, DSS heard from the
 14 Senior Policy Analyst of the County Welfare Directors’ Association (CWDA) and individual
 15 counties that counties were concerned about the additional workload associated with making
 16 these retroactive payments and asking why the change could not be done automatically through
 17 CMIPS. Carroll Decl. ¶ 8. In fact, a change of this magnitude has never been done by EDS and
 18 there is no mechanism to effectuate a change to wage levels mid-month. Petty Decl. ¶ 7. In other
 19 words, State defendants cannot automatically –plaintiffs seem to think—make this change
 20 retroactively to July 1st. Indeed, section 12306.1(b) specifically provides that any change to
 21 wages will take affect by the first of the following month precisely because of this limitation in
 22 CMIPS. Thus, in order to pay providers pre-July 1st wages, counties must manually make the
 23 change.

24 After hearing from CDWA and some counties, on July 16, DSS contacted EDS and
 25 requested that counties have access to the wage change function in CMIPS so that counties could

26 ³ Notably, plaintiffs do not complain that DSS acceded to Contra Costa’s request to pay
 27 wages and benefits above the pre-July 1st levels. Apparently, it’s permissible for DSS to grant a
 28 county’s request as long as it works in plaintiffs’ favor.

⁴ There are approximately 76,000 providers in these counties.

1 change the level of wages as they processed a provider's timesheet for the July 1-15 pay period.
 2 In other words, if counties make this change as they process this timesheet, the provider will
 3 receive his/her pay warrant, reflecting pre-July 1st levels. If a county does not opt to change the
 4 rate when it processes the timesheet, then it will require the county to process a supplemental
 5 payment to make up the difference between the pre-July 1st rate and the rate set forth in its
 6 approved Rate Change Request. Counties need only make the change to the wage change
 7 function until July 23rd when CMIPS will reflect the pre-July 1st level of wages.

8 This is a complicated payments system which begins with providers submitting their
 9 timesheets to counties and counties processing those timesheets. DSS's role again is a limited
 10 one—ensuring the counties have submitted valid and complete timesheets and then transferring
 11 the information to EDS. Carroll Decl. ¶ 9. Based on past experience, approximately 50% of
 12 providers will submit their timesheets prior to July 23rd before the rate change is entered in
 13 CMIPS and the pre-July 1st wage level will be automatically calculated. Carroll Decl. 9. Thus,
 14 counties will not need to make this change manually for all providers. Indeed, approximately 25
 15 percent of providers wait more than *60 days* before submitting their timesheets. *Id.*

16 ARGUMENT

17 Plaintiffs once again have failed to meet their burden of establishing that State defendants
 18 have “violated a specific and definite order” of this court by “clear and convincing evidence.” *In*
 19 *re Dual Deck Video Cassette Recorder Antitrust Litigation*, 10 F.3d 693, 695 (9th Cir. 1993). In
 20 fact, State defendants have complied with the Amended Preliminary Injunction. It is only
 21 because the plaintiffs delayed for over two months in bringing this suit and do not understand
 22 how the provider payment system works, that they are back before this court asking for a “further
 23 more specific injunction.” At this point, plaintiffs are now asking this court to micromanage how
 24 the counties implement and administer the payment systems. However, counties are not parties to
 25 this action (with the lone exception of Fresno County) and there is no mechanism by which State
 26 defendants can now take over the functions performed by counties. See MMP 30-769.252.

27 To the extent the plaintiffs still believe that the July paychecks issue should be resolved
 28 more quickly in certain counties, they must join those counties as necessary parties. *See* Fed. R.

1 Civ. P. 19(a)(1)(A) (“[counties] must be joined as [parties] if in [the counties’] absence, the court
 2 cannot accord complete relief among existing parties”). And if the plaintiffs refuse to join the
 3 offending counties, the court must do so if it agrees those counties are necessary to accord
 4 complete relief to the plaintiffs. *See* Fed. R. Civ. P. 19(a)(2) (“If [the counties have] not been
 5 joined as required, the court must order that the [counties] be made [parties].”); *see also* Fed. R.
 6 Civ. P. 21 (“On motion or on its own, the court may at any time, on just terms, add or drop a
 7 party.”). The counties — not the State defendants — control when and how IHSS providers’ time
 8 sheets are processed, and they decide when and how supplemental paychecks will be issued. If
 9 the plaintiffs or this court believe these county-controlled functions should be executed in a more
 10 efficient way, the offending counties must be joined to this lawsuit. *See* Fed. R. Civ. P.
 11 19(a)(1)(A); 19(a)(2); 21.

12 The bottom line is this: State defendants have, and will continue, to comply with this
 13 court’s orders. However, they simply must have the time to do it: Less than 24 hours was simply
 14 not enough time to address all the issues raised by the Amended Preliminary Injunction. Indeed,
 15 within 48 hours, State defendants had identified a method by which counties could immediately
 16 implement the change to pre-July 1st wage levels and implemented it.⁵ In addition, under
 17 California Labor Code section 204(a), providers are required to be paid within 10 days of
 18 submitting their timesheets, and they will be. The only issue remaining is whether counties will
 19 manually change the wage rate function in CMIPS before the changes are automated on July 23rd.
 20 Again, this is entirely up to the counties.

21 Thus, Plaintiffs’ charge that State defendants are “exploit[ing] every possible loophole and
 22 evad[ing] even clear mandates” is not only specious, it is inaccurate. Had plaintiffs and this court
 23 provided State defendants with even *one more day* to implement the Amended Preliminary
 24 Injunction, plaintiffs would not have had *any* basis whatsoever to ask this court for further more

25 ⁵ Plaintiffs’ counsel refers to this process in her declaration which was presumably
 26 prepared as DSS staff was notifying the counties that it had received permission for counties to
 27 have access to the wage change function in CMIPS. (See Leyton Decl. ¶ 18.) Just because
 28 plaintiffs’ counsel was unaware that DSS was continuing to try to resolve the issues raised by the
 counties does not constitute evidence that State defendants are not complying with this court’s
 Amended Preliminary Injunction.

1 specific relief or civil contempt sanctions. Indeed, they have no grounds now. This motion
2 should be denied in its entirety.

3 Dated: July 20, 2009

Respectfully Submitted,

4 EDMUND G. BROWN JR.
5 Attorney General of California

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 JUL 16 2009
 FRESNO SUPERIOR COURT
 By _____ DEPT. 97D - DEPUTY

7 Attorneys for Petitioner,
 SEIU - UHW WEST UNITED
 8 HEALTHCARE WORKERS UNION

9
 10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 11 **FOR THE COUNTY OF COUNTY FRESNO**
 12

13 SEIU - UHW WEST UNITED
 14 HEALTHCARE WORKERS UNION,

15 Petitioner,

16 vs.

17 FRESNO COUNTY IHSS PUBLIC
 18 AUTHORITY,

19 Respondent.
 20

CASE NO.: 09CECG02506

**PROPOSED ORDER TO SHOW
 CAUSE RE: PRELIMINARY
 INJUNCTION AND FOR TEMPORARY
 RESTRAINING ORDER**

Hearing Date: July 16, 2009

Time: 3:30 p.m.

Dept.:

Petition Filed: July 16, 2009

By Fax

21
 22 On reviewing petitioner's Petition for Order Compelling Arbitration and for Injunctive
 23 Relief; petitioner's Memorandum of Points and Authorities in Support of Petitioner's Request for a
 24 Temporary Restraining Order; declarations of Barbara J. Chisholm, Stacey Leyton, Rebecca
 25 Malberg, Dionne Jimenez, Curt Austin, Lisa Brown, Christal Hopkins, Thomas Hunn, Carlos
 26 Martinez, Andy Martinez, Anthony Mesaris, Darlene Mefford, Jackie Peppers, and Charles Taylor
 27 in support thereof; and [Proposed] Order to Show Cause re: Preliminary Injunction and Temporary
 28 Restraining Order; and on hearing argument presented by counsel; and it appearing to the

1 satisfaction of this Court that this is a proper case for granting an Order to Show Cause and a
2 Temporary Restraining Order,

3 IT IS HEREBY ORDERED that respondent Fresno County IHSS Public Authority ("Public
4 Authority") appear in Department 97A of this Court on 7/30/09, 2009, at
5 3:30, or as soon thereafter as the matter may be heard, then and there to show cause, if any,
6 why the Public Authority, its officers, employees, servants, agents and all others acting on its behalf
7 should not be ordered to maintain the *status quo* IHSS hourly wage of \$10.25 and benefits of \$0.85
8 pending expedited arbitration of the Union's grievance under the parties' labor agreement, including
9 but not limited to by notifying the State Department of Social Services that the scheduled rate
10 reduction for Fresno County IHSS providers for the pay period of July 1-15, 2009, and pay periods
11 thereafter, should not be implemented until such time as the parties have submitted the petitioner's
12 grievance to binding arbitration pursuant to the parties' labor agreement and a final decision and
13 award resolving the controversy has been issued pursuant to that agreement.

14 IT IS HEREBY FURTHER ORDERED that pending the hearing and determination of the
15 Order to Show Cause, the Public Authority, its officers, employees, servants, agents and all others
16 acting on its behalf are hereby ordered to maintain the *status quo* IHSS hourly wage of \$10.25 and
17 benefits of \$0.85 pending expedited arbitration of the Union's grievance under the parties' labor
18 agreement, including but not limited to by notifying the State Department of Social Services that the
19 scheduled rate reduction for Fresno County IHSS providers for the pay period of July 1-15, 2009,
20 and pay periods thereafter, should not be implemented until such time as the parties have submitted
21 the petitioner's grievance to binding arbitration pursuant to the parties' labor agreement and a final
22 decision and award resolving the controversy has been issued pursuant to that agreement.

23 IT IS HEREBY FURTHER ORDERED that copies of the Petition for Order Compelling
24 Arbitration and for Injunctive Relief; petitioner's Memorandum of Points and Authorities in
25 Support of Petitioner's Request for a Temporary Restraining Order; all declarations filed in support
26 therefore; and [Proposed] Order to Show Cause re: Preliminary Injunction and Temporary
27 Restraining Order be personally served on respondent not later than July 17, 2009; that
28 respondent file and personally serve on petitioner its opposition to the issuance of the preliminary

1 injunction not later than July 23, 2009; and that petitioner file and personally serve on
2 respondent its reply no later than ^{noon} ~~July~~ 7/30 2009.

3 Dated: 7-16-09

DONALD R. FRANSON JR.
Judge of the Superior Court