IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

THE UNITED STATES' OPPOSITION TO THE MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* OF MODA HEALTH PLAN, INC. AND HEALTH REPUBLIC INSURANCE COMPANY

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The United States respectfully requests that the Court deny the motion of Moda Health Plan, Inc. ("Moda") and Health Republic Insurance Company ("Health Republic") (collectively, "Movants") for leave to file a brief as *amicus curiae* in support of Land of Lincoln Mutual Health Insurance Company ("Land of Lincoln"). Dkt. No. 23.

INTRODUCTION

The Court set an expedited briefing schedule and determined that this case would be decided on the administrative record. Movants do not appear as "friends of the court," but rather, "they too have filed lawsuits in this Court," asserting the same claims that the United States and Land of Lincoln are in the midst of briefing. *See Health Republic Ins. Co. v. United States*, No. 16-259; *Moda Health Plan, Inc. v. United States*, No. 16-649. They request leave to file a 50-page *amicus* brief ostensibly supporting Land of Lincoln's recently-filed dispositive motion and opposing the United States' dispositive motion. Their proposed brief makes no mention of the administrative record, on which this Court will decide this case. They assert that their brief is necessary because it addresses "regulatory background and case law not addressed by either" party in their initial briefs and are concerned because this Court's holding may be "considered" by the judges in their lawsuits. Motion at 2. Critically, Movants interject claims on which Land of Lincoln itself apparently chose not to move in its dispositive motion. Movants have "no right to participate as *amicus curiae*" in this Court, and each of the factors this Court considers weighs against granting leave. *See Fluor Corp. v. United States*, 35 Fed. Cl. 284, 285 (1996).

Movants already have their own lawsuits pending where they can present their arguments. They have no actual interest in this case, as this Court's decision, while it may be informative, will have no controlling effect on their cases. Land of Lincoln is represented by able counsel, capable of representing Land of Lincoln's interests and presenting its case. The parties to this case are in

the middle of an expedited briefing schedule. Movants' desire to brief their cases, which have been assigned to other members of this Court, in Land of Lincoln's case, is patently unfair and wholly unnecessary. The motion to file an *amicus* brief should be denied.

BACKGROUND

On June 23, 2016, Land of Lincoln filed this action seeking damages under section 1342 of the Affordable Care Act. Seven other cases are currently pending in this Court seeking monetary relief under the same section. *See Health Republic Ins. Co. v. United States*, No. 16-259; *First Priority Life Ins. Co. v. United States*, No. 16-587; *Moda Health Plan, Inc. v. United States*, No. 16-649; *Blue Cross Blue Shield of North Carolina v. United States*, No. 16-651; *Maine Community Health Options v. United States*, No. 16-967; *New Mexico Health Connections v. United States*, No. 16-1199; *BCBSM, Inc. v. United States*, No. 16-1253.

On August 12, 2014, following the request of Land of Lincoln for expedited consideration, the Court entered a scheduling order requiring the parties to file "potentially dispositive motions" by September 23, 2016. Both parties filed dispositive motions on that date, and each party's opposition to the other's motion is due by October 12, 2016. Oral argument is scheduled for October 25, 2016.

On October 5, 2016, the Movants filed the motion, seeking to file a 50-page *amicus* brief. Where the proposed brief does not duplicate arguments Land of Lincoln already made in its dispositive motion, it raises arguments that Land of Lincoln apparently chose not to present and argues for judgment on grounds that Land of Lincoln did not raise under the expedited schedule established by the Court.

ARGUMENT

"[T]here is no right to participate as amicus curiae; the decision 'is left entirely to the discretion of the court.'" *Wolfchild v. United States*, 62 Fed. Cl. 521, 536 (2004), *rev'd on other grounds*, 559 F.3d 1228 (Fed. Cir. 2009) (citing *Fluor Corp.*, 35 Fed. Cl. at 285). "When making such a decision, courts have considered factors such as opposition of the parties, interest of the movants, partisanship, adequacy of representation, and timeliness." *Fluor Corp.*, 35 Fed. Cl. at 285. Each of these factors weighs against granting leave.

Opposition of the Parties. "Opposition by the parties is a factor militating against allowing participation." *American Satellite Co. v. United States*, 22 Cl. Ct. 547, 549 (1991). *See also Fluor Corp.*, 35 Fed. Cl. at 285 (recognizing that while parties to an action cannot bar the filing of an amicus brief, their "opposition should be given great weight by a court"). Here, the United Sates opposes Movants' request for leave.

Interest of the Movants. "When a court's decision would directly affect a person or entity's rights or would set a controlling precedent regarding a claim of that person or entity, leave to file an amicus curiae brief may be allowed." *Fluor Corp.*, 35 Fed. Cl. At 285 (citations omitted). That cannot be the case here. "The decisions of the judges of this court are not binding on other judges." *American Satellite*, 22 Cl. Ct. at 548. Even if, as Movants contend, this Court's decision will be "considered" by Movants' judges, Movants will "not be legally foreclosed or barred by principles of collateral estoppel or res judicata from fully litigating [their] claim[s], even in the face of a result unfavorable to [Land of Lincoln]." *Id.* at 548. That one judge may reach a decision before another judge of the same court is not grounds to permit litigants in other cases "to get another bite at the apple." *See Beesley v. International Paper Co.*, No. 06-703, 2011 WL 5825760, *1 (S.D. Ill. Nov. 17, 2011); *see also Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir.

1997) ("The vast majority of amicus briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse."). If Health Republic, Moda, and Land of Lincoln, *see* Dkt. No. 24, believe their cases are related and wish to consolidate their cases for decision, then they can move under RCFC 42.1 and RCFC 40.2 to have their cases consolidated or transferred to Judge Sweeney, the judge to whom the earliest-filed case is assigned.

Partisanship. This Court "'frown[s] on participation which simply allows the amicus to litigate its own views' or present 'its version of the facts.'" *Fluor*, 35 Fed. Cl. At 286 (citing American Satellite, 22 Cl Ct. at 549). *See also New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979) (an amicus should not be partisan). Although "an adversary role of amicus curiae has become accepted . . . there are, or at least there should be, limits." *Ryan*, 125 F.3d at 1063. Here, the Movants "make no pretense at impartiality," *Fluor*, 35 Fed. Cl. At 286, as "they too have filed lawsuits in this Court seeking the recovery of risk corridor payments," Motion at 2. Indeed, the United States' motion to dismiss in *Health Republic* is fully briefed and ready for a decision before Judge Sweeney. Health Republic should not be permitted to press its views on the merits of its case before a different judge when its claims will be decided (and may ultimately be dismissed) by the assigned judge. As for Moda, the United filed a motion to dismiss on September 30, and Moda can present its opposition in its own case pending before Judge Wheeler.

Adequacy of Representation. "Trial courts have allowed amicus filings when the court was 'concerned that one of the parties is not interested in or capable of fully presenting one side of the argument.'" *Fluor*, 35 Fed. Cl. At 286 (quoting *American Satellite*, 22 Ct. Cl. at 549). Here, these concerns cannot seriously be raised. The parties are in midst of briefing "the exact issue" which

Movants want to see addressed, and Movants do not offer any unique perspective that Land of Lincoln's counsel is unable to provide. Moreover, Land of Lincoln is represented by more than capable counsel. And given the significance of the issues at stake in this case, each party already has an interest in vigorously presenting its side of the argument.

Timeliness. Movants submit a proposed 50-page brief just seven days before the deadline for each party to oppose the other's dispositive motion and twenty days before the hearing. Their proposed brief does not present an objective analysis of the issues. In addition, the proposed brief raises issues not currently pending before the Court. Land of Lincoln filed a motion for judgment on the administrative record, arguing only that it is entitled to judgment under the applicable statute and regulation. *See* Dkt. No. 20, at 8-14. The United States, in turn, has moved for dismissal on jurisdiction and justiciability grounds and for failure to state a claim on Counts II through V and moved for judgment on the administrative record on Count I. Movants, however, argue that Land of Lincoln is entitled to judgment on an implied contract theory ground.[1] Notably, Movants make no citation to the administrative record to support this argument, and Land of Lincoln has not moved for judgment on this ground. Permitting Movants to file their *amicus* brief would delay this litigation and prejudice the United States by forcing counsel to litigate against Movants in this case, as well as their respective cases.

CONCLUSION

For the foregoing reasons, Movant's request for leave to file an *amicus* brief should be denied.

[1] Health Republic does not even allege the existence of an implied contract in its Complaint, *see Health Republic Ins. Co. v. United States*, No. 16-259, Dkt. No. 1, yet here suggests that the government is liable to *all* Qualified Health Plans on an implied contract theory.

Dated: October 6, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October 2016, a copy of the foregoing, *The United States' Opposition to the Motion for Leave to File a Brief as Amicus Curiae of Moda Health Plan, Inc. and Health Republic Insurance Company*, was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing with be sent to all parties by operation of the Court's ECF system.

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