

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS OF CALIFORNIA, HMO)
 COLORADO, INC., dba HMO NEVADA,)
 ROCKY MOUNTAIN HOSPITAL AND)
 MEDICAL SERVICE, INC., dba ANTHEM)
 BLUE CROSS AND BLUE SHIELD,)
 ANTHEM HEALTH PLANS, INC., BLUE)
 CROSS BLUE SHIELD HEALTHCARE)
 PLAN OF GEORGIA, INC., ANTHEM)
 INSURANCE COMPANIES, INC.,)
 ANTHEM HEALTH PLANS OF KY, INC.,)
 ANTHEM HEALTH PLANS OF ME,)
 HEALTHY ALLIANCE LIFE COMPANY,)
 MATTHEW THORNTON HEALTH)
 PLAN, INC., EMPIRE HEALTHCHOICE)
 HMO, INC., COMMUNITY INSURANCE)
 COMPANY, HEALTHKEEPERS, INC., and)
 COMPCARE HEALTH SERVICES)
 INSURANCE COMPANY,)
)
 Plaintiffs,)
)
 v.)
)
 THE UNITED STATES OF AMERICA,)
)
 Defendant.)
 _____)

No. 20-606 C

COMPLAINT

Plaintiffs Blue Cross of California; HMO Colorado, Inc., dba HMO Nevada; Rocky Mountain Hospital and Medical Service, Inc., dba Anthem Blue Cross and Blue Shield; Anthem Health Plans, Inc.; Blue Cross Blue Shield Healthcare Plan of Georgia, Inc.; Anthem Insurance Companies, Inc.; Anthem Health Plans of KY, Inc.; Anthem Health Plans of ME; Healthy Alliance Life Company; Matthew Thornton Health Plan, Inc.; Empire HealthChoice HMO, Inc.; Community Insurance Company; HealthKeepers, Inc.; and Compcare Health Services Insurance

Company (collectively “Plaintiffs” or “Anthem”), by and through their undersigned counsel, bring this action against Defendant, the United States of America (“Defendant,” “United States,” or “Government”), and allege the following:

INTRODUCTION

1. This action seeks money damages for Defendant’s breach of its statutory, regulatory, and/or contractual obligations to make full and timely cost-sharing reduction (“CSR”) payments to Anthem, as mandated by Sections 1402 and 1412 of the Patient Protection and Affordable Care Act (“ACA”). The Government had made such monthly advance CSR payments to Anthem for 45 consecutive months from January 2014 until October 12, 2017, when the Government announced it would stop making such mandatory CSR payments to Anthem and other similarly situated qualified health plan issuers (“QHPs”) that had been voluntarily participating on the ACA Exchanges.

2. As detailed below, Congress mandated in Section 1402 of the ACA that Defendant “shall make periodic and timely [CSR] payments” to QHPs as full reimbursement for the QHPs providing mandatory CSR discounts to certain of their middle- and low-income ACA customers. Congress designed those CSR discounts as a federally-funded subsidy to reduce eligible customers’ out-of-pocket costs for health care.

3. In Section 1412 of the ACA, Congress expressly required Defendant to make the advance CSR payments to QHPs, such as Anthem, in advance of when those QHPs would provide the CSR discounts to their eligible customers, to minimize the financial burden on those QHPs while they served as the Government’s conduit for delivering the federal CSR subsidies to eligible enrollees.

4. Defendant has failed to honor its mandatory advance CSR payment obligation to Anthem, but Anthem remains financially obligated under Section 1402 to continue to provide CSR discounts to its eligible customers. Defendant unlawfully has shifted the financial burden entirely upon Anthem, thwarting Congress's design, intent, and express payment mandate as set forth in the CSR statutory provisions.

5. This action seeks monetary damages from Defendant of at least \$523,319,475.52 the total amount of monthly CSR payments the Government owes Anthem for the fourth quarter of 2017, and for the full calendar years 2018 and 2019, but unlawfully has refused to pay.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action and venue is proper in this Court pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), because Plaintiffs bring claims for monetary damages over \$10,000 against the United States based on the Government's violations of money-mandating Acts of Congress, money-mandating regulations of an executive department, and implied-in-fact contracts with the United States.

7. The actions and/or decisions of the Department of Health and Human Services ("HHS"), the Centers for Medicare & Medicaid Services ("CMS"), and the Department of the Treasury ("Treasury") at issue in this lawsuit were conducted on behalf of the Defendant United States within the District of Columbia.

PARTIES

8. Plaintiff BLUE CROSS OF CALIFORNIA ("Anthem CA") is a California managed care company located in Woodland Hills, California. Anthem CA was a QHP issuer on the California Health Insurance Marketplace for CY 2017, CY 2018, and CY 2019.

9. Plaintiff HMO COLORADO, INC., dba HMO NEVADA (“Anthem NV”) is a Colorado-domiciled health maintenance organization, duly authorized to issue health insurance coverage in the states of Colorado and Nevada. Anthem NV was a QHP issuer on the Nevada Health Insurance Marketplace for CY 2017.

10. Plaintiff ROCKY MOUNTAIN HOSPITAL AND MEDICAL SERVICE, INC., dba ANTHEM BLUE CROSS AND BLUE SHIELD (“Rocky Mt. CO” or “Rocky Mt. NV”) is a Colorado-domiciled licensed insurer, duly authorized to issue health insurance coverage in the states of Colorado and Nevada. Rocky Mt. CO was a QHP issuer on the Colorado Health Insurance Marketplace for CY 2017, CY 2018, and CY 2019. Rocky Mt. NV was a QHP issuer on the Nevada Health Insurance Marketplace for CY 2017, CY 2018, and CY 2019.

11. Plaintiff ANTHEM HEALTH PLANS, INC. (“Anthem CT”) is a Connecticut health insurance company located in Wallingford, Connecticut. Anthem CT was a QHP issuer on the Connecticut Health Insurance Marketplace for CY 2017, CY 2018, and CY 2019.

12. Plaintiff BLUE CROSS BLUE SHIELD HEALTHCARE PLAN OF GEORGIA, INC. (“Anthem GA”) is a Georgia managed care corporation located in Atlanta, Georgia. Anthem GA was a QHP issuer on the Georgia Health Insurance Marketplace for CY 2017, CY 2018, and CY 2019.

13. Plaintiff ANTHEM INSURANCE COMPANIES, INC. (“Anthem IN”) is an Indiana health insurer located in Indianapolis, Indiana. Anthem IN was a QHP issuer on the Indiana Health Insurance Marketplace for CY 2017, CY 2018, and CY 2019.

14. Plaintiff ANTHEM HEALTH PLANS OF KY, INC. (“Anthem KY”) is a Kentucky health insurance company located in Louisville, Kentucky. Anthem KY was a QHP issuer on the Kentucky Health Insurance Marketplace for CY 2017, CY 2018, and CY 2019.

15. Plaintiff ANTHEM HEALTH PLANS OF ME (“Anthem ME”) is a Maine health insurance company located in South Portland, Maine. Anthem ME was a QHP issuer on the Maine Health Insurance Marketplace for CY 2017, CY 2018, and CY 2019.

16. Plaintiff HEALTHY ALLIANCE LIFE COMPANY (“Anthem MO”) is a Missouri health insurance company located in St. Louis, Missouri. Anthem MO was a QHP issuer on the Missouri Health Insurance Marketplace for CY 2017, CY 2018, and CY 2019.

17. Plaintiff MATTHEW THORNTON HEALTH PLAN (“Anthem NH”) is a New Hampshire health insurer located in Manchester, New Hampshire. Anthem NH was a QHP issuer on the New Hampshire Health Insurance Marketplace for CY 2017, CY 2018, and CY 2019.

18. Plaintiff EMPIRE HEALTHCHOICE HMO, INC. (“Anthem NY”) is a New York health maintenance organization located in New York, New York. Anthem NY was a QHP issuer on the New York Health Insurance Marketplace for CY 2017, CY 2018, and CY 2019.

19. Plaintiff COMMUNITY INSURANCE COMPANY (“Anthem OH”) is an Ohio health insurance company located in Mason, Ohio. Anthem OH was a QHP issuer on the Ohio Health Insurance Marketplace for CY 2017, CY 2018, and CY 2019.

20. Plaintiff HEALTHKEEPERS, INC. (“Anthem VA”) is a Virginia health insurance corporation located in Richmond, Virginia. Anthem VA was a QHP issuer on the Virginia Health Insurance Marketplace for CY 2017, CY 2018, and CY 2019.

21. Plaintiff COMPCARE HEALTH SERVICES INSURANCE COMPANY (“Anthem WI”) is a Wisconsin health insurance corporation located in Waukesha, Wisconsin. Anthem WI was a QHP issuer on the Wisconsin Health Insurance Marketplace for CY 2017.

22. Defendant is THE UNITED STATES OF AMERICA. HHS, CMS, and Treasury are agencies of the Defendant United States of America.

FACTUAL ALLEGATIONS

Congress Enacts the Patient Protection and Affordable Care Act

23. Congress's enactment in 2010 of the ACA, Public Law 111-148, 124 Stat. 119, marked a historic shift in the United States health care market.

24. Through the ACA, Congress aimed to increase the number of Americans covered by health insurance and decrease the cost of health care in the U.S., and included a series of interlocking reforms designed to expand coverage in the individual health insurance market. The market reforms guaranteed availability of health care to all Americans, and prohibited health insurers from using factors such as health status, medical history, preexisting conditions, gender, and industry of employment to set premium rates or deny coverage.

25. The ACA provides that "each health insurance issuer that offers health insurance coverage in the individual . . . market in a State must accept every . . . individual in the State that applies for such coverage." 42 U.S.C. § 300gg-1(a). The ACA also generally bars insurers from charging higher premiums on the basis of a person's health. *See* 42 U.S.C. § 300gg.

26. Through the ACA, Congress created competitive statewide health insurance marketplaces – the ACA Exchanges – that offer health insurance options to consumers. Section 1311 of the ACA establishes the framework for the Exchanges. *See* 42 U.S.C. § 18031.

27. Collectively, Plaintiffs voluntarily participated and offered QHPs in the ACA Marketplaces in 14 states – California, Colorado, Connecticut, Georgia, Indiana, Kentucky, Maine, Missouri, Nevada, New Hampshire, New York, Ohio, Virginia, and Wisconsin – after complying with the certification requirements of the Government and/or the state-level operator

of those ACA Exchanges that they should be certified as QHPs beginning on January 1, 2014 (the first day of the ACA Exchanges). All Plaintiffs remained on the ACA exchanges through the present day, with the exception of Anthem NV and Anthem WI, which participated in the ACA Exchanges in CY 2017, but not CY 2018 or CY 2019. For each calendar year in which Plaintiffs have participated on the ACA Exchanges, their premiums were submitted to and approved by each respective state's insurance regulator in the spring and/or summer of the previous year (*e.g.*, spring and/or summer of 2016 for CY 2017).

28. Upon the Government's and/or the state-level operator's evaluation and certification of Plaintiffs as QHPs, Anthem was required to provide a package of "essential health benefits" on the ACA Exchange on which it voluntarily participated. 42 U.S.C. § 18021(a)(1).

29. In deciding to become and continue as a QHP in its respective states each calendar year, Anthem understood and believed that, in exchange for complying with numerous obligations imposed on QHPs, the Government would comply with many reciprocal obligations imposed on it – including among others, the obligation to make full and timely advance CSR payments to eligible QHPs, like Anthem. The Government, however, unlawfully has failed to do so, as detailed below.

The ACA's Cost-Sharing Reduction Program

30. To make health insurance more affordable for low- and modest-income Americans, the ACA provides for funding from the Government to eligible enrollees. Those federal subsidies help offset the two kinds of costs that consumers must pay to obtain health insurance: (i) health insurance premiums, and (ii) out-of-pocket expenses for health care (such as deductibles, co-pays, co-insurance, the annual limitation on cost-sharing, and similar

expenses). The latter are known as “cost-sharing” expenses, and are directly related to the former under the ACA.

31. Regarding health insurance premiums, Section 1401 of the ACA amended the Internal Revenue Code by providing “premium tax credits” from the Government that reduce monthly health insurance premiums on ACA Exchange plans for individuals who earn between 100% and 400% of the federal poverty level, and who satisfy additional criteria. *See* 26 U.S.C. § 36B (ACA § 1401).

32. Regarding cost-sharing expenses, Section 1402 of the ACA mandates that, after being notified by HHS that a customer is eligible for CSR discounts, a QHP “shall reduce” a specified portion of that customer’s out-of-pocket health care costs for “deductibles, copayments, or similar charges.” 42 U.S.C. § 18071(a)(2); § 18022(c)(3)(A).

33. Congress intended CSR discounts to be available to enrollees who meet three criteria: (i) they are eligible to receive premium tax credits under Section 1401, (ii) their household income is less than 250% of the federal poverty level—in 2017, under \$61,500 for a family of four—and (iii) they are enrolled in a “silver” plan offered by the QHP in an ACA Exchange’s individual market. 42 U.S.C. § 18071(b), (c)(2), (f)(2); *Annual Update of the HHS Poverty Guidelines*, 82 FR 8831, 8832 (Jan. 31, 2017), attached hereto at Exhibit 01; CMS, *Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Year 2016* at 6 (Dec. 27, 2016), attached hereto at Exhibit 02 (hereinafter, “CMS 2016 CSR Manual”). Section 1402(d) further provides special rules for QHPs that provide CSR discounts to American Indians and Alaska Natives. *See* 42 U.S.C. § 18071(d).

34. QHPs, like Anthem, that are certified to voluntarily participate in an ACA Exchange must offer at least one “silver” health plan. *See* 42 U.S.C. § 18071(c)(2). Before

applying CSR discounts, a “silver” plan is structured so that the QHP pays an estimated 70 percent of an enrollee’s health care costs, leaving the enrollee responsible for a 30 percent share of their health care costs. *See* 42 U.S.C. § 18022(d)(1)(B). Congress intended for CSR discounts subsidized by the Government to further reduce eligible enrollees’ health care costs, but not to increase costs for QHPs.

35. Of the approximately 10.3 million people enrolled through the ACA Exchanges in CY 2017, nearly 5.9 million (about 57%) received CSR discounts. In CY 2018, about 53% of enrollees received CSR discounts, and 52% of enrollees received CSR discounts in CY 2019. *See* CMS, *2017 Effectuated Enrollment Snapshot* (June 12, 2017), attached hereto at [Exhibit 03](#); CMS, *Early 2018 Effectuated Enrollment Snapshot* (July 2, 2018), attached hereto at [Exhibit 04](#); CMS, *Early 2019 Effectuated Enrollment Snapshot* (August 12, 2019), attached hereto at [Exhibit 05](#).

36. Although Congress’s design called for eligible enrollees to receive CSR discounts directly from their health insurance QHPs, like Anthem, Congress did not intend for QHPs to bear the expense of the CSR discounts. Instead, Congress intended and mandated in Sections 1402 and 1412 of the ACA that the Government “shall” fully reimburse QHPs – and do so in advance – for those CSR discounts through advance CSR payments from the Government to QHPs.

37. 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).

38. Additionally, in Section 1412, Congress mandated 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).

39. Congress purposefully used the word “*shall*” in Sections 1402 and 1412 to clearly indicate that advance CSR payments are a money-mandating obligation of the United States that the Government must make to QHPs, like Anthem. Advance CSR payments are not subsidies for QHPs; they are mandatory advance payments owed by the Government to reimburse QHPs for the mandatory CSR discounts the ACA requires QHPs to provide to eligible customers for their out-of-pocket health care expenses.

40. Congress did not limit in any way the Government's obligation to make full advance CSR payments owed to QHPs, due to appropriations, restriction on the use of funds, the amount of premium tax credits provided to ACA enrollees under 26 U.S.C. § 36B or otherwise in Section 1402, Section 1412, or anywhere else in the ACA. The Government's obligation to make full advance CSR payments to QHPs is not, and has never been, subject to “budget neutrality.”

41. 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.

42. The Government thus lacks statutory authority to pay anything less than 100% of the unmade CSR payments due to Anthem.

43. Based on the language of Sections 1402 and 1412 and their implementing regulations, and the representations and conduct of the Government since the CSR program was initiated, when it agreed to commit each year to the ACA Exchanges, Anthem understood that it would not bear the expense of the mandatory CSR discounts the ACA required it provide to eligible enrollees. Instead, Anthem understood that the Government would pay Anthem in advance for those CSR discounts through “periodic and timely” advance monthly CSR payments.

44. The Government has failed to honor its mandatory advance CSR payment obligation to Anthem since October 12, 2017.

HHS’s Cost-Sharing Reduction Regulations

45. The HHS Secretary formally delegated authority over the CSR program under Section 1402 and Section 1412 to the CMS Administrator on August 30, 2011, specifically directing that “CMS will consult with the Department of the Treasury.” *See* 76 FR 53903, 53903-04 (Aug. 30, 2011), attached hereto at Exhibit 06. By authority of this delegation from the HHS Secretary, CMS issued implementing regulations for the CSR program at 45 C.F.R. Part 156.

46. The process for providing advance CSR payments and later reconciling those payments against CSR discounts is set forth at 45 C.F.R. § 156.430. *See* 45 C.F.R. § 156.430; CMS 2016 CSR Manual at 6 n.9, Ex. 02.

47. The CSR payment regulations state that QHPs “*will* receive periodic *advance* payments based on the advance payment amounts calculated in accordance” with a regulatory formula. 45 C.F.R. § 156.430(b)(1) (emphasis added).

48. HHS and CMS determined that the Government would make “periodic” advance CSR payments monthly, and then in fact the Government made advance CSR payments to QHPs each month from January 2014 until October 2017 – a total of 45 consecutive monthly advance CSR payments. As HHS explained when it first decided to make monthly CSR payments:

We proposed to implement a payment approach under which we 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. *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.* We expect that this approach would not require issuers to fund the value of any cost-sharing reductions prior to reimbursement.

78 FR 15409, 15486 (Mar. 11, 2013) (Final Rule) (emphasis added) (internal footnote omitted), attached hereto at Exhibit 07.

49. Under the implementing regulations, an annual CSR reconciliation process occurs following the conclusion of each benefit year, with QHPs notifying the HHS Secretary of CSR discounts provided on behalf of eligible enrollees for actual essential health services. *See* 45 C.F.R. § 156.430(c); Bulletin, CMS, *Data submission deadline for cost-sharing reduction reconciliation* (Apr. 15, 2016), attached hereto at Exhibit 08 (hereinafter, “CMS CSR Data Submission Bulletin”).

50. HHS then analyzes the relevant data and reconciles the amount of CSR discounts that eligible customers received from a QHP in the previous benefit year against the advance CSR payments that HHS made to the QHP for the same benefit year. *See* 45 C.F.R. § 156.430(d); CMS CSR Data Submission Bulletin, Ex. 08.

51. If a discrepancy exists between the previous benefit year’s amount of CSR discounts and advance CSR payments, the discrepancy is resolved through either an additional

reimbursement “for the difference” that HHS “will” provide to the QHP, or a repayment of “the difference” that the QHP “must” provide to HHS. 45 C.F.R. § 156.430(e); CMS 2016 CSR Manual at 36, Ex. 02.

52. Through this annual CSR reconciliation and reimbursement process, which historically has been completed by the end of June following the benefit year, HHS and QHPs ensure that the advance CSR payments from the Government to a QHP in a benefit year equal the actual amount of CSR discounts from the QHP to its eligible enrollees in that benefit year, consistent with Congress’s mandate to the Government in Section 1402. *See* 42 U.S.C. § 18071(c)(3)(A) (“[T]he [HHS] Secretary shall make periodic and timely payments to the [QHP] equal to the value of the [CSR discount] reductions.”).

Plaintiffs are QHPs for CYs 2017 to 2019

53. Based on Congress’ statutory commitments set forth in the ACA, and the regulations implementing the ACA, including the CSR program, each of the Plaintiffs agreed to become QHPs, and to enter into QHP Agreements either with CMS, a federal agency within HHS, or with the state-level operator of the ACA Exchange in California, Colorado, Connecticut, Kentucky and New York, after CMS and/or the state-level operator had exercised its discretion to certify each of the Plaintiffs as QHPs in, respectively, California, Colorado, Connecticut, Georgia, Indiana, Kentucky, Maine, Missouri, Nevada, New Hampshire, New York, Ohio, Virginia, and Wisconsin. Collectively, the QHP Agreements are attached to this Complaint at Exhibits 09 to 46.

54. On November 30, 2017, Anthem CA executed a QHP Issuer Agreement for 2017, attached hereto at Exhibit 09. On February 20, 2018, Anthem CA executed a QHP Issuer

Agreement for 2018, attached hereto at Exhibit 10. On February 14, 2019, Anthem CA executed a QHP Issuer Agreement for 2019, attached hereto at Exhibit 11.

55. On December 30, 2015, Rocky Mt. CO executed a QHP Issuer Agreement in effect from 2016 through 2019, attached hereto at Exhibit 12.

56. On September 21, 2016, Rocky Mt. NV executed a QHP Issuer Agreement for 2017, attached hereto at Exhibit 13. On October 2, 2017, Rocky Mt. NV executed a QHP Issuer Agreement for 2018, attached hereto at Exhibit 14. On September 25, 2018, Rocky Mt. NV executed a QHP Issuer Agreement for 2019, attached hereto at Exhibit 15.

57. On September 21, 2016, Anthem NV executed a QHP Issuer Agreement for 2017, attached hereto at Exhibit 16.

58. On June 13, 2016, Anthem CT executed a QHP Issuer Agreement for 2017, attached hereto at Exhibit 17. On May 24, 2017, Anthem CT executed a QHP Issuer Agreement for 2018, attached hereto at Exhibit 18. On July 16, 2018, Anthem CT executed a QHP Issuer Agreement for 2019, attached hereto at Exhibit 19.

59. On September 21, 2016, Anthem GA executed a QHP Issuer Agreement for 2017, attached hereto at Exhibit 20. On October 2, 2017, Anthem GA executed a QHP Issuer Agreement for 2018, attached hereto at Exhibit 21. On September 25, 2018, Anthem GA executed a QHP Issuer Agreement for 2019, attached hereto at Exhibit 22.

60. On September 21, 2016, Anthem IN executed a QHP Issuer Agreement for 2017, attached hereto at Exhibit 23. On October 2, 2017, Anthem IN executed a QHP Issuer Agreement for 2018, attached hereto at Exhibit 24. On September 25, 2018, Anthem IN executed a QHP Issuer Agreement for 2019, attached hereto at Exhibit 25.

61. On September 21, 2016, Anthem KY executed a QHP Issuer Agreement for 2017, attached hereto at Exhibit 26. On October 2, 2017, Anthem KY executed a QHP Issuer Agreement for 2018, attached hereto at Exhibit 27. On September 25, 2018, Anthem KY executed a QHP Issuer Agreement for 2019, attached hereto at Exhibit 28.

62. On September 21, 2016, Anthem ME executed a QHP Issuer Agreement for 2017, attached hereto at Exhibit 29. On October 2, 2017, Anthem ME executed a QHP Issuer Agreement for 2018, attached hereto at Exhibit 30. On September 25, 2018, Anthem ME executed a QHP Issuer Agreement for 2019, attached hereto at Exhibit 31.

63. On September 21, 2016, Anthem MO executed a QHP Issuer Agreement for 2017, attached hereto at Exhibit 32. On October 2, 2017, Anthem MO executed a QHP Issuer Agreement for 2018, attached hereto at Exhibit 33. On September 25, 2018, Anthem MO executed a QHP Issuer Agreement for 2019, attached hereto at Exhibit 34.

64. On September 21, 2016, Anthem NH executed a QHP Issuer Agreement for 2017, attached hereto at Exhibit 35. On October 2, 2017, Anthem NH executed a QHP Issuer Agreement for 2018, attached hereto at Exhibit 36. On September 25, 2018, Anthem NH executed a QHP Issuer Agreement for 2019, attached hereto at Exhibit 37.

65. On October 20, 2014, Anthem NY executed a QHP Issuer Agreement in effect from 2013 through 2018, attached hereto at Exhibit 38. On August 15, 2018, Anthem NY executed a QHP Issuer Agreement in effect from 2018 through 2023, attached hereto at Exhibit 39.

66. On September 21, 2016, Anthem OH executed a QHP Issuer Agreement for 2017, attached hereto at Exhibit 40. On October 2, 2017, Anthem OH executed a QHP Issuer

Agreement for 2018, attached hereto at Exhibit 41. On September 25, 2018, Anthem OH executed a QHP Issuer Agreement for 2019, attached hereto at Exhibit 42.

67. On September 21, 2016, Anthem VA executed a QHP Issuer Agreement for 2017, attached hereto at Exhibit 43. On October 2, 2017, Anthem VA executed a QHP Issuer Agreement for 2018, attached hereto at Exhibit 44. On September 25, 2018, Anthem VA executed a QHP Issuer Agreement for 2019, attached hereto at Exhibit 45.

68. On September 21, 2016, Anthem WI executed a QHP Issuer Agreement for 2017, attached hereto at Exhibit 46.

69. Guidance from HHS and CMS to Issuers on Federally-Facilitated Exchanges (“FFE”) and State Partnership Exchanges on April 5, 2013, stated that, “A signed QHP Agreement with CMS will complete the certification process in an FFE or State Partnership Exchange. The Agreement will highlight and memorialize many of the QHP issuer’s statutory and regulatory requirements and will serve as an important reminder of the relationship between the QHP issuer and CMS.” Letter from CMS to Issuers on Federally-Facilitated Exchanges and State Partnership Exchanges at 23 (Apr. 5, 2013), attached hereto at Exhibit 47.

70. Additionally, HHS and CMS confirmed in the April 5, 2013 Guidance that “Applicants will ... be required to attest to their adherence to the regulations set forth in 45 C.F.R. parts 155 and 156 and other programmatic requirements necessary for the operational success of an Exchange, and provide requested supporting documentation.” *Id.* at 20.

71. Before Anthem executed the CY 2017, CY 2018 and CY 2019 QHP Agreements, Anthem executed dozens of attestations certifying its compliance with the obligations it was undertaking by agreeing to become, or continuing to act as, a QHP on the ACA Exchanges in all

of the states in which Plaintiffs voluntarily participated in the ACA Marketplace. *See, e.g.*, Anthem NH CY 2017, CY 2018, and CY 2019 Attestations, attached hereto at Exhibits 48 to 50.

72. The federal Government's advance CSR payments that Congress mandated through the CSR program, and that the Government confirmed in the implementing regulations, was a significant factor in Anthem's decision to agree to become QHPs and undertake the many responsibilities and obligations required for Anthem to participate in the ACA Exchanges.

73. Had Anthem known that the Government would fail to fully and timely make the mandatory advance CSR payments owed to Anthem, then Anthem may not have agreed to provide CSR discounts to eligible members and Anthem's annual premiums in the ACA Exchanges would necessarily have been higher than actually charged. Anthem also would not have agreed to participate in the ACA Marketplace without adequate pricing had it known that the Government would have breached its obligations regarding the CSR program.

**HHS's and CMS's Interpretation of
The Government's Cost-Sharing Reduction Payment Obligations**

74. Starting in January 2014 and continuing uninterrupted until October 2017, the HHS and Treasury Secretaries – including those in the current Trump Administration – made the Government's monthly advance CSR payments to QHPs, including Anthem, as Congress required in the ACA and consistent with their interpretation of the Government's money-mandating payment obligations under the ACA. *See* CMS 2016 CSR Manual at 36, Ex. 02 (“Payments to issuers for the cost-sharing reduction component of advance payments began in January 2014.”).

75. In rulemaking as early as 2012, HHS and CMS publicly wrote in the Federal Register that “if the actual amounts of [CSR discounts provided from QHPs to eligible enrollees] exceed the advance [CSR] payment amounts provided to the [QHP by HHS] ..., *HHS would*

reimburse the issuer for the shortfall, assuming that the [QHP] has submitted its actual [CSR] amount report to HHS in a timely fashion.” 77 FR 73118, 73176 (Dec. 7, 2012) (Proposed Rule) (emphasis added), attached hereto at Exhibit 51.

76. Anthem has always timely submitted its required CSR reports to HHS.

77. In final rulemaking of March 11, 2013, while QHPs like Anthem were contemplating whether to commit to participating in the ACA Exchanges, HHS and CMS announced their interpretation that “*cost-sharing reductions are reimbursed by the Federal government.*” 78 FR 15409, 15481 (Mar. 11, 2013) (Final Rule) (emphasis added), Ex. 07. In describing the CSR advance payment and reconciliation process, HHS and CMS expressly acknowledged “the [HHS] 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.” *Id.* at 15486 (emphasis added). HHS and CMS expressed their understanding of the statutory requirement that “*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.” *Id.* at 15488 (emphasis added). Finally, HHS and CMS expressed their interpretation that “*Section 1402(c)(3) provides for the Secretary of HHS to make payments to QHP issuers equal to the value of the cost-sharing reductions.*” *Id.* at 15489 (emphasis added).

78. In final rulemaking of March 11, 2014, HHS and CMS stated their interpretation that:

Section 1402(c)(3) of the Affordable Care Act directs a QHP issuer to notify the Secretary of cost-sharing reductions made under the statute, and directs the Secretary to make periodic and timely payments to the QHP issuer equal to the value of those reductions. Section 1412(c)(3) of the Affordable Care Act permits advance payments of cost-sharing reduction amounts to QHP issuers based upon amounts specified by the Secretary. Under these authorities, we established a payment approach in the 2014 Payment Notice under which monthly advance payments made to issuers

to cover projected cost-sharing reduction amounts are reconciled after the end of the benefit year to the actual cost-sharing reduction amounts.

79 FR 13743, 13805 (Mar. 11, 2014) (Final Rule) (emphasis added), attached hereto at Exhibit 52.

79. In early 2015, in guidance issued to QHPs regarding the CSR reconciliation process, HHS and CMS stated that “[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. Bulletin, CMS, *Timing of Reconciliation of Cost-Sharing Reductions for the 2014 Benefit Year* at 1 (Feb. 13, 2015), attached hereto at Exhibit 53 (hereinafter, “CMS 2014 CSR Bulletin”) (emphasis added).

80. In a December 2016 manual regarding CSR reconciliation, HHS and CMS again acknowledged that under Sections 1402 and 1412 of the ACA, “periodic and timely payments equal to the value of [QHPs’ CSR] reductions **are required to be made to issuers** ... in advance” by the Government. CMS 2016 CSR Manual at 6 & n.8 (emphasis added), Ex. 02.

81. HHS and CMS implemented the CSR reconciliation process for both CY 2014 and CY 2015 in the middle of 2016, and Anthem timely submitted its CSR data to CMS and participated in the process. See CMS 2014 CSR Bulletin at 1-2, Ex. 53; CMS CSR Data Submission Bulletin, Ex. 08; CMS, *Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Years 2014 and 2015* at 6 (Mar. 16, 2016), attached hereto at Exhibit 54 (hereinafter, “CMS 2014-15 CSR Manual”); see e.g., Email from Jeff Grant, Director, Payment Policy and Financial Management Group, CMS, to Anthem WI (June 30, 2016) (regarding Benefit Years 2014-15), attached hereto at Exhibit 55.

82. These repeated public statements by HHS and CMS were made or ratified by representatives of the Government who had actual authority to bind the United States, including,

but not limited to, the HHS Secretary and Kevin J. Counihan, the CMS official designated as the Chief Executive Officer of the ACA Health Insurance Marketplaces and Director of CMS's Center for Consumer Information and Insurance Oversight ("CCIIO"), which regulates health insurance at the federal level. *See* CMS Leadership, Center for Consumer Information and Insurance Oversight, Kevin Counihan, <https://www.cms.gov/About-CMS/Leadership/cciiio/Kevin-Counihan.html> (last visited Jan. 12, 2017), attached hereto at Exhibit 56 (Mr. Counihan's job description). Mr. Counihan's successor was Randy Pate, who 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/cciiio/Randy-Pate.html>.

83. After the inauguration of President Donald J. Trump on January 20, 2017, HHS, CMS and Treasury continued to make the Government's monthly advance CSR payments to QHPs.

84. In the middle of 2017, HHS and CMS implemented the CSR reconciliation process for CY 2016, and Anthem timely submitted its CSR data to CMS and participated in the process. *See* CMS 2016 CSR Manual at 8-9 & 36, Ex. 02; *see, e.g.*, Email from Jeffrey Grant, Director, Payment Policy and Financial Management Group, CMS, to Anthem WI (June 30, 2017), attached hereto at Exhibit 57.

85. The Government continued making monthly mandatory advance CSR payments to QHPs, including Anthem, through September 2017 (for October 2017 CSR discounts) as

required by the ACA and its implementing regulations, as well as by the Government's contracts with Plaintiffs.

The Government Breaches its Cost-Sharing Reduction Payment Obligations

86. On October 12, 2017, the Trump Administration announced that the Government would no longer make CSR payments to QHPs. In a press statement, the White House stated that:

Based on guidance from the Department of Justice, the Department of Health and Human Services has concluded that there is no appropriation for cost-sharing reduction payments to insurance companies under [the ACA]. In light of this analysis, the Government cannot lawfully make the cost-sharing reduction payments.

Dan Mangan, *Obamacare bombshell: Trump kills key payments to health insurers*, CNBC, Oct. 12, 2017, attached hereto at Exhibit 58.

87. HHS and CMS also issued a press release on October 12, 2017, stating:

After a thorough legal review by HHS, Treasury, OMB, and an opinion from the Attorney General, we believe 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), attached hereto at Exhibit 59.

88. In making such statement, however, the Government ignored that “[i]t 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.” *Prairie Cnty., Mont. v. United States*, 782 F.3d 685, 690 (Fed. Cir.), *cert. denied*, 136 S. Ct. 319 (2015); *see also Maine Cmty. Health Options v. United States*, No. 18-1023, 2020 WL 1978706, at *10 (U.S. Apr. 27, 2020). The Supreme Court confirmed in *Maine Cmty. Health Options* that a similar ACA statutory

obligation that HHS “shall” pay monies owed to insurers for the risk corridors program was itself (without express “budget authority”) a binding, money-mandating government “obligation neither contingent on nor limited by the availability of appropriations or other funds.” *Id.*; *cf.* ACA § 1412(c)(3) (the Treasury Secretary “shall make” advance CSR payment to QHPs). The Supreme Court also held the ACA’s statutory payment obligation was unaffected by the Anti-deficiency Act because the “obligation was authorized” by the ACA’s risk corridors statute. *Id.* at *9.

89. Attached to the HHS and CMS press statement was an October 12, 2017 order from HHS Acting Secretary Eric Hargan 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), attached hereto at Exhibit 60.

90. Attached to Mr. Hargan’s order was an October 11, 2017 legal opinion signed by U.S. Attorney General Jeff Sessions and addressed to the Treasury Secretary and HHS Acting Secretary. *See* Letter from Jefferson B. Sessions III, U.S. Attorney General, to Steven Mnuchin, Secretary of the Treasury & Don Wright, HHS Acting Secretary (Oct. 11, 2017), attached hereto at Exhibit 61.

91. Former U.S. Attorney General Sessions admitted that Section 1402 “*requires* insurers offering policies through ACA exchanges to reduce co-payments and other out-of-pocket costs for certain policyholders (reductions referred to in the ACA as “Cost-Sharing Reductions”).” *Id.* at 2 (citing ACA § 1402) (emphasis added).

92. U.S. Attorney General Sessions also admitted that Section 1412 “authorizes” advance CSR payments from the Government to QHPs for the cost of QHPs’ CSR discounts to

eligible customers. *Id.* Section 1402 mandates that HHS “shall” make CSR payments to QHPs, and Congress never made those money-mandating obligations subject to the availability of appropriations or limited the Government’s CSR payment obligation in any way.

93. Pursuant to the Administration’s decision to cease making required advance CSR monthly payments to QHPs, HHS and Treasury have not made any of the Government’s advance CSR payments to QHPs, like Anthem, in and after October 2017.

94. On October 13, 2017, CMS’s Financial Management Coordination Center (“FMCC”) emailed to Anthem and other QHPs a letter stating that:

[CMS] will discontinue payments of [CSR] to issuers effective in October. ... For the October monthly payment cycle and beyond, CMS will withhold advance CSR payments for the current month of coverage and will not make any adjustments to CSR payment amounts related to retroactive enrollment data changes for prior months of 2017. Issuers will therefore receive no net payment of 2017 advance CSR in the October and future payment cycles. ... CSR reconciliation payments for the 2016 benefit year, including any payments owed as the result of reported discrepancies, will not be made. CMS will collect CSR reconciliation charges that result from any discrepancies.

Email from CMS FMCC to Anthem (Oct. 13, 2017, 3:52 PM), attached hereto at [Exhibit 62](#).

95. On October 20, 2017, CMS emailed to Anthem and other QHPs a notice that “CMS has published a supplemental FAQ document today related to the cessation of cost-sharing reductions to provide additional detail on the impacts of this change to issuers’ enrollment and payment data processing,” and provided a link to the referenced FAQ document.

Email from CMS FMCC to Anthem (Oct. 20, 2017, 4:15 PM), attached hereto at [Exhibit 63](#).

96. CMS’s FAQ document of October 20, 2017, confirmed that:

For the October monthly payment cycle and beyond, CMS will not make advance CSR payments, and will not make any adjustments to CSR payment amounts related to retroactive enrollment data changes for prior months of 2017, unless Congress appropriates funding for these payments.

Issuers will therefore receive no net payment of 2017 advance CSR in the October and future payment cycles.

Bulletin, CMS, *FAQ on Cessation of Payment of Cost-sharing Reductions* at 1 (Oct. 20, 2017), attached hereto at Exhibit 64.

97. Regarding payments and charges from the CSR reconciliation process established in the Government's implementing regulations, the FAQ document stated that:

CSR reconciliation payments for the 2016 benefit year and prior year restatements previously scheduled for the October 2017 payment cycle or future cycles, including any payments calculated as the result of reported discrepancies, will not be made. However, if a discrepancy results in an overpayment to the issuer, CMS will proceed with the collection of those charges after the issuer has been notified of CMS's discrepancy decision.

Id.

98. At least five federal judges have recognized the Government's liability to QHPs, like Anthem, in these particular circumstances regarding advance CSR payments.

99. Judge Rosemary Collyer of the U.S. District Court for the District of Columbia wrote that if CSR payments are discontinued, "[u]nreimbursed insurers might sue the government under the Tucker Act, 28 U.S.C. § 1491(a)(1), to receive the money owed them under ACA Section 1402(c)(3)(A) ('[T]he Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions.')." *U.S. House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 183 (D.D.C. 2016).

100. Subsequently, Judge Vince Chhabria of the U.S. District Court for the Northern District of California wrote that "the [ACA] requires the federal government to make advance payments to the [health insurance] companies to cover the cost of this [CSR] subsidy"; that "the [ACA] requires the insurance companies to be paid"; that "the [ACA] requires the federal government to compensate the insurance companies for those [cost-sharing] reductions"; that the

ACA “required the federal government to pay the insurance companies in advance for these [cost-sharing] reductions”; that the mandatory “shall” in Section 1402(c)(3)(A) “is how the [ACA] ‘authorized’ the cost-sharing reduction program and the CSR payments to the insurers”; and that, ***“In sum, the [ACA] requires the federal government to pay insurance companies to cover the cost-sharing reductions. The federal government is failing to meet that obligation.”*** *California v. Trump*, 267 F. Supp. 3d 1119, 1121-24, 1129, 1133 (N.D. Cal. 2017) (emphasis added).

101. In five other CSR cases in this Court, Judges Kaplan, Sweeney, and Wheeler granted summary judgment on liability in favor of the plaintiff insurers that asserted statutory CSR claims under Section 1402 virtually identical to those asserted here by Anthem. *See Montana Health Co-Op v. United States*, 139 Fed. Cl. 213 (2018); *Sanford Health Plan v. United States*, No. 18-136C, 2018 WL 4939418 (Fed. Cl. Oct. 11, 2018); *Common Ground Healthcare Coop. v. United States*, 142 Fed. Cl. 38 (2019); *Cnty. Health Choice, Inc. v. United States*, 141 Fed. Cl. 744 (2019); *Local Initiative Health Auth. for L.A. Cty. v. United States*, 142 Fed. Cl. 1 (2019). The rulings finding the Government liable for its CSR statutory payment obligations in all of these cases are consistent with, and bolstered by, the Supreme Court’s decision in *Maine Cmty. Health Options v. United States*, No. 18-1023, 2020 WL 1978706, at *10 (U.S. Apr. 27, 2020).

102. The monetary damages Anthem seeks are specific—the statutorily mandated unmade CSR payments to which the Plaintiffs are entitled on and after October 12, 2017 through to the end of 2019.

Anthem's Advance Cost-Sharing Reduction Payments Owed Since October 12, 2017

103. Between January 2014 and October 12, 2017, Defendant made monthly advance CSR payments to Anthem on or about a date between the nineteenth and twenty-second of each month. *See* Decl. of Elizabeth Parish in Supp. of Defs.' Opp'n to Pls.' Mot. for a TRO, *Calif. v. Trump*, No. 3:17-cv-5895-VC, ECF No. 35-3, at ¶ 5 (Oct. 20, 2017), attached hereto at Exhibit 65 (CMS official declaring under oath that "monthly [advance CSR] payments [are] scheduled for a pre-established date between the nineteenth and twenty-second of each month").

104. The Administration announced its October 12, 2017 decision to stop making the Government's advance CSR payments before the Government made its expected October 20, 2017 monthly advance CSR payment to Anthem. *See id.* ("October payments are being made without CSR payments according to this schedule on October 20, 2017.").

105. Defendant thus has made no CSR payments to Anthem since September 2017.

106. In the October 13, 2017 CMS FMCC email to Anthem and other QHPs, CMS stated that it would continue to report the amount of monthly advance CSR payments a QHP would have received from the Government in and after October 2017, but that the same monthly payment report "will also show a lump-sum issuer-level manual adjustment that reverses the total net advance CSR payment," Email from CMS FMCC to Anthem (Oct. 13, 2017, 3:52 PM), Ex. 62 resulting in no CSR payment being paid despite the Government's obligations to make such payments each month.

107. CMS's FAQ document of October 20, 2017 also confirmed that "[QHPs] will see detailed advance CSR payments appear as in prior months on their payment reports[,] ... [which] will also show a lump-sum issuer-level manual adjustment that reverses the total net advance

CSR payment.” Bulletin, CMS, *FAQ on Cessation of Payment of Cost-sharing Reductions* at 1 (Oct. 20, 2017), Ex. 64.

108. Consistent with CMS’s October 13 and October 20, 2017 communications, each month since the Government’s decision to breach its advance CSR payment obligation, CMS has reported to Anthem the amount of advance CSR payments owed to Anthem, but has reversed those payments with manual adjustments.

109. As the Government stated in the October, November and December 2017 payment reports it sent to Anthem, Anthem expected advance CSR payments from Defendant in October, November, and December 2017, which the Government refused to pay in violation of its obligations.

110. Anthem is owed \$31,997,701.61 for CY 2017 following CMS’ reconciliation of CSR payment amounts owed Anthem for 2017, that was completed in June of 2018.

111. In addition, the Government owes Anthem CSR payments for each month in 2018 in the total amount of \$229,779,371.00 for CY 2018 following CMS’ reconciliation of CSR payments amounts owed Anthem for 2018, that was completed in June of 2019. The Government has likewise refused to pay this amount in violation of its obligations.

112. In addition, the Government owes Anthem CSR payments for each month in 2019 in the total amount of \$261,542,402.91, all of which the Government has likewise refused to pay in violation of its obligations. Anthem expects that CMS will reconcile the 2019 CSR amounts by the end of June 2020, after which, by the time of entry of judgment in this case, the Government may owe Anthem additional CSR amounts for 2019.

113. Anthem demands full and immediate payment from the United States in the total amount of \$523,319,475.52 for unpaid CSR payments due and owing to Anthem which

Defendant has refused to pay in violation of its obligations from October 12, 2017, through the date of entry of judgment against the United States.

COUNT I
Violation of Federal Statute and Regulation

114. Plaintiffs reallege and incorporate by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

115. Plaintiffs are entitled to the unmade CSR payments owed under § 1402's plain terms. Section 1402(c)(3)(A) of the ACA mandates compensation, expressly stating that a QHP issuer: "making reductions under this subsection shall notify the Secretary of such [cost-sharing] reductions and the Secretary *shall make periodic and timely payments* to the issuer equal to the value of the reductions." 42 U.S.C. § 18071(c)(3)(A) (emphasis added).

116. Section 1412(c)(3) of the ACA likewise mandates compensation, expressly stating that the "Treasury [Secretary] shall make such advance [CSR] payment [to QHPs] at such time and in such amount as the [HHS] Secretary specifies." 42 U.S.C. § 18082(c)(3).

117. HHS's and CMS's implementing regulation at 45 C.F.R. § 156.430(a) also mandates compensation, expressly stating that "A QHP issuer will receive periodic advance [CSR] payments." 45 C.F.R. § 156.430(a).

118. Furthermore, HHS's and CMS's implementing regulation at 45 C.F.R. § 156.430(e)(1) mandates compensation, expressly stating that "If the actual amounts of cost-sharing reductions [provided by QHPs to enrollees] are – (1) More than the amount of advance payments provided [by HHS and Treasury to a QHP] and the QHP issuer has timely provided the actual amounts of cost-sharing reductions as required ..., HHS will reimburse the QHP issuer for the difference." 45 C.F.R. § 156.430(e)(1).

119. HHS and CMS have long recognized “the [HHS] Secretary’s *obligation* to make ‘periodic and timely payments equal to the value of the [QHPs’ CSR] reductions’ under section 1402(c)(3) of the Affordable Care Act.” 78 FR 15409, 15486 (Mar. 11, 2013) (Final Rule) (emphasis added).

120. Anthem is entitled under Section 1402(c)(3)(A) of the ACA, Section 1412(c)(3) of the ACA, and 45 C.F.R. § 156.430(a) and (e)(1) to receive monthly advance CSR payments from Defendant in an amount equal to the full amount of the monthly CSR discounts that Anthem provides to its eligible customers for essential health benefits.

121. Anthem has provided CSR discounts to its eligible customers for essential health benefits every month since January 2014.

122. Every month between January 2014 and September 2017, Defendant complied with its obligations and made mandatory monthly advance CSR payments to Anthem. *See* 42 U.S.C. § 18071(a).

123. Anthem has not received any CSR payments from Defendant since October 2017, as a result of the Government’s unlawful decision on October 12, 2017 to breach its statutory and regulatory obligations and stop making monthly advance CSR payments to Anthem and other QHPs.

124. Despite the Government’s unlawful decision, the Government has continued to acknowledge the amount of advance CSR payments it owes to Anthem each month, in monthly payment reports sent to Anthem starting in October 2017.

125. Congress did not repeal, amend or otherwise abrogate the statutory obligation created by Sections 1402 and 1412 to make full and timely advance CSR payments to QHPs,

including Anthem, that provide CSR discounts to their eligible customers for essential health benefits.

126. The Government's failure to make full and timely advance CSR payments to Anthem since October 12, 2017 constitutes a violation and breach of the Government's mandatory payment obligations under Sections 1402(c)(3)(A) and 1412(c)(3) of the ACA and 45 C.F.R. § 156.430(a) and (e)(1).

127. Plaintiffs' statutory claims seek specific relief—the statutorily mandated unmade CSR payments to which they are entitled, and there is no statutory or other legal basis to undermine Plaintiffs' entitlement to those specific statutory CSR payments Plaintiffs are owed.

128. Section 1402 prescribes a precisely determinable CSR payment amount. Nothing in the ACA requires (or permits) the mandatory payments under §1402 to be reduced based on the size of premiums charged by an insurer, an insurer's rate of return on sales, its overall profit, or any other market or external factors.

129. The ACA states that, entirely apart from the CSR payments owed, QHP issuers are entitled to a “[r]efundable [tax] credit for coverage under a qualified health plan.” 26 U.S.C. § 36B. The ACA thus unconditionally requires the Government to make *both* CSR reimbursements and premium tax credits, and does not allow for reduction of one based on increase of the other.

130. The statutorily-mandated CSR payments the Government owes Plaintiffs cannot be reduced based on common law mitigation or offset theories that are not set forth in the ACA and have no statutory basis. The ACA imposes no obligation of mitigation on QHPs, and no right of offset to the Government with respect to the QHP issuers' unconditional right to receive the statutorily-mandated CSR payments due.

131. Plaintiffs' statutory claims are for the statutorily-mandated unmade CSR payments to which they are entitled and are not based on expectancy damages. Therefore, the ultimate, indirect consequences of the Government's failure to pay the CSRs owed Plaintiffs under the statute are irrelevant to Plaintiffs' right to receive those unmade CSR payments as specific relief.

132. As a direct result of the United States' violation of Sections 1402(c)(3)(A) and 1412(c)(3) of the ACA and 45 C.F.R. § 156.430(a) and (e)(1), Anthem has not been paid the CSR payments owed and Plaintiffs have been damaged in the amount of at least \$523,319,475.52 as of the filing date of its this Complaint, together with post-judgment interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT II
Breach of Implied-In-Fact Contract

133. Plaintiffs reallege and incorporate by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

134. The Government knowingly and voluntarily entered into valid implied-in-fact contracts with Anthem regarding the Government's obligation to make full and timely advance CSR payments to Anthem in exchange for Plaintiffs' voluntary agreement to participate as QHPs in the ACA Exchanges and undertake the obligations of QHPs including, among other things, providing CSR discounts to Anthem's eligible customers.

135. The existence of an implied-in-fact contract can be inferred from both the promissory "shall pay" and "will pay" language in Sections 1402 and 1412 of the ACA and their implementing regulations (45 C.F.R. § 156.430), as well as from the parties' conduct and the totality of the circumstances surrounding the enactment and implementation of the ACA and the CSR program, by which Congress, HHS, CMS, and Treasury committed to fully reimburse

QHPs in advance for the CSR discounts that QHPs were obligated to provide to their eligible customers.

136. Sections 1402 and 1412 and their implementing regulations use unequivocal promissory language leading QHPs to reasonably believe that they would be repaid the full amount of CSRs owed under the CSR program. There is no language in the CSR statute or implementing regulations that limited the Government's payment obligation.

137. Sections 1402 and 1412 of the ACA and their implementing regulations (45 C.F.R. § 156.430), confirmed and ratified by HHS's and CMS's repeated assurances admitting their obligation to make full monthly advance CSR payments, constituted a clear and unambiguous offer by the Government to make full and timely advance CSR payments to health insurers, including Anthem, that agreed to participate as QHPs in the ACA Exchanges and were approved as certified QHPs by the Government at the Government's discretion. This offer evidences a clear intent by the Government to contract with Anthem.

138. The Government provided in Sections 1402 and 1412 of the ACA a program that offered full reimbursement in advance of Anthem's actual costs in providing CSR discounts to its eligible customers in return for Anthem's voluntary performance in the form of an actual undertaking and gave HHS no discretion to decide whether or not to pay eligible QHPs that agreed to participate the specific amount of CSR discounts that they provide to eligible customers.

139. The CSR program is a means for distributing a Government subsidy in the form of CSRs that the Government chose to distribute by asking insurers to act as the sole and exclusive conduits for payment of those subsidies to eligible enrollees.

140. Anthem accepted the Government's offer by developing QHPs that complied with the ACA's requirements, agreeing to become QHPs and perform as QHPs on the ACA Exchanges, selling qualified plans on the ACA Exchanges, and providing CSR discounts to Anthem's eligible customers to reduce their out-of-pocket expenses as the ACA required.

141. Anthem's acceptance through performance and its undertakings were substantial and the Government's duty to pay Anthem the CSR payments owed for 2017, 2018 and 2019, has fully matured.

142. By agreeing to become QHPs, Anthem agreed to provide services by offering health insurance on particular Exchanges established under the ACA, and to accept the new obligations, responsibilities and conditions the Government imposed on QHPs – subject to the implied covenant of good faith and fair dealing – under the ACA and its implementing regulations.

143. As agreed under the implied-in-fact contracts between Anthem and Defendant, Plaintiffs provided a service to Defendant by delivering the Government's federal CSR subsidies to Anthem's eligible customers, on the promise that Defendant would provide advance reimbursements of Plaintiffs' actual costs in the form of monthly advance CSR payments.

144. Anthem was not obligated to participate as QHPs, to incur Exchange-related costs and losses, and to provide healthcare benefits – including mandatory CSR discounts – to numerous enrollees at premiums that were lower than they would have been without the Government's promised full advance reimbursement of the CSR discounts that Anthem provided to its eligible customers.

145. The Government's agreement to make full and timely advance CSR payments was a significant factor material to Anthem's agreement to become QHPs and participate in the ACA Exchanges.

146. Anthem, in turn, provided a real benefit to the Government by agreeing to become QHPs in their respective states, and to offer affordable health insurance on and to participate in the ACA Exchanges. Without sufficient health insurers voluntarily agreeing to participate in the new ACA Exchanges, and providing CSR discounts to eligible enrollees, the ACA could not have been implemented as intended.

147. Without Anthem's agreement to provide CSR discounts to eligible members, in exchange for the Government's promise to make required advance CSR monthly payments to Anthem, the members eligible to receive such CSR discounts in the form of reduced out-of-pocket costs, deductibles and copays, may not have been able to participate in or obtain health insurance coverage on ACA Exchanges.

148. Anthem satisfied and complied with its obligations and/or conditions which existed under the implied-in fact contracts.

149. The implied-in-fact contracts were supported by consideration. Defendant offered consideration in the form of promised advance CSR payments. In return, Anthem developed compliant plans, offered those plans for sale on the ACA Exchanges, and made CSR reductions to its eligible ACA customers.

150. The parties' mutual intent to contract is further confirmed by the parties' conduct, performance and statements, including, but not limited to, the Government's repeated actual monthly payment of advance CSR payments to Anthem for the 45 consecutive months from January 2014 through September 2017.

151. As former U.S. Attorney General Sessions acknowledged, Section 1412 “*authorizes* the federal government to make payments directly to insurers” for “the lost revenue these [CSR] reductions cause.” Letter from Jefferson B. Sessions III, U.S. Attorney General, to Steven Mnuchin, Secretary of the Treasury & Don Wright, HHS Acting Secretary (Oct. 11, 2017) (citing ACA § 1412(c)(3)) (emphasis added), Ex. 61.

152. Sections 1402 and 1412 provide that the Secretary of HHS “shall establish” the CSR program and “shall make” CSR payments and the Secretary is responsible for administering and implementing the ACA. *See* ACA §§ 1001, 1301(a)(1)(C)(iv), 1302(a)–(b), 1311(c)–(d). The HHS Secretary is charged with administering and implementing the CSR program which includes the authority to enter into contracts integral to the Secretary's duties.

153. The Secretaries of the Treasury and HHS were therefore authorized by law under the ACA to make the Government’s advance CSR payments to Anthem.

154. Defendant’s implied-in-fact contracts with Anthem were furthermore authorized and/or ratified by representatives of the Government who had express or implied actual authority to bind the United States, were clearly founded upon a meeting of the minds between the parties and entered into with mutual assent, and were supported by consideration.

155. Anthem has not received any monthly advance CSR payments from Defendant since October 2017 as a result of the Government’s unlawful decision on October 12, 2017, to breach its obligations under the implied-in-fact contracts and stop making monthly advance CSR payments to Anthem and other QHPs.

156. Despite the Government’s unlawful decision, the Government has continued to acknowledge the amount of advance CSR payments it owes to Anthem each month, in monthly payment reports sent to Anthem starting in October 2017.

157. Congress did not repeal, amend or otherwise abrogate the obligation established in Sections 1402 and 1412 to make full and timely advance CSR payments to QHPs, including Anthem, that provide CSR discounts to their eligible customers for essential health benefits.

158. The contractual damages the Government owes Plaintiffs are prescribed in a precisely determinable amount in §1402. Nothing in the ACA requires (or permits) payments under §1402 to be reduced based on the size of premiums charged by an insurer, an insurer's rate of return on sales, its overall profit, or any other market or external factors.

159. The ACA states that, entirely apart from the CSR reimbursements, QHP issuers are entitled to a "[r]efundable [tax] credit for coverage under a qualified health plan." 26 U.S.C. § 36B. The Government is thus unconditionally required by the ACA to make *both* CSR reimbursements and premium tax credits, and does not allow for reduction of one based on increase of the other.

160. The Government's failure to make full and timely advance CSR payments to Anthem on and after October 12, 2017, as the Government was obligated to do, is a continuing material breach of the implied-in-fact contracts.

161. The contractual damages Plaintiffs have suffered in the form of unmade CSR payments the Government owes, but has not paid, cannot be reduced by whatever measures Plaintiffs, the non-breaching parties, or third parties may take to mitigate the absence of the CSR payments owed.

162. Contractual mitigation, if legally permissible, is limited to actions taken by the non-breaching party that are directly related to the breach and its proximate consequences. In this case, any benefits the Government may claim QHP issuers, like Anthem, supposedly obtained through state insurance regulators subsequently increasing premium tax credits for

eligible ACA enrollees were not a direct result of the Government's violation of its CSR payment obligations and therefore, the Government is not entitled to claim a benefit from such speculative, indirect, remote and collateral consequences to reduce the amount of CSR payments it owes Plaintiffs.

163. The Government also is not legally entitled to any offsets to the amount of unmade CSR payments it owes Plaintiffs. Plaintiffs undisputedly do not owe the Government money under the CSR program, and the Government has no factual or legal basis to support any offset claim.

164. But for the Government's contractual breach, Plaintiffs would have received the full amount of specific, monthly CSR payments to which they were entitled, but did not receive. The Government's breach caused Plaintiffs not to receive the unmade CSR payments owed. The amount of the unmade CSR payments the Government owes Plaintiffs can be determined with reasonable certainty.

165. If it were determined that the Government is legally entitled to any mitigation or offset to Plaintiffs' alternative contractual damages recovery, the Government, as the breaching party, would bear the affirmative burden of proving with reasonable certainty: (a) the quantum of benefit it claims the Plaintiffs received as a direct and proximate result of the Government's failure to make the required CSR payments owed; (b) that Plaintiffs would not have received such benefit but for the Government's breach; and (c) that a reduction in Plaintiffs' damages by such quantum is warranted under settled law.

166. As a direct result of the United States' material breaches of its implied-in-fact contracts that it entered into with Anthem regarding advance CSR payments owed for the fourth quarter of 2017, 2018 and 2019, Anthem has been damaged in the amount of at least

\$523,319,475.52 as of the filing date of this Complaint, together with post-judgment interest, costs of suit, and such other relief as this Court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against the Defendant, the United States of America, as follows:

(1) For Count I, awarding damages sustained by Plaintiffs for the unmade CSR payments owed by the Government, in the amount of at least \$523,319,475.52, subject to proof at trial, as a result of the Defendant's violation of Sections 1402 and 1412 of the ACA and of 45 C.F.R. § 156.430 regarding the advance CSR payments owed to Plaintiffs from October 12, 2017, through the date of entry of judgment against the United States;

(2) For Count II, awarding contract damages sustained by Plaintiffs, in the amount of at least \$523,319,475.52, subject to proof at trial, as a result of the Defendant's breaches of its implied-in-fact contracts with Plaintiffs regarding the advance CSR payments owed to Plaintiffs from October 12, 2017, through the date of entry of judgment against the United States;

(3) Awarding all available interest, including, but not limited to, post-judgment interest, to Plaintiffs;

(4) Awarding all available attorneys' fees and costs to Plaintiffs; and

(5) Awarding such other and further relief to Plaintiffs as the Court deems just and equitable.

Dated: May 15, 2020

Of Counsel:

Conor M. Shaffer (PA Bar No. 314474)

REED SMITH LLP

Reed Smith Centre

225 Fifth Avenue, Suite 1200

Pittsburgh, PA 15222

Telephone: 412.288.3131

Facsimile: 412.288.3063

Email: cshaffer@reedsmith.com

Respectfully Submitted,

s/ Lawrence S. Sher

Lawrence S. Sher (D.C. Bar No. 430469)

REED SMITH LLP

1301 K Street NW

Suite 1000-East Tower

Washington, DC 20005

Telephone: 202.414.9200

Facsimile: 202.414.9299

Email: lsher@reedsmith.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2020, a copy of the foregoing Complaint and accompanying Exhibits were filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be sent to all parties by operation of the Court's ECF system.

s/ Lawrence S. Sher

Lawrence S. Sher

Counsel for Plaintiffs