IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES HOUSE OF REPRESENTATIVES, Plaintiff, v. SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of the United States Department of Health and Human Services, et al., Defendants.	Case No. 14-cv-01967-RMC

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DEFER THE FILING OF A JOINT PROPOSED BRIEFING SCHEDULE

Plaintiff United States House of Representatives ("House") respectfully urges the Court to deny Defendants' Motion to Defer the Filing of a Joint Proposed Briefing Schedule (Sept. 21, 2015) (ECF No. 45) ("Motion to Defer").

DISCUSSION

On September 9, 2015, the Court denied in pertinent part Defendants' motion to dismiss. Simultaneously, the Court directed the parties to "meet, confer, and file by September 23, 2015 a jointly proposed briefing schedule for dispositive motions." Order (Sept. 9, 2015) (ECF No. 42). The House promptly complied with its meet and confer obligation; on September 11, 2015, it drafted a proposed briefing schedule and sent it to Defendants' counsel, along with a request for a response to the proposal.

Defendants did not respond until September 21, 2015, when their counsel advised the House by email that Defendants "intend to file a motion to certify the district court's Order of September 9, 2015 for interlocutory appeal . . . [and] intend to file a motion to defer the deadline

for the submission of a proposed briefing schedule until after the disposition of the defendants' request for certification." Email from Joel McElvain (Sept. 21, 2015), attached to Plaintiff's Resp. to Court's September 9, 2015 Order (Sept. 21, 2015) (ECF No. 43) ("House Response to Sept. 9 Order").

Inasmuch as a "*jointly* proposed briefing schedule" obviously could not be filed without Defendants' participation, the House then completed its compliance with the September 9 Order by filing with the Court the House's proposed briefing schedule. *See* House Resp. to Sept. 9 Order. Later that same night, Defendants filed a Motion for Certification of This Court's Order of September 9, 2015, for Interlocutory Appeal (Sept. 21, 2015) (ECF No. 44) ("Section 1292(b) Motion"), along with their Motion to Defer.[1]

The Motion to Defer is supported by nothing more than Defendants' conclusory assertion that "[i]t would be appropriate for this Court to defer the parties' obligation to file a joint proposed briefing schedule until after the disposition [of the Section 1292(b) Motion] . . . ." Mot. to Defer at 2. The House disagrees, for the following reasons:

1. The self-evident impetus behind the Motion to Defer is delay. Defendants obviously seek to avoid, for as long as possible, articulating a legal defense to the House's well-founded claim that they are paying insurance companies billions of taxpayer dollars that Congress never appropriated, in blatant violation of the Constitution.

According to the last publicly available figures – reported not by Defendants but rather in a Joint Inspector General report – Defendants continue to funnel these unappropriated payments

[1] The Motion to Defer does not seek a stay of Defendants' obligation to file an Answer to the Complaint, an Answer due today, September 23, 2015. *See* Fed. R. Civ. P. 12(a)(4)(A) ("[I]f the court denies [a] motion [filed under Rule 12] . . . the responsive pleading must be served within 14 days after notice of the court's action."). If an Answer is not filed by midnight tonight, Defendants will be in default, absent a Court order extending their time to file an Answer.

from the United States Treasury to insurers at the rate of at least $250 million per month. *See Review of the Accounting Structure Used for the Administration of Premium Tax Credits* (Mar. 31, 2015), at 18-19, *available at* https://oig.hhs.gov/oei/reports/oei-06-14-00590.pdf.[2]

2. Defendants' desire to avoid defending their unconstitutional actions is not hard to understand. After all, 31 U.S.C. § 1324(b) – the statute Defendants have identified as the law appropriating funds for the Section 1402 Offset Program – on its face appropriates absolutely nothing for that program. However, Defendants' mere desire for delay – their sole justification here – does not justify a stay. *See, e.g., United States ex. rel. Barko v. Halliburton Co.*, 4 F. Supp. 3d 162, 169-70 (D.D.C. 2014).

3. There is no reason why the parties cannot proceed simultaneously with briefing on the propriety of an interlocutory appeal and briefing on the merits. Both parties have resources adequate to enable them to draft dispositive motions while the Court is considering the Section 1292(b) Motion. Moreover, Defendants will not be disadvantaged in proceeding in accordance with the Court's September 9 Order. On the other hand, the House will continue to suffer harm if the Motion to Defer is granted, as millions (and perhaps billions) of unappropriated taxpayer dollars continue to flow out the Treasury door. *See, e.g.*, *Horn v. Huddle*, 647 F. Supp. 2d 66, 69 (D.D.C. 2009) (denying Executive Branch stay motion because of harm to opposing party: courts "must be sensitive to the effect its ruling will have on the parties to this litigation").

4. The House will explain, in opposition to the Section 1292(b) Motion, why an interlocutory appeal is not justified here. In the event the Court agrees (and if the Court denies

[2] Defendants continue to conceal the actual amounts that they unconstitutionally are expending on the Section 1402 Offset Program by blending those amounts with the amounts being spent on the Section 1401 Refundable Tax Credit Program. *See, e.g.*, Office of Mgmt. & Budget, SF-133 Reports on Budget Execution and Budgetary Resources, at p. 12,130 (Dep't of Treasury) (Dec. 1, 2014), *available at* https://max.omb.gov/maxportal/document/SF133/Budget/attachments/703038966/705527982.pdf (blended figure only).

the Motion to Defer), briefing on dispositive motions will then be proceeding apace and the Court will be on track to address the merits of this important case in a timely fashion, without intervening unnecessary delays. On the other hand, *if* the Court grants the Section 1292(b) Motion, and *if* the Circuit Court then agrees to hear the appeal, *see* 28 U.S.C. § 1292(b), the parties can put down their pens at that time. No judicial resources will have been wasted.

5. Finally, there is no reason to delay briefing on the merits where, as here, the action involves discrete issues of law and requires no discovery. As the House already has proposed, the merits can be addressed in short order, *see* House Resp. to Sept. 9 Order, and then, if necessary, the entire action can be presented to the Court of Appeals as part of a complete record. Suspension of the briefing schedule serves neither the Court, the House, nor the public.

CONCLUSION

The Court should deny Defendants' Motion to Defer and, because Defendants have failed to comply with the Court's September 9 Order, forthwith adopt the House's proposed briefing schedule. Alternatively, should the Court determine to postpone briefing on the merits, it nevertheless should order Defendants to file their Answer to the Complaint no later than October 2, 2015, inasmuch as the obligation to Answer is imposed by Federal Rule 12(a)(4)(A) and Defendants have sought no stay of that obligation. *See supra* n.1.

Respectfully submitted,

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September 23, 2015

CERTIFICATE OF SERVICE

I certify that on September 23, 2015, I served one copy of the foregoing Plaintiff's Opposition to Defendants' Motion to Defer the Filing of a Joint Proposed Briefing Schedule by CM/ECF on all registered parties.

/s/ Sarah Clouse
Sarah Clouse