**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

No. 17-1224

**RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO ASSIGN RELATED APPEALS TO THE SAME PANEL**

This suit is the lead case of twenty-three Tucker Act cases filed in the Court of Federal Claims, in which health insurance companies contend that they are legally entitled to payment of additional amounts under the risk-corridors program created by Section 1342 of the Patient Protection and Affordable Care Act (ACA). Collectively, the insurers are seeking billions of dollars. Briefing in this appeal will close on May 22, and this Court ordered that oral argument will be set for the first available calendar after close of briefing. Doc. 13 at 2.

Recently, the government noticed an appeal from a final judgment in another risk-corridors case, *Moda Health Plan, Inc. v. United States*, No. 17-1994 (Fed. Cir.). That appeal was docketed on May 9. The plaintiffs in this case and in *Moda* have since filed identical motions asking the Court to assign the appeals to the same panel

for oral argument and decision, noting that it would be inefficient to have the appeals heard by two different panels. *See* Lincoln's Motion to Submit Related Appeals to the Same Panel (Doc. 121, No. 17-1224) (Lincoln's Mot.); Moda's Motion to Submit Related Appeals to the Same Panel (Doc. 7-1, No. 17-1994) (Moda's Mot.).

Those motions should be denied as moot. Because *Moda* presents the same issues that are presented in this appeal, the government today moved to stay its appeal in *Moda* pending the disposition of this case. There is no justification for duplicative briefing and no reason to delay oral argument in this case.

It is undisputed that this Court's decision in this case will control the resolution of *Moda* and the twenty-one other risk-corridors cases. *See* Lincoln's Mot. 2 (Doc. 121, No. 17-1224) ("The appeals in *Moda Health* and *Land of Lincoln* involve substantially similar legal questions."); *id.* ("*Moda Health* and *Land of Lincoln* are two of at least 22 cases brought in the Court of Federal Claims raising these issues."); Moda's Mot. 2 (Doc. 7-1, No. 17-1994) ("The appeals in *Moda Health* and *Land of Lincoln* involve substantially similar legal questions."); *id.* at 3 ("*Moda Health* and *Land of Lincoln* are two of at least 22 cases brought in the Court of Federal Claims raising these issues.").

The legal issues presented by the risk-corridors cases were comprehensively addressed in the voluminous briefing filed in this appeal (No. 17-1224). In addition to Lincoln's 56-page opening brief (Doc. 20), seven amicus briefs were filed in support of Lincoln's position by health insurance companies and their trade

associations. Moda itself filed a 29-page amicus brief in support of Lincoln's position. *See* Corrected Amicus Br. of Avera Health Plans, Inc.; DAKOTACARE; and Moda Health Plan, Inc. (Doc. 79). Amicus briefs in support of Lincoln's position also were filed by other health insurance companies that, like Lincoln and Moda, claim to be legally entitled to additional risk-corridors payments. *See* Docs. 63, 69, 77 (amicus briefs filed by Blue Cross and Blue Shield of South Carolina; BlueChoice HealthPlan of South Carolina, Inc.; Health Republic Insurance Co.; Highmark Inc.; Highmark BCBSD Inc.; Highmark West Virginia Inc.; Blue Cross and Blue Shield of North Carolina; Blue Cross of Idaho Health Service, Inc.; Blue Cross and Blue Shield of Kansas City). In addition, amicus briefs were filed by two trade associations: America's Health Insurance Plans (AHIP), which is the national trade association representing the health-insurance industry, *see* Doc. 67, and the National Alliance of State Health CO-OPs (NASHCO), which represents non-profit health insurance Consumer Operated and Oriented Plans that were established pursuant to section 1322 of the ACA, *see* Doc. 30.

In addition, after the trial court in *Moda* issued a decision in the insurer's favor, Lincoln submitted the *Moda* opinion to this Court as a supplemental authority, explaining that it addressed "virtually identical factual and legal claims." Doc. 83 at 3. Accordingly, the government addressed the *Moda* court's reasoning in its appellee's brief in Lincoln, in addition to responding to the arguments made by Lincoln and its amici. *See*, *e.g.*, Doc. 107, at 30-36, 40, 50, 56.

In any event, this Court may consider the reasoning of the trial court opinions in *Moda* and other risk-corridors cases, regardless of whether such opinions are formally filed with the Court. Many risk-corridors cases are fully briefed or almost fully briefed in trial court, and decisions in those cases may be issued at any time.[1] This Court may consider the reasoning of such opinions in the course of this appeal, without the burdens and delay that would arise from full briefing of a series of appeals that present the same legal issues. Moreover, a number of trial courts have stayed their risk-corridors cases pending this Court's decision in this case, and a delay of this appeal would be inconsistent with the expectations of the trial courts and parties in those cases.[2]

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[1] One trial court recently entered final judgment for the government in a risk-corridors case. *See Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C (Fed. Cl. Apr. 18, 2017) (Griggsby, J.). Three other cases have been fully briefed and argued and are awaiting decision. *See First Priority Life Ins. Co. v. United States*, No. 16-587C (Wolski, J.); *Maine Cmty. Health Options v. United States*, No. 16-967C (Bruggink, J.); *Montana Health CO-OP v. United States*, No. 16-1427C (Wolski, J.). In three other cases, merits briefing is due to close soon. *See HPHC Insurance Co., Inc. v. United States*, No. 17-87C (Griggsby, J.) (briefing due to close May 15); *Health Republic Ins. Co. v. United States*, No. 16-259C (Sweeney, J.) (briefing due to close June 1); *Molina Healthcare v. United States*, No. 17-97C (Wheeler, J.) (briefing due to close June 16). Other cases are in earlier stages of briefing. *See Blue Cross and Blue Shield of Kanas City v. United States*, No. 17-95C (Braden, J.) (motion to dismiss due May 23); *Health Net, Inc. v. United States*, No. 16-1722C (Wolski, J.) (motion to dismiss due May 31).

[2] *See*, *e.g.*, *Alliant Health Plans, Inc. v. United States*, No. 16-1491C (Braden, J.); *BCBSM, Inc. v. United States*, No. 16-1253C (Coster Williams, J.); *Blue Cross of Idaho Health Service, Inc. v. United States*, No. 16-1384C (Lettow, J.); *Medica Health Plans v. United States*, No. 17-94C (Horn, J.); *Minuteman Health Inc. v. United States*, No. 16-1418C (Griggsby, J.); *Neighborhood Health Plan, Inc. v. United States*, No. 16-1659C (Smith, J.); *New Mexico Health Connections v. United States*, No. 16-1199C (Smith, J.).

Contrary to the assertion made by Lincoln and Moda in their motions, nothing in the government's brief in this appeal suggested that resolution of the legal issues in the risk-corridors cases will depend on a "specific insurer's financial circumstances." Lincoln's Mot. 8; Moda's Mot. 8. In reality, as Lincoln and Moda acknowledge, the government expressly informed this Court that the "decision in *Land of Lincoln* 'is expected to control the disposition of' all Risk Corridor cases." Lincoln's Mot. 4; Moda's Mot. 4.

Nor did the government's appellate brief in this case suggest that anything turns on the procedural posture of a particular risk-corridors case. Instead, the government's brief demonstrates that the claims alleged by insurers in all of the risk-corridors cases fail as a matter of law on grounds that are generally applicable. Those legal issues will be fully briefed on May 22, and this appeal should be set for argument during the next available calendar as previously ordered by this Court. Doc. 13 at 2. The *Moda* appeal (and future appeals in risk-corridors cases) should be stayed pending this Court's decision in Lincoln, which will control the disposition of all of the risk-corridors cases. Because the *Moda* appeal should be stayed, Lincoln's motion to assign this appeal to the same panel that is assigned to hear *Moda* should be denied as moot.

## CONCLUSION

For the foregoing reasons, plaintiff's motion to assign related cases to the same panel should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2017, I electronically filed the foregoing document with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*/s/ Alisa B. Klein*
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