IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS & BLUE SHIELD OF VERMONT, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	)	Case No. 1:18-CV-00373-MBH

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Of Counsel:
Bridget Asay
STRIS & MAHER LLP
28 Elm Street, 2d Floor
Montpelier, VT 05602

Peter K. Stris
Brendan Maher
STRIS & MAHER LLP
725 S. Figueroa Street, Suite 1830
Los Angeles, CA 90017

Michael Donofrio
Counsel of Record
STRIS & MAHER LLP
28 Elm Street, 2d Floor
Montpelier, VT 05602
T: (802) 858-4465 | F: (802) 342-4794
michael.donofrio@strismaher.com

Attorneys for Plaintiff
Blue Cross & Blue Shield of Vermont

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INTRODUCTION

The Affordable Care Act requires the federal government, not insurers, to pay for cost-sharing reductions that lower health care costs for eligible Americans. The Federal Circuit's reasoning in *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1320-22 (Fed. Cir. 2018), confirms that the ACA's clear and unambiguous language "created an obligation of the government to pay." The Government contends that it cannot be liable for cost-sharing reduction (CSR) payments because, in its view, Congress has not appropriated funding. But the presence or absence of an appropriation does not matter here. The Government's obligation to pay is "independent of a sufficient appropriation to meet" it. *Id.* at 1322. That obligation is enforceable in this Court. Indeed, Judge Kaplan recently reached that conclusion and held the Government liable for unsatisfied CSR payments in two cases. *See Montana Health Co-op v. United States*, 139 Fed. Cl. 213, 217-221 (2018) ("government was statutorily obligated" for CSR payments); *Sanford Health Plan v. United States*, No. 18-136C, 2018 WL 4939418, at *4-8 (Fed. Cl. Oct. 11, 2018) (same). The same result follows here.

ARGUMENT

I. The Court should grant summary judgment to BCBSVT on Count I.

BCBSVT is entitled to summary judgment on Count I, its statutory claim.[1] The relevant facts are undisputed and the plain language of the statute is controlling.

[1] Because no further briefing is permitted on the Government's motion to dismiss, BCBSVT does not further address Counts III (takings claim) and IV (covenant of good faith and fair dealing). BCBSVT notes, however, that if the Court grants judgment in BCBSVT's favor on Count I, the Court need not address any other claims in the case. That was the approach taken by Judge Kaplan in *Montana Health* and *Sanford*, where the United States moved to dismiss and the insurers cross-moved for summary judgment. *Montana Health*, 139 Fed. Cl. at 214, 216 n.4; *Sanford*, 2018 WL 4939418, at *1, 3 n.4.

A. Based on the undisputed facts and plain language of the ACA, the Government is liable to BCBSVT for all unsatisfied CSR payments for 2017 and 2018.

The Government's liability for unsatisfied CSR payments cannot reasonably be disputed. Indeed, the Government does not contest any facts set forth by BCBSVT. It is thus undisputed that:

- The Government made CSR payments to BCBSVT and other insurers for over three and a half years.
- The Department of Justice, for years, took the position (including in court filings) that the ACA mandates those payments.
- BCBSVT provided cost-sharing reductions to its insureds and otherwise met all of its obligations with respect to CSR payments for 2017 and 2018.
- By the time the Government stopped making CSR payments in October 2017, BCBSVT was already committed to offering plans for both 2017 and 2018 and its rates were fixed for both years.
- BCBSVT did not and could not raise its 2017 or its 2018 rates to account for lost CSR payments.
- BCBSVT is owed CSR payments for 2017 and 2018.

As for the law, that too is clear and undisputed. The Government does not contest that, consistent with the Federal Circuit's analysis in *Moda*, the language of the ACA creates a mandatory obligation to make CSR payments to insurers. *See Moda*, 892 F.3d at 1320-22; *Montana Health*, 139 Fed. Cl. at 218; *Sanford*, 2018 WL 4939418, at *5; *see generally* ECF No. 18, at 18-20. The statutory language requiring payment is unambiguous, repeated in two sections of the ACA, and echoed in HHS's duly adopted regulations. *See* 42 U.S.C. § 18071(c)(3)(A); 42 U.S.C.A. § 18082(c)(3); 45 C.F.R. § 156.430(b)-(d). Likewise, the Government does not contest that Congress has taken no action to suspend, rescind, or otherwise alter the ACA's requirement for CSR payments. *See Montana Health*, 139 Fed. Cl. at 220; ECF No. 18, at 23; ECF No. 19, at 2.

The ACA requires "periodic and timely payments" to insurers. 42 U.S.C. § 18071(c)(3)(A). As explained below, the Government's attempts to avoid that liability conflict with precedent and are otherwise unpersuasive.

B. The Government's "intent" theory conflicts with *Moda* and ignores the best evidence of Congressional intent: the plain language of the ACA.

The Federal Circuit in *Moda* set forth a two-step process for assessing a claim for payment under a statute: (1) does the statute create a mandatory payment obligation; and (2) if so, does any subsequent congressional action suspend or rescind that payment obligation. *Moda*, 892 F.3d at 1320-23. Along with being binding precedent, *Moda's* direction—which starts with the plain language of the statute—is consistent with established principles of statutory construction. *See id.* at 1320 ("We begin with the statute."). The Government turns that settled approach on its head, asking the wrong question and placing more weight on congressional inaction than on the unambiguous language of the ACA. At each step, the Government's analysis is flawed.

1. The Government's framing of the question—asking whether Congress intended "to make CSR payments in the absence of an appropriation," ECF No. 19, at 3—is both illogical and contrary to *Moda*. The Congress that passed the ACA is not the same Congress that passed appropriations acts years later. There is no way to discern some kind of collective congressional intent spanning multiple sessions. The starting point, as in *Moda*, is the language of the statute that Congress did pass. And the ACA's provisions regarding CSR payments are "unambiguously mandatory." 892 F.3d at 1320; *see* ECG No. 18, at 18-20. The plain language of the ACA answers any question about congressional intent: when Congress adopted the ACA, it intended to, and did, create a binding obligation for the Government to fund the CSR program through payments to insureds.

The fact that later Congresses have not expressly appropriated funds for CSR payments does nothing to undermine the obligation created by the ACA. "Congressional inaction cannot amend a duly enacted statute." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (quotation omitted); *see also Butterbaugh v. Dep't of Justice*, 336 F.3d 1332, 1342 (Fed. Cir. 2003) (noting that congressional inaction "is perhaps the weakest of all tools for ascertaining legislative intent"). The Government tries to transform inaction into action through careful word choice, suggesting, for example, that Congress has "elected," "declined," or made a "decision" not to appropriate funds. *See* ECG No. 19 at 1, 4-6. To be clear: Congress has not *done* any of those things. The only relevant action that Congress has taken is passing the ACA, with its mandatory requirement that the Government fund the CSR program through payments to insurers. Congress has not rescinded or altered that obligation, nor did it take any other action to prevent the Government from making CSR payments, as it did for three and a half years. The Government cannot base a congressional intent argument on the absence of an express appropriation. *Cf. Cent. Bank*, 511 U.S. at 187 (noting that "several equally tenable inferences may be drawn from" congressional inaction, "including the inference that the existing legislation already incorporated the offered change" (quotation omitted)).

2. The Government also argues that the ACA cannot be construed to require CSR payments because, in its view, the ACA did not permanently appropriate funding for those payments. *Moda*, however, confirms that "it has long been the law that the government may incur a debt independent of an appropriation to satisfy that debt, at least in certain circumstances." 892 F.3d at 1321. Thus, even if the Government is correct that Congress "provided no permanent appropriation" for CSR payments in the ACA, the Government's

argument conflicts with *Moda*.[2] Assuming the ACA's permanent appropriation extends to Section 1401's premium tax credits but not Section 1402's CSR payments, that in no way undermines the mandatory payment obligation created by Section 1402.

Indeed, *Moda* rejected a virtually identical argument to the one made by the Government here. There, the Government argued that the absence of budget authority in the ACA's risk corridors statute was dispositive, because the ACA provision was expressly modeled on an existing Medicare program, and that statute did include budget authority. The Federal Circuit deemed it "immaterial" that Congress "declined to provide 'budget authority in advance of appropriations acts,' as in the corresponding Medicare statute." 892 F.3d at 1322; *Montana Health,* 139 Fed. Cl. at 219 (noting that *Moda* "rejected an analogy drawn from the language in the Medicare Part D statute similar to the one the government draws in this case"). Neither budget authority nor an express appropriation is necessary to create a binding obligation. *Moda*, 892 F.3d at 1322; *see also Montana Health,* 139 Fed. Cl. at 219 (The "court of appeals broke no new ground in *Moda* when it held that the 'shall pay' language of § 1342 created a statutory payment obligation and that the lack of appropriated funds was irrelevant to whether such an obligation was enforceable in this court."). Where the statutory language is clear and unambiguous, that is enough.

[2] The Government's argument presumes that Congress did not include CSR payments in the ACA's permanent appropriation. ECF No. 19, at 3. The Government makes no effort to argue that point, however. As shown by the Government's prior briefing defending its reliance on the permanent appropriation, *see* ECF No. 18, at 7-8, that question is neither settled nor obvious. The Court need not decide that question here, because the presence or absence of an express appropriation for CSR payments is not relevant to BCBSVT's claim in this Court. As previously noted, however, BCBSVT takes the position that CSR payments are covered by the ACA's express appropriation and reserves the right to press that claim if necessary. ECF No. 18, at 26-27.

3. Because the ACA creates a mandatory payment obligation, the Court does not need to find that the ACA also provides for an express "damages remedy." ECF No. 19, at 5. As Judge Kaplan recognized, plaintiffs "have never been required to make some separate showing that the money-mandating statute that establishes this court's jurisdiction over their monetary claims also grants them an express (or implied) cause of action for damages." *Montana Health*, 139 Fed. Cl. at 217. *Moda* did not adopt the Government's rule. And the Government cannot distinguish *Langston* either. The Supreme Court in *Langston* allowed the plaintiff to recover as damages his salary payment that was promised by law but not appropriated. *United States v. Langston*, 118 U.S. 389, 394 (1886). That is not, as the Government wrongly claims, a "very different" factual scenario. ECF No. 19, at 6. Both here and in *Langston*, the statute expressly promised payment for services and that payment was not provided. *Langston* confirms both that the mere failure to appropriate is not enough to vitiate the promise and that a statute's money-mandating provision is sufficient to afford a remedy in this Court.

C. The fact that some state regulators allowed other insurers to raise their rates to account for lost CSR payments is irrelevant.

As noted above, the Government does not dispute that BCBSVT did not and could not raise its 2017 or 2018 rates to account for lost CSR payments. Nonetheless, the Government still contends, albeit briefly, that after-the-fact rate increases authorized in other states are somehow relevant here. BCBSVT has already explained the flaws in the Government's argument regarding congressional intent, and the Government offers no meaningful response to any of those points. See ECF No. 18, 21-22; ECF No. 19, at 5. The Government continues to assert that Congress supposedly "structured" the ACA to allow insurers to raise their rates to account for lost CSR payments, but cannot identify a single statutory or regulatory provision supporting that position. *See Montana Health*, 139 Fed. Cl. at 221 (finding "no evidence in either the language of the

ACA or its legislative history that Congress intended" that premium increases would offset unsatisfied CSR payments). The fact that the current Administration has not challenged the actions of state regulators that authorized rate increases does not mean that Congress intentionally structured the ACA in that manner.[3]

Regardless, the Government's concession that BCBSVT could not raise its rates for 2017 or 2018 is dispositive. It confirms that the "structure" of the ACA—which includes advance rate review and approval—does not, in fact, simply allow insurers to substitute premium increases for CSR payments. Whether or not some insurers recouped any damages by increasing premiums has no relevance here.

D. Congress has never expressed any intent that private insurers bear the cost of the CSR program.

Although the Government focuses on Congress's supposed intent, it never grapples with the most obvious flaw in its position: Congress has never directed private insurers to bear the ultimate cost of providing cost-sharing reductions. The ACA created the CSR program as a government-funded benefit to expand access to health insurance for low-income Americans. The statute unambiguously directs the Government to bear the full cost of that benefit by making *advance* payments to insurers. 42 U.S.C. §§ 18071(c)(3)(A), 18082(c)(3). Nowhere in its briefing does the Government try to explain its justification for forcing private parties to assume the cost of funding a government benefit program. Nor has it attempted to explain why, if the current Administration in fact believes that the CSR program has not been funded by Congress, it

[3] In its argument point heading, the Government wrongly claims that BCBSVT "Concedes That The ACA's Structure Permits Issuers To Account For The Absence Of CSR Payments Through Premium Increases." ECF No. 19, at 5. That is exactly the point that BCBSVT disputed. *See* ECF No. 18, at 21 ("ACA does not 'allow[] *issuers* to account for the absence of CSR payments by increasing their premiums"; "Congress 'structured the ACA,' *id.*, so that insurers are *not* free to raise their rates").

stopped making the CSR payments to insurers but otherwise left the program unchanged. These logical flaws stem from the simple fact that the Government cannot shift its own financial obligations to private parties, especially when those obligations derive from an unambiguous statutory mandate.

The Government's position in this case is unprecedented. The CSR program is not the only program in which the federal government uses third parties as conduits for distributing benefits. Other examples include rent vouchers for low-income housing and the multibillion-dollar food stamp program. The Government's position here is no different than if it required retailers to accept food stamps, but then refused to pay for them. The Court should not allow the Government to abandon its obligations and leave private parties to foot the bill.

II. The Court should grant summary judgment to BCBSVT on Count II.

In addition to directly violating Section 1402's clear command, the Government made, and then breached, a contractual obligation to make CSR payments to BCBSVT. The undisputed facts show that the Government contracted with BCBSVT to act as the conduit to provide CSR benefits to eligible insureds. Because the CSR program necessarily involved that "*quid pro quo*" exchange, the Government's reliance on *Moda* is misplaced and its arguments lack merit.

A. The undisputed facts show that the Government contracted with BCBSVT to provide a service: the provision of CSR benefits to low-income Americans.

The Government does not dispute any of the facts that underpin BCBSVT's contract claim. As BCBSVT has shown: (1) it did everything required of it to sell qualified health plans on Vermont's exchange, including furnishing cost-sharing reductions to its eligible members; and (2) it did everything required of it to be entitled to reimbursement for those outlays. ECF No. 18, at 8-10.

Further, the facts set forth by BCBSVT—facts the Government does not dispute—confirm that the CSR program represented a contractual exchange between insurers and the Government. Indeed, the Government does not dispute that, in addition to the unambiguous statutory language, its regulations, guidance documents, manuals, public statements, and course of conduct for years all "made clear that if insurers took on the task of conveying CSR benefits to eligible enrollees, the Government had to, and would, reimburse them for fronting the cost of these government benefits." ECF No. 18, at 28; *see also id.* at 4-11. The Government says instead that its statements, representations, and course of conduct are irrelevant, citing *Moda*. ECF No. 19, at 7-8. But critically, the Government does not dispute the *fact* that its statements and actions with respect to CSR payments acknowledged a specific *quid pro quo*: insurers would provide CSR benefits to insureds and the Government would make insurers whole with advance CSR payments. *See, e.g.*, ECF No. 18, at 5-7; *cf. Moda*, 892 F.3d at 1316 (describing regulations that set forth "parameters for payments"). And the Government likewise does not dispute that it received a benefit—consideration—in this exchange, namely, that using insurers as a conduit for CSR benefits makes the CSR program "more efficient and more likely to achieve the ACA's objectives." ECF No. 18, at 31-32; *see also id.* at 4-5 (citing Declaration of Ruth K. Greene ¶¶ 11, 16, App. 8-9).

B. The Government violated its contractual obligations when it cut off CSR payments to BCBSVT.

1. The Government argues that the absence of "contract language" in Section 1402 precludes the existence of a contractual obligation. *See, e.g.*, ECF No. 19, at 9. But this form-over-substance argument fails, because an implied-in-fact contract does not hinge on the presence or absence of particular wording. Rather, it is "founded upon a meeting of minds and 'is inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding

circumstances, their tacit understanding.'" *Hanlin v. United States*, 316 F.3d 1325, 1328 (Fed. Cir. 2003) (quoting *Balt. & Ohio R.R. v. United States*, 261 U.S. 592, 597 (1923)). Although courts do not "lightly construe" regulatory programs as contractual undertakings, *see Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466-67 (1985), the law and the facts here lead to only one conclusion: The Government and BCBSVT both understood that in exchange for BCBSVT making the ACA-mandated reductions to its members' cost-sharing obligations, the Government would make the ACA-mandated CSR payments.

The Government tries to blur *Moda's* analysis by observing that in both cases the insurer plaintiffs rely on statutes, regulations, and agency conduct to show intent. ECF No. 19, at 8. But merely comparing the evidence overlooks the fundamental difference between the programs at issue here and in *Moda*. The Government cannot escape these facts: Section 1402 unambiguously created a government-funded benefit program designed to make health insurance more affordable for consumers, while the risk corridors statute created an incentive program designed to buffer insurers against uncertainty as they entered the new ACA-created marketplace. Against those qualitatively different backdrops, the same kinds of evidence operate in very different ways.

Viewed in this light, the Government's attempt to invoke *Moda* here by glossing over the distinction between a benefit program and an incentive program falls flat. Section 1402 makes insurers the *conduit* and the Government the *funder* of the CSR benefit, and thereby creates a "quid pro quo exchange for services" giving rise to a valid contract claim. *See Moda*, 892 F.3d at 1327 (contrasting an "incentive program" and a "quid pro quo exchange," and holding that the former cannot create an implied contract). Put differently, Section 1402 evinces "the contours of [a] contractual obligation," ECF No. 19, at 7, because it says that (1) insurers must convey the

CSR benefit to eligible insureds and (2) the Government must make CSR payments to those insurers to cover the cost of those benefits. Collectively, the statutes, regulations, and agency actions and statements BCBSVT relies on seamlessly bolster this conclusion, and easily withstand the Government's repeated mischaracterizations as an insignificant "patchwork." *See* ECF No. 19, at 7-9.

The Government's failure to address the difference between the CSR and risk corridors programs also dooms its argument that the Government-insurer relationship embodied in the CSR program "lacks the trappings of a contractual arrangement." *Id.* at 8 (quoting *Moda*, 892 F.3d at 1330). The Government's analysis of *Moda*, *Radium Mines*, and *New York Airways* is superficial; instead of, as *Moda* teaches, focusing on whether "the overall scheme" of the CSR program evinces "the trappings of a contractual arrangement," *Moda*, 892 F.3d at 1330, the Government advocates for a purely textual analysis. Specifically, it compares Section 1402, which it says contains "no contract language," with the "guarantee" at issue in *Radium Mines* and the "Liquidation of Contract Authorization" cited in *New York Airways*. ECF No. 19, at 9.

This analysis crumbles under scrutiny. Indeed, the very passage the Government quotes from *Moda* brings the point home: *Moda* did not reject the implied contract claim because the risk corridors statute lacked particular words that qualified as "contract language." It did so based on its view that "the overall scheme of the risk corridors program" reflected an incentive "designed to encourage the provision of affordable health care," not the "traditional *quid pro quo*" of a contractual arrangement. *Moda*, 892 F.3d at 1329-30 (quoted in ECF No. 19, at 9). By contrast, the "overall scheme" of the CSR program has a *quid pro quo* at its core—Section 1402's parallel requirements that insurers provide the required CSR benefits to eligible members and that the Government make the insurers whole for those outlays.

2. The Government's attempt to disclaim authority to contract also fails. Here again, the Government invokes a flawed theory that, absent specific wording expressing the authority to contract, that authority cannot exist. However, the law sees it differently.

The Government is, of course, correct that "express actual authority" must find its basis in Constitutional, statutory, or regulatory text. ECF No. 19, at 10 (quoting *McAfee v. United States*, 46 Fed. Cl. 428, 435 (2000)). But it misses the larger point: As BCBSVT observed in its motion, "[a]n agent's actual authority to bind the Government may be either express or implied." *Marchena v. United States*, 128 Fed. Cl. 326, 333 (2016) (citing *Salles v. United States*, 156 F.3d 1383, 1384 (Fed. Cir. 1998)). Implied authority, by definition, exists not by virtue of specific words on a page, but because it is "considered to be an integral part of the duties assigned to a government employee." *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989) (quotation omitted). This uncontroversial principle is fatal to the Government's argument; indeed, the Government's position—that authority to contract *only* exists if Congress *expressly* says so, *see* ECF No. 19, at 10 (noting purported failure to identify "ACA language authorizing the Secretary to enter into such contracts")—would erase the entire concept of implied authority.

In any event, the authority to bind the Government to make CSR payments is "an integral part of the duties assigned to" the Secretary of HHS. In general, the ACA makes clear that the HHS Secretary is responsible for administering the Act. *See, e.g.*, 42 U.S.C. §§ 18021(a)(1)(C)(iv), 18022(b), 18031(c). And the ACA provides express authority for the Secretaries of HHS and the Treasury to both implement a program for, and make, advance CSR payments. 42 U.S.C. § 18071(c)(3)(A) ("the Secretary shall make periodic and timely payments"); *see generally* 42 U.S.C. § 18082. It follows logically that the Government's authority to agree to fulfill its CSR obligations is implicit in and integral to Section 1402's

explicit assignment of the duty to implement that program and make periodic and timely CSR payments.

Finally, the Anti–Deficiency Act cannot save the Government here. That Act provides that federal officials "may not . . . involve [the] government in a contract or obligation for the payment of money before an appropriation is made *unless authorized by law*." 31 U.S.C. § 1341(a)(1)(B) (emphasis added). As explained above, Section 1402 not only authorizes the Government to implement the advance CSR payments, it *requires* the Government to do so. Accordingly, the Anti-Deficiency Act is no defense to BCBSVT's contract claim. *See N.Y. Airways, Inc. v. United States*, 177 Ct. Cl. 800, 369 F.2d 743, 752 (1966) ("Since it has been found that the Board's action created a 'contract or obligation (which) is authorized by law', obviously the statute has no application to the present situation. . . ."). In sum, BCBSVT is entitled to summary judgment on its contract claim, and the Government's opposing arguments fail to alter that conclusion.

CONCLUSION

For the reasons given above and in BCBSVT's prior filings, the Court should grant BCBSVT's cross-motion for partial summary judgment on liability, and hold the Government liable to BCBSVT for all unsatisfied CSR payments related to calendar years 2017 and 2018.

Respectfully submitted,

Dated: October 26, 2018

By: */s/ Michael Donofrio*
Michael Donofrio

Of Counsel:
Bridget Asay
STRIS & MAHER LLP
28 Elm Street, 2d Floor
Montpelier, VT 05602

Peter K. Stris
Brendan Maher
STRIS & MAHER LLP
725 S. Figueroa Street, Suite 1830
Los Angeles, CA 90017

Michael Donofrio
Counsel of Record
STRIS & MAHER LLP
28 Elm Street, 2d Floor
Montpelier, VT 05602
T: (802) 858-4465 | F: (802) 342-4794
michael.donofrio@strismaher.com

Attorneys for Plaintiff
Blue Cross & Blue Shield of Vermont

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2018 a copy of the attached Reply Memorandum in Support of Plaintiff's Cross-Motion for Partial Summary Judgment 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.

By: */s/ Michael Donofrio*

Michael Donofrio
STRIS & MAHER LLP

Counsel for Plaintiff
Blue Cross & Blue Shield of Vermont