IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH ALLIANCE MEDICAL PLANS, INC.	)	
Plaintiff,	)	No. 18-334C (Judge Campbell-Smith)
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

GOVERNMENT'S RESPONSE TO PLAINTIFF'S
STATEMENT OF PROPOSED UNCONTROVERTED FACTS

Pursuant to the Court's June 29, 2018 Order and Rule 56(c) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully submits this response to the proposed Statement of Uncontroverted Facts of Health Alliance Medical Plans. For the reasons set forth in the Government's accompanying cross-motion to dismiss and opposition to plaintiff's motion for summary judgment, plaintiff's complaint should be dismissed as a matter of law and its motion for summary judgment denied.

RESPONSES TO PLAINTIFFS' PROPOSED UNCONTROVERTED FACTS[1]

1. The Affordable Care Act imposed certain obligations on the federal government to help incentivize the participation of private insurers, stabilize premiums, and induce the uninsured to purchase health insurance coverage. Relevant to this dispute, the ACA established a cost-sharing reduction subsidy, paid preemptively to certain qualified insurers, to facilitate the core statutory mission of providing affordable health care to low- and moderate-income Americans.

RESPONSE: Qualified. Plaintiff's statements about the Affordable Care Act (ACA) are legal

[1] We have not responded to the section headings contained in plaintiff's statement of proposed uncontroverted facts, as they were argumentative in nature and did not appear to be offered as statements of uncontroverted fact.

conclusions. Whether the Government has an obligation to make cost-sharing reduction payments in the absence of Congressional appropriations is at the center of the legal dispute between the parties.

> 2. Section 1402 of the Affordable Care Act, as codified at 42 U.S.C. § 18071, created the CSR program. In relevant part, that Section states:
>
> > (a) IN GENERAL.—In the case of an eligible insured enrolled in a qualified health plan—
> >
> > > (1) the Secretary shall notify the issuer of the plan of such eligibility; and
> > >
> > > (2) the issuer ***shall reduce*** the cost-sharing under the plan at the level and in the manner specified in subsection (c).
> >
> > [. . .]
> >
> > (c)(3) Methods for Reducing Cost-Sharing
> >
> > > (A) In general. An issuer of a qualified health plan making reductions under this subsection shall notify the Secretary of such reductions and *the Secretary* ***shall make*** *periodic and timely payments to the issuer equal to the value of the reductions.*
> >
> > *See* 42 U.S.C. § 18071(emphases added).

RESPONSE: Admit that this is a partial quote of 42 U.S.C. § 18071, where Section 1402 of the ACA is codified.

> 3. HHS implemented the CSR payments in the Code of Federal Regulations at 45 C.F.R. § 156.430. In relevant part, Section 156.430 states that "[a] QHP issuer ***will receive periodic advance payments*** based on the advance payment amounts calculated in accordance with § 155.1030(b)(3) of this subchapter." (emphasis added). Section 155.1030(b)(3) and other regulations set forth the calculation methodologies applicable to CSR payments.

RESPONSE: Admit that this is a partial quote from 45 C.F.R. § 156.430, a regulation that HHS promulgated to manage the CSR payment process. Admit that 45 C.F.R. § 155.1030(b)(3) contains directions on calculating the advance payment amounts of CSRs. Additionally, 45 C.F.R. § 155.1030(b)(3) states that "the Exchange must use the methodology specified in the annual HHS

notice of benefit and payment parameters."

4. Following the ACA's implementation, the Government established a CSR reimbursement schedule under which the Government would provide the required periodic advance payments to QHP issuers. *See* 42 U.S.C. § 18082; 45 C.F.R. § 156.430(b)-(d). The reimbursements are then periodically reconciled to the actual amount of cost-sharing reductions made to enrollees and providers. 45 C.F.R. § 156.430(c). Specifically, CMS established "a payment approach under which HHS would make monthly advance payments to issuers to cover projected cost-sharing reduction amounts, and then reconcile those advance payments at the end of the benefit year to the actual cost-sharing reduction amounts." CMS, HHS Notice of Benefit and Payment Parameters for 2014 (Mar. 11, 2013), at 7, *available at* https://www.cms.gov/CCIIO/Resources/Files/Downloads/payment-notice-technical-summary-3-11-2013.pdf. "After the close of the benefit year, QHP issuers must submit to HHS information on the actual value of the cost-sharing reductions provided" and HHS "would then reconcile the advance payments and the actual cost- sharing reduction amounts." *Id*. Finally, the Government would reimburse the QHP issuer "any amounts necessary to reflect the CSR provided or, as appropriate, the issuer [would] be charged for excess amounts paid to it." CMS, Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Years 2014 and 2015 (Mar. 16, 2016), at 28, *available* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/CMS_Guidance_on_CSR_Reconciliationfor_2014_and_2015_benefit_years.pdf; *see also* 45 C.F.R. 156.430(e).

RESPONSE: Admit that this describes the procedure to be followed under the statutes, regulations, and CMS guidance, in the event CSR payments were to be made, based upon a valid appropriation.

5. For QHP issuers to participate on the marketplaces for the 2017 benefit year, they had to submit their premiums to the appropriate state or federal regulatory authority during May 2016 and submit a signed Qualified Health Plan Issuer Agreement ("QHPIA") to CMS by the end of September 2016. CMS, Key Dates for Calendar Year 2016: QHP Certification in the Federally-facilitated Marketplaces; Rate Review; Risk Adjustment and Reinsurance (Dec. 23, 2015), *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Final-2016-key- dates-table-April-2016.pdf. Health Alliance timely submitted a signed QHPIA, and by doing so committed itself to offering health insurance coverage on the exchange for benefit year 2017. Because the QHPIA has limited termination rights, and because terminating the QHPIA under any circumstance does not obviate the issuer's obligations under state law to continue coverage for enrollees who purchased the plan, Health Alliance's commitment to the 2017 marketplace was effectively irrevocable as of

the end of September 2016. *See* 45 C.F.R. § 147.106(b).

RESPONSE: Qualified. Admit that plaintiff sets forth the applicable deadlines and timely submitted a signed QHPIA. Plaintiff's obligations and termination rights under the QHPIA are legal questions, as is the question of when and whether its commitment to the 2017 marketplace was "effectively irrevocable."

> 6. Health Alliance committed itself to participating in the marketplace in 2017 with the express understanding—based on the plain text of Section 1402 and the Government's actions in previous benefit years—that, for those plans that required the issuers to reduce cost- sharing obligations of the enrollee, the Government would honor the statutory mandate, *i.e.*, "***the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions***." And in fact, in accordance with that understanding, the Government made monthly advance payments from January 2014 up and until October 2017. It was not until October 12, 2017—over a year after Health Alliance had committed itself irrevocably to the 2017 exchange—that the Government first announced that it would not make CSR payments for the remainder of the 2017 benefit year.

RESPONSE: Qualified. The Government has no means of knowing plaintiff's subjective beliefs or understandings, though the Government does not believe that such information is necessary for the Court to decide the parties' respective cross-motions. Admit that the Government made monthly advance payments from January 2014 until October 2017, and announced in October 2017 that it could not continue to make CSR payments absent a congressional appropriation.

> 7. Section 1401 of the ACA added a new section to the Internal Revenue Code that provided eligible insureds with premium tax credits to cover their health insurance premiums. 26 U.S.C. § 36B. The ACA also amended 31 U.S.C. § 1324, which establishes a permanent appropriation of "[n]ecessary amounts . . . for refunding internal revenue collections as provided by law," including "refunds due from" specified provisions of the tax code. 31 U.S.C. § 1324. Specifically, Section 1401 of the ACA amended the list in Section 1324 to include "refunds due from" Section 36B. 26 U.S.C. § 36B. Until October 2017, the Government relied on the appropriation in Section 1324 to pay amounts owed under both Sections 1401 and 1402.

RESPONSE: Admit that Section 1401 of the ACA is codified at 26 U.S.C. § 36B, which is part of the Internal Revenue Code. Admit that Section 1401 of the ACA also included a conforming amendment to 31 U.S.C. § 1324. Admit that prior to October 2017, the Government relied on the appropriation in Section 1324 to make payments under both Sections 1401 and 1402. In May 2016, the United States District Court for the District of Columbia held that Section 1324 did not appropriate funding for CSR payments. The court enjoined further payments but stayed the injunction pending appeal. *See United States House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 173-74 (D.D.C. 2016). The injunction has since been lifted pursuant to a settlement between the parties.

> 8. In its April 2013 budget request to Congress for fiscal year 2014, the Office of Management and Budget ("OMB") included a request for a line-item appropriation designating funds for the payment of cost-sharing reductions. *See* Fiscal Year 2014 Budget of the United States Government, Appendix at 448 (Apr. 10, 2013). The same day, HHS separately submitted is justification to Congressional Appropriations committees stating that "CMS requests an appropriation in order to ensure adequate funding to make payments to issuers to cover reduced cost-sharing in FY 2014." *See* HHS, Fiscal Year 2014, CMS, Justification of Estimates for Appropriations Committees at 184 (Apr. 10, 2013).

RESPONSE: Admit.

> 9. Congress did not provide the line-item appropriation requested by HHS. *See* S. Rep. No. 113-71, 113th Cong. at 123 (July 11, 2013). Congress never repealed or amended the CSR provision, however, and the October 2013 legislation references the existence of CSR reimbursements. *See* Continuing Appropriations Act, 2014, Pub. L. No. 113-46, Div. B, § 1001(a), 127 Stat. 558, 566 (Oct. 17, 2013) (requiring HHS to certify that a program was in place to verify that applicants were eligible for "premium tax credits . . . and reductions in cost- sharing" before "making such credits and reductions available").

RESPONSE: Admit.

> 10. In January 2014, HHS began making monthly advance payments to reimburse QHP issuers for cost-sharing reductions, (*see* CMS, Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Years 2014 and 2015 (Mar. 16, 2016), at 27 ("Payments to issuers of estimated monthly amounts began in January 2014."), available at

> https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/CMS_Guidance_on_CSR_Reconciliation-for_2014_and_2015_benefit_years.pdf.) relying on Section 1324 as the appropriation for these payments. *See* Letter from Sylvia M. Burwell, Dir., OMB, to Senators Ted Cruz and Michael S. Lee, at Responses p. 4 (May 21, 2014), ("cost-sharing subsidy payments are being made through the advance payments program and will be paid out of the same account from which the premium tax credit portion of the advance payments for that program are paid"), available at http://www.cruz.senate.gov/files/documents/Letters/20140521_Burwell_Response.pdf.

RESPONSE: Admit that in January 2014, HHS began making monthly advance CSR payments from the Section 1324 appropriation. HHS ceased this practice in October 2017 based upon legal guidance from the Attorney General of United States.

> 11. On November 21, 2014, the U.S. House of Representatives (the "House") filed a complaint against HHS and the Treasury, in which it sought an injunction preventing the executive branch from "making any further Section 1402 Offset Program payments to Insurers unless and until a law appropriating funds for such payments is enacted." *See* Compl. ¶ 27, *House v. Burwell*, Case No. 1:14-cv-01967-RMC, Dkt. 1 (D.D.C. filed Nov. 21, 2014). In its complaint, the House argued that "Congress has not, and never has, appropriated any funds (whether through temporary appropriations or permanent appropriations) to make any Section 1402 Offset Program payments to Insurers." *Id.* ¶ 28. The Government moved for summary judgment, asserting that 31 U.S.C. § 1324 provided a permanent appropriation for both Section 1401 premium tax credits and Section 1402 CSR reimbursements. *See* Defs.' Mem. ISO Mot. for Summ. J., *House v. Burwell*, Case No. 1:14-cv-01967-RMC, Dkt. 55-1 (D.D.C. Dec. 2, 2015) at 11. In its summary judgment briefing papers, the Government expressly acknowledged that the ACA "requires the government to pay cost-sharing reductions to issuers" and that "[t]he absence of an appropriation would not prevent the insurers from seeking to enforce that statutory right through litigation." Defs.' Mem. ISO Mot. for Summ. J., *House v. Burwell*, Case No. 1:14-cv- 01967-RMC, Dkt. 55-1 (D.D.C. Dec. 2, 2015) at 20. Moreover, the Government acknowledged that prevailing insurers "can receive the amount to which it is entitled from the permanent appropriation Congress has made in the Judgment Fund . . . . The mere absence of a more specific appropriation is not necessarily a defense to recovery from that Fund." *Id*. The district court ruled in favor of the House and entered an injunction preventing any further reimbursements under Section 1402, but stayed the injunction pending resolution of any appeal. *House v. Burwell*, 185 F. Supp. 3d 165 (D.D.C. 2016).

RESPONSE: Qualified. Admit that this statement describes the procedural history of the *House*

v. Burwell litigation. Plaintiff has selectively quoted the Government's brief in that case. The quoted portion reads in full context as follows:

> The House's interpretation could yield still further anomalies. The Act requires the government to pay cost-sharing reductions to issuers. *See* 42 U.S.C. § 18071(c)(3) ("An issuer of a qualified health plan making reductions under this subsection shall notify the Secretary of such reductions and the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions."); 42 U.S.C. § 18082(c)(3) (Secretary of Treasury "shall make" advance payments of cost-sharing reductions). The absence of an appropriation would not prevent the insurers from seeking to enforce that statutory right through litigation.
>
> Under the Tucker Act, a plaintiff may bring suit against the United States in the Court of Federal Claims to obtain monetary payments based on statutes that impose certain types of payment obligations on the government. *See* 28 U.S.C. § 1491(a)(1); *United States v. Mitchell*, 463 U.S. 206, 216 (1983). *If the plaintiff is successful*, it can receive the amount to which it is entitled from the permanent appropriation Congress has made in the Judgment Fund, 31 U.S.C. § 1304(a). The mere absence of a more specific appropriation is not necessarily a defense to recovery from that Fund. *See, e.g.*, *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2191-92 (2012).
>
> *If insurers were successful* in bringing such suits, they could in effect receive a windfall from the government, recovering once in the form of increased premium tax credits and a second time from the Judgment Fund. The House has explained neither how that result could be avoided if its interpretation were adopted nor why Congress would have created such a perverse scheme.

See Defs.' Mem. ISO Mot. for Summ. J., *House v. Burwell*, Case No. 1:14-cv- 01967-RMC, Dkt. 55-1 (D.D.C. Dec. 2, 2015) at 20 (emphasis added).

> 12. The Government appealed the ruling to the D.C. Circuit. In November 2016, the House asked the Court of Appeals to hold the case in abeyance to "provide the President-Elect and his future Administration time to consider whether to continue prosecuting or to otherwise resolve this appeal." Appellee's Mot. to Hold Briefing in Abeyance, *House v. Burwell*, Case No. 16-5202, Dkt. No. 1647228 (D.C. Cir. Nov. 21, 2016) at 1-2. The D.C. Circuit granted the request and the appeal remained in abeyance until Friday, December 15, 2017, when the parties announced that they had reached a settlement providing for the parties to request that district court's decision case to be vacated. On May 16, 2018, the D.C. Circuit granted the motion for remand to vacate the district court's injunction on HHS's CSR payments, and the district court accordingly vacated its ruling two days later.

RESPONSE: Admit.

13. Although the Government continued to make CSR reimbursements for most of 2017, it decided in October 2017 to stop doing so, arguing that 31 U.S.C. § 1324 could not be used to fund CSR reimbursements. The Department of Justice concluded that Section 1401 premium tax credits and Section 1402 CSR reimbursements were two distinct programs, and the permanent appropriation in Section 1324 only provided funding for the Section 1401 premium tax credits. *See* Oct. 11, 2017 Ltr. from Att. Gen. Sessions to Secretary of Treasury and Acting Secretary of HHS. The next day, HHS announced that it would stop making CSR reimbursements "until a valid appropriation exists." Oct. 12, 2017 Mem. from E. Hargan to S. Verma re Payments to Issuers for Cost-Sharing Reductions (CSRs).

RESPONSE: Admit.

14. QHP issuers are required by state and federal regulations to set their ACA-related health insurance rates well before the year they become effective. These unreimbursed costs are enormous. The Congressional Budget Office ("CBO") estimates that CSR reimbursements to QHP issuers will be $7 billion in fiscal year 2017, $10 billion in 2018, and rise to $16 billion by 2027. *See* CBO, Federal Subsidies Under the Affordable Care Act for Health Insurance Coverage Related to the Expansion of Medicaid and Nongroup Health Insurance: Tables from CBO's January 2017 Baseline at 4, available at https://www.cbo.gov/sites/default/files/recurringdata/51298-2017-01-healthinsurance.pdf. An April 2017 study analyzing the potential effect of ending CSR reimbursements predicted that "[m]any insurers might react to the end of subsidy payments by exiting the ACA marketplaces. If insurers choose to remain in the marketplaces, they would need to raise premiums to offset the loss of the payments." Larry Levitt, Cynthia Cox, and Gary Claxton, The Effects of Ending the Affordable Care Act's Cost-Sharing Reduction Payments, Kaiser Family Foundation, Apr. 25, 2017, available at https://www.kff.org/health-reform/issue-brief/the-effects-of-ending-the-affordable-care-acts- cost-sharing-reduction-payments/.

RESPONSE: Qualified. Admit that QHP issuers are typically required by state and federal regulations to set their ACA-related health insurance rates in advance of the year they become effective. However, insurance regulators in 38 states accounted for the possible termination of CSR payments in approving issuers' 2018 premium rates. *See California v. Trump*, 267 F. Supp. 3d 1119, 1136 (N.D. Cal.). After HHS ceased making CSR payments in October 2017, additional states permitted issuers to rerate their 2018 premiums to account for the cessation of CSR

payments. *Id*. The study cited by plaintiffs would not be admissible in evidence, and therefore the Government objects to this portion of the statement of undisputed material fact pursuant to RCFC 56(c)(2).

> 15. As an October 13, 2017 joint statement from America's Health Insurance Plans and Blue Cross and Blue Shield Association noted, the decision to end CSR reimbursements has "real consequences," including that "[c]osts will go up and choices will be restricted." Kristine Grow, Health Plans Issue Joint Statement Regarding Funding for Cost-Sharing Reduction Benefits for Millions of Americans, American Health Insurance Plans (AHIP), Oct. 13, 2017, available at https://www.ahip.org/joint-statement-regarding-funding-for-crs/. These effects are currently playing out in every major ACA exchange across the country.

RESPONSE: The joint statement cited by plaintiffs would not be admissible in evidence, and therefore the Government objects to this statement of undisputed material fact pursuant to RCFC 56(c)(2). In addition, plaintiff has not supported these statements with admissible evidence or declarations as required by RCFC 56.

> 16. Health Alliance is not immune to these harms, and in fact has already suffered, and will continue to suffer, their effects. Like other QHP issuers, Health Alliance was owed monthly CSR reimbursements in October 2017, November 2017, and December 2017 that have not been paid. Pursuant to the calculation methodologies in Section 155.1030(b)(3) and other applicable regulations, Health Alliance estimates that it is owed $4,823,755.49 ($1,624,785.72 for October 2017; $1,609,670.68 for November 2017; and $1,589,299.09 for December 2017) in unpaid CSR reimbursements for 2017. Like other QHP issuers, Health Alliance is still required by law to provide cost-sharing reductions to eligible insureds, despite not receiving the mandated reimbursement from the Government. This has caused Health Alliance and other QHP issuers to suffer large financial losses. It also leads to instability in the insurance markets and hinders Health Alliance's and other QHP issuers' ability to design and price plans effectively for the ACA exchanges.

RESPONSE: To the extent "these harms" refers to the study and joint statement referenced in SUMF 14 and 15, the Government restates its objections contained in the responses to those statements. With respect to the amount plaintiff claims to be owed for fourth quarter 2017 CSR payments, plaintiff cites to no record evidence supporting this calculation as required by RCFC

56(c). CMS has just recently finished reconciling 2017 CSR payment data, and thus it would be premature for the Court to award damages on the basis of plaintiff's estimate, even were the Court to determine that the Government were liable to make CSR payments. The Government is not aware of plaintiff's or other QHP issuers' financial position, or their ability to effectively design and price plans for the ACA exchanges, though the Government does not believe that such information is necessary to decide the parties' respective cross-motions. In addition, plaintiff has not supported these statements with admissible evidence or declarations as required by RCFC 56.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

s/Claudia Burke
CLAUDIA BURKE
Assistant Director

OF COUNSEL:

CHRISTOPHER J. CARNEY
Senior Litigation Counsel

ERIC E. LAUFGRABEN
VERONICA N. ONYEMA
Trial Attorneys
Civil Division
U.S. Department of Justice

s/ALBERT S. IAROSSI
ALBERT S. IAROSSI
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 616-3755
Facsimile: (202) 305-7644
Email: Albert.S.Iarossi@usdoj.gov

September 14, 2018

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 14th day of September, 2018, a copy of the foregoing "GOVERNMENT'S RESPONSE TO PLAINTIFF'S STATEMENT OF PROPOSED UNCONTROVERTED FACTS" was filed electronically. Service upon plaintiff's counsel was thus effected by operation of the Court's CM/ECF system.

s/Albert S. Iarossi
Albert S. Iarossi