IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MOLINA HEALTHCARE OF CALIFORNIA, INC., *et al.*,	)	
Plaintiffs,	)	
	)	No. 18-333C
v.	)	Judge Wheeler
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFFS' PARTIAL OPPOSITION TO UNITED STATES' MOTION TO STAY PROCEEDINGS AND ALTERNATIVE MOTION FOR EXTENSION OF TIME TO RESPOND

The Molina Plaintiffs respectfully partially oppose the United States' motion to stay or, in the alternative, for an extension of time because there is no valid reason to delay this Court's consideration of Molina's Cost-Sharing Reduction ("CSR") payment claims (Compl. Counts V to VII) under which Plaintiffs are owed nearly $160 million. Plaintiffs *do not* oppose, and consent to, Defendant's motion to stay Molina's risk corridors claims for CY 2016 (Compl. Counts I to IV), pending the Federal Circuit's decision in the combined *Land of Lincoln* and *Moda* appeals.[1] Those appeals are expected to address the unique facts and law pertaining to risk corridors.

Plaintiffs' CSR claims are separate counts under a distinct statutory program that imposed different obligations upon QHPs and the Government to serve other purposes under the ACA. While those CSR claims arise out of the Government's failure to make mandated payments to Molina under money-mandating provisions in the ACA, the facts and well-settled

[1] Following this Court's ruling on summary judgment in favor of Plaintiffs on the statutory and implied-in-fact contract counts concerning Plaintiffs' risk corridors claims for CY 2014 and CY 2015 (No. 17-97 C), Plaintiffs consented to stay the remaining claims relating to CY 2014 and CY 2015 risk corridors. *See* ECF 27 (No. 17-97 C).

law applied to CSRs are unlikely to be addressed by the Federal Circuit in its eventual *Lincoln*/*Moda* risk corridors decision. Staying Molina's CSR claims until the Federal Circuit issues its *Lincoln* and *Moda* decision therefore would be improper and prejudicial to Plaintiffs, because the risk corridors appeals pending before the Federal Circuit will not resolve the core issues presented in Molina's CSR claims. The fact that other risk corridors cases have been stayed by order or on consent pending the Federal Circuit's decision in *Lincoln* and *Moda* does not weigh in favor of a stay of Plaintiffs' CSR claims.

Because Defendant cannot satisfy its burden to show that it is "necessary" to, or that a "pressing need" exists to, stay Molina's CSR claims while the Federal Circuit resolves issues in the risk corridors appeals, and that its interests in staying the case outweigh Molina's interests in pursuing Plaintiffs' $160 million CSR claims, Defendant's motion to stay all of Molina's claims should be denied and Molina should be entitled to proceed with its CSR claims.

I. DEFENDANT DOES NOT SATISFY ITS BURDEN FOR A STAY OF MOLINA'S CSR CLAIMS UNDER GOVERNING CASE LAW

"[T]he court's paramount obligation [is] to exercise jurisdiction timely in cases properly before it." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997). This Court's broad, inherent discretion to stay a case "is not … without bounds." *Id.* A stay should be granted only if the proponent of the stay – here, Defendant – satisfies its burden of establishing that the stay is "necessary." *Haddock v. United States*, 135 Fed. Cl. 82, 91 (Fed. Cl. 2017) (Wheeler, J.) (citing *St. Bernard Par. Gov't v. United States*, 99 Fed. Cl. 765, 771 (2011)). In other words, "the suppliant for a stay must make out a clear case of *hardship* or *inequity* in being required to go forward …." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936) (emphasis added).

Moreover, if the requested stay lacks a definite end date – Defendant's request here is

indefinite, because it is unknown when the Federal Circuit will resolve *Lincoln* and *Moda*[2] – then the movant must show a "pressing need" for the stay. *Haddock* at 91 (quoting *Cherokee Nation* at 1416). The movant must further show that the "balance [of] interests favoring a stay" outweighs the other party's (*i.e.*, Molina's) opposing interests in proceeding with the case. *Id.* (quoting *Cherokee Nation* at 1416).

The movant's (*i.e.*, Defendant's) burden is especially high when, as here, a motion to stay is based upon proceedings in another litigation not involving the stay's opponent (*i.e.*, Molina), because "[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 [allegedly] define the rights of both." *Landis*, 299 U.S. at 255; *see also* Procedural Order, *Molina Healthcare of Calif. v. United States*, No. 17-97C, ECF No. 10 (Fed. Cl. Mar. 24, 2017) (Wheeler, J.) ("Given Molina's opposition, the Court declines to issue a stay of proceedings in this case. Molina, like all plaintiffs, is entitled to move forward with a claim properly filed in this Court. The existence and status of other risk corridor cases should not impede Molina's ability to pursue relief.").[3]

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[2] In *Haddock*, this Court found another action to be "indefinite" when "it [was] uncertain how long those proceedings may take." *Haddock*, 135 Fed. Cl. at 91. It is likewise uncertain how long the Federal Circuit will take to issue a *Lincoln*/*Moda* decision. The Federal Circuit has designated as related cases to *Lincoln* and *Moda* the risk corridors appeals in *Blue Cross and Blue Shield of North Carolina*, Fed. Cir. No. 17-2154, and *Maine Health Options*, Fed. Cir. No. 2395. Although *BCBSNC* and *Maine* are fully briefed and marked as companion cases to each other, neither is set for oral argument before the Federal Circuit. It remains unknown and uncertain when any *Lincoln*/*Moda* decision will be published. Defendant therefore requests an "indefinite" stay. *See Haddock* at 91.

[3] Because this Court recently found in *L.A. Care* that Defendant had met its rarely achieved burden to obtain a stay pending resolution of the indefinite risk corridors appeals in *Lincoln* and *Moda*, Molina here will not oppose a stay of its risk corridors claims in the same circumstances. *See* Order Granting Stay, *Local Initiative Health Auth. for L.A. Cnty. v. United States*, No. 17-1542C, ECF No. 19 (Fed. Cl. Mar. 5, 2018) (Wheeler, J.) (granting stay "given the substantial overlap and relatedness of issues between this case and the cases currently on appeal"). Molina, however, opposes a stay of its $160 million CSR claims, which deserve this Court's timely attention and lack any substantial overlap with the issues on appeal in *Lincoln* and *Moda*.

II. THE RISK CORRIDORS APPEAL ISSUES DO NOT ADDRESS MOLINA'S CSR CLAIMS

Defendant seeks to stay Molina's entire action (both risk corridors and CSR claims) until the Federal Circuit publishes its opinion – whenever that may occur – in the combined appeals of *Lincoln* and *Moda*, which are risk corridors cases. The Government's failure to make nearly $76 million in required CY 2016 risk corridors payments to Molina, however, is addressed in just four of the seven counts found in Molina's Complaint. *See* Compl. ¶¶ 309-369 (Counts I to IV). Due to the presence of Plaintiffs' $160 million CSR claims in this case, Defendant is incorrect in asserting that "the issues presented in this case mirror issues raised before the Federal Circuit in *Land of Lincoln* and *Moda.* Def's Mot. to Stay, ECF 7 at 4.

Molina's three remaining counts address nearly $160 million in monthly advance CSR payments that the Government stopped paying in October 2017 but nevertheless is required to pay to Molina for CY 2017. *See id.* ¶¶ 370-414 (Counts V to VII). As detailed below, CSRs are different than risk corridors. Because Defendant cannot satisfy its burden to show that it is "necessary" to, or that a "pressing need" exists to, stay Molina's CSR claims while the Federal Circuit resolves issues in the risk corridors appeals, and that its interests in staying the case outweigh Molina's interests in pursuing Plaintiffs' $160 million CSR claims, Defendant's motion to stay all of Molina's claims should be denied and Molina should be entitled to proceed with its CSR claims.

As stated in Molina's Complaint (*see* Compl. ¶¶ 222-308), the Government abruptly and wrongfully stopped making advance CSR payments to Molina in October 2017, after 45 consecutive months of making such payments to Molina (and other QHPs). Two money-mandating statutes passed by Congress require advance CSR payments to be made to Molina,

Congress never made the statutory payment obligation "subject to the availability of appropriations" or limited the obligation in any way, the U.S. Attorney General's recent formal legal opinion admits that the payments to Molina are "authorize[d]," and Congress has taken no legislative action to attempt to limit the Government's obligation to make advance CSR payments to Molina and other QHPs.

In fact, recognizing that CSR payments are owed to Molina and other QHPs, Congress recently tried – but failed due to disagreements over abortion language – to include CSR funding dating back to October 2017 in the FY 2018 omnibus appropriations act that President Trump signed into law on March 21, 2018. *See, e.g.*, Press Release, Sen. Lamar Alexander, *Legislation to Lower Health Insurance Premiums in Individual Market by up to 40% Proposed for Omnibus Spending Bill* (Mar. 19, 2018), *available at* https://www.alexander.senate.gov/public/index.cfm/pressreleases?ID=316AF55E-AE8E-4CA8-8187-280D5266DC5B (includes link to text of proposed legislation); Peter Sullivan, *Collins: 'Extremely disappointing' ObamaCare fix left out of spending deal*, The Hill (Mar. 21, 2018), *available at* http://thehill.com/policy/healthcare/379677-collins-extremely-disappointing-obamacare-fix-left-out-of-spending-deal.

The CSRs scenario, therefore, presents a classic example of "[t]he mere failure to appropriate sufficient funds," which "is not enough" for the Government to escape liability for the failure to pay. GAO, *Principles of Federal Appropriations Law*, GAO-16-463SP, at 2-63 (4th ed. Mar. 2016), available at https://www.gao.gov/assets/680/675709.pdf. While "[a] failure to appropriate in this type of situation will prevent administrative agencies [*e.g.*, HHS] from making payment," even the GAO recognizes that such a failure "is unlikely to prevent recovery by way of a lawsuit" in the U.S. Court of Federal Claims. *Id.* (citing *United States v. Langston*, 118 U.S. 389, 394 (1886); *United States v. Vulte*, 233 U.S. 509 (1914); *Wetsel-Oviatt Lumber*

Co., Inc. v. United States, 38 Fed. Cl. 563, 570-71 (1997); *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966); and *Gibney v. United States*, 114 Ct. Cl. 38 (1949)). Two federal judges have already recognized the Government's liability to QHPs, like Molina, in these particular circumstances regarding advance CSR payments. *See* Compl. ¶¶ 292-294. Molina has come to this Court to enforce the Government's payment obligations.

The two primary liability issues in the combined *Lincoln* and *Moda* risk corridors appeals are "budget neutrality" – whether Congress intended ACA § 1342 to be applied in a budget-neutral manner – and "implied repeal" – whether the subsequent appropriations riders vitiated the Government's existing obligation to make risk corridors payments to eligible QHPs. Neither of those liability issues arise in the CSRs context, and thus the Federal Circuit's rulings on those issues will have no effect on Molina's CSR claims. It is clear in the CSR context that "the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." *Prairie Cnty., Mont. v. United States*, 782 F.3d 685, 690 (Fed. Cir.), *cert. denied*, 136 S. Ct. 319 (2015) (citation omitted); *see* Compl. ¶ 266 (quoting *Prairie Cnty.*).

Therefore in resolving Plaintiffs' CSR claims, this Court will not be addressing the "same issues" as the Federal Circuit in the *Land of Lincoln* and Moda risk corridors appeals as Defendant now contends. Def's Mot. to Stay, ECF 7 at 6. To stay Molina's CSR claims pending the resolution of issues on appeal that have no relation to Molina's CSR claims would be extremely prejudicial and unjust to Molina. It is not "necessary" to impose such a stay, there is no "pressing need" to do so, and Molina's interests in timely pursuing its valid CSR claims outweigh Defendant's interest in delaying argument on the merits of the Government's unlawful

actions.

Even if there is some potential overlap between the risk corridors appeals and Molina's CSR claims on implied-in-fact contract issues, that would be insufficient to warrant a stay here given that the CSR statutes, regulations and operative facts are different than those found in the risk corridors cases. For instance, the Government made 45 consecutive monthly advance CSR payments before abruptly halting them in October 2017, raising course of performance issues not present in the risk corridors cases. Therefore, the Federal Circuit's expected decision on implied-in-fact contract in the risk corridors context may have only limited applicability to Molina's CSR claims.

This is not one of those "rare circumstances" in which Molina should be "compelled to stand aside while a litigant in another [case] settles the rule of law that will [allegedly] define the rights of both." *Landis*, 299 U.S. at 255. Defendant cannot show that it will suffer "hardship" or "inequity" by arguing the merits of Molina's implied-in-fact contract claims regarding CSRs while the Federal Circuit's risk corridors decision is pending, there is certainly no "pressing need" to stay in these circumstances, and whatever interests Defendant might articulate to this Court for a stay are outweighed by Molina's significant interests in obtaining timely resolution to its $160 million CSR claims..

Accordingly, given (1) Molina's significant interests in obtaining timely resolution of its $160 million CSR claims, (2) the differences between the CSRs and risk corridors claims, and (3) the fact that the Federal Circuit's forthcoming *Lincoln*/*Moda* risk corridors decision is likely not to resolve issues raised in Molina's CSR claims, the Court should deny any stay of Molina's CSR claims.

III. BECAUSE DELAY HARMS MOLINA, IT OPPOSES ANY STAY ON CSRS, BUT CONSENTS TO A FAIR EXTENSION FOR DEFENDANT'S RESPONSE

Finally, any delay compounds the injury to Molina because pre-judgment interest is not available here. Although Molina believes that it will ultimately obtain summary judgment from the Court for its CSR claims (as well as its risk corridors claims), the longer it takes to obtain judgment, the greater the harm caused by lack of access to the $160 million in CSR payments that the Government has repeatedly admitted it owes to Molina, but has not paid.

Molina thus opposes both an indefinite stay of its CSR claims, and a protracted extension of the deadline for Defendant to respond to the Complaint's CSR counts. Recognizing, however, that potentially novel issues are raised with the CSR claims, Molina is willing to consent to an additional month, to Monday, June 4, 2018, for the United States to respond to the Complaint. Given the significant amounts at issue, Molina opposes an extension beyond June 4, 2018.

IV. CONCLUSION

A stay of Molina's CSR claims is not "necessary" here, Defendant cannot show any "pressing need" for a stay, and the balance of interests weigh in Molina's favor of timely proceeding with its CSR claims in this case. For these reasons, Molina respectfully requests that the Court deny Defendant's request to stay the CSR claims in this case (Counts V to VII), and permit Defendant until Monday, June 4, 2018 to respond to the CSR claims in Molina's Complaint.

Dated: April 11, 2018

Respectfully Submitted,

s/ Lawrence S. Sher

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2018, a copy of the foregoing Plaintiffs' Partial Opposition to United States' Motion to Stay Proceedings and Alternative Motion for Extension of Time to Respond, was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing with be sent to all parties by operation of the Court's ECF system.

s/ Lawrence S. Sher
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