IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NORIDIAN MUTUAL INSURANCE COMPANY, D/B/A BLUE CROSS BLUE SHIELD OF NORTH DAKOTA,	)	
Plaintiff,	)	
v.	)	No. 18-01983-MBH Senior Judge Horn
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND CROSS-MOTION FOR SUMMARY JUDGMENT
AND MEMORANDUM OF LAW IN SUPPORT

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Plaintiff Blue Cross Blue Shield of North Dakota ("Plaintiff" or "BCBSND"), respectfully moves this Court for summary judgment on liability on both Counts I and II of its Amended Complaint (ECF No. 19) pursuant to Rule 56 of this Court's Rules ("RCFC") and opposes the Defendant's Motion to Dismiss (ECF No. 13).[1] Count I challenges the Government's violation of its obligation to make full advance cost-sharing reduction ("CSR") payments to BCBSND as required under the money-mandating CSR provisions under Sections 1402 and 1412 of the Patient Protection and Affordable Care Act ("ACA")[2] and implementing federal regulations. Count II alternatively seeks recovery for the Government's breach of its implied-in-fact contract to make full CSR payments to BCBSND. For the reasons demonstrated below, BCBSND has stated valid claims for relief sufficient to withstand Defendant's motion to dismiss and Plaintiff is entitled to summary judgment on liability on Counts I and II as a matter of law.

INTRODUCTION

Congress passed the ACA in 2010 in a "dramatic overhaul of the nation's healthcare system." *Moda Health Plan v. United States,* 130 Fed. Cl. 436, 441 (2017), *rev'd on other grounds*, 892 F.3d 1311 (Fed. Cir. 2018), cert. petition filed Feb. 4, 2019. The ACA "created a tectonic shift in the insurance market," which this Court recognized, "drastically enlarged the pool of eligible insurance purchasers," and "prohibited insurers from denying coverage or setting

[1] Defendant's Motion to Dismiss sought dismissal of, in addition to the other counts, Count III, the Takings claim. Pursuant to the Court's Order of March 1, 2019, Plaintiff filed an Unopposed Motion to Voluntarily Dismiss Count III of its Complaint on March 14, which the Court granted on March 15. Pursuant to the Court's March 15 Order, Plaintiff then filed an Amended Complaint on March 22, 2019 to remove Count III. Aside from the removal of references to Count III and reflecting Plaintiff's new name and case caption, and stating that it seeks to recover CSR damages owed to Plaintiff from October 12, 2017, through the date of entry of judgment, the Amended Complaint is in all other respects identical to the original complaint filed on March 9, 2018.

[2] Pub. L. 111-148, 124 Stat. 119 (2010).

increased premiums based on a purchaser's medical history." *Id*. at 442. "Central to the Act's infrastructure was a network of 'Health Benefit Exchanges' ("Exchanges") on which insurers would offer Qualified Health Plans ("QHPs")" to provide uninsured and underinsured individuals with access to the newly-created health insurance exchanges. *Id*. at 441; *see also Moda Health Plan v. United States*, 892 F.3d 1311, 1314 (Fed. Cir. 2018). The ACA included "a series of interlocking reforms designed to expand coverage in the individual health insurance market." *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). One of these reforms, the ACA's Cost-Sharing Reduction ("CSR") program enacted in section 1402 of the Affordable Care Act, 42 U.S.C. § 18071, was specifically aimed at ensuring that low income individuals had access to affordable insurance coverage and healthcare.

Under the CSR Program, in Sections 1402 and 1412, Congress expressly mandated that the Treasury Secretary "shall make periodic and timely payments" to insurers in advance that are "equal to the value of the [cost sharing] reductions" insurers are required to make to individual consumers. *See* 42 U.S.C. §§18071(c)(3), 18071(a)(2), 18082(c)(3). The cost sharing reductions offset eligible consumers' costs through reduced out-of-pocket expenses, such as deductibles, copayments, and coinsurance paid by individuals. *See* 42 U.S.C. §§18022(c)(3)(A), 18071(c)(2); *accord* 45 C.F.R. §§ 155.305(g), 156.410(a). "[T]he ACA, in turn, provides a mechanism to compensate insurers for the cost of making these reductions." *Montana Health Co-Op v. United States*, 139 Fed. Cl. 213, 215 (2018) (citing Section 1402) (2018). In short, "[t]he premium tax credits and the cost-sharing reductions work together: the tax credits help people obtain insurance, and the cost-sharing reductions help people get treatment once they have insurance." *California v. Trump*, 267 F. Supp. 3d 1119, 1123 (N.D. Cal. 2017).

There is no dispute that Congress created an unambiguous mandatory "shall" pay obligation on the Government in Sections 1402 and 1412 to timely make the full advance CSR

payments owed to QHPs each month. 42 U.S.C. § 18071(c)(3)(A); 42 U.S.C. § 18082(c)(3); 45 C.F.R. § 156.430(b)(1). In fact, beginning in January 2014, the Government actually made all of the required advance monthly CSR payments in full to all eligible QHPs, including BCBSND, for 45 consecutive months without fail. *See* Am. Compl. ¶¶ 35, 47, 58; Am. Compl. Ex. 02. Then, in October 2017, the Trump Administration abruptly announced that it would no longer make any further CSR payments citing a sudden lack of available appropriations. *See* Dan Mangan, *Obamacare bombshell: Trump kills key payments to health insurers*, CNBC, Oct. 12, 2017, Am. Compl. Ex. 17.

There is no dispute that BCBSND agreed to become a QHP and developed QHPs on the North Dakota ACA Exchange in 2013 and began offering QHPs on that Exchange each month since January 2014. Am. Compl. ¶¶ 40-43, Am. Compl. Exs. 07-09. There is also no dispute that each month since January 2014, BCBSND has made—and continues to make—all required offsetting cost-sharing reductions to eligible members to reduce their costs as required by Section 1402. *See* Am. Compl. ¶¶ 85-89. The Government's refusal to pay BCBSND the advance CSR payments owed each month is a material breach of the Government's statutory, regulatory and contractual obligations.

The Government's asserted excuse for failing to make the required CSR payments, a lack of appropriations, was rejected by the Federal Circuit in *Moda Health Plan, Inc. v. United States*, where the Court reaffirmed long-standing precedent and held that a similar "shall pay" obligation under the ACA's risk corridors program was "created by the statute itself," and was "unambiguously mandatory" even though "it provided no budgetary authority to the Secretary of HHS and identified no source of funds for any payment obligations beyond payments in" from profitable insurers on the ACA Exchanges. 892 F.3d 1311, 1320-22 (Fed. Cir. 2018). The Federal Circuit confirmed in *Moda* that the ACA's statutory mandatory payment obligation

existed "independent of an appropriation to satisfy that debt," and further that an insufficiency of appropriations "does not…cancel [the Government's] obligations, nor defeat the rights of other parties." *Id.* at 1321 (quoting *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)).

Unlike the defenses it asserted in the risk corridors cases, however, here the Government cannot assert (and has not asserted) defenses based on supposed "budget neutrality" or subsequent acts of Congress to "suspend" its mandatory CSR payment obligations through passage of appropriations riders or any other Congressional action. *See Moda*, 892 F.3d at 1329; *see also Blue Cross & Blue Shield of Vermont v. United States*, No. 18-373C, ECF No. 14. Instead, the defense raised by the Government for failing to make the mandatory CSR payments owed under ACA Section 1402—a purported lack of appropriations—has been squarely rejected by the Federal Circuit analyzing a similar "shall pay" obligation under ACA Section 1342 where, as here, the Federal Circuit concluded there was no appropriation available to fund the mandatory statutory payment obligation. *Moda*, 892 F.3d at 1320-22.

The Defendant's "structural" and other arguments designed to evade statutory liability cannot overcome the plain language of Section 1402 or the binding and long-standing precedent cited by the Federal Circuit in *Moda* reaffirming that clear, unambiguous statutory payment obligations are "created by the statute itself," and are enforceable money-mandating obligations even if Congress "provide[s] no budgetary authority" and "identifie[s] no source of" payment in the statute. 892 F.3d 1311, 1320-22 (Fed. Cir. 2018). Similarly, the Defendant's insistence that to recover the past-due CSR payments owed, BCBSND must also demonstrate that Section 1402 included an express "damages remedy," ignores long-standing precedent confirming that plaintiffs need *not* establish such a separate requirement to recover damages under the Tucker Act. *See, e.g.*, *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 477 (2003).

In the six other CSR case that have been decided to date, three judges of this Court have each granted summary judgment on liability in favor of the plaintiff insurers (and denied the Government's motions to dismiss), that asserted statutory CSR claims under § 1402 virtually identical to those asserted here by BCBSND. *See Montana Health Co-Op v. United States*, 139 Fed. Cl. 213, 214 (2018) (appeal pending at No. 19-1302, Fed. Cir. 2018) (Kaplan, J.); *Sanford Health Plan v. United States,* 139 Fed. Cl. 701 (2018*)* (appeal pending at No. 19-1290, Fed. Cir. 2018) (Kaplan, J.); *Local Initiative Health Auth. for L.A. Cty. v. United States*, No. 17-1542C, 2019 WL 625446, at *1 (Fed. Cl. Feb. 14, 2019) (Wheeler, J) ("*L.A. Care*"); *Common Ground Healthcare Coop. v. United States*, No. 17-877C, 2019 WL 642892, at *13 (Fed. Cl. Feb. 15, 2019) (Sweeney, J.); *Cmty. Health Choice, Inc. v. United States*, No. 18-5C, 2019 WL 643011, at *20 (Fed. Cl. Feb. 15, 2019) (Sweeney, J.); *Maine Cmty. Health Options v. United States*, No. 17-2057C, 2019 WL 642968, at *18 (Fed. Cl. Feb. 15, 2019) (Sweeney, J.). Defendant asserts that it "disagrees" with these rulings, but makes no attempt to distinguish them, nor does Defendant provide the Court with any basis why it should *not* reject the identical arguments Defendant raises here that three other Judges of this Court have unanimously rejected in all six CSR decisions. Motion to Dismiss at 12-13.

Following the Federal Circuit's ruling in *Moda* and a "long" line of Supreme Court and Federal Circuit precedent, Judge Kaplan first examined and rejected all of the Defendant's arguments and held that "the government violated a statutory obligation created by Congress in the ACA when it failed to provide Montana Health its full cost-sharing reduction payments for 2017" and that "Congress's failure to appropriate funds to make those payments did not vitiate that obligation." *Montana Health Co-Op*, 139 Fed. Cl. at 214; *Sanford Health Plan*, 139 Fed. Cl. at 702. Judge Wheeler and Chief Judge Sweeney did the same. *See L.A. Care*, 2019 WL 625446, at *6-7; *Common Ground*, 2019 WL 642892, at *13; *Cmty. Health Choice*, 2019 WL

643011, at *20; *Maine*, 2019 WL 642968, at *18. This Court similarly should find the Government liable for its failure to pay BCBSND the advance CSR payments owed and grant summary judgment on liability in favor of BCBSND and against the Government for the same reasons articulated by Judges Kaplan, Sweeney and Wheeler in the six CSR decisions decided to date.

In addition, alternatively, this Court should find that the Government entered into an implied-in-fact contract with BCBSND and breached its promise to make advance monthly CSR payments to BCBSND to reimburse BCBSND for the cost-sharing reductions it was required to offer its eligible members each month. In each of the decisions of this Court addressing CSR implied-in-fact contract claims, Judge Wheeler and Chief Judge Sweeney granted summary judgment for the plaintiffs on implied-in-fact contract claims nearly identical to those asserted by BCBSND here. *See L.A. Care*, 2019 WL 625446, at *11-14; *Cmty. Health Choice*, 2019 WL 643011, at *15-19; *Maine*, 2019 WL 642968, at *14-18.[3] There is no dispute that the Government induced BCBSND to participate in the North Dakota ACA Exchange, in part, through such promised advance monthly CSR payments and that the Government received the benefits of BCBSND's participation on that Exchange since January 2014, expanding health insurance coverage for North Dakota residents, scores of whom previously were uninsured. There is also no dispute that the Government continues to require BCBSND to provide cost-sharing reduction offsets to all eligible members, even while the Government has reneged on its promise to make cost-sharing reduction payments to BCBSND. But it is well-established that

[3] Although the plaintiffs in *Montana Health Co-op* and *Sanford Health Plan* also argued that the Government alternatively breached an implied-in-fact contract, the Court did not reach that claim "in light of its favorable disposition of Montana Health's statutory claim." *Montana Health Co-Op*, 139 Fed. Cl. at 216 n. 4; *Sanford Health Plan*, 139 Fed. Cl. at 704 n. 4. The plaintiffs in *Common Ground* did not bring a breach of implied-in-fact contract claim. *Common Ground*, 2019 WL 642892.

the Government's lack of appropriations defense does not limit its contractual obligations. *See Salazar v. Ramah Navajo Chapter*, 132. S.Ct. 2181, 2189 (2012) ("[T]he 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."); *Molina Healthcare of California, Inc. v. United States*, 133 Fed. Cl. 14, 41 (2017).

Nor should this Court feel constrained by the Federal Circuit's decision in *Moda* to find an implied-in-fact contract here because the Court clearly did not analyze in *Moda* whether an implied-in-fact contract was formed in the context of the CSR program. As demonstrated below, BCBSND goes further than merely stating a valid implied-in-fact contract claim sufficient to withstand Defendant's motion to dismiss, BCBSND has established that the Government was contractually obligated, but failed, to make monthly CSR payments to BCBSND, an obligation that likewise is unaffected by a purported lack of appropriations.

Accordingly, the Court should deny the Defendant's motion to dismiss and find the Government liable and enter summary judgment in favor of BCBSND on Counts I and II of its Amended Complaint for violations of the mandatory advance CSR payment obligation in ACA Sections 1402 and 1412 and implementing regulations, and alternatively, for breach of an implied-in-fact contract. As Judge Wheeler recognized, BCBSND "should not be left 'holding the bag' for taking our Government at its word." *L.A. Care*, 2019 WL 625446, at *16. This Court also should hold the Government to its word and grant summary judgment for BCBSND.

STATEMENT OF THE ISSUES PRESENTED

1. Is the Government liable, under Count I, for its failure to meet its statutory and regulatory obligations to make CSR payments to BCBSND in 2017 and 2018, and to the present date, under the ACA Sections 1402 and 1412 and their implementing regulations?

2. Is the Government liable, under Count II, for breach of its implied-in-fact contract with BCBSND to make CSR payments to BCBSND in 2017 and 2018 and to the present date?

STATEMENT OF THE CASE AND UNDISPUTED FACTS

I. CONGRESS ENACTS THE ACA TO EXPAND HEALTH INSURANCE COVERAGE AND INCLUDES A COST-SHARING REDUCTION PROGRAM

Congress passed the ACA in 2010, with the goal of creating a series of "interlocking reforms designed to expand" the availability of health insurance nationwide for individuals who previously lacked access to the new marketplace. *King*, 135 S. Ct. at 2485. To achieve that goal, in the ACA Congress called for the creation of an Exchange in each State where individuals who wanted access to the marketplace could "compare and purchase insurance plans." *Id.* In addition to drastically enlarging the pool of eligible insurance purchasers with the ACA and expanding Medicaid eligibility, Congress provided subsidies to low-income insurance purchasers to help offset costs for health insurance premiums and out-of-pocket expenses for health care known as "cost-sharing" expenses (such as deductibles, co-pays, co-insurance, the annual limitation on cost-sharing, and similar expenses). *See* ACA §§ 1401, 1402, 1412; 45 C.F.R. § 156.430.

With respect to health insurance premiums, Section 1401 of the ACA amended the Internal Revenue Code by providing "premium tax credits" to eligible consumers (individuals who earn between 100% and 400% of the federal poverty level, and who satisfy additional criteria) to reduce their monthly health insurance premiums on ACA Exchange plans. *See* 26 U.S.C. § 36B (ACA § 1401).

Regarding cost-sharing expenses, Section 1402 of the ACA created the CSR program. Section 1402 mandates that, after being notified by HHS that a consumer is eligible for CSR discounts, a QHP "shall reduce" at least some portion of that consumer's out-of-pocket health care costs. 42 U.S.C. § 18071(a). Although Congress's design called QHPs, like BCBSND, to

deliver the CSR discounts directly to eligible consumers, Congress certainly did not intend for QHPs to bear the expense of the CSR discounts. Instead, Congress mandated in Sections 1402 and 1412 of the ACA that the Government "shall" fully pay QHPs in advance for those CSR discounts through advance CSR payments from the Government to QHPs, subject to a later reconciliation.

II. THE ACA'S COST-SHARING REDUCTION PROVISIONS AND IMPLEMENTING REGULATIONS REQUIRE THAT ADVANCE CSR PAYMENTS BE MADE TO INSURERS

In Section 1402, Congress authorized and expressly required that the Government "***shall*** make periodic and timely [CSR] payments" directly to QHPs, in an amount "***equal to*** the value of the" CSR discounts, to reimburse QHPs for the CSR discounts that QHPs are statutorily required to make to eligible customers. 42 U.S.C. § 18071(c)(3)(A) (emphasis added).

In addition, in Section 1412, Congress mandated HHS and Treasury to coordinate in providing CSR payments to QHPs in advance of the QHPs' providing mandatory CSR discounts to eligible consumers. *See* 42 U.S.C. § 18082(c)(3) ("Treasury ***shall*** make such advance [CSR] payment [to QHPs] at such time and in such amount as the [HHS] Secretary specifies ….") (emphasis added).

HHS echoed those statutory mandates in its implementing regulations, stating that QHPs "***will*** receive periodic ***advance*** payments" for their CSR discounts to eligible customers, calculated in accordance with other provisions of the subchapter that set forth CSR calculation methodologies. 45 C.F.R. § 156.430(b)(1)(emphasis added); *see also Montana Health Co-Op*, 139 Fed. Cl. at 215 (HHS' CSR regulations "provide, in pertinent part, that the 'issuer must ensure that an individual eligible for cost-sharing reductions . . . pays only the cost sharing required of an eligible individual for the applicable covered service.' 45 C.F.R. § 156.410(a)" and "that such insurers 'will receive periodic advance payments based on the advance payment

amounts calculated in accordance' with a regulatory formula." (citing § 156.430(b)(1)).

HHS further established a CSR reimbursement process for providing advance CSR payments and later reconciling those payments against CSR discounts. *See* 45 C.F.R. § 156.430; CMS 2016 CSR Manual at 6 n.9, Am. Compl. Ex. 02. HHS and CMS established a payment system under which the Government would make "monthly advance payments to issuers to cover projected cost-sharing reduction amounts and then reconcile those advance payments at the end of the benefit year to the actual cost-sharing reduction amounts." 78 FR 15409, 15486 (Mar. 11, 2013) (Final Rule), Am. Compl. Ex. 05. ("This approach fulfills the Secretary's obligation to make 'periodic and timely payments equal to the value of the reductions' under section 1402(c)(3) of the Affordable Care Act.").

Following implementation of the program, HHS continued to express its understanding that the ACA requires full advance monthly CSR payments be made to QHPs. *See, e.g.*, 79 FR 13743, 13805 (Mar. 11, 2014) (Final Rule), Am. Compl. Ex. 11 ("Section 1402(c)(3) … directs the Secretary to make periodic and timely payments to the QHP issuer equal to the value of those reductions."); Bulletin, CMS, *Timing of Reconciliation of Cost-Sharing Reductions for the 2014 Benefit Year* at 1 (Feb. 13, 2015), Am. Compl. Ex. 12 ("[t]he [ACA] requires [QHPs] to provide cost-sharing reductions to eligible enrollees in such [silver] plans, and provides for issuers to be reimbursed for the value of those cost-sharing reductions" by the Government); CMS 2016 CSR Manual at 6 & n.8 (Dec. 2016), Am. Compl. Ex. 02 (acknowledging that "periodic and timely payments equal to the value of [QHPs' CSR] reductions are required to be made to issuers … in advance" by the Government).

Congress has not amended or repealed Section 1402 or Section 1412 since enactment of the ACA, and Congress has never taken any legislative action regarding the Government's obligation to make advance CSR payments to QHPs.

III. BCBSND OFFERS QHPS AND REDUCED COST-SHARING FOR INSUREDS ON THE NORTH DAKOTA EXCHANGE IN RELIANCE ON MANDATORY CSR REIMBURSEMENTS

With this backdrop, and in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, BCBSND agreed to become a QHP beginning in CY 2014 and continuing through the present, and accordingly, BCBSND developed and established ACA plans and premiums and participated in and offered QHPs on the North Dakota ACA Exchange, including fulfilling its obligation to reduce cost-sharing payments for eligible enrollees. In September of 2016, 2017 and 2018 respectively, BCBSND executed QHP Issuer Contracts with CMS confirming its participation on the North Dakota ACA Exchange for CY 2017 through CY 2019. Am. Compl. ¶¶ 41-43; Am. Compl. Exs. 07-09.

Starting in January 2014, for 45 consecutive months until October 2017, the HHS and Treasury Secretaries – including those in the current Administration– made the Government's monthly advance CSR payments to QHPs, including BCBSND, as Congress required in the ACA and consistent with the Government's interpretation of the money-mandating payment obligations under the ACA. *See* CMS 2016 CSR Manual at 36, Am. Compl. Ex. 02 ("Payments to issuers for the cost-sharing reduction component of advance payments began in January 2014."). From 2014 through September 2017, the Government repeatedly relied on the ACA's permanent appropriation, codified at 31 U.S.C. § 1324, to fund the advance CSR payments.

IV. THE GOVERNMENT BREACHES ITS COST-SHARING REDUCTION PAYMENT OBLIGATIONS

On October 12, 2017, over a year after BCBSND executed its QHP Issuer Contract for 2017, the current Administration announced that the Government would no longer make CSR payments to QHPs. *See* Dan Mangan, *Obamacare bombshell: Trump kills key payments to health insurers*, CNBC, Oct. 12, 2017, Am. Compl. Ex. 17. An October 11, 2017 legal opinion signed by then-U.S. Attorney General Jeff Sessions and addressed to the Treasury Secretary and

HHS Acting Secretary concluded that Section 1401 premium tax credits and Section 1402 CSR reimbursement were two distinct programs and proclaimed that the permanent appropriation in Section 1324 that had been used to fund CSRs since inception of the program could only be used to fund Section 1401 premium tax credits. Am. Compl. Ex. 20. The next day, HHS and CMS issued a press release announcing that the agencies now believed that "Congress has not appropriated money for CSRs, and we will discontinue these payments immediately." Press Release, HHS & CMS, *Trump Administration Takes Action to Abide by the Law and Constitution, Discontinue CSR Payments* (Oct. 12, 2017), Am. Compl. Ex. 18. On the same day, HHS Acting Secretary Eric Hargan issued a letter to CMS Administrator Seema Verma, instructing that "CSR payments to issuers must stop, effective immediately. CSR payments are prohibited unless and until a valid appropriation exists." Letter from Eric Hargan, HHS Acting Secretary, to Seema Verma, CMS Administrator (Oct. 12, 2017), Am. Compl. Ex. 19; *see Maine*, 2019 WL 642968, at *5 (detailing Trump Administration's cessation of CSR payments).

Pursuant to the Administration's decision, HHS and Treasury have not made any of the mandatory advance CSR payments to QHPs, like BCBSND, in and after October 2017, nor has the Government made any mandatory advance CSR payments for the CY 2018 plan year, or to date. The Government has refused to pay the CSR amounts owed in violation of its statutory and contractual mandatory payment obligations.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a); *see, e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "Issues of statutory interpretation and other matters of law may be decided on motion for summary judgment." *Santa Fe Pac. R.R. Co. v. United States*, 294 F.3d 1336, 1340 (Fed. Cir. 2002); *see Wade v. United States*, 136 Fed.

Cl. 232, 250 (2018) (Horn, J.) (quoting *Santa Fe*). The Court in *Montana Health Co-Op* agreed that "the parties' cross-motions present a single, purely legal issue: whether the federal government had a statutory obligation to provide Montana Health with the cost-sharing reduction payments described in § 1402 of the ACA, notwithstanding the lack of appropriations to fund such payments." *Montana Health Co-Op*, 139 Fed. Cl. at 218; *see also Sanford Health Plan*, 139 Fed. Cl. at 706 "Whether a contract exists is a mixed question of law and fact," and "[c]ontract interpretation itself also is a question of law." *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998).

MOTION TO DISMISS STANDARD

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 sets forth "enough facts to state a claim to relief that is plausible on its face." *Bruhn Newtech, Inc. v. United States*, 129 Fed. Cl. 656, 666–67 (2016) (J. Horn) (quoting *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009)). "When deciding a case based on a failure to state a claim, the court 'must accept as true the factual allegations in the complaint.'" *Id.* at 667 (quoting *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1355 (Fed. Cir. 2011)). "A motion to dismiss will be denied unless it appear to a certainty that no possible set of facts could be proved to support plaintiff's claims." *Id.* (quoting *Am. Satellite Co. v. United States*, 20 Cl.Ct. 710, 712 (1990)).

ARGUMENT

I. TUCKER ACT JURISDICTION EXISTS OVER BCBSND'S CLAIMS

A. Count I

In Count I, BCBSND asserts that the United States breached a money-mandating statute, § 1402, and its implementing regulations in 45 C.F.R. § 156.430(b)(1). BCBSND has unquestionably satisfied the jurisdictional requirements under the Tucker Act. *See Roberts v. United States*, 745 F.3d 1158, 1161 (Fed. Cir. 2014). First, § 1402 and its implementing regulations are clearly money-mandating. *See Molina,* 133 Fed. Cl. at 27 (cataloguing cases). Second, as a QHP, BCBSND is a member of the class that Congress prescribed to receive CSR payments under the statute and regulations. The Court in *Montana Health Co-Op and Sanford Health Plan* held that the Court "has jurisdiction under the Tucker Act over [plaintiff's] claim for monetary relief under § 1402 of the ACA" and HHS implementing regulations, 45 C.F.R. § 156.430(b)(1), concluding that "[t]hese provisions supply money-mandating sources of law for purposes of establishing this Court's Tucker Act jurisdiction." *Montana Health Co-Op*, 139 Fed. Cl. at 217; *Sanford Health Plan*, 139 Fed. Cl. at 706 ("[t]he 'use of the word 'shall' generally makes a statute money-mandating.'" (citing *Greenlee Cty. v. United States,* 487 F.3d 871, 877 (Fed. Cir. 2007) (quoting *Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003)); *L.A. Care*, 2019 WL 625446, at *5 (concluding the Court has subject matter jurisdiction over the plaintiff's CSR statutory and implied-in-fact contract claims).

B. Count II

This Court unquestionably also has Tucker Act jurisdiction to hear BCBSND's breach of implied-in-fact contract claim. *See Moda*, 130 Fed. Cl. at 450-51 (finding Tucker Act jurisdiction to hear breach of implied-in-fact contract claim regarding risk corridors); *Marchena v. United States*, 128 Fed. Cl. 326, 331 (2016) (recognizing that a "low threshold requirement"

exists to establish jurisdiction over contract claims). A plaintiff claiming the Government has breached an implied-in-fact contract need only make a "non-frivolous *allegation* of a contract with the government." *Mendez v. United States*, 121 Fed. Cl. 370, 378 (2015) (quoting *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011)) (emphasis in original). In its Complaint, BCBSND alleges each of the elements of an implied-in-fact contract. *See, e.g.*, Am. Compl. ¶¶ 105-25. Plaintiff "need only make a 'non-frivolous allegation of a contract with the government,'" that is all that is required. *L.A. Care*, 2019 WL 625446, at *5 (the plaintiff has "sufficiently alleged the existence of an implied-in-fact contract, and, as such, the Court has subject matter jurisdiction").

II. COUNT I: BCBSND IS ENTITLED TO SUMMARY JUDGMENT ON LIABILITY FOR THE GOVERNMENT'S VIOLATION OF ITS STATUTORY AND REGULATORY OBLIGATIONS TO MAKE ADVANCE COST-SHARING REDUCTION PAYMENTS

A. The Statutory and Regulatory Obligation to Make Full Advance CSR Payments is Clear and Unambiguous

Section 1402 of the ACA mandates that, after being notified by HHS that a consumer is eligible for CSR discounts, a QHP "shall reduce" a portion of that consumer's out-of-pocket health care costs. 42 U.S.C. § 18071(a); *see Montana Health Co-Op,* 139 Fed. Cl. at 216 ("Pursuant to the cost-sharing reduction requirement, insurers offering health plans on the exchanges must reduce these enrollees' out-of-pocket costs for 'deductibles, coinsurance, copayments, or similar charges' by a specified amount. § 18071(a)(2); *id.* § 18022(c)(3)(A)."); *Sanford Health Plan*, 139 Fed. Cl. at 703 (same). In turn, the statute explicitly and unambiguously mandates that the Government fully reimburse QHPs for those CSR discounts through advance payments to the QHPs. Section 1402 authorizes and expressly requires that the Government "***shall*** make periodic and timely payments to the issue ***equal to*** the value of the reductions." 42 U.S.C. § 18071(c)(3)(A) (emphasis added); *see Montana Health Co-op*, at *2

(the ACA "states that insurers 'shall notify the Secretary [of Health and Human Services] of such reductions' and that 'the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions.' *Id.* § 18071(c)(3)(A)."). Section 1412 further requires HHS and Treasury to coordinate in providing CSR payments to QHPs in advance of the QHPs' provision of CSR discounts to eligible customers. *See* 42 U.S.C. § 18082(c)(3) ("Treasury ***shall*** make such advance [CSR] payment [to QHPs] at such time and in such amount as the [HHS] Secretary specifies ….") (emphasis added).

Congress's use of the word "shall" in Sections 1402 and 1412 clearly expressed its intent that advance CSR payments are a money-mandating obligation of the United States that the Government must make to QHPs, including BCBSND. *See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("The mandatory 'shall' … normally creates an obligation impervious to judicial discretion."); *Moda,* 892 F.3d at 1329 (finding "shall pay" directive in risk corridors section of ACA to be "unambiguously mandatory"); *Molina*, 133 Fed.Cl. at 36 (noting "mountain of controlling case law holding that when a statute states a certain consequence 'shall' follow from a contingency, the provision creates a mandatory obligation") (citations omitted). Judge Kaplan agreed that with respect to CSRs, "the statutory language clearly and unambiguously imposes an obligation on the Secretary of HHS to make payments to health insurers that have implemented cost-sharing reductions on their covered plans as required by the ACA." *Montana Health Co-Op*, 139 Fed. Cl. at 218; *Sanford Health Plan*, 139 Fed. Cl. at 706 (citing 42 U.S.C. § 18071(c)(3)(A)); *see also L.A. Care*, 2019 WL 625446, at *6 ("That [CSR] provision can only mean one thing: the Government must repay QHPs for their CSR expenses"); *Maine*, 2019 WL 642968, at *9 ("In short, the plain language, structure, and purpose of the [ACA] reflect the intent of Congress to require the Secretary of HHS to make cost-sharing reduction payments to insurers"); *Common Ground*, 2019 WL 642892, at *8; *Cmty.*

Health Choice, 2019 WL 643011, at *9. BCBSND has satisfied the requirements for payment from the Government under Sections 1402 and 1412 and the Government has a mandatory statutory obligation to pay the amounts owed to BCBSND.[4]

B. The Government's Appropriations Arguments Were Rejected in *Moda* and the Six CSR Cases Decided to Date and Must be Rejected Here

Despite the existence of this mandatory "shall make" language, Defendant argues, as it recently has in other CSR cases, including those before this Court, that there is no obligation to pay because there was not an appropriation to fund the CSR program. *See* Motion to Dismiss at 13-17; *Montana Health Co-Op*, 139 Fed. Cl. at 218; *Sanford Health Plan*, 139 Fed. Cl. at 706; *Blue Cross & Blue Shield of Vermont v. United States*, No. 18-373C, ECF No. 14 at 12-18; *L.A. Care,* No. 17-1542, ECF No. 26 at 13-17. This repeated and rejected argument ignores long-standing precedent and would eviscerate the meaning of a money-mandating statute.

Defendant supposes that *Moda* actually supports its theory that a failure to appropriate funds demonstrates that Congress did not intend to create a mandatory payment obligation. Motion to Dismiss at 17-18. Far from it. The three-judge panel of the Federal Circuit in *Moda* unanimously rejected this very argument in *Moda* in evaluating similar "shall pay" language in the risk corridors provision in Section 1342 of the ACA despite the fact that the Court found there was no appropriation available to fund the statutory obligation. Citing a well-established line of precedent, the Federal Circuit held that the "shall pay" language of Section 1342 was mandatory and created a binding obligation to pay.[5] *Moda,* 892 F.3d at 1320-22. Rejecting

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[4] Indeed, the Government expressly admitted in *House v. Burwell* that "The [ACA] requires the government to pay cost-sharing reductions to issuers. . . . The absence of an appropriation would not prevent the insurers from seeking to enforce that statutory right through litigation." Defendants' Memorandum in Support of Their Motion for Summary Judgment, *U.S. House of Reps. v. Burwell*, No. 1:14-cv-01967-RMC, ECF No. 55-1 at 20 (D.D.C. Dec. 2, 2015).

[5] With respect to the risk corridors payments at issue in *Moda*, the Federal Circuit held that although Section 1342 created an express obligation to pay, the payment obligation was later

Defendant's argument, the Federal Circuit acknowledged that "it has long been the law that the government may incur a debt independent of an appropriation to satisfy that debt[.]" *Id.* at 1321; *see also N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966) ("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."). The Court further explained that "the obligation is created by the statute itself, not by the agency. The government cites no authority for its contention that a statutory obligation cannot exist absent budget authority." *Moda,* 892 F.3d at 1322; *see also Collins v. United States*, 15 Ct. Cl. 22, 35 (1879) ("The liability, however, exists independently of the appropriation, and may be enforced by proceedings in this court.") (*see infra* at 24-25). The Defendant may "disagree" with the Federal Circuit's first holding in *Moda,* but it certainly cannot overcome this precedent to avoid liability for failure to make statutorily-mandated CSR payments. Motion to Dismiss at 18, n. 10.

The Federal Circuit recognized in *Moda* that Defendant's position conflicts with more than one hundred years of precedent. In *United States v. Langston*, the Supreme Court held that a statute fixing an official's salary could not be "abrogated or suspended by the subsequent enactments which merely appropriated a less amount" for the services rendered, absent "words that expressly, or by clear implication, modified or repealed the previous law." 118 U.S. 389, 393 (1886). The Court allowed plaintiff to recover as damages his salary payment that was mandated by law, but was not appropriated. *Id.* In *Langston*, "the government's statutory obligation to pay persisted independent of the appropriation of funds to satisfy that obligation."

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capped or suspended by Congress through its enactment of subsequent appropriations riders. *Moda*, 892 F.3d at 1322-29. That holding does not apply in this case, however, because no appropriations riders or any subsequent statute placed any limitations on the mandatory obligation to make CSR payments.

Moda, 892 F.3d at 1321 (describing *Langston*). As the Federal Circuit recognized in *Moda*, the Defendant's position that the absence of an obligation can be inferred from a lack of appropriation "would be inconsistent with *Langston*, where the obligation existed independent of any budget authority and independent of a sufficient appropriation to meet the obligation." *Id.* at 1322. The Court in *Montana Health Co-Op* and *Sanford Health Plan* agreed, finding that the Government's failure to make the statutorily-mandated CSR payments was similar to its failure to pay in *Langston*, where the Supreme Court held that "'a bare failure to appropriate funds to meet a statutory obligation could not vitiate that obligation because it carried no implication of Congress's intent to amend or suspend the substantive law at issue.'" *Montana Health Co-Op*, 139 Fed. Cl. at 220; *Sanford Health Plan*, 139 Fed. Cl. at 708 (quoting *Langston*, 118 U.S. at 394); *see also L.A. Care*, 2019 WL 625446, at *7-9 (observing that the Defendant's "interpretation is flatly inconsistent with over a century of case law" and concluding that "[t]his case fits squarely into the *Langston* lineage.").

As demonstrated below, the identical defenses the Defendant raises here have been considered and squarely rejected by three Judges in the six CSR cases decided to date. *Montana Health Co-Op*, 139 Fed. Cl. 213; *Sanford Health Plan*, 139 Fed. Cl. 701; *L.A. Care*, 2019 WL 625446; *Common Ground*, 2019 WL 642892; *Cmty. Health Choice*, 2019 WL 643011; *Maine*, 2019 WL 642968. Defendant "disagrees" with these rulings, but fails to makes any attempt to distinguish them or even to provide the Court with any basis not to follow the sound reasoning of each of the three Judges who have rejected the identical Government arguments in the six CSR cases decided to date. Motion to Dismiss at 12-13.

C. The Government's Obligation to Pay CSRs Exists Independent of Appropriations and has Not Been Capped or Suspended

Judge Kaplan correctly recognized that the Federal Circuit "broke no new ground" by holding in *Moda* that the statutory "shall pay" obligation was enforceable without a specific appropriation or "budget authority," because "the lack of appropriated funds was irrelevant to whether such an obligation was enforceable in this court." *Montana Health Co-Op,* 139 Fed. Cl. at 219*; Sanford Health Plan,* 139 Fed. Cl. at 707 (citing *Moda*, 892 F.3d at 1321 ("'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.")); *see also L.A. Care*, 2019 WL 625446, at *7 (concluding that "[c]onsistent with *Langston* and *Moda Health,* section 1402 created the Government's obligation to make CSR payments, and this requirement exists independent of an appropriation"); *Common Ground*, 2019 WL 642892, at *8 ("it is well settled that the government can create a liability without providing for the means to pay for it"); *Cmty. Health Choice*, 2019 WL 643011, at *9 (same); *Maine*, 2019 WL 642968, at *9 (same); *Slattery v. United States*, 635 F.3d 1298, 1303, 1321 (Fed. Cir. 2011) (en banc) (failure to appropriate funds did not absolve the government of its statutory obligation to pay amounts owed); *Greenlee Cty.*, 487 F.3d at 877 (a "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" (quotation omitted)); *N.Y. Airways*, 369 F.2d at 748 ("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.").

Further, as Chief Judge Sweeney keenly observed, "it would defy common sense to conclude that Congress obligated the Secretary of HHS to reimburse insurers for their mandatory

cost-sharing reductions without intending to actually reimburse the insurers." *Common Ground*, 2019 WL 642892, at *9; *Cmty. Health Choice*, 2019 WL 643011, at *10; *Maine*, 2019 WL 642968, at *10.

Unlike the risk corridors payments at issue in *Moda*, where the Federal Circuit found the payment obligation was later capped or suspended by Congress through its enactment of subsequent appropriations riders, *Moda*, 892 F.3d at 1322-29, here there undisputedly are no appropriations riders or any subsequent statute which place any limitations on the mandatory obligation to make CSR payments. *See* Motion to Dismiss at 22 (Defendant acknowledging that "unlike in *Moda,* Congress has not enacted subsequent legislation stating an intent to modify or repeal Section 1402").

As in *Langston*, with respect to CSRs, as Judge Kaplan observed "there was no relevant congressional action taken at all after the passage of the ACA. There have been no appropriations bills enacted that make reference to § 1402. All that exists is the payment obligation spelled out by the plain language of § 1402 and the 'bare failure to appropriate funds' that the Supreme Court found insufficient to establish the congressional intent necessary to vitiate a statutory payment obligation in *Langston*." *Montana Health Co-Op*, 139 Fed. Cl. at 220; *Sanford Health Plan*, 139 Fed. Cl. at 708; *L.A. Care*, 2019 WL 625446, at *9 ("Congress has not acted at all here; it passed no bills or riders appropriating funds or limiting appropriations for the CSR program").

D. Congress's Mere Failure to Appropriate Funds Does Not Evidence an Intent to Repeal the CSR Payment Obligation

Congress's mere failure to appropriate funds for CSR payments provides no evidence of an intent to repeal the CSR payment provision itself. On this, the controlling law is absolutely clear. *See*, *e.g.*, *Belknap v. United States*, 150 U.S. 588, 595 (1893) (Congress's "mere failure to

appropriate" is "not, in and of itself alone, sufficient to repeal the prior act"); *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1321-22 (Fed. Cir. 2018) ("'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.'") (quoting *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966)); *L.A. Care*, 2019 WL 625446, at 9 ("The [CSR] situation at hand exemplifies a 'bare failure to appropriate funds to meet a statutory obligation' which simply has no impact on the statutory commitment," citing *Moda Health,* 982 F.3d at 1323).

This rule against construing the failure to appropriate funds—or Congressional silence—as proof of intent to repeal is rooted in bedrock principles of statutory construction. First, the Supreme Court long has applied a robust presumption against construing statutes to impliedly repeal other statutes—"'the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable[,]'" *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141–42 (2001), and even then, only where the evidence of irreconcilability is "overwhelming[,]" *id.* at 137. This presumption "applies with even greater force" where "the claimed repeal rests solely upon an Appropriations Act[,]" *TVA v. Hill*, 437 U.S. 153, 190 (1978), and its focus is on the text Congress actually enacted, not provisions left on the drafting room floor. *See Langston*, 118 U.S. at 394 (implied repeal requires "words that expressly, or by clear implication, modif[y] or repeal[] the previous law"—"express words of repeal, or … such provisions as would compel the courts to say that harmony between the old and the new statute was impossible"); *L.A. Care*, 2019 WL 625446, at *8-9 (Recognizing that "[r]epeals by implication are not favored," citing *Langston,* and finding "[t]here has been no indication from Congress that it intended an about-face to its originally intended obligation. Section 1402's mandate to pay QHPs for their CSR related expenses therefore remains intact.").

Second, "'[c]ongressional inaction lacks persuasive significance' in most circumstances," *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (citation omitted), and it certainly "cannot amend a duly enacted statute." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) (citation and internal quotation marks omitted); *Common Ground*, 2019 WL 642892, at *10 n. 16 ("drawing inferences from congressional inaction can be highly problematic"). Third, it is "'strongly presumed that Congress will specifically address language on the statute books that it wishes to change[,]'" *Hymas v. United States*, 810 F.3d 1312, 1320 (Fed. Cir. 2016) (citation omitted), and silence plainly cannot be equated with a "specific[]" direction from Congress that it wishes to change an existing statute. "Congress does not [even] make 'radical—but entirely implicit—change[s]'" to statutes "through 'technical and conforming amendments'" it actually enacts, *Cyan, Inc. v. Beaver Cty. Employees Ret. Fund*, 138 S. Ct. 1061, 1071 (2018), much less through silence in the form of its mere failure to appropriate funds.

Finally, Congress is presumed to know the law, including the centuries-old interpretive rule that the failure to appropriate funds, without more, does not repeal substantive statutory provisions. *See Kirkendall v. Dep't of Army*, 479 F.3d 830, 846 (Fed. Cir. 2007) "[W]e 'presume congressional understanding of … interpretive principles[]" at the time of enactment") (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991)); *Aectra Refining & Mktg., Inc. v. United States*, 565 F.3d 1364, 1370 (Fed. Cir. 2009) ("Congress is presumed to enact legislation with knowledge of the law and a newly-enacted statute is presumed to be harmonious with existing law and judicial concepts.") (citation omitted). So when Congress fails to appropriate funds—without also enacting specific text that explicitly amends existing law—it is presumed not to be carrying out a repeal of that existing law, implied or otherwise. Accordingly, Congress's failure to appropriate funds and continued silence cannot be read to infer intent. *See*

Common Ground, 2019 WL 642892 at *10 (rejecting Defendant's reliance on congressional inaction, which it noted "in this case may be interpreted, contrary to defendant's contention, as a decision not to suspend or terminate the government's cost-sharing reduction payment obligation"); *Cmty. Health Choice*, 2019 WL 643011, at *11 (same); *Maine*, 2019 WL 642968, at *11 (same); *L.A. Care*, 2019 WL 625446, at *7 (finding "Congress' failure to appropriate money to fund the CSR program" has "no impact on the existence of this statutorily-imposed payment obligation").

E. The Appropriations Cases Upon Which Defendant Has Relied Are Inapposite or Support Plaintiff's Claims

In defending the Government's refusal to make required CSR payments, Defendant relies upon inapposite cases like *United States v. Mitchell*, 109 U.S. 146, 150 (1883), *Dickerson v. United States*, 310 U.S. 554, 561-62 (1940), and *United States v. Will,* 449 U.S. 200, 224 (1980), where Congress affirmatively limited existing appropriations owed through subsequent express language, but here there is no dispute that Congress never took *any* action whatsoever to restrict, limit, or otherwise abrogate Section 1402's mandatory shall pay obligation. Motion to Dismiss at 23; *see L.A. Care*, 2019 WL 625446, at *10 (distinguishing the *Mitchell*, *Dickerson* and *Will* line of cases and finding the CSR cases instead fit the *Langston* lineage because "Congress has not acted at all here"); *see also Maine*, 2019 WL 642968, at *11 (finding the CSR cases are "distinguishable from those relied upon by defendant" including *Mitchell, Dickerson* and *Will* that "concerned situations in which Congress made affirmative statements in appropriations acts that reflected an intent to suspend the underlying substantive law").

Defendant also relies on cases such as *Greenlee Cnty., Ariz. v. United States,* 487 F.3d 871, 874 (Fed. Cir. 2007) and *Prairie Cty., Mont. v. United States*, 782 F.3d 685 (Fed. Cir. 2015) to support its arguments, but those cases actually support BCBSND's claims. *See* Motion to

Dismiss at 21-22. In *Greenlee*, the Federal Circuit recognized that a "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" (quoting *N.Y. Airways, Inc.,* 369 F.2d at 748). The Court went on to explain that "in some instances the statute creating the right to compensation (or authorizing the government to contract) may restrict the government's liability or limit its contractual authority to the amount appropriated by Congress." *Greenlee*, 487 F.3d at 878. The Court noted that "the language 'subject to the availability of appropriations' is commonly used to restrict the government's liability to the amounts appropriated by Congress." *Id.* Because the Payment in Lieu of Taxes Act ("PILT") at issue in both *Greenlee* and *Prairie County* contained such limiting language – "Amounts are available only as provided in appropriation laws" – the Federal Circuit held in both cases that the plain language of the statute limited the government's liability for PILT payments to the amounts appropriated. *Id.* at 878, 881; *Prairie Cty.*, 782 F.3d at 690; *see also Maine*, 2019 WL 642968, at *9 (citing *Greenlee*, 487 F.3d at 878); *see also L.A. Care*, 2019 WL 625446, at *7 (distinguishing *Prairie County*, 782 F.3d at 689). It is undisputed, however, that that there is no such language in Section 1402, so *Greenlee* and *Prairie County* do not support the Defendant's arguments.

Although *Greenlee* and *Prairie County* involved circumstances where Congress already had appropriate some monies to fund the statutory obligation at issue, it is undisputed that in *Moda*, the Federal Circuit concluded that but for the passage of the later appropriations riders, the Government's "shall pay" statutory payment obligation in Section 1342 was binding and enforceable without, and irrespective of, any appropriation. *See Moda*, 892 F.3d at 1320-22; *see also Prairie Cty.*, 782 F.3d at 690 (absent "congressional intent to limit the government's

liability," a money-mandating statute "imposes a statutory obligation to pay the full amounts according to the statutory formulas regardless of appropriations by Congress.").

Moreover, Congress knew how to expressly limit its payment obligations in the ACA when it wanted to do so. Indeed, Congress in at least *four other sections* of the ACA did specifically limit its obligations to be "subject to the availability of appropriations" but did not with respect to CSR payments in Section 1402. *See, e.g.*, 42 USC Sec. 280k(a) ("The Secretary …shall, subject to the availability of appropriations, establish a 5-year national, public campaign…"); 42 U.S.C. § 300hh–31(a); 42 U.S.C. § 293k–2(e); 42 U.S.C. § 1397m–1(b)(2)(A); *see also L.A. Care*, 2019 WL 625446, at *8 (finding Congress, "[i]n at least four places in the ACA," made "payment for a program 'subject to availability of appropriations,'" and concluding "Congress knew how to condition payment on the presence or absence of an appropriation; it did so in other subsections but not in section 1402.").

F. The Defendant's "Structural" Comparison of Section 1401 And 1402 Is Irrelevant to Congress's Intent to Create A Mandatory Payment Obligation

The Defendant argues that because Section 1401 contains a permanent appropriation and Section 1402 does not, this somehow demonstrates that Congress did not intend to fund or make CSR payments. *See* Motion to Dismiss at 14-18. This argument fails for several reasons, all of which demonstrate that the difference in appropriation methodology in Sections 1401 and 1402 means nothing more than that Congress intended to fund the obligations differently, not that it did not intend to create an obligation in the first place.

First, Defendant's structural argument ignores and would negate the plain language of Section 1402, which, as explained above, contains an unambiguous "shall make" payment obligation. *See supra* at 16-17.

Second, whether or not a particular section of a statute contains a permanent appropriation has no bearing on whether an enforceable statutory payment obligation exists. As explained above, such a rule would conflict with more than a century of precedent which clearly holds that the absence of an appropriation does not negate an underlying obligation to pay. *See Langston*, 118 U.S. at 394; *Collins*, 15 Ct. Cl. at 35; *Ferris*, 27 Ct. Cl. at 546; *N.Y. Airways, Inc.*, 369 F.2d at 748; *Slattery*, 635 F.3d at 1303, 1321; *Moda*, 892 F.3d at 1321; *Montana Health Co-Op,* 139 Fed. Cl. at 219*; Sanford Health Plan,* 139 Fed. Cl. at 707*; L.A. Care*, 2019 WL 625446, at *7; *Common Ground*, 2019 WL 642892, at *8; *Cmty. Health Choice*, 2019 WL 643011, at *9; *Maine*, 2019 WL 642968, at *9.

Third, the fact that Section 1401 identifies a permanent source of funding for the tax credit created by that provision, but Section 1402 leaves the funding to future appropriations, is unsurprising and irrelevant to the Government's liability. Congress funded the tax credit in Section 1401 through the same appropriation that has long been used to fund various kinds of tax credits. The fact that Congress left the funding of the obligation in Section 1402, which is not a tax credit, to future appropriations is unremarkable and says nothing about the enforceability of Section 1402's mandatory payment obligation in this Court. Judge Kaplan agreed, and rejected the Defendant's identical argument in both *Montana Health Co-Op* and *Sanford Health Plan* concluding:

> 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. Its failure to establish a permanent funding mechanism for the CSR payments does not, as the government would have it, give rise to the implausible inference that Congress intended "to consign CSRs 'to the fiscal limbo of an account due but not payable.' " [Government Reply] at 8 (quoting *United States v. Will*, 449 U.S. 200, 224, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980)). To the contrary, the lack of a permanent funding mechanism suggests that when it enacted the ACA, Congress anticipated that the CSR payments it obligated the government to pay in § 1402 would ultimately be funded through the annual appropriations process.

Montana Health Co-Op, 139 Fed. Cl. at 220; *Sanford*, 139 Fed. Cl. at 708; *see also L.A. Care*, 2019 WL 625446, at *8 (finding "[t]he difference in section 1401's and 1402's funding mechanisms is likely insignificant" and concluding "[t]he Government puts undue weight on the difference in funding methods for section 1401's and 1412's programs"); *Maine*, 2019 WL 642968, at *9 (noting that there could be several explanations for the difference and "declin[ing] to ascribe any particular intent to Congress based on Congress's disparate treatment of" the tax credit and CSR programs); *Common Ground*, 2019 WL 642892, at *8 (same); *Cmty. Health Choice*, 2019 WL 643011, at *9 (same).

Not surprisingly, the Defendant also fails to cite any case law to support its extraordinary proposition that an appropriation included in one portion of a statute negates a mandatory payment obligation contained in another section. Defendant unpersuasively relies on cases which merely cite the general rule that Congress acts intentionally in including particular language in one section of a statute and omitting it from another. Motion to Dismiss at 18. Defendant's reliance on *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018) is misplaced because, although the Supreme Court held that a government-reporting requirement found in the definition of "whistleblower" in the Dodd-Frank Act applied to the Act's anti-retaliation provision, not just to its award program, the Court relied heavily on the meaning of the plain language of the definition, which stated that it applied throughout "this section." *Id.* at 777-78, (citing *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (refusing to accept statutory interpretation that "runs afoul of the 'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute'" (citations omitted)). *Digital Realty* reinforces BCBSND's position that the Court must give weight to the plain unambiguous language of Section 1402. *L.A. Care*, 2019 WL 625446, at *8 ("As was the case in *Digital*

Realty, this Court sees no better indication of Congress' intent than the unambiguous words of obligation that it chose to include in section 1402."); *Maine*, 2019 WL 642968, at *9 (noting Defendant's reliance on *Digital Realty* and *Russello* but finding that with respect to CSRs, it is "difficult to discern" what Congress' intent may have been and concluding that the disparate funding mechanism for tax credits and CSRs "does not reflect congressional intent to foreclose liability for the latter.").

In fact, none of the cases Defendant cites has anything to do with the effect that a permanent appropriation in one section of a statute has on a mandatory payment obligation in another. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) (RICO subsection's restriction of the forfeiture of ill-gotten gains to an interest in an "enterprise" could not be read into another subsection that was broader and did not limit its reach to restrictions in an "enterprise"); *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir. 1972) (giving effect to plain meaning of the words "arrested and" in alien removal statute to find arrest was element of offense and noting that these words were not included in other related section). Unlike *Russello*, BCBSND is not asking the Court to read into Section 1402 a restriction that is not there; Plaintiff merely asks the Court to give effect to the plain meaning of the words in the statute, as the court did in *Wong Kim Bo*, which here includes an unambiguously mandatory payment obligation.

Lastly, the Government's actual, undisputed conduct over the course of several years confirms that, until the Defendant adopted its current litigation position, it understood Section 1402 plainly to mandate payment. Indeed, the Government made monthly CSR payments to BCBSND and other insurers for 45 consecutive months, from January 2014 through September 2017, before the current administration ceased making payments. *See, e.g.* Am. Compl. Ex. 55, 63.

G. CSR Payments Owed to BCBSND are Recoverable in The U.S. Court of Federal Claims

Defendant repeats its argument, rejected by every Judge of this Court to consider it, that the CSR claims cannot proceed in this Court because Congress did not provide an "express cause of action" or "damages remedy" in Section 1402. *See* Motion to Dismiss at 13-17. This argument impermissibly asks the Court to ignore the fundamental role of a money-mandating statute, which provides both the bases for jurisdiction and a cause of action. *See Fisher,* 402 F.3d at 1173 ("the determination that the source [of the plaintiff's claim] 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" (emphasis added)). Judge Kaplan rightly rejected this argument in *Montana Health Co-Op* and *Sanford Health Plan*, because she found it "inconsistent with this court's long-standing and well-established authority to entertain suits for money damages under the Tucker Act based on money-mandating statutes like the ACA. Plaintiffs have never been required to make some separate showing that the money-mandating statute that establishes this court's jurisdiction over their monetary claims also grants them an express (or implied) cause of action for damages." *Montana Health Co-Op*, 139 Fed. Cl. at 217, n. 5 (citing *Fisher*, 402 F.3d at 1172; *United States v. Testan*, 424 U.S. 392, 401–02 (1976)); *Sanford Health Plan*, 139 Fed. Cl. at 706, n. 5 (same); *see also Common Ground*, 2019 WL 642892, at *11, n. 17 (holding Defendant's "conten[tion] that for plaintiffs to recover under a money-mandating statute, they must separately establish that the statute authorizes a damages remedy for its violation…is incorrect" citing *Fisher* and *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 477 (2003)); *Cmty. Health Choice*, 2019 WL 643011, at *12, n. 19; *Maine*, 2019 WL 642968, at *12; *L.A. Care*, 2019 WL 625446, at *10 (holding the Defendant's argument "that section 1402 does

not authorize either an express or implied cause of action for an issuer to recover damages…runs afoul of…long-standing precedent").

Similarly, Defendant continues to rely on the Constitution's Appropriations Clause to argue that a lack of appropriations means that CSR plaintiffs have no cause of action and/or that this Court cannot order a payment of money. *See* Motion to Dismiss at 13-14. Defendant's argument likewise ignores more than a hundred years of precedent, conflates "obligations" and "appropriations," and would be inconsistent with the Federal Circuit's first holding in *Moda*. *See supra* at 15-16. As recognized since at least 1879, Article I, Section 9 of the Constitution has had no bearing on this Court or its predecessors, because:

> **That provision of the Constitution** is exclusively a direction to the officers of the Treasury, who are intrusted with the safekeeping and payment out of the public money, **and not to the courts of law**; the courts and their officers can make no payment from the Treasury under any circumstances. **This court**, established for the sole purpose of investigating claims against the government, **does not deal with questions of appropriations, but with the legal liabilities incurred by the United States under contracts, express or implied, the laws of Congress**, or the regulations of the executive departments. (Rev. Stat., § 1059.) That **such liabilities may be created where there is no appropriation of money to meet them** is recognized in section 3732 of the Revised Statutes.

Collins v. United States, 15 Ct. Cl. 22, 35 (1879) (emphasis added). *Collins* involved enforcement of a statutory obligation to reinstate and pay Major Collins after he had retired from the Army but had not received his military pension. *Collins*, 15 Ct. Cl. at 23-24. When payment was not made despite passage of the statute, Major Collins sought relief in the Court of Claims. *Id.* at 24-26. The Government argued that the Appropriations Clause foreclosed payment, claiming the statute lacked "[t]he familiar language expressive of legislative intent to take money from the Treasury, '*and the Secretary of the Treasury is hereby authorized out of any moneys not otherwise appropriated*,'" *Id.* at 28 (Defendant's statement) (emphasis in original). The Court of Claims rejected Defendant's argument, holding:

> It is clear that the Executive … without legislative authority, cannot create a liability on the part of the United States to pay [a public officer] a salary for the time he was not in service; **but Congress, the legislative branch of the government, may by law create such liability**, and may allow back pay to any public officer in consideration of past services or for any other cause which they deem sufficient.
> * * *
> The officers of the Treasury have no authority to pay such compensation until appropriations therefor are made[.] … **The liability, however, exists independently of the appropriation, and may be enforced by proceedings in this court**.

Collins, 15 Ct. Cl. at 34-35 (emphasis added); *see also Maine*, 2019 WL 642968, at *12 (citing *Collins* and rejecting Defendant's argument that a lack of CSR appropriations "constrain[s] the court's ability to entertain a claim that the government has not discharged the underlying obligation or to enter judgment for the plaintiff on that claim."); *Cmty. Health Choice*, 2019 WL 643011, at *12 (same); *Common Ground*, 2019 WL 642892, at *11 (same).

H. The Judgment Fund Is Available to Pay Judgments Entered By This Court Under The Tucker Act

Although Defendant argues the Judgment Fund should be irrelevant to this Court's liability analysis (Motion to Dismiss at 23-24), Defendant's appropriations argument improperly ignores the existence of the Judgment Fund. As set forth in 28 U.S.C. § 2517, except as specifically provided under the Contract Disputes Act, "every final judgment rendered by the United States Court of Federal Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the Secretary of the Treasury of a certification of the judgment by the clerk and chief judge of the court." The Judgment Fund is a "'permanent' or 'continuing' appropriation, once enacted, makes funds available indefinitely for their specified purpose; no further action is needed from Congress." *Nevada v. Dep 't of Energy,* 400 F.3d 9, 13 (D.C. Cir. 2005) and U.S. Government Accounting Office, GA0-04- 261 SP, 1 *Principles of Federal Appropriations Law* 2-14 (3d ed. 2004)). The Judgment Fund "was intended to establish

a central, government-wide judgment fund from which judicial tribunals administering or ordering judgments, awards, or settlements may order payments without being constrained by concerns of whether adequate funds existed at the agency level to satisfy the judgment." *Bath Iron Works Corp. v. United States,* 20 F.3d 1567, 1583 (Fed. Cir. 1994) (citing *Lopez v. A.C. & S., Inc.,* 858 F.2d 712, 716 (Fed. Cir. 1988)).

The Judgment Fund "is applied after the court has entered final judgment, to provide a mechanism whereby that judgment 'shall be paid out of any general appropriation therefor.'" *Slattery v. U.S.*, 635 F.3d 1298, 1317, 1320 (Fed. Cir. 2011). By operation of both 28 U.S.C. § 2517 and 31 U.S.C. § 1304, "unless provision for payment of a judgment is supplied by another statute, any final judgment issued by this court is satisfied by payment from the standing appropriation known as the Judgment Fund." *Wolfchild v. United States*, 101 Fed. Cl. 54, 84 (2011), *as corrected* (Aug. 18, 2011), *aff'd in part, rev'd in part on other grounds*, 731 F.3d 1280 (Fed. Cir. 2013) (citing *Doe v. United States,* 16 Cl.Ct. 412, 423 (1989) ("Every final judgment of the United States Claims Court rendered against the United States is to be paid out of the judgment fund.")).

As the Federal Circuit confirmed in *Slattery*, 635 F.3d at 1317, "the purpose of the Judgment Fund was to avoid the need for specific appropriations to pay judgments awarded by the Court of Claims," therefore this Court should not be concerned with "how the agency meets its obligations or how any judgment establishing those obligations is satisfied." *Id*. at 1318; *see also Collins,* 15 Ct. Cl. at 35 ("This court, established for the sole purpose of investigating claims against the government, does not deal with questions of appropriations…"). Therefore, the Judgment Fund is available to satisfy any judgment this Court may enter against Defendant on liability in this case in the absence of any specific Congressional appropriation to fund the CSR payments owed. *See Maine*, 2019 WL 642968, at *13 (concluding that "[b]ecause plaintiff's

[CSR] claim arises from a statute mandating the payment of money damages in the event of its violation, the Judgment Fund is available to pay a judgment entered by the court on that claim."); *Cmty. Health Choice*, 2019 WL 643011, at *13 (same); *Common Ground*, 2019 WL 642892, at *12 (same).

Contrary to its current litigating position, the Government itself explicitly conceded (correctly) in *House v. Burwell* that insurers like BCBSND could seek relief in this Court for unpaid CSR claims and, if successful, could recover amounts due from the Judgment Fund:

> The Act requires the government to pay cost-sharing reductions to issuers. . . . The absence of an appropriation would not prevent the insurers from seeking to enforce that statutory right through litigation. Under the Tucker Act, a plaintiff may bring suit against the United States in the Court of Federal Claims to obtain monetary payments based on statutes that impose certain types of payment obligations on the government. *See* 28 U.S.C. § 1491(a)(1); *United States v. Mitchell*, 463 U.S. 206, 216 (1983). If the plaintiff is successful, it can receive the amount to which it is entitled from the permanent appropriation Congress has made in the Judgment Fund, 31 U.S.C. § 1304(a). The mere absence of a more specific appropriation is not necessarily a defense to recovery from that Fund.

Defendants' Memorandum in Support of Their Motion for Summary Judgment, *U.S. House of Reps. v. Burwell*, No. 1:14-cv-01967-RMC, ECF No. 55-1 at 20 (D.D.C. Dec. 2, 2015).

I. Section 1402 Does Not Provide for Potential Offsets Based on Future State Premium Increases

Nor can the Government persuasively argue that its mandatory advance monthly CSR payment obligation should be "offset" by perceived premium increases by state insurance regulators in North Dakota or elsewhere. *See* Motion to Dismiss at 16-17. Section 1402 is completely silent on the effect of insurance premiums on the Government's express mandatory CSR payment obligation. There is simply no evidence that Congress considered the potential effect of future insurance premiums on its statutory CSR payment obligation in Section 1402. Nor does Defendant offer any evidence concerning alleged premium increases during 2018 or 2019 in North Dakota that would even arguably impact the CSR amounts Defendant owes in this

case. As Judge Kaplan correctly concluded, "[t]here 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 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." *Montana Health Co-Op,* 139 Fed. Cl. at 221; *Sanford Health Plan,* 139 Fed. Cl. at 709. Judges Sweeney and Wheeler agreed. As Judge Wheeler recognized:

> At bottom, the Government's argument is that section 1402 really provides that the Government shall make CSR payments to QHPs "unless state regulators in the future happen to raise premiums, in which case, Congress doesn't owe you." Oral Arg. Tr. at 24:13-14. Nowhere in the legislative history, statutory text or implementing regulations are CSR payments subject to alteration based on the availability of offsetting funds derived from premium increases permitted by state regulators. Premium rate adjustment is a state-specific decision, entirely separate from the CSR program. Its possibility does not reveal Congress' decision not to provide a damages remedy for CSR non-payment and therefore does not impact L.A. Care's ability to recover.

L.A. Care, 2019 WL 625446, at *10; *see also Common Ground*, 2019 WL 642892, at *9 (Court was "unpersuaded" by Defendant's increased premiums argument concluding that any increased premiums are by their nature "tax credit payments, not cost-sharing reduction payments," which the Court correctly observed "are not substitutes for each other."); *Cmty. Health Choice*, 2019 WL 643011, at *10 (same); *Maine*, 2019 WL 642968, at *10 (same).

The "shall make" language of Section 1402 and 1412, like the "shall pay" language in Section 1342 at issue in *Moda,* creates an express, mandatory statutory payment obligation for the Government, regardless of appropriations. Congress has not amended or repealed Section 1402 or Section 1412 or taken any legislative action since the enactment of the ACA regarding the Government's obligation to make advance CSR payments to QHPs. The CSR statute and regulations do not provide for payment after considering any premium increases, but clearly require full advance CSR payments each month. This Court therefore should hold the

Government to its clear statutory obligation and require it to make the advance CSR payments it owes to BCBSND for 2017, 2018 and through the date of entry of judgment.

III. COUNT II: THE GOVERNMENT BREACHED AN IMPLIED-IN-FACT CONTRACT WITH BCBSND BY REFUSING TO MAKE FULL COST-SHARING REDUCTION PAYMENTS

In addition, alternatively, the undisputed facts demonstrate not only that BCBSND has sufficiently alleged the existence of an implied-in-fact contract sufficient to withstand Defendant's motion to dismiss, but that the Government breached that contract when it failed to make full and timely advance CSR payments. The Court should make this finding "*regardless* of the Government's appropriation law defenses," because "later appropriation restrictions cannot erase a previously created contractual obligation." *Molina* at 41 (emphasis in original); *see also Salazar v. Ramah Navajo Chapter*, 132. S. Ct. at 2189.

To assert the existence of an implied-in-fact contract with the Government, a plaintiff must demonstrate: (1) mutuality of intent, (2) consideration, (3) offer and acceptance, and (4) actual authority to contractually bind the Government. *See Forest Glen Props., LLC v. United States*, 79 Fed. Cl. 669, 683 (2007); *Buesing v. United States*, 42 Fed. Cl. 679, 688 (1999) (Horn, J.). 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). Plaintiff unquestionably has alleged all requisite elements to state a non-frivolous implied-in-fact contract with the Government. Both Judge Wheeler and Chief Judge Sweeney held that the plaintiffs' CSR claims met each of the elements of an implied-in-fact contract and granted summary judgment on implied-in-fact contract claims in three cases nearly identical to this one. *See L.A. Care*, 2019 WL 625446, at *11-14; *Cmty. Health Choice*, 2019 WL 643011, at *15-19; *Maine*, 2019 WL 642968, at *14-18. This Court should follow the implied-in-fact contract analysis and

reasoning in these three CSR cases.

A. Controlling Law Requires the Court to Focus Beyond the Terms of the Statute

The Government does not always "intend to bind itself whenever it creates a statutory or regulatory incentive program." *Moda*, 130 Fed. Cl. at 462-63; (citing *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985)); *see also Molina*, 133 Fed. Cl. at 41-42. The Supreme Court's controlling *Nat'l R.R. Passenger Corp.* test requires courts to "first … examine the language of the statute," and second, to review "the circumstances" surrounding the statute's passage and the conduct of the parties, including their "legitimate expectation[s]" and whether "Congress would have struck" the bargain under such circumstances. 470 U.S. at 468-69; *L.A. Care*, 2019 WL 625446, at *11 (concluding "*National Railroad* encourage[s] courts not to treat one source as dispositive, but instead examine all potentially relevant signs" and "look at all relevant circumstances" to discern contractual intent); *see also Hercules, Inc. v. United States*, 516 U.S. 417, 424 (1996) (intent to contract can be inferred from the "conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding"); *Buesing*, 42 Fed. Cl. 679, 688 (quoting *Hercules*). The Defendant acknowledges *Nat'l R.R. Passenger Corp.* as "controlling precedent," but does not apply its test. *See* Motion to Dismiss at 25.[6]

[6] The Federal Circuit in *Moda* declined to find an implied-in-fact-contract because it simply labeled risk corridors as an "incentive program," and looked *only* at the words of the statute finding no express "statement…evinced an intent to form a contract." *Moda*, 892 F.3d at 1330; *see Molina*, 133 Fed. Cl. at 43 ("The Government advances form over substance by erroneously insisting that Congress cannot 'clear[ly] indicat[e]' an intent to contract without using those words. *Nat'l R.R.*, 470 U.S. at 465"). Although the Federal Circuit cited *Nat'l R.R. Passenger Corp., Moda,* at 1329, it failed to apply the Supreme Court's two-part test which requires a court to look beyond the statute's text and examine the surrounding circumstances and conduct of the parties.

The Supreme Court in *Nat'l R.R. Passenger Corp.* held that Congress did not, through passage of the statute at issue, intend to contractually agree *not* to re-impose any rail passenger service responsibilities on the freight railroads. *Id*. at 471. Instead, the Court found that the statute did not obligate the Government to "agree[] with anyone to do anything," emphasizing that, by its terms, Congress had "'expressly reserved' its right to 'repeal, alter or amend,'" the statute "'at any time.'" *Id*. at 467. Here, in contrast to the statute in *Nat'l R.R. Passenger Corp.*, Sections 1402 and 1412 unambiguously required that the Secretary "shall make" the mandatory CSR payments through monthly advances. 42 U.S.C. § 18071(c)(3)(A); 42 U.S.C. § 18082(c)(3).

With respect to surrounding circumstances, the Supreme Court in *Nat'l R.R. Passenger Corp.* observed that "Congress would have struck a profoundly inequitable bargain" had it agreed to the contractual terms urged by the railroads because, the Court found, Congress would have received little in exchange for a promise *never* to impose rail passenger service obligations on the profitable freight railroads. 470 U.S. at 468. The Court also determined that the "circumstances of the Act's passage belie[d] an intent to contract away" the Government's "pervasive" regulation of the freight railroads, which historically included requiring them to undertake such passenger rail service obligations. *Id.* The Court remarked that Congress would not have "nonchalantly shed" its prior "pervasive" regulatory powers and that "the railroads had no legitimate expectation" that Congress would be contractually bound. *Id*. at 468-69; *see also L.A. Care*, 2019 WL 625446, at *11 (discussing *National Railroad's* contract analysis).

Here, unlike the historical, pervasive regulation of the freight railroads which previously had required them to undertake rail passenger service obligations, the newly-created ACA exchange markets were unprecedented, uncertain and risky—there had been no prior, longstanding regulatory regime requiring insurers to provide health coverage to existing (much

less new) members on the ACA exchanges. *See King*, 135 S. Ct. at 2485; *cf. Nat'l R.R. Passenger Corp.*, 470 U.S. at 468; *L.A. Care*, 2019 WL 625446, at *12 ("Unlike *National Railroad,* there is no language in those [CSR] provisions which checked [the insurer's] expectations that it would be repaid."). Moreover, unlike the freight railroads, the health insurers had a "legitimate expectation" that Congress would be bound to honor its "shall make" obligation to make advance monthly CSR payments to insurers selling QHPs on the ACA exchanges that, correspondingly, were bound to "reduce" their eligible customer's out-of-pocket health care costs under 42 U.S.C. § 18071(a). *Cf. Nat'l R.R. Passenger Corp.*, 470 U.S at 469.

Further, unlike the "profoundly inequitable bargain" that Congress would have made by promising to lift the freight railroads' passenger rail service obligations, *Nat'l R.R. Passenger Corp.* at 468, the Government without question received valuable consideration from insurers participating on the ACA exchanges, which were "[c]entral to" the ACA's infrastructure and furthered the ACA's stated goals of expanding healthcare coverage to millions of new and previously uninsured Americans. *Moda*, 130 Fed. Cl. at 441-42, 465. Congress obligated itself to make advance CSR payments to insurers because it knew the only feasible way to distribute the CSR benefit to eligible recipients was for insurers to serve as the conduit. In exchange for providing that service on behalf of the Government, insurers legitimately expected to be paid the agreed-upon advance monthly CSR payments. *See L.A. Care*, 2019 WL 625446, at *12 (finding "the Government is not getting a raw deal…the CSR program's design makes issuers the sole means for distributing these out-of-pocket- healthcare costs to target recipients….vital to the success of both the CSR program and ACA generally.").

B. <u>There Was Mutuality of Intent to Contract</u>

To establish the mutual intent element, BCBSND need only demonstrate "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*, 97 Fed. Cl. at 27. Such intent can be inferred from the "conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Hercules,* 516 U.S. at 424; *L.A. Care*, 2019 WL 625446, at *11.

Here, Sections 1402, 1412 and HHS's implementing regulations established a program that promised full reimbursement in advance of BCBSND's actual costs in providing CSR discounts to its eligible customers. Like Section 1402, the controlling statute in *New York Airways* directed the Government to make payments in exchange for services provided. *See* 369 F.2d at 745 (statute directed Postmaster General to "make payments out of appropriations for the transportation of mail by aircraft of so much of the total compensation as is fixed and determined by the Board under this section"). Section 1402 did so in order to induce BCBSND's voluntary performance on the North Dakota ACA Exchange in the form of an actual undertaking. The CSR program was promissory in nature and gave HHS no discretion to decide whether or not to pay eligible QHPs who agreed to participate. Indeed, this was the only feasible way to distribute the CSR payments to eligible recipients. That is why the CSR program was structured to induce certain QHP conduct as in *Radium Mines v. United States,* 153 F. Supp. 403, 406 (Ct. Cl. 1957). In *Radium Mines*, the Government issued a circular in which it promised to pay private parties a "guaranteed minimum price" for uranium. *Radium Mines,* 153 F. Supp. at 404-05. The court held that the circular's purpose was to "induce persons to find and mine uranium" and that when a private party "complied in every respect with the terms" of the circular, "it surely could not be urged" that the Government was not bound to purchase uranium at the stated price. *Id.* at 405-06. The court concluded that "no one could have prudently engaged in" the transaction "unless he was assured of a Government market." *Id*. The CSR program is, as the Federal Circuit in *Moda* put it, the type of "traditional *quid pro quo* contemplated in *Radium Mines*." *Moda*, 892 F.3d at 1329-30; *L.A. Care*, 2019 WL 625446, at *12 (relying on *Radium Mines* and finding

mutuality of intent in "quid pro quo exchange" due to "unequivocal promissory language" used in the CSR program); *Maine*, 2019 WL 642968, at *16 (finding that "the parties' intent to enter into a contractual relationship can be implied from," among other things, "the quid pro quo nature of the cost-sharing reduction program."); *Cmty. Health Choice*, 2019 WL 643011, at *17 (same).

BCBSND has not only identified "circumstances surrounding the enactment of the ACA"—it has gone further, pointing to the core features of sections 1402 and 1412 and HHS's implementing regulations themselves, which plainly were promissory in nature and imposed enforceable obligations on the Government. *See N.Y. Airways*, 369 F.2d at 751-52 (finding offer arising out of statutory language and formation of implied-in-fact contract based on the parties' conduct indicating an intent to contract where performance "was the plaintiff's acceptance of [the statutory] offer"); *Radium Mines*, 153 F. Supp. at 405-06 (finding implied offer in "promissory" regulation designed to induce plaintiffs to purchase uranium); *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"); *L.A. Care*, 2019 WL 625446, at *12 (finding the CSR program's "surrounding circumstances reinforce the existence of a contractual arrangement.").

Moreover, as BCBSND has demonstrated, in and after 2011, the Government repeatedly manifested its intent to fully reimburse insurers for making cost-sharing reductions to encourage BCBSND's annual participation on the ACA Exchange and in the CSR program. *See, e.g.*, Am. Compl. ¶¶ 34-35, 50-53; 78 FR 15409, 15486 (Mar. 11, 2013) (Final Rule) Am. Compl. Ex.05 ("This approach fulfills the Secretary's obligation to make 'periodic and timely payments equal to the value of the reductions' under section 1402... We expect that this approach would not require issuers to fund the value of any cost-sharing reductions prior to reimbursement."); *id.* at

15488 ("QHP issuers will be made whole for the value of all cost-sharing reductions provided through the reconciliation process after the close of the benefit year"); 45 C.F.R. § 156.430(b)(1) (stating on March 11, 2013 that QHPs "will receive periodic advance payments" for their CSR discounts to eligible customers) (emphasis added); 79 FR 13743, 13805 (Mar. 11, 2014), Am. Compl. Ex. 11 (Section 1402 "directs the Secretary to make periodic and timely payments to the QHP issuer equal to the value of those reductions"), Am. Compl. Ex. 12 (February 13, 2015 CMS bulletin stating that ACA "provides for issuers to be reimbursed for the value of those cost-sharing reductions" by the Government); CMS 2016 CSR Manual at 6 & n.8, Am. Compl. Ex. 02 (stating on December 27, 2016 "periodic and timely payments equal to the value of [QHPs' CSR] reductions are required to be made to issuers … in advance"); *see L.A. Care*, 2019 WL 625446, at *12 (finding that the QHP issuer's CSR "repayment expectations were reaffirmed time and again by HHS' directives on the CSR program" and citing the exhibits Plaintiff references above).

Although Defendant contends that the Federal Circuit's decision in *Moda* rejected a "similar" implied-in-fact contract claim (Motion to Dismiss at 26), the distinctions between the risk corridors and the CSR implied-in-fact contract claims are important.[7] In exchange for the Government's promise to make mandatory advance CSR payments, QHPs agreed to participate in the ACA Exchanges, provide expanded coverage to previously uninsured Americans and timely provide eligible members with cost-sharing offsets to reduce their health care costs.

[7] Four risk corridors plaintiffs have sought hearing and/or rehearing en banc of the Federal Circuit's decision in *Moda* and *Land of Lincoln*. *See Moda Health Plan, Inc. v. United States*, No. 17-1994 (Fed. Cir.), ECF No. 89; *Land of Lincoln Mutual Health Insurance Company v. United States*, No. 17-1224 (Fed. Cir.), ECF No. 167; *Blue Cross and Blue Shield of North Carolina v. United States*, No. 17-2154 (Fed. Cir.), ECF No. 47; *Maine Community Health Options v. United States*, No. 17-2395 (Fed. Cir.), ECF No. 41. On November 6, 2018, the Federal Circuit denied the petitions for rehearing *en banc*, with two dissenting opinions. The petitions for writ of certiorari to the Supreme Court of the United States were filed on February 4, 2019.

In contrast to the Federal Circuit's conclusion in *Moda* regarding the risk corridors program, 892 F.3d at 1330, here, there was "undoubtedly a traditional 'quid pro quo' exchange[.]" *L.A. Care*, 2019 WL 625446, at *12 (explaining contractual distinctions between risk corridors incentive program and "quid pro quo exchange" of CSR program). The CSR program is not a "safety net. Rather, it is a means for distributing a Government subsidy. The Government chose to distribute that subsidy by asking insurers to act as conduits for payment of certain eligible insureds' out-of-pocket healthcare costs." *Id.* Chief Judge Sweeney agreed, finding "[t]he risk corridors program differs from the cost-sharing reduction program in one significant manner" concluding the CSR program is "less of an incentive program and more of a quid pro quo. Accordingly, that aspect of *Moda Health Plan's* analysis is inapplicable in this case." *Maine*, 2019 WL 642968, at *15; *Cmty. Health Choice*, 2019 WL 643011, at *17 (same).

C. BCBSND Accepted The Government's Offer

BCBSND has demonstrated the Government offered to make full and timely advance CSR payments, which BCBSND accepted by becoming a QHP and performing. An offer must be manifested by conduct that indicates assent to the proposed bargain. *See Grav v. United States*, 14 Cl. Ct. 390, 393 (1988) (holding Government's offer in statute was accepted, forming implied-in-fact contract). Offer and acceptance can be found in the "conduct of the parties." *Forest Glen*, 79 Fed. Cl. at 684; *see also 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 sections 1402 and 1412, the implementing regulations, and the Government's subsequent statements described above surrounding the implementation of the CSR program and afterward. The Government's repeated, undisputed statements before BCBSND accepted the offer assured BCBSND of the Government's intent to make full and timely advance CSR payments. *See, e.g.*, Am. Compl. ¶¶

48-54; *see supra* at 33; 78 FR 15409, 15488; 45 C.F.R. § 156.430(b)(1); Am. Compl. Exs. 02, 05, 11, 12; *L.A. Care*, 2019 WL 625446, at *13 ("the ACA and its implementing regulations established an offer to form a unilateral contract).

Those statements incentivized BCBSND to participate on the ACA Exchange. Becoming a QHP was volitional for BCBSND, and was subject to the Government's discretion to certify BCBSND as a QHP. Only after it was awarded QHP status, and accepted the Government's offer to participate on the ACA Exchange, did BCBSND become obligated to provide CSR discounts to eligible enrollees or entitled to receive CSR payments. *See, e.g.*, Am. Compl. ¶¶ 16; 42 U.S.C. § 18071; *N.Y. Airways*, 369 F.2d at 751. BCBSND, by engaging in preparations and incurring significant expenses to become a QHP, and then selling QHPs on the North Dakota Exchange and providing CSR discounts to eligible consumers, accepted the offer and performed. *See, e.g.*, Am. Compl. ¶¶ 110-11.

BCBSND accepted the Government's unilateral offer through its performance, which included participating on the ACA Exchange and making CSR payments to eligible enrollees. BCBSND's "performance went beyond filling out an application form." *Moda,* 130 Fed. Cl. at 464; *L.A. Care*, 2019 WL 625446, at *13 (finding that QHP issuer accepted the Government's offer through its performance and "substantial" undertakings); *Maine*, 2019 WL 642968, at *16 ("plaintiff accepted that [government] offer by offering the qualified plans with reduced cost-sharing obligations"); *Cmty. Health Choice*, 2019 WL 643011, at *17 (same).

The Government also accepted BCBSND's services in performance of the contract requirements, knowing that BCBSND had expended resources to become a QHP and to provide mandatory CSR discounts per the Government's requirements. *See, e.g.*, Am. Compl. ¶¶ 14-16; 42 U.S.C. §18021(a)(1) (QHPs that choose to participate must meet various requirements including providing package of "essential health benefits"). The Government's repeated advance

monthly payment of CSRs to BCBSND for the 45 consecutive months from January 2014 through September 2017 further confirms the parties' meeting of the minds. *See, e.g.*, Am. Compl. ¶¶ 35, 47, 58; CMS 2016 CSR Manual at 36, Am. Compl. Ex. 02 ("Payments to issuers for the cost-sharing reduction component of advance payments began in January 2014."); Email from Jeffrey Grant, Director, Payment Policy and Financial Management Group, CMS, to Tony Piscione, Vice President of Actuarial, Blue Cross Blue Shield of North Dakota (June 30, 2017) (Reconciliation report showing advance CSR payments made to BCBSND for 2015 and 2016), Am. Compl. Ex. 16; *see also Vargas v. United States*, 114 Fed. Cl. 226, 233 (2014) (finding that, among other facts, government's partial payment of amount owed under written agreement could support implied-in-fact contract).

D. <u>There Was Consideration</u>

BCBSND sufficiently asserts consideration. Am. Compl. ¶¶ 111-15. Defendant cannot credibly challenge that it offered consideration in the form of promised advance CSR payments to QHPs, including BCBSND, under Sections 1402 and 1412. Nor can Defendant contest that in return, BCBSND developed compliant QHPs and provided such plans to consumers on the ACA Exchange in North Dakota. BCBSND also provided valuable CSR reductions to eligible North Dakota enrollees. *See L.A. Care*, 2019 WL 625446, at *13 (finding consideration in CSR "bargained-for performance"); *Maine*, 2019 WL 642968, at *16 ("consideration was exchanged (plaintiff supplied qualified health plans that helped the government reduce the number of uninsured individuals, and the government made cost-sharing reduction payments to plaintiff)") *Cmty. Health Choice*, 2019 WL 643011, at *17 (same). Only those QHPs, like BCBSND, that actually provided cost-sharing reductions to eligible ACA Exchange members would be entitled to receive CSR payments from the Government. *See L.A. Care*, 2019 WL 625446, at *12 (noting that only QHPs that have "made CSR distributions to qualifying customers" were

entitled to receive "CSR repayment.").

E. The HHS Secretary Had Actual Authority to Contract on The Government's Behalf

To satisfy the "actual authority" element, BCBSND must show that expressly or implicitly "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 v. United States*, 81 Fed. Cl. 178, 186 (2008). "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). Here, BCBSND has demonstrated that an authorized Government agent entered into or ratified an implied-in-fact contract relating to the risk corridors CSR payments.

The HHS Secretary had actual authority to contract on the Government's behalf regarding the CSR program, as evidenced by Section 1402's instruction that the Secretary "shall establish" the program and "shall make" CSR payments, along with the Secretary's broad obligation to administer and implement the ACA.[8] *See L.A. Care*, 2019 WL 625446, at *13. ("The ACA itself creates a contractual framework that the HHS Secretary is charged with administering and implementing. Entering into contracts pursuant to the contractual structure of the CSR program is therefore integral to the Secretary's duties. Accordingly, the Secretary had implied actual authority to contract."); *Cmty. Health Choice*, 2019 WL 643011, at *18; ("There can be no doubt that making cost-sharing reduction payments is an integral part of the duties assigned to the Secretary of HHS because the Secretary of HHS is required to make such payments pursuant to 42 U.S.C. § 18071(c)(3)(A)."); *Maine*, 2019 WL 642968, at *16 (same).

[8] *See* ACA §§ 1001, 1301(a)(1)(C)(iv), 1302(a)-(b), 1311(c)-(d).

Section 1402 explicitly authorized the Secretary to make CSR payments to QHPs. *Id*.; 42 U.S.C. § 18071(c)(3)(A); *see also United States v. Winstar Corp.*, 518 U.S. 839, 890 n.36 (1996) ("The authority of the executive to use contracts in carrying out authorized programs is . . . generally assumed in the absence of express statutory prohibitions or limitations."); *H. Landau & Co.,* 886 F.2d at 324*; Moda*, 130 Fed. Cl. at 465. BCBSND has demonstrated that the implied-in-fact contracts were authorized or approved by Government representatives who had actual authority to bind the Government in contract as part of their employment duties. *See, e.g.*, Am. Compl. ¶¶ 119-20; Am. Compl. Ex. 20 (U.S. Attorney General Sessions acknowledging that Section 1412 "authorizes the federal government to make payments directly to insurers to offset the lost revenue these [CSR] reductions cause.").[9]

BCBSND also has demonstrated that HHS and CMS officials with authority repeatedly made statements regarding the Government's obligation to make full and timely CSR payments. *See, e.g.*, Am. Compl. ¶¶ 48-55; Am. Compl. Exs. 02, 05, 11, 12, 14, 16. Furthermore, BCBSND has demonstrated that Kevin Counihan, CMS's CEO of the ACA Marketplace, and his successor Randy Pate,[10] at all relevant times, ratified the terms of the contract through their acceptance of the benefits provided by BCBSND and their statements confirming the Government's obligations. *See, e.g.*, *id*.; *see also Silverman v. United States*, 679 F.2d 865, 870

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[9] Nor does the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(B), bar Plaintiff's implied-in-fact contract claim as Defendant asserts (Motion to Dismiss at 27-28), because the CSR payments are "authorized by law" and "[t]hus, the Antideficiency Act's prohibition is inapplicable in this case." *Maine*, 2019 WL 642968, at *16; *Cmty. Health Choice*, 2019 WL 643011, at *18 (same); *accord L.A. Care*, 2019 WL 625446, at *14 (concluding "the Anti-Deficiency Act…is not fatal to" the CSR plaintiff's claim because "the ACA explicitly authorizes HHS to make CSR payments.").

[10] Mr. Pate is the current CMS Deputy Administrator and the Director of the Center for Consumer Information and Insurance Oversight. Mr. Pate "leads CMS' work on the individual and small group markets, including the Health Insurance Exchanges." CMS Leadership, Center for Consumer Information and Insurance Oversight, Randy Pate, available at: https://www.cms.gov/About-CMS/Leadership/cciio/Randy-Pate.html.

(Ct. Cl. 1982) (finding Government bound if it ratifies contract even if Government official lacked authorization to enter into it). Mr. Counihan and Mr. Pate's job included overseeing the ACA Marketplace, and entering into agreements with QHPs was integral to their duties. *See* Am. Compl. ¶ 55; Am. Compl. Ex. 15; FAR 1.601(a) (Agency heads have contract-making authority "by virtue of their position"); *Telenor Satellite Servs. Inc. v. United States*, 71 Fed. Cl. 114, 120 (2006) (agent had implied actual authority where authority was "an integral part of the duties"). Accordingly, BCBSND has satisfied the authority element.

F. The Government Breached its Implied-In-Fact Contractual Obligations and BCBSND is Entitled to Judgment

Finally, BCBSND has demonstrated that the Government breached its implied-in-fact contractual obligations by failing to pay the mandatory advance CSR payments owed to BCBSND from October 2017 and for 2018 through the date of this filing. *See, e.g.*, Am. Compl. ¶¶ 85-89. *See L.A. Care*, 2019 WL 625446, at *14 ("The Government's failure to pay from October 2017 and beyond constitutes a breach of this contract."); *Maine*, 2019 WL 642968, at *18 (holding the CSR "plaintiff has established its entitlement to breach of contract damages in the amount of the unpaid cost-sharing reduction reimbursements."); *Cmty. Health Choice*, 2019 WL 643011, at *19 (same). Accordingly, the Court should find as a matter of law that no genuine dispute of material fact exists over BCBSND's satisfaction of all the elements to establish that the Government had and breached an implied-in-fact contract with BCBSND regarding CSR payments, for which the Government is liable to BCBSND, and that BCBSND is entitled to summary judgment in its favor on Count II.

CONCLUSION

For all of the foregoing reasons, BCBSND respectfully requests that this Honorable Court deny the Defendant's Motion to Dismiss in its entirety and grant Plaintiff's Motion for Summary Judgment on liability as to Counts I and II for the Government's failure to comply

with its statutory/regulatory and implied-in-fact contractual obligations to make full CSR payments owed to BCBSND for CY 2017, CY 2018, and through the date of entry of judgment.

Dated: March 25, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2019, a copy of the foregoing Plaintiff's Opposition to Defendant's Motion to Dismiss and Cross-Motion for Summary Judgment was 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
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