

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

MDwise Marketplace, Inc.,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

No. 2021-1957

UNOPPOSED 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 petitions for a writ of certiorari that have been 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. Plaintiff has authorized us to state that this abeyance motion is unopposed.

1. In many pending cases, insurers seek damages equal to the value of unpaid "cost-sharing reduction" (CSR) payments. 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 the Argued Cases, the panel (Dyk, Bryson, Taranto) ruled that the Patient Protection and Affordable Care Act (ACA) is fairly interpreted to mandate compensation for unfunded CSR payments, 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) (incorporating the reasoning of *Sanford Health Plan v. United States*, 969 F.3d 1370 (Fed. Cir. 2020)).

2. 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 a conditional cross-petition for rehearing en banc that urged the Court to rehear the liability ruling if it determined to rehear the damages ruling. This Court denied the petitions for rehearing en banc.

3. The same insurers have filed petitions for a writ of certiorari, which are pending before the Supreme Court. See *Maine Community Health Options v. United States*, No. 20-1162 (S. Ct.); *Common Ground Healthcare Cooperative v. United States*, No. 20-1200 (S. Ct.). The government has opposed those petitions but also filed conditional cross-petitions that urge the Supreme Court to review the liability ruling if it determines to review the damages ruling. See *United States v. Maine Community Health Options*, No. 20-1432 (S. Ct.); *United States v. Common Ground Healthcare Cooperative*,

No. 20-1536 (S. Ct.). We respectfully ask that the Court hold this appeal in abeyance pending the Supreme Court's disposition of those petitions.

4. Plaintiff's counsel has authorized us to state that this abeyance motion is unopposed.

Respectfully submitted,

MARK B. STERN

s/ Alisa B. Klein

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MAY 2021

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 433 words.

/s/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2021, 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