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

SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

The Court, in its January 7, 2019 order, has asked the parties for supplemental briefing in connection with the pending motions. ECF No. 21. The Court directed the parties to file simultaneous briefs addressing questions set forth by the Court.[1] *See id.* After the supplemental briefing order, Chief Judge Sweeney and Judge Wheeler issued multiple decisions finding the Government liable for unsatisfied CSR payments. *See Local Initiative Health Auth. v. U.S.*, No. 17-1542C, Op. & Order, ECF No. 32 (Fed. Cl. Feb. 14, 2019) (Wheeler, J.) (holding government liable on statutory and implied contract claims); *Common Ground Healthcare Coop. v. U.S.*, No. 17-877C, Op. & Order, ECF No. 48 (Fed. Cl. Feb. 15, 2019) (Sweeney, C.J.) (holding government liable on statutory claim); *Maine Community Health Options v. U.S.*, No. 17-2057C, Op. & Order, ECF No. 20 (Fed. Cl. Feb. 15, 2019) (Sweeney, C.J.) (holding government liable on statutory and implied contract claims); *Community Health Choice, Inc. v. U.S.*, No. 18-5C, ECF No. 28 (Fed. Cl. Feb. 15, 2019) (Sweeney, C.J.) (holding government liable on statutory and implied contract claims). These new decisions provide further support for BCBSVT's position and address several of the issues raised by this Court in the supplemental briefing order. They are further discussed below.

In response to the questions raised by the Court, BCBSVT makes four points below: (1) the Judgment Fund is available to satisfy a judgment in this case, and this Court has jurisdiction without regard to any particular funding source for a judgment, consistent with the government's position in *Burwell*; (2) *Greenlee County* confirms that the Government is liable for CSR payments; (3) as Judges Sweeney, Kaplan, and Wheeler have held, *Moda* supports liability here,

[1] In light of the recent partial government shutdown that affected the Department of Justice, the Court approved extending the deadline for supplemental briefs to February 22, 2019. ECF No. 25.

because Congress has not modified the ACA's unambiguous provision requiring the Government to make CSR payments; and (4) Congressional inaction cannot alter the meaning of a duly enacted statute.

ARGUMENT

I. The Judgment Fund is available to satisfy a judgment in BCBSVT's favor, and this Court has jurisdiction over BCBSVT's claims regardless of the availability of any particular funding source.

As the Court notes in its supplemental briefing order, the Government contends that BCBSVT may not recover from the Judgment Fund. *See* Def. Mot. Dis., ECF No. 14, at 18. The Government is wrong; the Judgment Fund is available to satisfy a judgment for BCBSVT here. Moreover, as the Federal Circuit has held, the Court has jurisdiction to render judgment on Tucker Act claims (like BCBSVT's) separate and apart from the availability of a particular source of funds to satisfy either the underlying obligation or a judgment. The Government's recognition in *Burwell v. United States* that insurers could sue under the Tucker Act to recover CSR payments merely confirms BCBSVT's right to recover in this case, which is consistent with and supported by longstanding precedent. The Government was right in *Burwell* and the Court should reject its about-face in this case.

A. A judgment awarded in this case would be paid from the Judgment Fund.

Congress has created and funded the Judgment Fund in order to satisfy judgments in cases like this. Except as specifically provided under the Contract Disputes Act,[2] "every final judgment rendered by the United States Court of Federal Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the Secretary of the Treasury

[2] The Government does not mention the Contract Disputes Act in its motion or its reply, let alone argue that the Act has any relevance here.

of a certification of the judgment by the clerk and chief judge of the court." 28 U.S.C. § 2517; *see* 31 U.S.C. § 1304 (appropriating "necessary amounts" to pay "final judgments, awards, and compromise settlements," where judgments are payable under, among others, 28 U.S.C. § 2517).

In other words, once this Court enters a final judgment against the United States, the Judgment Fund is available to satisfy it. *Maine Community Health*, slip op. at 19 ("judgments of this court are payable from the Judgment Fund").[3] No specific or further appropriation (or other funding source) is necessary, because the Judgment Fund is a permanent appropriation. *E.g.*, *Slattery v. United States*, 635 F.3d 1298, 1303 (Fed. Cir. 2011) (en banc). As the Federal Circuit has explained, the "purpose of the Judgment Fund was to avoid the need for specific appropriations to pay judgments awarded by the Court of Claims." *Id.* at 1317. To be sure, the availability of the Judgment Fund does not create the Government's liability. "Access to the Judgment Fund presupposes liability." *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1326 (Fed. Cir. 2018). Here, the Government's liability for timely and periodic advance CSR payments is established by the clear and unambiguous language of the Affordable Care Act. *See, e.g.*, Pls. Opp. & Cross-Mot., ECF No. 18, at 18-22 (citing 42 U.S.C. § 18071(c)(3)(A); 42 U.S.C. § 18082(c)(3); 45 C.F.R. § 156.430(b)). Indeed, the six decisions rendered by three judges of this Court to date unanimously agree on this point. Because the CSR payment provisions of the Affordable Care Act are "unambiguously mandatory," *Moda*, 892 F.3d at 1320, the Government is obligated to pay those amounts to insurers. Once adjudicated by this Court, those amounts can and will be paid out of the Judgment Fund. *See, e,g,, Maine Community*

[3] Chief Judge Sweeney issued decisions in three cases: *Maine Community Health*, *Common Ground*, and *Community Health Choice. See supra* at 1 (citing slip opinions). The analysis of the Government's liability on the statutory claim is substantially similar in each decision. For the sake of brevity, BCBSVT cites to *Maine Community Health*.

Health, slip op. at 19 ("Because plaintiff's claim arises from a statute mandating the payment of money damages in the event of its violation, the Judgment Fund is available to pay a judgment entered by the court on that claim.").

B. Consistent with *Slattery*, this Court has jurisdiction to decide BCBSVT's claims without regard to the source of funds available to fulfill the Government's underlying obligations or satisfy a judgment.

The Government's attempt to tie this Court's jurisdiction to the availability of the Judgment Fund (or any particular funding source) is misplaced for another reason: As the Federal Circuit has explained, "the jurisdictional foundation of the Tucker Act is not limited by the appropriation status of the agency's funds or the source of funds by which any judgment may be paid." *Slattery*, 635 F.3d at 1321. *Slattery* clarified that Tucker Act jurisdiction is separate from and not governed by the availability of appropriated (or other) funds to fulfill the Government's obligations or satisfy a judgment. In confirming that point, the Federal Circuit *expressly rejected* the Government's argument that the "United States cannot be sued under the Tucker Act unless there is a specific—not a general—appropriation to pay the judgment," noting that the Government's position "suggests a misunderstanding of the history of § 2517(a)." *Id.* at 1316-17, 1320. Citing *Slattery*, Chief Judge Sweeney explained that the "lack of an appropriation, standing alone, does not constrain the court's ability to entertain a claim that the government has not discharged the underlying statutory obligation or to enter judgment for the plaintiff on that claim." *Maine Community Health*, slip op. at 18.

Thus, even if there were some question about the availability of the Judgment Fund here—and there is not—it would not affect this Court's power to decide BCBSVT's claims. "Absent specific statutory provision addressing jurisdiction, Tucker Act jurisdiction is not affected by how the agency meets its obligations or how any judgment establishing those

obligations is satisfied." *Slattery*, 635 F.3d at 1318; *see also Nat'l Ass'n of Reg'l Councils v. Costle,* 564 F.2d 583, 590 (D.C. Cir. 1977) (observing that "courts do not deal with questions of appropriations at all"; their "sole purpose with respect to the claims against the Government over which Congress has given them jurisdiction is to adjudicate the legal liability of the United States").

This fundamental principle has deep roots in this Court's jurisprudence, dating back to the nineteenth century. *See Collins v. United States*, 15 Ct. Cl. 22, 35–36 (1879) ("This court, established for the sole purpose of investigating claims against the government, does not deal with questions of appropriations, but with the legal liabilities incurred by the United States under contracts, express or implied, the laws of Congress, or the regulations of the executive departments."). Consistent with this principle's recent articulations in *Slattery*, *Moda*, and *Maine Community Health*, the relevant jurisdictional inquiry is not whether BCBSVT has recourse to the Judgment Fund, but whether BCBSVT has alleged "claims against the Government over which Congress has given [this Court] jurisdiction to adjudicate the legal liability of the United States." *Costle*, 564 F.2d at 590. BCBSVT has unquestionably done so by seeking damages for violations of money-mandating statutory provisions, an implied-in-fact contract, and the U.S. Constitution. *See* ECF No. 18 at 17-18. This Court's jurisdiction is clear, regardless of how the Government's obligations will ultimately be satisfied.

C. The Government correctly recognized in *Burwell* that insurers could recover unsatisfied CSR payments in this Court.

As the Court's supplemental briefing order notes, the Government's position in this case "is inconsistent with [its] position in prior litigation involving the United States Department of Justice in *United States House of Representatives v. Burwell et al.*, 185 F. Supp. 3d 165, 174 (D.D.C. 2016), *appeal dismissed*, Case No. 16-5202 (D.C. Cir. May 16, 2018)." ECF No. 21, at

1. In *Burwell*, the Department of Justice defended the Government's practice (at that time) of making the advance CSR payments required by the Affordable Care Act. The Government repeatedly pointed to the risk that, if CSR payments stopped, insurers would file suit under the Tucker Act and recover the unpaid CSR amounts from the Judgment Fund. *E.g.*, ECF No. 18, at 8 (collecting cites). And the Government recognized, contrary to its position here, that the absence of an appropriation does not preclude recovery under the Tucker Act:

> But courts have held that the absence of an appropriation does not necessarily preclude recovery from the Judgment Fund (31 U.S.C. § 1304) in a Tucker Act suit. *See, e.g.*, *Greenlee Cty. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007) ("It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute.") (citation omitted). The House does not explain how, given this precedent, the government could avoid Tucker Act litigation by insurers in the wake of a ruling that the ACA did not permanently fund the cost-sharing reduction payments that the Act directs the government to make.

ECF No. 18-1, App. 279. *See also id.* at 299 (arguing to D.C. Circuit that the "district court's order also could expose the United States to damages actions by insurers under the Tucker Act, based on the statutory requirement that the government compensate insurers for cost-sharing reductions"); *Maine Community Health*, slip op. at 19 n.19 (noting that Government in *Burwell* "acknowledged th[e] possibility" of insurers recovering from the Judgment Fund).

The *Burwell* litigation was a prominent, high-profile dispute between the Administration and the House of Representatives, in which the Tucker Act's application was no minor point: the Government was acknowledging, albeit in careful language, the risk of substantial liability in potential future litigation. That is an extraordinary step for any litigant, much less the Government. There can be no serious doubt that the Government's position on this issue in *Burwell* was given serious and deliberate consideration and authorized at the highest levels of the Department of Justice. *Cf.* ECF No. 12, at 2 (Government's assertion in this case that, given

"breadth, complexity, and potential financial impact of the CSR cases," determination of legal positions "necessarily involves scrutiny within and among the highest levels of the Department of Justice").

Accordingly, this Court should give substantial weight to the Government's position in *Burwell*. BCBSVT does not contend that the Government is judicially estopped from changing its position.[4] But the fact that the Government viewed the likelihood of Tucker Act liability as relevant to both its decision to make CSR payments and its litigation defense—and openly acknowledged its potential liability in multiple high-profile court filings—confirms BCBSVT's position. Indeed, the Government's position in *Burwell* is consistent with longstanding and settled precedent, dating back at least to the late 1800's, *see United States v. Langston*, 118 U.S. 389, 394 (1886); *Collins*, 15 Ct. Cl. at 35–36, and recently reaffirmed by the Federal Circuit. *See Moda*, 892 F.3d at 1322. The current Administration may disagree with that law, but that *is* the law, and it is dispositive here.

II. *Greenlee County* confirms that the lack of a CSR-specific appropriation does not defeat the Government's unambiguous obligation to make CSR payments.

The Federal Circuit's decision in *Greenlee County* and this Court's related decision in *Kane Cty., Utah v. United States*, 135 Fed. Cl. 632 (2017) both confirm that the mere absence of an appropriation does not alter or undermine a statutory obligation to pay.

In *Greenlee County*, the Federal Circuit addressed claims by municipalities seeking full payment under the Payment in Lieu of Taxes Act (PILT). *Greenlee Cty. v. United States*, 487

[4] *See, e.g., New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (judicial estoppel applies where a party "assumes a certain position in a legal proceeding, and succeeds in maintaining that position" (quotation omitted)).

F.3d 871, 873 (Fed. Cir. 2007) (citing 31 U.S.C. § 6901 et seq.). PILT required the Secretary of the Interior to make annual payments to certain local governments as compensation for the loss of tax revenues attributed to federal lands. *Id.* The statute provided a formula for these payments but also stated that: "'Amounts are available only as provided in appropriation laws.'" *Id.* at 874 (quoting then-current 31 U.S.C. § 6906). The Department of Interior by rule proportionally reduced PILT payments when appropriations were insufficient. The plaintiff, Greenlee County, sued after its PILT payments fell short of full funding for several years. *Id.* at 874.

The Federal Circuit rejected the county's claim for additional PILT payments—but the Court's reasoning fully supports a different result here. The critical point in *Greenlee County* was that the statute expressly limited the Government's payment obligation based on appropriations. The Federal Circuit concluded that the reference to amounts "available only as provided in appropriations laws" was sufficient to "limit[] the government's liability under PILT to the amount appropriated by Congress." *Id.* at 878. The Court distinguished *New York Airways, Inc. v. United States*, 369 F.2d 743, 745 (Ct. Cl. 1966), which held that language requiring payments to be made "out of appropriations made . . . for that purpose" did not cap liability. The Court held that the *New York Airways* language was "markedly different" because it did not "limit the availability of funds to those appropriations." *Greenlee County*, 487 F.3d at 879.

Here, Congress did not limit the Government's obligation for CSR payments to appropriated funds. *Greenlee County* confirms that, absent such limiting language in statute, the mere failure to appropriate funds does not obviate the Government's obligation, and that the statutory right to payment is enforceable in this Court. *Id.* at 877 ("Rather than limiting the government's obligation, a 'failure [of Congress] to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but

such rights [remain] enforceable in the Court of Claims.'" (quoting *N.Y. Airways*, 369 F.2d at 748)); *see also Collins*, 15 Ct. Cl. at 35 ("The liability, however, exists independently of the appropriation, and may be enforced by proceedings in this court.").

This Court's decisions construing more recent versions of the PILT statute bolster BCBSVT's position. *Kane Cty. v. United States ("Kane II")*, 136 Fed. Cl. 644 (2018); *Kane Cty., Utah v. United States ("Kane I")*, 135 Fed. Cl. 632 (2017). As *Kane I* explains, Congress amended the PILT statute in 2008 to remove the language restricting payments to amounts available in appropriations laws. For several years, the program was fully funded and the statute specifically provided that local governments "shall be entitled to payment." *Kane I*, 135 Fed. Cl. at 633. For FY 2015 and 2016, the latter language lapsed and Congress did not appropriate sufficient funds to pay local governments as prescribed in the statutory formula. *Id.* at 634-35. This Court held, in contrast to *Greenlee County*, that in its current form the PILT statute established an obligation to pay the full amount due under the formula. As the Court observed, the PILT statute had "been amended to remove the limiting language that was pivotal" to the Federal Circuit's decision in *Greenlee County*. *Id.* at 637. Although the "shall be entitled" language had lapsed, "there was no longer *any* language in the PILT Act (as there was before 2008) that "restrict[s] the government's liability or limit[s] its contractual authority to the amount appropriated by Congress." *Id.* (quoting *Greenlee Cty.*, 487 F.3d at 878). Nothing in the PILT statute or appropriations acts restricted the Government's statutory payment obligation. *Id.* at 637-38.

In *Kane II*, this Court similarly found that the Government was obligated to make full payments for FY 2017. The primary difference in the FY 2017 Appropriations Act was new language in an administrative section of the bill "provid[ing] that 'in the event the sums

appropriated for any fiscal year for payments pursuant to [the PILT Act] are less than the full payments to all units of local government, then the payment to each local government shall be made proportionally.'" *Kane II*, 136 Fed. Cl. at 647. The Court found that this language was not sufficient to modify the statutory entitlement to full payment. The administrative provision, the Court concluded, "addresse[d] the potential problem in administering the PILT program where there is an unintentional shortfall in appropriations." *Id.* at 649. It did not "explicitly cap or partially repeal the government's PILT Act obligations for FY 2017," nor "clearly imply or manifest such an intent." *Id.* at 652.

The holdings in *Greenlee County*, *Kane I,* and *Kane II* confirm that a mere failure by Congress to specifically appropriate funds for CSR payments in no way alters the Government's statutory obligation for those payments. The recent decisions from Chief Judge Sweeney and Judge Wheeler, along with the decisions by Judge Kaplan discussed in BCBSVT's earlier briefing, reach the same conclusion: the absence of a specific appropriation for CSR payments has no bearing on the Govern7ment's liability. *See Maine Community Health*, slip op. at 13-18 (holding that lack of specific appropriation for CSR payments neither forecloses government's liability nor prevents insurers from recovering in Court of Claims); *Local Initiative*, slip op. at 12-13 (holding that bare failure to appropriate funds does not affect statutory obligation).

Greenlee County and *Kane County I & II* also demonstrate that the difference—flagged by the Court in its second question in the supplemental briefing order—between an inadequate appropriation and the absence of a specific appropriation does affect the Government's statutory obligation to pay. *Moda's* two-step analysis confirms this conclusion: after concluding that the "shall pay" language in the risk-corridors statute created an obligation to pay regardless of appropriations, the court moved on to consider whether "Congress has suspended or repealed

that obligation." *See Moda*, 892 F.3d at 1322. In other words, *Moda* and *Greenlee County* make clear that if a statute creates a mandatory obligation to pay, that obligation remains even if no funds (or insufficient funds) are appropriated to satisfy it, unless Congress clearly manifested its intent to alter or suspend the obligation to pay. *See, e.g.*, *Greenlee Cty*., 487 F.3d at 877 (a "mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute" (quotation omitted)); *N.Y. Airways*, 369 F.2d at 748 ("It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute."). Consistent with this precedent, Chief Judge Sweeney rejected the Government's argument that Congress's "complete failure to appropriate funds" somehow suspended the statutory obligation to make CSR payments. *Maine Community Health*, slip op. at 16. The fact that Congress may have under-appropriated or failed to appropriate only affects a specific agency's ability to access particular funds, but it does not reduce or relieve the Government's underlying obligation.

Finally, *Slattery* underscores this point. There, the Government argued that this Court did not have jurisdiction over claims against federal agencies, known as "non-appropriated fund instrumentalities" or "NAFI," that receive no appropriations. 635 F.3d at 1300, 1311. The Government took the position that, in the absence of any appropriation, claims against NAFIs (there, the FDIC) could not be paid out of the Judgment Fund. *Id.* at 1316-17. The Federal Circuit rejected that position, holding that "the jurisdictional foundation of the Tucker Act is not limited by the appropriation status of the agency's funds or the source of funds by which any judgment may be paid." *Id.* at 1321. If the absence of *any* appropriation whatsoever for a NAFI

does not reduce or alter the Government's liability, then certainly the absence of an express appropriation here cannot relieve the Government's obligation created by Section 1402's clear money-mandating language.

In sum, settled precedent from *Collins* through *Greenlee County* and *Slattery* to *Moda* uniformly confirms BCBSVT's position. Accordingly, this Court should hold, as have three other judges of this Court, that any lack of appropriated funds is "irrelevant" to whether the CSR payment obligation is "enforceable in this court." *Montana Health Co-Op v. U.S.*, 139 Fed. Cl. 213, 219 (2018); *see also Maine Community Health*, slip op. at 18 ("the lack of a specific appropriation for cost-sharing reduction payments does not preclude" insurers from recovering amount in this Court); *Local Initiative*, slip op. at 13 ("Section 1402's mandate to pay QHPs for their CSR related expenses therefore remains intact.").

III. Because Congress has not modified the payment obligation set forth in Section 1402, *Moda* requires a finding of liability against the Government.

Congress has not enacted any appropriations riders or other legislation that modifies the mandatory payment obligation established by 42 U.S.C. § 18071(c)(3)(A) and 42 U.S.C. § 18082(c)(3).[5] Indeed, the Government made the payments for years, relying on the ACA's permanent appropriation as authority. *E.g.*, ECF 18-1, App. 11. When the Government

[5] The Congressional Research Service has issued two reports detailing ACA-related legislation, including ACA-related provisions in appropriations acts. They confirm that Congress has not adopted appropriations riders limit funding for CSR payments or otherwise rescinded or modified the payment obligation set forth in § 1402. *See* C. Stephen Redhead and Janet Kinzer, Congressional Research Service, *Legislative Actions in the 112th, 113th, and 114th Congresses to Repeal, Defund, or Delay the Affordable Care Act*, at 10 (Table 1, Enacted Legislation) (Feb. 7, 2017), *available at* https://fas.org/sgp/crs/misc/R43289.pdf; C. Stephen Redhead and Ada S. Cornell, Congressional Research Service, *Use of the Annual Appropriations Process to Block Implementation of the Affordable Care Act (FY2011-FY2017)*, at 6 (describing ACA limitations proposed by House appropriators that were not included in final appropriations legislation); *id.* at 9-20 (Table I, ACA-Related Provisions in Appropriations Acts, FY2011-FY2017), *available at* https://fas.org/sgp/crs/misc/R44100.pdf.

terminated CSR payments in October 2017, it asserted only its newfound view that the permanent appropriation in 31 U.S.C. § 1324 was not available to fund CSR payments. ECF 18-1, App. 161, 162, 164. The Attorney General's memorandum did not point to any affirmative restriction on payments. *See id.* Nor has the Government identified any such legislation in its briefing in this case, or in any of the other pending CSR cases.

Indeed, Chief Judge Sweeney held in all three recent decisions that it was "undisputed" that "Congress has never (1) expressly prevented—in an appropriations act or otherwise—the Secretary of HHS or the Treasury Secretary from expending funds to make cost-sharing reduction payments or (2) amended the Affordable Care Act to eliminate the cost-sharing reduction payment obligation." *Maine Community Health*, slip op. at 6; *Community Health*, slip op. at 6; *Common Ground*, slip op. at 4. As Chief Judge Sweeney points out, the Government "does not contend that any appropriations acts—or, indeed, any statutes at all—enacted after the Affordable Care Act contain language that 'expressly or by clear implication' modifies or repeals the Act's cost-sharing reduction payment obligation." *E.g., Maine Community Health*, slip op. at 16. Judge Kaplan and Judge Wheeler likewise note that Congress has not taken any action to alter the payment obligation established by § 1402. *See, e.g., Montana Health Co-Op,* 139 Fed. Cl. at 220 ("In this case, there was no relevant congressional action taken at all after the passage of the ACA. There have been no appropriations bills enacted that make reference to § 1402."); *Sanford Health Plan v. United States*, 139 Fed. Cl. 701, 708 (2018) (same); *Local Initiative*, slip op. at 13 ("Congress has not acted at all here; it passed no bills or riders appropriating funds or limiting appropriations for the CSR program. . . . There has been no indication from Congress that it intended an about-face as to its originally intended obligation.").

There is simply no dispute on this point: Congress has never rescinded or altered § 1402's payment obligation. Therefore, as Judges Sweeney, Kaplan, and Wheeler have held, the Federal Circuit's reasoning in *Moda* requires a finding of liability against the Government. That is so for at least three reasons.

First, *Moda* confirms that § 1402 of the ACA creates a mandatory payment obligation. There, the Federal Circuit deemed the "shall pay" language in the risk corridors statute to be "unambiguously mandatory." 892 F.3d at 1320. Section 1402 likewise contains mandatory payment language. 42 U.S.C.A. § 18071(c)(3) ("the Secretary shall make periodic and timely payments"). In holding that the risk-corridors statute created an obligation to pay, the *Moda* Court focused on its plain and unambiguous language and rejected the Government's efforts to look elsewhere (including other provisions of the ACA and legislative history) for a contrary intent. *Id.* at 1320. The Court also rejected the Government's emphasis on the lack of budgetary authority or appropriations, holding that "it has long been the law that the government may incur a debt independent of an appropriation to satisfy that debt, at least in certain circumstances." 892 F.3d at 1321. Consistent with *Moda*, the "plain language" of § 1402 controls and "create[s] an obligation of the government to pay." *Id.* at 1322.

Second, *Moda* also confirms that Congress's mere inaction does not alter or rescind that obligation. With respect to risk-corridor payments, the Court held that subsequent "appropriations riders carried the clear implication of Congress's intent to prevent the use of taxpayer funds to support the risk corridors program." *Moda*, 892 F.3d at 1329. Those appropriations riders expressly addressed funding for the risk corridor program. *See id.* at 1318 (discussing appropriations rider which prohibited use of certain appropriated funds for risk corridor program); *id.* at 1325 (noting that Congress "cut off the sole source of funding identified

beyond payments in"). The Court then reviewed a series of decisions finding similar appropriations riders sufficient to suspend or rescind a payment obligation. In each of those cases, the appropriations language expressly limited funding for a particular purpose or program. *See id.* at 1323-24 (distinguishing *Langston's* "mere failure to appropriate" from those cases "wherein appropriations bills carried sufficient implication of repeal, amendment, or suspension of substantive law to effect that purpose"). The key takeaway: Congress must *act* to suspend or rescind a statutory obligation. *See id.* at 1323 (noting that "central issue" is "whether the appropriations riders adequately expressed Congress's intent to suspend payments on the risk corridors program beyond the sum of payments in").

Third¸ *Moda's* discussion of *New York Airways* highlights a critical distinction between this case and *Moda.* The Court distinguished *New York Airways* (which "held that Congress's failure to appropriate sufficient funds to pay for services at a rate set by a government agency did not defeat the obligation to pay the full amount") in part because the helicopter subsidies at issue were not an "incentive program" but rather a "quid pro quo exchange for services rendered." *Id.* at 1327. Just so here. CSR payments compensate insurers for administering a government benefit program. As Judge Wheeler has explained, the Government chose to distribute CSR benefits "by asking insurers to act as conduits for payment of certain eligible insureds' out-of-pocket healthcare costs" and "guaranteed" that it would cover insurers' costs for doing so. *Local Initiative*, slip op. at 17. "There is, undoubtedly, a traditional quid pro quo exchange in that transaction." *Id.*; *see also Maine Community Health*, slip op. at 22 (applying *Moda* and holding

that "the cost-sharing reduction program is less of an incentive program and more of a quid pro quo").[6]

Consistent with *Moda* and the six unanimous CSR decisions rendered by this Court to date, this Court should hold the Government liable for unsatisfied CSR payments BCBSVT has incurred by playing its statutory role in administering the ACA's cost-sharing reduction benefit.

IV. Congressional inaction cannot alter the meaning of a duly enacted statute.

The absence of an express appropriation for CSR payments does not and cannot repeal or modify § 1402.[7] As explained above, where a statute establishes a mandatory payment obligation, controlling precedent requires further affirmative Congressional action to rescind or modify that obligation. *See also Belknap v. United States*, 150 U.S. 588, 594 (1893) (Congress's "mere failure to appropriate" is "not, in and of itself alone, sufficient to repeal the prior act"). Congressional silence cannot alter an obligation created by law. *Moda* reiterated that Congressional action is required to alter or rescind a statutory obligation. 892 F.3d at 1321-22 ("'It has long been established that the mere failure of Congress to appropriate funds, *without further words modifying or repealing, expressly or by clear implication*, the substantive law, does not in and of itself defeat a Government obligation created by statute.'" (quoting *N.Y. Airways*, 369 F.2d at 748 (Ct. Cl. 1966)) (emphasis added).

[6] This reasoning also provides further support for BCBSVT's contract claim. *See* ECF No. 18, at 27-33; *Local Initiative*, slip op. at 15-20 (finding Government liable for CSR payments on implied contract theory); *Maine Community Health*, slip op. at 20-26 (same). Although *Local Initiative* rejected the insurer's takings claim, it based that decision on its holding that the insurer could recover for breach of contract. *Local Initiative*, slip op. at 22.

[7] As noted in its prior briefing, BCBSVT does not concede that Congress has failed to appropriate funds for CSR payments. BCBSVT agrees with the Government's position in *Burwell* that CSR payments are authorized by the ACA's permanent appropriation, codified at 31 U.S.C. § 1324. *See* ECF No. 18, at 25-27 (preserving this issue and citing Government's *Burwell* briefs). BCBSVT reserves the right to assert this as an additional basis for recovery.

That conclusion is buttressed by bedrock principles of statutory interpretation. Congress legislates only through bills duly enacted by both chambers and signed by the President. *E.g.*, *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994). As the Supreme Court has repeatedly held, "'Congressional inaction cannot amend a duly enacted statute.'" *Id.* (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 175, n. 1 (1989)).

The closest the Supreme Court has come to relying on Congressional "silence" is in so-called ratification cases, which have no bearing here. In those cases, the Court has occasionally found the implied ratification of judicial constructions of a statute where Congress readopts or comprehensively amends a statute without changing the relevant provisions underlying the judicial construction. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982) (fact that Congress conducted "comprehensive reexamination and significant amendment" that "left intact" provisions under which courts had implied a right of action was "evidence that Congress affirmatively intended to preserve that remedy"). In those cases, however, Congress acted by amending or re-enacting subsequent legislation with knowledge of that legal context. *See id.*; *Cent. Bank*, 511 U.S. at 185 ("When Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language."). And even in those cases, the Court has been increasingly skeptical of attributing weight to Congressional silence. *See Cent. Bank*, 511 U.S. at 187 (arguments based on congressional inaction "deserve little weight in the interpretive process"); *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (same).

Beyond the fundamental constitutional requirement that laws be duly enacted, the Supreme Court has also explained the practical hazard of attempting to infer intent from inaction:

the failure to act is inherently ambiguous. As the Court observed in *Central Bank*, "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." 511 U.S. at 187; *United States v. Craft*, 535 U.S. 274, 287 (2002) (same). Congressional silence can have multiple meanings and there is no reliable guide for courts to choose among them.

This case illustrates that point perfectly. Section 1402 requires insurers to provide cost-sharing reductions and mandates that the Government pay insurers (in advance) for the cost of doing so, *not* that insurers both administer *and* pay for the CSR program. Yet the Government takes the position that, absent an express appropriation, the Government's statutory obligation to make advance CSR payments is rescinded—but the requirement that insurers provide cost-sharing reductions *remains in effect.* The Government is simply re-writing § 1402 to impose a financial burden on insurers that Congress chose not to impose.

At the same time, the Government ignores other aspects of the legislative record that contradict its interpretation. For one thing, Congress knew that the Obama Administration relied on the ACA's permanent appropriation to make CSR payments; the House of Representatives was fighting that practice in court in *Burwell*. Against that background, Congress understood that an express restriction was needed to stop the payments. As Chief Judge Sweeney observed, congressional inaction here "may be interpreted, contrary to [the Government's] contention, as a decision *not* to suspend or terminate the government's cost-sharing reduction payment obligation." *Maine Community Health*, slip op. at 16-17.

In any event, the fact that Congress has never passed such an appropriations rider (or taken any other action) reflecting intent to saddle insurers with the Government's obligation to fund the CSR benefit means there have not been enough votes in Congress to support that

outcome. Indeed, multiple measures to repeal or defund the ACA have failed in Congress.[8] The House of Representatives repeatedly proposed limiting language in appropriations acts that was not adopted.[9] In 2014, a dispute over ACA funding in a continuing resolution led to a partial government shutdown.[10] And in 2016, President Obama vetoed a bill that would have repealed altogether the ACA's premium subsidies and cost-sharing reductions.[11] Against this backdrop, there is no way to interpret Congress's inaction as evidence that it actually intended to alter the clear obligation it placed on the Government when it enacted the CSR program.

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.

[8] Redhead & Kinzer, *supra* n.5, at 1 ("Since the ACA's enactment, lawmakers opposed to specific provisions in the ACA or the entire law have repeatedly debated its implementation and considered bills to repeal, defund, delay, or otherwise amend the law."); *id.* at 14-20 (summarizing ACA-related provisions that passed House) (Feb. 7, 2017).
[9] Redhead & Cornell, *supra* n.5, at 6 (noting that "House appropriators on multiple occasions have added language prohibiting an agency from using any of the funds for ACA implementation activities"; these limitations provisions were not included in final appropriations acts).
[10] *Id.* at 5 (explaining that House tried three times to add language to continuing resolution for FY2014 "to defund or delay ACA Implementation" and Senate rejected it, resulting in 16-day partial government shutdown in October 2014).
[11] Redhead & Kinzer, *supra* n.5, at 6 (describing H.R. 3762, passed January 6, 2016 and vetoed on January 8, 2016; override attempt failed February 2, 2016).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 22, 2019, I filed a copy of the attached Supplemental Brief in Support of Plaintiff's Cross-Motion for Summary Judgment and in Opposition to Defendant's Motion to Dismiss 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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