IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LOCAL INITIATIVE HEALTH AUTHORITY FOR LOS ANGELES COUNTY, d/b/a L.A. CARE HEALTH PLAN, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	No. 17-1542C Judge Wheeler

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S CROSS-MOTION TO DISMISS

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Plaintiff Local Initiative Health Authority for Los Angeles County, operating and doing business as L.A. Care Health Plan ("L.A. Care"), respectfully submits this Reply Memorandum in Support of its Motion for Partial Summary Judgment and in Opposition to the Defendant's Cross-Motion to Dismiss.

INTRODUCTION

Congress expressly mandated in Sections 1402 and 1412 of the Affordable Care Act that the Treasury Secretary "shall make periodic and timely payments" to insurers in advance that are "equal to the value of the [cost sharing] reductions" insurers are required to make to individual consumers. *See* 42 U.S.C. §§18071(c)(3), 18071(a)(2), 18082(c)(3). After the Government made these mandatory, advance cost-sharing reduction ("CSR") payments to L.A. Care and other insurers for 45 consecutive months, it suddenly stopped making those payments in October 2017. Since then, the Government has refused to make any further CSR payments to L.A. Care, while L.A. Care and other insurers continue to be required by the ACA to provide cost-sharing reductions to eligible members, forcing L.A. Care to pay for CSRs that the ACA expressly mandates the Government "shall" pay.

In defense of its failure to pay, the Defendant now argues that, despite the clear and unambiguous statutory payment obligation, it was never obligated to make CSR payments at all under various theories based on a lack of appropriation. As the Federal Circuit confirmed in *Moda Health Plan, Inc. v. United States*, however, the presence or absence of an appropriation is not relevant where, as here, there is an unambiguous statutory payment obligation. The Court emphasized, but the Defendant ignores in its Opposition, the Federal Circuit's conclusion that such clear mandatory "shall pay" obligations, like those found in Sections 1402 and 1412, exist "independent of an appropriation to satisfy that debt," and further that insufficiency of appropriations "does not…cancel [the Government's] obligations, nor defeat the rights of other

parties." 892 F.3d 1311, 1320-22 (Fed. Cir. 2018).

The Government's liability for unpaid CSR claims cannot reasonably be disputed. Defendant has not disputed the material facts set forth by L.A Care:

- The Government made all of the required advance monthly CSR payments in full to L.A. Care, for 45 consecutive months, from January 2014 through September 2017.
- The Government took the position for years (including in court filings by the Department of Justice) that the ACA mandates CSR payments.
- The Government has refused to make any CSR payments to L.A. Care since September 2017.
- L.A. Care provided cost-sharing reductions to its eligible members to reduce their costs as required by Section 1402 and has otherwise met all of its obligations regarding CSR payments for 2017 and 2018.

There is also no dispute as to the law--Congress created an unambiguous mandatory "shall" pay obligation in Sections 1402 and 1412 obliging the Government to make the full advance CSR payments owed to QHPs each month. 42 U.S.C. § 18071(c)(3)(A); 42 U.S.C. § 18082(c)(3); 45 C.F.R. § 156.430(b)(1). Unlike the defenses it asserted in the risk corridors cases like *Moda*, the Defendant does not (and cannot) contend that Congress has taken any action to suspend, repeal or otherwise alter the existing statutory CSR payment obligation.

The Defendant's "structural" and other arguments designed to evade statutory liability cannot overcome the plain language of Section 1402 or the binding and long-standing precedent cited by the Federal Circuit in *Moda* reaffirming that clear, unambiguous statutory payment obligations are "created by the statute itself," and are enforceable money-mandating obligations even if Congress "provide[s] no budgetary authority" and "identifie[s] no source of" payment in the statute. 892 F.3d 1311, 1320-22 (Fed. Cir. 2018). Similarly, the Defendant's insistence that to recover the past-due CSR payments owed, L.A. Care must also demonstrate that Section 1402 included an express "damages remedy," ignores long-standing precedent confirming that

plaintiffs need *not* establish such a separate requirement to recover damages under the Tucker Act. *See, e.g.*, *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 477 (2003).

In two other CSR cases in this Court, Judge Kaplan recently granted summary judgment on liability in favor of the plaintiff insurers (and denied the Government's motions to dismiss), that asserted statutory CSR claims under Section 1402 virtually identical to those asserted here by L.A. Care. *See Montana Health Co-Op v. United States*, 139 Fed. Cl. 213, 214 (2018); *Sanford Health Plan v. United States*, No. 18-136C, 2018 WL 4939418 (Fed. Cl. Oct. 11, 2018). Judge Kaplan rejected the same arguments asserted by the Defendant in this case, holding that "the government violated a statutory obligation created by Congress in the ACA when it failed to provide [the insurer] its full cost-sharing reduction payments for 2017" and "Congress's failure to appropriate funds to make those payments did not vitiate that obligation." *Montana Health Co-Op*, 139 Fed. Cl. at 214; *Sanford Health Plan*, 2018 WL 4939418, at *1. This Court similarly should grant summary judgment on liability in favor of L.A. Care and reject the identical arguments Defendant asserts here for the same reasons articulated by Judge Kaplan.

The Defendant's attempt to avoid liability for breach of an implied-in-fact contract misapplies binding precedent and ignores (or does not dispute) key aspects of the CSR program demonstrating the promissory, *quid pro quo* nature of the program: insurers, like L.A. Care, would provide CSR benefits and cost reductions to eligible insureds and, in exchange, the Government would make advance CSR payments to insurers to make them whole. This mutual bargain is evidenced not only by the statutory CSR program and its implementing regulations, but also by the Government's conduct and the surrounding circumstances. A proper application of the Supreme Court's decision in *Nat'l R.R. Passenger Corp*, *v. Atchison Topeka & Santa Fe*

Ry. Co., 470 U.S. 451, 465 (1985) confirms that the parties entered into an implied-in-fact contract that the Government unquestionably has breached.

The Defendant also has failed in its Motion to Dismiss to demonstrate, as it must, that any of L.A. Care's claims fail to allege the essential elements of their claims and therefore, Defendant's motion must be denied. *See Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005); *Forest Glen Props., LLC v. United States*, 79 Fed. Cl. 669, 683 (2007).

As demonstrated below and in our opening brief, and as recently determined by the Court in *Montana Health Co-Op* and *Sanford Health Plan,* each of the Defendant's defenses must be rejected because they fail to overcome Section 1402's unambiguous payment mandate and/or long-standing precedent. Accordingly, the Court should grant L.A. Care's Motion for Partial Summary Judgment and deny the Government's Cross-Motion to Dismiss.

ARGUMENT

I. THE STATUTORY AND REGULATORY OBLIGATION TO MAKE FULL ADVANCE CSR PAYMENTS IS CLEAR AND UNAMBIGUOUS.

The plain language of the ACA creates an unambiguously mandatory obligation on the United States to make full advance CSR payments. In Section 1402, Congress authorized and expressly required that the Government "***shall*** make periodic and timely [CSR] payments" directly to QHPs, in an amount "***equal to*** the value of the" CSR discounts, to reimburse QHPs for the CSR discounts that QHPs are statutorily required to make to eligible customers. 42 U.S.C. § 18071(c)(3)(A) (emphasis added). In Section 1412, Congress mandated HHS and Treasury to coordinate in providing CSR payments to QHPs in advance of the QHPs' provision of CSR discounts to eligible customers. *See* 42 U.S.C. § 18082(c)(3) ("Treasury ***shall*** make such advance [CSR] payment [to QHPs] at such time and in such amount as the [HHS] Secretary

specifies ….") (emphasis added).[1]

Congress clearly expressed its intent that advance CSR payments are a money-mandating obligation of the United States that the Government must make to QHPs, including L.A. Care, by its use of the word "shall" in Sections 1402 and 1412. *See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("The mandatory 'shall' … normally creates an obligation impervious to judicial discretion."); *Moda*, 892 F.3d at 1320 (finding "shall pay" directive in risk corridors section of ACA to be "unambiguously mandatory"); *Molina Healthcare of California, Inc. v. United States*, 133 Fed. Cl. 14, 36 (2017) (Wheeler, J.) (noting "mountain of controlling case law holding that when a statute states a certain consequence 'shall' follow from a contingency, the provision creates a mandatory obligation") (citations omitted). In *Montana Health Co-op* and *Sanford Health Plan,* Judge Kaplan agreed that, with respect to CSRs, "the statutory language clearly and unambiguously imposes an obligation on the Secretary of HHS to make payments to health insurers that have implemented cost-sharing reductions on their covered plans as required by the ACA." *Montana Health Co-Op*, 139 Fed. Cl. at 218; *Sanford Health Plan,* 2018 WL 4939418, at *5.

The Defendant contends that despite the clear and unambiguous statutory payment directive, the Government has no obligation to pay because the statute does not contain additional language identifying an appropriation from which to pay. Defendant argues that this supposed lack of appropriation can only reflect Congress's "intent" not to obligate the Government. But the Defendant's appropriation arguments ignore and squarely conflict with long-standing precedent and the Federal Circuit's recent decision in *Moda*. More than a century

[1] HHS repeated those mandatory statutory directives in its implementing regulations, stating that QHPs "***will*** receive periodic ***advance*** payments" for their CSR discounts to eligible customers, calculated in accordance with other provisions of the subchapter that set forth CSR calculation methodologies. 45 C.F.R. § 156.430(b)(1)(emphasis added).

of precedent has established that a lack of an appropriation does not negate an underlying obligation to pay. *See United States v. Langston*, 118 U.S. 389, 394 (1886) (holding that a mere failure to appropriate funds to meet a statutory obligation could not vitiate that obligation because it carried no implication of Congress's intent to amend or suspend the substantive law at issue); *Moda*, 892 F.3d at 1321 ("Our predecessor court noted long ago that '[a]n appropriation per se merely imposes limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.'") (quoting *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)); *Slattery v. United States*, 635 F.3d 1298, 1303, 1321 (Fed. Cir. 2011) (*en banc*) (failure to appropriate funds did not absolve the government of its statutory obligation to pay amounts owed); *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966) ("It has long been established 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.").

In *Moda*, the Federal Circuit reaffirmed this principle, holding that the similar "shall pay" language of the risk corridors provision in Section 1342 of the ACA was mandatory and created a binding obligation to pay, despite the absence of an appropriation. *Moda,* 892 F.3d at 1320-22. The Federal Circuit rejected the nearly identical appropriations arguments Defendant asserts here, acknowledging that "it has long been the law that the government may incur a debt independent of an appropriation to satisfy that debt." *Id.* at 1321; *see also Molina*, 133 Fed. Cl. at 35 ("The question before this Court is whether the Government is statutorily obligated to make full annual risk corridor payments, not whether money has been appropriated to make those payments.") (citing *Collins v. United States*, 15 Ct. Cl. 22, 35 (1879) ("This court...does not deal with questions of appropriations, but with the legal liabilities incurred by the United States....")).

Accordingly, the "shall make" language in Sections 1402 and 1412 creates an independent obligation to pay, regardless of appropriations or budget authority. Congress undisputedly has not amended or repealed § 1402 or § 1412 following the ACA's enactment or taken any legislative action regarding the Government's obligation to make advance CSR payments to QHPs. Therefore, the Government should be held to its clear statutory obligation to make full advance CSR payments to L.A. Care. The Defendant may "disagree" with the Federal Circuit's first holding in *Moda,* but it certainly cannot overcome the decision to avoid liability for failure to make required CSR payments. Opp. at 16 n.11.

A. The Government's "Structural" Theories Cannot Overcome The Plain Language of The Statute.

1. The Government's Reliance on *Moda* Is Misplaced.

The Defendant conceives that *Moda* actually supports its theory that a supposed failure to appropriate funds demonstrates that Congress did not intend to create a mandatory payment obligation. Far from it. The three-judge panel of the Federal Circuit in *Moda* unanimously rejected the same argument the Defendant repeats here against L.A. Care.

In *Moda*, the Federal Circuit reaffirmed long-standing precedent and held that a similar "shall pay" obligation under the ACA's risk corridors program was "created by the statute itself," and was "unambiguously mandatory" even though "it provided no budgetary authority to the Secretary of HHS and identified no source of funds for any payment obligations beyond payments in" from profitable insurers on the ACA Exchanges. 892 F.3d 1311, 1320-22. The Federal Circuit confirmed that the ACA's statutory mandatory payment obligation existed "independent of an appropriation to satisfy that debt," and further that insufficiency of appropriations "does not…cancel [the Government's] obligations, nor defeat the rights of other parties." *Id.* at 1321 (quoting *Ferris*, 27 Ct. Cl. at 546). After finding that the risk corridors statute created a mandatory payment obligation, the Federal Circuit determined, however, that in

Moda, the payment obligation was later capped or suspended by Congress through its enactment of subsequent appropriations riders. *Moda*, 892 F.3d at 1322-29.[2] Defendant asks this Court to ignore the first part of *Moda* and look instead *only* to the second portion which examined Congress's intent in passing subsequent appropriations riders which expressly limited the source of risk corridors funding.[3] That holding has no application here, however, because Congress did not pass any appropriations riders or take any subsequent Congressional action or otherwise attempt to limit the Government's clear, "shall pay" obligations contained in Sections 1401 and 1412.

Defendant's attempt to distinguish and minimize *United States v. Langston* is equally unavailing. *See* Opp. at 17. In *Langston*, the Supreme Court held that the statute fixing an official's salary could not be "abrogated or suspended by the subsequent enactments which merely appropriated a less amount" for the services rendered, absent "words that expressly, or by clear implication, modified or repealed the previous law." 188 U.S. 389 at 393. The Court allowed plaintiff to recover as damages his salary payment that was mandated by law, but was not appropriated. In *Langston*, "the government's statutory obligation to pay persisted independent of the appropriation of funds to satisfy that obligation." *Moda*, 892 F.3d at 1321 (describing *Langston*). As the Federal Circuit recognized in *Moda*, the Defendant's position that

[2] The portion of the *Moda* opinion addressing the effect of the subsequent appropriation riders was subject to petitions for rehearing *en banc*, which raised many of the points that Judge Newman made in her dissent from that portion of the *Moda* decision. On November 6, 2018, the Federal Circuit denied the petitions for rehearing *en banc*, with two dissenting opinions. The time for filing petitions for writ of certiorari to the Supreme Court of the United States has not yet expired.

[3] The Defendant concedes that in *Moda* "the Federal Circuit concluded that the language in Section 1342 stating that the Secretary 'shall pay' certain amounts in accordance with a statutory formula initially created an obligation to make full risk-corridors payments without regard to appropriations or budget authority." *See* Opp. at 16. While the Government "disagree[s] with" this binding precedent, it cannot distinguish or overcome it. *Id.,* n. 11.

the absence of an obligation can be inferred from a lack of appropriation "would be inconsistent with *Langston*, where the obligation existed independent of any budget authority and independent of a sufficient appropriation to meet the obligation." *Id.* at 1322. Judge Kaplan likewise recognized in *Montana Health Co-Op* and *Sanford Health Plan*, that "this case clearly falls into the same category as *Langston*" and not the other cases cited by the Government, where *subsequent* riders reflected Congress's later intent to abrogate a statutory obligation to pay. *Montana Health Co-Op*, 139 Fed. Cl. at 220; *Sanford*, 2018 WL 4939418, at *7; *cf. United States v. Will*, 449 U.S. 200, 221–22 (1980) (holding that Congress expressed its intent to repeal statutory obligations through subsequent appropriations riders). As Judge Kaplan explained in reasoning equally applicable here regarding the obligation to make CSR payments:

> [T]here was no relevant congressional action taken at all after the passage of the ACA. There have been no appropriations bills enacted that make reference to § 1402. All that exists is the payment obligation spelled out by the plain language of § 1402 and the 'bare failure to appropriate funds' that the Supreme Court found insufficient to establish the congressional intent necessary to vitiate a statutory payment obligation in *Langston*.

Montana Health Co-Op, 139 Fed. Cl. at 220 (quoting *Moda* at 1323); *Sanford Health Plan*, 2018 WL 4939418, at *7 (same). Here, as in *Langston*, Sections 1401 and 1412 expressly mandate payment and the Government has failed to pay. *Langston* confirms that a mere failure to appropriate funds does not vitiate a clear and unambiguous statutory mandatory payment obligation.

2. The Defendant's "Structural" Comparison of Section 1401 And 1402 Is Irrelevant to Congress's Intent to Create A Mandatory Payment Obligation.

The Defendant argues that because Section 1401 contains a permanent appropriation and Section 1402 does not, this somehow demonstrates that Congress did not intend to fund or make CSR payments. *See* Opp. at 14-20. As set forth below, this argument fails for several reasons, all of which demonstrate that the difference in appropriation methodology in Sections 1401 and

1402 means nothing more than that Congress intended to fund the obligations differently, not that it did not intend to create an obligation in the first place.

First, Defendant's structural argument ignores and would negate the plain language of Section 1402, which, as explained above, contains an unambiguous "shall make" payment obligation. "Where 'Congress has expressed its intention by clear statutory language, that intention controls and must be given effect.'" *Montana Health Co-Op*, 139 Fed. Cl. at 218 (quoting *Rosete v. Office of Pers. Mgmt.*, 48 F.3d 514, 517 (Fed. Cir. 1995). "That is, where 'statutory language is clear and unambiguous, the inquiry ends with the plain meaning.'" *Id.* (quoting *McGee v. Peake*, 511 F.3d 1352, 1356 (Fed. Cir. 2008)). As Judge Kaplan held with respect to Section 1402, "the statutory language clearly and unambiguously imposes an obligation on the Secretary of HHS to make payments to health insurers that have implemented cost-sharing reductions on their covered plans as required by the ACA." *Id.* at 218; *Sanford Health Plan*, 2018 WL 4939418, at *5; *see also Moda*, 892 F.3d at 1322 ("We conclude that the plain language of section 1342 created an obligation of the government to pay participants in the health benefit exchanges the full amount indicated by the statutory formula for payments out under the risk corridors program.").

Second, whether or not a particular section of a statute contains a permanent appropriation has no bearing on whether an enforceable statutory payment obligation exists. As explained above, such a rule would conflict with more than a century of precedent which clearly holds that the absence of an appropriation does not negate an underlying obligation to pay. *See Langston*, 118 U.S. at 394; *Collins*, 15 Ct. Cl. at 35; *Ferris*, 27 Ct. Cl. at 546; *N.Y. Airways, Inc.*, 369 F.2d at 748; *Slattery*, 635 F.3d at 1303, 1321; *Moda*, 892 F.3d at 1321.

Third, the fact that Section 1401 identifies a permanent source of funding for the tax credit created by that provision, but Section 1402 leaves the funding to future appropriations, is

unsurprising and irrelevant to the Government's liability. Congress funded the tax credit in Section 1401 through the same appropriation that has long been used to fund various kinds of tax credits. The fact that Congress left the funding of the obligation in Section 1402, which is not a tax credit, to future appropriations is unremarkable and says nothing about the enforceability of Section 1402's mandatory payment obligation in this Court. Judge Kaplan agreed, and rejected the Defendant's identical argument in both *Montana Health Co-Op* and *Sanford Health Plan*:

> The most one can say about Congress's decision to permanently appropriate funds for the tax credits but not for CSR payments is that it reveals that Congress did not intend for CSR payments to be funded by permanent appropriations. Its failure to establish a permanent funding mechanism for the CSR payments does not, as the government would have it, give rise to the implausible inference that Congress intended "to consign CSRs 'to the fiscal limbo of an account due but not payable.' " [Government Reply] at 8 (quoting *United States v. Will*, 449 U.S. 200, 224, 101 S.Ct. 471, 66 L.Ed.2d 392 (1980)). To the contrary, the lack of a permanent funding mechanism suggests that when it enacted the ACA, Congress anticipated that the CSR payments it obligated the government to pay in § 1402 would ultimately be funded through the annual appropriations process.

Montana Health Co-Op, 139 Fed. Cl. at 220; *Sanford*, No. 18-136C, 2018 WL 4939418, at *7 (Fed. Cl. Oct. 11, 2018).

Not surprisingly, the Defendant also fails to cite any case law to support its extraordinary proposition that an appropriation included in one portion of a statute negates a mandatory payment obligation contained in another section. Defendant unpersuasively relies on cases which merely cite the general rule that Congress acts intentionally in including particular language in one section of a statute and omitting it from another. Opp. at 15. Defendant's reliance on *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018) is misplaced because, although the Supreme Court held that a government-reporting requirement found in the definition of "whistleblower" in the Dodd-Frank Act applied to the Act's anti-retaliation provision, not just to its award program, the Court relied heavily on the meaning of the plain language of the definition, which stated that it applied throughout "this section." *Id.* at 777-78,

(citing *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (refusing to accept statutory interpretation that "runs afoul of the 'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute'" (citations omitted)). *Digital Realty* reinforces L.A. Care's position that the Court must give weight to the plain unambiguous language of Section 1402.

In fact, none of the cases Defendant cites has anything to do with the effect that a permanent appropriation in one section of a statute has on a mandatory payment obligation in another. *Cf. Russello v. United States*, 464 U.S. 16, 23 (1983) (RICO subsection's restriction of the forfeiture of ill-gotten gains to an interest in an "enterprise" could not be read into another subsection that was broader and did not limit its reach to restrictions in an "enterprise"); *United States v. Wong Kim Bo,* 472 F.2d 720, 722 (5th Cir. 1972) (giving effect to plain meaning of the words "arrested and" in alien removal statute to find arrest was element of offense and noting that these words were not included in other related section). Unlike *Russello*, L.A. Care is not asking the Court to read into Section 1402 a restriction that is not there; Plaintiff merely asks the Court to give effect to the plain meaning of the words in the statute, as the court did in *Wong Kim Bo*, which here includes an unambiguously mandatory payment obligation.

Lastly, the Government's actual, undisputed conduct over the course of several years confirms that, until the Defendant adopted its current litigation position, it understood Section 1402 plainly to mandate payment. Indeed, the Government made monthly CSR payments to L.A. Care and other insurers for 45 consecutive months, from January 2014 through September 2017, before the current administration ceased making payments. *See, e.g.* Am. Compl. Ex. 55, 63. Further, in 2015, the Government expressly admitted in *House v. Burwell* that "The [ACA] requires the government to pay cost-sharing reductions to issuers. . . . The absence of an appropriation would not prevent the insurers from seeking to enforce that statutory right through

litigation." Defendants' Memorandum in Support of Their Motion for Summary Judgment, *U.S. House of Reps. v. Burwell*, No. 1:14-cv-01967-RMC, ECF No. 55-1 at 20 (D.D.C. Dec. 2, 2015). Congress's intent in establishing a mandatory payment obligation in Section 1402 is clear and cannot be overcome by the Defendant's *post hoc* rationalizations regarding appropriations.[4]

3. Defendant's Premium Offset Theory Is Irrelevant.

Defendant argues further that Congress "structured the ACA in a manner that allows issuers to account for the absence of CSR payments by increasing their premiums" and that this somehow negates Section 1402's payment obligation. Opp. at 20. This structural argument also ignores the plain language of Section 1402 and its unambiguous "shall make" payment obligation by claiming that Congress did not intend what it plainly said.

Aside from negating the plain language of the statute, the Defendant misconstrues the regulatory framework under which state regulators ultimately establish annual premiums, which is unrelated to Section 1402 mandatory payment obligation or Congress' intent. The ACA does not permit "issuers" to increase their premiums. *See* Opp. at 20. Rather, state insurance regulators review and approve rates which issuers must follow. *See Montana Health Co-Op,* 139 Fed. Cl. at 220-21 ("even assuming that insurers could make up for the shortfall in CSR payments by raising their premiums, approval of premium rates is a matter for the states"). The premium setting and approval process is left to the states and is thus largely outside the scope of the ACA, and there is no evidence that state regulators had any role in the design of Section 1402. Rejecting the Defendant's identical argument, Judge Kaplan correctly concluded in *Montana Health Co-Op* and *Sanford Health Plan*, that "premium rates have no bearing on

[4] The Defendant's current position can only be viewed as a *post hoc* litigation position adopted to defend against CSR litigation. *See Parker v. Office of Pers. Mgmt.*,974 F.2d 164, 166 (Fed. Cir. 1992) ("[P]ost-hoc rationalizations will not create a statutory interpretation deserving of deference.").

whether § 1402 created a statutory obligation to pay insurers compensation for the cost-sharing reductions they implemented," because "[t]here is no evidence in either the language of the ACA or its legislative history that Congress intended that the statutory obligation to make CSR payments should or would be subject to an offset based on an insurer's premium rates." *Id*. 139 Fed. Cl. at 221; 2018 WL 4939418, at *8. Nor has the Defendant submitted any evidence that Congress intended Section 1402's mandatory payment obligation to be limited by some potential future action by state regulators, because no such evidence exists.

Defendant also cannot credibly rely on the preliminary injunction decision in *California v. Trump* to support its arguments. *See* Opp. at 20. In that case, the State of California, along with 17 other states and the District of Columbia, filed a lawsuit under the Administrative Procedure Act ("APA") after the Trump administration stopped making CSR payments and filed a preliminary injunction seeking to compel the administration to continue making advance CSR payments while the lawsuit was pending. *California v. Trump*, 267 F. Supp. 3d 1119, 1121, 1126 (N.D. Cal. 2017). The legal question there was "whether Congress has appropriated money for the CSR payments" and thus whether the administration was permitted to make CSR payments from the Treasury. *Id.* at 1127. The district court noted that the ACA "requires the federal government to pay insurance companies to cover the cost-sharing reductions" – a fact apparently not disputed by the parties – and that the "federal government is failing to meet that obligation." *Id.* at 1133. The district court's denial of the preliminary injunction on grounds that the plaintiff states failed to show immediate irreparable harm on their claims under the APA has no bearing on the question before this Court – whether, under the Tucker Act, the Government must pay L.A. Care damages for failure to make the advance CSR payments mandated by Sections 1402 and 1412.

B. CSR Payments Owed to L.A. Care Are Recoverable in The Court of Federal Claims.

In a further attempt to avoid liability, the Defendant argues that this case cannot proceed because, it claims, Congress did not provide an "express cause of action" or "damages remedy" in Section 1402. *See* Opp. at 18-22. Defendant impermissibly asks this Court to ignore the fundamental role of a money-mandating statute, which provides both the bases for jurisdiction and a cause of action. *See Fisher,* 402 F.3d at 1173 ("the determination that the source [of the plaintiff's claim] is money-mandating shall be determinative both as to the question of the court's jurisdiction and thereafter as to the question of whether, on the merits, plaintiff has a money-mandating source on which to base his cause of action").

Judge Kaplan rightly rejected this very argument in *Montana Health Co-Op* and *Sanford Health Plan*, because she found it "inconsistent with this court's long-standing and well-established authority to entertain suits for money damages under the Tucker Act based on money-mandating statutes like the ACA. "Plaintiffs have never been required to make some separate showing that the money-mandating statute that establishes this court's jurisdiction over their monetary claims also grants them an express (or implied) cause of action for damages." *Montana Health Co-Op*, 139 Fed. Cl. at 217, n. 5 (citing *Fisher*, 402 F.3d at 1172; *United States v. Testan*, 424 U.S. 392, 401–02 (1976)); *Sanford Health Plan*, 2018 WL 4939418, at *5, n. 5 (same).

The Government itself explicitly conceded in *House v. Burwell* that insurers like L.A. Care could seek relief in this Court for unpaid CSR claims:

> The Act requires the government to pay cost-sharing reductions to issuers. . . . The absence of an appropriation would not prevent the insurers from seeking to enforce that statutory right through litigation. Under the Tucker Act, a plaintiff may bring suit against the United States in the Court of Federal Claims to obtain monetary payments based on statutes that impose certain types of payment obligations on the government. *See* 28 U.S.C. § 1491(a)(1); *United States v. Mitchell*, 463 U.S. 206, 216 (1983). If the plaintiff is successful, it can receive the amount to which it is entitled from the permanent appropriation Congress has made in the Judgment Fund, 31 U.S.C. § 1304(a). The mere absence of a more specific appropriation is not necessarily a defense to recovery from that Fund.

Defendants' Memorandum in Support of Their Motion for Summary Judgment, *U.S. House of Reps. v. Burwell*, No. 1:14-cv-01967-RMC, ECF No. 55-1 at 20 (D.D.C. Dec. 2, 2015).

Moreover, if the Defendant's current litigation position were correct, the Federal Circuit could not have concluded, as it did in on the merits in *Moda,* that Section 1342 created a mandatory payment obligation even in the absence of an express damages remedy or appropriation. *See also Langston*, 118 U.S. at 394. Because Section 1402 and its implementing regulations create a mandatory payment obligation, it is well settled that no further "damages remedy" need be established.

II. THE GOVERNMENT IS LIABLE FOR BREACH OF IMPLIED-IN-FACT CONTRACT

A. The Defendant Misapplies Precedent And Ignores Key Aspects of The CSR Program to Argue That No Implied-In-Fact Contract Was Established.

The facts set forth by L.A. Care, which the Defendant does not dispute in its Opposition, demonstrate that the Government entered into an implied-in-fact contract with L.A. Care and breached that contract when it failed to make full and timely advance CSR payments. *See* ECF 21, Motion at 7-11, 20-29; Am. Compl. ¶¶ 371-90. L.A. Care has demonstrated an agreement meeting each element of an implied-in-fact contract based on the promissory nature of the CSR program set forth in the statute and regulations, manuals, guidance, and public statements. The conduct of the Government, in making timely advance CSR payments to L.A. Care for 45 consecutive months, and of L.A. Care, in offering cost-sharing reductions to all eligible plan members each year, further establishes an implied-in-fact-contract. All of this evidence demonstrates a *quid pro quo* exchange: L.A. Care would participate as a QHP and distribute CSR benefits to eligible recipients, and in return, the Government would make advance CSR payments to L.A. Care. *See* Motion at 21-24.

As L.A. Care explained, "Congress obligated itself to make advance CSR payments to insurers because it knew the only feasible way to distribute the CSR benefit to eligible recipients was for insurers to serve as the conduit. In exchange for providing that service on behalf of the Government, insurers legitimately expected to be paid the agreed-upon advance monthly CSR payments." *Id.* at 21. It is undisputed that the Government received consideration. L.A. Care's participation as a QHP and service as a conduit for the CSR payments was a real benefit to the Government. *Id.* at 21, 27. As L.A. Care noted – and the Government does not dispute - this was the only feasible way to distribute the CSR payments to eligible recipients. *Id.* That is why the CSR program was structured to induce certain QHP conduct as in *Radium Mines*. *See Radium Mines, Inc. v. United States,* 153 F. Supp. 403, 406 (Ct. Cl. 1957) (finding implied offer in promissory regulation designed to induce plaintiffs to purchase uranium where "no one could have prudently engaged in" the transaction "unless he was assured of a Government market"); *N.Y. Airways*, 369 F.2d at 751-52 (finding implied-in-fact-contract formed through acceptance of Government's offer arising in statute); *see also Hanlin v. United States*, 316 F.3d 1325, 1329 (Fed. Cir. 2003) ("words of promissory character in the statute or regulation that manifested an undertaking or commitment" could give rise to an implied-in-fact contract).

The Defendant does not dispute any of these facts. And it hardly addresses all of L.A. Care's arguments regarding the CSRs program's promissory nature, the *quid pro quo* exchange, the consideration received, offer and acceptance, or the Government's conduct and surrounding circumstances. Instead, Defendant focuses almost entirely on the language of the statute, asserting that Section 1402 does not contain "contract language." *See* Opp. at 22-25. Defendant urges form over substance, however, because to form an implied-in-fact contract, it is well-settled that no magic words such as "contract" need be used. *See, e.g., Hercules, Inc. v. United States*, 516 U.S. 417, 424 (1996) (intent to contract can be inferred from the "conduct of the

parties showing, in the light of the surrounding circumstances, their tacit understanding"); *Molina*, 133 Fed. Cl. at 43 ("The Government advances form over substance by erroneously insisting that Congress cannot 'clear[ly] indicat[e]' an intent to contract without using those words.") (citing *Nat'l R.R. Passenger Corp*, *v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465 (1985)). The "key" to *Radium Mines*, for example, was not some contractual language, but rather, was "that the regulations at issue were promissory in nature." *Baker v. United States*, 50 Fed. Cl. 483, 490 (2001). In *Radium Mines*, the Government issued a circular in which it promised to pay private parties a "guaranteed minimum price" for uranium. *Radium Mines,* 153 F. Supp. at 404-05. The court held that the circular's purpose was to "induce persons to find and mine uranium" and that when a private party "complied in every respect with the terms" of the circular, "it surely could not be urged" that the Government was not bound to purchase uranium at the stated price. *Id.* at 405-06. The CSR program is, as the Federal Circuit in *Moda* put it, the type of "traditional *quid pro quo* contemplated in *Radium Mines*." *Moda*, 892 F.3d at 1329-30.

Defendant does not address the promissory nature of the CSR program, nor does it try to distinguish the *quid pro quo* exchange inherent in the CSR program from the Federal Circuit's contrary determination in *Moda*. Instead, Defendant simply argues that *Moda*'s reasoning "applies equally here." Opp. at 24. But as L.A. Care demonstrated, the Federal Circuit's decision in *Moda,* considering whether an implied-in-fact contract was formed through the risk corridors program, did *not* apply the Supreme Court's *Nat'l R.R.Passenger Corp.* test. *See* Motion at 19-24. The Federal Circuit simply labeled risk corridors as an "incentive program," looking *only* at the words of the statute and not at the surrounding circumstances, the conduct of the parties, or their legitimate expectations as *Nat'l R.R.Passenger Corp.* requires. *Moda*, 892 F.3d at 1330; *Nat'l R.R.*, 470 U.S. at 468-69. The Defendant never squarely addresses the key *quid pro quo* characteristic of the CSR program that distinguishes it from the risk corridors

program: the Government asked the insurers to act as the conduit for payment of cost sharing reductions to the insureds and the Government agreed to fund those CSR payments in advance to insurers.

Defendant now claims that L.A. Care "overstates" the Supreme Court's holding in *Nat'l R.R. Passenger Corp.* Opp. at 23. But rather than even attempting to apply the Supreme Court's two-part test here, as L.A. Care has done (Motion at 20-23), Defendant insupportably suggests that the Court "only discussed" these well-established contractual indicia due to the particular circumstances of that case. Opp. at 23-25. Defendant cannot dispute, however, that the Supreme Court in *Nat'l R.R.Passenger Corp.* examined not only the text of the statute at issue, but also "the circumstances surrounding the Act's passage" and the "legitimate expectation[s]" of the parties, to determine if the parties had entered into a contractual arrangement. *Nat'l R.R.*, 470 U.S. at 468-69. Indeed, this is the test the Court consistently applies. *See Hercules*, 516 U.S. 417, 424 (1996) (intent to contract can be inferred from the "conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding"); *La Van v. United States*, 382 F.3d 1340, 1346 (Fed. Cir. 2004) (citing *Hercules*).

Simply labeling CSRs an "incentive program" and concluding—without analysis—that the CSR program lacks the "trappings of a contractual arrangement" (quoting *Moda*) as the Defendant has done (Opp. at 24), is not a substitute for the contractual analysis required by this long-standing precedent which demonstrates that the Government entered into a binding implied-in-fact contract with L.A. Care. *See* Motion at 18-26.

B. HHS Has Actual Authority to Enter into CSR Contracts.

In attempting to disclaim authority to contract, Defendant again ignores controlling precedent by arguing, incorrectly, that in order for authority to contract to exist, some specific

words must be found in a statute. While Defendant is correct that "express actual authority" must be based in the Constitution, a statute or a regulation, it ignores the concept of *implied* actual authority altogether. As L.A. Care explained in its Motion, actual authority can be express or implied and "[a]uthority to bind the government is generally implied when [it] is considered to be an integral part of the duties assigned to a government employee." *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989) (alterations omitted). As set forth in L.A. Care's Motion, the HHS Secretary had actual authority to contract on the Government's behalf regarding the CSR program, as evidenced both by Section 1402's explicit instruction that the Secretary "shall establish" the program and "shall make" CSR payments, and the Secretary's obligation to administer and implement the ACA.[5] *See Molina*, 133 Fed. Cl. at 42-43 ("the Secretary of HHS has actual authority to contract on the Government's behalf"). Nothing more is required.

The Anti-Deficiency Act ("ADA"), 31 U.S.C. § 1341(a)(1), also did not preclude the Government from entering into an implied-in-fact contract with L.A. Care, contrary to Defendant's unsupported assertion. The ADA provides in relevant part that "[a]n officer or employee of the United States Government … may not … involve [the U.S.] government in a contract or obligation for the payment of money before an appropriation is made *unless authorized by law*." 31 U.S.C. § 1341(a)(1)(B) (emphasis added). As explained above, the HHS Secretary had statutory authority to implement the advance CSR payments. The Government's obligation to make CSR payments was written into Section 1402 ("shall make" payment) and its

[5] *See* ACA §§ 1001, 1301(a)(1)(C)(iv), 1302(a)-(b), 1311(c)-(d).

implementing regulations ("will receive"), thus making the payment obligation "authorized by law." [6]

In *New York Airways*, the Government similarly argued that the ADA's predecessor statute prohibited it from entering into contracts before Congress had appropriated the funds to fulfill the contract obligation. *See* 369 F.2d at 743. The Court, however, held that the statute was inapplicable because the implied-in-fact contract at issue had been "authorized by law," under mandatory payment obligations in the Federal Aviation Act ("FAA"). *Id*. at 752. Although Congress had not appropriated funds to make payments required under the FAA, that fact only prohibited the agency from making disbursements, while the plaintiff's right to payment was nevertheless legally enforceable in this Court. *Id.* ("Since it has been found that the Board's action created a 'contract or obligation (which) is authorized by law', obviously the statute has no application to the present situation. . . ."). The same result must follow here.

C. QHP Agreements Do Not Preclude An Implied-in-Fact Contract.

Defendant argues that "[t]o the extent that L.A. Care also contends that the Qualified Health Plan (QHP) Agreements evidence an implied-in-fact bilateral contract…those claims must fail." Opp. at 27. This argument is a red-herring. L.A. Care has never contended that its QHP Agreements "evidence" an implied-in-fact contract regarding CSR payments. Indeed, L.A. Care's QHP Agreements do not address any obligations regarding the CSR program. *See* Am. Compl. Ex. 58. The case law Defendant cites is therefore inapposite. L.A. Care's implied-in-fact contract argument is not "grounded on the same facts as the express contract[.]" *Cf. Durant*

[6] *See Shell Oil Co v. United States*, 751 F.3d 1282, 1299-1301 (Fed. Cir. 2014) (holding that an Executive Order contained "a broad delegation of contracting authority that impliedly invokes the President's authority under [a statute] to bypass the ADA's restrictions"); *Chevron U.S.A., Inc. v. United States*, 20 Cl. Ct. 86, 89 (1990) (rejecting Government's argument that the plaintiff's construction of the contract would violate the ADA because "[t]he statutory authority under which the defendant originally entered the contract … makes the payment of operational expenses 'authorized by law'").

v. United States, 16 Cl. Ct. 447, 452 (1998); *Bank of Guam v. United States*, 578 F.3d 1318, 1329 (Fed. Cir. 2009). Defendant also does not contend that the QHP Agreements cover the same subject matter (or have anything to do with CSR payments) therefore such agreements could not preclude L.A. Care's implied-in-fact contract claim here. *See, e.g.*, *Laudes Corp. v. United States*, 86 Fed. Cl. 152, 154 (2009) (allowing mutual existence of implied-in-fact and express contracts with different subject matter); *see also Molina*, 133 Fed. Cl. at 45-46 (dismissing risk corridors express contract claim based on QHP agreements, but granting summary judgment on implied-in-fact contract claim).

D. Plaintiff's Allegations Do Not Raise Implied-in-Law Claims or Promissory Estoppel.

Contending that the Court lacks jurisdiction over L.A. Care's implied-in-fact contract claims, Defendant argues that these well-pled claims are somehow transformed into *implied-in-law* contract claims under a promissory estoppel theory because, it argues, L.A. Care "detrimentally relied" on the Government's representations. *See* Opp. at 27-28. The distinction between implied-in-fact and implied-in-law contracts is significant:

> An agreement implied in fact is "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." By contrast, an agreement implied in law is a "fiction of law" where "a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress."

Hercules Inc., 516 U.S. at 423-24 (internal citations omitted) (quoting *Baltimore & Ohio R. Co. v. United States*, 261 U.S. 592, 597 (1923)).

The jurisdictional dismissal Defendant seeks is permitted *only if* the complaint merely asserts what amounts to promissory estoppel and fails to plead all the elements of an implied-in-

fact contract. *See Steinberg v. United States*, 90 Fed. Cl. 435, 444 (2009).[7] As demonstrated above, however, L.A. Care alleges well-pled facts sufficient to satisfy each element of a claim for breach of implied-in-fact contract, including a "meeting of the minds," the Supreme Court's key element in *Hercules*. 516 U.S. at 423-24. That L.A. Care may *also* have relied, to its detriment, upon the Government's promises does not invalidate its implied-in-fact contract or somehow convert it to a "fictional" contract implied-in-law.[8] In *Steinberg*, this Court noted that although the plaintiff's detrimental reliance was an element of promissory estoppel, the complaint should also be evaluated for allegations fulfilling the elements of breach of implied-in-fact or express contract. *See* 90 Fed. Cl. at 444-47. Similarly, this Court has concluded that a plaintiff's detrimental reliance did not preclude it "from proving that defendant made promises … or that a meeting of the minds occurred as evidenced by plaintiff's reliance on those promises. Such arguments clearly go to the heart of plaintiff's [implied-in-fact] contract claim." *Son Broad., Inc. v. United States*, 42 Fed. Cl. 532, 535, 537 (1998) ("*Sun Broad. I*") (dismissing promissory estoppel claim, but holding that plaintiff stated a claim for breach of an implied-in-fact contract); *accord Travelers Indem. Co. v. United States*, 16 Cl. Ct. 142, 149-50 (1988) (holding complaint sufficiently alleged an implied-in-fact contract, rather than one implied-in-law, because the facts supported the "intent to contract" element). The Court should apply the same analysis here, giving credence to L.A. Care' well-pled allegations of fact, not to the Defendant's inapt labels.

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[7] "Promissory estoppel is another name for an implied-in-law contract claim." *Hubbs v. United States*, 20 Cl. Ct. 423, 427 (1990).

[8] Reliance is also applicable to L.A. Care's Takings claim. *See Cienega Gardens v. United States*, 331 F.3d 1319, 1346-48 (Fed. Cir. 2003) (considering reliance in regulatory takings context).

III. L.A. CARE HAS ADEQUATELY STATED A CLAIM UNDER THE TAKINGS CLAUSE.

Defendant's motion to dismiss L.A. Care's Takings claim in Count VII of its Amended Complaint is wholly dependent on the Court finding that L.A Care has not pled the existence of a contract with the Government regarding its CSR payment obligations. Defendant challenges only the first prong of L.A. Care's takings claim - the existence of a legally cognizable property interest - and does not challenge the second prong that such an interest was "taken." Opp. at 28-30. Contrary to Defendant's assertion that "L.A. Care has no contractual right to receive CSR payments" (Opp. at 29), for the reasons demonstrated above, L.A. Care has sufficiently alleged implied-in-fact contract rights to receive CSR payments. "Valid contracts are property," and "[r]ights against the United States arising out of a contract with [the United States] are protected by the Fifth Amendment." *Lynch v. United States*, 292 U.S. 571, 579 (1934); *see also Cienega Gardens v. United States*, 331 F.3d 1319, 1329 (Fed. Cir. 2003) (recognizing "ample precedent for acknowledging a property interest in contract rights under the Fifth Amendment"). Plaintiff's rights "vested" when it entered into the contract with the Government. *See Cienega Gardens*, 331 F.3d at 1319. L.A. Care thus possesses a legally cognizable property interest that, as set forth in its Amended Complaint, was taken by the Government in violation of the Fifth Amendment. Accordingly, Count VII must survive the Defendant's motion to dismiss.

CONCLUSION

For all of the foregoing reasons, and those set forth in its opening brief, L.A. Care respectfully requests that the Court grant L.A. Care's Motion for Partial Summary Judgment on liability as to Counts V and VI for the Government's failure to comply with its statutory/regulatory (Count V) and implied-in-fact contractual (Count VI) obligations to make full advance CSR payments owed to L.A. Care for CY 2017 and CY 2018 and deny the Government's Motion to Dismiss.

Dated: November 13, 2018

Respectfully Submitted,

s/ Lawrence S. Sher

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2018, a copy of the foregoing Plaintiff's Reply in Support of its Motion for Partial Summary Judgment and Opposition to Defendant's Cross-Motion to Dismiss was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing with be sent to all parties by operation of the Court's ECF system.

s/ Lawrence S. Sher
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