

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS BLUE SHIELD OF)	
NORTH DAKOTA,)	
)	
)	
Plaintiff,)	
)	
v.)	No. 18-1983C
)	Judge Hertling
THE UNITED STATES,)	
)	
Defendant.)	

DEFENDANT’S MOTION TO STAY

Pursuant to Rule 7 of the United States Court of Federal Claims, defendant, the United States, respectfully submits this motion to stay proceedings in this case pending a decision of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Sanford Health Plan v. United States*, 139 Fed. Cl. 701 (2018), *appeal docketed*, No. 19-1290 (2018) (*Sanford Health Plan*); *Montana Health Co-Op v. United States*, 139 Fed. Cl. 213 (2018), *appeal docketed*, No. 19-1302 (2018) (*Montana Health Co-Op*); and *Community Health Choice, Inc. v. United States*, 141 Fed. Cl. 744 (2019), *appeal docketed*, No. 19-1633 (2019) (*Community Health Choice*). Counsel for plaintiff indicates that it opposes our motion and intends to file a brief in opposition.

INTRODUCTION AND PROCEDURAL HISTORY

The Patient Protection and Affordable Care Act (ACA) established two programs in the same subpart to lower the cost of health coverage offered through the Exchanges. Section 1401 of the ACA authorizes a premium tax credit for eligible taxpayers and funded the program by amending a preexisting permanent appropriation for tax credits. Section 1402 of the ACA requires insurance issuers to reduce cost sharing (such as deductibles and co-payments) for eligible insureds, and further provides that the Secretary of Health & Human Services (HHS)

shall make payments to issuers equal to the value of the cost-sharing reductions issuers provide on behalf of their eligible insureds. In contrast to Section 1401, however, Section 1402 does not appropriate funds for cost-sharing reduction (CSR) payments to issuers.

Plaintiff seeks damages for HHS's failure to make CSR payments. In particular, on December 27, 2018, plaintiff filed its original complaint, where it alleged that under Section 1402, it is entitled to recover CSR payments from benefit years 2017 and 2018, regardless of whether Congress has appropriated money for those payments. *See* ECF No. 1 (Compl.) at ¶¶ 91-104. In the alternative, plaintiff alleged that it has entered into a binding implied-in-fact contract that the Government allegedly breached when it declined to make CSR payments, and further alleged that HHS's failure to make CSR payments is a taking under the Fifth Amendment to the United States Constitution. *Id.* ¶¶ 105-135. On March 22, 2019, plaintiff filed an amended complaint, which deleted references to its takings claim. *See generally* ECF No. 19. The case is now fully briefed. *See* ECF No. 23 (April 5, 2019 defendant's motion to dismiss); ECF No. 24 (April 19, 2019 plaintiff's opposition and cross-motion for summary judgment); ECF No. 25 (May 9, 2019 defendant's reply and opposition to plaintiff's cross-motion); ECF No. 26 (May 24, 2019 plaintiff's reply).

Other issuers have filed similar Tucker Act suits that seek damages for HHS's failure to make CSR payments in 2018 as well as in the last quarter of 2017.¹ In regards to the other CSR

¹ *See Common Ground Healthcare Coop. v. United States*, No. 17-877C (Sweeney, C.J.) (class action); *Local Initiative Health Auth. v. United States*, No. 17-1542C (Wheeler, J.); *Community Health Choice, Inc. v. United States*, No. 18-5C (Sweeney, C.J.); *Blue Cross & Blue Shield of Vermont v. United States*, No. 18-373C (Horn, J.); *see also Maine Cmty. Health Options v. United States*, No. 17-2057C (Sweeney, C.J.) (damages for 2017 only); *Montana Health Co-op v. United States*, No. 18-143C (Kaplan, J.) (same); *Sanford Health Plan v. United States*, No. 18-136C (Kaplan, J.) (same); *Molina Healthcare of Cal. v. United States*, No. 18-333C (Wheeler, J.) (same); *Harvard Pilgrim Health Care, Inc. v. United States*, No. 18-1820C (Smith, J.) (same); *Guidewell Mutual Holding Corp. v. United States*, No. 18-1791C (Griggsby,

cases now pending in the Court of Federal Claims, on September 4, 2018, Judge Kaplan denied the Government's motion to dismiss and granted Montana Health's motion for partial summary judgment on liability, holding that Section 1402 created a mandatory obligation on the Government's part to make CSR payments notwithstanding Congress's funding choices. *See Montana Health Co-Op*, 139 Fed. Cl. 213, 221 (2018), *appeal docketed*, No. 19-1302 (Fed. Cir. Dec. 12, 2018). On October 11, 2018, Judge Kaplan similarly granted Sanford Health Plan's motion for summary judgment on liability. *See Sanford Health Plan v. United States*, 139 Fed. Cl. 701 (2018), *appeal docketed*, No. 19-1290 (Fed. Cir. Dec. 11, 2018). We have appealed both decisions, which are now consolidated before the Federal Circuit. On March 22, 2019, we filed our opening brief in these consolidated appeals. *See Sanford Health Plan*, No. 19-1290, ECF No. 21. Then, on May 1, 2019, the appellees filed their responsive brief in *Montana Health Co-Op* and *Sanford Health Plan*. No. 19-1290, ECF No. 24.

In addition, on February 15, 2019, Chief Judge Sweeney ruled in favor of plaintiff on its statutory claim in *Community Health Choice, Inc. v. United States*, 2019 U.S. Claims LEXIS 81, *appeal docketed*, No. 19-1633 (Fed. Cir. Mar. 8, 2019). We have appealed the *Community Health Choice* decision.² On April 30, 2019, the Government filed its opening brief in

J.) (damages for 2015, 2016 and 2017); *Montana Health Co-Op v. United States*, No. 19-568C (Judge Kaplan) (damages for 2018 only); *Sanford Health Plan v. United States*, No. 19-569C (Judge Kaplan) (same).

² That same day, Chief Judge Sweeney also ruled in favor of plaintiffs on their statutory claims in the following CSR cases: (1) *Common Ground Healthcare Coop. v. United States*, No. 17-877C, ECF No. 48; and (2) *Maine Cmty. Health Options v. United States*, No. 17-2057C, ECF No. 20. Further, on February 14, 2019, Judge Wheeler granted summary judgment in favor of Local Initiative Health Authority on its statutory and implied-in-fact contract claims. *See Local Initiative Health Auth. v. United States*, No. 17-1542C, ECF No. 32. The Court has not yet issued judgment in *Common Ground Healthcare Cooperative or Local Initiative Health Authority*; as a result, those decisions are not yet final and appealable. On June 11, 2019, Chief Judge Sweeney issued judgment in *Maine Community Health Options*, and the time for appeal has not yet expired. *See* No. 17-2057C, ECF No. 35.

Community Health Choice. No. 19-1633, ECF No. 16. The Federal Circuit has ordered that *Community Health Choice* shall be considered a companion case to *Montana Health Co-Op* and *Sanford Health Plan* and, as a result, all three appeals are assigned to the same merits panel. See *Community Health Choice*, No. 19-1633, ECF No. 6. On June 10, 2019, appellee filed its responsive brief in *Community Health Choice*. *Id.* at ECF No. 17. The Federal Circuit has granted the Government's request for leave to file a single reply brief in the three appeals. See *Sanford Health Plan*, No. 19-1290, ECF No. 23. The Government's reply brief is due July 12, 2019. See *id.* at ECF No. 39.

ARGUMENT

The Court should stay this case. The Federal Circuit's decisions in *Sanford Health Plan*, *Montana Health Co-Op*, and *Community Health Choice* will likely resolve all legal issues underlying plaintiff's complaint—namely, whether insurers are entitled to recover CSR payments that Congress declined to fund directly; whether they also possess a private contractual right to CSR payments; and whether any 2018 CSR payments must be offset by monies the Government paid as a result of insurers raising premiums to cover cost-sharing reductions. Thus, it would be appropriate for the Court to exercise its discretion to stay proceedings in this matter pending resolution of the current appeals.

A stay will conserve both this Court's and the parties' resources. See *UnionBanCal Corp. v. United States*, 93 Fed. Cl. 166, 167 (2010) (“The orderly course of justice and judicial economy is served when granting a stay simplifies the ‘issues, proof, and questions of law which could be expected to result from a stay.’”) (quoting *CMAX, Inc. v. United States*, 300 F.2d 265, 268 (9th Cir. 1962)); see also *Farmer v. United States*, 132 Fed. Cl. 343, 345 (2017) (judicial economy rationale justified stay of insurer's risk-corridors suit pending resolution of the *Moda*

and *Land of Lincoln* appeals). Indeed, if the Court were to deny our request for a stay, the case would nevertheless likely need to be briefed anew following the Federal Circuit's resolution of the current appeals. In contrast, a stay will allow the parties to meaningfully address the Federal Circuit's rulings in targeted briefs.

Staying this case would be consistent with the manner in which this Court has handled most of the other CSR cases. Given the overlapping issues between the CSR cases in this Court and the CSR cases pending in the Federal Circuit, several other judges in this Court have stayed the CSR matters before them. *See Harvard Pilgrim v. United States*, Case No. 18-1820, ECF No. 10 (February 28, 2019 order staying case); *Health Alliance Medical Plans, Inc. v. United States*, Case No. 18-334C, ECF No. 22 (March 28, 2019 order staying case); *Guidewell Mut. Holding Corp. v. United States*, No. 18-1791, ECF No. 21 (May 15, 2019 order staying case over plaintiff's objection); *Montana Health Co-Op v. United States*, No. 19-568C, ECF No. 9 (May 17, 2019 order staying case over plaintiff's objection); *Sanford Health Plan v. United States*, No. 19-569C, ECF No. 9 (same).

Ultimately, a stay is appropriate given that the Federal Circuit's rulings in *Sanford Health Plan*, *Montana Health Co-Op*, and *Community Health Choice* will directly resolve plaintiff's claims in this case.

CONCLUSION

For these reasons, the Government respectfully requests that the Court stay this case pending a decision in the Federal Circuit appeals.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

s/Claudia Burke
CLAUDIA BURKE
Assistant Director

OF COUNSEL:

CHRISTOPHER J. CARNEY
Senior Litigation Counsel

ERIC E. LAUFGRABEN
ALBERT S. IAROSSO
Trial Attorneys
Civil Division
U.S. Department of Justice

s/Veronica N. Onyema
VERONICA N. ONYEMA
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 353-0536
Facsimile: (202) 514-8624
Email: Veronica.N.Onyema@usdoj.gov

June 28, 2019

Attorneys for Defendant