IN THE UNITED STATES COURT OF FEDERAL CLAIMS

GUIDEWELL MUTUAL HOLDING CORPORATION, BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., FLORIDA HEALTH CARE PLAN, INC., AND HEALTH OPTIONS, INC.	)	Case No. 18-1791 C Judge Lydia Kay Griggsby
Plaintiffs,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Plaintiff GuideWell Mutual Holding Corporation ("GuideWell"), and its three operating subsidiaries (collectively, "Plaintiffs"), respectfully submits this Reply in support of its Motion for Summary Judgment and Opposition to Defendant's Motion to Dismiss. For the reasons stated below, the Court should find the Defendant, the United States of America ("Government"), liable under Section 1402 of the Patient Protection and Affordable Care Act ("Section 1402") and related regulations. The Court should grant Plaintiffs' motion for summary judgment, and deny the Government's motion to dismiss.

As noted in Plaintiffs' Motion for Summary Judgment, this Court held in two cases that Section 1402 created an obligation of the United States to make CSR payments and, accordingly, found the Government liable for payments owed. *See Montana Health Co-Op v. United States*, 139 Fed. Cl. 213, 218-20 (2018), *appeal docketed*, No. 19-1302 (Fed. Cir. Dec. 12, 2018); *Sanford Health Plan v. United States*, 139 Fed. Cl. 701 (2018), *appeal docketed*, No. 19-1290 (Fed. Cir. Dec. 11, 2018). In addition, since that filing, the Court has issued four more decisions holding that Section 1402 created a mandatory obligation of the Government to make CSR payments. *See Local Initiative Health Auth. v. United States*, No. 17-1542C, 2019 WL 625446 (Fed. Cl. Feb. 14, 2019) (Wheeler, J.); *Common Ground Healthcare Coop. v. United States*, No. 17-877C, 2019 WL 642892 (Fed. Cl. Feb. 15, 2019) (Sweeney, C.J.); *Maine Cmty. Health Options v. United States*, No. 17-2057C, 2019 WL 642968 (Fed. Cl. Feb. 15, 2019) (Sweeney, C.J.); *Cmty. Health Choice, Inc. v. United States*, No. 18-5C, 2019 WL 643011 (Fed. Cl. Feb. 15, 2019) (Sweeney, C.J.). Those decisions are consistent with controlling precedent, and provide useful guidance for the Court to follow in this case.

I. THE EXISTENCE OF A STATUTORY PAYMENT OBLIGATION UNDER SECTION 1402 IS A SEPARATE QUESTION FROM THE QUESTION OF WHETHER AN APPROPRIATION HAS BEEN MADE.

Section 1402 of the Affordable Care Act (ACA) requires health insurance issuers like Plaintiffs to make cost-sharing reductions to their insureds. 42 U.S.C. § 18071(a)(2) (issuers "shall reduce the cost-sharing" under the applicable plan). It also mandates that the Government make payments to health insurance issuers for these cost-sharing reductions. The statute is unambiguous:

> An issuer of a qualified health plan making reductions under this subsection shall notify the Secretary of such reductions and the ***Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions.***

42 U.S.C. § 18071(c)(3)(A) (emphasis added).

For 45 months, from January 2014 to October 2017, the U.S. Department of Health and Human Services (HHS) duly "ma[d]e periodic and timely payments" to issuers, including to Plaintiffs, "equal to the value of the reductions" that Plaintiffs provided to their insureds. In October 2017, the Attorney General opined that the agency funds from which HHS had been making Section 1402 payments for nearly four years was not a proper source of funds for that purpose. HHS, in turn, immediately ceased making the required payments, including CSR payments for the remainder of the 2017 benefit year. Plaintiffs brought this action to obtain the payments required by the statute for the plans that they had already issued and sold for 2017, as well as to obtain payments of unreconciled 2016 CSR payments and unpaid reconciled 2015 CSR payments.

In moving to dismiss, the Government argues that this is not simply a case of the Government refusing to pay what it concededly owed. Instead, the Government asserts that notwithstanding the statutory directive that the Government "shall make" the payments, it actually has *no* statutory obligation to pay because the statute did not also create or identify a specific appropriation which HHS could use to make those payments. In so arguing, the Government continues to ignore the distinction between Congress creating an obligation for which the United States is liable, and Congress appropriating money for a particular agency (in this case, HHS) to pay the obligation. The two issues are distinct, and the Government's debt to Plaintiffs does not depend on an appropriation.

The Government's position in this case is inconsistent with more than a century of precedent establishing that money-mandating statutory language creates a payment obligation, even in the absence of an appropriation to make payment. *See United States v. Langston*, 118 U.S. 389 (1886); *Collins v. United States*, 15 Ct. Cl. 22, 35 (1879). As explained in *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892):

> An appropriation *per se* merely imposes limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.

The Government's arguments are doubly untenable now in light of *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311 (Fed. Cir. 2018). In *Moda*, the Federal Circuit addressed another provision of the ACA that uses nearly identical mandatory payment language. And consistent with historic precedent, the Federal Circuit panel unanimously rejected arguments substantially identical to those that the Government makes here.

The first question posed in *Moda* was whether Section 1342 of the ACA obligated the Government to make certain payments, irrespective of whether Congress appropriated funds for the purpose. The Federal Circuit said "yes," holding that the statutory requirement that "the Secretary ***shall pay to the plan*** an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount" created an obligation to pay. *Id*. at 1332 (emphasis added).

The court held that the "shall pay" language of Section 1342 was "unambiguously mandatory" and imposed a legal obligation on the United States. *Id.* at 1320. In so holding, the court reaffirmed the longstanding rule that the question of whether Congress has appropriated funds enabling the Government's ***agents*** (here, HHS) to pay an obligation is a question entirely distinct from Congress' creation of a statutory obligation in the first place. *Id.* at 1321 ("it has long been the law that the government may incur a debt independent of an appropriation to satisfy that debt").

The Federal Circuit observed that there is no precedent supporting the Government's contrary position that the absence of an obligation can be inferred from the lack of appropriations or budgetary authority. *Id.* at 1322 ("The government cites no authority for its contention that a statutory obligation cannot exist absent budget authority."). Such a "rule 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.*

Indeed, in *Moda*, the Government argued a variety of theories under which it asked the court to conclude that the failure to establish an appropriation demonstrated that no obligation existed in the first instance. But in light of the plain language, the Federal Circuit found all of those theories of "no moment" or "immaterial." *Id.* The "plain language of section 1342 created an obligation of the government to pay participants in the health benefit exchanges the full amount indicated by the statutory formula for payments out under the risk corridors program." *Id*.

The "shall make" directive of Section 1402 imposes an equally *unambiguous mandatory* payment obligation on the United States. *See* 42 U.S.C. § 18071; *accord Moda*, 892 F.3d at 1320 (the "shall pay" directive of Section 1342 was "unambiguously mandatory"). There is no material distinction between the words used by Congress in Section 1342 (at issue in *Moda*) and Section 1402, at issue here. The "shall make" language of Section 1402 is as mandatory as the "shall pay" language of Section 1342. Both create an unmistakable obligation to pay. And as in *Moda*, the fact that Congress did not appropriate funds is insufficient to render that obligation ambiguous, or to undermine it in any way.

No negative inference can be drawn from Congress's decision not to appropriate funds or establish budgetary authority. Obligations and the appropriations that fund them are separate issues. Here, Section 1402 plainly created an obligation to pay, and while a lack of appropriation may constrain the "government's own agents" (HHS) from making payments, the underlying statutory payment obligation—and the United States' obligation to make payment—is unaffected.

II. THE GOVERNMENT OFFERS NO VIABLE BASIS TO DISREGARD THE PLAIN LANGUAGE OF SECTION 1402, CREATING AN OBLIGATION, BASED ON CONGRESS'S MERE LACK OF APPROPRIATED FUNDS.

A. Congress Did Not Pass Any CSR Appropriation Riders, so the Government's Reliance on *Moda's* Discussion of Appropriation Riders and Legislative "Intent" Is Misplaced.

The Government stakes its defense on the second half of the *Moda* decision, in which the panel majority held that ***later acts*** of Congress—that it construed as taking direct aim at the obligation created by Section 1342—demonstrated an "intent" of Congress to negate the obligation for the relevant period of time. Whatever the merit to that portion of *Moda*,[1] the Government's reliance on it is misplaced because, unlike the statutory program at issue in *Moda*, there was ***no subsequent legislation*** that even arguably addressed the Government's CSR

[1] The portion of the *Moda* opinion addressing the effect of the appropriation riders was the subject of various petitions for rehearing *en banc* and, now, several petitions for writs of certiorari that are currently pending, which raise many of the points that Judge Newman made in her dissent from that portion of the decision. *Moda*, 892 F.3d at 1332-37.

obligations. The Government proposes that this Court ignore the first part of *Moda*, which held that equivalent language in Section 1342 of the ACA unambiguously created a payment obligation. The Government then asks this Court to find that the lack of an appropriation for Section 1402 payments signals the same sort of intent of Congress to cancel the obligation, notwithstanding the absence of the ***subsequent*** legislation that the panel majority in *Moda* found determinative of congressional intent. There is no basis for that comparison.

Moda examined congressional "intent" in a very different context, with very different kinds of evidence of legislative intent before it, to determine whether the "shall pay" obligations stated on the face of the ACA were overridden by subsequent enactments. The Federal Circuit sought to determine whether those ***subsequent*** enactments revealed Congress's "intent" to limit the amount paid out in the risk corridors program. *Moda*, 892 F.3d at 1322-23. In examining those subsequent enactments, the Federal Circuit noted a line of cases in which courts examined subsequent legislation, and specific legislative history concerning that legislation, to determine whether they abrogated existing statutory obligations. Specifically, the Federal Circuit examined the legislative history of appropriation riders that the Government contended signaled a congressional intent to cancel the ACA obligations. Among the history examined were correspondence between Congress and the GAO and a statement by the Chairman of the House Appropriations Committee. *Id.* at 1325.

No similar argument can be made here because (i) there is no subsequent legislation to construe, and (ii) the Government has proffered no legislative history at all to support its position. The very same lack of an original appropriation for Section 1402 payments, which the Government contends here signals an intent of Congress to not obligate the United States, existed with respect to Section 1342, which was at issue in *Moda*. There, the Federal Circuit unambiguously rejected this very same argument—that the absence of an appropriation in the original enactment signaled an intent not to obligate the United States.

Chief Judge Sweeney noted the flaw in the Government's position in rejecting the identical argument raised in *Maine Cmty. Health Options*:

> Defendant does not contend that any appropriations acts—or, indeed, any statutes at all—enacted after the Affordable Care Act contain language that "expressly or by clear implication" modifies or repeals the Act's cost-sharing reduction payment obligation. Rather, it relies on Congress's complete failure to appropriate funds for cost-sharing reduction payments as evidence that Congress intended to suspend the [payment obligation]. Defendant's reliance is misplaced. None of the appropriations acts enacted after the [Act] expressly or impliedly disavowed the payment obligation; they were complete silent on the issue . . . .
>
> Here, Congress has had ample opportunity to modify, suspend, or eliminate the statutory obligation to make cost-sharing reduction payments but has not done so. Congress's inaction stands in stark contrast to its treatment of the Affordable Care Act's risk corridors program.

2019 WL 642968 at *11.

Section 1402 means exactly what it says: the Secretary "***shall make periodic and timely payments to the issuer equal to the value of the reductions***." That obligation stands regardless of whether Congress made appropriations to allow the agency to fulfill that obligation, and the Government has offered no reasonable basis on which the Court should disregard the clear statutory language at issue.

B. The Government's Various Theories for Equating the Absence of an Appropriation with the Absence of a Payment Obligation Are Without Merit.

The Government tries to show that, notwithstanding the plain language of Section 1402, Congress impliedly did not intend it to create a payment obligation under Section 1402. As set forth below, those arguments do not lead logically to the conclusion that the Government seeks, namely that the plain language of the statute should be disregarded in favor of the Government's self-serving conception of congressional intent. And all of those arguments ultimately rest on the premise, rejected in *Moda*, that the absence of an appropriation can be equated with the absence of an obligation, when the statute in question unambiguously creates an obligation. *Moda*, 892 F.3d at 1320-22.

1. *The comparison between Sections 1401 and 1402 does not address the issues here.*

The Government highlights differences between Sections 1401 and 1402, noting that in Section 1401, Congress identified a source of permanent funding for the tax credit in that provision, but in Section 1402, Congress did not identify a permanent source of funding.

First, the fact that Section 1401 identifies a source of funding for the tax ***credit*** is wholly unsurprising. Because it was a tax credit, appearing in a health care bill, it seems perfectly logical to call attention to the fact that the funding would be found in the longstanding tax code provision appropriating funds to refund certain tax collections.[2] But it is equally unsurprising that for the Section 1402 CSR payments Congress would create an obligation yet leave the funding of that obligation to future general appropriations to the agency or to specific periodic appropriations to come later. That is the point of *Moda* and the long line of cases it follows: how Congress funds an obligation is distinct from the existence of the obligation itself. *Moda*, 892 F.3d at 1320-22.

[2] Section 1401(a) enacted the tax credit provision, codifying it in the Tax Code at 26 U.S.C. § 36B. A different subsection, Section 1401(d), enacted the permanent appropriation for that tax credit, by amending 31 U.S.C. § 1324(b), the part of the U.S. Code title that deals with appropriations and other budgetary matters. The cost-sharing reduction requirement of Section 1402, for its part, is codified at 42 U.S.C. § 18071, a title that deals broadly with public health and welfare. Section 1402, as the Government acknowledges, does not concern a tax credit, so there would be no reason for Congress to fund reimbursement payments for cost-sharing reductions as it has funded tax credits for many years, Section 1401 just being the latest.

Second, and more important, all that the comparison between Section 1401 and Section 1402 shows is that under one of the sections, Congress did designate an appropriation, and under the other, it did not. The difference in language between the sections means no more than what the two provisions say: for Section 1401, Congress established a specific funding mechanism, but for Section 1402, it did not do so.

The Government also asserts that the Court should not "infer that Congress intended to create a statutory entitlement to CSR payments that could only be collected through after-the-fact litigation." Def. Mot. at 20. But the Government's premise is flawed. The fact that Congress did not designate an appropriation in Section 1402 does not mean that an appropriation was not intended to be provided later through the usual appropriations process. It implies nothing about an intent not to obligate the United States or to fund Section 1402 only through litigation. Nor is it logical to believe that Congress created this clear statutory obligation and induced insurers to rely on it, but never intended to make good, through annual appropriations or otherwise, on giving HHS the necessary funds to allow it to make the very payments Congress said HHS "shall make." The fact that the Government ***made*** CSR payments for nearly four years illustrates the preposterous nature of the Government's litigating position. In any event, *Moda* reiterated that the absence of an appropriation mechanism does not relieve the Government of the obligation to make payment. 892 F.3d at 1322.

This Court is positioned to enter judgment based on the existence of a clearly stated statutory obligation; how it is to be paid is ordinarily not the responsibility of the Court. "Whether it is to be paid out of one appropriation or out of another; whether Congress appropriate[ed] an insufficient amount, or a sufficient amount, or nothing at all, are questions which are vital for the accounting officers, but which do not enter into the consideration of a case in the courts." *Gibney v. United States*, 114 Ct. Cl. 38, 52 (1949).

2. *The Government's "increasing premiums" theory is erroneous.*

The Government asserts that, since "the structure of the ACA" "allow[s] issuers to recoup their CSR expenses by raising premiums"—at least on a prospective basis—this somehow undermines Section 1402's payment obligation. Def. Mot. at 3. For support, the Government cites the fact that a federal district court denied a request for a preliminary injunction directing HHS to resume Section 1402 payments on grounds that states could prospectively authorize insurers to increase premiums ***for 2018***. *Id.* at 21 n.11. In other words, that the district court held that the possibility that insurers could increase premiums to offset a prospective loss of CSR payments, and increase their tax credit recovery, affected the equitable balance whether to grant a preliminary injunction.

The equities that factor into a federal district's decision to order the extraordinary relief of a preliminary injunction play no role in this Court's straightforward interpretation of Section 1402, and the very different nature of the judicial tasks in the respective cases. The decisive point here in response to the Government's "structural argument" is that there is no indication that Congress ever actually conceived, considered, or "intended" such a possible mechanism to offset prospective losses through premium increases approved by the States, and tax credits, when it enacted Section 1402. The Government does not identify ***any*** statutory provision permitting the Government to use premium tax credit payments to offset its cost-sharing reduction payment obligation.[3] And the possibility that a cut-off of CSR payments will be

[3] Indeed, the Government fails to point to any evidence in the ACA's legislative history that even suggests that Congress limited its obligation to make cost-sharing reduction payments by (Continued...)

reflected in state-approved premiums is far too thin a reed on which to rest a conclusion that, in directing that the Secretary "shall make payments," Congress did not mean what it plainly said. Premium setting and approval is assigned to the States, and thus largely outside the scope of the ACA, and there is no indication that it had any role in the design of Section 1402. As Chief Judge Sweeney noted, premium tax credits and CSR payments are not "substitutes" for each other, and cannot offset one another:

> The increased amount of premium tax credit payments that insurers receive from increasing silver-level plan premiums are still premium tax credit payments, not cost-sharing reduction payments. Indeed, under the statutory scheme as it exists, even if the government were making the required cost-sharing reduction payments, insurers could (to the extent permitted by their state insurance regulators) increase their silver-level plan premiums; in such circumstances, it could not credibly be argued that the insurers were obtaining a double recovery of cost-sharing reduction payments. While the premium tax credit and cost-sharing reduction provisions were enacted to reduce an individual's health-care-related costs (to obtain insurance and to obtain health care, respectively), they are not substitutes for each other.

Maine Cmty. Health Options, 2019 WL 642968 at *10. The Government is obligated to make CSR payments in accordance with the plain statutory language, and the availability of premium increases has no bearing on that obligation.

In any event, in presenting its "structural argument," the Government does not make any suggestion of windfall or double recovery in this case that might limit Plaintiffs' recovery. The recovery sought in this case is for the Section 1402 payments that the Government failed to make for the final calendar-year quarter of 2017 and for reimbursements from the previous benefit years that would, in the usual course, have been paid after a supplemental reconciliation process.

---

not restricting insurers' ability to raise their premiums. Nor would that make sense, since a primary goal of Congress in enacting the ACA was to keep premiums low and affordable.

Plaintiffs were not paid what it was owed when the Government ceased Section 1402 payments in October 2017. With its decision to cut off CSR payments, the Government also halted reconciled reimbursement payments from the previous benefit years. As a result, the Government also left unpaid unreconciled CSR payments owed to Plaintiffs for 2016 and reconciled CSR payments for 2015. The Government's decision to halt payment occurred long after Plaintiffs had committed to provide insurance, under rates that were set, on the understanding that the CSR payments would be made, and which could not be altered. Plaintiffs were still required by law to provide cost-sharing reductions to eligible insureds, despite not receiving the mandated reimbursement from the Government. Plaintiffs had no opportunity to recoup those lost payments since premiums are set (with regulatory approval) prospectively based on anticipated costs for the upcoming plan year. The Government does not contest that Plaintiffs' 2017 rates could not be changed when the Government stopped making CSR payments in October 2017, or that Plaintiffs were forced to bear their share of cost-sharing reductions *and* the Government's share. And of course, Plaintiffs could not have retroactively changed the rates they had charged for 2015 and 2016 and were, essentially, left holding the bag for those years as well due to the Government's abrupt change of course.

C. Recovery of Amounts Due From the Government's Failure to Make CSR Payments Are Actionable in the Court of Federal Claims.

The Government effectively asks this Court to ignore the bedrock rule recognizing the right of aggrieved parties to seek damages in the Court of Federal Claims where their entitlement to that relief arises from a money-mandating statute. *See Greenlee Cty., Ariz. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007); *see also Wolfchild v. United States*, 96 Fed. Cl. 302, 339 (2010), *rev'd in part* 731 F.3d 1280 (Fed. Cir. 2013); *Lummi Tribe of the Lummi Reservation v. United States*, 99 Fed. Cl. 584, 594 (2011). The Government argues that if Congress did not provide a "damages remedy" for insurers in Section 1402, the case cannot proceed. Def. Mot. 19-20. Of course, if that were true, the *Moda* decision would make no sense. The Federal Circuit could simply have stated that there was no provision creating an express cause of action—and stopped there.

The Government's position is fundamentally inconsistent with accepted principles of law. The Tucker Act, 28 U.S.C. § 1491(a)(1), waives sovereign immunity for claims predicated on federal statutes, contracts with the Government, and other bases. Where this Court has before it a money-mandating statute, and the claimant seeks payment for damages incurred, that mandate is what gives the plaintiff a right to relief in this Court, if it prevails on its claim. It is the claim for damages under a money-mandating statute that provides the right to recovery. *See Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005) ("the determination that the source is money-mandating shall be determinative . . . as to the question of whether, on the merits, plaintiff has a money-mandating source on which to base his cause of action."). There is no need for an ***additional*** "express cause of action for damages." Def. Mot. at 20. Rather, the right to relief is implied from the money-mandating statute, and the claim for damages actually incurred.

In *Greenlee County*, for example, the court held that identical language—"the Secretary of the Interior *shall make a payment*" to local governments to compensate them for losses due to the presence of tax-exempt federal land—was money-mandating. 487 F.3d at 876-77 (emphasis added). "We have repeatedly recognized that the use of the word 'shall' generally makes a statute money-mandating." *Id.* at 876-77 (citing *Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003)). And since a money-mandating statute "creates the right to money damages," *id.* at 875; *see also Jan's Helicopter Serv., Inc. v. F.A.A.*, 525 F.3d 1299, 1307 (Fed. Cir. 2008) (recognizing the right of a "class of plaintiffs entitled to recover under the money-mandating source”), Plaintiffs are entitled to pursue their right to recover what they are owed under the money mandating provisions of Section 1402.

The Government’s argument is belied by its own citation to *Bowen v. Massachusetts*, 487 U.S. 879, 905 n.42 (1988). There, the Court recognized that “shall” statutes generally provide a “self-enforcing” right to recover under the Tucker Act where they “mandate[] compensation by the Federal Government for the damage sustained.” *Id.* (*citing Eastport S. S. Corp. v. United States*, 372 F.2d 1002, 1009 (1967) (cited with approval in *United States v. Testan*, 424 U.S. 392, 398, 400 (1976)). That is the case here. The money-mandating statute provides reimbursement for the cost-saving reductions that Plaintiffs were statutorily required to grant to insureds, and which they did grant to their insureds. The statute thus provides compensation for a past act, which is the “essence of a Tucker Act claim for monetary relief.” *Id.* (*citing United States v. Mottaz*, 476 U.S. 834, 850-851 (1986) (suit to require the government to purchase property is not a form of compensation for past acts)).[4]

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

The Government’s contention that it has no implied-in-fact contract with Plaintiffs is also contrary to controlling precedent. Each Government argument reflects a misunderstanding or misapplication of longstanding precedent and improperly ignores the Government’s own conduct.

First, the Government’s position that the CSR program is simply a “benefits program” cannot be squared with prevailing law or the operative facts, both of which establish that

[4] The claim at issue in *Bowen* itself did not arise under a statute that was self-enforcing under the Tucker Act because it followed from an administrative review procedure that was more appropriately subject to Administrative Procedure Act review in the district court, in which the plaintiff sought injunctive relief. *See Bowen,* 487 U.S. at 905 n.42.

statutory schemes that ***are promissory in nature*—**like the CSR program**—**give rise to contractual obligations to make the requisite payments. As set forth in Plaintiffs' Motion for Summary Judgment, the Government's program is precisely the type of *quid pro quo* arrangement found to constitute an implied-in-fact contract in *Aycock-Lindsey Corp. v. United States*, 171 F. 2d 518, 521 (5th Cir. 1948).[5] There, the regulation at issue was designed to "induce" certain conduct. *Id.*; *Hanlin v. United States*, 316 F.3d 1325, 1329 (Fed. Cir. 2003) (observing that a statute or regulation could give rise to an implied-in-fact contract based on, among other things, "words of promissory character in the statute or regulation that manifested an undertaking or commitment rather than a *mere* instruction, prediction or intention"); *see also Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 739 n.11 (1982) (identifying *Aycock-Lindsey* and *Radium Mines*[6] as cases "where contracts were inferred from regulations promising payment."). Here, the Government sought to induce participation in a brand new health insurance marketplace, the costs of which insurers could not reliably predict, and Section 1402 required insurers to provide certain reductions to purchasers, in exchange for receiving the promised payments.

The Government's complaint that the statutory language establishing the CSR program does not "speak in terms of contract," Def. Mot. at 24, misses the mark. *Aycock* and *Radium Mines* were not based on the regulation's express reference to a possible contract. Rather, as this Court noted, the "key" to *Radium Mines* "is that the regulations at issue were promissory in nature." *Baker v. United States*, 50 Fed. Cl. 483, 490 (2001). Similarly, the court in *Aycock* held that "[i]n view of the numerous requirements for the [plaintiff] to put himself in position to

---

[5] *See also Radium Mines, Inc. v. United States*, 153 F. Supp. 403 (Ct. Cl. 1957) (finding an implied-in-fact contract where the statute and regulations induced and gave rise to a *quid pro quo* relationship between the United States and the plaintiff).
[6] *See supra* note 5.

receive the payments [provided by the regulation]," the payments proposed by the regulation were "compensatory in nature," and not subsidies. *Ayacock*, 171 F. 2d at 521. The CSR program was promissory in nature because, among other things, it was specifically designed to induce participation in the marketplaces by Plaintiffs' and other insurers. Pls. Mot. at 19-25. If you do this, we will give you that; if you provide the desired policies and grant the statutorily-required reductions, and make timely submissions, you will have access to many potential enrollees on the marketplaces and we will timely provide Section 1402 reimbursements. The Government's threadbare invocation of the general presumption against interpreting statutory language as creating contractual rights is unavailing.

Instead of addressing the program's promissory nature, the Government ignores the central feature of the CSR program: insurers under the CSR program received payments ***as a reimbursement*** for the cost-sharing reductions that they were statutorily required to make. The *quid pro quo* nature of the CSR program provides squarely supports the finding of an implied-in-fact contract. *See Maine Cmty. Health Options*, 2019 WL 642968 at *15.

Further, the Government's conduct with respect to the CSR program also evinces the existence of an implied-in-fact contract. Not only did the Government promise to make CSR payments in exchange for Plaintiffs' acceptance and performance of certain specified duties, but also, unlike under the risk corridors program, ***the Government in fact fulfilled its promise for 45 months***. The Government cannot escape its own course of conduct confirming the terms of the exchange by the parties. It is, of course, a fundamental principle of contract law that "[w]here an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, *any course of performance accepted or acquiesced in without objection* is given great weight in the interpretation of the agreement." *Metro. Area Transit, Inc. v. Nicholson*, 463 F.3d 1256, 1260 (Fed. Cir. 2006) (emphasis in original) (quoting Restatement (Second) of Contracts § 202(4)). Regardless of the Government's current litigating position, it appears to have agreed with Plaintiffs that it had made a promise and, until recently, kept that promise to pay.[7]

Second, the Government's argument that the QHPIA agreements were "express" contracts that preclude any finding of a bilateral implied-in-fact contract is equally misguided. The Government posits that the QHPIA agreements were "express" contracts because they "established the relevant contractual parameters of plaintiffs' offering of QHPs on an Exchange." Def. Mot. at 27.

But the Government's premise is flawed, and the argument collapses, because the QHPIA agreements were not express contracts of the kind that would preclude a finding of implied contract that goes far beyond the terms of whatever was in the QHPIA. The QHPIA agreement: (1) memorializes that the insurer is properly licensed and certified to sell health plans on the Exchange, and (2) sets forth standard rules for insurers to maintain data security and private patient information. QHPIAs do not contain any essential contract terms regarding payment, delivery, quantity, or performance. While they purport to be agreements, they do not contain any indicia of the Government's reciprocal obligations or consideration. Nothing within the four-corners of the QHPIA purports to be a "contract" with the U.S. Government. As the Government acknowledged, the QHPIAs contained some of "the relevant contractual parameters of plaintiffs' offering of QHPs on an Exchange," Def. Mot. at 27, but what the Government

[7] The Government's argument that HHS lacked contracting authority ignores the fact that, as set forth in Plaintiffs' Motion, actual authority can be express ***or implied***. Pls. Mot. at 22-23. For the reasons set forth therein, the Secretary had both express and implied authority to enter into contracts. The Government confuses "actual authority" of the HHS Secretary (to enter contracts) with whether entering into QHPIA contracts was potentially unauthorized under the Anti-deficiency Act; "actual authority" exists as a function of position, 48 C.F.R. § 1.601(a).

overlooks is that those nebulous "parameters" do not contain the essential terms of an *express* contract. Mere agreements or MOUs with the Government may evidence implied-in-fact contracts, but they are not "express" contracts. *See, e.g.*, *Cal. Fed. Bank, FSB v. United States*, 245 F.3d 1342, 1346-47 (Fed. Cir. 2001) (although forbearance letters do not constitute an express contract with the government, they constitute contemporaneous document evidencing the necessary elements of an implied-in-fact contract). Moreover, in *Molina Healthcare*, the Court of Federal Claims specifically examined whether QHPIA agreements were "express contracts" and held that they were not. *Molina Healthcare of Cal., Inc. v. United States*, 133 Fed. Cl. 14, 46 (2017) (holding instead that there *was* an implied-in-fact contract).

Rather, as explained by Plaintiffs, the full gamut of essential terms constituting the parties' implied-in-fact contractual bargain were specified and set forth in various statutory and regulatory provisions that preceded the QHPIA and, collectively, formed the parties' implied-in-fact contract. Specifically, the QHPIAs contain some of the insurers' compliance obligations (a portion of the quid) that the insurers complied with in exchange for the statutory payment terms set forth elsewhere (the quo). While the QHPIA agreements were not express contracts, they *were components* of the parties' implied-in-fact unilateral or, alternatively, bilateral, contract.

As such, the Government's assertion that Plaintiffs' implied contract with the Government is "precluded" by the QHPIAs is untenable. In each case cite by the Government, the plaintiffs had ***already signed express contracts*** (and were simply trying to evade those plain terms by alleging implied side-agreements). *Durant v. United States*, 16 Cl. Ct. 447, 451-52 (1988) (because an "***express*** contract, Form ASCS–477, ***existed*** between the parties," plaintiffs could not allege overlapping implied contract (emphases added)); *Bank of Guam v. United States*, 578 F.3d 1318, 1329 (Fed. Cir. 2009) ("because we have determined that the Bank has [created an express contract] with the United States dealing with the pertinent subject matter, we affirm the dismissal of its implied-in-fact contract claims"). Those cases have no relationship to a situation, as here, where the parties had never signed "express" contracts setting forth the basic terms of the *quid pro quo*.

CONCLUSION

For the reasons given, the Government's motion to dismiss should be denied, and summary judgment should be entered in favor of Plaintiffs on their statutory claim or, alternatively, on their breach of an implied-in-fact contract claim. Plaintiffs should be awarded monetary relief in the amounts to which Plaintiffs are entitled under Section 1402 of the Act and 45 C.F.R. § 156.430, *i.e.*, $223,231,670.52.

March 15, 2019

Respectfully submitted,

/s/ Stephen McBrady

Stephen McBrady
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 624-2500
Fax: (202) 628-5116
SMcBrady@crowell.com

Counsel for GuideWell Mutual Holding Corporation, Blue Cross and Blue Shield of Florida, Inc., Florida Health Care Plan, Inc., and Health Options, Inc.

OF COUNSEL:
Daniel Wolff
Xavier Baker
Skye Mathieson
Monica Sterling
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004

CERTIFICATE OF SERVICE

I certify that on March 15, 2019, a copy of the forgoing reply in support of Plaintiffs' motion for summary judgment and opposition to the Government's motion to dismiss was filed electronically using the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be served on Defendant's Counsel via the Court's ECF system.

/s/ Stephen McBrady
Stephen McBrady
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004
Tel: (202) 624-2500
Fax: (202) 628-5116
SMcBrady@crowell.com