No. 18-1983C
Senior Judge Horn

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS BLUE SHIELD OF NORTH DAKOTA,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

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

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

Pursuant to Rules 12(b)(6) and 56 of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully submits this combined reply in support of its motion to dismiss and opposition to plaintiff's cross-motion for summary judgment. *See generally* ECF No. 23 (Def. Mem.); *see also* ECF No. 24 (Pl. Opp.). As demonstrated below and in our opening brief, plaintiff's complaint fails to state a claim upon which relief can be granted and should be dismissed.[1]

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

[1] As we acknowledged in our opening brief, three judges have entered judgment in favor of issuers who alleged entitlement to CSR payments. *See* Def. Mem. at 12-13 (discussing the rulings of Chief Judge Sweeney, Judge Kaplan, and Judge Wheeler). Those decisions rely upon the same statutory arguments that plaintiff makes here. For the reasons set forth in our opening brief and in this combined response, we respectfully disagree with those decisions.

Administration requested funds to make those payments.[2] Plaintiff's response and cross-motion seek to minimize this important fact and instead rest 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 plaintiff's view, congressional appropriations decisions are irrelevant to how Federal funds are expended. Such a notion defies the Constitution—in particular, the Appropriations Clause (U.S. Const. art. I, § 9, cl. 7.).

Plaintiff argues that it should recover in damages the precise amount of CSR payments that Congress declined to appropriate. However, congressional intent controls plaintiff's 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 has chosen not to do so since then. And Congress did not authorize an ACA damages remedy so issuers could recover in court the precise CSR payments that Congress declined to fund. Because plaintiff's claim would circumvent Congress's intent to not fund CSR payments, the Court should dismiss its complaint.

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[2] 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 12-13. Since the filing of our motion, there has been further appellate activity in those cases. On April 30, 2019, we filed our opening brief in *Community Health Choice, Inc. v. United States*. No. 19-1633, ECF No. 16. In addition, on May 1, 2019, the appellees filed their responsive 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. 24. Further, we note that two of the cases 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).

ARGUMENT

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

In its response to our motion to dismiss and cross-motion for summary judgment, plaintiff makes a series of related arguments for its proposition that the "shall" language of Section 1402 unambiguously requires the Government to make CSR payments, irrespective of whether Congress has appropriated funding for those payments. *See generally* Pl. Opp. at 16-36. Plaintiff would have the Court read this language in a vacuum—without considering the surrounding statutory language or Congress's continued decision not to appropriate funds for CSR payments. The fatal problem with plaintiff's argument is that it begins with the faulty premise that a mandatory obligation exists for the Federal government to make CSR payments. As demonstrated 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 plaintiff has not affirmatively demonstrated congressional intent to create that obligation, its complaint must be dismissed.

A. Congressional Intent Controls Whether Funding Is Available Under A Statute

Plaintiff argues that the "shall" language of Section 1402 "unambiguously mandates" that the Government make CSR payments—notwithstanding the lack of an appropriation from which the Executive Branch can make such payments—and contends that this language ends this Court's inquiry into Congress's intent. Pl. Opp. at 16-17; *see also id*. at 18-27 (arguing that the Government's obligation to pay exists regardless of whether funds are appropriated). In support of its argument, plaintiff relies in part on the Federal Circuit's decision in *Moda Health Plan, Inc. v. United States,* 892 F.3d 1311 (Fed. Cir. 2018). *See* Pl. Opp. at 16-19. The statute's "plain language" does *not* end the inquiry though, because if it did, then the Federal Circuit would have

decided *Moda* differently. Indeed, focusing solely on the "shall" language in Section 1402 ignores Congress's intent in structuring the ACA the way it did.

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, plaintiff's 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 18-20.

Plaintiff relies upon language in *Moda* where 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* Pl. Opp. at 17 (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 plaintiff—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's 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's constitutional power pursuant to the Appropriations Clause or ignored its intent with regards to funding decisions.

In *Langston,* after reviewing all of Congress's 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, plaintiff's reliance on *Langston* and its progeny for its assertion that "[t]he Defendant's position conflicts with more than one hundred years of precedent[]" is unfounded. *See* Pl. Opp. at 19.

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. 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).

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, 428 (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.[3]

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,[4] 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 plaintiff's argument that "[t]he Government's obligation to pay CSRs exists independent of appropriations[.]" Pl. Opp. at 20 (emphasis and capitalization removed).

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[3] 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 here.

[4] Plaintiff continues to conflate the existence of the Judgment Fund as a source to pay ***damages*** after entry of a judgment with the Court's substantive analysis about the United States' ***liability***. *See* Pl. Opp. at 33-35. As we demonstrated in our opening brief, the Judgment Fund itself does not support a substantive claim for payment. *See* Def. Mem. at 24-25; *see also Richmond*, 496 U.S. at 431-32.

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

Plaintiff acknowledges that congressional intent controls whether the ACA requires the United States to make CSR payments. *See*, *e.g.*, Pl. Opp. at 22. However, it incorrectly assumes that Congress only signals its intent through a *subsequent* repeal or modification of an existing, substantive law. *See id.* at 21-22 (citing *Moda*, 892 F.3d at 1322-29). 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. As we demonstrated in our opening 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 15-18. 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 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 "[w]hen 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). In response, plaintiff argues that the structural comparison is irrelevant. Pl. Opp. at 27-28. However, the ACA 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—even after the

prior Administration requested funds to make those payments—plaintiff cannot establish as a matter of law its 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

In our motion, we also explained how the ACA's structure permits issuers to raise premiums to account for a lack of CSR appropriations. *See* Def. Mem. at 16-18. 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. Given issuers' ability to offset CSR expenses by raising premiums, it is not credible to conclude that Congress also intended to grant them a damages remedy.

In response, plaintiff argues that "[t]here is simply no evidence that Congress considered the potential effect of future insurance premiums on its statutory CSR payment obligation in Section 1402." Pl. Opp. at 35. As an initial matter, and as demonstrated above, the structure of the ACA—along with Congress's decision not to appropriate funds even after the prior Administration requested that it do so—confirms that Congress did not intend to fund CSRs. In any event, 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). As we demonstrate more fully below, there is 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.[5]

D. Section 1402 Does Not Authorize A Damages Remedy

Plaintiff further argues that the "shall pay" language of Section 1402 is money-mandating and authorizes a damages remedy in the Court of Federal Claims. *See* Pl. Opp. at 30-33. 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 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

[5] 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.

that interpretation is reasonable). Accordingly, plaintiff cannot recover unless it demonstrates 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.

Plaintiff also notes that the state of North Dakota did not allow issuers to engage in "silver loading" in 2018, but began permitting issuers to do so in 2019. *See* Pl. Opp. at 35.[6] However, as we explained in our motion to dismiss and above, the controlling question is whether Congress intended to give issuers a damages cause of action that it did not explicitly provide. Thus, whether a particular state allowed premium adjustments for a particular time period sheds no light on whether ***Congress*** intended to give issuers a damages remedy. Congress structured the ACA in a manner that allows plaintiff (and other issuers) to account for the absence of CSR payments by increasing insurance premiums. Indeed, as the *California v. Trump* court recognized, insurance regulators in 38 states accounted for the possible termination of CSR payments in approving issuers' 2018 premium rates. *See* Def. Mem. at 10 (citing *California v. Trump*, 267 F. Supp. 3d 1119, 1136 (N.D. Cal. 2017).

[6] Plaintiff contends that because North Dakota did not allow issuers to raise premiums in 2018, we have failed to demonstrate how this issue of offset could impact its damages amount. Pl. Opp. at 35. As we explained in our opening brief, if plaintiff were to prevail on the merits, the precise amount that it could recover would still need to be determined. *See* Def. Mem. at 3, fn. 2.

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

A. *Moda* Properly Applied Supreme Court Precedent In Rejecting Plaintiff's Implied Contract Claim

The Court should also reject plaintiff's implied-in-fact contract claim. *See* Pl. Opp. at 37-49. 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 14-23. There is a "well-established presumption" that the Government does not intend to form a contract through legislation or regulation. *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 creates an implied contract between the United States and a private party. *Brooks v. Dunlop, Mfg.*, 702 F.3d 624, 630-31 (Fed. Cir. 2012).

Plaintiff has not, and cannot, demonstrate the existence of an implied contract. The patchwork of statutes, regulations, and Government statements from which plaintiff seeks to cobble together a contractual relationship does not reflect Congress's intent to bind the United States in contract to make CSR payments. Given the enormity of the dollar amounts at stake, plaintiff's suggestion that Congress intended to bind the United States in contract with issuers for the payment of CSRs, without actually mentioning that intent in the ACA, is dubious.

Recognizing that *Moda* forecloses its implied contract claim, plaintiff argues that the Court may disregard *Moda* because the Federal Circuit allegedly failed to properly apply Supreme Court precedent. *See* Pl. Opp. at 38, fn. 6. In particular, plaintiff argues that the Federal Circuit in *Moda* looked only at the words of the statute to determine whether an implied contract existed, instead of also considering the surrounding circumstances and conduct of the parties. *Id*. However, as we demonstrated in our opening brief, the Federal Circuit considered

the "statute, its implementing regulations, **and HHS's conduct**" before determining that the statute merely worked towards crafting an incentive program. *Moda*, 892 F.3d at 1330 (emphasis added); *see also* Def. Mem. at 26. Further, the only conduct to which plaintiff points is that the Government previously made CSR payments in accordance with Section 1402, before concluding that no valid appropriation existed for such payments. *See* Pl. Opp. at 42-46. Plaintiff's 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.

Plaintiff also relies on *Radium Mines* and *New York Airways* to argue that Sections 1402, 1412, and HHS's implementing regulations demonstrate a mutual intent between the United States and issuers to contract. *See* Pl. Opp. at 41-42; *see also Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 404-06 (Ct. Cl. 1957), *N.Y. Airways Inc. v. United States*, 369 F.2d 743, 751-52 (Ct. Cl. 1966)). However, in *Moda*, the Federal Circuit rejected the issuer's argument that the ACA along with "its implementing regulations[] and HHS's conduct" were sufficient to demonstrate an implied contract because the overall scheme of the risk corridors program "lacks the trappings of a contractual arrangement." *Moda*, 892 F.3d at 1330. Here, too, plaintiff identifies no contract language in Section 1402 that reflects the "trappings of a contractual arrangement." *See id.* Even when the Government is unable to make CSR payments and plaintiff instead recoups its CSR costs through premium increases (or not), the ACA still obligates plaintiff—as a condition to sell insurance on ACA exchanges—to reduce cost-sharing for eligible insureds.

Further, the Federal Circuit in *Moda* rejected the same *quid pro quo* argument that plaintiff advances here. *Compare* Pl. Opp. at 41-44, *with Moda*, 892 F.3d at 1330. In particular, the Court held:

> [T]he overall scheme of the risk corridors program lacks the trappings of a contractual arrangement that drove the result in *Radium Mines*. There, the government made a "guarantee," it invited uranium dealers to make an "offer," and it promised to "offer a form of contract" setting forth "terms" of acceptance. *Radium Mines*, 153 F. Supp. at 404-05; *see N.Y. Airways*, 369 F.2d at 752 (finding intent to form a contract where Congress specifically referred to "Liquidation of Contract Authorization"). Not so here. The risk corridors program is an incentive program designed to encourage the provision of affordable health care to third parties without a risk premium to account for the unreliability of data relating to participation of the exchanges—not the traditional *quid pro quo* contemplated in *Radium Mines*.

Moda, 892 F.3d at 1330 (citing *Radium Mines*, 153 F. Supp. at 404-05; *N.Y. Airways*, 369 F.2d at 752. Plaintiff argues that the holding in *Moda—i.e.*, that the ACA did not create an implied-in-fact contract between the Government and issuers (*see Moda,* 892 F.3d at 1330)—is inapplicable due to factual distinctions between the risk corridors and CSR programs. *See* Pl. Opp. at 43-44 (contending that the CSR program is more of a *quid pro quo* than the risk corridors program). However, plaintiff fails to describe any meaningful distinctions between the programs as it relates to the existence of a contract. In both the risk corridors cases and this case, plaintiffs have argued that—despite the lack of any language in the ACA indicating an intent to create a contractual relationship, as well as the long-standing presumption against the formation of contracts through statutes and regulations—Congress nonetheless intended for the Government to enter into contracts with issuers by inducing them into participating on the ACA exchanges. *See id*. at 44-45. In *Moda*, the Federal Circuit rejected this argument, and plaintiff fails to explain why this Court should decline to follow that binding precedent.

Absent operative contract language in the CSR statutory and regulatory frameworks, no basis exists to invent an implied-in-fact contractual obligation to make CSR payments. Plaintiff fails to plausibly allege the existence of an implied contract, and its claim should be dismissed.

B. HHS Did Not Have Authority To Enter Into A Contract

In our opening brief, we also demonstrated why HHS had no authority to enter into the implied contract that plaintiff alleges exists. *See* Def. Mem. at 28-29. In response, plaintiff argues that "Section 1402's instruction that the Secretary 'shall establish' the program and 'shall make' CSR payments, along with the Secretary's broad obligation to administer and implement the ACA[,]" provide implied actual authority to contract. Pl. Opp. at 47. However, plaintiff confuses the statutory authorization *to pay* with the authority *to contract*. Ultimately, plaintiff's attempts to find an authority to contract based upon generalized pronouncements in Section 1402 authorizing the Secretary to establish a CSR program must fail.

In addition, although plaintiff claims that the Anti-Deficiency Act does not preclude its implied contract claims because CSR payments are "authorized by law[]" (Pl. Opp. at 48, fn. 9), plaintiff ignores the point that there must still be budgetary authority—*i.e.*, an existing appropriation—for those CSR payments. Notably, Congress has never appropriated any funds whatsoever for CSR payments. Thus, regardless of whether CSR payments are "authorized by law," the lack of budgetary authority precludes HHS from entering into a contract on behalf of the United States to make such payments. *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1449 (Fed. Cir. 1997) (quoting *Hercules, Inc. v. United States*, 516 U.S. 417, 426 (1996)); 31 U.S.C. § 1341(a)(1)(B).

These principles preclude plaintiff's implied contract claim. Sections 1402 and 1412 of the ACA do not vest any Federal official with contracting authority. As a result, no valid

contract for the payment of CSRs could have been formed, and the Court should dismiss plaintiff's breach of an implied contract claim.

CONCLUSION

For the reasons stated above and in our opening brief, we respectfully request that the Court dismiss plaintiff's complaint and deny its cross-motion for summary judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 9th day of May, 2019, a copy of the foregoing "DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT" was filed electronically. Service upon plaintiff's counsel was thus effected by operation of the Court's CM/ECF system.

s/Veronica N. Onyema
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