IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LAND OF LINCOLN MUTUAL HEALTH INSURANCE COMPANY,	:	Judge Lettow
Plaintiff,	:	Case No. 16-744C
v.	:	
THE UNITED STATES OF AMERICA,	:	
Defendant.	:	

THE UNITED STATES' OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD ON COUNTS II-V

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INTRODUCTION

The United States opposes Plaintiff Land of Lincoln Mutual Health Insurance Company ("Land of Lincoln")'s Cross-Motion for Judgment on the Administrative Record on counts II-V of its Complaint (the "Second Motion"). Docket No. 29.

In this Second Motion, Land of Lincoln seeks judgment on the Administrative Record on express and implied contract claims and a Fifth Amendment takings claim regarding risk corridors payments. As an initial matter, nothing in the Administrative Record establishes the elements of these claims, and the United States disputes nearly all of Land of Lincoln's allegations underlying these claims. For example, the United States disputes that either party understood or intended that the risk corridors program entailed any contractual obligations, or that Land of Lincoln had an investment-backed expectation that it would receive full, annual risk corridors payments. In short, Land of Lincoln has failed to meet its burden of proof to demonstrate that it is entitled to judgment on any of counts II through V.

Land of Lincoln does not attempt to adduce sufficient evidence in the record to support its contract and takings claims. In its argument asserting entitlement to judgment on counts II through V, Land of Lincoln cites to a total of five places in the Administrative Record: three times to statements by the Department of Health and Human Services ("HHS") in the Federal Register, and twice to letters relating to the availability of appropriations to make risk corridors payments. Second Motion at 34, 36, 45. None of these citations provides any evidence to meet Land of Lincoln's burden of proof on counts II through V.

Judgment on the administrative record is not the appropriate procedural vehicle for deciding breach of contract and takings claims in the posture of this case. To the extent administrative action is before the Court, it is HHS's implementation of a three-year payment

framework and HHS's decision to pro-rate payments in the face of a shortfall in risk corridors collections and congressional restrictions on available appropriated funds to make payments. The claims of contract breach and takings are matters subject to review de novo at the appropriate time and on an appropriate record. The three-year framework is determinative of the Court's jurisdiction over the case, and HHS's decision to make pro-rata risk corridors payments may be relevant to the question of liability on Count I. But there is no administrative action by HHS for the Court to review that bears on the elements Land of Lincoln must prove to be entitled to judgment on counts II through V.

Land of Lincoln filed its Complaint and sought an early status conference. At Land of Lincoln's request and over the United States' objection, this Court entered an expedited schedule for the filing of the Administrative Record and potentially dispositive motions on that Record. Pursuant to that schedule, the United States timely filed its Motion to Dismiss and Motion for Judgment on the Administrative Record on Count I. Docket No. 22. In light of the United States' Motion, the United States is not yet required to answer the Complaint, and given the present posture, no discovery has taken place. The United States disputes the very existence of the contractual obligations alleged in the Complaint and disputes all of the allegations in support of the takings claim. The Administrative Record simply does not contain—and, by its nature, would not be expected to contain—the universe of evidence related to these contract and takings claims, even assuming they have any support. Instead, these claims, if they survive the United States' Motion, necessarily raise fact-bound questions, and the United States is entitled to demand proof of each and every factual allegation Land of Lincoln relies upon to support its claims. Because no such proof is before the Court, Land of Lincoln's Second Motion must be denied.

STATEMENT OF THE CASE[1]

I. Congress Enacted the Temporary Risk Corridors Program As One of Three Programs to Help Stabilize Premiums During the Early Years of the Affordable Care Act

In 2010, Congress enacted the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (March 23, 2010) (the "ACA") establishing many broad-based reforms to health insurance markets. Among the reforms, the Act created Health Benefit Exchanges ("Exchanges"), virtual marketplaces in each state (operated by either the state or the federal government) where individuals and small groups can purchase health insurance coverage. 42 U.S.C. §§ 18031-18041. The ACA implemented a regime of state-by-state, regulated private insurance markets.[2] Contrary to Land of Lincoln's assertion, nothing in its text or legislative history suggests that, as part of its reforms, participating health insurers would become federal contractors providing health coverage for private individuals on the Government's behalf. *See*

[1] On September 23, 2016, the United States moved to dismiss Land of Lincoln's Complaint for lack of jurisdiction and for failure to state a claim and also moved for judgment on the Administrative Record on Count I ("United States' Motion"). Docket No. 22. On October 12, 2016, the United States' filed an opposition to Land of Lincoln's first Motion for Judgment on the Administrative Record ("United States' First Opposition"). Docket No. 30. In both the United States' Motion, at 4-14, and its First Opposition, at 3-9, the United States included a detailed Statement of the Case regarding the factual background of Land of Lincoln's claims. The United States assumes familiarity with the factual background contained in its Motion and First Opposition but reproduces a condensed version of that background here for the Court's convenience.

[2] *See, e.g.*, National Conf. of State Legislatures, 2011-2014 Health Insurance Reform Enacted State Laws Related to the Affordable Care Act (June 17, 2014) ("The 2010 federal Affordable Care Act (ACA) established a series of . . . uniform, 50-state requirements and additional options that build on existing state regulation of health insurance policies."), *available at* http://www.ncsl.org/research/health/health-insurance-reform-state-laws-2013.aspx.

Second Motion at 41 (arguing that, in exchange for "statutory payments," Land of Lincoln "served the population for whom the Government sought to provide health coverage").

All plans offered through an Exchange must be "Qualified Health Plans" ("QHPs"), meaning that they provide "essential health benefits" and comply with other regulatory requirements. *See* 42 U.S.C. § 18021; 45 C.F.R. parts 155 and 156. To ensure that issuers operating on the Exchanges comply with these requirements, Congress required Exchanges to establish annual certification procedures. 42 U.S.C. § 18031(d)(4); 45 C.F.R. part 156. HHS conducts the QHP certification process for Federally-facilitated Exchanges and, as part of this process, requires issuers to execute an agreement known as a "Qualified Health Plan Certification Agreement and Privacy and Security Agreement," or "QHP Agreement." In the QHP Agreement, issuers agree to adhere to privacy and security standards when conducting transactions on the Federally-facilitated Exchange. 45 C.F.R. § 155.260(b)(2); *see, e.g.*, Compl. Exhibits 2-4. State-based Exchanges have their own certification processes, and as a result, many QHPs that participate on the Exchanges, and thus in the risk corridors program, do not sign a QHP Agreement with HHS.[3]

To mitigate the pricing risks and incentives for adverse selection arising from the Act's reforms, the ACA established three premium stabilization programs modeled on similar programs

[3] As set forth in the United States' Motion, the ACA contemplated that states would establish their own Exchanges, 42 U.S.C. § 18031(b)(1), but provided under 42 U.S.C. § 18041(c) that HHS would establish and operate an Exchange on behalf of any state that elected not to do so. The term "Federally-facilitated Exchange" describes "an Exchange established and operated within a State by the Secretary under [42 U.S.C. § 18041(c)]." 45 C.F.R. § 155.20. It does not refer to an Exchange that is operated solely by a state. *See* 45 C.F.R. §§ 155.105, 155.106, 155.200 (distinguishing between federally- and state-operated exchanges). The QHP Agreements make clear that they are entered into by a QHP and HHS "as the Party . . . responsible for the management and oversight of [a] *Federally-facilitated Exchange*," rather than in any capacity applicable to QHPs nationwide. Compl. Exhibit 2 at Preamble (emphasis added).

established under the Medicare Part D Program. Informally known as the "3Rs," these programs began with the 2014 benefit year and consist of a transitional reinsurance program, temporary risk corridors program, and permanent risk adjustment program. *See generally* 42 U.S.C. §§ 18061-18063. As relevant here, section 1342 of the Act directed the Secretary of HHS to "establish and administer a program of risk corridors" under which issuers offering individual and small group QHPs between 2014 and 2016 "shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums." 42 U.S.C. § 18062(a). Because a QHP is defined to include health plans offered outside the Exchanges that are the same or substantially the same as a QHP offered on the Exchanges, a plan need not be sold on an Exchange in order to be subject to the risk corridors program. 45 C.F.R. § 153.500. Thus, all QHP issuers are statutorily required to participate in the risk corridors program.

There are no risk corridors contracts, and a QHP need not have entered into any agreement with HHS to owe risk corridors charges or to receive payments. *See generally* 42 U.S.C. § 18062(a). Instead, HHS administers the risk corridors program solely pursuant to statutory requirements, regulations, and administrative guidance.

II. Since 2014, HHS Has Implemented the Risk Corridors Program in a Budget Neutral Manner, and Congress Has Restricted Risk Corridors Payments

Although Congress expressly appropriated funds in the ACA for many programs and authorized funding for others,[4] Congress did not do so for the risk corridors program. On March 11, 2014, HHS issued a final rule stating that "[w]e intend to implement th[e] [risk corridors] program in a budget neutral manner, and may make future adjustments, either upward or downward to this program . . . to the extent necessary to achieve this goal." HHS Notice of

[4] *See, e.g.*, 42 U.S.C. §§ 18001(g), 18031(a)(1), 18042(g), 18043(c), 18054(i), 18121(b).

Benefit and Payment Parameters for 2015 Final Rule, 79 Fed. Reg. 13,744, 13,787 (Mar. 11, 2014), A.R. 4929; *see also id.* at 13,829 ("HHS intends to implement this program in a budget neutral manner."); Exchange and Insurance Market Standards for 2015 and Beyond Proposed Rule, 79 Fed. Reg. 15,808, 15,822 (Mar. 21, 2014), A.R. 6116 (same).

On April 11, 2014, HHS released guidance explaining in greater detail how it would implement budget neutrality in the event collections in a given year fell short of payments. HHS stated that any shortfall would result in a pro-rata reduction of all payments in that year's payment cycle, with remaining amounts to be paid from collections in the second and (if necessary) third years of the program. A.R. 108-09. HHS reiterated and expanded upon this guidance in final rules issued in May 2014 and February 2015. *See* Exchange and Insurance Market Standards for 2015 and Beyond Final Rule, 79 Fed. Reg. 30,240, 30,260 (May 27, 2014), A.R. 6195; *see also* HHS Notice of Benefit and Payment Parameters for 2016 Final Rule, 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015), A.R. 8153.

In the meantime, Congress took up the issue of funding for the risk corridors program. In the first half of 2014, Members of Congress asked both the Government Accountability Office ("GAO") and HHS for their opinions regarding the availability of appropriations to HHS to make payments to QHPs under the risk corridors program. *See* A.R. 1429, 1482. In response, HHS identified collections from insurance issuers as the only source of funding and explained that such collections could be spent pursuant to a provision of the Centers for Medicare & Medicaid Services ("CMS") Program Management appropriation that appropriated "such sums as may be collected from authorized user fees." A.R. 1366-67. The GAO issued an opinion agreeing with HHS that risk corridors collections could be used to make risk corridors payments under the user fee authority in CMS's Program Management appropriation. *See generally* The Honorable Jeff

Sessions, the Honorable Fred Upton, B-325630 (Comp. Gen.), 2014 WL 4825237 (Sept. 30, 2014) ("*GAO Op.*"). The GAO also looked to whether any other funds were legally available to be spent on the risk corridors program and concluded that, in the annual appropriations law then in effect (the "2014 Spending Law"), a lump sum appropriation of $3.6 billion to be transferred from CMS trust funds to the CMS Program Management account for "other responsibilities of [CMS]" was sufficiently broad to cover risk corridors payments. *Id*. at *3. The GAO also concluded, however, that because the 2014 Spending Law would expire at the end of fiscal year 2014, before risk corridors payments could be made, a similar appropriation would need to be enacted for subsequent fiscal years for the Program Management account to supply a source of funding for the program during those fiscal years. *Id*. at *5.

On December 9, 2014, many months before any payments could be made under the risk corridors program, Congress passed the Consolidated and Further Continuing Appropriations Act, 2015 ("the 2015 Spending Law"). Like the 2014 Spending Law, the 2015 Spending Law provided a lump sum amount for CMS's Program Management account for fiscal year 2015. Pub. L. No. 113-235, div. G, title II. Unlike the 2014 Spending Law, however, a rider to the Law expressly limited the availability of Program Management funds for the risk corridors program, as follows:

> None of the funds made available by this Act from [CMS trust funds], 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).

Id. § 227. The effect of the rider was to limit HHS's budget authority to make risk corridors payments to amounts derived from risk corridors collections.[5] An accompanying Explanatory

[5] This consequence results from the fact that risk corridors collections qualify as "user fees" within the meaning of the CMS Program Management appropriation. As explained in greater detail *infra* at 15, 26, and in the United States' Reply in further support of its Motion [Docket No. 39], at 15-

Statement indicated that the restriction was added "to prevent the CMS Program Management appropriation account from being used to support risk corridors payments." 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014). The Explanatory Statement observed that, "[i]n 2014, HHS issued a regulation stating that the risk corridor program will be budget neutral," and characterized that statement by HHS as "meaning that the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." *Id.*

On December 18, 2015, Congress enacted an identical funding limitation in the annual appropriations act for fiscal year 2016 (the "2016 Spending Law"). Pub. L. No. 114-113, div. H, title II, § 225. The Senate Committee Report to the 2016 Spending Law stated that the funding limitation "requir[es] the administration to operate the Risk Corridor program in a budget neutral manner by prohibiting any funds from the Labor-HHS-Education appropriations bill to be used as payments for the Risk Corridor program." Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 2016, S. Rep. No. 114-74, at 12 (2015).

The Government is currently working under a continuing resolution, which continues the 2016 Spending Law's limitation on risk corridors payments, and that limitation runs until the

18, and the United States' First Opposition, at 26, the Spending Law riders (in conjunction with other principles of federal appropriations law) prohibit risk corridors payments from being made from funds in the CMS Program Management account derived from sources other than risk corridors collections, thus requiring the program to be budget neutral for the years in which those Laws are in effect. Land of Lincoln argues that the Spending Law riders "allowed ongoing use of . . . risk corridors, risk adjustment and reinsurance user fees" to be used for risk corridors payments, Second Motion at 4, but to the extent Land of Lincoln suggests that "user fees" collected under the risk adjustment and reinsurance program exist and can be used for risk corridors payments, that suggestion is contrary to the citations on which Land of Lincoln relies, which constitute the opinions of both HHS and the GAO that risk corridors collections are the only type of user fee available to fund risk corridors payments. *See* Second Motion at 4 (citing A.R. 114-120, 1429, 1482).

earlier of December 9, 2016, or the enactment of a full fiscal year 2017 appropriations act. *See* Pub. L. No. 114-223, div. C (Sept. 29, 2016).

III. HHS Pro-Rated Risk Corridors Payments for 2014 Based on the Amount of Collections; HHS Has Not Yet Announced Charges or Payments for 2015

On October 1, 2015, HHS announced that collections under the risk corridors program for 2014 were expected to total $362 million, while payments calculated totaled $2.87 billion. A.R. 1254. HHS explained that, because payments exceeded charges, it could pay only 12.6% of these payments for benefit year 2014, assuming collection of all charges. *Id.* Shortly thereafter, HHS released guidance explaining that it would make the pro-rated payments in late 2015, with "[t]he remaining 2014 risk corridors payments . . . made from 2015 risk corridors collections, and if necessary, 2016 collections." A.R. 293. HHS has not yet announced the final charge and payment amounts due from and to issuers for benefit year 2015. Issuers were required to submit their benefit year 2015 risk corridors data to HHS by August 1, 2016, 45 C.F.R. § 153.530(d), and HHS expects to begin making payments to issuers from 2015 collections in December 2016. A.R. 1498.[6]

ARGUMENT

I. Counts II though V Cannot Properly Be Considered in a Motion for Judgment on the Administrative Record

As discussed below and in the United States' Motion, at 31-44, counts II through V fail on the merits as a matter of law. But in any event and as an initial matter, a motion for judgment on the administrative record is not the proper vehicle to consider counts II through V.[7] A motion for

[6] On September 9, 2016, HHS announced 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."

[7] As the United States has explained, even before reaching the argument here, the Court lacks

judgment on the administrative record under RCFC 52.1(c) is appropriate only when the matter in dispute is an agency decision and the relevant material is confined to the administrative record. *See, e.g.*, *Holmes v. United States*, 98 Fed. Cl. 767, 780 (2011) (discussing standard for considering motion under RCFC 52.1(c)); *see also Advanced Data Concepts, Inc. v. United States*, 216 F.3d 1054, 1058-59 (Fed. Cir. 2000) (noting that the Court of Federal Claims employs the arbitrary and capricious standard of 5 U.S.C. § 706 when deciding motions for judgment on the administrative record). But for counts II through V, the Court has no agency decision to review. Instead, the fundamental questions, such as whether there was a contract, require the Court to consider more than agency action and the administrative record of that action.

As this Court has held, where a plaintiff brings an administrative review claim in addition to contract claims, and material fact issues exist regarding the elements of those contract claims (as they do here), "materials producible in discovery for the [contract] claim . . . may legitimately be adduced as part of the parties' presentations of evidence . . . whether or not they constitute part of the administrative record." *Montana Fish, Wildlife, & Parks Found., Inc. v. United States*, 91 Fed. Cl. 434, 444 (2010) (citing RCFC 26(b)(1)) (Lettow, J.). Thus, if the Court does not dismiss Counts II through V under RCFC 12(b), the United States has a right to file an answer, and thereafter "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense" *Id.* at 445 n.10 (citing RCFC 26(b)(1)).

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jurisdiction over all of Land of Lincoln's claims, and they are not ripe, because final payments for the 2014 benefit year are not yet due and no payments are due for benefit year 2015. *See, e.g.*, *Roberta B. v. United States*, 61 Fed. Cl. 631, 634 (2004) ("To come within the scope of our general jurisdictional statute . . . a claim must be one for money *presently owing*, that is, money that is claimed to be due from the government *under the terms of a particular statute or regulation*.") (emphasis added). Thus, the Court lacks jurisdiction to grant Land of Lincoln's Second Motion.

Land of Lincoln's Complaint is replete with allegations that have no support in the Administrative Record. For example, Land of Lincoln alleges that it "agreed to become a QHP" "[b]ased on Congress' statutory commitments set forth in the ACA." Compl. ¶ 35. It alleges that "the financial risk sharing that Congress mandated through the risk corridors program was a significant factor in [Land of Lincoln's] decision to agree to become a QHP." Compl. ¶ 55; *see also* Compl. ¶¶ 173, 186. Land of Lincoln asserts that it "relied" on HHS's statements or alleged "commitments" to make full risk corridor payments, *see, e.g.*, Compl. ¶¶ 77, that HHS "intended" for QHPs to "rely" on statements in the Federal Register "in agreeing to become and continue as" QHPs, Compl. ¶¶ 89, 94, and that "[t]he Government induced [Land of Lincoln] to participate in the . . . Exchanges," Compl. ¶ 192. Land of Lincoln repeatedly alleges that the public statements upon which it claims to have relied were made by unnamed "representatives of the Government who had actual authority to bind the United States." *See, e.g.*, Compl. ¶¶ 93, 167, 181, 193. Land of Lincoln does not cite, and the record does not contain, support for these allegations. Land of Lincoln repeats its assertions of reliance and inducement in its first Motion for Judgment and in its Second Motion, but in neither does it identify any evidentiary support for them. *See* Docket No. 20 at 2, 4; Docket No. 29 at 36, 44.

The Administrative Record does not establish, *inter alia*: mutual assent to enter a contract for risk corridors payments, unambiguous terms of any offer to enter such a contract, the extent to which the alleged contracts incorporated the risk corridors program given the status of HHS rulemaking at the time of alleged contract formation, the alleged authority of HHS to enter such contracts, Land of Lincoln's expectation under such contracts, Land of Lincoln's expectation of payment under the statute and regulations, or the effect of HHS's public statements in 2014 and the enactment of the Spending Laws on Land of Lincoln's expectations. Nor does the

Administrative Record contain any evidence that Land of Lincoln complied with the terms of the alleged contracts or whether and in what amount the alleged breach of these contracts damaged Land of Lincoln. Before the Court can enter judgment in Land of Lincoln's favor on any of counts II through V, the United States is entitled to explore whether Land of Lincoln can support its allegations with evidence. For this reason alone, Land of Lincoln's Second Motion should be denied.

II. Land of Lincoln Has Not Met Its Burden On Its Contract Claims

In counts II through IV, Land of Lincoln asserts express contract, implied contract, and good faith and fair dealing claims to collect monies that have not yet been paid to any issuer under HHS's regulatory framework, including a $68.9 million "estimated" claim for 2015. Compl. ¶¶ 135, 137, 143, 165-217. As in any suit for breach of contract, Land of Lincoln bears the burden of proof on whether there was a contract, whether the United States breached, and whether and in what amount Land of Lincoln has been damaged by that breach. *See Stockton East Water Dist. v. United States*, 583 F.3d 1344, 1360 (Fed. Cir. 2009); *T.F. Scholes, Inc. v. United States*, 357 F.2d 963, 971 (Ct. Cl. 1966). The Second Motion must be denied because Land of Lincoln has not met and cannot meet the evidentiary and legal burden necessary to enter judgment in its favor.

A. Land of Lincoln's Express Contract Claim (Count II) Fails

1. The QHP Agreements Do Not Obligate the United States to Make Risk Corridors Payments

Count II asserts that HHS's failure to make full risk corridors payments on an annual basis constitutes a breach of the QHP Agreements. *See generally* Compl. ¶¶ 165-178. The QHP Agreements do not require the United States to make risk corridors payments. Rather, the QHP Agreements merely govern a QHP's participation on a Federally-facilitated Exchange and consist primarily of adherence with privacy, security, and electronic transmission standards. *See generally*

Compl. Exhibits 2-4. Land of Lincoln points to a few generalized phrases of these Agreements and urges the Court to ignore both their plain meaning and context by finding within them a hidden contractual obligation to make risk corridors payments. These efforts should be rejected.

First, Land of Lincoln relies on section II.d, which requires HHS to "undertake all reasonable efforts to implement systems and processes that will support QHP[] functions," Second Motion at 33.[8] Land of Lincoln does not explain how the risk corridors program—a regime of collections from and payments to issuers based on premiums and cost ratios established by statute and regulation—can be characterized as either a "system" or a "process" as those terms are used in the QHP Agreements. Nor does Land of Lincoln explain how assessing a charge, as HHS does when the premiums exceed allowable costs by a certain percent, constitutes "support" of a "QHP function."

In any event, the words of a contract must be read in context. *See Metric Constructors, Inc. v. Nat'l Aeronautics & Space Admin.*, 169 F.3d 747, 752 (Fed. Cir. 1999) ("[T]o interpret disputed contract terms, 'the context and intention [of the contracting parties] are more meaningful than the dictionary definition.'") (quoting *Rice v. United States*, 428 F.2d 1311, 1314 (Ct. Cl. 1970)). The context and surrounding provisions of section II.d demonstrate that the term "systems and processes" refers solely to the electronic systems and processes through which data flows between issuers and the Federally-facilitated Exchanges. This conclusion follows from the surrounding provisions in section II, which relate to standards for electronic transactions under HIPAA and other federal law. Indeed, the "Companion Guide," incorporated by reference in section II.b(3), expressly sets forth the "systems and processes" to which section II.d refers,

[8] Land of Lincoln appears to be referring to section II.d of the 2014 Agreement, Compl. Exhibit 2. Similar language appears in sections III.a of the 2015 and 2016 Agreements. *See* Compl. Exhibits 3 & 4.

including the: "testing process" (at 3), "validation processes" (at 4-5), "Centers for Medicare and Medicaid Services (CMS) Enterprise File Transfer (EFT) System" (at 7, 33), "Federal Exchange Program System (FEPS) Enrollment Data Store (EDS)" (at 9-10), "enrollment process" (at 27-26), termination process (at 32-35), monthly reconciliation process (at 35), "HHS Reconciliation Process Flow" (at 33), "QHP Issuer Reconciliation Process Flow" (at 32) and the "comparison process" (at 34). *See* Appendix A1. These systems and processes have nothing to do with the risk corridors program, demonstrating that neither does section II.d. *See, e.g.*, *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994) ("Under the rule of *ejusdem generis*, which means 'of the same kind,' where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified.").

Land of Lincoln argues alternatively that QHP Agreement section V.g's provision that "[t]his Agreement will be governed by the laws and common law of the United States of America" incorporates section 1342 (and, by necessary implication, the vast corpus of other federal laws, including the federal common law) as a contractual commitment between the United States and Land of Lincoln. Second Motion at 34. This theory, like Land of Lincoln's "systems and processes" theory, finds no support in the contractual text, and it has no limiting principle.

The Federal Circuit and this Court have repeatedly held that statutory and regulatory provisions are not incorporated into a contract with the government "unless the contract *explicitly* provides for [the] incorporation," *St. Christopher Associates, L.P. v. United States*, 511 F.3d 1376, 1384 (Fed. Cir. 2008), and "leave[s] no ambiguity about the identity of the document being referenced, nor any reasonable doubt about the fact that the referenced document is being incorporated into the contract." *Northrop Grumman Info. Tech., Inc. v. United States*, 535 F.3d 1339, 1344 (Fed. Cir. 2008); *see also Precision Pine & Timber, Inc. v. United States*, 596 F.3d

817, 826 (Fed. Cir. 2010). Section V.g. comes nowhere near to meeting this standard. It states merely that the Agreement "will be governed by the laws and common laws of the United States of America, including . . . such regulations as may be promulgated . . . by [HHS]." It does not mention risk corridors, section 1342, or 45 C.F.R. § 153.510 or in any way imply that the Agreement has anything to do with risk corridors. *See, e.g., Earman v. United States*, 114 Fed. Cl. 81, 104 (2013) (provision stating that a contract is governed by Federal laws, "which does not refer to any particular statutory or regulatory provision, cannot reasonably be read as incorporating the entire corpus of the [ ] statute into plaintiff's contract."); *Smithson v. United States*, 847 F.2d 791, 794 (Fed. Cir. 1988) (rejecting argument that provision that contract was "subject to" regulations promulgated by the Farmers Home Administration incorporated the agency's regulations). Land of Lincoln's reading of section V.g should be rejected.[9]

Next, Land of Lincoln argues that because the QHP Agreements mention "Federally-facilitated Exchange user fees" and "the Government treated the payments it collected under the "'payments in' portion of the risk corridors program as 'user fees,'" the QHP Agreement somehow "indicates that the Government understood and intended to be bound to make risk corridors payments." Second Motion at 34. This is incorrect. "Federally-facilitated user fees" are not the same as, or even related to, risk corridors collections.

Agencies are authorized to assess user fees pursuant to Title 31 of the United States Code, which provides that "each service or thing of value provided by an agency . . . to a person . . . is to

[9] As noted above, the QHP Agreements incorporate the Companion Guide expressly and specifically into the Agreements. *See, e.g.*, Compl. Exhibit 2 § II.b.3. The use of specific incorporation language to incorporate the Companion Guide but not to incorporate section 1342 or 45 C.F.R. § 153.510 further indicates that the Agreements do not incorporate the provisions of the risk corridors program.

be self-sustaining to the extent possible." 31 U.S.C. § 9701(a). Consistent with this goal, Congress mandated that Exchanges be financially self-sustaining and authorized them to "charge assessments or user fees to participating health insurance issuers, or to otherwise generate funding, to support its operations." 42 U.S.C. § 18031(d)(5). HHS implemented this mandate by adopting a "Federally-facilitated Exchange user fee," which is defined as a monthly user fee imposed on participating plans "[t]o support the functions of Federally-facilitated Exchanges." 45 C.F.R. § 156.50(c). Nothing in this regulation refers to risk corridors, and nothing in the risk corridors regulation, the QHP Agreements, the ACA, or elsewhere suggests that "Federally-facilitated Exchange user fees" encompass all charges that qualify as "user fees" under 31 U.S.C. § 9701.[10]

Separately, when considering potential sources of appropriations for risk corridors payments in September 2014, the GAO determined that risk corridors collections qualify as "user fees" within the meaning of the CMS Program Management appropriation that could be used to make risk corridors payments. *GAO Op.*, 2014 WL 4825237, at *4 (citing GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO–05–734SP (Washington, D.C. Sept. 2005), at 100). In other words, both risk corridors collections and Federally-facilitated Exchange user fees are types of "user fees" within the meaning of 31 U.S.C. § 9701, but they are distinct types, each arising under its own statute and regulations. And it belies the terms of the QHP Agreement (and common sense) to conflate the two. Among other differences, the Federally-facilitated Exchange user fee is part of a "monthly payments and collections reconciliation process" that includes a number of specified subsidies to QHPs. In contrast, risk corridors collections are charged annually

[10] The ACA provides for other types of user fees as well. *See, e.g.*, 45 C.F.R. §§ 53.610(f) (providing for an assessment of a "risk adjustment user fee" in certain instances); 156.50(b) (requiring assessment of "State-based Exchange user fees"); 155.160 (permitting states to assess user fees for Exchange operations).

and are not mentioned in the QHP Agreement. Compl. Exhibit 2 § II.c. In any event, Land of Lincoln has identified no evidence in the Administrative Record that demonstrates that the term "Federally-facilitated Exchange user fees," as used in the QHP Agreements, includes risk corridors collections, much less that it believed that to be the case when it signed the QHP Agreements. Land of Lincoln did not even allege as much in its Complaint, but instead raised this argument for the first time in its Second Motion. *See* Compl. ¶¶ 165-78. Finally, even if Federally-facilitated Exchange user fees *were* the same as risk corridors collections (they are not), section 4 of the Preamble of the QHP Agreements, which merely mentions that periodic subsidies and "payments of FFE user fees will be due between [HHS] and QHP[]" still would not constitute a contractual obligation to make risk corridors payments *in excess* of those fees, as Land of Lincoln contends.[11]

In sum, the provisions of section 1342 are not terms of the QHP Agreements. And even if this were not plain from the text of the Agreement, it is clear from the broader statutory scheme: the risk corridors program applies to all QHPs. 42 U.S.C. § 18062(a). Only a subset of QHPs (those participating on federal Exchange platforms) enter QHP Agreements with HHS. *See supra* note 3. Thus, to interpret the QHP Agreements to incorporate a risk corridors obligation would create an anomaly where some QHPs could enforce their rights in contract while others could not. That result is nonsensical as a matter of policy and programmatic design, and it is compelling evidence that the QHP Agreements are not intended to incorporate, and do not incorporate, risk corridors obligations.

[11] As discussed more fully below, at 26, even if the QHP Agreements did somehow incorporate section 1342 as a contractual term, that term would be void and unenforceable as an open-ended indemnification agreement for which Congress did not appropriate funds or otherwise express its intent to obligate the United States to cover issuers' losses in *contract*. *See Hercules v. United States*, 516 U.S. 417, 427 (1997); *Rick's Mushroom Serv., Inc.*, 521 F.3d 1338, 1346 (Fed. Cir. 2008).

Finally, the QHP Agreements do not otherwise provide for a substantive right to recover money damages. *See, e.g.*, Compl. Exhibit 2 § IV (governing termination). Because the QHP Agreements do not incorporate section 1342 as contract terms or provide for monetary damages, the Court lacks jurisdiction over Count II. *See Rick's Mushroom Serv., Inc.*, 521 F.3d 1343-44 (affirming dismissal of breach of contract claim based on a cost-sharing agreement that did not "provide a substantive right to recover money-damages"); *see also* RCFC 12(h)(3) ("If the Court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Land of Lincoln's Second Motion on Count II must be denied.[12]

2. Even if QHP Agreements Incorporated Risk Corridors Obligations, Land of Lincoln Has Not Established, and Cannot Establish, a Breach

Count II fails for the additional reason that it is based on vague references to "federal law," "systems and processes," and/or "user fees," rather than any specific or absolute instructions to make risk corridors payments. Such language, then, even if it could be construed to incorporate the risk corridors program, would necessarily incorporate the legal and administrative scheme governing the program. But, as set forth above and in the United States' Motion, the legal and administrative scheme governing the risk corridors program includes a three-year payment framework in which annual payments are limited by the amount of collections and final payment is not due until the end of the program. *See, e.g.*, 79 Fed. Reg. at 30,260; A.R. 6195. Nothing in the QHP Agreement requires anything else. Because any contractual obligation grounded in the

[12] To the extent the Court concludes, however, that Land of Lincoln's breach of express contract claim does not fail as a matter of law, then the United States is entitled to explore whether Land of Lincoln in fact ever intended or understood the QHP Agreements to include any contractual obligations with respect to risk corridors and the scope and extent of that alleged understanding.

QHP Agreements could extend no further than what is required by statute and regulation, HHS cannot have breached such an Agreement by making pro-rated payments to the extent of collections in conformity with its three-year payment framework.[13]

B. Land of Lincoln's Implied Contract Claim (Count III) Fails

In Count III, Land of Lincoln asserts breach of an implied-in-fact contract for the payment of risk corridors amounts. "A binding implied-in-fact contract arises between a private party and the government upon proof by the person of: (1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance, and (4) 'actual authority'" on the part of the government's representative to bind the government." *Schism v. United States*, 316 F.3d 1259, 1278 (Fed. Cir. 2002) (citation omitted). In other words, Land of Lincoln again bears the burden of proof on each of the elements of its implied contract claim. *Pac. Gas & Elec. Co. v. United States*, 3 Cl. Ct. 329, 339 (1983). As with Count II, judgment in Land of Lincoln's favor on this count must be denied because Land of Lincoln has failed to meet this burden on the record before the Court.

1. Land of Lincoln Has Not Established Mutuality of Intent

Land of Lincoln cites nothing in the Administrative Record suggesting that either it or the United States intended to enter into a contractual obligation for the payment of risk corridors amounts. With regard to its own intent, Land of Lincoln points only to allegations of "reliance" and "inducement." *See* Second Motion at 36 (citing Compl. ¶¶ 189 and 192). But allegations are not evidence. Moreover, alleged reliance on the risk corridors program in deciding to become a

[13] Even assuming Land of Lincoln could prove that the QHP Agreements included a right to receive annual risk corridors payments in an amount determined under the statutory formula, Land of Lincoln cannot prove a breach of either the 2015 or the 2016 QHP Agreement because no funds are yet due for those benefit years. *See* A.R. 1498; 45 C.F.R. § 153.530(d).

QHP does not mean that Land of Lincoln intended or understood the risk corridors program to be a *contractual* obligation. And alleged reliance by Land of Lincoln is not an element of an implied-in-fact contract; it is an element of an implied-in-law contract for which Congress has not waived sovereign immunity. *See Steinberg v. United States*, 90 Fed. Cl. 435, 444 (2009) ("'Detrimental reliance' is an element of a claim of promissory estoppel, a contract implied in law, but is not an element of a contract in fact."); *Twp. of Saddle Brook v. United States*, 104 Fed. Cl. 101, 111 (2012) ("promissory estoppel theory does not fall within the jurisdiction granted to the court by the Tucker Act").[14]

Land of Lincoln similarly fails to establish the United States' intent to enter a contract for the payment of risk corridors. It relies on section 1342 and its implementing regulation, 45 C.F.R. § 153.510, as purportedly "reflect[ing] Congress's intent that risk corridors payments be made in full[.]" Second Motion at 35. But congressional intent to enact a statutory program is not the same as intent to bind the government contractually. In fact, it is firmly established that "the United States cannot be contractually bound merely by invoking the cited statute and regulation." *Baker v. United States*, 50 Fed. Cl. 483, 489 (2001). This is because "the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state . . . [which], unlike contracts, are inherently subject to revision and repeal[.]" *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985). Thus, "absent some

[14] The element of contractual intent is belied by contemporaneous industry publications showing that, at the time issuers were deciding whether to participate in the Exchanges, the insurance industry understood Exchange-participation to be a business decision—with both risks and opportunity—undertaken in a regulated program, rather than a contractual commitment to the United States. *See generally* Catherine Murphy *et al.*, *Milliman Healthcare Reform Briefing Paper: Ten critical considerations for health insurance plans evaluating participation in public exchange markets* (December 2012), Appendix at A55 (discussing pros and cons of Exchange participation for insurance companies, omitting any mention of "contracts" with the United States, and describing risk corridors as a "three-year risk protection federal *program*," not a contract),.

clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Id.* (internal quotations, citations omitted). Land of Lincoln cannot overcome this presumption unless the language in the statute or regulation or "the circumstances surrounding the statute's passage manifest[] any intent by Congress to bind itself contractually." *Brooks v. Dunlop Mfg. Inc.*, 702 F.3d 624, 631 (Fed. Cir. 2012).

Land of Lincoln has not overcome the presumption. It relies solely on the statute, the regulation, and HHS's statements in the Federal Register, Second Motion at 36, but all of these provisions merely discuss risk corridors as a statutory and regulatory program; none of them say anything about a contract. *See, e.g.*, *Hanlin v. United States*, 316 F.3d 1325, 1329-30 (Fed. Cir. 2003) (noting that statute and regulation "set forth the [agency's] authority and obligation to act, rather than a promissory undertaking" and "[w]e discern no language in the statute or the regulation that indicates an intent to enter into a contract"); *AAA Pharmacy, Inc. v. United States*, 108 Fed. Cl. 321, 329 (2012) (finding no intent to contract under Medicare provisions and emphasizing that "*[o]nly* when statutes or regulations have *clearly expressed* the Government's intent to enter into a contractual arrangement with program participants have courts found an implied-in-fact contract.") (emphasis added); *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 28 (2011) (dismissing implied-in-fact contract claim because statute "simply provides that the government will make an outright payment to any applicant who meets specified conditions").[15] In contrast, when courts have found an intent to contract with participants of a statutory or regulatory program,

[15] Land of Lincoln attempts to distinguish *AAA Pharmacy, Inc.* and *ARRA Energy Co. I* on the basis that "both involved 'contract disputes' on issues corollary to the right of payment." Second Motion at 38. But these cases held that there was no contract at all. Land of Lincoln cannot disregard them merely because the "contract dispute" it brings concerns payment.

the statutes or regulations at issue clearly expressed contractual intent. *See, e.g.*, *Grav v. United States*, 14 Cl. Ct. 390, 392 (1988) (finding an implied-in-fact contract where statute provided that "Secretary shall offer to enter into a contract"), *aff'd*, 886 F.2d 1305 (Fed. Cir. 1989); *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 405 (Ct. Cl. 1957) (agency regulation could give rise to implied contract where it stated that "[u]pon receipt of an offer" the agency would "forward to the person making the offer a form of contract containing applicable terms and conditions ready for his acceptance"); *cf. Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 639 (2005) (emphasizing that statute "uses the word 'contract' 426 times to describe the nature of the Government's promise[,] . . [and] says that if the Government refuses to pay, then contractors are entitled to 'money damages' in accordance with the Contract Disputes Act."). And as far as "the circumstance surrounding the [ACA's] passage," Land of Lincoln has identified nothing to suggest that Congress intended, as part of the ACA's reforms of the market for individual and small group health insurance policies, that issuers would become federal contractors providing health insurance on the Government's behalf.[16]

Land of Lincoln's reliance on *Radium Mines*, Second Motion at 36, further undermines its claim because the regulation at issue in that case quoted "guaranteed minimum prices" for the purchase of uranium and provided that, upon the "[m]aking [of] an [o]ffer" by a person with

[16] Under *National Rail Road Passenger Corporation*, 470 U.S. at 465-66, and *Brooks*, 702 F.3d at 631, absent some indication of congressional intent to create a contractual obligation under a statute, government conduct alone is insufficient to allow the Court to infer an intent to contract when the plaintiff's implied contract claim is based on a statute. Even if conduct alone were enough, however, Land of Lincoln cites only to regulations, Second Motion at 39-41, and HHS statements in the Federal Register and letters written after contract formation allegedly occurred, Compl. ¶¶ 181, 183, 193. These statements contain no language suggesting that risk corridors are a contractual, rather than a statutory, obligation. In any event, these statements merely recognize the Government's pre-existing, independent obligation to follow the statute, regulation, and three-year payment framework, which are not to be construed as intent to contract under this court's precedent. *AAA Pharmac*y, 108 Fed. Cl. at 328.

uranium, the agency would "forward to the person making the offer a form of [purchase] contract containing applicable terms and conditions ready for his acceptance." *Radium Mines*, 153 F. Supp. at 404-05. Land of Lincoln fails to identify anything approaching such contract-specific language in the ACA or its regulations, and there is none. Land of Lincoln's reliance on *Aycock-Lindsey Corp. v. United States*, 171 F.2d 518, 521 (5th Cir. 1948), and *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 751 (Ct. Cl. 1966), is similarly unavailing because unlike the payments at issue in those cases, risk corridors payment are not "compensatory in nature." *Aycock-Lindsey Corp.*, 171 F.2d at 521; *compare N.Y. Airways, Inc.*, 369 F.2d at 805-06 (payments at issue compensated helicopter companies for transporting mail *on behalf of* the United States). HHS does not make risk corridors payments in exchange for a QHP's participation on the Exchanges. To the contrary, a QHP receives risk corridors payments only if its claims costs exceed the target amount by a sufficient percentage; conversely, a QHP must pay HHS if the target amount exceeds the QHP's claims costs. To construe such a program as "compensatory" or a quid pro quo for participation on the Exchanges is unsupportable given that the United States does not receive anything in return.

Finally, to the extent Land of Lincoln urges the Court to read *Radium Mines*, *Aycock-Lindsey Corp.*, or *N.Y. Airways, Inc.* as suggesting that the Court can find an implied-in-fact contract merely from the terms and conditions of a statutory program designed to fulfill the government's policy objectives, that reading cannot be reconciled with more recent Supreme Court and Federal Circuit precedent holding that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Nat'l R.R. Passenger Corp.*, 470 U.S. at 465-66 (internal quotation omitted); *see also Brooks*, 702 F.3d at 631; *Stanwyck v. United States*, 127 Fed. Cl. 308, 313 (2016) ("Absent

an adequate expression of actual intent, a court 'will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the state is a party.'") (quoting *Nat'l R.R. Passenger Corp.*, 470 U.S. at 466-67).

The record before the Court does not demonstrate contractual intent by either party, and Count III fails as a matter of law.[17]

2. Land of Lincoln Has Not Established an Unambiguous Offer and Acceptance

Land of Lincoln also has not shown an unambiguous offer and acceptance. Instead, it suggests that such offer and acceptance are shown by "an intricate set of specific obligations" arising under a number of regulations. *See* Second Motion at 39-41. But this is just another attempt to convert regulatory obligations into contractual ones. It has no basis in law, and it has no limiting principle. Rather, under Land of Lincoln's theory, every federally regulated activity involving mutual rights and obligations between an entity and the Government creates a contractual relationship, and every regulation constitutes an unambiguous offer. That is not the law. "[T]he United States cannot be contractually bound merely by invoking the cited statute and regulation." *Baker*, 50 Fed. Cl. at 489 (internal quotation omitted).[18]

[17] If the Court concludes otherwise, however, then the United States is entitled to explore through discovery the extent of Land of Lincoln's alleged intent to contract for risk corridors.

[18] Even if the regulations cited on pages 39 through 41 of its Second Motion could amount to an offer (they do not), Land of Lincoln makes no attempt to show *when* these offers were made or when, precisely, it "accepted" the offer and by what conduct. In fact, HHS continued to modify significant parts of the risk corridors program—including the definition of what plans qualified for the risk corridors program—*after* Land of Lincoln purports to have "accepted" the United States' alleged offer. *Compare* Compl. ¶¶ 187 (alleging that execution of the QHP Agreements in September 2013 "confirmed" the implied-in-fact contract) *with* Society of Actuaries, *Health Watch: Risk Corridors Under the Affordable Care Act—A Bridge over Troubled Waters, but the Devil's in the Details*, October 2013, Appendix at A48 ("The exact definition of which plans will qualify for the risk corridors program is still unknown at the time of this writing.").

3. Land of Lincoln Has Not Proven That HHS Had Authority to Bind the United States in Contract for the Payment of Risk Corridors Amounts

Regarding authority to enter an implied contract with issuers, Land of Lincoln again relies on the statute. Second Motion at 41. But as discussed, section 1342 merely constitutes HHS's authority to "establish and administer" a *statutory* program; it nowhere suggests that HHS has authority to bind the United States in contract. "A government agent possesses express actual authority to bind the government in contract only when the Constitution, a statute, or a regulation grants it to that agent in unambiguous terms." *McAfee v. United States*, 46 Fed. Cl. 428, 435 (2000). As with the other elements of its claim, Land of Lincoln bears the burden of proving authority to contract. *Miller Elevator Co., Inc. v. United States*, 30 Fed. Cl. 662, 694 (1994). Apart from its reliance on section 1342's direction to the Secretary to "establish and administer" a risk corridors program, Land of Lincoln has made no attempt to prove its allegations that the various "admissions" and "public statements" that allegedly combine to constitute an "unambiguous offer" (including statements in *proposed* rulemaking, *see, e.g.*, Compl. ¶ 86), were made by unnamed "representatives of the Government who had actual authority to bind the United States." Compl. ¶ 181.

Furthermore, the Anti-Deficiency Act prohibits government officials from involving the "government in a[n] . . . obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B); *see also id.* § 1301(d) ("A law may be construed . . . to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states . . . that such a contract may be made."). The Act also "restricts the ability of the government to enter into multi-year contracts [absent special authority] because funds generally cannot be obligated beyond the current fiscal year." *Cessna*

Aircraft Co. v. Dalton, 126 F.3d 1442, 1449 (Fed. Cir. 1997); *see also Schism*, 316 F.3d at 1300; 31 U.S.C. § 1301(c) ("An appropriation in a regular, annual appropriation law may be construed to be . . . available continuously only if the appropriation . . . expressly provides that it is available after the fiscal year covered by the law in which it appears."). Thus, without either specific authority to bind the government in contract in advance of an appropriation or a valid multi-year appropriation that could be used for contractual obligations, HHS could not form a valid contract in September 2013 (fiscal year 2013) for the payment of risk corridors amounts in December 2015 (fiscal year 2016). *See, e.g.*, *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 643 (2005) (recognizing that "without . . . special authority, a[n] . . . officer cannot bind the Government in the absence of an appropriation") (citations omitted). And, because risk corridors payments are based on issuers' losses and those losses cannot be determined in advance of the benefit year, under Land of Lincoln's theory, any contract to make risk corridors payments would be an open-ended indemnification agreement. Courts have relied on the Anti-Deficiency Act in refusing to find implied indemnification agreements and in rejecting express indemnification agreements. *See, e.g.*, *Hercules*, 516 U.S. at 427; *Rick's Mushroom Serv., Inc.*, 521 F.3d at 1346; *Union Pac. R.R. Corp. v. United States*, 52 Fed. Cl. 730, 732-34 (2002); *Johns-Manville Corp. v. United States*, 12 Cl. Ct. 1, 22-25 (1987).

As a basis for such authority here, Land of Lincoln contends that the GAO determined "the Secretary *did* have [budget] authority" to make risk corridors payments in September 2014. Second Motion at 42 (emphasis in original). That is not what the GAO determined. Rather, the GAO concluded that "any amounts collected in FY 2014 pursuant to section 1342(b)(2) *would have been* available, along with the general CMS [Program Management] lump-sum appropriation" for risk corridors payments as "other responsibilities" of CMS. *GAO Op.*, 2014

WL 4825237, at *5 (emphasis added). But the GAO went on to observe that, because risk corridors payments were not due in fiscal year 2014, and because "[a]ppropriations acts, by their nature, are considered nonpermanent legislation . . . language appropriating funds for 'other responsibilities of [CMS]' [and language appropriating sums for authorized user fees] *would need to be included in the CMS PM appropriation for FY 2015* in order for it to be available for [risk corridors] payments . . . ." *Id.* (emphasis added). Thus, because risk corridors payments were not due in fiscal year 2014, they did not constitute "other responsibilities" of HHS in that fiscal year, and the 2014 Program Management appropriation did *not* supply an appropriation for risk corridors payments. Nor could that appropriation provide the multi-year authority necessary to sustain the contract theory Land of Lincoln asserts here because, as the GAO concluded (and as is evident from the text of the appropriation), the $3.6 billion lump sum amount expired as of the conclusion of fiscal year 2014, and the amount of any authorized user fees for risk corridor payments would not be determined and collected until after the end of fiscal year 2014. An implied-in-fact contract for payment in future years cannot be formed where the government officials involved lack the requisite contracting authority to bind the United States government to any contract extending beyond the fiscal year in which the contract was entered into. *See Cessna Aircraft, Co.*, 126 F.3d at 1449.

Land of Lincoln fails to demonstrate the contractual and budget authority necessary to bind the United States in contract for the payment of risk corridors amounts. Therefore, the Second Motion must be denied.

4. An Implied Contract Cannot Be Grounded on an Express Contract

Finally, it is well settled that the existence of an express contract precludes the existence of an implied-in-fact contract dealing with the same subject matter, unless the implied contract is

entirely unrelated to the express contract. *Schism*, 316 F.3d at 1278; *see also Rick's Mushroom Serv. Inc.*, 521 F.3d at 1344 ("[T]his court may only find an implied-in-fact contract when there is no express contract."). Land of Lincoln contends that this rule does not apply here because if the QHP Agreements don't incorporate the risk corridors obligation, then an implied contract can. Second Motion at 43 n.13. Not so. Here, the alleged consideration for both the express QHP Agreement and the implied-in-fact agreement is Land of Lincoln's decision to become a QHP. Land of Lincoln alleges that it "certified its agreement" to become a QHP "by executing the QHP Agreements." Compl. ¶ 184. Thus, the existence of an express contract governing that decision precludes the existence of a separate implied contract incorporating risk corridors payments as an additional obligation. Land of Lincoln's decision to be a QHP on a Federally-facilitated Exchange cannot be subject to the QHP Agreement and *also* constitute consideration for a separate and independent implied-in-fact agreement for the United States to make risk corridors payments. In addition to the lack of evidentiary support to establish the elements of an implied-in-fact contract, Count III fails as a matter of law as well.

C. Land of Lincoln's Good Faith and Fair Dealings Claim (Count IV) Fails

Count IV alleges that HHS breached an asserted implied covenant of good faith and fair dealing by not making full risk corridor payments. Compl. ¶¶ 201-207; Second Motion at 44-45. The duty of good faith and fair dealing is a duty "not to act so as to destroy the *reasonable expectations* of the other party regarding the *fruits of the contract.*" *Metcalf Const. Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014) (emphasis in original). And the implied covenant "cannot expand a party's contractual duties beyond those in the express contract." *Id.*

Land of Lincoln alleges the existence of express QHP Agreements (for benefit years 2014, 2015, and 2016) and an implied-in-fact contract for the payment of risk corridors. With respect to

the implied contract, Land of Lincoln's failure to demonstrate that such contract exists necessarily precludes a good faith and fair dealing claim premised on such a contract. *HSH Nordbank AG v. United States*, 121 Fed. Cl. 332, 341 (2015). With respect to the QHP Agreements, Land of Lincoln has not identified the "fruits" of those agreements or adduced any evidence to establish "*reasonable expectations*" regarding those fruits. Neither has Land of Lincoln demonstrated that the United States "destroyed" those expectations.

HHS's inability to make full, annual risk corridors amounts does not destroy the alleged expectations of Land of Lincoln regarding the fruits of the QHP Agreements, which relate solely to the integrity and efficiency of the electronic systems and processes that make up the Federally-facilitated Exchange platform. In any event, Land of Lincoln cites to nothing in the Administrative Record demonstrating that HHS's pro rata payment scheme destroyed any expectations arising out of the QHP Agreement (reasonable or not).[19] And Land of Lincoln cites no evidence in the record to prove that the United States' alleged breach of the duty of good faith and fair dealing – by failing to "create a similar deadline for the Government's full payment of risk corridors," for example – damaged Land of Lincoln. Rather, to support its good faith and fair dealing claim, Land of Lincoln falls back on irrelevant and unsupported allegations of reliance and inducement. Second Motion at 44.

Land of Lincoln's good faith and fair dealing theory must also be rejected because, as with Land of Lincoln's express contract theory, entertaining such a claim based on the QHP Agreements would allow issuers operating on Federally-facilitated Exchange platforms greater rights than QHPs in states with their own Exchange platform, contrary to the manifest intent of section 1342

[19] As to the QHP Agreements for 2015 and 2016, Land of Lincoln cannot demonstrate a breach because no payments are due for those years.

that all QHPs are equally subject to participation in the risk corridors program. *See* 42 U.S.C. § 18062(a). Moreover, characterizing regulations and legislation as a violation of the duty of good faith and fair dealing, Second Motion at 44-45, would permit an end-run around the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, and other mechanisms for challenging agency action, and would further conflict with the principle that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976); *see also Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1579 (Fed. Cir. 1997) (contract principles cannot "block the exercise" of "a general, sovereign act").

Finally, Land of Lincoln's own argument in support of its Second Motion on Count IV demonstrates why judgment on the Administrative Record on counts II through V would be improper. Land of Lincoln inexplicably states that "the facts plead[ed] in Count IV stand uncontested by the Government[.]" Second Motion at 44. But the United States has not even answered the Complaint, and as set forth above and in the United States' prior filings, the United States does contest the facts pleaded in Count IV. Among other allegations, the United States disputes:

- that the QHP Agreements created "reasonable expectations for [Land of Lincoln] that fully and timely CY 2014, 2015, and 2016 risk corridors payments would be paid by the Government," Compl. ¶ 200;
- that "the United States has destroyed Plaintiff's reasonable expectations," Compl. ¶ 201;

- that "had [Land of Lincoln] been required to remit a risk corridors charge to the Government for CY 2014, CY 2015, or CY 2016, Plaintiff would have done so," Compl. ¶ 202;
- that "the United States breached the implied covenant of good faith and fair dealing by" any of the enumerated acts set forth in paragraph 207 of the Complaint;
- that "the Government concedes it owes Plaintiff," Compl. ¶ 208; and
- that "Land of Lincoln has been damaged or will be damaged" "[a]s a direct and proximate result" of the alleged breaches, Compl. ¶ 209.

Because Land of Lincoln points to nothing in the Administrative Record that supports these allegations, Land of Lincoln's Second Motion on Count IV must be denied.[20]

D. Land of Lincoln's Takings Claim (Count V) Fails

Count V asserts that the United States' "action in withholding . . . full and timely CY 2014, 2015 and 2016 risk corridor payments owed to Lincoln 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." Compl. ¶ 216. The United States has not withheld "full and timely" 2015 and 2016 risk corridors payments as those payments have not yet been announced by HHS (and in the case of 2016, cannot yet be calculated). Indeed, Land of Lincoln has not demonstrated entitlement to any 2015 or 2016 risk corridors payments. In any event, Land of Lincoln has failed even to cite to the Administrative Record in support of its Second Motion on Count V. *See* Second Motion at 46-47.

[20] If Count IV is not dismissed, the United States is entitled to discovery on all of these allegations.

Courts apply a two-part test when evaluating whether governmental action constitutes a taking without just compensation. "First, the court determines whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking. Second, if the court concludes that a cognizable property interest exists, it determines whether that property interest was 'taken.'" *Acceptance Ins. Cos., Inc. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009) (collecting Federal Circuit cases). "If the claimant fails to demonstrate the existence of a legally cognizable property interest, the court's task is at an end." *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004). As with counts II through IV, Land of Lincoln bears the burden of proving that a taking occurred. *See CCA Assocs. v. United States*, 667 F.3d 1239, 1245 (Fed. Cir. 2011).

As set forth above, Land of Lincoln has no contractual right to receive risk corridors payments. In the absence of a contract, courts have held that no property right exists that can give rise to a Fifth Amendment takings claim. For example, in *National Education Association—Rhode Island v. Retirement Board of the Rhode Island Employees' Retirement System*, the Court of Appeals for the First Circuit held that "[i]t would make nonsense of [the Supreme Court's] rulings—and the clear intent requirement—to conclude that an expectancy insufficient to constitute an enforceable contract against the state could simply be renamed 'property' and enforced as a promise through the back door under the Takings Clause." 172 F.3d 22, 30 (1st Cir. 1999). The Federal Circuit has likewise held that an ordinary obligation on the part of the United States to pay money under a statutory program does not give rise to a takings claim. *Adams v. United States*, 391 F.3d 1212, 1224 (Fed Cir. 2004); *see also Kizas v. Webster*, 707 F.2d 524, 539-40 (D.C. Cir. 1983) ("A 'legitimate claim of entitlement' to a government benefit does not transform the benefit *itself* into a vested right."). Land of Lincoln attempts to distinguish these

cases by arguing that the risk corridors payments it seeks are not government "benefits." Second Motion at 47. Land of Lincoln cites to nothing to support this claim, and it is difficult to see how the requested payment of $72 million is anything other than a "government benefit" under this Court's jurisprudence. And as explained in the United States' Motion, the relevant statutory and regulatory provisions do not obligate HHS to pay annual risk corridors amounts beyond the amounts collected under the program. Thus, the failure to make full annual payments for any year cannot constitute a taking. Land of Lincoln fails to cite any law to the contrary. Count V fails as a matter of law.

As a factual matter, nothing in the Administrative Record establishes a taking or supports Land of Lincoln's allegations. For example, no evidence before the court supports the allegation that the failure to pay full, annual risk corridors payments constitutes "a deprivation and taking of Plaintiff's property for public use." Compl. ¶ 211. Nor does anything in the record demonstrate that Land of Lincoln "has a reasonable investment-backed expectation of receiving the full and timely CY 2014, 2015, and 2016 risk corridors payments payable to it under the statutory and regulatory formula." Compl. ¶ 212. And nothing supports Land of Lincoln's allegation that "[t]he Government expressly and deliberately interfered with and has deprived Plaintiff of property interests and its reasonable investment-backed expectations." Compl. ¶ 213. In short, as with all of its claims, Land of Lincoln has failed to meet its burden, and its Second Motion on Count V must be denied.[21]

CONCLUSION

For the foregoing reasons, Land of Lincoln's cross-motion for judgment on the administrative record on counts II through V should be denied.

[21] If Count V is not dismissed, the United States is entitled to discovery.

Dated: October 25, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October 2016, a copy of the foregoing, The United States' Opposition to Plaintiff's Cross-Motion for Judgment on the Administrative Record on Counts II-V, was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be sent to all parties by operation of the Court's ECF system.

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