

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MODA HEALTH PLAN, INC.,)	
)	
Plaintiff,)	
)	
v.)	No. 16-649C
)	Judge Wheeler
THE UNITED STATES,)	
)	
Defendant.)	
)	

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

The United States respectfully moves the Court to 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. Absent a stay, we request an enlargement of time in which to file a reply to our motion to dismiss and an opposition to the cross-motion for summary judgment, of 60 days, to and including January 27, 2017. Moda has consented to an enlargement to December 2, 2016, but opposes the other requested relief.

I. Background

On June 1, 2016, Moda filed this action seeking approximately \$191 million in money damages. Compl. (ECF No. 1). Count I seeks statutory relief under Section 1342 of the Patient Protection and Affordable Care Act (ACA), 42 U.S.C. § 18062, and 45 C.F.R. § 153.510(b); Count II seeks relief under an implied-in-fact contract. Compl. ¶¶ 68-83. On September 30, 2016, the United States filed a motion to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6). ECF No. 8. On October 25, 2016, Moda filed a cross-motion for summary judgment. ECF No. 9. The United States' response is currently due on November 28, 2016.

Twelve other cases in this Court seek relief under identical and related legal theories to those asserted by Moda. *See Health Republic Ins. Co. v. United States*, No. 16-259C (Sweeney, J.); *First Priority Life Ins. Co. v. United States*, No. 16-587 (Wolski, J.); *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C (Griggsby, J.); *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 16-744C (Lettow, J.); *Maine Community Health Options v. United States*, No. 16-967C (Merow, J.); *New Mexico Health Connections v. United States*, No. 16-1199C (Bruggink, 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.); *Minuteman Health Inc. v. United States*, No. 16-1418 (Griggsby, J.); *Montana Health CO-OP v. United States*, No. 16-1427 (Wolski, J.); *Alliant Health Plans, Inc. v. United States*, No. 16-1491; *Blue Cross and Blue Shield of South Carolina v. United States*, No. 16-1501. The first decision was entered in these cases in *Land of Lincoln* on November 10, 2016. On November 15, 2016, *Land of Lincoln* filed a notice of appeal from the judgment entered in that case.

The cases involve several technically-detailed provisions of the ACA and raise significant jurisdictional issues as well as complex issues of appropriations law. *See* United States' Motion to Dismiss and Moda's Motion for Summary Judgment (ECF Nos. 8, 9). The undersigned counsel represents the United States in each of these cases, which implicate a total of \$2.5 billion in federal funding for the 2014 benefit year and potentially comparable amounts for the 2015 and 2016 benefit years.

Dispositive motions have been filed and are pending in five of the cases referenced above, as well as this one.¹ On November 10, 2016, the Court dismissed the complaint in *Land of Lincoln*

¹ In *Maine Community Health Options*, the plaintiff has moved for summary judgment in advance of the United States answering the complaint. We recently moved to stay that case pending disposition of the first-filed cases, and the plaintiff has opposed our motion.

on the merits and entered judgment for the United States and, as noted above, that case is now on appeal. The Court has announced its intent to hear argument in *Health Republic* in mid-December and a motion to certify a class remains pending in that case. Briefing on the Government's motion to dismiss is expected to be complete in both *First Priority Life Insurance* and *Blue Cross Blue Shield of North Carolina* by November 22, 2016.

II. A Stay Is Proper and Will Conserve Substantial Resources

The United States proposes to stay further activity in this case pending resolution of the presently pending dispositive motions in the other cases. The outcome of those motions will clarify and refine the issues in this case. Indeed, because the legal issues presented in this case are identical to issues raised in the other cases, the further development of those cases (whether in this Court or on appeal) is likely to inform or even determine Moda's ultimate ability to recover. A stay therefore 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. The United States proposes that, if a stay is granted, the parties can submit status reports every 45 days (or at another appropriate interval acceptable to the Court) in order to monitor the continued utility of the stay.

Because of the importance of the issues presented in these cases and the likelihood that each party will consider its full rights to judicial review, the requested stay will not affect the timing of any potential recovery by Moda. However, a stay will reduce the necessity for Moda, the Court, and the United States to expend substantial resources on issues being addressed in other cases. With consent of the plaintiffs, stays have already been entered in *New Mexico Health Connections* and *Minuteman Health*. For these reasons, we move the Court to stay this case pending further development of the cases referenced above.

III. Alternatively, the Court Should Grant the Government An Enlargement of Time in which to Respond

Under the current schedule, the United States reply in support of its motion to dismiss and response to the cross-motion for summary judgment is presently due on November 28, the day after the Thanksgiving holiday weekend. In light of the Thanksgiving holiday, it is unlikely that the United States will be able to complete the consultation and coordination necessary to file a brief in a case of this complexity and importance on that date. In light of the significance of the issues presented and the pendency and posture of other cases raising the same issues, in the event this case is not stayed, although we appreciate Moda's consent to an enlargement until December 2, 2016, we request that the Court enlarge the Government's time to reply in support of our motion to dismiss and to respond to Moda's cross-motion, by 60 days, to and including January 27, 2017.

IV. CONCLUSION

For these reasons, the United States respectfully requests that the Court stay this case pending the disposition of the cases cited above that raise the same legal issues, or alternatively, grant the Government's motion for an enlargement of time to reply in support of the motion to dismiss and respond to the cross-motion, of 60 days to and including January 27, 2017.

Respectfully submitted,

Dated: November 16, 2016

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CERTIFICATE OF SERVICE

I certify that on November 16, 2016, a copy of the attached Motion to Stay Or, In the Alternative, for an Enlargement of Time was served via the Court's CM/ECF system on Plaintiff's counsel, Steven Rosenbaum.

/s/ Phillip M. Seligman _____
Phillip M. Seligman