**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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| MODA HEALTH PLAN, INC.<br><br>Plaintiff,<br><br>v.<br><br>THE UNITED STATES OF AMERICA,<br>Defendant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Case No. 1:16–cv–00649–TCW<br>Judge Thomas C. Wheeler |

**PLAINTIFF'S OPPOSITION TO THE UNITED STATES' MOTION TO STAY OR, IN THE ALTERNATIVE, FOR AN ENLARGEMENT OF TIME**

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November 22, 2016

Plaintiff Moda Health Plan, Inc. ("Moda Health") strongly opposes the Government's motion to either stay this litigation or for a sixty-day extension for filing its combined reply brief in support of its motion to dismiss and opposition to plaintiffs' motion for summary judgment as to liability.

This lawsuit involves a very large underpayment of funds to which Moda is legally entitled. Pursuant to Section 1342 of the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 ("ACA"), Moda Health is entitled to $223 million in "Risk Corridors" payments for calendar years 2014 and 2015. The Government's own calculations confirm that number. But the Government has announced that it will pay Moda Health only $15 million in Risk Corridors payments for these two years, leaving a $208 million shortfall.

This enormous shortfall has caused and will continue to cause extraordinary hardship to the Company. The Company has been forced to withdraw from the Alaska Marketplace, remove a large health care system from its network in Oregon, and limit its enrollment.

Every day that goes by that the Government refuses to honor its Risk Corridors obligations causes additional financial harm to the Company, to its many loyal employees, and to the tens of thousands of customers who rely upon it for their health insurance needs. Assuming the success of the Government's position that Moda Health is not entitled to prejudgment interest, every day of delay also deprives Moda Health of the time value of the money it should already have received.

Despite this unquestioned, significant, ongoing hardship, the Government seeks indefinitely to delay Moda Health its day in court. The Government did not request this stay until three weeks after Moda Health had expended significant resources to prepare and file its

lengthy response to the Government's motion to dismiss. It was not until a judgment favorable to the Government was issued in another ACA case that the Government suddenly sought to avoid litigating this case, presumably to avoid a result here that might undermine the Government's chances on appeal in the other case.

That is not a valid justification for delay. Given that: any significant delay would substantially prejudice Moda Health; briefing on dispositive motions in this case is already well advanced; and the Government has already briefed the key issues in several other cases, there is no justification for the Government's request to stay or significantly delay this case. The Government's motion should therefore be denied. In light of the Thanksgiving holiday, Moda Health does not oppose an extension until Friday, December 2, 2016 of the Government's filing deadline.

**I. A Stay Is Unwarranted and Would Substantially Prejudice Moda Health.**

The Government has requested that this Court "stay this action pending disposition of several other cases raising identical issues, including *Land of Lincoln Mutual Health Ins. Co. v. United States*, No. 16-744C, which was decided on November 10, 2016" and has been appealed to the Federal Circuit. Govt. Mot. to Stay 1, Nov. 16, 2016, ECF No. 10.

"The proponent of a stay bears the burden of establishing its need, and must 'make out a ***clear case of hardship or inequity*** in being required to go forward.'" *St. Bernard Parish Govt. v. United States*, 99 Fed. Cl. 765, 771 (2011) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)) (emphasis added). In moving to stay proceedings indefinitely pending the resolution of another case, as the Government has requested here, the movant must establish both: (1) a "***pressing need***" for the stay; and (2) that a balancing of the interests weighs in favor of granting a stay. *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (emphasis added); *accord, e.g., Topsnik v. United States*, 114 Fed. Cl. 1 (2013); *Prati v. United*

*States*, 82 Fed. Cl. 373, 378 (2008); *Clinchfield Coal Co. v. United States*, 102 Fed. Cl. 592, 596 (2011). "Overarching this balancing is the court's paramount obligation to exercise jurisdiction timely in cases properly before it." *Cherokee Nation*, 124 F.3d at 1416.

The Government's motion to stay should be denied because the Government has not identified a clear case of hardship, inequity, or a "pressing need" for a stay, and the balance of the interests weighs heavily against it.

**A. There Is No "Pressing Need" for a Stay.**

The Government argues that the outcome of the other Risk Corridors cases "will clarify and refine the issues in this case," and thus a stay "will conserve judicial resources and the resources of both parties by avoiding further briefing of issues already pending before the Court of Appeals for the Federal Circuit and various other judges of this Court." Govt.' Mot. to Stay, at 3.

This does not constitute a "pressing need" to stay this action. Judges in this jurisdiction routinely hear claims from different plaintiffs that involve overlapping legal or factual issues, without staying or consolidating the cases. *Cf., e.g., Prati with Keener v. United States*, 76 Fed. Cl. 455 (2007). Indeed, this Court frequently rejects contested motions to stay cases pending the resolution of related matters, even where the related litigation may resolve important issues and thus save judicial resources. *See, e.g., Topsnik* (denying motion to continue to stay the case pending resolution of an appeal of a related case); *Consolidation Coal Co. v. United States*, 102 Fed. Cl. 489 (2011) (denying motion to stay pending the resolution of related case in another court).

In this case, both the Government and Moda Health have already filed dispositive motions, and the Government has filed nearly identical motions to dismiss in several related cases, thus minimizing the legal resources the parties will need to use to finish briefing the

pending motions. Nor does responding to Moda Health's motion for partial summary judgment give rise to any additional burden for the Government, as that motion is largely the inverse of the Government's motion to dismiss and thus involves the same fundamental legal issues.

Moreover, if the Government believed that it was inefficient separately to litigate Moda Health's claims and the other pending Risk Corridors cases, the Government was free to move to consolidate the cases pursuant to RCFC 42 and 42.1, when Moda Health filed its complaint almost six months ago. Or, if the Government became genuinely concerned about conserving its resources, it could have filed a motion to stay before it drafted and filed the pending motion to dismiss and Moda Health responded to that motion. The Government did neither. Instead, within days of the ruling in the Government's favor in *Land of Lincoln*, the Government suddenly moved to stay this action. This history undermines the credibility of the Government's purported concern about conserving resources, and suggests that the Government's effort to stay this case is simply a litigation tactic seeking to minimize the chances of a Court of Federal Claims decision inconsistent with *Land of Lincoln* before the Risk Corridors issues reach the Federal Circuit.

**B. The Balancing of the Interests Weighs Against A Stay.**

Any minimal interest the Government may have in conserving resources is far outweighed by the prejudice Moda Health would suffer because of the delay. As this Court has recognized, an indefinite stay "based solely on the potential outcome of proceedings to which [Plaintiffs] are not currently named parties," in and of itself, significantly prejudices "the Plaintiffs' right to have their claims against the Government heard in this court." *St. Bernard Parish Govt.*, 99 Fed. Cl. at 771.

Furthermore, delaying this case would cause substantial harm to Moda Health's operations, and to its customers and potential customers. The Government owes Moda Health

$208 million in unpaid Risk Corridors claims.[1] The Government's failure to make these payments has already caused significant harm to the company. In November 2015, immediately following the Government's announcement that it would pay only 12.6 percent of the 2014 Risk Corridor payments, Oregon insurance regulators required Moda Health to raise private capital, limit enrollment, and limit premium payment options. (Declaration of James Francesconi, ¶ 2, Attachment 1 hereto). Due to concerns about the adequacy of Moda Health's capital reserves in light of the Government's non-payment of the Risk Corridor payments, Oregon insurance regulators issued an Order of Immediate Supervision of Moda Health, under which the company was prohibited from issuing new policies or renewing current policies. *Id.* ¶ 3. Alaska state regulators similarly prohibited Moda Health from issuing new policies or renewing existing policies in Alaska. *Id*.

Moda Health eventually came to an agreement with the state insurance regulators to allow it to continue to operate in those states, contingent upon Moda Health's ability to raise private capital to replace the loss the of risk corridors payments due in 2014 and 2015. *Id.* ¶ 4. However, as a direct result of the Government's failure to pay the full Risk Corridors payments, Moda Health has been forced to withdraw from Washington and California, and the Alaska

[1] The Government announced that it owes Moda Health $89,426,430 for 2014 Risk Corridor payments ($1,686,016 for Alaska and $87,740,414.38 for Oregon). CMS, *Risk Corridors Payment and Charge Amounts for Benefit Year 2014*, tbl. 2 (Nov. 19, 2015), https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RC-Issuer-level-Report.pdf. The Government announced last week that it owes Moda Health $133,951,163 for 2015 Risk Corridor payments ($31,531,143 for Alaska; $91,059,560 for Oregon; and $11,360,460 for Washington). CMS, *Risk Corridors Payment and Charge Amounts for Benefit Year 2015* (Nov. 18, 2016), https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2015-RC-Issuer-level-Report-11-18-16-FINAL-v2.pdf. The Government has stated that it will pay Moda Health only $15,727,580 in Risk Corridors payments for both years combined, unless it collects more money in Risk Corridors payments for 2016, a highly dubious proposition. *Id.*; CMS, *Risk Corridors Payment and Charge Amounts for Benefit Year 2014*.

Individual Marketplace, and to remove a large health care system from its network in Oregon. *Id.* ¶ 5.

Until Moda Health is awarded the unpaid $208 million, the company must continue with its scaled back operations to ensure that it continues to meet its capital reserve requirements. This means that Moda Health cannot expand its operations and otherwise conduct its business as in the past and as planned.

The harm of further delay is exacerbated by the fact that, if Moda Health eventually prevails in this litigation, the Government will object to the award of any pre-judgment interest. *See, e.g.*, *Health Republic Ins. Co. v. United States*, No. 16-cv-259, United States' Mot. to Dismiss, at 23-24, ECF No. 8 (Fed. Cl. Jun 24, 2016) (asserting that the CFC lacks jurisdiction to award interest if plaintiffs prevail on a claim to recover Risk Corridors payments).

The Government argues that "the requested stay will not affect the timing of any potential recovery by Moda," Govt. Mot. to Stay, at 3, but that is clearly incorrect, given that a ruling in Moda Health's favor on the pending motion for judgment as to liability will allow the parties promptly to resolve any issues relating to damages (including any necessary discovery), while a stay will forestall any advancement toward final resolution of the dispute.

Moreover, Moda Health has already bent over backwards to accommodate the Government, agreeing to a lengthy (60-day) extension of the Government's time to respond to the Complaint, and also agreeing to an extension of the Government's briefing deadline to December 2, 2016, to avoid interference with the Government's lawyers' Thanksgiving holiday. But no additional delays are warranted, given both Moda Health's own significant interest in avoiding the stay to in order to "preserve [its] access to the court" to resolve its claims against

the United States, *see Cherokee Nation*, 124 F.3d at 1418, and the strong "public policy favor[ing] expeditious resolution of litigation," *Prati*, 82 Fed. Cl. at 378 (quotations omitted).

### C. Sound Judicial Decision Making Will Be Fostered By Proceeding to a Resolution of the Merits of This Case.

There is significant value in allowing this Court to decide the merits, rather than simply deferring to the first CFC judge that happened to reach the issue. Where cases involve complex issues, it is helpful for the Federal Circuit to have the benefit of multiple judges' decisions, as well as a more complete picture of the spectrum of factual circumstances in which the cases and issues arise. *See Prati*, 82 Fed. Cl. at 378.

It is particularly important for the Federal Circuit to have the benefit of this Court's decision and reasoning on the pending motions, as we submit that the *Land of Lincoln* court made several critical errors in dismissing that case, in part because certain key legal principles were not presented to it by either party. As one example only: the *Land of Lincoln* court found that the Risk Corridor program was intended to be "budget neutral," in the sense that Risk Corridor payments by the Government to unprofitable insurers such as Moda Health could be limited to the amount of Risk Corridor payments collected by the Government from profitable insurers to the Government. The Court endorsed this reading notwithstanding the absence of any statutory language supporting it, and even though the agency that administers the program had, ***before the program even came into operation,*** publicly informed insurers such as Moda Health, through Federal Register publications, precisely the opposite: "***The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of [Risk Corridor] payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act.***" HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,410, 15,473 (Mar. 11, 2013) (emphasis added).

The *Land of Lincoln* court nonetheless reached a contrary conclusion, relying repeatedly on the fact that the Congressional Budget Office ("CBO") declined to "score" (*i.e.*, assign a budget cost to) Section 1342. *Land of Lincoln*, No. 16-cv-744, slip op. at 23-24, 26 (Fed. Cl. Nov. 10, 2016). Yet the relevant case law (which was not brought to the *Land of Lincoln* court's attention) soundly dismisses placing such weight on CBO pronouncements. *See e.g., Ameritech Corp v. McCann*, 403 F.3d 908, 913 (7th Cir. 2005) (Easterbrook, J.) ("Congress did not vote, and the President did not sign" the CBO opinion, and thus it "cannot alter the meaning of enacted statutes").

Moreover, the *Land of Lincoln* court was not presented an obvious explanation for why it was reasonable that the CBO did not score the ACA risk corridors program. Two other aspects of the ACA program -- the "risk adjustment" and the "reinsurance" programs -- ***are*** statutorily required to be budget neutral, and are projected by CBO as resulting in both annual costs and offsetting revenues. Standards Related to Reinsurance, Risk Corridors, and Risk Adjustment, 76 Fed. Reg. 41,930, 41,948-49 (July 15, 2011). Had CBO assumed the risk corridor program also to be budget neutral, it surely would have done the same.

Instead, CBO's decision not to include risk corridors suggests that it could not predict whether it would be a net cost or, as has been the case with the Medicare Part D risk corridor program, result in a net gain to the federal government. *See* Medicare Payment Advisory Commission, Report to the Congress: Medicare and the Health Care Delivery System, ch. 6, p. 155, tbl. 6-9 (June 2015), *available at:* http://www.medpac.gov/docs/default-source/reports/june-2015-report-to-the-congress-medicare-and-the-health-care-delivery-system.pdf?sfvrsn=0. The Medicare Part D risk corridor program experience is particularly relevant, given that the ACA Risk Corridors program is explicitly based on the Medicare Part D risk corridors program, *see*

ACA § 1342(a); the latter program is ***not*** statutorily required to be budget neutral, *see* 42 U.S.C. § 1395w-115(e); but in practice, the federal Government has ended up collecting much ***more*** in Medicare Part D risk corridors payment than it has paid out, and thus the Part D risk corridors program does not have a net cost to the federal Government.

In short, the CBO scoring for the ACA risk corridor program does not reflect that the risk corridor program was required to be neutral. The *Land of Lincoln* court thus erred both as a matter of governing case law and logic in relying on the CBO scoring as proof that Congress intended that Risk Corridor payments by the Government to unprofitable insurers such as Moda Health could be limited to the amount of Risk Corridor payments collected by the Government from profitable insurers to the Government.

Sound judicial decision-making would clearly be advanced by permitting the instant case to proceed to resolution, based upon the full panoply of relevant case law.

**II. The Government's Request for a 60-Day Enlargement of Time Is Unwarranted.**

For the same reasons that there is no "pressing need" for the Government's request to stay the case, there is no "good cause" for granting the Government's request for a 60-day extension. There is no plausible reason that the Government needs an additional 60 days, on top of the 31 days they have under the rules, to draft and file their brief. Rather, the Government's request for an extension is simply another effort to accomplish what it is attempting to do in seeking a stay — namely, to ensure that the decision in *Land of Lincoln* is the only CFC decision issued before the Federal Circuit reaches the issues raised in these Risk Corridor suits.

The Government argues that it needs a 60-day extension "[i]n light of the Thanksgiving holiday" and because of "the significance of the issues presented and the pendency and posture of other cases raising the same issues." Govt. Mot. to Stay, at 4. But Moda Health has already agreed to an extension until December 2, 2016, to account for the holiday. Nor does the

"significance of the issues presented" and the existence of the other Risk Corridors litigation give rise to good cause for a 60-day extension. The Government has already developed its litigation position with respect to the issues presented in this case: As explained above, the Government has already filed dispositive motions in this case and several others, thereby significantly minimizing the work the Government will need to do to file its brief in support of its motion to dismiss.

## III. CONCLUSION

The Government's Motion to Stay or, in the Alternative, for an Enlargement of Time should be denied, except to the extent that the Government should be allowed until December 2, 2016, to file its reply brief in support of its motion to dismiss and opposition to Moda's cross-motion for summary judgment as to liability.

Respectfully submitted,

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November 22, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22nd day of November 2016, a copy of the foregoing, the Plaintiff's Opposition to the United States' Motion to Stay or, in the Alternative, for an Enlargement of Time, 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.

Respectfully submitted,

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