

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

AMERICAN HOSPITAL ASSOCIATION, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	Civil Action No. 14-cv-00851 (JEB)
v.)	
)	
ALEX M. AZAR, in his official capacity as Secretary of Health and Human Services,)	
)	
Defendant.)	

RESPONSE TO PLAINTIFFS’ NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiffs’ notice of supplemental authority (ECF No. 78) asserts that HHS could reduce the Medicare appeals backlog by agreeing to toll the purported deadline for hospitals to file appeals related to the 340B Drug Discount Program pending the resolution of *American Hospital Association v. Azar*, No. 18-5004 (D.C. Cir.), in which the American Hospital Association and other organizations challenged a recent rulemaking by HHS that adjusts Medicare Outpatient Prospective Payment System (OPPS) payments for 340B hospitals. HHS declined Plaintiffs’ request for such tolling, and Plaintiffs now assert that this decision calls into question HHS’s commitment to reduce the backlog. This argument is without merit.

As HHS has explained in the 340B litigation, Congress has expressly precluded administrative and judicial review of OPPS adjustments. *See Amgen, Inc. v. Smith*, 357 F.3d 103, 112 (D.C. Cir. 2004) (applying 42 U.S.C. § 1395l(t)(12) to preclude review of equitable adjustments made to the OPPS under section 1395l(t)(2)(E)). These adjustments are not reviewable “initial determinations” because they are “computations of the payment amount of program reimbursement for which CMS has sole responsibility under Part B.” 42 C.F.R.

§ 405.926(c). If AHA member hospitals attempt to challenge non-reviewable determinations by filing administrative appeals with the Office of Medicare Hearings and Appeals (OMHA), then OMHA will flag those filings and dismiss them promptly. The filings will not add to the backlog of Medicare appeals awaiting a hearing before an administrative law judge at OMHA.

Dated March 21, 2018

Respectfully submitted,

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