No. 18-136C
(Senior Judge Firestone)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

SANFORD HEALTH PLAN,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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

CHAD A. READLER
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

CLAUDIA BURKE
Assistant Director

CHRISTOPHER J. CARNEY
Senior Litigation Counsel
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, D.C. 20044
Tele: (202) 305-7597
Fax: (202) 307-0972

Attorneys for Defendant

OF COUNSEL:

ERIC E. LAUFGRABEN
VERONICA N. ONYEMA
Trial Attorneys
United States Department of Justice

August 10, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

RULES

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

SANFORD HEALTH PLAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 18-136
	)	Senior Judge Firestone
THE UNITED STATES,	)	
	)	
Defendant.	)	
	)	

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

Pursuant to Rules 12(b)(6) and 56 of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully submits this reply in further support of its motion to dismiss the complaint of plaintiff, Sanford Health Plan, and in opposition to plaintiff's cross-motion for summary judgment. Plaintiff's complaint fails to state a claim upon which relief can be granted and its motion for summary judgment fails as a matter of law.

INTRODUCTION

The Patient Protection and Affordable Care Act (ACA) established two programs in the same subpart to lower the cost of health coverage offered through the Exchanges. Section 1401 of the ACA authorizes a premium tax credit, which Section 1401 funded by amending a preexisting permanent appropriation for tax credits. Section 1402 required health insurance issuers to reduce cost sharing (such as deductibles and co-payments) for eligible insureds, and further provided 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.

In plaintiff's opposition to our motion to dismiss and its cross-motion for summary judgment, it contends that it is nonetheless entitled to recover, through the Judgment Fund, CSR payments that Congress declined to fund directly and that whether Congress has appropriated money for a program is "irrelevant" to the Court's inquiry. To support its claims, plaintiff relies selectively upon the Federal Circuit's recent decision in the risk corridors case, *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311 (Fed. Cir. 2018). But *Moda* recognized that congressional intent is the touchstone for determining whether Congress created a right to payment. In the context of the CSR program, Congress made clear its intent not to fund CSR payments when it permanently appropriated funds for the only other statutory section appearing *in the same subpart*, while declining to do so for CSR payments. Congress plainly declined to fund the CSR program and deferred the funding question to a future Congress that also elected to not fund the program, such that no funding for these payments is available.

Furthermore, Section 1402 does not provide the damages remedy plaintiff seeks from the Judgment Fund. 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, 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 in the ACA.

Although Congress did not fund CSR payments, the structure of the ACA does allow 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 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 a 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 statutory and contract claims fail as a matter of law, the complaint should be dismissed and the cross-motion for summary judgment denied.[1]

[1] Plaintiff represents that its cross-motion "focuses solely on liability." Pl. Cross-Mot. at 4, n.6. While the Government contends that plaintiff's complaint should be dismissed, even were plaintiff to prevail, the precise amount of damages that plaintiff could recover would still need to be determined, as CMS is still in the process of reconciling CSR payments for 2017. Moreover, while plaintiff represents in its cross-motion that it participates on, among others, the Iowa ACA exchange (*see e.g.*, *id*. at 7), CMS's records do not show that plaintiff offered plans in Iowa for the 2017 plan year that were eligible for CSRs.

ARGUMENT

I. Plaintiff's Statutory Claims Fail Because Congress Did Not Intend To Fund CSR Payments

A. The Structure Of The ACA Demonstrates That Congress Did Not Intend To Fund CSRs

As the Court is aware, in *Moda* 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 *Moda*, the "central issue" and touchstone for the Federal Circuit's inquiry into whether issuers were entitled to collect risk corridor payments was congressional intent. 892 F.3d at 1320-23. Here, too, the touchstone of the inquiry must be congressional intent: insurers cannot collect CSR payments from the Government unless Congress intended to allow them to do so. The framework of the ACA, and in particular the single subpart in which Congress elected to permanently fund one section (premium tax credits) and to not fund the other section (CSRs), demonstrates that Congress did not intend for the Government to expend funds for CSRs absent a subsequent annual appropriation.

It is axiomatic that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir.

1972) (holding that had Congress meant to give two adjacent subsections the same meaning, it would not have placed restrictions in one subsection that it did not in the other)). The Supreme Court recently reiterated this point by observing 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). Contrary to the Supreme Court's guidance, plaintiff's reading of the ACA would make Congress's choice to fund Section 1401, and not to fund Section 1402, meaningless.

Plaintiff's statutory entitlement argument rests upon its selective reading of *Moda*. *See* Pl. Cross-Mot. at 11-16. Plaintiff claims that it is "beside the point here" whether "Congress chooses not to provide money to fund the CSR obligations," and that the existence of an appropriation is "irrelevant" to whether the Government has an obligation to pay CSRs. *Id*. at 12-13. Plaintiff's arguments in this regard fail to capture the complete holding in *Moda.*

We recognize that in *Moda*, the Federal Circuit concluded that the language in Section 1342 stating that the Secretary "shall pay" certain amounts in accordance with a statutory formula initially created an obligation to make full risk-corridors payments without regard to appropriations or budget authority.[2] But the Federal Circuit recognized in *Moda* that the dispositive issue is congressional intent (as is true in any statutory interpretation case). 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

[2] We respectfully disagree with this aspect of *Moda*'s reasoning and preserve the issue for further review.

subsequent appropriations legislation that reflected Congress's intent to have the program operate in a budget neutral manner. *Moda*, 892 F.3d at 1320-22.

Importantly, the Court in *Moda* ruled in favor of the Government and held that "the central issue on Moda's statutory claim, therefore, is whether the appropriations riders adequately expressed *Congress's intent* to suspend payments on the risk corridors program beyond the sum of payments in. We conclude the answer is yes." 892 F.3d at 1323, 1327 ("The question is what intent was communicated by Congress's enactments in the appropriations bills for FY 2015–2017.") (emphasis added). The Court further observed, "what else could Congress have intended? It clearly did not intend to consign risk corridors payments 'to the fiscal limbo of an account due but not payable.'" *Id*. at 1325 (quoting *United States v. Will*, 449 U.S. 200, 224 (1980)).

In reaching the conclusion in the earlier part of its opinion that a statutory obligation can exist independent of an appropriation, 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 relied upon *Belknap v. United States*, 150 U.S. 588, 594-95 (1893), where the Supreme Court itself explained that *Langston* "expresses the limit" for recognizing liability in a case in which "mere failure to appropriate . . . was not, in and of itself alone sufficient to repeal the prior act . . . ." As the Federal Circuit explained, *Langston* is "an extreme example of a mere failure to appropriate." *Moda* at 1323.

Section 1402 of the ACA is far from "an extreme example of a mere failure to appropriate" and altogether different factually from the salary of a single ambassador at issue in

Langston. 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. 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 for the only other section in that subpart—the CSR program. *See Digital Realty Trust, Inc.*, 138 S. Ct. at 777 ("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."). This distinction is all the more compelling considering the structural features of the Premium Tax Credits and Cost-Sharing Reductions subpart, which allow issuers to use advance payments of premium tax credits to recoup unfunded CSR costs.

It is also important to recognize that in *Moda* no judgment was entered against the United States based upon the Federal Circuit's statements regarding the text of the risk corridors statute, because that Court ruled in the Government's favor on other grounds. Moreover, in *Langston*, which predated the Judgment Fund, an Act of Congress was required to pay the judgment. *See* Act of August 4, 1886, 24 Stat. 256, 281-82 (1886) (authorizing payment of the judgment entered for Langston).

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

Plaintiff does not appear to dispute that absent an appropriation, the Executive Branch is forbidden from making CSR payments. *See* Pl. Cross-Mot. at 14 ("The Government stresses that the Constitution forbids money being paid from the federal fisc absent an appropriation. *True enough*.") (emphasis added). However, plaintiff maintains that "*regardless* of whether funds have been appropriated to HHS to make payment," the Government is bound to make CSR

payments because of the "shall pay" language in section 1402 of the ACA. *Id*. at 12 (emphasis added). That is because in its view, it is "the function of the Court of Federal Claims" to render judgment for unmet statutory obligations, making "the existence of a specific appropriation irrelevant." *Id*.[3] However, if the inquiry were that simple, the Court in *Moda* would have concluded that the "shall pay" language in section 1342 of the ACA required the Government to make risk corridors payments, regardless of whether Congress restricted the funding available to HHS to make those payments.

Instead, the *Moda* Court expressly rejected the plaintiff's argument that it did not matter that Congress had barred HHS from using particular appropriations for the risk corridors program. *Id*. at 1325-26. Moda's position would have required the Court to infer "that upon enacting the appropriations riders, Congress intended to preserve insurers' statutory entitlement to full risk corridors payments but to require insurers to pursue litigation to collect what they were entitled to." *Id*. at 1326. The Federal Circuit declined to draw that illogical inference.

Yet, plaintiff's position here would require the Court to draw the similar inference that, despite funding section 1401 premium tax credits and not funding 1402 CSR payments, Congress intended to consign CSRs "to the fiscal limbo of an account due but not payable." *Will*, 449 U.S. at 224. Likewise, plaintiff would have the Court infer that Congress intended to create a statutory entitlement to CSR payments that could only be collected through after-the-fact litigation. While in *Moda*, congressional intent was divined from *subsequent* appropriations legislation, nothing in the decision stands for the proposition that the Court cannot infer

[3] While plaintiff does not appear to dispute the district court's holding in *United States House of Representatives v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016), that Congress did not appropriate funding for the CSR program, it incorrectly refers to the case as "a now-vacated decision." Pl. Cross. Mot. at 13 & n.13. Although the district court vacated its injunction following a settlement between the parties, the court did not vacate its opinion.

congressional intent from the appropriation that was enacted *simultaneously* with the section at issue. Here, Congress made its intent plain by permanently funding the Section 1401 tax credits, while declining to fund the Section 1402 CSR payments.

In essence, plaintiff's claim is that it is entitled to *damages* for HHS's failure to make cost-sharing reduction 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 an implied damages remedy. Thus, the "touchstone here, of course, is whether Congress intended a cause of action that it did not expressly provide." *Bowen*, 487 U.S. at 905 n.42. 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 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 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.

Moreover, 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 advanced payment of 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. 3d at 1139.[4]

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 intended for issuers to collect full payments via damages, while also potentially recouping CSR costs through higher premiums and advanced payment of 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.

[4] 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 (filed July 16, 2018 N.D. Cal.). 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.

Plaintiff misconstrues our structural argument when it suggests that we are claiming that it might receive a windfall for the October-December 2017 period, were it to recover here. *See* Pl. Cross. Mot. at 16. Likewise, the claim that plaintiff was unable to raise premiums in North Dakota because of actions taken by the North Dakota Insurance Commissioner (*id*. at 16, n.16) is irrelevant to this legal inquiry. As discussed above, the controlling question is whether Congress intended to give issuers a damages cause of action that it did not explicitly provide. *See Bowen*, 487 U.S. at 905 n.42. Whether North Dakota allowed plaintiff to adjust its premiums sheds no light on whether *Congress* intended to give issuers a damages remedy. For the reasons discussed above, Congress had no such intention.

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)). *Greenlee County* did not award any damages because, as in *Moda*, the Federal Circuit ruled in the Government's favor on the merits.

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, 398 (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.

Finally, any reliance on the Judgment Fund as a stand-in appropriation for cost-sharing reduction payments 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. Plaintiff's Contract Arguments Fail Because Section 1402 Establishes A Benefits Program, Not An Implied-In-Fact Contract

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

"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*, 470 U.S. 451, 465-66 (1985)); *accord Moda*, 892 F.3d at 1329. This presumption rests on the basic premise that it is the function of Congress to pass laws that set national policy, not to make contracts. *Brooks*, 702 F.3d at 630 (citing *Atchison*, 470 U.S. at 466); *accord Moda*, 892 F.3d at 1329. As such, a party contending that Congress intended to

create a contact must overcome this presumption, and courts exercise caution both in finding a contract within a statute and in defining the nature of a contractual relationship. Plaintiff's attempts to overcome this well-settled presumption by citing to the CSR statute and regulation fail because these provisions do not speak in terms of contract. *See 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.").

Notably, while plaintiff relies heavily upon a selective reading of *Moda* in advancing its statutory damages argument, it relegates *Moda's* holding that plaintiffs had failed to establish an implied-in-fact contract under the ACA to a footnote, where plaintiff appears to call into question "the merits of that portion of the *Moda* decision." *See* Pl. Cross. Mot. at 19, n.20. Yet, 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. *Moda* rejected an implied-in-fact argument made by issuers with regard to the ACA's risk-corridors program that is similar to the one plaintiff makes here. "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* Pl. Cross. Mot. at 17-18. Also, similar to the issuer in *Moda*, plaintiff claims that "it is clear that the purpose of the CSR program was to mitigate risks for insurers and thereby induce them to offer

insurance coverage in the individual market," thus resulting in an implied-in-fact contract. *See id*. at 19. 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).

Plaintiff relies upon *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 405 (Ct. Cl. 1957) and *New York Airways, Inc. v. United States*, 369 F.2d 743, 752 (Ct. Cl. 1966), to support its implied-in-fact contract theory. *See* Pl. Cross. Mot. at 18-19. Yet, the Federal Circuit distinguished both those cases in *Moda* on grounds that apply equally here:

> [T]he overall scheme of the risk corridors program lacks the trappings of a contractual arrangement that drove the result in *Radium Mines*. There, the government made a "guarantee," it invited uranium dealers to make an "offer," and it promised to "offer a form of contract" setting forth "terms" of acceptance. *Radium Mines*, 153 F. Supp. at 404–05; *see N.Y. Airways*, 369 F.2d at 752 (finding intent to form a contract where Congress specifically referred to "Liquidation of Contract Authorization"). Not so here. The risk corridors program is an incentive program designed to encourage the provision of affordable health care to third parties without a risk premium to account for the unreliability of data relating to participation of the exchanges—not the traditional *quid pro quo* contemplated in *Radium Mines*.

Moda, 892 F.3d 1329-30.

In contrast to the statutes referenced in *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 Does Not Have Authority to Enter Into Contracts for CSR Payments And 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, 1302 (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). Thus, Plaintiff's attempts to find authority to contract based upon generalized pronouncements in section 1402 authorizing the Secretary to establish a CSR program, must fail.

Moreover, as noted in our motion to dismiss, 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).

These principles preclude plaintiff's claim. Sections 1402 and 1412 of the ACA do not vest any Federal official with any contracting authority. And as explained above, no appropriation or budget authority for CSR payments was ever enacted by Congress. Thus, no valid contract for the payment of CSRs could have been formed.

C. The QHP Agreements Preclude Any Implied Contract

Plaintiff also contends that an implied-in-fact bilateral contract is evidenced by the QHP Agreements. Pl. Cross-Mot. at 22-23. This argument must fail because an implied contract

cannot be grounded on an express contract. *Durant v. United States*, 16 Cl. Ct. 447, 452 (1998) ("Because plaintiffs' implied-in-fact contract argument is grounded on the same facts as the express contract, the existence of the express contract precludes the court from finding an implied-in-fact contract"); *accord Bank of Guam v. United States*, 578 F.3d 1318, 1329 (Fed. Cir. 2009) (citing cases). The QHP Agreements established the relevant contractual parameters of plaintiff's offering of QHPs on an Exchange, and those parameters required only that plaintiff meet certain data transmission and security requirements before it could participate on a Federally-facilitated Exchange. *See* 45 C.F.R. § 155.260(b)(2) (section titled "Privacy and security of personally identifiable information."). Plaintiff cannot inject additional contractual obligations by recourse to an implied contract theory.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court dismiss plaintiff's complaint and deny plaintiff's cross-motion for summary judgment.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

/s Claudia Burke
CLAUDIA BURKE
Assistant Director

OF COUNSEL:

ALBERT S. IAROSSI
ERIC E. LAUFGRABEN
VERONICA N. ONYEMA
Trial Attorneys
United States Department of Justice

/s Christopher J. Carney
CHRISTOPHER J. CARNEY
Senior Litigation Counsel
Commercial Litigation Branch
Civil Division
United States Department of Justice
PO Box 480
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 305-7597
Facsimile: (202) 307-0972
E-mail: chris.carney@usdoj.gov

Attorneys for Defendant

August 10, 2018