IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MODA HEALTH PLAN, INC.,	)	
	)	
Plaintiff-Appellee,	)	
	)	No. 17-1994
v.	)	
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
	)	
Defendant-Appellant	)	

MOTION OF PLAINTIFF-APPELLEE MODA HEALTH PLAN, INC., TO SUBMIT RELATED APPEALS TO THE SAME PANEL FOR ARGUMENT AND DECISION

Pursuant to Federal Circuit Rules 27 and 34, plaintiff-appellee Moda Health Plan, Inc. ("Moda") respectfully requests that this Court submit the above-captioned case, *Moda Health Plan, Inc. v. United States*, No. 17-1994 (Fed. Cir.), for disposition to the same panel that will decide the pending case *Land of Lincoln Mutual Health Insurance Co. v. United States*, No. 17-1224 (Fed. Cir.), and that a joint oral argument be held before the same panel in both cases.

Moda has consulted with counsel for Land of Lincoln Mutual Health Insurance Co., the appellant in *Land of Lincoln*, which consents to this motion and will be filing a similar motion in its appeal. Moda has also consulted with counsel for the United States, which is the appellant in *Moda Health* and the appellee in

Land of Lincoln. Counsel for the United States informed Moda that the United States will oppose this motion.

Sound judicial decision-making and judicial efficiency would be advanced by assigning a single panel to hear simultaneously and decide both cases, a practice this Court has previously employed in similar circumstances.

DISCUSSION

Section 1342 of the Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 ("ACA"), set forth a straightforward arrangement: if a health insurer would voluntarily agree to provide "Qualified Health Plans" through the "Health Benefit Exchanges" established by the ACA, the Government would make a "Risk Corridor" payment to the insurer covering a statutorily-defined portion of any losses the insurer suffered during each of the first three years of ACA operations. However, the Government has paid Qualified Health Plan insurers less than 6% of the amounts owed for 2014 and 2015 under that statutory formula.

The appeals in *Moda Health* and *Land of Lincoln* involve substantially similar legal questions, including: (1) whether the Government breached statutory or regulatory obligations to Qualified Health Plan issuers by failing to make full Risk Corridor payments; and (2) whether the Government breached an implied

contractual obligation to Qualified Health Plan issuers by failing to make such Risk Corridor payments.

Moda Health and *Land of Lincoln* are two of at least 22 cases brought in the Court of Federal Claims raising these issues,[1] and they are the only two cases to have reached the Federal Circuit to date. The two CFC judges deciding *Moda Health* and *Land of Lincoln* came to conflicting conclusions. Judge Charles F. Lettow held that the Government was not required, by either statute or contract, to make full, annual Risk Corridor payments to insurers, *Land of Lincoln Mut. Health Ins. Co. v United States*, 129 Fed. Cl. 81 (2016), and entered final judgment in favor of the Government. Judge Thomas C. Wheeler held that the Government was both statutorily and contractually obligated to make full, annual Risk Corridors payments, and entered final judgment in favor of Moda. *Moda Health*

[1] *See Health Republic Ins. Co. v. United States*, No. 16-259C; *First Priority Life Ins. Co. v. United States*, No. 16-587C; *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C (Griggsby, J.); *Moda Health Plan, Inc. v. United States*, No. 16-649C; *Land of Lincoln Mutual Health Ins. Co. v. United States*, No. 16-744C; *Maine Cmty. Health Options v. United States*, No. 16-967C; *New Mexico Health Connections v. United States*, No. 16-1199C; *BCBSM, Inc. v. United States*, No. 16-1253C; *Blue Cross of Idaho Health Service, Inc. v. United States*, No. 16-1384C; *Minuteman Health Inc. v. United States*, No. 16-1418C; *Montana Health COOP v. United States*, No. 16-1427C; *Alliant Health Plans, Inc. v. United States*, No. 16-1491C; *Blue Cross and Blue Shield of South Carolina v. United States*, No. 16-1501C; *Neighborhood Health Plan, Inc. v. United States*, No. 16-1659C; *Health Net, Inc. v. United States*, No. 16-1722C; *HPHC Ins. Co., Inc. v United States*, No. 17-87C; *Medica Health Plans v. United States*, No. 17-94C; *Blue Cross and Blue Shield of Kansas City v. United States*, No. 17-95C; *Molina Healthcare of California, Inc. v. United States*, No. 17-97C; *Sanford Health Plan v. United States*, No. 17-cv-357C; *Blue Cross Blue Shield of Alabama v. United States*, No. 17-cv-347; *Blue Cross and Blue Shield of Tennessee*, No. 17-cv-00348.

Plan, Inc. v. United States, 130 Fed. Cl. 436 (2017); *Moda Health Plan, Inc. v. United States*, Dkt. No. 25, No. 16-649C (Fed. Cl. Mar. 2, 2017) (Order for Entry of Judgment).

The United States has taken the position that this Court's decision in *Land of Lincoln* "is expected to control the disposition of" all Risk Corridor cases.[2] In closely analogous circumstances, this Court has assigned related appeals to a single panel for argument and decision.

In *Pacific Gas and Electric Co. v. United States*, No. 07-5046 (Fed. Cir.), the Government moved to submit related "spent nuclear fuels" appeals to the same panel for argument and decision. *See* Defendant-Appellee's Motion to Submit Related Appeals to the Same Panel for Purposes of Argument and Decision, Dkt. No. 55 (Nov. 6, 2007)(Exh. 1 hereto). The Government explained that multiple pending cases involved "claims for damages arising from an alleged partial breach by the United States Department of Energy ('DOE') of the 'Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste' ('Standard Contract')." *Id.* at 2. "One of the central issues" in all of the cases was how damages should be calculated with regard to spent nuclear fuel after 1998, given

[2] Def.'s Mot. for a 42-Day Extension of Time in Which to File the Appellee's Brief at 2, *Land of Lincoln Mut. Health Ins. Co. v. United States*, Dkt. No. 91, No. 17-1224 (Apr. 24, 2017).

that the Standard Contract "does not specify a specific speed or rate at which DOE must continue that acceptance after January 31, 1998." *Id.* at 2-3.

In resolving this question, the Court of Federal Claims judges had "announced conflicting interpretations of the government's obligations under the Standard Contract, and reached conflicting conclusions concerning the overlapping legal issues that arose in connection with determining the foreseeability, causation and reasonableness of the utility's damages." *Id.* at 4 (citations and quotation marks omitted). The Government argued that assigning the same panel to hear and decide three pending appeals raising these issues —

> would result in significant efficiencies for the Court, given that many of the background facts related to contract formation and performance for each appeal are identical, and coordinated treatment will allow a single panel to study and digest these background events and facts and to bring that knowledge to bear in both cases, while avoiding the need for two separate panels to undertake this significant task.

Id. (citation and quotation marks omitted). Moreover, "having the same panel hear all of the appeals that involve this issue will help to ensure that the Court speaks with a uniform voice on these initial appeals in the [spent nuclear fuels] damages matters," and "likely will determine a common legal framework that will be applicable to numerous cases pending in the trial court." *Id.* at 4-5 (citation and quotation marks omitted).

This Court agreed with the Government and granted its motion to submit the cases to a single panel for argument and decision. *See* Order, *Pacific Gas and Elec. Co. v. United States*, No. 07-5046, (Fed. Cir. Nov. 16, 2007) (Exh. 2 hereto). While this Court did not set forth its reasoning, it was apparently not persuaded by the plaintiff-appellant's opposition, which argued *inter alia* that "there are significant differences in the case" and that adding additional briefing and record evidence would unnecessarily complicate and delay the appeals, *see* Pl.-Appellant's Opposition to Defendant-Appellee's Motion to Submit Appeals to the Same Panel for Purposes of Argument and Decision, at 2, *Pacific Gas and Electric Co. v. United States*, Dkt. No. 56, No. 07-5046 (Nov. 9, 2007) (Exh. 3 hereto).

This Court has also utilized single panel resolution in other comparable cases, *see, e.g.*, *Prati v. United States*, 2009 WL 1754622, Nos. 2008-5117, 2008-5129 (Fed. Cir. June 17, 2009) (*sua sponte* ordering that two appeals be treated as companion cases and referred to the same merits panel for argument, where the cases were among more than 50 appeals regarding the IRS assessment of a penalty, the disposition of which the Government argued were controlled by a recently-decided Federal Circuit case); Order at 2, *In re Anderson*, Dkt. No. 13, No. 16-1156 (Fed. Cir. Jan. 26, 2016) (Exh. 4 hereto) (consolidated two related appeals from the Patent and Trademark Office over the objection of the appellant, when (1)

"the prior art and arguments at issue between the appeals overlap substantially" and (2) "consolidation of the cases will conserve party and judicial resources").

The arguments advanced in favor of single panel resolution in *Pacific Gas* apply equally here. As in *Pacific Gas*, these two appeals involve common legal issues, whose consolidated resolution will result in significant efficiencies. As in *Pacific Gas*, the CFC judges in *Moda Health* and *Land of Lincoln* "reached conflicting conclusions concerning the overlapping legal issues," so that having the same Federal Circuit panel resolve those issues "will help to ensure that the Court speaks with a uniform voice on these initial appeals" and facilitate the development of "a common legal framework that will be applicable to numerous cases pending in the trial court." *See* Defendant-Appellee's Motion to Submit Related Appeals to the Same Panel for Purposes of Argument and Decision, at 4-5, *Pacific Gas and Electric Co. v. United States*, Dkt. No. 55, No. 07-5046 (Fed. Cir. Nov. 6, 2007) (Exh. 1 hereto).

Moreover, additional factors not present in *Pacific Gas* also support joint resolution here. First, unlike in *Pacific Gas*, neither *Moda Health* nor *Land of Lincoln* requires the review of lengthy trial records that might delay resolution of either case.

Second, the United States has put the *Moda Health* CFC decision front-and-center in the *Land of Lincoln* appeal. The *Land of Lincoln* CFC decision relied

heavily on two legal conclusions: (1) that the case is premature because Risk Corridor payments are not due until sometime in late 2017 or early 2018; and (2) that deference is owed to HHS's post hoc interpretation of Section 1342 of the ACA. *See* 129 Fed. Cl. at 81. But the United States' appellee brief in *Land of Lincoln* largely abandons these positions, stating with respect to the former that "the practical significance of this timing issue may be overtaken by the passage of time while the litigation is pending," and with respect to the latter that "the government has not claimed that HHS is owed deference" on its interpretation of Section 1342. Brief for Appellee at 40, 57, *Land of Lincoln Mut. Health Ins. Co. v. United States*, Dkt. No. 107, No. 17-1224 (Apr. 24, 2017).

The United States instead devotes much of its *Land of Lincoln* appellee brief to an attack on the reasoning of the CFC decision in *Moda Health*. *Id.* at 30-40, 56. Hearing the two cases together will thus advance judicial decision making on what are now the salient, overlapping legal issues.

Including *Moda Health* would also promote "a common legal framework" by avoiding any interstices presented by a specific insurer's financial circumstances. In its *Land of Lincoln* appellee brief, the United States contends that the magnitude of a given plaintiff's claim for Risk Corridor payments reflect its "individually calculated business risks" and "business judgment," implying that Land of Lincoln is responsible for the financial harm it suffered as a result of the

Government's failure to make full Risk Corridor payments, which transformed the company from a brand new Consumer Operated and Oriented Plan ("CO-OP") capitalized through provisions of the ACA to an insurer under state receivership. *Id*. at 1. It would be helpful for the Federal Circuit panel also to have before it Moda's claims, given that Moda is a going concern and operated as a private insurance business for decades before the ACA was enacted.

Joint resolution of the two appeals would also avoid one potential pitfall to the prompt and efficient resolution of the legal questions presented. The CFC decided *Land of Lincoln* via the plaintiff's motion for judgment on the administrative record under RCFC 52.1, *Land of Lincoln Mut. Health Ins. Co.*, 129 Fed. Cl. at 101-03, 108, 114. Some amici have argued that the absence of a prior "proceedings before an agency" rendered RCFC 52.1 procedures inapplicable, especially given that the plaintiff's claims neither arise under the Administrative Procedure Act ("APA") nor trigger APA legal standards.[3] These issues are not presented in *Moda Health*, which was resolved on summary judgment.

Consolidating the two cases before a single panel will not result in significant delay. Briefing in *Land of Lincoln* is scheduled for completion by May 22, 2017, while briefing in *Moda Health* is scheduled to be completed by

[3] *See* Br. of Amicus Health Republic Ins. Co. in Supp. of Pl.-App., at 8-18, *Land of Lincoln Mut. Health Ins. Co. v. United States*, Dkt. No. 69, No. 17-1224 (Fed. Cir. Feb. 2, 2017).

September 5, 2017. A joint oral argument could be scheduled for a date soon thereafter. Any modest delay that may be caused in *Land of Lincoln* will be far outweighed by the value of having these cases heard together. And, the only party directly affected by such a delay, Land of Lincoln, has consented to a joint argument.

For the foregoing reasons, Moda respectfully requests that this Court grant its motion to submit its appeal and *Land of Lincoln* to the same panel for oral argument and decision.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Moda Health Plan, Inc. **v.** United States

Case No. 17-1994

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☒ (appellee) ☐ (amicus) ☐ (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10 % or more of stock in the party
Moda Health Plan, Inc.	Moda Health Plan, Inc.	Moda Inc.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

None.

May 11, 2017
Date

/s/ Steven J. Rosenbaum
Signature of counsel

Please Note: All questions must be answered

Steven J. Rosenbaum
Printed name of counsel

cc: Phillip M. Seligman

Reset Fields

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font. I further certify that this motion complies with the type-volume limitations of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains 2,238 words according to the count of Microsoft Word, excluding parts of the motion exempted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11 day of May, 2017, a copy of the foregoing, 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.

Respectfully submitted,

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