

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE AMERICAN HOSPITAL ASSOCIATION, <i>et al.</i> ,)	
)	
)	
Plaintiffs,)	
v.)	No. 1:18-cv-02084-RC
)	
ALEX M. AZAR II, in his official capacity)	
as Secretary of Health and)	
Human Services, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

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

Defendants hereby request that the Court (i) reconsider its May 6, 2019 Order, ECF No. 49, to the extent the Court retained jurisdiction following remand, (ii) enter final judgment pursuant to Rule 58(a) of the Federal Rules of Civil Procedure, and (iii) order expedited briefing on this motion. Granting this motion will permit Defendants to quickly seek expedited review in the court of appeals – the Solicitor General has already authorized an expedited appeal – and, thereby, attempt to obtain a ruling from the D.C. Circuit in time for the U.S. Department of Health and Human Services (“HHS”) to account for it in the final 2020 OPPS Rule. Defendants state the following in further support of this motion.

- 1) The Court ruled that HHS exceeded its statutory authority in reducing the Medicare payment amount for drugs purchased through the 340B Program in the 2018 and 2019 Outpatient Prospective Payment System rules. ECF Nos. 25, 49, 50. Following briefing on the appropriate remedy, the Court remanded the matter to the HHS without vacatur. ECF No. 49. Notwithstanding its remand to HHS, the Court “retain[ed] jurisdiction over this matter,” apparently to oversee HHS’s actions on

- remand. ECF No. 50, at 16. That retention of jurisdiction calls into question the finality of the Court's remand order for purposes of appeal.
- 2) Under Federal Rule of Civil Procedure 54(b), the Court has discretion to reconsider an interlocutory order. *Lewis v. District of Columbia*, 736 F. Supp. 2d 98, 102 (D.D.C. 2010). A court will grant a motion for reconsideration of an interlocutory order if a movant shows, among other things, a clear error in the first order. *Zeigler v. Potter*, 555 F. Supp. 2d 126, 129 (D.D.C. 2008), *aff'd*, No. 09-5349, 2010 WL 1632965 (D.C. Cir. Apr. 1, 2010) (quotation marks omitted).
 - 3) Reconsideration of the May 6 Order is appropriate here because the Court erred by retaining jurisdiction over this matter. Under D.C. Circuit precedent, "when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the correct legal standards." *Palisades Gen. Hosp. Inc. v. Leavitt*, 426 F.3d 400, 403 (D.C. Cir. 2005). Lest there be any doubt about whether a district court should, as a matter of course, retain jurisdiction in this circumstance to superintend the Agency's remand proceedings, the D.C. Circuit has put the matter even more bluntly: "Not only was it unnecessary for the court to retain jurisdiction to devise a specific remedy for the Secretary to follow, but it was error to do so." *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1011 (D.C. Cir. 1999).
 - 4) Defendants recognize that the Court has the discretion, in certain circumstances, to retain jurisdiction to require Defendants to file status reports. *See Cobell v. Norton*, 240 F.3d 1081, 1109 (D.C. Cir. 2001). But "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.” *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). None of those circumstances is present here. Moreover, as noted in Defendants’ opposition to Plaintiff’s request for a firm deadline for the submission of a proposed remedy, ECF No. 53, even with the retention of jurisdiction, the Court cannot review and reject proposed remedies in proposed rules because the Administrative Procedure Act furnishes the Court with jurisdiction over only final agency actions. 5 U.S.C. § 704; *Baystate Med. Ctr.*, 587 F. Supp. 2d at 42. Accordingly, the Court erred in retaining jurisdiction over this case.

- 5) The retention of jurisdiction has a significant negative practical effect of delaying the ultimate resolution of this dispute. The Court’s retention of jurisdiction calls into question the finality of the remand order, which HHS otherwise could appeal immediately. *See, e.g., North Carolina Fisheries Ass’n v. Gutierrez*, 550 F.3d 16, 20 (D.C. Cir. 2008) (explaining that although a district court’s remand order is normally not “final” for purposes of appeal under 28 U.S.C. § 1291, “there is a limited exception permitting a government agency to appeal immediately rather than bear significant expenses that cannot be recovered or take action pursuant to the remand that cannot be reversed if it is later determined that the order was improper”) (citing *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 330 (D.C. Cir. 1989)). And the delay in Defendants’ ability to appeal means that the 2020 OPPS rule will likely also become a subject of litigation. By contrast, if Defendants pursue an expedited appeal now as authorized by the Solicitor General, the D.C. Circuit may be in a position to

rule in time for HHS to account for its decision in the final 2020 OPPS rule, thereby obviating the continued multiplication of proceedings

- 6) Finally, given that time is of the essence, as explained above, Defendants request that the Court order expedited briefing of this motion. Specifically, Defendants request that the Court order Plaintiffs to file their response brief by June 10, 2019, and Defendants to file any reply brief on or before June 12, 2019.
- 7) Defendants have conferred with Plaintiffs regarding this motion. Plaintiffs oppose Defendants' requests for reconsideration and the entry of final judgment. As for the request for expedited briefing, Plaintiffs have told Defendants that they will inform the Court of their position once they have received and reviewed Defendants' motion.

Accordingly, for the reasons stated above, Defendants that the Court reconsider its May 6, 2019 order, relinquish jurisdiction, enter final judgment, and require expedited briefing of this motion.

Date: June 3, 2019

Respectfully submitted,

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Counsel for Defendants

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[PROPOSED] ORDER

The Court, having considered Defendants’ Motion for Reconsideration, Entry of Final Judgment, and Expedited Briefing hereby **GRANTS** the motion, thereby relinquishing jurisdiction over this matter and entering a final appealable judgment.

IT IS SO **ORDERED**, this _____ day of _____, 2019.

Dated: _____

HON. RUDOLPH CONTRERAS
UNITED STATES DISTRICT JUDGE