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18 UNITED STATES DISTRICT COURT
19 FOR THE NORTHERN DISTRICT OF CALIFORNIA
20 SAN FRANCISCO/OAKLAND DIVISION

20 DAVID OSTER, *et al.*,) Case No.: CV 09-04668 CW
21)
22 Plaintiffs) **PLAINTIFFS' MOTION FOR MISC.**
23) **ADMINISTRATIVE RELIEF RE:**
24) **SCHEDULING ORDER**
25 v.)
26) Civil Local Rule 7-11
27 WILL LIGHTBOURNE, Director of the)
28 California Department of Social Services;)
TOBY DOUGLAS, Director of the California) Date: N/A
Department of Health Care Services;) Time: N/A
CALIFORNIA DEPARTMENT OF HEALTH) Courtroom: N/A
CARE SERVICES; and CALIFORNIA)
DEPARTMENT OF SOCIAL SERVICES,)
Defendants)

**PLAINTIFFS' MOTION FOR MISC. ADMINISTRATIVE RELIEF
RE: SCHEDULING ORDER**

1 Pursuant to Civil Local Rule 7-11, Plaintiffs hereby respectfully submit the following
2 Motion for Miscellaneous Administrative Relief regarding a scheduling order for Plaintiffs'
3 pending motion for a preliminary injunction. Plaintiffs request that this Court make clear that
4 Plaintiffs' time to file a reply to Defendants' opposition to a preliminary injunction will be
5 shortened from the normal 7 days to an expedited 2 days only in the event that Defendants file
6 their opposition brief on an expedited basis, and that if Defendants take longer than the period
7 ordinarily permitted under the Local Rules to file their opposition brief, Plaintiffs be similarly
8 afforded additional time to file their reply brief. Plaintiffs also request that the period between
9 December 26 and 30, 2011 be excluded from the calculations of time.
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11 This Court's Temporary Restraining Order and Order to Show Cause ("TRO") (Dkt. No.
12 417) provides:

13 Defendants may file and serve their opposition to Plaintiffs' request for a
14 preliminary injunction on or before December 7, 2011. In the event that
15 Defendants file their opposition by that date, plaintiffs may file a reply brief in
16 support of their motion for preliminary injunction no later than December 9, 2011,
17 and a hearing on Plaintiffs' request will be held on December 15, 2011 at 2:00 pm.
18 Alternatively, Defendants may file and serve their opposition to Plaintiffs' request
19 for a preliminary injunction at their convenience. Plaintiffs shall file a reply brief
20 in support of their motion no later than two full court days thereafter. A hearing on
21 Plaintiffs' request for a preliminary injunction will be scheduled for the first or
22 second Thursday after Plaintiffs' reply is filed, at 2:00 pm.

23 TRO (Dkt. 417) at 4-5.

24 Defendants have stated that they require a hearing on the preliminary injunction motion no
25 later than January 19, 2012. Fifth Declaration of Melinda Bird, ¶ 6. Plaintiffs have no objection
26 to this or an earlier hearing date. However, Defendants' position is that the TRO permits them to
27 wait until January 9, 2012 - five and one-half weeks after the TRO was issued - to file their
28

1 Opposition brief, and that Plaintiff's reply brief must then be filed two days later, on January 11,
2 2012. *Id.* ¶ 7. Plaintiffs do object to such a schedule, which would be extremely unfair to
3 Plaintiffs' counsel and does not appear to comport with the intent of this Court's TRO.

4 Rather, the briefing schedule in the TRO appears intended to allow Defendants to obtain an
5 earlier hearing than the January 5, 2012 date that is otherwise permitted in the Local Rules, by
6 filing an opposition brief on an expedited basis. Without an expedited schedule, the Local Rules
7 would require Defendants to file their opposition to the preliminary injunction motion within 14
8 days, so by December 15, 2011; Plaintiffs' reply would be due seven days later, on December 22,
9 2011; and the hearing could be set no earlier than 35 days after the filing of the motion, that is,
10 January 5, 2012. Civil L.R. 7-2(a), 7-3(a), (c). This is in fact the briefing schedule in effect for
11 Plaintiffs' class certification motion. It is Plaintiffs' understanding that this Court set an expedited
12 schedule allowing Plaintiffs two days to reply so that the hearing could be set for December 15,
13 2012. The Court also gave Defendants flexibility to set an expedited hearing that would permit a
14 hearing before the date that the Local Rules would provide (January 5, 2012), for example by
15 filing an opposition brief on December 5 so that the hearing could be held on December 8, 2011,
16 or an opposition brief on December 14 so that hearing could be held on December 22, 2011.

17 However, there is no reasonable justification for Defendants to misuse this flexibility to
18 delay their preliminary injunction opposition past the time it would normally be due under the
19 Local Rules, including well into January, but still take the position that Plaintiffs shall have only
20 two days to respond. In addition, since Defendants have refused to specify a date for their
21 opposition filing, Plaintiffs will be left in suspense for the next month, with no ability to make
22 advance arrangements to meet with Plaintiffs and their medical providers to prepare rebuttal
23 evidence. Bird Decl., ¶ 14. Further, Plaintiffs as well as the consumers and providers who have
24 filed declarations for the most part lack access to electronic mail or facsimile machines, so that
25 any reply declarations will require additional time to obtain and transmit their signatures. Bird
26 Decl. ¶ 9. In light of these considerations, Plaintiffs have attempted to negotiate a reasonable
27 briefing schedule for this motion, without success. If the hearing is set in the third week of
28 January 2012 as Defendants proposed to Plaintiffs, Plaintiffs have no objection to allowing

1 Defendants additional time for their preliminary injunction opposition beyond the 14 days
2 permitted by the Local Rules, so long as Plaintiffs are also afforded additional time and/or a
3 reasonable opportunity to prepare their reply. However, Defendants' only compromise was to
4 offer Plaintiffs **four days** rather than two for their reply, while still insisting on a hearing on
5 January 19 and five and one-half **weeks** to prepare their Opposition. Bird Decl. ¶ 7.¹

6 In addition, Defendants should not be permitted to force Plaintiffs to obtain reply evidence
7 between December 23 and 27, given that Plaintiffs have previously shown that many IHSS offices
8 will be closed during that time period, Decl. of Karen Kessler, (Dkt. No. 376), ¶ 8, 10-12, other
9 potential declarants will be unavailable, and several of Plaintiffs' counsel and staff (who will be
10 obtaining physical signatures) have pre-planned travel and vacation in the last week of December
11 that cannot be altered. Bird Decl. ¶ 10.

12 Plaintiffs request that this Court issue a Scheduling Order specifying the following:

- 13 1. If Defendants file their preliminary injunction opposition on an expedited basis, that is,
14 on or before December 14, 2011, the expedited schedule set forth in this Court's TRO
15 shall apply.
- 16 2. If Defendants file their opposition on the date that it would normally be due under the
17 Local Rules, December 15, 2011, Plaintiffs' reply brief shall be due one week later, on
18 December 22, 2011, with a hearing held on January 5, 2012 or at the Court's
19 convenience prior to January 19, 2012.
- 20 3. If Defendants intend to take longer than the Local Rules ordinarily permit to file their
21 opposition brief, they shall give the Court and Plaintiffs notice no later than December

22 ¹ Moreover, these four days would be during the same time period that Plaintiffs would be drafting
23 a reply in support of class certification. Bird Decl., ¶ 8. Defendants may respond that Plaintiffs
24 previously offered to stipulate that class certification could be delayed until after the preliminary
25 injunction hearing, and then changed position on such a stipulation. As explained in greater
26 detail in the contemporaneously filed declaration, however, Plaintiffs became unwilling to
27 stipulate to postponement of class certification after learning of the impending issuance of a
28 Ninth Circuit decision holding that class certification is necessary for class-wide preliminary
injunctive relief. *Id.* ¶ 5. That being said, Plaintiffs are certainly willing to allow Defendants
longer than the normal period permitted for the filing of Defendants' opposition brief, so long as
Plaintiffs' time to respond is similarly lengthened, and the motion for class certification is heard
on the same date, or before, the preliminary injunction motion.

1 16, 2011 of when they intend to file, and of their proposed hearing date. Plaintiffs shall
2 have half the time that Defendants take to file their opposition brief in order to file a
3 reply or, at the very least, shall have one week for their reply, but the week between
4 December 26 and 30 shall not count toward Plaintiffs' or Defendants' briefing time.²
5 Plaintiffs recognize that this Court's TRO also would reduce the time that the Court ordinarily has
6 to review the parties' briefs under the Local Rules, and take no position on whether this Court
7 should reduce that time even if Defendants take longer than the Local Rules would ordinarily
8 permit.

9 Dated: December 9, 2011

Respectfully Submitted,

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By: /s/ Melinda Bird

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² For example, if Defendants take three weeks to file an opposition, Plaintiffs would have 1.5 weeks to file a reply brief. The week of December 26-30 would not count as part of either side's briefing time.

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