

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

_____	)	
EMBLEMHEALTH, INC.	)	
HEALTH INSURANCE PLAN OF	)	
GREATER NEW YORK, INC. ET AL,	)	
	)	Case No. 19-1164
Plaintiff,	)	
	)	Judge Campbell-Smith
v.	)	
	)	
THE UNITED STATES,	)	
	)	
Defendant.	)	
_____	)	

**JOINT MOTION TO STAY**

Pursuant to Rule 7 of the United States Court of Federal Claims, plaintiff, EmblemHealth, Inc. and defendant, the United States, respectfully submit this joint motion to stay proceedings in this case pending a decision of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Sanford Health Plan v. United States*, 139 Fed. Cl. 701 (2018), *appeal docketed*, No. 19-1290 (2018) (*Sanford Health Plan*); *Montana Health Co-Op v. United States*, 139 Fed. Cl. 213 (2018), *appeal docketed*, No. 19-1302 (2018) (*Montana Health Co-Op*); and *Community Health Choice, Inc. v. United States*, 141 Fed. Cl. 744 (2019), *appeal docketed*, No. 19-1633 (2019) (*Community Health Choice*).

**BACKGROUND**

The Patient Protection and Affordable Care Act (ACA) established two programs in the same subpart to lower the cost of health coverage offered through the Exchanges. Section 1401 of the ACA authorizes a premium tax credit for eligible taxpayers and funded the program by amending a preexisting permanent appropriation for tax credits. Section 1402 of the ACA requires insurance issuers to reduce cost sharing (such as deductibles and co-payments) for

eligible insureds, and further provides that the Secretary of Health & Human Services (HHS) shall make payments to issuers equal to the value of the cost-sharing reductions issuers provide on behalf of their eligible insureds. In contrast to Section 1401, however, Section 1402 does not appropriate funds for cost-sharing reduction (CSR) payments to issuers.

EmblemHealth seeks damages for HHS's failure to make CSR payments. In particular, on August 12, 2019, EmblemHealth filed the complaint in this case, alleging that under Section 1402, it is entitled to recover unpaid CSR payments for the 2018 plan year. *See, generally*, ECF No. 1 (Complaint) at 1, 15-16. In the alternative, plaintiff alleged that it has entered into a binding implied-in-fact contract that the Government allegedly breached when it declined to make CSR payments, and further alleged that HHS's failure to make CSR payments is a taking under the Fifth Amendment to the United States Constitution. *Id.* at 16-18.

Other issuers have filed similar Tucker Act suits that seek damages for HHS's failure to make CSR payments.<sup>1</sup> In regards to the other CSR cases now pending in the Court of Federal Claims, on September 4, 2018, Judge Kaplan denied the Government's motion to dismiss and granted Montana Health's motion for partial summary judgment on liability, holding that Section 1402 created a mandatory obligation on the Government's part to make CSR payments

---

<sup>1</sup> *See Common Ground Healthcare Coop. v. United States*, No. 17-877C (Sweeney, C.J.) (class action); *Local Initiative Health Auth. v. United States*, No. 17-1542C (Wheeler, J.); *Community Health Choice, Inc. v. United States*, No. 18-5C (Sweeney, C.J.); *Blue Cross & Blue Shield of Vermont v. United States*, No. 18-373C (Horn, J.); *see also Maine Cmty. Health Options v. United States*, No. 17-2057C (Sweeney, C.J.) (damages for 2017 only); *Montana Health Co-op v. United States*, No. 18-143C (Kaplan, J.) (same); *Sanford Health Plan v. United States*, No. 18-136C (Kaplan, J.) (same); *Molina Healthcare of Cal. v. United States*, No. 18-333C (Wheeler, J.) (same); *Harvard Pilgrim Health Care, Inc. v. United States*, No. 18-1820C (Smith, J.) (same); *Guidewell Mutual Holding Corp. v. United States*, No. 18-1791C (Griggsby, J.) (damages for 2015, 2016 and 2017); *Montana Health Co-Op v. United States*, No. 19-568C (Judge Kaplan) (damages for 2018 only); *Sanford Health Plan v. United States*, No. 19-569C (Judge Kaplan) (same).

notwithstanding Congress's funding choices. *See Montana Health Co-Op*, 139 Fed. Cl. 213, 221 (2018), *appeal docketed*, No. 19-1302 (Fed. Cir. Dec. 12, 2018). On October 11, 2018, Judge Kaplan similarly granted Sanford Health Plan's motion for summary judgment on liability. *See Sanford Health Plan v. United States*, 139 Fed. Cl. 701 (2018), *appeal docketed*, No. 19-1290 (Fed. Cir. Dec. 11, 2018). The Government has appealed both decisions, which are now consolidated before the Federal Circuit. In addition, on February 15, 2019, Chief Judge Sweeney ruled in favor of plaintiff on its statutory claim in *Community Health Choice, Inc. v. United States*, 2019 U.S. Claims LEXIS 81, *appeal docketed*, No. 19-1633 (Fed. Cir. Mar. 8, 2019). The Government has appealed the *Community Health Choice* decision as well.<sup>2</sup>

The CSR cases on appeal at the Federal Circuit are fully briefed, and on July 30, 2019, the Federal Circuit ordered that the appeals be placed on the next available oral argument calendar. Fed. Cir. case no. 19-2102 at ECF No. 13.

This case should be stayed because the cases on appeal at the Federal Circuit will likely resolve many, if not all, of the substantial legal issues underlying this case—namely, whether insurers are entitled to recover CSR payments that Congress declined to fund directly; whether they also possess a private contractual right to CSR payments; and whether any 2018 CSR payments must be offset by monies paid by the Government through insurance premium increases. Given that this case presents substantially identical legal issues, it would be

---

<sup>2</sup> That same day, Chief Judge Sweeney also ruled in favor of plaintiffs on their statutory claims in the following CSR cases: (1) *Common Ground Healthcare Coop. v. United States*, No. 17-877C, ECF No. 48; and (2) *Maine Cmty. Health Options v. United States*, No. 17-2057C, ECF No. 20. Further, on February 14, 2019, Judge Wheeler granted summary judgment in favor of Local Initiative Health Authority on its statutory and implied-in-fact contract claims. *See Local Initiative Health Auth. v. United States*, No. 17-1542C, ECF No. 32. The Court has not yet issued judgment in *Common Ground Healthcare Cooperative or Local Initiative Health Authority*; as a result, those decisions are not yet final and appealable. On June 11, 2019, Chief Judge Sweeney issued judgment in *Maine Community Health Options*. *See* No. 17-2057C, ECF No. 35.

appropriate for the Court to exercise its discretion to stay proceedings in this matter pending a decision from the Federal Circuit. A stay will conserve both judicial and party resources. *See UnionBanCal Corp. v. United States*, 93 Fed. Cl. 166, 167 (2010) (“The orderly course of justice and judicial economy is served when granting a stay simplifies the ‘issues, proof, and questions of law which could be expected to result from a stay.’”) (quoting *CMAX, Inc. v. United States*, 300 F.2d 265, 268 (9th Cir. 1962)).

Given the overlapping issues between the CSR cases in this Court and the CSR cases pending in the Federal Circuit, several other judges in this Court have stayed the CSR matters before them. *See Harvard Pilgrim v. United States*, Case No. 18-1820 (Judge Smith), ECF No. 10 (February 28, 2019 order staying case); *Health Alliance Medical Plans, Inc. v. United States*, Case No. 18-334C (Judge Campbell-Smith), ECF No. 22 (March 28, 2019 order staying case); *Guidewell Mutual Holding Corp. et al. v. United States*, Case No. 18-1791, ECF No. 21; *Molina Healthcare of California, Inc. et al. v. United States*, Case No. 18-333, ECF No. 9; *Montana Health Co-Op v. United States*, Case No. 19-568, ECF No. 9; *Noridian Health Insurance Co. dba Blue Cross Blue Shield of North Dakota*, Case No. 18-1983, ECF No. 33; *Sanford Health Plan v. United States*, Case No. 19-569, ECF No. 9.

We thus respectfully request that the Court stay this case until the CSR appeals at the Federal Circuit are finally resolved, and propose that the parties submit a status report within 30 days of final disposition of those case, proposing next steps in this litigation.

Respectfully submitted,

s/ Edward J. Meehan  
Edward J. Meehan, Esq.  
Tamara S. Killion, Esq.  
Ryan C. Temme, Esq.  
1701 Pennsylvania Ave., N.W.  
Washington, DC 20006  
P: (202) 857-0620  
F: (202) 659-4503  
E: emeehan@groom.com  
E: tkillion@groom.com

JOSEPH H. HUNT  
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.  
Director

s/ Claudia Burke  
CLAUDIA BURKE  
Assistant Director

s/ Albert S. Iarossi  
ALBERT S. IAROSSI  
Trial Attorney  
Commercial Litigation Branch  
Civil Division  
U.S. Department of Justice  
P.O. Box 480  
Ben Franklin Station  
Washington, D.C. 20044  
Telephone: (202) 616-3755  
Facsimile: (202) 514-8624  
Email: Albert.S.Iarossi@usdoj.gov

OF COUNSEL:

CHRISTOPHER J. CARNEY  
Senior Litigation Counsel

ERIC E. LAUFGRABEN  
Trial Attorney  
Civil Division  
U.S. Department of Justice

Counsel for Defendant

October 9, 2019