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February 5, 2022

VIA EMAIL AND NYSCEF

Justice Lyle E. Frank
Supreme Court of the State of New York
New York, NY 10007
email: lfrank@nycourts.gov

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

Dear Justice Frank:

We represent Petitioners in the above-captioned matter.

I write in response to Respondents' "update" letters of January 21st and February 3rd wherein they boast about the terrific progress the City and Alliance have been making in educating retirees about the Medicare Advantage Plan (MAP). And I write to address Respondents' request on January 28th for permission to begin immediately transferring data containing retirees' personal information; and the City's threat that without such permission, it "would, in the literal sense, require the shutdown of the City's payroll system."

Respondents' Strategy of "Blame the Victim" is Reprehensible – Before addressing the utter inadequacy of Respondents' revised education plan, I would like to address another statement made by the City in their January 21st letter: their accusation that it is the retirees that are "facilitating, if not engendering misinformation and hence the production of misleading affidavits then submitted to this Court." That is a false, outrageous, and slanderous. Respondents' allegation references "instructions posted on Petitioners' website," and the City includes a screenshot of the supposedly offending post:

01/11/2022

Today's Video & Homework Assignment!

Here is the link to the Alliance: <https://nyc-ma-plus.empireblue.com/>

Scroll down to the tiny print "FIND CARE" and search for your doctor there

THEN, call your doctor's office and speak with the billing people and ask:

1. Are you accepting the New NYC Medicare Advantage Plus Plan?
2. Has your office been contacted by the City or the Alliance regarding this plan?

If they are NOT taking it, and or HAVE NOT heard from the Alliance, please do a Notarized statement and send it to us . . .

Exactly what do Respondents consider misleading? That retirees are asked to use the Alliance’s own “FIND CARE” web tool to see if their doctors are participating? Or that they are advised to call their doctors to find out if the information posted on the Alliance website is correct?

Respondents’ strategy is as jaw-dropping as it is sad; it is to blame the victim. The City and the Alliance accuse retirees of causing confusion about the MAP; when in fact their real criticism is that these senior citizens have had the audacity to check the (in)accuracy of the Alliance’s representations.

Surprisingly, Mr. DeLarco’s letter of February 3rd includes a remarkably – and unintentionally – revealing chart (Exhibit J). It is a table listing the dozens of affidavits submitted by retirees, with the names of the doctors who have told retirees that although they are listed on the FIND CARE website as participating in the MAP, they are not. The chart’s last column includes a notation about what an Alliance representative learned after contacting the provider. Obviously, this was an effort intended to contradict the retirees’ findings.

It backfired. Mr. DeLarco’s chart shows that less than 5% of the doctors said they were going to participate – and then only as out-of-network providers. It is a complete validation of the retirees’ findings. Moreover, the Alliance representatives showed far less persistence in getting to the truth than did retirees. Most of the table entries say, “left voicemail,” “communicated via postcard,” or “contacted by email.”

The City’s accusation that the retirees are somehow misleading the Court or soliciting biased information is outrageous. We ask that the Court hold a hearing to determine the truth and to consider sanctions against Respondents pursuant to CPLR 728.

The Data Transfer Request – Respondents’ request to begin transferring data – retirees’ personal information – to the Alliance and then to CMS is not a mere ministerial accommodation. It is a bald-faced attempt to circumvent the Court’s March 31st opt-out deadline. It would involuntarily enroll every retiree into the MAP for several months – even if they exercised the opt-out prior to the deadline. Respondents’ data transfer request is an outrageous and poorly concealed attempt to avoid compliance with the Court’s Order.

In addition to blatantly disrespecting the Court’s Order, giving protected health information to a third party is a violation of several federal and state laws. We detailed those laws in our November 28th letter to the Court. ([NYSCEF Dkt. No. 156](#)).

When Respondents first tried to transfer retirees’ data back in November, they misrepresented the significance of that move. Ms. DiBenedetto’s letter of November 23rd admitted that “after additional research” they needed to correct their misstatements

made to the Court during the November 22nd hearing. But it is Respondents' November 24th letter that let the cat out of the bag. The City admitted that “transmittal of data would in fact result in enrollment” and “mass removal is not as readily achieved. To remove individuals on the City’s end would require individual actions *that would take multiple months to accomplish.*” ([NYSCEF Dkt. No. 154](#) at 1). In other words, once the transfer process occurs, retirees who wish to opt out of the MAP will be trapped in the MAP against their will for “multiple months” despite being guaranteed by the Court – and assured by Respondents – that they can opt out at any time until March 31st. Very simply, by transferring their data, retirees would not be enrolled in their chosen health insurance plan on April 1 – despite thinking they opted out – when the MAP is slated to take effect.

This automatic enrollment and months-long delay in returning seniors to their preferred plan was inadvertently revealed to a retiree in a series of phone calls with 833-representatives. As the affidavit of Peter Cherr states, he spoke with Alliance customer service representative “Sheila” on January 24th. She informed him that she had an internal email with “talking points” that said the real deadline for opting out – in order to avoid problems – was February 10th. In a subsequent phone call with an 833-supervisor named “Marietta”, she told Mr. Cherr, “Oh, that is formal language. That is an internal memo.” She then told Mr. Cherr that he shouldn’t have been read the actual memo, and that the real opt out deadline is February 10th.

To reiterate, transferring the data next week would automatically enroll hundreds of thousands of senior citizens and disabled retirees into a plan they have not yet decided upon – because they still do not have accurate information about the plan or doctors’ participation. If retirees complied with the Court’s Order and tried to opt out before March 31st, it would be in vain. **Because if the early data transfer is allowed, they will automatically become enrolled in the MAP on April 1st, and it will take “multiple months” to put them back into Senior Care.**

In the meantime, despite their thinking they have opted out, all retirees would be subject to onerous prior authorization procedures – which would cause serious delays in diagnosis and treatment for many of them. (See data compiled by the American Medical Association and submitted in [NYSCEF Dkt. No. 102](#) that makes clear that prior authorization regularly results in very serious medical consequences for patients.) And many retirees would not have access to their doctors – who are not participating in MAP – causing enormous anxiety to seniors and potentially serious disruptions in their continuity of care.

The disingenuousness of the City’s request is staggering. They have known since at least November that it would take months to transfer data, clean it, test it, and correct it – prior to the Court-approved start date of the MAP. Yet, back in December, when the Court set a March 31st opt-out deadline and an April 1st start date – knowing

this was not feasible – the City remained silent. Instead, Respondents repeatedly run to the Court, urging it to change hearing dates lest the sky fall in – or threatening that the City payroll system will shut down. Any emergency the City finds itself in now is one of its own making. Elderly and disabled retirees should not be deprived of their chosen healthcare for “multiple months” just because the City decided to withhold critical information from the Court.

The solution is very simple: there should be at least a one-month delay – and probably a two-month delay – between the Court-order opt-out deadline and the start of any new plan. That will give Respondents adequate time to transfer data without preventing retirees from having until March 31—the deadline they were told—to decide whether to opt out.

The City and Alliance’s Revised Education Program – As inconceivable as it may sound, Respondents’ “new-and-improved” education and outreach to retirees is even worse than the original. Despite their hand-waving, there has been precious little actual information provided to retirees – and what has been given to them is often outright wrong.

The Alliance’s doctor search tool is still inaccurate. The single most important question retirees need answers to is whether their doctors are participating in the MAP. As the dozens of attached affidavits make clear, retirees consult the Alliance’s online tool, see their provider listed, and then call the doctor’s office to double-check. Far too often, retirees are told, “No, we are not participating. The search tool is wrong.” Or they hear, “We haven’t decided. We don’t have enough information.”

Respondents’ response to this is incredible; instead of fixing their tool, they blame the retirees. Respondents complain that by “inquiring about the MA Plan by a single name without context, and directing inquiries to ‘billing people’.... Petitioners are generating misleading anecdotes.” (Respondents’ update letter of January 21st, [NYSCEF Dkt. No. 182](#), at 5). What else should retirees call the plan? Whom else should they call? Respondents’ complaint is illogical and churlish. The Alliance needs to fix the search tool and update their database of providers to be accurate.

It is not sufficient for the Alliance to claim that doctors are participating because they accept another insurance plan. If the doctors don’t agree with their supposed automatic enrollment – or don’t know about it – they are going to continue telling patients that they are not participating in MAP. At the very least, this causes patient confusion and anxiety. More seriously, it can cause a disruption in continuity of care or delays in treatment.

Without accurate information about doctor participation, retirees cannot make an informed decision about whether to participate in the MAP.

Doctors disagree with the Alliance’s insistence that they are automatically in-network. The Alliance has repeatedly stated that the MAP provider network is robust in part because doctors who accept another Emblem or Anthem plan are automatically considered in-network and must accept the MAP. As the attached affidavits from several providers state, they disagree with the Alliance’s interpretation of their contract. It is not for the retirees to get between providers and insurance companies in their contract interpretation. But retirees are the collateral damage when elephants fight.

The Alliance’s outreach to doctors is not working. Respondents’ update letters include pages of details about their supposed outreach to providers. But as Mr. DeLarco’s Exhibit J unintentionally reveals, these boasts are little more than a Potemkin village of ineffective communications. The Alliance targeted providers who told patients they were not participating or didn’t have enough information to make a decision. Yet what Exhibit J reveals is that in the vast majority of Alliance attempts to make their pitch to doctors, they never even spoke with anyone. Instead, they left a voicemail, sent an email, or dropped a postcard into a mailbox. One obvious question we have is whether Respondents’ claim in their February 3rd update letter (page 4) that they have “undertaken...outreach attempts including nearly 90% of provider targets in New York... and 100% of provider targets in New Jersey” means they left voicemails or sent postcards. (And why has the Alliance only attempted to reach 5% of providers in South Florida, where so many retirees live?)

Perhaps the Alliance can provide evidence that voicemail messages and junk mail postcards are an effective way to educate providers and convince them to participate. But given the frequency of providers recently telling retirees they are not participating or don’t have enough information, the proof is in the pudding: the Alliance is not connecting with providers.

But yet again, Respondents blame the victim, arguing that “Petitioners are ignoring OLR’s suggestion that retirees ‘refer providers to the NYC Medicare Advantage Plus Plan Call Center.’” (Respondents’ update letter of January 21st, p. 5). The City and the Alliance want retirees to do the job they are unable or unwilling to do.

The Alliance’s outreach to hospitals is inadequate. The Alliance has repeated many times that all New York City hospitals are participating in the MAP, and that some 95% of hospitals nationwide are participating. That may be true, but the message clearly has not gotten to many people working at those hospitals. There are more than one dozen affidavits attached from retirees stating that within the last two weeks they called their local hospitals – where they normally get treatment – and were told the hospitals are not participating in the MAP. This includes hospitals in New York and other regions with dense retiree populations.

An important example of the Alliance's inadequate outreach was brought to light two weeks ago when Memorial Sloan Kettering ("MSK") sent out messages to patients on its billing statements that it was not participating in any Medicare Advantage plan. We reasonably asked whether it was a misrepresentation by the City – or MSK just not getting the message. It turned out to be the latter: buried deep within a MSK webpage there was a statement saying MSK would be participating in the MAP beginning April 1st. But why would a retiree ever go searching for that webpage when they were being told clearly on their bill that MSK was not participating in any Medicare Advantage plan? Understandably, this miscommunication has caused these senior citizens and disabled retirees – who are being treated for cancer – enormous anxiety. The City and the Alliance are not in control of MSK's communications to its patients. But neither have they worked with MSK to anticipate this problem or correct it. Sadly, confusion reigns, and retirees are the victims of this communications inadequacy.

Hospitals may be participating, but their doctors don't have to.

Respondents have repeatedly touted the fact that many hospitals are participating in the MAP, and they have placed particular emphasis on MSK and the Hospital for Special Surgery ("HSS"). Unfortunately, the City and the Alliance have totally avoided addressing a fundamental truth about providers and Medicare Advantage participation: as long as the provider is not an employee of the hospital, it is the individual doctor's choice whether to participate.

This is especially relevant in the case of HSS. As multiple attached affidavits make clear, many HSS doctors are not participating in the MAP – despite HSS's participation. (I personally called my orthopedist at HSS and asked if he was participating. He is, although he also emphasized, "We had an internal meeting with HSS management, and they made it clear to us that while the hospital is participating, it is each individual doctor's choice whether to participate.")

Senior citizens are understandably confused. First, they have to contact their providers to find out if the individual doctors are participating in the MAP. And then they have to get clarification about what it means when the hospital is participating but the individual doctor is not. Unfortunately, in their rush to force everyone into the MAP and portray the plan as the best thing since sliced bread, the City and the Alliance are ignoring retirees' legitimate questions and concerns. Consequently, retirees cannot make an informed decision when they are being so badly informed by the City and the Alliance.

The wrong enrollment guides are being sent to retirees. As the Court's order made clear, Respondents are supposed to provide updated printed enrollment guides to retirees who request them. Sadly, the Alliance's response is completely inadequate. Attached are affidavits from retirees that detail some of the responses they have received from 833-customer service representatives:

- The most extraordinary SNAFU is that the Alliance is sending out completely irrelevant enrollment guides – for at least five different insurance plans. Plans that have nothing to do with the MAP.
- Some 833-operators are telling retirees they don't really need a new enrollment guide because nothing has changed.
- Retirees who request a printed copy of the Evidence of Coverage are being told none are available; or would be sent only after the retiree chooses to enroll in the MAP. Remarkably, Mr. DeLarco doubles-down and takes the same position in his February 3rd update letter: “the Evidence of Coverage (EOC) is a *post-enrollment* document not required to be provided in writing until enrollment is complete.” Perhaps Mr. DeLarco and the 833-operators should re-read their own “new” Enrollment Guide. Because on page 28 it states: “While the Summary of Benefits does not list every service, limitation, or exclusion, the Evidence of Coverage (EOC) does. ***If you have questions or would like to request a copy of the EOC, please call the NYC Medicare Advantage Plus Welcome Team at 1-833-325-1190.***” (Emphasis added.)
- Other retirees have requested large-print versions of the enrollment guide and are being told none are available.

How are elderly, non-computer savvy retirees expected to make an informed decision without clear, accurate printed information?

The information sessions are a sham. In the January 21st update, the City claims it conducted nine webinars between December 17th and January 12th; and said “We have now scheduled another fourteen general sessions through March.” Plus, they list another nine union-sponsored webinars scheduled through March 2nd. That seems to add up to 32 webinars – with half yet to take place. But on page 1 of their February 3rd update letter, they state: “in partnership with the unions, there have been over 100 retiree education meetings to date.” Either the City, the Alliance, and the unions more than tripled their output in a mere two weeks – which should be a Harvard Business School case study in productivity improvement – or someone needs a remedial course in arithmetic.

The bigger problem is that the webinars are not interactive; retirees' questions are not being answered. As the attached affidavits state, some of the webinars allowed for no question-and-answer mechanism. And for the few sessions that allowed retirees to post questions in the chat box, those questions went unanswered.

The “small potatoes” problems. I have a standing response to the dozens of other problems retirees bring to my attention every week: they are small potatoes, let's

just focus on the big implementation problems. Sadly, as one retiree recently pointed out, those small potatoes are now forming a heaping pile. To mix metaphors, it is death by a thousand cuts. We will spare the Court the many affidavits we have received detailing these less-serious, but nonetheless infuriating, problems with the City's MAP implementation.

Sadly, retirees are no better off today – with respect to accurate information – than they were four months ago. The City and Alliance's rush to implement a flawed plan continues to make it impossible for retirees to make an informed decision about whether to participate in the MAP or to opt out – and incur thousands of dollars in premium costs. We believe the latter "option" is illegal and look forward to argument on that issue. But until then, we respectfully ask the Court to delay implementation until the City and the Alliance comply with the Court's order to provide adequate, accurate information – and to at least delay implementation by two months to provide the City and the Alliance enough time to transfer data without trapping retirees in the MAP against their will.

Thank you for Your Honor's attention and consideration.

Sincerely,
/s/ Steve Cohen
Steve Cohen

cc (via email): Rachel DiBenedetto, Esq.
William Fraenkel, Esq.
Michael DeLarco, Esq.