IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FIRST PRIORITY LIFE INSURANCE COMPANY, INC., HIGHMARK INC. F/K/A HIGHMARK HEALTH SERVICES, HM HEALTH INSURANCE COMPANY D/B/A HIGHMARK HEALTH INSURANCE COMPANY, HIGHMARK BCBSD INC., HIGHMARK WEST VIRGINIA INC., AND HIGHMARK SELECT RESOURCES INC.,	:	Case No. 16-587C
Plaintiffs,	:	Judge Wolski
v.	:	
THE UNITED STATES OF AMERICA,	:	
Defendant.	:	

THE UNITED STATES' SUPPLEMENTAL BRIEF
REGARDING *MODA HEALTH PLAN, INC. V. UNITED STATES*

CHAD A READLER
Acting Assistant Attorney General
Civil Division

RUTH A. HARVEY
Director
Commercial Litigation Branch

KIRK T. MANHARDT
Deputy Director

CHARLES E. CANTER
FRANCES M. MCLAUGHLIN
TERRANCE A. MEBANE
L. MISHA PREHEIM
MARC S. SACKS
PHILLIP M. SELIGMAN
United States Department of Justice

Attorneys for the United States of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. *Moda* Erred In Exercising Jurisdiction Because Final Risk Corridors Payments Are Not Presently Due 1

II. *Moda's* Conclusions Regarding the Substantive Issues Do Not Withstand Scrutiny 3

A. Congress has never appropriated funds for risk corridors payments other than collections 3

1. The 2014 CMS Program Management appropriation did not appropriate funds for risk corridors payments 5

2. Congress mandated in the Spending Laws that risk corridors payments would be funded solely from collections 8

3. Under binding Supreme Court and Federal Circuit precedent, congressional intent in the Spending Laws governs the extent of the United States' obligation under section 1342 9

4. The Judgment Fund is not a back-up appropriation for every money-mandating statute 13

B. Section 1342(b) does not impose an independent obligation to make risk corridors payments 16

1. Judge Wheeler misconstrued the text of section 1342 and overlooked the lack of any appropriation or authorization of appropriations 16

2. Judge Wheeler overlooked the clear direction to make payments under Medicare Part D 19

3. The CBO's scoring of the ACA was critical to its passage, and post-enactment statements by the CBO do not reflect Congress's intent 20

C. Congress did not intend to contract with insurers for risk corridors payments 21

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Bath Iron Works Corp. v. United States,
20 F.3d 1567 (Fed. Cir. 1994).. 14

Belknap v. United States,
24 Ct. Cl. 433 (1889) 12, 13

Brooks v. Dunlop Mfg., Inc.,
702 F.3d 624 (Fed. Cir. 2012)... 22, 23

Exxon Corp. v. Phillips Petroleum Co.,
265 F.3d 1249 (Fed. Cir. 2001).. 2

Fisher v. United States,
402 F.3d 1167 (Fed. Cir. 2005).. 2

Gibney v. United States,
114 Ct. Cl. 38 (1949) 12, 13

Greenlee County v. United States,
487 F.3d 871 (Fed. Cir. 2007)... 4, 16, 17

Health Republic Insurance Company v. United States,
129 Fed. Cl. 757 (2017) 1

Highland Falls-Fort Montgomery Central School District v. United States,
48 F.3d 1166 (Fed. Cir. 1995)... 4, 10, 15

Land of Lincoln v. United States,
129 Fed. Cl. 81 (2016) .... passim

Maryland Dep't of Human Res. v. Dep't of Health & Human Servs.,
763 F.2d 1441 (D.C. Cir. 1985) 2

Maine Cmty. Health Options v. United States
No. 16-967C (Ct. Fed. Cl. Mar. 9, 2017)... 1, 2

Moda Health Plan, Inc. v. United States,
130 Fed. Cl. 436 (2017) .... passim

Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.,
470 U.S. 451 (1985)... 20, 21

Nevada v. Dep't of Energy,
400 F.3d 9 (D.C. Cir. 2005) 4

New York Airways v. United States,
369 F.2d 743 (Ct. Cl. 1966) 11, 12, 21, 22

Office of Pers. Mgmt. v. Richmond,
496 U.S. 414 (1990) 14

Prairie County, Montana v. United States,
782 F.3d 685 (Fed. Cir. 2015) 4, 8, 16, 17

Radium Mines, Inc. v. United States,
153 F. Supp. 403 (Ct. Cl. 1957) 21

Salazar v. Ramah Navajo Chapter,
567 U.S. 182 (2012) 7, 8

Sharp v. United States,
580 F.3d 1234 (Fed. Cir. 2009) 20

Slattery v. United States,
635 F.3d 1298 (Fed. Cir. 2011) 14

Star-Glo Associates, LP v. United States,
414 F.3d 1349 (Fed. Cir. 2005) 4, 10

Turtle Island Restoration Network v. Evans,
284 F.3d 1282 (Fed. Cir. 2002) 19

United States v. Dickerson,
310 U.S. 554 (1940) 9, 12, 13, 15

United States v. Mitchell,
463 U.S. 206 (1983) 2

Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.,
435 U.S. 519 (1978) 2

Wells Fargo Bank, N.A. v. United States,
88 F.3d 1012 (Fed. Cir. 1996) 21

Constitution

U.S. Const. art. I, § 9, c. 7 3

Statutes

2 U.S.C. § 622(2) 3, 4

31 U.S.C. § 1304(a) 14

31 U.S.C. § 6906 17

35 U.S.C. § 292(b) 22

41 U.S.C. § 7108(a) 14

42 U.S.C. § 1395w-115........ 18, 19

42 U.S.C. § 18062........ passim

Pub. L. No. 112-29........ 22

Pub. L. No. 113-164........ 7

Pub. L. No. 113-202........ 7

Pub. L. No. 113-203........ 7

Pub. L. No. 113-235........ 8

Pub. L. No. 113-76........ 5, 6

Pub. L. No. 114-113........ 8

Rules

RCFC 12(b)(1) 2

Regulations

45 C.F.R. § 153.510 .... 3, 18

Miscellaneous

Dept. of Health and Human Servs.- Risk Corridors Program, B-325630 (Comp. Gen.)
2014 WL 4825237 (Sept. 30, 2014)........ 6, 7

GAO-16-464SP, *Principles of Federal Appropriations Law* (Ch. 2) 2-1 (GAO Redbook)
(4th ed. 2016) 3, 8, 9

160 Cong. Rec. H9307-01 (Dec. 11, 2014) 8, 11

S. Rep. No. 114-74 (2015) 9, 12, 16

David M. Herszenhorn, *Fine- Tuning Led to Health Bill's $940 Billion Price Tag,* N.Y. Times,
Mar. 18, 2010........ 20

ARGUMENT

On February 9, 2017, reaching conclusions that conflict with the decision rendered by Judge Lettow in *Land of Lincoln Mutual Health Insurance Co. v. United States*, 129 Fed. Cl. 81, *appeal docketed*, No. 17-1224 (Fed. Cir. Nov. 16, 2016), Judge Wheeler issued an opinion in *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436 (2017), denying the United States' motion to dismiss and granting plaintiff's motion for summary judgment under both section 1342 of the Affordable Care Act ("ACA") and plaintiff's implied-in-fact contract claim. Here, the United States has moved to dismiss the complaint while plaintiffs, First Priority Life Insurance Company, Inc., *et al.* ("Highmark"), have not sought summary judgment. For the reasons explained below, *Moda* was wrongly decided and should not be followed.

I. *Moda* Erred In Exercising Jurisdiction Because Final Risk Corridors Payments Are Not Presently Due

As set forth in the United States' Motion to Dismiss, Docket No. 8, at 15-23, final risk corridors payments are not presently due under the Department of Health and Human Services' ("HHS") three-year payment framework. Because Highmark seeks payments that are not presently due, the Court lacks jurisdiction over the Complaint. And because under HHS's three-year payment framework Highmark will likely receive additional payments, its claims are not ripe. Judge Wheeler, following Judge Sweeney's decision in *Health Republic Insurance Company v. United States*, 129 Fed. Cl. 757 (2017), disagreed, concluding that the court possessed jurisdiction because section 1342 is a money-mandating statute and whether payments are presently due is a ripeness question. *Moda*, 130 Fed. Cl. at 450-55. Judge Bruggink has noted that Judges Wheeler and Sweeney's reasoning on jurisdiction and ripeness differed from Judge Lettow's analysis in *Land of Lincoln Mutual Health Insurance Co. v. United States*, 129 Fed. Cl. 81 (2016). *Maine Cmty. Health Options v. United States*, No. 16-967C (Fed. Cl. Mar. 9,

2017) (order denying motion to dismiss under RCFC 12(b)(1) and requesting supplemental briefing).

The United States respectfully disagrees with these analyses. The Court has jurisdiction over a claim founded on a statute or regulation only where "the source of substantive law can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, 463 U.S. 206, 217 (1983). Without a breach of a presently owed obligation, there can be no injury and, by definition, no "damages sustained." *See Maryland Dep't of Human Res. v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985) ("The term 'money damages' . . . normally refers to a sum of money used as compensatory relief . . . for a suffered loss"). Thus, "presently due" is a jurisdictional requirement for Tucker Act jurisdiction, not a ripeness question.

Moreover, the *Mitchell* test is a question of statutory interpretation, not a pleading standard. It is the court—not the plaintiff—that interprets the substantive law to determine whether the plaintiff has a money-mandating source of compensation. *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005) (*en banc*) ("If the court's conclusion is that the source as alleged and pleaded is not money-mandating, the court shall so declare and shall dismiss the cause for lack of jurisdiction."). When interpreting a statute that is ambiguous regarding the specific process by which it is to be implemented, courts must defer to an agency's reasonable implementation of that statute. *See, e.g.*, *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 544-45 (1978) (absent compelling circumstances, courts should not "dictat[e] to the agency the methods, procedures, and time dimension" of their tasks because such review "clearly runs the risk of propelling the court into the domain which Congress has set aside exclusively for the administrative agency") (citation and punctuation omitted); *Exxon*

Corp. v. Phillips Petroleum Co., 265 F.3d 1249, 1253 (Fed. Cir. 2001) (in "recognition of the agency's familiarity with the problems associated with the agency's mission," judicial "deference is owed to the agency's choice of its procedures to implement its assignment"). Thus, if, under the agency's reasonable implementation of the statute, payments are not presently due, then the statute is not "fairly interpreted as mandating compensation," and the court lacks jurisdiction.

The United States does not dispute that HHS must make annual payments to the extent it has budget authority. Indeed, HHS has made such payments. But as set forth in the United States' Motion to Dismiss, at 15-23, section 1342 does not specify a due date for final payment, and HHS has no authority to make risk corridors payments other than from risk corridors collections. HHS's three-year framework reasonably fills a gap in the statute such that HHS makes annual payment to the extent of its budget authority, with final payment not due until the end of the final payment cycle in 2017. Accordingly, Highmark seeks a money judgement for payments that are not presently due, and the Court lacks jurisdiction over Highmark's Complaint.

II. *Moda's* Conclusions Regarding the Substantive Issues Do Not Withstand Scrutiny

A. Congress has never appropriated funds for risk corridors payments other than collections

Under the Appropriations Clause, Congress controls the power of the purse. U.S. Const. art. I, § 9, cl. 7. Congress exercises that power by providing "budget authority," which grants federal agencies authority to incur financial obligations that are binding on the United States. *See* 2 U.S.C. § 622(2); GAO–16–464SP, *Principles of Fed. Appropriations Law* (Ch. 2) 2–1 (4th ed. 2016) (*GAO Redbook*), available at http://www.gao.gov/assets/680/675709.pdf; *see also GAO Redbook* at 2-55 ("Agencies may incur obligations only after Congress grants budget

authority.”). The Congressional Budget Act defines the four kinds of budget authority:

> **(i)** provisions of law that make funds available for obligation and expenditure (other than borrowing authority), including the authority to obligate and expend the proceeds of offsetting receipts and collections;
>
> **(ii)** borrowing authority, which means authority granted to a Federal entity to borrow and obligate and expend the borrowed funds, including through the issuance of promissory notes or other monetary credits;
>
> **(iii)** contract authority, which means the making of funds available for obligation but not for expenditure; and
>
> **(iv)** offsetting receipts and collections as negative budget authority, and the reduction thereof as positive budget authority.

2 U.S.C. § 622(2)(A). A claimant seeking to enforce a money-mandating statute or regulation generally “must identify not just a command to make [payment] but an appropriation of . . . money that . . . may [be] use[d] for that purpose.” *Nevada v. Dep’t of Energy*, 400 F.3d 9, 13 (D.C. Cir. 2005).

The Federal Circuit has repeatedly recognized that statutory language providing that an agency “shall pay” amounts calculated under a statutory formula (or words to that effect) does not, standing alone, create an obligation on the part of the government to provide for full payment. *See Prairie County, Montana v. United States*, 782 F.3d 685, 689 (Fed. Cir. 2015); *Greenlee County v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007); *Star-Glo Assoc., LP v. United States*, 414 F.3d 1349, 1355 (Fed. Cir. 2005); *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1170 (Fed. Cir. 1995). The threshold inquiry is whether Congress obligated the government to make full payment without regard to appropriations, and as with all statutory questions, the touchstone of that inquiry is congressional intent. *See Prairie County*, 782 F.3d at 690 (“Absent a contractual obligation, the question here is whether the statute reflects congressional intent to limit the government’s liability for

[Payment in Lieu of Taxes Act (PILT)] payments, or whether PILT imposes a statutory obligation to pay the full amounts according to the statutory formulas regardless of appropriations by Congress.").

As Judge Wheeler acknowledged, *Moda*, 130 Fed. Cl. at 442, section 1342 does not contain its own appropriation. But just as crucially, as Judge Lettow recognized in *Land of Lincoln*, section 1342 does not authorize the use of any appropriated funds. 129 Fed. Cl. at 107. As noted in the United States' briefs, Docket No. 17, at 33 n.17, Docket No. 21, at 15 n.5, Congress, in dozens of places in the ACA, either provided for appropriations for new programs or authorized appropriations for those programs. Congress did neither here. Without its own appropriation or other budget authority, section 1342 could not require any "Payments Out." And without an authorization of appropriations, in contrast to many other provisions of the ACA, section 1342 contains no indication that Congress intended risk corridors payments to be funded out of appropriations from the general fund of the Treasury, as opposed to just risk corridors collections, or "Payments In," as provided in the statute. Congress did not appropriate funds for risk corridors payments until fiscal year 2015 at the earliest, and when it did, it appropriated only risk corridors collections.

1. The 2014 CMS Program Management appropriation did not appropriate funds for risk corridors payments

Each year, including for fiscal year 2014, Congress generally makes a CMS Program Management appropriation "for carrying out" various programs administered by the Centers for Medicare & Medicaid Services ("CMS") and for "other responsibilities of [CMS]." The Program Management appropriation includes a lump sum amount transferred from specified trust funds as well as "such sums as may be collected from authorized user fees." Pub. L. No. 113-76, div. H, title II, 128 Stat. 5, 374 (Jan. 17, 2014). While the appropriated user fees collected during

that fiscal year remain available for the next five fiscal years, *id.*, the lump sum amount expires at the end of the fiscal year. Pub. L. No. 113-76, div. H, title V, § 502, 128 Stat. 408 ("No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein.").

Judge Wheeler erred in concluding the 2014 CMS Program Management appropriation was "available for [risk corridors] payments," but that HHS "chose not to use the Program Management appropriation for 2014 risk corridors payments." *Moda*, 130 Fed. Cl. at 456. Making risk corridors payments was not an "other responsibilit[y]" of HHS in fiscal year 2014. Under section 1342, risk corridors charges and payments are based on the ratio of allowable costs to the target amount "for any plan year." 42 U.S.C. § 18062(b). Indeed, "allowable costs" for "a plan for any year" must be reduced by any reinsurance and risk adjustment payments, which are not made until after the end of the plan year. *Id.* § 18062(c)(1). Thus, risk corridors payments for plan year 2014 could not become an "other responsbilit[y]" of HHS until sometime in calendar year 2015 at the earliest. Accordingly, because risk corridors payments were not a responsibility of HHS until after the lump sum amount expired, the 2014 CMS Program Management appropriation did not appropriate any funds for risk corridors payments.

While the Government Accountability Office ("GAO") concluded that "other responsibilities" was broad enough to encompass risk corridors payments, it did not conclude that the 2014 Program Management appropriation *was* available for risk corridors payments. It merely concluded that it "*would have been* available for making the payments pursuant to section 1342(b)(1)." *See Dep't. of Health and Human Servs.-Risk Corridors Program*, B-325630 (Comp. Gen.), 2014 WL 4825237, at *3 ("*GAO Op.*"). That it would have been available is not the end of the inquiry, however: The GAO noted that HHS would not begin collections or

payments under section 1342 until fiscal year 2015. *Id.* at *5 n.7. The GAO further noted that, because "[a]ppropriations acts, by their nature, are considered nonpermanent legislation," the "other responsibilities" language or the use of authorized user fees would need to be included in future appropriations acts in order for the Program Management appropriation to supply a source of funds in future fiscal years for risk corridors payments. *Id.* at *5. When Congress did appropriate funds for fiscal years 2015 and 2016, it expressly restricted the lump sum amount in the Program Management appropriation from being used to make risk corridors payments.

Judge Wheeler also erred in suggesting that, because Congress passed continuing resolutions in the beginning of fiscal year 2015 that were sufficient to pay Moda's (presumably 2014) risk corridors claim, Congress had appropriated funds for risk corridors payments such that the United States would be liable under *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182 (2012). *Moda*, 130 Fed. Cl. at 458 n.13. First, the continuing resolutions provided that "no appropriation or funds made available or authority granted [herein] shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2014." Pub. L. No. 113-164, § 104, 128 Stat. 1867, 1868 (Sept. 19, 2014).[1] As set forth above, the 2014 CMS Program Management appropriation did not appropriate funds for risk corridors payments, and the continuing resolutions, therefore, could not provide an appropriation for those payments either. Moreover, the continuing resolutions made funds available only until the enactment of the 2015 Spending Law on December 16, 2014 (there were no risk corridors charges collected during the time the resolutions were in effect), *id.* § 106, and no claim for risk corridors payments arose until calendar year 2015. Finally, Judge

[1] The subsequent continuing resolutions, Pub. L. No. 113-202, 128 Stat. 2069 (Dec. 12, 2014), and Pub. L. No. 111-203, 128 Stat. 2070 (Dec. 13, 2014), only amended the period of availability for the appropriations made available by Pub. L. No. 113-164 from December 11, 2014, until December 17, 2014.

Wheeler's reliance on *Ramah Navajo* is misplaced and contrary to Federal Circuit precedent. *Prairie County* rejected the argument that *Ramah Navajo* extends to statutory claims. *See* 782 F.3d at 689-90.

2. Congress mandated in the Spending Laws that risk corridors payments would be funded solely from collections

The GAO identified within the CMS Program Management appropriation two potential sources of funding for risk corridors payments: the lump sum amount derived from the Medicare trust funds and authorized user fees, in this case risk corridors collections. *GAO Op.* at *3-*4. Before any risk corridors payments could conceivably be claimed or paid under section 1342, Congress passed the 2015 Spending Law, barring the use of the lump sum transfer as a source of funding and leaving only risk corridors collections. Pub. L. No. 113-235, div. G, title II, § 227, 128 Stat. 2130, 2491 (Dec. 16, 2014). In the accompanying Explanatory Statement, Congress referred to HHS's budget neutral three-year framework, which Congress understood meant "that the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." 160 Cong. Rec. H9307-1, H9838 (Dec. 11, 2014). The Explanatory Statement then explains that the appropriations restriction would "prevent the CMS Program Management appropriation account from being used to support risk corridors payments." *Id.* Congress included the same language the following year in the 2016 Spending Law, the law under which the 2014 risk corridors payments were made in late December 2015. Pub. L. No. 114-113, div. H, title II, § 225, 129 Stat. 2242, 2624 (Dec. 18, 2015). The report of the Senate Appropriations Committee states:

> The Committee is proactively protecting discretionary funds in the bill by preventing the administration from transferring these funds to bail out ACA activities *that were never intended to be funded through the discretionary appropriations process*. * * * * The Committee continues bill language requiring the administration to operate the Risk Corridor program *in a budget neutral*

> *manner* by prohibiting any funds from the Labor-HHS-Education appropriations bill to be used as payments for the Risk Corridor program.

S. Rep. No. 114-74, at 12 (2015) (emphasis added).

In other words, Congress has twice—and for the only years to date in which any obligation to make risk corridors payments could arise—restricted the source of funding for those payments to collections. The legislative history of the appropriations laws make clear that discretionary appropriated funds other than risk corridors collections may not be used to make risk corridors payments, and this is consistent with the omission of any appropriation or authorization of appropriations in section 1342. Neither *Moda* nor any issuer has provided a basis to conclude that Congress nevertheless intended that issuers could still recover the very amounts Congress restricted by asserting billions of dollars in claims in this Court.

3. Under binding Supreme Court and Federal Circuit precedent, congressional intent in the Spending Laws governs the extent of the United States' obligation under section 1342

The Spending Laws corroborate Congress's original intent that payments under section 1342 would be funded solely by collections, but even if there were a question as to Congress's original intent, the Spending Laws definitively capped payments to the extent of collections. "Congress may enact a subsequent appropriation that makes a smaller payment than was contemplated in the permanent legislation . . . as long as the intent to reduce the amount of the payment is clear." *GAO Redbook* (Ch. 2) 2-62 – 2-63. When Congress does not appropriate sufficient funds to permit an agency to pay under a formula provided by statute or regulation, Courts must use all the ordinary tools of statutory interpretation to discern Congress's intent. *United States v. Dickerson*, 310 U.S. 554, 562 (1940) ("The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction.").

Indeed, several recent Federal Circuit cases not mentioned by Judge Wheeler are directly applicable to the United States' alleged liability for risk corridors payments. In *Highland Falls*, section 2 of the Impact Aid Act provided that school districts "shall be entitled" to amounts calculated under a statutory formula and further specified that, in the event of a shortfall in appropriations for various programs, the Secretary "shall first allocate" to each school district 100% of the amount due under section 2. 48 F.3d at 1168. Congress subsequently earmarked certain amounts for entitlements under various sections of the Act, and the earmarked amount was insufficient to pay 100% of the amounts due under section 2. *Id*. at 1169. In light of that clear limit on appropriations, the Federal Circuit held that the school districts were entitled to only a *pro rata* share of the amounts calculated under the statutory formula. *Id*. at 1170-71.

Similarly in *Star-Glo*, Congress had established a temporary program directing the Secretary of Agriculture to "pay Florida commercial citrus and lime growers $26 for each commercial citrus or lime tree removed to control citrus canker" and appropriated $58 million for these payments. *Id.* at 1357 & n.7. Growers brought suit seeking additional payments for trees removed after the $58 million appropriation had been exhausted. *Id.* at 1352-53. Nothing in the statute provided for "capping" the United States' liability through language like "not to exceed" and "not more than," but the Court looked to legislative history and concluded that Congress intended to cap total payments at $58 million. *Id.* at 1354. The application of *Highland Falls* and *Star-Glo* is clear: Congress has, by expressly prohibiting HHS from using the Program Management lump sum appropriation, removed any doubt that the Secretary is only obligated to make risk corridors payments to the extent of collections. Indeed, it is difficult "imagining a more direct statement of congressional intent than the instructions in the

appropriations statutes at issue here." *Highland*, 48 F.3d at 1170. The United States is not liable for any shortfall.

In contrast, the cases Judge Wheeler did rely on in analyzing the Spending Laws bear no resemblance to this case. In *New York Airways v. United States*, 369 F.2d 743 (Ct. Cl. 1966), the court addressed a shortfall in appropriations to compensate helicopter companies for delivering the U.S. mail, but that case does not apply here for at least four significant reasons. First, unlike section 1342, the statute at issue in *New York Airways* made explicit reference to appropriations, and there was no dispute that payments would be made from the general fund of the Treasury. 369 F.2d at 745 (quoting 49 U.S.C. § 1376(c) (1964)) ("The Postmaster General shall make payments out of appropriations for the transportation of mail by aircraft . . ."). Second, the statute expressly provided for compensation for services rendered to the Government, and the court recognized, even when considering the effect of the appropriations law, that payments were a "contract obligation" of the Government. 369 F.2d at 746.

Third, the express appropriations restrictions at issue here bear no resemblance to the appropriations provision in *New York Airways*. That provision, which referenced "Liquidation of Contract Authorization" in its title, simply provided for an appropriation "not to exceed" a specific sum. As noted, the court determined from the legislative history that Congress did not intend that appropriation to limit amounts owed to carriers. 369 F.2d at 749-51. In contrast, Congress appropriated only risk corridors collections and expressly barred the use of other funds to make risk corridors payments, and nothing in the text or legislative history of the Spending Laws or section 1342 itself suggests that Congress understood risk corridors payments to be contractual or that the United States would be liable for any shortfall in collections.

Finally, the *New York Airways* court recognized that "clear and uncontradicted" "proof of congressional inten[t] . . . in the legislative history" to amend permanent legislation through an appropriations restriction would place the restriction "within the ambit of *Dickerson*." *Id.* at 750. But in *New York Airways*:

> Congress was well-aware that the Government would be legally obligated to pay the carriers whatever subsidies were set by the Board even if the appropriations were deficient, [as was] evident in the floor debates during the period from 1961 through 1965. The subsidy was recognized by responsible members of Congress on both sides as *a contractual obligation* enforceable in the courts which could be avoided only by changing the substantive law under which the Board set the rates, rather than by curtailing appropriations.

Id. at 747 (emphasis added). Here, in contrast, the legislative history is "clear and uncontradicted." Congress enacted the appropriations restrictions to ensure that "the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect," 160 Cong. Rec. H9838, and to "requir[e] the administration to operate the Risk Corridor program in a budget neutral manner," S. Rep. No. 114-74, at 12.

Gibney v. United States, 114 Ct. Cl. 38 (1949), is likewise inapposite. There, the Court of Claims was faced with a single spending restriction intended to prevent appropriated funds from being used to pay overtime to immigration inspectors "other than as provided in the Federal Employees Pay Act of 1945." *Id.* at 48-49. In fact, as the Court of Claims recognized, the Federal Employees Pay Act of 1945 itself exempted immigration inspectors from its overtime pay provisions. *Id.* at 53. The court concluded that the restriction "did not prevent the premium payment to immigration inspectors" by its own terms, *id.*, and the sponsoring Senator stated the following year that he had been mistaken in his understanding of the permanent legislation (providing for compensation of immigration inspectors) to which he had directed his restriction, *id.* at 54. To analogize to risk corridors, it would be as if Congress restricted the use of

appropriated funds that were not otherwise available to make risk corridors payments in the first place. Instead, Congress, in two consecutive years, directly restricted the one source of discretionary appropriations funding that had been identified as a potential source for risk corridors payments, thus leaving collections as the sole remaining source. *Accord Belknap v. United States*, 24 Ct. Cl. 433, 441-42 (1889), *aff'd*, 150 U.S. 588 (1893) (holding that "Congress persistently determined each year to fix the compensation of Indian agents by annual appropriations" and thus "the claimant has received all he is entitled to"). *Gibney* provides no authority to disregard Congress's express restrictions on risk corridors funding.

Solely on the basis of the text of the appropriations restriction, Judge Wheeler contrasted cases where Congress stated that "no funds" or "no part of any appropriation" would be available for a specified payment. *Moda*, 130 Fed. Cl. at 460-61. Judge Wheeler also noted that Congress used similar "no funds" language in the Spending Laws directed at other programs. *Id.* at 461. But in those cases and for those programs, Congress made clear that no federal funds whatsoever be used for the specified programs. *See*, *e.g.*, *Dickerson*, 310 U.S. at 561. Here, Congress did not repeal section 1342 or prohibit risk corridors payments altogether. Instead, Congress, while providing HHS with the authority to make risk corridors payments, merely ensured that only risk corridors collections would be available to make those payments. But Congress has never obligated the United States Treasury to make up the resulting multi-billion dollar shortfall between the amounts calculated under section 1342 as "payments in" and "payments out."

4. The Judgment Fund is not a back-up appropriation for every money-mandating statute

Judge Wheeler relied on the existence of the permanent appropriation of the Judgment Fund to supply the necessary appropriation in the absence of an annual appropriation by Congress for risk corridors payments. *Moda*, 130 Fed. Cl. at 461-62. This was error. The

Judgment Fund is not a back-up source of appropriations, nor is it an invitation to litigants to circumvent express restrictions imposed by Congress on the expenditure of funds from the Treasury. "The general appropriation for payment of judgments . . . does not create an all-purpose fund for judicial disbursement. . . . Rather, funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 432 (1990). The express terms of section 1342, however, do not provide for payment without regard to collections or appropriated funds. Moreover, the Judgment Fund exists solely to pay "final judgments, awards, compromise settlements, and interests and costs." 31 U.S.C. § 1304(a). *See also Slattery v. United States*, 635 F.3d 1298, 1317 (Fed. Cir. 2011) (*en banc*) (recognizing that "[t]he purpose of the Judgment Fund was to avoid the need for specific appropriations to pay judgments awarded by the Court of Claims"). Thus, until entry of judgment, the permanent appropriation of the Judgment Fund is as irrelevant to the determination of liability as the existence of any other unrelated appropriation.

Bath Iron Works is not to the contrary. *See Moda*, 130 Fed. Cl. at 462 (citing *Bath Iron Works Corp. v. United States*, 20 F.3d 1567 (Fed. Cir. 1994)). In that case, the Federal Circuit considered whether a time limit for submitting ship-building contract claims to the Secretary of the Navy also precluded review of those claims in the Court of Federal Claims. 20 F.3d at 1583. Although the time limit was enacted as part of a Department of Defense appropriations act, the court concluded that the provision did not affect the power of Court of Federal Claims to enter judgment under the Contract Disputes Act, which expressly provides for payment of judgments out of the Judgment Fund. *Id.*; *see also* 41 U.S.C. § 7108(a). As the Federal Circuit recognized, the Judgment Fund applies not to the determination of liability, but only "to the payment of

judgments to contractors *after* the courts have adjudicated their substantive rights." *Bath Iron Works Corp.*, 20 F.3d at 1584 (emphasis added).

Judge Wheeler's erroneous reliance on the existence of the Judgment Fund led him to misconstrue Congress's intent in enacting the appropriations restriction in the Spending Laws. Contrasting the Spending Laws' limitation with the limitation in *Dickerson*, 310 U.S. 554, 555 (1940), which provided that "no part of any appropriation . . . or any other Act" would be available, Judge Wheeler reasoned that by specifying only the CMS Program Management appropriation, Congress "left open" the Judgment Fund for risk corridors payments. *Moda*, 130 Fed. Cl. at 462. But no case holds that Congress must specify "any other Act" or similar language in order to preclude liability in the Court of Federal Claims. Indeed, this reasoning squarely conflicts with *Highland Falls*, where the appropriations acts merely "'earmarked' certain amounts for entitlements" under the Impact Aid Act, 48 F.3d at 1169, without making reference to the availability of funds under any other act. Nonetheless, the Federal Circuit affirmed the Court of Federal Claims' dismissal of the school district's complaint for additional funds under the Tucker Act from the Judgment Fund. Under Judge Wheeler's reasoning in *Moda*, the school district should have prevailed.

Moreover, Judge Wheeler's reasoning turns the appropriations process on its head. Congress is not presumed to have appropriated funds, via the Judgment Fund, for every money-mandating statute, unless it each year specifies otherwise. Rather, Congress exercises the power of the purse through both substantive legislation and the annual appropriations process, and it is the duty of the Courts to decide how Congress has exercised that power by discerning Congress's intent in both forms of legislation.

Nothing in the text of section 1342 indicates that appropriated discretionary funds from the general fund of the Treasury would be used to fund risk corridors payments. And when the time came to address funding for risk corridors payments, Congress made its intent clear: only risk corridors collections would be available. Indeed, Congress emphasized that the risk corridors program was "never intended to be funded through the discretionary appropriations process." S. Rep. No. 114-74, at 12. Taken together, Congress never obligated the Secretary to pay out more than total collections, and the restrictions that Congress imposed on the source of funds may not be circumvented by seeking additional amounts from the Judgment Fund. Because issuers have no entitlement to additional payments in excess of their pro-rata share of collections, there is no basis for a judgment against the United States that could in turn be paid out of the Judgment Fund.

B. Section 1342(b) does not impose an independent obligation to make risk corridors payments

1. Judge Wheeler misconstrued the text of section 1342 and overlooked the lack of any appropriation or authorization of appropriations

Judge Wheeler's analysis of section 1342 errs at the outset by incorrectly assuming that the "shall pay" language of section 1342(b)(1)—standing alone—obligates the Secretary of HHS to make payments in accordance with the statutory formula. But section 1342(b)(1) does no such thing. As set forth above, Judge Wheeler committed several errors with respect to appropriations available to fund risk corridors payments, but by assuming that 1342(b)(1) obligated the Secretary to make payment regardless of collections, he also overlooked the critical importance of a lack of any appropriation and altogether failed to consider the lack of an authorization of appropriations in section 1342.

The Federal Circuit's reasoning in *Prairie County* and *Greenlee County* is illustrative. The statute at issue in those cases provided that "the Secretary of the Interior *shall make a payment* for each fiscal year to each unit of general local government" that met specified conditions, and it provided "a detailed mechanism for calculating these payments." *Greenlee County*, 487 F.3d at 877 (quoting 31 U.S.C. § 6902(a)(1)) (emphasis original). In addition, the statute authorized appropriations: "Necessary amounts may be appropriated to the Secretary of the Interior to carry out this chapter." 487 F.3d at 878 (quoting 31 U.S.C. § 6906). The statute qualified that authorization, however, with a proviso stating that "[a]mounts *are available only as provided in appropriations laws*." 487 F.3d at 878 (quoting 31 U.S.C. § 6906). Because the authorization of appropriations was qualified, the court concluded that "PILT limits the government's liability to the amount appropriated." 487 F.3d at 879.

In reaffirming that holding in *Prairie County*, the court emphasized that "if Congress had intended to obligate the government to make full PILT payments, it could have used different statutory language." *Prairie County*, 782 F.3d at 691. In particular, a subsequent amendment to PILT provided that each local government "shall be entitled to payment under this chapter" and that "sums shall be made available to the Secretary of the Interior for obligation or expenditure in accordance with this chapter." *Id*. But Congress did not make that amendment applicable to the fiscal years at issue in *Prairie County*, so the government had no obligation to make full PILT payments for those years. *Id.*

Judge Wheeler failed to consider *Greenlee County* or *Prairie County* in addressing the meaning of section 1342. As explained in the United States' brief in *Moda*, those cases indicate that Congress would have use different statutory language if it intended to provide for full payment of calculated risk corridors amounts. Indeed, Congress did provide such language in

the provision that governs the Medicare Part D risk corridors program on which section 1342 is based:

> This section constitutes budget authority in advance of appropriations Acts and represents the obligation of the Secretary to provide for the payment of amounts provided under this section.

42 U.S.C. § 1395w-115(a)(2). At a minimum, had Congress intended that discretionary appropriations from the general fund would be used to make up any shortfall in collections for risk corridors payments, it could have so indicated, as it did in dozens of other provisions in the ACA. But Congress did not do so. The absence of any reference to appropriations in section 1342 demonstrates that Congress intended the risk corridors payments to be self-funded.

Moreover, Judge Wheeler failed to read subsection (b)'s provision that "the Secretary shall pay" in context with the statute as a whole. Subsection (b) requires that the "Secretary shall provide" that, "under the program established under subsection (a)," if costs are sufficiently high relative to premiums in a given year, then the Secretary "shall pay" the plan and if costs are sufficiently low relative to premiums, then the plan "shall pay" HHS. 42 U.S.C. § 18062(b). The Secretary provided for just that in the implementing regulation, 45 C.F.R. § 153.510. To be sure, the "payment methodology" set forth in subsection (b) cabins the Secretary's discretion in how to "establish and administer" the risk corridors program. Judge Wheeler, however, ignored the importance of subsection (a), concluding that subsection (b) "overrides any discretion the Secretary otherwise could have in making 'payments out' under the program." *Moda*, 130 Fed. Cl. at 455. That conclusion is incorrect. The Secretary did retain discretion because the principal directive by Congress to the Secretary was not simply to "pay" issuers, but instead to "establish and administer a program of risk corridors" under which QHPs "shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's

aggregate premiums" and which would be "based on" Medicare Part D. 42 U.S.C. § 18062(a). The Secretary did establish and administer such a program, as directed by Congress. 45 C.F.R. § 153.510. Thus, Judge Wheeler erred in concluding that section 1342 "simply directs the Secretary of HHS to make full 'payments out.'" *Moda*, 130 Fed. Cl. at 455.

2. Judge Wheeler overlooked the clear direction to make payments under Medicare Part D

As noted above and emphasized in the United States briefs, Congress omitted from section 1342 the obligating language it had included for the risk corridors program under Medicare Part D. Judge Wheeler, however, discounted the omission of similar language in section 1342 based on a misreading of the Medicare Part D statute. Judge Wheeler mistakenly believed that "the Medicare Part D statute provides only that the Government 'shall establish a risk corridor,' not that the Secretary of HHS 'shall pay' specific amounts to insurers." *Moda*, 130 Fed. Cl. at 455. That is incorrect. The Medicare Part D risk corridors program is implemented as part of a subsidy program, which expressly provides that "the Secretary shall provide for payment" of "subsidies." 42 U.S.C. § 1395w-115(a). The Medicare Part D risk corridors program, set forth at 42 U.S.C. § 1395w-115(e), then provides that "the Secretary shall increase the total of the payments . . . under this section." 42 U.S.C. § 1395w-115(e)(2)(B). Judge Wheeler was therefore incorrect to conclude that 42 U.S.C. § 1395w-115(a)'s provision for "budget authority" and an "obligation" is merely "a further payment directive." *Moda*, 130 Fed. Cl. 455. As Judge Lettow recognized, "[w]hen Congress omits from a statute a provision found in similar statutes, the omission is typically thought deliberate." *Land of Lincoln*, 129 Fed. Cl. at 105 (quoting *Turtle Island Restoration Network v. Evans*, 284 F.3d 1282, 1296 (Fed. Cir. 2002)). Judge Wheeler erred in discounting the omission of any similar reference to appropriations or other obligating language in section 1342.

3. The CBO's scoring of the ACA was critical to its passage, and post-enactment statements by the CBO do not reflect Congress's intent

While Judge Wheeler acknowledged that Congress did rely on the CBO's scoring in passing the ACA, he relied on a subsequent statement by the CBO to speculate that "the CBO may never have believed the risk corridors program to be budget-neutral." *Moda*, 130 Fed. Cl. at 456. Whether the CBO believed the risk corridors program would be budget-neutral misunderstands the significance of the CBO's March 2010 cost estimate. In the ACA itself, in a provision entitled "Sense of the Senate Promoting Fiscal Responsibility," Congress indicated, "[b]ased on Congressional Budget Office (CBO) estimates," that "this Act will reduce the federal deficit between 2010 and 2019." ACA § 1563(a). The CBO's projection was crucial to the Act's passage. *See* David M. Herszenhorn, *Fine-Tuning Led to Health Bill's $940 Billion Price Tag*, N.Y. Times, Mar. 18, 2010. And it was predicated on the understanding that risk corridors payments would not increase the deficit. So again, nothing suggests section 1342 creates an uncapped liability. To the contrary, Congress relied on the CBO's scoring to conclude the ACA's programs would *not* create a net liability of the United States Treasury.

As for the CBO's post-enactment statements, Judge Lettow explained, "the CBO's March 2010 estimate is the only pertinent report because that is what Congress relied upon in passing the Act." *Land of Lincoln*, 129 Fed. Cl. at 105 n.22 (noting also that the CBO's post-enactment statements were inconsistent). Indeed, in *Sharp v. United States*, the Federal Circuit declined to rely on a post-enactment CBO cost estimate because "Congress never ratified the CBO's interpretation, which was completed more than two weeks after Congress took final action on the bill." 580 F.3d 1234, 1239 (Fed. Cir. 2009).

C. Congress did not intend to contract with insurers for risk corridors payments

Judge Wheeler's holding that "the Government intended to enter into contracts with insurers" is erroneous. *Moda*, 130 Fed. Cl. at 464. "[A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985). Section 1342 does not "create or speak of a contract." *Id.* at 467. It contains no "promissory words." *Wells Fargo Bank, N.A. v. United States*, 88 F.3d 1012, 1019-20 (Fed. Cir. 1996) (finding unilateral offer in government's regulations provided that upon issuance of "Conditional Commitment for Guarantee" government "will execute" agreement and loan guarantee). Indeed, nothing in either the text or legislative history of section 1342 indicates an intent by Congress to contract.

In finding intent, Judge Wheeler announced a sweeping new rule for inferring congressional intent to contract based on a statute's structure: Congress intends to contract when it (1) creates a voluntary "incentive program" and (2) promises fixed payment to those parties if they perform the required services. *Moda*, 130 Fed. Cl. at 463. This rule has no basis in law and is contrary to binding precedent.

Judge Wheeler relies on only two half-century-old cases for this new rule: *Radium Mines, Inc. v. United States*, 153 F. Supp. 403 (Ct. Cl. 1957), and *New York Airways*, 369 F.2d at 751. As Judge Lettow recognized in dismissing an implied contract claim based on section 1342, *Radium Mines* involved a regulation that "explicitly provided that the government would contract with uranium producers." *Land of Lincoln*, 129 Fed. Cl. at 112 (citing *Radium Mines*, 153 F. Supp. at 405-06). Indeed, apart from the explicit language in the circular on which the

plaintiff relied, the Court of Claims neither quoted nor discussed the underlying statute, so there is no basis from which to analogize the holding of *Radium Mines* and section 1342. Moreover, while the Court of Claims did conclude that the circular contained an offer, the court did not find that the parties in fact contracted, *Radium Mines*, 153 F. Supp. at 406-07, so the court's construction of the circular was not necessary to its holding and is therefore dicta.

New York Airways, as Judge Lettow recognized, is also distinguishable on its facts. *Land of Lincoln*, 129 Fed. Cl. at 112-13. There, plaintiffs were entitled to specific compensation in exchange for carrying U.S. Mail. *New York Airways*, 369 F.2d at 751. No further action was required because the order setting the rate of compensation "invited acceptance by performance." *Land of Lincoln*, 129 Fed. Cl. at 112 (citing *New York Airways*, 369 F.2d at 751). In contrast, insurers are not entitled to risk corridors payments as "compensation" for offering qualified health plans on the exchanges. *Id.* Only those insurers whose costs are sufficiently high relative to their premiums receive payment. *Id.*

The Federal Circuit has made clear that intent to contract in a statute is determined by looking first to the text and then to the legislative history. *Brooks v. Dunlop Mfg., Inc.*, 702 F.3d 624, 631 (Fed. Cir. 2012) ("In determining whether a statute creates a contract, the [Supreme Court] has instructed us to first look to the language of the statute. . . . We next look to whether the circumstances surrounding the statute's passage manifested any intent by Congress to bind itself contractually."). In *Brooks*, the court considered a plaintiff's claim that the former *qui tam* provision of the patent marking statute was a unilateral offer by the government. 702 F.3d at 630-32; *see also* 35 U.S.C. § 292(b), *amended by* Pub. L. No. 112-29, § 16, 125 Stat. 284 (2011). The court concluded that, based on the absence of any intent in the text or legislative history of

the *qui tam* provision, the plaintiff could not demonstrate an intent by Congress to contract. *Brooks*, 702 F.3d at 631.

Judge Wheeler's new rule cannot be reconciled with *Brooks*. In *Brooks*, the statute created an incentive program whereby individuals could bring suit on behalf of the United States against false patent markers, who would be fined $500 per offense. *Id.* at 626. The statute provided that, in exchange for bringing and prosecuting the suit, the plaintiff would receive one-half of any recovery. *Id.* The *qui tam* provision thus had the same "structure" that Judge Wheeler determined indicates intent to contract: (1) a voluntary incentive program and (2) a firm government promise to pay a fixed amount. "Performance" under this "incentive program" "went beyond filling out an application form." *Moda*, 130 Fed. Cl. at 464. Indeed, a plaintiff needed to bring and prosecute a lawsuit to judgment. *Brooks*, 702 F.3d at 626. But not only did the Federal Circuit not find an intent to contract in these circumstances, it determined that the plaintiff had no vested rights in the *qui tam* suit he had brought. *Id.* at 631-33. Similarly, Congress did not intend to contract with insurers under section 1342.

CONCLUSION

The Complaint should be dismissed for lack of jurisdiction or in the alternative because Highmark fails to present a justiciable claim or claims on which relief can be granted.

Dated: April 7, 2017

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General
Civil Division

RUTH A. HARVEY
Director
Commercial Litigation Branch

KIRK T. MANHARDT
Deputy Director

/s/ *Charles E. Canter*
CHARLES E. CANTER
FRANCES M. MCLAUGHLIN
TERRANCE A. MEBANE
L. MISHA PREHEIM
MARC S. SACKS
PHILLIP M. SELIGMAN
United States Department of Justice
Telephone: (202) 616-2236
Facsimile: (202) 307-0494
Charles.Canter@usdoj.gov

Attorneys for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2017, a copy of the foregoing, *The United States' Supplemental Brief Regarding Moda Health Plan, Inc. v. United States*, was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be sent to all parties by operation of the Court's ECF system.

/s/ *Charles E. Canter*
CHARLES E. CANTER
United States Department of Justice