

2017-1224

In the
United States Court of Appeals for the Federal Circuit

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

**Appeal from the United States Court of Federal Claims,
Case No. 16-744C (Lettow, J.)**

**REPLY IN SUPPORT OF MOTION FOR LEAVE OF *AMICI CURIAE*
HIGHMARK INC., HIGHMARK BCBSD INC., HIGHMARK WEST
VIRGINIA INC., BLUE CROSS AND BLUE SHIELD OF NORTH
CAROLINA, BLUE CROSS OF IDAHO HEALTH SERVICE, INC., AND
BLUE CROSS AND BLUE SHIELD OF KANSAS CITY, TO FILE BRIEF
IN SUPPORT OF PLAINTIFF-APPELLANT'S MOTION TO SUBMIT
RELATED APPEALS TO THE SAME PANEL FOR ARGUMENT AND
DECISION**

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CERTIFICATE OF INTEREST

Counsel for *Amici Curiae* certifies the following:

1. The full name of every party or *amicus* represented by me is:

Highmark Inc., Highmark BCBSD Inc., Highmark West Virginia Inc., Blue Cross and Blue Shield of North Carolina, Blue Cross of Idaho Health Service, Inc., and Blue Cross and Blue Shield of Kansas City.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by me are:

N/A

4. The names of all law firms and partners or associates that appeared for the party or *amicus curiae* now represented by me in the trial court or agency or are expected to appear in this court are:

Reed Smith LLP: Lawrence S. Sher, Colin E. Wrabley, Kyle R. Bahr, Conor M. Shaffer, Daniel I. Booker, Dan J. Hofmeister, Jr.

/s/ Lawrence S. Sher

**REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS
AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT’S MOTION
TO SUBMIT RELATED APPEALS TO THE SAME PANEL FOR
ARGUMENT AND DECISION**

Earlier today, Highmark Inc., Highmark BCBSD Inc., Highmark West Virginia Inc., Blue Cross and Blue Shield of North Carolina, Blue Cross of Idaho Health Service, Inc., and Blue Cross and Blue Shield of Kansas City (*Amici*) filed a motion for leave to file a brief as *amici curiae* in support of Plaintiff-Appellant Land of Lincoln Mutual Health Insurance Company (Lincoln) motion to submit related appeals to the same panel for argument and decision (ECF No. 117). *Amici* filed their motion for leave and proposed brief in order to respond to claims made in the government’s briefing that purport to represent the “expectations” of the plaintiffs in other pending risk corridors cases—including *Amici* themselves. *Amici* believe their perspective on that issue, and others, provides information helpful to the Court in its consideration of Lincoln’s motion.

Consistent with its approach in opposing Lincoln’s (and Moda Health Plan’s) motions to join the appeals in those two cases, and in seeking a stay of its own appeal in *Moda*, however, the government once again seeks to shut down full dialogue from interested parties by claiming—without any citation to authority—that *Amici*’s motion is untimely because briefing on Lincoln’s joinder motion has been completed. The government’s response is not well-founded.

As an initial matter, under the Federal Rules of Appellate Procedure, a motion for leave to file an *amicus* brief is due within 7 days of the filing of the party submission the *amicus* brief supports. *See* Fed. R. App. P. 29(e) (March 2016); Fed. R. App. P. 29(a)(6) (December 2016).¹ *Amici's* motion for leave here was filed 6 days after Lincoln filed the joinder motion that *Amici's* proposed brief supports. *Amici* therefore have a good-faith belief that their motion is timely.

Moreover, had the government used the full amount of time available to respond to Lincoln's joinder motion (10 days; Fed. R. App. P. 27(a)(3)(A)), *Amici's* motion for leave would in fact have been filed well before the briefing on Lincoln's joinder motion was completed. As it is, *Amici's* motion today was filed within 2 days of the completion of briefing on the joinder motion. Given that the Court has not yet ruled on Lincoln's May 12 joinder motion, that is hardly a consequential lapse in time.

There is no other equitable ground for the government's untimeliness plea, either. Indeed, just this afternoon, in a reply in support of its motion to stay the appeal in *Moda*—a motion closely related to Lincoln's (and *Moda's*) respective motions to join their appeals—the government repeated the very same claims that *Amici's* proposed *amicus* brief addresses. *See* Prop. Br. of *Amici Curiae* (ECF No.

¹ The Court also has discretion to permit a motion for leave and *amicus* brief to be filed beyond the 7-day deadline. *See* Fed. R. App. P. 29(e) (March 2016); Fed. R. App. P. 29(a)(6) (December 2016).

128-2) at 5, 7. Given the accelerated nature of the briefing on the various motions, the government's filing today, and the ongoing pendency of the joinder motions, there is simply no substance behind the government's timeliness complaint.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court grant their motion for leave to file the attached brief as *amici curiae* in support of Lincoln's joinder motion.

Dated: May 18, 2017

/s/ Lawrence S. Sher

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2017, I electronically filed the foregoing reply with the Clerk of the United States Court of Appeals for the Federal Circuit using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ Lawrence S. Sher