

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ALLINA HEALTH SERVICES, <i>et al.</i> ,	)	
	)	
<i>Plaintiffs,</i>	)	
	)	
v.	)	Civil Action No. 10-cv-01463 (RMC)
	)	
SYLVIA M. BURWELL, Secretary,	)	
Department of Health and Human Services,	)	
	)	
<i>Defendant.</i>	)	
	)	

**DEFENDANT’S MOTION FOR LEAVE TO FILE SUR-REPLY IN OPPOSITION TO  
PLAINTIFFS’ MOTION FOR FURTHER RELIEF**

Defendant respectfully moves for leave to file a short sur-reply in opposition to Plaintiffs’ Motion for Further Relief in order to address an argument raised for the first time in Plaintiffs’ Reply Brief. In their Motion for Further Relief, Plaintiffs contend that the Secretary is relying on the portion of the 2004 rule governing the treatment of Medicare Part C days under the DSH statute, 69 Fed. Reg. 48,916, 49,099 (Aug. 11, 2004), which was vacated in this case. Plaintiffs seek post-judgment injunctive relief, ostensibly to prevent the Centers for Medicare & Medicaid (“CMS”) from relying on the vacated portions of the Rule in calculating Plaintiffs’ 2012 SSI fractions. In its Opposition, Defendant explained that CMS is not relying on the vacated portion of the Rule to calculate Plaintiffs’ 2012 SSI fractions or for any other reason.

In their Reply, which is longer than their original Motion, Plaintiffs argue for the first time that injunctive relief is warranted because “the agency is bound by the pre-2004 policy [of excluding Part C days from the Medicare fraction] up until the point that it undertakes binding action to change it.” Pls.’ Reply at 6 (Doc. No. 64). Because Defendant has never had an opportunity to address this issue, Defendant moves for leave to file a short sur-reply, limited to

demonstrating why this new argument is not properly before this Court and should not be entertained in this litigation. Leave to file a sur-reply is appropriate here, because without such leave, Defendant would be “unable to contest matters presented to the [C]ourt for the first time” in Plaintiffs’ reply. *See Hoskins v. Napolitano*, 842 F. Supp. 2d 8, 12 n.1 (D.D.C. 2012) (quoting *Ben-Kotel v. Howard Univ.*, 319 F.3d 532, 536 (D.C. Cir. 2003)).

A copy of the proposed sur-reply and a proposed order are attached hereto. Undersigned counsel has consulted with counsel for Plaintiffs about the filing of this motion, and Plaintiffs took no position.

Dated: August 25, 2014

Respectfully submitted,

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SHEILA LIEBER  
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