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 LODGED

1 LLOYD A. BOOKMAN (State Bar No. 89251)
 BYRON J. GROSS (State Bar No. 76626)
 2 JORDAN B. KEVILLE (State Bar No. 217868)
HOOPER, LUNDY & BOOKMAN, INC.
 3 1875 Century Park East, Suite 1600
 Los Angeles, California 90067-2517
 4 Telephone: (310) 551-8111
 Facsimile: (310) 551-8181
 5 E-Mail: jkeville@health-law.com

6 CRAIG J. CANNIZZO (State Bar No. 70379)
 FELICIA Y SZE (State Bar No. 233441)
 7 **HOOPER, LUNDY & BOOKMAN, INC.**
 575 Market Street, Suite 2300
 8 San Francisco, CA 94105
 Telephone: (415) 875-8500
 9 Facsimile: (415) 875-8519
 E-Mail: ccannizzo@health-law.com

10 Attorneys for Intervenors
 11 SACRAMENTO FAMILY MEDICAL
 CLINICS, INC., THEODORE M.
 12 MAZER, M.D., EASTERN PLUMAS
 HEALTH CARE DISTRICT, PIONEERS
 13 MEMORIAL HEALTH CARE
 DISTRICT, KAWEAH DELTA HEALTH
 14 CARE DISTRICT, RONALD B. MEAD,
 D.D.S., and ACACIA ADULT DAY
 15 SERVICES

HOOPER, LUNDY & BOOKMAN, INC.
 1875 CENTURY PARK EAST, SUITE 1600
 LOS ANGELES, CALIFORNIA 90067-2517
 TEL: (310) 551-8111 • FAX: (310) 551-8181

17 **UNITED STATES DISTRICT COURT**
 18 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

20 INDEPENDENT LIVING CENTER
 OF SOUTHERN CALIFORNIA, et al. ,

21 Petitioners,

22 vs.

23 SANDRA SHEWRY, Director of the
 24 Department of Health Care Services of
 the State of California, et al.,

25 Respondents.

26 SACRAMENTO FAMILY MEDICAL
 27 CLINICS, INC., et al.,

28 Intervenors,

CASE NO. CV 08-3315 CAS (MANx)
COMPLAINT IN INTERVENTION

1 By leave of court, Intervenors Sacramento Family Medical Clinics, Inc.,
2 Theodore M. Mazer, M.D., Eastern Plumas Health Care District, Pioneers Memorial
3 Health Care District, Kaweah Delta Health Care District, Ronald B. Mead, D.D.S.,
4 and Acacia Adult Day Services (collectively, "Intervenors") file this complaint and
5 thereby intervenes in this action. Intervenors join with Petitioners Independent
6 Living Center of Southern California, *et al.* in challenging the validity of an across-
7 the-board ten percent reduction in reimbursement rates for health care services
8 provided to beneficiaries of California's Medicaid program, Medi-Cal, which
9 Respondent Sandra Shewry, Director of the California Department of Health Care
10 Services ("Department" or "DHCS") and DHCS are responsible for implementing,
11 alleging as follows:

12 **INTRODUCTION**

13 1. Medi-Cal is a major component of the "safety net" that ensures the
14 State's poor have access to health care services. Unfortunately for those who
15 depend on it to access basic healthcare services, the low rates at which the State
16 currently pays providers to care for Medi-Cal patients have created a gaping hole in
17 that net. Health care providers of virtually every type have been steadily leaving the
18 Medi-Cal program or scaling back services because the rates they are being paid are
19 not even sufficient to cover the costs they incur in providing services. The exodus
20 of providers from the program is leaving massive numbers of Californians without
21 access to critical services or is forcing them to obtain care in the already over-
22 crowded and increasingly scarce emergency departments of hospitals throughout the
23 state. Despite this disturbing state of affairs, California has decided to reduce Medi-
24 Cal rates again, without regard to the impact of these reductions.

25 2. On January 10, 2008, California Governor Arnold Schwarzenegger
26 issued a Fiscal Emergency Proclamation pursuant to Section 10(f) of Article IV of
27 the Constitution of the State of California, at the same time he proposed his budget
28 for fiscal year 2008-09. The Governor determined that the General Fund revenues

HOOPER, LUNDY & BOOKMAN, INC.
1875 CENTURY PARK EAST, SUITE 1600
LOS ANGELES, CALIFORNIA 90067-2517
TEL: (310) 551-8111 • FAX: (310) 551-8181

HOOPER, LUNDY & BOOKMAN, INC.
1875 CENTURY PARK EAST, SUITE 1600
LOS ANGELES, CALIFORNIA 90067-2517
TEL: (310) 551-8111 • FAX: (310) 551-8181

1 for fiscal Year 2007-08 will decline substantially below the estimate of General
2 Fund revenues upon which the 2007 Budget Bill was based. Accordingly, the
3 Governor declared a fiscal emergency based on the projected budget imbalance and
4 insufficient cash reserves for Fiscal Year 2007-08 and the projected insufficient cash
5 reserves and potential budgetary and cash deficit in Fiscal Year 2008-09. The
6 Governor caused the Legislature to assemble in special session to address the fiscal
7 emergency.

8 3. On February 16, 2008, the California Legislature enacted Assembly
9 Bill X3 5 ("AB 5") in special session. Section 14 of said Act added Section
10 14105.19 to the Welfare and Institutions Code, which provides in relevant part, as
11 follows:

12 (a) Notwithstanding any other provision of law, in order to
13 implement changes in the level of funding for health care services, the
14 director shall reduce provider payments as specified in this section.

15 (b)(1) Except as provided in subdivision (c), payments shall be reduced
16 by 10 percent for Medi-Cal fee for service benefits for dates of service
17 on or after July 1, 2008

18

19 (e) Notwithstanding Chapter 3.5 (commencing with section 11340)
20 of Part 1 of Division 3 of Title 2 of the Government Code, the
21 department may implement this section by means of provider bulletin,
22 or similar instruction, without taking regulatory action.

23

24 (g) The department shall promptly seek any necessary federal
25 approvals for the implementation of this section.

26 4. Pursuant to paragraph (b)(1) of Welfare and Institutions Code §
27 14105.19, payments under the Medi-Cal fee for service program for physicians,
28 dentists, pharmacies, ADHCs, clinics, health systems and other providers will be
reduced by ten percent for services provided on or after July 1, 2008. The rate
reduction will also impact inpatient services furnished by noncontract hospitals,
outpatient services furnished by all hospitals, and skilled nursing services provided
in distinct part units of hospitals [hereinafter "DP/NF services"].

1 5. Pursuant to section 15 of AB 5, the Legislature also enacted Welfare
2 and Institutions Code § 14166.245, which reduces payments to noncontract hospitals
3 for inpatient services furnished on or after July 1, 2008, by ten percent. This is
4 accomplished by reducing interim payments for inpatient hospital services furnished
5 by noncontract hospitals on or after July 1, 2008, by ten percent, and by limiting the
6 final reimbursement for each patient day of inpatient hospital services furnished on
7 or after July 1, 2008, to 90% of the hospital's audited allowable cost per day.

8 6. The rate and payment reductions set forth in Welfare and Institutions
9 Code sections 14105.19(b)(1) and 14166.245 are referred to herein as "the Ten
10 Percent Rate Reduction."

11 **PROCEDURAL BACKGROUND**

12 7. On April 22, 2008, Petitioners in the above-entitled action filed a
13 Verified Petition for Writ of Mandamus ("Petition") in the Superior Court of the
14 County of Los Angeles against the Respondents to challenge the validity of the Ten
15 Percent Rate Reduction.

16 8. The Petition alleges in pertinent part that the Ten Percent Rate
17 Reduction violates the Supremacy Clause of the United States Constitution because
18 it conflicts with 42 United States Code ("U.S.C.") § 1396a(a)(30)(A), which is part
19 of the federal Medicaid Act, and the Americans with Disabilities Act ("ADA"). The
20 Petition also alleges a separate claim under the ADA, independent of the Supremacy
21 Clause.

22 9. The Petition seeks an injunction preventing from Respondents from
23 implementing the Ten Percent Rate Reduction, attorneys' fees and costs.

24 10. Respondents removed Petitioner's action from state to federal court on
25 May 19, 2008. Petitioners did not seek to have the case remanded to state court.

26 11. On May 30, 2008, Petitioners filed a notice of motion and motion for a
27 preliminary injunction to prevent the Respondents from implementing the Ten
28 Percent Rate Reduction on July 1, 2008 on the grounds that Petitioners had a

HOOPER, LUNDY & BOOKMAN, INC.
1875 CENTURY PARK EAST, SUITE 1600
LOS ANGELES, CALIFORNIA 90067-2517
TEL: (310) 551-8111 • FAX: (310) 551-8181

HOOPER, LUNDY & BOOKMAN, INC.
1875 CENTURY PARK EAST, SUITE 1600
LOS ANGELES, CALIFORNIA 90067-2517
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1 substantial likelihood of prevailing on their legal claims that the Ten Percent Rate
2 Reduction conflicts with Section 30(A) and that, if not enjoined, the Ten Percent
3 Rate Reduction would result in irreparable harm to the Petitioners, other Medi-Cal
4 providers and Medi-Cal beneficiaries.

5 12. On June 25, 2008, this Court issued an order denying Petitioners'
6 motion for a preliminary injunction on the grounds that Petitioners did not establish
7 a likelihood of prevailing on its legal claims. Relying on the case of *Sanchez v.*
8 *Johnson*, 416 F.3d 1051 (9th Cir. 2005), the Court concluded that Section 30(A) is
9 not privately enforceable in federal court through the Supremacy Clause or any
10 other procedural vehicle. The Court did not reach the issue of whether the
11 Petitioners had adequately shown that the Ten Percent Rate Reduction would cause
12 irreparable harm.

13 13. Petitioners immediately appealed the Court's ruling on the motion for
14 preliminary injunction to the Court of Appeals for the Ninth Circuit. By order dated
15 July 16, 2008, the Ninth Circuit reversed the Court's decision, holding that the
16 Supremacy Clause does provide a vehicle for enforcement of federal laws such as
17 Section 30(A) and remanded the matter back to the this Court for further
18 proceedings.

19 14. Upon remand, Petitioners' motion for preliminary injunction again
20 came before the Court on August 1, 2008. The Court entertained argument from
21 both Petitioners and Respondents and thereafter took the matter under submission.

22 15. On August 18, 2008, the Court issued an order granting in part the
23 Petitioners' motion for preliminary injunction. The Court ordered the Respondents
24 to refrain from enforcing and otherwise implementing the Ten Percent Rate
25 Reduction authorized pursuant to California Welfare and Institutions Code section
26 14105.19(b)(1) with respect to Medi-Cal payments for services provided on or after
27 July 1, 2008. The Court specifically declined to grant any relief from the Ten
28 Percent Rate Reduction authorized pursuant to California Welfare and Institutions

1 Code section 14166.245(c) with respect to Medi-Cal payments for acute inpatient
2 services provided by "non-contract" acute care hospitals.

3 16. On August 22, 2008, Petitioners filed an Ex Parte Application for Order
4 to Show Cause re: Contempt against Respondents for failure to comply with this
5 court's preliminary injunction. On August 25, 2008, this court scheduled a hearing
6 on that Application on August 28, 2008. On August 28, 2008, this court scheduled
7 an additional hearing on the issue of contempt on September 5, 2008.

8 17. On August 25, 2008, Respondents filed a Motion to Stay the Court's
9 August 18, 2008 Order Pending Appeal. On August 26, 2008, Respondents filed a
10 Notice of Appeal on the preliminary injunction to the Ninth Circuit.

11 18. On August 27, 2008, Respondents filed a Motion to Alter or Amend,
12 and Clarify Order Granting In Part Petitioners' Motion for Preliminary Injunction.
13 The hearing on that Motion is scheduled for August 15, 2008.

14 **INTERVENORS AND THEIR INTEREST IN THIS LITIGATION**

15 19. Intervenor Sacramento Family Medical Clinics, Inc. ("SFMC") is a
16 corporation incorporated in the State of California with a primary business address
17 of 3441 Marysville Boulevard, Sacramento, CA 95838. SFMC is a wholly owned
18 professional corporation, owned and operated by Dr. Gilbert Simon, a physician
19 licensed in the State of California. Dr. Simon has been practicing medicine for the
20 last 20 years as a Pediatrician and Medical Director of the SFMC. Since 1989, the
21 SFMC has focused entirely on providing primary care services to the Medi-Cal
22 insured community of the Greater Sacramento area. SFMC currently has nine
23 clinics and 20 providers. Nearly all the patients served by the nine clinics are
24 insured by Medi-Cal, including through the fee-for-service program. If the 10% rate
25 reduction is implemented, SFMC will not be able to continue to operate it currently
26 does, forcing it or Dr. Simon to potentially borrow money, consolidate clinics or
27 eliminate staff. SFMC also does business as the Hmong New Life Health Center
28 and the Del Paso Heights Medical Center.

HOOPER, LUNDY & BOOKMAN, INC.
1875 CENTURY PARK EAST, SUITE 1600
LOS ANGELES, CALIFORNIA 90067-2517
TEL: (310) 551-8111 • FAX: (310) 551-8181

HOOPER, LUNDY & BOOKMAN, INC.
1875 CENTURY PARK EAST, SUITE 1600
LOS ANGELES, CALIFORNIA 90067-2517
TEL: (310) 551-8111 • FAX: (310) 551-8181

1 20. Intervenor Theodore M. Mazer, M.D., is an individual and a physician
2 licensed in the State of California, with a business address of 6699 Alvarado Road,
3 Suite 2209, San Diego, CA 92120. Dr. Mazer has practiced medicine for the last 20
4 years as an Otolaryngologist (Ear Nose and Throat surgeon) in San Diego, as a
5 private, solo practice physician. Dr. Mazer provides medical services to Medi-Cal
6 patients, both through the fee-for-service program and managed care. Dr. Mazer has
7 served the Medi-Cal population for approximately twenty years because of his
8 personal commitment to ensuring access to medical services for the different
9 segments of our communities. As a result of the Ten Percent Rate Reduction, Dr.
10 Mazer has directed his staff to turn away new patients for Medi-Cal fee-for-service,
11 or any other plans that reduce payment below existing Medi-Cal rates as of June 30,
12 2008. At this time, Dr. Mazer intends to continue to care for his current patients
13 who are insured by Medi-Cal.

14 21. Intervenor Eastern Plumas Health Care District ("Eastern Plumas") is a
15 political subdivision of the State of California. Eastern Plumas provides the only
16 medical services available for virtually all of Eastern Plumas and Sierra Counties in
17 northeastern California. Eastern Plumas operates two hospitals with campuses in
18 Plumas and Sierra Counties with a total of 76 beds, of which 67 are devoted
19 exclusively to distinct part skilled nursing patients. Among the other health care
20 services provided by Eastern Plumas are four rural health clinics and the only
21 emergency room and ambulance services available in Eastern Plumas and Sierra
22 Counties. Eastern Plumas is heavily dependent on government health care benefit
23 programs, including Medi-Cal for revenue. Approximately 70% of the patients
24 serviced by Eastern Plumas are either Medi-Cal or Medicare beneficiaries. In fact,
25 nearly every distinct part skilled nursing patient Eastern Plumas treats at its two
26 hospital campuses are beneficiaries of the Medi-Cal program. Due to its
27 dependence on Medi-Cal reimbursement and the increasing costs of providing
28 health care services, Eastern Plumas is currently not a financially viable

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TEL: (310) 551-8111 • FAX: (310) 551-8181

1 organization. If it goes forward, the Medi-Cal rate reduction enacted in 2008 will
2 cause Eastern Plumas to significantly reduce services available Medi-Cal and other
3 patients and potentially cause the financial failure of the district altogether.

4 22. Intervenor Pioneers Memorial Health Care District ("Pioneers") is a
5 political subdivision of the State of California. Pioneers operates several health care
6 facilities in Brawley, California and other areas of Imperial County, which is in the
7 southern most portion of California, close to the Mexican border. One of the
8 facilities Pioneers operates in Pioneers Memorial Hospital ("PMH"), which is a 107
9 bed general acute care hospital. PMH offers a comprehensive range of inpatient and
10 outpatient services, including intensive care, cardiopulmonary care and surgery.
11 PMH also offers a 24 hour-per-day emergency department. Approximately 35% of
12 the patients PMH treats are Medi-Cal beneficiaries. In particular, a majority of the
13 services PMH furnishes in the outpatient setting are for the benefit of Medi-Cal
14 patients. As such, Pioneers is dependent on Medi-Cal reimbursement to fund the
15 operations of PMH and other facilities. Due in large part to already low Medi-Cal
16 reimbursement rates, Pioneers is already in a financially vulnerable position.
17 Pioneers is projecting that, if the Medi-Cal rate reduction goes forward, it will result
18 in nearly \$2.2 million in annual losses for the district. In anticipation of these
19 losses, before the rate reduction even went into effect, Pioneers was forced to shut
20 down two outpatient clinics and is attempting to sell a third. The rate reduction may
21 require even further reductions in the services offered in Pioneers.

22 23. Intervenor Kaweah Delta Health Care District ("Kaweah") is a political
23 subdivision of the State of California. Kaweah is governed by an elected board of
24 directors and derives a small amount of income from local tax revenues. All other
25 funding for the district comes from patient care operations. The mission of Kaweah
26 is to provide high quality, customer oriented and financially strong health care
27 services to the residents of Visalia, California and its surrounding communities. In
28 furtherance of this mission, Kaweah operates four health care facilities, including

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1 Kaweah Delta Hospital ("KDH"). KDH is a 495 bed general acute care hospital that
2 provides a broad range of both inpatient and outpatient services, including among
3 other things, cardiac care, oncology orthopedics and mental health services. KDH
4 also operates a distinct part skilled nursing unit and a subacute unit. KDH has is
5 enrolled to participate in the Medi-Cal and treats a significant number of Medi-Cal
6 beneficiaries. Nearly 25 % of the inpatients treated as KDH are Medi-Cal
7 beneficiaries. The utilization of KDH's outpatient services by Medi-Cal patients is
8 similar. In contrast, virtually every patient treated in the facility's subacute unit is a
9 Medi-Cal beneficiary. As such, Kaweah is heavily dependent on Medi-Cal
10 reimbursement to fund operations at KDH. At present, Kaweah does not have a
11 contract with the California Department of Health Care Services for inpatient care
12 rendered to Medi-Cal beneficiaries.

13 24. Ronald B. Mead, DDS ("Dr. Mead") is an individual and a dentist
14 practicing San Luis Obispo, California. Dr. Mead has been licensed to practice
15 dentistry in California since approximately 1973. He specializes in oral and
16 maxillofacial surgery. Dr. Mead currently operates and office with two other
17 dentists. Among the patients that Dr. Mead and his partners service are Medi-Cal
18 beneficiaries. The services that Dr. Mead provides to Medi-Cal beneficiaries
19 include examination and diagnoses, performance of certain types of tests,
20 prescription of medications and other treatments like biopsies and extractions.
21 Other than his partners, Dr. Mead is not aware of another maxillofacial surgeon
22 within 100 miles of San Luis Obispo that services Medi-Cal patients. Dr. Mead has
23 continued to treat Medi-Cal beneficiaries despite the fact that the reimbursement
24 rates offered by Medi-Cal for dental services are not sufficient to cover the costs he
25 incurs. An additional reduction in Medi-Cal payments will make it effectively
26 impossible for Dr. Mead to continue to treat Medi-Cal patients. As such, since the
27 State of California has implemented a 10% reduction in Medi-Cal payments, Dr.
28 Mead has discontinued seeing Medi-Cal patients. Dr. Mead will resume treating

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TEL: (310) 551-8111 • FAX: (310) 551-8181

1 Medi-Cal patients if the 10% reduction in payment rates is eliminated.

2 25. Intervenor Acacia Adult Day Services ("AADS") is a non-profit
3 organization incorporated in the State of California. AADS is licensed by the State
4 of California to operate an ADHC located at 11391 Acacia Parkway, Garden Grove,
5 California. ADHCs provide intensive day services through a multi-disciplinary
6 team of health and social services professionals to frail elderly and disabled persons,
7 in order to maintain their ability to reside in the community. In operation for almost
8 29 years, AADS is viewed as a model program for Alzheimer's care and services for
9 frail elders and disabled adults. AADS currently serves 163 participants, all of
10 whom have complex, fragile medical conditions. The majority of these participants
11 are insured by Medi-Cal, including Medi-Cal fee-for-service. On October 13, 2007,
12 AADS had to close a second ADHC site due to an inadequate Medi-Cal
13 reimbursement, the tremendous costs of getting the center licensed, the costs of
14 meeting all of the regulations during the process of growing the census, and finally
15 the sudden and lengthy delay of Medi-Cal payments during the 2007 state budget
16 crisis. Since AADS is dependent on Medi-Cal reimbursement for the majority of
17 our participants, any change to the reimbursement or cash flow has an immediate
18 impact on its financial status. Without an increase in the ADHC Medi-Cal
19 reimbursement rate in August, 2007, AADS was unable to fully cover our financial
20 losses, causing an estimated June 30 year end deficit for 2007-08 of \$100,000. As a
21 result of the Ten Percent Rate Reduction, AADS will lose an additional \$140,000 in
22 Medi-Cal funding. The changes in Medi-Cal reimbursement, along with the
23 scheduled deferral by the State of our Medi-Cal reimbursement in August, will put
24 AADS in the position of having no other alternative but to close.

25 26. Intervenors may, with leave of Court, intervene as of right or,
26 alternatively, permissively in this matter pursuant to Federal Rule of Civil Procedure
27 ("F.R.C.P.") 24(a) & (b).

28 27. Intervenors have a right to intervene in this action because they have a

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1 "significantly protectable" interest in this litigation as health care providers that
2 participate in the Medi-Cal program who otherwise will be impacted by the Ten
3 Percent Rate Reduction. Each of the Intervenors participates in the Medi-Cal
4 program and provide services that are subject to the Ten Percent Rate Reduction.
5 Intervenors need to prevent Medi-Cal payment rates from being further reduced in
6 order to ensure that they can continue to provide quality services to Medi-Cal
7 beneficiares. Each Intervenor has a direct interest in this litigation as they will
8 pecuniarily be impacted by the outcome of this litigation. Moreoever, as each of the
9 Intervenors are part of the healthcare safety net providing care to poor and indigent
10 patients, they will be directly impacted by an increased demand for their services
11 from Medi-Cal patients as other providers pull out of the Medi-Cal program as a
12 result of the Ten Percent Rate Reduction. Lastly, each of the Intervenors treats
13 Medi-Cal beneficiaries who are directly impacted as their access to quality services
14 declines as a result of the Ten Percent Rate Reduction and have standing to assert
15 their patients' interests.

16 28. Adjudication of the Petitioners' claims with the participation of the
17 Intervenors will impede the ability of the Intervenors to protect their interest in
18 adequate Medi-Cal reimbursement rates. If this Court ultimately finds that the Ten
19 Percent Rate Reduction is lawful, or finds that the Ten Percent Rate Reduction is
20 lawful with respect to some categories of providers, but not others, Intervenors will
21 be unable to protect their interests in adequate Medi-Cal reimbursement for the
22 services they provide.

23 29. The Intervenors' interests are not adequately represented by the parties
24 to this litigation. The current Petitioners in this litigation are either Medi-Cal
25 beneficiaries, beneficiary groups or pharmacists and do not include physicians,
26 dentists, adult day health care centers or hospitals. As such, the Petitioners are
27 unlikely to have access to evidence relating to the impact of low Medi-Cal
28 reimbursement rates on physicians, dentists, adult day health care centers and

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1 hospitals. Intervenors, on the other hand, have access to such information. Further,
2 there are arguments as to why the Ten Percent Rate Reduction conflicts with Section
3 30(A) that are specific different provider types, such as hospitals, that do not apply
4 with respect to pharmacy services.

5 30. In the alternative, as demonstrated above, Intervenors should be
6 permitted to permissively intervene. Intervenors' involvement will not expand the
7 issues in this case as Intervenors are challenging the lawfulness of the Ten Percent
8 Rate Reduction on grounds raised by the Petitioners. Intervenors' claims are
9 identical to the Petitioners' claims and therefore, raise all the same questions of law
10 (e.g., whether AB 5 is preempted by 42 U.S.C. § 1396a(a)(30)(A)) and many
11 overlapping questions of fact (e.g., whether the Respondents relied on responsible
12 cost studies as a basis for its rate setting).

13 31. Adjudication of the Intervenors' interests will not delay or prejudice the
14 adjudication of the rights of the original parties to this action. This action is in the
15 early stages, as no settlements have yet been made and no issues in this case have
16 yet been finally adjudicated. As Intervenors' claims raise questions of law and fact
17 in common with those of the existing parties, Intervenors will not bring any new
18 issues to this case or expand the scope of the case. The participation of the
19 Intervenors will benefit this court by giving the court this supplemental briefing and
20 evidence for its consideration. For example, declarations from some of the
21 Intervenors were submitted in support of Petitioners' motion for preliminary
22 injunction adjudicated by this court. If Intervenors become parties to the case, the
23 Respondents will have a greater opportunity to further question the declarants who
24 are among the Intervenors.

25 32. Medi-Cal providers, such as Intervenors, are in a unique position to
26 advance the interests of Medi-Cal beneficiaries. Intervenors have an extremely
27 close relationship with their Medi-Cal beneficiary patients who seek that care. A
28 Medi-Cal beneficiary cannot secure medical services without his/her health care

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LOS ANGELES, CALIFORNIA 90067-2517
TEL: (310) 551-8111 • FAX: (310) 551-8181

1 providers, and without reimbursement by Medi-Cal for those services.

2 33. Medi-Cal providers, such as Intervenors, are better positioned and
3 informed as to the impact of a reimbursement rate cut on the services they intend to
4 provide. Medi-Cal beneficiaries lack information about the effect of Medi-Cal
5 reimbursement rates on providers in light of providers' costs and the further effect of
6 a rate cut on the provision of services to Medi-Cal beneficiaries. Providers know
7 the relationship of reimbursement to service and to their costs. As compared to
8 beneficiaries, providers are in a better position to evaluate the State's decisional
9 process and the data relied upon by the State in determining reimbursement rates.
10 This informational hurdle is sufficient to confer standing on providers, who
11 comprise substantial portions of Petitioner's membership, to assert the interests of
12 their patients who are Medi-Cal beneficiaries.

13 34. Furthermore, Medi-Cal beneficiaries face economic hindrances to their
14 ability to assert their own rights in this case. To qualify for Medi-Cal, an individual
15 must demonstrate financial need for medical assistance from the State. In light of
16 their finances and the cost of litigation, Medi-Cal beneficiaries may not be able to
17 effectively protect their interests.

18 **CLAIMS AND DEFENSES**

19 35. Intervenors join in the First Cause of Action set forth in Petitioners
20 Independent Living Centers of Southern California, et al.'s Petition for Writ of
21 Mandamus, which is for preemption by the Supremacy Clause of the Ten Percent
22 Rate Reduction for violation of Section 30(A).

23
24 WHEREFORE, Intervenors pray for judgment as follows:

25 1. For an Order permanently enjoining Respondents from effectuating the
26 Medi-Cal rate reduction imposed by Welfare and Institutions Code §§ 14105.19 and
27 14166.245 or reducing to any degree the Medi-Cal rates for health care services that
28 are affected by Welfare and Institutions Code §§ 14105.19 and 14166.245;

- 1 2. For the costs of suit, including reasonable attorneys' fees; and
- 2 3. Such other and further relief that the court deems just and proper.
- 3

4 DATED: August 27, 2008

HOOPER, LUNDY & BOOKMAN, INC.

5
 6 By: 
 CRAIG J. CANNIZZO

7 Attorneys for Intervenors SACRAMENTO
 8 FAMILY MEDICAL CLINICS, INC.,
 9 THEODORE M. MAZER, M.D., EASTERN
 10 PLUMAS HEALTH CARE DISTRICT,
 11 PIONEERS MEMORIAL HEALTH CARE
 12 DISTRICT, KAWEAH DELTA HEALTH
 13 CARE DISTRICT, RONALD B. MEAD,
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 TEL: (310) 551-8111 • FAX: (310) 551-8181