IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

AMERICAN ASSOCIATION OF ANCILLARY BENEFITS, *et al.*,

Plaintiff,

v.

XAVIER BECERRA, in his official capacity as Secretary of the United States Department of Health and Human Services, *et al.*,

Defendants.

Case No. 4:24-cv-00783-SDJ

JOINT REPORT

Pursuant to the Court's September 26, 2024 Order, ECF No. 26, Plaintiffs American Association of Ancillary Benefits and Premier Health Solutions, LLC, and Defendants Xavier Becerra, in his official capacity as Secretary of the United States Department of Health and Human Services; Julie Sue, in her official capacity as acting Secretary of the United States Department of Labor; and Janet Yellen in her official capacity as Secretary of the United States Department of the Treasury hereby submit this Joint Report addressing a proposed schedule for the submission and briefing of any dismissal motion(s) Defendants plan to file.

After review of the Amended Complaint, ECF No. 27, Defendants have determined not to move to dismiss.

Additionally, given that Defendants will not move to dismiss, and in the interest of expeditiously resolving Plaintiffs' claims on the merits, the parties have discussed potential schedules for further proceedings and wish to present their proposals to the Court. The parties have

not reached agreement on a proposed schedule and therefore present their respective proposals separately below. The parties are available for a status conference to discuss a schedule, should the Court find a conference helpful; however, defense counsel will be out of the country on pre-planned leave from October 4 through October 16, 2024, and therefore the parties request that any status conference be held after October 16.

The parties agree that, on October 21, 2024, Defendants will produce the administrative record to Plaintiffs' counsel and file on the docket a certified list of the contents of the record.

I. Defendants' Proposal

Defendants propose the following schedule for briefing the merits on cross-motions for summary judgment:

1. Plaintiffs file their motion for summary judgment on November 11, 2024.[1]
2. Defendants file their combined response in opposition and cross-motion for summary judgment on December 11, 2024 (i.e., 30 days after Plaintiffs file their motion).
3. Plaintiffs file their combined response and reply on January 10, 2025 (i.e., 30 days after Defendants file their combined response and cross-motion).
4. Defendants file their reply on February 4, 2025 (i.e. 25 days after Plaintiffs file their combined response and reply).
5. Defendants file the appendix, including all administrative record materials cited by the parties in their summary judgment briefing, on February 13, 2025.

[1] In the parties' discussions, Plaintiffs proposed that the parties file cross-motions for summary judgment on November 4th or 11th. Defendants take no position on which date is more appropriate for Plaintiffs to file their opening motion but request that Defendants' combined response and cross-motion be due no less than 30 days following the filing of Plaintiffs' opening motion, taking into account the Thanksgiving holiday. Defendants note that filing the opening motion on November 11 would make it so that subsequent filing deadlines would not fall so close to holidays.

The above proposed schedule provides for efficient resolution of the case while allowing sufficient time for the parties to adequately brief all merits issues notwithstanding intervening holidays when many agency personnel are out of office. Plaintiffs assert that a more compressed schedule—providing the parties even less time for responses than that provided by the Local Rules—is necessary to allow for a ruling on the merits before the end of the year, but they have not explained why a merits ruling is necessary by that time. Instead, Plaintiffs simply rehash the arguments in their preliminary injunction motion that they are irreparably harmed. But as Defendants explained in their brief opposing preliminary injunctive relief, ECF No. 19, at 14-17, and at oral argument on Plaintiffs' motion, Plaintiffs make no factual showing of irreparable harm, and the record contradicts many of their assertions. In any event, Plaintiffs have already moved for preliminary injunctive relief; they should not be permitted to seek both emergency injunctive relief and extremely expedited summary judgment briefing, particularly without any showing of irreparable harm, and given Plaintiffs' months-long delay in filing this action.

Defendants' proposed schedule—which proposes sequential, instead of simultaneous, briefing—also ensures efficient use of the parties' and the Court's resources. It better prevents unnecessarily duplicative or voluminous briefing by requiring the parties to present all arguments in a total of four briefs instead of spreading them out unnecessarily over six; and it allows the parties to better respond to each other's arguments (instead of talking past each other), thereby sharpening the issues before the Court. Filing a total of six briefs—simultaneously—as Plaintiffs propose, would only frustrate the ability of the parties to clearly respond to each other's arguments and undermine judicial and party economy.

Finally, under Federal Rule of Civil Procedure 15(a)(3), Defendants' answer to the Amended Complaint would be due by October 29, 2024, which is 60 days from the date the

original complaint was served. Defendants respectfully request that the answer deadline be stayed pending resolution of the parties' cross-motions for summary judgment. Defendants submit that an answer will not provide Plaintiffs or the Court with information necessary to resolve this Administrative Procedure Act (APA) case on the merits. "When a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. . . . '[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Delta Talent, LLC v. Wolf*, 448 F. Supp. 3d 644, 650 (W.D. Tex. 2020) (citation omitted). Thus, the Court's review will be based solely on the administrative record, rather than the allegations of the parties in the pleadings. Staying the answer deadline will thus preserve judicial and party resources and aid expeditious resolution of the merits of the case without prejudicing Plaintiffs. Plaintiffs consent to a stay of the answer deadline only if the Court adopts Plaintiffs' more compressed briefing schedule.

Defendants have attached a proposed order with their proposed schedule.

II. Plaintiffs' Proposal

Plaintiffs propose the following schedule for briefing the merits on cross-motions for summary judgment:

1. Cross-motions for Summary Judgment would be filed by November 4, 2024;
2. Responses to the Cross-motions for Summary Judgment would be filed on November 18, 2024; and
3. Replies in support of the Cross-motions for Summary Judgment would be filed on November 25, 2024.

Plaintiffs believe that Defendants' proposal unnecessarily delays the ruling on the merits of this dispute. Indeed, Defendants are not moving to dismiss on the grounds of venue or standing following the filing of the First Amended Complaint, but still want to delay any ruling on the merits until February or March 2025. Defendants maintain that this is an efficient process for dealing

with this matter. Defendants also maintain that Plaintiffs waited months to file this action, so there should be no urgency in coming to a ruling on the merits. This contention ignores the fact that Defendants wait 3.5 years from the Executive Order related to Short Term Limited Duration Insurance Plans to promulgate the new rule. Unless Defendants are agreeing to the preliminary injunction, there is immediate harm to Plaintiffs, consumers and the states who are responsible for regulating these plans. It is undisputed that there will be gaps in coverage and that the STLDI plans cannot be an effective stop-gap for health insurance benefits. Unless Defendants are agreeing to the entry of a preliminary injunction, which they are not, Plaintiffs believe that an expedited briefing schedule is warranted.

Next, simultaneously briefing the cross-motions for summary judgment will serve to shorten the overall briefing schedule. There is no reason for protracted briefing. If, after the *Loper Bright Enterprises* Supreme Court ruling, the new STLDI rule can withstand scrutiny, then there should be no reason to delay the ruling on the merits. Moreover, simultaneous briefing allows for clear and concise briefs in response to the argument raised by the opposing party, rather than the wait and see approach that is being proposed by Defendants.

In interest of judicial economy, Plaintiffs would agree to allow Defendants to forego answering the First Amended Complaint, if there is a compressed briefing schedule for the cross-motions for summary judgment. However, if Defendants are seeking a briefing schedule going well into next year, then an Answer is necessary, as the admissions would be salient to this Court's decisions.

A copy of Plaintiffs' proposed order is also attached hereto.

Dated: October 3, 2024

Respectfully submitted,

Lead Counsel for Plaintiffs
Gonzales Taplin PA
/s/Dominick L. Lanzito
Alex Gonzales
Texas State Bar No. 08118563
Dominick L. Lanzito
Illinois State Bar No. 6277856
Attorneys for the AMERICAN ASSOCIATION OF ANCILLARY BENEFITS and PREMIER HEALTH SOLUTIONS, LLC.
Gonzales Taplin PA
P.O. Box 171267
Austin, Texas 78717
Tele: (512) 492-5251 (for A. Gonzales)
Tele: (312)724-8035 (for D. Lanzito)
agonzales@gonzalestaplin.com
dlanzito@pjmlaw.com

Local Counsel for Plaintiff

THE FOWLER LAW FIRM, P.C.
/s/ Michael J. Smith
Michael J. Smith
Texas State Bar No.24037517
3301 Northland Drive, Suite 101
Austin, Texas 78731
Telephone: 512.441.1411
Facsimile: 512.469.2975
Email: msmith@thefowlerlawfirm.com

Counsel for Defendants
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
MICHELLE R. BENNETT
Assistant Branch Director
/s/ Kyla M. Snow
KYLA M. SNOW
Trial Attorney (Ohio Bar No. 96662)
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L St. NW
Washington, DC 20005
(202) 514-3259
kyla.snow@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2024, a copy of the foregoing was filed electronically via the Court's ECF system, which effects service upon counsel of record.

/s/ Kyla M. Snow
KYLA M. SNOW
Trial Attorney
U.S. Department of Justice