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12 **IN THE UNITED STATES DISTRICT COURT**  
13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14 ESTHER DARLING; RONALD BELL by his )  
15 guardian ad litem Rozene Dilworth; GILDA )  
16 GARCIA; WENDY HELFRICH by her guardian )  
17 ad litem Dennis Arnett; JESSIE JONES; RAIF )  
18 NASYROV by his guardian ad litem Sofiya )  
19 Nasyrova; ALLIE JO WOODARD, by her )  
20 guardian ad litem Linda Gaspard-Berry; )  
21 individually and on behalf of all others similarly )  
22 situated, )

23 Plaintiffs, )

24 v. )

25 TOBY DOUGLAS, Director of the Department of )  
26 Health Care Services, State of California, )  
27 DEPARTMENT OF HEALTH CARE )  
28 SERVICES, )

Defendants. )

**Case No.: C-09-03798 SBA**

**CLASS ACTION**

**PLAINTIFFS' SUPPLEMENTAL REPLY  
BRIEF IN SUPPORT OF MOTION FOR  
PRELIMINARY INJUNCTION**

**Hearing Date:** November 8, 2011

**Time:** 1:00 p.m.

**Judge:** Hon. Sandra Armstrong

**Address:** 1301 Clay Street

Oakland, CA 94102

**Courtroom:** 1, 4<sup>th</sup> Floor

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1 **I. Introduction**

2 Defendants' Opposition Brief and supporting declarations affirm Plaintiffs' contentions  
3 that their transition plan is structurally unsound and impossible to implement by December 1.  
4 With just one month until 35,000-38,000 ADHC recipients lose the services they have been  
5 determined to need to avoid institutionalization and hospitalization, Defendants cannot point to a  
6 single person who has replacement services in place. At this late date, only a tiny percentage of  
7 ADHC recipients have even been assessed by APS or managed care Plans, and Defendants have  
8 utterly failed to account for the time and components of essential care planning to secure services  
9 to replace ADHC. Defendants' assurances are illusory and must be enjoined.

10 **II. Defendants fail to provide any assurances that managed care Plans or APS will be**  
11 **able to provide ADHC recipients with services to prevent institutionalization.**

12 Defendants do not refute Plaintiffs' assertions that Medi-Cal managed care Plans are not  
13 and will not be obligated to provide ADHC or equivalent services to class members. Pltfs. Supp.  
14 Brf. (ECF No. 354) 2:10-3:14; Zirker Dec. Ex. G (ECF No. 342), Ogle Dep. 71:2-18. While  
15 exactly what Plans will be required to provide to class members remains uncertain,<sup>1</sup> it is clear  
16 that the provision of ADHC and many component services is "above and beyond the minimal  
17 requirements of [the] state Medi-Cal contract." Altman Dec. ¶ 31 (ECF No. 361).

18 Defendants do not even attempt to assure the Court that all, or even most, Plans will offer  
19 non-covered services to replace the gaps left by ADHC. Instead they provide declarations from  
20 just three of the approximately 50 Plans that have or will enroll ADHC recipients.<sup>2</sup> Ogle Dep.  
21 29:12-30:4. The inconsistent approach evidenced in these three declarations demonstrates a lack  
22 of standards for service provision by managed care Plans.<sup>3</sup>

23 \_\_\_\_\_  
24 <sup>1</sup> Compare Altman Dec. ¶ 32 ("the only additional contract requirement we are aware of is...to administer a health  
25 assessment...and to submit weekly reports...") to Lamirault Dec. ¶ 12 (ECF No. 368) ("...the Alliance assumes that  
26 the contract amendment will support the delivery and payment of this new bundled service.") See also, Ogle Supp.  
27 Dec. (ECF No. 370) ¶ 13 noting that contract amendments are not in yet in place.

28 <sup>2</sup> Strikingly, Defendants submit no declaration from L.A. Care, the only other Plan, along with Health Net, available  
to Los Angeles County's 22,000 ADHC recipients. Zirker Dec. Ex. R at ADHC01736 (ECF No. 353).

<sup>3</sup> The discrepancy in services offered from one Plan to the next also calls into question claims made by Ms. Ogle,  
without detailed explanation and with some overstatements of the facts, that Plans are incentivized to offer services  
beyond those required in contracts to prevent institutionalization. See Ogle Supp. Dec. ¶ 18. Significantly, two of  
the three Plans that submitted declarations did not claim to be properly incentivized to offer services to prevent  
institutionalization. For a more detailed explanation of Plan incentives, see Foster Dec. (ECF No. 325) ¶¶ 39-46.

1 In asserting that “some” Plans are “looking into” contracting with ADHC centers,  
2 Defendants were only able to cite to two out of three of their own Plan declarations, and even  
3 then were unable to make assurances that such contracts would actually materialize (let alone by  
4 December 1). Tellingly, the two Plans cited are jointly responsible for just 770 enrolled or  
5 enrolling ADHC recipients and do not purport to speak for other Plans or even represent their  
6 approach as typical; rather they make clear that such services “are not generally available” under  
7 managed care. Lamirault Dec. ¶ 8; Altman Dec. ¶¶ 20, 31. In contrast, HealthNet makes no  
8 suggestion that its 3,300 enrolled ADHC recipients will receive any replacement services upon  
9 the elimination of ADHC (other than an expedited initial assessment) beyond those already  
10 mandated under current contracts. *See*, Friedman Dec. (ECF No. 365) ¶¶ 12-13.

11 Defendants’ declarations only raise more questions about what APS will provide and by  
12 when. As of October 25, APS has completed 862 assessments-- just 5% of the total that need to  
13 be completed by November 15. Bone Dec. (ECF No. 362) ¶ 30. Defendants concede that “not  
14 everybody may receive a timely assessment” (Rico Dec. [ECF No. 372] ¶6) and appear to  
15 consider an unsuccessful attempted phone call to an ADHC center as an attempt to contact an  
16 ADHC recipient. Rico Dec. ¶ 11; Bone Dec. ¶ 30.<sup>4</sup> Although it is unlikely that APS can meet its  
17 goals given the few weeks remaining, even if APS assessments are completed by November 15  
18 and care plans by November 22, DHCS and APS will have just four working days before ADHC  
19 services end to ensure that services are in place for over 15,000 Class Members. Ogle Supp. Dec.  
20 ¶ 11; Bone Dec. ¶¶ 16, 18; Wilber 2d Supp. Dec. ¶ 6.

21 Defendants’ declarations do clarify that APS services will be extremely limited, falling  
22 far short of the care planning services described as essential to a safe transition by Plaintiffs’  
23 experts. *See*, Hendrickson Supp. Dec. (ECF No. 326) ¶¶ 31-36; Wilber 2d Supp. Dec. ¶¶ 9-10,  
24 14. APS will primarily telephonically, “attempt to link Beneficiaries to medical and social  
25 services,” but will not actually provide, or guarantee the provision of, any medical or social  
26 services to class members. Bone ¶¶ 14-19; Wilber 2d Supp. Dec. ¶ 7.

27 \_\_\_\_\_  
28 <sup>4</sup> Given Defendants’ stated concerns about non-cooperation from certain ADHC centers, it is troubling that participants at those centers might be denied an assessment if APS fails to contact them directly. Bone Dec. ¶26.

1 That APS' "service coordination" responsibilities are "targeted" to start on or after  
 2 December 1, coupled with significant inconsistencies and inadequacies in the scope and efficacy  
 3 of this service, leaves no doubt that many Class Members will be left in a void on December 1.  
 4 Bone Dec. ¶¶ 14, 18-19; Rico Dec. ¶¶ 5-6; Ogle Supp. Dec. ¶ 14; Puckett 2d Supp. Dec. ¶¶ 6, 8-  
 5 10; Wilber 2d Supp. Dec. ¶¶ 4, 15.

### 6 **III. IHO Waiver and Other Purported Alternatives Are Not Available**

7 It is revealing that "a core underpinning" of Defendants' transition effort — the IHO  
 8 Waiver (Defs. Supp. Opp. 1:6) — has only 1,000 slots, has no approved providers, no ADHC  
 9 recipients enrolled, and has been designed to exclude thousands who are eligible for placement  
 10 in an institution. *See*, Owen Supp. Dec. (ECF No. 371) ¶¶ 20-28. Defendants claim they can  
 11 increase the number of slots, but they are admittedly constrained by "budgetary issues" and  
 12 refuse to identify a maximum capacity. Zirker Dec. Ex. H (ECF No. 343), Owen Dep. 19:4-24.  
 13 Plaintiffs' expert concludes that Defendants' decision to open 1,000 slots "appears to be arbitrary  
 14 and not based on valid assessments or other clear criteria." Wilber 2d Supp. Dec. ¶¶ 11-12.  
 15 Defendants have limited the IHO Waiver to current ADHC recipients who meet NF-B level of  
 16 care, described as individuals who are "bedridden..., quadriplegics and full assist patients"  
 17 (Owen Supp. Dec. ¶ 22), rather than making this "comprehensive array of community-based  
 18 care" also available to many more thousands of individuals at risk for nursing facility placement,  
 19 but at the less stringent NF-A level.<sup>5</sup> *See*, Pltfs' Supp. Brief 5:13-19; Wilber 2d. Supp. Dec. ¶ 13;  
 20 *see also*, Owen Dep. 50:25-51:13; 60:17-61:4; Regalia 3d Supp. Dec. ¶ 15; Shen Dec. ¶ 12.<sup>6</sup>

21 The lack of feasibility of the IHO Waiver as a replacement by December 1 is further  
 22 borne out by its admittedly lengthy and bureaucratic enrollment process. Gershon Dec. Ex. A,  
 23 Owen Dep. 21:10-22:5; 59:24-60:16. Plaintiff Jones applied for the IHO Waiver on August 11,  
 24 Plaintiff Helfrich was identified by Defendants as meeting NF-B level of care, and Plaintiff  
 25 Woodard's ADHC provider submitted 69 applications for individuals believed to meet NF-B

26 \_\_\_\_\_  
 27 <sup>5</sup> Mr. Owen testified that determination of who meets NF-A level of care would require a "medical assessment"  
 (Owen Dep. 50:25-51:16) which neither APS, nor it appears, anyone else, will be doing. Bone Dec. ¶ 24. ("APS is  
 not conducting a clinical assessment...")

28 <sup>6</sup> Defendants do not refute the limitations of PACE and SCAN described by Plaintiffs. Pltfs' Supp. Brf. 6:10-21.

1 level of care. Behr 3d Supp. Dec. ¶¶ 4-5; Regalia 3d Supp. Dec. ¶¶6-7Davis 2d Supp. Dec. ¶¶  
 2 10-13. None have been contacted by Defendants about enrollment for the IHO Waiver. *Id.*

#### 3 **IV. Defendants' Characterization of Plaintiffs is Misleading and Unavailing**

4 Once again, Defendants are inaccurate and misleading in their characterizations of  
 5 Plaintiffs' needs, and the risks they face in the absence of ADHC services.<sup>7</sup> Defendants' repeated  
 6 suggestions that Plaintiffs do not need ADHC services are belied by their repeated approval and  
 7 authorization of services for these individuals, some of whom have been receiving ADHC  
 8 services for over a decade.<sup>8</sup> Defendants' charts containing superficial suggested alternatives to  
 9 ADHC leave numerous blank spaces in her charts where "Possibilities Available" were to be  
 10 filled in. Ferreira Dec., Exs. A-G.<sup>9</sup>

11 Defendants' blithe attempts at alternative service configurations are insulting to Plaintiffs  
 12 and their families. For example, regarding Plaintiffs Woodard and Helfrich, who are not eligible  
 13 for additional IHSS, and whose hours were reduced this year due to a statewide across-the-board  
 14 cut, Defendants suggest that their families can simply replace the hours of care lost by ADHC.  
 15 Carroll Dec. (ECF No. 363) ¶ 11; Ferreria Supp. Dec. Ex. D, (ECF No. 364-4) and Ex. G, (ECF  
 16 No. 364-7). Defendants have no basis to presume that Plaintiffs' families can undertake even  
 17 more caregiving, and they identify no alternatives to the skilled nursing and mental health care  
 18 that these Plaintiffs receive at ADHC. Regalia 3d Supp. Dec. ¶¶ 8-11; Davis 2d Supp. Dec. ¶¶ 6-  
 19 9; Gaspard-Berry Dec. (ECF No. 239) ¶¶ 5-8; Arnett Dec. (ECF No. 227) ¶¶ 5-9, 16-18.

20 Defendants admit that Plaintiff Darling would not be safe living alone without ADHC (Ferreria  
 21 Supp. Dec. Ex. A, ECF No. 364-1 at 3); and suggest that Plaintiff Bell would "benefit from" an  
 22 institutional placement (*Id.* Ex. B, ECF No. 364-2 at 3), precisely the harms that this Motion  
 23 seeks to prevent.

24  
 25 <sup>7</sup> Plaintiff Gilda Garcia, Ms. Garcia is in the process of enrolling in ADHC in San Diego, and is awaiting IHSS and  
 MSSP services. Dec. of Jennifer Hurlow-Paonessa ¶¶ 4-7.

26 <sup>8</sup> Defendants' insinuations that error rates and fraud diminish Class Members' risk of institutionalization ignore their  
 own findings that any such irregularities are concentrated within certain centers (Ogle Supp. Dec. ¶ 19) and that  
 27 even assuming their data is accurate, many thousands of Class Members unquestionably meet medical necessity for  
 ADHC. *Id.*

28 <sup>9</sup> Yet again, Defendants' declarant did not review the declarations of named plaintiffs or their GALs, nor did she  
 meet or speak with ADHC providers or named plaintiffs or their GALs.

1 Date: October 30, 2011

Respectfully submitted,

2 DISABILITY RIGHTS CALIFORNIA

3 By: /s/ \_\_\_\_\_

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5 Attorneys for Plaintiffs

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