IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BLUE CROSS & BLUE SHIELD OF VERMONT,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

No. 2021-1380

MOTION TO HOLD APPEAL IN ABEYANCE

For the following reasons, the government respectfully requests that the Court hold this appeal in abeyance pending the disposition of any petitions for a writ of certiorari filed in the related cases described below, with motions to govern further proceedings to be filed in this appeal within 14 days of the Supreme Court's disposition of such petitions.

1. In many pending cases, insurers seek damages equal to the value of "cost-sharing reduction" (CSR) payments that were authorized by the Patient Protection and Affordable Care Act (ACA) but not funded by Congress. Beginning with the 2018 year, most insurers raised premiums for silver plans sold on Exchanges to offset the absence of CSR payments—a practice known as "silver-loading." By operation of law under the ACA, silver-loading caused a significant increase in the premium tax

credits that the government pays to insurers, because the ACA ties the amount of premium tax credits to silver-plan premiums. Two States—Vermont and North Dakota—did not allow silver-loading until the 2019 year.

2. In September 2020, this Court issued decisions in *Sanford Health Plan v. United States*, No. 19-1290; *Montana Health Co-Op v. United States*, No. 19-1302; *Community Health Choice, Inc. v. United States*, No. 19-1633; and *Maine Community Health Options v. United States*, No. 19-2102 (collectively, the "Argued Cases"). In opinions issued the same day, the panel (Dyk, Bryson, Taranto) ruled that the ACA is fairly interpreted to mandate compensation for unfunded CSR payments, *Sanford Health Plan v. United States*, 969 F.3d 1370 (Fed. Cir. 2020), but that the trial court must reduce an insurer's damages by the amount of additional premium tax credits that the insurer received due to the termination of CSR payments, *see Community Health Choice, Inc. v. United States*, 970 F.3d 1364 (Fed. Cir. 2020).

3. The plaintiffs in *Community Health Choice* and *Maine Community Health Options* filed petitions for rehearing en banc, as did the plaintiff in another related case, *Common Ground Healthcare Cooperative v. United States*, No. 20-1286. The government opposed the petitions but, with leave of this Court, filed conditional cross-petitions for rehearing en banc that urged the Court to rehear the liability ruling if it determined to rehear the damages-mitigation ruling. This Court denied the petitions for rehearing en banc.

4. The time to file petitions for a writ of certiorari in the Argued Cases and *Common Ground* has not yet elapsed. Accordingly, the government respectfully requests that its appeal in this case be held in abeyance pending the Supreme Court's disposition of any petitions (including conditional cross-petitions) filed in the Argued Cases or *Common Ground Healthcare Cooperative v. United States*, No. 20-1286. This Court has granted a similar request to hold other CSR appeals in abeyance. *See Local Initiative Health Authority for Los Angeles County v. United States*, Nos. 20-1393 & 20-2254 (Fed. Cir. Dec. 17, 2020) (granting motion to continue abeyance).

5. Plaintiff's counsel has informed us that plaintiff opposes this abeyance motion because the claims in this case concern the period before silver-loading was allowed in Vermont and thus are not implicated by this Court's damages-mitigation ruling. However, the claims in this case would be implicated by Supreme Court review of this Court's liability ruling, which was explicitly intertwined with this Court's damages-mitigation ruling. See *Sanford*, 969 F.3d at 1383 (finding it unnecessary to consider the ACA's premium tax-credits in the liability analysis because "[d]amages law deals in a more targeted way with matters such as appropriate accounting for offsets and avoidance of double recoveries, as we conclude today in *Community Health Choice, Inc. v. United States*, No. 2019-1633, and *Maine Community Health Options v. United States*, No. 2019-2102."). Moreover, plaintiff explicitly reserved the right to bring claims for CSR payments not made in 2019 and 2020, when silver-loading occurred in Vermont. *See* Dkt. No. 35 at 2 ¶ 6.

6. Under these circumstances, abeyance is reasonable and appropriate. Indeed, the government recently filed an unopposed abeyance motion in a materially identical case brought by Blue Cross & Blue Shield of North Dakota, which, like the plaintiff here, was not permitted to engage in silver-loading until the 2019 year. *See Blue Cross & Blue Shield of North Dakota v. United States*, No. 21-1380 (Fed. Cir.). This Court has designated that appeal and this appeal as companion cases, *see* 12/16/20 Order, and abeyance is equally appropriate here.

Respectfully submitted,

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DECEMBER 2020

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 726 words.

/s/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2020, I electronically filed the foregoing motion 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/ Alisa B. Klein
Alisa B. Klein