

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS & BLUE SHIELD)	
OF VERMONT,)	
)	No. 18-373 C
Plaintiff,)	(Judge Horn)
)	
v.)	
)	
THE UNITED STATES,)	
)	
Defendant.)	

DEFENDANT’S MOTION TO STAY THE JANUARY 7, 2019
SUPPLEMENTAL BRIEFING ORDER IN LIGHT OF LAPSE OF APPROPRIATIONS

Defendant, the United States, respectfully requests that the Court stay its January 7, 2019 supplemental briefing order in this case.

1. At the end of the day on December 21, 2018, the appropriations act that had been funding the Department of Justice expired and appropriations to the Department lapsed. The Department does not know when funding will be restored by Congress.

2. Absent an appropriation, Department of Justice attorneys are prohibited from working, even on a voluntary basis, except in very limited circumstances, including “emergencies involving the safety of human life or the protection of property.” 31 U.S.C. § 1342.

3. Undersigned counsel for the Department of Justice therefore requests a stay of the Court’s January 7, 2019 order directing the parties to file supplemental briefs on January 31, 2019 until Congress has restored appropriations to the Department. A stay in this case is especially appropriate given the breadth, complexity, and potential financial impact of the cost-sharing reduction cases. Our response to the Court’s order necessarily involves scrutiny within and among the highest levels of the Department of Justice, as well as the Departments of Health

& Human Services and the Treasury. And because many of those officials are furloughed, our ability to coordinate and submit a meaningful response to the Court's supplemental briefing order would be compromised absent a stay.

4. The only cost-sharing reduction cases we have not yet moved to stay are either those in which the Court had scheduled oral argument before the lapse in appropriations or were recently filed. On January 4, 2019, the Court heard oral argument in *Local Initiative Health Authority of Los Angeles County v. United States*, No. 17-1542 (Fed. Cl.) (Wheeler, J). The Court also scheduled a combined oral argument for January 29, 2019 in three cases: *Common Ground Healthcare Cooperative v. United States*, No. 17-877C (Fed. Cl.); *Community Health Choice, Inc. v. United States*, No. 18-05C (Fed. Cl.); and *Maine Community Health Options v. United States*, No. 17-2057C (Fed. Cl.) (Sweeney, C.J.). Although we have not yet moved the Court to stay those oral arguments, if Congress does not fund the Department by January 22, 2019, we likely will ask the Court for such relief. In addition, we have not yet moved the Court to stay two recently-filed cases, *Harvard Pilgrim Health Care, Inc. v. United States*, No. 18-1820 (Fed. Cl.) (Smith, J.), and *Noridian Mutual Insurance Co. v. United States*, No. 18-1983 (Fed. Cl.) (Horn, J.), because our responses to those complaint are not due until, respectively, January 28, 2019 and February 25, 2019. Should the lapse in appropriations continue, we likely will request stays in those cases, too.

5. In the meantime, this Court stayed briefing in another cost-sharing reduction case, *Guidewell Mutual Holding Corp. v. United States*, No. 18-1791C (Fed. Cl.) (Griggsby, J.), pending an appropriation to the Department.

6. If this stay motion is granted, undersigned counsel will notify the Court as soon as Congress has appropriated funds for the Department. The United States requests that, at that

point, the January 31, 2019 supplemental brief deadline be extended commensurate with the duration of the lapse in appropriations.

7. Plaintiff's counsel has authorized us to state that plaintiff consents to a 14-day extension of time to respond to the supplemental briefing order, but does not consent to a stay.

Therefore, although we greatly regret any disruption caused to the Court and the other litigants, we respectfully request that the Court stay its January 7, 2019 supplemental briefing order until Department of Justice attorneys are permitted to resume their usual civil litigation functions.

Respectfully submitted,

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January 15, 2019

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 15th day of January 2019, I filed a copy of DEFENDANT'S MOTION TO STAY THE JANUARY 7, 2019 SUPPLEMENTAL BRIEFING ORDER IN LIGHT OF LAPSE OF APPROPRIATIONS electronically through the Court's CM/ECF system, by operation of which I understand that all registered parties were served electronically.

s/Eric E. Laufgraben