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

PLAINTIFF'S SUPPLEMENTAL BRIEF
IN RESPONSE TO THE COURT'S SEPTEMBER 4, 2019 ORDER

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The Court, in its September 4, 2019 order, directed the parties to file simultaneous briefs addressing the impact, if any, on the parties' pending motions of the Supreme Court's decision to review the Federal Circuit's decisions in *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311 (Fed. Cir. 2018), *cert. granted*, 139 S. Ct. 2743 (2019), and *Land of Lincoln Mut. Health Ins. Co. v. United States*, 892 F.3d 1184 (Fed. Cir. 2018), *cert. granted*, 139 S. Ct. 2744 (2019). *See* ECF No. 29. Plaintiff Blue Cross & Blue Shield of Vermont respectfully submits this supplemental brief in response.

I. The petitioners in *Moda* and *Land of Lincoln* have asked the Supreme Court to decide whether subsequent appropriations riders affected the Government's obligation to make risk-corridor payments, which is not an issue in this case.

As this Court is aware, *Moda* and *Land of Lincoln* addressed insurers' claims for "risk-corridor" payments under the Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. §§ 18001 et seq.). Section 1342 of the ACA, codified at 42 U.S.C. § 18062, required the Secretary to make certain payments to health plans whose cost of providing coverage exceeded their premiums received, as determined by a statutory formula. The statute also required health plans whose premiums exceeded their costs, per the same statutory formula, were required to pay a portion of the excess into the risk-corridor program. *See, e.g.*, *Moda*, 892 F.3d at 1315. Congress subsequently adopted appropriations riders that barred the use of specific appropriated funds to make risk-corridor payments. *See id.* at 1318-19. Based on those appropriations riders, the federal government limited payments out to the total amount of payments in—an amount far less than was owed under the statutory formula. *See id.* Insurers filed suit in this Court seeking to recoup the unpaid amounts, arguing that the government was liable because Section 1342 imposed a statutory obligation to make the payments; the risk corridors program gave rise to an implied-in-fact contract between the insurers and the government; and the government's refusal to pay was a takings.

The cases reached the Federal Circuit following split decisions in this Court. The Federal Circuit held that the risk-corridors statute was money-mandating, and therefore imposed a duty to pay on the government. However, the panel then concluded that the intervening appropriations riders suspended the government's payment obligation:

> Although we agree with Moda that section 1342 obligated the government to pay the full amount of risk corridors payments according to the formula it set forth, we hold that the riders on the relevant appropriations effected a suspension of that obligation for each of the relevant years.

Moda, 892 F.3d at 1320. For this reason, the Federal Circuit rejected the insurers' statutory claim.

The Court also rejected the insurers' contract claim, reasoning that the risk-corridor program was an "incentive program," and not a "traditional quid pro quo." *Id.* at 1330. The Federal Circuit's companion decision in *Land of Lincoln* denied the insurer's takings claim. *Land of Lincoln*, 892 F.3d at 1186.

Several insurers petitioned the Supreme Court for review. The Court granted those petitions on June 24, 2019. The petitions asked the Supreme Court to address whether the appropriations riders altered the government's obligation to make risk-corridor payments. *See Land of Lincoln v. United States*, No. 18-1038, Cert. Pet. at i (U.S. filed Feb. 4, 2019); *Moda Health Plan Inc. v. United States*, No. 18-1028, Cert. Pet. at i (U.S. filed Feb. 4, 2019); *Maine Community Health Options v. United States*, No. 18-1023, Cert. Pet. at i (U.S. filed Feb. 4, 2019).[1] The government's brief opposing the petitions focused on the appropriations riders, though also argued that the risk-corridors statute "never imposed any such absolute, privately enforceable obligation to begin with." *Maine Community Health Options v. United States*, No.

[1] The Supreme Court consolidated the risk-corridor cases for briefing and oral argument.

18-1023, *Moda Health Plan Inc. v. United States*, No. 18-1028 & *Land of Lincoln v. United States*, No. 18-1038, Brief of United States in Opp. at 26 (filed May 8, 2019). For purposes of those cases, however, the government noted that the latter issue has "no practical significance in light of the [Federal Circuit's] ultimate conclusion." *Id.*

As BCBSVT has previously explained, the government's decision to stop making CSR payments has forced insurers to fund a government benefit program for low-income Americans—an outcome directly contrary to the law passed by Congress. *See* ECF No. 18 at 34-37. By contrast, the risk-corridor statute created an "incentive program," *Moda*, 892 F.3d at 1330, not a benefit program. As in any case when a higher court is deciding related but distinct issues in a different case, it is difficult to predict the range of possible outcomes, let alone how those outcomes might impact the claims before this Court. Here, moreover, only petitioners' merits briefs have been filed in *Moda* and the case has not been argued. It appears likely, based on the available briefing and the Federal Circuit's specific reasoning in *Moda*, that the Supreme Court's decision will focus on the Federal Circuit's interpretation of the risk-corridors appropriations riders.[2] Accordingly, its decision is unlikely to support the government's position in the CSR cases, because Congress did not take any subsequent actions, via appropriations riders or any other method, that limited funding for CSR payments.

II. This Court should not stay its ruling pending the Supreme Court's decision in the risk-corridors case or the Federal Circuit's decision in other CSR cases.

As this Court knows, several CSR cases have been decided—all in favor of the insurer-plaintiffs—by other Court of Federal Claims judges. *See Sanford Health Plan v. U.S.*, 139 Fed. Cl. 701 (Fed. Cl. 2018) (holding government liable on statutory claim); *Montana Health Co-op*

[2] Because the government has not yet filed its merits brief, plaintiffs do not know whether the government will ask the Court to address issues other than the interpretation of the appropriations riders.

v. U.S., 139 Fed. Cl. 213 (Fed. Cl. 2018) (holding government liable on statutory claim); *Local Initiative Health Auth. v. U.S.*, 142 Fed. Cl. 1 (Fed. Cl. 2019) (holding government liable on statutory and implied contract claims); *Common Ground Healthcare Coop. v. U.S.*, 142 Fed. Cl. 38 (Fed. Cl. 2019) (holding government liable on statutory claim); *Maine Community Health Options v. U.S.*, 142 Fed. Cl. 53 (Fed. Cl. 2019) (holding government liable on statutory and implied contract claims); *Community Health Choice, Inc. v. U.S.*, 141 Fed. Cl. 744 (Fed. Cl. 2019) (holding government liable on statutory and implied contract claims).[3] BCBSVT respectfully asks that this Court address the pending motions so that a final judgment can be entered in this case as well. For at least two reasons, the equities strongly favor entry of a judgment in this matter, while the risk-corridor and CSR appeals are pending.

First, BCBSVT is out of pocket for millions of dollars that the federal government promised to pay. Absent the government's unlawful decision to stop making timely and periodic advance CSR payments, as required by Section 1402 of the ACA, BCBSVT would have received payments during the fourth quarter of 2017 and throughout calendar year 2018. In the event of a judgment in BCBSVT's favor, the government will almost certainly argue that it has no obligation to pay interest. BCBSVT therefore respectfully requests that this Court enter judgment in its favor while the Supreme Court and Federal Circuit appeals are pending, to facilitate BCBSVT's ability to recoup those funds as quickly as possible.

Second, BCBSVT is in a different, and stronger, position than other insurers who are litigating CSR claims. As the government has argued, many states allowed insurers to raise their

[3] The government has appealed the decisions in *Sanford Health Plan*, *Montana Health Co-op*, *Maine Community Health Options*, and *Community Health Choice*. The Federal Circuit has consolidated the appeals and ordered that they "shall be placed on the next available oral argument calendar." *Sanford Health Plan, Montana Health Co-op v. United States*, Nos. 2019-1920, -1302, ECF No. 56 at 3 (Fed. Cir. July 30, 2019).

premiums after the federal government stopped making CSR payments. BCBSVT did not get a premium increase in 2017 or 2018—indeed, Vermont's Green Mountain Care Board, the body that sets and regulates the premiums BCBSVT charges on Vermont's exchange, made clear in October 2017 that it would not permit BCBSVT to change the premiums that Board had already set for calendar year 2018 so close in time to the open enrollment period. *See* ECF No. 18, at 13 ("Shortly after the Government announced its decision to stop the CSR payments, the Chair of the Green Mountain Care Board publicly stated that the Board would not allow premium increases for 2018 plans, emphasizing that trying to change premiums within days of open enrollment 'makes absolutely no sense.'" (citing Appendix, ECF No. 18-1, at 73)). The government places great weight, in the trial courts and in the pending Federal Circuit appeal, on its supposed "double recovery" argument. *See, e.g., Sanford Health Plan v. United States*, Nos. 2019-1290 & 2019-1302, Appellant's Opening Brief, ECF No. 21, at 18-22 (Fed. Cir. filed March 22, 2019). It is undisputed that BCBSVT will have no double recovery; it is a relatively small insurer that has lost millions of dollars because of the government's refusal to honor its obligations. *See, e.g.*, ECF No. 18, at 13 (noting that "Government does not, however, dispute that BCBSVT did not and could not adjust its premium rates to account for the lost CSR payments"). These circumstances lend special force to BCBSVT's request for relief here.

CONCLUSION

For the reasons given above and in BCBSVT's prior filings, the Court should deny the Government's motion to dismiss and grant BCBSVT's motion for partial summary judgment as to liability.

Dated: September 13, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 13, 2019, I filed a copy of the attached Supplemental Brief in Response to the Court's September 4, 2019 Order 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.

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