IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BCBSM, INC., and HMO Minnesota d/b/a Blue Plus, Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	)	No. 16-1253C Judge Mary Ellen Coster Williams

AMENDED COMPLAINT

Plaintiffs BCBSM, Inc. ("BCBSM") and its subsidiary, HMO Minnesota d/b/a Blue Plus ("Blue Plus") (hereinafter collectively referred to as "Plaintiffs"), by and through their undersigned counsel, bring this action against Defendant, the United States of America ("Defendant," "United States," or "Government"), and allege the following:

INTRODUCTION

1. BCBSM/Blue Plus bring this action to recover damages that are owed by Defendant for violations of the mandatory risk corridor payment obligations prescribed in Section 1342 of the Patient Protection and Affordable Care Act ("ACA"), and its implementing federal regulations, as well as Defendant's breaches of its risk corridor payment obligations under an implied-in-fact contract and the covenant of good faith and fair dealing implied in Defendant's contract with BCBSM/Blue Plus. In addition, Defendant has violated the Fifth Amendment of the U.S. Constitution by taking BCBSM's/Blue Plus' property without just compensation.

2. Congress's enactment in 2010 of the ACA marked a major reform in the United States health care market. The market reform extended guaranteed availability of health care to

most Americans and prohibited health insurers from using factors such as health status, medical history, gender, and industry of employment to set premium rates or deny coverage.

3. These dramatic changes to the health care market, including introducing previously uninsured or underinsured citizens into the health care marketplace, created great uncertainty for BCBSM/Blue Plus, which had no previous experience or reliable data to meaningfully assess the needs and medical cost associated with this new population of insureds and to set the premiums for these insureds.

4. Congress, acknowledging this uncertainty for health insurers, included in the ACA three risk-sharing, premium-stabilization programs to help protect participating health insurers against risk selection and market uncertainty as these dramatic market reforms were implemented. One of the programs is the temporary risk corridors program, which mandated that participating health insurers be paid annual risk corridor payments for each of the program's three years: 2014, 2015 and 2016.

5. Section 1342 of the ACA contains two related mandatory terms for all issuers who seek and obtain certification under the ACA of health plans as Qualified Health Plans ("QHPs"). First, any QHP issuer agreeing to participate shall receive compensation from the Government if the amount the QHP issuer collects in premiums in any one of these years falls short of a certain target amount due to high utilization and high medical costs. Second, the QHP issuers must pay the Government if the amount the QHP issuer collects in premiums exceeds its medical expenses by a similar target amount.

6. The temporary risk corridors program, modeled on a similar program in Medicare Part D, was intended to encourage health insurers to participate by easing the transition between

the old and new health insurance marketplaces. It was also designed to help stabilize premiums for consumers.

7. The United States has specifically admitted its obligation to pay BCBSM, and its subsidiary, Blue Plus, for their risk corridor losses that total $262,586,241.31 for calendar years 2014, 2015 and 2016, of which the defendant has paid only $1,169,212.87. BCBSM's risk corridor losses for calendar year 2014, 2015 and 2016 (as confirmed by CMS's published calculations) were $6,955,635.49, $174,955,826.46 and $68,940,048.25 respectively for a total of $250,851,510.20. Blue Plus' risk corridor losses for calendar year 2015 and 2016 (as confirmed by CMS's published calculations) were $5,893,267.11 and $5,841,464.97 respectively for a total of $11,734,732.08. The defendant has not reimbursed Blue Plus for any of its risk corridor losses. As noted above, the Government has paid BCBSM $1,169,212.87 of its calendar year 2014 losses. The total unreimbursed risk corridor payments owed to BCBSM and its subsidiary, Blue Plus, are $261,417,029.41.

8. This action seeks damages from the Government of $261,417,029.41, which represents the amount of risk corridor payments still owed to BCBSM and its subsidiary Blue Plus for calendar years ("CY") 2014, 2015 and 2016.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action and venue is proper in this Court pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), because BCBSM and Blue Plus bring claims for damages over $10,000 against the United States founded on the Government's violations of the U.S. Constitution, a money-mandating Act of Congress, a money-mandating regulation of an executive department, and/or an implied-in-fact contract with the United States.

10. The actions and/or decisions of the Department of Health and Human Services ("HHS") and the Centers for Medicare & Medicaid Services ("CMS") at issue in this lawsuit were conducted on behalf of the Defendant United States within the District of Columbia.

PARTIES

11. Plaintiff BCBSM, Inc. is a nonprofit corporation organized under the laws of the State of Minnesota, with its principal place of business in Eagan, Minnesota. BCBSM is a health insurer that does business in Minnesota as Blue Cross and Blue Shield Minnesota, an independent licensee of the Blue Cross and Blue Shield Association. BCBSM is a QHP issuer on MNsure, Minnesota's health insurance marketplace, for CY 2014, CY 2015, and CY 2016.

12. Plaintiff HMO Minnesota d/b/a Blue Plus ("Blue Plus") is a subsidiary of BCBSM and a nonprofit corporation organized under the laws of the State of Minnesota, with its principal place of business in Eagan, Minnesota. BCBS is Blue Plus' sole member. Blue Plus is a health maintenance organization insurer that does business in Minnesota. Blue Plus is a QHP issuer on MNsure, Minnesota's health insurance marketplace, for CY 2015, and CY 2016.

13. Defendant is the United States of America. The Department of Health and Human Services and the Centers for Medicare & Medicaid Services are agencies of the Defendant United States of America.

FACTUAL ALLEGATIONS

Congress Enacts the Patient Protection and Affordable Care Act

14. In 2010, Congress enacted the ACA, Public Law 111-148, 124 Stat. 119.

15. The ACA aimed to increase the number of Americans covered by health insurance and decrease the cost of health care.

16. The ACA requires health insurers that offer individual health insurance coverage in a state to accept every individual in the state that applies for coverage. Health insurers can no

longer deny coverage, exclude pre-existing conditions, or set premiums according to individual health status.

17. Beginning on January 1, 2014, individuals and small businesses were permitted to purchase private health insurance through competitive statewide marketplaces, often called Exchanges.

18. BCBSM participated in the Exchange in Minnesota in CY 2014, CY 2015, and CY 2016 and Blue Plus participated in the Exchange in Minnesota in CY 2015 and CY 2016.

The ACA's Risk Corridors Program

19. The ACA established three insurance premium stabilization programs, which began in 2014: temporary reinsurance and risk corridor programs to give insurers payment stability as insurance market reforms began, and an ongoing risk adjustment program that makes payments to insurers that cover higher-risk populations (*e.g.*, those with chronic conditions) to more evenly spread the financial risk borne by insurers.

20. The premium stabilization programs, including the risk corridor program, were offered to encourage participation by providing certainty and protecting against adverse selection in the health care market. The programs were also designed to protect consumers from increases in premiums due to health insurer uncertainty as the ACA's market reforms were implemented in 2014.

21. The mandatory risk corridor payments, along with the other financial protections that Congress provided in the premium stabilization programs, provided QHPs with the security to become participating health insurers in their respective states' Exchanges, despite the significant financial risks posed by the uncertainty in the new health care markets.

22. Section 1342 of the ACA expressly authorizes and requires the Secretary of HHS to establish and administer the temporary risk corridors program that provides for the sharing in

gains or losses resulting from inaccurate rate setting for CY 2014, CY 2015, and CY 2016 between the Government and QHPs in the individual and small group markets.

23. Congress required the ACA risk corridors program established in Section 1342 to be modeled after a similar program implemented as part of the Medicare Part D prescription drug benefit program.

24. The risk corridors program applies only to participating plans certified as QHPs. All insurers that elect to participate in the Exchanges are required by to obtain plan certification.

BCBSM Is A QHP Issuer

25. Based on Congress' statutory commitments set forth in the ACA, including but not limited to Section 1342 and the risk corridors program, BCBSM/Blue Plus agreed to become a QHP issuer and participate in the Exchange in Minnesota.

26. Before BCBSM and Blue Plus received QHP certification, BCBSM/Blue Plus executed attestations certifying their compliance with the obligations they were undertaking by agreeing to become, or continuing to act as, a QHP on the Exchange in Minnesota.

27. By executing and submitting its annual attestations to the State of Minnesota as required by CMS, BCBSM/Blue Plus agreed to the many obligations and responsibilities imposed upon all QHPs that accept the Government's offer to participate in the ACA Exchanges. Those obligations and responsibilities that BCBSM/Blue Plus undertook include, inter alia, licensing, employment restrictions, benefit design standards, cost-sharing limits, and participating in financial management programs established under the ACA (including the risk corridors program).

28. Through these annual attestations, BCBSM/Blue Plus affirmatively attested that they would agree to comply with certain "Financial Management" obligations, including, among others:

> 2.) Applicant attests that it will adhere to the risk corridor standards and requirements set by HHS as applicable for:
>
> > a. risk corridor data standards and annual HHS notice of benefit and payment parameters for the calendar years 2014, 2015, and 2016 (45 CFR 153.510);
> >
> > b. remit charges to HHS under the circumstances described in 45 CFR 153.510(c).

29. The financial risk sharing that Congress mandated through the risk corridors program was a significant factor in BCBSM's/Blue Plus' decision to agree to become a QHP and undertake the many responsibilities and obligations required for BCBSM/Blue Plus to participate in the Exchange.

30. BCBSM/Blue Plus demonstrated their willingness to be a meaningful partner in the ACA program and has done so in good faith, by agreeing to participate as a QHP on MNsure, rolling out competitive rates, and offering a broad spectrum of health insurance products, with the understanding that the United States would honor its statutory, regulatory, and contractual commitments regarding the premium stabilization programs, including the temporary risk corridors program.

The Risk Corridors Payment Methodology

31. Under the risk corridors program, the federal government collects charges from a health insurer if the insurer's QHP premiums exceed claims costs of QHP enrollees by a certain amount and makes payments to the insurer if the insurer's QHP premiums fall short by a certain amount, subject to certain adjustments for taxes, administrative expenses, and other costs and payments.

32. Congress, through Sections 1342(b)(1) and (2) of the ACA, established the payment methodology and formula to determine the amounts the QHPs must pay to the Secretary

of HHS and the amounts the Secretary must pay to the QHPs if the risk corridors threshold is met.

33. The text of Section 1342(b) states:

> **(b) Payment methodology**
>
> **(1) Payments out**
>
> The Secretary shall provide under the program established under subsection (a) that if—
>
> (A) a participating plan's allowable costs for any plan year are more than 103 percent but not more than 108 percent of the target amount, the Secretary shall pay to the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount; and
>
> (B) a participating plan's allowable costs for any plan year are more than 108 percent of the target amount, the Secretary shall pay to the plan an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount.
>
> **(2) Payments in**
>
> The Secretary shall provide under the program established under subsection (a) that if—
>
> (A) a participating plan's allowable costs for any plan year are less than 97 percent but not less than 92 percent of the target amount, the plan shall pay to the Secretary an amount equal to 50 percent of the excess of 97 percent of the target amount over the allowable costs; and
>
> (B) a participating plan's allowable costs for any plan year are less than 92 percent of the target amount, the plan shall pay to the Secretary an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the excess of 92 percent of the target amount over the allowable costs.

42 U.S.C. § 18062(b).

34. To determine whether a QHP pays into, or receives payments from, the risk corridors program, HHS compares allowable costs (claims costs subject to adjustments for health care quality, health IT, risk adjustment payments and charges and reinsurance payments) and the target amount—the difference between a QHP's earned premiums and allowable administrative costs.

35. Pursuant to the Section 1342(b) formula, each year for CY 2014, CY 2015, and CY 2016, QHPs with allowable costs that are less than 97 percent of the QHP's target amount are required to remit charges for a percentage of those cost savings to HHS, while QHPs with allowable costs greater than 103 percent of the QHP's target amount will receive payments from HHS to offset a percentage of those losses.

36. Section 1342(b)(1) provides the specific payment formula from HHS to QHPs whose costs in a calendar year exceed their original target amounts by more than three percent.

37. Section 1342(b)(1)(A) requires that if a QHP's allowable costs in a calendar year are more than 103 percent, but not more than 108 percent, of the target amount, then "the Secretary [of HHS] shall pay" to the QHP an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount.

38. Section 1342(b)(1)(B) further requires that if a QHP's allowable costs in a calendar year are more than 108 percent of the target amount, then "the Secretary [of HHS] shall pay" to the QHP an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the allowable costs in excess of 108 percent of the target amount.

39. Section 1342(b)(2) sets forth the amount of charges that must be remitted to HHS by QHPs whose costs in a calendar year are more than three percent below their original target amounts.

40. Section 1342(b)(2)(A) requires that if a QHP's allowable costs in a calendar year are less than 97 percent, but not less than 92 percent, of the target amount, then "the plan shall pay to the Secretary [of HHS]" an amount equal to 50 percent of the excess of 97 percent of the target amount over the allowable costs.

41. Section 1342(b)(2)(B) requires that if a QHP's allowable costs in a calendar year are less than 92 percent of the target amount, then "the plan shall pay to the Secretary [of HHS]" an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the excess of 92 percent of the target amount over the allowable costs.

42. As detailed below, BCBSM/Blue Plus experienced allowable-cost losses of more than three percent of target amounts in the Minnesota ACA Individual Market, making it eligible to receive mandatory risk corridor payments required under Section 1342.

43. Congress did not impose any financial limits or restraints on the Government's mandatory risk corridor payments to QHPs in either Section 1342 or any other section of the ACA.

44. Congress also did not limit in any way the Secretary of HHS's obligation to make full risk corridor payments owed to QHPs, due to appropriations, restriction on the use of funds, or otherwise in Section 1342 or anywhere else in the ACA.

45. Congress has not amended Section 1342 since enactment of the ACA.

46. Congress has not repealed Section 1342.

47. HHS and CMS thus lack statutory authority to pay anything less than 100% of the risk corridor payments due to BCBSM/Blue Plus.

48. On March 11, 2013, HHS publicly affirmed—while health insurers, including BCBSM/Blue Plus, were contemplating whether to agree to participate in the new Exchanges that were beginning on January 1, 2014—that the risk corridors program is not statutorily required to be budget neutral. HHS further confirmed that, "[r]egardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." 78 FR 15409, 15473 (Mar. 11, 2013).

49. BCBSM/Blue Plus decided to become a QHP issuer based in part on the United States' commitment to make full risk corridor payments annually as set forth in Section 1342 of the ACA regardless of whether risk corridor payments to QHPs are actually greater than risk corridor charges collected from QHPs for a particular calendar year.

50. The United States, however, has refused to make full and timely risk corridor payments to BCBSM/Blue Plus, as set forth above, as required by Section 1342.

HHS's Risk Corridors Regulations

51. Congress authorized and directed HHS to establish and administer the risk corridors program enacted in Section 1342. Accordingly, CMS issued implementing regulations for the risk corridors program at 45 C.F.R. Part 153.

52. In 45 C.F.R. § 153.510, CMS adopted a risk corridors calculation that is mathematically identical to the statutory formulation in Section 1342 of the ACA, using the identical thresholds and risk-sharing levels specified in the statute. *See* 45 C.F.R. § 153.510.

53. Specifically, 45 C.F.R. § 153.510(b) prescribes the method for determining risk corridor payment amounts that QHPs "will receive":

> (b) *HHS payments to health insurance issuers*. QHP issuers will receive payment from HHS in the following amounts, under the following circumstances:
>
> > (1) When a QHP's allowable costs for any benefit year are more than 103 percent but not more than 108 percent of the target amount, HHS will pay the QHP issuer an amount equal to 50 percent of the allowable costs in excess of 103 percent of the target amount; and
> >
> > (2) When a QHP's allowable costs for any benefit year are more than 108 percent of the target amount, HHS will pay to the QHP issuer an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount.

54. Furthermore, 45 C.F.R. § 153.510(c) prescribes the circumstances under which QHPs "must remit" charges to HHS, as well as the means by which HHS will determine those charge amounts:

> (c) *Health insurance issuers' remittance of charges*. QHP issuers must remit charges to HHS in the following amounts, under the following circumstances:
>
> > (1) If a QHP's allowable costs for any benefit year are less than 97 percent but not less than 92 percent of the target amount, the QHP issuer must remit charges to HHS in an amount equal to 50 percent of the difference between 97 percent of the target amount and the allowable costs; and
> >
> > (2) When a QHP's allowable costs for any benefit year are less than 92 percent of the target amount, the QHP issuer must remit charges to HHS in an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the difference between 92 percent of the target amount and the allowable costs.

55. Additionally, 45 C.F.R. § 153.510(d) imposes a 30-day deadline for a QHP to fully remit charge payments to HHS when the QHP's allowable costs in a calendar year are less than 97 percent of the QHP's target amount, specifically stating that:

> (d) *Charge submission deadline.* A QHP issuer must remit charges to HHS within 30 days after notification of such charges.

56. The regulation is silent on when HHS must tender full risk corridor payments to QHPs whose allowable costs in a calendar year are greater than 103 percent of the QHP's target amount.

57. During the proposed rulemaking that ultimately resulted in adoption of the 30-day charge-remittance deadline for QHPs at 45 C.F.R. § 153.510(d), CMS and HHS stated that the deadline for the Government's payment of risk corridor payments to QHPs should be identical to the deadline for a QHP's remittance of charges to the Government. *See* 76 FR 41929, 41943 (July 15, 2011) and 77 FR 17219, 17238 (Mar. 23, 2012).

58. On July 15, 2011, CMS and HHS printed the following in its proposed rule in the Federal Register:

> HHS would make payments to QHP issuers that are owed risk corridor amounts from HHS within a 30-day period after HHS determines that a payment should be made to the QHP issuer. We believe that QHP issuers who are owed these amounts will want prompt payment, and also believe that the payment deadlines should be the same for HHS and QHP issuers.

76 FR 41929, 41943 (July 15, 2011).

59. On March 23, 2012, CMS and HHS printed the following in its final rule in the Federal Register:

> While we did not propose deadlines in the proposed rule, we . . . suggested . . . that HHS would make payments to QHP issuers that are owed risk corridors amounts within a 30-day period after HHS determines that a payment should be made to the QHP issuer. *QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers*.

77 FR 17219, 17238 (Mar. 23, 2012) (emphasis added).

60. When HHS implemented a final rule on March 11, 2013, regarding HHS Notice of Benefit and Payment Parameters for 2014 (78 FR 15409), HHS confirmed, "[t]he risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." 78 FR 15409, 15473 (Mar. 11, 2013).

61. Nothing in 45 C.F.R. Part 153 limits CMS's obligation to pay QHPs the full amount of risk corridor payments due based on appropriations or restrictions on the use of funds.

62. The United States should have paid BCBSM/Blue Plus their full risk corridor payments due but failed or refused to make full and timely risk corridor payments to them as required under Section 1342 of the ACA and 45 C.F.R. § 153.510.

The United States' Failure to Honor its Obligations

63. Beginning in 2014, after BCBSM/Blue Plus had already agreed to participate in MNsure in reliance on the Government's risk corridor payment obligations, the Government announced that the United States would not honor its payment obligations.

64. On March 11, 2014, HHS stated in the Federal Register that "HHS intends to implement this [risk corridors] program in a budget neutral manner." 79 FR 13743, 13829 (Mar. 11, 2014).

65. This statement was inconsistent with HHS's prior statement—made exactly one year earlier in the Federal Register, March 11, 2013—which stated: "The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." 78 FR 15409, 15473 (Mar. 11, 2013).

66. On April 11, 2014, HHS and CMS issued a bulletin entitled "Risk Corridors and Budget Neutrality," which contained HHS and CMS's statement that:

> We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments. ***However, if risk corridors collections are insufficient to make risk corridors payments for a year, all risk corridors payments for that year will be reduced pro rata to the extent of any shortfall.*** Risk corridors collections received for the next year will first be used to pay off the payment reductions issuers experienced in the previous year in a proportional manner, up to the point where issuers are reimbursed in full for the previous year, and will then be used to fund current year payments. If, after obligations for the previous year have been met, the total amount of collections available in the current year is insufficient to make payments in that year, the current year payments will be reduced pro rata to the extent of any shortfall. If any risk corridors funds remain after prior and current year payment obligations have been met, they will be held to offset potential insufficiencies in risk corridors collections in the next year.

Bulletin, CMS, "Risk Corridors and Budget Neutrality" (Apr. 11, 2014) (emphasis added).

67. The bulletin of April 11, 2014, was the first instance in which HHS and CMS publicly suggested that risk corridor charges collected from QHPs would be less than the Government's full mandatory risk corridor payment obligations owed to QHPs.

68. On December 16, 2014, Congress enacted the omnibus appropriations bill for fiscal year 2015, the "Consolidated and Further Continuing Appropriations Act, 2015" (the "2015 Appropriations Act"). Pub. L. 113-235.

69. In the 2015 Appropriations Act, Congress specifically targeted the Government's existing, mandatory risk corridors payment obligations owed to QHPs, including BCBSM, under Section 1342 of the ACA, limiting appropriations for those payment obligations from three large funding sources by including the following text at Section 227 of the 2015 Appropriations Act:

> ***None of the funds*** made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services—Program Management" account, ***may be used for payments under section 1342(b)(1) of Public Law 111-148 (relating to risk corridors)***.

128 Stat. 2491 (emphasis added).

70. Section 1342(b)(1) of Public Law 111-148—referenced in the above quotation—is the ACA's prescribed methodology for the Government's mandatory risk corridor payments to QHPs.

71. Congress's failure to appropriate sufficient funds for risk corridor payments due for CY 2014 did not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridor payments to QHPs, including to BCBSM.

72. On October 1, 2015, after collecting risk corridors data from QHPs for CY 2014, HHS and CMS announced that it intended to prorate the risk corridors payments owed to QHPs, including to BCBSM, for CY 2014, stating that:

> Based on current data from QHP issuers' risk corridors submissions, issuers will pay $362 million in risk corridors charges, and have submitted for $2.87 billion in risk corridors payments for 2014. **At this time, assuming full collections of risk corridors charges, this will result in a proration rate of 12.6 percent.**

Bulletin, CMS, "Risk Corridors Payment Proration Rate for 2014" (Oct. 1, 2015) (emphasis added).

73. HHS and CMS further announced on October 1, 2015, that they would be collecting full risk corridors charges from QHPs in November 2015 and would begin making the prorated risk corridor payments to QHPs starting in December 2015. *See id.*

74. On December 18, 2015, Congress enacted the Omnibus appropriations bill for fiscal year 2016, the "Consolidated Appropriations Act, 2016" (the "2016 Appropriations Act"). Pub. L. 114-113.

75. In the 2016 Appropriations Act, Congress again specifically targeted the Government's existing, mandatory risk corridor payment obligations owed to QHPs, including to BCBSM/Blue Plus, under Section 1342 of the ACA, limiting appropriations for those payment obligations from three large funding sources by including the following text at Section 225 of the 2016 Appropriations Act:

> ***None of the funds*** made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services—Program Management" account, ***may be used for payments under section 1342(b)(1) of Public Law 111-148 (relating to risk corridors)***.

129 Stat. 2624 (emphasis added).

76. Section 1342(b)(1) of Public Law 111-148 is the ACA's prescribed methodology for the Government's mandatory risk corridor payments to QHPs.

77. Congress's failure to appropriate sufficient funds for risk corridor payments due for CY 2014 and CY 2015 did not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridor payments to QHPs, including to BCBSM/Blue Plus.

78. On September 9, 2016, HHS and CMS announced that it would continue to prorate the risk corridor payments owed to QHPs for CY 2015 and CY 2016:

> [B]ased on our preliminary analysis, HHS anticipates that all 2015 benefit year collections will be used towards remaining 2014 benefit year risk corridors payments, and no funds will be available at this time for 2015 benefit year risk corridors payments. . . . Collections from the 2016 benefit year will be used first for remaining 2014 benefit year risk corridors payments, then for 2015 benefit year risk corridors payments, then for 2016 benefit year risk corridors payments.

Bulletin, CMS, "Risk Corridors Payments for 2015 [sic]" (Sept. 9, 2016).

79. HHS and CMS failed to provide BCBSM/Blue Plus with any statutory authority for their unilateral decision to make only partial, prorated risk corridor payments for CY 2014, and to withhold payment for the balance owed for CY 2014, CY 2015 and CY 2016.

80. The Government's written acknowledgement of its risk corridors payment obligation for CY 2014, CY 2015 and CY 2016, however, is an insufficient substitute for full and timely payment of the amounts owed as required by statute, regulation, contract, and HHS's and CMS's previous statements.

BCBSM's/Blue Plus' Risk Corridors Payments for CY 2014, CY 2015 and CY 2016

81. In a report released on November 19, 2015, HHS and CMS publicly announced QHPs' risk corridor charges and payments for CY 2014, and emphasized that "**Risk corridors charges payable to HHS are not prorated, and the full risk corridors charge amounts are noted in the chart below. Only risk corridors payment amounts are prorated.**" Bulletin,

CMS, "Risk Corridors Payment and Charge Amounts for Benefit Year 2014" (Nov. 19, 2015) ("CY 2014 Risk Corridors Report").

82. BCBSM's losses in the ACA Minnesota Individual Market for CY 2014 resulted in the Government being required to pay BCBSM a risk corridors payment of $6,955,635.49. *See* CY 2014 Risk Corridors Report at Table 24 – Minnesota.

83. The Government announced, however, that it would pay BCBSM a prorated amount of $877,652.80 for BCBSM's losses in the ACA Minnesota Individual Market for CY 2014. *See id.*

84. The Government made prorated risk corridor payments to BCBSM totaling $877,652.80. This amount represents only approximately 12.6% of CY 2014 risk corridor payments.

85. HHS lacks the authority, under statute, regulation or contract, to unilaterally withhold full and timely risk corridor payments from QHPs such as BCBSM/Blue Plus. BCBSM's unreimbursed risk corridor payment for CY 2015 was $174,955,826.46 (as confirmed by CMS in a November 18, 2016 report) and unreimbursed risk corridor payment for CY 2016 was $68,940,048.25 (as confirmed by CMS in a November 13, 2017 report, which report was updated on November 15, 2017). HHS paid BCBSM an additional $291,560.07 in prorated payments of BCBSM's CY 2014 losses. HHS's total prorated payments of BCBSM's CY 2014 losses were $1,169,212.87. HHS has not made any prorated or other payments towards BCBSM's CY 2015 and CY 2016 losses.

86. Blue Plus' unreimbursed risk corridor payment for CY 2015 was $5,893,267.11 (as confirmed by CMS in a November 18, 2016 report) and unreimbursed risk corridor payment for CY 2016 was $5,841,464.97 (as confirmed by CMS in a November 13, 2017 report, which

report was updated on November 15, 2017). HHS has not make any prorated or other payments towards Blue Plus' CY 2015 and CY 2016 losses.

87. To the extent required, BCBSM/Blue Plus has exhausted its non-judicial avenues to remedy the Government's failure to provide the full and timely mandated risk corridor payments for CY 2014, 2015 and 2016 as required by statute, regulation and contract.

Supreme Court Decision

88. On April 27, 2020, the United States Supreme Court issued its decision in *Maine Community Health Options v United States.* In that decision, the Court rejected all of the arguments the United States asserted in support of its failure and refusal to fully reimburse Maine Community Health Options ("Maine") for the risk corridor payments it was owed. The Court held that the "shall pay" language in Section 1342 imposed a legal duty by the United States to pay the full risk corridor payment to Maine and that duty was not constrained or limited by either the Appropriation Clause or the Anti-Deficiency Clause. The Court further held that Section 1342 was not impliedly repealed by appropriation riders. Finally, the Court held Maine could collect the full amount of its risk corridor payment from the Judgment Fund through the Tucker Act.

COUNT I
Violation of Federal Statute and Regulation

89. BCBSM/Blue Plus reallege and incorporate by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

90. Section 1342(b)(1) of the ACA, as interpreted by the Supreme Court, mandates compensation, expressly stating that the Secretary of HHS "shall pay" risk corridor payments to QHPs in accordance with the payment formula set forth in the statute.

91. HHS and CMS's implementing regulation at 45 C.F.R. § 153.510(b) also mandates compensation, expressly stating that HHS "will pay" risk corridor payments to QHPs in accordance with the payment formula set forth in the regulation, which formula is mathematically identical to the formula in Section 1342(b)(1) of the ACA.

92. HHS and CMS's regulation at 45 C.F.R. § 153.510(d) requires a QHP to remit charges to HHS within 30 days after notification of such charges.

93. HHS and CMS's statements in the Federal Register on July 15, 2011, and March 23, 2012, state that risk corridor "payment deadlines should be the same for HHS and QHP issuers." 76 FR 41929, 41943 (July 15, 2011) and 77 FR 17219, 17238 (Mar. 23, 2012).

94. BCBSM/Blue Plus were QHP issuers, and were qualified for and entitled to receive mandated risk corridor payments from the Government.

95. BCBSM/Blue Plus are entitled under Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) to recover full and timely mandated risk corridor payments from the Government.

96. The United States has specifically admitted its obligation to pay BCBSM, and its subsidiary, Blue Plus, for their risk corridor losses that total $262,586,241.31 for calendar years 2014, 2015 and 2016, of which the defendant has paid only $1,169,212.87. BCBSM's risk corridor losses for calendar year 2014, 2015 and 2016 (as confirmed by CMS's published calculations) were $6,955,635.49, $174,955,826.46 and $68,940,048.25 respectively for a total of $250,851,510.20. Blue Plus' risk corridor losses for calendar years 2015 and 2016 (as confirmed by CMS's published calculations) were $5,893,267.11 and $5,841,464.97 respectively for a total of $11,734,732.08. The defendant has not reimbursed Blue Plus for any of its risk corridor losses. As noted above, the Government has paid BCBSM $1,169,212.87 of its calendar

year 2014 losses. The total unreimbursed risk corridor payments owed to BCBBSM and its subsidiary, Blue Plus, are $261,417,029.41.

97. The United States has failed to make full and timely risk corridor payments to BCBSM/Blue Plus, despite the Government repeatedly confirming in writing that Section 1342 mandates that the Government make risk corridor payments.

98. Congress's failure to appropriate sufficient funds for risk corridor payments did not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridor payments to QHPs, including to BCBSM/Blue Plus.

99. The Government's failure to make full and timely risk corridor payments to BCBSM/Blue Plus constitutes a violation and breach of the Government's mandatory payment obligations under Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b).

100. As a result of the United States' violation of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b), BCBSM/Blue Plus have been damaged in the amount of $261,417,029.41, together with interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT II
Breach of Implied-In-Fact Contract

101. BCBSM/Blue Plus reallege and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

102. BCBSM/Blue Plus entered into a valid implied-in-fact contract with the Government regarding the Government's obligation to make full and timely risk corridor payments to BCBSM/Blue Plus in exchange for BCBSM's/Blue Plus' agreement to become a QHP issuer and participate in the Minnesota Exchange.

103. Section 1342 of the ACA, HHS's implementing regulations (45 C.F.R. § 153.510), and HHS's and CMS's admissions regarding their obligation to make risk corridor payments were made by representatives of the Government who had actual authority to bind the United States, and constituted a clear and unambiguous offer by the Government to make full and timely risk corridor payments to health insurers, including to BCBSM/Blue Plus, that agreed to participate as QHPs in the ACA Exchanges.

104. BCBSM/Blue Plus accepted the Government's offer by agreeing to become a QHP issuer and to participate in and accept the uncertain risks imposed by the Exchanges.

105. By agreeing to become a QHP, BCBSM/Blue Plus agreed to provide health insurance on the Minnesota Exchange established under the ACA, and to accept the obligations, responsibilities and conditions imposed on QHPs—subject to the implied covenant of good faith and fair dealing—under the ACA and, *inter alia*, 45 C.F.R. §§ 153.10 *et seq.* and 155.10 *et seq*.

106. BCBSM/Blue Plus satisfied and complied with its obligations and/or conditions which existed under the implied-in fact contracts.

107. The Government's agreement to make full and timely risk corridor payments was a significant factor material to BCBSM's/Blue Plus' agreement to become a QHP issuer.

108. The parties' agreement is further confirmed by the parties' conduct, performance and statements following BCBSM's/Blue Plus' acceptance of the Government's offer, BCBSM's/Blue Plus' execution of attestations including the attestations regarding risk corridor payments and charges, and the Government's repeated assurances that full and timely risk corridor payments would be made and would not be subject to budget limitations. *See, e.g.*, 78 FR 15409, 15473 (Mar. 11, 2013).

109. The implied-in-fact contract was authorized by representatives of the Government who had actual authority to bind the United States and was entered into with mutual assent and consideration by both parties.

110. The risk corridors program's protection from uncertain risk and new market instability was a real benefit that significantly influenced BCBSM's/Blue Plus' decision to agree to become a QHP and to participate in Minnesota Exchange.

111. BCBSM/Blue Plus, in turn, provided a real benefit to the Government by agreeing to become a QHP and participate in the Minnesota Exchange, despite the uncertain financial risk.

112. The risk corridors program in Section 1342 of the ACA and its implementing regulations, by which Congress, HHS, and CMS committed to help protect health insurers financially against risk selection and market uncertainty encouraged BCBSM/Blue Plus to participate in the Minnesota Exchange.

113. The Government repeatedly acknowledged its statutory and regulatory obligations to make full and timely risk corridor payments to qualifying QHPs through its conduct and statements to the public and to BCBSM/Blue Plus and other similarly situated QHPs, made by representatives of the Government who had actual authority to bind the United States.

114. Congress's failure to appropriate sufficient funds for risk corridor payments due did not defeat or otherwise abrogate the United States' contractual obligation to make full and timely risk corridor payments to BCBSM/Blue Plus.

115. The Government's failure to make full and timely risk corridor payments to BCBSM/Blue Plus is a material breach of the implied-in-fact contract.

116. As a result of the United States' material breaches of its implied-in-fact contract that it entered into with BCBSM/Blue Plus regarding the Exchange in Minnesota, BCBSM/Blue

Plus have been damaged in the amount of $261,417,029.41, together with any losses actually sustained as a result of the Government's breach, damages, interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT III
Breach of Implied Covenant of Good Faith and Fair Dealing

117. BCBSM/Blue Plus reallege and incorporate by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

118. A covenant of good faith and fair dealing is implied in every contract, express or implied-in-fact, including those with the Government, and imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to undermine the reasonable expectations of the other party regarding the fruits of the contract.

119. The implied-in-fact contract entered into between the United States and BCBSM/Blue Plus regarding the Minnesota Exchange created the reasonable expectations for BCBSM that full and timely risk corridor payments would be paid by the Government to QHPs, just as the Government expected that full and timely risk corridor remittance charges would be paid by QHPs to the Government.

120. By failing to make full and timely risk corridor payments to BCBSM/Blue Plus, the United States has undermined BCBSM's/Blue Plus' reasonable expectation regarding the fruits of the implied-in-fact contract, in breach of an implied covenant of good faith and fair dealing existing therein.

121. Congress granted HHS with rulemaking authority regarding the risk corridors program in Section 1342(a) of the ACA. HHS and CMS are permitted to establish annual charge remittance and payment deadlines that support QHP functions. HHS and CMS have an

obligation to exercise the discretion afforded to it in good faith and not arbitrarily, capriciously or in bad faith.

122. The United States breached the implied covenant of good faith and fair dealing by, among other things:

(a) Inserting in HHS and CMS regulations a 30-day deadline for a QHP's full remittance of risk corridor charges to the Government, but failing to create a similar deadline for the Government's full payment of risk corridor payments to QHPs, despite stating that QHPs and the Government should be subject to the same payment deadline (*see, e.g.*, 77 FR 17219, 17238 (Mar. 23, 2012);

(b) Requiring QHPs to fully remit risk corridor charges to the Government, but unilaterally deciding that the Government may make prorated risk corridor payments to QHPs;

(c) Legislatively limiting funding sources for risk corridor payments in appropriations acts after BCBSM/Blue Plus had undertaken significant expense in performing its obligations as a QHP in the Exchange in Minnesota, based on the reasonable expectation that the Government would make full and timely risk corridor payments if BCBSM/Blue Plus experienced sufficient losses.

123. As a direct and proximate result of the aforementioned breaches of the covenant of good faith and fair dealing, BCBSM/Blue Plus have been damaged in the amount of $261,417,029.41, together with any losses actually sustained as a result of the Government's breach, damages, interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT IV
Taking Without Just Compensation
in Violation of the Fifth Amendment to the U.S. Constitution

124. BCBSM/Blue Plus reallege and incorporate by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

125. The Government's actions complained of herein constitute a deprivation and taking of BCBSM's/Blue Plus' property for public use without just compensation, in violation of the Fifth Amendment to the U.S. Constitution.

126. BCBSM/Blue Plus have a vested property interests in their contractual, statutory, and regulatory rights to receive statutorily-mandated risk corridor payments. BCBSM/Blue Plus have a reasonable expectation of receiving the full and timely risk corridor payments payable to them under the statutory and regulatory formula, based on its implied-in-fact contract with the Government, Section 1342 of the ACA, HHS's implementing regulations (45 C.F.R. § 153.510), and HHS's and CMS's public statements.

127. The Government expressly and deliberately interfered with and has deprived BCBSM/Blue Plus of property interests and their reasonable expectation to receive full and timely risk corridor payments. On March 11, 2014, HHS for the first time announced, in direct contravention of Section 1342 of the ACA, 45 C.F.R. § 153.510(b) and its previous public statements, that it would administer the risk corridors program "in a budget neutral manner." 79 FR 13743, 13829 (Mar. 11, 2014).

128. On April 11, 2014, HHS and CMS stated for the first time that CY 2014 risk corridor payments would be reduced pro rata to the extent of any shortfall in risk corridor collections. *See* Bulletin, CMS, "Risk Corridors and Budget Neutrality" (Apr. 11, 2014).

129. Further, in Section 227 of the 2015 Appropriations Act and Section 225 of the 2016 Appropriations Act, Congress specifically targeted the Government's existing, mandatory

risk corridor payment obligations under Section 1342 of the ACA, expressly limiting the source of funding for the United States' CY 2014 risk corridor payment obligations owed to a specific small group of insurers, including BCBSM/Blue Plus. *See* 128 Stat. 2491 and 129 Stat. 2624. HHS and CMS continue to refuse to make full and timely risk corridor payments to BCBSM/Blue Plus, and therefore the Government has deprived BCBSM/Blue Plus of the economic benefit and use of such payments.

130. The Government's action in withholding, with no legitimate governmental purpose, the full and timely risk corridor payments owed to BCBSM/Blue Plus constitutes a deprivation and taking of BCBSM's/Blue Plus' property interests and requires payment to BCBSM/Blue Plus of just compensation under the Fifth Amendment of the U.S. Constitution.

131. BCBSM/Blue Plus are entitled to receive just compensation for the United States' taking of its property in the amount of $261,417,029.41, together with interest, costs of suit, and such other relief as this Court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demands judgment against the Defendant, the United States of America, as follows:

(1) For Count I, awarding damages sustained by Plaintiffs, in the amount of $261,417,029.41, as a result of the Defendant's violation of Section 1342(b)(1) of the ACA and of 45 C.F.R. § 153.510(b);

(2) For Count II, awarding damages sustained by Plaintiffs in the amount of $261,417,029.41, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's breaches of its implied-in-fact contract with Plaintiffs regarding risk corridor payments;

(3) For Count III, awarding damages sustained by Plaintiffs, in the amount of $261,417,029.41, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's breaches of the implied covenant of good faith and fair dealing that exists in the implied-in-fact contract regarding risk corridor payments;

(4) For Count IV, awarding damages sustained by Plaintiffs, in the amount of $261,417,029.41, as a result of the Defendant's taking of Plaintiffs' property without just compensation in violation of the Fifth Amendment to the U.S. Constitution;

(5) Awarding all available interest, including, but not limited to, pre- and post-judgment interest, to Plaintiffs;

(6) Awarding all available attorneys' fees and costs to Plaintiffs; and

(7) Awarding such other and further relief to Plaintiffs as the Court deems just and equitable.

Respectfully submitted,

Dated: May 28, 2020

Respectfully Submitted,

s/ Doug P. Hibshman

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