IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	No. 16-651 C Judge Griggsby

PLAINTIFF'S OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS

Lawrence S. Sher (D.C. Bar No. 430469)
REED SMITH LLP
1301 K Street NW
Suite 1000-East Tower
Washington, DC 20005
Telephone: 202.414.9200
Facsimile: 202.414.9299
Email: lsher@reedsmith.com

Of Counsel:

Kyle R. Bahr (D.C. Bar No. 986946)
Conor M. Shaffer (PA Bar No. 314474)
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222
Telephone: 412.288.3131
Facsimile: 412.288.3063
Email: kbahr@reedsmith.com
cshaffer@reedsmith.com

Counsel for Plaintiff Blue Cross and Blue Shield of North Carolina

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

STATEMENT OF QUESTIONS PRESENTED 3

STATEMENT OF THE CASE 4

I. CONGRESS INCLUDED RISK CORRIDORS IN THE ACA TO ADDRESS RISKS POSED BY THE NEWLY INSURED POPULATION 4

II. THE RISK CORRIDORS PROGRAM DIFFERS SIGNIFICANTLY FROM THE OTHER "3RS" PROGRAMS 5

III. PLAINTIFF BECAME A QHP FOR CY 2014 MINDFUL OF THE GOVERNMENT'S STATEMENTS REGARDING RISK CORRIDORS 7

IV. THE GOVERNMENT CONFIRMS BUT ATTEMPTS TO REINTERPRET ITS RISK CORRIDORS OBLIGATIONS TO PLAINTIFF 10

V. AFTER PLAINTIFF COMMITTED AS A QHP FOR CY 2015, CONGRESS TARGETED THE GOVERNMENT'S RISK CORRIDORS OBLIGATIONS 11

VI. THE GOVERNMENT ANNOUNCES THE $2.5 BILLION CY 2014 RISK CORRIDORS SHORTFALL AND 12.6 PERCENT PRORATED PAYMENTS 12

VII. THE GOVERNMENT ANNOUNCES THE CY 2014 RISK CORRIDORS AMOUNTS OWED 13

VIII. THE GOVERNMENT'S FINAL AGENCY RESPONSE CONFIRMS ITS BREACH OF ITS CY 2014 RISK CORRIDORS PAYMENT OBLIGATIONS 14

IX. THE GOVERNMENT ANNOUNCES THAT THE CY 2014 RISK CORRIDORS SHORTFALL MAY NEVER BE FILLED, AND CONFIRMS THAT THE UNITED STATES IS OBLIGATED TO PAY 15

ARGUMENT 16

I. RULE 12(B)(1) AND RULE 12(B)(6) STANDARDS 16

II. THE COURT HAS SUBJECT-MATTER JURISDICTION OVER ALL OF PLAINTIFF'S CLAIMS 17

A. The Court Has Tucker Act Jurisdiction Over Count I 18

B. The Court Has Tucker Act Jurisdiction Over Counts II-V 23

C. Plaintiff's Claims Are Ripe 24

III. COUNT I STATES A VALID CLAIM FOR VIOLATION OF § 1342 AND ITS IMPLEMENTING REGULATIONS 27

A. Section 1342 is Not a "Budget Neutral" Statute 28

B. CBO Recognized That § 1342 is Not "Budget Neutral" 31

C. The Appropriations Riders, GAO Opinion, and Agency's Continued Recognition of its Obligation Confirm That § 1342 is Not "Budget Neutral" 33

D. The Risk Corridors Riders to the 2015 and 2016 Appropriations Acts Did Not Alter the Government's Risk Corridors Payment Obligations 35

E. Defendant's Mere Labeling of Risk Corridors as a Statutory "Benefits Program" Does Not Negate the Government's Contractual Burdens 39

IV. COUNTS II-V SATISFY THE 12(B)(6) STANDARD 40

A. Plaintiff Adequately Alleges Breaches of Express or Implied-in-Fact Contracts Against the Government 41

B. Count II: Plaintiff Adequately Alleges an Express Contract 41

C. Count III: Plaintiff Adequately Alleges an Implied-in-Fact Contract 44

1. The Complaint Sufficiently Alleges Mutuality of Intent 46

2. The Complaint Sufficiently Alleges Offer and Acceptance 48

3. The Complaint Sufficiently Alleges Express or Implied Actual Authority 51

4. The ADA Presents No Barrier Here 53

D. Count IV: Plaintiff States a Claim for Breach of an Implied Covenant of Good Faith and Fair Dealing 55

E. Count V: Plaintiff States a Fifth Amendment Takings Claim 56

F. Plaintiff's Request for Incidental Declaratory Relief for CY 2015 and CY 2016 is Within the Court's Jurisdiction and Discretion 58

CONCLUSION 60

TABLE OF AUTHORITIES

Page(s)

Cases

A & D Auto Sales, Inc. v. United States,
748 F.3d 1142 (Fed. Cir. 2014).....17, 21

AAA Pharmacy, Inc. v. United States,
108 Fed. Cl. 321 (2012).....48, 50

Abbott Labs. v. Gardner,
387 U.S. 136 (1967).....24, 25

Abraham v. United States,
81 Fed. Cl. 178 (2008).....48, 51

Adv. Cardio. Sys., Inc. v. Scimed Life Sys., Inc.,
988 F.2d 1157 (Fed. Cir. 1993).....16, 35

Agwiak v. United States,
347 F.3d 1375 (Fed. Cir. 2003).....29

In re Aliphcon,
449 Fed. App'x 33 (Fed. Cir. 2011).....60

Alliant Techsys., Inc. v. United States,
178 F.3d 1260 (Fed. Cir. 1999).....59, 60

Ameritech Corp. v. McCann,
403 F.3d 908 (7th Cir. 2005).....32

Anaheim Gardens v. United States,
444 F.3d 1309 (Fed. Cir. 2006).....25

Annuity Transfers, Ltd. v. United States,
86 Fed. Cl. 173 (2009).....20, 59

Apotex Inc. v. Acorda Therapeutics, Inc.,
823 F.3d 51 (2d Cir. 2016).....21

Army & Air Force Exch. Serv. v. Sheehan,
456 U.S. 728 (1982).....45

ARRA Energy Co. I v. United States,
97 Fed. Cl. 12 (2011).....46, 47, 48, 49

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....17

Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't,
194 F.3d 1374 (Fed. Cir. 1999).....37

Bailey v. United States,
40 Fed. Cl. 449 (1998).....52

Baker v. United States,
50 Fed. Cl. 483 (2001).....45

Barlow & Haun, Inc. v. United States,
118 Fed. Cl. 597 (2014).....20, 26, 27

Barsebäck Kraft AB v. United States,
36 Fed. Cl. 691 (1996).....56

Bath Iron Works Corp. v. United States,
20 F.3d 1567 (Fed. Cir. 1994).....37

Bayou Des Familles Dev. Corp. v. United States,
130 F.3d 1034 (Fed. Cir. 1997).....26

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....17, 28, 40

Bickford v. United States,
228 Ct. Cl. 321 (1981).....38

BMY-Combat Sys. Div. of Harsco Corp. v. United States,
26 Cl. Ct. 846 (1992).....21

Bobula v. U.S. Dep't of Justice,
970 F.2d 854 (Fed. Cir. 1992).....20

Bowen v. Massachusetts,
487 U.S. 879 (1988).....20

Buckley v. Valeo,
424 U.S. 1 (1976).....24

Caddell Constr. Co. v. United States,
123 Fed. Cl. 469 (2015).....28

Cal. ex rel. Brown v. United States,
110 Fed. Cl. 130 (2013).....59, 60

Cambridge v. United States,
558 F.3d 1331 (Fed. Cir. 2009).....28, 40

Caraway v. United States,
123 Fed. Cl. 527 (2015).....16

Casitas Mun. Water Dist. v. United States,
708 F.3d 1340 (Fed. Cir. 2013).....20

Cebe Farms, Inc. v. United States,
83 Fed. Cl. 491 (2008).....58

Cedars-Sinai Med. Ctr. v. Watkins,
11 F.3d 1573 (Fed. Cir. 1993).....27

Centex Corp. v. United States,
395 F.3d 1283 (Fed. Cir. 2005).....55, 56

Chancellor Manor v. United States,
331 F.3d 891 (Fed. Cir. 2003).....56

Cherokee Nation of Okla. v. Leavitt,
543 U.S. 631 (2005).....54

Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984).....29

Chevron U.S.A., Inc. v. United States,
20 Cl. Ct. 86 (1990).....53

Christopher v. SmithKline Beecham Corp.,
132 S. Ct. 2156 (2012).....31

Cienega Gardens v. United States,
331 F.3d 1319 (Fed. Cir. 2003).....57, 58

Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs,
464 F.3d 1306 (Fed. Cir. 2006).....25, 27

Coast Fed. Bank, FSB v. United States,
323 F.3d 1035 (Fed. Cir. 2003).....43

Cobell v. Norton,
428 F.3d 1070 (D.C. Cir. 2005).....34

CW Gov't Travel, Inc. v. United States,
63 Fed. Cl. 369 (2004).....60

Delverde, SrL v. United States,
202 F.3d 1360 (Fed. Cir. 2000).....30

District of Columbia v. United States,
67 Fed. Cl. 292 (2005).....35, 36

Doe v. United States,
463 F.3d 1314 (Fed. Cir. 2006) ("*Doe II*").....18

Durant v. United States,
16 Cl. Ct. 447 (1998) 50

E. Enterprises v. Apfel,
524 U.S. 498 (1998).....58

Earman v. United States,
114 Fed. Cl. 81 (2013) 43

Eastport S.S. Corp. v. United States,
372 F.2d 1002 (Ct. Cl. 1967) 20

Engage Learning, Inc. v. Salazar,
660 F.3d 1346 (Fed. Cir. 2011).....16, 23, 28

Envirocare of Utah Inc. v. United States,
44 Fed. Cl. 474 (1999) 36

Evergreen Health Cooperative, Inc. v. HHS,
No. 1:16-cv-2039 (D. Md. Aug. 15, 2016) 18

Fernandez-Vargas v. Gonzales,
548 U.S. 30 (2006).....38, 39

Ferris v. United States,
27 Ct. Cl. 542 (1892) 35

First Priority Life Ins. Co.,
No. 16-587C (Fed. Cl. Sept. 16, 2016) 20

Fisher v. United States,
402 F.3d 1167 (Fed. Cir. 2005) (*en banc*) 16, 18

Forest Glen Props., LLC v. United States,
79 Fed. Cl. 669 (2007) 41, 49

Gibney v. United States,
114 Ct. Cl. 38 (1949) 35, 38

Grav v. United States,
14 Cl. Ct. 390 (1988) ("*Grav I*").....48

Greenlee Cnty. v. United States,
487 F.3d 871 (Fed. Cir. 2007).....16, 20, 35

H. Landau & Co. v. United States,
886 F.2d 322 (Fed. Cir. 1989).....51

Hanlin v. United States,
214 F.3d 1319 (Fed. Cir. 2000) ("*Hanlin I*") 23

Hanlin v. United States,
316 F.3d 1325 (Fed. Cir. 2003) ("*Hanlin II*").....41, 48

Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States,
48 F.3d 1166 (Fed. Cir. 1995).....38

Huntington Promotional & Supply, LLC v. United States,
114 Fed. Cl. 760 (2014).....41, 45

Inter-Tribal Council of Ariz., Inc. v. United States,
125 Fed. Cl. 493 (2016).....27

Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.,
525 F.3d 1299 (Fed. Cir. 2008).....21, 24

Johnson v. United States,
105 Fed. Cl. 85 (2012).....19

Juda v. United States,
6 Cl. Ct. 441 (1984).....45

Kanag'iq Constr. Co. v. United States,
51 Fed. Cl. 38 (2001).....47

Kanemoto v. Reno,
41 F.3d 641 (Fed. Cir. 1994).....17

Kawa v. United States,
77 Fed. Cl. 294 (2007).....45

Kellogg Brown & Root Servs., Inc. v. United States,
109 Fed. Cl. 288 (2013).....44

King v. Burwell,
135 S. Ct. 2480 (2015).....22, 30

Kizas v. Webster,
707 F.2d 524 (1983).....39

Land of Lincoln v. United States,
No. 16-744C (Fed. Cl. Aug. 12, 2016 & Oct. 18, 2016).....24

Laudes Corp. v. United States,
86 Fed. Cl. 152 (2009).....51

Lewis v. United States,
67 Fed. Cl. 158 (2005).....59

Lorillard v. Pons,
434 U.S. 575 (1978).....30

Lublin Corp. v. United States,
98 Fed. Cl. 53 (2011) 51

Lummi Tribe of the Lummi Reservation v. United States,
99 Fed. Cl. 584 (2011) 20, 21

Lynch v. United States,
292 U.S. 571 (1934) 57

Marchena v. United States,
No. 16-76C, --- Fed. Cl. ----, 2016 WL 5118304 (Sept. 21, 2016) 23

Martin v. United States,
96 Fed. Cl. 627 (2011) 40

Mastrolia v. United States,
91 Fed. Cl. 369 (2010) 16

Mathews v. United States,
123 U.S. 182 (1887) 38

Mayo Found. for Med. Educ. & Research v. United States,
562 U.S. 44 (2011) 31

Mendez v. United States,
121 Fed. Cl. 370 (2015) 23, 52

N.Y. Airways v. United States,
369 F.2d 743 (Ct. Cl. 1966) ..... *passim*

Nat'l Air Traffic Controllers Ass'n v. United States,
160 F.3d 714 (Fed. Cir. 1998) 60

Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.,
470 U.S. 451 (1985) 48

Nexagen Networks, Inc. v. United States,
124 Fed. Cl. 645 (2015) (Griggsby, J.) 17

Northrop Grumman Info. Tech., Inc. v. United States,
535 F.3d 1339 (Fed. Cir. 2008) 43, 44

OAO Corp. v. United States,
17 Cl. Ct. 91 (1989) 50

Office of Pers. Mgmt. v. Richmond,
496 U.S. 414 (1990) 54

Ohio Forestry Ass'n, Inc. v. Sierra Club,
523 U.S. 726 (1998) 24

Overall Roofing & Constr. Inc. v. United States,
929 F.2d 687 (Fed. Cir. 1991).....19

Pa. Coal Co. v. Mahon,
260 U.S. 393 (1922).....57

Pac. Gas & Elec. Co. v. United States,
110 Fed. Cl. 143 (2013).....60

Palmer v. United States,
168 F.3d 1310 (Fed. Cir. 1999).....21

Parker v. Office of Pers. Mgmt.,
974 F.2d 164 (Fed. Cir. 1992).....23, 31

Penn Cent. Transp. Co. v. City of N.Y.,
438 U.S. 104 (1978).....57

Prairie Cnty., Mont. v. United States,
782 F.3d 685 (Fed. Cir.), *cert. denied*, 136 S. Ct. 319 (2015).....35, 39

Precision Pine & Timber, Inc. v. United States,
596 F.3d 817 (Fed. Cir. 2010).....55

Prudential Ins. Co. of Am. v. United States,
801 F.2d 1295 (Fed. Cir. 1986).....44

Pucciariello v. United States,
116 Fed. Cl. 390 (2014).....24, 59

Radium Mines, Inc. v. United States,
153 F. Supp. 403 (Ct. Cl. 1957).....45, 49

Republic Airlines v. U.S. Dep't of Transp.,
849 F.2d 1315 (10th Cir. 1988).....36, 37

Reynolds v. Army & Air Force Exch. Serv.,
846 F.2d 746 (Fed. Cir. 1988).....16

Richmond Am. Homes of Colo., Inc. v. United States,
75 Fed. Cl. 376 (2007).....25

Roberts v. United States,
745 F.3d 1158 (Fed. Cir. 2014).....1, 4, 18, 21

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997).....28

RP1 Fuel Cell, LLC v. United States,
120 Fed. Cl. 288 (2015).....18

Sacramento Mun. Util. Dist. v. United States,
61 Fed. Cl. 438 (2004) 57

Salazar v. Ramah Navajo Chapter,
132 S. Ct. 2181 (2012) 39, 40, 54

Scheuer v. Rhodes,
416 U.S. 232 (1974) 16

Schooner Harbor Ventures, Inc. v. United States,
92 Fed. Cl. 373 (2010) 25

SGS-92-X003 v. United States,
74 Fed. Cl. 637 (2007) 52

Sharp v. United States,
80 Fed. Cl. 422 (2008) 32

Shell Oil Co v. United States,
751 F.3d 1282 (Fed. Cir. 2014) 53

Shinnecock Indian Nation v. United States,
782 F.3d 1345 (Fed. Cir. 2015) 26

Silverman v. United States,
679 F.2d 865 (Ct. Cl. 1982) 46, 52

Slattery v. United States,
635 F.3d 1298 (Fed. Cir. 2011) (*en banc*) 26, 35

Smithson v. United States,
847 F.2d 791 (Fed. Cir. 1988) 43

Solaria Corp. v. United States,
123 Fed. Cl. 105 (2015) 50

Sommers Oil Co. v. United States,
241 F.3d 1378 (Fed. Cir. 2001) 52

Son Broad., Inc. v. United States,
52 Fed. Cl. 815 (2002) 51

Speed v. United States,
97 Fed. Cl. 58 (2011) 19, 24

Sperry Corp. v. United States,
13 Cl. Ct. 453 (1987) 46

St. Christopher Assoc. L.P. v. United States,
511 F.3d 1376 (Fed. Cir. 2008) 43

Stovall v. United States,
71 Fed. Cl. 696,702 (2006) 18

Telenor Satellite Servs. Inc. v. United States,
71 Fed. Cl. 114 (2006) 52

Thomson v. United States,
174 Ct. Cl. 780 (1966) 48

Thorndike v. United States,
72 Fed. Cl. 580 (2006) 60

In re Title Ins. Antitrust Cases,
702 F. Supp. 2d 840 (N.D. Ohio 2010) 5

Todd v. United States,
386 F.3d 1091 (Fed. Cir. 2004) 19

Totes-Isotoner Corp. v. United States,
594 F.3d 1346 (Fed. Cir. 2010) 17

Trauma Serv. Grp. v. United States,
104 F.3d 1321 (Fed. Cir. 1997) 41, 50

TVA v. Hill,
437 U.S. 153 (1978) 36

U.S. House of Representatives v. Burwell,
No. 1:14-cv-01967-RMC (Dec. 2, 2015 D.D.C.), ECF No. 55-1 35

United States v. Dickerson,
310 U.S. 554 (1940) 36, 37

United States v. King,
395 U.S. 1 (1969) 19, 24

United States v. Langston,
118 U.S. 389 (1886) 35, 38

United States v. Larionoff,
431 U.S. 864 (1977) 38

United States v. Mitchell,
109 U.S. 146 (1883) 38

United States v. St. Louis, S.F. & Tex. Ry. Co.,
270 U.S. 1 (1926) 39

United States v. Testan,
424 U.S. 392 (1976) 19

United States v. Vulte,
233 U.S. 509 (1914).....35

United States v. White Mt. Apache Tribe,
537 U.S. 465 (2003).....18

United States v. Will,
449 U.S. 200 (1980).....36, 37

Universal Interpretive Shuttle Corp. v. Wash. Metro Area Transit Comm'n,
393 U.S. 186 (1968).....36

Usery v. Turner Elkhorn Mining Co.,
428 U.S. 1 (1976).....39

Vargas v. United States,
114 Fed. Cl. 226 (2014).....46, 47

Voge v. United States,
844 F.2d 776 (Fed. Cir. 1988).....19

Wetsel-Oviatt Lumber Co. v. United States,
38 Fed. Cl. 563 (1997).....35

White & Case LLP v. United States,
67 Fed. Cl. 164 (2005).....24, 27

Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,
473 U.S. 172 (1985).....27

Wolfchild v. United States,
96 Fed. Cl. 302 (2010).....20

Wood v. United States,
214 Ct. Cl. 744 (1977).....19

XP Vehicles, Inc. v. United States,
121 Fed. Cl. 770 (2015).....50

Statutes

28 U.S.C. § 1491(a).....16, 59

31 U.S.C. § 1341(a).....53, 54

42 U.S.C. § 1395w-115(e)(3)(A).....21, 30

42 U.S.C. § 18022.....6

42 U.S.C. § 18061.....5, 29

42 U.S.C. § 18062 ..... *passim*

42 U.S.C. § 18063 5

Pub. L. 111-148, 124 Stat. 119 4

Pub. L. 113-235, § 227, 128 Stat. 2491 (Compl. Ex. 21) 11, 38

Pub. L. 114-113, § 225, 129 Stat. 2624 (Compl. Ex. 24) 14, 38

S. 3040, Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2017, *available at* https://www.congress.gov/bill/114th-congress/senate-bill/3040/text 15

Rules

R. Ct. Fed. Cl. 8(a) 17

R. Ct. Fed. Cl. 8(d) 44, 50

R. Ct. Fed. Cl. 12(b)(1) ..... *passim*

R. Ct. Fed. Cl. 12(b)(6) ..... *passim*

Regulations

42 C.F.R. § 423.336 ..... 7, 22

45 C.F.R. Part 153 8

45 C.F.R. §§ 153.500-.540 28

45 C.F.R. § 153.510 ..... *passim*

45 C.F.R. § 153.530(d) 12

45 C.F.R. § 156.20 6

45 C.F.R. § 156.200 6

76 FR 41929 (July 15, 2011) (Compl. Ex. 07) 9, 43

76 FR 53903, 53903-04 (Aug. 30, 2011) 5

77 FR 17219 (Mar. 23, 2012) (Compl. Ex. 11) 9, 43

77 FR 73118 (Dec. 7, 2012) 6, 9

78 FR 15410 (Mar. 11, 2013) (Compl. Ex. 09) ..... *passim*

78 FR 65046, 65048 (Oct. 30, 2013) 6

79 FR 13743 (Mar. 11, 2014) (Compl. Ex. 19) 10, 33

80 FR 10749 (Feb. 27, 2015) (Compl. Ex. 15) 12

Other Authorities

U.S. Const. amend. V 56

5B Wright & Miller, *Fed. Prac. & P.* § 1357 (3d ed. 2004) 17

Bulletin, CMS, "Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment" (July 11, 2011) (Compl. Ex. 12) 9

Bulletin, CMS, "Risk Corridors and Budget Neutrality" (Apr. 11, 2014) (Compl. Ex. 20) 10, 12, 22

Bulletin, CMS, "Key Dates in 2015: QHP Certification in the Federally-Facilitated Marketplaces; Rate Review; Risk Adjustment, Reinsurance, and Risk Corridors" (Apr. 14, 2015) (Exhibit 34) 22

Bulletin, CMS, "Risk Corridors Payment Proration Rate for 2014" (Oct. 1, 2015) (Compl. Ex. 22) 12

Bulletin, CMS "The Three Rs: An Overview" (Oct. 1, 2015) (Exhibit 33) 21

Bulletin, CMS, "Risk Corridors Payments for the 2014 Benefit Year" (Nov. 19, 2015) (Compl. Ex. 17 & Mot. at App'x A158) 1, 13

Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for Benefit Year 2014" (Nov. 19, 2015) (Compl. Ex. 25) 13

Bulletin, CMS, "Risk Corridors Payments for 2015" (Sept. 9, 2016) (Mot. at App'x A248-A249) ..... *passim*

CBO, Letter from Douglas Elmendorf, CBO Director, to Nancy Pelosi, Speaker, House of Representatives (Mar. 20, 2010) (Exhibit 35) 32

CBO, *The Budget and Economic Outlook: 2014 to 2024* (Feb. 2014) (Exhibit 36) 32, 33

CBO, *Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, April 2014* (Apr. 2014) (Exhibit 37) 33

CBO, *The Budget and Economic Outlook: 2015 to 2025* (Jan. 2015) (Exhibit 38) 22

CMS Leadership, https://www.cms.gov/About-CMS/Leadership/cciio/Kevin-Counihan.html (Exhibit 32) 12, 52

Comp. Gen. B-325630 (Sept. 30, 2014) (Exhibit 31) ..... *passim*

GAO Report, *Patient Protection and Affordable Care Act: Despite Some Delays, CMS Has Made Progress Implementing Programs to Limit Health Insurer Risk*, GAO-15-447 (2015) (Exhibit 30) 7, 30

GAO, *Principles of Federal Appropriations Law*, at 2-63 (4th ed., 2016 revision).....36

PRELIMINARY STATEMENT

The United States admits that it owes Plaintiff[1] "full payment" of its risk corridors arrears, and that it "will record risk corridors payments due as an obligation of the United States Government for which full payment is required."[2] Defendant also concedes that § 1342 of the Affordable Care Act ("ACA")[3] is a money-mandating "shall pay" statute.

Yet, Defendant argues that this Court lacks Tucker Act jurisdiction to consider *any* of Plaintiff's claims for money damages from the United States *at all*. Defendant further contends that Plaintiff's claims to 2014 risk corridors payments will not be "ripe" until some unidentified "future years," because the Department of Health and Human Services ("HHS") recently reported that it may withhold annual risk corridors amounts due until sometime after the three-year program ends. The Government argues this despite already having paid a fraction of the 2014 risk corridors amounts owed to Plaintiff, and conceding that its remaining 2014 risk corridors debts have been booked as 2015 obligations of the United States.[4]

In its Rule 12(b)(1) motion, Defendant improperly attacks the merits of Plaintiff's claims, arguing that the risk corridors amounts claimed by Plaintiff – and admitted by HHS as due and owing – are not "presently due." This assertion challenges *when* the Government is obligated to pay Plaintiff's money-mandating claims, not *if*. As demonstrated below, Defendant bases its jurisdictional arguments on the wrong legal standard. Under the standard that actually governs, Plaintiff need only make a *prima facie* showing that § 1342 and its implementing regulations "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained" by Plaintiff. *See, e.g.*, *Roberts v. United States*, 745 F.3d 1158, 1162 (Fed. Cir. 2014).

---

1 Blue Cross and Blue Shield of North Carolina is referred to herein as "Plaintiff" or "BCBSNC."

2 *See, e.g.*, Defendant's Motion to Dismiss ("Mot.") at App'x A158, A248.

3 *See* 42 U.S.C. § 18062, referenced herein as "§ 1342."

4 *See* Mot. at App'x A158.

Plaintiff has surpassed this showing in its Complaint. *See, e.g.*, Compl. ¶¶ 2-10. Defendant's *post hoc* characterization, contending that the risk corridors payments admittedly owed are not payable in full until sometime *after* 2017, rather than annually, is not supported by the statutory text or purpose of the ACA or § 1342, and is entitled to no deference. The *ex post* litigation position Defendant has manufactured is belied by the ACA's text and purpose, legislative history, and HHS' statements, documents and conduct *preceding* this lawsuit – all of which demonstrate that risk corridors payments are due and payable annually, not after the end of the risk corridors program's three years.

Similarly unavailing are Defendant's arguments that Plaintiff's claims are unripe. This is not a hypothetical dispute or an abstract disagreement. Plaintiff's claims are ripe: the Government admits that it owes Plaintiff almost $147.5 million in risk corridors payments for 2014, has already paid Plaintiff just over $18 million of that obligation, and recently announced that it will not make timely payment to Plaintiff for any risk corridors amount it owes for 2015.

Furthermore, realizing its jurisdictional and ripeness challenges are unlikely to prevail, Defendant urges the Court to dismiss all Counts I-V under Rule 12(b)(6). Plaintiff's well-pled claims, however, satisfy the applicable notice pleading standards, giving Defendant fair notice of the claims and the grounds upon which each claim rests.

First, Plaintiff has stated a "facially plausible" statutory claim for relief in Count I for a violation of § 1342 and its implementing regulations. Defendant's strained argument that § 1342 was always meant to be "budget neutral" is insupportable based on: (i) the language and purpose of the risk corridors statute and the Medicare Part D statute it was specifically modeled after, (ii) the Government's own interpretations of the risk corridors program, and (iii) the Government's statements and conduct before and after passage of § 1342, including the 2015 and 2016 Appropriations Acts. All of these sources convincingly demonstrate that risk corridors were *not*

"originally" intended to be "self-funding" or "budget neutral." Defendant's 12(b)(6) motion improperly disregards Plaintiff's well-pled allegations and, at best, engages in revisionist history based on *post hoc* characterizations. None of the "authorities" upon which Defendant relies support its 12(b)(6) argument, and several actually undermine it. Further, recognizing that binding precedent prevents Congress from abrogating existing contractual obligations through the appropriations process, Defendant makes its 12(b)(6) challenge to Count I dependent on the Court finding that Plaintiff has not alleged any plausible contract claims under Counts II or III.

Second, Plaintiff has stated plausible claims for relief under Rule 12(b)(6) in Counts II-V for breach of express contract, breach of implied-in-fact contract, breach of an implied covenant of good faith and fair dealing, and Fifth Amendment takings.[5] The Complaint plausibly alleges, and certainly has placed Defendant on notice of, each of these claims under the applicable pleading standards. Defendant inappropriately challenges the sufficiency of the evidence to support the elements and merits of Plaintiff's non-statutory claims, but in resolving a motion to dismiss the well-pled facts are accepted, not weighed. The Court therefore must deny Defendant's attempt to dismiss these claims at the pleading stage.

Finally, should the Court determine that Plaintiff is entitled to monetary relief from the Government under any Count, the Court certainly has jurisdiction over, and the discretion to grant, Plaintiff's request for limited declaratory relief incidental to the Court's judgment for money damages.

STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court has subject matter jurisdiction over Count I, Plaintiff's money-mandating statutory and regulatory claim, under the governing jurisdictional standard

[5] While Defendant argues that Counts IV and V should be dismissed under Rule 12(b)(6), as demonstrated below, Defendant only challenges the sufficiency of these Counts by arguing that the Court should dismiss them *if* the Court finds that Plaintiff failed to state valid breach of contract claims in Counts II and III. *See* Mot. at 42-44.

stated in *Roberts v. United States*, 745 F.3d 1158 (Fed. Cir. 2014), and other cases?

2. Whether this Court has subject matter jurisdiction over Plaintiff's non-statutory claims stated in Counts II-V, when Defendant does not challenge any jurisdictional facts and the Complaint alleges all required elements for these claims?

3. Whether Plaintiff's monetary claims for risk corridors payments admittedly due and owing by the Government present an actual, ripe controversy proper for adjudication by this Court when Plaintiff would suffer undue hardship by further delay of their monetary recovery?

4. Whether Plaintiff has alleged in Count I a plausible claim for relief under the applicable Rule 12(b)(6) standard for violation of the Government's mandatory obligation to pay risk corridors payments to Plaintiff, as set forth in § 1342 and its implementing regulations?

5. Whether Plaintiff has alleged plausible claims for relief in Counts II-V under the applicable Rule 12(b)(6) standard, sufficient to place Defendant on fair notice of the claims against it and the grounds upon which those claims rest?

6. Whether this Court has the power and discretion to award Plaintiff's request for declaratory relief that is ancillary and incidental to its monetary claims over which the Court has subject matter jurisdiction?

STATEMENT OF THE CASE[6]

I. CONGRESS INCLUDED RISK CORRIDORS IN THE ACA TO ADDRESS RISKS POSED BY THE NEWLY INSURED POPULATION

The ACA[7] reformed the United States health insurance system by significantly expanding access and coverage to millions of Americans who just previously had been uninsured or underinsured. While the ACA promoted certainty by prohibiting health insurers from denying coverage for preexisting medical conditions, or setting premium rates based on health-related

[6] Unless otherwise noted below, Plaintiff's relevant facts are based on the Complaint, its exhibits, or the Appendix to Defendant's motion.

[7] Pub. L. 111-148, 124 Stat. 119.

factors,[8] it also created uncertainty as participating insurers would be forced to insure new members who had never been insured and for whom insurers lacked vital medical and actuarial data. This informational void increased the insurers' financial risk because insurers lacked reliable data to set accurate annual insurance premiums for the new population of members who previously were uninsured or underinsured. To address this uncertainty and increased risk faced by insurers who were being asked to offer new ACA Exchange plans to millions of uninsured Americans, and to ensure that annual premiums would not be set too high, Congress included in the ACA a trio of statutory "premium-stabilization" measures, commonly known as the "3Rs": risk adjustment, reinsurance, and risk corridors. *See* 42 U.S.C. §§ 18061-18063.

II. THE RISK CORRIDORS PROGRAM DIFFERS SIGNIFICANTLY FROM THE OTHER "3RS" PROGRAMS

Generally, risk adjustment[9] is a permanent state-based program designed to offset the increased costs of health insurers attracting high-risk populations (*e.g.*, individuals with chronic conditions) with equal collections from insurers with lower-risk populations. Reinsurance[10] is, generally, a temporary, three-year state-based program designed to collect equal funds from all participating insurers, then distribute funds to plans that experience high-cost cases. The risk corridors program[11] – the subject of this lawsuit – differs from the other 3Rs in significant ways.

The risk corridors program is federally administered by the Centers for Medicare and Medicaid Services ("CMS"), through a formal delegation of authority from the HHS Secretary.[12] Risk corridors require that the Government share in the financial risk by making mandatory

---

8 *See, e.g.*, *In re Title Ins. Antitrust Cases*, 702 F. Supp. 2d 840 (N.D. Ohio 2010) (generally describing underwriting processes in life insurance, auto insurance, and pre-ACA health insurance contexts).

9 The risk adjustment program is codified at § 1343 of the ACA, 42 U.S.C. § 18063.

10 The reinsurance program is codified at § 1341 of the ACA, 42 U.S.C. § 18061.

11 The risk corridors program is codified at § 1342 of the ACA, 42 U.S.C. § 18062.

12 *See* Comp. Gen. B-325630 at 3 (Sept. 30, 2014) (citing 76 FR 53903, 53903-04 (Aug. 30, 2011)); *see also* 42 U.S.C. § 18062(a) ("The Secretary [of HHS] shall establish and administer a program of risk corridors ….").

annual payments, pursuant to a statutorily prescribed payment formula, to participating Qualified Health Plans ("QHPs"),[13] like Plaintiff, that agreed to offer plans on the ACA Exchanges for 2014, 2015 and 2016. *See* 42 U.S.C. § 18062(b).[14] Under § 1342(b), if a QHP's members used health-related services less than predicted in a plan year, then Congress mandated that the QHP "shall pay" a percentage of its profits back to the Government if those profits exceed a threshold set in § 1342(b). *Id.* § 18062(b)(2).[15] On the other hand, if a QHP's members used more health-related services than predicted in a plan year, then Congress mandated that the HHS Secretary "shall pay" a percentage of the QHP's health care losses above the same threshold back to the QHP. *Id.* § 18062(b)(1). Section 1342 describes the risk corridors calculation as a comparison of "allowable costs" against a "target amount," both of which are defined on a plan-year basis. *See id.* § 18062(c).[16]

Unlike the other 3Rs, designed with payments equally offset by collections, Congress did *not* intend the risk corridors program to be "budget neutral." *See, e.g.*, Compl. ¶ 73 & Ex. 09 at 15473 (HHS statement in Federal Register that "[t]he risk corridors program is not statutorily required to be budget neutral"). On its face, Congress' mandatory "shall pay" obligation in § 1342(b) to make risk corridors payments to unprofitable insurers is unconnected to, and not contingent on, the receipt of any risk corridors collections by the Government from profitable insurers in a given year. Section 1342(b) does *not* state that annual risk corridors payments

---

[13] QHPs are health insurers that agreed to participate and were certified to offer plans on ACA Exchanges after demonstrating their compliance with a host of regulatory requirements. *See, e.g.*, 45 C.F.R. § 156.200 (listing QHP standards); 45 C.F.R. § 156.20 (citing ACA § 1302 (42 U.S.C. § 18022)). All duly-certified QHPs "shall participate" in the risk corridors program. 42 U.S.C. § 18062(a). "[I]f an insurer chooses *not* to offer coverage through the Exchanges, then it is *not* subject to the risk corridors program established by section 1342." Comp. Gen. B-325630 at 5-6 (Sept. 30, 2014) (emphasis added).

[14] *See, e.g.*, 77 FR 73118, 73121 (Dec. 7, 2012) ("The ... risk corridors program permits the Federal government and QHPs to share in profits or losses resulting from inaccurate rate setting from 2014 to 2016."), attached as Exhibit 29; 78 FR 15410, 15413 (Mar. 11, 2013) (same); 78 FR 65046, 65048 (Oct. 30, 2013) (same).

[15] A QHP's risk corridors payment to the Government is called a "charge collection" or "charge remittance."

[16] *See* Compl. ¶ 66 (approximate illustration of the risk corridors payment methodology).

cannot exceed risk corridors collections, or must be restricted to collected user fees. *See generally* 42 U.S.C. § 18062. It also does not create a single account to receive payments in and out, nor does § 1342 provide that annual risk corridors payments are limited by appropriations. *See generally id.* Rather, the risk corridors program is statutorily mandated to be based on a non-budget neutral program in Medicare Part D, signed into law by President George W. Bush. *See id.* § 18062(a) (referencing Part D); 42 C.F.R. § 423.336 (implementing Part D risk corridors).[17]

Like reinsurance, risk corridors is a temporary program, expiring after the third year of the new ACA Marketplace. This three-year period was designed for the Government to share in the annual risk with QHPs, while those QHPs' actuaries struggled to set annual premiums without accurate data on the new population of previously un- and under-insured individuals they were now obligated to insure annually on the ACA Exchanges. Congress prescribed the risk corridors program to operate annually "for calendar years 2014, 2015, and 2016." 42 U.S.C. § 18062(a). In the Government's words, the risk corridors program was intended to "protect QHP issuers in the individual and small group market against inaccurate rate setting," and to "permit issuers to lower rates by not adding a risk premium to account for perceived uncertainties in the 2014 through 2016 markets." 78 FR 15410, 15413 (Mar. 11, 2013).

III. PLAINTIFF BECAME A QHP FOR CY 2014 MINDFUL OF THE GOVERNMENT'S STATEMENTS REGARDING RISK CORRIDORS

Based in large part on the financial risk-sharing offered by the Government through the mandatory risk corridors program, in September 2013, Plaintiff agreed to become a QHP and offer health plans on the ACA Exchange in North Carolina.

Before executing a QHP Agreement, CMS required Plaintiff to execute and submit to CMS dozens of detailed attestations certifying Plaintiff's compliance with the obligations it

[17] *See also* U.S. Gov't Accountability Office Report, *Patient Protection and Affordable Care Act: Despite Some Delays, CMS Has Made Progress Implementing Programs to Limit Health Insurer Risk*, GAO-15-447 at 14 (2015) ("For the Medicare Advantage and Medicare Part D risk mitigation programs, the payments that CMS makes to issuers are not limited to issuer contributions."), attached as Exhibit 30.

would be voluntarily undertaking as a QHP.[18] *See* Compl. Ex. 05 at 20 (CMS' attestation requirement); Compl. Ex. 06 (Plaintiff's April 30, 2013 attestation for CY 2014). The attestations included Plaintiff's commitment to comply with certain "Financial Management" obligations, including:

> 2.) Applicant attests that it will adhere to the risk corridor standards and requirements set by HHS as applicable for:
>
> a.) risk corridor data standards and annual HHS notice of benefit and payment parameters for the calendar years 2014, 2015, and 2016 (45 CFR 153.510);
>
> b.) remit charges to HHS under the circumstances described in 45 CFR 153.510(c).

Compl. Ex. 06 at 8-9.

After Plaintiff agreed to meet all of the new statutory and regulatory obligations required of a QHP, the Government executed a CY 2014 QHP Agreement with BCBSNC. *See* Compl. Ex. 02. The CY 2014 QHP Agreement, entitled "Agreement Between [QHP] Issuer and The [CMS]," contained CMS' promise to "undertake all reasonable efforts to implements systems and processes that will support [Plaintiff's] QHPI functions," and to "work with [Plaintiff] in good faith to mitigate any harm caused by" "a major failure of CMS systems and processes." *Id.* § II.d. The CY 2014 QHP Agreement also stated that it "will be governed by the laws and common law of the United States of America, including without limitation [HHS and CMS] regulations as may be promulgated from time to time …." *Id.* § V.g.

Leading up to the parties' execution of the CY 2014 QHP Agreement, the Government had made several public statements regarding the risk corridors program, and also had implemented regulations for § 1342,[19] which included a risk corridors calculation mathematically identical to the one in § 1342(b). *See* 45 C.F.R. § 153.510(b)-(c). Given the risks involved with

---

[18] For a summary of Plaintiff's attested-to obligations and responsibilities, *see* Compl. ¶ 50.

[19] The implementing regulations are found at 45 C.F.R. Part 153.

becoming a QHP in the new, uncertain ACA Marketplace, when Plaintiff agreed to participate as a QHP and devote substantial effort and resources to make the CY 2014 ACA Exchange successful in its market,[20] it was mindful of the Government's previous actions and representations regarding the risk corridors program.

An HHS fact sheet dated July 11, 2011, confirmed that QHPs "will receive [risk corridors] payments from HHS" if they experienced high above-target costs in a calendar year. Compl. Ex. 12. In proposed rulemaking on July 15, 2011, the Government stated that the risk corridors charge collection and payment deadlines should be identical, recognizing that "QHP issuers who are owed these amounts will want prompt payment." Compl. Ex. 07 at 41943. In final rulemaking on March 23, 2012, while the Government had not yet adopted rules for risk corridors payments or charge remittances, it reiterated that "HHS would make payments to QHP issuers that are owed risk corridors amounts within a 30-day period after HHS determines that a payment should be made to the QHP issuer," and again recognized that "QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers." Compl. Ex. 11 at 17238. After submitting a proposed rule in late 2012 that would require QHPs to pay risk corridors charges to the Government within 30 days of receiving notice of the charges, *see* 77 FR 73118, 73164 (Dec. 7, 2012), Ex. 29, the Government finalized the rule on March 11, 2013. *See* Compl. Ex. 09 at 15473.[21] While the Government imposed no rule on itself to pay QHPs within 30 days of notice, it likewise did not in any way contravene its prior statements from July 2011 and March 2012 about risk corridors payment deadlines.

Furthermore, in the final rulemaking of March 11, 2013, the Government stated that

---

[20] In CY 2014, BCBSNC enrolled the majority of insureds in the North Carolina Exchange, and was the only QHP to offer ACA health insurance plans in all 100 counties in North Carolina. *See* Compl. ¶ 27.

[21] The 30-day QHP charge remittance rule is found at 45 C.F.R. § 153.510(d).

"[t]he risk corridors program is ***not statutorily required to be budget neutra****l*," and that **"*[r]egardless of the balance of payments and receipts***, HHS ***will remit payments*** [to QHPs] as required under section 1342 of the [ACA]." *Id.* (emphasis added).

IV. THE GOVERNMENT CONFIRMS BUT ATTEMPTS TO REINTERPRET ITS RISK CORRIDORS OBLIGATIONS TO PLAINTIFF

After September 2013, the Government repeatedly confirmed its risk corridors payment obligations. *See* Compl. ¶¶ 96-97, 99-100, 102-05. But on March 11, 2014 – one year after CMS had announced that § 1342 is *not* budget neutral and that risk corridors payments will be made "[r]egardless of the balance of payments and receipts"[22] – the Government stated just the opposite: that "HHS intends to implement this [risk corridors] program in a budget neutral manner." Compl. Ex. 19 at 13829. Along with that statement, the Government also offered assurances to Plaintiff that "we believe that the risk corridors program as a whole will be budget neutral or, [sic] will result in net revenue to the Federal government in FY 2015 for the 2014 benefit year." *Id.*

A month later, on April 11, 2014, the Government issued its "Risk Corridors and Budget Neutrality" Bulletin, in which the Government represented that it "anticipate[s] that risk corridors collections will be sufficient to pay for all risk corridors payments," but warned that "if risk corridors collections are insufficient to make risk corridors payments for a year, all risk corridors payments for that year will be reduced pro rata to the extent of any shortfall." Compl. Ex. 20 at 1. Recognizing that the risk corridors program would conclude in CY 2016, the Government also stated that it "anticipate[s] that risk corridors collections will be sufficient to pay for all risk corridors payments over the life of the three-year program," but admitted that it had no plan if a shortfall existed after CY 2016. *Id.* at 2.

[22] Compl. Ex. 09 at 15473.

V. AFTER PLAINTIFF COMMITTED AS A QHP FOR CY 2015, CONGRESS TARGETED THE GOVERNMENT'S RISK CORRIDORS OBLIGATIONS

In reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, Plaintiff submitted to CMS its CY 2015 attestations in June 2014, and executed its CY 2015 QHP Agreement in October 2014, re-committing to continue to offer plans on the ACA Exchange in North Carolina. *See* Compl. ¶ 49 & Ex. 03. Just beforehand, the U.S. Government Accountability Office ("GAO") had responded to inquiries from ranking members of Congress about the availability of appropriations to make the mandatory risk corridors payments due for CY 2014. *See* Comp. Gen. B-325630 (Sept. 30, 2014), attached as Exhibit 31. The GAO concluded that appropriations *did exist* for fiscal year ("FY") 2014 under the CMS Program Management ("PM") appropriation, but because CY 2014 risk corridors charges and payments would not be made until FY 2015, "the CMS PM appropriation for FY 2015 must include language similar to the language included in the CMS PM appropriation for FY 2014." *Id.* at 7. The Congressional majority ensured that it did not, targeting the mandatory risk corridors payment obligations with a rider in the Cromnibus appropriations bill for FY 2015, enacted on December 16, 2014 ("§ 227" of the "2015 Appropriations Act"),[23] which stated that:

> None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the [CMS PM] account, may be used for payments under section 1342(b)(1) of Public Law 111-148 (relating to risk corridors).

Compl. Ex. 21. Following the GAO's previous analysis, this rider purported to limit the funds available to make risk corridors payments to just the amount of risk corridors charge remittances collected as "user fees" under the FY 2015 CMS PM appropriation – *i.e.*, budget neutrality. *See* Comp. Gen. B-325630 at 4-7 (Sept. 30, 2014). Congress did not, however, amend or repeal § 1342's annual mandatory risk corridors payment obligation (and, to date, never has done so).

[23] Pub. L. 113-235, § 227, 128 Stat. 2491.

In spite of § 227, HHS subsequently assured Plaintiff, in February and July 2015, that "HHS recognizes that that [ACA] requires the Secretary to make full [risk corridors] payments to issuers," and that "CMS remains committed to the risk corridor program." Compl. Exs. 15 & 16. In May 2015, Plaintiff submitted its CY 2016 attestations to CMS. *See* Compl. ¶ 49. In late July 2015, Plaintiff submitted its CY 2014 risk corridors data to CMS,[24] showing that the Government owed Plaintiff a total of over $140 million in risk corridors payments for that year. In late September 2015, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, Plaintiff executed the CY 2016 QHP Agreement, again renewing its commitment to the ACA Exchange. *See* Compl. Ex. 04.

VI. THE GOVERNMENT ANNOUNCES THE $2.5 BILLION CY 2014 RISK CORRIDORS SHORTFALL AND 12.6 PERCENT PRORATED PAYMENTS

A week later, on October 1, 2015, what was previously not "anticipate[d]" by the Government[25] became a reality: CMS announced that its analysis of all QHPs' risk corridors data revealed a risk corridors payment shortfall of $2.5 billion, and advised Plaintiff and other QHPs that such shortfall "will result in a proration rate of 12.6 percent." Compl. Ex. 22.

On November 2, 2015, Kevin J. Counihan, Director of CMS' Center for Consumer Information & Insurance Oversight ("CCIIO") and CEO of the ACA Marketplace,[26] sent BCBSNC's President and CEO a letter reiterating that $362 million in risk corridors collections could not match the payment requests of $2.87 billion, and stating that:

> The remaining 2014 risk corridors claims will be paid out of 2015 risk corridors collections, and if necessary, 2016 collections. Since this is a three year program, we will not know the total loss or gain for the program until the fall of 2017 when the data from all three years of the program can be analyzed and verified. In the

---

[24] *See* 45 C.F.R. § 153.530(d) (requiring QHPs to submit risk corridors data to HHS "by July 31 of the year following the benefit year").

[25] Compl. Ex. 20 at 1 (Apr. 11, 2014) ("We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments.").

[26] *See* CMS Leadership, https://www.cms.gov/About-CMS/Leadership/cciio/Kevin-Counihan.html, attached as Exhibit 32 (Mr. Counihan's job description).

> event of a shortfall for the 2016 program year, HHS will explore other sources of funding for risk corridors payments, subject to the availability of appropriations. This includes working with Congress on the necessary funding for outstanding risk corridors payments.

Compl. Ex. 18. CMS did not provide Plaintiff with any statutory or other authority for the Government's unilateral decision to make only partial, prorated risk corridors payments for CY 2014, to withhold delivery of full risk corridors payments for CY 2014 beyond CY 2015, or to support its theory that CY 2014 risk corridors payments are not due "until the fall of 2017," after the end of the three-year program. *Id.*

Recognizing that the United States was acting in contravention of its statutory and regulatory payment obligations, Mr. Counihan reassured BCBSNC in his November 2, 2015 letter that HHS "recognizes that the [ACA] requires the Secretary to make full payments to issuers, and that HHS is recording those amounts that remain unpaid following our 12.6% payment this winter as fiscal year 2015 obligations of the United States government for which full payment is required." Compl. Ex. 18.[27] By emphasizing that the CY 2014 risk corridors payments were being booked "as [FY] 2015 obligations of the United States … for which full payment is required," the Government undermined its newly-minted three-year payment framework. *Id.*

VII. THE GOVERNMENT ANNOUNCES THE CY 2014 RISK CORRIDORS AMOUNTS OWED

On November 19, 2015, the Government disclosed that it was obligated to pay Plaintiff $147,474,968.35 in CY 2014 risk corridors payments, but announced that it would only make prorated payments totaling $18,608,194.67 (12.6 percent of the total owed). *See* Compl. Ex. 25.[28] Meanwhile, other QHPs that owed risk corridors charges to the Government were required

[27] Mr. Counihan's office, the CCIIO, made the same acknowledgement in a public bulletin on November 19, 2015. *See* Compl. Ex. 17.

[28] For a chart summarizing Plaintiff's inclusion in the state-by-state risk corridors amount tables, *see* Compl. ¶ 135.

promptly to remit *all* of their charges – not some unilaterally determined fraction thereof – by the end of November 2015. Since the November 19, 2015 announcement, the Government has paid Plaintiff $18,081,507.13, just 12.26 percent of the CY 2014 risk corridors payments owed. *See* Compl. ¶ 138.

On December 18, 2015, Congress continued § 227's limited funding language in § 225 of the Omnibus appropriations bill for FY 2016, the "Consolidated Appropriations Act, 2016" ("§ 225" of the "2016 Appropriations Act").[29] Congress' second effort to limit funding sources for the Government's mandatory risk corridors payment obligations was as ineffectual as its first: without modifying or repealing § 1342, the FY 2016 rider did not defeat or otherwise abrogate the United States' existing obligation to make full and timely annual risk corridors payments to QHPs, including Plaintiff.

VIII. THE GOVERNMENT'S FINAL AGENCY RESPONSE CONFIRMS ITS BREACH OF ITS CY 2014 RISK CORRIDORS PAYMENT OBLIGATIONS

Plaintiff's efforts to resolve the issue out of court were unsuccessful, *see* Compl. ¶ 146, and on March 17, 2016, another QHP that is owed risk corridors payments for CY 2014 sent a formal demand letter to Mr. Counihan, requesting a final agency response. *See* Compl. Ex. 28 ("Demand Letter"). Mr. Counihan responded to the Demand Letter on April 1, 2016, affirming the Government's payment obligation by stating that "2014 risk corridor payments … will be paid," but repeating the Government's plan to make such payments first out of CY 2015 risk corridors collections, then, if necessary, CY 2016 collections. Compl. Ex. 23 ("Final Agency Response"). Thereafter, if necessary, HHS committed to "explore other funding sources subject to the availability of appropriations," which "includes engaging with Congress to secure funding." *Id.* The Final Agency Response therefore did not resolve the Government's breach of its obligation to make CY 2014 risk corridors payments in full by the end of CY 2015.

[29] Pub. L. 114-113, § 225, 129 Stat. 2624 (Compl. Ex. 24).

IX. THE GOVERNMENT ANNOUNCES THAT THE CY 2014 RISK CORRIDORS SHORTFALL MAY NEVER BE FILLED, AND CONFIRMS THAT THE UNITED STATES IS OBLIGATED TO PAY

In June 2016, the Government told QHPs that "CMS will begin making RC [risk corridors] payments to insurers" for CY 2015 in "December 2016." Mot. at App'x A196. On September 9, 2016, however, the Government announced that, "based on our preliminary analysis" of the CY 2015 risk corridors data submitted by QHPs at the end of July 2016, "no funds will be available at this time for 2015 benefit year risk corridors payments." Mot. at App'x A248.[30] The Government also stated that CY 2015 collections would not be enough to fill the $2.5 billion shortfall for CY 2014, so "[c]ollections from the 2016 benefit year will be used first for remaining 2014 benefit year risk corridors payments." *Id.* If the CY 2016 collections prove insufficient to satisfy not only the Government's CY 2014 risk corridors payment obligation, but also its CY 2015[31] and CY 2016 obligations, then the Government announced that it plans to "explore other sources of funding for risk corridors payments, subject to the availability of appropriations," including "working with Congress on the necessary funding for outstanding risk corridors payments." *Id.* The Congress CMS pledged to work with, however, currently has pending a FY 2017 appropriations bill that contains the same restrictions on risk corridors funding as the riders enacted in the 2015 and 2016 Appropriation Acts.[32]

Finally, the Government confirmed in the September 9, 2016 announcement that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers," and that "HHS will record risk corridors payments due as an obligation of the United States Government for which full payment is required." *Id.*

---

[30] The 2016 CMS announcement was incorrectly dated as "2015." *See* Mot. at 15 n.13.

[31] Plaintiff estimates that it is owed CY 2015 risk corridors payments in excess of $175 million. *See* Compl. ¶ 144.

[32] *See* S. 3040, Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2017, *available at* https://www.congress.gov/bill/114th-congress/senate-bill/3040/text.

ARGUMENT

I. RULE 12(B)(1) AND RULE 12(B)(6) STANDARDS

Defendant alleges that the entire Complaint should be dismissed for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1). *See* Mot. at 14-21. Alternatively, Defendant argues that Counts I-V should be dismissed for failure to state a claim pursuant to Rule 12(b)(6). *See* Mot. at 22-44. Although the Court's analyses under 12(b)(1) and 12(b)(6) are different,[33] "on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

"A court deciding a motion under 12(b)(1) must determine whether jurisdiction is proper and must not reach the merits." *Caraway*, 123 Fed. Cl. at 529 (citing *Greenlee Cnty. v. United States*, 487 F.3d 871, 876 (Fed. Cir. 2007)).[34] Although a plaintiff "bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence," *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988), a "[p]laintiff need only make a *prima facie* showing of jurisdictional facts in order to survive a motion to dismiss." *Mastrolia v. United States*, 91 Fed. Cl. 369, 376 (2010); *see Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (*en banc*) ("It is hornbook law that the Tucker Act … confers jurisdiction upon the Court of Federal Claims over the specified categories of actions brought against the United States.") (quoting 28 U.S.C. § 1491(a)(1)).

A Rule 12(b)(6) motion "challenges the legal theory of the complaint, not the sufficiency of any evidence that might be adduced." *Adv. Cardio. Sys., Inc. v. Scimed Life Sys., Inc.*, 988

---

[33] "When considering motions under RCFC 12(b)(1) and 12(b)(6), the court must distinguish between its inquiries into jurisdiction and the merits." *Caraway v. United States*, 123 Fed. Cl. 527, 529 (2015) (citing *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1355 (Fed. Cir. 2011)).

[34] *See also Scheuer* at 236 (holding that a court's 12(b)(1) "task is necessarily a limited one," and "[t]he issue is not whether a plaintiff will ultimately prevail but whether [it] is entitled to offer evidence to support the claims").

F.2d 1157, 1160 (Fed. Cir. 1993). To withstand a Rule 12(b)(6) motion, a plaintiff need only "provide 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the … claim is and the grounds upon which it rests.'" *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1354 (Fed. Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *see* RCFC 8(a)(2). Thus, a 12(b)(6) motion must be denied when the complaint "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Nexagen Networks, Inc. v. United States*, 124 Fed. Cl. 645, 651 (2015) (Griggsby, J.) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A plaintiff meets the facial plausibility requirement by pleading "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Iqbal* at 678).[35]

II. THE COURT HAS SUBJECT-MATTER JURISDICTION OVER ALL OF PLAINTIFF'S CLAIMS

Defendant's Rule 12(b)(1) jurisdictional challenge is founded on an incorrect legal standard and an erroneous assertion that Plaintiff does not claim "presently due" money damages. *See* Mot. at 15-20. The Federal Circuit has rejected arguments identical to Defendant's that jurisdiction does not exist for lack of "presently due money damages." *Kanemoto v. Reno*, 41 F.3d 641, 647 (Fed. Cir. 1994) ("There is no requirement in the Tucker Act that there must be a finding that money is due before the Court of Federal Claims can exercise its jurisdiction."). Moreover, Defendant's jurisdictional argument conflicts with the position it recently advanced in Federal District Court, where it asserted that monetary claims for risk corridors payments – like Plaintiff's claims here – belong in the U.S. Court of Federal

[35] While a court's 12(b)(6) examination is primarily limited to the complaint's allegations, it "may also look to 'matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record.'" *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014) (quoting 5B Wright & Miller, *Fed. Prac. & P.* § 1357 (3d ed. 2004)).

Claims.[36]

A. The Court Has Tucker Act Jurisdiction Over Count I

Count I claims that the United States breached a money-mandating statute, § 1342, and its implementing regulations. *See* Compl. ¶¶ 154-65. The Federal Circuit recently confirmed the governing "standard for determining whether jurisdiction exists under the Tucker Act with respect to a claim for money under a statute and regulations," as established by the Supreme Court and Federal Circuit. *Roberts v. United States*, 745 F.3d 1158, 1161 (Fed. Cir. 2014). Just two requirements must be satisfied. First, "[f]or jurisdiction to exist, the statute and regulations must be such that they 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.* (quoting *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 472 (2003)).[37] Second, "the statute and regulations must be money-mandating as to the class of which plaintiff claims to be a member." *Id.*; *see also Fisher*, 402 F.3d at 1173-74. "[O]nce the regulations provide that a particular class is entitled to [money-mandating payment] and the plaintiff *alleges* that he is within that class, the regulations are money-mandating and the court has jurisdiction." *Roberts* at 1161 (citing *Doe II*, 463 F.3d at 1325) (emphasis added). "The question of whether [the plaintiff] *in fact is* within a class and entitled to [the money-mandating payment] is a *merits* issue," not a jurisdictional one. *Id.* (emphasis added).

Plaintiff has unquestionably satisfied both jurisdictional prongs. First, § 1342 and its implementing regulations are indisputably money-mandating provisions.[38] Second, as a QHP,

---

[36] *See* Gov't Mem. in Supp. of Mot. to Dismiss at 14, *Evergreen Health Cooperative, Inc. v. HHS*, No. 1:16-cv-2039 (D. Md. Aug. 15, 2016), ECF No. 41-1 ("Here, the premise of Count II is Plaintiff's claim that the agency has 'refus[ed] to honor its statutory obligation to make full risk corridors payments to Evergreen Health.'… This is fundamentally a monetary claim, ***over which the Court of Federal Claims has special competence and exclusive jurisdiction*** ….") (emphasis added and citation omitted); *cf. Stovall v. United States*, 71 Fed. Cl. 696,702 n.9 (2006) ("[H]aving the United States take inconsistent positions before sister courts is hardly a trifling matter.").

[37] *See Doe v. United States*, 463 F.3d 1314, 1324 (Fed. Cir. 2006) ("*Doe II*") ("This requirement is commonly termed as the 'money-mandating' requirement.").

[38] *See* 42 U.S.C. § 18062(b)(1) ("[T]he Secretary shall pay to the plan."); 45 C.F.R. § 153.510(b) ("HHS will pay the QHP."); *see, e.g.*, *RP1 Fuel Cell, LLC v. United States*, 120 Fed. Cl. 288, 316 (2015) ("[T]he Federal Circuit

Plaintiff is a member of the class that Congress prescribed to receive risk corridors payments under the statute and regulations. Defendant does not contest that § 1342 is money-mandating, and it cannot deny that Plaintiff is a QHP. In fact, the Government already has paid Plaintiff a fractional portion of the CY 2014 risk corridors amounts it is owed as a QHP. According to binding precedent, nothing further must be shown to establish the Court's Tucker Act jurisdiction. *See, e.g.*, *Voge v. United States*, 844 F.2d 776, 779 (Fed. Cir. 1988) ("If a statute mandates payment by the government, the Tucker Act authorizes suit in [this] Court.").

United States v. King and the other cases cited by Defendant urging application of *King*'s "presently due" standard actually *support* the Court's jurisdiction here. In *King*, "the Supreme Court articulated the now-canonical principle that a plaintiff must present a claim for 'actual, presently due money damages from the United States' to fall within the jurisdictional reach of the Tucker Act." *Speed v. United States*, 97 Fed. Cl. 58, 66 (2011) (quoting *United States v. King*, 395 U.S. 1, 3 (1969)). The courts that have applied *King*'s "presently due" language and found jurisdiction lacking did so only when the plaintiffs in those cases, like the *King* plaintiff, primarily sought injunctive, equitable or declaratory relief, rather than money damages.[39] Here, in stark contrast, BCBSNC seeks *immediately payable* money damages from the United States.[40]

---

has 'repeatedly recognized that the use of the word "shall" generally makes a statute money-mandating.'") (cataloguing cases).

[39] The non-monetary claims have typically arisen in cases where current or former federal employees filed claims in this Court seeking an order reversing a personnel decision, in the hopes of subsequently getting a pay or benefits raise. *See, e.g.*, *King* at 1-3 (retirement classification); *United States v. Testan*, 424 U.S. 392, 393-94, 397-98 (1976) (non-promotion); *Todd v. United States*, 386 F.3d 1091, 1093-95 (Fed. Cir. 2004) (facility designation); *Wood v. United States*, 214 Ct. Cl. 744, 744-45 (1977) (prospective retirement eligibility). Notably, the Federal Circuit in *Todd* initially recited a shorthand version of the *King* standard, omitting the word "claim," but later correctly re-stated the *King* standard: "Absent a *claim* for presently due money damages against the United States, the Court of Federal Claims does not have jurisdiction under the Tucker Act to entertain appellants' claims." *Todd* at 1095 (emphasis added). Defendant attempts to exploit this initial omission of the word "claim" by asserting that *Todd*'s – not *King*'s – statement of the standard should be controlling. *See* Mot. at 15, 20.

[40] The rare contract cases Defendant relies on where the plaintiffs sought equitable relief, rather than money damages, are thus inapposite and easily distinguishable from this case. *See, e.g.*, *Overall Roofing & Constr. Inc. v. United States*, 929 F.2d 687, 687-89 (Fed. Cir. 1991) (termination of roofing contract, but without the Government demanding return of any excess funds paid to the contractor); *Johnson v. United States*, 105 Fed. Cl. 85, 87, 94-96

Any declaratory relief Plaintiff has requested is expressly "incidental and collateral to a claim for money damages." *Bobula v. U.S. Dep't of Justice*, 970 F.2d 854, 858-59 (Fed. Cir. 1992). Therefore, *King* actually supports the existence of jurisdiction here.[41]

It is not surprising that Defendant elected not to rely on *Lummi Tribe of the Lummi Reservation v. United States*, 99 Fed. Cl. 584 (2011), as it has done in seeking to dismiss other risk corridors cases pending before the Court,[42] because *Lummi Tribe* undermines Defendant's position and underscores the inapplicability of *King*'s "presently due" standard to Count I. There, the controlling statute, NAHASDA, provided that the HUD Secretary "shall … make grants" and "shall allocate any amounts" pursuant to a particular formula among Indian tribes that comply with certain requirements. *Id.* at 594. This is similar to language used here in § 1342. *See, e.g.*, Compl. ¶ 55. Because the Court found the HUD Secretary "bound by the statute to pay a qualifying tribe the amount to which it is entitled under the formula," the Court concluded that "[s]uch mandatory language is sufficient to confer jurisdiction on this court." *Lummi Tribe* at 594 (citing *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967), *Greenlee Cnty.*, 487 F.3d at 877, and *Wolfchild v. United States*, 96 Fed. Cl. 302, 339 (2010)).[43] The Court in *Lummi Tribe* confirmed that, as in this case, "[a]ny claim for money to which a plaintiff is statutorily entitled … falls within our jurisdiction and is properly the subject

---

(2012) (student loan debt cancellation); *Annuity Transfers, Ltd. v. United States*, 86 Fed. Cl. 173, 174-75, 179 (2009) (finding no jurisdiction in action "seek[ing] *a declaration* from the court approving a structured settlement factoring transaction concerning an annuity purchased and owned by the United States") (emphasis added).

[41] Other cases cited in the motion's "presently due" section do not even discuss the "presently due" standard. In *Casitas Mun. Water Dist. v. United States*, the Federal Circuit affirmed dismissal of a takings claim as unripe, finding that the plaintiff's beneficial use had not yet been impinged upon. *See* 708 F.3d 1340, 1342-43, 1359-60 (Fed. Cir. 2013). In *Barlow & Haun, Inc. v. United States*, after the Court held a trial on all liability and damages issues regarding 26 oil and gas leases with BLM, the Court held that a breach-of-contract claim failed on the merits. *See* 118 Fed. Cl. 597, 601, 622 (2014). These cases have nothing to do with whether Plaintiff's claims for money damages satisfy this Court's Tucker Act jurisdiction.

[42] *See, e.g.*, The United States' Mot. to Dismiss at 17, *First Priority Life Ins. Co.*, No. 16-587C (Fed. Cl. Sept. 16, 2016), ECF No. 8 (citing *Lummi Tribe*).

[43] *See also Lummi Tribe* at 597 ("As Justice Scalia recognized in his dissent in *Bowen* [*v. Massachusetts*, 487 U.S. 879, 920 (1988)], this court has traditionally exercised jurisdiction over suits for money allegedly due under government grant programs that the government has refused to pay.").

of an action for money damages." *Id.* at 597.

All of Defendant's "presently due" arguments should also be rejected because they raise merits questions, not jurisdictional issues. *See Roberts* at 1161 ("[W]hether [the Plaintiff] can recover under the particular facts of the case is a merits question and not a jurisdictional issue."); *Palmer v. United States*, 168 F.3d 1310, 1312-13 (Fed. Cir. 1999) (explaining difference between jurisdictional and merits-based arguments). Defendant's merits-based arguments, grounded on its *post hoc* characterization of risk corridors as a "three-year payment framework," are irrelevant to the Court's jurisdictional analysis.[44] *See, e.g.*, *Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin*., 525 F.3d 1299, 1307 (Fed. Cir. 2008) ("The [Supreme] Court [has] made clear that the merits of the claim [are] not pertinent to the jurisdictional inquiry.").

Even if Defendant's argument regarding when risk corridors payments are due, based on its "three-year payment framework" theory, were relevant to the Court's jurisdictional determination (which it is not), Defendant's *post hoc* litigation position is belied by, *inter alia*:

1. The ACA's text (*e.g.*, § 1342(b)(1) states that the HHS Secretary "shall pay to the plan" a certain amount if the plan's allowable costs "**for any plan year**" exceed the target amount by a certain threshold);

2. The implementing regulations (*e.g.*, 45 C.F.R. § 153.510(b) states that risk corridors payments will be made for "**any benefit year**");

3. The risk corridors program's fundamental purpose (*e.g*., CMS' "The Three Rs: An Overview" (Oct. 1, 2015) explains that "The goal of the risk corridors program is to support the [Exchanges] by providing insurers with additional protection against uncertainty in claims costs **during the first three years** of the [Exchanges]");[45]

4. Prior legislative history from Medicare Part D, on which § 1342 was expressly modeled (*e.g.*, 42 U.S.C. § 1395w-115(e)(3)(A): "**For each plan year** the

---

[44] The amount of risk corridors payments due is a damages question, not a jurisdictional one. *See, e.g.*, *BMY-Combat Sys. Div. of Harsco Corp. v. United States*, 26 Cl. Ct. 846, 850 (1992) ("[T]he precise quantum [of damages] is a question of fact to be determined later in the proceedings.").

[45] CMS' October 1, 2015 "Three Rs" document is attached as Exhibit 33. This CMS document is a publicly available federal government record, properly considered here. *See, e.g.*, *A & D*, 748 F.3d at 1147; *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 59-60 (2d Cir. 2016) (considering FDA "Guidance for Industry" published on federal government website without converting motion to dismiss into motion for summary judgment).

Secretary shall establish a risk corridor for each prescription drug plan ….”; 42 C.F.R. § 423.336: “**For each year**, CMS establishes a risk corridor for each Part D plan”);

5. The Supreme Court’s ACA precedent (*e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2492-93 (2015) (“[T]he statutory scheme compels us to reject petitioners’ interpretation because it would destabilize the individual insurance market … and likely create the very ‘death spirals’ that Congress designed the Act to avoid”));

6. HHS’ statements (*e.g.*, CMS’ April 11, 2014 Bulletin stating that “if risk corridors collections are insufficient to make risk corridors payments **for a year**, all risk corridors payments **for that year** will be reduced pro rata to the extent of any shortfall ….” Compl. Ex. 20 at 1);

7. HHS’ documents (*e.g.*, CMS’ April 14, 2015 “Key Dates in 2015: QHP Certification in the Federally-Facilitated Marketplaces; Rate Review; Risk Adjustment, Reinsurance, and Risk Corridors,” **specifying payment schedule for “Remittance of Risk Corridors Payments** and Charges” from “**9/2015-12/2015**” for CY 2014);[46]

8. HHS’ conduct *preceding* this lawsuit (*e.g.*, **actually making prorated annual risk corridors payments to Plaintiffs** in **December 2015 to March 2016** for just under 12.6 percent of the amounts due for the CY 2014 plan year, *see* Compl. ¶ 138);

9. HHS’ conduct *post-dating* this lawsuit (*e.g.*, CMS’ September 9, 2016 announcement that “HHS will record risk corridors payments due as an obligation of the United States Government for which full payment is required.” Mot. at App’x A248); and

10. Other Government agencies’ assessments (*e.g.*, GAO stating that “HHS intends to begin [risk corridors] collections and payments … in fiscal year (FY) 2015,” Comp. Gen. B-325630 at 3 (Sept. 30, 2014); the Congressional Budget Office (“CBO”) stating that “[t]he risk corridors program … covers insurance issued for calendar years 2014 to 2016, and corresponding payments and collections will occur during fiscal years 2015 to 2017.” CBO, *The Budget and Economic Outlook: 2015 to 2025*, at 121 n.8 (Jan. 2015)).

These examples demonstrate that risk corridors payments are due and payable annually, not after the end of the risk corridors program’s three years, as Defendant now contends. The statutory payments are required to be calculated separately for each of the program’s three years, and are not in any way dependent on or connected to risk corridors payments made or charges received over the entire three-year period. Indeed, the phrase “three-year payment framework” now urged

[46] CMS’ April 14, 2015 “Key Dates in 2015” document is attached as Exhibit 34.

by Defendant does not appear anywhere in § 1342 or its implementing regulations, nor is there any language to support the Government's *post hoc* contention. *See Parker v. Office of Pers. Mgmt.*, 974 F.2d 164, 166 (Fed. Cir. 1992) ("[P]ost-hoc rationalizations will not create a statutory interpretation deserving of deference.").

B. The Court Has Tucker Act Jurisdiction Over Counts II-V

Although Defendant asserts that the entire Complaint should be dismissed for lack of jurisdiction under the Tucker Act, its motion fails to identify any specific jurisdictional deficiencies with Plaintiff's breach of contract claims in Counts II-IV, or with Plaintiff's Fifth Amendment takings claim in Count V. Indeed, Defendant relegates to a single footnote its entire jurisdictional challenge against Counts II-V, asserting only that the Court lacks jurisdiction over all of these Counts based on its unsupported and disputed claim that risk corridors payments are not due annually. *See* Mot. at 20 n.6. The Court should deny Defendant's 12(b)(1) footnote challenge to Counts II-V.[47]

There is no question that the Court has Tucker Act jurisdiction to hear Plaintiff's contract claims. *See Marchena v. United States*, No. 16-76C, --- Fed. Cl. ----, 2016 WL 5118304, at *4 (Sept. 21, 2016) (recognizing that a "low threshold requirement" exists to establish jurisdiction over contract claims);[48] *Mendez v. United States*, 121 Fed. Cl. 370, 379-380 (2015) (citing *Engage Learning*, 660 F.3d at 1355) (holding that a plaintiff need not prove "the *actual existence* of a contract" because that "is not a jurisdictional matter but rather a decision on the merits of the case"); *see also* Compl. Exs. 02-04 (express contracts). The Court's jurisdiction over Plaintiff's takings claim in Count V is also unquestionable. The Federal Circuit has confirmed that "[i]t is undisputed that the Takings Clause of the Fifth Amendment is a money-mandating source for

[47] Should Defendant's Reply brief raise any specific alleged jurisdictional arguments regarding Counts II-V, Plaintiff will seek leave to file a Sur-Reply memorandum.

[48] "[T]he requirements for an implied-in-fact contract are the same as for an express contract." *Hanlin v. United States*, 214 F.3d 1319, 1328 (Fed. Cir. 2000) ("*Hanlin I*").

purposes of Tucker Act jurisdiction." *Jan's Helicopter*, 525 F.3d at 1309. Due to the Complaint alleging "a taking of [Plaintiff's] property by the government," and because Plaintiff is "within the class of plaintiffs entitled to recovery if a Fifth Amendment takings claim is established, the court would normally have Tucker Act jurisdiction over plaintiff's takings claim." *Pucciariello v. United States*, 116 Fed. Cl. 390, 402 (2014) (citing *Jan's Helicopter* at 1309).[49]

C. Plaintiff's Claims Are Ripe

"The ripeness doctrine prevents courts from deciding hypothetical, abstract, or contingent claims." *White & Case LLP v. United States*, 67 Fed. Cl. 164, 172 (2005) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)). Plaintiff's claims seek immediate monetary damages for past-due CY 2014 risk corridors payments that the Government already has admitted: (a) are due and payable in "full," (b) are existing "fiscal year 2015 obligations of the United States government for which full payment is required," and (c) it paid to Plaintiff, albeit only a small fractional portion of the full amount owed. Compl. ¶¶ 138, 151. These claims are *very* real – *not* abstract, hypothetical or conjectural. No "abstract disagreements over administrative policies"[50] or "further factual development[s]"[51] prevent this Court from adjudicating Plaintiff's claims for the CY 2014 risk corridors amounts.[52] As demonstrated above, Plaintiff "present[s] a claim for '*actual, presently due money damages* from the United States'" on each of its Counts. *Speed*, 97 Fed. Cl. at 66 (quoting *King*, 395 U.S. at 3) (emphasis added). Plaintiff's claims are ripe.

Defendant's primary ripeness argument is that it is "too soon" for the Court to decide any

---

[49] *See Pucciariello* at 403 (finding jurisdiction preempted by separate statutory provision, not applicable to this case, vesting jurisdiction in federal courts of appeal).

[50] *White & Case* at 172 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)).

[51] *Id.* (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998)).

[52] Indeed, in another pending risk corridors action, the Court will soon hear argument on the Government's motion to dismiss and the plaintiff's dispositive motions for judgment on the administrative record, even though the Government asserted that the plaintiff's risk corridors claims are "not ripe." *See* Scheduling Order and Amended Scheduling Order, *Land of Lincoln v. United States*, No. 16-744C (Fed. Cl. Aug. 12, 2016 & Oct. 18, 2016) (Lettow, J.), ECF Nos. 12 & 36 (rescheduling oral argument for Nov. 7, 2016).

of Plaintiff's claims because "HHS has not yet finally determined the total amount of payments that [Plaintiff] (or any other issuer) will receive under the risk corridors program." Mot. at 22. According to Defendant, Plaintiff should wait until some unidentified "future years" after the risk corridors program has ended, *see id*., to seek recovery of the CY 2014 risk corridors monies that the Government already has admitted it owes in "full" and are a binding "obligation of the United States." Defendant's ripeness argument is not a serious one, and should be disregarded.

The Federal Circuit holds that claims are ripe for resolution in this Court so long as they are "fit for judicial review," and if "withholding judicial review would work hardship on the parties." *Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs*, 464 F.3d 1306, 1316 (Fed. Cir. 2006) (quoting *Abbott Labs.*, 387 U.S. at 149). Plaintiff's claims satisfy both of these tests.

Plaintiff's claims became fit for adjudication at the end of CY 2015, when, instead of making the full and timely CY 2014 risk corridors payments owed, the United States paid just a fraction of the $147,474,968.35 that it had announced was due for CY 2014. *See, e.g.*, Compl. ¶¶ 136, 138. The Government's fractional payment decision had "been formalized [by the Government] and its effects felt in a concrete way" by Plaintiff. *Abbott Labs.* at 148-49. The Government's decision to not make the full, timely CY 2014 risk corridors payments owed to Plaintiff by the end of CY 2015 was formalized in numerous ways as described in the Complaint, *see, e.g.*, Compl. ¶¶ 106-27, culminating in the April 1, 2016 Final Agency Response to another QHP's March 17, 2016 Demand Letter.[53] *See* Compl. ¶¶ 147-53 and Exs. 23 & 28.[54]

---

[53] This Final Agency Response to a fellow QHP with similar facts and claims rendered futile any attempt by Plaintiff to obtain a different response from CMS. *See, e.g.*, *Schooner Harbor Ventures, Inc. v. United States*, 92 Fed. Cl. 373 (2010) ("Futility is an exception to the agency final decision requirement for ripeness.") (citing *Anaheim Gardens v. United States*, 444 F.3d 1309, 1315-16 (Fed. Cir. 2006)); *Richmond Am. Homes of Colo., Inc. v. United States*, 75 Fed. Cl. 376, 385 (2007) (accepting agency's final decision to similarly situated party because "we can assume that the same result would have been obtained had the Plaintiffs pressed the issue").

[54] Additionally, Plaintiff's claims for the Government's failure to make full and timely CY 2015 risk corridors payments due by the end of CY 2016 are also ripe. Despite admitting that it owes Plaintiff the full

Plaintiff's contract claims ripened at the end of CY 2015, when the United States breached the parties' agreement to make the CY 2014 risk corridors payments in full and on time. Plaintiff's takings claim ripened on April 1, 2016, when the Final Agency Response confirmed that the Government would not timely pay Plaintiff or any other QHP the CY 2014 risk corridors amounts admittedly due.[55]

The ripeness of Plaintiff's claims to recover roughly 87.5 percent of CY 2014 risk corridors monies already admittedly due and owing, but not paid due to Congress' appropriations restrictions, is not affected by Defendant's assertion that HHS does not yet know the aggregated amount of risk corridors payments owed for each of the program's three years combined. No further factual development or future contingent events are necessary for the Court to adjudicate these claims for monies which are admittedly due and owing. Defendant's disputed, *post hoc* assertion that the CY 2014 risk corridors monies owed are subject to a "three-year payment framework" is merely a delay tactic.[56] In any event, how the Government might eventually make Plaintiff whole – *if ever*[57] – is not relevant, because "Tucker Act jurisdiction is not affected by how the agency meets its obligations or how any judgment establishing those obligations is satisfied." *Slattery v. United States*, 635 F.3d 1298, 1318 (Fed. Cir. 2011) (*en banc*).

The two cases upon which Defendant relies do not support its ripeness challenge. One case, *Shinnecock Indian Nation v. United States*, 782 F.3d 1345 (Fed. Cir. 2015), bears no factual

---

payment amounts, the Government confirmed on September 9, 2016, that it will not pay Plaintiff *any* CY 2015 risk corridors amounts until CY 2017, at the earliest. *See* Mot. at App'x A248; *see also Barlow & Haun*, 118 Fed. Cl. at 615-16 (Tucker Act claims are ripe when the plaintiff chooses to treat an anticipated failure to pay the statutory or contractual obligation as a present breach).

[55] As explained in footnote 53, *supra*, any effort by Plaintiff to obtain a different result by sending a demand letter would have been futile.

[56] The Court must be "aware that purposeful bureaucratic delay and obfuscation is not a valid basis for denial of judicial relief." *Bayou Des Familles Dev. Corp. v. United States*, 130 F.3d 1034, 1038 (Fed. Cir. 1997).

[57] *See* Mot. at 22 ("HHS may collect sufficient funds in future years …. Alternatively, Congress might appropriate sufficient funds …."). *But see* Mot. at App'x A248 (September 9, 2016 CMS announcement suggesting that CY 2014 shortfall may never be satisfied).

similarity to this case because there are no related pending appeals here.[58] The other, *Barlow & Haun*, actually supports a determination that Plaintiff's claims are ripe because it clarifies that different types of claims (*e.g.*, contract claims and takings claims) deserve different ripeness analyses. *See Barlow & Haun*, 118 Fed. Cl. at 615-19.[59]

Although Defendant does not address the second ripeness prong at all – hardship – Plaintiff satisfies this test as well. "The hardship prong is met where 'there is sufficient risk of suffering immediate hardship to warrant prompt adjudication—that is, whether withholding judicial decision would work undue hardship on the parties.'" *White & Case*, 67 Fed. Cl. at 172 (quoting *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1580-81 (Fed. Cir. 1993)). Even after the Government's partial payments, Plaintiff is still owed almost $130 million in CY 2014 risk corridors payments – a significant hardship. *See Coal. for Common Sense*, 464 F.3d at 1316 (claim for loss of "hundreds of millions" deemed ripe). The abstention urged by Defendant to wait to be paid until some "future years," Mot. at 22, will exacerbate this significant hardship by indefinitely delaying resolution of Plaintiff's claims. Defendant's attempt to prevent the Court from considering Plaintiff's claims based on alleged lack of ripeness should thus be rejected.

III. COUNT I STATES A VALID CLAIM FOR VIOLATION OF § 1342 AND ITS IMPLEMENTING REGULATIONS

Recognizing that its jurisdictional and ripeness challenges are unlikely to prevail, Defendant next asks the Court to dismiss Count I on the merits, arguing that Plaintiff has failed to plead a "facially plausible" claim for relief for a violation of § 1342 and its implementing

---

[58] *See Inter-Tribal Council of Ariz., Inc. v. United States*, 125 Fed. Cl. 493, 504 (2016) ("In *Shinnecock*, … the plaintiff's breach of trust claims against the United States were not ripe where the claims were based on a district court's judgment in another case and an appeal of that judgment was pending before the Second Circuit.").

[59] The Court found that, in contrast to takings claims, "breach-of-contract claims … ripen when the breach occurs because that is the time when the nonbreaching party is entitled to bring suit." *Barlow & Haun* at 615. On the other hand, a "claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 616 (quoting *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985)).

regulations. Mot. at 23 (citing *Cambridge v. United States*, 558 F.3d 1331, 1335 (Fed. Cir. 2009)). Defendant's 12(b)(6) motion ignores the well-established standard that "the court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to the plaintiff." *Cambridge* at 1335.[60] Because Plaintiff's well-pled facts state a "facially plausible claim," and "provide the grounds of [its] entitle[ment] to relief" for the Government's violation of a money-mandating statute and its implementing regulations, dismissal of Count I on the pleadings would be improper. *Id.*; *Twombly*, 550 U.S. at 555.

A. Section 1342 is Not a "Budget Neutral" Statute

Forced to concede that § 1342 is a money-mandating statute, Defendant's primary 12(b)(6) argument is a strained one made without statutory or case law support: that § 1342 was always meant to be "self-funding" and "budget neutral." *See* Mot. at 23-25. Disregarding Plaintiff's well-pled allegations, Defendant engages in revisionist history that finds no support in the statutory text, legislative history, or contemporaneous agency interpretations and statements that were made proximate to the ACA's passage. Defendant's entire description of the risk corridors program is completely divorced from the plain language of § 1342 and its implementing regulations, as well as from the Government's statements though the time that Plaintiff voluntarily committed to become a QHP, and even the *post hoc* conduct of Congress and HHS/CMS.

"Statutory interpretation starts with the plain language of the text." *Caddell Constr. Co. v. United States*, 123 Fed. Cl. 469, 476 (2015) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). Neither the term nor the concept of "budget neutral" appears anywhere in § 1342 or its implementing regulations. *See generally* 42 U.S.C. § 18062; 45 C.F.R. §§ 153.500-.540.

[60] *See also Engage Learning*, 660 F.3d at 1355 ("[A] court's characterization of a decision as jurisdictional rather than as on the merits affects its treatment of disputed facts. ***In deciding a motion to dismiss for failure to state a claim, the trial court must accept as true the factual allegations in the complaint.*** … In contrast … , in deciding a motion to dismiss for lack of subject matter jurisdiction, the court accepts as true only uncontroverted factual allegations in the complaint.") (emphasis added and citations omitted).

Quite the opposite. The text and structure of the statute and regulations expressly separate risk corridors "payments in" and "payments out." One is not limited by the other, as Defendant now wrongly suggests in its motion.

Section 1342(b)(1) plainly states that if a QHP qualifies for risk corridors payments in a plan year, then "the [HHS] Secretary *shall pay* to the plan an amount" set forth in the statute's prescribed formula. 42 U.S.C. § 18062(b)(1) (emphasis added). The regulations repeat this requirement, stating that "QHP issuers *will receive* payment from HHS" when they qualify for risk corridors payments in a benefit year, and furthermore that "HHS *will pay* the QHP issuer an amount" equal to the statutory payment formula. 45 C.F.R. § 153.510(b) (emphasis added). Separate sub-sections of the statute and regulations require profitable QHPs to remit charges to the Government. *See* 42 U.S.C. § 18062(b)(1); 45 C.F.R. § 153.510(c). But there is absolutely nothing in the statute or regulations limiting the Government's "shall pay" obligation to make full risk corridors payments to QHPs by the amount collected from other QHPs. 42 U.S.C. § 18062(b)(1); *see, e.g.*, *Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003) ("[U]se of the word 'shall' generally makes a statute money-mandating."); *see also Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").[61]

Congress clearly intended § 1342 to require the Government to share in the risks – or reap the rewards – of insurers' uncertainty in rate-setting in the first three years of the ACA Marketplace. The Government understood this in March 2013, when it published in the Federal Register that "[t]he temporary risk corridors program permits the Federal government and QHPs

[61] Where Congress actually intended a risk-mitigation provision of the ACA to be budget neutral, it knew how to include limiting language. *See* 42 U.S.C. § 18061(b)(1) ("[T]he applicable reinsurance entity collects payments under subparagraph (A) and uses amounts so collected to make reinsurance payments to health insurance issuers described in subparagraph (A).") (reinsurance program).

to share in profits or losses resulting from inaccurate rate setting from 2014 through 2016." 78 FR 15410, 15413 (Mar. 11, 2013). Contrary to Defendant's unsupported assertion that Plaintiff's statutory construction would make "HHS … the uncapped insurer of the insurance industry itself" (Mot. at 24), § 1342(b) explicitly capped the Government's and QHPs' risk both by dollar amount (the prescribed statutory formula) and by duration (payment obligations expiring after CY 2016). *See* 45 U.S.C. § 18062(b).

Although Defendant tries to distinguish Medicare Part D (*see* Mot. at 24), Congress expressly stated in § 1342(a) that "[t]he [HHS] Secretary shall establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016," and that "[s]uch program shall be based on … the program … under [Medicare] part D." 42 U.S.C. § 18062(a). There is no question that Medicare Part D required risk corridors payments in excess of collections and required annual payments. *See, e.g.*, 42 U.S.C. § 1395w-115(e)(3)(A) ("For each plan year the Secretary shall establish a risk corridor for each prescription drug plan."); Ex. 30 (GAO confirming that Medicare Part D "payments that CMS makes to issuers are not limited to issuer contributions"). Congress did not need to copy the text of the Medicare Part D statute word for word to make § 1342 non-budget neutral. When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the [administrative or judicial] interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

Additionally, Defendant ignores that Congress' intent can also be gleaned from the structure and purpose of the ACA, of which § 1342 is an integral part. *See Delverde, SrL v. United States,* 202 F.3d 1360, 1363 (Fed. Cir. 2000). The Supreme Court has already confirmed that the fundamental purpose of the ACA was to stabilize the health insurance markets. *See King v. Burwell*, 135 S. Ct.at 2492-93 ("[T]he statutory scheme compels us to reject petitioners'

interpretation because it would destabilize the individual insurance market … and likely create the very 'death spirals' that Congress designed the Act to avoid."). Defendant's attempt to retroactively construe § 1342 as budget neutral – allowing scores of QHPs to fail or suffer insurmountable losses for lack of annual risk corridor payments – is clearly inconsistent with the undisputed fundamental purpose of the ACA, and therefore must be disregarded. No deference is due to a Government interpretation that is "manifestly contrary to the statute." *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53-54 (2011).

HHS' own interpretation of § 1342, published in the Federal Register in March 2013, immediately before Plaintiff submitted its CY 2014 attestations and voluntarily executed its CY 2014 QHP Agreement, fully supports the fact that § 1342 was not intended to be budget neutral:

> ***The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act.***

Compl. Ex. 09 at 15473 (emphasis added).[62] The contrary position Defendant now asserts in its motion smacks of the type of "post-hoc rationalization" that courts disfavor. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (recognizing *Chevron* deference is "unwarranted" when, as here, "the agency's interpretation conflicts with a prior interpretation"); *Parker*, 974 F.2d at 166 ("[P]ost-hoc rationalizations will not create a statutory interpretation deserving of deference."). Tellingly, Defendant fails to even mention, much less address or explain, HHS' March 2013 non-budget neutral pronouncement, as if it was never published.

B. CBO Recognized That § 1342 is Not "Budget Neutral"

Instead of acknowledging HHS' March 2013 interpretation of § 1342, Defendant

[62] This was HHS' final statement on this subject before the ACA Exchanges became effective on January 1, 2014.

attempts to rely on a March 2010 analysis created by the CBO. *See* Mot. at 25.[63] First, this Court recognizes "that the CBO's 'view – on which the Congress did not vote, and [which] the President did not sign – cannot alter the meaning of enacted statutes.'" *Sharp v. United States*, 80 Fed. Cl. 422, 436 (2008) (quoting *Ameritech Corp. v. McCann*, 403 F.3d 908, 913 (7th Cir. 2005)). Moreover, as Defendant concedes, the 2010 CBO Report does not mention risk corridors, and Defendant does not attempt to explain why. *See generally* Ex. 35. Defendant's revisionist reasoning, that the CBO somehow "understood" risk corridors would "not impose liability on the government," is completely unfounded. Mot. at 25. Indeed, the CBO included the other two 3Rs in its 2010 Report, and unlike risk corridors, their respective collections and payments *were* projected to be "budget neutral" – to cancel each other out at $106 billion apiece from 2010-2019. *See* Ex. 35 at Table 2 (Reinsurance and Risk Adjustment Payments and Collections). If Defendant's revisionist rationale were correct, the CBO would not have included any of the 3Rs in the 2010 CBO Report.

Not surprisingly, Defendant's motion neglects to mention the CBO's first *actual* discussion of risk corridors, which reveals that the CBO understood risk corridors would *not* be budget neutral:

> By law, risk adjustment payments and reinsurance payments will be offset by collections from health insurance plans of equal magnitudes; those collections will be recorded as revenues. As a result, those payments and collections can have no net effect on the budget deficit. ***In contrast, risk corridor collections (which will be recorded as revenues) will not necessarily equal risk corridor payments, so that program can have net effects on the budget deficit.***

CBO, *The Budget and Economic Outlook: 2014 to 2024*, at 59 (Feb. 2014) (emphasis added).[64] Further undermining Defendant's current litigation position, CBO explained that:

> In contrast to the risk adjustment and reinsurance programs, ***payments and***

[63] For the Court's convenience, because Defendant's supplied link appears to result in an error page, the 2010 CBO Report is attached as Exhibit 35.

[64] The full February 2014 CBO Report is attached as Exhibit 36.

> ***collections under the risk corridor program will not necessarily equal one another: If insurers' costs exceed their expectations, on average, the risk corridor program will impose costs on the federal budget; if, however, insurers' costs fall below their expectations, on average, the risk corridor program will generate savings for the federal budget.***

Id. at 110 (emphasis added). While the CBO's earlier baseline projections "estimated that payments and collections for risk corridors would *roughly* offset each other," *id.* at 114 (emphasis added), this does not indicate that the CBO understood that the risk corridors program was required to be budget neutral by statute.

In February 2014, CBO projected that the Government would bring in revenues of $8 billion through the risk corridors program's three separate years of collections and payments.[65] *See id.* at 107, 109-10, 112, 114-15. As a result of HHS and CMS' *subsequent* March 2014 reversal regarding budget neutrality, the April 2014 CBO Report[66] amended the projections to show payments equaling collections over the risk corridors program's three years.[67] *See* Ex. 37 at 17-18. Simultaneously in April 2014, HHS and CMS assured Plaintiff and other QHPs that they "believe[d] that the risk corridors program as a whole will be budget neutral or, [sic] will result in net revenue to the Federal government in FY 2015 for the 2014 benefit year." Compl. Ex. 19 at 13829.

C. The Appropriations Riders, GAO Opinion, and Agency's Continued Recognition of its Obligation Confirm That § 1342 is Not "Budget Neutral"

Defendant next argues that the 2015 and 2016 Appropriations Acts, which Congress passed 5-6 years *after* the ACA's enactment, somehow "confirm" that Congress always intended

---

[65] "Collections and payments for the … risk corridor program[] will occur after the close of a benefit year. Therefore, collections and payments for insurance provided in 2014 will occur in 2015, and so forth." Ex. 36 at 110. In Table B-3, CBO projected that risk corridors collections would exceed payments by $1 billion in 2015, by $2 billion in 2016, and by $4 billion in 2017 – not that no payments would be made until 2017 or later. *See id.* at 109.

[66] The full April 2014 CBO Report is attached as Exhibit 37.

[67] The April 2014 CBO Report again projected different payment and collection amounts for 2015 and 2016, and did not indicate that risk corridors payments would not be made until 2017 or later. *See* Ex. 37 at 10. The CBO's January 2015 Report, attached as Exhibit 38, expressly stated that "[t]he risk corridors program … covers insurance issued for calendar years 2014 to 2016, and corresponding payments and collections will occur during fiscal years 2015 to 2017." Ex. 38 at 121 n.8.

§ 1342 to be budget neutral. Mot. at 26. Actually, the fact that Congress purposely decided that it subsequently needed to limit risk corridors funding sources through appropriations riders demonstrates Congress' recognition that § 1342 was *not* budget neutral. If § 1342 were budget neutral, then there would have been no need for Congress to pass Sections 225 and 227, artificially imposing budget neutrality on risk corridors payments through funding limitations in appropriations. Defendant's own cited authority (*see* Mot. at 20) negates any assertion that the appropriations riders can provide any insight into the statute's original meaning. *See Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005) ("The significance of appropriations bills is of course limited and the associated legislative history even more so. ... [P]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight.").

Nor does Defendant's reliance on GAO's September 2014 opinion support its position. *See* Comp. Gen. B-325630 (Sept. 30, 2014). GAO concluded that, had CY 2014 risk corridors payments been made during FY 2014, then the general FY 2014 CMS Program Management lump-sum appropriation would have been available to cover those payments. *See id.* at 7. GAO did not discuss budget neutrality, or conclude that § 1342 payments were limited by the amount of collections. *See generally id.* at 1-7. More importantly, however, GAO's opinion confirmed for Congress that funds *were available* to make risk corridors payments for CY 2014, and Defendant concedes that, "in response to the GAO's conclusion," Congress decided to add the § 227 rider to limit risk corridors funding sources that were *not* limited by § 1342. Mot. at 26.

Further negating Defendant's original budget neutrality position is the fact that HHS and CMS repeatedly have stated – as recently as September 9, 2016 – that they "will record risk corridors payments due as an obligation of the United States Government for which full payment

is required," with no restrictions based on budget neutrality. *See, e.g.*, Mot. at App'x A248.[68]

D. The Risk Corridors Riders to the 2015 and 2016 Appropriations Acts Did Not Alter the Government's Risk Corridors Payment Obligations

The riders to the 2015 and 2016 Appropriations Acts did not, in any way, abrogate or diminish the Government's pre-existing, mandatory payment obligation in § 1342. Those riders may have prevented HHS from complying with § 1342's mandatory payment obligation,[69] but as the Government argued in a separate case regarding cost-sharing reimbursements under the ACA, "the absence of an appropriation would not prevent the insurers from seeking to enforce that statutory right through litigation."[70]

A long line of decisions make clear that Congress' failure to appropriate funds for an agency to meet an obligation under a money-mandating statute "does not in and of itself defeat a Government obligation created by statute." *Greenlee Cnty.*, 487 F.3d at 877; *see, e.g.*, *Slattery*, 635 F.3d at 1321; *District of Columbia v. United States*, 67 Fed. Cl. 292 (2005); *Gibney v. United States*, 114 Ct. Cl. 38, 50-51 (1949); *United States v. Vulte*, 233 U.S. 509, 514-15 (1914); *United States v. Langston*, 118 U.S. 389 (1886). The standard to establish that language within appropriations legislation eliminates a preexisting statutory right (and thus cuts off Tucker Act jurisdiction) is stringent and has not been met by Defendant here. While Congress may have the legal authority prospectively to amend substantive preexisting statutory obligations, it must do so "expressly or by clear implication." *Prairie Cnty., Mont. v. United States*, 782 F.3d 685, 689

---

[68] To the extent the Court finds that Congress' "intent behind Section 1342 as originally enacted" is a disputed fact (or matter of law) as Defendant seems to suggest (Mot. at 26), resolution of this issue on 12(b)(6) grounds would not be appropriate. *See, e.g.*, *Adv. Cardio. Sys.*, 988 F.2d at 1164-65 (finding it improper to grant Rule 12(b)(6) dismissal when "there was a clear dispute as to the factual questions material to" the claim).

[69] "Insufficient appropriations at the agency level 'merely impose[] limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.'" *Wetsel-Oviatt Lumber Co. v. United States*, 38 Fed. Cl. 563, 571 (1997) (quoting *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)).

[70] Def.'s Mem. in Supp. of Mot. for Sum. J. at 20, *U.S. House of Representatives v. Burwell*, No. 1:14-cv-01967-RMC (Dec. 2, 2015 D.D.C.), ECF No. 55-1.

(Fed. Cir.), *cert. denied*, 136 S. Ct. 319 (2015).[71] As here, "[t]his rule applies with ***especial force*** when the provision advanced as the repealing measure was enacted in an appropriations bill." *United States v. Will*, 449 U.S. 200, 221-22 (1980) (emphasis added).

Because appropriations laws "have the limited and specific purpose of providing funds for authorized programs," the statutory instructions included in them are presumed *not* to impact substantive law. *See TVA v. Hill*, 437 U.S. 153, 190 (1978). "It has long been established that the mere failure of Congress to appropriate funds, without words modifying or repealing expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." *N.Y. Airways v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966).[72] Therefore, "[t]he intent of Congress to affect a change in the substantive law via provision in an appropriation act must be ***clearly manifest***." *Id.* at 749 (emphasis added); *accord District of Columbia*, 67 Fed. Cl. at 335 ("An appropriation with limited funding is not assumed to amend substantive legislation creating a greater obligation.") (quoting *N.Y. Airways*); *see also Universal Interpretive Shuttle Corp. v. Wash. Metro Area Transit Comm'n*, 393 U.S. 186, 193 (1968) ("[R]epeals by implication are not favored.").

The three cases on which Defendant principally relies – *United States v. Dickerson*, 310 U.S. 554 (1940); *United States v. Will*, 449 U.S. 200 (1980); and *Republic Airlines v. U.S. Dep't of Transp.*, 849 F.2d 1315 (10th Cir. 1988)[73] – all involved appropriations language that, unlike Sections 225 and 227, contained words that clearly manifested a change to the statutory

---

[71] Defendant's own cited authority, *Envirocare of Utah Inc. v. United States*, states the "very well-established" principle that "if Congress wants to modify or repeal existing law via appropriations acts, it must do so explicitly." 44 Fed. Cl. 474, 483 (1999) (citing *TVA v. Hill*, 437 U.S. 153, 190-91 (1978)).

[72] *See also* GAO, *Principles of Federal Appropriations Law*, at 2-63 (4th ed., 2016 revision) (citing *N.Y. Airways* and other cases).

[73] *Republic Airlines* was decided by the Tenth Circuit and does not bind this Court, was not a Tucker Act case, and the plaintiffs in *Republic Airlines* were not seeking a monetary judgment for the Government's failure to meet a statutory payment obligation, but were petitioning for review of an order of the Civil Aeronautics Board. Thus, the well-developed case law regarding the heavy scrutiny that applies when the Government seeks to rely upon an appropriations rider to avoid Tucker Act liability was not presented in *Republic Airlines*.

obligation. In contrast, the language in the 2015 and 2016 appropriations riders did nothing more than limit the source of specific funding for risk corridors payments. The *Dickerson* language prohibited funding for the statutory obligation from the appropriations bill in which it was contained and "***any other Act for the fiscal year***," and expressly stated that bonus payments were defunded "***notwithstanding the applicable portions of***" the underlying substantive law. *Dickerson* at 556-57 (emphasis added).[74] In *Will*, the federal judges challenging Congress' blocking of cost-of-living increases to their salaries came up against clear alterations to the statutory obligation in four consecutive fiscal year appropriations bills. *Will* at 205-08.[75]

The *Republic Airlines* appropriations language specifically capped all "payments under Section 406" at $14 million, ***"notwithstanding any other provision of law,"*** and directed that, to "the extent it is necessary to meet this limitation, the compensation otherwise payable by the Board under Section 406 shall be reduced by a percentage which is the same for all air carriers receiving such compensation." *Republic Airlines* at 1317 (emphasis added). The Federal Circuit found the Government's reliance on *Republic Airlines* "misplaced" in another case, *Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1384 (Fed. Cir. 1999). The court distinguished *Republic Airlines* from *N.Y. Airways*, recognizing that "[i]n *Republic Airlines*, there was clear congressional intent to eliminate the substantive programs, … while in *New York Airways* the court specifically provided that in order for an appropriations act to modify an underlying statute, the appropriations act must clearly manifest the congressional intent to do

---

[74] *Cf. Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1583-84 (Fed. Cir. 1994) (declining to apply *Dickerson*, finding "a fundamental difference" between the language in the case at bar and that in *Dickerson*).

[75] Congress blocked those pay increases for judges through the following four provisions: (i) "[n]o part of the funds appropriated in this Act ***or any other Act*** shall be used"; (ii) the salary increase that "would be made after the date of enactment of this Act under the following provisions of law [listing the provisions giving rise to the obligation] … ***shall not take effect***"; (iii) "No part of the funds appropriated for the fiscal year ending September 30, 1979, by this ***Act or any other Act*** may be used to pay …"; and (iv) "funds available for payment . . . shall not be used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year." *Will* at 205-08 (emphasis added).

so." *Id*. (citation omitted).

In contrast, the risk corridors appropriations language in the Section 225 and 227 riders: (i) does not suspend the underlying statutory mandatory payment obligation; (ii) does not prohibit the use of funding from "any other Act"; (iii) does not specify that the funding limits were imposed "notwithstanding" the substantive risk corridors obligation; and (iv) only limits the sources of funding that the Government may use to fulfill its statutory obligation to make risk corridors payments. *See* Compl. Exs. 21, 24.[76] The language Congress used in Sections 225 and 227 is remarkably similar to the appropriations language in *Gibney*, which the Court found did *not* amend the preexisting statute. *See Gibney*, 114 Ct. Cl. at 44 ("[N]one of the funds appropriated for the Immigration and Naturalization Service shall be used to pay compensation for overtime services other than as provided [under specific statutes] ....").

The chronology of events is paramount here. Section 227 was not passed until December 2014, *after* Plaintiff already had voluntarily committed to be a QHP for both CY 2014 and CY 2015 pursuant to (and in reliance upon) a statutory scheme in which full and timely risk corridors payments had been promised through, *inter alia*, money-mandating statutory language. Any subsequent Government effort to take Plaintiff's right to risk corridors payments would constitute a retroactive application of law, because it "would impair rights a party possessed when [it] acted." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006).[77] Retroactive

---

[76] The Government cites several additional cases that are also easily distinguishable. *See Bickford v. United States*, 228 Ct. Cl. 321 (1981) (underlying statute establishing the alleged government obligation actually prohibited the payments the plaintiff sought); *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166 (Fed. Cir. 1995) (underlying statute containing the obligation expressly directed the Government to decrease payments if appropriations were insufficient); *United States v. Mitchell*, 109 U.S. 146 (1883) (both the underlying statutory obligation and the alteration of that obligation were contained in appropriations acts, and both involved the special case of appropriations to Native Americans); *Mathews v. United States*, 123 U.S. 182, 185 (1887) (appropriations act explicitly amended the underlying statutory provision, and used additional language such that the case "does not come within [the] rule" created by *Langston*).

[77] *See, e.g.*, *United States v. Larionoff*, 431 U.S. 864, 879 (1977) ("No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits they had *expected* to be able to earn. … It is quite a different matter, however, for Congress to deprive a service

application of statutes is "disfavored," and thus "it has become 'a rule of general application' that 'a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication.'" *Id.* (quoting *United States v. St. Louis, S.F. & Tex. Ry. Co.*, 270 U.S. 1, 3 (1926)). No such language or necessary implication is presented by the 2015 or 2016 appropriations riders.

E. Defendant's Mere Labeling of Risk Corridors as a Statutory "Benefits Program" Does Not Negate the Government's Contractual Burdens

Defendant prematurely and improperly argues that *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2189 (2012), does not apply to the facts of this case because it labels risk corridors as a statutory "benefits program" and, therefore, Defendant contends that no contract can exist between the parties. *See* Mot. at 30-31.[78] *Salazar* involved a different statute and a different contract, not fully comparable to the ACA and the risk corridors program. As in *Salazar*, however, BCBSNC has plausibly alleged that its QHP Agreements created an express contract between the parties that incorporate the risk corridor obligations, or, alternatively, that the statutory language and the parties' course-of-dealing resulted in an implied-in-fact contract, and that such contracts were breached by the Government. *See* Compl. ¶¶ 166-79.[79] As the Supreme Court explained in *Salazar*, the Government is bound by its contractual obligations, and

---

member of pay due for services *already performed, but still owing*. In that case, the congressional action would appear in a different constitutional light.") (emphasis added and citations omitted).

[78] Ironically, Defendant urges the Court to ignore Plaintiff's "labels and conclusions." Mot. at 22.

[79] The cases cited by the Government are distinguishable because the plaintiffs in those cases did not allege contractual payment obligations based on an express or implied-in-fact contracts in their respective complaints. *See, e.g.*, *Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 16 (1976) (discussing a coal mining company's liability under the Federal Coal Mine Health and Safety Act of 1969 – no allegation of contractual liability); *Prairie Cnty.*, 113 Fed. Cl. at 202 (granting motion to dismiss because plaintiffs had failed to allege any of the elements of an implied-in-fact in their complaint); *Kizas v. Webster*, 707 F.2d 524, 539 (1983) (plaintiffs did not allege any an implied-in-fact contract arising out of a statute that vested them with the claimed rights; court found employment contracts did not vest federal employees with a "special preference" for promotion to special agents, even if they undertook the job with such an understanding because "federal workers serve by appointment, and their rights are therefore a matter of legal status even where compacts are made"). Here, the Government cites these cases assuming that the Court will find, on the merits, that Plaintiff has failed to allege the existence of an express or implied contract. As discussed below, because Plaintiff has alleged facts sufficient to support the necessary elements of an express and/or implied-in-fact contract, the determination urged by Defendant would be premature at the pleading stage.

thus even if Congress fails to appropriate sufficient funds, "the Government's valid [contractual] obligations remain enforceable in the courts." *Salazar*, 132 S. Ct. at 2188-89. Moreover, the ACA's language creating the risk corridors program is even stronger than in *Salazar* because there, unlike here, the Government's payment obligation was expressly "subject to the availability of appropriations." *Id.*

Accordingly, based on the well-pled allegations in BCBSNC's Complaint and its exhibits, the language and purpose of § 1342, the Government's own interpretations of the risk corridors provisions, the Government's statements and conduct both before and after passage and implementation of §1342, and the authorities cited above, Plaintiff has met and exceeded the 12(b)(6) standard to plead a "facially plausible claim" under Count I for the Government's violation of § 1342 and its implementing regulations. *Cambridge*, 558 F.3d at 1335; *Twombly*, 550 U.S. at 555.

IV. COUNTS II-V SATISFY THE 12(B)(6) STANDARD

Defendant's assertion that Counts II-V fail to state a claim for relief is unavailing. Instead of focusing on the applicable 12(b)(6) standard, which requires the Court to analyze whether the well-pled facts raise a plausible inference of the United States' liability, Defendant instead urges the Court to weigh the sufficiency of Plaintiff's evidence and the veracity of the well-pled facts.[80] At the pleading stage, Plaintiff's allegations are not subject to a burden of proof akin to that required at trial. The Complaint's well-pled facts satisfy all the elements of Counts II-V and allege plausible claims for relief, and therefore Defendant's 12(b)(6) motion to dismiss these Counts should be denied.

[80] *See, e.g.*, *Martin v. United States*, 96 Fed. Cl. 627, 633 (2011) ("The purpose of a Rule 12(b)(6) motion is not to trigger an adjudication of a plaintiff's factual allegations, but to conduct an inquiry into whether the factual allegations are sufficiently plausible under the governing legal standards to give rise to an actionable legal claim.").

A. Plaintiff Adequately Alleges Breaches of Express or Implied-in-Fact Contracts Against the Government

Counts II and III respectively assert breach of express contract and implied-in-fact contracts against the Government. To allege the existence of an express or implied-in-fact contract[81] with the Government, a plaintiff's allegations need only satisfy the following elements: (1) mutuality of intent, (2) consideration, (3) lack of ambiguity in the offer and acceptance, and (4) actual authority to bind the Government in contract. *See Forest Glen Props., LLC v. United States*, 79 Fed. Cl. 669, 683 (2007). A contractual breach is the failure to perform a contractual duty. *See Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). There is no question that BCBSNC's Complaint contains well-pled factual allegations satisfying each of these elements.

B. Count II: Plaintiff Adequately Alleges an Express Contract

Defendant concedes that the CY 2014 QHP Agreement is a binding contract between the parties. *See* Mot. at 6, 32-33. Plaintiff's factual allegations support the reasonable inference that the CY 2014 QHP Agreement obligates the Government to make full and timely CY 2014 risk corridors payments, which the Government subsequently breached. *See, e.g.*, Compl. ¶¶ 35-38, 46-47, 166-179. These allegations state a plausible breach of express contract claim sufficient to satisfy the applicable Rule 12(b)(6) standard.[82]

Defendant disputes whether the CY 2014 QHP Agreement encompasses a promise to pay risk corridors (*see* Mot. at 32-33), but this challenge goes well beyond Plaintiff's well-pled allegations, which must be accepted as true. The Complaint alleges that the CY 2014 QHP Agreement imposes risk corridors payment obligations on the Government in two separate

---

[81] The two types of contracts differ only in the evidence used to establish the elements. *See Hanlin v. United States*, 316 F.3d 1325, 1328 (Fed. Cir. 2003) ("*Hanlin II*").

[82] *See Huntington Promotional & Supply, LLC v. United States*, 114 Fed. Cl. 760, 771-72 (2014) (finding plausibility standard satisfied by alleging existence of contract and government's breach by failing to pay).

provisions: § II.d and § V.g. First, § II.d obliges the Government to "undertake all reasonable efforts to implement systems and processes that will support the [QHP] functions." *See* Compl. Ex. 02 at § II.d. By not making full and timely CY 2014 risk corridors payments, CMS' systems or processes not only failed to support BCBSNC's functions as a QHP, but threatened Plaintiff's very existence as a QHP in the ACA Marketplace. Receipt of the promised risk corridors funds is necessary for issuers to remain fiscally sound, not only to participate as QHPs, but also to continue offering products to the millions of previously uninsured or underinsured individuals on the ACA Exchanges. *See* Compl. ¶¶ 25-26, 169-71. QHPs could not be expected to sustain their functions as Marketplace participants without the annual risk corridors payments that the Government had agreed to pay at the time of contracting.[83]

Second, Plaintiff has alleged that the Government's refusal to pay the CY 2014 risk corridors amounts owed was a "major failure of CMS systems and processes,"[84] in breach of § II.d, and that, instead of "CMS … work[ing] with [BCBSNC] in good faith to mitigate any harm caused by such failure," the Government exacerbated the harm by rejecting Plaintiff's demand for full and timely payment – despite repeatedly acknowledging its payment obligation. *See* Compl. ¶¶ 89-105 & Ex. 02 at § II.d. The Government's offer of an "IOU" – booking the CY 2014 risk corridors shortfall as an FY 2015 obligation owed to Plaintiff (*see* Compl. ¶ 151) – did not satisfy the United States' contractual obligation under § II.d to make full and timely CY 2014 risk corridors payments to Plaintiff.[85]

---

[83] Section II.d embraces all aspects of the risk corridors program, including the Government's obligation to collect risk corridors charges from QHPs. By design, the charge-collection process promotes QHPs' functions by smoothing annual premiums. The process fails to support QHP functions, though, when the Government breaches its corresponding obligation to make risk corridors payments in full and on time.

[84] Arguing beyond the pleadings, Defendant contests that the "processes" and "functions" language relates to risk corridors, and asserts that a "Companion Guide" – which somehow limits HHS' promise to support Plaintiff's functions – is allegedly incorporated by § II.b(3). *See* Mot. at 34. In fact, § II.b(3) says that Plaintiff will abide by the Guide, not that the Guide should be used to define terms in the CY 2014 QHP Agreement.

[85] Defendant's argument that some other insurers did not sign QHP Agreements is irrelevant to its 12(b)(6) challenge to Plaintiff's express contracts, and relies on unsupported allegations outside of the Complaint. *See* Mot.

Third, Plaintiff has alleged that § V.g expressly incorporates by reference the ACA's implementing regulations, including the risk corridors provisions. *See* Compl. ¶¶ 46, 172-75. Specifically, the contracts are "governed by the laws and common law of the United States, including without limitation [HHS and CMS] regulations …." Compl. Ex. 02 at § V.g. The parties intended 45 C.F.R. § 153.510 and rulemaking statements[86] to govern their contractual relationship, requiring the parties to meet their risk corridors payment and charge obligations. Had Plaintiff been required to remit a risk corridors charge to the HHS Secretary, it would have been required to pay the Government 100 percent of its CY 2014 North Carolina Individual or Small Group market risk corridor charges; the Government breached its obligation by not in turn making full and timely CY 2014 risk corridors payments. *See* Compl. ¶¶ 137-38.

Improperly asserting arguments more appropriate for summary judgment, Defendant relies on cases involving contracts that, unlike here, did not incorporate the regulations implicated by the plaintiffs. In *Smithson v. United States*, the contract only stated that it was "subject to the present regulations of the secured party and to its future regulations," so long as those regulations were not inconsistent with the terms of the contract. 847 F.2d 791, 794 (Fed. Cir. 1988). Unlike the CY 2014 QHP Agreement, the *Smithson* contract did not expressly incorporate by reference the specific applicable regulations. *See id.*[87] Here, § V.g expressly identifies HHS and CMS regulations – which include the risk corridors provisions – as the

---

at 33 n.10. Even Defendant's cited case law confirms this is improper on a motion to dismiss. *See Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1040 (Fed. Cir. 2003) (stating that outside evidence may not be brought in to create an ambiguity where the language is clear).

[86] Including the Government's statements of July 15, 2011, March 23, 2012, and March 11, 2013, published in the Federal Register. *See* Compl. Ex. 07 at 41943; Compl. Ex. 11 at 17238; Compl. Ex. 09 at 15473.

[87] Similarly, the contract in *Earman v. United States* only provided that it "shall be carried out in accordance with all applicable Federal statutes and regulations." 114 Fed. Cl. 81, 103-04 (2013). Likewise, in *St. Christopher Assoc. L.P. v. United States*, the contract included "no reference whatsoever … to the implementing regulations or to the HUD Handbook" that the plaintiff sought to be incorporated. 511 F.3d 1376, 1384 (Fed. Cir. 2008). Moreover, in *Northrop Grumman Info. Tech., Inc. v. United States*, the court held that a specific letter was not incorporated by reference because the plaintiff was only able to point to the generic phrase "required information," which could have referred to a number of documents, as opposed to the specific letter it sought to incorporate. 535 F.3d 1339, 1346 (Fed. Cir. 2008).

governing law. *See* Compl. Ex. 02 at § V.g. Moreover, *Northrop Grumman*, cited by Defendant, explains that no "'magic words' of reference or of incorporation" are required to incorporate a writing by reference, the writing must simply be unambiguously identified. 535 F.3d at 1346. Plaintiff sufficiently alleges that those regulations and similar rulemaking statements by the agencies are incorporated by reference by clearly and expressly referencing the ACA in the CY 2014 QHP Agreement.[88]

Plaintiff sufficiently alleges that the risk corridors program was material to its decision to enter into the CY 2014 QHP Agreement, *see* Compl. ¶¶ 170, 174, and that the Government breached the express agreement by failing to make full and timely CY 2014 risk corridors payments in violation of § II.d and § V.g. *See, e.g.*, Compl. ¶¶ 166-179. Because Plaintiff plausibly alleges all essential elements of the Government's breach of an express contract, Defendant's 12(b)(6) motion should be denied for Count II.

C. Count III: Plaintiff Adequately Alleges an Implied-in-Fact Contract

In the alternative,[89] Count III sufficiently alleges the Government's breach of implied-in-fact contracts with respect to the CY 2014 risk corridors payments. An implied-in-fact contract "is not created or evidenced by explicit agreement of the parties, but is inferred as a matter of reason or justice from the acts or conduct of the parties." *Prudential Ins. Co. of Am. v. United States*, 801 F.2d 1295, 1297 (Fed. Cir. 1986).

To withstand a 12(b)(6) motion, Plaintiff must only plead facts supporting a reasonable inference that the four elements of an implied-in-fact contract exist, and that the Government

---

[88] To the extent the court finds an ambiguity as to whether the CY 2014 QHP Agreement incorporates 45 C.F.R. § 153.510, that question should be resolved on a motion for summary judgment. *See Kellogg Brown & Root Servs., Inc. v. United States*, 109 Fed. Cl. 288, 299 n.8 (2013) (noting inappropriateness of resolving ambiguous contract provision on 12(b)(6) because it was a factual determination precluding dismissal, and citing cases).

[89] *See* RCFC 8(d); Compl. ¶ 181 (introducing Count III "[i]n the alternative.").

breached the contract. Unable to challenge Plaintiff's well-pled allegations,[90] Defendant improperly urges the Court to weigh the sufficiency of the contractual evidence regarding intent and conduct. *See, e.g.*, *Kawa v. United States*, 77 Fed. Cl. 294, 305 (2007) ("[W]hether plaintiff entered into an implied-in-fact contract with the Government is a question of fact going to the merits of plaintiff's claim, and is not suitable for resolution" at the pleading stage).[91]

As previously mentioned, Defendant's label of the risk corridors program as a statutory "benefits program" is not controlling. *See* Mot. at 37. Indeed, Defendant also denies that the Government has any definite payment obligation under the statute. *See* Mot. at 22-30. In any event, this Court has found implied-in-fact contracts based on the Government's conduct, including through its published regulations. *See, e.g.*, *N.Y. Airways*, 369 F.2d at 751-52 (finding implied-in-fact contract arising out of statutory language, based on parties' conduct indicating an intent to contract); *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 405-06 (Ct. Cl. 1957) (finding implied offer in regulation designed to induce plaintiffs to purchase uranium);[92] *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 739 n.11 (1982) (citing *Radium Mines* as example of cases "where contracts were inferred from regulations promising payment"). As the Court held in *New York Airways*:

> Whether the obligation … is derived from express [or implied] contract with the Government … or by statute … the failure of Congress or an agency to appropriate or make available sufficient funds does not repudiate the obligation; it merely bars … the Government from dispersing funds and forces [the plaintiff] to a recovery in the Court of Claims.

---

[90] For example, Defendant makes no argument regarding consideration. *See generally* Mot. at 37-41. The Complaint sufficiently alleges consideration to contract. *See, e.g.*, Compl. ¶¶ 49, 73-74, 86, 95, 184-92.

[91] *See also Juda v. United States*, 6 Cl. Ct. 441, 453 (1984) ("[T]he court is concerned only with an examination of facts as alleged. Whether plaintiff's evidence will be sufficient to establish the [implied-in-fact contract claim] allegations as fact is a matter to be faced later."); *Huntington*, 144 Fed. Cl. at 771-72 (where allegations of implied-in-fact contract are sufficient, court will not dismiss the claim because "further factual development is necessary to determine whether the parties formed the contract plaintiff alleges").

[92] Cases cited by Defendants recognize that contracts can be "inferred from regulations promising payment" when the regulations are "promissory in nature." *See Baker v. United States*, 50 Fed. Cl. 483, 490 (2001) (citing *N.Y. Airways*, 117 Ct. Cl. at 816-17 and *Radium Mines*, 153 F. Supp. at 405-06).

369 F.2d at 752 (citations omitted).

Plaintiff's well-pled facts show that the combination of § 1342, 45 C.F.R. § 153.510, and the Government's conduct before and after Plaintiff agreed to become a QHP for CY 2014,[93] all support a reasonable inference that the Government entered into implied-in-fact contracts obligating it to pay CY 2014 risk corridors payments in full by the end of CY 2015. Because Plaintiff's allegations plausibly allege facts sufficient to satisfy all the elements of an implied-in-fact contract and the Government's breach, Count III cannot be dismissed under Rule 12(b)(6).

1. The Complaint Sufficiently Alleges Mutuality of Intent

The mutuality of intent element recognizes that an implied-in-fact contract is "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Silverman v. United States*, 679 F.2d 865, 871 (Ct. Cl. 1982). To establish this element, Plaintiff need only allege "language … or conduct on the part of the government that allows a reasonable inference that the government intended to enter into a contract." *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 27 (2011). Plaintiff has done so.

As Plaintiff has alleged, in and after 2012, the Government repeatedly manifested its intent to make annual risk corridors payments, even stating that such payments would be made irrespective of budget limitations, to encourage Plaintiff's participation on the ACA Exchanges. *See, e.g.*, Compl. ¶¶ 89-105, 151, 188; *Sperry Corp. v. United States*, 13 Cl. Ct. 453, 458 (1987) (imposing contractual liability where the Government induced or encouraged performance and

[93] *See* Compl. ¶¶ 26, 103, 182, 188. This conduct also included attestations by Plaintiff certifying its compliance with the risk corridors payments and charges. *See* Compl. ¶ 49 & Ex. 06. Even the facts listed by Defendant regarding HHS' acknowledgment of its duty to make risk corridors payments, *see* Mot. at 39-41, are sufficient to state a claim. *See, e.g.*, *Vargas v. United States*, 114 Fed. Cl. 226, 223 (2014) (holding that implied-in-fact contract claim survived 12(b)(6) on alleged written agreement and parties' conduct).

knew or should have known that the contractor expected compensation).[94] Furthermore, the Government approved Plaintiff's status as a QHP, knowing that Plaintiff had expended resources to become a QHP per the Government's requirements, and accepted Plaintiff's services in performance of the contract requirements. *See* Compl. ¶¶ 25, 167-71, 185, 188, 204. In fact, CMS required BCBSNC to execute attestations certifying its compliance with the obligations it was undertaking by agreeing to become, or continuing to act as, a QHP on the ACA Exchanges in North Carolina. Compl. ¶ 49 & Ex. 06. These attestations also required BCBSNC to comply with certain "Financial Management" obligations, including risk corridors payments and charges. *See* Compl. ¶ 51 & Ex. 06. The Government's collection of CY 2014 risk corridors charges, and its partial CY 2014 risk corridors payments to Plaintiff, further confirm the parties' meeting of the minds. *See* Compl. ¶¶ 26, 103, 137, 182, 188; *Vargas*, 114 Fed. Cl. at 221 (finding that, among other facts, government's partial payment of amount owed under written agreement could support implied-in-fact contract). All of this conduct reinforced the Government's promise in § 1342 that the HHS Secretary "shall pay" risk corridors payments. *See, e.g.*, Compl. ¶¶ 96-103.

Ignoring Plaintiff's well-pled allegations of fact, Defendant's motion encourages the Court to ignore the surrounding circumstances and instead consider solely the text of § 1342. *See* Mot. at 38-39.[95] Although statutory language expressly permitting the United States to enter contracts is one way to overcome the presumption that statutes generally do not create vested contractual rights, it is well-settled that the Court may also infer an intent to contract from the parties' conduct. *See ARRA* at 27 ("[T]o overcome this presumption, plaintiffs must point to

---

[94] Defendant argues that these so-called "assurances" cannot evince an intent to contract, Mot. at 40, but that assertion is contrary to the well-established case law regarding Government conduct, and inappropriately asks the Court to weigh the sufficiency of the evidence on a 12(b)(6) motion.

[95] By its very nature, Defendant's assertion of a lack of a meeting of the minds is a factual question, which is not suitable for resolution on a motion to dismiss because the issues depend on intent, conduct, and the surrounding circumstances. *See Kanag'iq Constr. Co. v. United States*, 51 Fed. Cl. 38, 47 (2001) (finding the parties' mutuality of intent to be a question of fact).

specific language in [the statute] *or to conduct on the part of the government* that allows a reasonable inference that the government intended to enter into a contract") (emphasis added);[96] *N.Y. Airways* at 751-52 (finding, despite no express contract authorization in statute, that the parties' conduct exhibited an enforceable implied-in-fact contract based in part on a meeting of the minds evidencing an intent to contract). Unlike Plaintiff's well-pled allegations of fact, the cases cited by Defendant did not involve any governmental conduct beyond the enactment of a statute or implementation of a regulation.[97] In contrast to the cases Defendant relies upon, Plaintiff's well-pled allegations permit a reasonable inference that the parties mutually intended to be contractually bound. *See, e.g.*, Compl. ¶¶ 98-105 & Exs. 02-04. Plaintiff has thus established this contractual element.

2. The Complaint Sufficiently Alleges Offer and Acceptance

Plaintiff plausibly alleges a Government offer to make full and timely CY 2014 risk corridors payments to Plaintiff evinced by the Government's language and conduct, which Plaintiff accepted by becoming a QHP. An offer must be manifested by conduct that indicates assent to the proposed bargain. *See Grav I*, 14 Cl. Ct. at 393 (holding Government's offer in statute accepted to form implied-in-fact contract); *Abraham v. United States*, 81 Fed. Cl. 178, 185 (2008) (finding implied-in-fact contract where Government, by its conduct, makes an offer

[96] In *ARRA*, the Court found no evidence of an implied-in-fact contract because the Government was statutorily mandated to issue payments when requirements were met, lacking discretion to refuse payments. *See ARRA* at 19-20. Here, by contrast, the Government exercised discretion to vet insurers, certifying only those that it deemed qualified to be QHPs. *See* Compl. ¶¶ 193, 205-07; *see also Thomson v. United States*, 174 Ct. Cl. 780, 791 (1966) (assent "may be overtly manifested by course of action," and once the Government exhibits such conduct, it "may not assert that it is not bound on the ground that it did not intend to contract"). Equally distinguishable is Defendant's reliance on *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, which found the Rail Passenger Service Act did not constitute a contract with the Government because that Act expressly stated there would be no contractual relationship between the United States and the plaintiff, and the court held that neither the statute nor the surrounding circumstances evidenced a binding contract. *See* 470 U.S. 451, 467, 469-470 (1985).

[97] *See* Mot. at 38-40; *ARRA* at 28 ("[T]here is no express language in section 1603 to support plaintiffs' assertion of an implied-in-fact contract."); *id.* (describing *Grav v. United States*, 14 Cl. Ct. 390, 392 (1988) ("*Grav I*"): "[T]he statute at issue in *Grav I* expressly required the government to enter into written contracts with program participants"); *Hanlin II* at 1330 ("We discern no language in the statute or the regulation that indicates an intent to enter into a contract with [the plaintiff]."); *AAA Pharmacy, Inc. v. United States*, 108 Fed. Cl. 321, 329 (2012) (holding that a regulation lacked "any language manifesting either an offer or an intent to enter into contract").

that is later accepted). Like in its mutual intent argument, Defendant contends that the Court should only consider the text of the statute and regulations for evidence of an offer, and ignore the Government's additional conduct. *See* Mot. at 38-39. Offer and acceptance, however, can be found in the "conduct of the parties."[98] *Forest Glen*, 79 Fed. Cl. at 684; *N.Y. Airways*, 369 F.2d at 751-52 (finding implied-in-fact-contract formed through acceptance of Government's offer arising in statute).

The Government's offer was made in the text of § 1342[99] and implementation of its related regulations, plus the Government's subsequent statements, which incentivized Plaintiff to participate in the ACA Marketplace by reducing the financial risks of setting premiums while lacking sufficient data on the population of insureds. Becoming a QHP was volitional for Plaintiff, and was subject to the Government's discretion in whether to certify Plaintiff as a QHP. Only after Plaintiff was awarded QHP status, and accepted the Government's offer to participate on the ACA Exchanges, did it become obligated to remit risk corridors charges or entitled to receive risk corridors payments. *See, e.g.*, Compl. ¶¶ 182-87; 42 U.S.C. § 18062(a); *supra* note 13. The Government's repeated, undisputed statements before Plaintiff accepted the offer assured Plaintiff of the Government's intent to make CY 2014 risk corridors payments by the end of CY 2015. *See, e.g.*, Compl. ¶¶ 93-94.[100]

Plaintiff's well-pled allegations go well beyond the facts presented in Defendant's cited

---

[98] *See* Mot. at 38 ("[P]laintiffs must point to … conduct on the part of the government that allows a reasonable inference that the government intended to enter into a contract.") (quoting *ARRA*, 97 Fed. Cl. at 27).

[99] Even if the offer had been contained exclusively within the text of § 1342, that would not necessarily preclude a valid offer by the Government. *See Radium Mines*, 153 F. Supp. at 406 (purpose of the regulation at issue "was to induce persons to find and mine uranium," demonstrating the Government's intent to contract).

[100] Challenging the merits of Plaintiff's contractual claim, Defendant argues that the terms of the offer were unclear when BCBSNC accepted them in September 2013. *See* Mot. at 30. That the Government did not ultimately formalize the terms of the offer by expressly implementing them in a regulation relates to the Government's lack of good faith after inducing Plaintiff to become a QHP, addressed in Count IV. *See, e.g.*, Compl. ¶ 208(a). Tellingly, Defendant cannot point to any statute, regulation, or statement in the Federal Register or other authoritative source stating that no risk corridors payments are due until sometime on or after CY 2017.

cases, which lacked additional governmental conduct from which the Court could infer an offer beyond the statute and regulation. *See XP Vehicles, Inc. v. United States*, 121 Fed. Cl. 770, 785 (2015); *AAA Pharmacy*, 108 Fed. Cl. at 328. Here, the Government's promises in § 1342, its implementation of the regulations, and its multiple statements including those published in the Federal Register confirming its commitment to prompt payment of its risk corridors obligations – all of which occurred *prior to* Plaintiff's acceptance in September 2013 – constituted an offer.[101] Plaintiff underwent significant preparation and expense to become a QHP and accept the offer.[102] *See, e.g.*, Compl. ¶¶ 25-28, 49-51, 170-71, 183-91, 208; *see also OAO Corp. v. United States*, 17 Cl. Ct. 91 (1989) (knowing that costs had to be incurred, the Government "bargained to get performance in advance of contract award," and as a result, was liable for said costs).

Defendant also mistakenly argues that the existence of the CY 2014 QHP Agreement "preclude[s]" Plaintiff's acceptance of the Government's implied-in-fact contract offer. *See* Mot. at 40. Under Rule 8(d), a pleading may include "two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones."[103] RCFC 8(d); *see Solaria Corp. v. United States*, 123 Fed. Cl. 105, 118, n.9 (2015) (allowing courts to adjudicate claims when a plaintiff argues, in the alternative, that if no express contract exists, an implied-in-fact contract exists) (quoting *Trauma Serv.* at 1325). If the Court finds that the express contracts do *not* concern the same *subject matter* as the alleged implied-in-fact

---

[101] The parties' conduct after September 2013 further confirms that the Government made an offer regarding risk corridors payments, particularly the Government's repeated recognition of its obligation to make risk corridors payments. *See* Compl. ¶¶ 90-94, 182.

[102] Plaintiff was not merely responding to an agency's invitation to the public to apply for a loan. *See XP Vehicles* at 785. Becoming a QHP on the completely new, revolutionary, and controversial ACA Exchanges was a major undertaking inuring to the benefit of the United States, made by Plaintiff on the belief that the Government would honor its obligations, including the full and timely payment of risk corridors payments.

[103] Defendant cites *Durant v. United States*, 16 Cl. Ct. 447 (1998) for the proposition that the existence of the express contract precludes the court from finding an implied in fact contract. *See* Mot. at 40. However, Defendant fails to mention that the *Durant* Court made the above determination on summary judgment after considering evidence concerning the subject matter of the contracts. *Durant* at 448.

contracts (*i.e.*, whether the CY 2014 QHP Agreement incorporates an obligation to make risk corridors payments), then both agreements can co-exist under the law. *See, e.g.*, *Laudes Corp. v. United States*, 86 Fed. Cl. 152, 154 (2009) (allowing mutual existence of implied-in-fact and express contracts with different subject matter). If the Court finds that the Government is bound to make CY 2014 risk corridors payments under the express contract alleged in Count II, then the Court need not analyze the implied-in-fact contracts alternatively alleged in Count III.

3. The Complaint Sufficiently Alleges Express or Implied Actual Authority

Plaintiff's well-pled allegations are sufficient to support a reasonable inference that an authorized Government agent entered into or ratified the implied-in-fact contracts for full and timely CY 2014 risk corridors payments. An implied-in-fact contract with the Government requires that "the officer whose conduct is relied upon had actual authority to bind the government in contract." *Lublin Corp. v. United States*, 98 Fed. Cl. 53, 56 (2011). Such authority can be "implied actual" or "express actual" authority. *See Abraham*, 81 Fed. Cl. at 186. "Authority to bind the government is generally implied when [it] is considered to be an integral part of the duties assigned to a government employee." *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989) (alterations omitted).[104]

Plaintiff specifically alleges that the implied-in-fact contracts were authorized or approved by Government representatives who had actual authority, express or implied, to bind the United States in contract as part of their employment duties. *See* Compl. ¶¶ 89-94, 182. Plaintiff further alleges that HHS and CMS officials with authority repeatedly made statements regarding the Government's obligation to make full and timely risk corridors payments. *See id*.

[104] Defendant misstates the applicable law, encouraging the Court only to consider express actual authority and ignore implied actual authority. *See* Mot. at 41. Express actual authority arises when the Constitution, a statute, or a regulation unambiguously grants an agent contracting authority, while implied actual authority is found "when such authority is an integral part of the [agent's] duties." *Son Broad., Inc. v. United States*, 52 Fed. Cl. 815, 820 (2002). Plaintiff sufficiently alleges implied actual authority. *See* Compl. ¶¶ 89-94, 182.

The Complaint thus sufficiently alleges that the Government's public statements to Plaintiff and other health insurers were made with express or implied actual authority sufficient to obligate the Government. Indeed, Defendant concedes that the GAO concluded in September 2014 that the HHS Secretary had actual authority to make risk corridors payments. *See* Comp. Gen. B-325630 (Sept. 30, 2014); Mot. at 26. The Government's payment of a small portion of the risk corridors amounts owed to Plaintiff for CY 2014 further demonstrates its actual authority to do so. Defendant's position would essentially require Plaintiff to identify the name, title and rank of each Government official, *see* Mot. at 41, but that is not required at the pleading stage.[105]

Even if, *arguendo*, the Government representatives lacked express actual authority, Plaintiff alleges that Kevin Counihan, CMS's CEO of the ACA Marketplaces, ratified the terms of the contract through his acceptance of the benefits provided by Plaintiff and his statements confirming the Government's obligations to the Plaintiff. *See Silverman*, 679 F.2d at 865 (holding that the Government is bound by the terms of an implied-in-fact contract if it subsequently ratifies the contract by accepting the benefits flowing under it, even if a Government official initially lacked authorization to enter into the contract).[106]

Mr. Counihan's job description, attached at Exhibit 32, includes overseeing the ACA Marketplace and directing the CCIIO, which makes entering into agreements with QHPs integral to his duties. *See* Compl. ¶¶ 100, 105, 118-121, 148, 194; *Telenor Satellite Servs. Inc. v. United States*, 71 Fed. Cl. 114, 121 (2006) (agent had implied actual authority to bind the Government where his authority was "an integral part of the duties"). In correspondence to Plaintiff dated

---

[105] *See Sommers Oil Co. v. United States*, 241 F.3d 1378, 1379 (Fed. Cir. 2001) (finding the plaintiff was not "required to identify and plead the particular person who approved the contractual arrangement with [plaintiff or] the particular statute or regulation that authorized that person to commit the government in contract," and that it was "sufficient to allege that the government's promise was authorized by a person having legal authority to do so"); *Bailey v. United States*, 40 Fed. Cl. 449, 469 (1998) (authority not properly determined on 12(b)(6) because record did not indicate whether agent with requisite authority approved arrangement alleged in plaintiff's complaint); *Mendez*, 121 Fed. Cl. at 386 (challenges to contractual authority are commonly reserved for summary judgment).

[106] Contract ratification may take place at the individual or institutional level. *See SGS-92-X003 v. United States*, 74 Fed. Cl. 637, 652 (2007).

November 2, 2015, Mr. Counihan stated on behalf of the HHS Secretary that CY 2014 risk corridors payments are required to be paid, and that those CY 2014 payments were being booked as the United States' FY 2015 obligations "for which full payment is required." Compl. Ex. 18 at 3. Mr. Counihan later confirmed in the April 1, 2016 Final Agency Response letter that the "remaining risk corridor claims will be paid." Compl. Ex. 23.[107] Based on these unambiguous statements ratifying HHS' obligation to make CY 2014 risk corridors payments to Plaintiff by the end of CY 2015, the well-pled facts sufficiently allege that Mr. Counihan had authority to ratify the implied-in-fact contracts.

4. The ADA Presents No Barrier Here

The Anti-Deficiency Act ("ADA"), 31 U.S.C. § 1341(a)(1), did not preclude the Government from entering into express or implied-in-fact contracts with Plaintiff, contrary to Defendant's unsupported assertion. *See* Mot. at 41-42. The ADA prohibits "an officer or employee of the United States Government" from "involv[ing] [the] government in a contract or obligation for the payment of money before an appropriation is made *unless authorized by law*." 31 U.S.C. § 1341(a)(1)(B) (emphasis added). The Government's obligation to make risk corridors payments was written into § 1342 ("shall pay") and its implementing regulations ("will pay"), thus making the payment obligation "authorized by law."[108] Additionally, GAO confirmed that the HHS Secretary had authority to make risk corridors payments out of the CMS Program Management appropriation and from risk corridors amounts that CMS had collected. *See* Comp. Gen. B-325630 at 3-5 (Sept. 30, 2014). Although Congress later restricted CMS'

[107] Although Defendant ignores the numerous agency assurances cited in the Complaint, the Government's frequent statements – made before and after Plaintiff became a QHP – provide the reasonable inference of actual government authority, and thus must be considered.

[108] *See Shell Oil Co v. United States*, 751 F.3d 1282, 1299-1301 (Fed. Cir. 2014) (holding that an Executive Order contained "a broad delegation of contracting authority that impliedly invokes the President's authority under [a statute] to bypass the ADA's restrictions"); *Chevron U.S.A., Inc. v. United States*, 20 Cl. Ct. 86, 89 (1990) (rejecting Government's argument that the plaintiff's construction of the contract would violate the ADA because "[t]he statutory authority under which the defendant originally entered the contract … makes the payment of operational expenses 'authorized by law'").

funding for risk corridors payments through Sections 225 and 227, those appropriations riders occurred *after* formation of the implied-in-fact contracts, and did not impact the Government's payment obligation. *See* Compl. ¶¶ 112-15; *N.Y. Airways*, 369 F.2d at 743.[109]

In *New York Airways*, the Government similarly argued that the ADA's predecessor statute prohibited it from entering into contracts before Congress had appropriated the funds to fulfill the contract obligation. *See* 369 F.2d at 743. The Court, however, held that the statute was inapplicable because the implied-in-fact contract at issue had been "authorized by law," under mandatory payment obligations in the Federal Aviation Act ("FAA"). *See id*. at 752. Although Congress had not appropriated funds to make payments required under the FAA, that fact only prohibited the agency from making disbursements, while the plaintiff's right to payment was nevertheless legally enforceable in this Court. *See id.* The Court explained that the actions of the parties were sufficient to support the existence of an implied-in-fact contract authorized by the FAA, even though the FAA never used the word "contract." *See id*. The alleged implied-in-fact contract, derived from the statutory text, was thus "authorized by law" and not invalidated by the lack of appropriations or the ADA. *Id.*[110]

Because § 1342 and its implementing regulations expressly authorized the Government to make risk corridors payments to participating QHPs, the contracts derived from those obligations were "authorized by law." 31 U.S.C. § 1341(a)(1). As in *New York Airways*, the conduct of the

---

[109] *See also Salazar*, 132 S. Ct. at 2189 ("When a Government contractor is one of several persons to be paid out of a larger appropriation sufficient in itself to pay the contractor, it has long been the rule that the Government is responsible to the contractor for the full amount due under the contract, even if the agency exhausts the appropriation in service of other permissible ends."); *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 646 (2005) ("A statute that retroactively repudiates the Government's contractual obligation may violate the Constitution.").

[110] Defendant's cited cases are inapposite and support Plaintiff's arguments. For example, in *Office of Pers. Mgmt. v. Richmond*, the plaintiff tried to claim money damages against the Government based on his reliance on incorrect advice from government officials. *See* 496 U.S. 414, 428 (1990). Denying his claim, the Court held that "[p]ayments of money from the Federal Treasury are limited to those authorized by statute, and erroneous advice given by a Government employee to a benefits claimant cannot estop the Government from denying benefits not otherwise permitted by law." *Id.* Similarly, in *Cherokee Nation*, the Supreme Court recognized that the ADA does not prohibit contractors from pursuing legal remedies because the Government broke its contractual promise. *See* 543 U.S. at 643 (citing *N.Y. Airways*, 177 Ct. Cl. at 808-11).

parties and GAO's September 2014 appropriation confirmation demonstrate that the implied-in-fact contracts regarding risk corridors were authorized and were not barred by the ADA.

D. Count IV: Plaintiff States a Claim for Breach of an Implied Covenant of Good Faith and Fair Dealing

Defendant's one-paragraph argument for dismissal of Count IV is wholly dependent on its assertion that the Complaint fails to establish an express or implied-in-fact contract regarding the Government's CY 2014 risk corridors payment obligations. *See* Mot. at 42. Defendant therefore concedes that if Counts II or III survive, so does Count IV, which asserts that the United States breached an implied covenant of good faith and fair dealing ("implied covenant") existing in Plaintiff's contracts with the Government. Plaintiff alleges sufficient facts to raise a reasonable inference that the Government's conduct in failing to make full and timely CY 2014 risk corridors payments to Plaintiff breached the implied covenant. *See* Compl. ¶ 208.

The Federal Circuit has explained that implied covenant cases:

> [T]ypically involve some variation on the old bait-and-switch. First, the government enters into a contract that awards a significant benefit in exchange for consideration. Then, the government eliminates or rescinds that contractual provision or benefit through a subsequent action directed at the existing contract.

Precision Pine & Timber, Inc. v. United States, 596 F.3d 817, 829 (Fed. Cir. 2010). The Government's conduct here is exactly the type of "bait and switch" that violates the implied covenant. *See, e.g.*, Compl. ¶ 208(a)-(e) (pleading facts supporting breach); *Centex Corp. v. United States*, 395 F.3d 1283, 1304-06 (Fed. Cir. 2005) (finding breach of implied covenant in legislation disallowing tax deductions, which deprived plaintiffs of significant contractual benefits and was specifically targeted at plaintiffs' contract rights). After inducing Plaintiff to agree to become a QHP on the promise of risk corridors payments, the Government's subsequent legislative and regulatory changes to the risk corridors program were "directed at a small and

specifically identified group … having contracts with the government, and … designed to reduce the cost of those contracts to the government." *Centex* at 1306.

The implied covenant also "limits the manner in which a party who is vested with discretion under the contract may exercise it by requiring that party to exercise that discretion reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties." *Barsebäck Kraft AB v. United States*, 36 Fed. Cl. 691, 706 (1996). The CY 2014 QHP Agreement vested CMS with discretion under § II.d. *See* Compl. ¶ 38 & Ex. 02. CMS failed to exercise its discretion reasonably and thus breached the implied covenant. Despite stating that the risk corridors payment deadlines "should be the same for HHS and QHP issuers," CMS created a 30-day deadline for QHPs' full remittance of risk corridors charges, but failed to implement a similar deadline for the Government's full payment of risk corridors amounts owed. *See* Compl. ¶¶ 80-84, 208. Even after a "major failure" of CY 2014 risk corridors was revealed in October 2015, the Government declined to exercise its discretion to mitigate the harm to QHPs. *See* Compl. ¶ 116. Instead, CMS required QHPs that had gains to promptly remit risk corridors charges, yet failed to make full and timely payments to QHPs, including Plaintiff, that qualified for risk corridors payments. *See* Compl. ¶¶ 133-34, 208.

E. Count V: Plaintiff States a Fifth Amendment Takings Claim

The Government is prohibited by the Fifth Amendment from taking "private property" for "public use, without just compensation." U.S. Const. amend. V. Analyzing a takings claim requires a two-part test, first considering whether the claimant has identified a cognizable property interest, and second determining whether that property interest was taken by the Government. *See Chancellor Manor v. United States*, 331 F.3d 891, 901 (Fed. Cir. 2003).

As with its arguments directed at Count IV, Defendant's motion to dismiss Count V is wholly dependent on the Court finding that Plaintiff has not pled the existence of a contract with

the Government regarding its risk corridors payment obligations. *See* Mot. at 43. As demonstrated above, however, Plaintiff alleges sufficient facts to satisfy the elements of either an express or implied-in-fact contract with the Government.[111] *See* Compl. ¶ 213. Plaintiff therefore satisfies the first takings prong: a cognizable property interest. "Valid contracts are property," and "[r]ights against the United States arising out of a contract with [the United States] are protected by the Fifth Amendment." *Lynch v. United States*, 292 U.S. 571, 579 (1934).[112] Plaintiff's rights "vested" when it entered into the contract with the Government. *See Cienega Gardens*, 331 F.3d at 1319 (holding that plaintiffs' "contract rights vested when the contracts were signed, because there was no explicit contract provision to the contrary"). Contrary to Defendant's unsupported and disputed assertion that no payments are yet due based on its *post hoc* "three-year payment framework" rationale, Mot. at 43-44, the Complaint alleges that Plaintiff had contractual rights to full and timely CY 2014 risk corridors payments by the end of CY 2015. *See* Compl. ¶¶ 166-98.

Plaintiff also satisfies the second takings prong: "government interference" with the identified property interest that "has gone 'too far.'" *Cienega Gardens* at 1336-37 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). This is determined by an "ad hoc, factual inquiry." *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978). The ad hoc and fact-intensive nature of the regulatory takings analysis makes it premature to dismiss Count V at the pleading stage. *See Sacramento Mun. Util. Dist. v. United States*, 61 Fed. Cl. 438, 442 (2004) ("Since the … Supreme Court repeatedly advised … that regulatory takings analysis is 'ad hoc and fact intensive,' … it would be premature to dismiss [plaintiff's] regulatory takings

---

[111] Defendant's motion incorrectly quotes paragraph 217 of the Complaint as asserting takings claims as to "CY 2014, 2015 and 2016 risk corridors payments[.]" *See* Mot. at 42. Count V of the Complaint, however, only asserts a takings claim regarding the CY 2014 risk corridors payments. *See* Compl. ¶¶ 213, 217.

[112] *See also Cienega Gardens v. United States*, 331 F.3d 1319, 1329 (Fed. Cir. 2003) (recognizing "ample precedent for acknowledging a property interest in contract rights under the Fifth Amendment").

claim at this [motion to dismiss] juncture.") (citing *E. Enterprises v. Apfel*, 524 U.S. 498, 523 (1998)).[113] For this reason, the Court should reject Defendant's attempt to dismiss Count V.

Courts applying the *Penn Central* factual inquiry "use a three-factor analysis to assess claimed regulatory takings: (1) character of the governmental action, (2) economic impact of the regulation on the claimant, and (3) extent to which the regulation interfered with distinct investment-backed expectations." *Cienega Gardens* at 1337. The Complaint alleges facts sufficient to satisfy all three tests. *See* Compl. ¶¶ 35, 74, 112-19, 125, 213-16 (egregious character of Governmental action); *id.* ¶¶ 214-16 (expense shifting); *id.* ¶¶ 121-22, 218 (severe economic impact); and *id.* ¶¶ 213-16 (interference with reasonable investment-backed expectations).[114] Defendant asserts that an appropriations rider Congress enacted fifteen months *after* the parties entered into the CY 2014 QHP Agreement somehow undermines Plaintiff's takings claim. Mot. at 43. This assertion, however, completely misconstrues the basis of Plaintiff's takings claim, which is based on reasonable expectations from its vested contractual rights, not a statutory benefit as Defendant mistakenly suggests. Count V therefore states a valid takings claim and should not be dismissed.

F. Plaintiff's Request for Incidental Declaratory Relief for CY 2015 and CY 2016 is Within the Court's Jurisdiction and Discretion

The Court has the power to grant Plaintiff's incidental requests for declaratory relief because they are ancillary to Plaintiff's money-mandating claims in Counts I-V, over which the

---

[113] *Cf. Cebe Farms, Inc. v. United States*, 83 Fed. Cl. 491, 497 (2008) ("[T]he fact-intensive nature of just compensation jurisprudence ... argues against precipitous grants of summary judgment, or, in this case, judgment on the pleadings.").

[114] Defendant insupportably asserts that Plaintiff had no reasonable expectation, and thus no vested property right, to receive payment "by a particular date" or at least prior to "the end of the risk corridor program," relying on its *post hoc* "three-year payment framework" rationalization. *See* Mot. at 43-44. As demonstrated above, however, when Plaintiff agreed to participate as a QHP in September 2013, it reasonably expected that full risk corridors payments would be made by the end of CY 2015. Plaintiff could not reasonably have anticipated the Government's failure to pay, nor Congress' subsequent funding limitations in the 2015 and 2016 Appropriations Acts. *See Cienega Gardens* at 1350, 1353 (finding that plaintiffs reasonably expected to retain right to prepay mortgages granted in contract and regulation, and could not have anticipated subsequent change in regulatory approach).

Court already has jurisdiction. *See* 28 U.S.C. § 1491(a)(1) & (2). Defendant disputes that Plaintiff is entitled to declaratory relief for CY 2015 and CY 2016, not because the United States will satisfy its risk corridors payment obligations in those years, but rather on the mistaken assertion that the Court lacks jurisdiction over Plaintiff's current monetary claims pursuant to Rule 12(b)(1). *See* Mot. at 44.[115] This Court has jurisdiction over requests for declaratory relief, like Plaintiff's, that are incidental and collateral to Tucker Act claims for monetary relief. *See, e.g.*, *Lewis v. United States*, 67 Fed. Cl. 158, 160-61 (2005); *Cal. ex rel. Brown v. United States*, 110 Fed. Cl. 130, 133-34 (2013) ("As this Court has been granted the power to order declaratory relief, it is within this Court's discretion to make a determination as to the parties' contract rights upon the future occurrence of FERC's correction of prices for the Excluded Transaction and Summer Period sales.").

The Federal Circuit holds "that the Tucker Act grants the Court of Federal Claims jurisdiction to grant nonmonetary relief in connection with contractor claims, including claims requesting an interpretation of contract terms." *Alliant Techsys., Inc. v. United States*, 178 F.3d 1260, 1270 (Fed. Cir. 1999). In *Cal. ex rel. Brown*, the plaintiff had prevailed at trial on a Tucker Act breach of contract claim against the United States, and sought declaratory relief in the form of orders that FERC shall not repeat the offending conduct in the parties' future dealings. *See* 110 Fed. Cl. at 131. The Court granted the plaintiff's request, finding the declaratory relief appropriate because the claim involved a live dispute between the parties, it would resolve the dispute, and future legal remedies would be inadequate because trial may need to be repeated on the same evidence, potentially with the loss of some live witness testimony.

[115] Defendant's reliance on *Pucciariello v. United States* is misplaced. *See* Mot. at 44. In *Pucciariello*, a separate statute, not relevant here, deprived the Court of jurisdiction over the plaintiff's monetary claim, and consequently over the declaratory judgment *See* 116 Fed. Cl. 390, 410 (2014). *Annuity Transfers*, 86 Fed. Cl. at 179, is also distinguishable because there, unlike here, the Court lacked jurisdiction over the claim for declaratory relief based on a finding that the plaintiff had not sought monetary damages from the United States.

See id. at 134-35 (citing *Alliant*, 178 F.3d at 1271 and *CW Gov't Travel, Inc. v. United States*, 63 Fed. Cl. 369, 389-90 (2004)). Similar circumstances exist here.

Furthermore, the Government recently confirmed that it will not make any payments on time for CY 2015 risk corridors amounts due. *See* Mot. at App'x A248-A249. The interests of judicial economy and efficiency thus support Plaintiff's request for incidental declaratory relief, because the United States confirmed it will breach its obligations to make full and timely risk corridors payments for CY 2015. *See In re Aliphcon*, 449 Fed. App'x 33, at *1 (Fed. Cir. 2011) (granting declaratory judgment because any concerns about convenience that could weigh against declaratory judgment "were out-weighed by the concerns of judicial efficiency and inconsistent judgments presented by allowing two cases with overlapping claims to proceed in two different federal courts"); *Pac. Gas & Elec. Co. v. United States*, 110 Fed. Cl. 143, 147-48 (2013) (granting plaintiff's claim for declaratory judgment based on plaintiff's arguments that it "would be time-consuming and inefficient to have to retry each set of transactions individually").

Because Plaintiff has established the Court's Tucker Act jurisdiction over Counts I-V, the Court also has jurisdiction and discretion to grant the incidental declaratory relief requested by Plaintiff, which Defendant does not dispute is ancillary to Plaintiff's monetary claims.[116]

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant's Motion to Dismiss under Rules 12(b)(1) and 12(b)(6) in its entirety, and permit all of Plaintiff's claims to proceed on their merits. Plaintiff respectfully requests an opportunity to present oral argument on this motion should the Court deem it useful.

[116] Defendant's other two cited cases are also unavailing. *Nat'l Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714, 716 (Fed. Cir. 1998), is distinguishable because the plaintiff did not seek a claim for monetary relief from the Court, thus depriving the Court of jurisdiction over any claim for related declaratory relief. Similarly, in *Thorndike v. United States*, 72 Fed. Cl. 580, 582 (2006), the declaratory relief sought was the primary focus of the dispute, rather than being ancillary or incidental to the plaintiff's claim for monetary damages, as it is in this case.

Dated: October 31, 2016

Respectfully Submitted,

s/ Lawrence S. Sher
Lawrence S. Sher (D.C. Bar No. 430469)
REED SMITH LLP
1301 K Street NW
Suite 1000-East Tower
Washington, DC 20005
Telephone: 202.414.9200
Facsimile: 202.414.9299
Email: lsher@reedsmith.com

Of Counsel:

Kyle R. Bahr (D.C. Bar No. 986946)
Conor M. Shaffer (PA Bar No. 314474)
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222
Telephone: 412.288.3131
Facsimile: 412.288.3063
Email: kbahr@reedsmith.com
cshaffer@reedsmith.com

Counsel for Plaintiff Blue Cross and Blue Shield of North Carolina

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2016, a copy of the foregoing Plaintiff's Opposition to the United States' Motion to Dismiss and Appendix were filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing with be sent to all parties by operation of the Court's ECF system.

s/ Lawrence S. Sher
Lawrence S. Sher
Counsel for Plaintiff