IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS BLUE SHIELD OF NORTH DAKOTA, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	No. 18-cv-01983-MBH **Oral Argument Requested** Senior Judge Horn

PLAINTIFF'S REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

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Plaintiff Blue Cross Blue Shield of North Dakota ("Plaintiff" or "BCBSND"), respectfully submits this reply in further support of its motion for summary judgment on liability on both Counts I and II of its Amended Complaint (ECF No. 24) (the "Motion"). For the reasons demonstrated below and in Plaintiff's Motion, Plaintiff is entitled to summary judgment on liability on Counts I and II as a matter of law.

INTRODUCTION

The material facts in this matter are not in dispute. As set forth in detail in Plaintiff's Motion, under the CSR Program, in Sections 1402 and 1412 of the ACA, Congress expressly mandated that the Treasury Secretary "shall make periodic and timely payments" to insurers in advance that are "equal to the value of the [cost sharing] reductions" insurers are required to make to individual consumers. *See* 42 U.S.C. §§18071(c)(3), 18071(a)(2), 18082(c)(3). Congress created an unambiguous mandatory "shall" pay obligation on the Government in Sections 1402 and 1412 to timely make the advance CSR payments owed to Qualified Health Plans ("QHPs") each month. Motion at 2. Beginning in January 2014, the Government actually made all of the required advance monthly CSR payments in full to all eligible QHPs, including BCBSND, for 45 consecutive months until October 2017, when the Trump Administration abruptly announced that it would no longer make any further CSR payments citing a sudden lack of available appropriations. *Id.* BCBSND offered QHPs on the North Dakota Exchange each month since January 2014 and made all required cost-sharing reductions to eligible members as required by § 1402. *Id.* The Government has materially breached its statutory, regulatory and contractual obligations by refusing to pay BCBSND the advance CSR payments owed each month since October 2017 to date.

In its Reply in Support of its Motion to Dismiss and Opposition to Plaintiff's Cross Motion for Summary Judgment ("Opposition" or "Opp.") (ECF No. 25), Defendant merely

restates the same arguments that have been repeatedly rejected by the Judges of this Court and the Federal Circuit. First, Defendant asks this Court to ignore the primary rule of statutory interpretation and long-standing precedent and disregard § 1402's plain "shall pay" obligation mandating CSR payments to insurers. Instead, Defendant improperly urges the Court to speculate about what intent Congress must have "signaled" through the way it "structured" the CSR statute, and by its initial and subsequent failures to appropriate funds for its CSR payment obligation. Second, again ignoring long-standing precedent, Defendant incorrectly asserts that Congress must specifically "authorize" a "damages remedy" in the CSR statute itself in order for Plaintiff to recover under the Tucker Act in this Court. All of Defendant's arguments to evade its statutory CSR payment obligation run afoul of more than a century of binding precedent and the Federal Circuit's recent holding in *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311, 1320-22 (Fed. Cir. 2018), and have been rightly rejected in each of the six CSR decisions by this Court to date.

In those six other CSR cases, three Judges of this Court have each granted summary judgment on liability in favor of plaintiff insurers asserting statutory CSR claims virtually identical to those BCBSND asserts here. *See Montana Health Co-Op v. United States*, 139 Fed. Cl. 213, 214 (2018) (appeal pending at No. 19-1302, Fed. Cir. 2018) (Kaplan, J.); *Sanford Health Plan v. United States,* 139 Fed. Cl. 701 (2018*)* (appeal pending at No. 19-1290, Fed. Cir. 2018) (Kaplan, J.); *Local Initiative Health Auth. for L.A. Cty. v. United States*, 142 Fed. Cl. 1, 6 (2019) (Wheeler, J.) ("*L.A. Care*"); *Common Ground Healthcare Coop. v. United States*, 142 Fed. Cl. 38, 53 (2019) (Sweeney, J.); *Cmty. Health Choice, Inc. v. United States*, 141 Fed. Cl. 744, 770 (2019) (Sweeney, J.) (appeal pending at No. 19-1633, Fed. Cir. 2019); *Maine Cmty. Health Options v. United States*, 142 Fed. Cl. 53, 78 (2019) (Sweeney, J.). Defendant

"disagrees" with these rulings (*see* Opp. at 1), but once again makes no attempt to distinguish them or articulate why a different result is warranted here.

Defendant's arguments regarding BCBSND's breach of implied-in-fact contract claim are similarly flawed because Defendant ignores controlling precedent and the *quid pro quo* nature of the CSR program described in BCBSND's Motion. In each of the three decisions of this Court addressing CSR implied-in-fact contract claims, Judge Wheeler and Chief Judge Sweeney granted summary judgment for the plaintiffs on implied-in-fact contract claims nearly identical to those asserted by BCBSND here, and which Defendant again fails to distinguish. *See L.A. Care*, 142 Fed. Cl. at 15-19; *Cmty. Health Choice*, 141 Fed. Cl. at 766-70; *Maine*, 142 Fed. Cl. at 73-78. BCBSND similarly has established that the Government was contractually obligated, but failed, to make monthly advance CSR payments to BCBSND, an obligation that is unaffected by a purported lack of appropriations or any of Defendant's other previously-rejected arguments. *See* Motion at 37-49.

Accordingly, the Court should deny the Defendant's motion to dismiss and enter summary judgment in favor of BCBSND on Counts I and II of its Amended Complaint for violations of the mandatory advance CSR payment obligation in ACA Sections 1402 and 1412 and implementing regulations, and alternatively, for breach of an implied-in-fact contract.

ARGUMENT

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

A. The Court Should Give Effect to the Clear and Unambiguous Statutory and Regulatory Obligation to Make Mandatory Advance CSR Payments

As demonstrated in BCBSND's Motion, Sections 1402 and 1412 of the ACA explicitly and unambiguously mandate that the Government fully reimburse QHPs for their CSR discounts

through advance CSR payments to the QHPs. Motion at 16-17. In Sections 1402 and 1412, Congress expressly mandated that the Treasury Secretary "shall make periodic and timely payments" to insurers in advance that are "equal to the value of the [cost sharing] reductions" insurers are required to make to individual consumers. *See* 42 U.S.C. §§18071(c)(3), 18071(a)(2), 18082(c)(3). Congress's use of the word "shall" in Sections 1402 and 1412 clearly expressed its intent that advance CSR payments are a money-mandating obligation of the United States that the Government must make to QHPs, including BCBSND. Each of the judges to rule on CSR cases has agreed. *See Montana Health Co-Op*, 139 Fed. Cl. at 218 ("the statutory language clearly and unambiguously imposes an obligation on the Secretary of HHS to make payments to health insurers that have implemented cost-sharing reductions on their covered plans as required by the ACA"); *Sanford Health Plan*, 139 Fed. Cl. at 706 (same); *L.A. Care*, 142 Fed. Cl. at 11 ("That [CSR] provision can only mean one thing: the Government must repay QHPs for their CSR expenses"); *Maine*, 142 Fed. Cl. at 71 ("In short, the plain language, structure, and purpose of the [ACA] reflect the intent of Congress to require the Secretary of HHS to make cost-sharing reduction payments to insurers"); *Common Ground*, 142 Fed. Cl. at 47; *Cmty. Health Choice*, 141 Fed. Cl. at 759.

Rather than give effect to the plain meaning of the "shall" pay statute, Defendant disregards the statutory language and instead urges the Court to focus on what it now claims Congress must have "signaled" through its silence about appropriations and the ACA's "structure." Opp. at 2. Defendant's flawed approach turns statutory interpretation on its head. Though Defendant correctly acknowledges that "congressional intent is dispositive" (Opp. at 10), it virtually ignores the statute's plain text in determining that intent. The Court should not accept Defendant's invitation to speculate about supposed "signals" of Congressional intent based on mere silence and a lack of appropriations and/or the "structure" of the ACA, when the

language of the CSR statute is plain and unambiguous.[1] Congress's intent to create a mandatory payment obligation is clear in the "shall" make language of Sections 1402. "Because the plain language of [Section 1402] is 'unambiguous,' [the Court's] 'inquiry begins with the statutory text, and ends there as well." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (citation omitted).

B. The Government's Appropriations Arguments Disregard Long-Standing Precedent, Were Rejected in *Moda* and the Six CSR Cases Decided to Date, and Must be Rejected Here

Despite the mandatory "shall make" language, Defendant continues to assert there is no obligation to pay because of Congress' failure to appropriate funds to pay for its statutory payment obligation. Defendant speculates that Congress signaled its intent not to be bound to its "shall pay" obligation by failing to appropriate funding for the CSR program and thereafter remaining silent on or refusing to fund CSR appropriations. Opp. at 2-6. As explained in detail in Plaintiff's Motion, this argument disregards more than a century of precedent, including the Federal Circuit's decision in *Moda,* holding that a failure to appropriate funds does not vitiate a statutory payment obligation. *See* Motion at 18-24; *United States v. Langston*, 118 U.S. 389, 393 (1886) (statute fixing an official's salary could not be "abrogated or suspended by the subsequent enactments which merely appropriated a less amount" for the services rendered, absent "words that expressly, or by clear implication, modified or repealed the previous law"); *Belknap v. United States*, 150 U.S. 588, 595 (1893) (Congress's "mere failure to appropriate" is "not, in and of itself alone, sufficient to repeal the prior act"); *Moda Health Plan, Inc. v. United States*, 892

[1] It is well established that "[l]egislative silence [ordinarily] is a poor beacon to follow in discerning the proper statutory route." *Zuber v. Allen*, 396 U.S. 168, 185 (1969). Indeed, silence ordinarily is understood to conform to, not displace, the controlling background legal principle—here, that Congress need not appropriate funds for mandatory payment obligations it creates in order for those obligations to be enforceable. *See*, *e.g.*, *Marx v. Gen. Rev. Corp.*, 568 U.S. 371, 380 (2013) (reasoning that statutory "silence does not displace the background" legal principle at issue).

F.3d 1311, 1321-22 (Fed. Cir. 2018) ("'It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute.'") (quoting *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966)).

In *Moda*, the Federal Circuit reaffirmed this bedrock principle and rejected Defendant's nearly identical argument. *Moda,* 892 F.3d at 1320-22. The three-judge panel in *Moda* unanimously found that similar "shall pay" language in the risk corridors provision in Section 1342 of the ACA was "created by the statute itself," was "unambiguously mandatory," and created a binding obligation to pay despite the fact that the Court found there was no appropriation available to fund the statutory obligation. *Id.* Citing a well-established line of precedent, the Federal Circuit explained that "it has long been the law that the government may incur a debt independent of an appropriation to satisfy that debt[.]" *Id.* at 1321. The Government's argument to the contrary is as wrong now as it was in *Moda*.

Defendant now attempts to evade *Moda* by pointing out that the Federal Circuit did not enter judgment against the United States because the Court "ultimately gave effect to subsequent appropriations legislation" that it found capped or suspended the payment obligation. *See* Opp. at 4, 6. As Defendant acknowledges, however, unlike the risk corridors payments at issue in *Moda*, there undisputedly are no appropriations riders or any subsequent legislative action which placed any limitations on the mandatory statutory obligation to make CSR payments. *See* Motion to Dismiss at 23; *see also L.A. Care*, 142 Fed. Cl. at 14 ("The [CSR] situation at hand exemplifies a 'bare failure to appropriate funds to meet a statutory obligation' which simply has no impact on the statutory commitment," citing *Moda Health,* 982 F.3d at 1323).

Try as it might, Defendant also cannot distinguish *Langston*, where the Supreme Court allowed the plaintiff to recover as damages his salary payment that was mandated by law, but was not appropriated. *Id.* As the Federal Circuit recognized in *Moda*, the Defendant's position that the absence of an obligation can be inferred from a lack of appropriation "would be inconsistent with *Langston*, where the obligation existed independent of any budget authority and independent of a sufficient appropriation to meet the obligation." 982 F.3d at 1322. All of the Judges in this Court to consider the issue unanimously have agreed that the CSR cases fit squarely into the *Langston* line of cases as a bare failure to appropriate which does not vitiate the obligation to pay. *See L.A. Care*, 142 Fed. Cl. at 12-14 (observing that the Defendant's "interpretation is flatly inconsistent with over a century of case law" and concluding that "[t]his case fits squarely into the *Langston* lineage."); *Montana Health Co-Op*, 139 Fed. Cl. at 220 ("'a bare failure to appropriate funds to meet a statutory obligation could not vitiate that obligation because it carried no implication of Congress's intent to amend or suspend the substantive law at issue'") (quoting *Langston*, 118 U.S. at 394); *Sanford Health Plan*, 139 Fed. Cl. at 708 (same).

Defendant nevertheless attempts to distinguish *Langston* by noting that in 1886, after judgment was entered in that case, Congress had to pass an act authorizing payment. Opp. at 4. Defendant ignores, however, that such an act appropriating funds for the judgment was only necessary because *Langston* predated the existence of the Judgment Fund (*see* Motion at 33-34), which today is available to satisfy any judgment this Court may enter against Defendant without regard to any specific Congressional appropriation to fund the CSR payments owed. *See Maine*, 142 Fed. Cl. at 72 (concluding that "[b]ecause plaintiff's [CSR] claim arises from a statute mandating the payment of money damages in the event of its violation, the Judgment Fund is available to pay a judgment entered by the court on that claim."); *Cmty. Health Choice*, 141 Fed. Cl. at 763-64 (same); *Common Ground*, 142 Fed. Cl. at 52 (same).

BCBSND also does not, contrary to Defendant's claim, ask the Court to "disregard" the Appropriations Clause or Congress's intent regarding funding decisions. *See* Opp. at 5-7. As explained in BCBSND's Motion, this Court and its predecessors have long recognized that the Appropriations Clause, Article I, Section 9 of the Constitution simply has no bearing on this Court because "it is a direction to officers of the Treasury…and not to courts of law[.]" *Collins v. United States*, 15 Ct. Cl. 22, 35 (1879). "This court… does not deal with questions of appropriations, but with the legal liabilities incurred by the United States[.]" *Id.*; *see* Motion at 31-32; *see also Maine*, 142 Fed. Cl. at 72 (citing *Collins* and rejecting Defendant's argument that a lack of CSR appropriations "constrain[s] the court's ability to entertain a claim that the government has not discharged the underlying obligation or to enter judgment for the plaintiff on that claim"); *Cmty. Health Choice*, 141 Fed. Cl. at 763 (same); *Common Ground*, 142 Fed. Cl. at 51 (same).

Finally, Defendant unpersuasively relies on the same cases previously distinguished and rejected as inapposite by every other Judge to consider them. Defendant continues to cite *United States v. Mitchell*, 109 U.S. 146, 150 (1883), *Dickerson v. United States*, 310 U.S. 554, 561-62 (1940), and *United States v. Will,* 449 U.S. 200, 224 (1980), where Congress affirmatively limited existing payment obligations through subsequent express language. As explained in BCBSND's Motion, in this case, unlike those, there is no dispute that Congress never took any action to restrict, limit, or otherwise abrogate Section 1402's existing mandatory payment obligation. *See* Motion at 25; *L.A. Care*, 142 Fed. Cl. at 14 (distinguishing the *Mitchell*, *Dickerson* and *Will* line of cases because "Congress has not acted at all here"); *see also Maine*, 142 Fed. Cl. at 70 (finding the CSR cases are "distinguishable from those relied upon by defendant" including *Mitchell, Dickerson* and *Will* that "concerned situations in which Congress

made affirmative statements in appropriations acts that reflected an intent to suspend the underlying substantive law").

Defendant likewise continues to rely on *Greenlee* and *Prairie County*, which actually support Plaintiff's claims. *See* Opp. at 6; *Greenlee Cty. v. United States,* 487 F.3d 871, 877 (Fed. Cir. 2007); *Prairie Cty., Mont. v. United States*, 782 F.3d 685 (Fed. Cir. 2015). Both of those cases involved a statute containing language that explicitly limited the statutory obligation to amounts appropriated – something Congress clearly knew how to do, and did in at least four other sections of the ACA, but did *not do* with respect to the CSRs program. *See* Motion at 26-27; 42 U.S.C. § 300hh–31(a); 42 U.S.C. § 293k–2(e); 42 U.S.C. § 1397m–1(b)(2)(A); *see also L.A. Care*, 142 Fed. Cl. at 8 (absence of "subject to availability of appropriations" language in Section 1402 "shows a decision to create a binding obligation to make CSR payments … not predicated on the presence of an appropriation").

C. The Defendant's Unsupported "Structural" Arguments Have Likewise Been Unanimously Rejected and Should be Rejected Again Here

1. Defendant's Comparison of Section 1401 And 1402 Is Irrelevant to Congress's Intent to Create A Mandatory Payment Obligation.

The Defendant repeats in its Opposition that because Section 1401 is funded by a permanent tax appropriation and Section 1402 is not, this "structure" is somehow dispositive of Congress's intent not to create a binding obligation to make CSR payments – despite the "shall make" payment language of Section 1402. *See* Opp. at 8. As BCBSND explained in its Motion, this argument fails for several reasons, because Defendant's interpretation would negate the plain language of the statute's unambiguous "shall make" payment obligation and would conflict with the longstanding precedent described above holding that the absence of an appropriation does not extinguish an underlying statutory payment obligation. *See* Motion at 27-30. BCBSND also pointed out that the sole case now cited by Defendant in defense of its structural argument,

Digital Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018) (Opp. at 8), actually supports the well-established rule that courts should give effect to the plain meaning of statutory language. Defendant again conspicuously fails to cite any case law to support its extraordinary proposition that an appropriation included in one portion of a statute negates a mandatory payment obligation contained in another section.

Moreover, the fact that Congress funded the tax credit in Section 1401 through the same appropriation that has long been used to fund various kinds of tax credits, but left the funding of the CSR obligation in Section 1402 to future appropriations, says nothing about the enforceability of Section 1402's mandatory payment obligation. The Judges of this Court have agreed and accordingly rejected Defendant's identical "structural" argument in each of the six CSRs cases decided to date. *See Montana Health Co-Op,* 139 Fed. Cl. at 220 ("The most one can say about Congress's decision to permanently appropriate funds for the tax credits but not for CSR payments is that it reveals that Congress did not intend for CSR payments to be funded by permanent appropriations"); *Sanford*, 139 Fed. Cl. at 708 (same); *L.A. Care*, 142 Fed. Cl. at 13 (finding "[t]he difference in section 1401's and 1402's funding mechanisms is likely insignificant" and concluding "[t]he Government puts undue weight on the difference in funding methods for section 1401's and 1412's programs"); *Maine*, 142 Fed. Cl. at 68–69 (noting that there could be several explanations for the difference and "declin[ing] to ascribe any particular intent to Congress based on Congress's disparate treatment of" the tax credit and CSR programs); *Common Ground*, 142 Fed. Cl. at 47-48 (same); *Cmty. Health Choice*, 141 Fed. Cl. at 759-60 (same). Indeed, it is not this Court's "function 'to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have' intended." *See Wisc. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2073 (2018).

2. Section 1402 Does Not Provide for Recoupment or Offsets Based on Potential Future State Premium Increases

Defendant also insupportably asserts that the ACA's "structure" permits issuers to raise premiums to account for a lack of CSR appropriations. Opp. at 9. In fact, Section 1402 indisputably is completely silent on the actual (much less potential) effect on the mandatory CSR payment obligation of possible future premium increases by state insurance regulators. Defendant also does not dispute that regulation of insurance companies and their annual premiums is determined not by Congress, but by the insurance regulators of each state. Despite there being no evidence that Congress considered the potential effect of possible future insurance premiums on its statutory CSR payment obligation in Section 1402, Defendant speculates that Congress could never have intended for issuers to recover mandatory CSR payments amounts owed through litigation while also "potentially recouping" costs through higher premiums or increased premium tax credits. Opp. at 9.[2] Tellingly, Defendant offers no evidence concerning actual premium increases during 2018 or 2019 in North Dakota that could impact the CSR amounts Defendant owes in this case. Nor does Defendant dispute that North Dakota did not even permit silver loading in 2018. Opp. at 11.

Defendant also cannot credibly rely on the preliminary injunction decision in *California v. Trump* to support its arguments. Opp. at 11. The district court's denial of the states' preliminary injunction motion in that case has no bearing on the question before this Court – whether, under the Tucker Act, the Government must pay BCBSND damages for failure to make the advance CSR payments mandated by Sections 1402 and 1412. *See* Opp. at 11; Motion to

[2] Section 1402 undisputedly does not provide for any offsets to its mandatory CSR payment obligation based on future potential state insurance premium increases or any other independent revenue source. Increased annual premiums flow from the independent discretionary acts of each state's insurance regulators designed to ensure that the insurers they regulate in each market remain solvent and their rates are actuarially sound.

Dismiss at 16-17.[3]

Regardless of "potential" future state insurance premium increases, the Judges in this Court uniformly have rejected this identical argument from Defendant, holding that "premium rates have no bearing on whether § 1402 created a statutory obligation to pay insurers compensation for the cost-sharing reductions they implemented." *Montana Health Co-Op,* 139 Fed. Cl. at 221; *Sanford Health Plan,* 139 Fed. Cl. at 709*; see also L.A. Care*, 142 Fed. Cl. at 15 ("Premium rate adjustment is a state-specific decision, entirely separate from the CSR program. Its possibility does not reveal Congress' decision not to provide a damages remedy for CSR non-payment and therefore does not impact L.A. Care's ability to recover."); *Common Ground,* 142 Fed. Cl. at 48-49 (Court was "unpersuaded" by Defendant's increased premiums argument concluding that any increased premiums are by their nature "tax credit payments, not cost-sharing reduction payments," which the Court correctly observed "are not substitutes for each other."); *Cmty. Health Choice*, 141 Fed. Cl. at 760 (same); *Maine,* 142 Fed. Cl. at 69 (same).

D. CSR Payments Owed to BCBSND are Recoverable in The U.S. Court of Federal Claims and Section 1402 Need Not Contain an Express "Damages Remedy"

Defendant continues to flout controlling precedent by arguing that CSR claims cannot proceed in this Court under the Tucker Act because Section 1042 does not explicitly "authorize a damages remedy." Opp. at 10. Defendant argues that a "damages cause of action" must be

[3] In that case, the State of California, along with 17 other states and the District of Columbia, filed a lawsuit under the Administrative Procedure Act ("APA") after the Trump administration stopped making CSR payments and filed a preliminary injunction seeking to compel the administration to continue making advance CSR payments while the lawsuit was pending. *California v. Trump*, 267 F. Supp. 3d 1119, 1121, 1126 (N.D. Cal. 2017). Aside from irreparable harm considerations, the main issue on the preliminary injunction was "whether Congress has appropriated money for the CSR payments" and thus whether the administration was permitted to make CSR payments from existing appropriations. *Id.* at 1127. The district court noted that the ACA "requires the federal government to pay insurance companies to cover the cost-sharing reductions" – a fact apparently not disputed by the parties – and that the "federal government is failing to meet that obligation." *Id.* at 1133. The court did not address at all the government's CSR obligation to pay monetary damages to insurers.

"explicitly provide[d]" in Section 1402 for Plaintiff to recover money damages. *Id.* at 11. Defendant's interpretation is plainly contrary to settled law and would create a new jurisdictional hurdle that has never before existed. As Plaintiff has explained (*see* Motion at 30-31), Defendant asks the Court to ignore the fundamental role of a money-mandating statute, which provides both the bases for jurisdiction and a cause of action. *See Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005) ("the determination that the source [of the plaintiff's claim] is money-mandating shall be determinative **both** as to the question of the court's jurisdiction and thereafter as to the question of whether, on the merits, plaintiff has a money-mandating source on which to base his cause of action" (emphasis added)). Section 1402 is plainly money-mandating and Defendant does not contend otherwise.

The Supreme Court and Federal Circuit have expressly rejected the notion that "an explicit provision for money damages [is required] to support every claim that might be brought under the Tucker Act." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 477 (2003); *see also N.Y. & Presbyterian Hosp. v. United States*, 881 F.3d 877, 881 (Fed. Cir. 2018) ("[W]e reiterate that there is no requirement of a 'plain and explicit statement' that money damages are due.") (citing *White Mountain Apache Tribe*, 537 U.S. at 477). Indeed, if the Defendant were right about the need for a "damages remedy" in the statutory text, precedents too numerous to count—finding Tucker Act jurisdiction under a host of statutes lacking any such explicit damages remedy—would be wrongly decided. *See, e.g., James v. Caldera*, 159 F.3d 573, 581 (Fed. Cir. 1998) (stating that 37 U.S.C. § 204 "serves as a money-mandating statute" even though it lacks a separate provision authorizing a damages remedy).

Not surprisingly, the Judges of this Court in the six other CSRs cases decided to date likewise have rejected Defendant's identical explicit damages remedy argument because it would subvert long-standing precedent. "Plaintiffs have never been required to make some separate

showing that the money-mandating statute that establishes this court's jurisdiction over their monetary claims also grants them an express (or implied) cause of action for damages." *Montana Health Co-Op*, 139 Fed. Cl. at 217, n. 5 (citing *Fisher*, 402 F.3d at 1172; *United States v. Testan*, 424 U.S. 392, 401–02 (1976)); *Sanford Health Plan*, 139 Fed. Cl. at 706, n. 5 (same); *see also Common Ground*, 142 Fed. Cl. at 51 n.17 (rejecting government's argument and explaining that, "[a]lthough some money-mandating statutes include a separate provision authorizing a damages remedy, other money-mandating statutes pursuant to which the Court of Federal Claims can enter judgment do not") (citations omitted)); *Cmty. Health Choice*, 141 Fed. Cl. at 762 n. 19; *Maine*, 142 Fed. Cl. at 71 n. 18; *L.A. Care*, 142 Fed. Cl. at 14 (holding the Defendant's argument "that section 1402 does not authorize either an express or implied cause of action for an issuer to recover damages…runs afoul of…long-standing precedent"). This Court should hold the Government to its clear statutory obligation and require it to make the advance CSR payments it owes to BCBSND for 2017, 2018 and through the date of entry of judgment.

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

BCBSND demonstrated in its Motion that the Government breached an implied-in-fact contract by failing to make advance CSR payments. BCBSND unquestionably has demonstrated each element of an implied-in-fact contract with the Government: (1) mutuality of intent, (2) consideration, (3) offer and acceptance, and (4) actual authority to contractually bind the Government. *See* Motion at 14-23. Both of the Judges to address the merits of breach of implied-in-fact contracts in the CSR context - Judge Wheeler and Chief Judge Sweeney - held that the plaintiffs' CSR claims met each of the elements of an implied-in-fact contract and granted summary judgment on implied-in-fact contract claims in three cases nearly identical to this one. *See L.A. Care*, 142 Fed. Cl. at 15-19; *Cmty. Health Choice*, 141 Fed. Cl. at 766-70;

Maine, 142 Fed. Cl. at 73-78. This Court should follow the implied-in-fact contract analysis and reasoning in these CSR cases and alternatively find that the Government breached an implied-in-fact contract with BCBSND regarding CSR payments and that BCBSND is entitled to summary judgment in its favor on Count II.

A. The Defendant's Implied-In-Fact Contract Arguments Ignore Controlling Law and the Core Features of the CSR Program

As set forth in BCBND's Motion, the Supreme Court's controlling *Nat'l R.R. Passenger Corp.* test requires courts to "first … examine the language of the statute," and second, to review "the circumstances" surrounding the statute's passage and the conduct of the parties, including their "legitimate expectation[s]" and whether "Congress would have struck" the bargain under such circumstances. *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 468-69 (1985); *see* Motion at 38-40; *L.A. Care*, 142 Fed. Cl. at 16 (concluding "*National Railroad* encourage[s] courts not to treat one source as dispositive, but instead examine all potentially relevant signs" and "look at all relevant circumstances" to discern contractual intent).

Defendant fails to acknowledge the central holding in that case. Blinders on, Defendant proceeds to narrow the implied-in-fact contract inquiry to the text of Section 1402 itself - searching merely for "contract language" - and then finds that text insufficient to overcome the presumption that statutes do not create contractual rights. Opp. at 13-15. Defendant further wrongly contends that the Federal Circuit's decision in *Moda* forecloses the implied contract claim here because it rejected "the same *quid pro quo* argument that plaintiff advances here." Opp. at 14.

Contrary to Defendant's contention, Plaintiff has identified important distinctions between the risk corridors program at issue in *Moda* and the CSR program. *See* Motion at 43-44.

Under the CSR program, in exchange for the Government's promise to make mandatory advance CSR payments, QHPs agreed to participate in the ACA Exchanges, provide expanded coverage to previously uninsured Americans, and timely provide eligible members with cost-sharing offsets to reduce their healthcare costs. Thus, in contrast to the Court's characterization of the risk corridors program in *Moda*, 892 F.3d at 1330, here, there was "undoubtedly a traditional 'quid pro quo' exchange[.]" *L.A. Care*, 142 Fed. Cl. at 16–17 (reciting contractual distinctions between risk corridors "incentive program" and "quid pro quo exchange" of CSR program). The CSR program is not a "safety net. Rather, it is a means for distributing a Government subsidy. The Government chose to distribute that subsidy by asking insurers to act as conduits for payment of certain eligible insureds' out-of-pocket healthcare costs." *Id.* at 17; *see also Maine Cmty. Health Options*, 142 Fed. Cl. at 75 (finding *Moda*'s analysis "inapplicable in this case" because the CSR program is "less of an incentive program and more of a quid pro quo"); *Cmty. Health Choice*, 141 Fed. Cl. at 768 (same).

Congress obligated itself to make advance CSR payments to insurers because it knew the only feasible way to distribute the CSR benefit to eligible recipients was for insurers to serve as the conduit. In exchange for providing that service on behalf of the Government, insurers legitimately expected to be paid the agreed-upon advance monthly CSR payments. *See L.A. Care*, 142 Fed. Cl. at 17 (finding "the Government is not getting a raw deal…the CSR program's design makes issuers the sole means for distributing these out-of-pocket- healthcare costs to target recipients….vital to the success of both the CSR program and ACA generally.").

Although Defendant now labels these important distinctions as not "meaningful" (Opp. at 14), Defendant fails to address these core distinctions between risk corridors and CSRs. Instead it simply relies on the holding in *Moda* regarding the distinct risk corridors program and places undue emphasis on the need for "contract language" in the statute that ignores the controlling

National Railroad test. This Court should reject these arguments – as Judge Wheeler and Chief Judge Sweeney did – and grant summary judgment for BCBSND on Count II.

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

BCBSND has satisfied the authority element by demonstrating that the HHS Secretary had actual authority to contract on the Government's behalf regarding the CSR program, as evidenced by Section 1402's instruction that the Secretary "shall establish" the program and "shall make" CSR payments, along with the Secretary's broad obligation to administer and implement the ACA. *See* Motion at 47-49. Section 1402 explicitly authorized the Secretary to make CSR payments to QHPs. *Id.*; 42 U.S.C. § 18071(c)(3)(A). Defendant tries to draw a distinction between statutory "authority to pay" and "authority to contract," but cites no authority for this distinction without a difference. Opp. at 15. Judge Wheeler and Chief Judge Sweeney rejected Defendant's identical lack of authority arguments and this Court should do the same. *See L.A. Care*, 142 Fed. Cl. at 18 ("The ACA itself creates a contractual framework that the HHS Secretary is charged with administering and implementing. Entering into contracts pursuant to the contractual structure of the CSR program is therefore integral to the Secretary's duties. Accordingly, the Secretary had implied actual authority to contract."); *Cmty. Health Choice*, 141 Fed. Cl. at 769 ("There can be no doubt that making cost-sharing reduction payments is an integral part of the duties assigned to the Secretary of HHS because the Secretary of HHS is required to make such payments pursuant to 42 U.S.C. § 18071(c)(3)(A)."); *Maine*, 142 Fed. Cl. at 76 (same). Similarly, the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(B), does not bar Plaintiff's implied-in-fact contract claim as Defendant asserts (Opp. at 15), because the CSR payments are "authorized by law" and "[t]hus, the Antideficiency Act's prohibition is inapplicable in this case." *Maine*, 142 Fed. Cl. at 76; *Cmty. Health Choice*, 141 Fed. Cl. at 769

(same); *accord L.A. Care*, 142 Fed. Cl. at 18-19 (concluding "the Anti-Deficiency Act…is not fatal to" the CSR plaintiff's claim because "the ACA explicitly authorizes HHS to make CSR payments.").

CONCLUSION

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

Dated: May 24, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2019, a copy of the foregoing Plaintiff's Reply in Support of its Cross-Motion for Summary Judgment was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing with be sent to all parties by operation of the Court's ECF system.

s/ Lawrence S. Sher
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