IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NEW LIFECARE HOSPITALS OF CHESTER COUNTY LLC, *et al.*, Plaintiffs, v. ALEX M. AZAR II, Secretary U.S. Department of Health and Human Services Defendant.	Civil Action No. 19-cv-705 (EGS)

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

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GLOSSARY

BNA	Budget Neutrality Adjustment
CMS	Centers for Medicare & Medicaid Services
HCO	High-Cost Outlier
IPPS	Inpatient Prospective Payment System
LTCH	Long-Term Care Hospital
LTCH PPS	Long-Term Care Hospital Prospective Payment System
MedPAC	Medicare Payment Advisory Commission
MS-DRG	Medicare Severity Diagnosis Related Group
PPS	Prospective Payment System
PRRB	Provider Reimbursement Review Board
PSRA	Pathway for SGR Reform Act of 2013, Pub. L. No. 113-67, Div. B, 127 Stat. 1165 (2013)
SSA	Social Security Act
SSO	Short-Stay Outlier

I. INTRODUCTION

Defendant's cross-motion for summary judgment, Dkt. 22 and 23, continues the Secretary's effort to convince this Court through arbitrary labels and convenient re-characterizations that he does not apply two 5.1% outlier budget neutrality adjustments ("BNAs") to long-term care hospital ("LTCH") site neutral payments, despite many statements admitting that they both apply. Because most of the Secretary's responses to Plaintiffs' motion for summary judgment, Dkt. 21, require that the Court adopt the agency's self-contradictory rationale, the Court should reverse the agency's error by setting aside the duplicative BNA.

II. ARGUMENT

A. The BNA is Duplicative

Plaintiffs' Memorandum clearly explains how the Centers for Medicare & Medicaid Services ("CMS") applies duplicative outlier BNAs to the Long-Term Care Hospital Prospective Payment System ("LTCH PPS") site neutral payment rate. Plaintiffs' Memorandum ("Pls.' Mem.") at 25-29. The duplication occurs when CMS applies *both* the Inpatient Prospective Payment System ("IPPS") outlier BNAs *and* the LTCH PPS site neutral outlier BNA to site neutral payments under the LTCH payment system. In a pure form over function argument, the Secretary claims that "there is no duplication." Defendant's Memorandum ("Def.'s Mem.") at 16. But, throughout Defendant's Memorandum, the Secretary makes a number of statements that admit to the underlying duplication at issue in this case. The Secretary admits that the IPPS payment rates include an outlier BNA. Def.'s Mem. at 7 ("The rates reflect the application of several adjustments . . . including the IPPS BNA for outliers."); *id.* at 17. The Secretary also admits that the IPPS BNA is an "adjustment" to the LTCH site neutral payment rate. Def.'s Mem. at 16 (the IPPS BNA is included in "amounts that Congress directed the Secretary to use when calculating site neutral payments."); *id.* at 20 ("[T]he IPPS BNA is simply one of many

adjustments to certain figures that are later used in the site neutral payment calculation."). The Secretary quotes a portion of the FY 2016 IPPS/LTCH PPS Final Rule where CMS previously admitted that the LTCH site neutral payment rate includes the IPPS outlier BNA: "the IPPS base rates that are used in site neutral payment rate calculation include a budget neutrality adjustment for IPPS [high cost outlier] HCO payments . . . ." FY 2016 IPPS/LTCH PPS Final Rule, 80 Fed. Reg. 49326, 49622 (Aug. 17, 2015) (Rulemaking Record ("R.R.") at 1264). Similarly, the Secretary's Answer admits that the "IPPS payment rates" with the IPPS outlier BNAs are used "to determine the IPPS comparable per diem amount under the LTCH PPS site neutral payment rate . . . ." Answer ¶22. In the FY 2016 IPPS/LTCH PPS Final Rule, CMS decided to apply a second 5.1% outlier BNA under 42 C.F.R. § 412.522(c)(2)(i). 80 Fed. Reg. at 49805 (R.R. at 1447) ("[U]nder § 412.522(c)(2)(i) for FY 2016, we are applying a budget neutrality factor of 0.949 (that is, the decimal equivalent of a 5.1 percent reduction, determined as 1.0–5.1/100 = 0.949)."). This second 5.1% BNA is the cause of the duplication at issue in this case. The Secretary states that CMS applies this second BNA to the LTCH site neutral payment rate. Def.'s Mem. at 22 ("[T]he Secretary determined that CMS must adjust the site neutral payment rate amount itself."). The Secretary specifically acknowledges that the site neutral rate includes both BNAs despite claiming that only one BNA is applied to LTCH site neutral payments. Def.'s Mem. at 26 ("As discussed, CMS applies only one BNA to site neutral payments (and uses inputs to the payment calculation that incorporate *another BNA*, among many other adjustments, as required by statute)." (emphasis added)).

Significantly, the Secretary does *not* argue that the LTCH site neutral payment rate only includes one 5.1% outlier BNA. Of course, such an argument would be contrary to the statements in the rulemaking record. *See e.g.*, 80 Fed. Reg. at 49622 (R.R. at 1264). Instead, the

Secretary argues that the IPPS BNA "does not promote budget neutrality in the LTCH PPS" and "does not in any way account for outlier payments that are made in LTCH PPS." Def.'s Mem. at 19. The Secretary also claims that the IPPS BNA "has no relevance to the LTCH PPS outliers." Def.'s Mem. at 20. The Secretary's arguments ignore the fact that the IPPS outlier BNA actually reduces LTCH site neutral payments by 5.1%. The duplication occurs when CMS applies the second 5.1% BNA to LTCH site neutral payments pursuant to 42 C.F.R. § 412.522(c)(2)(i). This duplication is depicted on Exhibit B to Plaintiffs' Memorandum. Dkt. 21-2. The IPPS comparable payment amount is based on the sum of the adjusted operating IPPS standardized amount and adjusted capital IPPS Federal Rate. Dkt. 21-2 at 2. Both of these figures include a 5.1% outlier BNA. *Id.* (Operating Outlier Factor and Outlier Adjustment Factor). CMS calculates the LTCH site neutral payment rate using the IPPS comparable per diem amount. *Id.* at 1. After determining the per day (per diem) amount, CMS applies *another* 5.1% BNA per 42 C.F.R. § 412.522(c)(2)(i). *Id.* The Medicare Payment Advisory Commission ("MedPAC") agrees that CMS' approach results in duplication: "Given that the IPPS standard payment amount is already adjusted to account for HCO payments, CMS' proposal to reduce the site-neutral portion of the LTCH payment by a budget neutrality adjustment of 0.949 is duplicative and exaggerates the disparity in payment rates across provider settings." R.R. at 1879-80. Plaintiffs' repeatedly explained this duplication in comment letters to the annual proposed rules. *See* R.R. at 1900-04, 2019-2026, 2109-2116, 2328-35, 3427, 3457-60, 3491-95, 3589-96, 5164-68, 5241-48, 5285-89.

The Secretary also acknowledges that CMS set both the IPPS BNA and the LTCH site neutral BNA at 5.1% because of CMS' "projection that costs and resource use for site neutral payment rate cases would mirror similar IPPS cases." Def.'s Mem. at 20 (citing FY 2019 IPPS/LTCH PPS Final Rule, 83 Fed. Reg. 41144, 41736-37 (Aug. 17, 2018) (R.R. at 6003-04)).

The two BNAs have been identical each year since the start of the LTCH site neutral payment rate in FY 2016. In the rulemaking that year, CMS said that the costs and resource use for LTCH site neutral cases "likely mirror the costs and resource use for IPPS cases assigned to the same MS-DRG . . . ." 80 Fed. Reg. at 49618 (R.R. at 1260). CMS also explained that the LTCH site neutral BNA was set at the same 5.1% because "site neutral payment rate cases would have lengths of stay and costs comparable to IPPS cases assigned to the same MS-DRG." *Id.* at 49621 (R.R. at 1263). By assuming that the two sets of patients and payments would mirror each other, CMS should have known that a separate outlier BNA was unnecessary and would be duplicative. The Secretary now attempts to downplay the significance of these identical BNAs by arguing that the BNAs "do not necessarily have to match." Def.'s Mem. at 20. According to the Secretary, this "underscores that [the two BNAs] serve to maintain budget neutrality in two distinct payment systems." Def.'s Mem. at 20. The Secretary's use of a hypothetical to support its erroneous extra BNA is unavailing. The fact is that CMS set both BNAs at an identical 5.1% consistently throughout FY 2016 through 2019 (and proposed for FY 2020). After determining that IPPS cases and LTCH site neutral cases would mirror each other, CMS should have determined that the first 5.1% BNA (included in the IPPS comparable payment amount for LTCH site neutral payments) was sufficient for maintaining budget neutrality in the LTCH PPS.

Although the Secretary repeatedly acknowledges the existence of the duplicative BNAs in the LTCH site neutral payment rate, the Secretary claims that the "IPPS BNA accounts only for outlier payments in [the] IPPS." Def.'s Mem. at 2; *see also* Def.'s Mem. at 22 ("To maintain budget neutrality within LTCH PPS, the Secretary reasonably determined that it is not sufficient to merely rely on adjustments incorporated into certain of the inputs for the calculation of the site neutral payment rate because those adjustments account only for outliers in IPPS hospitals.").

But, as Plaintiffs have already explained, Pls.' Mem. at 26 n.32, when the IPPS outlier BNA is used for LTCH site neutral payments, it cannot possibly account for outliers in IPPS hospitals. It can only account for outliers in LTCHs. And at 5.1%, it is the precise amount needed to offset the additional HCO payments that LTCHs receive for site neutral patients.

Despite the IPPS outlier BNA already included in the site neutral payment rate, CMS claimed that the second BNA was necessary because "'any HCO payment payable to site neutral payment rate cases would increase aggregate LTCH PPS payments above the level of expenditure if there were no HCO payments for site neutral payment rate cases.'" Def.'s Mem. at 9 (quoting 80 Fed. Reg. at 49622). The agency's math is flawed. By reducing LTCH site neutral payments by the 5.1% IPPS outlier BNA, CMS has already offset site neutral payments by the required 5.1% to maintain budget neutrality. Any additional BNA is an arbitrary and unwarranted payment cut.

Citing no authority, the Secretary now argues that "[p]rinciples of budget neutrality do not require CMS to disassemble the inputs to the site neutral payment calculation and treat each component of those inputs as adjustments that are made in the LTCH PPS." Def.'s Mem. at 21. However, Plaintiffs have already explained that CMS does not need to "disassemble the inputs" to reverse the duplication here. *See* Pls.' Mem. at 29-30. The duplication would be eliminated if CMS simply did not apply the additional outlier BNA under 42 C.F.R. § 412.522(c)(2)(i). The Plaintiffs' primary argument has always been that the additional outlier BNA is unnecessary. *See e.g.*, Kindred Healthcare & Select Medical Holdings Corporation, Comment Letter on FY 2019 IPPS/LTCH PPS Proposed Rule at 36 (June 25, 2018) (R.R. at 5242) ("*We strongly disagree* with CMS' proposal to apply an *additional* 5.1% budget neutrality adjustment for site neutral cases that qualify as high-cost outliers.").

Plaintiffs' Memorandum explains that the IPPS outlier BNA that CMS includes in the IPPS comparable per diem amount for LTCH site neutral payments must be accounting for outlier payments to LTCHs or it is meaningless. Pls.' Mem. at 28-30. In his Answer, the Secretary admitted that "the IPPS payment rates are used as inputs to determine the IPPS comparable per diem amount under the LTCH PPS site neutral payment rate . . . ." Answer ¶33. Now, the Secretary claims that the "IPPS BNA is not itself an input to the site neutral calculation." Def.'s Mem. at 22. This distinction is meaningless. Regardless of the label or other explanation the Secretary assigns to the IPPS BNA, the fact remains that this BNA actually reduces the LTCH site neutral payment rate by 5.1%. The Secretary also argues that it is accurate to describe the IPPS standardized amount and Federal rate as inputs. Def.'s Mem. at 22-23. According to the Secretary, Congress decided to include these "inputs" in the LTCH site neutral payment rate calculation. Def.'s Mem. at 23. However, nowhere in the statute cited by the Secretary, 42 U.S.C. § 1395ww(m)(6)(B)(ii), or elsewhere, does Congress actually call these inputs. Moreover, the Secretary does not respond to Plaintiffs' argument that the IPPS outlier BNA must have meaning or it is arbitrary. The IPPS outlier BNA performs a function in the site neutral payment rate to reduce that rate by 5.1% for outlier payments. Duplication occurs when CMS applies the additional LTCH outlier BNA under 42 C.F.R. § 412.522(c)(2)(i). If, however, the IPPS outlier BNA has no purpose in the LTCH site neutral payment calculation, it is purely meaningless and cannot survive review under the APA's arbitrary and capricious standard.

Plaintiffs' Memorandum also describes the origin of the phrase "IPPS comparable per diem amount" as determined under 42 C.F.R. § 412.529(d)(4). Pls.' Mem. at 26-27. CMS bases the IPPS comparable per diem amount for LTCH site neutral cases on the IPPS rate, as directed by Congress in section 1206(a)(1) of the Pathway for SGR Reform Act of 2013 ("PSRA"), Pub.

L. No. 113-67, Div. B, 127 Stat. 1165 (2013). Plaintiffs' Memorandum explains that "it is impossible to see how Congress was aware that the LTCH site neutral payment rate would include multiple BNAs." Pls.' Mem. at 27. The Secretary misstates Plaintiffs' argument, saying Plaintiffs argued "that Congress was not aware that the Secretary would budget neutralize the high cost outlier payments made to site neutral payment cases." Def.'s Mem. at 23. The Secretary says that "Congress surely expected" and "presumably understood" that CMS would budget neutralize outlier payments. Def.'s Mem. at 23. However, Congress did not directly address this issue in the site neutral statute.[1] Accordingly, it is inappropriate to presume that Congress would approve of CMS' decision to include two 5.1% BNAs in the LTCH site neutral payment rate. The Secretary does not cite to the statute or any legislative history to support this "expectation" or "presumption." Instead, the Secretary argues that Congress "was well aware of how CMS had implemented the 'IPPS comparable per diem amount' in the short stay outlier context." Def.'s Mem. at 23. The Secretary claims that the LTCH PPS short stay outlier calculation includes an IPPS BNA. Def.'s Mem. at 23. Again, no authority is cited for this claim regarding the short stay outlier calculation. It is therefore difficult to see how Congress would expect or presume that the LTCH site neutral payment rate would include the outlier BNAs from the IPPS and an additional LTCH outlier BNA. As discussed in Plaintiffs' Memorandum, the guidance implementing the LTCH short-stay outlier policy does not address budget neutrality adjustments. Pls.' Mem. at 26-27 (citing CMS, *Medicare Claims Processing Manual* (CMS Pub. 100-04), Ch. 3 § 150.9.1.1). The Secretary acknowledges this, but responds that "SSO payment rates discussed in that manual are not adjusted to account for high cost outliers" because "budget

[1] The Secretary also claims that Congress "understood that certain inputs to the calculation would already incorporate the IPPS BNA." Def.'s Mem. at 18. This claim begs the question of why CMS would need to apply a second BNA of the same 5.1% amount.

neutrality for high cost outliers in SSO cases is maintained by adjusting the standard Federal rate." Def.'s Mem. at 24 n.6. But that is only true for short stay outlier ("SSO") cases paid at least in part at the standard Federal rate. *See* FY 2018 IPPS/LTCH PPS Final Rule, 82 Fed. Reg. 37990, 38543 (Aug. 14, 2017) (R.R. at 4610) ("[A] budget neutrality factor will continue to be applied to *LTCH PPS standard Federal payment rate* cases to offset that 8 percent so that HCO payments for LTCH PPS standard Federal payment rate cases will be budget neutral." (emphasis added)); *see also* 42 U.S.C. § 1395ww(m)(7)(A) (Social Security Act ("SSA") § 1886(m)(7)(A)) ("[T]he Secretary shall reduce the *standard Federal payment rate* as if the estimated aggregate amount of high cost outlier payments for standard Federal payment rate discharges for each such fiscal year would be equal to 8 percent of estimated aggregate payments for standard Federal payment rate discharges for each such fiscal year." (emphasis added)). **It is not true for SSO cases that are paid entirely at the IPPS comparable per diem amount. Because these very short-stay outlier cases are <u>not</u> paid at the standard Federal rate, even in part, their payments are <u>not</u> adjusted for HCO budget neutrality via the standard Federal rate.** *See* FY 2013 IPPS/LTCH PPS Final Rule, 77 Fed. Reg. 53258, 53739 (Aug. 31, 2012) ("With the expiration of the moratorium, in the case of very short-stay outliers, effective for discharges on or after December 29, 2012, the 'blended payment' will be replaced with *only the 'IPPS comparable per diem amount*,' which results in a decrease in payments for many of these cases.") (emphasis added). It is, in fact, the very short-stay outlier portion of the SSO regulation that Congress referred to specifically in the statute to define the LTCH site neutral payment rate. 42 U.S.C. § 1395ww(m)(6)(B)(ii) (SSA § 1886(m)(6)(B)(ii)) ("SITE NEUTRAL PAYMENT RATE DEFINED.—In this paragraph, the term 'site neutral payment rate' means the lower of—(I) the IPPS comparable per diem amount determined under *paragraph (d)(4) of section 412.529*

of title 42, Code of Federal Regulations, including any applicable outlier payments under section 412.525 of such title; or (II) 100 percent of the estimated cost for the services involved.") (emphasis added). **Thus, Congress could not have been aware that CMS would apply a separate outlier BNA to site neutral payments based on the same IPPS comparable per diem amount.**

Plaintiffs' Memorandum explains how CMS removes the prior year's outlier BNA when performing the annual calculation of the IPPS payment rates. Pls.' Mem. at 30 (citing 83 Fed. Reg. at 41724-25 (R.R. at 5991-92)). The Secretary acknowledges that CMS does this so that the BNA is not cumulative. Def.'s Mem. at 24. But, the Secretary argues that CMS should not similarly remove the IPPS outlier BNA prior to calculating the LTCH site neutral payment rate because CMS is only "determining reimbursements for particular discharges based on a calculation defined by Congress." Def.'s Mem. at 24. However, as discussed above, there is no basis in the statute to conclude that Congress was aware that CMS would include both the IPPS outlier BNA and an additional LTCH outlier BNA in the LTCH site neutral payment rate, and the Secretary has not cited to any other authority to support his claim.

Finally, the Secretary attempts to defend the duplicative BNA by arguing that CMS has "substantial discretion" and CMS acted reasonably when it decided to only consider "adjustments made within LTCH PPS when analyzing LTCH PPS budget neutrality." Def.'s Mem. at 21. But this claim only further exposes the agency's error. CMS failed to implement the LTCH site neutral outlier policy in a budget neutral manner because it ignored the 5.1% IPPS outlier BNAs that were already included in the IPPS payment amount used for LTCH site neutral payments. The D.C. Circuit has been clear that deference to the agency in Medicare cases "is not unlimited." *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 216 (D.C. Cir. 2011). CMS and the

Secretary do not have the discretion to pay providers using erroneous payment rates. *Id.* at 214-15 ("[W]e never suggested that even after the error in the data on which the Secretary has relied was brought to her attention, she could have chosen to continue using the inaccurate wage index in calculating future payments."). The Secretary adds that CMS "'is not required to choose the best option, only a reasonable one.'" Def.'s Mem. at 21 (quoting *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 703 (D.C. Cir. 2007)). But Plaintiffs have consistently argued that CMS could reasonably apply either BNA, but not both. Pls.' Mem. at 29-30. The BNAs are the same amount, so either one would arguably maintain budget neutrality. Instead of choosing between one of these two reasonable approaches for budget neutrality, CMS decided to include both 5.1% BNAs in the LTCH site neutral payment rate. Instead of choosing "a reasonable one," CMS chose all of the options. This duplication is clearly unreasonable.

B. The Court has Jurisdiction Over Plaintiffs' Claims

Plaintiffs' Memorandum explains that the Court has jurisdiction over its challenge to the duplicative BNA that CMS began applying in FY 2016 and continues to apply during the current FY 2019. The Secretary has already admitted that the BNA at issue "will apply to the site-neutral payment rate in 2020 . . . ." Answer ¶39. Despite the fact that CMS has consistently applied the same duplicative BNA pursuant to 42 C.F.R. § 412.522(c)(2)(i) since FY 2016, and will continue to apply this BNA in FY 2020, the Secretary now claims that the Court only has jurisdiction over Plaintiffs' claims regarding FY 2019. Def.'s Mem. at 3, 13-16.

The Secretary argues that Plaintiffs only met the Medicare Act's presentment requirement for the BNA in FY 2019. Def.'s Mem. at 13. However, Plaintiffs' Memorandum explains that Plaintiffs met the presentment requirement by requesting Expedited Judicial Review from the Provider Reimbursement Review Board ("PRRB"). Pls.' Mem. at 20 (citing Administrative Record ("A.R.") at 37-49). The PRRB's decision and the Plaintiffs' request for

Expedited Judicial Review noted the Plaintiffs' objection to the BNA that CMS began applying in FY 2016. A.R. at 5-6, 37-49, 74. The Secretary also argues that the Plaintiffs' challenge to the FY 2020 BNA is not ripe. However, the Supreme Court has said that the ripeness doctrine in administrative cases is intended to "protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). Here, CMS formalized the site neutral outlier policy in 2015 and has continuously applied the same policy since then. Plaintiffs have suffered from the effects of this erroneous policy since the start of FY 2016. Dkt. 8-1 ¶6-11; Dkt. 8-2 ¶6-12; Dkt. 8-3 ¶6-11; Dkt. 8-4 ¶6-11. Accordingly, this legal issue is both fit for judicial decision and the hardship suffered by Plaintiffs is definite and facing the imminent threat of being greatly exacerbated when the federal FY 2020 begins. *See City of Houston, Tex. v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1430-32 (D.C. Cir. 1994). Thus, Plaintiffs' challenge to the duplicative BNA is ripe for the Court's review.

The issue before this Court is Plaintiffs' challenge to a duplicative BNA that CMS applies under 42 C.F.R. § 412.522(c)(2)(i). The Secretary recognizes that this regulation is the source of CMS' LTCH site neutral BNA. Def.'s Mem. at 8, 22.[2] The Secretary also admits that CMS implemented the site neutral policy for FY 2016 and the same policy still applies today. Def.'s Mem. at 6. However, according to the Secretary, the Court may only provide relief that

[2] During the rulemakings, CMS consistently used the term "budget neutrality adjustment" to refer to the separate 5.1% reduction CMS applies to LTCH site neutral payments. *See e.g.*, 83 Fed. Reg. at 41737 (R.R. at 6004) ("In establishing a HCO policy for site neutral payment rate cases, we established a budget neutrality adjustment under § 412.522(c)(2)(i)."). The Secretary's use of the more generic term "adjustment" now to describe the BNA under this regulation does not change the fact that it is solely used for budget neutrality. Def.'s Mem. at 8 (". . . CMS makes certain adjustments to the site neutral payment rate, including an *adjustment* to account for outlier payments paid to site neutral cases in the LTCH PPS." (citing 42 C.F.R. § 412.522(c)(2)) (emphasis added)).

addresses the BNA in FY 2019. Def.'s Mem. at 14. The Secretary says that "[l]egal questions that the PRRB did not approve for expedited judicial review are outside the Court's subject matter jurisdiction." Def.'s Mem. at 14 (citing 42 U.S.C. § 1395oo(f)(1)). However, the Plaintiffs challenge involves a single "legal question," CMS' duplicative BNA. CMS first adopted the policy at issue under 42 C.F.R. § 412.522(c)(2)(i) for FY 2016. Since then, CMS has continued applying the same duplicative BNA under the same regulation. *See* 80 Fed. Reg. at 49622 (R.R. at 1264); FY 2017 IPPS/LTCH PPS Final Rule, 81 Fed. Reg. 56762, 57308-09 (Aug. 22, 2016) (R.R. at 2908-09); 82 Fed. Reg. at 38545-46 (R.R. at 4612-13); 83 Fed. Reg. at 41737-38 (R.R. at 6004-05). The regulation requires an outlier BNA; the annual payment rule sets the amount of the BNA and how it is used in the site neutral payment calculation. As noted above, the Secretary set the BNA amount each year at 5.1%—the same as the IPPS outlier BNA—and applied them both in the site neutral payment calculation. The Secretary admits that the same policy will apply in FY 2020. Answer ¶39. When an agency acts in a consistent and predictable fashion, as is the case here, a court's decision invalidating that agency action can apply to other periods. *See NLRB v. Express Publishing Co.*, 312 U.S. 426, 435 (1941) ("A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past."). Moreover, the D.C. Circuit has stated that the Secretary may not continue reimbursing providers using erroneous payment rates in future years. *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 214-15 (D.C. Cir. 2011). Accordingly, the Secretary's objections to the Court's jurisdiction are unfounded.

The Plaintiffs properly challenged the duplicative BNA by filing an appeal with the PRRB and requesting expedited judicial review. A.R. at 1078-1153. This is not in dispute. *See*

Complaint ¶5; Answer ¶5. Plaintiffs chose to appeal after CMS issued the FY 2019 final rule for two reasons. First, after the third year of being underpaid by Medicare for site neutral patients in the amount of the duplicative BNA, Plaintiffs' monetary losses had compounded to the point where it was difficult for many LTCHs (including the Plaintiffs) to continue their operations. Dkt. 8-1 ¶9-11; Dkt. 8-2 ¶9-12; Dkt. 8-3 ¶9-11; Dkt. 8-4 ¶9-11. Second, FY 2019 is the final year of the transition period to site neutral payment. During the transition period, the duplicative BNA applies to one-half of the site neutral payment. *See* 42 U.S.C. § 1395ww(m)(6)(B)(i)(I) (SSA § 1886(m)(6)(B)(i)(I)). But beginning with discharges in cost reporting periods starting on or after October 1, 2019, the start of FY 2020, the duplicative BNA will apply to the entire site neutral payment, doubling its impact.

C. The Standard of Review in this Case is Not Highly Deferential to the Agency

Plaintiffs' Memorandum sets forth the summary judgment standard of review in this case involving review of agency action under the APA. Pls.' Mem. at 21-23. The Secretary argues that the scope of review under APA's arbitrary and capricious standard is narrow and the Secretary is entitled to even more deference because this is a Medicare case. Def.'s Mem. at 13. However, the D.C. Circuit cautions that the deference owed to the agency "is not unlimited." *Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 216 (D.C. Cir. 2011). Instead, the reviewing court in a Medicare case must "still engage in a 'searching and careful' review of the record to ensure that the Secretary has applied [his] expertise in a reasoned manner and has not acted arbitrarily or capriciously or otherwise violated legislative mandates." *Id.* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

The Secretary also says that the "court reviews the disputed rulemaking based on the administrative record that was before the agency at the time of rulemaking." Def.'s Mem. at 13 (citing *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 420). This is true in the sense that the

Court's review should only be based on the rationale provided by CMS in the rulemaking record, not *post hoc* rationalizations by government counsel. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 50 (1983) ("[C]ourts may not accept appellate counsel's post hoc rationalizations for agency action. It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." (citations omitted)). But judicial review under the APA requires that the court examine the whole administrative record, including documents from the appeal before the agency. *See Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 420 (explaining that judicial review under the APA is based on the full administrative record before the agency at the time the time the agency made its decision). Moreover, the court can examine other information to determine whether agency rules are consistent or inconsistent with the application of those rules in the past. *See Gen. Am. Transp. Corp. v. I.C.C.*, 872 F.2d 1048, 1053–54 (D.C. Cir. 1989) (noting that *Chevron* analysis requires courts to examine many factors, including the consistency of the agency's reasoning). The rulemaking record and comment letters on the same BNA, based on the same regulation at 42 C.F.R. § 412.522(c)(2)(i) in prior fiscal years and for the upcoming fiscal year, are part of the administrative record properly before this Court and are relevant to the Court's analysis.

D. The BNA is Unreasonable and CMS Did Not Engage in a Reasoned Analysis When It Implemented the Duplicative BNA without Accounting for the Adjustments Already Applied to the IPPS Comparable Per Diem Amount

Plaintiffs' Memorandum explains how CMS' decision to apply the duplicative BNA to the LTCH site neutral payment rate violates the APA because it is unreasonable and not the product of a reasoned agency analysis. Pls.' Mem. at 29-33. Applying double the required adjustment to maintain budget neutrality for LTCH site neutral payments is unreasonable and a textbook violation of the APA's arbitrary and capricious standard. *See U.S. Postal Serv. v. Postal Regulatory Comm'n*, 785 F.3d 740, 750 (D.C. Cir. 2015) ("[T]he [agency's] exercise of its

authority must be 'reasonable and reasonably explained' in order to survive arbitrary and capricious review under the Administrative Procedure Act."). In addition, CMS failed to engage in a reasoned analysis when it refused to take a "hard look" at the math behind the duplicative BNA. *See Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 851 (D.C. Cir. 1970). By ignoring the simple math of the duplicative BNA, CMS has "entirely failed to consider an important aspect of the problem." *See State Farm Mut. Auto. Ins.*¸ 463 U.S. at 43.

The Secretary claims that it was reasonable for the agency to conclude that "to the extent LTCH PPS provides additional payments for outliers for site neutral cases, it is necessary to apply a BNA to site neutral payments in order to maintain budget neutrality within LTCH PPS." Def.'s Mem. at 19. The Plaintiffs do not disagree that CMS has the general authority to apply a BNA to the LTCH PPS payment rates. Pls.' Mem. at 31 ("The Plaintiffs do not dispute that CMS has the authority to apply a BNA to reduce LTCH site neutral payments to account for HCO payments for LTCH site neutral payment rate cases."). Instead, the Plaintiffs have consistently challenged CMS' decision to apply the second 5.1% BNA that is duplicative of the outlier budget neutrality adjustments CMS borrows from the IPPS payment rates. CMS' decision to apply this duplicative BNA is unreasonable and therefore violates the APA's arbitrary and capricious standard. *See Cty. of L.A. v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999) ("Where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, we must undo its action." (citation and quotation marks omitted)). The Secretary also claims that CMS' decision is entitled to deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 845 (1984). However, as explained in Plaintiffs' Memorandum (Pls.' Mem. at 24), this is a *Chevron* step two case where the question for the Court is whether the agency's "interpretation is arbitrary or capricious in substance." *Judulang v. Holder*, 565

U.S. 42, 52 n.7 (2011) (internal quotation marks omitted). Applying the second 5.1% BNA is arbitrary and capricious because it is unreasonable to apply this duplicative BNA when the rates borrowed from the IPPS already include a 5.1% outlier BNA.

The Secretary also argues that CMS met the reasoned analysis requirement because CMS "carefully considered comments that the BNA for LTCH site neutral payments is duplicative of the IPPS BNA and has explained why those concerns are incorrect." Def.'s Mem. at 25. There are a few problems with this response. First, the Secretary misinterprets the nature of Plaintiffs' written comments to the agency each year since FY 2016. The Plaintiffs have not said that the IPPS outlier BNA when used to pay IPPS hospitals is duplicative of the LTCH outlier BNA when used to pay LTCH hospitals. Rather, Plaintiffs have consistently objected to the duplicative nature of these BNAs when they are both applied to LTCH site neutral payments. Second, despite the Plaintiffs' detailed comment letters on this issue, CMS never offered a reasoned analysis of why both BNAs are used to reduce LTCH site neutral payments—only a vague notion that the IPPS outlier BNA is merely an "input" to this calculation. Moreover, in the FY 2017, FY 2018 and FY 2019 final rules, CMS did not even bother to address the new evidence and information provided by Plaintiffs and others in their written comments on this issue. 81 Fed. Reg. at 57308 (R.R. at 2908); 82 Fed. Reg. at 38545-46 (R.R. at 4612-13); 83 Fed. Reg. at 41738 (R.R. at 6005). Contrary to the Secretary's claim, CMS' responses do not reflect careful consideration by the agency. Instead, CMS' terse responses in the final rules suggest that the agency is unwilling to even consider if it mistakenly adopted a payment policy for LTCH site neutral cases that includes multiple BNAs for high-cost outlier payments.

E. CMS' Decision to Apply a Duplicative Budget Neutrality Adjustment is Arbitrary and Capricious Because CMS' Reasoning is Internally Inconsistent

Plaintiffs' Memorandum also explains how CMS' decision to apply the duplicative BNAs to the LTCH site neutral payment rate is internally inconsistent. Pls.' Mem. at 33-35. An agency decision is arbitrary and capricious if it is "internally inconsistent and inadequately explained." *District Hosp. Partners v. Burwell*, 786 F.3d 46, 59 (D.C. Cir. 2015).

The Secretary argues that it is not internally inconsistent for CMS to apply a separate LTCH site neutral BNA even though the site neutral outlier policy uses the same outlier threshold and targets from the IPPS outlier policy. Def.'s Mem. at 25-26. Plaintiffs' Memorandum explained how it was internally inconsistent for CMS' LTCH site neutral outlier policy to use these features from the IPPS outlier policy, but then apply the extra 5.1% outlier BNA to the site neutral payment rate. Pls.' Mem. at 33-34. The Secretary says it is no surprise that CMS would use the features from the IPPS outlier policy for the LTCH site neutral policy because "the reason the site neutral rate was developed was that certain LTCH patients could be treated appropriately in a lower cost IPPS setting." Def.'s Mem. at 26. However, by including two 5.1% BNAs in the site neutral rate, CMS is actually paying LTCHs less for these cases than what it pays for the same cases treated at IPPS hospitals. MedPAC noted this inconsistency in its comments. *See* MedPAC, Comment Letter on FY 2017 IPPS/LTCH PPS Proposed Rule at 16-17 (May 31, 2016) (R.R. at 1879-80) ("Given that the IPPS standard payment is already adjusted to account for HCO payments, CMS' proposal to reduce the site-neutral portion of the LTCH payment by a budget neutrality adjustment of 0.949 is duplicative and exaggerates the disparity in payment rates across provider settings."). CMS' approach is *not* "site neutral" because Medicare's payment to an IPPS hospital for a site neutral case (*i.e.*, the patient would qualify for a site neutral payment if treated at an LTCH) is greater than the payment to an LTCH for the same case, even on a per day basis. CMS' approach is internally inconsistent.

Next, the Secretary claims that Plaintiffs are mistaken regarding the internal inconsistency in the LTCH site neutral outlier policy because "CMS applies only one BNA to site neutral payments (and uses inputs to the payment calculation that incorporate another BNA, among many other adjustments, as required by statute)." Def.'s Mem. at 26. However, even this statement by the Secretary concedes that the IPPS outlier BNA is part of the calculation of the LTCH site neutral payment rate. *See also* Def.'s Mem. at 22 ("To maintain budget neutrality within LTCH PPS, the Secretary reasonably determined that it is not sufficient to merely rely on adjustments incorporated into certain of the inputs for the calculation of the site neutral payment rate because those adjustments account only for outliers in IPPS hospitals."); *see also* 80 Fed. Reg. at 49622 (R.R. at 1264) ("[T]he commenters are correct that the IPPS base rates that are used in site neutral payment rate calculation include a budget neutrality adjustment for IPPS HCO payments . . . .").

Finally, the Secretary argues that there is no internal inconsistency in reducing LTCH site neutral payments below the budget neutral baseline because "Congress effectively has mandated" a baseline that includes the IPPS outlier BNA. Def.'s Mem. at 26. However, the Secretary again provides no authority for this purported Congressional mandate. As discussed above, there is no indication in the statute or otherwise that Congress wanted the agency to double the required BNA—and for good reason. This is inconsistent with the IPPS, where short-term acute care hospital payments are only reduced by one combined BNA of 5.1%, and it is inconsistent with the LTCH PPS standard Federal rate, where LTCH payments are only reduced by one BNA of 7.945%. The Secretary's responses acknowledge that the IPPS BNA *does* impact the LTCH site neutral payment rate. Yet, CMS still applies the separate outlier BNA to the LTCH site neutral payment rate under 42 C.F.R. § 412.522(c)(2)(i). This cannot be the product

of agency expertise worthy of the court's deference. The CMS site neutral outlier budget neutrality policy is very clearly internally inconsistent and is therefore arbitrary and capricious.

F. CMS' Decision to Apply a Duplicative Budget Neutrality Adjustment is Arbitrary and Capricious Because it Reflects a Clear Error of Judgment

Plaintiffs' Memorandum also describes how it was a clear error of judgment on the part of CMS to adopt the duplicative outlier BNA pursuant to 42 C.F.R. § 412.522(c)(2)(i). Pls.' Mem. at 35-38. APA review of agency action under the arbitrary and capricious standard requires a consideration of "whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

The Secretary argues that Plaintiffs did not identify any clear error of judgment and there are no computational errors in the LTCH payment rates. Def.'s Mem. at 27. This response is premised on the Secretary's erroneous argument that there is no duplication when CMS uses adjustments from the IPPS that include a 5.1% BNA, but then applies the separate 5.1% BNA under 42 C.F.R. § 412.522(c)(2)(i). As noted above, the Secretary and CMS have made numerous statements admitting that both 5.1% reductions apply to LTCH site neutral payments. *See e.g.*, Def.'s Mem. at 22; 80 Fed. Reg. at 49622 (R.R. at 1264). This duplication results in inaccurate payments to LTCHs and is the clear error of judgment. *Cf. Cape Cod Hosp. v. Sebelius*, 630 F.3d 203, 214-15 (D.C. Cir. 2011) ("[W]e never suggested that even after the error in the data on which the Secretary had relied was brought to her attention, she could have chosen to continue using the inaccurate wage index in calculating future payments.").

The Secretary also claims that the clear error of judgment standard "is no less deferential than ordinary arbitrary and capricious review and courts find a clear error of judgment 'only if the error is so clear as to deprive the agency's decision of a rational basis.' *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 n.74 (D.C. Cir. 1976)." Def.'s Mem. at 27. However, the D.C. Circuit has also

warned that "informal rulemaking proceedings are much more susceptible to abuse" by the agency because there is no evidentiary hearing. *Almay, Inc. v. Califano*, 569 F.2d 674, 681 (D.C. Cir. 1977). Accordingly, the D.C. Circuit notes that it is "all the more important that a rational basis for the agency's decision be found in the facts of record." *Id.*

The Secretary argues that there was no "clear error of judgment" by CMS because the agency did not ignore evidence, "but rather it carefully considered comments that the challenged BNA was duplicative and reasonably determined that there was no duplication." Def.'s Mem. at 27. Notably, the Secretary does not cite to any portion of the rulemaking record to support his claim that CMS carefully considered comments on this issue and made a reasonable determination about the duplicative BNAs. As already discussed in Part II.D. above, the rulemaking record shows that the Plaintiffs submitted detailed comment letters to CMS each year since 2015 explaining that CMS is using an erroneous calculation of the LTCH site neutral payment rate that includes double the BNA for high cost outlier payments. *See e.g.*, R.R. at 687-89, 2109-2116, 3589-96, 5241-48. The rulemaking record also contains comments from other stakeholders that clearly explained this error to CMS, including comment letters from MedPAC, the American Hospital Association, the Federation of American Hospitals, and the National Association of Long Term Hospitals. R.R. at 498-99, 1878-80, 5352-53, 5401-03. CMS' limited responses to these comments do not show "careful consideration" by the agency of this issue. MedPAC's decision to comment on this issue for FY 2017 shows that the duplicative BNA continued to be a major issue CMS needed to reconsider. But CMS never acknowledged that MedPAC specifically told CMS in writing not to finalize the LTCH outlier BNA because it is duplicative of the IPPS outlier BNA when applied to LTCH site neutral payments. *See* MedPAC, Comment Letter on FY 2017 IPPS/LTCH PPS Proposed Rule at 16 (May 31, 2016) (R.R. at

1879-80). Perhaps seeing this clear error of judgment, the Secretary has decided not to address MedPAC's comments at all in Defendant's Memorandum.

Similar to the Secretary's arguments in Defendant's Memorandum, CMS' response to comments in the FY 2019 IPPS/LTCH PPS Final Rule only addresses CMS' general authority to implement the LTCH site neutral outlier policy in a budget neutral manner. *See* 83 Fed. Reg. at 41738 (R.R. at 6005). The response completely disregards the substance of the written comments and shows that CMS refuses to entertain the possibility that the LTCH site neutral payment rate includes duplicative BNAs. CMS' decisionmaking therefore violated the APA as a clear error of judgment by "ignoring salient facts" and "offering patently implausible justifications." *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1098 (D.C. Cir. 1996).

G. CMS' Decision to Apply a Second Outlier Budget Neutrality Adjustment to the LTCH Site Neutral Payment Rate is Not Supported by Substantial Evidence

Plaintiffs' Memorandum describes how the rulemaking record lacks substantial evidence to support CMS' decision to apply a second outlier BNA to the LTCH site neutral payment rate. Pls.' Mem. at 38-40. Citing a case from outside this circuit, *Nat'l Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688 (2d Cir. 1975), the Secretary argues that the APA's substantial evidence test does not apply to informal rulemakings. Def.'s Mem. at 28. The case cited by the Secretary references dicta in *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 622 n.19 (1973). However, the Supreme Court plainly stated in *Overton Park* that "[r]eview under the substantial-evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, 5 U.S.C. § 553 . . . ." *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 414. Court of Appeals decisions from outside the D.C. Circuit are not binding on this Court. Moreover, there is no subsequent Supreme Court decision explicitly rejecting the Supreme Court's explanation in *Overton Park* regarding the

applicability of the substantial evidence test to informal rulemaking. Likewise, the D.C. Circuit has not stated that the Supreme Court's explanation of the substantial evidence test in *Overton Park* no longer applies. The Secretary does not offer any substantive response to Plaintiffs' discussion of the substantial evidence test. *See* Def.'s Mem. at 28. Accordingly, for the reasons discussed in Plaintiffs' Memorandum (Pls.' Mem. at 38-40), the Court should set aside the duplicative BNA because it is unsupported by substantial evidence.

H. CMS Did Not Provide a Sufficient Response to Comments Raising Major Issues Regarding the Duplicative BNA in the FY 2019 IPPS/LTCH PPS Final Rule

In addition to CMS' failure to comply with the APA's substantive requirements, Plaintiffs' Memorandum also explains how CMS' nominal response to Plaintiffs' comments in the FY 2019 IPPS/LTCH PPS Final Rule violates the procedural requirements for notice and comment rulemaking at section 553(c) of the APA. Pls.' Mem. at 40-41. The Secretary argues that CMS "easily met [the] obligation to respond" to comments." Def.'s Mem. at 29. However, the D.C. Circuit has "cautioned against an overly literal reading of the statutory terms concise and general" in section 553(c) of the APA. *Indep. U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987) (internal quotation marks omitted).

The Defendant's Memorandum quotes D.C. Circuit cases regarding agency obligations under the APA to respond to comments. Def.'s Mem. at 29. However, it is clear that at a minimum, CMS' responses in FY 2019 and FY 2018 did not meet this standard. The Secretary says the agency "provided detailed, substantive responses to comments." Def.'s Mem. at 2. But as already discussed in Parts II.D and E. above, the rulemaking record shows that most of CMS' responses to comments were dismissive and simply referred back to responses from previous years. Even the Secretary admits now that CMS' FY 2019 basis and purpose statement merely "referenced CMS's earlier substantive responses" from prior rulemakings. Def.'s Mem. at 29.

Perhaps the most troubling aspect of CMS' responses to comments is the agency's decision to ignore MedPAC's thoughtful comments on the duplicative BNA. MedPAC is an independent congressional agency that advises Congress on Medicare payment and other issues. *See* MedPAC, *About MedPAC*, http://www.medpac.gov/-about-medpac- (last visited July 16, 2019). There are 17 commissioners with substantial experience in the health care field. *Id.* MedPAC's staff analysts support the commissioners' work. *Id.* MedPAC issues two reports to Congress each year on Medicare payments and policies, and "advises the Congress through other avenues, including comments on reports and proposed regulations issued by the Secretary of the Department of Health and Human Services, testimony, and briefings for congressional staff." *Id.* These experts reviewed CMS' LTCH site neutral payment policy and determined that the extra BNA is duplicative. *See* MedPAC, Comment Letter on FY 2017 IPPS/LTCH PPS Proposed Rule at 16-17 (May 31, 2016) (R.R. at 1879-80). Specifically, MedPAC explained to CMS that the "proposal to reduce the site-neutral portion of the LTCH payment by a budget neutrality adjustment of 0.949 is duplicative and exaggerates the disparity in payment rates across provider settings." *Id.* The Plaintiffs' FY 2017, FY 2018, and FY 2019 comment letters discussed MedPAC's comments on this issue. *See e.g.*, R.R. at 2109-11, 3590-92, 5243-44. But, CMS has never responded to MedPAC's concerns or even acknowledged that MedPAC submitted these comments. *See* 81 Fed. Reg. at 57308-09 (R.R. at 2908-09); 82 Fed. Reg. at 38545-46 (R.R. at 4612-13); 83 Fed. Reg. at 41737-38 (R.R. at 6004-05). This is a glaring deficiency that highlights the agency's unwillingness to seriously consider its own error.

I. CMS' Duplicative BNA Violates the Social Security Act and Other Federal Laws

Plaintiffs' Memorandum explains that the duplicative BNA is contrary to law. Pls.' Mem. at 41-45. Plaintiffs' Memorandum analyzed three specific statutory violations by CMS. *Id.* In the

Defendant's Memorandum, the Secretary does not offer much of a substantive response to these violations. Instead, the Secretary argues that the Plaintiffs' claims fail because they are based on "the ill-conceived duplication theory." Def.'s Mem. at 30. However, it is the Secretary who misunderstands the duplication at issue in this case. Def.'s Mem. at 16-24. The Plaintiffs have shown that the LTCH site neutral payment rate includes duplicative BNAs. *See supra* Part II.A.; Pls.' Mem. at 25-29. As a result of this duplication, the BNA is not an "appropriate adjustment" under section 307 of the Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000 and results in Medicare costs being shifted to non-Medicare beneficiaries in violation of the Social Security Act, 42 U.S.C. § 1395x(v)(1)(A) (SSA § 1861(v)(1)(A)).

The Secretary argues that the anti-cross-subsidization principle (also known as the cost-shifting prohibition) does not apply here. Def.'s Mem. at 30. To support this argument, the Secretary cites to the D.C. Circuit's decision in *Abington Crest Nursing and Rehabilitation Ctr. v. Sebelius*, 575 F.3d 717 (D.C. Cir. 2009). However, the Secretary misreads this D.C. Circuit decision and its applicability here. The D.C. Circuit noted that the Secretary decided that the anti-cross-subsidization principle "applies only to reimbursements based on reasonable *costs*, and not to reimbursements based on *charges* or on fee schedules." *Id.* at 720. But, the D.C. Circuit's decision noted that the Secretary recognized that there was a "material difference" between the payment system at issue in that case, the Part B physician fee schedule, and the Part A prospective payment system ("PPS"). *Id.* at 721. The Secretary admitted that the "Part A PPS is based on hospitals' average *costs* per discharge in an annual base period," but the "Part B physician fee schedule is based on prices health care providers *charge*." *Id.* This reasoning indicates that the anti-cross-subsidization principle does apply to the LTCH payment system, a Part A PPS.

The Secretary also alleges that Plaintiffs are arguing that the Pathway for SGR Reform Act of 2013 requires "identical payments" under the IPPS and the LTCH PPS. Def.'s Mem. at 30. This was never Plaintiffs' position. Plaintiffs argued that CMS violated section 1206 of the PSRA because "CMS is acting in direct contradiction of its own position on the dual rate LTCH PPS by paying LTCH site neutral cases a rate other than the site neutral payment rate contemplated by the statute." Pls.' Mem. at 44. Plaintiffs did not argue that the LTCH site neutral payment rate had to be identical to the IPPS rate, only that the outlier BNAs must be identical, as determined by CMS. Every year, CMS stated in rulemaking that the outlier BNA for LTCH site neutral payments should be the same 5.1% as the outlier BNA for IPPS payments (*i.e.*, the BNAs are identical). By applying an extra outlier BNA to LTCH site neutral payments, CMS is arbitrarily reducing the payment rate so that it is no longer consistent with the PSRA directive.

III. CONCLUSION

For the reasons discussed herein and in Plaintiffs' Memorandum, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Summary Judgment, set-aside the duplicative negative 5.1 percent BNA, order that the Secretary reimburse Plaintiffs for the associated payments that CMS withheld from Plaintiffs during FY 2019 and prior years (plus statutory interest and fees), and order the Secretary not to apply the duplicative BNA to LTCH PPS site neutral payments in FY 2020 and later years.

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Respectfully Submitted,

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