

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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| HARVARD PILGRIM HEALTH CARE, INC.,) | |
| HPHC INSURANCE COMPANY, INC., AND) | |
| HARVARD PILGRIM HEALTH CARE OF) | |
| NEW ENGLAND, INC.,) | Case No. 18-1820C |
|) | Senior Judge Loren Smith |
| Plaintiffs,) | |
|) | |
| v.) | |
|) | |
| THE UNITED STATES,) | |
|) | |
| Defendant.) | |

JOINT MOTION FOR LEAVE TO FILE OUT OF TIME

Pursuant to the Rule 6 of the United States Court of Federal Claims, the parties jointly and respectfully submit this motion for leave to file out of time the attached joint status report regarding the status and next steps in this litigation.

This Court’s March 21, 2023 Order (ECF No. 54) granted the parties’ request for a continued stay of this case and ordered the parties to file a joint status report by May 17, 2023.

The parties inadvertently failed to file a joint status report on May 17, 2023 and respectfully request the Court find that the parties’ oversight was excusable neglect. The determination of excusable neglect is an equitable one, based on all relevant circumstances, including such factors as: the danger of prejudice to the non-movant, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *Govt. Servs. Corp. v. United States*, 130 Fed. Cl. 795, 797, (2017) (citing *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993)). Here, the case has been stayed, and there is no prejudice to either party, as both parties were engaged in

significant settlement discussions as described further below and in the attached joint status report. In addition, counsel for the Government participated in oral argument for a case-dispositive motion in *Richard Naltner et al. v. United States*, (Fed. Cl. No. 21-1064) on the day the parties' joint status report was due, and had been consumed with the preparation and conduct for that argument.

We apologize for the inconvenience this oversight has caused, but assure the Court that we have been working together to determine whether they may efficiently resolve this matter without further litigation or can at least streamline the damages and mitigation issues in this case. To wait for an agreement on a method that can be applied to most or all plaintiffs furthers judicial efficiency. We acknowledge the time this process has taken, but maintain that the time has been necessary to resolve issues with so many stakeholders and such complex accounting issues. The parties have significantly narrowed the issues to be resolved and believe that they are close to a final determination as to whether the methodology they have been discussing can be used. On May 12, counsel for the CSR Plaintiffs submitted a combined written response to the Government's most recent position on certain offset and mitigation issues that are material to any potential settlement, and the parties expect to engage in follow-up discussions soon. While the parties have been actively engaged in these settlement negotiations, we inadvertently failed to file a status report in this matter.

The parties still require additional time, and respectfully request that the Court grant this motion to file out of time the attached joint status report, which requests a continued stay in this case until July 17, 2023. At that time, the parties will update the Court on the status of their efforts to resolve this matter.

May 18, 2023

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JOINT STATUS REPORT

Pursuant to the Court’s March 21, 2023 Order, the parties respectfully submit this Joint Status Report. The March 21, 2023 Order continued the stay in these proceedings and directed the parties to file a joint status report proposing further proceedings by May 17, 2023.

In July 2021, shortly after the U.S. Supreme Court denied the petition for writ of certiorari (No. 20-1162) and the Government’s conditional cross-petition (No. 20-1432) in *Maine Community Health Options v. United States*, which sought review of the Federal Circuit’s CSR decision in *Community Health Choice, Inc. v. United States*, Nos. 2019-1633, -2102, 2020 WL 4723757 (Fed. Cir. Aug. 14, 2020), the parties began discussions regarding the next steps in this litigation. Several different attorneys, collectively representing a large number of plaintiff health plans—including the plaintiff here—engaged Government counsel in discussions regarding potential resolution of the CSR matters through settlement.

The parties’ resolution efforts are progressing. On December 3, 2021, Plaintiffs’ counsel shared a proposal with the Government to attempt to collectively resolve the damages and mitigation issues in the CSR cases without further litigation or to significantly streamline

resolution of the remaining damages/mitigation issues in these cases. On April 28, 2022, the Government responded to Plaintiffs' proposal, and Plaintiffs responded on May 23, 2022. Thereafter, the parties have convened by phone multiple times, and the Government produced certain settlement-related data and other information to the plaintiffs on July 22, 2022. The parties participated in a settlement-related call on September 1, 2022, and the CSR Plaintiffs followed that call with a letter to the Government on September 15, 2022. The Government responded to CSR Plaintiffs by letter dated November 10, 2022. On January 10, 2023, the CSR Plaintiffs responded to the Government's letter. The parties participated in conference calls on Thursday, January 19, 2023, and Friday, February 24, 2023 to discuss the latest settlement proposal. On May 12, counsel for the CSR Plaintiffs submitted a combined written response to the Government's most recent position on certain offset and mitigation issues that are material to any potential settlement. The parties expect to engage in follow-up discussions soon.

The parties respectfully request that the stay of this matter continue for an additional 60 days, at which time the parties will file a joint status report. Good cause exists for the Court to continue the existing stay of this case. The parties are working together to determine whether they may efficiently resolve this matter without further litigation or can at least streamline the damages and mitigation issues in this case. To wait for an agreement on a method that can be applied to most or all plaintiffs furthers judicial efficiency. There are currently 26 CSR cases before 14 judges. An agreement on a settlement method would eliminate the confusion that could result from multiple judges adjudicating the same claims differently. This would, in turn, free the Court's resources to devote to other matters. We acknowledge the time this process has taken, but maintain that the time has been necessary to resolve issues with so many stakeholders and such complex accounting issues. The parties have significantly narrowed the issues to be

resolved and believe that they are close to a final determination as to whether the methodology they have been discussing can be used. The parties therefore jointly propose that they file a status report by July 17, 2023, in which the parties will update the Court on the status of their efforts to resolve this matter.

May 18, 2023

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