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CLERK OF DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
FURNACINGS

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CALIFORNIA MEDICAL
TRANSPORTATION ASSOCIATION,
INC.,
Plaintiff,

Civil No.
CV 08-07046 ODW JTLX

-vs.-

COMPLAINT FOR INJUNCTION
AND DECLARATORY RELIEF

SANDRA SHEWRY, Director of
Department of Health Care Services
of the State of California, and DOES 1
through 50,
Defendants.

1 The plaintiff CALIFORNIA MEDICAL TRANSPORTATION
2 ASSOCIATION, INC., complains of the Defendant SANDRA SHEWRY, Director of
3 Department of Health Care Services of the State of California, and DOES 1 through 50,
4 and claims for relief alleges:

5 **INTRODUCTION**

6 1. Plaintiff challenges:

7 - (1) the validity of an across-the-board ten percent reduction, ("Ten Percent Rate
8 Reduction") under Assembly Bill X3 5 ("AB 5"), in reimbursement rates to
9 providers of non-emergency medical transportation ("NEMT") services to
10 beneficiaries of California's Medicaid ("Medi-Cal") fee-for-service ("FFS")
11 program, furnished on or after July 1, 2008, and,

12 - (2) the validity of an across-the-board one percent reduction, under Assembly
13 Bill ("AB") 1183, in reimbursement rates to providers of NEMT services to
14 beneficiaries of the Medi-Cal FFS program, furnished on or after March 1, 2009,

15 which Defendant Sandra Shewry, Director of the California Department of Health Care
16 Services is responsible for implementing under AB 5, AB 1183, and Welf. & Inst. Code
17 14105.

18 **Jurisdiction and venue**

19 2. The Court has jurisdiction under 28 U.S.C. § 1331. *Shaw v. Delta Air*
20 *Lines, Inc.*, 463 U.S. 85, 96 n.4 (1983).

21 3. The actions of the Defendant complained were and will be done in all parts
22 of the state of California, including the County of Los Angeles. The injuries which are
23 inflicted and threatened which are complained of, to Plaintiff, its members who are
NEMT providers, and their patients in the Medi-Cal FFS program, have occurred and are

1 threatened to occur in all parts of the state of California, including the County of Los
2 Angeles. The Defendant has an office in the County of Los Angeles.

3 **Parties**

4 4. The plaintiff CALIFORNIA MEDICAL TRANSPORTATION
5 ASSOCIATION, INC. ("Plaintiff CMTA") is a California nonprofit corporation, whose
6 principal place of business is Sacramento, California, and does business throughout
7 California, including the County of Los Angeles, California.

8 5. (a) The purposes of Plaintiff CMTA, as set forth in its articles of
9 incorporation, are to promote and protect the interests of all medical transportation
10 providers in the State of California.

11 (b) As of January 1, 2008, Plaintiff CMTA had 23 members throughout the
12 State of California, each of whom furnished non-emergency medical transportation
13 ("NEMT") services in the Medi-Cal FFS program. Since the effective date of the July
14 1, 2008 of AB 5, five members of Plaintiff CMTA who were NEMT providers were
15 forced to close business due to the ten percent rate reduction of AB 5.

16 6. The Defendant SANDRA SHEWRY ("Director") is the director of the
17 California Department of Health Care Services, ("the Department"). The Director is
18 exclusively empowered by §§ 14100.1 and 14105 California Welfare & Institutions
19 ("Welf. & Inst.") Code to set all policies, rules, and regulations in the Medi-Cal program,
20 including setting all rates payable to Medi-Cal providers, including NEMT providers.
21 The Director is sued in her official capacity only.

22 7. The Defendants DOES 1 through 50 are persons whose identity and
23 capacities are unknown to Plaintiff CMTA, who for that reason sues them by such
fictitious names. Plaintiff CMTA prays leave to amend this complaint when the identify
of any of these Does 1 through 50 become known to counsel.

1 8. Plaintiff CMTA is a corporate citizen and resident of the State of
2 California, and sues herein on its own behalf, in its own interest, and the interest of its
3 members, as well as also on behalf of the public of the State of California, and of the
4 Medi-Cal beneficiary patients of the members of the Plaintiff CMTA to procure the
5 performance of public duty by the defendant public officials: namely the performance of
6 the mandatory public duty of the Director, under and pursuant to the Supremacy Clause,
7 not to injure Medi-Cal beneficiaries and their providers, including NEMT providers, in
8 the Medi-Cal FFS program, by (1) implementing the federally preempted Ten Percent
9 Rate Reduction of AB 5, and by (2) implementing the federally preempted One Percent
10 Rate Reduction of AB 1183, -- which aforesaid actions of the Director are preempted,
11 under the Supremacy Clause, in that the aforesaid actions violate and are hence contrary
12 to 42 U.S.C. § 1396a(a)(30)(A), -- "Sec. 30A," -- including the quality and equal access
13 clauses of Sec. 30A.

14 9. Plaintiff CMTA also sues in a prudential *jus tertii* capacity to assert
15 (1) the interests of its members, each of whom is a NEMT provider in the Medi-Cal FFS
16 program as well as (2) the interests of the Medi-Cal patients of the members of Plaintiff
17 CMTA, in the claims for relief, and Supremacy Clause preemption, which are sued upon
18 and sought in this within intervention complaint.

19 10. Plaintiff CMTA, -- as well as the NEMT provider members of Plaintiff
20 CMTA, and the Medi-Cal beneficiary patients of the NEMT provider members of
21 Plaintiff CMTA on behalf of whom Plaintiff CMTA sues herein, -- also have standing
22 and a claim for relief against the Director inasmuch as each has suffered, will suffer, and
23 is threatened to suffer, concrete and irreparable injury, unless the Defendant Director is
restrained by an appropriate injunction from implementing the Ten Percent Rate
Reduction of AB 5 and the One Percent Rate Reduction of AB 1183, which actions are

1 preempted under the Supremacy Clause by Sec. 30A.

2 **INTRODUCTION**

3 11. Medi-Cal is a major component of the "safety net" that ensures the State's
4 poor have access to health care services. Unfortunately for those who depend on it to
5 access basic healthcare services, the low rates at

6 **LEGISLATIVE HISTORY OF ASSEMBLY BILL 5**

7 12. On January 10, 2008, the California Governor proclaimed a State fiscal
8 emergency, sent a proposed 2008-2009 budget bill to the Legislature, and called the
9 Legislature into special session.

10 13. (a) On February 16, 2008 the Governor signed into law AB X3 5 ("AB 5"),
11 the Special Session health care trailer bill.

12 (b) Assembly Bill 5, eff. February 16, 2008, was chaptered as Chapter 3,
13 Statutes 2007-2008 Third Extraordinary Session.

14 **Assembly Bill 5**

15 14. Section 14 of Assembly Bill 5 added §14105.19 Welf. & Inst. Code,
16 which, in subds. (a), (b)(1), (b)(2), and (c) - (e) provides that reimbursement shall be cut
17 10% across-the-board in Medi-Cal fee-for-service to providers, including NEMT
18 providers, in the Medi-Cal fee-for-service program, for dates of service on and after July
19 1, 2008.

20 15. § 14105.245 Welf. & Inst. Code, (added by Section 15 of Assembly Bill
21 5 as set forth above), provides:

22 “(a) The Legislature finds and declares that the state faces a fiscal crisis that
23 requires unprecedented measures to be taken to reduce General Fund expenditures
to avoid reducing vital government services necessary for the protection of the
health, safety, and welfare of the citizens of the State of California.” (Emphasis
supplied.)

16. Finally, Secs. 16 and 17 of Assembly Bill 5 provide:

1 “SEC. 16. This act addresses the fiscal emergency declared by the Governor
2 by proclamation on January 10, 2008, pursuant to subdivision (f) of Section 10
3 of Article IV of the California Constitution.

4 SEC. 17. . . . In order to make statutory changes needed to implement cost
5 containment measures affecting health services, at the earliest possible time, it is
6 necessary that this act take effect immediately.” (Emphasis supplied.)

7 Concrete injury from implementing Secs. 14 and 15 of Assembly Bill 5.

8 17. Plaintiff CMTA, as well as its NEMT provider members and their patients
9 in the Medi-Cal FFS program for whom Plaintiff CMTA is a virtual representative and a
10 *jus tertii* representative, have been and will, respectively, and foreseeably and inevitably,
11 suffer concrete injury, and are threatened with concrete injury, and are put at risk of
12 concrete injury, by the Ten Percent Rate Reduction, which was put into effect on July 1,
13 2008 and continuously since then, by the Defendants, pursuant to their policy, practice,
14 and provider bulletin to implement the aforesaid Ten Percent Rate Reduction to
15 providers in the Medi-Cal FFS program, including the NEMT providers who are
16 members of Plaintiff CMTA; -- which concrete injury from the Ten Percent Rate
17 Reduction is great, immediate, and irreparable; and which irreparable injury is also both
18 presumed and inferred from the fact that the Legislature and the Director failed to
19 consider quality of services or equal access of beneficiaries in the course of the
20 Legislature enacting and the Director implementing the Ten Percent Rate Reduction of
21 AB 5.

22 Denial of access to NEMT services

23 18. Since July 1, 2008, due to the Ten Percent Rate Reduction, persons with
 disabilities, including those in the areas served by the NEMT providers who are
 members of Plaintiff CMTA, (including the area of northern Los Angeles County which
 is served by several NEMT provider-members of Plaintiff CMTA), have more difficulty

1 and will continue to have more difficulty in locating NEMT providers to enable them to
2 obtain access to life-necessary care and services of providers in the Medi-Cal FFS
3 program, due to the Ten Percent Rate Reduction of AB 5, and the prospective One
4 Percent Rate Reduction which commences March 1, 2009, of AB 1183.

5 19. Further, (1) many areas of California formerly served by NEMT providers
6 in the Medi-Cal FFS program have been abandoned by NEMT providers since July 1,
7 2008 due to the Ten Percent Rate Reduction, and will continue to be abandoned under
8 and due to the One Percent Rate Reduction which commences March 1, 2009; and
9 (2) many NEMT providers have reduced services by not accepting new Medi-Cal
10 patients, or by not accepting Medi-Cal patients at all, or by going out of business, to the
11 great injury and irreparable injury of tens of thousands of Medi-Cal beneficiaries who
12 are unable, -- **by reason of no NEMT transportation services or reduced NEMT**
13 **transportation services**, -- to obtain dialysis treatment necessary to their life, or to
14 obtain other life-vital care and treatment in the Medi-Cal FFS program; so as to cause
15 and threaten to cause great physical suffering and injury to Medi-Cal beneficiaries,
16 including patients of the NEMT members of Plaintiff CMTA.

17 **FIRST CLAIM FOR RELIEF**

18 Against each of the Defendants, for injunctive relief to enjoin the
19 Defendants to refrain from implementing a 10% reduction of payments to
20 Medi-Cal fee-for-service NEMT providers under subds. (a), (b)(1), (b)(2),
21 and (c) - (e) of § 14105.19 Welf. & Inst. Code, -- which statutes, and the
22 State action of Defendants to implement the state statutes, violate, and are
23 hence preempted under the Supremacy Clause by, the quality and equal
access clauses of 42 U.S.C. § 1396a(a)(30)(A).

* * * * *

20 20. Plaintiff CMTA refers to and each of the allegations in each of the
21 preceding Paragraphs of this intervention complaint, as if fully set forth herein.

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21. The Medicaid Act, in 42 U.S.C. § 1396a, subd. (a)(30)(A), provides:

“(a) A State plan for medical assistance must - (30)(A) provide for such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan (including but not limited to utilization review plans as provided for in section 1396b(i)(4) of this title) as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area; . . . ” (Boldface emphasis supplied.)

22. 42 U.S.C. § 1396a, subd. (a)(30)(A), shall hereinafter be referred to as “Sec. 30A.”

23. However, in view of the fact that on January 10, 2008, the Governor proclaimed a fiscal emergency and called the Legislature into Special Session; and that on February 16, 2008 the Legislature enacted and the Governor signed into law Assembly Bill 5, which proclaims in Sec. 15 that “the state faces a fiscal crisis that requires unprecedented measures to be taken to reduce General Fund expenditures,” and which proclaims in Sections 16 and 17 that:

“SEC. 16. This act addresses the fiscal emergency declared by the Governor by proclamation on January 10, 2008, pursuant to subdivision (f) of Section 10 of Article IV of the California Constitution.

SEC. 17. . . . In order to make statutory changes needed to implement cost containment measures affecting health services, at the earliest possible time, it is necessary that this act take effect immediately.” (Emphasis supplied.)

The sole function and purpose, and the conclusive consideration in the Legislature’s decision to enact subds. (a), (b)(1), (b)(2), and (c) - (e) of § 14105.19 Welf. & Inst. Code, -- which provide that the Defendants shall cut Medi-Cal payments to providers in the Medi-Cal fee-for-service program, including NEMT services, was budgetary considerations, to “address the fiscal emergency” declared by the Governor, and to effect “cost containment measures affecting health services,” by making statutory

1 changes needed to reduce expenditures, (to fit the State's reduced budget), commencing
2 July 1, 2008.

3 24. However, therein, by each and all of the above allegations, the enactment
4 of the Ten Percent Rate Reduction in respect to NEMT services and providers in the
5 Medi-Cal FFS program, by subds. (a), (b)(1), (b)(2), and (c) - (e) of § 14105.19 Welf. &
6 Inst. Code by the Legislature was without any consideration of quality and access as
7 required by Sec. 30A,¹ and was without any consideration of what it costs NEMT
8 providers to perform the various services and procedures, as required by Sec. 30A;² such
9 that the State's sole purpose, and the conclusive factor, in enacting the across-the-board
10 10% reduction in reimbursement to providers in the Medi-Cal fee-for-service program,
11 including NEMT providers, was to reduce the budget deficit. Accordingly, under the
12 standard of *Orthopaedic Hosp.*, 103 F.3d 1491, at 1500 (1997); and *Arkansas Medical*
13 *Society, Inc. v. Reynolds*, 6 F.3d 519 (8th Cir.1983), the action of the Legislature to enact
14 the aforesaid subds. (a), (b)(1), (b)(2), and (c) - (e) of §14105.19 Welf. & Inst. Code,
15 and the policy and action of the Defendants to implement these statutes by reducing
16 payments to providers in the Medi-Cal fee-for-service program, including payments to
17 NEMT providers, by ten percent (10%), was and is arbitrary and capricious, and contrary
18 to and in violation of the quality and access provisions of Sec. 30A; so that hence, under
19 the Supremacy Clause, the aforesaid subds. (a), (b)(1), (b)(2), and (c) - (e) of §14105.19
20 Welf. & Inst. Code; and § 14166.245 Welf. & Inst. Code are preempted by Sec. 30A.

21 25. Accordingly, by each and all of the foregoing facts alleged, subds. (a),
22 (b)(1), (b)(2), and (c) - (e) of § 14105.19 Welf. & Inst. Code, were and are unlawful, in
23 violation of the quality and access provisions of Sec. 30A, so as to be preempted, under

21 ¹ *Othopaedic Hospital v. Belshe*, 103 F.3d 1491, 1500 (9th Cir.1997).

22 ² *Id.*, 103 F.3d at 1500; *Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519
23 (8th Cir. 1993).

1 the Supremacy Clause, by the quality and access provisions of Sec. 30A, such that the
2 Defendant Director has been and is acting in excess of and without jurisdiction to
3 implement subds. (a), (b)(1), (b)(2), and (c) - (e) of § 14105.19 Welf. & Inst. Code, by
4 reducing payments to NEMT providers in the Medi-Cal fee-for-service program,
commencing July 1, 2008.

5 26. Further, unless restrained by the Court by an appropriate injunction, the
6 Defendant Director has and will implement the aforesaid subds. (a), (b)(1), (b)(2), and
7 (c) - (e) of § 14105.19 Welf. & Inst. Code, and thereby will cause injury to Plaintiff
8 CMTA; its members who are NEMT providers, and the patients of these NEMT
provider-members of Plaintiff CMTA; which injury is irreparable.

9 27. Plaintiff CMTA, its NEMT members, and the patients of the NEMT
10 members of Plaintiff CMTA, have no administrative remedy, nor any plain, speedy, or
11 adequate remedy whatsoever or at all, except by this complaint in intervention for
12 injunctive relief.

13 WHEREFORE, Plaintiff CMTA prays for judgment and orders as shall
14 hereinafter be specified:

15 **SECOND CLAIM FOR RELIEF**

16 Against the Director, for declaratory
17 judgment under 42 U.S.C. § 2201

18 28. Plaintiff CMTA refers to and incorporates each of the allegations in the
19 preceding Paragraphs of this Complaint as if fully set forth herein.

20 29. Welf. & Inst. Code § 14105.19(b)(1), enacted by AB 5, provided:

21 “(b) (1) Except as otherwise provided by subdivision (c), payments shall be
22 reduced by 10 percent for Medi-Cal fee-for-service benefits for dates of service
23 on and after July 1, 2008.”;

(herein, “Subd. (b)(1)”); and subdivision (c) of Welf. & Inst. Code § 14105.19,
mentioned in the above Subd. (b)(1), did not exclude NEMT services or NEMT
providers. Hence the Ten Percent Rate Reduction of AB 5 expressly applied to NEMT

1 services and NEMT providers.

2 30. However, the above-entitled Court did, on August 18, 2008, file an order
3 entitled:

4 “Order Granting in Part and Denying in Part Petitioners’ Motion for
5 Preliminary Injunction,”

6 (Clerk’s Document 121 in Case No. 2:08-cv-03315 in the above-entitled Court, (“*ILC*”)),

7 which provided in relevant part:

8 “The Court hereby orders Defendant Director, her agents, servants, employees,
9 attorneys, successors, and all those working in concert with her to refrain from
10 enforcing Cal. Welf. & Inst. Code § 14105.19(b)(1), including refraining from
11 reducing by ten percent payments under the Medi-Cal fee-for-service program for
12 physicians, dentists, pharmacies, adult day care health centers, clinics, health
13 systems, and other providers for services provided on or after July 1, 2008.”
14 (Emphasis supplied.)

15 31. Subsequent to August 18, 2008, three minute orders were filed in the
16 Clerk’s Docket of this Case No. 2:08-cv-03315, namely:

- 17 - A written order dated August 27, 2008; -- being Clerk’s Document 135 in *ILC*;
- 18 - A written order dated August 28, 2008, -- being Clerk’s Document 134 in *ILC*;
- 19 - A written order dated Sept. 5, 2008; -- being Clerk’s Document 162 in *ILC* ; and,
- 20 - A written order dated Sept. 15, 2008, -- being Clerk’s Document 175 in *ILC*.

21 32. Plaintiff CMTA hereinafter refers to the five orders mentioned in
22 Paragraphs 30 and 31, collectively, as a single order, (herein, “the Order in Question”).

23 33. A controversy in respect to the Order in Question has arisen between
Plaintiff CMTA and the Defendant Director, in that Plaintiff CMTA claims that the
Order In Question, in substance and its totality, ordered the Director **to refrain from**
enforcing Cal. Welf. & Inst. Code § 14105.19(b)(1); but, the Director has failed at all
times to so obey the aforesaid provision of the Order in Question, by deducting 10%
from payments to NEMT providers for NEMT services in the Medi-Cal FFS program,
for dates of service on or after August 18, 2008.

1 34. Further, Plaintiff CMTA claims that by virtue of the duty of the Director
2 not to deduct anything from payments to NEMT for NEMT services furnished in the
3 Medi-Cal FFS program on or after August 18, 2008, -- which duty is set forth in the
4 Order in Question, -- that the Director has a present, existing, and continuing mandatory
5 duty to pay over all the 10% deductions to all NEMT providers which the Director has
6 made and will make in the future, to the respective NEMT providers from whose
7 payments the aforesaid deductions were and are being made, -- all, without any demand
8 being required by any NEMT provider to be entitled to receive such pay over.

9 35. In contrast, the Director claims that the Order in Question does not so
10 provide, and that she has a defense to, and a justification, for (1) not ceasing to make
11 these deductions and (2) not paying over the deducted amounts.

12 36. In turn, a further controversy exists between Plaintiff CMTA and the
13 Director in respect to her claims set forth in the preceding Paragraphs, in that Plaintiff
14 CMTA claims that under established U.S. Supreme Court decisions, that if a person
15 subject to an injunction has good and legal cause not to obey or to be excused from
16 complying with the injunction, that it is incumbent on the person to apply to the court
17 and obtain an order which amends or terminates the injunction, or excuses the
18 noncompliance with the injunction; **and for failure to so apply** and obtain any
19 exculpatory order, that the injunction continues in full force and effect **as written**, so as
20 to cause the person subject to the injunction to continue to subject thereto; **but**, the
21 Director disputes this claim of Plaintiff CMTA.

22 37. By the foregoing set forth in this Second Claim for Relief, an actual
23 controversy exists between Plaintiff CMTA, suing on behalf of its constituent member
NEMT providers, and the Defendant Director, such that a judgment and order should
issue pursuant to 28 U.S.C. § 2201 and Rule 65, Fed. Rules Civ. Proc., which:

- *First*, declares on the one hand, the rights of NEMT providers, including the
NEMT providers who are members of Plaintiff CMTA in respect to whom

1 Plaintiff CMTA is their virtual representative and their *jus tertii*
2 representative, and,

3 - *Second*, declares on the other hand, the rights and duties of the Defendant
4 Director and her successors in office, in respect to this controversy, and,

5
6 - *Third*, orders the Director to perform her mandatory duty under the Order in
7 Question, -- namely, the mandatory duty to pay over all the 10% deductions to
8 all NEMT providers which the Director has made and will make in the future, to
9 the respective NEMT providers from whose payments the aforesaid deductions
were and are being made;

10 unless and until the Director applies to the Court and obtains some order from the Court
11 which relieves her from any such further duty in this respect.

12 38. Plaintiff CMTA, its NEMT members, and the patients of the NEMT
13 members of Plaintiff CMTA, have no administrative remedy, nor any plain, speedy, or
14 adequate remedy whatsoever or at all, except by this complaint in intervention for
injunctive relief.

15 WHEREFORE, Plaintiff CMTA prays for judgment and orders as shall
16 hereinafter be specified:

17 **THIRD CLAIM FOR RELIEF**

18 Against the Director and Does 1 through 50.

19 39. Plaintiff CMTA refers to and incorporates each of the allegations in the
preceding Paragraphs of this Complaint as if fully set forth herein.

20 40. At all times, from and after at least September 15, 2008 to the present and
21 continuing, the Order in Question prohibited and commanded the Director to refrain
22 from enforcing the Ten Percent Rate Reduction of Subd. (b)(1) of Welf. & Inst. Code
23 § 14105.19.

1 41. The Legislature on September 30, 20098, while the aforesaid Order in
2 Question was still in force, did enact Sections 44 and 45 of AB 1183, (Cal. Stats. 2008-
3 2009, Ch. 758), which provisions, as part of one single statute, reduced the Ten Percent
4 Rate Reduction for all Medi-Cal fee-for-service benefits which had been subject to the
5 Ten Percent Rate Reduction under Subd. (b)(1) of Welf. & Inst. Code § 14105, (of AB
6 5) to *first*, a five percent (5%) reduction in Medi-Cal fee-for-service payments to
7 pharmacies, (herein “the Five Percent Rate Reduction”), and *second*, reduced the Ten
8 Percent Rate Reduction to a one percent (1%) reduction in Medi-Cal fee-for-service
9 payments to all other providers who had been subject to the aforesaid Ten Percent Rate
10 Reduction, including NEMT providers of NEMT services in the Medi-Cal FFS program,
11 (herein “the One Percent Rate Reduction”), for dates of service on or after March 1,
12 2009.

11 42. Sec. 45 of AB 1183 enacted subd. (f) of Welf. & Inst. Code
12 § 14105.191 to provide:

13 “(f) Notwithstanding Chapter 3.5 (commencing with Section 11340) of Part 1 of
14 Division 3 of Title 2 of the Government Code, the department may implement
15 and administer this section by means of provider bulletins, or similar
16 instructions, without taking regulatory action.”

15 Further, the policy and practice of the Director whenever Medi-Cal rate reductions are
16 enacted by the Legislature, which contain a provision as in subd. (f) of Welf. & Inst.
17 Code § 14105.191, next above which permits the Director to pass through a rate cut
18 enacted by the Legislature without taking any regulatory action herself, by use of
19 provider bulletins to the providers affected, is to always so pass through the legislative
20 Medi-Cal rate cut, without taking any regulatory action herself, by announcing the rate
21 cut to providers in bulletins, (just as the Director did in respect to legislative rate cuts in
22 the Medi-Cal program in the 2003-2004, 2004-2005, and 2007-2008 fiscal years, which
23 contained the same above “pass through” authorization set forth in subd. (f) of Welf. &
Inst. Code § 14105.191.

1 43. Accordingly, based on the above facts alleged in Paragraphs 39 through 42
2 next above, Plaintiff CMTA alleges that the Director, under her aforesaid policy and
3 practice mentioned in Paragraph 42, will pass through the One Percent Rate Reduction
4 in respect to all payments to NEMT providers, (including the NEMT members of
5 Plaintiff CMTA) for NEMT services furnished on or after March 1, 2009.

6 44. However, -- **due to the fact that the existing injunction of the Order in
7 Question** still facially currently enjoins the Director:

8 - in the first ordering clause of the Order in Question, to refrain from enforcing
9 Subd. (b)(1) of Welf. & Inst. Code § 14105.19 (of AB 5),

10 it follows that the Director has been enjoined to **refrain from deducting anything**
11 from providers such as NEMT providers of NEMT services in the Medi-Cal FFS
12 program, without first applying to the Court and obtaining an order which terminates or
13 modifies the Order in Question to so allow.

14 45. Therein by each and all of the facts alleged in this Third Claim for Relief,
15 unless:

16 - (1) a declaratory judgment and order is issued pursuant to 28 U.S.C. § 2201,
17 adjudicating and declaring that the Director must first apply to the Court and
18 show by a preponderance of the evidence that the State has complied with the
19 requirements of the federal Medicaid rate-setting statute, Sec. 30A, in enacting
20 and implementing the One Percent Rate Reduction of Welf. & Inst. Code
21 § 14105.191, and,

22 - (2) an appropriate preliminary and permanent injunction is issued,

23 the Director will violate the existing Order in Question by implementing the One
Percent Reduction to **NEMT providers** (which include NEMT providers who are
members of Plaintiff CMTA), **without first applying to the Court** in the *ILC* case,

1 (No. 2:08-cv-03315 in the above-entitled Court), and obtaining an order in the *ILC* case
2 which terminates or modifies the August 18, 2008 preliminary injunction in the *ILC*
3 case, so as to permit the Director to implement AB 1183 in respect to dates of NEMT
services on and after March 1, 2009.

4 46. Plaintiff CMTA, its NEMT members, and the patients of the NEMT
5 members of Plaintiff CMTA, have no administrative remedy, nor any plain, speedy, or
6 adequate remedy whatsoever or at all, except by this complaint in intervention for
7 injunctive relief.

8 WHEREFORE, Plaintiff CMTA prays for judgment and orders as shall
hereinafter be specified:

9 **FOURTH CLAIM FOR RELIEF**

10 Against each of the Defendants, for injunctive relief to enjoin the
11 Defendants to refrain from implementing a One Percent Rate
12 Reduction in respect to NEMT providers, -- which statute, and the State
action of Defendants to implement the state statute, violate, and are
hence preempted under the Supremacy Clause by, the quality and equal
access clauses of 42 U.S.C. § 1396a(a)(30)(A).

13 47. Plaintiff CMTA refers to and incorporates each of the allegations in the
14 preceding Paragraphs of this Complaint as if fully set forth herein.

15 **LEGISLATIVE HISTORY OF ASSEMBLY BILL 1183**

16 48. Assembly Bill ("AB") 1183, -- a health trailer bill to implement the
17 budget cutting decisions of the 2008-2009 Budget Bill, was enacted September 30,
2008 and was chaptered as Chapter 758, Statutes 2008-2009.

18 **AB 1183**

19 49. AB 1183 was introduced Feb. 2, 2008 as a hazardous material bill.
20 However, during the record budget stalemate which preceded enactment of the 2008-
21 2009 budget bill in late September 2008, the budget bills which had passed by each
22 house without 2/3 majority needed for enactment, were sent to the Big Four, namely, the
23 majority and minority leader of each house. When they finally made their budget deal

1 in late September 2008, the AB 1183 hazardous material bill was amended **Sept. 15,**
2 **2008** by the Assembly Committee on Budget, passed by both houses on September 16,
3 2008, and signed by the Governor and filed with the Secretary of State on September
4 30, 2008, as part of the process of the Governor signing the Budget Bill for 2008-2009.

5 50. By such legislative history, there were no committee hearings on AB
6 1183. The reasons why its provisions are what they are, are a secret known only to the
7 Big Four leaders of the Legislature who drafted the provisions of AB 1183 in secret.

8 51. Further, there are hundreds of different health care subjects in AB 1183,
9 each of which required separate consideration by the Legislature if any reasoned
10 decision was to be made by any legislator in the Senate or the Assembly in deciding to
11 vote for or against particular provisions in the hundreds of different subjects contained
12 in the bill. AB 1183 was hence the pure product of pure logrolling, where, if any
13 member wished his or her health care provision in the multi-provisioned AB 1183 to be
14 enacted, that legislator had to accept blindly all the other provisions relating to the
15 hundreds of other subjects in the same bill.

16 52. It is a fact, and it is manifest from all the facts alleged in this Fourth
17 Claim for Relief, that individual legislators who voted on AB 1183, and the Legislature
18 as a whole, could not and did not appropriately consider whether or not the reduced
19 rates of the Five Percent Rate Reduction for pharmacy services, and the reduced rates of
20 the One Percent Rate Reduction, were consistent with quality of services, or consistent
21 with equal access of beneficiaries to quality services, in the Medi-Cal FFS program.

22 53. Hence, facially, the action of the Legislature in enacting, and the action of
23 the Director to implement, the One Percent Rate Reduction provisions of AB 1183 were
and are arbitrary, capricious, and contrary to law, (namely, contrary to the quality and
equal clauses of Sec. 30A; so that the provisions of (new) Welf. & Inst. Code
§ 14105.191, subds. (a) and (b) which enacted the One Percent Rate Reduction in
respect to NEMT services, effective March 1, 2009, violated and hence are preempted,

1 under the Supremacy Clause, by Sec. 30A.

2 54. Further, unless restrained by the Court by an appropriate injunction, the
3 defendant Director will implement the aforesaid One Percent Rate Reduction in respect
4 to NEMT services providers (including members of the Plaintiff CMTA); which in
5 turn will thereby result in injury to the Plaintiff CMTA; to its members who are nemt
6 providers; and to patients of NEMT services providers (including patients of members
7 of the Plaintiff CMTA); -- which injury will foreseeably result in NEMT providers
8 (including members of Plaintiff CMTA) not accepting new Medi-Cal patients, or
9 stopping serving Medi-Cal patients at all, or by reducing kinds, amounts, locations, and
10 levels of services to Medi-Cal beneficiaries, or by going out of business, so that thereby
11 beneficiaries are and will be caused, and threatened to be caused, denial and reduction
12 of access to life-vital NEMT services and treatment in the Medi-Cal FFS program,
13 resulting in great physical suffering and injury to beneficiaries, including beneficiaries
14 served by the members of Plaintiff CMTA, many of whom will thereby be forced into
15 institutions such as nursing homes to obtain their necessary medical treatment and
16 medicines, especially to receive dialysis treatments; and some will die; all to the
17 irreparable injury, and threat of irreparable injury, to thousands of Medi-Cal
18 beneficiaries including the beneficiaries served by the members of Plaintiff CMTA.

19 55. Plaintiff CMTA and the members of Plaintiff CMTA, have no
20 administrative remedy, nor any plain, speedy, or adequate remedy whatsoever or at all,
21 except by this complaint in intervention for injunctive relief.

22 WHEREFORE, Plaintiff CMTA prays for judgment and orders as shall
23 hereinafter be specified:

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FIFTH CLAIM FOR RELIEF

1
2 Against each of the Defendants, for injunctive relief to enjoin the
3 Defendants to refrain from implementing a One Percent Rate
4 Reduction under Sec. 45 of AB 1183 in payments to NEMT
5 providers, -- which statute, and the State action of Defendants to
6 implement the state statute, violate, and are hence preempted under the
7 Supremacy Clause by, the quality and equal access clauses of 42 U.S.C.
8 § 1396a(a)(30)(A).

9 56. Plaintiff CMTA refers to and incorporates each of the allegations in the
10 preceding Paragraphs of this Petition as if fully set forth herein.

11 57. However, the enactment of the One Percent Rate Reduction in respect to
12 NEMT services and providers in the Medi-Cal FFS program, by subds. (a) - (b)(1) and
13 (e) - (h) of new Welf. & Inst. Code § 14105.191, by Sec. 45 of AB 1183, by the
14 Legislature was without any consideration of quality and access as required by Sec.
15 30A,³ and was without any consideration of what it costs providers to perform the
16 various services and procedures, as required by Sec. 30A;⁴ such that the State's sole
17 purpose, and the conclusive factor, in enacting the across-the-board 10% reduction in
18 reimbursement to providers in the Medi-Cal fee-for-service program, including NEMT
19 providers, was to reduce the budget deficit.

20 58. Accordingly, under the standard of *Orthopaedic Hosp.*, 103 F.3d 1491, at
21 1500 (1997); and *Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519 (8th Cir.
22 1983), the action of the Legislature to enact the aforesaid subds. (a) - (b)(1) and
23 (e) - (h) of §14105.191 Welf. & Inst. Code, including the One Percent Rate Reduction
in respect to NEMT providers (including NEMT providers who are members of

³ *Othopaedic Hospital v. Belshe*, 103 F.3d 1491, 1500 (9th Cir.1997).

⁴*Id.*, 103 F.3d at 1500; *Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519 (8th Cir. 1993).

1 Plaintiff CMTA); and the policy and action of the Director and the other Defendants to
2 implement these statutes by reducing payments to providers in the Medi-Cal fee-for-
3 service program, including payments to NEMT providers, by one percent (1%), was
4 and is arbitrary and capricious, and contrary to and in violation of the quality and
5 access provisions of Sec. 30A.

5 59. Accordingly, by each and all of the foregoing facts alleged, subs.
6 (a) - (b)(1) and (e) - (h) of § 14105.191 Welf. & Inst. Code, and the One Percent Rate
7 Reduction and the Five Percent Rate Reduction, in respect to NEMT providers, were
8 and are contrary to and in violation of the quality and access provisions of Sec. 30A, so
9 as to be preempted, under the Supremacy Clause, by the quality and access provisions
10 of Sec. 30A, such that the Defendant Director is and will be acting in excess of and
11 without jurisdiction to implement subs. (a) - (b)(1) and (e) - (h) of § 14105.191 Welf.
12 & Inst. Code, including the One Percent Rate Reduction, to NEMT providers,
13 commencing March 1, 2009.

14 60. Further, unless restrained by the Court by an appropriate injunction, the
15 Defendant Director will implement the aforesaid subs. (a) - (b)(1) and (e) - (h) of
16 § 14105.191 Welf. & Inst. Code, and the One Percent Rate Reduction in payments to
17 NEMT providers, commencing March 1, 2009, and thereby will cause injury to
18 Plaintiff CMTA; its members who are NEMT providers, and the patients of these
19 NEMT provider-members of Plaintiff CMTA; which injury is irreparable, all, as has
20 been hereinbefore set forth in detail in the within complaint in intervention.

21 61. Plaintiff CMTA, its NEMT members, and the patients of the NEMT
22 members of Plaintiff CMTA, have no administrative remedy, nor any plain, speedy, or
23 adequate remedy whatsoever or at all, except by this complaint in intervention for

1 injunctive relief.

2 WHEREFORE, Plaintiff CMTA prays for judgment and orders as follows:

3 A. That Plaintiff CMTA have judgment against the Defendant SANDRA
4 SHEWRY, Director of California Department of Health Services, (herein, "Director"),
and that Defendants take nothing.

5 B. First Claim for Relief

6 That a preliminary and permanent injunction be issued to command the
7 Defendant SANDRA SHEWRY, Director of the Department, and the Defendants Does
8 1 through 50, to set aside their preempted policy to implement subds. (a), (b)(1), (b)(2),
9 and (c) - (e) of § 14105.19 Welf. & Inst. Code, and, to refrain from implementing the
10 same; including but not limited to refraining from reducing payments by ten percent
11 (10%) or by any lesser deduction, to providers, including non-emergency medical
12 transportation ("NEMT") providers, (including NEMT providers who are members of
Plaintiff CMTA), in the Medi-Cal FFS program.

13 C. Second Claim for Relief

14 **FIRST:** That the Court issue a declaratory judgment and order which declares
15 the rights of the parties in respect to the August 18, 2008 preliminary injunction as
16 amended by minute orders dated August 27, August 28, September 5, and September
17 15, 2008, (herein, "the Order in Question"); and that the Court find, adjudicate, and
18 declare that:

19 1. The Order In Question ordered the Director to refrain from enforcing Cal.
20 Welf. & Inst. Code § 14105.19(b)(1), but that the Director has failed at all times to so
21 obey the aforesaid provision of the Order in Question, (by deducting 10% from
22 payments to non-emergency medical transportation ("NEMT") providers for NEMT
23 services in the Medi-Cal fee-for-service ("FFS") program, for services on or after

1 August 18, 2008).

2 2. That by virtue of the duty of the Director, under the Order in Question,
3 not to deduct anything from payments to NEMT for NEMT services furnished in the
4 Medi-Cal FFS program on or after August 18, 2008, -- which duty is set forth in the
5 Order in Question, -- that the Director has a present, existing, and continuing
6 mandatory duty to pay over all the 10% deductions to all NEMT providers which the
7 Director has made and will make in the future, to the respective NEMT providers from
8 whose payments the aforesaid deductions were and are being made, -- all, without any
9 demand being required by any NEMT provider to be entitled to receive such pay over.

10 **SECOND:** That if the Director has a good and legal cause not to obey or to be
11 excused from complying with the Order in Question, that it is incumbent on the
12 Director to apply to the Court and obtain an order which amends or terminates the
13 Order in Question, or excuses the noncompliance with the Order in Question; and for
14 failure to so apply and obtain any exculpatory order, that the Order in Question
15 continues in full force and effect as written, so as to cause the Director, who is subject
16 to the Order in Question, to continue to be subject thereto.

17 **THIRD:** That the Court order the Director to perform her mandatory duty
18 under the Order in Question, to pay over all the 10% deductions to all NEMT providers
19 which the Director has made and will make in the future, to the respective NEMT
20 providers from whose payments the aforesaid deductions were and are being made;
21 unless and until the Director applies to the Court and obtains some order from the
22 Court which relieves her from any such further duty in this respect; all, without any
23 NEMT provider having to demand that this be done.

D. Third Claim for Relief

- (1) That the Court issue find, adjudicate and issue a declaratory judgment and

1 order pursuant to 28 U.S.C. § 2201, which adjudicates and declares that the Director
2 must first apply to the Court and show by a preponderance of the evidence that the
3 State has complied with the requirements of the federal Medicaid rate-setting statute,
4 Sec. 30A, in enacting and implementing the One Percent Rate Reduction in respect to
5 NEMT services, **before** the Director may commence to implement the new One
6 Percent Rate Reduction rate of AB 1183; and,

7 - (2) That the Court order and enjoin the Director from implementing AB 1183
8 and its One Percent Rate Reduction, -- unless and until the Director first complies with
9 the August 18, 2008 injunction by (1) refraining from deducting any amounts from any
10 payments to providers in the Medi-Cal FFS program, and (2) by paying over to all
11 NEMT providers all amounts of deductions heretofore deducted by the Director from
12 payments to Medi-Cal providers, since the August 18, 2008 injunction was issued by
13 this Court.

14 E. Fourth and Fifth Claims for Relief

15 That a preliminary and permanent injunction be issued to command the
16 Defendant SANDRA SHEWRY, Director of the Department, and the co-Defendants
17 Does 1 through 50, to set aside their preempted policy to implement subds. (a) - (b)(1)
18 and (e) - (h) of § 14105.191 Welf. & Inst. Code, and to refrain from implementing the
19 same; including but not limited to refraining from reducing payments by one percent
20 (1%) or by any lesser or larger percentage or sum of deductions, to Medi-Cal fee-for-
21 service providers, including non-emergency medical transportation (“NEMT”)
22 providers, (including members of Plaintiff CMTA), in the Medi-Cal fee-for-service
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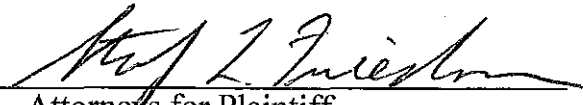
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All Claims for Relief

F. That Plaintiff CMTA have costs of suit incurred, together with such other and further relief as may be just.

LYNN S. CARMAN
STANLEY L. FRIEDMAN

By: 
Attorneys for Plaintiff
California Medical Transportation
Association, Inc.