UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ALLINA HEALTH SERVICES, et al., Plaintiffs, v. SYLVIA M. BURWELL, Secretary, United States Department of Health and Human Services, Defendant.	)	Case No.: 10-01463 (RMC) CONSOLIDATED WITH 10-01462 (RMC)

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR FURTHER RELIEF

The D.C. Circuit decision affirmed this Court's holding that the agency's 2004 rule changing its policy on Medicare part C days in the DSH calculation was "infirm *ab initio*." Post-Judgment Order, ECF No. 47, at 2 (Dec. 18, 2012); *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1111 (D.C. Cir. 2014). In the face of this decision, the agency issued the 2012 Medicare part A/SSI fractions without any indication whatsoever that, before their issuance, it had reconsidered the treatment of part C days and determined to alter that treatment again, this time independent of the vacated 2004 rule.

The government's defense is that it had to apply "some" interpretation of the admittedly ambiguous statute, Gov. Opp. 7. But this defense flatly ignores that the agency was not writing on a clean slate after the 2004 rule was vacated because the vacatur reinstated the pre-2004 policy. This Court and the D.C. Circuit have repeatedly held that prior to the 2004 rulemaking, the agency had a policy of treating part C days as *not* part A days. The government's opposition begrudgingly acknowledges those holdings, but fails to recognize their full legal import. The

necessary effect of the vacatur is to restore the *status quo ante*, which the 2012 fractions indisputably do not reflect, until the agency takes valid action to change that prior policy, which the government says it has not yet done.

By requiring the government to hew to the vacatur, the requested injunction would simply effectuate the D.C. Circuit's judgment. That judgment left for another day the question whether the agency could *ever* undertake an adjudication that readopted the 2004 interpretation. But it just as surely precludes the agency from simply reinstating the 2004 interpretation (much less applying the rule itself) in the meantime.

Moreover, the Secretary's attempted procedural roadblocks to an injunction are meritless. This Court has repeatedly reaffirmed its power to grant prospective injunctive relief so that plaintiff hospitals are not forced to file repeated actions in order to effectuate a judgment. And the Secretary's request to dismiss the Hospitals' dispositive and clearly still disputed motion based on Local Rule 7(m) grossly distorts that meet-and-confer requirement for procedural motions.

A. The Vacatur Precludes The Agency From Issuing Part A/SSI Fractions Including Part C Days Until The Agency Makes A Valid Policy Change

As it must, the government concedes that the agency cannot apply the vacated 2004 rule. Gov. Opp. 6. It insists, however, that by issuing the 2012 part A/SSI fractions that include part C days, the agency was not applying the vacated rule, but instead relying upon "the same interpretation of the DSH statute that was also embodied in the [r]ule[.]" Gov. Opp. 7 & n.4. The government offered no explanation whatsoever, never mind a new one, for issuing part A/SSI fractions just the same way it had for years under the vacated rule. Whatever distinction there may be in a metaphysical sense between the application of a rule and application of the same interpretation, there is no such distinction here.

As found repeatedly by this Court and the Court of Appeals, the agency had a policy regarding part C days prior to the 2004 rulemaking. The vacatur of the 2004 rule restored that prior policy, *Croplife Am. v. EPA*, 329 F.3d 876, 879 (D.C. Cir. 2003), at least until the agency validly changes it. With the instant motion, the Hospitals are not asking this Court to decide whether the government can *ever* adopt that same interpretation following the vacatur of the 2004 rule. But certainly the agency must use some process, based on some fresh analysis, to again apply the policy of the invalidated rule. The Hospitals ask this Court to confirm that, until that agency process occurs, the prior policy is current policy.

1. *The Contemporaneous Record Shows the Agency Applied the Vacated Rule*

All of the evidence from the agency itself available at the time when it adopted the part A/SSI fractions for 2012—as opposed to *post hoc* documents prepared for this litigation—indicates that the agency issued the fractions based upon the vacated rule. The agency's issuance of the 2012 part A/SSI fractions was identical in all material respects to the issuance of those fractions for previous years under the 2004 rule. Like in prior years, the agency published a data file on the agency's website listing the part A/SSI fractions for all hospitals nationwide, and at the top of the file the agency simply stated that the calculations "includ[e] MA [*i.e.*, part C] Claims Submissions." *Compare* DSH Adjustment and 2011-2012 File (2012 fractions) ("including MA Claims Submissions"), *with* DSH Adjustment and 2010-2011 File (2011 fractions) (same), *and* DSH Adjustment and 2009-2010 (2010 fractions) (same).[1] In publishing the 2012 fractions, the agency still nowhere acknowledged the policy that existed prior to the 2004 rule change. Nor did the agency provide any analysis of the statutory language

[1] *Available at* http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/dsh.html.

independent of the 2004 rule itself. Much less did the agency provide any explanation whatsoever for the agency's departure from the now-restored pre-2004 policy.

Moreover, the agency cannot mechanically apply the "language of the statute itself," Gov. Opp. 7 n.4, as if on autopilot, when that language has been found by the Court of Appeals to be *ambiguous*, as the government admits, Gov. Opp. 7. By definition, the terms of the statute do not dictate a result, and so if the agency had truly considered the question anew, without simply applying the 2004 rule, it would have had to demonstrate that it made a considered choice in calculating the 2012 fractions. *See Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) (explaining that had an earlier district court decision vacated a rule, it "likely would have required HHS to make payments to those hospitals [the challenger hospital and "similarly situated hospitals"] for those [challenged] years and for any subsequent years until the agency repromulgated the same rule and *gave an adequate reason for rejecting the alternatives*") (emphasis added). An agency may not, without any valid administrative process, simply "pick[] a permissible interpretation out of a hat." *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011). In applying the very same interpretation of the statute, without any separate, independent analysis of text, context, or purpose, the agency did nothing more than re-apply the now-vacated rule.

This Court should reject the government's *post hoc* rationalization of agency action as other courts have done in similar circumstances. For example, the Fifth Circuit concluded that an agency merely applied a pre-existing rule, and did not independently develop a policy through adjudication, when the agency did not discuss any specific facts in the so-called adjudication and the same policy was applied to multiple regulated entities. *Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 627-628 (5th Cir. 2001). Likewise, the only reasonable inference from the

circumstances here is that the agency was simply applying the vacated rule, not choosing to include part C days following a new and objective examination of the question.

2. *The Government's Opposition Reflects Continued Disregard for the Court of Appeals Holdings Regarding Its Pre-2004 Policy on Part C Days*

To justify the inclusion of part C days in the 2012 part A/SSI fractions, the government asserts that the agency was forced to pick "some" interpretation to administer Medicare, Gov. Opp. 7. But the agency was not acting in a regulatory vacuum. This response is just one more example of the government's refusal to accept the holdings of this Court and the D.C. Circuit that the agency did, in fact, have a long-standing policy prior to the 2004 rulemaking that "treated Part C patients as *not* entitled to benefits under Part A." *Allina Health Servs.*, 746 F.3d at 1106.

Notwithstanding the D.C. Circuit's prior holding in *Northeast Hospital Corp. v. Sebelius*, 657 F.3d 1 (D.C. Cir. 2011), in the prior proceedings before this Court, the government insisted that the agency did not have a "policy" of excluding part C days from the part A/SSI fraction—only a "practice"—and therefore the 2004 rulemaking "did not constitute a policy change." *Allina Health Servs. v. Sebelius*, 904 F. Supp. 2d 75, 87 (D.D.C. 2012). This Court flatly rejected that position, noting that *Northeast* did not "give room for a legally significant difference between practice and policy," and "[i]n fact, the appellate court went to pains to state the opposite." *Id.* at 88. In the D.C. Circuit, the agency narrowed its "no policy" argument to focus on the Medicaid fraction, insisting that the 2003 notice could not have "endors[ed] a prior policy" because there was no such policy. *Allina Health Servs.*, 746 F.3d at 1108. The D.C. Circuit, too, flatly rejected that position because it "disregards [the] holding in *Northeast Hospital*." *Id.* The D.C. Circuit reiterated that prior to the 2004 rulemaking, the agency had a long-standing policy of excluding part C days from the part A/SSI fraction and including them in

the Medicaid fraction (if Medicaid eligible). *Allina Health Servs.*, 746 F.3d at 1108 (describing the agency's "policy … of excluding Part C days from the Medicare fraction and including them in the Medicaid fraction").

The government here again pays lip service to that holding, Gov. Opp. 7 n.5. But it ignores its legal and practical consequence, which is that the agency is not now writing on a clean slate. This Court's vacatur of the 2004 rule reinstated the pre-2004 interpretation. *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 672 (D.C. Cir. 2006) (Vacatur "restored the *status quo ante.*"). Thus, the agency is not now free simply to pick *some* or any interpretation of the statute in calculating the part A/SSI fractions for 2012. Rather, the agency is bound by the pre-2004 policy up until the point that it undertakes binding action to change it. The government states that the agency has not yet taken any such action. Gov. Opp. 8 n.6. Accordingly, the agency is bound by the interpretation and the established policy that governed prior to the 2004 rule. The government does not get a do-over as if starting from scratch.

The government resists this conclusion by singing a yet more narrow version of its no-prior-policy refrain. The government now contends that there is no "binding regulation" on part C days that is reinstated by the vacatur of the 2004 rule—and that this regulatory vacuum cannot be disputed. Gov. Opp. 7 & n.5. This is both wrong and irrelevant. It is wrong because—as the Hospitals have consistently argued from the beginning of this litigation—the 2003 version of the DSH rule provided that the numerator of the part A/SSI fraction includes only "covered patient days that … [a]re furnished to patients who during that month were entitled to both Medicare Part A and SSI." 42 CFR § 412.106(b)(2)(i) (2003). As the D.C. Circuit has recognized, that regulation included only "covered Medicare Part A inpatient days" in the part A/SSI fraction. *Catholic Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 921 n.5 (D.C. Cir. 2013).

More critically for present purposes, however, whether the government had a "binding regulation" just does not matter. The law in this Circuit mandates that even policies and practices *not* codified in formal regulations are reinstated when an agency's invalid attempt to change that policy is vacated. For example, in *Croplife America*, the D.C. Circuit considered a challenge to the EPA's attempt to change its policy and practice regarding the use of human studies in evaluating the safety of pesticides. 329 F.3d at 878. Prior to December 2001, the EPA had a "practice of considering third-party human studies on a case-by-case basis." *Id.* at 879. This practice was not codified in a regulation, but was "made clear" in a press announcement and through the agency's actions (such as "in fact consider[ing] available human data" in making pesticide decisions). *Id.* at 880. On December 2001, however EPA publicly "announced a broad moratorium on the use of third-party human test data." *Id.* The D.C. Circuit vacated the moratorium for failure to comply with notice-and-comment rulemaking requirements. It further held that "[a]s a consequence, the agency's previous practice … is reinstated and remains in effect unless and until it is replaced." *Id.* at 879. So, too, here. Until the agency undertakes the "adjudicatory decision" that it apparently has planned to readopt the 2004 interpretation, Gov. Opp. 8 n.6, the agency's pre-2004 policy remains.

B. The Hospitals' Requested Relief Would Effectuate The Judgments Of This Court And The D.C. Circuit

The government does not dispute that injunctive relief is generally necessary and proper to effectuate a vacatur in the face of agency noncompliance. *See* 28 U.S.C. § 2202; *Public Citizen v. Carlin*, 2 F. Supp. 2d 18, 20 (D.D.C. 1998). Indeed, an injunction is an "authorized and common sequel to a declaratory judgment" when "the defendant thumbed his nose at the declaration." *Allan Block Corp. v. Cnty. Materials Corp.*, 512 F.3d 912, 916 (7th Cir. 2008). The Declaratory Judgment Act, 28 U.S.C. § 2202, "clearly anticipate[s] ancillary or subsequent

coercion to make an original declaratory judgment effective." *Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, 843 F.2d 546, 548 (D.C. Cir. 1988). Consistent with that purpose, the requested injunction seeks to enforce the favorable judgment the Hospitals have already attained, not to address issues that the D.C. Circuit determined were beyond the scope of the earlier proceeding.

Of course, the Hospitals' view is that the Administrative Procedure Act, 5 U.S.C. § 553, and the Medicare Act, 42 U.S.C. § 1395hh, preclude the agency from changing its policy on part C days except through notice-and-comment rulemaking for various reasons, including that the pre-2004 binding regulation required the exclusion of part C days from the part A/SSI fraction. *See* Hospitals' Mot. for Inj. 7. The Secretary, on the other hand, contends that the agency can change its policy on part C days through an adjudication. *See* Gov. Opp. 3. The Hospitals acknowledge that the D.C. Circuit did not decide whether the agency can change a substantive payment standard without rulemaking. *Allina Health Servs.*, 746 F.3d at 1111. Rather, it held that the question of whether the agency could change its policy through adjudication was not yet presented. *Id*. ("The question whether the Secretary could reach the same result through adjudication was not before the district court[.]"). The question presented now, however, is not what the agency may *ever* do to change the pre-2004 policy restored by the vacatur, but what the vacatur requires in the interim period. According to the government, we are in that interim period now. Gov. Opp. 4 ("[T]he matter is still pending before the agency on remand."); *id.* at 8 n.6 ("Ultimately, the interpretive question presented on remand will be resolved by a final adjudicatory decision by the Secretary. … No such final decision has been rendered at this time."). The problem is that the government seems to believe that there is some regulatory no man's land where it can do whatever it wants with part C days in the DSH calculation until it

undertakes its apparently planned adjudication to adopt a change in policy, *see* Gov. Opp. 8 n.6, 9.[2] Unfortunately for the government, that is not how it works. Following the vacatur, the *status quo ante* governs. *See Virgin Islands Tel. Corp.*, 444 F.3d at 672.[3]

C. Injunctive Relief To Rectify The 2012 Part A/SSI Fractions Is Proper

The Hospitals have established their entitlement to an injunction because there is no adequate remedy at law. *Burman v. Phoenix Worldwide Indus., Inc.*, 384 F. Supp. 2d 316, 341 (D.D.C. 2005) ("[W]hen a plaintiff seeks post-judgment injunctive relief, he must simply plead and … prov[e] facts which show, that he has no adequate remedy at law.") (internal quotation marks omitted; ellipsis and alteration in original). It is hornbook law that legal remedies are inadequate when there could be "[r]epeated acts" and a "multiplicity of suits" because the "defendant acts in such a way that the plaintiff may be required to bring (or defend) more than one suit to effectuate his legal remedy." 1 Dan B. Dobbs, Law of Remedies § 2.5(2) (2d ed. 1993). It is thus entirely proper to grant an injunction to enforce a vacatur when the Secretary's agency has indicated that it does not intend to abide by the vacatur, especially in light of the government's proposition that the Hospitals must bring multiple, repetitious suits to defend their rights, Gov. Opp. 9-10. *See Los Angeles Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 662 (9th Cir. 2011) ("[B]ecause the Secretary is apparently unwilling to give any assurance that she will voluntarily refrain from enforcing the invalid regulation [for other years] … the district court had

[2] The government insists that publication of the part A/SSI fractions is "but one step" in the payment process. Gov. Opp. 4. But the agency's own rule requires application of those agency-calculated fractions in issuing notices of program reimbursement ("NPRs") for cost reporting periods that began in the 2012 federal fiscal year. 42 C.F.R. § 412.106(b)(2); *Baystate Med. Ctr. v. Leavitt*, 545 F. Supp. 2d 20, 24 (D.D.C. 2008). Moreover, the agency is trying to have its cake and eat it, too, by maintaining the moratorium on NPRs that it adopted just after this Court issued its decision in this case in November 2012. *See* Technical Direction Letter, TDL-130516, Sept. 3, 2013, at 1 (Ex. A to Hospitals' Mot. for Inj.).

[3] Accordingly, this Motion only reinforces that the judgment entered in the related cases was correct. The Hospitals here are seeking nothing more than to hold the agency to the judgment requiring that its remand proceedings be "consistent with" the D.C. Circuit's opinion, which is also what the judgment in the related cases requires. *Palm Springs Gen. Hosp. Inc. v. Burwell*, No. 1:13-cv-00648 (RMC), Order at 1, ECF No. 23 (D.D.C. July 11, 2014).

both the authority and discretion to enjoin future application of the invalid regulation, at least as against [the plaintiff]."); *see also Public Citizen*, 2 F. Supp. 2d at 20. Filing multiple suits to enforce the vacatur is not an adequate legal remedy.[4]

Moreover, this Court has uniformly rejected the government's contention, Gov. Opp. 10, that it lacks jurisdiction to grant an injunction reaching additional years for the Hospitals beyond fiscal year 2007. "Once a reimbursement challenge has reached the end of the administrative review process, the subsequent judicial action is governed by the terms of the APA" which plainly "authorizes the court to enjoin unlawful agency action." *Affinity Healthcare Servs., Inc. v. Sebelius*, 746 F. Supp. 2d 106, 119 (D.D.C. 2010) (granting injunction and rejecting government's argument that injunction reaching other years "would grant the plaintiffs relief for challenges to … cost years that have not been exhausted at the administrative level"); *see also Charleston Area Med. Ctr. v. Sebelius*, No. 1:13-cv-00643 (RMC), Order at 2, ECF No. 40 (D.D.C. Aug. 6, 2014) (ordering that the "Board, the rest of the Department of Health and Human Services, and all current and future Medicare contractors are enjoined from applying" a certain regulation "to any pending or future Board appeal that … is based on the Medicare contractor's failure to issue a timely NPR"). When a hospital seeks expedited judicial review to challenge a regulation, *see* 42 U.S.C. § 1395oo(f)(1), as the Hospitals did here, "the very question that has been funneled through the administrative process and is … before the court is the [agency's] authority to utilize [that regulation] in calculating the plaintiffs" reimbursements as a facial matter, not year-by-year. *Affinity Healthcare*, 746 F. Supp. 2d at 120; *see also*

[4] A number of the plaintiff Hospitals have appealed to the Provider Reimbursement Review Board and requested expedited judicial review of whether the agency can *ever* treat part C days as part A days in the DSH calculations for their 2012 cost years. At issue here, however, is what the agency is permitted to do after the vacatur of the 2004 rule but before the agency takes action through its remand proceeding, which the government says has not yet occurred, Gov. Opp. 8 n.6, and would only relate to the hospital's 2007 cost years, Gov. Opp. 10.

Russell-Murray Hospice, Inc. v. Sebelius, 724 F. Supp. 2d 43, 60 (D.D.C. 2010) ("[T]he court prospectively enjoins HHS from applying the challenged regulation to the plaintiff.").

Courts of appeals agree with this Court's view that it is appropriate to enjoin the Secretary from applying a vacated regulation. *See Los Angeles Haven Hospice*, 638 F.3d at 664 ("On its face, [the expedited judicial review] provision specifically authorizes the district courts to decide pure questions of law," such as facial validity, "notwithstanding the fact that the legal question is raised in connection with the plaintiff's appeal … for a specific accounting year" and therefore "the district court had the authority and acted within its discretion to enjoin further application of the [challenged] regulation[.]"); *Lion Health Servs., Inc. v. Sebelius*, 635 F.3d 693, 702 (5th Cir. 2011) ("[T]he question of the regulation's validity was properly before the district court pursuant to 42 U.S.C. § 1395oo(f)(1). Therefore, the district court had the authority under § 706 of the APA to enjoin the Secretary from using the Regulation … for any past, present, and future year."). The Secretary offers no response to any of this authority.

Furthermore, the Hospitals are not required to bring a new case in order to obtain relief from any action inconsistent with the D.C. Circuit's mandate, *contra* Gov. Opp. 9. What is at issue here is whether the agency may ignore the vacatur's reinstatement of the pre-2004 policy pending a binding agency policy change. That question—which depends upon the interpretation of the judgment in this case—is proper for resolution in this case, not some new proceeding.

The *Heartland Regional Medical Center* cases are not to the contrary. In the first *Heartland* case, the district court invalidated a certain regulatory requirement for failure to consider alternatives. *Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24, 27 (D.C. Cir. 2005). On remand, the agency conducted a rulemaking and an adjudication in which it considered those alternatives, but rejected them and reinstated the same policy. *Id.* at 28. Heartland then filed a

motion to enforce the district court decision, contending that the district court decision entitled Heartland to an order forcing the agency to reach a different result. *Id.* at 28. The D.C. Circuit held that Heartland was not entitled to enforcement, because the agency did everything that the judgment required by considering the alternatives. *Id.* at 29. The D.C. Circuit noted that the decision might be subject to *other* grounds of attack under the APA—other than noncompliance with the prior judgment—but those would have to wait for a new remand suit. *Id.* at 30.

The D.C. Circuit did not hold, however, that *any* challenge to an agency action on remand had to be brought in a new suit. To the contrary, it accepted the principle that a motion to enforce was the proper vehicle to force an agency to comply on remand with the "relief to which [the plaintiff] is entitled under [its] original action and the judgment entered therein." *Id.* at 29 (internal quotation marks omitted; alteration in original). It simply disagreed that the remand action at issue violated the original judgment. Here, the Hospitals' ground for the motion is that the judgment in this case requires the agency to apply the pre-existing policy, at least until it takes binding agency action to change that policy. On that point, the D.C. Circuit's final decision in the *Heartland* cases supports the Hospitals. *See Heartland Reg'l Med. Ctr.*, 566 F.3d at 198 (explaining that had an earlier district court decision vacated a rule, it "likely would have required HHS to make payments to those hospitals" under a policy that did not incorporate the rule "until the agency repromulgated the same rule").

In sum, injunctive relief is proper and well within this Court's power. If this Court decides against entry of an injunction, however, then the Hospitals respectfully request that the declaration of vacatur entered in this case further specify that the vacatur restores the Secretary's pre-2004 policy of excluding part C days from the part A/SSI fraction (and including them in the Medicaid fraction, if Medicaid eligible), at least until the Secretary makes a valid and binding

change to that policy.

D. Though Not Required, The Hospitals Communicated Their Concerns To The Secretary Without Success Before Seeking Relief From This Court

Finally, the Secretary's primary argument for denying an injunction to effectuate the D.C. Circuit's judgment is baseless. The Hospitals informed the Secretary of their contention that the 2012 part A/SSI fractions were inconsistent with the mandate in this case, and sought relief from the Secretary prior to filing this motion. The Hospitals reached out to the government because the agency had complied with the Hospital's earlier requests, during the pendency of the government's appeal, to revise part A/SSI fractions released for earlier years consistent with the pre-2004 policy. The government's two dismissive responses confirmed its view—reflected in its opposition here—that the recently released 2012 fractions were permissible. Further discussions would not have narrowed this disagreement, which persists.[5]

Perhaps viewing our prior communication as something other than the genuine attempt at resolution of the Hospitals' concerns it was, the government claims that the Hospitals had an obligation to confer with them regarding their position on this dispositive motion. But the Hospitals were under no obligation to confer about their request for an injunction to effectuate the vacatur. Indeed, in a case where the government itself argued that a motion for post-judgment relief was a dispositive motion, this Court noted that it is "far from clear" whether Local Rule 7(m) even "covers post-judgment litigation." *United States v. Philip Morris USA, Inc.*, 793 F. Supp. 2d 164, 172 (D.D.C. 2011) (declining to modify an injunction to require the government to confer with defendants before filing a motion to enforce); Gov. Opp. to Mot. to

[5] Given that the parties dispute whether the agency's issuance of the 2012 fractions complies with the vacatur in this case, and the agency refused to withdraw those fractions, there remains a live controversy and the case is not moot. Accordingly, *American Wild Horse Preservation Campaign v. Salazar*, 800 F. Supp. 2d 270 (D.D.C. 2011)—in which the agency had withdrawn the challenged action—is entirely inapposite.

Clarify, *id.*, ECF No. 5927, at 6 (filed Apr. 25, 2011). Regardless, that rule does not require any conference on this motion, because this motion seeks an injunction and is therefore dispositive.

Even motions for preliminary injunctions are considered dispositive within the meaning of the Federal Rules of Civil Procedure and the Local Rules. Thus, magistrate judges—who may finally determine only nondispositive pretrial motions, Fed. R. Civ. P. 72(a)—may not render final decisions on preliminary injunctions without consent of the parties, 28 U.S.C. § 636(b)(1)(A), (c); *see also* Local Civ. Rule 72.3(a), 73.1. *A fortiori*, a claim for a *post-judgment* injunction is dispositive. Moreover, the Hospitals' motion fits squarely within the definition of "dispositive" used by the authority the Secretary cites. *See Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23, 26 (D.D.C. 2001) (defining dispositive as "a motion that, if granted, would result … in the determination of a particular claim on the merits") (cited at Gov. Opp. 6). This motion will fully determine the merits of the Hospitals' claim for an injunction under 28 U.S.C. § 2202. *See Horn & Hardart Co.*, 843 F.2d at 549 (defining request under 28 U.S.C. § 2202 as a "claim[] for further relief"). Therefore, the government's primary response to the Hospitals' motion—that it should be dismissed for failure to confer under Local Rule 7(m), Gov. Opp. 4-6—is entirely without merit.

CONCLUSION

For the foregoing reasons and those stated in the motion, the Hospitals respectfully request that the Court enter an order enjoining the Secretary from applying the vacated rule when calculating any final, tentative, or interim DSH payments for plaintiff Hospitals or when calculating any component of the DSH payment calculation for any hospital cost year for plaintiff Hospitals beginning before October 1, 2013.

Respectfully Submitted,

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