IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BLUE CROSS & BLUE SHIELD OF VERMONT,

Plaintiff-Appellee,

v.

UNITED STATES,

Defendant-Appellant.

No. 2021-1380

OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY AFFIRMANCE

For the following reasons, plaintiff's motion for summary affirmance should be denied as premature. Instead, this Court should grant the government's pending motions to hold this appeal and the companion case, *Blue Cross & Blue Shield of North Dakota*, No. 21-1389, in abeyance pending the disposition of any petitions for a writ of certiorari filed in the related cases described below.

1. In many pending cases, insurers seek damages equal to the value of "cost-sharing reduction" (CSR) payments that were authorized by the Patient Protection and Affordable Care Act (ACA) but not funded by Congress. Beginning with the 2018 year, most insurers raised premiums for silver plans sold on Exchanges to offset the absence of CSR payments—a practice known as "silver-loading." By operation of law under the ACA, silver-loading caused a significant increase in the premium tax

credits that the government pays to insurers, because the ACA ties the amount of premium tax credits to silver-plan premiums. Two States—Vermont and North Dakota—did not allow silver-loading until the 2019 year.

2. In September 2020, this Court issued decisions in *Sanford Health Plan v. United States*, No. 19-1290; *Montana Health Co-Op v. United States*, No. 19-1302; *Community Health Choice, Inc. v. United States*, No. 19-1633; and *Maine Community Health Options v. United States*, No. 19-2102 (collectively, the "Argued Cases"). In opinions issued the same day, the panel (Dyk, Bryson, Taranto) ruled that the ACA is fairly interpreted to mandate compensation for unfunded CSR payments, *Sanford Health Plan v. United States*, 969 F.3d 1370 (Fed. Cir. 2020), but that the trial court must reduce an insurer's damages by the amount of additional premium tax credits that the insurer received due to the termination of CSR payments, *see Community Health Choice, Inc. v. United States*, 970 F.3d 1364 (Fed. Cir. 2020).

3. The plaintiffs in *Community Health Choice* and *Maine Community Health Options* filed petitions for rehearing en banc, as did the plaintiff in another related case, *Common Ground Healthcare Cooperative v. United States*, No. 20-1286. The government opposed the petitions but, with leave of this Court, filed conditional cross-petitions for rehearing en banc that urged the Court to rehear the liability ruling if it determined to rehear the damages-mitigation ruling. This Court denied the petitions for rehearing en banc.

4. The time to file petitions for a writ of certiorari in the Argued Cases and *Common Ground* has not yet elapsed. Accordingly, the government has moved to hold this appeal and the companion case, *Blue Cross & Blue Shield of North Dakota*, No. 21-1389, in abeyance pending the Supreme Court's disposition of any petitions (including conditional cross-petitions) filed in the Argued Cases or *Common Ground Healthcare Cooperative v. United States*, No. 20-1286.

5. In the companion case, counsel for Blue Cross & Blue Shield of North Dakota gave consent to the government's abeyance motion. Plaintiff does not dispute that this case is materially identical, in that both cases involve claims that concern the period before silver-loading was allowed and thus are not implicated by this Court's damages-mitigation ruling. Nor does plaintiff dispute that this case and the companion case would be implicated by Supreme Court review of this Court's liability ruling. Instead, plaintiff assumes that Supreme Court review of the damages-mitigation ruling would not entail review of the liability ruling.

There is no basis for that assumption. The liability ruling is antecedent to the question of damages mitigation. And as the government explained in its conditional cross-petitions for rehearing en banc, this Court's liability ruling is intertwined with its damages-mitigation ruling. In rejecting the government's liability argument, the Court reasoned that "there is a separate body of law that more precisely addresses the problem the government identifies." *Sanford Health Plan v. United States*, 969 F.3d 1370, 1383 (Fed. Cir. 2020)). It acknowledged the "premise of the government's

argument," which was that "the premium tax credit provision can indeed lead to partial or complete offsetting of losses from non-reimbursement of cost-sharing reductions and that the government should not in effect be charged twice" for terminating CSR payments, "once through raised premium tax credits and again through a damages award under the Tucker Act." *Id.* But the Court found it unnecessary to consider the ACA's premium tax-credits in the liability analysis because it concluded "[d]amages law deals in a more targeted way with matters such as appropriate accounting for offsets and avoidance of double recoveries, as we conclude today in *Community Health Choice, Inc. v. United States*, No. 2019-1633, and *Maine Community Health Options v. United States*, No. 2019-2102." *Id.* The Supreme Court, however, could well conclude that the ACA's premium tax-credit mechanism is reason not to infer a damages remedy in the first place. Accordingly, plaintiff's motion for summary affirmance should be denied as premature.

Respectfully submitted,

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DECEMBER 2020

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 796 words.

/s/ Alisa B. Klein
Alisa B. Klein

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2020, I electronically filed the foregoing document 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/ Alisa B. Klein
Alisa B. Klein