IN THE UNITED STATES COURT OF FEDERAL CLAIMS

GUIDEWELL MUTUAL HOLDING CORPORATION, et al,	)	
Plaintiffs,	)	
v.	)	No. 18-1791C
	)	(Judge Griggsby)
THE UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS CROSS-MOTION TO DISMISS

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Pursuant to Rule 12(b)(6) of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully submits this reply in support of its cross-motion to dismiss the complaint filed by GuideWell Mutual Holding Corporation and its three operating subsidiaries. *See generally* ECF No. 14 (Def. Mem.). As demonstrated below and in our opening brief, plaintiffs' complaint fails to state a claim upon which relief can be granted and should be dismissed.

INTRODUCTION

In our opening brief, we demonstrated that Congress has repeatedly chosen not to appropriate funds for cost-sharing reduction (CSR) payments—even after the prior Administration requested funds to make those payments.[1] Plaintiffs' response to our motion to

[1] We also provided the Court with an update regarding the status of the other CSR cases currently pending in the Court of Federal Claims and the Federal Circuit. *See* Def. Mem. at 11-12. Since the filing of our motion, there has been further appellate activity in those cases. In particular, on March 22, 2019, we filed our opening brief in the *Montana Health Co-op v. United States* and *Sanford Health Plan v. United States* consolidated appeals. *See Sanford Health Plan*, No. 19-1290, ECF No. 21. In addition, the Government has appealed Chief Judge Sweeney's decision in *Community Health Choice, Inc. v. United States*. *See* 2019 U.S. Claims LEXIS 81, *appeal docketed*, No. 19-1633 (Fed. Cir. Mar. 8, 2019). Furthermore, several of the CSR cases

dismiss seeks to minimize this important fact and instead rests on the mistaken premise that when a statutory program includes a payment, the Government must pay, regardless of whether Congress appropriates funds for that program. In plaintiffs' view, congressional appropriations decisions are irrelevant to how the Government's funds are expended. Such a notion defies the Constitution—in particular, the Appropriations Clause (U.S. Const. art. I, § 9, cl. 7.).

Plaintiffs argue that they should recover in damages the precise amount of CSR payments that Congress declined to appropriate. But, congressional intent controls plaintiffs' entitlement to CSR payments. Congress already signaled its intent in the Affordable Care Act (ACA) by appropriating permanent funding for Section 1401 (Premium Tax Credits), while leaving its companion provision, Section 1402 (Cost-Sharing Reductions) to the annual appropriations process. Importantly, Congress did not fund CSRs when it enacted the ACA, and it has chosen not to fund CSRs since then. And Congress did not authorize an ACA damages remedy so issuers could recover in Court the precise CSR payments for which Congress declined to appropriate funds. Because plaintiffs' claim would circumvent Congress's intent to not fund CSR payments, the Court should dismiss their complaint.

ARGUMENT

I. Plaintiffs Fail To Demonstrate That Congress Intended To Make CSR Payments In The Absence Of An Appropriation

In their response to our motion to dismiss, plaintiffs would have the Court read the "shall pay" language of Section 1402 in a vacuum—without consideration of the surrounding statutory language or Congress's continued decision not to appropriate funds for CSR payments. The fatal

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in the Court of Federal Claims have been stayed pending a decision in the Federal Circuit appeals. *See Harvard Pilgrim v. United States*, Case No. 18-1820 (Judge Smith), ECF No. 10 (February 28, 2019 order staying case); *Health Alliance Medical Plans, Inc. v. United States*, Case No. 18-334C (Judge Campbell-Smith), ECF No. 22 (March 28, 2019 order staying case).

problem with plaintiffs' response is that it begins with the faulty premise that a mandatory obligation exists for the Federal government to make CSR payments. Plaintiffs then attempt to argue that the issues we raised in our motion do not "negate" that payment obligation. However, as shown in our opening brief and below, the decisions Congress made when it enacted the ACA demonstrated its intent *not* to create such a mandatory payment obligation ***in the absence of appropriations***. Because plaintiffs have not affirmatively demonstrated congressional intent to create that obligation, their complaint must be dismissed.

A. Congress Controls Whether Funding Is Available Under A Statute

Plaintiffs claim entitlement to CSR payments, notwithstanding the lack of an appropriation from which the Executive Branch can make such payments, based on the Federal Circuit's decision in *Moda Health Plan, Inc. v. United States,* 892 F.3d 1311 (Fed. Cir. 2018). *See* ECF No. 15 (Pls. Opp.) at 3-5. In *Moda*, the Federal Circuit ruled that Congress's decision to restrict funding to make risk-corridors payments under the ACA limited the United States' obligation to make such payments to those funds that were collected from insurers. 892 F.3d at 1328-29. As we explained in our motion to dismiss, plaintiffs' reliance on *Moda* is misplaced because the Federal Circuit recognized that congressional intent is dispositive, and the Court ultimately gave effect to subsequent appropriations legislation that reflected Congress's intent to have the risk-corridors program operate in a budget neutral manner. *See* Def. Mem. at 14-17.

Plaintiffs rely heavily upon language in *Moda* in which the Court stated that an "unambiguously mandatory" statutory provision that the United States "shall pay" money, standing alone, creates an obligation to make CSR payments. *Moda*, 892 at 1320, 1322; *see also* Pls. Opp. at 3-5 (quoting *Moda*). However, these statements by the Federal Circuit do not control the question of whether a party with such a claim is entitled to an enforceable judgment

against the United States. As we explain below, read in whole, *Moda* itself recognizes the fundamental limitations on the award of damages against the United States.

First, the Court in *Moda* did not enter judgment against the United States and no Federal Circuit case in similar circumstances has done so. Second, the authority upon which *Moda*—and in turn plaintiffs—relies regarding the absence of an appropriation, *United States v. Langston,* 118 U.S. 389, 393-94 (1886), did not hold that a command to pay, standing alone, creates an obligation that the United States had to pay. Payment in *Langston* could not occur absent Congress' exercise of its power under the Appropriations Clause. *See* Act of August 4, 1886, 24 Stat. 256, 281-82 (1886) (Authorizing payment to Langston following Supreme Court's decision). Indeed, the Supreme Court has never disregarded Congress' constitutional power pursuant to the Appropriations Clause or ignored its intent with regards to funding decisions.

In *Langston,* after reviewing all of Congress' legislation related to the question of what salary Congress intended to pay the then-ambassador to Haiti, the Supreme Court held that "a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly, or by clear implication, modified or repealed the previous law." 118 U.S. at 394. *Moda* itself affirms that "[t]he jurisprudence in the century and a half since *Langston* has cemented that decision's place as an extreme example of a mere failure to appropriate." *Moda*, 892 F.3d at 1323. Thus, plaintiffs' reliance on *Langston* and its progeny for their assertion that "[t]he 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" is unfounded. *See* Pls. Opp. at 3.

Indeed, prior to and since *Langston*, the Supreme Court has consistently recognized the importance of Congress's funding choices and given effect to appropriations limitations in determining that there were no substantive grounds for liability on the part of the Government. In *United States v. Mitchell*, 109 U.S. 146, 149-50 (1883), for example, the Supreme Court concluded that, by appropriating salaries at the rate of $300 per year for five consecutive years instead of the $400 provided in permanent legislation, Congress "reveal[ed] a change in the policy" with the "purpose" "to suspend the law fixing the salaries . . . at $400 per annum." The Supreme Court in *Dickerson v. United States*, 310 U.S. 554, 561-62 (1940), held that Congress's repeated restriction on the use of appropriated funds to pay reenlistment bonuses, notwithstanding permanent legislation providing for such bonuses, evinced an intent to suspend payment of them. And, in *Will v. United States*, 449 U.S. 200, 222-24 (1980), which involved four differently-phrased appropriations restrictions in four different years, the Supreme Court had no trouble concluding that each restriction expressed the same congressional intent not to raise judicial pay.

Likewise, the Federal Circuit has consistently drawn a connection between Congress's appropriations choices and substantive liability—contrary to plaintiffs' contention that payment obligations and appropriations are "distinct[]" issues. Pls. Opp. at 3. Indeed, in *Moda,* the Federal Circuit gave effect to Congress's decision to restrict the appropriations from which risk-corridors payments could be made and held that the Government was not substantively liable for risk-corridors payments beyond those amounts paid into the program by issuers. *See* 892 F.3d at 1323, 1327. The Court observed, "[w]hat else could Congress have intended? It clearly did not

intend to consign risk corridors payments 'to the fiscal limbo of an account due but not payable.'" *Id*. at 1325 (quoting *Will*, 449 U.S. at 224); *see also Prairie Cty., Mont. v. United States*, 782 F.3d 685, 686 (Fed. Cir. 2015) (limiting liability under "shall pay" statute to amounts appropriated by Congress); *Greenlee County, Ariz. v. United States*, 487 F.3d 871, 877-80 (Fed. Cir. 2007) (same); *Star-Glo Associates, L.P., v. United States*, 414 F.3d 1349, 1355 (Fed. Cir. 2005) (concluding that Congress intended to restrict payments due under "shall pay" statute to amounts appropriated); *Highland Falls-Fort Montgomery School Dist. v. United States*, 48 F.3d 1166, 1171-72 (Fed. Cir. 1995) (holding that Congressional earmarks limited Government's liability to amounts appropriated under a "shall pay" statute).

In *OPM v. Richmond*, the Supreme Court explained that by reserving to Congress the authority to approve or prohibit the payment of money from the Treasury, the Appropriations Clause serves the "fundamental and comprehensive purpose" of assuring "that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents or the individual pleas of litigants." 496 U.S. 414, 427-28 (1990). And the Court further explained that "[i]t follows that Congress has appropriated no money for the payment of the benefits respondent seeks, and the Constitution prohibits that any money 'be drawn from the Treasury' to pay them." *Id*. at 424.

The Supreme Court reaffirmed the significance of the Appropriation Clause limitation in *Salazar v. Ramah Navajo,* 567 U.S. 182, 198 n. 9 (2012). There, the Court explained:

> In *Richmond,* we held that the Appropriations Clause does not permit plaintiffs to recover money for Government-caused injuries for which Congress "appropriated no money.". . . . *Richmond*, however, indicated that the Appropriations Clause is

> no bar to recovery in a case like this one, in which "the express terms of a specific statute" establish "a substantive right to compensation" from the Judgment Fund.[2]

Id. (quoting *Richmond*, 496 U.S. at 424, 432).

No term of the Affordable Care Act expressly provides a substantive right to compensation from the Judgment Fund, and Congress made no appropriation for CSR payments. In these circumstances, "[t]he established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (citing *Reeside v. Walker*, 52 U.S. (11 How.) 272 (1851)). Accordingly, the Court should reject plaintiffs' argument that "[t]he existence of a statutory payment obligation under Section 1402 is a separate question from the question of whether an appropriation has been made." Pls. Opp. at 2.

B. Section 1402 Reflects No Congressional Intent To Make CSR Payments In The Absence Of An Appropriation

Plaintiffs appear to acknowledge that congressional intent controls whether the ACA requires the United States to make CSR payments. *See*, *e.g.*, Pls. Opp. at 5-6. However, they labor under the misimpression that Congress only signals its intent through a *subsequent* repeal or modification of an existing, substantive law. *See id.* (citing *Moda*, 892 F.3d at 1322-23). As we demonstrated in our moving brief, no subsequent repeal or modification is necessary given that the ACA's structure already reflects Congress's intent. *See*, *e.g.*, Def. Mem. at 20-21. The relevant ACA subpart—Title 1, subtitle E, part I, subpart A (Premium Tax Credits and Cost-Sharing Reductions)—contains two sections: Section 1401 (Premium Tax Credits) and Section

[2] The statute at issue in *Ramah Navajo*—unlike the one here—provided that claimants denied payment could bring claims for money damages under the Contract Disputes Act, thereby explicitly identifying the Judgment Fund as a source of payment. *See Ramah Navajo*, 567 U.S. at 185. As a result, *Ramah Navajo* did not involve the same appropriations concern present in this case.

1402 (Cost-Sharing Reductions). Section 1401 amended the tax code to provide a permanent appropriation to fund Section 1401. *See* 26 U.S.C. § 36B. In contrast, Congress provided no permanent appropriation to fund Section 1402, leaving CSR funding to the annual appropriations process.

This structural difference is dispositive because "[when Congress includes particular language in one section of a statute but omits it in another[,] . . . th[e] Court presumes that Congress intended a difference in meaning." *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) (citations omitted). Yet, plaintiffs never addresses this statutory construction canon in their response and instead unconvincingly rationalize why Congress chose to fund Section 1401, but not Section 1402. *See* Pls. Opp. at 8-9; *id*. at 9 ("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.").

Moreover, plaintiffs' reliance on *Moda* to suggest that Congress could only have indicated its intent to not fund CSR payments through *subsequent* legislation in the form of appropriations riders is misplaced. *See* Pls. Opp. at 5-7 (citing *Moda*, 892 F.3d at 1322-23). Whether Congress reflects its intent through restrictions in subsequent appropriations, as in *Moda*, or through the structure of the statute itself, as in this case, that congressional intent is still controlling. Of course, courts routinely look to the substantive statute at issue—not just subsequent enactments—to determine congressional intent. *See*, *e.g.*, *Consol. Edison Co. of N.Y. v. O'Leary*, 117 F.3d 538, 543-44 (Fed. Cir. 1997) (examining substantive statute to determine whether Congress intended to provide a private remedy); *see also Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1192 (Fed. Cir. 2004) (same).

In this case, the ACA itself reflects Congress's intent to permanently fund Section 1401 (Premium Tax Credits) while leaving Section 1402 (Cost-Sharing Reductions) funding to future Congresses. And because Congress elected not to appropriate funds for CSR payments either in the ACA itself or in subsequent appropriations legislation, plaintiffs cannot establish as a matter of law their entitlement to CSR payments in the absence of such appropriations.

C. The ACA's Structure Permits Issuers To Account For The Absence Of CSR Payments Through Premium Increases, And Plaintiffs' Arguments To The Contrary Are Unavailing

In our motion, we also explained how the ACA's structure permits issuers to raise premiums to account for a lack of CSR appropriations, and thus it is implausible to conclude that Congress intended issuers to recover through litigation the amounts Congress deliberately chose not to appropriate, while also potentially recouping CSR costs through higher premiums and advanced payment of premium tax credits. *See* Def. Mem. at 20-21. Given issuers' ability to offset CSR expenses by raising premiums, it is not credible to conclude that Congress also intended to grant issuers a damages remedy. It defies common sense to conclude Congress intended to provide a potential double payment of amounts that it never appropriated in the first place.

In response, plaintiffs argue that there is no indication Congress "ever actually conceived, considered, or 'intended' such a possible mechanism[.]" Pls. Opp. at 10. Yet, there is likewise no indication that Congress ever conceived that its decision not to fund CSRs would result in dollar for dollar funding of CSRs through litigation in this Court. The "touchstone here, of course, is whether Congress intended a cause of action that it did not expressly provide." *Bowen v. Massachusetts*, 487 U.S. 879, 905 n.42 (1988). There is simply no basis to conclude that

Congress intended to provide a damages cause of action for issuers whose inability to receive CSR payments flows from Congress's own decision not to fund such payments.[3]

Moreover, in debating whether Congress anticipated the workaround that issuers developed to recoup CSR costs, plaintiffs do not dispute that such a mechanism exists. Instead, plaintiffs argue that they were not able to make use of that mechanism in the fourth quarter of 2017. *See* Pls. Opp. at 12. In so doing, plaintiffs misconstrue our structural argument. As discussed above, the controlling question is whether Congress intended to give issuers a damages cause of action that it did not explicitly provide. *See Bowen*, 487 U.S. at 905 n.42. Whether plaintiffs were able to adjust their premiums for that particular time period sheds no light on whether *Congress* intended to give issuers a damages remedy. For the reasons discussed above, the structure of the ACA demonstrates no such intention on the part of Congress.

D. Section 1402 Does Not Authorize A Damages Remedy

Plaintiffs further argue that the "shall pay" language of Section 1402 is money-mandating and authorizes a damages remedy in the Court of Federal Claims. *See* Pls. Opp. at 12-14. This argument also fails. In a footnote, the *Moda* Court stated that a statute is "money-mandating for jurisdictional purposes" if "it 'can fairly be interpreted' to require payment of damages, or if it is 'reasonably amenable' to such a reading, which does not require the plaintiff to have a successful claim on the merits." *Moda*, 892 F.3d at 1320 n.2 (citing *Greenlee County*, 487 F.3d at 877). The precedent on which *Moda* relied, *Greenlee County*, in turn recognized that "'[t]he Tucker Act itself does not create a substantive cause of action; in order to come within the jurisdictional

[3] Furthermore, state health insurance regulations generally require state regulators to review insurance premiums to ensure that premiums are set high enough to cover costs and ensure solvency. Thus, there is no reason to suggest that Congress would not have been aware of the potential actuarial consequences of not funding CSR payments directly.

reach and the waiver of the Tucker Act, a plaintiff must identify a separate source of substantive law that creates the right to money damages.'" *Greenlee County*, 487 F.3d at 875 (quoting *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (*en banc* in relevant part)). *Greenlee County* did not award any damages because, as in *Moda*, the Federal Circuit ruled in the Government's favor on the merits.

Ultimately, as we understand this Circuit precedent, it does not allow liability to be imposed on the Government unless the substantive statute is *correctly* interpreted to provide a cause of action for damages. In any statutory case, congressional intent is dispositive, and Government liability cannot be premised on a statutory interpretation that is incorrect (even if that interpretation is reasonable). Accordingly, plaintiffs cannot recover unless they demonstrate that Congress, in enacting Section 1402, "confer[red] a substantive right to recover money damages from the United States." *United States v. Testan*, 424 U.S. 392, 398 (1976). And for the reasons given above, it did not. Given the text and structure of the ACA, it is implausible to infer that Congress intended for issuers to collect as damages the very CSR payments that Congress chose not to fund.

II. Plaintiffs' Implied-In-Fact Contract Claim Fails Because The ACA Reflects No Intent To Bind The United States And Plaintiffs In Contract

In our motion to dismiss, we demonstrated that congressional intent controls whether a statute vests a private party with contract rights against the United States. *See* Def. Mem. at 23-25. Given the "well-established presumption" that the Government does not intend to form a contract through legislation or regulation, *see Moda*, 892 F.3d at 1330, absent statutory or regulatory language identifying both (1) a contract and (2) "the contours of any contractual obligation," courts routinely reject allegations that a statutory and regulatory scheme comprises

an implied contract between the United States and private party. *Brooks v. Dunlop, Mfg.*, 702 F.3d 624, 630 (Fed. Cir. 2012).

Recognizing that *Moda* forecloses plaintiffs' implied contract claim, they attempt to distinguish the implied contract claim at issue in *Moda* from their claim here by focusing on the Government's conduct as it relates to CSRs. *See* Pls. Opp. at 14-17. For example, plaintiffs contend that the Government previously made CSR payments in accordance with Section 1402 before concluding that no valid appropriation existed for such payments. *See*, *e.g.*, *id*. at 16. Plaintiffs' argument that the Government entered into an implied-in-fact contract by making Section 1402 payments, because such payments are contractual in nature, simply begs the question.

Plaintiffs next argues that the QHP Agreements entered into by plaintiffs and other ACA issuers do not constitute express contracts that would preclude finding an implied-in-fact contract covering CSR payments. *See* Pls. Opp. at 17-19. Yet, the Government never asserted that it entered into an express contract with issuers governing the payment of CSRs, precisely because the CSR program is statutory—not contractual—in nature. Instead, we were responding to the argument in plaintiffs' opening brief that the QHP Agreements somehow created a contract for the payment of CSRs and that "the parties' offer and acceptance were unambiguously evidenced by entering into the [QHP Agreements], which included the cost-sharing requirement." *See* ECF No. 9 (Plaintiffs' Motion for Summary Judgment) at 23; *id*. at 24-25 ("The QHP certification process, along with the ultimate [QHP Agreement], evidences the mutual intent of Plaintiffs and CMS to enter into a bilateral implied-in-fact agreement, where the parties would perform their respective obligations pursuant to Section 1402 of the Act.").

Now, plaintiffs instead claim that the QHP Agreements "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." Pls. Opp. at 17. The Government agrees with plaintiffs that the QHP Agreements do not establish a contract for the payment of CSRs. However, for all the reasons explained in our motion to dismiss, the express QHP Agreements—which covered narrow topics such as data transmission and security requirements—cannot form the basis of an implied-in-fact contract obligating the Government to make CSR payments. *See* Def. Mem. at 27.

CONCLUSION

For the reasons stated above and in our opening brief, we respectfully request that the Court dismiss plaintiffs' complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 5th day of April, 2019, a copy of the foregoing "DEFENDANT'S REPLY IN SUPPORT OF ITS CROSS-MOTION TO DISMISS" was filed electronically. Service upon plaintiffs' counsel was thus effected by operation of the Court's CM/ECF system.

s/Veronica N. Onyema
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