

B1040 (FORM 1040) (12/15)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)		ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS BORREGO COMMUNITY HEALTH FOUNDATION, a California nonprofit public benefit corporation	DEFENDANTS CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, by and through its Director, Michelle Baas	
ATTORNEYS (Firm Name, Address, and Telephone No.) DENTONS US LLP SAMUEL R. MAIZEL (Bar No. 189301) / TANIA M. MOYRON (Bar No. 235736) 601 South Figueroa Street, Suite 2500 Los Angeles, California 90017-5704 Telephone: (213) 623-9300	ATTORNEYS (If Known) Kenneth K. Wang Office of the Attorney General, Deputy Attorney General 300 S. Spring Street No. 1702 Los Angeles, CA 90013	
PARTY (Check One Box Only) <input checked="" type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee	PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input checked="" type="checkbox"/> Other <input type="checkbox"/> Trustee	
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) Complaint to Enforce the Automatic Stay to Prevent the California Department of Health Care Services from Suspending all Medi-Cal Payments and Taking other related acts pursuant to 28 U.S.C. §§ 105(a) and 362 of title 11 of the United States Code; Rules 7065, 9013-9, 7001(9) and 7065 of the Federal Rules of Bankruptcy Procedure.		
NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)		
<p>FRBP 7001(1) – Recovery of Money/Property</p> <input type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input type="checkbox"/> 14-Recovery of money/property - other <p>FRBP 7001(2) – Validity, Priority or Extent of Lien</p> <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property <p>FRBP 7001(3) – Approval of Sale of Property</p> <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) <p>FRBP 7001(4) – Objection/Revocation of Discharge</p> <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) <p>FRBP 7001(5) – Revocation of Confirmation</p> <input type="checkbox"/> 51-Revocation of confirmation <p>FRBP 7001(6) – Dischargeability</p> <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny <p style="text-align: center;">(continued next column)</p>	<p>FRBP 7001(6) – Dischargeability (continued)</p> <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other <p>FRBP 7001(7) – Injunctive Relief</p> <input checked="" type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other <p>FRBP 7001(8) Subordination of Claim or Interest</p> <input type="checkbox"/> 81-Subordination of claim or interest <p>FRBP 7001(9) Declaratory Judgment</p> <input checked="" type="checkbox"/> 91-Declaratory judgment <p>FRBP 7001(10) Determination of Removed Action</p> <input type="checkbox"/> 01-Determination of removed claim or cause <p>Other</p> <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et. seq.</i> <input type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)	
<input type="checkbox"/> Check if this case involves a substantive issue of state law	<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23	
<input type="checkbox"/> Check if a jury trial is demanded in complaint	Demand \$	
Other Relief Sought		



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B1040 (FORM 1040) (12/15)

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR BORREGO COMMUNITY HEALTH FOUNDATION, a California nonprofit public benefit corporation		BANKRUPTCY CASE NO. 22-02384-11
DISTRICT IN WHICH CASE IS PENDING Southern District of California	DIVISION OFFICE San Diego	NAME OF JUDGE Hon. Laura S. Taylor
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) /s/ Tania M. Moyron		
DATE September 26, 2022	PRINT NAME OF ATTORNEY (OR PLAINTIFF) Tania M. Moyron	

INSTRUCTIONS

The filing of a bankruptcy case creates an “estate” under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor’s discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 1040, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court’s Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 1040 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff’s attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

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12 *Proposed Attorneys for the Chapter 11*
13 *Debtor and Debtor In Possession*

14 **UNITED STATES BANKRUPTCY COURT**
15 **SOUTHERN DISTRICT OF CALIFORNIA**

16 In re

17 **BORREGO COMMUNITY HEALTH**
18 **FOUNDATION, a California nonprofit**
19 **public benefit corporation,**
20 Debtor and Debtor in Possession.

Case No. 22-02384-11

Chapter 11 Case

21 **BORREGO COMMUNITY HEALTH**
22 **FOUNDATION, a California nonprofit**
23 **public benefit corporation,**

Adv. Pro. No. 22-_____

24 Plaintiff,

25 v.

26 **CALIFORNIA DEPARTMENT OF**
27 **HEALTH CARE SERVICES, by and**
28 **through its Director, Michelle Baass**

**DEBTOR'S COMPLAINT FOR
DECLARATORY JUDGMENT AND
PRELIMINARY AND PERMANENT
INJUNCTIVE RELIEF, OR IN THE
ALTERNATIVE, FOR WRIT OF
MANDATE UNDER CODE OF
CIVIL PROCEDURE 1085**

Defendant.

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1 Borrego Community Health Foundation, the plaintiff in the above-captioned
2 adversary proceeding and the debtor and debtor-in-possession (“Borrego Health” or
3 the “Plaintiff”) in the above-captioned chapter 11 bankruptcy case (the “Case”),
4 alleges as follows:

5 **I. THE PARTIES**

6 1. Borrego Health is a California nonprofit 501(c)(3) public benefit
7 corporation operating a Federally Qualified Health Center (also known as an FQHC).
8 Borrego Health provides primary and related healthcare services to historically
9 underserved areas of San Diego, Riverside, and—until recently—San Bernadino
10 counties. It provides high quality, comprehensive, compassionate primary health care
11 to the people in their communities, regardless of their ability to pay, by partnering
12 with licensed medical professionals across Southern California. Borrego Health
13 operates eighteen (18) clinics, primarily in underserved desert and inland
14 communities throughout San Diego, Riverside, and—until recently—San Bernardino
15 counties. Borrego Health provides essential services in Family Practice, Pediatrics,
16 OB/GYN, Internal Medicine, Podiatry, Dermatology, Cardiology, HIV/Hepatitis C
17 and Covid-19 related testing and vaccinations to over 94,000 patients, most of whom
18 cannot obtain affordable comprehensive primary care from other sources. Borrego
19 Health specializes in culturally-competent care for a number of specialized
20 populations, including care for migrant farmworkers and the LGBTQ and transgender
21 populations. During the recent pandemic, Borrego Health tested tens of thousands of
22 Californians for Covid-19 infections, and vaccinated tens of thousands of people
23 against Covid-19.

24 2. Defendant Michelle Baass is the Director of the California Department
25 of Health Care Services (“DHCS” or the “Department”) and as such, has the
26 responsibility to administer the Medi-Cal program consistent with the federal
27 Medicaid Act. The Director is sued in her official capacity. The Director has an
28 office in the City and County of San Diego.

1 3. The Department is the single state agency charged with the
2 administration of California’s Medicaid program, known as Medi-Cal. *See* Cal. Welf.
3 & Inst. Code §§ 14000 *et seq.* The federal/state Medicaid program is the health
4 insurance program for the poor. 42 U.S.C. §§ 1396 *et seq.* Collectively, the
5 Department and Michelle Baass are referred to herein as the “Defendants.”

6 **II. JURISDICTION AND VENUE**

7 4. This Court has jurisdiction over this adversary proceeding pursuant to 28
8 U.S.C. §§ 157(b)(2) and 1334(b). This is a core proceeding under 28 U.S.C. § 157(b).

9 5. This adversary proceeding is brought under Rules 7001(7) and (9) of the
10 Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) and seeks
11 declaratory and injunctive relief pursuant to 28 U.S.C. § 2201, *et. seq.* (the
12 “Declaratory Judgment Act”), §§ 105 and 362 of title 11 of the United States Code.
13 (the “Bankruptcy Code”), Bankruptcy Rule 7065, Rules 57 and 65 of the Federal
14 Rules of Civil Procedure, and the general legal and equitable powers of the Court.

15 6. Venue is proper in this Court under 28 U.S.C. § 1409.

16 **III. OVERVIEW**

17 7. The Defendants are threatening to (i) suspend Borrego Health from any
18 payment for services provided for Medi-Cal beneficiaries starting September 29, 2022
19 (the “Suspension”), (ii) to compel third parties with contracts with Borrego Health to
20 effectively terminate those contracts by (a) block transferring of patients or (b)
21 refusing to assign new patients, as well as continuing to withhold more than \$6.7
22 million owed to Borrego Health for providing in-house dental services despite being
23 informed of the applicability of the automatic stay imposed by the Bankruptcy Code
24 and the extreme risk to patient well-being. Borrego Health is dependent on Medi-Cal
25 revenue to provide service to patients.

26 8. To preserve its ability to continue to provide essential and irreplaceable
27 medical services, Borrego Health commenced the Case, which invoked the
28 application of the automatic stay imposed by § 362 of the Bankruptcy Code. The

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1 purported basis for the payment suspension is an alleged “credible allegation of fraud
2 for which an investigation is pending” against Borrego Health. However, there is no
3 credible allegation of ongoing fraud. The pending investigation is related to
4 contracted dental services that Borrego Health discontinued long ago. In fact, the
5 contract dental services have been under a temporary payment suspension since
6 November 18, 2020. Thus, the suspension, interference with Borrego Health’s
7 contractual relations and retention of suspended payments all violate the automatic
8 stay and other rights of the Debtor.

9 9. The Defendants are imposing a 100% payment suspension, based on
10 issues which cannot, under applicable law, form the basis for a temporary payment
11 suspension.

12 10. Unless this Court acts, a 100% payment suspension will go into effect in
13 violation of the automatic stay imposed by § 362 of the Bankruptcy Code and before
14 Borrego Health is given any opportunity to respond and be heard in any consequential
15 manner.

16 11. Thus, Borrego Health brings this adversary proceeding to enforce the
17 automatic stay pursuant to § 362 of the Bankruptcy Code and a civil rights action
18 pursuant to title 42 of the United States Code in order to vindicate Borrego Health’s
19 rights secured by the federal Medicaid statutes and the Fourteenth Amendment to the
20 United States Constitution, as well as to enforce the regulations of 42 C.F.R. § 455 *et*
21 *seq.*

22 12. Borrego Health asks the Court to order Defendants to (i) cease any
23 further suspension efforts, based either on the automatic stay or the issuance of a
24 temporary restraining order and (ii) notify Borrego Health of the issues causing the
25 suspension and allow it a meaningful hearing opportunity to rebut the allegations that
26 have led to its proposed suspension.

27 13. During the time of any suspension, Borrego Health will be unable to be
28 paid by the Medi-Cal program for services it renders or that are rendered on its behalf.

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1 Borrego Health is heavily dependent on Medi-Cal revenue to provide services, so a
2 suspension will force Borrego Health to shutter its clinics, resulting in a lack of access
3 to care for thousands of Medi-Cal beneficiaries in remote and underserved areas of
4 California.

5 14. Such threatened action is unlawful because it violates the automatic stay,
6 is not authorized by the controlling federal Medicaid law and because it deprives
7 Borrego Health of procedural due process of the law.

8 **IV. FACTS**

9 15. On October 20, 2020, the California Department of Justice (“DOJ”),
10 Division of Medi-Cal Fraud and Elder Abuse (“DMFEA”) executed search warrants
11 at two of Borrego Health’s administrative offices.

12 16. DOJ was attending a previously scheduled meeting at Borrego Health’s
13 offices that day where Borrego Health was going to voluntarily present concerns
14 Borrego Health had identified regarding dental providers contracted with Borrego
15 Health. The meeting had been set based on discussions between Borrego Health and
16 DOJ representatives.

17 17. By letter dated November 18, 2020, Borrego Health was advised that the
18 Department was temporarily suspending Borrego Health’s Medi-Cal provider
19 numbers pursuant to Welfare and Institutions Code § 14107.11 and 42 C.F.R. §
20 455.23, effective that same day, due to an ongoing investigation by the DMFEA.

21 18. Borrego Health appealed the temporary suspension through a meet and
22 confer process. Borrego Health and its representatives met with the Department and
23 explained how a narrowly-tailored payment suspension would be more appropriate
24 and how there was good cause to permit Borrego Health to continue to operate, for
25 among other reasons, the fact it was delivering services to underserved areas
26 designated by the Health Resources and Services Administration (“HRSA”), an agency
27 of the U.S. Department of Health and Human Services.

28 19. By letter dated January 29, 2021, the Department notified Borrego

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1 Health that it was modifying the payment suspension to apply to dental claims only.

2 20. The Department was able to narrowly draw the suspension, because the
3 only area under investigation was Borrego Health’s contract dental services – services
4 where Borrego Health contracted with area dentists to provide dental services on
5 behalf of Borrego Health and for its patients.

6 21. The payment suspension maintained by the Department prohibited
7 payment for any dental services to Borrego Health, even though only contract dental
8 services were at issue. Thus, the temporary suspension could have been more
9 appropriately and narrowly tailored under the law, but Borrego Health was in such
10 need of funding and without any meaningful appeal rights, that it agreed to accept the
11 modified temporary suspension.

12 22. The Department conditioned the temporary suspension on a Term Sheet
13 and in contemplation of an ultimate settlement agreement consistent with the Term
14 Sheet. Borrego Health had no meaningful option other than to accept the Term Sheet
15 or lose all funding.

16 23. While the payment suspension was in place from November 18, 2020
17 until January 29, 2021, the Department retained approximately \$15,000,000 in billed
18 services that would otherwise have been payable to Borrego Health.

19 24. The modified payment suspension for dental claims has remained in
20 place at all times since the November 18, 2020, and it still in place today.

21 25. However, Borrego Health has continued to provide dental services
22 despite the payment suspension, because patients desperately need the services.

23 26. Borrego Health estimates that DHCS has withheld at least an additional
24 \$6,000,000 dollars of in-house dental claims since the suspension went into effect.

25 27. Borrego Health executed a formal settlement agreement with the
26 Department dated January 27, 2021 (“Settlement Agreement”).

27 28. Borrego Health had no option other than to sign the agreement and no
28 substantive terms were negotiable. There was no meaningful opportunity to avoid a

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1 temporary suspension without acceding to the Department’s demands.

2 29. A requirement of the Settlement Agreement was for Borrego Health to
3 retain an independent monitor. The Department selected Berkely Research Group
4 (“BRG”) as the compliance consultant or monitor.

5 30. Thus, Borrego Health retained BRG pursuant to the Settlement
6 Agreement because Borrego Health had no viable alternative or options to refuse.

7 31. Borrego Health worked diligently with BRG and the Department to
8 improve Borrego Health’s quality and operations, including billing and compliance.

9 32. Despite Borrego Health’s best efforts, BRG alleged dilatory performance
10 and underperformance of certain compliance and operational efforts resulting in the
11 Department demanding Borrego Health execute two separate Corrective Action Plans
12 (“CAPs”) that were drafted by BRG, were not negotiable, and which Borrego Health
13 had to accept to maintain only a partial temporary suspension. Any refusal would
14 have resulted in a full payment suspension, thereby putting Borrego Health out of
15 business.

16 33. Borrego Health diligently endeavored to comply with the Settlement
17 Agreement and CAPs. Its performance was appropriate under the time available and
18 circumstances. It substantially and materially complied with the terms of the
19 agreements.

20 34. However, the Department and BRG required a level of performance that
21 was inconsistent with applicable industry standards and above what is required by any
22 applicable contract, regulation or statute. Moreover, those requirements were
23 frequently changed.

24 35. For example, BRG and the Department took issue with Borrego Health’s
25 reporting of grievances and complaints by its patients to the Medicaid Managed Care
26 Plans that covered the patients.

27 36. Borrego Health disagreed with BRG’s interpretation of reporting
28 obligations but recognized that it either had to do what BRG said or risk losing all

1 funding and having no meaningful appeal opportunity. As a result, Borrego started
2 reporting all grievances and complaints of any nature on timeframes and intervals
3 more frequently than the plans required. Thus, Borrego Health was over-performing
4 under its agreements and the law, and the complaint and grievance issue should have
5 been resolved.

6 37. However, BRG then modified the grievance issue to allege that Borrego
7 Health was not meaningfully reviewing the grievances. Once that was addressed,
8 BRG alleged that the process was not driving quality improvement.

9 38. While Borrego Health agreed with the goal of improving quality, there
10 was and is no regulatory requirement for the process to function as BRG suggested,
11 much less could failure of the grievance process to improve quality result in a
12 temporary suspension (even though the Department is using this alleged
13 nonperformance as a basis for suspension in dispute in this litigation).

14 39. The Department's asserted ability to reimpose the full payment
15 suspension at any time meant that Borrego Health had no meaningful opportunity to
16 refuse demands by the Department and BRG, even when their allegations were flawed
17 or based on misinterpretations.

18 40. BRG and the Department tried to impose a standard of performance that
19 is not only unattainable, but not legally required to participate in Medi-Cal.

20 41. Regardless, Borrego Health did improve. It made great strides and
21 performed what was necessary to comply with the Settlement Agreement and CAPs.

22 42. The performance was such that in the summer of 2022 Borrego Health
23 concluded BRG was no longer needed and that the Department should further tailor
24 the payment suspension to apply only to contract dental claims. In other words, the
25 Department should have started paying for dental claims provided by Borrego Health
26 itself. Uncompensated in-house dental claims were causing significant liquidity
27 issues for Borrego Health and risked making it impossible for Borrego Health to
28 continue to provide patient services so necessary to the communities it serves.

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1 43. During the suspension, Borrego Health has provided services during
2 30,347 dental visits that were uncompensated. These services were provided through
3 an in-house program entirely disconnected from the contract dental program that was
4 under investigation, and to date Borrego Health is aware of no allegation of any fraud
5 with this program, much less credible allegations of fraud.

6 44. Thus, in May 2022, Borrego Health requested that the Department meet
7 with the Borrego Health leadership team to discuss further modifying the payment
8 suspension to permit payment of in-house dental claims and to consider whether BRG,
9 which was extremely expensive and paid for by Borrego Health (fees for BRG to date
10 exceed \$2.6 million), was still necessary.

11 45. The Department agreed to a meeting, and the Department and Borrego
12 Health representatives then met on July 7, 2022.

13 46. The Department's questions at the meeting indicated that the Department
14 was misinformed by BRG as to Borrego Health's performance under the Settlement
15 Agreement and CAPs.

16 47. At the meeting Borrego Health attempted to correct inaccuracies and
17 misunderstandings, but the Department requested that Borrego Health submit any
18 documentation to support its position within two weeks.

19 48. On July 22, 2022, Borrego Health submitted voluminous documentation
20 in response to the Department's areas of identified concerns under the Settlement
21 Agreement, CAPs, and other areas that the Department and BRG identified at the July
22 7 meeting.

23 49. Borrego Health followed up several times with the Department on the
24 written submission, including asking for the Department to agree to proposed audit
25 methodologies, and to address open areas under the Settlement Agreement and CAPs.

26 50. For example, the Settlement Agreement called for Borrego Health to
27 conduct an internal audit of contracted dental claims that were billed to the
28 Department. Borrego Health proposed a sampling and extrapolation methodology

1 that was in conformity with state auditing standards, but the Department did not
2 respond.

3 51. The purpose of the audit was to inform the Department of any potential
4 overpayment amount impacted by contract dental. Such work calculating an
5 overpayment amount would be useless if the Department did not agree with the audit
6 methodology. However, neither BRG nor the Department approved the audit plans,
7 and Borrego Health could not perform the audit. The Department has not responded
8 to multiple written requests for feedback.

9 52. Thus, to the extent there is any alleged non-performance under the
10 Agreements, such non-performance is excused by the failure of the Department and
11 BRG to cooperate.

12 53. The Department did not have any questions or provide any feedback to
13 the written submission until August 19, 2022, when it provided two separate letters to
14 Borrego Health's CEO.

15 54. The first letter was from Bruce Lim, Deputy Director for the Department.
16 The letter from Mr. Lim explained that the Department did not find Borrego Health's
17 written submission persuasive, and stated, in relevant part:

18 As a result of ongoing issues, including quality of care concerns, member grievances,
19 and referrals, Borrego's failure to fully comply with the February 26, 2021, stipulated
20 agreement between Borrego and DHCS, continued and unresolved inappropriate
21 billings, and the California Department of Justice's (DOJ) ongoing criminal investigation
22 of Borrego for potential fraudulent Medi-Cal billings, DHCS is reimposing the full 100
23 percent Medi-Cal payment suspension on all Borrego Medi-Cal services, (medical and
24 dental), pursuant to Welfare and Institutions (W&I) Code Section 14107.11. The
25 payment suspension will go into effect September 29, 2022, to allow time to finalize
26 transition planning for affected Borrego Medi-Cal beneficiaries. See the attached
27 payment suspension letter.

28 55. Thus, Mr. Lim and the Department provided notice to Borrego Health in
a publicly-available document that the Department was imposing a 100% payment
suspension for a litany of reasons, including potentially fraudulent billing.

56. The allegations by the Department are disputed and denied by Borrego

1 Health, and tarnish Borrego Health's public image and reputation.

2 57. In a separate letter that was stamped "CONFIDENTIAL" Bob Sands,
3 Assistant Deputy Director for the Department, provided additional notice of the
4 temporary suspension for the same reasons alleged in Mr. Lim's letter, and was clearly
5 intended to comply with federal law, including 42 C.F.R. § 455.23.

6 58. The Department typically does not publicize a temporary suspension,
7 because the Ninth Circuit has recognized a liberty interest when the Department
8 publicizes charges. *See e.g. Guzman v. Shewry*, 552 F.3d 941, 955 (9th Cir. 2009).

9 59. As it pertains to Borrego Health, not only did the Department publicize
10 the temporary suspension in the letter from Mr. Lim, which was publicly available to
11 anyone who requested it, but it took the unprecedented step of providing a
12 spokesperson to the media to make sure the public was aware of the temporary
13 suspension.

14 60. The Department did this knowing that Borrego Health had no
15 meaningful opportunity for a name clearing hearing to respond to the Department and
16 that such action violated, among other things, Borrego Health's liberty interests.

17 61. For example, the San Diego Union Tribune reported on August 30, 2022,
18 "State health officials will halt all Medi-Cal reimbursements to the Borrego
19 Community Healthcare Foundation for the second time in two years, saying the
20 nonprofit provider has failed to meet its obligations under a settlement reached early
21 last year." See <https://www.sandiegouniontribune.com/news/watchdog/story/2022-08-30/borrego-health-medi-cal-suspension>
22

23 62. The Department's entire statement to the media is quoted below:

24 DHCS can confirm that a full payment suspension had been
25 reimposed on all Medi-Cal medical and dental services provided
26 by Borrego Community Health Foundation (Borrego). The
27 suspension is pursuant to the February 26, 2021, stipulated
28 agreement between the Department of Health Care Services (DHCS) and Borrego, pursuant to Welfare and Institutions Code Section 14107.11 and Federal Regulations, Title 42, section 455.23, and is effective on September 29, 2022.

1 After 17 months of working with Borrego Health to attempt to
 2 correct its ongoing deficiencies, DHCS has determined that it is
 3 in the best interest of Medi-Cal beneficiaries and the Medi-Cal
 4 program to reimpose a full payment suspension on all Borrego
 5 Medi-Cal services and to prepare for the transition of care for
 6 Medi-Cal members.

7 DHCS' priority is to ensure the health and well-being of affected
 8 Medi-Cal beneficiaries. This includes *working to ensure that if*
 9 *Medi-Cal managed care plans (MCPs) terminate their contracts*
 10 *with Borrego, and Borrego ceases operations, there will be a*
 11 *safe transition for all beneficiaries receiving Medi-Cal services*
 12 *through Borrego. DHCS will partner with the MCPs to assist*
 13 *Medi-Cal managed care members who transition to other*
 14 *providers. This will include providing access to quality and*
 15 *medically necessary care, and reaching out directly to the*
 16 *affected fee-for-service beneficiaries through a letter informing*
 17 *them of their medical care options and directing them to call*
 18 *DHCS' 1-800 beneficiary call-line if assistance is needed.*

19 (Emphasis added.) With this statement, the Department's spokesperson also
 20 provided Bruce Lim's August 19, 2022 letter.

21 63. On information and belief, the Department provided the August 19, 2022
 22 letter to health plans with whom Borrego Health has contracts and whose beneficiaries
 23 are assigned to Borrego Health, including Inland Empire Health Plan (collectively,
 24 the "Health Plans"). On information and belief, the Department also demanded the
 25 Health Plans establish a plan to move all of their beneficiaries to other providers
 26 through a "bulk transfer of lives." A bulk transfer of lives is irreversible. Once the
 27 bulk transfer is implemented, Borrego Health will have no patients assigned and
 28 would be unable to operate. Additionally, on information and belief, the Department
 also instructed the Health Plans to not assign any new patients to Borrego Health,
 although the new patients would be assigned to Borrego Health absent that instruction
 from the Department. The cumulative impact of these actions is to force Borrego
 Health to cease operations, including patient care, and close its clinics.

64. This is an additional action by the Department with a permanent impact,
 despite the alleged "temporary" nature of the payment suspension.

65. When Borrego Health's payments were suspended in 2020, it continued
 to provide uninterrupted care to its patients without payment. Thus, it is not necessary

1 or appropriate to cause the block transfer of lives. Borrego Health is committed to
2 providing care to Medi-Cal beneficiaries for so long as funding permits.

3 66. Notably, the allegations made by the Department and reported by the
4 Union Tribune were untrue. Even more problematic, the spokesperson for the
5 Department relied on invalid reasons for a temporary suspension. A lack of
6 performance under the Settlement Agreement was not a valid basis for a 100%
7 temporary suspension under the law cited by the Department in the suspension letter.
8 Moreover, any allegations should have remained private and at least been limited to
9 legally supportable justifications.

10 67. While incorrect, the Department's statements are valuable to discern its
11 true motivations. The current proposal to reimpose a 100% payment suspension is
12 not about a credible allegation of fraud or an ongoing investigation and not intended
13 to be temporary. Instead, the Department decided it would take actions expressly
14 intended to force Borrego Health to cease operations for reasons it would not be able
15 to otherwise.

16 68. As explained above, the Department was already aware that Borrego
17 Health had been under investigation since 2020. The Department, BRG, and civil and
18 criminal DOJ were all scrutinizing Borrego Health's practices. Borrego Health
19 stopped all contract dental programs, had not submitted any contract dental claims,
20 and was also cooperating with criminal and civil investigators.

21 69. There is no plausible theory that Borrego Health was engaging in
22 ongoing fraud, and, to the contrary, the evidence is that Borrego Health was doing
23 everything it could to be compliant and avoid any further allegations.

24 70. Borrego Health recently commenced a lawsuit against the former staff
25 and contractors who were responsible for the alleged fraud related to the contract
26 dental program.

27 71. In short, there was no justification under the law to reimpose a 100%
28 payment withhold. The limited payment suspension already addressed the concern

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1 the Department had with what the government was investigating criminally – contract
2 dental services. There is no allegation of any other criminal investigation and no
3 explanation why a tailored suspension would not be sufficient, much less how there
4 was no longer good cause to permit Borrego Health to continue to provide services to
5 patients in underserved areas.

6 72. Thus, there is not a “credible” allegation of fraud at issue for the new
7 suspension.

8 73. Moreover, the Department’s reaction ignores patients and their best
9 interests.

10 74. Borrego Health is informed and believes that the Department has no
11 meaningful plan to ensure Borrego Health’s 94,000 plus patients have access to care.

12 75. Without Borrego Health and its clinics, patients will have to travel hours
13 and many miles to seek care.

14 76. Even then, the alternate providers are not demonstrated to have capacity
15 to handle the influx of patients. It is well-established that the areas in which Borrego
16 Health operates are underserved areas. The care network, even with Borrego Health,
17 is inadequate. There are simply not other providers to absorb Borrego Health’s 94,000
18 patients.

19 77. Even if they could, the alternate providers do not have the expertise to
20 serve Borrego Health’s unique patient population.

21 78. Borrego Health is intimately familiar with the unique needs of its patient
22 population, and provides critically important and culturally-competent care to meet
23 those unique needs. For example, Borrego Health serves many transgender patients
24 and even has transgender patient advocates on staff, including at clinic sites, to assist
25 with their unique healthcare needs.

26 79. Borrego Health has become a trusted care provider for the migrant
27 farmworker community thanks to Borrego Health’s efforts to meet them where they
28 live, work, and play to provide care. During the pandemic, Borrego Health ran

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1 COVID-19 testing sites that started at dawn and were located at the gas station on the
2 farmworkers’ route to the fields to make it accessible to the farmworkers, even doing
3 drive-through testing for those riding on tractors and combines.

4 80. Borrego Health provides this type of culturally competent care to
5 numerous hard-to-reach populations, including undocumented immigrants, people
6 living with HIV/AIDS, and many others.

7 81. An attempt to transfer care to another provider will break these patient
8 connections. These patient relationships, when broken, are not easily re-established
9 and can lead to “transfer trauma.”

10 82. Borrego Health requested a meet and confer to discuss the proposal to
11 reimpose a 100% payment suspension. The Department and Borrego Health met on
12 September 16, 2022 for that purpose.

13 83. At the meeting the Department made clear that it was motivated by a
14 goal to compel Borrego Health to cease operations.

15 84. The discussion also highlighted how Borrego Health could not
16 meaningfully respond to the Department’s allegations.

17 85. Many of the issues alleged by the Department are stated too vaguely to
18 be intelligible.

19 86. For example, the Department states that Borrego Health does not have a
20 “robust” compliance department. This is vague and factually untrue. Borrego Health
21 has onboarded six compliance professionals (a team of similar size to much larger
22 organizations), has implemented every recommended element of a compliance
23 program, and has had its compliance program plan reviewed extensively and
24 approved by BRG.

25 87. Despite repeated questions to the Department to explain the allegation
26 regarding compliance, the Department has not provided more information.

27 88. Borrego Health requested that the Department provide an explanation as
28 to why Borrego Health’s prior written submission was insufficient, but the

1 Department repeatedly responded it was there to “listen and react,” not provide
2 information.

3 89. As a result, Borrego Health is no more informed about the purported
4 basis for the Department’s allegations than when it started the meet and confer
5 process. If anything, it appears that the Department is not considering the materials
6 submitted by Borrego Health.

7 90. Borrego Health is awaiting a response on the meet and confer request to
8 rescind the 100% payment suspension. In the meantime, bankruptcy counsel for the
9 Department has informed bankruptcy counsel for Borrego Health that the Department
10 does not intend to change its position or respect the automatic stay in place by virtue
11 of the bankruptcy filing.

12 91. Because the Department will not delay the suspension or respect the
13 automatic stay, Borrego Health commences this adversary proceeding.

14 92. Borrego Health has not filed its written appeal yet, but it is not due and
15 filing of the appeal will not stay the imposition of the temporary suspension in any
16 event.

17 93. The written appeal result would not be due until ninety (90) days after
18 the papers are submitted, and is futile. There will not be any ability to cross-examine
19 witnesses or review any of the Department’s evidence.

20 V. FEDERAL MEDICAID LAW

21 94. As indicated above, the Medicaid program, Title XIX of the Social
22 Security Act, is the federal/state health insurance program for the low income people.
23 Federal Medicaid statutes are supreme to state statutes and state regulations with
24 respect to the administration of the Medicaid program in a particular state. As a result,
25 state Medicaid agencies must comply with the controlling federal Medicaid statutes
26 and may not act inconsistently with or without the express authority of federal
27 Medicaid law.

28 95. Each state’s Medicaid plan must “provide such methods and procedures

1 . . . relating to the utilization of, and the payment for, care and services available under
2 the plan which may be necessary . . . *to assure that payments are consistent with*
3 *efficiency, economy, and quality of care and are sufficient to enlist enough providers*
4 *so that care and services are available under the plan at least to the extent that such*
5 *care and services are available to the general public in the geographic area” 42*
6 U.S.C. § 1396a(a)(30)(A) (emphasis added); 42 C.F.R. § 447.204.

7 96. The Code of Federal Regulations, 42 C.F.R. § 455.23(a)(1), states that:

8 The State Medicaid agency must suspend Medicaid
9 payments to a provider after the agency determines there
10 is a credible allegation of fraud for which an investigation
11 is pending under the Medicaid program against an
12 individual or entity unless the agency has good cause to
not suspend payments or to suspend only in part.

13 97. The Code of Federal Regulations, 42 C.F.R. § 455.2, defines a “credible
14 allegation of fraud” as “an allegation, which has been verified by the State.” With
15 respect to provider audits, allegations are considered to be credible “when they have
16 indicia of reliability and the State agency has reviewed all allegations, facts, and
17 evidence carefully and acts judiciously on a case-by-case basis.” 42 C.F.R. § 455.2(3).

18 98. The Code of Federal Regulations, 42 C.F.R. § 455.23(a)(3), states that
19 “a provider may request, and must be granted, administrative review when State law
20 so requires.”

21 99. The Code of Federal Regulations, 42 C.F.R. § 455.23(b), provide for
22 notice to the provider when suspension of payments is made. Section 455(b)(2)(ii)
23 states that the notice “must set forth the general allegations of the as to the nature of
24 the suspension action, but need not disclose any specific information concerning an
25 ongoing investigation.”

26 100. The Code of Federal Regulations, 42 C.F.R. § 455.23(b)(v), states that
27 the notice must “set forth the applicable State administrative appeals process and
28 corresponding citations to State law.”

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1 101. The Code of Federal Regulations, 42 C.F.R. § 455.23(c), provides that
2 “suspension under this section will be temporary” and that it will not continue if the
3 agency determines there is insufficient evidence of fraud by the provider or after legal
4 proceedings have been completed.

5 102. The Code of Federal Regulations, 42 C.F.R. § 455.23(e), states that a
6 State may find that good cause exists not to suspend payments, or not to continue
7 payment suspension previously imposed to an individual or entity against which there
8 had been a credible allegation of fraud if, among other things, suspension is not in the
9 interest of the Medicaid program.

10 103. Another type of “good cause” that would warrant a state Medicaid
11 agency not sanctioning a provider suspected of fraud is when effectively excluding
12 that provider from Medicaid may jeopardized patient access to items or services
13 because the provider serves a large number of “beneficiaries within a HRSA
14 designated medically underserved area.” 42 C.F.R. § 455.23(e)(4)(ii)

15 104. The federal government has made clear to state Medicaid agencies that,
16 “We do not interpret the new provision in the ACA as mandating that a State must
17 always suspend all payments to a provider in cases of an investigation of a credible
18 allegation of fraud.” 76 Fed. Reg. 5861, 5934.

19 105. Instead, the federal government explained how states are to tailor
20 suspensions, and that they have flexibility to suspend payments in part, explaining:

21 For example, as stated in the preamble to the current
22 regulation, there may be times where an investigation is
23 solely and definitively centered on *only a specific type of*
24 *claim* in which case a State may determine it is appropriate
25 to impose a payment suspension on only that type of claim.
26 Likewise, a State might determine that an investigation of a
27 credible allegation of fraud is limited to *a particular*
28 *business unit or component of a provider* such that a
suspension need not apply to certain business units or
components of a provider.

Balancing these approaches, we proposed to allow States to

1 implement a partial payment suspension, or, where
 2 appropriate, to convert a previously imposed full payment
 3 suspension to a partial payment suspension, if justified via
 4 a good cause exception. The good cause exceptions for
 5 partial suspension at paragraphs (f)(1) and (2) mirror those
 6 at paragraphs (e)(4) and (3), respectively, and allow the
 7 State to *adopt a partial payment suspension where*
 8 *suspension in whole would so jeopardize a recipient's*
 9 *access to items or services as to endanger the recipient's*
 10 *life or health, or where the State deems it in the best*
 11 *interests of the Medicaid program.* At paragraph (f)(3), we
 12 proposed that a State may avail itself of the good cause
 13 exception to suspend payments only in part if the nature of
 14 the credible allegation is *focused solely and definitively on*
 15 *only a specific type of claim or arises from only a specific*
 16 *business unit of a provider, and the State determines and*
 17 *documents in writing that a payment suspension in part*
 18 *would effectively ensure that potentially fraudulent claims*
 19 *were not continuing to be paid.*

20 76 Fed. Reg. 5861, 5934 (emphasis added).

21 106. In summary, a state is supposed to assess whether the alleged fraud can
 22 be addressed through a properly-tailored suspension, rather than suspending all
 23 claims, particularly when patient access is concerned and specific types of claims are
 24 at issue.

25 **VI. THE MEDI-CAL ANTIFRAUD STATUTES**

26 107. In cases not involving a criminal conviction, proceedings for suspension
 27 must generally be conducted pursuant to California Health and Safety Code § 100171,
 28 which incorporates the trial-type hearing procedures of the California Administrative
 Procedure Act. *See* Welf. & Inst. Code § 14123(c).

108. However, California Welfare & Institutions Code § 14107.11, which
 largely mirrors the federal law regarding the Department's obligation to suspend
 providers that are facing an ongoing investigation for a credible allegation of fraud,
 provides less robust due process protections.

1 109. Section 14107.11 permits the Department to temporarily suspend
 2 payment to Medi-Cal provider upon receipt of a credible allegation of fraud and for
 3 which an investigation is pending under the Medi-Cal program, unless it is determined
 4 there is a good cause exception not to suspend the payments or to suspend them only
 5 in part.

6 110. The state appeal process available to a provider suspended under §
 7 14107.11 is the written-only appeal process of Welfare and Institutions Code Section
 8 14043.65. *See* Section 14107.11(b).

9 111. This written appeal process will not be available until *after* the provider
 10 is suspended from the Medi-Cal program. The written administrative appeal process
 11 also does not contain any of the safeguards of a trial-type hearing and is not even
 12 considered by the Department, itself, to be an adjudicative hearing or a name-clearing
 13 hearing.

14 112. Additionally, any subsequent state judicial review must proceed under
 15 California Code of Civil Procedure Section 1085, which is limited to determining
 16 whether the Department's decision is reasonable based on the limited records made
 17 during the administrative appeal. *See* Welf. & Inst. Code § 14043.65(a).

18 113. Because of the obvious inadequacy of the written-only appeal process,
 19 the California Legislature adopted a statute, effective January 1, 2007, which requires
 20 the Department to "meet and confer" with a provider within thirty days of the issuance
 21 of a suspension letter for the purpose of presenting and discussing information and
 22 evidence that could impact the Department's decision to modify or terminate the
 23 sanction. *See* Welf. & Inst. Code § 14123.05.

24 **VII. CLAIMS FOR RELIEF**

25 **CLAIM I: DECLARATORY JUDGMENT**

26 114. Borrego Health realleges paragraphs 1-113 as if fully set forth herein.

27 115. Pursuant to the Declaratory Judgment Act, "[i]n a case of actual
 28 controversy within its jurisdiction . . . any court of the United States . . . may declare

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1 the rights and other legal relations of any interested party seeking such declaration,
2 whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a).

3 116. As a result of the acts described in the foregoing paragraphs, there exists
4 a definite and concrete, real and substantial, justiciable controversy between Borrego
5 Health and the Defendants regarding the Defendants’ continued actions against the
6 Debtor to suspend Medi-Cal payments and taking other acts, all of which constitute
7 acts to take possession of property of the estate or from the estate, exercise control
8 over property of the estate, and to collect, assess, or recover a claim against the debtor
9 that arose prepetition.

10 117. This controversy is of sufficient immediacy and reality to warrant the
11 issuance of a declaratory judgment.

12 118. Plaintiff seeks a declaratory judgment (the “Declaratory Judgment”)
13 from this Court that:

14 a. DHCS’s enforcement of its decision set forth in its prepetition
15 letter, dated August 19, 2022, to suspend all payments under Medi-Cal
16 to the Debtor effective September 29, 2022 is a violation of the automatic
17 stay under §§ 362(a)(1), (3), and (6) of the Bankruptcy Code;

18 b. DHCS’s ongoing withholding of payments for in-house dental
19 services is a violation of the automatic stay because it constitutes an act
20 to take possession of property of the estate or from the estate, exercise
21 control over property of the estate, and to collect, assess, or recover a
22 claim against the Debtor that arose prepetition under Sections 362(a)(3)
23 and (6) of the Bankruptcy Code; and

24 c. DHCS’s efforts to compel Health Plans, including health plans
25 such as Inland Empire Health Plan, to block transfer patients from the
26 Debtor and refuse to assign new patients to the Debtor, are violations of
27 the automatic stay because they constitute acts to take possession of
28 property of the estate or from the estate, exercise control over property

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1 of the estate, or to collect, assess, or recover a claim against the Debtor
2 that arose prepetition under §§ 362(a)(3), and (6) of the Bankruptcy
3 Code.

4 d. DHCS’s continued retention of more than \$6.7 million in
5 suspended payments related to Borrego Health’s providing contract
6 dental services to Medi-Cal patients violates the automatic stay because
7 it constitutes an act to take possession of property of the estate or from
8 the estate, exercise control over property of the estate, and to collect,
9 assess, or recover a claim against the Debtor that arose prepetition under
10 §§ 362(a)(3), and (6) of the Bankruptcy Code (collectively, each of the
11 acts alleged in the previously set forth subparagraphs shall be referred to
12 herein as the “Department Actions”).

13 e. Any other declarations that the Court deems proper to put the
14 Department and related parties on notice concerning the impropriety of
15 their actions.

16 **CLAIM II: ENFORCEMENT OF AUTOMATIC STAY**

17 119. Borrego Health realleges paragraphs 1-118 as if fully set forth herein.

18 120. The automatic stay prohibits the “commencement or continuation,
19 including the issuance or employment of process, of a judicial, administrative, or other
20 action or proceeding against the debtor that was or could have been commenced
21 before the commencement of the case under this title, or to recover a claim against
22 the debtor that arose [prepetition], all entities” from taking any “act” to “exercise
23 control over property of the estate,” and “any act to collect, assess, or recover a claim
24 against the debtor that arose [prepetition].” 11 U.S.C. § 362(a)(1), (3) and (6).

25 121. The Department Actions do and would each constitute (a)
26 commencement or continuation, including the issuance or employment of process, of
27 a judicial, administrative, or other action or proceeding against the debtor that was or
28 could have been commenced before the commencement of the case under this title, or

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1 to recover a claim against the debtor that arose prepetition; (B) an exercise of
2 “control” over the Debtor’s property; or an “act to collect, assess, or recover a claim
3 against the debtor that arose [prepetition].” 11 U.S.C. §§ 362(a)(1), (3) and (6).

4 122. None of the Department Actions are the exercise of police or regulatory
5 powers within then meaning of § 362(b)(4) of the Bankruptcy Code.

6 123. Issuing an order enforcing the automatic stay as to any Department
7 Action is therefore necessary and appropriate.

8 **CLAIM III: PRELIMINARY AND PERMANENT INJUNCTION**

9 124. Borrego Health realleges paragraphs 1-123 as if fully set forth herein.

10 125. A Bankruptcy Court may “issue any order, process, or judgment that is
11 necessary or appropriate to carry out the provisions of [the Bankruptcy Code].” 11
12 U.S.C. § 105(a). Further, this Court may issue a temporary restraining order or
13 injunction under Rules 7001(7) and Rules 7065 of the Federal Rules of Bankruptcy
14 Procedure, including to restrain activities that threaten the reorganization process or
15 impair the court’s jurisdiction with respect to the case before it.

16 126. Any Department Action would irreparably harm the estate of Borrego
17 Health.

18 127. The Debtor therefore requests an injunction against any Department
19 Action, so that the Debtor may continue to operate during its Chapter 11 Case and to
20 serve its patients.

21 **CLAIM IV: VIOLATION OF DUE PROCESS**

22 128. Borrego Health realleges paragraphs 1-127 as if fully set forth herein.

23 129. While federal and state law provide for the withholding of funds based
24 on credible evidence of fraud, such withholding may only be temporary.

25 130. Defendants have withheld money due Plaintiff since January 2020
26 without providing Borrego Health sufficient basis for the withholding.

27 131. The suspension of Borrego Health’s payments is no longer “temporary”
28 and Borrego Health has a property interest in the recovery of those funds.

1 132. The justification for a temporary suspension with no pre-deprivation due
2 process has been that the suspension is *temporary*. The Department’s media
3 statements make clear that the temporary suspension will cause *permanent* harm,
4 namely the reassignment of beneficiaries (*i.e.*, patients) to other providers and that
5 Borrego Health “cease operations.”

6 133. The Department has publicized the temporary suspension to the Health
7 Plans and has instructed the Health Plans to plan to “bulk transfer” all of Borrego
8 Health’s patients to other providers. This action will cause the immediate and
9 permanent closure of Borrego Health.

10 134. Federal and state law require the Defendants to provide Borrego Health
11 a hearing with respect to the temporary suspension of payments.

12 135. The publication of the temporary suspension also implicates Borrego
13 Health’s liberty interests and right to a hearing. Because of the Department’s
14 publication, reputational damage to Borrego Health is permanent.

15 136. Despite Borrego Health’s request for a full hearing on the temporary
16 suspension and withholding, the Defendants will not provide one.

17 137. Nor have the Defendants offered Borrego Health an alternative method
18 in which it can obtain an explanation for the basis behind the suspension. The
19 summary allegations do not meaningfully inform Borrego Health as to the basis for
20 the suspension and along with lengthy period of time thus violates Borrego Health’s
21 right to due process in that it takes its money that it legitimately earned without just
22 reason.

23 138. Moreover, Defendants have doubled down on the due process violation
24 by continuing to withhold funds without a hearing or explanation as to the conduct
25 that has led to the suspension, depriving Borrego Health of its right to participate in
26 the Medi-Cal program by preventing it from taking steps that might terminate the
27 suspension.

28 139. Borrego Health is informed and believes that the Defendants have failed

1 to conduct the independent review or independent verification of the facts and
2 evidence that have purportedly led the Defendants to suspend Borrego Health’s
3 payments.

4 140. Defendants’ actions in withholding present and future payments
5 threatens Borrego Health’s financial well-being.

6 141. Defendants’ actions in withholding present and future payments also
7 threatens the well-being of Borrego Health’s patient population.

8 142. All of Borrego Health’s clinics operate in areas designated as medically
9 underserved by HRSA.

10 143. The above actions by Defendants have thus violated Plaintiff’s Due
11 Process rights by, among other things:

- 12 a. Suspending past and future payments that Borrego Health earned
13 and earns without verifying whether there was a credible allegation of
14 fraud;
- 15 b. Failing to make available to Borrego Health a hearing in which the
16 propriety for withholding funds could be legitimately determined;
- 17 c. Withholding and suspending payments for nearly a year and thus
18 for a period that is no longer “temporary” without affording Borrego
19 Health a meaningful process to contest that suspension;
- 20 d. Making statements to the media and to Health Plans having the
21 effect of harming Borrego Health’s reputation, in which it has a liberty
22 interest, and that will cause the permanent closure of Borrego Health
23 with no access to due process;
- 24 e. Publicizing the planned suspension to health plans and instructing
25 them to bulk transfer Borrego Health’s patients, which will leave
26 Borrego Health permanently out of business;
- 27 f. On information and belief failing to conduct any independent
28 review or verification of allegations of misrepresentation or fraud prior

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1 to suspending Medi-Cal payments, such that the suspension was not
2 issued in response to a credible allegation of fraud as required by the law.

3 **CLAIM V: INJUNCTIVE AND DECLARATORY RELIEF PURSUANT TO**
4 **18 U.S.C. § 1983 AND 42 C.F.R. § 455.23**

5 144. Borrego Health realleges paragraphs 1-143 as if fully set forth herein.

6 145. The suspension in the instant case violates 18 U.S.C. § 1983 and 42
7 C.F.R. § 455.23 because federal law requires a state to offer a provider a hearing when
8 its payments are withheld pending purported reliable evidence of possible
9 misrepresentation in billing or fraud. A hearing is likewise required when a provider’s
10 liberty interests are implicated through publication of the temporary suspension.

11 146. The Defendants have failed to provide evidence of plausible and credible
12 allegations of fraud or misrepresentation in order to suspend and withhold payments
13 due it without providing a meaningful hearing.

14 147. The suspension in the instant case violates 18 U.S.C. § 1983 and 42
15 C.F.R. § 455.23 because the Defendants have failed to provide Borrego Health with
16 a meaningful opportunity to rebut the allegations of possible fraud.

17 148. The suspension in the instant case violates 18 U.S.C. § 1983 and 42
18 C.F.R. § 455.23 because the notice of suspension does not inform Borrego Health of
19 the nature of the allegations or satisfy the notice requirements contained in the
20 regulations.

21 149. By failing to provide Borrego Health with a hearing, which is required,
22 the Defendants have prevented Borrego Health from presenting any grounds not to
23 suspend payments under 42 C.F.R. § 455.23(e), including issues with respect to
24 medical access for the patient population Borrego Health services.

25 150. By failing to notify Borrego Health as to any appeal process and
26 applicable citations thereto, the Defendants have failed to comply with the
27 requirements of law.

28

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1 **IRREPARABLE HARM**

2 151. As discussed above, Borrego Health's suspension from the Medi-Cal
 3 program will cause it to be unable to treat its Medi-Cal patients resulting in irreparable
 4 harm not only to Borrego Health but also to his existing patients. If the suspension
 5 goes into effect, Borrego Health will have to lay off all employees and may not be
 6 able to continue to pursue reorganization. The Medi-Cal suspension will also trigger
 7 a series of collateral consequences, including interference by Medicaid Managed Care
 8 plans, which are already refusing to assign patients to Borrego Health and threatening
 9 to move those that remain. Additionally, as discussed above, the proposed suspension
 10 will deprive Borrego Health of its federal and constitutional rights.

11 **THE LACK OF AN EFFECTIVE STATE REMEDY**

12 152. The administrative appeal process and judicial review process allowed
 13 under state law woefully inadequate and not meaningful with respect to the
 14 circumstances here because the suspension goes into effect prior to the completion of
 15 the appeal process and the written-only appeal process does not allow for a trial-type
 16 hearing or a name-clearing hearing. Moreover, the only subject to be discussed at the
 17 state appeal will be whether Borrego Health is under investigation. The same is true
 18 with respect to subsequent judicial review of the administrative appeal decision
 19 because such judicial review is limited to the procedures available under California
 20 Code of Civil Procedure § 1085.

21 **VIII. WRIT OF MANDATE (CAL. CODE OF CIVIL PROCEDURE**
 22 **SECTION 1085)**

23 153. Borrego Health hereby incorporates by reference each and every
 24 allegation contained in the above paragraphs as though fully set forth herein.

25 154. A writ of mandate under California Code of Civil Procedure section 1085
 26 may issue to compel a state agency to perform a mandatory duty or to correct a
 27 prejudicial abuse of discretion.

28 155. The Department's decision to suspend all Medi-Cal payments to Borrego

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1 Health and indefinitely deactivate all of Borrego Health’s Medi-Cal billing numbers,
2 which effectively bars Borrego Health from participation in the Medi-Cal program,
3 constitutes a prejudicial abuse of discretion and otherwise was arbitrary and
4 capricious conduct for the following reasons:

5 a. The Department has deprived Borrego Health of a liberty interest
6 without affording Borrego Health appropriate due process. California
7 law recognizes that health care providers have a liberty interest in being
8 eligible to contract with the State to participate in Medi-Cal. That liberty
9 interest can be infringed when providers are effectively excluded from
10 Medi-Cal without being afforded adequate due process. In this instance,
11 the Department has excluded Borrego Health from Medi-Cal by
12 suspending Medi-Cal payments to the entire organization, indefinitely
13 deactivating Borrego Health’s billing numbers, as applicable to all
14 Borrego Health clinics, and directing Medi-Cal managed care plans to
15 steer their members away from Borrego Health. This exclusion occurred
16 without Borrego Health being afforded an evidentiary hearing or any
17 kind of meaningful opportunity to contest the alleged basis for the
18 sanctions;

19 b. The Department also has infringed on Borrego Health’s due
20 process rights through the imposition of the Medi-Cal sanctions because
21 the Department’s communication of information about the sanctions
22 against Borrego Health to third parties has caused damage to Borrego
23 Health’s reputation in the health care community. It is well established
24 that when injury to reputation is combined with damage to the property
25 interest of a party, that party’s due process rights are implicated. Here,
26 Borrego Health is informed and believes and thereon alleges that the
27 Department advised other parties that Borrego Health was suspended
28 from the Medi-Cal program before Borrego Health had an opportunity

1 to exercise any appeal rights, which in turn resulted in some of those
2 third-parties passing along false information about Borrego Health,
3 including but not limited to the suggestion that Borrego Health was
4 “closing” imminently. Borrego Health’s reputation has been harmed by
5 the public dissemination of information about the Medi-Cal sanctions,
6 much of which was inaccurate, and the Department is responsible. Since
7 this reputational harm occurred before Borrego Health had a meaningful
8 opportunity to contest the sanctions, the Department denied Borrego
9 Health of adequate due process and abused its discretion

10 c. The Department also has denied Borrego Health adequate due
11 process and otherwise acted arbitrarily by excluding Borrego Health
12 from the Medi-Cal Program in 2020, based on information that has been
13 in the agency’s possession for many months prior to that time. California
14 case law recognizes that a health care provider’s liberty interest in not
15 being excluded from Medi-Cal may improperly be infringed where a
16 temporary suspension is imposed based on a multi-year investigation.
17 Here, the Medi-Cal sanctions are purportedly based on a DOJ
18 investigation that focused narrowly on particular services, which
19 occurred or commenced years ago. The DOJ investigation has not
20 resulted in formal findings against Borrego Health in the years that they
21 have been pending. It is therefore arbitrary, capricious and an abuse of
22 discretion for DHCS to now completely exclude Borrego Health — a
23 critically important safety net provider — from Medi-Cal, based on
24 information that the Department has been content to sit on for years until
25 now;

26 d. The Department also has acted in an arbitrary and capricious
27 manner in this situation in that, prior to sanctioning Borrego Health, the
28 agency clearly did not consider all factors made relevant to such a

1 determination by state and federal law. As explained above, both federal
2 FQHC law, as well as state laws governing the Medi-Cal program
3 generally and Medi-Cal managed care plans, specifically establish that
4 ensuring that patients have adequate access to health care services is of
5 paramount importance. As one example, as mentioned, federal Medicaid
6 regulations establish specifically that one type of “good cause” that
7 would warrant a state Medicaid agency not sanctioning a provider
8 suspected of fraud is when effectively excluding that provider from
9 Medicaid may jeopardized patient access to items or services because the
10 provider serves a large number of “beneficiaries within a HRSA
11 designated medically underserved area.” 42 C.F.R. § 455.23(e)(4)(ii).
12 Here, the Department plainly did not give adequate consideration to the
13 potential impact on beneficiary access to services before moving forward
14 with effectively excluding the entirety of the Borrego Health network
15 from Medi-Cal. The decision therefore was arbitrary, capricious and
16 inconsistent with certain purposes of the federal health center and
17 Medicaid programs, as laid out in statutes and regulations;

18 e. Finally, the Department has abused its discretion in this situation
19 because the penalties imposed on Borrego Health are overly draconian
20 and excessive relative to the supposedly improper conduct alleged
21 against Borrego Health. The Department has effectively excluded
22 Borrego Health’s entire of network of clinics from the Medi-Cal program
23 apparently based on investigations that were limited only to particular
24 services and none of which actually have heretofore resulted in any
25 formal fraud findings against Borrego Health. There are various other
26 penalties or measures that DHCS could have implemented to address any
27 concerns about Borrego Health’s billing practices that would be less
28 severe than completely excluding the organization from Medi-Cal,

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1 including, among other things, putting Borrego Health on prepayment
2 claims review or limiting the suspension only to the services that were
3 focus of the DHCS visits and/or DOJ investigation. Along those lines,
4 completely excluding from Medi-Cal a provider that the federal
5 government recognizes as critical to delivering care in medically
6 underserved areas, based on investigations into supposed fraud that have
7 been lingering for years, is an excessive penalty and an abuse of
8 discretion.

9 **PRAYER**

10 WHEREFORE, Borrego Health prays as follows:

- 11 1. For the Declaratory Judgment;
- 12 2. For an order temporarily and permanently enjoining the Department
13 from suspending Borrego Health from the Medi-Cal program until and unless the
14 Department affords Borrego Health the rights to which it is entitled under federal law
15 and under the Constitution;
- 16 3. For costs of suit, including reasonable attorneys’ fees under 42 U.S.C. §
17 1988; and
- 18 4. For a Writ of Mandate under Code of Civil Procedure 1085: (1) setting
19 aside the Department’s suspension of Borrego Health’s Medi-Cal payments; (2)
20 ordering the Department to rescind any notices issued to third-parties, including but
21 not limited to Medi-Cal health plans, directing or otherwise compelling them to (x)
22 block transfer patients already assigned to Borrego Health, and (y) assign patients that
23 would otherwise be assigned to Borrego Health to other providers; and (3) compel the
24 payment of approximately \$6.7 million that is currently being withheld related to prior
25 provision of in-house dental services to Medi-Cal beneficiaries.
- 26 5. For costs of suit, including attorneys’ fees; and
- 27 6. For such other and further relief that the Court may deem just and proper.

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DATED: September 26, 2022

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