UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE AMERICAN HOSPITAL ASSOCIATION, *et al.*,	)	
Plaintiffs,	)	
v.	)	**Case No. 1:14-cv-609-RBW**
SYLVIA M. BURWELL, in her official capacity as Secretary of Health and Human Services,	)	
Defendant.	)	

OPPOSITION TO DEFENDANT'S MOTION
TO STAY SUMMARY JUDGMENT BRIEFING

Having already sought and obtained a 30-day extension to respond to Plaintiffs' complaint, *see* ECF No.7, and a 21-day extension to respond to Plaintiffs' opposition to Defendant's motion to dismiss and cross-motion for summary judgment, *see* ECF No. 11, Defendant, the Secretary of Health and Human Services ("Secretary"), now seeks to stay summary judgment briefing altogether. The Secretary's motion is based on fallacious reasoning and should be denied.

The Secretary suggests that district courts cannot consider summary judgment briefing until after they resolve dismissal motions, but that is obviously wrong—district courts, including this one, simultaneously adjudicate summary judgment and dismissal motions all the time. She argues that summary judgment briefing is inappropriate because her administrative adjudicators have not yet considered Plaintiffs' claims, but that argument ignores the reason this Court has jurisdiction in the first place: Plaintiffs raise purely legal challenges to the lawfulness of Defendant's Medicare policies, her adjudicators will not consider those claims for *years*, and even when they do, they lack the power to pass on them.

Finally, in a particularly galling argument, the Secretary asserts that this Court cannot consider Plaintiffs' summary judgment motion because she has not yet compiled an administrative record. That assertion, frankly, takes some audacity. As the Secretary is well aware, Plaintiffs challenge the lawfulness of three CMS policies adopted after notice-and-comment rulemaking and published in the Federal Register. This Court requires nothing more than the notice of proposed rulemaking and final rule to adjudicate Plaintiffs' claims, and it already has both. And to the extent the Court wishes to see the comments submitted in response to the proposed rule, the Secretary *already has compiled them*: The nation's hospitals are suing the Secretary over another policy adopted in the same final rule, *see* Case No. 1:14-cv-00263-EGS (D.D.C.), and the administrative record filed by the Secretary in that litigation includes the comments on all three policies challenged in this litigation. There is nearly complete overlap between that record and this one.

As Plaintiffs observed in their pending summary judgment motion, Medicare litigation has fallen into a disturbing pattern: "For years now, [the Secretary] has been adopting policies that unlawfully shortchange hospitals and then striving to insulate those policies from judicial review." Plaintiffs' Opp. & Mot. Summ. J. 4. This case is the latest example. The Secretary has adopted policies that will cost the nation's hospitals hundreds of millions of dollars a year. Yet she argues in her motion to dismiss that some of those policies should be shielded from review by a court for many years, while others should *never* be subject to judicial review. And now, doubling down on that strategy, she seeks to ensure that this Court never even finds out what this case is about before it is dismissed. The nation's hospitals urge this Court to reject that approach and allow summary judgment briefing to proceed.

ARGUMENT

I. THE SECRETARY'S JURISDICTIONAL ARGUMENT FINDS NO SUPPORT IN PRECEDENT.

The Secretary argues that " 'resolving a merits issue while jurisdiction is in doubt carries the courts beyond the bounds of authorized judicial action and violates the principle that the first and fundamental question is that of jurisdiction.' " Mot. 5 (quoting *In re Papandreou*, 139 F.3d 247, 253 (D.C. Cir. 1998)). If the Secretary is suggesting that this Court is *required* to adjudicate her Rule 12(b)(1) motion separately and in advance of the summary judgment question, she is simply wrong. This Court regularly allows briefing on motions to dismiss and summary judgment to proceed simultaneously and then disposes of both issues together—including in cases where the defendant contests jurisdiction. *See, e.g.*, *Gibbs v. Jewell*, --- F.Supp.2d ---, 2014 WL 1568760 (D.D.C. April 21, 2014) (adjudicating Rule 12(b)(1) motion and summary-judgment motion together); *Westcott v. McHugh*, --- F. Supp. 2d ---, 2014 WL 1491209 (D.D.C. 2014) (Walton, J.) (same); *Klein v. Am. Land Title Ass'n*, 926 F. Supp. 2d 193, 195 (D.D.C. 2013) (Walton, J.) (same); *Care Net Pregnancy Ctr. v. U.S. Dep't of Agric.*, 896 F. Supp. 2d 98, 101 (D.D.C. 2012) (Walton, J.) (same); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 15 (D.D.C. 2012) (same); *McKinley v. F.D.I.C.*, 756 F. Supp. 2d 105, 110 (D.D.C. 2010) (same). The Secretary's cited cases, *In re Papandreou* and *United Transportation Service Employees of America, CIO v. National Mediation Board*, 179 F.2d 446, 454 (D.C. Cir. 1949), stand merely for the obvious proposition that courts cannot grant summary judgment to the plaintiff *without ever considering* objections to jurisdiction. That has nothing to do with whether courts can adjudicate jurisdiction and the merits at the same time—something they do every day.

The Secretary also argues that she should not be "put to the trouble" of responding to the Plaintiffs' summary judgment brief until after her 12(b)(1) motion is adjudicated, and that

courts "routinely" stay summary-judgment briefing in this circumstance. Mot. 5-6. But as the cases cited above (and many others like them) reveal, the default rule is not to stay summary judgment briefing—it is for dismissal and summary judgment briefing to proceed together. The Secretary is asking for special relief here. It should be denied. In a case like this one, where the effect of the Secretary's position would be to *forever insulate* challenged policies from judicial review, *see* Plaintiffs' Opp. & Mot. Summ. J. 4, it is particularly proper that she should be "put to the trouble" of explaining her case on the merits.

The Secretary says Plaintiffs' summary judgment motion is "particularly inappropriate" because the Medicare statute's "unique jurisdictional provision" requires claimants to exhaust administrative remedies, which Plaintiffs have not done. Of course, that is merely an argument that this Court lacks jurisdiction—an argument the defendant necessarily is making in every case involving a 12(b)(1) motion. And in most such cases, as shown above, summary judgment briefing proceeds apace. It should proceed here too.

But in any event, the Secretary's administrative exhaustion argument is misleading for two reasons. First, just as she did in her motion to dismiss, the Secretary completely ignores the fact that while *presentment* of claims to the agency is a jurisdictional prerequisite, *exhaustion* is not; it can and should be waived when plaintiffs raise a pure legal issue that agency adjudicators lack the power to resolve. *See* Plaintiffs' Opp. & Mot. Summ. J. 28-34. That is the case here, as Plaintiffs explain in their opposition and cross-motion: Plaintiffs challenge generally applicable legal policies adopted by CMS after notice-and-comment rulemaking. And the agency's adjudicators lack the authority to invalidate them, because administrative law judges ("ALJs") obviously cannot undo agency regulations. *See id.* Waiting for agency adjudication is pointless. Thus the Secretary's assertion that "deferring summary-judgment briefing would not prejudice Plaintiffs" because their administrative

appeals "may well result in payment of any initially denied claims," Mot. 6-7, is particularly risible. Plaintiffs challenge the lawfulness of Medicare policies, and the Secretary's administrative adjudicators *lack the power to pass on that issue*. Only this Court can do so.

The second reason not to accept Defendant's exhaustion argument is that exhaustion is impossible for certain of Plaintiffs' claims and would take many years for others. As the Secretary knows, systemic delays within the four-step administrative appeals process are postponing administrative adjudications by *up to five years*. *See* Plaintiffs' Opp. & Mot. Summ. J. 34-35. In December 2013, Defendant declared a moratorium on the assignment of new claim appeals to ALJs for hearing. That moratorium is expected to last for at least two years and likely longer—a time frame that does not even include the actual hearing or rendering of a decision once the suspension is lifted. *See id.* As of July 1, 2014, 800,000 appeals were pending at the ALJ level. Statement of N. Griswold before U.S. House Committee on Oversight and Government Reform, Subcommittee on Energy Policy, Health Care & Entitlements (July 10, 2014). And even after getting through the ALJ level, Plaintiffs would have to obtain a decision at the fourth level of administrative review, which is similarly inundated. The total time for Plaintiffs to exhaust their claims—an entirely pointless task, since the agency's adjudicators cannot invalidate agency rules—may well be a half-decade.[1]

In short, the Secretary's attempt to keep the merits hidden indefinitely from this Court's view imposes severe prejudice on Plaintiffs. Her contrary arguments cannot withstand scrutiny.

[1] The AHA and other hospital plaintiffs are challenging these systemic delays in a separate litigation. *See American Hosp. Ass'n v. Burwell*, Civil Action No. 1:14-CV-851-JEB (D.D.C.)

II. THE SECRETARY'S ADMINISTRATIVE RECORD ARGUMENT IS SPURIOUS.

The Secretary separately argues that Plaintiffs' summary judgment motion is "premature" because "the agency has not yet compiled and certified an administrative record for this Court to review." Mot. 7. But that is no one's fault but the agency's. As already explained, Plaintiffs challenge three Medicare policies adopted in a 2013 final rule issued after notice-and-comment rulemaking. Plaintiffs' challenge is not procedural; they do not claim, for example, that CMS failed to reveal data on which it relied to arrive at its policies. Plaintiffs instead advance a facial challenge to the policies adopted, arguing that they contradict the Medicare statute and are otherwise unexplained and irrational. *See* Plaintiffs' Opp. & Mot. Summ. J. 1-3. This Court thus can adjudicate Plaintiffs' claims by looking to the proposed and final rules. And it should not require any notable effort for the Secretary to "compile" those. For one thing, they are publicly available Federal Register documents. For another, the Secretary has known for four months that she needed to compile them; Plaintiffs filed this lawsuit on April 14. And finally, to the extent other documents (such as rulemaking comments) are properly part of the record, the Secretary *already has reviewed and compiled them*: As noted *supra* at 2, hospitals are suing the Secretary over another policy adopted in the exact same final rule, *see* Case No. 1:14-cv-00263-EGS (D.D.C.), and the Secretary compiled the administrative record documents for that litigation in June. The notion that the Secretary can hold summary judgment proceedings hostage by her own failure to file the record should be self-refuting.

The Secretary suggests that she *cannot* compile the record because there is not yet a "final decision by the Secretary" on Plaintiffs' administrative appeals. Mot. 7-8. She argues, in other words, that there can be no review until Plaintiffs' administrative remedies are exhausted. But that argument ignores the premise of Plaintiffs' case: Plaintiffs seek waiver

of exhaustion precisely because they are challenging agency rules of general applicability, which cannot be invalidated by the agency's adjudicators. In such circumstances—where exhaustion would be futile because there is "no reason to believe that agency machinery might accede to plaintiffs' claims," *Tataranowicz v. Sullivan*, 959 F.2d 268, 274 (D.C. Cir. 1992)—courts waive exhaustion, and do not wait for the agency adjudicators, because to do so would be pointless. If this Court agrees with Plaintiffs that waiver of exhaustion is appropriate, then by definition any future rulings on Plaintiffs' administrative appeals are irrelevant and need not be part of the record on review.

Finally, it bears noting that elsewhere in the same filing, the Secretary admits that she *can* compile the administrative record. *See* Mot. 8 ("Were a certified record to become necessary, however, the agency estimates that it would take at least 30 days to compile[.]"). Indeed she can. Her failure to have done so in a timely manner cannot justify a stay of summary judgment proceedings.

III. THE SECRETARY'S REQUEST FOR AN EXTENSION OF TIME SHOULD BE DENIED.

In the alternative, the Secretary requests a 45-day extension of time to oppose Plaintiffs' motion for summary judgment. Mot. 8-9. That request should be denied. The Secretary already has obtained two lengthy extensions, *see supra* at 1, during which she apparently has found the time to research and draft lengthy motions to obtain further extensions, complete with detailed caselaw research. If the Secretary had put those efforts toward opposing summary judgment, the opposition would already be well on its way. Moreover, the task of compiling the administrative record in this case cannot possibly take "at least 30 days," Mot. 8, for reasons discussed above. And while Plaintiffs are sympathetic to the fact that defense counsel has been out of work due to illness, that fact already is

reflected in the 21-day extension the Secretary obtained to reply to Plaintiffs' opposition to the motion to dismiss.

CONCLUSION

The Secretary's motion should be denied.

Dated: August 18, 2014

Respectfully submitted,

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