IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	Case No. 16-744C Judge Charles F. Lettow

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S CROSS-MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD ON COUNTS II-V

Plaintiff Land of Lincoln Mutual Health Insurance Company (Lincoln) respectfully responds to Defendant United States' (Government) October 13, 2016 Motion (Gov. Mot.) which again cynically seeks to interject unwarranted delay in the schedule for a merits resolution of this action. The Government's motion has no sustainable basis in law, fact, or logic and should be denied. The Government's assertion – without any supporting citation – that Lincoln's cross-motion should be stricken should be rejected for the following reasons:[1]

First, the Government asserts that Lincoln has belatedly "moved for judgment on the administrative record on the theories it omitted from its opening brief" after September 23, 2016.

[1] The Government's Motion is not supported by RCFC 12(f). Additionally, courts view motions to strike with disfavor and rarely grant them. *See, e.g., Fisherman's Harvest, Inc. v. United States,* 74 Fed. Cl. 681, 690 (2006) (citing 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1380, at 394 (3d ed. 2004) (motions to strike are infrequently granted "because striking a portion of a pleading is a drastic remedy and because it often is sought by the movant simply as a dilatory or harassing tactic"); *Reunion, Inc., et al v. United States*, 90 Fed. Cl. 576, 581 (2009)(courts generally are reluctant to respond favorably to motions to strike)(citing 2 James Wm. Moore et al., *Moore's Federal Practice* § 12.37[1], at 12–99 (3d ed.2006)).

Gov. Mot. at 1. However, the Government fails to recognize that the Government moved to dismiss Counts II through V in its September 23, 2016 filing, and Lincoln responded to that filing on October 12, 2016, on the merits. That substantive response which was entirely timely and proper under the Court's scheduling Order, demonstrated not only that the Government's motion to dismiss each of those counts was meritless, but that based on the record, Lincoln was in fact entitled to judgment on the Administrative Record (AR) for those counts. The same core of operative facts and applicable law brought forth to respond to the Government's Motion to Dismiss warrants judgment for Lincoln on each of Lincoln's counts. This Court's rules explicitly provide that every "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Rules of the Court of Federal Claims (RCFC) 54(c). Under that Rule, Lincoln would have been entitled to judgment without even demanding it. However, in view of the statement in the Court's October 7 Order denying the amicus filing – that Lincoln did not assert an implied contract theory – (in reliance on the assertion to that effect by the Government in its opposition to that filing, which Lincoln had no opportunity to respond to) Lincoln determined to make it expressly clear that it was entitled to and seeking judgment on the Administrative Record on all counts.

Second, the Government erroneously asserts that Lincoln's September 23 Motion "does not specify on which count it seeks judgment." Gov. Mot. at 1. Lincoln's motion for judgment (Lincoln's Mot.) explicitly stated, however, "Lincoln is owed Risk Corridors Payments from Defendant, the United States of America (Government), by statute, regulation and contract, and is entitled to be paid." Lincoln's Mot. at 1 (emphasis added). The next page refers to the contract claims. *Id.* at 2. Lincoln moved for judgment on the Administrative Record generally, as to all counts, and under RCFC 54(c) is entitled to judgment on all counts.

Third, because Lincoln's opposition to the Government's motion to dismiss counts II through V contains the substantive response on the merits to that motion, the Government must respond to the same arguments and case law that it was already required to respond to, had Lincoln not made the additional statement that based on its response to the Government's Motion to Dismiss, Lincoln "also cross moves for judgment on the administrative record on Counts II through V." Again, contrary to the Government's argument, there can be no prejudice to the Government in responding to arguments in opposition to its Motion to Dismiss Counts II through V that it would be and is required to respond to in any event under the briefing schedule. The Government does not explain how adding the statement to the effect that based on the foregoing opposition to the Government's Motion to Dismiss, that Lincoln is entitled to judgment on each of Counts II through V changes anything with respect to its reply.

Fourth, the Government's assertion that Lincoln "made no attempt to comply with" RCFC 52.1 is also meritless. Lincoln in its October 12 response referred to its own Statement of Facts in its September 23 Motion (with AR citations) and rebutted the Government's statement of facts with additional citations as necessary, as explicitly permitted in RCFC 5.4(a)(2)(D) and (a)(3). Again, Lincoln reiterates that the same provisions of the Administrative Record support judgment for Lincoln on all of the Counts in its Complaint.

Fifth, there simply is no warrant to revise the briefing schedule for the Government to respond to "new arguments" (Gov. Mot. at 3), because there are no new arguments, only the response to the Government's Motion to Dismiss Counts II through V, which the Government was already under a preexisting Court-ordered schedule to address. The Government should fully have anticipated that Lincoln would respond comprehensively to its motion to dismiss Counts II through V, and it would have to file a reply to that response. The Government is

simply attempting to garner a schedule extension to a brief it was already scheduled to respond to, and to use this as a pretext to again attempt to delay resolution of this RCP litigation.

Additionally, the Government cannot dispute that its pending motion has no bearing whatsoever on Lincoln's Motion for Judgment on the Administrative Record as it relates to Count I. As the Government must concede, Lincoln's entitlement to judgment on that Count will be fully briefed and ready for argument at the hearing scheduled for October 25. Lincoln submits that its entitlement to judgment on that Count is clear, and a judgment in Lincoln's favor there will likely resolve the litigation (because the counts are in the alternative). Therefore, the Court should maintain the October 25 hearing date.

Finally, the Court should reject the Government's effort to boot strap into a schedule extension and further delay on an issue unrelated to the purported basis for the Motion to Strike – Lincoln's liquidation status – which again simply confirms that the Government's real objective is to attempt delay resolution of this action. The Government seeks a revised scheduling order because Lincoln's status "as a going concern has changed" and because Lincoln "has been placed in liquidation proceedings" (Gov. Mot. at 3) which of course was caused by the Government's failure to timely make the required Risk Corridors Payments. Although Lincoln is among seventeen (17) of twenty-three (23) Co-op QCPs issuers that have not timely received RCPs and have failed or left the market, the Government's statement that "the outcome of this case will not change anything in the immediate term for either [Lincoln] or its customers" is simply incorrect. To the contrary, the Illinois state court's liquidation order does not change the urgent need for the Court to address Lincoln's right to payment of the risk corridors payments now. Like all state insurance guaranty associations, the Illinois guaranty association is funded by post-insolvency assessments on other Illinois health insurers. Absent a recovery of the Risk

Corridors funds, Lincoln's assets are insufficient by tens of millions of dollars to pay all of the outstanding health insurance claims of its policyholders, which will necessitate an assessment on the other health insurers in Illinois to cover the shortfall. In addition, guaranty association protection in Illinois is limited and is capped at $500,000 per policyholder. Any claims in excess of the cap for such guaranty claims in Illinois fall on Illinois healthcare providers and ultimately Illinois consumers. Last year Lincoln had at least seven such claims over that cap. If the risk corridors payments are not timely made, such providers do not get paid or they can seek reimbursement from the Illinois beneficiaries who received the healthcare but who lost their coverage because the Government failed to make the risk corridors payments. Therefore, contrary to the Government's desire for delay, there remain urgent considerations for an expedited resolution of this action. The fact that the Government's own conduct in delaying payment of RCPs has succeeded in driving Lincoln into liquidation is not a basis to delay resolution of this action but rather to expedite it because the outcome still has significant impacts.

As Judge Smith noted in connection with the *Winstar* litigation, "[i]t is the obligation of the United States to do right" and the United States has an obligation to act in a manner that "respects the life, liberty and property of its citizens," and not to interpose delay simply because the dollars at stake appear to be so large. *California Federal Bank v. U.S.*, 39 Fed. Cl. 753, 754-755(1997) *reversed in part and vacated in part on other grounds, Suess v. United States*, 535 F.3d 1348 (Fed. Cir. 2008). The Government does not fulfill that obligation by interposing this baseless motion.

THEREFORE, for the foregoing reasons, Lincoln respectfully requests that the Court deny the Government's motion to strike Lincoln's cross-motion for judgment on the administrative record on counts II through V. The Court should also reject the Government's attempt to again delay resolution of this matter by delaying the schedule.

Dated: October 17, 2016

Respectfully submitted,

s/ Daniel P. Albers

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 17th day of October 2016, a copy of the foregoing was filed electronically through the Court's Electronic Case Filing (ECF) system. As I understand, pursuant to RCFC Appendix E, V.12.(c), the Court's Notice of Electronic Filing satisfies the service requirement of RCFC 5 and the proof of service requirement of RCFC 5.3 via operation of the Court's ECF system.

s/ Daniel P. Albers

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