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13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
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17 XIUFANG SITO, JOSEPHINE GUIN, BOBBI )  
BEER, CALIFORNIA ALLIANCE FOR )  
18 RETIRED AMERICANS and ACTION )  
ALLIANCE OF SENIOR CITIZENS OF ) CIVIL ACTION NO.  
19 GREATER PHILADELPHIA )  
on behalf of themselves and all ) COMPLAINT FOR INJUNCTIVE,  
20 others similarly situated, ) DECLARATORY, AND MANDAMUS  
21 Plaintiffs, ) RELIEF  
22 v. )  
23 MICHAEL O. LEAVITT, )  
Secretary of Health and Human )  
24 Services, )  
25 Defendant. )  
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**I. INTRODUCTION**

1. This action challenges the failure of the defendant, Secretary of Health and Human Services (the Secretary), to provide Medicare Part D prescription benefits to millions of impoverished beneficiaries who are entitled to them and who cannot obtain the drugs that they need.

2. The Medicare Part D program went into effect on January 1, 2006 and is intended to provide access to prescription drug benefits through private insurance plans to all Medicare beneficiaries. Enrollment in the Part D program is voluntary for all beneficiaries except for the more than 6,000,000 individuals eligible for both Medicare and Medicaid, known as dual eligibles. These dual eligible beneficiaries, all of whom are by definition elderly and/or disabled, must participate in the Medicare Part D program (or have no drug coverage at all) because they no longer have drug coverage through the Medicaid program. Medicaid prescription drug coverage ended for these individuals on December 31, 2005. To ensure a smooth transition for the dual eligibles, Congress mandated that the Secretary establish a process to automatically enroll all dual eligibles into a Part D prescription drug plan to ensure that they had access to prescription drug coverage. Congress also established a Low-Income Subsidy program (LIS) to waive the monthly Part D premium and annual deductible and to reduce cost sharing substantially for dually eligible individuals and others who meet the LIS financial eligibility criteria. While most low income beneficiaries must apply for the subsidy, dual eligibles are considered to be subsidy eligible without any action necessary on their part. The Secretary is obligated to inform the prescription drug plan in which the individuals are enrolled of their status as subsidy eligible individuals. Finally, Congress entitled all dual eligible individuals to an ongoing Special Enrollment Period (SEP) to allow them to change Part D plans at any time.

3. The Secretary has failed:

a. to implement uniformly and properly the auto-enrollment requirement, causing dual eligibles not to be enrolled in a Part D plan;

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1 b. to inform Part D plans on a timely basis of their dual eligible enrollees and to  
2 inform Part D plans of their dual eligible enrollees' entitlement to the LIS to defray the  
3 cost of their Part D participation;

4 c. to process adequately and uniformly changes in plan enrollment when dual  
5 eligibles exercise the freedom of choice to change prescription drug plans.

6 4. As a consequence of the Secretary's failures, many dual eligible individuals  
7 cannot obtain the prescription drugs that they need and to which they are entitled. When they go  
8 to the pharmacy to fill a prescription they are told that they are not enrolled in a Part D plan and  
9 have no drug coverage, or that they are not enrolled in the drug plan that they chose. To obtain  
10 medications, many beneficiaries, who are by definition very low income, are asked to pay  
11 deductibles, the unsubsidized cost-sharing, or the full cost of the drugs, even though they are  
12 entitled under the law to receive their medications for a nominal charge.

13 5. Accordingly, on behalf of themselves and a class of similarly situated  
14 individuals, plaintiffs bring this lawsuit to compel the Secretary to meet his statutory obligations  
15 to ensure that plaintiffs immediately receive the subsidized Part D prescription drug coverage,  
16 Low-Income Subsidy, and Special Enrollment Period.

## 17 **II. JURISDICTION**

18 6. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1361 and  
19 pursuant to 42 U.S.C. § 405(g), which is incorporated into the Medicare statute by 42 U.S.C. §§  
20 1395ff(b)(1)(A), 1395w-22(g)(5), and 1395w-104(h)(1).

## 21 **III. PARTIES**

22 7. Plaintiff XIUFANG SITO is a resident of Alameda County, California. She is a  
23 dual eligible, eligible for Medicaid (Medi-Cal in California) and Medicare. She has high blood  
24 pressure and osteoporosis and takes several medicines for these conditions. She speaks Chinese  
25 and does not speak or understand English. She never received any letter from CMS or Medi-Cal  
26 describing any change in her drug coverage, so she did not know there was a change. Ms. Sito  
27 went to the pharmacy in January 2006 to renew her prescriptions. The pharmacist asked for her  
28 Medicare Part D card. She did not have one. The pharmacist told her to show her Social

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1 Security Card. She was reluctant to show the pharmacist her Social Security card, so she left the  
2 pharmacy without getting her medication.

3 Ms. Sito's husband contacted Bay Area Legal Aid about another matter and Ms. Sito's  
4 Part D problems were revealed on April 21, 2006. The attorney there called CMS to find out  
5 which plan Ms. Sito was enrolled in and was told Pacificare. She called Pacificare and was told  
6 Ms. Sito was inactive in their system. Ms. Sito doesn't know what plan she is in or how to  
7 access the drugs she needs under Medicare Part D. She is extremely confused about what to do  
8 and is worried about how she will get her medicine.

9 8. Plaintiff JOSEPHINE GUIN is 76 years old and lives with her 71 year old  
10 husband in Tallahassee, Florida. Their household monthly income is \$1,464. Ms. Guin takes  
11 eight prescriptions per month for congestive heart failure. Prior to 2006, Ms. Guin received her  
12 medications through the Florida Medicaid program. Because of her status as a dual eligible in  
13 2005, Ms. Guin is automatically eligible for the full low-income subsidy to assist with her  
14 prescription drug costs. Nevertheless, \$14.10 per month is being deducted from her Social  
15 Security check to pay the premium for her WellCare Part D plan. Most recently Ms. Guin tried  
16 to pick up the drug Coreg and was told it would cost \$15.00. She did not get the drug because  
17 she does not have the money to pay for it.

18 9. Plaintiff BOBBI BEER is a 65 year old dual eligible who lives in San Diego  
19 California, and makes \$973 a month. She has physical and mental disabilities and takes 12  
20 different prescription drugs each month. She recently found out that her drug plan, Healthnet  
21 Orange, has been charging her trustee incorrect amounts for her medications. Since she is a dual  
22 eligible and should be on the low-income subsidy, she should have only paid \$1 or \$3 for her  
23 medications. Her drug plan has been charging her \$35 for her Cymbalta and even higher co-  
24 payments for other medications. She is currently out of four of her medications. She has asked  
25 for reimbursement, but is worried that she won't get reimbursed by the drug plan, and she will  
26 stop taking her medications if she has to keep paying these incorrect co-payments.

27 10. Plaintiff CALIFORNIA ALLIANCE FOR RETIRED AMERICANS (CARA) is  
28 a statewide nonprofit organization made up of 130 organizations with a combined membership

1 of more than 750,000 individual Californians. CARA is headquartered in Oakland, California, in  
2 Alameda County, and is a broad-based coalition which includes senior centers, tenant  
3 associations, retired public employee organizations, trade union retirees and a variety of other  
4 consumer agencies and associations. Many of its individual members are themselves dual  
5 eligibles struggling with Medicare Part D enrollment problems.

6 CARA is dedicated to educating and informing the public and its members about issues  
7 that affect the well-being of California's older adults. CARA has expended an enormous amount  
8 of its resources educating its members, the public and policy makers about Medicare Part D and  
9 the many problems associated with it. The enrollment problems and subsidy errors associated  
10 with Part D and low income people have taken a large amount of time for CARA its staff, board  
11 and members which would otherwise be spent on other matters.

12 11. Plaintiff ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER  
13 PHILADELPHIA is a coalition of over 229 senior clubs and organizations in the Philadelphia,  
14 Pennsylvania area, representing over 110,000 elderly people, including many low income  
15 Medicare beneficiaries also eligible for Medicaid. Its members come from senior centers, union  
16 retiree clubs, church clubs, tenant councils and community groups. Its mission is to fight for a  
17 better life for all seniors.

18 Since the passage of the Medicare Act of 2003, Action Alliance has been educating its  
19 members and other seniors about Medicare Part D, and since implementation of the program in  
20 January 2006, its staff and volunteers have been diverted from other activities due to the need to  
21 help members and other seniors navigate Part D plan issues and problems.

22 12. Defendant MICHAEL O. LEAVITT is the Secretary of the Department of  
23 Health and Human Services. In that capacity, he has responsibility for the conduct and policies  
24 of the Department of Health and Human Services, including responsibility for the Centers for  
25 Medicare and Medicaid Services (CMS), which administers the Medicare program. He is sued  
26 in his official capacity.

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**IV. CLASS ACTION ALLEGATIONS**

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2           13.       Plaintiffs XIUFANG SITO, JOSEPHINE GUIN, BOBBI BEER,  
3 CALIFORNIA ALLIANCE FOR RETIRED AMERICANS and ACTION ALLIANCE OF  
4 SENIOR CITIZENS OF GREATER PHILADELPHIA bring this action on behalf of themselves,  
5 and, in the case of California Alliance for Retired Americans and the Action Alliance of Senior  
6 Citizens of Greater Philadelphia, also on behalf of their members, and pursuant to Rules 23(a)  
7 and (b)(2) of the Federal Rules of Civil Procedure, as representatives of a class of all others  
8 similarly situated, which is defined as follows:

9           All full benefit dually eligible Medicare beneficiaries who are unable to receive the full  
10 benefits of Medicare Part D prescription drug coverage and/or the Low Income Subsidy program  
11 due to the actions or failure to act of the Secretary of Health and Human Services.

12           14.       Joinder is impracticable due to the large number of class members and for other  
13 reasons, including but not limited to their geographic diversity, their ages and/or disabilities, and  
14 their low incomes. The composition of the class changes on a daily basis due to beneficiaries  
15 becoming newly dually eligible, as they become eligible for Medicare or Medicaid or both.

16           15.       There are questions of law and fact common to all members of the class.

17           16.       The named plaintiffs' claims are typical of the claims of the class, as their health  
18 is imperiled by the lack of prescription drug coverage due to the policies, actions, and inactions  
19 of the Secretary.

20           17.       The named plaintiffs will fairly and adequately represent the interests of the  
21 proposed class. They have no interest that is or may be potentially antagonistic to the interests of  
22 the class. Moreover, plaintiffs are represented by competent counsel who have represented  
23 classes in numerous other cases involving Medicare and other public benefit programs.

24           18.       Plaintiffs seek certification of the class under Rule 23(b)(2) of the Federal Rules  
25 of Civil Procedure. The Secretary has acted or refused to act on grounds generally applicable to  
26 the class, thereby making appropriate final injunctive relief or corresponding declaratory relief  
27 with respect to the class as a whole. Because plaintiffs challenge a systemic failure, they seek  
28 declaratory and injunctive relief making class certification appropriate under Rule 23(b)(2).

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**V. LEGAL FRAMEWORK**

**Medicare and Medicaid**

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3 19. In 1965, Congress enacted Titles XVIII and XIX of the Social Security Act (42  
4 U.S.C. §§ 1395 *et seq.* and 1396 *et seq.*), creating the Medicare and Medicaid programs.

5 20. Medicare, which is funded by the federal government through beneficiary  
6 premiums, payroll taxes, and general revenues, provides health care coverage to 43 million  
7 eligible individuals who are either age 65 or over or have long-term disabilities or specified  
8 medical conditions. Medicare provides coverage for in-patient hospital stays, doctor and clinic  
9 visits, and certain other reasonable and necessary services and items, but did not, prior to  
10 January 1, 2006, provide coverage for most prescription drugs.

11 21. Pursuant to 42 U.S.C. §§ 1395w *et seq.*, starting January 1, 2006, Medicare  
12 offers prescription drug coverage under a new Part D. Such coverage is offered entirely through  
13 private prescription drug plans (PDPs) and Medicare Advantage plans (MA-PDs). Benefits  
14 vary from plan to plan, but must be actuarially equivalent to a standard benefit described in the  
15 law.

16 22. Medicaid, which is funded jointly by the states and the federal government,  
17 pays for medical assistance for certain individuals (including people age 65 and over and those  
18 with long term disabilities) with limited incomes and resources. Although Medicaid coverage  
19 varies from state to state (subject to federal guidelines), it generally covers the same types of  
20 health care services as Medicare with two important additions: Medicaid provides  
21 comprehensive coverage for non-skilled long-term care services and, until January 1, 2006, only  
22 Medicaid provided prescription drug coverage.

23 23. At present more than 6 million low-income people qualify for coverage under  
24 both Medicaid and Medicare and are known, in Part D, as full benefit dual eligibles. They are, as  
25 a group, poorer and sicker than other Medicare beneficiaries. Most full benefit dual eligibles  
26 have incomes below the federal poverty line, and all are elderly and/or disabled.

27 24. Dual eligibles have more extensive health care needs than the general Medicare  
28 or Medicaid populations. Approximately 38% of dual eligibles have mental or cognitive

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1 impairments, and almost 25% live in nursing homes or other long-term care facilities. Dual  
2 eligibles have higher rates of Alzheimer's disease, diabetes, pulmonary disease, and stroke than  
3 other people covered by Medicare. The prevalence of chronic conditions is higher among dual  
4 eligibles than among the general Medicare population. One-third of dual eligibles have  
5 significant limitations in activities of daily living.

6 25. As a result, dual eligibles as a group are highly dependent upon prescription  
7 medications. They take 10 more prescriptions per month than the average Medicare beneficiary.  
8 Given the extensive health care needs of dual eligibles, the health care costs of dual eligibles is,  
9 on a per capita basis, double that of other Medicare beneficiaries.

10 26. Until January 1, 2006 dual eligibles received comprehensive outpatient  
11 prescription drug coverage as part of their Medicaid coverage. Most Medicaid beneficiaries  
12 obtain drug coverage at no cost to them. This varies by state and program. Although nominal  
13 co-payments are permitted, they must be waived for people who cannot afford to pay them. 42  
14 U.S.C. § 1396o(e).

15 The Medicare Modernization Act (MMA) and the Low Income Subsidy

16 27. On December 8, 2003, the MMA was enacted. The MMA establishes the  
17 Medicare prescription drug benefit under the new Part D, effective January 1, 2006.  
18 Significantly, the MMA prohibits dual eligibles from receiving their prescription drugs through  
19 the Medicaid program, as they had prior to January 1, 2006.

20 28. The Medicare Part D benefit is delivered through private prescription drug plans  
21 that provide medically necessary medications to Medicare beneficiaries and are reimbursed by  
22 the federal government pursuant to contract. 42 U.S.C. §§1395w-111-112. In numerous ways  
23 the program operates much like private insurance plans available to the general public, with  
24 premiums, deductibles and other cost-sharing applicable to most beneficiaries. Most  
25 beneficiaries must affirmatively enroll in a plan to get Part D benefits. Medicare beneficiaries  
26 have a choice of plans offering different benefit packages. There are certain out of pocket costs  
27 associated with the benefit, usually including a \$250 annual deductible, monthly premiums, and  
28 variable co-insurance payments for each prescription. In addition the program has significant

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1 coverage gaps that require beneficiaries to pay the full price of some prescriptions. Within  
2 certain parameters plans are allowed to have formularies (lists of covered drugs) that limit the  
3 number and type of drugs that are available. 42 U.S.C. §§ 1395w-102, § 1395w-104 ; 42  
4 C.F.R. § 423.100 *et seq.*. Generally speaking, plans are permitted to differ in numerous ways,  
5 including, but not limited to, cost-sharing requirements, formularies and the pharmacies in their  
6 networks.

7         29.         The MMA statutory scheme contains specific protections for those Medicare  
8 beneficiaries who are also eligible for Medicaid reflecting the Congressional goal of protecting  
9 dual eligibles by mandating that they have access to prescription drugs in a seamless manner.  
10 These MMA protections, in turn, reflect some approximation of the pre-existing situation of dual  
11 eligibles who, under Medicaid, had access to open formularies (with some use restrictions), with  
12 cost-sharing of never more than \$5 per prescription that was required to be waived if the  
13 individual could not pay it.

14                 First, the Secretary's enrollment process must allow for the enrollment into a  
15 fully subsidized plan of all dual eligibles who have failed "to enroll in a prescription drug plan or  
16 an MA-PD plan." 42 U.S.C. § 1395w-101(b)(1)(C).

17                 Congress also directed that dual eligibles should be treated as full subsidy  
18 eligible individuals, excusing them from all Part D cost-sharing except for co-payments of  
19 between \$0 and \$5 (adjusted annually). 42 U.S.C. § 1395w-114(a)(3)(B)(v)(I). Whereas other  
20 subsidy eligible individuals must apply for the subsidy, dual eligibles are entitled to it without  
21 taking any affirmative action.

22                 To ensure that dual eligibles (and other low income beneficiaries) actually  
23 received the benefit of their subsidy, the MMA charges the Secretary with providing "a process  
24 whereby, in the case of a part D eligible individual who is determined to be a subsidy eligible  
25 individual and who is enrolled in a prescription drug plan . . . (A) the Secretary provides for a  
26 notification of the PDP [prescription drug plan] sponsor . . . offering the plan involved that the  
27 individual is eligible for a subsidy and the amount of the subsidy under subsection (a) of this  
28 section." 42 U.S.C. § 1395w-114(c)(1).



1 and these problems are annoying and confusing for her. She knows that she will suffer more if  
2 she doesn't get her medicine, and she is afraid that she will need to go without food or other  
3 necessities of life.

4 Plaintiffs California Alliance for Retired Americans and Action Alliance of Senior  
5 Citizens of Greater Philadelphia are spending significant staff and member resources working on  
6 the identification and resolution of Medicare Part D enrollment, disenrollment and subsidy  
7 problems of the dual eligibles they serve, and as a result are unable to do other important work to  
8 fulfill the missions of their organizations.

9 32. Due to the plaintiffs' and class members' lack of financial resources they cannot  
10 pay for their prescription drugs. For many, the lack of prescription drugs is a life and death  
11 matter or can cause other severe health consequences.

12 **VII. INADEQUACY OF REMEDY AT LAW AND PROPRIETY OF**  
13 **ISSUANCE OF A WRIT OF MANDAMUS**

14 33. Plaintiffs are presently suffering irreparable injury that will continue in the  
15 future by reason of the defendant's action and inaction complained of herein. Plaintiffs have no  
16 adequate remedy at law. Only the declaratory, injunctive, and mandamus relief that this Court  
17 can provide will fully redress the wrongs done to plaintiffs.

18 34. Plaintiffs have a clear right to the relief sought. There is no other adequate  
19 remedy available to correct an otherwise unreviewable defect not related to the claims for  
20 benefits. The defendant Secretary has a plainly defined and nondiscretionary duty to provide  
21 the relief that plaintiffs seek.

22 **VIII. FIRST CAUSE OF ACTION**

23 35. Defendant's failure to provide Medicare Part D benefits to dual eligible  
24 beneficiaries violates 42 U.S.C. § 1395 w-101(b)(1)(C) and 42 U.S.C. § 1395w-114 and its  
25 implementing regulations.

26 **IX. SECOND CAUSE OF ACTION**

27 36. Defendant's failure to enroll dual eligible beneficiaries properly in a Part D  
28 drug plan and to notify prescription drug plans that plaintiffs and class members are subsidy

1 eligible individuals violates rights guaranteed by the Due Process Clause of Fifth Amendment to  
2 the Constitution.

3 **X. PRAYER FOR RELIEF**

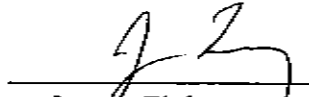
4 WHEREFORE, plaintiffs respectfully request this Court to:

- 5 1. Assume jurisdiction of this matter;
- 6 2. Certify this action as a class action pursuant to Rule 23(a) and (b)(2) and  
7 appoint plaintiffs' counsel as class counsel pursuant to Rule 23(g);
- 8 3. Declare that the Secretary has violated 42 U.S.C. §§ 1395w-101, 104, 111, 112,  
9 and 114 *et seq.* and plaintiffs' rights under the Due Process Clause;
- 10 4. Issue a permanent injunction directing the Secretary:
  - 11 a. to promptly auto-enroll all dual eligible beneficiaries who have not chosen  
12 a plan into a Part D plan and inform plans of the assignment;
  - 13 b. to disenroll beneficiaries on a prompt and efficient basis from plans and  
14 enroll them into the appropriate plan of their choice when they have enrolled themselves or  
15 switched plans, and notify the appropriate plan of their enrollment according to the law;
  - 16 c. to inform the appropriate prescription drug plans in a prompt and timely  
17 manner that plaintiffs and the class members are subsidy eligible individuals;
  - 18 d. to refrain from reducing any monthly Social Security benefit check to pay  
19 for Part D premiums for which the plaintiffs and class members are not responsible as subsidy  
20 eligible individuals, or allow Part D plans to bill plaintiffs for any of these amounts;
  - 21 e. to take any and all other steps to ensure that plaintiffs and the class  
22 members receive the full benefits of the Part D program and the LIS program to which they are  
23 entitled. This includes using the current "Point of Service" contractor or other system of the  
24 Secretary's choosing to ensure that plaintiffs receive their needed medications at a plan  
25 pharmacy;
- 26 5. Award costs of the suit herein, as authorized by 28 U.S.C. § 1920;
- 27 6. Award reasonable attorneys' fees and expenses pursuant to the Equal Access to  
28 Justice Act, 28 U.S.C. § 2412; and

7. Grant such other and further relief as may be just and proper.

Respectfully submitted,

Dated: *April 26, 2006*

By:  \_\_\_\_\_

Jeanne Finberg  
National Senior Citizens Law Center  
Attorney for Plaintiffs

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