

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

EMBLEMHEALTH, INC., <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	
	:	No. 17-703C
v.	:	Judge Wheeler
	:	
THE UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

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**THE UNITED STATES' UNOPPOSED MOTION TO STAY PROCEEDINGS**

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The United States respectfully moves the 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. Counsel for EmblemHealth does not oppose this stay of the proceedings.

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. 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 many of the same legal issues raised in EmblemHealth’s Complaint. A temporary stay pending disposition of the appeals already before the Federal Circuit, which will likely result in binding precedent that will dispose of many of the issues in this case, will conserve judicial resources and streamline consideration of any issues that might remain to be decided here.

**I. Background**

On May 26, 2017, EmblemHealth filed this action seeking approximately \$70 million in money damages 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), and for Takings and breach of implied-in-fact contract. Docket No. 1. The United States' response to the Complaint is currently due on July 27, 2017.

This is one of 27 cases filed in the last 17 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 Cnty. Health Options v. United States*, No. 16-967C (Merow, 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 Cooperative v. United States*, No. 17-877 (Sweeney, J.); *Ommen v. United States*, No. 17-957C (Lettow, 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 risk corridors payments for the 2016 benefit year, which have yet to be calculated.

These cases involve several technically-detailed provisions of the ACA and raise significant jurisdictional issues as well as complex issues of appropriations law. The undersigned counsel represents the United States in each of these cases.

The Court entered the first decision in these 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*, this Court entered judgment in favor of the plaintiff. The United States appealed, and filed its opening brief on July 10, 2017. As noted above, the Federal Circuit has ordered that *Land of Lincoln* and *Moda* will be treated as companion cases and argued before and decided by the same panel.

A third case has 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), *appeal docketed* No. 2017-2154 (Fed. Cir.).

16 cases filed to date have been stayed. Since the Federal Circuit's May 30, 2017 order consolidating the *Land of Lincoln* and *Moda* appeals, judges of this Court have stayed proceedings pending disposition of those appeals in five cases: *Health Republic*, *Blue Cross and Blue Shield of Kansas City*, *Farmer*, *Health Alliance*, and *HPHC*. In addition, the Court has entered stays in

11 other cases: *New Mexico Health Connections, Minuteman Health, BCBSM, Alliant Health Plans, Blue Cross of Idaho Health Service, Blue Cross and Blue Shield of South Carolina*,<sup>1</sup> *Neighborhood Health Plan, Medica Health Plans, Blue Cross and Blue Shield of Alabama, BlueCross BlueShield of Tennessee, and Sanford Health Plan*. Dispositive motions have been fully briefed and are pending a decision in four other cases: *First Priority, Montana, Maine Community Health Options, and Molina*.

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

“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 v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). “Moreover, when and how to stay proceedings is within the sound discretion of the trial court.” *Id.* (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)).

Because the legal issues presented in this case mirror the issues raised in the earlier-filed cases, the further development of those cases (whether in this Court or on appeal) will be instructive to both parties. A stay therefore will conserve judicial resources and the resources of

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<sup>1</sup> In *Blue Cross and Blue Shield of South Carolina*, the plaintiff subsequently voluntarily dismissed its complaint to opt into the *Health Republic* class action, which has been stayed.

both parties by potentially reducing the amount of briefing of issues already pending before multiple judges of this Court.

### **III. Conclusion**

Accordingly, the United States, without opposition from EmblemHealth, seeks a time-limited 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.

Dated: July 25, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of July, 2017, a copy of the foregoing, *The United States' Unopposed Motion to Stay Proceedings*, 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.

/s/ Phillip M. Seligman  
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