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 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12 OAKLAND DIVISION

13
 14 **V.L., et al.,**

15 Plaintiffs,

16 v.

17 **JOHN A. WAGNER, et al.,**

18 Defendants.

CV 09-4668 CW

**DEFENDANTS' REQUEST FOR
 RECONSIDERATION OF OCTOBER 14,
 2009 ORDER GRANTING EMERGENCY
 TEMPORARY RESTRAINING ORDER**

Date: N/A
 Time: N/A
 Courtroom: 2, 4th Floor
 Judge: The Honorable Claudia Wilken
 Trial Date: None Set
 Action Filed: October 1, 2009

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INTRODUCTION

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2 Defendants respectfully request that the court reconsider and vacate the emergency
3 Temporary Restraining Order (TRO) issued yesterday afternoon, which temporarily restrains
4 defendants from sending out Notices of Action to recipients whose benefits will be reduced or
5 terminated under ABX4 4, which will take effect on November 1, 2009. Defendants were not
6 given an opportunity to respond to plaintiffs' *ex parte* application for a TRO, and accordingly the
7 court was deprived of an opportunity to learn the facts relevant to the TRO or to hear argument
8 thereon. For the reasons set forth herein, plaintiffs have not met, and cannot meet, the legal or
9 equitable requirements for obtaining the extraordinary remedy of a TRO in this instance, and
10 accordingly the TRO should be vacated and defendants should be immediately permitted to send
11 the Notices of Action to recipients.

ARGUMENT

I. THE TRO IS PREMISED ON A MISUNDERSTANDING OF THE PURPOSE AND FUNCTION OF THE NOTICES OF ACTION

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14 The TRO was issued before defendants could submit an opposition and without any
15 argument, and as a result rests upon a fundamental misunderstanding of both the purpose and
16 function of the Notices of Action and what the practical effect is of such a TRO. The Notices of
17 Action do not themselves reduce or terminate anyone's IHSS benefits. They are – as their name
18 implies – merely *notices* that are sent to recipients to inform them of actions *that have already*
19 *been taken in the IHSS computer system* – a system called CMIPS that is operated by a third party
20 vendor, Electronic Data Systems, LLP (EDS). *See* Petty Decl., ¶¶ 1 et seq. Accordingly, the
21 TRO has no effect whatsoever on actions relevant to plaintiffs' complaint or motion for a
22 preliminary injunction – i.e., the implementation of ABX4 4's reductions and terminations in the
23 CMIPS system – and instead merely deprives recipients of *notice* of the actions that have already
24 been taken (and have not been restrained or enjoined by the court). In other words, the TRO does
25 nothing to stop the implementation of ABX4 4, and instead *directly harms IHSS recipients* by
26 depriving them of notice of the pending reductions in or terminations of their benefits which will
27 take effect on November 1, 2009. The earlier that recipients receive notice, the sooner they can
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1 determine whether to seek a state hearing, which would entitle them to aid paid pending the
2 hearing.

3 Subsequent to the issuance of the TRO, defendants' counsel has obtained additional
4 information regarding the implementation of ABX4 4. Defendants' counsel spoke with plaintiffs'
5 attorney Dara Schur earlier today to bring this new information to plaintiffs' attention, *see* Brown
6 Decl., ¶ 3, and defendants now wish to bring that information to the court's attention as well:

7 In order to make the necessary changes to the state's CMIPS computer system to implement
8 ABX4 4, EDS had to develop a new program that took over six weeks to develop, test, and verify
9 to ensure that it would work. Petty Decl., ¶ 6. Under this new program, CMIPS has been
10 modified so that individuals whose functional ranks and/or FI scores are below the need
11 thresholds under ABX4 4 will have those services automatically reduced or terminated by the
12 CMIPS system as of November 1, 2009. *Id.*, ¶ 7. These changes were completed in early
13 October 2009, *meaning that the terminations and reductions effective November 1, 2009 under*
14 *ABX4 4 have already occurred in the CMIPS system. Id.*, ¶¶ 6, 9. The Notices of Action that
15 were enjoined by the TRO simply notify recipients of these changes; whether or not they are sent,
16 the changes are already in effect.

17 Defendants wish to notify the court that these changes will not be easy to undo. If the court
18 were to order EDS to stop or reverse the changes that it has made to CMIPS under ABX4 4, it
19 would take up to *five* weeks to accomplish. *Id.*, ¶ 8. This is because the reductions and
20 terminations effective November 1, 2009 under ABX4 4 have already been entered into the
21 CMIPS system. *Id.*, ¶¶ 6-9. CMIPS does not currently have the ability to reconstruct past data,
22 and thus a new program would have to be created, designed, and tested before that could be done
23 on a system-wide bases – a process that has never been done before in the 25+ years that EDS has
24 supported CMIPS, and which accordingly would take extensive time and effort to implement. *Id.*,
25 ¶ 8. Therefore, in order to attempt to reverse the reductions and terminations that have been
26 entered into CMIPS prior to November 1, 2009, the counties would have to manually re-enter the
27 information into CMIPS for each individual recipient. *Id.*, ¶¶ 9, 10. At this point defendants do
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1 not have a good estimate of how long that process would take. Even if EDS were to develop an
2 automated solution, considerable effort by the counties would still be required. *Id.*, ¶¶ 9, 10.

3 **II. THE ALLEGED “EMERGENCY” WAS CREATED ENTIRELY BY PLAINTIFFS’ OWN**
4 **DELAY**

5 The TRO should be vacated for the separate and independent reason that the supposed
6 “emergency” for the TRO was created entirely by plaintiffs’ own delay. Plaintiffs have known
7 since ABX4 4 was enacted on July 28, 2009 that defendants would have to send out Notices of
8 Action to affected beneficiaries prior to the statute taking effect. Despite this knowledge,
9 plaintiffs sandbagged defendants and waited until October 14, 2009 – *78 days later* – to raise their
10 first challenge to the issuance of the Notices of Action (as no such claims were raised in the
11 complaint or motion for a preliminary injunction), and then gave defendants just *67 minutes*’
12 notice before seeking a TRO. The TRO was granted just 24 minutes after plaintiffs completed the
13 filing of their moving papers, without a hearing and without giving defendants any opportunity to
14 respond.

15 Plaintiffs’ claims that the reason for the October 19, 2009 hearing date was to ensure that
16 the hearing was held prior to the issuance of the Notices of Action is simply false. On at least two
17 separate occasions, plaintiffs’ counsel informed defendants’ counsel that their primary concern
18 with the timing of the hearing date was not the sending of the Notices of Action, but rather to
19 have the hearing early enough so that, in the event a preliminary injunction is granted, CDSS will
20 have time to notify recipients prior to November 1, 2009 that they are entitled to continue to
21 receive their benefits. See Brown Decl., ¶ 2 & Exh. A. Indeed, if the date of mailing of the
22 Notices of Action had been a genuine concern to plaintiffs, plaintiffs’ counsel could have sought
23 and easily obtained that information from defendants prior to filing their motion to shorten time
24 on October 5, 2009.

25 Plaintiffs’ claims that they were “sandbag[ged]” by defendants are truly beyond the pale.
26 *See Application at 2 n.1.* Plaintiffs delayed for 69 days before filing their motion for a
27 preliminary injunction, and then sandbagged defendants with just 7 days to respond to over 1,100
28 pages on the basis of an alleged “emergency” that was entirely plaintiffs’ own creation.

1 Beginning on October 8, 2009, while plaintiffs were well aware that defendants' counsel were
2 working around the clock to read and respond to plaintiffs' moving papers, plaintiffs contacted
3 defendants' counsel to ask them questions regarding (1) what defendants would argue in their
4 briefs regarding class certification and (2) the exact date on which the Notices of Action would
5 issue. The first question improperly inquired into defendants' litigation strategy and required no
6 response, and defendants' counsel had no time to immediately track down the answer to the
7 second question given the extremely tight briefing schedule. Moreover, defendants' counsel
8 recognized that the second question was entirely irrelevant to plaintiffs' claims and accordingly
9 was not particularly urgent. Indeed, plaintiffs' counsel Eve Cervantes acknowledged that this
10 question was not particularly urgent via email on October 9, 2009, stating:

11 Even if notices will be sent this Saturday [October 10, 2009], *the briefing and hearing*
12 *schedule should remain as previously set, so that the State has sufficient time to send*
13 *notices informing affected recipients that their IHSS will not be terminated or*
reduced, in the event the Court grants a preliminary injunction enjoining the
terminations and reductions.

14 Brown Decl., Exh. A.

15 In response to plaintiffs' questions, Deputy Attorney General Gregory D. Brown informed
16 plaintiffs' counsel that he would get back to them after defendants' brief was filed, and he did so,
17 leaving a voice message for Stacey Leyton on October 13, 2009. Ms. Leyton responded to
18 Mr. Brown's message on October 14, 2009, and asked defendants to confirm when the Notices of
19 Action would be mailed out. Mr. Brown contacted CDSS that same day to obtain that
20 information, and sent a letter to Ms. Leyton that same afternoon, via email, immediately upon
21 learning that the Notices of Action were potentially going out the next day, October 15, 2009.
22 Indeed, as Mr. Brown's letter states, he had not yet had time to confirm that information at the
23 time he sent the letter, but nonetheless sent the letter to ensure that Ms. Leyton received all of the
24 information that Mr. Brown had as soon as possible.

25 **III. PLAINTIFFS FAILED TO MEET EITHER THE LEGAL OR EQUITABLE REQUIREMENTS**
26 **FOR OBTAINING A TRO**

27 Plaintiffs cannot meet any of the standards for receiving a TRO. To obtain the
28 extraordinary remedy of a TRO, plaintiffs must show: "(1) a strong likelihood of success on the

1 merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a
2 balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain
3 cases).” *Guzman v. Shewry*, 552 F.3d 941, 948 (9th Cir. 2009) (internal quotation marks omitted).

4 First, plaintiffs have no likelihood of prevailing on the merits of their claims relating to the
5 TRO. The alleged wrong that plaintiffs have temporarily restrained via the TRO – the sending of
6 Notices of Action – *is not challenged in their complaint and is not a subject of their motion for a*
7 *preliminary injunction*. Indeed, plaintiffs claim in their complaint and motion for preliminary
8 injunction that recipients’ due process rights will be violated if they do *not* receive adequate
9 notice. Plaintiffs have now turned around 180 degrees and, without citing a single authority,
10 obtained a TRO to *prevent* recipients from receiving any notice of the actions that have already
11 been taken in the CMIPS system. Plaintiffs cannot possibly succeed on the merits of such a
12 claim.¹

13 Second, plaintiffs have not even attempted to offer any evidence of harm that could be
14 caused by the mere sending of Notices of Action. The only “irreparable harm” that plaintiffs
15 allege in this case would supposedly stem from the action taken in implementing ABX4 4 (i.e.,
16 reducing or terminating recipients’ benefits), and not from the notices sent to recipients informing
17 them of that action.

18 Third, the balance of hardships and public interest both tilt overwhelmingly against the
19 issuing of a TRO to restrain the Notices of Action. Indeed, it is in both the state’s interest *and*
20 *recipients’ interest* to have the Notices of Action sent out as soon as reasonably feasible. The
21 TRO has already caused and will continue to cause the state considerable expense, and it is
22 presently depriving recipients of notice of the actions being taken under ABX4 4.

23 Finally, it appears from the record that plaintiffs have not given any security to pay the
24 costs if defendants are found to have been wrongfully restrained, as required by Federal Rule of
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26 ¹ Moreover, as defendants demonstrated in their opposition to the motion for a preliminary
27 injunction, plaintiffs cannot succeed on the merits of *any* of the claims in their complaint or
28 motion for a preliminary injunction. Nor have plaintiffs shown any likelihood of irreparable harm
from the implementation of ABX4 4.

1 Civil Procedure 65(c). To the extent that a request for a security is required under Civil Local
2 Rule 65.1-1(a), defendants hereby request that such security be furnished immediately.

3 **CONCLUSION**

4 For the foregoing reasons, the court should vacate the TRO and permit defendants to send
5 Notices of Action regarding ABX4 4 to IHSS recipients immediately.

6 Dated: October 15, 2009

Respectfully submitted,

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