

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

| | | | |
|--|------------|---|------------------------|
| <hr/> | |) | |
| NANCY G. ATKINS, in her capacity as | |) | |
| Liquidator of Kentucky Health Cooperative, | |) | |
| Inc., | |) | |
| | |) | |
| | Plaintiff, |) | Case No. 17-906C |
| | |) | Judge Elaine D. Kaplan |
| | |) | |
| v. | |) | |
| | |) | |
| THE UNITED STATES OF AMERICA, | |) | |
| | |) | |
| | Defendant. |) | |
| <hr/> | |) | |

RESPONSE TO “NOTICE OF DIRECTLY RELATED CASE AND MOTION TO TRANSFER AND CONSOLIDATE”

Pursuant to Rules 40.2(a)(4)(A) and 40.1(b) and (c) of the Rules of the United States Court of Federal Claims, Plaintiff Nancy G. Atkins, as Liquidator of Kentucky Health Cooperative, Inc. (“Plaintiff” or “KYHC”), respectfully opposes Defendant’s Motion to Consolidate *Nancy G. Atkins v. United States*, No. 17-1108C (Horn, J.), filed August 16, 2017 (“Atkins II”) with *Nancy G. Atkins v. United States*, No. 17-906C (Kaplan, J.), filed July 6, 2017 (“Atkins I”) as “directly related cases.”¹ However, Plaintiff does not oppose the transfer of Atkins II to this Court, if the Court believes that transfer would further docket efficiency or the efficient administration of justice.

¹ Although Rule 40.2 does not specify a mechanism for responding to a Notice of Directly Related Cases, Plaintiff respectfully requests leave to file a response, as set forth herein.

INTRODUCTION

The Government has moved to transfer and consolidate Atkins II with Atkins I as directly related cases because both cases purportedly “arise out of the same facts.” Def.’s Mot. Consolidate at 1, ECF No. 12. As set forth in greater detail below, there is no basis for consolidating the two cases as directly related because (1) they are not based on the same or similar claims and (2) they do not involve the same contract. *See* RCFC 40.2(a)(2). Indeed, on September 11, 2017, the Government requested a 60-day extension to respond to Atkins II, citing the differences between the two cases:

Will you consent to a 60 day extension for the government to respond to the complaint? *As I’m sure you can appreciate, this complaint is much different than the risk corridors complaints.*

Ex. A (emphasis added). Plaintiff believed then, and agrees now, that the cases are distinct.

BACKGROUND

Atkins I and Atkins II allege distinct facts, distinct governing law, and distinct theories of liability.

Atkins I: On July 6, 2017, Plaintiff filed a complaint seeking \$142,101,334.20 in payments owed by the Government under the ACA’s “risk corridors program” (“RCP”), established in Section 1342. Atkins I Compl. ¶¶ 28-77, 97. Based on the particular program established by the RCP and its specific payment methodology, Plaintiff alleged two counts: (1) a violation of a statutory and regulatory mandate to make RCP payments (Count I) and (2) breach of an implied-in-fact contract to make payments (Count II). *Id.* ¶¶ 78-97. Atkins I is one of at least 27 cases that seek damages related solely to the Government’s failure to make payments due under the RCP. Importantly, as Plaintiff set forth in its motion for summary judgment filed on July 26, 2017, Atkins I presents a purely legal question capable of resolution on a summary

basis. Indeed, the Government does not disagree. *See, e.g.*, Def.'s Opp. to Pl.'s Mot. Summ. J. and Cross-Mot. Summ. J., *Health Republic Ins. Co. v. United States*, No. 16-259C (Sweeney, J.) (Fed. Cl. Apr. 12, 2017), ECF No. 52.

The Government moved to stay Atkins I on August 7, 2017, however, pending resolution of certain RCP cases currently on appeal at the Federal Circuit, alleging that such a stay would further the interests of judicial efficiency. Def.'s Mot. Stay at 5-6, ECF No. 8. Plaintiff opposed that request. *See generally* Pl.'s Opp. to Def.'s Mot. Stay, ECF No. 9. On September 11, 2017, this Court denied the Government's motion to stay the case, denied the Government's request for an enlargement of time until December 20, 2017, and ordered the Government to respond to Plaintiff's motion for summary judgment by October 10, 2017.

Atkins II: On August 16, 2017, KYHC filed a complaint seeking payments under the ACA's reinsurance program, established under a separate section of the ACA (Section 1341), seeking damages totaling \$35,150,774.64. Atkins II Compl. ¶¶ 22-84. Plaintiff alleged three counts based on the reinsurance program's particular requirements and specified payment calculations: (1) violation of a statutory and regulatory mandate to make payments (Count I); (2) improper setoff of payment amounts due to Plaintiff in breach of a contract (Count II); and (3) breach of an implied-in-fact contract to make payments (Count III).² The reinsurance program is separate from the RCP; created under a separate section of the ACA; and includes a distinct payment methodology (which differs from the RCP's payment methodology). In addition, the Atkins II Complaint also details the provisions of two loan agreements specific to Plaintiff's

² The Government's motion does not appear to acknowledge that the Atkins II complaint contains not only statutory and implied-in-fact contract counts based on Plaintiff's reinsurance-specific theories of liability that are distinct from those asserted in Atkins I, but also that it contains a third count based on the unique terms of the reinsurance program. *See* Atkins II Compl. ¶¶ 91-98.

reinsurance claim that are not relevant to the RCP matters but are critical to the parties' dispute in Atkins II. Atkins II Compl. ¶¶ 69-84. Notably, the application of Kentucky state law under the terms of the loan agreements is unique to Plaintiff's Atkins II complaint, distinguishing it not only from Atkins I but from every other case currently pending at the Court of Federal Claims.

ARGUMENT

On September 11, 2017, nearly a month after Plaintiff filed its Complaint in Atkins II, the Government requested a 60-day extension to respond. Ex. A. Plaintiff informed the Government that it intended to file a motion for summary judgment in Atkins II in lieu of awaiting the Government's response. Plaintiff filed its motion for summary judgment in Atkins II on September 16, 2017. Pl.'s Mot. Summ. J., *Nancy G. Atkins v. United States*, No. 17-1108C (Horn, J.) (Fed. Cl. Sept. 16, 2017), ECF No. 5. The day after Plaintiff filed its motion for summary judgment, the Government filed a motion seeking to consolidate Atkins II with Atkins I as "directly related cases," without any prior notice to Plaintiff. Def.'s Mot. Consolidate, ECF No. 12.

The Government now asserts for the first time that the two cases "involve the same parties and are based on the same or similar claims." Def.'s Mot. Consolidate at 1. That assertion is incorrect. The RCP (at issue in Atkins I) and the reinsurance program (at issue in Atkins II) are distinct statutory programs with distinct requirements, and Plaintiff has accordingly advanced distinct theories of liability in each. *Compare* Atkins I Compl. ¶¶ 28-35 (detailing a payment methodology based on defined "allowable costs" and a "target amount," articulating that Section 1342 is not budget neutral, and invoking its modeling on Medicare Part D's risk corridors program), *with* Atkins II Compl. ¶¶ 26-31 (defining "high-risk individual" and related payment amounts as well as "attachment points," "coinsurance rates," and "reinsurance

caps” relevant to determining an appropriate reinsurance payment amount).³

Consolidation of the two cases will not promote judicial economy and the efficient administration of justice, and will instead unduly prejudice Plaintiff. Resolution of the claims will require briefing and argument specific to the distinct statutory programs; distinct implied-in-fact contracts; and in the case of Atkins II, distinct arguments regarding loan agreements and the Government’s attempted offset. The resolution of one case will not resolve the other. The Government has not specified what resources it expects consolidation will conserve, and Plaintiff can think of none sufficient to outweigh the risk of prejudice to Plaintiff. *See Entergy Nuclear Indian Point 2, LLC v. United States*, 62 Fed. Cl. 798, 803 (2004) (noting that, where there are divergent theories of recovery at issue, “there would be no saving of time or judicial resources through consolidation but rather trial or other resolution of the issues could be unduly complicated . . .”).

On the other hand, adjudicating the two cases together will likely prejudice Plaintiff by delaying resolution of one or both cases. Given the Government’s assertion that the distinctions between Atkins I and Atkins II will require a lengthy delay in order for the Government to adequately respond to Atkins II, *see* Ex. A, it logically follows that consolidation may delay resolution of Atkins I. On the other hand, it is just as likely that Atkins II would be delayed by proceedings in Atkins I. The Government has asserted numerous times that the parties in the risk corridors litigation are likely to seek full judicial review of any outcome in those cases. *See, e.g.*,

³ Similarly, the implied-in-fact contracts at issue in Atkins I and Atkins II are distinct contractual instruments with distinct contract terms and Plaintiff has accordingly advanced distinct theories of liability in each. *Compare* Atkins I Compl. ¶¶ 84-97, *with* Atkins II Compl. ¶¶ 99-108. The Government’s motion provides no reason why claims based on such different programs should nonetheless be treated as “the same or similar claims” simply because they are both housed in the Affordable Care Act and include claims based on a statutory mandate and an implied-in-fact contract.

Def.'s Mot. Stay, *Montana Health CO-OP v. United States* (Fed. Cl. Nov. 17, 2016), ECF No. 8.

The salient fact is that Atkins I and Atkins II are separate cases arising from the Government's failure to make payments under two separate provisions of law, and neither case should be delayed by proceedings in the other. The funds owed by KYHC's estate are *critical* to hospitals and other healthcare providers, especially those in small towns and rural settings, and thousands of individuals previously insured by KYHC, who are strained by the delay in payment and need to be reimbursed from KYHC's estate as soon as possible. Indeed, in observing that plaintiffs "might be prejudiced by the delay that would ensue from consolidation," this Court has denied a motion to consolidate even where the contracts at issue were nearly "identical." *Entergy Nuclear*, 62 Fed. Cl. at 803.

Although "[t]he court has a broad discretion to determine whether consolidation is appropriate," *Cienega Gardens v. United States*, 62 Fed. Cl. 28, 32 (2004) (citations omitted), this Court "must consider whether specific risks of prejudice and possible confusion are 'overborne by the risk of inconsistent adjudication of common factual and legal issues, the burden on parties, witnesses, and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.'" *Entergy Nuclear*, 62 Fed. Cl. at 802. Here, the risk of prejudice outweighs any countervailing considerations of judicial efficiency and resource conservation invoked by the Government.

Notwithstanding the above, if the Court believes that having both cases docketed before the same judge would further docket efficiency or the efficient administration of justice, for reasons unrelated to consolidation, Plaintiff would not oppose the transfer of Atkins II.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny the Government's Motion to Consolidate Atkins I and II.

Dated: September 19, 2017

Respectfully submitted,

OF COUNSEL:

James Regan
Daniel Wolff
Xavier Baker
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 624-2500

/s/ Stephen McBrady
Stephen McBrady
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 624-2500
Fax: (202) 628-5116
smcbrady@crowell.com

*Counsel for Plaintiff Nancy G. Atkins, in her
capacity as Liquidator of Kentucky Health
Cooperative*

CERTIFICATE OF SERVICE

I certify that on September 19, 2017, a copy of the forgoing “Response to ‘Notice of Directly Related Case and Motion to Transfer and Consolidate’” was filed electronically using the Court’s Electronic Case Filing (ECF) system. I understand that notice of this filing will be served on Defendant’s Counsel, Terrance Anthony Mebane, via the Court’s ECF system.

/s/ Stephen McBrady
Stephen McBrady
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 624-2500
Fax: (202) 628-5116
SMcBrady@crowell.com