

**IN THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT**

BLUE CROSS & BLUE SHIELD)	
OF VERMONT,)	
Plaintiff-Appellee,)	
)	
v.)	Case No. 2021-1380
)	
UNITED STATES OF AMERICA,)	
Defendant-Appellant.)	

**PLAINTIFF-APPELLEE’S OPPOSITION TO GOVERNMENT’S MOTION TO
HOLD APPEAL IN ABEYANCE**

Plaintiff-Appellee Blue Cross & Blue Shield of Vermont (BCBSVT) opposes the Government’s motion to hold this appeal in abeyance. BCBSVT has moved for summary affirmance because this case is controlled by this Court’s August 14, 2020 ruling in *Sanford Health Plan v. United States*, 969 F.3d 1370 (Fed. Cir. 2020). As explained below, there is no good reason to stay this appeal, given that this Court has already decided the Government’s liability and the damages amount is undisputed.

1. In *Sanford Health Plan*, this Court held that the Government is liable to insurers for unpaid cost-sharing reduction (CSR) payments under the Affordable Care Act (ACA). 969 F.3d at 1381-82. The Court relied on the Supreme Court’s recent decision in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020). *Maine Community Health* holds that the Government is liable for unpaid risk-corridor payments under the ACA. *Id.* at 1330-31. In reaching that decision, the

Supreme Court relied on both settled precedent and a “principle as old as the Nation itself: The Government should honor its obligations.” *Id.* at 1331.

Not surprisingly, this Court found “no persuasive basis for distinguishing” the CSR cases from the risk-corridor cases decided in *Maine Community*. 969 F.3d at 1373. Therefore, the Government must honor its CSR obligations as well.

2. After this Court’s decision in *Sanford Health Plan*, the Government stipulated to entry of a final judgment in BCBSVT’s favor, in the amount of \$7,203,738.83. *See* BCBSVT Mot. Summ. Affirm., ECF No. 8, Ex. A, ¶¶ 1-2; Ex. B. There is no dispute about the amount of damages owed to BCBSVT for 2017 and 2018. To be clear, this case does not involve the “silver-loading” issue that this Court addressed in *Community Health Choice, Inc. v. United States*, 970 F.3d 1364 (Fed. Cir. 2020). The Government has stipulated that BCBSVT did not “silver-load” in 2017 and 2018 and thus BCBSVT is owed the full amount of its unpaid CSR for those years. *See* BCBSVT Mot. Summ. Affirm., ECF No. 8, Ex. A, ¶ 2.

3. The Government appealed the judgment that it stipulated to, and now seeks to hold its appeal in abeyance because of the potential for further proceedings in *Community Health* and related cases. ECF No. 7, at 2-3. But the disputed damages issue in *Community Health* is not part of this case. The Government notes that BCBSVT has reserved the right to pursue its separate claims for 2019 and 2020, but those claims likewise are not part of this case. The Government does not explain why the possibility that BCBSVT would separately pursue its 2019 and 2020 claims should affect this appeal of the stipulated final judgment entered below.

The only explanation the Government offers for staying this appeal pending the possible filing of a petition for certiorari in *Community Health* is its logically flawed claim that the Court’s liability ruling in *Sanford Health Plan* “was explicitly intertwined with this Court’s damages-mitigation ruling.” ECF No. 7, at 3. This Court in fact treated the liability and damages questions as distinct, issuing a separate decision on each issue. The Court rejected the Government’s argument that the ACA’s premium-tax-credit provision displaces the Tucker Act remedy and explained that “appropriate accounting for offsets and avoidance of double recoveries” is part of “[d]amages law.” *See* 969 F.3d at 1382-83.

Given this Court’s decision in *Sanford Health Plan* and the Supreme Court’s decision in *Maine Community Health*, there is no serious question that the Government is liable for unpaid CSR payments. BCBSVT is a small non-profit insurer. Unlike the vast majority of insurers, BCBSVT was not allowed by its state regulator to silver-load in 2018. The Government’s refusal to honor its clear statutory obligation to make timely CSR payments cost BCBSVT over \$7 million. More importantly, that refusal has deprived BCBSVT’s policyholders of the benefit of those funds, to mitigate rate increases or supplement policyholder reserves. This Court should not delay a final ruling in BCBSVT’s case—where damages are undisputed—because other parties may seek Supreme Court review of an issue that is not part of this case.

Staying this case pending further proceedings in *Community Health* and its companion cases does not make sense for another reason: those cases are

interlocutory. This Court remanded *Community Health* for further proceedings related to damages. 970 F.3d at 1380-82. There is no way to know whether the Supreme Court will view the damages ruling in *Community Health* as ripe for review at this stage. Notably, the Government makes no representation regarding the disposition of this case should petitions for certiorari in *Community Health* and related cases be denied. ECF No. 7, at 1. This case has reached final judgment. It should not be put on hold pending a case with an uncertain timeline.

4. Finally, holding this appeal in abeyance does not avoid any significant cost or burden. Because the outcome of this case is controlled by *Sanford Health Plan*, no further briefing or argument is necessary. This Court can and should summarily affirm as BCBSVT has requested. If the Government believes that it should not be liable for CSR payments at all, it can seek Supreme Court review of that issue. But if, as is more likely, the only seriously disputed question is the calculation of damages for insurers who did silver-load, this case will end and BCBSVT can finally be paid.

Accordingly, BCBSVT respectfully requests that the Court deny the Government's motion to hold this appeal in abeyance.

Dated: December 22, 2020

Respectfully submitted,

Of Counsel:

By: s/ Bridget Asay
Bridget Asay

Peter K. Stris
STRIS & MAHER LLP
777 S. Figueroa St, Suite 3850
Los Angeles, CA 90017

Bridget Asay
Michael Donofrio
STRIS & MAHER LLP
28 Elm Street, 2d Floor

Montpelier, VT 05602
T: (802) 858-4285 | F: (213) 261-0299
bridget.asay@strismaher.com

**Counsel for Plaintiff Blue Cross
& Blue Shield of Vermont**

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 923 words.

/s/ Bridget Asay
Bridget Asay

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2020, I electronically filed the foregoing Opposition with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Bridget Asay
Bridget Asay