

**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

**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 opposes 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). Although Plaintiff-Appellee agrees that the Pending CSR Appeals present at least some overlapping issues, there are strong reasons to permit this appeal to move forward now rather than later.

1. As an initial matter, contrary to Defendant-Appellant’s characterization, the Pending CSR Appeals are not the “lead” Tucker Act cases alleging that 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). The first case in the nation that made such allegations is this one. The Pending CSR Appeals have proceeded more quickly than this case, but that is because this is a class action, which, in addition to typical dispositive motion briefing, required: a separate motion for class certification; a months-long notice process to potential class members; a months-long opt-in process for class members; and, finally, the completion of the months-long reconciliation process for CSR payments for all class members before the Court could enter judgment under Fed. R. Civ. P. 54(b). The Pending CSR Appeals proceeded to appeal more quickly not because they are the “lead” cases, but because they represent fewer clients’ interests and had less procedural steps on the path to judgment.

2. This action represents the largest CSR-related Tucker Act case in the nation, both in terms of the number of plaintiffs (101) and the amounts at issue (approximately \$1.6 billion). 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 turn out for similarly-situated plaintiffs. If the Court holds this appeal in abeyance, it will force the largest set of plaintiffs to sit by the wayside while their interests may not be fully represented on appeal by other plaintiffs with more limited interests.

3. Although Defendant-Appellant claims this case “presents the same issue” as the Pending CSR Appeals, Defendant-Appellant does not submit to dismiss its appeal here if the Court finds for the plaintiffs in the Pending CSR Appeals. Without ascribing any ill motive to Defendant-Appellant, this suggests it may intend to raise additional arguments on this appeal that it did not in the Pending CSR Appeals. If it did so at a later date, that would draw out this appeal unnecessarily when the parties are ready and able to address all issues now. For that reason, proceeding on this appeal now is the most efficient course, because the government can stand on the reasoning submitted in the Pending CSR Appeals while raising any new arguments on this appeal (to the extent permitted by law) sooner than later and putting this appeal on course for the quickest possible resolution. Given the amount of plaintiffs and claims at issue here, which dwarf the claims in the Pending CSR Appeals, that is the most just and efficient result.

Dated: January 8, 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 562 words.

/s/ Stephen A. Swedlow
Stephen A. Swedlow

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2020, I electronically filed the foregoing opposition with the Clerk of the Court by using the appellate CM/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