IN THE UNITED STATES COURT OF FEDERAL CLAIMS

DOUG OMMEN, in his capacity as Liquidator of CoOportunity Health, Inc., et al.,	:	Case No. 17-957C
	:	Judge Lettow
Plaintiffs,	:	
v.	:	
THE UNITED STATES OF AMERICA,	:	
Defendant.	:	

THE UNITED STATES' REPLY IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' (the "Liquidators") Amended Complaint pleads seven counts that can be grouped as follows: they allege entitlement to additional risk corridors payments under the Affordable Care Act's ("ACA") risk corridors program (Counts I, II, and V); they challenge the Department of Health & Human Services' ("HHS") use of offset to collect ACA debts (Counts III and IV); and finally, they allege that HHS's rules for the ACA risk adjustment program were arbitrarily and capriciously derived (Counts VI and VII). As clarified by their opposition to our motion to dismiss, the Liquidators' primary challenge to the propriety of HHS's offsets is based upon defunct-insurer CoOportunity Health, Inc.'s ("CoOportunity") alleged entitlement to additional risk corridors payments.

As we explained in our motion to dismiss and further demonstrate in this reply, the risk corridors payments the Liquidators seek are foreclosed by controlling precedent of the Court of Appeals for the Federal Circuit. The United States' offset rights are well-grounded in federal law and were properly exercised in this case. And finally, this Court's jurisdiction does not encompass the Liquidators' Administrative Procedure Act ("APA") challenges to the substantive validity of HHS's risk adjustment rules, notwithstanding the Liquidators' attempt to rely upon a prior ruling by a district court to support jurisdiction in this Court.[1]

[1]The Liquidators' opposition does not respond to our motion to dismiss Count V, their risk corridors' Takings claim, and thus they have conceded that portion of the motion.

ARGUMENT

I. The Risk Corridors Claims (Counts I, II, and V) Should Be Dismissed on the Merits Pursuant to *Moda* and *Land of Lincoln*

A. Federal Circuit Precedent is Binding

The Liquidators mistakenly argue this Court is not bound by the Federal Circuit's decisions in *Moda Health Plan, Inc. v. United States,* 892 F.3d 1311 (Fed. Cir. 2018) and *Land of Lincoln Mutual Health Insurance Co. v. United States,* 892 F.3d 1184 (Fed. Cir. 2018) because there are "*possibilities* for further appellate review" of those cases in the Supreme Court. Opp. at 5-6 (emphasis added). But the "mere possibility" of Supreme 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.").

This Court is bound to apply the Federal Circuit's precedent unless and until such precedent is overruled by the Supreme Court or the Federal Circuit *en banc*. *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); *Passamaquoddy Tribe v. United States*, 82 Fed. Cl. 256, 261-62 (2008) ("The United States Court of Appeals for the Federal Circuit has ruled that this court must not engage in a *de novo* interpretation of statutes . . .; rather, it should carefully follow the binding precedent in this circuit as to the meaning of . . . relevant statutory terms.") (citation omitted); *see also United States v. Vega-Castillo,* 540 F.3d 1235, 1236 (11th Cir. 2008) (recognizing that circuit court precedent is binding "unless and until" it is overruled) (internal quotation marks and citations omitted); *Yong v. I.N.S.,* 208 F.3d 1116, 1119 n.2 (9th Cir. 2000) (recognizing that "once a federal

circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority.").

If the Liquidators did not want their claims adjudicated while there remains a "possibility" of further review of the risk corridors issues, they could have requested to continue the stay that was in effect in this case. *See* Dkt. 18, 19. Having requested that the stay be lifted, the Liquidators cannot now litigate as if the Federal Circuit's precedent does not exist.[2] The Liquidators' risk corridors claims should be dismissed.

B. The Liquidators Do Not Raise a Novel Implied-in-Fact Contract Claim

In further support of their effort to recover risk corridors payments notwithstanding Federal Circuit precedent, the Liquidators wrongly contend that CoOportunity's status as a Consumer Operated and Oriented Plan ("CO-OP") distinguishes their claims from those resolved in *Moda* and *Land of Lincoln*. Opp. at 6. Land of Lincoln and Maine Community Health Options[3] were also CO-OPs, and the Federal Circuit still rejected their claims.

Nothing in the ACA's CO-OP program enabling statute and regulations, 42 U.S.C. § 18042, 45 C.F.R. §§ 156.500-156.520, distinguishes a CO-OP to allow the Court to read

[2] The Liquidators attempt to draw a false equivalency between this Court's adherence to Federal Circuit precedent and the early procedural posture in *New Mexico Health Connections v. United States*, 312 F. Supp. 3d 1164 (D.N.M. 2018). *Moda* and its progeny require dismissal of the Liquidators' risk-corridors-based claims; *New Mexico Health Connection*s has nothing to do with the obligations of this Court to act in accord with controlling precedent. In any event, the Liquidators over read the breadth of that decision. *New Mexico Health Connections*, 340 F. Supp. 3d 1112, 1183 (D.N.M. 2018) ("The Court vacates only the 2014-18 rules as to the statewide average premium rules, so this is a limited and tailored vacatur as to the deficiencies in the rules; *the remaining provisions stand*.") (emphasis added; footnotes omitted).

[3] Maine Community Health Options is another insurer whose risk corridor claims were rejected by the Federal Circuit. *Maine Cmty. Health Options v. United States*, 729 F. App'x 939 (Fed. Cir. 2018).

something into the risk corridors statute that the Federal Circuit did not. The CO-OP program contains no language whatsoever evincing an intent to contract for risk corridors. And as established in our motion to dismiss, CoOportunity's Loan Agreement similarly makes no mention of risk corridors.

The Federal Circuit made clear its holding that insurers were not entitled under an implied contract theory to risk corridors payments. Referring to section 1342 of the ACA, the risk corridors provision, the Federal Circuit held that "[t]he statute, its regulations, and HHS's conduct all simply worked towards crafting an incentive plan," not an implied contract. *Moda*, 892 F.3d at 1330; *see also Land of Lincoln v. United States*, 129 Fed. Cl. 81, 111-12 (2016) (Letow, J.). The Federal Circuit was clear that an unambiguous offer and acceptance cannot be inferred from the language or circumstances of the risk corridors program. *Moda*, 892 F.3d at 1330.

The Liquidators' attempt to distinguish *Moda* and *Land of Lincoln* on the basis of CoOportunity's CO-OP status should be rejected.[4]

II. The Offset Claims (Counts III and IV) Fail on the Merits

A. HHS's Offsets Were Consistent with Federal Law

The Liquidators concede, as they must, that HHS has the "right to setoff transactions to collect funds it is owed." Opp. at 8. The government's setoff rights are firmly established under federal common law, *United States v. Munsey Trust Co. of Washington, D.C.*, 332 U.S. 234, 239

[4] Even the Liquidators' animating rationale for its argument is misplaced. CoOportunity made the same decision that for-profit insurers made—to pursue a business opportunity by gaining access to new marketplaces in order to sell insurance. CoOportunity simply availed itself of the additional benefit of receiving seed money for its venture through the CO-OP program. In creating the risk corridors program, Congress placed no significance on the method by which an issuer was created. Further, the Liquidators' theory would require the Court to find that Congress intended to provide CO-OPs, but not other issuers of QHPs, a contractual right to additional risk corridors payments.

(1947); *Johnson v. All-State Construction, Inc.*, 329 F.3d 848 (Fed. Cir. 2003), and federal regulations, 45 C.F.R. § 156.1215; 42 C.F.R. § 401.607(a)(2).

Nevertheless, they argue that HHS's offsets were "improper" because "HHS failed to account for the full $130 million it owed to CoOportunity under the risk corridors program." Opp. at 14; *see also* Opp. at 18 (arguing that HHS did not follow the Netting Regulation). It is nonsensical for the Liquidators to suggest that the United States should have accounted for payments that the Federal Circuit has foreclosed.

Further, the Liquidators' notion that the Federal Circuit found a risk corridors "payment obligation" that was merely "suspended" by Congress, such that "HHS has an ongoing and continuing obligation," Opp. at 17, is contrary to the Federal Circuit's holding. As the Court of Appeals addressed the issue, "there is no safety valve built into the ACA to preserve the government's obligation notwithstanding Congress's suspension of it." *Moda*, 892 F.3d at 1328. Nor were risk corridors payments consigned "to the fiscal limbo of an account due but not payable." *Id.* at 1325 (internal citations omitted). CoOportunity is simply not entitled to additional risk corridors payments.

To reiterate the holding in *Moda*, the Federal Circuit explained, "Congress enacted temporary measures capping risk corridors payments out at the amount of payments in, *and it did so for each year the program was in effect*." *Id.* at 1327 (emphasis added). And the Court of Appeals left no doubt when it concluded its opinion:

> Accordingly, we hold that Moda has failed to state a viable claim of additional payments under the risk corridors program under either a statutory or contract theory.

Id. at 1331. The Liquidators' request that this Court deny HHS its right of offset—based upon risk corridors amounts that the Federal Circuit and this Court determined are not due—has no

foundation in the law. As determined in *Moda*, Congress specifically restricted HHS's ability to make risk corridors payments in excess of collections. *Id*. at 1329. CoOportunity received all the risk corridors payments it was due when it was credited its pro rata share of "payments in" under the program. *Id.* at 1330 ("we conclude that the government does not owe Moda anything in excess of its pro rata share of payments in"). The risk corridors program cannot serve as a basis for precluding HHS's use of offset to collect outstanding debts owed by CoOportunity.

B. HHS's Offsets Are Not in Tension with Iowa Law

The Liquidators do not dispute that HHS's right of offset attaches independent of distribution priority, that Iowa's liquidation code mandates offset (Iowa Code § 507C.30(1)), that the debts HHS offset were mutual, or that the Start-up Loan was a "loan" (as opposed to a capital contribution). *See* Mot. at 29-33 (establishing these points as a matter of law). Instead, the Liquidators contend that "State insurance laws" in the form of the Liquidation Order govern any dispute related to CoOportunity's liquidation. Opp. at 18-20. Not so.

As explained in our motion, federal law governs HHS's rights in federal programs. Mot. at 38 (citing *United States v. Kimbell Foods, Inc*., 440 U.S. 715, 726 (1979); *Boyle v. United Tech. Corp*, 487 U.S. 500, 504-05 (1988)). Congress, through the ACA, did not relinquish the primacy of federal law. Any doubt as to controlling law is foreclosed by 42 U.S.C. § 18041(d), which specifically preempts state law that "hinder[s] or impede[s]' the implementation of the ACA[.]" *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016, 1022 (8th Cir. 2015); *see also 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).

As for the Liquidation Order, the Liquidators do not argue that Congress has waived sovereign immunity such that a state court could enjoin HHS's administration of the ACA. Rather, the Liquidators assert that by submitting a proof of claim, HHS submitted to the jurisdiction of the state court. But this is not the law. "It has long been settled that officers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court in the absence of some express provision by Congress." *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947); *see also Goodin v. U.S. Postal Inspection Service*, 444 F.3d 998, 1002 (8th Cir. 2006) (holding that jurisdiction cannot be created by waiver or estoppel) (citations omitted). Therefore, HHS could not waive the United States' sovereign immunity by submitting a proof of claim in the State Court—only Congress can waive immunity. *See, e.g.*, *Granite Reinsurance Co. v. Frohman*, No. 8:08-cv-410, 2009 WL 2601105, *6 (D. Neb. Aug. 17, 2009) (rejecting the argument "that by filing of a Proof of Claim and actively participating in the . . . state receivership proceedings, [the government] voluntarily submitted to the jurisdiction of the [state court]" and holding that the agency "did not, and could not by its statements, acts, or omissions, grant to the [state court] subject matter jurisdiction"); *In re Matter of Simmons*, No. 1:15-cv-0107, 2016 WL 8223654, *2 (S.D. Ind. Jan. 22, 2016) (holding that state court's order was not "binding" on the government because "the order was not entered pursuant to a waiver [of sovereign immunity]").[5]

[5] As explained in our motion, the state court's *in rem* jurisdiction over CoOportunity's assets empowers that court to administer claims and determine distributions, but does not encompass a waiver of sovereign immunity. *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 38 (1992) (rejecting the notion that "a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity"); *see Zych v. Wrecked Vessel Believed to be the Lady Elgin*, 960 F.2d 665, 669 (7th Cir. 1992) (reiterating that "there is no general *in rem* exception to principles of sovereign immunity"). Following the decision in *Nordic Village*, Congress amended Section 106 of the Bankruptcy Code to abrogate the United States' sovereign immunity with respect to certain sections of the Code so that relief

Nor is there any merit to the Liquidators' argument that a waiver of immunity is not necessary. Opp. at 20 n.11. "The general rule is that a suit is against the sovereign if the judgment would expend itself on the public treasury or domain, or *interfere with public administration*, . . . or if the effect of the judgment would be to *restrain the Government from acting* or compel it to act." *See United States v. Rural Elec. Convenience Co-op. Co.*, 922 F.2d 429, 433 (7th Cir. 1991) (citations and quotation marks omitted) (emphasis supplied); *see also TransAmerica Assurance Corp. v. Settlement Capital Corp.*, 489 F.3d 256, 262 (6th Cir. 2007) ("compulsion itself is the vice that implicates federal sovereign immunity"); *Scheckel v. I.R.S.*, No. C03-2045 LRR, 2004 WL 1771063, at *2 (N.D. Iowa June 18, 2004) ("an injunction to prevent the IRS from collecting federal taxes" implicated sovereign immunity even though United States not named as defendant). Here, the Liquidators seek to rely upon a state court's order to bar HHS from exercising administrative offset to the detriment of the public treasury. In the absence of a waiver of sovereign immunity from Congress, neither the Liquidation Order nor HHS's submission of a proof of claim negates HHS's right to offset under federal law.

C. The Loan Agreement Permits HHS's Use of Offset to Collect the Start-up Loan

As explained in our motion to dismiss, 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." Although the Liquidators concede that this provision gives HHS "the *general* right to use setoff," Opp. at 21 (emphasis in original), they nevertheless argue that HHS's offsets were improper under the Loan Agreement because two other

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could be awarded against the United States in federal bankruptcy proceedings. *See* Pub. L. No. 103-394, Title I, § 113, 108 Stat. 4106, 4117 (1994). But Congress has not waived sovereign immunity for relief against the United States in state courts generally or in insurance-related proceedings specifically.

provisions of the Loan Agreement (sections 3.4 and 4.4), which are unrelated to setoff, should control. Opp. at 21-23.

It is undisputed that as a consequence of CoOportunity's default, HHS terminated the Loan Agreement. Dkt. 27-1, App. 1. Upon HHS's termination, the Start-up Loan became "immediately due and payable." Loan Agreement, section 15.3(b). CoOportunity 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) (CoOportunity shall "[r]epay any remaining Principal and Interest in accordance with Borrower's Repayment Schedules"); section 16.3(f) (same).[6] The Liquidators' contentions that the Start-up Loan remained subject to repayment and subordination restrictions upon loan termination simply make no sense; once CoOportunity 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.

The Liquidators' contention that HHS's offsets violated section 4.4 because CoOportunity 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 21. As defined by the Loan Agreement, "State Reserve Requirements" refer to financial reserve requirements that CoOportunity 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. 20-1 at page 8 of 74, Loan Agreement, Defined Terms. Those requirements have nothing to do

[6] The Liquidators' insistence that HHS terminated the Loan Agreement pursuant to section 15 rather than section 16, Opp. at 22, fails to appreciate that HHS's right to repayment of the Start-up Loan upon termination is the same under both provisions. Pursuant to section 15.3, upon default, which occurred here as a consequence of CoOportunity's insolvency, HHS exercised its right to declare the Start-up Loan immediately due and payable.

with debt collection subsequent to CoOportunity's liquidation and the Loan Agreement's termination.

The subordination provision, section 3.4, also is linked to circumstances no longer present post-termination.[7] Rather, the Loan Agreement expressly provided for what was to occur upon termination and, as happened here, upon declaration of CoOportunity'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). The collection of that debt through offset was proper.

D. HHS's Temporary Hold to Preserve its Right of Offset Was Proper, and In Any Event, the Liquidators' Claim to Funds Previously Held by HHS Is Moot

HHS's right to use an administrative hold to preserve its right of offset comported with the Supreme Court's holding in *Citizens Bank of Maryland v. Strumpf*, 516 U.S 16 (1995). The Liquidators offer no explanation, much less any supporting legal authority, as to the insufficiency of the law as determined by the Supreme Court.[8]

Nor was HHS's interest in preserving its right of offset speculative, as the Liquidators wrongly contend. Opp. at 10. It is undisputed that with insolvency and liquidation imminent, the

[7] 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.

[8] The Liquidators erroneously attempt to argue that government counsel before the district court conceded that HHS lacked authority for applying the administrative hold. Opp. at 12. The government explained to the district court, as it has explained here, that the administrative hold is permissible pursuant to the Supreme Court's recognition of the common law right.

struggling company's debts were, and would be, mounting on account of its participation in the ACA's CO-OP, 3Rs, and Consumer Subsidy programs.[9] As such, this case presents exactly the circumstances where the government's need to offset warrants a temporary withholding of payments.

Also misguided is the Liquidators' insistence that the legality of the administrative hold is not moot. All amounts once held by HHS, including pro-rata risk corridors payments, have been paid to CoOportunity in the form of offset. As we explained in our motion, offset is a form of payment. *Gonzales & Gonzales Bonds & Ins. Agency, Inc. v. Dep't of Homeland Sec.*, 490 F.3d 940, 945 (Fed. Cir. 2007) ("offset of other debt is a form of monetary relief"). Having received the amounts to which it is entitled, CoOportunity's estate has no additional claim to payment. The Liquidators' challenge to the temporary hold, instead, is subsumed in its generalized offset challenges. Because CoOportunity owed debts to HHS that were collected through offset, no consideration of the now-superseded administrative hold could lead to an award of money damages. Overtaken by HHS's subsequent offsets, the Liquidators' challenge to the hold is moot.

III. Sovereign Immunity Bars Adjudication of the APA Claims (Counts VI and VII) in This Court

It is well-settled that the Tucker Act does not waive sovereign immunity for claims founded on the APA, such as those asserted in Counts VI and VII. Mot. at 42-45.[10] Nevertheless, the Liquidators argue that this Court may entertain these APA-based counts because the parties

[9] Just to name a few, upon termination of the Loan Agreement the Start-up Loan became immediately due and payable (approximately, February-March 2016); overpayments of consumer subsidies continued to become due (April-July 2016); and reinsurance and risk adjustment for the 2015 benefit year became due (August-September 2016). Consistent with its purpose, the hold enabled HHS to satisfy some or all of these debts owed in its administration of the ACA.

[10] As noted in our motion, the counts of the Amended Complaint are misnumbered. To avoid confusion, this motion refers to the Amended Complaint's first APA count as Count VI, not Count V, as the Takings claim is the fifth count of the Amended Complaint.

litigated this Court's jurisdiction in an Iowa district court and that the United States (and this Court) are now precluded from considering any jurisdictional defects in Counts VI and VII. Opp. at 24-26. This theory misperceives the nature of jurisdiction, including black-letter principles of sovereign immunity, and is premised on multiple false assertions regarding what was litigated in the district court and what is at issue in these proceedings.

First, this Court is not precluded from determining its own jurisdiction; rather, this Court has an unflagging obligation to determine the basis for its 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, it is well settled that the Tucker Act's waiver of immunity does not extend to claims founded on the APA, such as those asserted at Counts VI and VII, Mot. at 42-43, and the Liquidators do not (and cannot) contend otherwise. The Liquidators' theory, however, would have this Court act contrary to Federal Circuit precedent and the statutory authority concerning the scope of the waiver of sovereign immunity under the Tucker Act. *Lane v. Pena*, 518 U.S. 187 (1996) (recognizing that Congress alone enjoys the power to waive sovereign immunity and any waiver is to be strictly construed); *Marathon Oil Co. v. United States*, 374 F.3d 1123 (Fed. Cir. 2004) (same). The Liquidators' implicit contention that principles of res judicata permit one court to expand the jurisdiction of another court, including the scope of Congress's sovereign immunity

waiver, should be rejected.[11]

Finally, the issues and claims before the Iowa district court and this Court are not the same. Contrary to the Liquidators' assertion, the United States did not move in the district court to dismiss the risk adjustment claim based upon sovereign immunity. In the district court, the United States moved to dismiss the Liquidators' risk adjustment claim based upon a lack of standing, contending that a money claim was not redressible under the APA. *Contrast Gerhart v. U.S. Dep't of Health & Human Servs.*, 242 F. Supp. 3d 806, 815-16 (S.D. Iowa 2017) ("HHS asserts the Liquidators' *risk adjustment claim* is not redressible.") *with id.* at 812 ("HHS contends the Liquidators' *offset claim* seeks only monetary relief and the Court of Federal Claims has jurisdiction over the claim.") (emphasis added).

By its express terms, the first amended complaint filed in the district court sought a declaration regarding CoOportunity's "Risk Adjustment Charges for 2015" or "any attempt to collect" 2015 risk adjustment charges; an injunction barring any attempt to collect payments "to account for any debt;" and an order "Enjoining Any Attempt to Collect Risk Adjustment Charges for 2015." *See* Dkt. 27-1 at Opp. App. 87, 90, District Court Amended Complaint. Nothing in this pleading suggests that the Liquidators instead sought remand to the agency to address, *inter alia*, any failures to explain its rationale as to budget neutrality (here, Count VI) or to modify its rules as to scope of participation in the program (Count VII), as is the necessary implication of the true-APA claims asserted in the case before this Court. Only with the benefit of hindsight, and the later-issued opinion of *New Mexico Health Connections v. United States*, 312 F. Supp. 3d 1164

[11] The circumstances of *Watson v. United States*, 86 Fed. Cl. 399 (2009) and *Case, Inc. v. United States*, 88 F.3d 1004 (Fed. Cir. 1996), relied on by the Liquidators are inapposite—neither involved the scope of the Tucker Act's sovereign immunity waiver. That a plaintiff cannot serially challenge a determination that the court lacks jurisdiction is not relevant to whether *res judicata* empowers a court to affirmatively exercise jurisdiction.

(D.N.M. 2018), do the Liquidators so characterize their previous claim.

Moreover, Counts VI and VII are not the same as the risk adjustment claim before the district court. Opp. at 24 n.13. In the district court proceedings, the Liquidators did not challenge HHS's purported failure to grant the Liquidators' May 24, 2016 exemption request or HHS's rules establishing the scope of participation in risk adjustment (here, Count VII), FAC ¶¶ 169, 261-62. Nor did the Liquidators challenge the "entire scheme" of risk adjustment (here, Count VI).[12] *Gerhart*, 242 F. Supp. 3d at 815-16 (stating "[n]otably, the Liquidators challenge the 2015, but not the 2014, risk adjustment calculation" and taking care to emphasize its view that the Liquidator did not assert "a challenge to the entire scheme of risk adjustment [] payments"). The district court plainly understood the Liquidators to be arguing that HHS improperly calculated CoOportunity's risk adjustment treatment for 2015 and to be seeking monetary relief in the form of a recalculated charge. *Id.* at 816 ("By challenging a single year of risk adjustment payments, the Liquidators demonstrate their desire for HHS to recalculate the risk adjustment payment and, based on their allegations, reduce the risk adjustment payment. A money judgment in favor of the CoOportunity estate would adequately address the Liquidators' claim[.]").[13]

[12] Unlike Count VI before this Court, which alleges the risk adjustment rules for benefit years 2014 and 2015 were the result of arbitrary and capricious rulemaking, before the district court, the Liquidators challenged only the amount of the "2015 risk adjustment charge" which they likewise characterized as a challenge to "methodology."

[13] The Liquidators rely, not on the government's briefs, but upon statements of counsel before the district court to support their characterization of the government's position in that litigation. When read in context, the government's arguments reflected an understanding that the Liquidators sought to recover money damages through the district court litigation. *See Bowen v. Massachusettes*, 487 U.S. 879 (1988). As explained above, the government's motion to dismiss the risk adjustment claim in district court asserted the claim, as presented, was not redressable in the district court. In their opposition, the Liquidators conceded that "[s]ome of the relief requested may result in a monetary payment to CoOportunity[.]" *See Gerhardt*, Case No. 4:16-cv-00151, Dkt. 69-1 at ECF Page 15 of 40. At argument, government counsel noted, and the district court apparently understood, that the Liquidators' claim challenged HHS's calculation of CoOportunity's 2015 risk

Because this Court lacks jurisdiction over the APA claims in this case challenging the substantive validity of HHS's rules, Counts VI and VII should be dismissed.

CONCLUSION

For the foregoing reasons, the Amended Complaint should be dismissed.

March 29, 2019

Respectfully submitted,

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adjustment charge and sought money damages. *See Gerhart*, 242 F. Supp. 3d. at 816 (analogizing to *Moda* as support for jurisdiction over claims disputing amounts calculated under ACA programs). The Liquidators' counsel did not refute that understanding; rather, when the district court asked why the Liquidators' claims were not simply monetary in nature, counsel argued that questions of priority distribution and ongoing monetary disputes meant that this Court could not provide adequate relief. *See* Dkt. 27-1 at App. 45-47, Transcript at 43:25-45:2. Against that backdrop, the government urged the district court to dismiss the entirety of the complaint asserting that full relief for the Liquidators could be sought in this Court. After dismissal, the Liquidators filed an appeal from the district court's decision. Prior to any appellate briefing, the Liquidators voluntarily abandoned that appeal and commenced this action. Cognizant that *Minuteman v. United States*, 291 F. Supp. 3d 174 (D. Mass. 2018) and *New Mexico Health Connections v. United States*, 312 F. Supp. 3d 1164 (D.N.M. 2018) were both brought in district court under the APA, and relying upon the theories pressed in those cases, the Liquidators chose to bring those APA-based claims before *this* Court. It has been the government's position throughout that the Liquidators' claim challenging 2015 risk adjustment charges in the district court sought relief beyond that which could be obtained under the APA because it effectively sought money damages.