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December 23, 2013

## VIA U.S. Mail

The Hon. Robert B. Kugler, U.S.D.J.  
Mitchell H. Cohen Building and U.S. Courthouse  
1 John F. Gerry Plaza, Room 6040  
Camden, NJ 08101

**Re: *Galletta v. Velez, et al***  
**Civil Case No. 1:13-cv-00532-RBK-AMD**

Dear Judge Kugler:

Enclosed please find a courtesy copy of Plaintiff's brief in opposition to Defendants' motion for reconsideration (ECF No. 37), along with attached certification (ECF No. 37-1), in the above-referenced case. The documents were e-filed with the Court on today's date.

Respectfully,

WILLIAMS CUKER BEREZOFSKY

By:   
JOSEPH ALAN VENTI, ESQ.

cc: Kay R. Ehrenkrantz, DAG (via email)  
Alan H. Sklarsky, Esq. (via email)  
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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CAMDEN VICINAGE**

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**ALMA GALLETTA, individually** : **DOCUMENT ELECTRONICALLY FILED**  
**on behalf of herself and all** :  
**others similarly situated,** : **Hon. Robert B. Kugler, U.S.D.J.**  
: **Hon. Ann Marie Donio, U.S.M.J.**  
**Plaintiffs,** :  
: **Civil Action No.1:13-cv-00532**  
**vs.** :  
:  
:  
**JENIFER VALEZ, Commissioner,** : **Motion Date: Jan. 6, 2014**  
**New Jersey Department of Human** :  
**Services; VALERIE HARR,** :  
**Director, New Jersey** : **PLAINTIFF'S OPPOSITION TO**  
**Division of Medical Assistance:** **DEFENDANTS' MOTION FOR**  
**& Health Services; and CAMDEN** : **RECONSIDERATION**  
**COUNTY BOARD OF SOCIAL** :  
**SERVICES,** :  
:  
:  
**Defendants.** :

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## ARGUMENT

Defendants provide no viable basis for reconsideration of this Court's November 12, 2013 Order denying Defendants' motion to dismiss Plaintiff's complaint. As set forth more fully below, Defendants waived their ability to argue that this case is moot, based on Plaintiff's purported ineligibility for benefits under the Veterans Administration Improved Pension ("VAIP") program, because they failed to present that argument as a basis for dismissal. District of New Jersey Local Civil Rule 7.1(i) is clear that a motion for reconsideration is to be used only when an issue was presented but overlooked; it is not an opportunity to try out a new argument.

Furthermore, even assuming, *arguendo*, that Defendants did not waive their ability to seek reconsideration on the basis asserted, Defendants still fail to show that the Court clearly erred as a matter of fact. Relatedly, Defendants also fail to demonstrate that Plaintiff is ineligible for VAIP benefits.

It is not subject to serious dispute that Plaintiff is eligible to receive and *currently* does receive VAIP benefits. Defendants cite nothing that could alter this reality. Therefore, the Court should deny Defendants motion for reconsideration and let the long-overdue issue at the heart of

this case be tested on the merits.

**A. Defendants waived the opportunity to raise the argument they now advance, for the first time, in their motion for reconsideration.**

Defendants appear to acknowledge that motions for reconsideration have a very limited scope, that they constitute extraordinary relief, and that they cannot be used to rehash arguments or raise new ones. See Defs. Reconsid., ECF No. 30-1 at 7 (citing cases).<sup>1</sup> Yet, perplexingly, after reciting the applicable standard Defendants in the next breath depart from it. Specifically, the exclusive basis for Defendants' motion—that Plaintiff's action is allegedly moot because she is no longer eligible for VAIP benefits—was **not** raised as a basis for dismissal in either Defendants' motion to dismiss or, at the very least, in their reply brief. Therefore, Defendants' motion improperly relies on an argument they clearly waived, and reconsideration can be denied on that basis alone.

To be sure, reconsideration under Local Rule 7.1(i)<sup>2</sup> will be

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<sup>1</sup> Plaintiff's record citations use ECF pagination and not the original pagination of the documents.

<sup>2</sup> Defendants invoke Local Rule 7.1(i) as the authority for their motion, see Defs. Reconsid., ECF No. 30-1 at 6, but fixate more on the standard under Federal Rule of Civil Procedure 59(e), see *id.* at 7, which is reserved for the following: "(1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error of law or prevent manifest injustice." *Lazaridis v. Wehmer*, 591 F.3d 666,

granted "only where dispositive factual matters or controlling decisions of law were presented to the court but not considered." *Khair v. Campbell Soup Co.*, 893 F. Supp. 316, 337 (D.N.J. 1995) (internal quotations and citations omitted). The key word in that quote is "presented", since "a motion for reconsideration may address only those matters of fact or issues of law which were presented to, but not considered by, the court in the course of making the decision at issue." *Wisowaty v. Port Authority Trans-Hudson Corp.*, Civ. No. 11-2722, 2013 U.S. Dist. LEXIS 2866, at \*5 (D.N.J. Jan. 8, 2013) (citation omitted). "In other words, a motion for reconsideration is not a vehicle for a party to raise arguments that were effectively waived by being omitted from that party's original briefs." *A & L Indus. v. P. Cipollini, Inc.*, Civ. No. 12-7598, 2013 U.S. Dist. LEXIS 165543, at \*3 (D.N.J. Nov. 21, 2013); see also *Tischio v. Bontex, Inc.*, 16 F. Supp. 2d 511, 533 (D.N.J. 1998) ("A motion for reconsideration should not provide the parties with an opportunity for a second bite at the apple.").

Looking back to Defendants' opening brief in support of dismissal, their lone argument was simply this: "a concrete and live controversy no longer exists between Defendants and

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669 (3d Cir. 2010) (per curiam).



Plaintiff because BCBSS has granted exactly what the Plaintiff was seeking from this Court - Medicaid eligibility under the Global Options Medicaid waiver." Defs. MTD, ECF No. 15-1 at 18-19. Defendants said absolutely nothing about Plaintiff's supposed ineligibility for VAIP benefits.

Even in response to Plaintiff's contention that the case was not moot because her VAIP benefits were in danger of future misapplication by BCBSS, see Pls. Opp., ECF No. 20 at 21, Defendants failed to directly refute the factual underpinnings of that argument and instead confined the arguments in their reply brief to Eleventh Amendment and mootness-exception issues. See generally Defs. Reply, ECF No. 23. In fact, Defendants at certain points took as a given that Plaintiff would continue to receive VAIP benefits. See, e.g., *id.* at 13 ("[T]here is no reasonable expectation that DMAHS will count Plaintiff's DVA pension, now that it has been designated by the DVA as entirely aid and attendance, as income in the future in order to terminate her Medicaid waiver benefits.").<sup>3</sup>

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<sup>3</sup> In a closing footnote, Defendants were equivocal about whether Plaintiff would continue to receive VAIP benefits, and ultimately deferred to the VA's eligibility determination. See Defs. Reply, ECF No. 23 at 14 ("DMAHS does not have the statutory authority to disagree with the manner in which the DVA calculates or administers its pensions."). The deferential nature of the footnote was consistent with other representations in Defendants' briefing, see, e.g., Defs. MTD, ECF No. 15-1 at

In sum, Defendants' motion for reconsideration fails to cite new law or new facts, fails to identify any dispositive issue that was presented to but overlooked by the Court, and utterly fails to satisfy the demanding "manifest injustice" standard. Defendants' motion is essentially a request for a do-over, which Local Rule 7.1(i) expressly prohibits. Reconsideration must be denied.

**B. Even in the absence of waiver, Defendants' argument for reconsideration comes nowhere close to demonstrating the existence of a dispositive, clear error of fact.**

Defendants take issue with the Court's observation that "[t]here is no apparent reason to suspect that Plaintiff will not continue to collect VAIP benefits . . . ." Ct. Op., ECF No. 25 at 10. Defendants characterize the Court's observation as a so-called "misapprehension of a factual conclusion," Defs. Reconsid., ECF No. 30-1 at 5., since, in their estimation, "Plaintiff will no longer be eligible for a VAIP as her income exceeds the low federal maximum income threshold." *Id.*

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16 ("BCBSS has accepted the DVA's classification of its own payment in this matter . . . ."), and is wholly inconsistent with Defendants attempt now to, in essence, unilaterally re-determine Plaintiff's eligibility for VAIP benefits.

However, the Court's ruling was factually sound.<sup>4</sup> Plaintiff was awarded VAIP benefits effective June 24, 2011, in accordance with the provisions of 38 U.S.C. § 1541(d)(1). See EFC No. 1 at ¶ 22; EFC No. 1-3. And indeed, Plaintiff continues to receive VAIP benefits **to this very day**, utilizing such funds to cover unreimbursed medical expenses. See Certification of Marylou Yam ("Yam Cert.") (attached) at ¶ 5. Defendants offer nothing that could undermine these assertions of fact.

Putting aside their conspicuous failure to cite any evidence that Plaintiff no longer receives VAIP benefits, Defendants are left to rely on speculation and a flawed perception of how the entitlement system *should* work as a matter of law. This sort of theoretical reasoning leads Defendants far astray from demonstrating the existence of a case-dispositive, "clear error" of fact by the Court. *Cf. Clark v. Prudential Ins. Co. of Am.*, 940 F. Supp. 2d 186, 189 (D.N.J. 2013) (noting requirement on reconsideration that alleged factual error be capable of altering the disposition); *In re Cardell, Inc.*, Civ.

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<sup>4</sup> Eligibility for VAIP benefits is an inquiry factually distinct from the central issue in this case, which is whether Defendants' conduct violates 20 C.F.R. § 416.1103(a)(7). That being so, in adjudicating Defendants' motion to dismiss, the Court was "'free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.'" *Torres-Negron v. J & N Records, LLC*, 504 F.3d 151, 163 (1st Cir. 2007) (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)).

No. 08-5190, 2009 U.S. Dist. LEXIS 57580, at \*7 (D.N.J. July 6, 2009) ("A finding of fact is clearly erroneous when, although there is evidence to support it, in consideration of the entire record, the reviewing court is left with the definite and firm conclusion that a mistake has been committed.").

At bottom, the Court made no mistake in recognizing that Plaintiff continues to receive VAIP benefits, the potential future misapplication of which by itself solidifies the existence of a live case or controversy. Accordingly, assuming that Defendants' argument is not deemed waived, it nevertheless fails as support for reconsideration.

**C. Even if the issue of Plaintiff's eligibility for VAIP benefits were properly before the Court, which it is not, the Court should reject Defendants' invitation to conclude as a matter of law that Plaintiff is ineligible for said benefits.**

Defendants previously took the position that "DMAHS does not have the statutory authority to disagree with the manner in which the DVA calculates or administers its pensions." Defs. Reply, ECF No. 23 at 14. Yet, with nary a citation to relevant case law, statutes or regulations, Defendants reverse course and now confidently assert that Plaintiff should not be receiving VAIP benefits at all. Their assertion rests on a simple, albeit defectively designed, syllogism: Plaintiff's VAIP eligibility

depends on the existence of unreimbursed medical expenses ("UMEs"); Medicaid now covers all of Plaintiff's medical expenses; therefore, Plaintiff is ineligible for VAIP benefits.

As a preliminary matter, Defendants are flat wrong insofar as they posit that an individual cannot be a beneficiary of both veterans' benefits and Medicaid. *Cf.* Defs. Reconsid., ECF No. 30-3 at 12 ("the federal programs for medical assistance have been structured to ensure that taxpayers only subsidize Ms. Galletta's unreimbursed medical expenses once- either by the VA's A & A benefit or by the Global Options waiver program"). In fact, various Medicaid statutes and regulations expressly recognize, and operate to handle, situations in which a person receives *both* types of benefit. *See, e.g.,* 38 U.S.C. § 5503(d)(2) (reducing but not eliminating VA benefits for an institutionalized Medicaid recipient); CMS Publication 45-3, § 3705, ¶ C (same); *see also* *Krammer v. Velez*, Civ. No. 11-4924, ECF No. 40-1 at 21 (D.N.J. July 2, 2012) (letter from the VA explaining that it "does not count the medical expenses paid by Medicaid - VA only counts the claimants income as medical expenses").

But perhaps the most glaring defects in Defendants' assessment of whether Plaintiff has UMEs, now that she receives

Medicaid, are present in the following statements by Defendants:

Under Global Options, the assisted living facility will be reimbursed by Medicaid for the medical support [Plaintiff] needs. Likewise, the room and board costs will be drastically reduced due to her eligibility, i.e. if she previously paid \$5000 per month for assisted living facility monthly fees, now she only needs to pay \$700 for her room and board fees, with Global Options program paying the difference.

Defs. Reconsid., ECF No. 30-1 at 11.

Plaintiff does **not** live in an "assisted living facility." As plainly alleged in Plaintiff's complaint, she "resides with her daughter" in "Oradel, New Jersey." ECF No. 1 at ¶ 7; see also Yam Cert. at ¶ 2. Consequently, Plaintiff does not pay for "room and board."<sup>5</sup> Rather, a sizable portion of Plaintiff's UMEs are from care by a Home Health Aide. See Yam Cert. at ¶¶ 3-4. Medicaid only covers less than *half* of that expense, and so even with her Social Security, VAIP and private pension, Plaintiff is still left with a \$1,134.66 monthly shortfall, i.e. UMEs. See *id.* at ¶¶ 6-7. "The VAIP exists to support the most financially

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<sup>5</sup> Defendants' mantra that "[r]oom and board costs at an assisted living facility are not medical expenses," Defs. Reconsid., ECF No. 30-3 at 11, is therefore irrelevant. It is also wrong. See *Ledford v. Colbert*, 2012 U.S. Dist. LEXIS 83840, at \*12 (S.D. Ohio June 18, 2012) (agreeing with plaintiffs' contention that Medicaid recipients are still entitled to VA benefits, "regardless of whether they are institutionalized in a nursing home or a VA state home, or are receiving waiver services in lieu of facility admission . . . .").

needy veterans' families," Defs. Reconsid., ECF No. 30-3 at 12, which is why Plaintiff's eligibility for benefits endures.

In sum, Defendants misapprehend the legal landscape and the facts of this case en route to erroneously concluding that Plaintiff is ineligible for any VAIP benefit. Even if one could put aside both Defendants' waiver of their current argument and their inability to in any event show a clear error or fact, Defendants thus fare no better on the merits.

**CONCLUSION**

For all of the reasons given above, Defendants' motion for reconsideration of the Court's Order denying their motion to dismiss fails and should be denied.

Dated: December 23, 2013

Respectfully submitted,

WILLIAMS CUKER BEREZOFSKY, LLC

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*Attorneys for Plaintiff and the putative class*

**CERTIFICATE OF SERVICE**

I, Joseph Alan Venti, Esq., certify that on this date Plaintiffs' Brief in Opposition to Defendants' Motion for Reconsideration is available for viewing on, and downloading from, the Court's ECF System and has, as a result, been served on Defendants' counsel of record.

Date: Dec. 23, 2013

/s/ Joseph Alan Venti  
JOSEPH ALAN VENTI, ESQ.



**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
CAMDEN VICINAGE**

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ALMA GALLETTA, individually and  
on behalf of herself and all others  
similarly situated,

Plaintiffs,

vs.

JENIFER VALEZ, Commissioner, New  
Jersey Department of Human Services;  
VALERIE HARR, Director, New Jersey  
Division of Medical Assistance & Health  
Services; and CAMDEN COUNTY  
BOARD OF SOCIAL SERVICES,

Defendants.

: **DOCUMENT ELECTRONICALLY FILED**

:

: Hon. Robert B. Kugler, U.S.D.J.

: Hon. Ann Marie Donio, U.S.M.J.

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: Civil Action No.1;13-CV-00532

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**CERTIFICATION OF  
MARYLOU YAM**

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I, Marylou Yam, of full age, upon my oath, do of my own personal knowledge make the following statements by way of certification:

1. I am the daughter of Alma Galletta and due to her deteriorating condition, I am responsible for managing her affairs and arranging for her day-to-day care.

2. My mother lives at home, but as a result of strokes she has suffered, my mother requires around the clock care and assistance.

3. Prior to receiving any Medicaid benefits, the home health aide bill from Bayada Home Health Aide ("Bayada") was \$6,131.66 per month.

4. Currently Medicaid remits payment to Bayada directly, and my mother receives monthly bills in the amount of \$3,713.66.


5. My mother has received and continues to receive monthly income in the amount of \$1,143.00 from Social Security, \$1,113.00 from the Department of Veteran Affairs ("DVA") in aid and attendance benefits and \$323.00 from a private pension. This amounts to a present total monthly income of \$2,579.00.

6. All of mom's monthly income is being applied toward her medical bills, yet there remains a shortfall of \$1,134.66 per month. I have been using my personal funds to pay for this on a monthly basis.

7. I am unaware to what extent mom's monthly home health care expenses are being covered by Medicaid, however it is clear that there are significant unreimbursed medical expenses which far exceed her income even where the total payment which Medicaid makes toward her care costs is included.

I certify that the foregoing statements made by me are true. I am aware that if the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: December 18, 2013

  
\_\_\_\_\_  
Marylou Yam