

**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 MOTION FOR SUMMARY AFFIRMANCE**

Pursuant to Rules 2 and 27 of the Federal Rules of Appellate Procedure and this Court’s Rules of Practice, plaintiff-appellee, Blue Cross & Blue Shield of Vermont (BCBSVT), respectfully requests that the Court summarily affirm the final judgment entered by the Court of Federal Claims on October 5, 2020. That final judgment was entered based on the parties’ stipulation. Summary affirmance is appropriate 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). There is no substantial question as to the outcome of this appeal. In support of its motion, BCBSVT relies on the following brief and exhibits (consisting of the stipulation and final judgment in the Court of Federal Claims).

**DISCUSSION**

**I. Legal Standard**

Disposition by means of summary affirmance is appropriate when an appeal is patently without merit as a matter of law. As this Court has held, “summary

disposition is appropriate, inter alia, when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists.” *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994); *see also* Fed. Cir. R. 27 practice note (identifying “motions to summarily affirm” as “[e]xamples of nonprocedural motions”). Likewise, the Court has granted summary affirmance where controlling precedent determines the outcome. *JBF RAK LLC v. United States*, 567 F. App’x 966 (Fed. Cir. 2014) (“Because both parties are in apparent agreement that *Union Steel* controls the outcome of this appeal by a panel of this court, we agree that summary affirmance is appropriate.”); *see also* Fed. R. App. Proc. 2 (permitting suspension of ordinary rules of appellate procedure for purposes of expediting decision).

As explained below, that standard is met here. By stipulating to entry of final judgment below, the Government recognized that the outcome of this case is controlled by this Court’s decision finding liability for unpaid CSR payments in *Sanford Health Plan v. United States*, 969 F.3d 1370, 1373 (Fed. Cir. 2020). Ex. A, ¶ 2.

## II. Discussion

**A. This Court should summarily affirm the stipulated judgment entered below, because this case is controlled by *Sanford Health Plan* and there is no substantial question regarding the outcome.**

In this case, plaintiff BCBSVT seeks to recover unpaid cost-sharing reduction (CSR) payments that the Government owes it for the fourth quarter of 2017 and all of 2018. In *Sanford Health Plan*, this Court held that the Tucker Act provides a

remedy for the Government's failure to make CSR payments to insurers as required under the Affordable Care Act (ACA). 969 F.3d at 1381-82. The Court ruled that the Supreme Court's decision in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020), addressing the Government's payment obligation under the ACA's "risk corridors" provisions, "makes clear that the cost-sharing-reduction reimbursement provision imposes an unambiguous obligation on the government to pay money and that the obligation is enforceable through a damages action in the Court of Federal Claims under the Tucker Act." *Sanford Health Plan*, 969 F.3d at 1372-73. The Court saw "no persuasive basis for distinguishing" the CSR cases from the risk-corridor cases decided in *Maine Community*. *Id.* at 1373.

BCBSVT's case was stayed by the Court of Federal Claims for over a year pending this Court's ruling in *Sanford Health Plan*. See *BCBSVT v. United States*, No. 1:18-cv-00373-MBH, ECF Doc. No. 32 (Sept. 25, 2019). After the decision issued in *Sanford*, the Government stipulated to entry of final judgment in the amount of \$7,203,738.83.<sup>1</sup> Ex. A, ¶ 1; Ex. B. The Government then appealed the stipulated judgment to this Court.

Because *Sanford Health Plan* is controlling precedent that governs the precise question at issue here, there is no substantial question regarding the outcome of this case and thus no need for full briefing and argument. This case does not involve the damages issue that this Court addressed in *Community Health Choice, Inc. v. United*

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<sup>1</sup> The judgment in this case represents unpaid CSR obligations for 2017 and 2018. The parties agreed that the entry of judgment in this case does not prejudice BCBSVT's right to litigate claims for 2019 and 2020. Ex. A, ¶ 6.

*States*, 970 F.3d 1364 (Fed. Cir. 2020). In *Community Health*, the Court considered the impact of “silver loading” on insurers’ damages. “Silver loading” occurs when an insurer increases the premiums charged for certain of its health plans whose actuarial values fall into the “silver” level, in a manner that does not increase the plan members’ cost-sharing but rather increases the premium tax credits received by the insurer. 970 F.3d at 1370. The Court concluded that for insurers who engaged in “silver loading” in 2018, “the Claims Court must reduce the insurers’ damages by the amount of additional premium tax credit payments that each insurer received as a result of the government’s termination of cost-sharing reduction payments.” 970 F.3d at 1367. *Community Health* and companion cases were remanded to the Court of Federal Claims for further proceedings related to the calculation of damages.

It is undisputed—indeed, the Government has stipulated—that BCBSVT did not engage in silver loading in 2018. Ex. A, ¶ 2. Its damages for 2018, like its damages for 2017, were readily ascertainable: the amount of unpaid CSR payments owed by the Government. Ex. A, ¶ 1. The parties thus stipulated to the amount of unpaid CSR payments for 2017 and 2018. *Id.*

The only potential issue in this appeal is whether the Government is liable for the unpaid CSR obligations. This Court has conclusively decided that issue in *Sanford Health Plan*. Summary affirmance is therefore appropriate.

**B. There is no basis to stay the appeal pending the disposition of other cases that have not reached a final judgment.**

The Government seeks to hold this appeal in abeyance pending the outcome of petitions for certiorari that may be filed in other CSR cases, including *Community*

*Health*. See ECF Doc. No. 7. Because the Supreme Court has extended the time for filing petitions for certiorari to 150 days, a petition for certiorari in *Community Health* is not due until April 2021.<sup>2</sup>

BCBSVT opposes the Government's request to hold this appeal in abeyance. For at least three reasons, this case should not be tied to the timeline of *Community Health*. First, and most importantly, the question that is seriously contested in *Community Health* is whether unpaid CSR should be offset by premiums received through silver-loading—and that issue is not part of this case. The Government may seek to contest liability should the insurer-plaintiffs seek certiorari on that damages question. But as this Court recognized in *Sanford*, liability for the CSR payments is effectively settled by the Supreme Court's ruling in the risk-corridor litigation. See *Sanford Health Plan*, 969 F.3d at 1373, 1380-83. There is simply “no sufficient basis for reaching a different conclusion” for CSR reimbursement “from the conclusion the Supreme Court drew for the Risk Corridor provision at issue in *Maine Community*.” *Id.* at 1381. A final disposition in this case should not be delayed because the Government and the plaintiff-insurers continue to dispute an unrelated damages question.

The Government's motion to hold the appeal in abeyance is based on flawed and incorrect assertions. The Government refers to BCBSVT's potential claims for 2019 and 2020. But those claims would be filed in a separate action. This case, which

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<sup>2</sup> This Court denied rehearing in *Community Health* on November 10, 2020. *Community Health Choice, Inc. v. United States*, No. 2019-1633, ECF Doc. No. 88 (Fed. Cir. Nov. 10, 2020).

has been resolved by a final judgment, was filed in early 2018, long before 2019 and 2020 claims would have accrued. Further, the Government incorrectly claims that this Court’s liability ruling was “explicitly intertwined” with the damages question. ECF Doc. No. 7, at 3. To the contrary, *Sanford Health Plan* confirms that the issues are distinct. *See* 969 F.3d at 1382-83 (rejecting Government’s argument that premium tax credit provision displaces Tucker Act remedy and explaining that “appropriate accounting for offsets and avoidance of double recoveries” is part of “damages law”). There is no reason why a final ruling in this case should be delayed because other parties may seek Supreme Court review of the damages question.

Second, *Community Health* has not reached a final judgment. This Court remanded the case for further proceedings related to damages. 970 F.3d at 1380-82. It is not certain that any party will petition for certiorari at this stage. The Government has not represented that it intends to file a petition for certiorari. And even if the Supreme Court is inclined to consider the damages question, there is no way to know whether it will do so now, or after final judgment.

Third, a stay 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.

**RULE 27(a)(2) STATEMENT**

BCBSVT conferred with counsel for the Government regarding the Government’s request to hold this appeal in abeyance. BCBSVT declined to agree to hold this appeal in abeyance and asked the Government for its position regarding

summary affirmance. Prior to responding to BCBSVT, the Government filed its motion to hold the appeal in abeyance. The Government's counsel subsequently indicated that the Government opposes this motion for summary affirmance.

Dated: December 18, 2020

Respectfully submitted,

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**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 1571 words.

/s/ Michael Donofrio  
Michael Donofrio

**CERTIFICATE OF SERVICE**

I hereby certify that on December 18, 2020, I electronically filed the foregoing motion and exhibits 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/ Michael Donofrio  
Michael Donofrio

# Exhibit A

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

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

**JOINT MOTION TO ENTER STIPULATED FINAL JUDGMENT**

In this case, plaintiff Blue Cross & Blue Shield of Vermont (BCBSVT) seeks to recover unpaid cost-sharing reduction payments, known as CSR payments, for benefit years 2017 and 2018. For the reasons set forth below, the parties jointly request this Court to enter judgment under Rule 58 of the Rules of the Court of Federal Claims in favor of BCBSVT in the amount of \$7,203,738.83, as reflected in the accompanying proposed final judgment. Entry of final judgment is without prejudice to the Government’s right to appeal.

Based on facts specific to BCBSVT, the parties stipulate as follows:

1. As determined by the Centers for Medicare & Medicaid Services, the combined total amount of unpaid CSR payments due and owing from the Government to BCBSVT for benefit years 2017 and 2018 is \$7,203,738.83.

2. Given the Federal Circuit’s August 14 rulings in *Sanford Health Plan v. United States*, No. 2019-1290, 2020 WL 4723703 (Fed. Cir. Aug. 14, 2020) and *Community Health Choice, Inc. v. United States*, No. 2019-1633, 2020 WL 4723757

(Fed. Cir. Aug. 14, 2020), and given that BCBSVT did not silver-load, or otherwise obtain additional premium tax credits to offset the unpaid CSR payments for benefit years 2017 or 2018, the parties agree that it is appropriate at this time for this Court to enter final judgment in favor of BCBSVT in the amount of \$7,203,738.83 (the Stipulated Amount).

3. BCBSVT requests an award of costs pursuant to Rule 54(d).

4. Neither party requests an award of attorney fees.

5. The entry of final judgment by this Court shall not prejudice the Government's right to appeal that judgment.

6. The entry of final judgment by this Court shall not prejudice either party's right to litigate future claims that may exist or arise from the Government's failure to make payments under Section 1402 of the ACA, including for benefit years 2019 and 2020.

Accordingly, the parties jointly request that this Court enter final judgment in the Stipulated Amount and consistent with these stipulations. A proposed final judgment is attached to this filing.

Dated: October 2, 2020

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

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Respectfully submitted,

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# Exhibit B

**In the United States Court of Federal Claims**

**No. 18-373 C**

**Filed: October 5, 2020**

**BLUE CROSS & BLUE  
SHIELD OF VERMONT**

**JUDGMENT**

**v.**

**THE UNITED STATES**

Pursuant to the court's Order, filed October 3, 2020, and the parties' joint motion to enter stipulated final judgment, filed October 2, 2020,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff recover of and from the United States the amount of \$7,203,738.83.

Lisa L. Reyes  
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is \$505.00.