IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DOUG OMMEN, in his capacity as Liquidator of CoOportunity Health, Inc., and DAN WATKINS, in his capacity as Special Deputy Liquidator of CoOportunity Health, Inc.,	)	
Plaintiffs,	)	
v.	)	Case No.: 1:17-cv-957C Judge Charles F. Lettow
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

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

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v.	)	Judge Charles F. Lettow
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

UNITED STATES' MOTION TO STAY PROCEEDINGS

The United States of America ("United States") respectfully moves this Court to stay this action pending the outcome of the *Land of Lincoln Mutual Health Insurance Company v. United States*, No. 17-1224, and *Moda Health Plan, Inc. v. United States*, No. 17-1994, cases now before the Federal Circuit. On May 30, 2017, the Federal Circuit issued an Order that *Land of Lincoln* and *Moda* "are considered companion cases and will be assigned to the same merits panel." *See Land of Lincoln*, Dkt. 140 (May 30, 2017), attached as Exhibit A. This Court previously entered a similar stay in *Blue Cross of Idaho Health Service, Inc. v. United States*, No. 16-1384C, Dkt. 19 (Mar. 8, 2017). Plaintiffs have advised us that they are opposed to this motion.

The United States seeks a stay of the proceedings in this case so that the Federal Circuit has the opportunity to issue its decision on the same legal issues raised in the Complaint. A temporary, carefully-monitored stay pending disposition of the appeals already before the Federal Circuit—which will likely result in binding precedent that will dispose of the dominant legal issue and largest dollar amount at issue in this case—will conserve judicial resources and streamline

consideration of any issues that might remain to be decided here. In the alternative, the United States requests a 60-day extension of time to respond to the Complaint, to November 14, 2017.

Plaintiffs Doug Ommen and Dan Watkins ("the Liquidators") oppose both this requested stay and the alternative request for an extension of time to respond to the Complaint.

I. BACKGROUND

As Iowa's Commissioner of Insurance, Doug Ommen serves as liquidator of the estate of defunct health insurance issuer CoOportunity Health, Inc. ("CoOportunity"), and Dan Watkins serves as Special Deputy Liquidator of CoOportunity. As part of the Patient Protection and Affordable Care Act ("ACA" or "Affordable Care Act"), CoOportunity offered health plans beginning in 2014 in the Iowa and Nebraska ACA marketplaces, operating those plans for just over a year before it folded in early 2015. CoOportunity has been in Iowa liquidation proceedings for over two years. During its short existence, the company participated in a number of programs created by the Affordable Care Act, including participation in three premium stabilization programs, informally known as the "3Rs," that consist of reinsurance, risk adjustment, and risk corridors. *See* 42 U.S.C. §§ 18061-18063. On account of its insolvency, CoOportunity defaulted on two loans—a start-up loan and a solvency loan—it had received under the Consumer Operated and Oriented Plan ("CO-OP") program created by section 1322 of the ACA.[1] Throughout this time, the United States Department of Health and Human Services ("HHS") determined that the CoOportunity estate was entitled to receive payments under some ACA programs but owed HHS payment under other programs, including but not limited to the CO-OP start-up loan. Consistent with its regular practice, HHS offset—or netted—amounts payable to the estate as authorized by, *inter alia*, 45 C.F.R. § 156.1215(b) (hereinafter, the "Netting Regulation"); *see also* 78 Fed. Reg.

[1] The CO-OP solvency loan is not at issue in this matter.

at 72,370-71 (to "streamline [its] payment and collection process," HHS operates a monthly payment and collection cycle for ACA-related financial transfers).

A. *This Case*

On July 17, 2017, the Liquidators filed this action seeking approximately $157 million in money damages under the risk corridors program created by section 1342 of the ACA, 42 U.S.C. § 18062, and 45 C.F.R. § 153.510(b). *See* Dkt. No. 1; Compl. ¶¶ 111-140. The Liquidators also challenge HHS's use of setoff (or netting) to collect over $30 million in amounts due to HHS under other ACA programs. *Id.* ¶ 192. The United States' response to the Complaint is currently due on Friday, September 15, 2017.

Regarding its claims to additional risk corridors payments, the Liquidators' raise identical statutory, contractual, and takings theories as those currently before the Federal Circuit in *Land of Lincoln* and *Moda* as to why they are entitled to risk corridors payments. *See* Compl. Counts I, II, III, IV (in part) & V. While the Liquidators independently challenge HHS's authority to effectuate setoffs (Counts III), their setoff-related claims are inextricably bound to their risk corridors claim in that one of the Liquidators' theories is that HHS was not permitted to use setoff because, *inter alia*, the $157 million risk corridors payment allegedly owed to the estate far exceeds the debts owed by CoOportunity that HHS collected via netting (i.e., the $14.7 million CO-OP start-up loan repayments and approximately $23 million in other 3R's-related charges). *See id.* at Counts III, IV, & ¶ 190 ("the government owed CoOportunity more than any debt of CoOportunity subject to arguable setoff rights").

In other words, given that CoOportunity's $157 million risk corridors claim far exceeds the amount at issue in its generalized offset challenges, if the Federal Circuit affirms the *Moda*

decision, this Court will have no need to decide the bulk of this case (*i.e.*, Counts I, II, III, IV (in part), & V), as the balance of debts will have been in CoOportunity's favor.

Finally, the Liquidators contend that, even if HHS's use of setoff were as a general matter permissible, HHS's setoff of the CO-OP start-up loan and the risk adjustment debts here should nonetheless be unwound. Regarding the start-up loan, the Liquidators assert that HHS agreed, via contract, not to exercise setoff to collect that loan until all other creditors were paid. Compl. Count IV (in part); ¶ 199. As to HHS's use of setoff to collect the risk adjustment charges, the Liquidators make at least two arguments. First, because the risk adjustment charges were allegedly derived from an arbitrary and capricious methodology, at least some portion of these charges should be refunded. *Id.* at Count VI. Second, HHS's administrative hold and use of setoff to collect these charges allegedly breached the QHP Agreement, which the Liquidators read to require HHS to make full and timely 3Rs payments to CoOportunity. *Id.* at Count IV (in part); ¶ 210.[2]

The Liquidators first raised these claims in the United States District Court for the Southern District of Iowa, but their Complaint was dismissed for lack of jurisdiction.[3]

[2] The Liquidators' alternative theories for why HHS's use of setoff breached the QHP Agreement also are impacted by the Federal Circuit's forthcoming ruling. Like the Liquidators here, the *Land of Lincoln* liquidator argued that HHS's failure to make full and timely risk corridors payments violated the QHP Agreement. In rejecting the breach of the QHP Agreement-theory, this Court held that "[t]he plain language of the agreements does not indicate any contractual commitment on behalf of HHS to make risk corridors payments" and concluded that plaintiff had failed to establish an express contract respecting the risk corridors program. 129 Fed. Cl. 81, 108-09. The Federal Circuit's forthcoming decision is likely to resolve, and at a minimum clarify, whether the scope of QHP Agreement is, as the Liquidators here suggest, so broad as to include a contractual duty to make full, annual, and "timely" 3Rs payments.

[3] *Gerhart v. United States Dep't of Health & Human Servs.*, No. 4:16-CV-00151-RGECFB, 2017 WL 1019816 (S.D. Iowa Mar. 16, 2017).

B. *Other Risk Corridors-Related Litigation*

This is one of 29 cases filed in the last 18 months in this Court in which health insurance companies claim that they are entitled to additional payments under the risk corridors program created by section 1342 of the ACA. *See Health Republic Ins. Co. v. United States*, No. 16-259C (Sweeney, J.); *First Priority Life Ins. Co. v. United States*, No. 16-587C (Wolski, J.); *Moda Health Plan, Inc. v. United States*, No. 16-649C (Wheeler, 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 Cmty. Health Options v. United States*, No. 16-967C (Bruggink, J.); *New Mexico Health Connections v. United States*, No. 16-1199C (Smith, J.); *BCBSM, Inc. v. United States*, No. 16-1253C (Coster Williams, J.); *Blue Cross of Idaho Health Serv., Inc. v. United States*, No. 16-1384C (Lettow, J.); *Minuteman Health Inc. v. United States*, No. 16-1418C (Griggsby, J.); *Montana Health CO-OP v. United States*, No. 16-1427C (Wolski, J.); *Alliant Health Plans, Inc. v. United States*, No. 16-1491C (Braden, J.); *Blue Cross and Blue Shield of South Carolina v. United States*, No. 16-1501C (Griggsby, J.); *Neighborhood Health Plan Inc. v. United States*, No. 16-1659C (Smith, J.); *Health Net, Inc. v. United States*, No. 16-1722C (Wolski, J.); *HPHC Ins. Co. v. United States*, No. 17-87C (Griggsby, J.); *Medica Health Plans v. United States*, No. 17-94C (Horn, J.); *Blue Cross and Blue Shield of Kansas City v. United States*, No. 17-95C (Braden, J.); *Molina Healthcare v. United States*, No. 17-97C (Wheeler, J.); *Blue Cross and Blue Shield of Alabama v. United States*, No. 17-347C (Campbell-Smith, J.); *BlueCross BlueShield of Tennessee, Inc. v. United States*, No. 17-348C (Horn, J.); *Sanford Health Plan v. United States*, No. 17-357C (Bruggink, J.); *Farmer v. United States*, No. 17-363C (Campbell-Smith, J.); *Health Alliance Med. Plans, Inc. v. United States*, No. 17-653C (Campbell-Smith, J.); *EmblemHealth, Inc. v. United States*, No. 17-703C (Wheeler, J.); *Common Ground*

Healthcare Coop. v. United States, No. 17-877 (Sweeney, J.); *Atkins v. United States*, No. 17-906C (Kaplan, J.); *Wisconsin Physicians Service v. United States*, No. 17-1070C (Braden, J.). These cases implicate a total of $8.3 billion in the 2014 and 2015 benefit years, and *Common Ground* is a class action asserting claims for the 2016 benefit year, which have yet to be calculated.

While the Liquidators were pursuing their claims in district court, this Court entered the first decision in these risk corridors cases in *Land of Lincoln*, in favor of the United States. Land of Lincoln appealed and the appeal is now fully briefed before the Federal Circuit. In *Moda*, the Court entered judgment in favor of the plaintiff and the United States appealed. The United States filed its opening brief on July 10, 2017. Moda's response brief is due August 21, 2017, and the government's reply brief is due by September 5, 2017. As noted above, on May 30, 2017, the Federal Circuit issued an Order that *Land of Lincoln* and *Moda* will be treated as companion cases and will be argued before and decided by the same panel.

Two other cases have since reached judgment. In *Blue Cross and Blue Shield of North Carolina*, the Court dismissed the complaint on the ground that the government's implementation of the program is reasonable and consistent with the ACA. 131 Fed. Cl. 457 (2017). On June 9, 2017, Blue Cross and Blue Shield of North Carolina filed a notice of appeal. Most recently, on July 31, 2017, the Court granted the United States' motion to dismiss the complaint in *Maine Community Health Options*; Maine docketed its appeal on August 2, 2017 (No. 17-2395 (Fed. Cir.)). On August 4, 2017, summary judgment in favor of the plaintiff was issued in *Molina*.

C. *Most Cases Have Been Either Temporarily Stayed Pending Appellate Review in the Federal Circuit or Are Fully Briefed Already*

In light of the pending Federal Circuit appeals in *Land of Lincoln* and *Moda*, the Court has entered stays in 17 cases: *Health Republic*, *New Mexico Health Connections*, *Minuteman Health*, *BCBSM*, *Alliant Health Plans*, *Blue Cross of Idaho Health Service*, *Blue Cross and Blue Shield of*

South Carolina, *Neighborhood Health Plan*, *Medica Health Plans*, *Blue Cross and Blue Shield of Alabama*, *BlueCross BlueShield of Tennessee*, *Sanford Health Plan*, *Farmer*, *Blue Cross and Blue Shield of Kansas City*, *HPHC*, *Health Alliance Medical Plans*, and *EmblemHealth*. Some of these stays were consensual; others were entered over the plaintiffs' objections. *See, e.g*. *Health Republic*, Docket No. 62 (attached as Exhibit B); *Farmer*, Docket No. 9 (attached as Exhibit C); *HPHC*, Docket No. 19 (attached as Exhibit D); and *Health Alliance*, Docket No. 14 (attached as Exhibit E). A motion to stay has been filed and is under review in *Health Net* and *Atkins*.

In addition, dispositive motions have been briefed and are pending a decision in two other cases: *First Priority* and *Montana*. The only other cases remaining are *Common Ground Health Cooperative and Wisconsin Physicians*, and the United States intends to seek a stay in those cases as well.

While the courts' reasoning in the previously-stayed cases is roundly instructive (*see, e.g.*, Ex. B, C, D, & E), given factual similarities to this case, the stay entered in *Farmer* is particularly germane.

Like the Liquidators here, the *Farmer* plaintiff is a state-appointed liquidator attempting to wind down a defunct ACA health plan issuer.[4] Farmer too opposed a stay, arguing that the stay would unfairly delay winding up the insolvency estate's affairs (No. 17-363C, Dkt. 7 at 4-6), that the stay was indefinite, and that the United States failed to show a "pressing need" (*id.* at 2-3). The *Farmer* court granted a stay, finding that the requested stay was not "indefinite":

> The end point of the stay can be specifically defined as the date on which the Federal Circuit issues its decisions in the *Land of Lincoln* and *Moda Health* cases,

[4] Farmer, in a separate district court action, also contests HHS's use of setoff in light of, *inter alia*, the risk corridors payment due to the estate, and similarly argues that HHS is not permitted to use setoff to collect the CO-OP start-up loan repayments. *Farmer v. United States*, No. 3:17-cv-00956 (D.S.C.). The United States' Motion to Dismiss Farmer's district court case was filed on July 19, 2017.

> which have been submitted for common review. The fact that the court cannot predict the exact date on which the Federal Circuit will issue its opinions does not mean the term of the stay is undefined.

No. 17-363C, Dkt. 9 at 3.

Because the United States did not request an indefinite stay, this "court, then, need not identify the 'pressing need' urged by plaintiffs, and may exercise its discretion to stay these proceedings so long as the stay is 'so framed in its inception that its force will be spent within reasonable limits.'" *Id.* (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 257 (1936)). The *Farmer* court continued:

> Given the advanced stage of the *Land of Lincoln* and *Moda Health* cases, the court finds that a stay pending the outcome of these matters will be of reasonable length, and therefore not "immoderate." *See Landis*, 299 U.S. at 257; *see also* [*Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1416 (Fed. Cir. 1997)]. Moreover, given the symmetry of issues involved, the court agrees with defendant that a stay will serve the valuable purpose of preserving the resources of both the parties and the court. These cases will proceed more efficiently and more productively with the forthcoming guidance from the Federal Circuit.

No. 17-363C, Dkt. 9 at 3.

This Court is not the only trial court to recognize the utility of a time-limited stay pending the Federal Circuit's disposition of the *Land of Lincoln* appeal. In *Preferred Medical Plan v. United States*, No. 17-cv-20091 (S.D. Fla.), a defunct health insurer asserts claims substantively similar to the Liquidators' Complaint here. Both cases challenge HHS's setoff practices for, *inter alia*, failing to account for risk corridors payments purportedly owed and both contend that HHS's risk adjustment methodology violates the APA. Also like the Liquidators, Preferred resisted the stay in light of its desire to finalize its wind down. Over Preferred's objection, the district court granted the government's motion to stay finding that

> [g]iven the similarity of issues in *Land of Lincoln* and this case, the Court finds moving forward risks unnecessary expense for the parties and unnecessary expenditure of judicial

> resources. In contrast, a limited stay will promote judicial economy without imposing undue hardship on [Preferred].

No. 17-20091 (S.D. Fla.); Dkt. 36 at 3. Rejecting Preferred's suggestion that the issues before the Federal Circuit are unrelated to its offset and risk adjustment-based claims, the court observed that "the ACA programs are interrelated . . . and make resolution of payment obligations owed between the parties in this case a complex question sharing similarities with *Land of Lincoln*." *Id*.

II. ARGUMENT

A. *A Stay Is Proper and Will Conserve Substantial Resources*

Because the dominant legal issues (and largest dollar amount) presented in this case mirror the issues raised in *Land of Lincoln* and *Moda*, which the Federal Circuit have made companion cases that will be heard and decided by the same panel, the further development of those cases on appeal will be instructive and likely dispositive of the dominant legal issues in this case. A stay therefore will conserve judicial resources and the resources of both parties by reducing the amount of briefing of issues already pending before the Federal Circuit.

"It is well established that every trial court has the power to stay its proceedings, which is 'incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *Freeman v. United States*, 83 Fed. Cl. 530, 532 (2008) (citing *Landis*, 299 U.S. at 254). "Moreover, when and how to stay proceedings is within the sound discretion of the trial court." 83 Fed. Cl. at 532 (citation and internal punctuation omitted). The Supreme Court has highlighted the conservation of judicial resources as an important reason for a trial court to stay proceedings in any matter pending before it, particularly where the appellate court may resolve issues before the trial court. *Landis*, 299 U.S. at 254-55; *UnionBanCal Corp. & Subsidiaries v. United States*, 93 Fed. Cl. 166, 167 (2010) ("The orderly course of justice and judicial economy is served when granting a stay simplifies the 'issues,

proof, and questions of law which could be expected to result from a stay.'") (quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962)). Indeed, the Supreme Court also recognizes that in cases of great complexity and significance, like the risk corridors issues in this case, "the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted," especially where, as here, a decision by the Federal Circuit would "settle" and "simplify" the issues presented. *Landis*, 299 U.S. at 256.

The Liquidators cannot seriously dispute that the risk corridors issues before the Federal Circuit envelop Counts I, II, III, IV (in part), and V of the Complaint. However the Federal Circuit resolves *Moda* and *Land of Lincoln*, the court will be issuing binding precedent that will resolve issues presented by these Counts.[5] While the Liquidators proffer numerous theories challenging HHS's use of setoff, if the Federal Circuit affirms *Moda*, then this Court will have no need to address any of those theories, as the balance due to CoOportunity will have exceeded the balance due to HHS. And if the Federal Circuit affirms *Land of Lincoln*, then the stay was still invaluable because the effect of that opinion will be to significantly reduce the number of issues for this Court to decide (and the parties to brief).

A stay in this case will allow the parties to address the Federal Circuit's ruling—whatever it is—with targeted briefing in a more efficient manner. In contrast, if this Court were to deny the government's request for a stay and the parties were to brief the United States' forthcoming Motion to Dismiss pursuant to Rule 12(b)(1) & (6), the case would nevertheless need to be briefed anew

[5] The Federal Circuit's decision to consider *Land of Lincoln* and *Moda* as companion cases, the former decided in favor of the United States and the latter in favor of the plaintiff insurer, ensures that the appellate court will consider differing perspectives.

following the Federal Circuit's disposition of *Land of Lincoln* and *Moda*.[6] Moreover, if this Court requires the United States to respond to the Liquidators' Complaint as scheduled (by September 15, 2017), briefing in this case will occur after the close of briefing in *Moda* (September 5, 2017) but before consideration by a panel. This scenario would have this Court considering the government's motion to dismiss and the Liquidators' opposition thereto *at the same time* the Federal Circuit is considering the very same legal issues.

Briefing here would be an indisputable waste of resources, given the simultaneity of the Federal Circuit's review of the very issues the parties would brief. All of that needless waste of the Court's and parties' resources is avoided by a stay. *See Sanford Health Plan*, Docket No. 8, at 2 (recognizing that "denying a stay would serve to merely consume additional resources for all parties while shedding little additional light").

B. *The United States Does Not Seek an Indefinite Stay*

As recognized by several judges of this Court, the United States is not seeking an indefinite stay. *Farmer*, Docket No. 9, at 3 ("[T]he Court disagrees with plaintiffs' characterization of defendant's stay request as indefinite in nature. The end point of the stay can be specifically defined as the date on which the Federal Circuit issues its decisions in the *Land of Lincoln* and *Moda Health* cases, which have been submitted for common review. The fact that the court cannot predict the exact date on which the Federal Circuit will issue its opinions does not mean the term of the stay is undefined."); *Health Republic*, Docket No. 62, at 2 ("A stay of proceedings would

[6] For example, in *Montana*, the parties have already had three separate rounds of briefing to address subsequently-issued opinions by members of the Court, and in *First Priority*, the parties have had two additional rounds of briefing to address those opinions. And with the recent ruling in *Maine* and *Molina*, the Court has requested another round of supplemental briefing in *Montana* and *First Priority*.

not be indefinite, because given the status of briefing in the appeals before the Federal Circuit, one or more decisions in those appeals may issue by early next year.").

The United States is not seeking an indefinite stay. Rather, the United States seeks a stay only until the Federal Circuit decides *Land of Lincoln* and *Moda*. This is a measured stay, not an indefinite one. As Judge Campbell-Smith found, "[t]he fact that the court cannot predict the exact date on which the Federal Circuit will issue its opinions does not mean the term of the stay is undefined." *Farmer*, Docket No. 9, at 3. The alternative of requiring the parties to brief this case while the Federal Circuit considers the same issues needlessly expends "time and effort for [this Court], for counsel, and for litigants." *Landis*, 299 U.S. at 254. The stay requested here is moderate, and as addressed below, causes no unredressable harm to CoOportunity's liquidation estate.

C. *A Stay Will Not Prevent the Liquidation Estate from Having Its Claim Heard or Delay Potential Recovery*

The Liquidators cannot provide any meaningful urgency for moving forward in this case now while the appeals in *Land of Lincoln* and *Moda* are nearing resolution. Unlike the plaintiff in *Land of Lincoln*, who was operating under an order of rehabilitation and claimed to be on the brink of liquidation when it petitioned this Court for expedited review in July 2016 (*see Land of Lincoln*, No. 16-00744, Dkts. 7, 12), CoOportunity ceased activity long ago and has been in liquidation proceedings since February 2015—well over two years. As CoOportunity is not a going concern, "[t]here simply cannot be any significant hardship in forcing a bankrupt corporation to wait for its money – if it has any coming." *DRG Funding Corp. v. Secretary of Hous. & Urban Dev.*, 76 F.3d 1212, 1216 (D.C. Cir. 1996).

While the Liquidators undoubtedly seek to fulfill the role of marshalling assets and paying creditors (here, the Iowa guaranty associations), a stay will not alter any potential recovery for the

liquidation estate should the Liquidators ultimately prevail on any of their claims. *See also Farmer*, No. 17-363C (granting temporary stay notwithstanding plaintiff's objection that the stay would delay closing out the insolvent's companies affairs); *Preferred*, No. 17-20091 (S.D. Fla.), Dkt. 36 (same).[7] On the scale of competing interests, this Court is well within its discretion to decide that the Liquidators' desire to close CoOportunity's books sooner rather than later does not counterweigh judicial economy. *See, e.g., Novelty, Inc. v. Tandy*, No. 1:04-CV-1502-DFH-TAB, 2006 WL 2375485, at *13 (S.D. Ind. Aug. 15, 2006) ("claims of hardship by a plaintiff seeking review of agency action are not, taken alone, compelling arguments in favor of immediate review"); *Ricks v. Allied Interstate, LLC*, No. 3:16-CV- 00205-HES-PDB, 2016 WL 4505173, at *1 (M.D. Fla. July 11, 2016) (recognizing that a litigant in one case may stand aside while "a litigant in another settles the rule of law that will define the rights of both" and emphasizing that other district courts have granted stays in light of a pending appeal) (internal citation omitted).

To be sure, the Liquidators' challenges to HHS's use of setoff to collect the CO-OP start-up loan and the agency's risk adjustment methodology are somewhat analytically distinct from the issues before the Federal Circuit in *Land of Lincoln* and *Moda*.[8] But that a small subset of issues in this case will not be definitely resolved by the forthcoming Federal Circuit rulings does not render the temporary stay requested any less judicious.

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[7] The absence of urgency was implicitly recognized by the district court when it denied the Liquidators' predecessor-in-interest's request for a preliminary injunction to stop HHS's offsets. *See Gerhart v. United States*, No. 16-cv-00151 (S.D. Iowa), Dkt. 55, August 19, 2016 Order Denying Plaintiff's Motion for Preliminary Injunction.

[8] As explained *supra*, because the Federal Circuit in *Land of Lincoln* will consider whether the QHP agreement encompasses payments owed under the 3Rs program of risk corridors, even the viability of the Liquidators' theory that HHS violated that same agreement when it failed to pay some 3Rs debts yet collected the risk adjustment debt through setoff is bound up in the issues on appeal. In other words, it would be incorrect for the Liquidators to attempt to divorce their risk adjustment-related challenges from the issues on appeal in *Land of Lincoln*.

First, piecemeal adjudication gets the estate no closer to a final money judgment, but would require a substantial duplication of the Court's (and the parties') efforts. Second, any cabining of the Liquidators' theories simply ignores the inter-relationship of the ACA's three premium stabilization programs (risk adjustment, risk corridors, and reinsurance). *See, e.g.*, https://www.ahip.org/affordable-care-act-premium-stabilization-programs-how-reinsurance-risk-corridors-and-risk-adjustment-protect-consumers/ (noting that the ACA's 3Rs programs "create[] *three interconnected* risk management programs") (emphasis added). Such a myopic view is also at odds with the agency's Netting Regulation (45 C.F.R. § 156.1215(b))—which plainly contemplates that, rather than being viewed in isolation, the 3Rs' payments and charges at issue in this case are netted "across" the ACA programs at issue. *See HHS Notice of Benefit and Payment Parameters for 2015*, 79 Fed. Reg. 13744, 13817 (Mar. 11, 2014) (explaining also that "payments and collections under *all* of these programs occur under an *integrated* monthly payment and collection cycle") (emphasis added). Finally, any attempt by the Liquidators to cleave from their risk corridors claim their claims about HHS's treatment of the CO-OP start-up loan and their challenge to the risk adjustment methodology simply ignores the practical reality that this case comes down to who owes who what and how much. A final reconciliation cannot occur—either legally or practically—until the rule of law on the risk corridors program is affirmed by the Federal Circuit.

Staying this case until the Federal Circuit decides *Land of Lincoln* and *Moda* will not alter the liquidation estate's ability to obtain a timely decision or potential recovery—it will only drastically reduce the resources expended by the Court and the parties in reaching a resolution. The stay should be granted.

IV. CONCLUSION

Accordingly, the United States seeks a time-limited, carefully-monitored stay pending further developments in the companion appeals of *Land of Lincoln* and *Moda*. The United States proposes that within 30 days of the disposition of those appeals, the parties submit a status report with the Court outlining next steps, or the parties can submit status reports every 45 days (or at another appropriate interval acceptable to the Court) after entry of an order granting the stay in order to closely monitor its continued utility.

In the alternative, the United States requests a 60-day enlargement of time to respond to the Complaint to November 14, 2017.

Dated: August 10, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 10, 2017, I electronically filed the foregoing UNITED STATES' MOTION TO STAY PROCEEDINGS with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants.

/s/ *Frances M. McLaughlin*
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