

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

MODA HEALTH PLAN, INC.,)	
)	
Plaintiff-Appellee,)	
)	No. 17-1994
v.)	
)	
THE UNITED STATES OF)	
AMERICA,)	
)	
Defendant-Appellant)	

**RESPONSE OF PLAINTIFF-APPELLEE IN OPPOSITION TO
DEFENDANT-APPELLANT’S MOTION TO STAY PROCEEDINGS**

On May 12, 2017, the Government moved to stay the appeal in this action pending resolution of *Land of Lincoln Mutual Health Insurance Co. v. United States*, No. 17-1224 (Fed. Cir.).¹ Plaintiff-appellee Moda Health Plan, Inc. (“Moda”) opposes that motion, for two reasons.

First, pending before this Court is Moda’s motion that this appeal be submitted for disposition to the same panel that will decide *Land of Lincoln*, and that a joint oral argument be held before the same panel in both cases.² As demonstrated in that motion, this Court has previously, at the behest of the Government itself,

¹ Government Mot. to Stay This Appeal Pending Outcome of This Court’s Decision in *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 1224, Dkt. No. 8 (May 12, 2017) (“Gov. Mot. to Stay”).

² Mot. of Plaintiff-Appellee Moda Health Plan, Inc., to Submit Related Appeals to the Same Panel for Argument and Decision, Dkt. No. 7 (Fed. Cir. May 11, 2017) (“Moda Mot.”).

granted joint oral argument before the same panel when pending appeals raised similar issues; the appeals were among multiple cases in which the plaintiffs had asserted similar claims; and the CFC decisions at issue had reached disparate conclusions, *see* Moda Mot. 4-6. Moda has further demonstrated that all of these factors weigh in favor of joint argument here. *Id.*

As further explained in its motion (Moda Mot. 8-9), Moda has also identified additional factors that militate in favor of joint oral argument and disposition before the same panel. The CFC in *Land of Lincoln* took the singular approach of resolving the dispute via a judgment on the administrative record, pursuant to RCFC 52.1 procedures typically followed only in administrative appeals, not Tucker Act cases. Amici have contended that this constitutes reversible error, *see* Moda Mot. 9, indicating that *Land of Lincoln* is not an appropriate, stand-alone vehicle for the resolution of the several overlapping questions that lay at the heart of the claims of Moda and the plaintiffs in almost two dozen other lawsuits.

In addition, the fact that Moda is a going concern that has been a private insurer for decades, while Land of Lincoln was a brand new Consumer Operated and Oriented Plan (“CO-OP”) capitalized through provisions of the same Act (the Affordable Care Act) under which its claims arise, which now finds itself under state receivership and liquidation, clearly distinguishes Land of Lincoln’s responses to the Government’s contention that its losses do not arise out of the Government’s

breach of its statutory, regulatory and contractual obligations, but rather result from its own “individually calculated business risks” and “business judgment,” *see* *Moda* Mot 8.

For these and the additional reasons set forth in *Moda*’s motion and in its reply in support thereof,³ the appeal in this case should not be stayed, but should instead be submitted for disposition to the same panel that will decide *Land of Lincoln*, with a joint oral argument.

Second, the Government cites no case law in its stay request, but does make explicit its intention that this appeal be stayed so that *Moda*’s rights will be determined by the outcome of the *Land of Lincoln* appeal: “The government respectfully asks the Court to stay its appeal in [*Moda*] pending this Court’s decision in *Lincoln*, which will control the resolution of all of the risk-corridors cases.” Gov. Mot. to Stay at 1.

To be sure, “the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants,” *In re Medical Components, Inc.*, 535 Fed. Appx. 916, 918 (Fed. Cir. 2013) (quoting *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936)); accord, e.g., *Murata Machinery USA v.*

³ Reply in Support of Plaintiff-Appellee’s Motion to Submit Related Appeals to the Same Panel for Argument and Decision, Dkt. No. 10 (Fed. Cir. May 15, 2017).

Daifuku Co., 830 F.3d 1357, 1361 (Fed. Cir. 2016). However, that power is not unfettered. “[U]nder circumstances where a litigant would be ‘compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both,’ the movant [seeking a stay] must ‘make out a clear case of hardship or inequity.’” *In re Medical Components*, 535 Fed. Appx. at 918 (quoting *Landis*, 299 U.S. at 255).

That is the situation here, where as noted the Government openly seeks to have *Moda*’s rights resolved by *Land of Lincoln*. Yet the Government does not attempt to make out a “clear case of hardship or inequity” that would warrant a stay of its appeal in *Moda*. And, as *Moda* has shown, *see pp. 2-3 supra*, there are differences between its case and *Land of Lincoln*, which warrant the cases being heard together, and at a minimum, a full briefing in *Moda* in the ordinary course.

The Government’s motion to stay should be denied.

Respectfully submitted,

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CERTIFICATE OF INTEREST

Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10 % or more of stock in the party
Moda Health Plan, Inc.	Moda Health Plan, Inc.	Moda Inc.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

Philip J. Peisch

May 17, 2017

Date

/s/ Steven J. Rosenbaum

Signature of counsel

Please Note: All questions must be answered

Steven J. Rosenbaum

Printed name of counsel

cc: Phillip M. Seligman

Reset Fields

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2017, a copy of the foregoing, was filed electronically with the Court's Electronic Case Filing ("ECF") system. I understand that notice of this filing will be sent to all parties by operation of the Court's ECF system.

Respectfully submitted,

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