

1 LYNN S. CARMAN, State Bar 028860
Medicaid Defense Fund
2 28 Newport Landing Dr.
Novato, CA 94949-8214
3 Telephone: (415) 927-4023
Facsimile : (415) 499-1687
4 Email: lynns carman@hotmail.com

5 JESSIE M. SANDOVAL, State Bar 256757
601 Van Ness Ave., Suite E3-140
6 San Francisco, CA 94102
Telephone: (415) 595-0763
7 Facsimile: (510) 528-3381
Email: sandovaljm@aol.com

8
Attorney for Plaintiffs
9 Gray Panthers of San Francisco; Mark Beckwith;
California Foundation for Independent Living
10 Centers; Independent Living Centers of
Southern California, Inc.; LifeLong Medical
11 Care; and Margaret Dowling

12 IN THE UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

14 THE GRAY PANTHERS OF SAN
FRANCISCO, a nonprofit corporation; MARK
15 BECKWITH; CALIFORNIA FOUNDATION
16 FOR INDEPENDENT LIVING CENTERS,
INC., a nonprofit corporation; INDEPENDENT
17 LIVING CENTER OF SOUTHERN
CALIFORNIA, INC., a nonprofit corporation;
18 LIFELONG MEDICAL CARE, a nonprofit
19 corporation; and MARGARET DOWLING,
Plaintiffs,

No. C-09-02307 EMC

**FIRST AMENDED
COMPLAINT FOR
INJUNCTIVE AND
DECLARATORY
RELIEF**

20 -vs.-

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

1 The plaintiffs, THE GRAY PANTHERS OF SAN FRANCISCO; MARK
2 BECKWITH, CALIFORNIA FOUNDATION FOR INDEPENDENT LIVING
3 CENTERS; INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC.;
4 LIFELONG MEDICAL CARE, and MARGARET DOWLING, complain of defendants
5 and each of them and for claims for relief alleges as follows:

6 **PRELIMINARY**

7 **Jurisdiction**

8 1. The above-entitled Court has jurisdiction under 28 U.S.C. § 1331.
9 *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983).

10 **Intradistrict Assignment and Venue**

11 2. The actions and failures to act of the defendants which are complained
12 of, and the injuries to the members of the plaintiff The Gray Panthers of San Francisco
13 have and will continuously occur in the City and County of San Francisco, State of
14 California. Also, the defendant Governor and the Attorney General of the State of
15 California each have offices in San Francisco, California. .

16 **Parties**

17 3. (a) At all times the plaintiff, The Gray Panthers of San Francisco ("SF Gray
18 Panthers") was and is a California nonprofit corporation which was and is duly organized
19 and incorporated in California on August 28, 1978, pursuant to General Nonprofit
20 Corporation Law of the State of California.

21 (b) Plaintiff has its principal office and place of business in, and does
22 business, in the City and County of San Francisco, California.

23 4. The plaintiff Mark Beckwith is a Medicaid beneficiary who resides in
24 Berkeley, California.

1 5. The plaintiff California Foundation for Independent Living Centers
2 (“CFILC”), was and is a California nonprofit public benefit corporation, whose principal
3 place of business is in the County of Sacramento, California.

4 6. The plaintiff, Independent Living Center of Southern California, Inc.,
5 (“ILC”), was and is a nonprofit corporation duly organized and incorporated in California,
6 whose offices are located in Van Nuys, Santa Clarita, and Lancaster, California.

7 7. (a) The plaintiff LifeLong Medical Care, (“LifeLong Care”), was and is a
8 California nonprofit corporation whose offices are located in Berkeley, Oakland, and
9 Novato, California.

10 (b) LifeLong Care is a community health center organization with nine
11 clinics in Berkeley, Oakland, and Novato, California.

12 8. The plaintiff Margaret Dowling is a Medicaid beneficiary who resides in
13 Pittsburg, California.

14 9. The defendant Arnold Schwarzenegger is the Governor of the State of
15 California. His duties under California Government (“Govt.”) Code §§ 12010, 12011 are
16 to supervise all executive and administrative officers of the State of California and see that
17 their official duties are performed. The Governor has an office in San Francisco,
18 California. This defendant is sued in his official capacity, only.

19 10. The defendant Kim Belshe (“Secretary”) is Secretary of the Health and
20 Human Services Agency (“Agency”) of the State of California. The Agency, by § 12801
21 Govt. Code, is under the supervision of the Secretary, and the Department of Health Care
22 Services is within and subordinate to the Agency. This defendant is sued in her official
23 capacity only.

24 11. (a) The defendant David Maxwell-Jolly ("Director") is the director of the
25
26

1 Department of Health Care Services (“Department”) of the State of California. The
2 Director is exclusively empowered by §§ 14000.1 and 14105 Welf. & Inst. Code to
3 exclusively set all policies, rules, regulations, and provider payment rates in the state-
4 federal Medicaid program in California, which operates under the Medicaid Act, Social
5 Security Act § 1901 et seq., (42 U.S.C. 1396 et seq.).

6 (b) This defendant is sued in his official capacity, only

7 (c) Plaintiffs are informed and believe and based on such belief allege that
8 the Director has an office in the City and County of San Francisco.

9 12. The defendant John Chiang is the Controller of the State of California. The
10 Controller, by § 12410 Govt. Code, superintends the fiscal concerns of the State of
11 California. Under California Constitution, article XVI, section 7, money may be drawn
12 from the Treasury of the State only upon the Controller's duly drawn warrant. The
13 Controller is sued in his official capacity, only.

14 13. The defendant Bill Lockyer is the Treasurer of the State of California.
15 Under § 12320 and 12324 Govt. Code, the Treasurer receives and keeps all moneys of the
16 State of California, and may only pay out State monies upon warrants drawn by the
17 Controller. The Treasurer is sued in his official capacity, only.

18 14. The defendant Michael E. Genest is the Director of Finance of the State of
19 California. The Director of Finance is authorized by § 13300 Govt. Code to supervise the
20 accounts of each department of the State, and may, by certain
21 statutes made and provided therefore, veto certain expenditures of the State.

22 **Standing**

23 **Medicaid beneficiaries**

24 15. The plaintiffs Beckwith and Dowling are Medicaid beneficiaries.
25
26

1 **SF Gray Panthers**

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

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

12 **LifeLong Care**

13 18. The plaintiff LifeLong Care is a community health center organization with
14 nine service sites in Berkeley, Oakland, and Novato. LifeLong provides a comprehensive
15 array of health care services including primary medical care, geriatric care, dentistry,
16 podiatry, optometry, and mental health services.

17 19. LifeLong Care provides approximately 12,000 dental visits per year of
18 which approximately 3,500 are provided to 1,300 adults covered by Medicaid. LifeLong
19 Care operates a 10 operator dental clinic for low income patient and also provides dental
20 services to homeless persons in cooperation with the Alameda County Health Care for the
21 Homeless program. LifeLong Care also provides approximately 4,000 podiatry visits to
22 adults covered by Medicaid, and 700 optometry visits per year to 1,600 adults covered by
23 Medicaid, and 700 optometry visits to adults who are covered by Medicaid, annually.
24
25
26

1 **The ILC**

2 20. (a) The ILC is a designated center for independent living (“CIL”). CILs are
3 community-based organizations established under the California Rehabilitation Act, (§
4 19800 California Welfare & Institutions (“Welf. & Inst.”) Code to advocate and provide
5 services to enable people with disabilities to achieve independence, including equal access
6 to society and all activities of society; which includes assisting them to find and maintain
7 providers for their health care.

8 (b) The ILC serves over 7,500 clients with disabilities who are categorically
9 linked to Medicaid for their health care coverage, because they are poor SSI beneficiaries
10 under the Social Security Act. Many of these 7,500 Medicaid beneficiaries require and
11 use the 9 Medicaid services which Welf. & Inst. Code § 14131.10 will eliminate from
12 Medicaid coverage on and after July 1, 2009.

13 **The CFILC**

14 21. (a) The CFILC is a nonprofit corporation in Sacramento, California, which
15 is made up of 25 members throughout California, each of which is a designated center for
16 independent living established under the California Rehabilitation Act, to advocate and
17 provide services to enable people with disabilities to achieve independence, including
18 equal access to society and all activities of society; which includes assisting them to find
19 and maintain providers for their health care.

20 (b) The members of CFILC serve over 330,000 clients with disabilities
21 annually, most of whom are Medicaid beneficiaries. Many of these Medicaid
22 beneficiaries served by the members of the CFILC require and use the 9 Medicaid services
23 which Welf. & Inst. Code § 14131.10 will eliminate from Medicaid coverage on and after
24 July 1, 2009.

25
26

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

2 22. In each of the Claims for Relief in this Complaint, the plaintiffs SF Gray
3 Panthers, LifeLong Care, ILC, and CFILC sue, respectively, on its own behalf and in a
4 prudential *jus tertii* capacity to assert, respectively, the interests of its members, clients, or
5 patients, as the case may be (and in the case of the CFILC, also on behalf of the Medi-Cal
6 beneficiaries who are clients of the members of the CFILC), to obtain injunctive and
7 declaratory relief from and in respect to injury threatened to them by the State action
8 complained of.

9 23. As of July 1, 2008 and presently and continuing, California's state Medicaid
10 plan includes the following benefits and services which are optional, and are not
11 mandatory to be provided by a State, in its state Medicaid plan, as a minimum condition
12 for the State to participate in the Medicaid program of 42 U.S.C. § 1396 and to, thereby,
13 receive federal funds as medical assistance specified by the Medicaid Act, (called the
14 “federal medical assistance percentage,” or “FMAP”), for such participation by the State
15 in the Medicaid program of the Medicaid Act:

- 16 1. Adult dental services, (except medical and surgical services which, if
17 provided by a physician, would be considered physician services),
18 2. Acupuncture services,
19 3. Audiology services,
20 4. Speech therapy services,
21 5. Chiropractic services,
22 6. Optometric and optician services,
23 7. Podiatric services,
24 8. Psychology services, and,
25 9. Incontinence creams and washes,

26 (herein, “the 9 Medicaid services”).

24 24. However, on February 17, 2009, Congress enacted the American Recovery and
25 Reinvestment Act of 2009, (Public Law 111-5; Page 123, Stat. 115), (the “Stimulus Act”), in

1 which the following provisions of Title V, Division B of the Stimulus Act provide:

2 - (1) “SEC. 5000. PURPOSES; . . .

3 (a) Purposes,—The purposes of this title are as follows:

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

5 (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”

6 - (2) § 5001, subs. (a), (b), (c) provide that the FMAP, – as defined in § 1905(b)
7 Social Security Act, 42 U.S.C. § 1396d(b), – in a State shall be temporarily increased
8 during the recession adjustment period of October 1, 2008 through December 31, 2010, by
9 at least 6.2%, – with an additional increase for a State of up to 17.7% depending upon the
10 increase in unemployment in a State during this period.

11 - (3) § 5001, subd. (f)(1)(A) provides:

12 “(f) State Ineligibility; Limitation; Special Rules.--

13 (1) Maintenance of eligibility requirements.--

14 (A) In general.— . . . [A] State is not eligible for an increase in its FMAP
15 under subsection (a), (b), or (c), . . . if eligibility standards, methodologies, or
16 **procedures** under its State plan under title XIX of the Social Security Act
17 (including any waiver under such title or under section 1115 of such Act (42
18 U.S.C. 1315)) are more restrictive than the eligibility standards, methodologies,
19 or procedures, respectively, under such plan (or waiver) as in effect on July 1,
20 2008.” (Boldface emphasis supplied.)

21 and,

22 - (4) § 5001, subd. (f)(3) provides:

23 “State's application toward rainy day fund.—A State is not eligible for an
24 increase in its FMAP under subsection (b) or (c) . . . if any amounts attributable
25 (directly or indirectly) to such increase are deposited or credited into any reserve
26 or rainy day fund of the State.”

25 25. The extra federal FMAP amounts paid to states, including California, under
26 the foregoing §§ 5000-5001 of the Stimulus Act, shall be referred to as “enhanced FMAP

1 funds.”

2 26. §§ 5000 - 5008 of Title V, Division B of the Stimulus Act shall sometimes be
3 referred to in this First Amended Complaint as the “Enhanced FMAP Measure.”

4 27. The State of California has elected to receive enhanced FMAP funds under
5 the Enhanced FMAP Measure of the Stimulus Act in respect to its expenditures of State
6 funds under the State Medicaid plan in and by which the State participates in the Medicaid
7 program, under the Medicaid Act.

8 28. Under and by virtue of Enhanced FMAP Measure, the increased FMAP for
9 the State of California for the 18-month recession adjustment period October 1, 2008
10 through December 31, 2010, is 61.59%; and both the defendant Director of Finance and the
11 defendant Director of DHCS have publicly so announced.

12 29. Further, in view of the fact that annual cost is only **\$124.6 million** in State
13 funds to furnish the 9 Medicaid services, the annual savings to the State from the enhanced
14 FMAP funds under the Enhanced FMAP Measure of the Stimulus Act, – which annual
15 savings to the State is estimated by the defendant Director of Finance to be **\$6.6 billion**
16 during the fiscal years 2008-09 and 2009-10, – vastly exceed the annual costs to the State
17 of California to continue the 9 Medicaid services for the unexpired 18-months remainder of
18 the recession adjustment period which ends December 31, 2010.

19 30. By the express provisions of Congress in the purposes clause of § 5000 of the
20 Enhanced FMAP Measure, which provide that the purposes of the Enhanced FMAP
21 Measure is:

22 “(2) To protect and maintain State Medicaid programs during a period of economic
23 downturn, including by helping to avert cuts to provider payment rates and benefits
24 and services,”

25 the acceptance by the State of the enhanced FMAP funds of the Enhanced FMAP Measure
26

1 was and is and subject to an express and implied requirement imposed by Congress, in the
2 purposes clause of §5000 of the Enhanced FMAP Measure: namely, that the State shall
3 protect and maintain the State's Medicaid program including averting cutting any services,
4 (at least, so long as the State enjoys savings from receipt of the enhanced FMAP funds
5 which exceed the cost of the Medicaid services it proposes to cut).

6 **FIRST CLAIM FOR RELIEF**

7 **For injunction against each defendant, to enjoin State action preempted**
8 **under the Supremacy Clause, which threatens injury, (e.g., violation**
9 **of the purposes clause of § 5000(a), Title V, Division B, of the Stimulus**
10 **Act).**

11 31. Each of the plaintiffs refer to the allegations in each of the preceding
12 Paragraphs, and incorporates each of the allegations in the preceding Paragraphs as if fully
13 set forth herein.

14 32. All statutory references are to Title V, Division B, of the Stimulus Act
15 (Public Law 111-5; Page 123, Stat. 115), unless otherwise stated.

16 33. As prior alleged, § 5000(a) provides:

17 “(a) Purposes,—The purposes of this title are as follows:

- 18 (1) To provide fiscal relief to States in a period of economic downturn.
19 (2) To protect and maintain State Medicaid programs during a period of
20 economic downturn, including by helping to avert cuts to provider payment
21 rates and benefits or services . . . ”

22 34. However, despite the aforesaid purposes of Congress expressed in § 5000(a),
23 (1) the State has enacted and has not rescinded Welf. & Inst. Code § 14131.10, and
24 (2) each of the defendant State officials has adopted a policy and will, unless restrained by
25 the Court, implement Welf. & Inst. Code § 14131.10 by eliminating and refusing to pay for
26 any of the 9 Medicaid services, for services rendered on or after July 1, 2009; – which state
statute and the policies and actions of the defendant State officers constitute State action
which is in violation of, hence preempted, under the Supremacy Clause, by the purposes

1 clause of § 5000(a), (which imposes upon the State and its officers the obligation to protect
2 and maintain the State's Medicaid program by averting cuts to services of the program;
3 **especially** when in case at bar, the State is enjoying billions of dollars in savings (of at least
4 **\$3 billion per year**) from the enhanced FMAP funds which vastly exceed the State's costs
5 (which are only **\$129.4 million per year**) to continue the 9 Medicaid services in question).

6 35. As a direct result of the aforesaid enactment of the preempted Welf. & Inst.
7 Code § 14131.10, and of the preempted actions of the defendant State officials to
8 implement this preempted State law, the two plaintiffs who are Medicaid beneficiaries, and
9 the Medicaid beneficiaries who are patients, clients, and members of the other plaintiffs,
10 will suffer and are threatened with irreparable injury; all of which is set forth in Paragraphs
11 50-53 of this First Amended Complaint.

12 36. Each of the plaintiffs hereby refer to and incorporate each of the allegations
13 of Paragraphs 50 through 53 of this First Amended Complaint as if fully set forth herein.

14 WHEREFORE, each of the plaintiffs prays for relief as shall hereinafter be
15 specified:

16 **SECOND CLAIM FOR RELIEF**

17 **For injunction against each defendant, to enjoin State action preempted**
18 **under the Supremacy Clause, which threatens injury, (e.g., violation**
19 **of §§ 5001(f)(3) and 5000(a) of Title V, Division B, of the Stimulus Act).**

20 37. Each of the plaintiffs refer to the allegations in each of the preceding Paragraphs,
21 and incorporates each of the allegations in the preceding Paragraphs as if fully set forth herein.

22 38. All statutory references are to Title V, Division B, of the Stimulus Act (Public Law
23 111-5; Page 123, Stat. 115), unless otherwise stated.

24 39. As prior alleged, subd. (f)(3) of § 5001 provides:

25 “A State is not eligible for an increase in its FMAP under subsection (b) or (c),
26 . . . if any amounts attributable (directly or indirectly) to such FMAP increase are
deposited or credited into any reserve or rainy day fund of the State.”

1 40. However, despite the above provisions of subd. (f)(3) of § 5001, (1) the State
2 has enacted and has not rescinded Welf. & Inst. Code § 14131.10, and (2) each of the
3 defendant State officials has adopted a policy and will, unless restrained by the Court,
4 implement Welf. & Inst. Code § 14131.10 by eliminating and refusing to pay for any of the
5 9 Medicaid services which are furnished on or after July 1, 2009; – which state statute and
6 the policies and actions of the defendant State officers constitute State action which is in
7 violation of, hence preempted, under the Supremacy Clause, by subd. (f)(3) of § 5001 and
8 the purposes for which the aforesaid subd. (f)(3) of § 5001 was enacted to accomplish,
9 (namely to protect and maintain the State's Medicaid program by averting cuts to Medicaid
10 services, as specified by § 5000(a); **especially** when in case at bar, the State is enjoying
11 billions of dollars of savings (of at least **\$3 billion per year**) from the enhanced FMAP
12 funds which vastly exceed the State's costs (which are only **\$129.4 million per year**) to
13 continue the 9 Medicaid services in question).

14 41. The violation of subd. (f)(3) of § 5001 consists of this: that the State and the
15 defendant officers have allowed savings resulting to the State from use of enhanced FMAP
16 funds in the Medicaid program, to sink into the fungible funds of the State of California, to
17 be reserved, used as a rainy day fund, and spent for other purposes; – without using these
18 savings to protect and maintain the State's Medicaid program including averting cuts in
19 Medicaid services, (which is the express purposes under § 5000(a) for which subd. (f)(3) of
20 § 5001 was enacted by Congress to accomplish).

21 42. As a direct result of the aforesaid enactment of the preempted Welf. & Inst.
22 Code § 14131.10, and of the preempted actions of the defendant State officials to
23 implement this preempted State law, the two plaintiffs who are Medicaid beneficiaries, and
24 the Medicaid beneficiaries who are patients, clients, and members of the other plaintiffs,
25 will suffer and are threatened with irreparable injury; all of which is set forth in Paragraphs
26

1 50-53 of this First Amended Complaint.

2 43. Each of the plaintiffs hereby refer to and incorporate each of the allegations
3 of Paragraphs 50 through 53 of this First Amended Complaint as if fully set forth herein.

4 WHEREFORE, each of the plaintiffs prays for relief as shall hereinafter be
5 specified:

6 **THIRD CLAIM FOR RELIEF**

7 **For injunction against each defendant, to enjoin State action preempted**
8 **under the Supremacy Clause, which threatens injury, (e.g., violation**
9 **of §§ 5001(f)(1)(A) and 5000(a) of Title V, Division B, of the Stimulus**
10 **Act).**

11 44. Each of the plaintiffs refer to the allegations in each of the preceding Paragraphs,
12 and incorporates each of the allegations in the preceding Paragraphs as if fully set forth herein.

13 45. All statutory references are to Title V, Division B, of the Stimulus Act (Public Law
14 111-5; Page 123, Stat. 115), unless otherwise stated.

15 46. As prior alleged, subd. (f)(1)(A) of § 5001 provides:

16 “A State is not eligible for an increase in its FMAP under subsection (a), (b),
17 or (c), . . . if eligibility standards, methodologies, or procedures under its
18 State plan under title XIX of the Social Security Act (including any waiver
19 under such title or under section 1115 of such Act (42 U.S.C. 1315) are more
20 restrictive than the eligibility standards, methodologies, or procedures,
21 respectively, under such plan (or waiver) as in effect July 1, 2008.”

22 47. However, despite the above provisions of subd. (f)(1)(A) of § 5001,
23 (1) the State has enacted and has not rescinded Welf. & Inst. Code § 14131.10, and
24 (2) each of the defendant State officials has adopted a policy and will, unless restrained by
25 the Court, implement Welf. & Inst. Code § 14131.10 by eliminating and refusing to pay for
26 any of the 9 Medicaid services, which are furnished on or after July 1, 2009; – which state
statute and the policies and actions of the defendant State officers constitute State action
which is in violation of, hence preempted, under the Supremacy Clause, by subd. (f)(1)(A)

1 of § 5001 and the purposes for which the aforesaid subd. (f)(1)(A) of § 5001 was enacted
2 to accomplish, (namely, to protect and maintain the State's Medicaid program by averting
3 cuts to Medicaid services as specified in § 5000(a); **especially** when in case at bar, the
4 State is enjoying billions of dollars of savings (of at least **\$3 billion per year**) from the
5 enhanced FMAP funds which vastly exceed the State's costs (which are only **\$129.4**
6 **million per year**) to continue the 9 Medicaid services in question).

7 48. The violation of subd. (f)(1)(A) of § 5001 consists of this:

8 **First**, that receipt of enhanced FMAP funds under the Enhanced FMAP Measure of
9 the Stimulus Act on the one hand, but elimination of the 9 Medicaid services which were
10 part of California's state Medicaid plan as of July 1, 2008, on the other hand, violates the
11 express prohibition of subd. (f)(1)(A) of § 5001 against restricting "procedures," (i.e.,
12 against restricting services), in the State's Medicaid program to less than were in effect on
13 July 1, 2008; and,

14 **Second**, to construe the clause of subd. (f)(1)(A) of § 5000 which prohibits
15 restricting "procedures" to less than those which existed on July 1, 2008, so as not to apply
16 to or refer to restricting the 9 Medicaid "services" which existed on July 1, 2008, would be
17 contrary to and would render the express purposes clause of § 5000(a) meaningless and
18 without any force or effect; so that the rules of statutory construction require, in case at bar,
19 that "procedures" as used in subd. (f)(1)(A) be construed so as to mean and include the 9
20 Medicaid "services" which are the subject of this lawsuit.

21 49. As a direct result of the aforesaid enactment of the preempted Welf. & Inst.
22 Code § 14131.10, and of the preempted actions of the defendant State officials to
23 implement this preempted State law, the two plaintiffs who are Medicaid beneficiaries, and
24 the Medicaid beneficiaries who are patients, clients, and members of the other plaintiffs,
25 will suffer and are threatened with irreparable injury; all of which is set forth in Paragraphs
26

1 50-53 below.

2 **FURTHER FACTS COMMON TO ALL CLAIMS**

3 50. Further, as the direct and proximate result of each of the violations of:

4 - § 5000a as alleged in the First Claim for Relief,

5 - §§ 5001(f)(3) and 5000(a) as alleged in the Second Claim for Relief,

6 - §§ 5001(f)(1)(3) and 5000(a) as alleged in the Third Claim for Relief,

7 by each of the defendants, millions of Medicaid beneficiaries in California, including

8 - the plaintiffs Mark Beckwith and Margaret Dowling,

9 - the Medicaid beneficiaries who are patients, clients, or members of the plaintiffs

10 LifeLong Care, the ILC, the CFILC, and SF Gray Panthers, as the case may be, will suffer

11 injury and be threatened with injury by reason and cause of the preempted acts of the

12 defendant State officials which are alleged in each of the preceding First, Second, and

13 Third Claims for Relief, by being unable to obtain, after June 30, 2009, any of the 9

14 Medicaid services consisting of treatment, cure, and relief of pain and suffering from or in

15 respect to:

16 - (1) treatment and cure of, and relief of pain and suffering from, injury, diseases

17 and conditions of their teeth, mouth, jaws, ability to eat, and facial appearance

18 (dentistry); bodily functions and health (acupuncture and chiropractic services);

19 hearing (audiology); speech (speech therapy); sight (optometric and optician

20 services); feet (podiatry); mental health (psychology); and,

21 - (2) treatment and relief of pain and suffering from incontinence, (incontinence

22 creams and washes);

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

25 51. Also, the organizational plaintiffs SF Gray Panthers, ILC, the CFILC, and
26

1 LifeLong Care, will also be irreparably injured by the aforesaid preempted State action of
2 the defendant State officials, which is alleged in each of the First, Second, and Third
3 Claims for Relief, respectively, from interference with their ability to obtain or provide
4 the 9 Medicaid services to or for their members, clients, and patients, as the case may be,
5 after June 30, 2009, due to the elimination of the aforesaid 9 Medicaid services by the
6 defendants.

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

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

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

14 **FOURTH CLAIM FOR RELIEF**

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

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

19 55. Pursuant to each and all of the facts alleged in the preceding Paragraphs of
20 this Complaint, there exists an actual controversy between the plaintiffs and the
21 defendants, in respect to which a declaratory judgment should be issued.

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

25 WHEREFORE, each of the plaintiffs respectfully pray for judgment as follows:

26 //

1 **On All Claims for Relief:**

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

4 **On each of the First, Second, Third, and Furth Claims for Relief:**

5 2. That the Court find that (1) the plaintiffs Mark Beckwith and Margaret
6 Dowling, who are Medicaid beneficiaries, and (2) the Medicaid beneficiaries who the
7 patients, clients, and members of the other four plaintiffs, as the case may be, will be
8 injured and harmed and are threatened with injury and harm, which is irreparable, from
9 State action by each and all of the defendant State officials in each of the First, Second, and
10 Third Claims for Relief, which is contrary to, hence preempted under the Supremacy
11 Clause, by a contrary federal statute, to wit:

12 - § 5000(a), Title V, Division B of the American Recovery and Reinvestment Act of
13 2009, (Public Law 111-5; Page 123, Stat. 115) (“ARRA”), in respect to the First Claim for
14 Relief;

15 - §§ 50001(f)(3) and 5000(a), Title V, Division B, ARRA, in respect to the Second
16 Claim for Relief;

17 - §§ 5001(f)(1)(A) and 5000(a), Title V, Division B, ARRA, in respect to the Third
18 Claim for Relief;

19 - §§ 5000(a), 5001(f)(1)(A), and 5001(f)(3), Title V, Division B. ARRA, in respect
20 to the Fourth Claim for Relief;

21 3. That the defendants and each of them be ordered by a temporary restraining
22 order, preliminary injunction, and permanent injunction:

23 A. To refrain from implementing California Welf. & Inst. Code § 14131.10,
24 including without limitation thereby to refrain from eliminating:

25 //

26

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

11 (herein the “9 Medicaid services”), rendered on or after July 1, 2009 in California's
12 Medicaid program;

13 B. To refrain from refusing to pay established Medicaid rates to providers of these 9
14 Medicaid services which are furnished on and after July 1, 2009; and,

15 C. To do all acts necessary to affirmatively use and deploy the savings to the State of
16 California from the temporary increase of Federal Medical Assistance Percentage (FMAP)
17 payments to the State of California under §§ 5000 - 5004, Title V, Division B, of the ARRA, to
18 protect and maintain California's Medicaid program including averting cuts to Medicaid provider
19 payment rates, benefits, and services under the Medicaid Act, (42 U.S.C. § 1396 et seq.); including
20 but not limited to paying Medicaid providers the established rates for furnishing the 9 Medicaid
21 services to Medicaid beneficiaries in California on or after July 1, 2009; and,

22 D. To do all things necessary to reinstate and continue the 9 Medicaid services in the
23 State's Medicaid program, for the duration of the remainder of the recession adjustment period of
24 July 1, 2009 to December 31, 2010; including, without limitation thereby, making timely requests
25 to the Secretary of the U.S. Department of Health and Human Services to obtain all approvals, if
26 necessary, to continue the 9 Medicaid services in the state Medicaid plan and program.

 4. That the defendants and each of them be ordered to comply with the terms of the
temporary restraining order, preliminary injunction, permanent injunction, or declaratory judgment

1 as the case may be, within a reasonable date set by the Court, or cease receiving or accepting, on
2 and after that date, any more enhanced FMAP funds from the federal government pursuant to or
3 under Title V, commencing with § 5000, of Division B, of the ARRA; and, notify the Secretary of
4 the U.S. Department of Health and Human Services that the State of California (1) will no longer
5 accept any extra FMAP payments under the ARRA, and (2) will return to the federal
6 government all the extra FMAP payments which the State of California has received from
7 the federal government, since the date that the State of California first began to receive
8 such extra FMAP payments, under the ARRA.

9 **On the Fourth Claim for Relief:**

10 5. That if and only if the Court denies injunctive relief, and to the extent that the
11 Court does not grant injunctive relief, that the Court nevertheless issue its declaratory
12 judgment in which it finds and adjudicates the rights and duties of the parties to be as set
13 forth in Paragraphs 3 and 4 of this Prayer for Relief.

14 **On all Claims for Relief:**

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

18 Dated: June 29, 2009

19

LYNN S. CARMAN
JESSIE M. SANDOVAL

20

21

By /s/ Lynn S. Carman
Attorneys for Plaintiffs

22

23

24

25

26