IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NANCY G. ATKINS, in her capacity as Liquidator of Kentucky Health Cooperative, Inc., Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 17-906C Judge Elaine D. Kaplan

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO STAY PROCEEDINGS, OR IN THE ALTERNATIVE, FOR AN ENLARGEMENT OF TIME TO RESPOND TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The central issue in this case is the Government's refusal to fulfill its statutory obligation to make payments under the risk corridors program ("RCP") established by Section 1342 of the Affordable Care Act ("ACA"). Plaintiff, Nancy G. Atkins, in her capacity as Liquidator of Kentucky Health Cooperative, Inc. ("Plaintiff" or "Liquidator"), filed a Motion for Summary Judgment on July 26, 2017. Mot. Summ. J., ECF No. 7. As detailed in Plaintiff's Complaint and Motion for Summary Judgment, the Government owes Plaintiff $64,789,497.96 for benefit year 2014 and $77,311,836.24 for benefit year 2015. Rather than respond to Plaintiff's motion, the Government now seeks to stay this case pending a decision in two other cases (*Land of Lincoln Mutual Health Insurance Company v. United States*, No. 17-1224 and *Moda Health Plan, Inc. v. United States*, No. 17-1994) now pending before the Federal Circuit, which the Government contends will "likely result" in binding precedent. Absent from the Government's argument is any acknowledgment that *other* cases are currently before the Federal Circuit (*Blue Cross and Blue Shield of N.C. v. United States*, No. 16-651C and *Maine Cmty. Health Options v. United States*, No. 16-967C); that a fifth case has been decided by the Court of Federal Claims (*Molina Healthcare of Cal., Inc., et al. v. United States*, No. 17-97C) and will likely be appealed by the Government; or that several additional cases are currently proceeding at the Court of Federal Claims. *See, e.g.*, *Montana Health CO-OP v. United States*, No. 16-1427C; *First Priority Life Ins. Co. v. United States*, No. 16-587C; *Health Net, Inc. v. United States*, No. 16-1722C; *HealthNow New York Inc. v. United States*, No. 17-1090C. Two of those cases, *Montana* and *First Priority*, have been argued on summary judgment and are in the process of supplemental briefing.

The Government appeals to vague notions of resource conservation and judicial efficiency as justifying its request to stay *this* case. Def.'s Mot. Stay ("Stay Motion"), ECF No.

10. But the Government's request for a stay is not intended to conserve the resources of this Court or the parties. Rather, it is part of the Government's 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. The chronology of the Government's efforts should be carefully considered in deciding its current motion.

After Judge Lettow issued a decision granting the Government's motion to dismiss *Land of Lincoln* pursuant to Rule 12(b)(6), the Government sought to choke off further discussion of the issues surrounding its refusal to make mandatory RCP payments to health plans. To date, the Government has filed at least 19 stay motions in the Court of Federal Claims.[1] One of the cases the Government sought to stay was *Moda*. After denying the Government's motion to stay that

[1] Def.'s Mot. Stay, *Montana Health CO-OP v. United States*, No. 16-1427C (Wolski, J.) (Fed. Cl. Nov. 17, 2016), ECF No. 8; Def.'s Mot. Stay, *Maine Cmty. Health Options*, No. 16-967C (Bruggink, J.) (Fed. Cl. Oct. 31, 2016), ECF No. 8; Def.'s Mot. Stay, *Sanford Health Plan v. United States*, No. 17-357 (Bruggink, J.) (Fed. Cl. Apr. 20, 2017), ECF No. 6; Def.'s Mot. Stay, *Health Net, Inc. v. United States*, No. 16-1722C (Wolski, J.) (Fed. Cl. Mar. 1, 2017), ECF No. 6; Def.'s Mot. Stay, *Health Net, Inc. v. United States*, No. 16-1722C (Wolski, J.) (Fed. Cl. June 22, 2017), ECF No. 13; Def.'s Mot. Stay, *Health Alliance v. United States*, No. 17-653C (Campbell-Smith, J.) (Fed. Cl. June, 22, 2017), ECF, No. 13; Def.'s Mot. Stay, *Moda Health Plan, Inc. v. United States*, No. 16-649C (Wheeler, J.) (Fed. Cl. Nov. 16, 2016), ECF No. 10; Def.'s Mot. Stay, *New Mexico Health Connections v. United States*, No. 16-1199C (Smith, J.) (Fed. Cl. Oct. 24, 2016), ECF No. 6; Def.'s Mot. Stay, *BCBSM, Inc. v. United States*, No. 16-1253C (Coster Williams, J.) (Fed. Cl. Dec. 1, 2016), ECF No.6; Def.'s Mot. Stay, *Blue Cross of Idaho Health Service, Inc. v. United States*, No. 16-1384C (Lettow, J.) (Fed. Cl. Nov. 29, 2016), ECF No. 9; Def.'s Mot. Stay, *Blue Cross of Idaho Health Service, Inc. v. United States*, No. 16-1384C (Lettow, J.) (Fed. Cl. Mar. 7, 2017), ECF No. 18; Def.'s Mot. Stay, *Minuteman Health Inc. v. United States*, No. 16-1418C (Griggsby, J.) (Fed. Cl. Nov. 3, 2016), ECF No. 6; Def.'s Mot. Stay, *Alliant Health Plans, Inc. v. United States*, No. 16-1491C (Braden, J.) (Fed. Cl. Dec. 13, 2016), ECF No. 6; Def.'s Mot. Stay, *Neighborhood Health Plan v. United States*, No. 16-1659C (Smith, J.) (Fed. Cl. Jan. 27, 2017), ECF No. 6; Def.'s Mot. Stay, *MEDICA Health Plans et al v. United States*, No. 17-94C (Horn, J.) (Fed. Cl. Mar. 10, 2017), ECF No. 7; Def.'s Mot. Stay, *Blue Cross Blue Shield of Alabama v. United States*, No. 17-347C (Campbell-Smith, J.) (Fed. Cl. May 11, 2017), ECF No. 8; Def.'s Mot. Stay, *Blue Cross Blue Shield of Tennessee v. United States*, No. 17-348 (Horn, J.) (Fed. Cl. May 11, 2017), ECF No. 7; Def.'s Mot. Stay, *Raymond Farmer v. United States*, No. 17-363C (Campbell-Smith, J.) (Fed. Cl. May 4, 2017), ECF No. 5; Def.'s Mot. Stay, *Blue Cross and Blue Shield of South Carolina v. United States*, No. 16-1501C (Griggsby, J.) (Fed. Cl. Dec. 28, 2016), ECF No. 7.

case, Judge Wheeler granted summary judgment in favor of the plaintiff-health plan. If the Government had its way, *Moda* would never have been decided in the first place, and *Land of Lincoln* would be the only case pending at the Federal Circuit. But even after Judge Wheeler's decision granting summary judgment for *Moda*, the Government sought to limit the Federal Circuit's ability to consider *that* case. After waiting nearly the full 60 days to appeal *Moda*, the Government then sought to stay its own appeal to focus the Federal Circuit's attention exclusively on *Land of Lincoln*. While the Government now raises arguments about efficiency and judicial economy, the Government vigorously opposed the assignment of *Moda* and *Land of Lincoln* at the Federal Circuit to the same merits panel. The reason is clear: the Government's principal interest is to limit the issues raised and considered in the risk corridors cases. That might be a legitimate legal strategy, but it cannot be conflated with conserving resources. The Federal Circuit underscored this point when it denied the Government's motion to stay *Moda*, expressly stating that "there are distinctions between the cases and having both cases before the same merits panel would be helpful to the court in deciding the merits of the issues." Def.'s Mot. Stay, Ex. A at 3.

The Government cannot meet its burden to justify the stay that it seeks. First, the date on which any decision in *Land of Lincoln* or *Moda* will be issued is unknown. Under longstanding precedent, this Court does not require plaintiffs to "stand aside" for the convenience of the Government while it litigates against a chosen plaintiff or plaintiffs. Second, the Government itself has acknowledged that given the significance of these cases (over $8 billion in potential Government liability), the plaintiffs and the Government are likely to exercise their "full rights" to judicial review. *See, e.g.*, Def.'s Mot. Stay, *Montana Health CO-OP v. United States* (Fed. Cl. Nov. 17, 2016), ECF No. 8. That almost certainly means further litigation beyond the "decision"

contemplated in the Government's briefing (and thus an even lengthier stay, if the Government's logic is to be followed). And, as noted *ante*, the Government's argument ignores the numerous other cases that are currently proceeding at the Court of Federal Claims and the Federal Circuit, and how decisions in those cases might impact Plaintiff's case.

Having requested a stay of indefinite duration, the Government must articulate a pressing need. *See, e.g.*, Order, *Health Net Inc. v. United States*, No. 16-1722C (Wolski, J.) (Fed. Cl. Mar. 2, 2017), ECF No. 8 ("*Health Net* Stay Denial"); Order, *Montana Health CO-OP v. United States*, No. 16-1427C (Wolski, J.) (Fed. Cl. Dec. 14, 2016), ECF No. 16 ("*Montana* Stay Denial"). The Government cannot do so, and in fact, its rationale for a stay is self-contradictory. On the one hand, the Government argues that the instant action raises issues that mirror those raised in *Land of Lincoln* and *Moda*, which it has already briefed. Def.'s Mot. Stay 6. On the *other* hand, the Government argues that the Court should delay *this* case to "drastically reduce the resources expended by the Court and the parties in reaching that resolution." *Id.* at 8. The Federal Circuit rejected these same arguments in denying the Government's motion to stay *Moda* pending its consideration of *Land of Lincoln*. The issue is no different here. The conservation of judicial resources alone does not justify an open-ended stay; nor does the workload of a defendant's legal counsel present a "pressing need" to stay a well-pleaded cause of action brought in good faith by an aggrieved plaintiff.

The Government also overstates the resources a stay will supposedly conserve. Plaintiff has filed a motion for summary judgment illustrating the fact that this lawsuit can be resolved as a matter of law, without discovery or trial. Moreover, the Government's repeated references to the volume of risk corridors cases currently pending, several of which are "fully briefed," belies the assertion that the Government is not sufficiently prepared to respond to Plaintiff's motion. It

strains credulity to suppose that the United States Government will be overtaxed by responding to Plaintiff's motion.

Plaintiff is diligently prosecuting its claim in good faith and is entitled to pursue a timely decision on the merits, irrespective of whether other similarly situated plaintiffs have sought relief. Plaintiff's right to be heard is not subservient to the arguments made by other plaintiffs, and it is not subservient to the Government's interest in limiting discussion of the risk corridors cases. The Government's actions have undermined the ability of the ACA's exchanges to function as Congress intended. The Government should not be permitted to dodge the substantive issues raised in Plaintiff's motion. Accordingly, Plaintiff respectfully requests that the Court deny the Government's motion to stay this case.

LEGAL STANDARD

Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 817 (1976) (citations omitted). The Government, on the other hand, bears the burden of establishing its entitlement to a stay:

> the suppliant for a stay must make out a *clear case of hardship or inequity* in being required to go forward, if there is even a *fair possibility* that the stay for which he prays will work damage to someone else. 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.

Landis v. N. Am. Co., 299 U.S. 248, 255 (1936) (emphases added). While this Court has discretion to manage its docket, *see Clinton v. Jones*, 520 U.S. 681, 706 (1997), that discretion is bounded by due regard for the plaintiff's interests in obtaining justice for its cause. *See id*. at 707 (finding that district court abused its discretion in granting stay); *Cherokee Nation of Okla. v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (stating that discretion to stay "is not . . . without bounds") (citations omitted).

The Federal Circuit applies a tripartite formula to stay requests pending the resolution of related cases:

> (i) "a trial court must first identify a pressing need for the stay;"
>
> (ii) "[t]he court must then balance interests favoring a stay against interests frustrated by the action;" and
>
> (iii) "[o]verarching this balancing is the court's paramount obligation to exercise jurisdiction timely in cases properly before it."

Cherokee Nation, 124 F.3d at 1416; *see Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 34 (2000), *aff'd*, 271 F.3d 1327 (Fed. Cir. 2001) (citing same formula).

The Government's request should be denied because (1) the Government seeks an indefinite stay, (2) it has identified no "pressing need" for a stay, (3) the balance of interests weighs against a stay, and (4) this Court's paramount obligation to timely exercise jurisdiction weighs in favor of denying the requested stay.

ARGUMENT

This Court's denial of other essentially identical requests to stay in similar RCP cases on the basis that the Government "has not shown the requisite 'pressing need'" provide ample support for denying the Government's motion. *Health Net* Stay Denial; *Montana* Stay Denial.

But even if the Court is inclined to indulge the Government and consider this request, the motion is without merit because the Government's argument suffers from the same substantive flaws: it seeks an indefinite stay of this case without identifying any pressing need for it. That, combined with the equities and this Court's own obligation to decide cases before it, requires the denial of the Government's motion.

I. THE GOVERNMENT SEEKS AN INDEFINITE STAY OF PROCEEDINGS.

The Government's request 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," Def.'s Mot. Stay 1, both of which are before the Federal Circuit, constitutes a request for an "indefinite stay." *See Health Net* Stay Denial (treating the Government's request to stay the instant action pending resolution of a related case as indefinite by requiring a showing of "pressing need"); *see also Consolidation Coal Co. v. United States*, 102 Fed. Cl. 489, 493 (2011) (request to delay litigation until another case was decided is a request for an indefinite stay). The Oxford English Dictionary defines "indefinite" as "undefined, unlimited; the opposite of definite." Definition of *Indefinite, Oxford English Dictionary* (2nd ed. 1989). Notwithstanding the Government's contention that it seeks a "temporary, carefully monitored stay," it fails to explain how a stay of unknown duration could qualify as anything other than "indefinite." *See* Def.'s Mot. Stay 7.

At best, the Government speculates that the Federal Circuit's decision in those cases, whenever issued, "will be instructive" and "*likely* dispositive," *id.* at 6 (emphasis added), and will "*likely* result" in precedent that resolves the issues before this Court. *Id.* at 1 (emphasis added). The Government's speculation about what is "likely" to happen deserves little regard. "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," *Landis*, 299 U.S. at 255 (emphasis added). Plaintiff should be permitted to have its day in Court now, not at some indefinite point in the future.

The Court of Federal Claims, the Federal Circuit, and the Supreme Court have all recognized that a stay pending resolution of similar cases is the very definition of "indefinite." In *Landis* itself, the Supreme Court rejected a stay of one case pending a decision on appeal in another because movants had failed to demonstrate a "pressing need." *Id.* at 255 (explaining that a trial court abuses its discretion if it enters "a stay of indefinite duration in the absence of a

pressing need"). The Federal Circuit, applying the *Landis* standard, similarly treated a motion to stay proceedings during the pendency of related cases as "indefinite" and applied the *Landis* pressing need requirement to deny the stay. *Cherokee Nation*, 124 F.3d at 1416. The judges of this Court continue to apply this standard and deny motions to stay cases pending appeals to the Federal Circuit, absent a showing of "compelling need." *See, e.g.*, *Brown v. United States*, 131 Fed. Cl. 540, 543 (2017).[2]

This Court must also consider the time reasonably expected for resolution of the cases on appeal, *see Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 545 (5th Cir. 1983), and, as the Supreme Court cautioned, a stay must be "so framed in its inception that its force will be spent within reasonable limits, *so far at least as they are susceptible of prevision and description*." *Landis*, 299 U.S. at 257 (emphasis added). The Government's characterization of its request as a "temporary" stay to allow the Federal Circuit to "dispose of all issues" in the risk corridors litigation is a ruse. *See* Def.'s Mot. Stay 6, 10. It is not realistic to assume that a decision in the consolidated cases will be the final word on this Court's risk corridors docket. As the Government is quick to point out, *see id.* at 3, the United States' exposure for risk corridors liability exceeds $8 billion. At the very least, *en banc* review or even review by the Supreme Court can be expected. *See, e.g.*, *id.*; Def.'s Mot. Stay, *Montana Health CO-OP v. United States*, No. 16-1427C (Wolski, J.) (Fed. Cl. Nov. 17, 2016), ECF No. 8 (recognizing "the likelihood that each party will consider its full rights to judicial review.").

Indeed, if the Federal Circuit remands the consolidated appeals for further proceedings at the Court of Federal Claims, presumably the Government would request that the indefinite stay *in this case* continue, based on the Government's bald supposition that issues that have been

[2] *See also infra* at 12(RCP cases in which this Court applied the pressing need standard and denied the Government's requested stay).

raised in other risk corridors cases (including this one) are not entitled to be heard. And then there are the other risk corridors cases pending at the Federal Circuit *right now*, and others that will likely be appealed to the Federal Circuit. *See, e.g.*, *First Priority Life Ins. Co. v. United States*, No. 16-587C (Wolski, J.) (supplemental briefs due 9/8/2017); *Montana Health CO-OP v. United States*, No. 16-1427C (Wolski, J.) (supplemental briefs due 9/8/2017); *Health Net Inc. v. United States*, No. 16-1722C (Wolski, J.) (answer due 9/5/2017); *HealthNow New York Inc. v. United States*, No. 17-1090C (Hodges, J.) (answer due 10/12/2017); *Molina Healthcare of Cal., Inc., et al. v. United States*, No. 17-97C (Wheeler, J.) (decision rendered); *Blue Cross and Blue Shield of N.C. v. United States*, No. 17-2154 (Federal Circuit opening brief due 8/21/17); *Maine Cmty. Health Options*, No. 17-2395 (Federal Circuit opening brief due 10/6/2017).

Finally, the Plaintiff and Defendant in this case are currently in litigation over the Government's failure to make approximately $35 million in mandatory Reinsurance payments under a separate provision of the ACA. *Atkins v. United States*, No. 17-1108C (Horn, J.) (answer due 10/16/2017). One of the Government's bases for withholding these mandatory payments under the Reinsurance program is a supposed (and improper) "offset," which the Government will undoubtedly argue is tethered to the resolution of Plaintiff's risk corridors case. In arguing that its requested stay is *not* indefinite, the Government conveniently ignores the import of all of these cases.[3]

[3] Two risk corridors cases were appealed to the Federal Circuit in the past two months. Neither case has been consolidated with *Land of Lincoln* and *Moda* for a hearing before the same merits panel. The existence of these separate appeals belies the Government's assertion that *Moda* and *Land of Lincoln* are the only cases that matter, just as the Government's *original* assertion—that *Land of Lincoln* was all that mattered—was misguided (as the Federal Circuit made clear when it rejected the Government's motion to stay *Moda* in favor of *Land of Lincoln*).

II. THE GOVERNMENT CANNOT SHOW A PRESSING NEED FOR THE COURT TO STAY PROCEEDINGS.

In deciding the Defendant's Stay Motion, this Court must first and foremost identify a "pressing need" for the stay. *See Health Net* Stay Denial; *Cherokee Nation*, 124 F.3d at 1416. The Government bears the burden of demonstrating its need. *See Clinton*, 520 U.S. at 708 (finding that the "proponent of a stay bears the burden of establishing its need" (citing *Landis,* 299 U.S. at 255)). The party moving for a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Landis*, 299 U.S. at 255. A trial court abuses its discretion if it issues a stay of indefinite duration "in the absence of a pressing need." *Id*.

The Government's request fails on this threshold issue. Its motion identifies no pressing need whatsoever. Rather, the apparent basis for its requested stay is the Government's claim that doing so will conserve judicial resources. But, as discussed above, the Government's rationale is self-contradictory. On the one hand, the Government argues that the instant action raises issues that "mirror" those raised in *Land of Lincoln* and *Moda*. Def.'s Mot. Stay 6. On the *other* hand, the Government argues that the Court should delay Plaintiff's case to "drastically reduce the resources expended by the Court and the parties in reaching that resolution." *Id.* at 8. The Federal Circuit rejected these same arguments in denying the Government's motion to stay *Moda* pending its consideration of *Land of Lincoln*.

Moreover, the conservation of judicial and government resources does not justify an open-ended stay. The Federal Circuit's rejection of this very argument in denying the Government's motion to stay the *Moda* appeal pending its decision in *Land of Lincoln* should guide the Court's decision on the current motion. *Accord Cherokee Nation*, 124 F.3d at 1416 (where the only reason for granting the stay was that it would avoid duplicative litigation and

conserve judicial resources, finding that "this concern falls short of the 'pressing need' required when a trial court seeks to suspend its proceedings indefinitely"); *Ortega Trujillo v. Conover & Co. Commc'ns*, 221 F.3d 1262, 1265 (11th Cir. 2000) ("The case law illustrates that . . . the interests of judicial economy alone are insufficient to justify such an indefinite stay.") (citing *Landis*, 299 U.S. at 256-57); *see also Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1111-12 (9th Cir. 2005) (holding that a *Landis* stay was inappropriate where grounds other than judicial economy were offered and found to lack merit); *cf. Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990) (holding that a crowded docket, without more, is insufficient to justify lengthy delay).

The Government also grossly overstates the resources it seeks to conserve. Although the Government makes much of the judicial resources it believes will likely be consumed should it move to dismiss this case, the Government has elsewhere taken the position that the risk corridors cases are capable of resolution without discovery or trial.[4] In that regard, this action is markedly different from the case cited by the Government, *UnionBanCal Corp. & Subsidiaries v. United States* (*see* Def.'s Mot. Stay 6), in which the court's entry of a stay repeatedly cited the value of *avoiding trial*. 93 Fed. Cl. 166, 168 (2010). Here, it is unlikely that resolution of Plaintiff's claims will draw upon the resources a trial would demand.

Moreover, the Government's argument that a stay will conserve the *parties'* resources, in addition to the Court's, has been discredited numerous times. As a practical matter, the Government's position is already fully briefed in other RCP cases before this Court. Thus, the Government's argument that briefing the instant action will draw on substantial resources at the Department of Justice lacks credibility. In addition, the Government has raised this argument

[4] *See, e.g.*, Def.'s Opp. to Pl.'s Mot. Summ. J. and Cross-Mot. Summ. J., *Health Republic Ins. Co. v. United States*, No. 16-259C (Sweeney, J.) (Fed. Cl. Apr. 12, 2017), ECF No. 52.

(unsuccessfully) in risk corridors cases since at least October 2016.[5] In total, the Government's requests to stay have been denied at least six times because the Government cannot demonstrate the requisite "pressing need," including:

- Procedural Order, *Molina Healthcare of Cal., Inc., et al. v. United States*, No. 17-97C (Wheeler, J.) (Fed. Cl. Mar. 24, 2017), ECF No. 10 ("*Molina* Order");
- Order, *Health Net, Inc. v. United States*, No. 16-1722C (Wolski, J.) (Fed. Cl. Mar. 2, 2017), ECF No. 8;
- Order, *HPHC Ins. Co., Inc. v. United States*, No. 17-87C (Griggsby, J.) (Fed. Cl. Feb. 21, 2017), ECF No. 8;[6]
- Order, *Montana Health CO-OP v. United States*, No. 16-1427C (Wolski, J.) (Fed. Cl. Dec. 14, 2016), ECF No. 16;
- Opinion and Order, *Moda Health Plan, Inc. v. United States*, No. 16-649C (Wheeler, J.) (Fed. Cl. Nov. 28, 2016), ECF No. 12; and
- Order, *Maine Cmty. Health Options v. United States*, No. 16-967C (Merow, J.) (Fed. Cl. Dec. 2, 2016), ECF No. 16.

The Government cites to 17 stays that have been entered, but in all but three of those cases, Plaintiff ***consented*** to the Government's requested stay, as is each plaintiff's prerogative. *See* Def.'s Mot. Stay 4. In *Sanford Health Plan v. United States*, the Court entered a temporary but far more limited stay pending a decision *by the same judge* in *Maine Community Health Options*, which was already fully briefed and argued. Order, *Sanford Health Plan v. United*

[5] *See, e.g.*, Def.'s Mot. Stay 2, *Maine Cmty. Health Options*, No. 16-967C (Merow, J.) (Fed. Cl. Oct. 31, 2016), ECF No. 8; Def.'s Mot. Stay 3, *Montana Health CO-OP*, No. 16-1427C (Wolski, J.) (Fed. Cl. Nov. 17, 2016), ECF No. 8.

[6] In both *HPHC* and *Molina*, the Government did not formally move to stay the action, but rather urged the Court to enter a stay through a joint status report in the former and a status conference in the latter. Notwithstanding the differing vehicles for raising the arguments, they nonetheless represent examples of judges of this Court rejecting the Government's now standard arguments. Joint Status Report 1-6, *HPHC Ins. Co., Inc. v. United States*, No. 17-87C (Griggsby, J.) (Fed. Cl. Feb. 16, 2017), ECF No. 7 (setting forth, in the section titled "The United States' Position," substantially the same arguments, including a "request for a limited stay of this action pending (1) this Court's decision in BCBSNC and (b) the Federal Circuit's decision in *Land of Lincoln*"); *Molina* Order 2 ("Defendant's counsel urged the Court to invoke a stay of proceedings pending the Federal Circuit's review of *Land of Lincoln*, and potentially of *Moda Health* if the Government elects to appeal that decision. In the alternative, due to the presence of a heavy workload in the other risk corridors cases, the Government requested an enlargement of time . . .").

States, No. 17-357C (Bruggink, J.) (Fed. Cl. May 1, 2017), ECF No. 9. That is not analogous to the case *sub judice* where the Government is asking for an open-ended stay the length of which is dependent on activity that is outside the control of this Court and thus speculative. For obvious reasons, the Government can cite no authority for the proposition that the purportedly taxed resources of trial counsel support a stay of a plaintiff's case—such a proposition would be transparently arbitrary even where the cases involve common subject matter. Defendant's case load falls short of the sort of "pressing need" the Federal Circuit requires. It would also be unseemly for the Government to bar an aggrieved plaintiff from the courthouse on the grounds that the suit inconveniences the Government.

Unsurprisingly, courts have routinely rejected such arguments as falling short of the standard of "hardship" required. *See, e.g.*, *Brown*, 131 Fed. Cl. at 543 (finding that "the court cannot agree that the possible need for additional briefing on the issue of liability constitutes a hardship that necessitates a stay of proceedings"); *Lockyer*, 398 F.3d at 1112 ("being required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis.*"); *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (same).

In addition to the general insufficiency of asserting that it is a hardship for lawyers to defend a lawsuit, the notion that *this case* will overtax the Government's resources is greatly overstated. The Government's "familiarity with the issues presented and the ample size of the legal staff devoted to these cases" militates *against* granting a stay. *Molina* Order 2-3. For the very same reason, the Government's assertion that a stay in this case would "conserve judicial resources and the resources of both parties," Def. Mot. Stay 6, should not be given any weight.

The Government has already briefed its position in numerous other risk corridors cases. Plaintiff's case is not uniquely onerous for the Government.

In reality, the Government's request for a stay is not intended to conserve the resources of this Court or the parties. Rather, the Government's goal is to limit the legal analysis taking place in this Court's risk corridors docket, and thereby limit the analysis available to the Federal Circuit. The Court should reject this procedural gambit. To the extent that the Government's motivation is that by delaying this case it might be able to avail itself of favorable decisions of other judges of this Court, or any related outcome on appeal, the Stay Motion would have to be rejected not only because it does not present a pressing need, but also as mere defensive forum shopping. The Federal Circuit has considered parties' motives in seeking stays and has affirmed that it "need not countenance such legal gamesmanship." *Commonwealth*, 46 Fed. Cl. at 34. Plaintiff is entitled to a decision on the merits no less than any other plaintiff. If judges of this Court were to hold cases in abeyance any time a similar case had already been docketed, the wheels of justice would slow to a crawl for well-deserving plaintiffs. Here, the law does not support entry of the Government's requested stay. *See Cherokee Nation*, 124 F.3d at 1416; *Prati v. United States*, 82 Fed. Cl. 373, 378 (2008) (in denying reconsideration, noting that, unlike a stay pending an interlocutory or administrative appeal, "concerns about resources and judicial economy are not as relevant" to requests for indefinite stays pending Federal Circuit resolution of a companion case decided by this Court).

III. THE BALANCE OF INTERESTS WEIGHS AGAINST A STAY OF THESE PROCEEDINGS.

The Government charges that Plaintiff "cannot provide any legitimate justification for moving forward in this case" due to the *Land of Lincoln* and *Moda* appeals. Def.'s Mot. Stay 7. For one thing, Plaintiff does not bear any burden to justify *not* staying this case. A stay is the

rare exception, not the rule; and the burden falls on the Government to establish its need, which it has failed to do. *See St. Bernard Par. Gov't v. United States*, 99 Fed. Cl. 765, 771 (2011) ("The proponent of a stay bears the burden of establishing its need, and must 'make out a clear case of hardship or inequity in being required to go forward.'" (quoting *Landis*, 299 U.S. at 255)). In any event, the Government is wrong that no justification to proceed exists.

Indeed, the Federal Circuit has itself already rejected the Government's rationale in the very risk corridors appeals it now invokes here. *Land of Lincoln* was appealed first, following Judge Lettow's ruling in favor of the Government. *Moda*, decided subsequently by Judge Wheeler in favor of the plaintiff, was appealed second. After waiting until the last minute to appeal *Moda*, the Government then sought to stay its own appeal to train the Federal Circuit's attention exclusively on *Land of Lincoln*. This was further evidenced by the Government's vigorous opposition to the assignment of *Moda* and *Land of Lincoln* to the same merits panel. The Federal Circuit rejected the Government's "conservation of resources" rationale, however, expressly stating in its May 30, 2017 order denying the Government's motion to stay *Moda* pending *Land of Lincoln* that "there are distinctions between the cases and having both cases before the same merits panel would be helpful to the court in deciding the merits of the issues." Def.'s Mot. Stay, Ex. A at 3.

This "percolation principle" is well ingrained in court decisions and apt here: the resolution of distinct plaintiffs' claims in similar cases will better inform the court of appeals about the important issues raised in this and the other cases. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) (stressing the importance of allowing "difficult question[s]" to percolate among the multiple courts of appeals before granting certiorari); *Prati*, 82 Fed. Cl. at 378 (noting that "additional [cases of the type at issue] could benefit the Federal Circuit . . . ."); *Columbus*

Fruit & Vegetable Co-op. Ass'n, Inc. v. United States, 8 Cl. Ct. 525, 529 (1985) (applying percolation principle in context of fee dispute affected by Government effort to litigate multiple cases in different forums) (citing *Mendoza*, 464 U.S. 154 (1984)). The Government itself has acknowledged that the Federal Circuit "may consider the reasoning of the trial court opinions in this case and other risk-corridors cases, regardless of whether such opinions are formally filed with the Court." Def.'s Response in Opp. to Pl.'s Motion to Assign Related Appeals to the Same Panel 4, *Moda Health Plan, Inc. v. United States*, No. 17-1994 (Fed. Cir. May 12, 2017), ECF No. 9. Indeed, the Government's argument that the instant action implicates similar issues counsels in favor of denying, not granting, a stay, as "[i]f the issues are sufficiently similar, the Federal Circuit could consolidate these [related] appeals . . . and reach a single decision with all the relevant cases before the court." *Prati*, 82 Fed. Cl. at 378.

Furthermore, a stay would unduly frustrate Plaintiff's interests. The Government's efforts to diminish the importance of the timing of any judgment Plaintiff may be awarded ignores the challenges faced by insurers who offered ACA Qualified Health Plans on the exchanges. An expeditious resolution of this dispute is not only in Plaintiff's best interest, but also critical to hospitals and other healthcare providers, especially those in small towns and rural settings, and thousands of individuals previously insured by Kentucky Health Cooperative ("KYHC"), who are strained by the delay in payment and need to be reimbursed from KYHC's estate as soon as possible. Plaintiff indisputably has an interest in resolving this dispute as quickly as possible. *See Landis*, 299 U.S. at 255 (a stay would not be appropriate where there is "a fair possibility that the stay . . . will work damage" to the non-moving party); *Cherokee Nation*, 124 F.3d at 1416.

A plaintiff does not lose its right to be heard in a timely manner merely because another plaintiff filed a similar suit. It is for that reason that this Court has repeatedly permitted cases to move forward despite the pendency of related litigation. *See, e.g.*, *Cherokee Nation*, 124 F.3d at 1418 (trial court abused its discretion in staying proceedings pending resolution of related quiet title action in another court); *Nez Perce Tribe v. United States*, 101 Fed. Cl. 139, 140 n.1 (2011) (2006 case in this Court proceeded while district court action brought by same party was pending).

The strong interests weighing against a stay overwhelm whatever desire the Government has for a contrary result because the Government's failure to pay Plaintiff over a hundred million dollars it owes has caused real and significant harm. Plaintiff's good-faith desire for a decision on the merits as soon as practicable eclipses whatever limited regard the Court should give to the workload argument raised by the Government.

IV. THE COURT'S PARAMOUNT OBLIGATION TO TIMELY ADJUDICATE CASES WEIGHS IN FAVOR OF DENYING THE STAY.

The lack of a "pressing need" and the balance of interests favoring denial of the Stay Motion are joined by yet another overarching consideration: this Court's "paramount obligation to exercise jurisdiction timely in cases properly before it." *Cherokee Nation*, 124 F.3d at 1416. This Court's own Rule 1 requires that the rules of this Court "should be construed, administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." RCFC 1. This principle springs from the Court's "virtually unflagging obligation . . . to exercise the jurisdiction given [it]" to decide controversies. *Cherokee Nation*, 124 F.3d at 1418 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14-15 (1983)).

This Court has jurisdiction to hear Plaintiff's case. Presumably, the Government believes that this matter can be resolved without an evidentiary hearing in light of its assertion that other fully briefed cases involve the "identical" legal issues. *See* Def.'s Mot. Stay 2. Whatever the Government's motivation or belief, it has failed to point to anything justifying why the Court should set aside Plaintiff's right to be heard in a timely manner.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny the Government's request for a stay pending resolution of other cases.

Dated: August 21, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 21, 2017, a copy of the forgoing "Plaintiff's Opposition to Defendant's 'Motion to Stay Proceedings, Or In the Alternative, for An Enlargement of Time to Respond to Plaintiff's Motion for Summary Judgment'" was filed electronically using the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be served on Defendant's Counsel, Terrance Anthony Mebane, via the Court's ECF system.

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