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 *MODA HEALTH PLAN, INC. 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

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 March 24, 2017 (ECF No. 31), permitting the parties to address Judge Wheeler's opinion in *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436 (2017) (hereinafter, "*Moda*"), which was published following the February 7, 2017 hearing in Plaintiffs' case.[1]

Plaintiffs fully agree with Judge Wheeler's reasoning and conclusions in *Moda*, and submitted *Moda* as additional authority the day following the opinion's release. *See* ECF No. 28. Plaintiffs are aware that this Court has already received substantial briefing on *Moda* from both Defendant and the plaintiff-insurer in *Montana Health CO-OP v. United States*, No. 16-1427C. Plaintiffs agree with the arguments raised by Montana in its supplemental briefing, but to avoid duplicative briefing, will not repeat them all here. *See Montana*, ECF No. 26.[2]

I. JURISDICTION AND RIPENESS ARE MET HERE

Moda is one of this Court's four recent decisions concluding that this Court has subject-matter jurisdiction over risk corridors claims, and that those claims are ripe for resolution.[3] In each case, Defendant raised and the Court properly rejected the same jurisdictional and ripeness arguments that Defendant raises in this case. Subsequent to *Moda*, Judge Bruggink likewise denied Defendant's Rule 12(b)(1) jurisdiction and ripeness challenges to a claim mirroring

---

[1] The February 7, 2017 hearing transcript (cited as "Tr." herein) is found at ECF No. 30.

[2] Particularly worthy of consideration are the sections of Montana's brief explaining how Judge Wheeler rejected all of Defendant's assertions that the payment obligation under Section 1342 was either unenforceable, unfunded, or undone by a lack of dedicated appropriations or Congress' later appropriations riders. *See Montana*, ECF No. 26 at 6-12.

[3] *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 claims mirroring Plaintiffs' Counts I to V here); *Health Republic. Ins. Co. v. United States*, 129 Fed. Cl. 757, 770-78 (2017) (Sweeney, J.) (denying Defendant's 12(b)(1) challenge to claim mirroring Plaintiffs' Count I); *Moda* at 450-454 (denying Defendant's 12(b)(1) challenges to claims mirroring Plaintiffs' Counts I and III).

Plaintiffs' Count I here. *See Maine Cmty. Health Options v. United States*, No. 16-967C, 2017 WL 1021837, at *2 (Fed. Cl. Mar. 9, 2017).[4] Accordingly, four Judges unanimously agree that this Court has Tucker Act jurisdiction to hear risk corridors claims, and that those claims are ripe for adjudication now. This Court should similarly so hold and deny Defendant's motion to dismiss under RCFC 12(b)(1).

II. THE GOVERNMENT WAS OBLIGATED TO MAKE ANNUAL RISK CORRIDORS PAYMENTS

In *Moda*, Judge Wheeler agreed with Judge Sweeney's decision in *Health Republic* finding that the Government's risk corridors payment obligation is due *annually* under both Section 1342 and, alternatively, HHS' interpretation of the statute. *See Moda* at 451-54 (citing and quoting *Health Rep.*, 129 Fed. Cl. at 770-79).[5] Judge Bruggink subsequently concurred based on the face of Section 1342, holding that "[w]e reject the [Defendant's] notion that the statute does not mandate the payment of money on a yearly basis," and that "[n]otwithstanding HHS' *post hoc* pronouncements, 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 ("[T]he clear inference from the text of the statute is that payment will be made on a yearly basis. The claim is thus ripe.").

Judge Wheeler concluded that Defendant's "three-year payment framework" argument, which asserts that no full payment for any year is due until the end of the risk corridors program's third year, "conflates the merits question with the ripeness question." *Id.* at 454; *see also Health Rep.*, 129 Fed. Cl. at 778 (resolution of "whether plaintiff was entitled to *full* payment … will require the court to determine, *on the merits*, whether HHS is permitted to make

---

[4] Judge Bruggink reserved ruling on the merits of Defendant's Rule 12(b)(6) motion pending supplemental briefing from the parties. *See Maine*, 2017 WL 1021837, at *2.

[5] Notably, Judge Wheeler carefully explained why the annual payment question – "when" payment is due – is a jurisdictional issue, while the full payment question – "whether" full payment must be made on the due date – is a merits issue. *See Moda* at 453 & n.10.

partial annual risk corridors payments.") (emphasis added).[6]

Additionally, Defendant does not genuinely dispute the Government's annual payment obligation here. At Plaintiffs' hearing, counsel for Defendant stated that "what she [Judge Sweeney] addressed [in *Health Republic*] was she said collections are due -- or *payments are due annually*, so long as there are collections, *and we don't actually dispute that*." Tr. at 137:20-23 (emphasis added). Nor could Defendant seriously dispute it, given the "significant" fact that "HHS (through CMS) indicated repeatedly that it would make payments every year." *Moda* at 454 (citing multiple HHS statements). Moreover, the Government actually made annual payments to Plaintiffs. *See Health Rep.*, 129 Fed. Cl. at 778 ("Indeed, HHS has, in actual practice, … made annual risk corridors payments to insurers."); *Moda* at 454 ("HHS followed a rigid annual schedule in practice as well as in interpretation."); Compl. ¶ 148.

Accordingly, *Moda* further supports that the Court has jurisdiction over Plaintiffs' claims and that risk corridors payments are due annually. Defendants' RCFC 12(b)(1) motion to dismiss therefore should be denied in its entirety as to all of Plaintiffs' Counts I to V.

---

[6] At Plaintiffs' hearing, counsel for Defendant argued that QHPs were bound by the "three-year payment framework" articulated in the annual HHS "Notice of Benefit and Payment Parameters" for CY 2014, CY 2015, and CY 2016, as referenced in 45 C.F.R. § 153.510(a). *See* Tr. at 30:2-32:4. A review of those "Notice" statements, however, shows that their only definitive guidance regarding risk corridors payments in the event of a collections shortfall was 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 15410, 15473 (Mar. 11, 2013) (Final Rule, "HHS Notice of Benefit and Payment Parameters for 2014"); *see also* 79 FR 13744, 13787, 13829 (Mar. 11, 2014) (Final Rule, "HHS Notice of Benefit and Payment Parameters for 2015") (merely stating what HHS "intends" for CY 2015, which cannot bind QHPs); 80 FR 10750, 10752, 10779 (Feb. 27, 2015) (Final Rule, "HHS Notice of Benefit and Payment Parameters for 2016") (only "finalizing" the approach described in the April 11, 2014 bulletin if "risk corridors collections available in 2016 *exceed* risk corridors payment requests from QHP issuers," and recognizing that HHS must "make full payments to issuers") (emphasis added).

III. CONGRESS CREATED A STATUTORY OBLIGATION FOR FULL RISK CORRIDORS PAYMENTS WITHOUT APPROPRIATIONS LIMITATIONS

While Count I's merits are beyond the scope of Defendant's Rule 12(b)(1) motion, Judge Wheeler's analysis in *Moda* finding liability and granting summary judgment against the Government for violation of Section 1342 and its implementing regulations bears consideration here. *See Moda* at 455-62.[7] Judge Wheeler determined that Section 1342 requires full risk corridors payments each year, because (a) the statute demands it and (b) the appropriations riders did not abrogate the Government's payment obligations to QHPs. *See id.*

A. Statutory Obligations are Enforceable by This Court Independent of Appropriations

Judge Wheeler correctly determined that an act of Congress – like Section 1342 – can, standing alone, create a legally enforceable obligation.[8] This is integral to the congressional "power of the purse" that Defendant emphasizes in the *Montana* action before this Court. *See Montana*, ECF No. 25 at 1 & 12; *Montana*, Hrg. Tr. at 114:9-15. Defendant asserts that money-mandating statutes cannot legally bind the United States absent an appropriation, because the Appropriations Clause states that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. Defendant's argument is as unavailing in this Court now as it was 138 years ago.

As recognized since at least 1879, Article I, Section 9 of the Constitution has had no bearing on this Court or its predecessors, because:

That provision of the Constitution is exclusively a direction to the officers of

---

[7] After the Court's judgment on liability, the parties agreed that damages were measured by the amounts published in CMS's annual risk corridors announcements for CY 2014 and CY 2015, minus prorated amounts already paid, and the Court entered judgment for Moda for $209,830,445.79, plus RCFC 54(d) reasonable costs. *See Moda*, No. 16-649C, ECF Nos. 24-25.

[8] *See Moda* at 455 (finding that Section 1342's "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").

> the Treasury, who are intrusted with the safekeeping and payment out of the public money, **and not to the courts of law**; the courts and their officers can make no payment from the Treasury under any circumstances.
>
> **This court**, established for the sole purpose of investigating claims against the government, **does not deal with questions of appropriations, but with the legal liabilities incurred by the United States under contracts, express or implied, the laws of Congress**, or the regulations of the executive departments. (Rev. Stat., § 1059.) That **such liabilities may be created where there is no appropriation of money to meet them** is recognized in section 3732 of the Revised Statutes.

Collins v. United States, 15 Ct. Cl. 22, 35 (1879) (emphasis added). Statutory payment obligations can thus exist independent of appropriations.

Under the Government's tripartite structure, Article I, Section 9 expressly limits the *executive branch's* power to spend, but not the *legislative branch's* power to make laws obligating the United States' purse strings.[9] This Court's purpose under the Tucker Act is determining whether the obligations created by Congress have been breached – "the asserted entitlement to money damages depends upon whether **any federal statute** 'can fairly be interpreted as **mandating compensation** by the Federal Government for the damage sustained'"[10] – while "Congress has always reserved for itself the power to address claims … founded not on any **statutory authority**, but upon the … equities." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 430-31 (1990) (emphasis added).

Indeed, the statute referenced in *Collins* was a precursor to the modern Anti-Deficiency Act ("ADA"), which provides in relevant part that "[a]n *officer or employee* of the United States

---

[9] *Cf.* U.S. Const. art. I, § 7, cl. 2 (Congress' lawmaking power); *Knote v. United States*, 95 U.S. 149, 154 (1877) (the President's power "cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress"); *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) ("[Art. I, § 9] was intended as a restriction upon the disbursing authority of the Executive department, and is without significance here. It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.").

[10] *United States v. Testan*, 424 U.S. 392, 400 (1976) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)) (emphasis added).

Government … may not … involve [the U.S.] 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).[11] The ADA constrains the executive's authority to obligate the public fisc, but does not constrain Congress' power to "authorize[] by law" any obligation. *Id.*

Just as it attempted in 1879 in *Collins*, Defendant now wants this Court to conflate "obligations" and "appropriations" and asserts that no statutory obligation exists unless there is a corresponding appropriation. That is simply not the law under this Court's binding precedent. Indeed, HHS itself has repeatedly recognized that "full" risk corridors payments are due to QHPs, including Plaintiffs, that suffered annual losses on the ACA exchanges in excess of the statutory targets. *See, e.g.*, Compl. ¶¶ 98, 101, 103, 120-121 (HHS statements); *Moda* at 457 ("[HHS] has never conflated its inability to pay with the lack of an obligation to pay.").

Congress' ability to create binding statutory obligations that are legally enforceable independent of appropriations has been confirmed by this Court in many cases, frequently involving the statutory obligation to pay federal salaries where appropriations were lacking.

B. *Collins v. United States*

A prime example of such cases is *Collins*, which involved enforcement of a statutory obligation to reinstate and pay Major Collins after he had retired from the Army but had not received his military pension. *Collins*, 15 Ct. Cl. at 23-24. When payment was not made despite passage of the statute, Major Collins sought relief in the Court of Claims. *Id.* at 24-26. The Government argued then – as it does now – that the Appropriations Clause foreclosed payment, claiming the statute lacked "[t]he familiar language expressive of legislative intent to take money

[11] The statute in *Collins* (Rev. Stat. § 3732) similarly stated in relevant part, "no contract or purchase on behalf of the United States shall be made, unless the same is authorized by law, or is made under an appropriation adequate to its fulfillment …." 15 Ct. Cl. at 35.

from the Treasury, '*and the Secretary of the Treasury is hereby authorized out of any moneys not otherwise appropriated*,' &c." *Id.* at 28 (Defendants' statement) (emphasis in original).

The Court of Claims rejected Defendant's argument, holding that:

> It is clear that the Executive … without legislative authority, cannot create a liability on the part of the United States to pay [a public officer] a salary for the time he was not in service; **but Congress, the legislative branch of the government, may by law create such liability**, and may allow back pay to any public officer in consideration of past services or for any other cause which they deem sufficient.
>
> * * *
>
> The officers of the Treasury have no authority to pay such compensation until appropriations therefor are made[.] … **The liability, however, exists independently of the appropriation, and may be enforced by proceedings in this court**.

Collins, 15 Ct. Cl. at 34-35 (emphasis added).[12]

C. *United States v. Langston*

In *Langston*, one of the cases analyzed in *Moda*,[13] the money-mandating "shall pay" statute stated that "[t]he representative at Hayti **shall be entitled to** a salary of $7500 a year." *United States v. Langston*, 118 U.S. 389, 390 (1886) (quoting Rev. Stat. § 1683). Just like Section 1342, the statute was silent regarding appropriations for this obligation. Congress later passed appropriations acts providing $2,500 less than the statutory amount, but those bills did not state "that such sum shall be 'in full compensation' for those years," or that they were "an appropriation of money 'for additional pay,' from which it might be inferred that Congress intended to repeal the act fixing his annual salary at $7500." *Langston*, 118 U.S. at 393. The Supreme Court affirmed the Court of Claims' judgment for Langston, concluding that:

---

[12] *See also Geddes v. United States*, 38 Ct. Cl. 428, 444 (1903) (holding that "[a]n appropriation constitutes the means for discharging **the legal debts** of the Government" created by Congress, and that the sources and amounts of appropriations "are questions which are **vital for the accounting officers**, but which **do not enter into the consideration of a case in the courts**") (emphasis added).

[13] *See Moda* at 459.

> [A]ccording to the settled rules of interpretation, **a statute fixing the annual salary of a public officer at a named sum, without limitation** as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained **no words that expressly or by clear implication modified or repealed the previous law**.

Langston, 118 U.S. at 394 (emphasis added). The statutory obligation remained intact.

Applied to the risk corridors cases, Section 1342 "fixed" the annual risk corridors amount a qualifying QHP must be paid – in *Langston* it was a sum-certain, here it was fixed by a prescribed statutory formula – which created a legal obligation that must be honored, unless the underlying obligation itself was subsequently (and clearly) modified or repealed—which it was not.[14] Analyzing numerous cases proffered by both parties, Judge Wheeler correctly held in *Moda* that the statutory obligation in Section 1342 had *not* been altered by the subsequent appropriations riders. *See Moda* at 457-62.

D. *United States v. Dickerson*

Even cases cited by Defendant undermine its position. In *Moda*, Defendant relied on the Supreme Court's *Dickerson* opinion, which Judge Wheeler analyzed – but ultimately distinguished – as one of two decisions that "have analyzed appropriations laws that suspended or repealed previous **statutory obligations**," and in which "the Supreme Court confronted a situation where a **statute promised** an enlistment allowance to honorably discharged soldiers who reenlisted." *Moda* at 459-60 (citing *United States v. Dickerson*, 310 U.S. 554, 554-55 (1940)) (emphasis added). In *Dickerson*, the Supreme Court concluded that the statute, unless amended, "**would entitle [**a reenlisted soldier] to the sum of [$75]." *Dickerson* at 555 (emphasis added). The Supreme Court thus recognized that statutes alone can create payment obligations.[15]

---

[14] Defendant even concedes that "Congress did not intend to repeal section 1342 or prohibit risk corridors payments altogether" with the appropriations riders. *Montana*, ECF No. 25 at 10.

[15] *See also United States v. Will*, 449 U.S. 200, 222 (1980) (finding in appropriations acts

Defendant described the obligatory nature of the original statute in *Dickerson* to this Court in its motion to dismiss brief in *Montana*, stating that *Dickerson* is among "a long line of Supreme Court and appellate cases [that] have held that provisions enacted in annual appropriations laws, such as the spending limits at issue here, can substantively amend **money-mandating provisions in previously enacted laws**, thereby eliminating or reducing **a claimant's right to payment**." *Montana*, ECF No. 17 at 37 (emphasis added). Defendant thus concedes that statutes can create legally enforceable obligations, independent of appropriations.

E. *Gibney v. United States*

In a case addressing overtime pay for Immigration Inspectors, the Court of Claims relied on and quoted most of the above-discussed authorities before observing that "[w]e know of no case in which any of the courts have held that a simple limitation on an appropriation bill of the use of funds has been held to suspend **a statutory obligation**." *Gibney v. United States*, 114 Ct. Cl. 38, 53 (1949) (emphasis added).[16] Explaining further, the Court of Claims stated:

> For more than half a century according to the rules and the practice prevailing in the Congress, a pure limitation on an appropriation bill does not have the effect of either repealing or even suspending **an existing statutory obligation**[.] … [T]he uniform rule was that if it were simply a withholding of funds and not a legislative provision under the guise of a withholding of funds it had **no effect whatever on the legal obligation**. … **The courts have also uniformly followed this interpretation**.

Id. at 50-51 (emphasis added); *see also id*. at 55 (Congress "merely prohibited the use of certain funds to discharge **the obligation under that Act**. **This did not repeal the liability the Act created**.") (Whitaker, J., concurring) (emphasis added).

F. *New York Airways, Inc. v. United States*

The Court of Claims recognized the applicability of these bedrock principles outside of

---

that "Congress intended to repeal or postpone **previously authorized increases**") (emphasis added); *Moda* at 460-61 (analyzing *Will*).

[16] Judge Wheeler also analyzed *Gibney*. *See Moda* at 459-60.

the federal salary context in *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966), a case involving a statutory (and contractual) claim substantially similar to Plaintiffs' here.[17] The Court held that:

> It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government **obligation created by statute**. … The failure to appropriate funds to meet **statutory obligations** prevents the accounting officers of the Government from making disbursements, **but such rights are enforceable in the Court of Claims**.

Id. at 748 (citations omitted and emphasis added).

The principle stated in *Collins* is no anachronism. Congress created a statutory obligation in Section 1342,[18] and the appropriations riders – while constraining *HHS' ability* to make full annual risk corridors payments – did not vitiate that existing legal obligation.[19] Relying on the *New York Airways*, *Gibney* and *Langston* cases confirming this core principle, Judge Wheeler correctly held the Government liable under the statute. *See Moda* at 458-61.

G. *Nevada v. Department of Energy*

Nor does this principle conflict with any case that Defendant relies upon in its supplemental brief in *Montana*. *See Montana*, ECF No. 25 at 1-2. On the contrary, Defendant's cases support this principle. In *Nevada v. Dep't of Energy*, for example, the state sought distribution of funds allegedly owed under section 302 of the Nuclear Waste Policy Act ("NWPA"). *See* 400 F.3d 9, 10-11 (D.C. Cir. 2005). The D.C. Circuit determined the agency

---

[17] *See* Pls.' Opp'n Br., ECF No. 12 at 32-37 & 42; Pls.' Sur-Reply, ECF No. 21 at 10-13.

[18] Even Judge Lettow recognized this, stating that "**Section 1342 and the implementing regulations … mandate payment from HHS**[.] … **HHS's obligation to make risk-corridors payments** when certain conditions are met represents the agency's independent authority and **obligation as directed by Congress**." *Lincoln*, 129 Fed. Cl. at 111-12 (emphasis added).

[19] *See also Dist. of Columbia v. United States*, 67 Fed. Cl. 292, 336 (2005) (Bush, J.) ("An appropriation with limited funding is not assumed to amend **substantive legislation creating a greater obligation**.") (citing *N.Y. Airways*, 369 F.2d at 749) (emphasis added).

was not liable because section 302 expressly made the funds "subject to appropriations,"[20] and Congress did not appropriate such funds. *Id.* at 13. The court observed, however, that while section 116 of the NWPA "**speaks in mandatory terms, obliging** DOE to grant Nevada reasonable sums for repository-related expenditures," by reference to the statutory text that obligation was only triggered "when Congress appropriates Waste Fund money for general repository-related purposes." *Id.* at 15 (citation omitted and emphasis added). Had the statutory text not contained this express contingency, then the agency may have been liable for the statutory obligation created by Congress regardless of appropriations.

H. ***Prairie County v. United States***

The Federal Circuit took the same approach in *Prairie County v. United States*, 782 F.3d 685 (Fed. Cir. 2015). After citing with approval cases like *Langston* and *New York Airways*, and observing that the statute at issue – the Payment in Lieu of Taxes Act ("PILT") – "does not involve a contract," the court framed the two sides of the issue:

> Absent a contractual obligation, the question here is whether the statute reflects congressional intent to limit **the government's liability** for PILT payments, or whether PILT imposes a **statutory obligation** to pay the full amounts according to the statutory formulas **regardless of appropriations** by Congress.

Id. at 688-90 (emphasis added). Between these two possibilities, the court chose the former because PILT expressly included a clause, *not* present in Section 1342, stating that "[a]mounts are available *only* as provided in appropriation laws." *Id.* at 690 (quoting 31 U.S.C. § 6906 (2006)) (Federal Circuit's emphasis). The Court found that "[t]he inclusion of the word 'only' limits the availability of PILT payments to appropriations." *Id.*

Unlike the PILT, Section 1342 is completely silent regarding appropriations,[21] and

---

[20] Section 1342 lacks such language.

[21] Defendant cannot credibly rely upon *Highland Falls-Fort Montgomery Cent. Sch. Dist. v.*

specifically lacks language limiting the Government's risk corridors payment obligation to appropriations.[22] Following the Federal Circuit's reasoning in *Prairie County*, Section 1342 thus "imposes a statutory obligation to pay the full amounts according to the statutory formulas regardless of appropriations by Congress." *Id.* Judge Wheeler therefore correctly concluded that the United States was obligated by Section 1342 to make full annual risk corridors payments to QHPs, and that the later-enacted appropriations riders did not remove that statutory obligation. *See Moda* at 455-62.

IV. THE GOVERNMENT ALTERNATIVELY BREACHED AN IMPLIED-IN-FACT CONTRACT BY NOT FULLY PAYING RISK CORRIDORS EACH YEAR

Addressing an implied-in-fact contract claim substantively similar to Plaintiffs' Count III, Judge Wheeler in *Moda* denied Defendant's 12(b)(6) motion and, alternatively, held the Government liable to the insurer for breach of an implied-in-fact contract. *See Moda* at 462-66. His reasoning confirms that Plaintiffs have sufficiently alleged a breach of implied-in-fact contract claim here, and that Defendant's virtually identical 12(b)(6) motion against Count III

United States, 48 F.3d 1166 (Fed. Cir. 1995), because the underlying statute containing the "shall be entitled" payment obligation there also expressly directed the Government how to allocate funds if annual appropriations were insufficient to fulfill the statutory payment obligation, and the subsequent appropriations acts specifically "earmarked" the *precise* amount of funds to be used toward the statutory payment obligation. *Id*. at 1168 (quoting 20 U.S.C. §§ 237(a) & 240(c)); *id.* at 1170 ("[W]e have great difficulty imagining a more direct statement of congressional intent than the instructions in the appropriations statutes at issue here."). Defendant's reliance on *Star-Glo Associates, LP v. United States*, 414 F.3d 1349 (Fed. Cir. 2005), is similarly misplaced. There, the Federal Circuit held that Congress' express limitation on payments available under a statutory program compensating citrus growers for destroyed citrus groves – "[t]he Secretary of Agriculture shall use $58,000,000 of the funds of the Commodity Credit Corporation to carry out this section, to remain available until expended" – was intended as a statutory cap based on the plain language of the statute itself and its legislative history. *Id.* at 1354-55 (quoting P.L. No. 106-387, 810(e) (2000)).

[22] The Federal Circuit provided examples of such limiting language in *Greenlee County v. United States*, 487 F.3d 871, 878 (Fed. Cir. 2007) ("We see little functional difference between saying that amounts are 'subject to the availability of appropriations' and saying that amounts are 'available only as provided in appropriations laws,' and we conclude that the language of 6906 limits the government's liability under PILT to the amount appropriated by Congress.").

should be denied. Plaintiffs unquestionably have made, like the insurer in *Moda*, not only the requisite jurisdictional "non-frivolous allegation of a contract with the government" by pleading each of the four elements of an implied-in-fact contract, *id.* at 450, but also the plausible fact-based allegations to support each element at the 12(b)(6) stage. *See id.* at 462-66; Compl. ¶¶ 193-210; Pls.' Opp'n Br., ECF No. 12 at 31-44; Pls.' Sur-Reply, ECF No. 21 at 10-13.

As Judge Wheeler correctly observed in *Moda*, the Government does not always "intend to bind itself whenever it creates a statutory or regulatory incentive program." *Moda* at 462-63 (citing *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985)). Therefore, "Courts should 'proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation.'" *Id.* at 463 (quoting *Brooks v. Dunlop Mfg. Inc.*, 702 F.3d 634, 631 (Fed. Cir. 2012)). Relying on cases also cited by Plaintiffs here, *Radium Mines* and *New York Airways*, Judge Wheeler held that the statutory language establishing the ACA's risk corridors program "meets the criteria," as set forth in these cases, to "bind the Government in contract" because: (1) the Government provided "a program that offers specified incentives in return for voluntary performance of private parties" in the "form of an actual undertaking," and (2) the risk corridors program's statutory provision is "promissory"—it gave HHS "no discretion to decide whether or not to award incentives to parties who perform." *Id.* at 463-64 (citing *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 406 (Ct. Cl. 1957), and *N.Y. Airways*, 369 F.2d at 744-46, 751).

Judge Wheeler found that the Government "created an incentive program in the form of the Exchanges on which insurers could voluntarily sell QHPs." *Moda* at 464. "In return for insurers' participation," Judge Wheeler found that "the Government promised risk corridors payments as a financial backstop" if the insurers were "unprofitable" (*i.e.*, their annual losses on

the ACA exchanges exceeded the statutory target set forth in Section 1342). *Id*. Judge Wheeler determined that because "Section 1342 specifically directs the Secretary of HHS to make risk corridors payments in specific sums," HHS had "no discretion to pay more or less than those sums." *Id*. Additionally, Judge Wheeler found that the insurers had accepted the Government's unilateral offer through their performance, which included "develop[ing] QHPs that would satisfy the ACA's requirements and then sell[ing] those QHPs to consumers." *Id*. Emphasizing the contractual nature of the QHPs' "actual undertaking," *id.* at 463, Judge Wheeler concluded that the "[i]nsurers' performance went beyond filling out an application form." *Id*. at 464 ("Here, the Government has promised to make risk corridors payments in return for Moda's performance. Moda accepted this offer through performance. It sold QHPs on the health benefit exchanges while adhering to the ACA's requirements.").

Judge Wheeler also addressed the other elements necessary to establish a binding implied-in-fact contract against the Government, and determined that both consideration and authority to contract were satisfied in the risk corridors context. *See Moda* at 465.

A. Case Law Supports Judge Wheeler's Conclusion

At Plaintiffs' hearing, this Court inquired whether the Government's contractual obligation came solely from the statute itself. *See* Tr. at 87:22-88:11. This is precisely what Judge Wheeler found: in Section 1342, Congress created a unilateral offer to contract, to be accepted by an insurer's performance as a QHP. *See Moda* at 462-65. By becoming certified as QHPs, adhering to the myriad new ACA statutory and regulatory requirements, and offering the new plans to members on the ACA exchanges, the insurers accepted the Government's offer and were contractually entitled to receive risk corridors payments in the statutorily-prescribed amounts, so long as the QHPs satisfied the condition precedent by suffering losses on the ACA exchanges in excess of the statutory target. *See id.* Case law supports Judge Wheeler's

conclusion, even when a statute like Section 1342 does *not* contain the word "contract."

Aside from the precedential cases discussed above – *Radium Mines* and *New York Airways*[23] – the Claims Court in *Kentucky ex rel. Cabinet for Human Resources v. United States*, 16 Cl. Ct. 755 (1989), granted summary judgment against the Government for breach of an implied-in-fact contract found in a statute requiring that HHS "shall pay" a percentage of a state's expenditures back to the state in enforcing the child support obligations owed by parents. *Kentucky*, 16 Cl. Ct. at 756, 765. Finding no express promissory words like "contract" in the statute and regulations, the Court nevertheless determined that "HHS[']s assistance in the preparation of the state Title IV-D plan, its approval of the state plan, and the elaborate administrative procedures developed to determine and implement FFP payments, *create[d] a contractual relationship and obligate[d] the Government to the terms agreed upon*. These obligations may be enforced in the Claims Court." *Id.* at 756-57, 762 (emphasis added).

Furthermore, the Supreme Court has held that a statute that "condition[s] an offer of federal funding on a promise by the recipient … *amounts essentially to a contract* between the Government and the recipient of funds." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) (emphasis added). And Justice Scalia, in his dissent in *Bowen v. Massachusetts*, found that a Medicaid provision, which mandated that "the Secretary (except as otherwise provided in this section) *shall pay* to each State which has a plan approved under this subchapter" the amounts specified by statutory formula, "*itself can be analogized to a unilateral offer for contract*—offering to pay specified sums in return for the performance of specified services and inviting the States to accept the offer by performance." *Bowen v. Mass.*, 487 U.S. 879, 923 (1988) (Scalia, J., dissenting) (quoting 42 U. S. C. § 1396b(a)) (emphasis added).

[23] Both of which are examples of cases "where contracts were inferred from regulations promising payment." *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 739 n.11 (1982).

B. The Supreme Court's Two-Step Test Set Forth in *Nat'l R.R. Passenger Corp.* Supports Judge Wheeler's Implied-In-Fact Contract Determination in *Moda*

Judge Wheeler expressly disagreed with Defendant's reliance on *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12 (2011), which is also cited by Defendant here,[24] 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. Judge Wheeler disagreed with the *ARRA Energy* Court's reluctance to find a binding contract because the plaintiff there had not "point[ed] to specific language in" the relevant statute that "specifically require[d] the Government to enter into contracts." *Id*. at 464.[25] Judge Wheeler emphasized that "[n]either *Radium Mines* nor *New York Airways* turned on the invocation of the magic word 'contract' in the statutes they examined." *Id*. Rather, as Judge Wheeler did in *Moda* with respect to the risk corridors program, the Courts in both of those cases "examined the *structure* of [the] statutory program[s] and determined … the Government had expressed its intent to contract by using that structure." *Id*. (emphasis in original); *see also N.Y. Airways,* 369 F.2d at 751 ("The actions of the parties support the existence of a contract at least implied in fact. The Board's rate order 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 mail was the plaintiff's acceptance of that offer.").[26]

---

[24] *See* Def.'s Mot. to Dismiss, ECF No. 8 at 31-32.

[25] Judge Wheeler observed that while the Court in *ARRA Energy* only analyzed the language of the statute at issue in that case, the Court correctly recited *Nat'l R.R. Passenger Corp.*'s governing two-step analysis, which allows courts to examine either "specific language" in the statute **or "conduct on the part of the government** that allows a reasonable inference that the government intended to enter into a contract." *Moda* at 464 (quoting *ARRA Energy*, 97 Fed. Cl. at 27) (emphasis added); *see also Nat'l R.R. Passenger Corp.*, 470 U.S. at 468.

[26] Defendant's attempt to distinguish *New York Airways* based on Judge Lettow's decision in *Land of Lincoln* is unpersuasive, not only because the Court improperly permitted its findings on the anomalous Motion for Judgment on the Administrative Record as to the statutory count to

Judge Wheeler followed the Supreme Court's two-step test laid out in *Nat'l R.R. Passenger Corp.* for determining "whether a particular statute gives rise to a contractual obligation," which requires a 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. 470 U.S. at 467-68. The Supreme Court's examination of the surrounding circumstances included the "legitimate expectation[s]" of the parties and whether "Congress would have struck" the bargain under such circumstances. *Id*. at 468-69 After reviewing these two factors in detail, the Supreme Court determined that Congress did not, through passage of the statute at issue, intend to contractually agree *not* to re-impose any rail passenger service responsibilities on the freight railroads. *Id*. at 471. Instead, the Court found that the statute did not obligate the Government to "agree[] with anyone to do anything," emphasizing that, by its terms, Congress had "'expressly reserved' its right to 'repeal, alter or amend,'" the statute "'at any time.'" *Id*. at 467.

Further, with respect to surrounding circumstances, the Supreme Court observed that "Congress would have struck a profoundly inequitable bargain" had it agreed to the contractual terms urged by the railroads because, the Court found, Congress would have received little in exchange for a promise *never* to impose rail passenger service obligations on the profitable freight railroads. *Nat'l R.R. Passenger Corp.*, 470 U.S. at 468. The Court also determined that

---

impact his decision on the other counts (which should have been decided strictly under the RCFC 12(b)(6) or RCFC 56 standards), *see* Tr. at 78:7-80:7, but also because the distinction urged between "compensation" for mail services in *New York Airways,* and risk corridors payments for insurers providing QHPs to members on the ACA exchanges, is a distinction without a difference. *See Lincoln*, 129 Fed. Cl. at 112-13. In both instances, 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. Indeed, the Court of Claims in *New York Airways* described the "compensation" for mail transportation services in that case as "constitut[ing] an equivalent compliance with [the requirements of] the rate order entitl[ing] them to receive subsidy payments." 369 F.2d at 752.

the "circumstances of the Act's passage belie[d] an intent to contract away" the Government's "pervasive" regulation of the freight railroads, which historically included requiring them to undertake such passenger rail service obligations. *Id.* The Court remarked that Congress would not have "nonchalantly shed" its prior "pervasive" regulatory powers and that "the railroads had no legitimate expectation" that Congress would be contractually bound. *Id*. at 468-69.

Although Defendant relies on *Nat'l R.R. Passenger Corp.* to support its contractual defense here,[27] as described above, the statutory text and surrounding circumstances there were dramatically different than those regarding "the structure" of the risk corridors program. *Moda* at 464. Judge Wheeler's contractual analysis in *Moda* exemplifies this.

First, Judge Wheeler determined that Section 1342's "shall pay" language was "promissory" in nature, *Moda* at 463, requiring that "the Secretary of HHS 'shall pay' specific sums of money to" QHPs that voluntarily participated in the ACA exchanges and experienced losses in excess of prescribed targets. *Id.* at 455. "HHS ha[d] no discretion to pay more or less than those sums." *Id*. at 464. In Section 1342, unlike in the *Nat'l R.R. Passenger Corp.* statute, Congress did not expressly reserve its right to "repeal, alter or amend" its mandatory risk corridors payment obligation. *See Nat'l R.R. Passenger Corp.* at 468. In fact, as Judge Wheeler concluded, Section 1342's "shall pay" obligation was "unambiguous," non-discretionary, and not contingent on risk corridors collections or any other restrictions. *Moda* at 455.

Second, unlike the historical, pervasive regulation of the freight railroads which previously had required them to undertake rail passenger service obligations, the newly-created ACA exchange markets were unprecedented, uncertain and risky—there had been no prior, long-standing regulatory regime requiring insurers to provide health coverage to existing (much less

[27] *See* Def.'s Mot. to Dismiss, ECF No. 8 at 30-31; Def.'s Reply Br., ECF No. 17 at 19, 21.

new) members on the ACA exchanges. *See King v. Burwell*, 135 S. Ct. 2480, 2485 (2015); *cf. Nat'l R.R. Passenger Corp.*, 470 U.S. at 468. Moreover, unlike the freight railroads, the health insurers had a "legitimate expectation" that Congress would be bound to honor its "shall pay" obligation to insurers selling QHPs on the ACA exchanges that suffered losses in excess of the prescribed statutory targets. *See Moda,* at 462-64; *cf. Nat'l R.R. Passenger Corp.* at 469.

Further, unlike the "profoundly inequitable bargain" that Congress would have made by promising to lift the freight railroads' passenger rail service obligations, *Nat'l R.R. Passenger Corp.* at 468, the Government without question received valuable consideration from insurers participating on the ACA exchanges, which Judge Wheeler recognized was "[c]entral to" the ACA's infrastructure and furthered the ACA's stated goals of expanding healthcare coverage to millions of new and previously uninsured Americans. *Moda* at 441-42, 465.

The statute at issue in *Brooks*, a case also relied upon by Defendant here,[28] is similarly distinguishable from the risk corridors statute and the circumstances surrounding its passage. In *Brooks*, potential false-patent-marking plaintiffs claimed that a *qui tam* provision in Section 292(a) of the Leahy-Smith America Invests Act created a contract that was breached when the statute was later amended to eliminate the *qui tam* provision. *See* 702 F.3d at 625.

Applying *Nat'l R.R. Passenger Corp.*'s two-step test, the Federal Circuit held that Congress had not intended to be contractually bound to potential *qui tam* plaintiffs merely by providing them an opportunity to bring a *qui tam* action under the statute's prior version. *Brooks*, 702 F.3d at 630-31. In the first step, unlike Judge Wheeler's determination in *Moda*, the Federal Circuit found that the statute lacked any promissory obligation; instead it "simply authorized a *qui tam* action" by providing that "any person may sue for the penalty," and

[28] *See* Def.'s Reply Br., ECF No. 17 at 19-21.

"specified how any penalty would be divided." *Id*. at 631. Unlike Section 1342, which obligated the Government to make risk corridors payments once insurers performed by voluntarily offering QHPs on the ACA exchanges and experiencing annual losses that exceeded statutory targets, the *qui tam* provision in *Brooks* did not require a potential false-patent-marking plaintiff to file suit or do anything at all—there was no mutuality, method of acceptance, or consideration.

In the second step, the Federal Circuit examined "the circumstances surrounding the statute's passage," and found no suggestion that Congress had intended to bind itself contractually with potential *qui tam* relators, but instead observed that the *qui tam* provisions' long history demonstrated otherwise, noting that *qui tam* plaintiffs had no "vested right" to receive any award. *Brooks*, 702 F.3d at 631. Absent from the *Brooks* statute and surrounding circumstances was the promissory "shall pay" obligation that Congress included in Section 1342, requiring HHS to pay specified sums to QHPs with qualifying losses and specifically inducing insurers to "develop QHPs that would satisfy the ACA's requirements and then" voluntarily "sell those QHPs to consumers" on the ACA exchanges. *Moda* at 464.

Accordingly, the Court should deny the Government's Rule 12(b)(6) motion to dismiss Count III. Applying the same precedent, Plaintiffs will prove and this Court should hold, as Judge Wheeler did in *Moda*, that the Government breached an implied-in-fact contract with Plaintiffs "by failing to make full risk corridors payments as promised." *Moda* at 465-66. Like Judge Wheeler, this Court should, when the time comes, "direct[] the Government to fulfill that promise." *Id*. at 466.

CONCLUSION

For the foregoing reasons, as well as those stated in Plaintiffs' earlier 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.

Dated: April 7, 2017

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

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

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2017, a copy of the foregoing Plaintiffs' Supplemental Brief Addressing the *Moda Health Plan, Inc. 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