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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, et al.,

Petitioners

and

SACRAMENTO FAMILY MEDICAL CLINICS, INC., et al.,

Intervenors,

vs.

DAVID MAXWELL-JOLLY, Director of the Department of Health Care Services of the State of California, et al.,

Respondents.

CASE NO. CV 08-3315 CAS (MANx)

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

[Memorandum of Points and Authorities, Declarations of Raymond, Dauner, Achermann, Mazer, Mead, Pumpian, Simon, Vega, Keville, and Exhibits Thereto; [Proposed] Order on Summary Judgment; [Proposed] Judgment, Separate Statement of Uncontroverted Facts and Request for Judicial Notice filed concurrently herewith]

Date: July 19, 2010
Time: 10:00 a.m.
Crtrm.: 5, 2nd Floor

Hon. Christina A. Snyder, Judge Presiding
Action Filed: April 22, 2008

TO PETITIONERS INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, INC., et al. and RESPONDENT DAVID MAXWELL-JOLLY, DIRECTOR OF THE DEPARTMENT OF HEALTH CARE SERVICES, AND THEIR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that on July 19, 2010 at 10:00 a.m. or as soon thereafter as counsel may be heard by the above-entitled Court, located at 312 N. Spring Street, Los Angeles, California 90012, Intervenors SACRAMENTO FAMILY MEDICAL CLINICS, INC., THEODORE M. MAZER, M.D., RONALD B. MEAD, D.D.S., ACACIA ADULT DAY SERVICES, CALIFORNIA ASSOCIATION OF MEDICAL PRODUCT SUPPLIERS, CALIFORNIA HOSPITAL ASSOCIATION, SHARP MEMORIAL HOSPITAL, GROSSMONT HOSPITAL CORPORATION, SHARP CHULA VISTA MEDICAL CENTER and SHARP CORONADO HOSPITAL AND HEALTH CARE CENTER (collectively, "Intervenors") will and hereby do move the Court for summary judgment on the ground that there is no genuine issue as to any material fact and that Intervenors are entitled to judgment as a matter of law for the reason that the Medi-Cal payment rate reductions challenged in the above-entitled action, which were enacted pursuant to California Assembly Bill 3xxx 5 of 2008 ("AB 5") and set forth in California Welfare and Institutions Code §§ 14105.19 and 14166.245, respectively, as applied to physician, dentist, adult day health care center, inpatient hospital, outpatient hospital, distinct part skilled nursing and hospital based subacute services, were adopted by the California Legislature for purely budgetary reasons, without any consideration by the Legislature of the impact on the rate reductions on efficiency, economy quality of care, and beneficiary access to health care services and therefore violate the mandates of 42 United States Code § 1396a(a)(30)(A) and are preempted under the Supremacy Clause of the United States Constitution.

Intervenors are further entitled to an equitable order permanently enjoining Respondent, his agents, employees, and all others working in concert with him from

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implementing or otherwise applying the unlawful provisions of AB 5 to them or to the classes of Medi-Cal provider they represent because there is no adequate legal remedy available to Intervenors and/or their members for Respondent's unlawful application of the Medi-Cal payment rate reductions called for by AB 5.

This motion is made following the conference of counsel required by Central District Local Rule 7-3, which took place between April 21, 2010 and April 22, 2010. *See* Declaration of Jordan B. Keville filed concurrently herewith.

As indicated above, through this motion for summary judgment, Intervenors seek an order permanently enjoining Respondent from implementing or otherwise applying the Medi-Cal rate reductions called for by AB 5 and requiring Respondent to disgorge any funds wrongfully withheld from Medi-Cal providers due to the application the unlawful payment rate reductions at any time between July 1, 2008 and the present.

This motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points of Authorities, Request for Judicial Notice, Declarations of Theodore M. Mazer, M.D., Ronald B. Mead, D.D.S., Gilbert Simon, M.D., Ann Pumpian, C. Duane Dauner, Robert J. Achermann, Jan S. Raymond, Esq., and Jordan B. Keville all pleadings and papers on file in this action, and upon such other matters as may be presented to the Court at the time of hearing.

DATED: May 28, 2010

HOOPER, LUNDY & BOOKMAN, INC.

By: /s/
JORDAN B. KEVILLE
Attorneys for Intervenors

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

INDEPENDENT LIVING CENTER OF SOUTHERN CALIFORNIA, et al.,

Petitioners

and

SACRAMENTO FAMILY MEDICAL CLINICS, INC., et al.,

Intervenors

vs.

DAVID MAXWELL-JOLLY, Director of the Department of Health Care Services of the State of California, et al.,

Respondents.

CASE NO. CV 08-3315 CAS (MANx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF INTERVENORS' MOTION FOR SUMMARY JUDGMENT

[Notice of Motion and Motion for Summary Judgment, Declarations of Raymond, Dauner, Mazer, Pumpian, Achermann, Mead, Simon, Vega, Keville and Exhibits Thereto; [Proposed] Order on Summary Judgment; [Proposed] Judgment, Separate Statement of Uncontroverted Facts and Request for Judicial Notice filed concurrently herewith]

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I. INTRODUCTION

By this Motion for Summary Judgment ("Motion"), Intervenors request that this court decide, as a matter of law, that the Medi-Cal reimbursement reductions being challenged in this litigation are not consistent with the mandates of 42 United States Code ("U.S.C.") § 1396a(a)(30)(A) ("Section 30(A)") and are therefore preempted under the Supremacy Clause of the United States Constitution. Both this court, as well as the Ninth Circuit Court of Appeals, have already decided that the statutes adopting the reductions are preempted. There is no evidence that Respondent, the Director of the California Department of Health Care Services ("Director"), can present now that would compel a contrary conclusion. The relevant facts have not previously been, and cannot now be, reasonably disputed. The California Legislature enacted the challenged payment rate reductions for purely budgetary reasons without consideration of the impact of the reduced rates on efficiency, economy, quality of care and Medi-Cal beneficiary access to services. This renders the rate reductions invalid under Section 30(A) as a matter of law. Accordingly, summary judgment in Intervenors' favor is appropriate.

Given the invalidity of the rate reductions, Intervenors are entitled to an order permanently enjoining the Director from applying or otherwise enforcing these reductions with respect to physician, dentist, adult day health care center, inpatient hospital, outpatient hospital, distinct part skilled nursing ("DP/NF"), hospital based subacute and durable medical equipment ("DME") services rendered on or after July 1, 2008. In light of what the Ninth Circuit has ruled in this case in regard to the Director's Eleventh Amendment waiver, such an order would require the Director to disgorge any funds previously withheld from providers based on the reductions.

II. LEGAL BACKGROUND

A. The Federal Medicaid Program

The Medicaid Act, 42 U.S.C. § 1396 *et seq*., authorizes federal financial support to states for medical assistance provided to low-income persons who are

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aged, blind, disabled, or members of families with dependent children. The program is jointly financed by the federal and state governments and administered by the states. To receive federal funds, states must agree to comply with the applicable federal Medicaid law and regulations. *See Alexander v. Choate* 469 U.S. 287, fn.1 (1985) ; *Harris v. McRae*, 448 U.S. 297, 301 (1980); *see also Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1493 (9th Cir. 1997), cert. den. *Belshe v. Orthopaedic Hosp*. (1998) 522 U.S. 1044 ("*Orthopaedic II*"); *California Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098, 1102 (9th Cir. 2010) ("*Cal. Pharm. II*").

At the state level, Medicaid is administered by a single state agency, which must establish and comply with a State Medicaid Plan that, in turn, must comply with federal Medicaid law. 42 U.S.C. § 1396a(a)(5); 42 Code of Federal Regulations ("C.F.R.") §§ 430.10, 431.10. The state Medicaid plan must be submitted to the Secretary of the United States Department of Health and Human Services (the "Secretary") for approval and must describe the policies and methods used to set payment rates. 42 C.F.R. §§ 430.10, 447.201(b). State Plan changes must be approved by the Secretary prior to implementation. See *Exeter Memorial Hospital Assn. v. Belshe*, 145 F.3d 1106, 1108 (9th Cir. 1995).

Under 42 U.S.C. § 1396a(a)(30)(A), a state plan must:

> [p]rovide such methods and procedures relating . . . the payment for . . . care and services . . . as may be necessary . . . to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

42 U.S.C. § 1396a(a)(30)(A). This provision imposes clear duties on states when setting Medicaid payment rates for health care providers, as discussed below.

B. The California Medi-Cal Program

California participates in Medicaid through the Medi-Cal program. *See* Welf. & Inst. Code § 14000 *et seq*.; Cal. Code Regs., tit. 22 (hereafter "C.C.R."), § 50000 *et seq*. The Department of Health Care Services ("Department") is the single state

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agency charged with operating Medi-Cal. The Director oversees the Department. This case concerns reimbursement for Medi-Cal services that are not covered by a managed care plan, commonly referred to as "fee-for-service" Medi-Cal.

III. FACTUAL AND PROCEDURAL BACKGROUND

The factual background of this case is well known to the court and the parties. Accordingly, the following discussion focuses on the facts and procedural background most directly relevant to Intervenors' Motion, including a brief recounting of the history of the Medi-Cal rate reductions that are in dispute and the major procedural developments in the case that have preceded the present Motion.

A. Assembly Bill X3 5 of 2008

On February 16, 2008, the California Legislature enacted Assembly Bill X3 5 ("AB 5") in special session. Section 14 of AB 5 added Section 14105.19 to the Welfare and Institutions Code, which provided in relevant part, as follows:

> (a) Notwithstanding any other provision of law, in order to implement changes in the level of funding for health care services, the director shall reduce provider payments as specified in this section.
>
> (b)(1) Except as provided in subdivision (c), payments shall be reduced by 10 percent for Medi-Cal fee for service benefits for dates of service on or after July 1, 2008
>
> . . . .
>
> (g) The Department shall promptly seek any necessary federal approvals for the implementation of this section.

AB 5, § 14 (Request for Judicial Notice ("RJN") Exhibit ("Exh.") A).

Pursuant to section 15 of AB 5, the Legislature also enacted Welfare and Institutions Code § 14166.245, which reduces payments to hospitals that do not have a contract with the Department for inpatient services furnished on or after July 1, 2008, by ten percent. The rate and payment reductions set forth in Welfare and Institutions Code sections 14105.19(b)(1) and 14166.245 are referred to hereinafter as the "Ten Percent Rate Reductions."

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B. ILCSC, *et al.* v. Shewry

On April 22, 2008, the original Petitioners in the above-entitled action - as distinguished from subsequent Intervenors - filed a Verified Petition for Writ of Mandamus in the Superior Court of the County of Los Angeles against the Respondents to challenge the validity of the Ten Percent Rate Reductions. According to the Petition, the Petitioners are organizations representing the interests of seniors and/or the disabled, two pharmacists and two Medi-Cal beneficiaries.

The Petition alleges that the Ten Percent Rate Reductions violate the Supremacy Clause of the United States Constitution because they conflict with Section 30(A). The Petition asserts that the California Legislature enacted the Ten Percent Rate Reductions for purely budgetary reasons, without consideration of efficiency, economy, quality of care or on the impact the reduced payment rates would have on beneficiary access to care. The Petition seeks an injunction preventing the Director from implementing the Ten Percent Rate Reductions as applied to services rendered by doctors, dentists, pharmacies, noncontract acute care hospitals and "other providers," and also seeks attorneys' fees and costs. First Amended Petition for Writ of Mandate ("FAP") ¶ 11 (Docket No. 6).

The Director removed Petitioners' action from state to federal court on May 19, 2008. Petitioners did not seek to have the case remanded to state court and subsequently filed a motion for preliminary injunction seeking to stop the Director from implementing the Ten Percent Rate Reductions. The Court initially denied the motion on the grounds that Section 30(A) is not privately enforceable in federal court, even through the Supremacy Clause. Petitioners immediately appealed the ruling and sought an emergency stay order from the Ninth Circuit. The Ninth Circuit granted Petitioners' emergency motion on July 11, 2008 on the grounds that Petitioners could pursue an action under the Supremacy Clause to challenge the Ten Percent Rate Reductions and accordingly remanded the case back to this Court.

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See Independent Living Ctr. of Southern California v. Shewry, 543 F.3d 1047, 1049-1050 (9th Cir. 2008).

On August 18, 2008, this court issued an order granting in part the Petitioners' preliminary injunction motion. The court ordered the Director to refrain from enforcing and otherwise implementing the Ten Percent Rate Reductions authorized pursuant to California Welfare and Institutions Code § 14105.19(b)(1), as applied to physicians, dentists, pharmacies, adult day health care centers ("ADHCs"), clinics, health systems and other providers, with respect to Medi-Cal payments for services provided on or after July 1, 2008.

The court specifically declined to grant any relief from the Ten Percent Rate Reductions for acute inpatient services provided by "non-contract" acute care hospitals on the grounds that the hospitals did not adequately demonstrate irreparable harm that would result from the cuts in the form of reduced beneficiary access to hospital services. On September 15, 2008, the court amended its order to clarify that, among other things, the preliminary injunction did not apply to services furnished by hospitals. The order also did not enjoin the Ten Percent Rate Reductions applicable to reimbursement for durable medical equipment. Both Petitioners and Director appealed aspects of this court's preliminary injunction ruling to the Ninth Circuit Court of Appeals.

On August 29, 2008, while the appeals of the preliminary injunction ruling were pending, Sacramento Family Medical Clinics, Inc. ("SFMC"), Theodore M. Mazer, M.D. ("Dr. Mazer"), Eastern Plumas Health Care District, Pioneers Memorial Health Care District, Kaweah Delta Health Care District, Ronald B. Mead, D.D.S. ("Dr. Mead"), and Acacia Adult Day Services ("Acacia") moved this court for leave to intervene in the case. These parties were a physician, a physician clinic, a dentist, an ADHC and three hospital districts. The court granted leave to intervene to SFMC, Dr. Mazer, Dr. Mead and Acacia, denying leave to intervene to the three health care districts. Intervenors joined the Petitioners' first cause of

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action for mandamus and injunctive relief alleged in the FAP. *See* Sacramento Family Medical Clinics, Inc., *et al.*, Complaint in Intervention, ¶ 35 (Docket No. 368).

On July 9, 2009, the Ninth Circuit issued a published decision regarding Respondents' appeal of this court's injunction of the Ten Percent Rate Reductions. *See Independent Living Ctr. of S. California v. Maxwell-Jolly*, 572 F.3d 644 (9th Cir. 2009) [hereinafter "*ILC II*"]. The Ninth Circuit affirmed the court 's determination that Petitioners were likely to prevail on their claim that AB 5 was not enacted in accordance with, and therefore is preempted by, Section 30(A). The Ninth Circuit also concluded that this court did not abuse its discretion in determining that Petitioners adequately demonstrated a likelihood of irreparable harm if the Ten Percent Reductions were not enjoined. However, the court disagreed as to what was the proper effective date of the injunction.

The Ninth Circuit ruled that the effective date of the preliminary injunction order should have been July 1, 2008, notwithstanding the fact that the court's decision was issued on August 18, 2008. *See ILC II*, 572 F.3d at 661-663. The court reasoned that the State would not be immune from a retroactive order were the case to be litigated in State court and that the Director waived any Eleventh Amendment immunity by removing the case from state to federal court. *Id.* at 663. There was therefore nothing precluding this court from making the effective date of the injunction retroactive to the date that the Ten Percent Rate Reductions became effective – July 1, 2008. *Id.*

After the case was remanded back to this court, on October 5, 2009, the California Association of Medical Product Suppliers ("CAMPS"), the California Hospital Association ("CHA"), Sharp Memorial Hospital, Grossmont Hospital Corporation, Sharp Chula Vista Medical Center, and Sharp Coronado Hospital and Healthcare Center (collectively, the "Sharp Facilities") filed a motion seeking to intervene in the case. By order dated March 26, 2010, the court granted all of these

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parties leave to intervene. Like the first set of Intervenors, this second group of Intervenors also joined the Petitioners' claim for mandamus and injunctive relief based on alleged violation of Section 30(A). CAMPS, *et al.*, Complaint in Intervention, ¶ 45 (Docket No. 362).

The Ninth Circuit's mandate arising from the *ILC II* opinion issued on December 21, 2009. This court issued an order spreading the mandate on January 4, 2010. By order dated January 22, 2010, in accordance with the Ninth Circuit's directive, this court amended its August 18, 2008 preliminary injunction of the Ten Percent Rate Reductions to apply retroactive to July 1, 2008. Minute Order Amending This Court's August 18, 2008 Order Pursuant to the Ninth Circuit Court of Appeals Mandate Issued December 21, 2009 (Docket No. 323). The amended injunction order applies only to services rendered by six categories of Medi-Cal providers: physicians, dentists, pharmacies, ADHCs, optometrists and clinics. *Id.* Consistent with the amended order, the Director has already commenced making additional payments to some classes of providers with respect to services that were rendered between July 1, 2008 and August 18, 2008 and subject to the rate reductions. Hospitals and DME suppliers were unaffected by the court's amended injunction order and have not yet obtained any relief from the rate cuts.

C. The 2008-09 Budget Trailer Bill and the *California Pharmacists Ass'n* Decisions

On September 18, 2008, Governor Schwarzenegger signed Assembly Bill 1183 ("AB 1183"). AB 1183 amended Welfare and Institutions Code § 14105.19, suspending the ten percent rate reductions imposed by that section applicable to "small and rural" hospitals after October 31, 2008, and superseded the rate reductions for all other non-institutional providers, effective March 1, 2009, through the enactment of new Welfare and Institutions Code § 14105.191.

In addition, AB 1183 modified the reduction on reimbursement for inpatient services for hospitals not under contract with the Department of Health Care

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Services, as set forth in Welfare and Institutions Code § 14166.245, by adding a secondary limitation that caps reimbursement at the lower of a hospital's costs, reduced by 10 percent, or a "regional average" rate. Significantly, the statute left intact the ten percent reduction for non-contract inpatient hospital services that was originally enacted through AB 5.

Like the Ten Percent Rate Reductions, the AB 1183 Medi-Cal cuts were challenged by a coalition of impacted providers and provider organizations on the grounds that AB 1183 was preempted by Section 30(A). The lawsuit eventually resulted in two published decisions on appeal from the Ninth Circuit. *See California Pharmacists Ass'n v. Maxwell-Jolly*, 563 F.3d 847 (9th Cir. 2009) (hereinafter "*Cal. Pharm. I*.") and *Cal. Pharm. II*, 569 F.3d 1098.

In *Cal. Pharm. I,* the Ninth Circuit concluded that the plaintiffs showed that AB 1183 likely was preempted by Section 30(A) because the statute, and the Medi-Cal rate cuts called for therein, were enacted by the Legislature without consideration of efficiency, economy, quality of care, the impact of the lower rates on beneficiary access to services or provider costs. *Cal. Pharm. I*, 563 F.3d at 851. *Cal. Pharm. I* also establishes that unlawfully reduced Medi-Cal reimbursement constitutes an injury to the providers subject to the decreased rates and that such an injury is irreparable when, due to sovereign immunity, the lost payments cannot be recovered in a suit for money damages in federal court. *Id.* at 851-853.

The Ninth Circuit's decision in *Cal. Pharm. I* stayed the AB 1183 rate cuts impacting hospitals. However, the Ninth Circuit made clear in a subsequent order that the stay did not extend to the ten percent reduction for rates paid to non-contract hospitals for inpatient services because that cut was originally enacted by AB 5 and not by AB 1183, nor was it in any way modified by AB 1183. *See California Pharmacists Ass'n v. Maxwell-Jolly*, Ninth Cir. Case No. 09-55365, Order On Urgent Motion for Clarification (May 28, 2009) (RJN Exh. B). That component of the Ten Percent Rate Reductions has never been enjoined and remains in effect.

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In *Cal. Pharm. II*, the Ninth Circuit affirmed this Court's preliminary injunction of the AB 1183 rate reduction as applied to ADHCs. *Cal. Pharm. II*, 596 F.3d at 1115. Among other things, in reaching this holding the Ninth Circuit ruled that this Court was correct in finding that AB 1183 was likely preempted by Section 30(A) because there was no evidence that the Legislature considered any of the EEQ[1] factors before enacting the challenged rate cuts. *Id.* at 1105-1113. The court rejected the Director's suggestion that Section 30(A) is not binding on the Legislature. Rather, since in this instance it was the Legislature that set the relevant Medi-Cal rates, it was the Legislature's responsibility to consider the Section 30(A) factors in doing so. *Id.* at 1105-1107. Consequently, the Ninth Circuit went on to hold that the "studies" performed by the Department regarding the potential impact of the rate cuts after AB 1183 was already enacted were not adequate to satisfy the State's obligations under Section 30(A). *Id.* at 1109-1112.

IV. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56, a party is entitled to summary judgment, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Proc. 56(c). The moving party has the burden of establishing the absence of a material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). This can be accomplished either by showing, based on the evidence, that no reasonable trier of fact could rule in favor of the non-moving party at trial or by showing that the non-moving party will be unable to furnish evidence sufficient to support its claims or defenses.

---

[1] The factors of efficiency, economy, quality of care and beneficiary access to services, as set forth in Section 30(A), are sometimes referred to herein as the "EEQ Factors."

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See Celotex, 477 U.S. at 325.

If the moving party shows an absence of a material fact, the burden shifts to the non-moving party to go beyond the pleadings and identify facts which show a genuine issue for trial. *See id.* at 324. Summary judgment must be entered against "a party who fails to make a showing sufficient to establish the existence of essential element to the party's case . . ." *See id.* at 322.

Summary judgment is particularly appropriate in cases involving purely legal questions, such as the proper interpretation of a statute. *See Asuncion v. District Director of the United State Immigration & Naturalization Service*, 427 F.2d 523, 524 (9th Cir. 1970); *see also International Ass'n of Machinists and Aerospace Workers, Dist. 776 v. Texas Steel Co.*, 538 F.2d 1116, 1119 (5th Cir. 1976) ("It is axiomatic that where questions of law alone are involved in a case, summary judgment is appropriate."). Another purely legal question is whether a state statute is preempted by a federal law. *See Moreno Roofing Co., Inc. v. Nagle*, 99 F.3d 340, 342 (9th Cir. 1996); *see also Contract Services Network, Inc. v. Aubry*, 62 F.3d 294, 297 (9th Cir. 1995). With respect to mixed questions of law and fact, such as whether the applicable statutory standard was met, summary judgment is appropriate when the facts will reasonably support only one conclusion. *See Mattel, Inc. v. Walking Mountain Productions,* 353 F.3d 792, 800 (9th Cir. 1993).

V. STANDARD FOR INJUNCTIVE RELIEF

As discussed above, Intervenors are seeking to permanently enjoin the implementation of the Ten Percent Rate Reductions. In the Ninth Circuit, permanent injunctive relief is available when the party seeking the injunction succeeds on the merits and demonstrates no adequate remedy at law. *See Continental Airlines v. Intra Brokers, Inc.*, 24 F.3d 1099, 1102 (9th Cir. 1994); *Gathright v. City of Portland*, 482 F. Supp.2d 1210, 1214 (D. Oregon 2007). Where seeking legal relief in the form of money damages would result in a multiplicity of suits, legal remedies are inadequate. *See Continental,* 24 F.3d at 1104-1105;

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Koniag, Inc. v. Koncor Forest Resource, 39 F.3d 991, 1000, n. 9 (9th Cir. 1994). In addition, where the party seeking relief demonstrates no triable issues of fact, a permanent injunction may be issued on summary judgment. *See Continental,* 24 F.3d at 1102.

VI. LEGAL ARGUMENT

Intervenors are entitled to summary judgment on their legal claim and an order from the court permanently enjoining the Ten Percent Rate Reductions as to certain services and requiring Respondent to disgorge any moneys wrongfully withheld from Medi-Cal providers through application of the Ten Percent Rate Reductions beginning July 1, 2008. The present Motion turns on whether the AB 5 is preempted by Section 30(A) and therefore invalid and unenforceable. Intervenors will show that Respondent cannot present evidence demonstrating that AB 5 was enacted and implemented in compliance with the requirements of Section 30(A). As this Court and the Ninth Circuit have recognized previously, AB 5 was enacted solely for budgetary reasons, with no consideration by the Legislature or the Department of efficiency, economy, quality of care and the impact of the rate cuts on beneficiary access to services. The Director cannot prove otherwise now.

Intervenors will also show that there is no adequate legal remedy available to them because there is no vehicle, other than a permanent injunction in this case, that would allow Medi-Cal providers to obtain permanent relief from the illegal Ten Percent Rate Reductions and, even if there were, an award of equitable relief still would be appropriate in order to prevent a multiplicity of actions.

A. Intervenors Have Standing

Before turning to the substance of Intervenors' legal claim, it is necessary to establish Intervenors' standing in this case. In *Independent Living Ctr. of Southern California v. Shewry*, 543 F.3d at 1050, 1064 (9th Cir. 1998) [hereinafter "*ILC I*"], the Ninth Circuit concluded that Medi-Cal participating providers have Article III standing to challenge Medi-Cal payment rate reductions (indeed, the very same

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reductions at issue here) under the Supremacy Clause. *Id.; see also Cal. Pharm. I*, 563 F.3d at 851-852. Medi-Cal providers suffer an injury-in-fact for Article III standing purposes from the loss of gross income resulting from reimbursement rate changes. *ILC I*, 542 F.3d at 1065, *Cal. Pharm. I*, 563 F.3d at 851.

Intervenors Dr. Mead, Dr. Mazer, Acacia, and SFMC are Medi-Cal participating providers that have been individually adversely impacted by the rate reductions. *See* Declaration of Ronald B. Mead, D.D.S. ("Mead Decl."), ¶¶ 5, 8-9, Declaration of Theordore M. Mazer, M.D. ("Mazer Decl."), ¶¶ 6-9; Declaration of Mallory Vega ("Vega Decl."), ¶¶ 3-5, 8; Declaration of Gilbert Simon, M.D., ¶¶ 7-9, 12. Each of these Intervenors endured reduced Medi-Cal payments between July 1, 2008 and August 18, 2009 due to application of the Ten Percent Rate Reductions. Mead Decl., ¶¶ 8-9; Mazer Decl., ¶¶ 10-11; Vega Decl., ¶ 8, Simon Decl. ¶ 12. Further, if a permanent injunction is not issued in this case, these Intervenors risk additional monetary harm if the Director were to attempt to recover any purported "extra" payments from them.

The Sharp Facilities also have standing to challenge the Ten Percent Rate Reductions. Each of these entities provided either outpatient, DP/NF or subacute services to Medicaid beneficiaries during the period between July 1, 2008 and February 28, 2009. *See* Declaration of Ann Pumpian ("Pumpian Decl."), ¶¶ 4-7. Consequently, all of these facilities received reduced payment for these services during the relevant time period due to the Director's application of the Ten Percent Rate Reductions. *Id.*, ¶¶ 8-9. Since the reductions never were enjoined as to hospital services, the Sharp Facilities collectively lost more than $ 2 million due to the lower Medi-Cal payment they received during the relevant period. *Id.*, ¶¶ 8-9.

Intervenors CAMPS and CHA also have standing to pursue this action on behalf of their members. An association has standing in a case when any of its members would have standing in their own right, the interests at stake are germane to the organization's purpose and the relief requested does not require participation

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of the individual members. *See Colwell v. Department of Health and Human Services*, 558 F.3d 1112, 1122-1123 (9th Cir. 2009); *see also ILC I*, 543 F.3d at 1065. In this regard, CHA is a trade association representing the interests of hundreds of California hospitals, including "non-contract" hospitals that provide inpatient services to Medi-Cal beneficiaries, as well as hospitals that operate DP/NF and subacute units. *See* Declaration of C. Duane Dauner ("Dauner Decl."), ¶¶ 3-4. CHA's mission is to, through various means, establish and maintain a financial and regulatory environment in which hospitals can continue to provide high quality care. *Id.,* ¶ 3. Intervenor CAMPS is a statewide trade association representing DME suppliers. Declaration of Robert J. Achermann ("Achermann Decl.") ¶ 3. CAMPS' mission is to deliver its members services and products that allow them excel in the provision of service to their patients. The association pursues various activities in furtherance of that mission. *Id.,* ¶ 5.

For reasons explained in *ILC I*, and reiterated above, CHA and CAMPS' individual members could pursue this action in their own right. *See ILC I*, 543 F.3d at 1065. Individual members of these associations have already suffered reduced Medi-Cal revenue as a result of the Ten Percent Rate Reductions and, in the case of CHA's members that do not have a contract with the State for inpatient services, are continuing to be harmed by decreased Medi-Cal payments. Dauner Decl, ¶¶ 6-7; Achermann Decl., ¶ 7. CHA and CAMPS have intervened in this action in a representative capacity in an effort to prevent further injury to their members resulting from the Ten Percent Rate Reductions through a broad, injunctive order. Dauner Decl., ¶ 5; Achermann Decl, ¶ 6. As such, the lawsuit, as well as the present motion, are germane to CHA and CAMPS respective purposes and do not require the participation of individual hospitals or DME suppliers.

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B. State Medicaid Provisions That Are Inconsistent With Federal Law Are Invalid Under The Supremacy Clause And Preempted.

In *ILC I*, the Ninth Circuit made clear that Medi-Cal providers may seek to invalidate state Medicaid laws under the Supremacy Clause of the United States Constitution, where the state law is preempted by provisions of the federal Medicaid Act. *See generally ILC I*, 543 F.3d at 1059 - 1064. As stated in *ILC I*, under the Supremacy Clause, ". . . injunctive relief is presumptively available to remedy a state's ongoing violation of federal law." *See id.* at 1064.

Here, Intervenors join in the original Petitioners' claim that AB 5 is preempted because it conflicts with Section 30(A). Under general federal preemption principles, a conflict arises, sufficient for federal preemption, either where "compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Pacific Gas & Elec. Co. v. State Energy Comm'n*, 461 U.S. 190, 220 (1983). Case law demonstrates that, where a state law is inconsistent with the requirements of a particular Medicaid Act provision, it is preempted. *See ILC II*, 572 F.3d at 653; *see also Lankford v. Sherman*, 451 F.3d 496, 510 (8th Cir. 2006) ("While Medicaid is a system of cooperative federalism, the same analysis applies; once the state voluntarily accepts the conditions implied by Congress, the Supremacy Clause obliges it to comply with federal requirements."); *see also Planned Parenthood of Houston & Southeast Texas v. Sanchez*, 403 F.3d 324, 336 (5th Cir. 2005) (holding that state standard that was incompatible with federal requirements was preempted). In short, a state law that does not comply with Medicaid Act requirements conflicts with federal law for preemption purposes. Intervenors will show that AB 5 does not meet the requirements of Section 30(A) and therefore is preempted.

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C. The Ten Percent Rate Reductions Violate Section (30)(A)

1. The Requirements of Section 30(A)

As mentioned, because California participates in the Medicaid program and receives federal funds, it is bound by the Supremacy Clause to comply with the federal statutes and regulations governing that program, including Section (30)(A). *See Cal. Pharm. II*, 596 F.3d at 1102. Section 30(A) has been interpreted to establish certain minimum requirements that a state must meet with respect to establishing and applying Medicaid payment rates. First, Section 30(A) precludes states from altering Medicaid rates based solely on budgetary concerns. *See Orthopaedic II*, 103 F.3d at 1499; *see also ILC II*, 572 F.3d at 651-652. Second, the statute requires that the state body responsible for setting provider payment rates give some consideration to the factors of efficiency, economy, quality of care and beneficiary access to services before making changes to the rates. *Cal. Pharm. II*, 596 F.3d at 1107. Finally, the Ninth Circuit has found Section 30(A) to mandate that Medicaid reimbursement rates be reasonably related to provider costs unless there is some justification not to do so other than purely budgetary reasons. *Orthopaedic II*, 103 F.3d at 1499; *ILC II*, 572 F.3d at 652.

This court, as well as the Ninth Circuit, already have found, at least preliminarily, that AB 5 was not adopted and implemented in accordance with the requirements of Section 30(A). *See* Order Granting in Part and Denying In Part Petitioners' Motion for Preliminary Injunction [hereinafter "PI Order"] (Docket No. 121) at 10; *ILC II*, 572 F.3d at 657. Specifically, the court found that the statute was enacted for purely budgetary reasons without consideration of the EEQ Factors. PI Order at 10. The Ninth Circuit affirmed these conclusions. *ILC II*, 572 F.3d at 657. Although he has had two years to do so at various stages of this case, the Director has failed to come forward with any further evidence that the court's earlier findings are incorrect.

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2. The Rate Reductions Were Adopted For Budgetary Reasons

The purpose of AB 5 is set forth succinctly in the statute itself: "This act addresses the fiscal emergency declared by the Governor . . . [t]his act is an urgency statute necessary for the immediate preservation of the public peace, health or safety . . . The facts constituting the necessity are: In order to make statutory changes needed to implement cost containment measures affecting health services." *See* AB 5 §§ 16-17 (emphasis added). The legislative history behind AB 5 is entirely consistent with the statement in the statute itself regarding its purpose.

Numerous legislative committee reports, bill analyses and other documents included in the history for AB 5 state that the purpose of the health care program payment reductions were "to implement budget reductions to address the state's fiscal emergency." *See, e.g.* Assembly Committee on Budget, Bill Analysis, AB 5 X3, p. 1 (Feb. 14, 2008). *See* Declaration of Jan S. Raymond ("Raymond Decl.") ¶ 9, Exh. B at 7. Another committee report addresses the Medi-Cal cuts in AB 5 specifically and states merely that they were projected to "provide[] a savings of $544.3 million General Fund in 2008-09." Senate Rules Committee, Bill Analysis AB 5 X (Third Reading) at 2 (Raymond Decl. ¶ 9, Exh. B. at 42). There is no indication in any document comprising the legislative history of AB 5 that the State had any other purpose or considered any other impact than saving money.

Notably, the Director never has suggested at any time during the history of this case, whether before this Court or the Ninth Circuit, that AB 5 was enacted for any reason other than budgetary savings. As explained in *ILC II*, the fact that the Ten Percent Rate Reductions were enacted by the Legislature for solely budgetary reasons, by itself, renders the rate reductions in conflict with Section 30(A).

3. The Legislature Did Not Consider the EEQ Factors

The Ten Percent Rate Reductions also are invalid as a matter of law because the Director cannot present any evidence showing that the Legislature considered any of the EEQ factors before enacting AB 5. The Ninth Circuit made clear in *Cal.*

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Pharm. II that where the Legislature is "the final body responsible for setting Medicaid reimbursement rates," it "must study the impact of the contemplated rate reduction on the statutory factors of efficiency, economy, quality of care and access to care prior to setting or adjusting payment rates." *Cal. Pharm. II*, 596 F.3d at 1107 (emphasis in original). In this regard, there can be no reasonable dispute that the Legislature is the body responsible for the Ten Percent Rate Reductions. Pursuant to AB 5, the Director was statutorily mandated to implement the cuts "notwithstanding any other provision of law." *See* Welf. & Inst. Code § 14105.19(a); *see also* Welf. & Inst. Code § 14166.245(b)(1) ("Notwithstanding any other provision of law . . . the amounts paid as interim payments for inpatient hospital services provided on and after July 1, 2008, shall be reduced by 10 percent."). Since it was the Legislature that mandated the rate reductions, Section 30(A) placed on obligation on the Legislature to consider the relevant factors before enacting those rate reductions. The Legislature failed to carry out that obligation.

Intervenors have looked fruitlessly for any indication that the Legislature considered efficiency, economy, quality of care, and access in enacting the Ten Percent Rate Reductions. Nothing in the documents comprising the legislative history of AB 5 demonstrates any consideration of efficiency, economy, quality of care, or access by the Legislature.

As the court is aware, the California Legislative Analysts' Office ("LAO") prepared a report regarding the health care and social services cuts proposed in Governor's Schwarzenegger's budget proposal for the 2008-09 California fiscal year, some of which were eventually adopted as part of AB 5. The LAO's report appears in the legislative history for AB 5. Although the report includes discussion of what the LAO determined to be the possible impact of the proposed Medi-Cal cuts on beneficiary access to services, the report does not constitute evidence that the Section 30(A) requirements were met with respect to AB 5 for several reasons.

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First, as the court noted when it partially granted the original Petitioner's motion for preliminary injunction, the fact the LAO report exists does not show that it was considered by the legislature or the Department. *See* PI Order at 10, n. 10. The Ninth Circuit echoed this same sentiment in *ILC II*. *ILC II*, 572 F.3d at 656 ("[T]he State's own Legislative Analyst warned that the ten percent rate reduction had 'the potential to negatively impact the operation of the Medi-Cal program . . . Nothing in the record indicates that any other State officer considered . . . these possibilities prior to enacting the cuts."). The Director presented no evidence during the preliminary injunction proceedings, including the proceedings before the Ninth Circuit, that the Legislature ever reviewed or considered the concerns raised in the LAO report. The Director will not be able to provide such evidence now. If anything, the fact that AB 5 still was enacted despite a strong recommendation from the LAO against payment rate reductions for certain categories of services is a telling indication that the report was not considered. *See id.*

Second, even if it was considered by the Legislature, the LAO report alone does not demonstrate compliance with Section 30(A), as it only includes discussion of one of the factors set forth in the statute – beneficiary access to services. There is nothing in the report indicating that the LAO analyzed issues bearing on efficiency, economy and quality of care. In fact, the LAO recommended further investigation to determine if the then-proposed Medi-Cal rate reductions were efficient and economical. Specifically, the report states that, "[t]he legislature may wish to consider whether a reduction of rates to certain providers would cause a cost-shift toward more expensive provider types." Raymond Decl., ¶ 9, Exh. C at 39. Clearly, if the Ten Percent Rate Reductions result in increased utilization of more expensive types of care, it would not be neither efficient or more economical. *See Orthopaedic II*, 103 F.3d at 1498. There is no evidence in the legislative history of AB 5 demonstrating that the Legislature acted upon the LAO's recommendation.

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In addition, the LAO report does not address the relationship between the reduced payment rates and provider costs. Under *Orthopaedic II*, the consideration of provider costs is an essential component of the requirements of Section 30(A). *See ILC II*, 572 F.3d at 652. Therefore, the LAO report does not, and cannot, establish that AB 5 was enacted and implemented in accordance with Section 30(A).

4. The Legislature Failed To Consider Provider Costs

As explained above, in *Orthopaedic II*, the Ninth Circuit determined that Section 30(A) requires that, before setting Medi-Cal payment rates, the State must determine that such rates bear a reasonable relationship to provider costs. *See Orthopaedic II*, 103 F.3d at 1496. Further, the State's evaluation of costs must be based on "responsible cost studies . . . that provide reliable data as a basis for its rate setting." *See id.* The Ninth Circuit reaffirmed these principles from *Orthopaedic* in *ILC II* when affirming this Court's injunction of the AB 5 rate cuts. *ILC II*, 572 F.3d at 652. This is yet another independent ground on which this Court can find AB 5 preempted by Section 30(A).

There is no indication in the legislative history for AB 5 that the Legislature considered any provider costs, whether costs incurred by doctors, dentists, ADHCs, hospitals or DME suppliers, in enacting the Ten Percent Rate Reductions. Similarly, there is no evidence indicating that the Legislature determined that a reasonable relationship exists between Medi-Cal payments under AB 5 and the costs providers actually incur in furnishing such services.

5. The Department's Studies Do Not Satisfy Section 30(A)

In connection with the preliminary injunction proceedings in this matter, the Director referenced several declarations from Department employees that purportedly show that the Department did conduct after-the-fact "studies" of the adequacy of the reduced reimbursement rates for, among other things, non-contract inpatient hospital services, outpatient hospital services, DP/NF services and subacute services. *See, e.g. ILC II*, 572 F.3d at 652, n. 9. The Department claimed

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these studies were sufficient under Section 30(A). Such a claim is erroneous.

No study that the Department has cited in connection with any phase of this litigation is sufficient to meet the Section 30(A) standard, as established in *Orthopaedic II,* because there is no evidence that any of those studies was conducted or even considered by the Legislature before AB 5 was enacted and the rate reductions were already a *fait accompli*. Again, Section 30(A) mandates that the entity actually responsible for setting Medicaid rates consider efficiency, economy, quality of care and access before the rates are adjusted. *Cal. Pharm. II*, 596 F.3d at 1107. The Director has not previously, and cannot now, point to any evidence showing that any rate studies done by the Department were provided to the Legislature before the enactment of AB 5. Indeed, were that the case, these studies more than likely would appear in, or at least be mentioned in, the legislative history behind AB 5. There is no mention of any such studies in the relevant legislative history. After the fact studies designed to justify decisions already made do not satisfy the rule announced in *Orthopaedic II*. *See ILC II*, 572 F.3d at 652, n.9 (stating that this Court acted within its discretion in rejecting the Director's "*post hoc* rationalizations" for the AB 5 cuts). That is all the Director can point to here and therefore cannot prove compliance with Section 30(A).

In summary, the Director cannot present an issue of fact as to whether AB 5 was enacted in compliance with Section 30(A). At no time during the roughly two year history of this case, which has included numerous motions and requests for rehearing filed by the Director regarding the court's preliminary injunction, has the Director ever been able to present any evidence showing that the Legislature enacted AB 5 for, or based on, anything other than budgetary considerations. There is no reason to believe the Director will be able to present any such evidence now.

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VII. RELIEF REQUESTED

Consistent with the *ILC II* opinion, and with the relief the original Petitioners sought through the FAP, Intervenors are requesting that the court permanently enjoin the Director from further implementing or otherwise applying the Ten Percent Rate Reductions called for by AB 5. For all categories of impacted services, such relief will have both a prospective and retrospective component.

The injunction order will prospectively prohibit the Director from subjecting the provider classes represented by the Intervenors from applying the rate reductions to any services provided while the cuts were in effect. Although, as explained above, the majority of the Ten Percent Rate Reductions expired by statute on February 28, 2009, the Director has represented in proceedings arising from this case that, absent a contrary court order, he has the authority to recoup "extra" payments made to providers for previously rendered services that purportedly should otherwise have been subject to the rate cuts. *Maxwell-Jolly v. Independent Living Ctr. of Southern California, et al.*, Supreme Court Case No. 08-1223, Reply in Support of Petition for Certiorari at 9, n. 3 (June 1, 2009) ("The Ninth Circuit's decision regarding the preliminary injunction will determine whether the state is entitled to recoup those extra payments.") (RJN, Exh. E); *Maxwell-Jolly v. Independent Living Ctr. of Southern California, et al.,* Supreme Court Case No. 09-958, Reply in Support of Petition for Certiorari at 8 (May 3, 2010) (RNJ, Exh. E). A permanent injunction is necessary to bar the Director from undertaking any recoupment efforts. The injunction also is necessary to prevent the Director from applying the rate reduction to inpatient services rendered by non-contract hospitals, as that component of the Ten Percent Rate Reductions remains in effect.[2]

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[2] On November 18, 2009, the district court in *Santa Rosa Memorial Hospital v. Maxwell-Jolly*, 2009 WL 3925498 (N.D. Cal. 2009), issued an injunction barring the Director from continuing to enforce the 10 percent non-contract rate reduction (footnote continued)

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In addition to the prospective impact described above, a permanent injunction in this case also will require the Director to disgorge to providers any funds that he wrongfully withheld due to application of the Ten Percent Rate Reductions at any time between July 1, 2008 and the date of the order. For physicians, dentists and ADHCs, the relevant period spans from July 1, 2008 through August 18, 2009.[3] For DME suppliers, and with respect to hospital outpatient, DP/NF and subacute services the retroactivity period extends to February 28, 2009. As for hospital inpatient services provided by noncontract facilities, the order require will require a refund of money withheld for services rendered between the original effective date of the rate reduction and the effective date of the court's permanent injunction.

Intervenors are entitled to the relief described above because they are correct on the merits of their claim and because there is no adequate remedy at law. Intervenors prevail on the substance of their legal claim for the reasons stated above. *See generally* Section VI, *supra*. Intervenors also meet the other requirements for an injunctive order, as discussed below.

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based upon a finding that AB 5 violates federal Medicaid law as shown in *ILC II*. Notwithstanding that injunction, the Director elected to not apply the ruling in that case to hospitals not specifically named as plaintiffs in that action. *See* DHCS Medi-Cal Bulletin dated December 22, 2009, attached as Exhibits F to Intervenors' RJN; *see also* DHCS Medi-Cal Bulletin dated April 22, 2009 (declining to apply Ninth Circuit's order in *Cal. Pharm. I* to 10 percent reduction for non-contract inpatient services) (Exh. G to RJN).

[3] As mentioned above, pursuant to this Court's preliminary injunction order, the Director already has started making payments to some of these provider groups for money that was withheld pursuant to the AB 5 rate cuts between July 1, 2008 and August 18, 2008. In this regard, a permanent injunction requiring the Director to disgorge funds for the this period would not be duplicative of the relief the Court already has ordered because the preliminary injunction will merge with, and be superseded by, the permanent order. *See Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles*, 979 F.2d 1338, 1340, n.1 (9th Cir. 1992).

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A. There Is No Adequate Remedy At Law

With respect to the adequacy of any legal remedies, an injunctive order in this case is the only way that Intervenors and/or their members can obtain relief from the Director's wrongful withholding of Medi-Cal reimbursement pursuant to AB 5. As mentioned above, in *ILC II*, the Ninth Circuit held that it would not offend sovereign immunity principles for the court to issue an injunctive order with retroactive effect in this case because the Director waived any Eleventh Amendment protection by voluntarily removing the case to federal court and would be subject to such an order were the case litigated in state court. *ILC II*, 572 F.3d at 660-663. Absent these limited circumstances involving removal by the Director, retroactive relief would not be available in this case either due to operation of the Eleventh Amendment or because there is no federal cause of action pursuant to which the Intervenors could seek retroactive money damages from the State based on an alleged violation of Section 30(A). *See, e.g. Sanchez v. Johnson*, 416 F.3d 1051, 1068 (9th Cir. 2005).[4]

Further, even assuming there was a remedy at law available to the Intervenors in this case, it still would be appropriate for the court to grant injunctive relief. The Ninth Circuit recognizes that legal relief is inadequate where it necessarily would invite multiple, otherwise needless lawsuits. *See Continental Airlines*, 24 F.3d at 1104. That is the case here because, if the rate cuts are not permanently enjoined, it could result in many Medi-Cal providers pursuing separate suits for legal relief.

[4] In *ILC I*, the Ninth Circuit held that Section 30(A) could be enforced against the State pursuant to the Supremacy Clause. In reaching this conclusion, the Court made clear that its holding was limited to claims for injunctive relief under the Supremacy Clause. *ILC I*, 543 F.3d at 1057-1062. Parties cannot assert a claim for retrospective damages under the Supremacy Clause. *Id.* at 1063-1064.

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B. Intervenors Are Entitled to Retrospective Relief

As mentioned, as part of their request for relief, Intervenors are asking the court to order the Department to disgorge any monies that were wrongfully withheld from all classes of impacted providers under AB 5 between while those cuts were in effect and being applied by the Department. Such relief falls squarely within the holding of *ILC II*. *See ILC II*, 572 F.3d at 660-663.

Although this case already was in federal court at the time the Intervenors joined the case, they are nevertheless entitled to the benefit of the Director's Eleventh Amendment waiver. The same case that the *ILC II* court looked to in determining that the State waived its Eleventh Amendment protection makes clear that such waivers are broad. In *Embury v. King*, the Ninth Circuit explained that when a state defendant voluntarily removes a case to federal court, the state invokes the judicial power of the United States over the entire "suit," not just particular claims. *Embury v. King*, 361 F.3d 562, 565 (9th Cir. 2004). Once a state submits to federal court jurisdiction, it is subject to the authority of the court, including the court's application of the federal rules. *Id.* at 565.

Based on the foregoing reasoning, the *Embury* court rejected an argument by the state defendant that it did not waive its immunity as to claims that did not exist at the time of the removal, which were later added to the case through an amended complaint. As stated in *Embury*:

> . . . [R]emoval itself affirmatively invokes federal judicial authority and therefore waives Eleventh Amendment immunity from subsequent exercise of that judicial authority, in this case over claims added in the amended complaint. The removal is the waiver, regardless of whether . . . the waiver could also have been effected by subsequent events.

Id. at 566 (emphasis added); *see also In re Regents of the University of California*, 964 F.2d 1128, 1135 (Fed. Cir. 1992) (rejecting argument by state defendant that waiver of Eleventh Amendment immunity did not apply to consolidation of multidistrict litigation). Accordingly, under *Embury*, the State waived its Eleventh Amendment immunity as to this entire case, not just to the parties that existed at the

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time of removal. Since the Director voluntarily submitted himself to this Court's jurisdiction and application of the federal rules, the Director's waiver is not impacted by this Court's subsequent decisions to allow participation of the Intervenors pursuant to the Federal Rules of Civil Procedure.[5]

The law on intervention also demonstrates that Intervenors are entitled to the benefit of the State's forfeiture of its Eleventh Amendment immunity in this case. As a general matter, intervenors enter the suit "with the status of original parties...." *United States v. State of Or.*, 657 F.2d 1009, 1014 (9th Cir. 1981). An intervenor "must take the main suit as he finds it... and must join subject to the proceedings that have occurred prior to his intervention; he cannot unring the bell." *Hartley Pen Co. v. Lindy Pen Co.*, 16 F.R.D. 141, 153 (S.D.Cal. 1954). This case law further supports the view that the Director waived any Eleventh Amendment immunity for the purposes of this case; not just with respect to the original Petitioners. Accordingly, consistent with *ILC II*, the Eleventh Amendment does not serve as a bar to the retrospective relief Intervenors are seeking.

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[5] Notably, the involvement of the Intervenors has not expanded the potential scope of the Director's liability beyond what is alleged in Petitioners' FAP. Intervenors simply joined the Supremacy Clause claim Petitioners allege in the FAP. They did not assert any new or additional claims. The FAP seeks to enjoin application of the Ten Percent Rate Reductions as to services furnished by doctors, dentists, hospitals and other providers. The Intervenors therefore do not include any provider classes not addressed in the FAP.

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VIII. CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the court grant summary judgment in their favor and issue a permanent injunction precluding the Department from applying the Ten Percent Rate Reductions as to physician, dentist, ADHCs, non-contract inpatient hospital, outpatient hospital, DP/NF, subactute and DME services and, attendant to that injunction, requiring the Department to disgorge to any of the impacted provider classes any monies wrongfully withheld while the AB 5 rate cuts were in effect.

DATED: May 28, 2010

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By: /s/
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