IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE AMERICAN HOSPITAL ASSOCIATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:18-cv-02084-RC
ALEX M. AZAR II, in his official capacity as Secretary of Health and Human Services, *et al.*,	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION AND ENTRY OF FINAL JUDGMENT

Defendants filed a motion asking the Court to relinquish jurisdiction and enter final judgment so as to permit the U.S. Department of Health and Human Services ("HHS") to pursue expedited appeal of the Court's remand order, as authorized by the Solicitor General. ECF No. 54. Such an appeal potentially could result in a decision from the D.C. Circuit before HHS needs to finalize the 2020 OPPS Rule. Absent a decision from the D.C. Circuit in the fall, this litigation will likely grow to include the 2020 Rule.

Plaintiffs too would like a quick decision from D.C. Circuit. Pls.' Resp., June 7, 2019, ECF No. 56. Yet they oppose Defendants' motion. Plaintiffs' scattershot arguments fall into three categories: 1) Defendants should have filed the motion for final judgment earlier, *id.* at 1-2; 2) "there is still time [to] follow the Court's schedule regarding the remedy and obtain a ruling from the Court of Appeals in time for the 2020 rule," *id.* at 2-3; and 3) the Court properly retained jurisdiction and can review—and reject—proposed administrative actions, *id.* at 3-4. These arguments fail, as explained below. But even if they did not, they would merely support the conclusion that the Court *could* retain jurisdiction—not that it must or *should.* To the extent

Plaintiffs have doubts about the existence of appellate jurisdiction, there is no question that the Court of Appeals has jurisdiction to hear Defendants' appeal now. *Occidental Petroleum Corp. v. S.E.C.*, 873 F.2d 325, 331–32 (D.C. Cir. 1989).

Defendants did not wait too long to request final judgment. They filed the motion less than a month after the Court issued its order on remedy on May 6, 2019, ECF No. 49. Plaintiffs cannot reasonably argue that this time period is excessive. Instead, they reframe the analysis, suggesting that Defendants should have moved for the entry of final judgment after the Court issued its December 27, 2018 order, ECF No. 24: "If Defendants were correct that a court's inquiry ends when the court determines that the agency made an error of law (ECF No. 54 at 2, citing *Palisades Gen. Hosp. v. Leavitt*, 426 F.3d 400, 403 (D.C. Cir. 2005)), a request for entry of final judgment was appropriate in December 2018 or January 2019." Pls.' Resp. at 3. But Defendants, of course, do not deny that the Court has the authority to remand the matter to the agency, upon its finding of an error in the agency's rule. Indeed, *Palisades General Hospital* indicates as much: "[W]hen a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case *must be remanded* to the agency for further action consistent with the correct legal standards." *Palisades Gen. Hosp. Inc.*, 426 F.3d at 403 (emphasis added). Moreover, the government could not represent to this Court that it intended to seek an appeal until appeal was authorized by the Solicitor General, which did not occur until recently. There was no undue delay.

Plaintiffs' argument that there is still time to "follow the Court's schedule regarding the remedy" similarly falls flat. *See* Pls.' Resp. at 2-3. The Court appropriately has not set out a rigid timeline for the Agency to determine the appropriate remedy which, in light of the budget-neutrality requirement, must be developed, at least in part, through notice-and-comment rulemaking. *Palisades Gen. Hosp. Inc.*, 426 F.3d at 403; *County of Los Angeles v. Shalala*, 192

F.3d 1005, 1011 (D.C. Cir. 1999).[1] The Court did, however, direct defendants to file a status report by August 5, 2019 to apprise the Court of the "agency's progress on remand to remedy the issues raised in this litigation concerning the 2018 and 2019 OPPS Rules." ECF No. 49. Retaining jurisdiction at this juncture, much less through August 5, 2019, would make it highly unlikely that the D.C. Circuit would issue a decision before the 2020 OPPS rule needs to be finalized.

Finally, Plaintiffs argue that the Court appropriately retained jurisdiction and can review—and reject—proposed agency rules. Pls.' Resp. at 3-4. They insist that the Court properly retained jurisdiction because this is a case involving "'unreasonable delay of agency action or failure to comply with a statutory deadline or for cases involving a history of agency noncompliance with court orders or resistance to fulfillment of legal duties.'" *Id.* (quoting *Baystate Med. Ctr. v. Leavitt*, 587 F. Supp. 2d 37, 41 (D.D.C.), judgment entered, 587 F. Supp. 2d 44 (D.D.C. 2008)). As support for this proposition, Plaintiffs note that it has been more than five months since the Court identified an error in the 2018 OPPS Rule. Pls.' Resp. at 3.

But as noted above, it has been less than a month since the Court issued its remedial order, ECF No. 49, and the suggestion that the Agency was required to institute a remedy before the Court even issued its remedial order refutes itself. Moreover, as an example of the kind of agency delay and recalcitrance that justifies the retention of jurisdiction, the *Baystate Medical Center* decision cites *Cobell v. Norton*, 240 F.3d 1081, 1089-90, 1109 (D.C. Cir. 2001), a case in which the D.C. Circuit concluded that the U.S. Department of Interior had knowingly neglected its trust responsibilities to Native Americans for decades. Unlike *Cobell*, this case clearly does not present the type of protracted agency delay that would warrant retention of jurisdiction.

[1] Because of the budget neutrality requirement, it is difficult to alter an OPPS payment rate once it has been implemented. Accordingly, Defendants plan to seek a stay of this Court's remedial order pending a decision from the D.C. Circuit.

Plaintiffs argue that Defendants' position regarding the retention of jurisdiction is "flatly inconsistent with the position they took in the Court of Appeals less than three months ago, where they stated that the district court 'retains jurisdiction to effectuate the injunction.'" Pls.' Resp. at 2 (quoting Exhibit A to Notice of Defendants' Unopposed Motion to Hold Appeal in Abeyance Pending the District Court's Entry of Final Judgment, ECF No. 47). Not so. Defendants made that statement prior to the Court's issuance of its remedial order remanding the matter. The Court issued its remand order on May 6, and consistent with the D.C. Circuit's decisions in similar circumstances, *Palisades Gen. Hosp. Inc.*, 426 F.3d at 403; *County of Los Angeles v. Shalala*, 192 F.3d at 1011, the Court's task is at an end and it should relinquish jurisdiction now.

At the close of their brief, Plaintiffs reiterate their view that the Court should require Defendants to submit proposed remedies to the Court for its review. They maintain that Defendants "identified no administrative law principle or case that prevents them from proposing the contents of a proposed (as opposed to final) rule or preventing the Court from ruling on the contents of such a proposal." Pls.' Resp. at 4. Yes they did. Defendants demonstrated that the Administrative Procedure Act authorizes Courts to review only final agency action, 5 U.S.C. § 704, and that the court in *Baystate Medical Center* identified this limitation on the court's authority to reject proposed administrative actions at the remedial stage of a case. *Baystate Med. Ctr.*, 587 F. Supp. 2d at 42. Moreover, as Defendants noted in opposition to Plaintiffs' motion for a firm date for the submission of the proposed remedy, the Court cannot obtain jurisdiction to review challenges to a Medicare reimbursement rule until a claimant has satisfied the Medicare statute's presentment requirement, which necessarily post-dates the issuance of a final rule. ECF No. 53 at 6 (citing *American Hospital Association v. Azar*, 895 F.3d 822, 826 (D.C. Cir. 2018)). There is no reason to submit the proposed rule to this Court after its issuance because the proposed rule will

be published in the Federal Register. Nor is there a good reason to direct HHS to provide the Court with an advance copy of the proposed rule before inclusion in the Federal Register (even if the necessary clearance from the Office of Management and Budget could be obtained), because this Court has no veto authority under the APA.

Last week's D.C. Circuit decision in another Medicare preclusion-of-review case underscores the importance of allowing the D.C. Circuit to address the dispositive legal issues without delay. *In DCH Regional Medical Center v. Azar,* __ F.3d __, 2019 WL 2344831, at *5 (D.C. Cir. June 4, 2019), the D.C. Circuit clarified that *ultra vires* review is permitted only when "the statutory preclusion of review is implied rather than express" and "the agency plainly acts in excess of its delegated powers and contrary to a specific prohibition in the statute that is clear and mandatory." *Id*. The Medicare preclusion of review is express, rather than implied, so *DCH Regional* calls into question the premise of this litigation. Moreover, we respectfully submit that the rate adjustment at issue here was not plainly in excess of HHS's delegated powers or contrary to a specific prohibition in the statute that is clear and mandatory—an issue that the D.C. Circuit should be allowed to address expeditiously.

For the reasons stated above and in Defendants' opening motion, the Court should reconsider its May 6 order, relinquish jurisdiction over this matter, and enter a final, appealable judgment.

Date: June 10, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

JEAN LIN
Special Counsel, Federal Programs

s/ Justin M. Sandberg
Justin M. Sandberg (Ill. Bar No. 6278377)
Senior Trial Counsel
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, NW, Room 11004
Washington, DC 20005
Tel.: (202) 514-5838
Fax: (202) 616-8460
Email: justin.sandberg@usdoj.gov

Counsel for Defendants