Receipt number 9998-4938932

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Raymond G. Farmer, in his capacity as Liquidator of Consumers' Choice Health Insurance Company, and Michael J. FitzGibbons, in his capacity as Special Deputy Liquidator of Consumers' Choice Health Insurance Company,	)	No. 18-18-1484 C
Plaintiffs,	)	
vs.	)	
The United States of America,	)	
Defendant.	)	

COMPLAINT

The Plaintiffs above-named, complaining of the Defendant herein, would respectfully show unto this Court as follows:

PRELIMINARY STATEMENT

The intent of the Patient Protection and Affordable Care Act ("ACA") was laudable. The ACA was to usher in health care reform aimed at improving health care quality and providing access to health insurance to those who had been previously denied (particularly those with pre-existing medical conditions), while at the same time controlling health care costs and saving billions of dollars by reforming provider payments, reducing medical errors, reducing excessive payments to insurance companies, and combatting Medicare and Medicaid fraud. *See* CMS, *Reducing Costs, Protecting Consumers: The Affordable Care Act on the One Year Anniversary of the Patient's Bill of Rights* (Sept. 23, 2011), *available at* https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/Downloads/patients-bill-of-rights09232011a.pdf. But however well-intentioned the ACA may have been, it has ultimately failed because the federal government

has refused to fund the risk mitigation programs designed to protect health insurers formed under the ACA, like Consumers' Choice Health Insurance Company ("Consumers' Choice").

Consumers' Choice, like every other health insurer formed under the ACA, depended on funding promised in the ACA because it bore the risk of providing insurance to an uninsured population with unknown health risks. However, when the federal government did not pay the funding promised in ACA, Consumers' Choice failed and was ultimately placed into liquidation in the Court of Common Pleas for South Carolina. Remarkably, and despite being the reason for Consumers' Choice's failure, due to not making its required payments to Consumers' Choice, the federal government (as both a creditor and insider of Consumers' Choice) initiated a series of improper and self-dealing set-offs designed to wrongfully elevate its priority of payment from Consumers' Choice's estate at the expense of all other creditors. Indeed, the federal government seeks repayment of its debt before the citizens of South Carolina, through the South Carolina Life and Accident and Health Insurance Guaranty Association, are repaid approximately $37 million for having to honor Consumers' Choice's obligations.

The federal government's actions should be declared wrongful and enjoined, as such actions violate the terms of the ACA and also President Trump's Executive Order entered on January 20, 2017 requiring the federal government to exercise all authority and discretion to waive and defer any provision of the ACA that would impose a fiscal burden on any State. In the absence of monetary relief to compensate Consumers' Choice for the amounts wrongfully withheld by the federal government and/or declaratory and injunctive relief requiring the Government to comply with state and federal law and this Executive Order, the costs of Consumers' Choice's insolvency have now been shouldered by the taxpayers of South Carolina.

THE PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Raymond G. Farmer ("Liquidator") is the Director of the South Carolina Department of Insurance and is the Liquidator of Consumers' Choice appointed by the Richland County Court of Common Pleas, in the matter captioned as *Raymond G. Farmer, as Director of the South Carolina Department of Insurance vs. Consumers' Choice Health Insurance Company* (Civil Action Number 2016-CP-40-00034). Mr. Farmer brings this suit in his capacity as the court-appointed Liquidator.

2. Plaintiff Michael J. FitzGibbons is the Special Deputy Liquidator ("Special Deputy Liquidator") of Consumers' Choice appointed by the Richland County Court of Common Pleas, in the matter captioned as *Raymond G. Farmer, as Director of the South Carolina Department of Insurance vs. Consumers' Choice Health Insurance Company* (Civil Action Number 2016-CP-40-00034). Mr. FitzGibbons brings this suit in his capacity as the court-appointed Special Deputy Liquidator. The Liquidator and the Special Deputy Liquidator are collectively referred to as the "Plaintiffs."

3. The United States of America ("United States") is a Defendant in this matter. The Department of Health and Human Services ("HHS") and the Centers for Medicare & Medicaid Services ("CMS") are agencies of the federal government of the United States. The United States, HHS, and CMS are collectively referred to as the "Government."

4. This Court has subject matter jurisdiction over this matter pursuant to the Tucker Act, 28 U.S.C. § 1491, because the Plaintiffs bring claims for damages over $10,000 against the United States founded upon the Government's violations of a money-mandating Act of Congress, a money-mandating regulation of an executive department, an express contract and/or implied-in-

fact contract with the United States, and a taking of Consumers' Choice's property in violation of the Fifth Amendment of the United States Constitution.

5. The actions and/or decisions of the Government at issue in this lawsuit were conducted on behalf of the Government within the District of Columbia.

FACTUAL BACKGROUND

I. Congress authorized and HHS established various programs and mechanisms pursuant to the ACA to facilitate the formation, operation, and funding of insurers like Consumers' Choice.

A. The Establishment of CO-OPs.

6. On March 23, 2010, President Obama signed the ACA into law.

7. In the ACA, Congress authorized the creation of various programs to facilitate the formation, operation, and funding of insurers such as Consumers' Choice. These new health insurance marketplaces, or exchanges, offered consumers organized platforms to shop for coverage with specified benefit levels.

8. To offer plans on the exchanges, the ACA required that an insurer certify that its plans are "qualified health plans" ("QHPs") that meet certain federally-mandated criteria.

9. In order to promote competition within the exchanges and to provide consumers with greater choices among QHPs, the ACA established the Consumer Operated and Oriented Plan ("CO-OP") program, which authorized the creation of nonprofit health insurance issuers to offer QHPs to individuals and small groups. Further, the ACA directed HHS/CMS to establish and operate the CO-OP program. *See* 42 U.S.C. § 18042(a)(1)–(2).

B. Funding for CO-OPs.

10. The ACA also authorized two loan types "to persons applying to become qualified nonprofit health insurance issuers" under the CO-OP program:

a) Start-up loans "to provide assistance to such person in meeting its start-up costs;" and

b) Solvency loans "to provide assistance to such person in meeting any solvency requirements of States in which the person seeks to be licensed to issue qualified health plans."

42 U.S.C. § 18042(b)(1).

C. Risk Mitigation for CO-OPs (the "3Rs").

11. In addition, the ACA created three federal risk mitigation programs in which CO-OPs and other qualified insurers could participate: a temporary Reinsurance program, a permanent Risk Adjustment program, and a temporary Risk Corridor program. Due to the volatility and the uncertainty associated with insuring a previously uninsured population with unknown health risks, these programs were critical to the viability of the CO-OPs and necessary so as to persuade QHPs to participate in the healthcare exchanges.

12. These programs, colloquially referred to as the "3Rs," are integral to the ACA and directly benefit the federal government. The Reinsurance and Risk Corridor programs operate only during the first three years of full implementation of the ACA, *i.e.*, 2014 to 2016.

13. Without the 3Rs, the risks associated with the ACA roll-out (*i.e.*, enrollment of the previously uninsured population with unknown health risks and pent up demand for services) would have necessitated higher premiums and shifted costs to insureds to protect against risk. The 3Rs were intended to allow insurers to offer quality, affordable plans, despite the uncertainty, because the 3Rs protected against those risks. As explained by CMS, the "overall goal" of the three programs "is to provide certainty and protect against adverse selection in the market while stabilizing premiums in the individual and small group markets as market reforms and [sic]

Exchange begin in 2014." CMS, *Reinsurance, Risk Corridors, and Risk Adjustment Final Rule* (Mar. 2012), *available at* https://www.cms.gov/cciio/resources/files/downloads/3rs-final-rule.pdf.

14. This suit involves the Reinsurance program.[1]

i. Reinsurance.

15. The first of the 3Rs—the federal Reinsurance program—is established in Section 1341 of the ACA (codified at 42 U.S.C. § 18061) and is intended to stabilize individual market premiums during the early years of the ACA's new market reforms.

16. The ACA gives states the option to operate their own reinsurance program or to allow HHS to run one for the State. South Carolina—like nearly every other state—has elected for HHS to operate the Reinsurance program.

17. Under the Reinsurance program, HHS collects all reinsurance contributions, and eligible insurance plans receive Reinsurance payments when the plan's cost for an enrollee crosses a threshold called an "attachment point," which is a dollar amount of insurer costs, above which the insurer is eligible for Reinsurance payments. HHS set the attachment point at $45,000 in 2014 and 2015, and at $90,000 for the 2016 benefit year. The coinsurance rate approximated 50%. HHS also set a reinsurance cap (a dollar-amount threshold, above which the insurer is no longer eligible for reinsurance) at $250,000 in 2014, 2015, and 2016.

[1] On March 17, 2017, the Plaintiffs filed a complaint against the United States of America in this Court (Civil Action No. 17-363C) based on the Government's failure to pay Consumers' Choice $92,201,709 in Risk Corridor payments due and owing. That action was stayed pending the Federal Circuit's resolution of two appeals raising similar claims. Consumers' Choice also filed suit against the United States, HHS, CMS, the Secretary of HHS, and the CMS Administrator in the District of South Carolina on April 12, 2017 seeking declaratory and injunctive relief relating to the Reinsurance program. That action was dismissed without prejudice by the District Court for lack of jurisdiction on March 16, 2018.

18. In 2014, reinsurance contributions ($9.7 billion) exceeded requests for payments ($7.9 billion) and CMS was able to pay out 100 percent of eligible claims. *See* CMS, *The Three Rs: An Overview* (Oct. 1, 2015), *available at* https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2015-Fact-sheets-items/2015-10-01.html.

19. In 2015, however, estimated reinsurance contributions ($6.5 billion) were smaller than requests for payments ($14.3 billion), and thus, CMS estimated that it would make only $7.8 billion in Reinsurance payments to 497 of the 575 participating issuers nationwide. *See* CMS, *Summary Report on Transitional Reinsurance Payments and Permanent Risk Adjustment Transfers for the 2015 Benefit Year* at 2, 10 (June 30, 2016), *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/June-30-2016-RA-and-RI-Summary-Report-5CR-063016.pdf.

20. For the 2015 benefit year, Consumers' Choice is eligible to receive a Reinsurance payment of $36,976,345.

21. Congress did not impose any financial limits or restraints on the government's mandatory Reinsurance payments in Section 18061 or any other section of the ACA.

22. Congress did not in any way limit the Secretary of HHS' obligation to make full Reinsurance payments due to appropriations, restrictions on the use of funds, or otherwise in either Section 18061 or anywhere else in the ACA.

23. Congress has not amended or repealed Section 18061 since its enactment.

24. Accordingly, the Government lacks statutory authority to pay anything less than 100% of the Reinsurance payments due to Consumers' Choice, and is legally obligated to make full payment.

ii. Risk Adjustment.

25. The second of the 3Rs—the Risk Adjustment program—is established in Section 1343 of the ACA (codified at 42 U.S.C. § 18063) and aims to protect consumer access to coverage options by "reducing the incentive for insurance companies to seek only to insure healthy individuals," and is supposed to collect funds from and distribute funds to insurers based on the actuarial risk (*i.e.*, the relative health or sickness) of their enrollees. *See* CMS, *The Three Rs: An Overview* (Oct. 1, 2015), *available at* https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2015-Fact-sheets-items/2015-10-01.html. The Risk Adjustment program attempts to "level the playing field" between insurers, normalizing the negative cost impact of member health status, or, in other words, preventing carriers from making or losing money solely because they draw healthier or sicker enrollees.

26. The Risk Adjustment program shares a similar goal with the Reinsurance program discussed above, namely to encourage and facilitate insurers' offering of affordable health insurance to high risk individuals. Reinsurance, however, differs from Risk Adjustment in several ways:

a) Reinsurance is a temporary, transitional program in place only from 2014 to 2016, whereas the Risk Adjustment program is permanent;

b) Reinsurance payments are only made to individual market plans that are subject to new market rules (*e.g.*, guaranteed issue), whereas Risk Adjustment payments are made to both individual and small group plans;

c) Reinsurance payments are based on actual costs, whereas Risk Adjustment payments are based on an actuarial estimate of expected costs, and thus

Reinsurance payments will also account for low-risk individuals who may have unexpectedly high costs;

d) While risk adjustment payments net to zero within the individual and small group markets, Reinsurance payments represent a net flow of dollars into the individual market, in effect subsidizing premiums in that market for a period of time.

27. In 42 U.S.C. § 18063(a), Congress set forth the requirements of the Risk Adjustment program: each state (or HHS acting in their stead) must (1) "assess a charge on health plans and health insurance issuers . . . if the actuarial risk of the enrollees of such plans or coverage for a year is less than the average actuarial risk of all enrollees in all plans or coverage in such State for such year" and (2) "provide a payment to health plans and health insurance issuers . . . if the actuarial risk of the enrollees of such plans or coverage for a year is greater than the average actuarial risk of all enrollees in all plans and coverage in such State for such year."

28. The ACA tasks the Secretary of HHS with establishing the "criteria and methods" for the risk adjustment program. *Id.* § 18063(b). The Secretary has delegated this authority to CMS.

29. The method developed by CMS bases Risk Adjustment assessments and payments on "risk scores" ascribed to a plan's membership base. Members' risk scores are intended to reflect their anticipated health care claims costs based on their age, gender, and medical diagnoses. An individual with more complex medical needs (and, presumably, higher health costs) should be ascribed a higher risk score. A membership base's risk score is then compared with the average risk score within the relevant state and market. The government then calculates Risk Adjustment payments and assessments based on these relative risk scores. Insurers with higher risk (sicker) individuals should receive Risk Adjustment payments, and insurers with lower risk (healthier)

members should make payments. *See* 45 C.F.R. § 153.320; 78 Fed. Reg. 15,410 at 15,419-52 (March 11, 2013).

iii. Risk Corridor.

30. The third of the 3Rs—the Risk Corridor program—is established in Section 1342 of the Affordable Care Act (codified as 42 U.S.C. § 18062) and is intended to level the playing field for issuers and to protect insurers from loss risks associated with the launch of the ACA by mitigating the pricing risk that issuers faced because they had very limited data to use to estimate who would enroll in plans operating under the ACA rules and what their health costs would be.

31. Congress mandated that "[t]he Secretary shall establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums." 42 U.S.C. § 18062(a).

32. Congress required the ACA Risk Corridors established pursuant to Section 18062 be modeled after a similar program implemented as part of the Medicare Part D prescription drug benefit program that was signed into law by President George W. Bush. *Id.* (mandating that the Risk Corridors "program shall be based on the program for regional participating provider organizations under part D of title XVIII of the Social Security Act").

33. The Risk Corridor program is designed to limit insurer gains and losses. Under the program, a participating plan either (1) must pay to the Secretary of HHS certain sums if the plan's costs are less than a "target amount" of premium revenues or (2) the "Secretary *shall* pay to the plan" certain sums if the plan's costs are greater than a certain percentage of the "target amount"

of premium revenues. *Id*. § 18062(b) (emphasis added); *see also* 45 C.F.R. § 153.510 (setting out the formula by which the sums and target amounts are calculated).

34. Accordingly, the Government's obligation to pay Risk Corridor payments are mandatory.

35. Congress did not impose any financial limits or restraints on the government's mandatory Risk Corridor payments to QHPs in Section 18062 or any other section of the ACA.

36. Congress did not in any way limit the Secretary of HHS' obligation to make full Risk Corridor payments to QHPs due to appropriations, restrictions on the use of funds, or otherwise in either Section 18062 or anywhere else in the ACA.

37. Congress has not amended or repealed Section 18062 since its enactment.

38. Accordingly, the Government lacks statutory authority to pay anything less than 100% of the Risk Corridor payments due to Consumers' Choice, and is legally obligated to make full payment.

39. CMS issued implementing regulations related to the Risk Corridor program containing the same mandatory language and the same mathematical formulas found in Section 18062. *See* 45 C.F.R. § 153.510.

40. The regulation implementing the Risk Corridor program imposed a 30-day deadline for a QHP to fully remit payments due to HHS under the Risk Corridor program. *See* 45 C.F.R. § 153.510(d).

41. Although the regulation does not contain an express deadline for HHS to tender full Risk Corridor payments to QHPs, during the proposed rulemaking that ultimately resulted in adoption of the 30-day deadline for QHPs to make payments, CMS and HHS stated the deadline

for the government to make Risk Corridor payments to QHPs "should be the same" as the QHP's 30-day deadline. *See* 76 FR 41929, 41943 (July 15, 2011); 77 FR 17219, 17238 (Mar. 23, 2012).

42. Nothing in 45 C.F.R. Part 153 limits CMS's obligation to pay promptly to QHPs the full amount of Risk Corridor payments due based on appropriations, restrictions on the use of funds, or otherwise.

43. Indeed, when HHS implemented a final rule regarding HHS Notice of Benefit and Payment Parameters for 2014, HHS confirmed, "The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." 78 FR 15409, 15473 (Mar. 11, 2013).

II. Consumers' Choice is formed as a South Carolina insurer, receives federal funding under the ACA to operate as a CO-OP, and participates in the 3Rs.

44. Consumers' Choice was one of 23 CO-OPs created under the ACA and was certified by CMS as a QHP to participate on the ACA exchanges.

45. It was organized under South Carolina law as a non-profit mutual benefit corporation, effective August 25, 2011, and its home office was 301 University Ridge, Suite 5050, Greenville, SC 29601.

46. Consumers' Choice applied for federal funding to operate as a CO-OP, and in early 2012, HHS/CMS approved Consumers' Choice's business plan and application to operate as a QHP, and authorized federal funding to Consumers' Choice to operate as a CO-OP as defined in 42 U.S.C. § 18042(a)(1)–(2).

47. On March 27, 2012, HHS/CMS and Consumers' Choice closed on a Loan Agreement (**Exhibit A**) that included Promissory Notes for a Start-up Loan to Consumers' Choice in the amount

of $18,709,800 ("Start-up Loan") and Solvency Loans to Consumers' Choice in the amount of $68,868,408 ("Solvency Loan").

48. Consumers' Choice received the Start-up Loan and Solvency Loan from HHS/CMS pursuant to 42 U.S.C. § 18042(b)(a)(A)–(B) and the Loan Agreement.

49. Although Consumers' Choice received funding and was subject to the CO-OP program, it received its certificate of authority from the South Carolina Department of Insurance on May 2, 2013 and began operating as a non-profit mutual benefit corporation under South Carolina law.

50. On September 11, 2013, Consumers' Choice and CMS entered into a Qualified Health Care Plan Issuer Agreement regarding Consumers' Choice's provision of insurance in calendar year ("CY") 2014 and the payment of various amounts between Consumers' Choice and CMS. *See* 2014 Qualified Health Care Plan Issuer Agreement (the "2014 QHP Agreement," *see* **Exhibit B**).

51. Consumers' Choice first offered health insurance plans to individuals and groups during the "open enrollment" period beginning on October 1, 2013, for health insurance coverage effective January 1, 2014.

52. On October 28, 2014, pursuant to § III.B of the 2014 QHP Agreement, Consumers' Choice and CMS renewed its QHP Agreement to extend through CY 2015 (the "2015 QHP Agreement," *see* **Exhibit C**).

53. As of October 2015, Consumers' Choice had approximately 67,000 participating members.

54. Over the course of its operations, Consumers' Choice participated in and upheld its obligations under the ACA's Reinsurance, Risk Adjustment, and Risk Corridor programs.

III. Consumers' Choice experiences financial distress and is placed into rehabilitation and then into liquidation pursuant to South Carolina law.

A. Consumers' Choice experiences financial distress.

55. On or about October 1, 2015, Consumers' Choice was informed by CMS that it would receive only 12.6% of the Risk Corridor payments that it was scheduled to receive for 2014. These payments were to be made in full in 2015. CMS represented to Consumers' Choice that the remaining 87.4% would be paid in subsequent years based on collections and funding.

56. CMS later informed the South Carolina Department of Insurance that Consumers' Choice would not receive any of the remaining risk corridor payments owed for 2014. This resulted in Consumers' Choice having to non-admit the promised full risk corridor payment because it was no longer qualified as an admitted asset and is required by statutory accounting principles to be non-admitted. Consequently, Consumers' Choice risk-based capital ("RBC") ratio dropped from 877% as of December 31, 2014 to an amount at or below the regulatory action level.

57. Without the Risk Corridor payments, Consumer' Choice's pro forma projections indicated that it would be in a hazardous financial condition without additional federal financial support or a significant capital infusion.

58. On October 20, 2015, CMS advised that any additional federal funds to Consumers' Choice would be extremely unlikely. Without the Government's promised funds, Consumers' Choice's premium structure would not be sufficient to support its ongoing operation.

B. South Carolina law governs rehabilitation, liquidation, and priority of distributions of an insolvent insurer.

59. Nothing in the ACA altered the primacy of state law regarding the liquidation of an insolvent insurer. In contrast, the ACA and its implementing regulations reflect Congress' intent

to preserve state regulation of health insurer solvency requirements and proceedings relating to financially distressed or insolvent insurers.

60. Although Congress authorized and appropriated billions of dollars to fund the start-up and solvency funding needed by the CO-OPs (thus making the federal government the predominant creditor in a CO-OP's insolvency), the ACA includes an express provision, under a clause titled "No interference with State regulatory authority," which states: "Nothing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title." 42 U.S.C. § 18041(d).

61. Further, Congress directed the Secretary of HHS to promulgate regulations "with respect to the repayment of [loans to CO-OPs] *in a manner that is consistent with State solvency regulations and other similar State laws* that may apply." 42 U.S.C. § 18042(b)(3) (emphasis added).

62. The ACA provided that "[i]n promulgating such regulations, the Secretary shall provide that such loans shall be repaid within 5 years and such grants shall be repaid within 15 years, *taking into consideration any appropriate State reserve requirements, solvency regulations, and requisite surplus note arrangements* that must be constructed in a State to provide for such repayment prior to awarding such loans and grants." *Id.* (emphasis added).

63. In July 2011, CMS published proposed regulations implementing the ACA and noted that insurer liquidation is typically handled under state law rather than federal law, stating as follows:

> State law establishes a variety of required regulatory actions if an insurer's RBC [risk based capital] falls below established levels or percent of RBC. *These regulatory interventions can range from a corrective action plan to liquidation of the insurer if it is insolvent. Solvency and the financial health of insurers is historically a State-regulated function.*

Proposed Rules, 45 C.F.R. Part 156, 76 FR 43237-01 (July 20, 2011) (emphasis added).

64. There were several comments submitted in response to proposed regulations regarding plans to avert insolvency, and HHS/CMS responded by noting: “In the potential case of insurer financial distress, a CO-OP follows the same process as traditional issuers and must comply with all applicable State laws and regulations.” *See* Final Rules, Responses and Comments, 45 C.F.R. 156, E.6 and F (Dec. 13, 2011).

65. In the final regulation, HHS/CMS addressed the comments only by including ways to “reduc[e] the risk of insolvency.” HHS/CMS stated that “[m]ost of those who have expressed interest in the program are . . . likely to be viable because of their private support, healthcare experience, and business expertise.” *Id.* at Section F, “Alternatives Considered.”

66. Thus, the implementing regulations attempted only to “reduce the risk of insolvency,” but made no attempt to regulate the process of liquidation of an insolvent insurer, which was left to the states.

67. By recognizing and preserving the states’ jurisdiction over any insolvency proceeding, the federal government, as the largest investor in the CO-OPs, consented to application of state law in relation to all aspects of the liquidation, including priority of claimants.

68. Further, Congress did not express any intent, express or implied, to preempt state regulation of insurer insolvency, including in relation to the CO-OPs, nor could Congress have done so. *See United States v. Fabe*, 508 U.S. 491 (1993) (holding an Ohio statute that gave policyholders priority over the claims of the federal government was exempt from preemption).

69. Accordingly, pursuant to S.C. Code Ann. § 38-27-40, Consumers’ Choice is subject to the South Carolina Insurers Rehabilitation and Liquidation Act (hereinafter the “Liquidation Act”), found in Title 38, Chapter 27 of the South Carolina Code.

70. In South Carolina, the Liquidation Act expressly sets out the priorities of distributions of claims from the insurers' estate. *See* S.C. Code Ann. § 38-27-610.

71. Under S.C. Code Ann. § 38-27-610, the guarantee association payments, which are policyholder level claims, are recognized as higher priority claims than claims asserted by the Government.

72. Additionally, under S.C. Code Ann. § 38-27-510, the amount recoverable by the Liquidator from reinsurers may not be reduced as a result of delinquency proceedings.

73. Under S.C. Code Ann. § 38-27-470(a), any transfer of an insolvent insurer's property to a creditor is a voidable preference if (i) the effect of the transfer is to allow the creditor to obtain more of the insurer's assets than the creditor would otherwise be entitled to under the Liquidation Act, (ii) the transfer occurs within one year before the filing of the successful petition for rehabilitation or within two years before the filing of the successful petition for liquidation (whichever time is shorter), and (iii) at the time of the transfer the insurer was insolvent or the creditor had reasonable cause to believe the insurer was insolvent or would soon be insolvent.

C. Consumers' Choice reorganization and liquidation in the South Carolina state court under the Liquidation Act.

74. On October 21, 2015, Raymond G. Farmer, as Director of the South Carolina Department of Insurance, and Consumers' Choice entered into a consent order placing Consumers' Choice into supervision.

75. On October 22, 2015, Consumers' Choice agreed to wind down its operations.

76. On January 6, 2016, the Consumers' Choice's Board of Directors consented to a rehabilitation of its business.

77. On January 8, 2016, the Richland County Court of Common Pleas, acting pursuant to the Liquidation Act, entered an order placing Consumers' Choice into rehabilitation

("Rehabilitation Order"). The Rehabilitation Order contained a "Notice of Automatic Stay," which among things, and pursuant to S.C. Code Ann. §§ 38-27-70(a)(4) and (11) prevented "waste of the insurer's assets" and "any other threatened or contemplated action that might lessen the value of the insurer's assets."

78. The subsequent efforts of Plaintiffs Farmer and FitzGibbons to rehabilitate Consumers' Choice proved futile, and ultimately they filed a petition and supporting affidavit with the Richland Court of Common Pleas describing their efforts, seeking an order of liquidation, and confirming that further attempts to rehabilitate Consumers' Choice substantially increased the risk of loss to creditors, policyholders, or the public.

79. On March 28, 2016, the Richland County Court of Common Pleas, again acting pursuant to the Liquidation Act, filed an order placing Consumers' Choice into liquidation (the "Liquidation Order").

80. The Liquidation Order stated, among other things, that the Liquidator and his designees were authorized to institute suits and other legal proceedings and to collect all debts and monies due and claims belonging to Consumers' Choice.

81. The Liquidation Order also provided as follows:

> 5. PURSUANT TO S.C. Code Ann. §§ 38-27-70 & -430 (2015) and the Rehabilitation Order, Notice is hereby given that the permanent automatic stay and injunction applicable to all persons and proceedings, other than the Receiver, shall remain in full force and effect and survive entry of this Order.

82. S.C. Code Ann. § 38-27-70(a)(4) and (11) prevent "waste of the insurer's assets" and "any other threatened or contemplated action that might lessen the value of the insurer's assets."

IV. The Government's failure to pay amounts owed to Consumers' Choice under the Reinsurance program.

83. Under the ACA and HHS's implementing regulations, Consumers' Choice is owed $36,976,345 under the Reinsurance program for the 2015 policy year.

84. Despite its statutory mandate and assurance to pay 100% of this payment, HHS/CMS has failed to pay the amounts it owes to Consumers' Choice for the 2015 policy year.

85. Indeed, despite being owed $36,976,345 under the Reinsurance program for policy year 2015, Consumers' Choice has been paid $0.

86. In the Spring of 2016, shortly after Consumers' Choice was placed in rehabilitation and then liquidation, CMS made early Reinsurance payments to other insurers for the 2015 policy year. *See* CMS, *Summary Report on Transitional Reinsurance Payments and Permanent Risk Adjustment Transfers for the 2015 Benefit Year* at 9–10 (June 30, 2016) (noting that "CMS made early reinsurance payments for the 2015 benefit year to 483 insurers in March and April, 2016" at a 55.1% coinsurance rate), *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/June-30-2016-RA-and-RI-Summary-Report-5CR-063016.pdf. Consumers' Choice, however, received no such early Reinsurance payment.

87. As of June 30, 2016, CMS estimated that "$7.8 billion in reinsurance payments will be made to 497 issuers" for the 2015 policy year. *Id*. at 2. Consumers' Choice, however, which had been placed in liquidation, received $0 in Reinsurance payments for the 2015 policy year.

A. The Government has placed an improper administrative hold on and reduction of payments owed to Consumers' Choice.

88. On March 8, 2016, Consumers' Choice received a letter from CMS stating CMS had placed an administrative hold on amounts payable to Consumers' Choice. The amounts in

question included $30.6 million owed to Consumers' Choice under the Reinsurance program at that time.

89. Further, HHS/CMS has repeatedly, and unilaterally, held or reduced payments owed to Consumers' Choice based on debts that HHS/CMS claims Consumers' Choice owes to HHS/CMS. For instance, by letter dated August 11, 2016, CMS unilaterally and without notice advised Consumers' Choice that it had offset approximately $21.7 million of Reinsurance balances due Consumers' Choice against balances alleged to be due CMS by Consumers' Choice of $15.1 million in Risk Adjustments, $4.7 million in cost-sharing reduction amounts and approximately $2.0 million in other balances. Similarly, by letter dated September 29, 2016, CMS advised Consumers' Choice that it had offset another $11 million of Reinsurance due Consumers' Choice by CMS by amounts alleged to be owed CMS by Consumers' Choice on the Start-up loan. By doing so, CMS effectively leapt over CCHIC's higher-priority creditors (such as the South Carolina Life and Accident and Health Insurance Guarantee Association ["SCGA"]) to collect loan payments that were expressly subordinated to claims of the SCGA and others. *See* ¶ 92, *infra*. By letter dated January 19, 2017, CMS advised Consumers' Choice that it had offset another approximately $2.2 million of Reinsurance and Risk Corridor balances due Consumers' Choice against balances alleged to be due CMS by Consumers' Choice of approximately $1.4 million on the Start-up Loan and approximately $745,000 in other balances. Finally, by letter dated March 31, 2017, CMS advised Consumers' Choice it had offset another approximately $2.3 million of Reinsurance balances due to Consumers' Choice against balances alleged to be due CMS by Consumers' Choice of that amount on the Start-Up Loan.

90. This administrative hold and any attempts by HHS or CMS to offset amounts owed to and from Consumers' Choice are contrary to the ACA, state law, the Liquidation Order, and the Loan Agreement.

91. Any administrative hold or set-off by HHS/CMS or any other federal agency is improper because Consumers' Choice is owed more than all of the claimed debts even allegedly subject to set-off.

92. Further, set-off by the Government against Consumers' Choice is not legal as it pertains to the Start Up Loan. The Government explicitly agreed to subordinate itself to policyholders claims in the event of insolvency.[2] Despite this clear "subordination," CMS has unilaterally used $18.7 million of the $37 million in Reinsurance proceeds to pay in full the Start Up loan. This was accomplished by CMS applying impermissible set offs.

93. As discussed above, the contractual and statutory prioritization of policyholder claims above loan repayments is not limited to cash payments, but also applies to any set-off.

94. In addition, set-off for amounts owed under the Start-up Loan is not authorized by the ACA "netting" regulation, 45 C.F.R. § 156.1215, which does not list the Start-up or Solvency

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[2] The Loan Agreement expressly recognizes that HHS' claim for repayment of the loan amounts is subordinate to the claims of policyholders, the SCGA and other claimants, stating in part:

> 3.4. Security for the Loans
>
> The Loans and other Obligations will be general obligations of Borrower. Because the intent of the Loans, and the Solvency Loan in particular, is to provide financing to Borrower that meets the definition of "risk based capital" for State Insurance Laws purposes, *the Loans will have a claim on cash flow and reserves of Borrower that is subordinate to* (a) *claims payments*, (b) *Basic Operating Expenses, and* (c) *maintenance of required reserve funds while Borrower is operating as a CO-OP under State Insurance Laws*.

Exhibit A (emphasis added).

Loans among the categories of debts that may potentially be netted on payments to qualified health plans.

95. Furthermore, the Start-up and Solvency Loans to Consumers' Choice are, in effect, capital contributions rather than loans. The loans were essential for the creation and implementation of the CO-OP program. Consumers' Choice would have never existed but for enactment of the ACA and the Congressional authorization for the Start-up Loans and Solvency Loans, and the timing of the Loan Agreement suggests that the transaction was nothing more than a capital contribution. As capital contributions, these amounts are not debt and therefore not subject to set-off against Consumers' Choice.

96. In addition, the Government's set-off, administrative holds, and withholding of Reinsurance amounts owed to Consumers' Choice amounts to an impermissible preference in violation of S.C. Code Ann. § 38-27-470.

97. Finally, under the Liquidation Act, S.C. Code Ann. § 38-27-510, the Government, acting as a reinsurer, was not entitled to reduce the amounts recoverable by the Liquidator due to the delinquency (*i.e.*, the rehabilitation and liquidation) proceedings. The Government effected such a reduction through the setoffs and administrative holds described above, setting off all $37 million due to Consumers Choice against alleged obligations owed to the Government, and leaving $0 in Reinsurance amounts to be recovered by the Liquidator. The amounts Consumers' Choice owed to the Government as a result of the liquidation formed the basis of the Government's withholding of Reinsurance payments to Consumers' Choice. This was improper under the Liquidation Act.

FOR A FIRST CAUSE OF ACTION
(Violation of Federal Statute or Regulation: Failure to Make Mandatory Reinsurance Payments Owed to Consumers' Choice)

98. To the extent not inconsistent herewith, each and every allegation in the above-numbered paragraphs is repeated and incorporated herein as if stated verbatim.

99. ACA section 1341, codified at 42 U.S.C. § 18061, mandates the States—or, as here, HHS—make payments to eligible issuers in accordance with the criteria set forth in the statute and its implementing regulations.

100. HHS's and CMS's implementing regulation, 45 C.F.R. § 153.235(a), also mandates compensation, expressly stating HHS "will distribute" Reinsurance payments to issuers in accordance with the payment formulas and criteria set forth in the regulations.

101. Consumers' Choice was a QHP in CY 2015, and was qualified for and entitled to receive mandated Reinsurance payments from the Government for the 2015 policy year.

102. Consumers' Choice is entitled under 42 U.S.C. § 18061 and 45 C.F.R. §§ 153.153.200–153.270 to recover full and timely mandated Reinsurance payments from the Government for the 2015 policy year.

103. For the 2015 policy year, Consumers' Choice is eligible to receive a Reinsurance payment of $36,976,345.

104. The Government has failed to make full and timely Reinsurance payments to Consumers' Choice for the 2015 policy year.

105. Congress has not modified or repealed Section 1341 of the ACA, nor has Congress altered or otherwise abrogated the Government's statutory obligation created by Section 1341 to make full and timely Reinsurance payments to eligible issuers, including Consumers' Choice.

106. The Government's failure to make full and timely Reinsurance payments to Consumers' Choice for the 2015 policy year constitutes a violation and breach of the Government's mandatory payment obligations under Section 1341 of the ACA and its implementing regulations.

107. As a result of the Government's violation of Section 1341 of the ACA and its implementing regulations, Consumers' Choice has been damaged in the amount of $36,976,345 and by being forced into liquidation, together with reliance damages, interest, costs of this action, and such other relief as this Court deems just and proper.

FOR A SECOND CAUSE OF ACTION
(Violation of Federal Statute or Regulation: Exercising an Offset and Imposing an Administrative Hold in Violation of Federal and State Law)

108. To the extent not inconsistent herewith, each and every allegation in the above-numbered paragraphs is repeated and incorporated herein as if stated verbatim.

109. The Government has caused HHS and CMS to take agency actions that are not in accordance with federal law and South Carolina law governing insolvency, as applicable, namely:

a. The ACA and its implementing regulations reflect Congress' intent to preserve state regulation of health insurer solvency requirements and proceedings relating to financially distressed or insolvent insurers.

b. The Government has unilaterally held, set off, and engaged in "netting" by eliminating or reducing payments the Government has a legal obligation to pay to Consumers' Choice based on debts the Government claims Consumers' Choice owes, even though the payments due Consumers' Choice far exceed the balance of all of its debts that are arguably subject to

set-off. This is contrary to both South Carolina insolvency law and the federal netting regulation that the Government has unlawfully applied.

c. The Government's use of set off post-liquidation to repay the amounts owed under the Start Up Loan using Reinsurance balances owed to Consumers' Choice is improper under the Liquidation Act because South Carolina law permits the Government to receive payment of its claims against Consumers' Choice only after higher priority claimants had have been paid in full, *see* S.C. Code Ann. § 38-27-610.

d. The Government's payment of Reinsurance payments to other ACA insurers for the 2015 policy year but not to Consumers' Choice, which was in rehabilitation and liquidation, is improper under the Liquidation Act, S.C. Code Ann. § 38-27-510, because the Government is acting as a reinsurer as contemplated by South Carolina law, and under South Carolina law the amount recoverable by the Liquidator from the Government may not be reduced (even by way of a dollar-for-dollar setoff, as the Government did here) as a result of delinquency proceedings.

e. The Government placed an "administrative hold " on all payments that it is required by law to make to Consumers' Choice. Such hold is not authorized by any provision of state or federal law, and the Government abandoned the pretense of a "hold" as soon as CMS, acting as an insider, had redirected the $37 million in Reinsurance amounts due to Consumers' Choice back to the Government under the guise of a set off against Start Up Loan and Risk Adjustment amounts owed by Consumers' Choice.

110. The above-listed agency actions also exceed HHS/CMS's statutory jurisdiction and authority, were made without statutory right, and were without observance of procedures required by law insofar as (i) they are based on an unlawful application of federal law to the priority of claims, rather than South Carolina law as Congress intended; (ii) in the case of netting/set-off, are contrary to South Carolina law, the Liquidation Order, and the federal netting regulation which HHS/CMS claims applies but does not follow; and (iii) in the case of the administrative hold, are without any basis in law whatsoever.

111. The above-listed agency actions also violate the terms of the Executive Order as they impose a fiscal burden on the State of South Carolina.

112. All of the above-listed agency actions are final. There are no internal administrative remedies with respect to the above-listed agency actions. In the alternative, any internal administrative remedies that exist with respect to the above-listed agency actions are permissive, not mandatory, and the time to use such internal administrative remedies has expired.

113. Plaintiffs, Liquidator and the Special Deputy Liquidator of Consumers' Choice, are adversely affected and aggrieved by the above-listed agency actions insofar as the actions have interfered with the orderly liquidation of Consumers' Choice, deprived Consumers' Choice estate of needed cash liquidity, and violated the rights of Consumers' Choice's creditors most importantly the SCGA and other South Carolina policyholder claimants.

114. As a result of the Government's violation of the state and federal laws described above, Consumers' Choice has been damaged in the amount of $36,976,345 and by being forced into liquidation, together with reliance damages, interest, costs of this action, and such other relief as this Court deems just and proper.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract: Failure to Make Reinsurance Payments as Required by the QHP Agreements)

115. To the extent not inconsistent herewith, each and every allegation in the above-numbered paragraphs is repeated and incorporated herein as if stated verbatim.

116. Consumers' Choice entered into valid QHP Agreements with CMS. *See* **Exhibits B and C**.

117. The QHP Agreements were executed by representatives of the Government who had actual authority to bind the United States, and were entered into with mutual assent and consideration by both parties.

118. The QHP Agreements obligated CMS to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions." *See* **Exhibit B** at § II.d; **Exhibit C** at § III.a.

119. By agreeing to become a QHP, Consumers' Choice agreed to provide health insurance under the ACA, and to accept the obligations, responsibilities and conditions the Government imposed on QHPs under the ACA.

120. Consumers' Choice satisfied and complied with its obligations and/or conditions under the QHP Agreement.

121. The QHP Agreement provided that it "will be governed by the laws and common law of the United States of America, including without limitation such regulations as may be promulgated from time to time by the Department of Health and Human Services or any of its constituent agencies . . . ." *See* **Exhibit B** at § V.g; **Exhibit C** at § V.g.

122. Therefore, the QHP Agreement incorporated the provisions of Section 1341 of the ACA and 45 C.F.R. § 153.210 *et seq*. into the QHP Agreement.

123. The Government's statutory and regulatory obligations to make full and timely Reinsurance payments were significant factors material to Consumers' Choice's agreement to enter into the QHP Agreements.

124. The Government's failure to make full and timely Reinsurance payments to Consumers' Choice is a material breach of CMS' obligation to support Consumers' Choice's function as a QHP.

125. Congress has not altered or abrogated the Government's contractual obligation to make full and timely Reinsurance payments to Consumers' Choice.

126. The Government's breach of Section 1341 of the ACA and 45 C.F.R. § 153.210 *et seq*. by failing to make full and timely Reinsurance payments to Consumers' Choice for the 2015 policy year is a material breach of the QHP Agreements.

127. As a result of the Government's material breach by failing to make Reinsurance payments due and owing to Consumers' Choice, Consumers' Choice has been damaged in the amount of $36,976,345 and by being forced into liquidation, together with reliance damages, interest, costs of this action, and such other relief as this Court deems just and proper.

FOR A FOURTH CAUSE OF ACTION
(Breach of Contract: Exercising an Offset in Violation of the Loan Agreement's Terms)

128. To the extent not inconsistent herewith, each and every allegation in the above-numbered paragraphs is repeated and incorporated herein as if stated verbatim.

129. Consumers' Choice entered into a valid Loan Agreement with CMS. *See* **Exhibit A**.

130. The Loan Agreement was executed by representatives of the Government who had actual authority to bind the United States, and it was entered into with mutual assent and consideration by both parties.

131. The Loan Agreement expressly recognizes that HHS' claim for repayment of the loan amounts under both the Start-up Loan and the Solvency Loans is subordinate to the claims of policyholders, the SCGA and other claimants. *See* **Exhibit A** at § 3.4.

132. The Government's contractual obligation to subordinate loan payments to the claims of policyholders, the SCGA, and other claimants was a significant factor material to Consumers' Choice's agreement to enter into the Loan Agreement.

133. Prior to Liquidation, Consumers' Choice satisfied and complied with its obligations and/or conditions under the Loan Agreement.

134. HHS's Reinsurance set offs, collecting amounts it is owed by Consumers' Choice under the Loan Agreement, is impermissible under § 3.4 the Loan Agreement and is a material breach of that agreement.

135. Nowhere in the ACA or elsewhere has Congress abrogated the Government's contractual obligation to subordinate loan repayment claims to the claims of policyholders, the SCGA, and other claimants.

136. As a result of the Government's material breach of the Loan Agreement by impermissibly offsetting amounts owed to and from Consumers' Choice, and thus prioritizing the Government's claim, Consumers' Choice has been damaged in the amount of $36,976,345 and by being forced into liquidation, together with reliance damages, interest, costs of this action, and such other relief as this Court deems just and proper.

FOR A FIFTH CAUSE OF ACTION
(Breach of Implied-in-Fact Contract)

137. To the extent not inconsistent herewith, each and every allegation in the above-numbered paragraphs is repeated and incorporated herein as if stated verbatim.

138. In the alternative, Consumers' Choice entered into a valid implied-in-fact contract with the Government regarding the Government's obligation to make full and timely Reinsurance payments to Consumers' Choice in exchange for Consumers' Choice's agreement to become a QHP and participate as a CO-OP in the ACA.

139. Section 1341 of the ACA and HHS's implementing regulations were made by representatives of the Government who had actual authority to bind the United States, and constituted a clear and unambiguous offer by the Government to make full and timely Reinsurance payments to health insurers, including Consumers' Choice, that agreed to participate as an eligible issuer such as a QHP.

140. Consumers' Choice accepted the Government's offer by agreeing to become a QHP and to participate in and accept the uncertain risks imposed by the ACA.

141. By agreeing to become a QHP, Consumers' Choice agreed to provide health insurance under the ACA, and to accept the obligations, responsibilities and conditions the Government imposed on QHPs—subject to the implied covenant of good faith and fair dealing—under the ACA and, *inter alia*, 45 C.F.R. §§ 153.210 *et seq*.

142. Consumers' Choice satisfied and complied with its obligations and/or conditions which existed under the implied-in fact contracts.

143. The Government's agreement to make full and timely Reinsurance payments was a significant factor material to Consumers' Choice's agreement to enter into the QHP Agreement and to participate as a CO-OP under the ACA.

144. The parties' agreement is further confirmed by the parties' conduct, performance and statements following Consumers' Choice's acceptance of the Government's offer and the execution by the parties of the QHP Agreement expressly incorporating "the laws and common

law of the United States of America, including without limitation such regulations as may be promulgated from time to time by the Department of Health and Human Services or any of its constituent agencies," *see* **Exhibit A** at § V.g; **Exhibit B** at § V.g.

145. The implied-in-fact contracts were authorized by representatives of the Government who had actual authority to bind the United States, and were entered into with mutual assent and consideration by both parties.

146. The Reinsurance program's protection from uncertain risk and new market instability was a real benefit that significantly influenced Consumers' Choice's decision to agree to become a QHP and participate as a CO-OP under the ACA.

147. Consumers' Choice, in turn, provided a real benefit to the Government by agreeing to become a QHP and participate in the ACA, despite the uncertain financial risk.

148. Adequate insurer participation was crucial to the Government's achieving the overarching goal of the ACA: to make affordable health insurance available to individuals who previously did not have access to affordable coverage, and to help to ensure that every American has access to high-quality, affordable health care by protecting consumers from increases in premiums due to health insurer uncertainty.

149. The Government induced Consumers' Choice to participate in the ACA by including the Reinsurance program in Section 1341 of the ACA and its implementing regulations, by which Congress, HHS, and CMS committed to help protect health insurers financially against risk selection and market uncertainty.

150. The Government repeatedly acknowledged its statutory and regulatory obligations to make full and timely Reinsurance payments to qualifying issuers through its conduct and

statements to the public and to Consumers' Choice, made by representatives of the Government who had actual authority to bind the United States.

151. For the 2015 benefit year, Consumers' Choice is eligible to receive a Reinsurance payment of $36,976,345.

152. The Government has failed to make any Reinsurance payments to Consumers' Choice for the 2015 policy year. The Government instead chose to pay all but $314,000 of the Start Up Loan and all Risk Adjustment balances with Consumers' Choice's reinsurance balances.

153. Congress has not modified or repealed Section 1341 of the ACA, nor has Congress altered or otherwise abrogated the Government's implied-in-fact obligation to make full and timely Reinsurance payments to eligible issuers, including Consumers' Choice, and nowhere in the ACA or elsewhere has Congress abrogated the Government's contractual obligation to make such payments.

154. The Government's failure to make any Reinsurance payments to Consumers' Choice for the 2015 policy year is a material breach of the implied-in-fact contracts.

155. As a result of the United States' material breaches of its implied-in-fact contracts that it entered into with Consumers' Choice regarding the ACA CO-OP Program, Consumers' Choice has been damaged in the amount of $36,976,345 and by being forced into liquidation, together with reliance damages, interest, costs of this action, and such other relief as this Court deems just and proper.

FOR A SIXTH CAUSE OF ACTION
(Breach of the Implied Covenant of Good Faith and Fair Dealing)

156. To the extent not inconsistent herewith, each and every allegation in the above-numbered paragraphs is repeated and incorporated herein as if stated verbatim.

157. A covenant of good faith and fair dealing is implied in every contract, express or implied-in-fact, including those with the Government, and imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.

158. The express or, alternatively, the implied-in-fact contracts entered into between the Government and Consumers' Choice regarding the ACA CO-OPs created the reasonable expectations for Consumers' Choice that full and timely Reinsurance payments for the 2015 policy year would be paid by the Government to QHPs, just as the Government expected that full and timely Reinsurance charges would be paid by QHPs to the Government.

159. By redirecting Reinsurance payments due to Consumers' Choice to pay itself for the Start Up Loan and Risk Adjustment for the 2015 policy year, the Government destroyed Consumers' Choice's reasonable expectations regarding the fruits of the express or, alternatively, the implied-in-fact contracts, in breach of an implied covenant of good faith and fair dealing existing therein.

160. Despite the Government's failure to honor its contractual obligations, Consumers' Choice, in good faith conformance with its express or implied-in-fact contractual obligations, submitted its full and timely Reinsurance charges owed to the Government.

161. The QHP Agreement allows CMS to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions," but do not define standards for CMS's implementation of the function-supporting systems and processes.

162. Where, as here, an agreement affords CMS the power to make a discretionary decision without defined standards, the duty to act in good faith limits the Government's ability to act capriciously to contravene Consumers' Choice's reasonable contractual expectations.

163. CMS is afforded substantial discretion in determining the systems and processes that it will implement to support Consumers' Choice's functions as a QHP.

164. Congress granted HHS rulemaking authority regarding the Reinsurance program in Section 1341 of the ACA. HHS and CMS are permitted to establish remittance and payment deadlines that support QHP functions. HHS and CMS have an obligation to exercise the discretion afforded to them in good faith, and not arbitrarily, capriciously, or in bad faith.

165. The United States breached the implied covenant of good faith and fair dealing by, among other things:

(a) Requiring issuers to timely remit their Reinsurance charges to the Government, but failing to timely make the Government's full payment of Reinsurance payments to QHPs;

(b) Requiring QHPs to fully remit Reinsurance charges to the Government, but unilaterally deciding that the Government may make prorated Reinsurance payments to QHPs.

166. For the 2015 policy year, Consumers' Choice is eligible to receive a Reinsurance payment of $36,976,345.

167. The Government has failed to make full and timely Reinsurance payments to Consumers' Choice for the 2015 policy year, rather choosing itself to be the beneficiary of the Reinsurance balances due Consumers' Choice.

168. As a result of the United States' material breaches of its express and/or implied-in-fact contracts that it entered into with Consumers' Choice, Consumers' Choice has been damaged in the amount of $36,976,345 and by being forced into liquidation, together with reliance damages, interest, costs of this action, and such other relief as this Court deems just and proper.

FOR A SEVENTH CAUSE OF ACTION
(Violation of S.C. Code Ann. § 38-27-510)

169. To the extent not inconsistent herewith, each and every allegation in the above-numbered paragraphs is repeated and incorporated herein as if stated verbatim.

170. As detailed above, Consumers' Choice was placed into rehabilitation and later liquidation pursuant to the procedures outlined in the Liquidation Act.

171. As further detailed above, nothing in the ACA altered the primacy of state law regarding the liquidation of an insolvent insurer. In contrast, the ACA and its implementing regulations reflect Congress' intent to preserve state regulation of health insurer solvency requirements and proceedings relating to financially distressed or insolvent insurers.

172. The Government is acting as a reinsurer as contemplated by South Carolina law.

173. Accordingly, the amount recoverable by the Liquidator from the Government may not be reduced as a result of delinquency proceedings, including a "reduction" that takes the form of a dollar-for-dollar offset of Reinsurance amounts due to Consumers' Choice against amounts allegedly owed by Consumers' Choice, when the effect of such an offset is to entirely eliminate the $37 million in Reinsurance payments owed to Consumers' Choice by paying itself the Start Up Loan in the amount of $18.7 million, when the Government expressly subordinated this debt to those of policyholders, and by paying 100% of the Risk Adjustment balances due.

174. The Government made reinsurance payments to other ACA insurers for the 2015 policy year but made no such payments to Consumers' Choice, choosing instead to reduce the amount recoverable by the Liquidator from the Government as a result of delinquency proceedings by paying itself for the Risk Adjustment balances and the Start Up Loan, despite the fact that the loan balances were contractually subordinated to policyholders.

175. In addition, if the Government had properly paid Consumers' Choice the amounts rightfully due to it under the 3Rs programs, Consumers' Choice would have been able to meet its obligations and would not have needed to undergo rehabilitation and later liquidation.

176. Therefore, the amounts allegedly owed to the Government by Consumers' Choice arose as a direct result of Consumers' Choice's financial distress and the resulting delinquency proceedings.

177. The Government has placed an administrative hold on reinsurance payments, contending that such payments are being "netted" against debts the Government claims Consumers' Choice owes to it, contrary to S.C. Code Ann. § 38-27-510.

178. As a result of the United States' violations of the Liquidation Act, Consumers' Choice has been damaged in the amount of $36,976,345 and by being forced into liquidation, together with reliance damages, interest, costs of this action, and such other relief as this Court deems just and proper.

FOR AN EIGHTH CAUSE OF ACTION
(Violation of S.C. Code Ann. § 38-27-610)

179. To the extent not inconsistent herewith, each and every allegation in the above-numbered paragraphs is repeated and incorporated herein as if stated verbatim.

180. As detailed above, Consumers' Choice was placed into rehabilitation and later liquidation pursuant to the procedures outlined in the Liquidation Act.

181. As further detailed above, nothing in the ACA altered the primacy of state law regarding the liquidation of an insolvent insurer. In contrast, the ACA and its implementing regulations reflect Congress' intent to preserve state regulation of health insurer solvency requirements and proceedings relating to financially distressed or insolvent insurers.

182. The Government's use of administrative holds and offsetting in regard to the reinsurance payments owed to Consumers' Choice has circumvented the priority of distribution established and mandated by S.C. Code Ann. § 38-27-610.

183. As a result of the United States' violations of the Liquidation Act, Consumers' Choice has been damaged in the amount of $36,976,345 together with reliance damages, interest, costs of this action, and such other relief as this Court deems just and proper.

FOR A NINTH CAUSE OF ACTION
(Voidable insider preferences under S.C. Code Ann. § 38-27-470)

184. To the extent not inconsistent herewith, each and every allegation in the above-numbered paragraphs is repeated and incorporated herein as if stated verbatim.

185. As detailed above, Consumers' Choice was placed into rehabilitation and later liquidation pursuant to the procedures outlined in the Liquidation Act.

186. As further detailed above, nothing in the ACA altered the primacy of state law regarding the liquidation of an insolvent insurer. In contrast, the ACA and its implementing regulations reflect Congress' intent to preserve state regulation of health insurer solvency requirements and proceedings relating to financially distressed or insolvent insurers.

187. Both before and after the time Consumers' Choice was placed into rehabilitation and later liquidation, the Government was a creditor of Consumers' Choice.

188. By placing administrative holds on Reinsurance amounts owed to Consumers' Choice and then initiating a scheme offsetting the Reinsurance amounts owed to Consumers' Choice against amounts owed to the Government, the Government engaged in insider preferences made voidable by the Liquidation Act.

189. As a result of the United States' engaging in insider preference payments, Consumers' Choice and/or the Liquidator have been damaged in the amount of $36,976,345 and

by being forced into liquidation, together with reliance damages, interest, costs of this action, and such other relief as this Court deems just and proper.

FOR A TENTH CAUSE OF ACTION
(Taking Without Just Compensation in Violation of the Fifth Amendment to the U.S. Constitution)

190. To the extent not inconsistent herewith, each and every allegation in the above-numbered paragraphs is repeated and incorporated herein as if stated verbatim.

191. The Government's actions complained of herein constitute a deprivation and taking of Consumers' Choice's property for public use without just compensation, in violation of the Fifth Amendment to the U.S. Constitution.

192. Consumers' Choice has a vested property interests in its contractual, statutory, and regulatory rights to receive statutorily-mandated Reinsurance payments for the 2015 policy year. Consumers' Choice had a reasonable investment-backed expectation of receiving the full and timely Reinsurance payments for the 2015 policy year payable to it under the statutory and regulatory formula, based on its QHP Agreement, its implied-in-fact contracts with the Government, Section 1341 of the ACA, HHS's implementing regulations, and HHS's and CMS's public statements.

193. The Government expressly and deliberately interfered with and has deprived Consumers' Choice of property interests and its reasonable investment-backed expectations to receive full and timely Reinsurance payments for the 2015 policy year.

194. The Government's action in withholding, with no legitimate governmental purpose, the full and timely Reinsurance payments owed to Consumers' Choice for the 2015 policy year constitutes a deprivation and taking of Consumers' Choice's property interests and requires

payment to Consumers' Choice of just compensation under the Fifth Amendment of the U.S. Constitution.

195. Consumers' Choice is entitled to receive just compensation for the United States' taking of its property in the amount of at $36,976,345, together with reliance damages, interest, costs of this action, and such other relief as this Court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against the Defendant, the United States of America, as follows:

1. For the First Cause of Action, award damages sustained by Consumers' Choice in the amount of at least $36,976,345 as a result of the Defendant's violation of Section 1341 of the ACA and its implementing regulations regarding the Reinsurance payments owed to Consumers' Choice for the 2015 policy year.
2. Alternatively, for the Second Cause of Action, award damages sustained by Consumers' Choice in the amount of at least $36,976,345 as a result of the Defendant's violation of state and federal law by exercising an offset and imposing an administrative hold on the Reinsurance payments owed to Consumers' Choice for the 2015 policy year.
3. Alternatively, for the Third Cause of Action, award damages sustained by Consumers' Choice in the amount of at least $36,976,345 together with any losses actually sustained as a result of the Government's breach of the QHP Agreement regarding the Reinsurance payments owed to Consumers' Choice for the 2015 policy year.

4. Alternatively, for the Fourth Cause of Action, award damages sustained by Consumers' Choice in the amount of at least $36,976,345 together with any losses actually sustained as a result of the Government's breach of the Loan Agreement's subordination clause regarding the Government's payment to itself of the Start Up Loan balance of $18,709,800 by redirecting Consumers' Choice Reinsurance balances for the 2015 policy year to itself.

5. Alternatively, for the Fifth Cause of Action, award damages sustained by Consumers' Choice in the amount of at least $36,976,345 together with any losses actually sustained as a result of the Government's breach of the parties' implied-in-fact contract.

6. Alternatively, for the Sixth Cause of Action, award damages sustained by Consumers' Choice in the amount of at least $36,976,345 together with any losses actually sustained as a result of the Government's breach of the implied covenant of good faith and fair dealing in relation to the parties' express or implied-in-fact contract.

7. Alternatively, for the Seventh Cause of Action, award damages sustained by Consumers' Choice in the amount of at least $36,976,345 together with any losses actually sustained as a result of the Government's violations of the Liquidation Act through its reduction in the payment of Reinsurance amounts owed to Consumers' Choice.

8. Alternatively, for the Eighth Cause of Action, award damages sustained by Consumers' Choice in the amount of at least $36,976,345 together with any losses actually sustained as a result of the Government's violations of the Liquidation Act

through its circumvention of the priority of distribution established by that Act, particularly as it relates to the clear contractual subordination of the Start Up Loan to policyholder claims.

9. Alternatively, for the Ninth Cause of Action, award damages sustained by Consumers' Choice in the amount of at least $36,976,345 together with any losses actually sustained as a result of the Government's engaging in insider preferences that are voidable under the Liquidation Act.

10. Alternatively, for the Tenth Cause of Action, award damages sustained by Consumers' Choice in the amount of at least $36,976,345 for the Government's taking of Consumers' Choice's property without just compensation.

11. In addition to any award of damages requested above, to award reliance damages, pre- and post-judgment interest, costs of this action, attorneys' fees, and such other relief or monetary damages as this Court deems just and proper.

12. In addition to or in lieu of the award of a money judgment requested above, in the exercise of this Court's ancillary authority, issue the following injunctive relief:

    a. An injunction directing the Government to immediately fund to Consumers Choice the $18.7 million in set offs asserted against the Reinsurance balances by CMS providing for the collection of the Start Up Loan despite CMS' agreed-upon subordination, and enjoining the Government from any future attempt to impose an "administrative hold" or set-off on payments owed to Consumers' Choice.

b. An order enjoining Defendant from any attempt to net, reduce, or set off any payment owed to Consumers' Choice to account for any debt claims by Defendant.

13. Grant the Plaintiffs all such further relief as this Court deems just and proper.

Respectfully submitted,

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