IN THE UNITED STATES COURT OF FEDERAL CLAIMS

NORIDIAN MUTUAL INSURANCE COMPANY, D/B/A BLUE CROSS BLUE SHIELD OF NORTH DAKOTA, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	No. 18-01983-MBH Senior Judge Horn

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AND MEMORANDUM OF LAW IN SUPPORT

Lawrence S. Sher (D.C. Bar No. 430469)

REED SMITH LLP
1301 K Street NW
Suite 1000-East Tower
Washington, DC 20005
Telephone: 202.414.9200
Facsimile: 202.414.9299
Email: lsher@reedsmith.com

Of Counsel:

Conor M. Shaffer (PA Bar No. 314474)
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222
Telephone: 412.288.3131
Facsimile: 412.288.3063
Email: cshaffer@reedsmith.com

Counsel for Plaintiff Blue Cross Blue Shield of North Dakota

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Plaintiff Blue Cross Blue Shield of North Dakota ("Plaintiff" or "BCBSND"), respectfully moves this Court for summary judgment on liability on Counts I and II of its Complaint (ECF No. 1) pursuant to Rule 56 of this Court's Rules ("RCFC"). Count I challenges the Government's violation of its obligation to make full advance cost-sharing reduction ("CSR") payments to BCBSND as required under the money-mandating CSR provisions under Sections 1402 and 1412 of the Patient Protection and Affordable Care Act ("ACA")[1] and implementing federal regulations. Count II alternatively seeks recovery for the Government's breach of its implied-in-fact contract to make full CSR payments to BCBSND. For the reasons demonstrated below, BCBSND is entitled to summary judgment on liability on Counts I and II as a matter of law.

INTRODUCTION

Congress passed the ACA in 2010 in a "dramatic overhaul of the nation's healthcare system." *Moda Health Plan v. United States,* 130 Fed. Cl. 436, 441 (2017), *rev'd on other grounds*, 892 F.3d 1311 (Fed. Cir. 2018), cert. petition filed Feb. 4, 2019. The ACA "created a tectonic shift in the insurance market," which this Court recognized, "drastically enlarged the pool of eligible insurance purchasers," and "prohibited insurers from denying coverage or setting increased premiums based on a purchaser's medical history." *Id*. at 442. "Central to the Act's infrastructure was a network of 'Health Benefit Exchanges' ("Exchanges") on which insurers would offer Qualified Health Plans ("QHPs")" to provide uninsured and underinsured individuals with access to the newly-created health insurance exchanges. *Id*. at 441; *see also Moda Health Plan v. United States*, 892 F.3d 1311, 1314 (Fed. Cir. 2018). The ACA included "a series of interlocking reforms designed to expand coverage in the individual health insurance market." *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). One of these reforms, the ACA's Cost-

[1] Pub. L. 111-148, 124 Stat. 119 (2010).

Sharing Reduction ("CSR") program enacted in section 1402 of the Affordable Care Act, 42 U.S.C. § 18071, was specifically aimed at ensuring that low income individuals had access to affordable insurance coverage and healthcare.

Under the CSR Program, in Sections 1402 and 1412, Congress expressly mandated 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). The cost sharing reductions offset eligible consumers' costs through reduced out-of-pocket expenses, such as deductibles, copayments, and coinsurance paid by individuals. *See* 42 U.S.C. §§18022(c)(3)(A), 18071(c)(2); *accord* 45 C.F.R. §§ 155.305(g), 156.410(a). "[T]he ACA, in turn, provides a mechanism to compensate insurers for the cost of making these reductions." *Montana Health Co-Op v. United States*, 139 Fed. Cl. 213, 215 (2018) (citing Section 1402) (2018). In short, "[t]he premium tax credits and the cost-sharing reductions work together: the tax credits help people obtain insurance, and the cost-sharing reductions help people get treatment once they have insurance." *California v. Trump*, 267 F. Supp. 3d 1119, 1123 (N.D. Cal. 2017).

There is no dispute that Congress created an unambiguous mandatory "shall" pay obligation on the Government in Sections 1402 and 1412 to timely 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). In fact, beginning in January 2014, the Government actually made all of the required advance monthly CSR payments in full to all eligible QHPs, including BCBSND, for 45 consecutive months without fail. *See* Compl. ¶¶ 35, 47, 58; Compl. Ex. 02. Then, in October 2017, the Trump Administration abruptly announced that it would no longer make any further CSR payments citing a sudden lack of available appropriations. *See* Dan Mangan,

Obamacare bombshell: Trump kills key payments to health insurers, CNBC, Oct. 12, 2017, Compl. Ex. 17.

There is no dispute that BCBSND agreed to become a QHP and developed QHPs on the North Dakota ACA Exchange in 2013 and began offering QHPs on that Exchange each month since January 2014. Compl. ¶¶ 40-43, Compl. Exs. 07-09. There is also no dispute that each month since January 2014, BCBSND has made—and continues to make—all required offsetting cost-sharing reductions to eligible members to reduce their costs as required by Section 1402. *See* Compl. ¶¶ 85-89. The Government's refusal to pay BCBSND the advance CSR payments owed each month is a material breach of the Government's statutory, regulatory and contractual obligations.

The Government's asserted excuse for failing to make the required CSR payments, a lack of appropriations, was rejected by the Federal Circuit in *Moda Health Plan, Inc. v. United States*, where the Court 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 (Fed. Cir. 2018). The Federal Circuit confirmed in *Moda* that the ACA's statutory mandatory payment obligation existed "independent of an appropriation to satisfy that debt," and further that an insufficiency of appropriations "does not…cancel [the Government's] obligations, nor defeat the rights of other parties." *Id.* at 1321 (quoting *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)).

Unlike the defenses it asserted in the risk corridors cases, however, here the Government cannot assert (and has not asserted) defenses based on supposed "budget neutrality" or subsequent acts of Congress to "suspend" its mandatory CSR payment obligations through

passage of appropriations riders or any other Congressional action. *See Moda*, 892 F.3d at 1329; *see also Blue Cross & Blue Shield of Vermont v. United States*, No. 18-373C, ECF No. 14. Instead, the defense raised by the Government for failing to make the mandatory CSR payments owed under ACA Section 1402—a purported lack of appropriations—has been squarely rejected by the Federal Circuit analyzing a similar "shall pay" obligation under ACA Section 1342 where, as here, the Federal Circuit concluded there was no appropriation available to fund the mandatory statutory payment obligation. *Moda*, 892 F.3d at 1320-22.

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 motion to dismiss), that asserted statutory CSR claims under § 1402 virtually identical to those asserted here by BCBSND. *See Montana Health Co-Op v. United States*, 139 Fed. Cl. 213, 214 (2018) (appeal pending at No. 19-1302, Fed. Cir. 2018); *Sanford Health Plan v. United States,* 139 Fed. Cl. 701 (2018*)* (appeal pending at No. 19-1290, Fed. Cir. 2018). Following the Federal Circuit's ruling in *Moda* and a "long" line of Supreme Court and Federal Circuit precedent, Judge Kaplan rejected all of the Defendant's arguments and held that "the government violated a statutory obligation created by Congress in the ACA when it failed to provide Montana Health its full cost-sharing reduction payments for 2017" and that "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*, 139 Fed. Cl. at 702. This Court similarly should find the Government liable for its failure to pay BCBSND the advance CSR payments owed and grant summary judgment on liability in favor of BCBSND and against the Government for the same reasons articulated by Judge Kaplan.

In addition, alternatively, this Court should find that the Government entered into an implied-in-fact contract with BCBSND and breached its promise to make advance monthly CSR

payments to BCBSND to offset the cost-sharing reductions BCBSND was required to offer its eligible members each month. There is no dispute that the Government induced BCBSND to participate in the North Dakota ACA Exchange, in part, through such promised advance monthly CSR payments and that the Government received the benefits of BCBSND's participation on that Exchange since January 2014, expanding health insurance coverage for North Dakota residents, scores of whom previously were uninsured. There is also no dispute that the Government continues to require BCBSND to provide cost-sharing reduction offsets to all eligible members, even while the Government has reneged on its promise to make cost-sharing reduction payments to BCBSND. But it is well-established that the Government's lack of appropriations defense does not limit its contractual obligations. *See Salazar v. Ramah Navajo Chapter*, 132. S.Ct. 2181, 2189 (2012) ("[T]he Government is responsible to the contractor for the full amount due under the contract, even if the agency exhausts the appropriation in service of other permissible ends."); *Molina Healthcare of California, Inc. v. United States*, 133 Fed. Cl. 14, 41 (2017).

Nor should this Court feel constrained by the Federal Circuit's decision in *Moda* to find an implied-in-fact contract here because the Court clearly did not analyze in *Moda* whether an implied-in-fact contract was formed in the context of the CSR program. In *Moda*, the Federal Circuit declined to find an implied-in-fact risk corridors contract because the Federal Circuit failed to apply the Supreme Court's controlling two-part test in *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.,* which requires courts to look beyond the text of the statute and examine the "the circumstances" surrounding the statute's passage and the conduct of the parties. 470 U.S. 451, 467-68 (1985). As demonstrated below, properly applied, *Nat'l R.R. Passenger Corp.* compels a finding that the Government was contractually obligated to make

monthly CSR payments to BCBSND, an obligation that likewise is unaffected by a purported lack of appropriations.

Accordingly, the Court should find the Government liable and enter summary judgment in favor of BCBSND on Counts I and II of its Complaint for violations of the mandatory advance CSR payment obligation in ACA Sections 1402 and 1412 and implementing regulations, and alternatively, for breach of an implied-in-fact contract. Otherwise, as Judge Wheeler recognized in *Moda,* "to say to [BCBSND], 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Moda,* 130 Fed. Cl. at 466 (quoting *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970)); *see also United States v. Winstar Corp.*, 518 U.S. 839, 886 n.31 (1996) (plurality op.) ("It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one way street.") (quoting *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387-388 (1947) (Jackson, J., dissenting)). In this case, the Court should stifle the Government's "joke," require the Government to turn a square corner, and grant summary judgment for BCBSND.

STATEMENT OF THE ISSUES PRESENTED

1. Is the Government liable, under Count I, for its failure to meet its statutory and regulatory obligations to make CSR payments to BCBSND in 2017 and 2018 under the ACA Sections 1402 and 1412 and their implementing regulations?

2. Is the Government liable, under Count II, for breach of its implied-in-fact contract with BCBSND to make CSR payments to BCBSND in 2017 and 2018?

STATEMENT OF THE CASE AND UNDISPUTED FACTS

I. CONGRESS ENACTS THE ACA TO EXPAND HEALTH INSURANCE COVERAGE AND INCLUDES A COST-SHARING REDUCTION PROGRAM

Congress passed the ACA in 2010, with the goal of creating a series of "interlocking reforms designed to expand" the availability of health insurance nationwide for individuals who

previously lacked access to the new marketplace. *King*, 135 S. Ct. at 2485. To achieve that goal, in the ACA Congress called for the creation of an Exchange in each State where individuals who wanted access to the marketplace could "compare and purchase insurance plans." *Id.* In addition to drastically enlarging the pool of eligible insurance purchasers with the ACA and expanding Medicaid eligibility, Congress provided subsidies to low-income insurance purchasers to help offset costs for health insurance premiums and out-of-pocket expenses for health care known as "cost-sharing" expenses (such as deductibles, co-pays, co-insurance, the annual limitation on cost-sharing, and similar expenses). *See* ACA §§ 1401, 1402, 1412; 45 C.F.R. § 156.430.

With respect to health insurance premiums, Section 1401 of the ACA amended the Internal Revenue Code by providing "premium tax credits" to eligible consumers (individuals who earn between 100% and 400% of the federal poverty level, and who satisfy additional criteria) to reduce their monthly health insurance premiums on ACA Exchange plans. *See* 26 U.S.C. § 36B (ACA § 1401).

Regarding cost-sharing expenses, Section 1402 of the ACA created the CSR program. Section 1402 mandates that, after being notified by HHS that a consumer is eligible for CSR discounts, a QHP "shall reduce" at least some portion of that consumer's out-of-pocket health care costs. 42 U.S.C. § 18071(a). Although Congress's design called QHPs, like BCBSND, to deliver the CSR discounts directly to eligible consumers, Congress certainly did not intend for QHPs to bear the expense of the CSR discounts. Instead, Congress mandated in Sections 1402 and 1412 of the ACA that the Government "shall" fully pay QHPs in advance for those CSR discounts through advance CSR payments from the Government to QHPs, subject to a later reconciliation.

II. THE ACA'S COST-SHARING REDUCTION PROVISIONS AND IMPLEMENTING REGULATIONS REQUIRE THAT ADVANCE CSR PAYMENTS BE MADE TO INSURERS

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 addition, in Section 1412, Congress mandated HHS and Treasury to coordinate in providing CSR payments to QHPs in advance of the QHPs' providing mandatory CSR discounts to eligible consumers. *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).

HHS echoed those statutory mandates 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); *see also Montana Health Co-Op*, 139 Fed. Cl. at 215 (HHS' CSR regulations "provide, in pertinent part, that the 'issuer must ensure that an individual eligible for cost-sharing reductions . . . pays only the cost sharing required of an eligible individual for the applicable covered service.' 45 C.F.R. § 156.410(a)" and "that such insurers 'will receive periodic advance payments based on the advance payment amounts calculated in accordance' with a regulatory formula." (citing § 156.430(b)(1)).

HHS further established a CSR reimbursement process for providing advance CSR payments and later reconciling those payments against CSR discounts. *See* 45 C.F.R. § 156.430; CMS 2016 CSR Manual at 6 n.9, Compl. Ex. 02. HHS and CMS established a payment system under which the Government would make "monthly advance payments to issuers to cover

projected cost-sharing reduction amounts and then reconcile those advance payments at the end of the benefit year to the actual cost-sharing reduction amounts." 78 FR 15409, 15486 (Mar. 11, 2013) (Final Rule), Compl. Ex. 05. ("This approach fulfills the Secretary's obligation to make 'periodic and timely payments equal to the value of the reductions' under section 1402(c)(3) of the Affordable Care Act.").

Following implementation of the program, HHS continued to express its understanding that the ACA requires full advance monthly CSR payments be made to QHPs. *See, e.g.*, 79 FR 13743, 13805 (Mar. 11, 2014) (Final Rule), Compl. Ex. 11 ("Section 1402(c)(3) … directs the Secretary to make periodic and timely payments to the QHP issuer equal to the value of those reductions."); Bulletin, CMS, *Timing of Reconciliation of Cost-Sharing Reductions for the 2014 Benefit Year* at 1 (Feb. 13, 2015), Compl. Ex. 12 ("[t]he [ACA] requires [QHPs] to provide cost-sharing reductions to eligible enrollees in such [silver] plans, and provides for issuers to be reimbursed for the value of those cost-sharing reductions" by the Government); CMS 2016 CSR Manual at 6 & n.8 (Dec. 2016), Compl. Ex. 02 (acknowledging that "periodic and timely payments equal to the value of [QHPs' CSR] reductions are required to be made to issuers … in advance" by the Government).

Congress has not amended or repealed Section 1402 or Section 1412 since enactment of the ACA, and Congress has never taken any legislative action regarding the Government's obligation to make advance CSR payments to QHPs.

III. BCBSND OFFERS QHPS AND REDUCED COST-SHARING FOR INSUREDS ON THE NORTH DAKOTA EXCHANGE IN RELIANCE ON MANDATORY CSR REIMBURSEMENTS

With this backdrop, and in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, BCBSND agreed to become a QHP beginning in CY 2014 and continuing through the present, and accordingly, BCBSND developed

and established ACA plans and premiums and participated in and offered QHPs on the North Dakota ACA Exchange, including fulfilling its obligation to reduce cost-sharing payments for eligible enrollees. In September of 2016, 2017 and 2018 respectively, BCBSND executed QHP Issuer Contracts with CMS confirming its participation on the North Dakota ACA Exchange for CY 2017 through CY 2019. Compl. ¶¶ 41-43; Compl. Exs. 07-09.

Starting in January 2014, for 45 consecutive months until October 2017, the HHS and Treasury Secretaries – including those in the current Administration– made the Government's monthly advance CSR payments to QHPs, including BCBSND, as Congress required in the ACA and consistent with the Government's interpretation of the money-mandating payment obligations under the ACA. *See* CMS 2016 CSR Manual at 36, Compl. Ex. 02 ("Payments to issuers for the cost-sharing reduction component of advance payments began in January 2014."). From 2014 through September 2017, the Government repeatedly relied on the ACA's permanent appropriation, codified at 31 U.S.C. § 1324, to fund the advance CSR payments.

IV. THE GOVERNMENT BREACHES ITS COST-SHARING REDUCTION PAYMENT OBLIGATIONS

On October 12, 2017, over a year after BCBSND executed its QHP Issuer Contract for 2017, the current Administration announced that the Government would no longer make CSR payments to QHPs. *See* Dan Mangan, *Obamacare bombshell: Trump kills key payments to health insurers*, CNBC, Oct. 12, 2017, Compl. Ex. 17. An October 11, 2017 legal opinion signed by then-U.S. Attorney General Jeff Sessions and addressed to the Treasury Secretary and HHS Acting Secretary concluded that Section 1401 premium tax credits and Section 1402 CSR reimbursement were two distinct programs and proclaimed that the permanent appropriation in Section 1324 that had been used to fund CSRs since inception of the program could only be used to fund Section 1401 premium tax credits. Compl. Ex. 20. The next day, HHS and CMS issued

a press release announcing that the agencies now believed that "Congress has not appropriated money for CSRs, and we will discontinue these payments immediately." Press Release, HHS & CMS, *Trump Administration Takes Action to Abide by the Law and Constitution, Discontinue CSR Payments* (Oct. 12, 2017), Compl. Ex. 18. On the same day, HHS Acting Secretary Eric Hargan issued a letter to CMS Administrator Seema Verma, instructing that "CSR payments to issuers must stop, effective immediately. CSR payments are prohibited unless and until a valid appropriation exists." Letter from Eric Hargan, HHS Acting Secretary, to Seema Verma, CMS Administrator (Oct. 12, 2017), Compl. Ex. 19.

Pursuant to the Administration's decision, HHS and Treasury have not made any of the mandatory advance CSR payments to QHPs, like BCBSND, in and after October 2017, nor has the Government made any mandatory advance CSR payments for the CY 2018 plan year, or to date. The Government has refused to pay the CSR amounts owed in violation of its statutory and contractual mandatory payment obligations.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a); *see, e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "Issues of statutory interpretation and other matters of law may be decided on motion for summary judgment." *Santa Fe Pac. R.R. Co. v. United States*, 294 F.3d 1336, 1340 (Fed. Cir. 2002); *see Wade v. United States*, 136 Fed. Cl. 232, 250 (2018) (Horn, J.) (quoting Santa Fe). The Court in *Montana Health Co-Op* agreed that "the parties' cross-motions present a single, purely legal issue: whether the federal government had a statutory obligation to provide Montana Health with the cost-sharing reduction payments described in § 1402 of the ACA, notwithstanding the lack of appropriations to fund such payments." *Montana Health Co-Op*, 139 Fed. Cl. at 218; *see also Sanford Health Plan*,

139 Fed. Cl. at 706 "Whether a contract exists is a mixed question of law and fact," and "[c]ontract interpretation itself also is a question of law." *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998).

ARGUMENT

I. TUCKER ACT JURISDICTION EXISTS OVER BCBSND'S CLAIMS

A. Count I

In Count I, BCBSND asserts that the United States breached a money-mandating statute, § 1402, and its implementing regulations in 45 C.F.R. § 156.430(b)(1). BCBSND has unquestionably satisfied the jurisdictional requirements under the Tucker Act. *See Roberts v. United States*, 745 F.3d 1158, 1161 (Fed. Cir. 2014). First, § 1402 and its implementing regulations are clearly money-mandating. *See Molina,* 133 Fed. Cl. at 27 (cataloguing cases). Second, as a QHP, BCBSND is a member of the class that Congress prescribed to receive CSR payments under the statute and regulations. The Court in *Montana Health Co-Op and Sanford Health Plan* held that the Court "has jurisdiction under the Tucker Act over [plaintiff's] claim for monetary relief under § 1402 of the ACA" and HHS implementing regulations, 45 C.F.R. § 156.430(b)(1), concluding that "[t]hese provisions supply money-mandating sources of law for purposes of establishing this Court's Tucker Act jurisdiction." *Montana Health Co-Op*, 139 Fed. Cl. at 217; *Sanford Health Plan*, 139 Fed. Cl. at 706 ("[t]he 'use of the word 'shall' generally makes a statute money-mandating.'" (citing *Greenlee Cty. v. United States,* 487 F.3d 871, 877 (Fed. Cir. 2007) (quoting *Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003)).

B. Count II

This Court unquestionably also has Tucker Act jurisdiction to hear BCBSND's breach of implied-in-fact contract claim. *See Moda*, 130 Fed. Cl. at 450-51 (finding Tucker Act jurisdiction to hear breach of implied-in-fact contract claim regarding risk corridors); *Marchena*

v. United States, 128 Fed. Cl. 326, 331 (2016) (recognizing that a "low threshold requirement" exists to establish jurisdiction over contract claims). A plaintiff claiming the Government has breached an implied-in-fact contract need only make a "non-frivolous *allegation* of a contract with the government." *Mendez v. United States*, 121 Fed. Cl. 370, 378 (2015) (quoting *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011)) (emphasis in original). In its Complaint, BCBSND alleges each of the elements of an implied-in-fact contract. *See, e.g.*, Compl. ¶¶ 105-25. "[T]hese non-frivolous allegations are all that is required. Therefore, the Court also has subject-matter jurisdiction over [BCBSND's] contract claim." *Moda,* 130 Fed. Cl. at 450 (citing *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 98-99 (2016)).

II. COUNT I: BCBSND IS ENTITLED TO SUMMARY JUDGMENT ON LIABILITY FOR THE GOVERNMENT'S VIOLATION OF ITS STATUTORY AND REGULATORY OBLIGATIONS TO MAKE ADVANCE COST-SHARING REDUCTION PAYMENTS

A. The Statutory and Regulatory Obligation to Make Full Advance CSR Payments is Clear and Unambiguous

Section 1402 of the ACA mandates that, after being notified by HHS that a consumer is eligible for CSR discounts, a QHP "shall reduce" a portion of that consumer's out-of-pocket health care costs. 42 U.S.C. § 18071(a); *see Montana Health Co-Op,* 139 Fed. Cl. at 216 ("Pursuant to the cost-sharing reduction requirement, insurers offering health plans on the exchanges must reduce these enrollees' out-of-pocket costs for 'deductibles, coinsurance, copayments, or similar charges' by a specified amount. § 18071(a)(2); *id.* § 18022(c)(3)(A)."); *Sanford Health Plan*, 139 Fed. Cl. at 703 (same). In turn, the statute explicitly and unambiguously mandates that the Government fully reimburse QHPs for those CSR discounts through advance payments to the QHPs. Section 1402 authorizes and expressly requires that the Government "***shall*** make periodic and timely payments to the issue ***equal to*** the value of the

reductions." 42 U.S.C. § 18071(c)(3)(A) (emphasis added); *see Montana Health Co-op*, at *2 (the ACA "states that insurers 'shall notify the Secretary [of Health and Human Services] of such reductions' and that 'the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions.' *Id.* § 18071(c)(3)(A)."). Section 1412 further requires 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).

Congress's use of the word "shall" in Sections 1402 and 1412 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 BCBSND. *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 1329 (finding "shall pay" directive in risk corridors section of ACA to be "unambiguously mandatory"); *Molina*, 133 Fed.Cl. at 36 (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). 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*, 139 Fed. Cl. at 706 (citing 42 U.S.C. § 18071(c)(3)(A)). BCBSND has satisfied the

requirements for payment from the Government under Sections 1402 and 1412 and the Government has a mandatory statutory obligation to pay the amounts owed to BCBSND.[2]

B. The Government's Appropriations Arguments Were Rejected in *Moda* and Must be Rejected Here

Despite the existence of this mandatory "shall make" language, BCBSND expects that Defendant will argue, as it recently has in other CSR cases, including those before this Court, that there is no obligation to pay because there was not an appropriation to fund the CSR program. *See Montana Health Co-Op*, 139 Fed. Cl. at 218; *Sanford Health Plan*, 139 Fed. Cl. at 706; *Blue Cross & Blue Shield of Vermont v. United States*, No. 18-373C, ECF No. 14 at 12-18; *Local Initiative Health Authority for Los Angeles County v. United States*, No. 17-1542, ECF No. 26 at 13-17. This argument ignores long-standing precedent and would eviscerate the meaning of a money-mandating statute. The Federal Circuit rejected this very argument in *Moda* in evaluating similar "shall pay" language in the risk corridors provision in Section 1342 of the ACA despite the fact that the Court found there was no appropriation available to fund the statutory obligation. Citing a well-established line of precedent, the Federal Circuit held that the "shall pay" language of Section 1342 was mandatory and created a binding obligation to pay.[3] *Moda,* 892 F.3d at 1320-22. Rejecting Defendant's argument, the Federal Circuit acknowledged that "it has long been the law that the government may incur a debt independent of an

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[2] Indeed, 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).

[3] With respect to the risk corridors payments at issue in *Moda*, the Federal Circuit held that although Section 1342 created an express obligation to pay, the payment obligation was later capped or suspended by Congress through its enactment of subsequent appropriations riders. *Moda*, 892 F.3d at 1322-29. That holding does not apply in this case, however, because no appropriations riders or any subsequent statute placed any limitations on the mandatory obligation to make CSR payments.

appropriation to satisfy that debt[.]" *Id.* at 1321; *see also 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."). The Court further explained that "the obligation is created by the statute itself, not by the agency. The government cites no authority for its contention that a statutory obligation cannot exist absent budget authority." *Moda,* 892 F.3d at 1322; *see also Collins v. United States*, 15 Ct. Cl. 22, 35 (1879) ("The liability, however, exists independently of the appropriation, and may be enforced by proceedings in this court.") (*see infra* at 24-25).

The Federal Circuit recognized in *Moda* that Defendant's position conflicts with more than one hundred years of precedent. In *United States v. Langston*, the Supreme Court held that a 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." 118 U.S. 389, 393 (1886). The Court allowed plaintiff to recover as damages his salary payment that was mandated by law, but was not appropriated. *Id.* 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 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. The Court in *Montana Health Co-Op* and *Sanford Health Plan* agreed, finding that the Government's failure to make the statutorily-mandated CSR payments was similar to its failure to pay in *Langston*, where the Supreme Court held that "'a bare 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.'" *Montana Health Co-Op*, 139 Fed. Cl. at 220; *Sanford Health Plan*, 139 Fed. Cl. at 708 (quoting *Langston*, 118 U.S. at 394).

C. The Government's Defenses Also Were Rejected by The Court in *Montana Health Co-Op* and *Sanford Health Plan*

The Court in *Montana Health Co-Op* and *Sanford Health Plan* considered and rejected all of the Government's arguments aimed at evading liability for making the statutorily-required advance monthly CSR payments to insurers, observing that "none of these arguments withstands scrutiny under controlling precedent, the most recent example of which is the court of appeals' decision in *Moda Health Plan*." *Montana Health Co-Op*, 139 Fed. Cl. at 218; *Sanford Health Plan*, 139 Fed. Cl. at 707. Specifically, the Court dispensed with the Government's argument "that § 1402 does not give rise to a statutory payment obligation because Congress has never appropriated funds to meet any such obligation," emphasizing that the Government "concede[d]" that the statutory "shall pay" risk corridors obligation in Section 1342 "created an obligation to make full risk-corridors payments without regard to appropriations or budget authority," that the Federal Circuit in *Moda* found was "'unambiguously mandatory.'" *Montana Health Co-Op, 139 Fed. Cl. at 218-19; Sanford Health Plan, 139 Fed. Cl. at 706-07*(citing *Moda,* 892 F.3d at 1320). Judge Kaplan also denied the Government's "structural" argument that Congress somehow expressed its intent not to create a CSR payment obligation by permanently appropriating funds for Section 1401 but not Section 1402, concluding that "[t]he 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." *Montana Health Co-Op,* 139 Fed. Cl. at 220; *Sanford Health Plan*, 139 Fed. Cl. at 708.[4]

Judge Kaplan correctly recognized that the Federal Circuit "broke no new ground" by holding in *Moda* that the statutory "shall pay" obligation was enforceable without a specific appropriation or "budget authority," because "the lack of appropriated funds was irrelevant to whether such an obligation was enforceable in this court." *Montana Health Co-Op, 139 Fed. Cl. at 219; Sanford Health Plan,* 139 Fed. Cl. at 707 (citing *Moda*, 892 F.3d at 1321 ("'it has long been the law that the government may incur a debt independent of an appropriation to satisfy that debt, at least in certain circumstances.")); *see also 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); *Greenlee Cty.*, 487 F.3d at 877 (a "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" (quotation omitted)); *N.Y. Airways*, 369 F.2d at 748 ("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.").

Unlike the risk corridors payments at issue in *Moda*, where the Federal Circuit found the payment obligation was later capped or suspended by Congress through its enactment of

[4] Judge Kaplan also rejected the Government's argument that "failure to establish a permanent funding mechanism for the CSR payments" would "give rise to the implausible inference that Congress intended to consign CSRs 'to the fiscal limbo of an account due but not payable,'" concluding "[t]o 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 Health Plan*, 139 Fed. Cl. at 708.

subsequent appropriations riders, *Moda*, 892 F.3d at 1322-29, here no appropriations riders or any subsequent statute placed any limitations on the mandatory obligation to make CSR payments.

As in *Langston*, with respect to CSRs, as Judge Kaplan observed "there 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; *Sanford Health Plan*, 139 Fed. Cl. at 708.

D. Congress's Mere Failure to Appropriate Funds Does Not Evidence and Intent to Repeal the CSR Payment Obligation

Congress's mere failure to appropriate funds for CSR payments provides no evidence of an intent to repeal the CSR payment provision itself. On this, the controlling law is crystal clear. *See*, *e.g.*, *Belknap v. United States*, 150 U.S. 588, 595 (1893) (Congress's "mere failure to appropriate" is "not, in and of itself alone, sufficient to repeal the prior act"); *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1321-22 (Fed. Cir. 2018) ("'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.'") (quoting *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966)).

This rule against construing the failure to appropriate funds—or Congressional silence—as proof of intent to repeal is rooted in bedrock principles of statutory construction. First, the Supreme Court long has applied a robust presumption against construing statutes to impliedly

repeal other statutes—"'the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable[,]'" *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 141–42 (2001), and even then, only where the evidence of irreconcilability is "overwhelming[,]" *id.* at 137. This presumption "applies with even greater force" where "the claimed repeal rests solely upon an Appropriations Act[,]" *TVA v. Hill*, 437 U.S. 153, 190 (1978), and its focus is on the text Congress actually enacted, not provisions left on the drafting room floor. *See Langston*, 118 U.S. at 394 (implied repeal requires "words that expressly, or by clear implication, modif[y] or repeal[] the previous law"—"express words of repeal, or … such provisions as would compel the courts to say that harmony between the old and the new statute was impossible").

Second, "'[c]ongressional inaction lacks persuasive significance' in most circumstances," *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (citation omitted), and it certainly "cannot amend a duly enacted statute." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994) (citation and internal quotation marks omitted).

Third, it is "'strongly presumed that Congress will specifically address language on the statute books that it wishes to change[,]'" *Hymas v. United States*, 810 F.3d 1312, 1320 (Fed. Cir. 2016) (citation omitted), and silence plainly cannot be equated with a "specific[]" direction from Congress that it wishes to change an existing statute. "Congress does not [even] make 'radical—but entirely implicit—change[s]'" to statutes "through 'technical and conforming amendments'" it actually enacts, *Cyan, Inc. v. Beaver Cty. Employees Ret. Fund*, 138 S. Ct. 1061, 1071 (2018), much less through silence in the form of its mere failure to appropriate funds.

Finally, Congress is presumed to know the law, including the centuries'-old interpretive rule that the failure to appropriate funds, without more, does not repeal substantive statutory

provisions. *See Kirkendall v. Dep't of Army*, 479 F.3d 830, 846 (Fed. Cir. 2007) "[W]e 'presume congressional understanding of … interpretive principles[]" at the time of enactment") (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991)); *Aectra Refining & Mktg., Inc. v. United States*, 565 F.3d 1364, 1370 (Fed. Cir. 2009) ("Congress is presumed to enact legislation with knowledge of the law and a newly-enacted statute is presumed to be harmonious with existing law and judicial concepts.") (citation omitted). So when Congress fails to appropriate funds—without also enacting specific text that explicitly amends existing law—it is presumed not to be carrying out a repeal of that existing law, implied or otherwise. Accordingly, Congress's failure to appropriate funds and continued silence cannot be read to infer intent.

E. The Cases Upon Which Defendant Has Relied Are Inapposite or Support Plaintiff's Claims

In defending the Government's refusal to make required CSR payments, Defendant has relied upon inapposite cases like *United States v. Mitchell*, 109 U.S. 146, 150 (1883), *Dickerson v. United States*, 310 U.S. 554, 561-62 (1940), and *United States v. Will,* 449 U.S. 200, 224 (1980), where Congress affirmatively limited existing appropriations owed through subsequent express language, but here there is no dispute that Congress never took *any* action whatsoever to restrict, limit, or otherwise abrogate Section 1402's mandatory shall pay obligation.

Defendant also has relied on cases such as *Greenlee Cnty., Ariz. v. United States,* 487 F.3d 871, 874 (Fed. Cir. 2007) and *Prairie Cty., Mont. v. United States*, 782 F.3d 685 (Fed. Cir. 2015) to support its arguments, but those cases actually support BCBSND's claims. In *Greenlee*, the Federal Circuit recognized that a "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" (quoting *N.Y. Airways, Inc.,* 369 F.2d at 748). The Court went on to explain that "in some instances the statute creating

the right to compensation (or authorizing the government to contract) may restrict the government's liability or limit its contractual authority to the amount appropriated by Congress." *Greenlee*, 487 F.3d at 878. The Court noted that "the language 'subject to the availability of appropriations' is commonly used to restrict the government's liability to the amounts appropriated by Congress." *Id.* Because the Payment in Lieu of Taxes Act ("PILT") at issue in both *Greenlee* and *Prairie County* contained such limiting language – "Amounts are available only as provided in appropriation laws" – the Federal Circuit held in both cases that the plain language of the statute limited the government's liability for PILT payments to the amounts appropriated. *Id.* at 878, 881; *Prairie Cty.*, 782 F.3d at 690. It is undisputed, however, that that there is no such language in Section 1402, so *Greenlee* and *Prairie County* do not support the Defendant's arguments.

Although *Greenlee* and *Prairie County* involved circumstances where Congress already had appropriate some monies to fund the statutory obligation at issue, it is undisputed that in *Moda*, the Federal Circuit concluded that but for the passage of the later appropriations riders, the Government's "shall pay" statutory payment obligation in Section 1342 was binding and enforceable without, and irrespective of, any appropriation. *See Moda*, 892 F.3d at 1320-22; *see also Prairie Cty.*, 782 F.3d at 690 (absent "congressional intent to limit the government's liability," a money-mandating statute "imposes a statutory obligation to pay the full amounts according to the statutory formulas regardless of appropriations by Congress.").

Moreover, Congress knew how to expressly limit its payment obligations in the ACA when it wanted to do so. Indeed, Congress in at least *four other sections* of the ACA did specifically limit its obligations to be "subject to the availability of appropriations" but did not with respect to CSR payments in Section 1402. *See, e.g.*, 42 USC Sec. 280k(a) ("The Secretary …shall, subject to the availability of appropriations, establish a 5-year national, public

campaign…"); 42 U.S.C. § 300hh–31(a); 42 U.S.C. § 293k–2(e); 42 U.S.C. § 1397m–1(b)(2)(A).

F. CSR Payments Owed to BCBSND are Recoverable in The U.S. Court of Federal Claims

Defendant has repeatedly argued that the CSR claims cannot proceed in this Court because Congress did not provide an "express cause of action" or "damages remedy" in Section 1402. *See Blue Cross & Blue Shield of Vermont v. United States*, No. 18-373C, ECF No. 14 at 12-18; *Local Initiative Health Authority for Los Angeles County v. United States*, No. 17-1542, ECF No. 26 at 18-22. This argument impermissibly asks the 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" (emphasis added)). 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*, 139 Fed. Cl. at 706, n. 5 (same).

Similarly, Defendant has relied on the Constitution's Appropriations Clause to argue that a lack of appropriations means that CSR plaintiffs have no cause of action and/or that this Court

cannot order a payment of money. *See Local Initiative Health Authority for Los Angeles County v. United States*, No. 17-1542, ECF No. 28 at 8. Defendant's argument likewise ignores more than a hundred years of precedent, conflates "obligations" and "appropriations," and would be inconsistent with the Federal Circuit's first holding in *Moda*. *See supra* at 15-16. As recognized since at least 1879, Article I, Section 9 of the Constitution has had no bearing on this Court or its predecessors, because:

> **That provision of the Constitution** is exclusively a direction to the officers of the Treasury, who are intrusted with the safekeeping and payment out of the public money, **and not to the courts of law**; the courts and their officers can make no payment from the Treasury under any circumstances. **This court**, established for the sole purpose of investigating claims against the government, **does not deal with questions of appropriations, but with the legal liabilities incurred by the United States under contracts, express or implied, the laws of Congress**, or the regulations of the executive departments. (Rev. Stat., § 1059.) That **such liabilities may be created where there is no appropriation of money to meet them** is recognized in section 3732 of the Revised Statutes.

Collins v. United States, 15 Ct. Cl. 22, 35 (1879) (emphasis added). *Collins* involved enforcement of a statutory obligation to reinstate and pay Major Collins after he had retired from the Army but had not received his military pension. *Collins*, 15 Ct. Cl. at 23-24. When payment was not made despite passage of the statute, Major Collins sought relief in the Court of Claims. *Id.* at 24-26. The Government argued that the Appropriations Clause foreclosed payment, claiming the statute lacked "[t]he familiar language expressive of legislative intent to take money from the Treasury, '*and the Secretary of the Treasury is hereby authorized out of any moneys not otherwise appropriated*,'" *Id.* at 28 (Defendant's statement) (emphasis in original). The Court of Claims rejected Defendant's argument, holding:

> It is clear that the Executive … without legislative authority, cannot create a liability on the part of the United States to pay [a public officer] a salary for the time he was not in service; **but Congress, the legislative branch of the government, may by law create such liability**, and may allow back pay to any public officer in consideration of past services or for any other cause which they deem sufficient.

> * * *
> The officers of the Treasury have no authority to pay such compensation until appropriations therefor are made[.] … **The liability, however, exists independently of the appropriation, and may be enforced by proceedings in this court**.

Collins, 15 Ct. Cl. at 34-35 (emphasis added).

G. The Judgment Fund Is Available to Pay Judgments Entered By This Court Under The Tucker Act

Defendant's argument also ignores the availability of the Judgment Fund. 28 U.S.C. § 2517. As set forth in 28 U.S.C. § 2517, except as specifically provided under the Contract Disputes Act, "every final judgment rendered by the United States Court of Federal Claims against the United States shall be paid out of any general appropriation therefor, on presentation to the Secretary of the Treasury of a certification of the judgment by the clerk and chief judge of the court." The Judgment Fund is a "'permanent' or 'continuing' appropriation, once enacted, makes funds available indefinitely for their specified purpose; no further action is needed from Congress." *Nevada v. Dep 't of Energy,* 400 F.3d 9, 13 (D.C. Cir. 2005) and U.S. Government Accounting Office, GA0-04- 261 SP, 1 *Principles of Federal Appropriations Law* 2-14 (3d ed. 2004)). The Judgment Fund "was intended to establish a central, government-wide judgment fund from which judicial tribunals administering or ordering judgments, awards, or settlements may order payments without being constrained by concerns of whether adequate funds existed at the agency level to satisfy the judgment." *Bath Iron Works Corp. v. United States,* 20 F.3d 1567, 1583 (Fed. Cir. 1994) (citing *Lopez v. A.C. &* S., *Inc.,* 858 F.2d 712, 716 (Fed. Cir. 1988)).

The Judgment Fund "is applied after the court has entered final judgment, to provide a mechanism whereby that judgment 'shall be paid out of any general appropriation therefor.'" *Slattery v. U.S.*, 635 F.3d 1298, 1317, 1320 (Fed. Cir. 2011). By operation of both 28 U.S.C. § 2517 and 31 U.S.C. § 1304, "unless provision for payment of a judgment is supplied by another

statute, any final judgment issued by this court is satisfied by payment from the standing appropriation known as the Judgment Fund." *Wolfchild v. United States*, 101 Fed. Cl. 54, 84 (2011), *as corrected* (Aug. 18, 2011), *aff'd in part, rev'd in part on other grounds*, 731 F.3d 1280 (Fed. Cir. 2013) (citing *Doe v. United States,* 16 Cl.Ct. 412, 423 (1989) ("Every final judgment of the United States Claims Court rendered against the United States is to be paid out of the judgment fund.")).

As the Federal Circuit confirmed in *Slattery*, 635 F.3d at 1317, "the purpose of the Judgment Fund was to avoid the need for specific appropriations to pay judgments awarded by the Court of Claims," therefore this Court should not be concerned with "how the agency meets its obligations or how any judgment establishing those obligations is satisfied." *Id*. at 1318; *see also Collins,* 15 Ct. Cl. at 35 ("This court, established for the sole purpose of investigating claims against the government, does not deal with questions of appropriations…"). Therefore, the Judgment Fund is available to satisfy any judgment this Court may enter against Defendant on liability in this case in the absence of any specific Congressional appropriation to fund the CSR payments owed.

Contrary to its current litigating position, the Government itself explicitly conceded (correctly) in *House v. Burwell* that insurers like BCBSND could seek relief in this Court for unpaid CSR claims and, if successful, could recover amounts due from the Judgment Fund:

> 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).

H. Section 1402 Does Not Provide for Potential Offsets Based on Future State Premium Increases

Nor can the Government persuasively argue that its mandatory advance monthly CSR payment obligation should be "offset" by perceived premium increases by state insurance regulators in North Dakota or elsewhere. Section 1402 is completely silent on the effect of insurance premiums on the Government's express mandatory CSR payment obligation. There is simply no evidence that Congress considered the potential effect of future insurance premiums on its statutory CSR payment obligation in Section 1402. As Judge Kaplan correctly concluded, "[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. The Court concludes, therefore, that premium rates have no bearing on whether § 1402 created a statutory obligation to pay insurers compensation for the cost-sharing reductions they implemented." *Montana Health Co-Op,* 139 Fed. Cl. at 221; *Sanford Health Plan,* 139 Fed. Cl. at 709.

The "shall make" language of Section 1402 and 1412, like the "shall pay" language in Section 1342 at issue in *Moda,* creates an express, mandatory statutory payment obligation for the Government, regardless of appropriations. Congress has not amended or repealed Section 1402 or Section 1412 or taken any legislative action since the enactment of the ACA regarding the Government's obligation to make advance CSR payments to QHPs. This Court therefore should hold the Government to its clear statutory obligation and require it to make the advance CSR payments it owes to BCBSND.

III. COUNT II: THE GOVERNMENT BREACHED AN IMPLIED-IN-FACT CONTRACT WITH BCBSND BY REFUSING TO MAKE FULL COST-SHARING REDUCTION PAYMENTS

In addition, alternatively, the undisputed facts demonstrate that the Government entered into an implied-in-fact contract with BCBSND and subsequently breached that contract when it failed to make full and timely advance CSR payments. The Court should make this finding "*regardless* of the Government's appropriation law defenses," because "later appropriation restrictions cannot erase a previously created contractual obligation." *Molina* at 41 (emphasis in original); *see also Salazar v. Ramah Navajo Chapter*, 132. S.Ct. at 2189.

To assert the existence of an implied-in-fact contract with the Government, a plaintiff must demonstrate: (1) mutuality of intent, (2) consideration, (3) offer and acceptance, and (4) actual authority to contractually bind the Government. *See Forest Glen Props., LLC v. United States*, 79 Fed. Cl. 669, 683 (2007); *Buesing v. United States*, 42 Fed. Cl. 679, 688 (1999) (Horn, J.). An implied-in-fact contract "is not created or evidenced by explicit agreement of the parties, but is inferred as a matter of reason or justice from the acts or conduct of the parties." *Prudential Ins. Co. of Am. v. United States*, 801 F.2d 1295, 1297 (Fed. Cir. 1986). Plaintiff unquestionably has alleged all requisite elements to state a non-frivolous implied-in-fact contract with the Government. Although the plaintiffs in *Montana Health Co-op* and *Sanford Health Plan* also argued that the Government alternatively breached an implied-in-fact contract, the Court did not reach that claim "in light of its favorable disposition of Montana Health's statutory claim." *Montana Health Co-Op*, 139 Fed. Cl. at 216 n. 4; *Sanford Health Plan*, 139 Fed. Cl. at 704 n. 4.

A. Controlling Law Requires the Court to Focus Beyond the Terms of the Statute

The Government does not always "intend to bind itself whenever it creates a statutory or regulatory incentive program." *Moda*, 130 Fed. Cl. at 462-63; (citing *Nat'l R.R. Passenger Corp.*

v. Atchison Topeka & Santa Fe Ry. Co., 470 U.S. 451, 465-66 (1985)); *see also Molina*, 133 Fed. Cl. at 41-42. The Supreme Court's controlling *Nat'l R.R. Passenger Corp.* test requires courts to "first … examine the language of the statute," and second, to review "the circumstances" surrounding the statute's passage and the conduct of the parties. 470 U.S. at 467-68; *see also 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"); *Buesing*, 42 Fed. Cl. 679, 688 (quoting *Hercules*).

The Federal Circuit in *Moda* declined to find an implied-in-fact-contract because it simply labeled risk corridors as an "incentive program," and looked *only* at the words of the statute finding no express "statement…evinced an intent to form a contract." *Moda*, 892 F.3d at 1330; *see 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. *Nat'l R.R.*, 470 U.S. at 465").[5] Although the Federal Circuit cited *Nat'l R.R. Passenger Corp., Moda,* at 1329, it failed to apply the Supreme Court's two-part test which requires a court to look beyond the statute's text and examine the surrounding circumstances and conduct of the parties. Critically, the Supreme Court's examination of the surrounding circumstances in *Nat'l R.R. Passenger Corp.* included the "legitimate expectation[s]" of the parties and whether "Congress would have struck" the bargain under such circumstances. 470 U.S. at 468-69. But the Federal Circuit in *Moda* did not examine these circumstances at all.

[5] Judge Wheeler in *Moda* expressly disagreed with *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12 (2011), because the Court there applied an overly narrow and "literal[]" interpretation of *Nat'l R.R. Passenger Corp.* test. *Moda*, 130 Fed. Cl. at 463-64. This Court further admonished that "[n]either *Radium Mines* nor *New York Airways* turned on the invocation of the magic word 'contract' in the statutes they examined." *Id*. Nor must the offer include the word "guarantee" as suggested by the Federal Circuit in *Moda*, 892 F.3d at 1330.

After reviewing these two factors in detail, the Supreme Court in *Nat'l R.R. Passenger Corp.* determined that Congress did not, through passage of the statute at issue, intend to contractually agree *not* to re-impose any rail passenger service responsibilities on the freight railroads. *Id*. at 471. Instead, the Court found that the statute did not obligate the Government to "agree[] with anyone to do anything," emphasizing that, by its terms, Congress had "'expressly reserved' its right to 'repeal, alter or amend,'" the statute "'at any time.'" *Id*. at 467. Here, in contrast to the statute in *Nat'l R.R. Passenger Corp.,* Sections 1402 and 1412 unambiguously required that the Secretary "shall make" the mandatory CSR payments through monthly advances. 42 U.S.C. § 18071(c)(3)(A); 42 U.S.C. § 18082(c)(3).

With respect to surrounding circumstances, the Supreme Court in *Nat'l R.R. Passenger Corp.* observed that "Congress would have struck a profoundly inequitable bargain" had it agreed to the contractual terms urged by the railroads because, the Court found, Congress would have received little in exchange for a promise *never* to impose rail passenger service obligations on the profitable freight railroads. 470 U.S. at 468. The Court also determined that the "circumstances of the Act's passage belie[d] an intent to contract away" the Government's "pervasive" regulation of the freight railroads, which historically included requiring them to undertake such passenger rail service obligations. *Id.* The Court remarked that Congress would not have "nonchalantly shed" its prior "pervasive" regulatory powers and that "the railroads had no legitimate expectation" that Congress would be contractually bound. *Id*. at 468-69.

Here, unlike the historical, pervasive regulation of the freight railroads which previously had required them to undertake rail passenger service obligations, the newly-created ACA exchange markets were unprecedented, uncertain and risky—there had been no prior, longstanding regulatory regime requiring insurers to provide health coverage to existing (much less new) members on the ACA exchanges. *See King*, 135 S. Ct. at 2485; *cf. Nat'l R.R.*

Passenger Corp., 470 U.S. at 468. Moreover, unlike the freight railroads, the health insurers had a "legitimate expectation" that Congress would be bound to honor its "shall make" obligation to make advance monthly CSR payments to insurers selling QHPs on the ACA exchanges that, correspondingly, were bound to "reduce" their eligible customer's out-of-pocket health care costs under 42 U.S.C. § 18071(a). *Cf. Nat'l R.R. Passenger Corp.*, 470 U.S at 469.

Further, unlike the "profoundly inequitable bargain" that Congress would have made by promising to lift the freight railroads' passenger rail service obligations, *Nat'l R.R. Passenger Corp.* at 468, the Government without question received valuable consideration from insurers participating on the ACA exchanges, which were "[c]entral to" the ACA's infrastructure and furthered the ACA's stated goals of expanding healthcare coverage to millions of new and previously uninsured Americans. *Moda*, 130 Fed. Cl. at 441-42, 465. 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. For these reasons, the Federal Circuit's holding and analysis on the implied-in-fact contract claim in *Moda* did not follow controlling precedent, was flawed and should not be followed.[6]

B. <u>There Was Mutuality of Intent to Contract</u>

To establish the mutual intent element, BCBSND need only demonstrate "language … or

[6] Four risk corridors plaintiffs have sought hearing and/or rehearing en banc of the Federal Circuit's decision in *Moda* and *Land of Lincoln*. *See Moda Health Plan, Inc. v. United States*, No. 17-1994 (Fed. Cir.), ECF No. 89; *Land of Lincoln Mutual Health Insurance Company v. United States*, No. 17-1224 (Fed. Cir.), ECF No. 167; *Blue Cross and Blue Shield of North Carolina v. United States*, No. 17-2154 (Fed. Cir.), ECF No. 47; *Maine Community Health Options v. United States*, No. 17-2395 (Fed. Cir.), ECF No. 41. On November 6, 2018, the Federal Circuit denied the petitions for rehearing *en banc*, with two dissenting opinions. The petitions for writ of certiorari to the Supreme Court of the United States were filed on February 4, 2019.

conduct on the part of the government that allows a reasonable inference that the government intended to enter into a contract." *ARRA Energy*, 97 Fed. Cl. at 27. Such intent can be inferred from the "conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Hercules,* 516 U.S. at 424.

Here, Sections 1402, 1412 and HHS's implementing regulations established a program that promised full reimbursement in advance of BCBSND's actual costs in providing CSR discounts to its eligible customers. Like Section 1402, the controlling statute in *New York Airways* directed the Government to make payments in exchange for services provided. *See* 369 F.2d at 745 (statute directed Postmaster General to "make payments out of appropriations for the transportation of mail by aircraft of so much of the total compensation as is fixed and determined by the Board under this section"). Section 1402 did so in order to induce BCBSND's voluntary performance on the North Dakota ACA Exchange in the form of an actual undertaking. The CSR program was promissory in nature and gave HHS no discretion to decide whether or not to pay eligible QHPs who agreed to participate. Indeed, this was the only feasible way to distribute the CSR payments to eligible recipients. That is why the CSR program was structured to induce certain QHP conduct as in *Radium Mines v. United States,* 153 F. Supp. 403, 406 (Ct. Cl. 1957). 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 court concluded that "no one could have prudently engaged in" the transaction "unless he was assured of a Government market." *Id*. 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.

BCBSND has not only identified "circumstances surrounding the enactment of the ACA"—it has gone further, pointing to the core features of sections 1402 and 1412 and HHS's implementing regulations themselves, which plainly were promissory in nature and imposed enforceable obligations on the Government. *See N.Y. Airways*, 369 F.2d at 751-52 (finding offer arising out of statutory language and formation of implied-in-fact contract based on the parties' conduct indicating an intent to contract where performance "was the plaintiff's acceptance of [the statutory] offer"); *Radium Mines*, 153 F. Supp. at 405-06 (finding implied offer in "promissory" regulation designed to induce plaintiffs to purchase uranium); *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 739 n.11 (1982) (citing *Radium Mines* as example of cases "where contracts were inferred from regulations promising payment").

Moreover, as BCBSND has demonstrated, in and after 2011, the Government repeatedly manifested its intent to fully reimburse insurers for making cost-sharing reductions to encourage BCBSND's annual participation on the ACA Exchange and in the CSR program. *See, e.g.*, Compl. ¶¶ 34-35, 50-53; 78 FR 15409, 15486 (Mar. 11, 2013) (Final Rule) Compl. Ex.05 ("This approach fulfills the Secretary's obligation to make 'periodic and timely payments equal to the value of the reductions' under section 1402... We expect that this approach would not require issuers to fund the value of any cost-sharing reductions prior to reimbursement."); *id.* at 15488 ("QHP issuers will be made whole for the value of all cost-sharing reductions provided through the reconciliation process after the close of the benefit year"); 45 C.F.R. § 156.430(b)(1) (stating on March 11, 2013 that QHPs "will receive periodic advance payments" for their CSR discounts to eligible customers) (emphasis added); 79 FR 13743, 13805 (Mar. 11, 2014), Compl. Ex. 11 (Section 1402 "directs the Secretary to make periodic and timely payments to the QHP issuer equal to the value of those reductions"), Compl. Ex. 12 (February 13, 2015 CMS bulletin stating

that ACA "provides for issuers to be reimbursed for the value of those cost-sharing reductions" by the Government); CMS 2016 CSR Manual at 6 & n.8, Compl. Ex. 02 (stating on December 27, 2016 "periodic and timely payments equal to the value of [QHPs' CSR] reductions are required to be made to issuers … in advance").

In contrast to the Federal Circuit's conclusion in *Moda,* 892 F.3d at 1330, here, there unquestionably was a "quid pro quo" where, in exchange for the Government's promise to make mandatory advance CSR payments, QHPs agreed to participate in the ACA Exchanges, provide expanded coverage to previously uninsured Americans and timely provide eligible members with cost-sharing offsets to reduce their health care costs. *See Molina*, 133 Fed. Cl. at 42.

C. BCBSND Accepted The Government's Offer

BCBSND has demonstrated the Government offered to make full and timely advance CSR payments, which BCBSND accepted by becoming a QHP and performing. An offer must be manifested by conduct that indicates assent to the proposed bargain. *See Grav v. United States*, 14 Cl. Ct. 390, 393 (1988) (holding Government's offer in statute was accepted, forming implied-in-fact contract). Offer and acceptance can be found in the "conduct of the parties." *Forest Glen*, 79 Fed. Cl. at 684; *see also N.Y. Airways*, 369 F.2d at 751-52 (finding implied-in-fact-contract formed through acceptance of Government's offer arising in statute).

The Government's offer was made in the text of sections 1402 and 1412, the implementing regulations, and the Government's subsequent statements described above surrounding the implementation of the CSR program and afterward. The Government's repeated, undisputed statements before BCBSND accepted the offer assured BCBSND of the Government's intent to make full and timely advance CSR payments. *See, e.g.*, Compl. ¶¶ 48-54; *see supra* at 33; 78 FR 15409, 15488; 45 C.F.R. § 156.430(b)(1); Compl. Exs. 02, 05, 11, 12.

Those statements incentivized BCBSND to participate on the ACA Exchange. Becoming

a QHP was volitional for BCBSND, and was subject to the Government's discretion to certify BCBSND as a QHP. Only after it was awarded QHP status, and accepted the Government's offer to participate on the ACA Exchange, did BCBSND become obligated to provide CSR discounts to eligible enrollees or entitled to receive CSR payments. *See, e.g.*, Compl. ¶¶ 16; 42 U.S.C. § 18071; *N.Y. Airways*, 369 F.2d at 751. BCBSND, by engaging in preparations and incurring significant expenses to become a QHP, and then selling QHPs on the North Dakota Exchange and providing CSR discounts to eligible consumers, accepted the offer and performed. *See, e.g.*, Compl. ¶¶ 110-11.

BCBSND accepted the Government's unilateral offer through its performance, which included participating on the ACA Exchange and making CSR payments to eligible enrollees. BCBSND's "performance went beyond filling out an application form." *Moda,* 130 Fed. Cl. at 464; *see also Molina*, 133 Fed. Cl. at 42.

The Government also accepted BCBSND's services in performance of the contract requirements, knowing that BCBSND had expended resources to become a QHP and to provide mandatory CSR discounts per the Government's requirements. *See, e.g.*, Compl. ¶¶ 14-16; 42 U.S.C. §18021(a)(1) (QHPs that choose to participate must meet various requirements including providing package of "essential health benefits"). The Government's repeated advance monthly payment of CSRs to BCBSND for the 45 consecutive months from January 2014 through September 2017 further confirms the parties' meeting of the minds. *See, e.g.*, Compl. ¶¶ 35, 47, 58; CMS 2016 CSR Manual at 36, Compl. Ex. 02 ("Payments to issuers for the cost-sharing reduction component of advance payments began in January 2014."); Email from Jeffrey Grant, Director, Payment Policy and Financial Management Group, CMS, to Tony Piscione, Vice President of Actuarial, Blue Cross Blue Shield of North Dakota (June 30, 2017) (Reconciliation report showing advance CSR payments made to BCBSND for 2015 and 2016), Compl. Ex. 16;

see also Vargas v. United States, 114 Fed. Cl. 226, 233 (2014) (finding that, among other facts, government's partial payment of amount owed under written agreement could support implied-in-fact contract).

D. There Was Consideration

BCBSND sufficiently asserts consideration. Compl. ¶¶ 111-15. Defendant cannot credibly challenge that it offered consideration in the form of promised advance CSR payments to QHPs, including BCBSND, under Sections 1402 and 1412. *See Molina*, 133 Fed. Cl. at 42; *Moda*, 130 Fed. Cl. at 465. Nor can Defendant contest that in return, BCBSND developed compliant QHPs and provided such plans to consumers on the ACA Exchange in North Dakota. BCBSND also provided valuable CSR reductions to eligible North Dakota enrollees. *See Molina*, 133 Fed. Cl. at 42; *Moda*, 130 Fed. Cl. at 465. Only those QHPs, like BCBSND, that actually provided cost-sharing reductions to eligible ACA Exchange members would be entitled to receive CSR payments from the Government.

E. The HHS Secretary Had Actual Authority to Contract on The Government's Behalf

To satisfy the "actual authority" element, BCBSND must show that expressly or implicitly "the officer whose conduct is relied upon had actual authority to bind the government in contract." *Lublin Corp. v. United States*, 98 Fed. Cl. 53, 56 (2011). Such authority can be "implied actual" or "express actual" authority. *See Abraham v. United States*, 81 Fed. Cl. 178, 186 (2008). "Authority 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). Here, BCBSND has demonstrated that an authorized Government agent entered into or ratified an implied-in-fact contract relating to the risk corridors CSR payments.

The HHS Secretary had actual authority to contract on the Government's behalf

regarding the CSR program, as evidenced by Section 1402's instruction that the Secretary "shall establish" the program and "shall make" CSR payments, along with the Secretary's broad obligation to administer and implement the ACA.[7] *See Molina*, 133 Fed. Cl. at 42-43 ("the Secretary of HHS has actual authority to contract on the Government's behalf"). Section 1402 explicitly authorized the Secretary to make CSR payments to QHPs. *Id.*; 42 U.S.C. § 18071(c)(3)(A); *see also United States v. Winstar Corp.*, 518 U.S. 839, 890 n.36 (1996) ("The authority of the executive to use contracts in carrying out authorized programs is . . . generally assumed in the absence of express statutory prohibitions or limitations."); *H. Landau & Co.*, 886 F.2d at 324; *Moda*, 130 Fed. Cl. at 465. BCBSND has demonstrated that the implied-in-fact contracts were authorized or approved by Government representatives who had actual authority to bind the Government in contract as part of their employment duties. *See, e.g.*, Compl. ¶¶ 119-20; Compl. Ex. 20 (U.S. Attorney General Sessions acknowledging that Section 1412 "authorizes the federal government to make payments directly to insurers to offset the lost revenue these [CSR] reductions cause.").

BCBSND also has demonstrated that HHS and CMS officials with authority repeatedly made statements regarding the Government's obligation to make full and timely CSR payments. *See, e.g.*, Compl. ¶¶ 48-55; Compl. Exs. 02, 05, 11, 12, 14, 16. Furthermore, BCBSND has demonstrated that Kevin Counihan, CMS's CEO of the ACA Marketplace, and his successor Randy Pate,[8] at all relevant times, ratified the terms of the contract through their acceptance of

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

[8] Mr. Pate is the current CMS Deputy Administrator and the Director of the Center for Consumer Information and Insurance Oversight. Mr. Pate "leads CMS' work on the individual and small group markets, including the Health Insurance Exchanges." CMS Leadership, Center for Consumer Information and Insurance Oversight, Randy Pate, available at: https://www.cms.gov/About-CMS/Leadership/cciio/Randy-Pate.html.

the benefits provided by BCBSND and their statements confirming the Government's obligations. *See, e.g.*, *id.*; *see also Silverman v. United States*, 679 F.2d 865, 870 (Ct. Cl. 1982) (finding Government bound if it ratifies contract even if Government official lacked authorization to enter into it). Mr. Counihan and Mr. Pate's job included overseeing the ACA Marketplace, and entering into agreements with QHPs was integral to their duties. *See* Compl. ¶ 55; Compl. Ex. 15; FAR 1.601(a) (Agency heads have contract-making authority "by virtue of their position"); *Telenor Satellite Servs. Inc. v. United States*, 71 Fed. Cl. 114, 120 (2006) (agent had implied actual authority where authority was "an integral part of the duties"). Accordingly, BCBSND has satisfied the authority element.

F. The Government Breached its Implied-In-Fact Contractual Obligations and BCBSND is Entitled to Judgment

Finally, BCBSND has demonstrated that the Government breached its implied-in-fact contractual obligations by failing to pay the mandatory advance CSR payments owed to BCBSND from October 2017 and for 2018 through the date of this filing. *See, e.g.*, Compl. ¶¶ 85-89. Accordingly, the Court should find as a matter of law that no genuine dispute of material fact exists over BCBSND's satisfaction of all the elements to establish that the Government had and breached an implied-in-fact contract with BCBSND regarding CSR payments, for which the Government is liable to BCBSND, and that BCBSND is entitled to summary judgment in its favor on Count II.

CONCLUSION

For all of the foregoing reasons, BCBSND respectfully requests that this Honorable Court grant its Motion for Partial Summary Judgment on liability as to Counts I and II for the Government's failure to comply with its statutory/regulatory (Count I) and implied-in-fact contractual (Count II) obligations to make full CSR payments owed to BCBSND for CY 2017, CY 2018, and through the date of entry of judgment.

Dated: February 11, 2019

Respectfully Submitted,

s/ Lawrence S. Sher
Lawrence S. Sher (D.C. Bar No. 430469)
REED SMITH LLP
1301 K Street NW
Suite 1000-East Tower
Washington, DC 20005
Telephone: 202.414.9200
Facsimile: 202.414.9299
Email: lsher@reedsmith.com

Of Counsel:

Conor M. Shaffer (PA Bar No. 314474)
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222
Telephone: 412.288.3131
Facsimile: 412.288.3063
Email: cshaffer@reedsmith.com

Counsel for Blue Cross Blue Shield of North Dakota

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2019, a copy of the foregoing Plaintiff's Motion for Partial Summary Judgment 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
Lawrence S. Sher
Counsel for Plaintiff