

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

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

Defendant, the United States, respectfully moves to strike as untimely Plaintiff's cross-motion for judgment on the administrative record on counts II through V. Plaintiff has improperly included a cross-motion in its Response in Opposition to Defendant's Motion to Dismiss and Motion for Judgment on the Administrative Record and Cross-Motion for Judgment on the Administrative Record on Counts II-V [Docket No. 29]. As explained below, this filing is untimely and will prejudice the United States because of the limited time period we have in which to respond.

On August 12, 2016, based upon Plaintiff Land of Lincoln Mutual Health Insurance Company ("Land of Lincoln")'s request for expedited consideration [Docket No. 7], the Court entered a scheduling order requiring the parties to file any "potentially dispositive motions" by September 23, 2016, responses on October 12, 2016, replies on October 19, 2016, and setting a hearing on the dispositive motions for October 25, 2016, at 10:00 a.m. Docket No. 12. On September 23, 2016, in accordance with the Court's order, we moved to dismiss the case on

jurisdictional and justiciability grounds, moved to dismiss counts II through V for failure to state a claim, and moved for judgment on the administrative record on count I. Docket No. 22.

Consistent with the Court’s direction to file any “potentially dispositive motions” no later than September 23, 2016, Land of Lincoln filed its own motion for judgment on the administrative record the same day. Docket No. 20. Though Land of Lincoln’s motion does not specify on which count it seeks judgment, the arguments set forth in the motion pertain only to count I. *See* Docket No. 20 at 8-14. Nothing prevented Land of Lincoln from including its contract and takings theories in its opening motion. Yet, as the Court noted in an order denying interested third parties’ motion for leave to file an amicus brief, Land of Lincoln elected not to pose an implied contract theory in its September 23 motion. *See* Docket No. 26. Now, more than two weeks after the deadline to file dispositive motions—under an expedited schedule that Land of Lincoln requested—and less than two weeks before the hearing on those motions, Land of Lincoln belatedly moves for judgment on the administrative record on the theories it omitted from its opening brief.¹

Land of Lincoln’s cross-motion should be stricken. First, it is untimely. The Court’s Scheduling Order clearly required any “potentially dispositive motions” contemplated in this round of briefing to be filed by September 23. Docket No. 12. The expedited briefing schedule following the deadline upon which to move pertains only to “responses” and “replies”; it does not give either party a second opportunity to move on theories omitted from its opening brief. *Id.* Second, we are prejudiced by the filing because we have only one week in which to respond to

¹ On October 11, 2016, counsel for Land of Lincoln informed counsel for the United States that Land of Lincoln would be seeking leave to file an oversized brief “to respond to the United States’ oversized brief filed September 23rd.¹ The United States does not oppose Land of Lincoln’s request for leave, but we were not notified that Land of Lincoln required the extra pages to file an untimely cross-motion.

both Land of Lincoln's opposition to the United States' motion as well as the newly filed cross-motion on its express and implied contract theories, good faith and fair dealing, and takings claims. In contrast, the United States made all of its opening arguments in a single motion, as directed by the Court, and Land of Lincoln has had the full two and a half weeks allotted by the Court to respond to that motion. Third, Land of Lincoln makes no attempt to comply with Rule 52.1(c) in its cross-motion. Specifically, with respect to counts II through V, Land of Lincoln does not include a "statement of facts that draws upon and cites to the portions of the administrative record that bear on the issues presented to the court." In fact, Land of Lincoln cites to the administrative record only five times in support of its cross-motion: twice to letters regarding the availability of appropriations for risk corridors payments, Docket No. 29 at 34 (citing A.R. 114, 1482), and three times to the Federal Register, *id.* at 36, 45 (citing A.R. 797, 969, 950). Land of Lincoln does not cite to the administrative record at all in support of its cross-motion on count V.

To the extent the Court is inclined to consider Land of Lincoln's cross-motion, the Court should vacate its August 12, 2016 Scheduling Order, and enter an appropriate scheduling order allowing the United States time to properly and fully respond to Land of Lincoln's new arguments. Indeed, there no longer appears to be any need for expedited consideration as sought by Land of Lincoln at the August 12 status conference. Since the time the Court granted Land of Lincoln's request for expedited consideration, Land of Lincoln's status as a going concern has changed. No longer in rehabilitation proceedings with a goal of serving policy holders, Land of Lincoln—with the consent of its board of directors—has been placed in liquidation proceedings. A copy of the Agreed Order of Liquidation entered by the Circuit Court of Cook County, Illinois is attached. Importantly, all policies except for certain policies and certificates of insurance covered under the Illinois Life and Health Insurance Guaranty Association Law, 215 Ill. Comp. Stat. 5/531.01 *et seq.*,

were cancelled effective October 1, 2016. *See* Agreed Order of Liquidation at 5. Accordingly, the outcome of this case will not change anything in the immediate term for either Land of Lincoln or its customers, and the case can proceed without expedited consideration.

Dated: October 13, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of October 2016, a copy of the foregoing, *Defendant's Motion to Strike Plaintiff's Cross-Motion for Judgment on the Administrative Record on Counts II-V*, 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/ Terrance A. Mebane

TERRANCE A. MEBANE
United States Department of Justice

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

PEOPLE OF THE STATE OF ILLINOIS, *ex rel.*)
ANNE MELISSA DOWLING, ACTING DIRECTOR)
OF THE ILLINOIS DEPARTMENT OF INSURANCE,)
Plaintiffs,) CASE NO.: 16 CH 09210
v.)
LAND OF LINCOLN MUTUAL HEALTH INSURANCE)
COMPANY, an Illinois Domestic Mutual Insurance)
Company)
Defendant.)

**AGREED ORDER OF LIQUIDATION
WITH A FINDING OF INSOLVENCY**

THIS CAUSE COMING TO BE HEARD upon the Verified Complaint for Liquidation With a Finding of Insolvency filed herein by THE PEOPLE OF THE STATE OF ILLINOIS, upon the relation of ANNE MELISSA DOWLING, Acting Director of the Illinois Department of Insurance (the "Director), seeking an Order of Liquidation with a Finding of Insolvency as to and against Land of Lincoln Mutual Health Insurance Company ("Land of Lincoln") pursuant to the provisions of Article XIII, 215 ILCS 5/187 *et seq.*, of the Illinois Insurance Code (the "Code"), 215 ILCS 5/1 *et seq.*; the Court having jurisdiction over the parties hereto and the subject matter hereof; the Court having reviewed the pleadings filed herein and having considered arguments of counsel thereon, and the Court then being otherwise advised in the premises, and for good cause appearing therefore;

THE COURT FINDS THAT:

1. Sufficient cause exists for the entry of an order for the liquidation of Land of Lincoln with a finding of insolvency, including that a majority of its board of directors consented to the entry of an Agreed Order of Liquidation With A Finding of Insolvency against Land of Lincoln pursuant to the provisions of Article XIII of the Code (the “Agreed Order of Liquidation”); and
2. The Director has represented that, in order to allow individual insureds the opportunity to obtain replacement health coverage through the end of this calendar year on the Federal Health Insurance Marketplace without incurring a lapse in coverage when all Land of Lincoln policies lose Qualified Health Plan status and are terminated effective 12:01a.m., Central Time, on October 1, 2016, the Centers for Medicare & Medicaid Services (“CMS”) established an advance special enrollment period (the “Advance SEP”) during the period of August 2, 2016 through September 30, 2016.
3. The Director has represented that it is in the best interests of Land of Lincoln, its policyholders, creditors, and the public, that Land of Lincoln be placed into liquidation effective 12:01a.m., Central Standard Time, on October 1, 2016 upon the expiration of the 60-day Advance SEP provided for by CMS.
4. Pursuant to Section 191 of the Code, 215 ILCS 5/191, effective 12:01a.m., Central Standard Time, on October 1, 2016 this Agreed Order of Liquidation creates an estate comprising of all of the liabilities and assets of Land of Lincoln; and
5. There being no just reason for delaying enforcement or appeal this Agreed Order of Liquidation is a final order within the meaning of Illinois Supreme Court Rule 307(a)(5); and

6. Commencing at 12:01a.m., Central Standard Time, on October 1, 2016, the Director's statutory authority, as Liquidator, includes, without limitation, the following:

- a. Pursuant to Section 191 of the Code, 215 ILCS 5/191, the Liquidator is vested by operation of law with the title to all property, contracts, and rights of action of Land of Lincoln; and
- b. Pursuant to Section 191 of the Code, 215 ILCS 5/191, the Liquidator is entitled to immediate possession and control of all property, contracts, and rights of action of Land of Lincoln; and
- c. Pursuant to Section 191 of the Code, 215 ILCS 5/191, the Liquidator is authorized to remove any and all records and property of Land of Lincoln to her possession and control or to such other place as may be convenient for purposes of the efficient and orderly administration of Land of Lincoln's liquidation; and
- d. Pursuant to Section 193(1) of the Code, 215 ILCS 5/193(1), the Liquidator is authorized to deal with the property, business, and affairs of Land of Lincoln in her name as Director or, if the Court shall so order, in the name of Land of Lincoln; and
- e. Pursuant to Section 193(2) of the Code, 215 ILCS 5/193(2), the Liquidator, without the prior approval of the Court, is authorized to sell or otherwise dispose of any real or personal property of Land of Lincoln, or any part thereof, and to sell or compromise all debts or claims owing to Land of Lincoln having a value in the amount of Twenty-Five Thousand Dollars (\$25,000.00), or less. Any such sale by the Liquidator of the real or personal

property of Land of Lincoln having a value in excess of Twenty-Five Thousand Dollars (\$25,000.00), and sale or compromise of debts owing to Land of Lincoln by the Liquidator where the debt owing to Land of Lincoln exceeds Twenty-Five Thousand Dollars (\$25,000.00) shall be made subject to the approval of the Court; and

- f. Pursuant to Section 193(3) of the Code, 215 ILCS 5/193(3), the Liquidator is authorized to bring any action, claim, suit or proceeding against any person with respect to that person's dealings with Land of Lincoln including, but not limited to, prosecuting any action, claim, suit, or proceeding on behalf of the policyholders, beneficiaries or creditors of Land of Lincoln; and
- g. Pursuant to Section 194(a) of the Code, 215 ILCS 5/194(a), the rights and liabilities of Land of Lincoln, and of its policyholders, creditors, and all other persons interested in Land of Lincoln's assets, are fixed as of the date of the entry of the order of liquidation prayed for herein; and
- h. Pursuant to Section 194(b) of the Code, 215 ILCS 5/194(b), the Liquidator may, within two (2) years after the entry of the Agreed Order prayed for herein or within such further time as applicable law permits, institute an action, claim, suit, or proceeding upon any cause of action against which the period of limitation fixed by applicable law had not expired as of the filing of the complaint upon which said order was entered; and
- i. Subject to the provisions of Section 202 of the Code, 215 ILCS 5/202, the Liquidator is authorized to appoint and retain those persons specified in Section 202(a) of the Code, 215 ILCS 5/202(a), and to pay, without the further

order of the Court, from the assets of Land of Lincoln, all administrative expenses incurred during the course of the rehabilitation of Land of Lincoln; and

- j. Pursuant to Section 203 of the Code, 215 ILCS 5/203, the Liquidator shall not be required to pay any fee to any public officer for filing, recording or in any manner authenticating any paper or instrument relating to any proceeding under Article XIII of the Illinois Insurance Code, 215 ILCS 5/187 *et seq.*, nor for services rendered by any public officer for serving any process; and
- k. Pursuant to the provisions of Section 204 of the Code, 215 ILCS 5/204, the Liquidator may seek to avoid preferential transfers of Land of Lincoln's property and to recover such property or its value, if it has been converted.

**THE COURT HEREBY ORDERS THAT EFFECTIVE
12:01a.m., CENTRAL STANDARD TIME, ON OCTOBER 1, 2016:**

A. Anne Melissa Dowling, Acting Director of Illinois Department of Insurance, and her successors in office, is affirmed as the statutory Liquidator (the "Liquidator") of Land of Lincoln, with all of the powers appurtenant hereto.

B. All policies and/or certificates of insurance heretofore issued by Land of Lincoln are cancelled except for those policies and/or certificates of insurance which are covered under the Illinois Life and Health Insurance Guaranty Association Law, 215 ILCS 5/531.01 *et seq.*, or which may give rise to "covered claims" of a similar organization in any other state, as defined by the provisions of such similar statute in any such other state, which shall remain in full force and effect until cancelled, or until they expire in accordance with their terms.

C. The Liquidator, subject to the further orders of the Court, is authorized to take such actions as the nature of the cause and the interests of Land of Lincoln, its policyholders, beneficiaries, creditors, or the public may require including, but not limited to, the following:

- i. The Liquidator is directed and authorized to take immediate possession and control of the property, books, records, accounts, business and affairs, and all other assets of Land of Lincoln, and of the premises occupied by Land of Lincoln for the transaction of its business, and to take such action as the nature of this cause and the interests of Land of Lincoln's policyholders, beneficiaries, creditors or the public may require; and
- ii. The Liquidator is authorized, acting either in her name as the Liquidator of Land of Lincoln, or in the name of Land of Lincoln, to sue and defend, and to settle claims on behalf of Land of Lincoln, or for the benefit of Land of Lincoln's policyholders, beneficiaries and creditors.

D. The caption in this cause and all pleadings filed in this matter shall hereafter read:

**“IN THE MATTER OF THE LIQUIDATION OF
LAND OF LINCOLN MUTUAL HEALTH
INSURANCE COMPANY”**

E. All costs of the proceedings prayed for herein shall be taxed and assessed against the Defendant, Land of Lincoln.

F. All outstanding costs of the rehabilitation proceedings shall be affirmed as administrative costs of the liquidation proceedings under Section 205(1)(a), 215 ILCS 5/205(1)(a), of the Code.

G. The Court issues the following mandatory and prohibitive injunctions pursuant to its authority under Section 189 of the Code, 215 ILCS 5/189:

- i. In accordance with Section 191 of the Code, *supra*, all persons, companies, and entities shall immediately release their possession and control of any and all property, contracts, and rights of action of Land of Lincoln to the Director including, but not limited to, bank accounts and bank records, premium and related records, and claim, underwriting, accounting and litigation files, as follows:
 - a. All accountants, auditors, actuaries, and attorneys of Land of Lincoln having knowledge of this Agreed Order of Liquidation shall deliver to the Liquidator, at her request, copies of all documents in their possession or under their control concerning or related to Land of Lincoln, and provide the Liquidator with such information as she may require concerning any and all business and/or professional relationships between them and Land of Lincoln, and concerning any and all activities, projects, jobs and the like undertaken and/or performed by them at the request of Land of Lincoln, or its agents, servants, officers, trustees, directors, third party administrators and/or employees, or which Land of Lincoln may be, or is, entitled to as the result of its relationship with such accountants, auditors, actuaries, and attorneys; and
 - b. Land of Lincoln and its directors, trustees, officers, agents, third party administrators, servants, representatives and employees, and all other persons and entities having knowledge of this Agreed Order of Liquidation shall give immediate possession and control to the Liquidator of all property, business, books, records and accounts of Land of Lincoln,

and all premises occupied by Land of Lincoln for the transaction of its business; and

c. All banks, brokerage houses, financial institutions and any and all other companies, persons or entities having knowledge of this Agreed Order of Liquidation shall immediately deliver any and all such assets and/or records to the Liquidator; and

ii. Land of Lincoln and its directors, trustees, officers, agents, third party administrators, servants, representatives and employees, and all other persons and entities having knowledge of this Agreed Order of Liquidation are enjoined and restrained from transacting any business of Land of Lincoln, or disposing of any of Land of Lincoln's property or assets, without the express written consent of the Liquidator, or doing or permitting to be done any action which might waste the property or assets of Land of Lincoln, until the further order of the Court; and

iii. The directors, trustees, officers, agents, third party administrators, servants, representatives and employees of Land of Lincoln, and all other persons and entities, including Land of Lincoln's policyholders and creditors, having knowledge of this Agreed Order of Liquidation are enjoined and restrained from bringing or further prosecuting any claim, action or proceeding at law or in equity or otherwise, whether in this State or elsewhere, against Land of Lincoln, or its property or assets, or the Director as its Liquidator, except insofar as those claims, actions or proceedings arise in or are brought in the liquidation proceedings; and from obtaining, asserting or enforcing preferences, judgments, attachments or other like liens, including common law retaining liens, or encumbrances or the

making of any levy against Land of Lincoln, or its property or assets while in the possession and control of the Liquidator; and from interfering in any way with the Liquidator in her possession or control of the property, business, books, records, accounts, premises and all other assets of Land of Lincoln, until the further order of the Court; and

- iv. Any and all claimants and creditors of Land of Lincoln having knowledge of this Agreed Order of Liquidation, whether an individual, aggregation of individuals, business entity (either incorporated or unincorporated), governmental entity, or any other person or entity, except for the Liquidator, are enjoined and restrained from setting off or netting monies owed Land of Lincoln without the prior written leave of this Court; and
- v. Any and all banks, brokerage houses, financial institutions and any and all other companies, persons or entities having knowledge of this Agreed Order of Liquidation, having in its possession accounts and any other assets which are, or may be, the property of Land of Lincoln, are enjoined and restrained from disbursing or disposing of said accounts and assets and be further enjoined and restrained from disposing of or destroying any records pertaining to any business transaction between Land of Lincoln, and such banks, brokerage houses, financial institutions, companies, persons or entities having done business, or doing business, with Land of Lincoln, or having in its possession assets which are, or may be, the property of Land of Lincoln; and
- vi. All agents, brokers and producers of Land of Lincoln, and their respective agents, servants, representatives and employees, and all other persons or entities having

knowledge of this Agreed Order of Liquidation, are enjoined and restrained from returning any unearned premiums or any money in their possession, or under their control, collected from premiums, contributions or assessments upon policies, contracts or certificates of insurance or reinsurance previously issued by Land of Lincoln, to policyholders, beneficiaries, certificate holders or others, and all said agents, brokers and producers and their respective agents, servants, representatives and employees are directed to turn over all such funds in their possession or under their control, or to which they may hereafter acquire possession or control, to the Liquidator in gross and not net of any commissions which may be due thereon; and

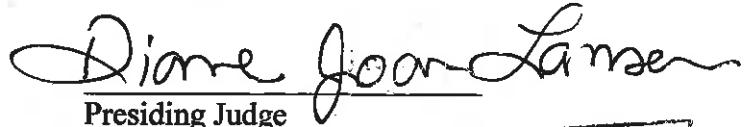
- vii. The Director is vested with the right, title and interest in all funds recoverable under treaties and agreements of excess insurance or reinsurance heretofore entered into by or on behalf of Land of Lincoln, and that all insurance and reinsurance companies and entities that assumed liabilities from Land of Lincoln arising under either contracts, policies, certificates, treaties or agreements of insurance are enjoined and restrained from making any settlements with any claimant or policyholder of Land of Lincoln, or any other person other than the Liquidator, except with the written consent of the Liquidator, or when the insurance or reinsurance contract, policy, certificate, treaty or agreement lawfully provides for payment to or on the behalf of Land of Lincoln's insured by the assuming reinsurer; and

H. Any acts or omissions of the Liquidator in connection with the rehabilitation shall not be construed or considered to be a preference within the meaning of Section 204 of the Code,

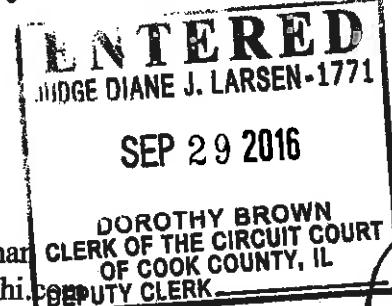
215 ILCS 5/204, notwithstanding the fact that any such act or omission may cause a policyholder, claimant, beneficiary, third party or creditor to receive a greater percentage of debt owed to or by Land of Lincoln than any other policyholder, claimant, member, third party or creditor in the same class; and

- I. The Agreed Order of Rehabilitation is terminated; and
- J. The Court retains jurisdiction in this cause for the purpose of granting such further relief as the nature of the cause and the interests of Land of Lincoln, its policyholders, beneficiaries and creditors, or of the public, may require and/or as the Court may deem proper in the premises.

ENTERED:



Presiding Judge



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