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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

CV 09 2307

THE GRAY PANTHERS OF SAN FRANCISCO, a nonprofit corporation, and MARK BECKWITH,

Plaintiffs,

-vs.-

ARNOLD SCHWARZENEGGER, Governor of State of California; KIM BELSHE, Secretary of Health and Human Services Agency of the State of California; DAVID MAXWELL-JOLLY, Director of Department of Health Care Services of the State of California; JOHN CHIANG, Controller of State of California; BILL LOCKYER, Treasurer of State of California; and MICHAEL E. GENEST, Director of Finance of the State of California,

Defendants. /

Civil Case No.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

California. Under § 12320 Govt. Code all moneys of the State are received and kept by the Treasurer, and under § 12324 Govt. Code, the Treasurer may only pay out State monies upon warrants drawn by the Controller. The Treasurer is sued in his official capacity, only.

10. The defendant MICHAEL E. GENEST is the Director of Finance of the State of California. The Director of Finance is authorized by § 13300 Govt. Code to supervise the accounts of each department of the State, and may, by certain statutes made and provided therefore, veto certain expenditures of the State.

Standing

11. The SF Gray Panthers have a membership of approximately 150, and work in coalition with other groups on senior health, housing, social justice, and war/peace issues. The membership of the SF Gray Panthers is predominantly over the age of 65.

12. A primary function and purpose of the SF Gray Panthers is to advocate and advance the health care and the health care rights and civil rights of its members, – most of whom are on Medicare, with approximately 10%, or at least 15, who are beneficiaries of the state-federal funded Medicaid program (called "Medi-Cal" in California), either in the Medi-Cal fee-for-service program or the Medi-Cal managed care program, as the case may be.

Prudential *jus tertii* suit by the plaintiff SF Gray Panthers

12. In each of the Claims for Relief in this Complaint, the plaintiff SF Gray Panthers sue on its own behalf and in a prudential *jus tertii* capacity to assert, respectively, the interests of its respective members who are beneficiaries of the Medi-

Cal fee-for-service program as well as those of its respective members who are beneficiaries in the Medi-Cal managed care program, to obtain injunctive and declaratory relief from and in respect to injury threatened injury by the State action complained of.

FIRST CLAIM FOR RELIEF

For injunction against State action, preempted under the Supremacy Clause, which threatens injury.

13. Plaintiffs refer to the allegations in each of the preceding Paragraphs and incorporate each of the said allegations as if fully set forth herein.

14. As of July 1, 2008 and presently, California's state Medicaid plan which is required by the Medicaid Act, (42 U.S.C. 1396a) to be filed with and approved by the Secretary of the U.S. Department of Health and Human Services, (the "State Medicaid plan") included and includes the following benefits and services which are optional and are not mandatory under the Medicaid Act to be provided by a State, in its State Medicaid plan, as a minimum condition for the State to participate in the Medicaid program, and thereby to receive federal funds specified by the Medicaid Act, (called the "federal medical assistance percentage," or "FMAP"), for such participation by the State in the Medicaid program of the Medicaid Act:

1. Adult dental services, (except medical and surgical services which, if provided by a physician, would be considered physician services),
2. Acupuncture services,
3. Audiology services,
4. Speech therapy services,
5. Chiropractic services,
6. Optometric and optician services,
7. Podiatric services,

8. Psychology services, and,
9. Incontinence creams and washes,

(herein, "the 9 optional services").

15. However, California Welfare & Institutions ("WI") Code § 14131.10 (which statute was enacted and became in effect on March 3, 2009 by California Assembly Bill ("AB") X3 5, chaptered as Chapter 20, California Statutes 2009-2010), eliminated the 9 optional benefits, effective July 1, 2009.

16. However, on February 17, 2009, Congress enacted the American Revoery and Reinvestmant Act of 2009, (Public Law 111-5), (herein, the "Stimulus Act"), in which:

- (1) § 5000, subd. (a), provides as follows:

"(a) PURPOSES.—The purposes of this title are as follows:

(1) To provide fiscal relief to States in a period of economic downturn.

(2) To protect and maintain State Medicaid programs during a period of economic downturn, including by helping to avert cuts to provider payment rates and benefits or services . . . "

- (2) § 5001, subds. (a), (b), (c) provide that the Federal medical assistance percentage ("FMAP"), – as defined in § 1905(b) Social Security Act (42 U.S.C. 1396(b), – shall be temporarily increased to 67% for the duration of the period beginning on October 1, 2008 and ending on December 31, 2010, (the "recession adjustment period"); such that thereby the federal government now contributes $2 to

every $1 a State expends for health care services (called "medical assistance") to qualified Medicaid beneficiaries, under the State's Medicaid plan filed with the Secretary of U.S. Department of Health and Human Services, during the recession adjustment period, compared to the FMAP of only $1 to every $1 similarly expended by a State before the Stimulus Act was enacted.

- (3) § 5001, subd. (f)(1)(A) provides:

"STATE INELIGIBILITY; LIMITATION; SPECIAL RULES.—

"(f) STATE INELIGIBLITY; LIMITATION; SPECIAL RULES.---

(1) MAINTENANCE OF ELIGIBILITY REQUIREMENTS.---

(a) IN GENERAL.— [A] State is not eligible for an increase in its FMAP under subsection (a), (b), or (c), . . . if eligibility standards, methodologies, or **procedures** under its State plan under title XIX of the Social Security Act (including any waiver under such title or under section 1115 of such Act (42 U.S.C. 1315) are more restrictive than the elegibility standards, methodologies, or procedures, respectively under such plan (or waiver) as in effect on July 1, 2008." (Boldface emphasis supplied.)

and,

- (4) § 5001, subd. (f)(3) provides:

"STATE'S APPLICATION TOWARD RAINY DAY FUND.–A State is not eligible for an increase in its FMAP under subsection (b) or (c) . . . if any amounts attributable (directly or indirectly) to such increase are deposited or credited into any reserve or rainy day fund of the State."

17. The extra federal FMAP amounts paid to states, including California, under the foregoing §§ 5000-5001 of the Stimulus Act are know as "Stimulus funds."

18. The State of California has elected to receive Stimulus Funds under the Stimulus Act in respect to its expenditures of State funds pursuant to and under the State Medicaid plan of the State of California in and by which the State of California

1 participates in the state-federal Medicaid program, under the Medicaid Act.

2 19. However, despite each and all of the provisions of Stimulus Act which
3 are set forth in the prior Paragraph 16 of this Complaint, (namely, § 5000, and subds.
4 (a),(b),(c), and (f)(1)(A), and (f)(3) of the Stimulus Act), each of the defendant State
5 officials has adopted a policy, intends, and will unless restrained by the Court,
6 implement the elimination of the 9 optional Medicaid services (as enacted by the state
7 statute, WI Code § 14131.10, by AB X3 5), by refusing to pay for any of the 9
8 optional Medicaid services which are furnished on or after July 1, 2009, even though
9 the **refusal of the defendants to use any savings to the State from the extra FMAP**
10 **payments to pay for the continuation of the 9 optional Medicaid services**:

11 - (1) violates the express and implied duty, imposed by the State accepting
12 extra FMAP payments for the express purpose under § 5000 of the Stimulus
13 Act of:

14 - enabling the State to protect and maintain its Medicaid program at the
15 same level and inclusions of services as existed on July 1, 2008, and,

16

17 - enabling the State to avert cuts to Medicaid benefits or services;

18

19 - (2) violates the express prohibition of subd. (f)(1)(A) of the Stimulus Act,
20 against restricting "procedures," (i.e., against restricting services), in the State's
21 Medicaid program to less than were in effect on July 1, 2008; and,

22

23 - (3) violates the express prohibition of subd. (f)(3) of the Stimulus Act not to

24

indirectly deposit or credit into any reserve or rainy day fund any amount attributable to the extra FMAP payments, (here, the savings from the extra FMAP funds which sink unidentified into the General Fund of the State of California, for use by the Legislature as a real but unidentified source of funds for non-Medicaid purposes);

such that therein and thereby, the policies and actions of each of the defendant State officials which are alleged in this Paragraph 19, constitute and comprise State action which is in violation of, hence preempted, under the Supremacy Clause, by § 5000 and subds. (a),(b) and (c), and subd. (f)(1)(A), and (f)(3) of § 5001 of the Stimulus Act, and defeat and prevent wholly and in substantial part the full accomplishment of the purposes of Congress in enacting these provisions of the Stimulus Act.

20. Further, hundreds of thousands of Medi-Cal beneficiaries, including the plaintiff MARK BECKWITH, and the 15 members of the plaintiff SF Gray Panthers who are beneficiaries in the Medi-Cal fee-for-service and managed care programs, will suffer injury and be threatened with injury by reason and cause of the preempted acts of the defendant State officials which are alleged in Paragraph 19, by being denied by defendants and being unable to obtain any of the 9 optional services for:

- (1) treatment and cure of, and relief of pain and suffering from, injury, diseases and conditions of their teeth, mouth, jaws, ability to eat, and facial appearance (dentistry); bodily functions and health (acupuncture and chiropractic services); hearing (audiology); speech (speech therapy); sight (optometric and optician services); feet (podiatry); mental health (psychology); and,

- (2) treatment and relief of pain and suffering from incontinence, (incontinence creams and washes);

which injuries are irreparable and inexcusably insufferable in their nature and character.

21. Also, the plaintiff SF Gray Panthers will also be irreparable injured by the aforesaid preempted State action of the defendant State officials, from interference with the ability of the SF Gray Panthers to obtain, on behalf of its members, adequate health care, due to the elimination of the aforesaid 9 optional Medicaid services by the defendants.

22. Plaintiffs have no plain, speedy, adequate or any relief from the preempted action of the defendant State officials except by the injunctive and declarative relief which is prayed for hereinbelow.

23. Plaintiffs have no administrative relief, and any administrative relief which may be available to them is futile.

WHEREFORE, each of the plaintiffs respectfully pray for judgment as shall be hereinafter specified:

SECOND CLAIM FOR RELIEF

For declaratory relief in respect to State action, preempted under the Supremacy Clause, which threatens injury

24. Plaintiffs refer to the allegations in each of the preceding Paragraphs and incorporate each of the said allegations as if fully set forth herein.

25. Pursuant to each and all of the facts alleged in the preceding Paragraphs of this Complaint, there exists an actual controversy between the plaintiffs and each

of the defendants, in respect to which the plaintiffs request a declaration of the respective rights and duties of defendants to the plaintiffs, as set forth in the Prayer to this Second Claim for Relief.

26. Plaintiffs have no plain, speedy, adequate or any relief from the preempted action of the defendant State officials except by the declarative relief which is prayed for hereinbelow.

27. Plaintiffs have no administrative relief, and any administrative relief which may be available to them is futile.

WHEREFORE, the plaintiffs respectfully pray for judgment as follows:

On All Claims for Relief:

1. That plaintiffs have judgment against each and all of the defendants, and that the defendants take nothing.

On the First Claim For Relief:

2. That the Court find that MARK BECKWITH, the plaintiff Medi-Cal beneficiary, and the 15 members of the plaintiff GRAY PANTHERS OF SAN FRANCISCO ("SF Gray Panthers") who are Medicaid beneficiaries, will be injured and are threatened with injury, which is irreparable, from State action by each and all of the defendant State officials which is contrary to, hence preempted under the Supremacy Clause, by a contrary federal statute, (to wit, Section 5000, and subds. (a),(b),(c) and (f)(1)(A) and (f)(3) of Section 5001 of the American Recovery and Reinvestment Act of 2009, (the "Stimulus Act"); and that the plaintiff SF Gray Panthers will also be irreparable injured by the aforesaid preempted State action of the defendant State officials, from interference with the ability of the SF Gray Panthers to

obtain, on behalf of its members, adequate health care;

3. That the defendants and each of them be ordered by a temporary restraining order, preliminary injunction, and permanent injunction, to refrain from implementing California Welfare & Institutions Code § 141131.10, or any provision of Assembly Bill X3 5, (chaptered as Chapter 20, California Statutes 2009-2010), enacted and eff. March 3, 2009, including but not limited to refraining from implementing their policy and policies to eliminate the 9 optional Medicaid services, either on July 1, 2009 or at any other time or times whatsoever or at all; which 9 optional Medicaid services are, without limitation thereby:

1. Adult dental services, (except medical and surgical services which, if provided by a physician, would be considered physician services),
2. Acupuncture services,
3. Audiology services,
4. Speech therapy services,
5. Chiropractic services,
6. Optometric and optician services,
7. Podiatric services,
8. Psychology services, and,
9. Incontinence creams and washes;

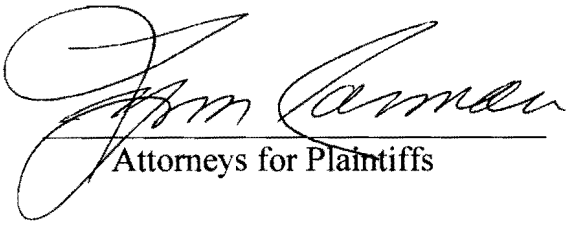
or that, in lieu of compliance with the said order, that the defendant State officials notify the Secretary of the U.S. Department of Health and Human Services that the State of California (1) will no longer accept any extra FMAP payments under the Stimulus Act, and (2) will return to the federal government all the extra FMAP payments which the State of California has received from the federal government, at a ratio of $2 federal money for every $1 of state money expended to furnish services to Medi-Cal beneficiaries in the State of California's State Medicaid plan.

On the Second Claim for Relief:

4. That if and only if the Court denies injunctive relief, and to the extent that the Court does not grant injunctive relief, that the Court nevertheless issue its declaratory judgment in which it finds and adjudicates the rights and duties of the parties to be as set forth in Paragraph 2 of this Prayer for Relief.

On all Claims for Relief:

4. That plaintiffs have their costs of suit herein incurred, together with such attorneys' fees as may be according to law, together with such other and further relief as may be just.



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