UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE AMERICAN HOSPITAL ASSOCIATION, *et al.*, *Plaintiffs,* –v– ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services, *et al.*, *Defendants.*	**Civil Action No. 18-2084 (RC)**

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR A FIRM DATE BY WHICH DEFENDANTS MUST PROPOSE A REMEDY

More than five months after the Court entered a permanent injunction directing Defendants to submit a brief on their proposed remedy, four weeks after the Court ordered the agency to "expeditiously" resolve the remedy issue, and one business day after opposing Plaintiffs' motion to expedite the date by which Defendants must disclose their proposed remedy, Defendants filed a motion urging the Court to reconsider its prior order and to expeditiously enter a final judgment in this action. Defendants' motion is particularly ironic since as a basis for expedition it relies on the need "to obtain a ruling from the D.C. Circuit in time for the U.S. Department of Health and Human Services ("HHS") to account for it in the final 2020 OPPS Rule" (ECF No. 54 at 1), even though the previous business day, in opposing the instant motion, it had argued that it was inappropriate for Plaintiffs to rely on the 2020 OPPS rule as a basis for expedition because the "2020 OPPS rule is not a subject of this case," and "[i]n fact, the proposed 2020 OPPS rule has not been issued yet, much less the final one." ECF No. 54 at 5-6.

The benefit of requiring the Defendants to identify their preferred remedy, as the Court has ordered, is that it will allow the Court of Appeals to consider both the merits and appropriate remedy in a single appeal. Yet until yesterday, Defendants have opposed expedition at every juncture, including opposing Plaintiffs request that their opposition to Plaintiffs' four-page Motion for a Firm Date be expedited, and then requesting a one-week extension to respond, stating that "parties are engaged in discussing a number of issues presented by this litigation" (ECF No. 52), which certainly implies that Defendants have made significant progress in formulating a remedy. All Defendants need to do to expedite this case, as Plaintiffs have been asking, is to quickly follow this Court's instruction and submit their proposed remedy, which would allow the Court, after receiving plaintiffs' response, to issue a prompt decision and a final, appealable judgment.

Although Defendants are framing Plaintiffs' request for a date certain as a request for reconsideration of the Court's order, it is Defendants who are asking the Court to reconsider its order. Plaintiffs have consistently supported the Court's approach and are merely asking the Court to create a date certain by which that must happen. In any event, Plaintiffs meet the standard for reconsideration because "harm or injustice would result if reconsideration were denied." *United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 893 F. Supp.2d 258, 268 (D.D.C.2012). The absence of a firm and expeditious deadline would severely disadvantage the 340B hospitals because it would mean that they will be subject to an additional six months of collectively losing $25 million per week and because it would allow HHS to propose a third

illegal rule for the 2020 year. As made apparent in yesterday's motion, Defendants also have a strong interest in expedition.[1]

It is significant that Defendants have not explained why they cannot comply with a June 28 deadline. After asking the court to give them an extra week to respond to Plaintiffs' Motion so that the parties could work on issues related to remedy, Defendants now claim that the Court does not have authority to require Defendants to submit their remedy to the Court, a position which is flatly inconsistent with the position they took in the Circuit Court of Appeals less than three months ago, where they stated that the district court "retains jurisdiction to effectuate the injunction" See Exhibit A to Notice of Defendants' Unopposed Motion to Hold Appeal in Abeyance Pending the District Court's entry of Final Judgment, ECF No. 47.

Plaintiff hospitals and 340B hospital members of the association plaintiffs have been receiving claims payment that is almost 30% below what the statute allows for more than 18 months and HHS has made no commitment whatsoever to remedy those past shortfalls. In the meantime, HHS continues to pay 340B hospitals at the illegal rate. Moreover, there is no basis to conclude that HHS will not continue this practice for the next fiscal year (2020).

Accordingly, Plaintiffs respectfully request that the Court require the Defendants to submit their proposed remedy no later than June 28. Given Defendants' new interest in obtaining a decision from the D.C. Circuit in time for the 2020 OPPS Rule, they should be able to comply

[1] The other cases cited by Defendants also support a finding that Plaintiffs meet the standard for reconsideration. *See Singh. V. George Washington Univ.*, 383 F. Supp.2d 99, 101 (D.D.C. 2005) (allowing reconsideration where there is a justification or where, as here with respect to timing, the issue was not previously litigated; *Zeigler v. Potter*., 555 F. Supp.2d 126, 129 (D.DC. 2008), *aff'd*, No. 09-539, 2010 WL 1632965 (D.C. Cir. April 1, 2010) (which cites *Singh* for the proposition that revision may be permitted when a decision was made outside the adversarial issues presented by the parties). This is certainly not a case where the court has court has "already rejected" the arguments in Plaintiffs Motion. *Westrick*, 893 F. Supp.2d at 253.

in advance of June 28. Plaintiffs commit to filing a prompt response so that the Court will be in a position to issue an expedited decision.

Dated: June 4, 2019

Respectfully submitted,

/s/ William B. Schultz

William B. Schultz (DC Bar No. 218990)
Margaret M. Dotzel (DC Bar No. 425431)
Ezra B. Marcus (DC Bar No. 252685)
ZUCKERMAN SPAEDER LLP
1800 M Street, NW, Suite 1000
Washington, DC 20036
Tel: 202-778-1800
Fax: 202-822-8136
wschultz@zuckerman.com
mdotzel@zuckerman.com
emarcus@zuckerman.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on June 4, 2019, I caused the foregoing to be electronically served on counsel of record via the Court's CM/ECF system.

/s/ Ezra B. Marcus
Ezra B. Marcus