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

20 DAVID OSTER, *et al.*,

21 Plaintiffs

22 v.

23 WILL LIGHTBOURNE, Director of the
California Department of Social Services;
24 TOBY DOUGLAS, Director of the California
Department of Health Care Services;
25 CALIFORNIA DEPARTMENT OF HEALTH
CARE SERVICES; and CALIFORNIA
26 DEPARTMENT OF SOCIAL SERVICES

27 Defendants

) Case No.: CV 09-04668 CW

) CLASS ACTION

) PLAINTIFFS' NOTICE OF
) MOTION AND MOTION FOR
) CLASS CERTIFICATION;
) MEMORANDUM OF POINTS
) AND AUTHORITIES IN SUPPORT

) Hearing Date: To Be Determined

) RELIEF REQUESTED BY DECEMBER 6

1 **NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION**

2 TO: WILL LIGHTBOURNE, Director of the California Department of Social
3 Services; TOBY DOUGLAS, Director of the California Department of Health
4 Care Services; CALIFORNIA DEPARTMENT OF HEALTH CARE
5 SERVICES; and CALIFORNIA DEPARTMENT OF SOCIAL SERVICES:

6 **PLEASE TAKE NOTICE** that at the date, time, and location set by the Court for the
7 Hearing on Plaintiffs’ Motions for leave to File a Third Amended Complaint, for Temporary
8 Restraining Order, and for Preliminary Injunction, and/or as soon thereafter as counsel may be
9 heard, in the United States District Court for the Northern District of California, the Named
10 Plaintiffs David Oster; Willie Beatrice Sheppard; C.R. by and through his guardian *ad litem*, M.R.;
11 Dottie Jones; Andrea Hylton; Helen Polly Stern, L.C. by and through her guardian *ad litem*, M.G.,
12 and Charles Thurman, individually and on behalf of all others similarly situated, will and do hereby
13 move under Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure for an order certifying
14 the following classes for the purposes of injunctive and declaratory relief:

15 For Part A of the First, Second, Third, Fourth, Fifth, Seventh, and Tenth Claims for Relief,
16 Named Plaintiffs David Oster, Willie Beatrice Sheppard, Dottie Jones, L.C., and Charles Thurman
17 seek certification of the following class, and appointment as class representatives:

18 All recipients of IHSS in the State of California whose IHSS services
19 will be limited, cut, or terminated under the provisions of ABX4 4, and
20 all applicants to IHSS in the State of California who would have been
21 eligible for IHSS services but who are either not eligible, or are
22 eligible for fewer services, as a result of ABX 4 4 (hereinafter the
23 Class “A”).

24 For Part B of the First, Second, Third, Fourth, Fifth, Sixth, and Seventh claims for relief,
25 Named Plaintiffs David Oster, Willie Beatrice Sheppard, C.R., Dottie Jones, Andrea Hylton, Helen
26 Polly Stern, L.C., and Charles Thurman seek certification of the following class, and appointment as
27 class representatives:

28 All recipients of IHSS in the State of California who have received or
 will receive notices of action that include a reduction of IHSS hours
 based on SB 73 or Defendants’ implementation of SB 73, including
 future applicants for IHSS services whose notice of action will reflect
 reduced IHSS hours as a result of SB 73 or Defendants’
 implementation of SB 73 (hereinafter the “Class B”).

1 Named Plaintiffs David Oster, Willie Beatrice Sheppard, C.R., Dottie Jones, Andrea Hylton,
2 Helen Poly Stern, L.C., Charles Thurman, and others similarly situated also seek appointment of
3 subclasses as follows:

4 For Part A of the Sixth Claim for Relief:

5 “Loss of Domestic and Related Services Subclass A” to be defined as
6 “all present and future IHSS recipients and applicants who have been
7 or would have been authorized to receive domestic and/or related
8 IHSS, and whose IHSS will be reduced to eliminate some or all of
9 their domestic and/or related services under the provisions of ABX4
10 4.”

11 Plaintiffs Dottie Jones, Willie Beatrice Sheppard, and Charles Thurman are typical of this subclass.

12 For Part A of the Eighth Claim for Relief:

13 “Children Subclass A” to be defined as “all present or future IHSS
14 recipients who are under the age of 21, who qualify for full-scope
15 Medi-Cal with federal financial participation, and who therefore are
16 entitled to the protections of the Early Periodic Screening Diagnosis
17 and Treatment provisions of the federal Medicaid Act (42 U.S.C. §
18 1396a(a) who have been or would have been authorized to receive
19 IHSS, and whose IHSS services will be reduced or terminated under
20 the provisions of ABX4 4.”

21 Plaintiffs C.R. and L.C. are typical of this subclass.

22 For Part B of the Eighth claim for relief:

23 “Children Subclass B” to be defined as “all present or future IHSS
24 recipients who are under the age of 21, who qualify for full-scope
25 Medi-Cal with federal financial participation, and who therefore are
26 entitled to the protections of the Early Periodic Screening Diagnosis
27 and Treatment provisions of the federal Medicaid Act, 42 U.S.C. §
28 1396a(a), who have received or will receive notices of action that
include a reduction of IHSS hours based on SB 73 or Defendants’
implementation of SB 73, including future applicants for IHSS
services whose notice of action will reflect reduced IHSS hours as a
result of SB 73 or Defendants’ implementation of SB 73.”

Plaintiffs C.R. and L.C. are typical of this subclass.

Plaintiffs further request that this Court appoint Named Plaintiffs’ counsel to serve as class
counsel pursuant to Federal Rule of Civil Procedure 23(g).

1 The Named Plaintiffs move for certification because the above-defined Plaintiff classes and
2 subclasses are so numerous that joinder would be impracticable, there are common questions of law
3 or fact among the class members and subclass members, the claims of the representative Named
4 Plaintiffs are typical of those of the class and subclasses, and the Named Plaintiffs and their counsel
5 will fairly and adequately represent the class and subclass interests. Additionally, Defendants Will
6 Lightbourne, Director of the California Department of Social Services; Toby Douglas, Director of
7 the California Department of Health Care Services; California Department of Health Care Services;
8 and California Department of Social Services have acted or refused to act on grounds applicable to
9 the entire class and subclasses, rendering declaratory and injunctive relief appropriate to the class
10 and subclasses as a whole.

11 This Motion is based on the following Memorandum of Points and Authorities, the
12 Declarations of Class Counsel Dara Schur, Anna Rich, Shawna Parks, Charles Wolfinger, and Jane
13 Perkins in Support of Plaintiffs' Motion for Class Certification; the Declarations filed in Support of
14 Plaintiffs' Motions to File a Third Amended Complaint, and for Temporary Restraining Order,
15 Preliminary Injunction, and Class Certification; attached exhibits; the arguments of counsel; and all
16 other relevant pleadings, briefs, and evidence.

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25
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28

TABLE OF CONTENTS

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.....1

II. BACKGROUND1

 A. The IHSS Program.....1

 B. ABX4 4 and SB 73 Eliminated or Reduced IHSS Services for Vast Numbers of IHSS Recipients.....2

III. ARGUMENT.....3

 A. Plaintiffs Meet the Standards for Certification Under Rule 23(a).....3

 1. The Proposed Classes Meet the Numerosity Requirement of Rule 23(a)4

 2. There are Questions of Law and Fact Common to the Classes5

 a. Common Issues of Fact.....6

 b. Common Issues of Law7

 3. The Named Plaintiffs’ Claims Are Typical of the Claims of the Class.....8

 4. The Named Plaintiffs and Their Attorneys Will Fairly and Adequately Protect the Interests of the Class10

 a. The Named Plaintiffs’ Interests are Not Antagonistic to Those of the Class10

 b. Plaintiffs’ Counsel Are Qualified to Litigate This Action.....10

 B. This Case Satisfies Rule 23(b)(2) Because Defendants have Acted on Grounds Generally Applicable to the Class, Making Final Injunctive and Declaratory Relief Appropriate and Making Notice Unnecessary11

 C. The Court Should Designate Plaintiffs’ Counsel as Class Counsel Pursuant to Rule 23(g)(1).....13

IV. CONCLUSION13

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

TABLE OF AUTHORITIES

Cases

Amchem Products v. Windsor
521 U.S. 591 (1997). 11

Capitol People First v. DDS
155 Cal. App. 4th 676 (2007)..... 6

Crawford v. Honig
37 F.3d 485 (9th Cir. 1994)..... 10

Cyrus v. Walker
233 F.R.D. 467 (S.D. W.Va. 2006)..... 5, 12

D.L. v District of Columbia
--F.Supp.2d --, 2011 WL 5559927 (D.D.C. 2011)..... 5

Darling v. Bowen
685 F. Supp. 1125 (W.D. Mo. 1984)..... 4

Dominguez v. Schwarzenegger
270 F.R.D. 477 (N.D. Cal. 2010) 5

Elliott v. Weinberger
564 F.2d 1219 (9th Cir. 1977)..... 11

Gen. Tel. Co. of SW v. Falcon
457 U.S. 147 (1982) 5, 8

Gulf Oil Co. v. Bernard
425 U.S. 89 (1981) 3

Hanlon v. Chrysler Corp.
150 F.3d 1011 (9th Cir. 1998)..... 5, 9

Harris v. Palm Springs Alpine Estates
329 F.2d 909 (9th Cir. 1964)..... 4

Hernandez v. Meadows
209 F.R.D. 665 (S.D. Fla. 2002) 6

Hum v. Dericks
162 F.R.D. 628 (D.Hawai’i 1995)..... 9

In re MDC Holdings Securities Litig.
754 F. Supp 785 (S.D. Cal. 1990). 10

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2
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Jordan v. County of Los Angeles
669 F.2d 1311 (9th Cir. 1982)..... 4

Lopez v. Heckler
572 F. Supp. 26 (C.D. Cal. 1983),..... 10

Lynch v Rank
605 F. Supp. 30 (N.D. Cal. 1984)..... 4

M.A.C. v. Betit
284 F. Supp. 2d. 1298 (D. Utah, 2003) 12

Miller v. Woods
148 Cal.App.3d 862 (1983)..... 1

Navarro-Ayala v. Hernandez-Colon
951 F.2d 1325 (1st Cir. 1991). 12

Perez-Funez v. District Dir.
611 F.Supp. 990 (C.D. Cal. 1984)..... 4

Rancourt v. Concannon
207 F.R.D. 14 (D.Maine, 2002) 9

Risinger v. Concannon
201 F.R.D. 16 (D. Me. 2001) 5

Rodriguez v. Hayes
591 F.3d 1105 (9th Cir. 2010)..... 4, 9, 10, 12

Romero v. Producers Dairy Food Inc.
235 F.R.D. 474 (E.D. Cal. 2006)..... 5

Ryan v. Dreyfus
2009 WL 2914139 (W.D. Wash. 2009) 6

Wal-Mart v. Dukes
131 S. Ct. 2541 (2011) 4, 5, 12

Walter v. Reno
145 F.3d 1032 (9th Cir. 1998)..... 12

1
2
3
4
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27
28

Federal Statute

29 U.S.C. § 794 1, 7
 42 U.S.C. § 12132 1, 7
 42 U.S.C. § 1396a *et seq.* 1
 42 U.S.C. §§ 12131 *et seq.* 1

Federal Rules

Fed. R. Civ. P. 23(a) *passim*
 Fed. R. Civ. P. 23(a)(1) 4
 Fed. R. Civ. P. 23(a)(4) 9, 10, 11
 Fed. R. Civ. P. 23(b) 11
 Fed. R. Civ. P. 23(g)(1) 12, 13

California Legislation

ABX4 4 *passim*
 SB73 *passim*

California Welfare & Institutions Code

12051 2
 12052 2
 12300(a) 2, 8
 12300(b) & (c) 2
 12301.07 3, 8, 14
 12309 3, 7, 9, 14
 12309.2 3, 7, 9, 14
 14051 2
 14105 3, 8, 14
 14132.95(d)(1), (2) 2
 14132.951(c) 2
 4792 3, 8, 14

California Regulations

California Department of Social Services Manual of Policies and Procedures § 30-700.1 6

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Named Plaintiffs represent two prospective classes of hundreds of thousands of low-
4 income seniors and other people with disabilities throughout California who are threatened with the
5 loss of critical In-Home Supportive Services (IHSS) services that enable them to remain safely in
6 their homes. They move for an order certifying this case as a class action pursuant to Rule 23 of the
7 Federal Rules of Civil Procedure.

8 Plaintiffs seek declaratory and injunctive relief to enforce (1) the procedural due process
9 rights of prospective class members guaranteed to them by the Fourteenth Amendment of the United
10 States Constitution; (2) the requirements of Title XIX of the Social Security Act, 42 U.S.C. § 1396a
11 *et seq.* (“the Medicaid Act”); and (3) the integration mandate and other anti-discrimination
12 provisions of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (“ADA”) and Section
13 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (“Section 504”).

14 This action readily satisfies the requirements for class certification under Rule 23(a) and the
15 requirements of Rule 23(b)(2). *First*, there are in excess of 130,000 people in Class A, and 300,000
16 people in Class B, and the subclasses each have thousands of members. *Second*, members of the
17 proposed class and subclasses share common issues of fact and law. *Third*, the Named Plaintiffs are
18 typical of the classes because they are threatened with the loss or reduction of IHSS benefits by the
19 same statutes and policies of Defendants. *Fourth*, Named Plaintiffs are adequate class
20 representatives with experienced class action counsel. Finally, this case is appropriate for
21 certification under Rule 23(b)(2) because the class has been subjected to a common set of practices
22 for which plaintiffs seek only injunctive and declaratory relief.

23 **II. BACKGROUND**

24 **A. The IHSS Program**

25 The purpose of the IHSS program is “to enable the aged, blind or disabled poor to avoid
26 institutionalization by remaining in their homes with proper supportive services.” *Miller v. Woods*,
27 148 Cal.App.3d 862, 867 (1983); *See also* California Welfare and Institutions Code (“Welf. & Inst.”)
28

1 Code”) § 12300(a) (IHSS provides services to those who in the absence of these services “cannot
2 safely remain in their homes . . .”). People eligible for this program must be aged 65 or over, blind,
3 or disabled, and must also be poor under standards of the federal Supplemental Security
4 Income/State Supplemental Payment Program. Welf. & Inst. Code §§ 12051, 12052, 14051, Third
5 Amended Class Action Complaint for Injunctive and Declaratory Relief (“Third Am. Complaint”) ¶
6 32.

7 IHSS services, provided in the recipients’ home, include (1) domestic services; (2) related
8 services (meal preparation and clean-up, restaurant meal allowance, laundry, and food and other
9 shopping); (3) personal care services (bowel and bladder care, respiration, feeding, routine bed
10 baths, bathing, oral hygiene and grooming, dressing, repositioning and rubbing skin, including range
11 of motion exercises), transfers, care and assistance with prosthetic devices, assistance with self-
12 administration of medication, routine menstrual care, skin care, and ambulation); (4) travel to
13 medical appointments; (5) yard hazard abatement; (6) protective supervision; (7) teaching and
14 demonstration services, and (8) paramedical services. Welf. & Inst. Code §§ 12300(b) & (c);
15 14132.95(d)(1), (2); 14132.951(c). Most IHSS services are provided through California’s Medicaid
16 program (“Medi-Cal”). Third Am. Complaint ¶ 33.

17 **B. ABX4 4 and SB 73 Eliminated or Reduced IHSS Services for Vast Numbers of IHSS**
18 **Recipients.**

19 ABX4 4, effective July 28, 2009, amended Welf. & Inst. Code § 12309 and added § 12309.2
20 to terminate or reduce IHSS services based on measures called functional rankings and composite
21 Functional Index scores. These statutes eliminate Domestic and Related Services for all IHSS
22 recipients who have been assessed to have a Functional Index *Rank* of below 4 for a particular
23 domestic or related service and terminate all IHSS services for recipients with a composite
24 Functional Index *Score* of below 2.0. Stats. 2009, c. 4, § 29 (Part II) (amending Welf. & Inst. Code
25 §§ 12309(e)(1)) and *id.*, § 30 (Part II) (adding Welf. & Inst. Code §12309.2(a)(1)). The California
26 Department of Social Services estimated that 38,000 Californians would lose all IHSS services and
27 97,000 will lose domestic and related services. CDSS Press Release, September 18, 2009, Exh. F to
28 Kline Decl., Docket Number 031.

1 On June 30, 2011, the Governor signed into law SB 73, which amended the California Welf.
 2 & Inst. Code by adding §§ 4792, 12301.07, and 14105, which, if certain revenue targets are not met,
 3 will reduce the IHSS hours of most recipients by 20%, effective January 1, 2012. Certain people
 4 who receive Medi-Cal waiver services will be exempt from the cut, and others can apply for an IHSS
 5 “care supplement” for restoration of reduced hours based on their functional index ranks. Third Am.
 6 Complaint ¶¶106-135.

7 Functional index ranks and scores do not measure the safety risk of reducing or eliminating
 8 services; furthermore, these ranks and scores have never even been sent to IHSS recipients, so
 9 recipients have never before had the opportunity to challenge their accuracy. In particular, as county
 10 officials responsible for IHSS programs attest, FI scores were not designed to measure need or
 11 eligibility and have never been used for such purposes, and FI ranks are not predictors of risk of out-
 12 of-home placement and have never been used for such purposes. Collins Decl. ¶ 27 Docket 065
 13 (county social workers “do not use the composite FI scores for any reason.”); Crockett Decl. ¶¶ 4, 8,
 14 15-16 Docket 067 (people with relatively low FI ranks of 2 or 3 nonetheless can be at risk of out-of-
 15 home placement, and functional index scores were intended for use only to ensure uniformity of
 16 services); Kaljian Decl. ¶ 6 Docket 078 (FI score not an eligibility standard); Third Kaljian Decl. ¶¶
 17 15-16 (care supplement eligibility depends on functional index ranks, which do not accurately reflect
 18 clients’ risk of out-of-home placement); Nicco Decl. ¶ 20 Docket 080 (no one has ever used
 19 functional index ranks or scores for any purpose); Calame Decl., ¶ 6 Docket 064 (“completely
 20 arbitrary”); Frances Smith Decl. ¶¶ 15-16 (functional index ranks do not reflect risk of out-of-home
 21 placement); Second Decl. Marconi ¶¶ 14-22 (functional index ranks were intended to be used for
 22 purposes of standardization and are not an accurate reflection of individuals’ risk of out-of-home
 23 placement).

24 III. ARGUMENT

25 A. Plaintiffs Meet the Standards for Certification Under Rule 23(a).

26 “Class actions serve an important function in our system of civil justice.” *Gulf Oil Co. v.*
 27 *Bernard*, 425 U.S. 89, 99 (1981). Rule 23(a) of the Federal Rules of Civil Procedure allows an
 28 action to be maintained as a class action provided that it meets four conditions: “(1) the class is so

1 numerous that joinder is impracticable; (2) there are questions of law or fact common to the class;
2 (3) the claims or defenses of the representative parties are typical of the claims or defenses of the
3 class; and (4) the representative parties will fairly and adequately protect the interests of the class.”
4 Fed. R. Civ. P. 23(a). *See Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2548 (2011); *Rodriguez v. Hayes*,
5 591 F.3d 1105 (9th Cir. 2010). As shown below, the proposed class here easily satisfies all of the
6 requirements of Rule 23(a).

7 **1. The Proposed Classes Meet the Numerosity Requirement of Rule**
8 **23(a)**

9 A class action may be maintained only if “the class is so numerous that the joinder of all
10 parties is impracticable.” Fed. R. Civ. P. 23(a) (1). Impracticability addresses the expense and
11 burden, to the parties and the court, of litigating each claim individually, rendering the case difficult
12 or inconvenient without joining all members of the class. *Harris v. Palm Springs Alpine Estates*,
13 329 F.2d 909, 913-14 (9th Cir. 1964). Courts in the Ninth Circuit have found that classes of far
14 fewer than 100 members are sufficiently numerous to render joinder impracticable. *Perez-Funez v.*
15 *District Dir.*, 611 F. Supp. 990, 995 (C.D. Cal. 1984) (“Classes consisting of 25 members have been
16 held large enough to justify certification. [citation omitted]”).

17 In this case, there are more than 130,000 people in Class A, 300,000 people in Class B, and
18 thousands or tens of thousands of people in each of the subclasses. Third Am. Complaint ¶ 225.
19 Additionally, the Class and Subclass members are elderly and have serious disabilities, making their
20 participation as individual joined plaintiffs onerous or impossible. *See Darling v. Bowen*, 685 F.
21 Supp. 1125, 1127 (W.D. Mo. 1984). Further, the members of the class, as Medi-Cal recipients with
22 low incomes, are “by definition poor and disabled and do not have the economic means to pursue
23 remedies on an individual basis.” *Lynch v Rank*, 605 F. Supp. 30, 36 (N.D. Cal. 1984), *aff’d*, 747
24 F.2d 528 (9th Cir. 1984). Accordingly, this case is well suited for class-based litigation of the
25 declaratory and injunctive relief sought. *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th
26 Cir. 1982), vacated on other grounds, 459 U.S. 810 (1982). Plaintiffs meet the numerosity
27 requirement of Rule 23(a)(1).
28

1 alleged that defendant's provision of services violated Medicaid EPSDT requirements); *Ryan v.*
 2 *Dreyfus*, 2009 WL 2914139 (W.D. Wash. 2009) (certifying class of Medicaid recipients with
 3 disabilities seeking injunction relief on ADA and Due Process grounds against elimination of Adult
 4 Day Health Care services); *Hernandez v. Medows*, 209 F.R.D. 665, 669 (S.D. Fla. 2002) (certifying
 5 class of Medicaid beneficiaries, noting that "factual differences between class members do not
 6 preclude a finding of commonality, as long as common questions of law exist."); *See generally*,
 7 *Capitol People First v. DDS* 155 Cal. App. 4th 676 (2007) (reversing a trial court and ordering
 8 certification of a class in a case alleging that unnecessary institutionalization violated the Medicaid
 9 Act, the ADA, and other laws).

10 Welf. & Inst. Code §§ 12309(e) and 12309.2, as a result of ABX4-4, will adversely affect
 11 members of Class A by terminating or reducing their IHSS services. Welf. & Inst. Code §§ 4792,
 12 12301.07, and 14105, as a result of SB 73, will adversely affect members of Class B by reducing
 13 their IHSS services. While the ultimate effect of the termination or reduction on each individual
 14 class member may be different, the legality of defendant's practice or policies is a question common
 15 to the class. *Hernandez v. Medows, supra*.

16 **a. Common Issues of Fact**

17 The common issues of fact include the following:

18 (1) Class A members and Class B members have been receiving IHSS services after their
 19 county has found, using criteria developed by the state, that they need these services in order to live
 20 safely at home. Welf. & Inst. Code § 12300(a); Third Am. Complaint ¶¶ 38-41; California
 21 Department of Social Services Manual of Policies and Procedures § 30-700.1 ("Services shall be
 22 authorized only [where] Social services staff of the designated county department has had a face-to-
 23 face contact with the recipient in the recipient's home at least once within the past 12 months . . . and
 24 has determined that the recipient would not be able to remain safely in his/her own home without
 25 IHSS [and] [p]erformance of the service by the recipient would constitute such a threat to his/her
 26 health/safety that he/she would be unable to remain in his/her own home"); Altman Decl. ¶¶ 3-5
 27 Docket 062; Castro Decl. ¶¶ 5-10 Docket 066; Goldberg Decl. ¶¶ 3 Docket 071; Guerra Decl. ¶¶ 12-
 28 15 Docket 073; Hathaway Decl. ¶ 16 Docket 074; Nicco Decl. ¶¶ 5, 11-12 Docket 080; Collins Decl.

1 ¶¶ 10-12 Docket 065; Second Decl. Marconi ¶ 17; Second Decl. Good ¶ 6.

2 (2) Prior to the enactment of ABX4 4, and of SB 73, Class A members and Class B
3 members were not informed of their Functional Index Ranks or of their composite Functional Index
4 Scores. Amended Complaint ¶¶ 66, 85; Baran Decl. ¶ 9 Docket 063; Aho Decl. ¶ 9 Docket 042;
5 Bean Decl. ¶¶ 5-6 Docket Docket 045; Drass Decl. ¶ 3 Docket 068; Guerra Decl. ¶ 11 Docket 073;
6 Good Decl. ¶ 9; F.H. Decl. ¶ 3 Docket 050; Hylton Decl. ¶ 7 Docket Docket 052; Janson Decl. ¶ 3
7 Docket 054; Lagahid Decl. ¶ 9 Docket 122; Mandel Decl. ¶ 5 Docket 056; Oster Decl. ¶ 5 Docket
8 035; Worden Decl. ¶ 7 Docket 060; Thurman Decl. ¶ 31; Decl. Stern Decl. ¶ 26; Hylton Decl. ¶ 21.

9 (3) All Class A members and Class B members will be provided only 10 to 15 days of
10 notice prior to reduction of termination of their IHSS services and the notice is not readily
11 understandable. Third Am. Complaint ¶ 100.

12 (4) All Class A members and Class B members will have their IHSS services terminated
13 or reduced. Amended Complaint ¶ 148; Cal. Welf. & Inst. Code §§ 12309 & 12309.2.

14 Because the issue of Defendants' compliance with the federal statutes is common to all class
15 members, the commonality requirement has been satisfied.

16 **b. Common Issues of Law**

17 Among the common issues of law for the entire class are:

18 (1) Whether Defendants are violating Plaintiffs' rights arising from the federal
19 constitutional guarantee of procedural due process and provisions of the Medicaid Act by failing to
20 provide adequate notice and opportunity for hearing prior to depriving members of the Plaintiff
21 classes of critical IHSS services;

22 (2) Whether Defendants are violating the Medicaid Act by failing to provide (a)
23 comparable Medicaid services to individuals with similar needs; (b) services according to reasonable
24 standards; and (c) services sufficient to meet the purposes of IHSS;

25 (3) Whether Defendants are violating the integration mandate of the Americans with
26 Disabilities Act of 1990, 42 U.S.C. § 12132 ("ADA"), and Section 504 of the Rehabilitation Act of
27 1973, 29 U.S.C. § 794 ("Section 504"), by reducing or terminating IHSS for Class A members and
28

1 Class B members, thus placing them at imminent risk of being segregated and confined
2 unnecessarily in institutional settings in order to receive services; and

3 (4) Whether Defendants are violating the ADA and Section 504 by cutting IHSS benefits
4 in a manner that discriminates or has the effect of discriminating against Class A members and Class
5 B members based on the type of disability, or by using methods of administration that exclude
6 individuals with disabilities from IHSS.

7 The above issues are common to all class members, including those in subclasses. In
8 addition, the following are common issues of law regarding the subclasses:

9 (1) For the “Loss of Domestic and Related Services Subclass A,” whether Defendants are
10 violating the sufficiency provisions of the Medicaid Act by terminating IHSS domestic and related
11 services to individuals for whom such services have been deemed necessary pursuant to an
12 individual service plan approved by the state;

13 (2) For the “Children Subclasses A,” whether Defendants are violating the Medicaid
14 Act’s Early and Periodic Screening, Diagnosis and Treatment (EPSDT) requirements by failing to
15 assure that children obtain the full range of personal care services necessary to correct or ameliorate
16 their physical and mental conditions, including services that could replace lost IHSS; and

17 (3) For the “Children Subclass B,” whether Defendants are violating the Medicaid Act’s
18 Early and Periodical Screening, Diagnosis and Treatment requirements by failing to assure that
19 children obtain the full range of personal care services necessary to correct or ameliorate their
20 physical and mental conditions, including services that could replace lost IHSS.

21 **3. The Named Plaintiffs’ Claims Are Typical of the Claims of the**
22 **Class**

23 The claims of the Named Plaintiffs who represent the class must be typical of the class
24 claims. Fed. R. Civ. P. 23(a)(3). “A class representative must be part of the class and possess the
25 same interest and suffer the same injury as the class members.” *General Telephone Co.*, 457 U.S.
26 147, 156 (1982) (citations omitted). The primary purpose of the typicality requirement is to ensure
27 that the nature of the claims brought by the class representative are so interrelated that the interests
28 of the class members will be fairly and adequately protected in their absence. *Id.* at 157-158. “In

1 government benefit class actions, the typically requirement is met when the representative plaintiff is
2 subject to the same statute, regulation or policy as class members.” *Rancourt v. Concannon*, 207
3 F.R.D. 14, 16 (D.Maine, 2002) Citing 5 Newberg section 23:04. “[A] named plaintiff’s claim is
4 typical if it stems from the same event, practice or course of conduct that forms the basis of the class
5 claims and is based upon the same legal or remedial theory.” *Hum v. Dericks*, 162 F.R.D. 628
6 (D.Hawai’I 1995); *See also Rodriguez*, 591 F.3d at 1124.

7 Here, the claims of the Named Plaintiffs in Class A mirror those of the members of Class A,
8 and the claims of the Named Plaintiffs in Class B mirror those of Class B. Each Named Plaintiff is
9 a recipient of IHSS; each faces unlawful acts by Defendants: termination or reduction of the IHSS
10 services that allow him or her to remain safely at home; and each Named Plaintiff, like the proposed
11 class as a whole, claims that Defendants’ practices violate his or her rights under the federal
12 constitution and statutes. Named Plaintiffs David Oster, Willie Beatrice Sheppard, Dottie Jones,
13 C.R., L.C., and Charles Thurman have claims that are typical of Class A related to the termination or
14 reduction of their services based on ABX 4-4. Jones Decl. (Dkt. 39) ¶ 3; Third Jones Decl. Ex. A;
15 Oster Decl. (Dkt. 35) ¶ 5; Second Oster Decl. (Dkt. 146) ¶ 6; Thurman Decl., Ex. A; M.G. Decl. ¶ 17
16 & Ex. A (L.C. has ranks below 4 for all domestic and related services, and her FI score is 1.37),
17 M.R. Decl. (Dkt. 38) ¶ 8 (C.R. has FI score of 1.97), Third M.R. Decl., Ex. A. Named Plaintiffs
18 David Oster, Willie Beatrice Sheppard, Dottie Jones, C.R., Andrea Hylton, Helen Polly Stern, L.C.,
19 and Charles Thurman have claims that are typical of Class B in that they suffer the risk of reduction
20 in their services based on SB 73. Third Jones Decl. ¶ 2; Oster Decl. ¶¶ 3, 7; Stern Decl. ¶ 3;
21 Thurman Decl. ¶¶ 2-3; M.G. Decl. ¶ 12 (L.C. will lose 11.6 hours under SB73); Second Hylton Decl.
22 ¶ 8 & Ex. A (would lose 9.05 hours with a 20 percent reduction in hours). See Common Issues of
23 Law, section III.A.2.b, and Common Issues of Fact above, section III.A.2.a., for more information
24 about their claims and the claims of the subclass members. Finally, the Named Plaintiffs seek the
25 same relief as all class members. Amended Complaint ¶ 227.

26 Hence, the requirements of Rule 23(a)(3) are met for both the proposed classes and the
27 proposed subclasses.

1 Lead counsel for the class is Melinda Bird with Disability Rights California, who has been
2 involved in public interest class action cases for more than twenty-five years. Ms. Bird is teamed
3 with other highly experienced lawyers from Disability Rights California, as well as highly
4 experienced lawyers from Disability Rights Legal Center, the National Senior Citizens Law Center,
5 the National Health Law Project, and Charles Wolfinger, a lawyer with specialized expertise
6 regarding California's In-Home Supportive Services programs. Collectively, these long-established
7 public interest firms and attorneys have decades of extensive experience in litigation of federal class
8 actions involving disability and health programs, including representation of classes at the trial and
9 appellate levels. They include some of the most experienced lawyers in the nation and the state on
10 public benefits and Medicaid, disability discrimination, and In-Home Supportive Services issues.
11 Second Declaration of Schur in Support of Plaintiffs' Motion for Class Certification; Declarations of
12 Perkins (Docket 029), Rich (Docket 026), Parks (Docket 030), and Wolfinger (Docket 027) in
13 Support of Plaintiffs' Motion for Class Certification, and resumes attached thereto. The resources
14 and experiences of proposed class counsel are more than adequate to represent the class
15 competently.

16 Additionally, no conflicts exist between counsel, Named Plaintiffs, and the proposed class
17 members that would compromise their ability to represent the class.

18 In summary, the Named Plaintiffs satisfy the adequacy of representation requirement under
19 Rule 23(a)(4) both with respect to their interests and their choice of counsel.

20 **B. This Case Satisfies Rule 23(b)(2) Because Defendants have Acted on Grounds**
21 **Generally Applicable to the Class, Making Final Injunctive and Declaratory**
22 **Relief Appropriate and Making Notice Unnecessary**

23 In addition to the four requirements of Rule 23(a), the Named Plaintiffs also must satisfy the
24 requirements contained in one of the subdivisions of Rule 23(b). In this case they satisfy Rule
25 23(b)(2), which requires that "the party opposing the class has acted or refused to act on grounds
26 generally applicable to the class, thereby making appropriate final injunctive relief or corresponding
27 declaratory relief with respect to the class as a whole . . ." In interpreting this requirement, courts
28 have held that where the primary purpose in bringing the action is to seek injunctive relief, the action

1 is properly certifiable under Rule 23(b)(2). *Elliott v. Weinberger*, 564 F.2d 1219, 1228 (9th Cir.
2 1977) *aff'd in relevant part, rev'd in part*, 442 U.S. 682, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979).
3 Civil rights cases against parties charged with class-based discrimination are “prime examples” of
4 actions under Rule 23(b)(2). *Amchem Products v. Windsor*, 521 U.S. 591, 614 (1997). For example,
5 the Ninth Circuit has held that class determination under Rule 23(b)(2) is appropriate when “class
6 members complain of a pattern or practice that is generally applicable to the class as a
7 whole...[e]ven if some class members have not been injured by the challenged practice....” *Walter*
8 *v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998). Rule 23(b)(2) “does not require us to examine the
9 viability or bases of class members’ claims for declaratory and injunctive relief, but only to look at
10 whether class members seek uniform relief from a practice applicable to all of them.” *Rodriguez*,
11 591 F.3d at 1125. *See also Cyrus*, 233 F.R.D. at 467 (certifying class in a case alleging that changes
12 in Medicaid home and community based services eligibility determination processes led to
13 termination of benefits in violation of due process.); *M.A.C. v. Betit* 284 F. Supp. 2d. 1298 (D. Utah,
14 2003) (certifying class of disabled Medicaid recipients challenging the denial of Medicaid waiver
15 services as a violation of the Medicaid Act and the integration mandate of the ADA). Unlike the
16 plaintiffs in *Wal-Mart*, 131 S.Ct. 2541, 2547, plaintiffs herein seek exclusively injunctive and
17 declaratory relief, not monetary damages or compensation.

18 This case is exemplary of a Rule 23(b)(2) action because Defendants’ enforcement of Welf.
19 & Inst. Code §§ 12309(e)(1) and 12309.2(a)(1) affects all members of the Class A as well as the
20 Named Plaintiffs, and Welf. & Inst. Code §§ 4792, 12301.07, and 14105 affect all members of Class
21 B, and because Plaintiffs seek only declaratory and injunctive relief. Defendants’ violations of
22 federal law have equal application to all class members, as all class members are people with
23 disabilities who receive IHSS services.

24 Class-wide final injunctive and declaratory relief is appropriate to facilitate enforcement of
25 judgments. Given that the Plaintiffs seek only declaratory and injunctive relief, and the granting of
26 such relief is appropriate with respect to the class as a whole to remedy Defendants’ discriminatory
27 actions, Rule 23(b)(2) is satisfied in this case.

28

1 Because Plaintiffs seek to certify a class under Rule 23(b)(2), notice is not required. Fed. R.
 2 Civ. P. 23(c)(2)(A). *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325, 1336-37 (1st Cir. 1991).
 3 *Wal-Mart v. Dukes*, 131 S. Ct. at 2558.

4 **C. The Court Should Designate Plaintiffs' Counsel as Class Counsel Pursuant to**
 5 **Rule 23(g)(1).**

6 When a class is certified, the court must appoint class counsel (Fed. R. Civ. P. 23(g)(1)), and
 7 the class certification order must list these counsel. Fed. R. Civ. P. 23(c)(1)(B). The court considers
 8 four factors in appointing class counsel:

- 9 (i) the work counsel has done in identifying or investigation potential claims
 in the action;
 10 (ii) counsel's experience in handling class actions, other complex litigation
 and the types of claims asserted in the action;
 11 (iii) counsel's knowledge of the applicable law; and
 12 (iv) the resources that counsel will commit to representing the class.

13 Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

14 Pursuant to these four factors, Plaintiffs' counsel qualify for appointment in this case. As
 15 reflected in the Third Am. Complaint and Plaintiffs' concurrently filed Motions for Temporary
 16 Restraining Order and Preliminary Injunction, Plaintiffs' counsel has committed extensive time and
 17 resources to investigating and analyzing Plaintiffs' claims. Counsel is very experienced in class
 18 actions and complex litigation and has extensive knowledge of discrimination and benefits law.
 19 Second Declaration of Schur in Support of Plaintiffs' Motion for Class Certification; Declarations of
 20 Perkins (Docket 029), Rich (Docket 026), Parks (Docket 030), and Wolfinger (Docket 027) in
 21 Support of Plaintiffs' Motion for Class Certification. The Court should appoint Plaintiffs' counsel as
 22 class counsel in its class certification order.

23 **IV. CONCLUSION**

24 For the reasons stated above, the Named Plaintiffs have satisfied all of the requirements of
 25 Rule 23(a) and Rule 23(b)(2) with respect to the proposed defined class, and Rule 23(g)(1) as to
 26 appointment of class counsel. Plaintiffs respectfully request that this Court:

- 27 1) Certify this case as a Rule 23(b)(2) class action;
 28

1 2) For the Part A of the First, Second, Third, Fourth, Fifth, and Seventh Claims for Relief,
2 define Class A as:

3 All recipients of IHSS in the State of California whose IHSS services
4 will be limited, cut, or terminated under the provisions of ABX4 4, and
5 all applicants to IHSS in the State of California who would have been
6 eligible for IHSS services but who are either not eligible, or are
7 eligible for fewer services, as a result of ABX 4 4 (hereinafter “Class
8 A”).

9 3) For the First, Second, Third, Fourth, Fifth, Sixth, and Seventh, claims for relief, define
10 Class B as

11 All recipients of IHSS in the State of California who have received or will
12 receive notices of action that include a reduction of IHSS hours based on
13 SB 73 or Defendants’ implementation of SB 73, including future
14 applicants for IHSS services whose notice of action will reflect reduced
15 IHSS hours as a result of SB 73 or Defendants’ implementation of SB 73
16 (hereinafter the “Class B”).

17 4) For Part A of the Sixth claim for relief, define the “Loss of Domestic and Related
18 Services Subclass A as

19 All present and future IHSS recipients and applicants who have been or
20 would have been authorized to receive domestic and/or related IHSS, and
21 whose IHSS will be reduced to eliminate some or all of their domestic
22 and/or related services under the provisions of ABX4 4.

23 5) For Part A of the Eighth claim for relief, define the “Children Subclass A” as

24 All present or future IHSS recipients who are under the age of 21, who
25 qualify for full-scope Medi-Cal with federal financial participation, and
26 who therefore are entitled to the protections of the Early Periodic
27 Screening Diagnosis and Treatment provisions of the federal Medicaid
28 Act, 42 U.S.C. § 1396a(a), who have been or would have been authorized
29 to receive IHSS, and whose IHSS services will be reduced or terminated
30 under the provisions of ABX4 4.

31 6) For Part B of the Eighth claim for relief, define the “Children Subclass B” as

32 All present or future IHSS recipients who are under the age of 21, who
33 qualify for full-scope Medi-Cal with federal financial participation, and
34 who therefore are entitled to the protections of the Early Periodic
35 Screening Diagnosis and Treatment provisions of the federal Medicaid
36 Act, 42 U.S.C. § 1396a(a), who have received or will receive notices of
37 action that include a reduction of IHSS hours based on SB 73 or

1 Defendants' implementation of SB 73, including future applicants for
2 IHSS services whose notice of action will reflect reduced IHSS hours as a
3 result of SB 73 or Defendants' implementation of SB 73.

4 7) Appoint Named Plaintiffs David Oster, Willie Beatrice Sheppard, C.R., Dottie Jones, L.C.,
5 and Charles Thurman as class representatives for Class A, and Named Plaintiffs David Oster, Willie
6 Beatrice Sheppard, C.R., Dottie Jones, Andrea Hylton, Helen Polly Stern, L.C., and Charles
7 Thurman as class representatives for Class B; appoint Named Plaintiffs Dottie Jones, Willie Beatrice
8 Sheppard, and Charles Thurman as class representatives for Loss of Domestic and Related Services
9 Subclass A; appoint Named Plaintiffs C.R. and L.P. as class representatives for Children Subclass A
10 and Children Subclass B.

11 8) Appoint Plaintiffs' counsel to serve as class counsel; and

12 9) Dispense with any requirement for Plaintiffs to give notice to absent class members at this
13 stage of the litigation.

14 Date: November 30, 2011

Respectfully submitted,

15 /s/

16
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