

STEPHEN P. BERZON (SBN 46540)
 SCOTT A. KRONLAND (SBN 171693)
 STACEY M. LEYTON (SBN 203827)
 PEDER J. THOREEN (SBN 217081)
 ANNE N. ARKUSH (SBN 254985)
 Altshuler Berzon LLP
 177 Post Street, Suite 300
 San Francisco, California 94108
 Telephone: (415) 421-7151
 Facsimile: (415) 362-8064
 sberzon@altshulerberzon.com
 skronland@altshulerberzon.com
 sleyton@altshulerberzon.com
 pthoreen@altshulerberzon.com
 aarkush@altshulerberzon.com

Attorneys for Plaintiffs

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

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

Plaintiffs,

v.

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

Defendants.

Case No. C 09-02306 CW

CLASS ACTION

**PLAINTIFFS' MOTION FOR CIVIL
 CONTEMPT SANCTIONS OR, IN THE
 ALTERNATIVE, FOR A MORE
 SPECIFIC PRELIMINARY
 INJUNCTION; MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT**

Date: TBD

Time: TBD

Place: Courtroom 2, 4th floor,
 Oakland Federal Courthouse
 1301 Clay Street
 Oakland, CA 94612

**NOTICE OF MOTION AND MOTION FOR CIVIL CONTEMPT SANCTIONS OR,
IN THE ALTERNATIVE, A MORE SPECIFIC PRELIMINARY INJUNCTION**

Please take notice that at a date and time to be set by the Court, in Courtroom 2, Oakland Federal Courthouse, 1301 Clay Street, Oakland CA 94612, before the Honorable Claudia Wilken, Plaintiffs will move the Court for civil contempt sanctions against Defendants Schwarzenegger, Wagner, and Maxwell-Jolly ("State Defendants") for presently violating this Court's June 26, 2009 Preliminary Injunction, or, in the alternative, for a more specific preliminary injunction. State Defendants are refusing to permit counties that want to maintain their pre-July 1, 2009 wage rates to do so, and are telling such counties that the lower wage rate, based on the implementation of the statute this Court enjoined, will remain in effect for at least 60 days, over the counties' objections. In doing so, State Defendants are refusing to give force and effect to this Court's Preliminary Injunction.

Almost every single county that submitted a rate decrease request based upon Section 12306.1(d)(6) wants to continue the pre-July 1 wage rate in effect after July 1, 2009. However, despite the Preliminary Injunction, State Defendants are not permitting them to do so. Because paychecks for IHSS providers for the July 1st through July 15th pay period will be issued shortly after July 15, 2009, and because of the need to reprogram the database in order to ensure that the paychecks are issued for the correct amounts owed, a motion to shorten the time in which to hear this motion is being filed under separate cover. Plaintiffs ask that this Court rule promptly to ensure that IHSS providers are paid the correct amount in that paycheck.

Plaintiffs' motion for civil contempt sanctions is made pursuant to the inherent authority of the Court on the ground that State Defendants are presently violating this Court's June 26, 2009 preliminary injunction. *See Stone v. City and County of San Francisco*, 968 F.2d 850, 856 & n.9 (9th Cir. 1992).

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declarations in connection with this Motion, the [Proposed] [Alternative] Orders Granting Plaintiffs' Motion, the complete files and records of this action, and such other and further matters as the Court may properly consider.

//

//

//

1 Dated: July 7, 2009

Respectfully submitted

2 STEPHEN P. BERZON
3 SCOTT KRONLAND
4 STACEY M. LEYTON
5 PEDER J. THOREEN
6 ANNE N. ARKUSH
7 Altshuler Berzon LLP

8
9
10
11 By: /s/ Stacey M. Leyton
12 Stacey M. Leyton
13 Attorneys for Plaintiffs
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

BACKGROUND 2

 A. Implementation Of Section 12306.1(d)(6) Prior To This Court’s Injunction 2

 B. The June 26, 2009 Preliminary Injunction 4

 C. State Defendants’ Conduct After The Issuance Of The Injunction 4

ARGUMENT 9

 A. State Defendants Are In Contempt Of This Court’s Preliminary Injunction 9

 1. Contempt standard 9

 2. State Defendants are clearly violating this Court’s injunction 9

 3. Remedy 14

 B. In The Alternative, This Court Should Issue A More Specific Preliminary Injunction .. 15

CONCLUSION 16

TABLE OF AUTHORITIES

FEDERAL CASES

Gompers v. Bucks Stove & Range Co.,
221 U.S. 418 (1911) 14

In re Crystal Palace Gambling Hall, Inc.,
817 F.2d 1361 (9th Cir. 1987) 15

In re Dual-Deck Video Cassette Recorder Antitrust Litigation,
10 F.3d 693 (9th Cir. 1993) 9, 12, 13

In re Dyer,
322 F.3d 1178 (9th Cir. 2003) 15

S.E.C. v. Elmas Trading Corp.,
824 F.2d 732 (9th Cir. 1987) 12

Stone v. City and County of San Francisco,
968 F.2d 850 (9th Cir. 1992) 9

Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa County,
550 F.3d 770 (9th Cir. 2008) 14

United States v. Ayres,
166 F.3d 991 (9th Cir. 1999) 15

United States v. Young,
107 F.3d 903 (D.C. Cir. 1997) 13

FEDERAL STATUTES

42 U.S.C. §1396a(a)(30)(A) 4, 9, 14

STATE STATUTES

Section 12306.1(d)(6) *passim*

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs hereby move this Court for civil contempt sanctions against State Defendants for their present violation of the Court's June 26, 2009 Preliminary Injunction, or, in the alternative, for a more specific preliminary injunction.

In blatant defiance of this Court's outstanding Order, State Defendants are refusing to permit counties to maintain their pre-July 1, 2009 wage rates – even though the rate decrease requests every county had previously submitted were based solely on Section 12306.1(d)(6), the implementation of which this Court preliminarily enjoined, and even though almost every single one of those counties wants to maintain the pre-July 1st rates.¹ Instead, State Defendants are requiring counties to both formally submit new Rate Change Requests to the California Department of Social Services ("CDSS") and then to wait at least 60 days before returning the wage rate to the pre-July 1, 2009 level.

Unless this Court acts immediately, the status quo that this Court's Preliminary Injunction sought to maintain will not be reached for at least two months. In the meantime, consumers and low-wage providers will suffer the irreparable injury that the Preliminary Injunction was designed to prevent, and counties that determine they are obligated to pay the higher wage rate may lose hundreds of thousands of dollars in state and federal matching funds. There is no justification for this 60-day delay, which the State appears to be imposing based on its desire not to comply with the injunction while appealing it to the Ninth Circuit.

State Defendants' actions make clear that civil contempt sanctions are necessary to ensure compliance with this Court's order. Plaintiffs also seek attorney fees to compensate them for the cost of bringing the instant motion.

¹ Alameda, Contra Costa, Mendocino, Napa, Placer, San Mateo, Santa Barbara, and Yolo Counties have all informed CDSS that they want to maintain the pre-July 1 rates. McDevitt Supp. Decl. ¶¶9-11; Roth Supp. Decl. ¶2; Nam Supp. Decl. ¶3; Mancini Decl. ¶6; Malberg Supp. Decl. ¶¶3-4. In addition, Calaveras, San Benito, and Solano Counties have informed SEIU that they want to maintain the pre-July 1 rates. Malberg Supp. Decl. ¶5; McDevitt Supp. Decl. ¶¶8, 12. As of the date of this filing, Plaintiffs have been unable to determine whether Riverside County intends to maintain the pre-July 1 wage rate. Only Fresno County has definitively stated its intent to proceed with a rate cut despite this Court's Preliminary Injunction. Malberg Supp. Decl. ¶6.

1 The requirements imposed by the preliminary injunction are abundantly clear. But, if the Court
 2 concludes otherwise, Plaintiffs seek in the alternative a more specific preliminary injunction that (1)
 3 invalidates all rate reduction requests previously submitted and approved to be effective July 1, 2009, or
 4 (2) at the very least, directs State Defendants immediately to reinstate the pre-July 1, 2009 wage rate for
 5 any county that has informed or informs CDSS that it wishes to do so during the pendency of the
 6 preliminary injunction.

7 BACKGROUND

8 A. Implementation Of Section 12306.1(d)(6) Prior To This Court's Injunction

9 In April and May of 2009, CDSS, which administers the IHSS program, issued two notices to
 10 counties regarding Section 12306.1(d)(6), which purported to "inform counties how this change will be
 11 implemented." Leyton Supp. Decl., Ex. A. The notices stated that "[c]ounties currently providing
 12 wages and individual health benefits above \$10.10 *must* submit a PA Rate Change Request to reflect the
 13 change in the maximum amount in which the state will participate." *Id.*, Ex. B (emphasis added). They
 14 originally instructed counties to submit rate change requests by May 1, 2009 in order for the new rate to
 15 take effect on July 1, 2009, but later extended the deadline for rate change requests to June 1, 2009. *Id.*,
 16 Exs. A-B.

17 CDSS required all counties above \$10.10 to submit such requests because the State's position,
 18 set forth in communications with the federal Department of Health and Human Services, was that the
 19 enactment of Section 12306.1(d)(6) rescinded CDSS's approval of any wage rate over \$10.10, effective
 20 July 1, 2009. *Id.*, Ex. C (stating that "the PA rates, which are based upon the amount of state funding
 21 appropriated, are not approved as of July 1, 2009, and the counties will need to submit new rate
 22 packages for approval"). In other words, State Defendants explicitly asserted and communicated to the
 23 counties that the enactment of Section 12306.1(d)(6) rescinded, as of July 1, CDSS's previous approval
 24 of any rates higher than \$10.10, and that affected counties were *required* to submit new Rate Change
 25 Requests in time for CDSS to review and approve them.

1 Upon receipt of these notices from CDSS, at least thirteen counties submitted Rate Change
 2 Requests seeking to reduce IHSS provider wages and benefits below the rate currently paid.² There is no
 3 question that these requests were submitted in direct response to Section 12306.1(d)(6) and to the State's
 4 instructions as to how Section 12306.1(d)(6) would be implemented. Indeed, at least some of those
 5 requests *explicitly so stated*. For example, the cover letter submitted by Alameda County with its Rate
 6 Change Request states: "Alameda County intends to request approval of a revised In-Home Supportive
 7 Services (IHSS) Public Authority Rate *due to the change in the State Participation Rate effective July 1,*
 8 *2009.*" McDevitt Supp. Decl., Ex. A (emphasis added). Fresno County's Rate Change Request states,
 9 on a portion of the form designated for "Comments": "This change in the PA rate *is solely due to the*
 10 *State law change . . .*" Leyton Supp. Decl., Ex. E (emphasis added);³ *see also id.*, Ex. F (letter from
 11 Solano County to CDSS submitting rate reduction request information "as requested in [CDSS's] letter"
 12 notifying the counties of Section 12306.1(d)(6)). Notices issued by the counties to IHSS providers about
 13 the impending wage rate reduction also attributed the change solely to the State's decreased participation
 14 pursuant to the implementation of Section 12306.1(d)(6). McDevitt Supp. Decl., ¶4 & Ex. B.

15 State Defendants acted quickly to approve rate change requests submitted in implementation of
 16 Section 12306.1(d)(6). Indeed, CDSS approved rate change requests in as little as *one week*. For
 17 example, when Alameda County submitted a rate change on June 18, 2009 to be effective July 1, 2009,
 18 CDSS officially approved the change on June 25. McDevitt Supp. Decl., ¶7 & Ex. E; *see also id.*
 19 (CDSS informally approved the rate change the *same day it was submitted*). Similarly, Solano County
 20 submitted its rate change packet on June 15, 2009 and was notified of its approval on June 23, 2009. *Id.*,
 21 ¶6 & Ex. D.

22
 23 ² When Plaintiffs filed their preliminary injunction motion, they were only aware of twelve
 24 counties that had submitted rate reduction requests pursuant to Section 12306.1(d)(6). Since that time,
 25 Plaintiffs have learned that Santa Barbara also submitted such a request. Nam Supp. Decl. ¶2. In
 26 addition, Sonoma County submitted a request to reduce its rates because of Section 12306.1(d)(6)
 effective August 1, 2009; Sonoma County has informed Plaintiffs that, since the issuance of this Court's
 Preliminary Injunction, it no longer wants to reduce its rates effective August 1. Leyton Supp. Decl., Ex.
 S.

27 ³ Apparently, Fresno County subsequently submitted a second rate change request based on its
 28 assertion of a realignment funds shortfall. There is no record of any other county that has asserted any
 justification for a rate decrease other than the State's enactment of Section 12306.1(d)(6).

B. The June 26, 2009 Preliminary Injunction

After briefing and a hearing on June 25, 2009, this Court issued an oral Preliminary Injunction followed by a written Preliminary Injunction and Order Granting Plaintiffs' Motion for a Preliminary Injunction on June 26, 2009. This Court found that Plaintiffs had demonstrated a strong likelihood of success on their claim that State Defendants failed to consider the factors set forth in 42 U.S.C. §1396a(a)(30)(A) ("Section 30(A)") before enacting Section 12306.1(d)(6), in violation of the federal Medicaid Act. Order Granting Prelim. Inj. 10:14-17. This Court further found that, absent injunctive relief, both IHSS consumers and providers would suffer irreparable harm as a result of the wage reductions caused by the implementation of Section 12306.1(d)(6). *Id.* 10:25-11:21.

Accordingly, the Court's Preliminary Injunction enjoins and restrains State Defendants "from implementing California Welfare and Institutions Code § 12306.1(d)(6) without first conducting the analysis required by 42 U.S.C. § 1396a(a)(30)(A), as described in *Orthopaedic Hospital v. Belshe*, 103 F.3d 1941, 1493 (9th Cir. 1997)." Prelim. Inj. 1:24-28.

C. State Defendants' Conduct After The Issuance Of The Injunction

State Defendants took no timely action to notify the counties of the Court's injunction. Despite representing to this Court in writing that they would issue an All-County Notice "immediately" after the issuance of the injunction (Dkt. #132, at 2), State Defendants *waited five days* to do so, issuing a deficient and bare-bones notice (as further explained below) on the afternoon of June 30, 2009. Leyton Supp. Decl., Ex. G. Concerned about this lack of notice, on June 29, 2009 and June 30, 2009, respectively, Plaintiffs' counsel had sent a copy of this Court's Preliminary Injunction and a cover letter to counties that had submitted requests to reduce their rate based on Section 12306.1(d)(6), and to counties that planned to maintain their pre-July 1st rate despite Section 12306.1(d)(6). *Id.* ¶9.

Moreover, on June 26, 2009, shortly after the issuance of the Preliminary Injunction, Plaintiffs' counsel wrote to counsel for State Defendants asking that State Defendants notify the counties that, under the Preliminary Injunction, any rate reductions submitted and approved pursuant to Section 12306.1(d)(6) were disapproved, and that rates previously in effect remained in effect for those counties. *Id.*, Ex. H. Later the same day, counsel for State Defendants responded that they would not rescind the prior all-county communications or inform counties that rate decreases submitted and approved as part

1 of the implementation of Section 12306.1(d)(6) were “disapproved.” *Id.*, Ex. I. State Defendants
 2 explained in part: “CDSS does not have the authority to tell counties what level of wages and benefits
 3 they should pay to IHSS providers; that is determined through collective bargaining between the union
 4 and the county.” *Id.*

5 On June 29, 2009, Plaintiffs filed an *ex parte* motion asking this Court to further provide that all
 6 PA Rate Change Requests that had been submitted pursuant to Section 12306.1(d)(6) were invalid, and
 7 to enjoin State Defendants from giving effect to approvals of such PA Rate Change Requests. Later the
 8 same day, this Court denied Plaintiffs’ motion, but invited Plaintiffs to file a regularly noticed motion if
 9 they “are dissatisfied with the manner in which Defendants are implementing the injunction.” Order
 10 Denying Pls. *Ex Parte* Mot. 1:26-2:1.

11 On the afternoon of June 30, 2009, State Defendants finally notified counties of the preliminary
 12 injunction. Leyton Supp. Decl., Ex. G. The All-County Notice stated only:

13 On June 26, 2009, the federal district court for the Northern District of California issued an
 14 injunction prohibiting the department and other state agency defendants from implementing the
 15 above reduction in maximum state participation [Section 12306.1(d)(6)]. The maximum state
 participation in wages and benefits will remain at \$12.10 per hour as long as the injunction
 remains in effect.

16 *Id.* Notably, the Notice provided *no* information whatever to the counties regarding which wage and
 17 benefit rate would apply on July 1, 2009, or how counties that had submitted rate change requests based
 18 solely on Section 12306.1(d)(6) could ensure that the pre-July 1, 2009 wage rates would remain in effect
 19 now that Section 12306.1(d)(6) had been enjoined.

20 State Defendants did not provide counties with any information about the implementation of the
 21 injunction until July 3, when it issued an All-County Notice informing counties that:

22 The Rate Change Requests that were submitted by Public Authorities and approved by the
 23 California Department of Social Services (CDSS) and the Department of Health Care Services
 24 (DHCS) remain in effect until counties submit new Rate Change Requests through the process
 outlined in Welfare and Institutions Code Section 12306.1 and CDSS and DHCS approve those
 requests.

25 *Id.*, Ex. T. The Notice still gave counties no information about how long this process would take.

26 Since learning of the Preliminary Injunction, almost every single county that requested a reduced
 27 rate as a result of Section 12306.1(d)(6) wants to pay IHSS providers the pre-Section 12306.1(d)(6) rate.
 28 McDevitt Supp. Decl. ¶¶8-12; Roth Supp. Decl. ¶2; Nam Supp. Decl. ¶5; Mancini Decl. ¶6; Malberg

Supp. Decl. ¶¶3-5.⁴ Despite the fact that CDSS failed to notify counties of the existence of the Preliminary Injunction until June 30, 2009, and despite the absence of instructions from CDSS until July 3 as to how to reinstate the pre-July 1, 2009 wage rates, most of these counties have already submitted written rate change packets or otherwise communicated to CDSS their desire to maintain the pre-July 1, pre-Section 12306.1(d)(6) wage and benefit rate. McDevitt Supp. Decl. ¶¶9-11 & Exs. G-I (Mendocino, Alameda, Napa); Roth Supp. Decl. ¶2 (Placer); Nam Supp. Decl. ¶3 (Santa Barbara); Mancini Decl. ¶6 (San Mateo); Malberg Supp. Decl. ¶¶3-4 (Yolo, Contra Costa); *see also* McDevitt Supp. Decl. ¶12 (Solano County will submit request this week). Other counties have informed SEIU of their intent to maintain the pre-July 1 rate. Malberg Supp. Decl. ¶5 (Calaveras); McDevitt Supp. Decl. ¶8 (San Benito).

Despite receipt of these oral and written notifications, State Defendants have refused to maintain the current rate. Instead, State Defendants informed counties that they must both formally submit new Rate Change Requests and wait at least 60 days for CDSS to review and approve the “new” rate. For example, when Lisa Mancini, the Director of Aging and Adult Services for San Mateo County, contacted Eileen Carroll of CDSS requesting confirmation that San Mateo’s pre-July 1 wage rate would be effective for the July 1 through July 15 pay period, Ms. Carroll “would not confirm that” and instead told Ms. Mancini “that CDSS would process this rate change request pursuant to its ‘normal’ procedures and that it would take 60 days for the rate change to be effective.” Mancini Decl. ¶8; *see also* McDevitt Supp. Decl., Ex. I (Napa County received email from Rolonda Moen of CDSS stating that counties must submit new wage packets, which will not be effective until September 1); Malberg Supp. Decl. ¶4 (CDSS advised Contra Costa that it will take 60 days to approve and implement rate change); Leyton Supp. Decl., Ex. L (July 2 letter from CDSS to the California Association of Public Authorities stating that “the Rate Change Requests that were submitted by PA’s and approved by [CDSS and DHCS] remain in effect until counties submit new Rate Change Requests through the process outlines in

⁴ As noted above, Plaintiffs have been unable to determine whether Riverside County intends to maintain the pre-July 1 wage rate. In addition, Plaintiffs have been unable to confirm whether San Luis Obispo requested a rate reduction because of Section 12306.1(d)(6). Only Fresno County has definitively stated its intent to proceed with a rate cut despite this Court’s Preliminary Injunction. Malberg Supp. Decl. ¶6.

Welfare and Institutions Code section 12306.1 and CDSS and DHCS approve those requests”); *id.*, Ex. T.

Indeed, State Defendants have explicitly taken this position in their motion asking the Ninth Circuit to stay this Court’s preliminary injunction. There they submitted a declaration from a CDSS official stating:

CDSS cannot change the amount that is paid directly to IHSS providers until such time as another PA Rate Change Request is submitted to the State to change the wages and benefits to be paid. In order to change the current level of wages and benefits paid to IHSS providers for whatever reason, a county’s Public Authority must submit the new Rate Change Request to CDSS. Both CDSS and the Department of Health Care Services (DHCS) review the PA rate for compliance with applicable state and federal law. *The entire Rate Change Request process takes approximately 60 days.*

Leyton Supp. Decl., Ex. M ¶8 (emphasis added). State Defendants’ Stay Motion to the Ninth Circuit further underscores their position, claiming that “[a] stay will not result in *any* irreparable injury to IHSS providers or beneficiaries during the pendency of an expedited appeal; indeed, it would have *no effect*.” *Id.*, Ex. N at 8 (emphasis in original); *see also id.* at 26-27 (“IHSS providers and beneficiaries will not be immediately impacted *in any way* by the injunction.”) (emphasis in original).

In other words, State Defendants are arguing in the Ninth Circuit that staying this Court’s Preliminary Injunction will have no effect on providers and consumers because State Defendants do not intend to comply with the injunction by permitting counties to retain the wage rates that would be in effect but for Section 12306.1(d)(6).

On June 30, 2009, Plaintiffs’ counsel wrote to State Defendants’ counsel, informing them that even if State Defendants disagreed with Plaintiffs’ position that the injunction automatically rescinds the rate change requests submitted pursuant to Section 12306.1(d)(6), “there cannot be any question that the Court order requires the State to continue to pay the pre-July 1 wage rate to IHSS providers in any county that informs the State that its PA Rate Change Request lowering the rate was predicated on the enactment of § 12306.1(d)(6) and that, now that the statute has been enjoined by Judge Wilken, wants the pre-July 1 rate to remain in effect.” Leyton Supp. Decl., Ex. O at 1. Plaintiffs’ counsel requested confirmation that “providers in counties that notify the State that during the pendency of the preliminary injunction they want the pre-July 1 wage rate to remain in effect will continue to receive that wage in the first July pay period and thereafter.” *Id.* at 2. Rather than provide such confirmation, State Defendants’

counsel sent a non-responsive letter on July 1, 2009 which failed to address Plaintiffs' question but stated the following: "the only effect that Judge Wilken's injunction has is on how much the state must contribute toward the wages and benefits set forth in a county's MOU," and "the State does not have the authority to dictate how much counties should pay their IHSS providers." Leyton Supp. Decl., Ex. P. On July 2, 2009, Plaintiffs' counsel informed State Defendants' counsel that Plaintiffs interpreted State Defendants' letter to confirm that State Defendants did not intend to permit counties that informed CDSS that they wanted to retain their pre-July 1 wage rate to do so, and that Plaintiffs intended to pursue all available remedies to enforce State Defendants' compliance. *Id.*, Ex. Q. State Defendants' counsel has not responded to this letter.

Among the counties affected by this Court's injunction is San Mateo County, which had sent a rate change request to CDSS on June 1, 2009 requesting that the rate be reduced from \$11.50 to \$10.50 solely because of Section 12306.1(d)(6). Mancini Decl. ¶¶2, 4 & Ex. A. On June 29, 2009, San Mateo County officials sent a letter to CDSS stating that the \$10.50 wage rate request had been "predicated on the State's announcement that it would decrease the amount of its participation in the Independent Provider wage," and requesting that effective July 1, 2009, San Mateo County's rate be \$11.50 so long as the preliminary injunction remained in effect. *Id.*, ¶6 & Ex. C.⁵ The County enclosed the CDSS rate form and worksheets with this letter. *Id.* As set forth in the accompanying declaration of Lisa Mancini, the Director of Aging and Adult Services for San Mateo County:

On June 30, 2009, I spoke with Eileen Carroll of CDSS and asked her to confirm that our June 29th \$11.50 rate change would be in effect for the July 1-15 pay period. She would not confirm that. Instead, she told me that CDSS would process this rate change request pursuant to its "normal" procedures and that it would take 60 days for the rate change to be effective.

Id. ¶8. When an attorney from San Mateo County Counsel's office contacted CDSS Assistant Chief Counsel Janine LaMar to ask why CDSS intended to require San Mateo County to wait 60 days before the \$11.50 rate would be effective, even though CDSS had processed the rate change requests in implementation of Section 12306.1(d)(6) much more quickly, Ms. LaMar answered that CDSS had committed all resources to processing the Section 12306.1(d)(6) rate changes, and now it was processing

⁵ San Mateo County sent this letter despite the fact that it had not received any information from CDSS explaining how the injunction would be implemented "because we felt it was urgent to establish the wages to be in effect on July 1, 2009." Mancini Decl. ¶7.

rate change requests according to “normal” procedures. Leyton Decl. ¶13. San Mateo County made a preliminary estimate of the cost of a 60-day delay in State implementation of the \$11.50 per hour wage. If the County is required to pay providers \$11.50 per hour but is unable to obtain state or federal matching funds for 60 days because the rate is not approved, it will cost the County \$830,466. Mancini Decl. ¶11. On July 2, Ms. Mancini wrote a letter to CDSS informing it of this cost to the County and requesting written confirmation that the \$11.50 rate would be effective in time for the July 1-15 pay period or, alternatively, asking when the rate would be effective and what the State’s plans were for retroactively paying the State and federal match. *Id.* ¶12 & Ex. D. Ms. Mancini requested a response by the close of business on July 6th. *Id.* As of the morning of July 7, she had received no response. *Id.*

ARGUMENT

A. State Defendants Are In Contempt Of This Court’s Preliminary Injunction

1. Contempt standard

A district court “has wide latitude in determining whether there has been a contemptuous def[ianc]e of its order.” *Stone v. City and County of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992) (internal quotation marks omitted). The moving party must demonstrate by clear and convincing evidence that the alleged contemnor violated “a specific and definite order of the court.” *Id.* at 856 n.9. The burden then shifts to the opposing party to demonstrate that “they took every reasonable step to comply.” *Id.* The contempt “need not be willful, and there is no good faith exception to the requirement of obedience to a court order.” *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993).

2. State Defendants are clearly violating this Court’s injunction

State Defendants’ admitted actions – a deliberate and blatant refusal to preserve the status quo as it existed prior to Section 12306.1(d)(6) – violates the preliminary injunction’s direct order enjoining them “from implementing California Welfare and Institutions Code § 12306.1(d)(6) without first conducting the analysis required by 42 U.S.C. § 1396a(a)(30)(A)”

There is no question that the thirteen counties which submitted Rate Change Requests to CDSS seeking to reduce the wages of IHSS providers after CDSS notified counties of Section 12306.1(d)(6) and *required* a new rate submission for the period commencing July 1, 2009, did so as a direct result of

1 Section 12306.1(d)(6). Indeed, some of the Rate Change Requests explicitly said so. *See supra* at 3.
 2 That CDSS may have approved these requests before the issuance of this Court’s injunction is entirely
 3 irrelevant. To give effect to those rate changes – which were submitted and approved only as a direct
 4 result of Section 12306.1(d)(6) – is without question an “implement[ation]” of Section 12306.1(d)(6).

5 State Defendants’ reasoning for their action, set forth in their July 1, 2009 letter to Plaintiffs’
 6 counsel, makes no sense. First, State Defendants protest that they do not control the rates set by
 7 counties, which are established through collective bargaining. *See Leyton Supp. Decl., Ex. P.* But State
 8 Defendants made this very argument to this Court, which soundly rejected it, finding that “§
 9 12306.1(d)(6) has a *direct influence* on the wages for each county because it reduces the maximum
 10 payment towards wages and benefits that the State will contribute.” Order Granting Prelim. Inj. 10:5-8
 11 (emphasis added). State Defendants’ continued assertion that they have no impact on the IHSS provider
 12 rates flies directly in the face of this Court’s contrary finding.

13 Moreover, State Defendants’ denial of their role contradicts State Defendants’ sweeping
 14 invalidation of CDSS’s approval of any wage rate over \$10.10, effective July 1, 2009, pursuant to
 15 Section 12306.1(d)(6). *Leyton Supp. Decl., Ex. C* (DHCS analysis of Section 12306.1(d)(6), stating that
 16 “the PA rates, which are based upon the amount of state funding appropriated, are not approved as of
 17 July 1, 2009, and the counties will need to submit new rate packages for approval”). State Defendants
 18 cannot both have the authority to invalidate those pre-July 1st rate approvals, yet lack authority to
 19 invalidate the later approvals based solely on the implementation of now-enjoined Section
 20 12306.1(d)(6).

21 In any event, State Defendants’ rebuttal of a strawman – that they cannot force counties to pay a
 22 rate those counties do not want to pay – is contradicted in blatant terms by State Defendants’ current
 23 efforts to do just that. Numerous counties have informed CDSS that, in light of this Court’s Preliminary
 24 Injunction, they want to maintain the status quo, pre-Section 12306.1(d)(6) rate. Yet, State Defendants
 25 are *refusing* to permit the counties to pay providers these rates for at least 60 days while State
 26 Defendants review and process the “rate change” according to “normal” procedures and timelines (as
 27 opposed to the expedited processing CDSS did in implementation of Section 12306.1(d)(6)). As State
 28 Defendants indicated in their brief to the Ninth Circuit, this position effectively nullifies the Preliminary

1 Injunction. Leyton Supp. Decl., Ex. N (State Defendants' Ninth Circuit brief, asserting that "[a] stay
 2 will not result in *any* irreparable injury to IHSS providers or beneficiaries during the pendency of an
 3 expedited appeal; indeed, it would have *no effect*."') (emphasis in original). Indeed, it makes a mockery
 4 of this Court's Order.

5 There is no defense to State Defendants' denial of the pre-July 1st wage to providers. First, as
 6 previously mentioned, State Defendants' actions are inconsistent with their purported position that they
 7 cannot force counties to pay a wage rate other than the rate set by the counties. *See id.*, Ex. P. What
 8 State Defendants are now doing is *preventing* counties from maintaining the pre-July 1 wage rates over
 9 those counties' objections.⁶

10 Second, counties are not seeking a rate change at all; they are simply trying to maintain the wage
 11 rate that was in place through June 30, 2009, and that would have remained in place but for the
 12 implementation of Section 12306.1(d)(6). The only reason the rate would decrease effective July 1,
 13 2009 and then need to increase again after that date would be if State Defendants continue to violate this
 14 Court's Preliminary Injunction.

15 Third, even if it were true that State Defendants were required to process formal rate change
 16 requests in order to maintain the status quo, pre-July 1 rate, there is no reason this would need to take
 17 anywhere near 60 days. These rates were already approved by CDSS when they were implemented prior
 18 to Section 12306.1(d)(6). And State Defendants have demonstrated that they are fully capable of
 19 expediting the review process. Indeed, as set forth above (*supra* at 3), when processing Rate Change

20
 21 ⁶ State Defendants' statement that they cannot approve rate changes that do not comport with
 22 collective bargaining agreements between the counties and unions representing the IHSS providers has
 23 nothing to do with the issues before the Court. *See* Leyton Supp. Decl., Ex. P. As State Defendants are
 24 aware, most counties' collective bargaining agreements require the counties to pay the pre-Section
 25 12306.1(d)(6) rate now that the state cuts have been enjoined. *See* McDevitt Supp. Decl., Ex. A (letter
 26 from Alameda County to CDSS submitting its request to reduce the rate in light of Section
 27 12306.1(d)(6) and explaining that the county's collective bargaining agreement "states that if state (or
 28 federal) participation levels are reduced, wages will be reduced by the amount necessary to keep the cost
 to the County the same as it was before the change"); *see also* Leyton Supp. Decl., Ex. R (letter from
 Yolo County stating that the injunction "eliminat[es] the contractual basis under the Public Authority's
 Memorandum of Understanding with its employees' union for the Public Authority's planned reduction
 in the wage rate paid to Yolo County IHSS workers"); Mancini Decl. Ex. D (San Mateo County's
 collective bargaining agreement provides that the county will pay \$11.50 per hour as long as the state
 participates in that rate; county submitted rate reduction request solely because of Section
 12306.1(d)(6)).

1 Requests submitted pursuant to Section 12306.1(d)(6), State Defendants reviewed and officially
 2 approved rate changes in as little as one week. McDevitt Supp. Decl., ¶¶6-7 & Exs. D-E. Yet State
 3 Defendants' firm position now is that counties' requests to maintain the pre-Section 12306.1(d)(6) rates
 4 will not be approved in time to be effective before approximately September 1, 2009. *See, e.g., id.*, ¶11
 5 & Ex. I; Mancini Decl. ¶8 (CDSS official told San Mateo County that the State intends to process the
 6 County's June 29th Rate Change Request pursuant to its "normal" procedures which will delay the
 7 effective date of the rate change request for 60 days); Leyton Supp. Decl., Ex. M, ¶8 (declaration from
 8 CDSS official stating: "The entire Rate Change Request process takes approximately 60 days.");
 9 Mahlberg Decl., ¶4. When confronted with this discrepancy, State Defendants have informed counties
 10 that they employed the necessary resources to *expedite* the Section 12306.1(d)(6) rate change approvals,
 11 but are currently proceeding under "*normal*" procedures. Leyton Supp. Decl., ¶13.

12 To take at least 60 days to re-establish the pre-July 1st rate as opposed one week to eliminate that
 13 rate under Section 12306.1(d)(6) is to flagrantly defy this Court's Preliminary Injunction. State
 14 Defendants' contumacious conduct is *ensuring* that the reduced rates caused by Section 12306.1(d)(6)
 15 will go into effect and remain in effect for at least two months. And in counties that are obligated by
 16 collective bargaining agreements to pay providers the pre-July 1 rate now that Section 12306.1(d)(6) has
 17 been enjoined, State Defendants' conduct will cost those counties hundreds of thousands of dollars that
 18 they are unlikely to be able to recoup. As Ms. Mancini, the Director of Aging and Adult Services for
 19 San Mateo County, notes:

20 We are unaware of any way that the Public Authority can pay the providers \$11.50 per hour if the
 21 State has not changed the rate, nor are we aware of how we could receive and/or process
 22 payments from the State retroactive to July 1. We are also unaware of any way that we could
 23 draw down federal dollars for this time period retroactively.

24 Mancini Decl. ¶10; *see also id.* Ex. D (San Mateo County letter to CDSS).

25 Contempt need not be willful, *In re Dual-Deck*, 10 F.3d at 695, but here civil contempt sanctions
 26 are certainly warranted as the violating party, by deliberately engaging in a protracted stall, "is simply
 27 playing games with the court." *S.E.C. v. Elmas Trading Corp.*, 824 F.2d 732, 733 (9th Cir. 1987). State
 28 Defendants have demonstrated that their noncompliance is conscious and willful by falsely telling this
 Court on July 26, 2009 that they would issue an all-county information notice "immediately" but then

1 waiting five days to do so; by failing to inform counties which rate would be in effect on July 1, 2009
 2 and how counties could reinstate the pre-July 1 rates until July 3; and by making providers and
 3 consumers wait 60 days to process a pro forma request by counties to maintain the pre-July 1st wage rate
 4 now that Section 12306.1(d)(6) has been enjoined when rate change requests were previously processed
 5 in as little as one week. *See supra* at 3.

6 Finally, State Defendants cannot claim that they are complying with any reasonable
 7 understanding of this Court's injunction. The injunction specifically orders State Defendants to refrain
 8 from "implementing" Section 12306.1(d)(6). Yet State Defendants are proceeding to implement the
 9 statute by imposing – over counties' expressed desires – the reduced wage and benefit rates that were
 10 submitted and approved solely because of the implementation of Section 12306.1(d)(6). As San Mateo
 11 County, one of the many counties trying to maintain the pre-Section 12306.1(d)(6) rates, noted in a letter
 12 to CDSS: "we do not see how the State can be in compliance with the Court's injunction while
 13 simultaneously failing to immediately implement the Public Authority's June 29th Rate Change
 14 Request." Mancini Decl. Ex. D.

15 If there were any doubt that the plain language of the injunction precluded this – and Plaintiffs
 16 maintain there is not – it is entirely removed by the written order which followed the preliminary
 17 injunction. There, the Court plainly set forth the reasoning underlying the preliminary injunction. *See In*
 18 *re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993) (looking to
 19 "whereas" clauses to clarify meaning of order); *United States v. Young*, 107 F.3d 903, (D.C. Cir. 1997)
 20 (looking to "the context in which [the order] is issued and the audience to which it is addressed" to
 21 determine whether an order is sufficiently clear to justify a finding of contempt).

22 This Court's issuance of a preliminary injunction was based on its finding that the wage rate
 23 reductions caused by Section 12306.1(d)(6) "will cause many IHSS providers to leave employment,
 24 which in turn will leave consumers without IHSS assistance. The consumers' quality of life and health-
 25 care will be greatly diminished, which will likely cause great harm to disabled individuals." Order
 26 Granting Prelim. Inj. 10:26-11:3. This Court also found that IHSS providers would suffer "immediate
 27 and irreparable harm" from the reduced wages. *Id.* 11:11-12. State Defendants' actions – implementing
 28 wage reductions that were instituted solely because of Section 12306.1(d)(6) – will cause Medicaid

1 payment rates to be reduced in implementation of Section 12306.1(d)(6) without consideration of the
 2 impact of those reduced rates on the Section 30(A) factors and will cause irreparable harm to befall
 3 IHSS consumers and providers. *See* Mancini Decl. ¶10 (statement by Director of Aging and Adult
 4 Services for San Mateo County: “Any delay in implementing our \$11.50 rate request will cause
 5 immediate harm to the San Mateo County Public Authority and independent providers.”). The Court’s
 6 reasoning in support of its issuance of a preliminary injunction makes clear that it intended to prevent
 7 rate reductions pursuant to the implementation of Section 12306.1(d)(6) from going into effect, not
 8 simply to require the State to maintain its non-federal share of the provider wage in counties that had
 9 decided not to lower rates despite Section 12306.1(d)(6), because they intended to make up the
 10 difference out of county funds.

11 Moreover, the purpose of a preliminary injunction is to maintain the status quo pending a hearing
 12 on the merits. *See Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa County*,
 13 550 F.3d 770, 776 (9th Cir. 2008). Here, the status quo that the injunction was intended to preserve is
 14 the rates in effect before July 1, not the lower wage rates that would become effective on July 1 in some
 15 counties because of Section 12306.1(d)(6). In other words, the injunction was intended to preserve the
 16 situation that would have existed as if Section 12306.1(d)(6) had never been enacted and implemented.
 17 State Defendants’ actions will instead ensure that the status quo is changed. This constitutes a clear
 18 violation of this Court’s preliminary injunction.

19 **3. Remedy**

20 State Defendants have made clear that they will maintain their defiance of this Court’s order for
 21 as long as possible. This defiance harms not only counties, consumers, and providers, but also the very
 22 authority of the federal courts. “If a party can make himself a judge of the validity of orders which have
 23 been issued, and by his own act of disobedience set them aside, then the courts are impotent, and what
 24 the Constitution now fittingly calls ‘the judicial power of the United States’ would be a mere mockery.”
 25 *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911).

26 To ensure that State Defendants immediately comply with this Court’s Preliminary Injunction,
 27 Plaintiffs ask this Court to impose monetary sanctions in the form of a conditional fine of \$500,000 per
 28 day payable to the Court, starting on July 10 if State Defendants have not certified to the Court as of that

1 date that they will pay IHSS providers at the pre-July 1 rates for the pay period commencing July 1, 2009
 2 in all counties that inform or have informed CDSS that they wish to maintain that rate, and continuing
 3 until State Defendants so certify. *See United States v. Ayres*, 166 F.3d 991, 995 (9th Cir. 1999) (“One of
 4 the paradigmatic civil contempt sanctions is a per diem fine imposed for each day a contemnor fails to
 5 comply with an affirmative court order.”). A prospective sanction of this magnitude is necessary to
 6 ensure that State Defendants actually and immediately comply with the preliminary injunction, rather
 7 than make an economic decision to continue their defiance of a federal court order.

8 Plaintiffs further seek attorneys’ fees to compensate them for the cost of bringing this motion.
 9 *See In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1366-67 (9th Cir. 1987) (awarding
 10 monetary contempt sanctions to “compensate the contemnor’s adversary for the injuries which result
 11 from the noncompliance”); *see also In re Dyer*, 322 F.3d 1178, 1195 (9th Cir. 2003) (“attorneys’ fees are
 12 an appropriate component of a civil contempt award”).

13 **B. In The Alternative, This Court Should Issue A More Specific Preliminary Injunction**

14 Although it is Plaintiffs’ position that the requirements imposed by the Preliminary Injunction are
 15 abundantly clear, if the Court concludes otherwise, Plaintiffs seek in the alternative a more specific
 16 Preliminary Injunction that invalidates all rate reduction requests submitted and approved to be effective
 17 July 1, 2009. Alternatively, Plaintiffs seek, at the very least, a more specific preliminary injunction
 18 directing State Defendants to reinstate the pre-July 1 wage rate immediately for any county that informs
 19 or has informed CDSS that it wishes to retain that rate during the pendency of the preliminary injunction.

20 A more specific preliminary injunction that invalidated all rate reduction requests submitted and
 21 approved to be effective July 1, 2009 would ensure that the pre-July 1, 2009 status quo remains in effect
 22 for the duration of the preliminary injunction.⁷

23 Alternatively, a more specific preliminary injunction that, at the very least, directs State
 24 Defendants to reinstate immediately, starting with the post-July 1, 2009 pay period, the pre-July 1st wage
 25 rate for any county that informs or has informed CDSS that it wants the pre-July 1st rate to be paid

26 ⁷ Such an injunction would not prohibit Fresno County from submitting a new Rate Change
 27 Request for reasons independent of Section 12306.1(d)(6). Plaintiffs reserve all challenges to such a
 28 request, but simply note that the more specific injunction requested here would not bar Fresno from
 submitting it.

1 during the pendency of the preliminary injunction, would circumvent State Defendants' deliberate foot-
2 dragging response to such counties' requests.

3 **CONCLUSION**

4 For the foregoing reasons, Plaintiffs' motion for civil contempt sanctions or, in the alternative,
5 for a more specific preliminary injunction should be granted.

6
7 Dated: July 7, 2009

STEPHEN P. BERZON (SBN 46540)
SCOTT KRONLAND (SBN 171693)
STACEY M. LEYTON (SBN 203827)
PEDER J. THOREEN (SBN 217081)
ANNE N. ARKUSH (SBN 254985)
Altshuler Berzon LLP

8
9
10
11 By: /s/ Stacey M. Leyton
Stacey M. Leyton

12
13 Attorneys for Plaintiffs
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28