IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MODA HEALTH PLAN, INC.,	:	
	:	Judge Wheeler
Plaintiff,	:	
	:	Case No. 16-649C
v.	:	
	:	
THE UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

THE UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

RUTH A. HARVEY
Director
Commercial Litigation Branch

KIRK T. MANHARDT
Deputy Director

PHILLIP M. SELIGMAN
CHARLES E. CANTER
TERRANCE A. MEBANE
SERENA M. ORLOFF
FRANCES M. MCLAUGHLIN
L. MISHA PREHEIM
United States Department of Justice
Civil Division, Commercial Litigation Branch

Attorneys for the United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. The Court Lacks Jurisdiction Because Full Payments Are Not Due Annually 3

A. A "Presently Due" Claim Is a Prerequisite of Tucker Act Jurisdiction 3

B. Final Risk Corridors Payments Are Not Presently Due 5

1. HHS's Three-Year Framework Is Entitled to Deference 5

2. Because HHS's Three-Year Framework Is Reasonable, Additional Payments Are Not Presently Due 9

C. Moda's Claims Also Are Not Ripe 10

II. Count I Fails to State a Claim Because Congress Intended That Risk Corridors Payments Be Limited to Collections 12

A. Congress Intended the Risk Corridors Program to Be Self-Funded 12

B. Congress Restricted Risk Corridors Payments with the Intent That the Risk Corridors Program Be Budget Neutral While the Spending Laws Are in Effect 15

III. Moda's Implied-in-Fact Contract Claim (Count II) Fails as a Matter of Law 24

A. Moda Has Failed to Allege Facts That Demonstrate an Intent to Contract 25

B. Moda Cannot Establish an Unambiguous Offer and Acceptance 26

C. HHS Lacked Authority to Bind the United States in Contract for Risk Corridors Payments 28

D. Moda Cannot Establish That HHS Breached a Contractual Obligation 29

IV. Moda's Motion for Summary Judgment Is Premature 29

CONCLUSION 31

TABLE OF AUTHORITIES

Cases

AAA Pharmacy, Inc. v. United States,
108 Fed. Cl. 321 (2012) 26

Abbott Labs. v. Gardner,
387 U.S. 136 (1967) 11

Ameritech Corp v. McCann,
403 F.3d 908 (7th Cir. 2005) 14

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 30

ARRA Energy Co. I v. United States,
97 Fed. Cl. 12 (2011) 25, 26

Auburn Hous. Auth. v. Martinez,
277 F.3d 138 (2d Cir. 2002) 19

Baker v. United States,
50 Fed. Cl. 483 (2001) 26, 28

Bath Iron Works Corp. v. United States,
20 F.3d 1567 (Fed. Cir. 1994) 20

Brooks v. Dunlop Mfg. Inc.,
702 F.3d 624 (Fed. Cir. 2012) 25, 27

Caraco Pharm. Labs., Ltd. v. Forest Labs., Inc.,
527 F.3d 1278 (Fed. Cir. 2008) 11

Cathedral Candle Co. v. U.S. Int'l Trade Comm'n,
400 F.3d 1352 (Fed. Cir. 2005) 6

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 30

Cessna Aircraft Co. v. Dalton,
126 F.3d 1142 (Fed. Cir. 1997) 28

District of Columbia v. United States,
67 Fed. Cl. 292 (2005) 20, 22

Dunkin' Donuts of Am., Inc. v. Metallurgical Exoprods. Corp.,
840 F.2d 917 (Fed. Cir. 1988).. 30

Fisher v. United States,
402 F.3d 1167 (Fed. Cir. 2005).. 3, 4

Gibney v. United States,
114 Ct. Cl. 38 (1949) 20, 21, 22

Greenlee Cty. v. United States
487 F.3d. 871 (Fed. Cir. 2007) 23

Hanlin v. United States,
316 F.3d 1325 (Fed. Cir. 2003).. 25

Hercules, Inc. v. United States,
516 U.S. 417 (1996).. 28, 29

Highland Falls–Fort Montgomery Cent. Sch. Dist. v. United States,
48 F.3d 1166 (Fed. Cir. 1995)... 18, 22

Kanemoto v. Reno,
41 F.3d 641 (Fed. Cir. 1994)... 3

King v. Burwell,
135 S. Ct. 2480 (2015).. 7, 8

La Van v. United States,
382 F.3d 1340 (Fed. Cir. 2004).. 26

Landgraf v. USI Film Prod.,
511 U.S. 244 (1994).. 23

Land of Lincoln Mut. Health Ins. Co. v. United States,
No. 16-744C, 2016 WL 6651428 (Fed. Cl. Nov. 10, 2016) .... passim

Maryland Dep't of Human Res. v. Dep't of Health & Human Servs.,
763 F.2d 1441 (D.C. Cir. 1985) 4

Massie v. United States,
226 F.3d 1318 (Fed. Cir. 2000).. 3, 4

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012).. 13

Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.,
470 U.S. 451 (1985) 25, 27

New York Airways, Inc. v. United States,
369 F.2d 743 (Ct. Cl. 1966) 20, 22, 27

Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency,
373 F.3d 1251 (D.C. Cir. 2004) 7

Office of Personnel Management v. Richmond,
496 U.S. 414 (1990) 8

Radium Mines, Inc. v. United States,
153 F. Supp. 403 (Ct. Cl. 1957) 27

Republic Airlines, Inc. v. U.S. Dep't of Transp.,
849 F.2d 1315 (10th Cir. 1988) 18

Rick's Mushroom Serv., Inc.,
521 F.3d. 1338 (Fed. Cir. 2008) 29

Rodriguez v. United States,
480 U.S. 522 (1987) 15

Salazar v. Ramah Navajo Chapter,
132 S. Ct. 2181 (2012) 20, 23

Schism v. United States,
316 F.3d 1259 (Fed. Cir. 2002) 28

Shinnecock Indian Nation v. United States,
782 F.3d 1345 (Fed. Cir. 2015) 10

Surles v. Andison,
678 F.3d 452 (6th Cir. 2012) 30

Tennessee Valley Authority v. Hill,
437 U.S. 153 (1978) 23

Todd v. United States,
386 F.3d 1091 (Fed. Cir. 2004) 3

Union Pac. R.R. Corp. v. United States,
52 Fed. Cl. 730 (2002) 28

United States v. Dickerson,
310 U.S. 554 (1940) 18, 19

United States v. King,
395 U.S. 1 (1969) 3, 4, 9

United States v. Langston,
118 U.S. 389 (1886) 20

United States v. Mitchell,
109 U.S. 146 (1883) 18, 20

United States v. Mitchell,
463 U.S. 206 (1983) 4

United States v. Will,
449 U.S. 200 (1980) 18

Y.S.K. Const. Co. v. United States,
30 Fed. Cl. 449 (1994) 6

<u>Statutes</u>

31 U.S.C. § 1501 8

42 U.S.C. § 1395w-115 .... 6, 7, 9, 13

42 U.S.C. § 1395w-116 13

42 U.S.C. § 18001 13

42 U.S.C. § 18031 13

42 U.S.C. § 18041 6

42 U.S.C. § 18042 .... 13, 27

42 U.S.C. § 18043 13

42 U.S.C. § 18062 .... 6, 7, 10

42 U.S.C. § 18121 13

Pub. L. No. 111-148 13

Pub. L. No. 113–76 .... 16, 17

Pub. L. No. 113-235 17

Pub. L. No. 114-74 18

Pub. L. No. 114-113 18

Pub. L. No. 114-223 18

Regulations

42 C.F.R. § 423.336(c) 6

45 C.F.R. § 153.510(b) 25, 27

Patient Protection and Affordable Care Act; Exchange an Insurance Market Standards for 2015 and Beyond, 79 Fed Reg. 30,240 (May 27, 2014) 9, 29

Rules

RCFC 12(b)(6) 5, 12, 24

Miscellaneous

160 Cong. Rec. H9838 (Dec 11, 204) 10

10A Fed. Prac. & Proc. Civ. § 2727.1 30

Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343 (1988) 23, 24

GAO, Principles of Federal Appropriations Law (GAO Redbook) (Vol. II) (3d ed. 2004) 8

OMB Cir. No. A-25, *User Charges* (July 8, 1993) 17

The Honorable Jeff Sessions, the Honorable Fred Upton, B-325630 (Comp. Gen.), 2014 WL 4825237 (Sept. 30, 2014) 13

To the Adm'r, Veterans Admin., 39 Comp. Gen. 422 (Dec. 4, 1959) 8

INTRODUCTION

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Congress did not appropriate money for risk corridors payments when it enacted section 1342 in 2010, and for each of the years in which risk corridors payments could be made, Congress restricted the available funds to make such payments to risk corridors collections. Congress' intent in restricting those funds is clear: the risk corridors program must be budget neutral for the years that the Spending Laws are in effect. Because this clear congressional intent is dispositive of all issues before the Court, the case should be dismissed.

Regarding the Court's jurisdiction, this case cannot proceed unless congressional enactments require the Department of Health and Human Services ("HHS") to make full payments annually. Section 1342 does not require such annual payments, and the Spending Laws do not permit them when, as here, risk corridors payment requests exceed risk corridors collections. Thus, HHS has implemented an administrative framework in which it makes payments to the extent of its budget authority in each annual payment cycle, with final payment not due until the end of the program. That framework, which HHS implemented in April 2014, reasonably fills a gap left by Congress when it authorized HHS to "establish and administer a program of risk corridors" without specifying payment deadlines. *Land of Lincoln Mut. Health Ins. Co. v. United States* ("*Land of Lincoln*"), No. 16-744C, 2016 WL 6651428, at *15-*19 (Fed. Cl. Nov. 10, 2016) (Lettow, J.), *appeal docketed*, No. 17-1224 (Fed. Cir. Nov. 16, 2016). Moreover, Congress blessed HHS's three-year payment framework by enacting the 2015 Spending Law, observing in the Explanatory Statement that risk corridors payments will be made to the extent of collections "over the three year period risk corridors are in effect." Therefore,

Plaintiff Moda Health Plan, Inc. ("Moda") has no claim for "presently due" money damages, as it must for the Court to exercise jurisdiction under the Tucker Act.

If the Court does not dismiss for lack of jurisdiction, then the Court must uphold HHS's pro-rata distribution of risk corridors payments and dismiss the case for failure to state a claim because Moda is not presently entitled to additional payments under the three-year framework. Section 1342 "does not obligate HHS to make annual payments or authorize the use of any appropriated funds." *Land of Lincon*, 2016 WL 6651428, at *18. Also, Congress' constitutional exercise of its power of the purse has limited the United States' liability under section 1342 to the extent of risk corridors collections. As explained in the United States' Motion, a long line of Supreme Court and Court of Appeals cases recognizes that Congress can, through the annual appropriations process, limit the extent of the United States' obligations created in previously-enacted substantive legislation. Therefore, the question for the Court is whether, in either the substantive legislation enacting the obligation or the later appropriations laws from which payments would be made, Congress clearly expressed its intent to limit the United States' liability to the amounts appropriated. When that intent is unequivocal and clear, as it is here, binding precedent requires that it be given effect. Accordingly, Count I must be dismissed.

Finally, the Court in *Land of Lincoln* considered and dismissed an implied-in-fact contract claim for risk corridors payments. 2016 WL 6651428, at *21-*25. As Judge Lettow explained, no implied-in-fact contract obligates HHS to make risk corridors payments because nothing in section 1342 or HHS's regulations indicate any intent to contract. *Id.* Accordingly, Count II fails as a matter of law. In any event, to entertain summary judgment for Moda on its contract claim—prior to the United States answering the Complaint—would be impermissible.

Moda has neither proven the elements of its claim nor established the absence of genuine issues of material fact.

ARGUMENT

I. The Court Lacks Jurisdiction Because Full Payments Are Not Due Annually

A. A "Presently Due" Claim Is a Prerequisite of Tucker Act Jurisdiction

Moda contends that a "presently due" claim for money damages is not a prerequisite to jurisdiction under the Tucker Act. The jurisdictional requirement that the money a plaintiff seeks under the Tucker Act be presently due was recognized by the Supreme Court in *United States v. King*, 395 U.S. 1, 3 (1969), and has been reaffirmed repeatedly by the Federal Circuit since then. *See, e.g.*, *Todd v. United States*, 386 F.3d 1091, 1095 (Fed. Cir. 2004); *Massie v. United States*, 226 F.3d 1318, 1321 (Fed. Cir. 2000). This "presently due" requirement applies to Moda's claims, as it does to all claims for money damages.

Moda cites no controlling authority to support its assertion that "presently due" payment is not a jurisdictional requirement under the Tucker Act. Instead, it relies on a series of cases concerning either the standard for identifying a money-mandating source of law (not at issue here) or a plaintiff's eligibility for payment under a money-mandating authority (also not at issue). *See* Pl.'s Cross Motion at 41-42.[1] Moda does not cite a single case in which a court

[1] Because timing of payments was not at issue in *Fisher v. United States*, 402 F.3d 1167 (Fed. Cir. 2005) (en banc), Moda misreads that opinion. *See* Pl.'s Cross Motion at 41-42. Moda also quotes language from *Kanemoto v. Reno*, 41 F.3d 641, 644 (Fed. Cir. 1994). Pl.'s Cross Motion at 42. *Kanemoto* concerned only the proper forum (as between the Court of Federal Claims and the District Court) for a plaintiff challenging an agency determination that she was ineligible for restitution under a federal statute. The parties did not dispute that, if the claimant were eligible for payment as she claimed, payment was presently due. In any event, if the Federal Circuit's statement in *Kanemoto* is to be read in the way Moda contends, the statement cannot be reconciled with *King*, *supra*, and the court's more recent holdings affirming the "presently due" requirement as an independent element of jurisdiction. *See, e.g.*, *Todd*, 386 F.3d at 1095;

exercised jurisdiction where, under the rules and terms of the money-mandating authority at issue, payments were not yet due for *any participant*. None of the cases Moda cites discuss, much less abrogate, the "presently due" requirement, and nor could they, as the Supreme Court has interpreted the Tucker Act to include this requirement. *King*, 395 U.S. at 3.

Indeed, the cases cited by Moda recite the traditional rule that Tucker Act jurisdiction will lie only where the source of substantive law "can fairly be interpreted as mandating compensation [by the United States] for *damages* sustained[.]" *See, e.g.*, *Fisher*, 402 F.3d at 1173 (quoting *United States v. Mitchell*, 463 U.S. 206, 217 (1983)). Without a breach of a presently owed obligation, there can be no injury and, by definition, no "damages sustained." *See Maryland Dep't of Human Res. v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985) ("The term 'money damages' . . . normally refers to a sum of money used as compensatory relief . . . for a *suffered loss*") (emphasis added). Moreover, the *Mitchell* test is a question of statutory interpretation, not a pleading standard. It is the *court*—not the plaintiff—that interprets the substantive law to determine whether the plaintiff has a money-mandating source of compensation. *Fisher*, 402 F.3d at 1173 ("If the court's conclusion is that the source as alleged and pleaded is not money-mandating, . . . the court . . . shall dismiss the cause for lack of jurisdiction."). Under *Chevron*, when interpreting an ambiguous statute, courts must defer to an agency's reasonable interpretation of that statute. If, under the agency's reasonable interpretation of the statute, no payments are presently due, then the statute is not "fairly interpreted as mandating compensation," and the court lacks jurisdiction.[2] *Land of Lincoln*, 2016

Massie, 226 F.3d at 1321.

[2] In *Land of Lincoln*, Judge Lettow reasoned that "[t]he court's jurisdictional analysis differs depending on whether the plaintiff relies on a money-mandating statute" or a contract, and concluded that a "presently due" claim is a jurisdictional requirement only when a plaintiff's

WL 6651428, at *8.

B. Final Risk Corridors Payments Are Not Presently Due

As set forth in the United States' Motion, at 15-19, section 1342 does not set payment deadlines, much less annual deadlines. *See also Land of Lincoln*, 2016 WL 6651428, at *16. Rather, the timing of payments is a gap that Congress expressly authorized HHS to fill by granting it authority to "establish and administer" the risk corridors program. HHS exercised that authority by establishing, in April 2014, a three-year framework in which it makes payments each year based upon the amount of "payments in," with final "payments out" not due until the end of the program.[3] *See* Compl. ¶¶ 40-41 (acknowledging HHS's multi-year payment cycle). Under this framework, Moda is not presently entitled to additional payments.[4]

1. HHS's Three-Year Framework Is Entitled to Deference

A heightened "standard of deference applies if Congress either leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill, or implicitly delegates legislative authority, as evidenced by 'the agency's generally conferred

---

claim is founded on a contract. 2016 WL 6651428, at *9. The United States respectfully disagrees that such a distinction is warranted under either the text of the Tucker Act or Supreme Court precedent. But even if the "presently due" requirement is not jurisdictional, the absence of any present entitlement to additional payments requires dismissal of Moda's claims under RCFC 12(b)(6). *See id.* at *18-*19 (granting judgment for the United States because issuer had no present entitlement to additional payments).

[3] Moda cites to earlier rulemaking in which HHS specifically declined to propose or adopt payment deadlines. Compl. ¶ 26; Pl.'s Cross Motion at 44-45. Those statements, which Moda concedes were neither formally proposed nor adopted, *id.*, have no force of law. *See also Land of Lincoln*, 2016 WL 6651428, at *4 (noting that HHS's consideration of a deadline for payments to issuers was "not included in the proposed or final rule").

[4] On November 18, 2016, HHS announced that it will pay additional risk corridors amounts toward 2014 benefit year payment requests based on collections for benefit year 2015. Those amounts will be paid starting in December 2016, consistent with HHS's administrative guidance. *See* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2015-RC-Issuer-level-Report-11-18-16-FINAL-v2.pdf

authority and other statutory circumstances.'" *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1361-62 (Fed. Cir. 2005) (citation omitted). Here, Congress authorized agency gap-filling in two independent provisions of the ACA. First, by conferring on HHS the authority to "establish and administer" the risk corridors program, 42 U.S.C. § 18062(a), Congress explicitly authorized HHS to fill any gaps regarding the administration of the program—including the implementation of a collection and payment framework. *See Land of Lincoln*, 2016 WL 6651428, at *17; *see also Y.S.K. Const. Co. v. United States*, 30 Fed. Cl. 449, 458 (1994) (delegation of "broad authority to administer the statutory program" necessarily entails "the authority to make any decisions necessary to fill any gaps or ambiguities in that statute"). Second, through Congress' general direction that "[t]he Secretary shall . . . issue regulations setting standards for meeting the requirements under this title" and "take such actions as are necessary to implement such other requirements," Congress granted HHS general rulemaking authority in enacting the ACA. 42 U.S.C. § 18041(a), (c).

Moda suggests that Congress directly spoke to the timing of payments—and therefore that deference is not warranted—merely because it provided in section 1342 that the ACA risk corridors program would be "based on" the program under Medicare Part D. *See* Pl.'s Cross Motion at 15-16, 45-46. But Medicare Part D provides only that "[p]ayments under this section shall be based on such a method *as the Secretary determines*." 42 U.S.C. § 1395w-115(d) (emphasis added). Thus, HHS is no more statutorily required to remit annual payments under Medicare Part D than it is under the ACA. Moreover, while HHS has exercised its discretion under Medicare Part D to pay risk corridors payments on an annual basis, *see* 42 C.F.R. § 423.336(c), the agency is not required to adopt an identical approach under section 1342 simply because Congress required the program to be "based on" Part D. *See Land of Lincoln*,

2016 WL 6651428, at *17 (noting similarities and differences between section 1342 and Part D); *see also Nuclear Energy Inst., Inc. v. Envtl. Prot. Agency*, 373 F.3d 1251, 1269 (D.C. Cir. 2004) ("[t]here is no question that the phrase 'based on' is ambiguous") (citation omitted). Indeed, HHS could not have structured the ACA risk corridors payments identically to those made under Medicare Part D because Congress did not enact identical language for making payments. Whereas Congress enacted funding for Part D payments, Congress did not do so as part of section 1342. *Compare* 42 U.S.C. §§ 1395w-115(a) (conferring budget authority "in advance of appropriations Acts") and 1395w-116 (authorizing "appropriations to cover Government contributions") (capitalization omitted), *with* 42 U.S.C. § 18062 (omitting any mention of government contributions). Thus, HHS's three-year payment framework reasonably filled a gap left by Congress regarding the method and timing of payments in the event of a shortfall in "payments in" for one or more program years. *See Land of Lincoln*, 2016 WL 6651428, at *17.

Moda also attempts to rely on *King v. Burwell*, 135 S. Ct. 2480 (2015), Pl.'s Cross Motion at 47-48, in which the Supreme Court held that deference was not due to the IRS's interpretation of the statute because, "[i]n extraordinary cases, . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." *Id.* at 2488-89. This is not such an "extraordinary case." Unlike in *King*, Congress' delegation of authority to HHS to "administer" section 1342 is explicit. 42 U.S.C. § 18062(a). Furthermore, while the 3Rs programs serve an important role in achieving the goals of the ACA in its early years, the question here—when payments are due under section 1342—is not "central to th[e] statutory scheme." *Id.* at 2489. And whereas the Supreme Court concluded that the IRS "has no expertise in crafting health insurance policy of this sort," *id.*, HHS has precisely this type of technical expertise in administering a risk corridors program (Medicare Part D) that the Supreme Court

found lacking in *King*. Accordingly, *Chevron* deference applies. *See Land of Lincoln*, 2016 WL 6651428, at *17.

Finally, Moda suggests that because HHS has recorded risk corridors payments as fiscal year 2015 obligations for budgeting purposes, the United States admits that it presently owes full payment as calculated under section 1342. Pl.'s Cross Motion at 14. This is incorrect. To comply with federal appropriation law, agencies are required to charge and record obligations to the fiscal year in which they are incurred, including indefinite obligations. *See generally* 31 U.S.C. § 1501; *see also, e.g.*, *To the Adm'r, Veterans Admin.*, 39 Comp. Gen. 422, 424 (Dec. 4, 1959) ("The general rule is that expenditures are properly chargeable to the appropriation for the fiscal year in which the liability therefor was incurred."). As a result, agencies routinely record obligations that are not yet due, including certain obligations that may never come due. GAO, Principles of Federal Appropriations Law (GAO Redbook) (Vol. II) at 7-8 (3d ed. 2004). Moreover, "[i]f a given transaction is not sufficient to constitute a valid obligation, recording it will not make it one." *Id.* (citations omitted).[5]

[5] In arguing against the application of deference, Moda relies extensively on HHS's statements in various rule-makings regarding budget neutrality, Pl's Cross Motion at 3-4, 13-14, 16, and asserts that HHS's three-year framework is a "*post hoc* rationalization," *id.* at 17. But HHS's statements merely "reflect[] the agency's deliberations and efforts through the rulemaking process. The fact that the agency may have taken inconsistent positions prior to 2014 does not alter the analysis." *Land of Lincoln*, 2016 WL 6651428, at *17 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984)); *see also Office of Personnel Management v. Richmond*, 496 U.S. 414, 432 (1990) (it is well settled that an agency's public statements cannot, in and of themselves, create a payment obligation). Moreover, the three-year framework pre-dates this lawsuit by two years—it is not a "*post hoc* rationalization."

2. Because HHS's Three-Year Framework Is Reasonable, Additional Payments Are Not Presently Due

"Section 1342 . . . does not obligate HHS to make annual payments." *Land of Lincoln*, 2016 WL 6651428, at *18. HHS's three-year payment framework is, therefore, entitled to deference as a permissible construction of section 1342 that fills a gap in the statute left by Congress and reflects the agency's considered deliberation, including in notice and comment rulemaking. *Id.* at *17-*18. Moreover, HHS's three-year, budget neutral interpretation "reasonably reflects" (1) the Congressional Budget Office's scoring of the ACA in 2010, (2) Congress' decision not to specifically appropriate funds for risk corridors payments, and (3) Congress' choice to omit from section 1342 the appropriation language used in the Medicare Part D statute. *Id.* at *18. Finally, the three-year framework is consistent with the subsequently-enacted Spending Laws.

In contrast, Moda's interpretation that section 1342 requires full, annual payments is legally flawed and would disregard Congress' intent in passing the Spending Laws. Indeed, the fact that payments and charges are calculated for a benefit year does not mean that full payments also are due each year. As recognized in *Land of Lincoln*, although section 1342 contemplates that QHPs report costs on an annual basis, "that arrangement reflects the year-by-year transitory aspect of the temporary risk corridors program." 2016 WL 6651428, at *16. To be sure, HHS does operate an annual collection and payment cycle, and it remits payments on an annual basis to the extent possible. Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,240, 30,260 (May 27, 2014). But HHS defers payment to later years where the amount of collections does not permit it to make full payments in that year. *Id.* That deferral is a rational response to a shortfall in collections and Congress' express funding limitations. Moda points to no valid reason why annual *calculation*

necessarily requires annual *payment* of those amounts, particularly given Congress' express funding limitations.[6]

Nor is the three-year framework at odds with the purpose of the risk corridors program. Moda contends that "the Risk Corridor payments are intended to protect insurers from the risk of underpricing their plans." Pl.'s Cross Motion 16. Whether or not that is true, Moda offers no reason why the protection provided by the statute must be in the form of full annual payments, rather than partial payments spread out over the three years of the program. *See Land of Lincoln*, 2016 WL 6651428, at *18. In any event, Congress foreclosed full annual payments by enacting budget limitations that, at present and in light of the shortfall in collections, both prevent HHS from making full annual payments and contemplate that payments may be made in any payment cycle across the "three year period risk corridors are in effect." 160 Cong. Rec. H9838 (Dec. 11, 2014). Because section 1342 does not require—and, in light of the shortfall in collections, the Spending Laws do not permit—full payment on an annual basis, the Court must defer to HHS's three year framework. *See Land of Lincoln*, 2016 WL 6651428, at *18.

C. Moda's Claims Also Are Not Ripe

Ripeness principles prevent courts, "through avoidance of premature adjudication, from entangling themselves in abstract disagreements[.]" *Shinnecock Indian Nation v. United States*,

---

[6] Moda also contends that Congress' use of the plural "risk corridor**s**" in section 1342 rather than the singular "risk corridor" somehow means that payments must be made annually. Pl.'s Cross Motion at 43. But a "risk corridor" merely refers to a designated percentage range represented by an issuer's ratio of allowable costs to the target amount. HHS is required to assign one of several risk corridors (*i.e.*, 92-97%, 103-108%) to every participating plan in each year. *See* 42 U.S.C. § 18062(b) (setting forth applicable corridors under the ACA); *see also* 42 U.S.C. § 1395w-115(e)(3) ("For each plan year the Secretary shall establish *a* risk corridor *for each* . . . plan.") (emphasis added). Thus, Moda's contention that there is only "one [risk corridor] for each calendar year" is wrong. Pl.'s Cross Motion at 43. Congress' use of the plural denotes the fact that each issuer is assigned one of several possible risk corridors in each year. It says nothing about when payments must be made.

782 F.3d 1345, 1348 (Fed. Cir. 2015) (citations omitted). Determining whether a dispute is ripe requires evaluation of: (1) the "fitness" of the disputed issues for judicial resolution; and (2) "the hardship to the parties of withholding court consideration." *Id.* (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). The issues here are not fit for judicial resolution. No present obligation has been breached, additional payments are forthcoming, and the amount of those payments will be unknown until the program concludes. Until that time, the claims are necessarily abstract and premature because they cannot properly be resolved without further factual development (as to the amount of payments and collections across all three program years) and further legal development (as to the appropriations available for the final payment cycle of the program). Because those essential pieces of information would "significantly advance" the Court's ability to deal with the issues presented, the case is not ripe. *Caraco Pharm. Labs., Ltd. v. Forest Labs., Inc.*, 527 F.3d 1278, 1295 (Fed. Cir. 2008).

Nor would allowing these claims to ripen through the administrative and political processes result in hardship. Pl.'s Cross Motion at 49-50. Moda has been aware of the three-year framework since April 2014. Requiring it to abide by the terms of an administrative process, of which it has had notice for more than two years, cannot be hardship in the legal sense. Deferring decision will not affect whether Moda will offer QHPs in 2017; that decision has already been made. Moreover, the risk corridors program is in the final quarter of its final year, and HHS will begin operating the final payment and collections cycle in 2017. Conversely, exercising restraint until the conclusion of the program permits resolution through administrative and political processes to the extent possible and conserves judicial resources should the dispute fail to move from conjectural to concrete. This case should be dismissed because Moda's claims are not ripe.

II. Count I Fails to State a Claim Because Congress Intended That Risk Corridors Payments Be Limited to Collections

If the Court declines to dismiss this case for lack of jurisdiction or a justiciable claim, the United States is entitled to judgment in its favor on Count I. As explained in the United States' Motion, Congress planned the risk corridors program to be self-funded and confirmed that intention when it enacted the 2015 and 2016 Spending Laws restricting risk corridors payments to collections. Motion at 21-24. And even if Congress' intent in enacting section 1342 were unclear, Congress' intent in enacting the Spending Laws is unambiguous: the risk corridors program must be budget neutral while those Spending Laws are in effect. Motion at 24-30. Because the Spending Laws have been in effect since the first year in which risk corridors payments could be made, congressional intent as embodied in those Laws must govern. Accordingly, the Court must uphold HHS's pro-rata distribution of risk corridors payments to issuers and grant judgment in favor of the United States on Count I because Congress' constitutional exercise of its power of the purse has limited the United States' liability under section 1342 to the extent of collections.[7]

A. Congress Intended the Risk Corridors Program to Be Self-Funded

As discussed in the United States' Motion, at 21-24, the structure of section 1342 contemplates a self-contained program "establish[ed] and administer[ed]" by HHS in which insurers that have lower-than-expected costs for a given year are required to make "payments in" to the program, and those payments are used to fund "payments out" to insurers that have higher-

[7] Alternatively, if the Court concludes that section 1342 is ambiguous regarding the timing and source of payments, then the Court can dismiss Count I under RCFC 12(b)(6) on the basis that HHS's three-year, budget neutral framework reflects a reasonable construction of the statute and is consistent with the subsequently enacted Spending Laws. *Land of Lincoln*, 2016 WL 6651428, at *18-*19.

than-expected costs. While section 1342(b) outlines the formula for calculating risk corridors amounts, "payments in" are the only source of funding provided for "payments out." Nothing in section 1342 or the ACA requires HHS to make up a shortfall in collections. *See Land of Lincoln*, 2016 WL 6651428, at *18.

When Congress enacted section 1342, it did not appropriate money for risk corridors payments. *See id.* at *16 (citing *The Honorable Jeff Sessions the Honorable Fred Upton*, B-325630, 2014 WL 4825237, at *2 (Sept. 30, 2014) ("*GAO Op.*") ("Section 1342, by its terms, did not enact an appropriation to make the payments specified in section 1342(b)(1)")). In contrast, Congress did appropriate funds for many other programs. *See, e.g.*, 42 U.S.C. §§ 18001(g)(1), 18031(a)(1), 18042(g), 18043(c), 18121(b). Congress also omitted from section 1342 the language that it frequently uses when it intends payments to be funded from the Treasury through the annual appropriations process. *See Land of Lincoln*, 2016 WL 6651428, at *16. In such cases, Congress typically enacts an "authorization of appropriations" provision, as it did in dozens of other provisions in the ACA. *See, e.g.*, Pub. L. No. 111-148, § 2705(f), 124 Stat. 119, 325 (2010) ("There are authorized to be appropriated such sums as are necessary to carry out this section.").[8] The absence of either an appropriation or an authorization of appropriations for section 1342 indicates that Congress understood that funding for risk corridors payments would come from risk corridors collections. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012) ("Where Congress uses certain language in one part of a

[8] *See also*, *e.g.*, *id.*, §§ 1002, 2706(e), 3013(c), 3504(b), 3505(a)(5), 3505(b), 3506, 3509(a)(1), 3509(b), 3509(e), 3509(f), 3509(g), 3511, 4003(a), 4003(b), 4004(j), 4101(b), 4102(a), 4102(c), 4102(d)(1)(C), 4102(d)(4), 4201(f), 4202(a)(5), 4204(b), 4206, 4302(a), 4304, 4305(a), 4305(c), 5101(h), 5102(e), 5103(a)(3), 5203, 5204, 5206(b), 5207, 5208(b), 5210, 5301, 5302, 5303, 5304, 5305(a), 5306(a), 5307(a), 5309(b).

statute and different language in another, it is generally presumed that Congress acts intentionally.”).

The absence of a separate funding mechanism for section 1342 also marked a distinct contrast with the already-existing risk corridors program under Medicare Part D, under which Congress expressly provided “budget authority in advance of appropriations Acts . . . to provide for the payment of amounts provided under this section.” 42 U.S.C. § 1395w-115(a)(2); *see also* 42 U.S.C. § 1395w-116 (authorizing appropriations for Medicare Part D payments); *Land of Lincoln*, 2016 WL 6651428, at *17 (discussing differences between section 1342 and Part D). Consistent with Congress’ omission of a separate funding mechanism for risk corridors, the CBO excluded the risk corridors program from its scoring at the time of the ACA’s passage. Congress then relied on this cost estimate to find that “this Act will reduce the Federal deficit between 2010 and 2019.” ACA § 1563(a)(1). *See also Land of Lincoln*, 2016 WL 6651428, at *16 (noting that the omission of risk corridors from CBO scoring “is significant” in light of Congress’ reliance on scoring when enacting the ACA).[9]

In sum, Moda’s argument that the United States is required to make full payments annually is inconsistent with section 1342’s structure, the distinct absence in the ACA of a separate funding mechanism, and Congress’ budgetary considerations at the time of the ACA’s passage. These indicia of congressional intent regarding the budgetary impact of section 1342

[9] In its opposition to the United States’ motion to stay this case, Moda suggested that consideration of the CBO’s pre-enactment scoring is somehow improper. *See* Docket No. 11 at 8 (citing *Ameritech Corp. v. McCann*, 403 F.3d 908, 913 (7th Cir. 2005)). But, unlike in *Ameritech Corp.*, and as noted in the United States’ Motion, at 23, the CBO’s cost estimate was critical to the passage of the ACA, and Congress expressly relied on the CBO’s estimate in the ACA itself. ACA § 1563(a)(1). Accordingly, the Court should likewise consider that estimate when determining Congress’ intent in section 1342. *See Land of Lincoln*, 2016 WL 6651428, at *16.

cannot be overcome with unsupported appeals to the general purpose of the program or the ACA because "no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis in original). *See also Land of Lincoln*, 2016 WL 6651428, at *18.

B. Congress Restricted Risk Corridors Payments with the Intent That the Risk Corridors Program Be Budget Neutral While the Spending Laws Are in Effect

Congress' intent as conveyed in the 2015 and 2016 Spending Laws is clear: the risk corridors program must be budget neutral for the years the Spending Laws are in effect. This intent is manifest in the course of events leading up to the enactment of the 2015 and 2016 Spending Laws, the prohibition in these laws on the use of transferred funds for risk corridors payments, and the legislative history explaining that the purpose of the prohibition is to ensure that the program is budget neutral.

As explained in the United States' Motion, at 9-10, 24-25, in early 2014, the drafters of the Spending Laws asked the GAO to identify the funding sources that could lawfully be used on risk corridors payments given the absence of any appropriation in the law itself. At the time, the Centers for Medicaid & Medicare Services ("CMS") Program Management appropriation provided, in full:

> For carrying out, except as otherwise provided, titles XI, XVIII, XIX, and XXI of the Social Security Act, titles XIII and XXVII of the PHS Act, the Clinical Laboratory Improvement Amendments of 1988, and *other responsibilities* of the Centers for Medicare and Medicaid Services, not to exceed $3,669,744,000, to be transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as authorized by section 201(g) of

> the Social Security Act; together with all funds collected in accordance with section 353 of the PHS Act and section 1857(e)(2) of the Social Security Act, funds retained by the Secretary pursuant to section 302 of the Tax Relief and Health Care Act of 2006; *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.

Pub. L. No. 113-76, Div. H, Title II, 128 Stat. 5, 374 (2014) (emphasis added). Thus, the Program Management appropriation for fiscal year 2014 included a lump sum amount transferred from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund, as well as funds collected by HHS under other specified statutory authority, including "authorized user fees." In fiscal year 2014, all of these funds could be spent, to the extent not otherwise restricted, on unspecified "other responsibilities of [CMS]."

In response to the congressional inquiry, the GAO examined this appropriation language and concluded that risk corridors payments could constitute "other responsibilities of [CMS]" such that the lump sum transferred to the Program Management appropriation from CMS trust funds would have been available to make risk corridors payments, had payments been due in fiscal year 2014. *See GAO Op.*, 2014 WL 4825237, at *4-*5.[10] The GAO also opined that risk corridors collections constituted "user fees" such that those collections also would have been available for risk corridors payments under the language of the Program Management appropriation.[11] The GAO noted, however, that HHS would not collect risk corridors charges or

[10] Moda incorrectly asserts that in a letter to the GAO, HHS stated that "it had the legal authority to pay its entire Risk Corridors obligations regardless of the amount of payments the Government received through the program." Pl.'s Cross Motion at 14 n.13. That assertion mischaracterizes HHS's statements in that letter. In fact, HHS identified risk corridors collections (user fees) as the only source of funding for risk corridors payments. *See* Appendix A1-A3.

[11] As the GAO explained, "user fees" in the appropriations context are fees "assessed to users for goods or services provided by the federal government" and "apply to federal programs or

make payments in fiscal year 2014. *GAO Op.*, 2014 WL 4825237 at *1, *5. Therefore, risk corridors payments were not one of HHS's "other responsibilities" that year, and the 2014 appropriations act did not appropriate any funds for risk corridors payments.[12] Thus, the GAO's conclusion that Program Management funds could be used for risk corridors payments was necessarily dependent on the enactment of similar appropriations laws in the years in which risk corridors payments would be made. *Id.* at *5.

In response to the GAO's conclusion, Congress passed the 2015 Spending Law, which included the same CMS Program Management appropriation, as stated above, but also provided:

> None of the funds made available by this Act from [CMS trust funds], or transferred from other accounts funded by this Act to the 'Centers for Medicare and Medicaid Services—Program Management' account, may be used for payments under section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

Pub. L. No. 113-235, Div. G, Title II, § 227 (2014). Thus, through this appropriations rider, Congress limited the amount of funds available in the CMS Program Management appropriations for making risk corridors payments in that fiscal year to amounts derived from "such sums as may be collected from authorized user fees," which, for purposes of making payments under section 1342, consists of risk corridor collections.

---

activities that provide special benefits to identifiable recipients above and beyond what is normally available to the public." *GAO Op.*, 2014 WL 4825237, at *4 (quoting GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO–05–734SP (Washington, D.C. Sept. 2005), at 100). "[S]pecial benefit[s]" include programs that "provide[] business stability or contribute[] to public confidence in the business activity of the beneficiary (e.g., insuring deposits in commercial banks)." *Id.* (quoting OMB Cir. No. A-25, at § 6a, *User Charges* (July 8, 1993) (emphasis altered)).

[12] The 2014 Program Management appropriation provides that user fees collected in 2014 "remain available until September 30, 2019." Pub. L. No. 113-76, Div. H, Title II, 128 Stat. 5, 374 (2014). User fees collected in subsequent fiscal years must be separately appropriated. *GAO Op.*, 2014 WL 4825237, at *5. The lump sum transferred to the Program Management appropriation expires at the end of the fiscal year. *See* 31 U.S.C. § 1301(c).

In the accompanying Explanatory Statement, Congress indicated that the restriction was added "to prevent the CMS Program Management appropriation account from being used to support risk corridors payments." 160 Cong. Rec. H9838 (daily ed. Dec. 11, 2014). Congress' intent was unchanged the following fiscal year, when it included an identical restriction in the 2016 Spending Law. Pub. L. No. 114-113, Div. H, Title II, § 225 (2015). The Senate Committee Report to the 2016 Spending Law stated that the funding limitation "requir[es] the administration to operate the Risk Corridor program in a budget neutral manner by prohibiting any funds from the Labor-HHS-Education appropriations bill to be used as payments for the Risk Corridor program." Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriation Bill, 2016, S. Rep. No. 114-74, at 12 (2015). It was under the 2016 Spending Law that HHS made its pro-rata payments in December 2015 for the 2014 benefit year, and the provisions of the 2016 Spending Law continue in effect under a continuing resolution, Pub. L. No. 114-223, Div. C (Sept. 29, 2016). Thus, in the appropriations process for the first two fiscal years in which risk corridors payments could be made, Congress confirmed what was implicit in the structure of section 1342: risk corridors payments are funded solely from collections.

As the United States explained in its Motion, at 29-30, even if the Spending Laws are interpreted as limiting (rather than merely clarifying and confirming) the extent of HHS's payment obligations under section 1342, courts have long recognized that Congress can limit the United States' obligations in appropriations laws so long as it is clear regarding its intent to do so. *See e.g.*, *United States v. Dickerson*, 310 U.S. 554 (1940); *United States v. Will*, 449 U.S. 200 (1980); *Highland Falls–Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166 (Fed. Cir. 1995); *Republic Airlines, Inc. v. U.S. Dep't of Transp.*, 849 F.2d 1315 (10th Cir.

1988). Moda attempts to distinguish this case law based on minor differences in statutory language, Pl.'s Cross Motion at 25-31, but Moda misses the central point of these cases. The question of whether a specific appropriations act limits the United States' liability does not depend on the use of specific words over other words; rather "[t]he whole question depends on the intention of congress as expressed in the statutes." *United States v. Mitchell*, 109 U.S. 146, 150 (1883).[13]

In this case, Congress did not intend to prohibit risk corridors payments entirely, and therefore, it did not use the language used in *Dickerson* or the different and unique language used in *Will* and the other cited cases. Instead, as explained in the 2015 Explanatory Statement and 2016 Senate Committee Report, Congress intended only to limit risk corridors payments to the extent of collections. By targeting the prohibition at monies transferred to the CMS Program Management appropriation from other sources, Congress ensured that monies deposited into the account from risk corridors collections would still be available for risk corridors payments. Furthermore, the GAO had just informed Congress that the CMS Program Management account was the *only* source of funding potentially available for risk corridors payments under existing appropriations laws. Thus, Moda's attempt to distinguish controlling Supreme Court precedent based on immaterial differences in the statutory language, where the congressional objective in those cases was different from the objective in this case, should be rejected.

In fact, the differences among the text of the appropriations law riders in each of the cited cases are at least as stark as the differences between the text in those cases and the text of the

[13] If congressional intent cannot be clearly discerned, a court must look to whether a later-enacted spending law can effectively be harmonized with an earlier-enacted statutory obligation. *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 145 (2d Cir. 2002). If not, the court must give effect to the later-enacted law. *Id.*

Spending Law riders here, yet in each case, the disparate provisions led courts to the same result because congressional intent—as expressed in both the statutory text and the legislative history—was clear. To ignore the legislative history in interpreting the Spending Laws would contravene binding precedent and be error. *See Dickerson*, 310 U.S. at 562 (rejecting argument that Court should not consider legislative history of appropriations laws where "[t]he meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction"); *see also Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1584 (Fed. Cir. 1994) (considering legislative history of appropriations restriction). 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.[14] Moda cannot do so because the Supreme Court has directed that where congressional intent to limit the United States' obligations is clear, that intent controls. *Mitchell*, 109 U.S. at 150.

The four cases that Moda contends are "closely analogous to the case at hand" all support the proposition that congressional intent controls. *See* Pl.'s Cross Motion at 19-20 (citing *United States v. Langston*, 118 U.S. 389 (1886); *Gibney v. United States*, 114 Ct. Cl. 38 (1949); *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966); and *District of Columbia v. United States*, 67 Fed. Cl. 292 (2005)). In *Langston*, the Supreme Court held that "a statute

[14] Moda appears to concede that *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012), applies only to contractual obligations, Pl.'s Cross Motion at 39-40. As set forth in the United States' Motion, at 30-34, the United States has no contractual obligation to make risk corridors payments, and Moda has failed to state a claim on a contract theory. *See Land of Lincoln*, 2016 WL 6651428, at *19-*24. In any event, Count I is based on the statute and implementing regulations, not contract, and nothing in the statute or regulations contains any mention or indication of contractual obligations. Moreover, even assuming Moda's implied contract theory had merit, it necessarily incorporates as contractual terms all applicable federal law, including the Spending Laws and HHS's three-year framework. As a result, even if the United States had a contractual obligation to make risk corridors payments, that obligation would be limited to the extent of collections across the three-year cycle, just as is the statutory obligation. *Id.* at *24.

fixing the annual salary of a public officer . . . should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less[er] amount for the services of that officer for particular fiscal years, *and which contained no words that expressly, or by clear implication, modified or repealed the previous law*." 118 U.S. at 394 (emphasis added). Thus, the Court acknowledged that where, as here, subsequent enactments contain specific indicia of congressional intent to limit an obligation, that intent controls.

In *Gibney*, the Court merely applied the plain language of the subsequently enacted law, which incorporated the prior law by reference. In dicta, the Court opined that "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. To the extent Moda takes this statement, on which the Court did not rely in reaching its ultimate holding, to suggest that Congress cannot modify a prior statutory law through an appropriations act, that is a misreading of *Gibney* and is nonetheless refuted by *Dickerson*, *Mitchell*, and *Will*. The Court also noted that the appropriation provision at issue was only in effect for one year, that congressional intent could not be discerned solely from one senator's floor statement, and that the sponsor of the provision acknowledged the following year that the limitation was based on a mistaken assumption about the scope of the prior law. *Id.* at 53-54. In contrast, Congress' intention that the riders in the Spending Laws ensure the budget neutrality of the risk corridors program is unequivocally set forth in the 2015 Explanatory Statement and the 2016 Senate Committee Report. Indeed, the 2015 Spending Law provides that the Explanatory Statement "shall have the same effect . . . as if it were a joint explanatory statement of a committee of conference." 128 Stat. 2130, 2132. Thus, *Gibney* is inapposite.

In *New York Airways,* the Court merely recognized, consistent with *Langston*, that " the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute" and went on to conclude that any congressional intent to limit the obligation in the appropriations law at issue was unclear. 369 F.2d at 748-49. Here, in contrast, Congress did not "mere[ly] fail[] . . . to appropriate funds." *Id.* at 748. Instead, in the only bills appropriating any funding for risk corridors payments, Congress restricted the only potential source of funding to risk corridors collections and made clear it intended for risk corridors to operate in a budget neutral manner while these bills are in effect. *New York Airways* recognizes that where, as here, congressional intent in the legislative history is clear, a restriction on appropriations can modify or limit a statutory obligation, thus "lift[ing] [the restriction] from the ruling in the *Gibney* case and plac[ing] it within the ambit of *Dickerson*." 369 F.2d at 750; *see also Highland Falls*, 48 F.3d at 1166. Moreover, unlike this case, *New York Airways* was a contract case, *id.* at 747, such that any congressional intent was not dispositive of the obligation.

In *District of Columbia*, the court similarly recognized—again consistent with *Langston*—that "[a]n appropriation with limited funding is not assumed to amend substantive legislation creating a greater obligation." 67 Fed. Cl. at 335. But as noted, this principle is inapplicable because here, the Court need not assume that Congress intended to amend section 1342. Congress twice unequivocally stated that the restrictions in the Spending Laws were intended to ensure the program be budget neutral while those laws are in effect. In other words, in each of the cases Moda relies upon, the appropriations laws at issue did not limit the United States' obligation because Congress had not expressed its intent to do so.

Nor, as Moda contends, do the Spending Laws "constitute a retroactive application of law." Pl.'s Cross Motion at 30-31. "A statute does not operate 'retrospectively' merely because it is applied [to] conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events *completed before its enactment*." *Landgraf v. USI Film Prod.*, 511 U.S. 244, 269-70 (1994) (emphasis added) (citation omitted). Here, the Spending Laws are not retroactive because no right to receive risk corridors payments could come into existence until the completion of the benefit year and the determination of aggregate profit or loss (as defined by the risk corridors formula) at the conclusion of that year. Because the 2015 Spending Law was enacted before the completion of the first benefit year, the Law did not attach new legal consequences to any "events completed before its enactment," and thus should not be considered retroactive. *Landgraf*, 511 U.S. at 270. In any event, courts must give effect to retroactive laws if "their language requires this result." *Id.* at 272. The Spending Laws—including their restrictions—govern the fiscal years during which risk corridors payments could be made. The restrictions on funding for risk corridors payments must, therefore, be given the temporal effect prescribed by Congress. *Landgraf*, 511 U.S. at 280.

In short, this case does not concern a "mere failure of Congress to appropriate funds," *Greenlee Cty. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007), a repeal by implication, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189-90 (1978), or an attempt to limit an existing contractual obligation, *Ramah Navajo*. Instead, Congress, for the only fiscal years in which risk corridors payments could be made, enacted appropriations laws limiting the source of funds to make those payments. "[A]ppropriations do not merely set aside particular amounts of money; they define the character, extent, and scope of authorized activities." Kate Stith,

Congress' Power of the Purse, 97 Yale L.J. 1343, 1356 (1988). As a result, where Congress' intent is clear, the extent of the appropriation defines the extent of the program and, thus, the extent of the United States' obligation.[15]

Here, Congress unequivocally expressed its intent to limit risk corridors payments to the amount of collections and thereby ensure that the program is budget neutral while those spending restrictions are in effect. Because Moda has not refuted this congressional purpose, nor identified any other plausible purpose behind the Spending Law riders, its contention that the Spending Laws do not alter the United States' liability under section 1342, Pl.'s Cross Motion at 18-19, is untenable. Moda has not cited any authority that would permit the Court to ignore the intent embodied in Congress' exercise of its constitutional authority over the public fisc, and there is none. Accordingly, Count I must be dismissed.

III. Moda's Implied-in-Fact Contract Claim (Count II) Fails as a Matter of Law

As explained in the United States' Motion, at 30-34, HHS has no contractual obligation to make risk corridors payments. In *Land of Lincoln*, the Court considered the same implied-in-fact contract theory that Moda asserts here. *Compare* Complaint, Docket No. 1 *with Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 16-744C (Fed. Cl.), Complaint, Docket No. 1. Judge Lettow concluded that the implied-in-fact contract claim failed to state a claim upon which relief can be granted, and dismissed it under RCFC 12(b)(6). *Land of Lincoln*, 2016 WL 6651428, at *19-*24. The Court's reasoning in *Land of Lincoln* is sound and equally applicable here: Count II should be dismissed for failure to state a claim.

---

[15] Contrary to Moda's assertion, Pl.'s Cross Motion at 18-19, the United States' position in *U.S. House of Representatives v. Burwell*, No. 1:14-cv-01967 (D.D.C.), is not to the contrary. As explained above, this case does not concern a "mere absence of a more specific appropriation."

A. Moda Has Failed to Allege Facts That Demonstrate an Intent to Contract

Moda identifies nothing to overcome the presumption that Congress did not intend to bind itself contractually to make risk corridors payments, as it must to transform a statutory obligation into a contractual obligation. *See Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985); *Brooks v. Dunlop Mfg. Inc.*, 702 F.3d 624, 631 (Fed. Cir. 2012) (a party cannot overcome the presumption against intent to contract unless the statutory or regulatory language or "the circumstances surrounding the statute's passage manifest[] any intent by Congress to bind itself contractually") (citing *Nat'l R.R. Passenger Corp.*, 470 U.S. at 468-70). Indeed, nothing in the text of section 1342 or 45 C.F.R. § 153.510 is promissory or contractual in nature. Congress did not demonstrate an intent to contract merely by providing for payment when an issuer satisfies certain statutory or regulatory conditions. *Hanlin v. United States*, 316 F.3d 1325, 1328 (Fed. Cir. 2003); *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 27 (2011); *see also Land of Lincoln*, 2016 WL 6651428, at *23 ("Section 1342 and the implementing regulations do not provide any express or explicit intent on behalf of the government to enter into a contract with qualified health plan issuers.").

Moda's alleged reliance on HHS's statements and purported conduct in rulemaking and guidance, Pl.'s Cross Motion at 35, also fails to establish mutual intent; the only relevant "circumstances" for overcoming the presumption are those "surrounding the statute's passage," *Brooks*, 702 F.3d at 631, which HHS's proposed and final rulemakings—rendered years after the ACA's passage—are not. Regardless, none of the statements or conduct purportedly inducing Moda to become a QHP contain any language or indication of offer, acceptance, or contractual intent. HHS's statements simply recognize its pre-existing, independent obligation to follow the statute and regulations; accordingly, they cannot support an inference of an intent to contract.

See AAA Pharmacy, Inc. v. United States, 108 Fed. Cl. 321, 328 (2012). Moda's claim for breach of an implied-in-fact contract fails at the outset.

B. Moda Cannot Establish an Unambiguous Offer and Acceptance

Moda suggests that offer and acceptance of an implied contract for risk corridors payments are shown by "an intricate set of specific obligations" arising by regulation. Pl.'s Cross Motion at 36-38. But this is just another attempt to convert regulatory obligations into contractual obligations. It has no basis in law, and it has no limiting principle. Rather, under Moda's theory, every federally-regulated activity involving mutual rights and obligations between an entity and the United States creates a contractual relationship.[16] That is not the law. "[T]he United States cannot be contractually bound merely by invoking the cited statute and regulation." *Baker v. United States*, 50 Fed. Cl. 483, 489 (2001) (internal quotation omitted). *See also AAA Pharmacy, Inc.*, 108 Fed. Cl. at 329 (finding regulation providing for payment from the government did not create an implied-in-fact contract because it did not include any language manifesting either an offer or an intent to enter into contract); *ARRA Energy Co. I*, 97 Fed. Cl. at 27-28 (finding statute did not create an implied-in-fact contract because it did not clearly express an intent to contract).[17] And because "section 1342 and the implementing

---

[16] Neither Moda's certification as a QHP nor its mandatory and automatic participation in the risk corridors program correlate in any way to the negotiated treatment of accounting procedures at issue in *La Van v. United States*, 382 F.3d 1340 (Fed. Cir. 2004).

[17] Even if the cited regulations, Pl.'s Cross Motion at 36-38, or HHS's statements in rulemaking and guidance could amount to an offer (they do not), Moda makes no attempt to show *when* these offers were made or when, precisely, it "accepted" the offer and by what conduct. In fact, HHS continued to modify significant parts of the risk corridors program—including the definition of what plans qualified for the risk corridors program—*afte*r Moda purports to have "accepted" the United States' alleged offer. *Compare* Compl. ¶¶ 30-33, 79 (alleging formation of an implied-in-fact contract in September 2013) *with* Society of Actuaries, *Health Watch: Risk Corridors Under the Affordable Care Act—A Bridge over Troubled Waters, but the Devil's in the Details*, October 2013, Appendix at A5 ("The exact definition of which plans will qualify for

regulations make no explicit reference to an offer or contract," *Land of Lincoln*, 2016 WL 6651428, at *23, they cannot be construed as such.

Nor do *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 405 (Ct. Cl. 1957), or *New York Airways*, 69 F.2d at 751, support Moda's implied contract claim. *See* Pl.'s Cross Motion at 32-35, 38-39.[18] Unlike in *Radium Mines*, where the United States was purchasing uranium ore pursuant to a regulation *explicitly* requiring a contract, or in *New York Airways*, where the United States contracted for delivery of mail, here, the United States is not procuring goods or services, but is administering a program.[19] Contrasting the facts of *New York Airways* with those here, the Court in *Land of Lincoln* explained:

> [Q]ualified health plans are not entitled to compensation solely by offering health insurance on the Exchange. The only health plans eligible for payment are those that suffer sufficiently high losses and submit those losses to the government. *See* 45 C.F.R. §§ 153.510(b), (g), 156.430(c). Even then, HHS has some discretion in determining when payments will be made because the risk-corridors program does not require full payments annually[.]

2016 WL 6651428, at *23. Thus, while Moda asserts that it "accepted" HHS's offer by becoming a QHP, Pl.'s Cross Motion at 38, "[s]ection 1342 and the implementing regulations do not constitute an offer *or invite acceptance by performance alone*." *Id.* (emphasis added) (citing

---

the risk corridors program is still unknown at the time of this writing."). That Moda became certified as a QHP before HHS announced final rules for risk corridors payments demonstrates that neither party considered the risk corridors program to be a contractual, as opposed to a statutory, obligation.

[18] To the extent Moda urges the Court to read *Radium Mines* or *New York Airways* as suggesting that the Court can find an implied-in-fact contract merely from the terms and conditions of a statutory program designed to fulfill the government's policy objectives, that reading cannot be reconciled with the requirement that intent to contract must be found in the statute or regulation itself or the circumstances surrounding enactment. *See Nat'l R.R. Passenger Corp.*, 470 U.S. at 465-66; *Brooks*, 702 F.3d at 631; *Land of Lincoln*, 2016 WL 6651428, at *23.

[19] Moda's contention that it provided consideration by furthering a policy goal of the United States also fails as it has no limiting principle and lacks legal support.

Baker, 50 Fed. Cl. at 495). Section 1342, its implementing regulations, and HHS's rulemaking statements do not, as a matter of law, constitute an offer and acceptance in contract.

C. HHS Lacked Authority to Bind the United States in Contract for Risk Corridors Payments

Moda cannot demonstrate authority to bind the United States in contract for risk corridors payments. Section 1342 directs HHS to establish and administer a "program" in which all QHPs "shall participate." 42 U.S.C. § 18042(a). Contrary to Moda's assertion, Pl.'s Cross Motion at 38), nothing in section 1342 or the ACA authorizes any federal official to enter into a contract to make risk corridors payments. Absent statutory authority, no federal official can form a binding contract. *See Schism v. United States*, 316 F.3d 1259, 1288 (Fed. Cir. 2002) (en banc) (holding that neither Secretaries of the Armed Forces nor the President had authority to contract with service members for the benefits at issue). In addition, as explained *supra* at 16-17, because risk corridors payments were not an obligation of HHS in 2014 (or earlier), the 2014 Program Management appropriation act did not appropriate any funds for risk corridors payments. *GAO Op.*, 2014 WL 4825237 at *1, *5. Hence, HHS did not have authority in 2013 or 2014 to contract to make risk corridors payments in fiscal years 2015 or 2016 because "[a]s far as government contracts are concerned," the Anti-Deficiency Act "'bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, existing appropriation.'" *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1142, 1449 (Fed. Cir. 1997) (quoting *Hercules, Inc. v. United States*, 516 U.S. 417, 426 (1996)). As a matter of law, Moda cannot establish authority to contract for risk corridors payments.[20]

---

[20] Because risk corridors payments are based on issuers' losses and those losses cannot be determined in advance of the benefit year, under Moda's theory, any contract to make risk corridors payments would be an open-ended indemnification agreement. Courts have relied on

D. Moda Cannot Establish That HHS Breached a Contractual Obligation

Even if an implied-in-fact contract for the payment of risk corridors was formed (it was not), Moda cannot establish that HHS breached a contractual obligation. *See Land of Lincoln*, 2016 WL 6651428, at *24 (assuming an issuer could show that section 1342 and its implementing regulations "constituted a contractual offer relating to risk corridor payments that [the issuer] accepted," the issuer still could not state a claim for breach of contract). Moda's implied contract theory seeks to convert the risk corridors program into a contractual undertaking. But the program includes HHS's three-year payment framework. *See, e.g.*, Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,240, 30,260 (May 27, 2014). Because any contractual obligation could extend no farther than what is required by statute and regulation, HHS cannot have breached such an agreement by making pro-rated payments to the extent of collections in conformity with its three-year payment framework. *See Land of Lincoln*, 2016 WL 6651428, at *24.

IV. Moda's Motion for Summary Judgment Is Premature

As established above and in the United States' Motion, Count II fails as a matter of law. In the event Count II survives the United States' Motion, Moda's Cross Motion is premature and must be denied because material disputes of fact exist and the United States has not had the opportunity to obtain discovery (or even answer the Complaint).

Summary judgment on the implied-in-fact contract claim is unfounded because Moda has not proven the facts on which it relies and on which it bears the burden of persuasion at trial. *See*

---

the Anti-Deficiency Act in refusing to find implied indemnification agreements and in rejecting express indemnification agreements. *See, e.g.*, *Hercules, Inc.*, 516 U.S. at 427; *Rick's Mushroom Serv., Inc.*, 521 F.3d 1338, 1346 (Fed. Cir. 2008); *Union Pac. R.R. Corp. v. United States*, 52 Fed. Cl. 730, 732-34 (2002).

Surles v. Andison, 678 F.3d 452, 455-56 (6th Cir. 2012) ("where the party moving for summary judgment also bears the burden of persuasion at trial, the party's initial summary judgment burden is higher in that it must show that the record contains *evidence* satisfying the burden of persuasion and that the *evidence* is so powerful that no reasonable jury would be free to disbelieve it") (emphasis added) (internal citation and quotation omitted). The only evidence proffered in support of the Cross Motion—the Declaration of James Francesconi—pertains solely to Moda's statutory claim, and the Declaration is just a table of contents for the attached exhibits. The Declaration does not establish any material facts. For example, Mr. Francesconi does not attest to Moda's understanding or intent in 2013 or 2014 in becoming a QHP, or identify the representative from Moda (or HHS) who contracted on behalf of either party with authority to do so. The Declaration is insufficient to establish any elements of Moda's implied-in-fact contract.

In addition, where resolution of a claim turns on disputed issues of fact, summary judgment "is inappropriate unless a tribunal permits the parties adequate time for discovery." *Dunkin' Donuts of Am., Inc. v. Metallurgical Exoprods. Corp.*, 840 F.2d 917, 919 (Fed. Cir. 1988) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)). The Supreme Court has instructed that summary judgment must "be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986).

Here, to the extent Moda's implied-in-fact contract claim survives the United States' Motion—and it should not—Moda's Cross Motion raises several material issues of disputed fact that cannot be resolved absent discovery, including but not limited to: whether the parties possessed mutual intent to enter a contract for risk corridors payments; what the precise terms of

any alleged offer were and whether those terms were unambiguous given, among other things, the ongoing evolution of the risk corridors program as developed through HHS's rulemaking; and what Moda expected and understood under such purported contracts given HHS's guidance in April 2014 and the subsequent enactment of the Spending Laws. Nor does the present posture permit the Court to resolve whether Moda complied with the terms of the alleged contracts or whether and in what amounts the alleged breach of these contracts damaged Moda.

In sum, Moda has failed to demonstrate the absence of a genuine dispute of material fact or that it is entitled to judgment as a matter of law on Count II. The United States must be afforded an opportunity to explore whether Moda can support its factual burden on these elements with evidence. Moda's Cross Motion should be denied.

CONCLUSION

Moda's Complaint should be dismissed and its Cross Motion denied.

Dated: December 9, 2016

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

RUTH A. HARVEY
Director
Commercial Litigation Branch

KIRK T. MANHARDT
Deputy Director

/s/ Phillip M. Seligman
PHILLIP M. SELIGMAN
CHARLES E. CANTER
FRANCES M. MCLAUGHLIN
TERRANCE A. MEBANE
SERENA M. ORLOFF
L. MISHA PREHEIM
United States Department of Justice
Civil Division, Commercial Litigation Branch
Telephone: (202) 307-1105
Facsimile: (202) 307-0494
Phillip.Seligman@usdoj.gov

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December 2016, a copy of the foregoing, *The United States' Reply in Support of Its Motion to Dismiss and Opposition to Plaintiff's Cross Motion for Partial 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.

/s/ Phillip M. Seligman
PHILLIP M. SELIGMAN
United States Department of Justice