

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

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

The lengthy opposition (“Pl. Opp.”) of Nancy G. Atkins, in her capacity as Liquidator of Kentucky Health Cooperative, Inc. (the “Liquidator”), 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 10 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 (August 11, 2017); *Molina Healthcare v. United States*, No. 17-97C, 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*.¹
- The Court has not denied a stay *in even a single case*.

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 the Liquidator’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*. The Liquidator asserts that the United States seeks an indefinite stay, Pl. Opp. at 6-9, 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).

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 the

¹ The Liquidator’s counsel is also counsel for HPHC and Health Alliance. The same arguments the Liquidator makes in its opposition were made by HPHC, Dkt. 7, and Health Alliance, Dkt. 12, and rejected by the Court.

Liquidator, Pl. Opp. at 4, 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 the Liquidator 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

The Liquidator wrongly asserts that the United States’ requested stay “is not intended to conserve the resources of this Court or the Parties.” Pl. Opp. at 2. 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.

The Liquidator 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 2; *see id.* at 3, 14. The Liquidator 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 the Liquidator describes it; *see* Pl. Opp. at

15-16). *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, the Liquidator relies upon the United States’ motions to stay *Moda* in this Court and before the Federal Circuit. Pl. Opp. at 2-3. 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.”² 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 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.

² *Moda* filed an amicus brief in support of *Land of Lincoln*. No. 17-1224, Dkt. 79.

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 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 that were already before the Federal Circuit.

Finally, regardless of the unsupported aspersions cast by the Liquidator, as explained above, since the Federal Circuit combined the *Land of Lincoln* and *Moda* appeals, not a single judge of this Court has denied a motion to stay a pending risk corridors case.

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

The Liquidator incorrectly asserts that the United States failed to "acknowledge[e]" that there are two cases pending before the Federal Circuit in addition to *Land of Lincoln* and *Moda*. Pl. Opp. at 1. The United States' motion specifically identified that the Court had entered judgment in *Blue Cross and Blue Shield of North Carolina* and *Maine Community Health Options v. United States*, No. 16-967C, and that both cases are on appeal. US Mot. at 3-4.

The United States erroneously stated that a fifth case, *Molina*, had also reached judgment in the Court. US Mot. at 4. In *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.

Moreover, that *Blue Cross and Blue Shield of North Carolina* and *Maine Community Health Options* are now before the Federal Circuit only provides additional justification for a stay here, in order to allow the Federal Circuit to resolve the pending cases before it, establishing precedent that will narrow, if not fully resolve, the issues raised in the Liquidator'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* because those 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*.

Additionally, the Liquidator's counsel also represents Maine Community Health Options, and the Liquidator's Complaint is virtually identical to Maine's. *Compare, e.g.,* Dkt. 1, ¶ 52 with No. 16-967, Dkt. 1, ¶ 63 (only difference is abbreviating "risk corridors program" to "RCP" and a minor wording change in the final sentence). In any event, four pending appeals involving the identical legal issues raised by the Liquidator 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 the Liquidator's claims.³

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

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

³ 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.

V. 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 of time to December 20, 2017 to respond to the Liquidator's motion for summary judgment.

Dated: August 28, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

RUTH A. HARVEY
Director
Commercial Litigation Branch

KIRK T. MANHARDT
Deputy Director

/s/ Terrance A. Mebane
TERRANCE A. MEBANE
CHARLES E. CANTER
FRANCES M. MCLAUGHLIN
L. MISHA PREHEIM
MARC S. SACKS
PHILLIP M. SELIGMAN
United States Department of Justice
Civil Division, Commercial Litigation Branch
Telephone: (202) 307-0493
Facsimile: (202) 307-0494
Terrance.A.Mebane@usdoj.gov

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August 2017, a copy of the foregoing, THE UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO STAY PROCEEDINGS OR, IN THE ALTERNATIVE, FOR AN ENLARGEMENT OF TIME, was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be sent to all parties by operation of the Court's ECF system.

s/ Marc S. Sacks
MARC S. SACKS
United States Department of Justice