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 CITY AND COUNTY OF SAN FRANCISCO

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 15 UNITED STATES DISTRICT COURT  
 16 NORTHERN DISTRICT OF CALIFORNIA

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 18 CITY AND COUNTY OF SAN  
 FRANCISCO,

19 Plaintiff,

20 vs.

21 UNITED STATES DEPARTMENT OF  
 HEALTH AND HUMAN SERVICES;  
 22 XAVIER BECERRA, Secretary of the  
 Department of Health and Human Services;  
 23 and DOES 1-25,

24 Defendants.

Case No. 3:22-CV-4500

**COMPLAINT FOR DECLARATORY AND  
 INJUNCTIVE RELIEF**

Trial Date: None set

## INTRODUCTION

1  
2 1. Throughout its 150-year history, Laguna Honda Hospital and Rehabilitation Center  
3 (“Laguna Honda”) has provided skilled nursing and rehabilitation services to San Francisco’s most  
4 vulnerable residents, including seniors, adults with disabilities, and others who cannot care for  
5 themselves. For many, Laguna Honda provides the last safety net for patients who must, or wish to,  
6 receive health care in the Bay Area near friends, family, and their communities. Because of its  
7 commitment to serve the underserved, Laguna Honda often provides a last resort for patients who have  
8 nowhere else to go, and serves a critical need for San Francisco.

9 2. Laguna Honda relies on federal and state funding through the Medicare and Medicaid  
10 programs. Ninety-eight percent of Laguna Honda’s patients are Medicare or Medicaid beneficiaries.  
11 They have no other means of financial support. And because federal funds makeup sixty-seven  
12 percent of Laguna Honda’s operating budget, the facility’s participation in both programs is necessary  
13 to pay for the critical care the facility provides to San Francisco’s underserved. Laguna Honda cannot  
14 stay open without these essential funds.

15 3. Laguna Honda has recently faced challenges. After distinguishing itself among skilled  
16 nursing facilities nationwide through its successful response to the COVID-19 pandemic, the  
17 California Department of Public Health (“CDPH”) recently cited Laguna Honda for deficiencies in  
18 care. Those deficiencies related to preventing contraband, such as cigarette lighters and drug  
19 paraphernalia, on campus, infection prevention and control, as well as two missed doses of a  
20 medication. Laguna Honda takes these deficiencies seriously and has worked hard to correct them.  
21 Although Defendants terminated Laguna Honda’s Medicare and Medicaid provider agreements as a  
22 result of the deficiencies, Laguna Honda is on its way to correcting all deficiencies and is confident  
23 that it will submit an application allowing it to be recertified as a Medicare and Medicaid provider by  
24 the end of the year.

25 4. But that recertification cannot come in time for Laguna Honda and especially its  
26 patients and their loved ones in the community. According to Defendants, Laguna Honda must  
27 transfer or discharge all of its remaining 610 patients—a daunting number—close its doors, and stop  
28 providing critical services for San Francisco’s most vulnerable residents, all in just what is now a little

1 over a month, by September 13, 2022. Defendants are well aware that it is impossible for Laguna  
2 Honda to comply with the unrealistic September 13 deadline that they imposed. Simply put, there are  
3 not enough skilled nursing beds or facilities in the San Francisco Bay Area, in California, or in nearby  
4 states to care for Laguna Honda's 610 patients, many of whom have a combination of behavioral  
5 health challenges, substance use disorders, and other complex social and medical needs. And the  
6 impossibility of the September 13 deadline is only exacerbated by Defendants' recent decision to  
7 temporarily pause all discharges and transfers from Laguna Honda. Though San Francisco welcomes  
8 the pause so that Laguna Honda can do the work to bring the facility back into compliance without  
9 forcing patients out of the hospital, the pause makes it even less reasonable to impose a September 13  
10 deadline.

11 5. Likewise, Defendants have determined that they will cease the federal funding that is  
12 essential for Laguna Honda's operations on September 13, 2022. Laguna Honda cannot operate  
13 without federal funding, and it cannot get recertified before that date. Further, Laguna Honda should  
14 not need to be recertified at all. Laguna Honda has filed three successive administrative appeals  
15 challenging the Centers for Medicare & Medicaid Services' ("CMS's") termination of the facility and  
16 the statement of deficiencies that led to CMS's decision to terminate Laguna Honda as a Medicare and  
17 Medicaid provider. If Laguna Honda is successful in its administrative appeals, Laguna Honda will  
18 obtain an order finding that CMS improperly terminated Laguna Honda's Medicare and Medicaid  
19 provider agreements, and restoring Laguna Honda as a Medicare and Medicaid provider. But that  
20 administrative appeal will not be decided before September 13. Thus, Laguna Honda "might well be  
21 forced to close its doors, and the residents might have to be transferred during the very period when  
22 the hearing and post-hearing briefing . . . are taking place." *International Long Term Care, Inc. v.*  
23 *Shalala*, 947 F. Supp. 15, 18 (D.D.C 1996). Defendants' arbitrary September 13 date renders illusory  
24 the due process protections that Laguna Honda should receive through the administrative appeals  
25 process. And, even though patients cannot be relocated at this time because of the pause in transfers  
26 and discharges, Defendants remain unmovable on their arbitrary September 13 cutoff date for federal  
27 funding. Come September, Laguna Honda faces the very real prospect of having to provide services

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1 to over 600 Medicaid and Medicare patients, without the funding and resources necessary to provide  
2 quality care.

3           6. Defendants created this impossible situation knowing that Laguna Honda would have  
4 no choice but to agree to their unreasonable demands. When Defendants terminated Laguna Honda's  
5 Medicare and Medicaid provider agreements on April 14, 2022, the San Francisco Department of  
6 Public Health ("SFDPH") was compelled to prepare a closure plan to continue federal funding. In that  
7 plan, SFDPH proposed a termination and recertification process that would not require relocating  
8 existing patients while SFDPH pursued Laguna Honda's recertification. Defendants refused. SFDPH  
9 then asked for 18 months to ensure that patients were transferred or discharged in a safe and  
10 appropriate manner. Defendants refused. SFDPH also asked to be allowed to phase transfers so the  
11 most vulnerable patients would be transferred last. Again, Defendants refused. Instead, Defendants  
12 stuck with their unreasonable and impossible-to-satisfy demand that Laguna Honda transfer all patient  
13 populations simultaneously, including those in end of life or palliative care, and all by their  
14 unreasonable September 13 deadline to transfer all patients and close the facility. With no other  
15 option, SFDPH had no choice but to agree to that deadline.

16           7. Defendants' unreasonable conduct has given Laguna Honda and its patients a Hobson's  
17 choice. According to Defendants, Laguna Honda cannot stay open and it cannot close before  
18 transferring or discharging its patients. Laguna Honda cannot transfer or discharge patients, but it  
19 must transfer or discharge hundreds of patients by September 13. Laguna Honda will not receive  
20 federal funding after September 13, but it cannot operate without federal funding. Laguna Honda has  
21 availed itself of the right to appeal its termination as a Medicare and Medicaid provider, but it must  
22 close its doors and transfer all patients before that appeal can even be decided. SFDPH has repeatedly  
23 sought guidance from Defendants to resolve these conflicts, including in a July 15, 2022 letter from  
24 San Francisco's City Attorney that raised many of the same concerns that are the subject of this  
25 complaint, only to be ignored or rebuffed at every turn.

26           8. Because of Defendants' arbitrary and capricious conduct, San Francisco now has no  
27 choice but to seek declaratory and injunctive relief to stop the harm Defendants have caused to the  
28 City and County of San Francisco ("San Francisco" or "City"), Laguna Honda, and its patients.

**JURISDICTION AND VENUE**

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2 9. The Court has jurisdiction under 5 U.S.C. Sections 703–706 (Administrative Procedure  
3 Act), 28 U.S.C. Sections 1331 (action arising under the laws of the United States) and 1346 (United  
4 States as a defendant). This Court has further remedial authority under the Declaratory Judgment Act,  
5 28 U.S.C. Sections 2201(a) and 2202 *et seq.*

6 10. Defendants’ actions constitute final agency action and therefore are judicially  
7 reviewable within the meaning of the Administrative Procedure Act (“APA”). 5 U.S.C. §§ 704, 706.

8 11. Venue properly lies within the Northern District of California because Plaintiff,  
9 San Francisco, resides in this judicial district and a substantial part of the events or omissions giving  
10 rise to this action occurred in this District. 28 U.S.C. § 1391(e)(1).

**DIVISIONAL ASSIGNMENT**

11  
12 12. Assignment to the San Francisco or Oakland Division of this District is proper under  
13 Civil Local Rule 3-2(c)–(d) because a substantial part of the acts or omissions that give rise to this  
14 action occurred in the City and County of San Francisco.

**PARTIES**

15  
16 13. Plaintiff City and County of San Francisco is a municipal corporation organized and  
17 existing under and by virtue of the laws of the State of California, and is a charter city and county.

18 14. Defendant United States Department of Health and Human Services (“HHS”) is an  
19 agency of the United States government and bears responsibility, in whole or in part, for the acts  
20 complained of in this Complaint. CMS is part of HHS.

21 15. Defendant Xavier Becerra is the Secretary of HHS. He is sued in his official capacity.  
22 Secretary Becerra is responsible for implementing and fulfilling HHS’s duties under the United States  
23 Constitution and the APA.

24 16. Does 1 through 25 are sued under fictitious names. Plaintiff San Francisco does not  
25 now know the true names or capacities of said Defendants, who were responsible for the alleged  
26 violations, but pray that the same may be alleged in this Complaint when ascertained.

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**FACTUAL ALLEGATIONS****I. LAGUNA HONDA PROVIDES CARE TO SAN FRANCISCO'S MOST VULNERABLE.**

17. Laguna Honda is one of the largest skilled nursing facilities in the United States. It represents one of the most extensive commitments by any local public entity to therapeutic skilled nursing and rehabilitative care for seniors, adults with disabilities, and those with chronic diseases needing skilled nursing or rehabilitative care. Once referred to as the last almshouse in the country, Laguna Honda provides healthcare for San Francisco's most vulnerable residents who cannot care for themselves.

18. Like many facilities that provide skilled nursing services, Laguna Honda has faced challenges in recent years. Laguna Honda has been cited by federal and state surveyors for deficiencies in patient care related to preventing contraband (such as cigarette lighters and drug paraphernalia) in the facility and infection prevention and control, as well as two missed doses of a medication. Patient care is Laguna Honda's highest priority, and Laguna Honda leadership takes these issues seriously. With the help of hired expert consultants, Laguna Honda is working hard to correct any existing deficiencies and to create new protocols aligned with industry best-practices that will prevent deficiencies from occurring in the future.

19. But Laguna Honda's recent challenges do not diminish its long history of success and importance to the community:

- Laguna Honda provides a nationally-recognized program for people with Alzheimer's and other dementias.
- Laguna Honda provides the only dedicated skilled nursing facility for HIV/AIDS in the San Francisco Bay Area.
- Through its award-winning restorative care program that assists patients to retain and reclaim physical competency, every year as many as 240 people complete rehabilitative therapy at Laguna Honda and move to a lower level of care or independent living.
- While other facilities faced COVID-19 outbreaks that caused great suffering and loss of life, Laguna Honda distinguished itself through its successful and life-saving

1 response to the pandemic. Starting in early March 2020, the facility implemented  
2 cutting-edge infection prevention and control systems to protect its patients, and in  
3 2020, Laguna Honda received the top honor from the California Association of Public  
4 Hospitals and Health Systems for its response to the COVID-19 pandemic.

5 20. Every day, Laguna Honda clinicians and staff dedicate themselves to high-quality,  
6 individualized care for the facility's over 600 patients, including by providing group living facilities  
7 for people with developmental disabilities, treatment for multiple sclerosis, Parkinson's and other  
8 degenerative diseases, therapeutic services for traumatic brain injuries, services for people with  
9 psychosocial difficulties, end-of-life care emphasizing comfort and dignity, and the complex system of  
10 care required for people with multiple diagnoses.

11 **II. DESPITE LAGUNA HONDA'S LONG HISTORY OF SUCCESS, CMS TERMINATED**  
12 **LAGUNA HONDA'S PROVIDER AGREEMENTS.**

13 21. Laguna Honda relies primarily on federal funding, through the Medicare and Medicaid  
14 programs, to provide care for its patients. Without continued federal funding, Laguna Honda cannot  
15 operate and provide quality care for its patients. Laguna Honda's monthly budget is approximately  
16 \$26 million and the facility receives almost \$18 million each month from Medicare and Medicaid  
17 reimbursements.

18 **A. The Medicare and Medicaid Programs**

19 22. The Medicare program is a federally-administered and funded program for individuals  
20 65 and older and disabled individuals who are eligible for Social Security benefits. 42 U.S.C. §§ 426;  
21 1395c. The Medicaid program (known in California as Medi-Cal) is a joint federal and state program  
22 that provides medical insurance to low income individuals who are aged, blind, disabled, pregnant,  
23 young children, or members of families with dependent children. 42 U.S.C. §§ 1396 *et seq.*

24 23. Both the Medicare and Medicaid programs require facilities, including skilled nursing  
25 facilities ("SNFs"), to meet the Medicare conditions of participation to be eligible to participate in  
26 each program and receive reimbursement for services rendered to Medicare or Medicaid patients. 42  
27 U.S.C. §§ 1395i-3, 1396r; 42 C.F.R. § 483.1 *et seq.* To receive reimbursement, providers, such as  
28 SNFs, must enter into provider agreements with CMS. 42 U.S.C. § 1395cc(a)(1). Under the provider

1 agreements, the provider agrees to provide services on the terms of the program. In return, CMS  
2 agrees to reimburse providers for services rendered to beneficiaries and not to terminate the provider  
3 without just cause and due process. *See* 42 U.S.C. §§ 1395f(b); 1395cc(b)(2), (h)(1)(A); CMS  
4 Publication 100-07, State Operations Manual, Chapter 3, § 3005D.

5 24. CMS enforces the Medicare conditions of participation by conducting periodic surveys  
6 of participating facilities. 42 U.S.C. § 1395i-3(g). CMS also enters into agreements with state survey  
7 agencies to carry out surveys of skilled nursing facilities. 42 U.S.C. § 1395aa; 42 C.F.R. § 488.330.  
8 In California, the state survey agency is the Licensing & Certification Program within CDPH.

9 25. If CMS or CDPH determines that a facility is not in substantial compliance with a  
10 condition of participation, it assesses that deficiency using a scope and severity rating and documents  
11 the deficiency on a Statement of Deficiencies (also known as a CMS Form 2567). 42 C.F.R.  
12 § 488.408. A facility that CMS or CDPH finds to be out of substantial compliance must submit a Plan  
13 of Correction within 10 days of receiving a Statement of Deficiencies. 42 C.F.R. § 488.402(d). If a  
14 facility's deficiencies do not pose immediate jeopardy to a patient's health or safety, CMS has two  
15 options—it may terminate the facility's provider agreement immediately or allow the facility to  
16 participate for an additional 6 months. 42 C.F.R. § 488.412(a). During that six-month period, CMS or  
17 CDPH conducts revisit surveys to determine whether the facility has returned to substantial  
18 compliance. If a facility is not in substantial compliance at the end of the 6-month period, CMS  
19 terminates the provider agreement. 42 C.F.R. § 488.412(d).

20 **B. CMS's and CDPH's Enforcement Actions against Laguna Honda**

21 26. In July 2021, Laguna Honda self-reported two illicit drug overdose incidents where the  
22 patients were taken to an emergency department before ultimately returning to the facility. Based on  
23 this report, CDPH surveyed Laguna Honda in October 2021, completing the survey on October 14,  
24 2021. Over two months later, on December 16, 2021, CDPH issued a Statement of Deficiencies that  
25 assessed two deficiencies based on Laguna Honda's failure to eliminate all illicit drugs and contraband  
26 (such as cigarette lighters) from the facility. CDPH found that those two deficiencies amounted to  
27 substandard quality of care, meaning that Laguna Honda was out of substantial compliance with the  
28 Medicare conditions of participation. In its letter to Laguna Honda, CDPH stated that it recommended

1 that CMS impose a civil monetary penalty and terminate Laguna Honda's provider agreements by  
2 April 14, 2022, if Laguna Honda did not achieve substantial compliance by that date. Laguna Honda  
3 submitted a Plan of Correction for the deficiencies on December 27, 2021, which CDPH accepted on  
4 January 14, 2022.

5 27. On January 21, 2022, CDPH completed a revisit survey of the facility where it found  
6 that three patients continued to possess illicit drugs and contraband and that staff did not properly  
7 dispose of the confiscated contraband. Again, CDPH determined Laguna Honda was out of  
8 substantial compliance with the Medicare conditions of participation, and recommended that CMS  
9 terminate Laguna Honda's provider agreements on April 14, 2022. CDPH further recommended that  
10 CMS deny payments to Laguna Honda for newly admitted patients. On February 24, 2022, CMS  
11 issued a notice approving the remedies that CDPH recommended, including levying civil monetary  
12 penalties, denying federal reimbursements for new patients, and imposing the April 14, 2022,  
13 termination date.

14 28. Beginning March 16, 2022, CDPH conducted a second revisit survey. On March 22,  
15 2022, CDPH found Laguna Honda to be in immediate jeopardy to patient health or safety, meaning a  
16 deficiency likely to cause serious injury, harm, impairment, or death, after concluding that three  
17 patients were in possession of contraband or using illicit substances. After accepting Laguna Honda's  
18 Plan of Correction, five days later, on March 27, 2022, CDPH removed the immediate jeopardy  
19 finding. But, when the revisit survey ended the next day, on March 28, 2022, CDPH continued to find  
20 deficiencies related to use and possession of illicit substances, as well as new, previously unidentified  
21 deficiencies.

22 29. On March 30, 2022, CMS issued a notice to Laguna Honda that it remained out of  
23 substantial compliance with the Medicare conditions of participation and confirming that CMS still  
24 intended to terminate Laguna Honda's Medicare provider agreements effective at 12:01 a.m. on  
25 April 14, 2022 ("Termination Notice").

26 30. CMS and CDPH conducted a third revisit of the facility starting April 11 and ending  
27 April 13, 2022. At the exit interview, representatives of CMS and CDPH verbally informed Laguna  
28 Honda that the facility was not in substantial compliance. Surveyors identified new issues with

1 infection prevention and control, as well as two missed doses of a medication. CMS did not give  
2 Laguna Honda any time to cure these previously unidentified deficiencies because CMS terminated  
3 Laguna Honda's provider agreements the following day.

4 31. Laguna Honda has filed three successive administrative appeals with CMS. The first  
5 two appeals, dated February 15, 2022, and April 25, 2022, challenged the December 16, 2021  
6 Statement of Deficiencies and associated civil monetary penalties. On May 28, 2022, Laguna Honda  
7 filed the third appeal, challenging the March 30, 2022 Termination Notice. The administrative law  
8 judge has consolidated all three appeals; Laguna Honda's brief is currently due September 5, 2022,  
9 and CMS's is due October 7, 2022, with a hearing to be scheduled soon thereafter. The appeals  
10 challenge CMS and CDPH's pattern and practice of failing to provide timely Statements of  
11 Deficiencies prejudicing Laguna Honda's ability to respond to and correct any deficiency. They also  
12 challenge Defendants' unwritten zero-tolerance policy of requiring Laguna Honda to "eliminate" all  
13 illicit drugs and contraband in the facility, an unlawful standard that started the six-month cycle  
14 resulting in termination of Laguna Honda's provider agreements. On information and belief,  
15 Defendants have not imposed that unlawful standard on other facilities. Laguna Honda has undertaken  
16 significant efforts since October 2021 to address the occurrence of illicit drugs and contraband in the  
17 facility, but given the complexities of the patient population and that Laguna Honda is not a locked  
18 facility, it is impossible to comply with Defendants' strict liability policy.

19 **III. CMS ABUSED ITS DISCRETION BY ARBITRARILY TERMINATING FUNDING**  
20 **ON SEPTEMBER 13 AND REQUIRING ALL PATIENTS TO BE RELOCATED BY**  
21 **THAT DATE.**

22 32. In the March 30 Termination Notice, CMS stated that it would exercise its discretion to  
23 provide funding for a transition period following termination of the facility if the facility submitted a  
24 notification of closure under 42 C.F.R. § 483.70(*l*). Federal regulations require that such a notification  
25 include an approved closure plan providing for the relocation of the patients of the facility. *Id.* But  
26 federal regulations do not mandate that the closure occur within any set period of time.

27 33. Thereafter, CMS representatives advised SFDPH to prepare a Closure and Patient  
28 Transfer and Relocation Plan ("Closure Plan") that would meet the requirement of 42 C.F.R.  
§ 483.70(*l*), as well as a CMS Recertification Milestone Document ("Milestone Document") detailing

1 milestones that, if met, would put Laguna Honda on a defined path to recertification in the Medicare  
2 and Medicaid programs and thus prevent the closure plan from going into effect. In accordance with  
3 CMS’s direction, SFDPH spent several weeks preparing these documents and, on May 9, 2022,  
4 submitted them to CMS.

5 34. Despite encouraging SFDPH to prepare and submit the Milestone Document, CMS  
6 changed course and rejected it that same day, without explanation. CMS also indicated that it was  
7 contemplating a four-month deadline for terminating Laguna Honda’s funding, with the possibility of  
8 a two-month extension.

9 35. CMS and CDPH then reviewed SFDPH’s proposed Closure Plan and demanded  
10 extensive revisions. Although federal law delegates authority to CDPH to approve closure plans under  
11 federal law, upon information and belief, CMS provided extensive direction to CDPH in reviewing  
12 SFDPH’s proposed Closure Plan.

13 36. In its proposed Closure Plan, SFDPH stated that “a patient-centered transfer or  
14 discharge of all of [Laguna Honda’s] current patients will take *up to eighteen months, or until*  
15 *November 9, 2023.*” (Emphasis in original.) SFDPH also explained why 18 months was required,  
16 noting the large size of Laguna Honda, “the limited availability of SNF beds and beds in other  
17 appropriate placements in the San Francisco Bay Area and California,” and the “complexity of its  
18 patient population, many of whom have a combination of behavioral health needs, substance use  
19 disorders, and other complicated social and medical factors.”

20 37. CDPH rejected this proposed timeline, stating that 18 months “is not acceptable for  
21 transfer of residents given [CMS’s] proposed timeline for funding to continue for 4 months” with a  
22 [possible] 2-month extension for “extenuating circumstances.” Without addressing SFDPH’s practical  
23 concerns about the length of time it would take to safely transfer hundreds of patients, CDPH  
24 instructed SFDPH that “[t]he plan should include activities and timelines to complete transfers within  
25 4 months [i.e., by September 13]”—the same date that CMS said it would terminate federal funding.  
26 CMS and CDPH did not explain—and have never explained—why they selected this unreasonable  
27 deadline. Nor have they explained why a longer timeline would not better serve the common goal of  
28 ensuring that patients are “transferred to the most appropriate facility or other setting in terms of

1 quality, services, and location, taking into consideration the needs, choice, and best interests of each  
2 resident.” 42 U.S.C. § 1320a-7j(h)(1)(C).

3 38. SFDPH’s proposed Closure Plan also stated its intent to have interdisciplinary teams  
4 complete comprehensive assessments for each patient at Laguna Honda prior to transfer. SFDPH  
5 explained that because these assessments would take one to two hours per patient, staff would need  
6 until August 15 to complete the assessment process. As detailed in the proposed Closure Plan, this  
7 was an ambitious timeline at best, requiring staff to conduct 50 assessments every week. CDPH  
8 responded that SFDPH’s proposal was “unacceptable,” because it would not “meet [CMS’s] required  
9 timeline” to transfer all patients out of the facility by CMS’s arbitrarily selected September 13  
10 deadline.

11 39. SFDPH also proposed that patients be transferred or discharged based on a tiered  
12 system that would allow patients who did not require significant healthcare treatment to be moved  
13 before patients with more complex needs. CMS and CDPH rejected this aspect of the proposed  
14 Closure Plan as well, directing SFDPH to transfer all patient populations simultaneously, including  
15 those in end of life or palliative care.

16 40. As indicated in its initial proposed Closure Plan, SFDPH was concerned about the non-  
17 tiered approach and informed CMS and CDPH that relocation of all patients within 4 months was not  
18 possible—much less in the best interest of patients—given the shortage of SNF beds locally and  
19 statewide (*see* ¶¶ 47-50, *infra*) and the complexity of its patient population. But CMS would not  
20 continue discretionary funding for Laguna Honda past May 13, 2022, without an approved plan; and  
21 CDPH would not approve a plan that contained a realistic closure deadline because of CMS’s required  
22 timeframe. And without CMS funding, Laguna Honda would not have the funds necessary to continue  
23 to provide care to its patients during the transition period. Laguna Honda had no choice but to  
24 resubmit a plan that complied with CMS’s and CDPH’s unreasonable demands.

25 41. Accordingly, on May 13, 2022, SFDPH submitted a revised Closure Plan that  
26 incorporated CMS’s and CDPH’s arbitrary deadline and time frames. The revised plan required  
27 Laguna Honda staff to conduct 78 patient assessments every week—over 50 percent more than  
28 SFDPH thought was manageable. It abandoned the tiered transfer protocol SFDPH wanted to follow.

1 And it included the four-month deadline mandated by CMS. It explained: “Per CMS, Laguna Honda  
2 is required to transfer or discharge all of its current patients within four months from the approval of  
3 the Closure Plan (approval of which is anticipated on May 13, 2022, with four months from that date  
4 being September 13, 2022), with a possible 2-month extension based on extenuating circumstances as  
5 approved by CDPH and CMS.”

6 42. CDPH, which upon information and belief was acting at the direction of CMS,  
7 approved the revised plan.

8 43. Although federal regulations do not mandate that closure occur within any set period of  
9 time and allow the Secretary of HHS discretion to continue funding until the last patient is safely  
10 transferred or discharged from the facility, CMS and CDPH confirmed in several subsequent  
11 communications that federal funding will not be continued past September 13, 2022, and that all  
12 Medicare and Medicaid patients must be relocated by that date. This arbitrary and capricious decision  
13 constitutes an abuse of discretion.

14 44. Nonetheless, Laguna Honda has used best efforts to comply with CMS’s and CDPH’s  
15 arbitrary deadline. Over the past eleven weeks, Laguna Honda has transferred 41 patients and  
16 discharged 16 others.

17 45. Tragically, as of this filing, Laguna Honda has been informed that eight patients died  
18 after being transferred to another facility and one patient died after being discharged. Although there  
19 is no evidence that the deaths were the result of the transfers or discharges, San Francisco, SFDPH,  
20 and Laguna Honda are deeply concerned by these deaths as patient health and safety has always  
21 been—and remains—the highest priority.

22 46. On July 28, 2022, CMS reversed course—at least in part—by agreeing that Laguna  
23 Honda should pause all transfers and discharges of patients for an unspecified period. But, despite  
24 these dramatically changed circumstances regarding the transfers and discharges and the increasing  
25 reality of the infeasibility of the deadline in the closure plan, CMS has refused to vacate or extend the  
26 September 13 deadline. To the contrary, on July 29, 2022, counsel for CMS expressly confirmed that  
27 the September 13 date to relocate all patients and terminate funding is still in effect.

28 //

1 **IV. LAGUNA HONDA CANNOT TRANSFER AND DISCHARGE ALL PATIENTS BY**  
2 **SEPTEMBER 13 AS CMS AND CDPH CONTINUE TO REQUIRE.**

3 47. CMS's unreasonable demands have placed Laguna Honda and its patients in an  
4 impossible situation: Laguna Honda cannot transfer or discharge any patients at this time, yet CMS  
5 requires Laguna Honda to transfer or discharge all patients by September 13. Laguna Honda cannot  
6 close its facility, and also cannot provide quality care to patients after September 13 in the absence of  
7 funding.

8 48. Laguna Honda's overriding concern is to ensure patient health, safety, and welfare at all  
9 times, including when executing the clinically appropriate transfer or discharge of patients. Although  
10 this should be Defendants' primary concern as well, CMS's impossible requirements instead put the  
11 health and safety of Laguna Honda's patients at risk. As anticipated, Laguna Honda faces the lack of  
12 available skilled nursing beds to which it could transfer Medicare and Medicaid patients while trying  
13 to comply with CMS's unreasonable timeline. Since CMS and CDPH imposed the Closure Plan,  
14 Laguna Honda staff have called, on average, over a thousand skilled nursing facilities per week in the  
15 San Francisco Bay Area, across California, and even neighboring states, but has been unable to  
16 identify suitable placements for most patients. For example, during the week of July 4–10, 2022,  
17 Laguna Honda called 1,400 unique skilled nursing facilities, and identified no vacant beds eligible for  
18 Medicare or Medicaid reimbursement that could accept and provide sufficient skilled nursing services  
19 to Laguna Honda's patients. Putting aside the hardship of moving patients away from the  
20 communities where their loved ones live, Laguna Honda cannot transfer patients when there are no  
21 facilities available that can serve a patient's needs. CMS's unreasonable September 13 deadline is  
22 inconsistent with the obligation to "ensure that, before a facility closes, all residents of the facility  
23 have been successfully relocated to another facility or an alternative home and community-based  
24 setting." 42 U.S.C. § 1320a-7j (h)(2).

25 49. CMS was well aware of the critical shortage of skilled nursing facilities when it  
26 imposed its arbitrary and capricious September 13 deadline for Laguna Honda's closure. There is a  
27 shortage of nursing home beds for elderly persons in California and in the country as a whole due to a  
28 severe staffing crisis—exacerbated by the COVID-19 pandemic—that has caused long-term care

1 facilities to cut back on new admissions. According to a survey conducted by the American Health  
2 Care Association/National Center for Assisted Living (AHCA/NCAL), three out of five nursing homes  
3 (61%) have limited new admissions due to staffing shortages. The AHCA/NCAL survey found that  
4 87% of nursing home providers are facing moderate to high staffing shortages, with nearly half (48%)  
5 struggling with a severe staffing shortage. Given the shortage of available facilities, it is unreasonable  
6 to expect Laguna Honda to complete the impossible task of transferring several hundred patients in  
7 just four months.

8 50. Laguna Honda also cannot simply close its doors. As described above Laguna Honda  
9 serves as a safety net for many of San Francisco's most vulnerable residents. Laguna Honda has a  
10 duty to continue to provide care to patients in the facility while they await transfer or discharge.  
11 Nearly all of Laguna Honda's patients require either skilled nursing facilities, psychiatric health  
12 facilities, or board and care or residential supportive housing services. Even for the small number of  
13 patients who no longer have significant medical facility care needs, SFDPH requires adequate time to  
14 locate shelter and supportive services. Otherwise, discharged patients might wind up with no place to  
15 go. Indeed, three of the 16 patients who no longer need skilled nursing care and have been discharged  
16 (as opposed to transferred to another SNF) now live in homeless shelters. Once discharges resume to  
17 satisfy the arbitrary and capricious September 13 deadline imposed by CMS, additional vulnerable  
18 individuals are likely to end up homeless.

19 **V. CMS'S CONDUCT HAS VIOLATED LAGUNA HONDA'S DUE PROCESS RIGHTS.**

20 51. CMS's unreasonable requirements are not only harmful to patients and impossible to  
21 achieve, they are also unlawful. Laguna Honda has filed three successive administrative appeals  
22 challenging CMS's Termination Notice and the statement of deficiencies that led to CMS's decision to  
23 terminate Laguna Honda as a Medicare and Medicaid provider. If Laguna Honda is successful in its  
24 administrative appeals, Laguna Honda will obtain an order finding that CMS improperly terminated  
25 Laguna Honda as a Medicare and Medicaid provider, and restoring Laguna Honda as a Medicare and  
26 Medicaid provider.

27 52. But that remedy will come too late to protect Laguna Honda and more importantly its  
28 vulnerable patients. Despite Laguna Honda's diligence and requests for expedited consideration of its

1 appeals, the administrative appeals will not be fully briefed—let alone decided—before the September  
2 13 deadline for transferring all patients and for ending federal funding. The “Medicare statute is  
3 designed to protect the interests” of patients in facilities such as Laguna Honda, but “it is these very  
4 residents who will suffer the most if they are unnecessarily transferred” because of CMS’s arbitrary  
5 deadlines. *Int’l Long Term Care*, 947 F. Supp. at 19.

6 53. By terminating funding before Laguna Honda has the opportunity to be heard, CMS  
7 violates procedural due process. “The fundamental requirement of due process is the opportunity to be  
8 heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333  
9 (1976) (internal punctuation omitted). Here, for the administrative appeals process to be meaningful,  
10 the process must conclude before CMS terminates funding and requires Laguna Honda to care for  
11 Medicare and Medicaid patients, without federal reimbursement, until those patients can be transferred  
12 or discharged. Otherwise, Laguna Honda and its patients would suffer irreparable harm that cannot be  
13 remedied even if Laguna Honda ultimately prevails on its administrative appeals. Indeed, because of  
14 CMS’s September 13 deadline, Laguna Honda “might well be forced to close its doors, and the  
15 residents might have to be transferred during the very period when the hearing and post-hearing  
16 briefing . . . are taking place.” *Int’l Long Term Care*, 947 F. Supp. at 18. And, if the Administrative  
17 Law Judge eventually concludes that Laguna Honda should not be terminated from the Medicare  
18 program, “it may be too late for [Laguna Honda] to recover.” *Id.* at 19.

19 54. CMS is well aware of the harm its September 13 deadline causes to Laguna Honda’s  
20 due process rights. On July 15, 2022, San Francisco City Attorney David Chiu sent a letter to CMS’s  
21 Chief Counsel Paula Lee, explaining the violation of due process and harm to patients that CMS  
22 caused with its September 13 deadline. (*See Ex. A.*) Yet, instead of working cooperatively with San  
23 Francisco to allow the administrative appeals process to provide meaningful relief and to protect  
24 patient safety, CMS doubled down. CMS confirmed that the September 13 deadline still holds. Even  
25 though the September 13 deadline is impossible to achieve as described above, CMS confirmed that  
26 Laguna Honda must discharge or transfer hundreds of patients by September 13 although it cannot  
27 transfer patients at this time. And it confirmed that funding will terminate on September 13 although  
28 CMS has provided no plan for the safe care of patients after that date.

1           55.     CMS did not have to do this. It could have worked with Laguna Honda to correct  
2 deficiencies without compromising patient care and endangering patients. It could have provided a  
3 reasonable closure deadline that allows for the safe relocation of patients. It could have provided  
4 funding until the administrative appeals process is complete and the last patient is safely transferred or  
5 discharged. It could have allowed the administrative appeals process to resolve before forcing Laguna  
6 Honda to close. Instead, CMS has held fast to its arbitrary and unreasonable September 13 deadline  
7 without explanation or justification.

8 **VI.     CMS'S ARBITRARY AND CAPRICIOUS CONDUCT HAS CAUSED GRAVE HARM**  
9 **TO THE CITY, LAGUNA HONDA AND ITS PATIENTS.**

10           56.     Requiring transfers and discharges on an expedited time frame in the absence of  
11 available facilities is arbitrary and capricious, and causes irreparable harm to Laguna Honda and its  
12 patients.

13           57.     CMS's conduct has already caused grave harm to the City, Laguna Honda, and its  
14 patients. Laguna Honda serves as the last safety net for patients who must, or wish to, receive care in  
15 the Bay Area near friends, family and their communities. There are no available skilled nursing beds  
16 for Medicare and Medicaid patients in San Francisco and very few in California or surrounding states.  
17 And the quality of care these patients with specialized needs require is unlikely to be replicated at  
18 another facility. Transferring a patient hundreds of miles from their home would uproot them from  
19 their family and friends, and remove the only caregivers they know.

20           58.     Elderly patients with dementia have faced, and will continue to face, the confusion,  
21 disruption and ordeal of being transferred away from their long-term caregivers for reasons they might  
22 not understand. These elderly patients are at risk for relocation stress syndrome, also known as  
23 transfer trauma. For those patients, maintaining familiarity with people, place, and surroundings is  
24 important for their orientation and stability. The California Legislature has declared that "the transfer  
25 trauma which accompanies the abrupt and involuntary transfer of patients from one nursing home to  
26 another should be avoided when reasonable alternatives exist." Cal. Health & Safety Code § 1325.  
27 California law also requires transferring facilities to take reasonable steps to minimize possible  
28 transfer trauma. Cal. Health & Safety Code § 1336.2(a).

1           59. CMS’s arbitrary and capricious decision to move every Medicare and Medicaid patient  
2 out of the facility within four months has placed immense strain on Laguna Honda’s resources and  
3 staff, causing stress and burnout among already overburdened staff. As a result of CMS’s actions,  
4 Laguna Honda staff must conduct patient assessments and meetings to prepare patients for transfer or  
5 discharge on CMS’s unreasonable timeline, and simultaneously prepare the facility for recertification  
6 in Medicare and Medicaid, including resolving all previously identified deficiencies and implementing  
7 new systems and structures to prevent future deficiencies. And the multiple overlapping  
8 responsibilities impacts patient care because Laguna Honda must continue to provide essential care for  
9 its patients while awaiting discharge or transfer. All of these activities are occurring in the shadow of  
10 two public health emergencies—COVID-19 and monkeypox—which requires patients and staff to  
11 adhere to rigorous protocols.

12           60. Because Laguna Honda faces an imminent loss of funding, it is already losing  
13 employees who are needed to provide care to patients. The facility has already experienced an  
14 increase in the number of registered nurses transferring to other positions within the City. Laguna  
15 Honda’s vacancy rate for open positions is higher now (12.8% in June) than before the termination  
16 (10.2% in March) despite vigorous recruiting efforts by the facility. The loss of personnel undermines  
17 the facility’s ability to care for its patients, safely transfer or discharge patients who are eligible to be  
18 moved, and threatens Laguna Honda’s state-mandated minimum care requirements. *See, e.g.,* Cal  
19 Health & Safety Code § 1276.5 (requiring a minimum of 3.2 nursing hours per patient in skilled  
20 nursing facilities). Moreover, California is experiencing a shortage of registered nurses and Laguna  
21 Honda is already facing difficulties attracting quality licensed providers to a facility with uncertain  
22 funding or status in Medicare and Medicaid.

23           61. As explained above, Laguna Honda recognizes that it has fallen short of its goal to  
24 provide the highest standard of care at all times. Laguna Honda is committed to addressing all  
25 existing deficiencies and preventing new ones from occurring in the future. But Defendants’ demand  
26 that Laguna Honda close its doors before Laguna Honda can obtain recertification, before Laguna  
27 Honda receives the due process to which it is entitled through its administrative appeals, and before  
28 Laguna Honda’s patients can be safely transferred or discharged, violates the law.

**COUNT ONE**

**Violation of APA (5 U.S.C. § 706(2)(A))—Arbitrary and Capricious**

62. Plaintiff repeats and incorporates by reference each allegation of the prior paragraphs as if fully set forth herein.

63. The APA requires courts to “hold unlawful and set aside” agency action that is “arbitrary, capricious [or] an abuse of discretion.” 5 U.S.C. § 706(2)(A).

64. By terminating Laguna Honda’s funding on September 13 and requiring Laguna Honda to relocate all patients by that date, Defendants ignored important aspects of the problem, including impacts of their final decision on the vulnerable populations that Laguna Honda serves and information about the length of time it would take to safely transfer hundreds of medically fragile patients in the midst of a critical shortage of skilled nursing facilities. Those factors were raised by San Francisco but ignored by Defendants. Moreover, Defendants have failed to offer adequate explanation for their decision. Accordingly, Defendants’ decision to terminate funding on September 13 and to reject Laguna Honda’s proposal to implement an 18-month closure plan to ensure sufficient time to safely relocate its patients in favor of a 4-month deadline was arbitrary, capricious, and an abuse of discretion. The September 13 deadline for funding termination and patient relocation is invalid as a result.

65. There is a substantial controversy between parties having adverse legal interests.

66. The controversy between the parties is of sufficient immediacy and reality to warrant declaratory relief. Indeed, without prompt judicial action, Defendants actions will cause irreparable harm to the City, Laguna Honda and its patients.

**COUNT TWO**

**Violation of Procedural Due Process under the United States Constitution**

67. Plaintiff repeats and incorporates by reference each allegation of the prior paragraphs as if fully set forth herein.

//



- 1           5.       Award San Francisco reasonable costs and attorneys' fees; and
- 2           6.       Grant any other further relief that the Court deems fit and proper.

3 Dated: August 3, 2022

4                                   DAVID CHIU  
5                                   City Attorney  
6                                   JESSE C. SMITH  
7                                   YVONNE R. MERÉ  
8                                   SARA J. EISENBERG  
9                                   WAYNE SNODGRASS  
10                                  TARA M. STEELEY  
11                                  HENRY L. LIFTON  
12                                  Deputy City Attorneys

13                                  By:   /s/ Tara M. Steeley    
14                                  TARA M. STEELEY

15                                  Attorneys for Plaintiff CITY AND COUNTY OF SAN  
16                                  FRANCISCO

# **EXHIBIT A**

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY



DAVID CHIU  
City Attorney

July 15, 2022

**Via Email and U.S. Mail**

Paula R. Lee, Chief Counsel, Region IX  
U.S. Department of Health and Human Services  
Office of the General Counsel, Region IX  
90 7th Street, Suite 4-500  
San Francisco, California 94103-6705

Re: Due Process Issues with Laguna Honda Closure

Dear Ms. Lee:

We write to bring a serious problem to your attention, with the hope that we can find an amicable solution. We ask that the Centers for Medicare & Medicaid Services (“CMS”) exercise its discretion to continue funding to Laguna Honda Hospital & Rehabilitation Center D/P SNF, Provider Number 555020 (“Laguna Honda”) until all patients are safely discharged or transferred. That funding extension is necessary in light of the extreme difficulty in transferring or discharging so many patients with complex needs—especially due to the well-documented lack of beds across the region for these kinds of patients. At a bare minimum, we ask CMS to continue funding at least through completion of the appeal process described below.

**Laguna Honda provides care to San Francisco’s most vulnerable patients.**

Throughout its 150-year history, Laguna Honda has provided skilled nursing and rehabilitation services to San Francisco’s most vulnerable patients, including seniors, adults with disabilities, and others cannot care for themselves. For many, Laguna Honda provides the last safety net for patients who must, or wish to, receive care in the Bay Area near friends, family and their communities. For instance, Laguna Honda provides the only dedicated skilled nursing facility for HIV/AIDS in the San Francisco Bay Area. Because of its commitment to serve the underserved, Laguna Honda often provides a last resort for patients who have nowhere else to go, and serves a critical need for San Francisco’s most vulnerable.

There is no doubt that Laguna Honda has faced challenges in recent months. But those challenges do not diminish Laguna Honda’s history of success. Laguna Honda provides a nationally-recognized program for people with Alzheimer’s and other dementias. Through its award-winning restorative care program that assists patients to retain and reclaim physical competency, every year as many as 240 people complete rehabilitative therapy at Laguna Honda and move to a lower level of care or independent living. While other facilities faced COVID-19 outbreaks that caused great suffering and loss of life, Laguna Honda distinguished itself through its successful response to the pandemic. Starting in early March 2020, the facility implemented cutting-edge infection prevention and control systems to protect its patients, and in 2020, Laguna Honda received the top honor from the California Association of Public Hospitals and Health Systems for its response to the COVID-19 pandemic.

Every day, Laguna Honda clinicians and staff dedicate themselves to high-quality, individualized care for the center’s over 600 patients, including by providing group living

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facilities for people with developmental disabilities, treatment for multiple sclerosis, Parkinson's and other degenerative diseases, therapeutic services for traumatic brain injuries, services for people with psychosocial difficulties, end-of-life care emphasizing comfort and dignity, and the complex system of care required for people with multiple diagnoses. Laguna Honda seeks the opportunity to continue to serve the underserved, and the time needed to continue to act in the best interest of its patients.

**If CMS were to terminate funding or require Laguna Honda to complete closure of the facility before the appeals process is complete, Laguna Honda's due process rights would be violated.**

As you know, CMS recently terminated the Medicare provider agreement of Laguna Honda. Under the terms of a Closure and Patient Transfer and Relocation Plan ("Closure Plan"), CMS has agreed to extend federal reimbursement for Laguna Honda through September 13, 2022, with the possibility of extending reimbursement through November 13, 2022.

Meanwhile, our Office, on behalf of Laguna Honda, has filed three successive administrative appeals, including most recently on May 28, 2022, challenging CMS's March 30, 2022 Notice of Termination. CMS's prehearing brief is due by August 31, 2022, and our response brief is due by October 5, 2022. While the administrative law judge will schedule a hearing soon after we file our brief, the administrative appeals process almost certainly will not conclude before September 13, 2022, and likely will not conclude before November 13, 2022.

If CMS terminates funding and requires Laguna Honda to complete the transfer or discharge of its affected patients before Laguna Honda has the opportunity to be heard, Laguna Honda's due process rights will be violated. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal punctuation omitted). Here, for the administrative appeals process to be meaningful, the process must conclude before CMS terminates funding and requires Laguna Honda to transfer its patients. Otherwise, Laguna Honda and its patients would suffer irreparable harm that cannot be remedied even if Laguna Honda ultimately prevails on its appeals.

As in *International Long Term Care, Inc. v. Shalala*, Laguna Honda is facing what is essentially a "scheduling mismatch" between the date CMS has said funding will terminate and date when Laguna Honda's administrative appeals process will conclude. 947 F. Supp. 15, 18–19 (D.D.C. 1996). As a result, if CMS does not agree to extend funding until at least the end of the administrative appeals process, Laguna Honda "might well be forced to close its doors, and the residents might have to be transferred during the very period when the hearing and post-hearing briefing . . . are taking place." *Id.* at 18. And if the ALJ eventually concludes that Laguna Honda should not be terminated from the Medicare program, "it may be too late for [Laguna Honda] to recover." *Id.* at 19. Federal courts have repeatedly issued injunctive relief to prevent exactly that sort of "irreparable and unnecessary harm." *Id.*; see also *New Orleans Home for Incurables, Inc. v. Greenstein*, 911 F. Supp. 2d 386, 413 (E.D. La. 2012); *Pathfinder Healthcare, Inc. v. Thompson*, 177 F. Supp. 2d 895, 896 (E.D. Ark. 2001); *Frontier Health Inc. v. Shalala*, 113 F. Supp. 2d 1192, 1193 (E.D. Tenn. 2000); *Mediplex of Mass., Inc. v. Shalala*, 39 F. Supp. 2d 88, 94 (D. Mass. 1999); *Libbie Rehab. Ctr., Inc. v. Shalala*, 26 F. Supp. 2d 128, 130 (D.D.C. 1998); *Niskayuna Operating Co., LLC v. Sebelius*, 2010 WL 4248852, at \*5 (N.D.N.Y. Oct. 26, 2010); *Intensiva Hosp. of Greater St. Louis, Inc. v. Johnson*, 2009 WL 10704985, at \*5 (W.D. Mo. Apr. 15, 2009); *Oak Park Health Care Ctr., LLC v. Johnson*, 2009 WL 331563, at \*3 (W.D. La. Feb. 10, 2009); *Ridgeview Manor of Midlands, L.P. v. Leavitt*, 2007 WL 1110915, at \*9 (D.S.C. Apr. 9, 2007).

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**Laguna Honda shares CMS’s paramount goal of ensuring patient health, safety, and welfare, but implementation of the schedule under the current Closure Plan conflicts with that goal.**

The violation of Laguna Honda’s due process rights will also cause unnecessary and irreparable harm to patients. If Laguna Honda is forced to transfer its patients and close its doors before the administrative appeal process concludes, Laguna Honda’s eventual success in the administrative appeals will come too late to protect patients. By that time, Laguna Honda’s “residents will have already undergone an unnecessary and potentially destructive transfer from which many of them may sustain significant physical or psychological trauma.” *Int’l Long Term Care, Inc.*, 947 F. Supp. at 19.

Laguna Honda’s overriding concern, which we know CMS shares, is to ensure patient health, safety, and welfare, even when executing the clinically appropriate transfer or discharge of patients. Laguna Honda must take reasonable steps to transfer affected patients safely and minimize possible transfer trauma. (Cal. Health & Safety Code § 1336.2(a).) Laguna Honda has met the various requirements of section 1336.2(a) including, as of July 11, 2022, conducting 482 patient assessments, meeting with 284 patients and their representatives, discharging 13 patients, and transferring 35 patients.<sup>1</sup>

While Laguna Honda has proceeded in conducting patient assessments, meeting with patients, and transferring or discharging patients, Laguna Honda has repeatedly faced the lack of available skilled nursing beds to which it could transfer Medicare and Medicaid patients. Every week, Laguna Honda staff calls over a thousand skilled nursing facilities in the San Francisco Bay Area, across California, and even neighboring states, but is unable to identify suitable placements for most patients. For example, during the week of July 4–10, 2022, Laguna Honda called 1,400 unique out-of-county skilled nursing facilities, and identified no vacant beds eligible for Medicare or Medicaid reimbursement and that can provide a sufficient skilled nursing level of care for such patients. Discharging patients also often leaves them without adequate support. Indeed, three of the 13 patients who have been discharged now live in homeless shelters because they lack any other place to go, and three patients are receiving medical and case management services in temporary housing. Given the challenges Laguna Honda has had in trying to identify and transfer its patients, it is likely these extremely vulnerable individuals will end up homeless if CMS does not extend payment through when the last patient is transferred.

The population Laguna Honda serves is primarily either low-income or extremely low-income with diverse issues, including elderly patients and those with behavioral health issues, substance use and addiction disorders, and other complex conditions. Requiring transfers and discharges to facilities inadequate to a patient’s level of care or to facilities that are hundreds of miles away from patients’ homes and family support structures would not only be cruel, but it would also be unnecessary if Laguna Honda prevails in its administrative appeal. The “Medicare statute is designed to protect the interests” of patients in facilities such as Laguna Honda, but “it is these very residents who will suffer the most if they are unnecessarily transferred” because of a gap in Laguna Honda’s funding before the administrative appeals process concludes. *Int’l Long Term Care*, 947 F. Supp. at 19. And, because Laguna Honda faces an imminent loss of funding, it is already losing employees who are needed to provide care to patients.

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<sup>1</sup> Laguna Honda provided the 60-day notice required by California Health and Safety Code section 1336.2(c) on May 15, 2022 and could not involuntarily transfer patients before July 15, 2022.

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CMS is effectively requiring Laguna Honda to abandon its administrative rights and remedies in order for a short-term continuation of funding to serve the patients it is committed to serving. There is no real opportunity to be heard when process is delayed and deferred; unfortunately, that renders administrative due process illusory. We hope we can find an amicable solution to this problem given that both Laguna Honda and CMS intend to provide patients with a stable environment while Laguna Honda safely carries out its Closure Plan. Indeed, federal regulations contemplate CMS providing continued federal reimbursements “during the period beginning on the date such notification [of closure] is submitted and ending on the date on which the residents are successfully relocated.” (42 C.F.R. § 489.55(b); *see also* 42 C.F.R. § 488.450(c)(2).) And, in its 2013 final rule regarding Requirements for Long-Term Care Facilities, CMS agreed with “the need to provide continued funding until all of the residents are successfully relocated.” (Medicare and Medicaid Programs; Requirements for Long-Term Care (LTC) Facilities; Notice of Facility Closure, 78 Fed. Reg. 16,795-01, 16,801 (Mar. 19, 2013) (emphasis added).)

**CMS should exercise its statutory discretion to extend payments to Laguna Honda.**

Our Office, on behalf of Laguna Honda, requests that CMS exercise its discretion under Section 1128I(h)(2) of the Social Security Act and title 42 Code of Federal Regulations sections 489.55(b) and 488.450(c)(2) to extend payments to Laguna Honda. Those provisions allow CMS to extend funding until the last patient leaves Laguna Honda. Exercising that discretion would be appropriate in this case given the critical services provided by Laguna Honda, the lack of other facilities for patients, and the trauma patients are currently experiencing because of CMS’s threats to prematurely terminate funding. In its draft Closure Plan, Laguna Honda reasonably estimated that it would take 18 months to find suitable facilities who can accept Laguna Honda’s patients and satisfy their particular needs. CMS and CDPH imposed a four-month timeline instead. Allowing Laguna Honda only four months to complete that process is not reasonable, and is causing unnecessary trauma for patients.

At a minimum, Laguna Honda requests that CMS continue funding until a reasonable time after the Secretary of Health and Human Services reaches a final decision regarding Laguna Honda’s administrative appeal. Due process requires no less. Our Office previously requested an expedited hearing for Laguna Honda’s administrative appeals and remains willing to expedite the administrative appeals process so it can be resolved in a timely manner to reduce due process concerns.

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We request a response to our letter by Monday July 25, 2022, and we are available to discuss this matter further. Please direct any questions to Deputy City Attorneys Tara Steeley (Tara.Steeley@sfcityatty.org) and Henry Lifton (Henry.Lifton@sfcityatty.org).

Very truly yours,



DAVID CHIU  
City Attorney

cc: Femi M. Johnson, Acting Deputy Chief Counsel  
Jacob Richards, Assistant Regional Counsel  
Jacob Rossman, Assistant Regional Counsel

Honorable London N. Breed, Mayor, City and County of San Francisco  
Grant Colfax, M.D., Director of Health, San Francisco Department of Public Health  
Naveena Bobba, M.D., Deputy Director of Health, San Francisco Department of Public Health  
Roland Pickens, Director, San Francisco Health Network & Interim Chief Executive Officer, Laguna Honda Hospital  
Julie Van Nostern, Chief Attorney, Health & Human Services, San Francisco City Attorney's Office