UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JERRY THOMAS, et al., Plaintiffs, v. JENNIFER KENT, et al., Defendants.	Case No. CV 14-8013 FMO (AGRx) **ORDER RE: PENDING MOTIONS**

Having reviewed and considered all the briefing filed with respect to the Motion for Attorneys' Fees (Dkt. 355, "Pls' Motion") filed by Jerry Thomas ("Thomas"), Sean Benison ("Benison"), and Juan Palomares ("Palomares") (collectively, "plaintiffs"), as well as the Motion to Recover Fees and Costs (Dkt. 354, "Defs' Motion") filed by California Department of Health Care Services ("DHCS") and Toby Douglas ("Douglas") (collectively, "defendants"), the court finds that oral argument is not necessary to resolve the Motions, see Fed. R. Civ. P. 78; Local Rule 7-15; Willis v. Pac. Mar. Ass'n, 244 F.3d 675, 684 n. 2 (9th Cir. 2001), and concludes as follows.

BACKGROUND[1]

On October 23, 2014, plaintiffs filed this action against DHCS and then-DHCS Director Douglas. (See Dkt. 4, Complaint). Plaintiffs filed a First Amended Complaint on January 29, 2015 (Dkt. 26, "FAC") and the operative Second Amended Complaint on July 7, 2015. (Dkt. 70, "SAC").

[1] Because the parties are familiar with the facts of this case, the court recounts only the facts relevant to the instant Motions.

In the SAC, plaintiffs assert three claims against defendants for violations of: (1) the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, et seq.; (2) the Rehabilitation Act, 29 U.S.C. §§ 701, et seq.; and (3) California Government Code §§ 11135 and 11139. (See id. at ¶¶ 124-153). Among other things, the SAC seeks a permanent injunction, and a court order "requiring Defendants to . . . [a]uthorize Medi-Cal funded services for Plaintiffs through the Nursing Facility/Acute Hospital Waiver ["NF/AH Waiver"] or other appropriate Home and Community-Based Services Waivers . . . to enable them to receive medically necessary services commensurate with their needs [and to] [a]mend their policies and procedures consistent with the injunction above, and to require that Nursing Facility/Acute Hospital Waiver participants be provided with medically necessary Medi-Cal in-home services, commensurate with their assessed needs, and as identified by their treating physicians, consistent with federal cost neutrality requirements[;]" along with costs and attorney's fees. (Dkt. 70, SAC at § IX).

On January 12, 2017, defendants filed an Ex Parte Application [to] Dismiss[] the SAC as Moot (Dkt. 343, "Ex Parte Application"), asserting that "[t]he NF/AH Waiver was amended in November 2016 to delete the complained of cost limitations and to allow approval of waiver services based on medical necessity[,]" (Dkt. 343-1, Memorandum of Points and Authorities in Support of Ex Parte Application ("Ex Parte Memo") at 1). According to defendants, "because Plaintiffs have already received all of the requested relief[,]" the case should be dismissed. (Dkt. 343, Ex Parte Application at 2). The court denied the Ex Parte Application, (see Dkt. 345, Court's Order of January 16, 2018), and the parties filed a stipulation to dismiss the case on February 7, 2018. (See Dkt. 346, Notice of Voluntary Dismissal). The court held a status conference on February 22, 2018, and ordered the parties to revise the stipulation or submit supplemental briefing in light of the fact that Thomas has a guardian ad litem. (See Dkt. 350, Court's Order of February 22, 2019). The parties were unable to agree on a revised stipulation. As a result, plaintiffs filed a request for voluntary dismissal without prejudice on March 14, 2018. (See Dkt. 352, Petition for Dismissal without Prejudice []).

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DISCUSSION

State law applies to the right to recover attorney's fees for state law claims in a federal court action, even when there is a federal corollary. See Indep. Living Ctr. of S. Cal. v. Kent, 909 F.3d 272, 282-83 (9th Cir. 2018) ("Because the § 1085 Write is a state law cause of action, we look to California law to determine whether attorneys' fees are available to Appellants under § 1021.5 of the California Code of Civil Procedure"); Bass v. First Pac. Networks, Inc., 219 F.3d 1052, 1055 n. 2 (9th Cir. 2000) ("[A] federal court exercising supplemental jurisdiction over state law claims is bound to apply the law of the forum state to the same extent as if it were exercising its diversity jurisdiction."); Egelhoff v. Pac. Lightwave, 2013 WL 12125913, *1 (C.D. Cal. 2013) ("When exercising supplemental jurisdiction over state law claims, federal courts must determine attorneys' fees by applying state law.") (footnote omitted); see, e.g., Parks v. Eastwood Ins. Servs., Inc., 2005 WL 6007834,*2-3 (C.D. Cal. 2005) (awarding fees where the plaintiffs' state unfair competition claims derived from their federal Fair Labor Standards Act claim), aff'd in relevant part, 240 F.Appx. 172, 175 (9th Cir. 2007). Under California law, the "general rule" is that "parties in litigation pay their own attorney's fees." Friends of Spring St. v. Nevada City, 33 Cal.App.5th 1092, 1107 (2019); see Kirby v. Immoos Fire Prot., Inc., 53 Cal.4th 1244, 1248 (2012) ("In general, [California law allows] a prevailing party [to] recover attorney's fees when a statute or an agreement of the parties provides for fee shifting."). However, California Code of Civil Procedure § 1021.5 ("§ 1021.5") "is an exception to that rule. Derived from the judicially crafted private attorney general doctrine, section 1021.5 is aimed at encouraging litigants to pursue meritorious public interest litigation vindicating important rights and benefitting a broad swath of citizens, and it achieves this aim by compensating successful litigants with an award of attorney's fees." Friends of Spring St., 33 Cal.App.5th at 1107 (internal quotation marks and internal brackets omitted).

Section 1021.5 "can be divided in the following separate elements. A . . . court may award attorney fees to (1) a successful party in any action (2) that has resulted in the enforcement of an important right affecting the public interest if (3) a significant benefit has been conferred on the general public or a large class of persons, (4) private enforcement is necessary because no public

entity or official pursued enforcement or litigation, (5) the financial burden of private enforcement is such as to make a fee award appropriate, and (6) in the interests of justice the fees should not be paid out of the recovery." People v. Investco Mgmt. & Dev. LLC, 22 Cal.App.5th 443, 456 (2018) ("Investco") (internal quotation marks omitted); see In re Conservatorship of Whitley, 50 Cal.4th 1206, 1214 (2010) ("Whitley").

Here, defendants do not dispute the factors relating to the necessity and financial burden of private enforcement. (See, generally, Dkt. 360, Defendants' Opposition[] ("Defs' Opp.")). Also, whether the fees should "be paid out of the recovery, if any[,]" Cal Code Civ. P. § 1021.5, is not at issue here, as plaintiffs did not seek monetary recovery in this lawsuit. (See, generally, Dkt. 70, SAC); Charlebois v. Angels Baseball LP, 993 F.Supp.2d 1109, 1114 (C.D. Cal. 2012) ("[B]ecause this action was for injunctive relief alone, no fees can be paid out of the recovery."). Thus, only the first three factors are at issue.

I. SUCCESSFUL PARTY.

The "critical fact" in determining whether a party was "successful" under § 1021.5 "is the impact of the action, not the manner of its resolution." Graham v. DaimlerChrysler Corp., 34 Cal.4th 553, 566 (2005); see Henderson v. J.M. Smucker Co., 2013 WL 3146774, *4 (C.D. Cal. 2013). "Under this broad, pragmatic view[,] . . . a plaintiff need not obtain a judgment in its favor to be a successful party. . . . Rather, a plaintiff is a successful party whenever it obtains the relief sought in its lawsuit, regardless of whether that relief is obtained through a voluntary change in the defendant's conduct, through a settlement, or otherwise." Hogar v. Cmty. Dev. Comm. of the City of Escondido, 157 Cal.App.4th 1358, 1365 (2007) (internal quotation marks omitted); Investco, 22 Cal.App.5th at 458 ("To determine whether a party is 'successful,' courts look at the outcome the parties sought in commencing the action, the situation before the party commenced the suit, and the situation today."). To "obtain attorney fees without . . . a judicially recognized change in the legal relationship between the parties, a plaintiff must establish that (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense . . . and, (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing

the lawsuit." Tipton-Whittingham v. City of Los Angeles, 34 Cal.4th 604, 608 (2004). The catalyst theory exists to deter defendants from "litigat[ing] tenaciously, then avoid[ing] paying [plaintiffs' counsel's] fees by voluntarily providing relief before a court order is entered." Graham, 34 Cal.4th at 574.

A. Whether Suit Was a Catalyst.

"To be a catalyst, the lawsuit must have been 'a substantial causal factor' contributing to Defendant's conduct, though the lawsuit need not be the only cause of Defendant's conduct." Henderson, 2013 WL 3146774, at *4 (quoting Graham, 34 Cal.4th at 573). "A causal connection between the lawsuit and the result will be found if the defendant's voluntary action was induced by the plaintiff's legal action . . . or when the plaintiff's action was a material factor or contributed in a significant way to the result achieved." Cal. Common Cause v. Duffy, 200 Cal.App.3d 730, 743 (1987) (internal quotations and citations omitted). "[T]he chronology of events may raise an inference that the litigation was the catalyst for the relief[.]" Hogar, 157 Cal.App.4th at 1366; see Sablan v. Dep't of Fin., 856 F.2d 1317, 1326 (9th Cir. 1988) ("Clues to the provocative effects of the plaintiffs' legal efforts are often best gleaned from the chronology of events[.]") (internal quotation marks omitted).

Defendants argue that plaintiffs' lawsuit was not the catalyst because "plaintiffs failed to obtain the actual relief requested in the operative SAC[,]" (Dkt. 360, Defs' Opp. at 15; id. at 17), and because defendants "had already decided to amend the NF/AH Waiver to remove individual cost limits prior to the lawsuit being filed[,]" (id. at 4), "based on input received from all stakeholders[.]" (Id. at 1). According to defendants, "[t]he lawsuit was not a consideration, let alone a substantial factor, for removing individual cost limits" in 2017. (Id. at 1). The court is not persuaded.

As a preliminary matter, defendants' argument that plaintiffs failed to achieve their primary goals is not well-taken. Defendants previously asserted in a filing before this court that "Plaintiffs have already received all of the requested relief." (Dkt. 343, Ex Parte Application at 2). Given defendants' previous assertion that plaintiffs received all of their requested relief, defendants cannot now directly contradict their own position. See, e.g., Hamilton v. State Farm Fire & Cas.

Co., 270 F.3d 778, 782 (9th Cir. 2001) ("Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position."). In any event, as defendants acknowledge, plaintiffs obtained the relief they sought in the instant action when defendants eliminated the individual cost limits in the renewed Waiver program, shifted to authorizing Waiver services based on medical necessity, and formalized their policies and procedures regarding these changes. (See Dkt. 343-1, Ex Parte Memo at 1, 3, 8-10 ("Plaintiffs may request and receive all medically necessary waiver services as covered under the terms of the Waiver, without any application of cost limits."); Dkt. 360, Defs' Opp. at 15-17 (acknowledging that plaintiffs' SAC sought an end to "arbitrary NF/AH Waiver cost caps" and the provision of "medically necessary Medi-Cal in home services" for Waiver participants "commensurate with their assessed needs, and as identified by their treating physicians, consistent with federal cost neutrality requirements")).

Defendants admitted in their July 2015 Answer to plaintiffs' SAC that the NF/AH Waiver was subject to cost limitations, (Dkt. 71, Answer at ¶ 6) ("admit[ting] that the allowable Medi-Cal costs for in-home services for an individual are subject to a limitation for each available level of care, as specified in the applicable NF/AH Waiver"), and two and a half years later – in January 2018 – conceded that plaintiffs obtained all of the primary relief they were seeking in this action, i.e., "the individual cost limits [were] removed from the NF/AH Waiver." (Dkt. 343-1, Ex Parte Memo at 3; Dkt. 343, Ex Parte Application at 2). Under the circumstances, the chronology of events establishes a rebuttable presumption that plaintiffs' action was the catalyst for the changes in the waiver program made by defendants.[2] See Hogar, 157 Cal.App.4th at 1366-67 ("When, after litigation is initiated, a defendant has voluntarily provided the relief a plaintiff is seeking, the chronology of events may raise an inference that the litigation was the catalyst for the relief."); In

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[2] The fact that plaintiffs achieved their primary goals – even assuming they did not achieve all of their requested relief – is sufficient to render plaintiffs a successful party under § 1021.5. See, e.g., Hogar, 157 Cal.App.4th at 1363 (affirming fee award where trial court found that "although [plaintiff] did not achieve all of its goals, it was successful in attaining its primary goals"); Tipton-Whittingham, 34 Cal.4th at 608 (noting that catalyst theory "does not require a judicially recognized change in the legal relationship between the parties as a prerequisite for obtaining attorney fees under Code of Civil Procedure section 1021.5") (internal quotation marks omitted).

re Taco Bell Wage & Hour Actions, 222 F.Supp.3d 813, 825 (E.D. Cal. 2016) ("[W]ithin several months of this lawsuit being filed [defendant] changed its . . . policy . . . to comply with California law. The timing of the change . . . is circumstantial evidence from which the Court finds that this lawsuit was the reason that [defendant] changed its . . . policy."); (see also Dkt. 355, Pls' Motion at 12-16) (outlining chronology of events in detail).

Because defendants implemented plaintiffs' primary goals after litigation commenced, the burden shifts to defendants to rebut the inference of causation by introducing "convincing contemporaneous evidence[,]" MacDonald v. Ford Motor Co., 142 F.Supp.3d 884, 894 (N.D. Cal. 2015), that they had a pre-existing "concrete project or plan" to implement the changes to the Waiver program before this litigation began. See Henderson, 2013 WL 3146774 at *6. Defendants contend that "the Department had already decided to amend the NF/AH Waiver to remove individual cost limits prior to the lawsuit being filed," (Dkt. 360, Defs' Opp. at 4; see Dkt. 354, Defs' Motion at 4-10), citing the following evidence: (1) a September 2014 email exchange between Deborah Doctor ("Doctor") and DHCS; (2) a September 2014 email exchange between John Shen, then-Division Chief for DHCS's Long Term Care Division, and the Centers for Medicare and Medicaid Services ("CMS"); and (3) statements from Jennifer Chmura ("Chmura"), DHCS's in-house attorney, and Sarah Brooks ("Brooks"), DHCS's Deputy Director, Health Care Delivery Systems. (See Dkt. 360, Defs' Opp. at 6-7). Putting aside the fact that defendants previously conceded that plaintiffs obtained all the relief they requested through this lawsuit, defendants' contentions are unpersuasive.

With regard to the 2014 email exchanges, they are irrelevant to the issues in this litigation. Plaintiffs' claims in this action challenged the denial of and/or reduction in medically necessary Waiver services based on the cost limits for individuals receiving services. (See Dkt. 70, SAC at ¶¶ 130-133, 142-144, 150-152, 158-19; see also Dkt. 355-2, Exhibit ("Exh.") D, DHCS Decision on Thomas's claim; id., Exh. G, DHCS Notice of Action re: Benison; id., Exh. K, IHO Summary for Palomares). The 2014 email exchanges, on the other hand, relate to problems with the cost cap raised by the FLSA, which affected hourly compensation for home care providers due to payment of overtime, without any corresponding increase in the hours of authorized services for Waiver

recipients. (See Dkt. 355-3, Declaration of Elissa Gershon in Support of Plaintiffs' Motion [] ("Gershon Decl."), Exh. P, Deposition of Rebecca Schupp ("Schupp Depo."), volume ("v.") 1 at P155-P157; Dkt. 359-1, Declaration of Elissa Gershon in Opposition to Defendants' Motion [] ("Gershon Opp. Decl.") at ¶ 14; Dkt. 361, Declaration of Jennifer Chmura ("Chmura Decl."), Exh. A, September 17, 2014, Email from John Shen to Deborah Doctor (stating that DHCS had scheduled a conference call to "(1) assure [stakeholders] that overtime cost (or change in local IHSS wages) would not be a basis to change [NF/AH Waiver participants'] care plan and services, even if the cost of their services is beyond the cost cap; and (2) to propose DHCS working with waiver participants and their families on managing the overtime so that they would not trigger provisions in SB855 that would disrupt their . . . provider network")). Moreover, the changes to FLSA had no effect on licensed nursing services, which are the primary Waiver services plaintiffs Thomas and Benison receive. (See Dkt. 355-3, Exh. P, Schupp Depo. v.1 at P-166 & P-155-P-157). Thus, defendants' proposal to address FLSA cost cap issues, and the 2014 emails discussing those issues, had nothing to do with this case. But even if those discussions were relevant to plaintiffs' claims, they still would not rebut the presumption that plaintiffs' suit was a material factor leading to the removal of the cost limits because, as DHCS's Rule 30(b)(6) designee and then-Chief of the Long-Term Care Division Rebecca Schupp noted, DHCS abandoned these discussions with CMS on January 20, 2015, before plaintiffs even filed the FAC. (See Dkt. 355-1, Gershon Decl. at ¶¶ 21-22; Dkt. 355-3, Exh. O, Schupp Depo. v.2 at O-101-O-102, O-112-O-114, O-117-O-118, O-120, O-121-O-122; Dkt. 26, FAC; Dkt. 360-3, Declaration of Sarah Brooks ("Brooks Decl.") at ¶¶ 5-7).

Further, Chmura's statement that "[t]he Waiver amendment process that the Department started in 2014 continued into 2016[,]" (Dkt. 361, Chmura Decl. at ¶ 4), and Brooks's statement that "the Department already had begun the process of converting from individual cost limits" prior to the litigation, (see Dkt. 360-3, Brooks Decl. at ¶ 13), are insufficient to overcome the extensive evidence that plaintiffs' action was the catalyst for the Waiver changes. As an initial matter, defendants offer no evidence to support the self-serving, conclusory statements in the two declarations. (See, generally, Dkt. 360, Defs' Opp.). With respect to Brooks, she testified during

her deposition that she did not assume responsibility for any aspect of the Waiver program until June 2015. (See Dkt. 364-1, Declaration of Elissa Gershon in Support of Plaintiffs' Reply [] ("Gershon Reply Decl."), Exh. C, Deposition of Sarah Brooks ("Brooks Depo.") at C-35-C-36). In other words, there is little, if any, foundation for Brooks's assertions, (Dkt. 360-3, Brooks Decl. at ¶¶ 4 & 9), regarding the DHCS's motivations. Under these circumstances, particularly in light of the extensive contrary evidence, the court "[is] not required to believe a staff member's second-hand report" about the reason for the change. See Hogar, 157 Cal.App.4th at 1367; MacDonald, 142 F.Supp.3d at 893 (Defendant "has not offered declarations from the final decision makers who actually recommended and approved the 2014 recall. What role this lawsuit played in their decisions is unknown.").

Finally, defendants' argument ignores evidence – including statements made and documents produced by defendants themselves – that undermines their position and the credibility of the evidence they rely upon. For example, defendants admitted to CMS in writing that "[t]here were no changes to the waiver application as a result of the public input" it had received. (See Dkt. 355-1, Gershon Decl. at ¶ 37; Dkt. 355-4, Exh. V, HCBA Waiver at V-343). Also, despite the ongoing Waiver Renewal process, defendants did not publicly raise the topic of cost limits until April 20, 2016[3] – nearly a year and a half after this lawsuit was filed – and even then they made no commitments about whether or how they would address the cost limits in the Waiver Renewal. (See Dkt. 355-1, Gershon Decl. at ¶¶ 26-33; Dkt. 355-3, Exh. R, NF/AH Waiver Renewal Technical Workgroup Meeting #3 [] Minutes, April 20, 2016, at R-226 & R-232; id., Exh. S, NF/AH Waiver Renewal Technical Workgroup Meeting #3 Powerpoint Presentation, April 20, 2016, at S-286, S-292, S-300, S-302 (suggesting that comprehensive care management can ensure cost neutrality); id., Exh. T, NF/AH Waiver Renewal Technical Workgroup Feedback vs. Recommendations at T-317-T-318). Finally, and very telling of defendants' true motives in this case, is DHCS's refusal to support proposed legislation in 2015 that would have eliminated the

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[3] Defendants first revealed their intention to seek an amendment to the Waiver to the court on March 30, 2016, in their Reply in support of their Motion to Dismiss and in their supplemental memorandum in opposition to plaintiffs' Motion for Summary Judgment. (See Dkt. 117, Reply in Support of Motion to Dismiss [] at 1-3; Dkt. 118, Memorandum in Opposition to Motion to Dismiss).

individual cost limits. (See Dkt. 355-1, Gershon Dec. ¶ 50; Dkt. 355-6, Exhibit BB, California State Assembly Bill 1518 Documents). Defendants' claim that they intended to remove the cost limits as early 2014, (see Dkt. 360, Defs' Opp. at 4-8), is belied by their refusal to support the 2015 legislation.

Even assuming defendants had not conceded that plaintiffs obtained all of the primary relief they sought, and notwithstanding defendants' contentions that they intended to remove the cost limits as early as 2014, the fact remains that defendants did not eliminate the cost limits until this litigation was well underway. Defendants' first unqualified statement that they were modifying the cost neutrality approach was on June 10, 2016, shortly after this court denied their first Motion to Dismiss. (See Dkt. 355-3, Exh. U, DHCS NF/AH Waiver Renewal Proposal, June 10, 2016, at U-329) ("The State is proposing to change from an individual cost limit to an individual cost limit that calculates cost neutrality in the aggregate across all Waiver participants."); Dkt. 139, Court's Order of April 27, 2016 ("Order Re: MTD")). Indeed, DHCS's own budget documents do not reference a removal of cost limits until November 2016; the cost estimates in November 2015 and May 2016 simply describe the fiscal impact of the impending Waiver Renewal as "indeterminate." (Dkt. 355-1, Gershon Decl. at ¶¶ 51-55; Dkt. 355-6, Exhibits CC-FF); see Henderson, 2013 WL 3146774 at *5. ("Evidence of a general goal [to improve behavior] does not rebut" the inference that the litigation was a catalyst.).

In short, the evidence proffered by defendants is insufficient to "rebut the inference from the chronology of events and show that Plaintiffs' lawsuit did not catalyze" DHCS's decision to eliminate the Waiver cost limits. See MacDonald, 142 F.Supp.3d at 894; Hogar, 157 Cal.App.4th at 1367 ("Given this chronology of events, the trial court could reasonably conclude that overall [plaintiff's] litigation was successful.").

B. Whether Plaintiffs' Lawsuit Was "Frivolous, Unreasonable, or Groundless."

Under California's catalyst doctrine, the court must determine "that the lawsuit is not frivolous, unreasonable or groundless[.]" Graham, 34 Cal.4th at 575 (internal quotation marks omitted). A plaintiff must also show "that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense[.]" Tipton-Whittingham, 34 Cal.4th

at 608. While the court should review the factual record, the determination is "not a final decision on the merits but a determination at a minimum that the questions of fact and law are grave and difficult." Graham, 34 Cal.4th at 575-76 (internal quotation marks omitted).

Defendants contend that plaintiffs' suit "had no merit" because plaintiffs "have not been" at serious risk of institutionalization, (Dkt. 360, Defs' Opp. at 18-21), and because the Waiver program was "operating effectively" prior to the litigation. (Id. at 22-23). Defendants' contentions are utterly meritless and border on the frivolous.

As an initial matter, defendants never filed a motion for summary judgment in this case. (See, generally, Dkt.). If plaintiffs' case truly had no merit, then defendants should have done so. What's more, if the Waiver program was "operating effectively" prior to the litigation, (Dkt. 360, Defs' Opp. at 22-23), then it was incumbent upon defendants to explain why they ultimately changed the Waiver program to remove the cost limits. See Graham, 34 Cal.4th at 573 ("[T]he defendant in such cases knows better than anyone why it made the decision that granted the plaintiff the relief sought, and the defendant is in the best position to either concede that the plaintiff was a catalyst or to document why the plaintiff was not[.]"). This they did not do. (See, generally, Dkt. 360, Defs' Opp.).

In addition, defendants' argument that plaintiffs were not at serious risk of institutionalization misses the mark as it does not directly address the gravamen of plaintiffs' lawsuit, which is that defendants arbitrarily set individual cost limits for medically necessary services available through the Waiver program and that those cost limits were significantly lower than the average cost for providing comparable care in an institution. (See Dkt. 70, SAC at ¶¶ 5-9 & 43-48). Rather than addressing the merits of the individual cost limits, defendants attempt to re-frame the issue as whether plaintiffs were ever at a serious risk of institutionalization. (See Dkt. 360, Defs' Opp. at 18-21). But defendants' re-framing of the issue simply begs the question with respect to the legality of the individual cost limits.

In any event, even assuming defendants' argument directly addressed what is at issue in this case, the argument is without merit. To support their argument, defendants cite a number of their own facts from the parties' Statement of Uncontroverted Facts (Dkt. 195, "SUF") relating to

plaintiffs' motion for summary judgment. (See Dkt. 360, Defs' Opp. 18-21). However, many of the facts were disputed by plaintiffs during the summary judgment proceedings, (see, e.g., Dkt. 195, SUF at D43, D47, D48, D61, D66, D67, D68, D74), and defendants mishcharacterize many of the facts and underlying evidence. (See, e.g., Dkt. 360, Defs' Opp. at 18) (citing Dkt. 195, SUF at D43 as evidence that "Mr. Thomas had been well cared for and had not been at any serious risk of institutionalization during the time that he had been enrolled in the NF/AH Waiver" whereas D43, which was disputed by plaintiffs, actually states, "Since returning home, Mr. Thomas has been well cared for."). In addition, defendants mischaracterize this Court's Order Re: Plaintiffs' Motion for Summary Judgment, (see Dkt. 360, Defs' Opp. at 21), when they assert that the court "concluded that the Defendants had offered evidence showing that plaintiffs have been well cared for and have remained safely in their homes at all times while receiving their currently authorized services." (Id. (internal alterations and quotation marks omitted); see Dkt. 322, Court's Order of June 5, 2017 ("MSJ Order") at 9). Contrary to defendants' assertion, the court did not accept defendants' claim that plaintiffs "face no risk of institutionalization" based on the services DHCS authorized a year after this litigation commenced. (See Dkt. 322, MSJ Order at 9) (quoting defendants' argument). Rather, the court noted that the facts in the record – including that DHCS could rescind its authorization of services over the cost limits, that it had refused to commit to providing ongoing services, and that it lacked written policies or procedures for authorizing exceptions – "tend to show that plaintiffs are at risk of institutionalization as a result of the cost limits imposed by the Waiver program."[4] (Id. at 9). Moreover, it's worth noting that defendants' own expert stated that plaintiffs would be at "serious" or "high risk of institutionalization without the services they were authorized that exceeded the cost limits." (Dkt. 195, SUF at P186 & P189).

Finally, defendants' argument that the Waiver was "operating effectively[,]" (Dkt. 360, Defs' Opp. at 18-23), is irrelevant given that the basis of plaintiffs' request for fees is the change in the

[4] Defendants also misrepresented the MSJ Order in connection with their argument that they did not violate the ADA's integration mandate. (See Dkt. 360, Defs' Opp. at 23). In making their argument, defendants quote from the MSJ Order, (see id.), but conspicuously omit the court's concluding sentence, which expresses the court's "serious concerns about whether the Waiver program comports with the ADA's integration mandate[.]" (Dkt. 322, MSJ Order at 10). In other words, the court did not find or otherwise agree with defendants that plaintiffs' case had no merit.

Waiver program that eliminated the cost limits. Again, if the Waiver program had been operating effectively, then defendants should have filed a motion for summary judgment. Instead, plaintiffs filed a motion for a summary judgment because they "believed so strongly in the merits of their legal claims[.]" (Dkt. 364, Reply at 11). In denying plaintiffs' motion for summary judgment, the court expressed "serious concerns about whether the Waiver program comports with the ADA's integration mandate," and concluded that there were "genuine disputes of material fact" such that summary judgment was not appropriate at that time. (See Dkt. 322, Court's MSJ Order at 10). In short, the court finds that "the questions of law or fact [in this case] are grave and difficult[,]" and that plaintiffs' lawsuit was "not frivolous, unreasonable or groundless[.]"[5] Graham, 34 Cal.4th at 575 (internal quotation marks omitted).

C. Attempted Pre-litigation Settlement.

The final prong of the catalyst analysis requires plaintiffs to show that they "reasonably attempted to settle the litigation prior to filing the lawsuit." Hogar, 157 Cal.App.4th at 1365 (internal quotation marks omitted). The bar is not high: "[l]engthy prelitigation negotiations are not required, nor is it necessary that the settlement demand be made by counsel, but a plaintiff must at least notify the defendant of its grievances and proposed remedies and give the defendant the opportunity to meet its demands within a reasonable time." Graham, 34 Cal.4th at 577.

Defendants assert that plaintiffs did not reasonably attempt to settle, contending that plaintiffs sent only one letter prior to filing suit, and that neither the letter nor two subsequent emails to DHCS "contain[ed] sufficient information to support a claim for attorneys' fees." (Dkt. 360, Defs' Opp. at 23).

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[5] Indeed, it appears that defendants' motion to recover fees and costs may be sanctionable on the grounds that it is frivolous and unreasonably and vexatiously multiplied the proceedings. See Fed. R. Civ. P. 11; 28 U.S.C. § 1927 ("Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."); Fink v. Gomez, 239 F.3d 989, 994 (9th Cir. 2001) ("Sanctions are available for a variety of types of willful actions, including recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose."). However, the court need not address this issue at this time because plaintiffs will be entitled to fees for opposing defendants' motion for attorney's fees.

Defendants' assertions are unpersuasive and ignore the historical context preceding the filing of the instant action. See Investco, 22 Cal.App.5th at 458 ("To determine whether a party is 'successful,' courts look at the outcomes the parties sought in commencing the action, the situation before the party commenced the suit, and the situation today."). Public interest and community organizations such as those representing plaintiffs in this matter usually attempt to address legal, social and economic concerns in a comprehensive manner that entails, at a minimum, both policy and legal advocacy. Given the costs and resources required to litigate a case and the uncertainty of litigation, these organizations often attempt to resolve the problem informally or via the policy route by seeking to have the organization or governmental entity modify and/or change its policies and practices, either through the entity's internal administrative procedures and/or through legislation. The organizations representing plaintiffs in this case attempted to resolve the issues in this lawsuit informally and via the policy route for at least eight years prior to filing this lawsuit. (See Dkt. 355, Pls' Motion at 13-14). In spite of stakeholder advocacy for at least eight years, and despite the fact that it apparently recognized the seriousness of the problem, DHCS did not increase or eliminate the cost limits. (See Dkt. 355-1, Gershon Decl. at ¶¶ 56-57; Dkt. 355-6, Exh. GG, Plaintiffs' Counsel's June 29, 2006 and November 14, 2006 Letters to DHCS Re: Waiver Renewal Application; id., Exh. HH, Summary of Public Comments Re: [] Draft Waiver Application - August 2, 2006; id., Exh. II, Plaintiffs' Counsel Waiver Renewal Process Recommendations, May 10, 2011; id., Exh. JJ, Long-Term Care Coordinating Council Position Statement Re: Waiver Renewal Process - January 8, 2007; id., Exh. KK, Plaintiffs' Counsel NF/AH Waiver Problems and Solutions - May 12, 2014; id., Exh. EE, May 2016 Estimate at EE-836). That it took so many years for DHCS to change the Waiver program simply reflects that the organizations representing plaintiffs have the patience of Job, not that defendants were considering modifying the Waiver program.[6] It was not until three years into this

[6] Defendants' argument that plaintiffs did not "provide the Department with reasonable time to resolve the issues" because"[a] change to the NF/AH Waiver such as removal of individual cost limits can only occur through the California legislature appropriating funds to cover the state funded portion of those costs[,]" (Dkt. 360, Defs' Opp. at 24-25), is disingenuous. If eight years of advocacy with DHCS for removal of cost limits on the Waivers – through two waiver renewal

litigation that defendants eliminated the individual cost limits, authorized services based on medical necessity, and formalized their policies. (See Dkt. 343-1, Ex Parte Memo at 1) (stating that "NF/AH Waiver was amended in November 2016" to remove "cost limitations and to allow approval of waiver services based on medical necessity").

In Cates v. Chiang, 213 Cal.App.4th 791 (2013), the California court of appeal held that the "rule [on prelitigation settlement efforts] should not be applied blindly without any consideration of whether the demand would have made any difference in the need for the lawsuit and whether the plaintiff's motivations were directed toward seeking the relief demanded, as opposed to the recovery of attorney fees." Id. at 817. Where, as here, plaintiffs have attempted over the course of several years via various policy and advocacy efforts to obtain the relief they seek in the subsequent lawsuit, (see Dkt. 355-1, Gershon Decl. at ¶¶ 56-57), a court can presume that sufficient prelitigation efforts have been made which excuse plaintiffs' counsel from making any further prelitigation efforts on the ground that any further attempts to settle would be futile. See Cates, 213 Cal.App.4th at 814-17; Henderson, 2013 WL 3146774, at *10 (holding that insufficient prelitigation attempt at settlement may not preclude attorney's fees under § 1021.5 if such demand would have been futile).

In any event, the record contains more than sufficient evidence that plaintiffs "reasonably attempted to settle the litigation prior to filing the lawsuit." Hogar, 157 Cal.App.4th at 1365 (internal quotation marks omitted). On September 22, 2014, plaintiffs' counsel sent a demand letter to DHCS that expressed "grave concern" about the effects of the Waiver cost caps on plaintiffs, and threatened to file suit. (See Dkt. 355-1, Gershon Decl. at ¶ 2; Dkt. 355-2, Exh. A, DRC Letter to Douglas, September 22, 2014, at A-2-A-4). On October 20, 2014, plaintiffs' counsel

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cycles – was not a "reasonable" amount of time according to defendants, see supra at § I.B., the court questions whether any amount of time would be "reasonable" by defendants' standards. See Graham, 34 Cal.4th at 577 (defendants need only be put on notice of "[plaintiffs'] grievances and proposed remedies" and provided with "the opportunity to meet [plaintiffs'] demands within a reasonable time"). Moreover, as stated earlier, if DHCS had intended to remove cost limits, and legislative approval was required to fund the removal of the those limits, then DHCS would have supported a 2015 bill that would have removed individual cost limits. (See Dkt. 355-1, Gershon Decl. at ¶ 50; id., Exh. BB, California State Assembly Bill 1518 Documents, 2015).

followed up with an email to DHCS's then-director Douglas that "welcom[ed] the opportunity to meet with [Douglas] to resolve the issues in the case[.]" (Dkt. 355-2, Exh. B, DRC Email to Douglas, October 20, 2014, at B-5). Plaintiffs' counsel also sent a courtesy copy of the Complaint to Douglas on October 20, 2014, but did not serve it, so that the parties could engage in settlement discussions. (See Dkt. 355-1, Gershon Decl. at ¶ 3). For nearly two months, from October 20, 2014, through December 17, 2014, the parties discussed "possible resolution to the matter[,]" but defendants stopped responding to plaintiffs' counsel, and never responded to their emails dated December 1, 11, or 14, 2014. (See Dkt. 355-1, Gershon Decl. at ¶ 4; Dkt. 364-1, Gershon Reply Decl. at ¶ 2). In light of the foregoing, the court finds that plaintiffs "reasonably attempted to settle the case before litigation[,]" Hogar, 157 Cal.App.4th at 1365 (internal quotation marks omitted), and/or that any further attempts to settle would have been futile. See Cates, 213 Cal.App.4th at 814-17 (affirming conclusions that "a prelitigation demand would have been futile" and accordingly, plaintiff "was not barred from recovering section 1021.5 attorney fees"); Henderson, 2013 WL 3146774, at *10 (holding that insufficient prelitigation attempt at settlement may not preclude attorney's fees under § 1021.5 if such demand would have been futile).

II. ENFORCEMENT OF AN IMPORTANT RIGHT AFFECTING THE PUBLIC INTEREST AND WHETHER A SIGNIFICANT BENEFIT WAS CONFERRED ON THE GENERAL PUBLIC OR A LARGE CLASS OF PERSONS.

With respect to the remaining two § 1021.5 factors, defendants respond to plaintiffs' contentions in one paragraph, (see Dkt. 360, Defs' Opp. at 17), asserting that "[t]here is no evidence that this lawsuit forced any removal of individual cost limits"; "[p]rior to the removal of individual cost limits, the Department had authorized medically necessary Waiver services for approximately four hundred Waiver participants, even though their Waiver services exceeded individual cost limits"; and "[t]his case was not a class action[.]" (Id.). Defendants' assertions are unpersuasive.

First, with respect to the "important right" element, the court, "in its discretion must realistically assess the litigation and determine, from a practical perspective, whether or not the action served to vindicate an important right so as to justify an attorney fee award under section

1021.5." Maria P. v. Riles, 43 Cal.3d 1281, 1291 (1987) (internal quotation marks omitted). In determining what constitutes an important right, courts should "ascertain the strength or social importance of the right involved . . . in terms of its relationship to the achievement of fundamental legislative goals." Cty. of Colusa v. Cal. Wildlife Conservation Bd., 145 Cal.App.4th 637, 652 (2006) (internal quotation marks omitted). Here, there is no question that plaintiffs' action enforced important rights such as the right to be free from disability discrimination and the right to medical benefits. See, e.g., id. ("[T]he private attorney doctrine may find proper application in litigation involving, for example, racial discrimination, the rights of mental patients, legislative reapportionment and, most significantly for the instant case, environmental protection."); Green v. Obledo, 29 Cal.3d 126, 145 (1981) ("There can be no question that the proper calculation of [welfare] benefits is a matter of public right[.]"); Martinez v. City of Maywood, 2009 WL 10670099, *5 (C.D. Cal. 2009) ("Plaintiffs bring the present case to seek enforcement of their right to equal access and protection from discrimination based on disability, which is an important right affecting the public interest, from which the general public will benefit."); Samantha C. v. State Dep't of Dev. Servs., 207 Cal.App.4th 71, 80-81 (2012) (successful litigation correcting erroneous statutory interpretation of eligibility criteria for regional centers serving thousands of Californians with developmental disabilities "resulted in the enforcement of an important right affecting the public interest"). Thus, plaintiffs have easily met their burden to prove that an important right affecting the public interest was at stake.

Second, the significant benefit "that will justify an attorney fee award need not represent a tangible asset or a concrete gain but, in some cases, may be recognized simply from the effectuation of a fundamental constitutional or statutory policy." Investco, 22 Cal.App.5th at 465 (internal quotation marks omitted). Moreover, "the extent of the public benefit need not be great to justify an attorney fee award." RiverWatch v. Cty. of San Diego Dep't of Envtl. Health, 175 Cal.App.4th 768, 781 (2009). In assessing this factor, the court should "determine the significance of the benefit, as well as the size of the class receiving benefit, from a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case." Investco, 22 Cal.App.5th at 465 (internal quotation marks omitted).

Defendants assert that no significant benefit has been conferred on the general public or a large class, because this case was not a class action. (See Dkt. 360, Defs' Opp. at 17). However, defendants cite no authority that a certified class is a prerequisite to an award of attorney's fees under § 1021.5. (See, generally, Dkt. 360, Defs' Opp. at 17). In any event, "[a] class or representative action is not necessary to establish a significant benefit." Richard M. Pearl, California Attorney Fee Awards § 3.58 (CEB March 2018) (emphasis in original). "Code of Civil Procedure section 1021.5 requires that the action result in a significant benefit to the general public or a large class of persons. Thus, there need not be a significant benefit to many plaintiffs, but a significant benefit to many persons, whether plaintiffs or not." Nw. Energetic Servs., LLC v. Cal. Franchise Tax Bd., 159 Cal.App.4th 841, 876 (2008). Here, according to defendants' own estimates, the removal of the individual cost limits will potentially affect thousands of Waiver participants. (See Dkt. 355-4, Exh. V at V-376) (Waiver serves over 7,000 individuals and by 2021 will serve almost 10,000). Thus, the requirement of a "large" number affected persons is satisfied. See Press v. Lucky Stores, Inc., 34 Cal.3d 311, 321 (1983) (indicating that 3,000 affected signatories to petitions would satisfy "large class" requirement of § 1021.5).

Finally, defendants' contention that "[p]rior to the removal of individual cost limits, the Department had authorized medically necessary Waiver services for approximately four hundred participants, even though their Waiver services exceeded individual cost limits[,]" (Dkt. 360, Defs' Opp. at 17), does not undermine the significant benefit obtained by plaintiffs. The court has previously rejected defendants' ad hoc exception process as being inadequate. (See Dkt. 322, MSJ Order at 9 (the facts that DHCS "could, at any time, rescind its letters to plaintiffs authorizing medically necessary services above the Waiver's cost limits," and that "Defendants have no written policy or process for authorizing exceptions to the cost ceilings" "tend to show that plaintiffs are at risk of institutionalization" in spite of the Waiver exception program) (internal quotation marks omitted); see also Dkt. 112, Department of Justice Statement of Interest at 6 (indicating that, despite their ad hoc exception process, "Defendants have not implement[ed] any means of ensuring that individuals who need that exceptional care to avoid institutionalization actually receive it") (internal quotation marks omitted, emphasis in original); Dkt. 359-1, Gershon Opp.

Decl. at ¶¶ 17-19 & Exh. C, Decision in Pearl Helmuth v. Jennifer Kent, March 23, 2018, at C-16-C26 (despite daughter's repeated requests for an exception, 94-year-old Waiver participant denied sufficient Waiver services based on the cost limits as late as December 2016)).

In short, having conducted a realistic assessment of all the pertinent circumstances in this case, the court readily concludes that the elimination of the cost limits conferred a significant benefit for potentially thousands of people. The elimination of cost limits will ensure that Waiver participants will not have to resort to litigation to secure needed services and that they will be able to remain in their homes, and avoid the segregation and isolation that California Government Code § 11135 seeks to avoid.

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT:

1. Plaintiffs' Motion for Attorney's Fees **(Document No. 355)** is **granted**. Plaintiffs have satisfied all the criteria under § 1021.5 to justify an award of attorney's fees.

2. Defendants' Motion to Recover Fees and Costs **(Document No. 354)** is **denied**.

3. Plaintiffs shall file their motion for attorney's fees and costs no later than **July 31, 2019**. The parties shall meet and confer pursuant to the Local Rules and the motion shall be noticed pursuant to the Local Rules and the court's initial Standing Order on the Central District's website.

Dated this 30th day of May, 2019.

/s/
Fernando M. Olguin
United States District Judge