IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMON GROUND HEALTHCARE COOPERATIVE, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	No. 17-877C Judge Sweeney

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Defendant, the United States, respectfully submits this response to the motion for class certification by plaintiff, Common Ground Healthcare Cooperative (Common Ground). As explained below, in light of the Court's previous ruling on class certification, the United States does not oppose Common Ground's request to certify a 2019 cost-sharing reduction (CSR) class. However, the United States believes that for both reasons of judicial economy and jurisdiction, the Court should stay any proceedings or consideration of the merits of these 2019 CSR claims until the Federal Circuit has ruled on the currently pending CSR appeals. These appeals include our appeal of the judgment entered by this Court on the very same count of plaintiff's second amended complaint, of which these 2019 CSR claims are a part.

INTRODUCTION

Common Ground's motion is before the Court in an unusual procedural posture. Plaintiff is seeking to have the Court rule on a motion with respect to claims that are included in a count of its complaint as to which this Court has already entered a Rule 54(b) judgment, and which is currently on appeal to the Federal Circuit. Of course, it is a basic proposition that

"the filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the [trial] court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982).

Arguably, the Court possesses jurisdiction to entertain plaintiff's motion to certify a 2019 CSR class. However, less certain is the Court's jurisdiction to rule regarding the 2019 CSR class's claims, when the Court's judgment regarding essentially identical CSR claims for 2017 and 2018 brought by Common Ground and a similarly defined class, arising out of the same count of the complaint, are on appeal to the Federal Circuit.[1] Even if the Court concludes it does possess jurisdiction to consider the merits of the 2019 CSR class's claims, for reasons of judicial economy, the Court should stay any proceedings on the merits until the Federal Circuit has ruled on the currently pending CSR appeals.

BACKGROUND

On February 15, 2019, the Court held that by not making CSR payments to plaintiff and the 2017-2018 class members (2017-2018 CSR class), the Government had violated 42 U.S.C. § 18071, and that this entitled the class to an award of damages for 2017 and 2018. ECF No. 48. Following the Court's ruling, Common Ground moved on March 13, 2019 for leave to file a second amended complaint to add a 2019 CSR class. ECF No. 55. The Court granted it leave, and on March 22, 2019 Common Ground filed its second amended complaint adding a 2019 CSR class. ECF No. 59. Aside from the years at issue, the 2019 CSR class is

[1] In particular, the 2018 CSR claims mirror the 2019 CSR claims, as in most instances issuers were permitted to raise premiums to account for the absence of CSR payments, thereby increasing the premium tax credits paid by the Government. Following oral argument, the Federal Circuit specifically ordered the parties to file supplemental briefs addressing whether these increased premiums and premium tax credits serve to reduce damages.

defined identically to the 2017-2018 CSR class. Compare *id*. at ¶ 91 to *id*. at ¶ 99.

Several days later, the Court entered an order rejecting the CSR class's request to enter a Rule 54(b) judgment solely for 2017 CSRs—the only year for which final CSR amounts had been calculated. ECF No. 61. The Court recognized that "Plaintiff's complaint includes only a single claim to recover cost-sharing reduction payments (not claims for each year)." *Id*. The Court also concluded that "the entry of a judgment for each year at issue would likely lead to multiple appeals, wasting the resources of the parties and the [Federal Circuit], especially given that the Federal Circuit already has three cost-sharing reduction appeals on its docket . . . ." *Id.* Moreover, the Court noted, "the cost-sharing reduction class's sole claim—a violation of statute and regulation—is at issue in all three of those appeals." *Id*.

Subsequently, after the Government had completed its CSR reconciliation process and determined the amount of CSRs due for 2018, the Court entered an order on October 22, 2019, directing the Clerk to enter a Rule 54(b) judgment finding "that there is no just reason for delaying the entry of judgment on the 2017-2018 CSR class's cost-sharing reduction claim." ECF No. 71.[2] That same day, the Clerk entered a Rule 54(b) judgment on behalf of the 2017-2018 CSR class. ECF No. 72. The Government timely filed its notice of appeal on December 16, 2019. That appeal, No. 2020-1286, has been stayed pending the Federal Circuit's disposition of the lead CSR consolidated appeals in *Sanford Health Plan v. United States*, No. 2019-1290; *Montana Health CO-OP v. United States*, No. 2019-1302*; Community Health*

[2] The Court further observed that "judgment disposing of the entire case is not appropriate at this time because plaintiff also asserts a claim on behalf of a class related to the government's failure to make risk-corridors payments"—a claim that had been stayed at that time, pending the outcome of appeals in other risk-corridors cases. *Id*. at n. 1.

Choice v. United States, No. 2019-1633; and *Maine Community Health Options v. United States*, No. 2019-2102, which were argued on January 9, 2020.[3]

DISCUSSION

The Court previously certified a nearly identical CSR class for 2017 and 2018, over our opposition. *See Common Ground Healthcare Cooperative v. United States*, 137 Fed. Cl. 630 (2018). In light of the Court's ruling, the Government does not oppose the proposed certification of a 2019 CSR class. However, we do not waive and hereby reserve the right to dispute any material fact and to contest any theory of liability, including but not limited to those advanced by plaintiffs under sections 1402 and 1412 of the ACA and 45 C.F.R. § 156.430. We further reserve the right to: (1) move for decertification or to move for the class to be divided into subclasses if, as this case develops, such a motion is warranted; (2) contest whether any particular person or entity falls within the class or is otherwise entitled to relief; and (3) appeal the Court's class certification rulings.[4]

Although we do not oppose certifying a 2019 CSR class, and believe it would be appropriate to permit the class notice and opt-in process to proceed, the Court should not permit any substantive proceedings in this matter until the Federal Circuit has resolved the CSR appeals currently pending before that court. As an initial matter, as noted above, the Court previously entered a Rule 54(b) judgment on the sole CSR count in this case, and there is an appeal of that judgment stayed before the Federal Circuit. Under Supreme Court precedent, a trial court is

[3] The Federal Circuit has twice requested supplemental briefing since having held the hearing on the consolidated appeals. Common Ground is participating in those appeals as *amicus curiae* on behalf of itself and the CSR class.

[4] We also have no objection to the appointment of Quinn Emmanuel as class counsel, which was the subject of a separately filed motion. *See* Mot. to Appoint Class Counsel, ECF No. 82.

divested of jurisdiction over aspects of a case on appeal. *See Griggs*, 459 U.S. at 58. The 2019 CSR claim is included within the same count of the complaint that is on appeal to the Federal Circuit and is premised on the same legal theory that is before the Federal Circuit on appeal. Therefore, the Court should not allow any proceedings on the merits of this claim to proceed while jurisdiction is vested in the Federal Circuit.

Even if the Court were to conclude that it did possess jurisdiction to permit substantive merits proceedings on the 2019 CSR claims while the appeal of the Court's Rule 54(b) CSR judgment in this matter is pending, the Court should enter a stay pending the Federal Circuit's disposition of that appeal. In its motion for class certification, Common Ground argues that the Supreme Court's recent risk-corridors decision, "resolved the key issue in this case" concerning the Government's liability to pay CSRs. *See* Mot. for Class Cert. at 2, ECF No. 81 (citing *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1315 (2020)). Yet, that very issue is being considered by the Federal Circuit in the CSR appeals, where the Court ordered, and the parties and *amici* have filed, supplemental briefs concerning the impact of *Maine Community* on those cases.

"It is well established that every trial court has the power to stay its proceedings, which is 'incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *Freeman v. United States*, 83 Fed. Cl. 530, 532 (2008) (citing *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)). "Moreover, when and how to stay proceedings is within the sound discretion of the trial court." *Id.* (citation and internal punctuation omitted). The Supreme Court has highlighted the conservation of judicial resources as an important reason for a trial court to stay proceedings in any matter pending before it, particularly where the appellate court may resolve issues before

the trial court. *Landis*, 299 U.S. at 254-55; *UnionBanCal Corp. & Subsidiaries 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. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). Indeed, the Supreme Court also recognized that in cases of great complexity and significance, like the CSR issues in this case, "the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *See Landis*, 299 U.S. at 256.

Here, there can be no doubt that staying consideration of the merits of the 2019 CSR claims pending the Federal Circuit's resolution of nearly identical legal issues will promote judicial efficiency. Moreover, as the class notice and opt-in process will take place in the meantime, the class will suffer no prejudice.[5]

CONCLUSION

For these reasons, we do not oppose the certification of a 2019 CSR class, but respectfully request that the Court order that no proceedings on the merits of those claims take place until the appeal of the Court's earlier Rule 54(b) judgment on the CSR claims in this matter is fully resolved.

[5] In fact, in its March 13, 2019 Motion for Leave to File a Second Amended Complaint, Common Ground represented that "if the Court grants Plaintiff leave to file this Second Amended Class Action Complaint, Plaintiff will move to certify a class of QHP issuers owed CSR payments for the 2019 benefit year, and then file a motion for class notice similar to the one filed for the CSR Class for the 2017 and 2018 benefit years. *The class notice and opt-in process for the 2019 benefit year could be handled efficiently while the judgment on the 2017 and 2018 CSR claims is on appeal to the Federal Circuit.*" ECF No. 55 at 1-2 (emphasis added).

Respectfully submitted,

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