Case No. 18-373 C
(Judge Horn)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS & BLUE SHIELD OF VERMONT,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S MOTION TO DISMISS

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MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully requests that the Court dismiss the complaint of plaintiff, Blue Cross & Blue Shield of Vermont. Plaintiff's complaint fails to state a claim upon which relief can be granted.

INTRODUCTION

The Patient Protection and Affordable Care Act (ACA) established two programs to lower the cost of health coverage offered through the Exchanges. Section 1401 of the ACA authorizes a premium tax credit for eligible taxpayers and funded the program by amending a preexisting permanent appropriation for tax credits. Section 1402 of the ACA requires insurance issuers to reduce cost sharing (such as deductibles and co-payments) for eligible insureds, and further provides that the Secretary of Health & Human Services (HHS) shall make payments to issuers equal to the value of the cost-sharing reductions issuers provide on behalf of their eligible insureds. In contrast to Section 1401, however, Section 1402 does not appropriate funds for cost-sharing reduction (CSR) payments to issuers.

Plaintiff seeks damages for HHS's failure to make CSR payments. Plaintiff alleges that it is entitled to damages under Section 1402 itself or, alternatively, for breach of contract. Plaintiff

also alleges that HHS's failure to make CSR payments is a Fifth Amendment taking. None of these claims has merit.

Section 1402 does not provide a damages remedy. Thus, as the Supreme Court has explained, the controlling legal question is whether Congress intended a cause of action that it did not expressly provide. *See Bowen v. Massachusetts*, 487 U.S. 879, 905 n.42 (1988). Here, there is no basis to conclude that Congress intended to provide a damages cause of action for issuers that do not receive CSR payments as the direct result of Congress's decision not to fund such payments. The contrast between Section 1401 and Section 1402 of the ACA shows that Congress deliberately chose not to provide a permanent appropriation for CSR payments, and instead opted to leave those payments to the annual appropriations process. Given that clear congressional choice, it is implausible to claim, as plaintiff does, that Congress nonetheless intended to permanently fund the CSR payments through the cumbersome backdoor method of authorizing issuers to seek damages as a "remedy" for Congress's own decision not to fund CSR payments in annual appropriations bills. If Congress had intended to permanently fund CSR payments, it would have simply done so.

Although Congress did not fund CSR payments, the structure of the ACA allows issuers to recoup their cost-sharing reduction expenses by raising premiums. Such premium increases, in turn, enable issuers to receive increased advance payments of the premium tax credits. Indeed, for 2018, the Government is expected to pay more as a result of increased premium tax credits than the amounts foregone in CSR payments. *See California v. Trump*, 267 F. Supp. 3d 1119, 1139 (N.D. Cal. 2017). Any contention that Congress intended to allow issuers to obtain more than double payment of an amount for which it has never appropriated any money—once

in the form of increased premium tax credits and again in the form of damages—defies common sense and would undermine Congress's constitutional control over appropriations.

Plaintiff's implied-in-fact contract claim is equally unavailing. Absent clear indication to the contrary, a statute may not be read to bind the Government in contract. Section 1402 does not use the language of contract, so plaintiff's attempt to derive a contract from the statutory text fails. HHS does not have authority to enter into contracts for CSR payments and did not purport to do so. Because plaintiff's contract claim is meritless, its dependent claim of a breach of the implied covenant of good faith and fair dealing fails as well. Plaintiff's takings claim fails because it has no cognizable property right to CSR payments.

Because plaintiff's statutory, contract, and takings claims fail as a matter of law, the complaint must be dismissed.

QUESTIONS PRESENTED

1. Whether plaintiff's statutory claim fails as a matter of law because Congress did not authorize damages as a remedy for Congress's own decision not to fund CSR payments.

2. Whether plaintiff's implied-in-fact contract claim fails as a matter of law because Congress did not create private contractual rights to CSR payments or authorize HHS to do so.

3. Whether plaintiff's claim for a breach of the implied covenant of good faith and fair dealing fails as a matter of law because no contract exists between the United States and plaintiff for the payment of CSRs.

4. Whether plaintiff's claim for just compensation under the Fifth Amendment to the United States Constitution fails as a matter of law because plaintiff does not possess a legally cognizable property right to receive CSR payments.

STATEMENT OF THE CASE

I. The Affordable Care Act

In 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (collectively, the ACA), which enables individuals and small businesses to purchase health insurance through marketplaces called Exchanges. Each state and the District of Columbia has an Exchange on which health insurance issuers offer qualified health plans (QHPs) in the individual and small group markets.

The ACA classifies plans offered on the Exchanges into four "metal" levels based on how much of the expected cost of medical care the issuer will bear. 42 U.S.C. § 18022(d).[1] A "silver" plan is structured so that the issuer on average is expected to pay 70 percent of the average enrollee's health care expenses, leaving the enrollee expected to be responsible for the other 30 percent through cost-sharing charges such as co-payments, coinsurance, and deductibles. *Id*. In a "gold" or "platinum" plan, the issuer will bear a greater portion of health care expenses, while the issuer will be responsible for a lower portion of the enrollee's expenses in a "bronze" plan. *Id.*

The ACA establishes, as relevant here, two programs to lower the cost to insureds of qualified health plans (QHPs) offered through the Exchanges. The first is a premium tax credit. In Section 1401 of the ACA, Congress added a new provision to the Internal Revenue Code authorizing a refundable tax credit to subsidize health insurance premiums for eligible taxpayers with household incomes between 100 and 400 percent of the Federal poverty level. *See* 26

[1] "Catastrophic plans," which do not have a specified level of the expected cost of medical care the issuer will bear, are also available to certain consumers in the individual market Exchanges.

U.S.C. § 36B. The amount of the premium tax credit generally is based on the price of the second-lowest-cost silver plan available to the taxpayer on the Exchange, as well as on his or her household income. *See id*. Thus, if premiums for the second-lowest-cost silver plans increase, the premium tax credits increase by a corresponding amount. And in the ACA, Congress also amended the permanent appropriation for tax refunds to extend to § 36B's premium tax credit, thus ensuring this program would always be funded. *See* 31 U.S.C. § 1324(b)(2).

The second program Congress enacted was the CSR requirement for issuers. Section 1402 of the ACA requires issuers to reduce the amount of co-payments, deductibles, and other cost-sharing requirements for eligible insureds who are enrolled in "silver-level" health plans in the individual market on ACA Exchanges. *See* ACA § 1402 (*codified at* 42 U.S.C. § 18071). Section 1402 also authorizes the Government to make payments to issuers for these amounts, stating that the Secretary of HHS "shall make periodic and timely payments to the issuer equal to the value of the reductions." *Id*. § 1402(c)(3)(A). Unlike its treatment of premium tax credits, however, the ACA does not appropriate funds to make CSR payments to issuers.

It is the issuer's responsibility to "ensure that an individual . . . pays only the cost sharing required," and the reduction "must be applied when the cost sharing is collected" from the individual. 45 C.F.R. § 156.410(a). Assuming the CSR program is funded, CSR payments are claimed by and paid to the issuers directly. The regulations provide that issuers will receive periodic advance payments to cover projected CSR amounts, 45 C.F.R. § 156.430(b), and must thereafter submit information "in the manner and timeframe established by HHS" concerning the actual CSRs provided to insureds, which HHS uses to perform periodic reconciliations. 45 C.F.R. § 156.430(c)-(d).

Although CSRs and premium tax credits are funded differently, the requirement that issuers reduce cost sharing for eligible insureds can impact premiums (and thus premium tax credits). As noted above, plans listed on an Exchange are grouped into metal tiers based on the actuarial value of the plan. The actuarial value in this context refers to the percentage of health care costs for which the issuer is responsible, with the insured responsible for the remaining costs. The actuarial value of the plan determines the plan's metal tier on the Exchange. For instance, silver plans have an actuarial value of 70 percent, meaning that those plans cover 70 percent of an eligible insured's expected health care costs.

Under the ACA, the amount of premium tax credits is based on the price of the second-lowest-priced silver plan available to the insured, *i.e.*, the second-lowest-priced plan designed to cover 70 percent of his or her expected health care costs. *See* 26 U.S.C. § 36B. Cost-sharing reductions provided by issuers for eligible insureds increase the actuarial value of silver plans. *See* ACA § 1402(c) (*codified at* 42 U.S.C. § 18071(c)); 45 C.F.R. § 156.420(a). For instance, as a result of reduced cost sharing, an eligible insured with a household income between 100 and 150 percent of the Federal poverty level will see the issuer's share of his or her expected health care costs under a silver plan increase from 70 percent up to 94 percent, leaving the individual expected to pay only 6 percent of his or her costs.[2] *See* 45 C.F.R. § 156.420(a)(1). An eligible insured with household income between 150 and 200 percent of the Federal poverty level will be able to obtain a silver plan under which the reduced cost sharing will increase the actuarial value of those plans from 70 to 87 percent. *Id*. at § 156.420(a)(2). The ACA and its current implementing regulations give issuers the flexibility—if otherwise permitted by state

[2] In other words, the CSRs increase the actuarial value of the plan from 70 percent to 94 percent.

regulators—to increase premiums to account for a plan's higher actuarial value and cost-sharing design. *See* 45 C.F.R. § 156.80(d)(2)(i).

II. The ACA Permanently Appropriated Funding For Premium Tax Credits But Did Not Permanently Appropriate Funding For CSR Payments

Although the ACA authorizes both the premium tax credit program and the CSR program (as well as advance payment of amounts arising from these programs under Section 1412 of the ACA), the ACA provides funding for the premium tax credits only. A provision that long predates the ACA provides a permanent appropriation to Treasury "for refunding internal revenue collections," including refunds due from certain enumerated tax credits. *See* 31 U.S.C. § 1324. The ACA amends this provision by adding a reference to Internal Revenue Code § 36B—ACA § 1401's tax credit—to the list of tax expenditures for which this provision permanently appropriates funding. *See* Pub. L. 111-148, 124 Stat. 119, 213 (2010); 31 U.S.C. § 1324(b)(2).

The ACA does not, however, add the CSR program (which is not a tax program) to that permanent appropriation for tax refunds, or otherwise appropriate money for that program. Instead, it leaves CSR payments (like most Government programs) to be funded via the regular appropriations process through which Congress generally funds (or does not fund) Government programs in annual appropriations acts.

The prior Administration requested an appropriation in the annual appropriations act for CSR payments for fiscal year 2014, the first year of the CSR program, but Congress did not provide one. *See United States House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 173-74 (D.D.C. 2016). In January 2014, the Government nonetheless began making monthly advance CSR payments to issuers out of Section 1324's permanent appropriation for tax refunds. That prompted a lawsuit by the House of Representatives seeking to enjoin CSR payments on the

ground that the ACA did not appropriate money for those payments. In May 2016, the district court ruled in favor of the House and held that the ACA had not appropriated funding for CSR payments. The court enjoined further payments but stayed the injunction pending appeal. *See House of Representatives*, 185 F. Supp. 3d at 189.

The current Administration subsequently determined that there is no appropriation for CSR payments. In October 2017, in response to an inquiry from the Departments of Treasury and HHS, the Attorney General concluded "that the best interpretation of the law is that the permanent appropriation for 'refunding internal revenue collections,' 31 U.S.C. § 1324, cannot be used to fund the CSR payments to issuers authorized by 42 U.S.C. § 18071." Attorney General Letter at 1 (Oct. 11, 2017). The Attorney General explained in his letter that it would make little sense to conclude that the permanent appropriation for tax refunds could be used to fund a non-tax program like CSRs:

> [W]hile the two payment provisions [premium tax credits and CSRs] appear sequentially within the ACA, only the section 1401 tax credits are included in the Internal Revenue Code (consistent with their status as tax credits for taxpayers). It is logical that the permanent appropriation in 31 U.S.C. § 1324—which funds a variety of tax expenditures—would fund the ACA's tax credits. But it would make little sense for a provision that appropriates funds for "refunding internal revenue collections," 31 U.S.C. § 1324(a), to also (and without saying so) permanently fund a non-tax program that provides payments to insurers.

Id.

The next day, October 12, HHS sent a memorandum to its Centers for Medicare & Medicaid Services (CMS) explaining that "CSR payments are prohibited unless and until a valid appropriation exists." Memorandum from Acting Sec'y of HHS Eric Hargan to Adm'r of CMS

Seema Verma, Payments to Issuers for Cost-Sharing Reductions (CSRs), at 1 (Oct. 12, 2017).[3] Accordingly, the Government ceased making CSR payments to issuers.[4]

III. Issuers Increase Premiums To Offset The Absence Of CSR Payments

In 2017, some states began working with issuers to permit them to recoup the value of the CSR payments that they anticipated might be discontinued. These states permitted issuers to increase Exchange plan premiums for 2018 to try to offset the costs of maintaining the actuarial values of the silver plans without CSR payments from the Government. Because premium tax credits are benchmarked to the cost of the second-lowest-priced silver plan, if the premiums for those plans increase, then the premium tax credits increase generally.[5] Thus, in calculating premiums for the silver plans that set the benchmark for premium tax credits across all metal levels, issuers were permitted by certain states to factor in their anticipated unreimbursed cost of providing CSRs to their insureds, in an effort to offset their CSR costs indirectly through increased premium tax credits. And because premium tax credits—which are available to many more people than CSRs[6]—are tied to the cost of the second-lowest silver plan, increasing

[3] The Attorney General's letter, and the subsequent memorandum from the Acting HHS Secretary are available at https://www.hhs.gov/sites/default/files/csr-payment-memo.pdf.

[4] The district court has since vacated its injunction pursuant to a settlement agreement. *See United States House of Representatives v. Azar*, No. 14-1967 (D.D.C. May 18, 2018).

[5] To the extent issuers raise the premiums of the second-lowest-priced silver plans on the Exchanges, the amount of premium tax credits (which, again, Congress funded through a permanent appropriation) increase for all qualified health plans, permitting eligible insureds to purchase not only silver plans, but also to have greater purchasing power to purchase other metal-level plans for which premiums did not increase as much as silver plan premiums did, such as bronze plans with lower out-of-pocket costs, or gold plans that provide higher actuarial value.

[6] To be eligible for CSRs, an insured must not only satisfy the criteria for premium tax credits, but must also meet additional income-eligibility requirements. ACA § 1402 (*codified at* 42 U.S.C. § 18071).

premiums for silver plans caused premium tax credits to increase for all eligible taxpayers, not just the smaller pool of taxpayers eligible for CSRs.

Consistent with this strategy, insurance regulators in 38 states accounted for the possible termination of CSR payments in approving issuers' 2018 premium rates. *See id.* at 1136. After HHS ceased making CSR payments in October 2017, additional states permitted issuers to rerate their 2018 premiums to account for the cessation of CSR payments. *Id.*[7]

IV. States Bring Suit Under The APA To Compel HHS To Resume CSR Payments

Shortly after the Government announced its decision to cease making CSR payments, 17 states and the District of Columbia filed suit in district court under the Administrative Procedure Act seeking declaratory and injunctive relief to compel HHS to resume making CSR payments. The district court denied the states' motion for a preliminary injunction. *See California v. Trump*, 267 F. Supp. 3d 1119, 1140 (N.D. Cal. 2017). The court observed that at that initial stage of the proceedings, it appeared that the Federal Government had the stronger position on the merits as to whether Congress had appropriated funds for CSR payments. *See id.* at 1127-33. The court further concluded that the states had not shown irreparable harm because issuers had used the strategy described above to offset the non-payment of CSRs by the Government. The court explained that issuers generally had responded to the unavailability of CSR payments by increasing their silver-plan premiums for 2018, which in turn would increase

[7] According to the complaint, the chairman of the Vermont rate review board said publically that the board would not approve increases to 2018 premium rates to account for the termination of CSR payments. *See* Compl. ¶¶ 68-78. The complaint does not allege whether plaintiff ever actually filed a request with the board for a rate increase. Even if it had, and the board denied the request, plaintiff's explanation for the unavailability of this option hinges mainly on features that are unique to the Vermont market structure, including generally requiring all individual market consumers to purchase individual market coverage through the Exchange, rather than limitations in the ACA itself. *Id.* ¶ 72. As discussed below, those state-specific features have no bearing on the legal issues presented here.

the advance payments of premium tax credits that the issuers would receive. *See id*. at 1133-39. The court observed that "the widespread increase in silver plan premiums will qualify many people for higher tax credits," and "the increased federal expenditure for tax credits will be far more significant than the decreased federal expenditure for CSR payments." *See id*. at 1139.

On July 16, 2018, the states that sued the Federal Government in district court filed a motion to stay that litigation or in the alternative to dismiss it without prejudice. *See* Motion For Order Staying Proceedings, *California v. Trump*, No. 3:17-cv-05895-VC (N.D. Cal. July 16, 2018), ECF No. 102. In their motion, the states represented that because of the strategy described by the court "premiums [have become] lower for many low-income Americans than they would have been, had CSR payments continued in the ordinary course." *Id*. at 6. Thus, the states noted that "it is not clear, at present, that the public interest would be served by entering an injunction requiring resumption of CSR payments." *Id*. at 8. On July 18, 2018, the district court dismissed the complaint without prejudice.

V. BCBS Vermont Seeks Damages For HHS's Failure To Make CSR Payments

Plaintiff is an issuer that provides coverage on Vermont's ACA Exchange, including silver plans subject to the CSR program. *See* Compl. ¶ 7. In this suit, plaintiff seeks damages for HHS's failure to make CSR payments beginning in October 2017 through the date of the complaint, filed in March 2018. *Id*. at 27 (Prayer for Relief). Plaintiff contends that it is entitled to damages under Section 1402 of the ACA and, alternatively, for breach of contract and an implied covenant of good faith and fair dealing. *Id*. at 27, 28. Plaintiff also alleges that it is

entitled to just compensation for a Fifth Amendment taking of its right to CSR payments. *Id*. at 27.[8]

ARGUMENT

Plaintiff's complaint should be dismissed under Rule 12(b)(6) for failure to state a claim. To avoid dismissal, a plaintiff must "provide the grounds of [its] entitle[ment] to relief" in more than mere "labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation and quotation marks omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A "formulaic recitation of the elements of a cause of action" is insufficient. *Twombly*, 550 U.S. at 555. Rather, the complaint must "plead factual allegations that support a facially 'plausible' claim to relief." *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009). The Court must dismiss a claim "when the facts asserted by the claimant do not entitle [it] to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002).

I. Plaintiff's Statutory Claim Fails Because Congress Did Not Authorize A Damages Remedy For HHS's Failure To Make CSR Payments

In enacting the ACA, Congress established the Section 1401 premium tax credit program and the Section 1402 CSR program. Congress permanently appropriated funding for the premium tax credits but, in the immediately adjacent section of the ACA, did not permanently appropriate any funding for CSR payments. Congress also has not provided funding for CSR

[8] Other issuers have filed similar Tucker Act suits, including a certified class action that seeks damages for HHS's failure to make CSR payments in 2018 as well as in the last quarter of 2017. *See Common Ground Healthcare Coop. v. United States*, No. 17-877C (Sweeney, CJ.) (class action); *Local Initiative Health Auth. v. United States*, No. 17-1542C (Wheeler, J.); *Maine Cmty. Health Options v. United States*, No. 17-2057C (Sweeney, CJ.); *Community Health Choice, Inc. v. United States*, No. 18-5C (Sweeney, CJ.); *Sanford Health Plan v. United States*, No. 18-136C (Firestone, J.); *Montana Health CO-OP v. United States*, No. 18-143C (Kaplan, J); *Molina Healthcare of Cal. v. United States*, No. 18-333C (Wheeler, J.); *Health All. Med. Plans, Inc. v. United States*, No. 18-334C (Campbell-Smith, J.).

payments in any subsequent annual appropriations bills. Accordingly, HHS is legally barred from making those payments. *See* 31 U.S.C. § 1341(a)(1)(A) (prohibiting any officer or employee of the Federal Government from making or authorizing an expenditure for which there is no available appropriation).

Plaintiff does not appear to seriously dispute any of this. It does not seek to compel HHS to resume making CSR payments. If plaintiff believed that CSR payments were in fact permanently funded, it could have brought suit in district court under the Administrative Procedure Act to compel the resumption of CSR payments. A coalition of States brought such an Administrative Procedures Act action but, as discussed above, they recently dismissed their suit. No issuers joined that suit, and plaintiff's complaint makes no attempt to demonstrate that HHS has funding available to make CSR payments.

Plaintiff claims, instead, that it is entitled to damages for HHS's failure to make CSR payments even though that failure is the necessary legal consequence of Congress's decision not to appropriate funding for those payments. The claim fails because Section 1402 does not give insurers either an express cause of action for damages or a damages remedy. Thus, the "touchstone here, of course, is whether Congress intended a cause of action that it did not expressly provide." *Bowen v. Massachusetts*, 487 U.S. 879, 905 n.42 (1988). And there is no basis to conclude that Congress intended to provide a damages cause of action for issuers whose inability to receive CSR payments flows from Congress's own decision not to fund such payments.

In sequential provisions of the ACA, Congress provided permanent funding for premium tax credits, but not for CSR payments. That contrast shows that the decision not to provide permanent funding for CSR payments was an integral part of the ACA itself. Instead of

permanently funding CSR payments (as Congress did for premium tax credits), Congress instead chose to leave CSR funding to the annual appropriations process, to be decided by future Congresses.

The damages remedy that plaintiff asks this Court to imply into Section 1402 would provide the very permanent funding for CSR payments that Congress itself declined to enact—just through the more cumbersome means of damages suits rather than a direct appropriation. Having deliberately left CSR funding to the annual appropriations process, Congress could not have plausibly intended to *also* authorize damages awards to "remedy" its own future decisions not to fund CSR payments. If Congress had wished to provide permanent funding for CSR payments in Section 1402, it would have done so directly—as it did for premium tax credits in the immediately preceding provision of the statute.

Although Congress did not enact a permanent appropriation for CSR payments, Congress structured the ACA in a manner that allows issuers to account for the absence of CSR payments by increasing their premiums. Increased premiums, in turn, increase the amounts that issuers receive as advance payments of premium tax credits. *See* 26 U.S.C. § 36B(b). In rejecting the states' motion for a preliminary injunction that would have compelled HHS to resume CSR payments, the district court noted that, for 2018, "the increased federal expenditure for tax credits will be far more significant than the decreased federal expenditure for CSR payments." *California*, 267 F. Supp. 2d. at 1139.

Given issuers' ability to offset CSR expenses by raising premiums, it is particularly implausible to conclude that Congress also intended to grant issuers a damages remedy. That argument rests on the untenable premise that Congress, in declining to permanently appropriate funds for CSR payments in the ACA, intended that in the event of an absence of annual

appropriations, issuers would be allowed to collect full payments via damages, while also potentially recouping CSR costs through higher premiums and premium tax credits. It defies common sense to conclude Congress intended to provide a potential double payment of amounts that it never appropriated for in the first place.

Although plaintiff alleges that unique restrictions affecting the Vermont Exchange prevented it from adjusting its 2018 premiums to account for the absence of CSR payments, *see* Compl. ¶¶ 68-78, this Vermont-specific situation is irrelevant to the dispositive legal issue. As discussed above, the controlling question is whether Congress intended to give issuers a damages cause of action that it did not explicitly provide. Whether Vermont regulators would have allowed plaintiff to adjust its premiums in 2018 or 2019 sheds no light on whether *Congress* intended to give issuers a damages remedy. For the reasons discussed above, Congress had no such intention.

As the Court is aware, in *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311 (Fed. Cir. 2018), and the companion case, *Land of Lincoln Mutual Health Insurance Co. v. United States*, 892 F.3d 1184 (Fed. Cir. 2018), the Federal Circuit rejected the contention that issuers are owed additional payments under the risk-corridors program established by Section 1342 of the ACA. The Court disagreed with the Government's contention that Section 1342 was originally intended to be budget neutral, but ruled for the Government in light of subsequent appropriations legislation that kept the program budget neutral for the three years that it was in effect.

In a footnote, the *Moda* Court stated that a statute is "money-mandating for jurisdictional purposes" if "it 'can fairly be interpreted' to require payment of damages, or if it is 'reasonably amenable' to such a reading, which does not require the plaintiff to have a successful claim on the merits." *Moda*, 892 F.3d at 1320 n.2 (citing *Greenlee County v. United States*, 487 F.3d 871,

877 (Fed. Cir. 2007)). The precedent on which *Moda* relied, *Greenlee County*, in turn recognized that "'[t]he Tucker Act itself does not create a substantive cause of action; in order to come within the jurisdictional reach and the waiver of the Tucker Act, a plaintiff must identify a separate source of substantive law that creates the right to money damages.'" *Greenlee County*, 487 F.3d at 875 (quoting *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc in relevant part)).

As we understand this Circuit precedent, it does not allow liability to be imposed on the Government unless the substantive statute is *correctly* interpreted to provide a cause of action for damages. In any statutory case, congressional intent is dispositive, and Government liability cannot be premised on a statutory interpretation that is incorrect (even if that interpretation is reasonable). Accordingly, plaintiff cannot recover unless it demonstrates that Congress, in enacting Section 1402, "confer[red] a substantive right to recover money damages from the United States." *United States v. Testan*, 424 U.S. 392, 298 (1976). And for the reasons given above, it did not. Given the text and structure of the ACA, it is implausible to infer that Congress intended for insurers to collect as damages the very CSR payments that Congress chose not to fund.

We recognize that in *Moda*, the Federal Circuit concluded that the language in Section 1342 stating that the Secretary "shall pay" amounts in accordance with a statutory formula created an obligation to make full risk-corridors payments without regard to appropriations. But the Federal Circuit confirmed in *Moda* that the touchstone of the inquiry is congressional intent. The Court concluded that Congress did not originally intend in enacting Section 1342 for the risk-corridors program to be budget neutral and then continued its analysis

and gave effect to subsequent appropriations legislation that reflected Congress's intent to maintain the budget neutrality of the program. *Moda*, 892 F.3d at 1320-22.

In reaching its conclusion, the *Moda* Court relied upon the Supreme Court's 1886 decision in *United States v. Langston* for the proposition that "in certain circumstances," the United States "may incur a debt independent of an appropriation to satisfy that debt." *See id*. at 1321 (citing *Langston*, 118 U.S. 389 (1886)). However, the Federal Circuit also noted that *Langston* "is an extreme example of a mere failure to appropriate." *Id*. at 1323. Unlike in *Langston*, the Court concluded in *Moda* that "Congress clearly indicated its intent" to limit the amounts available under the risk-corridors program. *Id*. at 1325.

It is also critical to recognize that *Moda* entered no judgment against the United States based upon its statements regarding the text of the risk corridors statute. We are aware of no case in which the court has entered judgment against the United States based solely upon a statutory claim in the absence of Congress having appropriated funds for that program.

Section 1402 of the ACA is far from "an extreme example of a mere failure to appropriate." Instead, Section 1402 is found in title 1, subtitle E, part I, subpart A, which is entitled "Premium Tax Credits and Cost-Sharing Reductions." The *only other* section located in that subpart is Section 1401, the premium tax credit provision. So Congress *did* appropriate funds for that subpart, however, it chose only to fund the portion of that subpart that called for the payment of the premium tax credit. Congress conspicuously declined to provide funding in the only other section in that subpart—the CSR program. The Supreme Court has recently reiterated that "when Congress includes particular language in one section of a statute but omits it in another[,] . . . this Court presumes that Congress intended a difference in meaning." *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) (quoting *Loughrin v. United States*, 134

S. Ct. 2384, 2390 (2014)). This conclusion is all the more compelling considering the structural features of the Premium Tax Credits and Cost-Sharing Reductions subpart, which allow issuers to use premium tax credits to recoup unfunded CSR costs.

To the extent that plaintiff relies on the Judgment Fund as an appropriation for CSR payments, that reliance is misplaced for the reasons discussed in *Moda*. *See Moda*, 892 F.3d at 1326. As the Federal Circuit recognized, the Judgment Fund is a permanent appropriation available to pay final judgments against the United States, 31 U.S.C. § 1304(a)(1). The existence of that litigation-contingency fund has no bearing on whether a judgment may be entered in the first place. The Judgment Fund is not a catch-all appropriation for programs that Congress decides against funding.

II. Section 1402 Establishes a Benefits Program, Not an Implied-In-Fact Contract

Plaintiff's contention that it has an implied-in-fact contract for CSR payments, Compl. ¶¶ 54-62, also fails. To allege a binding implied-in-fact contract, a plaintiff must allege facts demonstrating: "(1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance, and (4) 'actual authority' of the government's representative whose conduct is relied upon to bind the government." *Moda*, 892 F.3d at 1329. The ACA did not bind the Government in contract to make CSR payments or authorize HHS to enter into such contracts.

A. The ACA Did Not Create Implied-In-Fact Contracts For CSR Payments

Controlling precedent forecloses plaintiff's attempt to derive an implied-in-fact contract from the ACA provisions authorizing CSR payments. "The Supreme Court 'has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights, but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Brooks v. Dunlop*

Mfg., 702 F.3d 624, 630 (Fed. Cir. 2012) (quoting *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66 (1985)); *accord Moda*, 892 F.3d at 1329. "This well-established presumption is grounded in the elementary proposition that the principal function of the legislature is not to make contracts, but to make laws that establish the policy of the state." *Brooks*, 702 F.3d at 630 (quoting *Atchison*, 470 U.S. at 466); *accord Moda*, 892 F.3d at 1329. Accordingly, "the party asserting the creation of a contract must overcome this well-founded presumption and [courts should] proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation." *Brooks*, 702 F.3d at 630-31 (quoting *Atchison*, 470 U.S. at 466); *see also Baker v. United States*, 50 Fed. Cl. 483, 489 (2001) ("[T]he United States cannot be contractually bound merely by invoking the cited statute and regulation.").

The Federal Circuit has consistently held that where the language in the applicable statute does not evince an intent on the part of Congress to create contractual rights, no contract will be found to have arisen from the statute. The Federal Circuit's recent *Moda* decision rejected a similar implied-in-fact argument made by issuers with regard to the ACA's risk-corridors program. "Moda contend[ed] that . . . the statute, its implementing regulations, and HHS's conduct all evinced the government's intent to induce insurers to offer plans in the exchanges[.]" *Moda*, 892 F.3d at 1330. Because "the statute, its regulations, and HHS's conduct all simply worked towards crafting an incentive program," the Federal Circuit held that Moda had failed to state a contract claim. *Id.*

Like the issuer in *Moda*, plaintiff here alleges that the ACA, its implementing regulations, and HHS's conduct all evidenced an intent by the Government to establish contracts. *See* Compl. ¶ 101. Like the issuer in *Moda*, plaintiff claims that it was induced into offering plans on

an Exchange by the statute, regulations, and HHS's conduct, thus resulting in an implied-in-fact contract. *See id*. ¶ 108. The Federal Circuit rejected those arguments in reasoning that applies equally here. Because the "statute, its regulations, and HHS's conduct all simply worked towards crafting an incentive program," plaintiff "cannot overcome the 'well-established presumption' that Congress and HHS never intended to form a contract by enacting the legislation and regulation at issue here." *Moda*, 892 F.3d at 1330; *accord Brooks*, 702 F.3d at 631-32; *Hanlin v. United States*, 316 F.3d 1325, 1328-30 (Fed. Cir. 2003); *Bay View, Inc. v. United States*, 278 F.3d 1259, 1266 (Fed. Cir. 2001).

When courts have found an intent to contract with program participants, the statutes at issue clearly expressed Congress's intent for the Government to enter into contracts. *See, e.g.*, *Grav v. United States*, 14 Cl. Ct. 390, 392 (1988) (finding an implied-in-fact contract where statute provided that the "Secretary shall offer to enter into a contract"), *aff'd*, 886 F.2d 1305 (Fed. Cir. 1989); *New York Airways, Inc. v. United States*, 369 F.2d 743, 752 (Ct. Cl. 1966) (explaining that "Congress recognized the contract nature of the subsidy payments" by titling its enactment "Payments to Air Carriers (Liquidation of Contract Authorization)"); *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 405 (Ct. Cl. 1957) (opining that agency regulation could give rise to implied contract where it stated that "[u]pon receipt of an offer" the agency would "forward to the person making the offer a form of contract containing applicable terms and conditions ready for his acceptance").

In contrast to the statutes referenced in *Grav*, *New York Airways*, and *Radium Mine*s—and similar to the ACA provision at issue in *Moda*—Section 1402 of the ACA contains no contract language. Plaintiff's attempt to derive a contract from the text of Section 1402 is thus unavailing.

B. HHS Has No Authority to Enter Contracts for CSR Payments And Did Not Purport To Enter Into Such Contracts

Plaintiff's claim that HHS's regulations, conduct, and statements sufficed to create an implied-in-fact contract, *see, e.g.*, Compl. ¶¶ 106-09, must be rejected for an additional reason: HHS has no authority to enter into contracts for CSR payments and, unsurprisingly, HHS did not purport to do so.

An implied-in-fact contract cannot arise without "actual authority" on the part of the Government's representative to bind the Government. *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (en banc). "A government agent possesses express actual authority to bind the government in contract only when the Constitution, a statute, or a regulation grants it to that agent in unambiguous terms." *McAfee v. United States*, 46 Fed. Cl. 428, 435 (2000).

Moreover, budget authority is a prerequisite to contract formation with the United States. Except as authorized by law, the Anti-Deficiency Act "bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, existing appropriation." *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1449 (Fed. Cir. 1997) (quoting *Hercules, Inc. v. United States*, 516 U.S. 417, 426 (1996)); 31 U.S.C. § 1341(a)(1)(B). Without "special authority," an "officer cannot bind the Government in the absence of an appropriation." *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 643 (2005). Thus, in *Schism*, the Federal Circuit held that promises of free lifetime medical care made by military recruiters did not bind the Government because the "[t]he recruiters lacked actual authority, meaning the parties never formed a valid, binding contract." *Schism*, 316 F.3d at 1284. The Court emphasized that even the President, as Commander-in-Chief, "does not have the constitutional authority to make promises about entitlements for life to military personnel that bind the government because such

powers would encroach on Congress' constitutional prerogative to appropriate funding." *Id*. at 1288.

These principles foreclose plaintiff's claim. Sections 1402 and 1412 of the ACA do not vest any Federal official with any contracting authority. And as explained above, Congress did not provide an appropriation for CSR payments. Thus, no valid contract for the payment of CSRs could have been formed.

In any event, HHS did not purport to enter into contracts for CSR payments. Plaintiff cites the implementing regulation, 45 C.F.R. § 156.430, *see*, *e.g.*, Compl. ¶ 101, but that regulation tracks the statute and contains no contractual language.

C. Plaintiffs' Allegations That It Relied On The Government's Actions And Promises Raise Implied-In-Law Claims Outside This Court's Jurisdiction

Plaintiff's claims that the Government's actions "in promising to make [CSR] payments," "promulgating regulations that implemented the legal requirement to make those payments," and "making those payments for over three-and-a-half years," induced it into offering plans on Vermont's ACA Exchange, Compl. ¶ 108, must also be dismissed for raising claims outside of this Court's jurisdiction. The substance of plaintiff's claim is that it detrimentally relied upon the Government's actions and that the Government should be estopped from breaking its promises to make payments.

This Court lacks jurisdiction over implied-in-law contracts. *See Int'l Data Prods. Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007). Detrimental reliance "is an element of an implied-in-law claim, over which this court does not have jurisdiction." *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 111 n.29 (2016) (citing *Int'l Data Prods. Corp.* 492 F.3d at 1325; *Baistar Mech. Inc. v. United States*, 128 Fed. Cl. 504, 515-16 (2016); *XP Vehicles, Inc. v. United States*, 121 Fed. Cl. 770, 782-83 (2015)).

Claims for promissory estoppel are likewise outside this Court's jurisdiction. Such claims arise "when a promisor makes 'a promise [that] the promisor should reasonably [have] expect[ed] to induce action or forbearance on the part of the promisee ... and which d[id] induce such action or forbearance[.]'" *XP Vehicles, Inc.*, 121 Fed. Cl. at 782 (quoting Restatement (Second) of Contracts § 90(1) (2012)). "It is 'essentially an equitable cause of action whereby one who reasonably relies on another's promise can subsequently require [him] to make good on his promise.'" *Id*. (quoting *Carter v. United States*, 98 Fed. Cl. 632, 638 (2011)). Promissory estoppel "is another name for an implied-in-law contract claim." *Id*. (quoting *Carter*, 98 Fed. Cl. at 638). Once again, the Tucker Act does not allow suits against the Government based on contracts implied-in-law. *See United States v. Mitchell*, 463 U.S. 206, 218 (1983).

Accordingly, plaintiff's claim for breach of an implied contract must be dismissed.

D. Plaintiff's Breach Of The Implied Covenant Of Good Faith And Fair Dealing Claim Fails Because No Contract Exists For CSR Payments

Count IV alleges that HHS breached an asserted implied covenant of good faith and fair dealing by not making CSR payments, but plaintiff identifies no contract requiring the Government to make CSR payments. Compl. ¶¶ 123-32. When a plaintiff "fail[s] to establish either an express or implied contract with [the United States], its dependent claim for a breach of implied covenant of good faith and fair dealing also must be dismissed." *HSH Nordbank AG v. United States*, 121 Fed. Cl. 332, 341 (2015), *aff'd*, 644 F. App'x. 1004 (Fed. Cir. 2016); *accord Land of Lincoln*, 129 Fed. Cl. at 113-14. As set forth above, HHS has no contractual obligations with respect to CSR payments. Thus, Count IV must be dismissed.

III. Plaintiff's Takings Claim Fails Because Plaintiff Has No Vested Property Right In Receiving CSR Payments

In Count III, plaintiff asserts that the United States, by "halting cost-sharing reduction payments in October 2017," took plaintiff's property for public use without just compensation in violation of the Fifth Amendment. Compl. ¶¶ 115-21. Courts apply a two-part test when evaluating whether governmental action constitutes a taking without just compensation. "First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether that property interest was 'taken.'" *Acceptance Ins. Cos., Inc. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009) (collecting Federal Circuit cases). "If the claimant fails to demonstrate the existence of a legally cognizable property interest, the court's task is at an end." *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

At set forth above, because plaintiff has no contractual right to receive CSR payments, its takings claim must fail to the extent it relies on the existence of a contract with HHS. *See Land of Lincoln*, 892 F.3d at 1186 ("Because Land of Lincoln cannot state a contract claim, its takings claim fails to the extent it relies on the existence of a contract.").

Thus, plaintiff is left to rely on the erroneous premise that its statutory or regulatory rights comprise property rights. The Federal Circuit recently rejected a takings claim brought under the ACA on these exact grounds. *See id*. In *Land of Lincoln*, the Federal Circuit held that "what remains is Land of Lincoln's takings claim to the extent that claim arises from its statutory entitlement to full payments." *Id*. The Court noted it has "previously held that 'no statutory obligation to pay money, even where unchallenged, can create a property interest within the meaning of the Takings Clause.'" *Id*. (quoting *Adams v. United States*, 391 F.3d 1212, 1225

(Fed. Cir. 2004)); *see also Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001) (en banc). Because the plaintiff provided "no basis for departing from that rule," and the Court saw none, it held that "Land of Lincoln's takings claim fails." *Land of Lincoln*, 892 F.3d at 1186.

For the same reasons stated in *Land of Lincoln*, CSR payments do not constitute a property interest subject to the Takings Clause. Apart from its generalized and conclusory allegation that it "has a reasonable investment-backed expectation of receiving the full and timely . . . [CSR] payments," plaintiff pleads no facts to support its assertion that it "has a vested property interest in its . . . statutory, regulatory, and contractual rights to receive statutorily-mandated [CSR] payments." Compl. ¶ 116. Because plaintiff does not have a legally cognizable property interest in CSR payments, "the court's task is at an end." *Am. Pelagic Fishing Co.*, 379 F.3d at 372.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court dismiss plaintiff's complaint.

Respectfully submitted,

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