IN THE UNITED STATES COURT OF FEDERAL CLAIMS

SANFORD HEALTH PLAN, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 19-569 Judge Elaine D. Kaplan

JOINT STATUS REPORT

Pursuant to the Court's May 3, 2019 Order (ECF No. 7), the parties submit this Joint Status Report with their respective positions regarding further proceedings in this matter:

Plaintiff's Position

On April 16, 2019, Plaintiff Sanford Health Plan ("Sanford") filed a complaint in the above-captioned action seeking cost-sharing reduction ("CSR") payments for the 2018 benefit year. Defendant's answer is currently due on or before June 17, 2019. For the reasons set forth below, Plaintiff respectfully requests that in the interest of judicial economy this Court adopt an expedited briefing schedule.

This Court has already adjudicated claims relating to CSR payments due for 2017. On September 4, 2018, this Court issued an Opinion and Order denying the government's motion to dismiss and granting plaintiff's cross-motion for summary judgment in connection with 2017 CSR payments claimed by plaintiff in *Montana Health Co-Op v. United States*, 139 Fed. Cl. 213 (2018), *appeal docketed* No. 19-1302 (Fed. Cir. Dec. 12, 2018) ("*Montana CSR I*"). On September 6, 2018, this Court issued an order in a directly related case brought by Plaintiff Sanford for 2017 CSR payments, noting that the parties' dispositive motions were fully briefed

and ready for decision, noting that counsel to plaintiffs and the government were identical, and requesting the parties' positions on whether the case should proceed to a decision on the pending motions in light of this Court's decision in *Montana CSR I*. Order, *Sanford Health Plan v. United States* ("*Sanford CSR I*"), No. 18-136C (Sept. 6, 2018), ECF No. 16. The parties conferred and submitted to this Court that the motions in *Sanford CSR I* were fully briefed and ready for decision, that argument was unnecessary due to the substantially similar briefing submitted by the parties and the identities of counsel in *Montana CSR I*, and the total reconciled amount of CSR payments owed by the Government in the fourth quarter of 2017. Joint Status Report, *Sanford CSR I*, No. 18-136C (Oct. 4, 2018), ECF No. 17. Accordingly, on October 11, 2018, this Court issued an Opinion and Order denying the government's motion to dismiss and granting Sanford's cross-motion for summary judgment in *Sanford CSR I*. *Sanford Health Plan v. United States*, 139 Fed. Cl. 701 (2018), *appeal docketed* No. 19-1290 (Fed. Cir. Dec. 11, 2018). This Court thereafter entered a judgment in favor of Sanford. Judgment, *Sanford CSR I*, No. 18-136C (Oct. 17, 2018), ECF No. 19.

The instant action seeks CSR payments under the same statute at issue in *Montana CSR I* and *Sanford CSR I* and adjudicated by this Court in fall 2018. Moreover, the parties are represented by identical counsel. As such, Plaintiff respectfully proposes the following schedule for further proceedings in the instant action:

- Plaintiff will file its motion for summary judgment with respect to CSR payments that were not paid in 2018 no later than Friday, May 24, 2019. The motion may be pro forma and state its request for judgment and that it is adopting the arguments it previously advanced with respect to its request for CSR payments that were not paid in 2017. Alternatively, at the Court's discretion, Plaintiff may file a more comprehensive motion.

- Defendant will file its response to Plaintiff's motion for summary judgment no later than Friday, June 14, 2019. The response may be pro forma and, if it so chooses, defendant may simply adopt the arguments it previously advanced with respect to Plaintiff's request for 2017 CSR payments. Alternatively, defendant may file a more comprehensive brief.

Defendant's Position

Sanford CSR II should be stayed because the *Sanford CSR I* appeal, along with its companion case, *Community Health Choice*, will resolve all legal issues underlying *Sanford CSR II*—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. Given that *Sanford CSR II* involves the same parties and the same legal issues on appeal in *Sanford CSR I* and *Community Health Choice*, it would be appropriate for the Court to exercise its discretion to stay proceedings in this matter pending resolution of those appeals. A stay will conserve both this Court's and the parties' resources, and will avoid saddling the Federal Circuit with unnecessary, duplicative appeals. *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). If the Court were to deny our request for a stay and the parties were to brief plaintiff's claims in *Sanford CSR II* now, the case would nevertheless need to be briefed anew following the Federal Circuit's resolution of *Sanford CSR I* and *Community Health Choice*. In contrast, a stay in *Sanford CSR II* will allow the parties to meaningfully address the Federal Circuit's rulings in targeted briefs.

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 (Judge Smith), ECF No. 10 (February 28, 2019 order staying case); *Health Alliance Medical Plans, Inc. v. United States*, Case No. 18-334C (Judge Campbell-Smith), ECF No. 22 (March 28, 2019 order staying case); *Guidewell Mut. Holding Corp. v. United States*, No. 18-1791 (Judge Griggsby), ECF No. 21 (May 15, 2019 order staying case over plaintiff's objection).

Plaintiff's proposed expedited briefing schedule is inappropriate in this case. Although the parties agreed to proceed with an expedited briefing schedule in *Maine Community Health Options v. United States*, No. 17-2057 (Chief Judge Sweeney), as it related to that plaintiff's 2018 claim, *Maine* was unique in terms of its procedural posture. In particular, the plaintiff in *Maine* sought leave to amend its existing complaint to include 2018 damages before the Court entered judgment on its 2017 claim, but after the Court issued its decision ruling in plaintiff's favor. *See Maine*, ECF No. 26 at 1-2 (Government's response to plaintiff's motion for leave to amend) (describing the procedural history of the case). Notably, on February 14, 2019, Chief Judge Sweeney entertained oral argument in *Maine*, *Community Health Choice*, and *Common Ground Healthcare Coop. v. United States*, No. 17-877C (class action)—with the plaintiffs in the latter two cases seeking damages for both 2017 and 2018. *See id*. at 2. At the close of oral argument, Chief Judge Sweeney indicated that she would issue a decision in plaintiffs' favor on their statutory and implied-in-fact contract claims. *See id*. Because Chief Judge Sweeney had already indicated that she would rule in plaintiffs' favor on the 2018 claims in *Common Ground* and *Community Health Choice*, we did not oppose the *Maine* plaintiff's motion seeking leave to amend, and we further requested that the arguments we raised in *Common*

Ground and *Community Health Choice* as they related to 2018 CSR costs be deemed part of the record in *Maine*. *See id*. at 3.

In other words, when we agreed to proceed with expedited briefing in *Maine*, the posture of that case was unique in that (1) the plaintiff sought to amend its existing complaint; (2) Chief Judge Sweeney had already ruled in favor of the *Common Ground* and *Community Health Choice* plaintiffs on their 2018 claims; and (3) Chief Judge Sweeney proposed the pro forma, expedited briefing for the Court's convenience. In contrast here, the plaintiff has filed a new complaint, and this Court has neither ruled with regards to this plaintiff's (or any other plaintiff's) entitlement to recover 2018 CSR costs, nor has it addressed whether any 2018 CSR costs must be offset by the additional payments it received through increased Government-paid premium tax credits. Ultimately, a stay is appropriate given that the Federal Circuit's rulings in *Sanford CSR I* and *Community Health Choice* will directly resolve plaintiff's claims in *Sanford CSR II*.

However, if the Court is not inclined to stay the proceedings, we request an opportunity to brief this case in the full time permitted under the Rules of the Court of Federal Claims, rather than on an expedited basis. As we explained above, this Court has not yet considered whether an issuer can recover damages for 2018 and/or whether such damages must be offset by monies obtained from the Government as a result of premium increases, and we request a full opportunity to brief these issues before the Court.

Respectfully submitted,

s/ Stephen McBrady
Stephen McBrady
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: (202) 624-2500
Facsimile: (202) 628-5116
SMcBrady@crowell.com

OF COUNSEL:
Daniel Wolff
Xavier Baker
Skye Mathieson
Charles Baek
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004

Counsel for Sanford Health Plan

JOSEPH H. HUNT
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

s/Claudia Burke
CLAUDIA BURKE
Assistant Director

s/Eric E. Laufgraben
ERIC E. LAUFGRABEN
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 353-7995
Facsimile: (202) 514-8624
Email: Eric.E.Laufgraben@usdoj.gov

OF COUNSEL:

CHRISTOPHER J. CARNEY
Senior Litigation Counsel

VERONICA N. ONYEMA
ALBERT S. IAROSSI
Trial Attorneys
Civil Division
U.S. Department of Justice

Counsel for Defendant

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