IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMON GROUND HEALTHCARE COOPERATIVE,	)	
Plaintiff,	)	No. 17-877C
	)	Judge Sweeney
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR RELIEF REGARDING CLAIMS RECONCILIATION PROCESS

Defendant, the United States, respectfully submits its opposition to the motion for relief regarding the claims reconciliation process filed by plaintiff, Common Ground Healthcare Cooperative (Common Ground or the class). As the Court is aware, the Department of Health and Human Services (HHS) offered to expedite the data reconciliation process for 2018 to allow the Court to enter judgment on the 2018 damages more quickly than it would have been able to had HHS used its normal process. Now that HHS has implemented that expedited process, the class reverses course and asks the Court to slow it down.

The relief requested by the class is not only outside the Court's jurisdiction, it also would unnecessarily disrupt the expedited schedule that the class has known about for more than a month—a schedule that we agreed to specifically to accommodate the class's insistence on a speedy judgment. We are nevertheless sympathetic to certain class members that may struggle to meet the schedule. Although HHS cannot change the data submission window, HHS agreed, before the class filed this motion, to provide individual extensions upon request, and as long as issuers submit their data by the end of May. This gives class members who

require extra time nearly two months to submit their data. Still, this appears to be insufficient for the class, which asks for a Court order to force HHS to extend the window even further.

BACKGROUND

On February 15, 2019, the Court issued its decision granting summary judgment to Common Ground on liability and ordering the parties to tell the Court the amount of cost-sharing payments each class member did not receive for 2017 and for 2018. Aware that the amounts for 2018 were not yet final, the Court stated, "[i]f the parties are unable to provide the amounts for 2018, they shall (1) suggest a deadline for providing the court with that information and (2) indicate whether an RCFC 54(b) judgment limited to the cost-sharing reduction claims for 2017 would be appropriate." Dkt. 48 at 18.

The parties provided this information in two joint filings, one on March 5, the other on March 22. In the March 5 status report, the class asked the Court to issue a judgment for its 2018 claims using the Government's 2018 monthly advance payments, and then, after judgment, to institute a claims adjudication process to derive the actual amounts owed. The class requested this because, in its view, to go through the normal reconciliation process "*before* the entry of a final judgment serves only to unnecessarily delay the final resolution of this mater." Dkt. 53 at 4 (emphasis in original). We opposed the class's suggestion to use what the parties knew to be inaccurate (and overstated) estimates. Instead, we explained that HHS preferred to use the normal reconciliation process that it has used every year. Normally, HHS begins accepting data in April, and provides approximately two months for issuers to submit their data, which is then reconciled in approximately one month—in all, about a three month process. Dkt. 53 at 9-10.

However, given the class's wish for a quicker judgment, we stated that HHS was "more than willing to expedite the process of the reconciliation of the class . . . ." Dkt. 53 at 9. To that end, we proposed that "CMS plans to open the data submission window to accept issuers' benefit year 2018 CSR data in early-April 2019. Assuming that a class member completes its own verification process and makes timely 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." With this expedited process, "[t]he Court could therefore enter a final judgment reflecting actual 2018 CSR data amounts by June." The class did not opine on our proposal in the joint status report, or indicate in any way that the schedule was problematic.

The Court issued an order on March 7, 2019, quoting the government's language above regarding its willingness to expedite the process to provide issuers a one-month period for submissions, which HHS would then quickly reconcile, allowing the Court to enter judgment by June. The Court ordered the parties to file a joint status report within seven days of the completed reconciliation process. Dkt. 54.

During the remainder of March, HHS and CMS worked diligently to prepare the submission windows for reconciliation—in particular, to provide the expedited timeframe that we proposed in our section of the March 5, 2019 Joint Status report, which would give class members and other litigants priority over other issuers. CMS coordinated extensively with HHS and its contractors to be able to enable CMS to bifurcate the CSR data submission window and to provide updated guidance to all issuers, including producing FAQ (frequently asked questions) and webinar instructions on the 2018 reconciliation process. As we had proposed, the submission window opened in early April (on April 4, 2019), and closes about one month later—on May 3, 2019 for the class and other litigants. For non-litigant issuers, the

window opens on May 6, and closes on May 31, 2019.

On April 4, 2019, the day the submission window opened, class counsel notified us that the class now wanted the submission window to be longer. Specifically, the class now wanted the submission window to be what it had been in previous years. During an April 5, 2019 telephone call, we informed class counsel that we could not change the window at that late date. Later that day, we informed class counsel that if any issuer in the class were to timely request an extension of the litigant submission period, HHS would grant the request, so long as no extension went beyond the close of submissions for non-litigants (May 31). We assumed this would be sufficient to allay their concerns.

Unhappy with this accommodation, the class now asks the Court to order HHS to lengthen the submission window, extending it until June 7, 2019[1].

ARGUMENT

As a threshold matter, the class requests relief outside of this Court's jurisdiction. Whether their request is viewed as one for injunctive, declaratory, or mandamus relief, this Court does not possess jurisdiction to provide it. The Tucker Act does not confer jurisdiction over declaratory or injunctive relief, unless that relief is requested in the context of a bid protest, or is incident to a judgment, and even then, nonmonetary relief is limited to actions beyond what the class asks for here. 28 U.S.C. § 1491(a)(2), (b)(2); *see also Alvarado Hospitals LLC v. Price*, 868 F.3d 983, 999 (Fed. Cir. 2017). Neither can the Court award mandamus relief. *Alvarado,* 868 F.3d at 999. This case is not a bid protest, nor has a money judgment been issued yet that could be an anchor for any non-monetary relief, let alone relief

[1] Since the class filed its motion, class counsel has represented that some class members are unsure whether they will be granted extensions. We have assured counsel, now twice, that extensions will be granted permitting litigant issuers to submit data through May 31, 2019.

like that which the class now demands.

And in any event, we believe we have provided sufficient assurances to the class that if needed, class members can receive extensions through May 31, which is the close of data submissions for non-litigants. This effectively gives the class nearly two months to submit their data and prevents the agency from having to reestablish different submission windows—a process that requires extensive coordination within HHS and with its contractors to accept and process data and to provide updated guidance to all issuers. To force the agency to change its processes at the whim of the class's changing demands undermines these processes.

The class's accusation that HHS is attempting to "manipulate this process to discourage members of the CSR Class" from participating in the reconciliation process confounds us. As the Court is aware, we proposed this expedited process to accommodate the class, which insisted it wanted a judgment as quickly as possible. The Government's efforts to accommodate the class's request for the speediest resolution possible required weeks of preparation to accomplish, including making significant adjustments to the window for nonlitigants—all to ensure that we could give the class priority consideration. As such, the insinuation that the agency is acting in bad faith in an attempt to dissuade class members from submitting their data is both groundless and reckless.[2] Although HHS was unable to change the window submission times at the last minute, we understood that some class members might need additional time and offered them through May 31 to submit data—which gives them just short of the two months they have had in previous years and could reasonably have expected

[2] We note that we have worked seamlessly with other plaintiffs in other CSR cases to accommodate their requests. For example, in *Community Health Choice v. United States*, we agreed to the plaintiff's request to use a conservative estimate for their 2018 claim to facilitate a speedier judgment from the Court. There is simply no evidence that the Government has or will attempt to manipulate these proceedings in any way.

for this year, had they not initially sought to expedite the reconciliation process. To force the agency to further extend that time is simply not warranted under the circumstances.

CONCLUSION

For these reasons, we respectfully request that the Court deny Common Ground's motion to force the agency to change its data submission window.

Respectfully submitted,

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