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 February 15, 2019 and February 28, 2019 Orders (Dkts. 48 and 52), the parties submit this Joint Status Report regarding the amounts due to Plaintiffs for the cost-sharing reduction ("CSR") payments they did not receive for 2017 and 2018. 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

Pursuant to Rule 54(b) of the Rules of the United States Court of Federal Claims ("RCFC"), Plaintiffs respectfully request that the Court enter a judgment for **$2,358,817,206.33**, the total amount of the 2017 and 2018 unpaid CSR amounts owed to members of the CSR Class. This amount comes directly from the Government's records and is the sum of (1) the Government's calculations for the unpaid 2017 amounts for the members of the CSR Class, as calculated after the reconciliation process; and (2) the total of the Government's calculated 2018 monthly advance payments for members of the CSR Class, as determined before the reconciliation process. Following entry of the final judgment, Plaintiffs suggest a claims adjudication process to determine

the amounts owed to each member of the CSR Class, with any remaining funds being returned to the Government. Finally, Class Counsel will be seeking an award of reasonable attorneys' costs and fees. Pursuant to RCFC 23(h), Class Counsel would be happy to submit such briefing at the Court's convenience, although it also believes that the Class will be most benefited by the entry of a judgment first, so that the appellate clock starts running on substantive issues and the Class is able to obtain finality on its claims on as expedited a basis as possible. Plaintiffs' positions on this and the other issues referenced above are discussed in more detail below.

A. The Government Has Provided 2017 and 2018 Data for Class Members.

The Government has informed Plaintiffs that the Department of Health and Human Services ("HHS") completed the reconciliation process for 2017, and **$101,704,853.65** is the total amount of CSR payments owed to CSR Class members for 2017, according to the Government's records.

The Government also provided Plaintiffs with its calculations for the 2018 CSR advance monthly payments for the members of the CSR Class. According to the Government's records, had the Government paid the CSR advance monthly payment amounts in 2018, members of the CSR Class would have received a total of $**2,257,112,352.68**. Although the Government has not completed its reconciliation process for 2018, the Government still calculated monthly statements that showed the amount of the advance CSR payments those QHP issuers would have received had the Government been making those payments. It is this data that the Government has provided for members of the CSR Class, the total of which is $2,257,112,352.68.

B. Plaintiffs Propose a Claims Adjudication Process Following Entry of Final Judgment.

Following entry of the final judgment, Plaintiffs request that the Court authorize a claims adjudication process to ensure that each member of the CSR Class is paid the actual amount they are owed. This would provide members of the CSR Class the opportunity to verify the Government's calculations, as well as give the Government the chance to verify the actual CSR

amounts paid by CSR Class members (especially for 2018, where the Government failed to perform its typical reconciliation process). Plaintiffs suggest that the parties utilize a third party (*e.g.*, Truven) to assist with claims adjudication in a process similar to the one that QHP issuers and HHS used to reconcile CSR amounts prior to October 2017. To the extent the actual amount owed to members of the CSR Class exceeds the amount of the judgment, Plaintiffs would seek an upward adjustment of the judgment. To the extent the actual amount owed to members of the CSR Class is less than the amount of the judgment, any remaining amounts would be returned to the Government.

Plaintiffs' proposed approach is not novel. Other Court of Federal Claims judgments have involved entry of a single judgment in favor of the class, followed by a claims adjudication process, with excess funds returned to the Government. *See, e.g., DeMons v. United States*, 131 Fed. Cl. 514, 515 (2017) (amounts owed to individual class members were determined through claims administration process and any amounts remaining were returned to the Government); *Athey v. United States*, 132 Fed. Cl. 683, 688-89 (2017) (judgment entered for estimated amount owed, claims administration process determined the amount owed to each class member, and any remaining amounts were to be returned to the Government); *see also Athey v. United States*, Case No. 1:99-cv-02051-PEC, Dkt. 285-1 (Fed. Cl. 5/19/2017). Contrary to the Government's suggestion, this is not impermissible injunctive relief but is instead the way claims administration is often handled in class actions in the Court of Federal Claims and other jurisdictions.

The Government cites to *Dawco Constr., Inc. v. United States*, 930 F.2d 872, 880-82 (Fed. Cir. 1991), but that case does not involve a class action and involves the court rejecting a "jury verdict method" approach that is not relevant here.[1] Rather, the proposed judgment amount in this

[1] The Government's citation to *W.L. Gore & Assocs. V. Int'l Med Prosthetics Research Assocs.*, likewise does not advance its argument, since in that case the Federal Circuit found the trial court *had* entered a proper final judgment. The other cases cited by the Government are similarly inapposite, including because they do not relate to the claims adjudication process in a class action. *See, e.g., Int'l Elec. Tech. Corp. v. Hughes Aircraft Co.*, 476 F.3d 1329, 1330 (Fed. Cir. 2007) (not a final judgment because there were counterclaims outstanding); *Houston Industries, Inc. v. U.S.*, 78 F.3d 564, 565 (Fed. Cir. 1996) (tax case where issues related to disputed credits were left

case is the *Government's* calculation of the *actual amounts* it would have paid members of the CSR Class in 2018.[2] Indeed, the Government does not dispute that it would have paid the members of the CSR Class $2,257,112,352.68 in CSR monthly advance payments in 2018, had it been making the payments it was obligated to make pursuant to Section 1402 and Section 1412.

C. Plaintiffs' Proposal Does Not Cause the Government to Suffer Any Prejudice and Prevents an Unnecessary Delay to the Appeal.

The Government will suffer no prejudice under Plaintiffs' proposal. As an initial matter, Plaintiffs' proposal is similar to what would have occurred in 2018 had the Government actually been meeting its obligations: the Government would have paid out CSR monthly advance payments to members of the CSR Class and then there would be a reconciliation process whereby members of the CSR Class would return any overpayments to the Government. The Government cannot persuasively argue it will suffer prejudice by following the exact sort of CSR payment process set out by federal statute and regulation. Moreover, as a practical matter, the Government will not actually pay out any money to class members until the conclusion of the appellate proceedings. This will give the parties ample time to complete the claims adjudication process long before the Government actually pays out any funds. On the other hand, the Government's proposal that the reconciliation and verification process happen *before* entry of a final judgment serves only to unnecessarily delay the final resolution of this matter. The Government cannot appeal until a final judgment is entered, and delaying the entry of judgment for months unnecessarily extends this process.

Entering final judgment only on 2017 amounts and delaying entry of a final judgment on the 2018 amounts similarly does not resolve this concern. Assuming the Government plans to appeal this Court's judgment, Plaintiffs anticipate that the Government may make unique

unresolved at trial court).

[2] Perplexingly, the Government takes the position that entry of judgment for 2018 damages based "on an extrapolation of actual 2017 CSR data" is sufficiently accurate, but 2018 damages based on its own calculations for 2018 is not.

arguments on appeal regarding the 2018 claims versus the 2017 claims.[3] The most efficient way to achieve finality on all 2017 and 2018 CSR claims is to have them heard together by the Federal Circuit. 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 $2.3 billion in 2017 and 2018 CSR claims. The CSR Class should get the opportunity to argue its case to the Federal Circuit, rather than remain stayed at the trial court while other plaintiffs determine the results at the appellate level.

The Government suggests that the fact the reconciliation process is not completed is somehow Plaintiffs' fault. However, QHP Issuers had been left in the dark regarding how, when, and if the Government would ever be completing the 2018 reconciliation process. In previous years, the Government was in regular contact with QHP Issuers regarding the reconciliation process and provided technical assistance, guidance and direction to issuers. For example, the Government would host nationwide conference calls with QHP Issuers to discuss the CSR reconciliation process. Unlike in previous years, the Government has *not* been in communication with QHP Issuers about the process for the 2018 reconciliation. For example, Common Ground's last communication with the Government regarding the CSR payment reconciliation process was in late 2018, and that related to *2017* plan year reconsiderations/appeals. To our knowledge, there has been no information provided to QHP Issuers about the 2018 CSR reconciliation process or submission timelines (or whether the 2018 data submission portal ever would be opened) until Class Counsel received the Government's draft joint status report this afternoon.

As discussed above, the Government will suffer no prejudice if the Court proceeds with Plaintiffs' proposal—no money will be paid out until the conclusion of the appellate process.

[3] For example, the Government may argue that its liability is canceled or offset due to "silver-loading," an approach that has already been rejected by this Court. *See* 2/15/2019 Order, Dkt. 48, at 18 (finding "the court is not convinced by defendant's arguments," including the argument "that plaintiff's ability to increase the premiums for its silver-level qualified health plans to obtain greater premium tax credit payments precludes recovery under the Act's cost-sharing reduction provision."); *see also id.* (rejecting argument that "allowing insurers to both obtain greater premium tax credits and obtain a judgment for their lost cost-sharing reduction payments would provide an unwarranted windfall for insurers").

Plaintiffs' proposal puts the Government no worse off than it would have been had it actually made 2018 CSR advance payments. On the other hand, the Government's proposal will unnecessarily delay the appeal in this matter and will force the members of the CSR Class to take a backseat and observe the Federal Circuit make a final determination on their rights without the ability meaningfully to participate.

II. Statement of Defendant's Position

The Government has 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. However, the Government urges the Court to reject the 2018 damages methodology proposed by the class because it is plagued with irreconcilable legal, quantitative, factual, and procedural flaws that, if accepted, would force the Government to stipulate to damages that it knows to be inaccurate. As we explain below, the Court should enter final judgment reflecting the class members' *actual* 2017 and 2018 CSR amounts—a number that the parties can calculate by May 2019. Should the Court contemplate entertaining the class's proposal, we request the opportunity to fully brief the issue.

1. The class's proposal would force the Government to agree to an estimate of damages that the parties know is inaccurate. We are not aware of any circumstances in which the Government has been forced to stipulate to an admittedly inaccurate estimate of damages, simply to appease plaintiffs who wish to expedite their appeal. And the class has offered none. Instead, it relies upon two cases where the parties settled a matter and as part of the settlement agreement, the plaintiffs *agreed* to return owed amounts to the government. The parties have not agreed to settle this matter, let alone in the manner proposed by the class.

Specifically, the class's proposal is unworkable because it asks the Court to enter a judgment for over $2 billion against the Government based upon estimates, when the class has not gathered—much less provided to the Government—its actual 2018 CSR data, which is necessary to calculate an actual amount, but is only currently possessed by the class members.[4] Thus, the class's proposal 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)). The class suggests *Dawco* is inapplicable outside the class context and because it concerns the "jury verdict" method. However, *Dawco* stands for the fundamental principle applied by this Court in a variety of contexts that actual proof of damages when available must be used in place of estimates.

In this case, by definition, the class has failed to "demonstrate[d] any justifiable inability to substantiate" its damages when it possesses the actual data needed to calculate its alleged damages." *Id.* The class expressly acknowledges that their proposal is similar to what would have occurred in 2018 if the Government had sufficient funding to make CSR payments: the Government would have paid out CSR monthly advance payments to class members and then

[4] Class counsel never explains why it has not gathered such data from the class members it represents over the course of the past year. Indeed, even under the class's proposal, class members would need to collect their 2018 CSR data to determine an accurate 2018 CSR amount. The likelihood is that, as is customary at this point in the year following the close of the prior benefit year, issuers are still in the midst of collecting, adjudicating, re-adjudicating, and otherwise processing their claims data in order to even know themselves what their actual CSR amounts are.

there would be a reconciliation process whereby class members would return any overpayments to the Government. In effect, the class seeks injunctive relief outside this Court's jurisdiction.

The two cases cited by the class, *DeMons v. United States*, 131 Fed. Cl. 514, 515 (2017) and *Athey v. United States*, 132 Fed. Cl. 683, 688-89 (2017), both involved *settlement agreements* with the United States, in which the Government agreed to the calculation of damages. *DeMons* involved a little more than $6 million and *Athey* involved several hundred thousand dollars. By contrast, here the Government vigorously disputes the accuracy of the figure that the class proposes to use. As we have explained to class counsel, 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.[5] This is the very embodiment of a genuine dispute as to material facts, which precludes the entry of judgment. *See* RCFC 56.

Although we have agreed to a 2018 CSR amount in *Community Health Care, Inc. v. United States*, No. 18-05 (Fed. Cl.), and request entry of final judgment in that case pursuant to Rule 54(b), the plaintiff (Community) used a very different methodology than class counsel proposes here. There, Community based its 2018 actual CSR estimation on an extrapolation of actual 2017 CSR data. Moreover, this Court accepted *Community Health Choice's* implied-

[5] "[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 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 the class wants to enter as damages in this case – are going to be significantly higher due to the increased premiums charged in 2018. But there is no reason to believe that the actual CSRs issuers paid on behalf of their enrollees increased at a commensurate rate.

in-fact contract claim as well as its statutory claim. Thus, an appeal in *Community Health Choice* will allow the Federal Circuit to consider all significant legal issues. By contrast, the class did not allege an implied-in-fact contract claim, and thus this case would be a poor vehicle for appellate review even if there were a way to enter an appealable final judgment before the class members submit their actual 2018 data to CMS for reconciliation. Certainly, the class can participate as amicus in any CSR appeal.[6]

2. The class appears to acknowledge that HHS plans to conduct its typical reconciliation process similar to the way that it has conducted the process in previous years. That process, as we describe below, will, as it has usually, begin in April. The Government has not shut down the website where issuers submit their data. Rather, the portal for submitting CSR reconciliation data is only open during a specified data submission window each year. As we describe below, that website will begin accepting data in April, as it typically has in previous years.[7]

HHS is more than willing to expedite the process of reconciliation for the class, but the class parties must first do their part in assembling their own data—and as far as the government

[6] The class tries to suggest that the Government is somehow being inconsistent by entering into a stipulation with Community Health Choice. However. Community Health Choice agreed to accept as final what both parties perceived as a conservative estimate of its 2018 CSRs. Here, the individual class members made no offer to compromise their claims; on the contrary, their estimate uses a methodology that historically overstates the amount due and, in any event, would not be the final figure. It also worth noting that the plaintiff in *Maine Community Health Options* has agreed to participate in HHS's reconciliation process to determine a 2018 CSR amount.

[7] While the class originally suggested that the Government had no plans to reconcile 2018 CSR data, the class now appears to complain that it did not receive as much notice about the reconciliation process as it has in other years. We just learned of the class's grievances this evening and therefore cannot assess their accuracy. However, we advised class counsel last week that CMS was proposing to follow its usual CSR reconciliation process. In any event, whether they received notice prior to the Court's ruling has no bearing on whether the Court should accept estimated 2018 CSR advanced payment amounts when class members possess actual 2018 CSR data.

is aware, they are not yet in a position to provide 2018 CSR data for reconciliation. Moreover, the procedure described by the class in which it "adjudicates" its own data, either with or without a third-party vendor, is a process that has historically taken place *before* issuers submit their CSR data to CMS to ensure that such data only includes valid claims. As evidenced by the class's proposal, the class members have not yet completed this process. *See* Section I.B.

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:[8]

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

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

data in early-April 2019. Assuming that a class member completes its own verification process and makes timely data submissions (by April 29, 2019), CMS expects to be able to notify those class members of their 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. Thus, the class's proposal saves no real time or resources because it contemplates the same reconciliation process that would occur anyway. Indeed, the class proposal would require needless appellate litigation over the propriety of entering final judgment, using placeholder numbers, when actual CSR amounts are available in a mere few months.

3. Finally, the class's methodology is unworkable because it will not result in a final judgment. Instead the class has proposed an estimate that all parties suspect is too high. Then the class suggests that the estimate be revised in some future adjudication process. This is not a final judgment by any standard.

Rule 58 of the Rules of this Court contemplates that all issues in a given litigation—liability and damages—will be resolved in a single, final judgment. RCFC 58. "The requirement of a final disposition of a claim is mandatory and is not a matter of discretion. *Houston Indus. Inc. v. United States*, 78 F.3d 564, 567 (Fed. Cir. 1996) (reversing entry of Rule 54(b) judgment when entire tax year's damages had not been fully calculated) (quoting *W.L. Gore & Assocs., Inc. v. International Medical Prosthetics Research Assocs., Inc.*, 975 F.2d 858, 862, (Fed. Cir. 1992)). "A judgment is final for Rule 54(b) purposes when it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Id*. (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)) (emphasis added). A "judgment is

final where it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Int'l Elec. Tech. Corp v. Hughes Aircraft Co.*, 476 F.3d 1329, 1330 (Fed. Cir. 2007) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). "The requirement of finality is a statutory mandate and not a matter of discretion." *W.L. Gore*, 975 F.2d at 862. Further, Rule 54(c) specifies that a "final judgment should grant the relief to which each party is entitled." RCFC 54(c).

The class's proposal does not satisfy these requirements. Rather, the class's proposal would require the Court to enter an interlocutory order reflecting estimated 2018 CSR amounts, subject to revision pending some court-approved, third-party-administered process for deriving the class members' actual 2018 CSR amounts. Thus, because it "leaves [*more*] for the Court to do," the class's proposed "judgment" does not meet the finality requirement for appellate jurisdiction. *See Int'l Elec. Tech.*, 476 F.3d at 1330,; 28 U.S.C. 1291. The class's proposal is also inconsistent with Rule 54(c) because the judgment is necessarily inconsistent with the "relief to which [the class] is entitled;" instead, it would reflect an incorrect number subject to further proceedings to derive actual 2018 CSR amounts. On the other hand, if the court permits the 2018 CSR reconciliation process to take place as we describe above, the court should be in a position to enter final judgment by early summer on the class's claim for 2017 and 2018 CSRs.

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