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

PROPOSED SCHEDULES FOR FURTHER PROCEEDINGS

Undersigned counsel for Plaintiff and Defendants have conferred and were unable to reach agreement on a proposed schedule for further proceedings in this case. Accordingly, the parties set forth their respective scheduling proposals below.

Plaintiff's Proposal: Baltimore believes that the interests of efficiency and judicial economy are best served by the parties each moving for summary judgment only as to claims 1-3 next week while the parties work expeditiously to ready the remainder of the claims for summary judgment at a later date. In particular, Baltimore proposes the following schedule:

The Parties Cross-Move for summary judgment on Claims 1-3: September 27, 2019

Oppositions Due: October 4, 2019

No Replies.

Additionally, the parties will confer over the coming weeks to set a schedule to resolve the remaining issues in this case.

Baltimore believes that this approach is by far the simplest and most efficient way to move this case forward at this juncture. Defendants claim Baltimore's approach is more complicated because it involves more briefs. But in fact it does not—it involves only four briefs. And in fact Defendants' approach is far more complicated, because it requires the parties to brief and argue collateral issues (such as the availability of discovery), engage in potentially extensive additional fact development, and argue complex legal claims that the Court may never need to reach should Baltimore prevail on any of Counts 1-3. The inherent complexity of Defendants' approach is highlighted by the fact that Defendants suggest that the Court should delay briefing on summary judgment to resolve several collateral questions unrelated to the merits. Indeed, in discussing a potential joint scheduling order Defendants have repeatedly suggested that the parties should delay summary judgment in this case, even though Baltimore is currently suffering irreparable harm from the Final Rule and even though this Court has already determined that Baltimore is likely to prevail on Counts 1 and 2.

Moreover, Courts use phased summary judgment all of the time and this case is particularly appropriate for phased summary judgment. Courts have broad power to regulate the timing of summary judgment. Rule 16 specifically authorizes the court to "consider and take appropriate action" with respect to "determining the appropriateness and timing of summary adjudication under Rule 56." Fed. R. Civ. P. 16(c)(2)(E). One application of that power is to structure the pretrial process so that the parties may seek summary judgment on some claims or issues at one stage of the proceedings, leaving other claims or issues for later. The Supreme Court has acknowledged that this type of phased process is appropriate. In *Crawford-El v. Britton*, the

Supreme Court recognized that when there are threshold issues that may be dispositive, the court has discretion to structure the pretrial schedule to isolate those issues for an early summary-judgment motion. 523 U.S. 574, 598 (1998). The potential benefits of taking a phased approach to summary judgment are not limited to threshold issues. Phased proceedings may be helpful any time there is good reason to think the disposition of the case might be advanced by an early resolution of a particular claim or issue. In many cases, for example, the court's summary-judgment ruling on a particular claim might provide key information facilitating settlement. *See Hotel 71 Mezz Lender LLC v. National Retirement Fund,* 778 F.3d 593, 606 (7th Cir. 2015) (noting that early partial motion may facilitate settlement of the remainder of the case). "The idea of phased summary judgment is to focus the parties' initial efforts on particular claims or issues that, if resolved early, might lead to an early resolution of the case before full discovery, or at least reduce the scope of the discovery needed going forward." Steven S. Gensler, *Judgment*, in 2 Federal Rules of Civil Procedure, Rules and Commentary Rule 56 (2019).

Finally, this case calls out for phased summary judgment. Baltimore suffers irreparable harm from each day's delay in the resolution of its claims in this case. Baltimore therefore believes that the parties and the Court should work together to expeditiously resolve a motion for summary judgment on Baltimore's purely legal claims (Counts 1-3). Those claims are ripe for resolution *today* and Baltimore is prepared to move for summary judgment as to those claims by Friday, September 27, 2019 (Friday of next week). But Baltimore's other claims (claims 5-9) all involve collateral issues that will complicate or make impossible their resolution at summary judgment in the coming weeks. Some are complex. Others involve issues of disputed material fact and require additional fact development. Still others may require discovery. Baltimore would like these

claims resolved on an expedited basis, but Baltimore cannot be ready to bring a motion for summary judgment as to those claims by next week.

There are several significant advantages to Baltimore's proposal. First, it avoids—potentially entirely—the need to resolve any collateral issues related to amending the complaint, supplementing the record, or engaging in discovery. Second, it allows the Court to potentially avoid ruling on more legal questions or broader legal questions than necessary to resolve this case. Third, it will speed the resolution of the case by limiting the number of questions the parties must brief and the Court must resolve at this juncture. Fourth, it will promote the speedy and efficient resolution of this case by narrowing the questions that must be resolved to questions the Parties have already extensively briefed and argued and that the Court has already carefully considered.

Defendants concerns about the appealability of partial summary judgment should not dictate whether the Court decides to use it. Defendants' concern can be addressed once the Court rules on the motion. Defendants' are well aware that there are avenues available to address circumstances in which a court resolves fewer than all of the issues on summary judgment, including in APA cases. *See Am. Forest Res. Council v. Ashe*, 301 F.R.D. 14, 16-18 (D.D.C. 2014) (Bates, J.); *see also infra* (stating that Defendants would seek to appeal any adverse judgment).

Whatever the Court decides, Baltimore believes that this case must remain on an expedited schedule because time is of the essence.

Finally, Defendants' complaints about the process involved in crafting these proposed schedules is unfounded, *see infra*. Baltimore offered on Thursday evening (and indeed, throughout the process) to make numerous meaningful concessions in the hopes of securing a *joint* schedule. Defendants rejected all of Baltimore's offers. Baltimore would be glad to provide the Court with the entire email exchange between Baltimore and Defendants regarding scheduling. Those emails

show that Baltimore has not engaged in any gamesmanship but rather has consistently sought, in good faith, to reach agreement with the Defendants on a joint schedule. Moreover, given how thoroughly the parties have already briefed Claims 1-3, including twice before this court, Defendants' claim that Defendants need more time to file summary judgment on those claims rings hollow.

Defendants' Proposal: Defendants believe that the interests of efficiency and judicial economy are best served by a single, consolidated summary judgment briefing schedule that would allow the Court to resolve all of Plaintiff's claims at once. Accordingly, Defendants propose a briefing schedule that accords with Local Civil Rule 105-2(c), which provides for a four-brief schedule when both parties intend to file summary judgment motions. Defendants also seek to accommodate Plaintiff's interest in resolving the case expeditiously, and accordingly propose a schedule that would allow the parties' cross motions for summary judgment to be fully briefed, and the case to be ripe for final resolution, by November 5, 2019. In particular, Defendants propose the following schedule:

Plaintiff's Motion for Summary Judgment on all claims: October 1, 2019

Defendants' Opposition and Cross Motion for Summary Judgment: October 15, 2019

Plaintiff's Combined Opposition and Reply: October 29, 2019

Defendants' Reply: November 5, 2019.

Defendants note that this schedule generally accords with, and with respect to Defendants' final reply brief is shorter than, the default response deadlines set by Local Civil Rule 105-2(a).

Defendants believe that this streamlined proposal is preferable to Plaintiff's significantly more complicated approach, which would have the parties and the Court address Plaintiff's claims piecemeal—potentially in three separate rounds of summary judgment motions. Plaintiff's

proposal, in addition to undermining efficiency, would substantially delay final resolution of the case. It also would raise significant concerns about either party's ability to appeal any Court Order granting or denying summary judgment as to some, but not all, of Plaintiff's claims.

Plaintiff claims that its scheduling proposal is justified because Plaintiff believes it needs more time to develop the factual record in support of some of its claims. But this argument is a red herring. Plaintiff challenges administrative agency action; thus, "[t]he task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency's decision based on the record the agency presents to the reviewing court." *E.g.*, *Fla. Power & Light Co.*, 470 U.S. 729, 743-44 (1985). It makes no difference that Plaintiff presents constitutional claims because the APA provides that such claims challenging agency action as "contrary to constitutional right, power, privilege, or immunity" shall be evaluated on a "review [of] the whole record." 5 U.S.C. § 706; *see, e.g.*, *Chang v. United States Citizenship & Immigration Servs.*, 254 F. Supp. 3d 160 (D.D.C. 2017); *Harkness v. Sec'y of Navy*, 858 F.3d 437, 451 n.9 (6th Cir. 2017) (explaining that a constitutional claim "is properly reviewed on the administrative record"). Defendants provided Plaintiff with a copy of the administrative record months ago, and will file that record with the Court expeditiously, and Plaintiff has provided no valid basis for its contention that extra-record materials are needed to resolve any of its claims.[1]

In any event, Defendants recognize that Plaintiff may disagree and that it has identified certain threshold issues, including (1) whether Plaintiff should be permitted to obtain discovery or otherwise supplement the administrative record, and (2) whether Plaintiff should be permitted to

[1] Based on their discussions with Plaintiff, Defendants understand that Plaintiff may wish to introduce some extra-record material that does not require discovery (e.g., affidavits). To be clear, Defendants believe such materials are not appropriately considered and will object if Plaintiff seeks to introduce them. For purposes of this scheduling proposal, however, Defendants note that there is no logistical barrier to Plaintiff including such materials with its motion for summary judgment.

amend its Complaint to reassert the claims that this Court dismissed. If Plaintiff wishes to raise these issues and the Court wishes to entertain them, Defendants respectfully submit that these threshold issues are appropriately dealt with first, before the parties brief summary judgment, rather than proceeding piecemeal in a manner that requires multiple rounds of summary judgment briefing and jeopardizes the losing party's ability to obtain immediate appellate review.[2]

Defendants are willing to move forward to resolve these threshold issues expeditiously. If Plaintiff insists on either seeking discovery (or otherwise attempting to supplement the administrative record) or amending its Complaint, Defendants request that the Court defer summary judgment briefing until these issues are resolved and order the parties to meet and confer and propose a schedule for briefing the threshold issues. Defendants believe that this approach, unlike Plaintiff's proposal, will allow the Court both to (1) resolve Plaintiff's claims expeditiously, and (2) resolve those claims comprehensively in a manner that mitigates the specter of the Court entering a judgment that may not be immediately appealable.

Defendants further note that the timing of Plaintiff's proposal is contrary to the Local Rules, as well as procedurally and substantively unreasonable. As noted above, the Local Rules call for motions for summary judgment to be resolved via cross-motions on a four-brief schedule. This schedule reflects the reality that *simultaneous* briefing is cumbersome and prevents the parties from meaningfully engaging with the opposition's arguments. Nor is there any good reason for Plaintiff's request that the Court cut the ordinary two-week period for briefing in half, or for Plaintiff's extraordinary suggestion that the Court decide the merits of its statutory claims without the benefit of reply briefs.

[2] In noting this concern, which militates against Plaintiff's complex proposal, Defendants of course do not concede that any particular hypothetical order would not be immediately appealable.

As to procedure, Defendants respectfully note their disappointment with the course of events surrounding this filing. As noted, the parties engaged in negotiations to determine whether they could agree upon a joint schedule. Defendants note that Plaintiff seemed to agree yesterday afternoon via email both with Defendants' proposed four-brief format and with the dates Defendants proposed above (with the main disagreement between the parties being whether summary judgment would proceed piecemeal or all at once). Defendants were thus reasonably under the impression that this format and schedule had been agreed to until 4:35 pm this afternoon—when Plaintiff circulated their portion of this document, proposing simultaneous briefing, one-week intervals, and no replies. Finally, as to substance, due to the press of other matters and the lack of notice, Defendants need additional time beyond next Friday to coordinate and file a motion for summary judgment.

Thus, Defendants request that the Court enter their proposed schedule for resolving all claims. However, if the Court is inclined to permit Plaintiff to file a motion for partial summary judgment on only some of their claims, Defendants request that the schedule for doing so be consistent with the local rules (with the exception that Defendants have agreed to one week for their reply brief). Consistent with Rule 56, Defendants reserve the right to cross move for summary judgment on all of Plaintiff's claims

Dated: September 20, 2019

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Respectfully submitted,

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