IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PALOMAR MEDICAL CENTER
2185 Citracado Parkway
Escondido, CA 92029

PROVIDENCE HOLY CROSS MEDICAL CENTER
15031 Rinaldi Street
Mission Hills, CA 91345

PROVIDENCE SAINT JOSEPH MEDICAL CENTER
501 South Buena Vista Street
Burbank, CA 91505

PROVIDENCE LITTLE COMPANY OF MARY MEDICAL CENTER
4101 Torrance Boulevard
Torrance, CA 90503

CPMC MISSION BERNAL CAMPUS
3555 Cesar Chavez Street
San Francisco, CA 94110

SUTTER MEDICAL CENTER OF SANTA ROSA
30 Mark West Springs Road
Santa Rosa, CA 95403

KUAKINI MEDICAL CENTER
347 North Kuakini Street
Honolulu, HI 96817

ADVENTIST HEALTH SIMI VALLEY HOSPITAL
2975 North Sycamore Drive
Simi Valley, CA 93065

SOUTH SHORE UNIVERSITY HOSPITAL
301 East Main Street
Bay Shore, NY 11706

THE UNIVERSITY OF CHICAGO MEDICAL CENTER
5841 South Maryland Avenue
Chicago, IL 60637

Case No.

SSM HEALTH SAINT ANTHONY HOSPITAL
1000 North Lee
Oklahoma City, OK 73102,

Plaintiffs,

v.

XAVIER BECERRA, SECRETARY,
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES
200 Independence Avenue, S.W.
Washington, D.C. 20201,

Defendant.

COMPLAINT FOR JUDICIAL REVIEW AND DECLARATORY AND INJUCTIVE RELIEF UNDER THE MEDICARE ACT

NATUIRE OF ACTION

1. Plaintiffs Palomar Medical Center et al. (the "Hospitals"), by and through the undersigned legal counsel, challenge the Secretary of Health and Human Services' (the "Secretary") computation of the Medicare disproportionate share hospital ("DSH") adjustment relating to inpatients enrolled in a Medicare Advantage plan under Part C of the Medicare Act (sometimes referred to here as the "DSH Part C Policy"). The Hospitals filed jurisdictionally proper appeals challenging the DSH Part C Policy with the Provider Reimbursement Review Board ("Board" or "PRRB") fully in compliance with the governing statute, 42 U.S.C. § 1395oo(a). The Secretary seeks to thwart this appeal. First, the Secretary persists in applying the DSH Part C Policy although the Court of Appeals and the Supreme Court have invalidated it. Second, through unauthorized administrative action based on a mere proposed rule the Secretary deprives the Hospitals of the statutory appeal rights to which they are entitled The Court should find this

action prototypically "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A).

2. At issue is Medicare payment for fiscal years ended 12/31/1999 for all but one of the Hospitals (SSM Saint Anthony Hospital which appeals its fiscal year ended 12/31/2006)). The Hospitals' challenge to the DSH Part C Policy is definitively supported by decisions of the Court of Appeals and the Supreme Court. Specifically, in *Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1, 16–17 (D.C. Cir. 2011) the Secretary attempted to apply its DSH Part C Policy through a retroactive rule change for cost years prior to the October 1, 2004 effective date of the rule. The Court of Appeals found that the retroactive application to periods prior to October 1, 2004 violated the Supreme Court's longstanding decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). 657 F.3d at 16. The Court held that "the Secretary's present interpretation, which marks a substantive departure from his prior practice of excluding [Part C] days from the Medicare fraction, may not be retroactively applied" to the fiscal years at issue. *Id.* at 17.[1] *See also Allina Health Services v. Sebelius*, 746 F.3d 1102, 1105 (D.C. Cir. 2014) ("*Allina I*") (vacating 2004 rule as not a logical outgrowth of proposed rule); *Allina Health Servs. v. Price*, 863 F.3d 937, 943–44 (D.C. Cir. 2017) ("*Allina II*") (agency required to conduct notice-and-comment rulemaking before the policy of the 2004 vacated rule can take effect); *Azar v. Allina Health Servs.*, 139 S. Ct. 1804 (2019) (affirming *Allina II*).

[1] TDL-1239, which was issued following the *Northeast Hosp. Corp.* decision, instructed contractors to "include any disallowed patient days attributable to patients who were enrolled in a Medicare Part C Plan and also eligible for Medicaid for discharges occurring on or after January 1, 1999 through September 30, 2004 in the Medicaid fraction" of the DSH calculation. This instruction applies to the Hospitals' properly filed appeals. *Id.* at 1–2.

3. Apparently undaunted by these judicial decisions, the Secretary, through the Centers for Medicare & Medicaid Services ("CMS") continues to apply the DSH Part C Policy adopted in the now-vacated 2004 rule. The Court should find that the application of the DSH Part C Policy unlawful because it is procedurally invalid, as the Court of Appeals has now twice ruled (and as the Supreme Court has affirmed), fails any test of reasoned decision-making, and is inconsistent with congressional intent in adopting the Medicare DSH statute.

4. As part of its apparent "denial" of the *Allina I* and *Allina II*, on August 6, 2020 CMS published in the Federal Register a notice of proposed rulemaking announcing a proposal to adopt retroactively for periods prior to October 1, 2013 (and even prior to the vacated 2004 rule) the same DSH Part C Policy previously vacated in *Allina I* and *Allina II*. 85 Fed. Reg. 47,723 (the "Proposed Rule"). (Exhibit 3) The Proposed Rule posits that, due to the vacatur of the 2004 rule, the agency has no rule governing the treatment of Part C days and must, under the Supreme Court decision in *Allina II* requiring notice-and-comment rulemaking, engage in retroactive rulemaking. *Id.* at 47,724. The Proposed Rule erroneously relies on two bases for its use of retroactivity: (1) that retroactive rulemaking is necessary to comply with the statutory requirement to calculate Medicare DSH payments, and (2) that retroactive rulemaking is in the "public interest" because, absent retroactive rulemaking, the agency "would be unable to calculate and confirm proper DSH payments for the time periods before FY 2014 . . . ." *Id.* Remarkably, CMS states in the preamble to the Proposed Rule "[w]e do not expect this proposal to have an effect on payments as payments previously made reflect the proposed policy." *Id.* at 47726.

5. On August 17, 2020 CMS then issued CMS Ruling 1739-R (the "Ruling") (Exhibit 4), purporting to deprive the PRRB of jurisdiction over any pending jurisdictionally proper administrative appeals "regarding the treatment of patient days associated with patients enrolled

in [Part C] Medicare Advantage plans in the Medicare and Medicaid fractions of the disproportionate patient percentage" so that contractors can apply the result of the retroactive rulemaking to those pending appeals once the new rule is in place. Ruling at 1-2. The purported authority for the Ruling is merely the Proposed Rule. The Ruling addresses appeals of the "Part C day DSH issue" for periods prior to October 1, 2013, including for periods prior to the enactment of the 2004 rule. *Id.* at 7–8. The Ruling, which is "binding" and affects hospitals' substantive Medicare payment and appeal rights, was not adopted through notice-and-comment rulemaking. *See id.* at 1; *see also* 42 C.F.R. § 405.1867 (requiring the Board to comply with CMS rulings); *id.* § 401.108 (defining CMS ruling and explaining they are binding on agency adjudicators).

6. Before taking any action on an appeal of the DSH Part C Policy, the Ruling requires the Board to determine whether an appeal "satisfies the applicable jurisdictional and procedural requirements of section 1878 of the [Medicare] Act, the Medicare regulations, and other agency rules and guidance." Ruling at 7. The Ruling generally provides for remand of jurisdictionally proper appeals of the "Part C day DSH issue" pending at the Board back to the contractors that issued the payment determinations under appeal. *Id.* at 2, 7-8. Despite depriving the Hospitals of the relief to which they are entitled, although the Proposed Rule has not been finalized, and while CMS concedes that the Proposed Rule has no payment effect, the Ruling claims the Proposed Rule "eliminates any actual case or controversy regarding the hospital's previously calculated SSI and Medicaid fractions and its DSH payment adjustment and thereby renders moot each properly pending claim in a DSH appeal involving the issue resolved by the Supreme Court in *Allina* . . . ." *Id.* at 8.

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