IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	No. 16-651 C Judge Griggsby

PLAINTIFF'S RESPONSIVE SUPPLEMENTAL BRIEF

Pursuant to the Court's February 13, 2017 Scheduling Order (ECF No. 25), Plaintiff Blue Cross and Blue Shield of North Carolina ("BCBSNC") respectfully responds to Defendant's Initial Supplemental Brief ("Defendant's Brief" or "Def.'s Br.") (ECF No. 28), which plainly failed to answer the four specific questions asked by the Court and raised new arguments never previously made by Defendant.

1. Whether the purpose of the risk corridor program may only be fulfilled by the full, annual payment of risk corridor payments?

As an initial matter, the Court has already ruled in multiple cases that Section 1342 and its implementing regulations require annual risk corridors payments.[1] Defendant conceded in its brief that annual risk corridors payments are required and have been made by the Government, acknowledging "HHS's *annual* pro-rata risk corridors payments" and "HHS's *annual* payment schedule." Def.'s Br. at 1 (emphasis added); *see also id.* at 2 n.2 (describing – and not criticizing

[1] *See Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757, 776 (2017) (Sweeney, J.) ("HHS is required to make annual risk corridors payments to eligible [QHPs]."); *Moda Health Plan, Inc. v. United States*, No. 16-649C, --- Fed. Cl. ----, 2017 WL 527588, at *13 (Feb. 9, 2017) (Wheeler, J.) ("[T]his Court concurs with the *Health Republic* court in finding that … Congress required HHS to make annual risk corridors payments."); *Maine Cmty. Health Options v. United States*, No. 16-967C, slip op. at 2 (Mar. 9, 2017) (Bruggink, J.) ("We reject the notion that the statute does not mandate the payment of money on a yearly basis.").

– Judge Sweeney's description of the importance of annual risk corridors payments in achieving the program's purpose). The Court should accordingly deny Defendant's Rule 12(b)(1) motion.[2]

Strikingly, Defendant answered the Court's first question in the negative while conceding that the fundamental purposes of the risk corridors program are to "mitigate the potential impact of adverse selection," "provide stability to health insurance issuers," and "protect against uncertainty in rates for QHPs by limiting the extent of issuer losses (and gains)." *See* Def.'s Br. at 1 (quoting 77 FR 17220, 17220-21 (Mar. 23. 2012)); *see* BCBSNC's Initial Supplemental Brief[3] at 6-7, 13-15 (describing same purposes). Defendant failed to plausibly explain, however, how these undisputed fundamental purposes could be fulfilled through the Government's unilateral decision to pay BCBSNC only a small fraction of the risk corridors amounts owed for CY 2014,[4] and none for CY 2015.[5] *See generally* Def.'s Br. at 1-3. Glaringly, Defendant failed to cite to any language in the text of Section 1342 or its implementing regulations to support its answer that Congress must have meant to only mitigate "some" of the undisputed insurance risks and uncertainties Defendant concedes were prevalent when the ACA was passed. *See generally id.*

Defendant's failure to cite to Section 1342 or the implementing regulations is not surprising, because those authorities contain no such limiting language as Defendant now

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2 *See, e.g.*, *Moda*, 2017 WL 527588, at *13 (distinguishing between "two similar but conceptually distinct questions in this case: (1) whether annual payments are required, and (2) whether full annual payments are required," and explaining that "[t]he former is a ripeness [Rule 12(b)(1)] question, and the latter goes to the merits [Rule 12(b)(6)] of this case").

3 BCBSNC's Initial Supplemental Brief (ECF No. 29) is referred to herein as "BCBSNC's Brief" or "BCBSNC's Br."

4 The CY 2014 amount was $147,474,968.35. *See* BCBSNC Opposition Br. at 13 (ECF No. 14).

5 The CY 2015 amount was $215,313,093.70. *See* BCBSNC Sur-Reply Br. at 7 (ECF No. 22).

insupportably suggests. The statute and implementing regulations are clear that Congress "shall pay" and QHPs "will receive" the prescribed amount of risk corridors payments calculated pursuant to the statutory formula for each of the three plan years of the program. 42 U.S.C. § 18062(b)(1); 45 C.F.R. § 153.510(b). Neither the statute nor the regulations give the Government discretion to pay "some" pro-rata portion of the risk corridors payments that are due to QHPs based on annual collections from profitable QHPs, or for any other reason. *See* 42 U.S.C. § 18062(b)(1); 45 C.F.R. § 153.510(b); *Moda*, 2017 WL 527588, at *15 ("Section [1342] gives the Secretary no discretion to increase or reduce this [risk corridors payment] amount. … Section 1342 simply directs the Secretary of HHS to make full 'payments out.' Therefore, full payments out [the Secretary] must make.").

Indeed, Congress specified what it intended the proper mitigation levels to be in the statute itself: "50 percent of" the QHP's losses "in excess of 103 percent of the target amount," and "the sum of 2.5 percent of the target amount plus 80 percent of" the QHP's losses "in excess of 108 percent of the target amount." 42 U.S.C. § 18062(b)(1).[6] Defendant cannot deny that these are the required mitigation levels for the risk corridors program: HHS adopted the identical mitigation levels in the implementing regulations. *See* 45 C.F.R. § 153.510(b).

Therefore, simply making an annual payment of some *de minimis* amount – which is what the Government has done here for CY 2014, along with zero risk corridors payments for CY 2015 (and, barring a "miracle,"[7] zero risk corridors payments for CY 2016) – defeats the purpose of the risk corridors program. That purpose can only be fulfilled by full, annual

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[6] Defendant's statement that risk corridors was not "intended to *eliminate* risk to issuers" (Def.'s Br. at 1) is correct – under the statutory formula, a QHP still loses money, but those losses are mitigated by the Government's sharing in the risk at the levels expressly stated in Section 1342(b).

[7] *Moda*, 2017 WL 527588, at *17.

payments, as required by Section 1342 and its implementing regulations. This is borne out by reviewing the actual consequences of the Government's failure to provide full, annual risk corridors payments. *See* BCBSNC's Br. at 9-10 (describing effects).

Unable to rely on the statute or implementing regulations to support its answer to the Court's question, Defendant turned to Judge Lettow's opinion in *Land of Lincoln* to argue that paying less risk corridors payments than required by Section 1342 does not defeat the purpose of the statute. Def.'s Br. at 1-2 (quoting *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 107 (2016) (Lettow, J.), appeal docketed, No. 17-1224 (Fed. Cir. Nov. 16, 2010)). As detailed in BCBSNC's Brief at 3 and Sur-Reply at 8-11, the Court's decision on the motion for judgment on the "Administrative Record" that had been hastily compiled in that case, applying the Administrative Procedure Act's deferential standard of review to an agency decision that had not actually been made by HHS, is anomalous and should not be followed here. Those infirmities aside, *Land of Lincoln* undercuts Defendant's position because Judge Lettow took the Government at its word in recognizing that "HHS has repeatedly acknowledged its obligation to pay [QHPs] that are eligible for payment under the risk-corridors program." *Land of Lincoln*, 129 Fed. Cl. at 107 (citing 79 FR 30240, 30260 (May 27, 2014), which states that "HHS recognizes that the [ACA] requires the Secretary to make full payments to issuers"). Although Judge Lettow's "analysis is puzzling,"[8] his incorrect conclusion that HHS was not required to make risk corridors payments *annually* nevertheless did not affect his recognition that the Government was obligated to make *full* risk corridors payments. *See id.* Even if Congress "gave HHS discretion in administering the [risk corridors] program," *id.*, as discussed above, HHS had no discretion to determine that the mitigation levels should be less than those expressly

[8] *Moda*, 2017 WL 527588, at *16.

required by the statute. *See* 42 U.S.C. § 18062(b)(1). Yet, that is what the Government has done here by failing to make full, annual risk corridors payments.

Although Defendant selectively cited an excerpt from HHS' March 23, 2012 Federal Register statements to support it answer to this question, *see* Def.'s Br. at 1 (quoting 77 FR 17220, 17220-21 (Mar. 23, 2012)), Defendant attempted to ignore the many other statements by HHS published in that very same Federal Register that support the conclusion that full, annual payments are the only way to satisfy the risk corridors program's purpose. *See* BCBSNC's Br. at 11-15 (quoting 77 FR 17220, 17220-21, 17236, 17238-40, 17243-44, 17251 (Mar. 23, 2012)). As just one example, on the same page cited by Defendant, HHS stated that "[t]he temporary Federally administered risk corridors program serves to protect against uncertainty in rate setting by qualified health plans *sharing risk* in losses and gains *with the Federal government*." 77 FR 17220, 17220 (Mar. 23, 2012) (emphasis added). Defendant's answer ignores and would eliminate the Government's own acknowledged risk-sharing in the risk corridors program. If risk corridors payments were limited by available annual collections from profitable QHPs, then there would be no risk-sharing by the Government *at all*. That clearly was not Congress' intent.

Opting to avoid further discussion of the *enacting* Congress' purpose for the ACA's risk corridors program, Defendant attempted to rely upon the *later* Congress' Appropriations Acts to support its interpretation of what the *enacting* 2010 Congress must have meant. *See* Def.'s Br. at 2-3. It is well settled that a later Congress' actions provide little insight into a previous Congress' intentions regarding statutory intent. *See Moda*, 2017 WL 527588, at *18 n.14 ("[I]t would be illogical to divine the intent of a former Congress from the actions of a later one.") (citing *United States v. United Mine Workers of Am.*, 330 U.S. 258, 281-82 (1947), which held that "[w]e fail to see how the remarks of these Senators in 1943 can serve to change the

legislative intent of Congress expressed in 1932").[9] While it may be true that, through the FY 2015 and FY 2016 appropriations riders passed years after the ACA was enacted in 2010, "Congress gave HHS no choice but to limit annual payments to the extent of its funding authority," *id.* at 2, federal courts have decided this issue for over a century in favor of aggrieved parties like BCBSNC. *See, e.g.*, *United States v. Langston*, 118 U.S. 389 (1886).[10] According to this Court's binding precedent:

> [T]he failure of Congress or an agency to appropriate or make available sufficient funds does not repudiate the obligation; it merely bars the accounting agents of the Government from disbursing funds and forces the [plaintiff] to a recovery in the Court of Claims.

N.Y. Airways, 369 F.2d at 752; *see id.* at 748 ("The failure to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in the Court of Claims.") (cataloguing cases); *Moda*, 2017 WL 527588, at *22 ("[M]aking funds from a specific account unavailable to a specific agency for a specific purpose 'prevents the accounting officers of the Government from making disbursements,' but private parties may still recover their funds in this Court.") (quoting *N.Y. Airways*); *id.* at *17 ("To be sure, HHS has not been able to pay insurers because it does not have the funds to do so. Still, it has never conflated its inability to pay with the lack of an obligation

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[9] *See also Massachusetts v. EPA,* 549 U.S. 497, 530 n.27 (2007) ("'[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'") (citation omitted)); *Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005) ("The significance of appropriations bills is of course limited and the associated legislative history even more so. ... [P]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight.").

[10] *See, e.g.*, *United States v. Vulte*, 233 U.S. 509 (1914); *Gibney v. United States*, 114 Ct. Cl. 38 (1949); *N.Y. Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966); *Greenlee Cnty., Ariz. v. United States*, 487 F.3d 871 (Fed. Cir. 2007); *Slattery v. United States*, 635 F.3d 1298 (Fed. Cir. 2011); *District of Columbia v. United States*, 67 Fed. Cl. 292 (2005); *Moda*, 2017 WL 527588, at *17-22 (finding that the FY 2015 and FY 2016 appropriations riders "did not modify or repeal the Government's obligation under Section 1342" to make full annual risk corridors payments).

to pay."). As explained in BCBSNC's Brief, the Government not only defeated the risk corridors program's purpose by refusing to make full, annual risk corridors payments, but also breached its legal obligations to BCBSNC. *See* BCBSNC's Br. at 4-10.

Defendant incredibly urged the Court not to look at the "general purpose" of the ACA in answering whether the purpose of the risk corridors program can be fulfilled with less than full, annual payments. *See* Def.'s Br. at 2 ("Congressional intent … cannot be overcome with reliance on the general purpose of the program," and it is myopic "to rely solely on the program's general purpose"). Defendant's insistence flies in the face of the canons of statutory construction, recognized by both Judge Sweeney and Judge Wheeler, which start with the statutory text[11] – ignored in Defendant's Brief here – and, if necessary, then turn to "evaluating the specific provision of the [ACA] establishing the risk corridors program … in the context of the entire statutory scheme of the [ACA]." *Health Republic*, 129 Fed. Cl. at 773 (cataloguing seven precedential cases); *see Moda*, 2017 WL 527588, at *13 (basing findings of Congress' intent on "the function and structure of the risk corridors program as part of the ACA's 3Rs"). As this Court recognized by posing its first question, the purpose of the risk corridors program (which is a fundamental and integral part of the ACA) *should* be considered in determining whether the Congress that enacted the risk corridors program in 2010 meant what it said.

Although Defendant argued that Congress expected that the ACA *as a whole* would reduce the federal deficit, *see* Def.'s Br. at 3, there is no indication that Congress specifically intended that the risk corridors program would reduce the deficit. Indeed, the CBO's early analysis of the risk corridors program – before HHS later announced its budget-neutrality plan in

[11] *See, e.g.*, *Health Republic*, 129 Fed. Cl. at 773 (quoting *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004)) ("The starting point in discerning congressional intent is the existing statutory text.").

March 2014 – projected that, over the program's three years, "risk corridor payments from the federal government to health insurers will total $8 billion and the corresponding collections from insurers will amount to $16 billion, yielding net savings for the federal government of $8 billion." CBO, *The Budget and Economic Outlook: 2014 to 2024*, at 110 (Feb. 2014), BCBSNC Opposition Br. Ex. 36.

In sum, Defendant's answer to the Court's first question is insupportable, particularly when compared against BCBSNC's affirmative response, which detailed the purpose of the ACA risk corridors program as demonstrated in the plain text of the risk corridors statute, its implementing regulations, HHS' repeated announcements and conduct, and the devastating consequences that actually occurred when the Government made less than full, annual risk corridors payments in violation of its unambiguous statutory and regulatory obligations.[12]

2. Whether the United States Department of Health and Human Service's ("HHS") proposed rule dated March 23, 2012, at 77 Fed. Reg. 17220-01, 17238, 2012 WL 959270 (Mar. 23, 2012), requires that HHS provide full, annual payment of the risk corridor payments?

Unlike BCBSNC, which provided a detailed analysis of the Final Rulemaking referenced in the Court's second question, Defendant again attempted to evade the Court's question in its answer because HHS' statements in the March 23, 2012 Federal Register do not support Defendant's current position. *Compare* BCBSNC's Br. at 10-15 *with* Def.'s Br. at 3-5. Instead, Defendant dodged and weaved to later rulemaking efforts, CMS' budget neutrality bulletin of April 11, 2014, the inapplicable Anti-Deficiency Act, the GAO Redbook, and – of course – the later-enacted FY 2015 appropriations rider. *See* Def.'s Br. at 3-5. None of those items, however, answer or even relate to the Court's question, which, as BCBSNC demonstrated in its Brief, must

[12] *See* BCBSNC's Br. at 1-10.

be answered "Yes." *See* BCBSNC's Br. at 10-15.

In the rare instance that Defendant actually addressed the March 23, 2012 Final Rulemaking in its answer, it focused on HHS' statement that the implementing regulations "had not 'propose[d] deadlines'" for risk corridors payments, but "stated that it would 'address the risk corridors payment deadline'" in the future. Def.'s Br. at 3 (quoting 77 FR 17220, 17238 (Mar. 23, 2012)). Yet, Defendant does not – and indeed cannot – point to any subsequent instance when HHS *actually* established a payment deadline. *See generally* Def.'s Br. at 3-5. It never happened, and certainly was never adopted in an HHS regulation.

Under these circumstances, Judge Sweeney and Judge Wheeler followed the Supreme Court's guidance that, in proper circumstances, "courts 'must give substantial deference to an agency's *interpretation* of its own regulations." *Moda*, 2017 WL 527588, at *13 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)) (emphasis added); *Health Republic*, 129 Fed. Cl. at 777 (same). Defendant admits, reluctantly, that HHS' text at 77 FR 17220, 17238 (Mar. 23, 2012) "characterizes the payment methodology provided in 45 C.F.R. § 153.510(b)" – in other words, the text interprets HHS' own regulation, and thus requires deference. Def.'s Br. at 3. Although Defendant would prefer to ignore and avoided discussing that interpretation in its answer, HHS stated in its interpretation of the regulation that:

> While we did not propose deadlines in the proposed rule [of July 15, 2011], we … suggested … *that HHS would make payments to QHP issuers that are owed risk corridors amounts within a 30-day period after HHS determines that a payment should be made to the QHP issuer. QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers.*

77 FR 17220, 17238 (Mar. 23, 2012) (emphasis added). This was HHS' last official word on this specific subject. Judge Sweeney, reading this language in the July 15, 2011 proposed rule

(the March 23, 2012 final rule's relevant text is nearly identical),[13] held that "HHS recognized that to be effective, the risk corridors program should provide for regular payments, both to and from insurers, throughout the existence of the program." *Health Republic*, 129 Fed. Cl. at 777. HHS' interpretation not only commits to *annual*, but also to *full*, risk corridors payments. Consistent with this interpretation, when it announced the CY 2014 risk corridors shortfall, the Government admitted that "HHS recognizes that the [ACA] requires the Secretary to make *full* payments to issuers, and HHS is recording those amounts that remain unpaid following our 12.6% payment this winter as *fiscal year 2015 obligation* [sic] of the United States Government *for which full payment is required*." Bulletin, CMS, "Risk Corridors Payments for the 2014 Benefit Year" (Nov. 19, 2015), Compl. Ex. 17 (emphasis added).

The remainder of Defendant's answer to the Court's second question did not address the March 23, 2012 Final Rulemaking. *See* Def.'s Br. at 3-5. As explained in BCBSNC's Opposition to Defendant's Motion to Dismiss, the Government's April 2014 "budget-neutral implementation" is deserving of no *Chevron* deference. *See* ECF No. 14 at 31 (citing *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53-54 (2011), *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012), and *Parker v. Office of Pers. Mgmt.*, 974 F.2d 164, 166 (Fed. Cir. 1992)).[14] Both Judge Lettow and Judge Wheeler found that the

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[13] *Compare* 76 FR 41929, 41943 (July 15, 2011), *with* 77 FR 17220, 17238 (Mar. 23, 2012).

[14] Indeed, the law is clear that if an agency's policy creates "serious reliance interests," then a subsequent change is facially arbitrary and capricious – and "receives no *Chevron* deference" – absent a reasoned explanation from the agency. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-26 (2016). HHS has never even attempted to explain – let alone provide a "reasonable explanation" for – its complete about-face on its budget neutrality interpretation between March 2013 (when QHPs like BCBSNC were contemplating whether to participate in the ACA Exchanges) and April 2014 (when QHPs were already committed). *See* 78 FR 15409, 15473 (Mar. 11, 2013), Compl. Ex. 09 ("The risk corridors program is not statutorily required to

Anti-Deficiency Act did not present a bar to risk corridors lawsuits. *See Land of Lincoln*, 129 Fed. Cl. at 113 n.30 (finding that HHS had sufficient appropriations when insurers became QHPs); *Moda*, 2017 WL 527588, at *26 (finding that the HHS Secretary was "authorized by law" under the ACA to make risk corridors payments).

Finally, Defendant asked the Court to ignore the March 23, 2012 Final Rulemaking, arguing that "congressional intent as provided in the statute, not statements or regulations issued by the agency, govern" here. Def.'s Br. at 5. Perplexingly, Defendant again asks the Court to look only at what it argues is the intent of the *later* Congress in enacting the 2015 appropriations rider, and to simply ignore the unambiguous text of the relevant statute: Section 1342 and its implementing regulations. *See id. But see supra* note 9 and accompanying text.

3. Whether the Court should dismiss Count I of the complaint pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), if the Court concludes that plaintiff is not entitled to "presently due money damages" under Section 1342 of the Patient Protection and Affordable Care Act ("ACA")?

Defendant agreed that "presently due money damages" is not a merits issue for Rule 12(b)(6) disposition, but rather is "a prerequisite for jurisdiction under the Tucker Act." Def.'s Br. at 5. Because Defendant conceded that annual payments are due, *see id.* at 1, there is no genuine dispute here regarding ripeness. *Accord Land of Lincoln*, 129 Fed. Cl. at 97-102; *Health Republic*, 129 Fed. Cl. at 772-78; *Moda*, 2017 WL 527588, at *12-14; *Maine*, No. 16-967C, slip op. at 2-3.

In attempting to manufacture a merits issue here using its "presently due money damages" jurisdictional and ripeness arguments, Defendant urged the Court to adopt an insupportable position that would amend not only this Court's Rules, but also the *Twombly*/*Iqbal*

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be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act."

standard and the Tucker Act. *See* Def.'s Br. at 6. Although Defendant attempted to rely on *Land of Lincoln* to support its new argument (never before advanced in this or any other risk corridors case), the Court in *Land of Lincoln* did not decide the statutory claim on a motion under RCFC 12(b)(6), or even under RCFC 56. Rather, as BCBSNC has previously shown, the Court in *Land of Lincoln* decided the statutory claim on a motion for judgment on the "Administrative Record" under RCFC 52.1, and upheld HHS' budget-neutral interpretation as "reasonable" and "not contrary to law" based on the "Administrative Record" the Defendant had compiled in that case, applying the APA standard of review. *See* 129 Fed. Cl. at 102-08. Applying *Land of Lincoln*'s reasoning here would violate the RCFC 12(b)(6) standard established by the Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). *See* BCBSNC Sur-Reply Br. at 8-11 (ECF No. 22). Furthermore, to impose a "presently due money damages" element on pleading a violation of a money-mandating statute – which Section 1342 indisputably is – would impermissibly add a new jurisdictional requirement to the Tucker Act. Defendant's position would prevent the Court from applying the proper RCFC 12(b)(6) standard, which requires that the Court accept as true BCBSNC's well-pled facts that the Government's risk corridors payments are presently due. *See* BCBSNC's Br. at 17-18.

In addition, setting aside the anomalous procedure used and standard applied in *Land of Lincoln*, it is simply untrue that "Judge Lettow relied only on material that is already before this Court" in rendering his opinion on the statutory count. Def.'s Br. at 7. The limited "Administrative Record" in that case did not exist before the case was filed, was compiled by the Government at the plaintiff's request and the Court's order, and lacked fundamental documents such as the QHP Agreements and Attestations, materials undermining the Government's position such as the CBO's February 2014 report expressly stating that the risk corridors program is not

budget neutral,[15] plus other materials that are now before this Court or will be before this Court in this case at the summary judgment stage. *See* BCBSNC's Amicus Br. at 14-15, *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 17-1224 (Fed. Cir. Feb. 7, 2017) (ECF No. 63) (listing documents missing from the "Administrative Record" in *Land of Lincoln*).[16]

4. Whether the Court should dismiss Counts II-IV of the complaint, pursuant to RCFC 12(b)(6), if the Court concludes that plaintiff is not entitled to "presently due money damages" under Section 1342 of the ACA?

Similar to its answer to question 3 above regarding Count I, Defendant urged a novel and wholly insupportable position regarding what is required to state a claim for the remaining contractual and takings counts in BCBSNC's Complaint. Tellingly, Defendant has never taken this position before in this case or in defense of any other risk corridors case. Without citing any case law – because none exists – Defendant asserts that "presently due money damages" is a new element that Courts must impose upon all plaintiffs in order to state a claim for each of these common-law causes of action. *See* Def.'s Br. at 8-10. The Court should decline to impose such a new element. *See, e.g.*, *Moda*, 2017 WL 527588, at *23 (stating the elements of breach of express or implied-in-fact contract, which do not include "presently due money damages"). The Court in *Moda* concluded on summary judgment that, as a matter of law, the plaintiff had undisputedly satisfied all the elements necessary to establish the Government's breach of an implied-in-fact contract with Moda, and "presently due" damages was not one of those elements. *See Moda*, 2017 WL 527588, at *26. In fact, the Court in *Moda* correctly rejected the

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15 *See* CBO, *The Budget and Economic Outlook: 2014 to 2024*, at 59 (Feb. 2014), BCBSNC Opp. Br. Ex. 36 ("[R]isk corridor collections (which will be recorded as revenues) will not necessarily equal risk corridor payments, so that program can have net effects on the budget deficit.").

16 The plaintiff in *Land of Lincoln* also did not seek to supplement the "Administrative Record" compiled by the Government with any additional documents, including, but not limited to, those identified by the Amicus Brief at 14-15 (ECF No. 63).

Defendant's "presently due" argument under RCFC 12(b)(1). *Id*. at *11-14.

Even if Plaintiff were required affirmatively to plead this additional element to allege these causes of action (which it is not), the issue of "presently due money damages" would be a disputed fact, precluding RCFC 12(b)(6) dismissal, because the Complaint sufficiently alleges that money damages are presently due. *See* BCBSNC's Br. at 19 (citing Compl. ¶¶ 8, 72, 87). Moreover, if Defendant had its way, BCBSNC impermissibly would be required *to prove* at the pleadings stage that the Government had "breached" its contract or deprived it of its property. *See* Def.'s Br. at 9. Whether the Government "breached" its statutory or contractual obligations under the risk corridors program, however, undisputedly raises factual issues that should be decided on a full summary judgment motion, not on the pleadings by an RCFC 12(b)(6) motion to dismiss. *See, e.g.*, *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998) ("Whether a contract exists is a mixed question of law and fact."); *Moda*, 2017 WL 527588, at *23-26 (deciding on summary judgment, after reviewing the entire record, that the Government had breached an implied-in-fact unilateral contract to make full, annual risk corridors payments).

Finally, although previously there may have been an arguable question about the Government's intentions and ability to pay the outstanding risk corridors payments that it repeatedly acknowledged were due in "full" to participating QHPs, including BCBSNC, by the end of the three-year risk corridors program,[17] now the program has ended. The Government has actually paid only a small fraction of the $2.87 billion that it acknowledged was owed QHPs for CY 2014, none of the $5.8 billion that it admitted was owed to for CY 2015, and very likely

[17] *See, e.g.*, Bulletin, CMS, Risk Corridors Payments for 2015 (Sept. 9, 2016), Def.'s App'x at A248 ("HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. HHS will record risk corridors payments due as an obligation of the United States Government for which full payment is required.").

none of the amount that it will announce later this year is owed to QHPs for CY 2016.[18] Under these circumstances, the Government cannot credibly assert that the risk corridors payments, for which it already has recorded as legal obligations of the United States, are not "presently due." *See, e.g.*, Bulletin, CMS, *Risk Corridors Payments for 2015* (Sept. 9, 2016), Def.'s App'x at A248.

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For all of these reasons, and those stated in BCBSNC's Opposition Brief (ECF No. 14), Sur-Reply Brief (ECF No. 22) and Initial Supplemental Brief (ECF No. 29), the Court should deny Defendant's Motion to Dismiss and order Defendant to answer BCBSNC's Complaint.

Date: March 17, 2017

Respectfully Submitted,

s/ Lawrence S. Sher

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[18] *See supra* note 7 and accompanying text.

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2017, a copy of the foregoing Plaintiff's Responsive Supplemental Brief was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be sent to all parties by operation of the Court's ECF system.

s/ Lawrence S. Sher
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