IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DOUG OMMEN, *in his capacity as Liquidator of CoOportunity Health, Inc.*, and DAN WATKINS, *in his capacity as Special Deputy Liquidator of CoOportunity Health, Inc.*,	)	
Plaintiffs,	)	
v.	)	No. 17-CV-00957-CFL Judge Charles F. Lettow
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO STAY

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INTRODUCTION

Since the inception of the dispute, the Government has consistently sought to delay the resolution of CoOportunity's claims and has proffered the false narrative that this case is about nothing more than the Department of Health and Human Services' ("HHS") failure to pay the *full* amount of funds owed under the "risk corridors" provisions of the Affordable Care Act ("ACA"). The Government mischaracterizes CoOportunity's claims again in the context of its request for a stay, asserting this case is just like *Land of Lincoln* and *Moda,* and should be stayed entirely pending action by the Federal Circuit in those cases. But the Government ignores numerous other claims in CoOportunity's Complaint. Collectively, those other claims implicate over $30 million that is not contingent upon the Federal Circuit's disposition of the pending appeals. CoOportunity does not intend to litigate the legal issue bound up in *Land of Lincoln* and *Moda* prior to the Federal Circuit issuing its decisions. However, there is no reason to stay the entirety of this case; CoOportunity should be allowed to litigate its various other claims and issues without delay. And the Government makes no showing that it would be burdensome or inequitable to require the Government to mount a defense.

That this case involves far more than a global risk corridors claim is obvious. For example, CoOportunity's Complaint asserts a claim that the Government improperly assessed and collected some $22 million from CoOportunity in "risk adjustment" charges for 2015 as the result of an arbitrary and capricious formula and an arbitrary and capricious application of that formula (Count VI). The risk adjustment component of the ACA's "3Rs" is entirely separate from risk corridors; this claim has nothing to do with *Land of Lincoln* or *Moda*.

Similarly, as it pertains to ACA revenues owed CoOportunity, CoOportunity claims HHS, without any legal authority, invented an "administrative hold" to avoid paying funds indisputably owed to CoOportunity so it could set them off at a later date. Notably, the

Government admitted to the federal district court in Iowa that it had no legal basis to implement such a hold. At a minimum, CoOportunity's wrongful hold/set-off claims implicates HHS's wrongful setoff of CoOportunity's *pro rata* share of risk corridors funds—some $16 million—that the Government itself concedes was payable under risk corridors and which it paid to other insurers. This claim does not depend upon the Federal Circuit's resolution of whether the Government was required to pay risk corridors amounts beyond the *pro rata* share. Indeed, CoOportunity has filed a Motion For Partial Summary Judgment seeking an immediate adjudication that the "administrative hold" was illegal. That motion can, and should, be resolved immediately.

While an indefinite stay cannot be justified solely based on claims of judicial economy and efficiency in any event, granting the Government's requested stay of the entire case will neither conserve judicial resources nor improve efficiency. It would, instead, result in the unique issues of this case sitting dormant for months, or potentially years, while the CoOportunity liquidation grinds to a halt as the Government persists in its continuing campaign of wrongful setoff. Then, when the stay is lifted, the Government will move to dismiss, effectively putting the case right back where it was before a stay was granted.

Apart from the Government's lack of a justification for a stay of the entire case, there are important policy reasons that militate against granting one. CoOportunity is in liquidation, and the liquidators have duties to the estate's creditors to efficiently and expeditiously wind down the estate. The Government's request for an open-ended and complete stay undermines the orderly and expeditious liquidation process contemplated by Iowa law. The delay would allow the Government to put off the legal determination of claims which are separate and distinct from

those at issue in *Land of Lincoln* and *Moda*, to the detriment of creditors whose claims have priority over the Government's own.

Finally, the Court should reject the Government's request for an open-ended and total stay because a stay is inequitable in light of the Government's litigation tactics. When CoOportunity first sued the Government in the District Court for the Southern District of Iowa seeking injunctive and declaratory relief to block the illegal set-offs, the Government moved to dismiss and opposed prospective injunctive relief on the basis that the claims should be heard only by the Court of Federal Claims. After the Government convinced the Iowa district court to dismiss the case on that basis, and CoOportunity refiled the case here as the Government demanded, the Government flipped its position claiming adjudication of all of CoOportunity's claims should be put on ice, when it is fully aware that CoOportunity's claims involve far more than risk corridors. Justice delayed is justice denied. The Court should not indulge the Government's continued delaying tactics and should, instead, exercise its virtually unflagging obligation to adjudicate those aspects of CoOportunity's claims that are not dependent on the outcome of *Land of Lincoln* and *Moda.*

STATEMENT OF THE CASE

The factual background of this dispute as relevant to this motion is fully described in CoOportunity's contemporaneously filed Motion For Partial Summary Judgment, as well as in the Complaint. Briefly restated for purposes of this motion: CoOportunity was a non-profit "CO-OP" entity created pursuant to the ACA. Like other CO-Ops nationwide, CoOportunity struggled financially and ultimately was placed in liquidation in a proceeding in Iowa state court, pursuant to the direction of the ACA and HHS's implementing regulations.

The ACA established three risk-stabilization programs, known colloquially as the "3R" programs, to provide a safety net to entities—like CoOportunity—that were taking on the risk of

previously uninsured patients whose healthcare costs were unknown. As set out in the Complaint, CoOportunity believes that HHS failed to properly and legally administer these 3R programs. As the Government explains in its brief, several insurers have sued for these failures, focusing primarily on HHS's failure to pay the full amount of the "risk corridor" payments for policy years 2014 and 2015. That issue is currently pending before the Federal Circuit, following two varying decisions from the Court of Federal Claims in the *Land of Lincoln* and *Moda* cases of which this Court is intimately familiar.

CoOportunity first sued the government in the United States District Court for the Southern District of Iowa seeking an injunction and declaration to prevent the Government from continuing its illegal hold/setoff practices and to enjoin the Government's application of an arbitrary and capricious risk adjustment formula. But the Government resisted, claiming that CoOportunity's request for prospective relief, and its request to enjoin the risk adjustment regulation, amounted to *de facto* claims for money damages that could only be litigated in the Court of Federal Claims. It represented, repeatedly to the Iowa federal district court, that CoOportunity had an adequate remedy in the Court of Federal Claims in the form of retrospective money damages. The Iowa federal district court agreed with the Government and dismissed the case in March 2017, ruling that this Court alone had jurisdiction over CoOportunity's claims.

CoOportunity first filed suit in this Court on May 30, 2017, just as the Government asked. Yet, soon thereafter, the Government threatened to move to dismiss on the technical basis that CoOportunity's Eighth Circuit's appeal of the Iowa federal district court's dismissal was still pending at the time CoOportunity filed in this Court. CoOportunity cured this issue by

voluntarily dismissing and refiling a nearly identical complaint on July 17, 2017, at a point when the Eighth Circuit appeal had already been dismissed.

As set forth above, CoOportunity's Complaint does include a claim for full risk corridors payments similar to that made by the plaintiffs in *Land of Lincoln* and *Moda*. But CoOportunity's Complaint asserts other, unique claims, including Count VI, which seeks to recover $22 million in risk adjustment charges that the Government assessed for 2015 based on its design and application of an arbitrary and capricious risk adjustment formula. Further CoOportunity's Complaint asserts wrongful setoff claims arising from the Government's illegal implementation of an "administrative hold" to effectuate setoff of numerous ACA revenues, including $16 million in *pro rata* risk corridors funds paid to other insurers and indisputably owed to CoOportunity because such *pro rata* share was to be funded by amounts paid into risk corridors, rather than from separate HHS funds or a new appropriation.

The Government now moves to stay the entirety of this litigation pending the Federal Circuit's anticipated rulings in *Land of Lincoln* and *Moda*, despite that CoOportunity's Complaint asserts in excess of $30 million in claims that have nothing to do with the outcome of those appeals.

ARGUMENT

I. This Case Presents Discrete, Unique Issues Not Implicated in the Federal Circuit Appeals, and a Stay Is Therefore Inappropriate.

The lynchpin of the Government's request for stay is its claim that this case is fundamentally the same as the *Land of Lincoln* and *Moda* cases currently pending on appeal before the Federal Circuit. This is not so. And because it is not so, the entire justification for a complete and total stay collapses.

The existence of distinct issues and claims in this case is obvious. CoOportunity has a $22 million risk adjustment claim for 2015 that is not related to risk corridors at all. Under this claim, the Court will have to decide whether HHS's risk adjustment formula, which failed to account for the situation where an insurer went out of business less than a quarter into the year, was arbitrary and capricious in its design and whether HHS applied it in an arbitrary and capricious manner.

Further, as explained fully in CoOportunity's Motion for Partial Summary Judgment, HHS's decision to invent and implement an "administrative hold" for funds due to CoOportunity is a separate, distinct, and unique legal issue because it implicates the Government's wrongful setoff of risk corridors payments that were revenue neutral and which the Government would have paid to CoOportunity but for its illegal hold and use of self-help through setoff. Analysis of this issue must occur independent of issues currently pending before the Federal Circuit because those cases concern the different issue of whether the Government was required to pay risk corridors amounts above and beyond those that were revenue neutral, i.e., payments that exceeded risk corridors revenue inflows. Regardless of whether the Federal Circuit decides that HHS was required to make full, annual risk corridors payments, this Court will still have to decide the issue of whether the amounts HHS admits were payable but that it placed on an administrative hold (and then ultimately paid to itself) were illegally withheld from CoOportunity.

These are not, as the Government suggests, mere trivial or ancillary issues to the global risk corridors claim. Together, the risk adjustment claim and wrongful hold/setoff claims easily account for in excess of $30 million. Further, apart from holding $16 million in *pro rata* risk corridors funds, HHS also placed additional ACA funds in the administrative hold but never

provided an accounting to CoOportunity so that the total amount of additional withheld funds could be known. CoOportunity believes the value of these additional funds that were held and setoff exceeds $30 million.

The Government cites several cases articulating the proposition that judicial efficiency is a consideration when evaluating a motion to stay proceedings. Yet, a stay of a case pending resolution of an appeal in a separate case is an *extraordinary remedy* that is typically denied. Indeed, where, as here (see *infra* Section II) the requested stay is indefinite, the Court must be mindful of its "paramount obligation to exercise jurisdiction timely in cases properly before it" and not impose a stay without a "pressing need." *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (10th Cir. 1997). A claim that a stay is justified by the efficiency of waiting on the disposition of a companion case simply isn't enough, especially when the disposition of companion cases will not settle all of the claims in the case sought to be stayed. To the contrary, the Supreme Court has held that a party seeking a stay pending resolution of a separate case cannot simply plead efficiency as though it is a talisman; the party 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).

Even if judicial economy and efficiency were sufficient alone to justify a complete stay of the type sought here (they aren't), neither end is served by a stay. At bottom, the Government suggests that the parties make no progress on any issue (unique, or otherwise) in this case until (at least, *see infra* Section II) the Federal Circuit issues a decision in the *Land of Lincoln* and *Moda* cases. This is an incredibly *in*efficient approach when the Government is admittedly sitting on arguments it will likely use in support of a motion to dismiss and where there are other, discrete legal issues that could be briefed and decided while the parties await the Federal

Circuit's decision. An equally important facet of "efficiency" is the prompt resolution of one's claims. That is especially true here, where the time the Government wishes to waste could be put to use in deciding legal issues central to CoOportunity's other claims, which, as discussed above, do not depend on the outcome of *Land of Lincoln* and *Moda*.

Efficient and prompt resolution of the case is also in the public's interest. Indeed, as CoOportunity described in its briefing, the taxpayers of Iowa and Nebraska are ultimately responsible for funding policyholder claims against CoOportunity that are not covered by amounts collected in the liquidation. Under state law, the taxpayers fund these policyholder claims by the state issuing tax credits to reimburse insurer guaranty associations that fund the claims in the first instance. The tax credits are spread over a five year period. So every year that CoOportunity's recovery from the Government is delayed costs Iowa and Nebraska more tax revenues that could be used to immediately fund roads, schools, and other vital public services. It is precisely for this reason, and the need to promptly pay other creditors, that liquidators are under a fiduciary duty to quickly and efficiently marshal the assets of the liquidation estate. A complete and total stay hampers their ability to do so.

Apart from compelling efficiency and policy reasons to move forward with the case, there is an important equitable reason. As explained above, the Government itself convinced the Iowa district court to dismiss CoOportunity's attempt to obtain prospective relief by arguing CoOportunity had an adequate remedy in the Court of Federal Claims. Now the Government is attempting to block that remedy by seeking an indefinite and total stay. To compound matters, prior to the filing of the Government's motion, CoOportunity attempted to negotiate an agreement where it would consent to a substantial extension of the Government's response deadline if the Government would agree that it would not move to dismiss and that

CoOportunity's unique claims would be resolved through cross motions for summary judgment. The Government refused, however, indicating its intent to move to dismiss CoOportunity's claims if and when it is required to answer or otherwise respond. If the Government believes, for whatever reason, that this Court should not hear CoOportunity's claims at all, then those arguments should be made and addressed now, and the Government will have to explain how such arguments are not at odds with the assertions it made to the Iowa district court. Staying the case indefinitely—only to then have the Government move to dismiss when the stay is lifted—is deeply unfair, unjustified, and inconsistent with the general rule that parallel cases should proceed forward at the same time. *See Landis*, 299 U.S. at 255 ("Only 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 define the rights of both.").

Plaintiffs readily acknowledge that the Federal Circuit will decide whether HHS was required to make full, annual risk corridors payments to other insurers irrespective of fiscal neutrality. CoOportunity agrees that it does not make sense to brief that broader issue until the Federal Circuit renders its opinion, and CoOportunity does not intend to do so. But here, the Government seeks to shut the entire case down and waste time by doing nothing when there are unique aspects of this case that could and should be litigated because they do not depend on the outcome of *Land of Lincoln* and *Moda*. The Court should allow the case to proceed forward on all aspects of CoOportunity's claims that do not depend on the outcome of the pending appeals.

II. The Government's Proposed Stay, As Currently Structured, Is Indefinite. If Granted, The Stay Should Be Made Definite In Time.

Irrespective of whether *some* form of stay is justified, the stay the Government proposes here is indefinite and should be made definite, were the Court inclined to grant it.

The Government argues that the stay is limited and defined because it is confined to the duration of the Federal Circuit appeal. Yet, that is not consistent with the scope of the stay the Government actually seeks in its papers. Specifically, in its Prayer for Relief, the Government proposes "that within 30 days of the disposition of those appeals [*Land of Lincoln* and *Moda*], the parties submit a status report with the Court outlining next steps." Doc. 6, at p. 17. So, in reality, the Government is not requesting a stay through the date of decision in *Land of Lincoln* and *Moda*. It is instead, requesting an indefinite stay, with a *status report* due after the Federal Court's decisions.

The result is predictable. If the Federal Circuit decides *Land of Lincoln* and *Moda* in favor of the insurers, the Government will not simply concede the effect of the decision and agree that a stay imposed by this Court should be lifted. To the contrary, true to its strategy of delaying resolution of this case at every stage for the last 18 months, the Government will file a status report claiming the stay should be continued while it seeks panel rehearing or rehearing *en banc*. And if such rehearing is granted, the Government will urge a further continuation of the stay. If the Government fails at this step, given the amount of funds at issue, it would likely argue that the stay should continue while it decides whether to petition the Supreme Court for *certiorari*. And when it does petition for *certiorari*, it will claim the stay should be extended until the Supreme Court rules. So on, and so on, until a stay that the Government currently presents as modest and manageable amounts to a two or three year delay while the Government exhausts every possible means of overturning an adverse Federal Circuit ruling.

Rather than such an indefinite stay, if the Court is inclined to grant any stay at all, the stay should be self-terminating, specifically stating that the Government is required to answer or otherwise respond within 30 days of the date the Federal Circuit panel issues its decision. If the

Government believes the stay should be continued beyond the time the Federal Circuit panel issues its decision, the burden should be on the Government to justify such an extension through a separate motion.

III. The Government Is Not Entitled to an Extension of Time.

In the alternative to a stay, the Government requests a 60-day extension of time to plead or otherwise respond to the Complaint. The Government is well versed in the arguments and issues in this case. It litigated the case once in Iowa federal district court, including the litigation of a preliminary injunction with an evidentiary hearing. The United States is already vested with an extended answer deadline in the Rules of 60 days. *See* Rule 12(a)(1)(A). In this case, Plaintiffs filed the original complaint on May 30, 2017 and voluntarily dismissed it on July 12, giving the Government an additional 44 days to evaluate the claims. Plaintiffs then filed the now-operative complaint (which was nearly identical to the original complaint), on July 17, 2017, giving the Government well over 100 days of total time to evaluate the operative issues and respond.

The Department of Justice has thousands of capable and competent attorneys, and, indeed, a *team* of multiple Government attorneys has worked in defense of CoOportunity's claims since the parties' disagreement began in 2015. The Government is intimately familiar with the claims in this case. *See Molina Healthcare of Cal., Inc. v. United States*, 131 Fed. Cl. 160, 161 (denying request for stay and limiting extension of time to only 14 days "due to the Government's familiarity with the issues presented and the ample size of the legal staff devoted to these cases"). There simply is no justification for why the Government is incapable of answering or otherwise responding within 100 days of the Complaint being filed. The Court should require the Government to answer or otherwise respond within the time dictated by the rules.

CONCLUSION

The Government's Motion to Stay should be denied in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 24, 2017, I filed a copy of the foregoing Opposition to Defendant's Motion for Stay via the Court's ECF system, which provided electronic notice to all counsel of record.

/s/ DOUGLAS J. SCHMIDT