

March 3, 2022

**Via NYSCEF**

The Honorable Lyle E. Frank  
Supreme Court of the State of New York  
80 Centre Street  
New York, NY 10013

Re: *NYC Organization of Public Service Retirees, Inc. et al v. Renee  
Campion et al*, Index No. 158815/2021

Dear Justice Frank:

As you know, we represent the Petitioners in the above-captioned matter.

We are hesitant to make accusations of bad faith, but there is no other way to describe the letter filed by Respondents yesterday afternoon. Not only is it factually and legally unsupported, it makes shocking new assertions—which contradict Respondents’ previous representations—well past the eleventh hour, all in a transparent attempt to derail the Court’s imminent ruling. This desperate effort to salvage an unwinnable case should be rejected.

Petitioners filed their Article 78 Petition nearly six months ago. From the beginning, they have asserted—and proven—that Senior Care has been fully funded by the City for decades because it has always cost less than the HIP HMO statutory cap. After months of motion practice, court conferences, and oral arguments, Respondents have never once disputed this fact (even after Petitioners pointed out the lack of dispute). To the contrary, Respondents have explicitly and repeatedly *conceded* this fact,<sup>1</sup> including as recently as two days ago in response to Your Honor’s direct question on this topic.

Yesterday afternoon, Respondents claim to have suddenly (and for no apparent reason) realized that they misunderstood that question. According to their letter, Mr. Fraenkel—who expressed no confusion or uncertainty at Tuesday’s follow-up hearing—“construed Your Honor’s question as asking if the current premium free

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<sup>1</sup> See, e.g., Resps.’ Reply Br. at 2 (referring to “health insurance plans that fall below [the] statutory cap, including GHI-Senior Care”); *id.* at 5 (arguing that the City need not pay for Senior Care “[s]imply because the cost of GHI-Senior Care premiums may fall below the statutory cap”).

option, Senior Care, if it were to remain premium free, would it violate the statutory cap.” That explanation is inscrutable. It is also implausible.

Respondents are making a mockery of civil procedure. This case has been fully briefed and argued. The deadline for Respondents to contest the statutory cap has long since passed. Not only have they waived the opportunity to make such an argument now, *see RSB Bedford Assocs., LLC v. Ricky’s Williamsburg, Inc.*, 91 A.D.3d 16, 23 (1st Dep’t 2011) (arguments not raised by defendants in their brief are waived and not properly before the court), they have affirmatively forfeited it by *conceding* that Senior Care costs less than the statutory cap.

Yet now, on the eve of this Court’s dispositive ruling, Respondents file a letter claiming—for the first time, and with no citation to any evidence or authority—that the statutory cap is below the \$191 cost of Senior Care, and in fact is \$7.50. This sort of ambush tactic would be wildly inappropriate in any case and by any litigant. It is especially so here, where the healthcare rights of hundreds of thousands of elderly and disabled retirees are at stake and the offender is the City of New York, which should be held to the highest standards.

Even if Respondents had not clearly waived and forfeited their new statutory cap argument (which they have), their factual assertion must be rejected on its face. To claim that the statutory cap for active employees and younger retirees is **\$776** per person per month, while the cap for elderly and disabled retirees is **\$7.50**, is preposterous and belied by decades of past practice.

Contrary to Respondents’ untimely assertion, the HIP VIP plan cannot set the statutory cap. Among other reasons, that plan (like all other HIP plans for Medicare-eligible retirees) will no longer be offered after March 31.<sup>2</sup> A plan that will soon cease to exist cannot possibly set the statutory cap. Even if it did set the statutory cap (which it does not), the cost of HIP VIP has always been virtually identical to that of Senior Care. There is no conceivable reason why, after steadily rising every year, the cost of HIP VIP would suddenly drop from approximately \$182 last year to \$7.50 this year, especially when the cost of every other health insurance plan has increased.

If, against all logic and past practice, the cost of HIP VIP has suddenly dropped to \$7.50, that would raise serious red flags. If true, it would suggest that the City and the Alliance—specifically Alliance member EmblemHealth, which is the insurance company behind HIP VIP, Senior Care, *and* the MAP—have manipulated the cost of HIP VIP in order to drastically reduce what they (wrongly) claim is the

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<sup>2</sup> See *Frequently Asked Questions (FAQs) About the NYC Medicare Advantage Plus Plan*, <https://www1.nyc.gov/assets/olr/downloads/pdf/health/ma-faqs-01-21-2022.pdf>.

statutory cap.<sup>3</sup> Such naked collusion would be cause for investigation. It should not be rewarded by a court of equity. Indeed, the City should not be allowed to escape its healthcare payment obligations to its most vulnerable retirees by conspiring with an insurance company to manipulate the cost of HIP VIP.<sup>4</sup>

Respectfully, this Court should rule on this case based on the factual and legal positions advanced by the parties in their briefs and at oral argument, just as it is required to do.

Thank you for Your Honor's attention and consideration.

Respectfully submitted,

  
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Jacob Gardener

cc: Rachel DiBenedetto, Esq.  
William Fraenkel, Esq.

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<sup>3</sup> As part of the City's healthcare overhaul, the HIP VIP plan—in which very few retirees are enrolled—will no longer be accepting new members, and existing members will be transferred into the MAP unless they affirmatively opt out. Thus, lowering the price of HIP VIP would have little effect on EmblemHealth's bottom line, since there will soon be nobody enrolled in that plan. And whatever marginal short-term losses it might incur would be more than offset by the enormous profits it stands to make on the MAP.

<sup>4</sup> Even if the \$7.50 figure were correct, that would not represent the “full cost” of the HIP VIP plan. N.Y.C. Admin. Code § 12-126(b)(1). In order for EmblemHealth to agree to lower the cost of HIP VIP from \$182 (last year) to \$7.50 (this year), the City must be paying EmblemHealth the difference through more favorable terms on the other insurance plans EmblemHealth provides City retirees (*i.e.*, the MAP and Senior Care).