IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NEW MEXICO HEALTH CONNECTIONS, a New Mexico Non-Profit Corporation,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

No. 16-1199 C

COMPLAINT

Plaintiff New Mexico Health Connections ("Plaintiff or "NMHC") is a New Mexico non-profit health insurance company that is owed millions of dollars from Defendant the United States of America ("Defendant," "United States," or "Government") under the risk corridors program of the Affordable Care Act. The amounts owed to NMHC are expressly provided for by statute, regulation, and contract. They are specifically determinable as an accounting matter. And, they are not in dispute. The Government has acknowledged its obligations to make full risk corridors payments to NMHC (and other insurers) and has recorded or will record those amounts as payment obligations of the Government. Nevertheless, the Government has failed to pay the acknowledged amounts purportedly because of funding shortfalls.

The Government has dug the hole deeper by demanding that NMHC timely pay every cent of its obligation under the risk adjustment program (another market stabilizing program of the ACA) without giving NMHC any credit or offset for the amount owed to NMHC by the Government. In other words, the Government is taking the duplicitous position that NMHC must fully and timely satisfy its obligation while the Government can simply ignore its own

obligation. The absurdity of the Government's position is easily illustrated by an elementary example:

> Andy owes Newman $100. Newman owes Andy $150. Overall, after offset, Newman owes Andy $50. But, Andy is refusing to pay Newman or even offset his debt. Instead, Andy is keeping his $100 and demanding that Newman pay $150.

In this example, Andy's demand is laughable. There is no merit to Andy demanding $150 from Newman when Andy is owed an overall amount of $50. Despite its obvious lack of merit, this is precisely the position the Government has taken with NMHC. But, rather than $50, *millions of dollars* are at stake.

The Government's failure to timely make payments to NMHC of the admittedly owed risk corridors payments, and its refusal to allow an offset against risk adjustment assessments, has caused NMHC substantial and continuing harm. NMHC, through its undersigned counsel, is compelled to petition this Court for relief and alleges as follows:

INTRODUCTION

1. NMHC brings this action to recover damages and for declaratory relief for: (1) Defendant's failure to make mandatory risk corridors payments in violation of Section 1342 of the Patient Protection and Affordable Care Act (the "ACA" or the "Act"), and its implementing federal regulations; (2) Defendant's failure to make risk corridors payments in breach of its contractual obligations; (3) Defendant's breaches of the covenant of good faith and fair dealing implied in Defendant's contracts with NMHC; (4) Defendant's improper collection of full risk adjustment payments without offsetting against risk corridors payments owed to NMHC; and (5) Defendant's unlawful taking of Plaintiff's property without just compensation in violation of the Fifth Amendment of the U.S. Constitution.

2. In 2010, the Government enacted the ACA, which marked a major reform in the United States health care market. The ACA extended guaranteed availability of health care coverage to all Americans regardless of medical history and prohibited health insurers from using factors such as health status, medical history, gender, and industry of employment to set premium rates.

3. The ACA not only required individuals to purchase coverage if they were not otherwise insured, but also created federal subsidies to offset the cost of coverage. The ACA's individual health insurance policy purchase mandate, coupled with the availability of federal subsidies and the ease of online shopping, dramatically increased the number of individuals - many previously uninsured - who now purchase health insurance. To facilitate access to the new insurance markets, the Act created health insurance exchanges, which are online marketplaces through which individuals may purchase health insurance.

4. To further facilitate affordability and access to competitive health insurance through the exchanges, Congress created the Consumer Operated and Oriented Plan ("CO-OP") program to "foster the creation of qualified nonprofit health insurance issuers to offer qualified health plans in the individual and small group markets . . ." ACA, Pub. L. No. 111-148, § 1322 (codified at 42 U.S.C. § 18042). CO-OPs are required to offer at least two-thirds of their plans as qualified health plans ("QHPs") certified by CMS in the individual and small group markets. In other words, unlike their larger, entrenched competitors, CO-OPs are required to offer products on the exchanges established by the ACA, and are required to do "substantially all" of their business in the individual and small group markets. NMHC was created under the CO-OP program and is the CO-OP insurance carrier for New Mexico.

5. Because the ACA introduced thousands of previously uninsured or underinsured citizens into the health care marketplace, it created great uncertainty for health insurers, including NMHC, that had no previous experience or reliable data to meaningfully assess the risks and set the premiums for this new population of insureds. Congress included three premium-stabilization programs in the ACA to mitigate the effects of this lack of information, which could otherwise compel nervous carriers to charge extremely high premiums to obtain protection against such unknown risks: a 3-year temporary reinsurance program, a 3-year temporary risk corridors program, and a permanent risk adjustment program. The reinsurance program is not at issue in this Complaint.

6. The permanent risk adjustment program aims to protect consumer access to coverage options by "reducing the incentive for insurance companies to seek only to insure healthy individuals." CMS, *The Three Rs: An Overview* (Oct. 1, 2015), available at https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2015-Fact-sheets-items/2015-10-01.html. It does this by distributing funds to and making assessments against insurers based on the actuarial risk (*i.e.*, the relative health or sickness) of their enrollees. *Id.* Theoretically[1], insurance issuers with healthier populations will make payments to CMS, and issuers with sicker populations will receive payments from CMS. The program aims to "level the playing field" among insurers to prevent carriers from making or losing money solely because they draw healthier or sicker enrollees.

7. The temporary risk corridors program aims to support the marketplace by providing insurers with additional protection against uncertainty in claims costs during the first

[1] NMHC has challenged the risk adjustment methodology in a separate action pending in the United States District Court for the District of New Mexico because, as applied, the methodology is arbitrary, capricious and unlawful.

three years of the Marketplace. *Id.* It does this by having the Government share risk in a health plan's losses and gains. "Issuers whose premiums exceed claims and other costs by more than a certain amount pay into the program, and insurers whose claims exceed premiums by a certain amount receive payments for their shortfall." *Id.* If the amount a QHP collects in premiums in a relevant calendar year exceeds its medical expenses by a certain target amount, the QHP must make a payment to the Government. If annual premiums fall short of this target, however, the Government must make a risk corridors payment to the QHP under a formula prescribed in Section 1342.

8. The United States has admitted its statutory and regulatory obligations to pay the full amount of risk corridors payments owed to QHPs, but has failed to make the required payments, to the tune of *over $2.5 billion* for 2014 alone.

9. Instead, the Government arbitrarily has paid Plaintiff, and other QHPs, only a pro-rata share - roughly 12.6% - of the total amount due for 2014 and nothing yet for 2015, asserting that full payment is limited by available appropriations, even though no such limits appear anywhere in the ACA or its implementing regulations or in NMHC's contracts with the Government.

10. In addition to its failure to pay NMHC its risk corridors payments, the Government has continued to assess full risk adjustment payments from NMHC without offsetting the amounts it owes to NMHC under the risk corridors program.

11. This action seeks damages from the Government of at least $23,084,748 which represents the amount of risk corridors payments owed to Plaintiff for 2014 and the estimated amounts for 2015. It also seeks a declaration that the Government is required to offset NMHC's risk adjustment assessments against the risk corridors payments owed to NMHC.

12. Plaintiff also seeks declaratory relief from the Court regarding the Government's obligation to make full and timely risk corridors payments for 2015 and 2016, in accordance with the Defendant's legal obligations. The law is clear, and the Government must abide by its statutory obligations. NMHC respectfully asks the Court to compel the Government to meet its obligations.

JURISDICTION AND VENUE

13. 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 Plaintiff brings claims for damages over $10,000 against the United States, and these claims are founded upon the Government's violations of a money-mandating Act of Congress, a money-mandating regulation of an executive department, a contract between the United States and Plaintiff, and a taking of Plaintiff's property in violation of the Fifth Amendment of the Constitution.

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

PARTIES

15. NMHC is a not-for-profit New Mexico company with headquarters located in Albuquerque, serving nearly 45,000 members.

16. NMHC is a member-led QHP issuer on the New Mexico exchange. It is organized as a non-profit under the CO-OP program and offers comprehensive health insurance benefits to individuals, families and businesses in New Mexico. It is the State of New Mexico's only non-profit CO-OP insurer. NMHC began providing affordable, high-quality health plans in New Mexico in 2014.

17. From NMHC's inception, both its Board of Directors and senior management have focused on offering health insurance plans to individuals and families through the New Mexico exchange, and to small businesses.

18. NMHC has always been committed to providing access to quality healthcare to individuals and families regardless of income. Half of its members qualify for subsidized health insurance coverage. NMHC fills a void in New Mexico's health insurance options, providing *affordable*, high quality coverage. Since its inception, NMHC has offered the lowest cost or second lowest cost plan available in each of New Mexico's five rating regions.

19. NMHC is able to provide these low premium plans thanks to its excellent medical management capabilities, which help members to have the best health status possible for each individual, thus avoiding major unnecessary costs, especially hospitalizations. Affordability and health improvement are core to its mission and business success.

20. The popularity of this approach to health insurance is evident from the significant growth NMHC has achieved in each of its three years of existence – from 14,000 members in 2014 to 44,500 members thus far in 2016.

21. Members are particularly drawn to NMHC's innovations that promote a focus on improved health status. The benefits available to each NMHC member include:

(a) no co-payments for chronic disease generic drugs and behavioral health medications;

(b) no co-payments or other patient out-of-pocket costs for the first three visits to primary care and behavioral health providers;

(c) personalized outreach to patients to ensure compliance with medication regimens;

(d) care coordination, including follow-up visits with primary care providers after a hospitalization;

(e) assistance of community health workers and social workers when needed; and

(f) intense personalized medical management of high risk individuals.

22. In keeping with its mission, NMHC is the only health plan in New Mexico where margins are redirected to the benefit of its members through rate reductions and/or improvement of care and health quality. It is not under pressure to make extraordinary profits to deliver returns to shareholders; its focus is solely on its members.

23. Nevertheless, the positive impact of NMHC is felt beyond its membership pool. At a recent meeting of the National Association of Insurance Commissioners, the Superintendent of Insurance of New Mexico stated to his colleagues that the presence of the NMHC CO-OP had saved New Mexico health insurance subscribers over half a billion dollars over the last three years by simply being a new competitor in the market and focusing on care management and cost.

24. NMHC has, by all measures, been a success. In a thorough financial and operational review by Deloitte Consulting recently instituted by CMS, the Deloitte team leader stated that NMHC was no longer a fledgling start-up, but now a fully mature health plan given its rapid success (the plan filed a first quarter profit with NAIC in May of 2016), and the deep industry experience of the senior team and staff.

25. In sum, NMHC has helped its members maintain or even *improve* their health, which, in turn, has lowered costs. This is precisely the type of innovative offering the ACA CO-OP program was designed to support.

26. Defendant is the United States of America. HHS and CMS are agencies of the Defendant United States of America. These Government agencies are responsible for overseeing the administration of the ACA.

FACTUAL ALLEGATIONS

Congress Enacts the Patient Protection and Affordable Care Act

27. In 2010, Congress enacted the ACA, Pub. L. No. 111-148, 42 U.S.C. § 18001, *et seq.*

28. The ACA aimed to increase the number of Americans covered by health insurance and decrease the cost of health care in the United States.

29. 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." ACA, Pub. L. No. 111-148, § 2702(a) (codified at 42 U.S.C. § 300gg-1(a)).

30. The ACA also bars insurers from charging higher premiums on the basis of a person's health. ACA, Pub. L. No. 111-148, § 2701 (codified at 42 U.S.C.§ 300gg).

31. Beginning on January 1, 2014, individuals and small businesses were permitted to purchase private health insurance through competitive statewide marketplaces called "American Health Benefit Exchanges." ACA Section 1311 establishes the framework for these exchanges. *See* ACA, Pub. L. No. 111-148, § 1311 (codified at 42 U.S.C. § 18031).

32. NMHC participated in the exchange in New Mexico in 2014 and 2015, and also is currently participating this year.

NMHC Establishes Itself as a QHP

33. As noted, *supra*, one major aspect of the ACA's health care overhaul was the establishment of health insurance exchanges, which offered consumers organized platforms to shop for coverage with specified benefit levels. These exchanges were established to meet the ACA's goal of providing "competitive environments in which consumers can choose from a number of affordable and high quality health plans." Steven Sheingold et al., *Competition and*

Choice in the Health Insurance Marketplaces, 2014-2015: Impact on Premiums, ASSISTANT SEC'Y FOR PLANNING AND EVALUATION ISSUE BRIEF (July 27, 2015), at 1, available at https://aspe.hhs.gov/sites/default/files/pdf/108466/rpt_MarketplaceCompetition.pdf.

34. To offer plans on the exchanges, an issuer must certify that the plans are QHPs, that is, that they meet certain federally-mandated criteria. The ACA offers tax credits and cost sharing subsidies to help lower-income individuals purchase QHPs through the exchanges. *See* ACA, Pub. L. No. 111-148, §§ 1401-02 (codified at 26 U.S.C. § 36B, 42 U.S.C. § 18071).

35. In order to promote competition within the exchanges and to provide consumers with greater choice among QHPs, the ACA created the CO-OP program, which provided funding to new non-profit health insurers committed to the development of innovative health insurance models that would invigorate competition, drive costs down, and increase the quality of health care delivered to consumers in the individual and small group markets. *See* ACA, Pub. L. No. 111-148, § 1322(a)(1)-(2) (codified at 42 U.S.C. § 18042(a)(1)-(2)); HHS et al., *Loan Funding Opportunity Number: OO-COO-11-001* (Dec. 9, 2011), at 7, 10, available at https://apply07.grants.gov/apply/opportunities/instructions/oppOO-COO-11-001-cfda93.545-instructions.pdf.

36. NMHC was initiated by a group of community advocates in 2011 to apply for CO-OP funding under Section 1322 of the ACA.

37. NMHC was awarded this funding, and on February 19, 2012, NMHC signed a loan agreement ("Loan Agreement") with HHS to fund its initial formation and operation in New Mexico. *See* Loan Agreement, CMS & NMHC (Feb. 19, 2012). The stated purpose of the Loan Agreement (which was drafted by the Government) was to permit NMHC

"to offer health plans primarily in the individual and small group markets" on the exchanges. *Id.* at 8.

38. The Loan Agreement required NMHC to develop a viable and sustainable CO-OP, offering plans certified by CMS as QHPs to participate on the exchanges. *See* HHS et al., *Loan Funding Opportunity Number: OO-COO-11-001,* at 8, 22.

39. To be deemed certified, NMHC was required to comply with all standards set forth in Section 1311(c) of the ACA, all state specific standards, and any CO-OP regulatory standards. NMHC was also required to offer at least two-thirds of its plans as QHPs in the individual and small group markets.

40. The Loan Agreement was executed by representatives of the Government who had actual authority to bind the United States, and was entered into with mutual assent and consideration by both parties.

41. NMHC also signed QHP Agreements with CMS.

42. NMHC executed its initial QHP Agreement in September 2013 ("2014 QHP Agreement")." *See* QHP Agreement, CMS & NMHC (Sept. 23, 2013). The 2014 QHP Agreement was executed by representatives of the Government who had actual authority to bind the United States, and was entered into with mutual assent and consideration by both parties.

43. The 2014 QHP Agreement obligated CMS to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions." *Id.* at 5. It further provided that CMS could amend the agreement to reflect changes in applicable law or regulations, but any such amendments would be prospective only, not retrospective, and CMS was required to give notice of such amendment, so that NMHC would have the opportunity to reject it. *Id.* at 7. CMS provided no such notice under the 2014 QHP Agreement at any time.

44. Before NMHC executed the 2014 QHP Agreement, NMHC executed an attestation certifying its compliance with the obligations it was undertaking by agreeing to become a QHP on the ACA exchange in New Mexico. Plaintiff submitted its executed attestation to CMS on April 25, 2013.

45. By executing and submitting this attestation to CMS, NMHC agreed to the many obligations and responsibilities imposed upon all QHPs that accept the Government's offer to participate in the ACA exchanges. Those obligations and responsibilities that Plaintiff undertook include, *inter alia,* licensing, reporting requirements, employment restrictions, marketing parameters, HHS oversight of the QHP's compliance plan, maintenance of an internal grievance process, benefit design standards, cost-sharing limits, rate requirements, enrollment parameters, premium payment process requirements, participating in financial management programs established under the ACA (including the risk corridors and risk adjustment programs), adhering to data standards, and establishing dedicated and secure server environments and data security procedures.

46. NMHC affirmatively attested that it would agree to comply with certain "Financial Management" obligations, including, among others:

> (1) New Mexico Health Connections attests that it will . . . be bound by Federal statutes and requirements that govern Federal funds. Federal funds include . . . Federal payments related to the risk adjustment, reinsurance, and risk corridors programs.
>
> (2) New Mexico Health Connections attests that it will adhere to the risk corridor standards and requirements set by HHS as applicable for:
>
> **(a)** risk corridor data standards and annual HHS notice of benefit and payment parameters for the calendar years 2014, 2015, and 2016 (45 C.F.R. 153.510); and
>
> remit charges to HHS under the circumstances described in 45 C.F.R. 153.510.

(3) New Mexico Health Connections attests that it will:

(a) adhere to the risk adjustment standards and requirements set by HHS in the annual HHS notice of benefit and payment parameters (45 CFR Subparts G and H); and

(b) remit charges to HHS under the circumstances described in 45 C.F.R. 153.610.

Martin E. Hickey, *Qualified Health Plan Program Attestations* (Apr. 25, 2013), at 5.

47. The financial risk sharing that Congress mandated through the risk corridors program was a significant factor in NMHC's decision to agree to execute the Loan Agreement, become a QHP, and undertake the many responsibilities and obligations required for NMHC to participate in the ACA exchange.

The ACA's Premium-Stabilization Programs

48. To help protect health insurers against the risks inherent in covering a new and previously uninsured population about whom little was known, the ACA established three premium-stabilization programs, commonly referred to as the "Three Rs": (1) a three-year risk corridors program; (2) a three-year reinsurance program; and (3) a permanent risk adjustment program. Of these programs, two are relevant to this action: risk corridors and risk adjustment.

49. The goal of the temporary risk corridors program, which is the main focus of this action, is to give insurers payment stability as insurance market reforms begin.

50. The ongoing risk adjustment program is intended to make payments to health insurance issuers that cover higher-risk populations (*e.g.*, those with chronic conditions) to more evenly spread the financial risk borne by issuers.

51. The financial protections that Congress provided in the statutory premium-stabilization programs, including the mandatory risk corridors payments, provided QHPs with the security – backed by federal law and the full faith and credit of the United States – to become

participating health insurers in their respective states' ACA exchanges, at considerable cost to the QHPs, and despite the significant financial risks posed by the uncertainty in the new health care markets.

52. Since the ACA's rollout, NMHC has worked with the Government to make the ACA exchange successful in New Mexico. Participating as a QHP on the New Mexico exchange, NMHC has developed a broad spectrum of health insurance products at competitive rates, providing quality, low-cost options to its thousands of members and sparking greater competition among other issuers. Since January 1, 2014, NMHC has served 72,047 unique members.

53. NMHC has stayed true to its mission and to the goals of the ACA, expanding health care coverage by providing quality options at affordable rates. But doing so is not easy in a new market where the risk profile of its enrolled population is unknown. NMHC has none of the information that is typically used by insurers to set premiums. NMHC could have protected itself from these unknown risks by setting premiums high – attempting to ensure that it would take in more money than it would pay out in claims. But, doing that would be anathema to the mission of NMHC and the ACA. Rather, NMHC relied on the protections built into the market stabilization programs, including the risk corridors program, to keep its premiums at affordable levels. The premium rates NMHC set for its QHPs were lower than they would have been in the absence of the Government's promise of risk corridors payments.

54. The lower premiums obviously benefit NMHC's 45,000 members. But they also benefit the Government and the taxpayers. The Government is obligated to provide premium tax credits under the ACA, to help individuals pay premiums for QHPs. Higher premiums equates to higher Government payments. By keeping premiums low, the tax credits

provide by the Government to NMHC members were much less than they otherwise would have been.

55. NMHC has demonstrated its willingness to be a meaningful partner in the ACA program, and has done so in good faith, with the understanding that the United States would honor its statutory, regulatory, and contractual commitments regarding the premium-stabilization programs, including the temporary risk corridors program.

The ACA's Risk Corridors Program

56. As noted above, this action is primarily concerned with the risk corridors program.

57. Section 1342 of the ACA expressly requires the Secretary of HHS to establish a temporary risk corridors program that provides for the sharing in gains or losses between the Government and certain participating health plans in the individual and small group markets. *See* ACA, Pub. L. No. 111-148, § 1342 (codified at 42 U.S.C. § 18062).

58. The risk corridors program applies only to participating plans that agreed to accept the responsibilities and obligations of QHPs. All insurers that elect to enter into agreements to become QHPs are required by Section 1342(a) of the ACA to participate in the risk corridors program. As a CO-OP, NMHC was required by its Loan Agreement to become a QHP and thus to participate in the risk corridors program.

59. By enacting Section 1342 of the ACA, Congress recognized that, due to uncertainty about the population entering the exchanges during the first few years, health insurers may not be able to predict their risk accurately, and their premiums may reflect costs that are ultimately lower or higher than predicted.

60. Congress intended the ACA's temporary risk corridors provision as an important safety valve for consumers and insurers as millions of Americans would transition to

new coverage in a brand new marketplace, protecting against the uncertainty that health insurers, like NMHC, would face when estimating enrollments and costs resulting from the market reforms by creating a mechanism for sharing risk between the Government and issuers of QHPs in each of the first three years of the new regulatory scheme and exchange marketplaces.

61. Under the risk corridors program, the Government shares risk with QHP health insurers by collecting charges from a health insurer if the insurer's QHP premiums exceed claims costs of QHP enrollees by a certain amount, and by making payments to the insurer if the insurer's QHP premiums fall short by a certain amount, subject to certain adjustments for taxes, administrative expenses, and other costs and payments.

62. Congress, through Sections 1342(b)(1) and (2) of the ACA, expressly established the payment methodology and formula for the risk corridors program:

> (b) **Payment methodology**
>
> **(1) Payments out**
>
> The Secretary ***shall*** provide under the program established under subsection (a) that if—
>
> (A) a participating plan's allowable costs ***for any plan year*** are more than 103 percent but not more than 108 percent of the target amount, the Secretary ***shall pay*** to the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount; and
>
> (B) a participating plan's allowable costs ***for any plan year*** are more than 108 percent of the target amount, the Secretary ***shall*** pay to the plan an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount.
>
> **(2) Payments in**
>
> The Secretary shall provide under the program established under subsection (a) that if—
>
> (A) a participating plan's allowable costs for any plan year are less than 97 percent but not less than 92 percent of the target amount, the plan shall pay to the Secretary an amount equal to 50

> percent of the excess of 97 percent of the target amount over the allowable costs; and
>
> (B) a participating plan's allowable costs for any plan year are less than 92 percent of the target amount, the plan shall pay to the Secretary an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the excess of 92 percent of the target amount over the allowable costs.

ACA, Pub. L. No. 111-148, § 1342(b) (codified at 42 U.S.C. § 18062(b)) (emphasis added).

63. HHS implemented the risk corridors program in the Code of Federal Regulations at 45 C.F.R. § 153.510. In relevant part, Section 153.510 states:

> (b) HHS payments to health insurance issuers. QHP issuers will receive payment from HHS in the following amounts, under the following circumstances:
>
> (1) When a QHP's allowable costs ***for any benefit year*** are more than 103 percent but not more than 108 percent of the target amount, ***HHS will pay the QHP issuer*** an amount equal to 50 percent of the allowable costs in excess of 103 percent of the target amount; and
>
> (2) When a QHP's allowable costs ***for any benefit year*** are more than 108 percent of the target amount, ***HHS will pay to the QHP issuer*** an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount.

Risk Corridors Establishment and Payment Methodology, 45 C.F.R. § 153.510(b) (2016) (emphasis added).

64. To determine whether a QHP pays into, or receives payments from, the risk corridors program, HHS compares allowable costs (essentially, claims costs subject to adjustments for health care quality, health IT, risk adjustment payments and charges and reinsurance payments) and the target amount (*i.e.*, the difference between a QHP's earned premiums and allowable administrative costs).

65. Through this risk corridors payment methodology, QHPs keep all gains and bear all losses that they experience within three percent of their target amount for a calendar year. For example, a QHP that has a target amount of $10 million in a given calendar year will not pay a risk corridors charge or receive a risk corridors payment if its allowable charges range between $9.7 million and $10.3 million for that calendar year.

66. As detailed below, in 2014 and 2015, NMHC experienced allowable-cost losses in excess of its target costs, making NMHC eligible to receive mandatory risk corridors payments required under Section 1342.

67. Congress did not impose any financial limits or restraints on the Government's mandatory risk corridors payments to QHPs in either Section 1342 or any other section of the ACA.

68. The United States has failed or refused to make full and timely risk corridors payments to NMHC as required under Section 1342 of the ACA and 45 C.F.R. § 153.510.

69. HHS and CMS, which are charged with administering the risk corridors program, lack authority to pay anything less than 100% of the risk corridors payments due to Plaintiff and are legally obligated to make full payment.

HHS and CMS's Recognition of Risk Corridors Payment Obligations

70. Since Congress's enactment of the ACA in 2010, HHS and CMS have repeatedly and publicly acknowledged and confirmed their statutory and regulatory obligations to make full and timely – *i.e.*, annual – risk corridors payments to qualifying QHPs.

71. These public statements by HHS and CMS were made by representatives of the Government who had actual authority to bind the United States.

72. HHS and CMS intended for QHPs to rely on these public statements to assume and continue their QHP status, and participate on the ACA exchanges.

73. On July 11, 2011, HHS issued a fact sheet on HealthCare.gov, "Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment," stating that under the risk corridors program, "qualified health plan issuers with costs greater than three percent of cost projections ***will receive payments*** from HHS to offset a percentage of those losses." *Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment*, HEALTHCARE.GOV (July 11, 2011) (emphasis added).

74. On March 23, 2012, HHS implemented a final rule regarding Standards Related to Reinsurance, Risk Corridors and Risk Adjustment. *See* Standards Related to Reinsurance, Risk Corridors, and Risk Adjustment, 77 Fed. Reg. 17,219 (Mar. 23, 2012). Although HHS did not expressly propose deadlines for making risk corridors payments, HHS stated that "QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers." *Id.* at 17,238. The payment deadline for QHP issuers to pay HHS under the risk corridors program is within 30 days after notification of such charges. *See* 45 C.F.R. § 153.510(d).

75. On March 11, 2013, HHS publicly affirmed that the risk corridors program is ***not*** statutorily required to be budget neutral, *i.e.*, payments into the program do not have to equal payments out of the program. *See* HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,409 (Mar. 11, 2013). HHS confirmed that, "Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." *Id.* at 15,473.

76. The statute is in fact clear that the Government will share in the losses for plans with higher than anticipated costs so that if, hypothetically, all plans have higher than anticipated costs, the Government would need to make full payments to each plan, even though there would be no insurer payments coming in. The risk corridors program could not have been subject to budget neutrality and still in accord with Congressional intent. Had the program been cabined by budget neutrality concerns, the ACA would have failed to attract sufficient entrants into the marketplace because the investment would have been too risky, as payments owed could easily swamp payments made into the program (as actually happened). HHS's timely payment to plans under the risk corridors program is essential to realizing the ACA's intent that the program stabilize premiums. Indeed, Section 1342 is modeled for just that reason on the Medicare Part D program, which also is not required to be budget neutral. *See* Risk Sharing Arrangements, 42 C.F.R. § 423.336 (2016).

77. In deciding to become and continue as a QHP, by entering into the Loan Agreement and 2014 QHP Agreement, NMHC relied upon HHS's commitments to make full risk corridors payments annually, as required in Section 1342 of the ACA, regardless of whether risk corridors payments to QHPs are actually greater than risk corridors charges collected from QHPs for a particular calendar year.

The Government Reneges on Its Statutory Obligation to Make Full and Timely Risk Corridors Program Payments

78. Since its enactment, Congress has not altered the Government's obligations under the ACA's risk corridors program. Despite this, the Government has taken several steps to frustrate the purpose it was intended to serve: timely and complete payment to QHP issuers in order to permit them to survive, learn from, and adapt to this uncharted new market.

79. The first such step was in March 2014, when HHS stated in the Federal Register that "HHS intends to implement this [risk corridors] program in a budget neutral manner." HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13,743, 13,829 (Mar. 11, 2014).

80. That 2014 guidance radically departed from what the ACA intended and requires and what the implementing regulation reflected: that the risk corridors program had been enacted without regard to annual budget neutrality. Indeed, one year earlier, HHS clearly stated "[t]he risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. at 15,473.

81. Then, in April 2014, CMS issued a statement entitled "Risk Corridors and Budget Neutrality," asserting:

> if risk corridors collections are insufficient to make risk corridors payments for a year, all risk corridors payments for that year will be reduced pro rata to the extent of any shortfall. Risk corridors collections received for the next year will first be used to pay off the payment reductions issuers experienced in the previous year in a proportional manner, up to the point where issuers are reimbursed in full for the previous year, and will then be used to fund current year payments.

CMS, *Risk Corridors and Budget Neutrality* (Apr. 11, 2014), at 1, available at https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/faq-risk-corridors-04-11-2014.pdf.

82. On December 16, 2014, Congress enacted the "Consolidated and Further Continuing Appropriations Act, 2015" (the "2015 Appropriations Act"). *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130.

83. In the 2015 Appropriations Act, Congress specifically targeted the Government's existing, mandatory risk corridors payment obligations owed to QHPs, including Plaintiff, under Section 1342 of the ACA, limiting appropriations for those payment obligations from three large funding sources by including the following text at Section 227 of the 2015 Appropriations Act:

> *None of the funds* made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services—Program Management" account, *may be used for payments under section 1342(b)(1) of Public Law 111-148 (relating to risk corridors).*

Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 227, 128 Stat. 2491 (emphasis added).

84. Section 1342(b)(1) of Public Law 111-148 - referenced immediately above - is the ACA's prescribed methodology for the Government's mandatory risk corridors payments to QHPs.

85. Congress's failure to appropriate sufficient funds for risk corridors payments, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridors payments to QHPs, including Plaintiff.

86. On October 1, 2015, after collecting risk corridors data from QHPs for 2014, HHS and CMS announced that they intended to prorate the risk corridors payments owed to QHPs, including Plaintiff, for 2014, stating that:

> Based on current data from QHP issuers' risk corridors submissions, issuers will pay $362 million in risk corridors charges, and have submitted for $2.87 billion in risk corridors payments for 2014. **At this time, assuming full collections of**

> **risk corridors charges, this will result in a proration rate of 12.6 percent.**

CMS, *Risk Corridors Payment Proration Rate for 2014* (Oct. 1, 2015), available at https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RiskCorridorsPaymentProrationRatefor2014.pdf.

87. HHS and CMS further announced on October 1, 2015, that they would be collecting full risk corridors charges from QHPs in November 2015, and would begin making the prorated risk corridors payments to QHPs starting in December 2015. *See id.*

88. More recently, on April 1, 2016, CMS reaffirmed in a letter to another QHP that - although "remaining risk corridors claims will be paid" - the amounts owed would be delayed and contingent upon the Government's receipt of sufficient risk corridors charges/collections for 2015 and/or 2016. Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces & Dir. of CCIIO, to David L. Holmberg, President & CEO of Highmark Health (Apr. 1, 2016). The Government has thus left QHPs to guess when—if ever—the United States will make the 2014 risk corridors payments it owes.

89. HHS and CMS failed to cite any statutory authority for their unilateral decision to make only partial, prorated risk corridors payments.

90. Recognizing that the United States was acting in contravention of its statutory and regulatory payment obligations, on November 19, 2015, HHS and CMS issued a bulletin acknowledging the Government's obligation to make full risk corridors payments.

> HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers, and HHS is recording those amounts that remain unpaid following our 12.6% payment this winter as fiscal year 2015 obligation [*sic*] of the United States Government for which full payment is required.

CMS, *Risk Corridors Payments for the 2014 Benefit Year* (Nov. 19, 2015), available at https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/RC_Obligation_Guidance_11-19-15.pdf.

91. The Government's written acknowledgement of its risk corridors payment obligation, however, is no substitute for full and timely payment of the amounts owed.

92. On December 18, 2015, Congress enacted the "Consolidated Appropriations Act, 2016" (the "2016 Appropriations Act"). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242.

93. In the 2016 Appropriations Act, Congress again specifically targeted the Government's existing, mandatory risk corridors payment obligations owed to QHPs, including Plaintiff, under Section 1342 of the ACA, limiting appropriations for those payment obligations from three large funding sources by including the following text at Section 225 of the 2016 Appropriations Act:

> *None of the funds* made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services—Program Management" account, *may be used for payments under section 1342(b)(1) of Public Law 111-148 (relating to risk corridors).*

Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 225, 129 Stat. 2624 (emphasis added).

94. Again, Section 1342(b)(1) of Public Law 111-148 is the ACA's prescribed methodology for the Government's mandatory risk corridors payments to QHPs.

95. Congress's failure to appropriate sufficient funds for risk corridors payments, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise

abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridors payments to QHPs, including Plaintiff.

NMHC's 2014 Risk Corridors Payment Amounts

96. In a report released on November 19, 2015 (the "2014 Risk Corridors Report"), HHS and CMS publicly announced QHPs' risk corridors charges and payments for 2014, and emphasized that **"[r]isk corridors charges payable to HHS are not prorated, and the full risk corridors charge amounts are noted in the chart below. Only risk corridors payment amounts are prorated."** CMS, *Risk Corridors Payment and Charge Amounts for Benefit Year 2014* (Nov. 19, 2015), at 1, available at https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RC-Issuer-level-Report.pdf. In other words, issuers who had to pay into the risk corridors program had to pay 100% of their obligation while those who were owed money could expect only a prorated share to be paid by the Government.

97. NMHC's losses in the ACA New Mexico Individual Market for plan year 2014 resulted in the Government being required to pay NMHC a risk corridors payment of $4,211,650.62. *Id.* at 18-19.

98. The Government announced, however, that it would pay NMHC a prorated amount of only $531,420.45 for NMHC's 2014 losses. *See id.*

99. NMHC did not have gains in 2014 that resulted in NMHC being required to remit risk corridors charges to the Secretary of HHS. *See generally id.*

100. Had NMHC been required to remit a risk corridors charge to the Secretary of HHS, then NMHC would have been required to remit 100% of the amount of the charge to HHS before the close of calendar year 2015, as it had affirmatively attested it would do. *See id.* *See also* Martin E. Hickey, *Qualified Health Plan Program Attestations* (Apr. 25, 2013), at 5.

101. The Government made some prorated risk corridors payments to Plaintiff totaling $516,379, as of the date of the filing of this Complaint. This amount represents only approximately 12.26% of 2014 risk corridors payments that the Government owes to Plaintiff - even less than the 12.6% pro rata amount that the Government stated it would pay NMHC for 2014 risk corridors payments.

102. HHS lacks the authority, under statute, regulation or contract, to withhold full and timely 2014 risk corridors payments from QHPs such as NMHC. The Government owes NMHC $3,695,272 for 2014 risk corridors payments.

Forecast Risk Corridors Payment and Charge Amounts for 2015

103. The United States has now stated it will not make full and timely risk corridors payments to QHPs for 2015.

104. In the 2016 Appropriations Act, Congress again specifically withheld appropriations from three large funding sources for the Government's 2015 risk corridors payments, although again Congress did not alter or repeal the Government's risk corridors payment obligation. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 225, 129 Stat. 2624.

105. HHS and CMS have repeatedly announced that 2015 risk corridors collections will first be paid out towards the 87.4% of 2014 risk corridors payments that remain due and owing to QHPs, as a result of the Government's failure to provide full and timely 2014 risk corridors payments. *See* CMS, *Risk Corridors and Budget Neutrality* (Apr. 11, 2014), at 1; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,239, 30,260 (May 27, 2014) ("[I]f risk corridors collections in the first or second year are insufficient to make risk corridors payments as prescribed by the regulations, risk corridors collections received for the next year will first be used to pay off the payment reductions issuers experienced in the

previous year in a proportional manner, up to the point where issuers are reimbursed in full for the previous year, and remaining funds will then be used to fund current year payments.").

106. Standard & Poor's Ratings Services predicted on November 5, 2015, that "the 2015 risk corridors [will] be significantly underfunded if external funding is not added to the risk corridors funds. We estimate that the amount of underfunding in 2015 could be close to what it was for 2014. In addition, the 2015 corridor will not have adequate funds to cover the 2014 deficit." Standard & Poor's Ratings Services, *The ACA Risk Corridor Will Not Stabilize The U.S. Health Insurance Marketplace In 2015* (Nov. 5, 2015), available at https://www.globalcreditportal.com/ratingsdirect/renderArticle.do?articleId=1476233&SctArtId=352088&from=CM&nsl_code=LIME&sourceObjectId=9401106&sourceRevId=5&fee_ind=N&exp_date=20251105-19:10:01.

107. Based on estimated calculations as of the filing of this Complaint, the Government owes NMHC mandatory risk corridors payments of at least $19,389,476 for 2015.

108. The Government's official announcement regarding 2015 risk corridors payment and charge amounts is anticipated to be made in the Fall of 2016, after HHS and CMS collect and analyze the relevant data from QHPs. The Government is in anticipatory breach of its obligation to pay NMHC's 2015 risk corridors payments.

The Government's Failure to Offset Risk Adjustment Assessments Against Risk Corridors Payment Amounts

109. As noted *supra*, the temporary risk corridors program is one of three inter-related premium stabilization programs under the ACA that are intended to work together to stabilize insurance premiums.

110. The permanent premium stabilization program is the risk adjustment program, which aims to protect consumer access to coverage options by "reducing the incentive

for insurance companies to seek only to insure healthy individuals." CMS, *The Three Rs: An Overview* (Oct. 1, 2015). It does this by distributing funds to and making assessments against insurers based on the actuarial risk (*i.e.*, the relative health or sickness) of their enrollees. *Id.*

111. States may offer their own risk adjustment program or allow the Government to administer their program for them. New Mexico opted to allow the Government to administer its risk adjustment program.

112. Specifically, the text of the ACA statute provides that:

> each State shall assess a charge on health plans and health insurance issuers [in the individual or small group market within the state] . . . if the actuarial risk of the enrollees of such plans or coverage for a year is less than the average actuarial risk of all enrollees in all plans or coverage in such State for such year that are not self-insured group health plans (which are subject to the provisions of the Employee Retirement Income Security Act of 1974). . . .
>
> each State shall provide a payment to health plans and health insurance issuers [in the individual or small group market within the state] . . . if the actuarial risk of the enrollees of such plans or coverage for a year is greater than the average actuarial risk of all enrollees in all plans and coverage in such State for such year that are not self-insured group health plans (which are subject to the provisions of the Employee Retirement Income Security Act of 1974).

ACA, Pub. L. No. 111-148, § 1343(a) (codified at 42 U.S.C. § 18063(a)).

113. The premium stabilization programs were intended to work in tandem, and the actual amount of payments and/or liability under each of the programs is intertwined.

114. As described above, the risk corridors calculation compares a QHP's allowable costs against a target.

115. The ACA expressly specifies that "[a]llowable costs shall [be] reduced by any *risk adjustment* and reinsurance payments received under section 1341 and 1343." ACA, Pub. L. No. 111-148, § 1342(c)(1)(B) (codified at 42 U.S.C. § 18062(c)(1)(B)) (emphasis

added). Under CMS regulations, the inverse is true as well: a plan's "allowable costs" are increased by any risk adjustment or reinsurance payments made or accrued. Risk Corridors Data Requirements, 45 C.F.R. § 153.530(b)(1) (2016).

116. But CMS has insisted on collecting risk adjustment payments in full without honoring its related risk corridors obligations. While admittedly withholding the lion's share of risk corridors payments owed to NMHC, CMS has continued to demand full risk adjustment payments from NMHC, payments totaling over $6 million for 2014 and over *$14 million* for 2015.

117. CMS itself has construed the ACA, through its regulations, as authorizing QHP issuers to offset or "net" payments owed against payments the Government owes to the issuers, and vice versa, including with respect to risk adjustment payments, risk corridors payments, reinsurance payments, cost sharing subsidies, and premium tax credits. Payment and Collections Processes, 45 C.F.R. § 156.1215(c) (2016). CMS regulations state that the "determination of debt" owed by QHP issuers must be calculated "after HHS nets amounts owed by the Federal government under these programs." *Id.* But CMS refuses to net NMHC's risk adjustment assessment against the full risk corridors payments owed.

118. The purpose and structure of the ACA, and CMS's implementing regulations, leave no room for CMS to unilaterally collect payments under one of the Three Rs while refusing to honor obligations under another.

119. If CMS refuses to fulfill its risk corridors obligations by direct payment because of the congressional appropriations riders, CMS should either halt risk adjustment collections until the risk corridors program is fully funded, or at least decrease risk adjustment collections for NMHC by the $3,695,272 the Government is statutorily required to pay in 2014

risk corridors payments, as well as the $19,389,476 in risk corridors payments the Government will owe NMHC for 2015.

NMHC's and Other QHPs' Efforts to Resolve Issues Out of Court

120. Since learning of HHS's and CMS's decision not to make the full risk corridors payments owed to Plaintiff in a timely manner, QHPs have made significant efforts to resolve the issue. Unfortunately, their efforts to persuade HHS and CMS to honor the Government's statutory, regulatory and contractual obligations to make full and timely risk corridors payments have been unsuccessful to date.

121. On March 17, 2016, another QHP that is owed risk corridors payments for 2014 sent a formal demand letter to HHS and CMS. *See* Letter from David L. Holmberg, President & CEO of Highmark Health, to Kevin J. Counihan, CEO of Health Insurance Marketplaces & Dir. of CCIIO (Mar. 17, 2016).

122. The Government responded to the QHP's March 17, 2016 demand letter on April 1, 2016, affirming that "2014 risk corridors payments ... will be paid," but repeating the Government's plan to make such payments out of 2015 risk corridors collections, and if necessary, 2016 collections - a position that is without support in Section 1342 or its implementing regulations. Letter from Counihan to Holmberg (Apr. 1, 2016).

123. The Government's position on when the risk corridors payments must be made is contrary to the nature, purpose, intent, and language of Section 1342 and its implementing regulations, as well as the risk corridors program's role within the ACA as a temporary program designed to mitigate the potentially significant risks posed *each year* within the first three years of the ACA exchanges.

124. Indeed, Section 1342(b)(1) provides that the Secretary "shall pay to the plan" a certain amount if the plan's allowable costs "for any plan year" exceed the targeted

amount by a certain threshold. ACA, Pub. L. No. 111-148, § 1342(b)(1) (codified at 42 U.S.C. § 18062(b)(1)).

125. The Government's Response Letter of April 1, 2016 states Defendant's final position regarding its refusal to fully and timely pay risk corridors payments owed for 2014 and 2015 to QHPs, including NMHC. *See* Letter from Counihan to Holmberg (Apr. 1, 2016).

126. On information and belief, there are no required administrative avenues NMHC is required to take before bringing this action. Even if there were, to the extent required, Plaintiff has exhausted any required non-judicial avenues to remedy the Government's failure to provide the full and timely mandated risk corridors payments or any such avenues are futile.

COUNT I

Violation of Federal Statutory and Regulatory Mandate to Make Payments

127. Plaintiff realleges and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

128. Section 1342(b)(l) of the ACA mandates compensation, expressly stating that the Secretary of HHS "shall pay" risk corridors payments to QHPs in accordance with the payment formula set forth in the statute.

129. HHS and CMS's implementing regulation at 45 C.F.R. § 153.510(b) also mandates compensation, expressly stating that HHS "will pay" risk corridors payments to QHPs in accordance with the payment formula set forth in the regulation, which formula is mathematically identical to the formula in Section 1342(b)(1) of the ACA.

130. HHS and CMS's regulation at 45 C.F.R. § 153.510(d) requires a QHP to remit charges to HHS within 30 days after notification of such charges.

131. HHS and CMS's statements in the Federal Register on July 15, 2011, and March 23, 2012, state that risk corridors "payment deadlines should be the same for HHS and

QHP issuers." Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 76 Fed. Reg. 41,929, 41,943 (proposed July 15, 2011); Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 77 Fed. Reg. at 17,238.

132. NMHC was a QHP in 2014 and was qualified for and entitled to receive mandated risk corridors payments from the Government.

133. NMHC is entitled under Section 1342(b)(l) of the ACA and 45 C.F.R. § 153.510(b) to recover full and timely mandated risk corridors payments from the Government for 2014.

134. In the 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $4,211,650.45 that the Government concedes it owes NMHC for 2014. *See* CMS, *Risk Corridors Payment and Charge Amounts for Benefit Year 2014* (Nov. 19, 2015), at 18-19.

135. The United States has failed to make full and timely risk corridors payments to NMHC, despite the Government confirming in writing that Section 1342 mandates that the Government make risk corridors payments.

136. Congress's failure to appropriate sufficient funds for risk corridors payments due did not and could not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridors payments to QHPs, including Plaintiff.

137. The Government's failure to make full and timely risk corridors payments to NMHC constitutes a violation and breach of the Government's mandatory payment obligations under Section 1342(b)(l) of the ACA and 45 C.F.R. § 153.510(b).

138. As a result of the United States' violation of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b), NMHC has been damaged in the amount of at least $23,084,748 together with interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT II

Breach of Express Contract – 2014 QHP Agreement

139. Plaintiff realleges and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

140. NMHC entered into a valid written QHP Agreement with CMS in 2014. *See* QHP Agreement, CMS & NMHC (Sept. 23, 2013).

141. The 2014 QHP Agreement was executed by representatives of the Government who had actual authority to bind the United States, and was entered into with mutual assent and consideration by both parties.

142. The 2014 QHP Agreement obligated CMS to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions." *Id.* at 5.

143. By agreeing to become a QHP, NMHC agreed to provide health insurance on particular exchanges established under the ACA, and agreed and attested to accept the obligations, responsibilities and conditions the Government imposed on QHPs under the ACA and, *inter alia*, 45 C.F.R. §§ 153.10 *et seq.* and 155.10 *et seq.* *See id.;* Martin E. Hickey, *Qualified Health Plan Program Attestations* (Apr. 25, 2013). NMHC has satisfied and complied with its obligations and/or conditions under the 2014 QHP Agreement.

144. The 2014 QHP Agreement provides that it "will be governed by the laws and common law of the United States of America, including without limitation such regulations

as may be promulgated from time to time by the Department of Health and Human Services or any of its constituent agencies ..." *Id.* at 8.

145. The 2014 Agreement therefore incorporates the provisions of Section 1342(b)(l) of the ACA and 45 C.F.R. § 153.510(b).

146. The Government's statutory and regulatory obligations to make full and timely risk corridors payments were significant factors material to NMHC's agreement to enter into the 2014 QHP Agreement.

147. The Government's failure to make full and timely risk corridors payments to Plaintiff is a material breach of HHS and CMS's obligation to support NMHC's functions as a QHP.

148. In the 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $4,211,650.45 that the Government concedes it owes NMHC for 2014. *See* CMS, *Risk Corridors Payment and Charge Amounts for Benefit Year 2014* (Nov. 19, 2015), at 18-19.

149. Congress's failure to appropriate sufficient funds for risk corridors payments due did not and could not defeat or otherwise abrogate the United States' contractual obligation to make full and timely risk corridors payments to Plaintiff.

150. The Government's breach of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) by failing to make full and timely risk corridors payments to NMHC is a material breach of the 2014 QHP Agreement.

151. As a result of the United States' material breach of the 2014 QHP Agreement that it entered into with Plaintiff, NMHC has been damaged in the amount of at least

$23,084,748, together with interest, costs of suit, and such other damages or relief as this Court deems just and proper.

COUNT III

Breach of Implied Covenant of Good Faith and Fair Dealing – 2014 QHP Agreement

152. Plaintiff realleges and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

153. A covenant of good faith and fair dealing is implied in every contract, including those with the Government, and imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.

154. The 2014 QHP Agreement created the reasonable expectation for NMHC that full and timely risk corridors payments would be paid by the Government, just as the Government expected that any risk corridors remittance charges owed would be fully and timely paid by NMHC to the Government.

155. By failing to make full and timely risk corridors payments to NMHC, the United States has destroyed Plaintiff's reasonable expectations regarding the fruits of the 2014 QHP Agreement, in breach of the implied covenant of good faith and fair dealing. The United States breached the implied covenant of good faith and fair dealing by, among other things:

(a) Inserting in HHS and CMS regulations a 30-day deadline for a QHP's full remittance of risk corridors charges to the Government, but failing to make full payment of risk corridors payments to QHPs, despite stating that QHPs and the Government should be subject to the same payment deadline. *See e.g.,* Standards Related

to Reinsurance, Risk Corridors and Risk Adjustment, 77 Fed. Reg. at 17,239.

(b) Requiring QHPs to fully remit risk corridors charges to the Government, but unilaterally deciding, in direct violation of the ACA, that the Government may make prorated risk corridors payments to QHPs; making repeated statements regarding its obligation to make risk corridors payments, then depriving NMHC of full and timely risk corridors payments after Plaintiff had fulfilled its obligations as a QHP by participating in the New Mexico 2014 exchange and had suffered losses which the Government had promised would be shared through mandatory risk corridors payments.

156. In the 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $4,211,650.45, that the Government concedes it owes Plaintiff for 2014. *See* CMS, *Risk Corridors Payment and Charge Amounts for Benefit Year 2014* (Nov. 19, 2015), at 18-19.

157. As a direct and proximate result of the aforementioned breach of the covenant of good faith and fair dealing, NMHC has been damaged in the amount of at least $23,084,748, together with any losses actually sustained as a result of the Government's breach, and such other damages and relief as this Court deems just and proper.

COUNT IV

Breach of Implied Covenant of Good Faith and Fair Dealing – Loan Agreement

158. Plaintiff realleges and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

159. A covenant of good faith and fair dealing is implied in every contract, including those with the Government, and imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.

160. The Loan Agreement was executed based on the reasonable expectation for NMHC that full and timely risk corridors payments would be paid by the Government, in order to assure that NMHC could be a financially sustainable enterprise offering QHPs on the exchange, as it was required to by the Loan Agreement.

161. By failing to make full and timely risk corridors payments to NMHC, the United States has destroyed Plaintiff's reasonable expectations regarding the fruits of the Loan Agreement, in breach of the implied covenant of good faith and fair dealing. The United States breached the implied covenant of good faith and fair dealing by, among other things:

(a) Inserting in HHS and CMS regulations a 30-day deadline for a QHP's full remittance of risk corridors charges to the Government, but failing to make full payment of risk corridors payments to QHPs, despite stating that QHPs and the Government should be subject to the same payment deadline. *See e.g.,* Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 77 Fed. Reg. at 17,239.

(b) Requiring QHPs to fully remit risk corridors charges to the Government, but unilaterally deciding, in direct violation of the ACA, that the Government may make prorated risk corridors payments to QHPs; making repeated statements regarding its

obligation to make risk corridors payments, then depriving NMHC of full and timely risk corridors payments after Plaintiff had fulfilled its obligations as a QHP by participating in the New Mexico exchange in 2014, 2015, and 2016 and had suffered losses which the Government had promised would be shared through mandatory risk corridors payments.

162. In the 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $4,211,650.45, that the Government concedes it owes Plaintiff for 2014. *See* CMS, *Risk Corridors Payment and Charge Amounts for Benefit Year 2014* (Nov. 19, 2015), at 18-19. The Government has also announced that it does not intend to pay risk corridors amounts in full in 2015, leaving QHPs to wonder what, if any amounts they will receive in 2016.

163. As a direct and proximate result of the aforementioned breach of the covenant of good faith and fair dealing, NMHC has been damaged in the amount of at least $23,084,748, together with any losses actually sustained as a result of the Government's breach, and such other damages and relief as this Court deems just and proper.

COUNT V
Taking Without Just Compensation
in Violation of the Fifth Amendment to the U.S. Constitution

164. Plaintiff realleges and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

165. The Government's actions complained of herein constitute a deprivation and taking of Plaintiff's property for public use without just compensation, in violation of the Fifth Amendment to the U.S. Constitution.

166. NMHC has a vested property interest in its contractual, statutory, and regulatory rights to receive statutorily-mandated risk corridors payments. NMHC had and has a reasonable investment-backed expectation of receiving the full and timely risk corridors payments payable to it under the statutory and regulatory formula, based on its QHP Agreement, the Loan Agreement, Section 1342 of the ACA, HHS's implementing regulations (45 C.F.R. § 153.510), and HHS's and CMS's direct public statements.

167. The Government expressly and deliberately interfered with and has deprived Plaintiff of property interests and its reasonable investment-backed expectations to receive full and timely risk corridors payments. On March 11, 2014, HHS for the first time announced, in direct contravention of Section 1342 of the ACA, 45 C.F.R. § 153.510(b) and its previous public statements, that it would administer the risk corridors program "in a budget neutral manner." HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. at 13,829.

168. On April 11, 2014, HHS and CMS stated for the first time that 2014 risk corridors payments would be reduced pro rata to the extent of any shortfall in risk corridors collections. *See* CMS, *Risk Corridors and Budget Neutrality* (Apr. 11, 2014).

169. HHS and CMS continue to refuse to make full and timely risk corridors payments to NMHC, and, therefore, the Government has deprived Plaintiff of the economic benefit and use of such payments.

170. The Government's action in withholding, with no legitimate governmental purpose, the full and timely risk corridors payments owed to NMHC constitutes a deprivation and taking of Plaintiff's property interests and requires payment to Plaintiff of just compensation under the Fifth Amendment of the U.S. Constitution.

171. NMHC is entitled to receive just compensation for the United States' taking of its property in the amount of at least $23,084,748, together with interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT VI
Violation of Federal Statute and Regulations – Failure to Offset Risk Adjustment

172. Plaintiff realleges and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

173. The Government's decision to assess and collect the full risk adjustment payments it alleges NMHC owes, while refusing to honor its statutory obligation to make full risk corridors payments to NMHC, violates Sections 1342 and 1343 of the ACA and its implementing regulations.

174. The actual amount of payments and/or liability under the risk corridors and risk adjustment programs are directly intertwined. The amount of risk corridors payments owed to a QHP depends on the amount that its "allowable costs" exceed a "target amount," and the statute expressly specifies that "allowable costs shall [be] reduced by any risk adjustment or reinsurance payments received." ACA, Pub. L. No. 111-148, § 1342(c)(1)(B) (codified at 42 U.S.C. §18062(c)(1)(B)). Under CMS regulations, the inverse is true as well: a plan's "allowable costs" are increased by any risk adjustment or reinsurance payments made or accrued. 45 C.F.R. § 153.530(b)(1).

175. The regulations further authorize QHP issuers to offset or "net" payments owed to the federal Government against payments the federal Government owes to the issuers, and vice versa, including with respect to risk adjustment payments, risk corridors payments, reinsurance payments, cost sharing subsidies, and premium tax credits. 45 C.F.R. § 156.1215(c).

CMS regulations state that the "determination of debt" owed by QHP issuers must be calculated "after HHS nets amounts owed by the Federal government under these programs." *Id.*

176. In light of the Government's admitted failure to pay presently due risk corridors payments under the statute and regulations, the Government must at least decrease the risk adjustment amounts assessed against Plaintiff by the amount of the Government's unpaid debt under the risk corridors program.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in its favor and against the Defendant, the United States of America, and requests the following relief:

(1) That the Court award monetary relief in the amount Plaintiff is entitled to under Section 1342(b)(l) of the ACA and 45 C.F.R. § 153.510(b) regarding the 2014 risk corridors payments;

(2) That the Court award damages sustained by Plaintiff as a result of the Government's breach of the 2014 QHP Agreement and its breaches of the implied covenant of good faith and fair dealing contained in the 2014 QHP Agreement and the Loan Agreement.

(3) That the Court award just compensation for the United States' taking of its property in the amount of at least $23,084,748.

(4) That the Court award appropriate declaratory relief, including but not limited to a declaration that the Government is obligated to make 2015 and 2016 risk corridors payments to Plaintiff within 30 days of determination of the payment amount;

(5) That the Court award appropriate declaratory relief that that the Government must refrain from assessing or collecting risk adjustment payments until the Government fulfills its statutory obligation to pay the full amount of the risk corridors payments that it owes NMHC or

alternatively that the Government must set off any amounts due by NMHC against the amounts owed by the Government under the risk corridors program;

(6) That the Court award Plaintiff such additional damages and other monetary relief as is available under applicable law;

(7) That the Court award all available interest, including, but not limited to, post-judgment interest, to Plaintiff;

(8) That the Court award all available attorneys' fees and costs to Plaintiff; and

(9) That the Court award such other and further relief to Plaintiff as the Court deems just and proper.

Dated: September 26, 2016

Respectfully submitted:

/s/ *Barak A. Bassman*

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