IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO STAY PROCEEDINGS AND ALTERNATIVE MOTION FOR AN ENLARGEMENT OF TIME TO RESPOND TO THE COMPLAINT

Defendant, the United States, respectfully submits this reply in support of its motion to stay proceedings pending a decision of the United States Court of Appeals for the Federal Circuit (Federal Circuit) in *Land of Lincoln Mutual Health Insurance Co. v. United States*, No. 17-1224 (Fed. Cir.), and/or *Moda Health Plan, Inc. v. United States*, No. 17-1994 (Fed. Cir.), and alternative request for a 64-day enlargement of time, until July 11, 2018, to respond to the complaint.

In our motion (Def. Mot.), we demonstrated that judicial economy compels a stay of proceedings in this case pending the Federal Circuit's resolution of the *Land of Lincoln* and/or *Moda* appeals because those appeals and this case both concern whether "shall pay" language in the text of the Affordable Care Act (ACA) requires the Department of Health and Human Services (HHS) to make certain payments even in the absence of an appropriation. *Compare* Compl. ¶¶ 65, 104, *with Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 458, 464-65 (2017). Thus, before asking this Court to decide the validity of BCBSVT's complaint, judicial economy supports a stay of these proceedings so the Court and the parties may obtain the guidance that will flow from the Federal Circuit's rulings.

BCBSVT's opposition to our stay motion (Pl. Opp.) ignores the similarities between this case and the pending appeals and mischaracterizes the nature of the requested stay. Moreover, BCBSVT's opposition to our alternative motion for a 64-day enlargement ignores the reality that additional time is needed to coordinate our response to one of the first CSR complaints filed in this Court and the first to raise takings and breach of the implied duty of good faith and fair dealings claims.

I. The Requested Stay Is Not "Indefinite"

The requested stay is only pending the resolution of fully-submitted appeals—both of which were filed, briefed, and argued long before BCBSVT filed its complaint. As we explained in our motion, when an appellate ruling is likely to have a substantial or even controlling effect, the reason for a stay is "at least a good one, if not an excellent one." *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1196 (11th Cir. 2009); *see also UnionBanCalCorp. & Subsidiaries v. United States*, 93 Fed. Cl. 166, 167-68 (2010) (staying proceedings pending resolution of related appeal); *Belgarde v. United States*, No. 07-265L, 2008 WL 1990865, *1 (Fed. Cl. Mar. 27, 2008) (staying proceedings pending resolution of related interlocutory appeal). A stay is particularly appropriate in this case because it concerns an important Government program and could potentially have a substantial impact on the public fisc. *See Taunton Gardens Co. v. Hills*, 557 F.2d 877, 879 (1st Cir. 1977).

In its response, BCBSVT erroneously argues that the proposed stay is "indefinite," such that the United States must show that "the requested stay is necessary *and* further show[s] a 'pressing need' for the stay." Pl. Opp. at 4 (emphasis in original) (citing *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997), *Haddock v. United States*, 135 Fed. Cl. 82, 91 (2017)). BCBSVT's key case for that proposition, *Cherokee Nation*, demonstrates

that the stay requested here is quite modest. *Cherokee Nation* concerned allegations that the United States misappropriated and mismanaged tribal lands. *Cherokee Nation of Okla.*, 124 F.3d at 1415. After five years of litigation, the Court determined that it could not address the merits of the suits without knowing the precise metes and bounds of the disputed tribal lands. Accordingly, the Court *sua sponte* stayed the case pending the outcome of prospective quiet title suits that the United States had not yet filed. *Id.* at 1416. The Federal Circuit determined that the Court abused its discretion because it identified no "pressing need" for a stay pending the quiet title suits when judgments could be "decades away." *Id.* Further, because the potential rulings in the quiet title suits would pertain to quantum, not liability, the Federal Circuit determined that the stay was overbroad. *See id.* at 1417. Like *Cherokee Nation*, the remaining two cases cited by BCBSVT, *Haddock*, and *National Food & Beverage Co.*, concerned stays pending the resolution of district court suits of uncertain duration. *See Haddock*, 135 Fed. Cl. at 91 (2017) (denying stay pending related Administrative Procedures Act suit in district court); *Nat'l Food & Beverage Corp. v. United States*, 96 Fed. Cl. 258, 260, 268 (2010) (denying stay of takings case pending resolution of later-filed district court condemnation suit).

Unlike the district court suits in *Cherokee Nation*, *Haddock*, and *National Food & Beverage Co.*, the *Land of Lincoln* and *Moda* appeals have been fully briefed and argued, and are awaiting disposition. Thus, concerns about long periods of district court litigation of "indefinite duration" are not present here.

II. The Benefit Of The Stay Outweighs BCBSVT's Hypothetical Burden

As we explained in our motion, the Court and both parties would benefit from the Federal Circuit's guidance in appeals that concern payments to insurers under the Affordable Care Act. Def. Mot. at 3. If the Government were to respond to the complaint now, the parties would

inevitably need to file supplemental briefs concerning the Federal Circuit's rulings in *Land of Lincoln* and/or *Moda*. Although BCBSVT contends it has an "overriding interest in an expeditious resolution," its argument relies on its misimpression (addressed above) that the requested stay is "indefinite[]." Pl. Opp. at 9. Responding to the complaint now and then filing supplemental briefs after the Federal Circuit rules in *Land of Lincoln* and/or *Moda* will resolve this case no faster than if the Government waits to respond after the Federal Circuit rules in those appeals.

III. BCBSVT Understates The Similarities Between The Legal Issues In This Case And In *Land of Lincoln* and *Moda*

As we demonstrated in our motion, because the legal issues in this case overlap with legal issues on appeal in *Land of Lincoln* and *Moda*, the Federal Circuit's rulings in those appeals are likely to clarify and simplify matters in this case. *See* Def. Mot. at 6-7. With two exceptions, this Court has stayed CSR claims pending resolution of the earlier-filed appeals in *Moda* and *Land of Lincoln*. *See* Def. Mot. at 2-3. Indeed, Judge Wheeler, who wrote the opinion on appeal in *Moda*, stayed CSR claims in two cases. *See, e.g.*, Mar. 5, 2018 Order, *Local Initiative Health Auth. v. United States* (Fed. Cl. 17-1542) ("[a]fter reviewing the parties' arguments and given the substantial overlap and relatedness of issues between this case and the cases currently on appeal, the Court GRANTS the Government's motion to stay").

Although BCBSVT mischaracterizes the similarities between this case and *Land of Lincoln* and *Moda* as "superficial[]," Pl. Opp. at 5, the appeals will resolve two, important questions that are relevant to this case: (1) whether the "shall pay" language in the ACA, by itself, creates an "obligation" of the government without regard to whether Congress has appropriated funding for the program; and (2) whether that same language is sufficient to form an implied-in-fact contract with the Government. Thus, whether or not the Federal Circuit

determines in *Land of Lincoln* and/or *Moda* that the ACA entitles issuers to payments under the ACA in the absence of an appropriation, the Federal Circuit's ruling and its rationale likely will inform the resolution of this matter.

IV. Should The Court Deny A Stay, The Court Should Grant Our Alternative Request For A 64-Day Enlargement Of Time

In our motion we demonstrated that a 64-day enlargement of time to respond to the complaint is necessary for at least two reasons. Def. Mot. at 9. First, because BCBSVT's complaint is one of the first CSR complaints to which the United States will respond, preparation of a meaningful response requires extensive coordination with the client agency, HHS, and within the Department of Justice. Second, because no CSR complaint other than BCBSVT's complaint has alleged entitlement to CSR payments under takings or breach of the implied duty of good faith and fair dealing theories, our response to BCBSVT's complaint will necessarily be different from responses we may file in *Sanford Health Plan v. United States*, No. 18-136 (Fed. Cl.) on May 29 and *Montana Health CO-OP v. United States*, No. 18-143 (Fed. Cl.) on June 1, 2018. Although BCBSVT argues that any enlargement over 30 days complicates it decisions regarding premium rate requests, Pl. Opp. at 9, BCBSVT fails to explain what business decisions would be resolved if we were to respond on June 7, 2018 (30-day enlargement) that would otherwise remain unresolved should we respond on July 11, 2018 (64-day enlargement). Thus, should the Court determine that a stay is unwarranted, the proposed 64-day time extension would provide the United States with sufficient time to prepare a response to BCBSVT's complaint.

CONCLUSION

For these reasons and the reasons set forth in our motion, this Court should stay proceedings in this case pending the Federal Circuit's decisions in *Land of Lincoln* and/or *Moda*.

In the alternative, we respectfully request that the Court extend our deadline to respond to BCBSVT's complaint by 64 days, until July 11, 2018.

Respectfully submitted,

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