

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

NEW MEXICO HEALTH)	
CONNECTIONS,)	
)	
Plaintiff,)	
)	
v.)	No. 1:16-cv-00878 JB/JHR
)	
UNITED STATES DEPARTMENT OF)	
HEALTH AND HUMAN SERVICES,)	
<i>et al.</i> ,)	
)	
Defendants.)	
)	

DEFENDANTS' RESPONSE TO
PLAINTIFF'S NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants respectfully respond to the Plaintiff's Notice of Supplemental Authority, ECF No. 74, appending the decision of the Federal Circuit in *Moda Health Plan, Inc. v. United States*, which concerned payments under the ACA's "risk corridors" program.

In *Moda*, the Federal Circuit rejected claims that the government is liable for risk corridors payments in excess of available appropriations. Slip op. at 31-32. Although the court concluded that *Congress*, in certain circumstances, can create a legally-enforceable payment obligation absent an appropriation, and that Congress initially had done so with respect to the risk corridors program, it went on to conclude that Congress had limited that obligation through subsequent legislation. Plaintiff misreads *Moda* as standing for the proposition that an appropriation is unnecessary for *agency officials* to make or authorize a legally-enforceable debt. On the contrary, the court recognized that the absence of an appropriation imposes "limitations upon the Government's own agents"—such as the agency officials responsible for the risk adjustment program—and that the

Anti-Deficiency Act “constrains [such] officials” from making or authorizing obligations or spending in excess of amounts available in an appropriation. *Id.* at 18.

In concluding that Congress initially made risk corridors payments an obligation of the government, the *Moda* decision relied on 42 U.S.C. § 18062(b), which the court read to establish a set formula of mandatory payments that was not limited by the amount of payments into the program. The statute governing the risk adjustment program, by contrast, does not dictate a formula for mandatory payments. *See* 42 U.S.C. § 18063(b). Thus, while the *Moda* decision concluded that Congress, in certain circumstances, can create an enforceable payment obligation absent an appropriation, slip op. at 16-18, nothing in *Moda* supports Plaintiff’s suggestion that HHS could have done so via regulation. Relatedly, the *Moda* court also rejected the contention made by Plaintiff here, that the Judgment Fund is a source of budgetary authority for incurring obligations. *Id.* at 27.

Dated: June 20, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2018, I caused the foregoing document to be served on counsel for plaintiff by filing with the court's electronic case filing system.

/s/ James Powers
James R. Powers