IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GLENDA JIMMO, *et al.*, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	
	)	Civil Action No. 5:11-CV-17-CR
v.	)	
SYLVIA MATHEWS BURWELL, Secretary of Health and Human Services,	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN RESPONSE TO
PLAINTIFFS' PROPOSED CORRECTIVE ACTION PLAN

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Plaintiffs' proposed corrective action plan is an impermissible attempt to renegotiate the parties' original Settlement Agreement by adding unwarranted terms to the agreed-upon Educational Campaign that are wholly unrelated to the deficiency identified in the Court's August 17, 2016 Opinion and Order ("Order"), ECF No. 106. *See* Pls.' Mem. re Corrective Action Plan ("Pls.' Mem."), ECF No. 111. In fact, Plaintiffs' plan seeks to address perceived deficiencies that were specifically not guaranteed under the Agreement. Plaintiffs' plan would also grant their counsel undue control in developing CMS educational materials and an outsize role in CMS's corrective action efforts. Further, their plan would subject CMS to the Court's continuing jurisdiction for an indefinite period and beyond the specific three-year limit which the parties carefully negotiated. There is no basis for the Court to modify this material provision of the Agreement in the course of ruling on Plaintiffs' Motion to Enforce, ECF No. 94.

Overall, Plaintiffs' plan reflects a desire to impose their own subjective preferences for how the *Jimmo* settlement should be implemented and is not a reasonable response to the deficiency the Court found in its Order. The Court should reject this proposal to, in effect, rewrite and supplement the parties' arm's-length agreement to now require CMS to conduct what amounts to a second round of the Educational Campaign. Plaintiffs may be dissatisfied with the perceived results of the *Jimmo* settlement, but as the parties expressly agreed and the Court acknowledged, CMS made no guarantee that any particular result would obtain once the agreed-upon settlement measures were taken. *See* Settlement Agreement ("SA") § IX.18, ECF No. 82-1; Order 17-18. The Court should apply this "no guaranteed results" provision here to reject Plaintiffs' corrective action plan in favor of CMS's more reasonable proposal, which provides robust educational measures that are more than adequate to remedy the deficiency identified by

the Court. *See* Def.'s Mem. Supp. Prop. Corrective Action ("CMS Mem."), ECF No. 112; Letter from M. Andrew. Zee to Gill Deford (Dec. 1, 2016) ("CMS Proposal"), ECF No. 112-1.

ARGUMENT

None of Plaintiffs' asserted concerns justify the overbroad corrective action relief they seek. Pls.' Mem. 5. Rather than accept the Secretary's reasonable and robust proposal, Plaintiffs instead use their corrective action proposal as an attempt to obtain from the Court through this proceeding more than they bargained for in the Agreement. The Court should reject this tactic.

First, Plaintiffs take the untenable position that it is not possible for CMS to provide accurate information about its own Medicare policies without "significant input" from Plaintiffs' counsel. *Id.* Plaintiffs would evidently like to control the content of the message, but want the message to come directly from CMS. In effect, Plaintiffs want the best of all worlds: to shape their own message of what *they* think the *Jimmo* settlement means and to carry with it the government's imprimatur. The crux of Plaintiffs' entire argument is that the maintenance coverage standard had an "intended impact," and that their input is needed for CMS to communicate that supposed impact. *Id.* But the Agreement expressly disavows any guarantees of an intended result. *See* SA § IX.18 ("Defendant is not guaranteeing to Plaintiffs that certain results will be achieved once the steps set forth in this Settlement Agreement have been implemented.") Plaintiffs may be disappointed insofar as they think the settlement may have fallen short of their self-defined goal. But, for good reason, CMS does not operate the Medicare program to allow outside entities, such as Plaintiffs here, to validate their own subjective view of what Medicare policy should be.

Second, Plaintiffs argue that information provided by CMS should not be "static" and suggest that CMS must play an ongoing interactive role by responding directly to any future

Jimmo-related inquiry from Medicare stakeholders or other members of the public. Pls.' Mem. 5. As an initial matter, the Summary document which the Court found deficient was directed only to Medicare contractors and appeals adjudicators—not to providers or other members of the public. Further, the manual revisions were finalized over three years ago, and the policy has not changed. Continuous and ongoing updates regarding a fixed and established policy are likely to create confusion regarding that policy and are therefore unwarranted. Moreover, a mechanism is already in place by which CMS can field questions through Medicare Administrative Contractors ("MACs"), and there is neither basis nor authority, in the Agreement or elsewhere, for CMS to create a separate process dedicated to answering *Jimmo*-related questions. The Court should reject Plaintiffs' improper attempt to dictate how the agency should spend its limited resources.

Third, Plaintiffs complain that they and other advocacy organizations bore the "burden" of explaining the maintenance coverage standard to Medicare stakeholders. But this supposed "burden" of spreading their interpretation of the maintenance coverage standard was, by all accounts, an entirely voluntary effort by Plaintiffs and their counterparts. It is not CMS's fault that Plaintiffs and their counsel chose to spend resources conveying to the public their own view of the *Jimmo* policy clarifications—especially when numerous CMS resources explaining the policy clarifications were made readily available to the public. *See* Def.'s Opp'n to Mot. to Enforce 12 n.6, ECF No. 102 (listing CMS public resources detailing the policy clarifications, including the *Jimmo* Fact Sheet, CMS Change Request, MLN Matters Article, and PowerPoint presentation, which are available on CMS.gov). Indeed, it is altogether possible that Plaintiffs and other organizations may have caused, or at the very least contributed to, some of the confusion that they maintain exists by advancing a divergent interpretation of the maintenance coverage standard than that detailed in the Settlement Agreement and in the clarified manual

provisions themselves. That Plaintiffs may have chosen to undertake this burden does not warrant imposition of the relief they seek here.

Plaintiffs' corrective action proposal contains six measures, which, for the reasons that follow, the Court should largely reject. Where there is agreement between Plaintiffs and CMS on core elements of the proposals, that agreement is noted below.

1. The dedicated *Jimmo* webpage should not require regular updating of FAQs or a web portal for public inquiries.

Plaintiffs request that CMS develop a dedicated *Jimmo* webpage that collects in one location all information about the settlement previously posted on the cms.gov website. Pls.' Mem. 7-8. CMS has already agreed to do this, and also to include a set of FAQs as requested by Plaintiffs. CMS Mem. 9. Already, these measures go beyond the deficiency the Court identified, which only involved Medicare contractors and appeals adjudicators. Plaintiffs, however, demand still more, including regularly scheduled updates to the FAQs and a "web portal" through which the public may pose questions to CMS. Neither of these additional steps is necessary or indeed even sensible for the Court to impose, and, given the agency's limited resources, whether to take them must be left to CMS's discretion.

Although the agency would reserve its discretion to update the FAQs if needed, the purpose of this resource is to convey information to minimize confusion about the clarified policy and the maintenance coverage standard. Subjecting the FAQs to mandatory updating and revision could very well introduce additional confusion. It could, for instance, lead readers who become aware of newly posted questions and answers to believe, erroneously, that some intervening policy change caused the revision.

Meanwhile, the request for a "web portal" through which "beneficiary advocates" can submit directly to CMS issues that are "percolating" is unnecessary and lacks any basis in the

Agreement. Pls.' Mem. 8. CMS never agreed to allocate the substantial resources that would be necessary to setup such a portal, and then to monitor it for inquiries and provide responses. In entering into the Agreement, CMS quite rationally accounted for the costs of implementing only the measures actually agreed to, and staffing an online Q&A portal open to queries from the public was not among the measures it committed to provide.

Further, as the Court is no doubt aware, reviewing the details of any given application of Medicare is a complex, time-consuming endeavor, made even more so when the specific circumstances and condition of an individual patient enter the picture. Given the size of the Medicare-eligible population and the array of issues that arise in any individual case, the number of inquiries could be substantial, as would the time required to respond to each one. The existing individual claim determination and appeals process created by Congress coupled with the existing ability to direct specific questions to the MACs already address claim- or beneficiary-specific issues and disputes that arise in connection with the maintenance coverage standard.

As CMS stated in its opening brief, the parties never agreed to have CMS play an ongoing, interactive role with Medicare advocates regarding the maintenance coverage standard. For the Court to impose such a measure as corrective action relief—for a deficiency that was not related to the extent or manner of CMS's interaction with the general public—would unduly upset the careful bargain agreed to by the parties. The Court should reject Plaintiffs' attempt to usurp from the government its discretion to determine how to spend its limited resources.

2. CMS should retain final control over the content of written statements about the *Jimmo* settlement.

As contemplated in Plaintiffs' proposal, CMS intends to include a summary message to be displayed on the *Jimmo* webpage and to affirmatively disavow the so-called "Improvement Standard" in communications notifying stakeholders of the webpage publication. *See* CMS

Mem. 6-9. CMS has no objection to, and in fact wishes to provide, this statement as part of its own corrective action plan and has agreed to allow Plaintiffs a chance to review and comment on a draft. *See* CMS Proposal at 2. Plaintiffs, however, insist that they be the ones to author the statements that CMS will publish and transmit. Pls.' Mem. 8-9. This proposal is wholly inappropriate.

As the agency within the Department of Health and Human Services charged with implementing Medicare policy, CMS has, subject to the Secretary's oversight, authority to describe applicable policy.[1] In suggesting a specific statement of their own drafting, Plaintiffs would substitute their own judgment for that of the agency. CMS has never varied from the position, to which the parties expressly agreed, that it, rather than Plaintiffs or any other entity, must craft and determine the relevant language describing Medicare policy. *See* SA §§ IX.12, IX.14.c. There is no reason to deviate from the prior agreement that allowed Plaintiffs input on educational materials, while reserving to CMS final authority over the content of any written educational materials. *Id.*

In any event, CMS does intend to meet Plaintiffs' essential concern here—by stating clearly that the application of an "Improvement Standard" is improper for the Medicare benefits at issue and reiterating the maintenance coverage standard addressed in the *Jimmo* settlement. And, contrary to Plaintiffs' proposed language, *see* Pls.' Mem. 9, there is no need to include a subjective, historical critique of allegedly "erroneous" beliefs of certain providers, adjudicators,

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[1] Statement of Organization, Functions and Delegations of Authority; Reorganization Order, 66 Fed. Reg. 35,437, 35,437 (July 5, 2001) (renaming the Health Care Financing Administration as the Centers for Medicare & Medicaid Services and changing all references to the Health Care Financing Administrator to the Centers for Medicare & Medicaid Services Administrator); Department of Health, Education, and Welfare, Reorganization Order, 42 Fed. Reg. 13,262, 13,262 (Mar. 9, 1977) (establishing the Health Care Financing Administration to administer the Medicare and Medicaid programs).

and contractors. Nor is it necessary to stray from the terms of the Agreement to introduce such undefined concepts as "equal coverage" for so-called "improvement and maintenance" care. *Id.* Doing so could very well generate confusion on its own or, alternatively, cause providers, adjudicators, and contractors to believe, erroneously, that services are now covered more broadly than they actually are.[2] These are precisely the reasons why CMS must make the final determination on the content of its policy statements.

3. There is no need to redo the National Call for contractors and adjudicators.

Plaintiffs claim a need to redo the National Call for contractors and adjudicators based on their perception that "confusion and misinformation" has resulted from that Call and that it left "misleading impressions." *Id.* at 10. To the extent that Plaintiffs premise these claims on the Summary the Court found deficient, CMS explained in its opening brief that the maintenance coverage standard was properly communicated during that same Call through a PowerPoint presentation, which Plaintiffs reviewed in advance. CMS Mem. 5 n.4. Regardless, CMS has proposed to revise the Summary and distribute it to Call participants as a superseding version, and to thereby remedy any misinformation participants may have taken from the Call. *Id.* at 5. More fundamentally, the Court did not find the Call deficient or otherwise suggest that CMS should be required to redo it.

As CMS pointed out in its opening brief, *see id.* at 13, redoing a National Call more than three years after it was originally held also poses practical problems that are avoided by issuing a written document. Specifically, the live-format of the Call does not lend itself to delivering a

[2] Plaintiffs also propose that CMS deliver the "correct information" at a series of Open Door Forums. Pls.' Mem. 9. While CMS retains the option to include *Jimmo*-related information in any Open Door Forum, there is no persuasive reason to require the agency to put these items on the agenda, particularly when the Court took no specific issue with the Open Door Forums and the alleged deficiencies Plaintiffs advanced in their motion. Order 16-17.

large volume of technical information, or to describing policies that are often complex in application to particular cases. Participants may not understand why the information is being conveyed to them again, which may introduce confusion. Finally, a written revision of the Summary document, unlike a live-format Call, would enable Plaintiffs to review and comment on the draft document, as CMS has offered.

If, over CMS's objections, the Call is redone, Plaintiffs should not be permitted to attend it. The Settlement Agreement does not allow Plaintiffs to attend the National Call with contractors and adjudicators. *See* SA § IX.15. This agreed-upon restriction reflects the fact that CMS's communications with its contractors and adjudicators are internal to the agency and are confidential. Maintaining the internal and confidential nature of this Call is for good reason: Plaintiffs' presence would stifle open communication. The Court should not disturb the agreement of the parties.

4. CMS has already agreed to reasonable new training initiatives.

CMS's proposal already contains much of what Plaintiffs ask for with respect to training for MACs and MAOs. CMS agreed that it would direct MACs to conduct additional training on the *Jimmo* manual revisions and request that MAOs conduct the same training.[3]

But rather than allow Plaintiffs to draft the training materials to be used by the MACs and MAOs, as they propose, *see* Pls.' Mem. 10-11, CMS recognizes that the MACs and MAOs are best positioned to conduct the training to suit their operational needs as they routinely do in the normal course of their business operations. Moreover, CMS itself will be providing materials that the contractors can use in conducting their respective trainings. Plaintiffs offer no basis for

[3] CMS lacks authority to direct the MAOs (Medicare Advantage Organizations), which administer Medicare Part C plans, to conduct training.

why they should be allowed to draft and edit the anticipated training materials, other than their "knowledge about Medicare in general and the issues of this case in particular." *Id.* While Plaintiffs' counsel may possess general knowledge about Medicare and a familiarity with this case, it does not mean they should be allowed to take over the training role reserved to the contractors themselves or the policy guidance role held by CMS. That Plaintiffs have filed their Motion to Enforce, and that the Court identified a deficiency, does not mean that Plaintiffs can leverage their partially granted motion into an opportunity to craft training regimes for Medicare contractors. In order to correct the deficiency identified, there is no need for Plaintiffs' involvement in the drafting or review of the training materials. The Court should approve CMS's training proposal, which eliminates the improper involvement of Plaintiffs in the contractor training process.

5. No additional monitoring or enforcement is permitted or necessary.

The Settlement Agreement expressly provides that the Court's retention of jurisdiction ends thirty-six months following the end of the Educational Campaign. SA § VI.3. As Plaintiffs acknowledge, the date when the Court's jurisdiction ends is therefore January 24, 2017. Pls.' Mem. 11. The Agreement allows only a narrow exception to this termination of jurisdiction, as necessary for the Court "to rule on a motion for enforcement . . . filed prior to [January 24, 2017]." SA § VI.4. Assuming the Court does not resolve this corrective action dispute before January 24, 2017, Plaintiffs' Motion to Enforce will fall within that narrow exception and, accordingly, the Court "maintain[s] jurisdiction to rule on" that particular motion. *Id.* There is no basis, however, for the Court to impose, under SA § VI.4 or any other provision of the Agreement, the extensive enforcement regime that Plaintiffs describe in their brief. Pls.' Mem. 11-12. Plaintiffs essentially ask for the Court to adopt a novel and standalone monitoring regime

and force CMS to agree to it as an addendum to the Agreement. The Court must reject this request.

CMS settled this case because it sought finality in the face of litigation uncertainty. Plaintiffs' monitoring proposal would deprive CMS of the finality benefits of its bargain by exposing it to ongoing second-guessing by Plaintiffs. Even then, it appears that Plaintiffs believe they should in the future be allowed to continue to press for judicial enforcement of the corrective action, which would only further drain this Court's resources in an attempt to police speculative future non-compliance. *See id.* at 11 (suggesting that Plaintiffs be allowed to "suggest corrections to the actions taken"). Plaintiffs are of course free to advise CMS of any concerns that they think warrant attention or request future meetings with CMS—which Plaintiffs' counsel have done and which CMS has granted, both in this case and on other issues. But there is no basis for the Court to award a new monitoring and enforcement regime altogether separate from the carefully negotiated jurisdictional provisions of the Agreement. *See Hendrickson v. United States*, 791 F.3d 354, 360 (2d Cir. 2015) (noting with approval that a "district court cannot retain jurisdiction by issuing a postdismissal order to that effect").

CONCLUSION

For the reasons above, the Court should reject Plaintiffs' proposed corrective action plan. The Secretary respectfully requests that the Court instead approve CMS's corrective action proposal and dismiss as moot Plaintiffs' Motion to Enforce.

Dated: January 13, 2017.

Respectfully submitted,

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