

June 27, 2019

The Honorable Paul A. Engelmayer
United States District Court for the Southern District of New York
Thurgood Marshall U.S. Courthouse
40 Foley Square, Room 2201
New York, NY 10007

RE: Supplemental authority regarding Defendants' motion to continue the deadline to respond to Plaintiffs' motions for preliminary injunction in *State of New York v. U.S. Dep't of Health & Human Servs.*, 19 Civ. 4676 (PAE) (consolidated with 19 Civ. 5433 (PAE) and 19 Civ. 5435 (PAE)).

Dear Judge Engelmayer,

Plaintiffs write to bring to the Court's attention the attached order in *City and County of San Francisco v. Azar*, No. 19-cv-2405-WHA (N.D. Cal. June 27, 2019), which was issued this morning after Plaintiffs filed their opposition to Defendants' motion to continue the preliminary injunction deadlines. *Cf.* Fed. R. App. P. 28(j). In the attached order, Judge Alsup of the U.S. District Court for the Northern District of California denied Defendants' request for virtually identical relief in three consolidated challenges to the same Final Rule at issue in these cases. Ex. 1. The order holds that "a mere indication HHS 'will delay' enforcement of the rule until November 22 is not the same as an official postponement of the Rule" and "[u]ntil there is an official postponement, counsel's and the agency's indications are too uncertain to rely on." *Id.* at 1.

Accordingly, as it stands, Defendants must litigate the preliminary injunction in the Northern District of California cases prior to the July 22, 2019 effective date, or otherwise effectuate an official postponement of the Final Rule. For that reason, and for all the other reasons Plaintiffs have put forward, Plaintiffs respectfully submit that at present Defendants have not established good cause for deviating from the Court-ordered schedule. *See* Dkt. 38. Of course, Plaintiffs remain willing to consent to a stipulated order that would fully preserve the status quo while permitting Defendants additional time to litigate the preliminary injunction motions. *See* Dkt. 80 at 2.

Respectfully submitted,

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* Application for admission forthcoming
***Pro hac vice* motion forthcoming

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Exhibit 1

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

v.

ALEX M. AZAR II, Secretary of U.S. Department of Health and Human Services; ROGER SERVERINO, Director, Office for Civil Rights, Department of Health and Human Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; and DOES 1-25,

Defendants.

No. C 19-02405 WHA
Related to
No. C 19-02769 WHA
No. C 19-02916 WHA

ORDER RE DEFENDANTS’ ADMINISTRATIVE MOTION TO ADJUST SCHEDULE

The Court has received defendants’ request to hold in abeyance plaintiffs’ motion for preliminary injunction and to set a briefing schedule for cross motions for summary judgment (Dkt. No. 50). The motion is principally based on defense counsel’s representation to the Court that “HHS will delay enforcement of the HHS rule challenged in this case, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23, 170 (May 21, 2018) [hereinafter Final Rule], until November 22, 2010” (Br. at 2).

In support, defense counsel swears, “The Department of Health and Human Services (HHS) has indicated to the undersigned that it will delay enforcement of the Final Rule until November 22, 2019” (Takemoto Decl. at ¶ 4).

The problem is that a mere indication HHS “will delay” enforcement of the rule until November 22 is not the same as an official postponement of the rule. Until there is an official postponement, counsel’s and the agency’s “indications” are too uncertain to rely on.

1 Accordingly, we will proceed with the motion for preliminary injunction until there is an official
2 postponement.

3 Defendants are already in default with the existing briefing schedule. As such, this order
4 gives defendants until **JULY 1, 2019 AT NOON** to file their opposition to the pending motion. The
5 reply will be due **JULY 8, 2019 AT NOON**. The hearing will remain on **JULY 17, 2019 AT 8:00**
6 **A.M.**

7 Unfortunately, this extra time for the defendants will come out of the time the Court
8 needs to review the materials. Counsel should have taken this into account before filing this
9 half-baked administrative motion.

10 Defendants are admonished that nothing short of an official postponement of the final
11 revised rule until a later fixed date will be sufficient to reactivate defendants' request for relief
12 from the existing briefing schedule. Defendants should not gamble again on this possibility.
13 Defendants must file their opposition. The administrative motion is **DENIED**.

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15 **IT IS SO ORDERED.**

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17 Dated: June 27, 2019.

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20 WILLIAM ALSUP
21 UNITED STATES DISTRICT JUDGE
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