IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MAINE COMMUNITY HEALTH OPTIONS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 17-2057C
	)	Chief Judge Sweeney
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S PRO FORMA OPPOSITION TO
PLAINTIFF'S PRO FORMA MOTION FOR SUMMARY JUDGMENT

Pursuant to the Court's Orders dated March 7, 2019 and April 4, 2019 (*see* ECF Nos. 28 and 30), defendant, the United States, respectfully submits this pro forma opposition to the pro forma motion for summary judgment filed by plaintiff, Maine Community Health Options (Maine). *See generally* ECF No. 31 (Pl's Mot.). On February 15, 2019, plaintiff filed a motion for leave to file an amended complaint to include a claim for 2018 cost-sharing reduction (CSR) costs. ECF No. 21. We did not oppose the motion, but filed a response indicating that because plaintiff had not made a claim for 2018 CSR costs, the Court's Opinion and Order did not address this claim. ECF No. 26. As a result, we requested that to the extent the Court intended to enter judgment in plaintiff's favor on its 2018 claim, the Court expressly set forth its reasons for doing so. *Id*. at 3. In response, the Court ordered plaintiff to file a motion for summary judgment that included its claim for 2018 CSR costs, directed us to file a response to that motion, and further indicated that it would then issue a decision regarding plaintiff's 2018 claim and enter judgment in plaintiff's favor on both its 2017 and 2018 claims. ECF No. 28 at 2-3. The Court noted that the parties could elect to submit pro forma filings. *Id*. We respond as follows.

As we demonstrated in our September 7, 2018 cross-motion to dismiss and opposition to plaintiff's motion for summary judgment, plaintiff's statutory claim must fail because Congress

did not intend to fund CSR payments or authorize a damages remedy for the Government's failure to make these payments. *See* ECF No. 13 (Def. Mem.) at 14-22. Further, plaintiff's implied-in-fact contract claim also fails because Section 1402 does not create a contract between plaintiff and the Government. *See id*. at 22-26. We adopt all arguments we previously advanced in our earlier briefs as it relates to plaintiff's claim for 2017 CSR payments. *See generally id*; *see also* ECF No. 15 (Def. Reply).

We also adopt all arguments that we previously advanced in this case—as well as the arguments we made in *Common Ground Healthcare Coop. v. United States*, No. 17-877, and *Community Health Choice, Inc. v. United States*, No. 18-5—regarding why plaintiff's ability to raise premiums to recover CSR costs through Government-paid premium tax credits should preclude a claim for 2018 CSR costs.[1] Notably, Congress structured the ACA in a manner that allows issuers to account for the absence of CSR payments by increasing their premiums. Increased premiums, in turn, increase the amounts that issuers receive as advance payments of premium tax credits. *See* 26 U.S.C. § 36B(b). Given issuers' ability to offset CSR expenses by raising premiums, it is particularly implausible to conclude that Congress also intended to grant issuers a damages remedy.

[1] *See* Def. Mem. at 20; Def. Reply at 8-9; *see also Common Ground*, No. 17-877, ECF Nos. 39 and 41 (Government's dispositive briefs); *Community Health Choice*, No. 18-5, ECF Nos. 17 and 23 (same); *see also* ECF No. 26 (Government's response to plaintiff's motion for leave to amend) ("The Government also asks that all arguments that it made in [*Common Ground* and *Community Health Choice*]—whether written or oral—as to why plaintiff's ability to raise premiums to recover CSR costs through Government-paid premium tax credits should preclude a claim for 2018 CSR costs, be deemed part of the record in this case."); ECF No. 27 (Joint Status Report) ("Defendant also requested that all arguments it made in those two cases, as to why plaintiff's ability to raise premiums to recover CSR costs through premium tax credits should preclude a claim for 2018 CSR costs, be deemed part of the record in this case").

Plaintiff's argument rests on the untenable premise that Congress, in declining to permanently appropriate funds for CSR payments in the ACA, intended that in the event of an absence of annual appropriations, issuers would be allowed to collect full payments via damages, while also potentially recouping CSR costs through higher premiums and premium tax credits. Indeed, Congress had no reason to provide issuers a damages remedy because issuers have the ability to raise premiums if the Government does not reimburse their cost-sharing reduction expenses. That the ACA was enacted against the backdrop of state insurance regulations that required (and still require) issuers to set premiums high enough to cover their costs and ensure solvency further shows that Congress did not contemplate a damages remedy. *See, e.g.*, *ASPE Issue Brief: Potential Fiscal Consequences of Not Providing CSR Reimbursements* at 3 n.3 (Dec. 1, 2015), *available at* https://go.usa.gov/xEPH8.

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