IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

No. 16-651 C

COMPLAINT

Plaintiff Blue Cross and Blue Shield of North Carolina ("Plaintiff" or "BCBSNC"), by and through its undersigned counsel, brings this action against Defendant, the United States of America ("Defendant," "United States," or "Government"), and alleges the following:

INTRODUCTION

1. BCBSNC brings this action to recover damages owed by Defendant for violations of the mandatory risk corridor payment obligations prescribed in Section 1342 of the Patient Protection and Affordable Care Act ("ACA"), and its implementing federal regulations, as well as Defendant's breaches of its risk corridor payment obligations under express or implied-in-fact contracts, Defendant's breaches of the covenant of good faith and fair dealing implied in Defendant's contracts with BCBSNC, and Defendant's taking of Plaintiff's property without just compensation in violation of the Fifth Amendment of the U.S. Constitution.

2. Congress's enactment in 2010 of the ACA marked a major reform in the United States health care market.

3. The market reform extended guaranteed availability of health care to all Americans, and prohibited health insurers from using factors such as health status, medical

history, gender, and industry of employment to set premium rates or deny coverage.

4. The ACA introduced scores of previously uninsured or underinsured citizens into the health care marketplace, creating great uncertainty to health insurers, including Plaintiff, 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.

5. Congress, recognizing such uncertainty for health insurers, included three premium-stabilization programs in the ACA to help protect health insurers against risk selection and market uncertainty, including the temporary risk corridors program, which mandated that health insurers be paid annual risk corridor payments based on a statutorily prescribed formula to provide health insurers with stability as insurance market reforms began.

6. Under the statutory parameters of the risk corridors program, Qualified Health Plans ("QHPs") – such as Plaintiff – and the federal government share in the risk associated with the new marketplace's uncertainty for each of the temporary program's three years: 2014, 2015 and 2016. If the amount a QHP collects in premiums in any one of these years exceeds its medical expenses by a certain target amount, the QHP will make a payment to the Government. If annual premiums fall short of this target, however, Congress required the Government to make risk corridor payments to the QHP under a formula prescribed in Section 1342.

7. The temporary risk corridors program was designed to ease the transition between the old and new health insurance marketplaces and help stabilize premiums for consumers, and was modeled on a similar program in Medicare Part D signed into law by President George W. Bush.

8. The United States has specifically admitted in writing its statutory and regulatory obligations to pay the full amount of risk corridor payments owed to BCBSNC for calendar year

2014 ("CY 2014"), but Defendant has failed to pay the full amount due. Instead, the Government arbitrarily has paid Plaintiff only a pro-rata share – less than 12.6% – of the total amount due, asserting that full payment to BCBSNC is limited by available appropriations, even though no such limits appear anywhere in the ACA or its implementing regulations or in BCBSNC's contracts with the Government.

9. This action seeks damages from the Government of at least $147,474,968.35, less any prorated payments made by the Government, which represents the amount of risk corridor payments owed to Plaintiff for CY 2014.

10. Should this Court find that the United States failed to make full and timely CY 2014 risk corridor payments to BCBSNC in violation of Defendant's statutory, regulatory and/or contractual obligations, and/or Plaintiff's constitutional rights under the Fifth Amendment, then Plaintiff also seeks declaratory relief from the Court regarding the Government's obligation to make full and timely risk corridor payments for CY 2015 and CY 2016, in accordance with the Defendant's legal obligations.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this action and venue is proper in this Court pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), because Plaintiff brings claims for damages over $10,000 against the United States founded upon the Government's violations of a money-mandating Act of Congress, a money-mandating regulation of an executive department, an express contract and/or an implied-in-fact contract with the United States, and a taking of Plaintiff's property in violation of the Fifth Amendment of the Constitution.

12. The actions and/or decisions of the Department of Health and Human Services ("HHS") and the Centers for Medicare & Medicaid Services ("CMS") at issue in this lawsuit

were conducted on behalf of the Defendant United States within the District of Columbia.

PARTIES

13. Plaintiff BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA ("BCBSNC"), an independent licensee of the Blue Cross and Blue Shield Association, is a fully taxed, not-for-profit North Carolina company with headquarters located in Durham, North Carolina, serving nearly 3.9 million customers. BCBSNC is a QHP issuer on the North Carolina Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

14. Defendant is THE UNITED STATES OF AMERICA. The Department of Health and Human Services ("HHS") and the Centers for Medicare & Medicaid Services ("CMS") are agencies of the Defendant United States of America.

FACTUAL ALLEGATIONS

Congress Enacts the Patient Protection and Affordable Care Act

15. In 2010, Congress enacted the ACA, Public Law 111-148, 124 Stat. 119.

16. The ACA aimed to increase the number of Americans covered by health insurance and decrease the cost of health care in the U.S.

17. 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).

18. The ACA also bars insurers from charging higher premiums on the basis of a person's health. 42 U.S.C. § 300gg.

19. Beginning on January 1, 2014, individuals and small businesses were permitted to purchase private health insurance through competitive statewide marketplaces called Affordable Insurance Exchanges, Health Benefit Exchanges, "Exchanges," or "Marketplaces." ACA

Section 1311 establishes the framework for the Exchanges. *See* 42 U.S.C. § 18031.

20. BCBSNC participated in the ACA Marketplace in North Carolina in CY 2014, CY 2015, and CY 2016.

The ACA's Premium-Stabilization Programs

21. To help protect health insurers against risk selection and market uncertainty, the ACA established three premium-stabilization programs, which began in 2014: temporary reinsurance and risk corridor 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.

22. This action only addresses the temporary, three-year risk corridors program, which began in CY 2014 and expires at the end of CY 2016.

23. Congress's overarching goal of the premium-stabilization programs, along with other Exchange-related provisions and policies in the ACA, 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.

24. 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.

25. The financial protections that Congress provided in the statutory premium-stabilization programs, including the mandatory risk corridor 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.

26. Since the ACA's rollout, BCBSNC has worked in partnership with the federal government to make the ACA Exchanges successful in BCBSNC's market by agreeing to participate as a QHP on the North Carolina ACA Exchanges, rolling out competitive rates, and offering a broad spectrum of health insurance products.

27. In CY 2014, BCBSNC was the largest of the two QHPs participating in the North Carolina ACA market, enrolling the majority of insureds in the North Carolina ACA Exchanges. BCBSNC was the only QHP in CY 2014 to offer ACA health insurance plans in all 100 counties in North Carolina.

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

The ACA's Risk Corridors Program

29. Section 1342 of the ACA expressly requires the Secretary of HHS to establish a temporary risk corridors program that provides for the sharing in gains or losses resulting from inaccurate rate setting from CY 2014 through CY 2016 between the Government and certain participating health plans in the individual and small group markets. *See* 42 U.S.C. § 18062, attached hereto at Exhibit 01.

30. 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. 01 (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").

31. The risk corridors program applies only to participating plans that agreed to accept the responsibilities and obligations of QHPs. All insurers that elect to enter into agreements to become QHPs are required by Section 1342(a) of the ACA to participate in the risk corridors program.

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

33. Congress intended the ACA's temporary risk corridors provision as an important safety valve for consumers and insurers as millions of Americans would transition to new coverage in a brand new Marketplace, protecting against the uncertainty that health insurers, like BCBSNC, would face when estimating enrollments and costs resulting from the market reforms by creating a mechanism for sharing risk between the federal government and issuers of QHPs in each of the first three years of the Marketplace.

BCBSNC is a QHP

34. Based on Congress' statutory commitments set forth in the ACA, including, but not limited to, Section 1342 and the risk corridors program, BCBSNC agreed to become a QHP, and to enter into QHP Agreements with CMS, a federal agency within HHS, which QHP

Agreements are attached to this Complaint at Exhibits 02 to 04.

35. BCBSNC executed a QHP Agreement on September 11, 2013, which is referred to herein as the "CY 2014 QHP Agreement." *See* Exhibit 02.

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

37. Pursuant to Section III.a. of the CY 2014 QHP Agreement, the CY 2014 QHP Agreement had effective dates from the date of execution by the last of the two parties until December 31, 2014, the last day of CY 2014.

38. Section II.d. of the CY 2014 QHP Agreement states that CMS is obligated to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions."

39. On October 30, 2014, BCBSNC executed a QHP Agreement with terms that were materially and substantially identical to those found in the CY 2014 QHP Agreement, which is referred to herein as the "CY 2015 QHP Agreement." *See* Exhibit 03.

40. The CY 2015 QHP Agreement was executed by representatives of the Government who had actual authority to bind the United States, and was entered into with mutual assent and consideration by both parties.

41. Pursuant to Section IV.a. of the CY 2015 QHP Agreement, the CY 2015 QHP Agreement had effective dates from the date of execution by the last of the two parties until December 31, 2015, the last day of CY 2015.

42. On September 24, 2015, BCBSNC executed a QHP Agreement with terms that were materially and substantially identical to those found in the CY 2015 QHP Agreement,

which is referred to herein as the "CY 2016 QHP Agreement." *See* Exhibit 04.

43. The CY 2016 QHP Agreement was executed by representatives of the Government who had actual authority to bind the United States, and was entered into with mutual assent and consideration by both parties.

44. Pursuant to Section IV.a. of the CY 2016 QHP Agreement, the CY 2016 QHP Agreement has effective dates from the date of execution by the last of the two parties until December 31, 2016, the last day of CY 2016.

45. Section III.a. of both the CY 2015 and CY 2016 QHP Agreements states that CMS is obligated to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions."

46. In addition to certifying that BCBSNC is a QHP, each of the CY 2014, CY 2015, and CY 2016 QHP Agreements expressly states that it is governed by United States law and HHS and CMS regulations, stating specifically in Section V.g. that:

> This Agreement will be governed by the laws and common law of the United States of America, including without limitation such regulations as may be promulgated from time to time by the Department of Health and Human Services or any of its constituent agencies, without regard to any conflict of laws statutes or rules.

47. Guidance from HHS and CMS to Issuers on Federally-Facilitated Exchanges ("FFE") and State Partnership Exchanges on April 5, 2013, stated that, "A signed QHP Agreement with CMS will complete the certification process in an FFE or State Partnership Exchange. The Agreement will highlight and memorialize many of the QHP issuer's statutory and regulatory requirements and will serve as an important reminder of the relationship between the QHP issuer and CMS." Letter from CMS to Issuers on Federally-Facilitated Exchanges and State Partnership Exchanges at 23 (Apr. 5, 2013), attached hereto at Exhibit 05.

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

49. Before BCBSNC executed the CY 2014, CY 2015, and CY 2016 QHP Agreements, BCBSNC executed dozens of attestations certifying its compliance with the obligations it was undertaking by agreeing to become, or continuing to act as, a QHP on the ACA Exchanges in North Carolina. Plaintiff submitted its executed attestations for CY 2014 to CMS on April 30, 2013, and Plaintiff's CY 2015 and CY 2016 attestations were submitted via CMS's web-based system on, respectively, June 27, 2014, and May 15, 2015. *See* Federally-facilitated Marketplace Issuer Attestations: Statement of Detailed Attestation Responses (Apr. 30, 2013), attached hereto at Exhibit 06.

50. By executing and submitting its annual attestations to CMS, BCBSNC 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.

51. Through these annual attestations, BCBSNC affirmatively attested that it would

agree to comply with certain "Financial Management" obligations, including, among others:

> 2.) Applicant attests that it will adhere to the risk corridor standards and requirements set by HHS as applicable for:
>
> > a.) risk corridor data standards and annual HHS notice of benefit and payment parameters for the calendar years 2014, 2015, and 2016 (45 CFR 153.510);
> >
> > b.) remit charges to HHS under the circumstances described in 45 CFR 153.510(c).

Federally-facilitated Marketplace Issuer Attestations: Statement of Detailed Attestation Responses at 8-9 (Apr. 30, 2013), Ex. 06.

52. The financial risk sharing that Congress mandated through the risk corridors program was a significant factor in BCBSNC's decision to agree to become a QHP and undertake the many responsibilities and obligations required for BCBSNC to participate in the ACA Exchanges.

The Risk Corridors Payment Methodology

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

54. Congress, through Sections 1342(b)(1) and (2) of the ACA, established the payment methodology and formula for the payments in and the payments out to determine the amounts the QHPs must pay to the Secretary of HHS and the amounts the Secretary must pay to the QHPs if the risk corridors threshold is met.

55. 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. 01.

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

57. Pursuant to the Section 1342(b) formula, each year from CY 2014 through CY

2016, QHPs with allowable costs that are less than 97 percent of the QHP's target amount are 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 will receive payments from HHS to offset a percentage of those losses.

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

59. 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.

60. 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.

61. Alternatively, Section 1342(b)(2) sets forth the amount of 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.

62. 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.

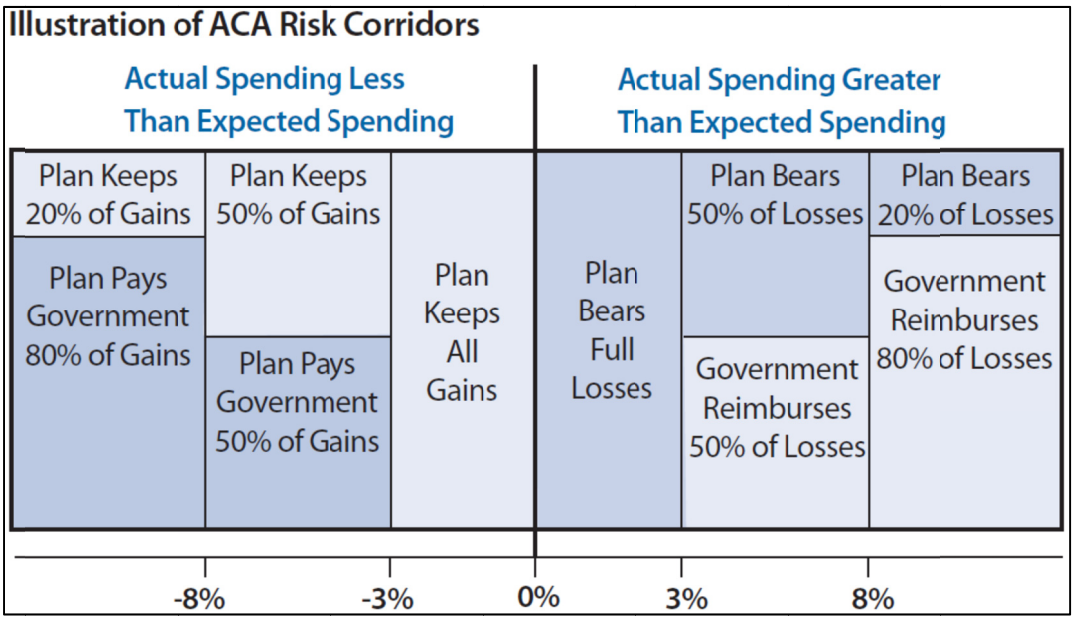
63. Section 1342(b)(2)(B) requires that if a QHP's allowable costs in a calendar year are less than 92 percent of the target amount, then "the plan shall pay to the Secretary [of HHS]"

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.

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

65. 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 corridor payments the Government must pay under different allowable cost, target amount, and gain and loss scenarios. *See* 76 FR 41929, 41943 (July 15, 2011), attached hereto at Exhibit 07.

66. 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 08.

67. As detailed below, in CY 2014, BCBSNC experienced allowable-cost losses of more than three percent of its target amounts in the North Carolina ACA Individual and Small Group Markets, making BCBSNC eligible to receive mandatory risk corridor payments required under Section 1342.

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

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

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

71. Congress has not repealed Section 1342.

72. HHS and CMS thus lack statutory authority to pay anything less than 100% of the risk corridor payments due to Plaintiff for CY 2014.

73. On March 11, 2013, HHS publicly affirmed – while health insurers, including BCBSNC, were contemplating whether to agree to participate in the new Exchanges that were opening on January 1, 2014 – that the risk corridors program is not statutorily required to be budget neutral. HHS further confirmed that, "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 09.

74. In deciding to become a QHP, BCBSNC relied upon HHS's commitments to make full risk corridor payments annually to it as required in Section 1342 of the ACA regardless of whether risk corridor payments to QHPs are actually greater than risk corridor charges collected from QHPs for a particular calendar year.

75. The United States, however, has refused to make full and timely risk corridor payments to BCBSNC for CY 2014 as required by Section 1342.

HHS's Risk Corridors Regulations

76. Congress directed HHS to administer the risk corridors program enacted in Section 1342. *See* 42 U.S.C. § 18062(a), Ex. 01. Accordingly, CMS issued implementing regulations for the risk corridors program at 45 C.F.R. Part 153.

77. In 45 C.F.R. § 153.510, CMS adopted a risk corridors calculation 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.

78. Specifically, 45 C.F.R. § 153.510(b) prescribes the method for determining risk corridor 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.

79. 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.

80. Additionally, 45 C.F.R. § 153.510(d) imposes a 30-day deadline for a QHP to fully remit charge payments to HHS when the QHP's allowable costs in a calendar year are less than 97 percent of the QHP's target amount, specifically stating that:

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

81. CMS did not impose a deadline for HHS to tender full risk corridor payments to QHPs whose allowable costs in a calendar year are greater than 103 percent of the QHP's target amount.

82. During the proposed rulemaking that ultimately resulted in adoption of the 30-day charge-remittance deadline for QHPs at 45 C.F.R. § 153.510(d), however, CMS and HHS stated that the deadline for the Government's payment of risk corridor 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. 07; 77 FR 17219, 17238 (Mar. 23, 2012), attached hereto at Exhibit 11.

83. On July 15, 2011, CMS and HHS printed the following in its proposed rule in the Federal Register:

> 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. 07.

84. On March 23, 2012, CMS and HHS printed the following in its final rule in the Federal Register:

> 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*.

77 FR 17219, 17238 (Mar. 23, 2012), Ex. 11 (emphasis added).

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

86. BCBSNC relied upon these statements by HHS and CMS in the Federal Register in deciding to agree to become a QHP in North Carolina and accept the obligations and responsibilities of a QHP, believing that the Government would pay the full risk corridor payments owed to it within 30 days after it had been determined that Plaintiff experienced losses sufficient to qualify for risk corridor payments under Section 1342 of the ACA and 45 C.F.R. § 153.510.

87. The United States should have paid BCBSNC the full CY 2014 risk corridor payments due by the end of CY 2015, but failed to do so.

88. The United States has failed or refused to make full and timely risk corridor payments to BCBSNC for CY 2014 as required under Section 1342 of the ACA and 45 C.F.R. § 153.510.

HHS and CMS's Recognition of Risk Corridors Payment Obligations

89. Since Congress's enactment of the ACA in 2010, HHS and CMS have repeatedly publicly acknowledged and confirmed to BCBSNC and other QHPs their statutory and regulatory obligations to make full and timely risk corridor payments to qualifying QHPs.

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

91. BCBSNC relied on these public statements by HHS and CMS to assume and continue its QHP status, including its continued participation in the North Carolina ACA Exchanges.

92. On July 11, 2011, HHS issued a fact sheet on HealthCare.gov, "Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment," stating that under the risk corridors program, "qualified health plan issuers with costs greater than three percent of cost projections will receive payments from HHS to offset a percentage of those losses." HealthCare.gov, "Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment" (July 11, 2011), attached hereto at Exhibit 12.

93. 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 corridor payments, HHS stated that "QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers." 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 11.

94. 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, "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. 09.

95. In September 2013, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, BCBSNC executed the CY 2014 QHP Agreement and became a QHP. *See* Ex. 02.

96. 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. Schulz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014), attached hereto at Exhibit 13.

97. 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 14.

98. In October 2014, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, BCBSNC executed the CY 2015 QHP

Agreement. *See* Ex. 03.

99. On February 27, 2015, HHS's implementation of a final rule regarding HHS Notice of Benefit and Payment Parameters for 2016 (80 FR 10749), further confirmed that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers." 80 FR 10749, 10779 (Feb. 27, 2015), attached hereto at Exhibit 15.

100. 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 16.

101. In September 2015, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, BCBSNC executed the CY 2016 QHP Agreement. *See* Ex. 04.

102. 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." Bulletin, CMS, "Risk Corridors Payments for the 2014 Benefit Year" (Nov. 19, 2015), attached hereto at Exhibit 17.

103. HHS and CMS's direct statements to BCBSNC also have unequivocally confirmed the agencies' position that risk corridor payments owed to Plaintiff are a binding obligation of the United States.

104. CMS's letter to BCBSNC on November 2, 2015 stated, "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, to J. Bradley Wilson, President and CEO,

BCBSNC (Nov. 2, 2015) (emphasis added), attached hereto at Exhibit 18.

105. Moreover, CMS stated in an email transmitting its November 2, 2015 letter to BCBSNC that the "letter from CMS reiterat[es] that risk corridors payments *are an obligation of the U.S. Government*." Email from Counihan, CMS, to Wilson, BCBSNC (Nov. 2, 2015) (emphasis added), Ex. 18.

The United States' Failure to Honor its Obligations

106. Beginning in 2014, after BCBSNC (which had executed the CY 2014 QHP Agreement in September 2013) had already agreed to participate in the CY 2014 North Carolina ACA Exchanges in reliance upon the Government's risk corridor payment obligations, the Government announced that the United States would not honor those payment obligations.

107. On March 11, 2014, HHS stated in the Federal Register that "HHS intends to implement this [risk corridors] program in a budget neutral manner." 79 FR 13743, 13829 (Mar. 11, 2014), Exhibit 19.

108. This announcement was inconsistent with 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. 09.

109. On April 11, 2014, HHS and CMS issued a bulletin entitled "Risk Corridors and Budget Neutrality," which contained HHS and CMS's statement 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 20.

110. The bulletin of April 11, 2014, was the first instance in which HHS and CMS publicly suggested that risk corridor charges collected from QHPs would be less than the Government's full mandatory risk corridor payment obligations owed to QHPs.

111. 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. 19.

112. On December 16, 2014, 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.

113. 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 21.

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

115. Congress's failure to appropriate sufficient funds for risk corridor payments due for CY 2014, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridor payments to QHPs, including Plaintiff.

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

> Based on current data from QHP issuers' risk corridors submissions, issuers will pay $362 million in risk corridors charges, and have submitted for $2.87 billion in risk corridors payments for 2014. **At this time, assuming full collections of risk corridors charges, this will result in a proration rate of 12.6 percent.**

Bulletin, CMS, "Risk Corridors Payment Proration Rate for 2014" (Oct. 1, 2015), attached hereto at Exhibit 22.

117. 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 corridor payments to QHPs starting in December 2015. *See id.*

118. HHS and CMS also advised BCBSNC by letter on October 1, 2015, that the Government "will not know the total loss or gain for the [temporary risk corridors] program until the fall of 2017 …. In the event of a shortfall for the 2016 program year, HHS will explore other

sources of funding for risk corridors payments, subject to the availability of appropriations. This includes working with Congress on the necessary funding for outstanding risk corridors payments." Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to J. Bradley Wilson, President and CEO, BCBSNC (Oct. 1, 2015).

119. More recently, on April 1, 2016, CMS reaffirmed in a letter to another QHP that – although "remaining risk corridor claims will be paid" – the amounts owed would be delayed and contingent upon the Government's receipt of sufficient risk corridor charges/collections for CY 2015 and/or CY 2016. Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to Highmark Health (Apr. 1, 2016), attached hereto at Exhibit 23. The Government has thus left BCBSNC, and other QHPs owed past-due risk corridor payments, to guess when—if ever—the United States will make the CY 2014 risk corridor payments owed to Plaintiff.

120. HHS and CMS failed to provide Plaintiff with any statutory authority for their unilateral decision to make only partial, prorated risk corridor payments for CY 2014, and to withhold delivery of full risk corridor payments for CY 2014 beyond 2015.

121. Recognizing that the United States was acting in contravention of its statutory and regulatory payment obligations, on November 2, 2015, HHS and CMS sent an email to Mr. Wilson expressly "reiterating that risk corridors payments are an obligation of the U.S. Government," which also included as an attachment a letter to Mr. Wilson stating that:

> 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, and 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.

Email and Letter from Counihan, CMS, to Wilson, BCBSNC (Nov. 2, 2015), Ex. 18.

122. HHS and CMS made the same acknowledgement in a public bulletin on November 19, 2015, regarding CY 2014 risk corridor payments:

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

Bulletin, CMS, "Risk Corridors Payments for the 2014 Benefit Year" (Nov. 19, 2015), Ex. 17.

123. The Government's written acknowledgement of its risk corridors payment obligation for CY 2014, however, is an insufficient substitute for full and timely payment of the amounts owed as required by statute, regulation, contract, and HHS and CMS's previous statements.

124. On December 18, 2015, Congress enacted the Omnibus appropriations bill for fiscal year 2016, the "Consolidated Appropriations Act, 2016" (the "2016 Appropriations Act"). Pub. L. 114-113.

125. In the 2016 Appropriations Act, Congress again specifically targeted the Government's existing, mandatory risk corridor 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 24.

126. Again, Section 1342(b)(1) of Public Law 111-148 is the ACA's prescribed

methodology for the Government's mandatory risk corridor payments to QHPs.

127. Congress's failure to appropriate sufficient funds for risk corridor payments due for CY 2014 and CY 2015, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridor payments to QHPs, including Plaintiff.

BCBSNC's Risk Corridors Payment Amounts for CY 2014

128. In a report released on November 19, 2015, HHS and CMS publicly announced QHPs' risk corridor 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 25.

129. BCBSNC's losses in the ACA North Carolina Individual Market for CY 2014 resulted in the Government being required to pay BCBSNC a risk corridors payment of $147,421,876.38. *See* CY 2014 Risk Corridors Report at Table 34 – North Carolina, Ex. 25.

130. The Government announced, however, that it will pay BCBSNC a prorated amount of only $18,601,495.60 for BCBSNC's losses in the ACA North Carolina Individual Market for CY 2014. *See id.*

131. BCBSNC's losses in the ACA North Carolina Small Group Market for CY 2014 resulted in the Government being required to pay BCBSNC a risk corridors payment of $53,091.97. *See id.*

132. The Government announced, however, that it will pay BCBSNC a prorated amount of only $6,699.07 for BCBSNC's losses in the ACA North Carolina Small Group Market

for CY 2014. *See id.*

133. Unlike some other QHPs, BCBSNC did not have gains in the ACA Individual or Small Group Markets for CY 2014 that resulted in BCBSNC being required to remit risk corridors charges to the Secretary of HHS. *See generally* CY 2014 Risk Corridors Report, Ex. 25.

134. Had BCBSNC been required to remit a risk corridors charge to the Secretary of HHS, then BCBSNC would have been required to remit 100% of the amount of the charge to HHS before the close of calendar year 2015, as it had affirmatively attested it would do. *See id.*; Federally-facilitated Marketplace Issuer Attestations: Statement of Detailed Attestation Responses at 8-9 (Apr. 30, 2013), Ex. 06.

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

Plaintiff	State / Market	Risk Corridor Amount	Prorated Amount	Percent Pro Rata
BCBSNC	NC / Individual	$147,421,876.38	$18,601,495.60	12.6%
BCBSNC	NC / Small Group	$53,091.97	$6,699.07	12.6%

136. In total, the Government is required to pay BCBSNC risk corridor payments for CY 2014 of $147,474,968.35, but the Government announced that it will only make prorated payments to Plaintiff equal to 12.6% of the amounts owed ($18,608,194.67).

137. Had BCBSNC been required to remit a risk corridors charge to the Secretary of HHS, then BCBSNC would have been required to pay the Government 100% of its CY 2014 North Carolina Individual or Small Group market risk corridor charges – not some unilaterally determined fraction thereof – and to do so promptly. BCBSNC was ready, willing, and able to satisfy this obligation to which it had attested, had BCBSNC been required to do so.

138. The Government made some prorated risk corridor payments to Plaintiff on

December 21, 2015, January 8, 2016, February 13, 2016, and March 11, 2016, totaling $18,081,507.13, as of the date of the filing of this Complaint. This amount represents only approximately 12.26% of CY 2014 risk corridor payments that the Government owes to Plaintiff — even less than the 12.6% pro-rata amount that the Government stated it would pay BCBSNC for CY 2014 risk corridor payments.

139. HHS lacks the authority, under statute, regulation or contract, to unilaterally withhold full and timely CY 2014 risk corridor payments from QHPs such as BCBSNC.

Forecast Risk Corridors Payment and Charge Amounts for CY 2015

140. Plaintiff anticipates that the United States will fail to make full and timely risk corridor payments to QHPs for CY 2015.

141. In the 2016 Appropriations Act, Congress again specifically withheld appropriations from three large funding sources for the Government's CY 2015 risk corridor payments. *See* 129 Stat. 2624, Ex. 24.

142. HHS and CMS have repeatedly announced that CY 2015 risk corridor collections will first be paid for the 87.4% of CY 2014 risk corridor payments that remain due and owing to QHPs, as a result of the Government's failure to provide full and timely CY 2014 risk corridor payments. *See* Bulletin, CMS, "Risk Corridors and Budget Neutrality" (Apr. 11, 2014), Ex. 20; 79 FR 30239, 30260 (May 27, 2014), attached hereto at Exhibit 26 ("[I]f risk corridors collections in the first or second year are insufficient to make risk corridors payments as prescribed by the regulations, risk corridors collections received for the next year will first be used to pay off the payment reductions issuers experienced in the previous year in a proportional manner, up to the point where issuers are reimbursed in full for the previous year, and remaining funds will then be used to fund current year payments.").

143. Standard & Poor's Ratings Services predicted on November 5, 2015, that "the 2015 risk corridor [will] be significantly underfunded if external funding is not added to the risk corridor funds. We estimate that the amount of underfunding in 2015 could be close to what it was for 2014. In addition, the 2015 corridor will not have adequate funds to cover the 2014 deficit." Standard & Poor's Ratings Services, The ACA Risk Corridor Will Not Stabilize The U.S. Health Insurance Marketplace In 2015 (Nov. 5, 2015), attached hereto at Exhibit 27.

144. BCBSNC estimates that the Government will owe it mandatory risk corridor payments in excess of $175 million for CY 2015.

145. The Government's official announcement regarding CY 2015 risk corridors payment and charge amounts is anticipated to be made in the Fall of 2016, after HHS and CMS collect and analyze the relevant data from QHPs.

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

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

147. On March 17, 2016, another QHP that is owed risk corridors payments for CY 2014 sent a formal demand letter to HHS and CMS. *See* Letter from Highmark to HHS and CMS (March 17, 2016), attached hereto at Exhibit 28.

148. The Government responded to the QHP's March 17, 2016 demand letter on April 1, 2016, affirming that "2014 risk corridor payments … will be paid," but repeating the Government's plan to make such payments out of CY 2015 risk corridor collections, and if

necessary, CY 2016 collections – a position that is without support in Section 1342 or its implementing regulations. Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to Highmark Health (Apr. 1, 2016) ("Response Letter"), Ex. 23.

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

150. Indeed, Section 1342(b)(1) provides that the Secretary "shall pay to the plan" a certain amount if the plan's allowable costs "for any plan year" exceed the targeted amount by a certain threshold. 42 U.S.C. § 18062(b)(1), Ex. 01.

151. Confirming that HHS and CMS interpreted their risk corridors payment obligation to be an annual one for each of the three years of the temporary program, CMS officially booked its CY 2014 risk corridor shortfall obligation amount as a FY 2015 obligation. *See, e.g.*, Bulletin, CMS, "Risk Corridors Payments for the 2014 Benefit Year" (Nov. 19, 2015), Ex. 17 ("HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers, and HHS is recording those amounts that remain unpaid following our 12.6% payment this winter as fiscal year 2015 obligation of the United States Government for which full payment is required.").

152. The Government's Response Letter of April 1, 2016, states Defendant's final position regarding its refusal to fully and timely pay risk corridor payments owed for CY 2014 to QHPs, including BCBSNC. *See* Ex. 23.

153. To the extent required, Plaintiff has exhausted its non-judicial avenues to remedy

the Government's failure to provide the full and timely mandated risk corridor payments for CY 2014 required by statute, regulation and contract.

COUNT I
Violation of Federal Statute and Regulation

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

155. Section 1342(b)(1) of the ACA mandates compensation, expressly stating that the Secretary of HHS "shall pay" risk corridor payments to QHPs in accordance with the payment formula set forth in the statute.

156. HHS and CMS's implementing regulation at 45 C.F.R. § 153.510(b) also mandates compensation, expressly stating that HHS "will pay" risk corridor 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.

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

158. HHS and CMS's statements in the Federal Register on July 15, 2011, and March 23, 2012, state that risk corridor "payment deadlines should be the same for HHS and QHP issuers." 76 FR 41929, 41943 (July 15, 2011), Ex. 07; 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 11.

159. BCBSNC was a QHP in CY 2014, *see* Ex. 02, and was qualified for and entitled to receive mandated risk corridor payments from the Government.

160. BCBSNC 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 corridor payments from the Government for CY 2014.

161. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $147,474,968.35, that the Government concedes it owes BCBSNC for CY 2014. *See* Ex. 25.

162. The United States has failed to make full and timely risk corridor payments to BCBSNC for CY 2014, despite the Government repeatedly confirming in writing that Section 1342 mandates that the Government make risk corridor payments.

163. Congress's failure to appropriate sufficient funds for risk corridor payments due for CY 2014, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridor payments to QHPs, including Plaintiff.

164. The Government's failure to make full and timely risk corridor payments to BCBSNC for CY 2014 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).

165. As a result of the United States' violation of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b), BCBSNC has been damaged in the amount of at least $147,474,968.35, 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.

COUNT II
Breach of Express Contract

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

167. BCBSNC entered into a valid written QHP Agreement with CMS: the CY 2014 QHP Agreement. *See* Ex. 02.

168. The CY 2014 QHP Agreement was executed by representatives of the

Government who had actual authority to bind the United States, and was entered into with mutual assent and consideration by both parties.

169. The CY 2014 QHP Agreement obligates CMS to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions." *Id.* at § II.d.

170. By agreeing to become a QHP, BCBSNC agreed to provide health insurance on particular exchanges established under the ACA, and agreed and attested to accept the obligations, responsibilities and conditions the Government imposed on QHPs – 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*. *See id.*; Federally-facilitated Marketplace Issuer Attestations: Statement of Detailed Attestation Responses at 8-9 (Apr. 30, 2013), Ex. 06.

171. BCBSNC satisfied and complied with its obligations and/or conditions under the CY 2014 QHP Agreement.

172. The CY 2014 QHP Agreement provides that it "will be governed by the laws and common law of the United States of America, including without limitation such regulations as may be promulgated from time to time by the Department of Health and Human Services or any of its constituent agencies … ." Ex. 02 at § V.g.

173. The CY 2014 QHP Agreement therefore incorporates the provisions of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) into the CY 2014 QHP Agreement.

174. The Government's statutory and regulatory obligations to make full and timely risk corridor payments were significant factors material to BCBSNC's agreement to enter into the CY 2014 QHP Agreement.

175. The Government's failure to make full and timely risk corridor payments to Plaintiff is a material breach of CMS's obligation to support BCBSNC's functions as a QHP.

176. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $147,474,968.35, that the Government concedes it owes BCBSNC for CY 2014. *See* Ex. 25.

177. Congress's failure to appropriate sufficient funds for risk corridor payments due for CY 2014, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' contractual obligation to make full and timely risk corridor payments to Plaintiff.

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

179. As a result of the United States' material breaches of the CY 2014 QHP Agreement that it entered into with Plaintiff, BCBSNC has been damaged in the amount of at least $147,474,968.35, 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 III
Breach of Implied-In-Fact Contract

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

181. In the alternative, Plaintiff entered into valid implied-in-fact contracts with the Government regarding the Government's obligation to make full and timely risk corridor payments to BCBSNC for CY 2014 in exchange for BCBSNC's agreement to become a QHP and participate in the North Carolina ACA Exchanges.

182. Section 1342 of the ACA, HHS's implementing regulations (45 C.F.R. §

153.510), and HHS's and CMS's admissions regarding their obligation to make risk corridor payments were made by representatives of the Government who had actual authority to bind the United States, and constituted a clear and unambiguous offer by the Government to make full and timely risk corridor payments to health insurers, including Plaintiff, that agreed to participate as QHPs in the CY 2014 ACA Exchanges.

183. BCBSNC accepted the Government's offer by agreeing to become a QHP and to participate in and accept the uncertain risks imposed by the ACA Exchanges.

184. By agreeing to become a QHP, Plaintiff agreed to provide health insurance on particular exchanges established under the ACA, and to accept the 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*.

185. BCBSNC certified its agreement by executing the QHP Agreements and the attestations required by the Government, including the attestations regarding risk corridor payments and charges. *See, e.g.*, Ex. 02; Ex. 06.

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

187. The Government's agreement to make full and timely risk corridor payments was a significant factor material to BCBSNC's agreement to become a QHP and participate in the CY 2014 ACA Exchanges.

188. The parties' agreement is further confirmed by the parties' conduct, performance and statements following Plaintiff's acceptance of the Government's offer, the execution by the parties of the CY 2014 QHP Agreement expressly incorporating "the laws and common law of

the United States of America, including without limitation such regulations as may be promulgated from time to time by the Department of Health and Human Services or any of its constituent agencies," *see* Ex. 02 at § V.g., BCBSNC's execution of attestations including the attestations regarding risk corridor payments and charges, *see* Ex. 06, and the Government's repeated assurances that full and timely risk corridor payments would be made and would not be subject to budget limitations. *See, e.g.*, 78 FR 15409, 15473 (Mar. 11, 2013), Ex. 09.

189. Each of the implied-in-fact contracts were authorized by representatives of the Government who had actual authority to bind the United States, and were entered into with mutual assent and consideration by both parties.

190. The risk corridors program's protection from uncertain risk and new market instability was a real benefit that significantly influenced BCBSNC's decision to agree to become a QHP and participate in the CY 2014 ACA Exchanges.

191. BCBSNC, in turn, provided a real benefit to the Government by agreeing to become a QHP and participate in the CY 2014 ACA Exchanges, despite the uncertain financial risk, and was the only insurer to offer ACA plans in all 100 North Carolina counties.

192. Adequate insurer participation was crucial to the Government's achieving the overarching goal of the CY 2014 ACA Exchange programs: to make affordable health insurance available to individuals who previously did not have access to affordable 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.

193. The Government induced BCBSNC to participate in the CY 2014 ACA Exchanges by including the risk corridors program in Section 1342 of the ACA and its implementing regulations, by which Congress, HHS, and CMS committed to help protect health

insurers financially against risk selection and market uncertainty.

194. The Government repeatedly acknowledged its statutory and regulatory obligations to make full and timely risk corridor payments to qualifying QHPs for CY 2014 through its conduct and statements to the public and to BCBSNC and other similarly situated QHPs, made by representatives of the Government who had actual authority to bind the United States. *See, e.g.*, 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 11; Email and Letter from Counihan, CMS, to Wilson, BCBSNC (Nov. 2, 2015), Ex. 18; Response Letter (Apr. 1, 2016), Ex. 23.

195. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $147,474,968.35, that the Government concedes it owes BCBSNC for CY 2014. *See* Ex. 25.

196. Congress's failure to appropriate sufficient funds for risk corridor payments due for CY 2014, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' contractual obligation to make full and timely risk corridor payments to Plaintiff.

197. The Government's failure to make full and timely CY 2014 risk corridor payments to BCBSNC is a material breach of the implied-in-fact contracts.

198. As a result of the United States' material breaches of its implied-in-fact contract that it entered into with BCBSNC regarding the CY 2014 ACA Exchanges, Plaintiff has been damaged in the amount of at least $147,474,968.35, 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
Breach of Implied Covenant of Good Faith and Fair Dealing

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

200. 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.

201. The express or, alternatively, the implied-in-fact contracts entered into between the United States and Plaintiff regarding the CY 2014 ACA Exchanges created the reasonable expectations for BCBSNC that full and timely CY 2014 risk corridor payments would be paid by the Government to QHPs, just as the Government expected that any CY 2014 risk corridor remittance charges owed would be fully and timely paid by QHPs to the Government.

202. By failing to make full and timely CY 2014 risk corridor payments to BCBSNC, the United States has destroyed Plaintiff's reasonable expectations regarding the fruits of the express or, alternatively, the implied-in-fact contracts, in breach of an implied covenant of good faith and fair dealing existing therein.

203. Despite the Government's failure to honor its contractual obligations, had BCBSNC been required to remit a risk corridors charge to the Government for CY 2014, Plaintiff would have done so in good faith as it had agreed and attested to do.

204. The CY 2014 QHP Agreement allows CMS to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions," but do not define standards for CMS's implementation of the function-supporting systems and processes.

205. Where, as here, an agreement affords CMS the power to make a discretionary decision without defined standards, the duty to act in good faith limits the Government's ability to act capriciously to contravene Plaintiff's reasonable contractual expectations.

206. CMS is afforded discretion in determining the systems and processes that it will implement to support Plaintiff's functions as a QHP.

207. Congress granted HHS with rulemaking authority regarding the risk corridors program in Section 1342(a) of the ACA. HHS and CMS are permitted to establish charge remittance and payment deadlines that support QHP functions. HHS and CMS have an obligation to exercise the discretion afforded to them in good faith, and not arbitrarily, capriciously or in bad faith.

208. 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 corridor charges to the Government, but failing to create a similar deadline for the Government's full payment of risk corridor 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. 11);

(b) Requiring QHPs to fully remit risk corridor charges to the Government, but unilaterally deciding that the Government may make prorated risk corridor payments to QHPs;

(c) In Section 227 of the 2015 Appropriations Act, legislatively targeting and limiting funding sources for CY 2014 risk corridor payments after

BCBSNC had undertaken significant expense in performing its obligations as a QHP in the North Carolina ACA Exchanges, based on the reasonable expectation that the Government would make full and timely risk corridor payments if BCBSNC experienced sufficient losses in CY 2014;

(d) In Section 225 of the 2016 Appropriations Act, legislatively targeting and limiting funding sources for CY 2014 risk corridor payments after BCBSNC had undertaken significant expense in performing its obligations as a QHP in the North Carolina ACA Exchanges, based on the reasonable expectation that the Government would make full and timely risk corridor payments if BCBSNC experienced sufficient losses in CY 2014; and

(e) Making statements regarding risk corridor payments upon which BCBSNC relied to agree to become a QHP and participate in the ACA Exchanges, then depriving BCBSNC of full and timely risk corridor payments after Plaintiff had fulfilled its obligations as a QHP by participating in the North Carolina ACA Exchanges and had suffered losses which the Government had promised would be shared through mandatory risk corridor payments.

209. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $147,474,968.35, that the Government concedes it owes Plaintiff for CY 2014. *See* Ex. 25.

210. As a direct and proximate result of the aforementioned breaches of the covenant of good faith and fair dealing, BCBSNC has been damaged in the amount of at least $147,474,968.35, 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 V
Taking Without Just Compensation
in Violation of the Fifth Amendment to the U.S. Constitution

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

212. 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.

213. BCBSNC has a vested property interest in its contractual, statutory, and regulatory rights to receive statutorily-mandated risk corridor payments for CY 2014. BCBSNC had a reasonable investment-backed expectation of receiving the full and timely CY 2014 risk corridor payments payable to it under the statutory and regulatory formula, based on its QHP Agreement, its implied-in-fact contract 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.

214. The Government expressly and deliberately interfered with and has deprived Plaintiff of property interests and its reasonable investment-backed expectations to receive full and timely CY 2014 risk corridor payments. On March 11, 2014, HHS for the first time announced, in direct contravention of Section 1342 of the ACA, 45 C.F.R. § 153.510(b) and its previous public statements, that it would administer the risk corridors program "in a budget neutral manner." 79 FR 13743, 13829 (Mar. 11, 2014), Ex. 19.

215. On April 11, 2014, HHS and CMS stated for the first time that CY 2014 risk corridor payments would be reduced pro rata to the extent of any shortfall in risk corridor

collections. *See* Bulletin, CMS, "Risk Corridors and Budget Neutrality" (Apr. 11, 2014), Ex. 20.

216. Further, in Section 227 of the 2015 Appropriations Act and Section 225 of the 2016 Appropriations Act, Congress specifically targeted the Government's existing, mandatory risk corridor payment obligations under Section 1342 of the ACA, expressly limiting the source of funding for the United States' CY 2014 risk corridor payment obligations owed to a specific small group of insurers, including BCBSNC. *See* 128 Stat. 2491, Ex. 21; 129 Stat. 2624, Ex. 24. HHS and CMS continue to refuse to make full and timely risk corridor payments to BCBSNC, and therefore the Government has deprived Plaintiff of the economic benefit and use of such payments.

217. The Government's action in withholding, with no legitimate governmental purpose, the full and timely CY 2014 risk corridor payments owed to BCBSNC 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.

218. BCBSNC is entitled to receive just compensation for the United States' taking of its property in the amount of at least $147,474,968.35, 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.

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 $147,474,968.35, subject to proof at trial, less any prorated 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 risk corridor payments;

(2) For Count II, awarding damages sustained by Plaintiff, in the amount of at least $147,474,968.35, subject to proof at trial, less any prorated 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 CY 2014 QHP Agreement regarding the CY 2014 risk corridor payments;

(3) Alternatively, for Count III, awarding damages sustained by Plaintiff, in the amount of at least $147,474,968.35, subject to proof at trial, less any prorated 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 contract with Plaintiff regarding the CY 2014 risk corridor payments;

(4) For Count IV, awarding damages sustained by Plaintiff, in the amount of at least $147,474,968.35, subject to proof at trial, less any prorated 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 CY 2014 QHP Agreement or, alternatively, the implied-in-fact contracts regarding the CY 2014 risk corridor payments;

(5) For Count V, awarding damages sustained by Plaintiff, in the amount of at least $147,474,968.35, subject to proof at trial, less any prorated 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;

(6) Should the Court determine, under any Count, that the Government is liable to Plaintiff for monetary damages for failure to make full and timely risk corridor payments for CY

2014, and thus enter judgment against the United States, Plaintiff further requests that the Court declare, as incidental to that monetary judgment, that based on the Court's legal determinations as to the Government's CY 2014 risk corridor payment obligations, the Government must make full and timely CY 2015 and CY 2016 risk corridor payments to Plaintiff if Plaintiff experiences qualifying losses during those years;

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

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

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

Dated: June 2, 2016

Respectfully Submitted,

s/ Lawrence S. Sher

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