UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

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| FLANDREAU SANTEE SIOUX TRIBE, a federally recognized Indian tribe,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES OF AMERICA; XAVIER BECERRA, Secretary of Health and Human Services, *et al.*,[1]<br><br>Defendants. | 4:20-cv-04142-LLP<br><br>**DEFENDANTS' REPLY** |

COMES NOW the United States of America, on behalf of Defendants, Xavier Becerra, Secretary, U.S. Department of Health and Human Services ("HHS"); Elizabeth Fowler, Acting Director, Indian Health Service ("IHS"); and Deb Haaland, Secretary, U.S. Department of the Interior (collectively "Defendants"), by and through Dennis R. Holmes, Acting United States Attorney for the District of South Dakota, and Meghan K. Roche, Assistant United States Attorney, and hereby replies to Plaintiff's Opposition (Docket 24) to Defendants' Partial Motion to Dismiss.

## INTRODUCTION

In Plaintiff's response brief, it is telling that Plaintiff never directly addresses the question currently before the Court: whether the Court has jurisdiction over Counts II, III, and VI of the Complaint. Instead, Plaintiff argues the merits of its litigation position and provides an extensive preview of how it believes the law should be. Although Plaintiff's position is contrary to D.C.

[1] Subsequent to the Administration change in January 2021, the Defendants have been updated here as appropriate. *See* Fed. R. Civ. P. 25(d) (providing a public officer's "successor is automatically substituted as a party.").

Circuit precedent and the majority[2] view, Plaintiff weaves its merits arguments into a subject matter jurisdiction review of presentment solely to confuse the issues.

Presentment is a clear-cut jurisdictional hurdle that Plaintiff has failed to meet. Upon plain review of Plaintiff's claims letters for Fiscal Years 2011-2013, Plaintiff did not give a clear and unequivocal statement providing notice of the basis and amount of the claims now alleged in Counts II, III, and VI of the Complaint, and therefore failed to present to the contracting officer proper claims under the Contract Disputes Act ("CDA"). Because these three new claims are based on different operative facts or involve distinct legal theories from Plaintiff's other claims, they had to have been presented, are now unexhausted, and must be dismissed.

**LEGAL STANDARD**

Plaintiff argues that under Federal Rule of Civil Procedure 12(b)(1) the Court must construe the allegations in the Complaint favorably to Plaintiff. Docket 24 at 7 (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). This is not the appropriate standard here. Defendants made a factual attack on subject matter jurisdiction, and "no presumptive truthfulness attaches to the plaintiff's allegations[.]" *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990) (citation and

[2] Plaintiff relies on the *Sage* decision to support its litigation position. However, *Sage* is an outlier opinion, and its rationale has been thoroughly dismantled by the D.C. Circuit and district courts alike. *Swinomish Indian Tribal Cmty. v. Becerra*, 993 F.3d 917, 920 (D.C. Cir. 2021) ("The [ISDEAA] does not require Indian Health Service to pay for contract support costs on insurance money received by Swinomish. Neither does Swinomish's contract with Indian Health Service."); *Swinomish Indian Tribal Cmty. v. Azar*, 406 F. Supp. 3d 18, 32 (D.D.C. 2019) (finding "the text, structure, and logic of § 5325(a) counsel against treating the Tribe's collection and expenditure of third-party revenue as part of the Secretarial amount or federal program for the purposes of calculating CSC owed."), *aff'd*, 993 F.3d 917 (D.C. Cir. 2021), *pet. reh'g en banc denied* (July 6, 2021); *see also San Carlos Apache Tribe v. Azar*, 482 F. Supp. 3d 932, 940 (D. Ariz. 2020) (finding the *Sage* opinion, which was decided in the Tribe's favor, was not persuasive "as it did not engage with the text of" 25 U.S.C. § 5325); *N. Arapaho Tribe v. Cochran*, Civ. 21-0037, Docket 26 at 14 (D. Wyo. July 7, 2021) (finding *Sage Memorial* to be "unpersuasive" because "the Tribe's earned income from third-party payers is not spent 'on the program' (as concluded by the Court in *Sage Memorial*), but it is spent as required by law").

quotation omitted). "Because there is no statutory procedure prescribing an approach to determinations of jurisdiction, 'trial courts have wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1).'" *Patterson v. United States*, Civ. 16-3041-LLP, 2017 WL 4381526, at *2 (D.S.D. Sept. 29, 2017) (citations omitted).

In its response brief, Plaintiff neglected to carry its burden of establishing that it presented all of its claims to the contracting officer, as it must, to establish jurisdiction. *See Green Acres Enters., Inc. v. United States*, 418 F.3d 852, 856 (8th Cir. 2005) (finding the party asserting jurisdiction carries the burden of proof). Plaintiff's attempt to reach the merits of the third-party revenue issue is misguided "because jurisdiction is a threshold question," which "judicial economy demands . . . be decided at the outset[.]" *Osborn*, 918 F.2d at 729. The only facts[3] necessary to resolve this motion are Plaintiff's CDA claims, as presented in Plaintiff's claim letters for each fiscal year.

At the outset, Plaintiff labels the CDA and its presentment requirement as "a low, notice-based threshold" and argues the CDA is to "be interpreted leniently[.]" Docket 24 at 14. Plaintiff ignores that "the CDA is a statute waiving sovereign immunity . . . . [and] must be strictly construed in favor of the sovereign" and courts accordingly "enforce[] the strict limits of the CDA as jurisdictional prerequisites to any appeal." *M. Maropakis Carpentry, Inc. v. United States*, 609

[3] In a footnote, Plaintiff attempts to raise settlement negotiations as evidence. However, settlement negotiations are just that – an attempt to resolve a case outside of litigation. The relevant facts for the Court to view when examining presentment are the submitted claims. Plaintiff and IHS both marked settlement correspondence as subject to Federal Rule of Evidence 408, and Plaintiff was further put on notice that "any correspondence or information that was exchanged during settlement discussions covered by Rule 408 is not part of the Tribe's claims presented to the Agency." Docket 1-4 at 2. Plaintiff never amended its claim letters to include new operative facts or legal theories, even though that option was available to it.

F.3d 1323, 1329 (Fed. Cir. 2010) (citations omitted); *see also Tunica-Biloxi Tribe of La. v. United States*, 577 F. Supp. 2d 382, 409 (D.D.C. 2008) (finding the CDA's presentment requirement is jurisdictional and "inflexible"). The Court should reject Plaintiff's self-serving view and strictly apply the CDA to dismiss Counts II, III, and VI of Plaintiff's Complaint.

## ARGUMENT

### I. The Court Lacks Jurisdiction over Counts II and III Because Plaintiff Did Not Present Those Claims to IHS.

Plaintiff failed to present[4] clear and unequivocal notice of the basis and sum certain for its claims for alleged lost third-party revenue (lost profits) (Count III) and lost indirect contract support costs ("CSC") on those third-party revenues (Count II).

#### A. Counts II and III Do Not Arise from the Same Operative Facts or Legal Theories as the Claims Presented to the Agency.

Recognizing that it did not specifically present Counts II and III as the CDA requires, Plaintiff pivots to argue that all of its unpresented claims fit under the umbrella of its presented direct and indirect CSC claims because third-party revenue should have been included in its direct cost base. Docket 24 at 15-16; 21-22. Plaintiff further asserts that it need not have specifically

[4] Plaintiff's briefing on this partial motion to dismiss would suggest the motion is about how to calculate Plaintiff's direct cost base or alleged unfairness in the ISDEAA contracting scheme set forth by Congress. Both arguments should be ignored. First, Plaintiff's direct cost base argument has been rejected. *See N. Arapaho Tribe v. Cochran*, Civ. 21-0037, Docket 26 at 10-11 (D. Wyo. July 7, 2021) ("The Court finds the terms in 25 U.S.C. § 5325(a)(2) clearly and unambiguously define the 'cost base' for calculation and payment of CSC to include only the Secretarial amount, and these terms do not sweep into the calculation program income earned by the Tribe (third-party reimbursements)."). Next, Plaintiff's extensive detailing of how IHS allegedly operates when it provides direct healthcare services is irrelevant to the motion before the Court. The ISDEAA provides for the distinct differences between contractors and a federal agency, and its terms guide the Court's future merits analysis pertaining to allowable CSC. *See generally Menominee Indian Tribe of Wis. v. United States*, 577 U.S. 250, 258 (2016) ("The ISDA and CDA establish a clear procedure for the resolution of disputes over ISDA contracts[.]").

presented its third-party claims to the contracting officer because the CDA does not require that "each line of a claimant's 'sum certain' be accounted for to satisfy the presentment requirement[.]" Docket 24 at 18 (citation omitted). Plaintiff's contentions, however, find no support in the law. Courts specifically and routinely reject the argument that a properly presented claim for indirect CSC can encompass any possible basis upon which a plaintiff may later rely in district court. *See, e.g.*, *Tunica-Biloxi Tribe of La.*, 577 F. Supp. 2d at 409 (finding that "any alleged errors in the [agency]'s accounting practices not identified in the plaintiffs' CDA claims cannot be asserted now."); *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1110 (D.N.M. 2006).

Plaintiff sidesteps Defendants' fundamental legal argument that Counts II and III rely on different operative facts and distinct legal theories than does Count I (general "shortfall" claim), and instead retreats to its merits position that the only operative facts for *all* of its claims "are the negotiated indirect cost rate and the Tribe's direct cost base" (Docket 24 at 21). But an examination of each claim's operative facts highlights the essential, factual differences in the third-party claims. As Defendants previously noted, "Counts II and III would require an examination, for each fiscal year, of how much Plaintiff collects from third-party payers, whether the collections are program income related to the ISDEAA Agreement, how Plaintiff expended any program income, whether any third-party payers have reimbursed the costs Plaintiff now claims as CSC, and how much third-party revenues Plaintiff typically generates and would have generated." Docket 16 at 11. Plaintiff fails to explain how the contracting officer could have even known Plaintiff was making third-party claims, let alone considered the merits of those claims, without any of this information.[5]

[5] Defendants provided these as examples of the types of operative facts a contracting officer may want to consider for Counts II and III. Contrary to Plaintiff's argument that Defendants argue it had to submit financial documentation to "establish the full amount of its damages," Defendants simply state those facts prove Claims II and III do not derive from the same set of operative facts as Count I. *Cf.* Docket 24 at 18, n.6.

Plaintiff acknowledges that it did not present the contracting officer with the facts necessary to resolve its third-party claims when it admits that the contracting officer needed Plaintiff's financial information to resolve the third-party claims in the first instance. Docket 24 at 23 n.12. Although Plaintiff alleges the contracting officer could have resolved the third-party revenue claims by looking at the Plaintiff's annual financial audits, none of Plaintiff's claims letters mentions the audits as the factual basis undergirding any claim. Docket 1-3. It is not the contracting officer's job (or the reviewing court's) to assume an ISDEAA contractor is or is not including a particular argument, or relying on certain facts, in its presented claim. Rather, the contractor bears the burden to make plain it was "even remotely suggesting to the contracting officer that [it] was making such a request." *J.C. Equip. Corp. v. England*, 360 F.3d 1311, 1318 (Fed. Cir. 2004).

Conversely, Plaintiff had all information necessary to calculate and present claims pertaining to third-party income, but chose not to do so. It is Plaintiff's burden to clearly articulate its claims and provide the contracting officer with sufficient notice of the basis and amount of the claims. It failed to meet that burden with regard to both third-party claims (Count II and Count III), and thus deprived IHS of notice of the scope of the claims and the amounts at issue.

Moreover, Plaintiff failed to address Defendants' initial argument that Plaintiff's third-party claims also raise a distinct legal theory from its general breach of contract claims. *See* Docket 16 at 9 (collecting cases). But this analysis fares no better than the *supra* operative facts analysis. First, Plaintiff's argument that a generic breach of contract claim includes expectancy theories was considered and rejected by the Court in *Keweenaw Bay Indian Community v. Sebelius*, 291 F.R.D. 124, 127-28 (W.D. Mich. 2013).[6] Like here, the ISDEAA contractor in *Keweenaw* attempted to

add a claim for "third party loss based upon an expectancy theory" for the first time in district court even though it had only presented that it had been underpaid generally. *Id.* The *Keweenaw* court concluded that although Plaintiff presented claims for both direct and indirect CSC, "[i]t was the obligation of the plaintiff to present" its "third party billings" claims and it "never made any claims for third party billings under any theory." *Id.* at 128. The exact rationale applies here to bar the third-party claims for lack of presentment.

Similarly, Plaintiff cannot cite to anything in its claims letters, or documents referred to in the claims letters, that informed IHS that Plaintiff was asserting a third-party claim "under any theory." *See id.*; *see also J.C. Equip. Corp.*, 360 F.3d at 1318 (dismissing CDA claim for lack of presentment when "there was no mention" in the claim letter of the type of claim later advanced in litigation). Thus, for each fiscal year at issue, Plaintiff failed to include "a clear and unequivocal statement" that gave the contracting officer adequate notice that Plaintiff was seeking CSC on third-party program income and a sum certain. *Contract Cleaning Maint., Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987).

Plaintiff further undercuts its own argument that Counts II and III are not distinct legal theories by its presentment conduct. Plaintiff's claims for indirect CSC ($242,255.00) and direct CSC ($1,705.00) for FY 2011, which it did present to the contracting officer, mirror IHS's CSC Report to Congress, a portion of which estimated[7] Plaintiff's shortfall for 2011 and does not factor

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[6] Plaintiff does not address *Keweenaw* at all in its response brief, which is telling. Plaintiff also avoided discussing *SMS Data Prods. Group, Inc. v. United States*, 19 Cl. Ct. 612, 615 (Cl. Ct. 1990), and merely mentions it in a string cite with no analysis. Docket 24 at 23. Plaintiff cannot refute that court's conclusion that lost profits or expectancy damages are a distinct legal theory that must be presented separately from traditional compensatory relief. *See SMS Data Prods.*, 19 Cl. Ct. at 615. *Keweenaw* and *SMS Data Prods.* are persuasive authority and provide further support that dismissal of Counts II and III is warranted.

[7] Of course, this report was just an *estimate* of Plaintiff's shortfall for 2011 provided to Congress for budgeting purposes. IHS pays CSC on the full amount of eligible CSC that a Tribe actually

in third-party income at all. *See* 2012 Report to Congress on Funding Needs for Contract Support Costs of Self-Determination Awards,[8] PDF p. 10 (column K, direct CSC; column V, indirect CSC). Plaintiff's mirroring of IHS's estimated shortfall is relevant for two reasons. First, it shows Plaintiff knew third-party income, and any associated claim, is distinct from the "Secretarial" amount IHS provides from its appropriated funds and associated CSC and must be presented separately, if at all. *Id.* at 3 (explaining "[t]he report is based on . . . funds provided . . . for Secretarial funding and [CSC]"); *id.* at 3-4 (noting IHS compiles the data shared in the report "in accordance with the CSC Policy"). Next, even assuming, arguendo, that the contracting officer should have anticipated that Plaintiff intended to present a claim for CSC based on expenditures of third-party income, the presented numbers, on their face, provided no hint that they included inappropriate third-party income.

Plaintiff also acknowledges that third-party claims are distinct from traditional shortfall claims in its own briefing. Plaintiff characterizes third-party claims as "unique under the law" and admits it understood IHS's position that third-party revenue claims are separate from traditional CSC shortfall claims alleging an insufficiency in funding from IHS's appropriation. Docket 24 at 21 and n.3 (admitting IHS opines that CSC "is limited to costs and functions supported by federally appropriated dollars."); Docket 24 at 22 (conceding it was cognizant of *Sage* and the government's position in *Sage* when presenting its claims for FYs 2011-2013). Plaintiff devotes pages of its

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incurs rather than an estimate. *See Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 185 (2012) (holding that the government's promise to pay certain CSC that the Tribes incurred is legally binding); *see also* 25 U.S.C. § 5325(a)(2) (defining CSC as "reasonable costs for activities that must be carried on" by a contractor to ensure contract compliance and prudent management).

[8] Publicly available at: https://www.ihs.gov/sites/newsroom/themes/responsive2017/display_objects/documents/RepCong_2012/2012%20Report%20to%20Congress%20and%20Data.pdf.

response brief to attacking the post-*Sage* case law, even while admitting most courts have held that expenditures of third-party income are not CSC. *See* Docket 24 at 23 (citing post-*Sage* decisions of *Swinomish* and *San Carolos Apache*, but attempting to draw a meaningless distinction to their facts). Given this knowledge, Plaintiff's failure to present its third-party claims cannot be excused.

The Court should ignore Plaintiff's misplaced criticism that Defendants cannot control the Tribe's form and manner of presentment to match its defenses. Plaintiff drafted its claims letters and attachments. Plaintiff formulated its calculation of estimated damages and chose what information it wanted the contracting officer to consider when deciding its claims. The contracting officer merely responded to the claims as submitted. The contracting officer could not "receive and pass judgment on" what was not presented. *Keweenaw Bay Indian Cmty.*, 291 F.R.D. at 128.

In sum, under Plaintiff's view of the CDA, any plaintiff could satisfy the CDA's presentment requirement, even if it has diverse and multiple theories of recovery, by presenting a claim letter that states that the government breached the contract by failing to pay the full amount of CSC and setting any dollar amount that could be updated at a later date. The CDA requires more than a vague assertion that "the government breached its contract" to present all claims and theories that could possibly exist related to the contract. *See Santa Fe Eng'rs, Inc. v. United States*, 818 F.2d 856, 859-60 (Fed. Cir. 1987) (dismissing "entirely new" claim for lack of presentment when contractor presented CDA claims for specific change orders on a construction job, but on appeal attempted to raise "all the problems, changes and directives" for the project). If the CDA's jurisdictional terms were satisfied by the contractor alleging a generic, placeholder breach, then presentment would be a meaningless process. It would require no calculation or analysis by the contractor itself. It also would require no examination by the contracting officer. This would defeat

the very purpose of the presentment process[9] to allow the agency, in the first instance, "to receive and pass judgment" on the claims and to resolve contractual disputes prior to litigation. *Tunica-Biloxi*, 577 F. Supp. 2d at 409; *see also Estes Express Lines v. United States*, 123 Fed. Cl. 538, 546 (Fed. Cl. 2015) ("[T]he jurisdictional prerequisites of the CDA are mandatory and are intended to encourage parties to resolve contract disputes outside of the judicial process when possible").

The Court should reject Plaintiff's argument that it preserved its theories in Counts II and III by stating it properly presented a direct CSC and indirect CSC claim for each Fiscal Year.

**B. Plaintiff's Mere Reference to "Expectancy Damages" with No Sum Certain Cannot Provide Adequate Notice of the Basis and Amount of Plaintiff's Third-Party Claims.**

Plaintiff claims its placeholder claim of $0 or $ - for expectancy[10] damages constitutes a properly presented sum certain. Notably, however, Plaintiff never explains how the contracting officer received adequate notice of both the basis and amount of a claim for which the dollar amount was $0 and/or left blank, nor does Plaintiff explain how this constitutes a "claim" sufficient to waive the United States' sovereign immunity under the strictly-construed CDA.

Plaintiff acknowledges that its expectancy damages claim included no sum certain (other than $0), but implies that it nevertheless met the presentment requirement through argument alone,

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[9] This was not the intent of Congress, which specifically added a presentment requirement where there previously had not been one. *See generally Fidelity Const. Co. v. United States*, 700 F.2d 1379, 1382-83 (Fed. Cir. 1983) (quoting legislative history in support of a more stringent requirement as pre-CDA claims were made with "little relation to facts and intended only as a starting point for bargaining"), *superseded by statute*.

[10] Plaintiff argued in its response brief that Defendants misrepresented Plaintiff's claims because Defendants omitted Plaintiff's FY 2011 expectancy damages claim. Misrepresentation is a heavy label, not to be lightly asserted. Defendants acknowledged that the September 27, 2017 claim letter (for FY 2011) included a fifth category of damages that was labeled "Expectancy and Other Damages," but that IHS did not treat it as a valid claim, as it listed "$0" as the amount alleged. Docket 16 at 5 n.4.

i.e., by its argument how a theoretical set of expectancy damages could be calculated (Docket 24 at 10; Docket 17-1). Even were this computation argument valid, which it is not, the explanation only applies to Plaintiff's FY 2012 and 2013 claims. Furthermore, there is no information as to percentages or other necessary information and amounts to complete Plaintiff's novel calculation. With a blank amount and no additional information provided, the contracting officer could not possibly have made a "reasonable determination of the recovery available at the time the claim [was] presented and/or decided by the contracting officer." *Tunica-Biloxi Tribe of La.*, 577 F. Supp. 2d at 410 (internal quotation and citation omitted).

Instead of Plaintiff's post-hoc view, a review of what Plaintiff actually submitted to the contracting officer is instructive. Plaintiff's FY 2011 claim letter included a table with various categories of damages, and four of those categories included a brief explanation of the type of damage alleged and a specified dollar amount. Adding the presented amounts of those four categories together equals $278,739.00, which was the total amount of Plaintiff's demand to IHS. *See* Docket 1-3 at 1-2. For the fifth and final category, Plaintiff listed the category as "Expectancy and Other Damages" but did not assign a valuation to the category.

For both FYs 2012 and 2013, the claim letter simply demanded $900,869.00 "arising out of the Indian Health Services' failure to pay Claimant's full contract support costs[.]" Docket 1-3 at 6. Plaintiff appears to understand that it had to provide *some* notice of the basis and amount of its claim, because it later provided the contracting officer with a spreadsheet to support the claims for FYs 2012 and 2013. Docket 17-1. Each FY spreadsheet identified seven different categories. *Id.* Only one of the seven categories on each spreadsheet – Claim 1, the shortfall claim – had information included in the formula and a sum certain. *Id.* The other six categories, which included Claim 7 – "Expectancy" – were left blank and had no sum certain. Thus, of the fourteen categories

contained in the two spreadsheets, only the two shortfall categories provided the basis and amount of the claim. It was reasonable and clear to the contracting officer that Plaintiff was only presenting these two shortfall claims because, added together, they totaled $900,869.00, the overall amount Plaintiff certified that IHS owed. Docket 1-3 at 6-9. Plaintiff cannot establish[11] how it presented a claim for expectancy damages given these undisputed facts.

Plaintiff asks for a pass on the strict presentment requirement because the CDA allows a plaintiff to adjust the amount of its claim. Docket 24 at 15, n.8 (citing *Pueblo of Zuni*, 467 F. Supp. 2d at 1109-10). A change from $0[12] to almost $350,000 (lost third-party revenue) and $835,000 (unpaid CSC on third-party revenue) is not an "adjustment." Rather, it reflects an entirely new claim where one had not existed. Although Plaintiff cites *Zuni*, it fails to address *Zuni*'s recognition

[11] In a footnote, Plaintiff cites *AAI Corp. v. United States*, 22 Cl. Ct. 541 (Cl. Ct. 1991), to conclude a claim of $0 is properly presented and can simply be updated and increased. *AAI Corp.*, however, is distinguishable. In *AAI Corp.*, the contractor was discussing complicated contract terms that may have included savings to which the contractor was entitled and there was a specific reason that claim was originally presented as zero. *See id.* at 543 ("The original complaint reflects a belief that the sum of instant contract savings and VECP implementation costs approximates zero, leaving no instant contract savings or negative instant contract savings."). Here, Plaintiff has not carried its burden or explained why it merely included a placeholder category for expectancy damages without any further support or clarification to the contracting officer. Furthermore, in *AAI Corp*, the Court concluded that that claim involved the same set of operative facts and the same legal theory. In this instance, expectancy damages involve different facts and a completely distinct legal theory. *See Keweenaw*, 291 F.R.D. at 128; *SMS Data Prods*., 19 Cl. Ct. at 615; *see also Ketchikan Indian Cmty. v. Dep't of Health & Human Servs*., CBCA, 13-1 BCA ¶ 35, 436, 2013 WL 11065992 (dismissing the expectancy damages claim from the litigation because "[t]he operative facts and quantification that pertained to the lost third-party expectancy damages portion of this case are completely distinct from the facts giving rise to entitlement to additional CSCs.").

[12] Under the Federal Tort Claims Act lens of a "sum certain," at least one court has found that leaving the sum certain line blank, as Plaintiff did here, was not a proper claim. *Low v. Donahoe*, 2015 WL 1471110, at *4 (E.D. Wash. March 31, 2015) (finding while a plaintiff may amend his FTCA administrative claim, plaintiff failed to "validly present" a claim in the first place when leaving the damages section blank or unknown).

that any "excess amount sought . . . must spring from the same certified claim" and must be "based on the same set of operative facts. *Zuni*, 467 F. Supp. 2d at 1110.

Like in *Zuni*, and as discussed *supra*, Plaintiff's third-party claims are not simply enlarged shortfall claims for each fiscal year, but rather rest on a different set of operative facts. *See* Docket 16 at 10-12 (describing different facts necessary to resolve direct or indirect CSC claims versus third-party revenue claims); *see also Zuni*, 467 F. Supp. 2d at 1110 (finding that although "the later claims are based upon some of the same contracts as those presented," there "is insufficient similarity in the set of operative facts upon which the later claims are based").

The Court should strictly enforce the CDA "to force contractors to use specificity" in their claims and provide "adequate notice of the basis and amount of a claim[.]" *See AAB Joint Venture v. United States*, 74 Fed. Cl. 367 (2005) ("The purpose of the certification requirement is to force contractors to use specificity in the claim that they submit to the contracting officer so that the contracting officer can give the claim full consideration before it goes to court.") (citations omitted); *M. Maropakis*, 609 F.3d at 1328. Simply put, the Court does not have jurisdiction over Counts II and III because Plaintiff never presented them to the contracting officer.

## II. Plaintiff Failed to Present Count VI: Breach of Statutory Right and Failed to State a Claim.

In response to Defendants' Motion to Dismiss, Plaintiff only creates more confusion as to Count VI – Breach of Statutory Right. Plaintiff admits Count VI "reiterates the violation of the contract" for Plaintiff's other claims. And yet, Plaintiff asserts a distinct set of damages in its complaint ($376,235.00) that is untethered to any presented claim or to any other count in the complaint. Thus, Plaintiff fails to carry its burden of either establishing this claim was presented or that it is not merely duplicative of a presented claim.

**III. The Indian Canon of Construction Does Not Change the Outcome of this Motion.**

Finally, a word is warranted on the Indian canon of statutory construction, on which Plaintiff frequently relies. *See, e.g.*, Docket 24 at 9, 19, 23-24. Under this canon, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (internal citations omitted). This canon applies in ISDEAA cases. *Seminole Tribe of Fla. v. Azar*, 376 F. Supp. 3d 100, 108 (D.D.C. 2019) ("If there were any doubt that the canon applies with full force in the context of ISDEAA cases, the Act itself puts the doubt to rest: The Act's model contract language expressly incorporates the canon—stating that every self-determination contract provision 'shall be liberally construed to the benefit of the [tribal] Contractor.' " (quoting 25 U.S.C. § 5329(a)(2))).

But even though the canon would apply to the merits of the litigation, it would not alter the outcome. "For one thing, canons are not mandatory rules. They are guides that need not be conclusive." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (internal quotation marks and citation omitted). More importantly, "[t]he canon of construction regarding the resolution of ambiguities in favor of Indians . . . does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) (footnote omitted).

Plaintiff's argument that the canon should apply because of ambiguity in CSC *caselaw* regarding third-party claims should be rejected (Docket 24 at 24). *See Montana*, 471 U.S. at 766 (finding ambiguous provisions of "*statutes* are to be construed liberally in favor of the Indians") (emphasis added); *see also supra* footnote 2 (describing the majority viewpoint on third-party revenues and CSCs post-*Sage*). Further, courts have found that the canon did not apply when determining that third-party revenues are not CSC because the ISDEAA is clear and unambiguous. *See Swinomish*, 406 F. Supp. 3d at 32 ("And because [25 U.S.C. § 5325(a)] is clear, the Indian

canon of construction does not bear on the outcome.") (citation omitted); *see also San Carlos Apache Tribe*, 482 F. Supp. 3d at 940–41 (finding the canon is a "tiebreaker" and "neither 25 U.S.C. § 5325 nor § 5326 is fairly capable of two interpretations and therefore ambiguous. Because there is accordingly no tie to break, that canon is of no consequence."). In any event, the canon is inappropriate at this stage of litigation where presentment is a jurisdictional issue and viewed strictly in favor of the federal government.

## CONCLUSION

For the reasons set forth above and in Defendants' Motion to Dismiss, the Court should dismiss Counts II, III, and VI of the Complaint for lack of subject matter jurisdiction.

Dated: July 20, 2021.

Respectfully Submitted,

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