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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

BRUCE ANDERSON, JOHN WILSON, ROBERT AUSTIN, individuals; and CALIFORNIA ADVOCATES FOR NURSING HOME REFORM, a California non-profit corporation,

Plaintiffs,

v.

MARK GHALY, in his official capacity as Secretary of the CALIFORNIA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant.

Case No.: 4:15-cv-05120-HSG

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: May 14, 2020
Time: 2:00 PM
Ctrm.: 2, 4th Floor
Judge: Hon. Haywood S. Gilliam, Jr.

NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT

PLEASE TAKE NOTICE that on May 14, 2020 at 2:00 PM, or as soon thereafter as the matter may be heard before the Honorable Judge Haywood S. Gilliam, Jr., in the United States District Court for the Northern District of California, located in the Ronald V. Dellums Federal Building and United States Courthouse, Courtroom 2, 4th Floor, 1301 Clay Street, Oakland, CA 94162, Plaintiffs will and hereby do move the Court for partial summary judgment on Defendant Mark Ghaly's liability.

This motion will be based on this notice of motion and motion, the memorandum of points and authorities below, and the declarations and proposed order filed concurrently.

Dated: April 2, 2020

Respectfully submitted,

BRAUNHAGEY & BORDEN LLP

By: */s/ Matthew Borden*
Matthew Borden

Attorneys for Plaintiffs Bruce Anderson, John Wilson, Robert Austin, and California Advocates for Nursing Home Reform

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Plaintiffs Bruce Anderson, Robert Austin, John Wilson, and California Advocates for Nursing Home Reform ("CANHR") respectfully submit this memorandum in support of their motion for partial summary judgment.

INTRODUCTION

This is a public-interest case that seeks to stop the State of California's refusal to follow federal laws protecting nursing-home residents' rights to quickly return home after temporary hospitalization. As detailed in Plaintiffs' concurrently filed motion for a preliminary injunction, the State's conduct is a result of agency capture and it is robbing us of crucial hospital beds in this time of crisis. Plaintiffs seek summary judgment on the limited issue of liability because there is no dispute that the State makes no effort to comply with the law.[1]

Federal law entitles nursing-home residents to a fair hearing when a facility refuses to readmit them, so that they can quickly return home if they are entitled to do so. The State provides a hearing, but then refuses to enforce its own decisions. This policy only benefits nursing homes, which dump their poorest and neediest residents into hospitals so they can replace them with more lucrative clients.

Both the Ninth Circuit and this Court have held that the State fails to satisfy its obligation to provide a fair hearing if the process it offers ultimately proves meaningless. In denying the State's motion to dismiss, this Court held that if it is true that (1) the State does not enforce Department of Health Care Services ("DHCS") hearing decisions itself, and (2) that private citizens have no feasible means to enforce such decisions, then the State is violating Plaintiffs' federal rights. (Order Denying MTD, Dkt. 43 at 10-11.) Discovery has proven that there is no dispute that both of these facts are true.

In response to an interrogatory asking the State to identify all actions it has taken to ensure DHCS readmission orders are enforced, the State answered that "it is not required to take any

[1] What remedy is appropriate, ultimately, is a question that can await another day. It is one that Plaintiffs have sought to mediate with the State, but the State has refused. (Borden Decl. ¶ 13.) In the interim, Plaintiffs have concurrently moved for preliminary injunctive relief to mitigate the worst effects of the State's illegal policy during the pendency of this litigation.

'actions' and thus, there are no non-privileged 'actions' to identify in response to this request." (Declaration of Matthew Borden ("Borden Decl."), Ex. 3 at 5-6.)

Similarly, in responses to requests for admission, the State admitted that it has no evidence of any case in which "a resident successfully obtained readmission to a skilled nursing facility as a result of filing suit under Cal. Health & Safety Code § 1430(b) to enforce [a DHCS readmission] order." (Borden Decl., Ex. 5 at 3.) It also admitted that it was unaware of any such case under Cal. Health & Safety Code § 1599.1, Cal. Code Civ. P. § 1094.5, or "any other provision of state or federal law." (*Id.* at 3-6.) In fact, it admitted it was unaware of "any case in which a resident successfully enforced an order requiring a skilled-nursing facility to readmit the resident that was issued by [DHCS]." (*Id.* at 6-7.) The reason is simple. The only evidence in the record shows that indigent residents cannot find counsel to bring such cases, state courts do not uniformly treat DHCS orders as binding, and under California appellate procedure, any successful injunction would be automatically stayed on appeal and delayed for longer than any resident could endure living in a hospital bed.

In light of these undisputed facts, Plaintiffs are entitled to judgment of liability as a matter of law. The ultimate question of what remedies are appropriate is a narrow issue that can be litigated or resolved subsequently.

FACTUAL BACKGROUND

A. The Dumping Epidemic in California

Dumping is one of the biggest issues facing nursing-home residents. (Declaration of Jonathan Evans ("Evans Decl.") ¶ 25; Declaration of Anthony Chicotel ("Chicotel Decl.") ¶¶ 2, 5-10.) When a resident's ability to pay comes exclusively from Medi-Cal, a facility has a strong financial motivation to replace the resident with someone who is either a private-pay resident or who receives money from Medicare in addition to Medi-Cal. (Chicotel Decl. ¶ 6.) Facilities have similar incentives for residents who require substantial amounts of care. If they can replace such residents with ones who require less staff time, their bottom-line increases. (*Id.*)

Federal law prohibits facilities from discharging residents, except under very limited circumstances. 42 U.S.C. § 1395i-3(c)(2)(A). Hospital dumping is a way in which facilities

circumvent this law. (Evans Decl. ¶¶ 8-9.) The facility sends the resident to a hospital, purportedly for medical or mental-health treatment, but when the hospital discharges the resident, the facility refuses to take him or her back. (*Id.*) The result is that residents are forcibly removed from their homes, their familiar surroundings, friends, and caregivers. (Evans Decl. ¶ 25; Chicotel Decl. ¶¶ 8, 10.) In hospitals, residents have no social activities. (*Ibid.*) They are often isolated from their families. (*Ibid.*) They are subjected to a higher risk that they will be given psychotropic drugs to keep them docile—which has a profound impact on their health and will to live. (*Ibid.*) Residents who can walk often lose the ability to ambulate as a result of muscle atrophy from living in a hospital bed. (Evans Decl. ¶ 25.) In sum, they are stuck in a setting wholly inappropriate for long-term residential care. (Chicotel Decl. ¶ 10.) This practice has a devastating impact on residents, including Plaintiffs, and has cost California residents tens of millions of dollars. (*Id.* ¶¶ 8, 10-11.)

Dumping in ordinary times is bad enough, but in the time of coronavirus it is deadly. Hospitals are filling with Covid-19 patients and the air is thick with coronavirus. (Evans Decl. ¶ 23.) Each day illegally discharged nursing-home residents remain in such a hospital, their chances of contracting Covid-19 increase. (*Id.*) Each day, they are subjected to the risk of contracting a disease that will leave more than one out of ten of them gasping for air on a ventilator until they expire. (*Id.*)

B. Plaintiffs' Claims

Federal law protects against dumping by requiring states to provide residents with a "fair hearing" whenever they have been refused readmission from a hospital. *See* 42 U.S.C. §§ 1395i-3(c), (e)(3); 1396r(c), (e)(3).[2] The Ninth Circuit has held that the right to a "hearing" includes the right to a meaningful result. *Anderson v. Ghaly*, 930 F.3d 1066, 1076 (9th Cir. 2019).

The Centers for Medicare and Medicaid Services ("CMS"), the federal agency tasked with enforcing the Medicaid Act, has told the State of California at least three times that it must enforce DHCS hearing decisions. (Chicotel Decl., Ex. 3 at 3-4; *id.*, Exs. 6-7.) But no California agency will do so. DHCS conducts the fair hearing. (Evans Decl. ¶¶ 11-12.) Once it issues its order,

[2] Section 1395i-3 applies to any facility that accepts Medicare reimbursement, while § 1396r applies to any facility that accepts Medicaid reimbursement. The provisions at issue here are not substantively different in the two statutes.

however, DHCS's position is that it lacks jurisdiction to act further. (Chicotel Decl., Ex. 2 (Letter from DHCS (Aug. 6, 2015)); *id.*, Ex. 4 at 2 (Letter from DHCS (Aug. 21, 2015).) The California Department of Public Health ("CDPH") has taken the position that it will not enforce DHCS orders since CDPH was not a party to the hearing. (Chicotel Decl., Ex. 5 at 2 (CDPH Memorandum at 2 (Oct. 23, 2008)).) DHCS and CDPH report directly to Defendant Ghaly.

Each of the individual Plaintiffs in this case won his fair hearing. (Declaration of Sara Anderson ("Anderson Decl."), Dkt. 13-1 ¶ 7; Declaration of Vera Washington ("Washington Decl."), Dkt. 13-3 ¶ 10; Declaration of Jeremy Wilson ("Wilson Decl."), Dkt. 15 ¶ 6.) Each of the individual Plaintiffs obtained an order from DHCS requiring the facility to admit him to the first available bed. (*Ibid.*) None of the individual Plaintiffs was able to return home because the State of California refuses to enforce its own hearing decisions. (Anderson Decl. ¶¶ 8-10; Washington Decl. ¶¶ 11, 13; Wilson Decl. ¶¶ 7-9.) Plaintiffs repeatedly petitioned the State to enforce its own decisions, but it refused to do so. (*Ibid.*)

Plaintiffs suffered cruelly as a result of the State's inaction. Plaintiff Bruce Anderson was forcibly drugged and restrained in a hospital bed for over a year. (Anderson Decl. ¶ 12; Chicotel Decl. ¶ 21.) Plaintiff Wilson, who suffered from ALS, could only communicate through eye movements. (Wilson Decl. ¶ 2.) He was removed from his familiar caregivers, who had learned how to communicate with him. (*Id.* ¶¶ 2-3.) He passed away while this case was on appeal. (Chicotel Decl. ¶ 21.) Plaintiff Austin suffered a stroke and began to lose all the therapeutic gains he made at his nursing facility because he did not receive therapy at the hospital. (Washington Decl. ¶¶ 7-8, 12.) Because Mr. Austin was deteriorating rapidly at the hospital, his sister began looking for other facilities to accept him, but could only find a facility in Crenshaw, which is over 400 miles from her house. (Washington Decl. ¶ 14.) As a result, Mr. Austin's sister can rarely visit with him, he spends the holidays alone, and he often goes long periods of time where he does not see his family. (*Id.* ¶¶ 14-15; Chicotel Decl. ¶ 21.)

When the State refused to help Plaintiffs, they enlisted the help of Plaintiff CANHR, a public-interest organization dedicated to protecting nursing-home residents that has been trying to stem the tide of resident dumping for years. (Chicotel Decl. ¶¶ 2-5; Washington Decl. ¶ 13; Wilson

Decl. ¶ 8.) Thereafter, CANHR petitioned the State to act. (Washington Decl. ¶ 13; Wilson Decl. ¶ 8.) When it again refused to do so, Plaintiffs filed this case seeking to enforce their federal rights under 42 U.S.C. § 1983.

After the Ninth Circuit issued its opinion in this case, Plaintiffs wrote Governor Gavin Newsom a letter imploring him to "do the right thing and enforce meaningful remedies" for Plaintiffs. (Borden Decl., Ex. 2.) The State did not respond, and instead filed a motion to dismiss the First Amendment Complaint ("FAC").

On January 15, 2020, the Court denied Defendant's motion to dismiss. (Dkt. 43 at 12.) The Court held that if it is true that the State does not enforce DHCS hearing decisions and that citizens have no feasible means to privately enforce such decisions, then Plaintiffs have stated a claim. (*Id.* at 10-11.) Thereafter, Plaintiffs propounded discovery on the State and the Governor to determine (1) if the State has ever done anything to enforce a DHCS readmission order, (2) if it had any evidence to support its position that any resident had ever obtained readmission to a nursing home by filing a private lawsuit to enforce a DHCS hearing decision, and (3) why the Governor had done nothing in response to Plaintiffs' repeated pleas. (Borden Decl., Exs. 3-5; Dkt. 51-1, Ex. A.) Defendant responded to Plaintiffs' discovery on March 3, and Governor Newsom refused to respond. (Borden Decl., Exs. 3-5; Dkt. 51.)

C. Defendant's Discovery Responses Admit that California Has No Effective Judicial Mechanism to Enforce DHCS Readmission Orders

Given the two principal factual issues remaining in this case—whether the State itself enforces DHCS readmission orders and whether residents can obtain private enforcement of readmission orders on their own—Plaintiffs asked the State whether it had any evidence that either predicate was true. (Borden Decl., Exs. 3-5.) Defendant answered with a litany of evasions that ultimately boiled down to a single answer—*no*—and the Governor refused to answer entirely. (*Ibid.*; Motion to Quash, Dkt. 51.)

1. The State Has Never Enforced a DHCS Readmission Order

Plaintiffs' Interrogatory No. 5 asks: "Identify all actions you have taken to ensure that orders by DHCS requiring skilled-nursing facilities to readmit a resident after the resident

exercised his or her federal right to a meaningful hearing on readmission, as required by 42 U.S.C. §§ 1395i-3(e)(3), 1396r(e)(3), *Anderson v. Ghaly*, 930 F.3d 1066, 1077 (9th Cir. 2019), and 42 C.F.R. § 431.246(a) are enforced." (Borden Decl., Ex. 3 at 5-6.) Defendant answered that "it is not required to take any 'actions' and thus, there are no non-privileged 'actions' to identify in response to this request." (*Id.*)

Defendant's responses to Plaintiff's Requests for Admission similarly reflect that the State does not enforce DHCS orders. For example, Plaintiffs' Request for Admission No. 7 inquires: "Admit that the California Department of Public Health has never issued a citation, fine, or penalty to a skilled-nursing facility for refusal to obey an order requiring it to readmit a resident that was issued by the California Department of Health Care Services after the resident exercised his or her federal right to a meaningful hearing on readmission, as required by 42 U.S.C. §§ 1395i-3(e)(3), 1396r(e)(3), *Anderson v. Ghaly*, 930 F.3d 1066, 1077 (9th Cir. 2019), and 42 C.F.R. § 43 l.246(a)." (Borden Decl., Ex. 5 at 7.) Defendant was unable to identify any such instance, and instead asserted that in three cases, CDPH had issued citations to facilities based on its own "investigation." (*Id.*) In other words, Defendant reprised the argument from his motion to dismiss, rejected by this Court, that any sanctions CDPH might levy after its own independent investigation suffice to "enforce" a DHCS order. (*Cf.* Reply in Support of MTD, Dkt. 42 at 4-5; Order Denying MTD, Dkt. 43 at 9-10.) Of course, none of the three cases Defendant identified resulted in the resident being readmitted. (Borden Decl. ¶ 2.)[3]

Finally, Request for Admission No. 11 asks: "Admit that you have done nothing to change your practices regarding enforcement of orders requiring facilities to readmit a resident that were issued by the California Department of Health Care Services after the resident exercised his or her federal right to a meaningful hearing on readmission, as required by 42 U.S.C. §§ 1395i-3(e)(3), 1396r(e)(3), *Anderson v. Ghaly*, 930 F.3d 1066, 1077 (9th Cir. 2019), and 42 C.F.R. § 431.246(a),

[3] RFA No. 8 similarly inquires: "Admit that since the time this case was filed, you have done nothing to ensure that orders by DHCS requiring skilled-nursing facilities to readmit a resident after the resident exercised his or her federal right to a meaningful hearing on readmission" (Borden Decl., Ex. 5 at 7-8.) Again, Defendant was unable to identify anything that it had done to enforce a DHCS readmission order, and instead claimed that CDPH does its own "investigations" regarding illegal discharges. (*Id.*)

in response to Judge Gilliam's order denying your motion to dismiss in *Anderson v. Ghaly*, No. 4:15-cv-5120-HSG (Jan. 15, 2020), Dkt. No. 43." (Borden Decl., Ex. 5 at 10-11.) Defendant claimed not to understand this question and refused to respond altogether. (*Id.*)

In addition to these admissions, the State has admitted that it has no documents to show that it had ever enforced a DHCS order or changed its practices to do so since the outset of this litigation. (Borden Decl., Ex. 4 at 6.) When Plaintiffs subpoenaed Governor Newsom to see what he had done to fix this problem, he refused to respond. (Subpoena to Gavin Newsom, Dkt. 51-1, Ex. A at 4; Motion to Quash, Dkt. 51.)

2. The State Has No Evidence to Support Its Argument that Private Individuals Can Gain Readmission by Bringing Private Litigation

In both the Ninth Circuit and in this Court, the State has argued that its hearing results are meaningful because it has created a private cause of action that allows residents to enforce the DHCS readmission orders themselves. (Motion to Dismiss, Dkt. 37 at 18-20.) *See also Anderson*, 930 F.3d at 1080-81. In denying Defendant's motion to dismiss, this Court explained that creating such a cause of action does not alleviate the State's obligation to provide a meaningful hearing, if in reality, indigent residents are unable to successfully use the private right of action to enforce the orders. (Dkt. 43 at 10.) In particular, the Court held that the following allegations, if proven true, sufficed to state a claim for relief:

> The FAC alleges that there are "no reported instances of any resident successfully filing" a § 1430(b) suit because of the following: (1) residents who would pursue § 1430(b) are indigent and cannot afford to find and retain counsel (given they are typically MediCal recipients); (2) state courts "do not … uniformly treat DHCS readmission orders as *res judicata*"; and (3) even if state courts did treat DHCS readmission orders as *res judicata*, any appeal from a mandatory injunction "automatically stays the injunction, and such appeals take roughly two years to resolve."

(*Id.*) Here, Plaintiffs have provided evidence that all of the above facts are true. (Chicotel Decl. ¶¶ 2-5, 15, 29; Borden Decl. ¶¶ 7-9.)

In particular, CANHR operates a hotline for people to call when they or their loved ones have been mistreated. (Chicotel Decl. ¶ 2.) CANHR also runs an attorney-referral service, where it attempts to find counsel for people who call with legal problems. (*Id.* ¶ 12.) In over a decade of

dealing with California's dumping epidemic, CANHR has almost never been able to find counsel to bring suits to enforce DHCS readmission orders because these types of suits are not perceived to be lucrative. (*Id.*)

In over a decade of dealing with the dumping epidemic, CANHR is likewise unaware of any resident ever successfully enforcing a DHCS readmission order on his or her own. (*Id.* ¶ 29; *see also* Borden Decl. ¶ 8.) Even in the few cases where a resident was able to find pro bono counsel to take the case, the resident did not end up getting readmitted. (Chicotel Decl. ¶ 13.) Plaintiffs are unaware of any case where a state court has found that a DHCS readmission order has given rise to issue or claim preclusion, and in the one state court case known to counsel, the court held that the DHCS order was non-binding. (Borden Decl. ¶ 7.)

Finally, under California law, it has been long established that "[a] mandatory injunction is automatically stayed by an appeal." *Canavarro v. Theatre and Amusement Janitors Union Local No. 9*, 15 Cal. 2d 495, 498 (1940); *see also, e.g.*, *Byington v. Superior Court*, 14 Cal. 2d 68, 70 (1939) ("an injunction mandatory in character is automatically stayed by appeal"); *Kettenhofen v. Superior Court*, 55 Cal. 2d 189, 191 (1961) ("An appeal stays a mandatory but not a prohibitory injunction."). In the California Courts of Appeal, it usually takes at least a year and a half to obtain a decision. (Borden Decl. ¶ 9.) *See also 2016 Court Statistics Reports—Statewide Caseload Trends* 28, Judicial Council of California (2016) (reporting that in 2016, 90% of civil appeals in California took up to 22 months to resolve).[4] Thus, any indigent resident who was fortunate enough to find counsel, and who succeeded in obtaining an order from a state trial court enforcing a DHCS readmission order, would still face an insurmountable 18-to-22-month delay.

In discovery, the State has admitted that it has no evidence to contradict Plaintiffs or to substantiate its argument that providing a private right of action does anything to meaningfully enforce DHCS readmission orders. The State admitted that it has no evidence of any case in which "a resident successfully obtained readmission to a skilled nursing facility as a result of filing suit under Cal. Health & Safety Code § 1430(b) to enforce [a DHCS readmission] order." (Borden Decl., Ex. 5 at 3.) It also admitted that it was unaware of any such case under Cal. Health & Safety

[4] https://www.courts.ca.gov/documents/2016-Court-Statistics-Report.pdf.

Code § 1599.1, Cal. Code Civ. P. § 1094.5, or "any other provision of state or federal law." (*Id.* at 3-6.) It admitted it was unaware of "any case in which a resident successfully enforced an order requiring a skilled-nursing facility to readmit the resident that was issued by [DHCS]." (*Id.* at 6-7.) In short, it admitted that it had no evidence to support its primary contention both on appeal and in this Court that despite state non-enforcement, residents can privately enforce a DHCS readmission order.

ARGUMENT

A party is entitled to summary judgment if the "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The purpose of summary judgment 'is to isolate and dispose of factually unsupported claims or defenses.'" *Synchronoss Techs., Inc. v. Dropbox Inc.*, 389 F. Supp. 3d 703, 709 (N.D. Cal. 2019) (Gilliam, J.) (quoting *Celotex v. Catrett*, 477 U.S. 317, 32324 (1986).) The moving party bears the initial burden of identifying the issues and evidence showing that there is no triable issue of material fact, but then the burden "shifts to the non-moving party to present facts showing a genuine issue of material fact for trial." *Id.* The court must view the evidence in the light most favorable to the non-movant, but the "mere existence of a scintilla of evidence in support of the [non-movant's] position [is] insufficient" to avoid summary judgment. *Clicks Billiards Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1257 (9th Cir. 2001); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 255 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quotation marks omitted). In light of the State's admissions in discovery and the prior rulings in this case by the Ninth Circuit and this Court, there is no genuine issue for trial.

I. PLAINTIFFS HAVE A RIGHT TO A MEANINGFUL READMISSION HEARING

Nursing-home residents discharged or transferred in violation of federal law have a right to an enforceable readmission order. *Anderson*, 930 F.3d at 1077; *see also Catanzano ex rel. Catanzano v. Wing*, 103 F.3d 223, 229 (2d Cir. 1996) ("[T]he statutory right to a fair hearing must include within it the right to effective redress." (quotation marks omitted)). Congress did not pass

the FNHRA to "create meaningless show trials that allow nursing homes to persist in improper transfers and discharges." *Anderson*, 930 F.3d at 1076.

Both the Ninth Circuit and this Court have held that the State fails to satisfy its obligation to provide a fair hearing if the process it offers ultimately proves meaningless. The Ninth Circuit held that if "that state *agencies*—namely, DHCS and CDPH—refuse to enforce favorable hearing decisions," and state *courts* also do not "enforce DHCS hearing decisions through [a] private cause of action" provided by state or federal law, then the State is violating Plaintiffs' federal rights. *Id.* at 1080-81. This Court held much the same in denying the State's motion to dismiss: If no state instrumentality enforces DHCS hearing decisions, then California violates federal law and its liability is established. (Order Denying MTD, Dkt. 43 at 10-11.)

The State concedes that it has never enforced a DHCS readmission order. It also admits that it is unaware of any nursing-home resident successfully doing so on his or her own. In other words, DHCS hearings are "meaningless show trial[s]," from which orders issue that neither the State's executive branch nor its judicial branch will enforce. *See id.* at 1076; (Chicotel Decl. ¶¶ 15-20, 22, 29). Accordingly, the State is undisputedly in violation of federal law.

II. THE STATE DOES NOT ENFORCE DHCS READMISSION ORDERS

In various briefing, the State has argued that its executive agencies engage in enforcement activities regarding residents' transfer and discharge rights. (*See, e.g.*, Motion to Dismiss, Dkt. 37 at 8-9.) However, none of these activities involve enforcing the results of the federally mandated hearing at issue in this action.

DHCS claims that it lacks jurisdiction to enforce its own hearing decisions after issuing them. (Chicotel Decl., Ex. 2 (Letter from DHCS (Aug. 21, 2015)).) And the State has candidly admitted in this proceeding that CDPH does not enforce DHCS readmission orders, and instead, makes its own independent determination about whether the resident should be readmitted, regardless of whether the resident won his or her hearing. (*See*, *e.g.*, Reply in Support of MTD, Dkt. 42 at 4 (explaining that even though Plaintiff Austin won his DHCS hearing and DHCS had issued an order requiring that the facility admit him to the first available bed, "CDPH investigated the facility that refused to readmit Plaintiff Austin, but determined that the refusal was allowable

under the federal regulations, and so did not impose a penalty").) CDPH itself has issued a memorandum expressly explaining that it does not enforce DHCS's hearing decisions: It conducts its own investigation, and if the facility convinces CDPH that DHCS got things wrong, CDPH "will not require the facility to re-admit the resident." (Chicotel Decl., Ex. 5 at 2 (CDPH Memorandum at 2 (Oct. 23, 2008)).) The State points to no other agency that might enforce a readmission order.

The State's discovery responses confirm that none of its agencies enforce readmission orders. In its interrogatory responses, the State could not identify a single "action[] [it had] taken to ensure that [readmission orders] are enforced." (Borden Decl., Ex. 3 at 5-6; *see also id.* at 6-7 (identifying no actions the State has taken "to ensure that skilled-nursing-facility residents who obtain a [readmission order] are actually readmitted to their skilled-nursing facilities").) Instead, it simply asserted that "it is not required to take any 'actions' and thus, there are no non-privileged 'actions' to identify in response to this request." (*Id.* at 5-7.) Nor does the State have any documentation of how often, if ever, "readmission orders result in readmission of the resident," or whether readmission hearing orders were effective at all. (Borden Decl., Ex. 4 at 3.)

That CDPH sometimes conducts its *own* investigation of refusals to readmit does not render the results of Plaintiffs' (or anyone's) federally mandated hearings meaningful. (Order Denying MTD, Dkt. 43 at 9-10.) To the contrary, Plaintiffs all won their hearings, and none of them was readmitted. (Anderson Decl. ¶¶ 8-10; Washington Decl. ¶¶ 11, 13; Wilson Decl. ¶¶ 7-9.) When Plaintiffs asked the State to admit that CDPH does not enforce DHCS readmission orders, the State was unable to identify any instance in which it had. (Borden Decl., Ex. 5 at 7.) Instead, the State simply argued that CDPH had *independently* investigated refusals to readmit two out of three individual plaintiffs in this case, as well as the facility's refusal to readmit an individual named Gloria Single, and had levied penalties in those cases. (*Id.*) Leaving aside that none of these three cases resulted in the resident's readmission as ordered by DHCS (Borden Decl. ¶ 2), investigating the same refusal-to-readmit complaint as DHCS is not the same as enforcing DHCS's readmission order. (Order Denying MTD, Dkt. 43 at 9-10.) No state agency does the latter.

III. RESIDENTS CANNOT ENFORCE DHCS READMISSION ORDERS ON THEIR OWN

The State also argues that DHCS hearing orders are meaningful because indigent residents can simply find counsel, bring suit under Cal. Health & Safety Code § 1430(b), and thereby force facilities to comply with DHCS's orders to readmit them. (Motion to Dismiss, Dkt. 37 at 18-20.) As the Court held in denying Defendant's motion to dismiss the FAC, private litigation is an enforcement mechanism only if it works. (Dkt. 43 at 10.) Discovery has proven that private enforcement of DHCS readmission orders has never resulted in any resident being readmitted.

As a threshold matter, there are no reported instances of any resident successfully filing such a suit. Plaintiff CANHR, whose mission it is to advocate for nursing-home residents and which often represents them in their hearings before DHCS, is aware of no such case. (Chicotel Decl. ¶ 29.) Neither is Jonathan Evans, the erstwhile president of the American Medical Director's Association and an expert in skilled-nursing care in the United States. (Evans Decl. ¶ 14.)

Neither is the State. Plaintiffs asked the State whether it was aware "of any case in which "a resident successfully obtained readmission to a skilled nursing facility as a result of filing suit under Cal. Health & Safety Code § 1430(b) to enforce [a DHCS readmission] order." (Borden Decl., Ex. 5 at 3.) It was not. (*Id.*) Plaintiffs asked if it was aware of any such case under Cal. Health & Safety Code § 1599.1, Cal. Code Civ. P. § 1094.5, or "any other provision of state or federal law." (*Id.* at 3-6.) It was not. (*Id.*) Finally, Plaintiffs asked if it was aware of "any case in which a resident successfully enforced an order requiring a skilled-nursing facility to readmit the resident that was issued by [DHCS]." (*Id.* at 6-7.) It was not. (*Id.*)

The reason there is no such case is that the population targeted for dumping is generally indigent, and lawyers are not interested in taking on such cases in the hopes that they might be able to recoup legal fees. (Chicotel Decl. ¶ 12.) CANHR runs an attorney-referral service, where it attempts to find counsel for people who call with legal problems. (*Id.*) In over 10 years of dealing with California's dumping epidemic, CANHR has almost never been able to find counsel to bring suits to enforce DHCS readmission orders because these types of suits are not perceived to be lucrative. (*Id.*)

Even if a dumped resident were to find a lawyer to take their case, state courts do not uniformly enforce the decisions as res judicata. (*Id.* ¶ 13; Borden Decl. ¶ 7.) And even if a trial court were to enter an injunction enforcing a readmission order, state appellate procedure makes enforcement impossible in any event. (Chicotel Decl. ¶ 14; Borden Decl. ¶ 9.) Under California law, an appeal from a mandatory injunction automatically stays the trial court's injunction. *Canavarro*, 15 Cal. 2d at 498; *URS Corp. v. Atkinson/Walsh Joint Venture*, 15 Cal. App. 5th 872, 884 (2017). In the California Courts of Appeal, it usually takes at least a year and a half to obtain a decision, and up to 22 months in 90% of cases. (Borden Decl. ¶ 9.) *See also 2016 Court Statistics Reports—Statewide Caseload Trends* 28, *supra*. Thus, even if an indigent resident manages to find counsel, and even if counsel successfully obtains an order from a state trial court enforcing a DHCS readmission order, the resident would still have to languish in a hospital bed for another 18 to 22 months. As a practical matter, the order is unenforceable. (Chicotel Decl. ¶ 14.) With neither executive nor judicial enforcement, California's federally mandated readmission hearings are just the sort of "arid ritual[s] of meaningless form" that the Ninth Circuit has held is not permitted by federal law. *Anderson*, 930 F.3d at 1076.

* * *

Because no state instrumentality enforces DHCS hearing decisions. the State of California is in violation of federal law. Plaintiffs are entitled to partial summary judgment on that score. What the right remedy is—what form of permanent injunctive relief will ensure that residents who obtain a favorable readmission decision are actually readmitted to their nursing homes—is a question for another day, which Plaintiffs have been trying to resolve with the State for years.

CONCLUSION

For the foregoing reasons, the Court should enter partial summary judgment in favor of Plaintiffs on the issue of liability.

Dated: April 2, 2020

Respectfully submitted,

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