Elissa Gershon, State Bar No. 169741
elissa.gershon@disabilityrightsca.org
Elizabeth Zirker, State Bar No. 233487
elizabeth.zirker@disabilityrightsca.org
Kim Swain, State Bar No. 100340
kim.swain@disabilityrightsca.org
DISABILITY RIGHTS CALIFORNIA
1330 Broadway, Suite 500
Oakland, CA 94612
Telephone: 510.267.1200
Facsimile: 510.267.1201

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California, DEPARTMENT OF HEALTH CARE SERVICES,

Defendants.

Case No.: C-09-03798 SBA

CLASS ACTION

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR ENFORCEMENT OF STIPULATED JUDGMENT AND FOR CIVIL CONTEMPT SANCTIONS

Hearing Date: **March 29, 2012**

Time: **9:00 a.m.**

Judge: **Magistrate Judge Jacqueline Scott Corley**

Address: **450 Golden Gate Avenue San Francisco, CA 94102**

Courtroom: **F, 15th Floor**

Kenneth A. Kuwayti, State Bar No. 145384
kkuwayti@mofo.com
Benjamin A. Petersen, State Bar No. 267120
bpetersen@mofo.com
Morrison & Foerster LLP
755 Page Mill Road
Palo Alto, California 94304-1018
Telephone:

650.813.5600
Facsimile:

650.494.0792

Anna Rich, State Bar No. 230195
arich@nsclc.org
Kevin Prindiville, State Bar No. 235835
kprindiville@nsclc.org
NATIONAL SENIOR CITIZENS LAW CENTER
1330 Broadway, Suite 525
Oakland, California 94612
Telephone:

510.663.1055
Facsimile:

510.663.1051

Eric Carlson, State Bar No. 141538
Ecarlson@nsclc.org
NATIONAL SENIOR CITIZENS LAW CENTER
3435 Wilshire Boulevard, Suite 2860
Los Angeles, CA 90010
Telephone:

213.674.2813
Facsimile:

213.639.0934

Barbara Jones, State Bar No. 88448
bjones@aarp.org
AARP FOUNDATION LITIGATION
200 So. Los Robles, Suite 400
Pasadena, California 91101
Telephone:

626.585.2628
Facsimile:

626.583.8538

Kenneth W. Zeller, *Pro Hac Vice*
kzeller@aarp.org
Kelly Bagby, *Pro Hac Vice*
kbagby@aarp.org
AARP FOUNDATION LITIGATION
601 E Street N.W.
Washington, D.C. 20049
Telephone:

202.434.2060
Facsimile:

202.434.6424

Sarah Somers, State Bar No. 170118
somers@healthlaw.org
Martha Jane Perkins, State Bar No. 104784
perkins@healthlaw.org
NATIONAL HEALTH LAW PROGRAM
101 East Weaver Street, Suite G-7
Carrboro, North Carolina 27510
Telephone:

919.968.6308
Facsimile:

919.968.8855

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NOTICE OF MOTION AND MOTION FOR ENFORCEMENT OF STIPULATED JUDGMENT AND FOR CIVIL CONTEMPT SANCTIONS

TO DIRECTOR TOBY DOUGLAS, DEPARTMENT OF HEALTH CARE SERVICES AND THEIR ATTORNEYS: PLEASE TAKE NOTICE that on March 29, 2012 at 9:00 a.m., or as soon as the matter can be heard by the Court, in Courtroom F, 15th Floor, U.S. District Court, Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, Plaintiffs individually and on behalf of Class Members will move the Court pursuant to Rule 70(a) and (e) of the FRCP and Rule 7-2 of the Civil Local Rules, and pursuant to this Court's inherent authority to enforce compliance and impose civil contempt sanctions, for an order that:

1. Requires Defendants to implement the terms of the Stipulated Judgment entered by this Court on January 25, 2012 (ECF No. 444), which incorporated as though fully set forth therein the Settlement Agreement (ECF No. 438-1 filed January 17, 2012) as follows:
    a) Rescind all Notices of Action of ineligibility for CBAS in which the finding of eligibility at the face-to-face assessment was overturned by a "Second Level Review" or a "Quality Assurance Review" and issue new Notices finding such Class Members eligible to transition to CBAS without interruption and at their same level of service, pursuant to Section XI.A.4.a of the Settlement Agreement;
    b) Cease sending notices of ineligibility for CBAS for a period of 30 days, or until activities set forth in the Proposed Order are completed to the satisfaction of the Court or by Agreement of the parties, and conduct Presumptive Eligibility reviews in conformance with Sections VI.19 and XI.A.1.b of the Agreement, including documenting such reviews and providing information to Plaintiffs' counsel;
    c) Ensure that lists of ineligible and eligible Class Members are confirmed to be complete and accurate, as determined by telephonic or in-person communication with Adult Day Health Care (ADHC) centers, and ensure that such communications occur prior to sending any further Notices to Class Members, consistent with Section XI.B.4.d of the Settlement Agreement;

d) For Class Members who are determined to meet the criteria for Presumptive Eligibility but who are determined to be ineligible for CBAS pursuant to a face-to-face assessment, once the Court permits such notification, issue accurate Notices of Action to them that inform them of their right to aid-paid-pending under the CBAS program until a final hearing decision on any appeal of the determination of ineligibility and of the timelines for making a request for aid paid pending, consistent with Section XIV.D of the Agreement;

e) Ensure that Class Members are not terminated from ADHC or CBAS unless and until the above steps have been completed, or in the alternative, Defendants shall not eliminate ADHC as an optional Medi-Cal benefit unless and until the above actions have been completed;

f) Document all steps taken to comply and provide weekly reports by close of business each Friday by email or fax to Plaintiffs' counsel regarding their compliance;

g) Ensure that no future Quality Assurance reviews are used for the purpose of overturning face-to-face assessments, and that any Quality Assurance reviews that are conducted meet the standards in Section XVI.B of the Agreement; and

h) Ensure that Second Level reviews are used only for purpose and in the manner set forth in Sections XI.A.4.a and c of the Settlement Agreement.

2. Declares that Defendants' practice of conducting administrative reviews that result in overturning of eligibility determinations made at face-to-face assessments violates the Stipulated Judgment and Settlement Agreement.

3. Declares that Defendants' practice of failing to classify Class Members as Presumptively Eligible and provide them aid paid pending prior to conducting face-to-face assessments for CBAS violates the Stipulated Judgment and Settlement Agreement.

4. Requires Defendants to provide notice of the terms of the Court's Order to all Class Members and ADHC providers.

5. Subjects Defendants to civil contempt sanctions of $50,000 per day for failure to comply with any provision of this Court's Order or of the Stipulated Judgment, payable as a fine to the Court.
6. Requires Defendants to file a status report to Plaintiffs' Counsel and to the Court on compliance each week until the Defendants are in full compliance with the Court's Order.
7. Requires Defendants to pay Plaintiffs' Counsel reasonable attorneys' fees and costs incurred in bringing the instant motion for civil contempt.

This Motion seeks relief pursuant to this Court's inherent authority, and pursuant to Federal Rule of Civil Procedure 70(a), to enforce the Stipulated Judgment over which it retained jurisdiction. Relief is sought pursuant to the Court's inherent authority and Federal Rule of Civil Procedure 70(e) to address civil contempt by imposition of sanctions designed to seek compliance and deter future wrong doing, and by the imposition of remedial and compensatory sanctions, including reimbursement of Plaintiffs' attorneys' fees.

This Motion is based upon the Stipulated Judgment ("Judgment") and incorporated Settlement Agreement ("Settlement") in this action, this Notice of Motion and Motion, the Memorandum in support, supporting declarations and exhibits, the pleadings and records on file, any oral and written argument and supporting evidence presented on reply and at the Motion hearing. The Motion is made on the grounds that Defendants' failure to implement the express terms of the Settlement Agreement is resulting in significant and substantive violations of the rights of Class Members to live in the most integrated setting appropriate, to be free of unnecessary institutionalization, and to receive the benefits to which they are entitled under the terms of the Settlement, and that they will suffer irreparable injury unless the Court issues an Enforcement Order.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In twice enjoining cutbacks to Adult Day Health Care (ADHC) Medi-Cal benefits, this Court has found that the loss or interruption of necessary ADHC services would irreparably harm ADHC recipients. *Brantley v. Maxwell-Jolly,* 654 F. Supp. 2d 1161, 1176-1177 (N.D. Cal. 2009); *Cota v. Maxwell-Jolly*, 688 F.Supp.2d 980, 997-998 (N.D. Cal. 2010). The Settlement in this case was structured specifically to

respond to those concerns by ensuring that all Class Members with initial evidence of eligibility are able to transition to continuing services.

Defendants have acted in a manner that undercuts two important structural components of the Settlement that were designed to ensure the protection of vulnerable Class Members. First, they have failed to ensure that Class Members who are Presumptively Eligible for Community Based Adult Services (CBAS) are able to transition to CBAS without interruption in services and to receive continued benefits through the transitions from ADHC to CBAS and through the administrative appeals process. Second, for Class Members who have been determined to be eligible for CBAS after a face-to-face assessment, Defendants have failed to ensure that Class Members will "transition from ADHC to CBAS…without interruption and at their current level of service." These two violations were compounded by the confusing manner of providing information to ADHC providers and notifying Class Members about eligibility status, which will lead to Class Members being irreparably harmed when and if they are wrongfully terminated from ADHC on March 31, 2012, and by Defendants' refusal to correct known errors in the eligibility determination process.

Plaintiffs bring this Motion to prevent Class Members from losing ADHC services on March 31, 2012 when in fact they are entitled to transition to CBAS on April 1, either because they are eligible for continuation of services[1] pending a denial of CBAS eligibility or because they are in fact eligible for CBAS according to the terms of the Agreement.

Specifically, Defendants have failed to conduct the Presumptive Eligibility review required by the Agreement, thereby denying Class Members the right to transition to CBAS without interruption upon the elimination of ADHC. Instead, Defendants skipped this critical step and made eligibility determinations, failing to distinguish between Presumptively Eligible Class Members who would be eligible for continuing services pending a hearing decision and other Class Members who would not have that right. Defendants' proposed cure to this defect fails in that Defendants intend to deny Presumptive Eligibility

[1] The Settlement refers to the term "aid paid pending" insofar as the Settlement presumes that Class Members would transition to CBAS before a subsequent denial of CBAS eligibility. Given that circumstances have changed, and Class Members here are asserting a right to receive continued services that bridge the transition from ADHC to CBAS, after being determined ineligible, we use the term "continuation of services" or "CBAS pending" to refer to this right under the Settlement.

status to an untold number of Class Members by using criteria to deny such status outside the confines of the Agreement.

Second, the process conducted by Defendants for determining CBAS eligibility has failed to comport with the Agreement in that Defendants are denying CBAS to Class Members who have been determined to be eligible at a face-to-face assessment, by invalidating such findings through unauthorized and inappropriate administrative reviews. There is simply no basis in the Agreement for a process by which a finding of eligibility may be overturned on an administrative review.

In addition, despite numerous reports of significant discrepancies in the notifications of CBAS eligibility status of Class Members given to ADHC providers and Class Members pursuant to the Agreement, Defendants have refused to take adequate and reasonable steps to address and reconcile these discrepancies in order to ensure proper notification of CBAS eligibility status to both Class Members and ADHC providers. This is significant since, as the ADHC elimination date approaches, ADHC providers must have a clear understanding of which of their participants are CBAS eligible, which participants are eligible for CBAS pending a hearing to challenge a denial of CBAS eligibility, and which participants are entitled to an orderly and safe discharge. With the unresolved discrepancies, ADHC providers will likely discharge participants if they cannot be assured they will be reimbursed for continuing to provide services to that participant. Without a speedy resolution, Class Members will be terminated from ADHC on March 31 when in fact they are eligible to transition to CBAS.

The parties have met and conferred on numerous occasions and have been unable to resolve these concerns. With the elimination of ADHC imminent, Plaintiffs have no choice but to seek the intervention of this Court to prevent the termination of ADHC or CBAS services to Class Members until Defendants comply with their obligations under the Agreement. Plaintiffs seek an order from this Court, pursuant to Federal Rules of Civil Procedure 70(a) and (e) and this Court's inherent authority to enforce compliance and impose sanctions, that requires Defendants to comply with the terms of the Settlement, an order finding Defendants in contempt of the Judgment of this Court in that they have continued to issue Notices of ineligibility for CBAS which will result in termination of ADHC services to Class Members, despite ample evidence that a number of Class Members slated for termination on March 31, 2012 are eligible for

CBAS pending a hearing decision challenging a denial of CBAS eligibility and/or are in fact eligible for CBAS, and civil contempt sanctions for their violation of the Judgment.

II. BACKGROUND

On January 25, 2012, this Court entered a Stipulated Judgment, approving and incorporating the Settlement reached by the parties to this class action litigation. (ECF Nos. 438-1 and 444). The Settlement resolves all claims in the litigation, including claims brought to challenge Defendants' planned elimination of ADHC Medi-Cal services without adequate replacement services to ensure that Plaintiffs and Class Members would not be placed at risk of unnecessary institutionalization in violation of the Americans with Disabilities Act. Section IV. at 2.

Pursuant to the Settlement, the elimination of ADHC as a Medi-Cal benefit would be postponed, and the program would be converted to Community Based Adult Services (CBAS), which will provide the identical services as ADHC to qualifying Class Members. The elimination of ADHC is now scheduled for March 31, 2012. Section IX. at 11; Section VI.5 at 5-6. The Settlement sets forth in detail the five categories of eligibility for CBAS, which were designed to ensure that individuals with the highest needs, and therefore who are at the greatest risk for institutional placement without ADHC or CBAS, would be eligible to receive it. Section X.A.-E. at 11-12. The parties agreed to a comprehensive assessment process for determining eligibility for CBAS; the process, including assessment tools, instructions, and training materials were developed by a collaborative group of nurses from DHCS and ADHC providers. The assessments would be conducted by teams of DHCS nurses who would meet face-to-face with Class Members at their ADHC centers, review medical records, and consult with ADHC providers. Section XI.A.3 at 14-16. For Class Members found ineligible for CBAS at the face-to-face assessment, the parties agreed to a Second Level review by a DHCS nurse supervisor. Section XI.A.4 at 16. The Settlement contains no such provision for Class Members found eligible at the face-to-face assessment; such Class Members are to transition to CBAS without interruption and at their current level of service (i.e., number of days per week of attendance at the ADHC center). Section XI.B.3 at 18-20.

In order to streamline the CBAS eligibility determination process, the parties devised two groups of Class Members who would transition to CBAS without needing a face-to-face assessment beforehand. Section XI.A.1 at 13. The first group, "Categorically Eligible" Class Members, would be determined eligible for CBAS based on their participation in other state programs for people with disabilities, and ascertained by a data run by DHCS or other state departments. Section VI.4 at 5. The second group, "Presumptively Eligible" Class Members, would be determined by DHCS review of their ADHC Individual Plans of Care (IPC) in advance of the face-to-face assessments, using criteria specifically set forth in the Settlement. Section VI.19 at 9. DHCS was to provide lists of Categorically Eligible and Presumptively Eligible Class Members to ADHC centers prior to conducting face-to-face assessments and these individuals were not to be assessed prior to the transition from ADHC to CBAS. Section XI.A.1 at 13; Section XI.B.1 and 2 at 17-18. Rather, these two groups were to transition from ADHC to CBAS, without interruption and at their current level of service. *Id.*

According to the Settlement, Presumptively Eligible Class Members were to receive a face-to-face assessment within three months, and if found ineligible at the face-to-face assessment, would be entitled to aid paid pending any hearing filed to challenge the denial of CBAS eligibility. Section XI.B.2.c at 17-18.

III. ARGUMENT

A. This Court Has Authority to Enforce its Judgment and Incorporated Settlement

This Court has the inherent authority to enforce compliance with its orders through a civil contempt proceeding. *International Union, UMWA v. Bagwell,* 512 U.S. 821, 827–28, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). Federal Rules of Civil Procedure 70(a) and (e) further authorize the Court to order compliance and "hold the disobedient party in contempt." The Court may issue a contempt order if Defendants "(1)…violated the court order, (2) beyond substantial compliance, (3) not based on a good faith and reasonable interpretation of the order, (4) by clear and convincing evidence." *In re Dual-Deck Video Cassette Recorder Antitrust Litig*., 10 F.3d 693, 695 (9th Cir. 1993). A district court "has wide latitude in determining whether there has been a contemptuous def[ianc]e of its order." *Stone v. City and County of San Francisco*, 968 F. 2d 850, 857 (9th Cir. 1992) (internal quotation marks omitted). A

contempt sanction is considered civil if it "is remedial, and for the benefit of the complainant." *Id.* A contempt fine is considered civil and remedial if it either "coerce[s] the defendant into compliance with the court's order, [or] ... compensate[s] the complainant for losses sustained." *United States v. United Mine Workers,* 330 U.S. 258, 303–304, 67 S.Ct. 677, 91 L.Ed. 884 (1947). The contempt "need not be willful, and there is no good faith exception to the requirement of obedience to a court order." *In re Dual-Deck*, 10 F.3d at 695. Intent is irrelevant to a finding of civil contempt. *Stone v. City and County of San Francisco*, 968 F. 2d at 856; *McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 191(1949).

Plaintiffs will show that Defendants violated "a specific and definite order of the court." *Stone v. City and County of San* Francisco, 968 F. 2d at 856 n. 9, and did so based on clear violations of the Settlement and/or based on unreasonable and unwarranted interpretations of the Settlement. There is no dispute that the Defendants were ordered to comply with the terms of the Settlement, since the Judgment incorporates the Settlement and specifically orders the parties "to perform all of their obligations thereunder." (ECF No. 444 ¶¶ 3, 4). The language of the Settlement was specific and definite and Defendants violated its terms. Defendants cannot demonstrate that "they took every reasonable step to comply" with the terms of the Settlement. *Stone* at *856*.

B. Defendants' Actions Are Not Based on a Reasonable Interpretation of the Judgment and Settlement

In order to determine whether Defendants' actions were based on a good faith and reasonable interpretation of the Judgment and Settlement, the Court should construe the language of the Settlement under ordinary contract principles. *Nehmer v. U.S. Dept. of Veterans Affairs*, 494 F.3d 846, 861 (9th Cir. 2007). Where the plain language of the Settlement is clear, it is not necessary to consider extrinsic evidence. *Id.* As set forth below, Defendants' actions are not based on a reasonable interpretation of the Settlement, particularly in two areas where the Settlement language is clear. First, with respect to the Presumptive Eligibility reviews required by the Settlement, Defendants have failed to conduct such reviews consistent with the Settlement and have failed to offer Class Members who meet the Presumptive Eligibility requirements continuing services pending appeals challenging a denial of CBAS eligibility, thereby violating the express language of the Settlement. Sections VI.19 at 9, XI.B.2 at 17, and XIV.D at 33-34. Second, with respect to the requirement in the Settlement that Class Members found eligible for

CBAS at a face-to-face assessment transition to CBAS without interruption, Defendants have implemented unauthorized, after-the-fact administrative reviews which overturn such eligibility findings. Section XI.B.3 at 18-19.

C. Defendants Have Not Taken All Reasonable Steps to Comply

Defendants must perform "all reasonable steps within their power to insure compliance" with the court's orders. *Stone v. City and County of San Francisco*, 968 F. 2d at 856; *Sekaquaptewa v. MacDonald,* 544 F.2d 396, 404 (9th Cir.1976), *cert. denied,* 430 U.S. 931, 97 S.Ct. 1550, 51 L.Ed.2d 774 (1977); *see also General Signal Corp. v. Donallco, Inc.,* 787 F.2d 1376, 1379 (9th Cir.1986). As discussed further below, in addition to Defendants' facial violations of the Agreement, they have failed to take reasonable steps within their power to rectify known problems that will result in the erroneous termination of services to Class Members.

IV. DEFENDANTS HAVE DENIED PRESUMPTIVE ELIGIBILITY STATUS TO CLASS MEMBERS AND FAILED TO OFFER CBAS PENDING ADMINISTRATIVE APPEALS

A. Defendants Admit They Failed to Identify Presumptively Eligible Class Members in Violation of the Settlement

Defendants have acknowledged that they have not complied with the express terms of the Settlement in that they did not: 1) conduct a review of all Class Members' Individual Plans of Care (IPC) consistent with the criteria in the Settlement (Section VI.19 at 9); 2) provide lists of Presumptively Eligible Class Members to ADHC centers ***prior to*** face-to-face assessments (Section XI.A.1.b at 13); and 3) for Class Members subsequently found ineligible for CBAS, inform them of the right to transition to CBAS and receive CBAS pending a hearing decision challenging such denial of eligibility. Sections XI.B.2 at 17-18; XIV.D at 33-34. Declaration of Elissa Gershon ("Gershon Dec.") ¶ 10, Ex. F, G, I at 2.

The Settlement provides that while most Class Members would be assessed for eligibility for CBAS via a face-to-face assessment process prescribed in detail in the Settlement Agreement, some Class Members would be classified as Presumptively Eligible for CBAS via a paper review of their IPCs, using criteria set forth in the Settlement. As the name suggests, Presumptively Eligible Class Members were expected to be highly likely to be CBAS eligible, and at risk for institutional placement if their services were interrupted, based on their intensive care needs and/or high acuity. Presumptively Eligible Class

Members would transition to CBAS, receive a face-to-face assessment within three months, and, if found ineligible for CBAS be eligible for continuing CBAS services pending a hearing decision challenging the denial of eligibility. The Settlement defines Presumptive Eligibility as:

> "… current ADHC recipients who are: likely to meet NF-B level of care (as set forth in 22 Cal. Code Regs. §§ 513340) and § 51124), as determined by DHCS, or whose ADHC IPCs indicate a need for assistance or supervision with three (3) of the following ADLs/IADLs: bathing, dressing, self-feeding, toileting, ambulation, transferring, medication management, and hygiene, and one nursing intervention at ADHC, as determined by DHCS' review of all ADHC participants' current IPCs. *Presumptively eligible Class Members will transition to fee-for-service CBAS and will receive a face-to-face assessment by DHCS within three (3) months*."

Section VI.19 at 9 (emphasis added). The Agreement requires that DHCS provide lists of Presumptively Eligible Class Members to ADHC centers "on a rolling basis, *prior to conducting face-to-face assessments* at a particular facility." Section XI.A.1.b at 13 (emphasis added). Once classified as Presumptively Eligible, such Class Members "*will transition from ADHC to CBAS as a fee-for-service program without interruption, and at their current level of service*, and will continue to be eligible for CBAS at their current level of service at least until a face-to-face assessment by DHCS…." Section XI.B.2 at 17-18 (emphasis added). If later found ineligible for CBAS pursuant to a face-to-face assessment, Presumptively Eligible Class Members would be eligible for continuing CBAS services pending a hearing decision challenging their denial of CBAS eligibility. Section XIV.D at 33-34.

Instead of completing these processes as prescribed in the Agreement, Defendants admit that they collapsed the Presumptive Eligibility review into the face-to-face assessment. *See* Gershon Dec. ¶ 10, Ex. F, I at 2. As a result, Class Members who should have been classified as Presumptively Eligible *prior to* the face-to-face assessment were not. Instead, they were informed incorrectly that they were ineligible for CBAS services pending appeals. *See* Gershon Dec. ¶¶ 5-15. Presumptively Eligible Class Members are entitled to receive CBAS services until further assessment determines them ineligible and a subsequent fair hearing appeal determination. Without the protection of Presumptive Eligibility status, these same class members are left without services unless and until they are able to prove they are eligible at their fair hearing.

//

B. Defendants Utilized Procedures and Extraneous Criteria Not Permitted by the Settlement in Determining Which Class Members are Presumptively Eligible

As noted above, Defendants admit that they improperly conducted face-to-face reviews before determining whether participants were Presumptively Eligible, and therefore they have begun a review of all Class Members determined to be ineligible for CBAS in order to identify those who meet the criteria for Presumptive Eligibility for CBAS. Section VI.19 at 9. They agree that they will then notify those determined to meet Presumptive Eligibility criteria of the right to receive CBAS services pending a hearing decision. *See* Gershon Dec. ¶ 13, Ex. G. As of the filing of this motion, just nine days before the elimination of ADHC, Defendants have not informed any Class Member of this right. In addition, Defendants have unilaterally denied Presumptive Eligibility status (and therefore denied continuation of benefits pending a hearing decision) to an undisclosed number of Class Members, based on procedures and extraneous criteria not permitted by or identified in the Settlement. Gershon Dec. ¶ 13.

The Settlement specifically provides that Presumptive Eligibility will be based on specific criteria as evidenced in Class Members' "current ADHC IPCs," not on additional or extraneous criteria. This Court has previously found that IPCs "which were prepared following a comprehensive assessment by a team of health care professionals—and approved by Medi-Cal—are compelling evidence" in support of Plaintiffs' claims during the litigation. *Brantley v. Maxwell-Jolly*, 656 F.Supp.2d 1161, 1173 (N.D. Cal. 2009). The State has already determined that these IPCs are valid and has authorized services in reliance on them. This prior determination underlies the Settlement structure which provides that if these documents, on their face, meet the criteria for the new CBAS services, those individuals will transition to CBAS prior to other reviews or second guessing.

However, despite the plain language of the Settlement that Presumptive Eligibility is based on a review of ADHC participants' current IPCs, using criteria explicitly set forth in the Settlement (*see* Section VI.19 at 9), Defendants are denying Presumptive Eligibility status to Class Members based on additional criteria that they are imposing that are found nowhere in the Settlement. For example, they are denying Presumptive Eligibility based on comparisons among IPCs, or based on inferences of "inconsistency" that are nowhere referenced in the Settlement, such as so called "boilerplate" information on multiple IPCs or nursing interventions that do not match some identified service. Gershon Dec. Ex. F.

This Court previously specifically declined to credit the opinions of a DHCS nurse "who has no personal knowledge of Plaintiffs' medical history or needs and has never examined or spoken to them, over those proffered by the multidisciplinary team of physicians, nurses, therapists and various health care professionals who have" created and approved the IPCs, finding that Defendants' evidence was of "limited probative value." *Brantley v. Maxwell-Jolly*, 656 F.Supp.2d at 1173. Defendants' current practices in reviewing the IPC's continues in this vein of acting on non-credible evidence.

C. The Requested Sanctions are Necessary to Prevent Irreparable Harm to Presumptively Eligible Class Members

Despite numerous explicit requests, and an agreement to the contrary, Defendants have continued to send erroneous Notices of ineligibility to Class Members which do not inform them of the right to CBAS pending a hearing decision, or of the correct timelines to file for a hearing and request continuation of services. *See* Gershon Dec. ¶¶ 5, 6, 9, 13-15, Ex. A, B, D, F-I. Thus, Class Members who may be eligible to receive CBAS services pending a hearing decision challenging the denial of CBAS eligibility have not been apprised of this right; rather, they have been made to understand that their ADHC services will end in less than two weeks. Significantly, their ADHC providers also understand that reimbursement for serving such Class Members will end on March 31, 2012. Declaration of Michael Nolan Grimes ("Grimes Dec.") ¶ 18; Declaration of Suzanne Pouransari ("Pouransari Dec.") ¶ 11; Declaration of Corinne Jan ("Jan Dec.") ¶¶ 34-35. Thus, even if the right to provider reimbursement (retroactive CBAS pending a hearing decision) is established via a Medi-Cal fair hearing, in most cases, the Class Member will have already suffered the harm of losing ADHC, making it a hollow victory. Given that Presumptive Eligibility status was intended to apply to Class Members with the highest needs and thus at highest risk for institutionalization without ADHC, the harm of an interruption in ADHC or CBAS services is irreparable.

D. Defendants Cannot Violate the Settlement in Order to Deny CBAS Continuation Services to Presumptively Eligible Class Members

The Settlement does permit Defendants to conduct further face-to face reviews of eligibility, and to send termination notices to Presumptively Eligible Class Members, *so long as* those reviews and proposed terminations occur without infringing on the due process rights of Class Members, particularly

the right to transition to CBAS without interruption and to receive CBAS services pending hearings on proposed terminations. Sections XI.B.2 at 17 and XIV.D at 33-34. The Settlement is explicitly structured this way to protect the most vulnerable class members from an abrupt termination and to provide them with CBAS services pending any determination. The Settlement does not permit Defendants to utilize their unilateral approach to deny Presumptive Eligibility status, and thus to deny continuation of services pending an appeal.

V. DEFENDANTS HAVE DENIED CBAS TO CLASS MEMBERS FOUND ELIGIBLE AT FACE-TO-FACE REVIEWS IN VIOLATION OF THE SETTLEMENT

Defendants have implemented a process by which determinations of eligibility for CBAS made at face-to-face assessments are overturned by administrative reviews, so-called "Quality Assurance" (QA) reviews and/or "Second Level reviews" in violation of the procedures set forth in the Settlement, thus denying CBAS to eligible Class Members.

A. Defendants Have Failed to Honor Eligibility Findings Made Pursuant to Face-to-Face Assessments

For Class Members who have not been determined Categorically Eligible or Presumptively Eligible, the Settlement provides that Class Members are to be assessed for CBAS eligibility pursuant to a face-to-face assessment process prescribed in great detail in the Agreement. Section XI.A at 13-14. According to the Agreement, Class Members who have been found eligible for CBAS after a face-to-face assessment, will "transition from ADHC to CBAS…*without interruption and at their current level of service*." Section XI.B.3.a at18-19 (emphasis added). In direct violation of the Agreement, Class Members have been found eligible at a face-to-face assessment, only to have that finding overturned on an administrative review. Jan Dec. ¶¶ 15-16, 22 [186 of 202 files received showed face-to-face eligibility determinations were overturned]; Gershon Dec. ¶¶ 22-23 [50 of 65 denials showed face-to-face determinations overturned on QA review]; Declaration of Sarah Chan ("Chan Dec.") ¶¶ 9-10 [Ten of 14 files received showed face-to face eligibility determinations overturned by "QA Reviewer" and denial confirmed by "Second Level Reviewer"]; Grimes Dec. ¶¶ 9, 12 [All seven of the files received overturned eligibility determinations at QA and Second Level Review]; Declaration of Sheila Hembury ("Hembury Dec.") ¶ 9 [Five of the seven files received showed eligibility determinations overturned by QA and

Second Level Review]; Declaration of Karina Markosian ("Markosian Dec.") ¶¶ 11-12 [Informed by Medi-Cal field office that another review had switched five participants from eligible to ineligible list].

The Settlement does provide for a Second Level review, by a DHCS nurse supervisor, to review determinations that a Class Member is *ineligible* after a face to face review. Section XI.A.4 at 16-17. This Section was designed for the protection of Class Members, to ensure that "participants were not erroneously found ineligible." Declaration of Diane Puckett ("Puckett Dec.) ¶ 18. Second Level reviews are described in a totally different section from the face-to-face assessment and do not apply to determinations that a Class Member is *eligible.* Findings of *eligibility* in the face-to-face assessment are not subject to a Second Level Review. (Compare Section XI. A.4 at 16-17 with Sections XI.A.3 at 14-16 and XI.B.3.a at 18-19). The Settlement provides no basis whatsoever for overturning eligibility findings made after a thorough process that includes an on-site, face-to-face interview and records review. Yet this is happening in great numbers. Diane Puckett, an ADHC provider who served on the clinical and programmatic team of professionals and "spent dozens of hours meeting with DHCS" to develop the assessment tools, instructions and training materials for CBAS eligibility assessments (Puckett Dec. ¶ 5), confirms that use of administrative reviews to overturn face-to-face eligibility determinations is a "distortion of the process." Puckett Dec. ¶ 13. Ms. Puckett states:

> It is troubling that the assessor made a finding of eligibility based on what he or she reviewed at the ADHC center, and presumably believed that the completed CEDT [CBAS Eligibility Determination Tool] sufficiently supported that finding. Assessors were not trained to expect that their eligibility findings would be subject to being second-guessed, and therefore likely did not see a need to copy additional records from the chart or otherwise provide support for their eligibility determination.

Puckett Dec. ¶ 16; *see also* Chan Dec.¶ 14.

According to Corinne Jan, a nurse with 29 years of experience in geriatric health and 17 years in ADHC:

> It appears that the QA and Second Level reviewers made their decision to overturn the assessor's decision solely on the CEDT… [A]s a former ADHC nurse, this concerns me a great deal. In my experience, reviewing paper documents simply does not indicate the true frailty and needs of any of these participants. If I had the responsibility, as a second level reviewer, to determine someone's 'fate' for this critical program, I would certainly want to do a more in depth, face to face assessment of each and every one of the participants and scrutinize all of the same, if not more, documents than those that were reviewed by the assessor before overturning the decision. It's clear that in the majority of

> our cases, this was not done; and, I am extremely disheartened. To me, this represents an unfair and disrespectful way to treat our elderly, whose health and lives hang in the balance.

Jan Dec. ¶ 30.

As discussed above, this Court previously found Plaintiffs' IPCs, and the professionals who developed them, highly credible compared to Defendants' cursory paper reviews. *Brantley v. Maxwell-Jolly*, 656 F.Supp.2d 1173. Similarly, here, the face-to-face assessment process was designed, and nurses were trained, to avail themselves of the full range of information available—the ADHC chart, the ADHC multi-disciplinary team, and the Class Member interview. "The assessors who came to our centers reviewed charts, scrutinized IPCs, met with participants, and reviewed the screening tools that our multidisciplinary team completed. They therefore had a great deal of information with which to make their findings; and, on that basis, they found the vast majority of our participants eligible." Jan Dec. ¶ 30. It defies logic and common sense, as well as clinical sense, that findings based on this wealth of information could be overturned by a paper review with any degree of reliability. *See* Puckett Dec. ¶ 6 ("Our group's common understanding was that...DHCS nurses and ADHC providers would need to work collaboratively and use sound clinical judgment throughout the process.") Such a process is not only unreliable, it does not comport with the Settlement requirement that people found eligible at the face-to-face assessment will "transition from ADHC to CBAS…*without interruption and at their current level of service*." Section XI.B.3.a at18-19 (emphasis added).

As with Presumptive Eligibility determinations, the Settlement does not prohibit Defendants from ever conducting a reassessment. However, the plain language of the Settlement is that Class Members found eligible as a result of the face-to-face assessment process are eligible to transition to CBAS without interruption. Class Members who are eligible at the face-to-face assessment are eligible to receive CBAS until their next regular reassessment. Section XI.B.3.a at 18-19.

B. Defendants Cannot Conduct Impermissible Second Level Reviews under the Guise of "Quality Assurance"

As described above, eligibility determinations made at face-to-face assessments are not subject to being second-guessed by an administrative review. However, Defendants attempt to evade this restriction by calling these reviews "quality assurance." This process violates the plain language of Settlement

Section XI.B.3, as set forth above, but also does not comport with any reasonable interpretation of the Settlement provisions regarding quality assurance.

Pursuant to the Settlement, Defendants must conduct Quality Assurance activities, "focused on measuring whether services are provided to Class Members in accordance with this Agreement." Section XVI.B.2 at 38. Quality Assurance activities "shall include reviews of data, random sampling of files and in person reviews with individuals whose files are examined." Section XVI.B.2 at 38. However, here, in the vast majority of files received by ADHC providers and Plaintiffs' counsel in which CBAS eligibility determinations were overturned based on a purported "QA Review", the entire "file" consists solely of the CBAS Eligibility Determination Tool ("CEDT") (a four-page form completed and signed by the on-site assessor), without any supporting documentation that would enable a reviewer to ascertain, using permissible quality assurance measures, whether the CBAS eligibility criteria have been met. Jan Dec. ¶¶ 22, 30; Gershon Dec.¶¶ 21-23, 25; Chan Dec. ¶¶ 9; Grimes Dec. ¶¶ 13. The files show none of the indicia called for in the Settlement for true Quality Assurance activities, such as "reviews of data, random sampling of files, and in person reviews with individuals whose files are examined." Section XVI.B.1 at 38. These QA Reviews and Second Level reviews are signed days after the face-to-face assessments. Jan Dec. ¶ 23; Chan Dec. ¶¶ 9-11; Grimes Dec. ¶¶ 9, 12; Hembury Dec. ¶¶ 9-12. ADHC providers have confirmed that the assessment teams were not on site on the dates that the QA Reviews or the Second Level Reviews were signed and that DHCS nurses did not call their centers to gather additional information. Chan Dec. ¶ 11; Grimes Dec. ¶ 13; Hembury Dec. ¶ 10.

Thus, Defendants' purported "QA reviews" do not comport with the clear requirements in the Settlement for conducting any such quality assurance activities. As a basis for overturning valid eligibility determinations, they should be unquestionably prohibited.

C. Defendants Have Used Impermissible Bases for Overturning Findings of Eligibility

In addition to the impermissibility of overturning valid eligibility determinations, Defendants also do so ignoring the specific eligibility criteria set out in the Settlement. In virtually all of the over 300 case files provided to Plaintiffs, the reason for overturning the eligibility finding is lack of "nursing intervention to substantiate CBAS." Jan Dec. ¶ 27; Gershon Dec.¶¶ 23, 25; Chan Dec. ¶¶ 12; Hembury

Dec. ¶ 11; Grimes Dec. ¶¶ 14. The Settlement clearly articulates how and when nursing interventions are to be considered in determining eligibility for CBAS. The only category of CBAS eligibility where nursing interventions are relevant is Nursing Facility level A (NF-A), Section X.A at 11. When considering whether an individual meets the criteria for NF-A, assessors are to apply criteria contained in state regulations. Section X.A at 11 and Section VI.16 at 8. The state regulations use 10 factors as a guide in determining whether an individual meets NF-A level of care, not all of which need to be met to qualify. While included among these 10 factors are the need for skilled nursing care or observation, other factors to be considered are personal care needs, medications, special diet, sensory or movement limitations, incontinence, and confusion or depression. 22 Cal. Code Regs. § 51334(l). Thus, Defendants' boilerplate rejection based on lack of nursing intervention calls into question the validity of these reviews because lack of nursing intervention is not, in itself, a valid basis for finding a Class Member ineligible for CBAS.

In addition, it is especially troubling that in some cases, Class Members' eligibility determinations made at the face-to-face assessment were overturned on the basis of a lack of nursing intervention, even though the categories under which they were found eligible do not require any such showing. Specifically, under the Settlement Class Members can be eligible for CBAS if they have a brain injury or chronic mental illness and accompanying impairments in their daily care needs. Section X.B at 11. In two other categories, Class Members can be eligible if they have a cognitive impairment or dementia. Section X.C and D at 12-13. None of these categories require a showing of nursing interventions. Yet individuals found eligible in these categories at face-to-face assessments were overturned by administrative reviews, or lack of nursing intervention. Puckett Dec. ¶ 14; Chan Dec. ¶ 12 [QA Reviewer overturned eligibility for participant with Brain Injury due to no substantial nursing intervention]; Hembury Dec. ¶ 11 [ineligibility due to no nursing intervention for participant with Chronic Mental Illness]; Jan Dec. ¶ 27 [Six eligibility determinations based on dementia overturned for lack of nursing intervention]; Gershon Dec. ¶¶ 24, 25 [Four of 10 files showed lack of nursing intervention cited as the reason for overturning finding of eligibility for categories other than NF-A].

Defendants' unauthorized practice has, to date, overturned the eligibility findings of at least 300 hundred Class Members. Chan Dec. ¶ 10; Grimes Dec. ¶ 12; Hembury Dec. ¶ 9; Gershon Dec. ¶¶ 22, 25;

Jan Dec. ¶ 22. The actual impact of this practice is yet unknown because of delays in the receipt of CBAS assessment files which have been requested from DHCS. Gershon Dec. ¶¶ 26-27.

These many irregularities described above call into question the validity of Defendants' so called "quality assurance process." For these reasons, Plaintiffs request that the findings of eligibility by the assessors at the face-to-face assessment be determined to be final as provided in the Settlement, that denials based on a purported QA review and/or a Second Level Review that overturned a finding of eligibility at the face-to-face assessment be rescinded, and that participants and providers be notified that these Class Members are eligible for transition to CBAS.

VI. DEFENDANTS HAVE FAILED TO TAKE ALL REASONABLE STEPS TO PROVIDE ADEQUATE AND ACCURATE NOTICES AND INFORMATION TO ADHC PROVIDERS AND CLASS MEMBERS

A. Defendants Have Failed to Take Steps Mandated by the Settlement to Resolve Problems Identified by Providers, Class Members and Class Counsel

Plaintiffs have received, and provided to Defendants, numerous reports of discrepancies in information provided to ADHC providers and Class Members regarding Class Members' eligibility status for CBAS. As a result, many Class Members are likely to lose ADHC on March 31, 2012, and not receive CBAS on April 1, even if they are in fact eligible for CBAS, since ADHC providers who do not have certainty that they will be reimbursed for providing CBAS services to participants will likely be forced to terminate such Class Members on that date.

The Settlement provides that "Prior to finalizing a determination of ineligibility for CBAS, the DHCS nurse supervisor shall contact the ADHC center." Section XI.A.4.d at 17. This step was intended to ensure that ADHC centers would have the opportunity to correct misinformation and reconcile any discrepancies in DHCS' findings. Gershon Dec. ¶ 16; Puckett Dec. ¶¶ 17-18, Ex. B. It was also intended to enable ADHC providers to speak to their participants to help them understand their options and avoid the shock and trauma of receiving a notice of ineligibility without warning. *Id.* In practice, this "contact" has generally been in the form of a fax list of CBAS eligible and ineligible participants. Gershon Dec. ¶ 17, Ex. F, G; Puckett Dec. ¶¶ 17-18, Ex. B. In some cases, these faxes appear to be sent simultaneously with Notices sent to participants, in violation of the requirement that such contact occur before determination of ineligibility is finalized. Puckett Dec. ¶ 17, Ex. B; Jan Dec. ¶¶ 12-14; Declaration of

Daly Chin ("Chin Dec.") ¶ 5; Grimes Dec. ¶ 11. The result has been widespread confusion and uncertainty and unnecessary anguish for Class Members. Declaration of Debbie Toth ("Toth Dec.") ¶¶ 5-11; Markosian Dec. ¶ 10; Jan Dec. ¶¶ 17, 35; Chin Dec. ¶ 10.

B. Defendants Have Sent Out Conflicting and Erroneous Information and Refused to Correct It

ADHC providers have reported that: 1) participants appear on lists of both eligible and ineligible Class Members; 2) participants appear on no list; 3) participants have moved, at times in great numbers, from eligible to ineligible status on subsequent lists; and 4) Class Members have received Notices that are inconsistent with information given to their ADHC provider or managed care plan. *See* Toth Dec. ¶ 9; Markosian Dec. ¶¶ 6-10; Jan Dec. ¶¶ 13-14, 17; Pouransari Dec. ¶¶ 6-9; Chin Dec. ¶¶ 5-9. In one program, after eligibility determinations were made and participants notified, 61 of those same individuals were moved wholesale from being eligible to being ineligible, including two Class Members on DHCS' own Categorical and Presumptively Eligible list sent in December 2011. Jan Dec. ¶ 13. A second Notice of Action was sent to each recipient revoking their eligibility determination; however, there was no explanation about the mistake or why their initial determinations were overturned. *Id.* When program staff inquired about the change, they were told that names were moved after an "upper level review." Jan Dec. ¶¶ 15-16.

At another center, after initial eligibility notices were sent by DHCS, five of the eligible participants showed up on the ineligibility list. Markosian Dec. ¶ 8. They and their provider remain concerned that the initial eligibility decision will be revoked for these participants and that other participants' determinations are at risk of being overturned at any time. Markosian Dec. ¶¶ 10-11. In addition, some participants have not appeared in either the eligibility or ineligibility lists, leaving their fate uncertain. Pouransari Dec. ¶¶ 6-7; Markosian Dec. ¶ 11; Chin Dec. ¶ 9. Providers have reported that participants who were, or should have been, informed that they were eligible for CBAS, were contacted by their managed care plan which told them that they are not CBAS eligible. Toth Dec. ¶ 9; Pouransari Dec. ¶¶ 8-9. Thus, there is evidence that discrepancies exist between information provided to managed care plans, ADHC providers, and Class Members. Providers have reported that their attempts to reconcile

the lists and information they receive have been unsuccessful. Jan Dec. ¶¶ 15-16; Markosian Dec. ¶ 11; Chin Dec. ¶ 8.

In such cases, Class Members have been forced to file for, or consider filing for, fair hearings, simply to protect their right to challenge a possible denial, even if they are in fact eligible for CBAS. Pouransari Dec. ¶ 7; Markosian Dec. ¶ 13; Jan Dec. ¶ 17; Chin Dec. ¶¶ 7, 10. For this frail population, needlessly embarking on the hearing process is an anxiety-producing and traumatic experience that could and should be avoided. "During this time of uncertainty, our participants are clearly anxious and stressed as evidenced by staff who need to spend extra time to reassure them and console them every day." Jan Dec. ¶ 34. These concerns are echoed by numerous providers and participants. Markosian Dec. ¶ 10 [participants and families upset about why changed from eligible to ineligible]; Chin Dec. ¶ 10 [process confusing and stressful to participants]; Chan Dec. ¶ 15 [witness to tremendous stress, anxiety and burden in participants and caregivers].

At Defendants' request, on February 21, 2012, Plaintiffs provided Defendants with specific and credible information, including a number of examples, of ADHC centers which reported unresolved discrepancies in the lists they received from Defendants. Plaintiffs have repeatedly asked that notices not be sent to Class Members until the lists are reconciled. Gershon Dec. ¶¶ 17-19, Ex. F, I at 7, J. Notwithstanding the fact that Defendants are aware of these problems, they have continued to send Notices to Class Members and have failed to rectify the problems. *See* Jan Dec. ¶¶ 15-16; Markosian Dec. ¶¶ 11-12; Toth Dec. ¶ 10. This leaves Class Members to await an uncertain fate on March 31, and their ADHC providers in the untenable position of terminating eligible Class Members from a program that they believe is needed to maintain their health and independence.

As discussed above, Defendants were violating the Settlement in regards to Presumptive Eligibility reviews. However, they repeatedly refused to acknowledge or correct the problem. Defendants misrepresented the status of the Presumptive Eligibility reviews, even after notices began to be mailed. *See* Gershon Dec. ¶¶ 5, 9-10, Ex. A, D, E (According to DHCS counsel Douglas Press, "And as far as PE, yes, I attended a meeting recently and re-confirmed with the team that they are to provide a list of the PE, according to the settlement criteria, to the centers before conducting the FTF [face to face].") Defendants eventually acknowledged that they had not conducted Presumptive Eligibility reviews

that conform to the Agreement but nonetheless initiated the mailing of Notices of ineligibility. *See* Gershon Dec. ¶ 10, Ex. H, I at 4. Despite a verbal agreement on February 16 that Notices would be halted, Defendants have continued to send erroneous information to Class Members that improperly finds them ineligible for CBAS and fails to inform them about a significant due process right under the Agreement. Gershon Dec. ¶¶ 12-14.

Similarly, Defendants continued to conduct unauthorized administrative reviews of Class Members who have been properly found eligible at face-to-face assessments. Such Class Members have no way of knowing that they are in fact eligible unless and until they file an appeal and receive their CBAS assessment files, which will in all likelihood occur after they are terminated from ADHC. *See* Gershon Dec. ¶¶ 26-27. Defendants have failed to cease this practice, or even respond to Plaintiffs' concerns and inquiries for more information to better understand this practice. Gershon Dec. ¶ 21, Ex. G, I at 5.

Despite months of meeting and conferring with Defendants, Plaintiffs have been unable to secure an agreement that Defendants comply with the Settlement and halt the mailing of notices until such compliance is achieved. Gershon Dec. ¶¶ 5-15, 17, 19, 28.

VII. THE REQUESTED SANCTIONS ARE NECESSARY TO ENSURE COMPLIANCE WITH THE JUDGMENT AND TO REMEDY DEFENDANTS' VIOLATIONS

This Court entered Judgment in this case, incorporating the terms of the Settlement and ordering the parties "to perform all of their obligations thereunder." (ECF No. 444 ¶¶ 3-4). This Court has retained jurisdiction for a 30-month period and thus has jurisdiction to order civil contempt sanctions. *Id*. at ¶ 5. As described above and in the declarations accompanying this Motion, Defendants have acted in ways prohibited by the plain language of the Settlement, failed to take all reasonable steps to comply with the Judgment, created uncertainty and even chaos as to the eligibility status of hundreds if not thousands of Class Members, and caused the real and significant risk that CBAS eligible Class Members will be terminated from ADHC on March 31, 2012 and will not receive CBAS on April 1. This Court has previously found that "even temporary gaps in services would present serious consequences for Plaintiffs and place them at great risk of being institutionalized." *Brantley,* 654 F. Supp. 2d at 1174.

In deciding whether to impose a civil contempt sanction, a district court should consider the following factors: the harm from non-compliance; the probable effectiveness of the sanction; the contemnor's financial resources and the burden the sanctions may impose; and the contemnor's willfulness in disregarding the court's order. *United Mine Workers,* 330 U.S. at 303-304. The sanctions sought by Class Members are appropriately tailored to address the violations. The harm from the loss of ADHC services to Class Members is significant, as this Court has previously found. Brantley v. Maxwell-Jolly, 654 F. Supp. 2d. at 1176-1177. The proposed injunctive relief and award of attorneys' fees is within the Defendants' ability to perform and is not unnecessarily burdensome.

Furthermore, a finding of contempt by this Court is warranted because although Defendants were "specifically and repeatedly warned" of these problems, and "thus they knew that, unless they took some affirmative action" their misinformation would result in Class Members losing access to services to which they are entitled, they failed to take all reasonable steps to ensure compliance. *V.L. v. Wagner*, Case No. C09-04668 CW 2009 WL 4282079 at *5 (N.D. Cal.) (Order granting in part Plaintiffs' Motion for Civil Contempt Sanctions due to Defendants' failure to rectify discrepancies in In-Home Supportive Services (IHSS) records, resulting in potential denial of services to eligible individuals due to providers' uncertainty about whether they would be paid for services provided).

The specific relief sought by Plaintiffs, as outlined in the Proposed Order Submitted herewith, is designed to 1) remedy the violations of this Court's Judgment by requiring Defendants to take steps to correct the violations; 2) to put in place processes to ensure future compliance with the Judgment and Settlement and any other orders of this Court, and to impose financial consequences if such compliance does not occur, and 3) to compensate Plaintiffs for costs incurred as a result of Defendants' violations, by ensuring that Class Members can retain the services they are entitled to under the Settlement and that Plaintiffs' counsel are compensated for the attorneys' fees incurred due to the need to bring this Motion.[2]

VIII. CONCLUSION

In nine days, an untold number of affected Class Members will suffer irreparable harm in the form of interruption of the ADHC services that they depend on to remain independent and free from

[2] To the extent the Court awards attorneys' fees as a civil sanction for hours expended in bringing this Motion, Plaintiffs will not seek to recover compensation for that time pursuant to Section XX of the Settlement Agreement.

institutionalization. Even if their services are restored at a later date via a Medi-Cal fair hearing the harm will have occurred; this Court previously found that even a reduction in care of one to two days per week would cause irreparable harm. *Brantley,* 654 F. Supp. 2d at 1176-77.

For these reasons, Plaintiffs request an order from this Court that requires Defendants to comply with the Settlement and ensure that Class Members are not terminated from ADHC or CBAS until such compliance is achieved, and an order finding Defendants in contempt of this Court's January 25, 2012 Judgment.

Date: March 22, 2012

Respectfully submitted,

DISABILITY RIGHTS CALIFORNIA

By: /s/
Elissa Gershon
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

TOBY DOUGLAS, Director of the Department of Health Care Services, State of California, DEPARTMENT OF HEALTH CARE SERVICES,

Defendants.

Case No.: C-09-03798 SBA

CLASS ACTION

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR ENFORCEMENT OF STIPULATED JUDGMENT AND FOR CIVIL CONTEMPT SANCTIONS

Hearing Date: **March 29, 2012**
Time: **9:00 a.m.**
Judge: **Magistrate Judge Jacqueline Scott Corley**

Address: **450 Golden Gate Avenue San Francisco, CA 94102**

Courtroom: **F, 15th Floor**

Plaintiffs' Motion for Enforcement of Stipulated Judgment and for Civil Contempt Sanctions was heard on March 29, 2012 before the Honorable Judge Jacqueline Scott Corley, Magistrate Judge of the United States District Court. Plaintiffs appeared by their attorneys Elissa Gershon, Elizabeth Zirker, and Kim Swain of Disability Rights California. Defendants appeared by their counsel Susan M. Carson, Supervising Deputy Attorney General.

Upon consideration of the terms of the Stipulated Judgment and of the Settlement Agreement incorporated into the Stipulated Judgment, Plaintiffs' Memorandum of Points and Authorities in Support of the Motion and supporting Declarations and Exhibits; the Proposed Order Granting Plaintiffs' Motion For Civil Contempt Sanctions And Enforcement Of Stipulated Judgment; Defendants' Memorandum, Declarations, and Exhibits in Opposition;, the arguments of counsel and any other matters this Court has considered,

THE COURT FINDS AND DECLARES, BASED ON CLEAR AND CONVINCING EVIDENCE, THAT:

1. This Court entered a Stipulated Judgment on January 25, 2012 (ECF No. 444), which incorporated as though fully set forth therein the Settlement Agreement (ECF No. 438-1, filed January 17, 2012);
2. In the Stipulated Judgment, this Court ordered the parties to the Settlement Agreement to perform all of their obligations thereunder;
3. This Court ordered that the Stipulated Judgment would be binding against Defendants, their successors in office, and their respective officers, agents and employees, and all others acting in concert with them;
4. This Court retained jurisdiction to enforce the Stipulated Judgment and Settlement Agreement;
5. PRESUMPTIVE ELIGIBILITY REVIEWS: Defendants have violated the Court's Order in the Stipulated Judgment by failing to comply with the Presumptive Eligibility components of the Settlement (Section VI.19 and XI.A.1 of the Settlement) by:
    a. Failing to determine Presumptive Eligibility for Class Members under the terms of the Settlement, and using criteria for Presumptive Eligibility not permitted under the Settlement Agreement in violation of Section VI.19 of the Agreement;

b. Failing to provide ADHC providers with complete and accurate lists of individuals who met the Presumptive Eligibility standard on a rolling basis prior to conducting face-to-face reviews of eligibility, as required by Section XI.A.1.b of the Agreement;

c. Failing to notify Presumptively Eligible Class Members found ineligible for CBAS of their rights to be transferred to CBAS and to receive CBAS services pending final resolution of any dispute through the Administrative Hearing process (aid-paid-pending);

d. Failing to take all reasonable steps within their power to insure compliance with the Settlement requirements relating to Presumptive Eligibility; and

e. Making determinations that Class Members were not eligible or Presumptively Eligible, and failing to make Presumptive Eligibility determinations, in a manner that was not based on good faith or a reasonable interpretation of the Stipulated Judgment and Settlement.

6. DENIAL OF CBAS TO ELIGIBLE CLASS MEMBERS: Defendants have violated the Court's Order in the Stipulated Judgment that requires that Class Members found eligible for CBAS after a face-to-face assessment transition to CBAS without interruption and at their current level of service (Section XI.B.3.a). Section XI.B.3.a. has no provisions for higher level reviews or terminations of eligibility for Class Members found eligible for CBAS after a face-to-face-assessment, but instead requires that they be determined eligible for CBAS, provided information about enrollment in CBAS, and continue to be eligible for CBAS at least until a regularly scheduled reassessment under XI.C, which shall be no sooner than 6 months after being determined eligible or transition to CBAS, whichever is later.

7. UNAUTHORIZED ADMINISTRATIVE REVIEWS WHICH INVALIDATE FACE-TO-FACE ELIGIBILITY DETERMINATIONS: Defendants have violated the Court's Order in the Stipulated Judgment by conducting administrative reviews ("QA reviews" and "Second Level reviews") which are unauthorized by the Agreement, and conducted in a manner that fails to comport with the Agreement (Sections XI.A.4) by improperly using procedures

purportedly labeled as "Quality Assurance" or "Second Level" reviews to improperly overturn face-to-face determinations of eligibility, in violation of Section XI.A.4 of the Settlement.

8. QUALITY ASSURANCE PROCEDURES: Arbitrarily and improperly carrying out activities identified as Quality Assurance procedures in violation of the Quality Assurance provisions in the Settlement, including conducting such reviews without reviewing data, using a random sampling of files and in person reviews as required by Section XVI.B. of the Settlement Agreement.

9. DEFECTIVE IMPLEMENTATION OF NOTIFICATION REQUIREMENTS: Defendants have violated the Court's Order in the Stipulated Judgment by failing to provide adequate and clear notification of CBAS eligibility status to Class Members and ADHC providers, thereby resulting in confusion, misinformation, and likely erroneous termination of services on March 31, 2012 by:

   a. Failing to contact ADHC providers prior to finalizing a determination of CBAS ineligibility as required by Section XI.A.4.d of the Agreement;

   b. Sending multiple lists to ADHC providers and multiple notices to Class Members without acknowledging prior communications or providing explanations for the changes;

   c. Sending inaccurate and conflicting information to ADHC providers, Class Members, and managed care plans about Class Members' CBAS eligibility status;

   d. Sending erroneous notices to Class Members who should be Presumptively Eligible for CBAS that fail to inform them about the right to seek aid paid pending a hearing decision challenging a denial of CBAS eligibility and the timelines for doing so;

   e. Creating a state of confusion and chaos due to the above actions and inactions which is causing stress and anxiety to Class Members and their families, leaving Class Members without certainty as to their status or when they will know their status, causing Class Members to file appeals perhaps needlessly, and causing Class Members to be at risk for erroneous termination of services on March 31, 2012 because their ADHC

providers have no certainty that they will be reimbursed for serving such Class Members after that date; and

f. Creating the real risk that Class Members will be terminated from their ADHC programs on March 31, 2012 in violation of their right to transition to CBAS either because they are in fact eligible or because they are entitled to aid paid pending a hearing decision challenging a denial of CBAS eligibility, thereby causing them irreparable harm due to the interruption or elimination of the ADHC/CBAS services they need to remain free from institutionalization.

10. GENERAL IMPLEMENTATION: Defendants have violated the Court's Order in the Stipulated Judgment by failing to take all reasonable steps within their power to comply with the Settlement, including failing to take all reasonable steps to correct problems with implementation of the Settlement.

11. Defendants' actions violate explicit provisions of the Stipulated Judgment and Settlement and were not based on good faith and reasonable interpretations of the Stipulated Judgment and Settlement, nor did Defendants make every reasonable effort to comply, and that Defendants are in Contempt of this Court's Stipulated Judgment.

12. This Court has inherent authority to enforce compliance with the Stipulated Judgment through a civil contempt proceeding. *United States v. United Mine Workers,* 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947).

13. Defendant's actions have created confusion and uncertainty among large portions of the Class, and increased the risk that Class Members will be terminated from the ADHC/CBAS program without cause and without due process. Such actions cause irreparable harm to Class Members and put many of them at risk of unnecessary institutionalization.

14. The civil contempt sanctions and orders set forth below are necessary to remedy prior noncompliance and prevent future noncompliance, and are designed to redress Defendants' specific violations of the Stipulated Judgment and Settlement.

15. The civil contempt sanctions and orders set forth below do not create an unreasonable burden on Defendants.

THEREFORE, IT IS HEREBY ORDERED that:

1. Plaintiffs' Motion to Enforce Stipulated Judgment and for Civil Contempt Sanctions is HEREBY GRANTED both to enforce the Judgment and for Civil Contempt.
2. Defendants Toby Douglas, in his official capacity as Director of the Department of Health Care Services, and the Department of Health Care Services are hereby found in Contempt of Court pursuant to this Court's inherent authority and pursuant to Federal Rule of Civil Procedure Rule 70: Enforcing a Judgment for a Specific Act, Sections (a) and (e).
3. Defendants Toby Douglas, in his official capacity as Director of the Department of Health Care Services; the Department of Health Care Services; and their successors, agents, officers, servants, employees, attorneys and representatives and all persons acting in concert or participating with them are hereby ordered to comply with the terms of the Stipulated Judgment entered by this Court on January 25, 2012 (ECF No. 444) and the incorporated Settlement Agreement (ECF No. 438-1, Filed January 17, 2012), and to further implement the Judgment and Settlement as follows:
    a) Within seven days of the date of this Order, Defendants shall rescind, by issuance of a Notice agreed to by the parties, all Notices of Action of ineligibility for CBAS in which the finding of eligibility at the face-to-face assessment was overturned by a "Second Level Review" or a "Quality Assurance Review." In this agreed-upon Notice, Class Members who were found eligible for CBAS at the face-to-face assessment, and their ADHC providers, shall be immediately notified that, in accordance with Section XI.B.3.a of the Agreement, they will transition to CBAS without interruption and at their same level of service and will continue to be eligible for CBAS at least until a regularly scheduled assessment as set forth in Section XI.C of the Agreement;
    b) Defendants shall cease sending notices of ineligibility for CBAS for a period of 30 days, or until the following activities are completed, whichever is later, as determined by the Court or by agreement of the parties:

i. By March 31, 2012, Defendants shall review all Individual Plans of Care (IPCs) for those Class Members who have been determined to be ineligible for Community Based Adult Services (CBAS), consistent with the criteria set forth in the Settlement Agreement, to determine if they meet the criteria for Presumptive Eligibility in Section VI.19 of the Settlement, without reference to any subsequent face-to-face reviews;

ii. If any "indicia of unreliability" arise from the face of the IPCs that may result in a denial of Presumptive Eligibility where the IPC would otherwise facially meet the criteria in VI.19, Defendants shall attempt to resolve those issues prior to a final determination of denial of Presumptive Eligibility through a telephonic or in-person conversation with that individual's ADHC provider and review of any additional information submitted by the ADHC provider in an attempt to resolve the issues; and

iii. Defendants shall document the outcome of each Presumptive Eligibility review, and for IPCs which Defendants determine to not qualify for Presumptive Eligibility status after taking the actions described in ii above, Defendants shall identify the basis for the denial of Presumptive Eligibility status for each Class Member;

iv. Defendants shall provide to Plaintiffs' counsel, on a weekly basis by close of business each Friday by email or fax, until the Presumptive Eligibility review is completed, data on the outcome of the Presumptive Eligibility reviews which includes the number of Class Members found to meet and not meet Presumptive Eligibility status and the bases for denial of Presumptive Eligibility status. Defendants shall also provide to Plaintiffs' counsel each week by close of business each Friday by email or fax, a random sample of 10 percent of the IPCs denied Presumptive Eligibility status and the documentation completed to support that denial.

c) Defendants shall ensure that lists of ineligible and eligible Class Members are confirmed to be complete and accurate, as determined by telephonic or in-person communication with Adult Day Health Care (ADHC) centers, and Defendants shall ensure that such communications occur prior to sending any further Notices to Class Members;

d) For Class Members who are determined to meet the criteria for Presumptive Eligibility but who are determined to be ineligible for CBAS pursuant to a face-to-face assessment, and once the Court permits such notification, Defendants shall issue accurate Notices of Action to them that inform them of their right to aid-paid-pending under the CBAS program until a final hearing decision on any appeal of the determination of ineligibility and of the timelines for making a request for aid paid pending;

e) Defendants shall ensure that Class Members are not terminated from ADHC or CBAS unless and until the above steps have been completed, or in the alternative, Defendants shall not eliminate ADHC as an optional Medi-Cal benefit unless and until the above actions have been completed;

f) Defendants shall document all steps taken to comply with this Order and shall provide weekly reports close of business each Friday by email or fax to Plaintiffs' counsel regarding their compliance;

g) Defendants shall ensure that no future Quality Assurance reviews are used for the purpose of overturning face-to-face assessments, and that any Quality Assurance reviews that are conducted meet the standards in Section XVI.B of the Agreement, including the requirements that quality assurance activities monitor "the quality and accuracy of the screening and assessment of Class Members for CBAS services and…include reviews of data, random sampling of files and in person reviews with individuals whose files are examined" and that "[q]uality assurance activities [are]

focused on measuring whether services are provided to Class Members in accordance with this Agreement"; and

h) Defendants shall ensure that Second Level reviews are used only for purpose and in the manner set forth in the Agreement, specifically that:

i. Second Level reviews are conducted only where "the outcome of a face-to-face assessment is that a Class Member is not eligible for CBAS" (Section XI.A.4.a);

ii. the Second Level review includes "the completed assessment tool used in the face-to-face assessment as well as supporting documentation, notes, and other medical records as necessary" (Section XI.A.4.c); and

iii. the nurse supervisor shall, in the exercise of the nurse's discretion, contact the ADHC center, the Class Member and/or family as necessary to clarify or augment any pertinent information needed to make an informed decision." (Section XI.A.4.c).

4. Defendants Toby Douglas, in his official capacity as Director of the Department of Health Care Services; the Department of Health Care Services; and their successors, agents, officers, servants, employees, attorneys and representatives and all persons acting in concert or participating with them are hereby ordered to take all actions necessary within the scope of their authority to implement the above Order.

5. Defendants Toby Douglas, in his official capacity as Director of the Department of Health Care Services; the Department of Health Care Services; and their successors, agents, officers, servants, employees, attorneys and representatives and all persons acting in concert or participating with them are hereby ordered to provide notice by March 20, 2012 to all Adult Day Health Care (ADHC) providers of the terms of this Order.

6. Defendants Toby Douglas, in his official capacity as Director of the Department of Health Care Services; the Department of Health Care Services; and their successors, agents, officers, servants, employees, attorneys and representatives and all persons acting in concert or participating with them are hereby ordered to provide notice by March 24, 2012 to all

recipients of Adult Day Health Care program services and ADHC providers of the terms of this Order, in an understandable format.

7. Defendants' failure to comply with any provision of this Order or of the Stipulated Judgment shall subject each of them to civil contempt sanctions of $50,000 per day for each violation, payable as a fine to the Court;

8. Defendants shall file a status report to Plaintiffs' Counsel and to the Court on compliance each week until the Defendants are in full compliance with this Order.

9. Plaintiffs' are entitled to compensatory attorneys' fees for costs arising out of Defendants' civil contempt. Defendants shall pay Plaintiffs' Counsel reasonable attorneys' fees and costs incurred in bringing the instant motion for civil contempt. Within thirty days of this Order, Plaintiffs' Counsel shall submit an application to the Court documenting their reasonable attorneys' fees and costs incurred in connection with this motion, and a proposed order.

IT IS SO ORDERED.

Dated:_____

_____
JACQUELINE SCOTT CORLEY
MAGISTRATE JUDGE OF THE UNITED STATES
DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA