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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10 WESTERN DIVISION

NATIONAL ASSOCIATION OF CHAIN DRUG STORES; ET AL. Plaintiffs, vs. ARNOLD SCHWARZENEGGER; ET AL. Defendants.	Case No. CV 09-7097 CAS (MANx) **ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL**

I. INTRODUCTION

On September 30, 2009, plaintiffs, the National Association of Chain Drug Stores ("NACDS") and the National Community Pharmacists Associations ("NCPA"), filed the instant action. On October 2, 2009, plaintiffs filed an amended complaint ("FAC") against defendants Arnold Schwarzenegger, Governor of the State of California; Kim Belshe, Secretary of the California Health and Human Services Agency; David Maxwell-Jolly, Director the California Department of Health Care Services; and the California Department of Health Care Services (the "Department"). The Department is a California agency charged with the administration of California's Medicaid program, Medi-Cal. Plaintiffs represent certain Medi-Cal pharmacy providers.

Plaintiffs seek to enjoin defendants from "reducing by, on average, slightly more than four percent (4%) Medicaid reimbursement based on Average Wholesale Price ("AWP") for drug products paid to pharmacies for dispensing prescription drugs reimbursed" by Medi-Cal (the "AWP reductions"). FAC at 2. Plaintiffs allege that the implementation of the AWP reductions violates Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 et seq. (the "Medicaid Act"), and other applicable state and federal regulations. Id.

On December 22, 2009, the Court denied plaintiffs' motion for preliminary injunction. Plaintiffs filed a notice of appeal regarding this order on December 28, 2009. On January 12, 2010, the Ninth Circuit Court of Appeals denied plaintiffs' request for an injunction pending appeal without prejudice to renewal, if necessary, upon the filing and disposition of such request in the district court, pursuant to Fed. R. App. P. 8(a)(1). See Nat'l Assoc. of Chain Drug Stores v. Arnold Schwarzenegger, No. 09-57051 (9th Cir. Jan. 12, 2010). The Ninth Circuit granted plaintiffs' request for an expedited briefing schedule and hearing date. Id.

On February 1, 2010, plaintiffs filed the instant motion for preliminary injunction pending appeal. Defendants filed their opposition on February 16, 2010. A hearing was held on February 22, 2010. After carefully considering the arguments set forth by both parties, the Court finds and concludes as follows.

II. BACKGROUND

Medicaid is a cooperative federal program: the federal government provides federal funding to the states so that states may provide medical care to their needy citizens. State participation is voluntary; however, once a state chooses to participate by accepting federal funds, it must comply with requirements imposed by the Medicaid Act. Because California has elected to participate in the Medicaid program, it must administer its state Medicaid program, Medi-Cal, in compliance with a state plan that has been pre-approved by the Secretary of the U.S. Department of Health and Human Services (the "Secretary"), and which complies with the requirements set forth in 42 U.S.C. §

1396a(a)(1)-(70). In accordance with these requirements, California must provide "methods and procedures" for the payment of care and services that (1) are "consistent with efficiency, economy, and quality of care," and (2) ensure their availability to the Medicaid population to the same "extent as they are available to the general population in the geographic area." 42 U.S.C. § 1396a(a)(30)(A). These requirements are known, respectively, as the "quality of care" and "equal access" provisions of § 30(A) of the Medicaid Act. Further, under California law, the Department must administer Medi-Cal in accordance with the state plan; applicable state law, as specified in sections 14000 to 14124 of the Welfare and Institutions Code; and Medi-Cal regulation. Cal. Code Regs. tit. 22, § 50004(b).

The subject of this case is pharmacy reimbursement in the Medicaid program. Medi-Cal reimburses pharmacies that dispense prescription drugs to patients covered by Medicaid. The department reimburses these pharmacies for the "estimated acquisition cost" of drugs along with a fixed dispensing fee per prescription. Cal. Welf. & Inst. Code § 14105.45(b)(1). Pursuant to the California state plan and state law, the reimbursement of drug costs is based on the lesser of four alternatives: (1) AWP minus 17%; (2) the selling price; (3) the federal upper limit; or (4) the maximum ingredient cost ("MAIC"). Id. § 14105.45(b)(2).

In the instant action, plaintiffs challenge an alleged 4% reduction in reimbursements tied to the AWP, which is the "price for a drug product listed as the average wholesale price in the department's primary price reference source." The Department uses First DataBank, Inc. ("First DataBank"), a drug pricing publisher, as its primary price reference source for determining the AWP. On March 17, 2009, as part of a class action settlement in a separate lawsuit, First DataBank agreed to reduce the mark-up of 1.25 over the wholesale acquisition cost ("WAC") to 1.20 over WAC, when setting

the AWP for approximately 1,400 drug products.[1] See New England Carpenters Health Benefits Fund v. First DataBank, Inc., 602 F. Supp. 2d 277 (D. Mass. 2009) (approving the settlements). The settlement agreements were affirmed by the First Circuit on appeal. See 582 F.3d 30 (1st Cir. 2009). Plaintiffs allege that First DataBank also voluntarily reduced the markup to 1.20 over WAC when setting the AWP for approximately 18,000 additional drug products, where the mark-up previously exceeded 1.20. FAC ¶ 25; Mot. at 6. Implementation of these AWP reductions occurred on September 26, 2009. Plaintiffs contend that the practical effect of these reductions is that the reimbursement for drug products tied to AWP has been reduced by slightly more than 4%. FAC ¶ 26.

III. LEGAL STANDARD

While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, a court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. Fed. R. Civ. P. 62(c). Although different rules of procedure govern the power of district courts and court of appeals to stay an order pending appeal, see Fed. R. Civ. P. 62(c) and Fed. Rule App. P. 8(a), the Supreme Court has held that the factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Cal. Pharmacists Ass'n v. Maxwell-Jolly, 563 F.3d 847, 849-50 (9th Cir. 2009).

[1] The AWP figure is usually derived by applying a multiplier to the wholesale acquisition cost ("WAC"). See Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund, 582 F.3d 30, 36-37 (1st Cir. 2009) (providing a background to drug pricing and the controversy in the underlying case).

IV. DISCUSSION

Plaintiffs move to preliminarily enjoin reductions based on implementation of the AWP reductions, pending appeal of this Court's December 22, 2009 order denying plaintiffs' original motion for preliminary injunction. Plaintiffs contend that under the applicable standard, the degree of irreparable harm in this case tips the sliding scale continuum toward issuance of an injunction. Mot. at 1. According to plaintiffs, the Court cannot truncate the sliding scale analysis and ignore the irreparable harm factor, unless there is a complete lack of probability of success on the merits.[2] Id. at 9. Plaintiffs assert this is "simply not the case here."[3] Id. at 9. Accordingly, plaintiffs argue that even if this Court still holds the view that plaintiffs have not established a high likelihood of succeeding on the merits, that immediate injunctive relief is warranted pending the appeal because irreparable harm to Medicaid beneficiaries and plaintiffs' members cannot be ignored. Id. Plaintiffs submit NACDS and NCPA member declarations in support of their contention that plaintiffs' members and Medi-Cal beneficiaries will suffer irreparable injury absent an injunction of the AWP reductions. Id. at 9-12. For example, plaintiffs assert that Costco Wholesale Corporation ("Costco"), a member of NACDS, has already terminated its participation in the

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[2] The Ninth Circuit has held that no determination of irreparable harm or balancing hardships is necessary if "a party has not shown any chance of success on the merits." Global Horizons, Inc. v. United States DOL, 510 F.3d 1054, 1058 (9th Cir. 2007). "To reach this sliding scale analysis, . . . a moving party must, at an 'irreducible minimum,' demonstrate some chance of success on the merits." Id. (citing Arcamuzi v. Cont'l Air Lines, Inc., 819 F.2d 935, 937 (9th Cir. 1987)).

[3] Plaintiffs reiterate the same arguments raised in their original motion for preliminary injunction that they have made a strong showing of success on the merits of their claim that implementation of the AWP reductions violates section 30(A). Mot. at 6-8. Further they argue that by adopting and implementing the reduced AWP, defendants engage in state action. Id. at 13-14. Accordingly, the State's obligations under § 30(A) were triggered and the Department cannot delegate its duties to consider the impact of the reimbursement reduction to a private third party, in this case First DataBank. Id.

Medicaid programs.[4] Id.; Declaration of Victor Curtis ¶ 5. According to plaintiffs' expert Dr. Kenneth W. Schafermeyer ("Schafermeyer"), because of the AWP reductions "[v]irtually all California pharmacies will have to consider refusing Medicaid prescriptions for which they will experience significant losses." Schafermeyer Decl., Ex. 1 at 43.

Defendants respond that the Court should deny plaintiffs' instant motion for the same reasons it denied plaintiffs' original motion for preliminary injunction — namely, the reduction in AWP was not a result of any state mandated change in the reimbursement methodology.[5] Opp'n at 6-9. Further, defendants argue that even assuming that the AWP reductions triggered a new § 30(A) analysis, the Department relied on a responsible cost study to evaluate the impact of the First DataBank AWP reductions to determine that the reimbursement continues to comply with requirements under § 30(A). Id. at 14-18; Declaration of Kevin Gorospe ¶¶ 24-36 & 40.[6]

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[4] A representative from Costco asserts that has "chosen not to participate in the Medicaid programs because the current rate of Medicaid reimbursement for drug products combined with the allowed amount for dispensing fees would not cover Costco's total cost for drug acquisition and dispensing." Curtis Decl. ¶ 5. Further, he asserts that the AWP reductions "provides a further disincentive for Costco to participate in state Medicaid programs." Id. ¶ 7.

[5] Defendants further argue that plaintiffs cannot establish that the AWP reductions are causing irreparable harm because the AWP for several hundreds of drugs have already increased, as of October 16, 2009, and any alleged injury is "uncertain and speculative." Opp'n at 18-20.

[6] Defendants request that the Court take judicial notice of the Gorospe Declaration and its attached exhibits. Under Fed. R. Evid. 201, a court may take judicial notice of "matters of public record." Mack v. South Bay Beer Distrib., 798 F.2d 1279, 1282 (9th Cir.1986). As such, judicial notice is proper insofar as judicial notice is taken that these four court filings were made. The Court GRANTS the Meshkatai defendants' request for judicial notice to the extent they request that the Court take judicial notice that the documents were filed with the Court. However, the Court does not take judicial notice of the truth of the matters asserted therein.

1 There does not appear to be good reason to depart from the reasoning contained in
2 the Court's December 22, 2009 order denying plaintiffs' original motion for preliminary
3 injunction. As noted in that order, the Ninth Circuit has held that § 30(A) of the
4 Medicaid Act creates certain duties on behalf of the Department when establishing
5 reimbursement rates. See, e.g., Indep. Living Ctr., 572 F.3d 644, 651 (9th Cir. 2009)
6 (citing Orthopaedic Hospital v. Belshe, 103 F.3d 1491, 1492 (9th Cir. 1997)). However,
7 in the instant case, the challenged reductions in reimbursement are the result of changes
8 in how First DataBank, a private party, establishes wholesalers' prices. For this reason,
9 the Court finds that this case is distinguishable from previous cases in which it
10 preliminarily enjoined implementation of State mandated Medi-Cal rate reductions. See,
11 e.g., Managed Pharmacy Care v. David Maxwell Jolly, 603 F. Supp. 3d 1230 (C.D. Cal.
12 2009) (enjoining the Director from implementing the five percent payment reductions
13 codified in Cal. Welf. & Inst. Code § 14105.191(b)(3), as modified by Assembly Bill
14 1181); see also, Indep. Living Ctr., No. CV 08-3315 CAS (MANx), 2008 WL 3891211
15 (C.D. Cal. Aug. 18, 2008)). In the instant case, the State has not affirmatively acted to
16 create a new, or modified, "method or procedure" for establishing reimbursement rates to
17 provider pharmacies, thus triggering its duties under § 30(a) and relevant regulations.
18 Rather, the Department is making payments pursuant to a preexisting formula codified in
19 Cal. Welf. & Inst. Code § 14105.45(b)(2). Thus, the Court concludes that plaintiffs have
20 not made out a sufficient showing they have a likelihood of success on the merits of their
21 claims.
22 As to plaintiffs' argument that its showing of irreparable harm tips the sliding
23 scale continuum toward issuance of an injunction, the Court finds that to the extent that
24 the Ninth Circuit's opinion in Am. Trucking Ass'n Inc. v. City of Los Angeles, 559 F.3d
25 1046, 1052 (9th Cir. 2009), rejected the appropriateness of a sliding scale analysis, this
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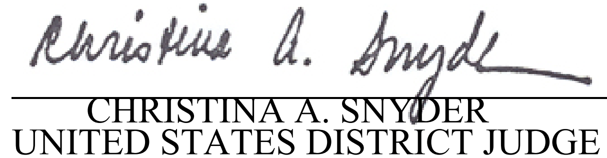
standard is not applicable to the instant motion.[7] Accordingly, the Court denies plaintiffs' instant motion.

V. CONCLUSION

In accordance with the foregoing, the Court DENIES plaintiffs' motion for preliminary injunction pending appeal.

IT IS SO ORDERED

Dated: February 22, 2010



CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

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[7] In Am. Trucking, the Ninth Circuit summarized the Supreme Court's recent clarification of the standard for granting preliminary injunctions in Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 374 (2008). 559 F.3d at 1052 ("To the extent that our cases have suggested a lesser standard, [than the standard outlined in Winter], they are no longer controlling, or even viable."). However, if, as suggested by Justice Ginsburg's dissenting opinion in Winter, 129 S. Ct. at 392, the sliding scale analysis of Rodeo Collection, Ltd. v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987), is still the law, the decision to grant a preliminary injunction, pending appeal, is a much closer question given the vast irreparable harm plaintiffs' members would potentially suffer absent an injunction.