

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

COMMON GROUND HEALTHCARE
COOPERATIVE, on behalf of itself and
all others similarly situated,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

No. 2020-1286

**NOTICE OF MOTION AND MOTION TO SUPPLEMENT APPELLEE'S
OPPOSITION TO MOTION TO HOLD APPEAL IN ABEYANCE**

Plaintiff-Appellee Common Ground Healthcare Cooperative, on behalf of itself and the certified CSR Class in this action, respectfully requests to supplement its opposition to Defendant-Appellant's motion to hold this appeal in abeyance pending the disposition of the appeals in *Sanford Health Plan v. United States*, No. 19-1290; *Montana Health CO-OP v. United States*, No. 19-1302; *Community Health Choice v. United States*, No. 19-1633; and *Maine Community Health Options v. United States*, No. 19-2102 (collectively, the Pending CSR Appeals) (D.E. 8). The need to supplement stems from certain facts and arguments that came to light for the first time yesterday, January 9, 2020, during oral argument on the Pending CSR Appeals. Those facts and arguments, which only arose after Plaintiff-Appellee filed its opposition, bolster why this appeal should not be held in abeyance.

1. First, the oral argument in the Pending CSR Appeals began with a lengthy discussion regarding whether the government’s damages reduction arguments—which, Defendant-Appellant has claimed, apply equally across all cost-sharing reduction (CSR) plaintiffs—were properly preserved for appeal. Although Plaintiff-Appellee takes no position on that issue for the Pending CSR Appeals, it notes that the damages reduction arguments have been preserved here. In the trial court, the government explicitly opposed summary judgment on the grounds that, *inter alia*, the CSR Class has no damages remedy because Congress (supposedly) intended to create a statutory structure whereby insurers can offset any unreimbursed CSR expenses by raising premiums. Therefore, the government argued, the CSR Class is seeking a “double payment.” Although Plaintiff-Appellee strongly disagrees with this view—and the trial court agreed it was erroneous and without support—the issue is prime for this appeal, unlike in the Pending CSR Appeals. That fact alone demonstrates why this appeal should not be put in abeyance.

2. Second, during oral argument, the government’s lawyer characterized Plaintiff-Appellee’s factual arguments multiple times, based on an *amicus* brief Plaintiff-Appellee submitted in support of the insurers in the Pending CSR Appeals. Plaintiff-Appellee submitted that *amicus* brief before this appeal had even been noticed, and then only on discrete issues, as is proper for an *amicus*

brief. Because Plaintiff-Appellee’s counsel was not permitted to speak at oral argument on the Pending CSR Appeals, Plaintiff-Appellee was unable to respond to what it believes are important mischaracterizations from the government; ones that have potentially serious implications for this appeal. Plaintiff-Appellee therefore needs a full opportunity to present its arguments to this Court, particularly since the government noted to the Pending CSR Appeal panel that the statements it was characterizing were from “over a hundred insurers.”

3. Plaintiff-Appellee appreciates and respects the substantial work the parties have conducted in the Pending CSR Appeals. However, as the government itself noted on the record yesterday, *this* class action is by far the largest of the currently-pending CSR appeals, yet the plaintiffs will not receive an opportunity to make their arguments on appeal if this case is held in abeyance. Given the efficiencies to be gained from hearing an appeal that actually addresses what appeared to be the panel’s key questions yesterday—*i.e.*, damages reduction—and that the government itself has put the class’s appeal arguments at issue, abeyance in this instance would be prejudicial. Plaintiff-Appellee therefore reiterates its request that the Court deny Defendant-Appellant’s motion.

4. Counsel for Defendant-Appellant indicated it does not oppose this motion to supplement.

Dated: January 10, 2020

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 572 words.

/s/ Stephen A. Swedlow
Stephen A. Swedlow

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Common Ground Healthcare Cooperative v. United States

Case No. 2020-1286

CERTIFICATE OF INTEREST

Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Common Ground Healthcare Cooperative	N/A	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

N/A

FORM 9. Certificate of Interest

Form 9
Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

N/A

1/10/2020

Date

/s/ Stephen A. Swedlow

Signature of counsel

Stephen A. Swedlow

Printed name of counsel

Please Note: All questions must be answered

cc: _____

Reset Fields

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2020, I electronically filed the foregoing opposition with the Clerk of the Court by using the appellate EM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Stephen A. Swedlow
Stephen A. Swedlow