IN THE UNITED STATES COURT OF FEDERAL CLAIMS

SANFORD HEALTH PLAN,	)	
	)	
Plaintiff,	)	**No. 17-357C**
	)	
v.	)	
	)	**Judge Eric G. Bruggink**
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

UNITED STATES' MOTION TO STAY OR, ALTERNATIVELY, TO ENLARGE THE TIME TO RESPOND TO SANFORD'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The United States of America ("United States") respectfully moves this Court to stay this action pending this Court's disposition of *Maine Community Health Options* v. *United States*, No. 16-967C, in which Maine Community Health Options ("Maine") seeks partial summary judgment, and the United States seeks dismissal, on a claim *identical* to the one brought by Sanford Health Plan ("Sanford").[1] As we explain below, requiring the parties here to litigate the identical legal issue that this Court will soon resolve in *Maine*, which has been fully briefed (including post-argument supplemental briefing) and argued, would needlessly consume the resources of this Court and the parties.[2] Thus, the United States respectfully requests that this Court stay this action until this Court has issued an opinion in *Maine*.

[1] Sanford and Maine are represented by the same counsel.

[2] As the Court is aware, the same claims asserted by Sanford and Maine are already on appeal to the Federal Circuit in *Land of Lincoln Mutual Health Insurance Co. v. United States*, No. 17-1224 (Fed. Cir.).

In the alternative, the United States requests that this Court enlarge the deadline for the United States to respond to Sanford's motion for summary judgment by 60 days, until June 23, 2017. Sanford has indicated that it opposes any stay or enlargement of time.

This suit is the 20th of 23 cases filed in the Court of Federal Claims in which health insurance companies claim that they are entitled to additional payments under the risk corridors program created by section 1342 of the Patient Protection and Affordable Care Act ("ACA"), 42 U.S.C. § 18062.[3] The cases involve several technically-detailed provisions of the ACA and raise significant jurisdictional issues as well as complex issues of appropriations law. The undersigned counsel represents the United States in each of these cases, which implicate a total of $8.3 billion in federal funding for the 2014 and 2015 benefit years, with a likely additional amount yet to be determined for the 2016 benefit year. The activity in these cases has consumed substantial resources of the United States since their filing.

I. Sanford's Statutory Claim is Identical to Maine's

In its Complaint, Sanford makes two claims for relief. The first is a statutory claim based upon section 1342. That identical claim is also made by Maine, and indeed by every risk corridors plaintiff in the Court of Federal Claims. Sanford also contends that it entered into an implied-in-fact contract with the United States. While Maine did not make that claim in its Complaint,[4] the claim, like the statutory claim, is currently before the Federal Circuit in *Land of Lincoln*. A review

[3] Additionally, five cases involving risk corridors payments under section 1342 have been filed against the United States in district courts.

[4] At oral argument, *Maine* counsel told the Court that *Maine* would be "happy to move for leave" to amend its Complaint to add a contract claim, and this Court responded: "Well, no, we're not going to do that." Transcript of Argument – Motion to Dismiss and Motion for Summary Judgment, Feb. 15, 2017, at 63:5-10.

of Sanford's Complaint reveals no facts or legal arguments (apart from alleging that section 1342 was an offer to contract) that are not already before this Court in *Maine*.

Compare, for example, *Maine*, Dkt. 1 (attached as Exhibit 1), ¶ 41 with *Sanford*, Dkt. 1 (attached as Exhibit 2), ¶ 39.

> 41. Health insurers had relied on the statutorily mandated risk corridors program and the other premium stabilization programs in agreeing to participate on the exchanges and in setting their premiums for each year of the risk corridors program. It was not until October 2015, long after health insurers had set premiums and agreed to participate for the last year of the risk corridors program, that the Government first indicated that it would pay only 12.6 percent of its obligations under the risk corridors program for the 2014 benefit year.

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And compare *Maine*, Dkt. 1, ¶ 81 with *Sanford*, Dkt. 1, ¶ 81:

> 81. Plaintiff relied upon the risk corridors program when it entered and participated in the ACA exchanges, and when it designed and priced its 2014 and 2015 plans. At the end of benefit year 2014, when Plaintiff *owed* money based on its participation in the individual market, it promptly paid those amounts. When Plaintiff was owed money by HHS based upon its participation in the small group market in 2014, HHS paid only a small fraction of the total that was due. The remainder in the amount of $211,217 is owed and presently due. By the same token, the $22,739,206 losses sustained in the risk corridors program for benefit year 2015, which have been properly calculated pursuant to the formula written into the ACA, and properly documented, and properly submitted to CMS in accordance with the law, are owed to Plaintiff under the express terms of Section 1342 of the ACA. By this lawsuit, Plaintiff seeks the immediate payment in full of risk corridors receivables for 2014 and immediate payment of risk corridors receivables for 2015, so that it can continue to offer affordable health insurance as contemplated by the ACA.

> 81. Plaintiff relied upon the risk corridors program when it entered and participated in the ACA exchanges, and when it designed and priced its

> 2014 and 2015 plans. At the end of benefit year 2014, Plaintiff was *owed*[5] money based on its participation in both the individual and small group market. HHS paid only a small fraction of the total that was due. The remainder in the amount of $3,110,382.06 is owed and presently due. By the same token, the $5,869,541.98 losses sustained in the risk corridors program for benefit year 2015 are owed and presently due to Plaintiff under the express terms of Section 1342 of the ACA. By this lawsuit, Plaintiff seeks the immediate payment in full of risk corridors receivables for the 2014 and 2015 benefit years, so that it can continue to offer affordable health insurance as contemplated by the ACA.

Moreover, Sanford's statutory claim for relief is virtually identical, word-for-word to Maine's Count I claim for relief. Compare *Maine*, Dkt. 1, ¶¶ 82-86 with *Sanford*, Dkt. 1, ¶¶ 82-86. Finally, the plaintiffs' prayers for relief are also virtually identical, word-for-word, with the exception of the dollar amounts specific to each plaintiff.

The summary judgment motions filed by Maine and Sanford are also extremely similar. For example, compare *Maine*, Dkt. 9 (attached as Exhibit 3), Table of Contents page i, with *Sanford*, Dkt. 5 (attached as Exhibit 4), Table of Contents page i. And, compare *Maine*, Dkt. 9, at 25 with *Sanford*, Dkt. 5 at 22 (verbatim word-for-word).

> [*Maine*] Third, the enacting Congress's repeated and specific statements upwards of 15 times applying or exempting various ACA provisions from budget neutrality illustrate that Congress was aware of the implications of modeling the RCP on Medicare Part D. *See, e.g.*, ACA § 3007(p)(4)(C) ("The payment modifier established under this subsection shall be implemented in a budget neutral manner."). To suppose that Congress carefully considered budget neutrality throughout the ACA yet neglected to do so in connection with the RCP is patently unreasonable; it would insert into Section 1342 a budget-neutrality requirement that Congress chose not to insert. Courts "may not add terms or provisions where Congress omitted them . . . ." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 168 n.16 (1993).

[5] The Sanford Complaint even maintains the italics used in the Maine Complaint for the word "owed." Presumably, the word was italicized in the Maine Complaint to emphasize that when Maine owed risk corridors charges to the government, it paid them. There is no similar explanation for the use of italics in the Sanford Complaint.

> [*Sanford*] Third, the enacting Congress's repeated and specific statements upwards of 15 times applying or exempting various ACA provisions from budget neutrality illustrate that Congress was aware of the implications of modeling the RCP on Medicare Part D. *See, e.g.*, ACA § 3007(p)(4)(C) ("The payment modifier established under this subsection shall be implemented in a budget neutral manner."). To suppose that Congress carefully considered budget neutrality throughout the ACA yet neglected to do so in connection with the RCP is patently unreasonable; it would insert into Section 1342 a budget-neutrality requirement that Congress chose not to insert. Courts "may not add terms or provisions where Congress has omitted them . . . ." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 168 n.16 (1993).

II. A Stay Is Proper and Will Conserve Substantial Resources

Because Maine's motion for summary judgment on a claim identical to that raised by Sanford has been briefed and argued (by the same counsel that represents Sanford) and is pending a ruling on the merits by this Court,[6] this Court should enter a time-limited stay of this action pending this Court's decision in *Maine*.[7] As the Supreme Court has made clear, "the power to stay proceedings 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." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (refusing to establish rule that would prohibit "a stay to compel an unwilling litigant to wait upon the outcome of a controversy to which he is a stranger"). "Moreover, when and how to stay proceedings is within the sound discretion of the trial court." *Freeman v. United States*, 83 Fed. Cl. 530, 532 (2008) (citation and internal punctuation omitted).

[6] In this Court's March 9, 2017 Order in *Maine*, this Court denied the United States' Rule 12(b)(1) motion to dismiss on jurisdictional grounds.

[7] Sanford's counsel also represents the plaintiff in *Montana Health CO-OP v. United States*, No. 16-1427C (J. Wolski), where Montana raises the exact same claims (statutory and implied-in-fact contract) as Sanford. As in *Maine*, Montana's motion for summary judgment and the United States' motion to dismiss have been briefed and argued and are ripe for decision.

This Court's ruling in *Maine* will likely resolve Sanford's statutory claim. Should this Court dismiss Maine's statutory Count I, there would be no factual or legal basis on which Sanford could avoid dismissal of its Count I here. Should this Court grant Maine summary judgment on its statutory count, the same legal analysis would apply to Sanford's claim.[8] Detailed briefing by the parties now on the same issues already fully briefed in *Maine* would serve no purpose.[9] Even if the Federal Circuit, in resolving whether section 1342 entitles insurers to additional payments under the risk corridors program, would benefit from several decisions by different judges of the Court of Federal Claims, there is no value from multiple decisions by the same judge resolving identical legal issues (with no distinguishing facts) in an identical fashion.

Furthermore, a time-limited stay here will conserve judicial resources, as well as the resources of both parties. Other risk corridors plaintiffs have either moved for, or agreed to, a stay. In the two other risk corridors cases before this Court, this Court has stayed both cases (with the consent of the plaintiffs). *Neighborhood Health Plan, Inc. v. United States*, No. 16-1659C, Dkt. 8; *New Mexico Health Connections v. United States*, No. 16-1199C, Dkt. 7, 10. Sanford cannot identify a single unique legal or factual issue that requires resolution now.

[8] A stay may also allow the issues in this case to be clarified and refined by a decision from the Federal Circuit in *Land of Lincoln*. In addition to the *Land of Lincoln* parties' briefs, seven *amici curiae* briefs have been filed with the Federal Circuit, including briefs by a number of the plaintiffs currently before the Court of Federal Claims.

[9] In the event that this Court, in *Maine*, grants the United States' motion to dismiss, Sanford's implied-in-fact contract claim will, technically, remain at issue (though Sanford's pending motion for summary judgment does not address that claim). This Court could, should that event occur, order limited briefing here on the implied-in-fact contract claim.

III. Alternatively, this Court Should Grant the Government an Enlargement of Time in which to Respond

Sanford filed its Complaint on March 15, 2017, setting the United States' response date for May 15, 2017. Rule 12(a)(1)(A). But Sanford then filed an immediate motion for partial summary judgment, on March 22, 2017, essentially shortening the United States' response date to April 24, 2017. Rule 7.2(b)(1). If this Court does not enter a stay, in order to provide the United States with the opportunity to complete the consultation and coordination necessary to file a response to Sanford's motion, which will likely include a cross-motion to dismiss the entirety of Sanford's Complaint, we request an enlargement of time of 60 days, to June 23, 2017, to respond to Sanford's motion.

An enlargement of time is warranted due to not only the necessary consultation and coordination but also the burdensome work associated with the risk corridors cases. The United States has recently filed supplemental briefs in *Maine* (March 31, 2017 and April 10, 2017), a supplemental brief in *First Priority Life Insurance Co. v. United States*, No. 16-587 (J. Wolski), a cross-motion for summary judgment in *Health Republic Insurance Co. v. United States*, No. 16-259 (J. Sweeney) (April 12, 2013), and a cross-motion to dismiss in *HPHC Insurance Co. v. United States*, No. 17-87C (J. Griggsby) (April 13, 2013). Numerous additional deadlines in the risk corridors cases are upcoming in the next 60 days.

IV. Conclusion

Therefore, we ask this Court to issue a time-limited stay of all proceedings until 14 days following this Court's ruling in *Maine*. We request that this Court direct that the parties file a joint status report on or before that date addressing whether the stay should continue or providing a proposed schedule for further proceedings. In the alternative, should this Court deny a stay, we

request that this Court enlarge the deadline for the United States to respond to Sanford's motion for partial summary judgment by 60 days, until June 23, 2017.

Dated: April 20, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 20, 2017, I electronically filed the foregoing UNITED STATES' MOTION TO STAY OR, ALTERNATIVELY, TO ENLARGE THE TIME TO RESPOND TO SANFORD'S MOTION FOR PARTIAL SUMMARY JUDGMENT with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

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