Case No. 18-373 C
(Judge Horn)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS & BLUE SHIELD OF VERMONT,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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

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October 15, 2018

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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 combined reply in support of its motion to dismiss and response to plaintiff's cross-motion for partial summary judgment as to liability. Because plaintiff's complaint fails to state a claim upon which relief can be granted and its cross-motion for partial summary judgment fails to establish liability as a matter of law, the complaint should be dismissed.

INTRODUCTION

As we demonstrated in our moving brief (U.S. Mot.), plaintiff is not entitled under any theory to cost-sharing reduction (CSR) payments absent an appropriation by Congress. Thus, however plaintiff frames its claim—as a statutory violation, breach of contract, or a taking—plaintiff relies on the erroneous premise that it should recover in damages the precise amount of CSR payments for which Congress declined to appropriate funds. But as plaintiff recognizes, congressional intent controls plaintiff's entitlement to CSR payments. Congress already signaled its intent in the Affordable Care Act (ACA) by appropriating permanent funding for Section 1401 (premium tax credits) while leaving its companion provision, Section 1402 (cost-sharing reductions) to the annual appropriations process. Congress did not fund CSRs when it enacted the ACA and it has not funded CSRs since then. And Congress did not authorize an ACA damages remedy so issuers could recover in Court the same CSR payments that Congress declined to fund. Because granting plaintiff's motion would circumvent Congress's intent to leave CSR funding to the annual appropriations process, the Court should grant the United States' motion to dismiss, deny plaintiff's cross-motion for partial summary judgment, and dismiss the complaint.[1]

ARGUMENT

I. Plaintiff Fails To Demonstrate That Congress Intended To Make CSR Payments In The Absence Of An Appropriation

As we demonstrated in our moving brief, the ACA's structure reflects Congress's intent to leave CSR funding to the annual appropriations process, to be decided by future Congresses. *See* U.S. Mot. at 12-18. In its response, plaintiff makes three global points, none of which undermines our argument that congressional intent controls whether plaintiff is entitled to CSR payments in the absence of an appropriation. First, plaintiff erroneously argues that neither the existence of an appropriation nor an authorized damages remedy is relevant to plaintiff's entitlement to CSR payments because subsequent Congresses have not signaled an intent to repeal Section 1402's statement that the "Secretary shall make periodic and timely payments."

[1] We recognize that Judge Kaplan recently granted partial summary judgment to issuers alleging entitlement to CSR payments. *See Montana Health Co-Op v. United States*, No. 18-143 C, 2018 WL 4203938, at *4 (Fed. Cl. Sept. 4, 2018); *Sanford Health Plan v. United States*, No. 18-136 C, 2018 WL 4939418 (Fed. Cl. Oct. 11, 2018). In both cases, Judge Kaplan held that Section 1402 created a mandatory obligation on the United States' part to make CSR payments notwithstanding Congress's funding choices. *See, e.g.*, *Montana Health Co-Op*, 2018 WL 4203938, at *7. Judge Kaplan relied upon the same statutory arguments that plaintiff makes here in reaching this conclusion. Thus, for the reasons set forth in our moving brief and in this brief, we respectfully disagree with Judge Kaplan's rulings.

See Pl.'s Resp. and Cross-Mot. (Pl. Br.) at 19, 23, 25. Second, plaintiff erroneously argues that issuers may *not* raise premiums to account for the lack of CSR appropriations because premium adjustments are subject to approval of state regulators. *Id*. at 21-22. Third, plaintiff erroneously argues that, even in the absence of an appropriation, plaintiff may still seek damages in this Court. Pl. Br. at 23-27. As we demonstrate below, none of plaintiff's arguments overcomes the ACA's legislative hurdle.

A. Section 1402 Reflects No Congressional Intent To Make CSR Payments In The Absence Of An Appropriation

Although plaintiff acknowledges that congressional intent controls whether the ACA requires the United States to make CSR payments, plaintiff labors under the misimpression that Congress only signals its intent through a *subsequent* repeal or modification of an existing, substantive law. *See* Pl. Br. at 21, 25 (citing *Moda Health Plan v. United States*, 892 F.3d 1311, 1323 (Fed. Cir. 2018); *Langston v. United States*, 118 U.S. 389, 393-94 (1886)). As we demonstrated in our moving brief, no subsequent repeal or modification is necessary given that the ACA's structure already reflects Congress's intent. U.S. Mot. at 12-14, 16. The relevant ACA subpart—Title 1, subtitle E, part I, subpart A (Premium Tax Credits and Cost-Sharing Reductions)— contains two sections: Section 1401 (premium tax credits) and Section 1402 (cost-sharing reductions). Section 1401 amended the tax code to provide a permanent appropriation to fund premium tax credits. *See* 26 U.S.C. § 36B. In contrast, Congress provided no permanent appropriation to fund Section 1402, leaving CSR funding to the annual appropriations process. This structural difference is dispositive because "[w]hen Congress includes particular language in one section of a statute but omits it in another[,] . . . th[e] Court presumes that Congress intended a difference in meaning." *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) (quoting *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014)).

Plaintiff cites *Moda* for the incorrect proposition that Congress may only demonstrate its intent to control CSR payments through "certain *subsequent* actions, including express restrictions in appropriations acts . . . ." Pl. Br. at 25 (citing *Moda*, 892 F.3d at 1323 (emphasis added)). Whether Congress reflects its intent through restrictions in subsequent appropriations, as in *Moda*, or through the structure of the statute itself, as in this case, the point is that *Moda* does not specify that Congress *only* signals its intent through subsequent actions, rather than through the underlying statute itself. *See Moda*, 892 F.3d at 1320-22. On the contrary, courts routinely look to the substantive statute to determine congressional intent. *See*, *e.g.*, *Consol. Edison Co. of N.Y. v. O'Leary*, 117 F.3d 538, 543-44 (Fed. Cir. 1997) (examining substantive statute to determine whether congress intended to provide a private remedy); *see also Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1192 (Fed. Cir. 2004).

In this case, the ACA itself reflects Congress's intent to permanently fund Section 1401 (premium tax credits) while leaving Section 1402 (CSR payments) funding to future Congresses. And because Congress elected not to appropriate funds for CSR payments either in the ACA itself or in subsequent appropriations legislation, plaintiff cannot establish as a matter of law its entitlement to CSR payments in the absence of an appropriation.[2]

[2] Plaintiff's repeated characterization of the CSR program as a benefit program, *see* Pl. Br. at 1, 3, 16, 29, 33, 34, 38, only underscores our point that congressional appropriations limit the United States' liability for CSR payments. As the Federal Circuit explained, "there is greater room in benefits programs to find the government's liability limited to the amount appropriated." *Greenlee County v. United States*, 487 F.3d 871, 879 (Fed. Cir. 2007) (quoting *Star-Glo Assocs., L.P. v. United States*, 414 F.3d 1349, 1355 (Fed. Cir. 2005)).

B. Plaintiff Concedes That The ACA's Structure Permits Issuers To Account For The Absence Of CSR Payments Through Premium Increases

In our moving brief, we also demonstrated that the ACA's structure permits issuers to raise premiums to account for the lack of CSR appropriations. U.S. Mot. at 6, 15. In response, plaintiff acknowledges that many issuers have increased premiums to account for the absence of CSR payments, but contends that those premium increases were permissible only because state regulators approved them. *See* Pl. Br. at 15. However, as we explained in our motion to dismiss, the controlling question is whether Congress intended to give issuers a damages cause of action that it did not explicitly provide. Thus, whether a particular state allowed premium adjustments for a particular time period sheds no light on whether Congress intended to give issuers a damages remedy. Congress structured the ACA—as matter of Federal law—in a manner that allows plaintiff (and other issuers) to account for the absence of CSR payments by increasing insurance premiums. *Compare* U.S. Mot. at 6, 14, *with* Pl. Br. at 11-13. Indeed, as the *California v. Trump* court recognized, insurance regulators in 38 states accounted for the possible termination of CSR payments in approving issuers' 2018 premium rates. *See* U.S. Mot. at 10 (citing *California v. Trump*, 267 F. Supp. 3d 1119, 1136 (N.D. Cal. 2017).

C. The ACA Reflects No Intent That Issuers Would Recoup As Damages The CSR Payments For Which Congress Elected Not To Appropriate Funds

Other than quoting the *Montana* decision, plaintiff does not meaningfully address our argument that the ACA provides no damages remedy in the event that Congress declines to appropriate funds for the CSR program. *Compare* U.S. Mot. at 13-16 (citing *Bowen v. Massachusetts*, 487 U.S. 879, 905 n.42 (1984)), *with* Pl. Br. at 24 (citing *Montana Health Co-Op*, 2018 WL 4203938, at *6)).

Instead, plaintiff restates its incorrect conclusion that Section 1402 permits plaintiff to recover as damages in this Court the precise amount of CSR payments for which Congress declined to appropriate funding. Pl. Br. at 23-25. In making this argument, plaintiff relies on the Supreme Court's decision in *Langston*. *See Langston*, 118 U.S. at 393-94. But the factual scenario in *Langston* is very different than the factual scenario here and, if anything, demonstrates why Congress could not have plausibly anticipated a scenario in which a court circumvents Congress's decision not to appropriate CSR funds by awarding an issuer a money judgment for those exact same funds.

In *Langston*, permanent legislation provided that the minister to Haiti would receive an annual salary of $7,500. *See id*. at 390. For several consecutive years, Congress appropriated that full amount in annual legislation. *Id*. Then in 1882, Congress changed the manner in which it appropriated funds for certain ambassadors, appropriating a lump sum of $25,000 for the salaries of ministers in five countries, including Haiti, "at $5,000 each." *Id.* at 391. Although the Supreme Court stated that "the case is not free from difficulty," because the appropriation acts "contained no words that expressly, or by clear implication, modified or repealed the previous law," the Supreme Court concluded that Congress did not intend, by an insufficient appropriation, to deny a Federal officer the salary for which he had worked. *Id*. at 394.

Unlike in *Langston* where Congress appropriated the minister's full salary for several years and subsequently appropriated an insufficient amount, in this case, Congress appropriated no funds to make CSR payments. To the extent that *Langston* is "extreme" because Congress's only subsequent action was to appropriate a smaller sum than the statute required, this case is straightforward because Congress appropriated no funds for CSR payments in the ACA or subsequent appropriations legislation. In contrast to *Langston*, this Court need not parse through appropriations bills to divine congressional intent because the absence of a CSR appropriation has been consistent since the ACA's enactment.

II. Plaintiff Fails To State A Plausible Implied-In-Fact Contract Claim Because The ACA Reflects No Intent To Bind In Contract The United States And Plaintiff

A. The ACA Establishes Neither A Contract Nor The Contours Of Any Contractual Obligation To Make CSR Payments

In our motion to dismiss, we demonstrated that congressional intent controls whether a statute vests a private party with contract rights against the United States. *See* U.S. Mot. at 18-20. Given the "well-established presumption" that the United States does not intend to form a contract through legislation or regulation, *see Moda*, 892 F.3d at 1330, absent statutory or regulatory language identifying both (1) a contract and (2) "the contours of any contractual obligation," courts routinely reject allegations that a statutory and regulatory scheme creates an implied contract between the United States and a private party. *Id.* at 19 (quoting *Brooks v. Dunlop Mfg., Inc.*, 702 F.3d 624, 630 (Fed. Cir. 2012)).

No implied-in-fact contract exists here. The patchwork of statutes, regulations, and Government statements from which plaintiff seeks to cobble together a contractual relationship does not reflect Congress's intent to bind the United States in contract to make CSR payments. Given the enormity of the dollar amounts at stake, plaintiff's suggestion that Congress intended to bind the United States in contract with issuers for the payment of CSRs, without actually mentioning that intent in the ACA, is dubious.

Recognizing that *Moda* forecloses plaintiff's implied contract claim, plaintiff attempts to distinguish the implied contract claim at issue in *Moda* from the implied contract claim at issue in this case by highlighting the Federal Circuit's description of the risk corridors program as an "incentive program," *Moda*, 892 F.3d at 1327, and the United States' description of the CSR program as a "benefits program." Pl. Br. at 29. Although plaintiff argues that the benefit/incentive distinction is "dispositive," the distinction has no legal relevance. *Id.* Whether described as an incentive program or a benefit program, the point is that Section 1402 does not reflect the United States' intent to enter into a contractual relationship with issuers for CSR payments. Despite plaintiff's efforts to distinguish the implied contract claim in *Moda* from plaintiff's implied contract claim here, the claims are virtually identical. Like the issuer in *Moda*, plaintiff alleges that a patchwork of "statutes, regulations, agency statements, and . . . Government[] actions" reflects the United States' intent to bind itself in contract to a private party. *Compare* Pl. Br. at 29, *with Moda*, 891 F.3d at 1329 ("Moda alleges a contract arising 'from the combination of [the statutory] text, HHS's implementing regulations, HHS's preamble statements, . . . and the conduct of the parties'"). And like the issuer in *Moda*, plaintiff alleges that this patchwork of statutes, regulations, statements, and actions "induc[ed]" plaintiff to offer qualified health plans on an Exchange. *Compare* Compl. ¶ 108, *with Moda*, 891 F.3d at 1330 ("Moda contends that here, the statute, its implementing regulations, and HHS's conduct all evinced the government's intent to induce insurers to offer plans in the exchanges without an additional premium"). Further, like the issuer in *Moda*, plaintiff relies on *Radium Mines* and *New York Airways* for the incorrect proposition that statutory "will pay" language on its own is sufficient to establish a binding contract between the United States and an issuer. *Compare* Pl. Br. at 29-30, *with Moda*, 892 F.3d at 1330.

These arguments are no more compelling in this case than they were in *Moda*. In *Moda*, the Federal Circuit rejected the issuer's argument that the ACA along with "its implementing regulations[] and HHS's conduct" were sufficient to demonstrate an implied contract because the overall scheme of the risk corridors program "lacks the trappings of a contractual arrangement."

Moda, 892 F.3d at 1330. Here, too, plaintiff identifies no contract language in Section 1402 that reflects the "trappings of a contractual arrangement." *See id.* Even when the Government is unable to make CSR payments and plaintiff instead recoups its CSR costs through premium increases (or not), the ACA still obligates plaintiff—as a condition to sell insurance on ACA exchanges—to reduce cost-sharing for eligible insureds. Pl. Br. at 1.

Further, the Federal Circuit rejected the same *Radium Mines* and *New York Airways* contract arguments that plaintiff advances here. *Compare* Pl. Br. at 29-30, *with Moda*, 892 F.3d at 1330.

> [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 at 1329-30 (citing *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 404-05 (Ct. Cl. 1957), *N.Y. Airways Inc. v. United States*, 369 F.2d 743, 752 (Ct. Cl. 1966)).

The *Radium Mine*s "guarantee" and the *New York Airways* "Liquidation of Contract Authorization" highlight the absence of any contract language in the CSR statutory and regulatory framework. *Compare* ACA § 1402, *with Radium Mines*, 153 F. Supp. at 405; *N.Y. Airways*, 369 F.2d at 749. And absent operative contract language in the CSR statutory and regulatory frameworks, no basis exists to invent an implied-in-fact contractual obligation to make CSR payments without an appropriation. Given plaintiff's failure to plausibly allege an implied contract, plaintiff's contract claim should be dismissed.

B. Congress Did Not Grant The HHS Secretary Authority To Enter Into Contracts For CSR Payments

As we demonstrated in our motion, plaintiff also fails to allege an essential element of its implied contract claim: "actual authority" on the part of the Government's representative to bind the Government. U.S. Mot. at 21 (citing *Schism v. United States*, 316 F.3d 1259, 1288 (Fed. Cir. 2002) (*en banc*)). Thus, even if the Court were to determine that plaintiff demonstrated all other elements of an implied contract claim, plaintiff's failure to show actual authority would still compel dismissal of its claim.

"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). And because budget authority is a prerequisite to contract formation with the United States, the absence of a CSR appropriation shows that no contract to make CSR payments was formed. Indeed, given the absence of a CSR appropriation, the Anti-Deficiency Act precludes a Government representative from contracting with plaintiff or any issuer to make such payments. *See 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).

In its brief, plaintiff erroneously contends that the HHS Secretary possesses authority to enter implied-in-fact contracts to make CSR payments to issuers. *See* Pl. Br. at 32. Rather than identifying any ACA language authorizing the Secretary to enter into such contracts (because no such language exists), plaintiff presumes such authority because the "Secretary of HHS is responsible for administering the ACA . . . [a]nd the ACA provides express authority for the

Secretaries of HHS and the Treasury to . . . make[] advance CSR payments." *Id.* The Secretary's authority to make CSR payments and administer the ACA has no bearing on whether the Secretary possesses the separate authority to undertake those statutory acts by entering into a binding contract with plaintiff. Thus, plaintiff's failure to plausibly allege actual authority to enter into a contract is an independent basis on which the Court should dismiss plaintiff's implied contract claim.

III. The Absence Of A Contract For CSR Payments Precludes Plaintiff's Breach Of Implied Covenant Of Good Faith And Fair Dealing Claim

As we demonstrated in our motion, plaintiff states no claim for breach of the implied covenant of good faith and fair dealing because it has no contract requiring the United States to make CSR payments in the absence of an appropriation. *See* U.S. Mot. at 23. In its response, plaintiff concedes that its implied covenant claim relies on the Court's recognition that an implied-in-fact contract exists. Pl. Br. at 33. Here, because the United States has no contractual obligation—implied or express—to make CSR payments to plaintiff, plaintiff's claim for breach of the implied covenant of good faith and fair dealing should be dismissed.

IV. Plaintiff Fails To State A Plausible Takings Claim[3]

A. Plaintiff Identifies No Cognizable Property Right Protected By The Takings Clause

As we demonstrated in our motion, plaintiff fails to state a takings claim because it cannot allege a cognizable property right that the United States took without payment of just compensation. *See* U.S. Const. art. 5. Although the complaint alleges that the United States took

[3] Because plaintiff has not moved for summary judgment on its takings claim, and only opposes the United States' motion to dismiss that claim, plaintiff cannot attempt to remedy any pleading deficiencies in its reply in support of its cross-motion for summary judgment.

plaintiff's purported right to CSR payments, plaintiff now alleges a new property right in its opposition to our motion to dismiss: the value of its insurance contracts with ACA insureds. *Compare* Compl. ¶ 116 ("BCBSVT has a vested property interest in its statutory, regulatory, and contractual rights to receive statutorily-mandated cost-sharing reduction payments"), *with* Pl. Br. at 37 ("the Government effected a taking of the value of BCBSVT's insurance contracts.").[4] The value of plaintiff's insurance contracts is not a cognizable property right under the Takings Clause.

Notwithstanding plaintiff's attempt to reframe its takings allegations, plaintiff still fails to identify a cognizable Takings Clause property right in insurance contract value given the statutory and regulatory framework under which those contracts arise. Property rights are, for takings purposes, limited by "existing rules" and "background principles" derived from the statutory and regulatory framework in existence when the plaintiff acquires the property. *See Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1379 (Fed. Cir. 2004). This legal framework inheres in the property, invalidating any Fifth Amendment takings claim arising from the United States' exercise of its powers within that framework. *See, e.g.*, *Acceptance Ins. Cos.*

[4] Plaintiff also contends that the United States "effectively confiscated" its "funds" by requiring plaintiff to "fund a government benefit program." Pl. Br. at 34. In other words, the property right that the United States allegedly took was plaintiff's money. *See id.* But absent an identifable cache of money, like a bank account, the Takings Clause does not protect money because, unlike real or personal property, "money is fungible." *See Alaska Airlines, Inc. v. Johnson*, 8 F.3d 791, 798 (Fed. Cir. 1993) (citing *United States v. Sperry Corp.*, 493 U.S. 59, 62 n.9 (1989)); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338 (Fed. Cir. 2001) (citing *Phillips v. Washington Legal Found.*, 524 U.S. 156, 160 (1998) (holding that interest income generated by funds held in a lawyer trust account is private property belonging to the owner of the account's principal for purposes of the Takings Clause)). *See also Atlas Corp. v. United States*, 895 F.2d 745, 757 (Fed. Cir. 1990) ("Requiring money to be spent is not a taking of property."). Because we are unaware of any Takings Clause precedent that would support a claim for a taking of money, we will not address it further in this section. We will address plaintiff's allegation that the United States exacted funds in the section where we address plaintiff's new illegal exaction claim. *See* Section V, *infra*.

v. United States, 583 F.3d 849, 857-58 (Fed. Cir. 2009). The ACA laws that regulate issuer-insured relationships thus limit plaintiff's rights in its insurance contracts. *See Branch v. United States*, 69 F.3d 1571, 1575 (Fed. Cir. 1995); *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1073-74 (Fed. Cir. 1994).

The rationale behind this rule is that regulated entities, such as plaintiff, do not possess the "fundamental right to exclude the government from [their] property." *Golden Pacific*, 15 F.3d at 1073 (citing *Cal. Hous. Sec. v. United States*, 959 F.2d 955, 957 (Fed. Cir. 1992)). In this case, given that plaintiff lacks the right to exclude the United States from its contractual relationship with its insureds, plaintiff "h[o]ld[s] less than the full bundle of rights" necessary to show compensable property under the Takings Clause. *Id.* at 1073-74 (internal quotation marks omitted).

Here, plaintiff entered into 2017 and 2018 insurance contracts aware that Section 1402 contains no appropriation for CSR payments and such payments were subject to the annual appropriations process. Thus, plaintiff assumed the risk that Congress would not appropriate funds for those payments—which is the precise scenario that materialized in this case—and the alleged value of its insurance contracts already reflects that risk.

B. Allegations That The Government Frustrated Performance Of A Private Contract Do Not State A Takings Claim

Even assuming that the value of plaintiff's insurance contracts could constitute a cognizable property right—which it does not—the United States does not "take" property under the Takings Clause if it decreases the value of a private contract. A taking of contract rights occurs only if the Government appropriates a private contract for its own use by substituting itself for the private contractor. *See, e.g., Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1379, 1380 (Fed. Cir. 2008) (because Huntleigh "conceded that the government did not actually assume its contracts" it failed to state a claim "predicated upon a taking of the contracts"). This proposition, rooted in Supreme Court and Federal Circuit precedent, invalidates plaintiff's allegation that the United States took the value of plaintiff's insurance contracts.

The Supreme Court's decision in *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), is controlling. In *Omnia*, the plaintiff (Omnia) had a valuable contract to purchase steel from the Allegheny Steel Company (Allegheny) at a below-market price. *Id*. at 507. The United States requisitioned Allegheny's entire steel production for the year "and directed [Allegheny] not to comply with the terms of [Omnia's] contract, declaring that if an attempt was made to do so the entire plant of the steel company would be taken over and operated for the public use." *Id*. Omnia then sued the United States alleging a taking of its contract rights. The Supreme Court determined that no taking occurred because Omnia's contract "was not appropriated, but ended" by the United States' actions. *Id*. at 511.

Federal Circuit precedent further demonstrates that Government actions that decrease the value of a private contract are insufficient to show a taking. *See, e.g.*, *Palmyra Pac. Seafoods LLC v. United States*, 561 F.3d 1361, 1365 (Fed. Cir. 2009) ("[T]he [G]overnment does not 'take' contract rights pertaining to a contract between two private parties simply by engaging in lawful action that affects the value of one of the parties' contract rights."); *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1216 (Fed. Cir. 2005) (Air Pegasus alleged "that the FAA, by regulating helicopters owned by third parties, frustrated its business expectations," but, "like the appellant in *Omnia*, Air Pegasus, while no doubt injured by reason of the government's actions, has not alleged a taking.").

Thus, plaintiff states no takings claim based on allegations that the United States took the value of plaintiff's insurance contracts.

C. Plaintiff Fails To State A Regulatory Takings Claim Under Either A *Lucas* Wipeout Theory Or A *Penn Central* Balancing Test

Because plaintiff has not alleged a physical taking of its property, we understand plaintiff to allege that ceasing CSR payments caused a regulatory taking under either a *Lucas* "wipeout" theory or a *Penn Central* ad hoc balancing analysis. As demonstrated below, the complaint does not allege a regulatory taking under either framework.

1. Plaintiff States No Plausible Categorical Regulatory Takings Claim

Under a categorical or "wipeout" theory, a property owner may establish a taking by showing that a "regulation denies all economically beneficial or productive use of land." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). The Supreme Court, however, has explained that the categorical takings analysis introduced in *Lucas* applies only in the "relatively rare" and "extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." *Id.* at 1017-18 (emphasis in original).

As an initial matter, whether *Lucas* applies to contract rights is unsettled. *See A&D Auto Sales v. United States*, 748 F.3d 1142, 1151-52 (Fed. Cir. 2014) ("We have not had occasion to address whether the categorical takings test applies to takings of intangible property such as contract rights."); *cf. Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 441 (8th Cir. 2007) ("*Lucas* protects real property only."). But even if *Lucas* extends to intangible personal property, such as contract value, plaintiff alleges no plausible scenario in which the United States wiped out all value in plaintiff's insurance contracts. Plaintiff still possesses these contracts and the complaint contains no allegation that the contracts are valueless. Indeed, plaintiff acknowledges that the ACA provides plaintiff with the ability to "reach[] consumers who might not buy insurance absent the ACA's tax credits and cost-sharing reductions." Pl. Br.

at 32, 34. Because plaintiff's insurance contracts still retain value, the United States did not categorically take the value of those interests under a *Lucas* wipeout analysis.

As plaintiff acknowledges, in *Eastern Enterprises v. Apfel*, Justice Kennedy's controlling concurrence explained that "the mere imposition of an obligation to pay money . . . does not give rise to a claim under the takings clause." Pl. Br. at 34 (quoting *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001)). In *Eastern Enterprises*, a former coal operator challenged a statute requiring it to continue funding health care benefits for retired miners long after the operator left the coal business. Because the statute "neither target[ed] a specific property interest nor depend[ed] upon any particular property for the operation of its statutory mechanisms," Justice Kennedy concluded that the statute did not effect a taking. *Eastern Enters. v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring). Because the entire premise of plaintiff's takings claim is that the ACA obligates it to reduce cost-sharing even in the absence of Section 1402 CSR payments, Justice Kennedy's controlling concurrence in *Eastern Enterprises* requires dismissal of the takings claim here.

Although plaintiff cites *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 606-09 (2013), in support of its wipeout claim, *Koontz* is inapposite because it solely concerns the applicability of the "unconstitutional conditions" doctrine to a developer's request for a land-use permit. *Id.* at 606. In *Koontz*, a county water district denied a developer's request for a land-use permit when the developer refused the district's allegedly extortionate demand for public-land improvement payments. *Id.* at 599. Relying on the "unconstitutional conditions" doctrine, the Court held unconstitutional the district's demand for improvement payments in exchange for the permit: "Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation." *Id.* at 607.

Koontz is inapplicable here where no allegation exists that the Government imposed a restriction on plaintiff's constitutional right to obtain just compensation in exchange for a land-use permit or any kind of benefit. The language quoted by plaintiff—that the categorical takings approach is applicable when the "government commands the relinquishment of funds to a specific, identifiable property interest such as a bank account or parcel of real property" in exchange for a permit—has no application in this case. Putting aside that plaintiff did not relinquish to the United States a bank account or property secured by a parcel of the land in exchange for a land-use permit, plaintiff's effort to extrapolate a much broader principle of law from *Koontz's* narrow holding is insufficient to salvage its *Lucas* wipeout claim.

2. Plaintiff States No Plausible *Penn Central* Regulatory Takings Claim

Even though plaintiff's takings claim has changed significantly since it filed its complaint, and its response brief contains allegations raised for the first time, plaintiff's new allegations are still insufficient to state a plausible *Penn Central* regulatory takings claim.

When the alleged regulatory taking is not a *Lucas*-type categorical taking, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), supplies the judicial framework to determine whether Government action is a taking. *See Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1340 (Fed. Cir. 2018). The *Penn Central* inquiry looks at three factors to determine whether a plaintiff has a regulatory takings claim: (1) the regulation's economic impact; (2) the extent to which the regulation interferes with reasonable investment-backed expectations; and (3) the nature or character of the Governmental action. *See Penn Central*, 438 U.S. at 124. Here, because the complaint fails to plausibly allege that stopping

CSR payments interfered with plaintiff's allegedly reasonable investment-backed expectations, plaintiff fails to state a takings claim. *See Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005-08 (1984) (failure to show reasonable investment-backed expectation is fatal to takings claim); *see also Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 511 (2009).

Plaintiff's purported investment-backed expectation that the United States would make CSR payments in the absence of an appropriation is not reasonable. Because Section 1402 contains no permanent appropriation, plaintiff allegedly "invested" in its insurance contracts knowing that Congress left the CSR program to the annual appropriations process, which may or may not result in funding. As plaintiff concedes, plaintiff must demonstrate that it "bought [its] property in reliance on a state of affairs that did not include the challenged regulatory regime." Pl. Br. at 39 (quoting *Cienega Gardens v. United States*, 331 F.3d 1319, 1346 (Fed. Cir. 2003)). In this case, because the statutory state of affairs with respect to CSR appropriations at the time of the ACA's enactment is the same as it is today, plaintiff cannot identify a statutory change to the CSR program regime sufficient to show interference with its allegedly reasonable investment-backed expectations. Plaintiff entered into insurance contracts knowing the risk that Congress did not permanently appropriate funds to make CSR payments; the only difference now is that such a risk materialized.

Moreover, at the time plaintiff voluntarily chose to become a qualified health plan issuer on Vermont's ACA exchange, Section 1402 obligated issuers to reduce cost-sharing for eligible insureds. Accordingly, unlike plaintiffs in *Cienega Gardens* and other regulatory takings cases, this plaintiff identifies no alteration to the regulatory scheme made after plaintiff entered into its insurance contracts. What plaintiff characterizes as a taking is really a dispute about the parties' respective obligations under the existing regulatory scheme. Thus, because plaintiff cannot plausibly show that Government action interfered with its allegedly reasonable investment-backed expectations in the value of its insurance contracts, plaintiff fails to state a regulatory takings claim.

V. Plaintiff Fails To State A Plausible Illegal Exaction Claim

Although the complaint makes no mention of an illegal exaction, plaintiff raises the claim as an alternative to its takings claim for the first time in its brief. *See* Pl. Br. at 36-37. Like plaintiff's takings claim, the illegal exaction claim also fails on the merits.

To assert a plausible illegal exaction claim, a plaintiff must show that the United States improperly collected or withheld plaintiff's money through the misapplication of a money-mandating statute or regulation. *See Norman v. United States*, 429 F.3d 1081, 1095 (Fed. Cir. 2005) (citing *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967)). Further, the United States must, as a result of violation of a statute or regulation, receive a financial benefit in one of two ways: either (1) "directly" through the plaintiff's payment to the United States; or (2) "in effect" by requiring a plaintiff to incur a cost that the United States otherwise would have had to pay itself. *See Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996). In other words, "an illegal exaction has occurred when 'the Government has the citizen's money in its pocket.'" *Id.* (quoting *Clapp v. United States*, 127 Ct. Cl. 505, 512 (1954)); *see also Camellia Apartments, Inc. v. United States*, 334 F.2d 667, 669 (Ct. Cl. 1964) (illegal exaction stated where Federal Housing Administration (FHA) regulations required banks to collect charges and pay them over to the FHA).

Even if the Court were to entertain this new claim not raised in the complaint, plaintiff's illegal exaction allegations would fail because plaintiff does not allege that the United States required plaintiff to make CSR payments in contravention of the law—an essential condition of an illegal exaction claim. Indeed, Section 1402 expressly provides that "the issuer shall reduce the cost-sharing under the plan at the level and in the manner specified in subsection (c)." 42 U.S.C. § 18071(a)(2). Thus, rather than violating the law, plaintiff reduced cost-sharing to comply with a statutory obligation that Congress imposed upon all qualified health plan issuers offering plans to CSR-eligible individuals.

No dispute exists that the ACA required issuers, such as plaintiff, to reduce cost-sharing obligations for eligible insureds, *id.*; rather, the parties dispute whether a separate provision in that section requires the United States to make "payments to the issuer equal to the value of the reductions," *id*. at § 18071(c)(3)(A), when Congress declined to appropriate funds for those payments. *Compare* U.S. Mot. at 13-14, 17, *with* Pl. Br. at 23-26. Because the scenario plaintiff alleges reflects a claim for money allegedly due under a statute, not a deprivation of a constitutional right, plaintiff's new illegal exaction allegations are insufficient to state a claim.

CONCLUSION

For these reasons and the reasons set forth in our motion to dismiss, we respectfully request that the Court grant the United States' motion to dismiss, deny plaintiff's cross-motion for partial summary judgment, and dismiss the complaint.

Respectfully submitted,

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October 15, 2018