STATE OF MAINE
CUMBERLAND, ss.

SUPREME JUDICIAL COURT
Sitting as the Law Court
DOCKET NO. BCD-18-228

RICKER HAMILTON, Commissioner, Maine Department of Health & Human Services Appellant, v. MAINE EQUAL JUSTICE PARTNERS, CONSUMERS FOR AFFORDABLE HEALTH CARE, et al., Appellees.	)	**APPELLANT'S RENEWED MOTION FOR STAY AND EXPEDITED BRIEFING**

Pursuant to this Court's order dated June 11, 2018, Appellant Ricker Hamilton, in his official capacity as Commissioner of the Maine Department of Health and Human Services ("DHHS"), renews his previously filed motion for (1) a stay pending appeal; and (2) expedited briefing.

INTRODUCTION

This case raises tremendously consequential and far-reaching issues regarding the separation of powers and Maine's long-term fiscal health. The Superior Court's order required the Commissioner to make a binding commitment to the federal government to expand the state's Medicaid program even though *none of the*

necessary funding or staffing to effectuate the expansion has been appropriated by the Legislature. *See* Superior Court Order of June 1 (attached as Exhibit 1). On June 7, 2018, the Commissioner filed a notice of appeal and motion for expedited briefing in this Court. The Commissioner further argued that the Superior Court's order was automatically stayed pending appeal under Rule 62(e) or that, in the alternative, this Court should stay the order pending appeal. On June 11, 2018, this Court directed the Superior Court to rule in the first instance on the Commissioner's filings. After receiving a reply in support of the Commissioner's initial motion (attached as Exhibit 2) and supplemental briefs (Exhibits 3-6) regarding the practical effects of staying or not staying its order, the Superior Court issued an order holding that the automatic stay did not apply and that the Commissioner was not entitled to a discretionary stay.

With the Superior Court now having denied a stay pending appeal, the Commissioner respectfully renews his motion before this Court. Whether under the automatic stay or the criteria governing a discretionary stay, this Court should preserve the status quo and stay the Superior Court's extraordinary order pending disposition of an expedited appeal on the merits. At bottom, the Commissioner has been ordered to make a binding commitment with the federal government to implement a massive new benefit program that the Legislature has not yet funded. The Commissioner will explain at length in his merits briefs why the Superior

Court's order is legally flawed, but there is no basis whatsoever to force the Commissioner to move ahead with implementing the Medicaid expansion without the necessary funding or staff while this appeal is pending.

As this Court anticipated, *see* June 11 Order ¶ 3, the Commissioner incorporates by reference his earlier arguments and the pleadings filed in this Court and in the Superior Court. The Commissioner submits this short additional memorandum to respond to the Superior Court's reasoning in its June 15, 2018 order denying a stay (attached as Exhibit 7).

ARGUMENT

I. The Superior Court Erred In Finding The Case Not Automatically Stayed Pursuant to Me. R. Civ. P. 62(e).

As the Commissioner explained in his initial motion, this Court has held that Rule 62(e)'s automatic stay applies to orders of the Superior Court even when they award something other than money damages. In *Lisbon Sch. Comm. v. Lisbon Educ. Ass'n.*, this Court applied Rule 62(e)'s automatic stay to an order confirming an arbitration award and compelling the immediate reinstatement of a discharged teacher. 438 A.2d 239, 245-46 (Me. 1981). *Lisbon Sch. Comm.* made clear that Rule 62(d)'s exception to the automatic stay for injunctions applies only to orders in which the court makes explicit findings that the plaintiff has satisfied each of the traditional injunctive factors, not any order that "is in the nature of an injunction." *Id.* at 245. The order at issue here directed the Commissioner to take certain actions

in furtherance of an alleged statutory duty, as authorized by the Maine Administrative Procedures Act, 5 M.R.S.A. § 11007(4)(A)-(C), but was not an injunction. Neither Appellees nor the Superior Court has contended otherwise.

Instead, the Superior Court refused to apply the automatic stay in Rule 62(e) based on *Nat'l Org. for Marriage v. Comm'n on Governmental Ethics & Elections Practices*, 2015 ME 103, ¶ 10, 121 A.3d 792, 797 (Me. 2015). This was error. To begin, this Court's holding in *Nat'l Org. for Marriage* was based on the fact that the appellant was seeking a stay of an *agency's* intended action, not of a Superior Court's *order*. *Id.* The Court noted that the definition of "judgment" in Rule 54(a) "does not include agency actions, because an appeal to the Law Court does not lie directly from the agency's decision but instead from the Superior Court's review of that decision." *Id.* Here, however, the Commissioner *is* appealing a judgment from the Superior Court. Indeed, this Court noted that Rule 80C and 15 M.R.S.A. § 11004 "preclude[] an automatic stay of the agency's decision pursuant to M.R. Civ. P. 62(e), *at least at the initial review stage*" *Id.*, 2015 ME ¶ 11. This appeal is not in the initial review stage and does not seek to stay a decision of the agency; it involves a stay of the Superior Court's order pending an appeal in this Court.

The Superior Court ignored all of this, instead relying on this Court's observation that Rule 62(e)'s reference to a stay of "execution upon the judgment" "does not include agency actions because they are not judgments upon which an

execution may issue." Exhibit 7, at 3 (citing *Nat'l Org. for Marriage*, 2015 ME ¶ 10). But because a Superior Court order *is* a judgment upon which execution may be had, this reliance was misplaced. Nor can this sentence be read more broadly to suggest that Rule 62(e)'s automatic stay only applies to *money* judgments, because this Court's decision in *Lisbon Sch. Comm.* expressly applied Rule 62(e) to an order requiring reinstatement of an employee. Nothing in *Nat'l Org. for Marriage* purported to overrule *Lisbon Sch. Comm.*, and it was error for the Superior Court to interpret it as having done so.

Appellees likewise cannot avoid the automatic stay by relying on Rule 81(c), as they did below (in an argument the Superior Court declined to address). As explained in the Commissioner's Reply Brief, *see* Ex. 2 at 2-7, Rule 81(c) does not apply to Rule 80C actions, but instead only to claims against governmental agencies in an "ordinary civil action . . . for 'other relief' formerly available by writ of prohibition." 3 Maine Prac., Maine Civil Practice § 81:10 (3d ed.). This is not such a claim. Claims brought under Rule 80C are indisputably *statutory* in nature, governed in substance and process by that rule and 15 M.R.S.A. § 11004. Rule 81(c) does not even mention Rule 80C or the Maine Administrative Procedures Act,[1] and thus cannot remove this case from the reach of Rule 62(e).

[1]Indeed, Rule 81(c) allows for an *alternative* to a Rule 80C petition, for example when "the time limits of Rule 80B or Rule 80C ha[ve] expired, but justice nevertheless demand[s] relief as an exercise of [the court's] inherent power." 3 Maine Prac., Maine Civil Practice § 81:10 (3d ed.).

Indeed, the different reasoning of the Superior Court and the Appellees share a common obvious flaw: under their view, *every* time the state loses a Rule 80C case in the Superior Court, it must seek a stay of that order pending appeal. If that were the case, one might expect the Appellees to be able to identify examples of such stays being litigated on a regular basis. They have yet to identify an example. On the other hand, as the Commissioner noted, there are multiple examples of parties who chose to bring actions for injunctive relief in addition to their Rule 80C claims, thus ensuring that an award in their favor will meet the requirements of an injunction and take advantage of the exception to the automatic.[2] In the meantime, this Court's holding *Lisbon Sch. Comm.* controls, and the automatic stay applies.

II. The Superior Court's Analysis of the Discretionary Stay Factors is Legally Flawed and Internally Inconsistent.

The Superior Court's order requires the Commissioner to immediately submit to the federal government a State Plan Amendment (SPA) effectuating Medicaid expansion, even in the absence of the required appropriation to fund and provide staffing to implement that expansion. The court did not—and could not—dispute that, once accepted by the federal government, the SPA would impose binding, federal-law obligations on the state to comply with the terms of the SPA. But the

[2] *See, e.g., Med. Mut. Ins. Co. of Me. v. Bureau of Ins*., 2005 ME 12, ¶ 4, 866 A.2d 117, 119); *Nat'l Council on Comp. Ins. v. Superintendent of Ins*., 538 A.2d 759, 761 (Me. 1988); *Brown v. State, Dep't of Manpower Affairs*, 426 A.2d 880, 887 (Me. 1981).

court nonetheless concluded in its order on the motion for stay that immediate submission of the SPA would not impose irreparable harm on the Commissioner because the state could always submit another amendment or opt out of the Medicaid expansion in the future. *See* Exhibit 7 at 4-5. Put differently, the Superior Court envisions a convoluted back-and-forth process in which the Commissioner submits the SPA and begins implementing the Medicaid expansion immediately (even in the absence of the necessary funding) but then breaks its commitment to the federal government or withdraws the expansion if the Commissioner prevails before this Court on the merits or if the necessary funding and staff do not materialize by some (unspecified) point in the future.

The Commissioner respectfully submits that there is a vastly more straightforward and efficient course: rather than forcing the Commissioner to make, and then potentially break, a binding commitment to the federal government, this Court could simply issue a short stay of the Superior Court's order until this Court can issue a decision on the merits. If Appellees prevail, then the Commissioner will promptly submit the SPA. And if the Commissioner prevails, a short stay will avoid the complexities of having to cancel and unwind a program that is already in the process of being implemented.

The Superior Court eliminated any doubt about the sweeping breadth of its order when it stated that the balance of equities favors Appellees because "the harm

to [Appellees] of being without MaineCare benefits to which they are statutorily entitled outweighs any harm to the Commissioner or DHHS resulting from a denial of the motion to stay." Exhibit 7 at 5. From the start of this case, Appellees have sought to portray submission of the SPA as merely a "ministerial" act that would not require the Commissioner to spend or commit to spending funds in advance of an appropriation. The Superior Court's order on the merits endorsed that theory as well. *See* 6/4 Order at 12-13 & fn.5 ("[T]his case addresses only the SPA, and [] no money need be expended to submit the SPA").

The Superior Court has now acknowledged, however, that once the SPA is submitted and accepted, Appellees (and tens of thousands of other individuals) would become eligible for expanded Medicaid benefits. The only way the balance of the equities could favor Appellees is if the Superior Court's order required the Commissioner to not just submit the SPA to the federal government but *begin implementing the Medicaid expansion in the absence of the necessary appropriations*. That order violates the separation of powers and usurps the role of the Legislature—as the Commissioner will explain in his merits briefing—but at the very least should be stayed until this Court can issue a ruling on the merits.[3]

[3] In addressing whether the Commissioner is likely to succeed on the merits on appeal, the Superior Court merely cross-referenced its earlier June 4, 2018 Order. *See* Exhibit 7 at 5-6. The Commissioner has explained in his opening motion why he is likely to prevail on appeal.

Finally, the Superior Court held that the public interest counsels against a stay because "[t]he executive branch's refusal to act and follow the will of the people … has the potential to engender disrespect for duly enacted laws." Exhibit 7 at 6. But the Medicaid ballot initiative—the only "duly enacted law" at issue here—was enacted amid *express recognition* that the expansion was contingent upon further appropriations of funds by the Legislature. The sponsors of the initiative could have included a dedicated funding mechanism—which presumably would have made it more difficult to convince voters to pass the measure—but they instead left the appropriations to the ordinary legislative process. The Commissioner is not in any way subverting or disregarding the "will of the people"; it is the Superior Court whose order would short-circuit the appropriations process and impermissibly usurp the power of the purse, which this Court has heretofore recognized as belonging exclusively to the Legislature.

CONCLUSION

The Commissioner respectfully submits that the best way forward in this complicated and tremendously consequential case is to freeze the status quo and issue a short stay of the Superior Court's order while this Court considers an expedited appeal. Although the initial schedule negotiated by the parties may no longer be feasible, the Commissioner remains willing to file his merits briefs on an

expedited schedule in order to present the case to this Court as soon as July 18, and avoid any undue delays for Petitioners or the Court.

Dated: June 18, 2018

Respectfully submitted,

Patrick Strawbridge, No. 10024
Consovoy McCarthy Park PLLC
Ten Post Office Square
8th Floor PMB #706
Boston, MA 02109
Tel: 617.227.0548
patrick@consovoymccarthy.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that it has served counsel for Appellees with a copy of this motion by e-mail and U.S. Mail on this day, June 18, 2018

Patrick Strawbridge