IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMUNITY HEALTH CHOICE, INC. Plaintiff, v. THE UNITED STATES, Defendant.	)	No. 1:18-cv-00005-MMS Chief Judge Margaret M. Sweeney

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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Plaintiff Community Health Choice, Inc. ("CHC") respectfully submits this Reply in support of its Motion for Summary Judgment on Liability and Opposition to Defendant's Cross-Motion to Dismiss. For the reasons stated below and based on the undisputed material facts of record, the Court should find Defendant, the United States of America ("Government"), liable (i) under Section 1402 of the Patient Protection and Affordable Care Act ("ACA")[1] and related statutes and regulations; and (ii) for breach of express and/or implied-in-fact contract. The Court should deny the Government's Cross-Motion to Dismiss.

INTRODUCTION

The Government's position in this case is extraordinary. Despite 45 months of consistent performance—during which the Government made monthly cost-sharing reduction payments to CHC and CHC passed the cost-sharing reductions ("CSRs") on to patients and their providers as mandated by Section 1402 and the QHP[2] Issuer Agreement—the Government now contends that it never really had any legal obligation to make any CSR payments. This position cannot be squared with the controlling statutory or contractual language. Under the ACA, CSRs are a subsidy to be paid by the Government to the patient/insured, with the issuer/QHPI acting as an intermediary: the Government "shall make" CSR payments to the QHPI, and the QHPI in turn must deliver the CSRs to patients and their providers. Under the QHP Issuer Agreement, the Government must "recoup or net" payments due to CHC, including CSRs, as part of a "monthly payments and collections reconciliation process." CHC has fully met its statutory and contractual obligations as a QHPI. The Government met its obligation to make CSR payments until September 2017, but since that time has failed to do so.

[1] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[2] "QHP" is Qualified Health Plan, and "QHPI" is Qualified Health Plan Issuer.

The Government's conduct is contrary to law and violates both Section 1402 and the QHP Issuer Agreements. Regarding Section 1402, the ACA unambiguously states that the Government "shall make periodic and timely payments to the issuer" for CSRs. 42 U.S.C. § 18071(c)(3)(A) (codifying Section 1402 of the ACA). Under long-established law including binding Federal Circuit precedent, this statute establishes a legal obligation of the Government to make CSR payments to issuers like CHC. Congress's mere failure to appropriate funds for these payments does not repeal or annul the Government's legal obligation to pay, nor deprive this Court of jurisdiction to determine and enforce that obligation. The Government's self-contradictory argument—that "shall make" actually means "does not have to make" because Congress included a permanent appropriation in the premium tax credit program but in not the CSR program—contradicts the statute's plain meaning and would up-end more than a hundred years of precedent holding that Congress can create a payment obligation without a simultaneous appropriation.[3]

The Government also cannot avoid liability by arguing that the ACA's structure permits the possibility that CHC could raise its premiums and obtain so-called "double payments." First, no such possibility exists for CHC's 2017 losses, as its premiums for that year were locked-in long before the Government's October 2017 cessation of CSR payments. Second, this argument is erroneous even for 2018. Liability turns solely on the legal obligation imposed by Section 1402 and whether the Government has met that obligation. Nothing in the ACA suggests that receiving premium tax credit payments eliminates or offsets the Government's obligation to make CSR

[3] As discussed in its opening brief, CHC does not concede that there has been no appropriation for CSR payments. In fact, for years the Government itself took the view that the permanent appropriation included in the ACA's Section 1401(d) covered CSR payments as well. *U.S. House of Reps. v. Burwell*, 185 F. Supp. 3d 165, 174 (D.D.C. 2016), *vacated in part sub nom. U.S. House of Reps. v. Azar*, 14-cv-01967-RMC (D.D.C. May 18, 2018) (granting joint motion upon settlement). But this question need not be answered on these motions, as the Government's legal obligation to pay exists independently of whether an appropriation exists. Pl. Br. at 17, 17 n.13.

payments (and the issuer's corresponding obligation to provide CSRs to patients and their providers). At most, this argument raises a potential issue about quantum of damages, which is not before the Court at this time and involves fact questions not resolvable on the present cross-motions.

Regarding CHC's claim for breach of express contract, the Government side-steps the critical language. The contract expressly states that as part of a "monthly payments and collections reconciliation process," "[the Government] *will recoup or net payments due to [CHC] . . . including . . . advance payments of CSRs . . . .*" Contract § III.b (emphasis added).[4] This language mandates that the Government make its CSR payment every month, either by sending the money to CHC or offsetting the CSR payment amount against payments owed by CHC to the Government. No other interpretation withstands scrutiny.

The Government's argument regarding the parties' implied-in-fact contract mis-states the case law and ignores the long-standing course of conduct between the parties, both of whom fully performed according to Section 1402 and the QHP Issuer Agreements for 45 consecutive months, before the Government's breach. The Government's efforts to cast aside its promises to CHC should be rejected.

At the time of CHC's opening brief, one judge of this Court had already ruled for the insurer on an identical Section 1402 statutory claim (the Court did not reach a similar implied-in-fact contract claim). *Mont. Health Co-Op v. United States*, 139 Fed. Cl. 213, 216 (2018) (Kaplan, J.). Since then, Judge Kaplan has reached the same result in a second case.

[4] The QHP Issuer Agreements, which contain identical provisions, were attached to the Janda Declaration filed with CHC's motion for summary judgment as Exhibits A (2017 benefit plan year) and B (2018). They are collectively hereinafter cited as "Contract."

Sanford Health Plan v. United States, No. 18-136C, 2018 WL 4939418 (Fed. Cl. Oct. 11, 2018) (Kaplan, J.).

This Court, too, should grant summary judgment in favor of CHC on liability and deny the Government's motion to dismiss.

ARGUMENT

I. The ACA Mandates CSR Payments and Establishes the Government's Legal Obligation to Pay CHC.

The Federal Circuit has recently reiterated the governing rule: it has "long been established that the mere failure of Congress to appropriate funds, without further 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." *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1321–22 (Fed. Cir. 2018) (quoting *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966)), *reh'g denied*, No. 2017-1224, 2018 WL 5795969 (Fed. Cir. Nov. 6, 2018). Moreover, "it has long been the law that the government may incur a debt independent of an appropriation to satisfy that debt, at least in certain circumstances." *Moda*, 892 F.3d at 1321 (discussing *U.S. v. Langston*, 118 U.S. 389 (1886)). Much of the Government's brief attempts to avoid this binding precedent.

A. Statutory Payment Obligations Exist Independently of Appropriations.

The Government does not dispute that Section 1402's mandate—that it "shall make" CSR payments—creates a *prima facie* payment obligation. And it certainly does. "[W]here 'statutory language is clear and unambiguous, the inquiry ends with the plain meaning.'" *Mont. Health*, 139 Fed. Cl. at 218 (quoting *McGee v. Peake*, 511 F.3d 1352, 1356 (Fed. Cir. 2008)). As CHC has already shown, the CSR statute created a payment obligation through its plain language, and the Government has not seriously disputed the meaning of that language. *See* Pl. Br. at 15–17; Govt.

Br. at 15–16. That such clear and unambiguous language establishes a legal obligation of the Government to pay CSRs is the necessary result of the Federal Circuit's holding in *Moda* and the case law on which that opinion relies.

The Government fails to identify any congressional action that repeals or negates this payment obligation. None exists. This case involves nothing like the appropriations riders in *Moda*. In *Moda* the Federal Circuit determined that the ACA's risk-corridors provisions initially created a payment obligation. 892 F.3d at 1322. But when later Congresses passed appropriations riders that expressly restricted risk-corridors funding, the *Moda* panel held that this "effected a suspension" of the risk-corridors program. *Id.* at 1325 n.6.

Critically for this case, the *Moda* court recognized that the ACA's "shall pay" language establishing the risk corridors program created a legal obligation of the Government even though the ACA's risk corridors program "provided no budgetary authority to the Secretary of HHS and identified no source of funds for any payment obligations beyond payments in." *Id.* at 1321. In discussing *Langston*, the *Moda* court further noted, "That is, the government's statutory obligation to pay persisted independent of the appropriation of funds to satisfy that obligation." *Id.* In other words, the absence of an appropriation in the statute mandating Government payment does not change that mandate's status as a legal obligation enforceable in this Court. Existence of the legal obligation is determined by the language of the enacting statute and is independent of the question of appropriations to meet that obligation.

In this case, the enacting statute is plain. It mandates payment of CSRs. And unlike in the risk corridors case, no later appropriations act of Congress exists, and so no change in congressional intent can be argued. As a result, the Government is forced to argue that, although Congress commanded that the Government "shall make" CSR payments, the Court should infer

from the same statute that Congress did not really mean it. Gov. Br. at 19 ("nothing in [*Moda* says] that the Court cannot infer congressional intent from the appropriation that was enacted *simultaneously* with the section at issue"). The Government points out that Congress enacted a permanent appropriation for Section 1401 of the ACA, dealing with premium tax credits that help lower-income individuals pay for health coverage. Govt. Br. at 15–18. Since Congress did not enact a similar permanent appropriation for Section 1402, the Government contends, Congress must not have intended to require Section 1402 payments at all.

That is a resounding *non sequitur*, because it collapses the basic legal distinction between payment obligations and appropriations. Congress regularly appropriates money, permanently, annually, and otherwise, for just about every government program. That does not mean that, when Congress does *not* appropriate money, it thereby wipes out payment obligations that are dictated by statutory language passed into law. The longstanding rule of law is just the opposite: a failure to appropriate, standing alone, leaves the obligation intact. Thus, as Judge Kaplan concluded:

> The most one can say about Congress's decision to permanently appropriate funds for the tax credits but not for CSR payments is that it reveals that Congress did not intend for CSR payments to be funded by permanent appropriations. . . . [T]he CSR payments it obligated the government to pay in § 1402 would ultimately be funded through the annual appropriations process.

Mont. Health, 139 Fed. Cl. at 220; *see also Sanford Health*, 2018 WL 4939418, at *7 (Kaplan, J.).

There is nothing unusual about this conclusion. "[A]nnual appropriations [are] the default way in which Congress provides funds." *Civil Rights Comm'n*, 71 Comp. Gen. 378 (1992). The funding arrangement used here does not warrant any inference that Congress did not intend to require CSR payments.

Assuredly, there can be no inference so strong that it could override Section 1402's unambiguous statutory command that the Government "shall make" CSR payments to issuers. A reading contrary to such clear and unambiguous language cannot be correct. *Mont. Health*, 139

Fed. Cl. at 218 (quoting *McGee*, 511 F.3d at 1356) ("[W]here 'statutory language is clear and unambiguous, the inquiry ends with the plain meaning.'"); *see also* Pl. Br. at 17–21.

B. The Details of Sections 1401 and 1402 Undermine the Government's Argument.

Examining the details of Sections 1401 and 1402 reinforces the conclusion that Section 1402 creates a legal obligation that the Government make CSR payments. Under established law, Congress must be presumed to know what the effect would be if it created a permanent appropriation for one provision and not for another: the second obligation would remain binding, with appropriations provided annually. This principle is established in a long line of cases, *Moda*, 892 F.3d at 1321–22 (quoting *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892); *N.Y. Airways*, 369 F.2d at 748), and is a common approach to funding Government obligations, *Civil Rights Comm'n*, 71 Comp. Gen. 378; *A Glossary of Terms Used in the Federal Budget Process*, U.S. Gov't Accountability Off., 13 (2015), https://www.gao.gov/assets/80/76911.pdf. Both Sections 1401 and 1402 create payment obligations; they just use different funding approaches.

There is no basis for the Government's suggestion that a contrary conclusion should be conjured out of the ACA's "framework." *See* Govt. Br. at 15–18. No qualifier or condition is attached to Section 1402's obligating language. Nor does the Government explain how a permanent appropriation for premium-subsidy tax credits could support an inference that the money-mandating language in the ACA's separate CSRs section should be set aside as inoperative. The two programs' mere placement in successive sections under the same subpart is no justification for such a radical departure from the plain language of the statute and the prevailing rules of statutory construction.

The broader context further undermines the Government's proposed inference. Income-tax refunds have been permanently appropriated since long before the ACA was enacted. *See* 31

U.S.C. § 1324. When Congress chose in Section 1401 to subsidize individual health-coverage premiums through a refundable income-tax credit, applying the same permanent appropriation made sense. No similar circumstance existed for the CSR payments required by Section 1402. Following the normal route of enacting the payment obligation but leaving appropriations to the annual process would be unsurprising.[5] This arrangement does not begin to support the Government's extraordinary inference that the lack of a permanent appropriation cancels the payment obligation.

Finally, the structure of Section 1402 suggests that the payment obligation is *not* canceled by the permanent appropriation for Section 1401. The requirement that the Government "shall make" CSR payments is only a part of 42 U.S.C. § 18071's CSR regime. The rest of that section requires insurers to reduce the cost-sharing obligations for eligible insureds, and mandates that insurers pay the difference. There is no indication that *this* obligation is contingent on Congress appropriating funds. It would be bizarre and inequitable if Congress had intended to make § 18071's provisions optional for the Government, but obligatory for insurers.

In sum, the appropriations difference between Sections 1401 and 1402 is not, as the Government says, "conspicuous,"[6] Govt. Br. at 18, but rather the expected result from the fact that each section describes a different program. Although the CSR and premium tax credit programs "work together" to make healthcare more affordable, *California v. Trump*, 267 F. Supp. 3d 1119, 1122–23 (N.D. Cal. 2017), they are not the same program. The CSR program reduces patients'

[5] This assumes, arguendo, the Government's contention that the permanent appropriation does not also cover CSRs. CHC does not concede that point. *See* n.3, *supra.*

[6] The Government tries to make this "conspicuous" difference seem "all the more compelling" by purporting that "the structural features of the Premium Tax Credits and Cost-Sharing Reductions subpart . . . allow issuers to use advance payments of premium tax credits to recoup unfunded CSR costs." Govt. Br. at 18. However, the statutes do not structure the tax credits as a "recoupment" of CSR costs, so this characterization of the statutes is misleading. *See* Section I.D, *infra*.

out-of-pocket expenses after they incur costs for healthcare, while the premium tax credits lower the cost of the premium when an insured buys health insurance in the first place. *Id.* The two programs come into play at different times, and one is a tax credit while the other is not. *Id.*

C. Lack of an Appropriation Does Not Deprive This Court of Jurisdiction.

The Government stretches even further to argue that the alleged lack of appropriation means there is no cause of action for missing CSR payments at all. Govt. Br. at 20–22. The Government's basis for this argument is the same as for its other statutory arguments. It claims that, because Congress made a "decision not to fund [CSR] payments," it must not have intended to allow insurers to sue to collect those payments, *id.* at 20, and so the Judgment Fund should not become a "cumbersome backdoor" CSR appropriation, *id.* at 3. This argument fails for the same reasons as the Government's other contentions, and more.

The Government is wrong to suggest that, even if a statute mandates government payments, this Court cannot enforce it without an additional and separate inquiry whether "Congress intended to provide a damages cause of action." *Id.* at 20. The Federal Circuit expressly holds otherwise. There is only one relevant legal inquiry: whether the statute "is money-mandating," in the sense that "it can fairly be interpreted as mandating compensation for damages sustained as a result of the breach of the duties it imposes." *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005) (en banc) (quoting *United States v. Mitchell*, 463 U.S. 206, 217 (1983)). A "determination that the source is money-mandating shall be determinative both as to the question of the court's jurisdiction and thereafter as to the question of whether, on the merits, plaintiff has a money-mandating source on which to base his cause of action." *Id.* For the reasons explained above and in CHC's moving brief, Section 1402 plainly is money-mandating. That establishes this Court's jurisdiction, the existence of a cause of action, and CHC's entitlement to relief on the merits.

To the extent the Government is arguing that the lack of an appropriation means that CHC has no cause of action and this Court has no jurisdiction (Govt. Br. at 20, 22), it is rehashing an issue that Judge Kaplan has already decided against it. *See Mont. Health*, 139 Fed. Cl. at 217 (Kaplan, J.) (finding jurisdiction under the Tucker Act over a claim for monetary relief under Section 1402); *Sanford Health*, 2018 WL 4939418, at *4–5 (Kaplan, J.) (same). The Federal Circuit's discussion of jurisdiction in *Moda* also supports the conclusion that there is a cause of action and a damages remedy available here. Pl. Br. at 17.

Finally, to the extent the Government argues that the non-appropriation for CSRs also cuts off the availability of the Judgment Fund, it is once again wrong. A defendant's inability or unwillingness to pay a judgment does not absolve it from liability. As the Government concedes, "[t]he existence of th[e Judgment Fund] has no bearing on whether a judgment may be entered in the first place." Govt. Br. at 22–23. This Court's role is to determine the liability of the Government for legal obligations it fails to honor, and to enter judgment accordingly. How a judgment gets paid is a separate question, although the Judgment Fund exists to satisfy monetary judgments against the Government that are not otherwise funded. *See* 31 U.S.C. § 1304(a); *Slattery v. United States*, 635 F.3d 1298, 1302–03 (Fed. Cir. 2011) ("Congress made periodic general appropriations for payment of the judgments of the Court of Claims . . . by a standing appropriation that created a Judgment Fund to pay all Court of Claims judgments for which a specific appropriation did not exist . . . ."); Defendants' Memorandum in Support of Their Motion for Summary Judgment at 20, *U.S. House of Reps.*, 185 F. Supp. 3d 165 (No. 14-cv-01967-RMC), 2015 WL 9316243 (Government noting that "mere absence of a more specific appropriation is not necessarily a defense to recovery from that Fund").

* * *

To sum up: the Government posits a system where all federal payment obligations are created by appropriations bills, and only by appropriations bills. Under its reasoning, any other language in a statute—"shall pay," "must pay," "will be solemnly obligated to pay"—creates no obligation that this Court (or any court) can enforce. That is not the system that our constitutional tradition has established. Under the long-established legal principles that govern here, Congress *can* create payment obligations independent of appropriations.

And Congress did that in the CSR statute. In the end, there is no need to infer congressional intent from any alleged omission because the words of the statute itself establish Congress's intent to make CSR payments obligatory.

D. Insurers' Ability to Raise Premiums in 2018 Cannot Preclude Government Liability.

The Government additionally argues that insurers should not be able to sue the Government for failing to make CSR payments because insurers can raise their premiums instead, and the Treasury will somehow effectively pay part of the increase in the form of higher premium tax subsidies. Govt. Br. at 21. This is wrong on both the law and the facts. Legally, the Government cannot explain why the possibility of raising rates should negate Section 1402's command that the Government "shall make" CSR payments. Factually, the Government oversimplifies the process of raising rates, which was impossible for coverage year 2017, which is intensively regulated at the state level, and which can cause other effects that make matters worse for insurers.

1. The Possibility of Raising Premiums in 2018 Does Not Make CSR Payments Optional for the Government.

Whenever a business suffers a major loss, raising prices is one way it may try to deal with the damage. Of course, if the loss was caused by a customer's wrongful conduct and that customer wants to buy the business's products in the future, it too will have to pay the increased prices. But

it would be absurd if that allowed the customer to avoid liability for its wrong by protesting about "double payment." Yet that is essentially the Government's position here.

The text of Sections 1401 and 1402 confirms the error in the Government's argument. Nothing in those provisions conditions CSR payments on any particular level of insurance premiums or tax subsidies. Providing CSRs to insureds and receiving "payments to the issuer equal to the value of the reductions" from the Government, 42 U.S.C. § 18071(c)(3)(A), is nowhere made contingent on an insurer's not receiving other or greater funds from the Government through premium tax credit payments. *See* 26 U.S.C. § 36B; 42 U.S.C. §§ 18071, 18082. These are two separate programs, each with their own statutory section, requirements for eligibility, and methods of calculating the amount due. They do not, and cannot properly be considered to, offset each other. CHC receives amounts due to it as calculated and defined by the premium tax credit statute in 26 U.S.C. § 36B, and CHC here only seeks to receive the amounts due to it under the separate CSR statute in 42 U.S.C. § 18071.

The Government's reliance on the denial of a preliminary injunction in *California v. Trump* is misplaced. *See* Govt. Br. at 21. The district court there noted that, with some insurers having raised their premiums for 2018, the Government would be paying more in tax credits than it would have in CSR payments. *California*, 267 F. Supp. 3d at 1139. But this statement is not in the context of a dispositive motion as to liability. It is not even in a discussion of likelihood of success on the merits—it is in the court's analysis of irreparable harm, balance of hardships, and the public interest. *See id.* What that court determined to be in the public interest regarding a temporary injunction does not have any bearing on the legal question of whether the Government has an obligation to make CSR payments under the statute. Indeed, in that same opinion the California court bluntly observed, "[T]he Affordable Care Act requires the federal government to pay

insurance companies to cover the cost-sharing reductions. The federal government is failing to meet that obligation." *Id.* at 1133. The *California* court did not transform premium tax credit payments into "offsets" for CSR payments.

Moreover, this Court has already examined a purported relationship between CSR payment obligations and receiving premium tax credit payments, like that advanced by the Government here, and found no such relationship. *Common Ground Healthcare Coop. v. United States*, 137 Fed. Cl. 630, 642–44 (2018) (Sweeney, C.J.). Addressing the Government's argument regarding the superiority requirement for class certification, the Court noted a "lack of cited authority supporting the availability of such an offset," *id.* at 644, and that "defendant does not identify any statutory provision permitting the government to use premium tax credit payments to offset its cost-sharing reduction payment obligations (even if insurers intentionally increased premiums to obtain larger premium tax credit payments to make up for lost cost-sharing reduction payments)," *id.* at 643; *see also* Govt. Br. at 21 (citing no authority for the proposition that receiving increased tax credit payments as a result of increased premiums is an "offset" for or "recoupment" of CSR payments). This Court also addressed the Government's reliance on *California v. Trump*: "Defendant's reliance on that decision for this proposition is misplaced. . . . [N]owhere in its decision does the district court hold that the government's liability for cost-sharing reduction payments is lessened or eliminated by the government making larger premium tax credit payments to insurers." *Common Ground*, 137 Fed. Cl. at 643; *see also Mont. Health*, 139 Fed. Cl. at 221 ("There is no evidence in either the language of the ACA or its legislative history that Congress intended that the statutory obligation to make CSR payments should or would be subject to an offset based on an insurer's premium rates."). The same reasoning applies here.

2. Raising Premiums Was Impossible for 2017 and Is Complex with Unknown Impacts in 2018.

No adjustment of premiums for coverage year 2017 was possible. The premiums for 2017 were locked-in in late 2016 and could not have been changed. Pl. Br. Janda Decl. ¶ 10. Thus, this Government argument is inapplicable to its liability for the CSR payments it failed to make in the final three months of 2017.

For 2018, even if premiums increased, that does not change the Government's statutory obligation to make CSR payments. The Government remains liable for its failure to make those payments. *See Mont. Health*, 139 Fed. Cl. at 221 ("The Court concludes, therefore, that premium rates have no bearing on whether § 1402 created a statutory obligation to pay insurers compensation for the cost-sharing reductions they implemented.").

Not only is there no basis in the statutes or case law to support erasing the obligation to make CSR payments based on whether insurers were allowed to raise premiums for 2018, but the Government's argument ignores the realities of premium rate-setting. Rate-setting is a multi-factor process taking into consideration, among other things, the health and risks of potential insureds, cost of care, funds available from other entities (including Government CSR payments, among others), the competitive landscape, and the impact of rate changes on market share. Moreover, insurers are subject to state regulation of rates, Govt. Br. at 9–10, adding an independent third-party actor to the process of rate-setting. *See Mont. Health*, 139 Fed. Cl. at 220–21. There is no assurance that raising premiums will alleviate the lack of CSR payments because premiums and plan enrollments are influenced by a multitude of factors, including state actors whose decisions are not controlled by Congress, as well as competitive and market factors beyond the insurer's control. An individual insurer could end up in a worse position due to premium changes. There is no way to know in advance, or across-the-board for every insurer, whether or to what extent rate

changes would alleviate lost CSR payments. As a result, there is no basis to infer that Congress must have intended raising premiums (and not Tucker Act claims) to be the proper remedy for the Government's failure to make CSR payments.

As discussed *supra* at Section I.D.1, strong legal reasons exist to conclude that 2018 premium changes are also irrelevant to damages in this case, no matter their impact on an insurer's bottom line. But at most, they are relevant only to quantum. And their actual economic impacts involve factual questions that cannot be resolved on the pending motions. They cannot support dismissal of CHC's claims or prevent summary judgment on the Government's liability.

II. The QHP Issuer Agreement Is a Contract that Obligates the Government to "Recoup or Net Payments" to CHC, and the Government Has Breached That Promise.

A. It Is Undisputed that the Parties Are Bound by the QHP Issuer Agreement.

The Government does not dispute the existence of express, binding contracts between it and CHC, in the form of QHP Issuer Agreements for 2017 and 2018. The Government raises no argument that any of the elements for a contract—mutual intent to contract, offer and acceptance, consideration, and execution or ratification by a Government official with actual authority to bind the United States—are missing in this case. *See* Govt. Br. at 23–24. Moreover, CHC has demonstrated that all of these elements are satisfied. *See* Pl. Br. at 23–26. The only dispute here is about the obligation that the contract language imposes on the Government, and whether it has been breached.

B. The Government Misconstrues Its Contractual Promise by Ignoring the Operative Language.

The QHP Issuer Agreement requires the Government to make CSR payments in a section entitled "CMS Obligations," which provides that the Government "will recoup or net payments due to [CHC] against amounts owed to CMS by [CHC] . . . including . . . advance payments of CSRs . . . ." Pl. Br. at 22, 24 (quoting Contract § III.b). The Government fails to offer any analysis

of that language and whether it has been breached. *See* Govt. Br. at 23. Instead, the Government side-steps this language and claims that its only obligation is "to reconcile payments." *Id.* The Government offers no explanation why its obligation under the contract does not include "recoup[ing] or net[ting] payments . . . including . . . advance payments of CSRs," as the contract states.

The Government's interpretation cannot be squared with the plain language, and "[t]he plain language of the contract will be viewed as controlling if it is unambiguous on its face." *Kogan v. United States*, 112 Fed. Cl. 253, 264 (2013) (citing *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1040–41 (Fed. Cir. 2003) (en banc)). The full contractual provision reads, "As part of a monthly payments and collections reconciliation process, CMS will recoup or net payments due to [CHC] against amounts owed to CMS by [CHC] in relation to offering of QHPs . . . , including the following types of payments: . . . advance payments of CSRs . . . ." Pl. Br. at 22, 24 (quoting Contract § III.b). The word "reconciliation" that the Government attempts to transform into the main verb and central concept of this contract provision appears only in an introductory clause to the main sentence and merely gives shape to a monthly "payments and collections" process within which CSR payments, among others, will be made. "[W]ill recoup or net payments" is the language that creates the obligation in this provision—an obligation to make or net payments owed to CHC of the types named in the contract, which include CSRs. The Government has not netted any CSR payments due to CHC since September 2017, thereby breaching this contractual obligation.

The recitals at the opening of the contract serve to strengthen the contractual payment obligation. They specify that "[i]t is anticipated that periodic . . . advance payments of CSRs . . .

will be due between CMS and [CHC]."[7] Pl. Br. at 22–23 (quoting Contract 1, ¶ 3). This language reinforces that the contract encompassed advance payments of CSRs and the Government's obligation to make them.

Likewise, the monthly payments and collections reconciliation process described in the contract does not point away from a contractual obligation to make CSR payments to CHC, as the Government argues. Rather, that process necessitates making payments, or netting them as an offset to amounts due from CHC. CSR payments are enumerated as one of the types of payments to be made. Contract § III.b ("the following types of *payments*: . . . advance *payments* of CSRs" (emphasis added)). The contract requires a "*payments* and collections reconciliation process," Contract § III.b (emphasis added). The "reconciliation process" must involve payments. That is consistent with the word "reconciliation" itself, as used in this accounting context. To reconcile is "to make consistent or congruous . . . to obtain agreement between (two financial records) by accounting for all outstanding items (~ a checkbook with a bank statement)." *Webster's Third New International Dictionary* 1897 (2002); *see also The American Heritage College Dictionary* 1163 (4th ed. 2002) ("to make compatible or consistent"); *id.* ("reconciliation" is "the act of reconciling"). To make its payments and collections consistent or congruent, the Government must balance the amounts due and amounts paid or collected. Only by making or netting such amounts can the Government "obtain agreement between [the] two financial records" of the amounts due and amounts paid or collected. Accordingly, the Government's detour into the word "reconciliation" does not help its case.

The QHP Issuer Agreement requires the Government to "recoup or net" CSR payments on a monthly basis, and it is undisputed that the Government has not done so since September 2017.

[7] CHC does not, contrary to the Government's assumption, assert that this recital serves as a separate, independent basis for breach of contract.

The Government has therefore breached its obligation to make CSR payments under the QHP Issuer Agreements.

III. The Government Entered into, and Breached, an Implied-in-Fact Contract to Make CSR Payments to CHC.

A. The Government Indicated an Intent to Enter into a Contract.

The Government relies on the idea that the CSR statute "do[es] not speak in terms of contract," but it cites no authority for the proposition that to have an implied-in-fact contract, a statute or regulation must speak in such terms. *See* Govt. Br. at 25. Rather, *Moda* stated only that the absence of a "statement by the government evinc[ing] an intention to form a contract" preserves the presumption that the Government did not intend to form a contract. 892 F.3d at 1330; *accord Hanlin v. United States*, 316 F.3d 1325, 1330 (Fed. Cir. 2003) (focusing on "language in the statute or the regulation that indicates an intent to enter into a contract"). Here, however, the Government made statements evincing an intention to form a contract. Pl. Br. at 27–28. Among other things, the CSR statute's "shall" language makes an explicit promise sufficient to justify CHC's understanding that performance of the obligations of a QHPI would conclude the bargain. *See Baker v. United States*, 50 Fed. Cl. 483, 493 (2001) ("[W]here a plaintiff claims a contractual obligation on the part of the Government stemming solely from a statute or regulation, the requirements of mutuality of intent to contract and lack of ambiguity require that the statute or regulation make an explicit promise—sufficient to justify another person in understanding that his assent to that bargain will conclude it.").

Radium Mines dictates the outcome here, *see* Pl. Br. at 28–29, and the Government does not offer any analysis of why it should not, *see* Govt. Br. at 25–26. This Court said that the "key" to *Radium Mines* "is that the regulations at issue were promissory in nature." *Baker*, 50 Fed. Cl. at 490 (discussing *N.Y. Airways*, 369 F.2d 743, and *Radium Mines, Inc. v. United States*, 153 F. Supp.

403 (Ct. Cl. 1957)). The *Radium Mines* decision was not based on the regulation's express reference to a contract; instead, it was based on the promissory nature of regulations, and here, the promissory nature of the CSR statutes, regulations, and QHP Issuer Agreements requires a similar outcome.

The Government further ratified the agreement by its subsequent performance: it made CSR payments to CHC for 45 straight months. Pl. Br. 25–26, 29. "Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, *any course of performance accepted or acquiesced in without objection* is given great weight in the interpretation of the agreement." *Metro. Area Transit, Inc. v. Nicholson*, 463 F.3d 1256, 1260 (Fed. Cir. 2006) (emphasis in original) (quoting Restatement (Second) of Contracts § 202(4)); *see also Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1326 (Fed. Cir. 1997) (quoting *Hercules Inc. v. United States*, 516 U.S. 417, 424 (1996)) ("An implied-in-fact agreement must be 'founded upon a meeting of the minds, which . . . is inferred, as a fact, from conduct of the parties showing . . . their tacit understanding.'"). Likewise, for that same time period and ever since, the Government understood and accepted that CHC would provide CSRs to eligible insureds, further confirming that the parties believed themselves to be obligated to perform the duties of the full CSR program as outlined in the ACA.

The Government's statements in the CSR statutes and regulations, and its conduct during the course of the CSR program, establishes the Government's intent to contract and the "meeting of the minds" to create an implied-in-fact contract.

B. The Secretary of HHS Had Actual Authority to Contract for Making CSR Payments.

The Government also argues that there was no actual authority for a government representative to contract to make CSR payments, Govt. Br. at 26–27, but this ignores the Secretary of HHS's authority regarding CSR payments and the ACA generally. Authority is 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) (citation omitted). Section 1402 states that the Secretary "shall" make CSR payments, 42 U.S.C. § 18071(c)(3)(A), and the Secretary is generally responsible for administering the ACA, *see* ACA Sections 1301(a)(1)(C)(iv), 1302(a)–(b), 1311(c)–(d); *see also* 42 U.S.C. § 18082(a) ("The Secretary shall establish a program under which . . ."). The language of Section 1402 specifically and the ACA generally gives at least implied, if not express, authority to contract, as entering into contracts to implement the CSR program is an integral part of the Secretary's duties in implementing the ACA. Additionally, the Secretary had actual authority to contract, as agency heads have contract-making authority "by virtue of their position." FAR 1.601(a).

The Government further argues that budget authority is required, Govt. Br. at 27,[8] but the ACA sections outlined above give such authority by explicitly authorizing CSR payments, so the Secretary is "authorized by law" under the ACA to make these payments to insurers. *See* 31 U.S.C. § 1341(a)(1)(B).

[8] The Federal Circuit's analysis of the implied contract claim in *Moda* did not address the element of actual authority. *See* 892 F.3d at 1329–30. In the underlying decision, Judge Wheeler of this Court agreed with the insurer that the Secretary of HHS had actual authority to contract on the Government's behalf to make risk corridors payments. *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 465 (2017).

C. The Government's Preclusion Argument Undermines Its Argument Against an Express Contractual Obligation to Make CSR Payments.

The Government contradicts itself when addressing the import of the QHP Issuer Agreements. When addressing CHC's express contract claim, the Government says that the Agreements do not include any contractual obligation to make payments, Govt. Br. at 23, but when addressing CHC's implied contract claim, the Government says that because the QHP Issuer Agreements deal with that same subject matter, the implied contract claim is precluded, Govt. Br. at 25, 27–28. Either these agreements include a provision requiring CSR payments—in which case, the Government is liable for breach of an express contract—or they do not include a provision on that subject—in which case, there can be an implied contract, since the subject matter of the implied contract would be outside the purview of the express contract. "[T]he 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) (quoting *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002)).

CHC contends that the QHP Issuer Agreements *do* expressly provide for and obligate the Government to make CSR payments, but if the Government's position on that point is accepted, then by extension the QHP Issuer Agreements do not deal with the subject matter of CSR payments. The Government itself described the terms of these Agreements as "establish[ing] the relevant contractual *parameters of plaintiff's offering* of QHPs . . . , and those parameters required *only* that plaintiff meet certain data transmission and security requirements before it could participate . . . ." Govt. Br. at 27–28 (emphasis added). Under this (erroneous) characterization of the Agreements, they are "entirely unrelated" to the Government making CSR payments, leaving an implied-in-fact contract available. The Government cannot have it both ways.

CONCLUSION

As Abraham Lincoln said, "It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same, between private individuals." The Court should render justice here by granting summary judgment in favor of CHC as to liability on all counts and denying the Government's motion to dismiss.

Dated: November 30, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2018, a copy of the foregoing Plaintiff's Reply in Support of Its Motion for Summary Judgment and Opposition to Defendant's Cross-Motion to Dismiss was filed electronically with the Court's Electronic Case Filings (ECF) system. I understand that notice of this filing will be sent to all parties by operation of the Court's ECF system.

s/ William L. Roberts
William L. Roberts