UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' RESPONSE TO DEFENDANT'S OBJECTION TO RELATED CASE DESIGNATION UNDER LOCAL CIVIL RULE 40.5

This case (*Allina II*) is related to civil action number 10-1463 (*Allina I*) because both cases grow out of the same event, the Secretary's 2004 rule changing the agency's policy on counting Medicare part C days in the disproportionate share hospital ("DSH") calculation. Moreover, a dispositive motion for injunctive relief from the agency's continued application of that now vacated rule was pending on the merits in *Allina I* when this case was filed. For these reasons, and to promote judicial economy, the related case designation is appropriate.

I. The Related Case Rule

New cases filed in this Court are generally assigned randomly in order to prevent judge shopping. LCvR 40.3(a)*; see Tripp v. Exec. Office of President,* 196 F.R.D. 201, 202 (D.D.C. 2000) (noting that the general rule requiring random assignment "guarantees fair and equal distribution of cases to all judges, avoids public perception or appearance of favoritism in assignments, and reduces opportunities for judge-shopping"). The assignment of related cases to the same judge, intended to promote judicial economy, stands as an exception to this general rule. *See id.* ("The exception to the general rule . . . rests primarily on considerations of judicial

economy."). A party filing a civil action is required to notify the Court of any related cases. LCvR 40.5(b)(2). Two cases are deemed related when the earliest case is "pending on the merits in the District Court" and when at least one of four additional criteria are met including, pertinent here, when both cases "grow out of the same event or transaction." *Id*. 40.5(a)(3). When a party objects to a related case designation, *id.* 40.5(b)(2), the matter is determined by the judge to whom the case is assigned, *id*. 40.5(c)(3).

II. *Allina II* Is Related to *Allina I*

Allina I and this case are related if they both "grow out of the same event or transaction."[1] *See id.* 40.5(a)(3). To "grow out of" means "to originate in" or "develop from." *See* Random House Webster's Unabridged Dictionary (2d ed. 2001). The action from which both *Allina I and II* originate is the Secretary's policy change in the 2004 rule on counting part C days in the DSH calculation. *See Autumn Journey Hospice, Inc. v. Sebelius*, 753 F. Supp. 2d 135, 140 (D.D.C. 2010) (concluding that two cases "ar[ose] out of a common event or transaction – namely, the promulgation of the hospice cap reimbursement regulation . . ."). [2] The government challenges relatedness because "*Allina I* did not involve the Secretary's interpretation of the DSH statute reached in the absence of the vacated 2004 Final Rule." Def. Obj. at 2. But neither does *Allina*

[1] Citing an unpublished six line order issued in *Atlanticare Regional Medical Center v. Leavitt*, *see* Order, No. 08-872 (D.D.C. 2010) (Kessler, J.), ECF No. 15, the government also apparently argues against relatedness based on lack of common facts. *See* Def. Obj. at 2. But cases are related if they "involve common issues of fact" *or* "grow out of the same event or transaction." LCvR 40.5(a)(3). Both are not required.

[2] Like the Secretary's part C days rule at issue in this case, which applies to periods from October 1, 2004 to September 30, 2013, the one hospice cap regulation challenged in *Autumn Journey*, 42 C.F.R. 418.309(b), applies to multiple cost years. The cases listed in *Autumn Journey* as having been designated related involved multiple cost years, including one overlapping year. *See, e.g.*, Complaint, *Autumn Journey Hospice, Inc.*, No. 1:09-cv-02403 (D.D.C. Dec. 22, 2009), ECF No. 1 (cost year 2007); Complaint, *Russell-Murray Hospice, Inc. v. Sebelius*, No. 1:09-cv-2033 (D.D.C. Oct. 29, 2009), ECF No. 1 (cost years 2006 and 2007); Complaint, *Hospice Advantage, Inc. v. Sebelius*, No. 1:10-cv-00845 (D.D.C. May 21, 2010), ECF No. 1 (cost years 2007 and 2008).

II, in the Hospitals' view, because the Hospitals' contention in *Allina II* is that the 2004 rule is not "absen[t]," as it should be, but ever present, and the Secretary continues to apply it. That the Secretary disagrees does not eliminate the relatedness of the cases, as relatedness is determined based on the Plaintiffs' claims, not the Defendant's arguments. *See Collins v. Pension Benefit Guaranty Corp*., 126 F.R.D. 3, 7 (D.D.C. 1989) (rejecting defendant's contention that cases challenging a phase-in rule were not related because in the latter case, defendant's argument would obviate the need to reach that issue, because if the court agreed with the plaintiffs' contentions, then the phase-in rule would apply, and it was the same rule challenged in the earlier case). Two cases need not be the *same* case to be related. The cases can simply grow out of the same event, which the two *Allina* actions plainly do. The 2004 rule was the administrative action in which the Secretary announced the policy change for the periods at issue that was applied in *Allina I* and, now, in this case.

In any event, although it is not necessary to establish relatedness, the legal issues overlap as well between the two cases, contrary to the government's contention, *see* Gov. Obj. at 2. Because both cases grow from the Secretary's attempted policy change, they both concern the procedural and substantive validity of the Secretary's new policy (as embodied in the Secretary's 2004 rule and applied in the binding part A/SSI fractions for 2007 and 2012). Both cases necessarily involve what the Secretary's pre-2004 policy was, the procedural requirements for adopting the new policy, and whether that policy is substantively permissible under *Chevron* step two. Indeed, providing all the more reason to deem these cases related, the Secretary has not objected to relatedness to *Allina I* in at least seven other cases, at least three of which do not even grow out of the policy change on part C days but involve other aspects of the Medicare DSH

calculation.[3] *See Autumn Journey Hospice*, 753 F. Supp. 2d at 140 (finding cases related where Secretary had not objected to related case designations filed in multiple other similar cases).

In addition, the government's objection fails to acknowledge or address the motion for further relief that was pending on the merits in *Allina I* when the instant case was filed. On July 17, 2014, the plaintiffs in *Allina I*, including all nine plaintiffs in this case, requested injunctive relief from the Secretary's determination to apply the vacated rule anew even after the D.C. Circuit issued its mandate in *Allina I*. *See* Pls' Mot. For Order Granting Further Relief, July 17, 2014, ECF No. 62. When the Hospitals filed their complaint in *Allina II* on August 19, 2014, that motion was still pending in *Allina I*.

And, as explained in responding on August 14 to the government's argument that the Hospitals had a duty to confer as to their motion for further relief in *Allina I*, that motion was a dispositive motion on the merits. *Allina I*, Pls.' Reply in Support of Pls.' Mot. For Further Relief 13-14, Aug. 14, 2014, ECF No.64. In this Circuit, "[t]he term 'dispositive motion' includes a motion that, if granted, would result either in the determination of a particular claim on the merits or elimination of such a claim from the case." *See Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1215 (D.C. Cir. 1997). The motion for further relief would have fully determined the merits of the Hospitals' claim for an injunction under 28 U.S.C. § 2202. *See Horn & Hardart Co. v. Nat'l Rail Passenger Corp.*, 843 F.2d 546, 549 (D.C. Cir. 1988)

[3] *See* Notice of Related Case, *Florida Health Sciences Ctr., Inc. v. Sebelius*, No. 1:12-cv-00328 (D.D.C. Feb. 29, 2012), ECF No. 2*;* Notice of Related Case, *Palm Springs Gen. Hosp., Inc. v. Sebelius*, No. 1:13-cv-00648 (D.D.C. May 6, 2013), ECF No. 2; Notice of Related Case, *MCG Med. Ctr. v. Sebelius*, No. 1:13-cv-00684 (D.D.C. May 13, 2013), ECF No. 3; Notice of Related Case, *Kaleida Health v. Sebelius*, No 1:13-cv-00792 (D.D.C. May 30, 2013), ECF No. 2; Notice of Related Case, *Univ. of Ariz. Med. Ctr. – Univ. Campus v. Sebelius*, No. 1:13-cv-00923 (D.D.C. June 19, 2013), ECF No. 2; Notice of Related Case, *Stringfellow Mem'l Hosp. v. Sebelius*, No. 1:13-cv-01741 (D.D.C. Nov. 5, 2013), ECF No. 3; Notice of Related Case, *Novant Health Forsyth Med. Ctr. v. Burwell*, No. 1:14-cv-01054 (D.D.C. June 23, 2014), ECF No. 3. The cases that do not even grow out of the part C days policy change are: *Univ. of Ariz. Med. Ctr.*, No. 13-cv-00923; *Stringfellow Mem'l Hosp.*, No. 13-cv-01741; and *Novant Health Forsyth Med. Ctr.*, No. 14-cv-01054.

(defining request under 28 U.S.C. § 2202 as a "claim[] for further relief"). The fact that this Court later converted Plaintiffs' motion in *Allina I* to a summary judgment motion in this case only underscores the dispositive nature of the motion and the relatedness of the two cases. *Allina II*, Minute Order, Sep. 29, 2014. The Hospitals' claims were still pending on the merits in *Allina I* when this case was filed, and this case was thus properly designated as related to the earlier one.

Finally, the local rule and principles of judicial economy would be served by having *Allina I* and *II* pending before the same judge because both cases properly present the question of the (im)propriety of the Secretary's application of the same 2004 rule. *See Assiniboine & Sioux Tribe of the Fort Peck Indian Reservation v. Norton*, 211 F. Supp. 2d 157, 159 (D.D.C. 2002) (finding two cases related when "it would clearly waste judicial resources to have two separate courts make findings of fact regarding the administration of a single lease").

For all these reasons, the Court should deny the Defendant's objection to related case designation.

Respectfully Submitted,

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