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By  Deputy

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STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
OTHER CIVIL

Deanna Brayton, Darlene Bullock, Forough Mahabady, Debra Branley, Marlene Griffin and Evelyn Bernhagen, on behalf of themselves and all others similarly situated,

Civil File No. 62-CV-09-11693
Chief Judge Kathleen R. Gearin

Plaintiffs,

vs.

**MEMORANDUM IN
SUPPORT OF PLAINTIFFS'
MOTION FOR TEMPORARY
RESTRAINING ORDER**

Tim Pawlenty, Governor of the State of Minnesota, Thomas Hanson, Commissioner, Minnesota Department of Management and Budget, Cal Ludeman, Minnesota Department of Human Services, and Ward Einess, Commissioner, Minnesota Department of Revenue,

Defendants.

I. INTRODUCTION

Plaintiffs seek a temporary restraining order under Rule 65.01 of the Minnesota Rules of Civil Procedure enjoining Defendants Governor and the Commissioner of the Minnesota Department of Management and Budget from reducing allotments to the Minnesota Supplemental Aid Special Diet (MSA Special Diet) program and enjoining Defendant Commissioner of the Minnesota Department of Human Services from implementing the unallotment of the MSA Special Diet grant. Commissioner Ludeman caused notices to be sent to MSA Special Diet grant recipients reducing their grants because "State Money for MSA Special Diets has ended due to 'unallotment' as of November 1, 2009." Recipients of MSA Special Diet grants receive those grants because they are low-income and disabled and their doctors have prescribed special diets for them to maintain

their health. *See* Compl. ¶¶ 31-33. Like the named plaintiffs, many disabled individuals will suffer losses in income sufficient to make it impossible for them to maintain their medically prescribed diet or causing them to shift payments from other necessary, basic living expenses in order to maintain the diet prescribed by their doctors. Those unable to maintain their medically necessary diets may suffer significant health consequences as a result.

Defendants' actions are in violation of the limitations imposed on unallotment by Minn. Stat. §§ 16A.14 and 16.152. Defendants' actions further violate the Minnesota Constitution's Separation of Powers Doctrine set forth in Article III. Thus Defendants are acting without authority. Because the proposed unallotments involve reduction of income for the poorest families in the state, Defendants' actions, if allowed to proceed, will cause irreparable harm. This Court should therefore enjoin implementation of these unallotments, and restore MSA special diet payments as provided for by statute retroactive to November 1, 2009, pending resolution of this dispute.

II. FACTS

A. **The MSA Special Diet Program Unallotment Will Have Devastating Effects on Plaintiffs.**

The plaintiffs and the class they represent all live in poverty. Due to their limited incomes, they all struggle to barely meet their necessary living expenses for food, clothing, shelter and health. For each, the reduction in MSA Special Diet income resulting from Defendants' unallotment of these grants is devastating and places them on the precipice of disaster.

Plaintiff Deanna Brayton suffers from a variety of health problems. She has been diagnosed with an autoimmune disorder, rheumatoid arthritis, degenerative disc disease, osteoporosis, high cholesterol, elevated blood sugar, underactive thyroid, irritable bowel syndrome, traumatic brain injury, irregular heartbeat, anxiety, migraine headaches and visual disturbances. She suffers from frequent blood clots, kidney stones and multiple ill-defined leg fractures. As a result, Ms. Brayton is unable to work. Prior to the unallotment of MSA Special Diet funds, Ms. Brayton's monthly income was Supplemental Security Income (SSI) benefits of \$674, MSA benefits of \$415.40, a basic grant of \$81, and a special diet supplement of \$334.40. She also got \$16 per month in food support.¹ Her total monthly income was \$1089.40. *See* Ex. A (Brayton Aff.).

Multiple health impairments force Ms. Brayton to carefully monitor her health. Not only does she take numerous medications, but she must also follow a strict diet. Ms. Brayton's doctor requires that Ms. Brayton follow both a lactose-free diet and a gluten-free diet. She must also eat between 40 and 60 grams of protein each day. And, she must follow an anti-dumping diet. If Ms. Brayton violates any one of these dietary restrictions, she becomes ill. *Id.*

Ms. Brayton spends an average of \$400 per month on the foods she needs to maintain her special diet. With the addition of her other basic needs, Ms. Brayton's monthly expenses total \$1,221. She cannot afford to pay all her expenses each month.

¹ After losing her special diet supplement of \$334.40, Ms. Brayton's Food Support increased only \$1 and is now \$17 per month. *See* Ex. J (Mason Aff.). Her net loss due to unallotment is \$333.40.

Instead, she must choose one expense or another to leave unpaid. She pays the unpaid bill the following month and chooses another bill to forgo. *Id.*

Defendants' unallotment of the MSA Special Diet program will result in the reduction of Ms. Brayton's monthly income by \$334.40. Her total monthly income will be reduced to \$755. Ms. Brayton does not know how she will be able to buy the foods she needs to maintain her diet with this significant reduction in her income. She is afraid that if she is unable to follow her diet, she will end up in the hospital. *Id.*

Plaintiff Darlene Bullock is a 74-year-old disabled woman whose total monthly income prior to November 1 was \$895. This included \$201 in MSA, a basic grant of \$82 and a special diet supplement of \$119. Ms. Bullock also receives Social Security Disability Insurance (SSDI) of \$255, and retirement income of \$439. She also gets \$16 per month in food support. Ms. Bullock is required to follow a low cholesterol, high residue hypoglycemic, high protein diet. She spends an average of \$250 per month on groceries. *See Ex. B (Bullock Aff.).*

Ms. Bullock has been notified that her MSA Special Diet funding will end November 1, 2009. This will reduce her total monthly income to \$776. Ms. Bullock's total monthly expenses are \$930. Without the MSA Special Diet funds, Ms. Bullock will be unable to buy the foods she needs to maintain her medically prescribed diet, resulting in increased medical problems. *Id.*

Plaintiff Forough Mahabady suffers from multiple health problems that prevent her from working. In 2006, her left kidney was partially removed as a result of kidney cancer. Ms. Mahabady has had both hips replaced, leaving her with significant pain and

mobility limitations. She also suffers from digestive problems that cause her to be unable to eat many foods. Because of these health problems, Ms. Mahabady is forced to follow a strict high protein diet. It costs Ms. Mahabady an average of \$350 per month to maintain this diet. *See Ex. C (Mahabady Aff.)*.

Ms. Mahabady receives SSDI of \$805 per month and prior to November 1, 2009, she received MSA Special Diet funds of \$200 per month. Ms. Mahabady also got \$156 per month in food support.² The termination of the MSA Special Diet program will cause a 20 percent reduction in her monthly income. Ms. Mahabady simply cannot absorb this cut and continue to buy the foods that she needs to maintain her medically prescribed diet. She will be forced to choose between eating and paying her bills. *Id.*

Plaintiff Debra Branley has significant health problems, including acromegaly panhypopituitarism leading to the removal of her pituitary gland, renal disease leading to a kidney transplant, rheumatoid arthritis, and depression. Like all kidney transplant recipients, Ms. Branley must follow a special diet. Prior to November 1, 2009, Ms. Branley received \$250 in MSA Special Diet funds which she spent to meet her special dietary needs. She has been notified that these funds will end November 1, 2009. Without these funds, Ms. Branley's monthly income will be reduced to \$805, far below her monthly expenses of \$1366. *See Ex. D (Branley Aff.)*.

Prior to the loss of her MSA Special Diet funds, Ms. Branley was already struggling to meet her monthly expenses. Her income is limited to SSDI of \$701 per

² After losing her special diet supplement of \$200, Ms. Mahabady's Food Support increased \$44 to \$200 per month. *See Ex. K (Gassaway Aff.)* Her net loss due to unallotment is \$156.

month and MSA now reduced to \$34 per month. She also got \$16 per month in food support.³ Each month, Ms. Branley chooses which bills to pay in full and which to pay only a portion of what is due. With the loss of her MSA Special Diet funding, Ms. Branley will be forced to default on some of her obligations. *Id.*

She will also put her health in significant jeopardy if she is unable to maintain her transplant diet. Specialized diets are necessary to maintain the unique dietary needs of transplant recipients. If Ms. Branley is unable to follow her diet, she puts her new kidney at risk of failure. *See Ex. E (Gjesvold Aff.)*.

Plaintiff Marlene Griffin received \$130 per month in MSA Special Diet funds to maintain the lactose-free, gluten-free, low sodium, low sugar diet required by her complex medical condition of lupus, rheumatoid arthritis, osteoporosis, fibromyalgia, anemia, asthma, diabetes, hypertension, emphysema, renal disease and carpal tunnel syndrome. These funds supplemented her SSI of \$674 and her basic MSA grant of \$81. Her total monthly income prior to unallotment of MSA Special Diet was \$885. She also got \$16 per month in food support.⁴ As of November 1, 2009, her income is reduced to \$755 per month. This is less than her monthly expenses of \$919. *See Ex. F (Griffin Aff.)*.

Ms. Griffin spends an average of \$200 per month on groceries. Without MSA Special Diet funds, Ms. Griffin will be forced to buy cheaper foods that are not on her

³ After losing her special diet supplement of \$250, Ms. Branley's Food Support increased only \$5 and is now \$21 per month. *See Ex. J (Mason Aff.)* Her net loss due to unallotment is \$ 245.

⁴ After losing her special diet supplement of \$130, Ms. Griffin's Food Support increased \$54 to \$70 per month. *See Ex. K (Gassaway Aff.)*. Her net loss due to the unallotment is \$76.

diet. Ms. Griffin knows that if she eats these foods, she will get sick, but she does not know how she will be able to avoid that. *Id.*

Plaintiff Evelyn Bernhagen is also disabled and also must follow a medically prescribed diet. She receives MSA Special Diet funding to assist her with the higher food costs necessitated by her special dietary needs. Ms. Bernhagen had a monthly income of \$674 from SSI and \$151.40 from MSA (\$81 in basic needs and \$70.40 in special diet) totaling \$825.40. She also got \$38 per month in food support.⁵ Her monthly expenses of \$925 cause Ms. Bernhagen to borrow money each month against her next Social Security check. She ultimately pays this back with the Renter Tax Refund check she gets each year. It is only by relying on the Renter Tax Refund that Ms. Bernhagen is able to make ends meet. *See Ex. G (Bernhagen Aff.).*

Like all the other plaintiffs, Ms. Bernhagen has been notified that her MSA Special Diet funds will end on November 1, 2009, reducing her monthly income to \$755. Without these funds, Ms. Bernhagen does not know how she will afford the \$200 she spends each month for her groceries. She is afraid that she will be forced to eat foods that are not on her diet and will cause her hypoglycemia and high cholesterol to get worse. *Id.*

Each of the named plaintiffs has medical conditions that require a special diet. If they fail to maintain their diet, their health conditions will get worse, putting them in significant jeopardy. The plaintiffs already live below the poverty limit. They do not

⁵ After losing her special diet supplement of \$70.40, Ms. Bernhagen's Food Support increased \$35.00 and is now \$73 per month. *See Ex.K (Gassaway Aff.).* Her net loss due to unallotment is \$35.40.

have sufficient income to meet their current expenses. They each face the very real prospect of being unable to meet their dietary needs once the MSA Special Diet program ends. The plaintiffs represent a small fraction of disabled Minnesotans impacted by Defendants' unallotment of the MSA Special Diet program, each with their own story of the extreme hardship the unallotment will cause.

B. Background on MSA Special Diet.

Minnesota Supplemental Aid, commonly known as MSA, is a state-funded program that supplements the Supplemental Security Income (SSI) benefits available to Minnesota residents who are aged, blind or age eighteen (18) years of age or older and disabled. Minn. Stat. § 256D.425. At the time the federal government assumed primary responsibility for providing cash assistance to the aged, blind and disabled, states which had previously provided similar assistance were required to maintain their programs to the extent that the state's benefits exceeded the federal benefit. 42 U.S.C. § 1382g (2). MSA is Minnesota's required state program.

The program pays a monthly cash benefit to eligible recipients. The amount of the benefit is determined by subtracting the recipient's net income from the program's established standard of need. Minn. Stat. § 256D.45 subdiv. 3. The standard of need is based on the amount determined necessary to meet an individual or married couple's basic needs. Minn. Stat. § 256D.44, subdiv. 3. For example, an individual who lives alone and who receives SSI will be eligible for an MSA grant of \$81 per month.

In addition to the basic needs standard, MSA provides for additional assistance to recipients who have special needs. Minn. Stat. § 256D.44, subdiv. 5. The statute

identifies six different special needs and provides additional assistance standards for each of those special needs. *Id.* Medically prescribed special diets are one of the identified special needs. Minn. Stat. § 256D.44, subdiv. 5(a).

MSA recipients who follow certain special diets are eligible for additional assistance but only if their diet is medically prescribed by a licensed physician and “if the cost of those additional dietary needs cannot be met through some other maintenance benefit.” *Id.* The statute sets forth a list of covered diets and the amount of additional assistance available for each diet. For example, a recipient who must follow a controlled protein diet is entitled to a \$176 supplement; a recipient who must follow a lactose free diet is entitled to a \$44 supplement; and a recipient who must follow both a controlled protein diet and a lactose free diet is entitled to a \$225 supplement. *Id.*

C. **Minnesota State Budget and Unallotment of the MSA Special Diet Program.**

The State of Minnesota operates on a two-year budget cycle. The biennial budget is comprised of appropriations established by the Legislature and signed into law by the Governor. To assist in the creation of the budget, the Commissioner of Management and Budget is required to prepare a series of forecasts of revenues and expenditures. Minn. Stat. § 16A.103. In November of 2008, the budget forecast projected a \$4.847 billion budget deficit for the 2010/2011 biennium. *See* Ex. H-1.

On January 27, 2009, Governor Pawlenty submitted his proposed budget for the 2010/2011 biennium to the Legislature. *See* Ex. H-2. This proposed budget incorporated the projected budget deficit and included numerous reductions in expenditures. *Id.* As the

Legislature began their deliberations on the budget, a new forecast was released by the Commissioner of Management and Budget in February of 2009. *See* Ex. H-3. The Commissioner continued to project a budget deficit of \$4.847 billion for the upcoming biennium. *Id.*

Governor Pawlenty and the State Legislature continued their efforts to develop the state budget. On March 17, 2009, Governor Pawlenty submitted a revised budget. *See* Ex. H-4. This budget continued to recognize the projected budget deficit. *Id.* In April 2009, the Department of Management and Budget issued a State Economic Update showing that state revenues received in February and March of 2009 were less than previously forecast. *See* Ex. H-5.

On May 11, 2009, after months of negotiation, three budget forecasts, and two proposed budgets submitted by the Governor, the Legislature approved HF 1362, the Omnibus Health and Human Services appropriations bill. The bill contained the state budget appropriations for all Human Services programs for the 2010/2011 biennium, including appropriations for the MSA program. Governor Pawlenty signed the bill on May 14, 2009. *See* Ex. H-6. The Governor exercised his right to line-item veto only one provision in the bill, funding for the General Assistance Medical Program. Governor Pawlenty did not veto funding for the MSA program. *Id.* On the same day he signed the Health and Human Service funding bill into law, Governor Pawlenty announced at a news conference that he would reduce allotments to a variety of state programs for the purpose of balancing the budget.

On May 18, the final day of the legislative session, the Legislature approved HF 2323, which contained provisions for increased revenue needed to pay for appropriations already

signed into law by Governor Pawlenty. Governor Pawlenty vetoed HF 2323 on May 21, 2009. *See* Ex. H-7. This resulted in the legislative session ending without a balanced budget.

In June of 2009, Defendants took steps to fulfill the Governor's earlier promise to unilaterally balance the budget through the use of unallotments. On June 4, Commissioner Hanson sent the Governor a letter stating that the state's revenues were not anticipated to be sufficient to support the planned spending during the 2010/2011 biennium. *See* Ex. H-8. A couple of days later, Commissioner Hanson met with members of the community to discuss the proposed unallotments. *See* Compl. ¶ 56. Then on June 16, Commissioner Hanson sent Governor Pawlenty a letter stating that the enacted budget spent a projected \$2.676 billion more than anticipated revenues. *See* Ex. H-9. Commissioner Hanson proposed a series of spending reductions, including \$236 million from the Human Services budget. *Id.* The reduction in Human Services spending proposed by Commissioner Hanson included elimination of the MSA Special Diet program effective November 1, 2009, through June 30, 2011. *Id.* Commissioner Ludeman then caused instruction to be issued to all county human service agencies instructing them to identify all MSA Special Diet recipients and send them notice that their special diet benefits would end November 1, 2009, due to unallotment. *See*, Ex. H-11.

III. PROCEDURAL POSTURE AND RELIEF SOUGHT

Plaintiffs' attorney Galen Robinson spoke with Defendants' attorney Alan Gilbert, Solicitor General for the State of Minnesota, on October 30, 2009, following the filing of this action. Mr. Robinson requested that Defendants agree to continue payment of benefits to recipients of the MSA Special Diet program pending final resolution of this matter. On

November 2, 2009, Mr. Gilbert informed Mr. Robinson that Defendants would not agree to Plaintiffs' request that special diet payments be paid pending a ruling on a temporary injunction. *See* Ex. I (Robinson Aff.). Therefore, the unallotment of Plaintiffs' special diet payments remains effective, and all payments have ended, beginning November 1, 2009. Plaintiffs are unable resolve this matter without court involvement and must seek relief through the current action to avoid irreparable harm.

Plaintiffs ask for a temporary restraining order against implementation of the unallotment of MSA Special Diets. Plaintiffs seek an order directing Defendant Commissioner Ludeman to reimburse the Plaintiff Class for any Special Diet grants already withheld as a result of the unallotment. At future hearings, Plaintiffs will seek a temporary injunction, and a final order that, among other requested relief, enjoins Commissioner Ludeman from implementing the unallotment of MSA-Special Diets.

IV. ARGUMENT

A. **Plaintiffs Satisfy the Prerequisites for Issuance of a Temporary Restraining Order.**

A temporary injunction allows the status quo to be preserved among the parties pending the court's adjudication of the merits of the case. *Queen City Constr., Inc. v. City of Rochester*, 604 N.W.2d 368, 372 (Minn. Ct. App. 1999). And, while the court considers the same factors when deciding whether to issue a temporary restraining order or a temporary injunction, the consideration given by the court will be different, and the likelihood of immediate and irreparable injury will usually be the primary factor in deciding whether to grant a TRO. Herr & Haydock, Minnesota Practice, v. 2A, § 65.5

(4th Edition, 2005). *See e.g., Turner v. Walsh*, 435 F. Supp. 707, 711 (W.D. Mo. 1977) (termination of reduction of Medicaid benefits is sufficient irreparable injury to justify a temporary restraining order). Plaintiffs' diets are prescribed by their doctors to maintain Plaintiffs' health. MSA Special Diet payments are granted because there are no other resources available to Plaintiffs to meet this need. Minn. Stat. § 256D.44. Equity requires that Plaintiffs who raise potentially meritorious claims not be deprived of their MSA Special Diet benefits pending the Court's resolution of this case.

An injunction is proper only when the plaintiff "faces irreparable harm and has no adequate remedy at law." *Id* at 372; *see also City of Mounds View v. Metro. Airports Comm'n*, 590 N.W.2d 355, 357 (Minn. Ct. App. 1999). Here, Plaintiffs have diets prescribed by their doctors as a result of their disabling conditions and insufficient resources with which to maintain their diets and meet their other monthly expenses. They satisfy this prerequisite to injunctive relief because the diets should be maintained on a daily basis in order to maintain Plaintiffs' health. An inability to purchase the foods necessary to maintain the diet, or forcing Plaintiffs to divert resources from other necessary expenses, will result in irreparable harm.

The Court should grant temporary relief enjoining Defendants from implementing the unallotment of MSA Special Diet funding because the unallotment is not authorized under state law or the Minnesota Constitution, and if allowed to proceed, the State will cause irreparable harm to Plaintiffs and those similarly situated. Plaintiffs meet the legal requirements for granting temporary relief.

B. The *Dahlberg* Factors Weigh Heavily in Favor of Issuing the Injunction.

Because Plaintiffs have established that they face irreparable harm without adequate legal remedies, this Court must consider the five factors set out by the Minnesota Supreme Court in *Dahlberg* to determine whether Plaintiffs' requested temporary injunctive relief should be granted. See *City of Mounds View*, 590 N.W.2d at 357-58. The five *Dahlberg* factors are:

- (1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief.
- (2) The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial.
- (3) The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief.
- (4) The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal.
- (5) The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Dahlberg Bros., Inc. v. Ford Motor Co., Inc., 272 Minn. 264; 137 N.W.2d 314, 321-22 (Minn. 1965) (footnotes omitted).

The equitable nature of a temporary injunction requires that no single *Dahlberg* factor is determinative and the importance of each factor varies from case to case depending on the relevancy of each factor to the case at hand "rather than [on] a formulaic threshold." *Minneapolis Fed'n of Teachers Local 59 v. Minneapolis Pub. Sch., Special Sch. Dist. No. 1*, 512 N.W.2d 107, 110 (Minn. Ct. App. 1994).

Because each of these considerations favors Plaintiffs, the Court should grant temporary injunctive relief in this matter.

1. The harm to Plaintiffs far exceeds any harm to Defendant.

The illegal reduction of MSA special diet funds will irreparably harm Plaintiffs because they are living in poverty and rely on the special diet supplemental assistance payments to help them buy the food they need in order to follow their diets. This harm far outweighs any inconvenience suffered by the state in delaying implementation of the MSA Special Diet unallotment. The Court must consider "the harm to be suffered by the plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial." *Dahlberg* 272 Minn. at 274-75; 137 N.W.2d at 321.

Courts have consistently noted the extraordinary role that monetary assistance plays in the lives of poor people. Because even small changes in income can have large consequences for the ability of a family to meet its basic needs, the termination or reduction of benefits is treated as exceptional. *See e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring hearing prior to termination of welfare benefits in part because of welfare recipients' "brutal need"). Thus, courts examining claims for temporary relief have repeatedly found that the reduction of welfare payments – even if those payments could be recouped later through legal action — would constitute irreparable harm. *See Cha v. Noot*, 696 F.2d 594 (8th Cir. 1982); *Nelson v. Likins*, 389 F. Supp. 1234 (D. Minn. 1974) *aff'd per curiam*, 510 F.2d 414 (8th Cir. 1975); *see also Beno v. Shalala*, 30 F.3d 1057, 1064, n.10 (9th Cir. 1994) ("[n]umerous cases have held that reductions in AFDC benefits, even reductions of a relatively small magnitude, impose irreparable harm on recipient families") (citing cases).

Here, the plaintiffs and the class they seek to represent will suffer irreparable harm if the State is allowed to terminate their MSA Special Diet payments. Plaintiffs rely on their existing benefits to cover basic expenses. The MSA special diet supplement is necessary because there are no other resources available to help Plaintiffs pay for the additional expenses necessitated by their medically prescribed diets. Minn. Stat. § 256D.44 subdiv. 5(a).

Deanna Brayton suffers from numerous health conditions which have left her permanently disabled. As a result of her disabilities, she has numerous doctor-prescribed special diets that she must follow in order to maintain her health. Ms. Brayton's monthly income without the special diet supplement consists of \$674 in Supplemental Security Income (SSI), Minnesota Supplemental Aid (MSA) of \$81, and \$17 in Food Support for a total of \$772. She is eligible to receive an MSA special diet supplement of \$334.40 to cover the expenses of her special dietary needs, however, Defendants suspended her receipt of these payments as a result of their unallotment of MSA special diets. Ms. Brayton currently spends an average of \$400 per month on food, and her current monthly expenses of \$1,221 far exceed her monthly income of \$772. Ms. Brayton relies on the \$334.40 special diet payments to purchase the foods she needs to follow her medically prescribed diets.

Plaintiff Darlene Bullock also suffers from multiple health conditions which have rendered her disabled. Ms. Bullock is required to closely monitor her health. She takes multiple medications and is required to maintain a low cholesterol, high residue hypoglycemic, high protein diet. Ms. Bullock's only sources of monthly income are

Social Security Disability Insurance (SSDI) of \$255, retirement income of \$439, MSA of \$81, and \$16 in Food Support benefits for a total of \$791. She is eligible to receive an MSA special diet supplement of \$119, but Defendants suspended her receipt of these payments as a result of their unallotment of MSA special diets. Ms. Bullock currently spends an average of \$250 per month on food, and her current monthly expenses of \$930 exceed her current monthly income of \$791. Ms. Bullock relies on the \$119 special diet payment to purchase the foods she needs to follow her medically prescribed diets.

Plaintiff Forough Mahabady suffers from multiple health conditions, and she too is permanently disabled. Ms. Mahabady must maintain a strict high protein diet. Her monthly income consists of SSDI of \$805, and \$200 in Food Support benefits for a total of \$1005. The food support portion of this income can only be used to purchase food. She is eligible to receive an MSA special diet supplement of \$200, but Defendants suspended her receipt of these payments as a result of their unallotment of MSA special diets. Ms. Mahabady currently spends an average of \$350 per month on food, and her current monthly expenses of \$1892 greatly exceed her monthly income of \$1005. Ms. Mahabady relies on the \$200 special diet payment to purchase the foods she needs to follow her medically prescribed diet.

Plaintiff Debra Branley has significant health problems that have resulted in her total disability. She follows a medically prescribed and monitored diet. Her only source of income is SSDI in the amount of \$701 per month, MSA of \$34, \$21 in Food Support benefits. for a total of \$756 per month. She is eligible to receive an MSA special diet supplement of \$250, but Defendants suspended her receipt of these payments as a result

of their unallotment of MSA special diets. Ms. Branley currently spends an average of \$250 per month on food, and her current monthly expenses of \$1366 exceed her current monthly income of \$756. Ms. Branley relies on the \$250 special diet payment to purchase the foods she needs to follow her medically prescribed diets.

Plaintiff Marlene Griffin suffers from multiple disabling health conditions. Ms. Griffin takes multiple medications and vitamin supplements. She is required to maintain a low sugar and low sodium diet. In addition, she must follow both a lactose-free diet and a gluten-free diet. Ms. Griffin's monthly income is SSI in the amount of \$674, MSA of \$81, and \$70 in Food Support benefits for a total of \$825. She is eligible to receive an MSA special diet supplement of \$130, but Defendants suspended her receipt of these payments as a result of their unallotment of MSA special diets. Ms. Griffin spends an average of \$200 per month on food, and her current monthly expenses of \$919 exceed her current monthly income of \$825. Ms. Griffin relies on the \$130 special diet payment to purchase the food she needs to follow her medically prescribed diets.

Plaintiff Evelyn Bernhagen has a number of health conditions which include hypoglycemia and high cholesterol. She must follow special diets for each of these conditions. Her monthly income consists of SSI of \$674, MSA of \$81, and \$73 in Food Support benefits for a total of \$828. She is eligible to receive an MSA special diet supplement of \$70.40, but Defendants suspended her receipt of these payments as a result of their unallotment of MSA special diets. Ms. Bernhagen spends an average of \$200 per month on food, and her current monthly expenses of \$925 exceed her monthly income of

\$828. Ms. Bernhagen relies on the \$70.40 special diet payment to purchase the foods she needs to follow her medically prescribed diets.

The harm faced by these plaintiffs is nearly identical to the harm identified in *Cha* and *Nelson*. In *Cha*, the plaintiff faced a \$172.00 reduction in benefits because the state had terminated his refugee assistance and placed him in a program with less cash assistance. The Eighth Circuit, reversing the district court's denial of a temporary injunction, found: "We have no doubt that irreparable harm is occurring to the plaintiff class as each month passes without the [higher] level of benefits." *Cha*, 696 F.2d at 599. The court also found that: "[f]or people at the economic margin of existence, the loss of \$172.00 per month and perhaps some medical care cannot be made up by the later entry of a monetary judgment". *Id.* Likewise, in *Nelson*, the court granted the plaintiff's motion for temporary relief, enjoined the reduction of welfare benefits, and noted that the loss of money is "immediate and irreparable harm" to those who are "in the grip of poverty." *Nelson*, 389 F. Supp. at 1237.

In contrast, the relief Plaintiffs seek presents little, if any, harm to the state. By granting the temporary restraining order, this Court would be placing on hold the implementation of the MSA Special Diet unallotment until the Court reaches a decision on Plaintiffs' request for a temporary injunction. In the meantime, the State simply has to instruct counties to administer the MSA Special Diet program as they had been prior to November 1 of this year, requiring no additional administrative burden or expense. *See, e.g., Nelson v. Likins, supra*, (an increase in administrative work does not outweigh the rights and needs of AFDC recipients).

The savings the State would forgo are a tiny fraction of the State's budget and cannot compare to the losses suffered by the plaintiffs and the class they seek to represent. The potential harm to the plaintiffs – loss of the income necessary for them to be able to purchase the food necessary to carefully maintain their health – far outweighs any potential harm to the defendants. This factor thus supports Plaintiffs' request for a temporary restraining order.

2 Plaintiffs are likely to succeed on the merits.

The Court must consider the likelihood of Plaintiffs' success on the merits in evaluating whether to grant the injunctive relief. *Dahlberg*, 272 Minn. at 275, 137 N.W.2d at 321. Here, because the law is clear and the evidence undisputed, this factor weighs in Plaintiffs' favor.

The focus of Plaintiffs' argument is on the plain meaning of the words in Minn. Stat. § 16A.152 subdiv. 4. This statute grants certain powers to the Commissioner of Finance and to the governor. In 2009, these defendants have exceeded the powers given by this statute.

If the defendants contend that their unilateral actions in 2009 are authorized by Minn. Stat. § 16A.152 subdiv. 4, they render the statute unconstitutional and unenforceable.

a. Plain Meaning of the Statute

The authority to reduce allotments, or “unallot,” is set forth in Minn. Stat.

§ 16A.152 subdiv. 4. Among other things, it provides:

- (a) If the commissioner determines that **probable receipts** for the general fund **will be less than anticipated**, and that the amount available for the **remainder of the biennium** will be less than needed, the commissioner shall...reduce the amount in the budget reserve account as needed to balance expenditures with the revenue (emphasis added).
- (b) An additional deficit shall...be made up by reducing unexpended allotments of any prior appropriation or transfer. The commissioner is empowered to defer or suspend prior statutorily created obligations which would prevent effecting such reductions.

The legislative system that we have in Minnesota is straightforward. Finances are handled in a biennium, a two-year cycle. The revenues and expenditures for the two-year fiscal cycle are to balance.⁶

Minn. Stat. § 16A. subdiv. 4 is to be understood in this context. The biennium begins with a balanced budget, i.e., with laws being enacted to raise revenue and to authorize expenditures. If, after starting with a balanced budget, it turns out that “receipts from the general fund will be less than anticipated,” and that “the amount available for the remainder of the biennium will be less than needed,” the Commissioner and Governor have statutory authority to reduce the allotments in order to prevent a deficit.

⁶ Prior to 1973, the budget was to be brought into balance every quarter (three months). In 1973, the time period was extended to one year. Since 1981, the requirement to balance the budget is applied to the biennium. The extension of time provides the State with a longer period during which it can recover from unanticipated fiscal problems. See Ex. H-12, (Legislative History of Unallotment Power).

b. How Defendants Departed From the Law

The statute on unallotment cannot be used unless certain conditions are met to trigger the application of the statute. There must be a decrease in “probable receipts” so that the receipts become “less than anticipated.” If this unanticipated decline in receipts caused a shortfall for “the remainder of the biennium,” the authority to unallot is conferred. Absent these triggers, there is no authority to unallot conferred by the statute.

What occurred in 2008 and 2009? The following chronology traces the relevant events:

- | | |
|----------------|---|
| November, 2008 | Commissioner of Management and Budget forecasts a deficit of \$4.847 billion based upon anticipated receipts of \$31.866 billion. <i>See Ex. H-1, pg. 6.</i> |
| January, 2009 | Governor submits a proposed budget with anticipated receipts of \$34.221 billion. <i>See Ex. H-2, pg. 3.</i> |
| February, 2009 | Commissioner provides a revised forecast with a deficit of \$4.847 billion based upon anticipated receipts of \$30.700 billion. <i>See Ex. H-3, pg. 4</i> |
| March, 2009 | Governor submits a revised budget with anticipated receipts of \$29.905 billion. <i>See Ex. H-4, pg. 4.</i> |
| April, 2009 | The Department of Management and Budget issues an economic update showing that receipts for March and April 2009 were \$46 million less than projected in the February forecast. <i>See Ex. H-5, pg. 1.</i> |
| May 11, 2009 | Legislature passes and sends HF 1362, the Health and Human Services appropriations bill to the Governor for approval. |
| May 14, 2009 | the Governor signs HF 1362 into law, with one item subject to a “line-item” veto. |
| May 14, 2009 | Governor announces that he will veto the revenue bill and use the unallotment statute to balance the budget. |

- May 18, 2009 Legislature passes HF 2323, the revenue bill which would have resulted in a balanced budget, and sends it to the Governor for approval.
- May 21, 2009 Governor vetoes the revenue bill.
- June 16, 2009 Governor announces allotment reductions, including the reductions at issue in this litigation.
- July 1, 2009 Biennium begins.

When in the course of these events did the probable receipts for the general fund become “less than anticipated”? The answer is “Never.” The defendants were fully aware of the projected receipts available for spending in the 2010/2011 biennium.

When in the course of these events did the Governor become authorized to use “unallotment” authority granted by statute? The answer is “Never.”

If the meaning of a statute is unambiguous, it is interpreted according to its plain language. *Molloy v. Meier*, 679 N.W.2d 711, 723 (Minn. 2004). The statutory triggers for the use of unallotment authority have never been met. The Governor’s actions are not an attempt to adjust expenditures “for the remainder of the biennium” on the grounds that the projected “probable receipts for the general fund will be less than anticipated.” The Governor’s actions are not authorized by law.

c. **Defendants’ use of Minn. Stat § 16A.152 subdiv. 4 violates Article III, Section 1 of the Minnesota Constitution.**

Because the Legislature does not intend to violate the Minnesota Constitution, Minn. Stat. § 645.17(3), and because Plaintiffs’ claims can be resolved based upon the plain meaning of the statute, it is not necessary for the Court to reach Plaintiffs’

constitutional claims in order to grant the requested Temporary Restraining Order.

However, constitutional issues will now be addressed because Defendants' claimed reliance on Minn. Stat. § 16A.152 on the facts of this case does render the statute unconstitutional. The Defendants use of unallotment before the beginning of a biennium circumvents the Legislature's prerogative to attempt to override line-item vetoes of appropriations, and represents an unconstitutional violation of Article III, section 1 of the Minnesota Constitution.

The Constitution grants the executive branch only the power to approve or to veto legislation. In the case of appropriations, the Constitution permits the Governor to exercise the veto power selectively by using a line-item veto on one or more appropriations within the bill.⁷ If a governor vetoes all or any portion of an appropriation bill, the Constitution grants the power to the Legislature to try to override the veto. If the Legislature is successful, the bill becomes law despite the veto. Once the Governor signs a bill or his veto is overridden, he is required by the Constitution to see that the law as enacted is faithfully executed. If Minn. Stat § 16A.152 were to be construed in a manner permitting the executive branch first to sign an appropriation bill into law and then to ignore its provisions from the very first day the appropriations become law, then the

⁷ The Minnesota Constitution is a limit to—not a grant of—legislative power, *Citizens for Rule of Law v. Senate Committee on Rules & Administration*, 770 N.W. 2d 169,176, (Minn. Ct. App. 2009) (citations omitted) Similarly, it is also a limit to executive power. During the process of achieving a balanced budget for an upcoming biennium, the executive branch has no power to appropriate funds or reduce an appropriation other than through a line-item veto.

statute is an unconstitutional delegation of legislative authority.⁸ The Governor simply may not arrogate to himself the power to rewrite appropriations at the beginning of a biennium without violating Minnesota's Constitution.

The Legislature is presumed not to pass laws that yield absurd or unreasonable results or that are unconstitutional. Within the context of Chapter 16A, it would be an unreasonable interpretation of 16A.152 subdiv. 4 to permit the statute to be used by the executive branch to balance the budget for an entire biennium.

The unallotment statute was found to be constitutional in the context before the court in *Rukavina v Pawlenty*, 684 N.W.2d 525 (Minn. Ct. App., 2004). But no Minnesota court has considered the question in the context now before this Court. In the present case, the executive branch of government has used the unallotment statute in lieu of using its constitutional powers either of the line-item veto to reduce appropriations or of calling the Legislature into special session to continue to work toward resolving the budget shortfall that occurred when the Governor vetoed the revenue bill that would have resulted in a balanced budget.

While the constitutionality of Minn. Stat. § 16A.152 subdiv. 4(b) was addressed by the court of appeals in *Rukavina*, that case involved facts distinctly different from those now presented to this Court. *Rukavina* involved a challenge to a reduction in funds from the mineral fund. The funds were available, they were not encumbered or otherwise obligated, and there were no pending development project requests for money. In other

⁸ Permitting the statute to be used in this way leads to unreasonable and illogical results. It would permit the Governor to unallot a program that he first rejected using his line-item veto of an appropriations bill even if the Legislature were to override that veto. See e.g. *Fairbanks North Star Borough, and North Star Borough School District v. State of Alaska et al.*, 736 P.2d 1140, 1143 (Ala, 1987)

words, the funds were not needed to pay any current ongoing obligation. Furthermore, the unallotment occurred in February of 2003, a mere four months before the end of the biennium in which the shortfall occurred. Put another way, the unallotment was from unused funds, and it was used to balance the budget during the end of the biennium in which the shortfall occurred. In addition, the unallotment toward the end of the biennium occurred at a time when the Legislature was in session and could have acted on its own. Against this backdrop of facts, the *Rukavina* court concluded that the statute was not unconstitutional. The court noted that while the:

appropriation of money is the responsibility of the legislature under Minn. Const. Art. XI § 1, *it is an annual possibility* that the revenue streams to fund those appropriations may be insufficient to actually realize each appropriation. For that purpose, the legislature, by statute authorized the executive branch to avoid, or reduce *a budget shortfall in any given biennium*. Minn. Stat. § 16A.152 does not represent a delegation of the legislatures ultimate authority to appropriate money, but merely enables the executive to deal with an *anticipated shortfall before it occurs*.

id. at 535 (emphasis added.) The court, citing *Lee v Delmont*, 228 Minn 101, 112-13, 36 N.W.2d 530, 538 (1949), further noted that “although purely legislative power cannot be delegated, the legislature may authorize others to do things ... that it might properly but *cannot conveniently or advantageously do itself*.” *id.* (emphasis added.) (*Lee* involved the question of whether regulatory powers conferred upon a board constituted a delegation of legislative power. In holding that it did not, the court reasoned that while the power to ascertain facts which automatically bring a law into operation by virtue of its own terms can be delegated, it is not the same as the power to pass, modify or annul a law.) *id.* This rational does not apply when the executive, as in the present case, claims

the power to modify or annul a duly enacted law.

Compare the *Rukavina* facts with the facts now before the Court. In the present case, economic forecasts of probable receipts and a projected budget deficit for the next biennium dated back at least to November of 2008. The unallotments here at issue were aimed at developing a balanced budget *for the next biennium*. They did not deal with unanticipated shortfalls occurring within a current biennium.

The Governor was aware of probable receipts and the projected deficit when he signed numerous appropriations bills into law. He had a constitutional right to use his line-item veto authority to reduce lines in any number of appropriation bills to achieve a balanced budget, but he chose not to do so. Instead he signed them into law, at which point he had a constitutional duty to see that they were faithfully executed. He was also presented with an opportunity to adhere to his duty—the Legislature sent him a revenue bill that would have balanced the budget, but he vetoed that and then unilaterally rewrote the state’s budget. In so doing, he not only exceeded his constitutional authority, he also deprived the Legislature of its constitutional right to try to override line item vetoes of appropriations bills.

The premises for the holding in *Rukavina* do not support a similar holding in the case now before the Court. The court in *Rukavina* reached its conclusion only after noting that insufficient revenue streams are an *annual possibility*, and that the unallotment statute authorized the executive branch to reduce *a budget shortfall in any given biennium*. It then concluded that the statute *merely* enabled the executive to deal with an *anticipated shortfall* before it occurs. The *Rukavina* court’s statement concerning

the constitutionality of the statute must be limited to its distinctly different facts – it should not be extended to the facts now before the Court.

The Court should reject an overly broad interpretation of *Rukavina* because “The tendency to sacrifice established principles of constitutional government in order to secure centralized control and high efficiency in administration may easily be carried so far as to endanger the very foundation upon which our system of government rests.” *Juster Bros. v. Christgau*, 7 N.W.2d 501, (1943) citing *State ex rel. Young v. Brill*, 100 Minn, 499, 520, 111 N.W. 294, 639-40 (1907).

Courts in other states have considered statutes similar to 16A.152 subdiv. 4 and found them to be constitutionally infirm. These decisions focus on the balance of power between the two branches of government.

In *Fairbanks North Star Borough, and North Star Borough School District v. State of Alaska et. al.*, 736 P.2d 1140 (Ala, 1987), the governor of Alaska unallotted appropriated funds in a manner comparable to Governor Pawlenty’s unallotments at issue in the present case. Such actions were judged to be an unconstitutional violation of limits imposed by separation of powers. Quoting Justice Brandeis, the Alaska Supreme Court gave the following description of the separation of powers doctrine:

[T]he doctrine was adopted not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the government powers among three departments, to save the people from autocracy.

736 P.2d, at 1142, citing *Myers v. U.S.*, 272 U.S.52, 293, 47 S. Ct. 21, 85 (1926).

In 2009, Governor Pawlenty is asserting that Minn. Stat. § 16A.152 subdiv. (4)

provides him with unbridled power to unilaterally reduce statutory allotments and to rewrite statutes (i.e. change the statutory 19% rate for calculating renters' rebates to his preferred rate of 15%). If Minn. Stat. § 16A.152 subdiv. (4) were to be read to confer such power on the Governor, it would be unconstitutional. In holding the comparable Alaska statute unconstitutional, the Alaska Supreme Court rejected it because the powers conferred were overly broad and amounted to a legislative abdication. *id.* at 1144. In rejecting the statute, the Alaska court noted it articulated no principles to guide the executive, and most importantly, the executive was provided with no policy guidance as to how the cuts should be distributed. As a result, the court concluded that nothing in the statute would prevent the governor from effectively vetoing a project where his veto had been previously overridden. Minn. Stat. § 16A.152 when used by the Governor as a tool to balance the budget unilaterally at the outset of a biennium is equally infirm.

Childs v. Children A, B, C, D, E, and F, 589 So.2d 260, (Fla. 1991) also involved the constitutionality of a statute remarkably similar to Minn. Stat. § 16A.152 subdiv. 4. In *Childs*, the court concluded that the statute was an impermissible attempt by the legislature to abdicate a portion of its lawmaking responsibility and vest it in the executive. *id.* at 267. The court's conclusion was based on the following analysis: The power to appropriate state funds is legislative and to be exercised only through duly enacted statutes. The power to reduce appropriations is also a legislative function. The veto power is the power to nullify – it is not the power to alter or amend legislative intent. Therefore, the executive branch does not have the power to use the veto to restructure an appropriation. The court concluded that the legislature cannot grant by statute a power to

the executive to do at a later date what it is forbidden by the constitution during the initial appropriations process. *id* at 265.

The principles at issue in balancing legislative and executive powers are also analyzed by the court in *Hunter v. State of Vt.*, 177 VT 339, 347, 805 A.2d 381,390 (2004). The Vermont statute dealing with “unallotment” authorized the governor to recommend reductions if, after the passage of a balanced budget, there was a reduction of 2% or more in the amount of revenue projected at the time the budget was adopted. The recommendation would be made to a Joint Fiscal Committee of the legislature, which could review and revise the recommendation. This alternative process for balancing the budget could be used only if the legislature was not in session. This process was held to be constitutional. The discussion of applicable standards for assessing the constitutionality of the process is instructive.

The Vermont Supreme Court in *Hunter* noted “...appropriations necessarily represent legislative determination of policy, by deciding which programs and activities to support financially, and therefore who obtains intended public benefits. If the Governor has a free hand to refuse to spend any appropriated funds, he or she can totally negate a legislative policy that lies at the core of the legislative function.” *id.* at 347, 390. However, the Vermont court went on to note that because the “activity of spending is essentially an executive task, the Governor is allowed some discretion to exercise his judgment not to spend money in a wasteful fashion, *provided that* he determines that such a decision will not compromise the achievement of underlying legislative purposes and goals.” *id.* at 348. (citing *Opinion of the Justices*, 375 Mass. 827; 376 N.E.2d 1217

(1978), emphasis added) *See; Colo. Gen. Assembly v. Lamm*, 700 P.2d 508,521 (Colo. 1985) (whatever inherent power the Governor has over administering the state budget, it does not extend to contradicting major legislative determinations.)

Applying well established principles of law to the unilateral actions of Governor Pawlenty in the 2009 unallotments, the powers claimed by the Governor under Minn. Stat. § 16A.152 would render the statute unconstitutional.

In *Rukavina*, the court permitted the use of Minn. Stat § 16A.152 to divert funds that were not in use at the end of a biennium in order to avoid a shortfall in that biennium. This use is a far cry from the present claimed expansion of executive power to unilaterally balance the budget at the beginning of a biennium by eliminating statutory appropriations for disabled Minnesotans entitled to their receipt. Used in this manner, the statute does result in a violation of the separation of powers doctrine.

3 Public policy favors granting the injunction.

Dahlberg requires that this Court determine whether the relief requested accords with expressed public policy. *See* 137 N.W.2d at 321-22. Here, the statute establishing eligibility for MSA special diet supplemental payments as well as the legislative appropriation for MSA special diets demonstrate that the public has a strong interest in providing this necessary assistance to disabled low-income individuals.

It is well settled that a state's public policy is embodied in its statutes. *See Onstad v. State Mut. Life Assur. Co.*, 32 N.W.2d 185, 187 (Minn. 1948) (statutes represent the announced public policy of the state of Minnesota); *Cardinal v. Merrill Lynch Realty/Burnet, Inc.*, 433 N.W.2d 864, 867 (Minn. 1988) ("public policy

embodied in” codified statute); *In the Matter of Welfare of N.C.K. and N.J.K.*, 411 N.W.2d 577, 582 (Minn. App. 1987) (“public policy embodied in Minnesota statutes”). Here, the express language of Minnesota Statutes §§ 256D.34(3) and 256D.44 provides for and specifically establishes eligibility requirements for special diet supplemental payments.

Pursuant to this statute, it is the policy of the State of Minnesota that persons who otherwise meet the eligibility requirements for MSA and who have certain medically prescribed diets are entitled to an additional monthly allowance to pay the anticipated costs of maintaining that diet when “the cost of those additional dietary needs cannot be met through some other maintenance benefit.” Minn. Stat. § 256D.44 subdiv. 4(a). The additional amount paid is determined by the type of diet. Diets eligible for the additional payments and the amount of payment for each diet are set forth in Minn. Stat. § 256D.44 subdiv. 4(a). Maintaining current levels of benefits for these families pending resolution of this matter fosters the underlying goals of this program.

Second, public policy also recognizes that the unallotment statute both as drafted and when read in conjunction with Minn. Stat § 16A.14 was not intended to be used at the beginning of a biennium, or where the revenues needed to fully fund appropriations were both anticipated and known, and the amounts needed to pay for appropriations for the next biennium were signed into law by Defendant Pawlenty.

Third, it is in the interest of all Minnesotans that the Constitution of the State of Minnesota be followed such that there is not an unlawful delegation of power from the

legislative to the executive branch, or an unlawful usurpation of legislative powers by the executive branch.

If Plaintiffs' request for a temporary restraining order is denied but their contentions ultimately proven, Defendants will have violated the law and put some of the State's most vulnerable individuals at risk of their health and welfare. For these reasons, public policy considerations weigh in favor of granting the temporary restraining order.

4 Granting the relief preserves the status quo.

On a motion for a temporary injunction, the court considers the nature of the relationship between the parties in order to evaluate the parties' reasonable expectations, *Dahlberg*, at 276, 137 N.W.2d at 322, and preserve the status quo. *Pacific Equip. & Irrigation, Inc. v. Toro Co.*, 519 N.W.2d 911, 915 (Minn. App. 1994), *rev. denied*, (Minn. Sept. 16, 1994).

Again, this consideration weighs in favor of Plaintiffs. First, as is clear from the affidavits of the named plaintiffs, the people most affected by the Court's decision here are MSA special diet recipients who had reasonable expectations that their benefits would continue. All of the plaintiffs rely on their special diet supplements to assist with the cost of purchasing the food necessary to maintain their health. In the context of each of their monthly budgets, the reduction in supplemental assistance is devastating. None of the plaintiffs have sufficient income to afford both their basic necessities and the expenses necessary to purchase the foods required for them to follow their medically prescribed diets. *See Exhibits A-G.*⁹

⁹ The expectations of persons eligible for MSA special diets to continued receipt of their benefits during the pendency of a legal challenge are also reasonable in light of *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that states must provide welfare recipients with benefits pending appeal from reduction or termination in individual cases) Although the State issued notices to individual MSA special diet recipients that they had a right to appeal, those that appealed were not provided a hearing and have had no other ability to

Second, Plaintiffs' request simply preserves the status quo. The Department of Human Services and Minnesota counties have been administering MSA special diets under current rules for many years. The injunctive relief Plaintiffs seek preserves stability for those who administer the program as well as those who are recipients of MSA special diet benefits pending resolution of these claims. Because an injunction would preserve the status quo and further the reasonable expectations of the parties, this factor weighs in favor of Plaintiffs' motion.

5. The Temporary Relief Entails no Administrative Burdens.

Last, *Dahlberg* requires that this Court determine the burdens imposed on the Court if the relief requested is granted. *See* 137 N.W.2d at 322. Plaintiffs' requested injunction simply requires the defendants to resume making special diet payments. The persons receiving these supplements have already been identified by the counties and can be sent a new notice that their payments will resume and warrants issued for the payments that were cancelled effective November 1, 2009. Assuming Defendants comply with the Court's order, it will impose no burden on the Court. Once Plaintiffs' special diet supplements are reinstated, the requested injunction will not put any burden on this Court. Accordingly, the fifth factor weighs in favor of Plaintiffs. *See County of Winona v. City of Winona*, 453 N.W.2d 710, 713 (Minn. App. 1990) (supporting the issuance of an injunction, when "[n]o active court supervision is necessary").

C. A Class-Wide Injunction is Appropriate.

Plaintiffs are entitled to injunctive relief because they have shown irreparable harm with no remedy at law and that each of the five *Dahlberg* factors weigh heavily in

challenge the unlawfulness of Defendants' actions. *See* Ex. L (Lobello Aff.)

their favor. Moreover, it is well established that the courts should enjoin termination of benefits on a class-wide basis in a case like this where the other party is systematically failing to adhere to legal requirements. In numerous instances, Minnesota courts have temporarily enjoined a common defendant from taking illegal actions against a group of similarly situated individuals pending resolution of the merits of the case. *See, e.g., Ward v. Smaby*, 405 N.W.2d 254, 257 (Minn. App. 1987) (detailing the trial court's temporary injunction preventing local agencies from terminating any recipients' benefits under a welfare program without making certain individualized assessments).

In addition, a federal court in Minnesota has recognized that when deciding whether to grant a preliminary injunction in a class action, it is proper to consider the threat of irreparable harm to the entire putative class even when the class is not yet certified. *See Russo v. NCS Pearson Inc.*, 462 F. Supp.2d 981, 986-87, 990-91 (D. Minn. 2006). In determining whether to grant the preliminary injunction in *Russo*, the court considered the threat of irreparable harm to all of the putative class members despite the fact that the class had not yet been certified. *Id.* at 990-91 (citing *Herrera v. Riley*, 886 F. Supp. 45, 52 (D.D.C. 1995) (addressing the threat of irreparable injury to the entire proposed class, not just the named plaintiffs); *Joyce v. City of San Francisco*, 846 F. Supp. 843, 854 (N.D. Cal.1994) ("Since a determination has not yet been made whether plaintiffs can proceed as a class, it is appropriate at this stage that the Court considers the injuries alleged to the individuals within the entire proposed class."); *Sharif v. N.Y. State Educ. Dep't*, 709 F. Supp. 345, 359 (S.D.N.Y. 1989) (concluding for purposes of an

irreparable harm analysis that although the named plaintiffs might not be affected, some members of the putative class would).

D. Bond or Security Should be Waived in this Matter

The amount of security required for emergency relief under Minn. R. Civ. P. 65.03(1) is within the Court's discretion and may be waived entirely. *Bio-Line, Inc. v. Wilfley*, 366 N.W.2d 662, (Minn. Ct. App.), *rev. denied*, (Minn. June 27, 1985). In this case, Plaintiffs are indigent and proceeding *in forma pauperis*. They have no funds to pay a bond or other surety. In similar circumstances courts have waived the bond requirement. *See, e.g., Petition of Giblin*, 304 Minn.510, 525-26, 232 N.W.2d 214, 222-23 (1975) (waiver of bond for plaintiff proceeding *in forma pauperis* not an abuse of discretion). *See also Bass v. Richardson*, 338 F. Supp. 478, 489-91 (S.D. N.Y. 1991) (holding that “indigents suing individually or as class plaintiffs, ordinarily should not be required to post a bond under Rule 65(c)”); *Denny v. Health and Soc. Serv. Bd.*, 285 F. Supp. 526, 527 (E.D. Wis. 1968) (holding that “poor persons . . . are by hypothesis unable to furnish security as contemplated in rule 65(c)”).

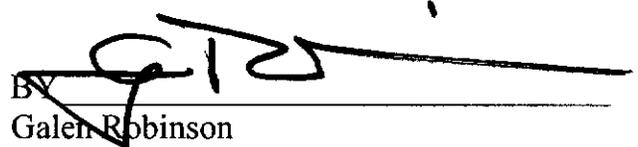
V. CONCLUSION

Plaintiffs, all surviving on below-poverty incomes, will be thrust into crisis if Defendants are allowed to implement the MSA special diet unallotment. Plaintiffs will suffer from the deprivation of the most basic needs –income sufficient to provide the diets prescribed by their doctors and necessary to maintain their already fragile health. If they use their very limited income to purchase the food without MSA special diet funds, they will be unable to meet their other necessary living expenses. The unallotment statute does not permit Defendants to end payment for MSA special diets in situations where, as here, the receipts to the general fund to fund

programs for the current biennium were not less than anticipated. The Court should grant Plaintiffs' request for a temporary restraining order enjoining Defendants from implementing the unallotment of MSA special diets and requiring Defendants to reinstate benefits during the pendency of this action because consideration of all the *Dahlberg* factors weigh in Plaintiffs' favor.

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