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 REPLY IN SUPPORT OF ITS MOTION TO STAY

Pursuant to Rule 7 of the United States Court of Federal Claims, defendant, the United States, respectfully submits the following reply in support of its 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*). *See* ECF No. 30 (Def. Mot.). Plaintiff raises three arguments in its opposition brief, none of which are persuasive. *See* ECF No. 31 (Pl. Opp.).

ARGUMENT

First, plaintiff argues that the Government has failed to meet its burden justifying a stay. Pl. Opp. at 1-5. This is incorrect. As we demonstrated in our opening brief, a stay will conserve judicial and party resources and is appropriate because the Federal Circuit appeals involve the same legal issues present in this case—*i.e.*, whether (1) plaintiff is entitled to recover cost-sharing reduction (CSR) payments regardless of whether Congress has appropriated money for those payments; and (2) the Government breached an implied-in-fact contract in failing to make

CSR payments. *See* Def. Mot. at 4-5; *see also* ECF No. 19 ¶¶ 91-125. As we noted in our opening brief, substantive briefing concludes later this week in the Federal Circuit appeals—on July 12, 2019. *See* Def. Mot. at 3 (citing *Sanford Health Plan*, No. 19-1290, ECF No. 39). Further, given the three CSR cases currently consolidated on appeal, a stay will also avoid burdening the Federal Circuit with yet another, separate appeal.

Plaintiff argues that the Court should not issue a stay based on proceedings in the other CSR cases. Pl. Opp. at 2. However, plaintiff does not—and cannot— dispute that the cases currently on appeal involve the same substantive legal issues present in its own case. Indeed, most of the other judges in this Court have stayed their respective CSR cases as a result, some over plaintiffs' objections. *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).

Plaintiff also argues that a stay is inappropriate "because this case is fully briefed and ripe for decision." Pl. Opp. at 3. However, in the event that the Court requests oral argument, the Court and parties will need to expend time and resources preparing for argument. Further, regardless of whether the Court schedules oral argument, it will need to review the briefs and arguments propounded by the parties therein,[1] and expend additional time preparing a written

[1] As the Court is aware, this case was only recently transferred on June 21, 2019. *See* ECF No. 28.

opinion—only for the Federal Circuit to issue a decision that will likely directly resolves the legal issues present in this case.

Second, plaintiff argues that as a general principle, "stay motions that are opposed are frequently denied." Pl. Opp. at 5 (emphasis and capitalization removed). However, again, plaintiff cannot ignore the fact that most of the CSR cases in this Court not on appeal are now currently stayed. In addition, how other judges chose to proceed in 2016 and 2017 in the risk corridor cases should not govern the Court's analysis here. *See id*. at 5-6 (plaintiff highlights fact that Judge Wheeler declined to issue stays in several of the risk corridor cases).

Further, although plaintiff correctly notes (s*ee* Pl. Opp. at 6-7) that Chief Judge Sweeney recently issued final judgment in *Maine Community Health Options v. United States*, No. 17-2057C, ECF No. 34 (June 10, 2019 Opinion and Order), the procedural history of that case is markedly different because Chief Judge Sweeney had already entered judgment in favor of multiple plaintiffs on both their 2017 and 2018 statutory claims, as well as their implied-in-fact contract claims. In particular, 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 Maine*, ECF No. 26 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 its complaint to include 2018 costs, 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. Chief Judge Sweeney then issued a final decision on Maine's claim for 2018 damages. ECF No. 34. Put another way, when she issued her decision on June 10, Chief Judge Sweeney had already ruled in plaintiffs' favor on their respective statutory and implied-in-fact contract claims—her new decision only served to address Maine's claim for 2018 damages, which it had not previously raised. In contrast here, this Court has not yet considered plaintiff's substantive claims.

Third, plaintiff argues that it will be harmed by the requested stay. *See*, *e.g.*, Pl. Opp. at 7 ("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[.]"). Plaintiff also notes that its financial injury is compounded given its inability to receive pre-judgement interest. *Id*. However, even if this Court denies our motion to stay, proceeds to issue a decision, and that decision is in plaintiff's favor, plaintiff will not receive the monetary damages it seeks until the appeals at the Federal Circuit have been finally resolved. Indeed, in regards to the other plaintiffs who have received favorable judgments in this Court on their CSR claims, those judgments have not yet been paid. Thus, regardless of when the Court issues judgment in this case, plaintiff will not receive the money it believes it is owed until some future point after the Federal Circuit issues its decision.

CONCLUSION

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

Respectfully submitted,

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