

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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| WISCONSIN PHYSICIANS SERVICE |) | |
| INSURANCE CORPORATION and WPS |) | |
| HEALTH PLAN, INC., |) | |
| |) | |
| Plaintiffs, |) | No. 17-1070C |
| |) | |
| v. |) | |
| |) | Judge Susan G. Braden |
| THE UNITED STATES OF AMERICA, |) | |
| |) | |
| Defendant. |) | |
| <hr/> |) | |

UNITED STATES’ UNOPPOSED MOTION TO STAY PROCEEDINGS

The United States respectfully moves the Court to stay this action (a) for 120 days or (b) until the Federal Circuit issues a decision in *Land of Lincoln Mutual Health Insurance Company v. United States*, No. 17-1224, and/or *Moda Health Plan, Inc. v. United States*, No. 17-1994 – whichever of (a) or (b) comes first. The parties will file a joint status report within 14 days of a decision in *Land of Lincoln* or *Moda*, or by December 21, 2017 (120 days from the date of this motion), advising the Court whether the parties contend that the stay should be lifted or continued. Plaintiffs Wisconsin Physicians Service Insurance Corporation and WPS Health Plan, Inc. do not oppose this motion.

I. BACKGROUND

On August 7, 2017, Plaintiffs filed this action seeking approximately \$28 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, for breach and anticipatory breach of implied-in-fact contracts, and for illegal exaction in violation of the United States Constitution. Dkt. 1.

A. Other Risk Corridors Cases

This is the 29th of 30 cases filed in the last 18 months in this Court seeking relief under identical and related theories to those asserted by Plaintiffs. *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, 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, 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.); *HealthNow New York Inc. v. United States*, No. 17-1090 (Hodges, J.). These cases implicate a total of \$8.3 billion for the 2014 and 2015 benefit years.

Four cases have reached judgment, and a partial decision on the merits was issued in a fifth. 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 5, 2017. On May 30, 2017, 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.

In the third case to reach judgment in the Court, *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 docketed its appeal on August 2, 2017.

In the fifth case, *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. The United States and plaintiff intend to jointly request a stay of further proceedings pending a decision of the consolidated appeals in *Land of Lincoln* and *Moda*.

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 18 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* and *EmblemHealth*. Although the majority of the stay requests were consensual, the Court granted stays over the plaintiffs' objections in *Health Republic*, Dkt. 62; *Farmer*, Dkt. 9; *Sanford*, Dkt. 9; *HPHC*, Dkt. 19; *Health Alliance*, Dkt. 14; and *Common Ground*, Dkt. 9. A motion to stay has been filed and is under review in *Health Net*, and the parties are currently briefing the United States' stay motions in *Ommen* and *Atkins*. Indeed, no judge of this Court has denied a stay request since the consolidation of the *Land of Lincoln* and *Moda* appeals.

This Court has entered stays in the two other risk corridors cases before it. In *Alliant Health Plans*, the Court granted the United States' unopposed motion to stay proceedings pending the *Land of Lincoln* appeal. Dkt 7 (Dec. 14, 2016). In *Blue Cross and Blue Shield of Kansas City*, No. 17-95C, the Court asked the parties to meet and confer to determine whether they would agree to a stay of proceedings pending a final decision by the Federal Circuit in the consolidated appeals of *Land of Lincoln* and *Moda*. The parties consented and the Court ordered the stay. Dkt. 10 (June 14, 2017).

In addition, dispositive motions have been fully briefed and are pending a decision in two other cases: *First Priority* and *Montana Health CO-OP*.¹ The only other case remaining is the recently-filed *HealthNow* case, and the United States intends to seek a stay in that case in the coming days.

II. A STAY WILL CONSERVE SUBSTANTIAL RESOURCES

“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*, 299 U.S. at 254). “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 are similar to the issues raised before the Federal Circuit in *Land of Lincoln* and *Moda*, and other previously-filed risk corridors cases, a stay here will conserve judicial resources and the resources of both parties by potentially reducing the amount of briefing of issues already pending before the Federal Circuit and this Court.

¹ Judge Wolski has ordered the parties to submit supplemental briefing on the *Maine Community Health Options* and *Molina* opinions in *First Priority* and *Montana Health CO-OP* by September 8, 2017.

III. CONCLUSION

For these reasons, the United States respectfully moves the Court to stay this action (a) for 120 days or (b) until the Federal Circuit issues a decision in *Land of Lincoln* and/or *Moda* – whichever of (a) or (b) comes first.

Dated: August 23, 2017

Respectfully submitted,

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ATTORNEYS FOR THE UNITED
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 23, 2017, I electronically filed the foregoing UNITED STATES' UNOPPOSED MOTION TO STAY PROCEEDINGS 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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