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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

INDEPENDENT LIVING CENTER OF
SOUTHERN CALIFORNIA, INC., a
nonprofit California
corporation; MARGARET DOWLING,
NATHAN THORNTON, SYLVIA HEDBIG,
LINDA BLOCK, HECTOR REYES,
MICHAEL FERONA, HOMA KARIMZAD,
and BLANE BECKWORTH,

No. 2:06-cv-0435-MCE-KJM

Plaintiffs,

v.

MEMORANDUM AND ORDER

MICHAEL LEAVITT, Secretary of
U.S. Department of Health and
Human Services; SANDRA SHEWRY,
Director of California
Department of Health Services;
and STEVE WESTLY, Controller
of the State of California,

Defendants.

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1 Through the present action, Plaintiffs¹ seek to enjoin
2 implementation of the Medicare Prescription Drug, Modernization
3 and Improvement Act of 2003, 42 U.S.C. § 1395w-101, et seq.
4 ("MMA") to the extent that changes in prescription drug coverage
5 available to individuals who are both eligible for benefits under
6 Medicare and Medicaid (so-called "dual eligibles") are
7 unconstitutional. Defendant Sandra Shewry, Director of the
8 California Department of Health Services, now moves to dismiss
9 Plaintiffs' claims pertaining to the State of California,
10 pursuant to Federal Rule of Civil Procedure 12(b)(1),² on grounds
11 that this Court lacks subject matter jurisdiction over such
12 claims. Alternatively, Defendant Shewry requests that
13 Plaintiffs' claims be dismissed for failure to state a claim upon
14 which relief can be granted under Rule 12(b)(6). Defendant Steve
15 Westly, Controller of the State of California, has joined in
16 Defendant Shewry's Motion.³ For the reasons set forth below, the
17 State Defendants' Motion will be granted on jurisdictional
18 grounds.

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22 ¹Plaintiffs include the Independent Living Center of
23 Southern California, Inc. ("ILC"), an independent living center
24 established under the auspices of California Welfare and
25 Institutions Code § 19801 to provide services to disabled
persons, as well as eight individuals who qualify as dual
eligibles and who claim to have been impacted by implementation
of the MMA.

26 ²All further references to "Rule" or "Rules" are to the
Federal Rules of Civil Procedure unless otherwise noted.

27 ³Defendants Shewry and Westly will be collectively referred
28 to as "State Defendants" throughout the remainder of this
Memorandum and Order.

1 **BACKGROUND**

2
3 Title XVIII of the Social Security Act, commonly known as
4 the Medicare Act, establishes a program of federally subsidized
5 health insurance for the elderly and disabled. 42 U.S.C. §§
6 1395, et seq. Coverage available under Medicare includes
7 hospital inpatient and related care (Part A), supplemental
8 coverage for outpatient services (Part B), and a managed-care
9 alternative to Part B (known as Part C). Through enactment of
10 the MMA, Congress provided Medicare coverage for drugs. Part D
11 became effective on January 1, 2006.

12 Another portion of the Social Security Act, Title XIX,
13 establishes a separate federal-state program providing medical
14 assistance for categorically low-income persons. 42 U.S.C. §§
15 1396, et seq. This coverage, known as Medicaid, or MediCal in
16 California, is administered by the states and funded in part
17 through federal aid so long as each state's program complies with
18 applicable Medicaid laws and regulations. See Alexander v.
19 Choate, 469 U.S. 287, 289 n.1 (1985). California's MediCal
20 program is administered by the California Department of Health
21 Services.

22 So-called "dual eligibles" qualify for both Medicare and
23 Medicaid benefits. For those individuals, Medicare generally
24 pays first and Medicaid provides protection for services not
25 covered under Medicare. Prior to enactment of the MMA, Medicaid
26 paid for dual eligibles' prescription drugs.

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1 In addition to receiving a fifty percent contribution from the
2 federal government for benefits provided under Medicaid,
3 including prescription drugs, the Medicaid Act also required
4 pharmaceutical companies to make substantial rebate payments in
5 return for dispensing their products under Medicaid.

6 Exclusive provision of prescription drugs through Medicaid
7 has changed with the advent of the MMA. Under Part D, Medicare
8 becomes the primary payer for dual eligibles as to all drugs
9 covered under Medicare. The Medicaid Act was consequently
10 amended to provide that Medicaid is not available for such drugs.
11 42 U.S.C. § 1396u-5(d)(1). The State of California similarly
12 enacted Welfare and Institutions Code § 14133.23, which
13 eliminated the provision of drug benefits under MediCal to dual-
14 eligible beneficiaries that would otherwise now be covered under
15 Medicare, Part D.

16 In order to ease transition difficulties between drug
17 payment under MediCare and reassignment of dual eligibles to
18 coverage under Medicare Part D, the California Legislature
19 enacted legislation on an emergency basis to pay for Part D
20 drugs. California Welfare and Institutions Code § 14133.23(f).
21 That emergency legislation was subsequently extended until May
22 16, 2006.

23 Plaintiffs name the State Defendants in this litigation in
24 an attempt to compel California to continue payment for
25 prescription drug coverage to dual eligibles under its MediCal
26 program.

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1 Plaintiffs contend that transfer of dual eligibles' prescription
2 drug coverage to Medicare has created a "dire situation" rife
3 with the potential for damage to dual eligibles' health if needed
4 medications cannot be obtained. Plaintiffs also contend that
5 formularies assigned by Medicare are less comprehensive than the
6 drug benefits formerly available under MediCal.

7
8 **STANDARD**
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10 In moving to dismiss for lack of subject matter jurisdiction
11 pursuant to Rule 12 (b) (1), the challenging party may either make
12 a "facial attack" on the allegations of jurisdiction contained in
13 the complaint or can instead take issue with subject matter
14 jurisdiction on a factual basis ("factual attack"). Thornhill
15 Publ'n Co. v. Gen. Tel. & Elect. Corp., 594 F.2d 730, 733 (9th
16 Cir. 1979); Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d
17 884, 891 (3d Cir. 1977). If the motion constitutes a facial
18 attack, the Court must consider the factual allegations of the
19 complaint to be true. Williamson v. Tucker, 645 F.2d 404, 412
20 (5th Cir. 1981); Mortensen, 549 F.2d at 891. If the motion
21 constitutes a factual attack, however, "no presumptive
22 truthfulness attaches to plaintiff's allegations, and the
23 existence of disputed material facts will not preclude the trial
24 court from evaluating for itself the merits of jurisdictional
25 claims." Thornhill, 594 F.2d at 733 (quoting Mortensen, 549 F.2d
26 at 891).

27 If the Court grants a motion to dismiss a complaint, it must
28 then decide whether to grant leave to amend.

1 Generally, leave to amend should be denied only if it is clear
2 that the deficiencies of the complaint cannot be cured by
3 amendment. Broughton v. Cutter Labs., 622 F.2d 458, 460 (9th
4 Cir. 1980).

5
6 **ANALYSIS**

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8 The State Defendants argue that Plaintiffs' lawsuit against
9 them must fail under the Eleventh Amendment because Plaintiffs in
10 effect seek damages against the State of California, in the form
11 of continued payment for prescription drugs under MediCal,
12 despite the advent of prescription benefits under Medicare Part D
13 as provided by the MMA. The Court agrees with the State
14 Defendants' position.

15 The Eleventh Amendment bars federal courts for exercising
16 jurisdiction over a suit brought against a state in federal court
17 by its own citizens. A state is immune from such an action.
18 Papasan v. Allain, 478 U.S. 265, 276 (1986). In addition, naming
19 state officials rather than the state itself, as Plaintiffs have
20 done here by designating Sandra Shewry and Steve Westly as
21 Defendants, does not save a lawsuit from the bar imposed by the
22 Eleventh Amendment if the state is deemed the real party in
23 interest. Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 277-78
24 (1997). Where a lawsuit seeks relief that must be paid by the
25 state treasury, the state is deemed the real party in interest
26 even though individual officials are denominated as nominal
27 defendants. Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459,
28 464 (1945).

1 As indicated above, the State Defendants argue that this
2 lawsuit effectively seeks monetary relief because Plaintiff seek
3 reversion to the previous system under which dual eligibles
4 received prescription drugs under MediCal, a program funded in
5 part by state dollars. They point out that Plaintiffs seek an
6 injunction ordering "the Director... [to] pay and Dual Eligible
7 prescription," (Compl., 43:17-21), as well as ordering "the
8 Director... [to] receive, accept, process, and treat all
9 prescription drug claims of non-enrolled Dual Eligibles as being
10 prescriptions required to be paid in the Medi-Cal program and not
11 under any Medicare program." (Compl., 44:14-17).

12 Any such payments would constitute damages against the State
13 of California prohibited under the Eleventh Amendment. Those
14 damages would unquestionably impact the state treasury, and could
15 have an even more pronounced result than the previously
16 administered MediCal system for two reasons. First, with the
17 dismantling of the Medicaid drug reimbursement system, the State
18 argues that rebates previously required from pharmaceutical
19 companies might no longer available. Secondly, if California
20 were to pay for dual eligible provisions in contravention of Part
21 D Medicare, it might no longer be entitled to the matching
22 federal funds it had previously received under the old system.
23 Both these factors could well make exclusive state payment for
24 prescriptions considerably more expensive.

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1 Plaintiffs cannot avoid the import of these concerns by
2 arguing⁴ that this case falls within the limited exception to
3 Eleventh Amendment preclusion established by Ex Parte Young, 209
4 U.S. 123 (1908). In that case, suit against a state was
5 permitted where only prospective equitable relief was sought as
6 opposed to any form of money damages or other legal relief.

7 Plaintiffs here argue that the relief requested is prospective
8 and equitable only despite the obvious fiscal impact as well as
9 the fact that individual Plaintiffs would appear to seek the
10 equivalent of money damages in the form of co-pay recoupment.

11 In determining whether the Ex Parte Young exception applies,
12 courts should look to the substance rather than the form of the
13 relief sought. Papasan, 478 U.S. at 278-79. As the State points
14 out, the primary purpose driving this lawsuit is State payment
15 for prescription drugs. That goes beyond mere equitable relief,
16 as does the Plaintiffs' demand that no co-payments be required.

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19 ⁴Plaintiffs in fact have offered no substantive opposition
20 to the State Defendants' Motion to Dismiss. Procedurally, they
21 contend that both the State's Motion to Dismiss, and a
22 corresponding motion filed on behalf of the Federal Defendant,
23 should be stayed pending the Ninth Circuit's consideration of
24 Plaintiffs' appeal from this Court's denial of Plaintiffs' Motion
25 for Preliminary Judgment on May 19, 2006. That position is
26 wrong, however, since an appeal from a preliminary injunction
27 does not deprive a district court of jurisdiction. See Moltan
28 Co. v. Eagle-Picher Indus., Inc., 55 F.3d 1171, 1174 (6th Cir.
1995) (district court may proceed with action on the merits where
order denying preliminary injunction appealed). Otherwise,
Plaintiffs state only that they oppose both Motions "upon each of
the grounds which are set forth in the Plaintiffs' Memorandum in
Support of First Amended Motion for Preliminary Injunction, filed
April 2, 2006." (Opp'n, 2:15-17). That Memorandum, however,
does not include any discussion of the State Defendants' claim
for immunity under the Eleventh Amendment as posited by the
Motion presently before the Court.

1 If any doubt remained as to the propriety of maintaining
2 this action under Ex Parte Young on the basis of the relief
3 sought, that doubt is put to rest by the additional requirement
4 of the Young doctrine that "the underlying authorization upon
5 which the named official acts is asserted to be illegal." Id. at
6 277. Here there can be no doubt that the Director acted legally
7 in coordinating California's MediCal system with the changes
8 authorized by Congress in enacting Medicare's new Part D
9 provision for providing prescription drugs. Plaintiffs cannot
10 dispute this, and consequently Plaintiffs' claims against the
11 State of California fail.⁵

12
13 **CONCLUSION**

14
15 As set forth above, the Eleventh Amendment precludes this
16 Court from exercising jurisdiction over Plaintiffs' claims
17 against the State Defendants in this matter.

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24 ⁵It should also be noted that even aside from Eleventh
25 Amendment concerns, granting the relief sought by Plaintiffs
26 would amount to a mandate that the State of California reinstate
27 MediCal coverage to dual eligibles when it has already, in the
28 wake of MMA, enacted legislation withdrawing such coverage. See
California Welfare and Institutions Code § 14133.23(a) and
(b)(1). This Court cannot issue a mandate to compel fiscal
appropriations; only the state legislature can authorize such
expenditures. Hopkins v. Saunders, 93 F.3d 522, 527 (8th Cir.
1996).

1 The State Defendants' Motion to Dismiss is accordingly GRANTED⁶
2 under Rule 12(b) (1).⁷ No leave to amend will be permitted
3 inasmuch as the Court does not believe the jurisdictional defects
4 implicit in Plaintiffs' claims against the State Defendants can
5 be rectified through amendment of its Complaint.

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7 IT IS SO ORDERED.

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9 DATED: June 28, 2006

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12 MORRISON C. ENGLAND, JR.
13 UNITED STATES DISTRICT JUDGE
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25 ⁶Because oral argument will not be of material assistance,
26 the Court orders this matter submitted on the briefing. E.D.
27 Cal. Local Rule 78-230(h).

28 ⁷Given the Court's determination that Plaintiffs are
jurisdictionally barred from proceeding against the State
Defendants, it need not address alternative contentions advanced
by said Defendants that Plaintiffs' Complaint also fails to state
a claim upon which relief can be granted under Rule 12(b) (6).