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8  
9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
11

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

Plaintiffs,

v.

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

Defendants.

CV 09-2306 CW (JL)

**STATE DEFENDANTS' OPPOSITION  
TO PLAINTIFFS' MOTION TO  
COMPEL**

Date: May 12, 2010  
Time: 9:30 a.m.  
Courtroom: F, 15th Floor,  
Federal Building, San Francisco

Trial Date March 21, 2011  
Action Filed: May 26, 2009

## INTRODUCTION

Plaintiffs' motion, that seeks to compel State defendants to produce confidential, privileged communications unrelated to any issue in this case, is baseless. Plaintiffs' attempts to justify their sweeping request to produce internal communications among State defendants and other administration attorneys and officials should be rejected. They are merely attempting to obtain communications between and among State officials regarding an issue that is unrelated to any claim or defense asserted in this case, but that relate to an issue raised by plaintiff SEIU with the federal agency charged with administering the Medicaid program regarding the American Recovery and Reinstatement Act (ARRA). Plaintiffs should not be permitted to delve into the internal deliberations about whether Welfare and Institutions Code section 12306.1(d)(6) would potentially violate a provision of ARRA such that the State of California would be denied billions of dollars in stimulus funds. ARRA is not at issue here, and to the extent that this issue was at all relevant to the Medicaid Act cause of action, that issue was resolved by the Ninth Circuit in its opinion, affirming the district court's preliminary injunction of section 12306.1(d)(6). Plaintiffs' attempt to tie the ARRA issue to the ADA claim and a defense to that claim that State defendants have not raised, should also be rejected. The bottom line here is that none of the documents plaintiffs seek are relevant and they are all unquestionably privileged. Plaintiffs' motion to compel should be denied.

## RELEVANT FACTS

### A. Factual Background

State defendants generally agree with plaintiffs' description of the In-Home Supportive Services (IHSS) program and the enactment of Welfare and Institutions Code section 12306.1(d)(6). Plaintiffs acknowledge that the union plaintiffs were involved in discussions with the federal government and State defendants regarding whether section 12306.1(d)(6) would violate section 5001(g)(2) of the American Recovery and Reinstatement Act. Plaintiffs' Motion at 4 n. 2; 5 n. 3. In fact, plaintiff SEIU initially raised the issue with the Centers for Medicare and Medicaid Services (CMS), the federal agency charged with administering the Medicaid program. Declaration of Toby Douglas ¶ 5.

In order to respond from inquiries from CMS and issues raised by SEIU, over 50 senior legal and program staff from the Governor's Office, the Department of Finance, the California Health and Human Services Agency as well as State defendants, Department of Health Care Services (DHCS) and the Department of Social Services (DSS) met and deliberated over a two-month period. Douglas Decl. ¶ 5. The memoranda outlining the State's position on the potential impact of section 12306.1(d)(6) on receipt of federal funds under ARRA were set forth in two memoranda, both of which were provided to SEIU. See Declaration of Carol Golubock in Support of Plaintiffs' Motion for Preliminary Injunction ¶ 2, 4, Exhs. A, C, respectively. Ultimately, CMS, the federal agency charged with administering the Medicaid program, determined that section 12306.1(d)(6) would not cause the State to be in violation of section 5001(g)(2) of ARRA. See Golubock Decl. ¶ 6, Exh. D.

#### **B. Procedural History**

While plaintiffs give a fairly accurate description with regard to the proceedings in the district court and Ninth Circuit with regard to their motion for preliminary injunction, what plaintiffs do not state is that the issue regarding what the State must do in order to comply with section 1396a(a)(30)(A) of the Medicaid Act has been resolved. Despite State defendants' arguments that the State does not set the level of wages and benefits paid to IHSS providers such that it should be required to comply with the Ninth Circuit's decisions in *Orthopaedic Hosp. v. Belshe* and *California Pharmacists II*, the Ninth Circuit has concluded otherwise.

The Ninth Circuit recently held "that before enacting Legislation that has the effect of lowering payments to providers – here, § 12306.1(d)(6) – the State must study the impact of that decision on the statutory factors section in § 30(A). *Dominguez v. Schwarzenegger*, 596 F.3d 1065, \*12 (9th Cir. 2010), citing *California Pharmacists II*, 2010 U.S. App. LEXIS 4530, at \*13. The Ninth Circuit specifically rejected State defendants' argument that because the State does not set the level of wages and benefits paid to IHSS providers, it was not required to conduct a study prior to enactment of section 12306.1(d)(6). "We are not persuaded by the State's attempt to distinguish its rate of *reimbursement* to providers from its *contribution* to the amount counties pay to providers in the IHSS context." *Id.* at 13 (emphasis in original).

## ARGUMENT

### **I. PLAINTIFFS HAVE FAILED TO SHOW THAT THE DOCUMENTS THEY SEEK ARE RELEVANT TO ANY CLAIM OR DEFENSE AT ISSUE IN THIS LITIGATION**

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides in pertinent part: “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense . . . .” Thus, the parties and the court should “focus on the actual claims and defenses involved in the action.” Advisory Committee Notes, 2000 Amendment; see also *Trevino v. ACB American, Inc.*, 232 F.R.D. 612, 615, 616 (N.D. Cal.2006) (documents not relevant to issues raised in suit were not required to be produced). Although the court may permit discovery relevant to the subject matter of the lawsuit, the party must establish “good cause” for the requested discovery. *In re: Subpoena to Michael Witzel*, 531 F.3d 113, 118 (1st Cir. 2008).

Here, there is nothing relevant about communications State defendants may have had amongst themselves or with the federal government about section 12306.1(d)(6) and the American Recovery and Reinstatement Act (ARRA) to any of the claims or defenses in this litigation. The Medicaid Act issues in this matter are quite straightforward: Did State defendants violate section 1396a(a)(30)(a) of the Medicaid Act because they failed to conduct a study under the Ninth Circuit’s decision in *Orthopaedic Hospital v. Belshe*, 103 F.3d 1490 (9th Cir. 1997) prior to the Legislature enacting section 12306.1(d)(6)? The Ninth Circuit has determined that State defendants must conduct such a study. The court specifically rejected State defendants’ explanations for why they did not believe that *Orthopaedic* applied. Thus, plaintiffs’ claim that “[t]he documents are particularly relevant to whether Section 12306.1(d)(6) would have the effect of reducing rates paid to IHSS providers” has been resolved by the Ninth Circuit. Plaintiffs’ Motion at 8.<sup>1</sup> Whether section 12306.1(d)(6) would have the effect of lowering wages and benefits for IHSS providers no longer matters. The Ninth Circuit has found that the reduction of the State’s contribution “[b]ecause section 12306.1(d)(6) directly affects what Medi-Cal providers are *paid* for providing services, its falls within § 30(A)” and that “the State must study the impact

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<sup>1</sup> State defendants have filed a petition for certiorari, however, with the U.S. Supreme Court.

1 of [the reduction] on the statutory factors set forth in § 30(A).” *Dominguez*, 596 F.3d at \*12.  
 2 Thus, plaintiffs’ claim that “State Defendants’ internal communications and communications with  
 3 the federal government regarding Section 12306.1(d)(6) are highly relevant to this litigation” is  
 4 baseless.

5 Plaintiffs’ contention that these communications are relevant to the “fundamental alteration  
 6 defense” to the ADA claim is also meritless. Plaintiffs’ Motion at 8-9 n. 5. There are two  
 7 problems with this contention: (1) State defendants have not asserted a fundamental alteration  
 8 defense to plaintiffs’ claims under the Americans with Disabilities Act;<sup>2</sup> and, (2) even if State  
 9 defendants were to argue the fundamental alteration defense, plaintiffs already have the  
 10 information they claim they would need, the percentage of federal funding available to the State  
 11 for paying for IHSS. Thus, plaintiffs have utterly failed to establish the relevance of these  
 12 privileged communications to any issue that remains in this lawsuit. In fact, plaintiffs did not  
 13 seek, or apparently need, these confidential communications while litigating the issue of whether  
 14 the State’s reduction of the maximum contribution for wages and benefits in the preliminary  
 15 injunction briefing. In other words, plaintiffs litigated this issue without the communications they  
 16 seek here, and it was resolved in their favor.

17 The internal, privileged communications regarding whether the State would be in violation  
 18 of a provision of ARRA are simply not relevant to any claim or issue in the case. The only  
 19 defense to which any information regarding ARRA *might* apply has not been asserted by  
 20 defendants, and if it were, the information plaintiffs would need to counter it is public information  
 21 -- that is the percentage of federal funding available to the State for Medicaid services provided.  
 22 There is simply no basis for plaintiffs’ claim that the communications sought “are at least  
 23 reasonably calculated to lead [to] the discovery of admissible evidence regarding the impact of  
 24 the ARRA (and its increased FMAP) on the resources available to the State to fund the IHSS  
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26 <sup>2</sup> In opposition to plaintiffs’ motion for preliminary injunction, State defendants’ argued  
 27 that plaintiffs could not prove an essential element of their ADA claim, causation. Moreover, this  
 28 is the first time plaintiffs have asserted that they need these privileged communications to respond  
 to a potential fundamental alteration defense. They did not raise this in their meet and confer  
 communications with State defendants. Thoreen Decl. ¶ 4, Exh. C.

1 program and competing programs.” Plaintiffs’ Motion at 9. Accordingly, plaintiffs have failed to  
 2 show that there is “good cause” for the court to order production of privileged communications  
 3 between and among high-ranking State legal and program staff.

4 **II. STATE DEFENDANTS HAVE PROPERLY RAISED THE ATTORNEY/CLIENT AND**  
 5 **DELIBERATIVE PROCESS PRIVILEGES IN RESPONSE TO PLAINTIFFS’ REQUEST FOR**  
 6 **IRRELEVANT DOCUMENTS**

7 In response to plaintiffs’ request for internal communications within the State  
 8 Administration regarding whether section 12306.1(d)(6) would violate a subsection of ARRA,  
 9 State defendants raised both the attorney/client and deliberative process privileges. The  
 10 deliberative process privilege” permits the government to withhold documents that reflect  
 11 advisory opinions, recommendations and deliberations comprising part of a process by which the  
 12 government decisions and policies are formulated.” *Federal Trade Comm’n v. Warner*  
 13 *Communications*, 742 F.2d 1156, 1161 (9<sup>th</sup> Cir. 1984), citing *NLRB v. Sears, Roebuck & Co.*, 421  
 14 U.S. 132, 150 (1975). “It was developed to promote frank and independent discussion among  
 15 those responsible for making governmental decisions, . . . and also to protect against premature  
 16 disclosure of proposed agency policies or decisions.” *Federal Trade Comm’n*, 742 F.2d at 1161  
 17 (citations omitted). Two requirements must be met for the privilege to apply: (1) the document  
 18 must be predecisional; and (2) the document must be deliberative in nature, containing opinions,  
 19 recommendations, or advice about agency policies. *Id.* Although the privilege is a qualified one,  
 20 the party seeking the privileged documents must show that its need overrides the government’s  
 21 interest in nondisclosure. The factors to be considered are (1) the relevance of the documents  
 22 sought; (2) the availability of other evidence; (3) the government’s role in the litigation; and (4)  
 23 the “extent to which disclosure would hinder frank and independent discussion regarding  
 24 contemplated policies and decisions.” *Id.*

25 Here, State defendants have properly raised the deliberative process privilege in response to  
 26 plaintiffs’ request for “internal communications between State Defendants or any of their officers,  
 27 employees, or agents, discussing, analyzing, reflecting, or otherwise §12306.1(d)(6).” See  
 28 Response to Document Request No. 3. Plaintiffs’ Motion at 6; Douglas Decl. ¶ 6. On the other  
 hand, plaintiffs have failed to meet a single factor that would warrant production of these internal,

1 confidential communications. First, as set forth above, the documents sought are not relevant to a  
 2 single claim or defense at issue in this litigation. Second, in the event that the State were to claim  
 3 the fundamental alteration defense – and it has not – plaintiffs already have the only relevant  
 4 piece of information they would need, the percentage of federal funding that would be available  
 5 to the State to offset its costs regarding the IHSS program. In addition, plaintiffs already possess  
 6 the memoranda that set forth the State’s position with regard to the issues raised regarding section  
 7 12306.1(d)(6) and ARRA, to the extent that such position might be relevant. Third, the State  
 8 defendants are the primary defendants in this action that concerns the enactment of a State statute.  
 9 Finally, if production were ordered of these internal, deliberative communications, the free flow  
 10 of ideas and candid exchange of opinions and advice among high-ranking program and legal staff  
 11 would certainly be chilled. Douglas Decl. ¶ 7. Indeed, if every time a political actor –here, SEIU  
 12 – could obtain the internal communications among State government official concerning an issue  
 13 that the actor raised with the federal officials charged with overseeing the administration of a  
 14 State’s program, written communication among the State staff would surely cease. State staff  
 15 would be unable to communicate in writing for fear that its internal deliberations could be used  
 16 against it in the political arena. State defendants cannot imagine a scenario more chilling than  
 17 this. Under all the circumstances here, plaintiffs have utterly failed to overcome the State’s need  
 18 to keep these deliberative, predecisional communications confidential. Thus, the deliberative  
 19 process privilege precludes the production of these internal communications.<sup>3</sup>

20 Under Fed. R. Evid. 501, issues with regard to the attorney/client privilege are to be  
 21 determined under State law. Under California law, lawyer-client communications are presumed  
 22 to be confidential. Cal. Evid. Code § 917; *see also* Cal. Evid. Code §§ 952, 954. Here, many if  
 23 not most of the confidential communications among State staff involved attorneys providing legal

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25 <sup>3</sup> Given the nature of the documents – almost exclusively emails among high-ranking  
 26 legal and program staff throughout the Administration from the Governor’s Office to the State  
 27 defendants, State defendants should not be required to search and retrieve every email from over  
 28 50 staff members’ computers in order to individually list each and every communication. To  
 require State defendants to undertake this onerous task given the utter irrelevance of the  
 communications and the severe budgetary constraints currently facing the State would constitute  
 undue burden and require undue expense.

advice. Douglas Decl. ¶ 6. State defendants properly raised the attorney/client privilege in response to plaintiffs' Request for Production No. 3. As with the deliberative process privilege, the number of staff with potentially privileged communications is in the dozens. It would be unduly burdensome and oppressive to require State defendants to search and retrieve hundreds of emails related to the legal position the State took and the analysis the State provided to CMS and SEIU with regard to the issues SEIU raised regarding section 12306.1(d)(6) and ARRA. Plaintiffs already have these final documents. They have no need for all the deliberative communications that occurred among State program and legal staff.

**III. STATE DEFENDANTS SHOULD NOT BE REQUIRED TO PAY FOR PLAINTIFFS' EXPENSES IN BRINGING THIS MOTION BECAUSE ITS REFUSAL TO PRODUCE THE REQUESTED DOCUMENTS IS SUBSTANTIALLY JUSTIFIED**

A party may recover its expenses if a discovery motion is granted and the opposing party's objection was not "substantially justified." Fed. R. Civ. Proc. Rule 37(a)(4)(A). The relevant inquiry is the substantive bases for a party's objections. *Neumont v. Monroe*, 225 F.R.D. 266, 268 (S.D. Fla. 2004) (magistrate erred when it considered the outcome of defendants' objections, not the background for their assertion).

Here, State defendants' position with regard to the irrelevance and privileged nature of the documents plaintiffs seek is more than substantially justified. The documents are not relevant to any claim or defense in this case. In addition, they are subject to the deliberative process and attorney/client privileges. If any party would be entitled to recover expenses, it would be State defendants for being required to respond to this baseless motion to compel. Therefore, plaintiffs' request to be reimbursed for their expenses in bringing this motion should be denied.

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**CONCLUSION**

Plaintiffs' motion to compel the production of documents that are not relevant to any claim or defense in this action and which are unquestionably privileged should be denied. Plaintiffs have utterly failed to establish that they need any of these documents to litigate a single issue in this case. And, they have failed to show that State defendants' objections to producing these confidential and privileged documents are not substantially justified. Therefore, plaintiffs' motion to compel should be denied.

Dated: April 21, 2010

Respectfully submitted,

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