IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DOUG OMMEN, in his capacity as Liquidator of CoOportunity Health, Inc., and DAN WATKINS, in his capacity as Special Deputy Liquidator of CoOportunity Health, Inc.,	)	
Plaintiffs,	)	
v.	)	Case No.: 1:17-cv-957C Judge Charles F. Lettow
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

THE UNITED STATES' REPLY IN SUPPORT OF MOTION TO STAY PROCEEDNGS, OR IN THE ALTERNATIVE, FOR AN ENLARGEMENT OF TIME TO RESPOND TO THE COMPLAINT

I. INTRODUCTION

As we demonstrated in our motion to stay, or in the alternative for an enlargement of time, proceedings in this case should be stayed, just as the Court has stayed 19 other cases, pending the disposition of the appeals in *Land of Lincoln* and *Moda.*[1] As we explained in our motion, Counts I, II, III, IV (in part) & V raise claims that are enveloped by the issues that are now pending in the appeals from judgments entered in the *Land of Lincoln* and *Moda* risk corridors cases. We also explained while Counts III and IV (setoffs) and VI (risk adjustment methodology) have some distinct elements, they too are intertwined with the disposition of the risk corridors issues.

In opposing our motion for stay, plaintiffs (referred to here as either the Liquidators or CoOportunity) concede that the risk corridors issues raised in their complaint should not proceed at this time. *See* Dkt 7, Pls. Opp. to Motion to Stay ("Pls. Opp.") at 9. In a contemporaneously filed motion for partial summary judgment, plaintiffs agree that consideration of their setoff claims (presumably Counts III and IV) need not be addressed at this time because they relate to the risk corridors issues. *See* Dkt. 8, Pls. Mot. for Partial Summary Judgment ("Pls. Partial MSJ") at 9, n.9.

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[1] On May 30, 2017, as noted in our motion to stay, the Federal Circuit issued an order that the pending appeals of *Land of Lincoln Mutual Health Insurance Company v. United States*, No. 17-1224 and *Moda Health Plan, Inc. v. United States*, No. 17-1994 will be treated as companion cases and will be argued before and decided by the same panel. *Land of Lincoln*, Dkt. 140. Two other cases have reached judgment: *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C (notice of appeal filed June 9, 2017) and *Maine Community Health Options v. United States*; No. 16-967C (notice of appeal filed August 2, 2017). In a fifth case to reach a merits decision, *Molina Healthcare of California, Inc. v. United States*, No. 17-97C, the Court granted partial summary judgment in favor of the plaintiff and granted, in part, the United States' motion to dismiss, leaving a remaining count pending. On August 28, 2017, the *Molina* court, upon the parties' joint request, agreed not to enter a Rule 54(b) judgment and stayed further proceedings pending the Federal Circuit's decision in *Land of Lincoln* and *Moda*. *Molina*, Dkt. 27.

Notwithstanding these concessions, plaintiffs oppose our motion, maintaining that they have presented claims for more than $30 million that are not related to the risk corridors issues currently on appeal. To support that statement, they focus upon two issues: their dissatisfaction with an administrative hold of funds that was applied temporarily in 2016 and superseded by offset, and their challenge to the regulatory methodology employed to determine risk adjustment payments and charges. Neither of these issues should be addressed in the piecemeal fashion proposed by the plaintiffs.

The administrative hold issue is not a separate count in the complaint. It is pled in Counts III and IV in conjunction with the Liquidators' objections to HHS's offset of funds owed to CoOportunity against debts CoOportunity owed to the Department of Health and Human Services (HHS). There is no basis to proceed with the adjudication of issues surrounding the administrative hold at this time because that hold ceased in 2016, and the operative legal dispute concerns the propriety of the offset taken, an issue CoOportunity concedes is related to the risk corridors claims.

Similarly, stay of the risk adjustment claim is warranted because it too is interwoven with the risk corridors issues. Plaintiffs allege that the risk corridors issues should have precluded recovery by offset and that the recovery was precluded by the parties' QHP agreement which is also at issue in the appeals. In addition, because risk adjustment charges are part of the formula applied to determine risk corridors, the issue of the Liquidators' entitlement to judgment (if any) cannot be resolved independent of the disposition of the issues on appeal.

II. DISCUSSION

A. Consideration of the Administrative Hold Should Not Proceed at This Time

Contemporaneous with the filing of their opposition to our motion for stay, plaintiffs filed a motion for partial summary judgment seeking $16.38 million and an accounting of the administrative hold. Dkt. 8. The motion does not seek judgment on any particular *count* of the

complaint. The Liquidators apparently seek a non-final order on a moot issue independent of HHS's setoff defense. And they seek this relief even though they recognize the Court would need to revisit the operative facts and related legal theories after the Federal Circuit rules in the consolidated appeals. Pls. Partial MSJ at 9, n.9.

The Liquidators motion for partial summary judgment disregards that HHS *has already paid* CoOportunity, via offset, the same $16 million it seeks in the motion. *See* Compl. ¶ 104(b), (d) (admitting the same); Attachment ("Att.") A, Declaration of Elizabeth Parrish ("Parrish Decl.") ¶ 7 (verifying the same). It is well settled that offset is a form of payment. *See Brazos Elec. Power Co-op., Inc. v. United States*, 144 F.3d 784, 787-88 (Fed. Cir. 1998) ("[c]ancellation of debt owed to the federal government under such circumstances is just as much a form of monetary damages for purposes of the Tucker Act as the direct payment by the federal government of conventional money damages"). They also fail to inform the Court that HHS is not now "holding" any funds payable to CoOportunity and that any amounts that were temporarily held since the company entered insolvency proceedings have also already been paid (via offset) to the estate. Att. A, Parrish Decl. ¶ 7 and ¶ 8. Having already received through offset the same money it seeks in the motion, the plaintiffs' partial summary judgment motion is moot.

Aside from mootness, the Liquidators' purported money claim is subject to HHS's defense of setoff The hold (which plaintiffs acknowledge was to effectuate setoff (Pls. Opp. at 5; Pls. Partial MSJ at 2)) cannot be factually or analytically divorced from setoff. As their own pleading and papers make clear, the Liquidators' allegations regarding the hold are *an ingredient of the complaint's offset claims* in Counts III and IV.[2]

[2] *See* Compl. Count III, titled "*Payment of Funds Improperly Set Off* By the Government," wherein the Liquidators assert HHS had no authority for the hold and setoffs and that, together, these actions violated state and federal law); Count IV, titled "*Breach of Contract by Wrongful*

The issue of *timing*—i.e., if and when there is a date certain that risk corridors must be paid—is an issue before the Federal Circuit. The underlying theory of plaintiffs' motion for partial summary judgment is that payment of CoOportunity's pro-rata share of 2014 risk corridors was required in January 2016 because that is when plaintiffs allege HHS paid other issuers and that waiting until March was too late. By casting their motion for partial summary judgment as a purported failure to timely pay the $16 million in January 2016, the Liquidators necessarily ask this Court to determine *when* risk corridors payments are required. Because the Federal Circuit will address the issue of timing, the Court is well within its discretion to stay consideration of the administrative hold issue until the Federal Circuit settles the more encompassing risk corridors issues.

B. The Risk Adjustment Methodology Issue Should Not Proceed At this Time

Count VI of the complaint contains the Liquidators' risk adjustment methodology claim. In it, plaintiffs allege that HHS's assessment of risk adjustment charges of $22.5 million against CoOportunity was too high and it was improper for HHS to recover risk adjustment charges through setoff. Additionally, the complaint alleges that HHS's actions constituted a breach of CoOportunity's QHP agreement. As we recognized in our stay motion, the core question of the risk adjustment methodology may be discrete from the risk corridors issues. However, the timing and effect of offsetting risk adjustment charges may well be affected by the outcome of the risk corridors appeals. And the parties' rights under the QHP agreement are at issue in those appeals.

Setoff," the Liquidators assert that HHS breached the QHP Agreement's purported obligation to make fully and timely risk corridors (and other 3Rs) payments to CoOportunity when it "illegally held and set-off" the "pro rata amount of policy year 2014 risk corridors funds" (*see* Compl. ¶ 208 & ¶ 210); *see also* Pls. Opp. at 6 (referring to the claim as the "wrongful hold/setoff claim" and admitting that the hold "implicates the Government's wrongful setoff of risk corridors payments . . .which the Government would have paid to CoOportunity but for its illegal hold and the use of self-help through setoff").

Moreover, risk adjustment charges and payments are elements of the risk corridors formula. For all of these reasons, the Court will not be in a position to reach judgment on plaintiffs' risk adjustment methodology claim independent of the outcome of the pending risk corridors appeals.

C. Piecemeal Litigation Does Not Promote Judicial Economy and Will Not Provide the Liquidators with a Money Judgment

The United States seeks a time limited stay in the interests of judicial economy and efficiency. The partial stay urged by CoOportunity affirmatively thwarts both goals, given the undisputed factual and legal overlaps among the counts of the complaint.

The sound reckoning behind the finality doctrine underscores why this Court is well within its discretion not to entertain the piecemeal adjudication urged by the Liquidators. *Franklin v. District of Columbia*, 163 F.3d 625, 629 (D.C. Cir. 1999) (expressing preference for a single appeal rather than piecemeal litigation, *especially where it would force a court of appeal "to master the same record twice[] and render two opinions instead of one*") (emphasis added)); *Allied Materials & Equip. Co., Inc.*, 223 Ct. Cl. 657, 659 (1980) (piecemeal adjudication "can result in the waste of judicial resources in deciding issues which are subsequently rendered moot").

At the end of the day, should the Liquidators prevail, CoOportunity's estate can be made whole with a final money judgment. Conversely, though, a final money judgment cannot arise from the piecemeal approach urged by the Liquidators. Any order on plaintiffs' motion for partial summary judgment could not be certified for appeal under Rule 54(b) as the alleged administrative hold is not even a claim for relief in the complaint, but instead is interwoven with the Liquidators' claims of improper setoff in Counts III and IV. *See*, e.g., *Osage Tribe of Indians of Oklahoma v. United States*, 263 F. App'x 43, 44–45 (Fed. Cir. 2008) (rejecting a Fed. R. Civ. P. 54(b)

certification when the trial court's determination did not dispose of a separate claim for relief, but only a portion of a claim).[3]

D. The Liquidators' Remaining Contentions Lack Merit

Plaintiffs' arguments that the requested stay is indefinite because the exact date of the Federal Circuit's decision is unknown (Pls. Opp. at 10) and that the government must show hardship to justify a stay pending appeal (Pls. Opp. at 7) have been roundly rejected by this Court in the risk corridors litigation. *See* Def. Motion Ex. A-E. The Liquidators' speculation about what may or may not occur after the Federal Circuit decides the pending appeals has no foundation. Pls. Opp. at 10. We seek a stay at this time until the disposition of the consolidated appeals. If the Court grants the stay, then, after the Federal Circuit rules, the parties may submit a joint status report and the Court can determine how best to proceed.

Finally, the government takes exception to plaintiffs' unfounded accusations regarding prior litigation between the parties. Plaintiffs complain that their case has been delayed. But the complaint here was filed on July 17, 2017. Before then, plaintiffs chose to commence an action in the United States District Court for which that court determined it lacked jurisdiction, and plaintiffs took an appeal from that decision. The United States is not responsible for plaintiffs' strategic litigation choices. Moreover, in choosing to disclose to the Court negotiations between the parties, the Liquidators admit they offered to consent to an extension of time to respond to the

[3] While the Liquidators emphasize it less, piecemeal adjudication of the risk adjustment-based claims in Counts IV and VI also could not be considered "final." While some of the risk-adjustment based issues are analytically distinct from the issues on appeal before the Federal Circuit (*see, e.g.*, Count VI; Def. Motion at 13 & note 8), the overlap with Count IV (improper setoff of risk adjustment charges) means this Court could not resolve liability or damages on the Liquidators' risk adjustment-based claims until after the Federal Circuit's rulings, including but not limited to the scope of the QHP Agreement.

complaint only if the United States would agree to forgo consideration of certain legal defenses. Pls. Opp. at 8-9.

In the event the Court declines to enter a stay pending a decision by the Federal Circuit in the consolidated appeals, given professional conflicts and personal commitments, the undersigned respectfully requests an extension of time.[4] The United States asks that this Court extend the time to respond to the complaint by 60 days to November 14, 2017, and extend the time to respond to plaintiffs' partial summary judgment motion so it would be due 60 days after the government files an answer.

CONCLUSION

Because of the interrelationship among the complaint's counts and that the binding precedent soon to be issued by the Federal Circuit will resolve legal issues pertinent to each, this Court should enter a temporary stay. The stay should not be partial. The "issues" carved out by the Liquidators cannot be resolved in isolation and would lead to piecemeal adjudication. In the alternative, the United States asks for an extension of time to respond to the complaint on November 14, 2017, and to respond to plaintiffs' partial summary judgment motion 60 days after the government files an answer.

[4] In addition to a pre-planned family vacation in October, in September, the undersigned will be out of the office to travel and stand in her sister's wedding.

Dated: August 31, 2017

Respectfully submitted,

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ATTORNEYS FOR THE UNITED STATES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 31, 2017, I electronically filed the foregoing UNITED STATES' REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ *Frances M. McLaughlin*
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