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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CALIFORNIA ASSOCIATION OF
HEALTH FACILITIES,

Plaintiff,

vs.

DAVID MAXWELL-JOLLY, et al.;

Defendants.

DEVELOPMENTAL SERVICES
NETWORK, et al.,

Plaintiffs,

vs.

DAVID MAXWELL-JOLLY, et al.;

Defendants.

Consolidated Cases:

Case No. CV 10-3259 CAS (MANx)
Case No. CV 10-3284 CAS (MANx)

**ORDER GRANTING PLAINTIFFS’
MOTIONS FOR PRELIMINARY
INJUNCTION**

I. INTRODUCTION

On April 30, 2010, plaintiffs Developmental Services Network and United Cerebral Palsy/Spastic Children’s Foundation of Los Angeles and Ventura Counties, in CV 10-3284 CAS (MANx), and California Association of Health Facilities, in CV 10-3259 CAS (RZx), filed the instant actions against David Maxwell-Jolly, Director of the

1 California Department of Health Care Services (the “Director”) and the California
2 Department of Health Care Services (the “Department”).¹ The Department is a
3 California agency charged with the administration of California’s Medicaid program,
4 Medi-Cal. Plaintiffs are entities that represent certain Medi-Cal providers, specifically
5 intermediate care facilities for the developmentally disabled and the mentally retarded
6 (respectively, “ICF/DD facilities” and “ICF/MR facilities”), and freestanding pediatric
7 subacute facilities (“FSP facilities”).

8 On July 28, 2009, California Governor Arnold Schwarzenegger signed into law
9 Assembly Bill X4 5 (“AB 5”), the budget trailer bill for California fiscal year 2009-
10 2010. AB 5 amends Cal. Welf. & Inst. Code § 14105.191, in part, and effectively
11 “freezes” the Medi-Cal reimbursement rates for certain designated services rendered
12 during the 2009-2010 rate year and each rate year thereafter at 2008-2009 levels. Cal.
13 Welf. & Inst. Code § 14105.191(f). Among the designated services, are services
14 provided by ICF/DD facilities, ICF/MR facilities, and FSP facilities.

15 Plaintiffs seek to enjoin implementation or enforcement of these rate freeze
16 provisions in AB 5 on the grounds that they violate Title XIX of the Social Security Act,
17 42 U.S.C. § 1396 *et seq.* (the “Medicaid Act”), and therefore are invalid under 42 U.S.C.
18 § 1983 and the Supremacy Clause of the United States Constitution, U.S. CONST. art. VI,
19 cl. 2. CAHF Complaint ¶ 1; DSN Complaint ¶ 1. Specifically, plaintiffs allege that AB
20 5 violates 42 U.S.C. § 1396a(a)(30)(A) of the Medicaid Act (“Section 30(A)”), because
21 neither the Director nor the California legislature considered the “quality of care” and
22 “equal access” provisions of Section 30(A), or whether reimbursement rates are
23 reasonably related to provider costs, before its implementation. CAHF Complaint ¶¶
24 50–51; DSN Complaint ¶¶ 10, 38–39. Plaintiffs further allege that AB 5 is unlawful
25 because the Director implemented the rate freeze through an amendment to the State’s
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27 ¹ On June 15, 2010, the Court ordered the two matters consolidated for all purposes.
28

1 Medi-Cal Plan without prior federal approval. CAHF Complaint ¶¶ 57–59; DSN
2 Complaint ¶¶ 10, 41. Finally, plaintiffs allege that AB 5 was enacted in violation of the
3 public process provisions of 42 U.S.C. § 1396a(a)(13)(A) (“Section 13(A)”). CAHF
4 Complaint ¶¶ 52–54; DSN Complaint ¶¶ 10, 40.

5 **II. BACKGROUND**

6 **A. Statutory Background**

7 Medicaid is a cooperative federal program whereby the federal government
8 provides funds to participating states to help defray the expense of providing health care
9 services to low income and needy citizens. State participation is voluntary; however,
10 once a state chooses to participate by accepting federal funds, it must comply with
11 requirements imposed by the Medicaid Act. See Orthopaedic Hosp. v. Belshe, 103 F.3d
12 1491, 1493 (9th Cir. 1997) (“Orthopaedic Hospital”). Because California has elected to
13 participate in the Medicaid program, it must administer its state Medicaid program,
14 Medi-Cal, in compliance with a State Medicaid Plan (“State Plan”) that has been pre-
15 approved by the Secretary of the U.S. Department of Health and Human Services, and
16 which complies with federal Medicaid law, including the requirements set forth in 42
17 U.S.C. § 1396a(a)(1)-(70). The State Plan is “a comprehensive written statement . . .
18 describing the nature and scope of [the State’s] Medicaid program and giving assurance
19 that it will be administered in conformity with the specific requirements of [federal
20 Medicaid law].” 42 C.F.R. § 430.10. The agency charged with approving State Plans is
21 the Centers for Medicare and Medicaid Services (“CMS”), an arm of the Department of
22 Health and Human Services. Id. §§ 400.200, 430.12. When a state wishes to make
23 changes to its State Plan, it must submit a State Plan Amendment to CMS. Id. § 430.12.
24 CMS may approve or disapprove of the State Plan Amendment, or it may request more
25 information from the State before making a final determination. Id. § 430.16. If CMS
26 does not act on the State Plan Amendment within 90 days, the amendment is considered
27 approved. Id. § 430.16(a)(1). If CMS requests additional information, however, the 90-
28 day period for CMS action on the State Plan Amendment begins on the day CMS

1 receives the information. Id. §§ 430.16(a)(2), 447.256.

2 The Medicaid Act further requires that, prior to establishing reimbursement rates,
3 California provide “methods and procedures” for the payment of care and services that
4 (1) are “consistent with efficiency, economy, and quality of care,” and (2) ensure their
5 availability to the Medicaid population to the same “extent as they are available to the
6 general population in the geographic area.” 42 U.S.C. § 1396a(a)(30)(A). These
7 requirements are known, respectively, as the “quality of care” and “equal access”
8 provisions of Section 30(A) of the Medicaid Act. In Orthopaedic Hospital, the Ninth
9 Circuit interpreted Section 30(A) to require the Director to set reimbursement rates that
10 “bear a reasonable relationship to efficient and economical hospitals' costs of providing
11 quality services, unless the Department shows some justification for rates that
12 substantially deviate from such costs.” 103 F.3d at 1496; see also Indep. Living Ctr. of
13 S. Cal. v. Maxwell-Jolly, 572 F.3d 644, 651–52 (9th Cir. 2009) (“ILC II”) (affirming the
14 standards established in Orthopaedic Hospital). To meet this statutory requirement, the
15 Ninth Circuit held that the Director “must rely on responsible cost studies, its own or
16 others', that provide reliable data as a basis for its rate setting.” Orthopaedic Hospital,
17 103 F.3d at 1496. In addition, for certain providers, including hospital service providers,
18 California must establish rates through a public process that includes publication of the
19 proposed rates and their underlying methodologies, such that providers are “given a
20 reasonable opportunity for review and comment.” 42 U.S.C. § 1396a(a)(13)(A).
21 Further, the state must administer Medi-Cal in accordance with Medicaid regulations;
22 applicable state law, as specified in sections 14000 to 14124 of the Welf. & Inst. Code;
23 and Medi-Cal regulations.

24 **B. Procedural Background**

25 In February 2010, this Court granted a preliminary injunction in another action
26 challenging the same rate freeze as applied to hospital based skilled nursing and
27 subacute facilities. See Cal. Hosp. Ass'n v. Maxwell-Jolly (“CHA I”), Case No. 09-CV-
28 8642, Order (C.D. Cal. Feb. 24, 2010). The Court enjoined the rate freeze on the

1 grounds that plaintiff was likely to succeed on its claim that the freeze was enacted by
2 the California legislature without complying with Section 30(A). CHA I, No. 09-8642,
3 slip op. at 5–10. Because the Court found that plaintiff demonstrated a likelihood of
4 success on the merits on its section 30(A) claim, the Court did not address the merits of
5 plaintiff’s remaining claims. Id. at 10. The Court further found that plaintiff had
6 sufficiently demonstrated that its member hospitals would suffer irreparable harm absent
7 a preliminary injunction because the rate freeze was causing them to be paid less than
8 they otherwise were entitled and the Eleventh Amendment barred them from pursuing
9 any reimbursement shortfall in an action for damages. Id. at 10–14.

10 In May 2010, plaintiffs filed the instant motions seeking to preliminarily enjoin
11 application of the rate freeze as applied to their members. See Doc. 6. Prior to the
12 hearing on the motion for a preliminary injunction, the Court stayed the case. See Doc.
13 34. The Court found that good cause existed to stay the case because there was then
14 pending before the United States Supreme Court the Director’s petitions for certiorari in
15 Independent Living Center of Southern California, Inc. v. Maxwell-Jolly, U.S.S.C. Case
16 No. 09-958 (“ILC II”), and Maxwell-Jolly v. California Pharmacists Ass’n (“Cal.
17 Pharm.”), U.S.S.C. Case No. 09-1158. On January 18, 2011, the Supreme Court partially
18 granted review in ILC II, limited to the question of whether Medicaid recipients and
19 providers may maintain a private cause of action under the Supremacy Clause to enforce
20 Section 30(A) by asserting that the provision preempts a state law that reduces
21 reimbursement rates.²

22 On March 16, 2011, plaintiffs filed an ex parte application to lift the stay in this
23 case, arguing that during the stay they continued to suffer irreparable harm and
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26 ² Subsequent to the stay that was issued in this case, the Director filed a petition for
27 certiorari in Maxwell-Jolly v. Santa Rosa Mem’l Hosp., U.S.S.C. Case No. 10-283, a case
28 concerning some of the same rate reductions at issue in ILC II and Cal. Pharm. The
petitions for certiorari in Santa Rosa and Cal. Pharm. raise identical legal issues to those
in ILC II and, consequently, the Supreme Court is addressing them together with ILC II.

1 irrespective of the Supreme Court’s decision in ILC II, the rate freeze is invalid because
2 the Department implemented it without first obtaining federal approval. On March 28,
3 2011, the Court granted plaintiffs’ ex parte application to lift the stay and restored
4 plaintiffs’ motions for a preliminary injunction to the calendar.

5 On April 20, 2011, the parties filed supplemental briefs on the pending motions
6 for preliminary injunction. After carefully considering the arguments set forth by both
7 parties, the Court finds and concludes as follows.

8 **III. LEGAL STANDARD**

9 A preliminary injunction is an “extraordinary remedy.” Winter v. Natural Res.
10 Def. Council, Inc., 555 U.S. 7, 129 S. Ct. 365, 375 (2008). The Ninth Circuit
11 summarized the Supreme Court’s recent clarification of the standard for granting
12 preliminary injunctions in Winter as follows: “[a] plaintiff seeking a preliminary
13 injunction must establish that he is likely to succeed on the merits, that he is likely to
14 suffer irreparable harm in the absence of preliminary relief, that the balance of equities
15 tips in his favor, and that an injunction is in the public interest.” Am. Trucking Ass’n,
16 Inc. v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009); see also Cal Pharms.
17 Ass’n v. Maxwell-Jolly, 563 F.3d 847, 849 (9th Cir. 2009) (“Cal Pharm. I”).

18 Alternatively, “serious questions going to the merits’ and a hardship balance that tips
19 sharply toward the plaintiff can support issuance of an injunction, assuming the other
20 two elements of the Winter test are also met.” Alliance for the Wild Rockies v. Cottrell,
21 632 F.3d 1127, 1132 (9th Cir. 2011). A “serious question” is one on which the movant
22 “has a fair chance of success on the merits.” Sierra On-Line, Inc. v. Phoenix Software,
23 Inc., 739 F.2d 1415, 1421 (9th Cir. 1984).

24 **IV. DISCUSSION**

25 **A. Success on the Merits/Serious Legal Questions**

26 **1. Standing**

27 As a threshold matter, the Director contends that plaintiffs have not established
28 that they have Article III standing. Opp’n at 20. In order to establish Article III

1 standing, a plaintiff must: (1) demonstrate an injury in fact, which is concrete, distinct
2 and palpable, and actual or imminent; (2) establish a causal connection between the
3 injury and the conduct complained of; and (3) show a substantial likelihood that the
4 requested relief will remedy the alleged injury in fact. See McConnell v. Fed. Election
5 Comm'n, 540 U.S. 93, 225-26 (2003). An association has standing to bring suit on
6 behalf of its members where any of its members would have standing in their own right,
7 the interests at stake are germane to the organization's purpose, and the relief request
8 does not require participation of individual members. Colwell v. Dep't of Health &
9 Human Servs., 558 F.3d 1112, 1122 (9th Cir. 2009). "The general rule applicable to
10 federal court suits with multiple plaintiffs is that once the court determines that one of
11 the plaintiffs has standing, it need not decide the standing of the others." Leonard v.
12 Clark, 12 F.3d 885, 888 (9th Cir. 1993).

13 Here, the Court finds that plaintiffs have Article III standing to challenge the rate
14 freeze. CAHF is a trade association representing the interests of hundreds of California
15 long-term care facilities, including all categories of ICF/MR facilities and FPS facilities.
16 See Declaration of Darryl Nixon ¶ 3. DSN is a trade association representing the
17 interests of hundreds of California intermediate care facilities, including ICF/DD
18 facilities. DSN Complaint ¶ 3. The Ninth Circuit has recognized that plaintiffs'
19 individual member facilities would have standing to pursue this action in their own right.
20 Indep. Living Ctr. of S. Cal. v. Shewry, 543 F.3d 1050, 1065 (9th Cir. 2008) ("ILC I")
21 (holding that Medi-Cal providers have Article III standing to challenge legislation
22 reducing payments to providers). Moreover, plaintiffs have brought the instant actions
23 in their representative capacities in an effort to prevent injury to their members resulting
24 from the implementation of the rate freeze enacted in AB 5. As such, the lawsuit is
25 germane to plaintiffs' purpose and does not require the individual participation of their
26 members. See Colwell, 558 F.3d at 1122.

27 The Director also argues for the first time in his supplemental opposition that
28 plaintiffs lack prudential standing to challenge the rate freeze because plaintiffs' claims

1 (1) violate the rule against third party standing, Warth v. Seldin, 422 U.S. 490, 499
2 (1975); (2) are barred by the prohibition against “generalized grievances,” Valley Forge
3 Christian Coll. v. Ams. United for Separation of Church & State, 454 U.S. 464, 475
4 (1982); and (3) are barred because plaintiffs, as providers, are not within the “zone of
5 interests” protected by the Medicaid Act provisions at issue, Valley Forge, 454 U.S. at
6 475. Dir. Supp. Mem. at 8–9. Unlike the Article III standing requirements, prudential
7 standing doctrines are non-constitutional limitations on the Court’s review. See ILC I,
8 543 F.3d at 1065 n.17 (citing Bd. of Natural Res. v. Brown, 992 F.2d 937, 945–46 (9th
9 Cir. 1993)). To the extent that the Director’s arguments are directed toward plaintiffs’
10 challenges under the Supremacy Clause, they are unavailing for the reasons set forth in
11 ILC I and Cal. Pharm. I. See ILC I, 543 F.3d at 1064–65; Cal. Pharm. I, 563 F.3d at
12 852–53; see also Cal. Hospital Ass’n v. Maxwell-Jolly, Civ No. 10-3465 FCD/EFB,
13 2011 WL 836706, at *19–20 (E.D. Cal. Mar. 4, 2011) (“CHA II”) (rejecting the
14 Director’s prudential standing argument in challenge to similar rate freeze brought by
15 hospital providers).

16 2. Section 30(A)

17 This Court has already found that the rate freeze provisions of AB 5, codified at
18 Cal. Welf. & Inst. Code §§ 14105.191(f), are likely preempted by federal law because
19 the rate freeze was not enacted in compliance with Section 30(A). See CHA I, No. 09-
20 8642, slip op. at 5–10. The Court’s ruling in CHA I was predicated on the Ninth
21 Circuit’s holding that Medicaid recipients and providers may maintain a private cause of
22 action under the Supremacy Clause to enjoin implementation of state legislation
23 preempted by the Medicaid Act. See ILC I, 543 F.3d at 1065–66; ILC II, 572 F.3d at
24 652–53. The Supreme Court has granted certiorari in ILC II and is currently set to
25 review whether Section 30(A) is enforceable in federal court through the Supremacy
26 Clause. See ILC II, U.S.S.C. Case No. 09-958.

27 Notwithstanding the Supreme Court’s review in ILC II, plaintiffs maintain that
28 they are likely to prevail on their Section 30(A) claim. CAHF Supp. Mem. at 1 n.1.

1 Plaintiffs argue that unless and until the Supreme Court actually reverses the Ninth
 2 Circuit’s decision in ILC II, that precedent should control. Id. The Court recognizes
 3 that at this time the Ninth Circuit’s ruling in ILC II is still good law and controlling in
 4 this circuit. See Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001) (“Once a panel
 5 resolves an issue in a precedential opinion, the matter is deemed resolved, unless
 6 overruled by the court itself sitting en banc, or by the Supreme Court.”). In light of the
 7 pending Supreme Court proceedings in ILC II, however, the Court finds that it would be
 8 imprudent to resolve the present motions under Section 30(A). For now, suffice it to say
 9 that plaintiffs’ claims under Section 30(A) present a “serious question going to the
 10 merits.” Wild Rockies, 632 F.3d at 1132.

11 **3. Prior Federal Approval of the Rate Freeze**

12 Plaintiffs argue that they are likely to succeed on their claim that the Director’s
 13 implementation and application of the rate freeze is unlawful because CMS has not
 14 approved an amendment to California’s State Plan. CAHF Mot. at 13–14; CAHF Reply
 15 at 13–16; CAHF Supp. Mem. at 2–4. After the passage of AB 5, the Department
 16 submitted to CMS State Plan Amendment No. 09-019 (“SPA 09-019”), which proposed
 17 changes to the rate methodology affecting long term care providers by maintaining the
 18 level of reimbursement in effect for the 2009–2010 rate year and each year thereafter.
 19 See Declaration of Jordan B. Keville ¶¶ 2–3, Exh. A. On December 4, 2009, CMS
 20 requested additional information on SPA 09-019. Id. To date, it appears that CMS is
 21 still waiting for additional information, and has not approved SPA 09-019. See Second
 22 Supp. Decl. of Gary Macomber ¶ 7; Supp. Decl. of Jordan B. Keville ¶¶ 4–5, Exh. B.

23 The Ninth Circuit has held that the Director must obtain federal approval before
 24 implementing amendments to the State Plan. See Exeter Mem’l Hosp. Ass’n v. Belshe,
 25 145 F.3d 1106, 1108 (9th Cir. 1998). In Exeter, the Ninth Circuit resolved a split in
 26 district court authority over whether federal approval was required before the
 27 Department could implement amendments to the State Plan. Id. at 1107. The court
 28 affirmed its prior holdings in Or. Ass’n of Homes for the Aging, Inc. v. Oregon, 5 F.3d

1 1239 (9th Cir. 1993) and Wash. State Health Facilities Ass'n v. Wash. Dep't of Soc. &
2 Health Servs., 698 F.2d 964 (9th Cir. 1982) (per curiam), that a state Medicaid agency
3 may not implement amendments to a State Plan unless it has received prior federal
4 approval. Exeter, 145 F.3d at 1108. The court based its holding on the “overall
5 statutory framework [of the Medicaid Act] rather than the particular language of the
6 statute relating to amendments to state plans.” Id. (citing Washington, 698 F.2d at 965).
7 More recently, two Eastern District of California cases decided by the Hon. Frank C.
8 Damrell, Jr., have reaffirmed that the lack of prior CMS approval for amendments to the
9 State Plan is grounds for enjoining a rate freeze. See Cal. Ass'n of Rural Health Clinics
10 v. Maxwell-Jolly, 748 F. Supp. 2d 1184, 1198–1200 (E.D. Cal. 2010) (“CARHC”);
11 CHA II, 2011 WL 836706, at *15–18.

12 The Director argues that Exeter is distinguishable because it construed provisions
13 of the Medicaid Act that were repealed in the Boren Amendment.³ Dir. Supp. Mem. at
14 2–4. The Director is correct in noting that the Ninth Circuit in Exeter declined to an
15 express a view as to how the elimination of the Boren Amendment would impact
16 subsequent challenges. See Exeter, 145 F.3d at 1109 (“We express no opinion as to
17 what effect that statute may have upon the validity of any other or future amendments to
18 Medi-Cal.”). As Judge Damrell points out, however, “[t]he Ninth Circuit [in Exeter] did
19 not tie its holding to any specific statutory language, and thus, the subsequent repeal of
20 the Boren Amendment does not render the decision inapposite. . . .” CARHC, 748 F.
21 Supp. 2d at 1199. This interpretation is fortified by Judge Levi’s reasoning in the
22 underlying decision in Exeter. See Exeter Mem’l Hosp. Ass’n v. Belshe, 943 F. Supp.
23 1239, 1242–44 (E.D. Cal. 1996). In reaching the conclusion that the state could not
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25 ³ The Boren Amendment, previously codified at 42 U.S.C. § 1396a(a)(13)(A),
26 required states to set hospital reimbursement rates that were “reasonable and adequate to
27 meet the costs which must be incurred by efficiently and economically operated facilities.”
28 Wilder v. Va. Hosp. Ass’n, 496 U.S. 498, 501–02 (1990) (quoting 42 U.S.C. §
1396a(a)(13)(A) (1982 ed., Supp. V)).

1 implement a new Medicaid reimbursement rate structure prior to federal approval of the
2 State Plan Amendment, Judge Levi relied almost entirely on the importance of the State
3 Plan in the overall structure of the Medicaid Act. See id. at 1242 (“In short, the State
4 must pay the rates approved in the State plan and therefore cannot pay rates proposed in
5 an amendment until the proposed amendment has been approved and made part of the
6 State plan. Any other interpretation of the plain language of the statute and regulations
7 would be inconsistent with the centrality of an approved State plan to the structure of the
8 Act.”).⁴

9 The Director further maintains that although the Medicaid regulations contemplate
10 CMS approval for material changes to the State Plan, they do not mandate that such
11 approval be obtained before a state implements the change. Dir. Supp. Mem. at 4. As
12 recognized in CARHC, this argument was explicitly rejected by Judge Levi in his
13 opinion in Exeter. See CARHC, 748 F. Supp. 2d at 1200; see also Exeter, 943 F. Supp.
14 at 1243 (to permit implementation of a State Plan amendment pending federal approval
15 “would be inconsistent with the function of the State plan, the approval process for State
16 plans and amendments, and the directive that the States ‘must pay’ reimbursement
17 according to the methods specified in an approved State plan.”).

18 Finally, the Director contends that plaintiffs do not have a private right of action
19 to challenge an amendment to the State Plan. Dir. Supp. Mem. at 5–6.⁵ Under
20 controlling Ninth Circuit precedent, Medicaid providers may bring a claim under 42
21 U.S.C. § 1983 to enjoin enforcement of changes to Medi-Cal reimbursement rates prior
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23 ⁴ It also bears mention that the Ninth Circuit rejected the Director’s argument that
24 the repeal of the Boren Amendment undermined the substantive and procedural
25 requirements of Section 30(A) as set forth in Orthopaedic Hospital. See ILC II, 572 F.3d
26 at 654–55.

27 ⁵At oral argument, the Director requested to submit additional briefing on whether
28 plaintiffs have a private right of action to assert a State Plan Amendment claim. Because
the Court finds the briefing on this issue adequate, see Dir. Supp. Mem. at 5–6, the Court
denies the Director’s request.

1 to federal approval of a State Plan Amendment.⁶ See Exeter, 145 F.3d at 1107; Oregon,
2 5 F.3d at 1240; Washington, 698 F.2d at 965 n.4; see also CARHC, 748 F. Supp. 2d at
3 1199; CHA II, 2011 WL 836706, at *16–17. To the extent the Director urges the Court
4 to ignore settled Ninth Circuit precedent on this issue, the Court declines to do so.

5 Accordingly, the Court finds that plaintiffs are likely to succeed on their claim that
6 the Director’s implementation of the rate freeze in advance of CMS approval is
7 unlawful. Because the Court finds that plaintiffs have demonstrated a likelihood of
8 success on the merits of their State Plan Amendment claim, the Court declines to address
9 plaintiffs’ claim under Section 13(A) for purposes of the present motion.

10 **B. Irreparable Harm**

11 Plaintiffs assert that their members are being irreparably harmed because they are
12 being reimbursed less now than they otherwise would be absent the rate freeze
13 provisions in AB 5. CAHF Mot. at 14–17; DSN Mot. at 19–21; CAHF Reply at 17–23;
14 CAHF Supp. Mem. at 8–10.

15 Traditionally, monetary losses alone are not irreparable because they can be later
16 remedied by a damage award. L.A. Mem’l Coliseum Comm’n v. Nat’l Football League,
17 634 F.2d 1197, 1202 (9th Cir. 1980). The Ninth Circuit has recognized an exception to
18 this rule where a plaintiff would be unable to recover damages due to a State’s Eleventh
19

20 ⁶ At oral argument, the Director argued that plaintiffs have alleged their State Plan
21 Amendment claim under the Supremacy Clause and not section 1983. Judge Damrell
22 rejected this exact same argument in CHA II, and this Court is similarly unmoved. In
23 Paragraph 1 of its complaint, CAHF alleges that the action is brought pursuant to “the
24 Supremacy Clause and 42 U.S.C. § 1983.” CAHF Complaint ¶ 1. CAHF’s State Plan
25 Amendment claim, although nominally asserted under the Supremacy Clause, incorporates
26 by reference all previous paragraphs of the complaint. “Thus, the complaint can be read
27 as alleging each of the claims for relief under the Supremacy Clause *and/or* Section 1983.”
28 CHA II, 2011 WL 836706, at *17 (emphasis in original). Moreover, even though DSN’s
complaint does not specifically allege a claim under section 1983, “the Ninth Circuit
recognized in Wash. State Health, that while the plaintiffs there did not plead a claim for
relief under Section 1983, ‘it is clear that they are properly in federal court under this
provision.’” Id. (quoting Washington, 698 F.2d at 965 n.4).

1 Amendment immunity. Cal. Pharm. I, 563 F.3d at 851–52 (“Because the economic
2 injury doctrine rests only on ordinary equity principles precluding injunctive relief
3 where a remedy at law is adequate, it does not apply where, as here, the Hospital
4 Plaintiffs can obtain no remedy in damages against the state because of the Eleventh
5 Amendment.”). Given that plaintiffs’ members are barred by the Eleventh Amendment
6 from obtaining retroactive relief in federal court from the AB 5 rate provisions, they can
7 establish irreparable harm by demonstrating that their members “will lose considerable
8 revenue through [a] reduction in payments that they will be unable to recover. . . .” Cal
9 Pharms. Ass’n v. Maxwell-Jolly, 596 F.3d 1098, 1113–1114 (9th Cir. 2010) (“Cal.
10 Pharm. II”).

11 The Court finds that plaintiffs have met their burden. Welfare and Institutions
12 Code section 14105.191, as amended by AB 5, effectively freezes at 2008–09 levels
13 reimbursement rates for services rendered by, among other things, ICF/DD facilities,
14 ICF/MR facilities, and FPS facilities, “during the 2009–10 rate year and each rate year
15 thereafter.” Cal. Welf. & Inst. Code § 14105.191(f). Plaintiffs state that but for the
16 application of the rate freeze, the Department would calculate updated rates that would
17 have included an increase to account for inflation. Declaration of Darryl Nixon ¶¶ 8–10.
18 Based on historical rate data and the Department’s own data regarding “unfrozen”
19 ICF/DD, ICF/MR, and FPS rates for the 2009–2010 rate year, plaintiffs argue that it is
20 evident providers operating these facilities are being paid less now than they otherwise
21 would be.⁷ Declaration of Nancy Hayward ¶¶ 6–8, Exhs. A & B; Declaration of P.
22 Dennis Mattson, Ph.D ¶ 5.

23 By way of example, plaintiffs state that CAHF member Hilldale Habilitation
24

25 ⁷ Although the Department has not released the “unfrozen” rates for the 2010–2011
26 rate year, plaintiffs state that the available data demonstrates that this fact remains true.
27 CAHF’s Supp. Mem. at 8–9 (citing Second Supp. Decl. of Nancy Hayward (Hayward 2nd
28 Supp. Decl.) ¶¶ 5–6; Second Supp. Decl. of Gary Macomber (Macomber 2nd Supp. Decl.)
¶¶ 5–6.

1 Center, an ICF/DD facility, is currently being paid for its services at a “frozen” rate of
2 \$175.03, while the Department has calculated an “unfrozen” rate for the facility of
3 \$179.88 for 2009–2010. Declaration of Nancy Hayward ¶ 8a. Annualized for the entire
4 year, the differential in reimbursement rates results in total losses to the facility of
5 \$100,278.60. *Id.* ¶ 8a, Exh. C. These losses appear to continue for the 2010-2011 rate
6 year. For example, plaintiffs estimate that ICF/DD facilities with 7–15 beds will lose
7 between \$56,000 and \$73,000 in Medi-Cal reimbursement during the 2010–2011 rate
8 year, and FPS facilities will lose a minimum of nearly \$700,000 for the same time
9 period. Hayward 2nd Supp. Decl. ¶ 6, Exh. A; Macomber 2nd Supp. Decl. ¶ 6.

10 Despite these ongoing losses, the Director argues that the Court should deny the
11 request for a preliminary injunction on the basis that plaintiffs “delayed” in initiating this
12 action relative to when the rate freeze went into effect. Opp’n at 21–22. “[D]elay by
13 itself is not a determinative factor in whether the grant of interim relief is just and
14 proper.” *Miller v. Cal. Pac. Med. Ctr.*, 991 F.2d 536, 543–44 (9th Cir. 1993). The factor
15 of delay is only material where the harm sought to be prevented already has occurred
16 and the parties cannot be returned to the status quo. *McDermott v. Ampersand Publ’g,*
17 *LLC*, 593 F.3d 950, 965 (9th Cir. 2010). Stated differently, where the delay is such that
18 it places the parties in a position where a preliminary injunction will “not actually make
19 a practical difference,” equitable relief may be denied. *Id.* That is plainly not the case
20 here. As discussed above, plaintiffs’ members have been subjected to the rate freeze
21 since August 1, 2009, and continue to be paid less now than they otherwise would be
22 absent application of the rate freeze. Because this shortfall cannot be remedied
23 retroactively, plaintiffs’ members continue to suffer irreparable harm.

24 Alternatively, the Director argues that plaintiffs cannot establish irreparable harm
25 because they may recover retroactive relief in a collateral state court action or through an
26 administrative process. Dir. Supp. Mem. at 9–10. The Ninth Circuit rejected this
27 argument in *Cal. Pharm. I*. There, the court acknowledged that damages may later
28 become available to plaintiffs in state court, but stated that federal courts must “consider

1 only prospective federal remedies for the purpose of gauging whether the harm caused to
2 [plaintiffs] and their members is irreparable.” Cal. Pharm. I, 563 F.3d at 852 n.2
3 (emphasis in original) (relying on United States v. New York, 708 F.2d 92, 93–94 (2d
4 Cir. 1983) (per curiam)).

5 In sum, the Court finds that plaintiffs have sufficiently demonstrated that there is a
6 likelihood that certain ICF/DD facilities, ICF/MR facilities, and FPS facilities “will lose
7 considerable revenue” as a result of the rate freeze implemented by AB 5. Cal. Pharm.
8 II, 596 F.3d at 1113–14. This harm is irreparable because if the Court does not grant the
9 preliminary injunction, plaintiffs’ members would be barred by the Eleventh
10 Amendment from obtaining retroactive relief in federal court. See Cal. Pharm. I, 563
11 F.3d at 851–52.

12 **C. Balance of Hardships and Public Interest**

13 While the Court is mindful of the difficulty facing the State of California in light
14 of its fiscal crisis, the Ninth Circuit has held that “[s]tate budgetary considerations do not
15 . . . in social welfare cases, constitute a critical public interest that would be injured by
16 the grant of preliminary relief.” ILC II, 572 F.3d at 659. Further, the Ninth Circuit has
17 determined that “it would not be equitable or in the public's interest to allow the state to
18 continue to violate the requirements of federal law, especially when there are no
19 adequate remedies available to compensate the [plaintiffs] for the irreparable harm that
20 would be caused by the continuing violation.” Cal. Pharm. I, 563 F.3d at 852–53.
21 Given that the State may decide to implement a rate change upon complying with the
22 mandates of federal law, the Court finds that the balance of equities and the public
23 interest weigh in favor of granting the injunction.⁸

24
25 ⁸ The Court notes that this does not appear to be a case where the balance of
26 hardships tips sharply in favor of plaintiffs because there is no showing on the present
27 record that Medi-Cal beneficiaries are likely to be forced to go without medical care due
28 to the implementation of the rate freeze. See ILC II, 572 F.3d at 657–58 (“it is not legal
error to conclude, when balancing the medical or financial hardship to Medi-Cal recipients
(continued...)”)

1 **V. CONCLUSION**

2 In accordance with the foregoing, the Court hereby GRANTS plaintiffs' motions
3 for preliminary injunction. The Court hereby ORDERS the Director, his agents,
4 servants, employees, attorneys, successors, and all those working in concert with him to
5 refrain from enforcing Cal. Welf. & Inst. Code § 14105.191(f), including refraining from
6 effectively freezing at 2008–2009 levels the Medi-Cal reimbursement rates for services
7 provided by intermediate care facilities for the developmentally disabled and the
8 mentally retarded, and freestanding pediatric subacute facilities during the 2009–2010
9 rate year and each rate year thereafter.

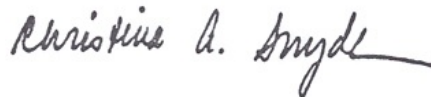
10 At oral argument, the Director orally moved for a stay of the preliminary
11 injunction pending the Director's emergency appeal of this order. In deciding whether
12 to issue a stay pending appeal, the Court considers "(1) whether the stay applicant has
13 made a strong showing that he is likely to succeed on the merits; (2) whether the
14 applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will
15 substantially injure the other parties interested in the proceeding; and (4) where the
16 public interest lies." See Golden Gate Rest. Ass'n v. City & County of S.F., 512 F.3d
17 1112, 1115 (9th Cir. 2008) (citations omitted). The Court finds that the relevant factors
18 do not weigh in favor of granting the Director's motion. Most importantly, there is no
19 evidence that the Director will suffer irreparable injury absent a stay, and issuance of a
20 stay would substantially injure plaintiffs because their members would continue to lose
21 considerable revenue that cannot be recouped retroactively in federal court.

22
23 _____
24 ⁸(...continued)

25 against the financial hardship to the state, that the balance of hardships tipped sharply in
26 favor of the plaintiffs.") (internal quotations omitted). Thus, the "serious questions"
27 analysis in Wild Rockies is inapplicable. See Wild Rockies, 632 F.3d at 1132.
28 Nevertheless, the Court finds that it is appropriate to issue the preliminary injunction
because plaintiffs have demonstrated that they are likely to succeed on the merits of their
State Plan Amendment claim and the other Winter elements are satisfied. See Am.
Trucking, 559 F.3d at 1052.

1 Accordingly, the Court DENIES the Director's motion for a stay pending appeal.

2 IT IS SO ORDERED



3 Dated: May 5, 2011

4 CHRISTINA A. SNYDER
5 UNITED STATES DISTRICT JUDGE

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