

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

NEW MEXICO HEALTH CONNECTIONS,
a New Mexico Non-Profit Corporation,

Plaintiff,

v.

No. 1:16-cv-00878-JB/WPL

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES, et al.,

Defendants.

NOTICE OF SUPPLEMENTAL AUTHORITY

Plaintiff respectfully notifies the Court of the Federal Circuit opinion in *Moda Health Plan, Inc. v. United States*, relating to risk corridors (copy attached hereto as Exhibit A). In *Moda*, HHS argued, like here, that the lack of a specific appropriation necessitated budget neutrality for the risk corridors program. The Federal Circuit rejected HHS's theory, explaining "it has long been the law that the government may incur a debt independent of an appropriation . . . The government cites no authority for its contention that a statutory obligation cannot exist absent budget authority. Such a rule would be inconsistent with [*United States v. Langston*, 118 U.S. 389 (1886)], where the obligation existed independent of any budget authority and independent of a sufficient appropriation to meet the obligation." Op. at 17, 19. The Federal Circuit also rejected HHS's arguments (which mirror those made in this case) that the Anti-Deficiency Act and the structure of Medicare Part D's risk stabilization programs supported its

budget neutral operation of the risk corridors program. Regarding the Anti-Deficiency Act, the Federal Circuit explained: “the Supreme Court has rejected the notion that the Anti-Deficiency Act’s requirements somehow defeat the obligations of the government.” *Id.* at 18. The Court was similarly unmoved by HHS’s reference to Medicare Part D’s budget authorization: “Budget authority is not *necessary* to create an obligation of the government.” *Id.* at 19 (emphasis in original).

While the Federal Circuit ultimately held that certain appropriations riders mandated budget neutrality for the *risk corridors* program, these riders were silent as to risk adjustment. Accordingly, this portion of the opinion is of no consequence to this matter except to show that the portions of Mr. Wu’s (procedurally improper) Declaration claiming an alleged reliance interest in further risk corridors payments are clearly without basis.

Dated: June 15, 2018

Respectfully submitted:

/s/ Nancy R. Long

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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2018, I electronically filed the foregoing Notice of Supplemental Authority using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

/s/ Nancy R. Long _____
Nancy R. Long