IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FIRST PRIORITY LIFE INSURANCE COMPANY, INC., *et al.*	)	
Plaintiffs,	)	
v.	)	No. 16-587C
	)	Judge Wolski
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFFS' SUPPLEMENTAL BRIEF ADDRESSING THE COURTS' DECISIONS IN *MAINE II* AND *MOLINA*

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Plaintiffs First Priority Life Insurance Company, Inc., and other Highmark Plaintiffs (collectively, "Highmark" or "Plaintiffs"), respectfully submit this supplemental brief pursuant to the Court's Orders of August 7, 2017 (ECF No. 39) and August 14, 2017 (ECF No. 41), ordering the parties to address the recent risk corridors decisions by Judge Bruggink in *Maine Community Health Options v. United States*, 133 Fed. Cl. 1, 2017 WL 3225050 (July 31, 2017), *appeal docketed*, No. 17-2395 (Fed. Cir. Aug. 3, 2017) ("*Maine II*"), and Judge Wheeler in *Molina Healthcare of California, Inc. v. United States*, 133 Fed. Cl. 14, 2017 WL 3326842 (Aug. 4, 2017) ("*Molina*").

In *Maine II*, Judge Bruggink granted Defendant's RCFC 12(b)(6) motion to dismiss the one-count complaint's statutory claim, denied the insurer's motion for summary judgment, and criticized portions of Judge Wheeler's analysis in a previous risk corridors decision, *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 450 (2017), *appeal docketed*, No. 17-1994 (Fed. Cir. May 5, 2017) ("*Moda*").[1] In *Molina*, Judge Wheeler answered Judge Bruggink's critique, identified that Court's errors in *Maine II*, and, expanding upon his reasoning in *Moda*, granted summary judgment to the plaintiff-insurer on its statutory and implied-in-fact contract claims, denied Defendant's RCFC 12(b)(6) motion to dismiss the insurer's claim for breach of an implied covenant of good faith and fair dealing, granted the RCFC 12(b)(6) motion to dismiss the insurer's express contract and takings claims, and found that the Court lacked jurisdiction over the plaintiff's request for declaratory relief.

Highmark's was the second-filed of what are now 33 risk corridors actions before the Court. Since this action was filed, the risk corridors arguments by Defendant and the various health insurance plaintiffs have evolved. The *Maine II* and *Molina* decisions address the very

[1] Highmark submitted supplemental briefing to this Court regarding *Moda* on April 7, 2017. *See* Pls.' Supp. Br. Addressing the *Moda* Opinion, ECF No. 33 (Apr. 7, 2017) ("Pls.' *Moda* Supp. Br.").

latest in the parties' positions, and illustrate how Judge Wheeler in *Molina* correctly addressed Defendant's newest arguments and case law in its attempt to evade the Government's statutory and contractual payment obligations, while Judge Bruggink unfortunately took shortcuts in *Maine II* that caused him, by his own admission, to struggle with the cases and arrive at the wrong conclusion.

The great weight of precedent, discussed both below and in all of Highmark's previously filed briefs, clearly demonstrates that Defendant's motion to dismiss should be denied. First, the Court should deny Defendant's RCFC 12(b)(1) motion to dismiss Highmark's entire Complaint. Section 1342 is a money-mandating statute, and Plaintiffs' claims are ripe because risk corridors payments are due *annually*. Second, the Court should deny Defendant's RCFC 12(b)(6) motion to dismiss Counts II-V[2] and find that Highmark's contractual and takings claims for *full* risk corridors payments to be made each year state plausible claims for relief under the governing pleading standards. The Court should permit Highmark to pursue its claims.

I. JUDGES UNANIMOUSLY AGREE THAT SECTION 1342 IS A MONEY-MANDATING STATUTE AND THAT THE COURT HAS SUBJECT-MATTER JURISDICTION OVER HIGHMARK'S CONTRACT AND TAKINGS CLAIMS

Both Judges Bruggink and Wheeler agree with all the other Judges of the Court that have opined on the issue: Section 1342 – with its mandatory "shall pay" obligation imposed on the Government – is a money-mandating statute, giving the Court subject-matter jurisdiction over risk corridors plaintiffs' statutory claims pursuant to the Tucker Act. *See Maine Cmty. Health Options v. United States*, No. 16-967C, 2017 WL 1021837, at *2 (Fed. Cl. Mar. 9, 2017) (Bruggink, J.) ("*Maine I*") ("[Section 1342] mandates the payment of money to participating insurance providers should their costs exceed a target amount."); *Molina*, 2017 WL 3326842, at *11 ("Section 1342 … is clearly money-mandating.") (citing *Land of Lincoln Mut. Health Ins.*

[2] Defendant only challenges Count I on 12(b)(1) subject-matter jurisdiction and ripeness grounds.

Co. v. United States, 129 Fed. Cl. 81, 97 (2016) (Lettow, J.), *appeal docketed*, No. 17-1224 (Fed. Cir. Nov. 16, 2016) ("*Lincoln*"); *Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757, 770 (2017) (Sweeney, J.) ("*Health Republic*"); *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 450 (2017) (Wheeler, J.), *appeal docketed*, No. 17-1994 (Fed. Cir. May 5, 2017) ("*Moda*"); and *Blue Cross and Blue Shield of N.C. v. United States*, 131 Fed. Cl. 457, 472 (2017) (Griggsby, J.), *appeal docketed*, No. 17-2154 (Fed. Cir. June 14, 2017) ("*BCBSNC*")).

Because the *Maine* plaintiff's complaint only asserted one count – a statutory claim similar to Highmark's Count I – the Court's subject-matter jurisdiction did not extend further. *See Maine I*, 2017 WL 1021837, at *2. The *Molina* plaintiff's complaint, however, contained contract and takings claims mirroring Highmark's Counts II-V, over which the Court held that jurisdiction was "not in question." *Molina*, 2017 WL 3326842, at *12. Here, Defendant has never disputed the fact that Defendant's RCFC 12(b)(1) motion to dismiss "fails to identify any specific jurisdictional deficiencies with Plaintiffs' … Counts II- IV, or … Count V." Pls.' Opp'n Br., ECF No. 12 at 22 (Oct. 14, 2016). This Court clearly has Tucker Act jurisdiction over all of Highmark's claims in Counts I-V of its Complaint, and, therefore, that aspect of Defendant's RCFC 12(b)(1) motion to dismiss should be denied.

II. RISK CORRIDORS PAYMENTS ARE DUE ANNUALLY AND HIGHMARK'S CY 2014 CLAIMS THEREFORE ARE RIPE

Judge Wheeler correctly observed that while the Court's Tucker Act jurisdiction over risk corridors claims is unquestionable, the Court "cannot adjudicate those claims if they are not yet ripe for judicial review." *Molina*, 2017 WL 3326842, at *12. The ripeness challenge posed by Defendant "has been consistent across the risk corridor cases," including here, with Defendant asserting that because Section 1342 does not require the Government "to actually make the risk corridor payments on an *annual* basis," "HHS determined that final risk corridor payments were

not due until the end of the program." *Id.* (emphasis added); *see, e.g.*, Def.'s Mot. to Dismiss, ECF No. 8 at 18-19 (Sept. 16, 2016) (making "not presently due" ripeness argument). To resolve the ripeness issue, the Court therefore must determine *when* risk corridors payments are due: either annually, as Highmark and other risk corridors plaintiffs assert, or a year or more after the three-year program ends (*i.e.*, December 31, 2017, or later), as Defendant asserts.

Judge Bruggink reduced his ripeness analysis to a few pointed sentences, concluding that "the clear inference from the text of [Section 1342] is that payment will be made on a yearly basis. The claim is thus ripe." *Maine I*, 2017 WL 1021837, at *2. Judge Wheeler came to the same conclusion – "Section 1342 mandates annual payments to insurers. Therefore, Molina's claims for 2014 and 2015 risk corridor payments are ripe for adjudication" – but importantly, the Court in *Molina* explained its reasoning and that of Judge Sweeney in *Health Republic*. *Molina*, 2017 WL 3326842, at *13-14. This Court should follow Judge Wheeler's ripeness analysis.

At the outset, this Court should avoid the mistakes made by Judges Lettow and Griggsby in "mudd[ying] together" two distinct issues: the initial ripeness question of *when* risk corridors payments are due,[3] and the subsequent merits question of whether *full* risk corridors payments must be paid by the due date.[4] *Molina*, 2017 WL 3326842, at *13 (citing *Moda*, 130 Fed. Cl. at 453, *Lincoln*, 129 Fed. Cl. at 98, and *BCBSNC*, 131 Fed. Cl. at 474). The problem with conflating the two distinct issues is that in "*Lincoln* and *BCBS*[*NC*], the Courts' entanglement of these issues may have resulted in incorrectly applying *Chevron* deference to both matters," *i.e.*, the timing-of-payment question and the full-payment question. *Id.* As it conceded to this Court

[3] As stated above, Plaintiffs assert that payment is due annually, while Defendant asserts that no payment is due until at least one year following the end of the three-year program.

[4] Plaintiffs assert that Section 1342's express "shall pay" mandate reflects Congress' intent that full payment must be made when risk corridors payments are due, while Defendant asserts that CMS' subsequent decision to implement Section 1342 on a "budget neutral" basis reflects Congress' alleged original (but, unstated) intent to limit payments to the extent of collections.

at the February 2017 hearing, however, Defendant only seeks *Chevron* deference on the timing issue, not on the full-payment issue. *See* Hr'g Tr., ECF No. 30 at 20:20-24 (Feb. 7, 2017) ("[T]he only place where we think deference is appropriate is on this question of timing, and the question is, is what HHS -- is how HHS implemented its program, the timing of payments here, is that a permissible construction of Section 1342?"). If this Court applies *Chevron* deference to determine ripeness, then it must carefully limit the scope of its analysis and its deference only to the timing issue. The Court should follow the analyses applied by the Courts in *Molina*, *Moda*, and *Health Republic*, not the model employed in *Lincoln* or *BCBSNC*. *See Molina*, 2017 WL 3326842, at *13 ("*Health Republic* remains the most thorough and instructive discussion of the Government's ripeness arguments.").

The familiar two-step framework under *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837 (1984), provides for court deference to "an agency's interpretation of a statute" only when "the statute is ambiguous" (step-one) and "the agency's interpretation is reasonable" (step-two). *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015). Importantly, and ignored by Judge Griggsby in *BCBSNC*,[5] courts do not "simply defer to the agency" where "the statute's text does not explicitly address the precise question," rather, the step-one "search for Congress's intent must be more thorough than that." *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998). Courts must "examine 'the statute's text, structure, and legislative history, and apply the relevant canons of interpretation.'" *Kyocera Solar Inc. v. ITC*, 844 F.3d 1334, 1338 (Fed. Cir. 2016) (citation omitted). Only if the ambiguity remains following this thorough search may a court proceed to the step-two analysis. Judge Wheeler took this correct approach in *Molina* regarding the timing-of-payment question, following the path set in *Health Republic* and *Moda*.

[5] *See* Pls.' Supp. Br. Addressing *BCBSNC*, ECF No. 36 at 10-19 (May 12, 2017) (detailing the Court's many *Chevron* errors in *BCBSNC*).

See Molina, 2017 WL 3326842, at *13-14.

First, Judge Wheeler found that Section 1342's "statutory language suggests that Congress intended insurers to receive payments annually." *Molina*, 2017 WL 3326842, at *13. Finding "that the plain language of Section 1342 suggests payments are to be made on an annual basis," Judge Wheeler next addressed "the function of the risk corridor program," concluding that the program's purpose within the ACA "requires that risk corridor payments be made on an annual basis." *Id.* Judge Wheeler's step-one analysis thus revealed no ambiguity in Section 1342 regarding the timing issue: the statute requires *annual* risk corridors payments. Although he could have stopped at step-one, Judge Wheeler moved to *Chevron* step-two, finding that "even if Section 1342 were ambiguous, HHS interpreted [the statute] to require annual risk corridor payments," because the agency "indicated repeatedly that it would make annual payments to insurers." *Molina*, 2017 WL 3326842, at *13-14; *see also Health Republic*, 129 Fed. Cl. at 776-78.

Among the sources Judge Wheeler cited for the Government's annual-payment obligation was the very April 11, 2014 bulletin out of which Defendant's so-called "three-year payment framework" arises, and on which Defendant seeks deference. *Molina*, 2017 WL 3326842, at *14 (quoting "Risk Corridor Mem.": "[I]f risk corridor collections are insufficient to make risk corridor payments for a year, all risk corridor payments for that year will be reduced pro rata to the extent of any shortfall").[6] Notably, in affording deference to an agency regulation, or even to

[6] *See also Molina*, 2017 WL 3326842, at *6 n.9 (defining "Risk Corridor Mem." as the April 11, 2014 bulletin); Def.'s Mot. to Dismiss, ECF No. 8 at 19 (Sept. 16, 2016) (citing CMS's "Risk Corridors and Budget Neutrality" document – *i.e.*, the April 11, 2014 bulletin – as the source of the "three-year payment framework," which Defendant claims "is entitled to deference by the Court"); Compl. Ex. 32 (the April 11, 2014 bulletin).

an agency statement not formally adopted in any regulation appearing in the C.F.R.,[7] the Court must defer to what the Government's source document *actually* says – here, that risk corridors payments are due annually and will be paid annually (albeit on a prorated basis) – rather than Defendant's *post hoc* litigation position construing the source document. *See, e.g.*, *Cameron v. United States*, 550 Fed. App'x 867, 872 (Fed. Cir. 2013) ("[D]eference is not appropriate where the agency's interpretation 'is nothing more than a convenient litigating position … or a post hoc rationalization advanced by an agency seeking to defend past agency action. …'") (quoting *Christopher v. Smith-Kline Beecham Corp.*, 567 U.S. 142, 155 (2012)). Whatever Defendant now tries to argue about the April 11, 2014 bulletin, that document expressly contemplated annual risk corridors payments. *See* Compl. Ex. 32. Moreover, the Government actually made annual payments to the Plaintiffs. *See, e.g.*, *Moda*, 130 Fed. Cl. at 454 ("HHS followed a rigid annual schedule in practice as well as in implementation."); Compl. ¶¶ 148 (CY 2014 payments to Plaintiffs starting in December 2015).

Construing the April 11, 2014 bulletin in any other way would cause a conflict with the Government's earlier interpretations of its payment obligations, namely the March 23, 2012 pronouncement that "QHP issuers who are owed these [risk corridors payment] amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers,"

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[7] Although the Court expressed uncertainty at the February 7, 2017 hearing whether agency statements outside of formally adopted regulations deserve any consideration (*see* Hr'g Tr. at 30:6-32:18 (Feb. 7, 2017)), the Supreme Court and Federal Circuit have held they do. *See, e.g.*, *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("We must give substantial deference to an agency's interpretation of its own regulations."). Judges Sweeney and Wheeler properly considered the April 11, 2014 bulletin, along with the Government's preceding relevant statements regarding its risk corridors payment obligations. *See, e.g.*, *Health Republic*, 129 Fed. Cl. at 777 ("[N]either [Section 1342] nor the regulations contain an explicit deadline for HHS to make risk corridors payments. Thus, the court turns to HHS's construction of its own regulations. Two documents—the July 11, 2011 proposed rule and the April 11, 2014 memorandum—reflect that HHS construed its regulations to require annual risk corridors payments.").

and that "HHS would make payments to QHP issuers that are owed risk corridors amounts within a 30-day period after HHS determines that a payment should be made to the QHP issuer." 77 FR 17219, 17238 (Mar. 23, 2012) (Compl. Ex. 22). "[U]nder *Chevron*, an agency can only reject a prior interpretation of an ambiguous statute if it explains why it is doing so." *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1382 (Fed. Cir. 2017). Because no such explanation for the agency's rejection exists here, the Supreme Court has made plain that Defendant's assertion of the April 11, 2014 bulletin's policy change "receives no *Chevron* deference." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (citation omitted).[8]

Following the proper *Chevron* analysis steps, Judge Wheeler concluded "that Section 1342 mandates annual payments to insurers." *Molina*, 2017 WL 3326842, at *14. Accordingly, the Court found Molina's claims – which are identical to Highmark's claims here – to be "ripe for adjudication." *Id.* This Court should follow the same careful analysis and arrive at the same conclusion, rejecting Defendant's ripeness challenge and denying Defendant's RCFC 12(b)(1) motion to dismiss.[9]

III. JUDGE WHEELER ANALYZED AND CORRECTLY FOUND THAT SECTION 1342 CREATES A STATUTORY PAYMENT OBLIGATION, WHILE JUDGE BRUGGINK FAILED TO ANALYZE THAT CRUCIAL ISSUE

The Courts in *Maine II* and *Molina* diverged on the merits of how they analyzed and decided the plaintiffs' statutory claims. While Defendant's RCFC 12(b)(6) motion to dismiss

[8] This explains why Defendant does not seek *Chevron* deference to the Government's 180-degree reversal in 2014 regarding "budget neutrality." *See* 79 FR 13743, 13829 (Mar. 11, 2014) ("HHS intends to implement this program in a budget neutral manner.") (Compl. Ex. 31); Compl. Ex. 32 (April 11, 2014 bulletin). The Government's earlier, March 11, 2013 statement controls: "The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments [to QHPs] as required under section 1342." 78 FR 15409, 15473 (Mar. 11, 2013) (Compl. Ex. 20). It was thus improper for Judges Lettow and Griggsby to conflate the full-payment issue with the timing-of-payment issue.

[9] *See also* Pls.' *Moda* Supp. Br. at 2-3 (analyzing ripeness).

does not target Highmark's Count I, a comparison of the two contrasting opinions helps define the controlling legal principles and understand how this Court should apply those principles following a careful and thorough analysis, without shortcuts.

Respectfully, the fundamental analytical shortcut employed by the Court in *Maine II* led Judge Bruggink to the wrong result. As Judge Wheeler recognized, the Court in *Maine II* chose not to analyze the fundamental issue of whether "Congress [ ] intend[ed] to obligate any payment of money beyond what is collected under the program," because Judge Bruggink concluded that "the answer to the second question [whether Congress expressly limited the funds available to make RCP payments in appropriation legislation] is clear." *Molina*, 2017 WL 3326842, at *24 (quoting *Maine II*, 2017 WL 3225050, at *7). In other words, Judge Bruggink avoided evaluating the scope of Section 1342's statutory payment obligation, deciding that no matter what Section 1342 might mandate, the later-enacted riders trumped it. As explained *infra*, however, the answer to the Court's second question involving the effect of the appropriations riders concerns the "implied repeal" doctrine. That doctrine's "cardinal rule" requires the Court to interpret an earlier statute (here, Section 1342) to determine whether a later statute (here, each appropriations rider) is "irreconcilable" with the earlier statute's obligations. *TVA v. Hill*, 437 U.S. 153, 190 (1978). Unfortunately, Judge Bruggink neglected to conduct that vital first analysis. *See Molina*, 2017 WL 3326842, at *24 ("Respectfully, the Court cannot properly resolve the second issue without resolving the first.").

Had the Court in *Maine II* actually examined the scope of Section 1342's statutory payment obligation, it would have been confronted with the case law and arguments that Judge Wheeler addressed in *Molina*, and, earlier, in *Moda*. Judge Wheeler properly framed and analyzed the two main issues on the full-payment question in *Molina*:

First, does the Government have a statutory duty to make full annual risk corridor

> payments despite the lack of a specific appropriation in Section 1342? … Second, if the Government had a duty to pay, did the Congressional 2015 and 2016 appropriations riders vitiate that statutory duty? … The Court agrees with Molina in both instances. … The Court concludes that Section 1342 unequivocally mandated full annual payments to insurers when it was enacted and throughout the life of the program.

2017 WL 3326842, at *15.

Regarding the first question[10] – does a statutory payment obligation exist absent an appropriation – among the cases addressed by Judge Wheeler was *Collins v. United States*, 15 Ct. Cl. 22 (1879), in which the Court of Claims established long ago that "[t]his court … does not deal with questions of appropriations, but with the legal liabilities incurred by the United States …." *Molina*, 2017 WL 3326842, at *19 (quoting *Collins*, 15 Ct. Cl. at 35).[11] Judge Wheeler also cited "a mountain of controlling case law holding that when a statute states [that] a certain consequence 'shall' follow from a contingency" – such as in Section 1342(b) – then "the provision creates a mandatory obligation." *Molina*, 2017 WL 3326842, at *19. Further, Judge Wheeler found that the cases relied upon by Defendant, such as "*Prairie County*,[12] *Greenlee County*,[13] and *Star-Glo*[14] do *not* hold that 'shall pay' language, standing alone, fails to create an obligation for the Government to make payments." *Molina*, 2017 WL 3326842, at *20 (emphasis added). Rather, those cases "stand for the proposition that Congress may cap the Government's payment obligations by use of express words in a statute or … the legislative

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[10] The second question – the legal effect of the appropriations riders – is addressed in the next section, *infra*.

[11] *See also* Pls.' *Moda* Supp. Br. at 4-7 (detailing *Collins*).

[12] *Prairie Cnty., Mont. v. United States*, 782 F.3d 685 (Fed. Cir. 2015); *see also* Pls.' *Moda* Supp. Br. at 11-12 (analyzing *Prairie County*).

[13] *Greenlee Cnty., Ariz. v. United States*, 487 F.3d 871 (Fed. Cir. 2007); *see also* Pls.' *Moda* Supp. Br. at 12 n.22 (discussing *Greenlee County*).

[14] *Star-Glo Assocs., LP v. United States*, 414 F.3d 1349 (Fed. Cir. 2005); *see also* Pls.' *Moda* Supp. Br. at 12 n.21 (distinguishing *Star-Glo*).

history of an ambiguous statute." *Id*. Judge Wheeler concluded that because Congress "explicitly capped the Government's liability at a certain percentage of a lossmaking insurer's allowable costs" in Section 1342, "the Government must make full payments to insurers up to the amount specified in Section 1342." *Id.* [15] And the Government must do so "despite the absence of specific appropriations in the statute." *Id.* at *21.

Judge Wheeler rightly criticized Judge Bruggink's shortcut for failing to analyze Section 1342's payment obligation and "whether Section 1342 was 'budget neutral' when it was created," and instead deciding *Maine II* based solely on his analysis of the appropriations riders. *See Molina*, 2017 WL 3326842, at *24. "Respectfully," Judge Wheeler observed, "the Court cannot properly resolve the second issue without resolving the first," because under the implied repeal doctrine, "[w]hether Section 1342 did initially commit the Government to make full annual risk corridor payments affects the legal test for determining whether Congress later vitiated that obligation." *Id.* "There can be no room for inference when dealing with whether the Government will honor its statutory commitments." *Id.*

Even though the Court in *Maine II* admittedly failed to analyze whether Section 1342 created a binding payment obligation, the Court went out of its way to suggest – incorrectly – that the Congress enacting the ACA in 2010 implicitly intended budget neutrality for Section 1342. *See Maine II*, 2017 WL 3225050, at *12 ("[W]e remain unconvinced … that Congress … did not intend the program to be budget neutral."). Although the Court placed much weight on the lack of a specific appropriation in Section 1342, *see id.*, it ignored precedent instructing that "[t]his court … does not deal with questions of appropriations." *Collins*, 15 Ct. Cl. at 35.

Moreover, while not "dispositive," the Court wrongly credited Defendant's

[15] The Court thus answered Defendant's repeated assertion that Section 1342 "would expose the Government to 'uncapped liability,'" noting that "[t]his assertion … is completely untrue." *See Molina*, 2017 WL 3326842, at *20 n.16.

"suggest[ion]" that the CBO's silence regarding risk corridors in its March 20, 2010 scoring of the ACA to Congress meant that Congress intended Section 1342 to be budget neutral. *Maine II*, 2017 WL 3225050, at *12. As the Federal Circuit has recognized, "the CBO is not Congress, and its reading of the statute is not tantamount to congressional intent." *Sharp v. United States*, 580 F.3d 1234, 1238-39 (Fed. Cir. 2009). Rather, "the CBO's failure to speak on Section 1342's budgetary impact was simply a failure to speak." *Moda*, 2017 WL 527588, at *15. The Court also ignored that once the CBO actually addressed Section 1342's budgetary impact, long after enactment of the ACA, the CBO affirmatively stated that, in contrast to the budget-neutral risk adjustment and reinsurance payments and collections that were in the March 2010 scoring, "risk corridor collections (which will be recorded as revenues) will not necessarily equal risk corridor payments, so that program can have net effects on the budget deficit." *CBO, The Budget and Economic Outlook*: 2014 to 2024, at 59 (Feb. 2014); *Moda*, 2017 WL 527588, at *16.

Further, in presuming, but not analyzing, the Congressional intent issue, the Court in *Maine II* ignored Section 1342's express mandate that the ACA risk corridors program "shall be based on" Medicare Part D's non-budget neutral risk corridors program. This omission contravened the Supreme Court's instruction that courts must "give effect, if possible, to every clause and word of a statute." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017); *Molina*, 2017 WL 3326842, at *16. Lastly, the Court's suggestion of budget neutrality further ignored HHS' own express understanding that "[t]he risk corridors program is not statutorily required to be budget neutral." 78 FR 15409, 15473 (Mar. 11, 2013).

IV. IT IS NOT "DIFFICULT TO HARMONIZE" THE IMPLIED REPEAL CASES

The Court's second significant shortcut in *Maine II* was to dispose of the case before completely understanding the implied repeal doctrine and the precedential cases underpinning it. Judge Bruggink admitted that he found "it difficult to harmonize the decisions" regarding

repeals-by-implication. *Maine II*, 2017 WL 3225050, at *11. Judge Wheeler, however, had no trouble harmonizing the same decisions in *Moda* and *Molina*, rejecting Defendant's argument that the later-enacted appropriations riders repealed or superseded Section 1342's mandatory payment obligation. *See Moda*, 130 Fed. Cl. at 457-62; *Molina*, 2017 WL 3326842, at *16-18 & *21-25.

It is not difficult to harmonize the decisions if the Court abides by the "cardinal rule" recognizing that "repeals by implication are not favored" – which "means that 'the only permissible justification for a repeal by implication is when the earlier and later statutes are ***irreconcilable***.'" *TVA*, 437 U.S. at 189-90 (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)) (emphasis added); *see also Molina*, 2017 WL 3326842, at *24 (discussing the "cardinal rule"). "[T]he policy applies with even *greater* force when," as in this case with the appropriations riders, "the claimed repeal rests solely on an Appropriations Act." *TVA*, 437 U.S. at 190 (emphasis in original). Plaintiffs do not dispute that Congress can "suspend or repeal a statute in force … by an amendment to an appropriation bill," but the "whole question depends on the intention of Congress as expressed in the statutes." *United States v. Will*, 449 U.S. 200, 222 (1980) (quoting *United States v. Mitchell*, 109 U.S. 146, 150 (1883)). And the "[Supreme] Court [has] held, in no uncertain terms, that 'the intention of the legislature to repeal ***must be clear and manifest***.'" *TVA* at 189 (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936)) (emphasis added).

Rather than heed the "cardinal rule" in *TVA*, which is not even cited in *Maine II*, Judge Bruggink followed his own "controlling principles" after admitting he had difficulty "harmoniz[ing] the decisions." *Maine II*, 2017 WL 3225050, at *11. Notably, the principles the Court applied did not include *TVA*'s fundamental "irreconcilable" test. *Compare id. with TVA*, 437 U.S. at 189-90. Contrary to the binding case law discussed below, Judge Bruggink

concluded that the riders repealed Section 1342's payment obligation even though, by his own reckoning, funding remained available for risk corridors payments. *See Maine II*, 2017 WL 3225050, at *12 ("Congress made clear its intention that … user fee contributions" would "be spent to reimburse risk corridor participants"). As Judge Wheeler understood after carefully analyzing the relevant cases, "[g]iven that Section 1342 clearly requires the Government to make full annual risk corridor payments, Congress cannot repeal this commitment by foreclosing the use of CMS Program Management funds *alone*." *Molina*, 2017 WL 3326842, at *24 (emphasis added).

In *Gibney*, the Court of Claims held that an appropriations bill prohibiting INS from using appropriations for overtime pay, "other than as provided in the Federal Employees Pay Act of 1945," did not suspend the overtime payment obligation. *Gibney v. United States*, 114 Ct. Cl. 38, 48-49 (1949). The Court disagreed that *United States v. Dickerson*, 310 U.S. 554 (1940), controlled. *Gibney*, 114 Ct. Cl. at 53. In *Dickerson*, the Supreme Court held that a prior statute for military re-enlistment bonuses was completely incompatible with a later appropriations bill expressly revoking those bonuses "notwithstanding" the prior statute – thus there had been an implicit repeal. *Dickerson*, 310 U.S. at 555, 561. The *Gibney* Court found that while the "notwithstanding" clause in *Dickerson*'s appropriation "carried a temporary *suspension* of the legislative authorization," the *Gibney* facts presented "a simple limitation on an appropriation bill of the use of funds," which has never "been held to *suspend* a statutory obligation." *Gibney*, 114 Ct. Cl. at 53 (emphasis added).[16]

Here, the appropriations riders do not suspend, but merely limit some funding for, the Government's risk corridors payment obligation – nowhere do the riders indicate that their instructions are to be followed "notwithstanding" Section 1342. Because payments still remain

[16] *See also* Pls.' *Moda* Supp. Br. at 8-9 (discussing *Dickerson* and *Gibney*).

due under Section 1342, its statutory obligation remains alive; *Gibney* controls, not *Dickerson*. *Accord Molina*, 2017 WL 3326842, at *17-18 (comparing cases).

The contrast between the late-1800s Supreme Court cases of *Mitchell* and *Langston* further illustrate the "cardinal rule." In *Mitchell*, an 1851 statute set the annual salary of Indian interpreters at $400, which "shall be in full of all emoluments and allowances whatsoever." *Mitchell*, 109 U.S. at 147. In other words, interpreters earned a salary, but no bonus. Later, the Indian appropriations acts cut the base pay to $300, but also appropriated $6,000 "[f]or additional pay … to be distributed in the discretion of the Secretary of the Interior." *Mitchell* at 149. Accordingly, interpreters lost some salary, but could earn a bonus. The Supreme Court held that the change in compensation structures – from a base salary with no bonus, to a lower base with a bonus – "distinctly reveals a change in the policy of Congress on this subject" that was "***irreconcilable***" with the 1851 statute, rendering it "*suspended*." *Mitchell* at 149-50 (emphasis added).

In *Langston*, by contrast, later appropriations acts provided only $5,000 for the U.S. minister to Haiti's annual salary, statutorily set at $7,500. *United States v. Langston*, 118 U.S. 389, 390-91 (1886). The Supreme Court found that there was no "positive ***repugnancy*** between the old and the new statutes." *Id.* at 393 (emphasis added). It observed that none of the appropriations acts "contains any language to the effect that such sum shall be 'in full compensation' for those years." *Id.* Nor, in contrast to *Mitchell*, "was there in either of the [appropriations acts] an appropriation of money 'for additional pay,' from which it might be inferred that Congress intended to repeal the act" setting the minister's salary at $7,500. *Id.* The Court thus held that a money-mandating statute "should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount … for particular fiscal years, and which contained no words that expressly or by clear implication modified or repealed the

previous law." *Id.* at 394.[17]

Here, as in *Langston*, Congress kept Section 1342's underlying obligation alive, and "merely appropriated a less amount" in the appropriations riders by limiting certain – but not all – funding sources to make Section 1342 payments. *Langston* thus controls. *Accord Molina*, 2017 WL 3326842, at *17-18.

Will is inapplicable as well. There, the Supreme Court considered the effects of several appropriations bills, including the so-called "Year 4" bill that prohibited "funds available for payment to executive employees" from being "used to pay any such employee or elected or appointed official any sum in excess of 5.5 percent increase in existing pay and such sum if accepted shall be in lieu of the 12.9 percent due for such fiscal year." 449 U.S. at 208. Because the prior cost-of-living-increase statute could not coexist with an appropriation blocking the use of ***any*** pay-related funds for cost-of-living increases beyond a certain percentage, which Congress expressly made "in lieu" of the full amount due under the prior cost-of-living statute, the Court found an implied repeal. *Id.* at 223-24 ("Congress intended to ***rescind*** these raises entirely, not simply to consign them to the fiscal limbo of an account due but not payable. The clear intent of Congress in each year ***was to stop*** for that year the application of the Adjustment Act.") (emphasis added).[18]

But here, Congress did not prohibit the entire universe of "funds available for risk corridors payments" from being "used to pay any risk corridors payments," nor did Congress state that "pro-rated risk corridors user fees if accepted shall be in lieu of the full risk corridors payment due for such calendar year." Section 1342's money-mandating "shall pay" obligation plainly is not ***irreconcilable*** with the limitation of ***some*** – but not ***all*** – funding sources for those

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17 *See also* Pls.' *Moda* Supp. Br. at 7-8 (detailing *Langston*).

18 *See also* Pls.' *Moda* Supp. Br. at 8 n.15 (footnote regarding *Will*).

payments. *Accord Molina*, 2017 WL 3326842, at *18 ("Congress meant only to prevent HHS from using the CMS Program Management account for risk corridor payments, not … to bar all other sources of funding for such payments.") (quoting *Moda*, 130 Fed. Cl. at 461).

Finally, in both *Maine II* and *Molina*, Defendant placed particular reliance on the Federal Circuit's decision in *Highland Falls-Fort Montgomery Central School District v. United States*, 48 F.3d 1166 (Fed. Cir. 1995), but after careful examination, Judge Wheeler correctly determined that it was inapplicable for several reasons. In *Highland Falls*, earmarks for specific amounts in appropriations acts were held to suspend discretionary payments to school districts determined by the Secretary of Education. Regarding those earmarks, the Federal Circuit found "great difficulty imagining a more direct statement of congressional intent than the instructions in the appropriations statutes at issue here." *Id.* at 1170 (noting that the appropriation specifically earmarked "$15,000,000").[19]

In the risk corridors context, by comparison, there are no earmarks in the appropriations riders, and the HHS Secretary has no discretion under Section 1342's "shall pay" mandate to pay less than the statutorily-prescribed sums. The *Highland Falls* statute also allowed for the possibility that Congress might underfund the program – no similar provision exists in § 1342. Thus, *Highland Falls* does not support Defendant's position. *See Molina*, 2017 WL 3326842, at *23 (concluding that the "reasoning in *Highland Falls* simply does not apply because the appropriation laws at issue are quite different"). Judge Bruggink did not even attempt to compare or apply *Highland Falls* to the risk corridors context, but merely recited that case's facts and holding. *See Maine II*, 2017 WL 3225050, at *9-10.

The reason the Court in *Maine II* likely found it "difficult to harmonize" the cases of *Norcross v. United States*, 142 Ct. Cl. 763 (1958), *Prairie County*, and *Star-Glo* with the repeal-

[19] *See also* Pls.' *Moda* Supp. Br. at 11 n.21 (distinguishing *Highland Falls*).

by-implication doctrine is because none of those decisions involved a repeal by implication. Had Judge Bruggink not taken his first shortcut, and instead had examined the scope of Section 1342's statutory payment obligation, he would have understood *Prairie County* and *Star-Glo* in their proper context.[20] Those cases demonstrate that Congress uses very specific language when it intends to limit a substantive statutory obligation it previously has created.

In *Prairie County*, the Federal Circuit held that the Payment in Lieu of Taxes Act (PILT) – a money-mandating statute providing local governments payments for "tax-immune" federal lands in their jurisdictions – limited the Government's statutory "shall pay" obligation to available appropriations because the statute expressly stated that "[a]mounts are available only as provided in appropriation laws." 782 F.3d at 690 (citation omitted). The Court found that using the word "only" "reflect[ed] congressional intent to limit the government's liability" for PILT's money-mandating payments. *Id.*; *see also Greenlee Cnty.*, 487 F.3d at 878 ("[I]n some instances the statute creating the right to compensation … may restrict the government's liability … to the amount appropriated by Congress…. [T]he language 'subject to the availability of appropriations' is commonly used.").[21]

Unlike the PILT, however, Section 1342's money-mandating "shall pay" language is unqualified and has never been altered. Section 1342's lack of any "subject to the availability of appropriations" language "commonly used to restrict the government's liability to the amounts appropriated by Congress," *Greenlee Cnty.*, 487 F.3d at 878, is particularly significant because

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[20] The inclusion of *Norcross* is a curiosity. That case addressed the limited one-year operation of appropriations acts, unless Congress included language showing an intent to make the appropriation – or an appropriation restriction – permanent law. *See* 142 Ct. Cl. at 766.

[21] *See also* Pls.' *Moda* Supp. Br. at 11-12 (analyzing *Prairie County*); *id.* at 12 n.22 (discussing *Greenlee County*).

Congress used that same limiting language in many other ACA provisions.[22] *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (courts presume "that differences in language like this convey differences in meaning"). Thus, Section 1342 is a "prime example" of a statute that "authorize[s] and mandate[s] payments without making an appropriation." *Molina*, 2017 WL 3326842, at *19 n.15 (quoting *U.S. House of Reps. v. Burwell*, 185 F. Supp. 3d 165, 185 (D.D.C.), *appeal held in abeyance*, 676 Fed. App'x 1 (D.C. Cir. 2016)).

Finally, *Star-Glo* addressed a "statutory cap" of $58 million that Congress expressly included in the original statute – not a later appropriations act – which the Federal Circuit found limited the Government's payment obligation. 414 F.3d at 1355.[23] Section 1342, by contrast, contains absolutely no statutory cap of a specific dollar amount.

Star-Glo nevertheless inspired Judge Bruggink's conclusion in *Maine II* that "[t]he government's obligation was [ ] *capped* to the amount brought in from user fees." *Maine II*, 2017 WL 3225050, at *12 (emphasis added). Judge Bruggink's conclusion was based on his reading of *Star-Glo* as well as the operation of the appropriations riders *and their legislative history*. *See id.* at *12. Significantly, however, Judge Bruggink's analysis of *Star-Glo* completely omitted the Federal Circuit's express admonition that "it is *inappropriate to rely upon legislative history* to establish the existence of a *statutory cap* that is *not contained in the text of the statute itself*." *Star-Glo*, 414 F.3d at 1355 (citing *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 646 (2005)) (emphasis added). No "cap" is contained in the appropriations riders. Judge Bruggink failed to recognize this crucial distinction, but the Court in *Molina* did not make the same mistake. *See Molina*, 2017 WL 3326842, at *23. The appropriations riders simply

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[22] Multiple other ACA provisions variously provide that payments to insurers are "subject to the availability of appropriations." *See, e.g.*, 42 U.S.C. § 280k(a); 42 U.S.C. § 300hh-31(a); 42 U.S.C. § 293k(d); 42 U.S.C. § 1397m-1(b)(2)(A).

[23] *See also* Pls.' *Moda* Supp. Br. at 12 n.21 (discussing *Star-Glo*).

limit certain funds transferred into the CMS Program Management account from being used for risk corridors payments:

> None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services—Program Management" account, may be used for payments under section 1342(b)(1) of Public Law 111-148 (relating to risk corridors).

Compl. Exs. 33 & 36. According to binding Supreme Court and Federal Circuit precedent, the Court's "cap" inquiry therefore should have ended with the statutory text. *Accord Molina*, 2017 WL 3326842, at *23 (after discussing *Star-Glo* and *Cherokee II*, concluding that "[t]he Court sees no ambiguity in the appropriation laws at issue here. Thus, the legislative history of the appropriation law cannot relieve the Government from an obligation specified in codified law" at Section 1342).

Because of the analytical shortcuts taken by the Court in *Maine II,* the Court failed to recognize the profound error in its finding that the later Congress' FY 2015 and FY 2016 appropriations riders "intercepted" the payment obligations in Section 1342 by virtue of being enacted "in December of each year," mere days before the CY 2014 and CY 2015 risk corridors periods closed. *Maine II*, 2017 WL 3225050, at *8.[24] That finding entirely ignores that *before* the riders were passed, in response to the enactment of Section 1342 and its "shall pay" mandate, Highmark and the QHPs already had: (i) developed ACA-compliant plans, (ii) signed on as QHPs and offered such plans for the 2014 plan year, and (iii) signed up as QHPs to offer plans for the 2015 plan year. *See* Compl. ¶¶ 39-46, 94, 97, 114 & 126. The Government's liability had matured, and was enforceable without regard to the last day of the calendar year. *See*

[24] While not before the Court, the FY 2017 appropriations rider was not enacted until May 2017, five months *after* the CY 2016 risk corridors period concluded. *See* Pub. L. 115-31, § 223, 131 Stat. 135 (May 5, 2017).

Molina, 2017 WL 3326842, at *19 (cataloguing "a mountain of controlling case law holding that when a statute states [that] a certain consequence 'shall' follow from a contingency, the provision creates a mandatory obligation"). Indeed, were the Court's conclusion in *Maine II* to prevail, then no entity would ever again participate in any statutory program targeting private companies to advance the goals of the United States, because the Government could abrogate its payment obligation at the eleventh hour – regardless of the private party's commitment, participation, risk and expense – by slipping a rider into an appropriations bill that does not even supersede the original statutory payment obligation. "[T]o say to [Highmark and all QHPs], 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Moda*, 130 Fed. Cl. at 466 (quoting *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970)).

V. JUDGE WHEELER CONSIDERED, AND RIGHTLY REJECTED, DEFENDANT'S CHALLENGE TO *MODA*'S IMPLIED-IN-FACT CONTRACT ANALYSIS

In *Molina*, Judge Wheeler paid particular attention to – and correctly rejected – Defendant's assertions that the Court's reasoning in *Moda* on implied-in-fact contract was "infirm." *See Molina*, 2017 WL 3326842, at *25-29.[25] Judge Wheeler granted summary judgment for the plaintiffs in *Molina* on their implied-in-fact contract claim, as the Court had done in *Moda*. *See id.* at *29. This Court should follow Judge Wheeler's analysis, and deny Defendant's RCFC 12(b)(6) motion to dismiss Highmark's implied-in-fact contract claim at Count III.

In addressing Defendant's implied-in-fact contract arguments, "the Court focuse[d] most of its discussion on the first element: mutuality of intent to contract." *Molina*, 2017 WL 3326842, at *25. Judge Wheeler tackled Defendant's arguments after providing a summary of

[25] Again, *Maine II* did not address anything beyond the sole statutory claim in that case.

his reasoning in *Moda*. *See id.* at *25-26.[26] Judge Wheeler devoted considerable attention to the three cases that Defendant proffered to argue that *Moda* faltered on the mutuality-of-intent element: *Brooks v. Dunlop Mfg. Inc.*, 702 F.3d 624 (Fed. Cir. 2012), *Hanlin v. United States*, 316 F.3d 1325 (Fed. Cir. 2003), and *Bay View, Inc. v. United States*, 278 F.3d 1259 (Fed. Cir. 2001). *See Molina*, 2017 WL 3326842, at *27-28. The Court forcefully distinguished all three cases, explaining why each was "not helpful to the Government." *See id.* With that, Judge Wheeler held that "the test established by the Court of Claims in *Radium Mines*[27] is still the proper legal test to determine whether Congress has clearly manifested an intent to bind itself contractually." *Id.* at *28.

That test includes "[t]he 'circumstances surround[ing]' the passage of the ACA," *Molina*, 2017 WL 3326842, at *28 (quoting *Brooks*, 702 F.3d at 631 and *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465 (1985)),[28] and the Government's "statements, made before Molina and similar insurers agreed to offer plans on the Exchanges," which "were designed to instill confidence in the Government's promise to actually share the risks of the ACA and actually protect against potential losses." *Id.* "If not," Judge Wheeler concluded, "then participation in the risk corridors program 'would have been madness.'" *Id.*; *see United States v. Winstar Corp.*, 518 U.S. 839, 848 (1996). These Government statements included, among others, that "Section 1342 was intended to 'protect against uncertainty in rates … by limiting the extent of insurer losses and gains,'" and that "the risk corridors program was a

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[26] Highmark previously addressed *Moda* in supplemental briefing to this Court, and refers the Court to the discussion concerning Plaintiffs' implied-in-fact contract claim. *See* Pls.' *Moda* Supp. Br. at 12-20.

[27] *Radium Mines, Inc. v. United States*, 153 F. Supp. 403 (Ct. Cl. 1957).

[28] The Supreme Court made clear that courts should consider the conduct and "legitimate expectations" of the parties both before and after the relevant legislation was passed, and determine whether "Congress would have struck" the bargain under such circumstances. *See Nat'l R.R. Passenger Corp.*, 470 U.S. at 465-66.

'mechanism for sharing risk' between the Government and insurers." *Molina*, 2017 WL 3326842, at *28 (quoting and citing 77 FR 73118, 73119 (Dec. 7, 2012); 78 FR 72322, 72379 (Dec. 2, 2013); 79 FR 13743, 13829 (Mar. 11, 2014); and 77 FR 17219, 17236 (Mar. 23, 2012)).

Judge Wheeler found that the totality of the circumstances – "[t]he function of the risk corridor program, and HHS's interpretation of it, along with the clear mandate that the Secretary of HHS make full risk corridor payments" and the fact "that the success of the ACA depended in no small part on insurers like Molina agreeing to take a significant risk [that] they thought they would be sharing with their Government" – "manifest nothing but an intent to bind Congress to its word in exchange for insurers' participation in the Exchanges." *Id.*[29] Accordingly, Judge Wheeler concluded that there was no genuine dispute that an implied-in-fact contract had been formed between the Government and Molina regarding risk corridors payments, and that the Government had breached that contract. *Id.* at *29.

In *Molina*, Judge Wheeler denied Defendant's RCFC 12(b)(6) motion to dismiss the

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[29] *Accord amicus* briefs filed in support of *Moda* in the Federal Circuit on August 28, 2017, attached hereto at Exhibits A-D:

- Ass'n for Cmty. Affiliated Plans *Amicus* Br. at 3 ("[E]veryone knew that 'shall pay' means 'shall pay.'");
- Nat'l Ass'n of Ins. Comm'rs *Amicus* Br. at 19 ("Companies were incentivized to market plans on the Exchanges with a promise of loss containment, and they still have no clarity on whether or to what extent that promise will be kept.");
- Blue Cross Blue Shield Ass'n *Amicus* Br. at 10 ("Congress intended the risk corridors program to require full and certain payments according to the statutory formula because otherwise the program would have served no rational purpose in stabilizing the early ACA markets."); and
- State Attorneys General *Amicus* Br. at 11 ("Through the ACA, Congress essentially invited insurance companies and states to enter an uncertain economic arena. Congress enticed them do so, in part by mandating the payments at issue as a way to reduce the financial exposure participating companies would face. Although the government then failed to make the mandated payments to those whose exposure was greater than they anticipated, the government is now trying to fault the companies (and, by implication, states such as Oregon) for relying on the statutory mandate, and for accepting Congress's invitation.").

implied-in-fact contract count, and granted summary judgment to the insurer. *See Molina*, 2017 WL 3326842, at *29. For the same reasons, this Court should deny Defendant's RCFC 12(b)(6) motion to dismiss Plaintiffs' implied-in-fact contract claim.

VI. HIGHMARK'S COMPLAINT PLAUSIBLY ASSERTS EXPRESS BREACH OF THE QHP AGREEMENTS

While Plaintiffs disagree with the Court's dismissal of Molina's express contract claim based on the record that was before the Court in *Molina*, here, Highmark's Complaint alleges plausible facts supporting Count II's claim that the Government's failure to make full risk corridors payments annually breached the Plaintiffs' QHP Agreements. Properly applying the governing RCFC 12(b)(6) standard, this Court should deny Defendant's RCFC 12(b)(6) motion to dismiss Count II.

VII. HIGHMARK'S IMPLIED COVENANT CLAIM SHOULD SURVIVE ALONG WITH HIGHMARK'S CONTRACT CLAIMS

Judge Wheeler denied Defendant's RCFC 12(b)(6) motion to dismiss Molina's claim for breach of an implied covenant and fair dealing, because "Molina's implied-in-fact contract claim survives dismissal and the Court finds that the Government is in breach." *Molina*, 2017 WL 3326842, at *29. Because this Court should find that Plaintiffs' contract claims survive Defendant's RCFC 12(b)(6) challenge, Highmark's Count IV should likewise proceed beyond the motion to dismiss stage.

VIII. HIGHMARK'S FACT-INTENSIVE TAKINGS CLAIM SHOULD NOT BE DISMISSED AT THIS STAGE

Judge Wheeler granted Defendant's RCFC 12(b)(6) motion to dismiss Molina's takings claim because "Molina's successful motion for partial summary judgment [regarding implied-in-fact contract] is precisely why its takings claim fails." *Molina*, 2017 WL 3326842, at *30. Highmark has not yet moved for summary judgment on its contract claims. It therefore would be improper for this Court – after finding that Highmark's contract claims survive Defendant's

RCFC 12(b)(6) motion to dismiss – to dismiss Plaintiffs' takings claim. As set forth in Highmark's Opposition, the fact-intensive nature of takings claims makes them ill-suited for dismissal this early in the proceedings. *See* Pls.' Opp'n Br., ECF No. 12 at 47-48 (Oct. 14, 2016). Defendant's RCFC 12(b)(6) motion to dismiss Plaintiffs' taking claim in Count V should be denied.

IX. HIGHMARK'S REQUEST FOR DECLARATORY RELIEF SHOULD SURVIVE

Finally, Judge Wheeler found that the Court lacked subject-matter jurisdiction over Molina's request for declaratory relief regarding the Government's obligation to make full and timely CY 2016 risk corridors payments. *Molina*, 2017 WL 3326842, at *14. Although the Court was presented with the same case law as Highmark relies upon here in support of its requested declaratory relief, *see* Pls.' Opp'n Br., ECF No. 12 at 49 (Oct. 14, 2016), Judge Wheeler did not address any of those cases in his decision in *Molina*. *See generally Molina*, 2017 WL 3326842, at *14. This Court, after considering those persuasive decisions, should deny Defendant's RCFC 12(b)(1) motion to dismiss Highmark's request for declaratory relief.

CONCLUSION

For all of the foregoing reasons, as well as those stated in Plaintiffs' previously-filed briefs, Plaintiffs respectfully request that the Court deny Defendant's Motion to Dismiss brought under Rule 12(b)(1) against Counts I-V, and under Rule 12(b)(6) against Counts II-V.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2017, a copy of the foregoing Plaintiffs' Supplemental Brief Addressing the Courts' Decisions in *Maine II* and *Molina* 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.

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