

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL ASSOCIATION OF CHAIN)	
DRUG STORES <i>et al.</i>)	
)	
Plaintiffs,)	
)	Civil Action No. 1:07cv02017 (RCL)
v.)	
)	
MICHAEL O. LEAVITT, SECRETARY OF)	
HEALTH AND HUMAN SERVICES <i>et al.</i> ,)	
)	
Defendants.)	

**DEFENDANTS’ EMERGENCY MOTION TO EXTEND
BRIEFING AND HEARING SCHEDULE REGARDING
PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to Local Rule 7, for good cause shown, Defendants file this Motion to Extend Briefing and Hearing Schedule Regarding Plaintiffs’ Motion for Preliminary Injunction. In support of this Motion, Defendants state as follows:

Defendants filed their opposition to Plaintiffs’ Motion for Preliminary Injunction on December 6, 2007. Defendants learned today, however, that one of the factual assertions which affects a portion of Defendants’ jurisdictional and “irreparable harm” arguments is not correct. Defendants must correct the erroneous factual representation they have made to this Court, as well as those legal arguments that rely in whole or in part on that representation.

Although the erroneous factual representation affects portions of Defendants’ jurisdictional and irreparable harm arguments, it is Defendants’ view that even taking the correct facts into account, this Court nonetheless lacks subject matter jurisdiction and Plaintiffs have failed to demonstrate irreparable harm. Because the portions affected are not easily extricated from those not affected, Defendants believe the clearest and most efficient way to rectify this error is to file an amended brief rather than attempt to explain in a supplemental filing how the

facts as they now understand them affects Defendants' jurisdictional and irreparable harm arguments. Importantly, Defendants do not seek to add any arguments but only to clarify their existing arguments so Plaintiffs and this Court clearly understand them.

Defendants therefore intend to file an amended opposition brief by Monday, December 10, 2007. Plaintiffs' reply is currently due, however, on Tuesday, December 11. Defendants have no objection to allowing Plaintiffs until Monday, December 17, to file their reply (which would give them a total of seven days to reply instead of the five they are allotted under the existing schedule). This would require that the hearing on Plaintiffs' motion be moved forward to Wednesday, December 19, or Thursday, December 20, as the Court's calendar permits. Defense counsel understands that Plaintiffs' counsel are available for a hearing on either of those days.

Plaintiffs will not be prejudiced by this extension. Plaintiffs' purported need for an expedited hearing was CMS's stated intent to publish "AMP" data calculated by manufacturers pursuant to the challenged rule in "mid-December." CMS had previously clarified that it would not publish any data before Monday, December 17, and this Court therefore set the hearing on Plaintiffs' motion for Friday, December 14. *See* Defs.' Consent Mot. to Modify Briefing Sched. for Pls.' Mot. for Prelim. Inj. & Req. for Expedited Hr'g (Nov. 20, 2007); *see also* Order (Nov. 21, 2007).

Defense counsel has recently learned, however, that CMS will not be prepared to publish any AMP data until at least December 21, and Defendants hereby commit to the Court that no publication will, in fact, occur before December 21. Because the publication date has been delayed, rescheduling the hearing for December 19 or December 20 will not prejudice Plaintiffs and will, in fact, put them in a better position by extending their time to respond to Defendants'

opposition brief, most of which will remain unchanged. Importantly, this extension will enable Plaintiffs to respond to, and this Court to consider, the correct facts and arguments rather than a factual mistake and arguments related thereto.

Defendants have consulted with Plaintiffs with respect to this motion. Plaintiffs object to this extension and to the filing of a corrected brief. Plaintiffs have represented that, instead of extending the briefing schedule, Defendants should be required to withdraw their jurisdictional arguments entirely, even those that do not depend on the factual error.

For the reasons stated above, Defendants respectfully request that this Court grant their motion to extend the briefing and hearing schedule on Plaintiffs' motion for preliminary relief.

Respectfully submitted,

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Counsel for Defendants

Dated: December 7, 2007

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2007, a copy of the foregoing pleading, together with proposed order, was filed electronically via the Court's ECF system, through which a notice of the filing will be sent to:

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and was sent by electronic mail to:

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s/ Wendy M. Ertmer

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