IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMON GROUND HEALTHCARE COOPERATIVE, Plaintiff, on behalf of itself and all others similarly situated, vs. THE UNITED STATES OF AMERICA, Defendant.	No. 1:17-cv-00877-MMS (Judge Sweeney)

JOINT STATUS REPORT

Pursuant to the Court's March 7, 2019 Order (Dkt. 54), the parties submit this Joint Status Report regarding entry of Rule 54(b) judgment for the amount due to the CSR class for 2017. Counsel for Plaintiffs and Defendant have conferred, but have been unable to reach agreement on the most appropriate process for entry of judgment. Each party's position is set forth below.

I. Statement of Plaintiffs' Position

Plaintiff respectfully requests that the Court enter a final judgment on Plaintiffs' 2017 CSR claims pursuant to Rule 54(b). Rule 54(b) permits the Court to "direct entry of a final judgment as to one or more, but fewer than all, claims" where the Court determines that "there is no just reason for delay." RCFC 54(b). "Recognizing that litigation has become increasingly complex, "[i]n the interest of sound judicial administration, Congress enacted Rule 54(b) to 'relax[] the restrictions upon what should be treated as a judicial unit for the purposes of appellate jurisdiction.'" *Conn. Yankee Atomic Power Co. v. United States*, Case No. 17-1673C, 2019 WL 762214, at *2 (Fed. Cl. Feb. 21, 2019) (citing *W.L. Gore & Assocs. Inc. v. Int'l Med. Prosthetics Research Assocs. Inc.*, 975 F.2d 858, 861 (Fed. Cir. 1992)). In the parties' March 5, 2019 Joint Status Report, the Government acknowledged that it "provided plaintiff with data regarding the

class members' 2017 CSR costs, which was derived from the 2017 CSR reconciliation process undertaken by the Centers for Medicare & Medicaid Services (CMS). **That data provides a sufficient basis to calculate the amounts due for 2017.**" 3/5/2019 Joint Status Report, Dkt. 53, at 6 (emphasis added).

On March 21, 2019, Plaintiff filed an Unopposed Motion to Include Additional Class Members in the CSR Class. *See* Dkt. 57. The Government did not oppose this Motion, and stated that it will provide data regarding these entities' 2017 and/or 2018 CSR costs during the week of March 25, 2019. If the Court permits the additional four entities to join the CSR Class and the Government provides those entities' CSR amounts during the week of March 25, Plaintiff will provide a status update by April 3, 2019 stating the updated total amount owed to members of the CSR Class for the 2017 CSR amounts, as determined through CMS' reconciliation process conducted in 2018. This amount will not include CSR amounts related to claims incurred during the 2016 and 2017 benefit years that did not result in a final payment and/or re-adjudication using CMS methodologies during the reconciliation process applicable to those benefit years. Members of the CSR Class reserve their right to seek the above-described CSR amounts as part of the judgment that will cover the claims for the 2018 benefit year, which will be determined following CMS' 2019 reconciliation process.[1]

During a meet and confer earlier this week, Plaintiff offered to take whatever procedural steps the Government suggested, including the possibility raised during the call that the Government's concerns may be resolved if Plaintiff seeks leave to file an amended complaint to

[1] For example, providers may submit claims incurred in the benefit year to QHP issuers too late to be included in the reconciliation process for that benefit year. Accordingly, CMS has allowed issuers to "restate" their CSR data for that benefit year so that these claims can be processed during the reconciliation process for the following year. Plaintiff requests that judgment be entered for the 2017 benefit year based on the claims submitted and reconciled pursuant to the CMS reconciliation process that occurred in 2018 (which will be the new 2017 total calculated after the Government provides amounts for the four new class members next week). Plaintiff and the CSR Class reserve the right to seek 2016-2017 restatement amounts in conjunction with the judgment for CSR claims for the 2018 benefit year, following CMS' reconciliation process occurring in 2019.

create two subclasses, one for 2017 and one for 2018.[2] For the reasons discussed below, Plaintiff believes that entry of a final judgment on the 2017 CSR amounts pursuant to Rule 54(b) is appropriate now in the current procedural posture. However, to the extent the Court believes an amended complaint creating subclasses would be beneficial, Plaintiff is willing to file an amended complaint creating subclasses. *See* RCFC 23(c)(5).[3]

Final Judgment. It is not necessary to have a final determination of the CSR amounts owed for the 2018 benefit year in order to have a final judgment on the claim for amounts owed for the 2017 CSR benefit year. *See Conn. Yankee Atomic Power Co. v. United States*, Case Nos. 17-673C, 2019 WL 762214, at *3 (Fed. Cl. Feb. 21, 2019) (entering Rule 54(b) judgment in favor of the plaintiff "for the undisputed portion of damages"). For example, in *Montana Health Co-Op v. United States*, Case No. 1:18-cv-00143-EDK (Fed. Cl.), the parties submitted a joint status report seeking entry of judgment on the CSR amounts owed for the fourth quarter of 2017. *Id.* at 10/4/2018 Joint Status Report, Dkt. 21. There, the complaint only sought 2017 amounts, and judgment was entered pursuant to Rule 58. *Id*., at 10/9/2018 Entry of Judgment, Dkt. 23. Nevertheless, the relevant facts were the same as in this case: the Government provided the reconciled amounts for 2017 CSR claims, and "Montana Health reserve[d] the right to litigate future claims that may arise from the Government's failure to make payments under Section 1402 of the Patient Protection and Affordable Care Act, including for benefit years 2018 and 2019." *Id.*

[2] To be clear, Defendant's opposition to the motion to certify the class objected to the certification of *any* CSR class, and did not raise the issue that it believed 2017 and 2018 should have been certified as separate classes. While Defendant discussed the impact of the 2018 silver-loading issue, this was in the context of arguing that class treatment for any of the QHP issuers was inappropriate, not that this was a reason to carve 2018 out from 2017.

[3] Defendant argues that "[t]o manipulate the Court's certification of the 2017/2018 class now is not only inefficient, it undermines the proceedings up to this point," and that it is "far too late in the litigation" to create subclasses. However, the Court's 4/17/2018 Order granting class certification stated that "[t]he parties may later move for decertification or move for the class to be divided into subclasses if, as this case develops, the circumstances warrant such a motion." Dkt. 30, at 17. The notice and opt-in process covered both the 2017 and 2018 benefit years, so there would be no need for an additional notice or opt-in period in order to divide the current CSR Class into 2017 and 2018 subclass. Finally, the Government provides no grounds for its suggestion that separate class counsel would be required for potential 2017 and 2018 subclasses.

at 10/4/2018 Joint Status Report, Dkt. 21, at 2. Judge Kaplan entered final judgment in favor of the plaintiff for the 2017 CSR amounts. *Id.*, at 10/5/2018 Order, Dkt. 22. Judge Kaplan followed an identical approach for a nearly identical fact pattern in *Sanford Health Plan v. United States*, Case No. 1:18-cv-00136-EDK (Fed. Cl.).

To the extent the Government argues that the plaintiff in *Montana Health Co-Op* was differently situated because it had not already filed 2018 claims, this is a distinction without a difference. Common Ground would have been entitled to file its 2018 CSR claims in a separate complaint, and according to the Government's approach in *Montana Health Co-Op*, the Government would apparently have had no objection to entry of a final judgment for 2017. However, rather than clutter the Court's docket with separate complaints for each benefit year the Government failed to pay CSR amounts, Plaintiff amended its existing complaint to bring its claims together in this action, seeking 2017 CSR amounts and 2018 CSR amounts. This does not change whether entry of a final judgment pursuant to Rule 54(b) on the distinct claim for 2017 CSR amounts is appropriate.[4] The QHP issuers who are owed 2017 CSR payments are owed those amounts regardless of whether that QHP issuer is also entitled to 2018 CSR amounts, and vice versa. To the extent some members of the CSR Class are not owed any CSR amounts for 2017, they would simply not recover anything for that year.

No Just Reason for Delay. There is no just reason to delay entry of final judgment here. "This court has recognized that when an award does not accrue pre- or post-judgment interest, '[t]o permit the Plaintiffs to receive its due based upon the final and irreversible portion of the judgment undeniably serves the ends of justice.'" *Conn. Yankee Atomic Power Co.*, 2019 WL

[4] The cases the Government cites do not advance its argument. In *Liberty Mut. Ins. Co v. Wetzel*, 424 U.S. 737 (1976), the Supreme Court found there was no final judgment where the trial court ruled in favor of the plaintiff on the issue of liability pursuant to Title VII (and arguably granted a declaratory judgment), but did not rule on whether the plaintiff was entitled to an injunction or damages on that Title VII claim. Here, the Court has ruled on liability for the 2017 CSR claims, and Plaintiff seeks an entry of judgment on damages for 2017 (the amount of which have already been calculated by the Government). In *Houston Indus. Inc. v. United States*, the United States successfully argued that the plaintiff's "tax liability for a particular tax year constituted a single claim." 78 F.3d 564, 566 (Fed Cir. 1996). Here, the Government takes an inconsistent approach and argues that *two* benefit years (2017-2018) should be taken together to constitute a single claim.

762214, at *4 (citation omitted). Delaying entry of a final judgment unnecessarily delays the final resolution of this matter. The Government cannot appeal until a final judgment is entered, and delaying the entry of judgment on the 2017 claims unnecessarily extends this process. Moreover, although there are several other CSR cases that may be on their way to the Federal Circuit, the CSR Class includes over 90 QHP issuers, representing over $100 million in 2017 CSR claims. There is no just reason to delay this case and deny the CSR Class the opportunity to argue its case to the Federal Circuit. It would be unjust to permit other QHP issuers to proceed to argue their entitlement to 2017 CSR amounts at the Federal Circuit while forcing members of the CSR Class to sit back and observe the Federal Circuit make a final determination on their rights without the ability meaningfully to participate.

Attorneys' Fees and Costs. Finally, pursuant to RCFC 23(h) and RCFC 54(d), Class Counsel will be seeking an award of reasonable attorneys' costs and fees. Class Counsel believes that the Class will be most benefited by entry of a judgment first, so that the appellate clock starts running on substantive issues and the CSR Class is able to obtain finality on its claims on as expedited a basis as possible. However, Class Counsel would be happy to submit such briefing at the Court's convenience or at the RCFC 54(d) default deadline of 30 days after date of entry of the final judgment.

II. Statement of Defendant's Position

Defendant respectfully submits that the Court should not enter a Rule 54(b) judgment for the 2017 amounts that are due to some members of the CSR class. Such a judgment would not meet the requirements of Rule 54(b) because the judgment would not finally dispose of the complaint's single CSR claim. Moreover, the Government specifically opposed certification of a 2017/2018 class because the putative class would be comprised of plaintiffs with different claims and different legal issues. *See* ECF No. 26 (Defendant's Opposition To Plaintiff's Motion For Certification Of Cost-Sharing Reduction Class) at 11-12. The Court granted the class certification nonetheless (ECF No. 30) and issued an opinion on the parties' cross motions for

summary judgment on both the 2017 *and* 2018 CSR claims. *See* ECF No. 48. Now that the Court has ruled on *all* of the class's arguments together (including both 2017 and 2018 issues) plaintiffs should not complain that they must deal with the effects of having the combined class that *they requested* – effects that preclude the entry of a Rule 54(b) judgment as shown below. To manipulate the Court's certification of the 2017/2018 class now is not only inefficient, it undermines the proceedings up to this point.

Indeed, we now know that there are members of the class that have no 2017 claims. We have provided class counsel with the data for the 58 current class members who have CSR claims for 2017 against the Government. The more than 30 remaining class members were *overpaid* by the Government for 2017 CSRs through the advanced payments made for the first three quarters of 2017. It would therefore be inappropriate to enter judgment in favor of a class that is known to have members who suffered no injury whatsoever. If the Court were to agree to the plaintiffs' request to create a subclass with only 2017 claims and a subclass of plaintiffs with both 2017 and 2018 claims, however, we can provide the Court the data so that individual dollar amounts can be entered for each 2017 subclass member (including the additional class members that plaintiffs propose to add in a concurrently-filed motion to add class members). Under these circumstances, of course, the Court would have to consider whether any subclasses would likely have to appoint separate counsel. Plaintiffs' request for the Court to separate 2017 and 2018 classes now, simply comes far too late in the litigation.

Rule 54(b) explains the mechanism by which the Court may enter a final judgment without adjudicating an action in its entirety:

> When an action presents more than one claim for relief—whether as a claim, counterclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just

reason for delay.

RCFC 54(b). The Federal Circuit has explained, "[I]n order for Rule 54(b) to apply, the judgment must be final with respect to *one or more claims*. The resolution of individual issues within a claim does not satisfy the requirements of Rule 54(b)." *Houston Indus. Inc. v. United States*, 78 F.3d 564, 567 (Fed. Cir. 1996) (*citing Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742-43 (1976)) (emphasis in original). "The requirement of a final disposition of a claim is mandatory and is not a matter of discretion." *Id*. at 567 (citations omitted).

The United States Supreme Court has also recognized that where plaintiffs put forward a single claim seeking multiple forms of relief, and only part of the claim for relief was addressed, while others were unresolved, there is no final judgment on that single claim pursuant to Federal Rule of Civil Procedure 54(b).[5] *See Liberty Mut. Ins.*, 424 U.S. at 743 & n. 4 ("It is sufficient to recognize that a complaint asserting only one legal right, even if seeking multiple remedies for the alleged violation of that right, states a single claim for relief.").

Here, the complaint has two counts—only one of which concerns the CSR issue for which the Court solicited the parties' positions in this joint status report (the other concerns the Affordable Care Act's Risk Corridors program, which the Court has stayed). The CSR claim in the complaint concerns the government's failure to make CSR payments and does not distinguish 2017 payments from 2018 payments. The class's proposed partial judgment would therefore only resolve "individual issues" within the CSR claim: the issue of damages for the last quarter of 2017, but not for 2018 damages. *See Houston*, 78 F.3d at 567. The CSR claim would live on for purposes of resolving the 2018 payments through the reconciliation process, and subsequent

[5] "RCFC 54(b) is almost identical to Fed. R. Civ. P. 54(b)." *Nat'l Australia Bank v. United States*, 74 Fed. Cl. 435, 438 n.3 (2006).

stipulation of damages, which, once complete, would conceivably result in a final resolution of the class's CSR claim, and another appeal of the *same claim*.

The cases cited by plaintiffs above, including related CSR cases now on appeal from Judge Kaplan (*Montana Health Co-Op v. United States*, Case No. 1:18-cv-00143-EDK and *Sanford Health Plan v. United States*, Case No. 1:18-cv-00136-EDK) are inapposite. As plaintiffs admit, those cases did not involve any claims for 2018 damages. Contrary to plaintiffs' claims, however, this is not merely a "distinction without a difference" for the reasons described above: both Federal Circuit and Supreme Court precedent preclude entry of a Rule 54(b) judgment when there is no final disposition of a claim. Irrespective of whether Common Ground is correct that it "would have been entitled to file its 2018 CSR claims in a separate complaint," it did not do so. Instead, its complaint contained a single CSR claim, and Common Ground then specifically requested that the Court certify a single class that would consist of plaintiffs that had damages for 2017 only, damages for 2018 only, and damages for both years. The class cannot justify ignoring binding appellate precedent simply because it believes that filing additional complaints for different time periods may "clutter the Court's docket."

Nor can the class show the absence of a "just reason for delay." "Even if the court finds that a claim is final, it must still determine whether it is appropriate to use its discretion to certify that there is no just reason for delay under Rule 54(b)." *Abbey v. United States*, 101 Fed Cl. 239, 241 (2011). (*citing Favell v. United States*, 22 Cl.Ct. 132, 142 (1990)). In making such a determination, the trial court "must take into account the judicial administrative interests as well as the equities involved." *Id*. (quoting *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 (1980)).

The Federal Circuit already has before it appeals that present all significant issues in the

CSR cases. *See Sanford Health Plan v. United States*, No. 19-1290; *Montana Health Co-Op v. United States*, No. 19-1302; *Community Health Choice v. United States*, No. 19-1633. The Federal Circuit has designated these appeals as companion cases that will be heard by the same merits panel. There is no reason to burden the Federal Circuit with an additional appeal from a partial judgment in this case. Indeed, the class did not even allege the implied-in-fact contract claim that this Court accepted in *Community Health Choice*, making this case a poor vehicle for appellate review at this point.

Moreover, even with respect to this case, a partial judgment would likely entail two appeals—one now for the class members' 2017 payments, and one after reconciliation of class members' 2018 payments. This is the sort of piecemeal appeal that the Supreme Court has cautioned against. *See Curtiss-Wright Corp.*, 446 U.S. at 8 (consideration of the court's administrative interests in determining whether to enter a Rule 54(b) judgment "is necessary to assure that application of the Rule effectively 'preserves the historic federal policy against piecemeal appeals.'") (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 438 (1956)). Finally, as the plaintiffs must admit, no monies will be paid from the Judgment Fund until all appellate review is exhausted, and thus the Court's issuance of a Rule 54(b) judgment will not expedite the resolution of this case or payment of any damages to the class.

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