IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN HOSPITAL ASSOCIATION, *et al.*, Plaintiffs, v. SYLVIA MATHEWS BURWELL, Defendant.	Civil Action No. 14-CV-851-JEB

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION

Plaintiffs oppose Defendant's motion for reconsideration of this Court's December 5 opinion and order. *See* Def.'s Mot. for Recons. (Dec. 15, 2016), ECF No. 49.

This Court has discretion to grant a Rule 59(e) motion if it finds that there is: "(1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice." *Lance v. United Mine Workers of Am. 1974 Pension Trust*, 400 F. Supp. 2d 29, 31 (D.D.C. 2005). But "Rule 59(e) motions are not granted if the court suspects the losing party is using the motion as an instrumentality of arguing the same theory or asserting new arguments that could have been raised prior to final judgment." *Piper v. U.S. Dep't of Justice*, 312 F. Supp. 2d 17, 21 (D.D.C. 2004). This motion falls in the latter camp. It rehashes the same meritless argument rather than identifying a change in the law or an overlooked error.

The Secretary's sole assertion is that compliance with the Medicare statute's deadlines—after four years of implementation time, *see* Mem. Op. 6 (Dec. 5, 2016), ECF No. 48—would interfere with "her statutory obligation to protect the Medicare Trust Funds." Mot. 1. If the argument looks familiar, it should. The Secretary made the same point in seeking summary

judgment. *See* Def.'s Mot. for Summ. J. & Opp'n to Pls.' Mot. for Summ. J. 12, 22 (Nov. 7, 2016), ECF No. 41. She said it again in her reply. *See* Def.'s Reply in Supp. of Mot. for Summ. J. 2-3 (Nov. 23, 2016), ECF No. 45-1. And she freely admits as much: She claims that "[i]t is impossible for the Secretary to comply with both mandates, as she explained in her prior briefing." Mot. 2. Because this motion argues the same theory once more, it should be denied. *See Piper*, 312 F. Supp. 2d at 21.

On the merits, the three cases that the Secretary cites do not undermine this Court's December 5 order. *See* Mot. 3. First, as Plaintiffs have already explained, the Supreme Court's decision in *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014), is irrelevant here. *See* Pls.' Reply in Supp. of Mot. for Summ. J. 3 (Nov. 15, 2016), ECF No. 43. Second, the D.C. Circuit has already held that *In re Barr Labs., Inc.*, 930 F.2d 72 (D.C. Cir. 1991), does not preclude the relief that this Court ordered. *See Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 192 (D.C. Cir. 2016). Third, the Secretary never fully embraced the impossibility principle of *Alabama Power Co. v. Costle*, 636 F.2d 323 (1979), until—charitably—her *reply* in support of her motion for summary judgment, after three prior rounds of briefing. An agency in even the best of circumstances "b[ears] a heavy burden to demonstrate the existence of an impossibility." *Id.* at 359. The Secretary cannot carry that burden now, in the Rule 59(e) context, by re-warming an argument she has only hinted at in a previous reply. *See Kattan by Thomas v. D.C.*, 995 F.2d 274, 276 (D.C. Cir. 1993) (noting that "this Court has recognized that a losing party may not use a Rule 59 motion to raise new issues that could have been raised previously").

In any event, impossibility is inapt here. *Alabama Power* recognized that agencies might adopt "streamlined agency approaches or procedures where the conventional course, typically case-by-case determinations, would, as a practical matter, prevent the agency from carrying out

the mission assigned to it by Congress." 636 F.2d at 358. In other words, the principle allows agencies to accomplish more, not justify doing less. And where, as here, an agency backlog is a function of the Secretary's own "policy position[s]," "[n]othing in the statute authorizes the Secretary to adopt a position of impossibility." *Ganem v. Heckler*, 746 F.2d 844, 854 (D.C. Cir. 1984).

Moreover, the Secretary's protests of impossibility are implausible on their face. The Secretary cannot, for example, decry settlement as an abdication of her statutory duties (because, hyperbolically, she must "settle claims without regard to their merit," Mot. 2), when she has elsewhere touted her successful efforts to settle groups of cases, *see, e.g.*, Def.'s Mot. for Summ. J. 2-3. Nor can she deem impossible any court-ordered schedule for compliance without offering her own assessment of what timetable *would* be possible. *See* Mem. Op. 6 (noting that "the Secretary does not otherwise dispute the specific dates and reduction percentages"). She made the choice to throw up her hands, and the Court properly concluded that the statute does not allow such defeatism. There is no reason to revisit that decision.

The Court should deny the Secretary's motion.

Respectfully submitted,

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Dated: December 21, 2016

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system.

/s/ Catherine E. Stetson
Catherine E. Stetson

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[PROPOSED] ORDER

Upon consideration of Defendant's Motion for Reconsideration and Plaintiffs' Opposition thereto, it is hereby

ORDERED that the motion is DENIED.

Entered this ____ day of _____, 201_.

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The Honorable James E. Boasberg
United States District Judge