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

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS, CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, AND MEMORANDUM OF LAW IN SUPPORT

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Plaintiff Blue Cross & Blue Shield of Vermont (BCBSVT) opposes the Government's motion to dismiss in its entirety and moves for partial summary judgment on its statutory (Count I) and breach of contract (Count II) claims. Based on controlling precedent, the Court should deny the Government's motion to dismiss, enter partial summary judgment in BCBSVT's favor, and hold the Government liable for unsatisfied cost-sharing reduction payments. Because BCBSVT's damages continue to accrue on a monthly basis, BCBSVT respectfully requests the right to supplement its claims over time to include the final amount owed by the Government.

INTRODUCTION

Since October 2017, BCBSVT has been forced to fund a government benefit program that, by law, must be paid for by the Government. The text of the Affordable Care Act (reinforced by regulations, agency guidance and statements, and a three-and-a-half year course of conduct) could not be clearer: insurers like BCBSVT must reduce the cost-sharing obligations of eligible low-income insureds, and the Government must "make periodic and timely payments to the issuer equal to the value" of those reductions. 42 U.S.C. § 18071(c)(3)(A).[1] From January 2014 through today, BCBSVT has followed the law by reducing the cost-sharing obligations of its eligible insureds (and will continue doing so). Until September 2017, the Government did as well, by making monthly advance cost-sharing reduction, or CSR, payments. Then it stopped, leaving BCBSVT and other insurers to bear the cost of this government benefit.

The Government now tries to block BCBSVT from seeking relief in this Court, claiming that the ACA's unambiguous promise to pay is meaningless absent an express appropriation. But that is not the law. As the Federal Circuit recently confirmed, "it has long been the law that the government may incur a debt independent of an appropriation to satisfy that debt, at least in

[1] Relevant statutes and rules are reproduced in the accompanying Appendix, at App. 75-150. The Appendix contains other materials referenced in this memorandum, and is cited as "App. __."

certain circumstances." *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1321 (Fed. Cir. 2018). *Moda* held that the "unambiguously mandatory" language governing the ACA's risk corridors program "created an obligation of the government to pay" regardless of the presence or absence of an appropriation. *Id.* at 1320, 1322. *Moda's* logic requires judgment for BCBSVT here, because the CSR statute contains functionally identical money-mandating language, and Congress has not enacted any post-ACA legislation concerning the CSR payments. Indeed, another judge of this Court, following *Moda*, recently granted an insurer's summary judgment motion, holding that "the government was statutorily obligated" to make CSR payments. *Montana Health Co-op v. United States*, No. 18-143C, 2018 WL 4203938, at *8 (Fed. Cl. Sept. 4, 2018). And the Government itself recognizes that *Moda* "concluded" that such money-mandating language "created an obligation to make full risk corridors payments without regard to appropriations." Def. Mot. 16, ECF No. 14.[2]

The Government's efforts to avoid liability are "unpersuasive." *Montana Health*, 2018 WL 4203938, at *8. Its motion to dismiss should be denied and BCBSVT's cross-motion for partial summary judgment should be granted.

STATEMENT OF THE ISSUES PRESENTED

1. Is the Government liable to BCBSVT for all unsatisfied CSR payments based on the ACA's unequivocal statutory mandate for periodic and timely payments?

[2] The majority in *Moda* went on to hold that the insurers could not recover the risk corridors payments because post-ACA appropriations riders obviated the Government's obligation to make those payments. BCBSVT is separately suing the United States to recover risk corridors payments and disputes the argument that any subsequent action by Congress vitiated the Government's liability. *Blue Cross & Blue Shield of Vt. v. United States*, No. 18-241C, ECF No. 1 (Ct. Cl. Feb. 15, 2018). In the CSR context, however, "there was no relevant congressional action taken at all after the passage of the ACA." *Montana Health*, 2018 WL 4203938, at *7.

2. Is the Government liable for breach of contract based on its failure to make CSR payments to BCBSVT?

3. Has BCBSVT plausibly alleged that the Government breached the covenant of good faith and fair dealing when it stopped making CSR payments?

4. Has BCBSVT stated a cognizable takings claim based on the Government's unprecedented action in confiscating BCBSVT's money to fund a public benefit program?

STATEMENT OF THE CASE AND UNDISPUTED MATERIAL FACTS

Both the law and the facts compel judgment in BCBSVT's favor. First, the ACA and its implementing regulations require the Government to make the CSR payments that it improperly discontinued in October 2017. Second, the undisputed facts laid out below show that BCBSVT has fulfilled all of its obligations and is entitled to full payment of all unpaid amounts for 2017 and 2018.

I. The Affordable Care Act mandates cost-sharing reduction payments.

Enacted in March 2010, the ACA transformed the health insurance marketplace and the Government's regulatory role by "adopt[ing] a series of interlocking reforms designed to expand coverage in the individual health insurance market." *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). To that end, the ACA required each state to establish an American Health Benefit Exchange by January 1, 2014, to enable consumers to compare and purchase qualified health plans (QHPs). 42 U.S.C. § 18031(b)(1). Among other requirements, a QHP must cover a set of "essential health benefits" established by HHS, and must be offered by a state-licensed issuer. *Id.* §§ 18021(a)(1), 18022(a)–(b). To encourage consumer participation in the exchanges, the ACA creates two government-funded financial support programs: advance premium tax credits, or APTC, and cost-sharing reductions:

APTC. Section 1401 of the ACA provides tax credits to reduce insurance premiums paid by those with household incomes between 100% and 400% of the federal poverty level. 26 U.S.C. § 36B(a), (b)(2), (c)(1)(A). HHS determines eligibility for tax credits and notifies the Treasury. 42 U.S.C. § 18082(b), (c)(1). The Treasury Secretary must then make periodic advance payments of the applicable premium tax credits to the QHP issuers, who in turn must use the advance payments to reduce the premiums collected from eligible insureds. *Id.* § 18082(c)(2)(A)–(B); 26 U.S.C. § 36B(f).

Cost-sharing reductions. Section 1402, codified at 42 U.S.C. § 18071, provides additional financial support to individuals and families between 100% and 250% of the poverty level by reducing their cost-sharing obligations. *Id.* § 18071(b). Cost-sharing means the portion of a person's covered health care costs that she must pay out of her own pocket. Typically, this includes copayments, coinsurance, and deductibles.[3]

This case is about the Government's decision to stop funding the CSR program.

The ACA makes insurers the mechanism to transfer CSR benefits from the Government to the intended beneficiaries. 42 U.S.C. §§ 18071(a)(2), (c). Making insurers the conduit is administratively efficient, because the Government only needs to process payments to insurers, not to millions of individual insureds. And because insurers can incorporate cost-sharing reductions into their plan designs, the insureds receive the benefit in real time, instead of paying

[3] Glossary, *Cost Sharing*, HealthCare.gov, https://www.healthcare.gov/glossary/cost-sharing/, App. 203.A deductible is "[t]he amount you pay for covered health care services before your insurance plan starts to pay." https://www.healthcare.gov/glossary/deductible/, App. 204. A copayment is a "fixed amount ($20, for example) you pay for a covered health care service after you've paid your deductible." https://www.healthcare.gov/glossary/co-payment/, App. 200. Coinsurance is the "percentage of costs of a covered health care service you pay (20%, for example) after you've paid your deductible." https://www.healthcare.gov/glossary/co-insurance/, App. 199.

upfront and waiting for reimbursement. Declaration of Ruth K. Greene ¶¶ 11, 16, App. 8-9; *see also* 45 C.F.R. § 156.410(a) (cost-sharing reductions "must be applied when the cost sharing is collected").

Although insurers are the conduit, cost-sharing reductions are government-funded benefits. Congress was crystal clear that the Government must fully cover the costs incurred by insurers like BCBSVT in transferring the benefit to eligible insureds: "An issuer of a qualified health plan making reductions under this subsection shall notify the Secretary of such reductions and the Secretary *shall make periodic and timely payments to the issuer equal to the value of the reductions*." 42 U.S.C. § 18071(c)(3)(A) (emphasis added). Congress also directed the Government to cover those costs in advance. *See* 42 U.S.C. § 18082(c)(3) ("The Secretary of the Treasury shall make such advance payment at such time and in such amount as the Secretary [of HHS] specifies in the notice."). Congress has not repealed or amended these provisions, required them to be budget-neutral, nor acted, through the appropriations process or otherwise, to curb the Government's obligation to cover the full amounts of the cost-sharing reductions provided by insurers like BCBSVT. Indeed, nothing in the Consolidated Appropriations Act for fiscal year 2017, *see* Pub. L. No. 115-31, 131 Stat. 135 (2017), which Congress passed on May 5, 2017, or any prior or subsequent act of Congress, restricts funding for CSR payments.

Not surprisingly, Congress's clear mandate is reflected consistently throughout the implementing regulations and agency guidance. For example, the regulations provide that QHP issuers like BCBSVT "will receive periodic advance payments based on the advance payment amounts calculated" and transmitted to HHS by the relevant health benefit exchange. 45 C.F.R. § 156.430(b)(1). In enacting these regulations, the agency decided "to implement a payment approach under which [it] would make monthly advance payments to issuers to cover projected

cost-sharing reduction amounts, and then reconcile those advance payments at the end of the benefit year to the actual cost-sharing amounts." HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,410, 15,486 (Mar. 11, 2013), App. 152, 156.

The regulations require QHP issuers to submit information to HHS demonstrating the "actual amounts" of the CSRs provided to plan enrollees. 45 C.F.R. § 156.430(c); *see, e.g.*, CMS, *Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Year 2017* at 6 (Mar. 29, 2018), App. 169 (requiring issuers to report "the amount they paid for each eligible medical claim, the amount enrollees paid for the claims, and the amount of cost sharing that would have been paid for the same services under the corresponding standard plan"). While the Government was making the required advance CSR payments, HHS used the reported data to perform "periodic reconciliations" of advance CSR payments against the actual reductions provided to enrollees. 45 C.F.R. § 156.430(d); *see* 2017 CSR Manual at 6, App. 169 (HHS compares "what the enrollee in a cost-sharing reduction plan variation paid in cost sharing to what the enrollee would have paid if enrolled in a standard plan").[4]

Along with the statutes and regulations, the Government repeatedly and consistently stated in other settings that it would make the payments in full and in advance. *Id.* ¶¶ 12, 20, App. 8-9, 11. For example, when HHS promulgated the final rule establishing the monthly payments, it explained that "[t]his approach fulfills the Secretary's obligation to make 'periodic

[4] *See also* CMS, *Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Years 2014 and 2015*, at 5-6, 28 (Mar. 16, 2016), https://tinyurl.com/y8qq9yhx, App. 179-180, 181; CMS, *Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Year 2016*, at 6 & n.8, 36 (Dec. 27, 2016), https://tinyurl.com/yaphxuen, App. 173, 176; CMS, *Timing of Reconciliation of Cost-Sharing Reductions for the 2014 Benefit Year*, at 1 (Feb. 13, 2015), https://tinyurl.com/y9fk3nvz, App. 188-89.

and timely payments equal to the value of the reductions' under section 1402(c)(3) of the Affordable Care Act." 78 Fed. Reg. at 15,486, App. 156. HHS further advised that "cost-sharing reductions are reimbursed by the Federal government" and that "QHP issuers will be made whole for the value of all cost-sharing reductions." *Id.* at 15,480, 15,488, App. 155, 158. CMS manuals and guidance consistently confirmed that issuers "will be reimbursed any amounts necessary to reflect the CSR provided."[5] CMS's monthly exchanges with BCBSVT also reflected the parties' mutual understanding that the ACA required BCBSVT to provide the CSR benefits to eligible insureds and obligated the Government to make advance payments sufficient to cover those benefits. Greene Dec. ¶¶ 17, 20 & Exh. F, App. 9-11, 47-49 (describing monthly template sent by CMS to BCBSVT for submission of CSR-related information). In other words, HHS consistently and publicly made clear to participating QHP issuers that it "would not require issuers to fund the value of any cost-sharing reductions prior to reimbursement." 78 Fed. Reg. at 15,486, App. 156.

What's more, the Government explained and defended its obligation to make the CSR payments in court. In its motion to dismiss, the Government briefly describes the relevant litigation, but not the position it pressed throughout the case. *See* Def. Mot. 7-8 (citing *U.S. House of Reps. v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016)). In *Burwell*, the Government argued that:

- CSR payments to insurers are "mandated" and "required" by the ACA. Answer, *U.S. House of Reps. v. Burwell*, No. 1:14-cv-01967-RMC, ECF No. 52, ¶ 35 (D.D.C. Nov.

[5] *See, e.g.*, CMS, *Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Years 2014 and 2015*, at 28 (Mar. 16, 2016), https://tinyurl.com/y8qq9yhx, App. 181; CMS, *Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Year 2016*, at 36 (Dec. 27, 2016), https://tinyurl.com/yaphxuen, App. 176; CMS, *Timing of Reconciliation of Cost-Sharing Reductions for the 2014 Benefit Year*, at 1 (Feb. 13, 2015), https://tinyurl.com/y9fk3nvz, App. 188-89.

2, 2015), App. 215; Defs. Mem. Mot. Summ. J., *id.*, ECF No. 55-1, at 1, 8, 10, 16, 20, App. 232, 239, 241, 247, 251; Defs. Reply Mem. Mot. Summ. J., *id.*, ECF No. 70, at 2, 3, 10, App. 272-73, 280.

- QHP issuers have a "legal right" to CSR payments. *Id.*, ECF No. 55-1, at 7, App. 238.
- The ACA's permanent appropriation, codified at 31 U.S.C. § 1324, is available to fund CSR payments, and no annual appropriation is required. *E.g.*, *id.*, ECF No. 55-1, at 12-26, App. 243-57.
- "Congress has not enacted any legislation restricting the use of the Section 1324 appropriation for that purpose or directing the Executive Branch to cease these ongoing advance payments." *Id.* at 10, App. 241.
- The lack of an appropriation for CSR payments "would not prevent the insurers from seeking to enforce that statutory right through litigation," specifically, by suit in this Court under the Tucker Act, and the "mere absence of a more specific appropriation is not necessarily a defense to recovery" from the Judgment Fund. *Id.* at 20, App. 251; *see also id.*, ECF No. 70, at 9, App. 279 (noting risk of "potentially costly lawsuits under the Tucker Act" because "courts have held that the absence of an appropriation does not necessarily preclude recovery from the Judgment Fund"); Appellants' Brief, *U.S. House of Reps. v. Burwell*, No. 16-5202, ECF No. 1642568 (D.C. Cir. Oct. 24, 2016), at 53 n.10, App. 299 (similar).

Finally, the Government's actions over time speak volumes: It made the required CSR payments to BCBSVT every month for more than three and a half years before improperly refusing to pay in October 2017. Greene Dec. ¶ 13, App. 9.

II. BCBSVT has met its obligations and is entitled to CSR payments for 2017 and 2018.

A. BCBSVT has issued QHPs and provided cost-sharing reductions.

BCBSVT is the cornerstone of Vermont's ACA-mandated exchange, Vermont Health Connect (VHC). Since VHC's inception, BCBSVT has been by far the largest issuer of qualified health plans to Vermonters. Approximately 53,000 BCBSVT members are enrolled in coverage through the exchange. Greene Dec. ¶ 6, App. 6.

BCBSVT has consistently complied with all legal and regulatory requirements for offering QHPs to Vermonters. Each year, the State of Vermont publishes a timeline of state and federal milestones that issuers and the state must meet so that the plans are available for open

enrollment.[6] These include submitting proposed premium rates and policy forms to state regulators for review and approval; completing all necessary federal documentation, including program attestations; and executing a binding agreement with the state to issue the approved QHPs at the approved premiums. BCBSVT has met those deadlines and the state has certified BCBSVT's plans for sale on VHC—typically in late August or early September in advance of the next policy year. *Id.* ¶¶ 6, 22-23, App. 6, 11-12. As a result, BCBSVT has issued QHPs for 2014 through 2018, and has provided all required cost-sharing reductions to its insureds. *Id.* ¶¶ 6, 16-18, App. 6, 9-10. In addition, BCBSVT has submitted and continues to submit all required CSR-related data, even though the government has stopped making advance payments. *Id*. ¶¶ 14-16, 30, App. 9, 13.

Among the many requirements imposed by the Government, BCBSVT has attested annually that it would:

- "acknowledge and agree to be bound by Federal statutes and requirements that govern Federal funds," including "cost-sharing reductions";
- "adhere to the standards set forth by HHS for the administration of advance payments of the premium tax credit and cost sharing reductions" and the "data standards and reporting requirements for the CSR reconciliation process"; and
- "provide and promptly update" certain information "needed by CMS in order for the applicant to receive invoices, demand letters, and payments under the APTC [and] CSR . . . programs, as well as any reconciliations of the aforementioned programs."

Id. ¶¶ 18 & Exhs. A-E ("State-based Marketplace Issuer Attestations: Statement of Detailed Attestation Responses"), App. 10, 15-46. This annual attestation is but one example of a federal

[6] The state sets these deadlines in its annual QHP Certification Timeline. The 2018 Timeline required issuers to submit their proposed rates by May 12, 2017. *See* 2018 Qualified Health Plan Certification Timeline (Dec. 2016), http://info.healthconnect.vermont.gov/sites/hcexchange/files/Additional_Resources/2018_planning/2018%20QHP%20Certification%20Timeline%20December%202016.pdf, App. 190-91.

document upon which BCBSVT reasonably relied in assuming the Government would honor its commitment to make the CSR payments. *See also supra* n.5 (citing CMS Manuals).

B. After three and a half years, the federal government abruptly and unilaterally halted the CSR payments.

Coverage under plans sold through ACA exchanges, including VHC, began January 1, 2014. Beginning in February 2014 and continuing through September 2017, BCBSVT received a monthly payment and remittance statement from the Government that included both advance premium tax credits and advance CSR payments. Greene Dec. ¶ 19, App. 11. The Government's instructions on the monthly template that insurers use to submit required information likewise reflect its obligation and longstanding practice to make the CSR payments to BCBSVT. *Id.* ¶ 20, App. 11 (stated "objective" of template is "to document the total premium, APTC, CSR advance payment, and user fee amounts").

On October 12, 2017, HHS announced that it would stop making CSR payments immediately "until a valid appropriation exists."[7] The agency cited the Attorney General's conclusion that the permanent appropriation in 31 U.S.C. § 1324 only funded the premium tax credits, not the CSR payments.[8] The Government took this action even though Congress has never: repealed or amended the ACA's cost-sharing reduction provision; repealed or amended the ACA's permanent appropriation to prevent its use for CSR payments; enacted any language in appropriations or other bills preventing the Government from accessing funds or accounts to make CSR payments; or otherwise changed the Government's obligation to make CSR payments.

[7] Memo from Acting Sec'y of HHS E. Hargan to CMS Administrator S. Verma (Oct. 12, 2017), https://www.hhs.gov/sites/default/files/csr-payment-memo.pdf, App. 161.
[8] *Id.* at 2–5 (Letter from Atty. Gen. Jefferson Sessions to Sec'y of Treasury and Acting Sec'y of HHS (Oct. 11, 2017)), App. 162-65.

C. By the time the Government stopped making CSR payments in October 2017, BCBSVT had committed to offer QHPs for both 2017 and 2018, at state-mandated rates that assumed the Government would fully fund the CSR program.

Like most health insurers, BCBSVT is not free to set its own rates for its insurance plans. Vermont implemented the ACA's requirement for annual rate review. *See* 42 U.S.C. § 300gg-94(a)(1) (requiring "process for the annual review . . . of unreasonable increases in premiums for health insurance coverage"). In Vermont, the Green Mountain Care Board reviews proposed rates and determines whether a rate "is affordable, promotes quality care, promotes access to health care, protects insurer solvency, and is not unjust, unfair, inequitable, misleading, or contrary to the laws of this State." Vt. Stat. Ann. tit. 8, § 4062(a)(3); Green Mountain Care Bd. Rule 2.000, § 2.301(a).[9]

Accordingly, in mid-May each year, BCBSVT submits a formal filing asking the Board to approve premium rates for its QHPs for the following calendar year. The rate review process is a contested proceeding, with the insurer and the Office of the Health Care Advocate, which represents the interests of Vermonters before the Board, appearing as parties. *See* Vt. Stat. Ann. tit. 8, § 4062(c), (d). The Vermont Department of Financial Regulation submits an analysis of the proposed rates' impact on the insurer's reserves and solvency to the Board. *Id.* § 4062(a)(2)(B). The Board's actuary also reviews the record and makes a recommendation to the Board and the parties. Finally, within 90 days of the rate filing, the Board must hold a hearing and issue a written decision to approve, modify, or deny the requested rates. *Id.* § 4062(e)(1).[10]

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[9] Vermont has an "Effective Rate Review Program" under federal law, enabling the state to review and approve premium rates for QHPs. CMS, *State Effective Rate Review Programs*, https://tinyurl.com/y9guh6av, App. 182-85.

[10] *See generally How Rates Are Reviewed*, Green Mountain Care Board Rate Review website, http://ratereview.vermont.gov/how_reviewed, App. 192-93.

By the time HHS announced in October 2017 that it would no longer make CSR payments, BCBSVT was providing coverage for calendar year 2017 to thousands of CSR-eligible Vermonters. Needless to say, the 2017 rates assumed that the Government would make all required CSR payments. Greene Dec. ¶ 22, App. 11. The 2017 rates and plan designs had been finalized in the fall of 2016 and could not be changed when the CSR payments stopped.

BCBSVT assumed the Government would continue to make the CSR payments in proposing its 2018 rates, and the Board did too in approving them. BCBSVT estimated that the Government would pay BCBSVT approximately $8.7 million to cover its 2018 CSR obligations, and built that assumption into its rates. *Id.* ¶ 23-25 & Exh. H, App. 12, 69.[11] In its August 10, 2017 decision setting BCBSVT's 2018 rates, the Board acknowledged some uncertainty regarding the CSR payments, but "assume[d] cost sharing reductions will continue." *Id.* ¶ 24 & Exh. G, App. 12, 50, 52. The Board reduced BCBSVT's average requested premium increases by over 25%, explaining its intent to "approve rates as lean as possible" while ensuring BCBSVT remained solvent and able to participate in Vermont's health insurance marketplace. *Id.*, App. 63.

Following the Board's decision, the 2018 rates and plan designs were fixed by September 29, 2017, the state's deadline to complete validation of the plans in the VHC computer systems. *Id.* ¶ 23, App. 12. Further, BCBSVT sent out its initial consumer outreach for its 2018 plans on October 6, 2017. *Id.* ¶ 29, App. 13. Thus, by the time HHS announced it would no longer make CSR payments, it was too late to change the 2018 rates (and, of course, the 2017 rates).

[11] *See also* SERFF Filing No. BCVT-131037743, *In re Blue Cross Blue Shield of Vermont 2018 Vermont Health Connect Rate Filing*, No. GMCB-008-17rr, at 2, 106 (May 12, 2017), http://ratereview.vermont.gov/sites/dfr/files/BCVT-131037743_SERRF%20final_082417.pdf, App. 195.

Accordingly, BCBSVT did not raise its 2017 or 2018 rates to account for the lost CSR payments. *Id.* ¶¶ 22-23, App. 11-12.

The Government nonetheless raises the specter of "potential double payment" for CSR obligations, noting that insurers in many states were allowed to increase their 2018 premiums for certain silver-level plans to account for the lost CSR payments. Def. Mot. 15. This approach, known as "silver loading," triggered larger premium tax credits, which in turn alleviated the financial burden for affected insureds. *Id.* at 9-10. The Government does not, however, dispute that BCBSVT did not and could not adjust its premium rates to account for the lost CSR payments. *See id.* Moreover, the Government takes the position that Vermont-specific circumstances are "irrelevant" to the legal issues in this case. *Id.*

Although this "double payment" issue is not material to BCBSVT's claims, the Government's repeated references to it require a response. *See id.* at 9-10 & n.7, 15, 17-18. To reiterate: BCBSVT did not raise its 2017 or 2018 rates to account for the loss of CSR payments from the Government. Greene Dec. ¶¶ 22-23, App. 11-12. Nor could it. Shortly after the Government announced its decision to stop the CSR payments, the Chair of the Green Mountain Care Board publicly stated that the Board would not allow premium increases for 2018 plans, emphasizing that trying to change premiums within days of open enrollment "makes absolutely no sense."[12]

In addition to the disruption and consumer confusion caused by late and unexpected rate hikes, Vermont law precluded the "silver-loading" approach taken in other states. In developing its exchange, Vermont required small groups—i.e., the employees of small employers—to

[12] Erin Mansfield, *Federal Upheaval Won't Change 2018 Health Care Premiums*, VTDigger (Oct. 24, 2017), https://tinyurl.com/yar3pj7s, App. 73.

purchase QHPs and structured its QHP market as a merged risk pool that included both the individual and small-group markets. Vt. Stat. Ann. tit. 33, §§ 1803(b)(2), 1811(b)(3). Small-group enrollees, in general, are not eligible for advance premium tax credits. Because of this market structure, silver-loaded premium increases would have saddled small-group QHP enrollees with higher premiums, but no corresponding increased APTC. Responding to this reality, the Vermont Legislature changed Vermont law to allow silver loading for 2019. Regulators may now approve separate plans and rates for the small-group market, so that the approved rates for certain silver-level QHPs can "include funding to offset the loss of the federal cost-sharing reduction payments," without increasing premiums for small-group enrollees (who do not receive premium tax credits). *See* Vt. Stat. Ann. tit. 33, § 1813(a)(2). This change for 2019 plans underscores that the silver-loading option was not available for 2017 and 2018.

LEGAL STANDARDS

Motion to dismiss. In reviewing a motion to dismiss, the Court should "generally construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1331 (Fed. Cir. 2012). To survive dismissal, the complaint need only plead enough factual matter that, when taken as true, states a claim to relief that is plausible on its face. *Id.* The standard is plausibility, not probability, and it is met when a plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged*." Id*. (quotation omitted). As long as there are "sufficient facts alleged" to render the plaintiff's asserted inferences plausible, the Court may not "choose among competing inferences." *Id.* at 1340.

Summary judgment. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a). The government's liability on Counts I and II, BCBSVT's statutory and implied contract claims, is appropriate for resolution on summary judgment. The relevant facts are undisputed and both claims turn on questions of law that tip clearly in BCBSVT's favor. *See, e.g., Santa Fe Pac. R.R. Co. v. United States*, 294 F.3d 1336, 1340 (Fed. Cir. 2002) ("Issues of statutory interpretation and other matters of law may be decided on motion for summary judgment."); *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998) (noting that existence of a contract "is a mixed question of law and fact" and contract interpretation "is a question of law").

ARGUMENT

Settled law dictates that the Government must honor its legal obligations to insurers like BCBSVT. The text of the ACA is plain and unequivocal: it obligates the Government to make timely and periodic CSR payments. Congress has never abrogated that obligation. The Court should deny the Government's motion to dismiss and hold it liable to BCBSVT for breaching its statutory and contractual obligations.

Statutory claim. The ACA requires the Government, not BCBSVT, to bear the cost of the CSR program. *See Montana Health*, 2018 WL 4203938, at *5 ("statutory language clearly and unambiguously imposes an obligation on the Secretary of HHS to make payments to health insurers that have implemented cost-sharing reductions on their covered plans as required by the ACA"). *Moda* confirms that the ACA's mandatory-payment language places an obligation on the Government without regard to appropriations. 892 F.3d at 1321-22. Based on the undisputed facts, the Court should hold the Government liable for unpaid CSR obligations.

Implied contract claim. The Government is also liable for breaching its contractual obligations. BCBSVT and the Government are parties to an implied contract: BCBSVT accepted the opportunity to sell plans on Vermont's exchange, and in doing so agreed to the Government's terms. The clear terms of the CSR program are part of that deal: (1) insurers must provide CSR benefits to eligible enrollees; and (2) the Government must pay for those benefits by reimbursing the insurers. That is, Congress made insurers the *conduit* and the Government the *funder* of a benefit program that makes insurance more affordable for low-income Americans. Viewed properly, the CSR program is a "quid pro quo exchange for services" giving rise to a valid contract claim. *Moda*, 892 F.3d at 1327 (contrasting an "incentive program" and a "quid pro quo exchange," and holding that the former cannot create an implied contract). When the Government cut off the CSR payments, it failed to perform its end of the exchange. Accordingly, the Court should grant judgment to BCBSVT on its breach of contract claim and deny the Government's motion to dismiss BCBSVT's claim for breach of the covenant of good faith and fair dealing.

Takings claim. BCBSVT's takings claim easily survives dismissal. The Government's decision to stop making CSR payments forced BCBSVT to fund a government benefit program, to the detriment of its reasonable, investment-backed expectations in its insurance contracts. "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). BCBSVT has adequately pled a takings claim based on the Government's unprecedented decision to make BCBSVT pay for a program that Congress intended to fund with taxpayer dollars.

I. This Court has Tucker Act jurisdiction over BCBSVT's claims.

Under the Tucker Act, 28 U.S.C. § 1491, this Court:

> shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). The Act "waives sovereign immunity to allow jurisdiction over claims (1) founded on an express or implied contract with the United States, (2) seeking a refund from a prior payment made to the government, or (3) based on federal constitutional, statutory, or regulatory law mandating compensation by the federal government for damages sustained." *Bruhn Newtech, Inc. v. United States*, 129 Fed. Cl. 656, 662 (2016) (Horn, J.). In its motion to dismiss, the Government does not contest jurisdiction.[13] *See* Def. Mot. 12-23 (arguing that complaint should be dismissed for failure to state a claim). As in *Moda*, the Government's failure to contest jurisdiction effectively concedes that point. *See* 892 F.3d at 1320 n.2 (noting that government did not appeal jurisdictional determination and "appears to concede" that risk corridors statute is "money–mandating for jurisdictional purposes"). And BCBSVT's detailed allegations readily satisfy the threshold requirements for jurisdiction.

Count I: Count I is a claim for damages under a money-mandating statute, specifically, Section 1402 of the ACA (codified at 42 U.S.C. § 18071(c)) as well as 42 U.S.C. § 18082(c)(3) and 45 C.F.R. § 156.430. To establish jurisdiction, BCBSVT must show that "the statute and regulations . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained" and that BCBSVT is a member of the relevant class. *Roberts v. United*

[13] The Government contends that the Court does not have jurisdiction over a supposed "implied-in-law" contract claim based on detrimental reliance, but that is not BCBSVT's claim. Def. Mot. 22; *see infra* 30-31 n.8.

States, 745 F.3d 1158, 1162 (Fed. Cir. 2014) (quotation omitted). Section 1402 alone, which provides that "the Secretary shall make periodic and timely payments," readily satisfies the first requirement. *See, e.g., Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003) (Federal Circuit has "repeatedly recognized" that the "use of the word 'shall' generally makes a statute money-mandating"). And there is no dispute that BCBSVT is an issuer of QHPs entitled to CSR payments. *See* Greene Dec. ¶ 6, App. 6.

Counts II and IV: Count II is a claim for damages for breach of an implied contract, while Count IV alleges breach of the implied covenant of good faith and fair dealing. Tucker Act jurisdiction "requires no more than a non-frivolous *allegation* of a contract with the government." *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011). BCBSVT has properly alleged each of the elements of a contract: "(1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance; and (4) actual authority on the part of the government's representative to bind the government." *Fisher v. United States*, 128 Fed. Cl. 780, 785 (2016) (quotation omitted). *See, e.g.*, Compl. ¶¶ 100-113, ECF No. 1.

Count III: Count III is brought under the Takings Clause and thus falls within this Court's exclusive jurisdiction. *See, e.g., Jan's Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299, 1309 (Fed. Cir. 2008).

II. Under the express, money-mandating provisions of the ACA, the Government is liable to BCBSVT for all unsatisfied CSR payments.

Consistent with the Federal Circuit's controlling analysis in *Moda* and Judge Kaplan's recent ruling in *Montana Health*, Section 1402's mandatory payment language obligates the Government, independent of any appropriations or budget authority, to reimburse BCBSVT for the cost of CSR benefits. Congress has taken no action to suspend or repeal that obligation.

Accordingly, BCBSVT is entitled to partial summary judgment on liability, and the Government's motion to dismiss the statutory claim fails.

A. The ACA mandates periodic and timely CSR payments to insurers.

1. Consistent with *Moda* and *Montana Health,* there is no serious question that the ACA creates a mandatory payment obligation. *See Moda*, 892 F.3d at 1320-22 (holding that Section 1342's instruction that Government "shall pay" was "unambiguously mandatory" and required Government to make annual risk corridors payments); *Montana Health*, 2018 WL 4203938, at *5 (holding that Section 1402 "clearly and unambiguously" imposes obligation for CSR payments). The ACA's mandate that the federal government compensate insurers for the cost-sharing reductions appears at least twice in statute and again in the implementing regulations:

Statutory Provisions. Section 1402 of the ACA both requires insurers to provide the cost-sharing reductions and mandates that the government reimburse insurers for doing so: "An issuer of a qualified health plan making reductions under this subsection shall notify the Secretary of such reductions and the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions." 42 U.S.C. § 18071(c)(3)(A). Congress also directed HHS to adopt a program of advance payments for cost-sharing reductions and required the Treasury to make the payments. 42 U.S.C.A. § 18082(c)(3) ("Secretary of the Treasury shall make such advance payment at such time and in such amount as the Secretary specifies").

Regulations. The ACA's implementing regulations require advance payments to insurers and direct a reconciliation process so that insurers are fully compensated for the actual cost of providing cost-sharing reductions. The regulations provide that insurers "will receive periodic advance payments based on the advance payment amounts calculated in accordance with § 155.1030(b)(3)." 45 C.F.R. § 156.430(b). After insurers document the "actual amounts" of

cost-sharing reductions provided to consumers, HHS must "perform periodic reconciliations" of advance CSR payments against the actual costs borne by insurers. *Id.* § 156.430(c)–(d).

Any one of these provisions is sufficient to establish the Government's obligation to make CSR payments.[14]

2. As *Montana Health* recognizes, the Government's efforts to avoid this conclusion do not "withstand[] scrutiny under controlling precedent." 2018 WL 4203938, at *5. Even the Government's framing of the issue conflicts with *Moda.* The relevant inquiry is *not* whether Congress intended to "authorize damages as a remedy for Congress's own decision not to fund CSR payments." Def. Mot. 3. As *Moda* teaches, the issue is whether the plain language of the statute "created an obligation of the government to pay." *Moda,* 892 F.3d at 1322. The Government cannot dispute Section 1402's money-mandating text, and its arguments regarding congressional intent are unpersuasive and contrary to precedent.

The Government asserts that the ACA does not include an "express" damages remedy and that Congress did not (in the Government's view) permanently appropriate funding for CSR payments. Def. Mot. 13-14. As *Montana Health* observed, plaintiffs "have never been required to make some separate showing that the money-mandating statute that establishes this court's jurisdiction over their monetary claims also grants them an express (or implied) cause of action for damages." 2018 WL 4203938, at *4 n.5. Even if it were true that Congress did not permanently appropriate funding, the Federal Circuit held in *Moda* that Congress's failure to provide budget authority in the ACA was "immaterial." 892 F.3d at 1322; *see also Montana*

[14] The Department of Justice has repeatedly acknowledged to multiple federal courts that the Government is obligated to make CSR payments. *See supra* 7-8; App. 215, 232, 238, 239, 241, 247, 251, 272, 293, 296.

Health, 2018 WL 4203938, at *7 (rejecting Government's argument based on lack of permanent appropriation).

The Government fares no better deeming it "implausible" that Congress intended a damages remedy "for Congress's own decision not to fund CSR payments in annual appropriations bills." Def. Mot. at 2, 16. The fact that *subsequent* Congresses did not expressly appropriate funds for CSR payments is irrelevant; the intent of the Congress that passed the ACA is crystal clear from Section 1402's unambiguous instruction that the Government fully reimburse insurers for the cost-sharing reductions. Moreover, because the Government relied on the ACA's permanent appropriation to make CSR payments until October 2017, Congress did not need to take action. Indeed, the Speaker of the House said that CSR payments were not in the 2017 appropriations bill because "[t]hat's something separate that the administration does." Compl. ¶ 60. If congressional inaction signals anything, it is agreement with the prior practice of making CSR payments.

Finally, the fact that some states permitted insurers to recover lost CSR payments by increasing certain silver plans' premiums (thereby increasing the corresponding tax credits) does not salvage the Government's cause. Def. Mot. 14-15. To begin with, the ACA does not "allow[] *issuers* to account for the absence of CSR payments by increasing their premiums." *Id.* at 14 (emphasis added). Congress "structured the ACA," *id.*, so that insurers are *not* free to raise their rates, but rather must propose rates and plans well before the coverage period begins so that regulators can review and approve them. *See supra* 11-13; Compl. ¶¶ 38-46.[15] Consistent with

[15] Vermont, among many states, receives federal funds specifically to enhance their rate-review programs *See, e.g.*, CMS, State Effective Rate Review Programs, https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/rate_review_fact_sheet.html (based on ACA funding, "43 States and the District of Columbia are using $250 million in grants

the ACA, and contrary to the Government's point, the insurers who used the silver-loading workaround did so only after their regulators allowed it, not unilaterally. *See Montana Health*, 2018 WL 4203938 at *7 ("approval of premium rates is a matter for the states"); *California v. Trump*, 267 F. Supp. 3d 1119, 1134-37 (N.D. Cal. 2017).

The Government also disregards the fact that, while necessary to preserve the exchanges, silver loading disrupts and undermines the ACA. It is more expensive, less targeted, and raises premium costs for individuals who do not qualify for premium subsidies. For issuers to recoup their 2017 costs, they would have had to raise rates *retroactively*, imposing unexpected costs on their insureds. The purpose of the ACA was to expand access to insurance by creating an affordable and predictable market for health insurance. There is not a shred of evidence that the Congress that passed the ACA intended this inefficient, disruptive, and expensive outcome. *See Montana Health*, 2018 WL 4203938 at *7 (possibility of premium increases has "no bearing on whether § 1402 created a statutory obligation" to make CSR payments).

B. BCBSVT is entitled to CSR payments.

As the record here confirms, BCBSVT has complied with all statutory and regulatory requirements for receiving CSR payments for 2017 and 2018 by: (1) offering ACA-compliant qualified health plans on Vermont Health Connect as an issuer under the ACA, Greene Dec. ¶¶ 5-6, App. 6; (2) providing cost-sharing reductions to its insureds in both 2017 and 2018, and continues to do so, *Id.* ¶¶ 14-16, 30, App. 9, 13; and (3) reporting CSR-related data as required by law, *Id.* ¶¶ 17-20, App. 10-11. The Government cannot dispute any of this.

provided by HHS to help them improve their oversight of proposed health insurance rate increases"), App. 182.

C. Congress has not altered or reduced the Government's CSR payment obligation.

In the eight years since the ACA was enacted, Congress has not altered the Act's unambiguous requirement that the Government make CSR payments to insurers. The Government made those payments for three and a half years, from 2014 until October 2017. Further, Congress has done nothing to restrict appropriations. As *Montana Health* notes, "there was no relevant congressional action taken at all after the passage of the ACA" and "no appropriations bills enacted that make reference to § 1402." 2018 WL 4203938, at *7. The Government has acknowledged as much in its own court filings. *See, e.g.*, *Burwell*, ECF No. 55-1, at 10, App. 241 ("Congress has not enacted any legislation restricting the use of the Section 1324 appropriation for that purpose or directing the Executive Branch to cease these ongoing advance payments.").

Indeed, the Attorney General's analysis tellingly does *not* suggest that Congress restricted appropriations or abrogated the Government's obligation to make the payments. Oct. 11, 2017 Ltr. from Atty. Gen. Sessions to Sec'y of Treasury and Acting Sec'y of HHS, App. 162-65. The Attorney General opined only that "the best interpretation of the law is that section 1324 does not appropriate funds for the Affordable Care Act's Cost-Sharing Reduction program." *Id.* at 4, App. 165. This limited observation does not change the fact, as the Government has repeatedly recognized (and as *Moda* and *Montana Health* confirm), that CSR payments are "required" by the ACA. *E.g.*, *Burwell*, ECF No. 52, ¶ 35 (filed Nov. 2, 2015), App. 215.

D. BCBSVT may recover its damages in this Court whether or not Congress has specifically appropriated funds for the CSR payments.

1. BCBSVT may recover its damages in this Court even absent a specific appropriation for CSR payments. "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." *Greenlee Cty., Ariz. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007) (quoting *N.Y. Airways, Inc. v. United States*, 177 Ct. Cl. 800, 369 F.2d 743, 748 (1966)); *see also Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 194-96 (2012) (government is liable for contract obligations that exceed agency's total appropriations for that purpose).

Moda's recent application of this principal is dispositive here. As the Government recognizes, "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." Def. Mot. 16. Just like Section 1342, Section 1402 states unambiguously that the Government "shall make periodic and timely" CSR payments to insurers. 42 U.S.C. § 18071(c)(3)(A). The mere failure to appropriate does not change that obligation one iota. *See Moda*, 892 F.3d at 1321.

Moreover, the Federal Circuit "broke no new ground in *Moda* when it held that the 'shall pay' language of § 1342 created a statutory payment obligation and that the lack of appropriated funds was irrelevant to whether such an obligation was enforceable in this court." *Montana Health*, 2018 WL 4203938, at *6. Indeed, BCBSVT's right to obtain a judgment in this Court dates as far back as 1886, when the Supreme Court affirmed a money judgment awarded to the consul general for Haiti. *United States v. Langston*, 118 U.S. 389 (1886). Although his annual salary was fixed in statute as $7500, for several years Congress appropriated and he was paid only $5000. *Id.* The Supreme Court observed that, although Congress had under-appropriated, it did not adopt any language "from which it might be inferred that congress intended to repeal the act fixing his annual salary at $7,500." *Id.* at 393. Absent words "that expressly, or by clear

implication, modified or repealed the previous law," the full obligation remained and Mr. Langston was entitled to recover his additional salary in the Court of Claims. *Id.* at 394.

This case is no different. *See Montana Health*, 2018 WL 4203938, at *7 (CSR payments "clearly fall[] into the same category as *Langston*"). Congress has not modified or repealed the Government's statutory obligation to make CSR payments.

The Government seizes on *Moda's* description of *Langston* as an "extreme example of a mere failure to appropriate." Def. Mot. 17; *Moda*, 892 F.3d at 1323. But even if *Langston* "expresses the limit," *id.* at 1323, this case does not approach it. *Moda* reasons that Congress can demonstrate intent to repeal or suspend a statutory obligation through certain subsequent actions, including express restrictions in appropriations acts, that clearly signal its intent to override the statute. *Id.* at 1323-25. *Langston* is "extreme" in the sense that Congress's only subsequent action was to appropriate a smaller sum than the statute required. That lesser appropriation, with no other language or provision, was not enough to repeal the statute or nullify the obligation to pay. *Langston*, 118 U.S. at 393-94. Here, there is not even an argument that Congress signaled some contrary intent by appropriating a reduced amount. Congress has *never* disclaimed liability for the full amount of CSR payments owed to insurers, nor acted to restrict the use of funds for CSR payments. The Government cannot dispute this point. *See Burwell*, ECF No. 1642568, at 46 (D.C. Cir. Oct. 24, 2016), App. 292 ("Congress has taken no legislative action to restrict these ongoing payments—to the contrary, it has enacted legislation predicated on the understanding that the payments would be made.").

The Government's current attempt to escape liability rings especially hollow given its consistent litigation position in *Burwell* recognizing that insurers could seek relief in this Court for unpaid CSR obligations:

> The Act requires the government to pay cost-sharing reductions to issuers. . . . The absence of an appropriation would not prevent the insurers from seeking to enforce that statutory right through litigation.
>
> Under the Tucker Act, a plaintiff may bring suit against the United States in the Court of Federal Claims to obtain monetary payments based on statutes that impose certain types of payment obligations on the government. *See* 28 U.S.C. § 1491(a)(1); *United States v. Mitchell*, 463 U.S. 206, 216 (1983). If the plaintiff is successful, it can receive the amount to which it is entitled from the permanent appropriation Congress has made in the Judgment Fund, 31 U.S.C. § 1304(a). The mere absence of a more specific appropriation is not necessarily a defense to recovery from that Fund.

Burwell, ECF No. 55-1, at 20, App. 251; *see also* ECF No. 70, at 9, App. 279 ("courts have held that the absence of an appropriation does not necessarily preclude recovery from the Judgment Fund"); ECF No. 1642568, at 53 n.10, App. 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"). The Government was right then, and wrong now. *See, e.g., Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1583 (Fed. Cir. 1994) (Judgment Fund is "intended to establish a central, government-wide judgment fund from which judicial tribunals administering or ordering judgments, awards, or settlements may order payments without being constrained by concerns of whether adequate funds existed at the agency level to satisfy the judgment."). The absence of a specific appropriation does not defeat BCBSVT's claim.

2. BCBSVT does not, as the Government suggests, concede that Congress has not appropriated funds for CSR payments. *See* Def. Mot. 12-13 (claiming that BCBSVT does not "seriously dispute" this point).[16] From 2014 through September 2017, the Government

[16] The Government also suggests that if BCBSVT "believed that CSR payments were in fact permanently funded," BCBSVT would have brought a separate suit for injunctive relief in federal district court. Def. Mot. 13. This Court, however, "has no jurisdiction over a claim if the plaintiff has another suit for or in respect to that claim pending against the United States or its agents." *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 311 (2011); 28 U.S.C. § 1500.

appropriately relied on the ACA's permanent appropriation, codified at 31 U.S.C. § 1324, to fund the advance CSR payments. BCBSVT agrees with the position previously asserted by the Government in *Burwell* and reserves the right in this case to press its claim, if necessary, that the payments are authorized by that statute. But this Court need not address that question, thanks to *Moda's* holding that the mere failure to appropriate does not obviate the Government's obligation to pay in the face of a money-mandating statute like Section 1402. *See* 892 F.3d at 1322. Whether or not Congress specifically appropriated funds for the CSR payments, the Government's liability for the payments is fixed in statute, enabling BCBSVT to seek recovery in this Court. *See, e.g.*, *N.Y. Airways*, 369 F.2d at 751–52 ("[T]he failure of Congress or an agency to appropriate or make available sufficient funds does not repudiate the obligation; it merely bars the accounting agents of the Government from disbursing funds and forces the carrier to a recovery in the Court of Claims.").

III. By halting CSR payments, the Government breached its implied contract with BCBSVT.

BCBSVT and the Government are parties to an implied-in-fact contract that, among other things, requires BCBSVT to provide cost-sharing reductions to eligible consumers and obligates the Government to make advance payments to BCBSVT to cover those costs. The Government breached that contract when it stopped making the CSR payments, a separate grounds for finding it liable.

"An implied-in-fact contract is one founded upon a meeting of minds and 'is inferred, as a fact, from the conduct of the parties showing, in the light of the surrounding circumstances,

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In light of § 1500, BCBSVT has at this point chosen not to pursue the potentially risky path of filing a separate action in district court. BCBSVT maintains, however, that HHS does indeed have "funding available to make CSR payments." Def. Mot. 13.

their tacit understanding.'" *Hanlin v. United States*, 316 F.3d 1325, 1328 (Fed. Cir. 2003) (quoting *Balt. & Ohio R.R. v. United States*, 261 U.S. 592, 597 (1923)). The "requirements for an implied-in-fact contract are the same as for an express contract; only the nature of the evidence differs." *Id.* Here, the undisputed facts show that all the required elements are met: (1) mutuality of intent; (2) consideration; (3) an unambiguous offer and acceptance; and (4) actual authority on the part of the government's representative to bind the government in contract. *Id.*; *see also City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998).

A. Mutuality of Intent

The Government unequivocally demonstrated its intent to contract by the multi-layered evidence discussed at length above: the express language of the ACA; the implementing regulations promulgated by HHS; the relevant agency guidance and official statements; and its course of conduct in making CSR payments to BCBSVT for over three and a half years. *See supra* 4-11. Those actions and statements made clear that if insurers took on the task of conveying CSR benefits to eligible enrollees, the Government had to, and would, reimburse them for fronting the cost of these government benefits. Where the Government says it will pay private parties who meet its terms, courts have not hesitated to find that the Government intended to contract. *See Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 739 n.11 (1982) (distinguishing employment dispute from cases "where contracts were inferred from regulations promising payment"; collecting cases).

The Federal Circuit's analysis of the implied contract claim in *Moda* shows why that principle applies here. The *Moda* court held that "no statement by the government evinced an intention to form a contract" because the risk corridors statute, regulations, and related government conduct "all simply worked towards crafting an *incentive* program," rather than "the

traditional quid pro quo" inherent in a contract. 892 F.3d at 1330 (emphasis added). By contrast, Section 1402 creates a *benefit* program for insureds,[17] and one that (along with the relevant regulations, agency guidance, and course of conduct) embodies an explicit "quid pro quo exchange for services rendered," *id.* at 1327, between insurers and the Government.

This distinction is dispositive. As explained above, Congress recognized the practical reality that the Government needed the insurers' infrastructure and expertise to distribute that benefit to the intended recipients. Not surprisingly, the relevant statutes, regulations, agency statements, and the Government's actions for three and a half years all reflect Congress's intent, plainly stated in Section 1402's instruction to "make periodic and timely payments," that the Government pay for the benefit by reimbursing the insurers who distribute it in the first instance.

Court of Claims precedent drives home the point. For example, in *Radium Mines*, the Government issued a circular in which it promised to pay private parties a "guaranteed minimum price" for uranium. *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 404-05 (Ct. Cl. 1957). Although the Government argued that the circular was merely an invitation to contract, not an offer, the court deemed that interpretation "untenable." *Id.* at 405-06. The court held that the circular's purpose was to "induce persons to find and mine uranium" and that when a private party "complied in every respect with the terms" of the circular, agency officials were required to purchase uranium at that price. *Id.* Similarly, in *New York Airways*, the court found that the Government's conduct was sufficient to infer an intent to contract, even though Congress did not appropriate sufficient funds for, and the Government did not make, promised payments for helicopter delivery of mail. 369 F.2d at 751 (concluding that a statutorily authorized Board's

[17] The Government recognizes as much (though it draws the wrong conclusion), in the point heading of its argument on this claim. *See* Def. Mot. 18 ("II. Section 1402 Establishes a Benefits Program, Not an Implied-In-Fact Contract.").

order setting compensation rates "was, in substance, an offer by the Government to pay the plaintiffs a stipulated compensation for the transportation of mail"). Like Section 1402, the controlling statute in *New York Airways* directed the Government to make payments in exchange for services provided. *See id.* at 745 (statute directed Postmaster General to "make payments out of appropriations for the transportation of mail by aircraft of so much of the total compensation as is fixed and determined by the Board under this section").

So too here: the relevant statutes, regulations, and government conduct evince a clear intent to pay insurers who take on the job of distributing CSR benefits. *See, e.g.*, HHS Notice, 78 Fed. Reg. at 15,412-13, App. 153-54 (explaining standards developed by HHS that govern provision of cost-sharing and advance payments by federal government); *id.* at 15,480, App. 155 (noting, in explaining HHS requirements for cost-sharing design, that "because cost-sharing reductions are reimbursed by the Federal government, the degree of flexibility afforded to issuers . . . should be somewhat less"); *id.* at 15,486, App. 156 (explaining that HHS adopted advance payment approach to "fulfill[] the Secretary's obligation to make 'periodic and timely payments equal to the value of the reductions'" and "this approach would not require issuers to fund the value of any cost-sharing reductions prior to reimbursement"; *id.* at 15,488, App. 158 ("QHP issuers will be made whole for the value of all cost-sharing reductions"); Compl. ¶¶ 29-35.

Following this precedent, and given *Moda's* distinction between an incentive program and a quid pro quo exchange, the Government's intent to contract here is unmistakable.[18]

[18] The Government's suggestion that BCBSVT is asserting a claim based on detrimental reliance and estoppel is wrong. Def. Mot. 22. The Government misses the critical fact that supports BCBSVT's contract claim: the CSR program embodies a quid pro quo between the parties. This is not a case where the Government merely promised, and then withheld, a *gratis* benefit. *Cf. Steinberg v. United States*, 90 Fed. Cl. 435, 440, 444 (2009) (where plaintiff sought damages for travel costs because he received free tickets to presidential inaugural but was not allowed

Congress guaranteed advance CSR payments to insurers because it knew the only feasible way to distribute the CSR benefit was for insurers to serve as the conduit, and it knew that it was legally responsible to pay for the benefit. Although courts do not "lightly construe" regulatory programs as contractual undertakings, *see Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co*., 470 U.S. 451, 466-67 (1985), the only reasonable inference to draw from the law and the record here is that the Government intended to make a binding contractual obligation.

B. Offer and Acceptance

The Government's offer was conveyed through the statute, implementing regulations, guidance documents, and practice from 2014-2017: insurers participating in the exchanges and offering QHPs had to comply with certain requirements and in exchange would receive financial payments, including advance payments covering the cost-sharing reductions. BCBSVT accepted through its performance: it offered QHPs on the Vermont exchange, provided CSR reductions, and met every requirement for CSR payments. Thus, as in *New York Airways*, the "actions of the parties" show offer and acceptance, and "[n]o formal contract document was required to support the existence of the contract so implied." 369 F.2d at 751–52. Indeed, the Government, in its motion to dismiss, does not contend that BCBSVT did not accept the government's offer. Def. Mot. 18-22.

C. Consideration

The facts evincing mutual consideration are clear and undisputed; again, the Government did not contest this point in its motion to dismiss. *Id.* Consideration is "performance or a return promise . . . bargained for" by the parties. Restatement (Second) of Contracts § 71(1). Here, the

admittance, claim sounded in estoppel). The Government bargained for and received a benefit: BCBSVT's distribution of cost-sharing reductions to eligible insureds.

Government benefits because, by offering QHPs and distributing cost-sharing reductions in real time to insureds, BCBSVT makes the CSR program more efficient and more likely to achieve the ACA's objectives. BCBSVT benefits, in turn, from the potential to expand its market, by reaching consumers who might not buy insurance absent the ACA's tax credits and cost-sharing reductions.

D. Authority

There can be no dispute that the relevant actors had authority to bind the Government. "An agent's actual authority to bind the Government may be either express or implied." *Marchena v. United States*, 128 Fed. Cl. 326, 333 (2016) (citing *Salles v. United States*, 156 F.3d 1383, 1384 (Fed. Cir. 1998)). Authority is implied when it is "considered to be an integral part of the duties assigned to a government employee." *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989) (quotation omitted). The Secretary of HHS is responsible for administering the ACA. *See, e.g.*, 42 U.S.C. §§ 18021(a)(1)(C)(iv), 18022(b), 18031(c). And the ACA provides express authority for the Secretaries of HHS and the Treasury to both implement a program for, and make, advance CSR payments. 42 U.S.C. § 18071(c)(3)(A) ("the Secretary shall make periodic and timely payments"); *see generally* 42 U.S.C. § 18082. Given this express direction, the Government has ample authority to agree to fulfill its CSR payment obligations.

Contrary to the Government's argument, Def. Mot. 21-22, the Anti–Deficiency Act does not limit the Secretary's authority. That Act provides that federal officials "may not . . . involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). As explained above, the Secretary had express statutory authority to implement the advance CSR payments. In *New York Airways*, the Court of Claims held that a statute similar to the Act did not apply, because the relevant

government actor had authority to create the contractual obligation. *See* 369 F.2d at 752 ("Since it has been found that the Board's action created a 'contract or obligation (which) is authorized by law', obviously the statute has no application to the present situation. . . ."). So too here: given the ACA's grant of express authority, the Anti-Deficiency Act is not a defense.

IV. BCBSVT has pled a cognizable claim for breach of the covenant of good faith and fair dealing.

The Government's only argument for dismissing this claim is that "HHS has no contractual obligations with respect to CSR payments." Def. Mot. 23. As set forth above, BCBSVT's detailed allegations fully support its claim for breach of contract. BCBSVT's allegations further show that the Government acted to destroy BCBSVT's reasonable contractual expectations when it halted the CSR payments in October 2017 without eliminating or altering BCSVT's obligation to provide cost-sharing reductions to its insureds. Compl. ¶ 131. The Government has failed to show that this claim should be dismissed.

V. BCBSVT has stated a claim for relief under the Takings Clause.

BCBSVT has adequately pled a takings claim based on the Government's unprecedented decision to force BCBSVT to pay for a government benefit program that Congress intended to fund with taxpayer dollars. The Takings Clause of the Fifth Amendment "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). It protects interests in real property, intangible property, and tangible property. *See, e.g.*, *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009). The first step in analyzing a takings claim is determining whether "the claimant has identified a cognizable Fifth Amendment property interest." *Id.* Relying on *Land of Lincoln*, the Government asserts that BCBSVT has no cognizable property interest in receiving CSR payments. Def. Mot. 25; *Land of*

Lincoln Mut. Health Ins. Co. v. United States, 892 F.3d 1184, 1186 (Fed. Cir. 2018). But that argument misses the point. When the Government stopped compensating BCBSVT for cost-sharing reductions, it targeted and burdened BCBSVT with an unforeseen obligation to fund a government benefit program. Because BCBSVT has a protected property interest in its insurance contracts and in the funds that the Government has effectively confiscated, the complaint sufficiently pleads both a per se takings claim and a *Penn Central* regulatory taking.

A. The Government effected a per se taking by burdening BCBSVT's insurance contracts with the obligation to use its own funds to subsidize a public benefit program.

The CSR program is a *government-funded* insurance subsidy for low-income Americans. When the Government stopped making CSR payments, it effectively required insurers like BCBSVT to pay for this benefit program using their own money—i.e., to put their "private property" to a "public use." The Government has thereby "improperly shifted a public burden to a small class of private parties." *Cienega Gardens v. United States*, 331 F.3d 1319, 1328 (Fed. Cir. 2003). And it has done so by targeting and burdening BCBSVT's property interest in its insurance contracts. That is a taking.

BCBSVT's per se takings claim turns on the distinction between a mere obligation to pay money and a government action that operates upon and burdens a specific property interest. The Federal Circuit has held that "the mere imposition of an obligation to pay money . . . does not give rise to a claim under the Takings Clause." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001). *Commonwealth Edison* discussed and relied upon the Supreme Court's fractured decision in *Eastern Enterprises v. Apfel*, where Justice Kennedy's controlling concurrence held that retroactively requiring coal manufacturers to fund health care for their retirees did not effect a taking. *See* 524 U.S. 498, 540 (1998) (opinion of Kennedy, J.). This,

however, is not a case where the "'law simply imposes an obligation to perform an act, the payment of benefits.'" *Commonwealth Edison*, 271 F.3d at 1339 (quoting *Eastern Enterprises*, 524 U.S. at 540 (opinion of Kennedy, J.)). Congress has not taxed insurers nor, as in *Eastern Enterprises*, passed any law that requires insurers to fund the CSR program. The only law that Congress passed unambiguously provides that the federal government "shall" bear those costs. When the Government stopped making CSR payments, it confiscated BCBSVT's funds by making BCBSVT pay for the CSR program, and did so in a manner that operates on and burdens BCBSVT's property interest in its insurance contracts.

The Supreme Court has found a taking where government-imposed financial obligations operate upon an identified property interest "by directing the owner of a particular piece of property to make a monetary payment" toward some public purpose. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 613 (2013). In *Koontz*, a permitting authority attempted to exact money for offsite wetlands conservation in exchange for granting a permit. *Id.* at 612-13. Because the "monetary obligation" operated with respect to a specific property interest, it was a taking. *Id.* at 613-14. Distinguishing *Eastern Enterprises*, the Supreme Court explained that "when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a 'per se [takings] approach' is the proper mode of analysis." 570 U.S. at 614 (quoting *Brown v. Legal Foundation of Wash.*, 538 U.S. 216, 235 (2003)).

Here, the Government has decided (in clear violation of the ACA) to fund the CSR program by imposing a "monetary obligation burden[ing]" BCBSVT's individual insurance contracts. It makes no difference that the particular piece of property burdened here is a contract, rather than real property. "Valid contracts are property . . . ." *Lynch v. United States*, 292 U.S.

571, 579 (1934); *see also A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1152 (Fed. Cir. 2014) ("There is no dispute that the plaintiffs' franchise agreements are property for purposes of the Takings Clause."). It is settled law that the Takings Clause protects against government action that nullifies contract rights. *See Cienega Gardens*, 331 F.3d at 1334-35. Consistent with *Koontz* and *Cienega Gardens*, the Takings Clause also protects against what the Government is doing here: exacting funds from a private party to fund a public benefit as a condition of maintaining its contractual relationships. In other words, the Government has taken identifiable funds in a manner that operates on BCBSVT's contracts and therefore violates the Fifth Amendment. *See Koontz*, 570 U.S. at 614; *see also Phillips v. Washington Legal Found.*, 524 U.S. 156, 160, 172 (1998) (interest earned on client funds in IOLTA is clients' private property for purposes of the Takings Clause).

Further, even if the Court finds that the facts alleged do not support a per se takings claim, the facts support liability under the closely related doctrine of illegal exactions. An illegal exaction occurs when a "'plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum that was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.'" *Piszel v. United States*, 833 F.3d 1366, 1382 (Fed. Cir. 2016) (quoting *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996)). "The amount exacted and paid may be recovered whether the money was paid directly to the government, or was paid to others at the direction of the government to meet a governmental obligation." *Aerolineas Argentinas*, 77 F.3d at 1573. The Government had, and has, no legal authority to force BCBSVT to subsidize cost-sharing reductions for low-income insureds. The ACA requires the Government to bear those costs. By choosing to halt the CSR payments, but continuing to require insurers to provide cost-sharing

reductions, the Government forced BCBSVT to use its own funds to meet a government obligation. BCBSVT may pursue recovery of the funds illegally exacted in this Court. *See id.* (suit may be maintained under the Tucker Act to recover money illegally exacted).

B. BCBSVT has adequately pled a claim for a regulatory taking.

To establish a regulatory taking, a plaintiff "must show that his property suffered a diminution in value or a deprivation of economically beneficial use." *A & D Auto Sales,* 748 F.3d at 1157. Government regulation "becomes a compensable taking . . . if the government interference has gone 'too far,'" meaning "the government has forced 'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Cienega Gardens,* 331 F.3d at 1336-37 (quoting *Penn. Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922) and *Armstrong v. United States,* 364 U.S. 40, 49 (1960)). The Federal Circuit has recognized that government action that impairs contract rights may effect a regulatory taking. *See A & D Auto Sales*, 748 F.3d at 1158-59 (allowing franchise auto dealers opportunity to amend complaint to allege loss of value in franchises to support regulatory takings claim); *see also Cienega Gardens*, 331 F.3d at 1340-1353 (holding that statutes that abrogated prepayment rights in mortgage contracts effected regulatory taking).

The facts alleged by BCBSVT are sufficient to support a claim that the Government effected a taking of the value of BCBSVT's insurance contracts. Whether government action "goes 'too far' for purposes of the Fifth Amendment is determined by an 'ad hoc, factual inquiry.'" *Cienega Gardens*, 331 F.3d at 1337 (quoting *Penn Central Transp. Co. v. City of N.Y., et al.*, 438 U.S. 104, 124 (1978)). The Federal Circuit uses *Penn Central's* three factors to assess a regulatory taking claim: "(1) character of the governmental action, (2) economic impact of the

regulation on the claimant, and (3) extent to which the regulation interfered with distinct investment-backed expectations." *Id.* Each of these factors supports BCBSVT's claim.

1. The Government's action, in forcing BCBSVT to fund a benefit program that by law is to be funded with taxpayer dollars, is well over the line drawn by *Penn Central*. As in *Cienega Gardens*, this is simply "not a case in which the burden for remedying a societal problem has been imposed on all of society." 331 F.3d at 1340. The Government shifted that burden from the public fisc (where Congress placed it) to BCBSVT. Nor can the Government's abandonment of its CSR payment obligation fairly be described as a "public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. Again, Congress made an express and deliberate decision that the Government should pay for the CSR program. Instead of adhering to the ACA's requirements, the Government stopped making CSR payments at a point when BCBSVT was committed to offering QHPs for 2017 and 2018 and its rates were fixed. The Government's action caused a "disproportionate imposition" on BCBSVT by forcing it to bear the cost of this public benefit program. *Cienega Gardens*, 331 F.3d at 1340 ("disproportionate imposition . . . of the public's burden of providing low-income housing is not rendered any more acceptable by worthiness of purpose").

2. The economic impact of the regulation is substantial. BCBSVT is a nonprofit health insurer that plays a critical role in providing access to care for Vermonters. Compl. ¶¶ 6-8. Although it is the largest Vermont insurer, it is small by national standards and it has lost millions of dollars for the 2017 and 2018 plan years. Compl. ¶ 121. It has been forced to provide insurance coverage at a loss to thousands of insureds because the Government chose to abandon its obligations under the ACA. Because its rates are set by law, the additional costs imposed by

the Government's actions come out of BCBSVT's reserves. BCBSVT has easily met the "threshold requirement" of showing "serious financial loss." *Cienega Gardens,* 331 F.3d at 1340.

3. BCBSVT had reasonable, investment-backed expectations in its insurance contracts. This factor "limit[s] recoveries to property owners who can demonstrate that they bought their property in reliance on a state of affairs that did not include the challenged regulatory regime." *Id.* at 1346 (quotation omitted). BCBSVT has alleged that its rates were fixed and it was committed to offering plans on Vermont's exchange before the Government stopped making CSR payments. Compl. ¶¶ 52-54, 57, 67-68. Therefore, its insurance contracts with its members were premised on the Government meeting its obligation to make CSR payments. *Id.* ¶¶ 68-69. Further, BCBSVT's expectation that the Government would continue to make CSR payments was objectively reasonable. *See Cienega Gardens,* 331 F.3d at 1346 (noting that this factor "incorporates an objective test"). The Government unilaterally and without legislative authorization abrogated a "key rule of a pre-existing regime." *See id.* A reasonable insurer would not have expected the Government to stop making payments that are mandated by the ACA and were made for years—and certainly would not have expected the Government to do so after rates were approved for the 2018 plan year. Indeed, the Government cannot conceivably argue that insurers should have predicted the Government's wholesale abandonment of its legal obligations.

At this preliminary stage, the only issue is whether BCBSVT has pled sufficient facts to state a plausible claim. *See, e.g.*, *TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1380 (Fed. Cir. 2013) (holding that allegations supporting takings claim were "sufficient to survive dismissal at this early stage of the proceedings" and further factual development was necessary to assess Government's necessity defense). Because BCBSVT is moving for summary judgment on its

statutory and contract claims, the Court may not need to further address the takings claim. BCBSVT has, however, pled facts sufficient to survive dismissal "at this early stage." *Id.*

* * * *

Although BCBSVT presently seeks partial summary judgment on liability alone, BCBSVT has sustained and continues to sustain substantial harm from the Government's failure to make CSR payments. The 2017 and 2018 premium rates requested by BCBSVT and ultimately approved by the Green Mountain Care Board were premised on the Government continuing to fulfill its obligation to make the payments. BCBSVT did not (and indeed could not) increase those rates after the Government stopped paying. *See supra* 12-14. As a result, BCBSVT has been forced to absorb a multi-million dollar loss that mounts with every cost-sharing reduction it provides to its members.

CONCLUSION

For the reasons given above, the Court should deny the Government's motion to dismiss, grant BCBSVT's cross-motion for partial summary judgment on liability, and hold the Government liable to BCBSVT for all unsatisfied CSR payments related to calendar years 2017 and 2018.

Respectfully submitted,

Dated: September 14, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2018, a copy of the attached Plaintiff's Opposition to Defendant's Motion to Dismiss, Cross-Motion for Partial Summary Judgment, and Memorandum of Law in Support was filed 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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