UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SWINOMISH INDIAN TRIBAL COMMUNITY,

Plaintiff,

v.

ALEX M. AZAR, et al.

Defendants.

No. 1:18-cv-01156-DLF

Honorable Judge Friedrich

DEFENDANTS' REPLY IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Both the Indian Self Determination and Education Assistance Act ("ISDEAA") (codified as amended at 25 U.S.C. § 5301 *et seq*.) and the contract that Plaintiff, the Swinomish Indian Tribal Community, entered into with the Indian Health Service ("IHS") under the ISDEAA expressly provide that Medicare, Medicaid and other third-party income Plaintiff earned is *supplemental* and *additional* to the amount of funding that the ISDEAA requires IHS to pay Plaintiff. *See* 25 U.S.C. § 5388(j); Pl.'s Compact, Art. III, § 5, ECF No. 21-3. The ISDEAA also expressly prohibits IHS from funding direct and indirect costs associated with non-IHS entities, including expenditures of these Medicare, Medicaid, and other third-party funds. *See* 25 U.S.C. § 5326; *Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 418 (D.D.C. 2008), *reconsideration denied*, 655 F. Supp. 2d 62 (2009).

Despite the clear statutory and contract language, Plaintiff seeks to require IHS to pay additional Contract Support Costs ("CSC") on Plaintiff's expenditure of non-IHS funds based on the faulty notions that these non-IHS funds are part of the "Secretarial amount" and that Plaintiff's expenditure of these funds is the same Federal program that it is under contract to operate. But to do as Plaintiff asks would require this Court to add, re-write, or ignore terms of six separate ISDEAA provisions: 25 U.S.C. §§ 5325(a)(1), (a)(2), (a)(3)(A), (m), 5326, and 5388(j). This Court should decline Plaintiff's invitation.

The ISDEAA's purpose is to facilitate Indian self-determination by allowing a tribe or tribal organization to take over operations of an IHS or Bureau of Indian Affairs ("BIA") program operated for the benefit of Indians because of their status as Indians. The ISDEAA further provides for the transfer of funds that the Secretary would have otherwise used to operate the contracted program (the Secretarial amount), *id*. § 5325(a)(1), and for the Secretary to also pay CSC for the tribal contractor's reasonable direct and indirect costs of operating that program

that are not already part of the Secretarial amount, *id*. § 5325(a)(2)–(3).

But the ISDEAA's CSC provisions do not create an unlimited funding source to cover all of a tribal contractor's costs of administering programs funded with the myriad other non-IHS and non-BIA awards, such as other sources of federal financial assistance, as well as state financial assistance and other sources of funds. The handful of district court cases that suggest otherwise are not persuasive. To the contrary, the ISDEAA's CSC provisions limit IHS's obligation to reimburse a tribal contractor only for those costs directly associated with administering an IHS program or for that portion of a tribal contractor's indirect costs properly allocable to the IHS program. The ISDEAA's CSC provisions do not provide for IHS to reimburse a tribal contractor for its direct and indirect costs associated with its expenditure of Medicare, Medicaid, and other program income, even if the tribe uses those funds to provide additional health care services.

Nor has Plaintiff met its burden of proving damages in this case. Despite Plaintiff's insistence to the contrary, Plaintiff bears the burden to establish this Court's jurisdiction and to establish damages beyond mere speculation. Plaintiff seeks to require IHS to pay Plaintiff based on its expenditure of Medicare, Medicaid, a payment from another tribe, book sales, and interest income, but never comes forward with anything more than its 2010 audit to document either the receipt or expenditure of these funds. In failing to sustain its claim for damages, Plaintiff cannot support its request for declaratory relief, leaving no remedy for this Court to apply.

ARGUMENT

I. THE ISDEAA DOES NOT REQUIRE IHS TO PAY CSC BASED ON PLAINTIFF'S EXPENDITURE OF NON-IHS FUNDS

A. Medicare, Medicaid, and Other Program Income are Not Part of the Amount That IHS Must Pay Plaintiff under the ISDEAA

Defendants' opening brief demonstrated that the ISDEAA provides that Medicare,

Medicaid, and other program income Plaintiff earned is separate funding that IHS is not obligated to pay Plaintiff under Plaintiff's ISDEAA contract. *See* Defs.' Mem. in Supp. of Cross Mot. for Summ. J. & Opp'n to Pl.'s Mot. for Summ. J. at 29, ECF No. 28 (citing 25 U.S.C. § 5388(j)). Plaintiff, however, continues to contend both that these non-IHS funds are part of the amount of funds that IHS must pay Plaintiff, and that Plaintiff's expenditure of these non-IHS funds requires IHS to pay additional CSC. *See* Pl.'s Opp'n to Defs.' Mot. for Summ. J. & Reply in Supp. of Pl.'s Mot for Summ. J. at 1-6, ECF No. 29. Nothing in the ISDEAA or Plaintiff's ISDEAA contract supports Plaintiff's position.

First, the ISDEAA provides that Medicare, Medicaid, and other program income is "earned by an Indian tribe," not, as Plaintiff contends, provided by the Secretary as part of the Secretarial amount. *See* 25 U.S.C. § 5388(j). Nor does Plaintiff's ISDEAA contract provide for IHS to turn over non-IHS funds to Plaintiff as part of the Secretarial amount. Rather, as Defendants demonstrated in their opening brief, *see* Defs.' Mem. at 23, Plaintiff's contract requires Plaintiff to "maintain a system of third party payment collection for services provided to patients of the Swinomish Tribal Health Program," so that Plaintiff can obtain those reimbursements directly from the Center for Medicare and Medicaid Services ("CMS"), the State of Washington, and other third-party payers if it chooses to seek reimbursement from them for eligible health care services provided. Pl.'s 2010 Funding Agreement ("FA") § 2(B)(ix), ECF No. 21-4.

Second, § 5388(j) provides that Plaintiff's third-party income "shall be treated as supplemental funding to that negotiated in the funding agreement." 25 U.S.C. § 5388(j). Similarly, Plaintiff's ISDEAA contract provides that Plaintiff's earnings shall be treated as additional supplemental funding to that negotiated by the [Funding Agreement]." Pl.'s Compact,

Art. III, § 5. Thus, both the ISDEAA and Plaintiff's ISDEAA contract expressly provide that Plaintiff's non-IHS funds are ancillary to, and not part of, the amount of funds that IHS is required to pay Plaintiff.

Third, § 5388(j) provides that "[s]uch [Medicare, Medicaid, and other third-party] funds shall not result in any *offset or reduction* in the amount of funds the Indian tribe is authorized to receive under its funding agreement in the year the program income is received or for any subsequent fiscal year." 25 U.S.C. § 5388(j) (emphasis added). Neither this statutory provision nor Plaintiff's ISDEAA contract requires IHS to pay any *additional* amount of funds as a result of the fact that Plaintiff has earned program income.

Finally, neither § 5388(j) nor Plaintiff's ISDEAA contract requires Plaintiff to collect payments from third parties including the Medicare and Medicaid programs. *See* 25 U.S.C. § 5388(j); Pl.'s Compact, Art. III, § 5. Rather, both the statute and Plaintiff's contract provide that *if* Plaintiff obtains these reimbursements from non-IHS sources, Plaintiff must treat those payments as an additional, separate source of funding beyond that which the ISDEAA contract requires IHS to provide. *See* 25 U.S.C. § 5388(j); Pl.'s Compact, Art. III, § 5.

Thus, Plaintiff's program income is separate from the amount of funds IHS is required to pay under the ISDEAA and Plaintiff's ISDEAA contract.

B. The ISDEAA's Payment Provisions Do Not Provide for Plaintiff's Non-IHS Funds to be Part of the Secretarial Amount

In addition to the express language of § 5388(j), the payment provisions in both the ISDEAA and Plaintiff's ISDEAA contract rebut Plaintiff's contention that program income is part of the Secretarial amount.

The ISDEAA requires IHS to pay an "amount of funds … not … less than [IHS] would have otherwise provided for the operation of the programs … for the period covered by the

contract." 25 U.S.C. § 5325(a)(1). This is the Secretarial amount. As Defendants demonstrated in their opening brief, moreover, Congress did not use the terms "Medicare," "Medicaid," or "program income" or otherwise identify such funds as part of the Secretarial amount in § 5325(a)(1). *See* Defs.' Mem. at 28-31. Defendants further demonstrated that neither §§ 5325(m) or 5388(j) characterize Medicare, Medicaid or other program income as part of the Secretarial amount. *See id*. Rather, as noted above, § 5388(j) provides that such funds "shall be treated as supplemental funding to that negotiated in the funding agreement." 25 U.S.C. § 5388(j). "Congress kn[ows] how to differentiate between [different statutory terms] when it want[s] to," and its choice not to use a term elsewhere in the statute "should be given effect." *Jones v. Bock*, 549 U.S. 199, 222 (2007); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the [C]ourt assumes different meanings were intended."). Accordingly, in order to give effect to each of these statutory provisions, this Court should hold that Medicare, Medicaid, and other program income is not part of the Secretarial amount.

Further contrary to Plaintiff's contention, Plaintiff's ISDEAA contract provides for IHS to pay Plaintiff the Secretarial amount reflected in the "CY 2010 Self-Governance FA Table." Pl.'s 2010 FA, § 6. The CY 2010 Self-Governance FA Table is the amount of funds that IHS would have otherwise provided for IHS health care programs on the Swinomish Indian Reservation.[1] The parties agreed on this amount. This amount, moreover, does not include Plaintiff's Medicare, Medicaid, and other third-party reimbursements (such as the contract

[1] Defendants' opening brief incorrectly identified the total amount appropriated for CSC for Fiscal Year 2010. *See* Defs.' Mem. at 2. The correct amount is $398 million. *See* IHS, FY 2011 Justification of Estimates for Appropriations Committees. ("IHS FY 2011 Justification"), at CJ-13 (2010), https://www.ihs.gov/budgetformulation/includes/themes/responsive2017/documents/FY2011CongressionalJustification.pdf (showing enacted FY 2010 appropriations).

reimbursement by the Upper Skagit Tribe, *see* Pl.'s Mem. at 11), or tribal funds (such as Plaintiff's book sales, *see id*.).

Accordingly, Plaintiff's expenditure of Medicare, Medicaid, and other third-party funds cannot reasonably be considered to be part of the Secretarial amount on which Plaintiff's CSC is calculated and paid.

C. The ISDEAA's CSC Provisions Do Not Require IHS to Pay CSC Based on a Tribal Contractor's Expenditure of its Non-IHS Funds

Nor is there merit to Plaintiff's contention that it is entitled to CSC based on its expenditure of non-IHS funds because it allegedly spent the funds on the same Federal program that it is under contract with IHS to operate. *See* Pl.'s Opp'n at 2, 15. The ISDEAA's CSC provisions expressly prohibit IHS from paying CSC on non-IHS funds, and only require IHS to pay CSC for the reasonable, necessary, and non-duplicative direct and indirect costs allocable to Plaintiff's expenditure of the Secretarial amount.

1. Section 5326 Prohibits the Use of IHS Funds to Pay the Costs of Expending Non-IHS Funds

Defendants' opening brief established that § 5326 of the ISDEAA prohibits the use of IHS funding for costs "associated with" or "attributable to" non-IHS funds. *See* Defs.' Mem. at 17-21 (citing 25 U.S.C. § 5326). Plaintiff contends that § 5326 does not apply to Plaintiff's expenditure of non-IHS funds used to supplement its operation of the IHS health care programs because there are "no other agencies and no other contracts to which these costs could be allocated." Pl.'s Opp'n at 8. Plaintiff's claim ignores the plain language of the statute and the undisputed facts in this case.

Section 5326 provides that "funds available" to the IHS "may be expended only for costs directly attributable to contracts" pursuant to the ISDEAA, and "no funds … shall be available" for CSC "associated with" any contract, grant, cooperative agreement, self-governance compact,

or funding agreement entered into between" a tribal contractor and "any entity" other than IHS. 25 U.S.C. § 5326.

Like any other health care provider, Plaintiff entered into a host of agreements with third parties in order to obtain Medicare, Medicaid, and other third-party reimbursements. *See, e.g.*, Dep't of Health & Human Servs., Centers for Medicare & Medicaid Servs., Medicare Participating Physician or Supplier Agreement, https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/Downloads/CMS460.pdf; Wash. State Health Care Auth., Core Provider Agreement, https://www.hca.wa.gov/assets/billers-and-providers/09-015-core-provider-agreement.pdf.[2] Also, the $79,991.44 in "contract reimbursement" that Plaintiff obtained from the Upper Skagit Tribe was clearly the result of an agreement between Plaintiff and that tribe. *See* Pl.'s Mem. in Supp. of Mot. for Summ. J. at 11, ECF No. 21-2. Consequently, the disputed costs at issue in this case are all allocable to Plaintiff's expenditure of non-IHS funds obtained through Plaintiff's agreements with each of these non-IHS entities. Section 5326 thus prohibits IHS from paying (and Plaintiff from using) IHS funds for the direct and indirect costs associated with non-IHS entities. *Seminole Tribe of Fla. v. Azar, et al.*, _ F. Supp. 3d. _, 2019 WL 1359478, *6 (D.D.C. Mar. 26, 2019) (ISDEAA "explicitly prohibits IHS from funding ... indirect costs 'associated with' non-IHS entities."); *Tunica*, 577 F. Supp. 2d at 417-18 (same); *see also id*. at 418 (Section 5326 "prevents the IHS from paying more than its *pro rata* share of the indirect costs incurred by contracting tribes and tribal organizations.").

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[2] To be clear, a Medicare Provider Agreement establishes a statutory entitlement to payment, not a contract right, at least for purposes of considering whether the government may make retroactive adjustments to the Medicare reimbursement system. *See, e.g., Mem'l Hosp. v. Heckler*, 706 F.2d 1130, 1136-37 (11th Cir. 1983). Regardless of whether these are contracts for purposes of retroactive adjustments, they should be deemed to qualify as a contract, grant, cooperative agreement, self-governance compact, or funding agreement under § 5326.

A copy of Plaintiff's Core Provider Agreement is appended as an exhibit to Defendants' reply (Exhibit A).

Similarly, Plaintiff's ISDEAA contract provides that Plaintiff's CSC would be funded in accord with applicable Indian Health Manual ("IHM") provisions. *See* Pl.'s 2010 FA, § 6. The IHM requires that Plaintiff's costs eligible for CSC must "[b]e necessary and reasonable for the performance of the Federal award and be allocable thereto under [OMB cost] principles." IHM, Part 6, Ch. 3, Ex. 6-3-G, § A(3)(A)(1), https://www.ihs.gov/ihm/pc/part-6/p6c3/; *see also id*. at § A(3)(c)(3) (providing that "[a]ny cost allocable to a particular Federal award under the principles provided for in this part may not be charged to other Federal awards to overcome fund deficiencies, to avoid restrictions imposed by Federal statutes, regulations, or terms and conditions of the Federal awards.").[3] Thus, Plaintiff has already agreed that its CSC is limited to those costs that are reasonable, necessary, and allocable to its expenditure of the Secretarial amount to operate the IHS health care programs on the Swinomish Indian Reservation, and should not now be heard to contend otherwise.

Notwithstanding § 5326 and Plaintiff's ISDEAA contract, Plaintiff contends that "[t]he *source* of [its] funds is irrelevant," and that it is Plaintiff's "*use* of those funds that is decisive." Pl.'s Opp'n at 4 (citing *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 544 (D.D.C. 2014).[4] Plaintiff's claim fails because § 5326 expressly prohibits Plaintiff from using IHS funds, including IHS funding for CSC, to support Plaintiff's expenditure of non-IHS funds. *Pyramid Lake* does not provide persuasive authority saying otherwise.

2. Plaintiff Is Not Entitled to CSC Under 25 U.S.C. § 5325

Despite the clear prohibition of § 5326, Plaintiff contends that its claimed costs are

[3] Although this is the citation to the current IHM, which was adopted in 2016, the policy in effect in 2010 contained the same requirement.

[4] Elsewhere, Plaintiff admits that the source of funds does effect which costs are eligible for CSC. *See* Pl.'s Opp'n at 2 (admitting that "most types of non-IHS funding," including "state funds" and Plaintiff's "own funds" are not eligible for CSC).

entitled to payment as additional CSC because it expended its third-party funds on additional health care services. *See* Pl.'s Opp'n at 2. Plaintiff further contends that its expenditure of these third-party funds is part of the "'Federal program' that generates CSC needs." *Id*. Neither contention has merit.

Section 5325 provides for IHS to pay as CSC "an amount for the reasonable costs for activities which must be carried on by a tribal … contractor to ensure compliance with the terms of the contract and prudent management" and which IHS has not funded in the Secretarial amount. 25 U.S.C. § 5325(a)(2). The ISDEAA further clarifies that CSC may include the contractor's "direct program expenses for the operation of the Federal program that is the subject of the contract" and "additional administrative or other expenses related to the overhead … in connection with the operation of the Federal program … ." *Id*. § 5325(a)(3)(A). In this case, the Federal program that is the subject of Plaintiff's ISDEAA contract is comprised of the nine IHS health care programs identified in Plaintiff's contract. *See* Pl.'s 2010 FA, § 2(B). To operate these nine IHS health care programs, Plaintiff's ISDEAA contract provides for IHS to pay Plaintiff the Secretarial amount reflected in the "CY 2010 Self-Governance FA Table." *Id*. § 6. The operation of these nine IHS health care programs and the Secretarial amount used to fund their operation thus define the scope of the Federal program that is the subject of Plaintiff's ISDEAA contract. Section 5325(a)(3)(A) limits CSC only to costs of supporting that Federal program. Plaintiff cannot show that the terms of these statutory provisions require any other result.

a. Plaintiff's Proposed Reading of § 5325 Conflicts with §§ 5326 and 5388(j)

By contrast, Plaintiff's proposed reading of § 5325, which would require IHS to pay CSC based on Plaintiff's expenditure of non-IHS funds on additional health care services beyond those required by Plaintiff's ISDEAA contract, is in direct conflict with § 5326, a result this

Court should avoid. *See Tunica*, 577 F. Supp. 2d at 418-19. In *Tunica*, the court held that § 5325 must be interpreted in light of § 5326. *See id*. at 418-19; *see also Seminole*, 2019 WL 1359478, at *6 (finding that § 5326 limits the definition of CSC set out in § 5325(a)(2), (3)(A)). The *Tunica* court thus held that the only reasonable interpretation of § 5325(a)(2) is that it only requires IHS to pay CSC for indirect costs that are properly allocated to IHS. *See* 577 F. Supp. 2d at 422-23 (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

Moreover, Plaintiff's proposed reading of § 5325 directly conflicts with § 5388(j). As Defendants demonstrated above and in their opening brief, the ISDEAA differentiates program income from the funds that the Secretary transfers to a tribal contractor through its funding agreement. The ISDEAA expressly clarifies that program income is treated as "supplemental funding to that negotiated in the funding agreement;" it is not part of the funding agreement. *Id*. § 5388(j). If, as Plaintiff contends, Plaintiff's expenditure of non-IHS funds required IHS to pay additional CSC, the language that Congress used in § 5388(j) would be rendered meaningless, a result this Court should avoid. *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("statute should be construed so that effect is given to all its provisions."); *Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."); *see also HCSC–Laundry v. United States*, 450 U.S. 1, 6 (1981) (*per curiam*) (the specific governs the general "particularly when the two are interrelated and closely positioned, both in fact being parts of [the same statutory scheme]"); *Mingo Logan Coal Co. v. EPA*, 714 F.3d 608, 614 (D.C. Cir. 2013) (stating that "'one of the most basic interpretive canons'" is that "'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant'") (quoting *Corley*, 556 U.S. at 314); *Tunica*, 577 F. Supp. 2d at 422-23.

Further, neither of the ISDEAA provisions providing for Plaintiff's use of program income uses the term "Federal program," and none of the ISDEAA's CSC provisions identifies either program income, or the direct and indirect costs associated with the expenditure of program income, as eligible for CSC. *See* 25 U.S.C. §§ 5325(m); 5388(j); *see also id.* §§ 5325(a)(2) and (3)(A). Similarly, in describing the CSC that are "eligible costs" in § 5325(a)(3)(A), the ISDEAA does not mention a tribal contractor's expenditure of "Medicare," "Medicaid," or other "program income." *See id.* § 5325(a)(3)(A). If Congress had intended for IHS to pay CSC based on a tribal contractor's expenditure of these non-IHS funds, it would have so stated. Instead, Congress employed separate terms in § 5388(j) and § 5325(a)(3), and this Court should give them separate effect. As Defendants demonstrated in their opening brief, it is well settled that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *see also Jones*, 549 U.S. at 222 ("Congress kn[ows] how to differentiate between [different statutory terms] when it want[s] to," and its choice not to use a term elsewhere in the statute "should be given effect."); *Sosa*, 542 U.S. at 711 n.9 ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the [C]ourt assumes different meanings were intended."); *Nat'l Rifle Ass'n of Am., Inc. v. Reno*, 216 F.3d 122, 130 (D.C. Cir. 2000) ("[W]e presume that when Congress excluded qualifying language from [one subsection of a statute], it did so intentionally"); *accord Navajo Nation v. Dalley*, 896 F.3d 1196, 1212 (10th Cir. 2018) (holding that the explicit reference to jurisdiction in one clause of statute and silence on that issue in another clause "constitutes a significant clue that Congress did not intend for this provision to relate to . . . the allocation of jurisdiction" in that second clause), *cert*

denied, 2019 WL 162380 (U.S. Apr. 22, 2019).

b. Section 5325's Prohibitions Against Duplication Also Preclude Paying CSC on Expenditures of Medicare and Medicaid Reimbursements

Defendants' opening brief demonstrated that the Medicare and Medicaid reimbursements include payments for the direct and indirect costs associated with providing those services. *See* Defs.' Mem. at 15-17. Plaintiff contests the relevance, but not the accuracy, of Defendants' showing. *See* Pl.'s Opp'n at 11-12. Defendants' opening brief further demonstrated that even if Plaintiff's Medicare and Medicaid reimbursements were considered part of the Secretarial amount, § 5325's prohibitions against paying CSC for the costs of activities covered by the Secretarial amount would apply here precisely because Plaintiff's Medicare and Medicaid payments already include reimbursement for Plaintiff's direct and indirect costs associated with providing those health care services. *See* Defs.' Mem. at 24-25.[5] Plaintiff now attempts to evade § 5325's prohibitions against duplication by focusing on its expenditure of those reimbursements to provide additional health care expenditures. *See* Pl.'s Opp'n at 13-14. Plaintiff's attempt fails for several reasons.

The fact remains that even if Medicare and Medicaid funds were considered part of the Secretarial amount (which they are not), the non-duplication requirements in both §§ 5325(a)(2) and (a)(3)(A) would exclude them for eligibility for CSC. Section 5325(a)(2) excludes CSC for activities that "normally" are provided by IHS "in its direct operation of the program," or "are provided by [IHS] in support of the contracted program from resources other than those under

[5] Section 5325(a)(2) limits CSC to "costs for activities which must be carried on … but which" are not covered in the Secretarial amount because the activities "normally are not carried on by [IHS] in [its] direct operation of the program" or "are provided by [IHS] in support of the contracted program from resources other than those under contract." 25 U.S.C. § 5325(a)(2). Similarly, § 5325(a)(3)(A) provides that the CSC that are "eligible costs for the purposes of receiving funding under this chapter … shall not duplicate any funding provided under subsection (a)(1) of this section." *Id.* § 5325(a)(3)(A).

contract." *Id*. § 5325(a)(2). Similarly, § 5325(a)(3)(A) provides that "eligible costs for the purposes of receiving funding under this chapter … shall not duplicate any funding provided" in the Secretarial amount." *Id*. § 5325(a)(3)(A). When IHS directly operates a health care program, Congress requires it to place any Medicare and Medicaid reimbursements it might obtain "in a special fund" to be held by the agency to ensure that each IHS health care service unit "receives 100 percent of the amount" of the funds it has collected from the service unit. 25 U.S.C. § 1641(c)(1)(A).[6] When a tribal contractor enters into an ISDEAA contract, it also obtains "100 percent" of these funds. Since these funds already reimburse the tribal contractor for the direct and indirect costs associated with providing those Medicare or Medicaid eligible services, § 5325's non-duplication requirements would exclude activities reimbursed by Medicare and Medicaid from eligibility for CSC. Thus, Plaintiff's claim that third-party reimbursements are part of the "Federal program" does not advance its cause, because its expenditures would still be excluded by § 5325's non-duplication requirements.

Plaintiff additionally notes that, in general, funds provided as part of the Secretarial amount do not cover certain costs that a tribal contractor incurs (such as unemployment insurance and the cost of audits), and notes that CSC funding pays for these "incurred costs." Pl.'s Opp'n at 10. This is because such costs specifically meet the definition of costs for activities that IHS normally does not carry on or provides from resources not transferred under the contract. *See* 25 U.S.C. § 5325(a)(2)(A)-(B); *see also* IHM Ex. 6-3-G (explaining that State unemployment insurance is CSC because IHS does not fund it in the Secretarial amount). But that is exactly why Medicare and Medicaid reimbursements are different: unlike IHS and the

[6] The same is true when a tribal contactor requests that IHS collect these third party Medicare and Medicaid funds for the contractor; Congress requires IHS to distribute 100 percent of those funds to the tribal contractor. *See* 25 U.S.C. § 1641(c)(1)(A); *id*. § 1641(c)(2).

Secretarial amount, Medicare and Medicaid do reimburse Plaintiff for the direct and indirect costs associated with providing those eligible health care services, including costs such as unemployment insurance and audits. *See* Defs.' Mem. at 15-17. Section 5325's non-duplication requirements thus excludes them from eligibility for CSC.

Plaintiff further attempts to minimize § 5325's non-duplication requirement by arguing that Congress intended Medicare and Medicaid reimbursements to "supplement—and not supplant" IHS appropriations. Pl.'s Opp'n at 12. But as Defendants demonstrated in their opening brief, *see* Defs.' Mem. at 29-30, just because Medicare and Medicaid reimbursements cannot serve as a basis for *reducing* the amount otherwise paid to a tribal contractor in either the Secretarial amount or associated CSC, *see* 25 U.S.C. §§ 5325(m), 5388(j), it does *not* follow that the ISDEAA's recognition of the existence of program income can reasonably be construed as *increasing* the amount of CSC IHS is required to pay. Those are not the statutory terms that Congress used in § 5325(m) or § 5388(j). This Court should decline Plaintiff's invitation to re-write these provisions.

Additionally, to the extent that Plaintiff expends any Medicare and Medicaid funds on additional health services that are, in turn, also eligible for Medicare or Medicaid reimbursement, Plaintiff will recover the direct and indirect costs associated with providing those additional services when it submits claims and obtains those additional third-party reimbursements.[7] Plaintiff's attempt to obtain additional CSC on top of these new Medicare and Medicaid reimbursements would provide Plaintiff with an improper windfall. *See Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1464 (10th Cir. 1997) ("nothing in the Act entitles a tribe to a windfall

[7] Indeed, to the extent Plaintiff expends those additional reimbursements to provide still more health care services, those additional health care services may also, in turn, be eligible for Medicare or Medicaid reimbursements, which Plaintiff may expend on still more Medicare or Medicaid eligible services, and so on.

or requires defendants to ignore indirect costs funding a tribe receives from other sources"), *overruled on other grounds by* 25 U.S.C. §§ 5326-27.

c. Neither *Navajo Health Foundation—Sage Memorial Hospital* Nor *Seminole Tribe of Florida* Advances Plaintiff's Case

Plaintiff continues to contend erroneously that *Navajo Health Foundation—Sage Memorial Hospital Inc. v. Burwell*, 263 F. Supp. 3d 1083 (D.N.M. 2016) ("*Sage*"), and *Seminole Tribe of Florida, supra*, advance its case. *See* Pl.'s Opp'n at 4-6. Defendants' opening brief demonstrated that the *Sage* decision reached its conclusions without addressing § 5326, did not interpret § 5325 in light of § 5326, and did not address the fact that Medicare and Medicaid payments already include reimbursements for the direct and indirect costs associated with providing those services. Nor did the *Sage* court explain why the plaintiff's non-IHS funds could reasonably be considered part of the "Federal program" that the plaintiff was under contract to operate with IHS funds. *See* Defs.' Mem. at 32-33. Plaintiff's response demonstrates that it agrees with *Sage*'s conclusions, but it fails to demonstrate why the decision provides persuasive authority.

In a bit of sophistry, Plaintiff also contends that the *Seminole* decision "adopted" the "core reasoning" of *Sage*. *See* Pl.'s Opp'n at 5 (citing *Seminole Tribe of Fla*., 2019 WL 1359478, at *9-10). As Defendants demonstrated in their opening brief, however, the *Seminole* decision found that the plaintiff appeared to be improperly trying to apply an indirect cost rate that it had negotiated based on a smaller base for salaries, wages, and fringe benefits to its newly-proposed larger base in order to improperly inflate its CSC. *See* Defs.' Mem. at 33, n.23; *Seminole Tribe of Fla.*, 2019 WL 1359478 at *7. The court further found that "if the base has been inflated—even with IHS funds—and the indirect cost rate does not account for or offset that inflation, the effect is that the indirect CSC amount is being calculated based in part on the

Tribe's own resources." *Seminole Tribe of Fla.*, 2019 WL 1359478 at *10. Most of the *Seminole* decision's analysis of *Sage*, moreover, was confined to explaining why that case was distinguishable from *Seminole*. *See id*. at * 9. The *Seminole* decision's momentary speculation that "[i]f the Tribe can show that its other money is program income, *Sage Memorial may* ultimately govern," *id*. at *10 (emphasis added), neither accepts nor rejects the decision, is not a binding holding, and does not provide persuasive authority for this Court. Indeed, Plaintiff admits as much in noting that the *Seminole* decision did not grant summary judgment to the plaintiff. *See* Pl.'s Opp'n at 5.

II. PLAINTIFF HAS FAILED TO SUSTAIN ITS BURDEN OF PROVING DAMAGES FROM THE ALLEGED BREACH OF CONTRACT

Plaintiff is not entitled to recover damages for its breach of contract claim because it has failed to sustain its burdens of proof required under the Contract Disputes Act ("CDA").

Plaintiff's opposition attempts to establish, for the first time in this case, that this Court has jurisdiction over its claims under the CDA, 41 U.S.C. §§ 7101, 7103(a)(1), (4)(A), (b) (requiring CDA claims be presented to contracting officer within six-years of accrual); *YRC, Inc. v. United States*, 104 Fed. Cl. 360, 364 (Fed. Cl. 2010) (plaintiff's burden to establish jurisdiction under the CDA). *See* Pl.'s Opp'n at 16-19. In only now attempting to establish when its claim accrued, Plaintiff misses the larger point: that it is Plaintiff's burden to establish this Court's jurisdiction over Plaintiff's claim, and that Plaintiff failed to allege a basis for this Court's jurisdiction in its Complaint or establish this Court's jurisdiction in its motion for summary judgment. *See YRC*, 104 Fed. Cl. at 364.

Nothing in Plaintiff's opposition, moreover, establishes that Plaintiff has met its "burden of proving the amount of its damages 'with sufficient certainty so that the determination of damages will be more than mere speculation.'" *Haehn Mgt. Co. v. United States*, 15 Cl. Ct. 50,

60 (Cl. Ct. 1988) (quoting *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987), *aff'd*, 878 F.2d 1445 (Fed. Cir. 1989); *see also Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (contractor has burden of proving damages *de novo* in federal court). As Defendants demonstrated in their opening brief, Plaintiff's sole evidentiary basis for proving damages is its 2010 audit, but that audit is insufficient to meet Plaintiff's burden. *See* Defs.' Mem. at 33-35 (citing Pl.'s Mem. at 11; Pl.'s Claim at 2, ECF No. 21-7). The only place in Plaintiff's audit that shows these costs is on page 14, in the third column, and again on page 78, in the second column, which state that for IHS Self Governance, Plaintiff received $3,172,054 in grants and contracts, $636,421 in program income, and $27,730 in other income. *See* Pl.'s Audit at 14, 78, ECF No. 21-6.[8] Plaintiff offers no proof of amounts reimbursed for Medicare services it provided, amounts reimbursed for Medicaid services it provided, and any other amounts reimbursed from other third parties for health care services provided that may be properly claimed as program income under the ISDEAA. Nor does Plaintiff's audit identify the $79,991.44 in contract reimbursement from Upper Skagit Tribe, and $2,542.25 for book sales that Plaintiff claims is included in this program income; Plaintiff only identifies those in its memorandum in support of its summary judgment motion. *Compare id*. *with* Pl.'s Mem. at 11. Nor does Plaintiff (or its audit) identify how the claimed expenditures meet the ISDEAA's limitations on CSC. Thus, nothing in the audit provides proof of the claims at issue in this case. Indeed, Plaintiff admits that most types of non-IHS funding do not qualify for CSC because IHS would not have had such funds if it had still been operating the health programs at issue, *see* Pl.'s Opp'n at 2, yet Plaintiff still seeks CSC based on these same non-IHS funds. This contradiction

[8] On consideration of Plaintiff's objection, *see* Pl.'s Opp'n at 22, n. 15, Defendants concede that Plaintiff may treat interest income similar to program income. *Compare* 25 U.S.C. § 5388(h) *with id*. § 5388(j).

makes clear that Plaintiff's audit alone cannot establish the damages it seeks in this case.

Additionally, Plaintiff's audit does not prove its claim because it shows that Plaintiff expended $3,277,884 in "social and health" expenditures (including $193,177 in contractual services), $1,027,273 in indirect costs, and $19,800 in capital outlay. Pl.'s Audit at 78. Plaintiff's audit, however, does not show if Plaintiff expended all of these funds for IHS health care programs that it was under contract to administer, only that it expended them for "social and health programs." *Id*. Plaintiff's website, moreover, suggests that Plaintiff's social services include employment services and food vouchers, none of which are part of the IHS health care programs that Plaintiff is under contract to operate. *See* Swinomish Indian Tribal Community,Social Services, http://www.swinomish-nsn.gov/resources/social-services.aspx. Further, Plaintiff further admits that it runs (and apparently keeps records on) only a "single, unified health program," without establishing that all of its activities are within the scope of its ISDEAA contract. Pl.'s Opp'n at 24. This last admission is telling, as it demonstrates that Plaintiff has made no effort to differentiate which direct and indirect costs are properly allocated to IHS and which are properly allocated to Plaintiff's own health care and social programs. *See* 25 U.S.C. § 5326; *Tunica*, 577 F. Supp. 2d at 418; *Seminole Tribe of Fla.*, 2019 WL 1359478, at *10. Plaintiff nevertheless claims CSC based on its expenditure of all of these undifferentiated funds for all these undifferentiated IHS and non-IHS "social and health" programs. *See* Pl.'s Audit at 78. This Court should not countenance Plaintiff's attempt. Plaintiff's audit is insufficient documentary proof to sustain its burden of proving its damages for the alleged breach.[9]

[9] Plaintiff also appears to suggest that Defendants' alleged failure to object to Plaintiff's audit in 2011, five years before Plaintiff filed its claim, somehow now precludes Defendants from pointing out Plaintiff's failure to carry its burden of establishing damages. *See* Pl.'s Opp'n at 22. Plaintiff's objection is absurd, and Plaintiff misapprehends its burden of proof in this case.

Plaintiff additionally contends that its made-up method for determining damages relating to direct CSC is acceptable due to an alleged lack of guidance from IHS. *See* Pl.'s Opp'n at 25. Plaintiff's assertion ignores the IHS CSC Policy, which lays out the specific methodology and information IHS requires to calculate direct CSC, none of which Plaintiff used or provided in making up an amount for its alleged damages. *Compare* Pl.'s Claim; Pl.'s Mem. *with* IHM, Part 6, Ch. 3, Ex. 6-3-G (identifying the same methodology and requiring the same information as the 2007 CSC Policy, Ex. 6-3-H, that was in effect in 2010). Nor, contrary to Plaintiff's contention, does IHS ever calculate direct CSC as a "ratio." *See* IHM, Part 6, Ch. 3, Ex. 6-3-G.[10] Contrary to Plaintiff's contention, *see* Pl.'s Opp'n at 25, moreover, direct CSC, which is comprised primarily of fringe benefits for employees, would increase only if Plaintiff's staffing costs increased; Plaintiff has made no effort to show an increase in staffing or associated costs. Plaintiff's claim for damages based on unpaid direct CSC are thus based on nothing more than speculation.

In sum, Plaintiff failed to meet its burden of establishing this Court's jurisdiction over its claims and failed to meet its burden of proving damages from the alleged breach. Plaintiff thus cannot support its request for declaratory relief and leaves the Court with no remedy to apply.

CONCLUSION

This Court should deny Plaintiff's motion for summary judgment and grant Defendants' cross motion for summary judgment, and enter judgment for Defendants.

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[10] Plaintiff's complaint that IHS uses an "80/20" ratio to determine certain indirect costs, *see* Pl.' Opp'n at 25, is not a reasonable comparison to Plaintiff's claim for unpaid direct CSC, as indirect costs are, by definition, not readily attributable to any particular program. *See* 2 C.F.R. § 200.405. The "97/3 method" about which Plaintiff also complains, *see* Pl.'s Opp'n at 25, also concerns allocation of indirect costs, and, in any event, has been rescinded. *See* Ltr. from Michael Weahkee, Acting Dir., IHS to Tribal Leaders (Dec. 21, 2017), https://www.ihs.gov/newsroom/includes/themes/responsive2017/display_objects/documents/2017_Letters/59018-1_DTLL_12212017.pdf.

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Respectfully Submitted,

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