UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN HOSPITAL ASSOCIATION, *et al.*, Plaintiffs, v. SYLVIA M. BURWELL, in her official capacity as Secretary of Health and Human Services,[1] Defendant.	Civil Action No. 14-cv-00851 (JEB)

DEFENDANT'S MOTION FOR STAY AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

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[1] Pursuant to Fed. R. Civ. P. 25(d), Sylvia M. Burwell, the current Secretary of Health and Human Services is automatically substituted as the named defendant for Kathleen Sebelius, the former Secretary of Health and Human Services.

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DEFENDANT'S MOTION FOR STAY

Defendant Secretary of Health and Human Services (the "Secretary"), though undersigned counsel, hereby moves for a stay of this action until September 30, 2017, during which time the Secretary would submit status reports every six months. In support of this motion, the Secretary submits the following Memorandum of Points and Authorities in Support, the attached Declaration of Ellen Murray, Assistant Secretary for Financial Resources and Chief Financial Officer of the Department of Health and Human Services, and the attached Proposed Order. In accordance with LCvR 7(m), the undersigned conferred with counsel for Plaintiffs regarding this motion and learned that Plaintiffs oppose the motion.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

INTRODUCTION

The Court of Appeals has remanded this case to this Court to consider whether to issue a writ of mandamus instructing the Department of Health and Human Services (HHS) to resolve all appeals filed with its Office of Medicare Hearings and Appeals (OMHA) within ninety days. In recognition of the fact that such a writ would represent an "extraordinary and intrusive" infringement on HHS's functions, *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 192 (D.C. Cir. 2016) ("*AHA*"), the Court of Appeals also instructed this Court to proceed carefully before deciding whether the writ should issue. In particular, it suggested that this Court consider whether the political branches are making "significant progress" toward resolving the current backlog of administrative appeals pending before OMHA. *Id.* at 193. HHS is indeed making significant progress, as described in detail in the attached Declaration of Ellen Murray, Assistant Secretary for

Financial Resources and Chief Financial Officer of HHS. And there are currently pending before Congress proposals for additional HHS authorities and funding with which the agency can further bolster its efforts to alleviate and ultimately eliminate the backlog, as Ms. Murray's Declaration also describes in detail.

The Court of Appeals additionally identified the period of time over which this Court might assess the progress of the political branches. It suggested that this Court should consider whether the political branches have made "meaningful progress within a reasonable period of time—say, the close of the next full appropriations cycle," before any writ of mandamus is issued. *Id.* at 193.

Consistent with the Court of Appeals' observations, Defendant Sylvia M. Burwell, the Secretary of HHS (the "Secretary"), respectfully submits that a limited stay of this action should be ordered so as to allow HHS to continue to make meaningful progress in resolving the OMHA backlog, and also to allow Congress to continue its deliberations with respect to the legislative proposals that are pending before it. In keeping with the Court of Appeals' identification of the close of the next full appropriations cycle as a reasonable period of time in which to assess the progress of the political branches, *id.*, the Secretary requests that this Court stay this action for that time period, that is, through September 30, 2017.

The Secretary wishes to emphasize that HHS considers the resolution of the OMHA backlog to be a matter of the highest priority, and that the Court and the community of Medicare stakeholders have good reason to monitor the political branches' continued progress in addressing the backlog. She accordingly suggests that it would be appropriate for the Court also to require HHS, while this stay is in effect, to submit status

reports at six-month intervals describing the state of the backlog and the status of the political branches' efforts to address it.

For these reasons, elaborated upon below, there is good cause to enter this requested stay. The balance of the equities weigh in favor of a limited stay, particularly given the Court of Appeals' caution that "courts must respect the political branches and hesitate to intrude on their resolution of conflicting priorities," and its attendant suggestions that this Court should consider the political branches' progress after a reasonable period of time before determining whether to issue the writ. *Id.* at 193. The Secretary's proposed course of action would allow for HHS and Congress to continue to make meaningful progress in addressing the backlog, and this tips the balance of interests in favor of the requested limited stay.

BACKGROUND

Plaintiffs filed this suit on May 22, 2014, to seek a writ of mandamus under 28 U.S.C. § 1361 that would compel the Secretary to decide Medicare appeals pending before OMHA within 90 days based on 42 U.S.C. § 1395ff(d)(1)(A).[2] On December 18, 2014, this Court dismissed the action for lack of subject matter jurisdiction. ECF No. 21. On February 9, 2016, the Court of Appeals concluded that Plaintiffs had demonstrated the threshold requirements for mandamus jurisdiction, and reversed and remanded to this Court.[3] *AHA*, 812 F.3d at 192. The Court of Appeals directed the Court to determine on

[2] The statutory and regulatory background concerning the Medicare administrative appeals process is set forth in this Court's December 18, 2014 Memorandum Opinion, ECF No. 21, as well as the Court of Appeals' February 9, 2016 Opinion.

[3] The Fourth Circuit recently affirmed the Eastern District of North Carolina's denial of a mandamus petition similar to that of Plaintiffs. *Cumberland Cty. Hosp. Sys., Inc. v. Burwell*, 816 F.3d 48 (4th Cir. 2016).

remand "whether 'compelling equitable grounds' now exist to issue a writ of mandamus." *Id.*

The Court of Appeals recognized, however, that this Court has considerable discretion in determining whether the extraordinary writ of mandamus should issue. *Id.* at 193; *see also id.* at 189 ("The remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances.") (citing *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002)). It further opined,

> [I]f the district court determines on remand that Congress and the Secretary are making significant progress toward a solution, it might conclude that issuing the writ is premature. If so, it could consider such action as ordering the agency to submit status reports updating the court on the level of appropriations, the progress of the [Audit & Appeal Fairness, Integrity, and Reform in Medicare (AFIRM) legislation, S. 238] and any other relevant information.

Id. at 19. This Court received the Court of Appeals' mandate on April 4, 2016. ECF No. 26.

As Ms. Murray's Declaration explains, HHS has initiated the Medicare Appeals Process Improvement and Backlog Reduction Plan designed to reduce and eventually eliminate the current backlog in the processing of Medicare appeals. Murray Decl. ¶¶ 17–22. The Plan involves multiple administrative actions as well as legislative proposals targeted at reducing the number of pending appeals and encouraging resolution of claims earlier in the administrative process, as the Declaration describes in detail. *Id.*

For example, the Centers for Medicare & Medicaid Services (CMS) is implementing several changes to the Recovery Audit (RA) program to decrease the number of appeals that result from incorrectly denied claims: (i) modifying RA contracts to require contractors to offer providers an opportunity to discuss the basis of a claim and

submit additional information before a contractor refers a claim for recoupment; (ii) limiting the number of reviews that RA contractors may conduct without further CMS approval; and (iii) beginning approximately this summer, paying the RA contractor only if a Qualified Independent Contractor (QIC) upholds the contractor's denial of a claim for which reconsideration was sought. *Id.* ¶ 19(b).

The RA program, however, is the source of only a portion of the current OMHA backlog, and the percentage of appeals that are newly incoming to OMHA that are attributable to the RA program is declining further.[4] The Department is undertaking a series of additional measures that are designed to address all of the sources of the growth in incoming OMHA appeals. For example, CMS has undertaken a project to offer hospitals the option to administratively settle large numbers of homogenous claims together. *Id.* ¶ 19(a). When this action is complete by the end of FY 2016, the settlements will remove approximately 260,000 appeals that were pending before OMHA and the Medicare Appeals Council. *Id.* The Department has also identified that the current backlog is caused, in significant part, by a growing practice among some members of the provider community in filing wholesale appeals of virtually every claim denial to the OMHA level of appeal. *Id.* ¶ 12. Legislative initiatives to institute filing fees and increased amount-in-controversy requirements for the filing of an appeal with OMHA, if adopted, would discourage this practice. *Id.* ¶ 22(a), (c). The Department's education initiative to increase the consistency of adjudications among OMHA's various

[4] Notably, HHS projects that the percentage of the OMHA backlog attributed to RA Program appeals has dropped sharply; RA-related appeals constituted 31% of OMHA pending appeals as of April 25, 2016, but HHS projects that RA-related appeals currently constitute only 20% of incoming appeals. Murray Decl. ¶ 15. This decrease is partly attributable to the administrative settlement of homogenous claims, described below.

Administrative Law Judges also should decrease the incentive to file wholesale appeals. *Id.* ¶ 21(c).

HHS estimates that the administrative measures currently underway for which it can project impacts will, by the end of fiscal year 2020, reduce the backlog by 50% fewer appeals as compared to in the absence of these measures. *Id.* ¶ 20; *id.*, Ex. 1 (Medicare Appeals Backlog - Reduction Actions Data as of 03/31/2016). The agency has undertaken additional administrative actions, the impact of which it presently cannot quantify, to further reduce the backlog and increase adjudicative efficiency. *Id.* ¶ 21. An example is the Case Grouping Initiative, through which appellants with large numbers of filings are grouped for assignment to a single ALJ for potential consolidated proceedings and more efficient adjudication.. *Id.* ¶ 21(f).

There are also pending before Congress several legislative proposals that would allow HHS to expand its administrative efforts for reducing the OMHA backlog. *Id.* ¶ 22. The President's FY 2017 Budget and a bill pending before the Senate—the Audit & Appeal Fairness, Integrity, and Reforms in Medicare Act of 2015, S. 2368, or the AFIRM Act—include proposals to increase HHS's annual appropriations as well as provide the agency additional authorities with which to combat the backlog, e.g., allow HHS to use RA recoveries for use in resolving RA-related appeals. Murray Decl. ¶ 22. The AFIRM Act was favorably reported to the full Senate by the Senate Finance Committee on December 8, 2015. *See* S. Rep. No. 114-177 (2015).

These legislative proposals, if approved by Congress, combined with the administrative measures currently underway, are expected to reduce the number of pending OMHA cases to 50,000 by the end of FY 2020, and to completely eliminate the

backlog by FY 2021. Murray Decl. ¶ 3.[5] The Medicare Appeals Backlog - Reduction Actions Data spreadsheet attached to Ms. Murray's Declaration illustrates the projected impact of the administrative measures and the legislative proposals if adopted from the present through FY 2020. *Id.* ¶ Ex. 1.

ARGUMENT

1. Legal Standard

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *accord, e.g.*, *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.6 (1998). "The District Court has a broad discretion in granting or denying stays so as to coordinate the business of the court efficiently and sensibly." *McSurely v. McClellan*, 426 F.2d 664, 671 (D.C. Cir. 1970). "How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 254–55; *accord, e.g.*, *Feld Entm't, Inc. v. A.S.P.C.A.*, 523 F. Supp. 2d 1, 2–3 (D.D.C. 2007).

2. A Limited Stay While HHS Continues to Make Significant Progress Towards Resolving the OMHA Backlog and Congress Considers the Pending Legislative Proposals Would Be Consistent with the Court of Appeals' Opinion as well as the Balance of Interests.

The Court of Appeals noted that the issuance of a writ of mandamus would be "extraordinary and intrusive," and would "risk[] infringing on the authority and discretion

[5] In addition to the Medicare Appeals Process Improvement and Backlog Reduction Plan and pending legislative proposals, Ms. Murray explains that HHS has implemented several measures to address the backlog of appeals before the Medicare Appeals Council. Murray Decl. ¶¶ 23–24. For example, the Council is using contract paralegal support to increase its adjudicative capacity. *Id.* ¶ 24(a).

of the executive branch." *AHA*, 812 F.3d at 192. It further noted that those risks are "especially salient here," given that the requested writ would "probably require the agency to make major changes to its operations and priorities, including [possibly] drastically limiting the scope of a statutory mandated program that has recovered billions of dollars in incorrectly paid funds." *Id.* Thus, the Court of Appeals recognized, "ideally the political branches should resolve [the backlog and associated delays]." *Id.* at 193. It accordingly suggested that this Court should consider whether the political branches are making significant progress toward resolving the OMHA backlog, and noted that if the branches are doing so, this Court could conclude that a writ of mandamus is premature. *Id*.

The Court of Appeals further recognized that it is not possible to eliminate the OMHA backlog immediately, and that it will take some time both for HHS to implement administrative efforts to address the backlog and for those efforts to come to fruition, and also for Congress to complete its consideration of legislative proposals to assist in eliminating the backlog. Accordingly, the Court of Appeals specified the time period over which this Court might consider the effect that the political branches' efforts have had in addressing the backlog. A "reasonable period of time" over which to assess whether the political branches will have made "meaningful progress" would be, the Court of Appeals suggested, "the close of the next full appropriations cycle." *AHA*, 812 F.3d at 193. The next full appropriations cycle closes on September 30, 2017. *See* 2 U.S.C. § 631.

Ms. Murray's Declaration explains that HHS is in fact making significant progress in addressing the backlog through multiple administrative measures, that

additional progress will be possible as a result of the President's Budget for FY 2017 if it is approved, and that the pending AFIRM legislation would even further advance the agency's progress in remedying the backlog, as previously described. As also set forth above, the agency projects that with the administrative measures currently underway and if the legislative proposals pending before Congress are approved, the backlog will be eliminated by FY 2021.

A limited stay for the period identified by the Court of Appeals—through the close of the next full appropriations cycle, or September 30, 2017—will permit this Court to assess the continued progress of HHS in its implementation of the various administrative measures that are identified in Ms. Murray's Declaration. For the reasons explained in that declaration, HHS is confident that significant progress will be made to address the backlog over that period. In addition, HHS is implementing a number of measures that it anticipates will succeed in reducing the backlog of appeals, but for which it cannot provide an estimate of the precise effect before they are implemented. A limited stay will permit this Court to evaluate the actual effect of these measures once they are fully implemented.

A limited stay is also warranted to allow legislative progress to continue. As noted above, the AFIRM Act has been favorably reported by the Senate Finance Committee, and is now pending before the full Senate. The President's FY 2017 Budget also remains pending, and the appropriations process for the coming fiscal year is continuing.

In light of the continuing administrative and legislative efforts to address the backlog, the Secretary respectfully submits that it is appropriate to enter a limited stay, so

as to permit the political branches to continue their efforts; as the Court of Appeals recognized, it would be far preferable to permit the political branches to address the backlog in the first instance, at least while the appropriations cycle is continuing. *See AHA*, 812 F.3d at 193. The Secretary recognizes, of course, that this Court and Medicare stakeholders have good reason to monitor the political branches' progress in addressing the backlog. The Secretary thus respectfully suggests that it would further the interests of justice if, during the duration of the limited stay, the Court directs her to provide status reports to inform the Court and Plaintiffs of the impact of the progress of the measures targeting the backlog.

The Secretary expects that status reports at intervals of six months will convey meaningful information about HHS's progress in resolving the backlog. Ms. Murray's Declaration explains that HHS, while monitoring the backlog continuously, projects its size and the impact of the Department's measures to address it on an annual basis, with quarterly updates. Murray Decl. ¶ 3. Because of the variance in the timing of provider appeals submissions as well as the time required to implement administrative initiatives and see results, the Department believes that its progress on resolving the backlog is more meaningfully measured on a semi-annual and annual basis. *Id.* The Secretary therefore proposes that the Court stay this action until September 30, 2017, and that the Secretary submit status reports every six months during the stay.[6]

At the conclusion of the proposed stay period, the Court will have the benefit of facts on how successful administrative efforts and any legislative efforts have been in

[6] If the Court determines that status reports at intervals shorter than six months are appropriate, the Secretary requests that the interval be no less than three months given that HHS makes annual projections with quarterly updates. *See* Murray Decl. ¶ 3.

alleviating the backlog, as well as greater clarity as to the causes of the OMHA backlog, *e.g.*, the extent to which RA appeals continue to contribute to the backlog after administrative measures targeted at reducing the number of RA appeals have had time to make an impact. Such additional factual development will be informative as to the Court's ultimate decision on whether the extraordinary measure of a writ of mandamus is warranted.

In light of the foregoing, the balance of the equities weighs in favor of entering a limited stay. The Secretary, of course, does not dispute that the backlog has resulted in an adverse impact on some hospitals' interests. She respectfully submits, however, that any such harm is outweighed by the interests in allowing continuation of the significant progress toward resolution of the backlog through the political branches. Indeed, a denial of the stay would not meaningfully address the harm that some hospitals may be experiencing; the political branches are proceeding as expeditiously as possible to address the backlog, and there has been no suggestion that the immediate issuance of a writ would succeed in expediting these hospitals' appeals to any greater extent than the Department's current efforts are accomplishing. As the Court of Appeals recognized, "[t]he backlog and delays have their origin in the political branches, and ideally the political branches should resolve them." *AHA*, 812 F.3d at 192-93.

CONCLUSION

For the foregoing reasons, the Court should grant the Secretary's motion for a stay, and order this action stayed until September 30, 2017, during which time the Secretary shall submit status reports every six months.

Respectfully submitted,

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