

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’ RESPONSE TO DEFENDANTS’ MOTION FOR RECONSIDERATION,
ENTRY OF FINAL JUDGMENT, AND EXPEDITED BRIEFING**

On December 27, 2018, this Court held unlawful the Department of Health and Human Services’ (HHS’s) reduced payment rate of ASP minus 22.5% for 340B drugs in the Outpatient Prospective Payment System (OPPS) rule for calendar year 2018. Since that time, both the Court and the 340B hospitals have been waiting for HHS to reveal its plan for remedying this violation of the law. In the meantime, the agency has continued to pay 340B drugs claims at the illegal rate, which is costing 340B hospitals collectively more than \$25 million per week. In response to the Court’s December 2018 order in which the Court directed the parties to brief the issue of remedy (ECF No. 24), Defendants refused to identify the appropriate remedy and instead urged the Court to remand the matter to the agency with no instructions regarding remedy. ECF No. 31 at 1, 2, 12; ECF No. 36 at 1, 13. Defendants never suggested, much less argued, that this Court did not have the authority to require Defendants to identify their preferred remedy.

On May 6, 2019, the Court ruled that the reduced payments for 340B drugs in calendar year 2019 were also illegal, and it ordered Defendants to “expeditiously” remedy the damage

Plaintiffs and their members had suffered as a result of the illegal reduction in payments for 340B drugs, requiring the agency to submit a status report by August 5, 2019. ECF No. 49. Plaintiffs then filed a motion asking the Court to expedite the fashioning of a remedy and status report, relying in part on need for a decision that could be taken into account for the OPPS Rule for 2020. ECF No. 51. Now, more than five months after the Court first retained jurisdiction so that HHS would expeditiously resolve the issue of remedy, Defendants, both in their opposition to Plaintiffs' motion and in a separate motion, are, *for the first time*, asking the Court to reconsider its decision to retain jurisdiction in the case (ECF Nos. 53 and 54), 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. The Court of Appeals subsequently granted the Government's motion, which Plaintiffs did not oppose, directing the parties to file motions regarding further proceedings "within 30 days of the district court's resolution of proceedings concerning the appropriate remedy" in this case. ECF No. 48.

In their recent motion, Defendants urge the Court to reconsider its May 6, 2019 order and to expeditiously enter a final judgment in this action. ECF No. 54. In fact, just one business day after Defendants, in their opposition to Plaintiffs' request to expedite remedy, had argued that it was inappropriate for Plaintiffs to rely on the upcoming 2020 OPPS rule as a basis for expedition (ECF No. 53 at 5-6), they did just that. ECF No. 54 at 1.

While Plaintiffs support the Government's belated argument regarding expedition, it is, unfortunately, the Government's delay in reaching this point that has put resolution of the 2020 rule in jeopardy, although we believe that there is still time for follow the Court's schedule

regarding the remedy and obtain a ruling from the Court of Appeals in time for the 2020 rule. If Defendants were correct that a court's inquiry ends when the court determines that the agency made an error of law (ECF No. 54 at 2, citing *Palisade's Gen. Hosp. v. Leavitt*, 426 F.3d 400, 403 (D.C. Cir. 2005)), a request for entry of final judgment was appropriate in December 2018 or January 2019. Yet, Defendants did not make that request. Instead Defendants took all of the time they were afforded (including an extension of time) to brief the issue of remedy, after which they provided no remedial plan whatsoever and, then, one business day before filing this request for expedited briefing, objected to Plaintiffs request to expedite the matter.

As Defendants recognize, this Court has discretion in certain circumstances to retain jurisdiction. ECF No. 54 at 2, citing *Cobell v. Norton*, 240 F.3d 1081, 1109 (D.C. Cir. 2001). Defendants argue that "this discretion is typically reserved for cases alleging unreasonable delay of agency action or failure to comply with a statutory deadline or for cases involving a history of agency noncompliance with court orders or resistance to fulfillment of legal duties." ECF No. 54 at 2-3 citing *Baystate Med. Ctr. V. Leavitt*, 587 F. Supp. 2d 37, 41 (D.D.C.), judgment entered, 587 F. Supp. 2d 44 (D.D.C. 2008). This is such a case. Despite repeated opportunities to do so, more than five months after the Court ruled that the almost 30% cuts in the 2018 OPSS rule and more than a month after the Court issued the same ruling with respect to the 2019 rule, HHS has refused to disclose its view on an appropriate remedy. Without ever raising the jurisdictional issue raised in this motion, Defendants took the full time (plus one extension) to respond to the Courts request for briefing on remedy and then when Defendants did file, they offered nothing – no proposed remedy. HHS has a legal duty to reimburse the 340B hospitals for the illegal reductions in payments for 340B drug. The Court ruled against them and they have yet to

identify a remedy. This is the type of resistance and delay that warrants the Court's use of its discretion to retain jurisdiction.

In the meantime, all Defendants have to do to expedite this case is to quickly follow this Court's instructions and submit a proposed remedy, which would allow the Court, after receiving Plaintiffs' response, to issue a prompt decision and a final, appealable judgment. This would allow the Court of Appeals to consider both the merits and the appropriate remedy in a single appeal, which the parties can jointly move to expedite, now that Defendants finally agree with Plaintiffs on the importance of obtaining a ruling in time to be taken into account in the 2020 OPPS rule. Defendants have indicated that any remedy will require a rulemaking, but they have identified no administrative law principle or case that prevents them from proposing the contents of a proposed (as opposed to final) rule or preventing the Court from ruling on the contents of such a proposal.

For the reasons stated herein, Plaintiffs respectfully request that the Court deny Defendants' motion to relinquish jurisdiction and enter final judgment.

Dated: June 7, 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 7, 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