IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE AMERICAN HOSPITAL ASSOCIATION, *et al.*,

Plaintiffs,

v.

Alex M. Azar, II, in his official capacity as the Secretary of Health and Human Services, *et al.*,

Defendants.

Civil Action No. 1:18-cv-02084-RC

UNOPPOSED MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF THE FEDERATION OF AMERICAN HOSPITALS IN SUPPORT OF NEITHER PARTY

Pursuant to Local Rule 7(o), the Federation of American Hospitals ("FAH") respectfully moves for leave to file a brief as *amicus curiae* in support of neither party. A copy of the proposed brief is attached hereto as Exhibit A. A proposed order is attached as Exhibit B.

Pursuant to Local Civil Rule 7(o), undersigned counsel contacted counsel for the parties concerning the proposed brief. Plaintiffs and Defendants consent to the filing of the brief.

This Court's local rules do not specify the time for filing of amicus briefs, but this brief is being filed within seven days of the Parties' briefs, within the deadline provided in the relevant appellate rule governing amicus briefs. See Fed. R. App. P. 29(a)(6) ("An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed.")

Founded in 1966, FAH is the national representative of more than 1,000 investor-owned or managed community hospitals and health systems throughout the United States. These members include rural and urban teaching and non-teaching hospitals and provide a wide range of acute, post-acute, and ambulatory services. Dedicated to a market-based philosophy, FAH

provides representation and advocacy on behalf of its members to Congress, the Executive Branch, the judiciary, media, academia, accrediting organizations, and the public.

FAH's members are essential participants in the nation's health care community and provide services to millions of Medicare and Medicaid beneficiaries each year. FAH's members are not eligible to purchase discounted drugs through the 340B program, and are thus not reimbursed under the Medicare program for 340B drugs.[1] However, FAH's members, non-340B hospitals, relied on and were properly paid under an outpatient prospective payment system ("OPPS") payment rate that was increased by an offsetting amount designed to be budget neutral in 2018 based on prospective estimates made by the Centers for Medicare & Medicaid Services ("CMS"). In fact, our analysis, derived largely from information CMS makes available as part of its annual OPPS rulemaking, shows that approximately 2,450 non-340B hospitals were impacted by the 3.2 percent budget neutrality adjustment adopted by CMS for 2018 based on the estimated impact of the negative payment adjustment for 340B drugs.

The accompanying amicus brief will assist the Court by placing in perspective the Medicare Act's emphasis on finality in prospectively setting payment rates, hospitals' justified reliance on those prospectively set rates, the impropriety of any attempt to recoup payments properly made to hospitals under the final OPPS payment rules for 2018, and the harmful impact that would come from wholesale, retrospective changes to prospectively set outpatient payment rates. The brief will also assist the Court in fashioning a remedy by discussing the applicability

[1] Investor-owned hospitals are not eligible to participate in the 340B program, even though the vast majority far surpass the statutory threshold for serving low-income patients, and, through generous charity care and related programs, incur uncompensated care costs that meet or exceed the level of non-profit hospitals, measured as a percent of operating cost. Rather, 340B eligibility among hospitals is largely restricted to certain public or non-profit hospitals. 42 U.S.C. § 256b(a)(4)(L).

and limitations of the relevant budget neutrality provisions of the Medicare Act in greater detail than the Parties' briefs.

District courts have "inherent authority" to grant participation by an amicus curiae. *Youming Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008). In determining whether to grant leave to participate as an amicus, this Court has "broad discretion." *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 519 F. Supp. 2d 89, 93 (D.D.C. 2007). Participation by an amicus curiae is generally allowed when "the information offered is timely and useful." *Ellsworth Assocs. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996).

Thus, the "filing of an amicus brief should be permitted if it will assist the judge 'by presenting ideas, arguments, theories, insights, facts or data that are not to be found in the parties' briefs.'" *Northern Mariana Islands v. United States*, No. 08-1572, 2009 WL 596986, at *1 (D.D.C. Mar. 6, 2009) (quoting *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003)). Courts generally permit third parties to participate as amici curiae when they have "relevant expertise and a stated concern for the issues at stake in [the] case," *District of Columbia v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 237 (D.D.C. 2011).

The proposed, attached amicus curiae brief plainly satisfies these standards. As explained more fully in its brief, the amicus curiae brief sets forth arguments that the Parties do not address in their supplemental briefs.

WHEREFORE, leave to file the attached amicus curiae brief should be granted.

Dated: February 7, 2019

/s/ Thomas Barker
FOLEY HOAG, LLP
Thomas Barker (D.C. Bar No. 994485)
1717 K Street, N.W.
Washington, D.C. 20006-5350
Tel: (202) 223-1200
Fax: (202) 785-6687
tbarker@foleyhoag.com

/s/ Kelly A. Carroll
HOOPER, LUNDY & BOOKMAN, P.C.
Kelly A. Carroll (D.C. Bar No. 1018485)
401 9th Street, NW, Suite 550
Washington, D.C. 20004
Tel.: (202) 580-7700
Fax: (202) 580-7719
kcarroll@health-law.com

John R. Hellow
Nina A. Marsden
1875 Century Park East, Suite 1600
Los Angeles, CA 90067
Tel: (310) 551-8111
Fax: (310) 551-8181
jhellow@health-law.com
nmarsden@health-law.com

Katrina A. Pagonis
575 Market Street, Suite 2300
San Francisco, CA 94105
Tel: (415) 875-8500
Fax: (415) 875-8519
kpagonis@health-law.com

Counsel for Amicus Curiae
The Federation of American Hospitals