

1 DENNIS J. HERRERA, State Bar #139669
 City Attorney
 2 JESSE C. SMITH, State Bar #122517
 Chief Assistant City Attorney
 3 RONALD P. FLYNN, State Bar #184186
 Chief Deputy City Attorney
 4 YVONNE R. MERÉ, State Bar #173594
 Chief of Complex and Affirmative Litigation
 5 SARA J. EISENBERG, State Bar #269303
 Chief of Strategic Advocacy
 6 JAIME M. HULING DELAYE, State Bar #270784
 Deputy City Attorney
 7 City Hall, Room 234
 1 Dr. Carlton B. Goodlett Place
 8 San Francisco, California 94102-4602
 Telephone: (415) 554-4633
 9 Facsimile: (415) 554-4715
 E-Mail: sara.eisenberg@sfcityatty.org

10 Attorneys for Plaintiff
 11 CITY AND COUNTY OF SAN FRANCISCO

12
 13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA

15 CITY AND COUNTY OF SAN
 16 FRANCISCO,

17 Plaintiff,

18 vs.

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

22 Defendants.

Case No. 3:19-cv-02405 WHA

**DECLARATION OF SARA J. EISENBERG IN
 SUPPORT OF PLAINTIFF CITY AND
 COUNTY OF SAN FRANCISCO'S
 OPPOSITION TO DEFENDANTS'
 ADMINISTRATIVE MOTION**

Judge: Hon. William Alsup
 Hearing Date: July 17, 2019
 Time: 8:00 a.m.
 Place: Courtroom 12, 19th Floor
 450 Golden Gate Avenue
 San Francisco, CA 94102

Trial Date: None set

1 I, Sara J. Eisenberg, declare and state as follows:

2 1. I am an attorney duly licensed in the State of California. I am a Deputy City Attorney
3 in the San Francisco City Attorney's Office, which is counsel for the City and County of
4 San Francisco. I have personal knowledge of the facts stated herein and, if called as a witness, I would
5 testify competently thereto.

6 2. Attached as **Exhibit A** is a true and correct copy of an email exchange between me and
7 Benjamin Takemoto, counsel for Defendants in this case.

8
9 I declare under penalty of perjury under the laws of the United States that the foregoing is true
10 and correct and that this declaration was executed on June 26, 2019 at San Francisco, California.

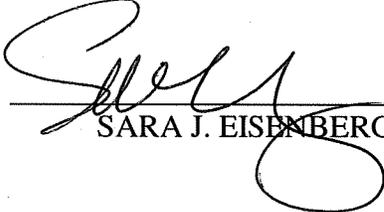
11
12
13 
14 SARA J. EISENBERG
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

Eisenberg, Sara (CAT)

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Tuesday, June 25, 2019 6:39 PM
To: Eisenberg, Sara (CAT)
Cc: Huling Delaye, Jaime (CAT); Flynn, Ronald (CAT); Mere, Yvonne (CAT); Kopplin, Rebecca M. (CIV)
Subject: RE: San Francisco v. Azar / Schedule

Hi Sara,

Thank you for your response last Friday. After further deliberations, HHS no longer intends to delay the effective date of the rule with a notice in the Federal Register. HHS will, however, delay any enforcement of the Rule until November 22, 2019. We intend to file a motion this evening asking the Court to enter the following briefing schedule (which is largely similar to our initial proposal, except the order of summary judgment motions is switched):

- July 22, 2019: HHS lodges the administrative record.
- September 5, 2019: Defendants file their motion for summary judgment.
- September 27, 2019: Plaintiff files its opposition to Defendants' motion for summary judgment (and cross-motion for summary judgment, if any).
- October 11, 2019: Defendants file their reply (and opposition, if any).
- October 25, 2019: Plaintiff files its reply in support of its motion for summary judgment, if any.

In the alternative, if the Court rejects that proposal, we will be asking for an extension of the PI opposition deadline until July 31.

Based on your earlier response, I understand that Plaintiff opposes our request, but I wanted to let you know nonetheless about the modification to our prior representation. We plan to file later this evening and, unless we hear differently from you, we'll indicate that Plaintiffs oppose our motion. Apologies for the tight timing on this.

In addition, we will seek a page limit extension to 55 pages. If you agree to that, I can send a proposed stipulation.

Thanks,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

The information in this e-mail, including any attachments, is intended only for any recipients listed above. It may contain information that is privileged or confidential. Any review, use, distribution, or copying of this e-mail is prohibited except by or on behalf of the intended recipient. If you have received this e-mail in error, please notify me immediately and destroy all copies of it. I appreciate your cooperation.

From: Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>
Sent: Friday, June 21, 2019 3:15 PM
To: Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>
Cc: Huling Delaye, Jaime (CAT) <Jaime.HulingDelaye@sfcityatty.org>; Flynn, Ronald (CAT) <Ronald.Flynn@sfcityatty.org>; Mere, Yvonne (CAT) <Yvonne.Mere@sfcityatty.org>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: Re: San Francisco v. Azar / Schedule

Hi Ben,

Thank you for your email and for your revised proposal.

While we welcome a delay in the Rule's effective date, we do not believe that a delay [until November 22, 2019](#) or the briefing schedule that you propose is sufficient for the parties to adequately litigate and for the court to properly decide the important legal issues in this case. This is particularly so in light of the massive administrative record that HHS will have to compile and the Plaintiffs will have to review before any merits briefing can be started. We therefore cannot agree to your revised proposal.

We are willing, however, to offer the following counter-proposal:

[July 22, 2019](#) – Defendants produce the administrative record

[Oct. 1, 2019](#) – Plaintiffs move for summary judgment

[Nov. 1, 2019](#) – Defendants oppose and cross-move

[Dec. 2, 2019](#) – Plaintiffs file their reply and opposition

[Dec. 20, 2019](#) – Defendants file their reply

Month of Jan. 2020 or at the Court's convenience – argument on cross-motions

[Feb. 15, 2020](#) – Rule's delayed effective date

We reserve the right to seek modification of the briefing schedule upon review of the administrative record should the size of the record or any sufficiency issues warrant such modification. Additionally, our position is that the motions for preliminary injunction should be held in abeyance instead of being withdrawn.

If the above is not agreeable to Defendants, we will contest Defendants' motion to set the summary judgment briefing schedule that you have proposed.

You stated that if the Court does not adopt Defendants' proposed summary judgment schedule, you will seek, in the alternative, an extension of time to respond to Plaintiffs' preliminary injunction motions [until July 31, 2019](#). Until Rule's

effective date is pushed back, we are not in a position to agree to such an extension. However, once the Rule's effective date is delayed [through Nov. 22, 2019](#), we anticipate that we will be able to agree to an extended schedule for briefing the preliminary injunction motions.

Best,

Sara

On Jun 20, 2019, at 6:36 PM, Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov> wrote:

Hi Sara,

Apologies for any confusion, but HHS is in fact prepared to delay the effective date of the rule until November 22, 2019, not October 31, 2019 as I said earlier. In light of that new effective date, Defendants propose the following schedule:

- HHS will provide the administrative record by July 22, 2019.
- Plaintiffs' motions for summary judgment by September 5, 2019.
- Defendants' oppositions and cross motions by September 27, 2019.
- Plaintiffs' replies and oppositions by October 11, 2019.
- Defendants' replies by October 25, 2019.

Best,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

The information in this e-mail, including any attachments, is intended only for any recipients listed above. It may contain information that is privileged or confidential. Any review, use, distribution, or copying of this e-mail is prohibited except by or on behalf of the intended recipient. If you have received this e-mail in error, please notify me immediately and destroy all copies of it. I appreciate your cooperation.

From: Takemoto, Benjamin (CIV)
Sent: Thursday, June 20, 2019 4:37 PM
To: 'Eisenberg, Sara (CAT)' <Sara.Eisenberg@sfcityatty.org>
Cc: Huling Delaye, Jaime (CAT) <Jaime.HulingDelaye@sfcityatty.org>; Flynn, Ronald (CAT) <Ronald.Flynn@sfcityatty.org>; Mere, Yvonne (CAT) <Yvonne.Mere@sfcityatty.org>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: San Francisco v. Azar / Schedule

Hi Sara,

Thanks for your e-mail, and for providing your concerns and counter-proposal. We appreciate the time you've put into trying to work with us. The government, however, is not willing to delay the effective date of the Rule beyond October 31. I suspect that means we're at an impasse, but we'd ask that you give us your definitive position on our initial proposal by noon tomorrow.

Regardless of Plaintiff's position, HHS intends to file a notice in the Federal Register delaying the effective date of the Rule until October 31, 2019.

If Plaintiff does not consent to Defendants' proposal, Defendants intend to file a contested motion requesting that the Court deny Plaintiff's motion for a preliminary injunction without prejudice in light of the delayed effective date and set briefing for cross motions for summary judgment according to the schedule we proposed in our email from Monday, with the view that this will permit the Court to rule on those motions by October 31, 2019.

If the Court does not adopt the requested MSJ schedule, Defendants will seek, in the alternative, an extension of time to respond to the preliminary injunction motion until July 31, 2019, at which point Defendants may also move for summary judgment. If Plaintiff does not consent to the proposed summary judgment briefing schedule, would you please let me know Plaintiff's position regarding this alternative request for an extension of the preliminary injunction opposition deadline by noon this Friday as well? We would hope that, in light of Defendants' extension of the effective date of the Rule, Plaintiffs would have no objection to our request for an extension of that deadline.

Thank you,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

The information in this e-mail, including any attachments, is intended only for any recipients listed above. It may contain information that is privileged or confidential. Any review, use, distribution, or copying of this e-mail is prohibited except by or on behalf of the intended recipient. If you have received this e-mail in error, please notify me immediately and destroy all copies of it. I appreciate your cooperation.

From: Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>
Sent: Thursday, June 20, 2019 3:59 PM
To: Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>
Cc: Huling Delaye, Jaime (CAT) <Jaime.HulingDelaye@sfcityatty.org>; Flynn, Ronald (CAT) <Ronald.Flynn@sfcityatty.org>; Mere, Yvonne (CAT) <Yvonne.Mere@sfcityatty.org>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: San Francisco v. Azar / Schedule

Hi Ben,

Thank you for your responses and apologies for the delay in getting back to you. San Francisco appreciates HHS's willingness to delay the effective date of the rule to allow the parties to litigate the

important legal issues in this case. We have some concerns about specifics and your timeline, but we wish to provide a counter-offer that is consistent with the desire to efficiently litigate the matter.

First, thank you for clarifying that HHS will post the delay of the effective date in the Federal Register to notify everyone that the rule will not be in effect, and that you will file an interim stipulation with the court. However, we are concerned that HHS's action to delay the effective start day may be subject to legal challenge. Therefore, and as part of any stipulation, please provide the legal authority under which HHS will delay the effective date as proposed. Assuming such authority is provided, we propose that the motions for preliminary injunction be maintained in abeyance rather than withdrawn.

Second, San Francisco cannot agree to file its motion for summary judgment only a month after receiving the administrative record, particularly where HHS cannot explain what the record will look like. As you are aware, there are over 200,000 comments and likely to be additional documents in the record. It will be hard enough to review the 200,000 comments to assess whether the record is sufficient, but when we do not know what else might or might not be in the record, we cannot agree to a timeline that precludes our ability to make that assessment.

Accordingly, and to ensure that the court has adequate time to analyze and address the numerous complicated issues in this case, we propose that the effective date be delayed until March 31, 2020, and that we set a schedule where the judge can hear and hopefully decide the summary judgment motions in this case in advance of that date. To achieve that, we propose the following:

HHS provides its answer or other responsive pleading to the complaint
July 15, 2019 – HHS produces the administrative record
August 29, 2019 – HHS provides its answer or other responsive pleading to the complaint
On or about September 16, 2019 – the parties and judge conduct a status conference to address whether the Court will need to address any motions regarding the sufficiency of the record.
November 1, 2019 – Plaintiff's motion for summary judgment
December 13, 2019 – HHS opposition and cross-motion
January 10, 2020 – Plaintiff's Opposition and reply
January 24, 2020 – HHS reply
January 31, 2020 – Plaintiff surreply (As this is our complaint and our motion, we would like the opportunity for a surreply)
First week of February - Argument

This proposed schedule is likely faster than if San Francisco were to obtain a preliminary judgment, and it allows San Francisco the opportunity sufficient time to analyze the likely voluminous administrative record. It also avoids any potential hang-ups that inevitably occur around the holiday season.

Please let us know if this works for you or if you have any questions.

Thank you,
Sara

<image003.jpg>**Sara J. Eisenberg**
Chief of Strategic Advocacy
Office of City Attorney Dennis Herrera
(415) 554-4633 Direct
www.sfcityattorney.org
Find us on: [Facebook](#) [Twitter](#) [Instagram](#)

Please note my new phone number.

This message is subject to attorney-client privilege and/or attorney work product privilege and must not be disclosed.

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Tuesday, June 18, 2019 2:25 PM
To: Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>
Cc: CityAttorney <cityattorney@SFCITYATTY.ORG>; Huling Delaye, Jaime (CAT) <Jaime.HulingDelaye@sfcityatty.org>; Flynn, Ronald (CAT) <Ronald.Flynn@sfcityatty.org>; Mere, Yvonne (CAT) <Yvonne.Mere@sfcityatty.org>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: RE: San Francisco v. Azar / Schedule

Hi Sara,

Just to follow up on this, HHS would file a notice in the Federal Register to announce that the rule's effective date will be delayed until October 31. Given that it often takes some time to get materials published in the Federal Register, we can't guarantee that the notice would be published before our opposition to the various PI motions would be due. However, in the meantime, the government would be willing to file a stipulation with the Court indicating that the effective date will be delayed and that a public notice will be forthcoming before July 22.

Please let us know if you'd like to discuss.

Thanks,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

The information in this e-mail, including any attachments, is intended only for any recipients listed above. It may contain information that is privileged or confidential. Any review, use, distribution, or copying of this e-mail is prohibited except by or on behalf of the intended recipient. If you have received this e-mail in error, please notify me immediately and destroy all copies of it. I appreciate your cooperation.

From: Takemoto, Benjamin (CIV)
Sent: Tuesday, June 18, 2019 3:16 PM
To: Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>
Cc: CityAttorney <cityattorney@SFCITYATTY.ORG>; Huling Delaye, Jaime (CAT) <Jaime.HulingDelaye@sfcityatty.org>; Flynn, Ronald (CAT) <Ronald.Flynn@sfcityatty.org>; Mere, Yvonne (CAT) <Yvonne.Mere@sfcityatty.org>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: San Francisco v. Azar / Schedule

Hi Sara,

Yes of course—I will take your question to HHS and will get back to you soon.

Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

The information in this e-mail, including any attachments, is intended only for any recipients listed above. It may contain information that is privileged or confidential. Any review, use, distribution, or copying of this e-mail is prohibited except by or on behalf of the intended recipient. If you have received this e-mail in error, please notify me immediately and destroy all copies of it. I appreciate your cooperation.

From: Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>
Sent: Tuesday, June 18, 2019 1:27 PM
To: Takemoto, Benjamin (CIV) <btakemot@CIV.USDOJ.GOV>
Cc: CityAttorney <cityattorney@SFCITYATTY.ORG>; Huling Delaye, Jaime (CAT) <Jaime.HulingDelaye@sfcityatty.org>; Flynn, Ronald (CAT) <Ronald.Flynn@sfcityatty.org>; Mere, Yvonne (CAT) <Yvonne.Mere@sfcityatty.org>; Kopplin, Rebecca M. (CIV) <rkopplin@CIV.USDOJ.GOV>
Subject: RE: San Francisco v. Azar / Schedule

Thanks for your quick response. Can you also let me know how you intend to effectuate the delay of the effective date?

<image004.jpg>**Sara J. Eisenberg**
Chief of Strategic Advocacy
Office of City Attorney Dennis Herrera
(415) 554-4633 Direct
www.sfcityattorney.org
Find us on: [Facebook](#) [Twitter](#) [Instagram](#)

Please note my new phone number.

This message is subject to attorney-client privilege and/or attorney work product privilege and must not be disclosed.

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Monday, June 17, 2019 3:33 PM
To: Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>
Cc: CityAttorney <cityattorney@SFCITYATTY.ORG>; Huling Delaye, Jaime (CAT) <Jaime.HulingDelaye@sfcityatty.org>; Flynn, Ronald (CAT) <Ronald.Flynn@sfcityatty.org>; Mere, Yvonne (CAT) <Yvonne.Mere@sfcityatty.org>; Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: Re: San Francisco v. Azar / Schedule

Hi Sara,

Yes, we're proposing a delay nationwide.

Ben

Sent from my iPhone

On Jun 17, 2019, at 5:22 PM, Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org> wrote:

Ben,

Thank you for your email. Just so I fully understand the proposal, are you proposing to delay the effective date of the Rule until October 31 nationwide or for a more limited area?

Thank you,
Sara

<image006.jpg>**Sara J. Eisenberg**
Chief of Strategic Advocacy
Office of City Attorney Dennis Herrera
(415) 554-4633 Direct
www.sfcityattorney.org
Find us on: [Facebook](#) [Twitter](#) [Instagram](#)

Please note my new phone number.

This message is subject to attorney-client privilege and/or attorney work product privilege and must not be disclosed.

From: Takemoto, Benjamin (CIV) <Benjamin.Takemoto@usdoj.gov>
Sent: Monday, June 17, 2019 1:48 PM
To: CityAttorney <cityattorney@SFCITYATTY.ORG>; Huling Delaye, Jaime (CAT) <Jaime.HulingDelaye@sfcityatty.org>; Flynn, Ronald (CAT) <Ronald.Flynn@sfcityatty.org>; Eisenberg, Sara (CAT) <Sara.Eisenberg@sfcityatty.org>; Mere, Yvonne (CAT) <Yvonne.Mere@sfcityatty.org>
Cc: Kopplin, Rebecca M. (CIV) <Rebecca.M.Kopplin@usdoj.gov>
Subject: San Francisco v. Azar / Schedule

Counsel,

I hope this e-mail finds you well. I write because we believe it would be more efficient to resolve the issues raised in the *San Francisco v. Azar* and in other similar cases through cross-motions for summary judgment on the basis of the administrative record rather than through briefing on the plaintiffs' request for preliminary relief.

Therefore, we're proposing to all of the plaintiffs that:

- HHS will delay the effective date of the Protecting Statutory Conscience Rights in Health Care; Delegations of Authority Rule until October 31, 2019.
- Plaintiffs withdraw their motions for preliminary injunction.
- HHS will provide the administrative record by July 15, 2019.
- Summary judgment briefing on a schedule that will permit hearings and rulings by October 31, 2019:
 - Plaintiffs' motions for summary judgment by August 15, 2019.

- o Defendants' oppositions and cross motions by September 6, 2019.
- o Plaintiffs' replies and oppositions by September 20, 2019.
- o Defendants' replies by October 4, 2019.

Would you please let us know your position on this proposal? If all of the plaintiffs agree we hope that it would be straightforward to get this schedule entered by the courts.

Thanks,
Ben

--

Benjamin T. Takemoto
Trial Attorney
U.S. Department of Justice, Civil Division, Federal Programs Branch
P.O. Box 883, Ben Franklin Station, Washington, DC 20044
Tel: (202) 532-4252 / Fax: (202) 616-8460

The information in this e-mail, including any attachments, is intended only for any recipients listed above. It may contain information that is privileged or confidential. Any review, use, distribution, or copying of this e-mail is prohibited except by or on behalf of the intended recipient. If you have received this e-mail in error, please notify me immediately and destroy all copies of it. I appreciate your cooperation.