

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

RAYMOND G. FARMER, in his capacity	:	
As Liquidator of Consumers' Choice	:	No. 17-363C
Health Insurance Company, et al.,	:	
	:	Judge Campbell-Smith
Plaintiffs,	:	
	:	
v.	:	
	:	
THE UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

---

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

---

This Court has already decided three risk corridors cases on the merits and two of those cases are now on appeal before the United States Court of Appeals for the Federal Circuit. On May 30, 2017, the Federal Circuit issued an Order that the pending appeals in *Land of Lincoln Mutual Health Insurance Company v. United States*, No. 17-1224, and *Moda Health Plan, Inc. v. United States*, No. 17-1994 “are considered companion cases and will be assigned to the same merits panel.” *See Land of Lincoln*, Docket No. 140 (May 30, 2017), attached as Exhibit A. The Federal Circuit noted that the plaintiffs in those appeals (like each plaintiff in the 22 risk corridors cases filed before the Liquidators filed this case) “separately sued in the United States Court of Federal Claims seeking damages between what they alleged was owed and what HHS has paid.” *Id.* at 2-3. In granting the insurers’ motions to assign the fully-briefed *Land of Lincoln* appeal to the same panel that will hear the yet-to-be-briefed *Moda* appeal, the Federal Circuit has effectively stayed consideration of *Land of Lincoln* in the very manner that we request that this Court stay this case.

In short, the United States only seeks a stay of the proceedings in this case so that the Federal Circuit can have an opportunity to issue its decision on the same legal issues raised in the Complaint by Plaintiffs Raymond G. Farmer, in his capacity as Liquidator of Consumers' Choice Health Insurance Company ("Consumers' Choice"), and Michael J. FitzGibbons, in his capacity as Special Deputy Liquidator of Consumers' Choice (collectively, the "Liquidators"). A temporary, carefully-monitored stay pending disposition of the appeals already before the Federal Circuit will conserve judicial resources and streamline consideration of any issues that might remain to be decided in this case.

In the alternative, should this Court deny a brief stay, the United States requests that the Court enlarge the deadline for the United States to respond to the Liquidators' Complaint by an additional 30 days, until July 17, 2017.

**I. The Liquidators Seek to Begin Briefing Claims That the Federal Circuit Will Address Soon**

The Liquidators seek relief under the same legal theories raised in the 22 other risk corridors cases filed before this case, with the first filed more than a year ago on February 24, 2016. Motion at 2. In each of these cases, the plaintiffs seek relief on risk corridors claims based upon section 1342 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18062. *Id.* The first decision in these cases was issued on November 10, 2016, more than four months before the Liquidators filed their Complaint.

If the Court were to deny our request for a stay and the parties were to brief the issues in this case, the case would nevertheless need to be briefed anew following the Federal Circuit's

disposition of *Land of Lincoln* and *Moda*.<sup>1</sup> In contrast, a stay in this case will allow the parties to address the Federal Circuit's ruling with targeted briefing in a more efficient manner.

The Federal Circuit's decision to consider *Land of Lincoln* and *Moda* companion cases also mollifies the Liquidators' concern with the Federal Circuit "consider[ing] the different viewpoints of the lower courts." Opposition at 3. This Court issued "differing opinions" in those cases, so the Federal Circuit's common consideration of the cases will ensure that differing perspectives are considered and the law harmonized. The Liquidators offer no justification for why it is prudent or necessary for this Court to address every risk corridors case prior to the Federal Circuit having an opportunity to address the two cases already on appeal.

## II. The United States Does Not Seek An Indefinite Stay

The Liquidators' contention that the United States seeks an "indefinite" stay places semantics over practicality. Opposition at 1, 2, 3. 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. The alternative of requiring the parties to brief this case while the Federal Circuit considers the same issues, needlessly expends "economy of time and effort for [this Court], for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). Indeed, as the Supreme Court recognized "in cases of extraordinary public moment, 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." *Id.* at 256. This is one of those moments—the stay requested is moderate, and as addressed below, causes no harm to the Liquidators.

---

<sup>1</sup> Notably, in *Montana Health CO-OP v. United States*, No. 16-1427C (Fed. Cl.), the parties have already had three separate rounds of briefing to address subsequently issued opinions by members of this Court, while in *First Priority Life Insurance Company, Inc. v. United States*, No. 16-587C (Fed. Cl.), the parties have had two additional rounds of briefing to address those opinions.

The Liquidators' reliance on *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413 (Fed. Cir. 1997), is misplaced. There, the Federal Circuit refused to stay the case "to await the conclusion of yet-to-be-filed quiet title suits." *Id.* at 1417. That is a drastically different circumstance than seeking a brief stay to await a decision by the Federal Circuit in already-pending and substantially briefed appeals which will address an identical legal issue.

Nor are the Court's denials of the United States' prior requests for a stay in a few previously-filed cases dispositive. The legal landscape has changed since the United States sought stays in those early cases—the motion to stay in *Maine* was filed on October 13, 2016, prior to the *Land of Lincoln* decision; and the motions to stay in *Moda* and *Montana* were filed contemporaneously with the decision in *Land of Lincoln*.<sup>2</sup> Moreover, since those early requests, the Court has entered stays in nine more-recent 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>3</sup>, *Neighborhood Health Plan*, *Medica Health Plans*, and *Sanford Health Plan*. In addition, dispositive motions have been fully briefed and are pending a decision in four other cases: *First Priority*, *Health Republic*, *Montana Health*, and *Maine Community Health Options*.

### **III. A Brief Stay Will Not Prevent the Liquidators from Having Their Claims Heard or Delay Potential Recovery**

The Liquidators fail to provide any legitimate justification for moving forward in this case now while the appeals in *Land of Lincoln* and *Moda* are pending. Although the Liquidators argue that they "are entitled to the counsel of their choice and to develop their arguments" and

---

<sup>2</sup> The Liquidators also cite to *HPHC* as a supposed example of the United States' request for a stay being denied. Opposition at 5. But the United States never moved to stay that case—the Court raised the issue of a stay *sua sponte*. See *HPHC*, Docket No. 6 (Feb. 3, 2017).

<sup>3</sup> On May 30, 2017, BCBSSC voluntarily dismissed its complaint in favor of opting-in to the *Health Republic* class of plaintiffs. Docket No. 11.

that they are “entitled to be heard,” Opposition at 4, those interests are fully preserved through a stay.

Nor will a brief stay delay any potential recovery for the Liquidators should they prevail. As noted above, the Federal Circuit assigned the *Land of Lincoln* and *Moda* appeals to the same panel, and that panel will address the same legal issue before this Court. Thus, even if the Liquidators ultimately prevail on their claim in this Court, they will not recover until the appeals in those risk corridors cases, as well as their own case, have concluded.

Briefly staying this case until the Federal Circuit decides *Land of Lincoln* and *Moda* will not alter the Liquidators’ 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 that resolution.

#### **IV. Any Delay in the Liquidators Closing Their Books Does Not Constitute Hardship**

Finally, even if a stay temporarily delayed the Liquidators’ financial recovery (and it will not), because Consumers’ Choice 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). Consumers’ Choice was placed in supervision and agreed to begin winding down its operations in October 2015. *See* Complaint ¶¶ 74-75. The Liquidators seek only to wind down Consumers’ Choice’s affairs as expeditiously as possible. Opposition at 5. But on the scale of competing interests, this Court is well within its discretion to decide that the Liquidators’ desire to close their 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). And, as explained above, disposition of the Liquidators’ claims for money will await the outcome through appeal in any event.

**V. Conclusion**

For these reasons, the United States respectfully requests that the Court stay this case pending further development in the appeals of *Land of Lincoln* and *Moda*. In the alternative, the United States requests an extension, up to and including July 17, 2017, to respond to the Complaint.

Dated: June 2, 2017

Respectfully submitted,

CHAD A. READLER  
Acting Assistant Attorney General  
Civil Division

RUTH A. HARVEY  
Director  
Commercial Litigation Branch

KIRK T. MANHARDT  
Deputy Director

/s/ Terrance A. Mebane  
TERRANCE A. MEBANE  
CHARLES E. CANTER  
FRANCES M. MC LAUGHLIN  
MARC S. SACKS  
L. MISHA PREHEIM  
PHILLIP M. SELIGMAN  
United States Department of Justice  
Civil Division, Commercial Litigation Branch  
Telephone: (202) 307-0493  
Facsimile: (202) 307-0494  
Terrance.A.Mebane@usdoj.gov

*Attorneys for the United States of America*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 2nd day of June 2017, a copy of the foregoing, *The United States' Reply in Support of Its Motion to Stay Proceedings, Or in the Alternative, For an Enlargement of Time*, 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/ Terrance A. Mebane  
TERRANCE A. MEBANE  
United States Department of Justice