IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LOCAL INITIATIVE HEALTH AUTHORITY FOR LOS ANGELES COUNTY, d/b/a L.A. CARE HEALTH PLAN, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	No. 17-1542C Judge Wheeler

AMENDED COMPLAINT

Pursuant to RCFC 15(a) and this Court's Order of February 8, 2018 (ECF No. 13) (granting leave to amend), Plaintiff Local Initiative Health Authority for Los Angeles County, operating and doing business as L.A. Care Health Plan ("Plaintiff" or "L.A. Care"), by and through its undersigned counsel, files this Amended Complaint against Defendant, the United States of America ("Defendant," "United States," or "Government"), and alleges the following:

INTRODUCTION

1. This action seeks recovery of the full amount of risk corridors payments owed by Defendant to L.A. Care for calendar years 2014 ("CY 2014"), 2015 ("CY 2015"), and 2016 ("CY 2016"), which Defendant has unlawfully withheld in violation of the Government's mandatory risk corridors payment obligations to qualified health plan issuers ("QHPs"), such as L.A. Care, prescribed in Section 1342 of the Patient Protection and Affordable Care Act ("ACA") and its implementing federal regulations, the implied-in-fact contracts between Defendant and Plaintiff regarding risk corridors payments, the covenant of good faith and fair dealing implied in Defendant's risk corridors contracts with Plaintiff, and the protections against the Government's taking of Plaintiff's property without just compensation afforded to L.A. Care

by the Fifth Amendment of the U.S. Constitution.

2. Previously, in a separate action, this Court granted another QHP's motion for partial summary judgment on that plaintiff's claims – identical to those made by L.A. Care here – regarding the Government's breach of its obligations under the money-mandating statute and its implementing regulations, as well as under implied-in-fact contracts, to make full and timely risk corridors payments owed to that plaintiff for CY 2014 and CY 2015, and awarded judgment for that plaintiff. *See Molina Healthcare of Calif., Inc. v. United States*, 133 Fed. Cl. 14 (2017) (Wheeler, J.).

3. In this action, L.A. Care seeks monetary damages from the Government of at least $25,765,038.33, less any prorated risk corridors payments made by the Government, which is the amount of risk corridors payments that the Government admits in writing it owes to L.A. Care for CY 2014, CY 2015, and CY 2016, but unlawfully has not paid.

4. Additionally, this action seeks money damages for Defendant's breach of its statutory, regulatory, contractual, and/or Constitutional obligations to make full and timely cost-sharing reduction ("CSR") payments to L.A. Care, as prescribed by Sections 1402 and 1412 of the ACA, following the Government's decision, announced on October 12, 2017, to stop making all such CSR payments, which Defendant had paid monthly since January 2014 to L.A. Care and other similarly situated QHPs that had been voluntarily participating on the ACA Exchanges.

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

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

7. Defendant has failed to honor its mandatory advance CSR payment obligation to L.A. Care, but L.A. Care remains financially obligated under Section 1402 to continue to provide CSR discounts to its eligible customers. Defendant unlawfully has shifted the financial burden entirely upon L.A. Care, thwarting Congress's design, intent, and express mandate regarding the CSR program and CSR reimbursements.

8. This action seeks monetary damages from Defendant of at least $5,969,171.49, the total amount of mandatory advance CSR payments the Government currently owes L.A. Care, but has unlawfully refused to pay.

JURISDICTION AND VENUE

9. 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 monetary damages over $10,000 against the United States based on the Government's violations of money-mandating Acts of Congress, money-mandating regulations of an executive department, implied-in-fact contracts with the United States, and takings of Plaintiff's property in violation of the Fifth Amendment of the Constitution.

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

States within the District of Columbia.

PARTIES

11. Plaintiff LOCAL INITIATIVE HEALTH AUTHORITY FOR LOS ANGELES COUNTY, operating and doing business as L.A. CARE HEALTH PLAN ("L.A. Care"), located in Los Angeles, California, is the nation's largest publicly operated health plan. It is an independent public agency authorized by the State of California and established by the Los Angeles County Board of Supervisors pursuant to California Welfare and Institutions Code sections 14087.96 through 14087.9725, and 14087.38. Its mission is to provide access to quality health care for Los Angeles County's vulnerable and low-income communities and residents, as well as to support the safety net required to achieve that purpose. L.A. Care has been a QHP issuer on the California Health Insurance Marketplace each calendar year since CY 2014.

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

FACTUAL ALLEGATIONS

Congress Enacts the Patient Protection and Affordable Care Act

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

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

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

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

17. L.A. Care voluntarily participated as a QHP on the ACA Exchange in California, after satisfying the Government and/or the state-level operator of the California ACA Exchange that it should be certified as a QHP for that state Exchange, from January 1, 2014 (the first day of the ACA Exchanges) through the present. For each calendar year in which Plaintiff has participated on the ACA Exchange, its premiums were submitted to and approved by the California insurance regulator in the spring and/or summer of the previous year (*e.g.*, spring and/or summer of 2013 for CY 2014).

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

19. In deciding to become and continue as a QHP in California each calendar year, L.A. Care understood and believed that, in exchange for complying with numerous obligations imposed on QHPs, the Government would comply with many reciprocal obligations imposed on it – including the obligations to make full and timely risk corridors payments and advance CSR payments to eligible QHPs, like L.A. Care. The Government, however, has unlawfully failed to

do so, as detailed below.

RISK CORRIDORS FACTUAL ALLEGATIONS

The ACA's Premium-Stabilization Programs

20. The ACA introduced scores of previously uninsured or underinsured citizens into the health care marketplace, creating great uncertainty to health insurers, including L.A. Care, that had no previous experience or reliable data to meaningfully assess the risks and set the premiums for this new population of insureds under the ACA.

21. Congress, recognizing such uncertainty for health insurers and the potential increased premiums that would come with that uncertainty, included in the ACA three premium-stabilization programs, which began in CY 2014: the temporary reinsurance and risk corridors programs to give insurers payment stability as insurance market reforms began, and an ongoing risk adjustment program that makes 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. These three premium-stabilization programs are known as the "3Rs."

22. Congress's overarching goal of the premium-stabilization programs, along with other Exchange-related provisions and policies in the ACA (such as the CSR program, detailed below), was to make affordable health insurance available to individuals who previously did not have access to such coverage, and to help to ensure that every American has access to high-quality, affordable health care by protecting consumers from increases in premiums due to health insurer uncertainty. *See, e.g.*, 42 U.S.C. § 18091(2)(I)-(J) (stating that one of the goals of the ACA was "creating effective health insurance markets").

23. Congress also strived to provide certainty and protect against adverse selection in the health care market (when a health insurance purchaser understands his or her own potential

health risk better than the health insurance issuer does) while stabilizing premiums in the individual and small group markets as the ACA's market reforms and Exchanges began in 2014.

24. Of the 3Rs, this action addresses only the temporary, three-year risk corridors program, which began in CY 2014 and expired at the end of CY 2016, and was a "Federally administered program." 77 FR 17219, 17221 (Mar. 23, 2012), attached hereto at Exhibit 01.

25. By enacting Section 1342 of the ACA, Congress recognized that, due to uncertainty about the population entering the ACA Exchanges during the first few years of Exchange operation, health insurers may not be able to predict their risk accurately, and that their premiums may reflect costs that are ultimately lower or higher than predicted. 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. *See* 76 FR 41929, 41931 (July 15, 2011), attached hereto at Exhibit 02; 77 FR 73118, 73119 (Dec. 7, 2012), attached hereto at Exhibit 03 ("The risk corridors program … will protect against uncertainty in rates for qualified health plans by limiting the extent of issuer losses and gains.").

26. While the risk adjustment and reinsurance programs were designed to share risk *between* health plans, Congress designed the risk corridors program to share risk between insurers *and the Government*. *See* 77 FR 73118, 73121 (Dec. 7, 2012), Ex. 03 ("The temporary risk corridors program permits *the Federal government* and QHPs *to share* in profits or losses resulting from inaccurate rate setting from 2014 to 2016." (emphasis added)).

27. The risk corridors program applied only to participating plans, like L.A. Care, that agreed to participate on the ACA Exchanges, accepted all of the responsibilities and obligations of QHPs as set forth in the statute and implementing regulations, and were certified as QHPs at

the discretion of CMS and/or the state-level operators of the ACA Exchanges in accordance with CMS regulations. All insurers that elected to enter into agreements with the Government to become QHPs were required by Section 1342(a) of the ACA to participate in the risk corridors program.

28. The financial protections that Congress provided in the statutory premium-stabilization programs, including the mandatory annual 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 markets, at considerable cost to the QHPs, despite the significant financial risks posed by the uncertainty in the new health care markets.

29. Since the ACA's rollout, L.A. Care has worked in partnership with the state and federal governments to make the ACA Exchange successful in California by agreeing to participate as a QHP on the ACA Exchange in California, rolling out competitive rates, and offering a broad spectrum of health insurance products.

30. L.A. Care has demonstrated its willingness to be a meaningful partner in the ACA program, and has done so in good faith by fulfilling all of its obligations, with the understanding that the United States would likewise honor its statutory, regulatory, and contractual commitments regarding, *inter alia*, the 3Rs, including the temporary risk corridors program.

31. The Government has failed to hold up its end of the bargain, necessitating the filing of this lawsuit.

The ACA's Risk Corridors Payment Methodology

32. Under the ACA's risk corridors program, the federal government shares risk with QHP health insurers annually in "calendar years 2014, 2015, and 2016," 42 U.S.C. § 18062(a),

attached hereto at Exhibit 04, 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. *Id.* at § 18062(b).

33. In this manner, "[r]isk corridors create a mechanism for sharing risk for allowable costs between the Federal government and QHP issuers." 76 FR 41929, 41942 (July 15, 2011), Ex. 02.

34. Through ACA Sections 1342(b)(1) and (2), Congress established the payment methodology and formula for the risk corridors "payments in" and "payments out."

35. The text of Section 1342(b) states:

> **(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.

42 U.S.C. § 18062(b), Ex. 04.

36. To determine whether a QHP in any year must pay into, or receive payments from, the Government under the risk corridors program, HHS compared allowable costs (essentially, claims costs subject to adjustments for health care quality, health IT, annual risk adjustment payments and charges, and annual reinsurance payments) and the target amount – the difference between a QHP's earned premiums and allowable administrative costs.

37. The risk corridors payment that HHS owed an eligible QHP for a particular year thus depended upon the amount of annual reinsurance and risk adjustment payments that QHP received for the same year. Congress thus intended for the Government's risk corridors payments to QHPs, like the annual reinsurance and risk adjustment payments upon which they depended, to be paid annually.

38. Pursuant to the Section 1342(b) formula, each year from CY 2014 through CY 2016, QHPs with allowable costs that were less than 97 percent of the QHP's target amount were required to remit charges for a percentage of those cost savings to HHS, while QHPs with allowable costs greater than 103 percent of the QHP's target amount were to receive payments from HHS to offset a percentage of those losses. None of these payments were contingent upon collections.

39. The risk corridors program does not require the Government to reimburse insurers for 100 percent of their losses in a calendar year, or insurers to remit 100 percent of their gains to the Government in a calendar year.

40. Section 1342(b)(1) prescribes the specific payment formula from HHS to QHPs whose costs in a calendar year exceed their original target amounts by more than three percent.

41. Section 1342(b)(1)(A) requires that if a QHP's allowable costs in a calendar year are more than 103 percent, but not more than 108 percent, of the target amount, then "the Secretary [of HHS] shall pay" to the QHP an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount.

42. Section 1342(b)(1)(B) further requires that if a QHP's allowable costs in a calendar year are more than 108 percent of the target amount, then "the Secretary [of HHS] shall pay" to the QHP an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the allowable costs in excess of 108 percent of the target amount.

43. Alternatively, Section 1342(b)(2) sets forth the amount of the annual risk corridors charges that must be remitted to HHS by QHPs whose costs in a calendar year are more than three percent below their original target amounts.

44. Section 1342(b)(2)(A) requires that if a QHP's allowable costs in a calendar year are less than 97 percent, but not less than 92 percent, of the target amount, then "the plan shall pay to the Secretary [of HHS]" an amount equal to 50 percent of the excess of 97 percent of the target amount over the allowable costs.

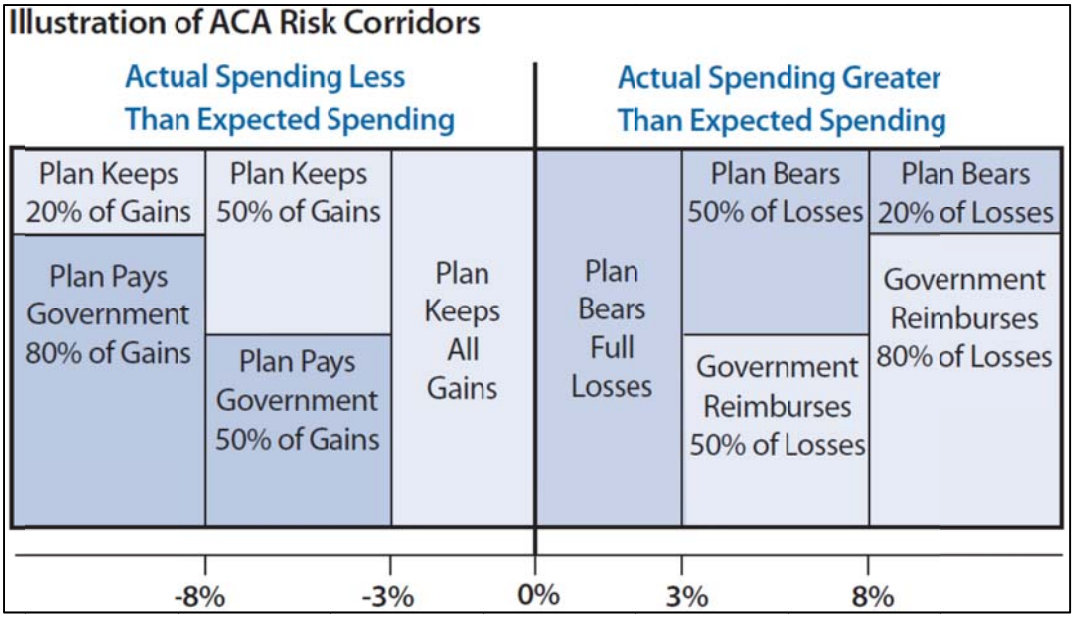
45. Section 1342(b)(2)(B) requires that if a QHP's allowable costs in a calendar year are less than 92 percent of the target amount, then "the plan shall pay to the Secretary [of HHS]" an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the excess of 92 percent of the target amount over the allowable costs.

46. 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, and the Government does not share in the risk. 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.

47. HHS and CMS provided specific examples of risk corridors payment and charge calculations beyond the three percent threshold – published in the Federal Register dated July 15, 2011, at 76 FR 41929, 41943 – which illustrate risk corridors payments the Government must pay under different allowable cost, target amount, and gain and loss scenarios. *See* 76 FR 41929, 41943 (July 15, 2011), Ex. 02.

48. The American Academy of Actuaries provided an approximate illustration of the risk corridors payment methodology – excluding the charge or payment of 2.5 percent of the target amount for gains or losses greater than eight percent – as follows:



Source: American Academy of Actuaries, *Fact Sheet: ACA Risk-Sharing Mechanisms* (2013), *available at* http://actuary.org/files/ACA_Risk_Share_Fact_Sheet_FINAL120413.pdf, attached hereto at Exhibit 05.

49. Congress, through Section 1342 of the ACA, did not either expressly or implicitly grant the Secretary of HHS any discretion to pay QHPs that qualified for risk corridors payments

any amount less than the full risk corridors payment amount prescribed in Section 1342(b)(1) and (2).

50. Congress also did not limit in any way the Secretary of HHS's obligation to make full risk corridors payments owed to QHPs, due to appropriations, restriction on the use of funds, or otherwise in Section 1342 or anywhere else in the ACA.

51. Congress did not establish any particular fund or account in Section 1342 to receive risk corridors charges or payments, nor did Congress prescribe in Section 1342 the use or collection of "user fees" regarding the risk corridors program.

52. Section 1342 does not state or otherwise require that risk corridors payments by the Government out to QHPs are constrained by the amount of risk corridors charges collected by the Government from QHPs. *See* 42 U.S.C. § 18062. Neither the term "budget neutral" nor the concept of "budget neutrality" appear anywhere in Section 1342 or its implementing regulations. HHS and CMS recognized this in March 2013, when in final rulemaking (following a notice-and-comment period), the agencies stated in the Federal Register:

> The 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.

78 FR 15409, 15473 (Mar. 11, 2013), attached hereto at Exhibit 06.

53. The Government's unilateral decision, detailed below, to belatedly interpret its statutory ACA risk corridors obligation as requiring "budget neutrality" – *i.e.*, that Government risk corridors payments to qualifying insurers cannot exceed the amount of risk corridors charges the Government collects from insurers – is found *nowhere* in the text or purpose of the ACA and forces insurers to share the risk amongst themselves, instead of *the Government* sharing in the risk, in contravention of Congress's intent and design in passing the ACA.

54. Congress has not amended Section 1342 since enactment of the ACA.

55. Congress has not repealed Section 1342, and all prior attempts to repeal Section 1342 have failed. *See* S. 1726, Obamacare Taxpayer Bailout Prevention Act, *available at* https://www.congress.gov/bill/113th-congress/senate-bill/1726.

56. Any potential future repeal of Section 1342 could not apply retroactively to negate the United States' obligation to make full risk corridors payments to QHPs, including L.A. Care, for CY 2014, CY 2015, and CY 2016.

57. The Government thus lacks statutory authority to pay anything less than 100% of the risk corridors payments due to Plaintiff for CY 2014, CY 2015, or CY 2016.

58. In deciding to apply to become a QHP, L.A. Care relied upon HHS's commitments to make full risk corridors payments annually to QHPs 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.

59. As detailed below, in each of CY 2014, CY 2015 and CY 2016, L.A. Care experienced allowable-cost losses of more than three percent of its target amount in the California ACA Individual Market, requiring the Government to make full mandatory risk corridors payments to L.A. Care under Section 1342 for CY 2014 by the end of CY 2015, for CY 2015 by the end of CY 2016, and for CY 2016 by the end of CY 2017. The Government made only a small percentage of CY 2014 risk corridors payments, and failed to make *any* risk corridors payments for CY 2015 or CY 2016.

60. L.A. Care did not experience allowable-cost gains of more than three percent of its target amount in either CY 2014, CY 2015, or CY 2016, and thus was not required to make any mandatory risk corridors charge remittances to the Government under Section 1342. Had L.A. Care been required to do so, it would have honored its statutory, regulatory, and contractual

obligations to do so in full and on time.

The ACA's Risk Corridors Program and Medicare Part D

61. Congress required the ACA risk corridors program established in Section 1342 to be modeled after a similar program implemented as part of the Medicare Part D prescription drug benefit program that was signed into law by President George W. Bush. *See* 42 U.S.C. § 18062(a), Ex. 04 (mandating that the risk corridors "program shall be based on the program for regional participating provider organizations under part D of title XVIII of the Social Security Act").

62. In the statute creating the Medicare Part D risk corridors program, Congress directed HHS to establish a risk corridor for each prescription drug plan for each plan year. *See* 42 U.S.C. § 1395w-115(e)(3)(A). The regulations implementing the Medicare Part D risk corridors program provided that "CMS makes payments after a coverage year" after receipt of all cost data information, and that "CMS at its discretion makes either lump-sum payments or adjusts monthly payments *in the following payment year*." 42 C.F.R. § 423.336(c) (2009) (emphasis added).

63. For example, in the first year of the Medicare Part D risk corridors program – 2006 – HHS paid funds owed to eligible plan sponsors in November and December 2007. *See* Office of Inspector Gen., Dep't of Health & Human Servs., *Medicare Part D Reconciliation Payments for 2006-2007*, at 14 (2009), attached hereto at Exhibit 07 ("CMS paid most of the funds owed to sponsors for 2006 by increasing these sponsors' monthly prospective payments for November and December 2007.").

64. The amount of Medicare Part D risk corridors payments for 2007 did not equal the amount of collections – payments and receipts were not budget neutral. *See id.* at 11 tbl. 2

(showing that sponsors owed Medicare $795 million while Medicare owed $195 million to sponsors, netting $600 million for Medicare); *see also* Suzanne M. Kirchhoff, Cong. Research Serv., R40611, *Medicare Part D Prescription Drug Benefit* at 40 (Oct. 27, 2016), attached hereto at Exhibit 08 ("Part D plans each year have made net risk corridor payments to CMS.").

65. Congress was aware of HHS's regulation and payment scheme for the Medicare Part D risk corridors program when Congress enacted the ACA – including Section 1342 – in March 2010. By directing HHS to base the ACA risk corridors program on the Medicare Part D risk corridors program, *see* 42 U.S.C. § 18062(a) ("shall be based on"), Ex. 04, Congress intended that ACA risk corridors payments, like in Medicare Part D, would be made annually and in full, and would not be constrained by budget neutrality.

HHS's Risk Corridors Regulations

66. Congress directed HHS to administer the risk corridors program enacted in Section 1342. *See* 42 U.S.C. § 18062(a), Ex. 04. The HHS Secretary formally delegated authority over the Section 1342 risk corridors program to the CMS Administrator on August 30, 2011. *See* 76 FR 53903, 53903-04 (Aug. 30, 2011), attached hereto at Exhibit 09. That delegation recognized that the ACA risk corridors program was statutorily required to be "based on" the Medicare Part D risk corridors program. *Id.* By authority of this delegation from the HHS Secretary, CMS issued implementing regulations for the risk corridors program at 45 C.F.R. Part 153.

67. In 45 C.F.R. § 153.510, CMS adopted a risk corridors calculation "for calendar years 2014, 2015, and 2016," 45 C.F.R. § 153.510(a), that is mathematically identical to the statutory formulation in Section 1342 of the ACA, using the identical thresholds and risk-sharing levels specified in the statute. *See* 45 C.F.R. § 153.510, attached hereto at Exhibit 10.

68. The implementing regulations, just like the controlling statute, do not limit the amount of the Government's required annual risk corridors payments out to insurers by the charge amounts the Government collects from insurers. *See id*. The implementing regulations, like Section 1342, do not require the risk corridors program to be "budget neutral."

69. Nothing in 45 C.F.R. §§ 153.500 to .540 prescribes the use of "user fees" regarding the risk corridors program.

70. Specifically, 45 C.F.R. § 153.510(b) prescribes the method for determining risk corridors payment amounts that QHPs "will receive":

> (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.

71. By this regulation, the Government intended that HHS "will pay" and QHPs "will receive" risk corridors payments in "an amount equal to" the risk corridors calculation "[w]hen" it is determined that a QHP qualifies for risk corridors payments – not some fraction of that amount at some indeterminate future date, or never at all.

72. Furthermore, 45 C.F.R. § 153.510(c) prescribes the circumstances under which QHPs "must remit" charges to HHS, as well as the means by which HHS will determine those charge amounts:

> (c) *Health insurance issuers' remittance of charges.* QHP issuers must remit charges to HHS in the following amounts, under the following circumstances:
>
> > (1) If a QHP's allowable costs for any benefit year are less than 97 percent but not less than 92 percent of the target amount, the QHP issuer must remit charges to HHS in an amount equal to 50 percent of the difference between 97 percent of the target amount and the allowable costs; and
> >
> > (2) When a QHP's allowable costs for any benefit year are less than 92 percent of the target amount, the QHP issuer must remit charges to HHS in an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the difference between 92 percent of the target amount and the allowable costs.

73. Nowhere does 45 C.F.R. § 153.510 make payments contingent upon collections.

74. The payment methodology provisions at 45 C.F.R. § 153.510(a) to (c) were adopted by HHS in final rulemaking on March 23, 2012, after a notice-and-comment period. *See* 77 FR 17219, 17251 (Mar. 23, 2012), Ex. 01.

75. In the preceding July 15, 2011 proposed rule, CMS and HHS stated regarding risk corridors payment deadlines that:

> HHS would make payments to QHP issuers that are owed risk corridor amounts from HHS within a 30-day period after HHS determines that a payment should be made to the QHP issuer. We believe that QHP issuers who are owed these amounts will want prompt payment, and also believe that the payment deadlines should be the same for HHS and QHP issuers.

76 FR 41929, 41943 (July 15, 2011), Ex. 02.

76. In the final rulemaking of March 23, 2012, HHS responded to comments received supporting the 30-day payment deadline to QHPs, and stated that it "plan[ned] to address the risk corridors payment deadline in the HHS notice of benefit and payment parameters." 77 FR 17219, 17239 (Mar. 23, 2012), Ex. 01. HHS reiterated, however, that:

> While we did not propose deadlines in the proposed rule, we … suggested … that HHS would make payments to QHP issuers that are owed risk

> corridors amounts within a 30-day period after HHS determines that a payment should be made to the QHP issuer. ***QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers.***

Id. (emphasis added).

77. This was HHS's final administrative construction and interpretation regarding the deadline for HHS's risk corridors payments to QHPs; it never "address[ed] the risk corridors payment deadline in the HHS notice of benefit and payment parameters." *Id.*

78. Subsequently, in a proposed rule of December 7, 2012, HHS "specified the annual schedule for the risk corridors program, including dates for claims run-out, data submission, and notification of risk corridors payments and charges." 77 FR 73118, 73200 (Dec. 7, 2012), Ex. 03.

79. Following a notice-and-comment period, CMS published a final rule on March 11, 2013, adopting, among other things, the 30-day deadline for a QHP to remit risk corridors charges to the Government. 78 FR 15409, 15531 (Mar. 11, 2013), Ex. 06. This resulted in 45 C.F.R. § 153.510 being amended by adding the following subsection:

> (d) *Charge submission deadline.* A QHP issuer must remit charges to HHS within 30 days after notification of such charges.

80. HHS also adopted a final rule on March 11, 2013, amending 45 C.F.R. § 153.530 by adding subsection (d), imposing the annual requirement that "[f]or each benefit year, a QHP issuer must submit all information required under this section by July 31 of the year following the benefit year." *Id.*

81. While CMS never imposed in the implementing regulations a specific deadline for HHS to tender full risk corridors payments to QHPs whose allowable costs in a calendar year are greater than 103 percent of the QHP's target amount, the Government also never contravened

its earlier public statements that the deadline for the Government's payment of risk corridors payments to QHPs should be identical to the deadline for a QHP's remittance of charges to the Government. *See* 76 FR 41929, 41943 (July 15, 2011), Ex. 02; 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 01.

82. L.A. Care relied upon these statements by HHS and CMS in the Federal Register in deciding to agree to become, and continue to act as, a QHP in California and accept the obligations and responsibilities of a QHP, believing that the Government would pay the full risk corridors payments owed to it within 30 days, or shortly thereafter, following a determination that L.A. Care experienced losses sufficient to qualify for risk corridors payments under Section 1342 of the ACA and 45 C.F.R. § 153.510.

83. Considered together, (i) the requirement of separate calculations for each year, (ii) the reference to a preexisting program (Medicare Part D) in which annual payments are made, (iii) the purpose of the 3Rs premium stabilization programs, and (iv) the interplay among the 3Rs premium stabilization programs, make it apparent that Congress intended in Section 1342 of the ACA to require the Government to make annual risk corridors payments to eligible QHPs, and HHS interpreted Section 1342 as requiring annual risk corridors payments.

84. Nothing in Section 1342 or 45 C.F.R. Part 153 limits the Government's obligation to pay QHPs the full amount of risk corridors payments due based on appropriations, restrictions on the use of funds, or otherwise.

85. The United States should have paid L.A. Care the full CY 2014, CY 2015 and CY 2016 risk corridors payments due by the end of, respectively, CY 2015, CY 2016 and CY 2017, but failed to do so as required under Section 1342 of the ACA and 45 C.F.R. § 153.510.

Plaintiff was a QHP for CY 2014, CY 2015 and CY 2016

86. Based on Congress's statutory commitments set forth in the ACA, including, but not limited to, Section 1342 and the risk corridors program, as well as on the Government's statements and conduct regarding its risk corridors obligations, Plaintiff agreed to become a QHP, and to enter into QHP Agreements with the state-level operator of the ACA Exchange in California ("Covered California"), after Covered California had exercised its discretion to certify Plaintiff as a QHP in California. L.A. Care's QHP Agreements are attached to this Complaint at Exhibits 11 to 13.

87. L.A. Care executed a QHP Agreement with Covered California on July 26, 2013, *see* Exhibit 11, regarding its participation on the California ACA Exchange for CY 2014 (the "CY 2014 QHP Agreement").

88. On May 28, 2015, L.A. Care executed an amendment to its CY 2014 QHP Agreement with Covered California that extended the term of the agreement through CY 2015, *see* Exhibit 12, confirming its participation on the California ACA Exchange for CY 2015 (the "CY 2015 QHP Agreement").

89. On March 24, 2016, L.A. Care executed an amendment to its CY 2014 QHP Agreement with Covered California that extended the term of the agreement through CY 2016, *see* Exhibit 13, confirming its participation on the California ACA Exchange for CY 2016 (the "CY 2016 QHP Agreement").

90. Guidance from HHS and CMS to Issuers on Federally-Facilitated Exchanges ("FFE") and State Partnership Exchanges on April 5, 2013, stated that "Applicants will … be required to attest to their adherence to the regulations set forth in 45 C.F.R. parts 155 and 156 and other programmatic requirements necessary for the operational success of an Exchange, and

provide requested supporting documentation." Letter from CMS to Issuers on Federally-Facilitated Exchanges and State Partnership Exchanges at 23 (Apr. 5, 2013), attached hereto at Exhibit 14.

91. Before L.A. Care executed the CY 2014, CY 2015, and CY 2016 QHP Agreements, L.A. Care executed many attestations certifying its compliance with the obligations it was undertaking by agreeing to become, or continuing to act as, a QHP on the ACA Exchange in California.

92. By executing and submitting its annual attestations, Plaintiff 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 program), adhering to data standards, and establishing dedicated and secure server environments and data security procedures.

93. The federal Government's risk-sharing that Congress mandated through the risk corridors program was a significant factor in L.A. Care's decision to agree to become a QHP and undertake the many responsibilities and obligations required for L.A. Care to participate in the ACA Exchanges.

94. Had L.A. Care known that the Government would fail to fully and timely make the risk corridors payments owed to L.A. Care – reneging on the Government's assurances that

"[t]he risk corridors program … will protect against uncertainty in rates for [QHPs] by limiting the extent of issuer losses and gains," 77 FR 73118, 73119 (Dec. 7, 2012), Ex. 03 – then L.A. Care's annual premiums on the ACA Exchange on which it voluntarily participated would necessarily have been higher than actually charged, as a result of the increased risks in the Marketplace. L.A. Care also would not have agreed to participate in the ACA Marketplace had it known that the Government would have breached its obligations regarding the risk corridors program.

HHS's and CMS's Interpretation of Their Section 1342 Risk Corridors Payment Obligations

95. Between Congress's enactment of the ACA in 2010 and the 2013 commitment of QHPs, including L.A. Care, to the ACA Exchanges, HHS and CMS repeatedly publicly acknowledged and confirmed to Plaintiff and other QHPs the Government's statutory and regulatory obligations to make full and timely risk corridors payments to eligible QHPs.

96. HHS and CMS continued making statements recognizing the Government's full and annual risk corridors payment obligations through September 2016.

97. These repeated public statements by HHS and CMS were made or ratified by representatives of the Government who had actual authority to bind the United States, including, but not limited to, the HHS Secretary and Kevin J. Counihan, the CMS official designated as the Chief Executive Officer of the ACA Health Insurance Marketplaces and Director of CMS's Center for Consumer Information and Insurance Oversight ("CCIIO"), which regulates health insurance at the federal level. *See* CMS Leadership, Center for Consumer Information and Insurance Oversight, Kevin Counihan, https://www.cms.gov/About-CMS/Leadership/cciio/Kevin-Counihan.html (last visited Jan. 12, 2017), attached hereto at Exhibit 15 (Mr. Counihan's job description).

98. L.A. Care relied on these repeated public statements by HHS and CMS to assume and continue its QHP status, including its continued participation in the California ACA Exchange each year from CY 2014 through CY 2016, and beyond.

99. On July 11, 2011, HHS issued a fact sheet on HealthCare.gov stating that under the risk corridors program, "[f]rom 2014 through 2016" – not at some indeterminate future date – "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." HealthCare.gov, *Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment* (July 11, 2011), attached hereto at Exhibit 16.

100. In the same July 11, 2011 fact sheet, HHS stated that "[r]isk corridors create a mechanism for sharing risk for allowable costs between the Federal government and qualified health plan issuers." *Id.*

101. Additionally, in the July 11, 2011 fact sheet, HHS stated that proposed rulemaking would "aim[] to align the data and payment policies for this temporary [risk corridors] program with other [3Rs] programs to promote simplicity and efficiency." *Id.* The other 3Rs programs require annual payments.

102. On July 15, 2011, in a proposed rule, HHS noted that although the proposed regulations did not contain any deadlines for QHPs to remit charges to HHS or for HHS to make risk corridors payments to QHPs, such deadlines were under consideration, with HHS stating that:

> HHS would make payments to QHP issuers that are owed risk corridor amounts from HHS within a 30-day period after HHS determines that a payment should be made to the QHP issuer. We believe that QHP issuers who are owed these amounts will want prompt payment, and also believe that ***the payment deadlines should be the same*** for HHS and QHP issuers.

76 FR 41929, 41943 (July 15, 2011) (emphasis added), Ex. 02.

103. Also in the July 15, 2011 proposed rule, HHS confirmed that the risk corridors program was designed to share risk between the Government and QHPs, stating that "[r]isk corridors create a mechanism for sharing risk for allowable costs between the Federal government and QHP issuers." *Id.* at 41942.

104. On March 23, 2012, HHS implemented a final rule regarding Standards Related to Reinsurance, Risk Corridors and Risk Adjustment (77 FR 17219). Although HHS recognized that it did not propose deadlines for making risk corridors payments, HHS re-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.***" 77 FR 17219, 17238 (Mar. 23, 2012) (emphasis added), Ex. 01.

105. In the same March 23, 2012 final rule, HHS also reconfirmed that the Government was sharing the risk with QHPs under the risk corridors program. *See id.*

106. In a March 2012 written presentation to health insurers regarding the final rule, CMS explained that risk corridors is a "Federal program under the statute," and that the risk corridors program "[p]rotects against inaccurate rate-setting by sharing risk (gains and losses) on allowable costs between HHS and qualified health plans to help ensure stable health insurance premiums." Presentation, CMS, *Reinsurance, Risk Corridors, and Risk Adjustment Final Rule* at 11 (Mar. 2012), attached hereto at Exhibit 17.

107. In proposed rulemaking on December 7, 2012, HHS assured QHPs, like L.A. Care, that "[t]he risk corridors program, which is a Federally administered program, will protect against uncertainty in rates for qualified health plans by limiting the extent of issuer losses and gains." 77 FR 73118, 73119 (Dec. 7, 2012), Ex. 03.

108. Also in the December 7, 2012 proposed rule, HHS reconfirmed the Government-QHP risk-sharing aspect of risk corridors, stating that "[t]he temporary risk corridors program permits the Federal government and QHPs to share in the profits or losses resulting from inaccurate rate setting from 2014 to 2016." *Id.* at 73121.

109. Additionally, in the December 7, 2012 proposed rule, HHS stated its intent that the risk corridors program would be administered on an annual basis, proposing "the annual schedule for the risk corridors program, including dates for claims run-out, data submission, and notification of risk corridors payments and charges." *Id.* at 73200.

110. When HHS implemented a final rule on March 11, 2013, regarding HHS Notice of Benefit and Payment Parameters for 2014 (78 FR 15409), HHS confirmed that:

> ***The 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.***

78 FR 15409, 15473 (Mar. 11, 2013) (emphasis added), Ex. 06.

111. The March 11, 2013 final rule also "specifie[d] the annual schedule for the risk corridors program." *Id.* at 15520.

112. A March 2013 CMS written presentation regarding the final rule to health insurers – some of whom, including L.A. Care, were preparing to apply to become certified as QHPs for the upcoming CY 2014 ACA Marketplace – contained the same affirmations of Government-to-QHP risk-sharing as in the March 2012 presentation discussed above. *See* Presentation, CMS, *HHS Notice of Benefit and Payment Parameters for 2014* at 18 & 19 (Mar. 2013), attached hereto at Exhibit 18.

113. On July 26, 2013, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, Plaintiff executed its CY 2014 QHP

Agreement and, upon approval and certification by Covered California, became a QHP in California. *See* Ex. 11.

114. In February 2014, the Congressional Budget Office ("CBO") published projections stating that, in contrast to the 3Rs' risk adjustment and reinsurance programs having "no net budgetary effect," the "payments and collections under the risk corridor program will not necessarily equal one another." CBO, *The Budget and Economic Outlook: 2014 to 2024* at 110 (Feb. 2014), attached hereto at Exhibit 19. The CBO's Table B-3 accordingly projected that in FY 2015, the difference between annual risk corridors payments and collections would net the Government $1 billion in positive revenue. *Id.* at 109. The table further projected positive annual revenue for the United States from the risk corridors program of $2 billion and $4 billion for, respectively, FY 2016 and FY 2017. *Id.* The CBO projected that "over the 2015-2024 period, risk corridor payments from the federal government to health insurers will total $8 billion and the corresponding collections from insurers will amount to $16 billion, yielding net savings for the federal government of $8 billion." *Id.* at 110.

115. The CBO's February 2014 analysis clearly contemplated that risk corridors payments would be made annually and in full, instead of payments being withheld until sometime after the end of the risk corridors program in 2017 or later. *Id.* at 109-110. The CBO stated that "[c]ollections and payments for the … risk corridor programs will occur after the close of a benefit year. Therefore, collections and payments for insurance provided in 2014 will occur in 2015, and so forth." *Id.* at 110 n.6. Additionally, CBO stated that "[t]o inform its projections, CBO analyzed recent data from the Medicare drug benefit (Part D)," and that "[u]nder Part D's risk corridors, collections from insurers have exceeded payments to insurers, yielding net collections that have averaged about $1 billion *per year*." *Id.* at 115 (emphasis

added).

116. The CBO stated that its February 2014 figures reflected "new estimates of payments and collections for the risk corridor program, which had previously been projected to have no net budgetary effect." *Id.* at 112. CBO explained that "in its baseline projections published in May 2013, [CBO] estimated that payments and collections for risk corridors would roughly offset one another." *Id.* at 114.

117. On information and belief, CBO's May 2013 baseline projections were the first CBO projections to include the risk corridors program.

118. In a letter report to House Speaker Nancy Pelosi immediately prior to Congress's enactment of the ACA, the CBO did not include any reference to the risk corridors program in its budget projections. *See generally* Letter, CBO to Hon. Nancy Pelosi (Mar. 20, 2010), attached hereto at Exhibit 20.

119. CBO provided no reasons explaining why it failed to mention the risk corridors in its March 20, 2010 budget projections. L.A. Care has found no publicly available documentary evidence stating why CBO was silent regarding risk corridors in its many reports to Congress leading up to the enactment of the ACA, from May 2009 to March 2010.

120. On information and belief, HHS engaged in speculation by stating in both July 15, 2011 and March 23, 2012 that the reason "CBO did not score the impact" of the risk corridors program in March 2010 was because CBO "assumed collections would equal payments to plans in the aggregate." 76 FR 41929, 41942 (July 15, 2011), Ex. 02; 77 FR 17219, 17244 (Mar. 23, 2012), Ex. 01.

121. Even if CBO, prior to the May 2013 baseline projection, had determined that risk corridors would "have no net budgetary effect," that does not mean that CBO believed that risk

corridors payments owed to QHPs under Section 1342 were *required* to be budget neutral based on the statute. CBO's February 2014 report confirmed this by stating that the "payments and collections under the risk corridor program will not necessarily equal one another." CBO, *The Budget and Economic Outlook: 2014 to 2024* at 110 (Feb. 2014), Ex. 19.

122. The Senate Finance Committee's "Chairman's Mark" of the "America's Healthy Future Act of 2009," a precursor bill to the ACA, included risk corridors language nearly identical to what became ACA Section 1342. *See* Sen. Comm. on Fin., Chairman's Mark, America's Healthy Future Act of 2009, at 9 (Sept. 16, 2009), attached hereto at Exhibit 21. The Chairman's Mark, including the risk corridors provision, was approved by the Committee. *See* S. 1796, 111th Cong. § 2214 (2009), attached hereto at Exhibit 22.

123. The CBO contemporaneously described the Chairman's Mark's risk-corridors proposal:

> The risk corridors would be modeled on those specified in the 2003 Medicare Modernization Act and would be in effect for 3 years. In that period, if plans incur costs (net of their reinsurance payments) that differ from their premium bids by more than 3 percent, the federal government would bear an increasing share of any losses or be paid the same increasing share of any gains.

CBO, *A Summary of the Specifications for Health Insurance Coverage Provided by the Staff of the Senate Finance Committee*, at 5, attachment to Letter, CBO to Hon. Max Baucus (Sept. 16, 2009), attached hereto at Exhibit 23.

124. Neither the Chairman's Mark or its CBO scoring, nor the text of S. 1796 or its accompanying Senate Report – *see* S. Rep. No. 111-89, at 15-16 (2009) (describing risk corridors); *id.* at 13-14 (describing Part D's risk-corridors program) – evidenced any intent or understanding that risk corridors payments would be budget neutral, or that payments and collections would not be made annually.

125. On January 1, 2014, L.A. Care began offering plans on the CY 2014 California ACA Exchange, pursuant to its commitments with and attestations to the Government.

126. In a proposed rule of December 2, 2013, and a final rule of March 11, 2014, HHS reiterated that the risk corridors program creates "a mechanism for sharing risk for allowable costs between the Federal government and QHP issuers," and that "[t]he risk corridors program will help protect against inaccurate rate setting in the early years of the Exchanges by limiting the extent of issuer losses and gains" 78 FR 72322, 72379 (Dec. 2, 2013), attached hereto at Exhibit 24; 79 FR 13743, 13829 (Mar. 11, 2014), attached hereto at Exhibit 25.

127. In the March 11, 2014 final rule, HHS confirmed that risk corridors payments would be made annually, stating that "we believe that the risk corridors program as a whole will be budget neutral or, will result in net revenue to the Federal government in FY 2015 for the 2014 benefit year." 79 FR 13743, 13829 (Mar. 11, 2014), Ex. 25.

The Government Breaches its Risk Corridors Payment Obligations

128. Also in the March 11, 2014 final rule, HHS announced for the first time, without prior notice in the December 2, 2013 proposed rule or anywhere else, that "HHS intends to implement this [risk corridors] program in a budget neutral manner." *Id.*

129. This statement was directly contrary to HHS's prior statement – made exactly one year earlier in the Federal Register, March 11, 2013 – which stated: "The 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." 78 FR 15409, 15473 (Mar. 11, 2013), Ex. 06.

130. The Government's announcement that the United States would not honor its risk corridors obligations in the manner it had promised and represented that it would came after L.A.

Care (which had executed the CY 2014 QHP Agreement in 2013) had already begun to participate in the CY 2014 California ACA Exchange in reliance upon the Government's risk corridors payment obligations.

131. The American Academy of Actuaries stated in April 2014 that the proposed "new budget neutrality policy … would change the basic nature of the risk corridor program retroactively" and "changes the nature of the risk corridor program from one that shares risk between issuers and CMS to one that shares risk between competing issuers." Am. Acad. of Actuaries, Comment to HHS on Proposed Rule, Exchange and Insurance Market Standards for 2015 and Beyond at 3 (Apr. 21, 2014), attached hereto at Exhibit 26.

132. HHS's "budget neutral" statement of March 11, 2014, was also contrary to Congress's intent for the Government to share risk with insurers, and Congress's direction to model the ACA risk corridors program on the Medicare Part D program, which is not required to be budget neutral. *See* 42 C.F.R. § 423.336, attached hereto at Exhibit 27; U.S. Gov't Accountability Office Report, *Patient Protection and Affordable Care Act: Despite Some Delays, CMS Has Made Progress Implementing Programs to Limit Health Insurer Risk*, GAO-15-447 (2015), attached hereto at Exhibit 28 ("For the Medicare Advantage and Medicare Part D risk mitigation programs, the payments that CMS makes to issuers are not limited to issuer contributions."); Am. Acad. of Actuaries, Comment to HHS on Proposed Rule, Exchange and Insurance Market Standards for 2015 and Beyond at 2 (Apr. 21, 2014), Ex. 26, ("The Part D risk corridor program is not budget neutral and has resulted in net payments to the Centers for Medicare and Medicaid Services (CMS). Similarly, the design of the ACA risk corridor program does not guarantee budget neutrality.").

133. HHS's statement was also contrary to the CBO's February 2014 published

projections that the risk corridors program would net the Government $8 billion in positive revenue. *See* CBO, *The Budget and Economic Outlook: 2014 to 2024* at 110 n. 6 (Feb. 2014), Ex. 19.

134. The fundamental change in position by HHS and CMS to declare that the risk corridors program would be "budget neutral" apparently was motivated by political considerations, not statutory or regulatory ones.

135. After the President released his Proposed Budget for FY 2015 on March 4, 2014, it was publicly reported that approximately $5.5 billion had been requested to cover expenses related to the risk corridors program. *See, e.g.*, Brianna Ehley, *$5.5 Billion for Obama's Contested Risk Corridors*, The Fiscal Times, Mar. 4, 2014, attached hereto at Exhibit 29; Alex Wayne, *Insurers' Obamacare Losses May Reach $5.5 Billion in 2015*, Bloomberg, Mar. 4, 2014, attached hereto at Exhibit 30.

136. A week later, on March 11, 2014, HHS and CMS published the final rule announcing their about-face on the budget-neutrality requirements for the risk corridors program.

137. The lack of reasoned decision-making by the agencies regarding budget neutrality is further exposed by the proposed rule of December 2, 2013, which did not contain any proposal by HHS or CMS to implement the risk corridors program in a budget neutral manner. *See generally* 78 FR 72322, 72379 (Dec. 2, 2013), Ex. 24. Therefore, the budget neutrality position adopted in the March 11, 2014 final rule was not the product of notice-and-comment rulemaking.

138. A month later, on April 11, 2014, HHS and CMS issued a bulletin entitled "Risk Corridors and Budget Neutrality," stating that:

> ***We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments. However, 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. If, after obligations for the previous year have been met, the total amount of collections available in the current year is insufficient to make payments in that year, the current year payments will be reduced pro rata to the extent of any shortfall. If any risk corridors funds remain after prior and current year payment obligations have been met, they will be held to offset potential insufficiencies in risk corridors collections in the next year.

Bulletin, CMS, *Risk Corridors and Budget Neutrality* (Apr. 11, 2014) (emphasis added), attached hereto at Exhibit 31.

139. The April 11, 2014 Bulletin was the first instance in which HHS and CMS publicly suggested that risk corridors charges collected from QHPs might be less than the Government's full mandatory risk corridors payment obligations owed to QHPs.

140. Only one month earlier, on March 11, 2014, HHS and CMS had publicly announced that "we believe that the risk corridors program as a whole will be budget neutral or, [sic] will result in net revenue to the Federal government in FY 2015 for the 2014 benefit year." 79 FR 13743, 13829 (Mar. 11, 2014), Ex. 25.

141. Indeed, in the April 11, 2014 Bulletin, HHS and CMS assured QHPs that "[w]e anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments." Bulletin, CMS, *Risk Corridors and Budget Neutrality* (Apr. 11, 2014), Ex. 31.

142. CMS's April 11, 2014 Bulletin also recognized that risk corridors payments are due annually, and lacked any express or implied statement that risk corridors payments for any year would not be due until sometime after the end of the risk corridors program in 2017. *See id.*

143. HHS's and CMS's change in position to call for "budget neutrality" in the risk corridors program caused the CBO to update its projections for risk corridors payments and charges in April 2014. *See* CBO, *Updated Estimates of the Effects of the Insurance Coverage*

Provisions of the Affordable Care Act, April 2014 (Apr. 2014), attached hereto at Exhibit 32. CBO stated that it "believes that the Administration has sufficient flexibility to ensure that payments to insurers will approximately equal payments from insurers to the federal government, and thus that the program will have no net budgetary effect over the three years of its operation. (Previously, CBO had estimated that the risk corridor program would yield net budgetary savings of $8 billion.)" *Id.* at 18. Despite this revision, CBO's Table 3 continued to project that risk corridors payments would be made annually, rather than sometime after the end of the program in 2017. *See id.* at 10.

144. In a final rule of May 27, 2014, HHS summarized its statements from the April 11, 2014 bulletin, providing that "we intend to administer risk corridors in a budget neutral way over the three-year life of the program, rather than annually," but reiterated that payments would be made annually by stating that "if 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." 79 FR 30239, 30260 (May 27, 2014), attached hereto at Exhibit 33.

145. In the May 27, 2014 final rule, HHS also repeated that "we anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments," and reassured QHPs that "a shortfall for the 2015 program year" would be an "unlikely event" – but should such an unlikely event occur, "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. In that event, HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations." *Id.*

146. In HHS's response letter to the U.S. Government Accountability Office ("GAO") dated May 20, 2014, HHS again admitted that "Section 1342(b)(1) … establishes … the formula to determine … the amounts the Secretary must pay to the QHPs if the risk corridors threshold is met." Letter from William B. Schultz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014), attached hereto at Exhibit 34.

147. On June 18, 2014, HHS sent to U.S. Senator Sessions and U.S. Representative Upton identical letters stating that, "As established in statute, … [QHP] plans with allowable costs at least three percent higher than the plan's target amount will receive payments from HHS to offset a percentage of those losses." Letter from Sylvia M. Burwell, Secretary, HHS, to U.S. Senator Jeff Sessions (June 18, 2014), attached hereto at Exhibit 35.

148. On September 30, 2014, the GAO published a written opinion concluding that:

> Section 1342 of PPACA directs the Secretary of HHS to collect from and make payments to qualified health plans. The CMS PM [Program Management] appropriation for FY 2014 would have been available to CMS to make the payments specified in section 1342(b)(1). The CMS PM appropriation for FY 2014 also would have appropriated to CMS user fees collected pursuant to section 1342(b)(2) in FY 2014. HHS stated that it intends to begin collections and payments under section 1342 in FY 2015. However, as discussed above, for funds to be available for this purpose in FY 2015, the CMS PM appropriation for FY 2015 must include language similar to the language included in the CMS PM appropriation for FY 2014.

GAO, *Department of Health and Human Services—Risk Corridors Program*, B-325630, at 7 (Sept. 30, 2014), attached hereto at Exhibit 36.

149. The CMS PM appropriation for FY 2014 was thus available to make risk corridors payments when Plaintiff committed as a QHP to the ACA Exchanges.

150. Not included in the GAO's opinion was an additional appropriation passed in March 2010, contemporaneously with the enactment of the ACA. The Health Insurance Reform Implementation Fund, enacted at Section 1005 of the Health Care and Education Reconciliation

Act of 2010 amending the ACA, was appropriated by the same Congress that passed the ACA expressly "to carry out the [ACA]," and Congress appropriated "$1,000,000,000" – *i.e.*, $1 billion – "for Federal administrative expenses to carry out" the ACA. 42 U.S.C. § 18122.

151. In Section 1342 of the ACA, Congress directed HHS to "establish *and administer*" the ACA's risk corridors program. 42 U.S.C. § 18062(a) (emphasis added).

152. Appropriations for risk corridors payments were thus available when Congress enacted the ACA in 2010.

153. On November 7, 2014, in reliance on the Government's statutory, regulatory and contractual obligations and inducements and assurances described above, Plaintiff executed its CY 2015 QHP Agreement, committing to the California ACA Exchange for CY 2015. *See* Ex. 12.

154. In proposed rulemaking on November 26, 2014, HHS repeated to QHPs that "a shortfall in the 2016 benefit year" is an "unlikely event." 79 FR 70673, 70676 (Nov. 26, 2014), attached hereto at Exhibit 37. HHS also repeated that "we anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments," and that "*HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers.*" *Id.* at 70700. So confident was HHS about the collections potential for the risk corridors program, that in its November 26, 2014 proposed rulemaking, HHS discussed its "propos[al] that if, for the 2016 benefit year, cumulative risk corridors collections exceed cumulative risk corridors payment requests, we would [adjust certain parameters] to pay out all collections to QHP issuers." *Id.* No detailed plan was expressed for a scenario in which collections were insufficient to satisfy all payment requests.

155. On December 16, 2014 – after L.A. Care had committed to the CY 2015 ACA

Exchanges and after the Government's obligation for CY 2014 risk corridors payments had matured – Congress enacted the Cromnibus appropriations bill for fiscal year 2015, the "Consolidated and Further Continuing Appropriations Act, 2015" (the "2015 Appropriations Act"). Pub. L. 113-235.

156. 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)***.

128 Stat. 2491 (emphasis added), attached hereto at Exhibit 38.

157. 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.

158. Congress did not repeal or amend the United States' statutory obligation created by Section 1342 to make full and timely risk corridors payments to QHPs, including Plaintiff.

159. On January 1, 2015, L.A. Care began offering plans on the CY 2015 California ACA Exchange, pursuant to its commitments with and attestations to the Government.

160. On February 27, 2015, HHS's implementation of a final rule regarding HHS Notice of Benefit and Payment Parameters for 2016 (80 FR 10749), finalized the proposed policy that HHS planned to implement if cumulative risk corridors collections exceed cumulative payment obligations by CY 2016, and further confirmed that "HHS recognizes that the

Affordable Care Act requires the Secretary to make full payments to issuers. In the unlikely event that risk corridors collections, including any potential carryover from the prior years, are insufficient to make risk corridors payments for the 2016 program year, HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations." 80 FR 10749, 10779 (Feb. 27, 2015), attached hereto at Exhibit 39.

161. CMS's letter to state insurance commissioners on July 21, 2015, stated in boldface text that "**CMS remains committed to the risk corridor program.**" Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to State Insurance Commissioners (July 21, 2015), attached hereto at Exhibit 40.

162. On or about July 31, 2015, Plaintiff submitted its CY 2014 risk corridors data to CMS per 45 C.F.R. § 153.530(d).

163. On October 1, 2015, after collecting risk corridors data from QHPs for CY 2014, and after receiving L.A. Care's and other QHPs' commitments to the CY 2016 ACA Exchanges, HHS and CMS announced a severe shortfall in the CY 2014 risk corridors program and that they intended to prorate the risk corridors payments owed to QHPs, including Plaintiff, for CY 2014. HHS and CMS stated 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.**

Bulletin, CMS, *Risk Corridors Payment Proration Rate for 2014* (Oct. 1, 2015), attached hereto at Exhibit 41.

164. 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.*

165. As detailed further below, HHS and CMS began their piecemeal CY 2014 risk corridors payments to L.A. Care in December 2015, continuing into 2016.

166. This December 2015 risk corridors payment schedule was consistent with an earlier payment schedule that CMS had provided to QHPs on April 14, 2015, before any CY 2014 risk corridors payments were due, specifically stating that the Government's "Remittance of Risk Corridors Payments and Charges" would be made on "9/2015 – 12/2015." Bulletin, CMS, *Key Dates in 2015: QHP Certification in the Federally-Facilitated Marketplaces; Rate Review; Risk Adjustment, Reinsurance, and Risk Corridors* (Apr. 14, 2015), attached hereto at Exhibit 42.

167. The risk corridors payment schedule that CMS announced was also consistent with its June 2015 presentations to insurers stating that in December 2015, "CMS will begin making RC [risk corridor] payments to issuers" for CY 2014. Presentation, CMS, *Completing the Risk Corridors Plan-Level Data Form 2014* (June 1, 2015), attached hereto at Exhibit 43.

168. On or about October 2015 or November 2015, QHPs received a letter from CMS stating, "I wish to reiterate to you that the Department of Health and Human Services (HHS) recognizes that the Affordable Care Act *requires* the Secretary to make *full payments* to issuers[.]" Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS (Oct./Nov. 2015) (emphasis added). The letter further stated that "HHS is recording those amounts that remain unpaid following our 12.6% payment this winter as fiscal year 2015 obligations of the United States Government for which full payment is required." *Id.*

169. CMS also stated in an email transmitting Mr. Counihan's letter to QHPs that the "letter from CMS reiterat[es] that risk corridors payments *are an obligation of the U.S. Government*." Email from Counihan, CMS (Oct./Nov. 2015) (emphasis added).

170. HHS's and CMS's direct statements to QHPs have unequivocally confirmed the agencies' position and interpretation that full annual risk corridors payments were owed to Plaintiff and were a binding obligation of the United States.

171. On November 19, 2015, CMS issued a public announcement further confirming that "HHS recognizes that the Affordable Care Act requires the Secretary to make *full payments* to issuers," and adding that "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*." Bulletin, CMS, *Risk Corridors Payments for the 2014 Benefit Year* (Nov. 19, 2015) (emphasis added), attached hereto at Exhibit 44.

172. By stating that the remaining 87.4% of L.A. Care's risk corridors payments for CY 2014 would be recorded "as fiscal year 2015 obligation[s] of the United States Government for which full payment is required," HHS and CMS admitted that full payment for CY 2014 was due and owing in 2015 – not at some future indeterminate date after CY 2016.

173. On December 18, 2015, after the Government's obligation for CY 2015 risk corridors payments had matured, Congress enacted the Omnibus appropriations bill for fiscal year 2016, the "Consolidated Appropriations Act, 2016" (the "2016 Appropriations Act"). Pub. L. 114-113.

174. 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)***.

129 Stat. 2624 (emphasis added), attached hereto at Exhibit 45.

175. 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.

176. Congress did not repeal, amend or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridors payments to QHPs, including Plaintiff.

177. On January 1, 2016, L.A. Care began offering plans on the CY 2016 California ACA Exchange, pursuant to its commitments with and attestations to the Government.

178. On March 24, 2016, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, Plaintiff executed its CY 2016 QHP Agreement, committing to the CY 2016 ACA Exchange in California for the final year of the risk corridors program. *See* Ex. 13.

179. On or about July 31, 2016, Plaintiff submitted its CY 2015 risk corridors data to CMS per 45 C.F.R. § 153.530(d).

180. On September 9, 2016 – after several lawsuits had been filed by other QHPs in the U.S. Court of Federal Claims that, like this lawsuit, seek monetary relief from the United States for breaches of the Government's risk corridors payment obligations – CMS publicly confirmed that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers," and that "HHS will record risk corridors payments due as an obligation of the United States Government for which full payment is required." Bulletin, CMS, *Risk Corridors Payments for 2015* (Sept. 9, 2016), attached hereto at Exhibit 46. CMS confirmed its

full risk corridors obligation to QHPs, despite revealing that "based on our preliminary analysis, HHS anticipates that all 2015 benefit year collections will be used towards remaining 2014 benefit year risk corridors payments, and no funds will be available at this time for 2015 benefit year risk corridors payments," and that "[c]ollections from the 2016 benefit year will be used first for remaining 2014 benefit year risk corridors payments, then for 2015 benefit year risk corridors payments, then for 2016 benefit year risk corridors payments." *Id.*

181. The Government's written acknowledgement of its risk corridors payment obligations for CY 2014, CY 2015, and CY 2016, however, was an insufficient substitute for full and timely payment of the amounts owed for each year of the risk corridors program, as required by statute, regulation, contract, and HHS's and CMS's previous statements. *See Molina Healthcare of Calif., Inc. v. United States*, 133 Fed. Cl. 14 (2017) (Wheeler, J.) (granting summary judgment to QHP for CY 2014 and CY 2015 risk corridors payments).

182. In its November 18, 2016 announcement of the severe risk corridors shortfall for CY 2015, CMS again confirmed the annual payment structure of the risk corridors program, stating that "if risk corridors collections for a particular year are insufficient to make full risk corridors *payments for that year*, risk corridors *payments for the year* will be reduced pro rata to the extent of any shortfall," and also that "HHS is collecting 2015 risk corridor charges in November 2016, and will begin remitting risk corridors payments to issuers in December 2016, as collections are received." Bulletin, CMS, *Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year* (Nov. 18, 2016) (emphasis added), attached hereto at Exhibit 47. In the announcement, CMS confirmed "that all 2015 benefit year risk corridors collections will be used to pay a portion of balances on 2014 benefit year risk corridors payments," and that no timely CY 2015 risk corridors payments would be made to QHPs like Plaintiff. *Id.*

183. The December 2016 payment schedule was consistent with CMS's written presentation to insurers on June 7, 2016, which represented to L.A. Care and other QHPs that "CMS will begin making [CY 2015] RC [risk corridor] payments to issuers" in "December 2016," supporting HHS and CMS's continued intention and representation to make annual risk corridors payments by the end of the year. CMS, *Completing the Risk Corridors Plan-Level Data Form for the 2015 Benefit Year* at 7 (June 7, 2016), attached hereto at Exhibit 48.

184. Although the November 18, 2016 announcement did not specify the total amount of CY 2015 risk corridors collections versus payments nationwide amongst all QHPs, by calculating the data provided in the announcement's tables, it appears that QHPs requested CY 2015 risk corridors payments of $5,821,439,995.74 from the Government versus CY 2015 risk corridors collections of $95,315,092.84. This increased the total risk corridors shortfall for CY 2014 and CY 2015 to over $8 billion owed to QHPs by the Government.

185. On May 5, 2017, after the Government's obligation for CY 2016 risk corridors payments had matured, Congress enacted the Omnibus appropriations bill for fiscal year 2017, the "Consolidated Appropriations Act, 2017" (the "2017 Appropriations Act"), which once 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 223 of the 2017 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)***.

Pub. L. 115-31, § 223, 131 Stat. 135 (May 5, 2017) (emphasis added), attached hereto at Exhibit 49.

186. 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.

187. On May 9, 2017, CMS issued a bulletin to insurers regarding reporting of CY 2016 risk corridors, confirming the agency's understanding – even in light of the Government's contrary litigation position that the statute creates no payment obligation – that "[u]nder Section 1342 of the [ACA], issuers of qualified health plans (QHPs) must participate in the risk corridors program and pay charges ***or receive payments from HHS based on the ratio of the issuer's allowable costs to the target amount***," and not limited by collections or the availability of appropriations. Bulletin, CMS, *Announcement of Medical Loss Ratio and Risk Corridors Annual Reporting Procedures for the 2016 MLR Reporting Year* at 1 (May 9, 2017) (emphasis added), attached hereto at Exhibit 50.

188. On or about July 31, 2017, Plaintiff submitted its CY 2016 risk corridors data to CMS per 45 C.F.R. § 153.530(d).

189. On November 13, 2017, HHS and CMS announced the CY 2016 collection and payment amounts for the final year of the risk corridors program. *See* Bulletin, CMS, *Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year* (Nov. 18, 2016), Ex. 47. The data HHS and CMS provided in the November 13, 2017 announcement indicated that the Government owes QHPs $3,978,220,798.38 in CY 2016 risk corridors payments and QHPs owe the Government $27,090,317.25 in CY 2016 risk corridors collections.

190. In total, for all three years of the risk corridors program, the Government owes QHPs CY 2014, CY 2015 and CY 2016 risk corridors payments of approximately $12.76 billion,

versus QHPs owing the Government CY 2014, CY 2015 and CY 2016 risk corridors collections of approximately $484.5 million, a shortfall of approximately $12.28 billion.

191. Defendant's current litigation position is that the Government has no legal obligation to make risk corridors payments beyond risk corridors collections, unless Congress appropriates additional funds toward risk corridors payments. *See, e.g.*, United States' Reply in Support of Its Cross-Motion to Dismiss, *Molina Healthcare of California, Inc., et al. v. United States*, No. 17-97C, ECF No. 16, at 1 (Fed. Cl. June 16, 2017) ("The scope of the United States' obligation to make risk corridors payments … extends only to the aggregate amount of collections.").

192. The Government has thus left L.A. Care, and other QHPs owed past-due risk corridors payments, to guess when—if ever—the United States will make the full CY 2014, CY 2015, and CY 2016 risk corridors payments that the Government has acknowledged are owed to Plaintiff, and for which this Court has ruled the Government is liable. *See, e.g.*, *Molina Healthcare of Calif., Inc. v. United States*, 133 Fed. Cl. 14 (2017) (Wheeler, J.).

193. The Government failed to provide Plaintiff with any statutory authority for its unilateral decision to make only partial, prorated risk corridors payments for CY 2014, to withhold delivery of full risk corridors payments for CY 2014 beyond CY 2015, to make no risk corridors payments for CY 2015 by the end of CY 2016, and to make no risk corridors payments for CY 2016 by the end of CY 2017.

L.A. Care's Risk Corridors Payment Amount for CY 2014

194. In a report released on November 19, 2015, HHS and CMS publicly announced QHPs' risk corridors charges and payments for CY 2014, and emphasized that "Risk 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." Bulletin, CMS, *Risk Corridors Payment and Charge Amounts for Benefit Year 2014* (Nov. 19, 2015) ("CY 2014 Risk Corridors Report"), attached hereto at Exhibit 51.

195. L.A. Care's losses in the ACA California Individual Market for CY 2014 resulted in the Government being required to pay L.A. Care a risk corridors payment of $13,561,651.72. *See id.* at Table 5 – California.

196. The Government announced, however, that it would pay L.A. Care a prorated amount of only $1,711,191.11 for L.A. Care's losses in the ACA California Individual Market for CY 2014. *See id.*

197. Plaintiff's risk corridors payments, and the Government's announced prorated payment amounts, for CY 2014 are summarized as follows:

Plaintiff	State / Market	Risk Corridors Amount	Prorated Amount	Percent Pro Rata
L.A. Care	CA / Individual	$13,561,651.72	$1,711,191.11	12.6%

198. The combined risk corridors payments from the Government to L.A. Care as of the date of this filing ($2,252,622.50) represents only 16.61% of the CY 2014 risk corridors payments that the Government owes to Plaintiff. While this satisfies the 12.6% prorated amount that the Government promised to pay L.A. Care for CY 2014 from risk corridors collections, it falls far short of the full amount owed to L.A. Care for CY 2014.

199. Unlike some other QHPs, L.A. Care did not have gains in the ACA Individual Market for CY 2014 that resulted in L.A. Care being required to remit risk corridors charges to the Secretary of HHS. *See generally* CY 2014 Risk Corridors Report, Ex. 51. Had L.A. Care been required to remit a risk corridors charge to the Secretary of HHS, then L.A. Care would have been required to pay the Government 100% of its CY 2014 California Individual Market risk corridors charges – not some unilaterally determined fraction thereof – and to do so

promptly before the close of CY 2015, as it had affirmatively attested it would do. L.A. Care was ready, willing, and able to satisfy this obligation to which it had attested, had L.A. Care been required to do so.

200. The Government lacks the authority, under statute, regulation or contract, to unilaterally withhold full and timely CY 2014 risk corridors payments from QHPs such as L.A. Care. *See Molina Healthcare of Calif., Inc. v. United States*, 133 Fed. Cl. 14 (2017) (Wheeler, J.) (granting summary judgment to QHP for CY 2014 and CY 2015 risk corridors payments).

201. L.A. Care is entitled to receive full and immediate payment from the United States.

L.A. Care's Risk Corridors Payment Amount for CY 2015

202. In a report released on November 18, 2016, HHS and CMS publicly announced QHPs' risk corridors charges and payments for CY 2015, stating that "all 2015 benefit year risk corridors collections will be used to pay a portion of balances on 2014 benefit year risk corridors payments," and that "HHS intends to collect the full 2015 risk corridors charge amounts indicated in the tables" printed in the report. Bulletin, CMS, *Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year* (Nov. 18, 2016) ("CY 2015 Risk Corridors Report"), Ex. 47.

203. L.A. Care's losses in the ACA California Individual Market for CY 2015 resulted in the Government being required to pay L.A. Care a risk corridors payment of $8,255,198.64. *See id.* at 3.

204. Plaintiff's risk corridors payments for CY 2015 are summarized as follows:

Plaintiff	State / Market	Risk Corridors Amount	Percent To Be Timely Paid
L.A. Care	CA / Individual	$8,255,198.64	0%

205. The Government has not made any payments for CY 2015 risk corridors owed to Plaintiff.

206. Unlike some other QHPs, L.A. Care did not have gains in the ACA Individual Market for CY 2015 that resulted in L.A. Care being required to remit risk corridors charges to the Secretary of HHS. *See generally* CY 2015 Risk Corridors Report, Ex. 47. Had L.A. Care been required to remit a risk corridors charge to the Secretary of HHS, then L.A. Care would have been required to remit 100% of the amount of the charge to HHS before the close of CY 2016, as it had affirmatively attested it would do. L.A. Care was ready, willing, and able to satisfy this obligation to which it had attested, had Plaintiff been required to do so.

207. The Government lacks the authority, under statute, regulation or contract, to unilaterally withhold full and timely CY 2015 risk corridors payments from QHPs such as L.A. Care. *See Molina Healthcare of Calif., Inc. v. United States*, 133 Fed. Cl. 14 (2017) (Wheeler, J.) (granting summary judgment to QHP for CY 2014 and CY 2015 risk corridors payments).

208. L.A. Care is entitled to receive full and immediate payment from the United States.

L.A. Care's Risk Corridors Payment Amount for CY 2016

209. In a report released on November 13, 2017, HHS and CMS publicly announced the amount of risk corridors payments the Government owes to QHPs, and the amount of risk corridors charges the Government will collect from QHPs, for the CY 2016 plan year. CMS announced that "HHS will use 2016 benefit year risk corridors collection to make additional payments toward 2014 benefit year balances," indicating that the Government will not make any payments to QHPs, including L.A. Care, toward the Government's CY 2015 or CY 2016 risk corridors amounts still owed. Bulletin, CMS, *Risk Corridors Payment and Charge Amounts for*

the 2016 Benefit Year at 1 (Nov. 13, 2017) ("CY 2016 Risk Corridors Report"), attached hereto at Exhibit 52.

210. Additionally, CMS announced that "HHS intends to collect the full 2016 risk corridors charge amounts indicated in the tables" printed in the report, and that HHS "is collecting 2016 risk corridor charges in November 2017." *Id.* at 1-2.

211. Contrary to recent guidance by CMS, which had represented to L.A. Care and other QHPs that "Remittance of Risk Corridors Payments Begins" on "12/2017," *see* CMS, *Key Dates for Calendar Year 2017* at 3 (Apr. 13, 2017), attached hereto at Exhibit 53, HHS and CMS announced on November 13, 2017 that "HHS … will begin remitting risk corridors payments to issuers in January 2018, as collections are received." CY 2016 Risk Corridors Report at 2, Ex. 52.

212. L.A. Care's losses in the ACA California Individual Market for CY 2016 resulted in the Government being required to pay L.A. Care a risk corridors payment of $3,948,187.97. *See id.* at 3.

213. Plaintiff's risk corridors payments for CY 2016 are summarized as follows:

Plaintiff	State / Market	Risk Corridors Amount	Percent To Be Timely Paid
L.A. Care	CA / Individual	$3,948,187.97	0%

214. The Government has stated that it will not make any payments to Plaintiff for CY 2016. *See, e.g.*, CY 2016 Risk Corridors Report at 1-2, Ex. 52.

215. Unlike some other QHPs, L.A. Care did not have gains in the ACA market for CY 2016 that resulted in Plaintiff being required to remit risk corridors charges to the Secretary of HHS. *See generally id.* Had Plaintiff been required to remit a risk corridors charge to the Secretary of HHS, then L.A. Care would have been required to pay the Government 100% of its CY 2016 risk corridors charges and to do so promptly, before the close of CY 2017. L.A. Care

was ready, willing, and able to satisfy this obligation to which it had attested, had Plaintiff been required to do so.

216. HHS lacks the authority, under statute, regulation or contract, to unilaterally withhold full and timely CY 2016 risk corridors payments from QHPs such as L.A. Care. *See Molina Healthcare of Calif., Inc. v. United States*, 133 Fed. Cl. 14 (2017) (Wheeler, J.) (granting summary judgment to QHP for CY 2014 and CY 2015 risk corridors payments).

217. L.A. Care is entitled to receive full and immediate payment from the United States.

218. Combined, the United States has recognized and repeatedly admitted that it is obligated to make risk corridors payments to L.A. Care in the total amount of $25,765,038.33 for CY 2014, CY 2015 and CY 2016, but as of the date of this filing, the Government has only made risk corridors payments to L.A. Care totaling $2,252,622.50, which is just 8.74% of the total amount owed to Plaintiffs. L.A. Care is entitled to receive, and demands, full and immediate payment from the United States.

COST-SHARING REDUCTION FACTUAL ALLEGATIONS

The ACA's Cost-Sharing Reduction Program

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

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

221. Regarding cost-sharing expenses, Section 1402 of the ACA mandates that, after being notified by HHS that a customer is eligible for CSR discounts, a QHP "shall reduce" at least some portion of that customer's out-of-pocket health care costs. 42 U.S.C. § 18071(a).

222. Congress intended CSR discounts to be available to enrollees who meet three criteria: (i) they are eligible to receive premium tax credits under Section 1401, (ii) their household income is less than 250% of the federal poverty level—in 2017, under $61,500 for a family of four—and (iii) they are enrolled in a "silver" plan offered by the QHP in an ACA Exchange's individual market. 42 U.S.C. § 18071(b), (c)(2), (f)(2); *Annual Update of the HHS Poverty Guidelines*, 82 FR 8831, 8832 (Jan. 31, 2017), attached hereto at Exhibit 54; CMS, *Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Year 2016* at 6 (Dec. 27, 2016), attached hereto at Exhibit 55 (hereinafter, "CMS 2016 CSR Manual"). Section 1402(d) further provides special rules for QHPs that provide CSR discounts to American Indians and Alaska Natives. *See* 42 U.S.C. § 18071(d).

223. QHPs, like L.A. Care, that are certified to voluntarily participate in an ACA Exchange must offer at least one "silver" health plan. *See* 42 U.S.C. § 18071(c)(2). Before applying CSR discounts, a "silver" plan is structured so that the QHP pays an estimated 70 percent of an enrollee's health care costs, leaving the enrollee responsible for a 30 percent share of their health care costs. *See* 42 U.S.C. § 18022(d)(1)(B). Congress intended for CSR

discounts subsidized by the Government to further reduce eligible enrollees' health care costs, but not to increase costs for QHPs.

224. Of the approximately 10.3 million people enrolled through the ACA Exchanges in CY 2017, nearly 5.9 million (about 57%) received CSR discounts. *See* CMS, *2017 Effectuated Enrollment Snapshot* (June 12, 2017), attached hereto at Exhibit 56.

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

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

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

228. Congress purposefully used the word "***shall***" in Sections 1402 and 1412 to clearly indicate that advance CSR payments are a money-mandating obligation of the United States that the Government must make to QHPs, like L.A. Care. Advance CSR payments are not subsidies

for QHPs, they are mandatory advance payments owed by the Government to reimburse QHPs for the mandatory CSR discounts the ACA requires QHPs to provide to eligible customers for their out-of-pocket health care expenses.

229. Congress did not limit in any way the Government's obligation to make full advance CSR payments owed to QHPs, due to appropriations, restriction on the use of funds, or otherwise in Section 1402, Section 1412, or anywhere else in the ACA. The Government's obligation to make full advance CSR payments to QHPs is not, and has never been, subject to "budget neutrality."

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

231. The Government thus lacks statutory authority to pay anything less than 100% of the advance CSR payments due to L.A. Care.

232. In agreeing to commit each year to the ACA Exchanges, L.A. Care understood that it would not bear the expense of the mandatory CSR discounts the ACA required it provide to eligible enrollees, but instead, L.A. Care understood that the Government would reimburse L.A. Care in full for those CSR discounts through "periodic and timely" advance CSR payments.

233. The Government has failed to honor its mandatory advance CSR payment obligation to L.A. Care since October 12, 2017.

HHS's Cost-Sharing Reduction Regulations

234. The HHS Secretary formally delegated authority over the CSR program under Section 1402 and Section 1412 to the CMS Administrator on August 30, 2011, specifically directing that "CMS will consult with the Department of the Treasury." *See* 76 FR 53903,

53903-04 (Aug. 30, 2011), Ex. 09. By authority of this delegation from the HHS Secretary, CMS issued implementing regulations for the CSR program at 45 C.F.R. Part 156.

235. The process for providing advance CSR payments and later reconciling those payments against CSR discounts is set forth at 45 C.F.R. § 156.430. *See* 45 C.F.R. § 156.430; CMS 2016 CSR Manual at 6 n.9, Ex. 55.

236. The CSR payment regulations state that QHPs "***will*** receive periodic ***advance*** payments" for their CSR discounts to eligible customers. 45 C.F.R. § 156.430(b)(1) (emphasis added).

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

> We proposed to implement a payment approach under which we would make ***monthly*** advance payments to issuers to cover projected cost-sharing reduction amounts, and then reconcile those advance payments at the end of the benefit year to the actual cost-sharing reduction amounts. ***This approach fulfills the Secretary's obligation to make "periodic and timely payments equal to the value of the reductions" under section 1402(c)(3) of the Affordable Care Act.*** We expect that this approach would not require issuers to fund the value of any cost-sharing reductions prior to reimbursement.

78 FR 15409, 15486 (Mar. 11, 2013) (Final Rule) (emphasis added) (internal footnote omitted), Ex. 06.

238. Under the implementing regulations, an annual CSR reconciliation process occurs following the conclusion of each benefit year, with QHPs notifying the HHS Secretary of CSR discounts provided on behalf of eligible enrollees for actual essential health services. *See* 45 C.F.R. § 156.430(c); Bulletin, CMS, *Data submission deadline for cost-sharing reduction*

reconciliation (Apr. 15, 2016), attached hereto at Exhibit 57 (hereinafter, "CMS CSR Data Submission Bulletin").

239. HHS then analyzes the relevant data, and reconciles the amount of CSR discounts that eligible customers received from a QHP in the previous benefit year against the advance CSR payments that HHS made to the QHP for the same benefit year. *See* 45 C.F.R. § 156.430(d); CMS CSR Data Submission Bulletin, Ex. 57.

240. If a discrepancy exists between the previous benefit year's amount of CSR discounts and advance CSR payments, the discrepancy is resolved through either an additional reimbursement "for the difference" that HHS "will" provide to the QHP, or a repayment of "the difference" that the QHP "must" provide to HHS. 45 C.F.R. § 156.430(e); CMS 2016 CSR Manual at 36, Ex. 55.

241. Through this CSR reconciliation and reimbursement process, HHS and QHPs ensure that the advance CSR payments from the Government to a QHP in a benefit year equal the actual amount of CSR discounts from the QHP to its eligible enrollees in that benefit year, consistent with Congress's mandate to the Government in Section 1402. *See* 42 U.S.C. § 18071(c)(3)(A) ("[T]he [HHS] Secretary shall make periodic and timely payments to the [QHP] equal to the value of the [CSR discount] reductions.").

Plaintiff is a QHP for CYs 2017 to 2019

242. Plaintiff realleges and incorporates by reference the preceding paragraphs 86-93 (regarding L.A. Care's CY 2014, CY 2015 and CY 2016 QHP Agreements and Attestations) as if fully set forth herein.

243. On September 29, 2016, L.A. Care executed a QHP Issuer Contract for 2017-2019 with Covered California that is effective from October 1, 2016 through December 31,

2019, attached hereto at Exhibit 58, confirming its participation on the California ACA Exchange for CY 2017 through CY 2019 (the "CY 2017-2019 QHP Agreement").

244. Before L.A. Care executed the CY 2017-2019 QHP Agreement, L.A. Care executed many attestations certifying its compliance with the obligations it was undertaking by continuing to act as a QHP on the ACA Exchange in California.

245. The federal Government's advance CSR payments that Congress mandated through the CSR program, and that the Government confirmed in the implementing regulations, was a significant factor in L.A. Care's decision to agree to become a QHP and undertake the many responsibilities and obligations required for L.A. Care to participate in the California ACA Exchange.

246. Had L.A. Care known that the Government would fail to fully and timely make the mandatory CSR payments owed to L.A. Care, then L.A. Care's annual premiums on the various ACA Exchanges on which it voluntarily participated would necessarily have been higher than actually charged. L.A. Care also would not have agreed to participate in the ACA Marketplace had it known that the Government would have breached its obligations regarding the CSR program.

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

247. Starting in January 2014, the HHS and Treasury Secretaries – including those in the current Trump Administration until October 2017 – made the Government's monthly advance CSR payments to QHPs, including L.A. Care, as Congress required in the ACA and consistent with their interpretation of the Government's money-mandating payment obligations under the ACA. *See* CMS 2016 CSR Manual at 36, Ex. 55 ("Payments to issuers for the cost-sharing reduction component of advance payments began in January 2014.").

248. In rulemaking as early as 2012, HHS and CMS publicly wrote in the Federal Register that "if the actual amounts of [CSR discounts provided from QHPs to eligible enrollees] exceed the advance [CSR] payment amounts provided to the [QHP by HHS] …, ***HHS would reimburse the issuer for the shortfall***, assuming that the [QHP] has submitted its actual [CSR] amount report to HHS in a timely fashion." 77 FR 73118, 73176 (Dec. 7, 2012) (Proposed Rule) (emphasis added), Ex. 03.

249. L.A. Care has always timely submitted its required CSR reports to HHS.

250. In final rulemaking of March 11, 2013, while QHPs like L.A. Care were contemplating whether to commit to participating in the ACA Exchanges, HHS and CMS announced their interpretation that "***cost-sharing reductions are reimbursed by the Federal government***." 78 FR 15409, 15481 (Mar. 11, 2013) (Final Rule) (emphasis added), Ex. 06. In describing the CSR advance payment and reconciliation process, HHS and CMS expressly acknowledged "the [HHS] Secretary's ***obligation*** to make 'periodic and timely payments equal to the value of the reductions' under section 1402(c)(3) of the Affordable Care Act." *Id.* at 15486 (emphasis added). HHS and CMS expressed their understanding of the statutory requirement that "***QHP issuers will be made whole*** for the value of all cost-sharing reductions provided through the reconciliation process after the close of the benefit year." *Id.* at 15488 (emphasis added). Finally, HHS and CMS expressed their interpretation that "***Section 1402(c)(3) provides for the Secretary of HHS to make payments to QHP issuers equal to the value of the cost-sharing reductions.***" *Id.* at 15489 (emphasis added).

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

> ***Section 1402(c)(3)*** of the Affordable Care Act directs a QHP issuer to notify the Secretary of cost-sharing reductions made under the statute, and

> ***directs the Secretary to make periodic and timely payments to the QHP issuer equal to the value of those reductions.*** Section 1412(c)(3) of the Affordable Care Act permits advance payments of cost-sharing reduction amounts to QHP issuers based upon amounts specified by the Secretary. Under these authorities, we established a payment approach in the 2014 Payment Notice under which monthly advance payments made to issuers to cover projected cost-sharing reduction amounts are reconciled after the end of the benefit year to the actual cost-sharing reduction amounts.

79 FR 13743, 13805 (Mar. 11, 2014) (Final Rule) (emphasis added), Ex. 25.

252. In early 2015, in guidance issued to QHPs regarding the CSR reconciliation process, HHS and CMS stated that "[t]he [ACA] requires [QHPs] to provide cost-sharing reductions to eligible enrollees in such [silver] plans, ***and provides for issuers to be reimbursed for the value of those cost-sharing reductions***" by the Government. Bulletin, CMS, *Timing of Reconciliation of Cost-Sharing Reductions for the 2014 Benefit Year* at 1 (Feb. 13, 2015), attached hereto at Exhibit 59 (hereinafter, "CMS 2014 CSR Bulletin") (emphasis added).

253. In a December 2016 manual regarding CSR reconciliation, HHS and CMS again acknowledged that under Sections 1402 and 1412 of the ACA, "periodic and timely payments equal to the value of [QHPs' CSR] reductions ***are required to be made to issuers*** … in advance" by the Government. CMS 2016 CSR Manual at 6 & n.8 (emphasis added), Ex. 55.

254. HHS and CMS implemented the CSR reconciliation process for both CY 2014 and CY 2015 in the middle of 2016, and L.A. Care timely submitted its CSR data to CMS and participated in the process. *See* CMS 2014 CSR Bulletin at 1-2, Ex. 59; CMS CSR Data Submission Bulletin, Ex. 57; CMS, *Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Years 2014 and 2015* at 6 (Mar. 16, 2016), attached hereto at Exhibit 60 (hereinafter, "CMS 2014-15 CSR Manual"); Email from Jeff Grant, Director, Payment Policy and Financial Management Group, CMS, to Priscilla Mora, Director, L.A. Care (June 30, 2016) (regarding Benefit Year 2014), attached hereto at Exhibit 61; Email

from Grant, CMS, to Mora, L.A. Care (June 30, 2016) (regarding Benefit Year 2015), attached hereto at Exhibit 62.

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

256. In the middle of 2017, HHS and CMS implemented the CSR reconciliation process for CY 2016, and L.A. Care timely submitted its CSR data to CMS and participated in the process. *See* CMS 2016 CSR Manual at 8-9 & 36, Ex. 55; Email from Jeffrey Grant, Director, Payment Policy and Financial Management Group, CMS, to Eric F. De Waele, L.A. Care (June 30, 2017), attached hereto at Exhibit 63.

257. The Government continued making monthly mandatory advance CSR payments to QHPs, including L.A. Care, through September 2017 (for October 2017 CSR discounts) as required by the ACA and its implementing regulations, as well as by the Government's contracts with Plaintiff.

The Government Breaches its Cost-Sharing Reduction Payment Obligations

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

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

Dan Mangan, *Obamacare bombshell: Trump kills key payments to health insurers*, CNBC, Oct. 12, 2017, attached hereto at Exhibit 64.

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

> After a thorough legal review by HHS, Treasury, OMB, and an opinion from the Attorney General, we believe that ... Congress has not appropriated money for CSRs, and we will discontinue these payments immediately.

Press Release, HHS & CMS, *Trump Administration Takes Action to Abide by the Law and Constitution, Discontinue CSR Payments* (Oct. 12, 2017), attached hereto at Exhibit 65.

260. However, "[i]t has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." *Prairie Cnty., Mont. v. United States*, 782 F.3d 685, 690 (Fed. Cir.), *cert. denied*, 136 S. Ct. 319 (2015).

261. Attached to the HHS and CMS press statement was an October 12, 2017 order from HHS Acting Secretary Eric Hargan to CMS Administrator Seema Verma, instructing that "CSR payments to issuers must stop, effective immediately. CSR payments are prohibited unless and until a valid appropriation exists." Letter from Eric Hargan, HHS Acting Secretary, to Seema Verma, CMS Administrator (Oct. 12, 2017), attached hereto at Exhibit 66.

262. Attached to Mr. Hargan's order was an October 11, 2017 legal opinion signed by U.S. Attorney General Jeff Sessions and addressed to the Treasury Secretary and HHS Acting Secretary. *See* Letter from Jefferson B. Sessions III, U.S. Attorney General, to Steven Mnuchin, Secretary of the Treasury & Don Wright, HHS Acting Secretary (Oct. 11, 2017), attached hereto at Exhibit 67.

263. U.S. Attorney General Sessions made two important admissions in his legal opinion.

264. First, U.S. Attorney General Sessions admitted that Section 1402 "***requires***

insurers offering policies through ACA exchanges to reduce co-payments and other out-of-pocket costs for certain policyholders (reductions referred to in the ACA as "Cost-Sharing Reductions")." *Id.* at 2 (citing ACA § 1402) (emphasis added).

265. Second, U.S. Attorney General Sessions admitted that Section 1412 "***authorizes*** the federal government to make payments directly to insurers to ***offset*** the lost revenue these [CSR] reductions cause." *Id.* (citing ACA § 1412(c)(3)) (emphasis added).

266. Because, as U.S. Attorney General Sessions stated in his official legal opinion of October 11, 2017, Section 1412 "authorizes" advance CSR payments from the Government to QHPs to "offset" the cost of QHPs' CSR discounts to eligible customers, *id.*, Section 1402 mandates that HHS "shall" make CSR payments to QHPs, and Congress never made those money-mandating obligations subject to the availability of appropriations or limited the Government's payment obligation in any way, the Government is liable to QHPs, like L.A. Care, that suffered money damages as a result of the Government's unlawful refusal to make CSR payments while those QHPs remained statutorily obligated to provide mandatory CSR discounts to their eligible customers.

267. The Administration's desire to violate the Government's statutory and contractual obligations and stop making advance CSR payments in order to harm QHPs had been expressed by President Trump both before and after the Government made its October 12, 2017 announcement through multiple Twitter postings. *See* Exhibits 68 to 74 (relevant @realDonaldTrump tweets from April 26, 2017 to October 18, 2017).

268. Pursuant to the Administration's decision, made with the specific intent by the Government to harm QHPs, HHS and Treasury has not made any of the Government's advance CSR payments to QHPs, like L.A. Care, in and after October 2017.

269. On October 13, 2017, CMS's Financial Management Coordination Center ("FMCC") emailed to L.A. Care and other QHPs a letter stating that:

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

Email from CMS FMCC to L.A. Care (Oct. 13, 2017, 3:55 PM), attached hereto at Exhibit 75.

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

Email from CMS FMCC to L.A. Care (Oct. 20, 2017, 1:18 PM), attached hereto at Exhibit 76.

271. CMS's FAQ document of October 20, 2017, confirmed that:

> For the October monthly payment cycle and beyond, CMS will not make advance CSR payments, and will not make any adjustments to CSR payment amounts related to retroactive enrollment data changes for prior months of 2017, unless Congress appropriates funding for these payments. Issuers will therefore receive no net payment of 2017 advance CSR in the October and future payment cycles.

Bulletin, CMS, *FAQ on Cessation of Payment of Cost-sharing Reductions* at 1 (Oct. 20, 2017), attached hereto at Exhibit 77.

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

> CSR reconciliation payments for the 2016 benefit year and prior year restatements previously scheduled for the October 2017 payment cycle or

> future cycles, including any payments calculated as the result of reported discrepancies, will not be made. However, if a discrepancy results in an overpayment to the issuer, CMS will proceed with the collection of those charges after the issuer has been notified of CMS's discrepancy decision.

Id.

273. Two federal judges have recognized the Government's liability to QHPs, like L.A. Care, in these particular circumstances regarding advance CSR payments.

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

275. Subsequently, Judge Vince Chhabria of the U.S. District Court for the Northern District of California wrote that "the [ACA] requires the federal government to make advance payments to the [health insurance] companies to cover the cost of this [CSR] subsidy"; that "the [ACA] requires the insurance companies to be paid"; that "the [ACA] requires the federal government to compensate the insurance companies for those [cost-sharing] reductions"; that the ACA "required the federal government to pay the insurance companies in advance for these [cost-sharing] reductions"; that the mandatory "shall" in Section 1402(c)(3)(A) "is how the [ACA] 'authorized' the cost-sharing reduction program and the CSR payments to the insurers"; and that, "***In sum, the [ACA] requires the federal government to pay insurance companies to cover the cost-sharing reductions. The federal government is failing to meet that obligation.***" *California v. Trump*, 267 F. Supp. 3d 1119, 1121-24, 1129, 1133 (N.D. Cal. 2017) (emphasis added).

276. L.A. Care seeks monetary damages in this Court to compensate it for the Government's failure to make mandatory advance CSR payments to L.A. Care on and after October 12, 2017.

L.A. Care's Advance Cost-Sharing Reduction Payments Owed Since October 12, 2017

277. Between January 2014 and October 12, 2017, Defendant made monthly advance CSR payments to L.A. Care on or about a date between the nineteenth and twenty-second of each month. *See* Decl. of Elizabeth Parish in Supp. of Defs.' Opp'n to Pls.' Mot. for a TRO, *Calif. v. Trump*, No. 3:17-cv-5895-VC, ECF No. 35-3, at ¶ 5 (Oct. 20, 2017), attached hereto at Exhibit 78 (CMS official declaring under oath that "monthly [advance CSR] payments [are] scheduled for a pre-established date between the nineteenth and twenty-second of each month").

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

279. Defendant thus has made no advance CSR payments to L.A. Care since September 2017.

280. In the October 13, 2017 CMS FMCC email to L.A. Care and other QHPs, CMS stated that it would continue to report the amount of monthly advance CSR payments a QHP would have received from the Government in and after October 2017, but that the same monthly payment report "will also show a lump-sum issuer-level manual adjustment that reverses the total net advance CSR payment," Email from CMS FMCC to L.A. Care (Oct. 13, 2017, 3:55 PM), Ex. 75, resulting in no advance CSR payment being paid despite the Government's obligations to make such payments each month.

281. CMS's FAQ document of October 20, 2017 also confirmed that "[QHPs] will see detailed advance CSR payments appear as in prior months on their payment reports[,] … [which] will also show a lump-sum issuer-level manual adjustment that reverses the total net advance CSR payment." Bulletin, CMS, *FAQ on Cessation of Payment of Cost-sharing Reductions* at 1 (Oct. 20, 2017), Ex. 77.

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

283. As the Government stated in the October 2017 payment report it sent to L.A. Care, L.A. Care expected an advance CSR payment from Defendant of $1,113,302.20 in October 2017, which the Government refused to pay in violation of its obligations.

284. As the Government stated in the November 2017 payment report it sent to L.A. Care, L.A. Care expected an advance CSR payment from Defendant of $1,591,782.84 in November 2017, which the Government refused to pay in violation of its obligations.

285. As the Government stated in the December 2017 payment report it sent to L.A. Care, L.A. Care expected an advance CSR payment from Defendant of $1,458,903.65 in December 2017, which the Government refused to pay in violation of its obligations.

286. As the Government stated in the January 2018 payment report it sent to L.A. Care, L.A. Care expected an advance CSR payment from Defendant of $1,805,182.80 in January 2018, which the Government refused to pay in violation of its obligations.

287. L.A. Care demands full and immediate payment from the United States in the total amount of $5,969,171.49 for advance CSR payments due and owing to L.A. Care as of this

Complaint's filing date, which Defendant has refused to pay in violation of its obligations.

RISK CORRIDORS COUNTS

COUNT I
Violation of Federal Statute and Regulation

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

289. Section 1342(b)(1) of the ACA mandates compensation, expressly stating that the Secretary of HHS "shall pay" risk corridors payments to eligible QHPs based on their annual ACA exchange losses, in accordance with the payment formula set forth in the statute. *See* 42 U.S.C. § 18062(b), Ex. 04; 45 C.F.R. § 153.510, Ex. 10.

290. HHS's and CMS's implementing regulation at 45 C.F.R. § 153.510(b) also mandates compensation, expressly stating that "when" QHPs' allowable costs exceed the 3 percent risk corridors threshold, 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.

291. Congress, through Section 1342 of the ACA, did not either expressly or implicitly grant the Secretary of HHS any discretion to pay QHPs that qualified for risk corridors payments any amount less than the full risk corridors payment amount prescribed by the statutory formula in Section 1342(b)(1) and (2), or to pay the risk corridors amounts due pursuant to the statutory formula over the course of, or after the end of, the three-year risk corridors program.

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

293. HHS's 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." 76 FR 41929, 41943 (July 15, 2011), Ex. 02; 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 01.

294. As the Supreme Court confirmed in *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015), "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them." Congress must have intended the ACA's risk corridors program to be consistent with, and not antithetical to, this purpose.

295. As early as July 15, 2011, HHS identified the purpose of the risk corridors program: "The temporary Federally-administered risk corridor program serves to protect against rate-setting uncertainty in the Exchange by limiting the extent of issuer losses (and gains)." *See* 76 FR 41929, 41948 (July 15, 2011), Ex. 02. HHS further explained that "[i]nsurers charge premiums for expected costs plus a risk premium, in order to build up reserve funds in case medical costs are higher than expected. Reinsurance, risk adjustment and risk corridors payments reduce the risk to the issuer and the issuer can pass on a reduced risk premium to beneficiaries." *Id.*

296. HHS confirmed the purpose of Section 1342 in its March 23, 2012 Final Rulemaking implementing the statute stating that the "temporary Federally administered risk corridors program serves to protect against uncertainty in rate setting by qualified health plans ***sharing risk in losses and gains with the Federal government.***" 77 FR 17219, 17220 (Mar. 23, 2012), Ex. 01 (emphasis added). Nine months later in December 2012, HHS confirmed that "[t]he temporary risk corridors program permits ***the Federal government*** and QHPs ***to share*** in profits or losses resulting from inaccurate rate setting from 2014 to 2016." 77 FR 73118, 73121 (Dec. 7, 2012), Ex. 03 (emphasis added).

297. Therefore, HHS assured prospective ACA QHPs in its Final Rulemaking

implementing Section 1342 that "[t]he risk corridors program, which is a Federally administered program, ***will protect*** against uncertainty in rates for QHPs ***by limiting the extent of issuer losses*** (and gains)." 77 FR 17219, 17221 (Mar. 23, 2012), Ex. 01 (emphasis added).

298. With respect to *when* risk corridors payments were intended to be made to further the purposes of the risk corridors program, HHS confirmed in its March 23, 2012 Final Rulemaking that, along with the other two "Rs," the ACA established the "temporary risk corridors program" to "further minimize the negative effects of adverse selection and foster a stable marketplace ***from year one*** *of implementation*[.]" 77 FR 17219, 17221 (Mar. 23, 2012), Ex. 01 (emphasis added). HHS confirmed in the same Final Rulemaking that the risk corridors program "***will mitigate*** *the impacts* of potential adverse selection and stabilize the individual and small group markets ***as*** *insurance reforms and the Exchanges* ***are implemented, starting in 2014.***" *Id.* at 17243 (emphasis added). Nowhere in Section 1342, its implementing regulations, or the March 23, 2012 Final Rulemaking, does Congress or HHS state or imply that risk corridors payments to QHPs would come at some undetermined time *after* the program's end in 2017.

299. The undisputed fundamental purposes of the risk corridors program, and the ACA generally, are not furthered, and have been subverted, by the Government's plan to pay the vast majority of risk corridors payments it has acknowledged it owes for CY 2014, CY 2015 and CY 2016, sometime **after** the end of the risk corridors program, in 2018 or later—nearly five years after Plaintiff was induced to join the ACA exchanges—and *only if* there happens to be risk corridors collections from profitable QHPs or other specific appropriations sufficient to fund such obligations, which the Government now estimates to be approximately $12.28 billion in total after the Government's final risk corridors collections.

300. That full, annual risk corridors payments must be made is also consistent with the Medicare Part D risk corridors program that Congress expressly stated Section 1342's risk corridors program "shall be based upon." 42 U.S.C. § 18062(a). Congress knew when it passed the ACA that full, annual risk corridors payments were required and had consistently been made by the Government under Medicare Part D's risk corridors program.

301. L.A. Care voluntarily applied to become, was certified as, committed itself to be, and in fact was, a QHP on the California ACA Exchange in CY 2014, CY 2015 and CY 2016, *see* Exs. 11 to 13, and was qualified for and entitled to receive mandated risk corridors payments from the Government for CY 2014, CY 2015 and CY 2016.

302. L.A. Care is entitled under Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) to recover full and timely mandated risk corridors payments from the Government for CY 2014, CY 2015 and CY 2016.

303. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $13,561,651.72, that the Government concedes it owes L.A. Care for CY 2014. *See* Ex. 51.

304. In the CY 2015 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $8,255,198.64, that the Government concedes it owes L.A. Care for CY 2015. *See* Ex. 47.

305. In the CY 2016 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $3,948,187.97, that the Government concedes it owes L.A. Care for CY 2016. *See* Ex. 52.

306. The Government was obligated to make full risk corridors payments promptly to L.A. Care for CY 2014 by the end of CY 2015, for CY 2015 by the end of CY 2016, and for CY

2016 by the end of CY 2017.

307. The United States has failed to make full and timely risk corridors payments to L.A. Care for CY 2014, CY 2015 and CY 2016, despite the Government repeatedly confirming in writing that Section 1342 mandates that the Government make full risk corridors payments.

308. Instead, the Government arbitrarily has paid L.A. Care only a pro-rata share of the total amount due for CY 2014, and has not paid any of the total amount due for CY 2015 and CY 2016, asserting that full payment to L.A. Care is limited by available appropriations, even though no such limits appear anywhere in the ACA, the money-mandating Section 1342, or the money-mandating implementing regulations.

309. Congress did not repeal, amend or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridors payments to QHPs, including L.A. Care, that suffered annual losses on the ACA Exchanges in excess of their statutory targets.

310. The Government's failure to make full and timely risk corridors payments to L.A. Care for CY 2014, CY 2015 and CY 2016 constitutes a violation and breach of the Government's mandatory payment obligations under Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b).

311. As a result of the United States' violation of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b), L.A. Care has been damaged in the amount of at least $25,765,038.33, less any prorated payments made by the Government, together with interest, costs of suit, and such other relief as this Court deems just and proper. *See Molina Healthcare of Calif., Inc. v. United States*, 133 Fed. Cl. 14 (2017) (Wheeler, J.) (granting summary judgment for QHP on identical statutory count).

COUNT II
Breach of Implied-In-Fact Contract

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

313. The Government knowingly and voluntarily entered into valid implied-in-fact contracts with L.A. Care regarding the Government's obligation to make full and timely risk corridors payments to L.A. Care for CY 2014 and/or CY 2015 and/or CY 2016 in exchange for Plaintiff's respective voluntary agreement to become a QHP and participate in the California ACA Exchange for CY 2014 and/or CY 2015 and/or CY 2016.

314. The existence of an implied-in-fact contract can be inferred from both the promissory "shall pay" and "will pay" language in, respectively, Section 1342 and its implementing regulations, as well as from the parties' conduct and the totality of the circumstances surrounding the enactment and implementation of the ACA and the risk corridors program, by which Congress, HHS, and CMS committed the Government to help protect QHPs financially against risk selection and market uncertainty.

315. Section 1342 of the ACA and HHS's implementing regulations (45 C.F.R. § 153.510), confirmed and ratified by HHS's and CMS's repeated assurances admitting the Government's obligation to make full risk corridors payments, constituted a clear and unambiguous offer by the Government to make full and timely risk corridors payments to health insurers, including L.A. Care, that agreed to participate as QHPs in the CY 2014 and/or CY 2015 and/or CY 2016 ACA Exchanges and were approved as certified QHPs at the Government's discretion. This offer evidences a clear intent by the Government to contract with Plaintiff.

316. Congress provided in Section 1342 a program that offered specified incentives in return for Plaintiff's voluntary performance in the form of an actual undertaking and gave HHS

no discretion to make less than the specific amount of risk corridors payments prescribed by the statutory formula from the Government to eligible QHPs, like L.A. Care, that agreed to participate in the ACA Exchanges.

317. L.A. Care accepted the Government's offer by developing health insurance plans that complied with the ACA's new requirements, agreeing to become a QHP, and by performing as a QHP on the new ACA Exchange in California, which posed uncertain risks that the Government agreed to share with Plaintiff by limiting the extent of L.A. Care's annual losses or profits based on a prescribed formula and targets.

318. By agreeing to become a QHP, L.A. Care agreed to provide services by offering health insurance on an Exchange established under the ACA, and to accept the new obligations, responsibilities and conditions the Government imposed on QHPs – subject to the implied covenant of good faith and fair dealing – under the ACA and, *inter alia*, 45 C.F.R. §§ 153.10 *et seq.* and 155.10 *et seq*.

319. L.A. Care was not obligated to participate as a QHP, to incur Exchange-related costs and losses, and to provide healthcare benefits to numerous enrollees who had not previously been insured at premiums that were lower than they would have been without the Government's promised risk-sharing.

320. The Government's agreement to make full and timely risk corridors payments was a significant factor material to L.A. Care's agreement to become a QHP and participate in the CY 2014, CY 2015 and CY 2016 ACA Exchanges in California.

321. The Government also induced QHPs, like L.A. Care, to commit to the CY 2015 and CY 2016 ACA Exchanges during and after HHS's and CMS's announcement in 2014 of their intention to implement the risk corridors program in a budget neutral manner by repeatedly

giving assurances to QHPs that "full" risk corridors payments were owed and that risk corridors collections would be sufficient to cover all of the Government's risk corridors payments for a calendar year. *See, e.g.*, Bulletin, CMS, *Risk Corridors and Budget Neutrality* at 1 (Apr. 11, 2014), Ex. 31 ("We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments.").

322. L.A. Care, in turn, provided a real benefit to the Government by agreeing to become a QHP and, despite the uncertain financial risk, to offer affordable health insurance on and to participate in the CY 2014, CY 2015 and CY 2016 ACA Exchanges in California. Without sufficient health insurers voluntarily agreeing to participate in the new ACA Exchanges, the ACA could not have been implemented as intended.

323. L.A. Care satisfied and complied with its obligations and/or conditions which existed under the implied-in fact contract.

324. The parties' mutual intent to contract is further confirmed by the parties' conduct, performance and statements, including, but not limited to, L.A. Care's execution of QHP Agreements and attestations, and the Government's repeated assurances that full and timely risk corridors payments would be made and would not be subject to budget limitations. *See, e.g.*, 78 FR 15409, 15473 (Mar. 11, 2013), Ex. 06.

325. Section 1342 states that the HHS Secretary "shall establish" the ACA risk corridors program and "shall pay" risk corridors payments, and the Secretary is responsible for administering and implementing the ACA and risk corridors program. 42 U.S.C. § 18062(a) & (b). The Secretary of HHS was explicitly authorized to make the Government's risk corridors payments in specific amounts under Section 1342 of the ACA. The Secretary was therefore authorized by law under the ACA to make the Government's risk corridors payments.

326. Each of the implied-in-fact contracts were furthermore authorized and/or ratified by representatives of the Government who had express or implied actual authority to bind the United States (including, but not limited to, the Secretary of HHS and/or Kevin J. Counihan), were clearly founded upon a meeting of the minds between the parties and entered into with mutual assent, and were supported by consideration.

327. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $13,561,651.72, that the Government concedes it owes L.A. Care for CY 2014. *See* Ex. 51.

328. In the CY 2015 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $8,255,198.64, that the Government concedes it owes L.A. Care for CY 2015. *See* Ex. 47.

329. In the CY 2016 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $3,948,187.97, that the Government concedes it owes L.A. Care for CY 2016. *See* Ex. 52.

330. Congress did not vitiate the United States' contractual obligation to make full and timely risk corridors payments to L.A. Care.

331. The Government was obligated to make full risk corridors payments promptly to L.A. Care for CY 2014 by the end of CY 2015, for CY 2015 by the end of CY 2016, and for CY 2016 by the end of CY 2017. The Government's failure to make full and timely CY 2014, CY 2015 and CY 2016 risk corridors payments to L.A. Care is a material breach of the implied-in-fact contracts.

332. As a result of the United States' material breaches of its implied-in-fact contracts that it entered into with L.A. Care regarding the CY 2014 and/or CY 2015 and/or CY 2016 ACA

Exchanges, Plaintiff has been damaged in the amount of at least $25,765,038.33, less any prorated payments made by the Government, together with any losses actually sustained as a result of the Government's breach, reliance damages, interest, costs of suit, and such other relief as this Court deems just and proper. *See Molina Healthcare of Calif., Inc. v. United States*, 133 Fed. Cl. 14 (2017) (Wheeler, J.) (granting summary judgment for QHP on identical implied-in-fact contract count).

COUNT III
Breach of Implied Covenant of Good Faith and Fair Dealing

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

334. A covenant of good faith and fair dealing is implied in every contract, express or implied-in-fact, 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.

335. The implied-in-fact contracts entered into between the United States and L.A. Care regarding the CY 2014 and/or CY 2015 and/or CY 2016 ACA Exchanges created the reasonable expectation for L.A. Care that full and timely CY 2014 and/or CY 2015 and/or CY 2016 risk corridors payments, which Plaintiff regarded as an important part of the contract consideration, would be paid by the Government to QHPs, just as the Government expected that any CY 2014, CY 2015 or CY 2016 risk corridors remittance charges owed would be fully and timely paid by QHPs to the Government.

336. By failing to make full and timely CY 2014, CY 2015, and CY 2016 risk corridors payments to L.A. Care, the United States has destroyed Plaintiff's reasonable

expectations regarding the fruits of the implied-in-fact contracts, in breach of an implied covenant of good faith and fair dealing existing therein.

337. In contrast to the Government's failure to honor its contractual obligations, had L.A. Care been required to remit a risk corridors charge to the Government for CY 2014, CY 2015 or CY 2016, Plaintiff would have done so in good faith as it had agreed and attested to do.

338. Congress granted HHS with rulemaking authority regarding the risk corridors program in Section 1342(a) of the ACA, subject to the limitations on the agency's discretion expressly mandated in Section 1342. *See, e.g.*, 42 U.S.C. § 18062(b) ("[T]he Secretary shall pay …."). HHS and CMS were permitted to establish charge remittance and payment deadlines, and had an obligation to exercise the discretion afforded to them in good faith, and not arbitrarily, capriciously or in bad faith.

339. 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 create a similar deadline in the regulations for the Government's 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.*, 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 01);

(b) Requiring QHPs to fully remit risk corridors charges to the Government, but unilaterally deciding that the Government may make prorated or no risk corridors payments to QHPs, despite earlier stating that QHPs and the

Government should be subject to the same payment deadline (*see, e.g.*, *id.*);

(c) In, respectively, Section 227 of the 2015 Appropriations Act, Section 225 of the 2016 Appropriations Act, and Section 223 of the 2017 Appropriations Act, legislatively targeting the Government's risk corridors payment obligations to a small group of QHPs in an attempt to save the Government money by limiting funding sources for, respectively, CY 2014, CY 2015, and CY 2016 risk corridors payments, after L.A. Care had undertaken significant expense in performing its obligations as a QHP in the California ACA Exchange based on Plaintiff's reasonable expectations that the Government would make full and timely risk corridors payments if L.A. Care experienced sufficient losses in, respectively, CY 2014, CY 2015, and/or CY 2016;

(d) Making statements regarding risk corridors payments upon which L.A. Care relied to agree to become a QHP and participate in the California ACA Exchange (*see, e.g.*, 78 FR 15409, 15473 (Mar. 11, 2013), Ex. 06 ("The 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.")), then depriving Plaintiff of full and timely risk corridors payments after L.A. Care had fulfilled its obligations as a QHP by participating in the California ACA Exchange and had suffered losses which the Government had promised would be shared through mandatory risk corridors payments (*see, e.g.*, 79 FR 13743, 13829 (Mar. 11, 2014), Ex. 25 ("HHS intends to implement this [risk corridors] program in a budget neutral manner."); Am. Acad. of Actuaries, Comment to HHS on Proposed Rule, Exchange and

Insurance Market Standards for 2015 and Beyond at 3 (Apr. 21, 2014), Ex. 26 ("The new budget neutrality policy … would change the basic nature of the risk corridor program retroactively" and "changes the nature of the risk corridor program from one that shares risk between issuers and CMS to one that shares risk between competing issuers.”));

(e) One year later, beginning in March 2014, adopting an about-face position regarding budget neutrality without any rulemaking process and without providing QHPs, including L.A. Care, any explanation or the opportunity for notice and comment; and

(f) Despite repeatedly acknowledging in writing that the Government is obligated to make full risk corridors payments to QHPs, including L.A. Care, taking a contrary position before this Court asserting that the Government has no obligation to pay any risk corridors amounts unless it has sufficient risk corridors collections from QHPs or unless Congress makes new specific appropriations for such purposes.

340. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $13,561,651.72, that the Government concedes it owes L.A. Care for CY 2014. *See* Ex. 51.

341. In the CY 2015 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $8,255,198.64, that the Government concedes it owes L.A. Care for CY 2015. *See* Ex. 47.

342. In the CY 2016 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $3,948,187.97, that the Government

concedes it owes L.A. Care for CY 2016. *See* Ex. 52.

343. The Government was obligated to make full risk corridors payments promptly to L.A. Care for CY 2014 by the end of CY 2015, for CY 2015 by the end of CY 2016, and for CY 2016 by the end of CY 2017, but failed to do so.

344. As a direct and proximate result of the aforementioned breaches of the covenant of good faith and fair dealing, L.A. Care has been damaged in the amount of at least $25,765,038.33, less any prorated payments made by the Government, together with any losses actually sustained as a result of the Government's breach, reliance damages, interest, costs of suit, and such other relief as this Court deems just and proper.

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

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

346. 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.

347. L.A. Care has a vested property interest in its contractual, statutory, and regulatory rights to receive statutorily mandated risk corridors payments for CY 2014, CY 2015, and CY 2016. Plaintiff had a reasonable investment-backed expectation of receiving the full and timely CY 2014, CY 2015, and CY 2016 risk corridors payments payable to it under the statutory and regulatory formula, based on its implied-in-fact contracts with the Government, Section 1342 of the ACA, HHS's implementing regulations (45 C.F.R. § 153.510), and HHS's and CMS's direct public statements.

348. The Government expressly and deliberately interfered with and has deprived L.A. Care of property interests and its reasonable investment-backed expectations to receive full and timely risk corridors payments for CY 2014, CY 2015, and CY 2016. 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." 79 FR 13743, 13829 (Mar. 11, 2014), Ex. 25.

349. On April 11, 2014, HHS and CMS stated for the first time that CY 2014 risk corridors payments would be reduced pro rata to the extent of any shortfall in risk corridors collections. *See* Bulletin, CMS, *Risk Corridors and Budget Neutrality* (Apr. 11, 2014), Ex. 31.

350. Further, in Section 227 of the 2015 Appropriations Act, Section 225 of the 2016 Appropriations Act, and Section 223 of the 2017 Appropriations Act, Congress specifically targeted the Government's existing, mandatory risk corridors payment obligations under Section 1342 of the ACA, expressly limiting the source of funding for the United States' CY 2014, CY 2015, and CY 2016 risk corridors payment obligations owed to a specific small group of insurers, including L.A. Care. *See* 128 Stat. 2491, Ex. 38; 129 Stat. 2624, Ex. 45; 131 Stat. 135, Ex. 49. HHS and CMS continue to refuse to make full and timely risk corridors payments to L.A. Care, and therefore the Government has deprived Plaintiff of the economic benefit and use of such payments.

351. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $13,561,651.72, that the Government concedes it owes L.A. Care for CY 2014. *See* Ex. 51.

352. In the CY 2015 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $8,255,198.64, that the Government

concedes it owes L.A. Care for CY 2015. *See* Ex. 47.

353. In the CY 2016 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $3,948,187.97, that the Government concedes it owes L.A. Care for CY 2016. *See* Ex. 52.

354. The Government was obligated to make full risk corridors payments promptly to L.A. Care for CY 2014 by the end of CY 2015, for CY 2015 by the end of CY 2016, and for CY 2016 by the end of CY 2017, but failed to do so.

355. The Government's action in withholding, with no legitimate governmental purpose, the full and timely CY 2014, CY 2015, and CY 2016 risk corridors payments owed to L.A. Care 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.

356. L.A. Care is entitled to receive just compensation for the United States' taking of its property in the amount of at least $25,765,038.33, less any prorated payments made by the Government, together with interest, costs of suit, and such other relief as this Court deems just and proper.

COST-SHARING REDUCTION COUNTS

COUNT V
Violation of Federal Statute and Regulation

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

358. Section 1402(c)(3)(A) of the ACA mandates compensation, expressly stating that "the [HHS] Secretary shall make periodic and timely payments to [QHPs] equal to the value of the [CSR discounts]" that QHPs provide to eligible customers. 42 U.S.C. § 18071(c)(3)(A).

359. Section 1412(c)(3) of the ACA likewise mandates compensation, expressly

stating that the "Treasury [Secretary] shall make such advance [CSR] payment [to QHPs] at such time and in such amount as the [HHS] Secretary specifies." 42 U.S.C. § 18082(c)(3).

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

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

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

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

364. L.A. Care has provided CSR discounts to its eligible customers for essential health benefits every month since January 2014.

365. Every month between January 2014 and September 2017, Defendant complied with its obligations and made mandatory monthly advance CSR payments to L.A. Care. *See* 42

U.S.C. § 18071(a).

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

367. Despite the Government's unlawful decision, the Government has continued to acknowledge the amount of advance CSR payments it owes to L.A. Care each month, in monthly payment reports sent to L.A. Care starting in October 2017.

368. Congress did not repeal, amend or otherwise abrogate the statutory obligation created by Sections 1402 and 1412 to make full and timely advance CSR payments to QHPs, including L.A. Care, that provide CSR discounts to their eligible customers for essential health benefits.

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

370. As a result of the United States' violation of Sections 1402(c)(3)(A) and 1412(c)(3) of the ACA and 45 C.F.R. § 156.430(a) and (e)(1), L.A. Care has been damaged in the amount of at least $5,969,171.49 on this Complaint's filing date, together with interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT VI
Breach of Implied-In-Fact Contract

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

372. The Government knowingly and voluntarily entered into valid implied-in-fact contracts with L.A. Care regarding the Government's obligation to make full and timely advance CSR payments to L.A. Care in exchange for Plaintiff's voluntary agreement to participate as a QHP in the California ACA Exchange and undertake the obligations of a QHP including, among other things, providing CSR discounts to L.A. Care's eligible customers.

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

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

375. The Government provided in Sections 1402 and 1412 of the ACA a program that offered full reimbursement in advance of L.A. Care's actual costs in providing CSR discounts to its eligible customers in return for L.A. Care's voluntary performance in the form of an actual undertaking and gave HHS no discretion to decide whether or not to pay eligible QHPs that

agreed to participate the specific amount of CSR discounts that they provide to eligible customers.

376. L.A. Care accepted the Government's offer by developing QHPs that complied with the ACA's requirements, agreeing to become a QHP and perform as a QHP on the ACA Exchange in California, and providing CSR discounts to L.A. Care's eligible customers.

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

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

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

380. The Government's agreement to make full and timely advance CSR payments was a significant factor material to L.A. Care's agreement to become a QHP and participate in the California ACA Exchange.

381. L.A. Care, in turn, provided a real benefit to the Government by agreeing to

become a QHP in California, and to offer affordable health insurance on and to participate in the ACA Exchange. Without sufficient health insurers voluntarily agreeing to participate in the new ACA Exchanges, and providing CSR discounts to eligible enrollees, the ACA could not have been implemented as intended.

382. L.A. Care satisfied and complied with its obligations and/or conditions which existed under the implied-in fact contracts.

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

384. As U.S. Attorney General Sessions acknowledged, Section 1412 "***authorizes*** the federal government to make payments directly to insurers to offset the lost revenue these [CSR] reductions cause." Letter from Jefferson B. Sessions III, U.S. Attorney General, to Steven Mnuchin, Secretary of the Treasury & Don Wright, HHS Acting Secretary (Oct. 11, 2017) (citing ACA § 1412(c)(3)) (emphasis added), Ex. 67. The Secretaries of the Treasury and HHS were therefore authorized by law under the ACA to make the Government's advance CSR payments to L.A. Care.

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

386. L.A. Care has not received any monthly advance CSR payments from Defendant since October 2017 as a result of the Government's unlawful decision on October 12, 2017, to

breach its obligations under the implied-in-fact contracts and stop making monthly advance CSR payments to L.A. Care and other QHPs.

387. Despite the Government's unlawful decision, the Government has continued to acknowledge the amount of advance CSR payments it owes to L.A. Care each month, in monthly payment reports sent to L.A. Care starting in October 2017.

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

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

390. As a result of the United States' material breaches of its implied-in-fact contracts that it entered into with L.A. Care regarding advance CSR payments, L.A. Care has been damaged in the amount of at least $5,969,171.49 on this Complaint's filing date, together with any losses actually sustained as a result of the Government's breach, reliance damages, interest, costs of suit, and such other relief as this Court deems just and proper.

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

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

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

393. L.A. Care has vested property interests in its contractual, statutory, and regulatory rights to receive mandatory advance CSR payments from Defendant. L.A. Care had a reasonable investment-backed expectation of receiving the full and timely advance CSR payments payable to it under the statutory and regulatory formula, based on its implied-in-fact contracts with the Government, Sections 1402 and 1412 of the ACA, HHS's implementing regulations (45 C.F.R. § 156.430), and HHS's and CMS's direct public statements.

394. The Government has expressly and deliberately interfered with and deprived L.A. Care of Plaintiff's property interests and its reasonable investment-backed expectations to receive full and timely advance CSR payments since October 12, 2017, when HHS announced, in direct contravention of Sections 1402 and 1412 of the ACA, 45 C.F.R. § 156.430, its previous public statements, its contracts with L.A. Care, and its course of dealing and course of performance for the previous 45 months, that it would stop making advance CSR payments to QHPs.

395. This announcement was preceded and followed by the President of the United States' statements on Twitter deriding the advance CSR payments that QHPs had been receiving as reimbursement for the CSR discounts that QHPs were providing to their eligible customers, pursuant to the Government's and QHPs' obligations, and expressing the Government's intent to "***hurt the insurance companies***" by refusing to make advance CSR payments. Donald J. Trump (@realDonaldTrump), Twitter (July 31, 2017, 5:16 AM), https://twitter.com/realdonaldtrump/status/891996053611917312 (emphasis added), Ex. 70; *see also* Exs. 68-69 & 71-74 (additional relevant Twitter statements by President Trump from April 26,2017 to October 18, 2017).

396. The Government considers Twitter statements by the President of the United

States to be "official statements" of the United States. *See, e.g.*, Elizabeth Landers, *White House: Trump's tweets are 'official statements,'* CNN, June 6, 2017, attached hereto at Exhibit 79 ("The President is the President of the United States, so they're considered official statements by the President of the United States.").

397. The Government's official policy as stated by the President's tweets specifically targeted the Government's existing, mandatory advance CSR payment obligations as established in Sections 1402 and 1412 of the ACA and unlawfully halted the United States' advance CSR payment obligations owed to a specific small group of insurers, including L.A. Care, with the express intent to "***hurt the insurance companies***." HHS, CMS and Treasury continue to refuse to make the Government's full and timely advance CSR payments, causing money damages to L.A. Care and other QHPs, and therefore the Government has deprived L.A. Care of the economic benefit and use of such payments.

398. Despite the Government's unlawful decision, the Government has continued to acknowledge the amount of advance CSR payments it owes to L.A. Care each month, in monthly payment reports sent to L.A. Care starting in October 2017.

399. The Government's action in withholding, with no legitimate governmental purpose, the full and timely advance CSR payments owed to L.A. Care since October 2017 constitutes a deprivation and taking of Plaintiff's property interests and requires payment to L.A. Care of just compensation under the Fifth Amendment of the U.S. Constitution.

400. L.A. Care is entitled to receive just compensation for the United States' taking of its property in the amount of at least $5,969,171.49 on this Complaint's filing date, together with interest, costs of suit, and such other relief as this Court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against the Defendant, the United States of America, as follows:

(1) For Count I, awarding damages sustained by Plaintiff, in the amount of at least $25,765,038.33, subject to proof at trial, less any prorated risk corridors payments made by the Government, as a result of the Defendant's violation of Section 1342(b)(1) of the ACA and of 45 C.F.R. § 153.510(b) regarding the CY 2014, CY 2015 and/or CY 2016 risk corridors payments;

(2) For Count II, awarding damages sustained by Plaintiff, in the amount of at least $25,765,038.33, subject to proof at trial, less any prorated risk corridors payments made by the Government, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's breaches of its implied-in-fact contracts with Plaintiff regarding the CY 2014, CY 2015 and/or CY 2016 risk corridors payments;

(3) For Count III, awarding damages sustained by Plaintiff, in the amount of at least $25,765,038.33, subject to proof at trial, less any prorated risk corridors payments made by the Government, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's breaches of the implied covenant of good faith and fair dealing that exists in the implied-in-fact contracts regarding the CY 2014, CY 2015, and/or CY 2016 risk corridors payments;

(4) For Count IV, awarding damages sustained by Plaintiff, in the amount of at least $25,765,038.33, subject to proof at trial, less any prorated risk corridors payments made by the Government, as a result of the Defendant's taking of Plaintiff's property without just compensation in violation of the Fifth Amendment to the U.S. Constitution regarding the CY 2014, CY 2015, and/or CY 2016 risk corridors payments;

(5) For Count V, awarding damages sustained by Plaintiff, in the amount of at least $5,969,171.49, subject to proof at trial, as a result of the Defendant's violation of Sections 1402 and 1412 of the ACA and of 45 C.F.R. § 156.430 regarding the advance CSR payments owed to Plaintiff from October 12, 2017 to this Complaint's filing date;

(6) For Count VI, awarding damages sustained by Plaintiff, in the amount of at least $5,969,171.49, subject to proof at trial, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's breaches of its implied-in-fact contracts with Plaintiff regarding the advance CSR payments owed to Plaintiff from October 12, 2017 to this Complaint's filing date;

(7) For Count VII, awarding damages sustained by Plaintiff, in the amount of at least $5,969,171.49, subject to proof at trial, as a result of the Defendant's taking of the Plaintiff's property without just compensation in violation of the Fifth Amendment to the U.S. Constitution regarding the advance CSR payments owed to Plaintiff from October 12, 2017 to this Complaint's filing date;

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

(9) Awarding all available attorneys' fees and costs to Plaintiff; and

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

Dated: February 8, 2018

Respectfully Submitted,

s/ Lawrence S. Sher

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2018, a copy of the foregoing Amended Complaint and accompanying Exhibits were filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing with be sent to all parties by operation of the Court's ECF system.

s/ Lawrence S. Sher
Lawrence S. Sher
Counsel for Plaintiff