

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTHNOW NEW YORK INC.,)	
)	
Plaintiff,)	No. 17-1090C
)	
v.)	
)	Judge Robert H. Hodges, Jr.
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	
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**UNITED STATES’ MOTION TO STAY PROCEEDINGS OR,
IN THE ALTERNATIVE, FOR AN ENLARGEMENT OF TIME**

The United States respectfully moves the Court to stay this action pending the outcome of the *Land of Lincoln Mutual Health Insurance Company v. United States*, No. 17-1224, and *Moda Health Plan, Inc. v. United States*, No. 17-1994, cases now before the Federal Circuit. On May 30, 2017, the Federal Circuit issued an Order that *Land of Lincoln* and *Moda* “are considered companion cases and will be assigned to the same merits panel.” *Land of Lincoln*, Dkt. 140.

The United States seeks a stay of the proceedings in this case so that the Federal Circuit has the opportunity to issue its decision on the same legal issues raised in the Complaint of HealthNow New York Inc. (“HealthNow”). A temporary, carefully-monitored stay pending disposition of the appeals already before the Federal Circuit, which will likely result in binding precedent that will dispose of all issues in this case, will conserve judicial resources and streamline consideration of any issues that might remain to be decided here.

In the alternative, should the Court deny the requested stay, the United States asks that this Court extend the deadline for the United States to respond to HealthNow’s Complaint, Dkt. 1, by 120 days, to February 7, 2018.

HealthNow opposes a stay and an extension of 120 days for the United States to respond to the Complaint, but consents to an extension of 30 days.

BACKGROUND

On August 11, 2017, HealthNow filed this action seeking approximately \$39 million in money damages under the risk corridors program created by section 1342 of the Patient Protection and Affordable Care Act (“ACA”), 42 U.S.C. § 18062, and for breach of an alleged implied-in-fact contract. Dkt. 1.

A. Other Risk Corridors Cases

This is the 30th of 32 cases filed in the last 18 months in this Court seeking relief under identical and related theories to those HealthNow asserts. *See Health Republic Ins. Co. v. United States*, No. 16-259C (Sweeney, J.); *First Priority Life Ins. Co. v. United States*, No. 16-587C (Wolski, J.); *Moda Health Plan, Inc. v. United States*, No. 16-649C (Wheeler, J.); *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C (Griggsby, J.); *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 16-744C (Lettow, J.); *Maine Cmty. Health Options v. United States*, No. 16-967C (Bruggink, J.); *New Mexico Health Connections v. United States*, No. 16-1199C (Smith, J.); *BCBSM, Inc. v. United States*, No. 16-1253C (Coster Williams, J.); *Blue Cross of Idaho Health Serv., Inc. v. United States*, No. 16-1384C (Lettow, J.); *Minuteman Health Inc. v. United States*, No. 16-1418C (Griggsby, J.); *Montana Health CO-OP v. United States*, No. 16-1427C (Wolski, J.); *Alliant Health Plans, Inc. v. United States*, No. 16-1491C (Braden, C.J.); *Blue Cross and Blue Shield of South Carolina v. United States*, No. 16-1501C (Griggsby, J.); *Neighborhood Health Plan, Inc. v. United States*, No. 16-1659C (Smith, J.); *Health Net, Inc. v. United States*, No. 16-1722C (Wolski, J.); *HPHC Ins. Co. v. United States*, No. 17-87C (Griggsby, J.); *Medica Health Plans v. United States*, No. 17-94C (Horn, J.); *Blue Cross and Blue Shield of*

Kansas City v. United States, No. 17-95C (Braden, C.J.); *Molina Healthcare v. United States*, No. 17-97C (Wheeler, J.); *Blue Cross and Blue Shield of Alabama v. United States*, No. 17-347C (Campbell-Smith, J.); *BlueCross BlueShield of Tennessee, Inc. v. United States*, No. 17-348C (Horn, J.); *Sanford Health Plan v. United States*, No. 17-357C (Bruggink, J.); *Raymond Farmer v. United States*, No. 17-363C (Campbell-Smith, J.); *Health Alliance Med. Plans, Inc. v. United States*, No. 17-653C (Campbell-Smith, J.); *EmblemHealth, Inc. v. United States*, No. 17-703C (Wheeler, J.); *Common Ground Healthcare Coop. v. United States*, No. 17-877C (Sweeney, J.); *Doug Ommen v. United States*, No. 17-957C (Lettow, J.); *Nancy Atkins v. United States*, No. 17-906C (Kaplan, J.); *Wisconsin Physicians Serv. Ins. Corp. v. United States*, No. 17-1070 (Braden, C.J.); *Premera Blue Cross v. United States*, No. 17-1155C (Griggsby, J.); *Tom Glause v. United States*, No. 17-1157C (Braden, C.J.).¹ These cases implicate a total of \$8.3 billion for the 2014 and 2015 benefit years.

Four cases have reached judgment and are on appeal to the Federal Circuit. The Court entered the first decision in these cases in *Land of Lincoln*, in favor of the United States. 129 Fed. Cl. 81 (2016). *Land of Lincoln* appealed and the appeal is now fully briefed before the Federal Circuit. In *Moda*, the Court entered judgment in favor of the plaintiff, 130 Fed. Cl. 436 (2017), and the United States appealed. The United States filed its opening brief on July 10, 2017, *Moda* filed its response on August 21, 2017, and the United States' reply brief is due by September 19, 2017. On May 30, 2017, as noted above, the Federal Circuit issued an Order that *Land of Lincoln* and *Moda* will be treated as companion cases and will be argued before and decided by the same panel.

¹ HealthNow's counsel also represents the plaintiffs in seven other risk corridors cases: *Maine Community Health Options*, *Montana Health CO-OP*, *Health Net*, *HPHC*, *Sanford Health Plan*, *Health Alliance Medical Plans* and *Atkins*. The eight plaintiffs raise virtually identical claims.

In the third case to reach judgment, *Blue Cross and Blue Shield of North Carolina*, the Court dismissed the complaint on the ground that the government's implementation of the program is reasonable and consistent with the ACA. 131 Fed. Cl. 457 (2017). On June 9, 2017, Blue Cross and Blue Shield of North Carolina filed a notice of appeal. In the fourth case to reach judgment, the Court granted the United States' motion to dismiss the complaint in *Maine Community Health Options*; Maine Community Health Options filed a notice of appeal on August 2, 2017.

In a fifth case to reach a merits decision, *Molina*, the Court granted partial summary judgment in favor of the plaintiff and granted, in part, the United States' motion to dismiss, leaving a remaining count pending. On August 28, 2017, the *Molina* court, upon the parties' joint request, agreed not to enter a Rule 54(b) judgment and stayed further proceedings pending the Federal Circuit's decision in *Land of Lincoln* and *Moda*. *Molina*, Dkt. 27.

B. Most Cases Have Been Temporarily Stayed Pending Appellate Review in the Federal Circuit

In light of the pending Federal Circuit appeals in *Land of Lincoln* and *Moda*, the Court has entered stays in 19 cases: *Health Republic*, *New Mexico Health Connections*, *Minuteman Health*, *BCBSM*, *Alliant Health Plans*, *Blue Cross of Idaho Health Service*, *Blue Cross and Blue Shield of South Carolina*, *Neighborhood Health Plan*, *Medica Health Plans*, *Blue Cross and Blue Shield of Alabama*, *BlueCross BlueShield of Tennessee*, *Sanford Health Plan*, *Farmer*, *Blue Cross and Blue Shield of Kansas City*, *HPHC*, *Health Alliance Medical Plans*, *Common Ground*, *Molina* and *EmblemHealth*.² Significantly since the Federal Circuit's May 30, 2017 Order treating *Land of Lincoln* and *Moda* as companion cases and assigning them to the same panel:

² A motion to stay has been filed and is under review in *Health Net* and *Atkins*, and the parties are currently briefing the United States' stay motion in *Ommen*.

- Judges of the Court have stayed 10 pending risk corridors cases: *Farmer*, Dkt. 9 (June 7, 2017); *Blue Cross and Blue Shield of Kansas City*, Dkt. 10 (June 14, 2017); *Blue Cross and Blue Shield of Alabama*, Dkt. 11 (June 23, 2017); *BlueCross BlueShield of Tennessee, Inc.*, Dkt. 9 (June 30, 2017); *HPHC*, Dkt. 19 (July 11, 2017); *Health Republic*, Dkt. 62 (July 11, 2017); *Health Alliance*, Dkt. 14 (July 17, 2017); *EmblemHealth*, Dkt. 7 (July 26, 2017); *Common Ground*, Dkt. 9 (August 11, 2017); *Molina*, Dkt. 27 (August 28, 2017).
- The court entered stays in five of those cases over the opposition of the plaintiff: *Farmer*, *HPHC*, *Health Republic*, *Health Alliance*, and *Common Ground*.³
- The Court has not denied a stay *in even a single case*.

In addition, dispositive motions have been fully briefed and are pending a decision in two other cases: *First Priority* and *Montana Health CO-OP*.⁴

ARGUMENT

A. A Stay Is Proper and Will Conserve Substantial Resources

The United States seeks a stay to conserve the resources of the parties and the Court. Should the parties proceed with litigating this case now, briefing on dispositive motions will indisputably address the *exact same issues* that are on appeal before the Federal Circuit. Once the Federal Circuit rules, any briefing here will be rendered useless, or require additional supplemental briefing to apply the Federal Circuit's legal rulings. A stay, however, avoids that wasted effort

³ HealthNow's counsel is also counsel for HPHC and Health Alliance. The same arguments HealthNow makes in its opposition to a stay were made by HPHC, Dkt. 7, and Health Alliance, Dkt. 12, and rejected by the Court.

⁴ Judge Wolski has ordered the parties to submit supplemental briefing on the *Maine Community Health Options* and *Molina* opinions in *Montana* and *First Priority* by September 8, 2017.

and allows the Court to efficiently direct the litigation consistent with precedent established by the Federal Circuit.

“It is well established that every trial court has the power to stay its proceedings, which 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.’” *Freeman v. United States*, 83 Fed. Cl. 530, 532 (2008) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). “Moreover, when and how to stay proceedings is within the sound discretion of the trial court.” *Id.* (citation and internal punctuation omitted). The Supreme Court has highlighted the conservation of judicial resources as an important reason for a trial court to stay proceedings in any matter pending before it, particularly where the appellate court may resolve issues before the trial court. *Landis*, 299 U.S. at 254-55; *UnionBanCal Corp. & Subsidiaries v. United States*, 93 Fed. Cl. 166, 167 (2010) (“The orderly course of justice and judicial economy is served when granting a stay simplifies the ‘issues, proof, and questions of law which could be expected to result from a stay.’”) (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)).

Because the legal issues presented in this case mirror the issues raised before the Federal Circuit in *Land of Lincoln* and *Moda*, further development of those companion cases on appeal will be instructive and likely dispositive. A stay therefore will conserve judicial resources and the resources of both parties by reducing the amount of briefing of issues already pending before the Federal Circuit.

If this Court were to deny our request for a stay and the parties were to file dispositive motions and brief the issues in this case, the case would nevertheless need to be briefed anew following the Federal Circuit’s disposition of *Land of Lincoln* and *Moda*. See *Sanford Health Plan*, Dkt. 8 at 2 (recognizing that “denying a stay would serve to merely consume additional

resources for all parties while shedding little additional light”). In contrast, a stay in this case will allow the parties, if necessary, to address the Federal Circuit’s ruling with targeted briefing in a more efficient manner.

B. The United States Does Not Seek an Indefinite Stay

As recognized by several judges of this Court, the United States is not seeking an indefinite stay. *Farmer*, Dkt. 9 at 3 (“[T]he Court disagrees with plaintiffs’ characterization of defendant’s stay request as indefinite in nature. The end point of the stay can be specifically defined as the date on which the Federal Circuit issues its decisions in the *Land of Lincoln* and *Moda Health* cases, which have been submitted for common review.”); *Health Republic*, Dkt. 62 at 2 (“A stay of proceedings would not be indefinite, because given the status of briefing in the appeals before the Federal Circuit, one or more decisions in those appeals may issue by early next year.”). Rather, the United States seeks a stay only until the Federal Circuit decides *Land of Lincoln* and *Moda*. This is a measured stay, not an indefinite one. As Judge Campbell-Smith found, “[t]he fact that the court cannot predict the exact date on which the Federal Circuit will issue its opinions does not mean the term of the stay is undefined.” *Farmer*, Dkt. 9 at 3.⁵

The alternative of requiring the parties to brief this case while the Federal Circuit considers the same issues needlessly expends “time and effort for [this Court], for counsel, and for litigants.” *Landis*, 299 U.S. at 254. The stay requested here is moderate, and as addressed below, causes no harm to HealthNow.

⁵ In contrast, the two denials of stay by Judge Wolski in *Montana Health CO-OP* and *Health Net*, where the Court deemed the United States’ requested stay “indefinite,” were (a) based on motions to stay that did not tie the requested stay directly to a decision by the Federal Circuit, and (b) were issued months before the Federal Circuit consolidated *Land of Lincoln* and *Moda*. See *Montana*, Dkt. 8; *Health Net*, Dkt. 6.

C. The United States Has Supported Multiple Rulings by the Court

In other cases, HealthNow’s counsel has argued that the United States’ requested stay is *not* intended to conserve resources of this Court or the Parties, but rather an “effort to limit the legal analysis taking place in this Court’s risk corridors docket, and thereby limit the analysis available to the Federal Circuit.” *Atkins*, Dkt. 9 at 2 (Aug. 21, 2017). That argument is without merit. Resource conservation is *precisely* the aim of the United States’ motion for a stay. Even if this case were to move forward now, once the Federal Circuit decides *Land of Lincoln* and *Moda* any briefing here will be rendered useless, or require additional supplemental briefing to apply the Federal Circuit’s legal rulings. A stay, however, avoids that wasted effort and allows the Court to efficiently direct the litigation consistent with precedent established by the Federal Circuit.

Moreover, the United States has consistently recognized that multiple opinions from this Court in the risk corridors cases allow for full consideration of the relevant issues and for comprehensive appellate review. *See, e.g., Health Net*, Dkt. 15 at 2 (United States brief explaining that “the goals of [the “percolation principle”] are . . . being fulfilled with two companion cases – one where the trial court ruled in favor of the United States and one where the trial court ruled in favor of the plaintiff – being briefed before the Federal Circuit, an additional notice of appeal filed, and multiple other cases before the Court fully briefed and ripe for decision.”); *see also Health Republic*, Dkt. 62 at 2 (concluding that “[t]he three decisions from the [Court] underlying the appeals will enable the Federal Circuit to review a variety of analyses of the parties’ claims, and if plaintiff finds these analyses inadequate, it is free to seek leave to file an amicus curiae brief with the Federal Circuit.”).

The United States did not seek a stay in *Health Republic*, *First Priority*, *Blue Cross and Blue Shield of North Carolina* and *Land of Lincoln*, recognizing that multiple judges on this Court should be permitted the opportunity to consider and decide plaintiffs’ risk corridors’ claims. The United States has, though, consistently sought stays in later-filed cases to avoid the parties

duplicating arguments that were either on appeal to the Federal Circuit or were fully briefed in this Court. In many of those later-filed cases, plaintiffs agreed to stays, recognizing the futility of expending resources addressing issues already before the Federal Circuit.⁶

D. This Case is Virtually Identical to One Already on Appeal

As noted above, HealthNow’s counsel represents seven other risk corridors plaintiffs and those plaintiffs’ claims are virtually identical to HealthNow’s. One of those plaintiffs is Maine Community Health Options, whose case is one of the four currently on appeal to the Federal Circuit. Compare, for example, the Complaint in this case, Dkt. 1, ¶ 72, with the Complaint in *Maine Community Health Options*, Dkt. 1, ¶ 80 (differing only in the name of the plaintiff and a corrected citation in the final sentence):

72. Regardless of HHS’s statements that it will manage the risk corridors program in a “budget-neutral” manner, and regardless of the acts of subsequent Congresses to limit the availability of certain funds to make payments owed to QHP issuers under the risk corridors program, the fact remains that the obligations of the Government under the ACA risk corridors program *have never been amended*. Section 1342 mandates payment to QHP issuers under certain conditions *without regard to budget neutrality*, and for the very purpose of stabilizing the market by mitigating annual losses of participating plans, a fact especially crucial for new entrants who relied on the promise of Congress that cost overruns would be partially mitigated through reimbursement. Notwithstanding *subsequent* agency pronouncements, *made only after QHP issuers such as HealthNow entered the market*, CMS’s implementing regulation (Section 153.510) reflected the mandatory nature of the payments without regard to budget neutrality.

80. Regardless of the HHS’s statements that it will manage the risk corridors program in a “budget-neutral” manner, and regardless of the acts of subsequent Congresses to limit the availability of certain funds to make payments

⁶ And while the United States initially opposed the Federal Circuit’s assignment of *Moda* to the same panel as *Land of Lincoln* for argument and decision, we did so because (a) the issues raised in the two cases (as well as all risk corridors cases) were similar, (b) briefing in *Land of Lincoln* was a week from completion and argument would be heard at the first available date following the close of briefing, (c) seven amicus briefs had been filed in support of *Land of Lincoln*’s position by health insurance companies and their trade associations, and (d) joining the cases would almost certainly delay a decision and, thus, further delay this Court having the benefit of an appellate ruling on the issues common to all of these cases. No. 17-1994, Dkt. 10.

owed to QHP issuers under the risk corridors program, the fact remains that the obligations of the Government under the ACA risk corridors program *have never been amended*. Section 1342 mandates payment to QHP issuers under certain conditions *without regard to budget neutrality*, and for the very purpose of stabilizing the market by mitigating annual losses of participating plans, a fact especially crucial for new entrants who relied on the promise of Congress that cost overruns would be partially mitigated through reimbursement. Notwithstanding subsequent agency pronouncements, *made only after QHP issuers such as Health Options entered the market*, CMS's implementing regulation (Section 153.530) reflected the mandatory nature of the payments without regard to budget neutrality.

Even if HealthNow could assert that its claims are different than those before the Federal Circuit in *Land of Lincoln* and *Moda* – which it cannot – the fact that *Maine Community Health Options* is on appeal and likely to reach resolution before this case only bolsters the appropriateness of a stay here.⁷

E. A Stay Will Not Prevent HealthNow from Having Its Claim Heard or Delay Potential Recovery

HealthNow cannot provide any legitimate justification for moving forward in this case now while the appeals in *Land of Lincoln* and *Moda* are nearing resolution, and *Maine Community Health Options* is also before the Federal Circuit. A stay will not delay any potential recovery for HealthNow should it ultimately prevail. As noted above, the Federal Circuit assigned the *Land of Lincoln* and *Moda* appeals to the same panel, which will address the same legal issues now before this Court. Thus, even if HealthNow prevails on its claim here, HealthNow will not recover until the appeals in those risk corridors cases, as well as any appeal of this case, have concluded.

Staying this case until the Federal Circuit decides *Land of Lincoln* and *Moda* will not alter HealthNow's ability to obtain a timely decision or potential recovery – it will only drastically reduce the resources expended by the Court and the parties in reaching that resolution.

⁷ Maine Community Health Options did not assert an implied-in-fact contract claim, but that legal theory, derivative of the statutory claim, is on appeal in both *Land of Lincoln* and *Moda*.

CONCLUSION

For these reasons, the United States respectfully requests that the Court stay this case pending further developments in the companion appeals of *Land of Lincoln* and *Moda*. In the alternative, the United States requests an extension to February 7, 2018, to respond to HealthNow's Complaint.

Dated: August 28, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 28, 2017, I electronically filed the foregoing UNITED STATES' MOTION TO STAY PROCEEDINGS OR, IN THE ALTERNATIVE, FOR AN ENLARGEMENT OF TIME with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ Marc S. Sacks

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