IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LOCAL INITIATIVE HEALTH AUTHORITY FOR LOS ANGELES COUNTY, Plaintiff, vs. THE UNITED STATES, Defendant.	No. 1:17-cv-1542-TCW (Judge Wheeler)

JOINT STATUS REPORT

Pursuant to the Court's February 14, 2019 order (ECF No. 32), the parties respectfully submit this Joint Status Report regarding proposed steps and schedule for completing the resolution of the Cost Sharing Reduction (CSR) claims asserted in this action. Counsel for the parties have conferred, but have been unable to reach agreement on the most appropriate process and schedule for entry of judgment on plaintiff's CSR claims. Each party's respective position is set forth below.

I. Statement of Plaintiffs' Position

Pursuant to the Court's February 14, 2019 Opinion and Order, the Plaintiff respectfully submits its position regarding the proposed steps and schedule for completing the resolution of Plaintiff's CSR claims in this action following this Court's February 14, 2019 Opinion and Order in this case (ECF No. 32) holding the Government liable for violating the express terms of the ACA and implementing regulations which require full, advanced CSR reimbursement payments and granting Plaintiff's motion for partial summary judgment on Counts V and VI. As Plaintiff Local Initiative Health Authority for Los Angeles County, operating and doing business as L.A.

Care Health Plan ("L.A. Care") previously advised the Court and the Government, it intends to file a motion for leave to file an amended complaint to include the updated CSR amounts the Government owes L.A. Care for 2018 to date, which now includes CSR amounts the Government was obligated to pay, but did not pay, L.A. Care in advance during the First Quarter of 2019. The total CSR amounts the Government was obligated to pay, but did not pay, L.A. Care in advance each month during 2017, 2018 and 2019 to date under the money-mandating provisions §§1402 and 1412 and 45 C.F.R. §156.430 is $75,341,483.79. With leave of Court, Plaintiff will amend its Complaint to include these additional damages amounts owed, and Defendant does not oppose such amendment. The Court should note that after the administrative reconciliation process CMS completed for the advance CSR amounts the Government owed L.A. Care for 2017, Plaintiff does not seek any damages for CSR amounts that were payable in 2017. With the Court's approval, Plaintiff proposes to file its motion for leave and amended Complaint on or before March 29, 2019.[1]

Following amendment of its Complaint, Plaintiff L.A. Care respectfully requests and proposes that the Court enter judgment pursuant to RCFC 54(b) in favor of Plaintiff and against the United States on Plaintiff's CSR claims (Counts V and VI) in the amount of $75,341,483.79. This is the exact amount of money-mandated CSR payments the Government has acknowledged were to be paid to L.A. Care, but were not paid, in advance, each month of 2018 and January through March, 2019, pursuant to §§1402 and 1412 of the ACA and 45 C.F.R. §156.430.

Entry of judgment in this amount as to Plaintiff's CSR claims under RCFC 54(b) would be appropriate because the judgment would finally resolve all of Plaintiff's CSR claims (Counts

[1] The parties have discussed, but have not identified an efficient process to resolve liability and entry of judgment for CSR payments that continue to accrue each month beyond those that will be included in the Amended Complaint.

V and VI) in this action and because there is no just reason for the Court to delay the entry of such judgment. *See Aleut Tribe v. United States*, 702 F.2d 1015, 1020 (Fed. Cir. 1983); *CB&I Areve Mox Servs., LLC v. United States*, 141 Fed. Cl. 603, 606 (2019) (Wheeler, J.) (quoting *Aleut Tribe* and concluding the "Court must make an 'express direction for the entry of judgment' and an 'express determination that there is no just reason for delay'" under RCFC 54(b)). Plaintiff's CSR claims are separable and distinct from its risk corridors claims (which the Court has stayed) and, if appealed by Defendant, the Federal Circuit would not need to decide the CSR claims upon which judgment has been entered more than once. *CB&I Areve Mox Servs.*, 141 Fed. Cl. at 607-08; *see also Cmty. Health Choice, Inc. v. United States*, No. 18-5C, ECF No. 34 (order entering judgment on CSR claims under RCFC 54(b) despite plaintiff also asserting risk corridors claims and holding that "[t]he court finds that there is no just reason for delaying the entry of judgment on plaintiff's cost-sharing reduction claims"). Accordingly, Plaintiff submits that there is no reason to delay entry of final judgment on its CSR claims and respectfully requests that the Court direct that final judgment on Plaintiffs' CSR claims as set forth above be entered against the United States and expressly state that there is no just reason for delay.

CMS's reconciliation, if any, of the amount of CSR amounts paid pursuant to the Court's entry of judgment for 2018 and 2019, should be made in the normal course through the administrative reconciliation process prescribed in 45 C.F.R. §156.430. The CSR statutory and regulatory regime were designed specifically to provide QHP Issuers, like L.A. Care, with monthly CSR payments in advance subject to a later administrative CMS administrative reconciliation process. *See* Am. Compl. ¶¶ 238-41; 45 C.F.R §156.430 (d).

Section 156.430 (d), *Reconciliation of amounts*, provides:

> HHS will perform periodic reconciliations of any advance payments of cost-sharing reductions provided to a QHP issuer under paragraph (b) of this section against—(1) The actual amount of cost-sharing reductions provided to enrollees and reimbursed to providers by the QHP issuer for benefits for which the QHP issuer compensates the applicable providers in whole or in part on a fee-for-service basis; and (2) The actual amount of cost-sharing reductions provided to enrollees for benefits for which the QHP issuer compensates the applicable providers in any other manner.

45 C.F.R. § 156.430(d). Section 156.430(e), *Payment of discrepancies,* further provides that:

> If the actual amounts of cost-sharing reductions described in paragraphs (d)(1) and (2) of this section are—(1) More than the amount of advance payments provided and the QHP issuer has timely provided the actual amounts of cost-sharing reductions as required under paragraph (c) of this section, HHS will reimburse the QHP issuer for the difference; and (2) Less than the amount of advance payments provided, the QHP issuer must repay the difference to HHS in the manner and timeframe specified by HHS.

45 C.F.R. § 156.430(e).

Accordingly, to the extent that CMS determines in the future, pursuant its administrative reconciliation process under §156.430, that L.A. Care is obligated to reimburse the Government any CSRs based on the actual amount of CSRs that L.A. Care provided to its enrollees for 2018 and the First Quarter of 2019, CMS has a process in place to obtain such reimbursement pursuant to existing regulations which do not require the involvement or oversight of this Court. This is the reconciliation process that has been employed by the Government pursuant to §§1402 and 1412 and 45 C.F.R. § 156.430 since the CSR program was initiated in 2014—the only difference is that instead of the Government making the money-mandated CSR payments to L.A. Care in advance each month for 2018 and 2019 to date, the Government would be paying the identical CSR amounts owed pursuant to an entry of judgment by this Court. Plaintiff notes that Defendant recently has stated that CMS' administrative CSR reconciliation process for 2018

should begin in early-April 2019 and be completed in early-May 2019.

The Defendant's proposed timeline – that no judgment should be entered on 2018 amounts until after reconciliation takes place in May 2019 – is unacceptable to Plaintiff because it is inconsistent with the CSR regulations, which plainly require advance payment, and does not compensate Plaintiff for the Government's failure to pay CSRs in advance. The Defendant's position also does not account for the advance CSR amounts that are owed to Plaintiff to date for the first quarter of 2019. Defendant's position would appear to require Plaintiff to wait more than a year for entry of judgment on the 2019 CSR amounts until May 2020, following CMS' administrative reconciliation for 2019 amounts due. While the Defendant cites to Judge Sweeney's CSR orders, including in *Common Ground Healthcare Cooperative v. United States*, the plaintiffs in those cases do not assert claims for 2019 amounts, but only 2018 amounts and thus they will only wait until May 2019 for entry of judgment, not May of 2020, as Defendant now apparently proposes here. *See* Common Ground, Court of Federal Claims case no. 17-877, at ECF No. 54.

This Court already held that the CSR statute and regulations require full, *advance* payments. Opinion and Order, ECF No. 32 at 2. ("The Government violated the express terms of the ACA and implementing regulations which require full, advanced CSR reimbursement payments."); *see also* 42 U.S.C. § 18082(c)(3) ("Treasury shall make such advance [CSR] payment [to QHPs] at such time and in such amount as the [HHS] Secretary specifies …."); . 45 C.F.R. § 156.430(b)(1)(stating that QHPs "will receive periodic advance payments" for their CSR discounts to eligible customers). Defendant's proposed timeline undermines the CSR statutory payments scheme and effectively rewrites the existing regulations by paying CSRs, due in advance under the statute, only *after* the CMS administrative reconciliation process is

completed in the year after CSR payments were required to be paid in advance each month. The advance CSR payment amounts owed are not, as the Defendant now contends, "approximations" or "guesstimates." They are required to be paid to L.A. Care under the CSR statute and regulations and the amounts due to L.A. Care are based on the Government's own reporting to L.A. Care of the advance payments owed. The CSR statute and regulations do not provide for payment months—or as Defendant now suggests more than a year— after any CMS reconciliation process, but clearly beforehand, in advance each month. As described above, if the advance payments exceed the CSR amounts due following CMS' reconciliation, the CSR regulations set forth a process for the Government to collect any discrepancy back from L.A. Care. This Court should reject the Defendant's attempt to rewrite the regulations and should enter final judgment now pursuant to RCFC 54(b) for the money-mandated advance CSR payment amounts owed to L.A. Care for 2018 and January through March 2019.

It is Plaintiff's position that, aside from CMS' above-described administrative reconciliation process to determine actual CSR amounts L.A. Care paid to its enrollees, Defendant is not entitled to any reductions from or offsets to the money-mandated CSR amounts Defendant is obligated to pay L.A. Care under §§1402 and 1412 and 45 C.F.R. § 156.430. Therefore, Plaintiff respectfully requests that the Court enter final judgment under RCFC 54(b) against the United States for the money-mandated CSR payment amounts it owes L.A. Care under §§1402 and 1412 and 45 C.F.R. § 156.430 for 2018 and January through March 2019.

II. Statement of Defendant's Position

Plaintiff L.A. Care's amended complaint sought damages for CSR payments from October 12, 2017 through February 8, 2018 (the date the amended complaint was filed). *See* ECF No. 14 at 91. The reconciliation process for 2017 was completed in 2018, and we

understand that L.A. Care intends to drop any claim for 2017 damages, because the reconciliation process showed that L.A. Care received more in advance CSR payments in 2017 than it ultimately paid out, and L.A. Care thus owed the Government more than $5 million for 2017.

We further understand that L.A. Care wishes to file an amended complaint to include damages claims for 2018 CSR payments, and the Government does not oppose the filing of such an amended complaint. The Government proposed that L.A. Care then participate in the annual reconciliation process with CMS to reconcile 2018 advance CSR payment calculations to actual CSR amounts issuers paid, as CMS has done for past benefit years.

CMS will open the CSR data submission window to accept issuers' benefit year 2018 CSR data in early April 2019. Assuming that L.A. Care makes a timely data submission (by April 29, 2019), CMS expects to be able to notify plaintiff of its benefit year 2018 reconciled CSR amount in early May 2019. That number would reflect actual CSR payments made by L.A. Care in 2018. At that time, the parties would be able to propose a final amount for 2018 damages due to L.A. Care, thus enabling the Court to issue a judgment pursuant to RCFC 54(b). The parties could appeal such a judgment while the rest of the case (regarding risk corridor payments) remains stayed.

This is essentially the same process that Chief Judge Sweeney endorsed last week in two other CSR cases currently pending before the Court. *See* Court of Federal Claims Case Nos. 17-877 at ECF No. 54; 17-2057 at ECF No. 28.

L.A. Care, however, wishes to amend its complaint to not only request damages for 2018 CSR payments, but also for the advanced estimated payments that would have been made to L.A. Care in the first quarter of 2019. L.A. Care would presumably then ask the Government to

stipulate to a damages figure, and have the Court issue a judgment for both 2018 and part of 2019. However, unlike the 2018 damages, which can be accurately calculated during the reconciliation process beginning next month, the Government cannot stipulate to a damages figure for 2019 that the Government knows to be inaccurate and premature. The Court should thus enter final judgment reflecting only *actual* 2018 CSR amounts—a number that the parties can accurately calculate by May.

L.A. Care's proposal to receive a judgment for 2018 and 2019 damages without taking part in the reconciliation process is an attempt to force the Government to agree to an estimate of damages that the parties know is inaccurate. Specifically, L.A. Care's proposal is flawed because it asks the Court to enter a judgment for damages against the Government based upon estimated advance CSR payments, when L.A. Care has not provided to the Government its actual CSR data for 2018 or 2019, which is necessary to calculate an actual amount. The reconciliation process for calculating actual CSR amounts for 2018 is expected to begin in only a few weeks, and should be completed in May. Despite this fact, L.A. Care asks the Court to enter a judgment for damages based only on advance *estimated* CSR payments – figures that both parties know do not accurately reflect CSR payments L.A. Care actually made. Indeed, for 2017, L.A. Care was paid more than $5 million in excess advanced CSR payments, yet it still claims that the Court should not wait a few weeks to permit the reconciliation process to occur. Regarding 2019 damages, the reconciliation process will not even take place until 2020, thus making L.A. Care's request premature.

L.A. Care's attempt to receive a judgment for estimated 2018 and 2019 CSR advance payments conflicts with the law of damages in this Court. As the Federal Circuit has held, and as this Court has repeatedly recognized, the plaintiff bears the burden of proving its damages and a

plaintiff can only rely upon approximations or "guesstimates" of damages when it "can demonstrate a justifiable inability to substantiate the amount of [its] resultant injury by direct and specific proof." *See Dawco Constr., Inc. v. United* States, 930 F.2d 872, 880–82 (Fed. Cir. 1991), *overruled on other grounds* by *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (quoting *Joseph Pickard's Sons Co. v. United States*, 532 F.2d 739, 742, 209 Ct. Cl. 643 (1976)).

In this case, by definition, L.A. Care has failed to "demonstrate any justifiable inability to substantiate" its damages when it possesses the actual data needed to calculate its alleged damages. *Id.* More importantly, the fact that L.A. Care will now be dropping its claim for 2017 damages shows that the estimated advance CSR payments figures that issuers receive can be significantly different from the actual CSR payments issuers (and, L.A. Care, in the case of 2017) made. As described above, for 2017, L.A. Care received more than $5 million in estimated advance CSR payments than it ultimately paid, and thus ended the year owing the Government money. Indeed, the advanced CSR amounts calculated for 2017 overstated actual CSRs on a nationwide basis by 38 percent as reflected through the 2017 CSR reconciliation process, and given the formula for how advanced CSRs are calculated, there is every expectation that 2018 actual CSRs will be significantly less than the amounts calculated as advanced CSR payments.[1] There is also no reason to believe that the results would be any different for 2019 estimated advance CSR payments. This is the very embodiment of a genuine dispute as to

[1] "[T]he advance payments will be simply calculated based on the product of the cost-sharing reduction plan variation multiplier specified by HHS and the premium for the policy" HHS Notice of Benefit and Payment Parameters for 2015 Final Rule, 79 Fed. Reg. 47, 13,744, 13,806-07 (Mar. 11, 2014), *available at* https://www.govinfo.gov/content/pkg/FR-2014-03-11/pdf/2014-05052.pdf. The plan variation multiplier has not changed since this notice, but most plan premiums – including L.A. Care's – increased significantly in 2018 to account for the Government's non-payment of CSRs. Thus, under the formula for estimating advanced CSRs, those amounts – the amounts L.A. Care would like to enter as damages for 2019 in this case – are going to be significantly higher due to the increased premiums charged. But there is no reason to believe that the actual CSRs issuers paid on behalf of their enrollees increased at a commensurate rate.

material facts, which precludes the entry of judgment. *See* RCFC 56.

Chief Judge Sweeney explicitly rejected efforts by plaintiffs in another CSR case to use advance estimated CSR payments as the basis for a judgment against the United States in her March 7, 2019 order in *Common Ground Healthcare Cooperative v. United States*. *See* Court of Federal Claims case no. 17-877, at ECF No. 54. There is no justification for treating L.A. Care's claim for 2019 damages any differently in this case.

In any event, the Government's usual practice is to collect actual CSR claims data from issuers from April through May of the year following the end of a benefit year (meaning after December 31st), validate that the issuer-submitted claims are for plan enrollees eligible for CSRs, and "reconcile" that data against the advanced CSR amounts. After reconciliation, CMS reports reconciled CSR amounts to issuers in June. For example, the schedule for reconciling 2017 CSR data and 2016 CSR restatements was as follows:[2]

Timing	Activity
March 29, 2018	Final Instructional Manual and Specifications Guide published on CMS website
March 29, 2018	Final technical specifications and attestation forms published
April-May 2018	Webinars and training for all issuers
April 2, 2018	Data submission window opens for benefit year 2017 reconciliation and 2016 restatements
June 1, 2018	Data submission window closes for benefit year 2017 reconciliation and 2016 restatements
June 29, 2018	CMS notifies issuers of the reconciled amounts due from the issuers to CMS.

CMS plans to open the data submission window to accept issuers' benefit year 2018 CSR

[2] *See* https://go.usa.gov/xEddk.

data in early-April 2019. Assuming that L.A. Care completes its own verification process and makes timely data submissions (by April 29, 2019), CMS expects to be able to notify L.A. Care of its benefit year 2018 reconciled amounts in early-May 2019. These numbers would reflect actual CSR payments made by such issuers in 2018 and not estimated advance CSR payments CMS calculated for benefit year 2018. The Court could therefore enter a final judgment reflecting actual 2018 CSR amounts by June.

For the reasons set forth above, the Government respectfully requests that the Court permit L.A. Care to engage in the reconciliation process for 2018, after which the parties may stipulate to a reconciled damages amount for 2018, and judgment may be entered accordingly.

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