

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

MAYOR AND CITY COUNCIL OF BALTIMORE,

Plaintiff,

v.

ALEX M. AZAR II, in his official capacity as the Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; DIANE FOLEY, M.D., in her official capacity as the Deputy Assistant Secretary, Office of Population Affairs; OFFICE OF POPULATION AFFAIRS,

Defendants.

Case No. 1:19-cv-01103-RDB

**JOINT STATUS REPORT AND PROPOSED SCHEDULE FOR FURTHER
PROCEEDING**

Undersigned counsel for Plaintiff and Defendants have conferred and submit the following status report and proposed schedule to govern further proceedings.

On March 4, 2019, the Department of Health and Human Services (HHS) published the final rule at issue in this litigation. *See* Compliance with Statutory Program Integrity Requirements, 84 Fed. Reg. 7714 (Mar. 4 2019) (Final Rule). On May 30, 2019, this Court granted Plaintiff's motion for a preliminary injunction, enjoining enforcement of the Final Rule in the State of Maryland. *See* ECF No. 44 (PI Order). Defendants appealed the PI Order, ECF No. 48, and moved the Fourth Circuit for a stay of the injunction pending appeal, *see* Docket No. 9, *Mayor & City Council of Baltimore v. Azar*, No. 19-1614 (4th Cir.). On July 2, the Fourth Circuit granted

Defendants' motion. Docket No. 23, *id.* Plaintiff has since moved for reconsideration en banc. Docket No. 27, *id.*

In Defendants' view, the ongoing proceedings before the Fourth Circuit are likely to result in substantial (if not dispositive) guidance to this Court and the parties in resolving the central merits issues presented in the case. Defendants believe, therefore, that a stay of district court proceedings pending appeal of the PI Order is warranted and would conserve the resources of the parties and the Court. Defendants intend to move to stay proceedings pending appeal by no later than July 22, 2019, and Plaintiff intends to oppose that motion.

In Plaintiff's view, the case should proceed as expeditiously as possible. Defendants have now represented in multiple filings before this Court and the court of appeals that the PI Order is causing Defendants irreparable harm by delaying implementation of the Rule. A swift decision on the merits would relieve Defendants of any burden they face from delay. Plaintiff also believes that expedition is warranted because the PI Order, while adequate, is not broad enough to completely remedy all of Baltimore's harms arising from the Rule. Only a summary judgment vacating the Rule can completely eliminate the harms to Baltimore arising from the Rule. Finally, any decision by the court of appeals will not resolve all of the issues in this case, including, for example, Baltimore's contention that the Rule is arbitrary and capricious.

In addition, Defendants' current deadline for responding to Plaintiff's complaint is July 17, 2019. Defendants respectfully request that the Court extend this deadline until after it has resolved Defendants' motion to stay proceedings pending appeal. This is because Defendants anticipate that their response to the complaint is likely to be a motion to dismiss, which would address the same issues that the Fourth Circuit is currently considering on appeal. Defendants believe that separately briefing such a motion while the appeal of the PI Order is pending would not be an

efficient use of resources. In particular, Defendants propose that their deadline for responding to Plaintiff's complaint be extended until three weeks after either (1) any stay is lifted, or (2) the Court denies Defendants' motion to stay proceedings. Plaintiff opposes this extension, but consents to a thirty-day extension, which would make Defendants' responsive pleading due on August 16. If the Court does not grant Defendants' preferred extension pending the Court's resolution of the motion to stay proceedings, Defendants respectfully request that the Court grant this unopposed thirty-day extension.

Plaintiff opposes any stay of these proceedings. As explained above, the court of appeals will—at minimum—not have occasion to consider whether the Rule is arbitrary and capricious nor any of several other meritorious claims stated in Baltimore's complaint. Staying district court proceedings while parties pursue appeals of preliminary injunctions is contrary to the whole purpose of preliminary injunctions—to preserve the status quo temporarily while the district court proceeds to an expeditious decision on the merits. Courts of appeals have “repeatedly admonished district courts not to delay trial preparation to await an interim ruling on a preliminary injunction.” *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018). As a matter of professional courtesy, Plaintiff consents to a 30-day extension of Defendants' time to answer, with the caveat that Plaintiff reserves the right to oppose further extensions on the grounds of undue delay.

Once the Court rules on Defendants' forthcoming motion to stay proceedings, the parties propose to meet and confer to discuss, and propose to the Court, an appropriate schedule for further proceedings. Defendants further state that Plaintiff's portion of this Joint Status Report contains substantial legal argument. Because this status report is due today, and because these arguments are more appropriately addressed – and will be addressed – in Defendants' forthcoming stay motion, Defendants will not respond to Plaintiff's assertions at this time.

Dated: July 15, 2019

By: /s/ Andre M. Davis

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