No. 18-05 C
(Chief Judge Sweeney)

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMUNITY HEALTH CHOICE, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

DEFENDANT'S REPLY IN SUPPORT OF ITS CROSS-MOTION TO DISMISS PLAINTIFF'S COST-SHARING REDUCTION CLAIMS

JOSEPH H. HUNT
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

CLAUDIA BURKE
Assistant Director

ERIC E. LAUFGRABEN
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 353-7995
Fax: (202) 514-8624
Email: Eric.E.Laufgraben@usdoj.gov

Attorneys for Defendant

OF COUNSEL:

CHRISTOPHER J. CARNEY
Senior Litigation Counsel
Civil Division
U.S. Department of Justice

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

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DEFENDANT'S REPLY IN SUPPORT OF ITS
CROSS-MOTION TO DISMISS PLAINTIFF'S COST-SHARING REDUCTION CLAIMS

Defendant, the United States, respectfully submits this reply in support of its cross-motion to dismiss the cost-sharing reduction claims (Counts IV-VI) in plaintiff's amended complaint. Because plaintiff's cost-sharing reduction claims fail to state a claim upon which relief can be granted, the Court should deny plaintiff's motion for partial summary judgment and grant the United States' cross-motion to dismiss.

INTRODUCTION

As we demonstrated in our cross-motion (U.S. Br.), absent an appropriation by Congress, plaintiff is not entitled to cost-sharing reduction (CSR) payments. Thus, however plaintiff frames its claim—as a statutory violation, breach of express contract, or a breach of implied contract—plaintiff relies on the mistaken premise that it should recover in damages the precise amount of CSR payments for which Congress declined to appropriate funds. But as plaintiff recognizes, congressional intent controls plaintiff's entitlement to CSR payments. And Congress signaled its intent in the Affordable Care Act (ACA) by appropriating permanent funding for Section 1401 (premium tax credits) while leaving its companion provision, Section 1402 (cost-sharing reductions) to the annual appropriations process. Congress did not fund CSRs when it

enacted the ACA and it has not funded CSRs since then. Congress also did not authorize an ACA damages remedy so issuers could recover in Court the same CSR payments that Congress declined to fund. Finally, plaintiff's failure to identify a binding, contractual duty to make CSR payments compels dismissal of its contract claims.

Because the remedy plaintiff seeks would circumvent Congress's intent to leave CSR funding to the annual appropriations process, the Court should deny plaintiff's motion for partial summary judgment and grant the United States' cross-motion to dismiss plaintiff's CSR claims (Counts IV-VI).[1]

ARGUMENT

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

The problem with plaintiff's response to our cross-motion (Pl. Resp.) is that it relies on the mistaken premise that a mandatory obligation exists for the Federal government to make CSR payments in the absence of an appropriation. Laboring under this mistaken premise, plaintiff contends that the arguments we raised in our cross-motion do not defeat that alleged "mandatory" payment obligation. But as we demonstrated in our cross-motion and as we further explain below, the decisions Congress made when it enacted the ACA demonstrated its intent *not* to create such a mandatory payment obligation absent an appropriation. Because plaintiff has

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

not affirmatively demonstrated congressional intent to create a mandatory payment obligation absent an appropriation, plaintiff's CSR claims must be dismissed.

A. Plaintiff Cannot Show That Congress Intended That The Government Would Make CSR Payments In The Absence Of An Appropriation

Plaintiff does not dispute that congressional intent controls whether it may recover CSR payments through litigation in this Court. Plaintiff's view of congressional intent, however, is inconsistent with the ACA. As we explained in our cross-motion, the district court in *United States House of Representatives v. Burwell* concluded that the permanent appropriation that funds Section 1401 premium tax credits (31 U.S.C. § 1342) did not encompass CSR payments. *See U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 189 (D.D.C. 2016). After reviewing the matter, the current administration determined that, unlike Section 1401, no appropriation existed for Section 1402. That Congress decided to permanently appropriate funds for Section 1401, but to leave Section 1402 to the annual appropriations process, reflects Congress's intent to leave CSR funding to future Congresses.

Plaintiff cannot meet its burden to show that Congress intended to make CSR payments in the absence of an appropriation. Instead, plaintiff makes a variety of arguments, all of which rest on the mistaken premise that the ACA entitles plaintiff to receive CSR payments notwithstanding the absence of an appropriation to make those payments.

First, in response to our argument that the ACA's structure reflects congressional intent, plaintiff erroneously contends that the Court cannot look to the underlying legislation because only a subsequent congressional act can demonstrate congressional intent. *See* Pl. Resp. at 5. But as we explained in our cross-motion, no subsequent legislation is necessary to divine congressional intent when the underlying statute already reflects it. *See* U.S. Br. at 19.

Second, in response to our argument that the ACA's structure reflects congressional intent, plaintiff offers an alternative, but incorrect, hypothesis why Congress included a permanent appropriation in Section 1401 and but provided no appropriation in Section 1402: A permanent, pre-ACA appropriation previously existed for refundable tax credits, yet no permanent appropriation previously existed for CSR payments. *See* Pl. Resp. at 6. But the existence of a pre-ACA appropriation for other tax credits is irrelevant. The point is that in enacting the ACA, Congress appropriated a permanent funding source for Section 1401 (premium tax credits), but left Section 1402 (CSR payments) to the annual appropriations process. *See* U.S. Br. at 19-21. By including a permanent appropriation in Section 1401 and excluding an appropriation from Section 1402, Congress signaled that it had no intent to make payments under Section 1402 until a future Congress funded those payments. "[W]hen Congress includes particular language in one section of a statute but omits it in another[,] . . . this Court presumes that Congress intended a difference in meaning." *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 777 (2018).

Third, plaintiff mischaracterizes our discussion about congressional intent as an argument that "Congress must not have intended to require Section 1402 payments at all." Pl. Resp. at 6. Rather, we explained that in enacting the ACA, Congress intended the Government to make CSR payments when a later Congress appropriates funds for those payments. *See* U.S. Br. at 20.

Fourth, plaintiff does not meaningfully address our observation that the ACA authorizes no damages remedy. *See id.* at 9-10. The lack of a damages remedy in the ACA demonstrates that Congress did not intend for issuers to recover in this Court the CSR payments for which Congress declined to appropriate funds. If Congress intended issuers to recover CSR payments, it would have appropriated funds for those payments.

Fifth, plaintiff cites the Government's previous CSR payments as indicative of congressional intent, *see id*. at 1, but the conduct upon which plaintiff relies occurred before the Government concluded that no valid appropriation existed for such payments.

The common thread among all of plaintiff's arguments is that the "shall make" language contained in Section 1402 renders meaningless the ACA's structure when considering congressional intent. As plaintiff recognizes, Congress deliberately structured the ACA so Section 1401 (premium tax credits) and Section 1402 (CSR payments) work in tandem to lower qualified insureds' health care costs. *See* Pl. Resp. at 8 (quoting *California v. Trump*, 267 F. Supp. 3d 1119, 1122-23 (N.D. Cal. 2017)). Congress provided a permanent appropriation for premium tax credits in Section 1401, but provided no appropriation for CSR payments in Section 1402. Yet the two programs work together so issuers, like plaintiff, may still obtain funds to reduce insureds' cost sharing by raising insurance premiums even in the absence of a specific appropriation for Section 1402. Because Congress has plenary power over the purse and chose not to fund CSR payments in the ACA or thereafter, Congress's funding decision forecloses plaintiff's demand for any unpaid CSR payments.

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

Plaintiff's argument starts and ends with the mistaken premise that the plain language of Section 1402 requires "the Government" to make CSR payments. Pl. Resp. at 4-8. In reality, Congress framed Section 1402 as a directive to an agency—the Department of Health and Human Services (HHS)—to make CSR payments. And under basic appropriations law principles, that directive could not properly be implemented until Congress provided HHS with the necessary funding. *See* 31 U.S.C. § 1341(a)(1)(A) ("An officer or employee of the United States Government or of the District of Columbia government may not . . . make or authorize an

expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.").

Plaintiff argues that these appropriation law principles are meaningless because the *Moda* court stated that the "government may incur a debt independent of an appropriation to satisfy that debt at least in certain circumstances." Pl. Resp. at 4 (quoting *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1321 (Fed. Cir. 2018)). *Moda* relied on the Supreme Court's *Langston* decision for that proposition. *See Moda*, 892 F.3d at 1321 (discussing *United States v. Langston*, 118 U.S. 389 (1886)). Importantly, *Langston* did not confront the issue that is the basis for our argument here—that the absence of an appropriation, in the context of the ACA, reflects Congress's intent. Indeed, prior to and since *Langston*, the Supreme Court has consistently recognized the importance of Congress's funding choices and given effect to appropriations limitations in determining that there was no substantive grounds for liability on the part of the Government.

For instance, in *United States v. Mitchell*, 109 U.S. 146, 150 (1883), the Supreme Court concluded that, by appropriating salaries at the rate of $300 per year for five consecutive years, instead of the $400 provided in permanent legislation, Congress "reveal[ed] a change in the policy" with the "purpose" "to suspend the law fixing the salaries . . . at $400 per annum." The Court in *Dickerson v. United States*, 310 U.S. 554, 561-62 (1940), held that Congress's repeated restriction on the use of appropriated funds to pay reenlistment bonuses, notwithstanding permanent legislation providing for such bonuses, evinced an intent to suspend bonus payments. And, in *United States v. Will*, 449 U.S. 200, 228 (1980), which involved four differently-phrased appropriations restrictions in four different fiscal years, the Supreme Court had no trouble concluding that each restriction expressed the same congressional intent not to raise judicial pay.

Following these precedents, the Federal Circuit has consistently drawn a connection between Congress's appropriations choices and substantive liability—contrary to plaintiff's contention that the existence of an appropriation is independent from the Government's obligation to pay. *See* Pl. Resp. at 4. In *Moda*, the Federal Circuit gave effect to Congress's decision to restrict the appropriations from which risk corridors payments could be made and held that the Government was not substantively liable for risk corridors payments in excess of those amounts paid into the program by issuers. *See Moda*, 892 F.3d at 1323, 1327. In so ruling, the Court observed, "what else could Congress have intended? It clearly did not intend to consign risk corridors payments 'to the fiscal limbo of an account due but not payable.'" *Id*. at 1325 (quoting *Will*, 449 U.S. at 224); *see also Prairie Cty., Mont. v. United States*, 782 F.3d 685 (Fed. Cir. 2015) (limiting liability under "shall pay" statute to amounts appropriated by Congress); *Greenlee County, Ariz. v. United States*, 487 F.3d 871, 877-80 (Fed. Cir. 2007) (same); *Star-Glo Assocs., L.P., v. United States*, 414 F.3d 1349, 1355 (Fed. Cir. 2005) (concluding that Congress intended to restrict payments due under "shall pay" statute to amounts provided in lump sum appropriation); *Highland Falls-Fort Montgomery School Dist. v. United States*, 48 F.3d 1166, 1171-72 (Fed. Cir. 1995) (holding that Congressional earmarks limited Government's liability to amounts appropriated under a "shall pay" statute).

All of these rulings stem from the constitutional limitations imposed by the Appropriations Clause: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. That clause independently bars a court from ordering the payment of money from the Treasury absent congressional authorization. *See OPM v. Richmond*, 496 U.S. 414, 425 (1990); *see also Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1851) ("However much money may be in the Treasury at any one time, not a dollar of

it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion. Hence, the petitioner should have presented [its] claim on the United States to Congress, and prayed for an appropriation to pay it.").

In *Richmond*, the Supreme Court explained that by reserving to Congress the authority to approve or prohibit the payment of money from the Treasury, the Appropriations Clause serves a "fundamental and comprehensive purpose"—namely, to ensure "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." *Richmond*, 496 U.S. at 427-28. And the Court further explained that "[i]t follows that Congress has appropriated no money for the payment of the benefits respondent seeks, and the Constitution prohibits that any money 'be drawn from the Treasury' to pay them." *Id*. at 424.

The Supreme Court reaffirmed the significance of the Appropriation Clause limitation in *Salazar v. Ramah Navajo,* 567 U.S. 182, 198 n.9 (2012). There, the Court explained that the underlying statute must establish a substantive right to compensation:

> In *Richmond,* we held that the Appropriations Clause does not permit plaintiffs to recover money for Government-caused injuries for which Congress "appropriated no money.". . . . *Richmond*, however, indicated that the Appropriations Clause is no bar to recovery in a case like this one, in which "the express terms of a specific statute" establish "a substantive right to compensation" from the Judgment Fund.[2]

Id. (quoting *Richmond*, 496 U.S. at 424, 432).

[2] The statute at issue in *Ramah Navajo*—unlike the one here—expressly provided that claimants denied payment could bring claims for money damages under the Contract Disputes Act, thereby explicitly identifying the Judgment Fund as source of payment.

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

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

In our cross-motion we also explained how the ACA's structure permits issuers to raise premiums to account for the lack of CSR appropriations. *See* U.S. Br. at 9-10, 20-21. Given this structure, plaintiff's position that Congress intended issuers to recover through litigation the amounts Congress deliberately chose not to appropriate, while also potentially recouping CSR costs through higher premiums and advanced payment of premium tax credits is implausible. Because issuers can offset CSR expenses by raising premiums, Congress could not plausibly have intended to grant issuers an additional damages remedy.

Texas already permitted plaintiff to increase its premiums in 2018 to account for the absence of CSR payments. *See generally* Pl. Br. at 14. Thus, plaintiff's proposed damages remedy would allow plaintiff a second recovery of 2018 CSR payments. Plaintiff contends that this Court's decision granting a motion for class certification in *Common Ground Health Cooperative v. United States*, 137 Fed. Cl. 630, 643 (2018), permits double recovery. *See* Pl. Resp. at 13. However, in *Common Ground*, the Court did not reach the issue, recognizing that the parties "have not had the opportunity to fully brief the issue of whether the government's

obligation to make cost-sharing reduction payments is mitigated by its increased premium tax credit payments[.]" *See Common Ground*, 137 Fed. Cl. at 643-44. Indeed, no Court has addressed whether an issuer may obtain double recovery of CSR payments.

Although plaintiff does not deny that it seeks double recovery for 2018 payments, it argues that the increased premiums do not guarantee dollar-for-dollar recovery of CSR payments because the premium rate-setting process is subject to, among other things, state actors whose decisions are not controlled by Congress, the competitive landscape, and the costs of care. *See* Pl. Resp. at 14. Under plaintiff's view of the ACA, an issuer is entitled to recompense for non-payment of CSR payments by (1) raising its premiums to account for those payments and (2) recovering those payments as damages in this Court.

Yet plaintiff identifies nothing in the ACA supporting its view that Congress conceived that its decision not to fund CSRs *through an appropriation* would result in dollar-for-dollar funding of CSRs *through litigation* in this Court. The "touchstone here, of course, is whether Congress intended a cause of action that it did not expressly provide." *Bowen v. Massachusetts*, 487 U.S. 879, 905 n.42 (1988). Plaintiff identifies no basis on which to conclude that Congress intended to provide a damages cause of action for issuers whose inability to receive CSR payments flows from Congress's own decision not to fund such payments.

II. The QHP Issuer Agreement Contains No Provision That Requires The Government To Make CSR Payments

Although plaintiff insists that the QHP Issuer Agreement (QHP Agreement) imposes on the Government a duty to make CSR payments, a review of the QHP Agreement itself reveals that no such duty exists. *See* Decl. of Kevin Janda in Support of Pl. Mot. for Partial Summary Judgment, Ex. A (Sept. 26, 2018), ECF No. 16-1. And because plaintiff identifies no payment

duty in the QHP Agreement, it fails to state an essential element of its breach claim. *See Bell/Heery v. United States*, 739 F.3d 1324, 1330-33 (Fed. Cir. 2014).

As an initial matter, plaintiff appears to concede that the non-binding recital in the QHP Agreement itself imposes no independent duty to make CSR payments. *See* Pl. Resp. at 16 (the recitals "strengthen" the purported contractual payment obligation). Nonetheless, plaintiff erroneously contends that Section III.B of the QHP Agreement imposes on the Government a duty to make CSR payments to plaintiff in the absence of an appropriation. Plaintiff purports to cite the "full contractual provision," but the quote in its brief contains multiple alterations. *See* Pl. Resp. at 16. The actual full text of the provision is below and it does not specify that the Government will make CSR payments:

> As part of a monthly payments and collections reconciliation process, CMS will recoup or net payment due to QHPI [Qualified Health Plan Issuer] against amounts owed to CMS by QHPI in relation to offering of QHPs or an entity operating the same tax identification number as QHPI (including overpayments previously made), including the following types of payments: APTCs [Advanced Premium Tax Credits], advance payments of CSRs, and payment of Federally-facilitated Exchange user fees.

Janda Decl., Ex. A at 6.

The provision on which plaintiff relies describes the mechanics of the monthly reconciliation process; it does not impose an independent duty to make CSR payments. *See id.* Although plaintiff argues that the provision creates an "obligation to *make* or net payments owed to CHC," Pl. Resp. at 16 (emphasis added), nowhere in the QHP Agreement did the Government obligate itself to "make" CSR payments. Indeed, the entire thrust of plaintiff's CSR claims is that such a payment duty arises out of Section 1402 of the ACA—*not* the QHP Agreement. Because plaintiff fails to identify any duty that the Government allegedly breached, plaintiff fails to state a claim for breach of the QHP Agreement.

III. Plaintiff's Implied Contract Claim Fails Because The ACA Reflects No Intent To Bind The United States And Plaintiff In Contract

A. The Absence Of An Express Contract Duty To Make CSR Payments Does Not Create An Implied Duty To Make Such Payments

As we demonstrated in our cross-motion, plaintiff's implied contract claim fails because the existence of an express contract precludes an implied contract concerning the same subject matter. *See* U.S. Br. at 27-28. As plaintiff acknowledges, "the existence of an express contract precludes the existence of an implied-in-fact contract dealing with the same subject matter, unless the implied contract is entirely unrelated to the express contract." *Bank of Guam v. United States*, 578 F.3d 1318, 1329 (Fed. Cir. 2009) (quoted in Pl. Br. at 21). From this proposition, however, plaintiff makes an erroneous leap of logic—if the QHP Agreement does not impose a mandatory duty to make CSR payments, then that duty must exist in an implied contract. *See* Pl. Br. at 21.

The flaw in plaintiff's reasoning is that it presumes "the same subject matter" means the same contract duty. On the contrary, an implied contract can only exist in harmony with an express contract when their subject matters are "entirely unrelated." *Bank of Guam*, 578 F.3d at 1329. Here, plaintiff's allegations demonstrate that the QHP Agreement and the alleged implied contract are related. Indeed, plaintiff alleges that the exact same conduct constituted a breach of the QHP Agreement and an implied contract. *Compare* Am. Compl. ¶¶ 127-34, *with id.* ¶¶ 136-49. And plaintiff contends that the existence of the QHP Agreement further demonstrates the existence of an implied contract: "The parties' [implied] agreement is further confirmed by . . . the execution by the parties of QHP issuer agreements." *Id.* ¶ 142. Because the QHP Agreement and implied contract allegedly impose the same CSR payment duty, the existence of the QHP Agreement forecloses plaintiff's implied contract claim.

B. Section 1402 Does Not Create An Implied Contract

In any case, in our cross-motion, we demonstrated that congressional intent controls whether a statute vests a private party with contract rights against the United States. *See* U.S. Br. at 24-27. Given the "well-established presumption" that the Government does not intend to form a contract through legislation or regulation, *see Moda*, 892 F.3d at 1330, absent statutory or regulatory language identifying both (1) a contract and (2) "the contours of any contractual obligation," courts routinely reject allegations that a statutory and regulatory scheme comprises an implied contract between the United States and private party. *Brooks v. Dunlop, Mfg.*, 702 F.3d 624, 630 (Fed. Cir. 2012).

Recognizing that *Moda* forecloses its implied contract claim, plaintiff argues that *Radium Mines, Inc. v. United States*, 153 F. Supp. 403 (Ct. Cl. 1957), a case that the Federal Circuit distinguished in *Moda*, "dictates the outcome here." Pl. Resp. at 18; *see Moda*, 892 F.3d at 1330. As the Federal Circuit explained, the regulations in *Radium Mines* reflected the "trappings of a contractual arrangement." *Moda*, 892 F.3d at 1330. Specifically, the regulations specified various conditions a uranium supplier must meet to submit an offer to the Government and stated that the Government would forward a "purchase contract" when the supplier's offer satisfied those conditions. *See Radium Mines*, 153 F. Supp. at 405. The regulatory scheme in *Radium Mines*, which provided that the Government would enter into purchase contracts with uranium suppliers, bears no resemblance to the statutory or regulatory scheme that governs CSR payments, which contains no reference to contracts.

According to plaintiff, the ACA, regulations, and the conduct of the Government established a "meeting of the minds." Pl. Resp. at 18. But the Federal Circuit rejected the implied contract claim in *Moda* based on these same allegations, explaining that the statute,

regulations, and alleged conduct merely crafted an incentive program. *See Moda*, 892 F.3d at 1330. Besides, the only conduct to which plaintiff points in support of its implied contract claim is the Government's prior payment of CSRs before it concluded that no valid appropriation existed for such payments.

C. HHS Had No Authority To Enter Into An Implied Contract To Make CSR Payments

As we demonstrated in our cross-motion, the absence of an "unambiguous" grant of contract authority also requires dismissal of plaintiff's implied contract claim. *See* U.S. Br. at 26 (quoting *McAfee v. United States*, 46 Fed. Cl. 428, 435 (2000)). In response, plaintiff argues that the HHS Secretary had contract authority by virtue of his responsibility to implement the CSR program as well as his regulatory authority as the head of an agency. Pl. Resp. at 20. But plaintiff confuses the statutory authorization *to pay* with the authority *to contract*. *See id.* ("[T]he ACA sections outlined above give [budget] authority by explicitly authorizing CSR payments[.]"). Plaintiff's efforts to identify an unambiguous grant of contract authority based on generalized pronouncements authorizing the Secretary to establish a CSR program are futile.

Plaintiff also cites FAR 1.601 for the proposition that "agency heads have contract-making authority 'by virtue of their position,'" but that same provision of the FAR specifies that "[c]ontracts may be entered into and signed on behalf of the Government only by contracting officers." FAR 1.601(a). Thus, FAR 1.601(a) establishes neither the express nor the implied authority that is otherwise absent from the ACA or its regulations.

These principles provide a second basis to dismiss plaintiff's implied contract claim. Sections 1402 and 1412 of the ACA do not vest any Federal official with contracting authority, so no valid contract for the payment of CSRs could have been formed. Thus, plaintiff's implied contract claim must be dismissed.

CONCLUSION

For these reasons, we respectfully request that the Court dismiss the CSR claims (Counts IV-VI) in the amended complaint and deny plaintiff's partial summary judgment motion.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

OF COUNSEL:

s/Claudia Burke
CLAUDIA BURKE
Assistant Director

CHRISTOPHER J. CARNEY
Senior Litigation Counsel
Civil Division
U.S. Department of Justice

s/Eric E. Laufgraben
ERIC E. LAUFGRABEN
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 353-7995
Facsimile: (202) 353-0461
Email: Eric.E.Laufgraben@usdoj.gov

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

December 14, 2018

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 14th day of December, 2018, DEFENDANT'S REPLY IN SUPPORT OF ITS CROSS-MOTION TO DISMISS PLAINTIFF'S COST-SHARING REDUCTION CLAIMS was filed electronically. Service upon plaintiff's counsel was thus effected by operation of the Court's CM/ECF system.

s/Eric E. Laufgraben
Eric E. Laufgraben