No. 17-877C
(Chief Judge Sweeney)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMON GROUND HEALTHCARE COOPERATIVE,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S REPLY IN SUPPORT OF ITS CROSS-MOTION TO DISMISS

JOSEPH H. HUNT
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
Tel: (202) 305-7597
Fax: (202) 307-2503

OF COUNSEL:

ALBERT S. IAROSSI
ERIC E. LAUFGRABEN
VERONICA N. ONYEMA
Trial Attorneys
Civil Division
U.S. Department of Justice

October 26, 2018

Attorneys for Defendant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMON GROUND HEALTHCARE COOPERATIVE,	)	
Plaintiff,	)	No. 17-877 (Chief Judge Sweeney)
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF ITS CROSS-MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully submits this reply in support of its cross-motion to dismiss. Because plaintiff's complaint fails to state a claim upon which relief can be granted, it should be dismissed.

INTRODUCTION

Plaintiff's response to our motion to dismiss rests on the mistaken premise that whether or not Congress decides to appropriate funds for a statutory program that includes a payment directive, the Government must pay. In other words, in plaintiff's view, congressional appropriations decisions are irrelevant to how the Government's funds are expended. Not only does such a notion defy the Constitution—in particular the Appropriations Clause (U.S. Const. art. I, § 9, cl. 7.)—it defies common sense.

Plaintiff argues that it is entitled to recover, in damages, the precise amount of cost-sharing reduction (CSR) payments that Congress declined to appropriate. But plaintiff also admits that congressional intent controls whether it is entitled to CSR payments. Congress 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 chose not to fund CSRs when it enacted the ACA in 2010 and, every year for nearly a decade, it has chosen not to fund CSRs payments. Nor did Congress authorize a damages remedy in the ACA that would permit issuers to recover in this Court the precise CSR payments for which Congress declined to appropriate funds. Because plaintiff's claim would circumvent Congress's intent not to fund CSR payments, the Court should grant the Government's cross-motion to dismiss.

ARGUMENT

I. Congressional Intent Controls Whether Plaintiff Is Entitled To CSR Payments

In an attempt to evade the effects of both the Appropriations Clause and the Anti-Deficiency Act, plaintiff's brief describes a statute that it wishes Congress had enacted, rather than the statute that Congress actually did enact. In the statute that plaintiff wishes had been enacted, Congress would have appropriated funds for the payment of CSRs under Section 1402, and permitted qualified health plan (QHP) issuers to recover unpaid CSR payments via litigation in this Court. In *that* statute, Congress would have chosen, in 2010, to fund payments that would not possibly become due until 2014, instead of leaving that decision to a future Congress to determine in annual appropriations legislation. But Congress was not obliged to decide every issue at the time it created the congressional direction in 2010 to make CSR payments, 42 U.S.C. § 18071(c)(2)(3)(A), and a prior Congress that did not permanently appropriate funds for such a directive cannot bind a later Congress. And here, later Congresses chose not to fund CSR payments.

A. Plaintiff's "Plain Language" Argument Ignores Congress's Decision To Structure The ACA By Funding Premium Tax Credits While Leaving The Choice To Fund CSR Payments To Future Congresses

Plaintiff does not dispute that congressional intent controls whether it may recover CSR payments through litigation in this Court. Pl. Resp. at 3. Nor is there any dispute that Congress has never chosen to appropriate *any* funds for CSR payments. As we explained in our opening brief, the district court in *United States House of Representatives v. Burwell* concluded that the permanent appropriation funding section 1401 premium tax credits (31 U.S.C. § 1342) did not encompass CSR payments. 185 F. Supp. 3d 165, 189 (D.D.C. 2016). After reviewing the matter, the current administration agreed. Plaintiff makes no contrary argument in its brief, and it conspicuously declines to defend the prior administration's conclusion that CSR payments were proper. Nor does plaintiff argue that there is any other funding source available to HHS from which to make CSR payments. In short, plaintiff concedes that, although Congress permanently funded the premium tax credits in Section 1401, it has not provided any funding to HHS for Section 1402 CSR payments.

Although congressional intent is dispositive here, plaintiff fails to demonstrate that Congress intended to make CSR payments in the absence of an appropriation. Instead, plaintiff claims that the "plain language" of Section 1402 is clear, and that such language ends this Court's inquiry into Congress's intent. Pl. Resp. at 1. Plaintiff also relies upon "the Government's repeated conduct over the course of years" to show that Section 1402 mandates payment. *Id*. at 5. The statute's "plain language" does *not* end the inquiry though, because if it did, then the Federal Circuit would have decided *Moda* differently. Further, focusing solely on the Section 1402 snippet "shall pay" ignores Congress' intent in structuring the ACA the way it did. Moreover, the governmental conduct upon which plaintiff relies occurred before the Government concluded that no valid appropriation existed for such payments.

Although plaintiff relies on *Moda* to argue that the plain language of Section 1402 ends this Court's inquiry, the Federal Circuit in *Moda* did not enter judgment against the United States, and no Federal Circuit case in similar circumstances has done so. The authority upon which *Moda*—and in turn plaintiff—relies regarding the absence of an appropriation, *U.S. v. Langston,* 118 U.S. 389, 394 (1886), did not hold that a command to pay, standing alone, creates an obligation that the United States had to pay. Payment in *Langston* could not occur absent Congress's explicit exercise of its power under the Appropriations Clause. *See* Act of August 4, 1886, 24 Stat. 256, 281-82 (1886) (authorizing payment to Langston following Supreme Court's decision). Indeed, the Supreme Court has never disregarded Congress's constitutional power pursuant to the Appropriations Clause or ignored its intent with regards to funding decisions.

Common Ground also claims that our arguments regarding the ACA's structure fail because those arguments allegedly ignore the "overriding purpose" of Section 1402 (and the ACA more generally). Pl. Resp. 5-8. According to plaintiff's theory, even if Section 1402's language were ambiguous, the Court should consider the "overriding purpose" of the provision highly relevant in resolving any ambiguity. *Id*. at 6. The plaintiff alleges that "one of the primary purposes of the CSR program was to bring low-income insureds' health care costs down," and that the CSR reimbursement structure was required in order to incentivize QHP issuers to enter ACA exchanges in the first place. *Id*. Common Ground thus urges the Court to dismiss the fact that Congress chose to fund Section 1401's premium tax credits while leaving the issue of CSR appropriations to a future Congress, even though those provisions are in the same subpart. The difference in funding, according to the plaintiff, can be explained because the sections "have different purposes." *Id*.

But Common Ground acknowledges that the "purpose" of each section was to make it easier for low-income insureds to afford health insurance costs. Pl. Resp. 6-7. Common Ground attempts to prove that these differently-funded sections have "different purposes" justifying the difference in appropriations because "deductibles, coinsurance [and] copayments" are "out of pocket costs," which Common Ground claims "are the sort of routine payment low-income insureds may not have at hand." *Id.* But it is difficult to see how such costs materially differ from the payments required for insurance premiums. After all, low-income insureds must still pay for their insurance premiums with either their own "out of pocket" money or a combination of their own money and the refundable tax credits provided by Section 1401. *See* BERNADETTE FERNANDEZ, CONG. RESEARCH SERV., R44425, HEALTH INSURANCE PREMIUM TAX CREDITS AND COST-SHARING SUBSIDIES: IN BRIEF 1 (2017) ("Individuals who are eligible for the premium credits generally are required to contribute some amount toward the purchase of their health insurance.").

Common Ground also argues that Congress's decision not to fund CSR payments undermines insurers' incentives to sell QHPs on the Exchanges. Pl. Resp. 6-7. Even if that premise were correct, it would not give the Court authority to disregard Congress's funding decisions. Congress has plenary power over the purse and chose not to fund CSR payments in the ACA or thereafter. That funding decision forecloses plaintiff's demand for money for CSRs.

In any event, plaintiff's premise is incorrect. The ACA gave insurers ample business incentives to sell QHPs on the Exchanges, because that is the only way for insurers to gain access to the large market of consumers who purchase coverage with the benefit of premium tax credits. Indeed, in 2014, approximately 87 percent of people who bought insurance on a Federal Exchange did so using premium tax credits. *King v. Burwell*, 135 S. Ct. 2480, 2493 (2015).

Moreover, the Exchanges created significant business opportunities for insurers, which had an incentive to compete for market share by lowering premiums. *See* Milliman, *Ten Critical Considerations for Health Insurance Plans Evaluating Participation in Public Exchange Markets* (Dec. 2012) (explaining that "the opportunity to reach a new market by participating in the exchange land grab could be a very quick way to increase the size of an insurer's covered population").

B. Contrary To Common Ground's Assertions, The Lack Of Appropriations For CSR Payments Is Not Only Relevant, It Is Dispositive

Plaintiff's argument starts with the premise that the plain text of Section 1402 requires "the Government" to make CSR payments. Pl. Resp. at 4-5. In reality, Section 1402 is framed as a directive to an agency—HHS—to make CSR payments. And under bedrock principles of appropriations law, that directive could not properly be implemented unless and until Congress provided the necessary funding to HHS. *See* 31 U.S.C. § 1341(a)(1)(A) ("An officer or employee of the United States Government or of the District of Columbia government may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."). It is undisputed that the plain language of Section 1402 does not contain an appropriation for CSRs.

But according to the plaintiff, the issue of appropriations is "legally irrelevant" to its Tucker Act claim. Pl. Resp. at 11. Plaintiff relies on both *Langston* and the Federal Circuit's decision in *Slattery v. United States*, 635 F.3d 1298 (Fed. Cir. 2001) (*en banc*). Plaintiff's suggestion that *Slattery* stands for the proposition that Congress's failure to appropriate funds has "no bearing" on whether an obligation exists and whether a plaintiff may sue to collect on that obligation is flatly wrong. *Slattery* does not hold that appropriations are irrelevant, but instead explicitly defines its holding as only that the "jurisdictional foundation of the Tucker Act

is not limited by the appropriations status of the agency's funds or the source of those funds by which any judgment may be paid." *Slattery*, 635 F.3d at 1321.

Nor does *Langston* confront the issue that is the basis for our argument here: the absence of an appropriation, in the context of this statute, is telling and dispositive of Congress's intent. Indeed, prior to and since *Langston*, the Supreme Court has consistently recognized the importance of Congress's funding choices and given effect to appropriations limitations in determining that there was no substantive grounds for liability on the part of the Government. In *United States v. Mitchell*, 109 U.S. 146, 150 (1883), for example, the Supreme Court concluded that, by appropriating salaries at the rate of $300 per year for five consecutive years instead of the $400 provided in permanent legislation, Congress "reveal[ed] a change in the policy" with the "purpose" "to suspend the law fixing the salaries . . . at $400 per annum." The Court in *Dickerson v. United States*, 310 U.S. 554, 561-62 (1940), held that Congress's repeated restriction on the use of appropriated funds to pay reenlistment bonuses, notwithstanding permanent legislation providing for such bonuses, evinced an intent to suspend payment of them. And, in *United States v. Will*, 449 U.S. 200, 228 (1980), which involved four differently-phrased appropriations restrictions in four different fiscal years, the Supreme Court had no trouble concluding that each restriction expressed the same congressional intent not to raise judicial pay.

The Federal Circuit has consistently drawn a connection between Congress's appropriations choices and substantive liability—contrary to plaintiff's contention that appropriations have "nothing to do" with the Government's obligation to pay. Remarkably, plaintiff contends that in *Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003) the Federal Circuit held that a "statute was money-mandating without regard to whether it was supported by a corresponding appropriation." Pl. Resp. at 8. Yet, the word "appropriation"

never appears in the text of the Court's decision, much less a discussion regarding the effect of congressional appropriations decisions on the Government's obligations to make payments under a statute. Indeed, *Agwiak* was a case that arose under Federal civilian pay statutes, which are, of course, funded through annual congressional appropriations.

In *Moda* the Federal Circuit gave effect to Congress's decision to restrict the appropriations from which risk corridors payments could be made and held that the Government was not substantively liable for risk corridors payments beyond those amounts paid into the program by issuers. *See* 892 F.3d at 1323, 1327. The Court 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)); *see also Prairie Cty., Mont. v. United States*, 782 F.3d 685 (Fed. Cir. 2015) (limiting liability under "shall pay" statute to amounts appropriated by Congress); *Greenlee County, Ariz. v. United States*, 487 F.3d 871, 877-80 (Fed. Cir. 2007) (same); *Star-Glo Associates, L.P., v. United States*, 414 F.3d 1349, 1355 (Fed. Cir. 2005) (concluding that Congress intended to restrict payments due under "shall pay" statute to amounts provided in lump sum appropriation); *Highland Falls-Fort Montgomery School Dist. v. United States*, 48 F.3d 1166, 1171-72 (Fed. Cir. 1995) (holding that Congressional earmarks limited Government's liability to amounts appropriated under a "shall pay" statute).

In *OPM v. Richmond*, the Supreme Court explained that by reserving to Congress the authority to approve or prohibit the payment of money from the Treasury, the Appropriations Clause serves the "fundamental and comprehensive purpose" of assuring "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of

litigants." 496 U.S. 414, 427-28 (1990). And the Court further explained that "[i]t follows that Congress has appropriated no money for the payment of the benefits respondent seeks, and the Constitution prohibits that any money 'be drawn from the Treasury' to pay them." *Id*. at 424.

No term of the Affordable Care Act expressly provides a "substantive right to compensation" from the Judgment Fund, and Congress made no appropriation for CSR payments. In these circumstances, "[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976). Accordingly, the Court should reject plaintiff's argument that "Congress' failure to appropriate funds for a self-imposed monetary obligation has no bearing on whether that obligation exists and whether a plaintiff may sue to collect on that obligation." Pl. Resp. at 11.

C. Given The ACA's Structure, No Subsequent Repeal Or Modification Of The Statute Is Necessary To Demonstrate Congressional Intent

Common Ground labors under the misimpression that Congress only signals its intent through a *subsequent* repeal or modification of an existing, substantive law. Pl. Resp. 12-13 (citing *Moda*, 892 F.3d at 1322-23). As we demonstrated in our opening brief, no subsequent repeal or modification is necessary given that the ACA's structure already reflects Congress's intent. The relevant ACA subpart—Title 1, subtitle E, part I, subpart A (Premium Tax Credits and Cost-Sharing Reductions)—contains two sections: 1401 and 1402. 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 "[when 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). Plaintiff attempts to distinguish *Digital Realty* by arguing inexplicably that Congress' decision to include a permanent appropriation for the premium tax credits, but *not* for CSR payments, is evidence of congressional intent to fund not only Section 1401's tax credits, but *the entire ACA.* Pl. Resp. 10.

Moreover, plaintiff s reliance on *Moda* to suggest that Congress could only have indicated its intent not to fund CSR payments through "subsequent appropriations bills modif[ying] the original money-mandating obligation by clear implication" is misplaced. Pl. Resp. at 12 (citing *Moda*, 892 F.3d 1322). 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, that congressional intent is still controlling. Of course, courts routinely look to the substantive statute at issue—not just subsequent enactments—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) (same).

In this case, the ACA itself reflects Congress's intent to permanently fund Section 1401 while leaving Section 1402 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 such appropriations.

D. The ACA's Structure Permits Issuers To Account For The Absence Of CSR Payments Through Premium Increases, And Plaintiff's Arguments To The Contrary Are Unavailing

In our motion we also explained how the ACA's structure permits issuers to raise premiums to account for the lack of CSR appropriations, and thus it is implausible to conclude

that Congress intended issuers to recover through litigation the amounts Congress deliberately chose not to appropriate, while also potentially recouping CSR costs through higher premiums and advanced payment of premium tax credits. Gov't Mot. at 6-7, 21. Given issuers' ability to offset CSR expenses by raising premiums, it is implausible to conclude that Congress also intended to grant issuers a damages remedy. Common Ground never even disputes the fact that the increases in premiums in 2018 have offset the absence of CSR payments. Instead, Common Ground's continued argument for damages rests on the untenable premise that Congress intended for issuers to collect full CSR 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.

In response, plaintiff argues that the Government has failed to "identify any statutory provision permitting the government to use premium tax credit payments to offset its cost-sharing reduction payment obligations." Pl. Resp. 14. Yet, there is likewise no indication that Congress ever conceived that its decision not to fund CSRs would result in dollar for dollar funding of CSRs through litigation in this Court. The "touchstone here, of course, is whether Congress intended a cause of action that it did not expressly provide." *Bowen v. Mass.*, 487 U.S. 879, 905 n.42 (1988). There is simply 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.[1] Indeed, the lack of "any statutory

[1] Furthermore, state health insurance regulations generally require state regulators to review insurance premiums to ensure that premiums are set high enough to cover costs and ensure solvency. Thus, there is no reason to suggest that Congress would not have been aware of the potential actuarial consequences of not funding CSR payments directly.

provision permitting the government to use premium tax credit payments to offset its cost-sharing reduction payment obligations" cited by plaintiff (Pl. Resp. at 14), only serves to bolster the conclusion that Congress could not have—through silence and absent any appropriation—created a potential double-payment obligation on the part of the Government.

CONCLUSION

For these reasons and those contained in our opening brief, we respectfully request that the Court deny plaintiff's motion for summary judgment and dismiss the complaint.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

s/Claudia Burke
CLAUDIA BURKE
Assistant Director

s/Christopher J. Carney
CHRISTOPHER J. CARNEY
Senior Litigation Counsel
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, DC 20044
Telephone: (202) 305-7597
Facsimile: (202) 307-2503
Email: Chris.Carney@usdoj.gov

Attorneys for Defendant

OF COUNSEL:

ALBERT S. IAROSSI
ERIC E. LAUFGRABEN
VERONICA N. ONYEMA
Trial Attorneys
Civil Division
U.S. Department of Justice

October 26, 2018