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VIA EMAIL AND NYSCEF NOVEMBER 24, 2021

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 your directive to address the City/Alliance's proposal to transfer retiree protected health information (PHI) to CMS by November 30th. I also wish to address the extraordinary flip-flops in the November 23, 2021 letter submitted by Respondent.

Respondent's proposal to move PHI data to CMS is not only a bad idea – for the reasons discussed below, including that without the express approval of the individual retiree, it is against New York State law – it directly contradicts the statements they made to the Court at the November 23, 2021 hearing. At the hearing, the Court advised Respondents that it was not authorizing a January 1, 2022 transition date at this time. In what it positioned as a totally benign, ministerial action, Respondents asked that the Court allow them to at least begin a data transfer process. Respondents repeatedly assured the Court that, "no one is going into the plan through this process" and that this data transfer would be easily reversible. They now admit that was not true.

A few hours later, "after additional research," Respondents submitted a letter advising the Court that if the City transfers the retirees' data to the Alliance, then "the latter would be compelled to then transfer the data to CMS, [which] would then begin enrolments [sic]." NYSECF No. 151. In other words—contrary to what Respondents repeatedly stated at the hearing—the data transfer would put retirees into the Medicare Advantage plan. That non-descript admission is the bait-and-switch, and why Respondents now blatantly ask the Court to "dissolve the injunction" by December 1st.

The shifting and inaccurate information provided by Respondents on this topic exemplifies the arbitrary and capricious approach the City has taken – and continues to take – towards Petitioners' health care benefits.

The City asks that they be allowed to automatically enroll retirees into the new Medicare Advantage Plan ("MAP") right after Thanksgiving weekend (December 1) and implement that Plan on January 1. There are numerous reasons why that is arbitrary,

capricious, irrational and wildly unfair. The most obvious reason is that the City has not "cure[d the] deficiencies with the implementation of the proposed new Medicare Advantage Plan" that this Court identified in its October 21 preliminary injunction order. A second reason is that retirees have not even been given a deadline by which to make their healthcare choice. One would think that the City would want to assure basic fairness and give seniors the opportunity to make an informed choice. Unfortunately, that is apparently not part of the City's process – which is arbitrary.

As detailed in Petitioners' November 12 submission ("Pets.' Br.") (NYSCEF No. 120), the printed Enrollment Guide (NYSCEF No. 55) mailed to retirees in September 2021—which hundreds of thousands of elderly and disabled retirees have been relying on to decide whether they will opt out of this new healthcare plan—contains glaring inaccuracies and material omissions. Most notably, the Enrollment Guide (1) states that various treatments are **not** subject to prior authorization when in fact they **are** (Pets.' Br. at 15-22); (2) misleads retirees in a host of other ways regarding prior authorization (Pets.' Br. at 13-25, 22-23, 28); and (3) misleads retirees with respect to the network of MAP doctors (Pets.' Br. at 10-13).

These issues are critically important to retirees. Without accurate information, they cannot make an informed healthcare decision. In order to correct these critical deficiencies, the City needs to, at the very least, print out and mail a new Enrollment Guide with accurate information, and retirees need to be given sufficient time to read and evaluate that information. There is no conceivable way that can be done on December 1, or even January 1.

<u>The Data Transfer Would be Illegal and Cause Seniors Serious Confusion and Anxiety, and Potential Harm</u>

The Respondents' original suggestion to transfer retirees' PHI data to CMS in order to have it "cleaned up" was, at best, uninformed – as their letter submitted just hours later admitted. But putting aside what now appears to be a Trojan Horse designed to ignore the Court's prerogative and force the implementation of the plan on January 1st, it is important to address Your Honor's question: why is this transfer a bad idea?

It is illegal. New York State requires people to affirmatively approve, in writing, the transfer of PHI.[1] It is also a violation of the federal HIPAA law.[2]

File Transfers Expose Data to High Risks. It is well established that transferring sensitive data always involves some significant degree of risk.[3] This transfer of PHI would trigger the need for three transfers, as opposed to only one if the

[1] N.Y. Comp. Codes R. & Regs. tit.10, § 300.5(a) (2016)
[2] https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html
[3] https://www.ipswitch.com/blog/why-are-file-transfers-high-risk

process were not inappropriately rushed: this would be the first; the opt-outs would be the second transfer; and there would have to be an updated transfer of PHI for people who choose the plan, but who dependents, address, or providers have changed since the November 30th transfer. Three transfers are inherently riskier than one[4].

The City and the Alliance companies have a terrible track record with respect to data security. The City Law Department suffered a catastrophic hack this year[5]. EmblemHealth paid a $575,000 fine for a data breach involving 80,000 people in 2018.[6] And Anthem had a breach that affected 78 million customers in 2015.[7]

CMS has no need for the data in December. CMS regulations are flexible about when data can be accepted for new plans[8]. The November 30th deadline is solely a creation of the City and the Alliance.

Transferring a database on November 30th will cause enormous confusion and anxiety to seniors. Retirees have been relying on the Court's Order that the opt-out date was suspended. explaining to senior citizens and disabled retirees why their PHI was being transferred before exercised their opt-out privilege will cause serious turmoil, likely disorientation, misunderstandings, and worry.

In sum, Petitioners are more than willing to work with Respondents to develop a better plan and implementation process. But now Respondents are asking Your Honor to cancel the December 8th conference. We are confused; and await the Court's direction.

We also welcome Your Honor setting a briefing schedule with respect to the Respondents' Cross Motion to Dismiss. The Respondents' arbitrary and capricious actions to impose an illegal, confusing, and inadequately planned or communicated plan demand a full and fair hearing.

Thank you for Your Honor's attention and consideration.

Sincerely,
/s/ Steve Cohen
Steve Cohen

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

[4] https://medcitynews.com/2021/04/500000-trinity-health-patients-affected-in-widespread-accellion-data-breach/
[5] https://www.nytimes.com/2021/06/18/nyregion/nyc-law-department-hack.html
[6] https://ag.ny.gov/press-release/2018/ag-schneiderman-announces-575000-settlement-emblemhealth-after-data-breach
[7] https://www.insurance.ca.gov/0400-news/0100-press-releases/anthemcyberattack.cfm
[8] Medicare Managed Care Manual Chapter 9 Employer/Union Sponsored health Plans §20.3