

**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 REPLY IN SUPPORT OF MOTION FOR  
SUMMARY AFFIRMANCE**

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). The Government does not dispute that *Sanford Health Plan* requires affirmance here. Nor does it represent that it intends to seek Supreme Court review of this Court’s decision in *Sanford*. Instead, the Government speculates that other parties may seek Supreme Court review of the Court’s damages-mitigation ruling in *Community Health Choice, Inc. v. United States*, 970 F.3d 1364 (Fed. Cir. 2020). The Court should not delay entry of a final judgment for BCBSVT based on the possibility that other parties will seek Supreme Court review of an issue that (as the Government concedes) is not part of this case.

1. Key to the Government’s opposition is what’s missing: an affirmative representation that it intends to seek Supreme Court review of *Sanford Health Plan*’s holding that the Government is liable for unpaid cost-sharing reduction (CSR)

payments. By stipulating to the judgment below, the Government acknowledged that *Sanford Health Plan* requires it to pay BCBSVT \$7,203,738.83. ECF No. 8, Ex. A, ¶¶ 1-2; Ex. B. It now asks this Court to put that liability on hold for an indefinite period of time, pending the disposition of “any” petitions or cross-petitions filed in *Sanford Health Plan*, *Community Health*, or companion cases. But the Government never says that it intends to file a petition or cross-petition that would implicate its liability in this case. Instead, its request for a stay rests on a passive-voice, double-negative assertion that “[t]here is no basis for th[e] assumption” that “Supreme Court review of the damages-mitigation ruling would not entail review of the liability ruling.” ECF No. 10, at 3.<sup>1</sup>

That is not enough to make BCBSVT wait, especially because the Government’s request here is extraordinary: it asks this Court to stay its appeal, instead of summarily affirming, even though the Government recognizes that a final decision of this Court requires entry of a \$7 million-plus judgment in BCBSVT’s favor. The request would be extraordinary even if the Government *had* affirmatively represented that it disputes liability and intends to seek Supreme Court review. A final judgment for BCBSVT should not be postponed based on nebulous assertions that petitions *might* be filed and *might* implicate liability. Perhaps the Government

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<sup>1</sup> The Government’s suggestion that this Court treated the damages-mitigation issue as “intertwined” with liability is incorrect. 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 Sanford Health Plan*, 969 F.3d at 1382-83.

is unable to decide its next steps in *Sanford Health Plan* and *Community Health* until after President-elect Biden and the new administration take office in 2021. Nonetheless, mere speculation is not grounds to defeat summary affirmance.

2. The Government does not offer any reason why a stay is more appropriate than summary affirmance. Summary affirmance avoids any burden associated with briefing or argument in this Court. And it does not change the Government's options in *Sanford* and *Community Health*. Petitions will be filed, or not, in those cases before the time for filing a petition in this case expires. If the Government has decided to press the liability issue in those other cases, it can file a petition in this case as well. And if it does not further contest liability, this case will become final—as it should.

In contrast, under the Government's approach, this case (and BCBSVT's recovery) must wait for the disposition of *any* petitions filed in *Community Health* and its companion cases, even if the Supreme Court only reviews the damages-mitigation ruling. It is not appropriate to delay a final judgment for BCBSVT, whose damages are undisputed, because of ongoing litigation regarding the damages calculations in other cases.

3. Indeed, any fair assessment of the equities strongly favors granting summary affirmance. BCBSVT's case has been pending for almost three years. It is a small nonprofit insurer that lost millions in 2017 and 2018 because the Government failed to meet its unequivocal statutory obligation to make CSR payments.<sup>2</sup> In light

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<sup>2</sup> The fact that a different party did not object to a stay in its case is irrelevant to the merits of BCBSVT's motion for summary affirmance.

of the Supreme Court's recent ruling in *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020), any possibility that the Supreme Court will review and reverse the liability ruling in *Sanford Health Plan* is vanishingly small. The Government may perceive some administrative convenience in having this case stayed rather than decided, but that is not enough to justify delaying a final decision for BCBSVT.

Dated: December 29, 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)(C) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 821 words.

/s/ Bridget Asay  
Bridget Asay

**CERTIFICATE OF SERVICE**

I hereby certify that on December 29, 2020, I electronically filed the foregoing Reply 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  
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