

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

| | | |
|-------------------------------|---|------------------------|
| MONTANA HEALTH CO-OP, |) | |
| |) | |
| Plaintiff, |) | Case No. 17-1298C |
| |) | |
| v. |) | Judge Victor J. Wolski |
| |) | |
| THE UNITED STATES OF AMERICA, |) | |
| |) | |
| Defendant. |) | |
| |) | |

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S
"MOTION TO STAY PROCEEDINGS, OR IN THE ALTERNATIVE,
FOR AN ENLARGEMENT OF TIME"**

Rather than respond to Plaintiff's motion for summary judgment, the Government seeks to stay this case pending a decision in *Montana Health CO-OP v. United States*, No. 16-1427C ("Montana I") or, alternatively, a 60-day stay until January 15, 2018 to see if the Federal Circuit schedules argument in two other cases (*Land of Lincoln Mutual Health Insurance Company v. United States*, No. 17-1224 and *Moda Health Plan, Inc. v. United States*, No. 17-1994), which the Government contends will be "instructive and possibly dispositive."¹ Def.'s Mot. Stay ("Stay Motion") at 7, ECF No. 10. The Government's motion should be denied.

Montana Health's claim for benefit years 2014 and 2015 totaling \$43,430,849.49 is pending before this Court in *Montana I*. The Government also owes Plaintiff \$13,835,742 for benefit year 2016 under the risk corridors program ("RCP") established by Section 1342 of the Affordable Care Act ("ACA"). Pl.'s Mot. Summ. J. at 3, ECF No. 9. When the Government previously sought to stay *Montana I* indefinitely under nearly identical reasoning, this Court

¹ After the Government filed its motion, oral argument was scheduled in those companion cases for January 10, 2018.

denied the motion because the Government failed to identify a “pressing need” for the requested stay. Order, *Montana Health CO-OP v. United States*, No. 16-1427C (Wolski, J.) (Fed. Cl. Dec. 14, 2016), ECF No. 16 (“*Montana I* Stay Denial”). The Government’s motion to stay this case should be denied for the same reason.

Despite its explicit recognition that the instant action is a related case by which Montana Health seeks the RCP payment due for benefit year 2016, Stay Motion at 3, the Government would have this Court delay its adjudication of the 2016 portion of Montana Health’s RCP claim while its 2014 and 2015 claims proceed. That makes no sense. The Government’s arguments are materially indistinguishable from those previously rejected by this Court, and its attempt to segregate a portion of Montana Health’s claim that it recognizes “involve the same parties and are based on the same or similar claims” is illogical.

The central issue in this case is the Government’s refusal to fulfill its statutory obligation to make payments under the RCP, which has cost Montana Health tens of millions of dollars across the three years of the RCP (2014, 2015, and 2016). Montana Health is a non-profit issuer of qualified health plans (“QHPs”) under the ACA that strives to provide coverage to historically uninsured or underinsured individuals. The Government’s failure to make mandatory RCP payments has prejudiced Montana Health and tens of thousands of its members who rely on it for healthcare coverage. As the Government has recognized, Montana Health filed suit and opposed delay due to a “lack of adequate capitalization and the potential for a 2017 enrollment cap.” Def.’s Mot. Stay at 5, *Montana I*, ECF No. 8. Montana Health (which insures nearly 1 in 5 people in Montana’s individual marketplace) is fighting to continue to fulfill its mission of increasing the affordability of healthcare coverage to individuals who traditionally lacked sufficient coverage, despite the Government’s withholding of funds. As was the case in *Montana I*, time is

of the essence for Plaintiff, and public policy favors “expeditious resolution of litigation.” *Prati v. United States*, 82 Fed. Cl. 373, 378 (2008) (citing *Kahn v. Gen. Motors Corp.*, 889 F.2d 1078, 1080 (Fed. Cir. 1989)).

The Government has again failed to articulate any reason, let alone the requisite “pressing need,” to treat Montana Health’s 2016 claim any differently than its 2014 and 2015 claims. As this Court has already ruled in connection with essentially identical stay requests, the Government fails to meet its burden to identify a “pressing need” to justify its indefinite stay as required by controlling case law. *Montana I* Stay Denial (denying stay where “the government has failed to show the ‘pressing need’ required for such an indefinite stay”). That earlier ruling should be dispositive here.

The Government charges that “[t]here can be no legitimate grounds for proceeding” in this case due to the pendency of *Montana I*. Stay Motion at 7. As Montana Health has previously briefed, Plaintiff does not bear any burden to justify *not* staying this case; the burden is on the Government to justify a rare exception to the general rule. *See St. Bernard Par. Gov’t v. United States*, 99 Fed. Cl. 765, 771 (2011) (“The proponent of a stay bears the burden of establishing its need, and must ‘make out a clear case of hardship or inequity in being required to go forward.’” (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936))). In any event, the basis for a stay of this case is even weaker now since *Montana I* is already fully briefed and argued on dispositive motions. To choke off the 2016 portion of Montana Health’s claim makes little sense, particularly where Montana Health, a non-profit insurer, remains in need of prompt payment. The Government’s efforts to diminish the importance of the timing of any judgment Plaintiff may be awarded should be dismissed out of hand; Plaintiff indisputably has an interest in resolving this dispute as quickly as possible. *See Landis*, 299 U.S. at 255 (a stay would not be

appropriate where there is “a fair possibility that the stay . . . will work damage” to the non-moving party); *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997).

Because there is no basis to make Montana Health sit on the sidelines with respect to its 2016 RCP claim while litigating its 2014 and 2015 claims, the Government’s motion should be denied.

Dated: November 30, 2017

Respectfully submitted,

OF COUNSEL:

Daniel Wolff
Xavier Baker
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 624-2500

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

Counsel for Montana Health CO-OP

John Morrison
MORRISON, SHERWOOD, WILSON, & DEOLA PLLP
401 North Last Chance Gulch
P.O. Box 557
Helena, Montana 59624
Tel: (406) 442-3261

CERTIFICATE OF SERVICE

I certify that on November 30, 2017, a copy of the forgoing “Plaintiff’s Opposition to Defendant’s ‘Motion to Stay Proceedings, Or In the Alternative, for An Enlargement of Time’” was filed electronically using the Court’s Electronic Case Filing (ECF) system. I understand that notice of this filing will be served on Defendant’s Counsel, Marc S. Sacks, via the Court’s ECF system.

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