

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

MONTANA HEALTH CO-OP, )  
Plaintiff, ) No. 16-1427C  
v. )  
THE UNITED STATES OF AMERICA )  
Defendants. )  
Judge Victor J. Wolski

## UNITED STATES' MOTION TO STAY

The United States of America (“United States”) respectfully moves the Court to stay this action pending disposition of several earlier-filed cases raising identical subject matter, including (a) *First Priority Life Ins. Co. v. United States*, No. 16-587C (Wolski, J.), for which the United States’ motion to dismiss is fully briefed and ripe for decision; and (b) *Land of Lincoln Mutual Health Ins. Co. v. United States*, No. 16-744C, which was decided on November 10, 2016, and for which the plaintiff filed a notice of appeal on November 15, 2016. Plaintiff Montana Health CO-OP (“Montana”) opposes the requested stay.

## I. Background

On October 28, 2016, Montana filed this action seeking approximately \$42 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 breach of an implied-in-fact contract. Compl. at 1, 29 & ¶¶ 17, 89, 98 (Dkt. 1). Pursuant to this Court’s Rules, the United States’ response to the Complaint is currently due by December 26, 2016.

Twelve other cases in this Court are currently seeking relief under identical and related legal theories to those asserted by Montana, including two cases filed this week.

*See Health Republic Ins. Co. v. United States*, No. 16-259C (Sweeney, J.); *First Priority*, No. 16-587C (Wolski, J.); *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C (Griggsby, J.); *Moda Health Plan, Inc. v. United States*, No. 16-649C (Wheeler, J.); *Land of Lincoln*, 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 (Bruggink, J.); *BCBSM, Inc. v. United States*, No. 16-1253C (Wheeler, J.); *Blue Cross of Idaho Health Service, Inc. v. United States*, No. 16-1384C (Lettow, J.); *Minuteman Health Inc. v. United States*, No. 16-1418C (Griggsby, 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.). As noted above, the first decision was entered in these cases in *Land of Lincoln* on November 10, 2016, and, 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, e.g.*, Compl. ¶¶ 4, 9, 11, 20, 31-34, 37-38, 44-49, 53-58. 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.

In addition to *Land of Lincoln*, and *First Priority*, pending before this Court, dispositive motions have been filed and are pending in three additional earlier-filed cases referenced above. In *Health Republic*, the Court has scheduled oral argument on the United States' fully-briefed motion to dismiss for December 8, 2016, and a motion to certify a

class has been filed. Dispositive motions also have been filed in *Moda* and *Blue Cross and Blue Shield of North Carolina*, where briefing will be completed by November 22, 2016. Several *amicus* filings also have been submitted.

The activity in these five first-filed cases has consumed substantial resources of the United States since their filing earlier this year. The importance and complexity of the issues and the amount of public funds at stake would necessitate a similar dedication of resources to this case.

## **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 earlier-filed cases. The outcome of those motions, while not binding on this Court, will potentially clarify and refine the issues in this case. Indeed, because the legal issues presented by this case are identical to the issues raised in the first-filed cases, the further development of those cases (whether in this Court or on appeal) is likely to inform or even determine Montana's ultimate ability to recover. A stay therefore will conserve judicial resources and the resources of both parties by avoiding briefing of issues already pending before Your Honor and four other judges of this Court.

Furthermore, 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 Montana. With consent of the plaintiffs, stays have already been entered in *New Mexico Health Connections* and *Minuteman Health*.

“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). Indeed, the Supreme Court has recognized that in cases of great complexity and significance, like this one, “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, decisions issued by other judges would “settle” and “simplify” the issues presented. *Landis*, 299 U.S. at 256; *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)).

The United States seeks a time-limited, carefully-monitored stay pending disposition of identical cases that are – or imminently will be – fully briefed and ripe for disposition in this Court. In contrast, the United States does not seek an indefinite stay and the requested stay will not be “at the mercy” of the United States. *See Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1418 (Fed. Cir. 1997). The United States proposes that, if a stay is granted, the parties submit status reports every 45 days (or at another appropriate interval acceptable to the Court) in order to closely monitor the continued utility of the stay. These status reports are not a place holder but a meaningful

opportunity to gauge the efficient use of this Court’s resources to resolve a claim that has already been decided in one of the earlier-filed cases and should be addressed soon in the remaining, earlier-filed cases.

Montana’s filing earlier this week of motions for partial summary judgment (Dkt. 5) and for a pretrial conference to seek expedited proceedings (Dkt. 7) does not diminish the appropriateness of a stay of this case and should not impact the Court’s consideration of this motion. In fact, if Montana truly seeks to “eliminate unnecessary proceedings and protracted litigation,” Dkt. 7 at ¶ 11, then a stay best accomplishes those worthy goals.

Like New Mexico Health Connections and Minuteman Health, Montana is a Consumer Operated and Oriented Plan (“CO-OP”) issuer established as a member-oriented non-profit under section 1322 of the ACA. Compl. ¶¶ 4, 15, 23-24. The United States anticipates that Montana will support its opposition to the requested stay based upon an asserted lack of adequate capitalization and the potential for a 2017 enrollment cap. *See* Dkt. 7 at ¶ 9. The United States is sensitive to these circumstances. However, 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 United States believes that the requested stay is not likely to affect the timing of any recovery that may be obtained by Montana.

By contrast, a stay will reduce the necessity for Montana, the Court, and the United States to expend substantial resources on issues ably being handled in other cases. In addition, the Court and the parties will benefit from the amplification of the issues through the disposition of the earlier-filed cases. For these reasons, the United States requests that the Court grant this motion and stay this case pending further development of the first-filed cases referenced above.

### III. 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 and where dispositive motions have already been decided or are pending.

Dated: November 17, 2016

Respectfully submitted,

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ATTORNEYS FOR THE UNITED  
STATES

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on November 17, 2016, I electronically filed the foregoing UNITED STATES' MOTION TO STAY 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/ Marc S. Sacks  
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