IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE AMERICAN HOSPITAL ASSOCIATION, ASSOCIATION OF AMERICAN MEDICAL COLLEGES, THE FEDERATION OF AMERICAN HOSPITALS, NATIONAL ASSOCIATION OF CHILDREN'S HOSPITALS, INC., MEMORIAL COMMUNITY HOSPITAL AND HEALTH SYSTEM, PROVIDENCE HEALTH SYSTEM - SOUTHERN CALIFORNIA d/b/a PROVIDENCE HOLY CROSS MEDICAL CENTER, and BOTHWELL REGIONAL HEALTH CENTER,

Plaintiffs,

v.

ALEX M. AZAR II,
in his official capacity as SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

Civil Action No. 1:19-cv-3619-CJN

DECLARATION OF MILTON JAMES KAUFMAN IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I, Milton James Kaufman, hereby declare and state the following:

1. My name is Milton James Kaufman. I am over 21 years of age and competent to testify to the facts set forth herein. I am an adult citizen of the United States. I reside in Alexandria, VA.

2. The facts set forth in this declaration are based on my personal knowledge and upon information available to me through the files and records of the National Association of

Children's Hospitals (NACH). If called upon as a witness, I could and would testify to these facts.

3. I am the Vice President, Public Policy of NACH I have served in this capacity since August 2008. In this role, I am responsible for developing and implementing NACH's public policy agenda to support efforts to advance children's health care in coordination with our member hospitals. In my capacity as Vice President, Public Policy, I have personal knowledge of the impact that the Centers for Medicare & Medicaid Services' (CMS) new negotiated rate rule will have on NACH's members.

4. NACH represents more than 220 children's hospitals nationwide. We work with member hospitals to develop forward-thinking solutions for child health and children's health care backed by 50 years of collaboration. We focus our collective efforts in areas of greatest impact and aggregated strength: policy, quality and safety best practices, and analytics to inform decision-making of clinicians, policymakers, payers, and providers. Children's hospitals are essential providers, setting the standard for the highest quality pediatric care while training the next generation of pediatricians. With its members, NACH champions policies that enable children's hospitals to better serve children; leverages its position as the pediatric leader in data analytics to facilitate national collaborative and research efforts to improve performance; and spreads best practices to benefit the nation's children. One of the critical ways in which NACH serves its mission is to protect its members' interests in connection with policy changes initiated by CMS through advocacy and litigation.

5. On behalf of its members, NACH (with its co-plaintiffs) has filed this lawsuit challenging a recent rule issued by CMS requiring the public disclosure of charges privately negotiated between hospitals and insurers (Final Rule).

6. The country's children's hospitals are committed to providing patients and their families with the information they need to make informed decisions about their health care. While practices differ across member hospitals, our hospitals work to provide patient families with information about the cost of their care based on the needs of the patient and the family's insurance coverage. Children's hospitals provide care to the most medically complex pediatric patients, and to better serve patient families, our member hospitals have call centers or financial counselors who provide good faith estimates to the patient families upon request. Our member hospitals also comply with federal, state, and local policies regarding posting of standard charges and hospital charity care policies. Also, due to the fact that many children qualify for Medicaid or the Children's Health Insurance Program (CHIP), our member hospitals work to ensure uninsured children receive coverage as appropriate.

7. To that end, NACH supports policy options that would require disclosure of the out-of-pocket amounts patients will be expected to pay for care, recognizing that each patient's circumstances will be differently affected by numerous variables in their health insurance coverage, patient's conditions, and potential co-morbid conditions.

8. But that is not what the Final Rule requires. By requiring disclosure of the prices privately negotiated between hospitals and insurers, the Final Rule is more likely to confuse patients than to help them. Patients may reasonably (but erroneously) assume that they can ascertain their out-of-pocket costs from negotiated rates, while in reality many other factors – such as the scope of the patient's coverage (e.g., is the provider in-network), the amount of the patient's coinsurance or co-payment, and the amount of the patient's and family's annual deductible, and whether it has been reached – determine out-of-pocket costs. The fact that CMS has touted these disclosures as enabling patients to make informed decisions will only make that

assumption even more likely, leading to even greater confusion about the relevance of the negotiated rates to out-of-pocket costs (or lack thereof).

9. This problem is particularly acute for patients of our member hospitals. More than half of our patients are covered by Medicaid, where the out-of-pocket costs, if any, are dictated by federal and state requirements, and bear no relationship to negotiated rates. The confusion caused by the disclosure of negotiated rates may delay or deter patient families from seeking necessary care and may lead to negative health consequences for our patients.

10. Under the Final Rule, virtually all of NACH's members are suffering and will continue to suffer imminent and concrete harm if the Final Rule is permitted to go into effect.

11. Hospitals and insurers typically negotiate contracts governing the prices that specified insurance plans will be expected to pay for specific services. Once negotiated, NACH's member hospitals take great care to protect the confidentiality of their insurer-specific pricing, including but not limited to: abiding by contractual confidentiality obligations, restricting access to a limited number of employees, and training those employees not to disclose the information to third parties or use it for an unauthorized purpose.

12. NACH's member hospitals treat their insurer-negotiated prices as confidential in order to protect their ability to negotiate with insurers at arms' length in the future. If an insurer knows that a hospital is charging a competitor X for a specific service, that insurer will demand equivalent or better pricing. The end result is likely to be much lower payment rates, which means fewer resources for children's health care. Moreover, since the majority of patients at children's hospitals are covered by Medicaid, which traditionally pays significantly less than Medicare and commercial insurers for similar services, if the rates privately negotiated between

hospitals and insurers become publicly known, there will be no fair and open competition in the marketplace.

13. The Final Rule requires hospitals to publicly disclose their negotiated rates by January 1, 2021. Once that information is disclosed, it cannot be un-disclosed; it will permanently undermine free competition in the marketplace. As a result, court intervention is necessary to ensure that hospitals, including NACH's members, will not be required to disclose these rates.

14. In addition, the burden on our member hospitals of complying with the Final Rule will be substantial. The amount of work necessary to develop a digital file with standard charges for all items and services provided by hospitals will be significant. Payer contracts do not always contain a list of negotiated rates for all items and services, identified by HCPCS or CPT codes, ready to be exported to a machine-readable format. For payor contracts without "rates sheets," our member hospitals will need to devote significant time and effort to calculate the negotiated rate for each item and service for each insurer product, if it can be calculated at all. Even for the occasional payor contracts that contain negotiated rates for items and services, the terminology used in the contracts across payors are not uniform and do not always align with the required data elements as mandated by the Final Rule. Instead of HCPCS or CPT, different payors may use different payment mechanisms, such as MS-DRG, APR-DRG, or even per diem rates. Our members must expend significant resources to interpret the contracts to determine how – if it is even possible – to extract the necessary information to comply with the Final Rule. At times the negotiated rate for a specific item or service may also depend on factors such as the severity of the patient condition, overall volume, value-based purchasing arrangements, bundling of service, or other types of arrangements that require post hoc reconciliations. In these

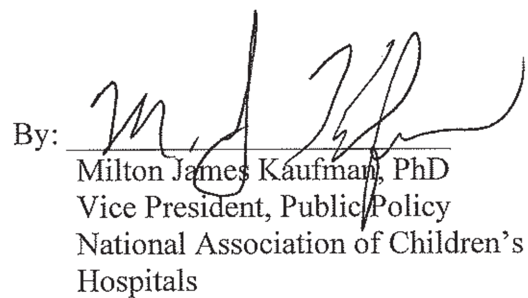
instances it will not be possible to provide a negotiated rate before the item or service is rendered.

15. Furthermore, since children's hospitals are regional and national providers, they have contracts with payers across the country, each with several different products, thereby requiring the positing of potentially hundreds of different negotiated amounts that will create tremendous burden for hospitals and confusion for patients.

16. The focus of policy efforts should be providing patients the information they need to determine potential out-of-pocket cost. Providing details for the 300 common "shoppable" services required by the Final Rule may overwhelm patients with information that does not apply to their unique case. Furthermore, the resources necessary to develop the consumer-friendly display for the 300 common shoppable services will be significant. Not only will hospitals have to make investments to create the consumer-friendly display interface, the requirement to identify all ancillary services for the 300 shoppable services will also be an intensive undertaking. As CMS admitted in the preamble, most states that require hospital posting of shoppable services range between 25 and 50 services. To require 300 services will significantly increase the cost and burden on our member hospitals, particularly for members without prior experience, which will divert resources that could otherwise be used for patient care.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed this 9th day of December 2019.

By: 

Milton James Kaufman, PhD
Vice President, Public Policy
National Association of Children's Hospitals