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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

ASSOCIATED INDUSTRIES MANAGEMENT SERVICES, in its fiduciary capacity as administrator for an association or member-governed group plans; **THE ASSOCIATION OR MEMBER GROUP-GOVERNED PLANS**; and **JAMES DeWALT**, in his capacity as a participant in one of the above-referenced plans,

Plaintiffs,

v.

MODA HEALTH PLAN, INC., dba MODA HEALTH INSURANCE, an Oregon Corporation,

Defendant.

Case No. 3:14-cv-01711-AA

PLAINTIFFS' RESPONSE TO ORDER TO SHOW CAUSE

I. INTRODUCTION AND SUMMARY OF RESPONSE

This case was filed in October of 2014 and Plaintiffs' Motion for Summary Judgment and Supporting Memorandum, dkt. #8, is currently pending before this Court. All the parties are in agreement that venue is proper in Oregon and desire that this Court rule on the motion before it. Moda Health Plan, Inc. ("Moda") has read this Response and does not oppose or object to any of

the statements contained herein. Plaintiffs, through their legal counsel, now take this opportunity to state the reasons that the current forum is appropriate and that this Court's transfer of venue would be in error as the factors considered for purposes of a transfer of venue under 28 U.S.C. § 1404 weigh in favor of maintaining this action in the District of Oregon.

This case involves a single federal issue – whether the Association or Member Group-Governed Plans ("Health Benefit Trusts") are sponsored by an "Employer" as defined by Section 3(5) of the Employee Retirement Income Security Act of 1974 ("ERISA"). There are no issues of state law involved in this proceeding. At the outset, the agency charged with enforcement of this provision, the U.S. Department of Labor (the "DOL"), was served with notice of this lawsuit and with a copy of the complaint. Declaration of Richard J. Birmingham ("Birmingham Decl."), ¶ 2. The DOL has made no effort to join in this lawsuit and is notably absent.

Similarly, when the Washington State Office of the Insurance Commissioner (the "Washington OIC") belatedly voiced concern about the Plaintiffs' ERISA Section 3(5) status, the Plaintiffs sought to join the Washington OIC as a party defendant to this lawsuit in order to ethically ensure that any opposing views were presented to this Court. Dkt. # 19. Rather than participating in this lawsuit and making its views known, the Washington OIC sent a letter to this Court indicating that it did not wish to participate in this lawsuit. Birmingham Decl. ¶ 3. Based on the Washington OIC's position, after notice of these proceedings, and this Court's statement that it felt comfortable deciding the issue without the Washington OIC named as a party, the Plaintiffs decided not to add the Washington OIC as a party and to proceed to summary judgment. Contrary to the statement in the Court's Show Cause Order, the Washington OIC has not made a determination that the Plaintiffs are not employers within the meaning of Section 3(5) of ERISA. Rather, the Washington OIC indicated that it did not have enough facts to make the determination and denied the Moda insurance contract applications on that basis. *Id.* ¶ 4. As a complete factual record has been developed in this proceeding, Plaintiffs invited the Washington

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OIC to participate in this proceeding, but it declined.

Both the DOL and the Washington OIC have been given the opportunity to timely participate in this proceeding, but they simply chose not to do so. Their behavior should not be rewarded by transferring this case to Washington State as a transfer would cause irreparable damage to the Plaintiffs.

Plaintiffs are required to provide sufficient evidence to the carrier to show that the association-sponsors of the Health Benefit Trusts are ERISA Section 3(5) employers in order to market a large group insurance contract. *See* WAC 284-170-958(2). While Plaintiffs' rate filing applications for the 2014 contract were disapproved, the Washington OIC has permitted Plaintiffs to continue to market insurance in Washington, pending a decision on their 2015 insurance applications. For reasons relating to renewal and transfer to other products, if the Plaintiffs' ERISA Section 3(5) status is not determined by the fourth quarter of this year, Plaintiffs' insureds will likely need to transition to other insurance products for 2016. Declaration of Keith VanderZanden ("VanderZanden Decl."), ¶ 3. Once the insureds transfer to new policies, it is unlikely that they will transfer back to the Plaintiffs' product during the same year. *Id.* Therefore, any delay in deciding this issue will irreparably harm the Plaintiffs, as they will essentially be forced out of business, even though Associated Industries Management Services ("AIMS") has been in business and providing insurance since 1952.

It is virtually impossible that any transferred case to the Eastern or Western Districts of Washington would be decided prior to the fourth quarter of 2015. While there is a current case pending in Washington, *Business Health Trust, et. al. v. Kreidler*, 2:14-cv-01918-RSL (W.D. Wash. 2014), the Washington OIC has taken every step possible to ensure that such case is not heard in a timely manner in federal court. The Washington OIC, in its Response in Opposition to Plaintiffs' Motion for Declaratory and Injunctive Relief, *id.* at dkt. #29, indicated that the case should be dismissed for lack of standing and jurisdiction. In the *Business Health Trust* action,

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plaintiffs' request for a declaration that the matter is subject to the exclusive jurisdiction of the federal courts is still pending before the Western District of Washington. Birmingham Decl. ¶ 5. Should plaintiffs prevail on the jurisdiction motion, the Washington OIC has indicated that it intends to file a motion to dismiss on other grounds. *Id.* The Washington OIC has indicated that it does not intend that the issue of ERISA Section 3(5) status be heard by a federal court. In addition, because the Health Benefit Trusts are administered in Eastern Washington, the correct venue in Washington State is the Eastern District of Washington and not the Western District of Washington. A transferred case would likely be subject to similar motions and delays, making it impossible for the Plaintiffs to receive a definitive ruling on their ERISA Section 3(5) status prior to the fourth quarter of 2015.

Ironically, the Washington OIC initially approved the Plaintiffs' ERISA Section 3(5) status in 2013, after months of negotiations, but suddenly reversed its position, citing a 2008 Department of Labor advisory opinion with respect to an Oregon trust. *Id.* ¶ 6 and Ex. A. The Washington OIC indicated that the multiple trust structure closely resembled the Bend Chamber of Commerce and disapproved the 2014 insurance contracts submitted on Plaintiffs' behalves on the basis that it did not have enough facts to distinguish the Bend Oregon opinion and privately expressed doubt that it ever could make such a distinction. *See Business Health Trust, et. al. v. Kreidler*, 2:14-cv-01918-RSL (W.D. Wash. 2014), dkt. # 29 at p. 6. However, after receiving such an adverse ruling, the Bend Chamber reorganized its structure in a manner similar to the Plaintiffs. The Oregon Insurance Commissioner subsequently approved the Bend Chamber to do business as an ERISA Section 3(5) employer in the State of Oregon. Birmingham Decl. ¶ 7 and Exs. B-D.

Moda does business in Oregon, Washington, and Alaska. Moda's clients with structures identical to the Plaintiffs' will be permitted to do business as ERISA Section 3(5) employers in Oregon and Alaska, but would be forbidden to do so in Washington. Such differences are not

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justified as the issues involved are solely federal in nature and do not involve issues of state concern or expertise.

In addition, the Plaintiffs in this case have been before this Court since October of 2014. In contrast, the *Business Health Trust* action was not commenced in the Western District of Washington until December; two months after Plaintiffs filed the current action with this Court. If Plaintiffs could be forced to transfer venue every time someone filed a new lawsuit, the results would be highly prejudicial. The Plaintiffs simply are entitled to a timely review of this issue by a federal court in the forum that they have chosen. A transfer to Washington State at this time would cause Plaintiffs irrevocable harm as a determination would not be made in time for their 2016 insurance renewal and Plaintiffs would be forced to transition their insureds to other competing products. Once transferred, it is extremely unlikely that the insureds would transfer back to the Plaintiffs' insurance product in the same plan year, as the insureds would have to renew deductibles and co-pays. The Washington OIC would not be a party to the transferred action, requiring procedural motions if they wished to participate and the transfer would result in a significant delay in the hearing of this case that was filed prior to any Washington proceeding. This Court should decide the motion before it and the missing agencies should simply bear the consequences of their own actions and omissions.

II. LEGAL ANALYSIS

If transferred to Washington, the correct venue is the United States District Court for the Eastern District of Washington as the Plan is administered in Eastern Washington and the Moda insurance business resides in Oregon. However, venue is appropriate in the District of Oregon and any transfer to a different district court would be in error for the following reasons, which Plaintiffs explain in more detail below: (1) transfer will cause irreparable harm to Plaintiffs; (2) Plaintiffs' choice of venue is entitled to deference; (3) heightened deference to Plaintiffs' choice applies in an ERISA action; (4) the parties are in agreement that venue is proper in Oregon; (5)

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federal law controls so transfer does not serve interests of justice; (6) ERISA Section 3(5) litigation is fact specific so the Court's decision will not establish precedence or result in inconsistent litigation; (7) Oregon was the situs of the initial controversy and Moda's clients are already subject to inconsistent results in Washington and Oregon and this Court should resolve the same; (8) Washington State has no special interest or expertise; and (9) both state and federal agencies have had ample opportunity to participate in this case and to make their views formally known to the Court, but they have declined to do so. There is nothing in the record that would support the transfer of this case. Any transfer will cause further delay, which will irrevocably harm the Plaintiffs.

1. A transfer will cause irrevocable harm to the Plaintiffs.

AIMS, the third party administrator of the Plaintiff Health Benefit Trusts, was founded by Associated Industries to offer insurance under the Associated Employers Trust in 1952 and has been providing insurance through Moda to approximately 866 employers and approximately 20,761 participants since 2011. VanderZanden Decl. ¶ 2. In order to avoid irreparable harm to the Plaintiffs' business, the Plaintiffs need a definitive determination of their Section 3(5) ERISA status no later than the fourth quarter of 2015. If this case is transferred to Washington State at this late date, a determination will not be rendered in 2015. If a decision is not rendered timely, the Plaintiffs will be forced to transition their insureds to competing products. If the Plaintiffs' ERISA Section 3(5) status is determined in 2016, it is unlikely that any of the insureds would transfer back in the same year, due to the administrative costs and the need to start anew with insurance deductibles and co-pays. The Plaintiffs will be damaged by any transfer, as they will essentially have been forced out of a business that they have operated for over 50 years, even if they ultimately prevail on the federal issue. *Id.* ¶ 4.

2. Plaintiffs' choice of venue is entitled to deference.

It is hornbook law that Plaintiffs' choice of venue is entitled to deference. 15 Fed. Prac.

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& Proc. Juris. § 3848 (4th ed.). In the instant case, the Plaintiffs, Defendants and the Court have all indicated that they are comfortable deciding this matter in Oregon. There is no compelling reason to transfer.

3. Heightened deference applies to a plaintiff's choice of venue in an ERISA action.

When enacting ERISA, Congress decided to remove procedural obstacles and established nationwide jurisdiction in ERISA cases. Thus, this Court has jurisdiction over any potential party to this lawsuit. For this reason, Plaintiffs' choice of venue is given heightened deference in ERISA cases. 15 Fed. Prac. & Proc. Juris. at § 3848 (4th ed.). *International Painters and Allied Trades Industry Pension Fund v. Painting Co.*, 569 F.Supp.2d 113, 119 (D.D.C. 2008). In the instant case, there are no compelling reasons that would defeat Plaintiffs' choice of venue.

4. Parties are in agreement that venue is proper in Oregon.

Moda does business in Washington, Oregon, and Alaska, but resides in Oregon. The Health Benefit Trusts are administered in Eastern Washington. Thus, venue is proper in either Oregon or the Eastern District of Washington. In the instant case, all parties have consented to the jurisdiction of the Oregon Court. There is no compelling reason to transfer the case to Washington State. If transferred, the correct venue is the United States District Court for the Eastern District of Washington, as the Health Benefit Trusts are administered there. The case, however, should not be transferred to Washington State as the delay will cause irreparable harm to the Plaintiffs.

5. A transfer does not serve interests of justice where federal law controls.

This case involves solely an issue of federal law - whether the Health Benefit Trusts are sponsored by an ERISA Section 3(5) Employer. Analysis of applicable law is irrelevant with respect to an issue involving a federal question as all federal judges are considered adept at interpreting federal law. *See*, 15 Fed. Prac. & Proc. Juris. § 3848 (4th ed.). Rather, the interests

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of justice require that this Court keep the case, in order that the federal issue will timely be decided. The Washington OIC has repeatedly resisted any attempt by the federal courts in either Oregon or Washington to hear this matter. If the Washington OIC has views that it wanted to litigate, it could have done so as a party, but declined.

6. This Court's decision will not establish binding precedent nor will it result in inconsistent court rulings.

The Court notes that it received notice that a case involving the precise issue raised in this case is pending in the Western District of Washington. Dkt. # 25 at p. 3. While the cases involve the same issue, an employer's ERISA Section 3(5) status, the determination of ERISA Section 3(5) status is inherently factual. The facts of this case and the Washington State case are not identical. The Washington State case involves insurance programs that were initially established by the Seattle Metropolitan Chamber of Commerce. In contrast, the Health Benefit Trusts serviced by Moda are not part of any chamber group. In fact, the Washington OIC issued a statement at the administrative level with respect to insurance ratings (an issue not before this court) that the demands made by Business Health Trust and the Plaintiff Health Benefit Trusts should ***not*** be consolidated, arguing that "It is the OIC's position that each disapproval of each rate and form filing is based on a unique set of facts specific to each carrier submitting health plans for review." Birmingham Decl. ¶ 8 and Ex. E. As there are no common facts, a decision in this case will not have precedential value or lead to inconsistent results. For these reasons, the case should not be transferred.

7. Oregon is the situs of the original controversy and inconsistent results already exist that must be resolved by this Court.

The original controversy with respect to groups that were previously banded together for insurance coverage started in Oregon with respect to the Bend Chamber of Commerce. The DOL concluded that the Bend Chamber Plan was not an ERISA Section 3(5) employer because

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the plan was not limited to employers in a particular industry. *See* DOL Advis. Opin. 2008-07A. The Bend Chamber Plans have since been restructured as separate industry-specific trusts and such plans have been approved by the Oregon Insurance Commissioner. Birmingham Decl. ¶ 7 and Exs. B-D. Similarly structured plans have yet to be approved by the Washington OIC. The Washington OIC's application of Advisory Opinion 2008-7A to all plans structured as multiple trusts is misguided and, furthermore, inconsistent with how the federal courts have interpreted ERISA Section 3(5). Therefore, there currently are inconsistent results for carriers such as Moda that do business in Oregon, Washington, and Alaska that stem from an Oregon controversy. This Court should resolve these inconsistent results by properly applying federal law.

8. Washington State has no special interest in this matter and the opinion of the State Regulator is entitled to no deference.

The issue before the Court is solely federal in nature – whether the Health Benefit Trusts are sponsored by an ERISA Section 3(5) employer. The opinion of the Oregon Insurance Commissioner of this issue is as follows:

> State regulators indicated that the authority to determine whether or not health coverage through an association qualified for ERISA large-group coverage rests with the U.S. Department of Labor, and because [the State] did not have authority to make such a determination, doubted that any state decision would "carry any weight" in this area.

See, Kevin Lucia, Sandy Ahn, and Sabrina Corlette, *Federal and State Policy Toward Association Health Plans in Oregon* at p. 5, quoting the Oregon Insurance Division; Birmingham Decl. ¶ 9 and Ex. F.

There are simply no matters of state interest or concern implicated by the issue before the Court. Moreover, the state agency has no expertise or authority in this area and its opinion is entitled to no deference. Therefore, the federal issue should be resolved in Oregon, as all the parties are in agreement as to venue in this Court.

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9. Both state and federal agencies have had ample opportunity to make their views known to this Court but have failed to do so. Their lack of candor and participation should not be rewarded by this Court.

The federal agency with oversight over this issue – the U.S. Department of Labor – has declined to participate in this issue. The Washington OIC originally approved the Plaintiffs' status and then abruptly withdrew its approval, citing inadequate facts, and has refused to recognize that this issue is federal in nature. It has refused to litigate this issue in federal court either in Washington or Oregon. However, if litigation is delayed, the Washington OIC effectively prevails without litigation, as the Plaintiffs' business will be irreparably damaged by requiring transfer to competing products in 2016 and any subsequent federal victory will be of no importance.

The Plaintiffs are ERISA Section 3(5) employers. They have invited state and federal agencies to set forth facts to the contrary. Both state and federal agencies have failed to establish any factual basis for disapproval of Plaintiffs' employer ERISA Section 3(5) status. This Court should not award such conduct at the expense of the Plaintiffs. This Court should timely reach an opinion and not transfer venue, as any delay will cause irreparable harm to the Plaintiffs.

III. CONCLUSION

Any transfer of venue should be to the Eastern District of Washington not the Western District of Washington. However, this case should not be transferred as the delay caused by a transfer will cause irreparable damage to the Plaintiffs. Unless a federal court reaches a decision on this issue prior to the fourth quarter of 2015, any victory will be meaningless as the Plaintiffs will have already transitioned their business to a competitor. The DOL and Washington OIC have been given the opportunity to join this lawsuit but they have declined to do so. The agencies have not made any adverse facts known to the Plaintiffs, the carrier or any court. The agencies know that delay will operate to force Plaintiffs out of business. The agencies do not

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intend to timely resolve this issue in federal court. As a transfer will delay the proceedings and cause irreparable damage, this Court should decide the issue and the agencies that have declined to participate should bear the consequences of their own acts and omissions. There is nothing in the record that supports the need to transfer this case to Washington State. To the contrary, all factors indicate that this Court should keep jurisdiction and enter a prompt decision. Moda has read this Response and does not oppose Plaintiffs' position stated herein.

DATED this 23rd day of April, 2015.

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