IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MAINE COMMUNITY HEALTH OPTIONS, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 16-967C Judge James F. Merow

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR STAY

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Plaintiff Maine Community Health Options ("Plaintiff" or "Health Options") respectfully submits this opposition to the Defendant's October 31, 2016 Motion to Stay ("Stay Motion"). The Stay Motion should be denied because Defendant, the United States of America ("Government"), acting through the Centers for Medicare & Medicaid Services ("CMS") (or CMS's parent agency, the U.S. Department of Health and Human Services ("HHS")) fails to demonstrate a "pressing need" for the indefinite stay that it requests. Moreover, a further delay of proceedings will substantially prejudice Health Options.

This Court has an overarching obligation to timely decide cases within its jurisdiction, and the Government's motion does not come anywhere close to overcoming the Court's obligation to do so in this case. The Court should also reject the Government's alternative request for a second extension of time to respond to the Complaint, beyond the already-extended deadline of November 28, 2016. The Government will by that time have had 111 days to respond to the Complaint. And inasmuch as the Government has already filed dispositive briefs in at least five other cases pending in the Court of Federal Claims that raise, by the Government's own characterization, "identical" issues (Def.'s Stay Mot. 3, ECF No. 8), the suggestion that responding to Health Options' Complaint will cause it substantial, additional burden strains credulity. If, as the Government has represented, those other cases are "seeking relief under identical and related legal theories to those asserted" by Health Options, the Government presumably will not need to craft a new legal theory in order to respond. *See id.* Health Options has diligently prosecuted its claim, and reasonably cooperated with the Government's previous extension request. It deserves the opportunity to seek a decision on the merits.

INTRODUCTION

Health Options is a non-profit issuer of qualified health plans, or QHPs, under the Affordable Care Act ("ACA"). As detailed in Health Options' Complaint and further

explained in Plaintiff's November Motion for Summary Judgment and Memorandum of Law in Support, the Government owes Health Options $22,950,776 under Section 1342 of the ACA (the so-called Risk Corridors Program, or RCP), codified at 42 U.S.C. § 18062. Pl's Mot. Summ. J. 5, 40, ECF No. 9.

The U.S. Department of Justice, which represents the Defendant, argues that several other cases brought in the Court of Federal Claims by other health insurers asserting similar claims for relief "ha[ve] consumed substantial resources of the United States" and therefore justifies an indefinite stay of this case while certain of those other lawsuits are decided.[1] *See* Def.'s Stay Mot. 2. Because the level of "busyness" of a defendant's legal counsel does not present a "pressing need" to stay a well-pleaded cause of action brought in good faith by an aggrieved plaintiff, the Government's motion must be denied.

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 Health Options millions of dollars. The Government's actions have substantially prejudiced Health Options and tens of thousands of its members who rely on it for healthcare coverage. Absent a pressing need, the Government must engage on the substantive issues raised in Health Options' Complaint. Accordingly, for the reasons set forth below, Plaintiff respectfully requests that the Court deny the Government's request to once again delay proceedings in this case.

STANDARD

While this Court unquestionably has broad discretion to manage its docket, *see Clinton v. Jones*, 520 U.S. 681, 706 (1997), that discretion is bounded by due regard for the

[1] The Department of Justice has approximately 113,000 employees and a $27 billion annual budget. The Department of Health and Human Services has approximately 79,000 employees and a $1.020 trillion annual budget.

plaintiff's interests in obtaining justice for its cause. *Id*. at 707 (finding that district court abused its discretion in granting stay); *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (stating that discretion to stay "is not . . . without bounds") (citing *Hendler v. United States*, 952 F.2d 1364, 1380 (Fed. Cir. 1991)); *Nat'l Food & Beverage Co. v. United States*, 96 Fed. Cl. 258, 263 (2010) (noting that discretion to stay "is not unbounded.").

The Federal Circuit thus applies a tripartite formula to motions for indefinite stays:

> (i) "a trial court must first identify a pressing need for the stay;"
> (ii) "[t]he court must then balance interests favoring a stay against interests frustrated by the action;" and
> (iii) "[o]verarching this balancing is the court's paramount obligation to exercise jurisdiction timely in cases properly before it."

Cherokee Nation, 124 F.3d at 1416; *see Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 34 (2000), *aff'd*, 271 F.3d 1327 (Fed. Cir. 2001) (citing same formula); *Freeman v. United States*, 83 Fed. Cl. 530, 533 (2008) (same).[2] For obvious reasons, the Government cites no authority for the proposition that the taxed resources of trial counsel owing to multiple pending lawsuits supports a stay of another plaintiff's case—such a proposition would be transparently arbitrary, even where the cases involve common subject matter. As the Supreme Court first observed in 1936, "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936).

Here, the Government's request should be denied because (1) the Government has identified no "pressing need" for a stay, (2) the balance of interests weighs against a stay, and

[2] The Government's request to stay this action "pending disposition of several earlier-filed cases . . ." constitutes a request for an "indefinite stay" subject to the Federal Circuit's formula. Def.'s Stay Mot. 1. *See Consolidation Coal Co. v. United States*, 102 Fed. Cl. 489, 493 (2011) (finding a request to delay litigation until another case was decided to be a request for an indefinite stay).

(3) this Court's paramount obligation to timely exercise jurisdiction weighs in favor of denying the requested stay.

I. THE GOVERNMENT HAS NOT, AND CANNOT, MEET ITS BURDEN TO DEMONSTRATE A PRESSING NEED TO STAY PROCEEDINGS.

In deciding the Stay Motion, this Court must first and foremost identify a "pressing need" for the stay. *See Cherokee Nation*, 124 F.3d at 1416. The Government bears the burden of demonstrating its need. *See Clinton*, 520 U.S. at 708 (finding that the "proponent of a stay bears the burden of establishing its need." (citing *Landis*, 299 U.S. at 255)); *St. Bernard Par. Gov't v. United States*, 99 Fed. Cl. 765, 771 (2011). The party moving for a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Landis*, 299 U.S. at 255. A trial court abuses its discretion if it issues a stay of indefinite duration "in the absence of a pressing need." *Id.*; *see Clinchfield Coal Co. v. United States*, 102 Fed. Cl. 592, 596 (2011) ("Stays of indefinite duration require a showing of a pressing need.").

The Government's request fails on this threshold issue because it has not, and cannot, meet its burden. Its motion identifies no pressing need whatsoever. Rather, the apparent basis for its requested stay is the Government's claim that the litigation team from the Commercial Litigation Branch of the Department of Justice's Civil Division assigned to this case[3] is the same team handling a series of similar cases now pending before other judges in the Court of Federal Claims, and that "activity" in five of those other cases has "consumed substantial resources of the United States." Def.'s Stay Mot. 2. This proposition, devoid of citation, does not pass muster. A legal team's case load falls well short of the sort of "pressing need" this Court requires.

[3] To date, at least nine attorneys from the Department of Justice have appeared on the Government's briefs in the various "risk corridors" cases. The Government has not yet entered an appearance in *Montana Health CO-OP v. United States*, No. 16-1427 (Wolski, J.).

The Government adds that if Health Options' case proceeds, the Government will be required to make a "similar dedication of resources" in light of the "importance and complexity of issues and the amount of public funds at stake." *Id.* This claim, too, misses the mark. After all, as the Government points out, it has already prepared and filed dispositive motions in at least five of the other cases. *See id.* The importance and complexity of the issues in this case notwithstanding, *the Government has already developed and briefed its position.* In point of fact, the Government has filed nearly identical dispositive motions in those other cases, styling its position as purely legal and not specific to the facts of any particular plaintiff. *See* Def.'s Stay Mot. 3 ("because the legal issue presented in this case is identical to the issues raised in the first-filed cases . . . ."). Although it is possible that the Government will modify its position in this matter, the notion that *this case* will overtax the Government's resources is greatly overstated.

For the very same reason, the Government's assertion that a stay in this case would "conserve judicial resources and the resources of both parties by avoiding briefing of issues already pending before five different judges of this Court," *see id.* at 3, cannot be taken seriously. For one thing, as noted, the Government's position is already of record in at least five other cases. For another, Health Options has filed a Motion for Summary Judgment—of which Health Options alerted the Government as a courtesy before the Government filed its Stay Motion. Finally, this case—no different than the others cited by the Government that are pending before other judges of this Court—is not uniquely onerous for the Government. Health Options is entitled to a decision on the merits no less than any other plaintiff. If judges of this Court were to hold cases in abeyance anytime a similar case had already been docketed, the wheels of justice

would slow to a crawl for numerous well-deserving plaintiffs.[4] Here, the law does not support the Government's request for an indefinite stay. *See Cherokee Nation*, 124 F.3d at 1416 (where the only reason for granting the stay was that it would avoid duplicative litigation and conserve judicial resources, finding that "this concern falls short of the 'pressing need' required when a trial court seeks to suspend its proceedings indefinitely"); *Prati v. United States*, 82 Fed. Cl. 373, 378 (2008) (in denying reconsideration, noting that, unlike a stay pending an interlocutory or administrative appeal, "concerns about resources and judicial economy are not as relevant" to requests for indefinite stays pending Federal Circuit resolution of a companion case decided by this Court).

Fairholme Funds, Inc., et al. v. United States provides useful guidance. In that case, this Court confronted a Government motion for an indefinite stay pending actions both within this Court and in federal district court challenging stock purchase agreements between the Government and Fannie Mae and Freddie Mac. Def.'s Mot. Stay at 1-2, 4, No. 13-465C (Fed. Cl. Aug. 6, 2013), ECF No. 7. The suits raised, in different combinations, takings, breach of contract, and illegal exaction claims, among other arguments. *Id.* at 2. The Government argued that because "the operative facts underlying all of the complaints are largely the same . . . [,] the orderly course of justice would be promoted if this case is stayed." *Id*. Plaintiff asserted that the mere fact that resolution of those actions "*could* provide guidance" that "*could* affect the resolution" based on assertions of what "*could* happen" in related actions improperly reduced the "possibility of inconsistent decisions" to "duplicative litigation" meriting a stay. Pl's Resp. Stay

[4] And to the extent that the Government's motivation is that by delaying this case it might be able to avail itself of a favorable decision of another judge of this Court (should it prevail in one or more of the other cases), the Stay Motion would have to be rejected not only because it does not present a pressing need, but also as mere defensive forum shopping. The Federal Circuit has considered parties' motives in seeking stays and has noted that it "need not countenance such legal gamesmanship." *Commonwealth*, 46 Fed. Cl. at 34.

at 6, *Fairholme Funds, Inc., et al. v. United States*, No. 13-465C (Fed. Cl. Aug. 30, 2013), ECF No. 10. Plaintiff argued that this fell far short of the "pressing need" standard, and the Court agreed. *Id.*; Order at 1, *Fairholme Funds, Inc., et al. v. United States*, No. 13-465C (Fed. Cl. Sept. 18, 2013), ECF No. 12 (denying motion for stay for "the reasons set forth in plaintiffs' response in opposition.").

For the same reason, the Government's request here should be denied.

II. THE BALANCE OF INTERESTS WEIGHS AGAINST A STAY OF THESE PROCEEDINGS.

Not only has the Government failed to articulate a "pressing need," but the interests of Health Options would be unduly frustrated by a stay. *See Landis*, 299 U.S. at 255 (stating 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*, 124 F.3d at 1416. As the Government acknowledges, the reason Health Options filed its lawsuit and opposes any further delay of this case is because it "lacks significant reserves and needs the money it seeks through its claims for its business operations and continued solvency." Def.'s Stay Mot. 3. Health Options' good-faith desire for a decision on the merits as soon as practicable eclipses whatever limited regard the Court should give to the workload argument raised by the Government.

In its motion, the Government concedes that it is "sensitive" to Health Options' "continued solvency," but assures the Court that the same issues are being "ably" handled in the other cases, that "further development of those cases (whether in this Court or on appeal) is likely to inform or even determine" Health Options' right to recovery, and that the Court and the parties *in this case* will benefit from the "amplification of the issues" through the disposition of these *other* cases. *Id.* at 3-4. The Government's claims are without merit.

Health Options is entitled to the counsel of its choice and to develop its arguments as it deems fit. It, no less than any other plaintiff, is entitled to be heard, irrespective of whether other plaintiffs with similar claims filed their complaints earlier in time. Case and point: Health Options has moved for summary judgment in this case. That strategic decision is precisely the type of legal judgment that Health Options is entitled to make for itself.

While the decisions of other judges of this Court are entitled to respect, they are not binding and would no better inform the Court's decision in this case than a decision in this case would inform the outcomes in those other cases. Stated simply, a plaintiff does not lose its right to be heard in a timely manner merely because another plaintiff filed a similar suit the day or month before. It is for that reason that this Court has repeatedly permitted cases to move forward despite the pendency of related litigation. *See, e.g.*, *Cherokee Nation*, 124 F.3d at 1418 (trial court abused its discretion in staying proceedings pending resolution of related quiet title action in another court); *Nez Perce Tribe v. United States*, 101 Fed. Cl. 139, 140 n.1 (2011) (2006 case in this Court proceeded while district court action brought by same party was pending); *Nat'l Food*, 96 Fed. Cl. at 269 (denying motion to stay takings claim pending resolution of related condemnation lawsuit involving portion of same property); *Clinchfield*, 102 Fed. Cl. at 598 (denying motion to continue stay pending resolution of district court litigation raising similar issues).

The Government's argument that holding *this* case in abeyance would allow for the "amplification" of the issues in the other cases defies logic. Amplification refers to *expansion*, not restriction. Here, "amplification" of the issues would be achieved through multiple decisions of the several judges of this Court with similar cases, which collectively would better inform the court of appeals, as necessary, about the important issues raised in this and the other

cases. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) (stressing the importance of allowing "difficult question[s]" to percolate among the multiple courts of appeals before granting certiorari); *Prati*, 82 Fed. Cl. at 378 (noting that "additional [cases of the type at issue] could benefit the Federal Circuit . . . ."); *Columbus Fruit & Vegetable Co-op. Ass'n, Inc. v. United States*, 8 Cl. Ct. 525, 529 (1985) (citing *United States v. Mendoza*, 464 U.S. 154 (1984) percolation principle in context of fee dispute affected by Government effort to litigate multiple cases in different forums).

Health Options has already withdrawn from the New Hampshire individual market beginning in 2017, where it previously enrolled 89% of the Ryan White (HIV/AIDS Program) patient population, due in part to the Government's decision to withhold approximately $23 million due under the RCP. Pl's Mot. Summ. J. 9. Across the country, more than half of the non-profit insurers operating in the exchanges have failed due in part to the Government's actions. But Health Options is fighting to continue to fulfill its mission of increasing the accessibility of healthcare coverage to individuals who traditionally lacked sufficient coverage, despite the Government's wrongful withholding of funds. Time is of the essence in this case, and there is no question that public policy favors "expeditious resolution of litigation." *Prati*, 82 Fed. Cl. at 378 (citing *Kahn v. Gen. Motors Corp.*, 889 F.2d 1078, 1080 (Fed. Cir. 1989)). The strong interests weighing against a stay overwhelm whatever desire the Government has for a contrary result. Against this backdrop, the balance of interests tips heavily against granting the Stay Motion.

III. THE COURT'S PARAMOUNT OBLIGATION TO TIMELY ADJUDICATE CASES WEIGHS IN FAVOR OF DENYING THE STAY.

The lack of a "pressing need" and the balance of interests favoring denial of the Stay Motion are joined by yet another overarching consideration: this Court's "paramount obligation

to exercise jurisdiction timely in cases properly before it." *Cherokee Nation*, 124 F.3d at 1416. One need look no further than this Court's own Rule 1, which requires that the rules of this Court "should be construed, administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." RCFC 1. This principle springs from the Court's "virtually unflagging obligation . . . to exercise the jurisdiction given [it]" to decide controversies. *Cherokee Nation*, 124 F.3d at 1418 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14-15 (1983)).

This Court has jurisdiction to hear Plaintiff's case and, as set forth in its Motion for Summary Judgment, Health Options believes the case is capable of resolution as a matter of law. Presumably, the Government would agree that this matter can be resolved without an evidentiary trial in light of its observation that the dispositive motions filed in the other cases involve the "identical" legal issues. Def.'s Stay Mot. 3. Moreover, there is no reason to think this Court would be overburdened by Health Options' case—it is the role of this Court to resolve cases of this type, and it may do so here on summary judgment.

IV. THE COURT SHOULD REQUIRE THE GOVERNMENT TO RESPOND TO THE COMPLAINT BY NOVEMBER 28, 2016.

The Government requests in the alternative that its deadline to respond to the Complaint be extended a second time, to January 15, 2017. This request, too, should be denied. As a professional courtesy, and notwithstanding the economic duress the Government's actions prompting this lawsuit have caused, Health Options already agreed to a 45-day extension of the Government's time to respond to the Complaint, to November 28, 2016—nearly four months after Health Options filed its Complaint. The fact that the Government's response is due four days after Thanksgiving does not justify an additional extension. The Government *agreed* to that deadline in *exchange* for getting 45 additional days to respond and, by the time it comes, that

deadline will have afforded the Government 111 days to respond. As the Government itself concedes, the Government has already developed its legal positions, and there is no need to wait until November 28 to file its response (presumably the same motion to dismiss that it has filed in the other cases). In fact, Plaintiff would prefer if the Government files sooner.[5] The Government has not demonstrated a need for any further extension and, particularly given the economic duress Health Options faces due to the Government's conduct and the significant time the Government has already had to craft its response, any such request should be denied.

CONCLUSION

For the foregoing reasons, Health Options respectfully requests that this court deny the Government's request for an indefinite stay pending resolution of other cases, and also deny the Government's alternative request for additional time to respond.

Dated: November 11, 2016

Respectfully submitted,

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[5] Although it is true, as pointed out in Health Options' Motion for Summary Judgment, that the Government's position has evolved, even in the course of the other litigation, *see* Pl's Mot. Summ. J. 27 n.21, surely the desire to adapt a litigating position (should the Government choose to do so again) is not grounds to delay Plaintiff's right to be heard.

CERTIFICATE OF SERVICE

I certify that on November 11, 2016, a copy of the forgoing "Plaintiff's Opposition to Defendant's Motion for Stay" 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, Serena Orloff, via the Court's ECF system.

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