

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

ALLINA HEALTH SERVICES, et al.)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 14-01415 (RMC)
)	
SYLVIA M. BURWELL, Secretary,)	
United States Department of Health and)	
Human Services,)	
)	
Defendant.)	

**DEFENDANT’S RESPONSE TO THE COURT’S SEPTEMBER 29, 2014
MINUTE ORDER AND OPPOSED MOTION FOR EXTENSION OF TIME TO
MOVE TO DISMISS AND FOR VOLUNTARY REMAND AND TO HOLD IN
ABEYANCE THE PARTIES’ SUMMARY JUDGMENT BRIEFING**

On August 19, 2014, plaintiffs, 10 hospitals, filed this action, seeking to challenge the Secretary’s calculation of their disproportionate share hospital (“DSH”) payments for Fiscal Year 2012. On the same day, plaintiffs filed a Notice of Related Case Designation, stating that this case is related to *Allina Health Servs. v. Sebelius*, Civ. No. 10-1463 (D.D.C.) (Collyer, J.) (“*Allina I*”), a case challenging the Secretary’s 2004 rulemaking governing how to calculate certain hospitals’ DSH payments for Fiscal Year 2007.¹ On September 29, 2014, this Court issued a Minute Order, transferring to this newly-filed case plaintiffs’ Motion for Granting Further Relief in *Allina I*, directed that it should be

¹ As explained in the Secretary’s recently filed Objection to Plaintiffs’ Notice of Related Case Designation, *see* ECF No. 12, plaintiffs have not met their burden of showing that this case is related to *Allina I*. At the time this new case was filed, *Allina I*, which was before the Secretary on remand, and the issue on remand is how the Secretary should take into account Medicare Part C days in calculating plaintiffs’ DSH payments. The issues in the two cases are purely legal and also concern different fiscal years and payments. Some of the parties also differ.

treated as a Motion for Summary Judgment in this new case, and requesting that the parties notify the Court, by no later than October 16, 2014, whether any further briefing on summary is required in this case. *See* Sept. 29, 2014 Minute Order. Defendant, Sylvia M. Burwell, in her official capacity as Secretary of the United States Department of Health and Human Services (“the Secretary”), respectfully submits the following response to the Court’s September 29, 2014 Minute Order:

1. The Board’s decision granting Expedited Judicial Review (“EJR”) for plaintiffs in this case on the basis that it “[wa]s bound” to apply the 2004 Final Rule when calculating plaintiffs’ Fiscal Year 2012 payments, *see* August 13, 2014 Provider Reimbursement Review Board decision, attached as Exhibit A, is clearly erroneous. Because the D.C. Circuit upheld the part of this Court’s November 15, 2012 Order in *Allina I* that vacated the 2004 Final Rule on the ground that it violated the procedural requirements of the Administrative Procedure Act (“APA”), the 2004 Final Rule has ceased to exist. *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1111 (D.C. Cir. 2014) (affirming “the portion of the district court’s opinion [in *Allina I*] vacating the rule” but “revers[ing] [] the portion of the district court’s opinion directing the Secretary to recalculate the hospitals’ reimbursements using the alternate methodology [advanced by plaintiffs]”).
2. Because the 2004 Final Rule had already been vacated before the Board considered plaintiffs’ (improper) July 2014 requests for EJR, the Board could not have been “bound” by the 2004 Final Rule, and its grant of EJR was therefore clear error.

3. Because EJR was improvidently granted, the Secretary intends to move to dismiss this action for lack of jurisdiction and to seek a remand to the Board.
4. If the Court grants the Secretary's motion to dismiss, it will obviate the need for any merits briefing in this matter and for establishing a summary judgment briefing schedule or responding to plaintiffs' motion for summary judgment, *see* ECF Nos. 8, 10, thereby conserving both the Court's (and the parties') time and resources. *See Sierra Club v. Antwerp*, 560 F. Supp. 2d 21, 23 (explaining that "the Circuit prefers 'to allow agencies to cure their own mistakes rather than wasting the court's and the parties' resources reviewing a record that both sides acknowledge to be incorrect'") (quoting *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993)).
5. Because the Secretary's response to this Complaint currently is due on October 20, 2014, the Secretary respectfully requests a one-week extension of time, until October 27, 2014, to file her motion to dismiss for lack of jurisdiction and for remand. Because the Secretary intends to move to dismiss this action, the Secretary also respectfully requests that the Court hold in abeyance any further summary judgment briefing until 30 days after the Court has ruled the Secretary's motion to dismiss.
6. The Secretary respectfully requests that the Court grant her counsel this requested extension of time because the Secretary's counsel was assigned to this matter only last Thursday, October 9, 2014, and has briefing deadlines in the next two weeks in other cases for which she has primary responsibility. The Secretary also respectfully requests that the Court hold summary judgment briefing in abeyance

for 30 days pending the Court's decision on the Secretary's Motion to Dismiss and for Voluntary Remand.

7. Pursuant to Local Rule 7(m), on October 16, 2014, counsel for the Secretary conferred with plaintiffs' counsel regarding the relief requested in this motion.

Counsel for plaintiffs opposes this motion.

Dated: October 16, 2014

Respectfully submitted,

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SHEILA LIEBER
Deputy Branch Director

/s/ Tamra T. Moore

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