**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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| COMMON GROUND HEALTHCARE COOPERATIVE,<br><br>Plaintiff,<br>on behalf of itself and all others similarly situated,<br><br>vs.<br><br>THE UNITED STATES OF AMERICA,<br><br>Defendant. | No. 1:17-cv-00877-MMS<br>(Judge Sweeney) |

**PLAINTIFF'S UNOPPOSED MOTION TO EXTEND THE 2019 COST-SHARING REDUCTION CLASS OPT-IN DEADLINE**

On May 29, 2020, the Court certified the following 2019 cost-sharing reduction class:

> All persons or entities offering Qualified Health Plans under the Patient Protection and Affordable Care Act in the 2019 benefit year, and who made cost-sharing reductions for eligible insureds pursuant to Section 1402 of the Patient Protection and Affordable Care Act, but did not receive a 'timely and periodic' payment from the Government of an amount 'equal to the value of the reductions' provided to its insureds. Excluded from the Class is the Defendant and its members, agencies, divisions, departments, and employees.

Dkt. 90. Subsequently, on August 14, 2020, the Federal Circuit issued its ruling *Community Health Choice, Inc. v. United States*, addressing parallel cost-sharing reduction claims brought by individual litigants. In *Community Health Choice*, the Federal Circuit ruled that QHP issuers are entitled to recover unpaid cost-sharing reduction totals. 970 F.3d 1364, 1367 (Fed. Cir. 2020). The court further ruled, however, that the amount plans are owed may be reduced to the extent that the plans received additional premium tax credits from the government after raising premiums due to the government's failure to make CSR payments. *Id.* at 1379-80. Community Health Choice and its co-appellee, Maine Community Health Options, have requested *en banc* rehearing of the panel's decision. *See Community Health Choice, Inc. v. United States*, Case No.

2019-1633, Dkt. 78 (Fed. Cir.); *Maine Community Health Options v. United States*, Case No. 2019-2102, Dkt. 50 (Fed. Cir.).

On September 30, 2020, the Federal Circuit entered judgment consistent with the panel's ruling in *Community Health Choice* in the government's appeal of the judgment in favor of the 2017/2018 CSR class in this case. *See Common Ground Healthcare Cooperative v. United States*, Case No. 2020-1286, Dkt. 14 (Fed. Cir.). Plaintiff intends to file a petition for *en banc* rehearing this week. Plaintiff anticipates that regardless of the outcome of the *en banc* proceedings, there will likely be a petition (or petitions) for certiorari asking the Supreme Court to resolve the question of the government's cost-sharing reduction liability and the appropriate damages measure.

Currently, the period for QHP issuers to opt into the 2019 CSR class is set to expire on October 5, 2020. Dkt. 102. Plaintiff respectfully requests that, pursuant to the Court's RCFC 23(d) power to issue orders governing procedural matters in this class action, the Court extend the opt-in period for the 2019 CSR class until after the cost-sharing reduction appeals currently before the Federal Circuit are finally resolved. Doing so will enable potential class members to adequately assess their eligibility for membership in the class, and will yield efficiencies for the Court and the parties. Plaintiff's counsel has conferred with the government, which indicated that it does not oppose this request.

Extending the opt-in period until there is a final resolution on the appropriate measure of CSR damages will allow potential class members to properly assess whether they are eligible to join the class prior to having to make an opt-in decision. As is, there is substantial uncertainty about the appropriate measure of damages in cost-sharing reduction cases: the Federal Circuit ruled that damages may be reduced to the extent a QHP issuer mitigated their damages by

receiving excess premium tax credits due to the government's failure to make CSR payments, while the QHP issuers on appeal (and Plaintiff) maintain that any reduction of CSR damages for mitigation is unsupported by the law. This issue is not fully resolved, as petitions for *en banc* rehearing are currently pending (and Common Ground's will soon be pending), and petitions for certiorari are certain to follow. As is, a QHP issuer who may be eligible to join the class if the issuers' view of damages ultimately prevails may be ineligible to join the class if the Federal Circuit's ruling becomes the final word. Consequently, closing the opt-in period before there is a final resolution of the damages issue prevents QHP issuers from making an informed assessment of whether they are indeed eligible to recover and thereby eligible join the class.

Granting this motion would yield efficiencies for the Court and the parties. In the scenario where the Federal Circuit's ruling becomes final, allowing QHP issuers to make their opt-in decisions with the benefit of a definitive ruling on damages would potentially prevent ultimately ineligible QHP issuers from opting in, and thereby save the Court and the parties from the attendant procedural headaches. And in the scenario where the Federal Circuit's ruling is reversed, and QHP issuers are entitled to full CSR recoveries, keeping open the opt-in period will stave off either or both of (1) a series of motions to add class members who previously believed they were ineligible to recover; or (2) a series of individual lawsuits brought by QHP issuers who previously thought they were ineligible to join the class. Thus, regardless of the final resolution of the damages issue, keeping the opt-in period open ensures a more streamlined process for administering this case.

Finally, there will be no harm or delay brought about by granting this motion. The merits of the 2019 CSR claim are stayed, and will likely remain stayed until the pending CSR appeals

are finally resolved. *See* Dkt. 90. Extending the opt-in period until after the appeals' final resolution thus will not impede the progress of this case.

For the foregoing reasons, the Court should grant Plaintiff's unopposed motion to extend the opt-in deadline for the 2019 CSR class until after the pending CSR appeals become final.

Dated: October 1, 2020

Respectfully submitted,

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