IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FIRST PRIORITY LIFE INSURANCE COMPANY, INC., HIGHMARK INC. f/k/a HIGHMARK HEALTH SERVICES, HM HEALTH INSURANCE COMPANY d/b/a HIGHMARK HEALTH INSURANCE COMPANY, HIGHMARK BCBSD INC., HIGHMARK WEST VIRGINIA INC., and HIGHMARK SELECT RESOURCES INC.,	)	
Plaintiffs,	)	No. 16-587 C Judge Wolski
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS

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PRELIMINARY STATEMENT

The United States admits that it owes Plaintiffs[1] "full payment" of its risk corridors arrears, and that it "will record risk corridors payments due as an obligation of the United States Government for which full payment is required."[2] Defendant also concedes that § 1342 of the Affordable Care Act ("ACA")[3] is a money-mandating "shall pay" statute.

Yet, Defendant argues that this Court lacks Tucker Act jurisdiction to consider *any* of Plaintiffs' claims for money damages from the United States *at all*. Defendant further contends that Plaintiffs' claims to 2014 risk corridors payments will not be "ripe" until possibly 2018 or later, because the Department of Health and Human Services ("HHS") recently decided that no annual risk corridors amounts are due until sometime after the three-year program ends. All this is despite the Government having already paid a fraction of the 2014 risk corridors amounts owed to Plaintiffs, and HHS stating that its remaining 2014 risk corridors debts have been booked as 2015 obligations of the United States.[4]

Furthermore, although it is forced to concede that Plaintiffs have plausibly alleged the existence of express contracts, as well as all the necessary elements of implied-in-fact contracts, with the United States, Defendant nevertheless urges the Court to dismiss Counts II-V under Rule 12(b)(6). Plaintiffs' well-pled claims, however, satisfy the applicable notice pleading standards, giving Defendant fair notice of the claims and the grounds upon which each claim rests.

As demonstrated below, Defendant's jurisdictional arguments are based on the wrong legal standard. Under the standard that actually governs, Plaintiffs need only make a *prima facie* showing that § 1342 and its implementing regulations "can fairly be interpreted as mandating

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1 The Plaintiffs listed in the caption are collectively referred to herein as "Highmark" or "Plaintiffs."
2 *See, e.g.*, Defendant's Motion to Dismiss ("Mot.") at App'x A103, A239.
3 *See* 42 U.S.C. § 18062.
4 *See* Mot. at App'x A103.

compensation by the Federal Government for the damage sustained" by Plaintiffs. *See, e.g.*, *Roberts v. United States*, 745 F.3d 1158, 1162 (Fed. Cir. 2014). Plaintiffs have done so, and more. *See, e.g.*, Compl. ¶¶ 2-10.

In its Rule 12(b)(1) motion, Defendant improperly attacks the merits of Plaintiffs' claims, arguing that the risk corridors amounts claimed by Plaintiffs – and admitted by HHS as due and owing – are not "presently due." This assertion challenges *when* the Government is obligated to pay Plaintiffs' money-mandating claims, not *if*. While not pertinent to the Court's jurisdictional analysis, Defendant's *post hoc* characterization, contending that the risk corridors payments admittedly owed are not payable in full until sometime *after* 2017, rather than annually, is wrong and entitled to no deference. Defendant has manufactured an *ex post* litigation position based on disputed facts, but its defense is belied by the ACA's text and purpose, legislative history, and HHS' statements, documents and conduct *preceding* this lawsuit – all of which demonstrate that risk corridors payments are due and payable annually, not after the end of the risk corridors program's three years.

This Court must also deny all of Defendant's arguments seeking dismissal under Rule 12(b)(6) of Plaintiffs' claims in Counts II-V for breach of express contract, breach of implied-in-fact contract, breach of an implied covenant of good faith and fair dealing, and Fifth Amendment takings.[5] The Complaint plausibly alleges, and certainly has placed Defendant on notice of, each of these claims under the applicable pleading standards. Defendant inappropriately challenges the sufficiency of the evidence to support the elements and merits of Plaintiffs' non-statutory claims, but in resolving a motion to dismiss the well-pled facts are accepted, not weighed.

This is not a hypothetical dispute or an abstract disagreement, as Defendant

[5] While Defendant argues that Counts IV and V should be dismissed under Rule 12(b)(6), as demonstrated below, Defendant only challenges the sufficiency of these Counts by arguing that the Court should dismiss them *if* the Court finds that Plaintiffs failed to state valid breach of contract claims in Counts II and III. *See* Mot. at 37-39.

disingenuously contends. All of Plaintiffs' claims are currently ripe for resolution by this Court: the Government admits that it owes Plaintiffs almost $223 million in risk corridors payments for 2014, has already paid Plaintiffs just over $27 million of that obligation, and recently announced that it will not make timely payment to Plaintiffs for any risk corridors amount it owes for 2015. Finally, should the Court determine that Plaintiffs are entitled to monetary relief from the Government under any Count, the Court certainly has jurisdiction over, and the discretion to grant, Plaintiffs' request for limited declaratory relief incidental to the Court's judgment for money damages.

For all of these reasons, detailed below, Plaintiffs respectfully request that the Court deny Defendant's Motion to Dismiss in its entirety.

STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court has subject matter jurisdiction over Count I, Plaintiffs' money-mandating statutory and regulatory claim, under the governing jurisdictional standards stated in *Roberts v. United States*, 745 F.3d 1158 (Fed. Cir. 2014) and other cases?

2. Whether this Court has subject matter jurisdiction over Plaintiffs' non-statutory claims stated in Counts II-V, when Defendant does not challenge any jurisdictional facts and the Complaint alleges all required elements for these claims?

3. Whether Plaintiffs have alleged plausible claims for relief in Counts II-V under the applicable Rule 12(b)(6) pleading standards, sufficient to place Defendant on fair notice of the claims against it and the grounds upon which those claims rest?

4. Whether Plaintiffs' monetary claims for risk corridors payments admittedly due and owing by the Government present an actual, ripe controversy proper for adjudication by this Court when Plaintiffs would suffer undue hardship by further delay of their monetary recovery?

5. Whether this Court has the power and discretion to award Plaintiffs' request for

declaratory relief that is ancillary and incidental to their monetary claims over which the Court has subject matter jurisdiction?

STATEMENT OF THE CASE[6]

I. CONGRESS INCLUDED RISK CORRIDORS IN THE ACA TO ADDRESS RISKS POSED BY THE NEWLY INSURED POPULATION

The ACA[7] reformed the United States health insurance system, and on January 1, 2014, the ACA Marketplace opened to millions of Americans who just previously had been uninsured or underinsured. The ACA's guarantee of health care for all Americans removed certain health insurance industry practices – such as denying coverage for preexisting medical conditions, or setting premium rates based on health-related factors[8] – that had been used to underwrite insurance applicants and to take a risk-based approach for setting members' annual premiums. At its core, insurance is about assessing and spreading risk.[9] Lacking data on the new population buying insurance through the ACA Exchanges, health insurance actuaries faced significant challenges in assessing risk and accurately setting annual premiums for the early years of the ACA. Until sufficient information – based on several years of experience – could be collected on these newcomers to the insurance system, health insurance actuaries found themselves in a data deficit while attempting to set sound annual premiums. That pressure was first felt in 2013, as insurers agreed to enroll in and submit their premiums for the ACA Marketplace's opening year.

Congress understood these concerns when it passed the ACA in 2010. The informational void regarding ACA insureds posed substantial challenges and risks to the very health insurance

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[6] Unless otherwise noted below, Plaintiffs' relevant facts are based on the Complaint, its exhibits, or the Appendix to Defendant's motion.

[7] Pub. L. 111-148, 124 Stat. 119.

[8] *See, e.g.*, *In re Title Ins. Antitrust Cases*, 702 F. Supp. 2d 840 (N.D. Ohio 2010) (generally describing underwriting processes in life insurance, auto insurance, and pre-ACA health insurance contexts).

[9] *See, e.g.*, *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 511 (1993) ("There is general agreement that the primary concerns of an insurance contract are the spreading and the underwriting of risk.") (citing authorities).

companies, like Plaintiffs, whose participation was vital to the ACA's success. To make the new ACA Exchange plans accessible to millions of uninsured Americans and ensure annual premiums would not be set too high based on this uncertainty, Congress included in the ACA a trio of statutory "premium-stabilization" measures, commonly known as the "3Rs": risk adjustment, reinsurance, and risk corridors. *See* 42 U.S.C. §§ 18061-18063.

II. THE ANNUAL RISK CORRIDORS PROGRAM DIFFERS SIGNIFICANTLY FROM THE OTHER "3RS" PROGRAMS

Generally, risk adjustment[10] is a permanent state-based program designed to offset the increased costs of health insurers attracting high-risk populations (*e.g.*, individuals with chronic conditions) with equal collections from insurers with lower-risk populations. Reinsurance[11] is, generally, a temporary, three-year state-based program designed to collect equal funds from all participating insurers, then distribute funds to plans that experience high-cost cases. The risk corridors program[12] – the subject of this lawsuit – differs from the other 3Rs in significant ways.

Risk corridors involves risk-sharing, but instead of sharing risk between insurers as the other 3Rs do, Congress designed the risk corridors program to share risk annually between Qualified Health Plans ("QHPs"),[13] like Plaintiffs, and the Federal Government under a statutorily prescribed payment formula. *See* 42 U.S.C. § 18062(b).[14] Under § 1342(b), if a QHP's members used health-related services less than predicted in a plan year, then Congress mandated that the QHP "shall pay" a percentage of its profits back to the Government if those

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[10] The risk adjustment program is codified at § 1343 of the ACA, 42 U.S.C. § 18063.

[11] The reinsurance program is codified at § 1341 of the ACA, 42 U.S.C. § 18061.

[12] The risk corridors program is codified at § 1342 of the ACA, 42 U.S.C. § 18062, and is referenced herein as "§ 1342."

[13] QHPs are health insurers that agreed to participate and were certified to offer plans on ACA Exchanges after demonstrating their compliance with a host of regulatory requirements. *See, e.g.*, 45 C.F.R. § 156.200 (listing QHP standards); 45 C.F.R. § 156.20 (citing ACA § 1302 (42 U.S.C. § 18022)). All duly-certified QHPs "shall participate" in the risk corridors program. 42 U.S.C. § 18062(a).

[14] *See* Compl. ¶ 66 (approximate illustration of the risk corridors payment methodology).

profits exceed a threshold set in § 1342(b). *Id.* § 18062(b)(2).[15] On the other hand, if a QHP's members used more health-related services than predicted in a plan year, then Congress mandated that the HHS Secretary "shall pay" a percentage of the QHP's health care losses above the same threshold back to the QHP. *Id.* § 18062(b)(1). Section 1342 describes the risk corridors calculation as a comparison of "allowable costs" against a "target amount," both of which are defined on a plan year basis. *See id.* § 18062(c). If, for example, a QHP's allowable costs in a plan year are more than three percent above its target amount, then § 1342(b) mandates that the Government "shall pay" the QHP a risk corridors payment for that plan year pursuant to the prescribed formula. *Id.*; *see* 45 C.F.R. § 153.510(b) ("HHS will pay the QHP.").

The risk corridors program is federally administered by the Centers for Medicare and Medicaid Services ("CMS"), through a formal delegation of authority from the HHS Secretary.[16] Unlike the other 3Rs, designed with payments equally offset by collections, Congress did *not* intend the risk corridors program to be "budget neutral." Section 1342(b) does *not* state that annual risk corridors payments cannot exceed risk corridors collections, or must be restricted to collected user fees. *See generally* 42 U.S.C. § 18062. It also does not create a single account to receive payments in and out, nor does § 1342 provide that annual risk corridors payments are limited by appropriations. *See generally id.* Rather, the risk corridors program is statutorily mandated to be based on a non-budget neutral program in Medicare Part D, signed into law by President George W. Bush. *See id.* § 18062(a) (referencing Part D); 42 C.F.R. § 423.336 (implementing Part D risk corridors).[17]

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[15] A QHP's risk corridors payment to the Government is called a "charge collection" or "charge remittance."

[16] *See* 76 FR 53903, 53903-04 (Aug. 30, 2011); *see also* 42 U.S.C. § 18062(a) ("The Secretary [of HHS] shall establish and administer a program of risk corridors ….").

[17] *See also* U.S. Gov't Accountability Office Report, *Patient Protection and Affordable Care Act: Despite Some Delays, CMS Has Made Progress Implementing Programs to Limit Health Insurer Risk*, GAO-15-447 at 14 (2015) ("For the Medicare Advantage and Medicare Part D risk mitigation programs, the payments that CMS makes to issuers are not limited to issuer contributions."), attached hereto at Exhibit 42.

Finally, like reinsurance, risk corridors was a temporary program, expiring after the third year of the new ACA Marketplace. This three-year period was designed for the Government to share the annual risk with QHPs while their actuaries struggled to set annual premiums without accurate data on the new population of previously un- and under-insured individuals they were now obligated to insure annually on the ACA Exchanges. Congress prescribed the risk corridors program to operate annually "for calendar years 2014, 2015, and 2016." 42 U.S.C. § 18062(a). Congress did not extend the risk corridors program into calendar year ("CY") 2017, presumably believing that three years of ACA data would be sufficient for health insurance actuaries to be confident in their risk assessment and rate-setting.

III. PLAINTIFFS BECAME QHPS FOR CY 2014 MINDFUL OF THE GOVERNMENT'S STATEMENTS REGARDING RISK CORRIDORS

In September 2013, after evaluating Plaintiffs' satisfaction of all statutory and regulatory requirements, the Government approved and certified Plaintiffs as QHPs. Plaintiffs[18] chose to accept the certification, commit themselves to the ACA Exchanges in Pennsylvania, Delaware and West Virginia, and execute the CY 2014 QHP Agreements with the Government. *See* Compl. Exs. 02-06. The CY 2014 QHP Agreements, each entitled "Agreement Between [QHP] Issuer and The [CMS]," contained CMS' promise to "undertake all reasonable efforts to implements systems and processes that will support [Plaintiffs'] QHPI functions," and to "work with [Plaintiffs] in good faith to mitigate any harm caused by" "a major failure of CMS systems and processes." *Id.* § II.d. The CY 2014 QHP Agreements also stated that they "will be governed by the laws and common law of the United States of America, including without limitation [HHS and CMS] regulations as may be promulgated from time to time …." *Id.* § V.g.

Leading up to the parties' execution of the CY 2014 QHP Agreements, the Government had made public statements regarding the risk corridors program and had implemented

[18] Except for Highmark Select Resources Inc., which did not become a QHP until the CY 2016 Exchange.

regulations for § 1342,[19] including adopting a risk corridors calculation that is mathematically identical to the statutory thresholds found in § 1342(b). *See* 45 C.F.R. § 153.510(b)-(c). Given the risks involved with becoming a QHP in the uncertain, new ACA Marketplace, when Plaintiffs agreed to participate as QHPs and devote substantial effort and resources to make the CY 2014 ACA Exchanges successful in their markets,[20] they were mindful of the Government's previous actions and representations regarding the risk corridors program.

An HHS fact sheet on July 11, 2011, confirmed that QHPs "will receive [risk corridors] payments from HHS" if they experienced high above-target costs in a calendar year. Compl. Ex. 23. In proposed rulemaking on July 15, 2011, the Government stated that the risk corridors charge collection and payment deadlines should be identical, recognizing that "QHP issuers who are owed these amounts will want prompt payment." Compl. Ex. 18 at 41943. In final rulemaking on March 23, 2012, while the Government had not yet adopted rules for risk corridors payments or charge remittances, it reiterated 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," and again recognized that "QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers." Compl. Ex. 22 at 17238. After submitting a proposed rule in late 2012 that would require QHPs to pay risk corridors charges to the Government within 30 days of receiving notice of the charges, *see* 77 FR 73118, 73164 (Dec. 7, 2012), attached hereto at Exhibit 43, the Government finalized the rule on March 11, 2013. *See* Compl. Ex. 20 at 15473.[21] While the Government imposed no rule on itself to pay QHPs within 30 days of notice, it likewise did not in any way contravene its prior statements from July 2011 and March 2012

[19] The implementing regulations are found at 45 C.F.R. Part 153.

[20] In CY 2014, Highmark enrolled the majority of insureds in the Pennsylvania and Delaware Exchanges, and was the only insurer on the West Virginia Exchange. *See* Compl. ¶ 32.

[21] The 30-day QHP charge remittance rule is found at 45 C.F.R. § 153.510(d).

about risk corridors payment deadlines. Furthermore, in the final rulemaking of March 11, 2013, the Government stated that "[t]he risk corridors program is *not statutorily required to be budget neutral,*" and that "*[r]egardless of the balance of payments and receipts*, HHS *will remit payments* [to QHPs] as required under section 1342 of the [ACA]." *Id.* (emphasis added).

IV. THE GOVERNMENT CONFIRMS ITS RISK CORRIDORS OBLIGATIONS TO PLAINTIFFS WHILE PLANNING TO BREACH THOSE OBLIGATIONS

After September 2013, the Government repeatedly confirmed its risk corridors payment obligations. *See* Compl. ¶¶ 95-96, 98-99, 101-04. But the Government also began to reveal its intent to breach its risk corridors obligations to Plaintiffs after it had secured their agreement to participate in the CY 2014 ACA Exchanges in Pennsylvania, Delaware, and West Virginia.

First, on March 11, 2014 – one year after its announcement that § 1342 is *not* budget neutral and that risk corridors payments will be made "[r]egardless of the balance of payments and receipts"[22] – the Government stated that "HHS intends to implement this [risk corridors] program in a budget neutral manner," but offered assurances to Plaintiffs that "we believe that the risk corridors program as a whole will be budget neutral or, [sic] will result in net revenue to the Federal government in FY 2015 for the 2014 benefit year." Compl. Ex. 31 at 13829.

A month later, on April 11, 2014, the Government issued its "Risk Corridors and Budget Neutrality" Bulletin, which on the one hand ensured Plaintiffs that the Government "anticipate[s] that risk corridors collections will be sufficient to pay for all risk corridors payments," Compl. Ex. 32 at 1, but on the other foreshadowed what would later fuel the Government's "three-year payment framework" *post hoc* litigation characterization. *See* Mot. at 1. The April 11, 2014 Bulletin explained that, "if risk corridors collections are insufficient to make risk corridors payments for a year, all risk corridors payments for that year will be reduced pro rata to the extent of any shortfall." Compl. Ex. 32 at 1. This future event – which the Government stated in

[22] Compl. Ex. 20 at 15473.

the Bulletin that it did not "anticipate" would occur – would cause collections from subsequent years to be used first toward filling previous years' shortfalls, then pro rata toward the current year's risk corridors payment obligations. *See id.* Recognizing that the risk corridors program would conclude in CY 2016, the Government also stated that it "anticipate[s] that risk corridors collections will be sufficient to pay for all risk corridors payments over the life of the three-year program," but that it had no plan if a shortfall existed after CY 2016. *Id.* at 2.

V. AFTER PLAINTIFFS COMMITTED AS QHPS FOR CY 2015, CONGRESS TARGETED THE GOVERNMENT'S RISK CORRIDORS OBLIGATIONS

In reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, Plaintiffs[23] executed the CY 2015 QHP Agreements in October 2014, re-committing to the ACA Exchanges in Pennsylvania, Delaware, and West Virginia. *See* Compl. Exs. 07-11. Just beforehand, the U.S. Government Accountability Office ("GAO") had responded to inquiries from ranking members of Congress about the availability of appropriations to make the mandatory risk corridors payments due for CY 2014. *See* Comp. Gen. B-325630 (Sept. 30, 2014), attached hereto at Exhibit 44. The GAO concluded that appropriations did exist for fiscal year ("FY") 2014 under the CMS Program Management ("PM") appropriation, but because CY 2014 risk corridors charges and payments would not be made until FY 2015, "the CMS PM appropriation for FY 2015 must include language similar to the language included in the CMS PM appropriation for FY 2014." *Id.* at 7. The Congressional majority ensured that it did not, targeting the mandatory risk corridors payment obligations with a rider in the Cromnibus appropriations bill for FY 2015, enacted on December 16, 2014 ("§ 227" of the "2015 Appropriations Act"),[24] which stated that:

> 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

[23] Again, except for Highmark Select Resources Inc.

[24] Pub. L. 113-235, § 227, 128 Stat. 2491.

> transferred from other accounts funded by this Act to the [CMS PM] account, may be used for payments under section 1342(b)(1) of Public Law 111-148 (relating to risk corridors).

Compl. Ex. 33. Under the GAO's previous analysis, this rider purported to limit risk corridors payments to only the amount of risk corridors charge remittances collected as "user fees" under the FY 2015 CMS PM appropriation – *i.e.*, budget neutrality. *See* Comp. Gen. B-325630 at 4-7 (Sept. 30, 2014). Congress did not, however, amend or repeal § 1342's annual mandatory risk corridors payment obligation (and, to date, has never done so).

In spite of § 227, HHS subsequently assured Plaintiffs, in February and July 2015, that "HHS recognizes that that [ACA] requires the Secretary to make full [risk corridors] payments to issuers," and that "CMS remains committed to the risk corridor program." Compl. Exs. 26 & 27. In late July 2015, Plaintiffs submitted their CY 2014 risk corridors data to CMS,[25] showing that the Government owed Plaintiffs a total of over $200 million in risk corridors payments for that year. In late September 2015, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, Plaintiffs[26] executed the CY 2016 QHP Agreements, again renewing their commitment to the ACA Exchanges. *See id.* Exs. 12-17.

VI. THE GOVERNMENT ANNOUNCES THE $2.5 BILLION CY 2014 RISK CORRIDORS SHORTFALL AND 12.6 PERCENT PRORATED PAYMENTS

A week later, on October 1, 2015, what was previously not "anticipate[d]" by the Government[27] became a reality: CMS announced that its analysis of all QHPs' risk corridors data revealed a risk corridors payment shortfall of $2.5 billion, which "will result in a proration rate of 12.6 percent." Compl. Ex. 34. That same day, Kevin J. Counihan, Director of CMS' Center for Consumer Information & Insurance Oversight ("CCIIO") and CEO of the ACA

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[25] *See* 45 C.F.R. § 153.530(d) (requiring QHPs to submit risk corridors data to HHS "by July 31 of the year following the benefit year").

[26] Including Highmark Select Resources Inc.

[27] Compl. Ex. 32 at 1 ("We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments.").

Marketplace,[28] wrote to Highmark's President and CEO a letter reiterating that $362 million in risk corridors collections could not match the payment requests of $2.87 billion, and stating that:

> The remaining 2014 risk corridors claims will be paid out of 2015 risk corridors collections, and if necessary, 2016 collections. Since this is a three year program, we will not know the total loss or gain for the program until the fall of 2017 when the data from all three years of the program can be analyzed and verified. In the event of a shortfall for the 2016 program year, HHS will explore other sources of funding for risk corridors payments, subject to the availability of appropriations. This includes working with Congress on the necessary funding for outstanding risk corridors payments.

Compl. Ex. 35. The Government did not provide Highmark with any statutory authority for the Government's unilateral decision to make only partial, prorated risk corridors payments for CY 2014, to withhold delivery of full risk corridors payments for CY 2014 beyond CY 2015, or to adopt the theory that CY 2014 risk corridors payments are not due "until the fall of 2017," after the end of the three-year program, when "the total loss or gain for the program" could be determined. *Id.*

Recognizing that the United States was acting in contravention of its statutory and regulatory payment obligations, on October 8, 2015, Highmark received another letter from Mr. Counihan, stating on behalf of HHS:

> I wish to reiterate to you that the Department of Health and Human Services (HHS) recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers, and that HHS is recording those amounts that remain unpaid following our 12.6% payment this winter as fiscal year 2015 obligations of the United States government for which full payment is required.

Compl. Ex. 29. Mr. Counihan's office, the CCIIO, made the same acknowledgement in a public bulletin on November 19, 2015. *See* Compl. Ex. 28. By emphasizing that the CY 2014 risk corridors payments were being booked "as [FY] 2015 obligations of the United States … for which full payment is required," the Government undermined its newly-minted three-year

[28] *See* CMS Leadership, https://www.cms.gov/About-CMS/Leadership/cciio/Kevin-Counihan.html, attached hereto at Exhibit 45 (Mr. Counihan's job description).

payment scheme. Compl. Ex. 29.

VII. THE GOVERNMENT ANNOUNCES THE CY 2014 RISK CORRIDORS AMOUNTS OWED

Also on November 19, 2015, the Government released tables showing, on a state-by-state basis, the amount of risk corridors charges owed by QHPs to the Government, and the amount of risk corridors payments owed to QHPs by the Government. *See* Compl. Ex. 37.[29] In total, the Government was obligated to pay Plaintiffs $222,939,981.70 in CY 2014 risk corridors payments, but announced that it would only make prorated payments totaling $28,130,269.32 (12.6 percent of the total owed). Meanwhile, Highmark Delaware was required to pay the Government promptly *all* of its CY 2014 Delaware Small Group market risk corridors charges – not some unilaterally determined fraction thereof – and it did so on November 20, 2015. *See* Compl. Ex. 38. Since then, the Government has paid Plaintiffs $27,334,068, just 12.26 percent – not 12.6 percent – of the CY 2014 risk corridors payments owed. *See* Compl. ¶ 148.

On December 18, 2015, Congress continued § 227's limited funding language in § 225 of the Omnibus appropriations bill for FY 2016, the "Consolidated Appropriations Act, 2016" ("§ 225" of the "2016 Appropriations Act").[30] Congress' second effort to target the Government's risk corridors payment obligations, however, was as ineffectual as its first: without modifying or repealing § 1342, the rider's renewal did not defeat or otherwise abrogate the United States' obligation to make full and timely annual risk corridors payments to QHPs, including Plaintiffs.

VIII. THE GOVERNMENT'S FINAL AGENCY RESPONSE CONFIRMS ITS BREACH OF ITS CY 2014 RISK CORRIDORS PAYMENT OBLIGATIONS

Highmark's efforts to resolve the issue out of court were unsuccessful, *see* Compl. ¶ 157, and on March 17, 2016, Highmark sent a formal demand letter to Mr. Counihan, requesting a final agency response. *See* Compl. Ex. 41 ("Demand Letter"). Mr. Counihan responded to the

[29] For a chart summarizing Plaintiffs' appearances in the tables, *see* Compl. ¶ 144.
[30] Pub. L. 114-113, § 225, 129 Stat. 2624; *see* Compl. Ex. 36.

Demand Letter on April 1, 2016, affirming the Government's payment obligation by stating that "2014 risk corridor payments … will be paid," but repeating the Government's plan to make such payments first out of CY 2015 risk corridors collections, then, if necessary, CY 2016 collections. Thereafter, if necessary, HHS committed to "explore other funding sources subject to the availability of appropriations," which "includes engaging with Congress to secure funding." Compl. Ex. 30 ("Final Agency Response"). The Final Agency Response therefore did not resolve the Government's breach of its obligation to make CY 2014 risk corridors payments in full by the end of CY 2015. Instead, by repeating the Government's three-year payment scheme,[31] the Final Agency Response left Highmark guessing when, if ever, the Government will satisfy the risk corridors payment obligations it has admitted it owes.

IX. THE GOVERNMENT ANNOUNCES THAT THE CY 2014 RISK CORRIDORS SHORTFALL MAY NEVER BE FILLED, AND CONFIRMS THAT THE UNITED STATES IS OBLIGATED TO PAY

In June 2016, the Government told QHPs that "CMS will begin making RC [risk corridors] payments to insurers" for CY 2015 in "December 2016." Mot. at App'x A186. But then, on September 9, 2016, the Government announced that, "based on our preliminary analysis" of the CY 2015 risk corridors data submitted by QHPs at the end of July 2016, "no funds will be available at this time for 2015 benefit year risk corridors payments." Mot. at App'x A239.[32] The Government also stated that CY 2015 collections would not be enough to fill the $2.5 billion shortfall for CY 2014, so "[c]ollections from the 2016 benefit year will be used first for remaining 2014 benefit year risk corridors payments." *Id.* If the CY 2016 collections prove insufficient to satisfy not only the Government's CY 2014 risk corridors

[31] Defendant asserts that the Government "won't know the total loss or gain for the risk corridor program until the fall of 2017 when the charges and disbursements for all three years will be verified." Compl. Ex. 30.

[32] The CMS announcement's year was incorrectly dated as "2015." *See* Mot. at 15 n.13.

payment obligation, but also its CY 2015[33] and CY 2016 obligations, then the Government announced that its plan is to "explore other sources of funding for risk corridors payments, subject to the availability of appropriations," including "working with Congress on the necessary funding for outstanding risk corridors payments." *Id.* Of course, CMS is referring to the same Congress whose currently pending FY 2017 appropriations bill contains the same restrictions on risk corridors appropriations as the riders enacted in the 2015 and 2016 Appropriation Acts.[34]

Finally, the Government confirmed in the September 9, 2016 announcement that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers," and that "HHS will record risk corridors payments due as an obligation of the United States Government for which full payment is required." *Id.*

ARGUMENT

I. RULE 12(B)(1) AND RULE 12(B)(6) STANDARDS

Defendant alleges that the entire Complaint should be dismissed for want of subject-matter jurisdiction pursuant to Rule 12(b)(1). *See* Mot. at 15-23. Alternatively, Defendant argues that Counts II to V – *not Count I* – should be dismissed for failure to state a claim pursuant to Rule 12(b)(6). *See* Mot. at 23-40. Although the Court's analyses under 12(b)(1) and 12(b)(6) are different,[35] "on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

"A court deciding a motion under 12(b)(1) must determine whether jurisdiction is proper and must not reach the merits." *Caraway*, 123 Fed. Cl. at 529 (citing *Greenlee Cnty. v. United*

[33] Plaintiffs estimate that they are owed CY 2015 risk corridors payments in excess of $300 million, *see* Compl. ¶ 154, an obligation that the Government has anticipatorily breached with its recent announcement.

[34] *See* S. 3040, Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2017, *available at* https://www.congress.gov/bill/114th-congress/senate-bill/3040/text.

[35] "When considering motions under RCFC 12(b)(1) and 12(b)(6), the court must distinguish between its inquiries into jurisdiction and the merits." *Caraway v. United States*, 123 Fed. Cl. 527, 529 (2015) (citing *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1355 (Fed. Cir. 2011)).

States, 487 F.3d 871, 876 (Fed. Cir. 2007)).[36] Although the "[p]laintiff bears the burden of showing jurisdiction by a preponderance of the evidence," *Taylor v. United States*, 303 F.3d 1357, 1359 (Fed. Cir. 2002), the "[p]laintiff need only make a *prima facie* showing of jurisdictional facts in order to survive a motion to dismiss." *Mastrolia v. United States*, 91 Fed. Cl. 369, 376 (2010); *see Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (*en banc*) ("It is hornbook law that the Tucker Act … confers jurisdiction upon the Court of Federal Claims over the specified categories of actions brought against the United States") (quoting 28 U.S.C. § 1491(a)(1)).[37]

A Rule 12(b)(6) motion "challenges the legal theory of the complaint, *not the sufficiency of any evidence that might be adduced*." *Adv. Cardio. Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993) (emphasis added). To withstand a Rule 12(b)(6) motion, a plaintiff need only "provide 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the … claim is and the grounds upon which it rests.'" *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1354 (Fed. Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *see* RCFC 8(a)(2). Thus, a 12(b)(6) motion "will be denied when the complaint 'contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Silver Buckle Mines, Inc. v. United States*, 117 Fed. Cl. 786, 791 (2014) (Wolski, J.) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A plaintiff meets the facial plausibility requirement by pleading "factual content that allows the court to draw the reasonable inference that the defendant is liable for the

[36] *See also Scheuer* at 236 (holding that a court's 12(b)(1) "task is necessarily a limited one," and "[t]he issue is not whether a plaintiff will ultimately prevail but whether [it] is entitled to offer evidence to support the claims").

[37] Procedures exist for determining challenged jurisdictional facts, *see, e.g.*, *Forest Glen Props., LLC v. United States*, 79 Fed. Cl. 669, 676-79 (2007) (Wolski, J.), but Defendant does not dispute the jurisdictional facts and Plaintiffs attached all pertinent evidence to the Complaint. Such procedures thus do not apply here.

misconduct alleged." *Iqbal* at 678.[38]

II. THE COURT HAS SUBJECT-MATTER JURISDICTION OVER ALL OF PLAINTIFFS' CLAIMS

Defendant's jurisdictional argument is founded on an incorrect legal standard and an erroneous assertion that Plaintiffs do not claim "presently due" money damages. *See* Mot. at 15-21. Defendant's argument conflicts with its position recently advanced in Federal District Court, where it asserted that monetary claims for risk corridors payments – like Plaintiffs' claims here – belong in the U.S. Court of Federal Claims.[39] Moreover, the Federal Circuit has rejected arguments identical to Defendant's that jurisdiction does not exist for lack of "presently due money damages." *Kanemoto v. Reno*, 41 F.3d 641, 647 (Fed. Cir. 1994) ("There is no requirement in the Tucker Act that there must be a finding that money is due before the Court of Federal Claims can exercise its jurisdiction.").

A. The Court Has Tucker Act Jurisdiction Over Count I

Count I claims that the United States breached a money-mandating statute, § 1342, and its implementing regulations. *See* Compl. ¶¶ 167-78. The Federal Circuit recently confirmed the governing "standard for determining whether jurisdiction exists under the Tucker Act with respect to a claim for money under a statute and regulations," as established by the Supreme Court and Federal Circuit. *Roberts v. United States*, 745 F.3d 1158, 1161 (Fed. Cir. 2014). Just two requirements must be satisfied. First, "[f]or jurisdiction to exist, the statute and regulations must be such that they 'can fairly be interpreted as mandating compensation by the Federal

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[38] While a court's 12(b)(6) examination is primarily limited to the complaint's allegations, it "may also look to 'matters incorporated by reference or integral to the claim, items subject to judicial notice, [and] matters of public record.'" *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014) (quoting 5B Wright & Miller, *Fed. Prac. & P.* § 1357 (3d ed. 2004)).

[39] *See* Gov't Mem. in Supp. of Mot. to Dismiss at 14, *Evergreen Health Cooperative, Inc. v. HHS*, No. 1:16-cv-2039 (D. Md. Aug. 15, 2016), ECF No. 41-1 ("Here, the premise of Count II is Plaintiff's claim that the agency has 'refus[ed] to honor its statutory obligation to make full risk corridors payments to Evergreen Health.' … This is fundamentally a monetary claim, ***over which the Court of Federal Claims has special competence and exclusive jurisdiction*** ….") (emphasis added and citation omitted); *cf. Stovall v. United States*, 71 Fed. Cl. 696,702 n.9 (2006) ("[H]aving the United States take inconsistent positions before sister courts is hardly a trifling matter.").

Government for the damage sustained.'" *Id.* (quoting *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 472 (2003)).[40] Second, "the statute and regulations must be money-mandating as to the class of which plaintiff claims to be a member." *Id.*; *see also Fisher*, 402 F.3d at 1173-74. "[O]nce the regulations provide that a particular class is entitled to [money-mandating payment] and the plaintiff *alleges* that he is within that class, the regulations are money-mandating and the court has jurisdiction." *Roberts* at 1161 (citing *Doe II*, 463 F.3d at 1325) (emphasis added). "The question of whether [the plaintiff] *in fact is* within a class and entitled to [the money-mandating payment] is a *merits* issue," not a jurisdictional one. *Id.* (emphasis added).

Plaintiffs have unquestionably satisfied both jurisdictional prongs. First, § 1342 and its implementing regulations are indisputably money-mandating provisions.[41] Second, because they are QHPs, Plaintiffs are members of the class that Congress prescribed to receive risk corridors payments under the statute and regulations. Defendant does not contest that § 1342 is money-mandating, and it cannot deny that Plaintiffs are QHPs. In fact, the Government already has paid Plaintiffs a fractional portion of the CY 2014 risk corridors amounts they are owed as QHPs. According to binding precedent, nothing further must be shown to establish the Court's Tucker Act jurisdiction. *See, e.g.*, *Voge v. United States*, 844 F.2d 776, 779 (Fed. Cir. 1988) ("If a statute mandates payment by the government, the Tucker Act authorizes suit in [this] Court.").

United States v. King and the other cases cited by Defendant urging application of *King*'s "presently due" standard actually *support* the Court's jurisdiction here. In *King*, "the Supreme Court articulated the now-canonical principle that a plaintiff must present a claim for 'actual, presently due money damages from the United States' to fall within the jurisdictional reach of

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[40] *See Doe v. United States*, 463 F.3d 1314, 1324 (Fed. Cir. 2006) ("*Doe II*") ("This requirement is commonly termed as the 'money-mandating' requirement.").

[41] *See* 42 U.S.C. § 18062(b)(1) ("[T]he Secretary shall pay to the plan."); 45 C.F.R. § 153.510(b) ("HHS will pay the QHP."); *see, e.g.*, *RP1 Fuel Cell, LLC v. United States*, 120 Fed. Cl. 288, 316 (2015) ("[T]he Federal Circuit has 'repeatedly recognized that the use of the word "shall" generally makes a statute money-mandating.'") (cataloguing cases).

the Tucker Act." *Speed v. United States*, 97 Fed. Cl. 58, 66 (2011) (quoting *United States v. King*, 395 U.S. 1, 3 (1969)). Courts have found subject matter jurisdiction lacking based on *King*'s "presently due" language when the plaintiffs in those cases, like the *King* plaintiff, primarily sought injunctive or declaratory relief in this Court, rather than money damages. The non-monetary claims have typically arisen in cases where current or former federal employees filed claims in this Court seeking an order reversing a personnel decision, in the hopes of subsequently getting a pay or benefits raise,[42] or in rare contract cases where the plaintiffs sought equitable relief, rather than money damages.[43] Here, in stark contrast, Plaintiffs seek *immediately payable* money damages from the United States. Any declaratory relief Plaintiffs have requested is expressly "incidental and collateral to a claim for money damages." *Bobula v. U.S. Dep't of Justice*, 970 F.2d 854, 858-59 (Fed. Cir. 1992). Therefore, *King* actually supports that jurisdiction exists here.[44]

The inapplicability of *King*'s "presently due" standard to Count I is underscored by Defendant's reliance on *Lummi Tribe of the Lummi Reservation v. United States*, 99 Fed. Cl.

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[42] *See, e.g.*, *King* at 1-3 (retirement classification); *United States v. Testan*, 424 U.S. 392, 393-94, 397-98 (1976) (non-promotion); *Todd v. United States*, 386 F.3d 1091, 1093-95 (Fed. Cir. 2004) (facility designation); *Wood v. United States*, 214 Ct. Cl. 744, 744-45 (1977) (prospective retirement eligibility). Notably, the Federal Circuit in *Todd* initially recited a shorthand version of the *King* standard, omitting the word "claim," but later correctly re-stated the *King* standard: "Absent a *claim* for presently due money damages against the United States, the Court of Federal Claims does not have jurisdiction under the Tucker Act to entertain appellants' claims." *Todd* at 1095 (emphasis added). Defendant attempts to exploit this initial omission of the word "claim" by asserting that *Todd*'s – not *King*'s – statement of the standard should be controlling. *See* Mot. at 17, 20.

[43] *See, e.g.*, *Overall Roofing & Constr. Inc. v. United States*, 929 F.2d 687, 687-89 (Fed. Cir. 1991) (termination of roofing contract, but without the Government demanding return of any excess funds paid to the contractor); *Johnson v. United States*, 105 Fed. Cl. 85, 87, 94-96 (2012) (student loan debt cancellation); *Annuity Transfers, Ltd. v. United States*, 86 Fed. Cl. 173, 174-75, 179 (2009) (finding no jurisdiction in action "seek[ing] *a declaration* from the court approving a structured settlement factoring transaction concerning an annuity purchased and owned by the United States") (emphasis added).

[44] Other cases cited in the Motion's "presently due" section do not even discuss the "presently due" standard. In *Smith v. Sec'y of the Army*, the Federal Circuit remanded for further factfinding on whether the plaintiff was part of the class benefitted by the money-mandating statute. *See* 384 F.3d 1288, 1290-97 (Fed. Cir. 2004). In *Casitas Mun. Water Dist. v. United States*, the Federal Circuit affirmed dismissal of a takings claim as unripe, finding that the plaintiff's beneficial use had not yet been impinged upon. *See* 708 F.3d 1340, 1342-43, 1359-60 (Fed. Cir. 2013). In *Barlow & Haun, Inc. v. United States*, after the Court held a trial on all liability and damages issues regarding 26 oil and gas leases with BLM, the Court held that a breach-of-contract claim failed on the merits. *See* 118 Fed. Cl. 597, 601, 622 (2014). These cases have nothing to do with whether Plaintiffs' claims for money damages satisfy this Court's Tucker Act jurisdiction.

584, 594 (2011). In *Lummi Tribe*, the controlling statute, NAHASDA, provided that the HUD Secretary "shall … make grants" and "shall allocate any amounts" pursuant to a particular formula among Indian tribes that comply with certain requirements. *Id.* This is similar to language used in § 1342. *See, e.g.*, Compl. ¶ 55. Because the HUD Secretary was "thus bound by the statute to pay a qualifying tribe the amount to which it is entitled under the formula," this Court found that "[s]uch mandatory language is sufficient to confer jurisdiction on this court." *Lummi Tribe* at 594 (citing *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967), *Greenlee Cnty.* at 877, and *Wolfchild v. United States*, 96 Fed. Cl. 302, 339 (2010)).[45] The Court concluded its jurisdictional analysis by confirming that "[a]ny claim for money to which a plaintiff is statutorily entitled … falls within our jurisdiction and is properly the subject of an action for money damages." *Id.* at 597. *Lummi Tribe* confirms that this Court has Tucker Act jurisdiction over Plaintiffs' money-mandating claim in Count I.

All of Defendant's "presently due" arguments, in addition to being inapplicable and unfounded, are improper because they raise merits questions, not jurisdictional issues. *See Roberts* at 1161 ("[W]hether [the Plaintiffs] can recover under the particular facts of the case is a merits question and not a jurisdictional issue."); *Palmer v. United States*, 168 F.3d 1310, 1312-13 (Fed. Cir. 1999) (explaining difference between jurisdictional and merits-based arguments). Defendant's merits-based arguments, grounded on its *post hoc* characterization of risk corridors as a "three-year payment framework," are irrelevant at this jurisdictional stage.[46] Defendant has not challenged Count I on 12(b)(6) grounds, and its merits-based arguments should not be considered under Rule 12(b)(1). *See, e.g.*, *Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.*,

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[45] *See also Lummi Tribe* at 597 ("As Justice Scalia recognized in his dissent in *Bowen* [*v. Massachusetts*, 487 U.S. 879, 920 (1988)], this court has traditionally exercised jurisdiction over suits for money allegedly due under government grant programs that the government has refused to pay.").

[46] *See, e.g.*, *BMY-Combat Sys. Div. of Harsco Corp. v. United States*, 26 Cl. Ct. 846, 850 (1992) ("[T]he precise quantum [of damages] is a question of fact to be determined later in the proceedings.").

525 F.3d 1299, 1307 (Fed. Cir. 2008) ("The [Supreme] Court [has] made clear that the merits of the claim [are] not pertinent to the jurisdictional inquiry.").

Even if Defendant's argument regarding *when* risk corridors payments are due, based on its "three-year payment framework" theory, were relevant to the Court's jurisdictional determination (which it is not), Defendant's *post hoc* litigation position is belied by, *inter alia*:

1. the ACA's text (*e.g.*, § 1342(b)(1) states that the HHS Secretary "shall pay to the plan" a certain amount if the plan's allowable costs "**for any plan year**" exceed the target amount by a certain threshold);
2. the implementing regulations (*e.g.*, 45 C.F.R. § 153.510(b) states that risk corridors payments will be made for "**any benefit year**");
3. the risk corridors program's fundamental purpose (*e.g.*, CMS' "The Three Rs: An Overview" (Oct. 1, 2015) explains that "The goal of the risk corridors program is to support the [Exchanges] by providing insurers with additional protection against uncertainty in claims costs **during the first three years** of the [Exchanges].");[47]
4. prior legislative history from Medicare Part D, on which § 1342 was expressly modeled (*e.g.*, 42 U.S.C. § 1395w-115(e)(3)(A): "**For each plan year** the Secretary shall establish a risk corridor for each prescription drug plan …."; 42 C.F.R. § 423.336: "**For each year**, CMS establishes a risk corridor for each Part D plan.");
5. the Supreme Court's ACA precedent (*e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2492-93 (2015) ("[T]he statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market … and likely create the very 'death spirals' that Congress designed the Act to avoid."));
6. HHS' statements (*e.g.*, CMS' April 11, 2014 Bulletin stating that "if risk corridors collections are insufficient to make risk corridors payments **for a year**, all risk corridors payments **for that year** will be reduced pro rata to the extent of any shortfall …." Compl. Ex. 32 at 1);
7. HHS' documents (*e.g.*, CMS' April 14, 2015 "Key Dates in 2015: QHP Certification in the Federally-Facilitated Marketplaces; Rate Review; Risk Adjustment, Reinsurance, and Risk Corridors," **specifying payment schedule for "Remittance of Risk Corridors Payments** and Charges" from "**9/2015-12/2015**" for CY 2014. Mot. at App'x A102.); and
8. HHS' conduct *preceding* this lawsuit (*e.g.*, **actually making prorated annual risk corridors payments to Plaintiffs** in **December 2015 to March 2016** for just under 12.6 percent of the amounts due for the CY 2014 plan year, *see* Compl. ¶ 148); and *post-dating* this lawsuit (*e.g.*, CMS' September 9, 2016 announcement that "HHS

[47] CMS' October 1, 2015 "Three Rs" document is attached hereto at Exhibit 46. This CMS document is a publicly available federal government record, properly considered here. *See, e.g.*, *A & D*, 748 F.3d at 1147; *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 59-60 (2d Cir. 2016) (considering FDA "Guidance for Industry" published on federal government website without converting motion to dismiss into motion for summary judgment).

> will record risk corridors payments due as an obligation of the United States Government for which full payment is required." Mot. at App'x A239.).

These are mere examples, but demonstrate that risk corridors payments are due and payable annually, not after the end of the risk corridors program's three years, as Defendant now contends. Indeed, the phrase "three year payment framework" now urged by Defendant does not appear anywhere in § 1342 or its implementing regulations. *See Parker v. Office of Pers. Mgmt.*, 974 F.2d 164, 166 (Fed. Cir. 1992) ("[P]ost-hoc rationalizations will not create a statutory interpretation deserving of deference.").

B. The Court Has Tucker Act Jurisdiction Over Counts II-V

Although Defendant asserts that the entire Complaint should be dismissed for lack of jurisdiction under the Tucker Act, the motion fails to identify any specific jurisdictional deficiencies with Plaintiffs' various breach of contract claims in Counts II- IV, or with Plaintiffs' Fifth Amendment takings claim in Count V. On this basis alone, the Court should deny Defendant's 12(b)(1) motion as to these Counts.[48]

There is no question that the Court has Tucker Act jurisdiction to hear Plaintiffs' contract claims. *See Marchena v. United States*, No. 16-76C, --- Fed. Cl. ----, 2016 WL 5118304, at *4 (Sept. 21, 2016) (recognizing that a "low threshold requirement" exists to establish jurisdiction over contract claims);[49] *Mendez v. United States*, 121 Fed. Cl. 370, 379-380 (2015) (citing *Engage Learning*, 660 F.3d at 1355) (holding a plaintiff need not prove "the *actual existence* of a contract" because that "is not a jurisdictional matter but rather a decision on the merits of the case."); *see also* Compl. Exs. 02 to 17 (express contracts). There is also no question of the Court's jurisdiction over Plaintiffs' takings claim in Count V. The Federal Circuit has confirmed

[48] Defendant's omission prevents Plaintiffs from addressing any yet-to-be stated deficiencies. Should Defendant's Reply brief raise any specific alleged jurisdictional arguments regarding Counts II-V, Plaintiffs will seek leave to file a Sur-Reply memorandum.

[49] "[T]he requirements for an implied-in-fact contract are the same as for an express contract." *Hanlin v. United States*, 214 F.3d 1319, 1328 (Fed. Cir. 2000) ("*Hanlin I*").

that "[i]t is undisputed that the Takings Clause of the Fifth Amendment is a money-mandating source for purposes of Tucker Act jurisdiction." *Jan's Helicopter*, 525 F.3d at 1309. Because the Complaint alleges "a taking of [Plaintiffs'] property by the government," and because Plaintiffs are "within the class of plaintiffs entitled to recovery if a Fifth Amendment takings claim is established, the court would normally have Tucker Act jurisdiction over plaintiff's takings claim." *Pucciariello v. United States*, 116 Fed. Cl. 390, 402 (2014) (citing *Jan's Helicopter* at 1309).[50]

C. Plaintiffs' Claims Are Ripe

"The ripeness doctrine prevents courts from deciding hypothetical, abstract, or contingent claims." *White & Case LLP v. United States*, 67 Fed. Cl. 164, 172 (2005) (Wolski, J.) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)). Plaintiffs' claims seek immediate monetary damages for past-due CY 2014 risk corridors payments that the Government already has admitted: (a) are due and payable in "full," (b) are existing "fiscal year 2015 obligations of the United States government for which full payment is required," and (c) it paid Plaintiffs for, albeit by a small fractional portion of the full amount owed. These claims are *very* real – *not* abstract, hypothetical or conjectural. There are no "abstract disagreements over administrative policies"[51] or "further factual development[s]"[52] that prevent this Court from adjudicating Plaintiffs' claims for the CY 2014 risk corridors amounts. As demonstrated above regarding jurisdiction, Plaintiffs "present a claim for '*actual, presently due money damages* from the United States'" on each of their Counts. *Speed*, 97 Fed. Cl. at 66 (quoting *King*, 395 U.S. at 3) (emphasis added). Plaintiffs' claims are indeed ripe.

Defendant's primary ripeness argument is that it would be "premature" for the Court to

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[50] *See Pucciariello* at 403 (finding jurisdiction preempted by separate statutory provision, not applicable to this case, vesting jurisdiction in federal courts of appeal).

[51] *White & Case* at 172 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)).

[52] *Id.* (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998)).

decide any of Plaintiffs' claims because, Defendant argues, "HHS has not 'consummated [its] decisionmaking process' regarding the total amount of payments Highmark (or any other issuer) will receive under the risk corridors program." Mot. at 22. According to Defendant, Plaintiffs should wait until after the risk corridors program has ended, sometime in "2017 or 2018," *id.* at 23, to seek recovery of the CY 2014 risk corridors monies that the Government already has admitted it owes in "full" and are a binding "obligation of the United States." Defendant's ripeness argument is not a serious one, and should be disregarded.

The Federal Circuit holds that claims are ripe for resolution in this Court so long as they are "fit for judicial review," and if "withholding judicial review would work hardship on the parties." *Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs*, 464 F.3d 1306, 1316 (Fed. Cir. 2006) (quoting *Abbott Labs.*, 387 U.S. at 149). Plaintiffs' claims are certainly fit for this Court's review, and Plaintiffs would surely suffer hardship if recovery of their multi-million dollar claims were further delayed until sometime in or after "2017 or 2018."

Plaintiffs' claims became fit for adjudication at the end of CY 2015, when, instead of making the full and timely CY 2014 risk corridors payments owed, the United States paid just a fraction of the $222,939,981.70 that it had announced was due for CY 2014. *See, e.g.*, Compl. ¶ 148. The Government's fractional payment decision had "been formalized [by the Government] and its effects felt in a concrete way" by Plaintiffs. *Abbott Labs.* at 148-49. The Government's decision to not make the full, timely CY 2014 risk corridors payments owed to Plaintiffs by the end of CY 2015 was formalized in myriad ways as described in the Complaint, *see, e.g.*, Compl. ¶¶ 105-126, culminating in the Government's April 1, 2016 Final Agency Response to Plaintiffs' March 17, 2016 Demand Letter. *See* Compl. ¶¶ 158-66 and Exs. 30 & 41.[53]

[53] Additionally, Plaintiffs' claims for the Government's failure to make full and timely CY 2015 risk corridors payments due by the end of CY 2016 are also ripe. Despite admitting that it owes Plaintiffs the full

Defendant's ripeness arguments fail to acknowledge the Final Agency Response. *See generally* Mot. at 21-23. The APA cases that Defendant cites for the "final-agency-action requirement" that it asserts is "[c]entral to the ripeness doctrine," Mot. at 22, are inapplicable in this case,[54] and the Court previously has rejected this very argument by Defendant.[55] Of the other two cases upon which Defendant primarily relies to support its ripeness argument, one, *Shinnecock Indian Nation v. United States*, 782 F.3d 1345 (Fed. Cir. 2015), bears no factual similarity to this case, which has no related pending appeals.[56] The other case, *Barlow & Haun*, actually supports a determination that Plaintiffs' claims are ripe, because it clarifies that different types of claims (*e.g.*, contract claims and takings claims) deserve different ripeness analyses. *See Barlow & Haun*, 118 Fed. Cl. at 615-19.[57] Plaintiffs' contract claims ripened at the end of CY 2015, when the United States breached the parties' agreements to make the CY 2014 risk corridors payments in full and on time. Plaintiffs' takings claim ripened on April 1, 2016, when the Final Agency Response confirmed that the Government would not timely pay Plaintiffs the CY 2014 risk corridors amounts admittedly due.

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payment amounts, the Government confirmed on September 9, 2016, that it will not pay Plaintiffs *any* CY 2015 risk corridors amounts until CY 2017, at the earliest. *See* Mot. at App'x A239; *see also Barlow & Haun*, 118 Fed. Cl. at 615-16 (Tucker Act claims are ripe when the plaintiff chooses to treat an anticipated failure to pay the statutory or contractual obligation as a present breach).

[54] *County of Suffolk* mentions ripeness only briefly in a footnote. *See Cnty. of Suffolk, N.Y. v. United States*, 19 Cl. Ct. 295, 299 n.2 (1990). In *Automated Merchandising Systems, Inc. v. Lee*, 782 F.3d 1376 (Fed. Cir. 2015), "the Federal Circuit determined that the USPTO's decision to initiate proceedings against a patentee did not constitute a final agency action." *Piccone v. USPTO*, No. 1:15cv536 (JCC/TCB), 2015 WL 6499687, at *5 (E.D. Va. Oct. 27, 2015). In *Franklin v. Massachusetts*, ripeness is only mentioned in a footnote to Justice Stevens' concurrence. *See* 505 U.S. 788, 815 n.13 (1992) (Stevens, J., concurring).

[55] *See CBY Design Builders v. United States*, 105 Fed. Cl. 303, 336 (2012) (Wolski, J.) (explaining why "the government's focus on cases concerning the presence of 'final agency action' satisfying the requirements of the APA appears to the Court to be misplaced" in a Tucker Act ripeness inquiry); *B&B Med. Servs., Inc. v. United States*, 114 Fed. Cl. 658, 661 n.4 (2014) (Wolski, J.).

[56] *See Inter-Tribal Council of Ariz., Inc. v. United States*, 125 Fed. Cl. 493, 504 (2016) ("In *Shinnecock*, … the plaintiff's breach of trust claims against the United States were not ripe where the claims were based on a district court's judgment in another case and an appeal of that judgment was pending before the Second Circuit.").

[57] The Court found that, in contrast to takings claims, "breach-of-contract claims … ripen when the breach occurs because that is the time when the nonbreaching party is entitled to bring suit." *Barlow & Haun* at 615. On the other hand, a "claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 616 (quoting *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985)).

The ripeness of Plaintiffs' claims to recover roughly 87.5% of CY 2014 risk corridors monies already admittedly due and owing, but not paid due to Congress' appropriations restrictions, is not affected by Defendant's assertion that HHS does not yet know an aggregated amount of risk corridors payments owed for each of the program's three years. No further factual development or future contingent events are necessary for the Court to adjudicate these claims for monies which are admittedly due and owing. Defendant's disputed, *post hoc* assertion that the CY 2014 risk corridors monies owed are subject to a "three-year payment framework" is merely a delay tactic.[58] In any event, how the Government might eventually make Plaintiffs whole – *if ever*[59] – is not relevant, because "Tucker Act jurisdiction is not affected by how the agency meets its obligations or how any judgment establishing those obligations is satisfied." *Slattery v. United States*, 635 F.3d 1298, 1318 (Fed. Cir. 2011) (*en banc*).[60]

Plaintiffs' claims also satisfy the hardship test for ripeness. "The hardship prong is met where 'there is sufficient risk of suffering immediate hardship to warrant prompt adjudication—that is, whether withholding judicial decision would work undue hardship on the parties.'" *White & Case*, 67 Fed. Cl. at 172 (quoting *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1580-81 (Fed. Cir. 1993)). Even after the Government's partial payments, Plaintiffs are still owed almost $200 million in CY 2014 risk corridors payments – a significant hardship. *See Coal. for Common Sense*, 464 F.3d at 1316 (claim for loss of "hundreds of millions" deemed ripe). The abstention urged by Defendant will exacerbate this significant hardship by indefinitely delaying resolution of Plaintiffs' claims. According to Defendant, sufficient funds for CY 2014 risk corridors payments may not be appropriated until sometime in "2017 or 2018" (Mot. at 23) –

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[58] The Court must be "aware that purposeful bureaucratic delay and obfuscation is not a valid basis for denial of judicial relief." *Bayou Des Familles Dev. Corp. v. United States*, 130 F.3d 1034, 1038 (Fed. Cir. 1997).

[59] *See* Mot. at 23 ("HHS may collect sufficient funds in future years …. Alternatively, Congress might appropriate sufficient funds …."). *But see* Mot. at App'x A239 (September 9, 2016 CMS announcement that CY 2014 shortfall may never be satisfied).

[60] "[R]ipeness [is] treated as a jurisdictional question." *CBY Design*, 105 Fed. Cl. at 331 n.22.

more than *five years* after Plaintiffs first agreed to participate in the "*three-year*" risk corridors program. This timeline, however, is pure speculation by Defendant: it readily admits that the likelihood of full payment "is presently unknown." The United States' questionable ability to secure funds in the future to make Plaintiffs (and other QHPs) whole – including requesting money from the very Congress responsible for passing Sections 227 and 225 to restrict appropriations for the Government's risk corridors obligations – confirms that Plaintiffs would experience undue hardship by the indefinite delay urged by Defendant.

Just like the plaintiff law firm in *White & Case*, the hardship that Plaintiffs would suffer if their claims "are considered unripe is clear: the plaintiff[s] will have to continue to suffer a delay of an indefinite duration" while the Government quixotically seeks other funds. *White & Case*, 67 Fed. Cl. at 174. The Court therefore should reject Defendant's attempt to prevent the Court from considering Plaintiffs' claims based on alleged lack of ripeness.

III. COUNTS II-V SATISFY THE 12(B)(6) STANDARD

Defendant's assertion that Counts II-V fail to state a claim for relief is unavailing. Instead of focusing on the applicable 12(b)(6) standard, which requires the Court to analyze whether the well-pled facts raise a plausible inference of the United States' liability, Defendant instead urges the Court to weigh the sufficiency of Plaintiffs' evidence and the veracity of the well-pled facts.[61] At this early stage, Plaintiffs' allegations are not subject to a burden of proof akin to that required at trial. The Complaint's well-pled facts satisfy all the elements of Counts II-V and allege plausible claims for relief, and therefore Defendant's 12(b)(6) motion to dismiss should be denied.

[61] *See, e.g.*, *Martin v. United States*, 96 Fed. Cl. 627, 633 (2011) ("The purpose of a Rule 12(b)(6) motion is not to trigger an adjudication of a plaintiff's factual allegations, but to conduct an inquiry into whether the factual allegations are sufficiently plausible under the governing legal standards to give rise to an actionable legal claim.").

A. Plaintiffs Adequately Allege Breaches of Express or Implied-in-Fact Contracts Against the Government

Count II asserts breach of express contracts, and Count III asserts breach of implied-in-fact contracts, against the Government. To allege the existence of an express or implied-in-fact contract[62] with the Government, a plaintiff's allegations need only satisfy the following elements: (1) mutuality of intent, (2) consideration, (3) lack of ambiguity in the offer and acceptance, and (4) actual authority to bind the Government in contract. *See Forest Glen*, 79 Fed. Cl. at 683. A contractual breach is the failure to perform a contractual duty. *See Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). There is no question that the Complaint contains well-pled factual allegations satisfying each of these elements.

B. Count II: Plaintiffs Adequately Allege an Express Contract

Defendant concedes that the CY 2014 QHP Agreements are binding contracts between the parties. *See* Mot. at 2, 25-26. Plaintiffs' factual allegations support the reasonable inference that the CY 2014 QHP Agreements obligated the Government to make full and timely CY 2014 risk corridors payments, which the Government subsequently breached. *See, e.g.*, Compl. ¶¶ 40-50, 179-92. These allegations state a plausible breach of contract claim sufficient to satisfy the applicable Rule 12(b)(6) standard.[63]

Defendant disputes whether the CY 2014 QHP Agreements encompass a promise to pay risk corridors (*see* Mot. at 25-29), but this challenge goes well beyond Plaintiffs' well-pled allegations, which must be accepted as true. The Complaint alleges that the CY 2014 QHP Agreements impose risk corridors payment obligations on the Government in two separate provisions: § II.d, and § V.g. First, § II.d obliges the Government to "undertake all reasonable

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[62] The two types of contracts differ only in the evidence used to establish the elements. *See Hanlin v. United States*, 316 F.3d 1325, 1328 (Fed. Cir. 2003) ("*Hanlin II*").

[63] *See Huntington Promotional & Supply, LLC v. United States*, 114 Fed. Cl. 760, 771-72 (2014) (finding plausibility standard satisfied by alleging existence of contract and government's breach by failing to pay).

efforts to implement systems and processes that will support the [QHP] functions." *See* Compl. Exs. 02-06 at § II.d. By not making full and timely CY 2014 risk corridors payments, CMS' systems or processes not only failed to support Highmark's functions as a QHP, but threatened Plaintiffs' very existence as QHPs in the ACA Marketplace. Receipt of the promised risk corridors funds is necessary for issuers to remain fiscally sound, not only to participate as QHPs, but also to continue offering their products to the millions of previously uninsured or underinsured individuals on the ACA Exchanges. *See* Compl. ¶¶ 50, 182-86. QHPs could not be expected to sustain their functions as Marketplace participants without the annual risk corridors payments that the Government had agreed to pay at the time of contracting.[64]

Second, Plaintiffs have alleged that the Government's refusal to pay the CY 2014 risk corridors amounts owed was a "major failure of CMS systems and processes,"[65] in breach of § II.d, and that, instead of "CMS … work[ing] with [Highmark] in good faith to mitigate any harm caused by such failure," the Government exacerbated the harm by rejecting Plaintiffs' demand for full and timely payment – despite repeatedly acknowledging its payment obligation. *See* Compl. Exs. 02-06 at § II.d; Compl. ¶¶ 88-104. The Government's offer of an "IOU" – booking the CY 2014 risk corridors shortfall as an FY 2015 obligation owed to Plaintiffs (*see* Compl. ¶ 164) – did not satisfy the United States' contractual obligation under § II.d to make full and timely CY 2014 risk corridors payments to Plaintiffs.[66]

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[64] Section II.d embraces all aspects of the risk corridors program, including the Government's obligation to collect risk corridors charges from QHPs. *See* Mot. at 27. By design, the charge-collection process promotes QHPs' functions by smoothing annual premiums. The process fails to support QHP functions, though, when the Government breaches its corresponding obligation to make risk corridors payments in full and on time.

[65] Arguing beyond the pleadings, Defendant contests that the "processes" and "functions" language relates to risk corridors, and asserts that a "Companion Guide" – which somehow limits HHS's promise to support Highmark's functions – is allegedly incorporated by § II.b(3). *See* Mot. at 26-27. In fact, § II.b(3) says that Plaintiffs will abide by the Guide, not that the Guide is incorporated by reference into or should be used to define terms in the CY 2014 QHP Agreements.

[66] Defendant's argument that some other insurers did not sign QHP Agreements is irrelevant to its 12(b)(6) challenge to Plaintiffs' express contracts, and relies on unsupported allegations outside of the Complaint. *See* Mot. at 27-28; *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1379 (Fed. Cir. 2004) (holding that, where

Third, Plaintiffs have alleged that § V.g of the CY 2014 QHP Agreements expressly incorporates by reference the ACA's implementing regulations, including the risk corridors provisions. *See* Compl. ¶¶ 50, 182-86. Specifically, the contracts are "governed by the laws and common law of the United States, including without limitation [HHS and CMS] regulations …." Compl. Exs. 02-06 at § V.g. The parties intended 45 C.F.R. § 153.510 and rulemaking statements[67] to govern their contractual relationship, requiring the parties to meet their risk corridors payment and charge obligations. While Plaintiff Highmark Delaware satisfied its QHP Agreement obligations by promptly remitting 100 percent of its risk corridors charges it owed, the Government breached its obligation by not in turn making full and timely CY 2014 risk corridors payments. *See* Compl. ¶ 146-48.

Improperly asserting arguments more appropriate for summary judgment, Defendant relies on cases involving contracts that, unlike here, did not incorporate the regulations implicated by the plaintiffs. In *Smithson v. United States*, the contract only stated that it was "subject to the present regulations of the secured party and to its future regulations," so long as those regulations were not inconsistent with the terms of the contract. 847 F.2d 791, 794 (Fed. Cir. 1988). Unlike the CY 2014 QHP Agreements, the *Smithson* contract did not expressly incorporate by reference the specific applicable regulations. *See id.*[68] Here, § V.g expressly identifies HHS and CMS regulations – which include the risk corridors provisions – as the governing law. *See* Compl. Exs. 02-06 at § V.g. Accordingly, Plaintiffs sufficiently allege that

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contract terms are clear, outside evidence may not be brought in to create an ambiguity).

[67] Including the Government's Federal Register statements of July 15, 2011, March 23, 2012, and March 11, 2013. *See* Compl. Ex. 18 at 41943; Compl. Ex. 22 at 17238; Compl. Ex. 20 at 15473.

[68] Similarly, the contract in *Earman v. United States* only provided that it "shall be carried out in accordance with all applicable Federal statutes and regulations." 114 Fed. Cl. 81, 103-04 (2013). Likewise, in *St. Christopher Assoc. L.P. v. United States*, the contract included "no reference whatsoever … to the implementing regulations or to the HUD Handbook" that the plaintiff sought to be incorporated. 511 F.3d 1376, 1384 (Fed. Cir. 2008).

those regulations and similar rulemaking statements by the agencies are incorporated into the CY 2014 QHP Agreements.[69]

Plaintiffs sufficiently allege that the risk corridors program was material to their decision to enter into the CY 2014 QHP Agreements, *see* Compl. ¶ 187, and that the Government breached the express agreements by failing to make full and timely CY 2014 risk corridors payments in violation of § II.d and § V.g. *See, e.g.*, Compl. ¶¶ 179-92. Because Plaintiffs plausibly allege all essential elements of the Government's breach of an express contract, Defendant's 12(b)(6) motion should be denied for Count II.

C. Count III: Plaintiffs Adequately Allege an Implied-in-Fact Contract

In the alternative,[70] Count III sufficiently alleges the Government's breach of implied-in-fact contracts regarding the timing and amount of the CY 2014 risk corridors payments. An implied-in-fact contract "is not created or evidenced by explicit agreement of the parties, but is inferred as a matter of reason or justice from the acts or conduct of the parties." *Prudential Ins. Co. of Am. v. United States*, 801 F.2d 1295, 1297 (Fed. Cir. 1986).

To withstand a 12(b)(6) motion, Plaintiffs must only plead facts supporting a reasonable inference that the four elements of an implied-in-fact contract exist, and that the Government breached the contract. Unable to challenge Plaintiffs' well-pled allegations, Defendant improperly urges the Court to weigh the sufficiency of the contractual evidence regarding intent and conduct. *See, e.g.*, *Kawa v. United States*, 77 Fed. Cl. 294, 305 (2007) ("[W]hether plaintiff entered into an implied-in-fact contract with the Government is a question of fact going to the

[69] To the extent the court finds an ambiguity as to whether the CY 2014 QHP Agreements incorporate 45 C.F.R. § 153.510, that question should be resolved on a motion for summary judgment. *See Kellogg Brown & Root Servs., Inc. v. United States*, 109 Fed. Cl. 288, 299 n.8 (2013) (noting inappropriateness of resolving ambiguous contract provision on 12(b)(6) because it was a factual determination precluding dismissal, and citing cases).

[70] *See* RCFC 8(d).

merits of plaintiff's claim, and is not suitable for resolution" at the complaint stage).[71]

Defendant's label of the risk corridors program as a "statutory benefits program" is not controlling. *See* Mot. at 1, 29. Indeed, Defendant also denies that the Government has any definite payment obligation under the statute. *See* Mot. at 16-23. In any event, this Court has found implied-in-fact contracts based on the Government's conduct, including through its published regulations. *See, e.g.*, *N.Y. Airways v. United States*, 369 F.2d 743, 751-52 (Ct. Cl. 1966) (finding implied-in-fact contract arising out of statutory language, based on parties' conduct indicating an intent to contract); *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 405-06 (Ct. Cl. 1957) (finding implied-in-fact contract on regulations that were promissory and induced plaintiffs to purchase uranium); *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 739 n.11 (1982) (citing *Radium Mines* as example of cases "where contracts were inferred from regulations promising payment"). As the Court held in *New York Airways*:

> Whether the obligation … is derived from express [or implied] contract with the Government … or by statute … the failure of Congress or an agency to appropriate or make available sufficient funds does not repudiate the obligation; it merely bars … the Government from dispersing funds and forces [the plaintiff] to a recovery in the Court of Claims.

369 F.2d at 752 (citations omitted).

Plaintiffs' well-pled facts show that the combination of § 1342, 45 C.F.R. § 153.510, and the Government's conduct before and after Plaintiffs agreed to become QHPs for CY 2014,[72] all support a reasonable inference that the Government entered into implied-in-fact contracts

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[71] *See also Juda v. United States*, 6 Cl. Ct. 441, 453 (1984) ("[T]he court is concerned only with an examination of facts as alleged. Whether plaintiffs' evidence will be sufficient to establish the [implied-in-fact contract claim] allegations as fact is a matter to be faced later."); *Huntington*, 144 Fed. Cl. at 771-72 (where allegations of implied-in-fact contract are sufficient, court will not dismiss the claim because "further factual development is necessary to determine whether the parties formed the contract plaintiff alleges").

[72] *See* Compl. ¶¶ 31, 102, 195, 200. Although Defendant's list of items that it asserts "Highmark rests on," Mot. at 30, is incomplete, even the facts listed by Defendant are sufficient to state a claim. *See, e.g.*, *Vargas v. United States*, 114 Fed. Cl. 226, 223 (2014) (holding that implied-in-fact contract claim survived 12(b)(6) on alleged written agreement and parties' conduct).

obligating it to pay CY 2014 risk corridors payments in full by the end of CY 2015. Because Plaintiffs' allegations plausibly plead facts to satisfy all the elements of an implied-in-fact contract and the Government's breach, Count III cannot be dismissed under Rule 12(b)(6).

1. The Complaint Establishes the Parties' Mutuality of Intent to Enter into an Implied-in-Fact Contract

The mutuality of intent element recognizes that an implied-in-fact contract is "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Silverman v. United States*, 679 F.2d 865, 871 (Ct. Cl. 1982). To establish this element, Plaintiffs need only allege "language … or conduct on the part of the government that allows a reasonable inference that the government intended to enter into a contract." *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 27 (2011). Plaintiffs have done so.

As Plaintiffs have alleged, in and after 2012, the Government repeatedly manifested its intent to make annual risk corridors payments, even stating that such payments would be made irrespective of budget limitations, to encourage Plaintiffs' participation on the ACA Exchanges. *See, e.g.*, Compl. ¶¶ 88-104, 164, 200; *Sperry Corp. v. United States*, 13 Cl. Ct. 453, 458 (1987) (imposing contractual liability where the Government induced or encouraged performance and knew or should have known that the contractor expected compensation).[73] Furthermore, the Government approved Plaintiffs' status as QHPs, knowing that each plan had expended resources to become a QHP per the Government's requirements, and accepted Plaintiffs' services in performance of the contract requirements. *See* Compl. ¶¶ 30, 180-84, 216. The Government's collection of Highmark Delaware's CY 2014 risk corridors charges, and the Government's partial CY 2014 risk corridors payments to Plaintiffs, further confirm the parties' meeting of the

[73] Defendant argues that these so-called "'assurances' … cannot evince an intent to contract," Mot. at 32, but that assertion is contrary to the well-established case law regarding Government conduct, and inappropriately asks the Court to weigh the sufficiency of the evidence on a 12(b)(6) motion.

minds. *See* Compl. ¶¶ 31, 102, 195, 200; *Vargas* at 221 (finding that, among other facts, government's partial payment of amount owed under written agreement could support implied-in-fact contract). All this conduct was, of course, subsequent to the Government's promise in § 1342 that the HHS Secretary "shall pay" risk corridors payments. *See, e.g.*, Compl. ¶¶ 95-102.

Ignoring Plaintiffs' well-pled allegations of fact, Defendant's motion encourages the Court to ignore the surrounding circumstances and instead consider solely the text of § 1342. *See* Mot. at 31-32.[74] Although statutory language expressly permitting the United States to enter contracts is one way to overcome the presumption that statutes do not create vested contractual rights, it is well-settled that the Court may also infer an intent to contract from the parties' conduct. *See ARRA* at 27 ("[T]o overcome this presumption, plaintiffs must point to specific language in [the statute] *or to conduct on the part of the government* that allows a reasonable inference that the government intended to enter into a contract" (emphasis added);[75] *N.Y. Airways* at 751-52 (finding, despite no express contract authorization in statute, that the parties' conduct exhibited an enforceable implied-in-fact contract based in part on a meeting of the minds evidencing an intent to contract). Unlike Plaintiffs' well-pled allegations of fact, the cases cited by Defendant did not involve any governmental conduct beyond the enactment of a statute or implementation of a regulation.[76]

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[74] By its very nature, Defendant's assertion of a lack of a meeting of the minds is a factual question, which is not suitable for resolution on a motion to dismiss because the issue depend on intent, conduct, and the surrounding circumstances. *See Kanag'iq Constr. Co. v. United States*, 51 Fed. Cl. 38, 47 (2001) (finding the parties' mutuality of intent to be a question of fact).

[75] In *ARRA*, the Court found no evidence of an implied-in-fact contract because the Government was statutorily mandated to issue payments when requirements were met, lacking discretion to refuse payments. *See ARRA* at 19-20. Here, by contrast, the Government exercised discretion to vet insurers, certifying only those that it deemed qualified to be QHPs. *See* Compl. ¶¶ 205, 217-19; *see also Thomson v. United States*, 174 Ct. Cl. 780, 791 (1966) (assent "may be overtly manifested by course of action," and once the Government exhibits such conduct, it "may not assert that it is not bound on the ground that it did not intend to contract").

[76] *See* Mot. at 31-32; *ARRA* at 28 ("[T]here is no express language in section 1603 to support plaintiffs' assertion of an implied-in-fact contract."); *id.* (describing *Grav v. United States*, 14 Cl. Ct. 390, 392 (1988) ("*Grav I*"): "[T]he statute at issue in *Grav I* expressly required the government to enter into written contracts with program participants"); *Hanlin II* at 1330 ("We discern no language in the statute or the regulation that indicates an intent to

Unlike in Defendant's cited cases, Plaintiffs' well-pled allegations permit a reasonable inference that the parties mutually intended to be contractually bound by their respective risk corridors obligations. Plaintiffs have thus established this contractual element.

2. The Complaint Adequately Alleges Consideration Between Plaintiffs and the Government

Plaintiffs plead facts sufficient to allege mutual consideration to contract between Plaintiffs and the Government. *See* Compl. ¶¶ 72-73, 94, 199, 202-203, 204. Again, Defendant improperly challenges, at this pleading stage, the sufficiency of the evidence supporting Plaintiffs' allegations demonstrating consideration. *See* Mot. at 30 n.21. Consideration must render a benefit to the Government, such as enabling the Government to further a goal, and not merely be a detriment to the contractor. *See Son Broad., Inc. v. United States*, 52 Fed. Cl. 815, 824 (2002) ("*Sun Broad. II*") (consideration found in plaintiff developing a site pursuant to permits, furthering governmental goals). Fulfilling an obligation also constitutes consideration. *See Vargas* at 223 (fulfillment of service to the Government was sufficient to constitute consideration under implied-in-fact contract).

Plaintiffs provided a "real benefit to the Government" by agreeing to become QHPs in Exchanges for the risk corridors promises in § 1342. *See* Compl. ¶¶ 202-03; *Frymire v. United States*, 51 Fed. Cl. 450, 459 (2002) ("[T]he conduct of the parties also reflected their tacit understanding of the consideration to be paid by the government."). Plaintiffs were not obligated to participate in the Exchanges, incur Marketplace-related costs and losses, and provide health benefits to thousands of enrollees who had never previously been insured. *See, e.g.*, Compl. ¶¶ 4, 31.[77] By agreeing to become QHPs, Plaintiffs took on scores of new, demanding obligations

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enter into a contract with [the plaintiff]."); *AAA Pharmacy, Inc. v. United States*, 108 Fed. Cl. 321, 329 (2012) (holding that a regulation lacked "any language manifesting either an offer or an intent to enter into contract").

[77] In CY 2014, Highmark was the only insurer on the West Virginia Exchange, and enrolled the majority of insureds in the Pennsylvania and Delaware Exchanges. *See* Compl. ¶ 32.

and subjected themselves to new standards to which they were not previously bound. *See* Compl. ¶¶ 85, 197; 45 C.F.R. § 156.200, *et seq*. The Government, in turn, knew that insurer participation was crucial to the success of the ACA Martketplaces and directly benefitted from Plaintiffs' actions in various ways, including by advancing the policy goal of providing affordable health insurance to all Americans. *See* Compl. ¶ 204.[78] Based on these well-pled allegations, Plaintiffs have alleged facts sufficient to find consideration between the parties.

3. The Complaint Sufficiently Alleges Offer and Acceptance

Plaintiffs adequately allege a Government offer to make full and timely CY 2014 risk corridors payments to Plaintiffs evinced by the Government's language and conduct, which Plaintiffs accepted by becoming QHPs. An offer must be manifested by conduct that indicates assent to the proposed bargain. *See Grav I*, 14 Cl. Ct. at 393 (holding Government's offer in statute accepted to form implied-in-fact contract); *Abraham v. United States*, 81 Fed. Cl. 178, 185 (2008) (finding implied-in-fact contract where Government, by its conduct, makes an offer that is later accepted). Like in its mutual intent argument, Defendant contends that the Court should only consider the text of the statute and regulation for evidence of an offer, and ignore the Government's additional conduct. *See* Mot. at 33.[79] Offer and acceptance, however, can be found in the "conduct of the parties." *Forest Glen*, 79 Fed. Cl. at 684; *N.Y. Airways*, 369 F.2d at 751-52 (finding implied-in-fact-contract formed through acceptance of Government's offer arising in statute).

The Government's offer was made in the text of § 1342[80] and implementation of its

[78] Although Defendant suggests that this policy goal cannot amount to consideration, it unsurprisingly fails to cite any authority to support its suggestion. *See* Mot. at 30 n.21.

[79] Defendant admits that the regulations are not "in and of themselves" dispositive, thereby conceding that Plaintiffs' additional facts regarding the Government's conduct should be considered. Mot. at 33.

[80] Even if the offer had been contained exclusively within the text of § 1342, that would not necessarily preclude a valid offer by the Government. *See Radium Mines* at 406 (finding purpose of the regulation at issue "was to induce persons to find and mine uranium," demonstrating the Government's intent to contract).

related regulations, plus the Government's subsequent statements, which incentivized Plaintiffs to participate in the ACA Marketplace by reducing the financial risks of setting premiums while lacking sufficient data on the population of insureds. Becoming QHPs was volitional for Plaintiffs, and was subject to the Government's discretion in whether to certify them as QHPs. Only after Plaintiffs were awarded QHP status and agreed with the Government to participate on the ACA Exchanges did they become obligated to remit risk corridors charges or entitled to receive risk corridors payments. *See, e.g.*, Compl. ¶¶ 195-99; 42 U.S.C. § 18062(a). The Government's repeated, undisputed statements before Plaintiffs accepted the offer assured Plaintiffs of the Government's intent to make CY 2014 risk corridors payments by the end of CY 2015. *See, e.g.*, Compl. ¶¶ 92-93.[81]

Plaintiffs' well-pled allegations go well beyond the facts presented in Defendant's cited cases, which lacked additional governmental conduct from which the Court could infer an offer beyond the statute and regulation. *See XP Vehicles, Inc. v. United States*, 121 Fed. Cl. 770, 785 (2015); *AAA Pharmacy*, 108 Fed. Cl. at 328. Here, the Government's enactment of the ACA and § 1342, its implementation of regulations confirming adherence to § 1342, and its multiple statements – including those published in the Federal Register regarding the Government's commitment to prompt payment of its risk corridors obligations – all of which occurred *prior to* Highmark's acceptance in September 2013, constituted an offer. Plaintiffs underwent significant

[81] Challenging the merits of Plaintiffs' contractual claim, Defendant argues that the terms of the offer were unclear when Highmark accepted them in September 2013. *See* Mot. at 33-34. That the Government did not ultimately formalize the terms of the offer by expressly implementing them in a regulation relates to the Government's lack of good faith after inducing Plaintiffs to become QHPs, addressed in Count IV. *See, e.g.*, Compl. ¶ 220(a). Tellingly, Defendant cannot point to any statute, regulation, or statement in the Federal Register or other authoritative source stating that no risk corridors payments are due until sometime on or after CY 2017. The closest Defendant can muster is its misreading of the March 11, 2013 final rule, but rather than "declin[e] to establish a due date for HHS's payments," Mot. at 34, that rule did not even mention risk corridors payments. *See* Compl. Ex. 20 at 15473 (addressing only the 30-day deadline for QHPs to remit risk corridors charges to HHS).

preparation and expense to become QHPs and accept the offer.[82] *See, e.g.*, Compl. ¶¶ 182-83, 199, 220; *see also OAO Corp. v. United States*, 17 Cl. Ct. 91 (1989) (knowing that costs had to be incurred, the Government "bargained to get performance in advance of contract award," and as a result, was liable for said costs). The Complaint's facts are sufficient to demonstrate offer and acceptance.[83]

Defendant also mistakenly argues that the existence of the CY 2014 QHP Agreements "preclude" Plaintiffs' acceptance of the Government's implied-in-fact contract offer. *See* Mot. at 32-33. Under Rule 8(d), a pleading may include "two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones." RCFC 8(d); *see Solaria Corp. v. United States*, 123 Fed. Cl. 105, 118, n.9 (2015) (allowing courts to adjudicate claims when a plaintiff argues, in the alternative, that if no express contract exists, an implied-in-fact contract exists) (quoting *Trauma Serv.* at 1325). If the Court finds that the express contracts do *not* concern the same *subject matter* as the alleged implied-in-fact contracts (*i.e.*, whether the CY 2014 QHP Agreements incorporate an obligation to make risk corridors payments),[84] then both agreements can co-exist under the law. *See, e.g.*, *Laudes Corp. v. United States*, 86 Fed. Cl. 152, 154 (2009) (allowing mutual existence of implied-in-fact and express contracts with different subject matter). If the Court finds that the Government is bound to make the CY 2014 risk corridors payments owed under the express contracts alleged in Count II, then the Court need not analyze the implied-in-fact contracts alternatively alleged in Count III.

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[82] Plaintiffs were not merely responding to an agency's invitation to the public to apply for a loan. *See XP Vehicles* at 785. Becoming a QHP on the completely new, revolutionary, and controversial ACA Exchanges was a major undertaking inuring to the benefit of the United States, made by Plaintiffs on the belief that the Government would honor its obligations, including the full and timely payment of risk corridors payments.

[83] The parties' conduct after September 2013 further confirms that the Government made an offer regarding risk corridors payments, particularly the Government's repeated recognition of its obligation to make risk corridors payments. *See* Compl. ¶¶ 88-93, 195.

[84] Defendant asserts that the CY 2014 QHP Agreements' subject matter does *not* include risk corridors payments. *See* Mot. at 25-26.

4. Government Representatives Had Actual Authority to Bind the United States in Contract or, Alternatively, the Government Ratified the Implied-in-Fact Contract

Plaintiffs' well-pled allegations are sufficient to support a reasonable inference that an authorized Government agent entered into or ratified the implied-in-fact contracts for full and timely CY 2014 risk corridors payments. An implied-in-fact contract with the Government requires that "the officer whose conduct is relied upon had actual authority to bind the government in contract." *Lublin Corp. v. United States*, 98 Fed. Cl. 53, 56 (2011). Such authority can be "implied actual" or "express actual" authority. *See Abraham*, 81 Fed. Cl. at 186. "Authority to bind the government is generally implied when … considered to be an integral part of the duties assigned to a government employee." *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989).[85]

a. Plaintiffs Are Not Yet Required to Identify the Specific Agent

Plaintiffs specifically allege that the implied-in-fact contracts were authorized or approved by Government representatives who had actual authority, express or implied, to bind the United States in contract as part of their employment duties. *See* Compl. ¶¶ 88-93, 195. Plaintiffs further allege that HHS and CMS officials with authority repeatedly made statements regarding the Government's obligation to make full and timely risk corridors payments. *See id*. The Complaint thus sufficiently alleges that the Government's public statements made to Plaintiffs and other health insurers were made with express or implied actual authority sufficient to obligate the Government. Indeed, the GAO concluded in September 2014 that the HHS Secretary had actual authority to make risk corridors payments. *See* Comp. Gen. B-325630

[85] Defendant misstates the applicable law, encouraging the Court only to consider express actual authority and ignoring implied actual authority. *See* Mot. at 34. Express actual authority arises when the Constitution, a statute, or a regulation unambiguously grants an agent contracting authority, while implied actual authority is found "when such authority is an integral part of the [agent's] duties." *Son Broad. II*, 52 Fed. Cl. at 820. Plaintiffs plausibly allege that the Government representatives were acting with authority integral to their employment duties. *See* Compl. ¶¶ 88-93, 195.

(Sept. 30, 2014). The Government's payment of a fractional portion of the risk corridors amounts owed to Plaintiffs for CY 2014 further demonstrates its actual authority to do so.

Defendant's position would essentially require Plaintiffs to identify, at the pleading stage, the name, title and rank of each Government official, *see* Mot. at 34, but that is not required prior to discovery.[86]

b. Mr. Counihan Ratified Plaintiffs' Contracts

Even if, *arguendo*, the Government representatives lacked actual authority, CMS's CEO of the ACA Marketplaces, Kevin Counihan, ratified the terms of the contract through his acceptance of the benefits provided by Plaintiffs and his statements confirming the Government's obligations to the Plaintiffs. *See Silverman*, 679 F.2d at 865 (holding that the Government is bound by the terms of an implied-in-fact contract if it subsequently ratifies it by accepting the benefits flowing under it, even if the Government official initially lacked authorization to enter into the contract).[87]

Mr. Counihan's job description includes oversight of the ACA Marketplace and directing the CCIIO, which makes entering into agreements with QHPs integral to his duties. *See* Compl. ¶¶ 99, 104, 117, 120, 160, 206; *Telenor Satellite Servs. Inc. v. United States*, 71 Fed. Cl. 114, 121 (2006) (agent had implied actual authority to bind the Government where his authority was "an integral part of the duties"). In correspondence to Highmark dated October 8, 2015, Mr. Counihan directly stated on behalf of himself and the HHS Secretary that CY 2014 risk corridors payments are required to be paid, and that those CY 2014 payments were being booked as the

[86] *See Sommers Oil Co. v. United States*, 241 F.3d 1378, 1379 (Fed. Cir. 2001) (finding the plaintiff was not "required to identify and plead the particular person who approved the contractual arrangement with [plaintiff or] the particular statute or regulation that authorized that person to commit the government in contract," and that it was "sufficient to allege that the government's promise was authorized by a person having legal authority to do so"); *Bailey v. United States*, 40 Fed. Cl. 449, 469 (1998) (authority not properly determined on 12(b)(6) because record did not indicate whether agent with requisite authority approved arrangement alleged in plaintiff's complaint); *Mendez*, 121 Fed. Cl. at 386 (challenges to contractual authority are commonly reserved for summary judgment).

[87] Contract ratification may take place at the individual or institutional level. *See SGS-92-X003 v. United States*, 74 Fed. Cl. 637, 652 (2007).

United States' FY 2015 obligations "for which full payment is required." Compl. Ex. 29 at 2. Mr. Counihan later confirmed in the April 1, 2016 Final Agency Response letter that the "remaining risk corridors claims will be paid." Compl. Ex. 30.[88] Based on these unambiguous statements ratifying HHS's obligation to make CY 2014 risk corridors payments to Plaintiffs by the end of CY 2015, the well-pled facts sufficiently allege that Mr. Counihan had authority to ratify the implied-in-fact contracts.

c. The ADA Presents No Barrier Here

The Anti-Deficiency Act ("ADA"), 31 U.S.C. § 1341(a)(1), did not preclude the Government from entering into express or implied-in-fact contracts with Plaintiffs, contrary to Defendant's unsupported assertion. *See* Mot. at 34-35. The ADA prohibits "an officer or employee of the United States Government" from "involv[ing] [the] government in a contract or obligation for the payment of money before an appropriation is made *unless authorized by law*." 31 U.S.C. § 1341(a)(1)(B) (emphasis added). The Government's obligation to make risk corridors payments was written into § 1342 ("shall pay") and its implementing regulations ("will pay"), thus making the payment obligation "authorized by law."[89] Additionally, when Plaintiffs agreed to become QHPs in September 2013, funds were appropriated for risk corridors payments by the CMS Program Management appropriation, which was renewed in the FY 2014 appropriations bill as confirmed by the GAO. *See* Comp. Gen. B-325630 (Sept. 30, 2014). Although Congress later restricted CMS' funding for risk corridors payments through Sections

[88] Although Defendant urges the Court to ignore "the litany of agency assurances" cited in the Complaint (*see* Mot. at 35), the Government's frequent statements – made before and after Plaintiffs became QHPs – provide the reasonable inference of actual government authority, and thus must be considered.

[89] *See Shell Oil Co v. United States*, 751 F.3d 1282, 1299-1301 (Fed. Cir. 2014) (holding that, although an Executive Order did not expressly state that the Agency could expend unappropriated funds otherwise in violation of the ADA, it clearly contained "a broad delegation of contracting authority that impliedly invokes the President's authority under [a statute] to bypass the ADA's restrictions"); *Chevron U.S.A., Inc. v. United States*, 20 Cl. Ct. 86, 89 (1990) (rejecting Government's argument that the plaintiff's construction of the contract would violate the ADA because "[t]he statutory authority under which the defendant originally entered the contract … makes the payment of operational expenses 'authorized by law'").

227 and 225, that appropriations legislation occurred after formation of the implied-in-fact contracts, not impacting the Government's payment obligation. *See* Compl. ¶ 111-14; *N.Y. Airways*, 369 F.2d at 743.[90]

In *New York Airways*, the Government similarly argued that the ADA's predecessor statute prohibited it from entering into contracts before Congress had appropriated the funds to fulfill the contract obligation. *See* 369 F.2d at 743. The Court, however, held the ADA to be inapplicable because the implied-in-fact contract at issue had been "authorized by law," under mandatory payment obligations in the Federal Aviation Act ("FAA"). *See id*. at 752. Although Congress had not appropriated funds to make payments required under the FAA, that fact only prohibited the Government from making disbursements, while the plaintiff's right to payment was nevertheless legally enforceable in this Court. *See id.* The Court explained that the actions of the parties were sufficient to support the existence of an implied-in-fact contract authorized by the FAA, even though the FAA never used the word "contract." *See id*. The alleged implied-in-fact contract, derived from the statutory text, was thus "authorized by law" and not invalidated by the lack of appropriations or the ADA. *Id*.[91]

Because § 1342 and its implementing regulations expressly authorized the Government to make risk corridors payments to participating QHPs, the contracts derived from those obligations were "authorized by law." 31 U.S.C. § 1341(a)(1). As in *New York Airways*, and as discussed in

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[90] *See also Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2189 (2012) ("When a Government contractor is one of several persons to be paid out of a larger appropriation sufficient in itself to pay the contractor, it has long been the rule that the Government is responsible to the contractor for the full amount due under the contract, even if the agency exhausts the appropriation in service of other permissible ends."); *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 646 (2005) ("A statute that retroactively repudiates the Government's contractual obligation may violate the Constitution.").

[91] Defendant's cited cases are inapposite and support Plaintiffs' arguments. For example, in *Office of Pers. Mgmt. v. Richmond*, the plaintiff tried to claim money damages against the Government based on his reliance on bad advice from government officials. *See* 496 U.S. 414, 428 (1990). Denying his claim, the Court held that "[p]ayments of money from the Federal Treasury are limited to those authorized by statute, and erroneous advice given by a Government employee to a benefits claimant cannot estop the Government from denying benefits not otherwise permitted by law." *Id.*

detail above, the conduct of the parties was sufficient to support the finding of an implied-in-fact contract authorized by the mandatory payment obligations in § 1342. Additionally, the GAO confirmed that appropriations for risk corridors payments existed at the time of contracting. Therefore, the implied-in-fact contracts regarding risk corridors are not barred by the ADA.

5. Plaintiffs Adequately Allege a Claim for Breach of Implied-in-Fact Contract, Not a Contract Implied-in-Law or Promissory Estoppel

Contending that the Court lacks jurisdiction over Plaintiffs' implied-in-fact contract claims, Defendant argues that these well-pled claims are somehow converted into *implied-in-law* contract claims under a promissory estoppel theory because, Defendant argues, Plaintiffs "reasonably relied" on the Government's representations regarding risk corridors payments, which induced Plaintiffs to become QHPs. *See* Mot. at 35-37. The distinction between implied-in-fact and implied-in-law contracts is significant:

> An agreement implied in fact is "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." By contrast, an agreement implied in law is a "fiction of law" where "a promise is imputed to perform a legal duty, as to repay money obtained by fraud or duress."

Hercules Inc. v. United States, 516 U.S. 417, 423-24 (1996) (internal citations omitted) (quoting *Baltimore & Ohio R. Co. v. United States*, 261 U.S. 592, 597 (1923)). "A contract implied-in-law is not a true contract. It requires no element of assent or meeting of the minds." *Travelers Indem. Co. v. United States*, 16 Cl. Ct. 142, 149 (1988).

The primary case relied upon by Defendant explains that dismissal for lack of jurisdiction is proper when a complaint falls short of pleading all the elements of an implied-in-fact contract, but merely asserts what amounts to promissory estoppel. *See Steinberg v. United States*, 90 Fed.

Cl. 435, 444 (2009).[92] As demonstrated above, however, Plaintiffs allege well-pled facts sufficient to satisfy each element of a claim for breach of implied-in-fact contract, including a "meeting of the minds," the Supreme Court's key element in *Hercules*. *Hercules*, 516 U.S. at 423-24. That Plaintiffs may *also* have relied, to their detriment, upon the Government's promises does not invalidate their implied-in-fact contracts or somehow convert them to contracts implied-in-law.[93] In *Steinberg*, this Court noted that although the plaintiff's detrimental reliance was an element of promissory estoppel, the complaint should also be evaluated for allegations fulfilling the elements of breach of implied-in-fact or express contract. *See* 90 Fed. Cl. at 444-47. Similarly, this Court has concluded that a plaintiff's detrimental reliance did not preclude it "from proving that defendant made promises … or that a meeting of the minds occurred as evidenced by plaintiff's reliance on those promises. Such arguments clearly go to the heart of plaintiff's [implied-in-fact] contract claim." *Son Broad., Inc. v. United States*, 42 Fed. Cl. 532, 535, 537 (1998) ("*Sun Broad. I*") (dismissing promissory estoppel claim, but holding that plaintiff stated a claim for breach of an implied-in-fact contract); *accord Travelers* at 149-50 (holding complaint sufficiently alleged an implied-in-fact contract, rather than one implied-in-law, because the facts supported the "intent to contract" element.). The Court must follow the same analysis here, giving credence to Plaintiffs' well-pled allegations of fact, not to Defendant's labels.[94]

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[92] "Promissory estoppel is another name for an implied-in-law contract claim." *Hubbs v. United States*, 20 Cl. Ct. 423, 427 (1990).

[93] Reliance is also applicable to Count V. *See Cienega Gardens v. United States*, 331 F.3d 1319, 1346-48 (Fed. Cir. 2003) (considering reliance in regulatory takings context).

[94] Defendant argues that detrimental reliance "pervades" the Complaint. Mot. at 37. Yet, it cites just six of the Complaint's 230 numbered paragraphs in support of its contention. *See id.*

D. Count IV: Plaintiffs State a Claim for Breach of an Implied Covenant of Good Faith and Fair Dealing

Defendant's one-paragraph argument for dismissal of Count IV is wholly dependent on its assertion that the Complaint fails to establish an express or implied-in-fact contract regarding the Government's CY 2014 risk corridors payment obligations. *See* Mot. at 37-38. Defendant therefore concedes that if Counts II or III survive, so does Count IV, which asserts that the United States breached an implied covenant of good faith and fair dealing ("implied covenant") existing in Plaintiffs' contracts with the Government. Even if the Court determines that the Government did not *breach* the contracts alleged, however, Count IV cannot be dismissed if the Court finds that an express or implied-in-fact contract *existed* regarding the risk corridors payments. *See Metcalf Constr. Co., Inc. v. United States*, 742 F.3d 984, 994 (Fed. Cir. 2014) ("[A] breach of the *implied* duty of good faith and fair dealing does not require a violation of an *express* provision in the contract.") (emphasis in original). Plaintiffs allege sufficient facts to raise a reasonable inference that the Government's conduct in failing to make full and timely CY 2014 risk corridors payments to Plaintiffs breached the implied covenant. *See* Compl. ¶ 220.

The Federal Circuit has explained that implied covenant cases:

> [T]ypically involve some variation on the old bait-and-switch. First, the government enters into a contract that awards a significant benefit in exchange for consideration. Then, the government eliminates or rescinds that contractual provision or benefit through a subsequent action directed at the existing contract.

Precision Pine & Timber, Inc. v. United States, 596 F.3d 817, 829 (Fed. Cir. 2010). The Government's conduct here is exactly the type of "bait and switch" that violates the implied covenant. *See, e.g.*, Compl. ¶ 220(a)-(e) (pleading facts supporting breach); *Centex Corp. v. United States*, 395 F.3d 1283, 1304-06 (Fed. Cir. 2005) (finding breach of implied covenant in legislation disallowing tax deductions, which deprived plaintiffs of significant contractual benefits and was specifically targeted at plaintiffs' contract rights). After inducing Plaintiffs to

agree to become QHPs on the promise of risk corridors payments, the Government's subsequent legislative and regulatory changes to the risk corridors program were "directed at a small and specifically identified group … having contracts with the government, and … designed to reduce the cost of those contracts to the government." *Centex* at 1306.

The implied covenant also "limits the manner in which a party who is vested with discretion under the contract may exercise it by requiring that party to exercise that discretion reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties." *Barsebäck Kraft AB v. United States*, 36 Fed. Cl. 691, 706 (1996). The CY 2014 QHP Agreements vested CMS with discretion under §II.d. CMS failed to exercise its discretion reasonably and thus breached the implied covenant. Despite stating that the risk corridors payment deadlines "should be the same for HHS and QHP issuers," CMS created a 30-day deadline for QHPs' full remittance of risk corridors charges, but failed to implement a similar deadline for the Government's full payment of risk corridors amounts owed. *See* Compl. ¶¶ 79-83, 220. Even after a "major failure" of CY 2014 risk corridors was revealed in October 2014, the Government declined to exercise its discretion to mitigate the harm to QHPs. *See* Compl. ¶ 115. Instead, CMS required Highmark Delaware to promptly remit risk corridors charges, yet failed to make full and timely payments to Highmark entities, including Highmark Delaware, that qualified for risk corridors payments. *See* Compl. ¶¶ 140-43, 220.

E. Count V: Plaintiffs State a Fifth Amendment Takings Claim

The Government is prohibited by the Fifth Amendment from taking "private property" for "public use, without just compensation." U.S. Const. amend. V. Analyzing a takings claim requires a two-part test, first considering whether the claimant has identified a cognizable property interest, and second determining whether that property interest was taken by the Government. *See Chancellor Manor v. United States*, 331 F.3d 891, 901 (Fed. Cir. 2003).

As with its arguments directed at Count IV, Defendant's motion to dismiss Count V is wholly dependent on the Court finding that Plaintiffs have not pled the existence of a contract with the Government regarding its risk corridors payment obligations. *See* Mot. at 39. As demonstrated above, however, Plaintiffs allege sufficient facts to satisfy the elements of either an express or implied-in-fact contract with the Government to receive full and timely CY 2014 risk corridors payments. *See* Compl. ¶ 225. Plaintiffs therefore satisfy the first takings prong: a cognizable property interest. "Valid contracts are property," and "[r]ights against the United States arising out of a contract with [the United States] are protected by the Fifth Amendment." *Lynch v. United States*, 292 U.S. 571, 579 (1934).[95] Plaintiffs' rights "vested" when they entered into the contracts with the Government. *See Cienega Gardens*, 331 F.3d at 1330 (holding that plaintiffs' "contract rights vested when the contracts were signed, because there was no explicit contract provision to the contrary"). Contrary to Defendant's unsupported and disputed assertion that no payments are yet due based on its *post hoc* "three-year payment framework" rationale, Mot. at 39-40, the Complaint alleges that Plaintiffs had contractual rights to full and timely CY 2014 risk corridors payments by the end of CY 2015. *See* Compl. ¶¶ 179-210.

Plaintiffs also satisfy the second prong of the takings analysis: "government interference" with the identified property interest that "has gone 'too far.'" *Cienega Gardens* at 1336-37 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). This is determined by an "ad hoc, factual inquiry." *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978). The ad hoc and fact-intensive nature of the regulatory takings analysis makes it premature to dismiss Count V at this early stage. *See Sacramento Mun. Util. Dist. v. United States*, 61 Fed. Cl. 438, 442 (2004) ("Since the … Supreme Court repeatedly advised … that regulatory takings analysis is

[95] *See also Cienega Gardens*, 331 F.3d at 1329 (recognizing "ample precedent for acknowledging a property interest in contract rights under the Fifth Amendment").

'ad hoc and fact intensive,' … it would be premature to dismiss [plaintiff's] regulatory takings claim at this [motion to dismiss] juncture.") (citing *E. Enterprises v. Apfel*, 524 U.S. 498, 523 (1998)).[96] For this reason alone, the Court should reject Defendant's attempt to dismiss Count V.

Courts applying the *Penn Central* factual inquiry "use a three-factor analysis to assess claimed regulatory takings: (1) character of the governmental action, (2) economic impact of the regulation on the claimant, and (3) extent to which the regulation interfered with distinct investment-backed expectations." *Cienega Gardens* at 1337. The Complaint alleges facts sufficient to satisfy all three tests. *See* Compl. ¶¶ 40, 73, 111-18, 124, 225-28 (egregious character of Governmental action); *id.* ¶¶ 226-28 (expense shifting); *id.* ¶¶ 120-21, 230 (severe economic impact); and *id.* ¶¶ 225-28 (interference with reasonable investment-backed expectations).[97] Count V therefore states a valid takings claim and should not be dismissed.

F. Plaintiffs' Request for Incidental Declaratory Relief for CY 2015 and CY 2016 is Within the Court's Jurisdiction and Discretion

The Court has the power to grant Plaintiffs' incidental requests for declaratory relief because they are ancillary to Plaintiffs' money-mandating claims in Counts I-V, over which the Court already has jurisdiction. Defendant disputes that Plaintiffs are entitled to declaratory relief for CY 2015 and CY 2016, not because the United States will satisfy its risk corridors payment obligations in those years, but rather on the mistaken assertion that the Court lacks jurisdiction

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[96] *Cf. Cebe Farms, Inc. v. United States*, 83 Fed. Cl. 491, 497 (2008) ("[T]he fact-intensive nature of just compensation jurisprudence ... argues against precipitous grants of summary judgment, or, in this case, judgment on the pleadings.").

[97] Defendant insupportably asserts that Plaintiffs had no reasonable expectation, and thus no vested property right, to receive payment prior to the end of the "final payment cycle," relying on its *post hoc* "three year payment framework" rationalization. *See* Mot. at 39-40. As demonstrated above, however, when Plaintiffs agreed to participate as QHPs in September 2013, they reasonably expected that full risk corridors payments would be made by the end of CY 2015. Plaintiffs could not have reasonably anticipated the Government's failure to pay, nor Congress' subsequent funding limitations in the 2015 and 2016 Appropriations Acts. *See Cienega Gardens* at 1350, 1353 (finding that plaintiffs reasonably expected to retain right to prepay mortgages granted in contract and regulation, and could not have anticipated subsequent change in regulatory approach).

over Plaintiffs' current monetary claims pursuant to Rule 12(b)(1). *See* Mot. at 40.[98] This Court has jurisdiction over requests for declaratory relief that are incidental and collateral to Tucker Act claims for monetary relief. *See, e.g.*, *Lewis v. United States*, 67 Fed. Cl. 158, 160-61 (2005); *Cal. ex rel. Brown v. United States*, 110 Fed. Cl. 130, 133 (2013).

On September 9, 2016, the Government confirmed that it will not make any payments on time for CY 2015 risk corridors amounts due. *See* Mot. at App'x A239-A240. The interests of judicial economy and efficiency thus support Plaintiffs' request for incidental declaratory relief, because the United States confirmed it will breach its obligations to make full and timely CY 2015 risk corridors payments. *See In re Aliphcon*, 449 Fed. App'x 33, at *1 (Fed. Cir. 2011) (granting declaratory judgment because any concerns about convenience that could weigh against declaratory judgment "were out-weighed by the concerns of judicial efficiency and inconsistent judgments presented by allowing two cases with overlapping claims to proceed in two different federal courts"); *Pac. Gas & Elec. Co. v. United States*, 110 Fed. Cl. 143, 147-48 (2013) (granting plaintiff's claim for declaratory judgment based on plaintiff's arguments that it "would be time-consuming and inefficient to have to retry each set of transactions individually").

Because, as demonstrated above, Plaintiffs have established the Court's Tucker Act jurisdiction over Counts I-V, the Court also has jurisdiction and discretion to grant the incidental declaratory relief requested by Plaintiffs, which Defendant does not dispute is ancillary to Plaintiffs' monetary claims. *See* 28 U.S.C. § 1491(a)(2); *see, e.g.*, *Cal. ex rel. Brown*, 110 Fed. Cl. at 133 (declaratory judgment ancillary to breach of contract claim).[99]

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[98] Defendant's reliance on *Pucciariello v. United States* is misplaced. *See* Mot. at 40. In *Pucciariello*, a separate statute, not relevant here, deprived the court of jurisdiction over the plaintiff's monetary claim, and consequently over the declaratory judgment *See* 116 Fed. Cl. 390, 410 (2014).

[99] Defendant's other two cited cases are also unavailing. *Nat'l Air Traffic Controllers Ass'n v. United States*, 160 F.3d 714, 716 (Fed. Cir. 1998), is distinguishable because the plaintiff did not seek a claim for monetary relief from the Court, thus depriving the Court of jurisdiction over any claim for related declaratory relief. Similarly, in

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's Motion to Dismiss brought under Rules 12(b)(1) and 12(b)(6) in its entirety and permit all of Plaintiffs' claims to proceed on their merits. Plaintiffs respectfully request an opportunity to present oral argument on this motion should the Court deem it useful.

Dated: October 14, 2016

Respectfully Submitted,

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Thorndike v. United States, 72 Fed. Cl. 580, 582 (2006), the declaratory relief sought was the primary focus of the dispute, rather than being ancillary or incidental to the plaintiff's claim for monetary damages, as it is in this case.

CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2016, a copy of the foregoing Plaintiffs' Opposition to the United States' Motion to Dismiss and Appendix were filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing with be sent to all parties by operation of the Court's ECF system.

s/ Lawrence S. Sher
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