IN THE UNITED STATES COURT OF FEDERAL CLAIMS

RAYMOND G. FARMER, in his capacity as Liquidator of Consumers' Choice Health Insurance Company, et al.,	:	Case No. 18-1484C
	:	Judge Campbell-Smith
Plaintiffs,	:	
v.	:	
THE UNITED STATES OF AMERICA,	:	
Defendant.	:	

THE UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

Plaintiffs' (the "Liquidators") Complaint pleads ten counts that can be grouped as follows: they challenge the Department of Health & Human Services' ("HHS") use of offset to collect Patient Protection and Affordable Care Act ("ACA") debts on statutory and regulatory grounds (Counts I and II); they allege that the offsets were in breach of express and implied contracts and the duty of good faith and fair dealing (Counts III, IV, V, and VI); they allege that the offsets violated three provisions of the South Carolina Liquidation Act (the "Liquidation Act") (Counts VII, VII, and IX); and they allege that the offsets constitute a Taking (Count X).

As we explained in our motion to dismiss and further demonstrate in this reply, the United States' offset rights are well-grounded in federal (and state) law and were properly exercised in this case. Nothing in the parties' express contracts prohibits offset, and no implied contract exists for the payments sought by the Liquidators. Furthermore, the Court lacks jurisdiction to entertain the alleged violations of the Liquidation Act, and even if the Court were to reach the merits, the provisions relied upon by the Liquidators do not address offsets; a separate provision of the Liquidation Act addresses offsets and expressly requires them. Finally, the Liquidators do not identify a cognizable property interest that could have been taken.

The crux of the Liquidators' position is that offsets are not permitted unless and until all amounts are paid to an insurer's estate, higher priority claims are paid, and distributions are then made by the estate. But that would render offset a nullity, despite the fact that offsets are expressly permitted by federal and state law. For these reasons, the Complaint should be dismissed.

ARGUMENT

I. The Offset Claims (Counts I and II) Should Be Dismissed Because HHS's Offsets Were Proper Under Federal (and State) Law

A. Federal Law Controls This Dispute and Authorizes HHS's Offsets

Relying on the McCarran-Ferguson Act, *United States Dep't of Treasury v. Fabe*, 508 U.S. 491 (1993), and 42 U.S.C. § 18042(d), the Liquidators argue that state law controls the outcome of the disputes presented in this case. Opp. at 17-21. Although federal and state law both permit HHS's offsets, to the extent any conflict exists, federal law controls.

Under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), state law only preempts federal law if: (1) the federal law at issue does not specifically relate to the business of insurance; (2) the state law at issue was enacted for the purpose of regulating the business of insurance; and (3) application of the federal law would "invalidate, impair or supersede" the state law. *See, e.g., Rhode Island Ins. Insolvency Fund*, 80 F.3d at 619 (citation omitted). Here, the federal law at issue is the ACA, and there is no dispute that the ACA relates to the business of insurance. HHS's offset of ACA debts were conducted pursuant to 45 C.F.R. § 156.1215, promulgated pursuant to section 1321(a) of the ACA, 42 U.S.C. § 18041(a), as well as 42 C.F.R. § 401.607(a)(2) and federal common law.[1] Moreover, the Liquidators do not identify a state law that prohibits offset, so there is no conflict that warrants a preemption analysis.

To the extent a conflict exists, federal law controls. As explained in the Motion, when Congress enacted section 1321(d) of the ACA, 42 U.S.C. § 18041(d), it established that the ACA "preempt[s] any State law that . . . prevent[s] the application of the provisions of [the ACA]."

[1] *See Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 18 (1995); *United States v. Munsey Trust Co. of Washington, DC*, 332 U.S. 234, 239 (1947); *Johnson v. All-State Construction, Inc.*, 329 F.3d 848, 852 (Fed. Cir. 2003).

Rather than support the Liquidators' theory, section 18041(d) instead provides state insurance law primacy only to the extent it does not interfere with the application of the ACA's requirements. *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016, 1022 (8th Cir. 2015) (holding that, pursuant to 42 U.S.C. § 18041(d), the ACA preempts any state law that hinders or impedes the implementation of the ACA); *Coons v. Lew*, 762 F.3d 891, 902 (9th Cir. 2014) (holding that state law is preempted to the extent it "interferes with the methods by which the [ACA] was designed to reach [its] goal") (citation and quotation marks omitted), *cert. denied*, 135 S. Ct. 1699 (2015). Offset is an integral component of HHS's administration of the ACA,[2] and any state law that interferes with it is preempted by the ACA's express terms.

The Liquidators also mistakenly rely on *Fabe*, which is inapposite in light of the ACA. In *Fabe*, the United States Supreme Court considered the effect of the McCarran-Ferguson Act on the relationship between the Federal Priority Statute, 31 U.S.C. § 3713, and a state law governing the priority of claims in an insurance liquidation proceeding. The Supreme Court held that state liquidation laws do not, in their entirety, "relate to the business of insurance" within the meaning of the McCarran-Ferguson Act, but do "relate to the business of insurance" to the extent they "protect policyholders." *Fabe*, 508 U.S. at 493-94. The Supreme Court held that the McCarran-Ferguson Act causes state insolvency laws to reverse-preempt the Federal Priority Statute—a federal statute that does not relate to the business of insurance—to the extent the state laws "afford priority, over claims of the United States, to insurance claims of policyholders and to the costs and expenses of administering the liquidation" but not to the extent they prioritize "other categories of

[2] See Patient Protection and Affordable Care Act; HHS Notice and Benefit Payment Parameters for 2015, 78 Fed. Reg. 72,322, 72,370-71 (Dec. 2, 2013) (explaining that netting "permit[s] HHS to calculate amounts owed each month, and pay or collect those amounts from issuers more efficiently").

claims" over those of the United States. *Id.* at 493-94.

Fabe does not apply to this case because the federal law at issue, the ACA, relates to the business of insurance. "[W]hen Congress enacts a law specifically relating to the business of insurance, that law controls." *Humana Inc. v. Forsyth*, 525 U.S. 299, 306 (1999). Thus, even if a conflict existed between federal and state law (and as addressed below, it does not), HHS's administration of the 3Rs programs pursuant to federal law would not yield to contrary state laws.[3] And the Liquidators' contention that HHS lacked authority under federal law for its offsets cannot be reconciled with federal common and regulatory law to the contrary.

B. The Liquidators Do Not Genuinely Dispute That South Carolina Law Authorizes HHS's Use of Offset

The Liquidators do not dispute that the South Carolina Liquidation Act requires offset. Opp. at 23 (citing S.C. Code § 38-27-490(a) ("Mutual debts or mutual credits between the insurer and another person . . . *must* be set off and the balance only may be allowed or paid[.]") (emphasis added)). Rather, they contend that HHS's use of offset violated another provision of the Liquidation Act, S.C. Code § 38-27-610, which governs the order in which an insolvent debtor's claims are paid. Opp. at 23-24. The United States addressed this argument in its Motion and cited to cases affirming its assertion that the right of setoff is not limited by a state priority scheme. Motion at 18-19. As the Supreme Court recognized more than a century ago, "it is only the balance, if any, after the set-off is deducted, which can justly be held to form part of the assets of the insolvent." *Scott v. Armstrong*, 146 U.S. 499, 510 (1892). Thus, it is only the post-offset assets of Consumers' Choice's estate that are distributed in accordance with the state priority scheme.

[3] The Liquidators argue that "Congress chose not to include a priority scheme within the ACA" and that this indicates that "state law controls insurance regulation." Opp. at 19. This argument misses the point completely. The issue before the Court is the propriety of HHS's offsets; there is no dispute as to any priority scheme.

The Liquidators make no attempt to dispute the sound reasoning of the courts that have considered the issue, and they do not assert that any court has held otherwise.

Moreover, the Liquidators' theory—that a creditor's debts can only be satisfied through the distributions from the estate—would render offset (and S.C. Code § 38-27-490(a)) a nullity. Offset avoids "the absurdity of making A pay B when B owes A." *Strumpf*, 229 U.S. at 528. Yet the Liquidators request that the Court sanction that very absurdity. Their theory lacks merit, is completely unsupported, and should be rejected.[4]

C. The Liquidators Concede That the Liquidation Order and Executive Order Are Irrelevant

The Motion demonstrated that nothing in the Liquidation Order purported to enjoin HHS from conducting offsets and that, in any event, the state court could not so enjoin the United States because Congress has not waived sovereign immunity in state courts. Motion at 20-21. The Motion also established that the Liquidators' reliance on Executive Order No. 13765 (2017) was misplaced because executive orders do not create any enforceable rights. Motion at 22. The Liquidators do not argue otherwise. Rather, they contend that even if the United States is correct, "it makes no difference to the merits of the suit or the disposition of the pending motion," that the purported violations are not "integral to the merits of any asserted claim," and that the "Court need not . . . analyze their substance or determine their effect." Opp. at 25. Although these allegations were mounted as part of Count II, the Liquidators apparently concede that those allegations are not legally relevant to any claim. As such, the Court need not consider those allegations in its

[4] Throughout their Opposition, the Liquidators argue that state law (and not federal law) controls the liquidation of an insolvent insurance company. Opp. at 17-21. But the Liquidators argue a point not in dispute. The question before the Court is whether HHS's offsets during its administration of a federal program were proper under federal law, and the Liquidators offer no justification as to why that question turns on state insolvency law.

analysis. Counts I and II should be dismissed.

II. The Contract Claims (Counts III, IV, V, and VI) Fail

A. The QHP Agreements (Count III) Are Irrelevant To The Liquidators' Offset Challenge

The Motion demonstrated that nothing in the QHP Agreements supports a contractual entitlement to reinsurance payments. Motion at 23-24. In response, the Liquidators admit that the QHP Agreements "do not specifically mention reinsurance payments," but nonetheless contend that the Complaint's allegations should be sufficient for them to survive the Motion. Opp. at 28. The Court need not accept the Complaint's allegations where those allegations defy the express terms of the agreements. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 662, 678 (2009).

Count III is especially dubious because the Federal Circuit and the Court of Federal Claims have already held that there is no contractual right to 3Rs payments and that the QHP Agreements are unrelated to the 3Rs programs. *See* Motion at 23-24. As Judge Lettow explained in rejecting an express contract claim for payment under another 3Rs program (risk corridors), the QHP Agreements merely certifies an insurer "as a qualified health plan issuer, as required by the Affordable Care Act and implementing regulations;" the "substance of each agreement" is that "the qualified health plan issuer agrees to use HHS's internet services in accord with the conduct outlined in the agreement." *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 108 (2016). The Federal Circuit agreed. *Land of Lincoln Mut. Health Ins. Co. v. United States*, 892 F.3d 1184, 1185 (Fed. Cir. 2018) ("For the reasons stated in our decision in the companion case, *Moda Health Plan, Inc. v. United States*, No. 17-1994, the statutory and contract claims . . . fail."). Although the Liquidators disagree with those holdings, Opp. at 26-27, they offer no reason to dispute that the analysis of the QHP Agreements was incorrect. Because nothing in the QHP Agreements even remotely suggests a contractual right to reinsurance payments, Count III should

be dismissed.

B. The Loan Agreement Permits Setoff (Count IV)

The Liquidators argue that the setoffs to collect the start-up loan were improper because (1) the loan had been subordinated and thus, the debts were not mutual, Opp. at 8-12, 22; and (2) the loan agreement's offset provision was no longer available, Opp. at 28-29.[5] Both of those theories lack merit.

As an initial matter, section 19.12 of the Loan Agreement preserves HHS's right of offset as to the start-up loan by stating that offset applies "notwithstanding any other provision of [the Loan] Agreement to the contrary." Nevertheless, the Liquidators argue that HHS's offsets were improper under the Loan Agreement because two other provisions of the Loan Agreement (sections 3.4 and 4.4), which are unrelated to setoff, should control. Opp. at 10-11.

It is undisputed that as a consequence of Consumers' Choice's default, HHS terminated the Loan Agreement. Upon HHS's termination, the start-up loan became "immediately due and payable." Loan Agreement, section 15.3(b). Consumers' Choice expressly agreed that in these circumstances HHS may pursue "any and all [] remedies . . . and rights . . . in [HHS's] sole and absolute discretion." *Id.* at section 15.3; *accord* section 16.2(f); section 16.3(f) (same). The Liquidators' contentions that the start-up loan remained subject to repayment and subordination restrictions upon loan termination simply make no sense; once Consumers' Choice was declared insolvent and in default, the Loan Agreement was terminated. The Liquidators' reading of those provisions fails to give effect to the agreement as a whole.

[5] The Liquidators also argue that if the Court accepts their arguments regarding the start-up loan, then the Court must necessarily deny the Motion. Opp. at 7-8. But the Liquidators allege that HHS offset several ACA debts (including the start-up loan, risk adjustment, cost-sharing reductions, and "other balances") against Consumers' Choice's 2015 reinsurance receivable. Complaint ¶¶ 89, 92. The Liquidators do not explain how success on their start-up loan theories affect the other offsets that they challenge.

The Liquidators' contention that HHS's offsets violated section 4.4 because Consumers' Choice was not obligated to repay the start-up loan unless it could meet "State Reserve Requirements" is based on a misreading of the Loan Agreement. Opp. at 8. As defined by the Loan Agreement, "State Reserve Requirements" refer to financial reserve requirements that Consumers' Choice was required to meet "for the delivery of health insurance" and "to issue CO-OP QHPs," and compliance with such financial requirements was a condition for "ongoing operations." *See* Dkt. 1-1 at page 8 of 74, Loan Agreement, Defined Terms. Those requirements have nothing to do with debt collection subsequent to Consumers' Choice's liquidation and the Loan Agreement's termination.

The subordination provision, section 3.4, also is linked to circumstances no longer present post-termination.[6] Rather, the Loan Agreement expressly provided for what was to occur upon termination and, as happened here, upon declaration of Consumers' Choice's insolvency: the unpaid principal amount of the start-up loan together with all other amounts "payable under" the agreement became "immediately due and payable." Loan Agreement, section 15.3(b).[7]

[6] The Liquidators' effort to limit the applicability of the language "while Borrower is operating as a CO-OP" found in section 3.4 is unavailing. There is nothing ambiguous about HHS's right to full payment of the start-up loan—without caveat or limitation—upon termination. Moreover, HHS's right of offset applies "notwithstanding any other provision" of the Loan Agreement, including section 3.4. *See* Loan Agreement, section 19.12.

[7] Relying on bankruptcy law, the Liquidators also contend that the United States has the burden of establishing mutuality. Opp. at 21. But the cases they rely on address post-petition offsets during bankruptcy proceedings under 11 U.S.C. § 553 of the Bankruptcy Code. This is not a bankruptcy proceeding, so the Bankruptcy Code is irrelevant. Moreover, the United States has met its burden under Rule 12(b)(6) to establish that its offsets were proper as a matter of law.

C. The Court Should Reject the Liquidators' Request to Recharacterize the Start-Up Loan

Relying exclusively on bankruptcy law, the Liquidators request that the Court recharacterize the start-up loan as equity. Opp. at 13-15. But that request is beyond the Court's authority.

The power to recharacterize debt "stems from the authority vested in the bankruptcy courts to use their equitable powers to test the validity of debts. The source of the [bankruptcy] court's general equitable powers is § 105 of the [Bankruptcy] Code, which states that bankruptcy judges have the authority to 'issue any order, process or judgment that is necessary or appropriate to carry out the provisions' of the Code.'" *In re AutoStyle Plastics, Inc.*, 269 F.3d 726, 748 (6th Cir. 2001) (internal citations omitted). This Court does not operate under the authority of 11 U.S.C. § 105, and, more broadly, its equitable powers are construed narrowly: "Except in strictly limited circumstances, there is no provision in the Tucker Act authorizing the [United States] Court of Federal Claims to order equitable relief." *Massie v. United States*, 226 F.3d 1318, 1321 (Fed. Cir. 2000) (internal citation omitted)). The Liquidators' request, which rests entirely on Bankruptcy Court opinions and appeals, seeks relief that the Court simply cannot grant. They have identified no authority that indicates otherwise, and their request for recharacterization should be denied.

Moreover, the Liquidators' position in the Opposition is completely contrary to the way they treated the start-up loan prior to initiating this case. The Liquidators admit that, in October 2015, they requested that the start-up loan be reclassified as equity. Opp. at 15 n.7.[8] They contend that HHS's willingness to consider that request means that the loan was equity all along. *Id.* at 15. But that argument is nonsensical; the Liquidators would have no reason to request a reclassification

[8] For the sake of completeness, a copy of the Liquidators' request is provided to the Court at Appendix A060.

if they never considered the loan to be debt.[9]

Further, the Liquidators do not dispute that in every financial statement they submitted to the State Court, they represented to the State Court that the start-up loan was a "liability" and that the solvency loan was "capital." *See* Motion at 19-20. They make no attempt to reconcile how or why they take two different legal positions. This Court should not entertain such duplicity.

The start-up loan is a loan, as the ACA expressly provides, 42 U.S.C. § 18042(b)(1)(A), (not equity or a capital contribution) and the Liquidators allege no other plausible inference.

D. The Implied Contract Claim (Count V) Fails

The Motion demonstrated that no implied contract for reinsurance payment exists because (1) the United States had no intent to contract; (2) no HHS official had authority to bind the United States in contract; (3) the United States did not breach any duty; and (4) any implied contract claim premised on the QHP Agreements is duplicative of the claims for breach of those express agreements. Motion at 25-28. The Liquidators' attempt to save this claim fails.

The Liquidators offer nothing to overcome "the presumption . . . that a law is not intended to create private contractual or vested rights." *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985). Instead, they rely entirely on Judge Wheeler's novel approach to finding intent in *Moda*, Opp. at 30-31, which was rejected by the Federal Circuit on appeal.[10] The Liquidators identify nothing in section 1341 of the ACA and the implementing

[9] In addition, as noted in the July 9, 2015 letter attached to the Opp., designation of the start-up loan as capital "must be approved by [South Carolina's] start regulator[.]" Opp., Exhibit B at pg. 2. *See, e.g.*, Motion at Appendix A002 (letter from South Carolina Department of Insurance approving of solvency loan as a surplus note). The Liquidators do and cannot allege that any such approval was requested or received regarding the start-up loan.

[10] The Liquidators argue that the Court can disregard the Federal Circuit's holdings in *Moda* (and *Land of Lincoln*) because "that opinion is not yet settled law while Moda Health Plan's petition for certiorari is pending." Opp. at 29 n.14, 39. That is not the law. The possibility of Supreme

regulations that constitutes an offer or invites acceptance by performance, and no such intent can be divined.

Moreover, the Liquidators assert, without authority, that the Secretary of HHS has authority to bind the government in contract for reinsurance payments because entering into such contracts was an integral part of the Secretary's duties. Opp. at 32. The Court need not accept that bald allegation as nothing in the ACA, much less section 1341, authorizes any federal official to enter into a contract to make reinsurance payments. Count V should be dismissed.

E. The Claim for Violation of the Implied Duty of Good Faith and Fair Dealing (Count VI) Necessarily Fails Absent a Breach of Any Contract

The Motion demonstrated that the Liquidators fail to identify any promise by the United States that was undermined by HHS's use of offset or any contractual obligation that suggests that HHS would not exercise offset. Motion at 29. In response, the Liquidators simply repeat their express and implied contract theories for reinsurance payments. But because Consumers' Choice has no contractual right to reinsurance payments, the Liquidators' claim for breach of the implied duty of good faith and fair dealing must fail. Count VI should be dismissed.

III. The State Law Claims (Counts VII, VIII, and IX) Fail

A. The Tucker Act Does Not Provide Jurisdiction Over the State Law Claims

The Motion demonstrated that the Tucker Act does not provide jurisdiction in this Court for the state law claims. Motion at 30-31. In their Opposition, the Liquidators do not refute any of the authority cited in the Motion. Rather, the Liquidators simply state—without citation—that

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Court review does not change the binding nature of precedent. *See In re Micron Tech., Inc.*, 875 F.3d 1091, 1098 (Fed. Cir. 2017) ("Circuit-court precedent is binding on district courts notwithstanding the mere possibility that the Supreme Court might come to disapprove of that precedent."); *Coltec Indus. v. United States*, 454 F.3d 1340, 1353 (Fed. Cir. 2006) ("There can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our court [the United States Court of Appeals for the Federal Circuit], and our predecessor court, the Court of Claims.") (citations omitted).

this Court can consider their state law claim because those claims arise from statutes that "contemplate the application of state law" and from contracts governed by state law. Opp. at 35. The Liquidators cite no authority for their theory that this Court's jurisdiction can be expanded in such a manner to encompass alleged violations of state law. Only Congress has that power, and nothing in the statutes or contract at issue suggests that Congress has done so.

In any event, the Liquidators also (wrongly) suggest that a district court dismissed their state law claims because that district court believed that this Court had jurisdiction to consider the claims. Opp. at 35.[11] First, this Court has an unflagging obligation to determine the basis for its own jurisdiction. *See, e.g.*, *Ultra-Precision Mfg. Ltd. v. Ford Motor Co.*, 338 F.3d 1353, 1356 (Fed. Cir. 2003) ("Jurisdiction is a threshold issue and a court must satisfy itself that it has jurisdiction to hear and decide a case before proceeding to the merits"); *View Eng'g, Inc. v. Robotic Vision Sys. Inc.*, 115 F.3d 962, 963 (Fed. Cir. 1997) ("courts *must always* look to their jurisdiction, whether the parties raise the issue or not") (emphasis added).

Second, the Liquidators' reliance on *Greene v. United States*, 440 F.3d 1304 (Fed. Cir. 2006) is misplaced. *Greene* was a civil action for the recovery of a tax refund, so the Court of Federal Claims exercised jurisdiction under 28 U.S.C. § 1346(a)(1)—not the Tucker Act—which is the Liquidators' asserted basis for jurisdiction. *Compare Greene v. United States*, 42 Fed. Cl. 18, 24 (1998) *with* Complaint ¶ 4. Moreover, the court in *Greene* did not resolve any issue of state law or entertain any claim based on state law. *See Greene*, 440 F.3d at 1314 ("At first blush, this court appears to be confronted with the necessity of deciding a question of Arizona law. . . . However, we do not need to reach this issue, because we conclude that a state cannot retroactively

[11] To the extent the Liquidators disagreed with the district court's decision, they could have appealed that decision to the Court of Appeals for the Fourth Circuit, but chose not to do so.

deprive the federal government of its priority rights."). *Greene* is simply inapposite.

Third, the Liquidators do not assert the same claims that were before the district court. In the district court complaint, the Liquidators asserted three claims for declaratory and injunctive relief, specific performance, and unjust enrichment. *Farmer v. United States*, No. 3:17-cv-956 (D.S.C.), Docket No. 1, Complaint ¶¶ 105-131. The fact that the district court lacked jurisdiction to consider those claims says nothing about this Court's jurisdiction to consider alleged violations of the Liquidation Act (which were never asserted in the district court case). The state law claims should be dismissed for lack of jurisdiction.

B. The State Law Claims Fail on the Merits

If this Court reaches the merits of the Liquidator's state law claims, those claims should be dismissed for the reasons set forth in the Motion. The three provisions of the Liquidation Act relied upon by the Liquidators, S.C. Code §§ 38-27-510, -610, and -470, are irrelevant because they have nothing to do with offsets—offset is addressed in a different provision, S.C. Code § 38-27-490(a), and is expressly required by the Liquidation Act. None of the Liquidators' arguments are sufficient to save the state law claims.

First, the Court should reject the Liquidators' request that the Court ignore the plain language of the Liquidation Act and read a prohibition against offset into the text of provisions unrelated to offset. Opp. at 22-24. Nothing in any of the provisions relied upon by the Liquidators addresses offset, or even remotely suggests that offsets are not permitted. The only provision of the Liquidation Act that addresses offset, S.C. Code § 38-27-490(a), expressly requires it. The Liquidators' reading of the Liquidation Act strains credulity.

Second, the Liquidators offer nothing to dispute that the ACA preempts state laws that interfere with the ACA. Instead, the Liquidators merely assert that state law controls disputes

involving the liquidation of insolvent insurers. Opp. at 37. As set forth in the Motion and above, state law cannot be permitted to impede HHS's administration of the ACA.

Third, HHS administers the reinsurance program pursuant to congressional authority. As such, the government is clearly not an insurance or reinsurance company. Insurance and reinsurance companies also require licensing and approval from state regulators, S.C. Code §§ 38-5-10, 38-5-60, and the Liquidators do not (and cannot) allege that the United States was licensed to conduct such business in South Carolina. The Liquidators simply assert without support that HHS "functioned as a reinsurer in the same way that concept is used and understood in the law and in the industry." Opp. at 38. The Court need not accept that bald allegation. Count VII should be dismissed.

Fourth, as explained above, HHS's right to offset attaches independent of distribution priority. *Supra* at 4-5. Count VIII should be dismissed.

Finally, the Liquidators argue that the Court should "assume" that the government "was an insider acting in a preferential way." Opp. at 38-39. But nothing in section 38-27-470 of the Liquidation Act suggests that an offset constitutes a "preference" as a matter of law, so the Court need not accept this allegation as true. Count IX should be dismissed.

IV. The Takings Claim (Count X) Fails

The Motion demonstrated that the Takings claim (Count X), which requires a "cognizable Fifth Amendment property interest," fails because statutory obligations do not create property interests and Consumers' Choice has no contractual entitlement to reinsurance payments. Motion at 35-36. In response, the Liquidators simply repeat their allegation that Consumers' Choice had a contractual and statutory right to reinsurance payments. Opp. at 39-40. For the reasons set forth in the Motion, Count X should be dismissed.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed.

Dated: May 6, 2019

Respectfully submitted,

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APPENDIX

Consumers' Choice
Health Plan

October 5, 2015

Kathleen Scelzo, Account Manager
HHS Center for Consumer Information and Oversight
200 Independence Avenue, SW
Washington, DC 20201

Re: Consumers' Choice Health Plan (CCHP)
Re-characterization of start-up loan to surplus

Dear Kathleen,

This is to provide written request that surplus notes be applied to CCHP's start-up loans. The financial forecast dated September 15, 2015 projected CCHP's net capital and surplus as of year-end 2015 to be 417% of NAIC Authorized Control Level without start-up loan re-characterization in 2015. This would fall below the 500% risk based capital required in the Loan Agreement between CMS and CCHP. However, the financial forecast projects that CCHP will be able to maintain net capital and surplus of at least 500% of NAIC Authorized Control Level if CCHP is able to re-characterize the start-up loan from debt to equity, and would remain in compliance with the risk based capital levels required by the Loan Agreement between CMS and CCHP.

The actuarially certified life of loan financial projections are attached. These financial projections reflect the implementation of the change, with Exhibit 5 showing the Surplus as a % of ACL without the loan re-characterization and Exhibit 20 showing the Surplus as a % of ACL with the loan re-characterization. These actuarially certified life of loan financial projections include CMS requirements, including risk based capital levels with respect to state requirements and actual and projected payments made or received through the Risk Adjustment, Reinsurance, and Risk Corridors programs.

This re-characterization of start-up loans to surplus notes has been discussed with Lee Hill, Deputy Director Financial Regulation & Solvency Division of the South Carolina Department of Insurance. He is supportive of the conversion and has verbally approved proceeding with this proposed amendment.

Execution of this amendment should be completed during 2015 so the 2015 Annual Statement and financial reporting reflect the additional net capital and surplus.

Sincerely,

Jerry W. Burgess
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