

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMON GROUND HEALTHCARE
COOPERATIVE,

Plaintiff,
on behalf of itself and all others
similarly situated,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Case No. 17-877C

Judge Sweeney

**JOINT MOTION TO DIVIDE CLASS INTO SUBCLASSES AND STIPULATION FOR
ENTRY OF PARTIAL JUDGMENT AS TO THE NON-DISPUTE SUBCLASS**

Pursuant to RCFC 23(c)(5) and in accordance with the Court's Order, Docket No. 79, Plaintiff Common Ground Health Cooperative ("Common Ground") and the United States move the Court to divide the Class into two subclasses: (1) the "Non-Dispute Subclass," and (2) the "Dispute Subclass." As set forth below, the Parties stipulate to entry of partial judgment as to the Non-Dispute Subclass.

STATUTORY BACKGROUND

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), 124 Stat. 119, and the Health Care Reconciliation Act of 2010, Pub. L. No. 111-152 (2010), 124 Stat. 1029 (collectively, the "ACA") created several interrelated programs under which the Parties' respective claims arise.

The ACA created three interrelated risk mitigation programs. Specifically, section 1341 (42 U.S.C. § 18061) created the reinsurance program; section 1342 (42 U.S.C. § 18062) created the risk corridors program; and section 1343 (42 U.S.C. § 18063) created the risk adjustment

program. Section 1322 of the ACA (42 U.S.C. § 18042), relates to the Consumer Operated and Oriented Plan program, under which the United States provided start-up loan and a solvency loans. Section 1412 (42 U.S.C. § 18082) authorizes advance payment of premium tax credits (“APTCs”) to insurers. Section 1402 (42 U.S.C. § 18071) authorizes cost-sharing reductions (“CSRs”). Sections 1343 (42 U.S.C. § 18063), 1311 (42 U.S.C. § 18031), and 1321 (42 U.S.C. § 18041) of the ACA authorize the United States to collect user fees for its operation of the federally-facilitated exchange (“FFE”) and the risk adjustment program.

THE PARTIES’ CLAIMS

On June 27, 2017, Common Ground, on behalf of itself and others similarly situated, filed the Complaint seeking risk corridors damages under section 1342 of the ACA for benefit year 2016. The Complaint alleged a single count for violation of the government’s statutory and regulatory mandate to make risk corridor payments. The Complaint was subsequently amended to add cost-sharing reduction claims for the 2017/2018 and 2019 benefit years.

On January 8, 2018, the Court certified the following class (the “Class”):

All persons or entities offering Qualified Health Plans under the Patient Protection and Affordable Care Act in the 2016 benefit year, and whose allowable costs in the 2016 benefit year, as calculated by the Centers for Medicare and Medicaid Services, were more than 103 percent of their target amounts (as those terms are defined in the Patient Protection and Affordable Care Act). Excluded from the Class are the Defendant and its members, agencies, divisions, departments, and employees.

Docket No. 17. In the same order, the Court appointed Common Ground as the class representative and appointed Quinn Emanuel Urquhart & Sullivan, LLP as lead counsel for the class. Ultimately, 130 QHP issuers opted into the Class.

On April 27, 2020, the United States Supreme Court held that section 1342 of the ACA “created an obligation neither contingent on nor limited by the availability of appropriations or

other funds,” that the obligation was not affected by subsequently-enacted legislation, and that the “petitioners may seek to collect payment through a damages action in the Court of Federal Claims.” *Maine Community Health Options v. United States*, 140 S. Ct. 1308, 1323, 1331 (2020).

The Parties agree that the Supreme Court’s decision in *Maine Community Health Options* entitles Common Ground and Class members to receive payment of damages from the United States under ACA section 1342 for risk corridors benefit year 2016.

THE CLASS SHOULD BE DIVIDED INTO TWO SUBCLASSES

The Parties agree on the amount due to the Class with respect to all but one Class member. Freelancers CO-OP of New Jersey, Inc. (HIOS ID 10191) (“Freelancers”), opposes the government’s effort to offset its risk corridor payments against other amounts the government believes are owed under the Affordable Care Act.

The Parties agree that there is no reason to delay judgment in favor of the Class members who have no dispute with the government, and that Freelancers’ dispute can be resolved independently. Accordingly, the Parties request that the “class . . . be divided into subclasses that are each treated as a class under” RCFC 23(c)(5). The Parties propose two subclasses: (1) the “Non-Dispute Subclass,” which consists of Class members who have no dispute with the government; and (2) the “Dispute Subclass,” which consists of Freelancers, who has a legal dispute with the government.

The Parties seek approval of the following Non-Dispute Subclass:

All approved class members offering Qualified Health Plans under the Patient Protection and Affordable Care Act in the 2016 benefit year, whose allowable costs in the 2016 benefit year, as calculated by the Centers for Medicare & Medicaid Services, were more than 103 percent of their target amounts (as those terms are defined in the Patient Protection and Affordable Care Act), except those entities with ongoing disputes with the government concerning

the amount due to the entity under Section 1342 of the Affordable Care Act, entities that dispute the government's right to offset debts against a judgment pursuant to Section 1342, or entities that disputes the extent of any such offset.

The Non-Dispute Subclass shall consist of all Class members listed on Exhibit A.

Common Ground has agreed to serve as class representative of the Non-Dispute Subclass.

The Parties seek approval of the following Dispute Subclass:

All approved class members offering Qualified Health Plans under the Patient Protection and Affordable Care Act in the 2016 benefit year, whose allowable costs in 2016 benefit year, as calculated by the Centers for Medicare & Medicaid Services, were more than 103 percent of their target amounts (as those terms are defined in the Patient Protection and Affordable Care Act), and that dispute the amount due to the entity under Section 1342 of the Affordable Care Act, and/or dispute the government's right to offset debts against a judgment pursuant to Section 1342, and/or dispute the extent of any such offset.

The Dispute Subclass shall consist of Freelancers, who has also agreed to serve as the class representative for the Dispute Subclass.

**STIPULATION FOR ENTRY OF JUDGMENT
AS TO THE NON-DISPUTE SUBCLASS**

The Parties stipulate that the Non-Dispute Subclass is entitled to payment from the United States under the risk corridors program for the 2016 benefit year in the amount of \$1,793,311,386.47, and that the amount due to each individual Non-Dispute Subclass member is accurately set forth in Exhibit A. Accordingly, the Parties jointly request that the Court enter judgment in favor of the Non-Dispute Subclass in the amount of \$1,793,311,386.47.

Common Ground requests that the Court direct the government to present this judgment to the Department of Treasury for payment to the Court-appointed claims administrator JND Legal Administration. Common Ground further requests the Court to determine the appropriate fees and costs to be paid by the claims administrator with the net judgment proceeds to be paid to each Non-Dispute Subclass member in accordance with the amounts listed in Exhibit A.

Common Ground requests that the Court enter the following schedule for determination of attorney's fees and expenses: Class Counsel shall file its petition for attorney's fees within 7 days of entry of judgment for the Non-Dispute Subclass. Non-Dispute Subclass members shall file any objections or responses to Class Counsel's petition within 21 days of the filing of the fee petition. Class Counsel shall file any replies to objections or responses within 14 days of the expiration of the period to file objections or responses.

Upon entry of final judgment and receipt of payment by the Non-Dispute Subclass, the Non-Dispute Subclass, and any and all of the Non-Dispute Subclass's affiliated entities, release the United States, its agencies, instrumentalities, officers, agents, employees, and servants, from all claims (including attorney fees, costs, and expenses of every kind and however denominated) that the Non-Dispute Subclass, and any and all of the Non-Dispute Subclass's affiliated entities, have asserted, could have asserted, or may assert in the future against the United States, its agencies, instrumentalities, officers, agents, employees, and servants, arising under section 1342 of the ACA for the 2016 benefit year.

DATED: July 17, 2020

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Exhibit A

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**EXHIBIT A TO JOINT MOTION TO DIVIDE CLASS INTO SUBCLASSES AND
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SUBCLASS**

HIOS ID	Issuer Name	2016 RC Payments Balance
36373	All Savers Insurance Company	\$6,211,732.83
39924	All Savers Insurance Company	\$1,126,391.67
85947	All Savers Insurance Company	\$37,629,395.75
98971	All Savers Insurance Company	\$2,787,630.49
78726	All Savers Insurance Company	\$446,164.50
63509	Allegian Insurance Company	\$6,758,866.06
67577	Alliance Health and Life Insurance Company	\$846,068.00
32536	ATRIO Health Plans	\$3,823,044.78
60536	Avera Health Plans, Inc.	\$14,067,742.19
74980	Avera Health Plans, Inc.	\$363,498.27
15287	Blue Cross & Blue Shield of Rhode Island	\$6,723,928.86
18558	Blue Cross and Blue Shield of Kansas, Inc.	\$17,976,022.65
27811	BlueCross BlueShield Kansas Solutions, Inc.	\$28,596,175.72
40586	Bluegrass Family Health, Inc.	\$12,763,363.04
45127	Capital Advantage Assurance Company	\$12,584,816.88
10207	CareFirst BlueChoice, Inc.	\$8,737,341.69
28137	CareFirst BlueChoice, Inc.	\$41,057,486.62
86052	CareFirst BlueChoice, Inc.	\$139,120.92
45532	CareFirst of Maryland, Inc.	\$11,602,784.86
77552	CareSource	\$32,086,445.80
54192	CareSource Indiana, Inc.	\$10,568,031.40

45636	CareSource Kentucky Co.	\$3,087,507.35
50328	CareSource West Virginia Co.	\$1,239,716.45
94788	CDPHP	\$1,128,625.43
92551	CDPHP Universal Benefits Inc.	\$10,440,924.71
27833	Celtic Insurance Company	\$1,846,059.24
47579	Chinese Community Health Plan	\$1,287,266.96
66252	CHRISTUS Health Plan	\$9,529,090.47
72034	CHRISTUS Health Plan	\$2,352,154.70
63312	Colorado Choice Health Plans	\$4,956,311.74
87416	Common Ground Healthcare Cooperative	\$27,657,256.98
18581	Community Health Plan of Washington	\$492,042.87
98905	CommunityCare HMO Inc.	\$677,742.83
38345	Dean Health Plan	\$5,406,793.42
78124	Excellus Health Plan, Inc.	\$23,595,031.50
88806	Fallon Community Health Plan, Inc.	\$1,935,393.50
22444	Geisinger Health Plan	\$13,244,631.61
75729	Geisinger Quality Options, Inc.	\$5,955,066.10
78079	GHMSI	\$434,190.13
94084	GHMSI	\$9,019,881.61
80473	Group Health Cooperative	\$21,043,260.92
34102	Group Health Plan, Inc.	\$14,052,643.55
40308	Group Hospitalization and Medical Services Inc.	\$4,073,508.25
27651	Gundersen Health Plan, Inc.	\$81,427.05
91058	Gundersen Health Plan, Inc.	\$3,649,847.44
78463	Harken Health Insurance Company	\$28,285,818.16
95852	Harken Health Insurance Company	\$12,210,414.34
70239	Health Choice Insurance Co.	\$12,591,097.47
27357	Health First Health Plans, Inc.	\$1,432,717.01
77150	Health First Insurance, Inc.	\$205,230.49
95865	Health Plan of Nevada, Inc.	\$3,326,339.65
47342	Health Tradition Health Plan	\$2,691,924.97
92036	HealthSpan, Inc.	\$1,546,837.99
20126	HealthSpan Integrated Care	\$4,471,693.71
19636	HMO Louisiana, Inc.	\$5,177,649.58
91661	Horizon Healthcare Services, Inc.	\$16,478,389.42
33380	Indiana University Health Plans, Inc.	\$403,177.29
21032	Kaiser Foundation Health Plan of Colo.	\$76,429,472.92
89942	Kaiser Foundation Health Plan of Georgia	\$30,010,904.53
90296	Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.	\$31,142,310.40
94506	Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.	\$2,007,972.38

95185	Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.	\$36,966,452.97
40513	Kaiser Foundation Health Plan, Inc.	\$155,537,695.89
60612	Kaiser Foundation Health Plan, Inc.	\$16,173,112.98
23371	Kaiser Foundation Healthplan of the NW	\$6,553,058.03
71287	Kaiser Foundation Healthplan of the NW	\$15,251,167.48
53789	Keystone Health Plan Central	\$14,500,584.78
97176	Louisiana Health Service & Indemnity Company	\$23,579,282.01
11177	MetroPlus Health Plan	\$15,037,085.52
81413	Network Health Plan	\$2,307,460.56
82483	North Shore-LIJ Insurance Company Inc	\$113,132,550.69
20507	Optima Health Plan	\$8,636,390.10
10544	Oscar Health Plan of California	\$4,167,289.22
20069	Oscar Insurance Company of Texas	\$35,085,745.70
74289	Oscar Insurance Corporation	\$107,138,699.40
50221	Oscar Insurance Corporation of New Jersey	\$3,064,840.14
48834	Oxford Health Plans (NJ), Inc.	\$4,561,830.04
10091	PacificSource Health Plans	\$7,045,120.75
23603	PacificSource Health Plans	\$9,853,702.22
60597	PacificSource Health Plans	\$1,205,143.84
65441	PHPS, Inc. (fka Phoenix Health Plans, Inc.)	\$14,356,552.64
50816	Physicians Health Plan of Northern Indiana, Inc.	\$4,482,634.94
58564	Physicians Plus Insurance Corporation	\$464,542.33
26734	Premier Health Plan, Inc.	\$5,682,287.55
57173	Presbyterian Health Plan, Inc.	\$2,801,184.47
52744	Presbyterian Insurance Company, Inc.	\$8,019,908.13
29698	Priority Health	\$26,339,617.56
29241	Priority Health Insurance Company (PHIC)	\$7,075,598.39
37392	Prominence HealthFirst of Texas, Inc.	\$1,572,951.33
56707	Providence Health Plan	\$66,966,568.57
70525	QCA Health Plan, Inc.	\$5,894,850.51
37903	QualChoice Life & Health Insurance Company, Inc.	\$6,742,797.09
80208	Rocky Mountain Health Care Options	\$4,463,039.51
97879	Rocky Mountain HMO	\$14,623,375.96
38166	Security Health Plan of Wisconsin, Inc.	\$27,043,286.85
26002	SelectHealth	\$57,700,877.85
68781	SelectHealth	\$143,988,818.30
26539	SHA, LLC DBA FirstCare Health Plans	\$7,708,618.14
92499	Sharp Health Plan	\$1,282,855.34
52664	Summa Insurance Company, Inc.	\$2,037,988.17
85736	UCare Minnesota	\$10,114,026.06
37873	UnitedHealthcare Benefits Plan of California	\$510,269.44

49650	UnitedHealthcare Insurance Company	\$793,529.41
31779	UnitedHealthcare Insurance Company	\$492,333.25
23489	UnitedHealthcare Insurance Company	\$2,903.41
57860	UnitedHealthcare Insurance Company	\$486,864.50
69443	UnitedHealthcare Insurance Company	\$2,134,105.98
68259	UnitedHealthcare of Alabama, Inc.	\$4,226,662.97
59036	UnitedHealthcare of Colorado, Inc.	\$719,427.07
68398	UnitedHealthcare of Florida, Inc.	\$9,330,450.46
43802	UnitedHealthcare of Georgia, Inc.	\$4,356,433.40
38499	UnitedHealthcare of Louisiana, Inc.	\$200,537.78
97560	UnitedHealthcare of Mississippi, Inc.	\$3,906,592.67
54235	UnitedHealthcare of New York, Inc.	\$4,509,245.86
33931	UnitedHealthcare of Ohio, Inc.	\$3,833,592.57
45480	UnitedHealthcare of Oklahoma, Inc.	\$3,012,668.48
24872	UnitedHealthcare of Pennsylvania, Inc.	\$2,254,922.55
21066	UnitedHealthcare of the Mid-Atlantic Inc	\$53,160.65
38599	UnitedHealthcare of the Mid-Atlantic Inc	\$1,646,134.28
44751	UnitedHealthcare of the Midlands, Inc.	\$6,406,781.24
51902	UnitedHealthcare of the Midlands, Inc.	\$1,351,512.14
16724	UnitedHealthcare of the Midwest, Inc.	\$157,038.37
66413	UnitedHealthcare of Utah, Inc.	\$53,669.11
43861	UnitedHealthcare of Washington, Inc.	\$1,374,207.83
62560	UPMC Health Coverage, Inc.	\$281,136.83
16322	UPMC Health Options, Inc.	\$60,714,960.72
75293	USAble Mutual Insurance Company	\$19,022,135.87
67243	Vantage Health Plan, Inc.	\$8,130,698.29
93689	Western Health Advantage	\$1,695,441.23
TOTAL		\$1,793,311,386.47