IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LOCAL INITIATIVE HEALTH AUTHORITY FOR LOS ANGELES COUNTY, d/b/a L.A. CARE HEALTH PLAN, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	No. 17-1542C Judge Wheeler

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR ENTRY OF RULE 54(b) JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Plaintiff Local Initiative Health Authority for Los Angeles County, operating and doing business as L.A. Care Health Plan ("L.A. Care"), respectfully submits this reply memorandum in further support of its motion for entry of partial final Judgment pursuant to Rule 54(b) of the Rules of the Court of Federal Claims ("RCFC"). For the reasons demonstrated in its Motion and below, Plaintiff respectfully requests that the Court enter final judgment pursuant to RCFC Rule 54(b) in favor of Plaintiff and against the United States on Plaintiff's Cost Sharing Reduction (CSR) claims (Counts V and VI) in the total amount of $53,061,170.53 for unpaid CSR damages presently due and owing for 2017, 2018 and January through June 2019.

INTRODUCTION

As set forth in L.A. Care's Motion, Plaintiff has provided sufficient, uncontroverted evidence to establish the unpaid CSR amounts it is owed in damages to a reasonable certainty – the total unpaid advance CSR amounts for 2017, 2018 and January through June 2019, as calculated by CMS. In its Response, Defendant does not dispute the accuracy of the 2017, 2018, or 2019 CSR amounts owed to L.A. Care, nor any of the facts set forth in L.A. Care's Motion and/or in the Declaration of Feven Liu and the exhibits thereto. Defendant also does not dispute that these amounts are due and owing and required by statute to be made in advance. Nor does Defendant dispute that the Court should enter judgment for the CSR damages amounts it owes L.A. Care for 2017 and 2018. *See* Response at 2, 15 (Defendant admitting "[t]he parties have no objection to the Court entering judgment for those [2017 and 2018] years because both parties agree the amounts are final.").

Defendant now only contests entry of judgment as to CSR amounts owed L.A. Care for 2019. Defendant mischaracterizes the 2019 advance CSR amounts owed to Plaintiff as "estimates" and wrongly contends that Plaintiff cannot recover CSR advance amounts owed for 2019 until some unspecified time *after* CMS' administrative reconciliation process is completed

in the following year, *i.e.* at least May 2020 or later. Defendant's position – that Plaintiff must wait more than a year to recover (or even to calculate) CSR amounts that were due and owing to L.A. Care since early 2019 - is plainly contrary to Sections 1402 and 1412 and the implementing regulations, which this Court already has held require *advance* payment of CSRs. Opinion and Order, ECF No. 32 at 2, 9. Defendant's attempt to delay further its payment of the mandatory advance CSRs undermines the CSR statutory payment scheme and would effectively rewrite the existing regulations.

An entry of partial judgment for Plaintiff under Rule 54(b) on its CSR claims will be a final order that will dispose of all of the CSR claims Plaintiff has filed, leaving nothing more for this Court to do with respect to those claims. In its Response, Defendant threatens that entry of judgment now may force it to file a motion to amend the judgment in the future, feigning ignorance as to how the Government could possibly reconcile data it receives regarding CSR amounts L.A. Care actually provides to its insureds, after judgment is entered. Response at 2, 14-15. Defendant ignores that CMS' administrative reconciliation process – the same one that has been employed by the Government pursuant to §§1402 and 1412 and 45 C.F.R. § 156.430 since the CSR program was initiated in 2014 - will permit the Government, *without* this Court's involvement, to obtain reimbursement in the event that advance CSR amounts owed and paid through judgment to L.A. Care exceed the actual amount of CSRs that L.A. Care provided to its members during 2019.

L.A. Care has established that there is no just reason to further delay entry of judgment. As the Court has recognized, Plaintiff cannot recover pre-judgment interest on the substantial CSR amounts owed. Entry of judgment at this time is just so that Plaintiff is not left waiting and "holding the bag" many more months without being able to accrue any interest. To require L.A. Care, as Defendant suggests, to file an entirely new complaint for its 2019 damages would

elevate form over substance, unnecessarily burden the Court and the parties, and unduly delay the resolution of Plaintiff's CSR claims. Defendant even goes so far as to chastise and blame L.A. Care for Defendant's professed inability to pay the advance CSR amounts it undisputedly owes. But this is not a "problem that L.A. Care itself has created." Response at 15. Defendant should not be permitted to keep delaying judgment and shifting the blame to L.A. Care for its delay when it is Defendant's breach of statutory and contractual obligations that have created this "problem" in the first place. To avoid injustice and in the interest of sound case management, this Court should direct entry of partial final judgment under Rule 54(b) in the total amount of $53,061,170.53.

I. L.A. CARE HAS PROVEN ITS 2019 CSR DAMAGES, WHICH ARE FINAL.

Defendant does not dispute any of the material facts L.A. Care has presented in support of its Motion. Plaintiff has provided evidence of the unpaid CMS amounts owed to Plaintiff for the benefit years 2017, 2018 and 2019. This evidence included the specific amount of unpaid advance CSR amounts Defendant owes L.A. Care for the first half of 2019, as calculated by CMS, totaling $35,262,241.40. *See* Motion at 4; Liu Decl. at ¶ 6. In its Response, Defendant does not dispute that this is the correct amount of advance CSR payments it owes to L.A. Care for January through June 2019. *See, e.g.*, Response at 11 (noting but not disputing that the unpaid CSR damages amounts L.A. Care seeks are "based on an email CMS sent L.A. Care summarizing the estimated monthly payments for 2019.").

Instead, Defendant's litigation position is that the unpaid advance CSR amounts CMS calculated it owes L.A. Care for 2019 are merely "estimates" or "guestimates" that it now contends cannot support a damages award. Response at 4-5, 8, 12. But nowhere in the statute or regulations are the advance CSR payment amounts CMS calculates it owes to issuers each month referred to as mere "estimates," nor did CMS call them "estimates" when it communicated with

issuers to tell them how much was owed. *See* Lui Decl. Exs. 1, 3. Ignoring the text of the ACA and implementing regulations, Defendant asserts that Plaintiff must instead prove its damages based on "the value of the CSRs L.A. Care actually provided for its eligible plan enrollees" which "cannot be finalized until next year" following the annual administrative reconciliation in May 2020. Response at 4, 8, 12. Defendant is wrong.

The CSR damages Defendant owes are determined by the CSR statute and regulations. As this Court has already found, CSR payments are required by the ACA and implementing regulations to be made *in advance*. *See* Opinion and Order, ECF No. 32 at 2, 9; 42 U.S.C. § 18082(c)(3); 45 C.F.R. §156.430(b)(1); 45 C.F.R. §156.430(e).[1] Section 1412 provides that the "Treasury shall make such advance [CSR] payments [to QHPs] at such time and in such amount as the [HHS] Secretary specifies." 42 U.S.C. § 18082(c)(3). This Court found that "[p]ursuant to that grant of authority, the Secretary promulgated rules entitling QHPs **to full CSR payments in advance of their actual incurred costs**." Opinion and Order, ECF No. 32 at 9 (emphasis added). Here, on behalf of HHS, CMS has specified the advance CSR amounts due to L.A. Care for the first six months of 2019 and Defendant does not dispute CMS' calculations. The CSR payments Defendant owes therefore are the "full CSR payments in advance of their actual incurred costs" (ECF No. 32 at 9) —not L.A. Care's incurred costs—the "amounts that L.A. Care will have actually provided in CSRs for 2019," as Defendant now insists. Response at 8.

The Defendant's position undermines this Court's opinion and reads the advance payment requirement completely out of the statute and regulations and effectively rewrites them to require payment only at some unspecified time *after* the CMS administrative reconciliation

[1] Defendant and Mr. Wu acknowledge that the ACA requires *advance* payment of CSR amounts. Response at 5; Wu Decl. ¶ 6 ("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).").

process is completed six months *after* the close of the benefit year. Unsurprisingly, Defendant is unable to point to any authority to support its extraordinary proposition. Instead, Defendant cites to the dissent in *Bowen v Massachusetts*, 487 U.S. 879, 895 (1988), for the unremarkable point that money damages compensate plaintiffs for a suffered loss, but ignores that granting judgment for the presently due advance CSR amounts owed for the first half of 2019 will do precisely that. The 2019 advance CSR amounts set forth in Plaintiff's Motion are undisputedly what this Court held the Government was obligated to pay *in advance* to L.A. Care each month, but failed to pay in violation of a money-mandating statute and in breach of an implied-in-fact contract. These amounts are undisputedly presently due and should have been paid to L.A. Care months ago as required by the ACA and regulations, and the Government cannot credibly contend otherwise.

Defendant also claims that the CSR advance amounts CMS has calculated the Government was obligated to pay L.A. Care for the first six months of 2019 are "wildly inflated," yet it does not dispute CMS' calculations pursuant the "simple formula" following the CSR statutory and regulatory scheme. Response at 5. Defendant attaches an 11-page Declaration from Mr. Jeff Wu, apparently to reassert its argument regarding the effect of increased 2018 premiums on Defendant's CSR liability. Besides being irrelevant to this Motion, these assertions already have been rejected by the Court on the merits. As this Court correctly held:

> Nowhere in the legislative history, statutory text or implementing regulations are CSR payments subject to alteration based on the availability of offsetting funds derived from premium increases permitted by state regulators. Premium rate adjustment is a state-specific decision, entirely separate from the CSR program. Its possibility does not reveal Congress' decision not to provide a damages remedy for CSR non-payment and therefore does not impact L.A. Care's ability to recover.

ECF No. 32 at 14; *see also Common Ground Healthcare Coop. v. United States*, 142 Fed. Cl. 38, 48-49 (2019) (Court was "unpersuaded" by Defendant's increased premiums argument,

concluding that any increased premiums are by their nature "tax credit payments, not cost-sharing reduction payments," which the Court found "are not substitutes for each other"). Premium rate increases simply have no effect on the amount of unpaid advance CSR amounts this Court has determined are owed to L.A. Care. CMS has calculated those amounts and Defendant does not dispute their accuracy. Defendant should not be permitted to re-litigate its rejected arguments here.

In its Response, Defendant mischaracterizes and disregards L.A. Care's position regarding CMS' administrative reconciliation. L.A. Care does not contend that the administrative reconciliation process is "irrelevant." Response at 12. Nor has L.A. Care ever suggested that the parties should "work out the proper amount at some later date" based on some "elaborate scheme." Response at 12-13. Rather, L.A. Care insists that the parties adhere to the existing CSR statutory and regulatory process, pursuant to which CMS' May 2020 administrative reconciliation of CSR amounts for 2019 will be made in the normal course. This is the administrative reconciliation process that has been employed by the Government pursuant to §§1402 and 1412 and 45 C.F.R. § 156.430 since the CSR program was initiated in 2014, and it is a process which does not require the involvement or oversight of this Court. If CMS determines that, pursuant to its administrative reconciliation process, L.A. Care is obligated to reimburse the Government based on the actual amount of CSRs that L.A. Care provided to its members for the first half of 2019, CMS can obtain that reimbursement administratively pursuant to these existing regulations. Accordingly, Defendant will not, as it now contends, "be forced to file a motion to amend the judgment." Response 15.

II. THERE IS NO JUST REASON FOR DELAY.

As Plaintiff demonstrated in its Motion, the Court must "take into account the judicial administrative interests as well as the equities involved" in determining whether there is no just

reason for delay. *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 8 (1980). The Court also considers whether "claims are separable and whether the appellate court would have to decide the same issue more than once." *CB&I AREVA MOX Servs., LLC v. United States*, 141 Fed. Cl. 603, 607 (2019) (Wheeler, J.). Plaintiff has demonstrated that each of these factors weigh in favor of entry of Rule 54(b) judgment for Plaintiff at this time.

Plaintiff's CSR claims are clearly separable from its risk corridors claims, which Defendant does not dispute. Defendant instead contends that there is only a single CSR claim, and thus, having wrongly concluded that the unpaid 2019 CSR amounts Defendant owes are not "final," Defendant argues the Court cannot enter judgment for *any* year 2017-19. Once again, the Government is wrong.

CMS' determination of the advance CSR amounts owed each month or year is not dependent on the CSR amounts owed in any other year. The unpaid CSR amounts owed for 2019 are not intertwined in any way with CSR amounts owed for previous years. Motion at 15-17. Defendant does not dispute this. Response at 10. Rather, it simply argues without support that L.A. Care's Second Amended Complaint contains a single CSR claim for all of the years 2017, 2018 and 2019, and relies on distinguishable case law to contend that the Court cannot enter any Rule 54(b) judgment for any year.[2] Response at 9-10, 13. In *Georgia Power Co. v. United States*, 143 Fed. Cl. 750, 755-56 (2019), a portion of damages was actually disputed

[2] Moreover, Defendant's contention that Plaintiff has only a single CSR claim is belied by its suggestion that Plaintiff should have filed a separate complaint for the 2019 damages. Indeed, if Defendant were correct that Plaintiff has only a single CSR claim, then Defendant's insistence that Plaintiff file a separate complaint may run afoul of the prohibition against claim splitting unless the Court explicitly determines that Defendant's failure to pay CSRs is an ongoing, continuing partial breach and grants Plaintiff leave to do so. *See, e.g., Globe Sav. Bank, F.S.B. v. United States*, 74 Fed. Cl. 736, 741 (2006) (noting that "[c]laim splitting is generally barred, *see Restatement (Second) of Judgments* § 24 at 197 (1982)…excepting only special circumstances, as, for example, where the court has reserved the right to maintain a second action or where a continuing partial breach is involved and a plaintiff is given leave 'to sue from time to time for the damages incurred to the date of suit.').

(certain dry storage costs) and Defendant claimed a right to assert future offsets against the disputed portion, which it claimed was "intertwined" with the undisputed portion. Here, in contrast, Defendant does not contest the unpaid advance CSR amounts CMS has calculated it owes L.A. Care for 2019. These unpaid 2019 CSR amounts are not intertwined in any way with any other year or any defense asserted by the Defendant. *See* Motion at 16-17. The other case cited by Defendant, *Houston Industries Inc. v. United States*, 78 F.3d 564, 567 (Fed. Cir. 1996), is also distinguishable because it was a tax refund case where all issues determining liability for a particular tax year had to be adjudicated together as a single, unified claim and cause of action and the Government in that case claimed certain offsets to the taxpayer's liability for that tax year. *See Entergy Nuclear Palisades LLC*, 122 Fed. Cl. at 230 n.3 (distinguishing *Houston Industries*); Motion at 14-16.

Senior Judge Firestone rejected similar arguments in *Connecticut Yankee Atomic Power Co. v. United States*, 142 Fed. Cl. 87, 91 (2019), finding they elevated form over substance and entered Rule 54(b) judgment for the plaintiff. *See* Motion at 14-16. Senior Judge Firestone also emphasized there was no just reason for delay because "the lack of prejudgment interest cannot be ignored." *Id*. at 91; *see also Entergy Nuclear Palisades, LLC v. United States*, 122 Fed. Cl. 225, 230 (2015) (same). Here too, the Court cannot ignore the prejudice to Plaintiff that would result from the lack of prejudgment interest if L.A. Care were forced to wait until sometime after May 2020 before its judgment could be entered on amounts undisputedly owed since January of 2019. *See* Motion at 15-17. Defendant's only response to the prejudice its proposed delay would cause Plaintiff is to assert its previously-rejected arguments about purported, unproven offsets from 2018 premium increases. Response at 14; *supra* at 5-6.

Chief Judge Sweeney's decisions in *Common Ground Healthcare Cooperative v. United States*, Case No. 17-877, are also distinguishable. *See* Response at 3, 8. The plaintiff class in

Common Ground brought CSR claims for 2017 and 2018 damages only, not 2019 damages. Chief Judge Sweeney initially declined plaintiffs' proposal that it engage in a post-judgment claims adjudication process administered by a third party in order to determine 2018 damages. S*ee* Order of March 7, 2019, ECF No. 54. Then on March 25, 2019, less than two months before CMS completed its reconciliation process for 2018, Judge Sweeney declined to enter judgment on 2017 amounts at that time. *See* Case No. 17-877, ECF No. 61. Judge Sweeney subsequently entered judgment on the plaintiffs' CSR claims for the 2017 and 2018 benefit years. *See* Case No. 17-877, ECF No. 71, 72. Here by contrast, Defendant asks this Court to delay at least another *six months* before entering judgment for any of the undisputed, unpaid advance CSR amounts Defendant owes Plaintiff.

Judicial administrative interests also favor entry of Rule 54(b) judgment. As Plaintiff noted in its Motion, there is no risk of multiple appeals here and Defendant does not contend otherwise. *See* Motion at 15-16. As explained above, Defendant will not be "forced to file a motion to amend the judgment" at some later point because the Government can recover any overpayment amount it determines may be due through the existing CMS administrative CSR reconciliation process without the involvement of this Court. *Supra* at 6; Response at 15. Moreover, Defendant should not dictate to Plaintiff when it can file its claims for presently due CSR amounts owed nor require Plaintiff to file a separate complaint for 2019 damages. Defendant's suggestion would needlessly burden the Court and the parties and further delay resolution of Plaintiff's CSR claims. There is no just reason for such delay. The Court can and should finally resolve Plaintiff's CSR claims for 2017, 2018 and January through June 2019 by entering Rule 54(b) judgment.

Finally, the Court should reject out of hand the Defendant's un-briefed and unsupported request for a stay until 30 days after "the final resolution of the lead CSR cases that are currently

on appeal at the Federal Circuit." Response at 16. *See* Joint Status Report, ECF No. 36 at 7 (citing *Nat'l Food & Beverage Co. v. United States,* 96 Fed. Cl. 258, 263 (2010) ("To justify suspending the regular course of litigation, the proponent 'must make a clear case of hardship or inequity in being required to go forward if there is even a fair possibility that the stay which he prays will work damage to someone else."); *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936) ("[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will [allegedly] define the rights of both.")).

CONCLUSION

For all of the foregoing reasons and those set forth in its Motion, L.A. Care respectfully requests that the Court grant L.A. Care's Motion for Entry of Rule 54(b) Judgment and enter judgment pursuant to RCFC 54(b) in favor of Plaintiff and against the United States on Plaintiff's Cost Sharing Reduction (CSR) claims (Counts V and VI) in the amount of $53,061,170.53 for 2017, 2018 and January through June 2019.

Dated: November 5, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2019, a copy of the foregoing Plaintiff's Reply in Support of its Motion for Entry of Rule 54(b) Judgment was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing with be sent to all parties by operation of the Court's ECF system.

s/ Lawrence S. Sher
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