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20 **IN THE UNITED STATES DISTRICT COURT**  
 21 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

22 LILLIE BRANTLEY, by her guardian ad )  
 23 litem Chauncey McLorin; GILDA GARCIA; )  
 24 ALLIE JO WOODARD, by her guardian ad )  
 25 litem Linda Gaspard-Berry, individually and )  
 26 on behalf of all others similarly situated, )

27 Plaintiffs,

28 vs.

29 DAVID MAXWELL-JOLLY, Director of the )  
 30 Department of Health Care Services, State of )  
 31 California, DEPARTMENT OF HEALTH )  
 32 CARE SERVICES, )

33 Defendants.

34 **Case No.: C09-03798 MEJ**

35 **CLASS ACTION**

36 **PLAINTIFFS' NOTICE OF**  
 37 **MOTION AND MOTION FOR**  
 38 **CLASS CERTIFICATION;**  
 39 **MEMORANDUM OF POINTS**  
 40 **AND AUTHORITIES IN SUPPORT**

41 Hearing Date, Time and Location to be set by  
 42 the Court at the Hearing on Plaintiffs' Motion  
 43 for Temporary Restraining Order

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1                   **NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION**

2           TO:    DAVID MAXWELL-JOLLY, Director of the Department of Health Care Services,  
3                    State of California, DEPARTMENT OF HEALTH CARE SERVICES AND ITS  
4                    ATTORNEYS OF RECORD

5           **PLEASE TAKE NOTICE** that at the date, time and location set by the Court at the Hearing  
6 on Plaintiffs’ Motion for Temporary Restraining Orders, or as soon thereafter as counsel may be  
7 heard, in the United States District Court for the Northern District of California, the individual  
8 Plaintiffs Lillie Brantley, by her guardian *ad litem* Chauncey McLorin; Gilda Garcia; and Allie Jo  
9 Woodard, by her guardian *ad litem* Linda Gaspard-Berry, individually and on behalf of all others  
10 similarly situated, will and do hereby move under Rules 23(a) and 23(b)(2) of the Federal Rules of  
11 Civil Procedure for an order certifying the following class for the purposes of injunctive and  
12 declaratory relief:

13                    “All recipients of Medi-Cal in the State of California who receive  
14                    Adult Day Health Care Services whose Adult Day Health Care  
15                    Benefits will be limited, cut, or terminated under the provisions of  
16                    ABX4 5.”

17           Plaintiffs will also and do hereby move at this time for certification of a “**Limitation of**  
18 **Benefits Subclass**” on the First, Second, Third, Fourth and Sixth Claims for Relief to be defined as:

19                    “All Medi-Cal beneficiaries who, as of August 26, 2009, have been authorized to  
20                    receive four or five days of Adult Day Health Care Services by DHCS, and whose  
21                    services will be reduced to a maximum of three days under the provisions of  
22                    ABX4 5.”

23           Plaintiffs further request that this Court appoint Plaintiffs’ counsel to serve as class counsel,  
24 and that the Court dispense with any requirement for Plaintiffs to provide unnamed plaintiff class  
25 members notice of the pendency of this action at this stage of the litigation.

26           The individual Plaintiffs move for certification because the above-defined plaintiff class and  
27 subclass are so numerous that joinder would be impracticable, there are common questions of law or  
28 fact among the class members and subclass members, the claims of the representative plaintiffs are

1 typical of those of the class and subclass, and the representative plaintiffs and their counsel will  
 2 fairly and adequately represent the class and subclass interests. Additionally, Defendant David  
 3 Maxwell-Jolly, Director of the Department of Health Care Services, State of California and  
 4 Defendant Department of Health Care Services have acted or refused to act on grounds applicable to  
 5 the entire class and subclass, rendering declaratory and injunctive relief appropriate to the class and  
 6 subclass as a whole.

7 This Motion is based on the following Memorandum of Points and Authorities, the  
 8 Declarations of Class Counsel Elizabeth Zirker, Anna Rich, Barbara Jones, and Sara Somers; the  
 9 Declarations filed in Support of Plaintiffs' Motion for Temporary Restraining Order, Preliminary  
 10 Injunction, and Class Certification and attached exhibits; the arguments of counsel; and all other  
 11 relevant pleadings, briefs and evidence made of record.

## 12 **MEMORANDUM OF POINTS AND AUTHORITIES**

### 13 **I. INTRODUCTION**

14 The individual Plaintiffs seek an Order certifying this case as a class action pursuant to Rule  
 15 23 of the Federal Rules of Civil Procedure. They represent a putative class of elderly people and  
 16 people with disabilities who currently receive Adult Day Health Care services ("ADHC") which  
 17 allow them to live safely in their homes. (Complaint ¶¶ 2, 107, 114, 121.) They bring an action to  
 18 enforce the rights of the putative class members to receive notice and hearing before termination of  
 19 Medicaid benefits and to enforce the integration mandates of federal law. The individual Plaintiffs  
 20 seek exclusively declaratory and injunctive relief under: (a) the Americans with Disabilities Act, as  
 21 Amended by the American with Disabilities Act Amendments Act of 2008 ("ADA"), 42 U.S.C.  
 22 §§ 12131 *et seq.* (2000, as amended in 2008); (b) Section 504 of the Rehabilitation Act of 1973, 29  
 23 U.S.C. §§ 794 *et seq.* (2000) ("Section 504"); (c) the United States Constitution; (d) Title XIX of  
 24 the Social Security Act, (the Medicaid Act), 42 U.S.C. § 13969(a); (e) 42 U.S.C. § 1983; and (f)  
 25 Section 11135 of the California Government Code, California Government Code Sections 11135  
 26 (2006) ("Section 11135"). (Complaint ¶¶ 3, 115-145, Request for Relief, p. 30 *et seq.*)

27 As a result of Defendants' failure to carry out the "integration mandate" of federal law, the  
 28 individual Plaintiffs and the class members they propose to represent are at risk of being

1 unnecessarily institutionalized, and will be denied the right to receive the community-based services  
2 they need in order to live in their own homes and communities. (Complaint ¶¶ 118-122; Steinke  
3 Decl. ¶¶ 21-24; McCloud Decl. ¶¶ 20-26; Davis Decl. ¶¶ 24-25, 27-32.) Defendants' policies and  
4 practices with respect to community-based Medi-Cal services will result in risk of injury, death,  
5 unnecessary segregation, and isolation of the putative class members away from their families and  
6 home communities. *Id.*

7 This action readily satisfies the requirements for class certification under Rule 23(a) and the  
8 requirements of Rule 23(b)(2). *First*, the proposed class consists of over 36,000 members and the  
9 proposed subclass consists of more than 8,000 members, thus making joinder impracticable.  
10 *Second*, members of the proposed class and subclass share common issue of fact and law as they are  
11 currently threatened and will continue to be threatened with the denial of ADHC benefits to which  
12 they are entitled and with the risk of discriminatory institutionalization. *Third*, the named Plaintiffs  
13 satisfy the typicality requirement because they are threatened with the loss of ADHC benefits, and in  
14 regard to the subclass, with the loss of two days a week of ADHC benefits. *Fourth*, Plaintiffs are  
15 adequate class representatives because they have no conflicts with the claims of putative class  
16 members. Likewise, Plaintiffs' attorneys have no conflict with the claims of putative class members  
17 and have substantial experience in class actions, public benefits cases, ADA and 504 cases, and other  
18 complex civil rights cases in federal court, making them more than adequate case counsel.

19 This case is appropriate under Rule 23(b)(2) because the class has been subject to a common  
20 set of practices for which they only seek injunctive relief.

21 Plaintiffs therefore request that the Court certify the proposed class and subclass, and appoint  
22 Plaintiffs' counsel to serve as class counsel. Plaintiffs also request that once the class is certified,  
23 they not be required to give unnamed plaintiff class members notice of the pendency of this action  
24 prior to judgment. Pre-judgment notice is not required in Rule 23(b)(2) class actions.

## 25 **II. STATEMENT OF THE ISSUES TO BE DECIDED**

26 This Motion presents the following issues for decision by this Court:

27 **Issue No. 1:** Should the following Plaintiff class be certified under Rule 23(a) and Rule  
28 23(b)(2) of the Federal Rules of Civil Procedure?

1 “All recipients of Medi-Cal in the State of California who receive Adult Day Health Care  
2 Services whose Adult Day Health Care Benefits will be limited, cut, or terminated under the  
3 provisions of ABX4 5.”

4 **Issue No. 2:** Should the following Plaintiff subclass be certified under Rule 23(a) and Rule  
5 23(b)(2) of the Federal Rules of Civil Procedure for the First, Second, Third, Fourth and Sixth  
6 Claim for Relief?

7 **“Limitation of Benefits Subclass”** to be defined as “all Medi-Cal beneficiaries who, as of  
8 August 26, 2009, have been authorized to receive four or five days of Adult Day Health Care  
9 Services by DHCS, and whose services will be reduced to a maximum of three days under the  
10 provisions of ABX4 5.”<sup>1</sup>

11 **Issue No. 3:** Assuming that a Plaintiff class and subclass as defined above are certified  
12 under Rule 23(a) and Rule 23(b)(2) of the Federal Rules of Civil Procedure, should the individual  
13 Plaintiffs be required to give notice of the pendency of this action to unnamed class members prior  
14 to judgment?

### 15 III. STATEMENT OF FACTS

#### 16 A. Description of Adult Day Health Care Program and Recipient.

17 Adult Day Health Care is a community-based day program for low income seniors and  
18 younger disabled adults. Adult Day Health Care programs provide comprehensive health and social  
19 services centered on a multi-disciplinary team approach with skilled professionals providing  
20 individualized care, treatments and services to frail elderly and disabled persons, in order to maintain  
21 their ability to reside in their own homes or with their families. (Complaint ¶ 1.)

22 The California legislature specifically intended ADHC as an alternative to institutional care.  
23 Cal. Health & Safety Code § 1570.2. The ADHC program includes as an eligibility criteria for  
24 receipt of services that: “*A high potential exists for the deterioration of the participant’s medical,*

---

25  
26 <sup>1</sup> Plaintiffs reserve the right to seek certification of the following subclass at a later date:  
27 “Termination of Benefits Subclass” to be defined as “all present and future Medi-Cal beneficiaries  
28 who have been authorized to receive any Adult Health Care services, and whose ADHC services will  
be terminated under the provisions of ABX4 5 at the time DHCS issues new classification standards  
pursuant to that statute for receipt of ADHC services.” See Complaint, Fifth Claim for Relief.

1 *cognitive, or mental health condition or conditions in a manner likely to result in emergency*  
2 *department visits, hospitalization, or other institutionalization if adult day health care services are*  
3 *not provided.” Cal. Welf. & Inst. Code § 14526.1(d)(4). The goal of the ADHC program is to*  
4 *prevent avoidable hospitalizations, emergency department use and nursing facility placement by*  
5 *improving and stabilizing an individual’s daily functioning, medical conditions and mental status.*  
6 (Complaint ¶ 52.)

7 Adult Day Health Care services are generally provided at a community based center.  
8 (Complaint ¶ 53.) Participants live at home or in assisted living, and are transported to and from the  
9 program center on a daily basis. ADHC programs are required to provide skilled nursing, skilled  
10 social work, therapeutic activities, dietician and nutritionally customized meal services, skilled  
11 physical therapy, skilled occupational therapy, skilled speech and language pathology services,  
12 skilled mental health services and non-emergency transportation to and from the center. Individuals  
13 can participate in ADHC from one to five days per week, depending on their needs and medical  
14 authorizations. (Complaint ¶ 38.)

15 The ADHC serves over 36,000 individuals throughout California. (Missaelides Decl., ¶ 27,  
16 Exh. C.) While the majority of persons served are elderly and frail, ADHCs also serve non-elderly  
17 adults with chronic disabling mental health, cognitive or physical conditions: for example, chronic  
18 schizophrenia, Parkinson’s disease, Alzheimer’s disease, stroke, or head injury. (Complaint ¶ 57.)  
19 Every recipient meets the criteria in the California Welfare and Institutions Code section  
20 14526.1(d)(4) that he or she is at risk of hospitalization or institutionalization without ADHC  
21 services. (Complaint ¶ 52.)

#### 22 **B. Passage of ABX45**

23 The Governor signed ABX4 5 on July 28, 2009. ABX4 5 provides that effective 30 days  
24 after the law is signed by the Governor, the maximum number of days that any ADHC participant  
25 may be authorized for Medi-Cal funding to attend ADHC is cut from five to three, regardless of  
26 current authorizations or the health condition of the individual. Cal. Welf. & Inst. Code § 14132(p),  
27 effective August 27, 2009. (Complaint ¶ 62.) These cuts are scheduled to occur on August 27,  
28 2009. The reduction in the ADHC benefit from four or five days to three days will affect

1 approximately 8,000 individuals. (Complaint ¶ 63.) This group of individuals are members of the  
 2 “Limitation of Benefits Subclass” discussed below.

### 3 C. New Restrictions on ADHC Eligibility

4 In addition to the cut in the maximum number of ADHC days, new restrictions limiting who  
 5 is eligible to receive ADHC services will go into effect if and when the Director of DHCS provides a  
 6 written declaration that new restrictions are ready to be implemented. Cal. Welf. & Inst. Code  
 7 § 14521.1, effective August 27, 2009. These new restrictions will terminate or deny ADHC services  
 8 to individuals based on degree of functional limitation and need for a certain level of care. The  
 9 statute provides that at the time of the declaration of new restrictions by the Director, the ADHC  
 10 benefit will revert back to a maximum of five days per week for the individuals who remain eligible.  
 11 Plaintiffs have alleged that these new restrictions violate the law, and they are addressed by the  
 12 proposed “Termination of Benefits Subclass” to be defined as “all present and future Medi-Cal  
 13 beneficiaries who have been authorized to receive any Adult Day Health Care services, and whose  
 14 ADHC services will be terminated under the provisions of ABX4 5 at the time DHCS issues new  
 15 classification standards pursuant to that statute for receipt of ADHC services.” (Complaint ¶ 110(b),  
 16 Fifth Claim for Relief.) However, these proposed cuts are not yet in place. Cal. Welf. & Inst. Code  
 §§ 14525.1, 14522.4(a)(10), effective August 27, 2009. Therefore, at this point Plaintiffs do not  
 seek certification of the subclass affected by this component of ABX4 5.

## 17 IV. ARGUMENT

### 18 A. This Lawsuit Satisfies All the Requirements of Rule 23 for Maintenance as a 19 Class Action

20 Rule 23(c) specifies that at an “early practicable time” after commencement of an action the  
 21 court shall determine whether the action is to be maintained as a class action. Fed.R.Civ.P.  
 22 23(c)(1)(A); *see also Blackie v. Barrack*, 524 F.2d 891, 901 (9<sup>th</sup> Cir. 1975), *cert. denied*, 429 U.S.  
 23 816, 97 S.Ct.57, 50 L.Ed.2d 75 (1976). In determining whether an action warrants class treatment  
 24 under Rule 23, “the question is not whether the plaintiff or plaintiffs have stated a cause of action or  
 25 will prevail on the merits, but rather whether the requirements of Rule 23 are met. *Eisen v. Carlisle*  
 26 *& Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (quotations and citation  
 27 omitted); *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9<sup>th</sup> Cir. 1983) (same.)  
 28

1 “No weighing of competing evidence” is appropriate on a class certification motion. *Wang v.*  
2 *Chinese Daily News, Inc.*, 231 F.R.D. 602, 605 (C.D. Cal. 2005). Indeed, the Court should accept  
3 the factual allegations in the Complaint as true at this stage in the proceedings. *Blackie*, 524 F.2d at  
4 901 n.17; *Burkhalter Travel Agency v. MacFarms Intern., Inc.*, 141 F.R.D. 144, 152 (N.D. Cal.  
5 1991); *see Eisen*, 417 U.S. at 177.

6 As discussed below, this class meets all the requirements of Rule 23(a): numerosity,  
7 commonality, typicality, and adequacy of representation. In addition, this class meets the  
8 requirements of Rule 23(b)(2) in that declaratory and injunctive relief predominates and is  
9 appropriate.

#### 10 **B. Plaintiffs Meet the Standards for Certification Under Rule 23(a).**

11 Rule 23(a) of the Federal Rules of Civil Procedure allows an action to be maintained as a  
12 class action provided that it meets four prerequisites: “(1) the class is so numerous that joinder is  
13 impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses  
14 of the representative parties are typical of the claims or defenses of the class, and (4) the  
15 representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ.  
16 P.23(a). *See Rodriguez v. Hayes*, -- F.3d --, 2009 WL 2526622, \*10 (9<sup>th</sup> Cir. 2009); *Dukes v. Wal-*  
17 *Mart, Inc.*, 474 F.3d 1214, 1224 (9<sup>th</sup> Cir. 2007); *Lancaster v. Tilton*, No. C 79-01630-WHA, 2006  
18 U.S. Dist. LEXIS 75121, at \*19-20 (N.D. Cal. Oct. 4, 2006). Rule 23(a) should be read liberally in  
19 the context of civil rights suits. *Armstrong v. Pingree*, 629 F. Supp. 273, 279 (M.D. Fla. 1986)  
20 (citing *Jones v. Diamond*, 519 F.2d 1090, 1099 (5<sup>th</sup> Cir. 1975)). As shown below, the proposed class  
21 here easily satisfies all of the requirements of 23(a).

#### 22 **1. The Proposed Class Meets the Numerosity Requirement of Rule 23(a).**

23 A class action may be maintained only if “the class is so numerous that the joinder of all  
24 parties is impracticable.” Fed. R. Civ. P. 23(a)(1). Impracticability addresses the expense and  
25 burden, to the parties and the court, of litigating each claim individually, rendering the case difficult  
26 or inconvenient without joining all members of the class. *Harris v. Palm Springs Alpine Estates*,  
27 329 F.2d 909, 913-14 (9<sup>th</sup> Cir. 1964); *Wang*, 231 F.R.D. at 605. Courts have often found the  
28 numerosity requirement satisfied by the sheer number of class members. *See, e.g., Lancaster*, 2006

1 U.S. Dist. LEXIS 75121, at \*20-21 (finding numerosity in a class of over 600 prisoners housed at  
2 San Quentin); *Wyatt v. Poundstone*, 169 F.R.D. 155, 164 (M.D. Ala. 1995) (upholding class of 1,000  
3 persons with developmental disabilities in state facilities). The fact that the exact size of the class  
4 cannot be easily ascertained does not preclude class certification. *Lynch v. Rank*, 604 F.Supp. 30, 36  
5 (N.D. Cal. 1984), *aff'd*, 747 F.2d 528 (9th Cir. 1984). A court may find the numerosity requirement  
6 has been met where the exact size of the class is unknown but general knowledge and common sense  
7 indicate that it is large. *Dukes*, 474 F.3d at 1224; *Cruz v. Bowen*, 672 F.Supp. 1300, 1304 (N.D. Cal.  
8 1987).

9 While there is no exact numerical formula, a class of over 100 members satisfies the  
10 numerosity requirements. *See* 1 Newberg on Class Actions (4<sup>th</sup> ed. 2002) § 3.5 at 247 (“as few as 40  
11 class members should raise a presumption that joinder is impracticable”). Courts in the Ninth  
12 Circuit have found that classes of far fewer than 100 persons are sufficiently numerous to render  
13 joinder impracticable. *See, e.g., Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9<sup>th</sup> Cir.),  
14 *vacated and rem'd on other grounds*, 459 U.S. 810, 103 S.Ct. 35, 74 L.Ed.2d 48 (1982) (“we would  
15 be inclined to find the numerosity requirement in the present case satisfied solely on the basis of the  
16 number of ascertained class members, i.e., 39, 64, and 71 . . . .”); *Perez-Funez v. District Dir.*, 611  
17 F.Supp. 990, 995 (C.D. Cal. 1984) (“Classes consisting of 25 members have been held large enough  
18 to justify certification.”); *Ashmus v. Calderon*, 935 F.Supp. 1048, 1064 (N.D. Cal. 1996) (52 class  
19 members).

20 In this case, there is no question that joinder is impracticable. There are in excess of 36,000  
21 people in the class. (Complaint, ¶ 63, Missaelides Decl., ¶ 27, Exh. C.) The “Limitation of Benefits  
22 subclass” consists of more than 8,000 people. (Missaelides Decl., ¶ 33, Exh. D)

23 Apart from the sheer number of affected individuals, joinder is not considered feasible when  
24 “members of the class, who are by definition poor and disabled, do not have the economic means to  
25 pursue remedies on an individual basis.” *Lynch*, 604 F. Supp. at 36. In this case, the proposed class  
26 as defined possesses this characteristic because it consists of persons with disabilities who qualify  
27 for Medi-Cal benefits based on their inability to pay for their medical care. (Complaint, ¶ 109.)  
28



1 Those who must survive on public assistance programs cannot afford to prosecute individual legal  
2 claims.

3 The numerosity requirement of Rule 23(a)(1) is therefore satisfied in this case.

4 **2. There are Questions of Law or Fact Common to All Members of the**  
5 **Class.**

6 Rule 23(a)(2) requires that there be either “questions of law or fact common to the class.”  
7 Fed. R. Civ. P. 23(a)(2). “[F]or the commonality requirement to be met, there must only be one  
8 single issue common to the proposed class.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th  
9 Cir. 1998) (“All questions of fact and law need not be common to satisfy the rule. The existence of  
10 shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts  
11 coupled with disparate legal remedies within the class.”); *Staton v. Boeing*, 327 F.3d 938, 953 (9th  
12 Cir. 2003) (quoting *Hanlon*); *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 648 (C.D. Cal. 1996). The  
13 commonality requirement is met “where the lawsuit challenges a system-wide practice or policy that  
14 affects all of the putative class members.” *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001).  
15 Courts do not treat commonality as a difficult hurdle; the requirement should be “construed  
16 permissively.” *Hanlon*, 150 F.3d at 1019.<sup>2</sup>

17 This requirement “focuses on the relationship of common facts and legal issues among class  
18 members.” *Dukes*, 474 F.3d at 1225. A class action is particularly appropriate when the issues  
19 involved are common to the class as a whole and when they “turn on questions of law applicable in  
20 the same manner to each member of the class.” *Falcon*, 457 U.S. at 155. Rule 23(a)(2) does not  
21 require the named plaintiffs to be “identically situated with all other class members;” it is enough if  
22 their situations share a common issue of law or fact and are sufficiently parallel to ensure a vigorous  
23 and full presentation of all claims for relief. *California Rural Legal Assistance v. Legal Services*

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24  
25 <sup>2</sup>In addition, courts apply the commonality requirement more liberally where, as here, plaintiff seeks  
26 class certification under Rule 23(b)(2) because a proposed class seeking declaratory or injunctive  
27 relief generally challenges policies and practices affecting an identifiable group in the same way. *See*  
28 *Von Colln v. County of Ventura*, 189 F.R.D. 583, 591 (C.D. Cal. 1999) (“[W]hen addressing  
commonality of class members proposed under Rule 23(b)(2), a court may employ a liberal  
definition of commonality.”).

1 *Corp.*, 917 F.2d 1171, 1175 (9th Cir. 1990) (citations omitted). Plaintiffs need only present a single  
2 issue of law or fact common to all class members, and not all questions of law and fact must be  
3 common. *Rodriguez*, 2009 WL 2526622 at \*10; *Dukes*, 474 F.3d at 1225 (pointing out that the  
4 commonality requirement is qualitative rather than quantitative; “one significant issue common to  
5 the class may be sufficient to warrant certification”).

6 Even when the effect on each class member differs, a common allegation that a governmental  
7 Defendants’ general or systemic policy, procedure, or practice is discriminatory or illegal suffices to  
8 establish commonality of the claims. *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) (citing  
9 *Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir. 1993)); *Arnold v. UA Theatre Circuit,*  
10 *Inc.*, 158 F.R.D. 439, 448 (N.D. Cal 1994) (common questions of failure to provide reasonable  
11 accommodations existed regardless of class members’ different disabilities and accommodation  
12 needs; commonality is “met by the alleged existence of common discriminatory practices. The  
13 actions of the defendant need not affect each member of the class in the same manner.”) (citations  
14 omitted). The Ninth Circuit has held, specifically in the civil rights context, that “commonality is  
15 satisfied where [a] . . . lawsuit challenges a system-wide practice or policy that affects all of the  
16 putative class members . . . In such circumstance [*sic*], individual factual differences among the  
17 individual litigants or groups of litigants will not preclude a finding of commonality.” *Armstrong v.*  
18 *Davis*, 275 F.3d at 868 (affirming certification of class of prisoners with disabilities despite facts  
19 showing different disabilities and accommodation needs because entire class had common issues  
20 related to systemic policies and implementation) (citations omitted); *accord Lancaster*, 2006 U.S.  
21 Dist. LEXIS 75121, at \*21. *See also Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (in  
22 class action involving foster children, court held “[t]he unique circumstances of each child do not  
23 compromise the common question of whether, as plaintiffs allege, defendants have failed to meet  
24 their federal and state law obligations.”); *Wyatt*, 169 F.R.D. at 165 (allegation that “defendants have  
25 not given them [plaintiffs] an informed choice to live in the community” was common question of  
26 law sufficient to uphold class determination). The Ninth Circuit has observed that courts “have  
27 generally given [Rule 23(a)(2)] a permissive application in a variety of substantive law areas so that  
28 the commonality requirement is usually found to be satisfied.” *Jordan*, 669 F.2d at 1320.

1 In this case, the overriding issues are Defendants' compliance with the federal and state  
2 statutes that require them to afford access to home and community-based services for persons with  
3 disabilities who are able to live in the community, and Defendants' compliance with constitutional  
4 and statutory requirements for notice and due process. This includes a challenge to Defendants'  
5 policies and practices that will lead to the unnecessary institutionalization and segregation of people  
6 with disabilities. *See Olmstead v. L.C.*, 527 U.S. 581, 600 (1999) ("unjustified isolation of persons  
7 with disabilities is discrimination" under the ADA).

8 There are many questions of law and fact common to the members of the proposed class.  
9 Among the common issues of law are:

10 (1) Whether Defendants violated the integration mandate of the Americans with  
11 Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504) by cutting  
12 their community-based ADHC services, causing Plaintiffs to be segregated and confined  
13 unnecessarily in institutional settings in order to receive services, rather than continuing to provide  
14 those services in appropriate, integrated settings in plaintiffs' homes and communities;

15 (2) Whether Defendants violated the methods of administrative provisions of ADA and  
16 Section 504 by cutting ADHC benefits in a manner which discriminates or has the effect of  
17 discriminating against class members; and

18 (3) Whether Defendants violated Plaintiffs' rights arising from Medicaid and  
19 constitutional obligations of notice and due process.

20 Because the issue of Defendants' compliance with the federal statutes is common to all class  
21 members, the commonality requirement has been satisfied.

22 Common issues of fact also unite the class. For example, all class members are Medicaid  
23 beneficiaries receiving ADHC services who allege failure to get notice.

24 Furthermore, the prosecution of separate actions by individual members of the class would  
25 create a risk of inconsistent or varying adjudication, establishing incompatible rules of law for the  
26 provision of services to people with disabilities served by the ADHC program.

27 Any differences in the ways in which these policies and practices affect individual class  
28 members do not undermine the finding of commonality. *Staton*, 313 F.3d at 447, 464 (where

1 plaintiffs have alleged a “complex of discriminatory practices,” individual class members need not  
2 have been affected by every practice); *Jordan*, 669 F.2d at 1320 (“The legality of defendant’s  
3 practice or policies will usually be a question common to the class, and the existence of different  
4 factual questions with respect to various [plaintiffs] will not defeat satisfaction of the commonality  
5 requirement”).

6  
7 A common inquiry is the plainly most efficient and appropriate way to answer any and each  
8 of the common factual and legal questions posed in this case.

### 9 3. The Named Plaintiffs’ Claims Are Typical of the Claims of the Class.

10 Rule 23(a)(3) requires that the claims of the class representatives be typical of the class  
11 claims. Fed. R. Civ. P. 23(a)(3); *Jordan*, 669 F. 2d at 1321. “A class representative must be part of  
12 the class and possess the same interest and suffer the same injury as the class members.” *General*,  
13 457 U.S. at 156 (citations omitted). The primary purpose of the typicality requirement is to ensure  
14 that the nature of the claims brought by the class representative are so interrelated that the interests  
15 of the class members will be fairly and adequately protected in their absence. *Id.* at 157. In other  
16 words, the interests of the class representatives must align with the interests of the class. *Lancaster*,  
17 2006 U.S. Dist. LEXIS 75121, at \*25 (citing *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th  
18 Cir. 1992)).

19 Like commonality, typicality does not require that each class member share the same factual  
20 situation. The Supreme Court has recognized that “the commonality and typicality requirements of  
21 Rule 23(a) tend to merge....” *Falcon*, 457 U.S. at 158 n.13. “[A] named plaintiff’s claim is typical if  
22 it stems from the same event, practice or course of conduct that forms the basis of the class claims  
23 and is based upon the same legal or remedial theory.” *Id.* See also *Rodriguez*, 2009 WL 2526622  
24 at\*11; *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985). In such a situation, “varying factual  
25 differences between the claims or defenses of the class and the class representative will not render  
26 the named representative's claim atypical.” *Jordan*, 669 F.2d at 1321. “The test for typicality, like  
27 the test for commonality, is not demanding.” *Lightbourn v. County of El Paso*, 118 F.3d 421, 425  
28 (5th Cir. 1997). “Like the commonality requirement, typicality is “permissive” and requires only

1 that the representative's claims are "reasonably co-extensive with those of absent class members;  
2 they need not be substantially identical." *Rodriguez*, 2009 WL 2526622 at \*10 citing *Hanlon*, 150  
3 F.3d at 1020.

4 Here, the claims of the named Plaintiffs mirror those of the class as a whole. Each of the  
5 individual Plaintiffs is a recipient of Adult Day Health Care services and a Medicaid recipient. Each  
6 of them faces termination or reduction of the services that allow them to remain safely in their  
7 homes (McLorin Decl. ¶¶ 17, 18; Garcia Decl. ¶ 18; Gaspard-Berry Decl. ¶¶ 16-17; Steinke Decl. ¶¶  
8 22-24; Davis Decl. ¶ 25; McCloud Decl. ¶¶ 26-27; Perelman Decl. ¶¶ 14-15). The individual  
9 Plaintiffs, like the proposed class as a whole, charge Defendants with violations of federal law due to  
10 their proposed reduction of ADHC benefits without notice. Their claims typify the claims of the  
11 class and they seek the same relief as all class members.

12 Regardless of any individual differences among class members, each has sustained the same  
13 discrimination and injuries resulting from the same course of conduct by Defendants. The claims of  
14 the individual Plaintiffs are typical of all unnamed class members who may lose ADHC services due  
15 to ABX4 5. In addition, the claims of the named Plaintiffs are typical of all unnamed class members  
16 whose ADHC benefits may be reduced from 4 or 5 days to 3 days a week. Each of the named  
17 plaintiffs currently gets ADHC benefits for 5 days and each of them will have those benefits reduced  
18 to 3 days if defendants' practices are not enjoined. (Complaint, ¶¶ 9, 14, 17, 62.)

19 Hence, the requirements of Rule 23(a)(3) are met for both the proposed class and the  
20 proposed subclass.

21 **4. The Named Plaintiffs and Their Attorneys Will Fairly and Adequately**  
22 **Protect the Interests of the Class.**

23 The final requirement of Rule 23(a) is that the representative parties must "fairly and  
24 adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy of  
25 representation requirement is two-fold: (1) the proposed class representatives must not have conflicts  
26 of interest with the proposed class, and (2) they must have qualified and competent counsel. *Dukes*,  
27 474 F.3d at 1233. Because the individual Plaintiffs have no interests that conflict with or are  
28

1 antagonistic to those of the class, and their counsel are qualified, Plaintiffs meet this requirement as  
2 well.

3 **a. The Individual Plaintiffs' Interests are Not Antagonistic to**  
4 **Those of the Class**

5 The class representatives do not have any interests that are antagonistic to the interests of the  
6 class. This inquiry includes examination of whether there is antagonism between the representatives  
7 and class members, a sharing of interests between the representatives and class members, and the  
8 unlikelihood that the suit is collusive. *In re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab.*  
9 *Litig.*, 693 F.2d 847, 855 (9th Cir. 1982); *accord Lancaster*, 2006 U.S. Dist. LEXIS 75121, at \*28;  
10 *Rodriguez*, 2009 WL 2526622, at \*12.

11 Here, as discussed above, the individual Plaintiffs' claims and their injuries are typical of  
12 those of the proposed class members. None of the individual Plaintiffs seeks personal damages or  
13 other individualized relief to the exclusion of other class members. To the contrary, the focus of this  
14 litigation is the grant of broad injunctive relief that will benefit the entire class. Collusion is absent.  
15 No conflicts exist which could hinder the individual Plaintiffs' ability to pursue the litigation  
16 vigorously on behalf of the class. They will fairly and adequately protect the interests of the class.

17 **b. Plaintiffs' Counsel Are Qualified to Litigate This Action.**

18 Rule 23(a)(4) also requires that the proposed class representatives be able to prosecute the  
19 action vigorously through qualified counsel. *In re MDC Holdings Securities Litig.*, 754 F. Supp 785,  
20 802 (S.D. Cal. 1990). It has been recognized that public interest attorneys with experience in  
21 protecting the interests of the poor adequately represent class interests. *See, e.g., Lopez v. Heckler*,  
22 572 F. Supp. 26, 31 (C.D. Cal. 1983), modified on other grounds, 725 F.2d 1489 (9th Cir.), vacated  
23 and remanded on other grounds, 469 U.S. 1082 (1984); *Serritella v. Engleman*, 339 F. Supp. 738,  
24 748 (D.N.J.), *aff'd*, 462 F.2d 601 (3d Cir. 1972).

25 Plaintiffs' attorneys in this matter are counsel with long established public interest firms, all  
26 with extensive experience in litigation of federal class actions involving disability and health  
27 programs. They are highly qualified and their resources are more than adequate to represent the  
28 class completely.

1           Lead counsel are employed by Disability Rights California, a private, non-profit agency  
2 established as California's federally-mandated advocacy system to protect the rights and interests of  
3 people with disabilities. Zirker Decl. in Support of Class Certification ¶ 3. *See, e.g.*, 42 U.S.C.  
4 §§ 10801 *et seq.*, §§ 5001 *et seq.*; 29 U.S.C. § 794e; Cal. Welf. & Inst. Code § 4900 *et seq.*  
5 Disability Rights California provides advocacy exclusively to people with disabilities. *Id.* Disability  
6 Rights California has served as counsel in federal and state class actions and other litigation on a  
7 broad range of issues, including unnecessary institutionalization, access to community-based  
8 programs and services, including Medicaid/Medi-Cal services, and disability-based discrimination in  
9 a variety of contexts under the ADA, Section 504 and federal and state fair housing statutes. *Id.* ¶ 8.  
10 The three primary Disability Rights California attorneys working on this case have almost 40 years  
11 combined experience as attorneys practicing disability rights law. *Id.*, ¶ 4.

12           The National Senior Citizens Law Center is a national, non-profit organization dedicated to  
13 promoting the independence and well-being of low-income seniors and individuals with disabilities.  
14 Rich Decl., ¶ 3. Attorneys with National Senior Citizens Law Center are national experts in public  
15 benefits law affecting senior citizens. *Id.*, ¶¶ 3, 5. They have extensive experience in class action  
16 litigation involving Medicaid. *Id.*, ¶ 6.

17           AARP Foundation Litigation is a national program that defends the rights of older Americans  
18 across the United States. Jones Decl., ¶¶ 3, 4. Attorneys in the program have extensive class action  
19 and Medicaid experience in numerous federal courts. *Id.*, ¶¶ 4, 5.

20           Additionally, no conflicts exist between counsel, named Plaintiffs and the proposed class  
21 members that would compromise their ability to represent the class.

22           In summary, the individual Plaintiffs satisfy the adequacy of representation requirement  
23 under Rule 23(a)(4) both with respect to their interests and their choice of counsel.

24                           **5.       The Proposed Plaintiff Class Is Adequately Defined and Clearly**  
25                           **Ascertainable.**

26           In addition to the explicit requirements of Rules 23(a) and 23(b)(2), “the class must be  
27 adequately defined and clearly ascertainable before a class action may proceed.” *Lukovsky v. City*  
28 *and County of San Francisco*, No. C 05-00389-WHA, 2006 U.S. Dist. LEXIS 3174, at \*5 (N.D. Cal.

1 Jan. 17, 2006) (quoting *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679-80 (S.D. Cal. 1999)). *See*  
2 *also Nat'l Federation of the Blind v. Target Corp.*, No. C 06-01802-MHP, 2007 U.S. Dist. LEXIS  
3 30513, at \*12 (N.D. Cal. Apr. 25, 2007) (holding that a class needs to “be adequately defined so that  
4 the class membership is clearly ascertainable”); *In re Tableware Antitrust Litigation*, No. C 04-3514-  
5 VRW, 2007 U.S. Dist. LEXIS 21166, at \*12 (N.D. Cal. Mar. 13, 2007) (holding that “there must be  
6 some evidence that a class exists and that it may be defined with reasonable specificity”).

7 A proposed class is considered ascertainable when it has been defined by objective criteria  
8 that are administratively feasible to apply, without the need to resort to a subjective determination.  
9 *See Tableware Antitrust Litigation*, 2007 U.S. Dist. LEXIS 21166, at \*13. In *Tableware Antitrust*  
10 *Litigation*, the Court concluded that the proposed class as defined was clearly ascertainable because  
11 “individuals would be able to determine, simply by reading the definition, whether they are members  
12 of the proposed class.” 2007 U.S. Dist. LEXIS 21166, at \*15. The Court found that none of the  
13 terms in the proposed definition required further clarification and the Court would not have to  
14 conduct individualized hearings to determine membership. *Id.* at \*15-16.

15 None of the terms in the Plaintiffs’ proposed class and subclass definitions require additional  
16 clarification. For example, the term “Medi-Cal beneficiaries” is well understood to refer to  
17 beneficiaries of the State of California’s program for providing necessary medical services to low-  
18 income people under the federal Medicaid statute. Moreover, an individual would be able to readily  
19 determine, by looking at the class definition, whether he or she is a current recipient of ADHC  
20 services and will know what services are reduced or terminated.

21 In summary, the individual Plaintiffs’ proposed class definition provides a set of objective  
22 criteria by which class membership is clearly ascertainable and administratively feasible for this  
23 Court to manage.

24 **C. This Case Satisfies Rule 23(b)(2) Because Defendant has Acted on**  
25 **Grounds Generally Applicable to the Class Making Final Injunctive and**  
**Declaratory Relief Appropriate.**

26 In addition to the four requirements of Rule 23(a), the individual Plaintiffs also must satisfy  
27 the requirement contained in one of the subdivisions of Rule 23(b). Fed. R. Civ. P. 23(b). Rule  
28 23(b)(2) requires that “the party opposing the class has acted or refused to act on grounds generally



1 applicable to the class, thereby making appropriate final injunctive relief or corresponding  
2 declaratory relief with respect to the class as a whole . . . .” In interpreting this requirement, courts  
3 have held that where the primary purpose in bringing the action is to seek injunctive relief, the action  
4 is properly certifiable under Rule 23(b)(2). *Elliott v. Weinberger*, 564 F.2d 1219, 1228 n.12 (9th Cir.  
5 1977) *aff’d in relevant part, rev’d in part*, 442 U.S. 682, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979);  
6 *Stolz v. United Bd. of Carpenters and Joiners of Am.*, 620 F.Supp. 396, 407 (D. Nev. 1985). Civil  
7 rights cases against parties charged with class-based discrimination are “prime examples” of actions  
8 under Rule 23(b)(2). *Amchem Products v. Windsor*, 521 U.S. 591, 614 (1997). For example, the  
9 Ninth Circuit has held that class determination under Rule 23(b)(2) is appropriate when “class  
10 members complain of a pattern or practice that is generally applicable to the class as a  
11 whole...[e]ven if some class members have not been injured by the challenged practice....” *Walters*,  
12 145 F.3d at 1046. Additionally, the individual circumstances of each class member do not defeat  
13 class determination when the challenged policies are systemic and declaratory and injunctive relief is  
14 sought. *Marisol A.*, 126 F.3d at 377. Rule 23(b)(2) “does not require us to examine the viability or  
15 bases of class members’ claims for declaratory and injunctive relief, but only to look at whether  
16 class members seek uniform relief from a practice applicable to all of them.” *Rodriguez*, 2009 WL  
17 2526622 at \*13.

18 This case is exemplary of a Rule 23(b)(2) action because Defendants’ policies and practices  
19 affect all members of the class as well as the individual Plaintiffs, and Plaintiffs seek only  
20 declaratory and injunctive relief. Defendants’ violations of federal law have equal application to all  
21 class members as persons with disabilities who receive Medicaid ADHC health care services.

22 Moreover, civil rights cases alleging discriminatory policies or practices are “by definition”  
23 class actions, provided the named and class plaintiffs share a common question of law or fact and  
24 injury. *General Telephone Co. v. Falcon*, 457 U.S. 147, 157 (1982). Several district courts have  
25 certified a plaintiff class in civil rights actions alleging a violation of the anti-discrimination  
26 provisions of the ADA and Section 504. *See, e.g., Williams v. Blagojevich*, No. 05 C 4673, 2006  
27 U.S. Dist. LEXIS 83537, at \*15-16 (N.D. Ill. Nov. 13, 2006) (certifying a class); *Lovely H. v.*  
28 *Eggleston*, 235 F.R.D. 248, 263 (S.D.N.Y. 2006) (certifying a subclass of people with physical or

1 mental impairment); *Ligas v. Maram*, No. 05 C 4331, 2006 U.S. Dist. LEXIS 10856, at \*18-19  
 2 (N.D. Ill. Mar. 7, 2006) (certifying a class); *Martin v. Taft*, No. C2-89-362, 2005 U.S. Dist. LEXIS  
 3 19872, at \*3 (S.D. Ohio Sept. 13, 2005) (denying decertification of a previously certified class);  
 4 *Frederick L. v. Dep't of Public Welfare*, 217 F.Supp.2d 581, 582 (E.D. Pa. 2002) (making reference  
 5 to the prior certification of a class action).

6 Class-wide final injunctive and declaratory relief is appropriate to facilitate enforcement of  
 7 judgments. Given that the individual Plaintiffs seek only declaratory and injunctive relief, and the  
 8 granting of such relief is appropriate with respect to the class as a whole to remedy Defendants'  
 9 discriminatory actions, Rule 23(b)(2) is satisfied in this case.

10 **D. The Court Should Designate Plaintiffs' Counsel as Class Counsel**  
 11 **Pursuant to Rule 23 (g)(1).**

12 When a class is certified, the court must appoint class counsel (Fed.R.Civ.P. 23(g)(1)) and  
 13 the class certification order must list these counsel. Fed.R.Civ.P. 23(c)(1)(B). The Federal Rules list  
 14 four factors the court must consider in appointing class counsel:

- 15 “(i) the work counsel has done in identifying or investigation potential claims in the action;  
 16 (ii) counsel’s experience in handling class actions, other complex litigation and the types of  
 17 claims asserted in the action;  
 18 (iii) counsel’s knowledge of the applicable law; and  
 19 (iv) the resources that counsel will commit to representing the class.”

20 Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

21 Pursuant to these four factors, Plaintiffs’ counsel qualify for appointment in this case. As  
 22 reflected in Plaintiff’s concurrently filed Motions for Temporary Restraining Order and Preliminary  
 23 Injunction, Plaintiffs’ counsel has committed extensive time and resources to investigating and  
 24 analyzing Plaintiffs’ claims. Counsel is very experienced in class actions and complex litigation and  
 25 has extensive knowledge of discrimination and benefits law. Zirker Decl., Rich Decl., Jones Decl.  
 26 The Court should appoint Plaintiffs’ counsel as class counsel in its class certification order.

27 **E. Precertification Class Notice is Not Required.**

28 Because Plaintiffs seek to certify a class under Rule 23(b)(2), notice is not required. Fed. R.  
 Civ. P. 23(c)(2)(A); *see also Elliot*, 564 F.2d at 1228-29; *Navarro-Ayala v. Hernandez-Colon*, 951  
 F.2d 1325, 1336-37 (1st Cir. 1991). There are several reasons why notice is less needed in a (b)(2)  
 than a (b)(3) class action: class members have no right to request exclusion from a (b)(2) class

1 action; the “characteristics of the class may reduce the need for formal notice”; and cost of providing  
2 notice “could easily cripple actions that do not seek damages.” Advisory Committee Notes to 2003  
3 Amendments to Rule 23; *see also* 2 Newberg at § 8.05 at 178 (“[C]lass actions seeking declaratory  
4 or injunctive relief under Rule 23(b)(2) are not subject to the individual notice requirements of Rule  
5 23(c)(2).”).

6 The purpose of the notice provisions is to protect absent class members. 2 Newberg on Class  
7 Actions at § 8.05 at 178. Due process requires notice to absent class members only when it is  
8 necessary to provide class members an opportunity to signify whether representation by named  
9 plaintiffs is fair and adequate or to otherwise intervene. *Elliott*, 564 F.2d at 1229. In Rule 23(b)(2)  
10 actions for equitable relief, however, “the due process rights of absent class members generally are  
11 satisfied by adequate representation alone.” *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994)  
12 (citation omitted). For example, in public benefits actions involving claims for declaratory and  
13 injunctive relief, once underlying liability has been determined, it is then well within the district  
14 court’s discretion simply to direct the offending governmental agency to notify absent class  
15 members of their rights under the class judgment in their favor. *Beltran v. Myers*, 701 F.2d 91, 94  
16 (9th Cir. 1983), *cert. denied sub nom. Rank v. Beltran*, 462 U.S. 1134 (1983).

17 “The authority to direct notice to class members in a . . . (b)(2) class action should be  
18 exercised with care.” Advisory Committee Notes to 2003 Amendments to Rule 23. Notice is not  
19 necessary in this case, because the named Plaintiffs’ claims are typical of those of the class as a  
20 whole, the named Plaintiffs are clearly adequate representatives of the class and are represented by  
21 experienced counsel. *See Elliot*, 564 F.2d at 1229 (notice not necessary for nationwide (b)(2) class  
22 where named plaintiffs are adequate representatives with experienced counsel); *Stolz v. United Bhd.*  
23 *of Carpenters*, 620 F.Supp. 396, 408 (D.Nev. 1985) (notice unnecessary for (b)(2) class where  
24 named plaintiffs are adequate representatives).

25 This case involves only claims for declaratory and injunctive relief. Accordingly, there is no  
26 need to provide absent class members with notice and the opportunity to opt out. *General Telephone*,  
27 559 F.2d at 334. Accordingly, Plaintiffs respectfully request that the Court exercise its discretion to  
28 certify the class without requiring any notice to unnamed plaintiff class members of the pendency of  
this action, at least at this stage of the litigation.

**V. CONCLUSION**

For the reasons stated above, the individual Plaintiffs have satisfied all of the requirements of Rule 23(a) and Rule 23(b)(2) with respect to the proposed defined class, and Rule 23 23(g)(1) as to appointment of class counsel. Plaintiffs respectfully request that this Court:

1) Certify this case as a Rule 23(b)(2) class action;

2) Define the Class as “All recipients of Medi-Cal in the State of California who receive Adult Day Health Care Services whose Adult Day Health Care Benefits will be limited, cut, or terminated under the provisions of ABX4 5”;

3) Certify a “Limitations of Benefits” Subclass for the First, Second, Third, Fourth and Sixth Claims for Relief of all “Medi-Cal beneficiaries who, as of August 26, 2009, have been authorized to receive four or five days of Adult Day Health Care Services by DHCS, and whose services will be reduced to a maximum of three days under the provisions of ABX4 5”;

4) Appoint Plaintiffs’ counsel to serve as class counsel; and

5) Dispense with any requirement for Plaintiffs to give notice to absent class members at this stage of the litigation.

Date: August 24, 2009

Respectfully submitted,

DISABILITY RIGHTS CALIFORNIA

By: /s/ Elizabeth Zirker  
Elizabeth Zirker  
Attorneys for Plaintiffs

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