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15 **Attorneys for Plaintiffs**

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION

19
20 California State Foster Parent Association,
California State Care Providers Association, and
21 Legal Advocates for Permanent Parenting,

22 Plaintiffs,

23 v.

24 JOHN A. WAGNER, Director of the California
Department of Social Services, in his official
25 capacity; MARY AULT, Deputy Director of the
Children and Family Services Division of the
26 California Department of Social Services, in her
official capacity,

27 Defendants.
28

Case No. C 07-5086 WHA

**PLAINTIFF'S SECOND MOTION
FOR FURTHER RELIEF**

Date: May 26, 2011
Time: 2:00 p.m.
Ctroom: Courtroom 9, 19th Floor
Judge: Honorable William H. Alsup

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NOTICE OF MOTION AND MOTION

TO DEFENDANTS JOHN A. WAGNER, Director of the California Department of Social Services, in his official capacity; MARY AULT, Deputy Director of the Children and Family Services Division of the California Department of Social Services, in her official capacity, AND THEIR ATTORNEY OF RECORD.

PLEASE TAKE NOTICE that California State Foster Parent Association, California State Care Providers Association, and Legal Advocates for Permanent Parenting (collectively, “Plaintiffs” or “Foster Parents”), plaintiffs in this action, in which a declaratory judgment in favor of Plaintiffs was issued by this Court on December 5, 2008 (Docket No. 105) and as described in the Court’s October 21, 2008 Order re Cross-Motions for Summary Judgment (Docket No. 98), on May 26, 2010, at 2:00 p.m., or sooner if convenient for the Court, in the Courtroom of the Honorable William H. Alsup, located at 450 Golden Gate Avenue, San Francisco, California, will move and hereby do move the Court, by and through counsel, for further necessary and proper relief against Defendants John A. Wagner and Mary Ault based on such declaratory judgment. This motion is made under the provisions of Title 28, § 2202 of the United States Code, and is based on this Notice of Motion and Motion, the memorandum of points and authorities filed concurrently herewith, and on the motion, memorandum of points and authorities, and declaration filed in support of Plaintiffs previous Motion for Further Relief (Docket Nos. 154, 155, & 160).

By a separate motion, Plaintiffs will and do move for shortened time on this Motion. Plaintiffs seek an expedited hearing as soon as convenient for the Court and immediate relief.

1 The only question left is *when* California will comply with the CWA and this Court's
2 orders. The State's April 8 filing says it might finally implement the compliant rate structure as
3 early as July. This is not enough. As the Ninth Circuit found in this very case, Congress couched
4 the statutory language in mandatory, not advisory or precatory, terms. Compliance is due now,
5 and there is no leeway for continuing violations.

6 The Foster Parents accordingly request that the Court order Defendants to implement the
7 new rate methodology detailed in their April 8 Statement, effective immediately.

8 II. BACKGROUND AND PROCEDURAL HISTORY

9 Plaintiffs filed this Section 1983 civil-rights action on October 3, 2007 to enforce
10 California foster parents' right under the CWA to receive Foster Care Maintenance Payments.
11 Plaintiffs' complaint sought declaratory relief and an order compelling the Defendants to comply
12 with the applicable federal law. (Docket No. 1.) On October 21, 2008, the Court granted
13 judgment for Plaintiffs and declared that "defendants are in violation of the Act by setting rates
14 without consideration of the Act's mandatory cost factors." (Docket No. 98 at 11.) The Court
15 denied Defendants' motion for reconsideration and entered judgment on December 5, 2008.
16 (Docket Nos. 104 (Order Denying Reconsideration) & 105 (Judgment).)

17 Following Defendants' unsuccessful appeal of the Court's denial of their motion to
18 dismiss—Defendants did not appeal the Court's judgment on the merits (*see* Docket No. 151
19 (Opinion))—and because the State still had not complied with the CWA or this Court's
20 declaratory judgment, Foster Parents moved in November 2010 for further relief effectuating the
21 declaratory order.² (Docket No. 154.) Defendants opposed Foster Parents' motion on the sole
22 ground that the State had commissioned a third-party study concerning the method by which
23 California should begin setting rates that take into account the cost factors mandated by the
24 CWA. Defendants argued for additional time to finish the study and implement new rates. (*See*
25 Dec. 16, 2010 Order (Docket No. 163) at 2-3.)

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27 ² A detailed factual history of this action is set forth in Pls.' Mot. for Further Relief
(Docket No. 154) at 4-11.

1 The Foster Parents countered that there exists no basis for permitting the State to continue
2 violating Foster Parents' enforceable Federal civil rights, and that concerns regarding the State's
3 financial circumstances have no bearing on its obligations under the CWA and 42 U.S.C. § 1983.
4 Indeed, the CWA was enacted in 1980 to ensure that states do not shortchange foster children or
5 the people who care for them during hard economic times, and Congress recently confirmed that
6 a state's compliance with the CWA reimbursement requirements may not be excused because of
7 the need to enact "legislation appropriating funds." (*See* Pls.' Reply in Supp. Mot. for Further
8 Relief (Docket No. 160) at 9 (quoting statute adding additional CWA cost factor).) The CWA
9 and Section 1983 forbid California from continuing to violate foster caregivers' rights to receive
10 payments that cover the mandatory costs. (*See id.* at 2-3.)

11 The Court ultimately granted the State four additional months to finish its report and
12 implement a set of compliant methodology for setting rates. Specifically, the Court ordered the
13 State to complete its new study by March 11, 2011, and also ordered that Defendants "shall have
14 until **APRIL 8, 2011, AT NOON**, to complete their implementation and submit a statement to the
15 Court describing the new method for determining the rates of payments to foster parents that
16 includes consideration of the cost factors required by the CWA." (Dec. 16, 2010 Order at 6
17 (emphasis in original).) The Court explained that it allowed the additional time because, after
18 completing the new study, "Defendants will then need time to evaluate the report and seek and
19 receive approval of implementation of its recommendations." (*Id.*)

20 Defendants timely submitted their study/report, which confirms that the State has indeed
21 long been paying rates substantially inadequate to cover the costs required by the CWA – at
22 Foster Parents' expense – exactly as alleged and proven by Plaintiffs in this action. (*See* Report
23 (Docket No. 165).)

24 On April 8, however, the State violated the Court's order that Defendants "complete *their*
25 *implementation*" of the study/report's recommendations by noon that day. (Docket No. 163 at 6
26 (emphasis added).) Instead, Defendants filed a statement that describes the new study and
27 explicitly acknowledges that the current rates are insufficient to cover the mandatory costs, but
28 defers implementation of the new rate structure until maybe July 1, 2011 at the earliest: "CDSS

1 is proposing that the new rates be made effective July 1, 2011, assuming approval by the
 2 Legislature and final enactment of the budget by the Governor.” (Docket No. 166; *see also* April
 3 14, 2011 All County Information Letter (Docket No. 169)³ (confirming that implementation of
 4 CDSS’s proposed new rate methodology is “contingent on approval by the Legislature and final
 5 enactment of the budget by the Governor”).)

6 On April 12, 2011 Plaintiffs notified the Court of the State’s continuing violation of
 7 Plaintiffs’ civil rights and the Court’s orders by letter. (Docket No. 167.) The Court instructed
 8 Plaintiffs to file a motion if they seek relief from the Court. (Docket No. 168.) Plaintiffs
 9 accordingly bring this motion for immediate relief effectuating the Court’s declaratory judgment
 10 and enforcing its December 2010 Order.

11 III. ARGUMENT

12 In addition to its ongoing violation of the CWA, California is now in violation of two
 13 separate orders of this Court. There is no option left but to compel immediate implementation of
 14 a compliant methodology for determining foster care reimbursement rates and payment of the
 15 corresponding rates.

16 First, Defendants remain in violation of the Court’s October 2008 Declaratory Judgment
 17 that “defendants are in violation of the Act by setting rates without consideration of the Act’s
 18 mandatory cost factors.” (Docket No. 98 at 11.) Despite repeatedly conceding that its
 19 reimbursement rates are too low, CDSS continues to this day to pay these same illegal rates. Of
 20 course, the Court’s declaratory judgment carries the effect of law and Defendants should have
 21 modified their behavior to avoid ongoing violations. 28 U.S.C. § 2201 (authorizing federal courts
 22 to “declare the rights and other legal relations of any interested party” and states that “any such

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 24 ³ Defendants’ April 14, 2011 ACIN wrongly states that “The Department was ordered to
 25 *select* a new rate structure and provide its choice to the court by April 8, 2011.” (Docket No. 169
 26 at 2 (emphasis added).) As stated above, the Court’s Order required Defendants to “complete
 27 their implementation” of the recommendations proposed in the new study/report (which was to be
 28 completed by March 11, 2011) by April 8, 2011 at Noon, not merely to select a choice. The
 recommendations necessarily include the rate increases stated in Defendants’ April 8 Statement.
 (*Compare* CPPR recommendations (Docket No. 165-1) at 37-38 (listing recommended rates) *with*
 Defendants’ new methodology (Docket No. 166) at 5 (listing new rates).)

1 declaration shall have the force and effect of a final judgment or decree . . .”).) Section 2202 of
2 the Declaratory Judgment Act vests the courts with expansive power to compel compliance by
3 recalcitrant parties. 28 U.S.C. § 2202 (“Further necessary or proper relief based on a declaratory
4 judgment or decree may be granted, after reasonable notice and hearing, against any adverse party
5 whose rights have been determined by such judgment.”). Accordingly, the district court “retains
6 jurisdiction to enter such further orders as it deems necessary or proper to give complete and
7 effectual relief consistent with its declaratory judgment.” *Omaha Indemn. Co. v. Cardon Oil Co.*,
8 687 F. Supp. 502, 503 (N.D. Cal. 1988) (granting request for further relief based on declaratory
9 judgment and citing *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 575 (9th Cir.
10 1980)). Indeed, in its summary of the proceedings in this action, the Ninth Circuit Court of
11 Appeals recognized the basic expectation that declaratory relief effects compliance: “The court
12 ordered a remedy that would bring about ‘substantial compliance’ with the federal statute.” *Cal.*
13 *State Foster Parent Ass’n v. Wagner*, 624 F.3d 974, 977 (9th Cir. 2010).

14 In addition to their ongoing violation of this Court’s declaratory judgment, Defendants are
15 in now in violation of a second Court Order. On December 16, 2010 this Court ordered
16 California to **complete implementation** of a compliant methodology for setting rates by April 8,
17 2011 at noon. But April 8th has come and gone and still the rates have not changed. Instead,
18 while recognizing that the current rates remain substantially insufficient to meet the requirements
19 of the CWA, the State has pushed off implementation of new rates even further—until July 1,
20 2011 at the earliest and still subject to “approval by the Legislature and final enactment of the
21 budget by the Governor.” (Docket No. 166).)

22 Defendants’ blatant disregard of this Court’s authority is troubling on numerous fronts.
23 First, this Court has already allowed Defendants considerable time to determine and implement a
24 compliant set of rates. As explained above, the Court ordered the State to evaluate and approve
25 the new rates by April 8. The Court gave Defendants this additional time precisely to allow for
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1 the implementation window Defendants now seek. (Docket No. 163 at 6.) Defendants' own
2 failure to make use of this time cannot justify any further delay at foster parents' expense.⁴

3 Second, the Ninth Circuit characterized foster parents' reimbursement right under the Act
4 in this very case as a direct "statutory guarantee." 624 F.3d at 980. Indeed, the recognition that
5 the CWA provision at issue in this action is stated in "mandatory, rather than precatory" terms is
6 exactly why the Ninth Circuit held that the Act confers an enforceable right to reimbursement.
7 *Id.* at 982.

8 Finally, Defendants' continued attempt to tie rates to State legislative approval is
9 unavailing. Congress has separately and clearly indicated its intent that states' compliance with
10 the CWA reimbursement requirements not be delayed because of the need to enact "legislation
11 appropriating funds." (*See* Fostering Connections to Success and Increasing Adoptions Act of
12 2008 § 601(b), Pub. L. No. 110-351, 122 Stat. 3949, 3949-81 (2008); *see also* Docket No. 95 Ex.
13 A.). California is no exception. Further, CDSS, not the Governor or State Legislature, is "the
14 single organizational unit" charged with the duty of "establishing rates in [California's foster
15 care] program." Cal. Welf. & Inst. Code § 11460(a); Wagner Decl. (Docket No. 71) ¶ 2 ("The
16 CDSS is responsible for the administration, interpretation, and enforcement of, among other
17 things, the federal Child Welfare Act, 42 U.S.C. sections 670-679b, and the programs related to
18 that act in California, and California Welfare and Institutions Code section 11400 et seq., which
19 includes the administration of the rate structure for foster family homes").

20 Having now admitted that its reimbursement rates violate the CWA and having
21 determined and published a methodology to address this insufficiency, it is time for the State to
22 act. And indeed, the State has already demonstrated that it *will* act if directly ordered to
23 implement a specific set of rates immediately. In the *California Alliance of Child and Family*
24 *Services* action before Judge Patel, for example, the *Alliance* plaintiffs, who care for foster

25 ⁴ Plaintiffs need immediate relief. Every month that passes results in irreparable
26 deprivation of foster parents' rights to payments that cover the mandatory cost criteria, because
27 Plaintiffs are precluded by the Eleventh Amendment to the U.S. Constitution from recovering
28 damages from the State in the federal courts. For this reason, Plaintiffs will file a concurrent
motion for expedited hearing of this motion.

1 children in group home facilities, sued, won, and obtained an order compelling specific rate
 2 increases. The new rates went into effect immediately. (See Decl. of Christina Riehl in Support
 3 of Plaintiffs' First Motion for Further Relief (Docket No. 155) ¶¶ 7-8 & Exs. H-I.) The Foster
 4 Parents, who also care for foster children but in their own homes, have also won their case, and
 5 the Ninth Circuit repeated this Court's view that "these plaintiffs have an even stronger case on
 6 the merits than the institutional providers in [*Alliance*]." 624 F.3d at 977. Defendants' most
 7 recent actions have made clear that in this case, as in the *Alliance* action, only a direct order
 8 compelling immediate and specific relief will bring Foster Parents their due under federal law.

9 IV. CONCLUSION

10 Defendants have ignored the CWA, this Court's Orders, and numerous opportunities to
 11 implement a compliant rate schedule for foster-parent reimbursements. There is no reason to
 12 expect that anything will change unless the Court orders the immediate implementation of the
 13 specific methodology proposed in the State's April 8, 2011 Statement. For the reasons stated
 14 above, the Foster Parents request that the Court order Defendants to implement the new
 15 methodology detailed in their April 8 Statement (Docket No. 166), effective immediately.

16 Dated: April 15, 2010

MORRISON & FOERSTER LLP

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 18 By: /s/ Richard S. Ballinger

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 22 Association, California State Care
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