IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY,	:	No. 16-259C
Plaintiff,	:	Judge Sweeney
v.	:	
THE UNITED STATES OF AMERICA,	:	
Defendant.	:	

DEFENDANT'S AMENDED ANSWER AND COUNTERCLAIM

For its amended answer to the Class Action Complaint ("Complaint"), Docket No. 1, defendant, the United States, admits, denies, and alleges as follows:

The paragraphs of the Complaint do not require a response because the Court has already entered judgment for the Non-Dispute Subclass pursuant to the parties' "Joint Motion to Divide Class into Subclasses and Stipulation for Entry of Partial Judgment as to One Subclass," Docket No. 80. In that motion, the parties agreed the Supreme Court decision in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020), entitles Health Republic Insurance Company ("Health Republic") and class members to damages from the United States under section 1342 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), 124 Stat. 119 (42 U.S.C. § 18062). In moving for entry of judgment, the United States and Non-Dispute Subclass also set forth the damages quantum owing to each subclass member and included offsetting debts owed by one subclass member to the United States.

The United States avers that the damages due the Dispute Subclass are subject to offset as set forth in the United States' counterclaim.

The United States denies each and every allegation not previously admitted or otherwise qualified.

COUNTERCLAIM

Defendant, the United States, for its counterclaim against the Dispute Subclass, alleges as follows:

NATURE OF THE ACTION

1. On January 3, 2017, the Court certified this matter as a class action. Docket No. 30.

2. On July 17, 2020, the parties filed the "Joint Motion to Divide Class into Subclasses and Stipulation for Entry of Partial Judgement as to One Subclass." Docket No. 80. The Motion proposed that the class be divided into three subclasses: (1) Non-Dispute Subclass, (2) the Dispute Subclass, and (3) the Arches Subclass. The Dispute Subclass consisted of Colorado Health Insurance Cooperative, Inc. (HIOS ID 20472) ("Colorado Health"), Freelancers CO-OP of New Jersey, Inc. (HIOS ID 10191) ("Freelancers"), Meritus Health Partners (HIOS ID 60761) ("Meritus Health"), and Meritus Mutual Health Partners (HIOS ID 92045) ("Meritus Mutual"). *Id.*[1]

3. On July 23, 2020, the Court entered an Order dividing the class into the three proposed subclasses. Docket No. 82.

JURISDICTION

4. This Court possesses jurisdiction to entertain defendant's counterclaim pursuant to 28 U.S.C. §§ 1503 and 2508.

[1] Meritus Health and Meritus Mutual are collectively referred to as "Meritus."

STATUTORY BACKGROUND

5. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (the "ACA"), were enacted in March 2010.

6. The ACA created Health Benefit Exchanges ("Exchanges"), virtual marketplaces in each state where individuals and small groups can purchase pre-certified health insurance coverage and obtain federal subsidies, if eligible. 42 U.S.C. §§ 18031-18041, 18071; 26 U.S.C. § 36B.

7. The ACA also created a number of inter-related programs.

8. The ACA established the Consumer Operated and Oriented Plan program to foster the creation of new consumer-governed, nonprofit health insurance issuers known as "CO-OPs." 42 U.S.C. § 18042(a)(1)-(2). This program provided loans for start-up costs ("start-up loans") and loans to enable CO-OPs to meet the solvency and capital reserve requirements of the states in which they are licensed to sell health insurance ("solvency loans"). *Id.* § 18042(b)(1). As a condition of program participation, the ACA requires CO-OPs to comply with all applicable federal and state law and to enter into a loan agreement providing comprehensive governance and funding provisions. *Id.* § 18042(b)(2)(C)(i)-(ii), (c)(5).

9. Loan recipients that fail to make loan payments when due are "subject to any and all remedies available to the Department of Health and Human Services ("HHS"), Centers for Medicare & Medicaid Services ("CMS") under law to collect the debt." 45 C.F.R. § 156.520(d). With respect to the start-up loan, the underlying loan agreement expressly preserves HHS's right to collect the debt through offset. *See* Loan Agreement § 19.12 ("Lender shall have at its disposal the full range of available rights, remedies and techniques to collect delinquent debts . . .

including . . . administrative offset").

10. In an effort to mitigate the pricing risk and incentives for adverse selection, the ACA established three inter-related premium-stabilization programs modeled on existing programs established under the Medicare program.[2] Informally known as the "3Rs," the ACA reinsurance, risk adjustment, and risk corridors programs began with the 2014 benefit year, which started January 1, 2014. *See* 42 U.S.C. §§ 18061-18063.

11. The 3Rs programs distribute risks among insurers. Each of the 3Rs programs is funded by amounts that insurers or plans pay into the program. *See* 76 Fed. Reg. 41,930, 41,948 (July 15, 2011) ("The payments and receipts in risk adjustment, reinsurance, and risk corridors are financial transfers between insurers.").

12. The risk corridors program was created by section 1342 of the ACA. It was a temporary program for the 2014, 2015, and 2016 benefit years. 42 U.S.C. § 18062.

13. The reinsurance program was created by section 1341 of the ACA. It was a temporary program for the 2014, 2015, and 2016 benefit years under which amounts collected from insurers and self-insured group health plans were used to fund payments to insurers of eligible plans that covered high-cost individuals. 42 U.S.C. § 18061.

14. The risk adjustment program was created by section 1343 of the ACA. It is a permanent program under which amounts collected from insurers whose plans have healthier-than-average enrollees in a state market risk pool are used to fund payments to insurers whose plans have sicker-than-average enrollees in the same state market risk pool. 42 U.S.C. § 18063.

15. The ACA contemplated states administering their own reinsurance and risk

[2] *Compare* 42 U.S.C. §§ 18061-18063 *with id.* §§ 1395w-115(a)(2), (b), (c), (e); *see also id.* §§ 18062(a); 18063(b); 42 C.F.R. § 423.329(b)-(c).

adjustment programs, with HHS responsible for operating those programs in states that fail to do so. 42 U.S.C. §§ 18061(b), 18063, 18041(a)-(c). In practice during the time relevant here, all states but one deferred to HHS to administer their reinsurance and risk adjustment programs as set forth in the ACA's state flexibility provision, *id.* § 18041. *See* Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10,750, 10,759 (Feb. 27, 2015).

16. A significant source of financial transfers between issuers and HHS under the ACA were for payment of premium tax credits ("PTC") and cost-sharing reductions ("CSR") and for CSR reconciliation payments. In order to make insurance more affordable, the ACA makes many individuals eligible for federal subsidies to help reduce their monthly health insurance premiums and their episodic cost sharing requirements (*i.e.*, deductibles, copays, and coinsurance). These APTCs and CSRs are only available to eligible consumers who purchase an individual market qualified health plan (excluding catastrophic plan coverage) through an Exchange. 42 U.S.C. § 18071(f)(2). Rather than provide this assistance directly to eligible individuals to pay to their health insurers, the Department of Treasury (as directed by HHS) paid the subsidies in advance to eligible individuals' insurers based on estimates derived from issuer-provided data. 42 U.S.C. § 18082. And, if the advance monthly CSR payments wound up being too high (or too low), collections (or further payments) were required to reconcile the difference. *E.g.*, 26 C.F.R. § 1.36B-4; 45 C.F.R. § 156.430.

17. The ACA and its implementing regulations mandated the payment of user fees in connection with the administration of the risk adjustment program. *See* 42 U.S.C. §§ 18031(d)(5), 18041(c)(1), 18063; 45 C.F.R. §§ 153.610(f).

18. As part of its payment and collections process, as relevant here, HHS may net

payments owed to issuers and their affiliates against amounts due from those issuers and their affiliates that arise under the risk adjustment, reinsurance, and risk corridors programs, or that result from reconciliation of advance CSR payments ("CSR Reconciliation amounts"), 45 C.F.R. § 156.1215.

FACTUAL ALLEGATIONS

Colorado Health

19. Colorado Health was formed pursuant to the ACA CO-OP program.

Colorado Health's Loan Agreements with CMS

20. On July 23, 2012, Colorado Health and CMS entered into a loan agreement ("Loan Agreement") under which Colorado Health received a start-up loan ("Start-up Loan") in the principal amount of $12,266,400 and a solvency loan ("Solvency Loan") in the principal amount of $57,129,600. *See* 42 U.S.C. § 18042(b)(1).

21. The Start-up Loan is evidenced by a promissory note. *See* 42 U.S.C. § 18042(b)(3). CMS disbursed, in separate disbursements, the funding available under the Start-up Loan to Colorado Health in its entirety ($12,266,400).

22. The Solvency Loan is evidenced by a promissory note. 42 U.S.C. § 18042(b)(3). CMS disbursed to Colorado Health, in separate disbursements, all of the funding available under the Solvency Loan ($57,129,600).

Colorado Health's Liquidation

23. Colorado Health participated in the Colorado markets in the 2014 and 2015 benefit years.

24. On November 10, 2015, the Denver County District Court issued a rehabilitation order for Colorado Health. The subsequent efforts to rehabilitate Colorado Health proved futile, and a petition was filed seeking an order of liquidation.

25. On January 4, 2016, the Denver County District Court issued a liquidation order for Colorado Health.

Colorado Health's Failure to Pay Charges Owed under the Risk Adjustment Program

26. Colorado Health failed to pay charges due to CMS under the risk adjustment program.

27. As of July 15, 2020, Colorado Health owes CMS $16,561,782.17 in risk adjustment charges.

Colorado Health's Failure to Pay Charges Owed under the Reinsurance Program

28. Colorado Health failed to pay charges due to CMS under the reinsurance program.

29. As of July 15, 2020, Colorado Health owes CMS $771,298 in reinsurance contributions.

Colorado Health's Failure to Pay CSR Reconciliation Charges

30. Colorado Health also failed to pay charges due to CMS resulting from CSR Reconciliation under the CSR program.

31. As of July 15, 2020, Colorado Health owes CMS $2,180,837.60 in CSR reconciliation charges.

Colorado Health's Failure to Pay Risk Adjustment User Fees

32. Colorado Health also failed to pay risk adjustment user fees.

33. As of July 15, 2020, Colorado Health owes CMS $74,917.92 in risk adjustment user fees.

Colorado Health's Failure to Pay Interest on Debts

34. Colorado Health is required to pay, and has failed to pay, interest on debts due to

CMS. 45 C.F.R. § 30.18.

Meritus

35. Compass Cooperative Mutual Health Network, doing business as Meritus Mutual, was formed pursuant to the ACA CO-OP program. Compass Cooperative Health Plan, Inc., doing business as Meritus Health, was a wholly-owned subsidiary of Meritus Mutual.

36. Meritus Mutual and Meritus Health operated under common control. They had the same officers and directors, shared the same home office, and shared services for the adjudication and payment of claims.

Meritus' Loan Agreements with CMS

37. On June 7, 2012, Meritus Mutual and CMS entered into a loan agreement ("Loan Agreement") under which Meritus Mutual received a start-up loan ("Start-up Loan") in the principal amount of $20,890,333 and a solvency loan ("Solvency Loan") in the principal amount of $72,422,900. 42 U.S.C. § 18042(b)(1).

38. The Start-up Loan is evidenced by a promissory note. See 42 U.S.C. § 18042(b)(3). CMS disbursed, in separate disbursements, the funding available under the Start-up Loan to Meritus Mutual in its entirety ($20,890,333).

39. The Solvency Loan is evidenced by a promissory note. 42 U.S.C. § 18042(b)(3). CMS disbursed to Meritus Mutual, in separate disbursements, all of the funding available under the Solvency Loan ($20,890,333).

Meritus' Liquidation

40. Meritus participated in the Arizona markets in the 2014 and 2015 benefit years.

41. On August 10, 2016, the Superior Court of Arizona, County of Maricopa, issued a liquidation order for Meritus.

Meritus' Failure to Pay Charges Owed under the Risk Adjustment Program

42. Meritus failed to pay charges due to CMS under the risk adjustment program.

43. As of July 15, 2020, Meritus owes CMS $46,583,774.29 in risk adjustment charges.

Meritus' Failure to Pay CSR Reconciliation Charges

44. Meritus failed to pay CSR reconciliation charges due to CMS under the CSR program.

45. As of July 15, 2020, Meritus owes CMS $3,920,461.72 in CSR reconciliation payments.

Meritus' Failure to Pay Risk Adjustment User Fees

46. Meritus failed to pay risk adjustment user fees.

47. As of July 15, 2020, Meritus owes CMS $47,320.83 in risk adjustment user fees.

Meritus' Failure to Pay Interest on Debts

48. Meritus is required to pay, and has failed to pay, interest on debts due to CMS. 45 C.F.R. § 30.18.

COUNT I

BREACH OF STATUTORY AND REGULATORY DUTIES

49. Defendant repeats and incorporates by reference the preceding allegations as if set forth in full.

50. The Dispute Subclass participated in the 3Rs and CSR programs. For each benefit year in which the Dispute Subclass participated in those programs, the members of that subclass received payment and/or were required to pay charges under those ACA programs.

51. By failing to pay charges and other amounts required under the ACA, the Dispute

Subclass breached their statutory and regulatory duties.

Colorado Health

52. Colorado Health owes and has failed to pay charges due to CMS under the risk adjustment program in the amount of $16,561,782.17.

53. Colorado Health owes and has failed to pay contributions due to CMS under the reinsurance program in the amount of $771,298.

54. Colorado Health owes and has failed to pay CSR reconciliation charges due to CMS under the CSR program in the amount of $2,180,837.60.

55. Colorado Health owes and has failed to pay risk adjustment user fees due to CMS in the amount of $74,917.92.

56. The United States is entitled to interest on all of these debts due, and as of July 15, 2020, the accrued interest due was $7,347,418.49.

Meritus

57. Meritus owes and has failed to pay charges due to CMS under the risk adjustment program in the amount of $46,583,774.29.

58. Meritus owes and has failed to pay CSR reconciliation charges due to CMS under the CSR program in the amount of $3,920,461.72.

59. Meritus owes and has failed to pay risk adjustment user fees due to CMS in the amount of $47,320.83.

60. The United States is entitled to interest on all of these debts due, and as of July 15, 2020, the accrued interest due was $18,070,304.58.

PRAYER FOR RELIEF

WHEREFORE, defendant respectfully requests that judgment be entered in defendant's favor on its counterclaim in an amount to be determined at trial, plus applicable interest and costs, and that defendant be granted such other and further relief as the Court may deem just and proper.

Dated: October 30, 2020

Respectfully submitted,

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