IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH NET, INC.,	)	
	)	
Plaintiff,	)	
	)	No. 16-1722C
v.	)	
	)	Judge Ryan T. Holte
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

JOINT STATUS REPORT

Pursuant to this Court's July 11, 2018 Order (ECF No. 21) directing the parties to submit a joint status report within 15 days after the judgments in *Land of Lincoln Mutual Health Insurance Company v. United States*, No. 17-1224 and *Moda Health Plan, Inc. v. United States*, No. 17-1994 have become final and non-appealable, the parties hereby submit this status report on the Supreme Court of the United States' final and non-appealable decision in *Maine Community Health Options et al. v. United States*, No. 18-1023 (April 27, 2020). *Maine* was argued before the Supreme Court together with *Moda Health Plan, Inc. v. United States* and *Blue Cross and Blue Shield of North Carolina v. United States* (No. 18-1028); and *Land of Lincoln Mutual Health Insurance Co. v. United States* (No. 18-1038). Below are the parties' respective positions.

Plaintiff's Position

The Supreme Court in *Maine* rejected every argument the Government has raised. Specifically, the Court addressed three questions: (1) did Section 1342 of the Affordable Care Act (ACA) obligate the United States to make payments to insurers (like Plaintiff) as prescribed in that section?; (2) if Section 1342 created an obligation, did Congress' decision not to fund those obligations through appropriations negate them?; and (3) if an obligation was created and

not negated for lack of appropriations, does a right of action against the United States for money damages exist under the Tucker Act?

The Supreme Court answered all three questions in the affirmative, reversing the judgment of the Federal Circuit and remanding for further proceedings consistent with the decision. The Supreme Court's decision requires a judgment in favor of Plaintiff in this case, where Plaintiff seeks $435,192,908.28[1] in money damages for benefit years 2014, 2015, and 2016 to which Plaintiff is entitled under Section 1342 of the ACA. Indeed, the Government has long agreed that the ruling in *Maine* and the companion cases, *Moda* and *Land of Lincoln*, would be dispositive of the issues in this case. *See, e.g.*, Def.'s Mot. Stay at 6, *Sanford Health Plan v. United States*, No. 17-357C, ECF No. 6 ("This Court's ruling in *Maine* will likely resolve [Plaintiff]'s statutory claim"); *see also, e.g.*, Def.'s Mot. Stay at 7, ECF No. 13 ("Because the legal issues presented in this case mirror the issues raised in *Land of Lincoln* and *Moda*, which the Federal Circuit have made companion cases that will be heard and decided by the same panel, the further development of those cases on appeal will be instructive and likely dispositive."); Def.'s Mot. Stay at 6, *Health Alliance Medical Plans, Inc. v. United States*, No. 17-653C, ECF No. 10 ("Because the legal issues presented in this case mirror the issues raised in *Land of Lincoln* and *Moda*, which the Federal Circuit have made companion cases that will be heard and decided by the same panel, the further development of those cases on appeal will be instructive and likely dispositive."); Def.'s Mot. Stay at 6, *HealthNow New York, Inc. v. United States*, No. 17-01090C, ECF No. 6 ("Because the legal issues presented in this case mirror the

[1] In its initial Complaint, Plaintiff sought $408,545,107.55 for the Government's failure to make risk corridors payments for benefit years 2014 and 2015. Plaintiffs sought this Court's leave to file an Amended Complaint (ECF No. 24) to include damages related to unpaid risk corridors payments for benefit year 2016, as well as damages incurred by a related entity, Celtic Group, Inc. This Court has yet to rule on that motion.

issues raised before the Federal Circuit in *Land of Lincoln* and *Moda*, further development of those companion cases on appeal will be instructive and likely dispositive."); Def.'s Mot. Stay at 6, *Atkins v. United States*, No. 17-906C, ECF No. 8 ("Because the legal issues presented in this case mirror the issues raised before the Federal Circuit in *Land of Lincoln* and *Moda*, the further development of those companion cases on appeal will be instructive and likely dispositive.").

Further, the Government has never disputed the quantum claimed by Plaintiff, and therefore this case is ripe for a judgment. In fact, the Government has never disputed that the risk corridors payment amounts calculated and ***published by CMS*** are the amounts to which Plaintiff is entitled under Section 1342. *See, e.g.*, Pl.'s Mot. Summ. J. at 14 (Statement of Undisputed Material Facts ¶ 19), *Maine Community Health Options v. United States*, No. 16-967C, ECF No. 5. In this regard, Plaintiff is not aware of any "outstanding debts owed to HHS under other ACA programs," as the Government suggests might potentially be the case and which would ostensibly merit another 45 days of delay.

Neither the entitlement nor the quantum is in dispute in this case; the Court may enter a judgment in favor of Plaintiff without further proceeding or delay, and Plaintiff opposes the Government's request for a 45-day stay of this case.

For these reasons, Plaintiff respectfully moves for this Court to enter judgment in favor of Plaintiff in the amount of $435,192,908.28.

The United States' Position

On April 27, 2020, the Supreme Court issued its decision in *Maine Community Health Options v. United States*, No. 18-1023, 590 U.S. --- (2020). The Supreme Court held that the risk corridors statute, section 1342 of the Patient Protection and Affordable Care Act ("ACA"), "created an obligation neither contingent on nor limited by the availability of appropriations or

other funds." Slip Op. at 16. The Court also determined that the obligation was not affected by subsequently enacted legislation and held that the "petitioners may seek to collect payment through a damages action in the Court of Federal Claims." *Id*. at 30. Along with three other similar risk corridors cases, the Court reversed the judgments of the Federal Circuit and remanded the cases to that court for further proceedings consistent with the opinion.

The United States continues to review the Supreme Court's opinion. That process of review requires that we confer with various components within the Department of Justice and the Department of Health and Human Services in order to discern a path forward. We ask the Court to permit the United States additional time to consider how the Supreme Court's ruling impacts all of the cases in this Court in which a plaintiff seeks damages under section 1342, so that we may propose an efficient and appropriate process to reach a conclusion in this, and every other risk corridors case before the Court.

We also request additional time for review because risk corridors was a nationwide program involving every single health insurance issuer participating on an ACA Exchange during benefit years 2014, 2015, or 2016. Some of those issuers are represented in the more than 64 individual cases pending before this Court; others are represented in this Court through either of two class actions; and still other issuers have not commenced litigation. The United States believes it would be most appropriate and fair to resolve all issuers' potential entitlement under section 1342 in a similar manner. In order to do so, the United States must consider and address a number of issues before these cases proceed.

To start, we note that since the time that most complaints were filed, the Department of Health and Human Services ("HHS") has made additional pro rata distribution of risk corridors collections to many of the plaintiffs before this Court. HHS is now determining the precise

amount of risk corridors payments paid to and remaining for each health insurance issuer before this Court, as well as to any issuer with a potential risk corridors claim. Agency staff requires additional time to review the record of payments and charges and the history of distributions made to ensure they are complete and accurate. HHS must finish this review before the United States will be in a position to pursue a potential consensual resolution of an issuer's case, and that review is most efficiently done on a program-wide, rather than piecemeal (or ad hoc) basis.

To cite another consideration, some of the plaintiffs may have outstanding debts owed to HHS under other ACA programs. In order to determine which issuers have such debts pending, HHS must review its records across ACA programs and distill that information for consideration by government officials with authority to evaluate the issues. Those parties owing debts and the United States should then have an opportunity to confer to seek to resolve those issues, and, as necessary, to prepare and propose a procedure to dispose of outstanding matters. Finally, because the United States has not yet answered any of the plaintiffs' complaints, the United States needs to consider whether it would be appropriate to raise defenses not previously considered and whether to answer and counterclaim.

For all of these reasons, the United States requests that the Court allow the government 45 days within which to consider its position in these cases and to propose, jointly with the plaintiff to the extent possible, a course to govern proceedings moving forward. Within that time, the Court could allow plaintiff the opportunity to refine or update its claim for damages whether through formal amendment of its complaint or through less formal means. We also request that, in the interest of efficiency, the Court defer the government's obligation to respond to a complaint or an amended complaint upon consideration of the joint status report we propose be due at the end of the requested 45-day period.

Dated: May 12, 2020

Respectfully submitted,

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