

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS BLUE SHIELD)	
OF NORTH DAKOTA,)	
)	
)	
Plaintiff,)	
)	No. 18-cv-01983-MBH
v.)	
)	
THE UNITED STATES OF AMERICA,)	Judge Hertling
)	
Defendant.)	
_____)	

**PLAINTIFF’S OPPOSITION TO UNITED STATES’ MOTION TO STAY
PROCEEDINGS**

Plaintiff Blue Cross Blue Shield of North Dakota (“Plaintiff” or “BCBSND”) respectfully opposes the United States’ motion to stay Plaintiff’s action seeking money damages for the Government’s failure to make the millions of dollars in advance Cost-Sharing Reduction (“CSR”) payments that are owed to BCBSND. Plaintiffs’ motion for summary judgment on liability and Defendant’s cross motion for summary judgment and to dismiss Plaintiff’s CSR claims have been fully briefed since May 24, 2019 and are ripe for decision by this Court. The Court should deny the stay motion because Defendant has not met its high burden to demonstrate a “pressing need” to stay all further proceedings in this case and the balance of interests certainly weigh in favor of the Court deciding the fully-briefed motions.

I. DEFENDANT HAS NOT SATISFIED ITS HEAVY BURDEN TO JUSTIFY A STAY

The Court has broad discretion to stay a case, but that discretion “is not ... without bounds.” *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997). A stay should be granted only if the proponent of the stay satisfies its burden of establishing that the stay is necessary. *See St. Bernard Par. Gov’t v. United States*, 99 Fed. Cl. 765, 771 (2011).

If, as here, the requested stay lacks a definite end date, the stay request is indefinite because it is unknown when the Federal Circuit will resolve the CSR appeals in *Montana Health Co-Op*, *Sanford Health Plan*, and *Community Health Choice*. Under these circumstances, Defendant must show a “pressing need” for a stay. *Cherokee Nation* at 1416; *see also Haddock v. United States*, 135 Fed. Cl. 82, 91 (2017) (describing requested stay based on litigation in another forum as “indefinite” where it was “uncertain how long those proceedings may take”).

Defendant must further show that the “balance [of] interests favoring a stay” outweighs the other party’s opposing interests, being mindful that “[o]verarching this balancing is the court’s paramount obligation to exercise jurisdiction timely in cases properly before it.” *Cherokee Nation* at 1416; *see also Nat’l Food & Beverage Co. v. United States*, 96 Fed. Cl. 258, 263 (2010) (“To justify suspending the regular course of litigation, the proponent ‘must make a clear case of hardship or inequity in being required to go forward if there is even a fair possibility that the stay which he prays will work damage to someone else.’” (citations omitted)).

Defendant’s burden is especially high when, as here, the motion to stay is based upon proceedings in another litigation not involving the stay’s opponent (*i.e.*, BCBSND), because “[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will [allegedly] define the rights of both.” *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936); *see also, e.g.*, Procedural Order, *Molina Healthcare of Calif. v. United States*, No. 17-97C, ECF No. 10 (Fed. Cl. Mar. 24, 2017) (Wheeler, J.) (“Given Molina’s opposition, the Court declines to issue a stay of proceedings in this case. Molina, like all plaintiffs, is entitled to move forward with a claim properly filed in this Court. The existence and status of other risk corridor cases should not impede Molina’s ability to pursue relief.”).

Accordingly, because Defendant seeks an “indefinite” stay, it carries the heavy burden of

showing a “pressing need.” *Cherokee Nation*, 124 F.3d at 1416. And, because BCBSND is not a party to the pending CSR appeals, that heavy burden is especially demanding here. *Landis*, 299 U.S. at 255.

In its Motion, Defendant largely ignores and fails to establish its burden to satisfy the relevant standard. Though briefing is complete, Defendant nevertheless claims that a stay will conserve resources because it contends the case will need to be “briefed anew” following the Federal Circuit’s decisions, but Defendant offers no explanation for why such briefing will be needed if, as it contends, the Federal Circuit’s rulings “will directly resolve plaintiff’s claims in this case.” Motion at 5.

More importantly, Defendant cannot demonstrate a “pressing need” because this case is fully briefed and ripe for decision. On March 22, 2019, Plaintiff filed its Amended Complaint. *See* ECF 19. Thereafter, Defendant filed a Motion to Dismiss. *See* ECF 23. Plaintiff filed its Response and Cross Motion for Partial Summary Judgment on April 19, 2019. *See* ECF 24. Defendant then filed its Reply in support of its Motion to Dismiss and Opposition to Plaintiff’s Motion for Partial Summary Judgment. *See* ECF 25. Briefing in this case has been complete since May 24, 2019, when Plaintiff filed its Reply in support of its Motion for Partial Summary Judgment. *See* ECF 26. Defendant therefore will not have to expend additional resources because the briefing is complete for both cross motions, and the case is ready for disposition on liability.¹

Indeed, as Plaintiff has demonstrated, the material facts in this matter are not in dispute. Sections 1402 and 1412 of the ACA, Congress expressly mandated that the Treasury Secretary

¹ Given that the Government already has memorialized the CSR amounts owed to insurers each month, and annually for 2017 and 2018, including plaintiff BCBSND, we do not anticipate that there would be any delay with respect to any proceedings on damages for those years.

“shall make periodic and timely payments” to insurers in advance that are “equal to the value of the [cost sharing] reductions” insurers are required to make to individual consumers. *See* 42 U.S.C. §§18071(c)(3), 18071(a)(2), 18082(c)(3). Congress created an unambiguous mandatory “shall” pay obligation on the Government in Sections 1402 and 1412 to timely make the advance CSR payments owed to Qualified Health Plans (“QHPs”) each month. Beginning in January 2014, the Government actually made all of the required advance monthly CSR payments in full to all eligible QHPs, including BCBSND, for 45 consecutive months until October 2017, when the Government abruptly announced that it would no longer make any further CSR payments citing a sudden lack of available appropriations. BCBSND offered QHPs on the North Dakota Exchange each month since January 2014 and made all required cost-sharing reductions to eligible members as required by §1402. Plaintiff has demonstrated that the Government has materially breached its statutory, regulatory and contractual obligations by refusing to pay BCBSND the advance CSR payments owed each month since October 2017 to date.

Defendant is forced to concede that in seven consecutive decisions from this Court, the Judges have been unanimous in rejecting all of the identical arguments Defendant raises in this case to evade its clear and unambiguous CSR payment obligations.² Although Defendant disagrees with these rulings, it makes no attempt to distinguish them or articulate why a different result is warranted in this case.

² *See Montana Health Co-Op v. United States*, 139 Fed. Cl. 213, 214 (2018) (appeal pending at No. 19-1302, Fed. Cir. 2018) (Kaplan, J.); *Sanford Health Plan v. United States*, 139 Fed. Cl. 701 (2018) (appeal pending at No. 19-1290, Fed. Cir. 2018) (Kaplan, J.); *Local Initiative Health Auth. for L.A. Cty. v. United States*, 142 Fed. Cl. 1, 6 (2019) (Wheeler, J.) (“L.A. Care”); *Common Ground Healthcare Coop. v. United States*, 142 Fed. Cl. 38, 53 (2019) (Sweeney, J.); *Cnty. Health Choice, Inc. v. United States*, 141 Fed. Cl. 744, 770 (2019) (Sweeney, J.) (appeal pending at No. 19-1633, Fed. Cir. 2019); *Maine Cmty. Health Options v. United States*, 142 Fed. Cl. 53, 78 (2019) (Sweeney, J.); *Maine Cmty. Health Options v. United States*, No. 17-2057C, 2019 WL 2426150, at *20 (Fed. Cl. June 10, 2019) (Sweeney, J.).

Further, Defendant has not even suggested, much less shown, that the Federal Circuit's ruling in the CSR appeals would likely require the Court and the parties to expend substantial additional time or incur significant additional litigation costs. Defendant therefore has not, and cannot, argue that it will incur any significant additional litigation costs or burdens absent the stay it requests.

II. STAY MOTIONS THAT ARE OPPOSED ARE FREQUENTLY DENIED

Defendant cites to several CSR cases that have been stayed, though only three of those cited were stated over plaintiffs' objection. Two of those stayed cases, *Montana* and *Sanford*, were stayed only because they involved claims for 2018 CSR damages and the plaintiffs' claims for 2017 CSR damages already were pending on appeal. In fact, the Court denied two similar stay motions filed by Defendant in the CSR cases. In *Sanford Health Plan v. United States*, 18-136, Judge Firestone denied the Defendant's stay motion on March 28, 2018 (ECF No. 7), which was opposed by the plaintiff. In *Blue Cross and Blue Shield of Vermont v. United States*, 18-373, Senior Judge Horn also denied the Defendant's stay motion on May 30, 2018 (ECF No. 10), which was also opposed by the plaintiff insurer.

In addition, in other decisions, the Court has denied similar stay motions filed by the Defendant, where, as here, the plaintiffs *opposed* the Government's stay motions.³ For example, in *Molina*, a case seeking damages for the Government's failure to make risk corridor payments under Section 1402 of the ACA, the Court denied Defendant's motion to stay pending the outcome of *Land of Lincoln* and *Moda Health Plan* in the Federal Circuit. *Molina v. United*

³ The Federal Circuit too has considered and denied similar stay motions by Defendant. In the *Moda Health Plan* case, Defendant filed a motion to stay pending a decision by the Federal Circuit in the *Land of Lincoln* case—both of which involved plaintiffs' claims under the risk corridors program. Order, *Moda Health Plan v. United States*, No. 2017-1994 (May 30, 2017), ECF No. 13.

States, No. 17-97C, ECF No. 10 (Mar. 24, 2017) (Wheeler, J.). The Court subsequently awarded summary judgment and money damages to Molina on money-mandating statutory and implied-in-fact contract risk corridor claims, while the *Lincoln* and *Moda* risk corridor cases remained pending before the Federal Circuit. *See Molina*, 133 Fed. Cl. 14 (2017) (Wheeler, J.).⁴ There is no material difference in the circumstances here.

Judge Wheeler also denied the Defendant's motion to stay, which the plaintiff had opposed, in the *Moda* case. In its Order, the Court expressly acknowledged that "lower courts must be free to consider similar facts and reach independent conclusions—otherwise, there would be no need for an appellate court to harmonize the law within a circuit." *Moda v. United States*, No. 16-649C, ECF No. 12 (Nov. 28, 2016) (Wheeler, J.). At that time, Defendant argued that *Moda* should be stayed pending the outcome of the *Lincoln* appeal. Had the Court stayed *Moda*, that case would not have been able to have been joined as a companion case to *Lincoln* before the Federal Circuit and now the Supreme Court. BCBSND similarly should be permitted to receive a decision on liability on its fully-briefed motions with respect to its CSR claims.

Defendant further fails to acknowledge that despite the pending CSR appeals in the Federal Circuit, Chief Judge Sweeney in the *Maine Community Health Options v. United States* case recently awarded summary judgment to the plaintiff-insurer, which sought reimbursement for the same CSR payments that BCBSND seeks here. *Maine Cmty. Health Options v. United States*, No. 17-2057C, 2019 WL 2426150, at *20 (Fed. Cl. June 10, 2019). Notably, Chief Judge Sweeney decided that case while *Montana Health Co-Op*, *Sanford Health Plan*, and *Community*

⁴ Subsequent to obtaining summary judgment on its risk corridors claims, the plaintiff in *Molina* joined with Defendant in requesting a stay "to preserve the status quo and both parties' rights with respect to Plaintiffs' remaining claim in Count IV [regarding a breach of an implied covenant of good faith and fair dealing] and potential claims for benefit year 2016." *Molina*, No. 17-97C, ECF No. 26 (Aug. 25, 2017).

Health Choice were pending before the Federal Circuit. This Court similarly should not be constrained from determining liability while those same appeals are before the Federal Circuit.

III. PLAINTIFF WILL BE HARMED BY THE REQUESTED STAY

BCBSND acted promptly to recover the millions of dollars in CSR payments owed to it by the Government since October 2017, and Plaintiff's harm continues unabated. Unlike the Government, BCBSND has continued to honor its obligation to pay out CSR benefits and reductions to all eligible members on the North Dakota ACA Exchange even without receiving the corresponding required advance monthly CSR payments from the Government. BCBSND continues to be harmed by the Government's breach of its statutory and contractual CSR obligations and it thus has an exceptionally strong interest in obtaining an entry of judgment on its CSR claims. BCBSND should not be sidelined while other insurers move forward with their CSR cases.

Moreover, any further delay compounds the injury to BCBSND because pre-judgment interest is not available here. Although BCBSND believes that it will ultimately obtain summary judgment on its CSR claims, the longer it takes to obtain that judgment, the greater the harm caused by lack of access to the funds that the Government has repeatedly admitted it owes to BCBSND. BCBSND thus opposes an indefinite stay of this case.

IV. CONCLUSION

This case is fully briefed on liability and ripe for this Court's decision. The Court should deny Defendant's stay motion because the Defendant has not satisfied its heavy burden of showing that there is a pressing need for a stay in these circumstances and the balance of interests certainly weigh in BCBSND's favor of the Court deciding the fully-briefed cross motions. For these reasons, BCBSND respectfully requests that the Court deny Defendant's motion to stay this case.

Dated: July 2, 2019

Respectfully Submitted,

s/ Lawrence S. Sher

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2019, a copy of the foregoing Plaintiff's Opposition to United States' Motion to Stay Proceedings was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be sent to all parties by operation of the Court's ECF system.

s/ Lawrence S. Sher

Lawrence S. Sher

Counsel for Plaintiff