UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEUROLOGICAL SURGERY PRACTICE OF LONG ISLAND, PLLC,

Plaintiff,

vs

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF LABOR; XAVIER BECERRA, in his official capacity as Secretary, United States Department of Health and Human Services; JANET YELLEN, in her official capacity as Secretary, United States Department of the Treasury; and JULIE A. SU, in her official capacity as Acting Secretary, United States Department of Labor,

Defendants.

NOTICE OF MOTION FOR RECONSIDERATION

Case No. 23-cv-02977-BMC

(Judge Cogan)

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law In Support of Plaintiff's Motion for Reconsideration, dated April 17, 2024; and all the prior proceedings had herein, the Plaintiff, Neurological Surgery Practice of Long Island, PLLC, by its attorneys, Harris Beach PLLC, will move this Court, before The Hon. Brian M. Cogan, United States District Judge, at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201, at a date and time fixed by the Court, for an Order under Local Civil Rule 6.3 granting reconsideration of this Court's Judgment entered April 3, 2024 (Dkt 45), and for such other relief that the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that opposition papers, if any, shall be filed in accordance with the provisions of Local Civil Rule 6.3, and the Court's orders and individual rules.

Dated: Uniondale, New York
April 17, 2024

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NEUROLOGICAL SURGERY PRACTICE OF LONG ISLAND, PLLC, Plaintiff, vs UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF LABOR; XAVIER BECERRA, in his official capacity as Secretary, United States Department of Health and Human Services; JANET YELLEN, in her official capacity as Secretary, United States Department of the Treasury; and JULIE A. SU, in her official capacity as Acting Secretary, United States Department of Labor, Defendants.	)	Case No. 23-cv-02977-BMC

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REARGUMENT

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PRELIMINARY STATEMENT

By Judgment entered April 3, 2024 (Dkt 45), this Court denied Plaintiff's preliminary injunction motion and granted HHS' dismissal motion based on mootness. Underlying this Judgment is the Court's Memorandum, Decision, dated April 1, 2024 (Dkt 44). Plaintiff now moves for reconsideration of the Judgment under Local Civil Rule 6.3 because the Court:

- Based its mootness dismissal on Defendants' March 28, 2024 Status Report (Dkt 43),without affording Plaintiff an opportunity to respond to the arguments raised in that submission.
- Failed to consider Defendants' continued refusal to correct their erroneous determination of the New York Surprise Bill as a No Surprises Act (NSA) specified state law, as enumerated in the Amended Complaint (Dkt 22).
- Failed to consider the continuing delays by Defendants in complying with the NSA's requirements for certifying enough independent dispute resolution (IDR_ entities.
- Failed to consider the long history of NSA portal suspensions and closures when making its mootness determination.

As explained below, these issues require reconsideration of the Judgment after reopening of the proceedings to permit Plaintiff to present factual evidence regarding the points raised above.

MOTION FOR RECONSIDERATION STANDARD

Plaintiff here moves for reconsideration under Local Civil Rule 6.3. "A motion for reconsideration is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." *Drapkin v. Mafco Consol. Grp., Inc.*, 818 F. Supp. 2d 678, 695 (S.D.N.Y. 2011). "Such motions are properly granted only if there is a showing of: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) a need to correct a clear error or prevent manifest injustice." *Giuffre v. Maxwell*, No. 15-cv-7433, 2020 U.S. Dist. LEXIS 33236, 2020 WL 917057, at *1 (S.D.N.Y. Feb. 26, 2020).

Applying this standard, this Court has granted motions for reconsideration in various contexts. *See, e.g., Am. Transit Ins. Co. v. Bilyk*, 514 F. Supp. 3d 463, 470 (E.D.N.Y. 2021) (granting reconsideration of default judgment motion); *Kornmann v. City of N.Y. Bus. Integrity Comm'n*, No. 17-cv-2328 (BMC), 2020 U.S. Dist. LEXIS 269514, at *4 (E.D.N.Y. Sep. 25, 2020) (granting reconsideration of *in limine* motion); *Funk v. Belneftekhim & Belneftekhim USA, Inc.*, No. 14-cv-376 (BMC), 2020 U.S. Dist. LEXIS 173314, at *34 (E.D.N.Y. Sep. 21, 2020) (granting in part reconsideration of *in limine* motion); *Lawson v. Rubin*, No. 17-cv-6404 (BMC) (SMG), 2019 U.S. Dist. LEXIS 181192, at *14 (E.D.N.Y. Oct. 17, 2019) (granting reconsideration of motion to vacate sealing); *Baez v. City of N.Y.*, No. 17-cv-1767 (BMC)(PK), 2017 U.S. Dist. LEXIS 176117, at *2 (E.D.N.Y. Oct. 23, 2017) (granting reconsideration of order dismissing action); *Ledgerwood v. Ocwen Loan Servicing LLC*, 2016 U.S. Dist. LEXIS 2363, at *16-17 (E.D.N.Y. Jan. 7, 2016) (granting reconsideration of motion to dismiss).

As we explain below, given the circumstances surrounding the Judgment and underlying Order, reconsideration is appropriate here under this standard.

I. Plaintiff Had No Meaningful Opportunity To Respond To Defendants' Status Report

On March 22, 2024, this Court entered an Order requiring Defendants to advise it by March 29, 2024 "if there has been any change in the status of the IDR process since the submission of the pending motions or the parties' subsequent letters. . . ." Defendants submitted their Status Report on March 28, 2024. (Dkt 43.) Four days later, relying on Defendants' Status Report arguments, the Court dismissed this lawsuit based on mootness. (Dkt 44.)

Given this timeframe, Plaintiff was not afforded an opportunity to respond to the issues Defendants raised in their Status Report by providing factual material regarding the status of the

NSA IDR portal specifically and NSA implementation overall. Indeed, there was one business day intervening between the status report's filing and the Court's Order – Friday, March 29, 2024 – which was Good Friday. This, plus the intervening Easter weekend rendered it impossible to review the Status Report and request an opportunity for a response within this abbreviated timeframe.

If Plaintiff had the opportunity to submit a response, Plaintiff would have informed the Court that, notwithstanding Defendants' representations, significant issues remain with the IDR portal and NSA implementation. This alone warrants reconsideration and reopening of proceedings to enable the Plaintiff to present factual evidence regarding:

- Defendants' continued failure to correct their erroneous determination of the New York Surprise Bill Law as an NSA specified state law, as enumerated in the Amended Complaint (Dkt 22).
- Defendants' continuing delays in complying with the NSA's requirements for certifying enough IDR entities.
- The Court's failure to consider the long history of NSA portal suspensions and closures.[1]

II. Defendants Have Failed To Correct Their Erroneous Determination Of The New York Surprise Bill Law As An NSA Specified State Law

Plaintiff alleges in the Amended Complaint that Defendants, in violation of the Administrative Procedure Act and the All Writs Act, wrongfully determined that the New York Surprise Bill Law is a specified state law under the NSA for all "non-emergency services provided by an out-of-network provider at an in-network facility or surgical center," in direct violation of

[1] This motion is an imperfect vehicle, at best, to submit this factual evidence. This is because Local Civil Rule 6.3 prohibits parties, in connection with motions for reconsideration, to submit affidavits or other evidence.

the NSA (42 U.S.C. §§ 300gg-111(a)(3)(H)(i), 300gg-111(a)(3)(I)). (Amended Complaint (Dkt 22) ¶¶ 46-62, 80(b, c).)

The Defendants, at the time of the Amended Complaint's filing, were rendering legally incorrect determinations that contradicted the NSA's plain language. Specifically, Congress made it clear that the NSA's IDR process does not apply when a state has a specified state law establishing an alternative IDR process that meets certain criteria. The Defendants, prior to the Amended Complaint's filing, issued a legally incorrect determination that the New York Surprise Bill Law was a specified state law under the NSA for all "non-emergency services provided by an out-of-network provider at an in-network facility or surgical center." This determination also directly contradicted the New York Surprise Bill Law, which expressly excludes from its scope "a bill received for health care services when a participating provider is available and the insured has elected to obtain services from a non-participating provider." Financial Services Law § 603(h) This wrongful determination was set forth in sub regulatory guidance on the Departments' public NSA website. IDR entities and health plans relied upon this guidance to determine ineligible for NSA IDR disputes which are properly eligible for IDR under the NSA. (*Id.* ¶¶ 46-62.)

Fifteen days after Plaintiff filed its Amended Complaint raising this issue about the Defendants' wrongful determination relating to whether the New York Surprise Bill Law was a specified state law under the NSA for elective services provided by out-of-network physicians, the Defendants informed the Court that "[t] o the extent there is any uncertainty about the overlap between New York's patient consent requirements and the No Surprises Act's patient consent requirements, Defendants are engaging in discussions with New York's Department of Financial Services and will issue updated guidance providing additional clarification, if necessary." (Dkt

25.) Defendants thereafter removed parts of the erroneous sub regulatory guidance from their websites but did so without comment or clarification.

To date, Defendants still have not issued any clarification as to the proper interpretation of whether the Surprise Bill Law is a specified state law for elective services. Thus, the confusion sown by Defendants' initial improper interpretation remains unabated. Upon reconsideration, Plaintiff can furnish the Court with extensive examples of confusion and delays in the IDR process directly caused by Defendants' persistent failure to properly interpret the NSA and provide guidance to stakeholders regarding the proper interpretation.

This failure to issue proper clarification entitles Plaintiff to proceed on its claim seeking a mandate from the Court that the Defendants take all steps necessary to correct its erroneous determination and provide clarified guidance. *See* 5 U.S.C. § 706(2)(A, C); *see also Make the Rd. N.Y. v. Pompeo*, 475 F. Supp. 3d 232, 259-60 (S.D.N.Y. 2020); *New York v. U.S. Dep't of Homeland Sec.*, 408 F. Supp. 3d 334, 342 (S.D.N.Y. 2019).

III. The Court Failed To Consider Defendants' Continuing Delays In Certifying Sufficient IDR Entities

The Amended Complaint also asserts a claim that the Defendants failed to obey the Congressional mandate that they "shall ensure that a sufficient number of [IDR] entities are certified . . . to ensure the timely and efficient provision of [IDR] determinations." 42 U.S.C. § 300gg-111(c)(4)(E). (Amended Complaint ¶¶ 36-45, 80(a).) As alleged in the Amended Complaint, there can be no dispute the Defendants have failed to ensure a significant number of IDR entities were certified to ensure the timely and efficient provision of IDR determinations, given that Defendants have certified only 26% of the IDR entities they needed based on estimated volume, and actual volume is 15.2 times what they anticipated. (Amended Complaint ¶ 39.) While

Defendants' original estimate was that it needed one certified IDR entity for every 440 IDR proceedings, it has only certified enough IDR entities to have one certified IDR entity for every 25,756 proceedings. (*Id.* ¶ 39.) This has led to the long delays in the IDR process, such that more than 90% of all IDR proceedings commenced in 2022 remained undecided as of March 2023 and more than 95% of open IDR claims remain unresolved after five months, despite the NSA's requirement that IDR proceedings be completed within 30 days, (*Id.* ¶¶ 42-45.)

These allegations make out a sufficient claim under APA § 706(1). As this Court has already stated, a court under section 706(1) may compel agency action unlawfully withheld or unreasonably delayed if the plaintiff identifies a discrete agency action that the agency is required to take. (Dkt 21 at 9.) Section 706(1) "empowers a court only to compel an agency 'to perform a ministerial or non-discretionary act,' or 'to take action upon a matter, without directing how it shall act.'" (*Id.* (quoting *Benzman v. Whitman*, 523 F.3d 119, 130 (2d Cir. 2008))).

This is precisely what Plaintiff alleges in the Amended Complaint: The NSA requires Defendants to ensure that a substantial number of IDR entities are certified to ensure the timely and efficient provision of IDR determinations. This is a discrete agency action that Defendants are required to take. The Amended Complaint simply seeks a judgment from the Court directing Defendants to take steps to comply with this statutory mandate without directing what steps they should take to comply. (Amended Complaint ¶¶ 36-45, 80(a).)

In response, Defendants sought dismissal of this claim under Fed. R. Civ. P. 12(b)(6), based on two grounds: (1) this Court already dismissed this claim in its July 17, 2023 Order (Dkt 21) dismissing original Complaint with leave to replead; and (2) Plaintiff has failed to identify a

"discrete agency action that [the Departments are] required to take," which is required to make out a claim under APA § 706(1). *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004).

As Plaintiff extensively explained in its dismissal opposition papers (Dkt 26), the Defendants are wrong on both grounds and Plaintiff's claim therefore is sufficiently plead to withstand Rule 12(b)(6) dismissal. The Court failed to address any of these specific arguments in its April 1, 2024 Order and, accordingly, reconsideration is appropriate to enable the Court to address these arguments. On reconsideration, Plaintiff respectfully requests the opportunity to submit additional factual materials establishing that the Defendants' utter failure to comply with eh IDR entity requirements persists up to the present day, unabated.

IV. The Court's Failure To Consider The Long History Of NSA Portal Suspensions And Closures

Finally, the Court failed to consider the long history of NSA portal suspensions and closures when making its mootness determination. The Supreme Court has stated that the "test for mootness . . . is a stringent one" and the Defendants' "[m]ere voluntary cessation of allegedly illegal conduct does not moot a case" because Defendants would still be "free to return to [their] old ways." *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968).

As the Plaintiff's moving papers laid out in detail – and the Court respectfully failed to consider – the Defendants have a long and documented record of opening and closing the IDR portal multiple times, for a variety of reasons. This alone proves that this claim is not moot, because nothing prevents the Defendants from closing the portal at any time for any reason. Given this record, it is likely that the Defendants will suspend the portal for indefinite period in the future, and, accordingly, the Defendants have failed to show that it would be impossible for a court

to grant any effectual relief to the prevailing party. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012).

CONCLUSION

For the reasons set forth above, this Court should grant Plaintiff's Local Civil Rule 6.3 reconsideration motion and award such other relief that the Court deems proper.

Dated: Uniondale, New York
April 17, 2024

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