

1 XAVIER BECERRA, State Bar No. 118517
 Attorney General of California
 2 KATHLEEN BOERGERS, State Bar No. 213530
 Supervising Deputy Attorney General
 3 NELI N. PALMA, State Bar No. 203374
 KARLI EISENBERG, State Bar No. 281923
 4 STEPHANIE YU, State Bar No. 294405
 Deputy Attorneys General
 5 1300 I Street, Suite 125
 P.O. Box 944255
 6 Sacramento, CA 94244-2550
 Telephone: (916) 210-7522
 7 Fax: (916) 322-8288
 E-mail: Neli.Palma@doj.ca.gov
 8 *Attorneys for Plaintiff State of California, by and
 through Attorney General Xavier Becerra*

9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 12

13
 14 **STATE OF CALIFORNIA, by and through**
ATTORNEY GENERAL XAVIER
 15 **BECERRA,**

16 Plaintiff,

17 v.

18 **ALEX M. AZAR, in his official capacity as**
 19 **Secretary of the U.S. DEPARTMENT OF**
 20 **HEALTH & HUMAN SERVICES; U.S.**
 21 **DEPARTMENT OF HEALTH AND**
 22 **HUMAN SERVICES; DOES 1-100,**

23 Defendants.
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Case No. 3:19-cv-02769-WHA

**REPLY IN SUPPORT OF PLAINTIFF
 STATE OF CALIFORNIA’S MOTION
 FOR ENTRY OF PARTIAL FINAL
 JUDGMENT UNDER RULE 54(b)**

Date: February 13, 2020
 Time: 8:00 a.m.
 Courtroom: 12
 Judge: The Honorable William Alsup
 Action Filed: May 21, 2019

1 **INTRODUCTION**

2 “It is left to the sound judicial discretion of the district court to determine the ‘appropriate
3 time’ when each final decision in a multiple claims action is ready for appeal.” *Curtiss-Wright*
4 *Corp. v. General Elec. Co.*, 446 U.S. 1, 8 (1980). Here, the Court has already made a preliminary
5 determination that certain threshold issues in this case—i.e., those decided by the Court in its
6 November 19, 2019 order—are “ready for appeal” and has directed the parties to stipulate to
7 “entry of final judgment with reservation of all issues not reached in this order in the event of
8 remand.” Dkt. No. 143 at 32. The Court’s direction was not reserved for only some of the parties
9 in this related matter, but to all of them. Nevertheless, Defendants have rebuffed California’s
10 good faith efforts to enter into a stipulation for entry of a final judgment for what appears to be a
11 strategic advantage. The Court should enter the partial final judgment because doing so will
12 promote judicial efficiency and the equities under Rule 54(b) warrant such entry.

13 **ARGUMENT**

14 **A. This Case Meets the Multiple Claims Requirement and an Immediate**
15 **Appeal will Serve Judicial Economy**

16 **1. California Meets the Multiple Claims Requirement**

17 The parties agree that, for Rule 54(b) to apply, “claims must be multiple and at least one
18 must have been adjudicated finally.” *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*,
19 819 F.2d 1519, 1524 (9th Cir. 1987). As a threshold matter, Defendants do not contest finality.
20 Indeed, Defendants stipulated with San Francisco and Santa Clara for entry of judgment because
21 they agreed the claims resolved by the Court’s November 19, 2019 order have been finally
22 adjudicated and are ready for appeal.

23 Instead, Defendants assert that the multiple claims requirement is not met because
24 California’s causes of action purportedly originate from the same single set of facts, the same
25 Rule and administrative record, and seek the same relief—vacatur of the Rule. Opp. 2. But as
26 California explained in its motion, absolute independence of claims is not the governing standard.
27 Mot. 5.

28 Rather, the solution for the question of “claims” for purposes of Rule 54(b) “lies in a more

1 pragmatic approach focusing on severability and efficient judicial administration.” *Continental*
2 *Airlines*, 819 F.2d at 1525. Indeed, overlapping facts is not detrimental to a Rule 54(b) motion
3 and the “present trend is toward greater deference to a district court’s decision to certify under
4 Rule 54(b).” *Texaco v. Ponsoldt*, 939 F.2d 794, 798 (9th Cir. 1991). Under the more recent
5 standard, certified claims need not be separate and independent from remaining claims. *Id.* In
6 *Texaco*, the Ninth Circuit upheld a district court’s Rule 54(b) certification of summary judgment
7 determinations concerning contract interpretation and enforceability issues in cross-claim
8 proceedings involving multiple contracts related to the sale of a property. Certification was
9 proper even though claims disposed of on appeal and the remaining counterclaims required proof
10 of the same facts because it would aid “expeditious decision” of the case. *Id.*

11 Similarly, in *Continental Airlines*, the Ninth Circuit upheld Rule 54(b) certification of a
12 district court’s partial summary judgment determination that the exculpatory clause in an airline
13 plane’s contract of sale barred some of the negligence and strict liability claims made by the
14 airline following a plane accident. 819 F.2d at 1524-25. Certification was proper even though
15 other claims—fraud, breach of warranty, passenger indemnification—remained and had
16 overlapping facts because the Ninth Circuit found that “given the size and complexity of th[e]
17 case,” it was within the district court’s discretion to carve out “sufficiently severable,” “threshold
18 claims and thus streamline further litigation.” *Id.* at 1525.

19 In the present case, the adjudicated claims are sufficiently severable, both factually and
20 legally, from the remaining claims. *See* Mot. 6-7. California’s FOIA claim is premised on
21 Defendants’ failure to conduct an adequate search, timely respond to, and disclose non-exempt
22 records and reasonably segregable records in response to California’s April 25, 2018 FOIA
23 request. *See* Dkt. No. 1 at 52-53. The existence of this separate and distinct claim alone weighs
24 in favor of Rule 54(b) certification. The same is true with respect to the constitutional claims, the
25 resolution of which Defendants contend would involve “many of the same legal and factual issues
26 required to resolve California’s APA arguments.” Opp. 3. But a “direct constitutional challenge
27 is reviewed independent of the APA.” *Grill v. Quinn*, 2012 WL 174873, at *2 (E.D. Cal. Jan. 20,
28 2012).

1 Moreover, the cases relied upon by Defendants are inapposite or support California's
2 position. First, Defendants' reliance on *Morrison–Knudsen Co. v. Archer*, 655 F.2d 962 (9th Cir.
3 1981) is misplaced. Opp. 1. The Ninth Circuit has stated that *Morrison–Knudsen Co.*, represents
4 “an outdated and overly restrictive view of the appropriateness of Rule 54(b) certification.”
5 *Texaco*, 939 F.2d at 798. Under that outdated view, “a similarity of legal or factual issues will
6 weigh heavily against entry of judgment under the rule, and in such cases a Rule 54(b) order will
7 be proper only where necessary to avoid a harsh and unjust result, documented by further and
8 specific findings.” *Morrison–Knudsen Co.*, 655 F.2d at 965. But in this case, Rule 54(b)
9 certification is proper even if the Court applies the traditional standard because the remaining
10 claims are sufficiently separate and distinct, *see* Mot. 6-7, and to avoid an unjust result, *see* Mot.
11 7-8; *supra* Section B.

12 Second, *Pakootas v. Teck Cominco Metals, Ltd.*, 905 F.3d 565 (9th Cir. 2018) does not lead
13 to a different result. Opp. 2. There, the Ninth Circuit confirmed that a challenger “cannot
14 successfully attack the court's finding of multiple claims merely by showing that some facts are
15 common to all of its theories of recovery,” as Defendants are attempting to do here. *Id.* at 575.
16 The Ninth Circuit further held that claims with partially “overlapping facts,” or even arising from
17 out of the same transaction and occurrence, are not foreclosed from being separate for purpose of
18 Rule 54(b). *Id.* The Court also held that Rule 54(b) was satisfied because the plaintiff's separate
19 counts required a different factual showing for recovery. *Id.* at 575-76. The same is true here
20 where under *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 581-82
21 (2012), California's Spending Clause claim requires a showing that federal funds are at stake and
22 California has significant reliance interests, Mot. 6-7, to seek the additional remedy of declaring
23 the final rule unconstitutional and precluding Defendants from withholding, denying, suspending
24 and/or terminating funding from California. Dkt. No. 1 at 53.

25 Lastly, in *Satpathy v. Cathay Pac. Airways, Ltd.*, 2005 WL 8162029 (N.D. Cal. Oct. 31,
26 2005), the court held that Rule 54(b) certification was not proper because claims under the
27 Warsaw Convention had been resolved with respect to only one party but not another who had
28 not joined the summary judgment motion. Opp. 3. Certification would potentially “burden the

1 Ninth Circuit [with] duplicative appeals raising the same legal issues.” *Id.* But that is the exact
 2 same burden Defendants’ position would impose on the Ninth Circuit; deferring California’s
 3 challenge while the actions by Washington and California’s two localities are considered by the
 4 Ninth Circuit. *Satpathy* does not support Defendants’ argument, but rather weighs in favor of
 5 Rule 54(b) certification in this case.

6 **2. Granting a Rule 54(b) Order Promotes Judicial Efficiency**

7 Immediate appeal will also further efficient judicial administration. Defendants have
 8 already appealed the case filed by the State of Washington to the Ninth Circuit,¹ and will likely
 9 appeal the challenges filed by the City and County of San Francisco and Santa Clara. It makes
 10 little sense from a judicial economy standpoint to place California’s challenge on a separate track.
 11 Indeed, this Court has already so determined, by stating that this case is “ready for appeal.” Dkt.
 12 No. 143 at 32. Allowing an appeal now will expedite the final resolution of the adjudicated
 13 claims by presenting them cleanly to the appellate court for decision, while allowing this Court to
 14 move forward on the remaining claims, such as the FOIA claim, in a manner suited to the specific
 15 legal and factual issues they raise. It will also help potential settlement of the FOIA claim by
 16 separating it out from the remainder of the case.²

17 **3. California, as the Prevailing Party, is not Barred from Seeking Rule** 18 **54(b) Certification**

19 Defendants question the appropriateness of California, as a prevailing party, to file this
 20 motion, and accuse California of wanting to “control *Defendants’* potential appeal.” Opp. 1
 21 (emphasis in original). But it is Defendants’ ongoing delay in complying with FOIA that has
 22 determined the timing. Moreover, there is nothing to preclude a prevailing party from filing for
 23 Rule 54(b) certification. The plain language of Rule 54(b) allows any party—or the Court sua
 24 sponte—to issue a 54(b) certification. *See generally Wright & Miller*, 10 Fed. Prac. & Proc. Civ.

25 ¹ Defendants filed their notice of appeal in the Washington matter on January 17, 2020. *See State*
 26 *of Washington v. Azar II*, Case No. 2:19-CV-00183-SAB, Dkt. No. 76.

27 ² Defendants assert that “Rule 54(b) is not an appropriate mechanism to relieve California from
 28 [its] choice to include the FOIA claim as part of this action.” Opp. 4. This is ironic given that
 Defendants assert that Rule 54(b) is only appropriate if there are multiple claims that are factually
 and legally distinct—like the FOIA claim. Moreover, Defendants’ suggestion that California file
 a separate lawsuit for its FOIA claim alone would in no way foster judicial efficiency.

1 § 2660 (4th ed.) (Aug. 2019) (explaining that “[t]here is no specific procedure for obtaining the
2 certification prescribed in Rule 54(b)). In *Continental Airlines*, the district court granted partial
3 summary judgment in favor of McDonnell Douglas Corporation and then granted its Rule 54(b)
4 motion. 819 F.2d 1519, 1524. The Ninth Circuit upheld the district court’s decision to
5 “streamline further litigation” while also noting:

6 It is true that the partial summary judgments below eliminated none of the parties and
7 left open potentially full recovery in both of Continental’s ultimate areas of loss
8 (damage to the airplane and liability to passengers). For that reason, it is possible that
Continental might never have needed to appeal the instant judgments if the case had
been compelled to go forward.

9 *Id.* at 1525.

10 The applicable case-specific standard for Rule 54(b) certification rejects bright-line rules in
11 favor of a careful assessment of the claims adjudicated in the context of the lawsuit as a whole.
12 *Pakootas*, 905 F.3d at 574-75 (the Supreme Court has expressly declined to attempt “any
13 definitive resolution of the meaning of” of the term “claim” and the Ninth Circuit has developed a
14 “pragmatic approach” to the question). That assessment in this case weighs in favor of 54(b)
15 certification.

16 **B. A Weighing of the Equities Shows That There is No Just Reason for**
17 **Delaying Entry of the Partial Final Judgment**

18 Rule 54(b) requires that the Court consider “judicial administrative interests and the
19 equities involved.” See *Curtiss-Wright Corp.*, 446 U.S. at 8. No harm will come to Defendants
20 from entry of the partial final judgment. In fact, they have already filed a notice of appeal in the
21 related State of Washington litigation and thus they will already be litigating the issues of this
22 case before the Ninth Circuit.

23 This Court ordered the parties to stipulate to “entry of final judgment with reservation of all
24 issues not reached in this order in the event of remand.” Dkt. No. 143 at 32. To date, Defendants
25 have failed to comply with this Court’s order and have not offered any viable, equitable, or lawful
26 alternative that complies with the district court’s order and addresses the potential jurisdictional
27 issues raised by California in its motion (at 7-8). In their opposition, Defendants suggest that this
28 Court not enter any judgment and “if California desired to participate in the appeals in [San

1 Francisco and Santa Clara’s related] cases, it could seek to do so through amicus briefing, even if
 2 there is not an appealable final judgment in California’s own case.” That suggestion does not
 3 satisfy the Court’s order.

4 Moreover, Defendants’ suggestion ignores that equities weigh in favor of a Rule 54(b)
 5 certification. As this Court recognized, “a single instance of noncompliance [with the final rule]
 6 could jeopardize [] the \$63 billion in federal funding it receives for healthcare programs for one-
 7 third of Californians.”³ Dkt. No. 143 at 28. Indeed, just last Friday, Defendants issued a “Notice
 8 of Violation” to California setting out OCR’s finding that California is in violation of the Weldon
 9 Amendment and threatening California’s HHS funding, for 2020 and retroactively for 2018 and
 10 2019. Exhs. C-G to Palma Decl. Like the final rule, the “Notice of Violation,” relies on an
 11 expansive reading of Weldon’s definitions. *Id.* Thus, the equities weigh in favor of California’s
 12 participation in the appeal.⁴

13 Alternatively, Defendants suggest that California dismiss all other claims, including its
 14 Spending Clause claim. But this Court’s order expressly stated that the parties stipulate to “entry
 15 of final judgment *with reservation of all issues not reached in this order* in the event of remand.”
 16 Dkt. No. 143 at 32. Defendants fail to explain how California’s claims would be “reserved” in
 17 the event of a remand if California dismisses those claims now. Indeed, Defendants have pointed
 18 to no authority that would permit such a result.

19 _____
 20 ³ Federal funds the state receives support critical programs for Californians from all walks of life
 21 run by state agencies and by local governments and other sub-grantees that depend on pass-
 through funding. Ghaly Decl. ¶¶ 2, 5, 8, Dkt. No. 76 at 2-4. Therefore, any loss of funding could
 impact not just the two counties in the two related cases, but all 58 counties in the state.

22 ⁴ California has long maintained that it is a target of Defendants’ unlawful rule. Dkt. Nos. 1 at 31-
 23 34; 11 at 19-21; 113 at 21-23. In the preamble, the HHS said that it wished to resolve confusion
 caused HHS’s 2016 closure, in California’s favor, three Weldon Amendment complaints by
 24 religious employers to the state’s non-discriminatory basic healthcare services coverage
 requirement. 84 Fed. Reg. 23,170, 23,178-23,179 (May 21, 2019); 83 Fed. Reg. 3880, 3890 (Jan.
 25 26, 2018). Specifically, HHS said it no longer agreed with its prior determination that Weldon’s
 protection of health care entities included “health insurance plans” but not institutions that
 26 purchase those plans, in other words, employers or plan sponsors. 84 Fed. Reg. at 23,179; 83
 Fed. Reg. at 3890. The final rule’s unlawful definition of “health care entity” to include “plan
 27 sponsors” and “third-party administrator” would thus allow non-covered entities to impermissibly
 claim discrimination against California. 84 Fed. Reg. at 23,194-95 (HHS responding to
 28 comments that the definition of “health care entities” exceeds HHS’s authority, including the
 extension of the term to employers who sponsor group health plans).

1 Defendants' arguments related to the FOIA claim also fail. Defendants assert that it makes
2 sense to wait for the FOIA claim to be resolved because California may receive documents
3 through FOIA that may cause the Court to reopen the administrative record in this case. Opp. 5.
4 This is a curious suggestion, given that Defendants certified the record's completeness. *See City*
5 *and County of San Francisco v. Azar, et al.*, Case No. 3:19-cv-2405 (N.D. Cal. May 2, 2019),
6 Dkt. No. 85-2 (certifying the administrative record submitted to the Court on July 22, 2019 and
7 August 19, 2019 "constitute[s] the complete administrative record for the 2019 Final Rule").

8 California also disagrees with Defendants' assertion that California's April 25, 2018 FOIA
9 request is overbroad. Since initiating this litigation, California has repeatedly offered to work
10 with Defendants to expedite the process. For instance, on August 2, 2019, California gave
11 Defendants a prioritized list of five requests. Exh. H to Palma Decl. California has also
12 repeatedly offered to work with Defendants on search terms in an effort to further narrow the
13 requests. *Id.* Despite California's repeated attempts to assist Defendants in a timely resolution
14 and production of requested documents, Defendants have made only six productions, all heavily
15 redacted.⁵ Accepting Defendants' arguments would reward them for failing to timely comply
16 with their statutory obligations under FOIA and allow them the strategic advantage of delaying
17 compliance to keep California from participating as a party at the appellate level.

18 The balance of equities favor an immediate appeal of all three cases partially adjudicated in
19 the Court's November 19, 2019 order. The Court itself agrees by stating in its order that it
20 believes the three cases are "ready for appeal." Dkt. No. 143 at 32. The Ninth Circuit accords
21 "substantial deference" to a district court's determination to issue a Rule 54(b) certification,
22 including the equitable factors of prejudice and delay. *Noel v. Hall*, 568 F.3d 743, 747 (9th Cir.
23 2009); *see also Bingham v. City of Manhattan Beach*, 341 F.3d 939, 942 n.1 (9th Cir. 2003).
24 Indeed, "issuance of a Rule 54(b) order is a fairly routine act that is reversed only in the rarest

25 _____
26 ⁵ Indeed, Defendants did not respond to the FOIA request until litigation had commenced. After
27 commencing suit, California contacted HHS on July 30, 2019, to meet and confer on California's
28 outstanding FOIA request and the associated cause of action. Exhibit H to Palma Decl.
Defendants characterized their submittal of the administrative record on July 22, 2019 as the first
interim production. But the first FOIA production, a "second" interim production, was not
received until September 2019. *Id.*

1 instances.” *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002). Because
2 Defendants’ arguments to the contrary are unavailing, the Court should grant the motion for a
3 Rule 54(b) certification.

4 **CONCLUSION**

5 California respectfully requests that the Court enter partial final judgment pursuant to Rule
6 54(b) in accordance with the terms of the Court’s November 19, 2019 Order Re Motions to
7 Dismiss and For Summary Judgment and Requests for Judicial Notice.

8
9 Dated: January 29, 2020

Respectfully submitted,

10 XAVIER BECERRA
11 Attorney General of California
12 KATHLEEN BOERGERS
13 Supervising Deputy Attorney General

/s/ Neli N. Palma

14 NELI N. PALMA
15 KARLI EISENBERG
16 STEPHANIE YU
17 Deputy Attorneys General
18 *Attorneys for Plaintiff State of California, by*
19 *and through Attorney General Xavier*
20 *Becerra*

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CERTIFICATE OF SERVICE

Case Name: *State of California v. Alex M. Azar, et al.* No. **3:19-cv-02769-WHA**

I hereby certify that on January 29, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

REPLY IN SUPPORT OF PLAINTIFF STATE OF CALIFORNIA’S MOTION FOR ENTRY OF PARTIAL FINAL JUDGMENT UNDER RULE 54(b)

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 29, 2020, at Sacramento, California.

Ashley Harrison
Declarant

/s/ Ashley Harrison
Signature

1 XAVIER BECERRA, State Bar No. 118517
 Attorney General of California
 2 KATHLEEN BOERGERS, State Bar No. 213530
 Supervising Deputy Attorney General
 3 NELI N. PALMA, State Bar No. 203374
 KARLI EISENBERG, State Bar No. 281923
 4 STEPHANIE YU, State Bar No. 294405
 Deputy Attorneys General
 5 1300 I Street, Suite 125
 P.O. Box 944255
 6 Sacramento, CA 94244-2550
 Telephone: (916) 210-7522
 7 Fax: (916) 322-8288
 E-mail: Neli.Palma@doj.ca.gov
 8 *Attorneys for Plaintiff State of California, by and
 through Attorney General Xavier Becerra*

9
 10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12
 13
 14 **STATE OF CALIFORNIA, by and through**
 15 **ATTORNEY GENERAL XAVIER**
 16 **BECERRA,**

3:19-cv-02769-WHA

Plaintiff,

**SECOND DECLARATION OF NELI N.
 PALMA IN SUPPORT OF PLAINTIFF
 STATE OF CALIFORNIA’S MOTION
 FOR ENTRY OF PARTIAL FINAL
 JUDGMENT UNDER RULE 54(b)**

v.

17
 18
 19 **ALEX M. AZAR, in his official capacity as**
 20 **Secretary of the U.S. DEPARTMENT OF**
 21 **HEALTH & HUMAN SERVICES; U.S.**
 22 **DEPARTMENT OF HEALTH AND**
 23 **HUMAN SERVICES; DOES 1-100,**

Date: February 13, 2020
 Time: 8:00 a.m.
 Courtroom: 12
 Judge: The Honorable William Alsup
 Action Filed: May 21, 2019

Defendants.

24 I, Neli N. Palma, declare:

25 1. I am a member of the California State Bar, admitted to practice before this Court,
 26 employed by the Office of the California Attorney General as a Deputy Attorney General, and
 27 counsel to Plaintiff in this action. I have personal knowledge of the facts set forth herein, and if
 28 called upon as a witness, I could testify to them competently under oath.

1 2. Attached hereto as **Exhibit C** is a true and correct copy of the January 10, 2020
2 letter from Director Roger Severino of the U.S. Department of Health and Human Services
3 (HHS), Office for Civil Rights (OCR) to Deputy Director and General Counsel Sarah Ream of
4 the California Department of Manage Health Care (DMHC).

5 3. Attached hereto as **Exhibit D** is a true and correct copy of the January 21, 2020
6 letter from California Deputy Attorney General Karli Eisenberg to Director Severino.

7 4. Attached hereto as **Exhibit E** is a true and correct copy of the January 24, 2020
8 “Notice of Violation” from Director Severino to California Attorney General Xavier Becerra.

9 5. For the Court’s convenience, attached hereto are true and correct copies of the
10 following documents referenced in the aforementioned recent correspondence from Defendants to
11 California:

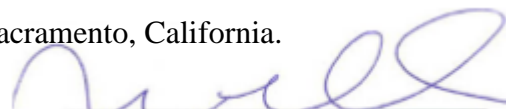
12 **Exhibit F:** DMHC’s August 22, 2014 letters, a portion of the administrative record, and
13 filed as Appendix 398, Dkt. No. 57-15 at 1-15.

14 **Exhibit G:** Then OCR Director Jocelyn Samuels’ June 21, 2016 closure letter concerning
15 three Weldon Amendment complaints involving California, a portion of the administrative
16 record, and filed as Appendix 396, Dkt. No. 57-14 at 333-338. This letter is referenced in
17 Defendants’ January 24, 2020 “Notice of Violation” (Exhibit E) at footnote 42.

18 6. Attached hereto as **Exhibit H** is a true and correct copy of email correspondence
19 between counsel for Defendants, Benjamin T. Takemoto, and Deputy Attorney General
20 Eisenberg, between July 1, 2019 and October 25, 2019.

21
22 I declare under penalty of perjury under the laws of the United States and the State of
23 California that the foregoing is true and correct.

24 Executed on January 29, 2020 in Sacramento, California.



25
26 Neli N. Palma
27 Deputy Attorney General

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EXHIBIT C



DEPARTMENT OF HEALTH & HUMAN SERVICES

OFFICE OF THE SECRETARY

Voice - (800) 368-1019 TDD - (800) 537-7697 Fax - (202) 619-3818
<http://www.hhs.gov/ocr/>

Office for Civil Rights
200 Independence Ave., SW
Washington, DC 20201

VIA FEDERAL EXPRESS OVERNIGHT AND ELECTRONIC EMAIL [Sarah.Ream@dmhc.ca.gov]

Sarah Ream
Deputy Director & General Counsel
California Department of Managed Health
Care
980 9th Street, Suite 500
Sacramento, CA 95814

January 10, 2020

Re: OCR Transaction Numbers 17-274771 and 17-283890

Dear Governor Newsom, Attorney General Becerra, Secretary Ghaly, Director Rouillard, and Deputy Director Ream:

The U.S. Department of Health & Human Services's ("HHS" or the "Department") Office for Civil Rights ("OCR") received complaints on June 27, 2017, and September 25, 2017, filed by Missionary Guadalupanas of the Holy Spirit, Inc. (OCR Transaction Number 17-274771) and Skyline Wesleyan Church (OCR Transaction Number 17-283890), respectively (collectively, "the Complaints"). OCR has conducted an investigation of the Complaints pursuant to 45 C.F.R. §§ 88.1 and 88.2 (effective March 25, 2011), which provide for the implementation and enforcement of certain Federal conscience and anti-discrimination laws. These laws include the Weldon Amendment,¹ which prohibits certain federal funds from being made available where a state or local government engages in discrimination on the basis that a health care entity, as defined in the Weldon Amendment, does not provide, pay for, provide coverage of, or refer for abortions.

The Complaints allege the California Department of Managed Health Care ("DMHC") engaged in unlawful discrimination, in violation of the Weldon Amendment, by sending a letter dated August 22, 2014, that ordered all health care service plans under DMHC jurisdiction that provide at least one product that limited or excluded abortion coverage to revise and file relevant health plan documents so they cover abortion without exclusion or limitation in every product they offer. The Complaints contend that many plan sponsors lost plans that limited abortion coverage as a result of DMHC's action.

¹ Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, and Continuing Appropriations Act, 2019, Public Law 115-245, Div. B., sec. 507(d), 132 Stat. 2981, 3118 (Sept. 28, 2018), as extended by the Further Continuing Appropriations Act, 2020, and Further Health Extenders Act of 2019, Pub. L. No. 116-69, Div. A., Sec. 101(1), 133 Stat. 1134 (Nov. 21, 2019).

We are aware that section 1367(i) of the California Health & Safety Code provides that “the [DMHC] Director may, for good cause, by rule or order exempt a plan or contract or any class of plan or contract from the requirements to provide subscribers and enrollees all basic health care services, including abortion.” We are also aware that the California Court of Appeals held that California law requires health care service plans to cover abortion as a basic health care service. *See Missionary Guadalupanas of Holy Spirit Inc. v. Rouillard*, 38 Cal. App. 5th 421, 427-28 (Cal. Ct. App. 2019), *review denied* (Nov. 20, 2019) (“Because California law guarantees every woman the right to choose whether to bear a child or obtain an abortion, the only legally tenable interpretation of the law is that abortions are basic health care services, which health care service plans are required to cover.”).

Based on our investigation of this matter, it is our understanding that, since that time, DMHC has not exempted the complainants’ issuers or plans from including abortion coverage, despite knowing that the plan sponsors objected to the coverage and despite significant litigation over this question and despite the Director’s authority in section 1367(i) to provide such exemption.

In an effort to resolve the Complaints expeditiously and in compliance with federal law, we request that the State clarify whether it believes it can, and, if so, whether it will, utilize the exemption process codified in the Knox Keene Act set forth above to align DMHC practices to be consistent with the Weldon Amendment. Specifically, we ask that you state whether DMHC will exempt, as a class, all issuers and plans regulated under the Knox Keene Act that have objected, or may in the future object, to California’s abortion coverage requirements (either on their own behalf, or on behalf of plan sponsors or beneficiaries) since the issuance of DMHC’s letter of August 22, 2014.

If the State makes such a clarification to issuers and plans covered by the Knox Keene Act in writing, OCR would close the open Complaints as satisfactorily resolved. We ask that you inform us, in a writing to be received by OCR on or before **January 21, 2020**, whether DMHC will make such a clarification to conform to the requirements of the Weldon Amendment. Given the length of time that has elapsed since the filing of the complaints and the lack of any action by the State to address the concerns raised, no extension of time will be granted to this request for clarification. If you reject the proposed course of action or otherwise fail to respond, we are prepared to inform you of our findings with respect to these Complaints in short order.

Sincerely,



Roger T. Severino
Director, Office for Civil Rights

Cc:

Gavin Newsom
Governor
State of California
c/o State Capitol
Suite 1173
Sacramento, CA 95814

Mark Ghaly
Secretary
California Health & Human
Services Agency
1600 Ninth Street, Room 460
Sacramento, CA 95814

Sarah Ream
Deputy Director & General
Counsel
California Department of
Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814

Xavier Becerra
Attorney General
State of California
Department of Justice
P.O. Box 944255
Sacramento, CA 94244

Michelle (Shelley) Rouillard
Director
California Department of
Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814

EXHIBIT D



XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550

Public: (916) 445-9555
Telephone: (916) 210-7913
Facsimile: (916) 324-5567
E-Mail: Karli.Eisenberg@doj.ca.gov

January 21, 2020

VIA FEDERAL EXPRESS OVERNIGHT MAIL AND ELECTRONIC MAIL
[Roger.Severino@HHS.GOV]

Roger T. Severino
Director, Office for Civil Rights
Department of Health and Human Services
Office of the Secretary
200 Independence Ave., SW
Washington, DC 20201

RE: OCR Transaction Numbers 17-274771 and 17-283890

Dear Director Severino:

On behalf of the State of California, this letter provides a response to your January 10, 2020 letter regarding California's nondiscrimination healthcare coverage requirement. Your letter requests information relating to complaints received by your office on June 27, 2017 and September 25, 2017. Specifically, your letter asks California to "state whether [the California Department of Managed Health Care (DMHC)] will exempt, as a class, all issuers and plans regulated under the Knox Keene Act that have objected, or may in the future object, to California's abortion coverage requirements." We provide our response as follows.¹

As your letter acknowledges, the DMHC regulates "health care service plans" (health plans) under the Knox-Keene Health Care Service Plan Act of 1975. Cal. Health & Safety Code

¹ By offering this response letter, we waive no rights and make no concessions regarding the lawful scope of federal funding restrictions or the proper scope of OCR's investigative jurisdiction. We do note, however, that recent federal rulemaking regarding the Weldon Amendment and OCR's authority, including HHS's attempt to add "expansive definitions in conflict with the statutes and imposing draconian financial penalties," has been enjoined by multiple courts. *City and County of San Francisco, et al. v. Azar*, -- F. Supp. 3d --, 2019 WL 6139750 (N.D. Cal. Nov. 19, 2019); *New York v. U.S. Dep't of Health & Human Servs.*, -- F. Supp. 3d --, 2019 WL 5781789 (S.D.N.Y. Nov. 6, 2019); *Washington v. Azar*, 2019 WL 6219541 (E.D. Wa. Nov. 21, 2019).

January 21, 2020
Page 2

§§ 1340–1399.864. DMHC does not regulate employers or other purchasers of health plan products.

When California learned that it had erroneously approved health plan products that violated California law, it notified those seven health plans of this error on August 22, 2014. The letters to seven licensed health plans stated that, under California law, health plans cannot discriminate against lawful abortion coverage. *See Missionary Guadalupanas of the Holy Spirit, Inc. v. Rouillard*, 38 Cal. App. 5th 421, 427-28 (Cal. Ct. App. 2019), *review denied* (Nov. 20, 2019) (confirming that DMHC’s letters stated what is required under California law—“Because California law guarantees every woman the right to choose whether to bear a child or obtain an abortion, the only legally tenable interpretation of the law is that abortions are basic health care services, which health care service plans are required to cover”). No plan objected to the Director’s letters, and all submitted amended documents complying with state law.

Following issuance of the letters, one plan, Blue Cross of California, sought an exemption from DMHC. It requested approval of contract language limiting abortion coverage for “religious employers” as defined in state law that would, consistent with limitations on federal funding of abortion in federal law, exclude abortion coverage except in the cases of rape, incest, or where the woman’s life is in danger. In October 2015, the Director granted that exemption request.

DMHC has not received any other requests from regulated licensed health plans for an exemption. If any further exemption request is received by a regulated licensed health plan, DMHC will, of course, comply with all applicable laws. The State of California, and its officials and agencies, take seriously their duties to carry out their obligations under state and federal law.

We appreciate the opportunity to work with your office. Thank you.

Sincerely,



KARLI EISENBERG
Deputy Attorney General

For XAVIER BECERRA
Attorney General

EXHIBIT E



U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office for Civil Rights

Office of the Director • Humphrey Building
200 Independence Ave, S.W. • Washington, D.C. 20201
Voice: (800) 368-1019 • TDD: (800) 537-7697
Fax: (202) 619-3818 • www.hhs.gov/ocr

VIA CERTIFIED U.S. MAIL AND ELECTRONIC MAIL [Xavier.Becerra@doj.ca.gov]

The Honorable Xavier Becerra
Attorney General
State of California
Department of Justice
1300 I Street
Sacramento, CA 95814

January 24, 2020

Notice of Violation -- OCR Transaction Numbers 17-274771 and 17-283890

Dear Governor Newsom, Attorney General Becerra, Secretary Ghaly, and Director Rouillard:

The U.S. Department of Health & Human Services's ("HHS" or the "Department") Office for Civil Rights ("OCR") has completed its investigation of the complaints filed by Missionary Guadalupanas of the Holy Spirit, Inc. (OCR Transaction Number 17-274771)¹ and Skyline Wesleyan Church (OCR Transaction Number 17-283890)² (collectively, the "Complainants"). OCR finds that the State of California ("California") has discriminated, in violation of the Weldon Amendment,³ against health care plans and issuers⁴ that did, or would, limit or exclude abortion

¹ Letter from **REDACTED** Attorney, **REDACTED**, to Michael Leoz, Regional Manager, Office for Civil Rights, U.S. Dep't of Health & Human Servs. (June. 26, 2017) (on file with HHS OCR) [hereinafter "Guadalupanas Sisters Complaint"].

² Letter from **REDACTED**, Attorney, **REDACTED**, to Office for Civil Rights, U.S. Dep't of Health & Human Servs. (Sept. 22, 2017) (on file with HHS OCR) [hereinafter "2017 Skyline Complaint"].

³ See, e.g., Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. H, § 507(d), 132 Stat. 348, 764 (Mar. 23, 2018) [hereinafter "2018 Weldon Amendment"]; Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Public Law 115-245, Div. B., sec. 507(d), 132 Stat. 2981, 3118 (Sept. 28, 2018), as extended by the Continuing Appropriations Act, 2020, and Health Extenders Act of 2019, Pub. L. No. 116-59, Div. A., sec. 101(8), 133 Stat. 1093, 1094 (Sept. 27, 2019) [hereinafter "2019 Weldon Amendment"]; Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019, and Continuing Appropriations Act, 2019, Public Law 115-245, Div. B., sec. 507(d), 132 Stat. 2981, 3118 (Sept. 28, 2018), as extended by the Further Continuing Appropriations Act, 2020, and Further Health Extenders Act of 2019, Pub. L. No. 116-69, Div. A., sec. 101(1), 133 Stat. 1134 (Nov. 21, 2019) [hereinafter "2020 CR Weldon Amendment"]; Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, Div. A., § 507(d), 133 Stat. 2534, 2607 (Dec. 20, 2019) [hereinafter "2020 Weldon Amendment"].

⁴ Under California law, a health care service plan is "[a]ny person who undertakes to arrange for the provision of health care services to subscribers or enrollees, or to pay for or to reimburse any part of the cost of those services, in return for a prepaid or periodic charge paid by or on behalf of the subscribers or enrollees." CAL. HEALTH & SAFETY CODE § 1345(f)(1). The "plan" "refers to the entity that offers health coverage, as distinct from one of more 'products' covering a specific package of benefits and services that a plan may offer to purchasers." Letter from **REDACTED**, Gen. Counsel & Deputy Dir., Dep't of Managed Health Care, Cal. Health & Human Servs. Agency, to Michael Leoz, Regional Manager, Office for Civil Rights, U.S. Dep't of Health & Human Servs., at 2 n.3 (Nov. 1, 2017) (on file with HHS OCR) [hereinafter "2017 DMHC Data Response"]. For purposes of this Notice of Violation, the term

coverage, by mandating abortion coverage in plans subject to regulation by the California Department of Managed Health Care (“DMHC”).

BACKGROUND

The Knox-Keene Health Care Service Plan Act of 1975 (“Knox-Keene Act”)⁵ requires health plan issuers operating in California to provide seven categories of “basic health care services” in their plan products. California’s DMHC licenses health plan issuers in the state⁶ and has authority to determine the scope of basic health care services under the Knox-Keene Act.⁷ In 2013, Loyola Marymount University and Santa Clara University, two religiously affiliated universities in California, implemented changes to their employee health care plans to no longer provide elective abortion coverage—changes that DMHC had previously approved.⁸

Abortion providers and advocacy groups, including Planned Parenthood, learned of this development and pressured DMHC to not only reverse its decision to allow the coverage changes, but also to make elective abortion coverage mandatory for all health care plans falling under DMHC’s jurisdiction.⁹

On August 22, 2014, DMHC responded to the pressure campaign by sending letters to seven California health care service plan issuers (the “Health Plan Issuers”) mandating they cover

“issuer(s)” or “health plan issuer(s)” refers to a “health care service plan” as defined under California law, and the terms “plan(s)”, “health plans”, “health care plans”, or “plan products” refers to the products covering a specific package of benefits and services that an issuer may offer to purchasers.

⁵ CAL. HEALTH & SAFETY CODE § 1340 *et seq.*

⁶ *See* CAL. HEALTH & SAFETY CODE § 1349 (requiring licensure unless exempted by § 1343 of California’s Health and Safety Code).

⁷ “The director shall by rule define the scope of each basic health care service that health care service plans are required to provide as a minimum for licensure under this chapter.” *Id.* at §§ 1367(i), 1345(b); CAL. CODE REGS. tit. 28, § 1300.67.

⁸ *See* OCR Interview with **REDACTED**, Vice Pres., California Catholic Conference, *et al.* (March 12, 2015) (on file with HHS OCR).

⁹ *See* E-mail from **REDACTED**, Managing Attorney, Nat’l Health Law Prog., (“NHLP”) to **REDACTED**, Dir. DMHC (Nov. 8, 2013) (on file with HHS OCR) (requesting to arrange a meeting between DMHC, NHLP, and other “allies” to address the “sensitive topic” of LMU’s and SCU’s decision to not cover elective abortions in their employee health plans). From November 2013 through Spring 2014, Planned Parenthood (lead by its Chief Legal Counsel, **REDACTED**) and, to a lesser extent, other advocacy groups, lobbied DMHC, CHHSA, and the California Governor’s Office for a legislative or administrative “fix” for “the ongoing issue of DMHC approval of employee plans that exclude abortion coverage.” E-mail from **REDACTED**, Legislative Advocate, Planned Parenthood, to **REDACTED**, Dep. Sec., CHHSA (March 17, 2014) (CHHS000052) (on file with HHS OCR). The weight of the details regarding the lobbying effort, including California’s requesting legal guidance from Planned Parenthood, are found in the trial court record in *Skyline Wesleyan Church v. Cal. Dep’t of Managed Health Care*, No. 16-cv-0501 (S.D. Cal. 2016). *See, e.g.*, Pl.’s Separate Statement Undisputed Material Facts Supp. Mot. Summ. J., *Skyline Wesleyan Church v. Cal. Dep’t of Managed Health Care*, No. 16-cv-0501 (Dkt. # 92-5) (S.D. Cal. March 9, 2018), and the declarations, depositions, and exhibits referenced therein. *See also* OCR Telephone Interview with **REDACTED**, Assoc. Gen. Counsel, Blue Cross of California, dba Anthem Blue Cross (Feb. 26, 2015) (on file with HHS OCR) [hereinafter “Anthem Blue Cross Interview”] (recounting Planned Parenthood’s advocating to DMHC that it implement the change in policy quickly).

abortion without exclusion or limitation in every plan product they offered (collectively, the “Mandate Letters”). The Health Plan Issuers were:

1. Aetna Health of California, Inc. (“Aetna”);¹⁰
2. Blue Cross of California, dba Anthem Blue Cross (“Anthem Blue Cross”);¹¹
3. California Physicians’ Service, dba Blue Shield of California (“Blue Shield”);¹²
4. Health Net of California, Inc. (“Health Net”);¹³
5. Kaiser Foundation Health Plan, Inc. dba Kaiser Foundation, Permanente Medicare Care Program (“Kaiser”);¹⁴
6. GEMCare Health Plan, Inc., dba ERD Inc., Physicians Choice by GEMCare Health Plan (“GEMCare”);¹⁵ and
7. UnitedHealthcare of California (“UnitedHealthcare”).¹⁶

Prior to sending the Mandate Letters, DMHC did not have any written rules, policies, or procedures related to abortion coverage for the health care plans under its jurisdiction.¹⁷ The Mandate Letters, and the change in position they announced, were issued without prior public notice, public comment, or hearing.¹⁸

¹⁰ See Letter from REDACTED, Dir. Cal. Dep’t of Managed Health Care, to REDACTED, Pres. Aetna, (Aug. 22, 2014), <https://www.dmhc.ca.gov/Portals/0/082214letters/aetna082214.pdf> [hereinafter “Aetna Letter”].

¹¹ See Letter from REDACTED, Dir. Cal. Dep’t of Managed Health Care, to REDACTED, Cal. Pres. of Anthem Blue Cross, (Aug. 22, 2014), <https://www.dmhc.ca.gov/Portals/0/082214letters/abc082214.pdf>.

¹² See Letter from REDACTED, Dir. Cal. Dep’t of Managed Health Care, to REDACTED, Pres. & Chief Exec. Officer, Blue Shield of Cal., (Aug. 22, 2014), <https://www.dmhc.ca.gov/Portals/0/082214letters/bsoc082214.pdf>.

¹³ See Letter from REDACTED, Dir. Cal. Dep’t of Managed Health Care, to REDACTED, Pres., W. Region Health Plan & Pres., Health Net, (Aug. 22, 2014), <https://www.dmhc.ca.gov/Portals/0/082214letters/hn082214.pdf>.

¹⁴ See Letter from REDACTED, Dir. Cal. Dep’t of Managed Health Care, to REDACTED, Senior Vice-Pres., Cal. Health Plan Operations, Kaiser, (Aug. 22, 2014), <https://www.dmhc.ca.gov/Portals/0/082214letters/k082214.pdf>.

¹⁵ See Letter from REDACTED, Dir. Cal. Dep’t of Managed Health Care, to REDACTED, Chief Exec. Officer, GEMCare, (Aug. 22, 2014), <https://www.dmhc.ca.gov/Portals/0/082214letters/gc082214.pdf>.

¹⁶ See Letter from REDACTED, Dir. Cal. Dep’t of Managed Health Care to REDACTED, UnitedHealthcare, Pres. & Chief Exec. Officer, (Aug. 22, 2014), <https://www.dmhc.ca.gov/Portals/0/082214letters/uh082214.pdf>.

¹⁷ Sept. 27, 2017 Deposition of REDACTED, former Dep. Dir. Office of Plan Licensing, DMHC (on file with HHS OCR) 41:18-21; Sept. 19, 2017 Deposition REDACTED, Dep. Dir. Leg. Affairs, DMHC (on file with HHS OCR) 15:18-16:13, 17:20–24; Sept. 20, 2017 Deposition of REDACTED former Dep. Dir. Plan & Prov. Relations, DMHC (on file with HHS OCR) 29:13-17 (“... DMHC didn’t seem to have a policy on this issue and hadn’t done—it seemed to me that they hadn’t done the—the research in regards to whether or not that—what its policy should be in regards to those exclusions . . .”).

¹⁸ Consolidated Opening Br. Pet., Opp’n Demurrer, & Supp. Writ Mandamus & Declaratory Relief at 4, *Missionary Guadalupanas of the Holy Spirit, Inc. v. Rouillard*, No. 34-2015-80002226 (Cal. Super. Ct. Aug. 12, 2016).

As a result of its edict, California forced over 28,000 people out of plans that up until that time had chosen to not cover elective abortions.¹⁹

As described further below, OCR’s current investigation was prompted by complaints alleging that California’s actions directly caused Complainants to lose health care plans that were consistent with their sincere moral or religious beliefs regarding their objection to helping pay for or facilitate elective abortion.²⁰

BACKGROUND OF THE COMPLAINTS

1. Missionary Guadalupanas of the Holy Spirit, Inc. (“Guadalupanas Sisters”)

The Guadalupanas Sisters are a Catholic order of religious women organized as a Florida nonprofit corporation and headquartered in Los Angeles, California.²¹ The Guadalupanas Sisters “endeavor to creatively live the attitudes modeled by Our Lady of Guadalupe: presence, accompaniment, solidarity and compassion towards the poorer people, especially the indigenous, migrants, and the marginalized.”²² The Guadalupanas Sisters are “faithful to the moral and theological teachings of the Roman Catholic Church”²³ and “believe that direct abortion, abortion willed either as an end or a means, is gravely contrary to the moral law.”²⁴ On June 26, 2017, the Guadalupanas Sisters filed a complaint with OCR alleging that the Mandate Letters “burden[] their conscience rights by compelling them to fund, through their premiums payments [to Kaiser], the practice of abortion on demand for other plan participants.”²⁵

¹⁹ Letter from **REDACTED**, Gen. Counsel & Deputy Dir., Dep’t of Managed Health Care, Cal. Health & Human Servs. Agency, to Michael Leoz, Regional Manager, Office for Civil Rights, U.S. Dep’t of Health & Human Servs., at 5 (Jan. 20, 2015) (on file with HHS OCR) [hereinafter “2015 DMHC Data Response”].

²⁰ Pursuant to 45 C.F.R. sections 88.1 and 88.2 (effective March 25, 2011), OCR receives and handles complaints concerning alleged violations of the Weldon Amendment in coordination with HHS funding components as appropriate. *See also* Statement of Organization, Functions, and Delegations of Authority, 83 Fed. Reg. 2,802, 2,803 (Jan. 19, 2018). This notice of violation does not rely on the final rule published on May 21, 2019, “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,” 84 Fed. Reg. 23,170, which has been vacated by courts in ongoing litigation. *See New York v. U.S. Dep’t of Health & Human Servs.*, 2019 WL 5781789, at *70 n.76 (S.D.N.Y. Nov. 6, 2019) (“The 2011 Rule, which has governed HHS’s administration of the Conscience Provisions for eight years and is unaffected by this decision, will remain in place, and continue to provide a basis for HHS to enforce these laws, pending any future rule that HHS may promulgate.”); *Id.* at *72 (“The Conscience Provisions recognize and protect undeniably important rights.”); *City and County of San Francisco v. Azar*, 2019 WL 6139750 (N.D. Cal. Nov. 19, 2019); *State of Washington v. Azar*, 2019 WL 6219541 (E.D. Wash. Nov. 21, 2019).

²¹ V. Pet. Writ Mandamus & Compl. Injunctive & Declaratory Relief & Attorneys’ Fees at ¶¶ 12-13, *Missionary Guadalupanas of the Holy Spirit, Inc. v. Rouillard*, No. 34-2015-80002226 (Cal. Super. Ct. Oct. 26, 2015).

²² Misionares Guadalupanas del Espíritu Santo, About Us, Charism, <http://mgsp.org/carisma-charism/> (last visited Jan. 23, 2020).

²³ V. Pet. at ¶ 14, *MGHS v. Rouillard* (2015).

²⁴ *Id.* at ¶ 16.

²⁵ Guadalupanas Sisters Compl. at 2. The Guadalupanas Sisters had previously “procured their insurance through a federally qualified Employee Retirement Income Security Act (“ERISA”) trust available to certain, qualified Catholic religious entities...this ERISA trust [is] not subject to California state regulations [and] excludes coverage of direct abortion of any kind.” In January 2015, the Guadalupanas Sisters no longer qualified for the ERISA trust and were

2. Skyline Wesleyan Church (“Skyline Church”)

Skyline Church is a non-profit Christian church located in La Mesa, California.²⁶ As a member of the Wesleyan denomination, Skyline Church “adheres to the Wesleyan Doctrinal Statement, including the belief that the Holy Bible is the inspired Word of God, infallible and without error.”²⁷ Skyline Church believes abortion “is a grave moral evil,”²⁸ that “violates the Bible’s command against the intentional destruction of innocent human life,” and “is inconsistent with the dignity conferred by God on creatures made in His image.”²⁹ “Skyline Church believes and teaches that participation in, facilitation of, or payment for an elective or voluntary abortion is a grave sin.”³⁰ Skyline Church expects its employees in their work and personal lives to abide by Skyline Church’s religious beliefs and teachings on abortion.³¹ “Because of its religious beliefs . . . Skyline Church seeks to offer health insurance coverage to its employees in a way that does not also cause it to pay for abortions.”³²

On September 22, 2017, Skyline Church filed a complaint with OCR alleging that the Mandate Letters violate the Weldon Amendment because California’s discrimination against health care plans forced Skyline Church to provide insurance coverage for elective abortions, “despite [its] sincerely held religious beliefs against abortion.”³³ Prior to the Mandate Letters, Skyline Church had been insured by Aetna under a plan that excluded elective abortion services.³⁴ Skyline alleges that California’s actions deprived it of insurance coverage that was consistent with its beliefs.

Although OCR’s investigation relates to the 2017 Guadalupanas and Skyline Complaints, OCR also received complaints from other parties raising similar allegations.³⁵

thus “compelled to seek recourse to commercial health plan markets to obtain health insurance for their sisters located in California,” opting to obtain coverage through Kaiser. *Id.*

²⁶ Compl. Declaratory & Injunctive Relief & Nominal Damages, ¶ 14, *Skyline Wesleyan Church v. Cal. Dep’t of Managed Health Care*, No. 37-2016-000036 (Cal. Sup. Ct. Feb. 4, 2016), *removed*, No. 16-cv-00501 (S.D. Cal. 2018), *appeal filed*, No. 18-55451 (9th Cir. Apr. 9, 2018).

²⁷ *Id.* ¶ 15.

²⁸ 2017 Skyline Compl. at 1.

²⁹ Compl. ¶ 22, *Skyline Wesleyan Church* (2018).

³⁰ *Id.* ¶ 23.

³¹ *Id.* ¶ 26.

³² *Id.* ¶ 29.

³³ 2017 Skyline Compl. at 2.

³⁴ Decl. REDACTED Supp. Pl.’s Mot. Summ. J., *Skyline Wesleyan Church v. DMHC*, No. 16-cv-00501, at ¶¶ 3-5 (S.D. Cal. Nov. 20, 2017).

³⁵ See, e.g., Complaint filed by REDACTED, received through HHS OCR Complaint Portal (October 9, 2017) (OCR Transaction No. 18-284511) (on file with HHS OCR); complaint filed by REDACTED, received through HHS OCR Complaint Portal (Jan. 9, 2018) (OCR Transaction No. 18-338383) (on file with HHS OCR); and Letter from REDACTED, Att’y for REDACTED, to Roger Severino, Dir., Office for Civil Rights (Aug. 24, 2018) (OCR Transaction No. 18-316979) (on file with HHS OCR). See also Letter from Rep. Kevin McCarthy, House Majority Leader, et al., to Hon. Sylvia Burwell, Sec., U.S. Dep’t Health & Human Servs., and Jocelyn Samuels, Dir.

JURISDICTION

Congress has included the Weldon Amendment in the Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act every year since 2004. The Weldon Amendment states, in relevant part:

None of the funds made available in this Act may be made available to a . . . State or local government, if such . . . government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.³⁶

The Weldon Amendment protects “institutional or individual health care entit[ies].”³⁷ Under the Weldon Amendment, “the term ‘health care entity’ includes an individual physician or other health care professional, a hospital, *a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.*”³⁸

The Weldon Amendment prohibits HHS from providing applicable funds to an entity that discriminates in violation of the Amendment’s terms. As a recipient, through grants or cooperative agreements, of the Federal funds from HHS that are subject to the Weldon Amendment, California is, and has been, subject to 45 C.F.R. § 75.300(a), which requires HHS funds to be awarded and implemented consistent with all U.S. statutory and public policy requirements, including nondiscrimination requirements. Therefore, HHS has the authority to ensure that both it, and covered entities, are spending Federal funds and operating programs consistent with the Federal laws applicable to those funds and programs.

OCR’S INVESTIGATION

As part of OCR’s investigation, it sent a detailed data request³⁹ to the California Health and Human Services Agency (“CHHSA”) and the DMHC, requesting information about California’s actions including “whether, and if so, how, the [CHHSA] and [DMHC], respectively, implement, provide guidance on, enforce, or plan to enforce the Knox-Keene Health Care Service Plan Act of 1975, (Cal. Health & Safety Code § 1340 *et seq.*), the California Reproductive Privacy Act (Cal. Health & Safety Code §§ 123460-123468), or Article 1, Section I, of the California Constitution, with regard to California health plans that do not cover abortions in their evidence

Office for Civil Rights (June 28, 2016) (on file with HHS OCR); H. Rept. 115-862, at 122 (July 23, 2018) (<https://www.congress.gov/115/crpt/hrpt862/CRPT-115hrpt862.pdf>).

³⁶ *E.g.*, 2020 Weldon Amendment, § 507(d)(1), 133 Stat. at 2607.

³⁷ *Id.* § 507(d)(2).

³⁸ *Id.* (emphasis added).

³⁹ Letter from Michael Leoz, Regional Manager, Office for Civil Rights, U.S. Dep’t of Health & Human Servs., to **REDACTED**, Sec., Cal. Health & Human Servs. Agency, and **REDACTED**, Dir., Cal. Dep’t Managed Health Care (Oct. 2, 2017) [hereinafter “2017 Data Request”] (on file with HHS OCR).

of coverage filings, subscriber documents, other plan documents, or otherwise, or plans that seek approval without covering abortions.”⁴⁰ OCR likewise inquired about enforcement of the Mandate Letters and provided California copies of the Guadalupanas Sisters and 2017 Skyline Complaints, along with notice of OCR’s investigation.⁴¹

OCR reviewed and analyzed California’s responses to the 2017 Data Request, as well as data request responses, interview notes, and other related documents obtained during OCR’s investigation of three complaints filed with OCR in 2014 concerning the Mandate Letters that had been closed in 2016.⁴²

OCR also reviewed and analyzed applicable pleadings, motions, briefs, discovery, deposition transcripts, declarations, affidavits, hearing transcripts and videos, and court decisions in the following matters:

- *Nat’l Family Planning & Reprod. Health Ass’n, Inc. v. Gonzales*, No. 04-cv-02148 (D. D.C. 2005).
- *Nat’l Family Planning & Reprod. Health Ass’n, Inc. v. Gonzales*, No. 05-5406 (D.C. Cir. 2006).
- *California ex rel. Lockyer v. United States*, No. 05-cv-00328 (N.D. Cal. 2005).
- *California ex rel. Lockyer v. United States*, Nos. 05–17292, 05–17312, 450 F.3d 436 (9th Cir. 2006).
- *Connecticut, et al. v. United States*, No. 09-cv-00054 (D. Conn. 2009).
- *Missionary Guadalupanas of the Holy Spirit, Inc. v. Rouillard*, No. 34-2015-80002226 (Cal. Super. Ct. 2015).
- *Missionary Guadalupanas of Holy Spirit Inc. v. Rouillard*, No. C083232 (Cal. Ct. App. 2019).
- *Skyline Wesleyan Church v. Cal. Dep’t of Managed Health Care*, No. 16-cv-0501 (S.D. Cal. 2016).
- *Skyline Wesleyan Church v. Cal. Dep’t of Managed Health Care*, No. 18-55451 (9th Cir. 2018).
- *Foothill Church, et al. v. Rouillard*, No. 15-cv-02165 (E.D. Cal. 2015).
- *Foothill Church, et al. v. Rouillard*, No. 19-15658 (9th Cir. 2019).

⁴⁰ 2017 Data Request at 3.

⁴¹ *Id.*; Letter from Luis E. Perez, Deputy Director, Conscience and Religious Freedom Div., to **REDACTED**, Sec., Cal. Health & Human Servs. Agency, and **REDACTED**, Dir., Cal. Dep’t Managed Health Care, et al. (Aug 30, 2018) (on file with HHS OCR).

⁴² On June 21, 2016, OCR closed the complaints and declined to make any finding of violation. *See* Letter from Jocelyn Samuels, Dir., Office for Civil Rights, U.S. Dep’t of Health & Human Servs., to **REDACTED**, Vice Pres. Of Legal Affairs, Life Legal Defense Found., et al. (June 21, 2016) (“Samuels Letter”) (on file with HHS OCR). However, on January 26, 2018, the Department announced that the Samuels Letter, and the analysis contained therein, no longer reflects the views of HHS, OCR, or the HHS Office of the General Counsel. 83 Fed. Reg. 3880, 3890-91.

FINDINGS AND ANALYSIS

1. The DMHC Enforced California’s Abortion Mandate against Health Care Entities that Limited or Excluded Abortion Coverage.

As the gatekeeper to the California health plan issuer market, which provides health care coverage to over 26 million Californians, the DMHC Director wields significant leverage through its regulation of over ninety-six percent of “commercial and public health plan enrollment” within the State of California.⁴³ This translates to approximately 171 different health care service plans and about 10,000 different products.⁴⁴ With limited exceptions, a health plan issuer must obtain a license from the DMHC Director to do business in California.⁴⁵ The DMHC Director issues a license when the Director determines that the health plan issuer’s application, which must contain, among other materials, copies of the evidence of coverage form, satisfies the requirements of the Knox-Keene Act.⁴⁶ A health plan issuer’s failure to provide “basic health care services” is grounds for disciplinary action.⁴⁷ A health plan issuer that commits an act or omission constituting grounds for disciplinary action may, after appropriate due process procedures, have its license suspended or revoked, or face administrative penalties.⁴⁸ Health plan issuers that do not comply with DMHC directives are subject to penalties.⁴⁹

The DMHC states that it “aggressively monitor[s]” health plan issuer compliance with the Knox-Keene Act.⁵⁰ Through post-license reviews and routine tri-annual surveys, DMHC states that it monitors “all aspects of the health plan[issuer]’s operations,” including “changes they make to their operations . . . changes in service areas, contracts, benefits or systems.”⁵¹ If DMHC identifies deficiencies, the DMHC “takes timely action against health plan[issuer]s that violate the law.”⁵² In 2017 alone, the DMHC closed 2,203 cases with penalties under the Knox-Keene Act, with assessed penalties totaling \$8.9 million.⁵³

⁴³ DEP’T OF MANAGED HEALTH CARE, CAL. HEALTH & HUMAN SERVS. AGENCY 2017 ANNUAL REPORT 10 at 3 (May 2018). Available at: <http://dmhc.ca.gov/Portals/0/Docs/DO/2017-Annual-Report-web.pdf>. [hereinafter “2017 Annual Report”].

⁴⁴ REDACTED Dep. 14:13-15:9.

⁴⁵ See CAL. HEALTH & SAFETY CODE § 1349 (requiring licensure unless exempted by § 1343 of California’s Health and Safety Code).

⁴⁶ *Id.* §§ 1351, 1353.

⁴⁷ *Id.* § 1386(b)(3)-(4).

⁴⁸ *Id.* § 1386(a).

⁴⁹ 2017 Annual Report at 12 and 16. See also REDACTED Dep. 122:5-21 (testifying that failure of a healthcare plan to provide coverage for all legal abortions is considered a violation of the Knox-Keene Act subject to administrative penalties handled by the enforcement office).

⁵⁰ 2015 DMHC Data Resp. at 3.

⁵¹ 2017 Annual Report at 10.

⁵² *Id.* at 2, 16.

⁵³ *Id.* at 16.

The DMHC Director informed each Health Plan Issuer that its “contracts contain language that . . . limit[s] or exclud[es] coverage for termination of pregnancies.”⁵⁴ The DMHC Director also mandated each of the Health Plan Issuers to “amend current health plan [issuer] documents to remove . . . coverage exclusions and limitations” for abortion.⁵⁵ “These limitations or exclusions include, but are not limited to, any exclusion of coverage for ‘voluntary’ or ‘elective’ abortions and/or any limitation of coverage to only ‘therapeutic’ or ‘medically necessary’ abortions.”⁵⁶ DMHC further instructed each Health Plan Issuer, within 90 days, to file an amendment to the Health Plan Issuer’s license by submitting revised documents, such as evidence of coverage forms.⁵⁷

The Mandate Letters declared that the limitation or exclusion of abortion in health coverage by health care entities is “inconsistent with the Knox-Keene Act and the California Constitution,”⁵⁸ and effectively presented an ultimatum: Either amend and refile license documents in violation of health care entities’ rights under the Weldon Amendment, or operate without approved plans and face possible enforcement action for being in violation of California law as set forth in the Mandate Letters.⁵⁹ This action discriminated against plans on the basis that they did not cover all abortions, notwithstanding the fact that DMHC had, for many years, consistently approved plan language limiting abortion coverage.⁶⁰

⁵⁴ *E.g.*, Aetna Letter at 1.

⁵⁵ *E.g.*, Aetna Letter at 2.

⁵⁶ *Id.* (emphasis in original).

⁵⁷ *Id.*

⁵⁸ *E.g.*, Aetna Letter at 2. In a lawsuit filed by Missionary Guadalupanas challenging the DMHC’s issuance of its Mandate Letters under the California Administrative Procedure Act, the California Court of Appeals determined that, “[b]ecause California law guarantees every woman the right to choose whether to bear a child or obtain an abortion, the only legally tenable interpretation of the law is that abortions are basic health care services, which health care service plans are required to cover.” *Missionary Guadalupanas of Holy Spirit Inc. v. Rouillard*, 38 Cal. App. 5th 421, 427-28 (Cal. Ct. App. 2019), *review denied* (Nov. 20, 2019).

⁵⁹ See CAL. HEALTH & SAFETY CODE § 1386(b)(3)-(4) (identifying a health plan issuer’s failure to provide a basic health care service as grounds for disciplinary action), and § 1386(a) (identifying that a health plan issuer that commits an act or omission constituting grounds for disciplinary action may, after appropriate due process procedures, have its license suspended or revoked or have to face administrative penalties).

⁶⁰ See, e.g., Email Communications from **REDACTED**, Department of Managed Health Care, to **REDACTED**, Associate General Counsel, Blue Shield CA, approving sample plan language that explicitly excluded coverage for “services which are . . . for or incident to elective abortion.” (Sept. 12, 2008, 11:40am) (on file with HHS OCR); “[P]rior to August 22, 2014, CDMHC’s position had been that voluntary abortions were not medically necessary under the Knox-Keene Act such that managed health care plans were not required to provide coverage.” Anthem Blue Cross Interview; “[T]here had been managed care products on the market for years with the option not to cover voluntary abortions.” Telephone Interview with **REDACTED**, Western Region General Counsel, Aetna Health of CA (Feb. 26, 2015) (on file with HHS OCR) [hereinafter “Aetna Interview”]; “For religious groups, United Healthcare has historically covered medically necessary termination of pregnancy” as opposed to covering “voluntary termination of pregnancy . . . United Healthcare has refiled for certain religious employers since 1997 using the same preapproved language regarding medically necessary termination of pregnancy.” Telephone Interview with **REDACTED**, Dir. of Regulatory Affairs, United Healthcare et al. (Mar. 12, 2015) (on file with HHS OCR) [hereinafter “United Healthcare Interview”]; See also Aetna Letter at 1. (“The DMHC has reviewed the relevant legal authorities and has concluded that it erroneously approved or did not object to such discriminatory language in some evidence of coverage (EOC) filings.”).

In response to the Mandate Letters, each of the issuers identified above removed coverage exclusions and limitations regarding abortion coverage because they viewed these alterations in their plan language as imperative for compliance.⁶¹ The mandated changes impacted at least 35 employer groups associated with at least 28,647 “lives enrolled” in health care plans that excluded or limited abortion coverage,⁶² including thirteen that met the definition of “religious employer” under California law.⁶³

This estimate likely significantly underrepresents the number of lives impacted for two reasons. First, this estimate is based on data from only five of the seven Health Plan Issuers.⁶⁴ Second, relevant data from Kaiser used for this estimate represents the number of employer IDs rather than lives enrolled.⁶⁵ Because more than one “life enrolled” may be associated with an employer ID,⁶⁶ Kaiser’s data likely underrepresents the number of lives enrolled in its products that limited or excluded abortion coverage.

2. California Does Not Exempt Health Care Entities that Otherwise Would Provide—and Did Provide—Coverage Limiting or Excluding Abortion.

Subsequent to the release of the Mandate Letters, the California Court of Appeals ruled that California law unequivocally requires health care service plans to cover abortion as a basic health care service, but also upheld provisions of the Knox-Keene Act that allow “the [DMHC] director [], for good cause, by rule or order” to exempt any plan or class of plan contracts from the

⁶¹ “Kaiser orally notified groups whose plans included abortion coverage restrictions that Kaiser was required to comply with CDMHC’s August 22 letter...[Life Legal Defense Fund] encouraged Kaiser to challenge the August 22 letter but Kaiser advised [Life Legal Defense Fund] that it had no choice but to comply with the letter.” Telephone Interview with **REDACTED**, Kaiser Executive Director of Policy, and **REDACTED**, Kaiser National Legal Department Senior Counsel (Mar. 3, 2015) (on file with HHS OCR) [hereinafter “Kaiser Interview”]; “Aetna viewed the amendment as necessary for regulatory compliance.” Aetna Interview; “United Healthcare was required to make a filing pursuant to the [DMHC] letter.” United Healthcare Interview.

⁶² 2015 DMHC Data Resp.at 5; Cal. Dep’t of Managed Health Care, Cal. Health & Human Servs. Agency, Health Plan Responses to DMHC Abortion Data Call 000728-31 (Sept. 30, 2014) (on file with HHS OCR) [hereinafter “DMHC Health Plan Issuer Responses”]. Of the 28,647 estimated, 22,747 represented “lives enrolled” in plan products that limited or excluded abortion coverage for Anthem Blue Cross, Blue Shield, Health Net, Aetna, and UnitedHealthcare, collectively. *Id.* The remainder of the estimate, 5,900, represented the number of employer IDs associated with Kaiser plan products that limited or excluded abortion coverage. *Id.* at 000729. DMHC had this information prior to issuing the Mandate Letters. *See* **REDACTED** Dep. 90:17-94:13, 103:2-6, 104:23-105:1, 107:2-7, 117:22-118:8; Aetna, DMHC Data Call – Abortion Coverage, Ex. E-1 (July 2, 2014) (AGO000467) (on file with HHS OCR) (responding to “data call issued . . . June 10, 2014, in which the Department seeks . . . the number of employer groups that have purchased coverage that limits or excludes abortion services . . . the number of those employers that would qualify as a ‘religious employer’ . . . [and] the total number of lives covered by [such] plans. . .”).

⁶³ DMHC Health Plan Issuer Responses at 000728; *See* CAL. HEALTH & SAFETY CODE § 1367.25(c)(1) (defining “religious employer”).

⁶⁴ DMHC requested information from six of the seven Health Plan Issuers affected and received estimates from Kaiser, United Healthcare, Blue Shield, Aetna, and Health Net. 2015 DMHC Data Resp.at 4. Anthem did not respond. *Id.* at 5 n.5. DMHC did not request data from GEMCare due to its small enrollment figures and status of its commercial business. *Id.*

⁶⁵ DMHC Health Plan Issuer Responses at 000730 n.5.

⁶⁶ *Id.*

requirement to provide all basic health care services, including abortion.⁶⁷ While exemptions are at the discretion of the director, there are no written rules, policies, or procedures governing how to handle an exemption request.⁶⁸

The Mandate Letters did not reference any available exemption process,⁶⁹ but did state (in a footnote) that no “religiously sponsored health carrier” may be required by law “to participate in the provision of or payment for a specific service if they object to doing so for reason of conscience or religion.”⁷⁰ This reference is a nearly verbatim copy of a Washington State insurance statute,⁷¹ except it excludes, without explanation, the text of a key subsection which states, “[n]o individual or organization with a religious or moral tenet opposed to a specific service may be required to purchase coverage for that service or services if they object to doing so for reason of conscience or religion.”⁷² This indicates that, while DMHC may have contemplated the possibility of exempting “religiously sponsored health carriers” (without explaining how an entity qualifies as a “carrier”), it would not, at the same time, exempt religious individuals⁷³—who object to paying for abortion coverage for themselves, their children, or others in the insurance pool—and would not exempt religious organizations, such as Complainants, that object to purchasing abortion coverage for their employees.

OCR notes that the DMHC discussed granting an exemption with some of the health care entities, and granted Anthem Blue Cross an exemption “to offer products that restrict abortion coverage to employers that meet the definition of a religious employer” under California law.⁷⁴ However, this lone exemption does not cure the impact of the Mandate Letters.

⁶⁷ CAL. HEALTH & SAFETY CODE § 1367(i); *Missionary Guadalupanas of Holy Spirit Inc. v. Rouillard*, 38 Cal. App. 5th 421, 439 (Cal. Ct. App. 2019), *review denied* (Nov. 20, 2019) (“the director clearly has the authority to exempt plan contracts from the requirements of the Knox-Keene Act.”).

⁶⁸ Sept. 19, 2017 Deposition of **REDACTED**, Dep. Dir. Legal Affairs, DMHC (on file with OCR) 32:18; 35:17.

⁶⁹ Sept. 28, 2017 Deposition of **REDACTED**, Dir., DMHC (on file with HHS OCR) 45:14-19; **REDACTED** Dep. 130:9-12.

⁷⁰ Aetna Letter at 1, n.3.

⁷¹ Compare, e.g., Aetna Letter at 1, n.3 with WASH. REV. CODE ANN. § 70.47.160(2)(a) (“No individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstances to participate in the provision of or payment for a specific service if they object to so doing for reason of conscience or religion.”).

⁷² WASH. REV. CODE ANN. § 70.47.160(3)(a). Ms. **REDACTED** was instructed by counsel not to answer why the Mandate Letters excluded this subsection. See **REDACTED** Dep. 48:19-49:7.

⁷³ Complainants’ religious beliefs regarding abortion are shared by their employees. See Consolidated Opening Br. Pet’ Opp’n Demurrer, & Supp. Writ Mandamus & Declaratory Relief at 4, *Missionary Guadalupanas of the Holy Spirit, Inc. v. Rouillard*, No. 34-2015-80002226, at 8 (Cal. Super. Ct. Aug. 12, 2016) (“Petitioner’s members have therefore been coerced into financially supporting procedures that they believe involve the killing of other human lives, in violation of their deeply-held religious and moral convictions.”); Pl.’s Mem. Points & Authorities Supp. Mot. Summ. J., *Skyline Wesleyan Church v. DMHC*, No. 16-cv-00501, at 16 (S.D. Cal. Nov. 20, 2017) (“Enforcing the abortion mandate against the church’s internal healthcare decisions simply is not in the public interest. The only people affected are those who work at the church, and they necessarily share the church’s beliefs about abortion.”).

⁷⁴ 2017 DMHC Data Resp. at 5, citing CAL. HEALTH & SAFETY CODE § 1367.25(c); see also Order Granting Def.’s Cross Mot. Summ. J. at 4, *Skyline Wesleyan Church*, No. 3:16-cv-0501 (S.D. Cal. March 9, 2018).

First, California was put on notice of the burdens imposed by the Mandate Letters by complaints filed with OCR and through long-running lawsuits over these issues filed by private entities (including the Complainants in this matter). Lawsuits are strong and explicit requests for relief, yet the State has refused to provide any relief at all in response to the litigation.⁷⁵

Second, the only exemption California offered (to a health plan issuer) was limited to plans covering a narrow set of “religious employers” under California law.⁷⁶ However, the Weldon Amendment protects from discrimination *all* plans that decline to cover abortion, without requiring any plan issuers, sponsors, or beneficiaries to have a religious character or have a religious reason for not providing or paying for such coverage. Based on the information available to OCR about those affected by the DMHC policy, even a categorical exemption of “religious employers,” as defined by California law, would have only been available to approximately 37% of those employer groups who, prior to the Mandate Letters, had health care coverage that limited or excluded abortion.⁷⁷

Third, for California’s regime to be compliant with the Weldon Amendment, exemptions from the abortion mandate cannot be discretionary, but rather, must be available to all health care entities that desire to limit or exclude coverage of abortion.

Fourth, the DMHC Director has never exempted abortion-free plans as a class,⁷⁸ nor the plans purchased by the Complainants at issue here, despite the fact that compliance with federal

⁷⁵ To OCR’s knowledge, DMHC has not taken any action to ensure Skyline Church has access to an exempted plan, despite having knowledge, since 2014, of the fact that Skyline Church meets the definition of a “religious employer” under California law, and possessing the statutory authority to exempt any person or plan contract from the abortion requirement. *See* Letter from **REDACTED**, Legal Counsel for Skyline Wesleyan Church, Foothill Church, Calvary Chapel Chino Hills, and Shepherd of the Hill Church, to **REDACTED**, Dir., DMHC (July 12, 2018) (attached as Ex. 1 to Appellant’s Mot. Supplement Record, *Skyline Wesleyan Church v. DMHC*, No. 18-55451 (9th Cir. Sept. 14, 2018); Appellants’ Opening Br., *Foothill Church v. Rouillard*, No. 19-15658, at 43 (9th Cir. Aug. 14, 2019) (“Five years later, the DMHC still refuses to make a similar accommodation for churches whose religious beliefs allow for abortion only when necessary to save the life of the mother.”). *See also* Oral Arg., 23:58-24:06, *Skyline Wesleyan Church v. DMHC*, No. 18-55451 (9th Cir. Nov. 4, 2019) (https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000016448). (Statement by Friedland, J. to counsel for DMHC: “I don’t understand why we should think that they really have a chance of getting an exemption when you’ve been fighting this tooth and nail.”).

⁷⁶ California defines “religious employer” narrowly to include only those employers for which:

- (A) The inculcation of religious values is the purpose of the entity.
- (B) The entity primarily employs persons who share the religious tenets of the entity.
- (C) The entity serves primarily persons who share the religious tenets of the entity.
- (D) The entity is a nonprofit organization as described in Section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986,1 as amended.

Cal. Health & Safety Code § 1367.25(c)(1).

⁷⁷ *See supra*, discussing the policy’s known impact on at least 35 employer groups, 13 of which met the definition of “religious employer” under California law, and 28,647 lives enrolled.

⁷⁸ *See REDACTED* Dep. 57:3-9. The DMHC Director claims that she cannot commit as to whether DMHC would approve a product sold to religious employers that excluded abortion in all cases, including rape and incest, except to save the life of the mother. *REDACTED* Dep. 51:8-54:17. California claims it has not had a chance to evaluate such a request. *See* Ans. Br. at 14, *Skyline Wesleyan Church v. DMHC*, No. 18-55451 (9th Cir. Dec. 14, 2018) (“Yet, no health plan has sought an exemption for a product that excludes all abortion coverage (including in cases of rape and incest, where the only exception is to protect the life of the woman. SER 83.”) (citing Decl. *REDACTED* Supp. Defs’ Mot. Summ. J. or in the Alt. Summ. Adjudication Claims at ¶ 2, *Skyline v. DMHC*, No. 16-cv-00501 (S.D. Cal. Nov. 20, 2017)

law, namely, the Weldon Amendment, is *per se* good cause for doing precisely that, and DMHC has long been aware of the conflict.

Finally, before concluding this investigation, OCR wrote California, asking it to confirm or deny whether it would utilize the exemption process under state law “to align DMHC practices to be consistent with the Weldon Amendment” and to clearly provide relief to all plans as a class so that they may decline to provide abortion coverage without discrimination by the State.⁷⁹ In response, California ignored OCR’s specific request and instead reasserted its purported authority to issue the Mandate Letters and stated that it would consider exemption requests from regulated health plan issuers without any reference to how such requests will be solicited, treated, or resolved, if at all.⁸⁰ California’s response further confirms its non-compliance.

3. California’s Arguments Regarding the Weldon Amendment Fail.

California has argued that, because the “[Health Plan Issuers] that received the letter already covered the legally required abortion services for the vast majority of their enrollees . . . the requirements outlined in the letter do not discriminate against the [Health Plan Issuers] for failure to cover abortion.”⁸¹ California misconstrues the plain language of the Weldon Amendment.

Pursuant to the Weldon Amendment, a covered state or local government has an absolute duty to refrain from subjecting “any . . . health care entity to discrimination on the basis that the health care entity does not . . . provide coverage of . . . abortions.”⁸² It is irrelevant that some or even most of the Health Plan Issuers’ plans covered abortion without exclusion or limitation, because the Weldon Amendment plainly defines a protected “health care entity” as a “health insurance plan . . . or any other kind of health care . . . plan.”⁸³ An issuer protected by Weldon does not lose protection because they do not object to abortion coverage in 99% of their plans, just as a covered health care professional does not lose the right to be free from state discrimination for refusing to participate in partial-birth abortions because they are willing to participate in early-term medication abortions.

(“To date, no plan has requested an exemption that would mandate that women who become pregnant as a result of rape or incest be forced to carry to term.”)). However, there is evidence in the record indicating DMHC approved such a plan in 2002. *See* Letter from **REDACTED**, Pres. and CEO, Daughters of Charity Health System, to **REDACTED**, Esq., Associate Gen. Counsel, Blue Shield of Cal. (Aug. 20, 2008) at 2 (DMHC000026) (on file with HHS OCR) (explaining DMHC had approved plan language since January 2002 that limited abortion coverage to “only if the member’s life or member’s spouse’s life would be in jeopardy as a direct result of pregnancy due to an existing medical condition.”).

⁷⁹ *See* Letter from Roger Severino, Dir., Office for Civil Rights, U.S. Dep’t of Health & Human Servs., to **REDACTED**, Dir., DMHC, et al. (Jan. 10, 2020) (on file with OCR).

⁸⁰ Letter from **REDACTED**, Dept. Att’y Gen., Cal., to Roger Severino, Dir., Office for Civil Rights, U.S. Dep’t of Health & Human Servs. (Jan. 21, 2010), at 2 (on file with OCR).

⁸¹ 2015 DMHC Data Resp.at 1, incorporated by reference in 2017 DMHC Data Resp. at 1-2.

⁸² *E.g.*, 2020 Weldon Amendment, § 507(d)(1), 133 Stat. at 2607.

⁸³ *Id.* § 507(d)(2).

By broadly conditioning licensure on abortion coverage, California discriminated, and continues to discriminate, against health care entities that did or would limit or exclude abortion coverage precisely because they would not provide coverage for abortion.

CONCLUSION AND REMEDY

Based on the evidence gathered in its investigation, and having considered California's responses to the allegations in the complaints, OCR finds California in violation of the Weldon Amendment⁸⁴ for having discriminated, and continuing to discriminate, against health care plans and issuers that did, or would otherwise, limit or exclude abortion coverage in their plan products. Because California refuses, despite ample notice and opportunity, to provide exceptions or take remedial action sufficient to comply with the Weldon Amendment, California's violation is ongoing, and implicates funding that HHS made available to it from the 2018, 2019, and 2020 Appropriations Acts applicable to the Department of Health and Human Services.

OCR is charged with helping ensure entities come into compliance with Federal laws protecting conscience and prohibiting coercion in health care, including the Weldon Amendment. Accordingly, OCR requests that the State of California notify OCR **within thirty (30) days from the date of this letter** whether the State of California intends to continue to enforce the Mandate Letters' requirement that all health care plans cover abortions, or will instead agree to take corrective action to come into compliance with the law and remedy the effects of its discriminatory conduct. OCR stands ready to assist California in coming into compliance with the Weldon Amendment.

If OCR does not receive sufficient assurance that California will cease requiring all health care plans, as a class, to cover abortion, or that it is willing to negotiate in good faith towards that end, OCR will forward this Notice of Violation and the evidence supporting OCR's findings in this matter to the appropriate HHS funding components for further action under applicable grants and contracts regulations. Such referral may ultimately result in limitations on continued receipt of certain HHS funds in accordance with the Constitution and applicable Supreme Court case law. *See, e.g.*, 45 C.F.R. § 75.371.

⁸⁴ 2018 Weldon Amendment, § 507(d), 132 Stat. at 764; 2019 Weldon Amendment, § 507(d), 132 Stat. at 3118; 2020 CR Weldon Amendment, § 507(d), 132 Stat. at 3118; 2020 Weldon Amendment, § 507(d)(1), 133 Stat. at 2607.

ADVISEMENTS

Nothing in this letter precludes OCR from making referrals to any other HHS component or other federal agencies, including the Department of Justice, for appropriate action.⁸⁵

OCR will share this Notice of Violation with the Health Plan Issuers and with the Complainants and their counsel. This Notice of Violation will be made available to the public and may include redactions.

Sincerely,

/s/

Roger T. Severino, Director

/s/

Luis E. Perez, Deputy Director
Conscience and Religious Freedom Division

⁸⁵ OCR will inform the State of California of any such referral.

Cc:

The Honorable Gavin Newsom
Governor
State of California
1303 10th Street, Suite 1173
Sacramento, CA 95814

Sarah Ream
Deputy Director & General Counsel
California Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814

Mark Ghaly
Secretary
California Health & Human Services Agency
1600 Ninth Street, Room 460
Sacramento, CA 95814

Michelle (Shelley) Rouillard
Director
California Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814

EXHIBIT F

Exhibit 398



Edmund G. Brown Jr., Governor
State of California
Health and Human Services Agency

Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814-2725
Phone: (916) 324-8176
Fax: (916) 255-5241

August 22, 2014

VIA ELECTRONIC MAIL & U.S. MAIL

Mark Morgan
California President of Anthem Blue Cross
Blue Cross of California, dba Anthem Blue Cross
21555 Oxnard Street
Woodland Hills, CA 91367

Re: Limitations or Exclusions of Abortion Services

Dear Mr. Morgan:

It has come to the attention of the Department of Managed Health Care (DMHC) that some Blue Cross of California (Blue Cross) contracts contain language that may discriminate against women by limiting or excluding coverage for termination of pregnancies. The DMHC has reviewed the relevant legal authorities and has concluded that it erroneously approved or did not object to such discriminatory language in some evidence of coverage (EOC) filings. The DMHC has performed a survey and has discovered that such language is present in EOCs for products covering a very small fraction of California health plan enrollees.

The purpose of this letter is to remind plans that the Knox-Keene Health Care Service Plan Act of 1975¹ (Knox Keene Act) requires the provision of basic health care services and the California Constitution prohibits health plans from discriminating against women who choose to terminate a pregnancy. Thus, all health plans must treat maternity services and legal abortion neutrally.

Exclusions and limitations are also incompatible with both the California Reproductive Privacy Act and multiple California judicial decisions that have unambiguously established under the California Constitution that every pregnant woman has the fundamental right to choose to either bear a child or to have a legal abortion.^{2,3} A health plan is not required to cover abortions that would be unlawful under Health & Safety Code § 123468.

¹ Health & Safety Code § 1340, *et seq.*

² Consistent with 42 U.S.C. § 18054(a)(6), this letter shall not apply to a Multi-State Plan.

³ Although health plans are required to cover legal abortions, no individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstance to participate in the provision of or payment for a specific service if they object to doing so for reason of conscience or religion. No person may be discriminated against in employment or professional privileges because of such objections.



Edmund G. Brown Jr., Governor
State of California
Health and Human Services Agency

Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814-2725
Phone: (916) 324-8176
Fax: (916) 255-5241

August 22, 2014

VIA ELECTRONIC MAIL & U.S. MAIL

John Ternan
President of Aetna Health of California, Inc.
Aetna Health of California, Inc.
2625 Shadelands Drive
Walnut Creek, CA 94898

Re: Limitations or Exclusions of Abortion Services

Dear Mr. Ternan:

It has come to the attention of the Department of Managed Health Care (DMHC) that some Aetna Health of California, Inc. (Aetna) contracts contain language that may discriminate against women by limiting or excluding coverage for termination of pregnancies. The DMHC has reviewed the relevant legal authorities and has concluded that it erroneously approved or did not object to such discriminatory language in some evidence of coverage (EOC) filings. The DMHC has performed a survey and has discovered that such language is present in EOCs for products covering a very small fraction of California health plan enrollees.

The purpose of this letter is to remind plans that the Knox-Keene Health Care Service Plan Act of 1975¹ (Knox Keene Act) requires the provision of basic health care services and the California Constitution prohibits health plans from discriminating against women who choose to terminate a pregnancy. Thus, all health plans must treat maternity services and legal abortion neutrally.

Exclusions and limitations are also incompatible with both the California Reproductive Privacy Act and multiple California judicial decisions that have unambiguously established under the California Constitution that every pregnant woman has the fundamental right to choose to either bear a child or to have a legal abortion.^{2,3} A health plan is not required to cover abortions that would be unlawful under Health & Safety Code § 123468.

¹ Health & Safety Code § 1340, *et seq.*

² Consistent with 42 U.S.C. § 18054(a)(6), this letter shall not apply to a Multi-State Plan.

³ Although health plans are required to cover legal abortions, no individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstance to participate in the provision of or payment for a specific service if they object to doing so for reason of conscience or religion. No person may be discriminated against in employment or professional privileges because of such objections.

Mr. John Ternan

August 22, 2014

Page 2

Regardless of existing EOC language, effective as of the date of this letter, Aetna must comply with California law with respect to the coverage of legal abortions.

Required Action

1. Aetna must review all current health plan documents to ensure that they are compliant with the Knox-Keene Act with regard to legal abortion. This includes plan documents previously approved or not objected to by the DMHC.

In regards to coverage for abortion services, the descriptors cited below are inconsistent with the Knox-Keene Act and the California Constitution. Aetna must amend current health plan documents to remove discriminatory coverage exclusions and limitations. These limitations or exclusions include, but are not limited to, any exclusion of coverage for “voluntary” or “elective” abortions and/or any limitation of coverage to only “therapeutic” or “medically necessary” abortions. Aetna may, consistent with the law, omit any mention of coverage for abortion services in health plan documents, as abortion is a basic health care service.

2. To demonstrate compliance, health plans are directed to file any revised relevant health plan documents (e.g. EOCs, subscriber documents, etc.) with the Department as an Amendment to the health plan’s license within 90 days of the date of this letter. The filing should highlight as well as underline the changes to the text as required by the California Code of Regulations, title 28, §1300.52(d).

Authority Cited

California Constitution, article 1, section 1; Health and Safety Code §1340, et seq. and Health and Safety Code §123460 et seq., and implementing regulations.

If you have any questions concerning the guidance issued in this letter, please contact your Plan’s Office of Plan Licensing reviewer.

Sincerely,



MICHELLE ROUILLARD
Director
Department of Managed Health Care

cc: Mary V. Anderson, Western Region General Counsel, Aetna Health of California, Inc.



Edmund G. Brown Jr., Governor
State of California
Health and Human Services Agency

Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814-2725
Phone: (916) 324-8176
Fax: (916) 255-5241

August 22, 2014

VIA ELECTRONIC MAIL & U.S. MAIL

Paul Markovich
President and Chief Executive Officer
California Physicians' Service, dba Blue Shield of California
50 Beale Street
San Francisco, CA 94105

Re: Limitations or Exclusions of Abortion Services

Dear Mr. Markovich:

It has come to the attention of the Department of Managed Health Care (DMHC) that some California Physicians' Service, dba Blue Shield of California (Blue Shield) contracts contain language that may discriminate against women by limiting or excluding coverage for termination of pregnancies. The DMHC has reviewed the relevant legal authorities and has concluded that it erroneously approved or did not object to such discriminatory language in some evidence of coverage (EOC) filings. The DMHC has performed a survey and has discovered that such language is present in EOCs for products covering a very small fraction of California health plan enrollees.

The purpose of this letter is to remind plans that the Knox-Keene Health Care Service Plan Act of 1975¹ (Knox Keene Act) requires the provision of basic health care services and the California Constitution prohibits health plans from discriminating against women who choose to terminate a pregnancy. Thus, all health plans must treat maternity services and legal abortion neutrally.

Exclusions and limitations are also incompatible with both the California Reproductive Privacy Act and multiple California judicial decisions that have unambiguously established under the California Constitution that every pregnant woman has the fundamental right to choose to either bear a child or to have a legal abortion.^{2,3} A health plan is not required to cover abortions that would be unlawful under Health & Safety Code § 123468.

¹ Health & Safety Code § 1340, *et seq.*

² Consistent with 42 U.S.C. § 18054(a)(6), this letter shall not apply to a Multi-State Plan.

³ Although health plans are required to cover legal abortions, no individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstance to participate in the provision of or payment for a specific service if they object to doing so for reason of conscience or religion. No person may be discriminated against in employment or professional privileges because of such objections.

Mr. Paul Markovich

August 22, 2014

Page 2

Regardless of existing EOC language, effective as of the date of this letter, Blue Shield must comply with California law with respect to the coverage of legal abortions.

Required Action

1. Blue Shield must review all current health plan documents to ensure that they are compliant with the Knox-Keene Act with regard to legal abortion. This includes plan documents previously approved or not objected to by the DMHC.

In regards to coverage for abortion services, the descriptors cited below are inconsistent with the Knox-Keene Act and the California Constitution. Blue Shield must amend current health plan documents to remove discriminatory coverage exclusions and limitations. These limitations or exclusions include, but are not limited to, any exclusion of coverage for “voluntary” or “elective” abortions and/or any limitation of coverage to only “therapeutic” or “medically necessary” abortions. Blue Shield may, consistent with the law, omit any mention of coverage for abortion services in health plan documents, as abortion is a basic health care service.

2. To demonstrate compliance, health plans are directed to file any revised relevant health plan documents (e.g. EOCs, subscriber documents, etc.) with the Department as an Amendment to the health plan’s license within 90 days of the date of this letter. The filing should highlight as well as underline the changes to the text as required by the California Code of Regulations, title 28, §1300.52(d).

Authority Cited

California Constitution, article 1, section 1; Health and Safety Code §1340, et seq. and Health and Safety Code §123460 et seq., and implementing regulations.

If you have any questions concerning the guidance issued in this letter, please contact your Plan’s Office of Plan Licensing reviewer.

Sincerely,



MICHELLE ROUILLARD
Director
Department of Managed Health Care

cc: Kathleen Lynaugh, Associate General Counsel, California Physicians’ Service, dba Blue Shield of California



Edmund G. Brown Jr., Governor
State of California
Health and Human Services Agency

Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814-2725
Phone: (916) 324-8176
Fax: (916) 255-5241

August 22, 2014

VIA ELECTRONIC MAIL & U.S. MAIL

Michael Myers
Chief Executive Officer
GEMCare Health Plan, Inc., dba ERD, Inc., Physicians Choice by GEMCare Health Plan
4550 California Avenue, Suite 100
Bakersfield, CA 93309

Re: Limitations or Exclusions of Abortion Services

Dear Mr. Myers:

It has come to the attention of the Department of Managed Health Care (DMHC) that some GEMCare Health Plan, Inc., dba ERD, Inc., Physicians Choice by GEMCare Health Plan (GEMCare) contracts contain language that may discriminate against women by limiting or excluding coverage for termination of pregnancies. The DMHC has reviewed the relevant legal authorities and has concluded that it erroneously approved or did not object to such discriminatory language in some evidence of coverage (EOC) filings. The DMHC has performed a survey and has discovered that such language is present in EOCs for products covering a very small fraction of California health plan enrollees.

The purpose of this letter is to remind plans that the Knox-Keene Health Care Service Plan Act of 1975¹ (Knox Keene Act) requires the provision of basic health care services and the California Constitution prohibits health plans from discriminating against women who choose to terminate a pregnancy. Thus, all health plans must treat maternity services and legal abortion neutrally.

Exclusions and limitations are also incompatible with both the California Reproductive Privacy Act and multiple California judicial decisions that have unambiguously established under the California Constitution that every pregnant woman has the fundamental right to choose to either bear a child or to have a legal abortion.^{2,3} A health plan is not required to cover abortions that would be unlawful under Health & Safety Code § 123468.

¹ Health & Safety Code § 1340, *et seq.*

² Consistent with 42 U.S.C. § 18054(a)(6), this letter shall not apply to a Multi-State Plan.

³ Although health plans are required to cover legal abortions, no individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstance to participate in the provision of or payment for a specific service if they object to doing so for reason of conscience or religion. No person may be discriminated against in employment or professional privileges because of such objections.

Mr. Michael Myers

August 22, 2014

Page 2

Regardless of existing EOC language, effective as of the date of this letter, GEMCare must comply with California law with respect to the coverage of legal abortions.

Required Action

1. GEMCare must review all current health plan documents to ensure that they are compliant with the Knox-Keene Act with regard to legal abortion. This includes plan documents previously approved or not objected to by the DMHC.

In regards to coverage for abortion services, the descriptors cited below are inconsistent with the Knox-Keene Act and the California Constitution. GEMCare must amend current health plan documents to remove discriminatory coverage exclusions and limitations. These limitations or exclusions include, but are not limited to, any exclusion of coverage for “voluntary” or “elective” abortions and/or any limitation of coverage to only “therapeutic” or “medically necessary” abortions. GEMCare may, consistent with the law, omit any mention of coverage for abortion services in health plan documents, as abortion is a basic health care service.

2. To demonstrate compliance, health plans are directed to file any revised relevant health plan documents (e.g. EOCs, subscriber documents, etc.) with the Department as an Amendment to the health plan’s license within 90 days of the date of this letter. The filing should highlight as well as underline the changes to the text as required by the California Code of Regulations, title 28, §1300.52(d).

Authority Cited

California Constitution, article 1, section 1; Health and Safety Code §1340, et seq. and Health and Safety Code §123460 et seq., and implementing regulations.

If you have any questions concerning the guidance issued in this letter, please contact your Plan’s Office of Plan Licensing reviewer.

Sincerely,



MICHELLE ROUILLARD
Director
Department of Managed Health Care



Edmund G. Brown Jr., Governor
State of California
Health and Human Services Agency

Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814-2725
Phone: (916) 324-8176
Fax: (916) 255-5241

August 22, 2014

VIA ELECTRONIC MAIL & U.S. MAIL

Steven Sell
President, Western Region Health Plan and President, Health Net of California, Inc.
Health Net of California, Inc.
21281 Burbank Blvd.
Woodland Hills, CA 91367

Re: Limitations or Exclusions of Abortion Services

Dear Mr. Sell:

It has come to the attention of the Department of Managed Health Care (DMHC) that some Health Net of California, Inc. (Health Net) contracts contain language that may discriminate against women by limiting or excluding coverage for termination of pregnancies. The DMHC has reviewed the relevant legal authorities and has concluded that it erroneously approved or did not object to such discriminatory language in some evidence of coverage (EOC) filings. The DMHC has performed a survey and has discovered that such language is present in EOCs for products covering a very small fraction of California health plan enrollees.

The purpose of this letter is to remind plans that the Knox-Keene Health Care Service Plan Act of 1975¹ (Knox Keene Act) requires the provision of basic health care services and the California Constitution prohibits health plans from discriminating against women who choose to terminate a pregnancy. Thus, all health plans must treat maternity services and legal abortion neutrally.

Exclusions and limitations are also incompatible with both the California Reproductive Privacy Act and multiple California judicial decisions that have unambiguously established under the California Constitution that every pregnant woman has the fundamental right to choose to either bear a child or to have a legal abortion.^{2,3} A health plan is not required to cover abortions that would be unlawful under Health & Safety Code § 123468.

¹ Health & Safety Code § 1340, *et seq.*

² Consistent with 42 U.S.C. § 18054(a)(6), this letter shall not apply to a Multi-State Plan.

³ Although health plans are required to cover legal abortions, no individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstance to participate in the provision of or payment for a specific service if they object to doing so for reason of conscience or religion. No person may be discriminated against in employment or professional privileges because of such objections.

Mr. Steven Sell

August 22, 2014

Page 2

Regardless of existing EOC language, effective as of the date of this letter, Health Net must comply with California law with respect to the coverage of legal abortions.

Required Action

1. Health Net must review all current health plan documents to ensure that they are compliant with the Knox-Keene Act with regard to legal abortion. This includes plan documents previously approved or not objected to by the DMHC.

In regards to coverage for abortion services, the descriptors cited below are inconsistent with the Knox-Keene Act and the California Constitution. Health Net must amend current health plan documents to remove discriminatory coverage exclusions and limitations. These limitations or exclusions include, but are not limited to, any exclusion of coverage for “voluntary” or “elective” abortions and/or any limitation of coverage to only “therapeutic” or “medically necessary” abortions. Health Net may, consistent with the law, omit any mention of coverage for abortion services in health plan documents, as abortion is a basic health care service.

2. To demonstrate compliance, health plans are directed to file any revised relevant health plan documents (e.g. EOCs, subscriber documents, etc.) with the Department as an Amendment to the health plan’s license within 90 days of the date of this letter. The filing should highlight as well as underline the changes to the text as required by the California Code of Regulations, title 28, §1300.52(d).

Authority Cited

California Constitution, article 1, section 1; Health and Safety Code §1340, et seq. and Health and Safety Code §123460 et seq., and implementing regulations.

If you have any questions concerning the guidance issued in this letter, please contact your Plan’s Office of Plan Licensing reviewer.

Sincerely,



MICHELLE ROUILLARD
Director
Department of Managed Health Care

cc: Douglas Schur, Vice President, Chief Regulatory Counsel, Health Net of California, Inc.



Edmund G. Brown Jr., Governor
State of California
Health and Human Services Agency

Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814-2725
Phone: (916) 324-8176
Fax: (916) 255-5241

August 22, 2014

VIA ELECTRONIC MAIL & U.S. MAIL

Wade J. Overgaard
Senior Vice President, California Health Plan Operations
Kaiser Foundation Health Plan, Inc., dba Kaiser Foundation, Permanente Medical Care Program
1950 Franklin Street, 20th Floor
Oakland, CA 94612

Re: Limitations or Exclusions of Abortion Services

Dear Mr. Overgaard:

It has come to the attention of the Department of Managed Health Care (DMHC) that some Kaiser Foundation Health Plan, Inc., dba Kaiser Foundation, Permanente Medical Care Program (Kaiser) contracts contain language that may discriminate against women by limiting or excluding coverage for termination of pregnancies. The DMHC has reviewed the relevant legal authorities and has concluded that it erroneously approved or did not object to such discriminatory language in some evidence of coverage (EOC) filings. The DMHC has performed a survey and has discovered that such language is present in EOCs for products covering a very small fraction of California health plan enrollees.

The purpose of this letter is to remind plans that the Knox-Keene Health Care Service Plan Act of 1975¹ (Knox Keene Act) requires the provision of basic health care services and the California Constitution prohibits health plans from discriminating against women who choose to terminate a pregnancy. Thus, all health plans must treat maternity services and legal abortion neutrally.

Exclusions and limitations are also incompatible with both the California Reproductive Privacy Act and multiple California judicial decisions that have unambiguously established under the California Constitution that every pregnant woman has the fundamental right to choose to either bear a child or to have a legal abortion.^{2,3} A health plan is not required to cover abortions that would be unlawful under Health & Safety Code § 123468.

¹ Health & Safety Code § 1340, *et seq.*

² Consistent with 42 U.S.C. § 18054(a)(6), this letter shall not apply to a Multi-State Plan.

³ Although health plans are required to cover legal abortions, no individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstance to participate in the provision of or payment for a specific service if they object to doing so for reason of conscience or religion. No person may be discriminated against in employment or professional privileges because of such objections.

Mr. Wade J. Overgaard

August 22, 2014

Page 2

Regardless of existing EOC language, effective as of the date of this letter, Kaiser must comply with California law with respect to the coverage of legal abortions.

Required Action

1. Kaiser must review all current health plan documents to ensure that they are compliant with the Knox-Keene Act with regard to legal abortion. This includes plan documents previously approved or not objected to by the DMHC.

In regards to coverage for abortion services, the descriptors cited below are inconsistent with the Knox-Keene Act and the California Constitution. Kaiser must amend current health plan documents to remove discriminatory coverage exclusions and limitations. These limitations or exclusions include, but are not limited to, any exclusion of coverage for “voluntary” or “elective” abortions and/or any limitation of coverage to only “therapeutic” or “medically necessary” abortions. Kaiser may, consistent with the law, omit any mention of coverage for abortion services in health plan documents, as abortion is a basic health care service.

2. To demonstrate compliance, health plans are directed to file any revised relevant health plan documents (e.g. EOCs, subscriber documents, etc.) with the Department as an Amendment to the health plan’s license within 90 days of the date of this letter. The filing should highlight as well as underline the changes to the text as required by the California Code of Regulations, title 28, §1300.52(d).

Authority Cited

California Constitution, article 1, section 1; Health and Safety Code §1340, et seq. and Health and Safety Code §123460 et seq., and implementing regulations.

If you have any questions concerning the guidance issued in this letter, please contact the Office of Plan Licensing reviewer.

Sincerely,



MICHELLE ROUILLARD
Director
Department of Managed Health Care

cc: Deborah Espinal, Executive Director of Policy, Kaiser Foundation Health Plan, Inc.



Edmund G. Brown Jr., Governor
State of California
Health and Human Services Agency

Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814-2725
Phone: (916) 324-8176
Fax: (916) 255-5241

August 22, 2014

VIA ELECTRONIC MAIL & U.S. MAIL

Brandon Cuevas
UnitedHealthcare of California, President and CEO
UHC of California
5995 Plaza Drive
Cypress, CA 92630

Re: Limitations or Exclusions of Abortion Services

Dear Mr. Cuevas:

It has come to the attention of the Department of Managed Health Care (DMHC) that some UHC of California (UHC) contracts contain language that may discriminate against women by limiting or excluding coverage for termination of pregnancies. The DMHC has reviewed the relevant legal authorities and has concluded that it erroneously approved or did not object to such discriminatory language in some evidence of coverage (EOC) filings. The DMHC has performed a survey and has discovered that such language is present in EOCs for products covering a very small fraction of California health plan enrollees.

The purpose of this letter is to remind plans that the Knox-Keene Health Care Service Plan Act of 1975¹ (Knox Keene Act) requires the provision of basic health care services and the California Constitution prohibits health plans from discriminating against women who choose to terminate a pregnancy. Thus, all health plans must treat maternity services and legal abortion neutrally.

Exclusions and limitations are also incompatible with both the California Reproductive Privacy Act and multiple California judicial decisions that have unambiguously established under the California Constitution that every pregnant woman has the fundamental right to choose to either bear a child or to have a legal abortion.^{2,3} A health plan is not required to cover abortions that would be unlawful under Health & Safety Code § 123468.

¹ Health & Safety Code § 1340, *et seq.*

² Consistent with 42 U.S.C. § 18054(a)(6), this letter shall not apply to a Multi-State Plan.

³ Although health plans are required to cover legal abortions, no individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstance to participate in the provision of or payment for a specific service if they object to doing so for reason of conscience or religion. No person may be discriminated against in employment or professional privileges because of such objections.

Mr. Brandon Cuevas

August 22, 2014

Page 2

Regardless of existing EOC language, effective as of the date of this letter, UHC must comply with California law with respect to the coverage of legal abortions.

Required Action

1. UHC must review all current health plan documents to ensure that they are compliant with the Knox-Keene Act with regard to legal abortion. This includes plan documents previously approved or not objected to by the DMHC.

In regards to coverage for abortion services, the descriptors cited below are inconsistent with the Knox-Keene Act and the California Constitution. UHC must amend current health plan documents to remove discriminatory coverage exclusions and limitations. These limitations or exclusions include, but are not limited to, any exclusion of coverage for “voluntary” or “elective” abortions and/or any limitation of coverage to only “therapeutic” or “medically necessary” abortions. UHC may, consistent with the law, omit any mention of coverage for abortion services in health plan documents, as abortion is a basic health care service.

2. To demonstrate compliance, health plans are directed to file any revised relevant health plan documents (e.g. EOCs, subscriber documents, etc.) with the Department as an Amendment to the health plan’s license within 90 days of the date of this letter. The filing should highlight as well as underline the changes to the text as required by the California Code of Regulations, title 28, §1300.52(d).

Authority Cited

California Constitution, article 1, section 1; Health and Safety Code §1340, et seq. and Health and Safety Code §123460 et seq., and implementing regulations.

If you have any questions concerning the guidance issued in this letter, please contact the Office of Plan Licensing reviewer.

Sincerely,



MICHELLE ROUILLARD
Director
Department of Managed Health Care

cc: Elizabeth Hays, Director, Regulatory Affairs, UHC of California

Mr. Mark Morgan

August 22, 2014

Page 2

Regardless of existing EOC language, effective as of the date of this letter, Blue Cross must comply with California law with respect to the coverage of legal abortions.

Required Action

1. Blue Cross must review all current health plan documents to ensure that they are compliant with the Knox-Keene Act with regard to legal abortion. This includes plan documents previously approved or not objected to by the DMHC.

In regards to coverage for abortion services, the descriptors cited below are inconsistent with the Knox-Keene Act and the California Constitution. Blue Cross must amend current health plan documents to remove discriminatory coverage exclusions and limitations. These limitations or exclusions include, but are not limited to, any exclusion of coverage for “voluntary” or “elective” abortions and/or any limitation of coverage to only “therapeutic” or “medically necessary” abortions. Blue Cross may, consistent with the law, omit any mention of coverage for abortion services in health plan documents, as abortion is a basic health care service.

2. To demonstrate compliance, health plans are directed to file any revised relevant health plan documents (e.g. EOCs, subscriber documents, etc.) with the Department as an Amendment to the health plan’s license within 90 days of the date of this letter. The filing should highlight as well as underline the changes to the text as required by the California Code of Regulations, title 28, §1300.52(d).

Authority Cited

California Constitution, article 1, section 1; Health and Safety Code §1340, et seq. and Health and Safety Code §123460 et seq., and implementing regulations.

If you have any questions concerning the guidance issued in this letter, please contact your Plan’s Office of Plan Licensing reviewer.

Sincerely,



MICHELLE ROUILLARD
Director
Department of Managed Health Care

cc: Terry German, Associate General Counsel, Blue Cross of California

EXHIBIT G

Exhibit 396



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Director
Office for Civil Rights
Washington, D.C. 20201

June 21, 2016

SENT VIA U.S. MAIL AND ELECTRONIC MAIL

Catherine W. Short, Esq.
Vice President of Legal Affairs
Life Legal Defense Foundation
P.O. Box 2105
Napa, CA 94558

Matthew S. Bowman, Esq., Senior Legal Counsel
Casey Mattox, Esq., Senior Legal Counsel
Alliance Defending Freedom
440 1st Street NW, Suite 600
Washington, D.C. 20001

James F. Sweeney, Esq.
Law Offices of James F. Sweeney
P.O. Box 320130
San Francisco, CA 94132

Michelle (Shelley) Rouillard, Director
California Department of Managed Health Care
980 9th Street, Suite 500
Sacramento, CA 95814

Re: OCR Transaction Numbers: 14-193604, 15-193782, & 15-195665

Dear Ms. Short, Mr. Bowman, Mr. Mattox, Mr. Sweeney, and Ms. Rouillard:

The Office for Civil Rights (OCR) of the U.S. Department of Health and Human Services (HHS) has concluded its investigation of allegations that the California Department of Managed Health Care (CDMHC) engaged in discrimination under the Weldon Amendment¹ by issuing letters to several health insurers directing them to amend their plan documents to remove coverage exclusions and limitations regarding elective abortions. OCR received three complaints challenging the CDMHC letter, filed on behalf of a religious organization, churches and a

¹ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. H, Sec. 507(d) (Dec. 18, 2015).

church-run school, and employees of a religiously-affiliated university. The following sets forth the results of our investigation of these complaints.

Background

On August 22, 2014, the Director of CDMHC notified seven California health insurance plans² that it had come to CDMHC's attention that each of them had issued insurance contracts that limited or excluded coverage for termination of pregnancies. CDMHC regulates health care service plans under the Knox-Keene Health Care Service Plan Act of 1975 (Act), Cal. Health & Safety Code Sections 1340-1399.864, and its letter directed each health insurer to ensure that its health plans complied with the Act's requirement to cover legal abortions. CDMHC required the insurers to amend plan documents to remove coverage exclusions and limitations for "voluntary" or "elective" abortions and any limitations on coverage to only "therapeutic" or "medically necessary" abortions and to file revised documents within 90 days. A footnote in the letter stated that "no individual health care provider, religiously sponsored health carrier, or health care facility may be required by law or contract in any circumstance to participate in the provision of or payment for a specific service if they object to doing so for reason of conscience or religion."

Implementing regulations of the Federal Health Care Provider Conscience Laws designate OCR as the office to receive complaints alleging discrimination under the Weldon Amendment. 45 C.F.R. § 88.2. OCR investigated each of the three complaints it received about the CDMHC letter, including requesting, receiving, and analyzing a written response to the complaints from CDMHC; collecting additional information from the complainants; interviewing each of the seven health insurers contacted by CDMHC, some on several occasions; and engaging in follow-up conversations with CDMHC.

OCR's investigation found that each of the insurers that received the CDMHC letter had, at the time it received the letter, included coverage for voluntary abortions in plans that it offered; upon receipt of the letter, each amended its plan documents by CDMHC's deadline to eliminate the subject exclusions from any plans that contained them. None of the insurers asserted any objection to offering coverage for voluntary abortion services and none identified any religious or moral objection that it had to such coverage.

OCR's investigation also found that Blue Cross of California (dba Anthem Blue Cross) subsequently sought and received from CDMHC an exemption to allow it to offer a plan excluding elective abortion services for religious employers as defined under California law. Cal. Health & Safety Code Section 1367.25(c)(1). As a result, CDMHC has demonstrated its willingness to authorize insurers to offer products that exclude coverage for elective abortion to such religious employers.

² The seven health insurance plans were Aetna Health of California, Inc.; Blue Cross of California, dba Anthem Blue Cross; California Physicians' Service, dba Blue Shield of California; GEMCare Health Plan, Inc., dba ERD, Inc., Physicians Choice by GEMCare Health Plan; Health Net of California, Inc.; Kaiser Foundation Health Plan, Inc., dba Kaiser Foundation, Permanente Medical Care Program; and United Healthcare of California. OCR understands that GEMCare is no longer participating in the commercial insurance marketplace.

The Weldon Amendment

The Weldon Amendment provides:

(d)(1) None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.

(2) In this subsection, the term “health care entity” includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.³

The amendment was passed to protect health care entities covered by the amendment from discrimination where those entities object to abortion on religious or moral grounds. *See State of California v. Lockyer*, 450 F.3d 436, 441 (9th Cir. 2006) (“Congress passed the Weldon Amendment precisely to keep doctors who have moral qualms about performing abortions from being put to the hard choice of acting in conformity with their beliefs or risking imprisonment or loss of professional livelihood”).

The amendment applies only to health care entities as defined therein. As the primary sponsor of the amendment, Representative Weldon himself made clear in discussing its scope:

This provision is intended to protect the decisions of physicians, nurses, clinics, hospitals, medical centers, and even health insurance providers from being forced by the government to provide, refer, or pay for abortions. . . . It explicitly clarifies existing law to state that a health care entity includes a hospital, a health professional, a provider-sponsored organization, a health maintenance organization, a health insurance plan or any other kind of health care facility. It goes on further to state that existing law protects health care entities from discrimination based on three kinds of participation in abortion: performing, training and referring.⁴

Representative Weldon further stated that the health care entities that are protected are those that “choose not to provide abortion services.”⁵ In making clear that the amendment protects those who object to the provision of abortions, he stated, “[t]he Hyde-Weldon amendment . . . simply states you cannot force the unwilling” to participate in elective abortions. “The amendment does not apply to willing abortion providers.”⁶

³ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. H, Sec. 507(d) (Dec. 18, 2015).

⁴ 150 Cong. Rec. H10090 (Statement of Rep. Weldon) (Nov. 20, 2004).

⁵ *Id.*

⁶ 151 Cong. Rec. H177 (Statement of Rep. Weldon) (Jan. 25, 2005).

Representative Weldon also made clear that the health care entities protected under the amendment are those that have objections based on religious or moral grounds:

[The Weldon Amendment] is a continuation of the Hyde policy of conscience protection. . . . The right of conscience is fundamental to our American freedoms. We should guarantee this freedom by protecting all health care providers from being forced to perform, refer, or pay for elective abortions.⁷

Findings

CDMHC is an agency and instrumentality of the State, and thus an entity to which the terms of the Weldon Amendment apply. The State of California receives federal funding under the Appropriations Act that includes the Weldon Amendment.⁸ The seven health insurers to which CDMHC sent the August 22, 2014 letter meet the definition of “health care entity” in the Weldon Amendment, as each is a “health insurance plan.” Based on the facts provided to OCR, none of the complainants meets the definition of a “health care entity” under the Weldon Amendment.

By its plain terms, the Weldon Amendment’s protections extend only to health care entities and not to individuals who are patients of, or institutions or individuals that are insured by, such entities. In addition, its author, Representative Weldon, made clear both that the amendment protects only those covered health care entities that object to the provision of abortions and that its basic purpose is to protect those entities whose objections are made on religious or moral grounds.

Here, none of the seven insurers that received the CDMHC letter – the entities that are covered under the Weldon Amendment – objected to providing coverage for abortions. All modified their plan documents to cover voluntary abortion in response to the CDMHC letter, and none has indicated to OCR that it has a religious or moral objection to abortion or to providing coverage for abortion in the products it offers. Indeed, as noted above, at the time CDMHC sent the letter, all of the insurers offered plans that covered abortion, demonstrating that they have no religious or moral objection to that procedure. As a result, there is no health care entity protected under the statute that has asserted religious or moral objections to abortion and therefore there is no covered entity that has been subject to discrimination within the meaning of the Weldon Amendment.⁹

We further note that the approach described above avoids a potentially unconstitutional application of the amendment. A finding that CDMHC has violated the Weldon Amendment might require the government to rescind all funds appropriated under the Appropriations Act to

⁷ 150 Cong. Rec. H10090 (Statement of Rep. Weldon) (Nov. 20, 2004).

⁸ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. H, Sec. 507(d) (Dec. 18, 2015).

⁹ We reiterate that to the extent that entities whose religious beliefs are not protected under the Weldon Amendment nonetheless object to CDMHC’s letter, CDMHC has demonstrated its willingness to authorize insurers to offer products that exclude coverage for elective abortion to entities that qualify as religious employers under California law. See discussion of Anthem Blue Cross *supra*. Some employers may also, of course, decide to self-insure; self-insured plans are not subject to the CDMHC policy.

the State of California – including funds provided to the State not only by HHS but also by the Departments of Education and Labor, as well as other agencies. HHS’ Office of General Counsel, after consulting with the Department of Justice, has advised that such a rescission would raise substantial questions about the constitutionality of the Weldon Amendment. Specifically, in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), the Supreme Court ruled that Congress could not condition a State’s preexisting Medicaid funding on the State’s compliance with an Affordable Care Act requirement to expand the program to include all low-income adults. The Court reasoned that this threat to terminate significant independent grants was so coercive as to deprive States of any meaningful choice whether to accept the condition attached to receipt of federal funds. Following accepted canons of statutory construction, OCR’s approach, which is consistent with the views of the primary sponsor of the amendment, avoids this potentially unconstitutional application of the statute. *See Gomez v. United States*, 490 U.S. 858, 864 (1989).

Accordingly, OCR is closing its investigation of these complaints without further action.

Advisements

The determinations in this letter are not intended, nor should they be construed, to cover any issues regarding CDMHC’s compliance with the Weldon Amendment that are not specifically addressed in this letter. It neither covers issues or authorities not specifically addressed herein nor precludes future determinations about compliance that are based on subsequent investigations.

The complainant has the right not to be intimidated, threatened, or coerced by a covered entity or other person because he or she has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing held in connection with a complaint. Please take all necessary steps to ensure that no adverse action is taken against the complainants or any other individual for the filing of this complaint, providing information to OCR, or otherwise participating in this investigation.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event OCR receives such a request, we will seek to protect, to the extent provided by law, personal information which, if released, would constitute an unwarranted invasion of privacy.

Sincerely,



Jocelyn Samuels
Director, Office for Civil Rights

cc: Gabriel Ravel
Deputy Director, General Counsel
California Department of Managed Health Care

EXHIBIT H

Ashley Harrison

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Friday, October 25, 2019 2:20 PM
To: Karli Eisenberg
Cc: Kathleen Boergers; Neli Palma; Stephanie Yu; Kopplin, Rebecca M. (CIV)
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Follow Up Flag: Follow up
Flag Status: Flagged

Hi Karli,

Despite California's exceedingly broad request and the considerable resource constraints facing HHS, HHS continues to work expeditiously to respond to the FOIA request on a timely basis. HHS's response to each of the specific items you've asked for are as follows:

1. HHS will continue to endeavor to prioritize California's requests by focusing on e-mails and calendar invites.
2. HHS is reviewing the e-mails that you have highlighted and intends to make any additional productions by next Wednesday, or shortly thereafter. I believe that I have already responded to the rest of your September 26, 2019 e-mail, but please let me know if you have more specific questions.
3. I am unavailable next week because of the hearing in this case on Wednesday. However, my colleague Rebecca Kopplin is available to speak with you next Tuesday morning ET, or next Wednesday or Thursday during ET business hours.
4. As with number 2, HHS is reviewing the e-mails that you have highlighted and intends to make any additional productions by next Wednesday, or shortly thereafter.

Best,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

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From: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Sent: Tuesday, October 22, 2019 3:54 PM
To: Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Dear Ben,

Thank you for your response. While we appreciate your description of HHS's efforts, our FOIA request has, of course, been pending since April 2018. We still have outstanding questions regarding the prior production, as we outlined in our September 26, 2019 email (attached here for your reference). Based on your email, can you confirm that HHS is following our prioritized requests as we provided to you on August 2, 2019? Also, we believe, as you are insisting on monthly productions for efficiency, that a discussion of search terms to expedite production is sensible. As you know, we offered to discuss such terms on August 2, 2019.

We would appreciate the following by October 30, 2019:

- (1) Confirmation that HHS is following our prioritized requests
- (2) Responses to our September 26, 2019 email, including but not limited to, production of unredacted emails erroneously withheld
- (3) A meet and confer regarding search terms
- (4) Production of the unredacted emails with third parties erroneously withheld under the (b)(5) exemption, as identified in our September 26, 2019 email.

While we are trying to be accommodating, we reserve our right to seek intervention by the Court if the production does not appear to be continuing expeditiously and in good faith. We note that the last production was only 250 pages and you only released 8 pages in their entirety.

Best Regards,

Karli

Karli Eisenberg

Deputy Attorney General
California Department of Justice
Office of the Attorney General
1300 I Street, Sacramento, CA 95814
Office: (916) 210-7913
Fax: (916) 324-5567

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Monday, October 7, 2019 10:49 AM
To: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Dear Karli,

Thank you for your e-mails. I am happy to report that HHS still plans to make its next production around tomorrow, October 8, 2019, as I indicated in my September 20, 2019 e-mail. HHS is also currently reviewing the items that you flagged in your September 26, 2019 e-mail.

In response to your request for bi-weekly productions, HHS respectfully insists on monthly productions. Bi-weekly productions (which, contrary to your assertion, HHS has never promised) put significant demands on HHS, as the time to search, review for responsiveness, review for exemptions, and transmit to you is compressed to an untenable timeframe. In addition, monthly productions would benefit both HHS and California: as I previously

indicated, monthly productions are more efficient and may enable the agency to increase the volume of its productions.

You also asked for an estimate of when productions would be complete. Predicting productions is not an exact science. Each production requires significant resources, including searching for responsive documents, reviewing for responsiveness, reviewing for exemptions, and transmitting to you. This is compounded by the extraordinary demands on HHS's FOIA office at the moment; as I previously indicated, HHS is currently responding to scores of requests, many of which are in active litigation, and which amount to a monthly production obligation of approximately 16,375 pages. Furthermore, any prediction in this case would be even more speculative in light of the breadth of California's request. For these reasons, HHS has been careful to approximate production dates and, as I have previously indicated, is unable to predict an exact date on which production will be complete.

Despite all of this, HHS is working expeditiously to respond to California's request, as evidenced by the thousands of responsive pages produced to date: approximately 5,000 pages on July 22, 2019; 767 pages on September 5, 2019; and 203 pages on September 23, 2019. And, as indicated above, HHS plans to make another production around October 8, 2019 and monthly productions thereafter.

Last, HHS respectfully declines California's request for a *Vaughn* index. As you are no doubt aware, "[t]here is no statutory requirement of a *Vaughn* index or affidavit." See *Fiduccia v. DOJ*, 185 F.3d 1035, 1042 (9th Cir. 1999). Rather, "*Vaughn* index" is a term that the D.C. Circuit has used to describe certain evidence that the government may produce in support of its motion for summary judgment. See *id.* It is not customary for plaintiffs in FOIA cases to obtain *Vaughn* indexes in advance of summary judgment briefing, and HHS will not depart from this custom here.

Sincerely,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

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From: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Sent: Friday, October 04, 2019 3:09 PM
To: Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Dear Ben,

We are looking forward to Monday's FOIA production. We hope that the Monday production includes the referenced documents from our September 26, 2019 email and a *Vaughn* index.

We renew our request that you provide us with a date certain by which you plan for the production to be complete. Please provide us with that completion date by Monday, October 7, 2019.

Karli

Karli Eisenberg

Deputy Attorney General
California Department of Justice
Office of the Attorney General
1300 I Street, Sacramento, CA 95814
Office: (916) 210-7913
Fax: (916) 324-5567

*****Please note the new phone number.***

From: Karli Eisenberg
Sent: Thursday, September 26, 2019 4:57 PM
To: 'Takemoto, Benjamin (CIV)' <Benjamin.Takemoto@usdoj.gov>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Dear Ben,

We do not agree to a unilaterally-imposed monthly production schedule. As we have noted, we submitted our FOIA request to HHS on April 25, 2018—well over a year ago. HHS did not produce any documents until we filed this lawsuit. Indeed, after filing this lawsuit, HHS did not reach out to discuss complying with its FOIA requirements. Instead, we had to contact you to request that HHS begin complying with its mandatory, statutory obligations under FOIA. As a result of this extensive delay, we have been prejudiced and we do not agree to monthly productions of documents. We request that HHS provide documents every two weeks, as your September 4, 2019 email said that HHS would.

Regarding your productions to date, we are incredibly alarmed at the overwhelming number of redactions. There are entire pages that are redacted, with no explanation other than a simple citation to the FOIA exemption statute. As a result, we have no way of knowing the validity of that claimed FOIA exemption. In terms of the partially redacted documents, there are several redactions that seem entirely unwarranted and unlawful. For example, in your second production, there is an email exchange with Alliance Defending Freedom which is redacted. Your production cites (b)(5), but (b)(5) is reserved for *intra-agency* or *inter-agency* memorandum. We request that you immediately provide this redacted information.

Specific concerns related to the September 23, 2019 production further include the following (see attached production bate-stamped for ease of reference):

- FOIA 092319 0003 – Referenced attachment is missing; please provide immediately.
- FOIA 092319 0005 – Referenced attachment is missing; please provide immediately.
- FOIA 092319 0018 – Exemption (b)(5) protects inter-agency or intra-agency memorandum which would not be available to a party other than an agency in litigation with the agency. This third party communication must be immediately produced without redaction and complete with any attachments.

- FOIA 092319 0019 – Please produce records related to the “master list” referenced in this document.
- FOIA 092319 0026 – Please produce records related to the “master chart” referenced in this document.
- FOIA 092319 0034-35 – Exemption (b)(5) protects inter-agency or intra-agency memorandum which would not be available to a party other than an agency in litigation with the agency. This third party communication must be immediately produced without redaction and complete with any attachments.
- FOIA 092319 0043 – Please produce records related to the “Midwest list” referenced in this document.
- FOIA 092319 0065 – Please produce the attachment referenced in this document.
- FOIA 092319 0075 – Please produce records related to the “UC’s request” referenced in this document.
- FOIA 092319 0107 – Please produce “Sarah’s template” referenced in this document.
- FOIA 092319 0109 – Please produce the “excel” referenced in this document.
- FOIA 092319 0128 – Please produce the invitation list referenced in this document (for the January 18, 2018 new division event).
- FOIA 092319 0130-31 – Exemption (b)(5) protects inter-agency or intra-agency memorandum which would not be available to a party other than an agency in litigation with the agency. This third party communication must be immediately produced without redaction and complete with any attachments.
- FOIA 092319 0132-33 – Exemption (b)(5) protects inter-agency or intra-agency memorandum which would not be available to a party other than an agency in litigation with the agency. This third party communication must be immediately produced without redaction and complete with any attachments.
- FOIA 092319 0149 – Exemption (b)(5) protects inter-agency or intra-agency memorandum which would not be available to a party other than an agency in litigation with the agency. This third party communication must be immediately produced without redaction and complete with any attachments. Please also produce any records relate to OCR Transaction Number 17-264789.
- FOIA 092319 0160-69 – Exemption (b)(5) protects inter-agency or intra-agency memorandum which would not be available to a party other than an agency in litigation with the agency. This third party communication must be immediately produced without redaction and complete with any attachments.
- FOIA 092319 0171-73 – Exemption (b)(5) protects inter-agency or intra-agency memorandum which would not be available to a party other than an agency in litigation with the agency. This third party communication must be immediately produced without redaction and complete with any attachments.
- FOIA 092319 0189 – Please produce the “OCR Enforcement Chart” referenced in this document.
- FOIA 092319 0193 – Please produce records related to PIMS 17-258677 as referenced in this document.
- FOIA 092319 0195 – Please produce records related to the “2 additional cases” as referenced in this document.
- FOIA 092319 0200-03 – Exemption (b)(5) protects inter-agency or intra-agency memorandum which would not be available to a party other than an agency in litigation with the agency. This third party communication must be immediately produced without redaction and complete with any attachments.

Further, we request that HHS provide us with a *Vaughn* index for all redactions so that we can know whether the exemption is being properly claimed. Without an index, we cannot even begin to gauge the propriety of the wholesale redactions in the productions.

Lastly, we request that you provide us with a date certain by which you plan for the production to be complete. Given the slow pace at which we are receiving documents and given that such a large portion of those documents are redacted in some form, we are incredibly worried that you plan to simply continue slowly releasing documents over the next 2-4 years, without any end date. This is not what Congress intended when it passed FOIA. Also, without a certain completion date, ultimate resolution of the ongoing case we be delayed indefinitely.

Thank you for your attention to these matters, and we look forward to discussing search terms on or around October 14th.

Karli

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Friday, September 20, 2019 2:58 PM
To: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Hi Karli,

I hope this e-mail finds you well. I wanted to update you on the FOIA production as well as to chart a path forward in light of the considerable burdens facing HHS.

First, HHS plans to produce approximately 200 pages, which prioritize items #25, #24, #6, #27, and #26 by focusing on e-mails and calendar invites, on Monday, September 23. This is, as I indicated in my September 4 e-mail, approximately two weeks after September 9 (not September 20, as you indicated in your last e-mail). Following that production, HHS plans to make another production around October 8, which may or may not contain prioritized items.

After October 8, HHS intends to make monthly productions, endeavoring to produce records responsive to items #25, #24, #6, #27, and #26. Monthly productions will be more efficient and may enable the agency to increase the volume of its productions. Monthly productions are also preferable in light of the considerable burdens facing the agency. HHS's FOIA office is involved in approximately 40 litigations covering approximately 85 FOIA requests. Of those litigations, 19 are in the production phase. Currently, the FOIA office's monthly production obligation is approximately 16,375 pages.

Going forward, HHS is amenable to working with Plaintiff to generate targeted search terms to apply to documents beyond the 13,300 pages that I previously referenced. HHS has collected approximately 60 GB of additional documents, which the agency is currently in the process of rendering searchable. Once that step is complete (HHS expects it to take approximately two weeks), HHS is open to discussing search terms.

Last, as I referenced in my September 6 e-mail, HHS intends to share with you an index describing portions of the administrative record that are responsive to California's FOIA request. HHS is finalizing that index and intends to share it with you sometime next week.

Best,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

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From: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Sent: Friday, September 06, 2019 3:30 PM
To: Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Hi Ben,

Thank you for providing the tracking information. We look forward to receipt of this 700 page production and the rolling productions to follow. Per your email below, we expect the next production will be September 20.

Thank you again.

Best Regards,

Karli

Karli Eisenberg
Deputy Attorney General
California Department of Justice
Office of the Attorney General
1300 I Street, Sacramento, CA 95814
Office: (916) 210-7913
Fax: (916) 324-5567
*****Please note the new phone number.***

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Friday, September 6, 2019 12:12 PM
To: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Hi Karli,

As previously discussed, HHS has sent you an interim production in response to your FOIA request. You can find the tracking information attached.

Best,
Ben

--

Benjamin T. Takemoto

Trial Attorney

U.S. Department of Justice, Civil Division, Federal Programs Branch

P.O. Box 883, Ben Franklin Station, Washington, DC 20044

Tel: (202) 532-4252 / Fax: (202) 616-8460

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From: Takemoto, Benjamin (CIV)

Sent: Wednesday, September 04, 2019 4:43 PM

To: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>

Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>

Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Hi Karli,

I respectfully disagree with your characterization of our e-mail exchange. I told you on August 15, 2019 that HHS expected the next major stage (review of certain collected documents) to begin on August 26, 2019, but that I could update you sooner if you wanted. I did not hear from you until the evening of August 26, 2019, and I provided an update to you the following day. HHS has promptly provided Plaintiff with updates whenever it has asked, and HHS is happy to do so again here.

Taking your last question first—and at the risk of being repetitive—HHS has made a significant production to Plaintiff in the form of the 549,940 page administrative record, much of which is responsive to Plaintiff's FOIA request. To facilitate Plaintiff's understanding of the overlap between the administrative record and the FOIA request, HHS is currently working on an index identifying the documents in the administrative record that are responsive to Plaintiff's FOIA request. HHS expects to have the index completed by September 20. Further, HHS expects to make another production of approximately 700 pages by September 9.

In response to your other questions:

1. HHS is searching for all items in Plaintiff's FOIA request. And, as Plaintiff asked, HHS is attempting to prioritize items 25, 24, 6, 27, and 26 from Plaintiff's FOIA request.
2. HHS is using a combination of methods to collect potentially responsive documents, including search terms. In an effort to prioritize records responsive to item 25, HHS will use search terms.
3. HHS sent Plaintiff the administrative record on July 22. Many of the 549,940 pages in the administrative record are responsive to Plaintiff's FOIA request. Separately, HHS has collected 13,300 potentially responsive pages from certain custodians. The next production of approximately 700 pages comes from these 13,300 pages. HHS continues to search for responsive records from other custodians.
4. It is not possible at this time to predict how long it will take HHS to review and produce all responsive documents. HHS has begun to review the 13,300 potentially responsive records mentioned above. In an effort to prioritize production of documents responsive to items 25, 24, 6, 27, and 26 as Plaintiff has requested, HHS will apply search terms in connection with those items to the 13,300 potentially responsive pages. HHS expects to begin producing documents from these prioritized searches of the 13,300 records approximately two weeks after HHS's 700 page production discussed above.
5. As explained, HHS made a production on July 22, 2019. It expects the next production to occur by September 9, 2019 and additional rolling productions shortly after that.

Once again, HHS is working to diligently respond to Plaintiff's extraordinarily broad FOIA request and Plaintiff's inquiries despite the considerable resource constraints facing HHS's FOI/Privacy Acts Division, and it will continue to do so.

Best,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

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From: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Sent: Wednesday, August 28, 2019 4:13 PM
To: Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: Re: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Dear Ben,

On August 15, you informed me that you would give me "an update" on August 21 "regarding the search for documents related to the five prioritized items." You did not provide any update on August 21. After I contacted you, you still failed to give me that update. Indeed, since we have begun these meet and confer discussions, you have not provided me with any concrete details regarding production. Among many other things, despite my requests, you have not told me:

- (1) Whether HHS is searching for all items or just request #25;
- (2) Whether HHS is using certain search terms for Request #25 (or all the requests);
- (3) How many documents have been located;
- (4) How long it will take to review documents;
- (5) How long until production will begin;
- (6) What the status is related to the documents that HHS began searching for 18 months ago.

It is becoming increasingly clear that HHS is not meaningfully participating in this meet and confer and California will need to expend additional attorneys fees to seek a court order. We expect some type of concrete response by September 4 with answers to these questions and a proposed production schedule. We also expect the first production by September 9.

Sincerely,

Karli

Karli Eisenberg

Deputy Attorney General
California Department of Justice
Office of the Attorney General
1300 I Street, Sacramento, CA 95814
Office: (916) 210-7913
Fax: (916) 324-5567

*****Please note the new phone number.***

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Tuesday, August 27, 2019 3:12 PM
To: Karli Eisenberg
Cc: Kathleen Boergers; Neli Palma; Stephanie Yu; Kopplin, Rebecca M. (CIV)
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Hi Karli,

I also want to reiterate that Defendants have produced a considerable number of documents in response to Plaintiffs' FOIA request by producing to Plaintiffs the administrative record supporting the challenged rule. As you know, the administrative record is over 500,000 pages long. Of course, Defendants continue to endeavor to search for, collect, and produce documents responsive to your request that have not already been produced as part of the administrative record, but any suggestion that Defendants have not produced any responsive documents since Plaintiffs submitted their FOIA request is incorrect.

Best,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

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From: Takemoto, Benjamin (CIV)
Sent: Tuesday, August 27, 2019 4:41 PM
To: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Hi Karli,

HHS continues to work expeditiously to search for, collect, and produce documents responsive to California's FOIA request. It has collected a large quantity of potentially responsive documents, which it plans to begin reviewing for purposes of making rolling productions shortly. However, at this time, I am unable to provide a specific date when productions will begin. I will provide you with additional information as soon as I have it.

Best,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

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From: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Sent: Monday, August 26, 2019 6:23 PM
To: Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Dear Ben,

Per your email below, would you please provide me with an update? Given that HHS has been searching and reviewing documents for over 18 months, we expect a production of responsive documents within the next two weeks.

Thank you very much.

Karli

Karli Eisenberg
Deputy Attorney General
California Department of Justice
Office of the Attorney General
1300 I Street, Sacramento, CA 95814
Office: (916) 210-7913
Fax: (916) 324-5567
*****Please note the new phone number.***

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Thursday, August 15, 2019 2:51 PM
To: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu

<Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>

Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Hi Karli,

HHS has collected some, but not all, potentially responsive documents. It is in the process of collecting all potentially responsive documents. It will start running a search for documents related to the five prioritized items within the next few days and hopes to have much of the results ready for internal review by August 26. It can then begin production soon afterward. Although we appreciate your requests for a timeline, a definitive timeline is impossible to give until HHS has identified all potentially responsive documents. However, I could give you an update next Wednesday regarding the search for documents related to your five prioritized items.

Best,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

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From: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Sent: Wednesday, August 14, 2019 12:40 PM
To: Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Dear Ben,

Thanks for your response. A couple clarifications:

1. Could you clarify: Is HHS “in the process of collecting potentially responsive documents” to Request #25? Or, as to all documents?
2. As you know, we were told in May 2018 that a search was underway. *See* attached letter. What is the status of those documents for which the search has been underway for 18 months? How does that relate to our prioritization request?
3. We have asked you twice previously for a timeline. Please give us an estimate for production of responsive documents to Request #25 by close of business this Thursday, August 15, 2019 PST.

Thank you for your prompt attention to this issue.

Best Regards,

Karli

Karli Eisenberg

Deputy Attorney General
California Department of Justice
Office of the Attorney General
1300 I Street, Sacramento, CA 95814
Office: (916) 210-7913
Fax: (916) 324-5567

*****Please note the new phone number.***

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Tuesday, August 13, 2019 12:06 PM
To: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Hi Karli,

I hope this e-mail finds you well. HHS is amenable to prioritizing your request in the order that you asked for. Currently, HHS is in the process of collecting potentially responsive documents and rendering them in searchable form. Once that step is complete, it would be open to working with Plaintiff regarding search terms to apply to those potentially responsive documents.

Please let me know how you would like to proceed.

Thanks,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

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From: Takemoto, Benjamin (CIV)
Sent: Monday, August 12, 2019 4:53 PM
To: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu

<Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>

Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Hi Karli,

I don't have an update for you at the moment, but your e-mail is received and I will continue to endeavor to get you HHS's position as soon as possible.

Best,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

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From: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>

Sent: Monday, August 12, 2019 4:47 PM

To: Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>

Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>

Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Dear Ben,

Do you have an update for us on this? If we do not hear from you by the end of tomorrow, we will have to consider litigation options, including but not limited to filing a motion for summary adjudication, thereby expending additional attorneys' fees.

Thank you for your prompt attention to this matter.

Karli

Karli Eisenberg

Deputy Attorney General

California Department of Justice

Office of the Attorney General

1300 I Street, Sacramento, CA 95814

Office: (916) 210-7913

Fax: (916) 324-5567

*****Please note the new phone number.***

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Friday, August 2, 2019 10:54 AM
To: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Thank you, Karli. I will let you know of HHS's position as soon as I can.

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

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From: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Sent: Friday, August 02, 2019 1:51 PM
To: Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Dear Ben,

Thank you very much for taking the time to speak with us this morning. As we discussed, California requests that Defendants begin producing documents as soon as possible. With that in mind, our prioritized requests are: #25, #24, #6, #27, and #26. We additionally request that Defendants provide us with a timeline and/or compliance plan with regard to these five prioritized requests and more broadly with regard to the entirety of the FOIA letter and its requests therein.

Thank you very much.

Best,

Karli

Karli Eisenberg
Deputy Attorney General
California Department of Justice
Office of the Attorney General
1300 I Street, Sacramento, CA 95814
Office: (916) 210-7913
Fax: (916) 324-5567
*****Please note the new phone number.***

From: Karli Eisenberg
Sent: Thursday, August 1, 2019 1:00 PM
To: 'Takemoto, Benjamin (CIV)' <Benjamin.Takemoto@usdoj.gov>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Hi Ben,

Great. Let's actually use a dial-in number in case my colleagues are available to join:

- 888-363-4735
- Code: 273 8836#

Thank you very much.

Karli

Karli Eisenberg

Deputy Attorney General
California Department of Justice
Office of the Attorney General
1300 I Street, Sacramento, CA 95814
Office: (916) 210-7913
Fax: (916) 324-5567
*****Please note the new phone number.***

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Thursday, August 1, 2019 12:40 PM
To: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Hi Karli,

Tomorrow at 10 a.m. PT sounds great. Should I use the number in your signature block?

Thanks,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch

P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

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From: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Sent: Thursday, August 01, 2019 11:25 AM
To: Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Hi Ben,

Unfortunately, I am unavailable at noon today. Could we do today at 2 pm PT? Or tomorrow at 10 am? Or 11:30 am PT?

Thank you!

Karli

Karli Eisenberg

Deputy Attorney General
California Department of Justice
Office of the Attorney General
1300 I Street, Sacramento, CA 95814
Office: (916) 210-7913
Fax: (916) 324-5567

*****Please note the new phone number.***

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Wednesday, July 31, 2019 1:06 PM
To: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: RE: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Hi Karli,

Thanks for the e-mail. We would be happy to talk tomorrow at noon PT if that works for you. I want to emphasize, though, that we do not view this as a Rule 26(f) conference; it is merely to informally discuss California's FOIA claim.

Best,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

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From: Karli Eisenberg <Karli.Eisenberg@doj.ca.gov>
Sent: Tuesday, July 30, 2019 3:04 PM
To: Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>
Cc: Kathleen Boergers <Kathleen.Boergers@doj.ca.gov>; Neli Palma <Neli.Palma@doj.ca.gov>; Stephanie Yu <Stephanie.Yu@doj.ca.gov>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: California v. Azar et al, No. 3:19-cv-02769-WHA - FOIA Claim

Dear Ben,

We are writing to meet and confer on California's outstanding FOIA request and the associated cause of action. As it has already been over a year and Defendants have failed to produce any documents, we would likely to resolve the outstanding requests as quickly as possible without further court intervention. Among other things, we would be willing to discuss prioritizing requests. I can make myself available anytime today or Wednesday for a conference call.

We look forward to hearing from you.

Best Regards,

Karli

Karli Eisenberg
Deputy Attorney General
California Department of Justice
Office of the Attorney General
1300 I Street, Sacramento, CA 95814
Office: (916) 210-7913
Fax: (916) 324-5567
*****Please note the new phone number.***

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