

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NANCY G. ATKINS, in her capacity	:	
as Liquidator of Kentucky Health	:	Case No. 17-906C
Cooperative, Inc.,	:	
	:	Judge Kaplan
Plaintiff,	:	
	:	
v.	:	
	:	
THE UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

**NOTICE OF DIRECTLY RELATED CASE AND
MOTION TO TRANSFER AND CONSOLIDATE**

Pursuant to Rule 40.2(a) of the Rules of the Court of Federal Claims, the United States provides notice of a case directly related to this case (“Atkins I”), and respectfully moves the Court to transfer *Nancy G. Atkins v. United States*, Case No. 17-1108C (Horn, J.), filed August 16, 2017 (“Atkins II”) and consolidate it with this case:

1. Atkins I and Atkins II are directly related under Rule 40.2(a)(2) as both cases involve the same parties and are based on the same or similar claims.
2. Nancy G. Atkins filed both Atkins I and Atkins II in her capacity as Liquidator of Kentucky Health Cooperative, Inc. (“KYHC”). The United States is the sole defendant in both cases.
3. The claims asserted in both cases arise out of the same facts: KYHC’s offering of Qualified Health Plans on the individual and small group health insurance exchanges in 2014 and 2015. *See* Atkins I, Complaint, Docket No. 1, ¶¶ 1-4, 23-28; Atkins II, Complaint, Docket No. 1, ¶¶ 1-4, 17-22.

4. Both cases seek money damages under interrelated programs created by the Patient Protection and Affordable Care Act (“ACA”): Atkins I seeks money damages under the risk corridors program created by section 1342 of the ACA, 42 U.S.C. § 18062, Complaint ¶¶ 79-83, and Atkins II seeks money damages under the reinsurance program created by section 1341 of the ACA, 42 U.S.C. § 18061, Complaint ¶¶ 87-90.

5. Both cases also assert claims for breach of alleged implied contracts arising out of the risk corridors and reinsurance statutes and regulations. The theories asserted by Plaintiff in support of the alleged contracts are the same. *Compare* Atkins I Complaint ¶ 85 (“KYHC entered into a valid implied-in-fact contract with the Government regarding the Government’s obligation to make full and timely risk corridors payments to KYHC in exchange for KYHC’s agreement to become a QHP issuer and participate in the Kentucky exchange.”) *with* Atkins II Complaint ¶ 100 (“KYHC entered into a valid implied-in-fact contract with the Government regarding the Government’s obligation to make full and timely Reinsurance payments to KYHC in exchange for KYHC’s agreement to become a QHP issuer and participate in the Kentucky Exchanges.”).

6. The risk corridors program and the reinsurance program, along with the risk adjustment program (collectively, the “3Rs”), are the three premium stabilization programs established by the ACA to help mitigate insurers’ pricing risk and incentives for adverse selection. *See* 42 U.S.C. §§ 18061-18063; *see also* Atkins I, Plaintiff’s Motion for Summary Judgment, Docket No. 7, at p. 5.

7. The ACA created an interrelated scheme for the 3Rs programs. For instance, risk Corridor payments take into account any reinsurance payments received by an issuer. *See, e.g.*, 45 U.S.C. § 18042(c)(1)(B).

8. Each of the 3Rs programs is funded by amounts that insurers pay into each program. *See* Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 76 Fed. Reg. 41,930, 41,948 (July 15, 2011). To “streamline [its] payment and collection process,” the government operates a monthly payment and collection cycle for the transfers. *See* 78 Fed. Reg. at 72,370-71. Federal regulation provides that the government may “net” amounts owed by issuers against amounts the government owes to the issuers under the other ACA programs. 45 C.F.R. § 156.1215(b); *see also* 78 Fed. Reg. at 72,370-71.

9. Indeed, three other liquidators have filed complaints in this court asserting claims arising out of multiple 3Rs programs and challenging the government’s right to offset payments owed to and from the insurer. *See, e.g., HealthyCT, Inc. v. United States*, No. 17-1233C (Firestone, J.), Docket No. 1; *Vullo v. United States*, No. 17-1185C (Wolski, J.), Docket No. 1; *Ommen v. United States*, No. 17-957C (Lettow, J.), Docket No. 1.

10. Finally, assigning both Atkins I and Atkins II to a single judge would conserve judicial resources and promote the efficient administration of justice because both cases involve the same parties and are premised on the same or similar facts and legal theories.

Dated: September 17, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

RUTH A. HARVEY
Director
Commercial Litigation Branch

KIRK T. MANHARDT
Deputy Director

/s/ Terrance A. Mebane

TERRANCE A. MEBANE
CHARLES E. CANTER
FRANCES M. MCLAUGHLIN
MARC S. SACKS
PHILLIP M. SELIGMAN
L. MISHA PREHEIM
United States Department of Justice
Civil Division, Commercial Litigation Branch
Telephone: (202) 307-0493
Terrance.A.Mebane@usdoj.gov

Counsel for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September 2017, a copy of the foregoing, *Notice of Directly Related Case and Motion to Transfer and Consolidate*, was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be sent to all parties by operation of the Court's ECF system.

/s/ Terrance A. Mebane
TERRANCE A. MEBANE
United States Department of Justice