

MEMO ENDORSED

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February 2, 2021

The Honorable Kenneth M. Karas
United States District Court
300 Quarropas Street
White Plains, New York 10601-4150

Re: United States ex. rel. Cutler v. Cigna Corp. et al., No. 17-cv-5715 (KMK)
Request to disregard declarations or grant leave to file sur-reply - Motion to
Transfer under 28 U.S.C. 1404(a)

Dear Judge Karas,

Relator respectfully requests that the Court disregard all of the declarations attached to Defendants' reply in connection with the above motion, or alternatively grant Relator leave to file a sur-reply. Relator believes this request is appropriate given that Defendants have produced these declarations for the first time in their reply. They were filed in attempt to show there are no New York witnesses, but Defendants having already argued this point and submitted a supporting declaration for it in their motion.¹ *See Revise Clothing, Inc. v. Joe's Jeans Subsidiary*, 687 F. Supp. 2d 381, 387 (S.D.N.Y. 2010); *Aurora Loan Servs. v. Posner & Associates*, 513 F. Supp. 2d 18, 20-21 (S.D.N.Y. 2007). Allowing them to submit additional evidence now would give Defendants "two bites of the apple" in meeting their burden of proof. *Id.* Defendants have indicated that they oppose Relator's request.

If the Court allows these declarations, it is only fair that Relator be afforded an opportunity to respond to them. Relator has grounds to believe they are fraudulent and can show that the statements directly contradict testimony provided under oath during the Arbitration and/or Cigna's own internal emails and other communications. Relator will identify a few examples of the misstated facts here, though the actual number of misstatements in the documents is voluminous.

Beginning with Dr. Harris, who was the President of CareAllies, he stated among other things that the 360 Program was not managed by CareAllies but rather "a different entity, HealthSpring Inc." (Harris Decl. at ¶ 5). This statement is false. His own employees testified during the Arbitration that they managed the 360 Program. For example, Ms. Chaun Tatum-Williams, CareAllies' Director of Coding and Performance, testified as follows:

Q: Okay. And what is that you do for CareAllies?
A: Director of Coding.

¹ See McKeon Declaration at ¶ 20.

- Q: And do you supervise HealthSpring employees?
 A: No.
 Q: Do you have any management role in the operation of the 360 program?
 ...
 A: I would say yes.²

Ms. Tatum-Williams goes on to explain how she led the process of distributing lists of high priority members to undergo 360 visits based on reports generated by Predilytics, as well as detailing the process for completing the visits.³ Other employees at CareAllies who testified as to their involvement include Peter Gardner, the Network Operations and Strategic Lead,⁴ and Whitney Horak, the Vice President of Network Operations for Texas and Mid-Atlantic, Pennsylvania markets.⁵ Dr. Fessenden also testified that CareAllies had a direct role in the program.⁶ Dr. Harris has misrepresented the facts to the Court, and no doubt has done so to avoid testifying about his involvement.

Dr. Muney likewise misrepresents the facts to distance himself from the 360 Program. He indicates that he was not involved in “approvals granted as to...program designs, or the protocols and procedures for performing the 360 exams.” (Muney Decl. at ¶ 3). But in his role as Executive Vice President of Total Health and Network he was responsible for the “clinical nurse executives, total health physician operations [and] total health clinical operations.” (emphasis added). He “oversaw Cigna’s team of doctors [and] nurses...involved in the company’s health management and wellness programs.”⁷ In 2014 he even gave a presentation in which he discussed the design of Cigna’s “Medicare Advantage & Physician Partnership” in which 360s would be performed at Cigna “Livingwell” centers.⁸

The declarations of Drs. Wales, Fessenden and Jean are also replete with false statements. They all contain the same exact statement that all key decisions as to “performance expectations...management structure and protocols and procedures for performing 360 visits,’ were made in Nashville, Tennessee” (Fessenden Decl. at ¶ 9; Jean Decl. at ¶ 8; Wales Decl. at ¶ 6). Yet this directly contradicts witness testimony and hundreds of internal communications within Cigna. For example, Shelley Stevens testified that reports were sent to Ms. Tatum-Williams in Texas to assess “the providers completing the exams, [and whether they] were [] on target with their completion ratios.”⁹ There is an email in which Mr. Gardner¹⁰ discusses a decision by CareAllies’ to use a provider “that has performed well in other markets.”¹¹ There are emails from Dr. Fessenden referring to Whitney Horak as “running the show” and that he needed to defer to Cigna’s corporate office in Connecticut on “policies and procedures” outlined in contracts with

² Cutler Decl., Ex. A at Tr. 455:8-19.

³ See *id.* at Tr. 523:9-528:15.

⁴ See Cutler Decl., Ex. B at Tr. 597:12-598:20

⁵ See Cutler Decl., Ex. A at Tr. 383:1-11; see also Exhibit 3 attached hereto (reflecting Mr. Gardner’s title).

⁶ See Cutler Decl., Ex. C at Tr. 1350:16-1351:7.

⁷ See Exhibit 1 attached hereto, which is a press release describing Dr. Muney’s responsibilities.

⁸ See Exhibit 2 attached hereto at 1-6.

⁹ See Cutler Decl., Ex. D at Tr. 1722:1-17.

¹⁰ He is also located outside of Tennessee.

¹¹ See Exhibit 3 attached hereto.

360 vendors.¹² There are multiple emails among individuals located in Cigna's office in Bloomfield discussing their negotiations of key contracts with 360 vendors and their expectations for performance.¹³ Indeed, all of the contracts executed for the 360 program outside of Tennessee were entered into by Cigna affiliates in those markets and had nothing to do with Nashville at all.¹⁴

Dr. Fessenden's statements also directly contradict his own testimony under oath during the Arbitration. There he testified that "[t]he state-level people decide either these providers aren't participating [in the 360 Program] or these patients of these providers need to be seen by an in-home vendor. It's all done within the state, within the market."¹⁵

That high level personnel for the program were located in multiple states is an indisputable fact. Ms. Stevens, was the highest operational manager within the 360 Program and she is based in Philadelphia. There were vice presidents of network operations for the 360 Program located in every state and market where the plans operated. Countless emails show coordinated action among multiple personnel, offices and entities across all regions of the United States on important decisions, such as controlling program costs,¹⁶ and this level of organization points to the corporate parent Cigna as the ultimate decision-maker. The Arbitration documents offer some insight on this as there is an email from a vice president at Cigna to local managers in the Arizona market that discusses rolling out the 360 Program in Arizona as part of "our coy-cannot-talk about project J."¹⁷ To say that all key decisions were made in Nashville and only within HealthSpring is pure fiction.

The sheer volume of false statements in these declarations is staggering. Like Casey McKeon's portrayal of the imaginary "Cigna Medicare," these statements have been fabricated specifically for this case. Defendants are so desperate to remove this case from New York that they have resorted to committing outright fraud on the Court. Defendants and their attorneys are squarely to blame for this nonsense. Yet all that they have done is further prove the point that this case belongs in New York, because this is the proper court to hear any motion for sanctions or contempt. *See Big Baby Co. v. Schechter*, 812 F. Supp. 442, 443 (S.D.N.Y. 1993).

The Sur-Reply is due 2/10/21.

So Ordered.



2/2/21

Respectfully Submitted,

/s/ Robert A. Cutler

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¹² See Cutler Decl., Ex. D at Tr. 1494:16-1495:4; see also Exhibit 4 attached hereto.

¹³ See Exhibit 5 attached hereto.

¹⁴ See Exhibit 6 attached hereto, which is an example of one such contract.

¹⁵ See Cutler Decl., Ex. C at Tr. 1355:5-9.

¹⁶ See Exhibit 7 attached hereto, which is one such example.

¹⁷ See Exhibit 8 attached hereto.