

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN HOSPITAL ASSOCIATION, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	Civil Action No. 14-cv-00851 (JEB)
v.)	
)	
Alex M. Azar, in his official capacity as)	
Acting Secretary of Health and Human Services,)	
)	
Defendant.)	

**REPLY IN SUPPORT OF OPPOSED MOTION FOR EXTENSION OF TIME TO FILE
RESPONSE TO PLAINTIFFS' PROPOSED MANDAMUS REMEDIES**

Defendant Alex M. Azar, in his official capacity as Secretary of Health and Human Services (“HHS”), respectfully submits this Reply in support of Defendant’s opposed motion to extend his time to respond to Plaintiffs’ proposed non-deadline remedies for the Medicare appeals backlog. *See* ECF. No. 83. In further support of that motion, Defendant states as follows:

1. This case was stayed from March 22nd until June 22nd so that this Court might better assess whether the Secretary’s efforts to reduce the backlog are having the desired impact. *See* Minute Order, dated March 22, 2018. Finalized data concerning the disposition of Medicare appeals from the third quarter of this fiscal year are clearly relevant and would aid this Court’s decision making. Plaintiffs do not argue otherwise. Rather, they argue that “[t]his case cannot continue to linger as HHS waits for the latest statistics.” ECF No. 84 at ¶ 4. The Secretary is not interested in delay, but rather providing the most up-to-date information. Even though the fiscal quarter ended on June 30, 2018, the data for that quarter are not fully entered into HHS’s system

and available for analysis until several weeks after the close of the quarter. And after the data are fully compiled, HHS performs multiple checks on the accuracy of the data and the projections generated by the data. That is why the requested extension is necessary if the Secretary is to be able to provide the Court with the updated third quarter data and the projections based on the data concerning the impact of the agency's efforts on the backlog. As noted, the data will include updated information about the number of appeals entering the system in the third quarter, including the number of Recovery Audit Contractor (RAC)-related appeals filed with the Office of Medicare Hearings and Appeals (OMHA) during this time period. This information is obviously germane to the issues raised by Plaintiffs' proposed mandamus remedies.

2. The extension of time sought by the Secretary is not inconsistent with Court's stay order, which contemplated that the Court would have the benefit of a record of new information, as compiled from the period of March through June, reflecting the government's efforts to reduce the Medicare backlog (which now includes help from Congress)¹ before considering the issuance of any mandamus remedies. Notably, the three-month period during which this case was stayed by the Court largely coincides with the three months that comprise the third quarter of the fiscal year (April 1st through June 30th).

3. In their most recent brief, Plaintiffs present a new proposal that the Court should require the Department to enter into settlements to allow providers to "rebill" denied claims for up to six months after the Court's order. *See* ECF No. 82 at 10. This new proposal is scant in

¹ Congress has made new appropriations to HHS, *see* Consolidated Appropriations Act, 208, Pub. L. No. 115-141, tit. II, 132 Stat. 348, 739 (2018), which will enable the Secretary to hire new administrative law judges and thereby increase HHS's capacity to adjudicate Medicare appeals.

detail and requires multiple components to thoroughly examine the proposal from legal, policy, and operational standpoints in order to prepare an adequate response. Throughout this litigation, the Secretary has given Plaintiffs' proposals careful consideration in tandem with the Department's own proposals and ongoing efforts to reduce the Medicare appeals backlog. Accordingly, the Secretary should be afforded some additional time to now carefully consider Plaintiffs' "rebilling" proposal. In addition, Plaintiffs' brief includes new arguments about existing proposals, which require declarations from multiple witnesses.

4. While both parties are eager for a resolution of this case, Plaintiffs will not be prejudiced by an extension until August 15. Contrary to their claim, Plaintiffs are not harmed by the inclusion of third quarter data into the record here. ECF No. 84 at ¶ 3. Their non-deadline remedies brief does not even address the agency's first and second quarter FY 2018 data. Thus, there is no conceivable prejudice to providing third quarter data to the Court, as it would have no apparent impact on Plaintiffs' arguments. In addition, it is worth noting that Plaintiffs received three months to prepare their response, as opposed to the two weeks over the July 4th holiday allotted to the Government.

5. On the other hand, not allowing HHS the time needed to furnish the Court with updated information based on third quarter data or for careful consideration of Plaintiffs' new proposal and factual arguments would prejudice HHS. "The remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016) (quoting *Power v. Barnhart*, 292 F.3d 781, 784 (D.C.Cir.2002)). In light of this bedrock legal principle, the Court should have the benefit of a fulsome record in this case before rendering any mandamus decision that could potentially have far-ranging policy and recourse consequences for the administration of the Medicare program. To allow for this all to

occur, the Secretary respectfully requests that the Court grant Defendant's motion for an extension of time.²

Dated July 12, 2018

Respectfully submitted,

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² As the Government explained in its motion, an extension is also warranted in light of the departure of a DOJ attorney with significant experience in this complex area who was the reviewer on this case, which requires time to get a replacement up to speed with this litigation.