

1 MELINDA BIRD (SBN 102236)  
 2 MARILYN HOLLE (SBN 61530)  
 3 DEBORAH DORFMAN (CRLSA No. 801060)  
 4 DISABILITY RIGHTS CALIFORNIA  
 5 3580 Wilshire Blvd., Ste. 902  
 6 Los Angeles, CA 90010  
 Telephone: (213) 427-8747  
 Facsimile: (213) 427-8767  
[Melinda.bird@disabilityrightsca.org](mailto:Melinda.bird@disabilityrightsca.org)  
[Debbie.dorfman@disabilityrightsca.org](mailto:Debbie.dorfman@disabilityrightsca.org)  
[Marilyn.holle@disabilityrightsca.org](mailto:Marilyn.holle@disabilityrightsca.org)

7 *Attorneys for Named Plaintiffs and the Proposed Class*  
 8 *Additional Attorneys for Named Plaintiffs and the*  
 9 *Proposed Class on Signature Page*

10 STEPHEN P. BERZON (SBN 46540)  
 11 EVE H. CERVANTEZ (SBN 164709)  
 12 STACEY M. LEYTON (SBN 203827)  
 13 PEDER J. THOREEN (SBN 217081)  
 14 CASEY A. ROBERTS (SBN 253474)  
 Altshuler Berzon LLP  
 15 177 Post Street, Suite 300  
 San Francisco, California 94108  
 Telephone: (415) 421-7151  
 Facsimile: (415) 362-8064  
[sberzon@altshulerberzon.com](mailto:sberzon@altshulerberzon.com)  
[ecervantez@altshulerberzon.com](mailto:ecervantez@altshulerberzon.com)  
[sleyton@altshulerberzon.com](mailto:sleyton@altshulerberzon.com)  
[pthoreen@altshulerberzon.com](mailto:pthoreen@altshulerberzon.com)

16 *Attorneys for Plaintiffs SEIU-UHW, SEIU-ULTCW, SEIU*  
 17 *Local 521, SEIU California State Council, UDW, and CUHW*

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

21 V.L., *et al.*,

22 Plaintiffs

23 v.

24 WAGNER, *et al.*,

25 Defendants

) Case No.: CV 09-04668 CW  
 )  
 ) **PLAINTIFFS' MOTION FOR CIVIL**  
 ) **CONTEMPT SANCTIONS OR IN THE**  
 ) **ALTERNATIVE FOR A FURTHER**  
 ) **PRELIMINARY INJUNCTION;**  
 ) **MEMORANDUM OF POINTS AND**  
 ) **AUTHORITIES IN SUPPORT**

1                   **NOTICE OF MOTION AND MOTION FOR CIVIL CONTEMPT SANCTIONS**  
2                   **OR IN THE ALTERNATIVE FOR A FURTHER MORE SPECIFIC PRELIMINARY**  
3                   **INJUNCTION**

4                   Please take notice that Plaintiffs hereby move the Court for civil contempt sanctions against  
5 Defendants for violating this Court’s Preliminary Injunctions issued on October 19 and 23, 2009,  
6 by (1) terminating from IHSS and/or reducing hours authorized of almost 3,000 individuals with FI  
7 Scores under 2 and/or functional ranks under 4; (2) failing to take all steps and commit all  
8 resources necessary to ensure that none of these otherwise eligible individuals are denied eligibility  
9 for, or terminated from, receipt of IHSS services and/or domestic and related IHSS services; (3)  
10 failing to notify providers who were incorrectly notified that their recipients’ IHSS hours had been  
11 terminated or reduced that they should continue to work previously-authorized hours; and (4)  
12 failing to serve and file a declaration of compliance demonstrating actual compliance with this  
13 Court’s Preliminary Injunction by Thursday, October 29, 2009. In the alternative, Plaintiffs move  
14 for a further injunction.

15                   As of Monday, November 9, 2009, Defendants knew that the files of 2,829 recipients who  
16 had been scheduled to lose some or all of their IHSS services as a result of ABX4 4 had not yet  
17 been restored by the counties. Defendants are also aware that between approximately  
18 November 6 and November 10, the State mailed or will mail time cards to providers, listing the  
19 hours they are authorized to work for the period November 1-15. Because the records of almost  
20 3,000 recipients have not yet been restored by the counties, providers for those recipients have  
21 received, or will shortly receive, time cards showing either “zero hours” (for recipients who were  
22 slated for termination), or a lower number of authorized hours for domestic and related services.  
23 Defendants have refused to notify the providers for these 3,000 recipients that the time cards were  
24 in error, and that they should continue to work their previously authorized hours.

25                   Providers, who receive these time cards directly, are likely to stop working for recipients, or  
26 work fewer hours than authorized for the recipients, on the basis of these incorrect time cards. The  
27 affected recipients are thus actually or effectively terminated from IHSS or from receipt of  
28 domestic and related services, in violation of this Court’s Preliminary Injunctions. As this Court

1 has already found, recipients who lose some or all of their IHSS services will suffer immediate and  
2 irreparable harm.

3 Plaintiffs respectfully request that the Court find Defendants in contempt of court, order  
4 that Defendants come into immediate compliance with the Court’s Order, order Defendants to file  
5 a status report on compliance each day until the Defendants are in full compliance with this Court’s  
6 preliminary injunction, and fine Defendants the sum of \$250,000 for each day in which Defendants  
7 remain out of compliance with this Court’s preliminary injunction. Plaintiffs’ motion for civil  
8 contempt sanctions is made pursuant to the inherent authority of the Court on the ground that  
9 Defendants are presently violating this Court’s Preliminary Injunction and Order Granting  
10 Preliminary Injunction, filed on October 19 and 23, respectively. *See Stone v. City and County of*  
11 *San Francisco*, 968 F.2d 850, 856 & n.9 (9th Cir. 1992). Plaintiffs further request that Defendants  
12 be required to inform Plaintiffs’ counsel of the names and contact information of the recipients and  
13 providers whose records have not been updated.

14 In the alternative, Plaintiffs request that this Court issue a further preliminary injunction,  
15 ordering Defendants to notify all providers whose clients’ records have not yet been restored that  
16 they may receive time cards showing an incorrect number of authorized hours and that they should  
17 continue to work the number of hours that were authorized for the previous pay period.

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

22 Dated: November 10, 2009

Respectfully Submitted,

23  
24 By: /s/ Melinda Bird  
25 MELINDA BIRD (SBN 102236)  
26 MARILYN HOLLE (SBN 61530)  
27 DEBORAH DORFMAN (CRLSA No. 801060)  
28 DISABILITY RIGHTS CALIFORNIA  
LOS ANGELES REGIONAL OFFICE  
3580 Wilshire Blvd., Ste. 902  
Los Angeles, CA 90010  
Telephone: (213) 427-8747  
Facsimile: (213) 427-8767

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[Melinda.bird@disabilityrightsca.org](mailto:Melinda.bird@disabilityrightsca.org)  
[Debbie.dorfman@disabilityrightsca.org](mailto:Debbie.dorfman@disabilityrightsca.org)  
[Marilyn.holle@disabilityrightsca.org](mailto:Marilyn.holle@disabilityrightsca.org)

SUJATHA JAGADEESH BRANCH (SBN 166259)  
DISABILITY RIGHTS CALIFORNIA  
SACRAMENTO REGIONAL OFFICE  
100 Howe Ave., Suite 235N  
Sacramento, CA 95825  
Telephone: (916) 488-9950  
Facsimile: (916) 488-9960  
[Sujatha.branch@disabilityrightsca.org](mailto:Sujatha.branch@disabilityrightsca.org)

DARA L. SCHUR (SBN 98638)  
FREDERICK P. NISEN (SBN 184089)  
JUNG PHAM (SBN 251232)  
DISABILITY RIGHTS CALIFORNIA  
BAY AREA REGIONAL OFFICE  
1330 Broadway, Suite 500  
Oakland, CA 94612  
Telephone: (510) 267-1200  
Facsimile: (510) 267-1201  
[Dara.schur@disabilityrightsca.org](mailto:Dara.schur@disabilityrightsca.org)  
[Fred.nisen@disabilityrightsca.org](mailto:Fred.nisen@disabilityrightsca.org)  
[Jung.pham@disabilityrightsca.org](mailto:Jung.pham@disabilityrightsca.org)

ANN MENASCHE (SBN 74774)  
DISABILITY RIGHTS CALIFORNIA  
SAN DIEGO REGIONAL OFFICE  
111 Sixth Avenue, Suite 200  
San Diego, CA 92101  
Telephone: (619) 239-7861  
Facsimile: (619) 239-7906  
[Ann.menasche@disabilityrightsca.org](mailto:Ann.menasche@disabilityrightsca.org)

PAULA PEARLMAN (SBN 109038)  
SHAWNA PARKS (SBN 208301)  
DISABILITY RIGHTS LEGAL CENTER  
919 Albany Street  
Los Angeles, CA 90015  
Telephone: (213) 736-1031  
Facsimile: (213) 736-1428  
[Paula.pearlman@lls.edu](mailto:Paula.pearlman@lls.edu)  
[Shawna.parks@lls.edu](mailto:Shawna.parks@lls.edu)

CHARLES WOLFINGER (SBN 63467)  
LAW OFFICE OF CHARLES WOLFINGER  
4655 Cass Street #314  
San Diego, Ca 92109  
Telephone: (858) 272-8115  
Facsimile: (858) 270-3960  
[Cw@charleswolfinger.com](mailto:Cw@charleswolfinger.com)

JANE PERKINS (SBN 104784)  
NATIONAL HEALTH LAW PROGRAM

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

211 N. Columbia Street  
Chapel Hill, NC 27514  
Telephone: (919) 968-6308  
Facsimile: (919) 968-8855  
perkins@healthlaw.org

ANNA RICH (SBN 230195)  
NATIONAL SENIOR CITIZEN LAW CENTER  
1330 Broadway, Suite 525  
Oakland, CA 94612  
Telephone: (510) 663-1055  
Facsimile: (510) 663-1051

*Attorneys for Individual Named Plaintiffs V.L., David  
Oster, Willie Beatrice Sheppard, C.R., Dottie Jones,  
and the Plaintiff Class*

By: /s/ Stacey M. Leyton

STEPHEN P. BERZON (SBN 46540)  
EVE H. CERVANTEZ (SBN 164709)  
STACEY M. LEYTON (SBN 203827)  
PEDER J. THOREEN (SBN 217081)  
CASEY A. ROBERTS (SBN 253474)  
Altshuler Berzon LLP  
177 Post Street, Suite 300  
San Francisco, California 94108  
Telephone: (415) 421-7151  
Facsimile: (415) 362-8064  
[sberzon@altshulerberzon.com](mailto:sberzon@altshulerberzon.com)  
[ecervantez@altshulerberzon.com](mailto:ecervantez@altshulerberzon.com)  
[sleyton@altshulerberzon.com](mailto:sleyton@altshulerberzon.com)  
[pthoreen@altshulerberzon.com](mailto:pthoreen@altshulerberzon.com)

*Attorneys for Plaintiffs SEIU-UHW, SEIU-ULTCW,  
SEIU Local 521, SEIU California State Council,  
UDW, and CUHW*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... ii

MEMORANDUM OF POINTS AND AUTHORITIES..... 1

INTRODUCTION ..... 1

BACKGROUND AND STATEMENT OF FACTS ..... 2

    A.    Prior Proceedings..... 2

    B.    Plaintiffs’ Communications with Defendants’ Counsel Re: Compliance ..... 5

    C.    Impact Upon Providers and Consumers ..... 9

ARGUMENT ..... 10

    A.    Defendants Are In Contempt of This Court’s Preliminary Injunction ..... 10

        1.    Contempt Standard ..... 10

        2.    Defendants Have Violated, And Continue To Violate, This Court’s Preliminary Injunction..... 10

    B.    Relief Requested..... 11

CONCLUSION ..... 13

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

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

*Stone v. City and County of San Francisco*,  
968 F.2d 850 (9th Cir. 1992) ..... 10

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**MEMORANDUM OF POINTS AND AUTHORITIES**

**INTRODUCTION**

Defendants have violated this Court’s Preliminary Injunctions issued on October 19 and 23, 2009, by (1) terminating from IHSS and/or reducing hours authorized of almost 3,000 individuals with FI Scores under 2 and/or functional ranks under 4; (2) failing to take all steps and commit all resources necessary to ensure that none of these otherwise eligible individuals are denied eligibility for, or terminated from, receipt of IHSS services and/or domestic and related IHSS services; (3) failing to notify providers who were incorrectly notified that their recipients’ IHSS hours had been terminated or reduced that they should continue to work previously-authorized hours; and (4) failing to serve and file a declaration of compliance demonstrating actual compliance with this Court’s Preliminary Injunction by Thursday, October 29, 2009.

As of Monday, November 9, 2009, Defendants knew that the files of 2,829 recipients who had been scheduled to lose some or all of their IHSS services as a result of ABX4 4 had not yet been restored by the counties. Defendants are also are aware that between approximately November 6 and November 10, the State mailed or will mail time cards to providers, listing the hours they are authorized to work for the period November 1-15. Because the records of almost 3,000 recipients have not yet been restored by the counties, providers for those recipients have received, or will shortly receive, time cards showing either “zero hours” (for recipients who were slated for termination), or a lower number of authorized hours for domestic and related services. Defendants have refused to notify the providers for these 3,000 recipients that the time cards were in error, and that they should continue to work their previously authorized hours.

Providers, who receive these time cards directly, are likely to stop working for recipients, or to work fewer hours than authorized for the recipients, on the basis of these incorrect time cards. The affected recipients are thus actually or effectively terminated from IHSS or from receipt of domestic and related services, in violation of this Court’s Preliminary Injunctions. As this Court has already found, recipients who lose some or all of their IHSS services will suffer immediate and irreparable harm.



1 Plaintiffs respectfully request that the Court find Defendants in contempt of court, order  
2 that Defendants come into immediate compliance with the Court’s Order, order Defendants to file  
3 a status report on compliance each day until the Defendants are in full compliance with this Court’s  
4 preliminary injunction, and fine Defendants the sum of \$250,000 for each day in which Defendants  
5 remain out of compliance with this Court’s preliminary injunction. Plaintiffs’ motion for civil  
6 contempt sanctions is made pursuant to the inherent authority of the Court on the ground that  
7 Defendants are presently violating this Court’s Preliminary Injunction and Order Granting  
8 Preliminary Injunction, filed on October 19 and 23, respectively. *See Stone v. City and County of*  
9 *San Francisco*, 968 F.2d 850, 856 & n.9 (9th Cir. 1992). Plaintiffs further request that this Court  
10 order Defendants to provide Plaintiffs with a list of the names and contact information of the  
11 recipients and providers whose records have not been updated.

12 In the alternative, Plaintiffs request a further injunction ordering Defendants to notify  
13 providers whose clients’ records have not been restored that their time cards may show an incorrect  
14 number of authorized hours and that they should continue to work the previously authorized hours.

15 **BACKGROUND AND STATEMENT OF FACTS**

16 **A. Prior Proceedings**

17 On October 19, 2009, this Court enjoined Defendants “from implementing the provisions of  
18 ABX4 4 that amended Sections 12309(e) and 12309.2 of the California Welfare and Institutions  
19 Code to terminate from eligibility for IHSS services those recipients with Functional Index Scores  
20 of less than 2.0 and to eliminate domestic and related services for recipients with functional ranks  
21 of less than 4 for those services.” Preliminary Injunction (Dkt. 182). On October 23, 2009, this  
22 Court ordered that,

23 to the extent that Defendants have already taken actions to eliminate  
24 eligibility for IHSS services for individuals with an FI Score under 2, or to  
25 eliminate eligibility for domestic and related services for individuals with  
26 functional ranks under 4, Defendants shall take all steps and commit all  
27 resources necessary to ensure that no otherwise eligible individual is  
28 denied eligibility for, or terminated from, IHSS, solely on the basis of an  
FI Score under 2.0, and that no otherwise eligible individual is denied  
eligibility for, or terminated from, receipt of domestic and related services,  
solely on the basis of a functional rank under 4.

1 Order Granting Preliminary Injunction (Dkt 198) at 30.<sup>1</sup> The Court also ordered that “Defendants  
2 shall further rescind any directions or notices issued to any person or entity for the termination or  
3 reduction of IHSS benefits on the basis of an FI Score under 2 or functional ranks under 4; and  
4 shall notify all persons and entities that have received such directions or notices that such IHSS  
5 benefits will not be terminated or reduced.” *Id.* at 31. The Court also ordered that by October 27  
6 (later amended by stipulation of the parties to October 29) Defendants mail notice to all IHSS  
7 recipients, in language agreed to by the parties, that the previously announced terminations or  
8 reductions in IHSS services would not go into effect. Finally, the Court ordered that “Defendants  
9 shall serve and file a declaration of compliance by Thursday, October 29, 2009.” *Id.*

10 On October 29, Defendants filed a “Certification of Compliance”<sup>2</sup> that stated: (1) On  
11 October 22, Defendants ordered the Counties to manually reenter information about individual  
12 recipients whose IHSS services were scheduled to be terminated or reduced; (2) As of noon on  
13 October 28, the counties had restored 67,738 records, leaving 50,048 files still to be restored; (3)  
14 “Defendants have asked the counties to take all steps necessary to ensure that all 117,786 Impacted  
15 Recipients’ files will be updated before November 1, 2009, and the counties appear to be on pace  
16 to do so;” and (4) “Defendants will file a supplemental certification of compliance after all  
17 Impacted Recipients’ files have been updated.” Defendants have not yet filed such a supplemental  
18 certification of compliance, apparently because not all files have been restored.<sup>3</sup>

19  
20 <sup>1</sup> Thus, although the Court ruled that Defendants could require counties to manually re-enter data  
21 for all affected individuals, it is clear that Defendants (not the counties) bear ultimate responsibility  
22 for ensuring that no recipients are terminated from IHSS services or from domestic and related  
23 IHSS services.

24 <sup>2</sup> This was not a “Declaration” signed under penalty of perjury by one of the Defendants with  
25 personal knowledge thereof, but, rather, a “Certification” signed by Defendants’ counsel, who did  
26 not attest to having personal knowledge of any of the facts set forth in the Certification.

27 <sup>3</sup> Defendants also acknowledged that they had not completed mailing notices to affected recipients,  
28 and that such notices would not be completely mailed until October 30, in violation of this Court’s  
Order that such notices be mailed, at the latest, by October 29. Defendants have never filed a  
supplemental declaration with this Court affirming that all notices have been mailed. However,  
because counsel for Defendants has assured Plaintiffs’ Counsel that all notices were mailed by  
October 30, Plaintiffs do not request that Defendants be found in contempt for this violation of the  
Court’s Order Granting Preliminary Injunction.

1 Defendants were well aware that if all files were not updated by November 1, serious  
 2 consequences would ensue. On October 20, Plaintiffs filed an “Additional Response re:  
 3 Implementation Issues” that included declarations from various county officials describing the way  
 4 in which provider time cards and paychecks are processed. These county officials stated that  
 5 provider time cards that show recipients’ post-November 1 authorized hours would be sent  
 6 sometime around November 6-10, 2009. Nicco Dec. ISO Plaintiffs’ Additional Response re:  
 7 Implementation Issues (Dkt. 187) at ¶5. Defendants are well aware of this, as it is the State (not the  
 8 counties) that issue provider paychecks and new time cards. McDevitt Dec. ¶¶ 3-5. Moreover,  
 9 Defendants earlier noted that “providers can and do turn in timesheets at any time of month, and  
 10 thus many providers are likely to turn in their timesheets [and be issued paychecks] prior to  
 11 November 15, 2009.” Defendants’ Response re: Implementation Issues (Dkt. 192) at 2, n. 1.

12 As part of the briefing on implementation issues, Plaintiffs requested that Defendants send  
 13 notice, not only to recipients, but to potentially affected providers, in case data entry errors caused  
 14 providers to receive time cards for the period November 1-15 that incorrectly showed zero hours or  
 15 reduced hours.<sup>4</sup> Plaintiffs’ Supplemental Response re: Implementation Issues (Dkt. 196) at 1.

16 Plaintiffs stated:

17 There appears to be a very real chance here that some providers will  
 18 receive erroneous timesheets or paychecks, and, believing that they have  
 19 been fired or had hours reduced by operation of state law, fail to provide  
 20 necessary IHSS services to a recipient. The only way to mitigate the  
 21 potential for errors is to send notices directly to providers, so that they  
 22 keep working and rendering IHSS services even if Defendants send them  
 23 an erroneous timesheet or paycheck.

24 *Id.*

25 <sup>4</sup> The Court Order Granting Preliminary Injunction did not specifically discuss notice to providers,  
 26 but instead provided that, to the extent Defendants had sent any directions or notices to any person  
 27 or entity terminating or reducing benefits, Defendants must notify persons who received such  
 28 directions or notices that the benefits would not be terminated or reduced. Order Granting  
 Preliminary Injunction at 30-31.

1 **B. Plaintiffs' Communications with Defendants' Counsel Re: Compliance**

2 Unfortunately, the potential for error posited by Plaintiffs has now come to pass: the files  
3 of almost 3,000 recipients have not yet been restored, meaning that their providers have or will  
4 soon receive incorrect time cards showing fewer hours or no hours for the period November 1-15,  
5 and thus may cease or reduce services to those recipients, under the erroneous impression that the  
6 recipient's services have been terminated or reduced. McDevitt Dec. ¶¶ 3-11. They are likely to  
7 believe that these reduced hours continue into the November 16-31 pay period, and to continue to  
8 fail to provide needed ISHS services to recipients. *Id.* at ¶ 12. It is also possible that some of these  
9 providers will receive incorrect paychecks, if recipient files are not updated by the time that  
10 paychecks are issued, or if the providers fail to write down hours that they actually worked but  
11 believe were not authorized.

12 Plaintiffs have been in continual communication with Defendants' counsel about  
13 implementation and compliance efforts, and have consistently told Defendants that they needed a  
14 contingency plan to comply with this Court's Preliminary Injunction if the counties were not able  
15 to complete the manual data entry in a timely manner. On Monday, October 26, Plaintiffs asked  
16 Defendants' counsel how Defendants planned to track counties' work to make sure it was  
17 completed before new and possibly incorrect times cards were issued to providers. Cervantez Dec.  
18 ¶ 3. On October 28 Defendants' counsel informed Plaintiffs that some 50,000 records had not yet  
19 been updated. Cervantez Dec. ¶ 5. Plaintiffs' counsel asked about Defendants' back up plan if all  
20 records had not been updated by November 1, and Defendants' response was that the records  
21 would be updated by November 1 or soon thereafter, so that there would be no disruption in  
22 services. *Id.* On October 29, Plaintiffs' counsel sent an e-mail to Defendants' counsel stating the  
23 following:

24 A concern has been raised that, if data entry is not completed in time, or  
25 there are errors in the data entry, providers may receive incorrect  
26 timesheets with their paycheck for the October 16-31 pay period. Please  
27 verify when the first of these time sheets will be sent out, and let us know  
28 what your clients' plans are for dealing with providers who receive  
incorrect time sheets (i.e. listing zero hours or reduced hours for the period  
November 1-15). If these time sheets are not corrected, some providers  
may incorrectly believe they have been terminated or had authorized hours  
reduced, and not work the full complement of hours needed by the  
consumers.

1 Cervantez Dec. Ex. A (October 29, 2009 email from Eve Cervantez to Greg Brown).

2 On October 30, Defendants' counsel responded generally that CDSS was not aware of any  
3 problems with implementation of the injunction, but did not respond to the specific questions and  
4 concerns raised in Plaintiffs' October 29 communication. Cervantez Dec. Ex. A (October 30 email  
5 from Greg Brown to Eve Cervantez). Plaintiffs followed up again asking for a more detailed  
6 response, and Defendants' counsel responded on October 30 at 4:55 p.m. that as of 12:30 on  
7 October 30, there were just over 8,500 files to update, and that it was anticipated that all changes  
8 would be made by the end of that day. Cervantez Dec. Ex. A (October 30 email from Greg Brown  
9 to Eve Cervantez). Defendants did not respond to Plaintiffs' questions regarding issuance of new  
10 time cards.

11 Counsel for Plaintiffs again contacted Defendants' counsel by telephone on Monday and  
12 Tuesday, November 2 and 3, asking for a status report. Cervantez Dec. ¶¶ 9-10. Finally, shortly  
13 before 5 p.m. on Tuesday, November 3, Defendants' counsel informed Plaintiffs that as of  
14 Monday, November 2, some 4,000 records remained to be restored. Cervantez Dec. ¶ 10.  
15 Defendants' counsel did not respond to a call placed to him on November 4. Cervantez Dec. ¶ 11.

16 Finally, on November 4, Plaintiffs' counsel wrote the following to Defendants' Counsel:

17 It is now November 4. We understand that paychecks for the last pay  
18 period in October will be mailed to providers soon, and those paychecks  
19 will be accompanied by timesheets for the period November 1-15, which  
20 may reflect an incorrect number of hours (or zero hours) if records have  
not been updated. If providers receive incorrect time sheets, they may  
believe that hours have been reduced or eliminated, and fail to provide all  
authorized hours of service to recipients....

21 If Defendants do not file a Declaration of Compliance by the close  
22 of business on Thursday, November 5 (a full week after the Declaration of  
Compliance was due), Plaintiffs will have no choice but to bring the  
matter to the Court's attention and seek appropriate relief.

23 Cervantez Dec. Ex. B.

24 Defendants did not file a Declaration of Compliance on November 5. Instead, Defendants'  
25 counsel wrote to Plaintiffs counsel shortly before 5 p.m. to inform them that, as of 2:40 pm on  
26 November 5, there were still 3,133 files that had not been updated, and that these files would  
27 probably not be updated within the next few days. Cervantez Dec. Ex. B (November 5, 2009 email  
28 from Greg Brown to Eve Cervantez). Counsel stated that the counties would endeavor to update

1 all records by November 15, and that they would issue supplemental paychecks if the files were not  
2 updated by November 15. *Id.* Defense counsel also spoke to Plaintiffs' counsel by telephone that  
3 day, and informed counsel of his view that the Court's Preliminary Injunction does not require the  
4 State to update all the IHSS files, it only requires them to take necessary steps to reverse the cuts,  
5 and that Defendants had therefore already complied with the injunction by ordering the counties to  
6 reverse the cuts. Bird Dec. ¶ 2.

7 By November 6, Plaintiffs still had not received assurance that Defendants would comply  
8 with the Court order to take all steps and commit all resources necessary to ensure that no  
9 otherwise eligible individuals were denied eligibility for, or terminated from, IHSS. Plaintiffs'  
10 counsel wrote to Defendants the morning of November 6, making the following points:

- 11 (1) Time cards would be going out as early as November 6: "Our concern is that  
12 providers who receive time cards showing authorized hours that are reduced due  
13 to the loss of domestic and related services will work only those hours shown on  
14 the time cards. In that event, the consumer who they serve will effectively have  
15 been "terminated from . . . receipt of . . . IHSS services...in violation of the  
16 Court's preliminary injunction." Cervantez Dec. Ex. B (November 6, 2009  
17 email from Stacey Leyton to Greg Brown).
- 18 (2) Plaintiffs requested that Defendants issue notice to the approximately 3000  
19 affected recipients and their providers, explaining that providers had being  
20 issued incorrect time cards and instructing providers to continue to work the  
21 previously authorized number of hours, and that Defendants send providers  
22 either a correct time card or a blank time card. Plaintiffs requested that this  
23 notice issue on Tuesday, November 10. *Id.*
- 24 (3) Plaintiffs requested that Defendants set up a toll free number for providers and  
25 recipients whose providers received incorrect time cards to call. *Id.*
- 26 (4) Plaintiffs asked for a list of the recipients and providers whose records had not  
27 been timely updated. *Id.*

28

1 (5) Plaintiffs asked for a commitment on these points by Monday, November 9, and  
2 warned Defendants that otherwise they faced a motion for contempt: “If we are  
3 not able to receive these commitments in writing from you by the close of  
4 business on Monday, November 9, we will have no choice but to seek relief  
5 from the court. Without the notice we have requested, Defendants will be in  
6 violation of the preliminary injunction, because Defendants are on notice that  
7 some counties have failed to restore these remaining records before time cards  
8 go out, and so without this notice Defendants will have failed to ‘take all steps  
9 and commit all resources necessary to ensure . . . that no otherwise eligible  
10 individual is . . . terminated from . . .IHSS services.. .’” Cervantez Dec. Ex. B  
11 (November 6, 2009 email from Stacey Leyton to Greg Brown).

12 Plaintiffs also suggested that the parties file simultaneous briefs on the issue on November  
13 10 by noon, so as to obtain expeditious resolution of the dispute before serious harm befell IHSS  
14 recipients. *Id.*

15 Defendants’ counsel telephoned Plaintiffs’ counsel on November 9 at approximately 5 p.m.,  
16 and reported the following: (1) As of 10 a.m. on November 9, the counties had not updated the files  
17 for 2,829 IHSS recipients. (2) Defendants had not identified which counties had not updated all  
18 files, but it appeared that the majority of counties had not completed all updates. (3) CDSS  
19 anticipated that most files would be updated by November 15, but did not have a specific “ETA”  
20 for completion, and could not make a commitment about date of completion. Bird Dec. ¶ 4.

21 Plaintiffs’ counsel reminded Defendants’ counsel that counties began mailing time cards on  
22 November 6 and completed most mailing by November 10, and Defense counsel agreed that some  
23 providers would therefore receive time cards with reduced hours. Bird Dec. ¶ 5. Defendants’  
24 counsel admitted that CDSS has not sent any instructions to counties instructing them to issue new  
25 time cards and/or supplemental checks, as necessary, to affected providers. *Id.* Finally, although  
26 Defendants’ counsel had stated in earlier conversations that he believed that the counties had  
27 prioritized and updated the files of all recipients whose IHSS was scheduled for termination  
28 because they had an FI Score below 2, he explained that Defendants could not confirm this, and

1 could not confirm how many of the remaining 2,829 files that had not been updated concerned  
2 terminations rather than reductions in hours. Bird Dec. ¶ 7.

3 Defendants' counsel also sent an e-mail to Plaintiffs' counsel at 5:30 p.m. on November 9,  
4 in which he reported that: (1) There were 2,829 files that had not yet been updated. (2) The  
5 counties expected to update all files by November 15. (3) If files are not updated in sufficient time,  
6 counties will be able to send corrected timecards and/or supplemental payments. Cervantez Dec.  
7 Ex. B (November 9, 2009 email from Greg Brown to Eve Cervantez).

8 Defendants also refused to send notice to the affected providers, and declined to provide  
9 Plaintiffs' counsel with information regarding the names of recipients and providers whose files  
10 had not yet been updated. *Id.*

### 11 **C. Impact Upon Providers and Consumers**

12 When providers receive time cards reflecting "zero" hours or a reduced number of hours,  
13 they will believe that they are authorized to work only the hours shown on the time cards.  
14 McDevitt Dec. ¶ 6-8. They are likely to stop or reduce their provision of services to recipients,  
15 believing that they will not be paid for the work. McDevitt Dec. ¶¶ 9-12. The fact that *recipients*  
16 received a notice stating that their IHSS services would not be terminated or reduced because of  
17 their functional index scores or ranks does not solve this problem, for a number of reasons. *Id.* at  
18 ¶¶ 13-17. Most notably, a provider receiving an incorrect time card from the State has no way of  
19 knowing that the notation of "zero" or reduced hours is a mistake caused by the attempted  
20 termination of IHSS services related to functional score or rank, particularly when the notice that  
21 the functional index cuts would not take effect were received only by the recipient and a week  
22 before the time card showing reduced or terminated hours. *Id.* at ¶¶ 16-17. Thus, many providers  
23 are likely to stop working, or work reduced hours, causing the very serious consequences to these  
24 2,829 IHSS recipients that this Court's injunction was meant to prevent.



**ARGUMENT**

**A. Defendants Are In Contempt Of This Court's Preliminary Injunction**

**1. Contempt standard**

The Court may issue a contempt order if Defendants “(1) [ ] violated the court order, (2) beyond substantial compliance, (3) not based on a good faith and reasonable interpretation of the order, (4) by clear and convincing evidence.” *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993). 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*, 10 F.3d at 695

**2. Defendants Have Violated, And Continue To Violate, This Court's Preliminary Injunction**

As of Monday, November 9, 2009, 21 days after this Court's issuance of the preliminary injunction, Defendants were aware that almost 3,000 IHSS recipients' records had not been restored. Defendants also knew that, because these records were not restored, incorrect time cards have been or will soon be sent to the affected recipients' providers, showing either zero hours or a reduced number of hours for domestic and related services. Defendants have refused to send notice to affected providers, informing them of the error in their time cards, and instructing them to keep working the hours they were previously authorized to work. Many providers will not work hours for which they are not authorized on their time cards. Thus, up to 3,000 IHSS recipients may not receive the services they need to remain safely in their homes.

As this Court has previously found, this will cause immediate and irreparable harm. Order Granting Preliminary Injunction at 26. Recipients who lose IHSS services “will be unable to care for themselves, suffer injuries, and be relegated to emergency rooms, hospitals, and other

1 institutions.” *Id.* at 2. “Some individuals who lose their IHSS may neglect to take vital  
2 medications or take them improperly. Others will be unable to leave their house to obtain food,  
3 medication and other necessities.” *Id.* at 26. “Without an IHSS caregiver to transport recipients to  
4 doctor’s appointments, many will go without essential care. Some recipients will try to clean their  
5 home or cook food and injure themselves as a result. Other recipients, because of mental illness or  
6 lack of appetite, need assistance in order to eat at all.” *Id.* at 26-27. “Even a temporary  
7 interruption in services may ‘result in damaging setbacks’ for the affected individual.” *Id.* at 27.

8 Defendants have violated this Court’s Preliminary Injunction in numerous ways: First,  
9 because the records were not restored by the November 1 effective date, numerous recipients were  
10 rendered ineligible for IHSS services as of November 1, in violation of this Court’s Order  
11 enjoining any implementation of the provisions of ABX4 4 that reduced or eliminated IHSS  
12 eligibility based on functional scores and ranks.

13 Second, in refusing to take sufficient steps to ensure that incorrect time cards showing zero  
14 hours or reduced hours for the current pay period were not sent to providers, and refusing to notify  
15 providers that they should work previously authorized hours and ignore the incorrect time cards,  
16 Defendants violated this Court’s order that they “take all steps and commit all resources necessary  
17 to ensure” that otherwise eligible individuals are not denied IHSS services because of their  
18 functional scores or ranks. Defendants know or should know that some providers will stop  
19 working, or will work reduced hours, based on the incorrect time cards they receive.

20 Third, by refusing to send notice to affected providers who received incorrect time cards  
21 showing terminated or reduced IHSS hours, Defendants have violated this Court’s Order that  
22 Defendants notify any person who previously received directions or notices that IHSS benefits  
23 would be reduced or terminated that these benefits would not actually be terminated or reduced.

24 Fourth, Defendants have not filed a Declaration of Compliance demonstrating actual  
25 compliance with the Court’s Preliminary Injunction and Order Granting Preliminary Injunction.

26 **B. Relief Requested**

27 Plaintiffs request that the Court fine Defendants the sum of \$250,000 per day until  
28 Defendants file a complete Declaration of Compliance, signed under penalty of perjury by an agent

1 of Defendants with personal knowledge, setting forth the following: (1) All recipient and provider  
2 records have been restored to eliminate any planned terminations or reductions in IHSS services on  
3 the basis of functional index score or functional rank, and (2) Any provider who received an  
4 incorrect time card reflecting zero or reduced hours because of their recipients' functional index  
5 score or functional rank has been notified that the time card was in error, and that they should  
6 continue working their normally authorized hours; and (3) Corrected time cards have been issued  
7 to providers who received incorrect time cards, and (4) Supplemental checks have been issued to  
8 any providers who were not paid for authorized hours that they worked in November 2009 due to  
9 errors on their time cards or the failure to restore the eligibility of recipients for whom they provide  
10 services. The notice should be sent in English, Spanish, Chinese, and Armenian, and with an insert  
11 stating that speakers of other languages should obtain translation. In the meantime, Plaintiffs also  
12 request that the Court order Defendants to file daily reports on the status of their compliance  
13 efforts.

14 While Plaintiffs believe that Defendants have violated the clear terms of this Court's  
15 preliminary injunction, Plaintiffs request in the alternative that this Court issue a further injunction  
16 ordering Defendants to issue such notices and restore all affected records if counties have not yet  
17 done so. This is important because it appears that Defendants are taking the position that they are  
18 already in full compliance with this Court's injunction (merely because they told the Counties to  
19 restore the records), even though not all records have been restored, and some providers have  
20 already been sent incorrect time cards. Defendants should understand from this Court's prior  
21 orders (but apparently do not) that they are ultimately responsible for insuring that all records are  
22 restored, that IHSS services are not terminated or reduced on the basis of functional index scores or  
23 ranks, and that providers are notified of their correct working hours and receive the correct  
24 payment for those hours.

25 Finally, because providers and recipients are likely to call their unions and/or Plaintiffs'  
26 counsel when the providers receive the incorrect time cards, Plaintiffs' counsel also request that  
27 Defendants be ordered to provide them with the names and contact information for all affected  
28

1 providers and recipients, who are their clients. This information is subject to discovery.<sup>5</sup> Because  
2 Plaintiffs are not yet permitted to serve discovery by operation of the Federal Rules, and because  
3 responses to discovery are not generally due until 30 days after discovery is served, Plaintiffs  
4 respectfully request that the Court use its inherent power to enforce the Preliminary Injunction to  
5 order Defendants to provide the requested information.

6 **CONCLUSION**

7 For the foregoing reason, Plaintiffs' Motion for Civil Contempt should be granted.

8 Dated: November 10, 2009

Respectfully Submitted,

9  
10 By: /s/ Melinda Bird

MELINDA BIRD (SBN 102236)  
MARILYN HOLLE (SBN 61530)  
DEBORAH DORFMAN (CRLSA No. 801060)  
DISABILITY RIGHTS CALIFORNIA  
LOS ANGELES REGIONAL OFFICE  
3580 Wilshire Blvd., Ste. 902  
Los Angeles, CA 90010  
Telephone: (213) 427-8747  
Facsimile: (213) 427-8767  
[Melinda.bird@disabilityrightsca.org](mailto:Melinda.bird@disabilityrightsca.org)  
[Debbie.dorfman@disabilityrightsca.org](mailto:Debbie.dorfman@disabilityrightsca.org)  
[Marilyn.holle@disabilityrightsca.org](mailto:Marilyn.holle@disabilityrightsca.org)

11  
12  
13  
14  
15  
16  
17 SUJATHA JAGADEESH BRANCH (SBN 166259)  
DISABILITY RIGHTS CALIFORNIA  
SACRAMENTO REGIONAL OFFICE  
100 Howe Ave., Suite 235N  
Sacramento, CA 95825  
Telephone: (916) 488-9950  
Facsimile: (916) 488-9960  
[Sujatha.branch@disabilityrightsca.org](mailto:Sujatha.branch@disabilityrightsca.org)

18  
19  
20  
21 DARA L. SCHUR (SBN 98638)  
FREDERICK P. NISEN (SBN 184089)  
JUNG PHAM (SBN 251232)  
DISABILITY RIGHTS CALIFORNIA  
BAY AREA REGIONAL OFFICE

22  
23  
24  
25 <sup>5</sup> Defendants contend that "the information regarding the names of the recipients whose files have  
26 not yet been updated, as well as the names of their providers, is confidential information that we  
27 are not authorized to disclose." Cervantez Dec. Ex. B (November 9, 2009 email from Defendants'  
28 counsel). Defendants' confidentiality concerns can be easily addressed through a protective order  
or other confidentiality agreement between the parties to ensure compliance with any applicable  
privacy concerns.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1330 Broadway, Suite 500  
Oakland, CA 94612  
Telephone: (510) 267-1200  
Facsimile: (510) 267-1201  
[Dara.schur@disabilityrightsca.org](mailto:Dara.schur@disabilityrightsca.org)  
[Fred.nisen@disabilityrightsca.org](mailto:Fred.nisen@disabilityrightsca.org)  
[Jung.pham@disabilityrightsca.org](mailto:Jung.pham@disabilityrightsca.org)

ANN MENASCHE (SBN 74774)  
DISABILITY RIGHTS CALIFORNIA  
SAN DIEGO REGIONAL OFFICE  
111 Sixth Avenue, Suite 200  
San Diego, CA 92101  
Telephone: (619) 239-7861  
Facsimile: (619) 239-7906  
[Ann.menasche@disabilityrightsca.org](mailto:Ann.menasche@disabilityrightsca.org)

PAULA PEARLMAN (SBN 109038)  
SHAWNA PARKS (SBN 208301)  
DISABILITY RIGHTS LEGAL CENTER  
919 Albany Street  
Los Angeles, CA 90015  
Telephone: (213) 736-1031  
Facsimile: (213) 736-1428  
[Paula.pearlman@lls.edu](mailto:Paula.pearlman@lls.edu)  
[Shawna.parks@lls.edu](mailto:Shawna.parks@lls.edu)

CHARLES WOLFINGER (SBN 63467)  
LAW OFFICE OF CHARLES WOLFINGER  
4655 Cass Street #314  
San Diego, Ca 92109  
Telephone: (858) 272-8115  
Facsimile: (858) 270-3960  
[Cw@charleswolfinger.com](mailto:Cw@charleswolfinger.com)

JANE PERKINS (SBN 104784)  
NATIONAL HEALTH LAW PROGRAM  
211 N. Columbia Street  
Chapel Hill, NC 27514  
Telephone: (919) 968-6308  
Facsimile: (919) 968-8855  
[perkins@healthlaw.org](mailto:perkins@healthlaw.org)

ANNA RICH (SBN 230195)  
NATIONAL SENIOR CITIZEN LAW CENTER  
1330 Broadway, Suite 525  
Oakland, CA 94612  
Telephone: (510) 663-1055  
Facsimile: (510) 663-1051

*Attorneys for Individual Named Plaintiffs V.L., David  
Oster, Willie Beatrice Sheppard, C.R., Dottie Jones,  
and the Plaintiff Class*

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

By: /s/ Stacey M. Leyton  
STEPHEN P. BERZON (SBN 46540)  
EVE H. CERVANTEZ (SBN 164709)  
STACEY M. LEYTON (SBN 203827)  
PEDER J. THOREEN (SBN 217081)  
CASEY A. ROBERTS (SBN 253474)  
Altshuler Berzon LLP  
177 Post Street, Suite 300  
San Francisco, California 94108  
Telephone: (415) 421-7151  
Facsimile: (415) 362-8064  
[sberzon@altshulerberzon.com](mailto:sberzon@altshulerberzon.com)  
[ecervantez@altshulerberzon.com](mailto:ecervantez@altshulerberzon.com)  
[sleyton@altshulerberzon.com](mailto:sleyton@altshulerberzon.com)  
[pthoreen@altshulerberzon.com](mailto:pthoreen@altshulerberzon.com)

*Attorneys for Plaintiffs SEIU-UHW, SEIU-ULTCW,  
SEIU Local 521, SEIU California State Council,  
UDW, and CUHW*