IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY, Plaintiff, v. UNITED STATES, Defendant.	Case No. 1:16-cv-00259-MMS (Judge Sweeney)

AMICUS CURIAE BRIEF ON BEHALF OF THE UNITED STATES HOUSE OF REPRESENTATIVES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

U.S. Constitution and Statutes

Legislative Authorities

Other Authorities

INTRODUCTION

The Department of Justice ("DOJ"), on behalf of the United States, has moved to dismiss this case for lack of subject matter jurisdiction, arguing that (i) because no payments are "presently due" to the Plaintiff, this Court does not have jurisdiction under the Tucker Act, and (ii) Plaintiff's claims are not ripe for determination. *See* United States' Mot. to Dismiss (ECF No. 8). DOJ inexplicably chose not to move to dismiss on the ground that Plaintiff has failed to state a claim, but DOJ has done so in later-filed cases brought by plaintiff-insurers seeking payments purportedly due under the same statutory provision. To ensure that the interests of the United States are fully represented, amicus curiae the United States House of Representatives (the "House") submits this memorandum in support of dismissal of this action with prejudice on the ground that Plaintiff has failed to state a claim.

BACKGROUND

I. The Risk Corridors Program of the ACA.

In 2010, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 ("ACA") was enacted into law. The ACA established Health Benefit Exchanges where individuals can obtain health insurance coverage, and contained certain risk mitigation provisions for Qualified Health Plans ("QHPs") that agreed to operate on these new exchanges. One of the risk mitigation provisions was the risk corridors program, a temporary measure that directed the Secretary of the U.S. Department of Health and Human Services ("HHS") to "establish and administer a program . . . for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums." ACA § 1342(a) (codified at 42 U.S.C. § 18062(a)); Compl. ¶ 21. The

ACA provides a statutory formula to calculate risk corridors payments. ACA § 1342(b)(1) (42 U.S.C. § 18062(b)(1)); Compl. ¶ 21. In brief, if a QHP's allowable expenses exceed a target figure by certain specified percentages, government payments to the issuer would increase. *See* ACA § 1342(b)(1) (42 U.S.C. § 18062(b)(1)). If a QHP's allowable expenses fall below the target figure by certain specified percentages, then funds would be remitted to the government. *See* ACA § 1342(b)(2) (42 U.S.C. § 18062(b)(2)); Compl. ¶ 21.

While the ACA provides that "the Secretary shall pay" when outgoing risk corridors payments are contemplated by the statute, *see* ACA § 1342(b)(1)(A), (B) (42 U.S.C. § 18062(b)(1)(A), (B)), the ACA itself does not appropriate any funds for those payments. In this regard, it is noteworthy that the ACA's temporary risk corridors program was modeled on a similar Medicare program, known as Medicare Part D. ACA § 1342(a) (42 U.S.C. § 18062(a)); Compl. ¶ 5. In the ACA, however, unlike the Medicare Part D program, *see* 42 U.S.C. § 1395w-115(a)(2), Congress omitted statutory language obligating HHS to make risk corridors payments in excess of the amounts collected. Under ordinary rules of statutory construction, this omission is intentional and must be given effect; more importantly, federal law does not allow an appropriation to be inferred. *See* 31 U.S.C. § 1301(d) ("A law may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made . . . .").

II. HHS Implementing Regulations.

In 2014, HHS issued regulations stating its intent "to implement [the risk corridors program] in a budget neutral manner." 79 Fed. Reg. 13744, 13787 (Mar. 11, 2014); Compl. ¶ 31. Two months later, HHS issued another set of implementing regulations, and repeated that it "intend[s] to administer risk corridors in a budget neutral way," but also explained that the

calculations would be made "over the three-year life of the program, rather than annually." 79 Fed. Reg. 30240, 30260 (May 27, 2014). HHS also opined that "the [ACA] requires the Secretary to make full payments to issuers," and advised that "[i]n the unlikely event of a shortfall for the 2015 program year . . . . HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations." *Id.*

III. The GAO Opinion.

In 2014, several Members of Congress asked the Government Accountability Office whether any appropriated funds were available to make risk corridors program payments. *See* U.S. Gov't Accountability Office ("GAO"), B-325630, Department of Health and Human Services —Risk Corridors Program, at 1 (Sept. 30, 2014) ("GAO Opinion"). GAO concluded, consistent with well-established principles of appropriations law, that the language of ACA § 1342(b)(1), authorizing the Secretary to make payments, is not sufficient to constitute an appropriation. *See id.* at 3 ("Section 1342, by its terms, did not enact an appropriation to make the payments specified in section 1342(b)(1)."). GAO determined, however, that a source of appropriated funds was available for those payments. Specifically, GAO concluded that the Centers for Medicare and Medicaid Services ("CMS") Program Management appropriation for FY 2014 could be used for risk corridors program payments in FY 2014.[1] *Id.* at 4. GAO also opined that receipts collected directly from QHPs, pursuant to ACA § 1342(b)(2), could be used to make risk corridors program payments in FY 2014 because, it concluded, those funds

[1] The CMS Program Management Appropriation for FY 2014 provided that appropriated funds were available "[f]or carrying out . . . other responsibilities of [CMS], not to exceed $3,669,744,000 . . . and such sums as may be collected from authorized user fees and the sale of data, which shall be credited to this account and remain available until September 30, 2019." *See* GAO Opinion at 3-4 (citing Pub. L. No. 113-76, div. H, tit. II, 128 Stat. 5, 374 (2014)).

constitute "user fees" within the meaning of the language of the CMS Program Management appropriation. *See id.* at 4-6.

IV. The FY 2015 and 2016 Appropriations Act.

Subsequent actions by Congress confirmed its original intent that the risk corridors program was intended to be a budget-neutral, self-funding program. Specifically, Congress responded to GAO's conclusions by barring, for FY 2015, the use of CMS Program Management account funds, other than user fees, to make risk corridors program payments. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. G, tit. IV, § 227, 128 Stat. 2130, 2491 (2014) ("None of the funds made available by this Act . . . or transferred from other accounts funded by this Act to the '[CMS] Program Management' account, may be used for payments under section 1342(b)(1) of Public Law 111-148 (relating to risk corridors)."); *see also* Compl. ¶ 35. Congress included identical language in the FY 2016 appropriations bill. *See* Pub. L. No. 114-113, div. G, tit. IV, § 226, 129 Stat. 2242, 2624 (2015) (continuing through Pub. L. No. 114-223, 130 Stat. 857 (2016)). The effect of these provisions is to ensure that the risk corridors program is funded exclusively through payments from insurers under the program and does not add to the budget deficit.

V. Lawsuits Seeking Risk Corridors Payments.

This case, filed in February 2016, "was the first of its kind seeking to recover risk corridors payments from the Government." Pl. Health Rep. Ins. Co.'s Mot. to Appoint Quinn Emanuel Urquhart & Sullivan, LLP as Interim Class Counsel at 1 (ECF No. 15). Plaintiff Health Republic Insurance Company is a QHP that provided health insurance in 2014 and 2015 through one of the state-based exchanges. Compl. ¶ 16. Plaintiff seeks risk corridors payments allegedly due pursuant to a "Statutory and Regulatory Mandate to Make Payments." Compl.

¶¶ 59-63. Specifically, Plaintiff claims that "[a]s part of its obligations under Section 1342 of the ACA and/or its obligations under 45 C.F.R. § 153.510(b), the Government is required to, subject to certain explicit statutory and/or regulatory conditions, pay any QHP certain amounts exceeding the target costs they incurred in 2014 and 2015." Compl. ¶ 60.

DOJ has moved to dismiss this case for lack of subject matter jurisdiction, arguing that (i) because no payments are "presently due" to Plaintiff, this Court does not have jurisdiction under the Tucker Act, and (ii) Plaintiff's claims are not ripe for determination. *See* United States' Mot. to Dismiss at 13-20 (ECF No. 8). While DOJ's memorandum in support of its motion to dismiss cited pertinent legislative history explaining why the risk corridors program must be administered in a budget-neutral manner, *see id.* at 6-11, DOJ did not move to dismiss on the ground that Plaintiff has failed to state a claim in light of Congressional intent that the program be self-funding and Congressional action barring the use of any external source of funds should the program not achieve its goal of budget neutrality.

Starting in May 2016, other QHPs began to file suits "pursuing the same risk corridors payments," Pl. Health Rep. Ins. Co.'s Mot. to Appoint Quinn Emanuel Urquhart & Sullivan, LLP as Interim Class Counsel at 5 (ECF No. 15), including at least seven other cases in this Court pending before other Judges.[2] All of the plaintiffs in these later-filed cases– like Plaintiff

[2] *First Priority Life Ins. Co. v. United States*, 16-587-VJW (Fed. Cl., filed May 17, 2016) ("First Priority"); *Moda Health Plan, Inc. v. United States*, 16-649-TCW (Fed. Cl., filed June 1, 2016) ("Moda Health"); *Blue Cross & Blue Shield of N.C. v. United States*, 16-651-LKG (Fed. Cl., filed June 2, 2016) ("Blue Cross Blue Shield"); *Land of Lincoln Mutual Health Ins. Co. v. United States*, 16-744-CFL (Fed. Cl., filed June 23, 2016) ("Land of Lincoln"); *Me. Cmty. Health Options v. United States*, 16-967-JFM (Fed. Cl., filed Aug. 9, 2016); *N.M. Health Connections v. United States*, 16-cv-01199 (Fed. Cl., filed Sept. 26, 2016); *Blue Cross & Blue Shield of Minn. v. United States*, No. 16-1253-MCW (Fed. Cl. filed Oct. 3, 2016) ("BCBS of Minn.").

in this case – allege that they are entitled to risk corridors payments due to a "Statutory and Regulatory Mandate to Make Payments."[3] In each of the four later-filed risk corridors cases in which a response from the United States has been submitted, DOJ has moved to dismiss, making the same jurisdictional arguments it made here. DOJ also argues persuasively in those cases, however, that the plaintiff-insurers have failed to state a claim, because HHS has no legal obligation to make the payments at issue:

> Section 1342 does not require HHS to make risk corridors payments beyond those funded from collections. And even if that intent were unclear when the Affordable Care Act was enacted in 2010, Congress removed any ambiguity when it enacted annual appropriations laws for fiscal years 2015 and 2016 that prohibited HHS from paying risks corridors amounts from appropriated funds other than collections. Thus, Moda has, to date, received all the payments it is owed.

United States' Mot. to Dismiss at 2, *Moda Health* (ECF No. 8) (attached as Exhibit 1).[4] (In the remaining later-filed cases, DOJ's motion to dismiss is not yet due.)

The House sought leave to file this amicus curiae brief, for the purpose of apprising the Court of DOJ's meritorious argument in the later-filed cases that the QHPs cannot state a statutory claim for risk corridors payments in excess of program receipts – an argument that applies with equal force here.

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[3] *See* Compl. ¶¶ 167-78, *First Priority* (ECF No. 1) (Count I, "Violation of Federal Statute and Regulation"); Compl. ¶¶ 154-65, *Blue Cross Blue Shield* (ECF No. 1) (same); Compl. ¶¶ 153-64, *Land of Lincoln* (ECF No. 1) (same); Compl. ¶¶ 68-74, *Moda Health* (ECF No. 1), (Count I, "Violations of Section 1342, Statutory Mandates and Statutory Authority"); Compl. ¶¶ 134-35, *BCBS of Minn.* (ECF No. 1).

[4] *See also* United States' Mot. to Dismiss at 25, *First Priority* (ECF No. 8); United States' Mot. to Dismiss at 32, *Blue Cross Blue Shield* (ECF No. 10); United States' Mot. to Dismiss at 22-31, *Land of Lincoln* (ECF No. 22).

INTEREST OF AMICUS

The House has a strong interest in the proper resolution of this case. As shown above, the House has repeatedly passed legislation making clear that the risk corridors program must be implemented in a budget-neutral and self-funding manner, such that no appropriated funds other than the user fees generated by the program may be used to make payments to insurers under the program. HHS previously recognized its obligation to implement the program in a budget-neutral manner in accordance with those statutory mandates, but has recently announced its intention to give billions of dollars of taxpayer money to insurers under the program despite the clearly expressed intent of Congress to the contrary. DOJ has correctly explained to several other Judges of this Court why that giveaway would be contrary to law, but inexplicably has declined to present those arguments to this Court. The House therefore has an interest in ensuring that this Court is presented with the controlling legal precedents that compel immediate dismissal of Plaintiff's claims, in order to forestall the unlawful giveaway of taxpayer money that HHS is attempting to engineer.

ARGUMENT

PLAINTIFF HAS FAILED TO STATE A CLAIM BECAUSE IT HAS NO STATUTORY RIGHT TO RISK CORRIDORS PAYMENTS IN EXCESS OF RECEIPTS

For the reasons explained below, and the reasons explained in detail by DOJ in later-filed cases, the United States has no obligation under the ACA to make risk corridors payments in excess of receipts, because there is no appropriation for such excess payments, and because Congress has made clear that it intends the risk corridors program to be budget-neutral and self-funding. *See* Exhibit 1, at Argument Part III.

Plaintiff's Complaint recites the Tucker Act, 28 U.S.C. § 1491, as its jurisdictional basis

for suit. *See* Compl. ¶ 14. Because the Tucker Act is "only a jurisdictional statute [and] does not create any substantive right enforceable against the United States for money damages," *United States v. Testan*, 424 U.S. 392, 398 (1976), the Court will be required to "look beyond the Tucker Act to identify a substantive source of law that creates the right to recovery of money damages against the United States," *Rick's Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1343 (Fed. Cir. 2008) (citing *United States v. Mitchell*, 463 U.S. 206, 216 (1983)).

Plaintiff contends that it has a "statutory right" to full risk corridors payments by virtue of the fact that ACA § 1342(b)(1) authorizes payments, but there is no corresponding appropriation for payments in excess of amounts collected under the program because the ACA did not specify a source of funds. *See, e.g.*, *Nevada v. Dep't of Energy*, 400 F.3d 9, 14 (D.C. Cir. 2005) ("[A] statute may 'be construed as making an appropriation if it contains a specific direction to pay . . . and a designation of the [f]unds to be used.'" (quoting 63 Comp. Gen. 331, 335 (1984)); U.S. Gov't Accountability Office, GAO-16-464SP, Principles of Federal Appropriations Law at 2-24 (4th ed. 2016) (private relief act that contained authorization and direction to pay, but no designation of funds, not an appropriation); 67 Comp. Gen. 332, 333 (1988) (designation of source of funds without specific direction to pay, not an appropriation); *see also* 31 U.S.C. § 1301(d) ("A law may be construed to make an appropriation out of the Treasury . . . only if the law specifically states that an appropriation is made . . . ."). Because the ACA did not appropriate funds for the risk corridors program, and no appropriations other than the 2014 program funds are available, Plaintiff has failed to state a claim. *See, e.g., OPM v. Richmond*, 496 U.S. 414, 424 (1990) (denying recovery because "Congress ha[d] appropriated no money for the payment of the benefits [sought], and the Constitution prohibits that any money 'be drawn from the Treasury' to pay them"); *see also* cases cited in Exhibit 1 at 25-28.

Although HHS has (correctly) concluded that it must administer the risk corridors program in a budget-neutral manner, *see*, *e.g.*, 79 Fed. Reg. at 13787, HHS has in response to the various risk corridors program cases pending before this Court expressed a willingness to settle those cases due to purported "litigation risk." *See* United States' Reply in Supp. of its Mot. to Dismiss at Ex. 1 (ECF No. 14). It is impossible to square HHS's extraordinary and demonstrably wrong position that "full payment is required" (which purportedly produces "litigation risk" if HHS fails to make full payments), *id.*, with the plain language of the ACA and the clear Congressional intent expressed both through the ACA itself and through additional legislation following enactment of the ACA.

Indeed, DOJ has confirmed that HHS's view that "full payment is required" is incorrect, expressly taking the contrary position and urging dismissal on that ground in the later-filed risk corridors cases. For example, DOJ explained in *Moda Health*:

> HHS's determination to operate the risk corridors program on a three-year, budget neutral basis, in which annual payments are limited by the amount of funds collected across all program years, must be upheld because Congress has not mandated that HHS make risk corridor payments in excess of collections. Rather, Congress planned the program to be 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 to fund payments to insurers that have higher-than-expected costs.
> . . .
>
> The appropriations riders that Congress enacted after the ACA's passage further reinforce the conclusion that the liability of the United States is limited to amounts collected under the risk corridors program.

United States' Mot. to Dismiss at 21-22, 24, *Moda Health* (ECF No. 8); *see generally id.* at Argument, Part III.

As set forth in DOJ's briefs in the later-filed cases, numerous precedents of the Supreme Court and the courts of appeals confirm that Plaintiff's and HHS's positions are contrary to law, and that the United States has no obligation to make risk corridors payments in excess of user fees collected under the program. The House will not burden the Court by duplicating those compelling arguments in this brief, but notes that the Federal Circuit's decision in *Highland Falls–Fort Montgomery Central School District v. United States*, 48 F.3d 1166 (Fed. Cir. 1995), is particularly instructive in this regard. *Highland Falls* involved a statute mandating financial assistance to school districts burdened by federal ownership of real property within their districts. *Id.* at 1168. The statute established three separate entitlements to assist such school districts, each of which was to be paid pursuant to a statutory allocation formula. *Id.* In particular, under the "Section 237" entitlement program (dealing with the loss of revenue due to a significant percentage of federal property in the school district), Congress mandated that qualifying districts "*shall be entitled to receive* for such fiscal year such amount as, in the judgment of the Secretary, is equal to the [financial burden imposed on the district.]" 20 U.S.C. § 237(a) (repealed) (emphasis added). In addition, Congress specified that if the Department of Education ("DOE") lacked sufficient funds to meet all of its obligations under the various entitlement programs, it must nonetheless "allocate to each local educational agency which is entitled to a payment under section 237 of this title an amount equal to 100 percentum of the amount to which it is entitled as computed under that section for such fiscal year." 20 U.S.C. § 240(c)(1)(A) (repealed).

In certain years, rather than appropriating a lump sum for all of the entitlement programs, Congress earmarked a specific amount for Section 237 payments and separately earmarked additional funds for the other entitlements under the statute. *Highland Falls*, 48 F.3d at 1169. In those years, "DOE followed Congress's specific funding directives instead of applying the

allocation formula." *Id.* at 1169. As a result, the Highland Falls school district received less than 100% of the payments due under the Section 237 statutory formula, and brought suit to recover the shortfall. *Id.* The Court of Federal Claims dismissed the suit for failure to state a claim, and the Federal Circuit affirmed. *Id*. at 1167.

Notwithstanding the express mandate of Section 237(a) that school districts "shall be entitled to receive" the full amount of funds provided under that program, and despite the express directive in Section 240(c)(1)(A) of the statute that the Section 237 program was to be funded at 100% in the event of a shortfall, the Federal Circuit rejected the school district's argument that DOE was obligated to make full payments under Section 237. *Id.* at 1170-72. The court explained that "we have great difficulty imagining a more direct statement of congressional intent than the instructions in the appropriations statutes at issue here." *Id.* at 1170. In the court's view, Congress had made its intent to limit the Section 237 payment obligation clear by providing a specific but limited appropriation for Section 237 payments, and thus DOE's refusal to pay the full amount that otherwise would have been due under Section 237 "gave effect to both the provisions of the Act and the appropriations laws." *Id.* at 1171; *see also id.* (discussing 31 § U.S.C. 1341(a)(1)(A) (prohibiting an officer from authorizing an expenditure in excess of an appropriation); and 31 U.S.C. § 1532 (providing that an agency may only use money appropriated for one program to fund a separate program which expressly authorized by law to do so)).

Highland Falls compels dismissal of Plaintiff's claims here, because it confirms that a subsequent appropriations bill specifying and limiting the funds available to fulfill a particular statutory obligation precludes a claim that the full amount of the underlying obligation is nonetheless due to the beneficiary. Here, just as in *Highland Falls*, the FY 2015 and FY 2016

appropriations laws contain a "direct statement of congressional intent": "None of the funds made available by this Act . . . or transferred from other accounts funded by this Act to the '[CMS] Program Management' account may be used for payments under section 1342(b)(1) of Public Law 111-148 (relating to risk corridors)." Consolidated and Further Continuing Appropriations Act, 2015 § 227, 128 Stat. at 2491; Pub. L. No. 114-113 § 226, 129 Stat. at 2624 (same) (continuing through Pub. L. No. 114-223 (2016)). It is undisputed that the CMS Program Management Account is the only potential source of funds to make risk corridors payments in excess of risk corridors receipts, and that the effect of the appropriations bills is to limit all future payments to a single source: user fees generated under the program. Accordingly, just as in *Highland Park*, Congress has specified an exclusive and limited source of funds for this particular program, and Plaintiff's claim for full payments under the statutory formula in excess of the funds appropriated by Congress must fail.

CONCLUSION

For the foregoing reasons, and those set forth by DOJ in its motions to dismiss the later-filed risk corridors program cases, this Court should dismiss Plaintiff's complaint with prejudice.

Respectfully submitted,

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