

**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’ MOTION FOR LEAVE TO AMEND THEIR OPPOSITION TO  
PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION  
AND REQUEST FOR EXPEDITED HEARING**

As Defendants informed this Court late last week, Defendants have become aware of a factual error affecting their jurisdictional and “irreparable harm” arguments presented in opposition to Plaintiffs’ motion for preliminary relief. Defendants respectfully ask this Court to grant Defendants’ motion for leave to file the amended opposition brief attached hereto.

On Friday, December 7, 2007, after Defendants filed their opposition to Plaintiffs’ motion for preliminary relief, Plaintiffs’ counsel called defense counsel to question statements in the government’s brief concerning the effect of the new FULs on state Medicaid payment rates for multiple source drugs. After consulting with CMS, CMS informed defense counsel that despite the agency’s prior statements, it was in fact not the case that before any state could reduce payments in response to the new FULs, the state would be required to submit to the Secretary for approval a State Plan amendment altering the states’ payment methodology. This fact substantially alters Defendants’ jurisdictional arguments, which were premised in large part on the lack of demonstrated injury Plaintiffs would suffer upon CMS’s implementation of the new AMP-based FULs. The statements Plaintiffs cited on pages 4 to 5 of their

Opposition to Defendants' Emergency Motion to Extend Briefing and Hearing Schedule were premised on this factual error.

Defendants immediately advised Plaintiffs that they would correct the error, but Defendants were not prepared on Friday to file an amended pleading because they were particularly concerned with ensuring that a corrected brief would contain no factual errors. Although Defendants still believed they had valid jurisdictional arguments, they had not yet determined the precise extent to which the factual errors affected those arguments. Upon further consideration, Defendants have decided that the best course is to withdraw their jurisdictional arguments in Sections II.A. and II.B. for the limited purpose of Plaintiffs' motion for preliminary relief. Defendants expressly reserve the right to raise, in a subsequent dispositive motion, the jurisdictional arguments that are not affected by this factual error; however, because those arguments will require reformulation and additional investigation by Defendants, and because Plaintiffs will not have an opportunity to respond to them under the existing briefing schedule, Defendants will withdraw them for purposes of Plaintiffs' motion for preliminary injunction, as reflected in the attached amended brief. Defendants have also excised the portions of their opposition brief related to Plaintiffs' alleged irreparable harm that Defendants also believe to be affected by this factual error.

Defendants sincerely regret their error and any additional expenditure of time it may have caused opposing counsel or this Court. They respectfully request that this Court accept the attached brief as their amended opposition to Plaintiffs' request for a preliminary injunction.

Defendants have consulted with Plaintiffs with respect to this motion, and Plaintiffs do not consent to the filing of an amended brief.

Respectfully submitted,

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*Counsel for Defendants*

Dated: December 10, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that on December 10, 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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s/ Wendy M. Ertmer  
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WENDY M. ERTMER