

1 MELINDA BIRD (SBN 102236)  
2 MARILYN HOLLE (SBN 61530)  
3 DISABILITY RIGHTS CALIFORNIA  
4 350 South Bixel Street, Suite 290  
5 Los Angeles, CA 90017  
6 Telephone: (213) 213-8000  
7 Facsimile: (213) 213-8001  
8 [melinda.bird@disabilityrightsca.org](mailto:melinda.bird@disabilityrightsca.org)  
9 [marilyn.holle@disabilityrightsca.org](mailto:marilyn.holle@disabilityrightsca.org)

6 ANNA RICH (SBN 230195)  
7 NATIONAL SENIOR CITIZEN LAW CENTER  
8 1330 Broadway, Suite 525  
9 Oakland, CA 94612  
10 Telephone: (510) 663-1055  
11 Facsimile: (510) 663-1051  
12 [arich@nsclc.org](mailto:arich@nsclc.org)

10 *Attorneys for Named Plaintiffs and the Class*  
11 *Additional Attorneys for Named Plaintiffs and the*  
12 *Class on Signature Page*

13 UNITED STATES DISTRICT COURT  
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
15 SAN FRANCISCO/OAKLAND DIVISION

15 DAVID OSTER, *et al.*,

16 Plaintiffs

17 v.

18 WILL LIGHTBOURNE, Director of the  
19 California Department of Social Services;  
20 TOBY DOUGLAS, Director of the California  
21 Department of Health Care Services;  
22 CALIFORNIA DEPARTMENT OF HEALTH  
23 CARE SERVICES; and CALIFORNIA  
24 DEPARTMENT OF SOCIAL SERVICES,

25 Defendants

) Case No.: CV 09-04668 CW  
)  
)

) **NOTICE OF MOTION AND MOTION**  
) **FOR PRELIMINARY APPROVAL OF**  
) **CLASS SETTLEMENT AGREEMENT,**  
) **AND FOR AN ORDER DIRECTING**  
) **NOTICE TO THE CLASS AND**  
) **SCHEDULING A FAIRNESS HEARING;**  
) **MEMORANDUM OF POINTS AND**  
) **AUTHORITIES IN SUPPORT OF**  
) **MOTION**

) **Hearing Date:** April 4, 2013  
) **Time:** 2:00 P.M.  
) **Judge:** Hon. Claudia Wilken  
) **Address:** 1301 Clay Street  
) Oakland, CA 94102  
) **Courtroom:** 2, 4<sup>th</sup> Floor

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**NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE THAT on April 4, 2013 at 2:00 p.m.<sup>1</sup> or on such date and time as may be set by the Court, Plaintiffs will move for preliminary approval of a proposed settlement reached between Plaintiffs and Defendants. This motion is based on this notice, the Memorandum of Points and Authorities and all documents and arguments submitted in support thereof, the record in this action, and whatever oral argument the Court may entertain.

**RELIEF SOUGHT:** Plaintiffs hereby request the following relief:

- 1. Preliminary approval of the Class Action Settlement Agreement;
- 2. Approval of the proposed form of Notice to the Class; and an order directing provision of Settlement Notice to the Class in accord with the Plan for Class Notice; and
- 3. An order setting a schedule for distribution of the Class Notice and for the Fairness Hearing.

Dated: March 28, 2013

Respectfully submitted,

By:                   /s/ Melinda Bird  
MELINDA BIRD  
Attorneys for Named Plaintiffs and the Class

DISABILITY RIGHTS CALIFORNIA  
DISABILITY RIGHTS LEGAL CENTER  
LAW OFFICE OF CHARLES WOLFINGER  
NATIONAL HEALTH LAW PROGRAM  
NATIONAL SENIOR CITIZENS LAW CENTER

<sup>1</sup> Plaintiffs are filing herewith an *ex parte* application for an order shortening time.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF SETTLEMENT**

3 As this Court previously found, “Plaintiffs are disabled and elderly Californians who need  
4 in-home assistance, ...in order to live safely at home without risk of injury or harm.” Order, Dkt.  
5 No. 198 at 1. Plaintiffs brought this class action to ensure their continued access to In-Home  
6 Supportive Services (“IHSS”), without which they “will be unable to care for themselves, suffer  
7 injuries and be relegated to emergency rooms, hospitals, and other institutions.” *Id.* at 2.  
8 Plaintiffs challenged two statutes, one of which would have made some recipients totally  
9 ineligible for IHSS while reducing domestic and related services for others, and one of which  
10 would have reduced IHSS hours by twenty percent (with certain very limited exceptions).

11 After over three years of hard-fought litigation regarding proposed cuts to the IHSS  
12 program, including temporary and preliminary injunctive relief, stay motions, and appeals,  
13 Plaintiffs and Defendants have finally reached a mutually agreeable settlement that will end this  
14 protracted case. Settlement Agreement, Attachment 1 to Declaration of Melinda Bird (“Bird  
15 Dec.”). The proposed resolution, which if approved by the Court will terminate both this case and  
16 the related IHSS case *Dominguez v. Brown*, Case No. 09-02306 CW (N.D. Cal.) (“*Dominguez*”),  
17 was reached only after months of difficult discussions between the parties. The result is the  
18 product of arms-length negotiation and is, in the view of Class Counsel, in the best interests of the  
19 class.

20 In exchange for the repeal of the statutes at issue here, Plaintiffs have agreed to a relatively  
21 modest, and most likely temporary, reduction in hours provided to IHSS recipients. Under the  
22 settlement, the State would be permitted to reduce service hours by 8% for the period of one year,  
23 beginning July 1, 2013. This would effectively be a 4.4% reduction below current hours, given  
24 that a 3.6% reduction is currently in effect. After twelve months, the cut in hours will be reduced  
25 to 7%. Most importantly, the State has committed itself to seek additional revenues for the IHSS  
26 program that, if approved by the federal government, would be used to restore the reduction in  
27 IHSS hours. While Plaintiffs do not want to see *any* reductions in the IHSS program, the  
28 reductions permitted under the settlement pale in comparison with the potential impacts of the

1 statutes they replace and are reasonable in light of the risks of litigation.

2 For all of these reasons, the proposed settlement easily satisfies the minimal standards  
3 necessary for preliminary approval. The Court should grant such approval, direct that notice be  
4 provided to the Class as provided for in the Plan for Class notice, which is Exhibit C to the  
5 Settlement Agreement, and set a schedule for a fairness hearing and final settlement approval.

## 6 II. PROCEDURAL HISTORY

7 Plaintiffs filed this lawsuit on October 1, 2009 on behalf of four individual IHSS recipients  
8 representing a class of IHSS recipients and six unions that represent IHSS providers. Complaint,  
9 Dkt. No. 1. Plaintiffs asserted challenges to ABX4 4, which added California Welfare and  
10 Institutions Code §§ 12309(e) & 12309.2. Those statutes would have terminated all IHSS  
11 eligibility for 30,000 recipients and reduced IHSS hours for an additional 100,000 recipients,  
12 based on their “Functional Index” ranks and scores. Plaintiffs raised claims under, *inter alia*, the  
13 Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, the Medicaid Act,  
14 and the Due Process and Supremacy Clauses of the U.S. Constitution.

15 On October 23, 2009, this Court issued a Preliminary Injunction enjoining Defendants  
16 from implementing any of the challenged statutes. Order, Dkt. No. 198. Defendants appealed that  
17 Order to the Ninth Circuit Court of Appeal. While the appeal was pending, the California  
18 Legislature enacted Cal. Welf. & Inst. Code §§12309(i) and 12309.2(e) to temporarily suspend  
19 ABX4 4 until final judgment was rendered in this case (relevant provisions of ABX4 4 “shall only  
20 be implemented if a court of competent jurisdiction has issued an order, that is not subject to  
21 appeal or for which the time to appeal has expired, upholding its validity”). On the basis of these  
22 suspension statutes, the Ninth Circuit dismissed the appeal as moot and vacated the order granting  
23 a preliminary injunction.

24 In addition, in 2011, the California Legislature enacted Senate Bill (SB) 73, which required  
25 the California Department of Social Services (“CDSS”) to “implement a 20-percent reduction in  
26 authorized hours of service” for most IHSS recipients if (as occurred) California experienced mid-

27  
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1 year revenue shortfalls. Cal. Welf. & Inst. Code § 12301.07.<sup>2</sup> On December 1, 2011, Plaintiffs  
2 filed an amended complaint that added challenges to implementation of SB 73, also based *inter*  
3 *alia*, on the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, the  
4 Medicaid Act, and the Due Process and Supremacy Clauses of the U.S. Constitution. Dkt. No. 17.  
5 Plaintiffs requested an *ex parte* Application for a Temporary Restraining Order and Preliminary  
6 Injunction, which this Court granted on December 1, 2011. Dkt. No. 417. This Court subsequently  
7 issued a preliminary injunction against implementation of SB 73 on January 19, 2012 (Dkt. No.  
8 494) and issued a written Order granting the Preliminary Injunction on March 2, 2012. Dkt. No.  
9 506.

10 Plaintiffs initially filed a motion for class certification in 2009, (Dkt. No. 20), and renewed  
11 this motion on December 1, 2011. Dkt. No. 356. This Court certified a class on March 2, 2012  
12 (Dkt. No. 505), with the following subclasses:

13 Class A: All recipients of IHSS in the State of California whose IHSS  
14 services will be limited, cut, or terminated under the provisions of ABX4 4, and all  
15 applicants to IHSS in the State of California who would have been eligible for  
16 IHSS services but who are either not eligible, or are eligible for fewer services, as a  
17 result of ABX4 4.

18 Class B: All recipients of IHSS in the State of California who have received  
19 or will receive notices of action that include a reduction of IHSS hours based on SB  
20 73 or Defendants' implementation of SB 73, including future applicants for IHSS  
21 services whose notice of action will reflect reduced IHSS hours as a result of SB 73  
22 or Defendants' implementation of SB 73.

23 Defendants filed timely appeals from this Court's 2012 orders. Dkt. No. 509. While this  
24 appeal was pending, the Parties began serious discussions regarding a potential settlement  
25 agreement. Bird Decl., ¶ 8. At the request of the parties, the 9<sup>th</sup> Circuit ordered both appeals

26 <sup>2</sup> A very narrow category of IHSS recipients was exempt from the twenty-percent reduction, and  
27 another group of IHSS recipients with sufficiently high functional rank scores could have clawed  
28 their way back onto the program if they managed to file a request for Supplemental Care on a  
short time frame.

1 placed in the 9<sup>th</sup> Circuit mediation program on May 30, 2012. *Id.* However, settlement  
2 negotiations were unsuccessful and the appeals were released from the mediation program on June  
3 19, 2012. *Id.* The appeals were fully briefed and set for oral argument on March 21, 2013.

4 In late February 2013, the parties began a new round of settlement negotiations that were  
5 ultimately successful. Bird Decl., ¶ 9. On March 13, the parties signed a term sheet and filed a  
6 joint notice to the Ninth Circuit regarding their settlement and seeking a 120 day continuance of  
7 the oral argument. *Id.*, ¶ 10. This request was granted on March 14, 2013. A settlement  
8 agreement based upon the term sheet was signed yesterday. Attachment 1 to Bird Decl.

### 9 III. DESCRIPTION OF SETTLEMENT PROVISIONS

10 The Settlement Agreement has four key features.

11 **First**, the statutes mandating the functional index cuts of 2009 and the 20% cuts in 2011  
12 will be repealed. Settlement Agreement, ¶ 23, Ex. A to Settlement Agreement (proposed  
13 legislation). As Defendants have stated, this repeal “creates stability and certainty to allow this  
14 vulnerable population to remain active in the communities in which they live.” CDSS And DHCS  
15 Press Release issued March 19, 2013, Attachment 2 to Bird Declaration.

16 **Second**, instead of cuts of 20% or more, Class members will be subject to a temporary  
17 reduction in hours of 8%, beginning July 1, 2013. Settlement Agreement, ¶ 12. The practical  
18 effect will be a reduction of 4.4% below current hours because a cut of 3.6%, unrelated to this  
19 litigation, is already in effect. This 3.6% reduction sunsets on July 1, 2013, so the 8% cut will  
20 replace, and not be in addition to, the 3.6% cut. *Id.*, ¶ 14. IHSS recipients receive, on average,  
21 fewer than 100 hours of assistance per month. Decl. of Eileen Carroll, Dkt. No. 446. A reduction  
22 of 4.4% will thus mean a loss of approximately 4½ hours per month, or one hour per week, for the  
23 average IHSS recipient.

24 This reduction will decrease to 7% after twelve months, that is, by July 1, 2014.  
25 Settlement Agreement, ¶ 13. This 7% reduction will be ongoing, except that State Defendants are  
26 required by the settlement agreement to seek the additional revenues described in the next  
27 paragraph and to use those revenues to offset the reduction.

28 **Third**, State Defendants have agreed to pursue additional revenues for the IHSS program

1 in the form of an assessment on home care services, including but not limited to IHSS and home  
2 health care. *Id.*, ¶¶ 18-22, 24. If that assessment is approved by the federal government, the  
3 savings generated must be used to restore the 7% reduction. Agreement, ¶¶ 13, 21 and Ex. A to  
4 Agreement (legislation re: process for restoring hours). Defendants have also committed to seek  
5 retroactive implementation of the new assessment and if approved, to use the one-time saving for  
6 the benefit of IHSS recipients. Agreement, ¶ 22.

7 **Fourth**, Defendants have agreed to clarify the process for seeking a reassessment of IHSS  
8 hours so that reassessments will be easier to obtain. *Id.*, ¶ 16. Reassessment of need is available  
9 for any change of circumstances, including non-medical reasons, such as the loss of alternative or  
10 volunteer assistance. However, many counties have adopted a practice of refusing to grant a  
11 reassessment without a doctor’s note that the recipient’s medical condition has changed. Bird  
12 Decl., ¶ 11. Defendants agreed to issue a directive to counties reiterating that a physician’s note is  
13 not required, and that IHSS recipients must be informed of their right to appeal if a request for a  
14 reassessment is denied. Agreement, ¶ 17. Most importantly, Defendants agreed to explain the  
15 right to request reassessment and to appeal the denial of a reassessment in the notice of action that  
16 will be issued regarding the 8% cut. *Id.*, ¶17.

17 The Settlement Agreement also contains release and waiver terms that represent fair  
18 compromises between the parties. As part of the settlement, Class Members will waive their right  
19 to file litigation challenging the 8% and 7% cuts in hours. Agreement, ¶33. However, class  
20 members will retain their right to challenge any other reductions in IHSS eligibility, services,  
21 hours, or wages that take place after the Settlement Agreement was signed. *Id.*

22 **IV. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE UNDER**  
23 **FED. RULE OF CIV. PROC. 23(e)**

24 Federal Rule of Civil Procedure 23(e) requires that any proposed settlement or  
25 compromise in a class action suit be approved by the court, subject to a determination that it is  
26 “fair, reasonable, and adequate.” The court may approve the settlement preliminarily, establishing  
27 an initial presumption of fairness. *In re General Motors Corp Pick-Up Truck Fuel Tank Products*  
28 *Liability Litigation* 55 F.3d 768 (3rd Cir.1995); *Hanlon v. Chrysler Corp*, .150 F.3d 1011, 1026

1 (9th Cir. 1998). Where a “proposed settlement appears to be the product of serious, informed,  
2 non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential  
3 treatment to class representative or segments of the class and falls within the reasonable range of  
4 approval, preliminary approval is granted.” *Bourlas v. Davis Law Associates*, 237 F.R.D. 345  
5 (E.D.N.Y.2006). *Id* at 355 (internal citations omitted).

6 The standard by which a proposed settlement is to be evaluated is whether the settlement is  
7 fundamentally fair, adequate and reasonable. FRCP 23(e); *Officers for Justice v. Civil Service*  
8 *Commission of the City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). This  
9 determination involves a balancing of factors which may include: “the strength of plaintiffs' case;  
10 the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class  
11 action status throughout the trial; the amount offered in settlement; the extent of discovery  
12 completed, and the stage of the proceedings; the experience and views of counsel; the presence of  
13 a governmental participant; and the reaction of the Class Members to the proposed settlement.  
14 The relative degree of importance to be attached to any particular factor will depend upon and be  
15 dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts  
16 and circumstances presented by each individual case.” *Id.* at 625 (internal citations omitted).

17 **A. The Settlement is the Product of Serious, Informed, Non-collusive**  
18 **Negotiations Conducted by Experienced Counsel**

19 This case has been aggressively and effectively litigated by the parties, as set forth in more  
20 detail in the Procedural History, Section II, *supra*. The parties litigated vigorously through two  
21 motions for preliminary relief, a motion to dismiss and a motion for class certification. Bird Decl.,  
22 ¶ 7. Class counsel include non-profit law firms with national scope and reputation, disability  
23 rights law firms from California and experienced private counsel. *Id.*, ¶ 4. Class counsel  
24 collectively possess decades of experience in the prosecution and settlement of class actions,  
25 claims under the ADA and the Medicaid Act, and the rights of people who are elderly or disabled.  
26 *Id.* Defendants were represented by experienced attorneys general with the California Department  
27 of Justice. In addition, the Chief Counsel of DHCS and other senior lawyers with other executive  
28 agencies participated throughout the settlement negotiations. *Id.*, ¶ 9.

1 In February 2013, on the eve of oral argument, the parties began a new round of  
2 negotiations. In addition to numerous telephone calls and email exchanges, the parties met in  
3 person on multiple occasions and exchanged written drafts and proposals. Discussions included  
4 direct participation of high-level staff and directors from the DHCS, CDSS, the Department of  
5 Finance and other state agencies. *Id.*, ¶ 9. The result of these discussions was a term sheet signed  
6 on March 17, 2013. Based on this term sheet, counsel for the parties then negotiated the more  
7 detailed provisions and attachments to the Settlement Agreement, which was signed on March 27,  
8 2013. *Id.* ¶ 10.

9 Throughout this process, virtually every element and phrase in the agreement has been  
10 extensively discussed. The parties considered alternative proposals, consulted clients and  
11 knowledgeable associates on a daily basis. *Id.* In sum, the settlement is the result of arms-length,  
12 informed and non-collusive negotiations.<sup>3</sup>

13 **B. The Settlement Fairly and Adequately Addresses the Concerns**  
14 **Underlying the Litigation and Provides Similar Benefits to All Similarly**  
15 **Situated Class Members**

16 Determination of adequacy of a settlement includes assessment of the degree to which the  
17 primary concern of plaintiffs in filing the suit is addressed by the proposed agreement. *Officers*  
18 *for Justice*, 688 F.2d at 628. The Settlement addresses the concerns that were the basis of  
19 Plaintiffs' claims, providing significant relief to the Class, and disposes of all claims filed against  
20 Defendants. Plaintiffs brought this suit to challenge drastic reductions in the IHSS program,  
21 alleging that these changes would place Class Members at risk of unnecessary institutionalization  
22 and violate the ADA and Medicaid Act. The Settlement eliminates the threat of the most severe  
23 cuts, replacing this with smaller reductions that, while difficult, are incremental in magnitude and  
24 most likely temporary.

25 From Plaintiffs' perspective, a crucial element of the Settlement is State Defendants'

26  
27 <sup>3</sup> Significantly, under the proposed settlement, both sides will bear their own fees and costs. Bird  
28 Decl., ¶ 12. This eliminates entirely an issue – the question of class counsel's remuneration – that  
might otherwise raise the possibility of an improperly collusive settlement.

1 obligation to pursue new revenue sources for the IHSS program through a new assessment on  
2 home care services. If approved by the federal government, the savings generated by this new  
3 assessment will most likely restore all cuts to the program and allay Class Members' concerns  
4 regarding repeated attempts to reduce IHSS benefits to solve state budget shortfalls.

5 The proposed Settlement is also fair in that named plaintiffs and unnamed class members  
6 are being treated equally. No plaintiffs – whether named plaintiffs or Class Members – will  
7 receive service payments or any money damages. Consequently, in an action such as this for  
8 declaratory and injunctive relief, the relief afforded to named plaintiffs is no greater than that  
9 afforded to class members as a whole.

10 **C. The Settlement is Reasonable in Light of the Risks of Further**  
11 **Litigation and Other Factors**

12 Significant in evaluating the reasonableness of a proposed settlement are the risks at trial  
13 for both sides, the costs of continuing the litigation, and the delay and/or preclusion in achieving  
14 the favorable results for Class Members that continued litigation, including appeals, would entail.  
15 *Officers for Justice*, 688 F.2d at 625. On appeal, Defendants had raised difficult issues regarding  
16 standing, ripeness and the 10th Amendment. Had the Court of Appeals concluded that these  
17 required a reversal of this Court's preliminary injunction against the 20% cut in IHSS hours,  
18 Class Members would have faced devastating reductions and chaotic attempts to navigate through  
19 the challenging process for obtaining Supplemental hours under SB 73.

20 As to the Functional Index cuts mandated by ABX4 4, the remand of the state's appeal also  
21 posed definite risks to the Class Members. Plaintiffs faced the prospect of extensive discovery  
22 directed in part at the circumstances of fragile class representatives and the possibility of a lengthy  
23 trial. An adverse decision from the 9<sup>th</sup> Circuit regarding the appeal of the 20% cuts, depending on  
24 the breadth and basis, could potentially have disposed of Plaintiffs' claims regarding ABX4 4 as  
25 well. This left open the possibility that both the functional index cuts and the 20% reduction could  
26 have been implemented at the same time, resulting in cuts of 50% or more in recipient hours. The  
27 settlement completely removes these threats to the health and well-being of class members, and  
28 holds the promise for full restoration of all hourly reductions. Consequently, the Settlement is

1 reasonable in light of the magnitude of the risk and the potential consequences for Class members  
2 from continued litigation.

3 **V. THE PROPOSED CLASS NOTICE AND PROCEDURE FOR APPROVAL**  
4 **ARE APPROPRIATE UNDER FED. RULE OF CIV. PROC. 23(e)(1).**

5 **A. The Proposed Class Notice and Settlement Materials Provides**  
6 **Appropriate Information to Class Members in Easily Understandable**  
7 **Language.**

8 Rule 23(e)(1) of the Federal Rules of Civil Procedure requires that prior to final approval  
9 of a class settlement, “[t]he court must direct notice in a reasonable manner to all class members  
10 who would be bound by the proposal.” Generally, notices to class members must be “clearly and  
11 concisely state[d] in plain, easily understood language.” Rule 23(c)(2)(B). “Notice is satisfactory  
12 if it ‘generally describes the terms of the settlement in sufficient detail to alert those with adverse  
13 viewpoints to investigate and to come forward and be heard.’” *Churchill Vill., LLC v. Gen. Elec.*,  
14 361 F.3d 566, 575 (9th Cir. 2004) (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338,  
15 1352 (9th Cir. 1980)).

16 The proposed combined class notice for the *Oster* and *Dominguez* classes accomplishes  
17 this. *See* Ex. C-1 to Settlement Agreement. The notice provides a brief description of the case and  
18 settlement, and a description of the classes in *Oster* and *Dominguez*. The headings are in bold and  
19 plainly describe the different topics covered by the notice. The notice explains how Class  
20 Members can obtain a list of Class counsel and a copy of the Settlement Agreement, including a  
21 listing of websites on which this information is posted. It provides a toll-free phone number, a  
22 P.O. Box and an email for Class Members to contact Class counsel to ask questions or obtain  
23 additional information. Finally, the notice also explains how Class Members can exercise their  
24 right to object, the deadline for objections and the date, time, and location of the fairness hearing.  
25 Moreover, the proposed Class Notice provides this information while remaining with reasonable  
26 parameters for readability. As measured by the most commonly-used readability scale, the Flesch-  
27 Kincaid grade-level scale, the readability rating for the class notice is 6.2, which is the first quarter  
28 of sixth grade. Bird Decl. ¶17.

1 In addition, the Class Notice will be translated into the 13 Medi-Cal threshold languages.  
2 Notice Plan, Ex. C-3 to Settlement Agreement. For individuals who need accommodations due to  
3 their disabilities, Class counsel will provide the Notice in alternative formats, such as electronic  
4 versions, tapes and large print. *Id.*

5 **B. The Process for Distribution of Class Notice is Reasonably Calculated**  
6 **to Reach Class Members.**

7 Rule 23(e) provides that, if a court grants preliminary approval, “[t]he court must direct  
8 notice in a reasonable manner to all class members who would be bound by the proposal. Fed. R.  
9 Civ. P. 23(e)(1). The parties have developed a Plan for Class Notice for both the Oster and  
10 Dominguez classes. Ex. C-3 to Settlement Agreement. The Plan for Notice has three  
11 components.

12 First, the three-page class notice will be posted to a number of public and non-profit  
13 websites that will serve as “portals” to distribute information to IHSS recipients and the larger  
14 disability and senior community of which they are a part. Ex. C-3 to Settlement Agreement.  
15 Specifically, within 24 hours of Court approval of the form of the notice, CDSS, DHCS and  
16 Disability Rights California will post the Class Notice and on their respective websites.  
17 Disability Rights California alone receives more than 300,000 “hits” to its website per year, so this  
18 alone will ensure broad distribution. Bird Decl., ¶ 21. Other class counsel and a number of union  
19 plaintiffs will also post the settlement materials on their respective websites.

20 Second, the settlement materials include a one page flyer or poster suitable for display in a  
21 waiting room or other public area. Ex. C-2 to Settlement Agreement. Defendant CDSS will  
22 request that county welfare departments and other county agencies as well as state hearing division  
23 offices post this flyer in their public areas and make the class notice and Settlement agreement  
24 available upon request. Ex. C-3 to Settlement Agreement. DHCS will send a “fax-blast” with the  
25 flyer and settlement materials to all Community Based Adult Services (“CBAS”) centers, with a  
26 similar request to post the flyer in their common areas. *Id.*

27 Third, the parties have developed an extensive outreach and notice campaign designed to  
28 reach virtually every organization involved with elderly and disabled individuals. Through a

1 combination of email distributions, public speaking and presentations, tele-town halls and other  
2 means of communication, the parties will enlist more than 25 state and non-profit organizations in  
3 distributing the settlement materials. In fact, Class counsel have already begun these outreach  
4 presentations and have received advance commitments from several groups to assist with this  
5 notice plan. Bird Decl., ¶ 23.

6 In addition to these three means of providing notice, the coordination of the settlements in  
7 both *Oster* and *Dominguez* provides an additional avenue for reaching class members. As set  
8 forth in the Declaration of Stacey Leyton in Support of Preliminary Approval of Class Settlement  
9 in the *Dominguez* case, the labor unions that are organizational plaintiffs in *Dominguez* and *Oster*  
10 are preparing for even more robust measures for informing their members about the combined  
11 settlement through outreach and mailings which will supplement the plan for notice described  
12 above. Most of these members are related to the IHSS recipients for whom they provide services,  
13 and those who are not related often enjoy close relationships with recipients, and can facilitate  
14 communication regarding the class settlement.

15 **C. Individual Mailed Notice Should Not be Required.**

16 In light of the robust notice scheme described above and given that this case involves a  
17 Rule 23(b)(2) class, individualized notice of the proposed settlement to all class members should  
18 not be required. Moreover, any negligible benefit gained by providing such notice would be  
19 outweighed by the cost and delay that would be incurred.

20 For Rule 23(b)(3) classes, the Rules specifically require individualized notice “to all  
21 members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). This  
22 individualized notice is necessary so that class members can exercise their right to opt out. In  
23 contrast, for (b)(1) and (b)(2) classes, as to which there is no right to opt out, Rule 23 provides  
24 only that “the court may direct appropriate notice to the class.” Fed. R. Civ. P. 23(c)(2)(A). The  
25 reason for the different treatment

26 derives from the nature of the relief sought in these actions. Rule 23(b)(1) and  
27 (b)(2) classes are cohesive in nature. Because of this cohesiveness, an adequate  
28 class representative can, as a matter of due process, bind all absent class members

1 by a judgment. . . . Rule 23(b)(3) classes are less cohesive, and must abide by  
2 more stringent due process constraints.

3 *Walsh v. Great Atl. & Pac. Tea Co., Inc.*, 726 F.2d 956, 963 & n.1 (3d Cir. 1983) (citations  
4 omitted).

5 Accordingly, “the form of notice of settlement of a Rule 23(b)(1) or (b)(2) class action  
6 need only be such as *to bring the proposed settlement to the attention of representative class*  
7 *members who may alert the court to inadequacies in representation, or conflicts in interest among*  
8 *subclasses*, which might bear upon the fairness of the settlement.” *Id.* at 963 (emphasis added);  
9 *see also Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986) (“Because of the  
10 common interests of all its members, a Rule 23(b)(2) class seeking declaratory and injunctive  
11 relief is cohesive by nature, and *notice to a representative class membership may be considered*  
12 *sufficient.*” (emphasis added; citation omitted)).

13 Courts have thus approved notice of proposed settlements in (b)(1) and (b)(2) cases by  
14 means of “publication over a period of weeks in several metropolitan New York newspapers”  
15 (*Handschu*, 787 F.2d at 833) and publication in two newspapers and posting in prisons in which  
16 potential class members were incarcerated. *Hawker v. Consovoy*, 198 F.R.D. 619, 621 & n.5  
17 (D.N.J. 2001).

18 In cases involving public benefits recipients such as this, notice is typically provided by  
19 posting on appropriate government websites and dissemination through a community-based and  
20 non-profit organizations which work with potential class members. Bird Decl, ¶¶ 26-28  
21 (discussing cases). Following the settlement of *Martinez v. Astrue*, a class action lawsuit against  
22 the Social Security Administration (“SSA”), this Court approved a plan for class notice that  
23 involved extensive outreach to community and public interest advocates as well as posting on  
24 SSA’s website, the websites of class counsel and on the websites of many other agencies that  
25 assist SSA recipients. Bird Decl., ¶ 27. A similar plan was approved in *Kaplan v. Chertoff*, No.  
26 Civ. 06-5304, 2008 WL 200108, at \*13 (E.D. Pa. Jan. 24, 2008) (class of SSI recipients adversely  
27 affected by immigration processing backlogs). In another California class action involving Medi-  
28 Cal recipients, a federal court approved a notice plan that required CDSS and DHCS – which are

1 also defendants here - to post the class notice on their website, distribute it to county social  
2 services offices, and provide the notice to non-profit agencies that worked with class members.  
3 Bird Decl. ¶ 26 (discussing notice in 2011 settlement in *Katie A. v. Bontá*, No. CV-02-05662  
4 AHM (SHx)(C.D. Cal., 2002)).

5 The proposed notice plan here, like the plans approved in the above cases, is designed to  
6 reach a substantial number of class members and will amply ensure awareness of the settlement by  
7 “representative class members” who will be able to inform the Court of any perceived deficiencies  
8 in the settlement—the very purpose of notice in a (b)(2) case.

9 Not only is individualized notice not required, it would be unnecessarily burdensome in  
10 this case. First, the cost of providing individualized notice to the hundreds of thousands of class  
11 members would be substantial. Bird Decl., ¶ 25. Defendants have consistently claimed severe  
12 financial hardship in this case, and the parties agree that the State’s limited resources would be  
13 better spent elsewhere (for example, for IHSS recipients). Second, individualized notice would  
14 delay the settlement approval process. State Defendants have informed Plaintiffs that it would  
15 take approximately thirty days to send out individualized notices. *Id.* In contrast, the proposed  
16 notice plan would post notice the day after preliminary approval is granted. Because  
17 implementation of the proposed settlement must be coordinated with the rapidly-approaching  
18 timelines of the State’s budget process, and the July 1 deadline for implementation of the 8% cut  
19 provided for in the Settlement Agreement, this thirty-day delay in the settlement approval process  
20 could impede the settlement. Therefore, the cost and delay involved in providing individualized  
21 notice weigh strongly in favor of the proposed notice plan. *See Kaplan*, 2008 WL 200108, at \*13  
22 (approving notice plan without individualized notice in part because the delay required by  
23 individualized notice would be contrary to “the time-sensitive nature of this case”).

24 In sum, individualized notice of the proposed settlement to all class members should not be  
25 required.

26 **D. The Settlement Approval Process Provides Adequate Opportunity for**  
27 **Class Members to Raise Objections or Comment on the Settlement.**

28 The Class Notice describes the process for raising objections and provides the addresses to

1 which objections must be mailed. There is a prominent heading in bold that calls the reader's  
2 attention to the objection process. The objection procedure itself is simple: class members may  
3 mail written objections to the attorney general and to Class counsel at the P.O. box listed on the  
4 notice. Class Members will have four weeks to respond to the proposed notice, pursuant to the  
5 following proposed schedule, agreed to by the parties and attached as Exhibit B to the Settlement  
6 Agreement:

- 7       **April 4, 2013:**           Hearing re Preliminary Approval of Settlement and Class  
8   Certification. (2:00 p.m.)
- 9       **April 5, 2013**            Notice to be mailed to Class Members
- 10       **May 3, 2013:**            Last day for Class Members to mail objections to settlement  
  agreement (Four weeks).
- 11       **May 10, 2013:**         Parties to file Summary of Objections and Responses with the  
12   Court.
- 13       **May 23, 2013:**         Fairness Hearing (2:00 p.m.)

14 **VI. CONCLUSION**

15       For the reasons discussed above, Plaintiffs request that the Court: 1) Issue Preliminary  
16 Approval of the Class-Action Settlement; 2) approve the proposed Notice of Proposed Settlement  
17 and the process for distribution of the Notice; 3) establish a schedule for distribution of the Notice,  
18 handling of objections, and related filings; and 4) set a date and time for the Fairness Hearing.

19 Dated: March 28, 2013

Respectfully Submitted,

20 By: /s/ Melinda Bird

21 MELINDA BIRD (SBN 102236)  
22 MARILYN HOLLE (SBN 61530)  
23 DISABILITY RIGHTS CALIFORNIA  
24 350 South Bixel Street, Suite 290  
25 Los Angeles, CA 90017  
26 Telephone: (213) 213-8000  
27 Facsimile: (213) 213-8001  
28 [melinda.bird@disabilityrightsca.org](mailto:melinda.bird@disabilityrightsca.org)  
[marilyn.holle@disabilityrightsca.org](mailto:marilyn.holle@disabilityrightsca.org)

SUJATHA JAGADEESH BRANCH (SBN 166259)  
DISABILITY RIGHTS CALIFORNIA  
SACRAMENTO REGIONAL OFFICE  
1831 K Street  
Sacramento, CA 95811  
Telephone: (916) 504-5800

Facsimile: (916) 504-5801  
[sujatha.branch@disabilityrightsca.org](mailto:sujatha.branch@disabilityrightsca.org)

DARA L. SCHUR (SBN 98638)  
FREDERICK P. NISEN (184089)  
JUNG PHAM (SBN 251232)  
DISABILITY RIGHTS CALIFORNIA  
BAY AREA REGIONAL OFFICE  
1330 Broadway, Suite 500  
Oakland, CA 94612  
Telephone: (510) 267-1200  
Facsimile: (510) 267-1201  
[dara.schur@disabilityrightsca.org](mailto:dara.schur@disabilityrightsca.org)

ANN E. MENASCHE (SBN 74774)  
DISABILITY RIGHTS CALIFORNIA  
1111 Sixth Avenue, Suite 200  
San Diego, CA 92101  
Telephone: 619-239-7861  
Facsimile: 619-239-7906  
[ann.menasche@disabilityrightsca.org](mailto:ann.menasche@disabilityrightsca.org)

PAULA PEARLMAN (SBN 109038)  
DISABILITY RIGHTS LEGAL CENTER  
919 Albany Street  
Los Angeles, CA 90015  
Telephone: (213) 736-1031  
Facsimile: (213) 736-1428  
[paula.pearlman@lls.edu](mailto:paula.pearlman@lls.edu)

CHARLES WOLFINGER (SBN 63467)  
LAW OFFICE OF CHARLES WOLFINGER  
4655 Cass Street # 314  
San Diego, CA 92109  
Telephone: (858) 272-8115  
Facsimile: (858) 270-3960  
[Cw@charleswolfinger.com](mailto:Cw@charleswolfinger.com)

JANE PERKINS (SBN 104784)  
NATIONAL HEALTH LAW PROGRAM  
101 East Weaver Street, Suite G-7  
Carrboro, NC 27510  
Telephone: (919) 968-6308  
Facsimile: (919) 968-8855  
[perkins@healthlaw.org](mailto:perkins@healthlaw.org)

ABIGAIL K. COURSOLE (SBN 266646)  
NATIONAL HEALTH LAW PROGRAM  
3701 Wilshire Blvd., Ste. 750  
Los Angeles, CA 90010  
Telephone: (310) 736-1652  
Facsimile: (213) 368-0774  
[coursolle@healthlaw.org](mailto:coursolle@healthlaw.org)

*Attorneys for Individual Named Plaintiffs David Oster, Willie Beatrice Sheppard, C.R., Dottie Jones, Andrea Hylton, Helen Polly Stern, Charles Thurman, L.C., and the Plaintiff Class*