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 MOTION FOR JUDGMENT ON THE ADMINISTRATIVE RECORD

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Robert Pear and David M. Herszenhorn, *House Unveils Health Bill, Minus Key Details*, N.Y. Times, June 19, 2009 21

INTRODUCTION

The United States opposes Plaintiff Land of Lincoln Mutual Health Insurance Company ("Land of Lincoln")'s motion for judgment on the administrative record (the "Lincoln Motion"). Docket No. 20. For the reasons that follow, Land of Lincoln's motion must be denied.[1]

At the threshold, Land of Lincoln's motion must fail because it has not established, and cannot establish, that the Court has jurisdiction over its claims. The Tucker Act waives sovereign immunity only to the extent a plaintiff seeks "actual, presently due money damages from the United States." *United States v. King*, 395 U.S. 1, 3 (1969). No money damages under the risk corridors program can possibly be "presently due" because, under the Department of Health and Human Services' ("HHS") administrative framework, payments for any one year may be funded from collections across all three years and final payment is not due until the end of the program. Land of Lincoln seeks to circumvent this framework as purportedly inconsistent with the purpose of section 1342, but it cannot point to anything contrary in the statute or regulation, nor—given the deference owed to HHS's implementation of the program—can it show that such a framework is irrational where, as here, HHS lacks sufficient funds to pay risk corridors amounts in full on an annual basis. And, even under Land of Lincoln's own theory that full payment is due annually, it can have no present right to risk corridors payments for 2015 where HHS is still processing those claims and has not yet concluded its annual payment and collections process for that year. Land of Lincoln cannot, therefore, show that HHS has breached any statutory or regulatory obligation that could give rise to "presently due" money damages. Land of Lincoln's motion must be denied on this basis alone.

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[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. Docket No. 22.

On the merits, Land of Lincoln's motion falls well short of the showing necessary for the Court to enter a judgment in its favor. Land of Lincoln fails even to specify on which of its five counts it seeks judgment, much less to demonstrate that the elements of those claims are satisfied as a matter of fact and law. It makes conclusory reference, for example, to the existence of a purported contractual obligation to make risk corridors payments, but it makes no attempt to prove the existence of such a contract. Indeed, no such contract exists. Land of Lincoln's showing on its statutory theory similarly falls short of the mark: it relies exclusively on the Supreme Court's holding in *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012), but under binding Federal Circuit precedent, that holding has no applicability in the absence of a contractual obligation.

This is a case where Congress enacted a statutory benefits program but indicated—through the structure and text of the statutory provision establishing the program and the absence of any specific appropriation or authorization of funding for the program—that the program would pay for itself as a redistributive system of payments and collections among issuers. HHS issued guidance explaining that it would endeavor to operate the program in a budget neutral manner but construed the statute to require full payment at the program's conclusion, subject to appropriations. Congress later enacted appropriations laws that limited HHS's ability to make payments in excess of collections. In so doing, Congress stated that the appropriations restriction would "requir[e] 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." Congress's exercise of its constitutional authority over the public fisc empowered it, through the annual appropriations process, to limit the United States' liability. Land of Lincoln, therefore, is not entitled to additional funds at this time, and its motion must be denied.

STATEMENT OF THE ISSUES

1. Whether Land of Lincoln can establish jurisdiction over claims based on alleged receivables that, in large part, have not even been determined by HHS to be owed and, in any event, are not yet due to be paid.

2. Whether Land of Lincoln has met its burden to establish that it is entitled to payment of a non-contractual benefit in excess of budgetary restrictions expressly imposed by Congress where it relies upon a single case that, under clear Federal Circuit precedent, does not apply to such benefits, and where it fails entirely to give effect to the most recent pronouncements of Congress related to that benefit.

STATEMENT OF THE CASE

I. Congress Enacted the Temporary Risk Corridors Program to 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 other 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. 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 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 established under the Medicare Program. *See* Compl. ¶¶ 4, 7, 31. Informally known as the "3Rs," these programs began with the 2014 benefit year and consist of reinsurance, risk adjustment, and

risk corridors. *See generally* 42 U.S.C. §§ 18061-18063. The reinsurance, risk adjustment, and risk corridors programs each function differently, but they all fundamentally operate to redistribute funds from certain entities to other entities on the basis of relative actuarial risk, claims costs, and premiums charged.

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). Under the "payment methodology" set forth under 42 U.S.C. § 18062(b), if an issuer's "allowable costs" (essentially, claims costs) exceed or fall short of a "target amount" (premiums minus administrative costs) by more than three percent, the plan either receives a percentage of the shortfall from HHS (referred to here as a "payment") or pays a percentage of the excess to HHS (referred to as a "charge" or "collection"). 42 U.S.C. § 18062(b); 45 C.F.R. § 153.510(b)-(c). The reference in section 1342 to "payments in" (*i.e.*, collections) is the only reference in the ACA to any source of funding to be used for risk corridors payments.

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 any agreement with HHS to owe risk corridors charges or receive payments.[2] *See generally* 42 U.S.C. § 18062(a). Instead, HHS administers the risk corridors program solely pursuant to statutory requirements, regulations, and guidance. Under the regulations, after the close of each benefit year, issuers of QHPs must compile and submit premium and cost data and other information underlying their risk corridors

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[2] With respect to the risk corridors program, QHP is defined at 45 C.F.R. § 153.500 to include health plans offered outside the Exchanges that are the same plan or substantially the same as a QHP offered on the Exchanges, as defined at 45 C.F.R. § 155.20.

calculations to HHS no later than July 31 of the next calendar year. 45 C.F.R. § 153.530(d). Using these data, HHS calculates the charges and payments due from and to each issuer for the preceding benefit year. *See* 45 C.F.R. § 153.530(a)-(c); HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,410, 15,473-74 (March 11, 2013). Within 30 days of HHS's announcement of final charge amounts, issuers are required to remit payment to HHS. 45 C.F.R. § 153.510(d). Neither the ACA nor the implementing regulations set a deadline by which HHS must make risk corridors payments to issuers. *See generally* 42 U.S.C. § 18062; 45 C.F.R. § 153.510.

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,[3] Congress did not do so for risk corridors. 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 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). Under HHS's guidance, in the event that aggregate payment requests in a given year (as calculated under the statutory formula) exceeded aggregate collections from issuers, payments that year would be reduced pro rata to the extent of the shortfall. However, issuers also stood to receive additional payments in the event collections exceeded payments across

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

all three program years. HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015), A.R. 8153.

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; 80 Fed. Reg. at 10,779, A.R. 8153.

In the meantime, Congress took up the issue of funding for the risk corridors program. 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 (*i.e.*, "payments in") 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 authorizing the expenditure of 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, at *4 (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 $3.7 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 noted, however, that because the 2014 Spending Law would expire before risk corridors payments began in fiscal year 2015, a similar appropriation would need to be enacted for fiscal years 2015, 2016, and 2017 for the Program Management account to supply a source of funding for the program. *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. An accompanying Explanatory 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. The continuing resolution runs until the 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). In June 2016, the Senate Committee on Appropriations approved an appropriations bill that contains the same prohibition for fiscal year 2017. *See* Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 2017, S. 3040, 114th Cong. tit. II, § 225 (as reported by S. Comm. on Appropriations, June 9, 2016), Appendix at A1.

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 collections, it could pay only 12.6% of these payments in the 2015 payment cycle. *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 [in 2016], and if necessary, 2016 collections [in 2017]." 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.[4]

ARGUMENT

I. The Court Lacks Jurisdiction Because Land of Lincoln's Claims Are Neither Presently Due Nor Ripe for Adjudication

At the outset, Land of Lincoln cannot prevail on its motion because, as set forth in the United States' Motion to Dismiss and Motion for Judgment on the Administrative Record on Count I [Docket No. 22] ("United States' Motion"), it cannot establish that the Court has subject matter jurisdiction over its claims. It is firmly established that to fall within the Tucker Act's waiver of sovereign immunity and be subject to the jurisdiction of this Court, a plaintiff "must seek 'actual, presently due money damages from the United States.'" *Annuity Transfers, Ltd. v. United States*, 86 Fed. Cl. 173, 179 (2009) (quoting *King*, 395 U.S. at 3); *see also Johnson v. United States*, 105 Fed. Cl. 85, 94-95 (2012); *Lummi Tribe of Lummi Reservation v. United States*, 99 Fed. Cl. 584, 596-597 (2011).

Land of Lincoln seeks risk corridors payments for benefit years 2014 and 2015. Lincoln Motion at 14. With respect to the latter, other than what appears to be a screen shot of the risk corridors data it submitted to HHS, Lincoln Motion at 5, Land of Lincoln makes no attempt to

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[4] 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." Appendix at A3.

justify its claim for 2015 risk corridors payments, and nothing in the Administrative Record or the ACA supports the conclusion that risk corridors amounts for 2015 are presently due. As Land of Lincoln concedes, *id.* at 8, and the Administrative Record demonstrates, A.R. 1498, HHS has not yet commenced its payment and collections cycle for the 2015 benefit year and is not scheduled to do so until later this year. As a result, HHS has not yet determined 2015 risk corridors amounts, much less begun collection and payment of those amounts. In fact, QHPs were not required to submit the data on which the risk corridors calculation is based until after Land of Lincoln filed this lawsuit. *See* 45 C.F.R. § 153.530(d).

Furthermore, even if the Court could grant judgment on claims that are not presently due, Land of Lincoln's inconsistent filings would prevent this Court from entering judgment. In its Complaint, Land of Lincoln seeks damages in the amount of $72,859,053—$3,941,462 for 2014 and $68,917,591 for 2015. Compl. ¶¶ 9, 138, 143. In its motion, Land of Lincoln seeks damages in the amount of $75,758,669.48—$3,925,418.48 for 2014 and $71,833,251 for 2015. Lincoln Motion at 2. Land of Lincoln does not explain the discrepancies in the amounts it seeks for 2014 ($16,043.52) or 2015 ($2,915,660). Under no plausible construction of section 1342 can 2015 payments be "presently due" when they have not yet been processed administratively by HHS and when Land of Lincoln's own informal calculation of the projected amount is a moving target.

As for 2014 payments, HHS has announced those amounts but it has not breached an obligation to pay them. Section 1342 does not specify a date by which payments must be made, and HHS, under its express authorization to administer the risk corridors program, 42 U.S.C. § 18062(a), established a three-year payment framework under which final payment is not due until after the conclusion of the three-year program. *See* A.R. 108-109; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,240, 30,260 (May 27, 2014), A.R. 6195;

HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015), A.R. 8153. As such, HHS has specifically stated that it intends to pay additional amounts for benefit year 2014 from benefit year 2015 collections, and, if necessary, benefit year 2016 collections. *Id.*; *see also* Appendix at A3. Because HHS's three-year payment framework has not yet run its course, Land of Lincoln has no present right to additional payments (to the extent it has any right to such payments at all). Where, as here, a plaintiff has received all the money it is currently due as of the filing of the complaint, there has been no breach of a money-mandating obligation and a court must dismiss the complaint for lack of jurisdiction. *Annuity Transfers*, 86 Fed. Cl. at 179-80.

Seeking to avoid this result, Land of Lincoln misreads the *en banc* portion of *Fisher* to support its argument that it need only establish a "fair inference" that section 1342 is "money-mandating." Lincoln Motion at 19 (citing *Fisher v. United States*, 402 F.3d 1167, 1173-74 (Fed. Cir. 2005) (en banc)). Not so. While *Fisher* addressed the standard for identifying a money-mandating source of law (which is not at issue here), it did not abrogate the independent requirement that a plaintiff seek "actual, presently due money damages." *Fisher*, 402 F.3d at 1173-1175. And because the Supreme Court has interpreted the Tucker Act to impose this requirement, *King*, 395 U.S. at 3, the Federal Circuit could not abrogate it.

The only other case cited by Land of Lincoln to establish this Court's jurisdiction concerns back pay claims under the Military Pay Act, 37 U.S.C. § 204. Lincoln Motion at 8 (citing *Albino v. United States*, 104 Fed. Cl. 801 (2012)). In *Albino*, the court held that the plaintiff had identified a money-mandating source of law, yet nevertheless concluded it *lacked* jurisdiction over the claims because the claims were "not ripe" until the plaintiff was separated from the military. *Id.* at 814 (noting that a court "cannot exercise jurisdiction over an unripe claim because it is 'premised upon

contingent future events that may not occur as anticipated'" (citation omitted)). As in *Albino*, Land of Lincoln's claims are not ripe. HHS has not yet determined the total amount of payments that Land of Lincoln (or any other issuer) will receive under the risk corridors program and will not do so until the end of the program. Whether sufficient funds will be available to make full payment of claims for any particular benefit year, and for all three years combined, is unknown. This Court does not address hypothetical situations that may be fully addressed by agency action, legislative action, or the passage of time. *See, e.g.*, *Shinnecock Indian Nation v. United States*, 782 F.3d 1345, 1351-52 (Fed. Cir. 2015) (affirming dismissal for lack of ripeness where "multiple possible . . . outcomes and factual developments could impact the Court of Federal Claims' adjudication" of plaintiff's claims). Thus, whether analyzed through a ripeness lens or through the independent requirement that money damages be "presently due," the outcome is the same: jurisdiction is lacking because HHS has not breached any present obligation to make full payments.

Finally, just as the Court lacks jurisdiction to award money damages for asserted 2015 risk corridors payments that are not yet due, the Court lacks jurisdiction to "grant judgment for Lincoln for its risk corridors payment for fiscal year 2016 for the amount finally determined in 2017." Lincoln Motion at 14. By its terms, Land of Lincoln's request is premature; no amount of risk corridors payment can be determined—much less paid—until after QHPs submit their risk corridors data in July 2017. In any event, the Court's jurisdiction to issue equitable or declaratory relief is limited to three statutorily defined circumstances, none of which apply here. *See* 28 U.S.C. §§ 1491(a)(2), (b)(2) (limiting issuance of equitable relief to employment and procurement disputes); *see also Annuity Transfers, Ltd.*, 86 Fed. Cl. at 181-82. And even that narrowly circumscribed relief can only be awarded where necessary "to complete the relief afforded by" a monetary judgment within the Court's primary jurisdiction. 28 U.S.C. § 1491(a)(2). Because the

Court lacks jurisdiction over Land of Lincoln's monetary claims, the Court "has no basis upon which to exercise jurisdiction over [the] claims for . . . declaratory relief." *Pucciariello v. United States*, 116 Fed. Cl. 390, 411-12 (2014) (citations omitted); *see also Nat'l Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714, 716 (Fed. Cir. 1998); *Thorndike v. United States*, 72 Fed. Cl. 580, 582 (2006).

Land of Lincoln's motion must be denied for lack of jurisdiction.

II. Should the Court Reach the Merits, Land of Lincoln Cannot Prevail Because It Has Not Met Its Burden to Establish that It Is Entitled to Annual Risk Corridors Payments in Excess of Collections

When considering a motion for judgment on the administrative record pursuant to RCFC 52.1(c), the Court must "not disturb the agency's decision . . . unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Adams & Assocs., Inc. v. United States*, 741 F.3d 102, 105–06 (Fed. Cir. 2014) (citing 5 U.S.C. § 706(2)). This standard is a "deferential" one and it requires the Court to sustain HHS's pro-rata payments so long as they "evince[] rational reasoning and consideration of relevant factors." *Res-Care, Inc. v. United States*, 735 F.3d 1384, 1390 (Fed. Cir. 2013).

A. Land of Lincoln Has Not Demonstrated a Contractual Obligation to Make Risk Corridors Payments, and Its Allegations of Reliance and Inducement Are Both Unsupported and Legally Irrelevant

In its Complaint, Land of Lincoln asserts contract theories of risk corridors liability that are separate and distinct from its claim under section 1342 and 45 C.F.R. § 153.510. *See* Compl. Count II & Count III. In its Motion, Land of Lincoln does not specify the counts for which it seeks judgment. While Land of Lincoln makes sporadic reference to a purported risk corridors contract with the government, Lincoln Motion at 1, 2, and 4, its arguments pertain only to Count I, the statutory and regulatory claim, *id.* at 8-14. Land of Lincoln makes no attempt to establish a

contractual obligation on the part of the United States to make risk corridors payments.[5] Nor does it identify anything in the administrative record to support its allegations of "inducement" or "reliance" on full annual payments, allegations which are belied by HHS's express guidance regarding budget neutrality and, in any event, do not give rise to a contract claim with the United States but rather sound in promissory estoppel over which this Court lacks jurisdiction. *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"). The United States disputes the existence of any contractual obligation to make risk corridors payments (and further disputes, to the extent relevant, that Land of Lincoln reasonably relied on full annual payments in the face of HHS's contrary guidance). Accordingly, the Court cannot enter judgment on the administrative record on the basis of any alleged contractual obligation—express or implied—to make risk corridors payments.

In the absence of a demonstrable contract right, *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012), the sole case on which Land of Lincoln relies, Lincoln Motion at 12-13, has absolutely no bearing on this case. *Ramah Navajo* concerned payment of contract support costs under contracts the government entered pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq*. *Ramah Navajo*, 132 S. Ct. at 2186. Congress had

[5] Because Land of Lincoln has not even plausibly alleged a contractual obligation to make risk corridors payments, the United States has moved to dismiss the contract counts for failure to state a claim under RCFC 12(b)(6). To the extent the Court denies such motion, disputed issues of fact that cannot be resolved by recourse to an administrative record preclude disposition of the contract claims until the United States has answered and had an opportunity to take discovery. *See* Docket No. 22, at 31-41.

appropriated sufficient funds to pay individual contractors in full, but not enough funds to cover the aggregate amount due to all contractors. *Id.* The Supreme Court held that once Congress appropriated sufficient funds for an individual contractor (and assuming an otherwise enforceable contract), the government was liable to pay that contractor in full, notwithstanding a later insufficiency of appropriations. *Id.* at 2190.

Land of Lincoln misstates the holding of *Ramah Navajo* and ignores binding Federal Circuit precedent in suggesting that the *Ramah Navajo* holding applies outside of a contract context. The Supreme Court grounded its holding in "longstanding principles of Government contracting law," *Ramah Navajo*, 132 S. Ct. at 2186, and nothing in the decision suggests the holding applies outside of that limited context. Indeed, the very language quoted by Land of Lincoln in its brief refers to payments owed to "Government contractor[s]" under "contracts." Lincoln Motion at 12-13 (citing *Ramah Navajo*, 132 S. Ct. at 2184); *see also Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 646 (2005) ("A statute that retroactively repudiates the Government's *contractual* obligation may violate the Constitution.") (emphasis added). Moreover, the Federal Circuit has confirmed that the holding of *Ramah Navajo* is limited to the narrow context of government contracts. In *Prairie County, Montana v. United States*, two counties sought payments under the Payment In Lieu of Taxes Act, 31 U.S.C. §§ 6901-6907, which the Federal Circuit had previously held were limited by annual appropriations. 782 F.3d 685, 687-88 (Fed. Cir.) (citing *Greenlee Cty. v. United States*, 487 F.3d 871, 879 (Fed. Cir. 2007)), *cert. denied*, 136 S. Ct. 319 (2015). The plaintiffs argued that, under *Ramah Navajo*, the government was obligated to pay the full amounts provided under the statutory formulas regardless of available appropriations. 782 F.3d at 688. The Federal Circuit, affirming this Court, rejected that argument, noting that *Ramah Navajo* and *Cherokee Nation* were different because "not all grants of benefits

are contracts." *Id.* at 690. The Federal Circuit concluded that, "[a]bsent a contractual obligation," the effect of an appropriations limitation on the government's liability depends on congressional intent. *Id.*[6]

Based on this binding precedent, the limited contract-based doctrine of *Ramah Navajo* has no application to this case because section 1342 provides for the creation of a benefits program, not a contract. As the Court noted in *Cherokee Nation*, the Indian Self-Determination and Education Assistance Act "uses 'contract' 426 times." 543 U.S. at 639. In contrast, neither section 1342 nor 45 C.F.R. § 153.510 contain any language of contract; they simply provide for the creation of a program and a formula for determining charges and payments. *See Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465–66 (1985) ("[A]bsent 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.") (internal quotations, citations omitted). And as noted above, nothing in the administrative record or Land of Lincoln's Motion establishes—or even suggests—that HHS has a contractual obligation to make risk corridors payments. Because Land of Lincoln cannot show—and unquestionably has not shown here—a contractual commitment by HHS to make risk corridors payments, *Ramah Navajo* has no application to this case.

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[6] In *Prairie County*, congressional intent to limit the United States' obligation was contained in the authorizing legislation rather than, as here, subsequent appropriations laws. However, the Federal Circuit's focus on congressional intent as manifested in the relevant statutory enactments is consistent with the line of cases, discussed *infra*, holding that it is the intent of Congress—taking all of its enactments into consideration—that controls the liability determination. *See infra* at Part II(C); *United States v. Mitchell*, 109 U.S. 146, 150 (1883) ("The whole question depends on the intention of congress as expressed in the statutes").

Land of Lincoln nevertheless asserts that because HHS had sufficient funds from risk corridors collections to pay Land of Lincoln's risk corridors payment in full, Land of Lincoln is entitled to judgment in this Court for the balance. This assertion is incorrect. In fact, in the absence of a contractual obligation, the Federal Circuit and other courts have held that where, as here, appropriated funds fall short of amounts due under a statutory formula, the agency has discretion to reduce the payments proportionately to the extent of its budget authority. *Prairie County*, 782 F.3d at 686, 691 (affirming agency's proportional reduction of payments where appropriated funds were insufficient); *City of Los Angeles v. Adams*, 556 F.2d 40, 49-50 (D.C. Cir. 1977) (holding that a pro-rata allocation of funds is proper where "Congress does not appropriate enough money to meet the needs of a class of beneficiaries prescribed by Congress, and . . . is silent on how to handle this predicament"); *cf. Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100-01 (D.C. Cir. 2003) ("[T]he agency is in a unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack."); *Cobell v. Norton*, 428 F.3d 1070, 1076 (D.C. Cir. 2005) (concluding that in light of statutory ambiguity and appropriations shortfalls, "the district court owed substantial deference" to the agency's plan because "[t]he choices at issue required both subject-matter expertise and judgment about the allocation of scarce resources, classic reasons for deference to administrators."). Because a pro-rated reduction in payments is precisely the approach HHS has taken here, and because that solution is a logical and rational response to the limited appropriations imposed by Congress, Land of Lincoln's Motion for additional funds beyond its pro-rated share must be denied.

B. Land of Lincoln Has Not Demonstrated That HHS Breached a Legal Duty to Pay Additional Risk Corridors Amounts Because the ACA Does Not Mandate Annual Risk Corridors Payments In Excess of Amounts Collected

Land of Lincoln contends that "full" risk corridors payments must be made "on an annual or plan year basis" and that this is so because "Congress stated expressly in Section 1342 that the risk corridors program is to be modeled after the Medicare Part D risk mitigation program, which is not budget neutral." Lincoln Motion at 10, 12. Otherwise, Land of Lincoln argues, the program "would not serve the intended Congressional purpose of risk mitigation." Lincoln Motion at 10. Land of Lincoln is incorrect.

First, as Land of Lincoln concedes, and as set forth above, the ACA does not require full payment on an annual basis. *See* Compl. ¶ 84 (conceding that neither Congress nor HHS "impose[d] a deadline for HHS to tender full risk corridor payments to QHPs[.]"). Section 1342 requires HHS to *calculate* risk corridors payments and charges *for* a "plan year," 42 U.S.C. § 18062(b), a requirement that accounts for the annual nature of the cost and revenue inputs to the risk corridors formula (such as premiums and claims costs). But section 1342 does not dictate anything about when the payments must be made. To the extent the annual nature of the risk corridors calculations has any bearing on when payments are due, it reflects that payments *are not due* until after the conclusion of that year when issuers' claims costs and target amounts can be finally determined.

Second, and more fundamentally, Land of Lincoln's reference to "full" payments is based on an incorrect reading of section 1342. Congress has not mandated that HHS make risk corridor payments in excess of collections. Rather, the program is self-funding: insurers that have lower-than-expected costs for a given year are required to make contributions to the program, and those contributions are used—across the three-year life span of the program if necessary—to fund

payments to insurers that have higher-than-expected costs. Thus, subsection (a) of section 1342 requires HHS to establish and administer a temporary "payment adjustment system" based on the ratio of a plan's allowable costs to the plan's aggregate premiums. HHS fulfills that role by collecting charges from plans whose allowable costs are less than the threshold and distributing those funds to plans whose allowable costs exceed the threshold. But nothing in section 1342 requires HHS to make up a shortfall in the event payments exceed collections under the statutory formula, and Congress, when it enacted section 1342, did not specifically authorize or appropriate funds that would permit HHS to do so. To the contrary, section 1342 creates a program with only "payments in" and "payments out." 42 U.S.C. § 18062(b) (capitalization altered). Insurers are assessed charges or receive payments "under the program," 42 U.S.C. § 18062(b)(1) and (2), and HHS distributes the monies accordingly. The statute contains no reference to any other source of funds.[7] Accordingly, HHS's determination to operate the risk corridors program on a three-year basis, in which annual payments are limited by the amount of funds collected across all program years, rationally conforms to the structure of section 1342 and must be upheld.

Land of Lincoln relies heavily on the language of subsection (b), which, in setting forth the "payment methodology," states that "the Secretary shall pay" amounts calculated under the formula. 42 U.S.C. § 18062(b)(1). But subsection (b) merely describes the "methodology" to be applied by HHS as it adjusts funds between plans "under the program"; it nowhere states that HHS

[7] Responding to a request for an opinion regarding the availability of appropriations to make risk corridors payments, the GAO concluded that, as a matter of appropriations law, the CMS Program Management appropriation then in effect would have been available to make risk corridors payments and also would have appropriated risk corridors collections to HHS to make risk corridors payments had any obligation to make payments existed in that fiscal year. *See GAO Op.*, 2014 WL 4825237, at *5. HHS had identified only collections as a source of funds for payments. *Id.* The GAO did not address whether HHS was required under section 1342 to make payments in excess of collections.

or the United States must provide additional funds to insurers when the funds available "under the program" fall short of the statutory amounts. Under Land of Lincoln's interpretation, HHS would be the uncapped insurer of the insurance industry itself, under criteria—the ratio of a plan's allowable costs to its aggregate premiums—which are wholly dependent upon issuers' business judgment. Congress did not intend that result.

That Congress did not intend such a result is demonstrated by the fact that a risk corridors provision in an earlier, unenacted bill would have authorized money to be appropriated for the risk corridors program on an annual basis and required HHS to "establish and administer a contingency fund for risk corridors." *See* Small Business Health Options Program Act of 2009, H.R. 2360, 111th Cong. §§ 3102(c)(14), 3108, 3111. That language is noticeably absent from the risk corridors provision that became part of the ACA, suggesting Congress ultimately determined that the risk corridors program must be self-funding. Congress's intent is further confirmed by the contrast between section 1342 and the preexisting risk corridors program under Medicare Part D. Although Congress specified that the ACA's temporary risk corridors program was generally to be "based on" the already-existing risk corridors program under Medicare Part D, *see* 42 U.S.C. § 18062(a), Congress omitted from the ACA the explicit statutory language that obligates the Secretary to make payments under the Medicare Part D risk corridors program in excess of amounts collected under that program. The Medicare Part D provision expressly provides: "This section constitutes budget authority in advance of appropriations Acts and represents the obligation of the Secretary to provide for the payment of amounts provided under this section." 42 U.S.C. § 1395w-115(a)(2). By contrast, there is no such language in section 1342.[8]

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[8] Nor does Congress's requirement that the risk corridors program be "based on" the Medicare program suggest that Congress intended to obligate itself for risk corridors payments under the

Accordingly, when the CBO performed a cost estimate contemporaneously with the Affordable Care Act's passage, it omitted the risk corridors program from its scoring. *See* Letter from Douglas Elmendorf, Director, Congressional Budget Office, to Nancy Pelosi, Speaker, House of Representatives, Tbl. 2 (Mar. 20, 2010), http://www.cbo.gov/ftpdocs/113xx/doc11379/amendreconProp.pdf. The CBO's cost estimate was critical to the ACA's passage and was referenced in the text of the ACA itself. *See* ACA § 1563(a), 124 Stat. 270-271, Appendix at A5, ("Based on Congressional Budget Office (CBO) estimates, this Act will reduce the Federal deficit between 2010 and 2019"); *see also* David M. Herszenhorn, *The Numbers Come Out Just Where Obama Wanted, With No Magic Involved*, N.Y. Times, Mar. 19, 2010, at A16; Robert Pear and David M. Herszenhorn, *House Unveils Health Bill, Minus Key Details*, N.Y. Times, June 19, 2009, at A1 (quoting House Democratic leader as saying "'whatever we do will be fully paid for'"). And that critical estimate of the ACA's fiscal consequences was predicated on the understanding that the risk corridors program would not impose liability on the government for payments in excess of amounts collected under the risk corridors program.

Finally, the contention that section 1342 must be construed to authorize uncapped payments to issuers in order to "serve the intended Congressional purpose of risk mitigation," Lincoln Motion at 10, is unsustainable. "[N]o legislation pursues its purposes at all costs.

ACA in the same way, as Land of Lincoln contends. Lincoln Motion at 12. Congress modeled all of the 3Rs programs on the Medicare Part D programs; yet, as the GAO observed, numerous and significant differences exist between the programs. *See* Lincoln Motion, App. 15, A.R. 89 ("PPACA directed HHS to consider the design of the Medicare risk mitigation programs . . . although it also set requirements that differed from the Medicare programs."). A prime example of these differences is that all of the ACA's premium stabilization programs are funded with collections from insurance companies (and related entities), whereas none of the analogous programs under Medicare Part D are dependent upon issuer contributions.

Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). The history of the ACA demonstrates that Congress was concerned with the budgetary impact of the law. Consistent with this concern, it declined to appropriate money for the program and instead planned the program, along with the rest of the 3Rs programs, to be self-funding. Because section 1342 does not give insurers a right to risk corridors payments from the Secretary in excess of collections, Land of Lincoln's Tucker Act claims fail as a matter of law.

C. The Spending Laws Confirm That Insurers Are Not Entitled to Risk Corridors Payments in Excess of Collections

Finally, the appropriations riders that Congress enacted in 2014 and 2015 corroborate Congress's original intent that payments be limited to the amount of collections. Land of Lincoln concedes the existence of these budgetary restrictions and further concedes that, as a result of these restrictions, HHS presently lacks sufficient funds to pay risk corridors amounts in full. Lincoln Motion at 5-7. Yet without even attempting to explain the purpose of these restrictions if not to confirm and ensure that the risk corridors program is budget neutral, Land of Lincoln suggests that they are irrelevant to the government's liability. *Id.* at 6, 11, 12. That suggestion is untenable.

In September 2014, the GAO released its opinion that, under the language of CMS's then-effective Program Management appropriation, monies transferred to the Program Management account from CMS trust funds would be available for risk corridors payments. *See GAO Op.*, 2014 WL 4825237, at *3. On December 9, 2014, in response to the GAO's conclusion, and well before any risk corridors payments could be made, Congress passed the 2015 Spending Law with a rider prohibiting the use of appropriated funds other than collections to make risk corridors payments.

The following year, Congress enacted an identical rider in the 2016 Spending Law. Pub. L. No. 114-113, div. H, title II, § 225. Congress's intent in each of the Spending Laws was clear: to ensure "that the risk corridor program will be budget neutral . . . over the three year period risk corridors are in effect," 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014), and to "requir[e] the administration to operate the Risk Corridor program in a budget neutral manner," Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 2016, S. Rep. No. 114-74 at 12, (2015). The 2015 and 2016 Spending Laws thus confirm that Congress intends HHS to administer the risk corridors program as a self-funding program of redistribution among insurers.

Even if this were not the intent behind section 1342 as originally enacted, "it is a well-established doctrine that Congress can authorize a deviation from pre-existing law by a provision in an appropriations act." *Bickford v. United States*, 228 Ct. Cl. 321, 329 (1981); *see, e.g.*, *United States v. Dickerson*, 310 U.S. 554, 555-56 (1940) (Congress can "suspend or repeal [an] authorization contained in [its own acts] . . . by an amendment to an appropriation bill, or otherwise"); *Republic Airlines, Inc. v. U.S. Dep't of Transp.*, 849 F.2d 1315, 1320 (10th Cir. 1988) ("Congress can amend substantive legislation through a provision in an appropriations act."); *Envirocare of Utah Inc. v. United States*, 44 Fed. Cl. 474, 482 (1999) (appropriations laws are "'just as effective a way to legislate as are ordinary bills relating to a particular subject'") (citation omitted); GAO, GAO–04–261SP, *Principles of Federal Appropriations Law (Vol. I)* 2-62-63 (4th ed. Mar. 10, 2016) ("Congress may enact a subsequent appropriation that makes a smaller payment than was contemplated in the permanent legislation . . . as long as the intent to reduce the amount of the payment is clear.").

A long line of Supreme Court and appellate cases have held that provisions enacted in annual appropriations laws, such as the spending limits at issue here, can substantively amend money-mandating provisions in previously enacted laws, thereby eliminating or reducing a claimant's right to payment. In *Dickerson*, for example, the Supreme Court considered the effect of an annual appropriations law providing that "no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1938, shall be available for the payment of [an] enlistment allowance . . . notwithstanding . . . [previously enacted legislation mandating that such allowance 'shall be paid']." *Dickerson*, 310 U.S. at 556-57. The Court held that the plaintiff was not entitled to collect such an allowance, notwithstanding the prior statute, because the statutory context and the legislative history showed that "Congress intended [the appropriations law] to suspend the enlistment allowance" for the fiscal year at issue. *Id.* at 561-62.

Similarly, in *United States v. Will*, 449 U.S. 200 (1980), the Supreme Court held that appropriations language providing that "[n]o part of the funds appropriated for the fiscal year ending September 30, 1979 . . . may be used to pay" salary increases mandated by earlier legislation "indicate[d] clearly that Congress intended to rescind these raises entirely, not simply to consign them to the fiscal limbo of an account due but not payable. The clear intent of Congress . . . *was to stop for that year the application of the . . . Act*." *Id.* at 224 (emphasis added); *see also Mitchell*, 109 U.S. at 148 (holding that "by the appropriation acts which cover the period for which the appellee claims compensation, congress expressed its purpose to suspend the operation of [a prior statute fixing salaries] and to reduce for that period the salaries of the appellee and other interpreters of the same class from $400 to $300 per annum"); *Matthews v. United States*, 123 U.S. 182, 186 (1887) (appropriations law capping salaries "in full compensation" for services "repealed, by necessary implication[,] . . . previous enactments" setting higher compensation).

In *Highland Falls–Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1171-72 (Fed. Cir. 1995), the Federal Circuit likewise gave effect to congressional intent in an earmarked appropriation that limited and modified previously enacted statutory directions for the payment of money. Other circuits have reached similar conclusions. For example, in *Republic Airlines*, an annual appropriation law stated that "notwithstanding any other provision of law, none of the funds appropriated by this Act shall be expended under section 406 [of the Federal Aviation Act of 1958] for [certain] services provided after ninety-five days following the date of the enactment of this Act." 849 F.2d at 1317 (citing Pub. L. No. 97-102). The Tenth Circuit held that the appropriations restriction substantively amended the previously existing subsidy program under section 406 of the Act, thereby limiting the Civil Aeronautics Board's power to pay subsidies. *Id.* at 1319-22 (citing *Will*, 449 U.S. at 223; *American Fed'n of Gov't Employees, AFL–CIO v. Campbell*, 659 F.2d 157, 157 (D.C. Cir. 1980)). In so holding, the court rejected the airlines' argument that "Congress intended in section 406(b) to create an entitlement which was to survive appropriations actions," concluding that the "appropriations act directly addressed, and limited, the subsidy payable by the Board under section 406 and, perforce, altered any 'entitlement' to which the Airlines refer." *Id.* at 1319. *See also City of Arcata v. Slater*, 133 F.3d 926, 1997 WL 812258, at *2 (9th Cir. 1997) [unpublished table op.] (holding that the "plain language" of the appropriations law stating that "none of the funds in this Act may be obligated or expended to operate" flight service station "defunds everything that [the prior act] obligates the FAA to do. Accordingly, the FAA's obligation to implement that section has been suspended") (citing *Burtch v. United States Dep't of the Treasury,* 120 F.3d 1087, 1090 (9th Cir. 1997)); *Am. Fed'n of Gov't Emp., AFL-CIO*, 659 F.2d at 161 ("the [appropriations act] in this case contains words that by clear implication, if not express statement, modified *pro tanto* the previous substantive law.

Consequently, we conclude that Congress, by express reference to the earlier statute, effectively modified the prevailing rate statute to provide that wages for prevailing rate employees could not be increased by more than 5.5% for fiscal year 1979.").

In many of these cases, Congress prohibited payment from the appropriations act as a whole (or, in *Dickerson*, from any appropriations act for the fiscal year at issue), or Congress capped payments at a lesser amount than specified. In contrast, because the risk corridors program includes collections from issuers, Congress did not intend through the 2015 and 2016 Spending Laws to eliminate risk corridors payments under section 1342 entirely or reduce payments by a specific amount, but instead intended to limit payments to the extent of risk corridors collections. Moreover, because collections are themselves considered an appropriation as a matter of appropriations law, rather than prohibiting payments from the Spending Laws as a whole (as the riders at issue in many cases did), Congress included riders that limit risk corridors payments only from the CMS Program Management appropriation, the only source of funding the GAO had determined to be legally available for risk corridors payments. The riders thus demonstrate Congress's intent that the risk corridors program be budget neutral.

The cases discussed above demonstrate that Congress can suspend or modify the extent of the government's obligation in an appropriations statute, and that Congress can demonstrate its intent to do so through the text of the appropriations statute itself, the surrounding context in which the appropriation was made, or the statute's legislative history. Here, in enacting the 2015 and 2016 Spending Laws, Congress demonstrated its intent that the risk corridors program be budget neutral for those fiscal years. Thus, even if Congress's intent to limit the United States' liability to the extent of risk corridors collections were unclear at the time the ACA was enacted, by the time any payments could be made, Congress had "directly spoken" to the issue by restricting the

use of HHS funds to support the risk corridors program. *Highland Falls*, 48 F.3d at 1170. Issuers' remedy "must lie with Congress." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 432 (1990).

CONCLUSION

For the foregoing reasons, Land of Lincoln's motion for judgment on the administrative record should be denied.

Dated: October 12, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October 2016, a copy of the foregoing, *The United States' Opposition to Plaintiff's Motion for Judgment on the Administrative Record*, was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing with be sent to all parties by operation of the Court's ECF system.

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