No. 17-1542
(Judge Thomas C. Wheeler)

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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LOCAL INITIATIVE HEALTH AUTHORITY FOR LOS ANGELES COUNTY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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# DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF RULE 54(b) JUDGMENT

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| Plaintiff, | ) | No. 17-1542 (Judge Thomas C. Wheeler) |
| v. | ) | |
| THE UNITED STATES, | ) | |
| Defendant. | ) | |

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR ENTRY OF RULE 54(b) JUDGMENT

Pursuant to Rule 7 of the Rules of the United States Court of Federal Claims (RCFC) and the Court's October 3, 2019 Order, defendant, the United States, respectfully submits this response in opposition to plaintiff Local Initiative Health Authority for Los Angeles County's (L.A. Care) motion (Motion) for entry of Rule 54(b) judgment (ECF No. 40). Because L.A. Care cannot meet the legal standard for entry of a Rule 54(b) judgment, its Motion should be dismissed.

## INTRODUCTION

L.A. Care seeks a judgment of more than $50 million in "unpaid advance CSR amounts" that the Government purportedly owes for 2017, 2018, and 2019. Because L.A. Care's current complaint contains only a single claim for CSR damages, and because two-thirds of the damages L.A. Care requests in its Motion remain in dispute, L.A. Care cannot satisfy the requirements for a Rule 54(b) judgment. L.A. Care's inability to satisfy those requirements is entirely a product of its own doing. LA Care's amended complaint includes damages claims for 2017 and 2018, and the amount of CSRs provided by L.A. Care to its eligible enrollees for both of those years

have been reconciled by the Department of Health and Human Services (HHS). The parties have no objection to the Court entering judgment for those years because both parties agree the amounts are final. This is exactly what nearly every other similarly-situated plaintiff has agreed to in the Court's other CSR cases.

But L.A. Care wants more—instead of filing a separate complaint for its 2019 damages, it inexplicably filed an amended complaint that included a request for damages for the 2019 benefit year, six weeks after the Court issued its summary judgment decision (ECF No. 32), and despite the Government's clear warning that, by doing so, we would not be able to stipulate to damages until HHS completed its 2019 reconciliation. We cannot stipulate to damages for 2019 because we know the that the amounts sought are based upon estimates that in past years have been between 170% and 246% higher than what L.A. Care was actually owed. To agree to such wildly inflated damages, knowing that the parties would have to request to reopen the judgment at some later point and *attempt yet another agreement*, confirms that L.A. Care's 2019 damages are still in dispute, and for that reason alone, the Court should deny the motion.

## FACTS

Most of the relevant facts are not disputed, but critical facts about L.A. Care's alleged 2019 damages *are* in dispute, which prevent the Court from entering judgment as L.A. Care requests.

### I. Procedural History

L.A. Care originally filed suit in October 2017, and amended its complaint in February 2018 to seek damages for CSR payments from October 12, 2017 through February 8, 2018 (the date the first amended complaint was filed). *See* ECF No. 14 at 91. On February 14, 2019, the Court issued its opinion on the parties' cross motions for summary judgment, finding that the

Government violated the express terms of the Affordable Care Act (ACA), and also breached an implied contract with the plaintiff to make certain cost-sharing reduction (CSR) payments. *See generally,* ECF No. 32.

On March 14, 2019, the parties submitted a joint status report (JSR) in which L.A. Care first asked the Court to enter a Rule 54(b) judgment. Although L.A. Care's complaint at that time had only sought damages for 2017, in the JSR, L.A. Care stated that it planned to amend its complaint again in order to seek damages for 2018 and the first three months of 2019 as well. ECF No. 33 at 2. L.A. Care also stated that it no longer expected to have damages for 2017, because the parties were under the impression that L.A. Care had received more than $5 million in estimated advance CSR payments than it was entitled to for 2017. *Id*.

Even though, in that March JSR, L.A. Care sought damages for only 2018 and three months of 2019, it claimed damages of $75.3 million and asked the Court to issue a judgment accordingly. *Id*. L.A. Care's March 2019 damages demand is $22 million *higher* than it now seeks in its Motion, even though the damages period covered by the Motion is now longer (*i.e.* the Motion seeks damages from October 2017 through June 2019, while the status report sought damages for only 2018 and the first three months of 2019).

Two weeks after the March 2019 status report was filed, L.A. Care filed a second amended complaint. That complaint sought damages for 2017, all of 2018, and a portion of 2019 (through the filing date of the second amended complaint). *See* ECF No. 35 at 90. There is no dispute that the second amended complaint contains only a single claim for CSR payment damages, and, according to its motion for a Rule 54(b) judgment, L.A. Care seeks damages from October 12, 2017 through June 2019 (despite the fact that L.A. Care's complaint demands damages only through March 29, 2019). *See Id*.

In the March 2019 JSR – prior to L.A. Care's filing of its second amended complaint – the Government pointed out that any purported damages figures for 2019 would be inaccurate, because the Center for Medicare & Medicaid Services (CMS), a component agency within HHS, has not yet completed a reconciliation process for 2019. As we noted, Chief Judge Sweeney had previously rejected the request by plaintiffs in another CSR case to use advanced estimated CSR payment as the basis for entering judgment in *Common Ground Healthcare Cooperative v. United States.* *See* Court of Federal Claims case no. 17-877, at ECF No. 54. We further described how L.A. Care's attempt to receive a Rule 54(b) judgment conflicts with the law of damages in this Court.

Despite being explicitly warned about (1) the inaccuracy of any potential 2019 CSR damages figure, (2) the Government's position that it would not be able to stipulate to any 2019 damages quantum at this time, and (3) the fact that this Court had already rejected using advance estimated CSR payments as the basis for a judgment, L.A. Care forged ahead with its plan to amend its complaint a second time to seek damages through March 2019 (and now, in its Motion, through June 2019).

II. The Estimated CSR Payments Sought By L.A. Care

In its Motion, L.A. Care has asked the Court to enter judgment for "unpaid CSR damages presently due and owing for 2017, 2018, and January through June 2019." Mot. 2-3. For 2019, however, L.A. Care defines "damages" as the "unpaid advance CSR amounts," *not* the value of the CSRs L.A. Care actually provided for its eligible plan enrollees. *See, e.g.,* Mot. at 11-12 ("The amount the advance payments should have been is precisely what L.A. Care seeks to recoup, based on CMS's own determinations."). As shown below, however, the "unpaid advance CSR amounts" that L.A. Care seeks for 2019 are only estimates – ones historically

shown to be vastly overblown – of the actual legal "damages" that L.A. Care *might* be entitled to for any statutory or contractual breach of the ACA by the Government.

The ACA's CSR program requires issuers to reduce cost sharing (such as deductibles, co-insurance, and copays) for eligible insureds who are also eligible for premium tax credits. Section 1402 directs issuers to reduce cost-sharing for eligible insureds who are enrolled in "silver" plans through an Exchange. Section 1402 further provides that HHS "shall make periodic and timely payments to the issuer equal to the value of the reductions," ACA § 1402(c)(3)(A), which would be paid directly to issuers in advance, *id*. § 1412(a)(3).

Attached to this response is a declaration from Mr. Jeff Wu, CMS's Deputy Director for Policy for the Center for Consumer Information and Insurance Oversight (CCIIO). *See* Declaration of Jeff Wu (Wu Decl.) at ¶ 1, attached hereto as Exhibit A. CCIIO is charged with operating HealthCare.gov, including the federally facilitated exchanges and certain state-based exchanges that use the federal Healthcare.gov infrastructure. *Id*. CCIIO is also responsible for administering the advance payment of the premium tax credit and CSR programs created by the ACA. *Id*. As. Mr. Wu explains in his declaration, estimated monthly advance payments of CSRs are usually not only overestimates of amounts due, but dramatic overestimates – sometimes hundreds of percent higher than is ultimately due.

CSR payments are calculated and, where appropriations exist, are made in advance on a monthly basis, according to a simple formula. The formula for calculating advance CSR payments is based on the total premium for each policy.[1] Wu Decl. ¶ 7. Each month, CMS calculates the amount of advance CSR payments for issuers providing CSRs and includes this calculation as part of a monthly payment report sent to issuers. *Id*. at ¶ 8. Advance CSR

[1] See 79 Fed. Reg. 13,744, 13,806-7 (March 11, 2014).

payments are reconciled to the correct amount in the following calendar year. Mr. Wu goes on to describe how the advance estimated payments formula is calculated (Wu Decl. ¶¶ 9-11) and then explains how, "[i]n recent years, the rate of premium increase has far outpaced the rate of increase of medical claims and enrollee utilization of services eligible for CSRs." Wu Decl. ¶ 12.

However, because the monthly advance CSR payment amount is the product of the monthly plan premium multiplied by the CSR plan variation multiplier, as the monthly plan premium has increased, so too has the advance CSR payment amounts calculated under the formula. Wu Decl. ¶ 13. But there is no evidence that the value of CSRs that issuers (like L.A. Care) provided to eligible enrollees has increased at a pace commensurate with the increase in premiums. *Id*. For example, Mr. Wu shows that monthly premiums increased 57% from 2014 to 2019, but claims costs for enrollees have not increased as much during the same period. Wu Decl. ¶¶ 14-15. Thus, the calculated (*i.e. estimated*) advance CSR payments due to issuers generally (which L.A. Care alleges are the "damages" basis for this Court's judgment) have grown from $3 billion in 2014 to more than $9.4 billion in 2018, and a similar amount for the first nine months of 2019. Wu Decl. ¶ 16. In other words, CMS's estimates tend to overestimate the amount of CSR payments that issuers will actually provide to qualified insureds.

Moreover, as we showed in our motion for summary judgment briefing (ECF No. 26 at 9-10) and which L.A. Care does not dispute, issuers, including L.A. Care, raised premiums significantly in response to the cessation of CSR payments in October 2017. Mr. Wu's testimony confirms this fact. Wu Decl. ¶¶ 17-20. He explained that L.A. Care projected a 21.7% premium increase for 2019, which specifically takes into account the lack of CSR payments from the Government. Meanwhile, L.A. Care admitted that its total premium-rate

increase, assuming that CSR subsidies would have been funded, was significantly lower, at 12.3%. Wu Decl. ¶ 21.

The practical effect of these facts is that, "for each benefit year, the aggregate amount of CSRs provided by issuers has been lower than the aggregate amount of advance CSR payments calculated by CMS. This difference reflects the fact that the rate of increase in premiums and calculated advance CSR payments described above has exceeded the rate of increase in medical costs and enrollee utilization of CSR claims." Wu Decl. ¶ 22. Most importantly for purposes of this Court's analysis, the arithmetic effects of this difference are *enormous*. Each year since 2014, the difference between the estimated advance CSR payments (*i.e.* the "damages" to which L.A. Care claims it is entitled) and the actual amounts of CSRs that issuers provide has grown. Looking at issuers in general, by 2018, the estimated advance CSR payment calculations were 43% higher than the actual CSR amounts provided by issuers. Wu Decl. ¶ 22 and Table 2.

For L.A. Care specifically, the results are far more dramatic. For the 2017 benefit year, the advance estimated CSR payment calculations were 170% higher than what L.A. Care actually spent on CSRs. For 2018, the advance estimated CSR calculations were **246%** higher than what L.A. Care actually provided– a difference of more than $42 million.[2] Wu Decl. ¶ 23 and Table 3. Mr. Wu's uncontroverted testimony is that this trend is expected to continue in 2019 and later years, assuming that Congress does not appropriate funds for CSR payments, and that if the Court were to issue judgments based on advance estimated CSR payments, "the government would pay billions of dollars more in CSR payments than the actual value of CSRs issuers provided to their eligible insureds." Wu Decl. ¶¶ 24-25.

[2] The dollar value difference in the advance estimated payments for the more general class of issuers was more than $1.7 billion for 2018. Wu. Decl. ¶ 22 and Table [2].

Although L.A. Care has completed the reconciliation process for 2017 and 2018, and thus is aware of the value of CSRs it actually provided – and would be entitled to as damages – the amounts for 2019 alleged in L.A. Care's Motion are merely the estimated advanced CSR payments that are described in detail above. They are *not* amounts that L.A. Care will have actually provided in CSRs for 2019. Thus, by seeking a judgment comprised of (1) L.A. Care's *actual* 2017-18 CSR expenditures and (2) *estimates* of 2019 expenditures, L.A. Care seeks to conflate these two calculations as if they are the same.

As will be shown below, because the only "damages" to which L.A. Care may be entitled is the value of the CSRs it provided to its eligible enrollees, and because those amounts for 2019 are not yet known, the material fact of the quantum of damages owed in this case remains in dispute. As a result, entering a Rule 54(b) judgment would be improper, given that L.A. Care's single claim for CSR damages through June 30, 2019 does not reflect its actual damages for the time period alleged in its complaint.

## ARGUMENT

Plaintiff's request for entry of judgment pursuant to Rule 54(b) should be denied. As the Chief Judge of this Court recognized in denying an analogous request in *Common Ground Healthcare Cooperative v. United States*, the standards for entry of a Rule 54(b) judgment are not met. *See* Court of Federal Claims case no. 17-877, at ECF No. 54. Although L.A. Care asks the Court to award damages for unpaid CSR amounts through June 2019, those amounts cannot be determined at this juncture because the value of the CSRs L.A. Care will actually provide for the 2019 benefit year cannot be finalized until next year. Nor is there any reason to burden the Federal Circuit with an additional appeal, given that briefing has closed in three appeals that

raise the same issue, and on July 30, 2019, the Federal Circuit ordered that the CSR appeals be placed on the next available oral argument calendar. Fed. Cir. case no. 19-2102 at ECF No. 13.

L.A. Care asks the Court to enter a judgment pursuant to Rule 54(b) for damages it claims it is owed for CSR payments for 2017, 2018, and the first six months of 2019 (*i.e.* "through June"). That rule states "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 held that "[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). L.A. Care knows that the 2019 portion of its damages will change, and will probably decrease significantly. Nevertheless, it wants the Court to enter judgment so that the post-judgment interest clock can begin ticking. But L.A. Care is not entitled to interest on a damages number that it cannot dispute is wildly inflated. By definition then, there is no way that L.A. Care's claim for CSR damages – including 2019 damages – are "finally" resolved under Rule 54(b).

I. L.A. Care's Complaint Contains Only A Single CSR Claim

L.A. Care cannot plausibly dispute that its complaint contains only one claim for CSR damages. *See* ECF No. 35. Both its statutory and implied-in-fact contract claims allege that the Government owes CSR payments under each of those theories. The time period for which L.A. Care claims damages is October 2017 through June 2019. In an attempt to evade the

requirements of Rule 54(b), L.A. Care repeatedly states that "the determination of the advance CSR amounts owed for each benefit year is not dependent (factually or legally), on the CSR amounts owed for any other benefit year." *See, e.g.,* Mot. at 15, 17. But, even if that characterization is true, it is irrelevant. The "claim" that L.A. Care brought is for a violation of a statutory obligation – not a violation for a statutory obligation in 2017, and a second *claim* for a violation of a statutory obligation in 2018, and a third *claim* for a violation of a statutory obligation for January through June of 2019. Indeed, if L.A. Care's characterization were correct, then it would not only have brought three different claims for 2017, 2018, and half of 2019, as it now purports, but *30* different claims: one for each month that L.A. Care alleges that advance estimated CSR payments should have been made. Yet, not even L.A. Care suggests that is an accurate depiction of its case.

Thus, because L.A. Care's characterization of its complaint as having multiple CSR claims is plainly wrong, in order to be entitled to a Rule 54(b) judgment, it has to prove that such a judgment would resolve the entire CSR claim. It cannot, because the quantum of damages is in dispute, and L.A. Care's "approximation" of the damages is not only totally inaccurate, but L.A. Care is not entitled to use such an approximation when it has the ability to substantiate the amount of its damages with precise proof.

## II. The "Damages" To Which L.A. Care May Be Entitled Is The Value Of The CSRs It Actually Provided, Not The Advance Estimated Monthly CSR Calculations

As the Supreme Court has unambiguously held, the term "money damages" "refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for a suffered loss." *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988) (emphasis in original). Judge Scalia's dissent in *Bowen* concurred with the majority's definition of damages, and noted that *Bowen* "sought money to compensate for the monetary loss (damage) it sustained by expending

resources to provide services to the mentally retarded in reliance on the Government's statutory duty to reimburse, just as a Government contractor's suit seeks compensation for the loss the contractor sustains by expending resources to provide services to the Government in reliance on the Government's contractual duty to pay." *Id*. at 917 (Scalia, J. dissenting).

Thus, L.A. Care's assertion that the "damages" to which it is entitled are merely the estimated advance CSR payments calculated by CMS's formula is wrong. Those estimated advance payments are not sought "to compensate for the monetary loss (damage) it sustained by expending resources [] in reliance on the Government's statutory duty to reimburse." *Id*. L.A. Care's own actions in this case show that it knows that the "damages" to which it is entitled are not the estimated advance monthly payments, but rather the value of CSRs it actually provided to its eligible enrollees during the relevant time period. As Mr. Wu testified, the estimated advance monthly CSR payments CMS calculated for L.A. Care for 2018 was nearly $60 million. Yet, L.A. Care has not asked the Court to grant judgment in its favor for $60 million for 2018. Rather, it correctly asks for the amount of money it actually provided in CSRs during that period (approximately $17 million, or 71% less than the estimated advance payments). The same is true for 2017.

Although L.A. Care recognizes that the damages to which it may be entitled is only the value of the CSRs it actually provided to its eligible insureds, it repeatedly asserts that the quantum of damages in this case is not in dispute, based on an e-mail CMS sent L.A. Care summarizing the estimated advance monthly payments for 2019. But, as we explained above, estimates of advance payments are different (and routinely higher) than the CSRs actually provided, and in L.A. Care's case, vastly different. L.A. Care must prove its quantum of actual damages in order to be entitled to a judgment under any Rule of this Court. Because L.A. Care

has not done so, and because L.A. Care cannot satisfy the Federal Circuit's requirement for a plaintiff's burden of proof, its request for a judgment must be denied.

The Federal Circuit has held, and this Court has repeatedly recognized, that 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." *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). Because L.A. Care has not proven that its damages estimate for the first half of 2019 is the amount it will actually have spent providing CSRs to eligible insureds in 2019 – because it cannot at this point in time – any quantum of CSR damages for 2019 will be inaccurate until after L.A. Care's 2019 CSRs are reconciled next year. This is the very embodiment of a genuine dispute as to material facts, precluding entry of judgment. *See* RCFC 56. Nor has L.A. Care demonstrated an inability to substantiate the amount of its injuries for 2019. Indeed, L.A. Care will be able to calculate the exact value of the CSRs has provided for 2019 once the benefit year is over and those CSRs are reconciled. This reconciliation process is precisely how L.A. Care now knows the exact value of the CSRs it provided for the 2017 and 2018 benefit years to claim as damages.

L.A. Care describes this "administrative" reconciliation process as essentially irrelevant to the question of damages in this case, but it has not presented any other method of calculating the amount of "monetary loss (damage)" it has sustained for 2019. L.A. Care provides the Court with no information regarding the CSRs it may have provided to its eligible enrollees during the first half of 2019. Rather, it attempts to use the *estimated* advance monthly payments as a proxy for those figures. But L.A. Care's attempt to rely on actual monetary loss for 2017 and 2018, but

advance monthly estimates for the first half of 2019 only underscores the problems with its position.

The Court recognized the problems with L.A. Care's theory in an analogous case in *Georgia Power Co. and Alabama Power Co. v. United States*, 143 Fed. Cl. 750 (2019). In that spent-nuclear fuel case, the plaintiffs claimed that they were entitled to nearly $179 million in damages. The Court had already held that the Government was liable for breach of contract, and the Government did not contest $143 million of the claimed damages. *Id*. at 752-53. Plaintiffs moved for partial summary judgment as to the $143 million in undisputed damages, and requested entry of a Rule 54(b) judgment. *Id*.

Acknowledging that the Government's liability had been established more than a decade ago, and the fact that the plaintiffs would not be able to recover interest while they waited for the issuance of a judgment, the Court nonetheless *denied* entry of a Rule 54(b) judgment. *Id*. at 753-755. Relying on *Houston Industries, Inc.*, the Court held that there was only a single claim at issue in the case – one for breach of contract – and that the view articulated by the Federal Circuit in *Houston Industries* must prevail. The situation in this case is even clearer. There can be no dispute that L.A. Care's second amended complaint contains only one claim for CSR payment damages. The only issue is the particular damages period. But, because L.A. Care has failed to prove its damages for 2019 with any reasonable certainty, relying instead on the estimated advance monthly payments, and because L.A. Care will have the ability to calculate precisely its damages through the reconciliation process after the close of 2019, a partial Rule 54(b) judgment violates both the law of damages and the rules of this Court, as explained by the Federal Circuit.

III. L.A. Care Has Not Demonstrated That There Is No Just Reason For Delay

L.A. Care contends that it should not be required "to wait many more months or even years – particularly without accruing any interest – for amounts that were owed in advance in 2017, 2018 and the first six months of 2019." Mot. 2. As we stated above, if L.A. Care amended its complaint to sever 2019 from its claim, we would not oppose the Court entering judgment on the remainder of the claim, because the 2017 and 2018 amounts have been reconciled – this was, again, entirely uncontroversial in the other CSR cases before the Court.

But if L.A. Care refuses to do this, the fact that it is foreclosed from recovering interest related to its claim does not justify entry of a final partial judgment at this time. As demonstrated above, L.A. Care cannot establish that the disputed damages award meets the threshold requirement that a Rule 54(b) judgment resolve an entire claim and not just a portion of the claim. The Court should only make equitable considerations if the award qualifies under Rule 54(b) for partial judgment. Here, L.A. Care has failed to demonstrate how this award would qualify and, thus, the Court should not consider its inability to recover interest in determining whether or not to enter a partial final judgment. Further, Rule 54(b) "should not be indulged as a matter of routine or as a magnanimous accommodation to lawyers or clients." *Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 42 (1st Cir. 1988).

Moreover, as Mr. Wu testified, issuers – including L.A. Care – generally have already offset the Government's failure to make CSR payments by dramatically increasing their monthly premiums. Thus, L.A. Care's plea for "equitable" consideration rings hollow, when a judgment would in fact be a windfall.

L.A. Care suggests that, if the Court were to issue a judgment for 2019 now, the parties could work out the proper amount at some later date. This confirms that any judgment issued

now is not final. It also fails to acknowledge how such a reconciliation would work. L.A. Care proposes that HHS reconcile its data at some other time, but provides no information on how HHS could do such a thing after entry of a final judgment. Nor does it make any sense to engage in such an elaborate scheme to resolve the problem that L.A. Care itself has created, given that L.A. Care can simply amend its complaint to include damages for 2017 and 2018 only, and file a new complaint with respect to a claim for 2019 damages.

L.A. Care's proposal for a judgment for half of 2019 should also be rejected for judicial administrative reasons. If the Court enters judgment for 2019 damages based only on the estimated advance monthly payments, and the amount of CSRs L.A. Care actually provided in 2019 is dramatically lower after reconciliation than what was estimated (as Mr. Wu testifies will almost certainly happen, Wu Decl. ¶¶ 22-25) the Government will be forced to file a motion to amend the judgment. That motion might be contested by plaintiffs, who may disagree with CMS's calculations, leading to yet another damages dispute that would have to be resolved by the Court. Such a result is not only not in the "interest of sound judicial administration," but affirmatively undermines that goal. *See Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436–37 (1956).

At bottom, not only has L.A. Care failed to show that there is no just reason for delay, but the problems with L.A. Care's request for judgment can simply be alleviated by the plaintiff narrowing this suit to 2017-2018 damages, for which the Court could enter a final judgment, and then bringing a new suit seeking 2019 damages. Should L.A. Care take that simple action, the Court would not have to resolve the issue of entering a final judgment damages based on *estimated* payments for 2019.

## CONCLUSION

For these reasons, the Government respectfully requests that the Court deny L.A. Care's motion for a Rule 54(b) judgment. We further reiterate our request in the August 2, 2019 Joint Status Report (ECF No. 36) that the parties file a joint status report proposing further steps and a schedule resolving this action within 30 days of the final resolution of the lead CSR cases that are currently on appeal at the Federal Circuit.

Respectfully submitted,

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# EXHIBIT A

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

DECLARATION OF JEFF WU

Pursuant to 28 U.S.C. § 1746, I, Jeff Wu, make the following declaration under the penalties for perjury based on personal knowledge, on information contained in the records of the U.S. Department of Health and Human Services ("HHS") and its subsidiary agencies, or on information provided to me by HHS employees in the course of their employment:

1. I am the Deputy Director for Policy for the Center for Consumer Information and Insurance Oversight ("CCIIO"), one of the centers in the Centers for Medicare & Medicaid Services ("CMS"), a component agency within HHS. CCIIO is charged with operating HealthCare.gov, including the federally facilitated exchanges and certain state-based exchanges that use the federal Healthcare.gov infrastructure. CCIIO is also responsible for administering the advance payment of the premium tax credit and cost-sharing reduction ("CSR") programs created by the Patient Protection and Affordable Care Act ("ACA" or "Act").

2. I graduated from Harvard College in 1992 with a bachelor's degree in economics, and from Stanford Business School and Stanford Law School in 2001 with a master's degree in business administration and a juris doctor degree, respectively.

3. In 2011, I joined CCIIO as a health insurance specialist, and I have served in various policy roles at CCIIO since then. I am currently the senior member of the career staff responsible for overseeing CCIIO's policy and regulatory activities, including policymaking with respect to the Exchanges and the advance-payment premium tax credit and CSR programs, and our payment policies.

4. I am providing this declaration for use in *Local Initiative Health Authority for Los Angeles County v. United States*, No. 17-1542C (Ct. Fed. Cl.) ("*L.A. Care*"). I am testifying to the best of my knowledge and recollection.

5. My role at CCIIO includes policy matters pertaining to sections 1402 and 1412 of the ACA (42 U.S.C. §§ 18071, 18082), which I understand is a disputed statutory provision in *L.A. Care*.

The CSR Program Under the ACA

6. The ACA's CSR program requires insurers to reduce cost sharing (such as deductibles, co-insurance, and copays) for eligible insureds who are also eligible for premium tax credits. Section 1402 directs insurers to reduce cost-sharing for eligible insureds who are enrolled in "silver" plans through an Exchange.[1] Section 1402 further provides that HHS "shall make

[1] The ACA classifies plans offered on the Exchanges into one of four metal levels based on their cost-sharing requirements. 42 U.S.C. § 18022(d). A "silver" plan is a plan structured so that the insurer pays on average 70% of an enrollee's health care costs, leaving the enrollee responsible (before the application of the cost-sharing reduction subsidy) for the other 30% through cost sharing. *Id.* In a "gold" or "platinum" plan, the insurer bears a greater portion of health care costs, while the insurer is responsible for a lower portion of those costs in a "bronze" plan. *Id.* An insurer that offers coverage on an Exchange is required to offer at least one plan at both the "silver" and "gold" levels of coverage. *Id.* § 18021(a)(1)(C)(ii).

periodic and timely payments to the issuer equal to the value of the reductions," ACA § 1402(c)(3)(A), which would be paid directly to insurers in advance, *id.* § 1412(a)(3).

7. CSR payments are calculated and, where appropriations exist, are made in advance on a monthly basis, according to a simple formula. The formula for calculating advance CSR payments is based on the total premium for each policy.[2]

8. Each month, CMS calculates the amount of advance CSR payments for issuers providing CSRs and includes this calculation as part of the monthly payment reports sent to issuers. Advance CSR payments are reconciled to the correct amount in the following calendar year.

The Advance CSR Payment Formula Is Based on Total Premium Amounts

9. CMS calculates the monthly advance payment amount for a specific health insurance policy as a product of the total monthly premium for the policy multiplied by a plan variation multiplier:

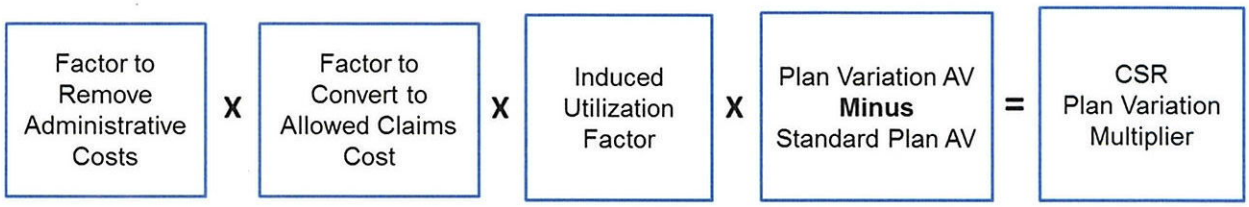
| | | | | |
|---|---|---|---|---|
| CSR Advance Payment for the Specific Policy | = | Total Monthly Premium for the Specific Policy | x | CSR Plan Variation Multiplier Applicable to the Specific Policy |

10. The CSR plan variation multiplier accounts for the difference between the actuarial value ("AV") of the CSR plan variation and the AV of the standard plan, as well as three factors that: (1) account for administrative costs; (2) convert premium amounts to allowed claims costs; and (3) adjust for induced utilization. The standard plan AV for each metal level plan is specified at 45 C.F.R. § 156.140(b) and is 70 percent for a silver metal plan, which means on average the issuer will pay 70% of the cost of the medical claims of enrollees in a standardized population. CSRs are only

[2] *See* 79 Fed. Reg. 13,744, 13,806-7 (March 11, 2014).

available to eligible enrollees in silver plans, and to Native American, Pacific Islander, and Alaska Native populations enrolled in zero or limited cost-sharing variations of any metal level QHP. The standard plan AVs used in the calculation of the CSR advance payment formula do not account for *de minimis* variation.

11. The CSR plan variation multiplier discussed in paragraph 10 can be visualized this way:




- Factor for administrative cost: 0.8 for all plan variations (based on the individual market medical loss ratio ("MLR") of 80 percent)
- Factor to covert allowed claims costs: 1.43 for all plan variations (1 divided by the standard plan AV of 70 percent)
- Induced utilization for CSR Variants:

| *CSR Variant Plan* | *Induced Utilization Factor* |
|---|---|
| 73% AV Silver Plan Variation | 1.00 |
| 87% AV Silver Plan Variation | 1.12 |
| 94% AV Silver Plan Variation | 1.12 |

The induced utilization factor estimates utilization across plan variants. Further information regarding the derivation of the CSR plan variation multiplier can be found in the 2015 HHS Notice of Benefit and Payment Parameters final rule at 79 FR 13,744, 13,805 (March 11, 2014) and the REGTAP Library under "Qualified Health Plan (QHP) – APTC & CSR Data Cost-Sharing."[3]

[3] The Registration for Technical Assistance Portal (REGTAP) is an online platform that serves as a hub for CMS technical assistance related to the Exchanges and ACA premium stabilization

Increased Plan Premiums Cause Calculated Advance CSR Payments to Exceed Actual CSR Payments

12. In recent years, the rate of premium increase has far outpaced the rate of increase of medical claims and enrollee utilization of services eligible for CSRs. In part for this reason, calculations using the formula have consistently resulted in advance CSR payments that substantially overestimate CSR amounts actually provided by issuers. The actual amount of medical care utilized by enrollees, the ratio of a plan's actual administrative costs to its premium, and the plan's actual allowed claims amount may vary from the estimates used in the advance payment formula.

13. As noted above, the monthly advance CSR payment amount is the product of the monthly plan premium multiplied by the CSR plan variation multiplier. Therefore, as the monthly plan premium has increased, so too has the *advance* CSR payment amounts calculated under the formula. But there is no evidence that the *actual* amount of CSRs issuers have provided for enrollees – based on the actual amount of medical care utilized by enrollees, the ratio of a plan's actual administrative costs to its premium, and the plan's actual allowed claims amount – has increased at a commensurate pace.

14. The various CSR factors that CMS uses to calculate advance CSR payments have not changed since the 2014 benefit year, but plan premiums have significantly increased during this time period. The chart below compares the average per-member-per-month ("PMPM")

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programs such as the risk adjustment programs. Members of the public can access REGTAP's library and resources by registering and creating a log in. REGTAP can be accessed at https://www.regtap.info/.

premium amount for all Exchanges for each benefit year since the first year of the ACA Exchanges in 2014.

PMPM Premium (All Exchanges)

| Benefit Year | PMPM Premium |
|---|---|
| 2014 | 335.4799 |
| 2015 | 343.9117 |
| 2016 | 360.3155 |
| 2017 | 428.0927 |
| 2018 | 530.9103 |
| 2019 | 527.9679 |

15. PMPM premium increased by a total of 57% from 2014 to 2019, but PMPM claims costs for enrollees have not increased as much during that same period.

16. The combination of increasing plan premiums and static CSR multipliers has resulted in a yearly increase in the amount of advance CSR payment amounts calculated in each benefit year.

| Benefit Year | Calculated Advance CSR |
|---|---|
| 2014 | $2,995,304,353.58 |
| 2015 | $5,358,188,433.05 |
| 2016 | $6,237,766,903.65 |
| Jan-Sep 2017 | $5,722,746,429.58 |
| Oct-Dec 2017 | $1,780,476,388.89[4] |

[4] The amounts for the last quarter of 2017, 2018, and 2019 are calculated as of the September 2019 Payment cycle. Issuers were not paid based on these calculated amounts as CMS stopped paying advanced CSR amounts in the October 2017 cycle.

| | |
|---|---|
| 2018 | $9,438,403,073.46 |
| 2019[5] | $6,995,403,518.31 |

The Cessation of CSR Payments and Increases in Premiums

17. Until October 2017, the federal government relied on the permanent appropriations at 31 U.S.C. § 1324 as the source of funds for federal CSR payments to issuers. On October 11, 2017, the Attorney General of the United States provided a legal opinion indicating that the permanent appropriation at 31 U.S.C. § 1324 cannot be used to fund CSR payments to insurers. On October 12, 2017, the Acting Secretary of the Department of Health & Human Services ("HHS") directed that cost-sharing reduction payments be discontinued until a valid appropriation exists.[6]

18. Although HHS discontinued cost-sharing reduction payments as of October 2017 and has not resumed them, federal law still requires issuers to provide CSRs to people with incomes at or below 250 percent of the federal poverty level who bought silver-tier plans on a health insurance Exchange.[7] In response to the termination of CSR payments from HHS, many issuers increased premiums, beginning for the 2018 benefit year, to compensate for the cost of CSRs.

19. Issuers and states have implemented a variety of strategies for increasing premiums to cover the cost of CSRs, including spreading premium increases across metal levels for Exchange

[5] The 2019 benefit year amounts only include Jan.-Sept. 2019 calculated advanced CSR amounts, as these amounts are based on effectuated enrollment and premiums reported as of the September 2019 payment cycle.

[6] Payments to Issuers for Cost-Sharing Reductions (CSRs), October 12, 2017, https://www.hhs.gov/sites/default/files/csr-payment-memo.pdf/

[7] 42 U.S.C. § 18071(a)(2); 45 C.F.R. § 156.410.

and off-Exchange plans, spreading the premium increase across all Exchange plans (but not necessarily off-Exchange plans), and concentrating the premium increase only on silver metal level plans.

20. The significant increase in silver plan premiums, caused in large part by the cessation of CSR payments by the government, has thus further increased the difference between advanced CSR amounts calculated and the amount of CSRs actually provided by issuers, as the rate of premium increase has far outpaced the rate of increase of medical claims (estimated at approximately 7% each year) and enrollee utilization of services eligible for CSRs.

21. For instance, "Table 1" below, taken from L.A. Care's individual rate filing with the State of California, summarizes its proposed rate changes by metal tier effective January 1, 2019. In the aggregate, L.A. Care projected a 21.7% premium increase, which takes into account the lack of CSR payment from the government. The total premium rate increase assuming that CSR subsidies are funded was significantly lower, at 12.3%.[8]

**Table 1**
**L.A. Care Health Plan**
**Summary of 2018 Rate Action***

| | 2017 Rate | | | 2018 Rate | | | Rate Change | |
|---|---|---|---|---|---|---|---|---|
| Product | Rating Area 15 | Rating Area 16 | Composite | Rating Area 15 | Rating Area 16 | Composite | Proposed (No CSR Subsidy Funding) | Original |
| Catastrophic | $301.84 | $316.12 | $313.58 | $333.74 | $357.78 | $353.50 | 12.7% | 12.7% |
| Bronze | $317.88 | $332.93 | $327.59 | $346.33 | $371.27 | $362.42 | 10.6% | 10.6% |
| Silver | $355.83 | $372.67 | $366.02 | $439.11 | $470.74 | $458.26 | 25.2% | 12.8% |
| Gold | $419.08 | $438.91 | $430.40 | $456.39 | $489.26 | $475.17 | 10.4% | 10.4% |
| Platinum | $487.18 | $510.23 | $499.23 | $532.92 | $571.30 | $552.98 | 10.8% | 10.8% |
| | | | | | | Product Rate Increase (weighted on 2018 metal mix) | 21.7% | 12.3% |

* Each plan's average premium is calculated assuming 2016 product-wide age mix, and plan-specific region mix.

[8] Milliman Actuarial Memorandum: Part III Actuarial Memorandum: Local Initiative Healthy Authority for Los Angeles County, dba LACHP Individual Rate Filing Effective January 1, 2019. https://ratereview.healthcare.gov/files/1322694_9281501012019INDAM20180907.pdf.

Calculated Advanced Payment Amounts Have Exceeded CSRs Actually Provided by Issuers Each Year Since 2014

22. For each year 2014 through 2018, CMS has collected data from issuers on the amount of CSRs actually provided. CMS data on advance CSR payment calculations and CSRs provided by issuers for benefit years 2014 through 2018 shows that, for each benefit year, the aggregate amount of CSRs provided by issuers has been lower than the aggregate amount of advance CSR payments calculated by CMS. This difference reflects the fact that the rate of increase in premiums and calculated advance CSR payments described above has exceeded the rate of increase in medical costs and enrollee utilization of CSR claims. Year-to-year differences between calculated advance payments and CSR amounts are displayed in "Table 2" below. Note that for the 2018 benefit year, not all issuers submitted data to CMS to report CSR-provided amounts. As such, the amount of valid CSR provided by all issuers for benefit year 2018 is not reflected in this table; likewise, the amount calculated as advance CSR payments reflect amounts only for those issuers that provided actual CSR data.

Table 2

| Benefit Year | Advance CSR | Valid CSR | Difference | Over-estimate of Advance CSR Calculations (%) |
|---|---|---|---|---|
| 2014 | $2,995,304,353.58 | $2,662,517,293.13 | $332,787,060.45 | 11.11% |
| 2015 | $5,358,188,433.05 | $4,647,596,665.73 | $710,591,767.32 | 13.26% |
| 2016 | $6,237,766,903.65 | $5,293,459,177.58 | $944,307,726.07 | 15.14% |
| 2017 | $7,503,222,818.47 | $5,381,160,621.92 | $2,122,062,196.55 | 28.28% |

| | | | | |
|---|---|---|---|---|
| 2018 | $3,966,312,861.88[9] (Shows what issuers would have been advanced had payments not stopped) | $2,258,961,512.31 | $1,707,351,349.57 | 43.05% |

23. Calculations of L.A. Care's advance versus actual CSR amounts have followed this pattern. "Table 3" below shows, according to CMS data for each coverage year 2014-2018, that the aggregate amount of CSRs provided by L.A. Care has been significantly lower than the aggregate amount of advance CSR payments calculated by CMS.

Table 3 (L.A. Care specific-data)

| Benefit Year | Advance CSR | Valid CSR | Difference | Over-estimate of Advance CSR Calculations (%) |
|---|---|---|---|---|
| 2014 | $2,774,016.07 | $2,737,399.08 | $36,616.99 | 1.33% |
| 2015 | $3,044,841.00 | $1,301,532.02 | $1,743,308.98 | 133.94% |
| 2016 | $4,061,098.79 | $1,722,402.73 | $2,338,696.06 | 135.78% |
| 2017 | $15,635,494.39[10] | $5,793,026.01 | $9,842,468.38 | 169.9% |
| 2018 | $59,718,814.18[11] | $17,244,504.35 | $42,474,309.83 | 246.3% |
| 2019 | $52,318,610.37[12] | | | |

[9] For benefit year 2018, these numbers include as Advance CSR amounts only the amounts calculated for issuers that submitted valid CSR amounts provided.

[10] Includes amounts paid in advance Jan. – Sept. 2017 and amounts calculated but not paid for Oct. – Dec. 2017.

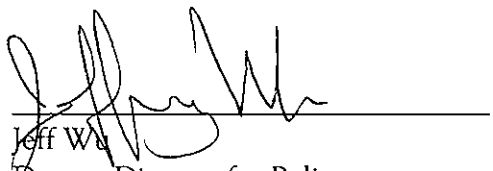
[11] Amounts calculated, but not paid.

[12] Amounts calculated, but not paid.

24. I expect this trend to continue in 2019 and later years, so long as there is no appropriation for cost-sharing reductions.

25. Although the exact amount of additional payment cannot be determined precisely, based on these circumstances and CCIIO's research, if the federal government were ordered by a court to make CSR payments to issuers equaling the monthly advance CSR payment amounts CMS calculates for issuers, the government would pay billions of dollars more in CSR payments than the actual value of CSRs issuers provided to their eligible insureds. As shown in Table 3 above, if the federal government were ordered to make CSR payments to L.A. Care equaling the calculated total monthly advance CSR amounts for the 2018 coverage year, the government would pay $42,474,309.83 more in CSR payments than the actual value of CSRs L.A. Care provided to their eligible insureds during 2018. We would expect similar results if the Court were to order payment to L.A. Care for the 2019 coverage year based on the advance CSR calculation.

Executed on October 29, 2019 in Washington, D.C.



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