

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

<b>HEALTHNOW NEW YORK INC.,</b>	)	
	)	
<b>Plaintiff,</b>	)	<b>No. 17-1090C</b>
	)	
<b>v.</b>	)	
	)	<b>Judge Robert H. Hodges, Jr.</b>
<b>THE UNITED STATES OF AMERICA,</b>	)	
	)	
<b>Defendant.</b>	)	
	)	

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**UNITED STATES’ REPLY IN SUPPORT OF ITS MOTION TO STAY PROCEEDINGS OR, IN THE ALTERNATIVE, FOR AN ENLARGEMENT OF TIME**

HealthNow New York Inc.’s (“HealthNow”) lengthy opposition (“Pl. Opp.”) fails to acknowledge that since the Federal Circuit’s May 30, 2017 Order treating *Land of Lincoln Mutual Health Insurance Company v. United States*, No. 17-1224, and *Moda Health Plan, Inc. v. United States*, No. 17-1994, as companion cases and assigning them to the same panel:

- Judges of the Court of Federal Claims have stayed 11 pending risk corridors cases: *Raymond Farmer v. United States*, No. 17-363C, Dkt. 9 (June 7, 2017); *Blue Cross and Blue Shield of Kansas City v. United States*, No. 17-95C, Dkt. 10 (June 14, 2017); *Blue Cross and Blue Shield of Alabama v. United States*, No. 17-347C, Dkt. 11 (June 23, 2017); *BlueCross BlueShield of Tennessee, Inc. v. United States*, No. 17-348C, Dkt. 9 (June 30, 2017); *HPHC Ins. Co. v. United States*, No. 17-87C, Dkt. 19 (July 11, 2017); *Health Republic Ins. Co. v. United States*, No. 16-259C, Dkt. 62 (July 11, 2017); *Health Alliance Med. Plans, Inc. v. United States*, No. 17-653C, Dkt. 14 (July 17, 2017); *EmblemHealth, Inc. v. United States*, No. 17-703C, Dkt. 7 (July 26, 2017); *Common Ground Healthcare Coop. v. United States*, No. 17-877C, Dkt. 9 (Aug. 11, 2017); *Molina Healthcare v. United States*, No. 17-877C, Dkt. 9 (Aug. 11, 2017);

*States*, No. 17-97C, Dkt. 27 (Aug. 28, 2017); *Doug Ommen v. United States*, No. 17-957C, Dkt. 12 (Sept. 5, 2017).<sup>1</sup>

- The Court entered stays in six of those cases over the opposition of the plaintiff: *Farmer*, *HPHC*, *Health Republic*, *Health Alliance*, *Common Ground*, and *Ommen*.<sup>2</sup>

For the same reasons other judges have issued stays pending the Federal Circuit’s decision in *Land of Lincoln* and *Moda* – efficiency and the conservation of judicial and the parties’ resources – this Court should enter a stay in this case. Nothing in HealthNow’s opposition requires or supports denying a stay.

#### **I. The United States’ Stay Request Is Not Indefinite**

As we explained in our motion (“US Mot.”), the United States does not seek an indefinite stay, but rather a stay directly tied to the Federal Circuit’s decision in *Land of Lincoln* and *Moda*. HealthNow asserts that the United States seeks an indefinite stay, Pl. Opp. at 7-9, but the fact that the exact date of the Federal Circuit’s decision cannot be currently known does not alter that the event of the decision is certain. Briefing in *Land of Lincoln* is complete and will be completed in *Moda* on September 19. Therefore, a stay tied to the Federal Circuit’s decision in the combined appeal is not indefinite, as multiple judges of this Court have already held. US Mot. at 7 (citing *Farmer*, Dkt. 9 at 3, and *Health Republic*, Dkt. 62, at 2); *Ommen*, Dkt. 12 at 4 (“[A] stay pending decision by the court of appeals in *Land of Lincoln* and *Moda Health* would not be indefinite but would have a specific end point.”).

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<sup>1</sup> Since the consolidation of the *Land of Lincoln* and *Moda* appeals, only one Judge of this Court has denied a stay request. *Nancy Atkins v. United States*, No. 17-906C, Dkt. 11 (Sept. 11, 2017).

<sup>2</sup> HealthNow’s counsel is also counsel for HPHC and Health Alliance. The same arguments HealthNow makes in its opposition were made by HPHC, Dkt. 7, and Health Alliance, Dkt. 12, and rejected by the Court.

In contrast, the two denials of stay by Judge Wolski in *Montana Health CO-OP v. United States*, No. 16-1427C, and *Health Net, Inc. v. United States*, No. 16-1722C, relied upon by HealthNow, Pl. Opp. at 4, 6, 7, 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.

Furthermore, even if, as HealthNow asserts, “a decision in the consolidated cases [of *Land of Lincoln* and *Moda*] will [not] be the final word on this Court’s risk corridors docket,” the United States has requested a time-limited stay only through a decision in the consolidated appeals. See Pl. Opp. at 8. If the Court grants the stay, then, after the Federal Circuit rules, the parties will submit a joint status report and the Court can determine how best to proceed going forward.

## **II. A Stay Will Conserve the Resources of the Court and the Parties**

HealthNow wrongly asserts that the United States’ requested stay “is not intended to conserve the resources of this Court or the parties.” Pl. Opp. at 1, 12. Resource conservation is *precisely* the aim of the United States’ motion for a stay. 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 and allows the Court to efficiently direct the litigation consistent with precedent established by the Federal Circuit.

HealthNow also broadly alleges that the United States’ litigation of all risk corridors cases has been 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.” Pl. Opp. at 1; *see id.* at 2-3, 12, 15. HealthNow is wrong. 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 (“percolation,” as HealthNow describes it; *see* Pl. Opp. at 15). *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.”).

To argue the contrary HealthNow relies upon the United States’ motions to stay *Moda* in this Court and before the Federal Circuit. Pl. Opp. at 2-3, 14. But, the November 2016 motion in this Court sought a stay because “[d]ispositive motions [were] filed and [were] pending in five” other risk corridors cases. No. 16-649C, Dkt. 10 at 2-3. And the United States sought to stay its own appeal before the Federal Circuit because the “legal issues presented by the risk-corridors cases were comprehensively addressed in the voluminous [*Land of Lincoln*] briefing . . ., [which included] seven amicus briefs . . . filed in support of Lincoln’s position by health insurance companies and their trade associations.”<sup>3</sup> No. 17-1994, Dkt. 8 at 7. Moreover, the United States opposed the Federal Circuit’s assignment of *Moda* to the same panel as *Land of Lincoln* for argument and decision because briefing in *Land of Lincoln* was a week from completion, argument would be heard at the first available date following the close of briefing, and joining the cases

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<sup>3</sup> *Moda* filed an amicus brief in support of *Land of Lincoln*. No. 17-1224, Dkt. 79.

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.

The United States did not seek a stay in *Health Republic; First Priority Life Ins. Co. v. United States*, No. 16-587C; *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C; 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 having to duplicate arguments that were either on appeal to the Federal Circuit or fully briefed in this Court. In many of those later-filed cases, plaintiffs agreed to stays, recognizing the futility of expending resources addressing issues that were already before the Federal Circuit.

### **III. Additional Pending Cases before the Federal Circuit Further Support a Stay**

As HealthNow recognizes, two other risk corridors cases are now pending before the Federal Circuit in addition to *Land of Lincoln* and *Moda*. Pl. Opp. at 1, 9. That *Blue Cross and Blue Shield of North Carolina* and *Maine Community Health Options v. United States*, No. 16-967C, are now before the Federal Circuit only provides additional justification for a stay here, in order to allow the Federal Circuit to resolve all pending cases before it, establishing precedent that will narrow, and likely resolve, the issues raised in HealthNow's Complaint. In our stay motion, we sought a limited, temporary stay tied to a decision by the Federal Circuit in *Land of Lincoln* and *Moda* (and not the other pending Federal Circuit cases) because the *Land of Lincoln* and *Moda* appeals are consolidated and on a set briefing schedule in which briefing in *Land of Lincoln* has been completed and only the United States' reply brief remains to be filed in *Moda*.<sup>4</sup>

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<sup>4</sup> HealthNow distorts the United States' position in falsely suggesting that the United States has claimed that *Land of Lincoln* and *Moda* are "the only cases that matter." Pl. Opp. at 9 n.3. In fact, the United States has merely argued that the Federal Circuit's decisions in those two cases, which

Additionally, HealthNow's counsel also represents Maine Community Health Options, and HealthNow's Complaint is virtually identical to Maine's. *Compare, e.g.*, Dkt. 1, ¶ 72 with No. 16-967, Dkt. 1, ¶ 80. In any event, four pending appeals involving the identical legal issues raised by HealthNow render additional proceedings in the Court of Federal Claims superfluous, especially where, as here, the Federal Circuit may well enter a decision before this Court would rule on HealthNow's claims.<sup>5</sup>

#### **IV. Alternatively, the Court Should Grant a 120-Day Enlargement**

In our motion, the United States sought, as an alternative to a stay, a 120 day enlargement of time to respond to HealthNow's Complaint. In its opposition, HealthNow did not discuss the United States' alternative request.

### **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.

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will be fully briefed by September 19, 2017, "will conserve judicial resources and streamline consideration of any issues that might remain to be decided" in this and other risk corridors cases. US Mot. at 1.

<sup>5</sup> Similarly, the fact that there are other fully briefed cases in this Court awaiting decision, such as *First Priority* and *Montana Health CO-OP*, also justifies a stay here. As those earlier-filed cases reach resolution, the issues in this case will likely narrow.

Dated: September 14, 2017

Respectfully submitted,

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ATTORNEYS FOR THE UNITED  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on September 14, 2017, I electronically filed the foregoing UNITED STATES' REPLY IN SUPPORT OF ITS 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.

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