UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

STATE OF TEXAS, TEXAS HEALTH AND HUMAN SERVICES COMMISSION,	§	
Plaintiffs,	§	Case No. 6:21-cv-00191
v.	§	
CHIQUITA BROOKS LASURE, in her official capacity as Administrator for the Centers for Medicare & Medicaid Services, et al.,	§	
Defendants.	§	

JOINT REPORT ON RULE 26(f) CONFERENCE

Pursuant to Federal Rule of Civil Procedure 26(f)(2) and the Court's August 30, 2021 Order, the parties hereby submit this Joint Report on their Rule 26(f) conference.

1. A brief statement of the claims and defenses.

Plaintiffs' Position:

On January 15, 2021, CMS approved an extension of the Texas Healthcare Transformation and Quality Improvement Program ("THTQIP" or the "Demonstration Project"). Then, on April 16, 2021, the acting Administrator for CMS sent Texas an eight-page letter purporting to rescind and withdraw the January extension approval. Plaintiffs originally asserted ten counts in their May 14, 2021 Complaint challenging the purported rescission of the Demonstration Project. Counts I-VIII challenge the April 16, 2021 rescission letter under the APA for being contrary to law and agency regulations, beyond statutory limitations, and arbitrary and capricious. These counts were addressed in Plaintiffs' Motion for Preliminary Injunction, which the Court granted on August 20,

2021.

Plaintiffs' final two counts in their May 14, 2021 Complaint raise non-APA claims. In what was Count IX, Plaintiffs assert that Defendants are estopped from revoking their prior approval of Texas's exemption from notice-and-comment requirements and the Demonstration Project extension. In what was Count X, Plaintiffs assert that Defendants' unlawful actions violated the Constitution's Spending Clause, because Defendants' purported rescission of the Demonstration Project extension was an attempt by the federal government to coerce Texas into adopting the Medicaid expansion of the Patient Protection and Affordable Care Act despite the Supreme Court's holding in *NFIB v. Sebelius*, 567 U.S. 518, 582-85 (2012), that the federal government may not coerce States into accepting the Medicaid expansion by withholding Medicaid funds.

Plaintiffs recently filed a First Amended Complaint, which adds a new Count IX under the APA and renumbers the previously-asserted non-APA claims as Counts X (estoppel) and XI (Spending Clause). In Count IX of the First Amended Complaint, Plaintiffs assert that Defendants have violated the APA by arbitrarily and capriciously failing to comply with the Special Terms and Conditions ("STCs") of the January 15, 2021 Demonstration Project extension. Plaintiffs seek to compel agency action unlawfully withheld and unreasonably delayed, i.e., CMS's compliance with the STCs, which fix the overall size of directed-payment programs, the details of which would be negotiated following the extension, set forth the procedures by which operational details of the directed-payment programs would be determined, and require that CMS work in good faith with HHSC to achieve approval of those directed-payment programs.

Defendants' Position:

The Court lacks subject-matter jurisdiction to consider some or all of Plaintiffs' claims and Plaintiffs cannot state a claim for which relief may be granted for certain claims. CMS acted within

its authority in voiding the January 15 letter because the January approval itself was made in excess of statutory authority and without observance of procedures required by law and is void ab initio. CMS's April 16 letter does not contravene the Social Security Act or any implementing regulations, nor is it an arbitrary and capricious exercise of the CMS's authority. CMS did not act ultra vires and the April 16 letter does not violate the Spending Clause. CMS has not unlawfully withheld or unreasonably delayed agency action, nor can Plaintiffs compel agency action that is not required by law. Finally, CMS cannot be estopped to take unlawful action.

2. The jurisdictional basis for the suit.

Plaintiffs' Position:

Plaintiffs challenge the constitutionality and legality of actions taken by a federal agency and federal officers in their official capacities and assert jurisdiction pursuant to 28 U.S.C. § 1331. Defendants have waived federal sovereign immunity under 5 U.S.C. § 702, because the April 16, 2021 letter from the acting Administrator of CMS constituted final agency action that adversely affects Plaintiffs, and Defendants' failure to comply with the STCs of the January 15, 2021 Demonstration Project extension is a failure to act that also adversely affects Plaintiffs. The Court is authorized to issue the requested declaratory and injunctive relief under 28 U.S.C. §§ 1361, 2201-02, Federal Rules of Civil Procedure 57 and 65, and by the general legal and equitable powers of the Court. As the Court held in its August 20, 2021 Opinion and Order, "(a) Article III jurisdiction exists; (b) jurisdiction is not barred by the final-agency-action limitation on the APA's waiver of sovereign immunity; and (c) jurisdiction is not barred by the committed-to-agency-discretion-by-law limitation on the APA's waiver of sovereign immunity." ECF 47 at 5.

In response to Plaintiffs' Complaint and Motion for Preliminary Injunction, Defendants argued that the Court lacked subject matter jurisdiction and that Plaintiffs were unlikely to succeed on the merits of their APA claims. The Court rejected Defendants' arguments in its August 20,

2021 Opinion and Order granting Plaintiffs' Motion for Preliminary Injunction.

Defendants' Position:

The asserted jurisdictional bases for this suit are 28 U.S.C. § 1331 and the Administrative Procedure Act (APA), 5 U.S.C. § 702. First Amended Complaint, ECF No. 54, ¶¶ 27-28.

Defendants do not concede that jurisdiction lies with this Court for any or all claims.

3. The existence of any additional related cases and the appropriateness of consolidation.

The parties are not aware of any additional related cases.

4. Proposed deadlines for dispositive motions and objections to experts (i.e., *Daubert* and similar motions) (note: the dispositive-motion deadline cannot be less than 90 days before trial; the court prefers 120 days).

Plaintiffs' Position:

As reflected in the Proposed Scheduling Order attached as Appendix A to this Joint Report, Plaintiffs propose a May 17, 2022 deadline for dispositive motions and objections to experts (i.e., *Daubert* and similar motions). This proposed deadline is 90 days before Plaintiffs' proposed trial date of August 15, 2022. Plaintiffs propose a period of 90 days between this deadline and trial because the Court is familiar with many of the issues to be addressed in the dispositive motions from the preliminary-injunction proceedings.

Defendants' Position:

Defendants propose dispositive motion deadlines as described in the attached proposed scheduling order (attached as Appendix B to this Joint Report). For the reasons explained in paragraph 6, *infra*, no discovery, including expert discovery, is necessary or appropriate to resolve the Plaintiffs' claims in this APA case. Additionally for the reasons explained in paragraph 12 *infra*, trial is not needed to resolve Plaintiffs' claims.

5. Whether the parties expect to provide expert reports under Rule 26(a)(2) and conduct expert discovery in this case.

Plaintiffs' Position:

Plaintiffs expect to provide expert reports under Rule 26(a)(2) and conduct expert discovery of any experts upon which Defendants intend to rely. Plaintiffs expect that expert testimony may be required to establish that Plaintiffs will suffer irreparable injuries absent a permanent injunction.

Defendants' Position:

For the reasons explained in paragraph 6, *infra*, no discovery is necessary or appropriate to resolve the Plaintiffs' claims in this APA case. However, if the Court permits Plaintiffs to rely on evidence outside of the administrative record, including expert reports and expert discovery, it may be necessary for Defendants to take expert discovery or produce expert reports, and Defendants reserve the right to do so.

6. A proposed plan and schedule for discovery, including a statement of the subjects on which discovery may be needed, a time limit to complete factual discovery and expert discovery, and a statement of whether discovery should be conducted in phases or limited to or focused upon particular issues.

Plaintiffs' Position:

Plaintiffs require discovery in this case, despite Defendants' position that this case is limited to review of the administrative record. First, Plaintiffs' claims are not all APA claims. Count X of the First Amended Complaint is an estoppel claim, and Count XI is a Spending Clause claim. But even if this case involved only APA claims, Plaintiffs should not be limited to the administrative record. The Fifth Circuit allows record supplementation when "(1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, . . . (2) the district court needed to supplement the record with 'background information' in order to determine whether the agency considered all of the relevant factors, or (3) the agency failed to

explain administrative action so as to frustrate judicial review." *Medina Cnty. Env't Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010) (quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)). And this list is not exclusive. *Gulf Coast Rod Reel & Gun Club v. U.S. Army Corps of Eng'rs.*, No. 3:13-cv-126, 2015 WL 1883522, at *3 (S.D. Tex. Apr. 20, 2015) (observing that *Medina* did not "purport to overrule prior decisions concerning exceptions" to the rule that APA claims should typically be decided on the administrative record).

> District courts in this circuit routinely allow extra-record evidence to be introduced under the following '*Davis Mountains*' circumstances:
>
> 1. When agency action is not adequately explained in the record before the court;
> 2. When the agency failed to consider factors which are relevant to its final decision;
> 3. When an agency considered evidence which it failed to include in the record;
> 4. When a case is so complex that a court needs more evidence to enable it to understand the issues clearly;
> 5. in cases where evidence arising after the agency action shows whether the decision was correct or not;
> 6. In cases where agencies are sued for a failure to take action;
> 7. In cases arising under NEPA; and
> 8. In cases where relief is at issue, especially at the preliminary injunction stage.

Texas v. Biden, No. 2:21-cv-067-Z, Order at 3 (N.D. Tex. July 19, 2021) (citing *NFIB v. Perez*, No. 5:16-cv-066-C, 2016 WL 3766121, at *23 (N.D. Tex. June 27, 2016)); *see also Davis Mountains Trans-Pecos Heritage Ass'n v. U.S. Air Force*, 249 F. Supp. 2d 763, 776 (N.D. Tex. 2003), *vacated on other grounds sub nom.*, *Davis Mountains Trans-Pecos Heritage Ass'n v. FAA*, 116 F. App'x 3 (5th Cir. 2004).

The record rule does not preclude discovery in this case because it does not govern issues like standing, the non-merits factors for injunctive relief, or non-APA claims. The record rule does not apply to standing because courts consider evidence related to these issues "not in order to supplement the administrative record on the merits, but rather to determine [their own] jurisdiction." *Nw. Env't Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997). Courts routinely rely on extra-record evidence to support standing in APA cases. *See, e.g.*, *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 153–54 (2010); *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010).

The record rule also does not limit the evidence this Court can consider when determining the propriety of injunctive relief. The APA permits consideration of "extra-record evidence for assessing the balance of the equities and the public interest." *East Bay Sanctuary Covenant v. Trump*, 354 F. Supp. 3d 1094, 1107–08 (N.D. Cal. 2018), *aff'd*, 950 F.3d 1242 (9th Cir. 2020), *aff'd sub nom. East Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021). "[I]njunctive relief is generally not raised in the administrative proceedings below and, consequently, there usually will be no administrative record developed on these issues." *Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 369 n.7 (D.D.C. 2017) (quotation omitted).

Finally, courts considering non-APA claims are not limited to the administrative record. For example, a court reviewing the constitutionality of agency action must make "an independent assessment of a citizen's claim of constitutional right." *Porter v. California*, 592 F.2d 770, 780 (5th Cir. 1979). Because "[a] direct constitutional challenge is reviewed independent of the APA," a court "is entitled to look beyond the administrative record in regard to this claim." *Grill v. Quinn*, No. 2:10-cv-757, 2012 WL 174873, at *2 (E.D. Cal. Jan. 20, 2012); *see also Rydeen v. Quigg*, 748 F. Supp. 900, 906 (D.D.C. 1990). Plaintiffs bring two non-APA claims.

As reflected in the Proposed Scheduling Order attached as Appendix A to this Joint Report, Plaintiffs propose a discovery period that commenced with the parties Rule 26(f) conference on September 3, 2021, and concludes on April 5, 2022. Plaintiffs do not believe that discovery should be conducted in phases or limited to or focused upon particular issues.

With the caveat that it is impossible to know the full scope of discovery needed until Defendants (belatedly) file the administrative record, Plaintiffs currently believe that discovery may be needed on the following subjects:

a. The impacts of the COVID-19 pandemic on Texas, healthcare providers, healthcare markets, and Medicaid beneficiaries.

b. The historical, present, and future financial condition and operations of healthcare providers, including how those conditions and operations are impacted by the COVID-19 pandemic and the status of Medicaid funding agreements between CMS and HHSC and between HHSC and managed care organizations.

c. Actions taken in reliance on the January 15, 2021 Demonstration Project extension by Texas, healthcare providers, and other interested parties.

d. Negotiations between CMS and HHSC related to the application that resulted in the January 15, 2021 Demonstration Project extension, approval of that extension, the terms of the extension, implementation of and reliance on that extension and its STCs, and CMS's purported rescission and withdrawal of that extension, including both communications within CMS regarding those negotiations and communications between CMS and HHSC.

e. Negotiations between CMS and HSSC related to DSRIP, including the planned transition from DSRIP, the expiration of DSRIP, potential extension of DSRIP, and

alternatives to the extension of DSRIP, including both communications within CMS regarding those negotiations and communications between CMS and HHSC.

f. To the extent not included in the above paragraphs, negotiations between CMS and HHSC related to the five state-directed payments submitted by HHSC in early 2021, including both communications within CMS regarding those negotiations and communications between CMS and HHSC.

g. CMS's efforts to coerce Texas to agree to the Medicaid expansion of the Patient Protection and Affordable Care Act, including communications within CMS and between CMS and Texas, HHSC, and third parties related to such efforts.

h. The impact that ending the Demonstration Project and not approving the directed-payment programs to be negotiated under its STCs would have on Texas, healthcare providers, Medicaid beneficiaries, and other interested parties.

Defendants' Position:

Discovery is inappropriate in this case because plaintiffs' claims should be reviewed on the basis of the administrative record compiled by CMS. Fed. R. Civ. P. 26(a)(1)(B). Plaintiffs' claims arise under the Administrative Procedure Act, *see* 5 U.S.C. § 702, and, the Court "may not consider evidence outside the administrative record." *Sierra Club v. U.S. Dep't of the Interior*, 990 F.3d 898, 907 (5th Cir. 2021) (quoting *Harris v. United States*, 19 F.3d 1090, 1096 n.7 (5th Cir. 1995)); *see also Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."). "Supplementation of the administrative record is not allowed unless the moving party demonstrates 'unusual circumstances justifying a departure' from the general presumption that review is limited to the

record compiled by the agency." *Medina Cnty. Env't. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010). These unusual circumstances are limited to situations in which: "(1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, (2) the district court needed to supplement the record with 'background information' in order to determine whether the agency considered all of the relevant factors, or (3) the agency failed to explain administrative action so as to frustrate judicial review." *Id.* The Supreme Court has also "recognized a narrow exception to the general rule against inquiring into 'the mental processes of administrative decisionmakers,' holding that '[o]n a strong showing of bad faith or improper behavior,' such an inquiry may be warranted and may justify extra-record discovery." *Kona v. Renaud*, No. 3:21-cv-463-L, 2021 U.S. Dist. LEXIS 161759, at *5-6 (N.D. Tex. June 4, 2021) (quoting *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573-74 (2019)). Plaintiffs have not made any showing that any of these unusual circumstances apply.

Even if extra-record discovery could be justified in this case, which it cannot, Plaintiffs' attempt to obtain discovery is premature because the administrative record has not yet been produced. *See Dep't of Commerce*, 139 S. Ct. at 2574; *see also, e.g.*, *Kona*, 2021 U.S. Dist. LEXIS 161759, at *6-7 ("[A]s the Supreme Court recently reiterated in *Department of Commerce*, any such extra-record discovery should only be ordered *after* the government produces the administrative record." (quoting *Ramos v. Wolf*, 975 F.3d 872, 901 (9th Cir. 2020) (Nelson, J. concurring))); *id.* (collecting cases). Plaintiffs have not reviewed the administrative record and they cannot therefore have determined or demonstrated that any of the "unusual circumstances" justifying departure from the agency record are present. As indicated in the attached proposed scheduling order (Appendix B), Defendants intend to certify the administrative record by September 24, 2021.

Nor does Plaintiffs' addition of a claim under 5 U.S.C. § 706(1) permit discovery beyond the administrative record. When "'reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record,' a principle which 'reflects the recognition that further judicial inquiry into executive motivation represents a substantial intrusion into the workings of another branch of Government and should normally be avoided.'" *Chayapathy v. Renaud*, Case No. 3:21-cv-458-K-BN, 2021 U.S. Dist. LEXIS 76444, at *6-7 (N.D. Tex. Apr. 21, 2021) (quoting *Dept. of Comm. v. New York*, 139 S. Ct. 2551, 2573 (2017)). "This principle applies equally to a court's review of agency inaction under Section 706(1): 'Nothing in the statutory text distinguishes the scope of record review based on whether the claim is directed at agency action or inaction. And nowhere does the text even hint at extra-record review occurring as a matter of course when agency action is alleged to be 'unlawfully withheld or unreasonably delayed.'" *Id.* at *7 (quoting *Dallas Safari Club v. Bernhardt*, __ F. Supp. 3d __, No. 19-cv-03696 (APM), 2021 U.S. Dist. LEXIS 24487, at *3 (D.D.C. Feb. 9, 2021)).

Additionally, the fact that Plaintiffs raise a constitutional challenge to agency action does not alter the general prohibition on extra-record discovery. *See, e.g.,McWaters v. FEMA*, No. 05-5488, Section "K" (3), 2006 U.S. Dist. LEXIS 109871, at *7 ("The APA's restriction of judicial review to the administrative record would be meaningless if any party seeking review based on statutory or constitutional deficiencies were entitled to broad-ranging discovery."); *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1232 (D.N.M. 2014) ("The presence of a constitutional claim does not take a court's review outside of the APA, however—§ 706(2)(B) specifically contemplates adjudication of constitutional issues—and courts must still respect agency fact-finding and the administrative record when reviewing agency action for

constitutional infirmities . . . ."); *Harvard Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 10 (D.R.I. 2004). These claims too arise under the APA, as there is no other cause of action for plaintiffs' claims. *Cf. Mohsin v. California Dep't of Water Res*., 52 F. Supp. 3d 1006, 1011 (E.D. Cal. 2014) (holding that there is no cause of action directly under the constitution when a statute provides a cause of action).

Nor are Plaintiffs entitled to any discovery on the basis of their requested declaratory relief. The Declaratory Judgment Act neither independently vests courts with jurisdiction nor "provide[s] a cause of action," so it cannot enlarge the scope of APA review principles. *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011); *see also Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989) (The DJA "only creates a remedy and is not an independent basis for jurisdiction."). Thus, the Act's "'operation . . . is procedural only.'" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 138 (2007) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937)).

All of Plaintiffs claims should be decided on the Administrative Record and can be decided on cross-motions for summary judgment. If the Court, however, permits Plaintiffs to rely on evidence outside of the administrative record, Defendants reserve the right to seek discovery. If any discovery is permitted it must not concern the same substance as Plaintiffs' APA claims, which are decided on the Administrative Record. If the Court determines that jurisdictional discovery is necessary, the parties should be strictly limited to discovery necessary to satisfy jurisdictional questions.

7. Whether document production should proceed by requests for production or mandatory disclosure.

Plaintiffs assert that discovery should proceed by requests for production and not mandatory disclosure. Defendants assert that no document production is necessary or appropriate

because Plaintiffs' claims will be adjudicated on the basis of the administrative record. However, if the Court permits extra-record discovery, Defendants agree that production should proceed by requests for production.

8. Any proposed changes to the discovery limitations imposed by the Federal Rules of Civil Procedure, the Local Rules, and any other discovery limitations, including whether the parties should be required to disclose the legal theories and factual bases of their claims and defenses along with their Rule 26(a)(1) disclosures.

Plaintiffs' Position:

Defendants contend that this case should be limited to the administrative record and that no discovery is required. Plaintiffs disagree and intend to seek discovery on subjects such as those listed above. Depending on (among other things) the content of the administrative record and whether Defendants will extend their prior stipulation of admissibility of exhibits considered at the preliminary injunction hearing, Plaintiffs may require more than the ten depositions permitted by Federal Rule of Civil Procedure 30(a)(2)(A)(i). If Plaintiffs were only to depose the healthcare providers that submitted declarations in support of Plaintiffs' Motion for Preliminary Injunction and Defendants' declarant Judith Cash, that alone will total eight depositions. Plaintiffs may not need to depose all of these healthcare providers, but Defendants expect to seek depositions of more individuals with knowledge of CMS's actions than just Judith Cash. However, Plaintiffs cannot state at this time exactly how many more depositions may be required. For example, Plaintiffs do not know at this time how many individuals were involved in the decision to send the April 16, 2021 letter rescinding the Demonstration Project extension, which Plaintiffs contend was intended to coerce Texas into adopting the Medicaid expansion of the Patient Protection and Affordable Care Act. Accordingly, Plaintiffs reserve their right to seek leave of the Court for additional depositions in the future if the need to do should arise as permitted by Federal Rule of Civil Procedure 30(a)(A)(2).

Plaintiffs do not believe that the Court should require that the parties disclose their legal theories and the factual bases for their claims and defenses along with their Rule 26(a)(1) disclosures.

Defendants' Position:

For the reasons explained in paragraph 6, *supra*, no discovery is necessary or appropriate because Plaintiffs' claims will be adjudicated on the basis of the administrative record. Defendants do not stipulate to the admission of any extra-record evidence previously admitted for the sole purpose of litigating the Preliminary Injunction Motion. If discovery is authorized in this case, Defendants would oppose any expansion of the limitations imposed by the Federal Rules of Civil Procedure, the Local Rules of the Eastern District of Texas, and any other discovery rules. This case is exempt from the requirements of initial disclosure under Rule 26(a)(1)(B)(i). However, if initial disclosures are ordered by the Court, Defendants agree that the parties should not be required to disclose their legal theories and the factual bases for their claims and defenses.

9. Proposed rules for disclosure or discovery of electronically stored information (ESI).

Plaintiffs' Position:

Plaintiffs agree to meet and confer with Defendants to develop rules to govern discovery and disclosure of electronically stored information (ESI).

Defendants' Position:

Defendants will produce the administrative record in electronic form if feasible. For the reasons explained in paragraph 6, *supra*, no electronic discovery is necessary or appropriate because Plaintiffs' claims will be adjudicated on the basis of the administrative record. In the event that the Court permits extra-record discovery, Defendants propose that the parties meet and confer to discuss ESI as part of such discovery.

10. Any proposed means for the protection of trade secrets, confidential business information, or other proprietary information.

The parties are not currently aware of any such information at issue in this case and, therefore, do not believe that any special protections for information of this sort is necessary at this time. If this changes during the course of discovery, counsel for Plaintiffs will confer with counsel for Defendants regarding appropriate means for the protection of such information and will, thereafter, file with the Court any requests for additional protections.

11. Any proposals regarding the handling and protection of privileged or trial-preparation material that should be reflected in a court order.

Plaintiffs' Position:

Plaintiffs propose the following provision regarding the inadvertent disclosure of privileged materials:

> The inadvertent production by a producing party of documents or information subject to the attorney–client privilege, work-product protection, or any other applicable privilege or protection will not waive the applicable privilege and/or protection if a request for return of such inadvertently produced documents or information is made promptly after the producing party learns of its inadvertent production.
>
> Upon a request from the producing party who has inadvertently produced documents or information that it believes is privileged and/or protected, each receiving party shall immediately return such documents or information and all copies thereof to the producing party, except for any pages containing privileged markings, information, summaries or derivations thereof made by the receiving party which shall instead be destroyed and certified as such by the receiving party to the producing party. Within seven business days of requesting return of inadvertently produced documents or information, the producing party shall provide a privilege log identifying such inadvertently produced documents or information, including the particular relevant bases and facts upon which its assertion of privilege and/or other protection is claimed.
>
> No use shall be made of any inadvertently produced or disclosed documents or information during deposition, at trial, or otherwise. Nor shall any inadvertently produced or disclosed documents or information be shown to anyone who has not already been given access to them subsequent to the request that they be returned. The receiving party may move the Court for an order compelling production of any inadvertently produced or disclosed documents or information within fourteen days

> after the producing party requests its return. The motion shall not assert as a ground for production the fact of the inadvertent production or disclosure, nor shall the motion disclose or otherwise use the content of the inadvertently produced or disclosed documents or information (beyond any information appearing on the above-referenced privilege log) in any way in connection with any such motion.

Plaintiffs are open to discussing the need for further protections beyond that which they propose above should Defendants ask for further protections.

Defendants' Position:

For the reasons explained in paragraph 6, *supra*, no extra-record documents or information are necessary or appropriate because Plaintiffs' claims will be adjudicated on the basis of the administrative record. However, if the Court permits extra-record discovery, Defendants propose that the parties meet and confer to discuss a possible protective order.

12. A proposed pretrial conference date, proposed trial date, estimated number of days required for trial, and whether a jury has been demanded.

Plaintiffs' Position:

As reflected in the Proposed Scheduling Order attached as Appendix A to this Joint Report, Plaintiffs propose that trial of this case commence on August 15, 2022, and that the pretrial conference take place on August 1, 2022. Plaintiffs estimate that no more than five days will be required for trial of this case. There is no jury demand in this case.

Plaintiffs disagree with Defendants' contention that this case can be resolved as a matter of law without need for resolving factual disputes. There are multiple issues in this case where factual disputes may arise. For example, the Court may need to resolve factual disputes regarding Plaintiffs' entitlement to injunctive relief, whether CMS's has been complying with the special terms and conditions of the THTQIP extension in good faith, and whether the April 16 rescission letter and CMS's subsequent actions were an unconstitutional attempt by Defendants to coerce Texas into Medicaid expansion despite the Supreme Court having already held that such coercion

by the federal government is unconstitutional.

Defendants' Position:

Defendants anticipate no need for trial. That is because this court "is not required to resolve any facts" in reviewing an agency decision. *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985). "[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal." *Redeemed Christian Church of God v. United States Citizenship & Immigration Servs.*, 331 Fed. Supp. 3d 684, 694 (S.D. Tex. 2018). (quoting *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001)). "The entire case on review is a question of law." *Id.* (citation omitted). Under the APA "it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas the 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." *Id*. (quoting *Stuttering Found. of Am. v. Springer*, 498 F. Supp. 2d 203, 207 (D.D.C. 2007)). "Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Id.*; *see also, e.g., Girling Health Care v. Shalala*, 85 F.3d 211, 214-15 (5th Cir. 1996) ("The summary judgment procedure is particularly appropriate in cases in which the court is asked to review or enforce a decision of a federal administrative agency…. The administrative agency is the fact finder. Judicial review has the function of determining whether the administrative action is consistent with the law--that and no more." (citation omitted)).

Because no trial is anticipated, Defendants' proposed scheduling order, Appendix B, proposes a schedule for resolution of all claims on cross-motions for summary judgment.

13. Objections to Rule 26(a)(1) asserted by either party, and other proposed modifications to the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made.

Plaintiffs' Position:

Plaintiffs believe that Initial Disclosures under Rule 26(a)(1) are appropriate in this case, which is not solely an action for review on an administrative record. Defendants, however, contend that this case is exempt from the requirement of Initial Disclosures Pursuant to Federal Rule of Civil Procedure 26(a)(1)(B)(i). Defendants indicated at the Rule 26(f) conference that they will not serve Initial Disclosures on September 8, 2021, based on their contention that they are not required. Based on Defendants' objection and indication that they will not produce their Initial Disclosures, Plaintiffs will likewise not produce Initial Disclosures on September 8, 2021. Plaintiffs respectfully request that the Court order the production of Initial Disclosures one week after the September 13, 2021 Rule 16 pretrial conference. Plaintiffs propose no modifications to the form or requirements for the disclosures under Rule 26(a).

Defendants' Position:

Initial disclosures have not been made by either party. Defendants object to the production of initial disclosures on the basis that this is "an action for review on an administrative record," and is therefore exempt under Fed. R. Civ. P. 26(a)(1)(B)(i).[1] Initial disclosures, if ordered by the Court, should not be made until after the certification of the Administrative Record and the period proposed for conference and motions on record disputes as reflected in Defendants' proposed scheduling order, Appendix B. Defendants do not propose any modifications to the form or

[1] Pursuant to Fed. R. Civ. P. 26(f) Defendants maintain that they are also exempt from participation in any Rule 26(f) conference and production of a conference report. Fed. R. Civ. P. 26(f) (conference required "[e]xcept in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)). However pursuant to the Court's Order, ECF No. 48, Defendants have complied with these obligations.

requirements for initial disclosures if they are ordered by the Court.

14. The parties' position on mediation or arbitration to resolve this litigation, including: whether the parties believe mediation or arbitration would be helpful to settlement and if not, specific reasons why not; when during the litigation mediation or arbitration would be most effective (e.g., before discovery, after limited discovery, after discovery closes, after filing dispositive motions, etc.); and whether the parties prefer to mediate with a private mediator (at the parties' expense) or with a United States Magistrate Judge.

Plaintiffs' Position:

Due to the nature of this dispute, Plaintiffs do not believe that mediation or arbitration is likely to resolve this litigation at this time. While the parties previously conducted settlement discussions to determine if an agreement could be reached that would avoid the need for a preliminary injunction, those discussions were unsuccessful because the parties fundamentally disagree about the legality of CMS's approval of the Demonstration Project extension and its decision to rescind that approval. Moreover, as the Court is aware, it is Plaintiffs' position that CMS has not been negotiating with HHSC in good faith since this litigation began. Mediation is unlikely to be effective under those circumstances. Because Plaintiffs do not believe that mediation or arbitration would be beneficial in this case, they respectfully request that the Court eliminate the deadlines in the Proposed Scheduling Order attached as Appendix A for (1) filing notice of the mediator and (2) the mediation deadline.

If the Court retains the mediation requirements in the Scheduling Order, Plaintiffs' current belief is that any such mediation would be most effective after the close of discovery, when the parties have a better understanding of the factual record. Plaintiffs also believe that a private mediator, agreed to by the parties and having familiarity with the subject matter and issues presented in this case, would be more likely to find an amicable solution to the parties' disputes.

Defendants' Position:

Because this case concerns questions of law to be determined by the Court on the basis of

the administrative record, Defendants do not believe that mediation would be helpful to settlement. Consequently, Defendants' proposed scheduling order, Appendix B, does not include mediation-related deadlines.

15. Any other proposals regarding scheduling and discovery that the parties believe will facilitate expeditious and orderly preparation for trial.

The parties do not have additional proposals regarding scheduling or and discovery at this time.

16. Whether a conference with the court is desired.

The parties agree to participate in the Court's conference currently scheduled for September 13, 2021, at 10:00 a.m.

17. The status of settlement negotiations, which shall not disclose settlement figures.

Earlier in this case, the parties held settlement negotiations to see if the need for a preliminary injunction could be avoided. Those negotiations were unsuccessful. The parties are not currently engaged in settlement negotiations.

18. A statement that counsel for each party has reviewed Judge Barker's standing orders and that counsel for each party understands that noncompliance with the Federal Rules of Civil Procedure, the Court's local rules, or Judge Barker's standing orders may result in sanction or other disadvantage.

Counsel for Plaintiffs and counsel for Defendants have reviewed Judge Barker's standing orders, which are available on the Court's website. Counsel for Plaintiffs and counsel for Defendants understand that noncompliance with the Federal Rules of Civil Procedure, the Court's local rules, or Judge Barker's standing orders may result in sanction or other disadvantage.

19. Any other matters relevant to the status and disposition of this case, including any other orders that the parties propose for the court to issue under Rules 16(b) and (c) and 26(c).

The parties do not propose that the Court issue any other orders under Rules 16(b), 16(c),

or 26(c) at this time.

Date: September 8, 2021

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

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First Assistant Attorney General

GRANT DORFMAN
Deputy First Assistant Attorney General

LESLEY FRENCH
Chief of Staff

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/s/ Jeffrey M. White
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LEIF A. OLSON
Special Counsel
Texas Bar No. 24032801

Counsel for Plaintiffs

Dated: September 8, 2021

Respectfully Submitted,

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Acting Assistant Attorney General

NICHOLAS J. GANJEI
Acting United States Attorney

MICHELLE BENNETT
Assistant Branch Director

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I certify that on September 8, 2021, this document was filed with the Court through its CM/ECF service, which served a copy on all counsel of record.

/s/ Jeffrey M. White
JEFFREY M. WHITE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

No. 6:20-cv-00191

State of Texas et al.,
Plaintiffs,
v.
Chiquita Brooks-LaSure et al.,
Defendants.

ORDER

Pursuant to Federal Rule of Civil Procedure 16(b) and the Eastern District of Texas Local Rules (except as modified herein), the court **orders** that the following schedule governs the disposition of this case:

As set by the court **(Monday, August 15, 2022)**	**9:30 a.m. Jury Selection and Trial before Judge J. Campbell Barker, 211 W. Ferguson St., 3rd Floor, Tyler, Texas.**
Scheduled by the court if necessary	A **pretrial conference** will be conducted, in person, before Judge J. Campbell Barker, 211 W. Ferguson St., 3rd Floor, Tyler, Texas. Lead counsel for each party must attend, or, if the party is proceeding pro se, the party must attend. Lead counsel and pro se parties must have authority to enter into stipulations and admissions that would facilitate the admission of evidence and reduce the time and expense of trial. All pretrial motions not previously decided will be resolved at that time, and procedures for trial will be discussed.
28 days before trial	**File a notice of time requested for (1) voir dire, (2) opening statements, (3) direct and cross examinations, and (4) closing arguments.**
28 days before trial	Settlement-conference deadline. See additional details below.

28 days before trial	Exchange exhibits. Each party intending to offer exhibits shall **serve a complete set** of marked exhibits, whether tangible or electronic, to all opposing parties and **shall deliver a set of marked exhibits to the judge's chambers** (except for large or voluminous items that cannot be easily reproduced).
30 days before trial	**File responses to motions in limine, if any.**
45 days before trial	**File motions in limine, if any, and pretrial objections.** Motions in limine should not be filed as a matter of course. Any motions should include an overview of the relevant factual background and citations to applicable law. The parties are **ordered** to meet and confer to resolve any disputes before filing any motion in limine. Replies to responses are not permitted except by leave of court.

45 days before trial	**File joint final pretrial report**. The joint final pretrial report should include: • for issues tried to the bench, proposed findings of fact and conclusions of law with citation to authority; • estimated length of trial; • each parties' one-to-three-page executive summary of what they expect the evidence to show and the main points of dispute at trial; • an agreed jury questionnaire; • each party's exhibit list; • each party's witness list; • a joint jury-instructions proposal, with citation to authority and any disagreements noted seriatim; • joint proposed verdict form; and • each party's certification that its lead trial attorney has re-read all the Federal Rules of Evidence within the past six months. Parties must email a word copy of the joint pretrial report to Judge_Barker_ECFDocs@txed.uscourts.gov.
45 days before trial	**Notice of request for daily transcript or real-time reporting of court proceedings due.** If a daily transcript or real-time reporting of court proceedings is requested for trial or hearings, every party making said request shall file a notice with the court. The parties should send a copy of this request to susan_zielie@txed.uscourts.gov.

56 days before trial	Objections to pretrial disclosures. Each party must serve a list disclosing any **objections** and the relevant grounds, including any objections under Federal Rules of Evidence 402 and 403, to: (1) any other party's deposition designation; (2) the admissibility of disclosed exhibits; and (3) the use of any witnesses. Any objections not so disclosed, other than objections under Rules 402 and 403, are waived unless excused by the court for good cause. The parties are **ordered** to meet and confer to resolve any disputes before filing any objections to pretrial disclosures.
63 days before trial	Exchange rebuttal deposition designations. For rebuttal designations, cross-examination line and page numbers must be included.
70 days before trial	Exchange pretrial disclosures (witness list, deposition designations, and exhibit list). Parties must make all disclosures required by Federal Rule of Civil Procedure 26(a)(3)(A)-(B). Any party who proposes to offer deposition testimony shall serve a disclosure identifying the line and page numbers to be offered.
As set by the court **(Tuesday, May 17, 2022)**	**Deadline for all dispositive motions and any other motions that may require a hearing (including *Daubert* motions).** Motions shall comply with Local Rule CV-56 and Local Rule CV-7. Motions to extend page limits will be granted only in exceptional circumstances.

205 days before trial or as requested by parties **(Tuesday, April 5, 2022)**	Discovery deadline All discovery—including expert discovery—shall be completed by this date. The parties may agree to extend this discovery deadline, provided that (1) the extension **does not affect** the trial setting, dispositive-motions deadline, challenges to experts deadline, or pretrial submission dates; and (2) the parties jointly file with the court written notice of the extension.
175 days after this scheduling order issues	Mediation deadline Within **seven days** after the mediation, the parties shall **jointly prepare and file a written report**, which shall be signed by counsel for each party, detailing the date on which the mediation was held, the persons present (including the capacity of any representative), and the outcome of the mediation.
30 days after any Rule 26(a)(2) disclosure	Parties may provide further expert disclosure of expert testimony or evidence intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) within 30 days of the disclosure contradicted or rebutted.
145 days after this scheduling order issues	Party without the burden of proof on an issue shall file a written designation of the name and address of each **expert witness**, if any, who will testify at trial for that party and shall otherwise comply with Federal Rule of Civil Procedure 26(a)(2) and Local Rule CV-26(b).
117 days after this scheduling order issues	Party with the burden of proof on an issue shall file a written designation of the name and address of each **expert witness**, if any, who will testify at trial for that party and shall otherwise comply with Federal Rule of Civil Procedure 26(a)(2) and Local Rule CV-26(b).

61 days after this scheduling order issues	Deadline for (1) motions for leave to join parties and (2) motions for leave to amend pleadings. This deadline does not modify the requirements of the Federal Rules of Civil Procedure regarding leave of court to amend pleadings and court action to join parties. See, e.g., Fed. R. Civ. P. 15(a), 21. Parties may petition the court to modify this deadline for good cause.
21 days after this scheduling order issues	File notice of mediator The parties must jointly file a notice that either identifies an agreed-upon mediator (with a proposed order appointing the mediator) or indicates that no agreement was reached. If the parties do not reach an agreement, the court will appoint a mediator. If the parties do agree upon a mediator, the parties must, before filing the notice identifying the agreed-upon mediator, schedule mediation to occur before this order's mediation deadline and state the scheduled mediation date in the notice.

If any of these dates falls on a weekend or court holiday, the deadline is modified to be the next court business day. Also note that all deadlines in this order are for **filing** or **delivery**, **not mailing** dates.

Unless otherwise ordered or specified herein, all limitations and requirements of the Federal Rules of Civil Procedure and the local rules of this court must be observed.

Settlement conference and status report

1. Settlement conference

By the deadline provided above, the parties and their respective lead counsel shall hold a **face-to-face meeting** to discuss **settlement** of this case. Individual parties and their counsel shall participate in person, not by telephone or other remote means. All other parties shall participate by both (1) counsel and (2) a representative or representatives who has settlement authority and who must participate in person, not by telephone or other remote means. If a party has liability-insurance coverage as to any claim made

against that party in this case, a representative of each insurance company providing such coverage, who shall have full authority to offer policy limits in settlement, shall be present at and participate in the meeting in person, not by telephone or other remote means.

2. Joint settlement report

Within **seven days** after the settlement conference, the parties shall **jointly prepare and file a written report**, which shall be signed by counsel for each party, detailing the date on which the meeting was held, the persons present (including the capacity of any representative), a statement regarding whether meaningful progress toward settlement was made, and a statement regarding the prospects of settlement.

Pretrial materials

1. Pretrial report

Plaintiff's counsel shall file the **joint pretrial report**, which must include each matter listed in the final pretrial report that is available on Judge Barker's website and the **estimated length of trial**. If counsel for any party does not participate in the preparation of the joint pretrial report, opposing counsel shall submit a separate pretrial report with an explanation of why a joint order was not submitted (so that the court can impose sanctions, if appropriate). Each party may present its version of any disputed matter in the joint pretrial report; therefore, failure to agree upon content or language **is not an excuse for submitting separate pretrial reports**. When the joint pretrial report is approved by the court, it will control all subsequent proceedings in this case.

2. Witness list

Each party shall file a **witness list** using the template available on Judge Barker's website.

If any witness needs an interpreter, please so note on the witness list. It is the obligation of the party offering such a witness to arrange for an interpreter to be present at trial.

3. Exhibit list

Each party shall file a **list of exhibits, whether tangible or electronic,** to be offered at trial using the template available on Judge Barker's website. The list of exhibits shall describe with specificity the documents or things in numbered sequence. The documents

or things to be offered as exhibits shall be numbered by attachment of physical or digital exhibit stickers to correspond with the sequence on the exhibit list and identify the party submitting the exhibit. This is a modification of Local Rule CV-79(a). Do not use letter suffixes to identify exhibits (e.g., designate them as Plaintiff's Exhibit 1, 2, and 3, not as 1A, 1B, and 1C).

Each party's **exhibit list** shall be accompanied by a written statement, signed by counsel for each party and state that, as to each exhibit shown on the list,

(i) the parties agree to the admissibility of the exhibit; or

(ii) the admissibility of the exhibit is objected to, identifying the nature and legal basis of any objection to admissibility and the party or parties urging the objection.

All parties shall cooperate in causing such statements to be prepared in a timely manner for filing with the exhibit lists. Counsel for the party proposing to offer an exhibit shall be responsible for coordinating activities related to preparation of such a statement as to the exhibit the party proposes to offer. This includes an obligation to make exhibits available for inspection in advance of the deadline for filing exhibit lists where a party needs to see exhibits to assess admissibility. The court may exclude any exhibit offered at trial unless such a statement regarding the exhibit has been filed in a timely manner. In addition, objections not identified in the statement may be waived. The court expects the parties to confer and agree to admit the majority of their exhibits prior to trial.

4. Deposition-testimony designations

Each party shall file a list of designated deposition testimony that it intends to offer at trial. Each list of deposition designations shall include any rebuttal designations by the opposing party. Each list of deposition designations shall also include a notation of any objections to the designated deposition testimony.

5. Jury charge:

The parties shall submit proposed jury instructions (annotated) and a proposed verdict form as set forth below. *Annotated* means that each proposed instruction shall be accompanied by citation to pertinent statutes, case law, or pattern instructions. It is not sufficient to submit a proposed instruction without citation to supporting authority.

(i) Counsel for plaintiff shall deliver to counsel for defendant by **[60 days before trial]** a copy of its proposed charge and verdict form.

(ii) Counsel for defendant shall deliver to counsel for plaintiff by **[55 days before trial]**: (1) a statement, prepared with specificity, of any objection to any portion of plaintiff's proposed charge and verdict form and (2) the text of all additional or modified instructions or portions of the verdict form that defendant proposes. Each objection and each such request shall be accompanied by citations of authorities supporting defendant's objection or request.

(iii) At a mutually agreed time on or before **[50 days before trial]** the lead attorneys for the parties shall meet face-to-face at either (1) a mutually agreeable place or (2) the office of counsel located closest to Tyler, Texas. At the meeting, the parties shall (1) discuss and try to resolve differences between the parties as to language to be included in the charge to the jury and (2) identify areas of disagreement that cannot be resolved. The meeting shall last long enough for the parties to meaningfully discuss all areas of disagreement and meaningfully try to reach agreement. Each attorney shall cooperate fully in all matters related to such a meeting.

(iv) On or before **[45 days before trial]**, counsel for plaintiff shall file a single document titled "Proposed Charge," which shall contain, in logical sequence, all agreed-to charge language plus each party's proposed charge language as to which agreement could not be reached. All disputed language of the proposed charge shall be (1) in bold face, (2) preceded by the name of the party proposing the language, and (3) followed by citation of authorities in favor of and in opposition to the language. Objections not stated in the Proposed Charge may be waived.

6. Voir dire

The parties shall file any **proposed voir dire questions** for the court to ask during its examination of the jury panel as an attachment to the pretrial report. The filing should note whether each question is agreed to by both parties or which party proposes the question.

7. Trial briefs

Trial briefs may be filed by each party by the deadline for the pretrial report. In the absence of a specific order of the court, trial briefs are not required but are welcomed. The briefing should discuss any applicable Supreme Court, federal court of appeals, or state-court authority in addressing the issues expected to arise at trial.

Modification of scheduling order

As addressed above, this order shall control the disposition of this case unless it is modified by the court upon a showing of **good cause** and by leave of court. Fed. R. Civ. P. 16(b)(4). Any request that the trial date be modified must be made **in writing** to the Court, **before** the deadline for completion of discovery.

Discovery disputes

A magistrate judge is available during business hours to immediately hear discovery disputes and to enforce provisions of the rules. The hotline is the best means to obtain an immediate ruling on whether a discovery request is relevant to any claims or defenses and on disputes arising during depositions. The hotline number is (903) 590-1198. *See* Local Rule CV-26(e).

Before filing a motion to compel, a motion to quash, or a motion for protection from discovery, lead counsel must confer in good faith about the dispute. If an agreement cannot be reached and counsel believe that the dispute may be quickly resolved with a call to the hotline, then counsel should call the hotline. If the dispute is not resolved by conferring in good faith or by the magistrate judge via the hotline, then a party may file an appropriate motion. Any such motion should include a certification by counsel describing the steps taken to comply with this paragraph, including whether the parties called the hotline or why they believed that the hotline was not appropriate to resolve the dispute.

Electronic discovery

In cases involving disputes over extensive electronic discovery, counsel for both sides shall review the court's *[Model] Order Regarding E-Discovery* before contacting the hotline or filing motions to compel or to quash. Access it on the court's website under Standard Forms.

The order can be modified for use in any case in which electronic discovery is an issue, and any ruling of the court on conduct of electronic discovery may be based, at least in part, on that model order.

Resources

The Eastern District of Texas website (www.txed.uscourts.gov) has information about mandatory electronic filing, Local Rules, telephone numbers, general orders, frequently requested cases, and the Eastern District fee schedule.

Compliance

A party is not excused from the requirements of this scheduling order by virtue of the fact that dispositive motions are pending, the party has not completed its investigation, the party challenges the sufficiency of the opposing party's disclosure, or because another party has failed to comply with this order or the rules.

Failure to comply with relevant provisions of the Local Rules, the Federal Rules of Civil Procedure, or this order may result in the exclusion of evidence at trial, the imposition of sanctions, or both. If a fellow member of the bar makes a just request for cooperation or seeks scheduling accommodation, a lawyer will not arbitrarily or unreasonably withhold consent. However, the court is not bound to accept agreements of counsel to extend deadlines imposed by rule or court order. *See* Local Rule AT-3(j).

Inquiries

Questions relating to this scheduling order or legal matters should be presented in a motion, as appropriate. For questions regarding electronic notice or electronic case files, please see the ECF FAQs on the Eastern District of Texas website.

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

THE STATE OF TEXAS; TEXAS HEALTH AND HUMAN SERVICES COMMISSION	§	
Plaintiffs,	§	
v.	§	**CIVIL ACTION NO. 6:21-CV-191**
CHIQUITA BROOKS-LASURE, in her official capacity as Administrator of the Centers for Medicare & Medicaid Services, et al.	§	
Defendants.	§	

[PROPOSED] SCHEDULING ORDER

Pursuant to Federal Rule of Civil Procedure 16(b) and the Eastern District of Texas Local Rules (except as modified herein), the court **orders** that the following schedule governs the disposition of this case:

Deadline for Filing of Defendants Answer to Plaintiffs' First Amended Complaint	Monday September 13, 2021
Filing of the Certified Administrative Record	Friday September 24, 2021
Deadline for Motions for leave to add parties and Motions for leave to amend pleadings	Monday November 1, 2021
Deadline for parties to meet and confer regarding administrative record disputes and for Plaintiffs to file their Motion (if any) to supplement the record or seek extra-record discovery	Monday November 1, 2021
Deadline for filing of Plaintiffs' Motion for Summary Judgment	30 days from the end of the meet and confer period or from the date of decision of any

	motion filed
Deadline for filing of Defendants' Opposition to Motion for Summary Judgment and Cross-Motion for Summary Judgment	30 days from the filing of Plaintiffs' Motion for Summary Judgment
Deadline for filing of Plaintiffs' Opposition to Defendant's Cross-Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment	21 days from the filing of Defendants' Opposition and Cross-Motion for Summary Judgment
Deadline for filing of Defendants' Reply in Support of Cross-Motion for summary Judgment	21 days from the filing of Plaintiffs' Opposition and Reply

Because the claims in this case can be resolved on cross-motions for summary judgment, no trial-related deadlines are needed.

If any of these dates falls on a weekend or court holiday, the deadline is modified to be the next court business day. Also note that all deadlines in this order are for **filing** or **delivery**, **not mailing** dates.

Unless otherwise ordered or specified herein, all limitations and requirements of the Federal Rules of Civil Procedure and the local rules of this court must be observed.

Settlement conference and status report

1. Settlement conference

By the deadline provided above, the parties and their respective lead counsel shall hold a **face-to-face meeting** to discuss **settlement** of this case. Individual parties and their counsel shall participate in person, not by telephone or other remote means. All other parties shall participate by both (1) counsel and (2) a representative or representatives who has settlement authority and who must participate in person, not by telephone or other remote means. If a party has liability-insurance coverage as to any claim made against that party in this case, a representative of each insurance company providing such coverage, who shall have full authority to offer policy limits in settlement, shall be present at and participate in the meeting in person, not by telephone or other remote means.

2. Joint settlement report

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A magistrate judge is available during business hours to immediately hear discovery disputes and to enforce provisions of the rules. The hotline is the best means to obtain an immediate ruling on whether a discovery request is relevant to any claims or defenses and on disputes arising during depositions. The hotline number is (903) 590-1198. *See* Local Rule CV-26(e).

Before filing a motion to compel, a motion to quash, or a motion for protection from discovery, lead counsel must confer in good faith about the dispute. If an agreement cannot be reached and counsel believe that the dispute may be quickly resolved with a call to the hotline, then counsel should call the hotline. If the dispute is not resolved by conferring in good faith or by the magistrate judge via the hotline, then a party may file an appropriate motion. Any such motion should include a certification by counsel describing the steps taken to comply with this paragraph, including whether the parties called the hotline or why they believed that the hotline was not appropriate to resolve the dispute.

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Failure to comply with relevant provisions of the Local Rules, the Federal Rules of Civil Procedure, or this order may result in the exclusion of evidence at trial, the imposition of sanctions, or both. If a fellow member of the bar makes a just request for cooperation or seeks scheduling accommodation, a lawyer will not arbitrarily or unreasonably withhold consent. However, the court is not bound to accept agreements of counsel to extend deadlines imposed by rule or court order. *See* Local Rule AT-3(j).

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