IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY,	:	No. 16-259C
Plaintiff,	:	Judge Davis
v.	:	
UNITED STATES OF AMERICA,	:	
Defendant.	:	

THE UNITED STATES' OPPOSITION TO THE MOTION TO DISMISS THE UNITED STATES' COUNTERCLAIM

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INTRODUCTION

The Department of Health and Human Services ("HHS") implements and administers major programs of the Patient Protection and Affordable Care Act ("ACA"), including programs under which insurance companies either owe money to or receive money from the United States.[1] After Congress failed to appropriate sufficient funds for the risk corridors program, created under section 1342 of the ACA, HHS made *pro rata* payments with the funds available and insurers filed individual and class action suits in the Court to recover the difference. Ultimately, the United States Supreme Court, in reversing the Federal Circuit, held that the obligation created by section 1342 was not dependent on appropriations. *Maine Community Health Options v. United States*, 140 S. Ct. 1308, 1331 (2020). The United States and the vast majority of insurers then stipulated to entry of final judgments, with outstanding ACA debts offset against insurers' judgments. *See, e.g.*, Order, Docket No. 82.

Class members Colorado Health Insurance Cooperative, Inc. ("Colorado Health") and Meritus Health Partners and Meritus Mutual Health Partners (collectively, "Meritus") seek to recover payments under section 1342, but want to avoid paying debts they owe under other ACA programs.[2] These companies received more than $100 million in taxpayer-funded seed money, failed after two years, and were placed in liquidation proceedings supervised by state courts.

Colorado Health and Meritus dispute the Court's jurisdiction to entertain the United States' claims, as well as the United States' authority to recover interest owed on ACA debts. Colorado

[1] HHS delegated many of its responsibilities under the ACA to the Centers for Medicare & Medicaid Services ("CMS"), which created the Center for Consumer Information and Insurance Oversight ("CCIIO") to oversee implementation of the ACA. *See* https://www.cms.gov/cciio. HHS, CMS, CCIIO, the Secretary of HHS, and the Administrator of CMS are collectively referred to as "HHS" or the "United States."

[2] Colorado Health and Meritus are the remaining members of the "Dispute Subclass," as defined in the Court's Order creating the subclass. *See* Docket No. 82.

Health also argues that federal law does not operate while the company undergoes liquidation in state court. And Meritus argues that the company already paid its ACA debts by preemptively using funds it did not then, and does not presently, possess, but expects to receive upon payment of judgment from this litigation. These theories lack merit.

1. Colorado Health and Meritus assert claims under the ACA against the United States, and the United States seeks to offset its ACA counterclaims against Colorado Health and Meritus. The United States has a well-established federal common law right to assert setoff "against any plaintiff making claim against the United States," and "this court can and must . . . hear[ ] and decide[ ]" that "claim for setoff." *Health Republic Ins. Co. v. United States*, 150 Fed. Cl. 233, 237, 241-42 (2020) (citing 28 U.S.C. § 2508), Docket No. 96. The Court's jurisdiction is not eliminated or affected by Colorado Health and Meritus' insolvency. *Preuss v. United S*tates, 412 F. 2d 1293 (Ct. Cl. 1969).

2. Colorado Health and Meritus acknowledge that the Court would "typically" have jurisdiction, but rely on portions of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), to argue that federal law is displaced because Colorado Health and Meritus are being liquidated. Not so. The McCarran-Ferguson Act only applies if (a) "clear conflict" exists between a federal statute and a state insurance statute; (b) the federal statute does not "relat[e] to the business of insurance;" (c) the state statute "regulat[es] the business of insurance;" and (d) application of the federal law would "invalidate, impair, or supersede" the state law. 15 U.S.C. § 1012(b); *Greene v. United States*, 440 F. 3d 1304, 1311-12 (Fed. Cir. 2006). Application of the McCarran-Ferguson Act is unwarranted in this case.

"[T]he government's right to assert a setoff is not an 'Act of Congress' subject to the preemption rule set forth in" the McCarran-Ferguson Act. *Health Republic*, 150 Fed. Cl. at 242.

Moreover, the United States' substantive right to recover its principal claims and interest arise under the ACA, which removes this case from the McCarran-Ferguson Act's purview. Colorado Health and Meritus feign conflict between the Court's jurisdiction to entertain counterclaims by the United States, and their respective state courts' jurisdiction over insolvency proceedings. But no conflict exists, and in any event, state jurisdictional statutes do not relate to the business of insurance. Finally, application of federal law would not "invalidate, impair, or supersede" any state law, and Colorado Health and Meritus do not argue otherwise.

3. The United States "is required to 'charge interest, penalties, and administrative costs on delinquent debts owed to the United States,' which 'continue to accrue until the debt is paid in full or otherwise resolved through compromise, termination, or waiver of the charges.'" *Health Republic*, 150 Fed. Cl. at 237 n.3 (citing 45 C.F.R. § 30.18(a)). Contrary to Colorado Health and Meritus' suggestion, this is not "prejudgment interest," but rather interest assessed pursuant to 45 C.F.R. § 30.18 after a determination of a debt pursuant to an ACA regulation, 45 C.F.R. § 156.1215. The McCarran-Ferguson Act has no application.

4. Despite the clarity of federal law, Colorado Health asks the Court to fashion new law for companies undergoing state-supervised liquidation in Colorado. But the Court need not create new law when federal law is clear that the United States' offsets are permissible in this Court.

5. Meritus does not dispute the underlying debts it owes, but contends that those debts were paid in November 2017. The theory is that the company preemptively offset its due and unchallenged ACA debts, not against actual funds, but against the company's *claim* for recovery in this case. That purported offset was not effective.

The motion to dismiss should be denied.

BACKGROUND

I. The Affordable Care Act

A. Overview

Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (collectively, the "ACA"), in March 2010. The ACA adopted a series of measures designed to expand coverage in the individual health insurance market. *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). First, the ACA provides billions of dollars of annual subsidies to help qualified individuals buy insurance. *Id.* at 2489. Second, the ACA generally requires individuals to maintain coverage or pay a penalty. *Id.* at 2486.[3] Third, the ACA bars insurers from denying coverage or charging higher premiums based on an individual's health status. *Id.* The ACA also created several interrelated programs, the following of which are relevant to this case.

B. The ACA's Premium Stabilization Programs (the "3Rs")

In an effort to mitigate the pricing risk and incentives for adverse selection, the ACA established three inter-related premium stabilization programs modeled on preexisting programs established under the Medicare program. Informally known as the "3Rs," these ACA programs began in the 2014 calendar year and consist of reinsurance, risk adjustment, and risk corridors. *See* 42 U.S.C. §§ 18061-18063. In general, these programs aim to distribute risk among insurance plans by collecting money from plans that have enrolled healthier populations in order to fund payments to other plans that have enrolled less healthy populations.

1. The Reinsurance and Risk Adjustment Programs

The reinsurance program was created by section 1341 of the ACA. It was a temporary,

[3] The Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (2017), enacted in December 2017, reduced the penalty to $0, beginning in 2019.

self-funded program for the 2014, 2015, and 2016 benefit years under which amounts collected from issuers and certain self-insured group health plans were used to fund payments to individual market issuers of eligible plans that covered high-cost individuals. 42 U.S.C. § 18061.

The risk adjustment program was created by section 1343 of the ACA. It is a permanent, self-funded, annual program established by Congress to mitigate the impact of adverse selection that could occur if insurers, whether advertently or inadvertently, enrolled a higher-than-average number of healthy or sick individuals. 42 U.S.C. § 18063. The ACA contemplated states administering their own reinsurance and risk adjustment programs, with HHS responsible for operating the programs in states that fail to do so. *Id.* §§ 18061(b), 18063, 18041(a)-(c). In practice, the majority of the states deferred to HHS to administer their programs as set forth in the ACA's state flexibility provision, *id.* § 18041. *See, e.g.*, Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10,750, 10,759 (Feb. 27, 2015). HHS operated both the reinsurance and risk adjustment programs in Colorado and Arizona.

This case implicates both of these programs for benefit year ("BY") 2015. Colorado Health and Meritus were assessed risk adjustment charges because they had healthier-than-average enrollees. Colorado Health was also responsible for remitting a reinsurance payment. *See* 45 C.F.R. §§ 153.20, 153.410. These amounts are not in dispute. *See* Summary Report on Transitional Reinsurance Payments and Permanent Risk Adjustment Transfers for the 2015 Benefit Year (June 30, 2016) at 16-17, 19.[4] Colorado Health and Meritus' risk adjustment charges and

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[4] Available at https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/June-30-2016-RA-and-RI-Summary-Report-5CR-063016.pdf.

reinsurance contributions fund payments to insurers who enrolled unhealthier-than-average populations or who enrolled high-cost enrollees.

2. The Risk Corridors Program

The risk corridors program was created by section 1342 of the ACA. It was a temporary program for the 2014, 2015, and 2016 benefit years. *See* 42 U.S.C. § 18062.[5] The risk corridors program mitigated risk for plans that underestimated their claims costs in the aggregate (including any required contributions or charges due under the reinsurance and risk adjustment programs). Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,410, 15,411 (Mar. 11, 2013).

Section 1342 directed HHS to establish a program whereby if participating plans' premiums exceeded costs by a certain amount (as determined by a statutory formula), the plans would pay a share of their profits to HHS—"payments in." 42 U.S.C. § 18062(b)(2). Conversely, if participating plans' costs of providing coverage exceeded the premiums they received by a certain amount (according to the same formula), the plans would be paid a share of their excess costs by HHS—"payments out." *Id.* § 18062(b)(1).

The ACA did not appropriate any funding for risk corridors payments. In subsequent legislation, Congress appropriated "payments in" from insurers so they could be used to make payments out, but barred HHS from using other potential funding sources to make payments. Throughout the risk corridors program's three-year life-span, the total amount of "payments in" fell short of the total amount requested by issuers in "payments out." CMS, Risk Corridors

An updated summary report for BY 2015 was released in December 2016. Available at https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/DDC_RevisedJune30thReport_v2_5CR_120516.pdf.

[5] Unlike the reinsurance and risk adjustment programs, the ACA established risk corridors as a federally-operated program.

Payment and Charge Amounts for the 2016 Benefit Year (November 2017).[6] Consistent with its three-year framework for administering the program, HHS issued prorated payments according to the extent of collections.

As explained more fully below, *infra* at 8-10, this case implicates the risk corridors program for BY 2014 and 2015. Colorado Health and Meritus seek payments under section 1342 for those years.

C. Cost-Sharing Reduction Reconciliations

One of the most significant sources of financial transfers between issuers and HHS under the ACA has been cost-sharing reduction ("CSR") payments.[7] Unlike the risk adjustment and reinsurance programs, CSR payments are not self-funded. This case implicates CSR reconciliation payments that Meritus and Colorado Health owe to HHS. The amount of the payments is not in dispute.

II. Colorado Health and Meritus' Participation in the ACA

A. The CO-OP Program

The ACA established the Consumer Operated and Oriented Plan ("CO-OP") program to foster the creation of new consumer-governed, nonprofit health insurance issuers, referred to as "CO-OPs." 42 U.S.C. § 18042(a)(1)-(2). This program provided loans for start-up costs ("start-up loans") and loans to enable CO-OPs to meet the solvency and capital reserve requirements of the states in which they are licensed to sell health insurance ("solvency loans"). *Id.* § 18042(b)(1).

[6] Available at https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization Programs/Downloads/Risk-Corridors-Amounts-2016.pdf.

[7] In October 2017, the Attorney General concluded that the permanent appropriation that had been funding CSR payments could not be used. Available at https://www.hhs.gov/sites/default/files/csr-payment-memo.pdf. HHS subsequently issued a memorandum explaining that it could not make CSR payments unless and until such payments have a valid appropriation. *Id.*

B. Colorado Health and Meritus' Participation in the ACA

Colorado Health is a former "CO-OP" that issued health insurance plans in Colorado's individual and small group markets in 2014 and 2015.[8] During its short existence, Colorado Health received more than $72 million in taxpayer-funded loans, participated in the 3Rs programs, and received millions of dollars in CSRs.[9] After two years, the company failed financially (without regard to the amounts sought in this case) and entered liquidation in January 2016.[10]

Meritus is also a former CO-OP, and it issued health insurance plans in Arizona's individual and small group markets in 2014 and 2015. During its two-year existence, Meritus received more than $93 million taxpayer-funded loans, participated in the 3Rs programs, and received millions of dollars in CSRs. Meritus too failed financially (without regard to the amounts sought in this case) and entered liquidation in March 2016.

III. Prior Risk Corridors Litigation

In February 2016, Health Republic Insurance Company filed this putative class action seeking payments under section 1342 of the ACA. Over the next year, dozens of other insurers would file similar suits. By July 2017, three judges of the Court had held that issuers were not entitled to additional risk corridors payments, *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81 (2016); *Blue Cross and Blue Shield of N.C. v. United States*, 131 Fed. Cl. 457 (2017); *Maine Cmty. Health Options v. United States*, 133 Fed. Cl. 1 (2017), while one judge had held the opposite, *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436 (2017).

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[8] Colorado Health received $15 million in start-up loan funds and $57 million in solvency funds and has not made any payments to the United States on this debt. In August 2015, HHS restructured Colorado Health's start-up loan to aid in the company's solvency.

[9] The United States does not seek to recover Colorado Health and Meritus' outstanding start-up and solvency loans in this case.

[10] *See* March 31, 2016 Balance Sheet, available at https://rsgca.org/chic/20160331.pdf

Several months later, the Court of Appeals for the Federal Circuit ruled in the United States' favor in an appeal consolidating the four cases. The Federal Circuit gave effect to Congress' restrictions on funding for risk corridors payments. *Land of Lincoln Mut. Health Ins. Co. v. United States*, 892 F.3d 1184 (Fed. Cir. 2018); *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1329 (Fed. Cir. 2018); *Maine Cmty. Health Options v. United States*, 729 Fed. Appx. 939 (Fed. Cir. 2018); *Blue Cross and Blue Shield of N.C. v. United States*, 729 Fed. Appx. 939 (Fed. Cir. 2018).

On April 27, 2020, the United States Supreme Court reversed, holding that section 1342 of the ACA "created an obligation neither contingent on nor limited by the availability of appropriations or other funds" and that the "petitioners may seek to collect payment through a damages action in the Court of Federal Claims." *Maine Community Health Options*, 140 S. Ct. at 1323, 1331. The United States and the vast majority of insurers then stipulated to entry of final judgments; for insurers with other outstanding ACA debts, those debts were offset against the insurers' judgments. *See, e.g.*, Order, Docket No. 82; *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 16-744; *Minuteman Health, Inc. v. United States*, No. 16-1418; *Farmer v. United States*, No. 17-363; *Ommen v. United States*, No. 17-957; *Oregon's Health CO-OP v. United States*, No. 18-96.

IV. Colorado Health and Meritus' Litigation in This Case

Colorado Health and Meritus joined the Class in June 2017. Because they dispute the United States' right to offset their ACA debts, the parties requested that the Court create a subclass to resolve that dispute without delaying judgment in favor of the other Class members. Docket No. 82. After the subclass was certified, the United States moved for leave to amend its answer to assert counterclaims. Docket No. 85. Colorado Health and Meritus opposed, arguing that "[t]he

McCarran-Ferguson Act and *Fabe* require that 28 U.S.C. § 1503 and § 2508—the federal statutes allowing the government to pursue offsets in the Court of Federal Claims—yield to state laws vesting exclusive jurisdiction over offsets (and other matters related to liquidation) in state liquidation courts." *See* Brief in Opposition, Docket No. 86, pg. 12-18. The Court held that the McCarran-Ferguson Act does not apply because "the right to assert a setoff arises under common law, not statute." *Health Republic*, 150 Fed. Cl. at 241. The Court explained that "[t]he statutes invoked by defendant and upon which the subclass's contention hinges," 28 U.S.C. §§ 1503, 2508, "merely provide that any claim for setoff raised by defendant against a plaintiff bringing suit in this court can and must be heard and decided by this court[,] but "the government's right to assert a setoff is not an 'Act of Congress' subject to the preemption rule set forth in" the McCarran-Ferguson Act. 150 Fed. Cl. at 241. The Court also observed that "[t]o the extent the defendant's proposed setoffs are deemed to derive from the provisions of the ACA that require certain insurers to make payments to the government, then 15 U.S.C. § 1012(b) is inapplicable because the ACA relates to the business of insurance." *Id.* at 242 n.10 (citing *UnitedHealthcare of N.Y., Inc. v. Lacewell*, 967 F.3d 82, 91 n.4 (2d Cir. 2020)).

With leave to amend granted, the United States filed its amended answer and counterclaim against Colorado Health and Meritus. Docket No. 101. On November 20, 2020, Colorado Health and Meritus moved to dismiss the United States' counterclaim. Docket No. 103.

ARGUMENT

I. The Court Has Jurisdiction to Adjudicate the United States' Offsets

The Supreme Court has recognized the United States' common law right to offset debts since at least 1841, *United States v. Munsey Trust Co.*, 332 U.S. 234, 240 (1947), and "this court can and must . . . hear[] and decide[]" that "claim for setoff," *Health Republic*, 150 Fed. Cl. at 241-

42. Colorado Health and Meritus assert claims under the ACA, and the United States seeks to offset their outstanding ACA debts. They rely on the McCarran-Ferguson Act to argue that "state laws vest[] exclusive jurisdiction over offsets . . . in state liquidation courts," that these state laws conflict with the Court's jurisdictional statutes, and that the state law reverse-preempts federal law under the McCarran-Ferguson Act, such that the Court must not hear the United States' claims.

As explained below, Colorado Health and Meritus' reliance on the McCarran-Ferguson Act is wholly misplaced. No conflict triggers the McCarran-Ferguson Act because no state statute vests "exclusive jurisdiction over offsets" in state courts. This Court has already recognized that "the right to assert a setoff arises under common law, not statute," meaning that the "right to assert a setoff is not an 'Act of Congress' subject to the preemption rule set forth in the [McCarran-Ferguson] Act." *Health Republic*, 150 Fed. Cl. at 241-42. Moreover, the United States' substantive rights arise under the ACA, which undoubtedly relates to the business of insurance and thus would preempt any conflicting state law. *Id.* at 242 n.10. Finally, the Court's jurisdiction does not "invalidate, impair, or supersede" any state law, and Colorado Health and Meritus do not argue otherwise.

A. Federal Law Requires the Court to Offset the United States' ACA Claims Against Colorado Health and Meritus' ACA Claims

In any suit in this Court, the United States is permitted to assert a setoff "against any plaintiff making claim against the United States," and the Court must "hear and determine" that asserted setoff. *Health Republic*, 150 Fed. Cl. at 237 (citing 28 U.S.C. § 2508); *accord* 28 U.S.C. § 1503 ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court."); *see also id.* § 2508 (permitting the United States to assert counterclaims); RCFC 13 (describing the rules for pleading counterclaims); *J.G.B. Enters., Inc. v. United States*, 497 F.3d 1259, 1261 (Fed. Cir.

2007). These statutes "permit the government, when sued in [this Court], to have determined in a single suit all questions which involve mutual obligations." *Cherry Cotton Mills v. United States*, 327 U.S. 536, 539 (1946).

The Supreme Court and this Court's predecessor have recognized that these federal statutes impose a mandatory duty to give effect to the United States' offsets. *See, e.g.*, *Munsey Trust Co.*, 332 U.S. at 240 (concluding that the Court of Claims was "under statutory duty to recognize the undisputed claim for damages of the United States" when adjudicating a claim against the government); *Blake Constr. Co. v. United States*, 585 F.2d 998, 1005 (Ct. Cl. 1978) ("By special statute, set-off is allowed in this court where the Government is always the defendant."); *Atlantic Contracting Co. v. United States*, 35 Ct. Cl. 30, 33-34 (1899) (recognizing that when a claimant "seeks the jurisdiction" of the Claims Court, "he is subjected to . . . determination of whatever claims the United States may have against him which can be properly pleaded by way of set-off"). The Court's duty to exercise jurisdiction follows from the fundamental principle of sovereign immunity and that the Court may award monetary relief against the United States only on the terms and conditions allowed by Congress. *United States v. Testan*, 424 U.S. 392, 399 (1976). The United States' right of setoff under sections 1503 and 2508 is "one of the conditions" on its "consent to be sued," "as plain as the English language can make it." *Kaufman v. United States*, 118 Ct. Cl. 91, 105 (1950).

By invoking the Court's jurisdiction to sue the United States, Colorado Health and Meritus are subject to the Court's jurisdiction in determining the United States' counterclaim or offset. *Atl. Contracting*, 35 Ct. Cl. at 33 ("[I]n connection with the jurisdiction of this court of demands against the United States, such jurisdiction shall extend to all set-offs, counterclaims, [and] claims for damages . . . of the United States against any claimant.); *see also Frantz Equip. Co. v. United*

States, 105 F. Supp. 490, 494-95 (Ct. Cl. 1952) ("Congress, by the act in question, informs the claimant that if he avails himself of the privilege of suing the government in the special court organized for that purpose, he may be met with a set-off, counterclaim, or other demand of the government, upon which judgment may go against him . . . . If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the government to the exercise of the privilege. Nothing more need be said on this subject.").

The Court's jurisdiction is unaffected by Colorado Health and Meritus' insolvency. *See Preuss*, 412 F.2d at 1304 (rejecting an insolvent party's claim that the government should not be permitted to effectuate its offset in the same litigation but instead should be forced to pursue its claim in bankruptcy court and explaining that the government's right of offset was "encompassed within the jurisdiction conferred on this court by Congress" and that the Court was "'not at liberty'" to "'limit or restrict'" it) (quoting *Frantz Equip. Co. v. United States*, 122 Ct. Cl. 622, 630 (1952)); *Frantz*, 122 Ct. Cl. at 629-30 (explaining that a plaintiff, by filing suit in the Court of Claims, "undeniably subject[s] itself" to the government's "right to assert counterclaims and claims for offsets" in the same suit, even if the government's claims otherwise must be brought elsewhere). These concepts are noncontroversial statements of black letter law.

Colorado Health and Meritus assert claims under the ACA, and the United States seeks to offset their ACA debts. The Court's jurisdiction to entertain claims by the United States and effectuate offset is well-established. As explained below, Colorado Health and Meritus' arguments to the contrary lack merit.

B. The McCarran-Ferguson Act Does Not Apply

Colorado Health and Meritus acknowledge that the Court "typically" has jurisdiction to entertain offsets, but wrongly argue that the Court's jurisdictional statutes, 28 U.S.C. §§ 1503, 2508, conflict with state court jurisdictional statutes here, Ariz. Rev. Stat. § 20-612(a), (c); Colo. Rev. Stat. § 10-3-504(2), and are thus reverse preempted under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). Motion at 7. Their reliance on the McCarran-Ferguson Act is wholly misplaced.

The McCarran-Ferguson Act provides, in relevant part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b). The McCarran-Ferguson Act "is triggered only by a clear conflict between state insurance law and a federal statute of general applicability." *Greene*, 440 F.3d at 1311-12 (citing *Humana Inc. v. Forsyth*, 525 U.S. 299, 310 (1999)). The McCarran-Ferguson Act thus applies if (a) "clear conflict" exists between a federal statute and a state insurance statute; (b) the federal statute does not "relat[e] to the business of insurance;" (c) the state statute "regulat[es] the business of insurance;" and (d) application of the federal law would "invalidate, impair, or supersede" the state law. *See* 15 U.S.C. § 1012(b); *Greene*, 440 F.3d at 1311-12; *see also Dep't of Treasury v. Fabe*, 508 U.S. 491, 501 (1993).

The McCarran-Ferguson Act "does not create reverse field preemption," *Greene*, 440 F. 3d at 1312, or "seek to insulate state insurance regulation from the reach of all federal law," *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 39 (1996). *See also Humana*, 525 U.S. at 308 ("We reject any suggestion that Congress intended to cede the field of insurance regulation to the States, saving only instances in which Congress expressly orders otherwise."). "Rather, it seeks to protect state regulation primarily against inadvertent federal intrusion—say, through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to constitute one part." *Barnett Bank*, 517 U.S. at 39. And "[a]s the text itself makes clear, the point of McCarran–Ferguson's legislative choice of leaving insurance regulation generally to the States was to limit congressional preemption under the commerce power, whether dormant or exercised." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003). The McCarran-Ferguson Act is thus limited to reverse preempting legislation passed through Congress' Commerce Clause authority. *Id.*

1. The McCarran-Ferguson Act Is Inapplicable Because the United States' Offset Rights Arise from Federal Common Law, Not an "Act of Congress"

By its plain terms, the McCarran-Ferguson Act only applies in resolving a clear conflict between an "Act of Congress" and a state law. 15 U.S.C. § 1012(b). The United States' offset rights arise under nearly two centuries of federal common law. *Munsey Trust Co.*, 332 U.S. at 240; *Gratiot v. United States*, 40 U.S. 336, 370 (1841). The Court previously (and correctly) recognized that "the government's right to assert a setoff is not an 'Act of Congress' subject to the preemption rule set forth in" the McCarran-Ferguson Act. *Health Republic*, 150 Fed. Cl. at 242. The "law of the case" doctrine "prevent[s] relitigation" of the conclusion that the McCarran-Ferguson Act does not apply in these circumstances. *See Suel v. Sec. of Health and Human Servs.*, 192 F. 3d 984, 985 (Fed. Cir. 1999). The United States is entitled to use its federal common law offset rights while in this Court to collect Colorado Health and Meritus' outstanding ACA debts.

2. The McCarran-Ferguson Act is Inapplicable Because the United States' Substantive Rights Derive from the ACA

Even if the United States relied on an "Act of Congress" for its offsets, the McCarran-Ferguson Act would not apply because the United States' substantive rights arise from federal laws that "specifically relate[] to the business of insurance." 15 U.S.C. § 1012(b); *see also Barnett Bank*, 517 U.S. at 38 ("By its terms . . . the [McCarran-Ferguson] Act does not apply when the conflicting federal statute '*specifically relates to the business of insurance*.'") (emphasis in original). The United States' substantive right to recover derives from the ACA, and its implementing regulations, which require Colorado Health and Meritus to make payments. Motion at 3, 11 n.6.

The ACA obviously relates to the business of insurance, for it materially altered the insurance industry as a whole. In enacting the ACA, Congress focused directly and unambiguously on the business of insurance, establishing interlocking reforms that specifically relate to insurance markets and the spreading of risk among insurers, and thus intended to affect—indeed to fundamentally transform—the relationship between insurers and insureds. *See King*, 135 S. Ct. at 2496 (noting that "Congress passed the Affordable Care Act to improve health insurance markets . . . ."). The risk-spreading and other programs at issue in this case, and under which the United States seeks payment, "specifically relate to the business of insurance" such that ordinary Supremacy Clause principles apply, and the McCarran-Ferguson Act's reverse-preemption provisions are inapplicable. *See United States v. R.I. Insurers' Insolvency Fund*, 80 F.3d 616, 620-22 (1st Cir. 1996) (holding that Medicare Secondary-Payer Act specifically related to the business of insurance so as to preempt contrary state insolvency law).

With no dispute that the ACA "relates to the business of insurance," *see* Motion at 11 n.6 (stating that Colorado Health and Meritus "do[] not dispute that the ACA is responsible for the existence of their purported debts"), the plain terms of the McCarran-Ferguson Act render it inapplicable. *See, e.g.*, *United Healthcare of N.Y., Inc. v. Lacewell*, 967 F.3d 82, 91 n.4 (2d Cir. 2020) ("Because the ACA 'specifically relates to the business of insurance,' the McCarran-Ferguson Act's special anti-pre-emption rule . . . does not apply").

3. The McCarran-Ferguson Act is Inapplicable Because No Conflict Exists Between Federal and State Jurisdictional Statutes

The McCarran-Ferguson Act "is triggered only by a *clear conflict* between state insurance law and a federal statute of general applicability." *Greene*, 440 F.3d at 1311-12 (emphasis added). Colorado Health and Meritus acknowledge that the United States' offset right "arises under common law, not statute," Motion at 7, but argue that a conflict exists between the Court's jurisdictional statutes and their respective state court jurisdictional statutes. To the extent the Court reaches this theory, it too lacks merit.

Neither Colorado Health nor Meritus identify a clear conflict between federal and state law that warrants consideration of the McCarran-Ferguson Act. Federal law provides this Court with jurisdiction to entertain Tucker Act claims against the United States, 28 U.S.C. § 1491, and offset debts against any judgment, *see* 28 U.S.C. §§ 1503, 2508. The state laws on which Colorado Health and Meritus rely provide state courts with jurisdiction over insurance "insolvency" and "delinquency" proceedings, Ariz. Rev. Stat. §§ 20-612(A), 20-612(C); Colo. Rev. Stat. § 10-3-504(2). The federal and state statutes create jurisdiction in entirely different courts over entirely different subject matters.

Contrary to Colorado Health and Meritus' assertion, nothing in the state statutes identified vests "exclusive jurisdiction over offsets" in any state court, and they cite to no state law supporting that proposition. *Cf. Humana*, 525 U.S. at 308 ("We reject any suggestion that Congress intended to cede the field of insurance regulation to the States, saving only instances in which Congress expressly orders otherwise."). Both Colorado and Arizona law permit offsets, but do not mandate that offset need be effectuated by a state court. Colo. Rev. Stat. § 10-3-529 ("mutual debts or mutual credits . . . shall be set off, and the balance only shall be allowed or paid"); Ariz. Rev. Stat. § 20-638(A) ("all . . . credits and debts *shall be set off* and the balance only shall be allowed or paid") (emphasis added). Because nothing about this Court's jurisdiction conflicts with a state court's jurisdiction over state insolvency proceedings, the McCarran-

Ferguson Act does not apply. *Humana*, 525 U.S. at 310 ("When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application."); *Greene*, 440 F.3d at 1311-12.

Moreover, the Courts of Appeal for the Third, Fourth, Fifth, Ninth, and Tenth Circuits have either categorically rejected or expressed skepticism that the McCarran-Ferguson Act applies to jurisdictional statutes. *Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 161 (3d Cir. 2000) ("We likewise find no inconsistency between the [McCarran-Ferguson] Act's conferral of 'original jurisdiction' on the [state court] and finding removal jurisdiction in other courts to adjudicate claims asserted by the Liquidator."); *Gross v. Weingarten*, 217 F.3d 208, 221 (4th Cir. 2000) ("The Supreme Court has repeatedly and unequivocally rejected the deputy receiver's contention that a state may oust the federal courts of jurisdiction by creating an exclusive forum for claims against an estate."); *Safety Nat'l Casualty Corp. v. Certain Underwriters at Lloyd's London*, 587 F.3d 714, 724 n.39 (5th Cir. 2009) ("we look skeptically on a claim that the McCarran-Ferguson Act intended to deny diversity jurisdiction or federal question jurisdiction to federal courts"); *Amsouth Bank v. Dale*, 386 F.3d 763, 783 (6th Cir. 2004) ("Where the insolvent insurer is itself a plaintiff in an ordinary contract or tort action, courts tend to look unfavorably on claims of McCarran–Ferguson preemption of the FAA or the removal statutes so as to insulate that action from the federal courts."); *Hawthorne Savs. F.S.B. v. Reliance Ins. Co. of Ill.*, 421 F.3d 835, 842-83 (9th Cir. 2005) (adopting the Fourth Circuit's reading in *Gross* and rejecting argument that jurisdiction statute was reverse preempted by state liquidation act); *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 702 (10th Cir. 1988) ("[W]e are hesitant to accept the proposition that a state statute, even when buttressed by the federal policy expressed in the McCarran-Ferguson Act, can affect the invocation of federal diversity jurisdiction.”).

4. The State Laws Relied on By Colorado Health and Meritus Do Not Regulate the Business of Insurance

Even if the United States’ rights did not arise under federal common law and relate to insurance and even if a conflict existed between federal and state law, the McCarran-Ferguson Act still would not apply because the state laws relied upon by Colorado Health and Meritus do not regulate the business of insurance. The McCarran-Ferguson Act only empowers state law “enacted . . . for the purpose of regulating the business of insurance.” 15 U.S.C. § 1012(b); *see also Fabe*, 508 U.S. at 504 (holding state law regulates the business of insurance only to the extent it is “integrally related to the performance of insurance contracts”). As noted above, state liquidation laws do not, in their entirety, regulate “the business of insurance” within the meaning of the McCarran-Ferguson Act. They do so only to the extent they “protect[] policyholders” or are “integrally related to the performance of insurance contracts.” *Fabe*, 508 U.S. at 492-93. In *Fabe*, the Supreme Court held that the McCarran-Ferguson Act permits a state insolvency law to reverse-preempt the federal priority statute—a federal statute that does not relate to the business of insurance—*to the extent* the state law “afford[] priority, over claims of the United States, to the insurance claims of policyholders and to the costs and expenses of administering the liquidation” but not to the extent they prioritize “other categories of claims” over those of the United States. *Id.* at 493-94.

Colorado Health and Meritus rely on state court jurisdictional statutes, neither of which uniquely “protect policyholders” or are “integrally related to the performance of insurance contracts,” as intended by *Fabe*. The state law relied upon by Colorado Health provides that state courts “shall have jurisdiction to entertain, hear, or determine any complaint praying for the . . . liquidation . . . of any insurer.” Colo. Rev. Stat. § 10-3-504(2). Similarly, the state statute relied upon by Meritus provides that the "superior court is vested with exclusive original jurisdiction of delinquency proceedings under this article," Ariz. Rev. Stat. § 20-612(a), and that "[d]eliquency proceedings pursuant to this article constitute the sole and exclusive method of liquidating, rehabilitating, reorganizing or conserving an insurer," *id.* § 20-612(c). Those state laws merely provide state courts general jurisdiction over insurer delinquency and liquidation proceedings. Nothing about those provisions regulates insurers or their business with policyholders or the performance of insurance contracts.

5. The Court's Jurisdictional Statutes Do Not "Invalidate, Impair, or Supersede" State Court Jurisdictional Statutes

The McCarran-Ferguson Act is inapplicable unless the federal statute would "invalidate, impair, or supersede" the state law. 15 U.S.C. § 1012(b). Neither Colorado Health nor Meritus argue that any federal law does so, and for good reason.

To "invalidate" means "to render ineffective, generally without providing a replacement rule or law;" to "impair" means "[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner;" and to "supersede" means "displace (and thus render ineffective) while providing a substitute rule." *Humana*, 525 U.S. at 307, 309-10 (citation omitted). In short, when a federal law "would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application." *Id.* at 310.

This Court's jurisdictional statutes do not "invalidate, impair, or supersede" any state laws identified by Colorado Health and Meritus. No state laws are invalidated, as the state jurisdictional statutes continue to operate and vest the state courts with *in rem* jurisdiction over the insurers and their estates. Nor do the federal statutes "impair" the state statutes, as the state statutes are made no worse or diminished in any way; the state courts continue exercising jurisdiction over and managing the liquidation of Colorado Health and Meritus' estates. This Court's jurisdictional statutes do not "supersede" either state statute, as those state jurisdictional statutes are not displaced. The net proceeds of any judgment that Colorado Health and Meritus obtain in this Court will be distributed to policyholders and other creditors in their respective liquidation proceedings in accordance with state law. *See Gross*, 217 F.3d at 222 (McCarran-Ferguson did not preempt federal litigation where the state court retained ultimate control over the disposition of the insolvent insurer's estate); *cf. Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 702 (10th Cir. 1988) ("[T]he policy of the McCarran-Ferguson Act was to leave the regulation of insurers to the states, it did not intend to divest federal courts of the right to apply state law regarding the regulation of insurers in appropriate diversity proceedings.").

The fact that Colorado Health or Meritus' estates may recover less money because of the United States' offsets does not "invalidate, impair, or supersede" the operation of any provision of state liquidation law. In short, the state court regimes continue unabated, and Colorado Health and Meritus offer no plausible argument to the contrary.

6. The Federal Arbitration Act Cases Cited By Colorado Health and Meritus Are Unpersuasive

Colorado Health and Meritus primarily rely on three cases involving the Federal Arbitration Act to support their proposition that the state court is the sole forum for the United States to assert its counterclaims. Motion at 9-11 (citing *Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir. 1998); *Davister Corp. v. United Republic Life Ins. Co.*, 152 F.3d 1277 (10th Cir. 1998); *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995)). Those cases are part of a split among federal and state courts, with the Courts of Appeals for the Third and Ninth Circuits and the District Court for the Eastern District of Kentucky all rejecting those courts' reasoning. *See, e.g.*, *Suter v. Munich Reins. Co.*, 223 F.3d 150, 162 (3d Cir. 2000) (holding that arbitration statute "does not impair the New Jersey Liquidation Act," and that "the Liquidation Act does not reverse preempt the [state liquidation statute] under the McCarran Ferguson Act"); *Bennett v. Liberty Nat'l Fire Ins. Co.*, 968 F.2d 969, 973 (9th Cir. 1992) ("Our rejection of the McCarran–Ferguson presumption in liquidation proceedings . . . should extend to the case before us because the liquidator is unable to explain why she is entitled to an advantage that the insolvent company whose position she now occupies did not have. Neither does she articulate how arbitration interferes with a valid state regulatory purpose."); *Milliman, Inc. v. Roof*, 353 F. Supp. 3d 588, 603 (E.D. Ky. 2018) (holding that "[t]he arbitration of the Liquidator's claims against third party contractors does not impair the delinquency proceedings in state court, nor does it invalidate the protections of the" state liquidation scheme).

Insurance regulators appealing decisions from the Iowa Supreme Court and Louisiana Supreme Court have filed petitions in the United States Supreme Court to resolve the split. *See Ommen v. Milliman, Inc.*, No 20-249 (petition from Iowa Supreme Court); *Milliman, Inc. v. Donelon*, No. 20-299 (petition from Louisiana Supreme Court).[11]

In any event, *Crawford*, *Davister*, and *Stephens* are all inapposite given the facts and posture of each case. None of those cases involved a counterclaim in a forum initiated by the insurer, unlike this case. Those courts considered whether a federal arbitration statute conflicted with a state insurance law that precluded arbitration, while here, the United States relies on federal common law to enforce rights arising under federal insurance statutes. *Crawford* and *Stephens* involved suits by state insurance commissioners against reinsurance companies for breach of insurance agreements. *Crawford*, 141 F.3d at 586-88; *Stephens*, 66 F.3d at 42-43. Those cases

[11] The Nevada Supreme Court, among others, is in accord with the Third and Ninth Circuits, as well as the Iowa Supreme Court. *State ex rel. Richardson v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 454 P.3d 1260 (Nev. 2019).

also involved clear conflicts—in *Stephens*, the court found a conflict between a state "anti-arbitration provision" and a federal arbitration statute, *id.* at 42; in *Munich*, the court found a conflict between a statute authorizing the state court to enjoin arbitration and a federal statute requiring arbitration, 141 F.3d at 591. *Davister* involved improper and unauthorized business activities by an insurer that the commissioner of insurance sought to unwind. 152 F.3d at 1278. The third party to those improper and unauthorized transactions then sued in another state to force arbitration in violation of a state court stay order. *Id.* at 1281.

Colorado Health and Meritus' surface reliance on those cases is also inapt. For example, they argue that all matters "related to liquidation" should be handled by the state court, Motion at 9, but even if that were an appropriate standard, the United States' effort to collect its debts is not "related to liquidation." They argue against a state liquidator having "to defend unconnected suits in different forums across the country," Motion at 9 (citing *Crawford*), but plaintiffs initiated this action, and their ACA claims are certainly not "unrelated" to their outstanding ACA debts. They worry about "conflicting rulings, piecemeal litigation of claims, and unequal treatment of claimants," Motion at 9, but this Court's jurisdiction ensures consistency when litigating with the United States, thereby preventing inconsistent rulings regarding the United States' offset rights. They assert that their theory prevents the United States from "pluck[ing] from the entire liquidation proceeding one discrete issue," Motion at 9-10 (citing *Davister*), but ignore that they are pursuing claims in this Court and identify no actual liquidation issue tied up in this case.

Unsurprisingly, *Crawford*, *Davister*, and *Stephens* has been soundly and persuasively rejected by the Fourth and Sixth Circuits. *See, e.g.*, *Gross*, 217 F.3d at 222 (concluding that "concurrent federal jurisdiction over the defendants' counterclaims [does not] threaten[ ] to 'invalidate, impair, or supersede' . . . [a state]'s efforts to establish a single equitable proceeding to liquidate or rehabilitate insolvent insurers"); *AmSouth Bank v. Dale*, 386 F.3d 763, 783 (6th Cir. 2004) ("Where the insolvent insurer is itself a plaintiff . . ., courts tend to look unfavorably on claims of McCarran-Ferguson preemption of the FAA or the removal statutes so as to insulate that action from the federal courts.").

II. The United States is Entitled to Interest on Unpaid Federal Debts

Colorado Health and Meritus failed to pay debts owed to the United States under the ACA. Counterclaim ¶¶ 26-33. The United States is thus "required to charge interest, penalties, and administrative costs on [those] delinquent debts . . . until the debt is paid in full." *Health Republic*, 150 Fed. Cl. at 237 n.3 (citing 45 C.F.R. § 30.18(a)) (internal citation omitted). "[I]nterest accrue[s] from the date of delinquency," and "is calculated using the rate set by the Secretary of the Treasury under 31 U.S.C. § 3717, and a six percent annual penalty is charged on debts delinquent for more than ninety days." *Id.* (citing 45 C.F.R. §§ 30.18(b), (d)) (internal citations omitted). Regulation specifically promulgated under ACA authority establishes that the ACA debts owed to the United States constitute "a determination of a debt," 45 C.F.R. § 156.1215(c), which requires the imposition of interest, *id.* § 30.18(b), (d).

Colorado Health and Meritus acknowledge that federal law requires interest, but wrongly argue that (1) the United States impermissibly seeks "prejudgment interest," and (2) federal law entitling the United States to interest conflicts with and is preempted by state statutes under the McCarran-Ferguson Act. Motion at 11-14. But the United States seeks interest owed on delinquent ACA debts—interest that accrues as a matter of federal law and is not dependent on a judgment. Colorado Health and Meritus do not explain how the state laws they rely on "regulat[e] the business of insurance," or even argue that the United States' entitlement would "invalidate, impair, or supersede" any state law. The McCarran-Ferguson Act is inapplicable.

A. The United States Seeks Payment of Federal Debts, Not Prejudgment Interest

Colorado Health and Meritus mischaracterize the United States as seeking "prejudgment interest." Motion at 12. The interest Colorado Health and Meritus owe is on undisputed "delinquent debts" that "continue to accrue [interest] until the debt is paid in full." 45 C.F.R. § 30.18(a). Unlike prejudgment interest, the United States' entitlement to interest does not depend on obtaining a judgment in its favor or even filing a complaint, and it is not left to the discretion of the Court. Rather, "charg[ing] interest, penalties, and administrative costs on delinquent debts" is a clear command to the United States.

Conversely, prejudgment interest is discretionary interest that "may be assessed by the district court after damages have been found . . . to compensate for the delay in payment of the damages." *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1066 (Fed. Cir. 1983). Unlike the United States' claims, prejudgment interest "is a form of compensatory relief" that "is part of a successful plaintiff's complete compensation." *Sanofi-Aventis v. Apotex, Inc.*, 659 F.3d 1171, 1178 (Fed. Cir. 2011) (citations omitted); *see also West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987) ("Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress."). "Although Congress has enacted a statute governing the award of postjudgment interest in federal court, *see* 28 U.S.C. § 1961, there is no comparable legislation regarding prejudgment interest." *City of Milwaukee v. Cement Div., Nat. Gypsum Co.*, 515 U.S. 189, 194 (1995). Colorado Health and Meritus simply mischaracterize the nature of the United States' claims.

B. State Law Does Not Reverse Preempt Federal Law Requiring Interest on Unpaid Federal Debts

Colorado Health and Meritus argue that federal law entitling the United States to interest is "inconsistent" with state law "fixing debts on the date a liquidation order is entered," and is thereby reverse preempted under the McCarran-Ferguson Act. Motion at 13-14. As explained above, the McCarran-Ferguson Act is limited to federal law that clearly conflicts with a state statute "enacted . . . for the purpose of regulating the business of insurance," if the federal statute does not "specifically relat[e] to the business of insurance" and would "invalidate, impair, or supersede" the state law. *See Humana*, 525 U.S. at 306-07; *Fabe*, 508 U.S. at 501.

Colorado Health and Meritus do not explain how the state laws they rely on "regulat[e] the business of insurance," or even argue that application of any federal law in this case would "invalidate, impair, or supersede" any state law. The state laws identified provide that the rights and liabilities of several interested parties are fixed, including creditors, policyholders, shareholders, members, and all other persons interested in its estate. Motion at 13 (citing Colo. Rev. Stat. § 10-3-517(2); Ariz. Rev. Stat. § 20-635). But as noted above, the McCarran-Ferguson Act "does not create reverse field preemption" over the entirety of federal law. *Greene*, 440 F.3d at 1312. Even in *Fabe*, the Supreme Court limited the preemption of a generally applicable federal statute, the Federal Priority Act, to the extent the state law protected policyholders. *See Fabe*, 508 U.S. at 493-94.

Although Colorado Health and Meritus do not argue that federal law would "invalidate, impair, or supersede" any state law, that argument would fail had it been raised. As explained above, the state laws continue operating undiminished. The net proceeds of any judgment that Colorado Health and Meritus receive will be distributed to policyholders and other creditors in the liquidation proceedings according to their relative priority as determined by state law. The fact that the estate may be smaller does not "invalidate, impair, or supersede" the operation of any provision of state liquidation law. *See, e.g.*, Suter, 223 F.3d at 161 ("It is true . . . that if the

District Court or an arbitrator should decide the [issue], the estate will be smaller than if that issue was resolved in the Liquidator's favor. But the mere fact that policyholders may receive less money does not impair the operation of any provision of New Jersey's Liquidation Act."). In short, the state court regimes continue, and Colorado Health and Meritus offer no plausible argument to the contrary.

The contrary cases cited by Colorado Health have no bearing on the case before the Court. Motion at 13 (citing *In re Liquidation of Pine Top Ins. Co.*, 322 Ill. App. 3d 693 (2001); *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 164 (1946); *Sexton v. Dreyfus*, 219 U.S. 339, 344 (1911)). The Illinois state court in *Pine Top* merely held "that a claimant against an insolvent insurance company in liquidation proceedings is not entitled to the payment of post-allowance interest *at the same priority level as its claim*," 322 Ill. App. 3d at 707 (emphasis added). But, as explained below, the offsets asserted in this case have no bearing on the priority distribution of assets under the state court's control. *Infra* at 29-31. The two federal bankruptcy cases cited are irrelevant as this case does not involve a federal bankruptcy. Nor would federal bankruptcy laws, which limit the United States' rights by congressional immunity waivers, be germane to any consideration of state laws. In any event, *Vanston Bondholders* is also irrelevant because there was no dispute that the creditors "should receive simple interest on the principal," notwithstanding bankruptcy; the court merely recognized that "interest *on interest*" would be inequitable because a federal court had enjoined the debtor from making payments. 329 U.S. at 159-60. But this case does not involve federal injunctions or bankruptcy law, let alone "interest on interest," and Colorado Health and Meritus do not argue that the state courts could enjoin the United States absent a waiver of sovereign immunity.

The United States is entitled to interest on unpaid debts until those debts are paid.

III. Colorado Health's Arguments Against This Court Applying Federal Law Lack Merit

The United States asserts a claim against Colorado Health for breach of statutory and regulatory obligations owed under the ACA. Counterclaim ¶¶ 26-34, 50-56. Colorado does not dispute the legal basis for these claims, that the company failed to make payments owed under the ACA, or that the United States is entitled to judgment in its favor. Rather, Colorado Health apparently argues that after the Court enters judgment in the United States' favor, the Court is precluded from offsetting against any judgment in Colorado Health's favor.

Binding federal law requires that those federal debts be offset against any recovery that Colorado Health receives in this Court. *Supra* at 10-13. In these circumstances, the Court need go no further. But to the extent the Court reaches Colorado Health's arguments, they are without merit.

A. The Court Need Not Create New Law for Colorado Health Because Federal Common Law Exists Already

Colorado Health argues that the Court should disregard established law and create new law for insurers undergoing liquidations in Colorado. Motion at 15-18 (citing *United States v. Kimbell Foods*, Inc., 440 U.S. 715, 740 (1979)). But the Court need not search for or create new law because, as explained above, the United States' federal common law right to offset debts is well established, applicable, and unaffected by Colorado Health's insolvency. *Supra* at 10-13.

Colorado Health's reliance on *Kimbell Foods* is misplaced. There, the Supreme Court considered "whether contractual liens arising from certain federal loan programs take precedence over private liens, in the absence of a federal statute setting priorities." 440 U.S. at 718. The court addressed two sets of facts: one involving a secured loan to a grocery store by the Small Business Administration, and another involving a secured loan by the Farmers Home Administration to a farm. *Id.* at 718-23. The Court did not interpret statutes or regulations relating to one or both of these loan programs, explaining that "the statutes authorizing these federal lending programs do not specify the appropriate rule of decision" and thus prior Supreme Court precedent "directs federal courts to fill the interstices of federal legislation 'according to their own standards.'" *Id.* at 727 (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)). Thus, the court had to decide "[w]hether to adopt state law or to fashion a nationwide federal rule." *Id.* at 728.

This case is nothing like *Kimbell Foods* because existing federal common law provides for the United States' offsets. *See Munsey Tr. Co.*, 332 U.S. at 240 (concluding that the Court of Claims was "under statutory duty to recognize the undisputed claim for damages of the United States" when adjudicating a claim against the government). The Court need not fashion new rules just for Colorado Health as federal standards exist already. Colorado Health's insolvency does not merit exception from federal law. *Supra* at 13.

B. The United States' Offsets Do Not Affect State Priority Schemes

Colorado Health is wrong to suggest that the United States' offset rights violate the state insurance liquidation priority scheme. Motion at 18-19 (citing *Conway v. United States*, 145 Fed. Cl. 514, 524 (2019)). The right of offset is independent of any creditor priority considerations because the government's "right to counterclaim" does not affect "priority." *Cherry Cotton Mills*, 327 U.S. at 540. That is because "only the balance, if any, after the set-off is deducted" constitutes the "assets of the insolvent" and is thus available for distribution in accordance with relevant priority rules. *Scott v. Armstrong*, 146 U.S. 499, 510 (1892); *see also See Transit Cas. Co. v. Selective Ins. Co. of Se.*, 137 F.3d 540, 543 (8th Cir. 1998) (crediting argument that "set-offs merely establish the bounds of the pre-receivership assets and that the Insurance Code governs only the distribution of those assets, rather than their definition"); *FDIC v. Liberty Nat'l Bank & Tr. Co.*, 806 F.2d 961, 967 (10th Cir. 1986) ("Only the balance, if any, after the setoff is deducted is considered an asset of the receivership.").

Courts have repeatedly rejected the assertion that the right of offset is limited by a state priority scheme. *See, e.g.*, *Comm'r of Ins. v. Munich Am. Reinsurance Co.*, 429 Mass. 140, 142, 706 N.E.2d 694, 696 (1999) (recognizing that "[t]he general principle has long been established that a setoff is appropriate between mutual debtor-creditors, even if one of them is insolvent at the time the right to the setoff is asserted;" holding that "a creditor of an insolvent insurer may apply amounts that it owes to the insolvent insurer as an offset against amounts that the insolvent insurer owes to it;" and holding that "[t]here is nothing explicit or implicit in the statutory scheme for the liquidation of insolvent insurers . . . that makes common-law principles of setoff inapplicable"); *In re Liquidation of Realex Grp. N.V.*, 210 A.D.2d 91, 94 (N.Y. App. Div. 1994) ("Although permitting offsets may conflict with the statutory purpose of providing for the pro rata distribution of the insolvent's estate to creditors, the Legislature has resolved the competing concerns and recognized offsets as a species of *lawful* preference. Indeed, . . . *it is 'only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent.'*") (emphasis added) (quoting *Scott v. Armstrong*, 146 U.S. 499, 510 (1892)); *Prudential Reinsurance Co. v. Superior Court*, 3 Cal. 4th 1118, 1124-25 (1992) (adopting position of "the majority of state and federal courts addressing the statutory right of setoff" and holding that the setoff provision "may not reasonably be construed as conditioning [a creditor's] right to set off on the insolvent insurer's ability to pay in full the claims of those in higher priority classes").

Moreover, Colorado law confirms this conclusion because Colorado's own liquidation statutory scheme includes Colo. Rev. Stat. § 10-3-529, which permits offset before the distributions based upon priority in section 541.[12]

C. Colorado Law Is Consistent with Federal Law in Permitting Offset

Because HHS's offsets are authorized by applicable federal law, analysis of Colorado law is unnecessary. But even if state law were relevant, offset would not violate state law.

Creditors in Colorado, as in other states, have an equitable offset right. *See Bluewater Ins. Ltd. v. Tennessee Ins. Co. v. Balzano*, 823 P.2d 1365, 1369 (Colo. 1992) (assuming right's existence). That the Colorado Supreme Court in *Bluewater* ultimately disapproved the offset at issue does not change this analysis. In *Bluewater*, the reinsurers had effectively waived their rights of offset during contract negotiations and in consultation with Colorado's commissioner of insurance. *See* 823 P.2d at 1369 (concluding that "[e]ven if the reinsurers otherwise enjoyed an equitable right to offset, nothing prevented the reinsurers from freely entering into enforceable contracts from which an offset clause was deliberately excluded," and "[h]aving entered into such contracts, the reinsurers are bound"). The Court thus concluded that the broader question "whether the right [of offset] creates an impermissible preference" under the State's priority rules was "mooted." *Id.* at 1374.

In any event, a Colorado statute enacted shortly after *Bluewater* expressly authorizes offsets during insurance liquidations. That statute provides that "[n]otwithstanding any other provision of this title, mutual debts or mutual credits, whether arising out of one or more contracts between the insurer and another person in connection with any action or proceeding under this part 5, shall be

[12] Judge Hertling erred in concluding that "HHS's offset violates Colorado's insurance liquidation priority scheme by leap-frogging claimants with higher priority." *Conway v. United States*, Order at 10. The court's conclusion was dependent on an incorrect reading of *Fabe*. In concluding that section 541 conflicts with the Netting Regulation, and that *Fabe* applies, the court misunderstood the scope of the Supreme Court's opinion, which dealt specifically with the conflict with the Federal Priority Statute. But the Netting Regulation is not a priority statute and does not suggest that HHS may receive a higher priority distribution in Colorado's liquidation. Rather, the Netting Regulation allows offset before the question of priority arises.

set off, and the balance only shall be allowed or paid, except as provided in [subsections not relevant here]." Colo. Rev. Stat. § 10-3-529(1). Accordingly, the "mutual debts" of HHS and Colorado Health are to be "set off," so that "the [resulting] balance only" becomes a debt subject to the state law governing the distribution of an insurer's liquidation estate.

Colorado Health wrongly argues that this state statute permits only "offset[s] involving a contract," *see* Motion at 18-23, and not the offset of debts arising by operation of federal or state law. On the contrary, the statute expressly authorizes offset "*whether*" the debts arise under contract. Colo. Rev. Stat. § 10-3-529(1) (emphasis added). As even the *Conway* court recognized, it is "grammatically preferable" to read the "whether" clause, which is set off by commas, as non-restrictive in nature. *Conway*, 145 Fed. Cl. at 526.[13] *Conway* also dealt with dissimilar facts and law, as that case involved an administrative offset effectuated by HHS, while this case involves the United States' federal common law rights, the Court's jurisdiction, and controlling authority that requires the Court to entertain the United States' claims.

IV. Meritus Could Not Offset Its Debts in 2017 Against a Judgment Not Yet Awarded

The Counterclaim asserts claims against Meritus for breach of the company's statutory and regulatory obligations to make payments under the ACA. Counterclaim ¶¶ 42-48, 49-51, 57-60. Meritus does not contest the underlying debts, but contends that the company paid those debts in

[13] Judge Hertling also departed from the most straightforward reading of the Colorado statute because he observed that its effective-date provision contains several explanatory clauses relating to contracts, which led the court to assume that contractual offsets must have been all that the legislature intended to authorize. Those clauses clarify that, in addition to applying to "contracts entered into … on or after [January 1, 1993]," the statute also applies to "transactions occurring after January 1, 1993" but undertaken pursuant to contracts "in existence prior to January 1, 1993." Colo. Rev. Stat. § 10-3-529(6). But those clauses simply elucidate how the statute's general effective-date provision—"[t]his section shall be effective January 1, 1993," *id.*—would apply to fact patterns involving contracts. Nothing in that language suggests that the state legislature, in broadly authorizing offset of "mutual debts or mutual credits," *id.* § 10-3-529(1), implicitly intended to withhold that right from federal and state governments in the course of administering essential government programs.

November 2017 when it announced an offset against the company's expected risk corridors recovery in this case. Motion at 23-25. But Meritus, at that time, did not have any risk corridors funds against which to offset. And HHS, the lawful authority responsible for determining Meritus' entitlement to risk corridors payments had determined that it could not be paid any additional funds absent further action by Congress. *See* HHS Notice of Benefit and Payment Parameters for 2015 Final Rules, 79 Fed. Reg. 13,744, 13,787 (Mar. 11, 2014);[14] CMS, Risk Corridors and Budget Neutrality (Apr. 11, 2014).[15] At best, the company's estate possessed a claim—a claim that could not be paid absent new appropriations from Congress or a court allowing access to the appropriated Judgment Fund. That was the state of the law when Meritus purported to conduct its offset.

Moreover, by July 2017, three judges of the Court had held that issuers were not entitled to additional risk corridors payments, *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81 (2016); *Blue Cross and Blue Shield of N.C. v. United States*, 131 Fed. Cl. 457 (2017); *Maine Cmty. Health Options v. United States*, 133 Fed. Cl. 1 (2017), while one judge had held the opposite, *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436 (2017). At that time, Meritus was a member of the Class, all of whose claims were stayed pending the Federal Circuit's review of the Court's decisions. Docket No. 33. Several months later, the Federal Circuit ruled in the United States' favor such that controlling law, prior to April 2020, held Meritus had no right to

[14] In this notice, HHS informed insurers that it would "implement th[e] program in a budget neutral manner."

[15] In April 2014, HHS released guidance explaining that CMS would operate risk corridors as a three-year program and if the total amount that insurers paid into the risk corridors program for a particular year proved insufficient to fund in full the "payments out" calculated under the statutory formula, payments to insurers would be reduced pro rata to the extent of any shortfall. The guidance further explained that collections received for the next year would first be used to pay off the payment reductions insurers experienced in the previous year, in a proportional manner, and then be used to fund payments for the current year. Available at https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/faq-risk-corridors-04-11-2014.pdf.

additional risk corridors payments. The Supreme Court ultimately reversed that holding in April 2020, but that was nearly three years after Meritus' fictional offset. Meritus, holding no funds in 2017, could not have paid its debts using a judgment it does not even now possess.[16]

V. Denial of the United States' Offsets Would Be Futile Because the Treasury Would Still Be Required to Offset Federal Debts Before Paying Any Judgment

Congress directed the Secretary of the Treasury to "withhold paying that part of a judgment against the United States Government presented to the Secretary that is equal to a debt the plaintiff owes the Government." 31 U.S.C. § 3728(a). Nothing in that statute conditions the Secretary's duty to withhold payment on the solvency of the judgment creditor. Thus, even if the Court were to determine that it lacks jurisdiction over the United States' counterclaims, the United States would still apply Colorado Health and Meritus' risk corridors judgment toward their outstanding ACA debt, which, as discussed above, is not seriously disputed. *Greene v. United States*, 124 Fed. Cl. 636, 645 (2015) (declining to grant relief that would be "futile" in light of 31 U.S.C. § 3728). The motion should be denied.

CONCLUSION

For these reasons, the United States requests that the motion to dismiss be denied.

[16] Meritus' retroactive approach would also undermine a central purpose of the ACA's premium stabilization programs. In general, these programs mitigate risk for insurers by making payments to those that provide coverage to unhealthier-than-average populations that are funded by amounts collected from insurers like Meritus, who enrolled healthier-than-average populations. Meritus' approach keeps much-needed funds out of the premium stabilization programs, thereby jeopardizing still-operational insurers.

Respectfully submitted,

Dated: January 22, 2021

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