

**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)

**REPLY IN SUPPORT OF PLAINTIFF-APPELLEE’S
MOTION TO SUBMIT RELATED APPEALS TO
THE SAME PANEL FOR ARGUMENT AND DECISION**

On May 11, 2017, plaintiff-appellee Moda Health Plan, Inc. (“Moda”) moved that the above-captioned case, *Moda Health Plan, Inc. v. United States*, No. 17-1994 (Fed. Cir.), be submitted for disposition to the same panel that will decide the pending case *Land of Lincoln Mutual Health Insurance Co. v. United States*, No. 17-1224 (Fed. Cir.), and that a joint oral argument be held before the same panel in both cases.¹ Land of Lincoln Mutual Health Insurance Co. (“Land of Lincoln”) filed a similar motion in its appeal.² The Government has filed responses in opposition to

¹ See 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.”).

² Mot. of Plaintiff-Appellant Land of Lincoln to Submit Related Appeals to the Same Panel for Argument and Decision, Dkt. No. 121, *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 17-1224 (Fed. Cir. May 12, 2017).

Moda's and Land of Lincoln's motions,³ and moved to stay the appeal in *Moda* pending resolution of *Land of Lincoln*.⁴

The Government's initial contention, that Moda's motion is "moot" (Gov. Response 2), is predicated on the presumption that the Court will grant the Government's motion to stay briefing in *Moda*, a motion that the Government only filed last Friday and which Moda will vigorously oppose. The Government cannot boot strap its way around Moda's motion by *ipse dixit*.

As to the merits of Moda's motion, this Court has previously, at the behest of the Government itself, 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. The Government's response does not explain why the reasoning the Government itself advanced in support of joint argument in those cases does not apply fully here.

The Government's expressions of concern (Gov. Response 4) over potential delay in the *Land of Lincoln* appeal ring hollow. The Government successfully

³ Response in Opp. to Plaintiff's Mot. to Assign Related Appeals to the Same Panel, Dkt. No. 9 (May 12, 2017) ("Gov. Response"); Response in Opp. to Plaintiff's Mot. to Assign Related Appeals to the Same Panel, Dkt. No. 123, *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 1224, Dkt. No. 8 (May 12, 2017).

⁴ 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).

opposed Land of Lincoln's effort to expedite that appeal,⁵ and later successfully obtained a **42-day** extension to file its appellate brief.⁶ The Government thus has done nothing to advance the resolution of *Land of Lincoln*. Nor does the Government contend that it would be prejudiced by a short delay in *Land of Lincoln*, and Land of Lincoln itself supports joint argument. Moda is informed by Land of Lincoln that this former health care insurer is now in full liquidation and has ceased providing insurance, and hence no longer has any ongoing business operations that would benefit from expedited resolution of its appeal.

Moreover, despite the Government's arguments to the contrary, *Land of Lincoln* is not the appropriate vehicle for resolution of Risk Corridor issues, for at least three reasons. First, 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. While Land of Lincoln may not itself have argued that its appeal turns on this procedural issue (*see* Gov. Response 5), others contend it constitutes reversible error, *see* Moda Mot. 9. If *Land of Lincoln* did, even arguably, proceed under an incorrect procedure using an incorrect legal standard, the case is surely not an appropriate,

⁵ Opp. to Pl.'s Emergency Mot. for Expedited Proceedings, Dkt. No. 11, *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 17-1224 (Nov. 21, 2017).

⁶ Unopposed Mot. for a 42-Day Extension of Time in Which To File the Appellee's Brief, Dkt. No. 91, *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 17-1224 (Feb. 22, 2017).

stand-alone vehicle for the resolution of the several overlapping questions that lay at the heart of the claims of *Moda* and almost two dozen other lawsuits.

Second, 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 ACA, which now finds itself under state receivership and liquidation, clearly distinguishes their responses to the Government’s contention that the losses they suffered do not arise out of the Government’s breach of its statutory, regulatory and contractual obligations, but rather result from their own “individually calculated business risks” and “business judgment,” *see* *Moda* Mot 8.

For all these reasons alone, briefing the *Moda* case would be far from “duplicative,” *see* Gov. Response 2. And, as already noted (*Moda* Motion 8), much of the Government’s appellate brief in *Land of Lincoln* is in actuality a briefing of the merits of the *Moda* decision, a fact the Government acknowledges, *see* Gov. Response 3, citing its *Land of Lincoln* appellate brief at 30-36, 40, 50, 56. For this additional reason, *Moda* should be argued at the same time, and decided by the same panel, as *Land of Lincoln*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th 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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