IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

PLAINTIFFS' SUPPLEMENTAL BRIEF ADDRESSING THE *BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA V. UNITED STATES* OPINION

Lawrence S. Sher (D.C. Bar No. 430469)
REED SMITH LLP
1301 K Street NW
Suite 1000-East Tower
Washington, DC 20005
Telephone: 202.414.9200
Facsimile: 202.414.9299
Email: lsher@reedsmith.com

Of Counsel:

Daniel I. Booker (D.C. Bar No. 377926)
Kyle R. Bahr (D.C. Bar No. 986946)
Conor M. Shaffer (PA Bar No. 314474)
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222
Telephone: 412.288.3131
Facsimile: 412.288.3063
Email: dbooker@reedsmith.com
kbahr@reedsmith.com
cshaffer@reedsmith.com

Counsel for Plaintiffs

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Plaintiffs First Priority Life Insurance Company, Inc., and other Highmark Plaintiffs (collectively, "Plaintiffs"), respectfully submit this supplemental brief pursuant to the Court's Order of May 2, 2017 (ECF No. 34), requesting that the parties address Judge Griggsby's opinion in the risk corridors case of *Blue Cross and Blue Shield of North Carolina v. United States*, No. 16-651C, 2017 WL 1382976 (Apr. 18, 2017) (hereinafter, "*BCBSNC*"), which was published following the February 7, 2017 hearing in Plaintiffs' case.

Judge Griggsby's opinion denied Defendant's 12(b)(1) motion to dismiss, finding that the Court had subject-matter jurisdiction over BCBSNC's claims and that those claims were ripe, and Plaintiffs agree with her jurisdictional and ripeness analysis. Despite finding that BCBSNC's risk corridors claims were ripe, however, Judge Griggsby granted Defendant's motion to dismiss under RCFC 12(b)(6)[1] and dismissed BCBSNC's claims based on her finding that risk corridors payments are "not 'presently due.'"[2] *BCBSNC* at *17. Plaintiffs respectfully disagree with this conclusion, which is particularly puzzling because Judge Griggsby held that all of BCBSNC's claims were ripe, expressly finding "unavailing" Defendant's argument that "no money is presently due" and thus that BCBSNC's "claims are unripe." *Id.* at *13. Additionally, "presently due" is not a required element to state a claim for relief under RCFC 12(b)(6) for any of the causes of action brought by BCBSNC or by Plaintiffs in this case, it is exclusively a jurisdictional ripeness concern under 12(b)(1).[3] Because Judge Griggsby held that all of BCBSNC's claims were ripe, she misapplied the "presently due" standard to the merits of BCBSNC's claims on 12(b)(6). As Judge Sweeney concluded, and as Judge Wheeler agreed, in

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[1] Unlike in *BCBSNC*, Defendant here did not move to dismiss the Count I statutory claim under RCFC 12(b)(6), but rather only under RCFC 12(b)(1).

[2] The Court did not provide an authority or citation for her "presently due" conclusion.

[3] Defendant did not argue in *BCBSNC*, nor in this case, that "presently due" is a pleading requirement under RCFC 12(b)(6). Instead, Defendant has consistently asserted, albeit wrongly, that "presently due" is an additional threshold jurisdictional requirement. *See, e.g.*, ECF No. 8 at 17; ECF No. 17 at 2-3.

their respective risk corridors opinions, "the Government's 'presently due' argument [is] a ripeness argument in disguise." *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 450 (2017) (Wheeler, J.), *appeal docketed*, No. 2017-1994 (Fed. Cir. May 9, 2017) (citing *Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757, 772 (2017) (Sweeney, J.)). Amazingly, *Health Republic* is barely cited in *BCBSNC*, and *Moda* not at all.

Although Judge Griggsby acknowledged that "Section 1342 and its implementing regulations … mandate compensation by the government," *BCBSNC* at *12 & *18, and found that "HHS appears to have interpreted Section 1342 to require that full [risk corridors] payments must be made," *id.* at *6, she nevertheless stated that she did not "reach the issue of whether Section 1342 mandates Risk Corridors Program Payments in excess of collections." *Id.* at *20 n.10. Rather, she simply concluded that "HHS has no obligation under Section 1342 or its implementing regulations to pay the full amount of Blue Cross's 2014 [or 2015] Risk Corridors Program Payments until, at a minimum, the agency completes its calculations for payments due for the final year of the Risk Corridors Program." *Id.* at *16. For the several reasons explained below, Plaintiffs respectfully disagree with Judge Griggsby's decision to dismiss BCBSNC's statutory and contractually-based claims on the pleadings under RCFC 12(b)(6), and this Court should not follow it.

I. JUDGE GRIGGSBY CORRECTLY HELD THAT THE COURT HAS SUBJECT-MATTER JURISDICTION AND THE CLAIMS ARE RIPE

BCBSNC is now the fifth recent decision of this Court unanimously concluding that the Court has subject-matter jurisdiction over risk corridors claims and that those claims are ripe for adjudication now.[4] Judge Griggsby, as with each of the four judges before her, properly rejected

[4] *See Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 95-102 (2016) (Lettow, J.), *appeal docketed*, No. 17-1224 (Fed. Cir. Nov. 16, 2016) (denying Defendant's 12(b)(1) challenges to risk corridors claims mirroring Plaintiffs' Counts I to V here); *Health*

the same jurisdictional and ripeness arguments that Defendant raises in this case, including its jurisdictional argument that money damages are not "presently due." *BCBSNC* at *11-14. As five Judges of this Court have now unanimously held, this Court has Tucker Act jurisdiction to hear risk corridors claims, the claims are ripe, and this Court should accordingly deny Defendant's RCFC 12(b)(1) motion here.

II. JUDGE GRIGGSBY DISMISSED BCBSNC'S STATUTORY CLAIM UNDER RCFC 12(B)(6) BECAUSE SHE ERRONEOUSLY CONCLUDED THAT RISK CORRIDORS PAYMENTS ARE NOT "PRESENTLY DUE"

Judge Griggsby made a number of critical errors in reaching the conclusion that risk corridors payments were not "presently due," and on that basis dismissing BCBSNC's statutory claim under RCFC 12(b)(6). While there is no 12(b)(6) motion to dismiss Plaintiffs' statutory Count I pending here, an examination of Judge Griggsby's erroneous analysis of this claim is instructive because, as explained below, it shaped her decisions to dismiss each of BCBSNC's other claims on 12(b)(6) grounds. The Court's errors included relying on unfounded factual assumptions, conflating the questions of when and whether full payments are due, violating the governing 12(b)(6) standards, impermissibly relying on certain selected facts while ignoring others, and fundamentally misapplying the doctrine of *Chevron* deference.

A. Judge Griggsby's Decision is Based on Factually Incorrect Assumptions

Despite holding that all of BCBSNC's risk corridors claims were ripe for adjudication in her 12(b)(1) analysis, Judge Griggsby held that BCBSNC failed to state a plausible claim for relief under RCFC 12(b)(6) based on her erroneous conclusion that risk corridors payments for calendar year 2014 are not "presently due." *BCBSNC* at *17. Having determined that the Court

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Republic at 770-78 (denying Defendant's 12(b)(1) challenge to risk corridors statutory claim); *Moda* at 450 & 454 (denying Defendant's 12(b)(1) challenges to risk corridors claims similar to Plaintiffs' Counts I and III); *Maine Cmty. Health Options v. United States*, No. 16-967C, 2017 WL 1021837, at *2 (Fed. Cl. Mar. 9, 2017) (Bruggink, J.) (denying Defendant's Rule 12(b)(1) jurisdiction and ripeness challenges to a risk corridors claim similar to Plaintiffs' Count I here).

had jurisdiction and that BCBSNC's claims were ripe for adjudication, Judge Griggsby violated the RCFC 12(b)(6) standards by concluding, contrary to BCBSNC's well-pled factual allegations, that the risk corridors amounts BCBSNC alleged were owed for 2014 were not "presently due."

Moreover, in reaching her 12(b)(6) decision that BCBSNC's suit was premature, Judge Griggsby improperly assumed facts that (a) have not occurred, (b) were contrary to those pled by BCBSNC in its Complaint and accompanying exhibits, and (c) were disputed by Defendant in that case. Specifically, integral to the Court's analysis and conclusion was her findings that HHS "requir[ed] the government [to] make up any outstanding payments owed during the subsequent years of the [risk corridors] program," and that HHS "committ[ed] to make up any [risk corridors] shortfall in those subsequent program years." *BCBSNC* at *17. It is not apparent how there can be a "shortfall" to be "made up" if, as Defendant argues, there is no legal obligation to pay any risk corridors in excess of collections, but Judge Griggsby neither identified nor resolved this issue.

We know, though, that HHS did *not* in fact make up any shortfall in risk corridors payments owed during those subsequent years—the program ended in December 2016, and over $8 billion in risk corridors payments is still owed and outstanding to insurers. This incorrect factual assumption was contrary to BCBSNC's well-pled allegations. *See* BCBSNC Compl. ¶ 138; *see also* Plaintiffs' Compl. ¶ 148. We also know, for a fact, that contrary to HHS' repeated acknowledgement that full risk corridors payments are due as a binding obligation of the United States,[5] Defendant both in *BCBSNC* and in this case steadfastly has repudiated that obligation, asserting instead that it has no legal obligation to make *any* risk corridors payments in excess of

[5] *See, e.g.*, Bulletin, Risk Corridors Payment for 2015 (Sept. 9, 2016), ECF No. 8-1, Def. App'x A239.

any amounts HHS may have collected in risk corridors charges from profitable insurers during the program. *See, e.g.,* ECF No. 32 at 16 (Defendant arguing that "issuers have no entitlement to additional payments in excess of their pro-rata share of collections"); *BCBSNC* ECF No. 30 (Defendant arguing that "issuers are entitled only to their pro rata share of collections and the United States is not liable for any shortfall").

Among the other reasons demonstrated below, this Court should not follow Judge Griggsby's decision because these assumptions, upon which the Court's conclusion and RCFC 12(b)(6) dismissal were based, were factually incorrect, were contrary to BCBSNC's (and Plaintiffs') well-pled allegations, and undermined the Court's reasoning and analysis.

B. Judge Griggsby Conflated the Questions of When and Whether Full Risk Corridors Payments are Due

Judge Griggsby failed to appreciate that *when* full risk corridors payments are due and *whether* full risk corridors payments must be made are separate questions, and erroneously conflated the two in her decision. As explained below, without conducting a proper *Chevron* "step one" analysis, Judge Griggsby initially found that Section 1342 and its implementing regulations were "silent, and thus ambiguous with respect to the timing of the Risk Corridors Program Payments." *BCBSNC* at *15. She then immediately jumped to the conclusion that "HHS has reasonably exercised its discretion with respect to the timing of Risk Corridors Program Payments to issuers, by making a pro-rata payment and requiring that the government make up any outstanding payments owed during the subsequent years of the program." *Id.* "Given this," Judge Griggsby held, risk corridors payments are not "presently due." *Id.*

In addition to other errors discussed above and below, Judge Griggsby's analysis is flawed because the Court looked only to Congress's intent regarding the timing of payment – *i.e.*, when payments are due – and ignored Congress's intent regarding whether *full* annual

payments are required. *See Moda*, 130 Fed. Cl. at 453 (distinguishing between "two similar but conceptually distinct questions in this case: (1) whether annual payments are required, and (2) whether full annual payments are required. The former is ripeness question, and the latter goes to the merits of the case").[6] Judge Griggsby conflated these two concepts, but did not even attempt to discern Congress's intent as to whether full payment is required. *See BCBSNC* at *20 n.10. Had she done so, she could not have reasonably concluded, from the language of Section 1342 and its implementing regulations, let alone from the fundamental purposes of the risk corridors program and the ACA as a whole, that Congress meant to pay anything less than the full amount of risk corridors payments owed each year. *See Moda*, 130 Fed. Cl. at 455-57.

Section 1342 is not ambiguous as to whether full payment is owed under the prescribed statutory formula. *See Moda*, 130 Fed. Cl. at 455 (finding that the "directive that the Secretary 'shall pay' unprofitable plans these specific amounts of money is unambiguous and overrides any discretion the Secretary otherwise could have in making payments out under the program … Section 1342 simply directs the Secretary of HHS to make full 'payments out'"). Accordingly, Section 1342 did not give HHS any discretion to pay a "pro rata" fraction, or any amount less than that prescribed in the statutory payment formula. *See id.* Judge Griggsby simply ignored Congress's intent on this question, while determining that HHS' pro-rata payment scheme is "reasonable" without conducting a proper *Chevron* analysis as explained below.

C. Judge Griggsby Failed to Apply the Correct RCFC 12(b)(6) Standards

1. Judge Griggsby Expressly Relied on Incorrect Standards

Judge Griggsby also violated RCFC 12(b)(6) because she relied on materials that cannot properly be considered on a 12(b)(6) motion. Judge Griggsby expressly found that facts set forth in her opinion were based on, *inter alia*, recitations in Defendant's briefs. *See BCBSNC* at *1

[6] While purporting to dismiss BCBSNC's claims under RCFC 12(b)(6), Judge Griggsby's analysis appears more akin to an erroneous ripeness analysis. *See Moda*, 130 Fed. Cl. at 453.

n.1. It was improper, however, for the Court to consider facts alleged in a motion to dismiss or other briefs, unless they are found in the complaint, public record, or judicially noticed. *See A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1147 (Fed. Cir. 2014); *Am. Contractors Indem. Co. v. United States,* 570 F.3d 1373, 1376 (Fed. Cir. 2009) ("On a motion to dismiss, the court generally may not consider materials outside the pleadings," and if "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment"); *Henthorn v. Dep't of Navy*, 29 F.3d 682, 688 (D.C. Cir. 1994) ("[F]actual allegations in briefs or memoranda of law … may never be considered when deciding a 12(b)(6) motion … and most certainly may not be considered when the facts they contain contradict those alleged in the complaint."). The Court was required to accept all well-pled facts in BCBSNC's complaint and exhibits as true and draw all reasonable inferences in the plaintiff's favor—not base her 12(b)(6) ruling on any facts contained in Defendant's briefs. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). By taking Defendant's—but not the plaintiff's—asserted facts as true, the Court was required by RCFC 12(d) to convert the motion to dismiss to one for summary judgment, and to give "[a]ll parties … a reasonable opportunity to present all the material that is pertinent to the motion," but the Court failed to do so in *BCBSNC*. This was error.

In addition, Judge Griggsby further misapplied the 12(b)(6) standard by stating that "this Court must assume that all *undisputed* facts alleged in the complaint are true." *BCBSNC* at *7 (emphasis added). Even the Supreme Court opinion cited by Judge Griggsby expressly requires that "when ruling on a defendant's motion to dismiss, a judge must accept as true *all* of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (emphasis added). By only accepting the undisputed facts as true, rather than "all" facts in the complaint, Judge Griggsby allowed herself to erroneously construe disputed facts in the *Defendant's* favor. *See, e.g.*, *BCBSNC* at *16 (incorrectly accepting facts "[a]s the government

argues in its reply brief").

2. Judge Griggsby Selectively Relied on Disputed Facts and Failed to View Facts in the Light Most Favorable to BCBSNC

Judge Griggsby not only incorrectly interpreted the governing RCFC 12(b)(6) standards, she erroneously applied them to the prejudice of BCBSNC. Judge Griggsby improperly selectively relied on disputed facts, ignored other facts that BCBSNC pled in its complaint or exhibits, and failed to view the facts in the light most favorable to BCBSNC.

For example, as explained above, the Court assumed critical facts contrary to the well-pled allegations in BCBSNC's Complaint – and contrary even to the Defendant's stated positions – in concluding that HHS' position was "reasonable" regarding when payment would be made. *See BCBSNC* at *17. Judge Griggsby compounded this error by selectively relying only on statements by HHS from March and April 2014 to support her finding that HHS' pro-rata payment policy was "reasonable." *See BCBSNC* at *4, *15-16. The Court *completely ignored* prior HHS statements that BCBSNC (and likewise Plaintiffs here) cited in its Complaint, such as those found in the March 11, 2013 Federal Register, in which the agency took the *opposite* position, stating that the 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 as required under section 1342 of the Affordable Care Act." 78 FR 15409, 15473 (Mar. 11, 2013); BCBSNC Compl. ¶¶ 73, 74, 94, 108; Compl. ¶¶ 72, 93, 107; *see also* Compl. Ex. 23 (July 11, 2011 fact sheet stating that "qualified health plan issuers with costs greater than three percent of cost projections *will receive* payments from HHS to offset a percentage of those losses") (emphasis added).

While ignoring this March 11, 2013 statement by HHS, Judge Griggsby recognized that the same HHS Final Rule established a 30-day deadline for charge remittances. *BCBSNC* at *4,

*15 n.7. But critically, the Court omitted and did not address, as BCBSNC had alleged in its Complaint, HHS' additional statement that the deadline for the Government's payment of risk corridor payments to QHPs should be identical to the deadline for a QHP's remittance of charges to the Government. *See* 77 FR 17219, 17238 (Mar. 23, 2012) ("While we did not propose deadlines in the proposed rule, we … suggested … 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. QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers.").

The Court further compounded her error by stating that "[i]t is also notable" that "HHS *declined* to establish" a deadline for it to make payments to QHPs, similar to the 30-day charge remittance deadline established in § 153.510(d), finding that "[t]he absence of such a deadline with respect to the payments owed to issuers *indicates that HHS did not intend to establish an annual deadline* for its payment of the Risk Corridors Program Payments." *BCBSNC* at *15 n.7 (emphasis added). It is a disputed fact that HHS "declined" to establish such a deadline, and the March 11, 2013 Federal Register does not state that HHS considered, but rejected, a 30-day payment deadline. Applying the proper 12(b)(6) standard, the Court should have determined, based on the factual allegations in BCBSNC's Complaint, with all reasonable inferences drawn in BCBSNC's favor, that the lack of a deadline in the regulations meant that HHS was relying on its earlier published guidance from March 2012: risk corridors charge remittances and risk corridors payments should be made at the same time. To ignore BCBSNC's well-pled facts and selectively rely on others to make dispositive factual findings on a 12(b)(6) motion was an error.[7]

[7] *See, e.g.*, *Henthorn*, 29 F.3d at 688 ("[F]actual allegations in briefs or memoranda of law … may never be considered when deciding a 12(b)(6) motion … and most certainly may not be considered when the facts they contain contradict those alleged in the complaint."); *Friedl v. City of New York*, 210 F.3d 79, 84 (2d Cir. 2000) ("[A] district court errs when it … relies on factual

D. Judge Griggsby Misapplied *Chevron* Deference

1. Judge Griggsby Erred at *Chevron* Step One by Failing to Look Beyond the Plain Text of Section 1342 Before Deferring to HHS' Interpretation

Based solely on what she described as "[a] plain reading" of Section 1342, Judge Griggsby found the statute "*silent* and, thus, *ambiguous* with respect to the timing of the Risk Corridors Program Payments," and immediately moved to "step two" of the familiar *Chevron* analysis to discern whether HHS' actions were "reasonable." *BCBSNC* at *15-16 (emphasis added). Under Supreme Court and Federal Circuit precedent, Judge Griggsby's analysis under "step one" of *Chevron* was flawed and incomplete. *Chevron* "step one" requires more than simply reading the express statutory text to determine whether a statute is ambiguous. *See Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). As the Federal Circuit explained in *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998), "[i]f … the statute's text does not explicitly address the precise question, we do not at that point simply defer to the agency. Our search for Congress's intent must be more thorough than that."

In *Cathedral Candle*, the Federal Circuit modeled the proper *Chevron* "step one" analysis, concluding that a statute was ambiguous *only after* **both** analyzing "the language of" the statute **and** applying "the traditional tools of statutory construction," which here include a review of the overall statutory scheme of the risk corridors program and the ACA. *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1362 (Fed. Cir. 2005) (emphasis added).

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allegations contained in legal briefs or memoranda in ruling on a 12(b)(6) motion to dismiss.") (citations and quotation marks omitted); *Clark v. Estate of Flach*, 604 F. Supp. 2d 1, 5 n.6 (D.D.C. 2009) ("The Court, however, when evaluating a Rule 12(b)(6) motion, may not consider facts alleged only in the briefs, particularly when they conflict with those alleged in the complaint.").

As the Federal Circuit recently explained:

> "In order to determine whether a statute clearly shows the intent of Congress in a *Chevron* step-one analysis, we employ traditional tools of statutory construction and examine 'the statute's text, structure, and legislative history, and apply the relevant canons of interpretation.'" *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012) (quoting *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000)). "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Mich. Dep't. of Treasury*, 489 U.S. 803 (1989))."

Kyocera Solar Inc. v. U.S. Int'l Trade Comm'n, 844 F.3d 1334, 1338 (Fed. Cir. 2016).

Although she described the correct approach in her opinion—stating that a court must consider a statute's "placement and purpose" and "context"—Judge Griggsby did not properly apply that approach in her *Chevron* analysis. *Compare BCBSNC* at *9 *with id.* at *15-16. Both Judge Sweeney and Judge Wheeler followed the correct *Chevron* step one approach in their respective *Health Republic* and *Moda* opinions – which Judge Griggsby failed to even address, let alone distinguish – and both of those Judges properly concluded that Congress intended risk corridors payments to be made to QHPs annually. *See Health Republic*, 129 Fed. Cl. at 773-76; *Moda*, 130 Fed. Cl. at 451-53. After reviewing the language of Section 1342 and its implementing regulations, the nature and purpose of the risk corridors program, and the ACA as a whole, both Judges Sweeney and Wheeler concluded that "when the factors are considered together, congressional intent becomes apparent: HHS is required to make annual risk corridors payments to eligible qualified health plans." *Health Republic*, 129 Fed. Cl. at 776; *see also Moda*, 130 Fed. Cl. at 451-53 (concurring with *Health Republic* to find that these factors "together mean that Congress required HHS to make annual risk corridors payments"). Judge Bruggink subsequently agreed with Judges Sweeney and Wheeler, concluding that "the clear *inference* from the text of the statute is that payment will be made on a yearly basis." *Maine*,

2017 WL 1021837, at *2 (emphasis added).

Judge Griggsby erred because she should have completed the full *Chevron* "step one" analysis, as required by precedent, before jumping to "step two" and determining whether HHS' own interpretation of Section 1342 was "reasonable." Had the Court considered the proper factors as presented by BCBSNC and previously analyzed by Judges Sweeney, Wheeler and Bruggink, the only conclusion that Judge Sweeney could have reached is that Congress intended risk corridors payments to be made annually. *See Health Republic*, 129 Fed. Cl. at 773-76; *Moda*, 130 Fed. Cl. at 451-53; *Maine*, 2017 WL 1021837, at *2.[8]

Only *after* completing her erroneous *Chevron* analysis did Judge Griggsby note that she was "not persuaded" by BCBSNC's argument that HHS' interpretation undermined the purpose of the risk corridors program—a *Chevron* step one issue. *BCBSNC* at *16. citing only the Government's reply brief, and with no further analysis, Judge Griggsby concluded that the "pro-rata Risk Corridors Program Payments satisfy the stated purpose and objectives of the Risk Corridors Program, by protecting issuers from uncertainties regarding the cost of health insurance claims *during* the first three years of the ACA's Exchanges." *Id.* (emphasis added). Aside from being completely absent from her *Chevron* step one analysis, there are several other problems with that cursory conclusion.

First, Judge Griggsby herself acknowledged that Congress intended the risk corridors program to "protect[]" QHPs "during" the ACA's first three years, 2014-2016. *Id.* (emphasis

[8] In addition, as noted above, had Judge Griggsby analyzed whether *full* annual payment was required under a proper *Chevron* framework, she could not have concluded that Congress meant to pay anything less than the full amount as stated in 1342 and its implementing regulations, as Judge Wheeler correctly held. *See Moda*, 130 Fed. Cl. at 455-57. Judge Griggsby failed to examine Congress's intent as to whether full payments were required. The plain text of the "shall pay" directive makes clear that Congress intended full payments, and did not give HHS discretion to make "pro rata" payments while the agency "establish[ed]" and "administer[ed]" the risk corridors program for each year. *See* 42 U.S.C. § 18062(a) & (b).

added). It is undisputed that full payments were not made "during" the 2014-2016 period – it is now 2017 and full payments still have not been made. Nor did Judge Griggsby provide any explanation of why paying only a small fraction of risk corridors amounts owed almost two years *after* the end of the program could protect insurers from uncertainties *during* the program years 2014, 2015 or 2016, as Congress had clearly intended and HHS repeatedly recognized.[9] In its Final Rulemaking implementing Section 1342, HHS made clear that the "great payment stability" intended by the risk corridors program would "*begin in 2014*," "*from year one* of the implementation," and would occur "*as* insurance market reforms *are implemented*." 77 FR 17220, 17221 (Mar. 23, 2012) (emphasis added). Judge Griggsby erroneously simply ignored these facts.

Further, BCBSNC and Plaintiffs here alleged the purposes of the risk corridors program based on HHS' own statements. Judge Griggsby looked to only one of those "purpose" statements asserted in Defendant's brief, rather than all of HHS' statements regarding the risk corridors program's many purposes asserted by BCBSNC, to conclude that pro-rated payments were "reasonable." *BCBSNC* at *16. Had she addressed the myriad other important and undisputed purposes of the risk corridors program raised by BCBSNC, including keeping premiums stable and affordable,[10] and providing financial protection to insurers by having *the*

[9] *See, e.g.*, 77 FR 17220, 17221 (Mar. 23, 2012) ("The risk corridors program will protect against uncertainty in rates for QHPs by limiting the extent of issuer losses (and gains)."); 78 FR 72322, 72379 (Dec. 2, 2013) ("The risk corridors program will help protect against inaccurate rate setting *in the early years* of the Exchanges by limiting the extent of the issuer losses and gains.") (emphasis added).

[10] *See, e.g.*, 76 FR 41929, 41948 (July 15, 2011) ("Insurers charge premiums for expected costs plus a risk premium, in order to build up reserve funds in case medical costs are higher than expected. Reinsurance, risk adjustment and risk corridors payments reduce the risk to the issuer and the issuer can pass on a reduced risk premium to beneficiaries.").

Government share risk with the QHPs,[11] as BCBSNC and Plaintiffs here have alleged, then she could not have reached that conclusion. *See* Compl. ¶¶ 28-30, 37-38. Judge Griggsby also neither considered, nor attempted to distinguish, Judge Wheeler's or Judge Sweeney's analysis, which explained that:

> Congress was aware that if the 3Rs "did not provide for prompt compensation to insurers upon the calculation of amounts due, insurers might lack the resources to continue offering plans on the exchanges." *Id.* This incentive alone indicates that a three-year payment framework is unlikely, given that courts generally do not "interpret federal statutes to negate their own stated purposes." *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419–20, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973); *see also King v. Burwell*, —— U.S. ——, 135 S.Ct. 2480, 2496, 192 L.Ed.2d 483 (2015) ("Congress passed the [ACA] to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter.").

Moda, 130 Fed. Cl. at 452 (quoting *Health Republic*, 129 Fed. Cl. at 775). Violating the governing RCFC 12(b)(6) standards, Judge Griggsby simply adopted the Defendant's narrow interpretation of the "purpose" of the risk corridors program, but improperly ignored BCBSNC's well-pled allegations, the well-reasoned holdings of Judges Sweeney and Wheeler, and the Government's own statements dating back to 2011.[12] *See, e.g.*, *Scheuer*, 416 U.S. at 236; *Henthorn*, 29 F.3d at 688; *Friedl*, 210 F.3d at 84; *Clark*, 604 F. Supp. 2d at 5 n.6.

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[11] *See, e.g.*, 76 FR 41929, 41942 (July 15, 2011) ("Risk corridors create a mechanism for sharing risk for allowable costs between the Federal government and qualified health plan issuers."). While Judge Griggsby recognized that under the risk corridors program, the Government and QHPs "share in the risk associated with the new marketplace's uncertainty for each of the temporary program's three years: 2014, 2015 and 2016," she failed to incorporate that fact into her reasoning or analysis. *See BCBSNC* at *1 (citing *BCBSNC* Compl. ¶ 6).

[12] Judge Griggsby compounded these errors by stating that, "In fact, Blue Cross acknowledges in the complaint that it decided to continue to participate in the Risk Corridors Program despite HHS' announcement that the government would provide only pro-rata Risk Corridors Program Payments if the collections for a particular year could not satisfy the payments due." *BCBSNC* at *16. She ignored, however, as BCBSNC alleged in its Complaint, that even in the April 11, 2014 bulletin, the Government assured QHPs that "We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments." Compl. Ex. 32 at 1. This was another example of a failure to view all of the facts in the light most favorable to the plaintiff.

Judge Griggsby similarly ignored Judge Sweeney's and Judge Wheeler's careful analysis when she concluded that Section 1342's express requirement that the ACA's risk corridors program "shall be based on" Medicare Part D's risk corridors program "alone, does not demonstrate" that Congress intended full, annual risk corridors payments. *BCBSNC* at *16. Judges Sweeney and Wheeler found that this statutory requirement was *among* the factors – not a sole dispositive fact – supporting Congress's intent for full, annual risk corridors payments. Judge Griggsby stated that she was "not aware of – and plaintiff has not cited to – any requirement in Section 1342 or elsewhere in the ACA that HHS administer the Risk Corridors program in the same manner as the Medicare Part D risk corridors program." *Id*. But BCBSNC did, and Plaintiffs here do, cite to such a requirement: Congress's express instruction in Section 1342(a) that "[s]uch program *shall be based on* the [Medicare Part D] program[.]" Compl. ¶ 35 (emphasis added). Judge Griggsby erred by failing to analyze the meaning of "shall be based on" in Section 1342. *See Moda*, 130 Fed. Cl. at 452 (analyzing Medicare Part D statute and implementing regulations and concluding that "although Congress's reference to Medicare Part D is not dispositive, it at least tends to show that Congress 'approved' of annual risk corridors payments"); *Health Republic*, 129 Fed. Cl. at 774 (same). Judge Wheeler found that "one possible reading of Section 1342 is that the statute incorporates Medicare Part D's annual payment structure by reference." *Moda*, 130 Fed. Cl. at 452 (citing *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here ... Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.").

Judge Griggsby likewise failed to give any reasoned consideration to Section 1342's references to distinct program years and annual payment calculations, only mentioning these in passing after concluding that the statute was ambiguous and then deferring to HHS' own later

interpretation. *See BCBSNC* at *17; *see also* ECF No. 12 at 21. She dismissed the significance of HHS calculating risk corridors annually, explaining that any deadline for payments "could be no earlier than the December of the following year" because risk adjustment and reinsurance must be included in the risk corridors calculation. *Id.* It is unclear, however, how this makes it *less* likely that Congress contemplated that full risk corridors payments would be made *annually* in the following year. Indeed, Judges Sweeney and Wheeler both reasoned that the fact that an insurer's risk corridors payments are reduced if it receives risk adjustment or reinsurance payments for the same year actually makes it *more* likely that Congress intended payments to be made annually. *See Health Republic*, 129 Fed. Cl. at 776 ("It seems probable, therefore, that Congress intended for risk corridors payments, like the reinsurance and risk corridors payments upon which they depend, to be paid annually."); *Moda*, 130 Fed. Cl. at 452.

As Judges Sweeney and Wheeler previously found, Section 1342's text, as well as the nature, context and purpose of the risk corridors program, and the ACA more generally, all demonstrate that Congress intended full annual risk corridors payments, without giving HHS discretion to pay less than the amount the statute prescribed. Judge Griggsby erred by failing to properly consider these factors in step one of her *Chevron* analysis, and to the extent she did address them, by only doing so in a cursory fashion after determining that the statute was ambiguous as to a specific payment deadline.

2. Judge Griggsby Erred at *Chevron* Step Two by Ignoring HHS' Prior Interpretations and Deferring to an Unreasonable Interpretation of Section 1342

Even if, applying *Chevron* step one, Judge Griggsby could have found Section 1342 ambiguous about an annual risk corridors payment obligation, her step two *Chevron* analysis was plainly flawed and should not be followed by this Court. In "step two" of the *Chevron* analysis, the Court must examine whether an agency's interpretation of ambiguous provisions in a

governing statute is reasonable. *Chevron*, 467 U.S. at 842-43. Courts also "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citation omitted). Judge Griggsby failed to properly apply these standards in numerous respects.

First, while Judge Griggsby concluded that HHS' policy announced in April 2014 – purporting to make pro-rata payments during the three-year program and make up any shortfall as funds become available – was "reasonable," *BCBSNC* at *16, unlike Judges Sweeney or Wheeler, she never analyzed whether HHS itself had determined if risk corridors payments were due annually. *See Health Republic*, 129 Fed. Cl. at 778 (concluding that "there can be no dispute that HHS construes its regulations to require annual risk corridors payments"); *Moda*, 130 Fed. Cl. at 453-54.

Second, in her "reasonableness determination," Judge Griggsby entirely ignored HHS' statements from prior to 2014 regarding payment deadlines and budget neutrality. For example, Judge Griggsby did not address the March 23, 2012 interpretation by HHS in its Final Rulemaking that states that "QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers." 77 FR 17219, 17238 (Mar. 23, 2012). She also ignored that on March 11, 2013, HHS stated in the Federal Register that "[t]he risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." 78 FR 15409, 15473 (Mar. 11, 2013). These are the interpretations that deserve deference. *See Moda*, 130 Fed. Cl. at 454 (finding it "significant that HHS (through CMS) indicated repeatedly that it would make payments every year" and concluding that "HHS interpreted Section 1342 and its own regulations as requiring annual risk corridors payments to insurers"). Judge Griggsby violated both *Chevron* and the RCFC 12(b)(6)

standards by ignoring these HHS statements, and not viewing all the well-pled facts in the light most favorable to BCBSNC, with all reasonable inferences drawn in its favor.

Third, by giving selective deference only to the agency's 2014 statements, Judge Griggsby violated Federal Circuit and Supreme Court precedent requiring that an agency must explain why it is rejecting its own earlier interpretation of a statute, or else the court should not defer to the later interpretation. "[U]nder *Chevron*, an agency can only reject a prior interpretation of an ambiguous statute if it explains why it is doing so." *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1382 (Fed. Cir. 2017). Because Judge Griggsby did not address or attempt to explain why HHS rejected its March 23, 2012 or March 11, 2013 interpretations of Section 1342, she should not have selectively given deference to HHS' later, contrary interpretations.

Fourth, even if it deserved deference, the agency's interpretation set forth in the April 11, 2014 bulletin was not reasonable in light of the bulletin's plain text and HHS' own actions. The Court itself quoted the April 11, 2014 bulletin's statements by HHS acknowledging that ***annual*** payments are due, with HHS using terms like "all risk corridors payments for that year," "reimbursed in full for the previous year," "current year payments," "obligations for the previous year," "make payments in that year," and "prior and current year payment obligations." *See also* ECF No. 12 at 21. Moreover, the April 11, 2014 bulletin does *not* address "the timing of" risk corridors payments at all, but rather HHS' approach if the agency finds that it cannot satisfy its admitted obligations to make full payments annually. In addition, HHS actually made annual payments, albeit a small fraction of the amount owed. This begs the question why HHS would make annual payments if it was not required to do so, a question the Court failed even to

consider, let alone answer.[13]

III. JUDGE GRIGGSBY'S ERRONEOUS STATUTORY ANALYSIS INFECTED HER ANALYSIS OF BCBSNC'S OTHER CLAIMS

Judge Griggsby's flawed statutory analysis also led her to erroneously dismiss BCBSNC's other contractually-based counts. In dismissing BCBSNC's breach of express contract claim, Judge Griggsby explained that to the extent that QHP Agreements could be read to incorporate Section 1342 and its implementing regulations, "these legal provisions do not require full, annual Risk Corridors Program Payments." *BCBSNC* at *17. On the breach of implied-in-fact contract claim, after analyzing an alternative ground for dismissal discussed below, Judge Griggsby found that even assuming there were implied-in-fact contracts between BCBSNC and the government, "[m]ore importantly … Blue Cross cannot show that the government breached such contracts in this case" because "neither Section 1342 nor its implementing regulations set an annual deadline for the Risk Corridors Program Payments." *BCBSNC* at *19. Likewise, on BCBSNC's claim for declaratory relief, Judge Griggsby stated that "the Court has determined that Blue Cross has no right to full annual Risk Corridors Payments under Section 1342 and its implementing regulations" so the declaratory relief "is unwarranted based upon the circumstances of this case." *BCBSNC* at *20. Judge Griggsby's dismissal of these claims was thus based on her erroneous and incomplete analysis of the risk corridors statute, its implementing regulations, and HHS' own statements, and should not be followed here.[14]

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[13] The Court also improperly omitted from her RCFC 12(b)(6) analysis that, in the April 11, 2014 bulletin, HHS prefaced the description of its payment-shortfall plan by stating that, "[w]e anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments." *BCBSNC* Compl. ¶ 109; Compl. ¶ 108.

[14] The implied covenant of good faith and fair dealing and Fifth Amendment takings claims were dismissed based on the Court's erroneous finding that there was no express or implied-in-fact contract. *See BCBSNC* at *19-20.

IV. JUDGE GRIGGSBY'S ANALYSIS OF THE IMPLIED-IN-FACT CONTRACT CLAIM WAS FLAWED

Judge Griggsby's analysis of the implied-in-fact contract claim was also flawed because she failed to properly follow the Supreme Court's two-part *Nat'l R.R. Passenger Corp.* test,[15] and overlooked the conduct upon which BCBSNC and Plaintiffs here have relied. She likewise overlooked that contractual intent can be inferred from the "conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Hercules, Inc. v. United States*, 516 U.S. 417, 424 (1996); *see, e.g.*, Compl. ¶¶ 2-7, 88-104. Instead, Judge Griggsby applied an impermissibly narrow application of the *Nat'l R.R. Passenger Corp.* test that focused *only* on the "conduct of Congress and the President in enacting and signing that statute." *BCBSNC* at *18. That is *not* the *Nat'l R.R. Passenger Corp.* test, which requires the Court, after examining the language of the statute, to more broadly focus on "the circumstances" surrounding the statute's passage, which includes the conduct and "legitimate expectations" of the parties before and after passage of the legislation, and whether "Congress would have struck" the bargain under such circumstances. *Nat'l R.R. Passenger Corp.* at 468-69. As Plaintiffs have argued at length, such a narrow application of the Supreme Court's test is untenable. *See* ECF No. 33 at 16-20; ECF No. 21 at 10-11.[16]

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[15] The two-part test determines "whether a particular statute gives rise to a contractual obligation," which requires the Court to "first … examine the language of the statute," and second, to review "the circumstances" surrounding the statute's passage and the conduct of the parties. *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 467-68 (1985); *see* ECF No. 33 at 16-20.

[16] Notably, while Judge Griggsby applied an overly restrictive interpretation of the *Nat'l R.R. Passenger Corp* test based on her narrow reading of *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12 (2011) and *Brooks v. Dunlop Mfg. Inc.*, 702 F.3d 624 (Fed. Cir. 2012), she failed to cite *Nat'l R.R. Passenger Corp.* in her opinion. Judge Wheeler in *Moda* expressly disagreed with Defendant's reliance on *ARRA Energy*, which is also cited by Defendant here, because he found that the Court had applied an overly narrow and "literal[]" interpretation of the applicable test articulated by the Supreme Court in *Nat'l R.R. Passenger Corp. Moda* at 463-64. As

Indeed, if governmental conduct could only be viewed so narrowly in analyzing an implied-in-fact contract claim, then *New York Airways* was wrongly decided, because there the Court of Claims looked to more than the just the "conduct of Congress and the President in enacting and signing that statute" in finding that the actions of the parties evidenced an intent to contract. *See N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 751 (Ct. Cl. 1966). For example, the Court explained, in addition to statements surrounding the act's passage:

> [I]t [wa]s equally manifest that throughout the years in question the key congressmen who spoke on the subject fully understood that the commitment to pay subsidy compensation decreed by the Board for helicopter carriers was a binding obligation of the Government in the courts even in the failure of Congress to appropriate the necessary funds.

Id. In *New York Airways*, there were no magic contractual terms—the Court found promissory language in the statute and looked at the conduct of the parties. The Court held that:

> The actions of the parties support the existence of a contract at least implied in fact. The Board's rate order [the regulation at issue] was, in substance, an offer by the Government to pay the plaintiffs a stipulated compensation for the transportation of mail, and the actual transportation of the mail was the plaintiffs' acceptance of that offer. No formal contract document was required to support the existence of the contract so implied.

Id. at 751. Despite its plain similarity to the circumstances present in *BCBSNC* and this case, Judge Griggsby barely attempted to distinguish *New York Airways* at all.[17]

Moreover, Judge Griggsby's finding that BCBSNC did not "identify any circumstances surrounding the enactment of the ACA that would manifest" contractual intent by Congress, and

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Plaintiffs stated in their Supplemental Brief Addressing the *Moda Health Plan, Inc. v. United States* Opinion, *Brooks* is factually distinguishable on several grounds. *See* ECF No. 33 at 19-20.

[17] The distinction Judge Griggsby drew between "payments for particular goods or services" for mail services in *New York Airways,* and "payments in connection with administering the Risk Corridors Program," is a distinction without a difference. *BCBSNC* at *19 n.8. In both instances, the plaintiffs were providing services for the Government's benefit and the Government was bound to pay the plaintiffs a specific sum in exchange for their performance. *See Moda* at 464; *N.Y. Airways*, 369 F.2d at 752. In both instances, there was no discretion not to pay the specific amounts due.

that the alleged conduct relied upon by BCBSNC only "occurred several years after the enactment of the ACA," ignored the well-pled allegations in BCBSNC's Complaint and again violated the governing RCFC 12(b)(6) standards. *See BCBSNC* at *18-19; *see, e.g.*, *Henthorn*, 29 F.3d at 688 ("[F]actual allegations in briefs or memoranda of law … may never be considered when deciding a 12(b)(6) motion … and most certainly may not be considered when the facts they contain contradict those alleged in the complaint."). Judge Griggsby overlooked that BCBSNC, like Plaintiffs here, identified such circumstances surrounding passage of the ACA and Section 1342. *See BCBSNC* Compl. ¶ 4-6, 21, 23-26, 32-33; Compl. ¶ 4-6, 26, 28-30, 37-38.

V. JUDGE GRIGGSBY'S HOLDING ON DECLARATORY RELIEF SHOULD NOT BE FOLLOWED

In addition to denying BCBSNC's request for declaratory relief, which mirrors Plaintiffs' here, on the ground that she had already found that BCBSNC had no right to full annual payments, Judge Griggsby also based her decision to deny declaratory relief on a separate erroneous ground. Without analysis or explanation, Judge Griggsby stated that "the declaratory relief that Blue Cross seeks here is not incident of or collateral to a monetary judgment regarding its 2014 Risk Corridors Program Payments." *BCBSNC* at *20. Tellingly, Judge Griggsby cited no authority for this conclusion, instead simply stating that 2015 and 2016 payments "are not at issue in this litigation."

Judge Griggsby overlooked the case law cited by BCBSNC (and Plaintiffs here) making clear that this type of declaratory relief is proper here. *See Cal. ex rel. Brown v. United States*, 110 Fed. Cl. 130, 133-34 (2013) (declaratory judgment ancillary to breach of contract claim). In *Cal. ex rel. Brown*, the plaintiff had prevailed at trial on a Tucker Act breach of contract claim against the United States, and sought declaratory relief in the form of orders that FERC shall not

repeat the offending conduct in the parties' future dealings. *See* 110 Fed. Cl. at 131. The Court granted the plaintiff's request, finding the declaratory relief appropriate because the claim involved a live dispute between the parties, it would resolve the dispute, and future legal remedies would be inadequate because trial may need to be repeated on the same evidence, potentially with the loss of some live witness testimony. *See id.* at 134-35. Similar circumstances exist here. Contrary to Judge Griggsby's holding, this Court has jurisdiction and discretion to grant the incidental declaratory relief Plaintiffs request. *See id.*; 28 U.S.C. § 1491(a)(2).

CONCLUSION

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

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Respectfully Submitted,

s/ Lawrence S. Sher

Lawrence S. Sher (D.C. Bar No. 430469)
REED SMITH LLP
1301 K Street NW
Suite 1000-East Tower
Washington, DC 20005
Telephone: 202.414.9200
Facsimile: 202.414.9299
Email: lsher@reedsmith.com

Counsel for Plaintiffs

Of Counsel:

Daniel I. Booker (D.C. Bar No. 377926)
Kyle R. Bahr (D.C. Bar No. 986946)
Conor M. Shaffer (PA Bar No. 314474)
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222
Telephone: 412.288.3131
Facsimile: 412.288.3063
Email: dbooker@reedsmith.com
kbahr@reedsmith.com
cshaffer@reedsmith.com

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2017, a copy of the foregoing Plaintiffs' Supplemental Brief Addressing the *Blue Cross and Blue Shield of North Carolina v. United States* Opinion was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing with be sent to all parties by operation of the Court's ECF system.

s/ Lawrence S. Sher
Lawrence S. Sher
Counsel for Plaintiffs