IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MODA HEALTH PLAN, INC. Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)))))))))	Case No. 1:16–cv–00649–TCW Judge Thomas C. Wheeler

PLAINTIFF'S REPLY IN SUPPORT OF ITS CROSS MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY

ORAL ARGUMENT REQUESTED

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The Government's opposition ("Govt. Opp.") begins with a constitutional quotation: "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. True, but inapt. This Court has Tucker Act jurisdiction to "render judgment upon any claim against the United States founded upon . . . any Act of Congress . . . or implied contract," 28 U.S.C. § 1491; the payment of this Court's final judgments are authorized by 28 U.S.C. § 2517; and the permanent, unlimited Judgment Fund provides that "[n]ecessary amounts are appropriated to pay final judgments . . . payable . . . under section[] 2517 . . . of title 28," *see* 31 U.S.C. § 1304(a)(3)(A). The requisite "Appropriation made by Law" is indisputable.

It is equally indisputable that Moda suffered sizeable losses, with the Government's Risk Corridor payments to it falling far short of the Affordable Care Act ("ACA") statutory formula. Moda is therefore entitled to summary judgment as to liability on its statutory claim unless the Government has demonstrated either that: (1) Congress *from the beginning* required that the ACA Risk Corridors program be budget neutral, or (2) Congress's enactment five years later of appropriations riders forbidding the use of specified HHS annual appropriations to make Risk Corridor payments, without amending the ACA, stripped Moda of its statutory rights and access to the Judgment Fund to vindicate them. The Government has demonstrated neither.

First, the Government fails to establish that Congress, at the time it adopted the ACA in 2010, intended the risk corridor program to be "budget neutral," *i.e.*, mandated that the Government's payments to unprofitable plans like Moda be limited to the amount of risk corridor receipts from profitable plans. Instead, the ACA statutory language unambiguously dictates that the Secretary "***shall pay***" Risk Corridor payments to unprofitable health plans pursuant to the

ACA statutory formula, with nary a hint that such payments are limited to receipts from profitable plans. The statute is unambiguous and the inquiry should end there.

Moreover, HHS's implementing regulations, which constitute the ***only*** Government pronouncements entitled to *Chevron* deference if the ACA itself is deemed ambiguous, unambiguously provide that unprofitable health plans "***will receive*** [risk corridor] payment from HHS" pursuant to the prescribed formula, without reference to the amounts received from profitable plans. HHS also provided straightforward assurances in the preamble to those ACA regulations: "The risk corridors program is **not statutorily required to be budget neutral**," and full Risk Corridors payments will be made "**[r]egardless of the balance of payments [to unprofitable plans] and receipts [from profitable plans].**" By contrast, at the very same time, HHS made clear that the two other "market stabilization" programs, Reinsurance and Risk Adjustment, ***were*** budget neutral, and it adopted regulations and formulas that so provided.

Second, Congress's enactment five years later of HHS appropriations riders did not divest this Court of the power to award via the Judgment Fund the Risk Corridor payments that Moda is statutorily owed but has not been paid. The riders on their face forbade the use of specified HHS annual appropriations to make risk corridor payments, without amending the ACA. The law is clear: Congress's failure to appropriate funds does not in and of itself defeat a Government obligation created by statute. To the contrary, the failure of Congress to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, ***but such rights are enforceable in this Court***.

Indeed, appropriations act riders in particular are presumed ***not*** to impact substantive law, and an intent to effect a change in the substantive law through an appropriation act provision must be "clearly manifest." In decisions fully binding on this Court, the Court of Claims held

that appropriation riders indistinguishable from those at issue here are insufficient to meet the "clearly manifest" standard, as a matter of law. The Government's contention that key passages in the leading Court of Claims decision should be treated as "dicta" is wrong and itself foreclosed by binding precedent.

A third, less pressing issue is exactly when full Risk Corridor payments must be made. Moda says they should already have been made for 2014 and 2015; the Government says they are not due until sometime in 2017. Given the timetable for completing this litigation, this appears to be an academic issue that will soon be mooted, but Moda is clearly correct.

Finally, with the unfettered nature of the Government's risk corridor promises recognized, the legitimacy of Moda's separate, implied contract claim turns on whether the Government's statutory and regulatory promises to make Risk Corridor payments, in return for Moda's agreement to provide ACA insurance coverage, constituted a contractual commitment. The answer is clearly yes, and the Government does not escape its contractual obligations even if Congress did not appropriate sufficient programmatic funds to pay them.

ARGUMENT

I. THE RISK CORRIDOR PROGRAM IS NOT BUDGET NEUTRAL.

A. The ACA Does Not Provide That the Risk Corridors Program Will Be "Budget Neutral."

The Government's contention that Congress mandated that the risk corridor program be "budget neutral," Govt.'s Reply In Support of Mot. to Dismiss and Opp. to Pl.'s Cross-Mot. for Partial Summ. J. [hereinafter "Govt. Opp."], at 1 (ECF No. 14), is belied by the ACA's plain text. Section 1342 is clear: "the Secretary ***shall pay***" Risk Corridors payments to unprofitable health plans pursuant to a fixed statutory formula. ACA § 1342(b)(1), 42 U.S.C. § 18062 (emphasis added); Pl.'s Cross-Mot. for Partial Summ. J. [hereinafter "Moda Br."], at 12 (ECF

No. 9) (quoting in full 42 U.S.C. § 18062) (emphasis added). No statutory language limits this statutory obligation to the amount of Risk Corridor collections from profitable plans. Where the statute's language is clear, that is where the statutory interpretation "begins [and] ends." *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016); *see* Moda Br. at 12.

Nor would budget neutrality make sense. ACA Risk Corridor protections assured health plans that their losses would be limited per the statutory formula, thus encouraging insurers both to participate in the new and uncertain ACA program and to keep their premiums low. *See* HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,410, 15,413 (Mar. 11, 2013). No such assurances would have been provided were Risk Corridor payments to unprofitable plans contingent on the speculative questions whether there would be other, profitable plans, and if so, whether such plans would be sufficiently profitable to create payment obligation large enough to cover the amounts owed to unprofitable plans. *See* Moda Br. at 16. Moda is not suggesting that "legislation pursues its purposes at all costs," Govt. Opp. at 15, but that the Risk Corridors purpose is served by applying the its statutory formula as written.

The only ***statutory*** language on which the Government even attempts to rely is the absence of language, specifically, "[t]he absence of either an appropriation or an authorization of appropriations for section 1342," which supposedly "indicates that Congress understood that funding for risk corridor payments would come from risk corridors collections." Govt. Opp. 13. But this argument runs afoul of both general ***and*** specific guidance from the Government Accountability Office, whose opinions are "give[n] special weight" on appropriations matters. *Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005) (internal quotation marks omitted).

GAO has ***generally*** explained that "[t]he existence of a statute (organic legislation) imposing substantive functions upon an agency that require funding for their performance is

itself sufficient authorization for the necessary appropriations;" there need not be (and often is not) a specific reference to appropriations. I GAO, Principles of Federal Appropriation Law, 2-41 (2004) [hereinafter "I GAO Redbook"], *available at* http://www.gao.gov/legal/red-book/overview. As GAO has stated: "[W]e are aware of no legal requirement for specific appropriation authorization language, although the use of such language certainly serves to remove any doubt as to whether an authorization of appropriations is intended. Rather, the enactment of general legislation which clearly contemplates Federal financing is sufficient authorization for appropriations to carry out such legislation." GAO, Letter from the Hon. George E. Danielson, B-173832 (Comp. Gen. Aug. 1, 1975), *available at* http://www.gao.gov/products/400005.

Thus, the fact that the Medicare Part D risk corridors included budget authority in advance of appropriations is immaterial. Moreover, unlike Section 1342, Medicare Part D does not include money-mandating language, *see* 42 U.S.C. § 1395w-115(e)(3), which may have prompted the additional language.

Moreover, and even more on point, GAO ***specifically*** concluded that HHS's general annual appropriation ***was*** available to make Section 1342 Risk Corridor payments. *See* Moda Br. at 39. That conclusion is of course diametrically opposed to the Government's current litigation position that the only available funds are the receipts from profitable plans.[1]

B. Any Ambiguity in the ACA Was Resolved by HHS's Regulations.

Consistent with Moda's reading of the ACA itself, and contrary to the position advanced by the Government, HHS's implementing risk corridor regulations specify that unprofitable

[1] Nor can Section 1342 reasonably be read as allowing a "three-year payment framework," for the reasons explained in Moda Br. at 42-49, and page 20, *infra*.

"issuers ***will receive payment*** from HHS," pursuant to the statutory formula, 45 C.F.R. § 153.510 (emphasis added), without any caveats or conditions indicating that those payments would be limited by the amount of Risk Corridors receipts from profitable plans, *see generally* 45 C.F.R. § 153.510-540. The preamble to the regulations provides explicit assurance that "**[t]he risk corridors program is not statutorily required to 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**." 78 Fed. Reg. at 15,473 (emphasis added).

These unambiguous HHS regulations, promulgated through notice-and-comment rulemaking, are the ***only*** HHS pronouncements entitled to *Chevron* deference (*i.e.*, deference to an agency's "reasonable" construction of a statute) were the ACA itself found ambiguous. *See, e.g.*, *Cathedral Candle Co. v. USITC*, 400 F.3d 1352, 1361, 1365 (Fed. Cir. 2005); *see also Wyo. Outdoor Council v. US Forest Servs.*, 165 F.3d 43, 53 (D.C. Cir. 1999) ("While language in the preamble of a regulation is not controlling over the language of the regulation itself, we have often recognized that the preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules.") (citations omitted).

Moreover, and importantly, the Risk Corridor regulations and preamble are in stark contrast to those governing two other ACA programs, Reinsurance and Risk Adjustment, which together with Risk Corridors make up the "3Rs" market stabilization programs. Unlike the Risk Corridor program, Reinsurance and Risk Adjustment ***are*** specifically made budget neutral. Reinsurance Program regulations provide:

> If HHS determines that all reinsurance payments requested under the national payment parameters from all reinsurance-eligible plans in all States for a benefit year will not be equal to the amount of all reinsurance contributions collected for reinsurance payments under the national contribution rate in all States for an applicable benefit year, HHS will determine a uniform pro rata adjustment to

> be applied to all such requests for reinsurance payments for all States.

45 C.F.R. § 153.230(d). Similarly, "Risk adjustment payments [to plans with sicker than average enrollees] would be fully funded by the charges that are collected from plans with lower risk enrollees (that is, transfers. . . would net to zero)." HHS Notice of Benefit and Payment Parameters for 2014, 77 Fed. Reg. 73,118, 73,139 (Dec. 7, 2012); *see also, e.g.*, 78 Fed. Reg. at 15,441 (the federal Risk Adjustment methodology provides for a "budget-neutral revenue redistribution among issuers"). Indeed, the ***very same*** HHS Federal Register notice stating that the "risk corridors program is not statutorily required to be budget neutral," and that "[r]egardless of the balance of payments and receipts, HHS will remit [Risk Corridor] payments as required under section 1342 of the Affordable Care Act," contrasted the Risk Adjustment program: "The Affordable Care Act risk adjustment program is designed to be a budget-neutral revenue redistribution among issuers." 78 Fed. Reg. at 15,441, 15,473.

In short, when a budget neutral program is required, the implementing regulations so require. Nothing in the HHS Risk Corridor regulations require budget neutrality, and as Moda will observe again, HHS explicitly stated the precise opposite at the time of their adoption.

C. Other HHS Pronouncements Are Not Entitled to Deference and Do Not in Any Event Support the Government's Litigation Position.

Because the regulations implementing the Risk Corridor program *without* budget neutrality were adopted through notice-and-comment rulemaking, HHS cannot overrule them except through subsequent notice and comment rulemaking, which it has not done. *See Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015) ("§ 1 of the APA . . . mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance."). Thus, the various HHS statements upon which the Government relies, *see* Govt. Opp. at 5-10, cannot overcome the non-budget neutrality of the Risk Corridor regulations.

Moreover, the Government relies on certain HHS statements, after the ACA program had already gone into operation, only to argue that issuers need not be paid until 2017 (*i.e.*, after the end of the three-year, 2014-16 Risk Corridor program), ***not*** that HHS took the view that no payments are ever due because the Risk Corridor program was *ab initio* legally required to be budget neutral. Indeed, HHS's statements are entirely ***in***consistent with any notion that Risk Corridor payments to unprofitable plans were intended to be limited to Risk Corridor receipts from profitable plans. *See, e.g.*, Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,240, 30,260 (May, 27, 2014) ("In the unlikely event of a shortfall for the 2015 program year [due to meager receipts from profitable plans], HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to [unprofitable] issuers.").[2] *Land of Lincoln* is thus mistaken both when it reads these statements to suggest that HHS concluded otherwise, and that such a position is entitled to *Chevron* deference, *see*, *Land of Lincoln Mut. Health Ins. Co. v. United States*, 2016 WL 6651428 at * 15- *18 (2016), a position the Government itself does not even advocate. *See* Govt. Mot. to Dismiss at 16-17 (ECF No. 8) (arguing that deference should be applied only to its jurisdictional argument that payments are not "presently due"); Govt. Opp. at 5 (same); Exh. 1 hereto (excerpt from *Land of Lincoln* oral argument).

D. The CBO Supports Moda, Not the Government.

The Government's and *Land of Lincoln*'s efforts to rely on the Congressional Budget Office to discern Congressional intent, *see* Govt. Opp. at 14; *Land of Lincoln*, 2016 WL

[2] While the Government asserts that Moda "mischaracterizes" an HHS letter in which, according to the Government, "HHS identified risk corridors collections (user fees) as the only source of funding for risk corridors payments," *see* Gov. Opp. at 16 n. 10, HHS in that letter said nothing about budget neutrality, or about payments out being limited to payments in, and it repeatedly confirmed that HHS "must pay" Qualified Health Plans if the statutory criteria are met. *See* Francesconi Decl., at A146-49, Appendix to Moda Br. (ECF No. 9-1).

6651428 at *16, is misplaced, given that "the CBO is not Congress, and its reading of the statute is not tantamount to congressional intent." *Sharp v. United States*, 580 F.3d 1234, 1238-39 (Fed. Cir. 2009); *see also Ameritech Corp. v. McCann*, 403 F.3d 908, 913 (7th Cir. 2005) (Easterbrook, J.) ("Congress did not vote [on], and the President did not sign" the CBO opinion, and thus it "cannot alter the meaning of enacted statutes"). ***But in any event, the CBO is squarely on Moda's side,*** having ***explicitly*** endorsed Moda's position that the ACA Risk Corridor payments to unprofitable plans are ***not*** limited to receipts from profitable plans:

> By law, risk adjustment payments and reinsurance payments will be offset by collections from health insurance plans of equal magnitudes; those collections will be recorded as revenues. As a result, those payments and collections can have no net effect on the budget deficit. ***In contrast, risk 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***.

CBO, *The Budget and Economic Outlook 2014 to 2024*, at 59 (emphasis added), *available at* https://www.cbo.gov/publication/45010.

This is the only statement CBO ever made whether the ACA Risk Corridor program was intended to be budget-neutral, and its answer is "no." Yet DOJ ignores this CBO statement completely; and it is buried and avoided in footnote 22 in *Land of Lincoln*.

Studiously ignoring what CBO ***actually said*** on the subject of Risk Corridors and budget neutrality, the Government claims that "the CBO excluded the risk corridor program from its scoring at the time of the ACA's passage," Govt. Opp. at 14; *see also Land of Lincoln*, 2016 WL 6651428 at *4, 17-18, from which one purportedly should infer that Risk Corridors were budget neutral. But *Land of Lincoln* reached that conclusion based on CBO having scored "Reinsurance and Risk Adjustment Payments," *Land of Lincoln*, 2016 WL 6651428 at *4, both of which ***are*** statutorily required to be budget neutral, *see* p. 6-7 *supra*. Thus, the Government is asserting that

the Risk Corridor program should be deemed to be budget neutral based on its ***absence*** from a listing of programs that indisputably ***are*** budget neutral. The logic is impossible to discern.

Moreover, it is unclear whether Risk Corridors were excluded from that CBO scoring, given that the line score at issue: "Reinsurance and Risk Adjustment Payments," CBO, Letter to Congress on the Effects of H.R. 4872, the Reconciliation Act of 2010, at Table 2 (Mar. 20, 2010), https://www.cbo.gov/sites/default/files/111th-congress-2009-2010/costestimate/amendreconprop.pdf, neatly matches the title of the ACA subtitle, "Reinsurance and Risk Adjustment," that covered reinsurance ***and*** risk adjustment ***and*** risk corridors, *see* ACA § 1341-43.

Furthermore, even assuming Risk Corridors were not included in that scoring, CBO's decision not to do so suggests that CBO either could not predict whether this brand new program would be a net cost, or predicted, as had been the case with the Medicare Part D risk corridor program,[3] that the ACA program would be approximately budget neutral. But whether the ACA Risk Corridor program was *predicted* to have roughly offsetting outflows to unprofitable plans and inflows from profitable plans, and whether it was *legally required* to be budget neutral, are two completely different questions. The latter is what is relevant here, and on that question, CBO came down squarely on Moda's side: "***[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,***" *see* CBO, *The Budget and Economic Outlook 2014 to 2024*, at 59.

Moreover, whatever early predictions may have been, the actual economics of the ACA program were sharply and negatively affected by the Government's last minute decision to allow

[3] The Medicare Risk Corridors program vacillated between being a net revenue, and a net cost, to the Government between 2007 and 2010. *See* CBO, *The Budget and Economic Outlook 2014 to 2024*, at Table 2-1.

existing, non-compliant health policies to remain in effect. *See* Moda Br. at 6-7. HHS openly acknowledged that this decision would likely result in lower revenues for all plans, but assured them that "the risk corridor program should help ameliorate unanticipated changes in premium revenue." *Id*. That assurance both explains why what happened, happened, and is yet another clear indication that the program was not legally required to be budget neutral, because if it were, it would have been inherently incapable of providing the very amelioration that HHS promised.

E. Later Actions by a Different Congress Do Not Inform Statutory Intent.

The Government's assertion that Congress's enactment of the FY 2015 and FY 2016 appropriations riders "confirm[s]" that Congress intended to make the Risk Corridors Program budget neutral when it enacted the ACA in 2010, *see* Govt. Opp. at 12, runs counter to decades of Supreme Court precedent. Post-enactment events are irrelevant to congressional intent, particularly when that history and action occurs years after the statute was enacted. *See, e.g.*, *United States v. United Mine Workers of Am.*, 330 U.S. 258, 281-82 (1947) ("We fail to see how the remarks of these Senators in 1943 can serve to change the legislative intent of Congress expressed in 1932."). As the Supreme Court has admonished, "'[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 840 (1988) (quotation omitted). This is especially true given that the appropriations riders were enacted ***five years after*** the ACA was enacted, by a different Congress controlled by a different party. *Cf. NLRB v. Fruit & Vegetable Packers and Warehousemen,* 377 U.S. 58, 66 (1964) ("[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents.").

F. There Need Not Have Been Any Appropriations Separate From the Judgment Fund Appropriation, But In Fact, There Were.

There does not need to have been any appropriation separate from the Judgment Fund itself. Under the Tucker Act, 28 U.S.C. § 1491, a plaintiff may recover money damages when the Government fails to meet its obligations under a money-mandating statute or regulation. *See, e.g., Price v. Panetta*, 674 F.3d 1335, 1338-39 (Fed. Cir. 2012); *District of Columbia v. United State*s, 67 Fed. Cl. 292 (2005). Statutes that provide that the Government "shall" make a payment are money mandating. *Greenlee Cty., Ariz. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007); *Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003).

Section 1342 of the ACA provides that when certain easily determinable financial metrics are met, the Government "shall pay to the [insurance] plan an amount" established by the statutory Risk Corridor payment formula. ACA § 1342(b)(1). The implementing regulations similarly provide that an unprofitable insurer "will receive payment from HHS," based solely on a calculation of the excess of the plan's enrollee medical claims costs over its premium revenues less administrative costs. 45 C.F.R. § 153.510. Thus, Section 1342 and its implementing regulation are money mandating, and the Judgment Fund is available to make payment of the Risk Corridor shortfalls owed to Moda. *See* 31 U.S.C. § 1304; *see also, e.g., Slattery v. United States*, 635 F.3d 1298, 1317 (Fed. Cir. 2011) (en banc) ("The purpose of the Judgment Fund was to avoid the need for specific appropriations to pay judgments awarded by the Court of Claims."); *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966) ("The failure [of Congress] to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in [this Court].")

Furthermore, while irrelevant for the reasons just stated, the Government's assertion, *see* Govt. Opp. at 1, that Congress never appropriated additional funds to make Risk Corridor

payments is simply wrong, for several reasons. ***First,*** the ACA program became operational January 1, 2014, and Congress on January 16, 2014 made a $3.6 billion lump sum **FY 2014** CMS Program Management appropriation that covered *inter alia* "other responsibilities" of CMS, *see* Consolidated Appropriations Act, 2014, Pub. L. No. 113-76 div. H, tit. II, 128 Stat. 5, 374 (2014), for the period through September 30, 2014. GAO concluded that, "with the enactment of section 1342," CMS's "other responsibilities" "include the risk corridors program," and thus "the CMS PM [Program Management] appropriation for FY 2014 would have been available for making the payments pursuant to section 1342(b)(1)." GAO, HHS Risk Corridors Program, B-325630 at 3-4 (Sept. 30, 2014), http://gao.gov/assets/670/666299.pdf.

GAO used the past perfect conditional tense — "would have been" — because GAO was writing on September 30, 2014, the last day of FY 2014, and HHS had not in fact used those funds for Risk Corridor purposes. But HHS could have: While an annual appropriation is only available for the federal fiscal year to which it applies, "the general rule is that the availability relates to the authority to obligate the appropriation, and does not necessarily prohibit payments after the expiration date for obligations previously incurred, unless the payment is otherwise expressly prohibited by statute." I GAO Redbook at 5-4 (citations omitted). The Government's statement, *see* Govt. Opp. at 17 n.12, that a lump sum appropriation "expires" at the end of the fiscal year is misleading, because the appropriation only needs to have been obligated, not spent. As GAO explains: "[E]xpired appropriation remains available for 5 years for the purpose of paying obligations incurred prior to the account's expiration and adjusting obligations that were previously unrecorded or under recorded." I GAO Redbook at 1-37.

Nor is it relevant that the exact amount of the 2014 Risk Corridors obligations was not known during FY 2014; an appropriation for a given year authorizes the agency to incur the

obligation to make payment "as long as the need arose, or continued to exist in, that year. . . even though the funds are not to be disbursed and the exact amount owed by the government cannot be determined until the subsequent fiscal year." I GAO Redbook at 5-14.

Second, there were also ***FY 2015*** appropriations available for Risk Corridors payments. The first of the appropriations riders was not enacted until December 17, 2014, almost three months into FY 2015. *See* Moda Br. at 8. For the first two-and-a-half months of FY 2015, *i.e.*, from October 1, 2014 until December 17, 2014, continuing resolutions provided appropriations to CMS, none of which limited in any manner the use of that appropriation for making Risk Corridors payments.[4] Thus, the approximately $750 million of lump sum CMS Program Management appropriations provided through those continuing resolutions[5] was fully available for Risk Corridors payments and obligations. That was more than enough money to satisfy the Government's commitments to Moda, and it is irrelevant to its claim whether there was enough money to pay everyone else as well, *see Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2189-90 (2012) ("[I]t is not reasonable to expect the contractor to know how much of that appropriation remains available for it at any given time.").

Third, risk corridors receipts from profitable plans are "user fees," and the appropriations language allowing the agency to spend "user fees" means that the Risk Corridors collections are "appropriated to CMS" to use for Risk Corridors payments. GAO, B-325630, *supra*, at 8.

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[4] *See* H.R.J. Res. 124, 113th Cong. (2015); H.R.J. Res. 130, 113th Cong. (2014); H.R.J. Res. 131, 113th Cong. (2014).

[5] The FY 2014 appropriations statute provided $3.6 billion for the CMS Program Management fund, *see supra*, an average of $300 million a month. The FY 2015 continuing resolutions continued CMS funding "at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2014," with a small across-the-board decrease of .06%. H.R.J. Res. 124 § 101(a)(8). Thus, there was approximately $750 million of unrestricted appropriations for the first two and a half months of FY 2015.

II. THE APPROPRIATIONS RIDERS DID NOT VITIATE MODA'S STATUTORY RIGHTS.

A. The Appropriations Riders Did Not Contain Language that "Clearly Manifested" an Intention to Amend the ACA.

While Congress has the raw power to repeal a statutory obligation via an appropriations bill, the strong presumption is that an appropriations bill does not have that effect. Moda Br. at 20-25. As the predecessor to the Federal Circuit explained, "[t]he intent of Congress to effect a change in the substantive law via provision in an appropriation act must be clearly manifest." *N.Y. Airways*, 369 F.2d at 749; *accord District of Columbia*, 67 Fed. Cl. at 335. Absent such clear manifestation, the statutory obligation remains, and may be vindicated in this Court, with the resulting judgment satisfied through the Judgment Fund. Moda Br. at 20-25.

In *Gibney v. United States*, 114 Ct. Cl. 38 (1949), the Court of Claims directly addressed whether appropriations language indistinguishable from that at issue here altered the payment obligation of a preexisting statute. The appropriations language there provided: "None of the funds appropriated for the Immigration and Naturalization Service shall be used to pay compensation for overtime services other than as provided" in two statutes not at issue in the case. *Gibney*, 114 Ct. Cl. at 48-49. The language at issue here is nearly identical. *See* Moda Br. at 22.

Gibney held that a preexisting statutory obligation to pay overtime was ***not*** affected by this appropriations language, because "a pure limitation on an appropriation bill does not have the effect of either repealing or even suspending an existing statutory obligation." 114 Ct. Cl. at 50-51. The Court further observed that it "know[s] of no case in which any of the courts have held that a simple limitation on an appropriation bill of the use of funds has been held to suspend a statutory obligation." *Id.* at 53.

While the Government avers that these *Gibney* court's statements were dicta, *see* Govt. Opp. at 21, they are in fact at the core of the *Gibney* court's holding. Perhaps the Government is relying upon the *Gibney* court's observation, immediately following the latter statement quoted above, that "it is not necessary in this case to rest the decision upon this point alone," followed by an alternative ground for decision. *Gibney*, 114 Ct. Cl. at 53-55. If so, the Government is off the mark: "[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Wood v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

The Government would thus have this Court ignore *Gibney* regarding the appropriations language necessary to satisfy the "clearly manifested" requirement. But Court of Claims decisions are binding in the CFC, and can only be overruled by a decision of the Federal Circuit sitting *en banc*. *Mercier v. United States*, 786 F.3d 971, 980 (Fed. Cir. 2015). And, additional precedents, two of them also binding, are to the same effect as *Gibney*. *See* Moda Br. at 19-25 (discussing *United States v. Langston*, 118 U.S. 389 (1886); *N.Y. Airways*, 369 F.2d 743; and *District of Columbia*, 67 Fed. Cl. 292).

The Government purports to rely on different cases, but every single one involves appropriations act language that clearly overrode the underlying statutory obligation. *See United States v. Dickerson*, 310 U.S. 554, 556-57 (1940) (the preexisting statutory obligation "is hereby suspended"; "no part of ***any appropriation*** contained in this or ***any other Act*** for the fiscal year . . . shall be available for the payment . . . ***notwithstanding the applicable provisions of***" the statute (emphasis added)); *United States v. Will*, 449 U.S. 200, 205-08 (1980) (involving four consecutive appropriations bills) ("[n]o part of the funds appropriated in this Act ***or any other Act*** shall be used" to meet the statutory obligation; the preexisting statutory obligation that "***shall not take effect;***" "No part of the funds appropriated for the fiscal year ending September 30,

1979, by this ***Act or any other Act*** may be used to pay . . .” the statutory obligation; “funds available for payment . . . shall not be used to” meet the statutory obligation (emphasis added)); *Republic Airlines, Inc. v. U.S. Dep’t of Transp.*, 849 F.2d 1315, 1317 (10th Cir. 1988) (capping payments for the preexisting statutory obligation “***notwithstanding any other provision of law,***” and expressly directing the Government that to “the extent it is necessary to meet this limitation, the compensation otherwise payable by the Board [under the preexisting statutory obligation] ***shall be reduced by a percentage which is the same for all air carriers receiving such compensation***” (emphasis added)); *United States v. Mitchell*, 109 U.S. 146, 150 (1883) (both the underlying statutory obligation to pay the interpreter $400 and decrease in that appropriation to $300 were contained in appropriations acts, and both involved the special case of Indian appropriations; the Court found that the language in the subsequent appropriations act revealed that Congress’ “purpose” was “to suspend the law” that appropriated the higher, $400 salary).

B. The Appropriations Language Is What Matters.

While the Government argues that “[t]he question of whether a specific appropriations act limits the United States’ liability does not depend on the use of specific words over other words,” Govt. Opp. at 19, statutory text is in fact ***the*** paramount consideration: “Because it is presumed that Congress expresses its intent through the ordinary meaning of its language, every exercise of statutory interpretation begins with an examination of the plain language of the statute.” *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 759 (3d Cir. 2009) (citation omitted); *accord Allergan, Inc. v. Alcon Lab., Inc.*, 324 F.3d 1322, 1335 (Fed. Cir. 2003). The legal standard pertinent here demands close examination of the appropriations language, to determine whether the words used “clearly manifest” an intent to repeal a prior statutory obligation.

The Government also cites post-ACA legislative history indicating that some members of Congress wanted to make the Risk Corridors Program budget neutral. Govt. Opp. 17-18. Some

members of Congress undoubtedly wanted that result; Senator Rubio, for example, introduced a bill, ***never enacted***, that would have amended Section 1342 to require that the Risk Corridors Program be budget neutral. *See* Obamacare Taxpayer Bailout Protection Act, S. 2214, 113th Cong. (2014). Some legislators may have wished the appropriations riders to have that effect, but that is not enough, given that the statutory language fell far short of the "clearly manifest" standard. *Cf. Gibney*, 114 Ct. Cl. at 55 (Whitaker, J. concurring) (some members of Congress wanted the appropriations language to suspend the Government's obligation to pay overtime, but "they did not accomplish their purpose; they merely prohibited the use of certain funds to discharge the obligation under that Act," and "[t]his did not repeal the liability the Act created").

Finally, while the Government argues that "Moda does not cite a single, non-contract case in which congressional intent to limit an obligation was clear and yet the court declined to give it effect," Govt. Opp. at 3-4, such intent here is ***not*** clear for the reasons just stated, and Moda's opening brief cited several non-contract cases in which a congressional limitation on appropriations was held to leave the substantive obligation unaffected. *See, e.g., Langston*; *District of Columbia*; *Gibney.*

III. ALTERNATIVELY, THE GOVERNMENT IS LIABLE FOR BREACH OF AN IMPLIED-IN-FACT CONTRACT WITH MODA (COUNT II).

A. There Was Mutuality of Intent to Contract, and An Unambiguous Offer and Acceptance.

The Government overstates the specificity with which the salient statutes and regulations must have indicated an intention to contract. When agency regulations and action induce a private party to act, and a private party acts as so induced, mutuality of intent to contract are inferred. *See* Moda Br. 32-35; *N.Y. Airways*, 369 F.2d at 751; *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 406, 490 (Ct. Cl. 1957); *see also Wells Fargo Bank, N.A. v. United State*s, 26 Cl. Ct. 805, 810 (1992) ("There is ample case law holding that a contractual

relationship arises between the government and a private party if promissory words of the former induce significant action by the latter in reliance thereon." (quotation omitted)); *Aycock-Lindsey Corp. v. United States*, 171 F.2d 518, 521 (5th Cir. 1948) (when the Government includes "numerous requirements . . . to receive the payments" and those payments are "compensatory in nature;" an entity accepts the Government's offer of payment by satisfying the listed requirements).

That is exactly what has happened here: through Section 1342, the implementing regulations at Section 153.510, and the Government's statements that it would make full Risk Corridors payments, the Government and Moda exchanged a quid: the Government's offer of Risk Corridor payments, for a quo: Moda's acceptance of that offer via its agreement to provide Qualified Health Plans. *See* Moda Br. at 30-31.

The Government repeatedly relies upon *Land of Lincoln, see, e.g.*, Govt. Opp. at 24, 29, but that Court found no breach based on the premise that the ACA itself limits Risk Corridor payments to unprofitable plans to the amount of receipts from profitable plans, such that the Government's failure to make full Risk Corridor payments pursuant to the statutory formula did not breach its obligations. *Land of Lincoln*, 2016 WL 6651428 at *19-*24. Because that premise is incorrect, *see* pp. 3-15 *supra*, so is the holding.

The Government's contention that Moda's position could lead to all regulatory obligations being converted into contractual obligations, *see* Govt. Opp. at 26, ignores that most regulatory obligations are mandatory and imposed unilaterally: The Government sets forth what must be done, and the regulated entity does it. By contrast, the obligations here were optional, and mutual, with an offer and inducement by the Government followed by an entirely

discretionary acceptance, and performance, by Moda. This forms a contract. *See Radium Mines*, 153 F. Supp. at 406, 490; Moda Br. at 33-37.

B. The Secretary of HHS Had Actual Authority to Contract.

As the official expressly tasked by Congress with administering the ACA generally and the Risk Corridors program specifically, the Secretary had the implicit authority to enter contracts he or she deemed were necessary to effectuate the program. *See* Moda Br. at 32-34. Moreover, the contracts were formed before an appropriations rider was first enacted in December 2014, and the Anti-Deficiency Act therefore did not prohibit the Secretary from entering into contracts for Risk Corridors payments for 2014 and 2015. *See* Govt. Opp. at 28; *see also Land of Lincoln*, 2016 WL 5900196 at *24 n. 30.

C. The Government Has Breached Its Contractual Obligation to Make Full Risk Corridors Payments.

While the Government argues that HHS has not breached any contractual obligation because payment is not required until the end of "HHS's three-year payment framework," Govt. Opp. at 25, 29, the notion that Risk Corridor payments were only to be paid after the three-year program ended is an untenable reading of Section 1342; inconsistent with the needs that the Risk Corridor program was designed to meet; and inconsistent with HHS ***having already made*** 2014 risk corridor payments to Moda, albeit only 12.6 cents on the dollar. Moda Br. at 42-49. Indeed, insurers have been driven out of entire markets due to the uncompensated losses they have suffered, the exact antithesis of the intent of the Risk Corridor program.

Moreover, even if Risk Corridor payments originally were not due until the end of 2017, when the Government renounces "a contractual duty before the time fixed in the contract for performance," that renunciation constitutes a "repudiation" of the contract that "ripens into a breach prior to the time for performance," if (as here) the non-repudiating party elects to treat it

as a breach by bringing suit. *See Franconia Assoc. v. United States*, 536 U.S. 129, 130 (2002) (internal citations omitted); *Kasarsky v. Merit Systems Protection Bd.*, 296 F.3d 1331, 1336-37 (Fed. Cir. 2002) (repudiation occurred when the Government informed the individual's attorney that it would not pay attorneys' fees under the settlement agreement).

Congress restricted HHS funding for FY 2015, and HHS announced it would not use its funding to pay for 2104 risk corridors. Moda Br. at 8. Congress restricted HHS funding for FY 2016, and HHS announced it would not use its funding to pay for 2015 risk corridors.[6] Congress has maintained the appropriation restrictions through at least April 28, 2017, thus provided zero HHS funding for Risk Corridor obligations.[7] Nor is there any possibility that HHS will collect sufficient Risk Corridors receipts from profitable plans to make up the Risk Corridors payment owed for 2014 and 2015, and the Government does not contend otherwise.[8] This is a clear repudiation, and it is irrelevant that congressional action was the source of the repudiation and breach, *see Mobil Oil Exp. & Producing Se., Inc. v. United States*, 530 U.S. 604, 619 (2000).

[6] CMS, Risk Corridors Payment and Charge Amounts for Benefit Year 2015, Table 2 (Nov. 18, 2016) ("CMS 2015"), *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2015-RC-Issuer-level-Report-11-18-16-FINAL-v2.pdf.

[7] Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and Zika Response and Preparedness Act, Pub. L. No. 114-223, § 101, 130 Stat. 857 (Sept. 29, 2016); Further Continuing and Security Assistance Appropriations Act, 2017, Pub. L. No. 114-254 (Dec. 10, 2016).

[8] HHS owes $8.69 billion in Risk Corridors payments to unprofitable plans for 2014 and 2015, and profitable plans will pay just $457 million in Risk Corridors collections for those two years. Under HHS's *pro rata* policy, it will pay out only 16 percent of the Risk Corridor payments owed for 2014, and 0 percent of the Risk Corridor payments owed for 2015. CMS 2015, Table 2; CMS, *Risk Corridors Payment and Charge Amounts for Benefit Year 2014*, Table 2 (Nov. 19, 2015), *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RC-Issuer-level-Report.pdf (Francesconi Decl., Exh. 19, A102).

D. Moda's Motion on Its Contract Claim Is Not Premature.

The Government asserts material disputes of fact preclude pre-discovery resolution of the contract claim only. *See* Govt. Opp. at 29-31. However, if the nonmovant believes summary judgment is premature because it "cannot present facts essential to justify its opposition," it must make such a showing by "affidavit or declaration." RCFC 56(d). "'A party may not simply assert that discovery is necessary and thereby overturn summary judgment'" without "'set[ting] out reasons for the need for discovery in an affidavit.'" *Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 1389 (Fed. Cir. 1989). No such declaration was submitted here.

Moreover, Moda's summary judgment motion is predicated upon the documents exchanged between the Government and Moda, which demonstrate the existence of mutuality of intent, unambiguous contract terms, consideration, and breach. *See* Moda Br. at 31-40. When the documents themselves establish both the intent of the parties and the terms of the contract, courts do not resort to testimony or other materials about the parties' subjective beliefs. *First Commerce Corp. v. United States*, 335 F.3d 1373, 1381 n.4 (Fed. Cir. 2003) ("We. . . prefer to rely on the objective and formal manifestations of the parties' communications").

CONCLUSION

Moda's cross motion for partial summary judgment as to liability should be granted as to Counts I and II. Moda requests oral argument on the pending motions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December 2016, a copy of the foregoing, Plaintiff's Reply in Support of Its Cross Motion For Summary Judgment as to Liability, 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.

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