

**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

**UNOPPOSED<sup>1</sup> MOTION TO DESIGNATE THIS APPEAL AS A  
COMPANION CASE TO FULLY BRIEFED RELATED APPEALS**

For the following reasons, Plaintiff-Appellee Common Ground Healthcare Cooperative (“Common Ground”), on behalf of itself and the certified CSR Class in this action, respectfully requests that this appeal be designated as a companion case to related appeals in which briefing on the merits is complete: *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). To avoid delay, Common Ground further requests that the

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<sup>1</sup> The government does not oppose this motion. Plaintiffs-Appellees in the Pending CSR Appeals oppose Common Ground’s request to have this appeal treated as a companion case and for Common Ground to participate in the supplemental briefing. However, because the Plaintiffs-Appellees in the Pending CSR Appeals are not parties to this appeal, Common Ground has filed this motion as unopposed.

parties be permitted to rest on the merits briefs already filed in the Pending CSR Appeals. However, Common Ground respectfully requests to participate in the supplemental briefing ordered by the Court on January 9, 2020; specifically, Common Ground requests the opportunity to submit its own supplemental brief on the limited issues the Court requested in that Order. *See Community Health Choice, Inc. v. United States*, Dkt. 2019-1633 (D.E. 44). Because Common Ground and the CSR Class did not allege a contract claim, Common Ground's supplemental brief will address the statutory theory of damages only. The government does not oppose this motion.

1. The issues presented in this appeal overlap with the issues presented in the Pending CSR Appeals. Therefore, Common Ground is willing to rest on the merits briefs already filed in the related appeals. However, Common Ground respectfully requests permission to participate in the pending supplemental briefing ordered by the Court on January 9, 2020. As explained below, Common Ground's participation in that supplemental briefing would be especially valuable here.

2. First, the oral argument in the Pending CSR Appeals began with a lengthy discussion regarding whether the government's damages reduction arguments—which, the government has claimed, apply equally across all cost-sharing reduction (CSR) plaintiffs—were properly preserved for appeal. Although Common Ground takes no position on that issue for the Pending CSR Appeals, it

notes that the damages reduction arguments have been preserved in this action. 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 Common Ground strongly disagrees with this view—and the trial court agreed it was erroneous and without support—the issue is ripe for appeal. That fact alone demonstrates why this appeal should be designated as a companion case to the Pending CSR Appeals and Common Ground should be permitted to submit a supplemental brief.

3. Second, Common Ground’s complaint was the first case in the nation that alleged that, pursuant to the Tucker Act, the government owes qualified health plan (QHP) issuers back payments under the cost-sharing reduction (CSR) program established by section 1402 of the Patient Protection and Affordable Care Act (ACA). In addition to being the first case filed on that issue, it is also the largest CSR-related Tucker Act case in the nation, both in terms of the number of plaintiffs (101) and the amounts at issue. Because this is an opt-*in* class action, class members have affirmatively chosen to participate in this case via undersigned class counsel rather than just wait and see how other cases, such as the Pending CSR Appeals, turn out for similarly-situated plaintiffs. If the Court refuses to

allow Common Ground to participate, it will force the largest set of plaintiffs to sit by the wayside on issues of national importance.

4. Because Common Ground is prepared to submit its supplemental brief on the schedule already ordered by the Court on January 9, there will be no delay in the briefing or resolution of the Pending CSR Appeals. Thus, granting Common Ground's motion is the most efficient course.

5. The government consents to the relief requested in this motion on the understanding that the parties will rest on the merits briefs already filed in the *Sanford/Montana* appeal and the *Community* appeal. The government also consents to Common Ground submitting a supplemental brief regarding the question presented in the Court's January 9, 2020 Order in the Pending CSR Appeals, and on the schedule set forth in that Order. *See Community Health Choice, Inc. v. United States*, Dkt. 2019-1633 (D.E. 44). Because Common Ground and the CSR Class did not allege a contract claim, Common Ground's supplemental brief will address the statutory theory of damages only.

Dated: January 14, 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 823 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  |
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|   |   |   |

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

1/14/2020

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 14, 2020, I electronically filed the foregoing 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