



deterioration so long as the beneficiary requires skilled care for the services to be safely and effectively provided.” Settlement Agreement Section IX.7.a.

3. Although the defendant made substantial revisions to Chapter 7 and 8 of the Medicare Benefit Policy Manual, most of the changes were not revisions and clarifications regarding the maintenance coverage, including additional documentation requirements. *See* Declaration of Michael Benvenuto, ¶5.

4. The defendant added the specific sentence quoted above to the section setting out the general principles, M.B.P.M. 40.1.1, but did not revise or clarify any of the specific sections that govern coverage requirements for skilled nursing services to provide for maintenance nursing, M.B.P.M. 40.1.2.1 through M.B.P.M. 40.1.2.14. *See* Benvenuto Dec. ¶12.

5. Specifically, the defendant failed to clarify or revise the section governing skilled observation and assessment, M.B.P.M. 40.1.2.1, in light of the maintenance nursing coverage standard. *Id.*

6. For skilled observation and assessment under M.B.P.M. 40.1.2.1, the defendant did not revise or eliminate the language that creates a suggestion of a “3 week rule” for coverage for skilled observation and assessment:

Where a patient was admitted to home health care for skilled observation because there was a reasonable potential of a complication or further acute episode, but did not develop a further acute episode or complication, the skilled observation services are still covered for 3 weeks or so long as there remains a reasonable potential for such a complication or further acute episode.

*See* Excerpt from Current Manual, Benvenuto Dec. Exhibit F.

7. The defendant’s failure to revise or eliminate the 3 week rule violates the express terms of the settlement agreement.

8. Also under M.B.P.M. 40.1.2.1, the defendant did not revise or eliminate language that suggests that skilled observation and assessment is not available for beneficiaries to address a

long standing pattern of their condition, particularly when their treatment plan does not require changes to meet their needs to maintain their condition:

However, observation and assessment by a nurse is not reasonable and necessary for the treatment of the illness or injury where fluctuating signs and symptoms are part of a longstanding pattern of the patient's condition which has not previously required a change in the prescribed treatment.

*See* Excerpt from Current Manual, Benvenuto Dec. Exhibit F.

9. The defendant's failure to revise or eliminate this language denying coverage for a long standing pattern violates the express terms of the settlement agreement.

10. The plaintiffs provided detailed and extensive comments on these issues and these specific sections during the comment period provided for under the terms of the Settlement Agreement, but the defendant refused to incorporate the substance of those comments. *See* Benvenuto Dec. ¶¶7-12.

11. The defendant published the manual revisions based on the Settlement Agreement on or around December 6, 2013. *See* Benvenuto Dec. ¶11.

### **Education Campaign**

12. Under the terms of the Settlement Agreement, defendant was required to carry out a nationwide education campaign on the maintenance coverage standard. Settlement Agreement Section IX.9.

13. The Settlement Agreement called for the publication of written material and for the defendant to conduct two National Calls for the sole purpose of communicating the maintenance coverage standard, one for providers and suppliers and one for contractors and adjudicators. Settlement Agreement Section IX,10-16.

14. The defendant held the National Call for contractors and adjudicators on December 16, 2013 and the National Call for providers and suppliers on December 19, 2013. Counsel for

plaintiffs were invited to participate in the call for providers and suppliers. Plaintiffs' counsel listened to that call. *See* Declaration of Gill Deford, ¶3.

15. During the National Calls, the defendant utilized a power point slide deck that had been provided to the plaintiffs for comment and review on or around November 27, 2013, and the plaintiffs submitted comments on or around December 5. *See* Deford Dec. ¶4.

16. Since defendant did not publish the final manual revisions until December 6, 2013, the plaintiffs therefore commented on the education campaign materials about the manual revisions, without having the opportunity to review the manual revisions.

17. The National Call for providers and suppliers was scheduled for one hour in length. The defendant estimated that there were 3428 participants on the call. The defendant first presented the power point slides, and took questions from 18 participants, and then announced that they were out of time and terminated the call. The defendant produced an audio and written transcript of this National Call. *See* Deford Dec. ¶3.

18. There were thousands of participants on the National Call for providers and suppliers. When the defendant terminated the National Call after one hour, many participants were waiting in the queue with questions about the Settlement Agreement and the manual revisions regarding the maintenance coverage standard. *Id.*

19. The answers given by the defendant during the National Call for providers and suppliers were confusing, misleading, and evasive, and at least two were incorrect. *See* Deford Dec. ¶7.

20. In addition to the express errors in the answers given by the defendant, the overall education campaign carried out by the defendant did not constitute a good faith effort to conduct a nationwide campaign on the revised manual or the maintenance coverage standard.

21. Because of the inadequate education provided and complete lack of follow-up and support that is normally provided by the agency, substantial confusion and ignorance continues to exist among providers, suppliers, contractors, adjudicators and beneficiaries about the Settlement Agreement and Medicare coverage for skilled nursing and therapy to maintain or slow decline of an individual's condition. *See, e.g.*, Declarations of William A. Dombi, ¶¶ 8-10; Mike Cheek, ¶¶ 6-7; Sharon Dunn, ¶¶ 8-10..

22. The Educational Campaign did not “communicate the SNF, home health, and OPT maintenance coverage standards...as set forth in Sections IX.6 through IX.8” of the Settlement Agreement. Settlement Agreement IX.9.

23. As an accountability measure, the Settlement Agreement required the defendant to carry out random sampling of coverage decisions by the Qualified Independent Contractors (QICs) to determine trends and identify problems in the application of the maintenance coverage standards. Settlement Agreement Section IX.17.

24. The results of the random sampling found major ongoing problems by the QICs in processing claims, with an error rate in excess of 40% for rounds 2 and 3 of the sampling. *See* Declaration of Margaret Murphy, ¶¶ 12-20.

25. The results from the random sampling further demonstrate the substantial confusion by the defendant's own contractors in properly applying the maintenance coverage standard.

#### **Dispute Resolution Process**

26. Following the publication of the manual revisions, the plaintiffs have diligently urged the defendant to properly revise the coverage requirements for skilled observation and assessment through email, correspondence and at the in-person biannual meetings. *See* Deford Dec. ¶¶ 5-8, 10-13; Declaration of Judith Stein, ¶¶ 4-10.

27. The plaintiffs have also diligently raised the issue of the inadequate education process and National Calls through email, correspondence and at the in-person biannual meetings with defendant. *Id.*

28. The plaintiffs raised these issues with the defendant immediately following the issuance of the manual revisions and the conclusion of the National Calls. *Id.*

29. The Plaintiffs repeatedly attempted to resolve these issues with the defendant *before* invoking the formal dispute resolution process set out in the Settlement Agreement.

30. These efforts by the plaintiffs include raising these issues at the biannual meetings that occurred in January 2014, September 2014, April 2015, and September 2015, as well as during follow up calls and correspondence between counsel. *Id.*

31. These efforts by the plaintiffs include submitting further manual revisions for consideration, numerous examples of continued misapplication of an Improvement Standard to deny Medicare coverage, written materials and Frequently Asked Questions, with citations and examples, for use by defendant, as well as numerous other suggestions for additional education and informational efforts by the defendant. *See* Deford Dec. ¶11; Stein Dec. ¶7.

32. The plaintiffs reasonably waited for a “final” answer from the defendant on these issues before proceeding with formal Notices of Noncompliance on these issues.

33. On August 6, 2015, having reasonably exhausted the possibility that these issues could be resolved informally, the plaintiffs served two Notices of Noncompliance as set out in the Settlement Agreement, Section VIII (1), one on the issue of the manual revisions and the other on the education campaign. *See* Deford Dec. ¶15, exhibits N and O.

34. The defendant responded to the Notices of Noncompliance on September 25, 2015. *See* Deford Dec. ¶16.

35. The parties then engaged in negotiations to attempt to resolve the alleged noncompliance, as required by Section VIII.3 of the Settlement Agreement, but were unable to do resolve these issues.

36. On November 10, 2015 the defendant definitively informed plaintiffs' counsel that no further action would be taken regarding the matters at issue in the Notices of Noncompliance. Defendant's counsel also agreed that the parties had engaged in good faith efforts to resolve these matters. *See* Deford Dec. ¶21.

37. As the plaintiffs have properly given notice of the noncompliance, and the parties have attempted to resolve the dispute as provided in the Settlement Agreement, the plaintiffs are entitled to invoke the continuing jurisdiction of the Court to seek an order to compel the defendant to comply with the terms of the Settlement Agreement.

### CONCLUSION

For the reasons set out in this Motion, as supported by the Memorandum and Declarations filed with this Motion, the Court should determine, pursuant to the Settlement Agreement, § VIII, ¶ 6, that the defendant has breached the Agreement in two ways: 1) by failing to make appropriate revisions to the Manual and 2) by failing to carry out an Educational Campaign that communicated the necessary information about revisions to the Manual on the maintenance coverage standard to providers, suppliers, contractors, adjudicators. For relief, plaintiffs request that the Court order defendant to correct the Manual language that has been identified as in conflict with the Settlement Agreement (see *supra* at ¶¶ 4-8) and to renew the Educational Campaign to ensure that the correct information is disseminated to providers, suppliers, contractors, and adjudicators.

DATED: March 1, 2016

Respectfully submitted,

/s/ Gill Deford

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### **CERTIFICATE OF SERVICE**

I hereby certify that on March 1, 2016, I electronically filed with the Clerk of Court the Motion for Resolution of Noncompliance with Settlement Agreement, the Memorandum in Support of Motion for Resolution of Noncompliance with Settlement Agreement, and Declarations of the following: Michael Benvenuto, Constance Beskind, Kimberly Calder, Peter Chan, Mike Cheek, Barbara A. Church, Gill Deford, William A. Dombi, Sharon L. Dunn, Robert Egge, William Gagliani, John Kurtz, Deborah S. Larsen, Diane Lifsey, George Mark McGregor, Margaret M. Murphy, Cheryl Phillips, Gabe Quintanilla, Fred Rich, Rachel Seelig, Leonard J. Selfon, Robert Soltis, Judith A. Stein, and Stella Tsiamanes.

The CM/ECF system will provide service of such filing via Notice of Electronic Filing.

/s/ Gill Deford

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