

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.)
THE UNITED STATES OF AMERICA,)
Defendant.)

Case No.: 1:17-cv-957C
Judge Charles F. Lettow

**UNOPPOSED MOTION TO CONTINUE HEARING ON THE GOVERNMENT'S
MOTION TO DISMISS UNTIL PETITION FOR CERTIORARI IS RESOLVED**

Plaintiffs respectfully move the Court to continue the hearing on the Government's Motion to Dismiss (Doc. 23), presently scheduled for April 25, 2019, until after the Supreme Court resolves the pending petition for a writ of certiorari in *Moda Health Plan, Inc. v. United States*, No. 18-1028. Counsel for the Government has indicated that the United States does not oppose Plaintiffs' motion.

In support of his motion, Plaintiffs offer the following points:

1. The Government filed its Motion to Dismiss on October 26, 2018.
2. Plaintiffs filed their Response (Doc. 27) to the Motion to Dismiss on December 14, 2018.
3. The Government filed its Reply (Doc. 32) in support of its Motion to Dismiss on March 29, 2019.

4. In their briefs, the parties discuss extensively the Federal Circuit's decision in *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311 (Fed. Cir. 2018), which was decided by a three-judge panel of the circuit on June 14, 2018.

5. At the time the Government filed its Motion to Dismiss, the *Moda* panel decision was subject to a petition for rehearing and rehearing *en banc* that was subsequently denied by the Federal Circuit on November 6, 2018, over the dissent of several members of the court.

6. On February 4, 2019, after Plaintiffs filed their Response, the plaintiffs in *Moda* filed a petition for writ of certiorari with the United States Supreme Court, requesting the Court to grant the petition and resolve the following question:

Whether Congress can evade its unambiguous statutory promise to pay health insurers for losses already incurred simply by enacting appropriations riders restricting the sources of funds available to satisfy the government's obligation.

7. After receiving an extension of time, the Government's response to the petition is due to be filed with the Supreme Court on May 8, 2019.

8. Given the present deadline for the Government's response, it is likely the petition will be distributed to the Justices in late May and the Supreme Court will likely act on the petition by the end of June.

9. Plaintiffs and the Government disagree on whether *Moda* was correctly decided, and they further disagree on what impact *Moda* has on Plaintiffs' claims in this case. Indeed, Plaintiffs contend that the present panel opinion in *Moda* supports certain of their claims, including those for illegal set-off (Counts III and IV), and does not require dismissal of other claims even if certiorari is denied. The Government, on the other hand, disputes that *Moda*

supports Plaintiffs' illegal set-off claims and argue it mandates dismissal of Plaintiffs claims for recovery of risk corridors payments and breach of contract, among others.

10. Given the parties' differing positions on *Moda*, and the presently uncertain nature of the finality of *Moda* in light of the pending petition for writ of certiorari, Plaintiffs believe it would be more efficient to defer a hearing and ruling on the Motion to Dismiss until after it is clear whether the Supreme Court will hear *Moda* or not.

11. If the petition is denied, the parties and the Court will be able to consider the effect of the *Moda* decision as it stands, without concern the decision might be reversed or modified in some way by the Supreme Court. If, on the other hand, the petition is granted, the parties and Court will be better able to consider whether any portion of the Motion to Dismiss should be held in abeyance pending the Supreme Court's resolution and whether other aspects of Motion to Dismiss could be disposed of immediately and certain aspects of the case allowed to proceed, if appropriate, depending on this court's ruling on the Government's arguments.

12. Given the likelihood that the Supreme Court will act on the petition for writ of certiorari by the end of June, Plaintiffs respectfully suggest this court set a hearing date in July 2019, at which point the parties and this court can benefit from the knowledge of the Supreme Court's disposition of the petition.

13. Counsel for the United States has indicated to the undersigned that the United States does not oppose continuing the present April 25, 2019 hearing date until after the Supreme Court has acted on the petition for writ of certiorari.

14. Plaintiffs suggest that continuing the hearing date to a date in July 2019 will be more efficient and is not made for the purpose of delay.

15. Continuing the hearing to July 2019 is a relatively modest delay in light of the history of this case and the stakes at issue. Neither party will be prejudiced by such a delay.

Wherefore, Plaintiff respectfully moves this Court to continue the present April 25, 2019 hearing on the Government's Motion to Dismiss until a date in July 2019, by which point the Supreme Court will likely have acted on the petition for writ of certiorari in *Moda*.

Dated: April 10, 2019

Respectfully submitted,

/s/ DOUGLAS J. SCHMIDT

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 10, 2019, I electronically filed the foregoing UNOPPOSED MOTION TO CONTINUE HEARING ON DEFENDANT'S MOTION TO DISMISS UNTIL PETITION FOR CERTIORARI IS RESOLVED 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/ DOUGLAS J. SCHMIDT
Attorney for Plaintiffs