No. 17-1542
(Judge Thomas C. Wheeler)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LOCAL INITIATIVE HEALTH AUTHORITY FOR LOS ANGELES COUNTY,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S CROSS-MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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Pursuant to Rules 12(b)(6) and 56 of the Rules of the United States Court of Federal Claims (RCFC) and the Court's July 16, 2018 Order, defendant, the United States, respectfully submits this cross-motion to dismiss the complaint and opposition to the partial summary judgment motion filed by plaintiff Local Initiative Health Authority for Los Angeles County (L.A. Care). L.A. Care's complaint fails to state a claim upon which relief can be granted and should be dismissed, 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 for eligible taxpayers and funded the program by amending a preexisting permanent appropriation for tax credits. Section 1402 of the ACA requires insurance issuers to reduce cost sharing (such as deductibles and co-payments) for eligible insureds, and further provides that the Secretary of Health & Human Services (HHS) shall make payments to issuers equal to the value of the cost-sharing reductions issuers provide

on behalf of their eligible insureds. In contrast to Section 1401, however, Section 1402 does not appropriate funds for cost-sharing reduction (CSR) payments to issuers.

L.A. Care's complaint (Compl.) contends that it is nonetheless entitled to recover CSR payments that Congress declined to fund directly, and that any failure by Congress to appropriate money for the CSR program does not defeat the Government's purported obligation to pay. L.A. Care's summary judgment motion 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.

Further, Section 1402 does not provide the damages remedy L.A. Care 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, L.A. Care cannot plausibly claim 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 the Government to pay issuers more than double an amount for which it has never appropriated any money—once in the form of increased advance payments of the premium tax credits and again in the form of damages—defies common sense and would undermine Congress's constitutional control over appropriations.

L.A. Care's implied-in-fact contract claim is equally unavailing. Absent clear indication to the contrary, a statute may not be read to bind the Government in contract. Section 1402 does not use contract language, so L.A. Care'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. Finally, L.A. Care's takings claim is also meritless because L.A. Care has no cognizable property right to CSR payments.

QUESTIONS PRESENTED

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

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

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

STATEMENT OF THE CASE

I. The Affordable Care Act

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

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

The ACA establishes in the same subpart, two programs to lower the cost to insureds of qualified health plans offered through the Exchanges. The first is a premium tax credit. In

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

Section 1401 of the ACA, Congress added a new provision to the Internal Revenue Code authorizing a refundable tax credit to subsidize health insurance premiums for eligible taxpayers with household incomes between 100 and 400 percent of the Federal poverty level. *See* 26 U.S.C. § 36B. The amount of the premium tax credit generally is based on the price of the second-lowest-cost silver plan available to the taxpayer on the Exchange, as well as on his or her household income. *See id*. Thus, if premiums for the second-lowest-cost silver plans increase, the premium tax credits increase by a corresponding amount. With Section 1401, Congress also amended the permanent appropriation for tax refunds to extend to § 36B's premium tax credit, thus ensuring this program would always be funded. *See* 31 U.S.C. § 1324(b)(2).

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

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

actual CSRs provided to insureds, which HHS uses to perform periodic reconciliations. 45 C.F.R. § 156.430(c)-(d).

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

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

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

able to obtain a silver plan under which the reduced cost sharing will increase the actuarial value of those plans from 70 to 87 percent, leaving the individual expected to pay 13 percent of his or her costs. *Id*. at § 156.420(a)(2). The ACA and its current implementing regulations give issuers the flexibility—if otherwise permitted by state regulators—to increase premiums to account for a plan's higher actuarial value and cost-sharing design. *See* 45 C.F.R. § 156.80(d)(2)(i).

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

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

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

The prior Administration requested an appropriation in the annual appropriations act for CSR payments for fiscal year 2014, the first year of the CSR program, but Congress did not provide one. *See United States House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 173-

74 (D.D.C. 2016). In January 2014, the Government nonetheless began making monthly advance CSR payments to issuers out of Section 1324's permanent appropriation for tax refunds. That prompted a lawsuit by the House of Representatives seeking to enjoin CSR payments on the ground that the ACA did not appropriate money for those payments. In May 2016, the district court ruled in favor of the House and held that the ACA had not appropriated funding for CSR payments. The court enjoined further payments but stayed the injunction pending appeal. *See House of Representatives*, 185 F. Supp. 3d at 189.

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

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

Id.

The next day, October 12, HHS sent a memorandum to its Centers for Medicare & Medicaid Services (CMS) explaining that "CSR payments are prohibited unless and until a valid

appropriation exists." Memorandum from Acting Sec'y of HHS Eric Hargan to Adm'r of CMS Seema Verma, Payments to Issuers for Cost-Sharing Reductions (CSRs), at 1 (Oct. 12, 2017).[3] Accordingly, the Government ceased making CSR payments to issuers.[4]

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

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

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

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

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

CSRs[6]—are benchmarked to the cost of the second-lowest silver plan, increasing premiums for silver plans caused premium tax credits to increase for all eligible taxpayers, not just the smaller pool of taxpayers eligible for CSRs.

Consistent with this strategy, insurance regulators in 38 states accounted for the possible termination of CSR payments in approving issuers' 2018 premium rates. *See California*, 267 F. Supp. 3d at 1136.[7] After HHS ceased making CSR payments in October 2017, additional states permitted issuers to rerate their 2018 premiums to account for the cessation of CSR payments. *Id*.

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

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

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

[7] In fact, California required issuers to impose surcharges (ranging from 8 to 27 percent) on the issuers' silver-level plans for 2018 "to make up for the potential loss of those [CSR] reimbursement payments." *See* https://coveredcanews.blogspot.com/2017/10/covered-california-keeps-premiums.html (accessed October 19, 2018).

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

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

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

L.A. Care is an issuer that provides coverage on the ACA Exchange in California, including silver plans subject to the CSR program. *See* Compl. ¶¶ 17, 223, 376. In this suit, L.A. Care seeks damages for HHS's failure to make CSR payments during the 2017 and 2018 benefit years. *Id*. ¶¶ 283-287; *see also* L.A. Care's motion for partial summary judgment (Pl. Mot.) at 29. L.A. Care contends that it is entitled to damages under Section 1402 of the ACA

and, alternatively, for breach of contract or a taking in violation of the Constitution's Fifth Amendment.[8] *Id*. ¶¶ 357-400.[9]

On September 4, 2018, Judge Kaplan denied the Government's motion to dismiss and granted Montana Health's motion for partial summary judgment on liability, holding that Section 1402 created a mandatory Government obligation to make CSR payments notwithstanding Congress's funding choices. *See Montana Health Co-Op*, No. 18-143C, 2018 WL 4203938, at * 7 (Fed. Cl. Sept. 4, 2018). Judge Kaplan reached the same result in a similar issuer suit, *Sanford Health Plan v. United States*, No. 18-136 C, 2018 WL 4939418 (Fed. Cl. Oct. 11, 2018). Judge Kaplan relied upon the same statutory arguments that L.A. Care makes here in reaching this conclusion. Thus, for the reasons set forth below, we respectfully disagree with Judge Kaplan's rulings.

ARGUMENT

I. Standards Of Review

L.A. Care's complaint should be dismissed under Rule 12(b)(6) for failure to state a claim. To avoid dismissal, a plaintiff must "provide the grounds of [its] entitle[ment] to relief" in more than mere "labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation and quotation marks omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678

[8] L.A. Care's motion for partial summary judgment relies only upon its statutory and implied contract claims, not its Fifth Amendment takings claim.

[9] Other issuers have filed similar Tucker Act suits, including a certified class action that seeks damages for HHS's failure to make CSR payments in 2018 as well as in the last quarter of 2017. *See Common Ground Healthcare Coop. v. United States*, No. 17-877C (Sweeney, C.J.) (class action); *Maine Cmty. Health Options v. United States*, No. 17-2057C (Sweeney, C.J.); *Montana Health Co-op v. United States*, No. 18-143C (Kaplan, J.) (closed); *Community Health Choice, Inc. v. United States*, No. 18-5C (Sweeney, C.J.); *Sanford Health Plan v. United States*, No. 18-136C (Kaplan, J.) (closed); *Molina Healthcare of Cal. v. United States*, No. 18-333C (Wheeler, J.); *Health Alliance Medical Plans, Inc. v. United States*, No. 18-334C (Campbell-Smith, J.); *Blue Cross & Blue Shield of Vermont v. United States*, No. 18-373C (Sweeney, C.J.).

(2009). A "formulaic recitation of the elements of a cause of action" is insufficient. *Twombly*, 550 U.S. at 555. Rather, the complaint must "plead factual allegations that support a facially 'plausible' claim to relief." *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009). The Court must dismiss a claim "when the facts asserted by the claimant do not entitle [it] to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002).

Pursuant to Rule 56, "[i]ssues of statutory interpretation and other matters of law may be decided on motion for summary judgment." *Santa Fe Pac. R.R. Co. v. United States*, 294 F.3d 1336, 1340 (Fed. Cir. 2002). When a party's motion for summary judgment relies on an incorrect interpretation of a statute, its motion should be denied. *See Mellon Bank, N.A. v. United States*, 47 Fed. Cl. 186, 196 (2000).

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

A. Congress Has Plenary Power Over Federal Spending

The Appropriations Clause provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Courts have long recognized that Congress's control over Federal expenditures is "absolute"; that Congress "is responsible for its exercise of this great power only to the people"; and that Congress "can refuse to appropriate for any or all classes of claims." *Admin'r v. United States*, 16 Ct. Cl. 459, 484 (1880), *aff'd sub nom. Hart v. United States*, 118 U.S. 62 (1886); *see also United States Dep't of the Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (citing *Harrington v. Bush*, 553 F.2d 190, 194-95 (D.C. Cir. 1977)).

Congress's exclusive constitutional authority over the use of public funds—and its corresponding accountability to the public for its exercise of that authority—is a bedrock feature of the Constitution's separation of powers. *See Schism v. United States*, 316 F.3d 1259, 1288

(Fed. Cir. 2002) (*en banc*); *see generally* Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1352-63 (1988). 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." *OPM v. Richmond*, 496 U.S. 414, 427-28 (1990). Congressional control over appropriations is "a bulwark of the Constitution's separation of powers" because, without it, "the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure." *United States Dep't of the Navy*, 665 F.3d at 1347 (quoting 3 Joseph Story, Commentaries on the Constitution of the United States § 1342, at 213-14 (1833)).[10]

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

As the Court is aware, in *Moda* and its 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

[10] Congress must, of course, exercise its appropriations power in a manner consistent with the other provisions of the Constitution. For example, restrictions on appropriations may be invalid if "they encroach on the powers reserved to another branch of the Federal Government." *Richmond*, 496 U.S. at 435 (White, J., concurring); *see id.* (rejecting the suggestion "that Congress could impair the President's pardon power by denying him appropriations for pen and paper"). But no such concern is present here.

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. *Moda*, 892 F.3d at 1320-22. Here, too, the touchstone of the inquiry must be congressional intent: issuers may not 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 wherein Congress elected to permanently fund one section (premium tax credits) and not to 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). Contrary to the Supreme Court's guidance, L.A. Care's reading of the ACA would make Congress's choice to fund Section 1401, and not to fund Section 1402, meaningless.

L.A. Care's statutory entitlement argument rests upon its selective reading of *Moda* (Pl. Mot. at 14-17) and demands that the Court ignore Congress's decision not to fund CSR

payments. L.A. Care's arguments fail, however, in the face of a *complete* reading of the Federal Circuit's *Moda* decision.

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.[11] But the Federal Circuit recognized in *Moda* that the dispositive issue is congressional intent (as is true in any statutory interpretation case). While the Court first concluded that Congress did not originally intend in enacting Section 1342 for the risk-corridors program to be budget neutral, the Court continued its analysis and gave effect to 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." *Id*. at 1323 (emphasis added). *See also id.* at 1327 ("The question is what intent was communicated by Congress's enactments in the appropriations bills for FY 2015–2017."). 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)).

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

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, 595 (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*, 892 F.3d 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.") (quoting *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014)). 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 *Moda* entered no judgment against the United States based upon its statements regarding the text of the risk corridors statute because the Federal Circuit 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).

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

L.A. Care does not appear to dispute that absent an appropriation, the Executive Branch is forbidden from making CSR payments. But, it maintains that Congress's failure to appropriate funds for the CSR program does not defeat the Government's purported obligation to make CSR payments because of the "shall pay" language in Section 1402 of the ACA. Compl. ¶¶ 260, 289; Pl. Mot. at 14-17. 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. *Moda,* 892 F.3d 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, L.A. Care's position here would require the Court to draw the similarly illogical inference that, despite funding Section 1401 premium tax credits and not funding Section 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, L.A. Care 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* the Court inferred congressional intent from *subsequent* appropriations legislation, nothing in the decision stands for the proposition that the Court cannot infer 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, L.A. Care'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 gives issuers neither an express cause of action for damages nor 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 premium tax credits, but not for CSR payments. That contrast shows that the decision not to provide permanent funding for CSR payments was an integral part of the ACA itself. Instead of

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

The damages remedy that L.A. Care asks this Court to infer from 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 premium tax credits. *See* 26 U.S.C. § 36B(b). In rejecting the states' motion for a preliminary injunction that would have compelled HHS to resume CSR payments, the district court noted that, for 2018, "the increased federal expenditure for tax credits will be far more significant than the decreased federal expenditure for CSR payments." *California*, 267 F. Supp. 2d. at 1139.[12]

[12] As discussed earlier, in July 2018, the states that sued the Federal Government in district court filed a motion to stay that litigation or in the alternative to dismiss it without prejudice. *See* Motion For Order Staying Proceedings, *California v. Trump*, No. 3:17-cv-05895-VC (N.D. Cal. July 16, 2018). 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

Given issuers' ability to offset CSR expenses by raising premiums (and, relevant to this case, California's express instruction that issuers on California's ACA Exchange impose surcharges of up to 27 percent "to make up for the potential loss of those [CSR] reimbursement payments"),[13] it is particularly implausible to conclude that Congress also intended to grant issuers a damages remedy. That conclusion rests on the erroneous 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 premium tax credits. Because it would defy common sense to conclude Congress intended to provide a potential double payment of amounts that it never appropriated in the first place, the Court should not infer a cause of action that would allow an issuer to recover double its CSR costs.

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.

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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.

[13] https://coveredcanews.blogspot.com/2017/10/covered-california-keeps-premiums.html

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, L.A. Care cannot recover unless it demonstrates that Congress, in enacting Section 1402, "confer[red] a substantive right to recover money damages from the United States." *United States v. Testan*, 424 U.S. 392, 298 (1976). And for the reasons given above, it did not. Given the text and structure of the ACA, it is implausible to infer that Congress intended for issuers 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. *Id.*; 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. *See Moda*, 892 F.3d at 1326 ("The Judgment Fund 'does not create an all-purpose fund for judicial disbursement.'" (quoting *Richmond*, 496 U.S. at 431)).

III. Plaintiff's Contract Claim Fails 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, Topeka & Santa Fe Ry., 470 U.S. 451, 465-66 (1985)); *accord Moda*, 892 F.3d at 1329. This presumption rests on the basic premise that Congress's function is to pass laws that set national policy, not to make contracts. *See Brooks*, 702 F.3d at 630 (quoting *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.

L.A. Care's attempts to overcome this well-settled presumption fail because the CSR statute and related regulations 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.").

The Federal Circuit has consistently held that if language in the applicable statute does not evince Congressional intent to create contractual rights, no contract will be found to have arisen from the statute. The Federal Circuit rejected implied-in-fact contract claims under the ACA in *Moda*. 892 F.3d at 1330. The implied-in-fact contract claims L.A. Care advances here are similar to those the *Moda* plaintiffs advanced and that the Federal Circuit rejected.

L.A. Care overstates the Supreme Court's holding in *National Railroad Passenger Corp.* when it suggests that the Supreme Court demands some formalistic two-part examination, first of the statutory text, and second of all surrounding circumstances (the analyses of which seem to be independent under L.A. Care's theory) to determine the existence of a contract. Pl. Mot. 19-24. L.A. Care argues at length that the Federal Circuit "failed to follow controlling precedent, was flawed, and should not be followed" because the *Moda* court allegedly failed to examine the circumstances surrounding the passage of the ACA. *Id*. at 19-24. L.A. Care claims that a proper

evaluation of the surrounding circumstances proves their contract claims have merit. But contrary to L.A. Care's assertions, the Federal Circuit performed the same analysis of the *Moda* plaintiffs' contract claims that the Supreme Court undertook in *National Railroad Passenger Corp.* and determined no contract for risk corridors payments existed.

The *Moda* plaintiffs did not "contend that the government manifested intent via the text of section 1342 alone." *Moda*, 892 F.3d at 1329. In *Moda*, issuers claimed 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[.]" *Id*. L.A. Care relies upon those same bases for its contract claims. *See* Compl. ¶¶ 371-390. And, like the *Moda* plaintiffs, L.A. Care claims that "the Government's agreement to make full and timely advance CSR payments was a significant factor material to L.A. Care's agreement to become a QHP and participate in the California ACA Exchange." Compl. ¶ 380.

The Federal Circuit rejected those arguments with reasoning that applies equally here. Because the "statute, its regulations, and HHS's conduct all simply worked towards crafting an incentive program," L.A. Care "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). Moreover, the rationale underlying the Federal Circuit's analysis of the plaintiff's implied contract theory in *Moda* applies equally to L.A. Care's CSR claims 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. (quoting *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 404-05 (Ct. Cl. 1957); *N.Y. Airways, Inc. v. United States*, 369 F.3d 743, 752 (Ct. Cl. 1966))

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.

L.A. Care further argues that the Supreme Court requires a court to examine the "legitimate expectations" of the parties when Congress passes legislation, and that in the case of the ACA, "there had been no prior, longstanding regulatory regime requiring insurers to provide health coverage to existing. . .members on the ACA exchanges." Pl. Mot. 19-21. The Supreme Court only discussed the parties' expectations in *National Railroad Passenger Corp.* because railroads had been subject to extensive – and changing – regulatory regimes prior to the events at issue in that case, and so when the statute was amended by Congress, it was clear that the plaintiffs' "expectations" shed no light on Congress's intent to bind the Government in contract. Moreover, the Federal Circuit in *Moda* specifically recognized plaintiffs' argument that risk corridor payments were provided as a means of offsetting "the risk of the dearth of data about the expanded market." *Moda*, 892 F.3d at 1330. Thus, contrary to L.A. Care's claims, the Federal Circuit took into account the "surrounding circumstances" when Congress passed the ACA and rejected plaintiffs' contractual claims nonetheless. L.A. Care's attempt to derive a contract from the text of Section 1402 and the surrounding circumstances 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*, 316 F.3d at 1288. "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, L.A. Care's attempts to find authority to contract based upon generalized pronouncements in Section 1402 authorizing the Secretary to establish a CSR program must fail. And, although L.A. Care states that "Section 1402 explicitly authorized the Secretary to make CSR payments to QHPs," (Pl. Mot. 28), a statutory authorization *to pay* appropriated funds does not confer the authority *to contract* on behalf of the United States.

Moreover, budget authority is a prerequisite to contract formation with the United States. Except as authorized by law, the Anti-Deficiency Act "bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, existing appropriation." *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1449 (Fed. Cir. 1997) (quoting *Hercules, Inc. v. United States*, 516 U.S. 417, 426 (1996)); 31 U.S.C. § 1341(a)(1)(B). Without "special authority," an "officer cannot bind the Government in the absence of an appropriation." *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 643 (2005).

These principles preclude L.A. Care's implied contract claim. Sections 1402 and 1412 of the ACA do not vest any Federal official with contracting authority. Thus, no valid contract for the payment of CSRs could have been formed.

C. The Qualified Health Plan Agreements Preclude Any Implied Contract

To the extent that L.A. Care also contends that the Qualified Health Plan (QHP) Agreements evidence an implied-in-fact bilateral contract (Compl. ¶¶ 242-244, 372, 379-380), those claims 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 L.A. Care's offering of QHPs on an Exchange, and those parameters required only that L.A. Care 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."). L.A. Care cannot impose additional obligations on an express contract by recourse to an implied contract theory.

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

To the extent that L.A. Care alleges that it detrimentally relied upon some Government promise to reimburse issuers for CSR payments issuers made on behalf of insureds (*see, e.g.* Compl. ¶¶ 86-93, 232, 245-254; Pl. Mot at 25-27), those claims must also be dismissed for lack of jurisdiction. The substance of such claims is that L.A. Care detrimentally relied upon the Government's actions and that the Government should be estopped from breaking its promises to make payments.

This Court lacks jurisdiction over implied in law contracts. *See Int'l Data Prods. Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007). Detrimental reliance "is an element of an

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

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

Accordingly, L.A. Care's claim for breach of an implied contract must be dismissed.

IV. Plaintiff's Takings Claim Fails Because L.A. Care Has No Vested Property Right In Receiving CSR Payments

In Count VII, L.A. Care asserts that when the United States discontinued making advance CSR payments to QHPs, the Government took "L.A. Care's property for public use without just compensation, in violation of the Fifth Amendment." Compl. ¶ 392. Courts apply a two-part test when evaluating whether governmental action constitutes a taking without just compensation. "First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether that property

interest was 'taken.'" *Acceptance Ins. Cos., Inc. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009) (collecting Federal Circuit cases). "If the claimant fails to demonstrate the existence of a legally cognizable property interest, the court's task is at an end." *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004).

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

Thus, L.A. Care is left to rely on the erroneous premise that its statutory or regulatory rights comprise property rights. The Federal Circuit rejected a takings claim brought under the ACA on these exact grounds. *See id.* In *Land of Lincoln*, the Federal Circuit held that "what remains is Land of Lincoln's takings claim to the extent that claim arises from its statutory entitlement to full payments." *Id.* The Court explained that it has "previously held that 'no statutory obligation to pay money, even where unchallenged, can create a property interest within the meaning of the Takings Clause.'" *Id*. (quoting *Adams v. United States*, 391 F.3d 1212, 1225 (Fed. Cir. 2004)); *see also Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001) (*en banc*). Because Land of Lincoln provided "no basis for departing from that rule," and the Court saw none, it held that "Land of Lincoln's takings claim fails." *Land of Lincoln*, 892 F.3d at 1186.

For the same reasons stated in *Land of Lincoln*, CSR payments do not constitute a property interest subject to the Takings Clause. Apart from its generalized and conclusory allegation that it "had a reasonable investment-backed expectation of receiving the full and timely . . . [CSR] payments," L.A. Care pleads no facts to support its assertion that it "has a

vested property interest in its contractual, statutory, and regulatory rights to receive mandatory advance CSR payments." Compl. ¶ 393. Because L.A. Care does not have a legally cognizable property interest in CSR payments, "the court's task is at an end." *Am. Pelagic Fishing Co.*, 379 F.3ds at 372.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court deny L.A. Care's motion for partial summary judgment and dismiss all CSR-related claims in L.A. Care's amended complaint.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 19th day of October, 2018, a copy of the foregoing "DEFENDANT'S CROSS-MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT" was filed electronically. Service upon plaintiff's counsel was thus effected by operation of the Court's CM/ECF system.

s/Albert S. Iarossi
Albert S. Iarossi