IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MOLINA HEALTHCARE OF CALIFORNIA, INC., MOLINA HEALTHCARE OF FLORIDA, INC., MOLINA HEALTHCARE OF MICHIGAN, INC., MOLINA HEALTHCARE OF NEW MEXICO, INC., MOLINA HEALTHCARE OF OHIO, INC., MOLINA HEALTHCARE OF TEXAS, INC., MOLINA HEALTHCARE OF UTAH, INC., MOLINA HEALTHCARE OF WASHINGTON, INC., and MOLINA HEALTHCARE OF WISCONSIN, INC.,	)	No. 17-97C
	)	Judge Wheeler
Plaintiffs,	)	
v.	)	
THE UNITED STATES OF AMERICA,	)	
Defendant.	)	

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT
AND MEMORANDUM OF LAW IN SUPPORT

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Pursuant to Rule 56 of the Rules of this Court ("RCFC"), the above-captioned Plaintiffs (the "Molina Plaintiffs" or "Molina"), move for summary judgment with respect to Counts I and III of the Complaint, which respectively challenge: (1) the Government's violation of its mandatory obligation to make full annual payments to Molina as required under the risk corridors provisions of the Patient Protection and Affordable Care Act ("ACA")[1] and its implementing federal regulations for Calendar Years ("CY") 2014 and 2015, and (2) the Government's breach of its implied-in-fact contract to make full annual risk corridors payments to Molina for the same years. For the reasons demonstrated below, and articulated by this Court in its recent decision regarding identical issues in *Moda Health Plan, Inc. v. United States*, No. 16-649C, --- Fed. Cl. ---, 2017 WL 527588 (Feb. 9, 2017) (Wheeler, J.), the Molina Plaintiffs are entitled to summary judgment in their favor on both of these Counts as a matter of law.

INTRODUCTION

As this Court recently observed in *Moda*, Congress passed the ACA in 2010 in a "dramatic overhaul of the nation's healthcare system. Central to the Act's infrastructure was a network of 'Health Benefit Exchanges' ('Exchanges') on which insurers would offer Qualified Health Plans ('QHPs') to eligible purchasers." *Moda*, 2017 WL 527588, at *2. The ACA "created a tectonic shift in the insurance market," which, this Court recognized, "drastically enlarged the pool of eligible insurance purchasers" and "prohibited insurers from denying coverage or setting increased premiums based on a purchaser's medical history." *Id*.

"To encourage insurers like Moda [and Molina] to offer health insurance on the exchanges, the ACA created a system of risk corridors under which the Government would pay insurers if they suffered losses during the first three years of the ACA's implementation (2014-2016)." *Id.* at *1. Congress included the risk corridors program in the ACA, along with the other two of the

[1] Pub. L. 111-148, 124 Stat. 119 (2010).

"3Rs" – reinsurance and risk adjustment – to reduce the insurers' risk on the uncertain new Exchanges. *Id*. As this Court noted, CMS announced that the risk corridors program would permit "the Federal government and QHPs to share in profits or losses resulting from inaccurate rate setting from 2014 to 2016." *Id*. at *4 (citing 77 FR 73118, 73121 (Dec. 7, 2012)).

Once "the final risk corridors program rules [were] in place" in March 2013, Molina and the other insurers agreed to offer QHPs on the ACA Exchanges for the upcoming CY 2014 plan year, and Molina "submitted its QHPs and premium rates to state healthcare regulators" in California, Florida, Michigan, New Mexico, Ohio, Texas, Utah, Washington, and Wisconsin. *Id*. Thereafter, the state regulators approved the QHPs, and as required by HHS regulations, Molina began selling QHPs to consumers on the Exchanges in those states on October 1, 2013, with coverage effective January 1, 2014. *See* 45 C.F.R. § 155.410(b)-(c); Declaration of J. Mario Molina, MD, President and CEO, Molina Healthcare, Inc. ("Decl.") at ¶ 5.

Molina voluntarily agreed to participate on the new ACA Exchanges in California, Florida, Michigan, New Mexico, Ohio, Texas, Utah, Washington, and Wisconsin for CY 2014 and CY 2015, and offered QHPs in those markets, each of which was certified by CMS and complied with the ACA's new requirements.[2] Molina faithfully performed its new obligations and responsibilities under the ACA and insured hundreds of thousands of new members on the Exchanges under its QHPs,[3] but Molina experienced annual losses in CY 2014 and CY 2015 in excess of the statutory target amounts set forth in Section 1342.[4] Pursuant to the unambiguous terms of Section 1342 and its implementing regulations, the Government was obligated to make

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[2] *See* Molina's CY 2014 and CY 2015 QHP Agreements, Compl. Exs. 06-23; Molina's CY 2014 and CY 2015 Attestations, Compl. Exs. 34-53; Decl. ¶ 3.

[3] *See* Decl. ¶ 4.

[4] *See* Compl. ¶¶ 234-236, 245-246, 253-258, 264-265; Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for Benefit Year 2014" (Nov. 19, 2015), Compl. Ex. 100; Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year" (Nov. 18, 2016), Compl. Ex. 87; Decl. ¶ 4.

full annual risk corridors payments to Molina of $39,035.74 and $52,339,075.46 for CY 2014 and CY 2015, respectively.[5]

HHS repeatedly has acknowledged that it owes Molina "full payment" of its risk corridors arrears, that it "will record risk corridors payments due as an obligation of the United States Government for which full payment is required."[6] HHS has even acknowledged the specific risk corridors amounts it owes Molina for CY 2014 and CY 2015.[7]

However, through appropriations riders passed "[i]n fiscal years 2015 and 2016, Congress made the CMS Program Management appropriation unavailable" for risk corridors payments by limiting the sources of funding that CMS could use to make the risk corridors payments the Government had consistently acknowledged were due in "full." *Moda*, 2017 WL 527588, at *8.[8] As a direct result, although the Government owed Molina $39,035.74 in risk corridors payments for CY 2014 and $52,339,075.46 for CY 2015, the Government has paid Molina only a small fraction — slightly over 15% — of the amount it owed for CY 2014, and none of the amount it owed for CY 2015.[9]

Despite HHS' repeated acknowledgements and admissions regarding its obligation to pay Molina the "full amount" of risk corridors payments due, Defendant has attempted to evade these mandatory risk corridors payment obligations and has "stated that HHS has no obligation to pay [Molina] the full amount it is owed if Congress fails to appropriate additional funds for the

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5 *See supra* note 4.

6 Bulletin, CMS, "Risk Corridors Payments for 2015" (Sept. 9, 2016), Compl. Ex. 86; *see also* 79 FR 30239, 30260 (May 27, 2014) ("HHS recognizes that the [ACA] requires the Secretary to make full payments to issuers."), Compl. Ex. 76; Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for Benefit Year 2014" (Nov. 19, 2015), Compl. Ex. 100 (same); Bulletin, CMS, "Risk Corridors Payments for the 2014 Benefit Year" (Nov. 19, 2015), Compl. Ex. 84 (same).

7 *See supra* note 4.

8 *See* Pub. L. 113-235, § 227, 128 Stat. 2491 (FY 2015 appropriations rider); Pub. L. 114-113, § 225, 129 Stat. 2624 (FY 2016 appropriations rider).

9 *See* Compl. ¶¶ 249-251, 268; Decl. ¶¶ 6, 14, 17, 18.

program." *Moda*, 2017 WL 527588, at *9. According to Defendant, "the joke" is on Molina for trusting the Government. *Moda* at *26 (quoting *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970)). Unamused, this Court in *Moda* held that the Government "unlawfully withheld risk corridors payments from Moda" and entered summary judgment against the Government for breach of its statutory and contractual obligations. *Id*. at *1.

For the same reasons it found the Government liable in *Moda*, this Court should hold the Government liable to Molina. The Court should resolve any threshold jurisdictional and ripeness issues raised by Defendant in Molina's favor, as it did in *Moda.* The Court should agree with the three other Judges of this Court who have rejected Defendant's jurisdictional defenses and separately concluded that the Court has subject matter jurisdiction over Molina's money-mandating statutory and contractual risk corridors claims.[10] As it did in *Moda*, the Court also should agree with the other Judges of this Court who rejected the Defendant's arguments regarding ripeness and "presently due" payment.[11] As in *Moda*, there is no question that "Congress required HHS to make annual risk corridor payments" to Molina, and thus Molina's "injury is not abstract or hypothetical" and its claims for CY 2014 and 2015 risk corridors payments "are ripe" for adjudication. *Moda*, 2017 WL 527588, at *13.

As demonstrated below, here, as in *Moda*, there is no genuine dispute that the Government is liable to Molina for the full, annual risk corridors payments owed under Section 1342 and its implementing regulations and, alternatively, under the implied-in-fact contract it breached. As this Court held in *Moda*, "Section 1342 requires full annual payments to insurers, and the

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[10] *See Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 95-99 (2016) (Lettow, J.); *Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757, 770-72 (2017) (Sweeney, J.); *Maine Cmty. Health Options v. United States*, No. 16-967C, slip op. at 2 (Fed. Cl. Mar. 9, 2017) (Bruggink, J.).

[11] *See Land of Lincoln*, 129 Fed. Cl. at 99-102; *Health Republic*, 129 Fed. Cl. at 772-78; *Maine*, No. 16-967C, slip op. at 2-3.

Government has not made these payments. Furthermore, Congress has not modified the risk corridors program to make it budget neutral. As a result, there is no genuine dispute that the Government is liable to [Molina] under Section 1342." *Id*. at *22. In addition, as the Court found in *Moda*, here the Government also breached an implied-in-fact contract with Molina "by failing to make full risk corridors payments as promised. Therefore, there is no genuine dispute that the Government is liable to [Molina] under the implied-in-fact contract." *Id*. at *26.

Here, as in *Moda*, "the Government made a promise in the risk corridors program that it has yet to fulfill." *Id*. The Court should apply the same reasoning to the same claims arising under the identical risk corridors program in this case, as it did in *Moda*, and "direct[] the Government to fulfill that promise" to Molina. *Id*.

Because the Government previously has acknowledged the specific risk corridors amounts it owes to Molina for CY 2014 and CY 2015, there is no genuine dispute of material fact as to the amount of Molina's risk corridors damages, and therefore the Court should enter summary judgment in Molina's favor in the amount of $52,372,303.56 on Counts I and III.

Finally, should the Court enter summary judgment in Molina's favor for damages under Counts I and III, the Court should declare, as incidental to that monetary judgment, and in the interests of efficiency and judicial economy, that following its own reasoning on Counts I and III, the United States is also obligated to make full annual CY 2016 risk corridors payments to Molina, with the precise amount of such damages to be determined following Molina's submission of its CY 2016 risk corridors data to CMS by July 31, 2017.

STATEMENT OF THE ISSUES PRESENTED

1. Is the Government liable, under Count I, for its failure to meet its statutory and regulatory obligations to make full annual risk corridors payments to Molina for CY 2014 and CY 2015 under the money-mandating statute and its implementing regulations?

2. Is the Government liable, under Count III, for breach of its implied-in-fact contract with Molina to make full annual risk corridors payments to Molina for CY 2014 and CY 2015?

3. If the Court finds the Government liable under Counts I and/or III, is Molina entitled to recover the $52,372,303.56 in combined unpaid risk corridors payments for CY 2014 and CY 2015 as damages?

4. If the Court finds the Government liable and enters judgment against Defendant under Counts I and/or III for unpaid risk corridors payments for CY 2014 and CY 2015, can the Court further declare, as incidental to entry of that judgment, that the Government is also required to make full and timely CY 2016 risk corridors payments to Molina for qualifying risk corridors losses that Molina experienced during that plan year?

STATEMENT OF THE CASE AND UNDISPUTED FACTS

I. CONGRESS INCLUDED RISK CORRIDORS IN THE ACA TO ADDRESS RISKS POSED BY THE NEWLY INSURED POPULATION[12]

Congress passed the ACA in 2010 and reformed the United States health insurance system by significantly expanding access and coverage to millions of Americans who had just previously been uninsured or underinsured. While the ACA promoted certainty by prohibiting health insurers from denying coverage for preexisting medical conditions, or setting premium rates based on health-related factors,[13] it also created uncertainty as participating insurers would be forced to insure new members who had never been insured and for whom insurers lacked vital medical and actuarial data. This informational void increased the insurers' financial risk because insurers lacked reliable data to set accurate annual insurance premiums for the new population of members who previously were uninsured or underinsured.

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[12] The record materials cited herein that were not attached as exhibits to Molina's Complaint are attached and indexed in the accompanying Appendix filed herewith.

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

To address this uncertainty and increased risk faced by insurers who were being asked to offer new ACA Exchange plans to millions of uninsured Americans, and to ensure that annual premiums would not be set too high, Congress included in the ACA a trio of statutory "premium-stabilization" measures, commonly known as the "3Rs": risk adjustment, reinsurance, and risk corridors. *See* 42 U.S.C. §§ 18061-18063. The risk corridors program[14] – the subject of this lawsuit – is federally administered by the Centers for Medicare and Medicaid Services ("CMS"), through a formal delegation of authority from the HHS Secretary.[15] Risk corridors require that the federal Government share in the financial risk by making mandatory annual payments, pursuant to a statutorily prescribed payment formula, to participating QHPs,[16] like the Molina Plaintiffs, that agreed to offer plans on the ACA Exchanges for CY 2014, CY 2015 and CY 2016. *See* 42 U.S.C. § 18062(b).[17] Under Section 1342(b), if a QHP's allowable costs fall below its statutory target amount by prescribed amounts "for any plan year," then Congress mandated that the QHP "shall pay" a specified percentage of its profits back to the Government as a risk corridors "charge." *Id.* § 18062(b)(2).[18] On the other hand, if a QHP's allowable costs exceed its statutory target amount "for any plan year" by prescribed amounts, then Congress mandated that the HHS Secretary "shall

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[14] The risk corridors program is codified at Section 1342 of the ACA, 42 U.S.C. § 18062.

[15] *See* Comp. Gen. B-325630 at 3 (Sept. 30, 2014), attached hereto at Exhibit 109 (citing 76 FR 53903, 53903-04 (Aug. 30, 2011)); *see also* 42 U.S.C. § 18062(a) ("The Secretary [of HHS] shall establish and administer a program of risk corridors ….").

[16] QHPs are health insurers that agreed to participate and were certified to offer plans on ACA Exchanges after demonstrating their compliance with a host of regulatory requirements. *See, e.g.*, 45 C.F.R. § 156.200 (listing QHP standards); 45 C.F.R. § 156.20 (citing ACA § 1302 (42 U.S.C. § 18022)). All duly-certified QHPs "shall participate" in the risk corridors program. 42 U.S.C. § 18062(a). "[I]f an insurer chooses *not* to offer coverage through the Exchanges, then it is *not* subject to the risk corridors program established by section 1342." Comp. Gen. B-325630 at 5-6 (Sept. 30, 2014) (emphasis added).

[17] *See, e.g.*, 77 FR 73118, 73121 (Dec. 7, 2012), Compl. Ex. 03 ("The ... risk corridors program permits the Federal government and QHPs to share in profits or losses resulting from inaccurate rate setting from 2014 to 2016."); 78 FR 15409, 15413 (Mar. 11, 2013), Compl. Ex. 64 (same); 78 FR 65046, 65048 (Oct. 30, 2013), attached hereto at Exhibit 110 (same).

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

pay" the QHP a specified percentage of its annual losses above the same statutory threshold as a risk corridors payment. *Id.* § 18062(b)(1). Section 1342 describes the risk corridors calculation as a comparison of "allowable costs" against a "target amount," both of which are defined on a plan-year basis. *Id.* § 18062(c).[19]

The text of Section 1342 also makes clear that risk corridors payments are to be paid annually. Section 1342 directs the HHS Secretary to "establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016." 42 U.S.C. § 18062(a). HHS also must calculate "payments in" and "payments out" of the program on the basis of insurers' costs in "any plan year," not over the life of the program. 42 U.S.C. § 18062(b)(1), (b)(2), (c)(1), (c)(2). In addition, an insurer's risk corridors payment for a plan year is reduced if the insurer receives payments under the risk-adjustment or reinsurance programs for the same year. *See* 42 U.S.C. § 18062(c)(1)(B).

On its face, Congress' mandatory "shall pay" obligation in Section 1342(b) to make risk corridors payments to unprofitable insurers is unconnected to, and not contingent on, the receipt of any risk corridors "charges" received by the Government from profitable insurers in a given year. Section 1342(b) does *not* state that annual risk corridors payments cannot exceed risk corridors collections, or must be restricted to collected user fees. *See generally* 42 U.S.C. § 18062. Neither Section 1342(b), nor its implementing regulations, provide for anything less than full payment of annual risk corridors charges or payments. *See id.*; 45 C.F.R. § 153.510(b). Section 1342(b) also does not create a single account to receive payments in and out, nor does Section 1342 provide that annual risk corridors payments are limited by appropriations. *See generally* 42 U.S.C. § 18062. Rather, although Congress did not specifically appropriate funds for the ACA risk corridors program, it is statutorily mandated to be "based on" a non-budget neutral program in

[19] *See* Compl. ¶ 94 (approximate illustration of the risk corridors payment methodology).

Medicare Part D, signed into law by President George W. Bush. *Id.* § 18062(a) (referencing Part D); 42 C.F.R. § 423.336 (implementing Part D risk corridors program, which has been paid annually for each plan year).[20]

In addition to being non-budget neutral, Medicare Part D's risk corridors program also has an annual payment structure. In the statute creating the Medicare Part D risk corridors program, Congress directed HHS to establish a risk corridor for each prescription drug plan for each plan year. *See* 42 U.S.C. § 1395w-115(e)(3)(A). The regulations implementing the Medicare Part D risk corridors program provided that "CMS makes payments after a coverage year" after receipt of all cost data information, and that "CMS at its discretion makes either lump-sum payments or adjusts monthly payments *in the following payment year*." 42 C.F.R. § 423.336(c) (2009) (emphasis added). For example, in the first year of the Medicare Part D risk corridors program – 2006 – HHS paid funds owed to eligible plan sponsors in November and December 2007. *See* Office of Inspector Gen., Dep't of Health & Human Servs., *Medicare Part D Reconciliation Payments for 2006-2007*, at 14 (2009), Compl. Ex. 05 ("CMS paid most of the funds owed to sponsors for 2006 by increasing these sponsors' monthly prospective payments for November and December 2007."). This is what Congress mandated that the ACA risk corridors program be "based on." 42 U.S.C. § 18062(a).

Risk corridors is a temporary program that expired on December 31, 2016, after the third year of the new ACA Marketplace. This three-year period was designed for the Government to

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[20] *See also* U.S. Gov't Accountability Office Report, *Patient Protection and Affordable Care Act: Despite Some Delays, CMS Has Made Progress Implementing Programs to Limit Health Insurer Risk*, GAO-15-447 at 14 (2015), Compl. Ex. 91 ("For the Medicare Advantage and Medicare Part D risk mitigation programs, the payments that CMS makes to issuers are not limited to issuer contributions."); Am. Acad. of Actuaries, Comment to HHS on Proposed Rule, Exchange and Insurance Market Standards for 2015 and Beyond at 2 (Apr. 21, 2014), Compl. Ex. 89 ("The Part D risk corridor program is not budget neutral and has resulted in net payments to the Centers for Medicare and Medicaid Services (CMS). Similarly, the design of the ACA risk corridor program does not guarantee budget neutrality.").

share in and mitigate the annual risk with QHPs, while those QHPs' actuaries struggled to set annual premiums without accurate data on the new population of previously un- and under-insured individuals they were now obligated to insure annually on the ACA Exchanges.[21] In the Government's words, the risk corridors program was intended to "protect QHP issuers in the individual and small group market against inaccurate rate setting," and to "permit issuers to lower rates by not adding a risk premium to account for perceived uncertainties in the 2014 through 2016 markets." 78 FR 15409, 15413 (Mar. 11, 2013), Compl. Ex. 64; *see also* 77 FR 73118, 73119 (Dec. 7, 2012), Compl. Ex. 03 ("The risk corridors program, which is a Federally administered program, will protect against uncertainty in rates for qualified health plans by limiting the extent of issuer losses and gains.").

II. HHS IMPLEMENTS THE RISK CORRIDORS PROGRAM AND ASSURES FULL RISK CORRIDORS PAYMENTS

In March 2012, after a notice and comment period, HHS promulgated final rules implementing the risk corridors program, including a rule prescribing the method for determining risk corridors payment amounts that QHPs "will receive." 45 C.F.R. § 153.510(b). In its written interpretation of those final rules, HHS confirmed that unprofitable QHPs to whom risk corridors

[21] *See* 76 FR 41929, 41942 (July 15, 2011), Compl. Ex. 02. ("Risk corridors create a mechanism for sharing risk for allowable costs between the Federal government and QHP issuers."); HealthCare.gov, "Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment" (July 11, 2011), Compl. Ex. 68 (same); Presentation, CMS, "Reinsurance, Risk Corridors, and Risk Adjustment Final Rule," at 11 (Mar. 2012), Compl. Ex. 69 (presentation to health insurers explaining that the risk corridors program "[p]rotects against inaccurate rate-setting by sharing risk (gains and losses) on allowable costs between HHS and qualified health plans to help ensure stable health insurance premiums"); HHS Notice of Benefit and Payment Parameters for 2014, 77 FR 73118, 73121 (Dec. 7, 2012), Compl. Ex. 03 ("The temporary risk corridors program permits the Federal government and QHPs to share in profits or losses resulting from inaccurate rate setting from 2014 to 2016."); Presentation, CMS, "HHS Notice of Benefit and Payment Parameters for 2014," at 18 & 19 (Mar. 2013), Compl. Ex. 70 (presentation to health insurers explaining that risk corridors program "[p]rotects against inaccurate rate-setting by sharing risk (gains and losses) on allowable costs between HHS and QHP issuers to help stabilize health insurance premiums").

payments are owed "will receive payment from HHS" when their allowable costs for any benefit year exceed the statutory target amounts set forth in Section 1342(b)(1). 77 FR 17220, 17251-52 (Mar. 23, 2012), Comp. Ex. 01.

As with the statute, the regulatory requirement that the Government make risk corridors payments to unprofitable insurers is not contingent on the extent to which the Government receives risk corridors payments from profitable insurers. *See* 45 C.F.R. § 153.510(b). Furthermore, like Section 1342(b), the implementing regulations also did not afford HHS any discretion to pay qualifying QHPs less than the full amount of risk corridors payments calculated annually under the statutory formula. *See id*. By this regulation, the Government intended that HHS "will pay" and QHPs "will receive" risk corridors payments in "an amount equal to" the risk corridors calculation "[w]hen" it is determined that a QHP qualifies for risk corridors payments – not some fraction of that amount at some indeterminate future date, or never at all. *See id.*

Moreover, in the preamble to a final rule published on March 11, 2013, the Government expressly stated that "[t]he risk corridors program is ***not statutorily required to be budget neutral***," and that ***"[r]egardless of the balance of payments and receipts***, HHS ***will remit payments*** [to QHPs] as required under section 1342 of the [ACA]." 78 FR 15409, 15473 (Mar. 11, 2013), Compl. Ex. 64 (emphasis added).

HHS and CMS also released rules and interpretations regarding the collections and payment schedule of the risk corridors program. On July 11, 2011, HHS issued a fact sheet on HealthCare.gov stating that under the risk corridors program, "[f]rom 2014 through 2016" – not at some indeterminate future date – "qualified health plan issuers with costs greater than three percent of cost projections will receive payments from HHS to offset a percentage of those losses." HealthCare.gov, "Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment" (July 11, 2011), Compl. Ex. 68. In the same fact sheet,

HHS also stated that proposed rulemaking would "aim[] to align the data and payment policies for this temporary [risk corridors] program with other [3Rs] programs to promote simplicity and efficiency." *Id.* The other 3Rs programs require annual payments. *See* 42 U.S.C. §§ 18061, 18063.

In proposed rulemaking on July 15, 2011, the Government stated that the risk corridors charge collection and payment deadlines should be identical, recognizing that "QHP issuers who are owed these amounts will want prompt payment." 76 FR 41929, 41943 (July 15, 2011), Compl. Ex. 02. In final rulemaking on March 23, 2012, while the Government had not yet adopted rules for risk corridors payments or charge remittances, it reiterated that "HHS would make payments to QHP issuers that are owed risk corridors amounts within a 30-day period after HHS determines that a payment should be made to the QHP issuer," and again recognized that "QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers." 77 FR 17220, 17238 (Mar. 23, 2012), Compl. Ex. 01. After submitting a proposed rule in late 2012 that would require QHPs to pay risk corridors charges to the Government within 30 days of receiving notice of the charges, *see* 77 FR 73118, 73164 (Dec. 7, 2012), Compl. Ex. 03, the Government finalized the rule on March 11, 2013. *See* 78 FR 15409, 15473 (Mar. 11, 2013), Compl. Ex. 64.[22] It also amended 45 C.F.R. § 153.530 by adding the following: "(d) Timeframes. For each benefit year, a QHP issuer must submit all information required under this section by July 31 of the year following the benefit year." *Id.*

III. MOLINA OFFERS QUALIFIED HEALTH PLANS AND HHS ANNOUNCES THE TRANSITIONAL POLICY

In July 2013 and September 2013, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, the Molina Plaintiffs voluntarily

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

agreed to become QHPs. The Molina Plaintiffs executed their respective CY 2014 QHP Agreements and, upon approval and certification by CMS, Covered California or the Washington Health Benefit Exchange, became accepted and approved as QHPs in California, Florida, Michigan, New Mexico, Ohio, Texas, Utah, Washington and Wisconsin. *See* Molina's CY 2014 QHP Agreements, Compl. Exs. 06 to 14. In addition, between April 2013 and September 2013, the Molina Plaintiffs executed and submitted their CY 2014 Attestations regarding, *inter alia*, their adherence to the risk corridors program for CY 2014. *See* Molina's CY 2014 Attestations, Compl. Exs. 34 to 43.[23] By executing and submitting their annual attestations on CMS' forms, the Molina Plaintiffs agreed to the many obligations and responsibilities imposed upon all QHPs and accepted the Government's offer to participate in the ACA Exchanges through their performance. *See id.*[24].

Shortly after the Molina Plaintiffs agreed to participate in the Exchanges, and after it became apparent that some consumers' health insurance coverage would be terminated because it did not comply with the ACA, HHS announced a transitional policy in November 2013.[25] Under the transitional policy, QHPs in effect on October 1, 2013, "will not be considered to be out of compliance with the [ACA's] market reforms" for the 2014 plan year. Transitional Policy Letter at 1-2. Consumers with non-compliant healthcare plans were no longer required to purchase

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[23] Through these annual attestations, the Molina Plaintiffs also affirmatively attested that they would agree to comply with certain "Financial Management" obligations, including, among others, to remit risk corridors charges to HHS. *See* Compl. Exs. 34 to 43.

[24] Those obligations and responsibilities that the Molina Plaintiffs undertook include, *inter alia*, licensing, reporting requirements, employment restrictions, marketing parameters, HHS oversight of the QHP's compliance plan, maintenance of an internal grievance process, benefit design standards, cost-sharing limits, rate requirements, enrollment parameters, premium payment process requirements, participating in financial management programs established under the ACA (including the risk corridors program), adhering to data standards, and establishing dedicated and secure server environments and data security procedures. *See* Molina's CY 2014 Attestations, Compl. Exs. 34 to 43.

[25] Letter from Gary Cohen, Dir., CMS Ctr. for Consumer Info. and Ins. Oversight ("CCIIO"), to State Ins. Comm'rs (Nov. 14, 2013) , attached hereto at Exhibit 111, https://www.cms.gov/cciio/resources/letters/downloads/commissioner-letter-11-14-2013.pdf ("Transitional Policy Letter").

insurance on the Exchanges from QHPs like Molina. This was a significant change because these consumers tended to be healthier, so the risk pool on the exchanges was skewed toward a sicker, more expensive group of potential insurance buyers. *See Moda*, 2017 WL 527588, at *5.[26] HHS recognized that this transitional policy would change the risk profile of enrollees in QHPs (*i.e.*, increase their average health risk level, and thus increase the average costs of providing them health insurance), and that "this transitional policy was not anticipated by health insurance issuers when setting rates for 2014." Transitional Policy Letter at 3. However, HHS expressed confidence that "the risk corridor program should help ameliorate unanticipated changes in premium revenue." *Id.* HHS has renewed the transitional policy twice, and it will extend through October 1, 2017.[27]

IV. THE GOVERNMENT ANNOUNCES ITS NEW "BUDGET NEUTRAL" INTERPRETATION

On March 11, 2014, over two months *after* the QHPs offered by Molina were in effect, and nearly four months *after* HHS cited the risk corridors program as an ameliorating force in the Transitional Policy Letter, the Government stated for the first time that "HHS intends to implement this [risk corridors] program in a budget neutral manner." 79 FR 13743, 13787 (Mar.

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[26] *See, e.g.*, HHS 2015 Health Policy Standards Fact Sheet (Mar. 5, 2014), attached hereto at Exhibit 112 ("Because issuers' premium estimates did not take the transitional policy into account, the transitional policy could potentially lead to unanticipated higher average claims costs for issuers of plans that comply with the 2014 market rules."), https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2014-Factsheets-items/2014-03-05-2.html.

[27] *See* Gary Cohen, Dir., CMS CCIIO, "Insurance Standards Bulletin Series—Extension of Transitional Policy through October 1, 2016" (Mar. 5, 2014), attached hereto at Exhibit 113, https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf; Kevin Counihan, Dir., CMS CCIIO, "Insurance Standards Bulletin Series—INFORMATION—Extension of Transitional Policy through Calendar Year 2017" (Feb. 29, 2016), attached hereto at Exhibit 114, https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/final-transition-bulletin-2-29-16.pdf.

11, 2014), Compl. Ex. 74.[28] This was a 180-degree reversal of its position announced exactly one year earlier that the program was "not statutorily required to be budget neutral" and that risk corridors payments will be made "[r]egardless of the balance of payments and receipts." 78 FR 15409, 15473 (Mar. 11, 2013), Compl. Ex. 64.

HHS' March 2014 budget-neutral reversal was also in contrast with the CBO's assessment of the risk corridors program issued in February 2014, in which the CBO had just recently recognized that the risk corridors program was *not* designed by Congress to be budget neutral:

> By law, risk adjustment payments and reinsurance payments will be offset by collections from health insurance plans of equal magnitudes; those collections will be recorded as revenues. As a result, those payments and collections can have no net effect on the budget deficit. ***In contrast, risk corridor collections (which will be recorded as revenues) will not necessarily equal risk corridor payments, so that program can have net effects on the budget deficit.*** CBO projects that the government's risk corridor payments will be $8 billion over three years and that its collections will be $16 billion over that same period....

CBO, *The Budget and Economic Outlook: 2014 to 2024*, at 59 (Feb. 2014), Compl. Ex. 71 (emphasis added). CBO further explained that:

> In contrast to the risk adjustment and reinsurance programs, ***payments and collections under the risk corridor program will not necessarily equal one another: If insurers' costs exceed their expectations, on average, the risk corridor program will impose costs on the federal budget; if, however, insurers' costs fall below their expectations, on average, the risk corridor program will generate savings for the federal budget.***

Id. at 110 (emphasis added).

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[28] Along with that March 11, 2014 statement, HHS elaborated:

> Our initial modeling suggests that th[e] adjustment for the transitional policy could increase the total risk corridors payment amount made by the Federal government and decrease risk corridors receipts, resulting in an increase in payments. However, we estimate that even with this change, the risk corridors program is likely to be budget neutral or, [*sic*] will result in net revenue to the Federal government.

79 FR 13743, 13829 (Mar. 11, 2014), Compl. Ex. 74.

On April 11, 2014, CMS issued a question-and-answer bulletin regarding its recent budget neutrality decision. *See* Bulletin, CMS, "Risk Corridors and Budget Neutrality," at 1 (Apr. 11, 2014), Compl. Ex. 75. To the question of "[w]hat risk corridors payments will HHS make if risk corridors collections for a year are insufficient to fund risk corridors payments for the year, as calculated under the risk corridors formula?," CMS answered that "[w]e 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." *Id.*

Recognizing that the risk corridors program would conclude in CY 2016, the Government also stated that it "anticipate[s] that risk corridors collections will be sufficient to pay for all risk corridors payments over the life of the three-year program," but admitted that it had no plan if a shortfall existed after CY 2016. *Id.* at 2. In a final rule of May 27, 2014, HHS summarized its statements from the April 11, 2014 bulletin, providing that "we intend to administer risk corridors in a budget neutral way over the three-year life of the program, rather than annually," but still acknowledged its obligation to make full risk corridors payments, stating:

> [W]e anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments. That said, we appreciate that some commenters believe that there are uncertainties associated with rate setting, given their concerns that risk corridors collections may not be sufficient to fully fund risk corridors payments. In the unlikely event of a shortfall for the 2015 program year, HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. In that event, HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations.

79 FR 30239, 30260 (May 27, 2014), Compl. Ex. 76.

Even after announcing its new budget-neutral interpretation, HHS and CMS continued to publicly recognize and assure insurers that it would make full risk corridors payments. For example, in HHS' response letter to the U.S. Government Accountability Office ("GAO") dated

May 20, 2014, HHS again admitted that "Section 1342(b)(1) … establishes … the formula to determine … the amounts the Secretary *must pay* to the QHPs if the risk corridors threshold is met." Letter from William B. Schultz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014), Compl. Ex. 77 (emphasis added). On June 18, 2014, HHS sent to U.S. Senator Jeff Sessions and U.S. Representative Fred Upton identical letters stating that, "As established in statute, … [QHP] plans with allowable costs at least three percent higher than the plan's target amount *will receive* payments from HHS to offset a percentage of those losses." Letter from Sylvia M. Burwell, Secretary, HHS, to U.S. Senator Jeff Sessions (June 18, 2014), Compl. Ex. 78 (emphasis added). In addition, on April 14, 2015, CMS published a timeline for QHPs regarding "Key Dates in 2015," which stated that "Remittance of Risk Corridors Payments and Charges" would occur from "9/2015 – 12/2015." Bulletin, CMS, "Key Dates in 2015: QHP Certification in the Federally-Facilitated Marketplaces; Rate Review; Risk Adjustment, Reinsurance, and Risk Corridors" (Apr. 14, 2015), Compl. Ex. 81; *see also* Presentation, CMS, "Completing the Risk Corridors Plan-Level Data Form 2014" (June 1, 2015), Compl. Ex. 96 (presentation to insurers stating that in December 2015, "CMS will begin making RC [risk corridor] payments to issuers" for CY 2014). CMS' letter to state insurance commissioners on July 21, 2015, stated in boldface text that "**CMS remains committed to the risk corridor program.**" Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to State Insurance Commissioners (July 21, 2015), Compl. Ex. 82.

In reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, the Molina Plaintiffs executed their respective CY 2015 QHP Agreements in July 2014, October 2014 and May 2015, committing to offer QHPs on the California, Florida, Michigan, New Mexico, Ohio, Texas, Utah, Washington and Wisconsin ACA Exchanges for CY 2015. *See* Molina's CY 2015 QHP Agreements, Compl. Exs. 15-23. The

Molina Plaintiffs' respective CY 2015 attestations were submitted in May to July 2014. *See* Molina's CY 2015 Attestations, Compl. Exs. 44 to 53. In July 2015, September 2015, and April 2016, the Molina Plaintiffs executed their CY 2016 QHP Agreements, committing to participate and offer QHPs on each of these ACA Exchanges for the final year of the risk corridors program. *See* Molina's CY 2016 QHP Agreements, Compl. Exs. 24 to 32. Plaintiffs' respective CY 2016 attestations were submitted in April to July 2015. *See* Molina's CY 2016 Attestations, Compl. Exs. 54 to 63.

V. CONGRESS RESTRICTS APPROPRIATIONS TO THE RISK CORRIDORS PROGRAM

In September 2014, the GAO responded to inquiries from Sen. Sessions and Rep. Upton about the availability of appropriations to make the mandatory risk corridors payments due for CY 2014. *See* Comp. Gen. B-325630 (Sept. 30, 2014). The GAO concluded that appropriations *did exist* for FY 2014 under the CMS Program Management ("PM") appropriation, but because CY 2014 risk corridors charges and payments would not be made until FY 2015, "the CMS PM appropriation for FY 2015 must include language similar to the language included in the CMS PM appropriation for FY 2014." *Id.* at 7.[29] The Congressional majority ensured that it did not, targeting the mandatory risk corridors payment obligations with a rider in the Cromnibus appropriations bill for FY 2015, enacted on December 16, 2014 ("§ 227" of the "2015 Appropriations Act"), which stated that:

> None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the [CMS PM] account, may be used for payments under section 1342(b)(1) of Public Law 111-148 (relating to

[29] The GAO also found that "payments in" from profitable insurers under the risk corridors program were available for risk corridors payments because they were "properly characterized as user fees." Comp. Gen. B-325630 at 10 (Sept. 30, 2014). According to the GAO, profitable QHP issuers who paid into the program were "paying for the certainty that any potential losses related to [their] participation in the Exchanges [were] limited to a certain amount." *Id.*

risk corridors).

Pub. L. 113-235, § 227, 128 Stat. 2491, Compl. Ex. 95. Following the GAO's previous analysis, this rider purported to limit the funds available to make risk corridors payments to just the amount of risk corridors charge remittances collected as "user fees" under the FY 2015 CMS PM appropriation – *i.e.*, budget neutrality. *See* Comp. Gen. B-325630 at 4-7 (Sept. 30, 2014). Congress included the same provision in the appropriations bill for 2016. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, at div. H, tit. II, § 225, 129 Stat. 2624, Compl. Ex. 97. Congress did not, however, amend or repeal Section 1342's annual mandatory risk corridors payment obligation (and never did so in the program's three active years).

VI. HHS PAYS MOLINA A FRACTION OF THE RISK CORRIDORS PAYMENTS IT IS OWED

On October 1, 2015, after collecting risk corridors data from QHPs for CY 2014, HHS and CMS announced their intention to prorate the risk corridors payments owed to QHPs, including Plaintiffs, 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), Compl. Ex. 83. In a report released on November 19, 2015, HHS and CMS publicly announced QHPs' risk corridors 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), Compl. Ex. 100. In the same bulletin, confirming that HHS and CMS interpreted their risk corridors payment obligation to be an annual one for *each* of the three years of the temporary program, CMS

officially booked its CY 2014 risk corridors shortfall obligation amount as a FY 2015 obligation – not as an FY 2017 obligation. *See id.* ("HHS recognizes that the [ACA] requires the Secretary to make full payments to issuers, and HHS is recording those amounts that remain unpaid following our 12.6% payment this winter as fiscal year 2015 obligation of the United States Government for which full payment is required."). On the same date, HHS and CMS again acknowledged in a public bulletin that full risk corridors payments are owed:

> HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers, and HHS is recording those amounts that remain unpaid following our 12.6% payment this winter as fiscal year 2015 obligation [sic] of the United States Government for which full payment is required.

Bulletin, CMS, "Risk Corridors Payments for the 2014 Benefit Year" (Nov. 19, 2015), Compl. Ex. 84.

HHS admitted that it owed one of the Molina Plaintiffs – Molina Healthcare of Florida, Inc. ("Molina FL") – risk corridors payments of $39,035.74 for CY 2014, but announced that it would pay only a prorated amount of $4,925.48, equal to 12.6% of the risk corridors amount owed for that year. *See* Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for Benefit Year 2014" at Table 10 – Florida (Nov. 19, 2015), Compl. Ex. 100. The Government made some prorated annual risk corridors payments to Molina FL, and the combined risk corridors payments from the Government to Molina as of the date of this filing – $5,913.45 – represents only 15.15% of CY 2014 risk corridors payments that the Government owes to Molina.[30] *See* Decl. ¶¶ 6, 17. The Molina Plaintiffs operating in the Michigan, New Mexico, Ohio, Texas, Utah, Washington and Wisconsin ACA Exchanges each made gains for CY 2014, which resulted in them being required to remit risk corridors charges to the Government, totaling $4,848,276.62. *See id*. ¶ 8.

[30] The Government made some prorated annual risk corridors payments to Molina FL for CY 2014 on December 21, 2015, January 22, 2016, February 23, 2016, March 23, 2016, October 25, 2016, December 22, 2016, January 20, 2017, and February 21, 2017. Decl. ¶ 16.

Molina made its full and timely remittance of its risk corridors charges to the Government, not some fraction thereof, on November 20, 2015. *See id.*; November 2015 Financial Transaction Reports, CMS Marketplace Payments (Nov. 30, 2015), Compl. Exs. 101-107.

On September 9, 2016, HHS announced that it would not make *any* payments toward its 2015 risk corridors obligations, because the agency "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." Bulletin, CMS, "Risk Corridors Payments for 2015" (Sept. 9, 2016), Compl. Ex. 86. HHS further stated that "[c]ollections 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." *Id.*[31] In a report released on November 18, 2016, HHS and CMS confirmed that "all 2015 benefit year risk corridors collections will be used to pay a portion of balances on 2014 benefit year risk corridors payments," and that "HHS intends to collect the full 2015 risk corridors charge amounts indicated in the tables" printed in the report. Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year" (Nov. 18, 2016), Compl. Ex. 87.

The Molina Plaintiffs operating on the Exchanges in California, Florida, Utah, Washington, and Wisconsin suffered losses resulting in the Government acknowledging that it owed them $52,339,075.46 in total risk corridors payments for CY 2015. *See id.* To date, Molina has not received any risk corridors payments for the CY 2015 plan year. Decl. ¶¶ 14, 18. The

[31] In the same bulletin, HHS and CMS once again recognized the Government's liability to insurers for the full amount of its risk corridors obligations, stating that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers," and that "HHS will record risk corridors payments due as an obligation of the United States Government for which full payment is required." Bulletin, CMS, "Risk Corridors Payments for 2015" (Sept. 9, 2016), Compl. Ex. 86.

Molina Plaintiffs operating on the Exchanges in Michigan, New Mexico, Ohio, and Texas each made gains for CY 2015, and made their full and timely remittance of risk corridors charges to the Government totaling $1,527,274.12 on November 21, 2016. Decl. ¶ 15.

Combined, the Molina Plaintiffs are undisputedly owed a total of $52,378,111.20 for the CY 2014 and CY 2015 plan years, but to-date, have only received payment of $5,913.45 from the United States, leaving $52,372,197.75 in risk corridors payments still due and owing for these two years. *See* Decl. ¶¶ 6, 14, 17-18. Additionally, Molina estimates that the Government owes it an additional $90 million in risk corridors payments for CY 2016.[32] The exact amount owed will be confirmed after Molina submits its CY 2016 risk corridors data to CMS by July 31, 2017. *See* 45 C.F.R. § 153.530(d) (requiring QHPs to submit risk corridors data "by July 31 of the year following the benefit year").

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a); *see, e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "Issues of statutory interpretation and other matters of law may be decided on motion for summary judgment." *Santa Fe Pac. R.R. Co. v. United States*, 294 F.3d 1336, 1340 (Fed. Cir. 2002); *see Moda*, 2017 WL 527588, at *14 (quoting *Santa Fe*). "Whether a contract exists is a mixed question of law and fact," and "[c]ontract interpretation itself also is a question of law." *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998).

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[32] *See* Decl. ¶ 19; Press Release, Molina Healthcare Inc., *Molina Healthcare Reports Fourth Quarter and Year-End 2016 Results and Provides Fiscal Year 2017 Outlook and Guidance* (Feb. 15, 2017), attached hereto at Exhibit 115 ("Based upon current estimates, we believe our health plans are also owed approximately $90 million in Marketplace risk corridor payments from the federal government for calendar year 2016.").

ARGUMENT

I. THE COURT HAS TUCKER ACT JURISDICTION OVER MOLINA'S CLAIMS

A. Count I

In Count I, Molina claims that the United States breached a money-mandating statute, Section 1342, and its implementing regulations including, *inter alia*, 45 C.F.R. § 153.510. *See* Compl. ¶¶ 293-306. The Federal Circuit recently confirmed the governing "standard for determining whether jurisdiction exists under the Tucker Act with respect to a claim for money under a statute and regulations," as established by the Supreme Court and Federal Circuit. *Roberts v. United States*, 745 F.3d 1158, 1161 (Fed. Cir. 2014). Just two requirements must be satisfied. First, "[f]or jurisdiction to exist, the statute and regulations must be such that they 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id.* (quoting *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 472 (2003)).[33] Second, "the statute and regulations must be money-mandating as to the class of which plaintiff claims to be a member." *Id.*; *see also Fisher*, 402 F.3d at 1173-74. "[O]nce the regulations provide that a particular class is entitled to [money-mandating payment] and the plaintiff *alleges* that he is within that class, the regulations are money-mandating and the court has jurisdiction." *Roberts* at 1161 (citing *Doe II*, 463 F.3d at 1325) (emphasis added); *see Moda*, 2017 WL 527588, at *10.

Molina has unquestionably satisfied both jurisdictional prongs. First, Section 1342[34] and its implementing regulations[35] are indisputably money-mandating provisions. *See Land of Lincoln*, 129 Fed. Cl. at 97 ("Section 1342 and the implementing regulation are money-mandating sources of law."); *Health Republic*, 129 Fed. Cl. at 770 ("Defendant does not dispute that these two provisions [Section 1342 and its implementing regulations] mandate the payment of money to

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

[34] *See* 42 U.S.C. § 18062(b)(1) ("[T]he Secretary shall pay to the plan.").

[35] *See* 45 C.F.R. § 153.510(b) ("HHS will pay the QHP.").

plaintiff and other similarly situated insurers. Indeed, it would be folly to do so."); *Moda*, 2017 WL 527588, at *10 ("[T]hese provisions are clearly money-mandating."); *Maine*, No. 16-967C, slip op. at 2 ("On the jurisdictional question, we agree with the opinions cited above and adopt their reasoning. Plaintiff has presented a claim for payment under a statute that mandates the payment of money to participating insurance providers should their costs exceed a target amount.").[36] Second, as a QHP in the period from CY 2014 through CY 2016, Molina is a member of the class that Congress prescribed to receive risk corridors payments under the statute and regulations. Just as it held in the four recent opinions regarding risk corridors claims, the Court should find here that it has subject matter jurisdiction over Molina's claim for the Government's violation of Section 1342 and its implementing regulations. *See Land of Lincoln*, 129 Fed. Cl. at 97; *Health Republic*, 129 Fed. Cl. at 772; *Moda* at *10; *Maine*, slip op. at 2.

B. Count III

The Court unquestionably also has Tucker Act jurisdiction to hear Molina's breach of implied-in-fact contract claim. *See Marchena v. United States*, 128 Fed. Cl. 326, 331 (2016) (Wheeler, J.) (recognizing that a "low threshold requirement" exists to establish jurisdiction over contract claims). A plaintiff claiming the Government has breached an implied-in-fact contract need only make a "non-frivolous *allegation* of a contract with the government." *Mendez v. United States*, 121 Fed. Cl. 370, 378 (2015) (quoting *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011)) (emphasis in original). To establish jurisdiction, a plaintiff must therefore plead the elements of a contract with the Government: "(1) mutuality of intent to contract; (2) consideration; (3) an unambiguous offer and acceptance; and (4) actual authority on the part of the

[36] In the *Maine* case, Judge Bruggink found in the plaintiff-insurer's favor on the questions of jurisdiction and ripeness, and reserved ruling on the merits of the Government's motion to dismiss under Rule 12(b)(6) pending supplemental briefing from the parties. *See Maine*, No. 16-967C, slip op. at 2-3.

government's representative to bind the government." *Fisher v. United States*, 128 Fed. Cl. 780, 785 (2016) (*quoting Biltmore Forest Broad. FM, Inc. v. United States*, 555 F.3d 1375, 1380 (Fed. Cir. 2009) (citation omitted)).

In its Complaint, Molina alleges each of the elements of an implied-in-fact contract. *See, e.g.*, Compl. ¶¶ 324-346. Molina has demonstrated that HHS extended an offer for a unilateral contract that insurers could accept by offering QHPs on the ACA Exchanges, and Molina accepted this offer when it began offering QHPs. *See* Compl. ¶¶ 327-328. Molina further alleges that the Secretary of HHS, as well as the HHS Secretary's agents, had the authority to bind the Government. *See* Compl. ¶¶ 327, 335, 340. Finally, Molina alleges that the Government breached its contract with Molina by paying it less than Molina is owed under the terms of the contract. *See* Compl. ¶¶ 342-346. "[T]hese non-frivolous allegations are all that is required. Therefore, the Court also has subject-matter jurisdiction over [Molina's] contract claim." *Moda*, 2017 WL 527588, at *11 (citing *Land of Lincoln*, 129 Fed. Cl. at 98-99).

II. MOLINA'S CLAIMS ARE RIPE BECAUSE ANNUAL RISK CORRIDORS PAYMENTS ARE REQUIRED

"Ripeness is a justiciability doctrine that prevents the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Shinnecock Indian Nation v. United States*, 782 F.3d 1345, 1348 (Fed. Cir. 2015) (citations and internal punctuation omitted). Therefore, "[a] court should dismiss a case for lack of ripeness when the case is abstract or hypothetical …. A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required." *Rothe Dev. Corp. v. Dep't of Def.*, 413 F.3d 1327, 1335 (Fed. Cir. 2005).

As this Court already explained, the ripeness question here is *whether* annual payments are required; the question of whether *full* annual payments are required goes to the merits of this case.

See Moda, 2017 WL 527588, at *13; *see also id.* at *13 n.10 (explaining incorrect combining of "when" and "whether" questions in ripeness analysis in *Land of Lincoln*). Molina's claims for *immediate* monetary damages for past-due CY 2014 and CY 2015 risk corridors payments are *very* real – *not* abstract, hypothetical or conjectural. *See Land of Lincoln*, 129 Fed. Cl. at 101; *Health Republic*, 129 Fed. Cl. at 778; *Moda*, 2017 WL 527588, at *14. No "abstract disagreements over administrative policies"[37] or "further factual development[s]"[38] prevent this Court from adjudicating Molina's claims.

As it did in *Moda*, this Court should reject any assertion by Defendant that Molina's claims are not ripe on the theory that money damages are not yet "presently due" as against the weight of authority of this Court, the Federal Circuit, and the Supreme Court. *See, e.g.*, *Land of Lincoln*, 129 Fed. Cl. at 97-102; *Health Republic*, 129 Fed. Cl. at 772-78; *Moda*, 2017 WL 527588, at *12-14; *Maine*, No. 16-967C, slip op. at 2-3. As this Court explained in disposing of Defendant's ripeness argument in *Moda*, "[b]oth Section 1342 and HHS's interpretation of Section 1342 require annual payments to insurers," and, "[a]s a result, the Court can quite easily determine whether or not full risk corridors payments were required for the 2014 and 2015 plan years." *Moda*, 2017 WL 527588, at *14. "[Molina's] claims are therefore ripe for adjudication." *Id.* Concurring with this Court's reasoning, Judge Bruggink recently held in the *Maine* risk corridors case:

> We reject the notion that the statute does not mandate the payment of money on a yearly basis. There is no indication that the statute means anything other than what it says, namely, that Congress adopted a risk-sharing program operated on a yearly basis. … Notwithstanding HHS' *post hoc* pronouncements, the clear inference from the text of the statute is that payment will be made on a yearly basis. The claim is thus ripe.

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[37] *White & Case LLP v. United States*, 67 Fed. Cl. 164, 172 (2005) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)).

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

Maine, No. 16-967C, slip op. at 2-3 (citing *Moda*, 2017 WL 527588, at *14) (citation omitted).

A. Section 1342 Requires Annual Risk Corridors Payments

As this Court concluded in *Moda*, while no specific payment schedule for the risk corridors program is found on the face of Section 1342, Congress' intent for annual risk corridors payments is found throughout Section 1342. *See Moda*, 2017 WL 527588, at *12. Together, Section 1342's references to distinct years,[39] its requirement that the ACA risk corridors program "shall be based on" the Medicare Part D risk corridors program,[40] and its function and structure as part of the ACA's 3Rs trifecta[41] mean that Congress required HHS to make annual risk corridors payments.[42] *See id.* at *12-13 (concurring in full with *Health Republic*, 129 Fed. Cl. at 772-76). Considering all of these factors, as this Court already has, it is clear that Congress intended risk corridors to be

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[39] Section 1342 directs the HHS Secretary to "establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016," rather than a program for "calendar years 2014 *through* 2016." *Health Republic*, 129 Fed. Cl. at 774 (quoting 42 U.S.C. § 18062(a)) (emphasis added). HHS also must calculate "payments in" and "payments out" of the program on the basis of insurers' costs in "any plan year," not over the life of the program. 42 U.S.C. § 18062(b)(1), (b)(2), (c)(1), (c)(2).

[40] The most plausible reading of this mandate in Section 1342 is that the statute incorporates Medicare Part D's annual risk corridors payment structure by reference. *See, e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here … Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."); *Moda*, 2017 WL 527588, at *12.

[41] Congress was aware that if the 3Rs programs "did not provide for prompt compensation to insurers upon the calculation of amounts due, insurers might lack the resources to continue offering plans on the exchanges." *Health Republic* at 775; *see Moda* at *13. As this Court recognized, this incentive alone indicates that a three-year payment framework is unlikely, given that courts generally do not "interpret federal statutes to negate their own stated purposes." *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973); *see also King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) ("Congress passed the [ACA] to improve health insurance markets, not to destroy them. If at all possible, we must interpret the [ACA] in a way that is consistent with the former, and avoids the latter."); *Moda* at *13.

[42] Furthermore, courts read statutes to preserve common law principles. *See United States v. Texas*, 507 U.S. 529, 534 (1993). Under the common law, a statute that does not set a specific payment timetable nevertheless requires parties to make payments within a reasonable period of time. *See Eden Isle Marina, Inc. v. United States*, 113 Fed. Cl. 372, 493 (2013); *Goodman v. Praxair, Inc.*, 494 F.3d 458, 465 (4th Cir. 2007). Insurers, like Molina, offer their QHPs on a yearly schedule, so yearly payments are reasonable. *See Moda*, 2017 WL 527588, at *13 n.9.

paid annually. *See id.* at *13. Thus, Molina's injury is not abstract or hypothetical because the annual risk corridors payment deadlines for CY 2014 and CY 2015 have passed, and Molina's claims are ripe. *See id.* (concurring with *Health Republic*'s ripeness findings); *Maine*, No. 16-967C, slip op. at 2-3 (concurring with *Moda*'s ripeness findings).

B. HHS Also Interprets Section 1342 to Require Annual Risk Corridors Payments

As this Court previously held in *Moda*, even if Section 1342 were ambiguous regarding annual risk corridors payments (which it is not), and this Court believed it were necessary to consider HHS' interpretation of the agency's risk corridors obligations to determine whether risk corridors payments were required annually, a review of HHS' own interpretations demonstrates that HHS interpreted Section 1342 to require annual risk corridors payments. *See Moda*, 2017 WL 527588, at *13.[43] This Court correctly determined that none of HHS' pronouncements or actions indicate that the agency believed it could "choose not to make annual risk corridors payments to insurers" if it had the funds to make payments. *Health Republic*, 129 Fed. Cl. at 778; *see Moda* at *14. Instead, the Court found that HHS followed a rigid annual payment schedule in practice as well as in interpretation. *See Moda* at *14. Accordingly, here, as in *Moda*, because HHS interpreted Section 1342 and its own regulations as requiring annual risk corridors payments to insurers, Molina's claims are ripe for adjudication.

III. COUNT I: MOLINA IS ENTITLED TO SUMMARY JUDGMENT FOR THE GOVERNMENT'S VIOLATION OF ITS STATUTORY AND REGULATORY OBLIGATIONS TO MAKE FULL ANNUAL RISK CORRIDORS PAYMENTS

A. Section 1342 Requires Full Annual Risk Corridors Payments to QHPs

This Court made clear in *Moda* that Section 1342 not only requires *annual* risk corridors

[43] As it did in *Moda*, the Court should reject any argument by Defendant that HHS' interpretation established a three-year payment framework with final payment not due until sometime in 2017 or later, because that argument conflates the merits question ("whether full annual payments are required") with the ripeness question ("whether annual payments are required"). *See Moda*, 2017 WL 527588, at *13-14.

payments – it also requires that *full* risk corridors payments shall be paid *each year*. *See Moda*, 2017 WL 527588, at *22 (granting QHP partial summary judgment on the issue of the Government's liability for risk corridors payments because "Section 1342 requires full annual payments to insurers, and the Government has not made these payments"). As the Court found in *Moda*, it should similarly conclude here that there is no genuine dispute of material fact that Section 1342 itself requires full annual risk corridors payments, and therefore Molina is entitled to summary judgment as a matter of law on Count I. *See Moda* at *15.

1. Congress Did Not Design Section 1342 to be Budget Neutral

As this Court concluded in *Moda*, Section 1342 is not budget neutral on its face. *See Moda*, 2017 WL 527588, at *15. "Statutory interpretation starts with the plain language of the text." *Caddell Constr. Co. v. United States*, 123 Fed. Cl. 469, 476 (2015) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)); *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Section 1342 expressly states that the HHS Secretary HHS "shall pay" specific amounts of money to QHPs that qualify for risk corridors payments in a plan year. 42 U.S.C. § 18062(b)(1); *see Moda* at *15. The amount of money the HHS Secretary must pay is tied to each respective QHP's ratio of costs to premiums collected, and Section 1342 gives the HHS Secretary *no discretion* to increase or reduce this amount. *See* 42 U.S.C. § 18062(b); *Moda* at *15. While Section 1342(a) gives the HHS Secretary authority to "establish and administer" the risk corridors program, *see* 42 U.S.C. § 18062(a), the later directive that the HHS Secretary "shall pay" QHPs experiencing losses these specific amounts of money is unambiguous and overrides any discretion the HHS Secretary otherwise could have in making "payments out" under the risk corridors program. 42 U.S.C. § 18062(b); *see Moda* at *15. Finally, there is *no language of any kind* in Section 1342

that makes "payments out" of the risk corridors program contingent on "payments in" to the program. *See generally* 42 U.S.C. § 18062(b) & (c); *see Moda* at *15.[44] Section 1342 simply directs the HHS Secretary to make full "payments out" – therefore, "full 'payments out'" the HHS Secretary "must make." 42 U.S.C. § 18062(b); *Moda* at *15. Neither the term nor the concept of "budget neutral" appears anywhere in Section 1342 or its implementing regulations. *See generally* 42 U.S.C. § 18062; 45 C.F.R. §§ 153.500-.540.[45]

a. Medicare Part D

The differences in the wording used to describe the ACA risk corridors programs in Section 1342, and the program it was explicitly based upon in Medicare Part D, does not require a finding that Section 1342 required budget neutrality. *See Moda*, 2017 WL 527588, at *15. Medicare Part D's risk corridors program's authorizing statute provides, "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); *see Moda* at *15. The absence of this language in Section 1342, however, does not mean that Congress intended the ACA's risk corridors program to be "budget neutral." *See Moda* at *15.

As this Court concluded, excluding that text does not make a statute budget neutral. *See Moda*, 2017 WL 527588, at *15. In fact, other differences between the Medicare Part D risk corridors statute and Section 1342 suggest that this was not Congress's intent. *See id.* For example, the Medicare Part D statute provides only that the Government "shall establish a risk

[44] Nor are the Government's risk corridors payment obligations "uncapped" as Defendant previously argued. Section 1342(b) explicitly capped the Government's and QHPs' risk both by dollar amount (the prescribed statutory formula) and by duration (payment obligations expiring after CY 2016). *See* 45 U.S.C. § 18062(b).

[45] Where Congress actually intended a risk-mitigation provision of the ACA to be budget neutral, it knew how to include limiting language. *See* 42 U.S.C. § 18061(b)(1) ("[T]he applicable reinsurance entity collects payments under subparagraph (A) and uses amounts so collected to make reinsurance payments to health insurance issuers described in subparagraph (A).") (reinsurance program).

corridor," not that the HHS Secretary "shall pay" specific amounts to insurers. *Compare* 42 U.S.C. § 1395w-115(e)(3)(A) *with* 42 U.S.C. § 18062(b); *see Moda* at *15. While the Medicare Part D statute provides that "the Secretary shall increase the total of the payments made to the sponsor or organization offering the plan for the year under this section" by the risk corridors amount, *see* 42 U.S.C. § 1395w-115(e)(3)(B), Section 1342's stronger payment language – "*the Secretary shall pay*" – obligates the HHS Secretary to make payments and removes the HHS Secretary's discretion, so a further payment directive to the HHS Secretary is unnecessary. 42 U.S.C. § 18062(b) (emphasis added); *see Moda* at *15.

Additionally, Congress expressly mandated that the ACA risk corridors program "shall be based on" the Medicare Part D risk corridors program. 42 U.S.C. § 18062(a). Those words are not mere surplusage – they must be given their intended effect. *See, e.g.*, *Glover v. West*, 185 F.3d 1328, 1332 (Fed. Cir. 1999) ("In construing a statute or regulation, ... [courts] attempt to give full effect to all words contained within that statute or regulation."). Section 1342 incorporates Medicare Part D's annual and full payment structure by reference. *See, e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here ... Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute."); *Moda*, 2017 WL 527588, at *12. Therefore, Congress's reference to Medicare Part D shows that Congress "approved" of annual and full risk corridors payments under Section 1342. *See Moda* at *12 (citing *Health Republic*, 129 Fed. Cl. at 775).

b. Congressional Budget Office

Nor does CBO's omission of the risk corridors program from its March 20, 2010 letter assessing the ACA's expected financial impact demonstrate that Congress must have intended the risk corridors program to be budget neutral. *See* Letter, CBO to Hon. Nancy Pelosi (Mar. 20,

2010) (Compl. Ex. 72). First, even if Congress "explicitly relied on the CBO's findings" when it enacted the ACA, *Land of Lincoln*, 129 Fed. Cl. at 104, as this Court already has correctly concluded, "the CBO's failure to speak on Section 1342's budgetary impact was simply a failure to speak." *Moda*, 2017 WL 527588, at *15. There is absolutely nothing in either the CBO's March 20, 2010 letter to Speaker Pelosi, or any of the preceding CBO letters to congressional leadership,[46] stating why risk corridors were omitted from all of those analyses. *See generally* Letter, CBO to Hon. Nancy Pelosi (Mar. 20, 2010) (Compl. Ex. 72). Second, extrapolating a "budget neutral" interpretation from the CBO's silence in its March 20, 2010 letter does not even make sense, because the CBO *did* score the reinsurance and risk-adjustment programs, both of which are explicitly required to be budget neutral under their governing regulations. *See Moda* at *15.[47] "It would not [have been] particularly difficult for the CBO to simply score the risk corridors program alongside its budget-neutral sister programs if it expected the [risk corridors] program to be budget-neutral. Instead, the CBO initially kept silent on the risk corridors program's budgetary impact." *Id.*

Third, regardless, "the CBO is not Congress, and its reading of the statute is not tantamount to congressional intent." *Sharp v. United States*, 580 F.3d 1234, 1238-39 (Fed. Cir. 2009). The CBO's March 20, 2010 letter thus does nothing to assist with determining Congress' intent in Section 1342. Furthermore, once the CBO *actually* addressed Section 1342's budgetary impact, long after enactment of the ACA, the CBO affirmatively stated that, in contrast to the

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[46] Public records show that the CBO sent letters regarding the ACA to Sen. Baucus on October 7, 2009, Sen. Reid on November 18, 2009, Sen. Bayh on November 30, 2009, Sen. Reid on December 19, 2009, Sen. Reid on March 11, 2010, and Speaker Pelosi on March 18, 2010.

[47] A "key difference" between risk corridors and the other 3Rs programs "is that nothing in the other programs' governing statutes requires the Secretary of HHS to pay insurers specific amounts," making it "fair to say that Congress gave HHS discretion to determine whether the risk-adjustment and reinsurance programs would be budget-neutral" – but no such discretion was given regarding the risk corridors program. *Moda* at *15 n.11 (citing 42 U.S.C. §§ 18061, 18063).

budget-neutral risk adjustment and reinsurance payments and collections, "risk corridor collections (which will be recorded as revenues) will not necessarily equal risk corridor payments, so that program can have net effects on the budget deficit." CBO, *The Budget and Economic Outlook: 2014 to 2024*, at 59 (Feb. 2014); *see also id.* at 110 ("[U]nder the risk corridor program … [i]f insurers' costs exceed their expectations, on average, the risk corridor program will impose costs on the federal budget; if, however, insurers' costs fall below their expectations, on average, the risk corridor program will generate savings for the federal budget."); *Moda*, 2017 WL 527588, at *16. While the CBO's earlier baseline projections from May 2013 "estimated that payments and collections for risk corridors would *roughly* offset each other," *id.* at 114 (emphasis added), this does not indicate that the CBO (much less Congress) understood that the risk corridors program was required to be budget neutral in 2010 when the ACA was enacted.

c. GAO September 20, 2014 Opinion

The Government's liability for its mandatory risk corridors payment obligations is not restricted to "payments in" under the statute. As the GAO determined, QHPs' "payments in" to the program are not the only source of funds available to make risk corridors payments. *See Moda*, 2017 WL 527588, at *16. As this Court concluded in *Moda*, the GAO's September 30, 2014 Opinion actually found two sources of funding for risk corridors payments: (i) the 2014 CMS Program Management appropriation, and (ii) "payments in" from profitable plans (which the GAO characterized as "user fees"). *See Moda* at *16; Comp. Gen. B-325630 at 4-7 (Sept. 30, 2014). The GAO's opinion also flatly contradicts the notion that only "user fees" were available for risk corridors payments because HHS only began making payments during fiscal year 2015, because the GAO found that the 2014 CMS Program Management Appropriation "would have been available" for 2014 risk corridors payments. *See* Comp. Gen. B-325630 at 7 (Sept. 30, 2014); *Moda* at *16 n.12. "The fact that HHS decided not to use [the $3.6 billion] appropriation

for that purpose is immaterial" – the appropriation was nevertheless available for such payments. *Moda* at *16 & n.12. Congress thus "did not restrict the funding for the risk corridors program to the 'payments in' under the program." *Id.* at *16. Moreover, the GAO did not discuss budget neutrality, or conclude that Section 1342 payments were limited by the amount of collections. *See generally* Comp. Gen. B-325630 at 1-7 (Sept. 30, 2014).

d. ACA's Structure and Purpose

Congress' intent can also be gleaned from the structure and purpose of the ACA, of which Section 1342 is undisputedly an integral part. *See Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000). The Supreme Court has already confirmed that the fundamental purpose of the ACA was to stabilize the health insurance markets. *See King v. Burwell*, 135 S. Ct.at 2492-93 ("[T]he statutory scheme compels us to reject petitioners' interpretation because it would destabilize the individual insurance market … and likely create the very 'death spirals' that Congress designed the Act to avoid."). Any attempt by Defendant to retroactively construe Section 1342 as budget neutral – allowing scores of QHPs to fail or suffer insurmountable losses for lack of annual risk corridor payments – is clearly inconsistent with the undisputed fundamental purpose of the ACA, and therefore must be disregarded. No deference is due to a Government interpretation that is "manifestly contrary to the statute." *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 53-54 (2011).[48]

2. HHS Did Not Originally Believe that Section 1342 was Budget Neutral, and Has Always Believed that Full Payments are Due

While the Court should find here, as it did in *Moda*, that the unambiguous language of Section 1342 is dispositive as to Congress' intent, the Court further held in *Moda* – and should

[48] The actions of a later Congress' provide little insight into a previous Congress' intentions regarding a bill. *See Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005) ("The significance of appropriations bills is of course limited and the associated legislative history even more so. ... [P]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight."); *accord Moda*, 2017 WL 527588, at *18 n.14.

hold here – that HHS itself did not believe the risk corridors program to be budget neutral from the beginning. *See Moda*, 2017 WL 527588, at *16. As this Court found, "HHS has consistently recognized that Section 1342 is not budget neutral." *Id*. at *17. In *Moda*, after reviewing HHS' various stated positions on the subject, the Court correctly concluded that HHS "has never conflated its inability to pay with the lack of an obligation to pay." *See Moda* at *17. While acknowledging HHS' shortfall in funding to pay the risk corridors obligations, the agency repeatedly has admitted it owes "full" risk corridors payments to QHPs, including Molina.[49] Although the FY 2015 and FY 2016 appropriations riders presented a funding issue for the agency, the Government's statutory obligation to make full annual risk corridors payments to QHPs like Molina has never abated and is enforceable in this Court. *See, e.g.*, *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966) ("The failure to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in the Court of Claims.") (cataloguing cases); *Moda* at *17; *Moda* at *22 ("[M]aking funds from a specific account unavailable to a specific agency for a specific purpose 'prevents the accounting officers of the Government from making disbursements,' but private parties may still recover their funds in this Court.") (quoting *N.Y. Airways*).

B. The FY 2015 and FY 2016 Appropriations Riders Did Not Vitiate the Government's Statutory Duty to Make Full Annual Risk Corridors Payments

Because Congress did not initially make Section 1342 budget neutral when the ACA was enacted in 2010, the only way that Section 1342 could have become budget neutral would have been through later repeal or amendment of Section 1342's mandatory payment obligation by

[49] *See, e.g.*, 79 FR 30239, 30260 (May 27, 2014) ("HHS recognizes that the [ACA] requires the Secretary to make full payments to issuers.") (Compl. Ex. 76); *Moda* at *17 (cataloguing some other instances).

Congress. *See Moda*, 2017 WL 527588, at *17, *18. It is undisputed that this did not occur. *See id.* at *17-22.

As this Court recognized in *Moda*, Congress' appropriations riders for FY 2015 and FY 2016[50] could not retroactively make Section 1342 budget neutral by merely limiting the available funding source only to "payments in" from profitable QHPs. *See Moda*, 2017 WL 527588, at *17. First, "it would be illogical to divine the intent of a former Congress from the actions of a later one." *Moda*, 2017 WL 527588, at *18 n.14 (citing *United States v. United Mine Workers of Am.*, 330 U.S. 258, 281-82 (1947) ("We fail to see how the remarks of these Senators in 1943 can serve to change the legislative intent of Congress expressed in 1932.")). This is particularly true with the highly politicized ACA. *See Moda* at *18 n.14. Actually, the fact that Congress purposely decided that it subsequently needed to limit risk corridors funding sources through appropriations riders demonstrates Congress' recognition that Section 1342 was not budget neutral. If Section 1342 were budget neutral, then there would have been no need for Congress to pass Sections 225 and 227, artificially imposing budget neutrality on risk corridors payments through funding limitations in appropriations.

Second, the FY 2015 and FY 2016 appropriations riders did not, in any way, abrogate or diminish the Government's pre-existing, mandatory risk corridors payment obligation in Section

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[50] In both years, the text of the restriction was as follows:

> 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 [the ACA] (relating to risk corridors).

128 Stat. at 2491; 129 Stat. at 2624; *see Moda* at *17.

1342.[51] *See Moda*, 2017 WL 527588, at *18-22. "It has long been established that the mere failure of Congress to appropriate funds, without words modifying or repealing expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." *N.Y. Airways*, 369 F.2d at 748; *Moda* at *18. Further, "[r]epeals by implication are not favored." *United States v. Langston*, 118 U.S. 389, 393 (1886); *see Moda* at *18.[52] Practically speaking, "[r]epealing an obligation of the United States is a serious matter, and burying a repeal in a standard appropriations bill would provide clever legislators with an end-run around the substantive debates that a repeal might precipitate." *Moda* at *18 (citing *Gibney v. United States*, 114 Ct. Cl. 38, 51 (1949)). Thus, "the uniform rule was that if [the restriction] were simply a withholding of funds and not a legislative provision under the guise of a withholding of funds[,] it had no effect whatever on the legal obligation." *Gibney*, 114 Ct. Cl. at 51; *see Moda* at *18.

Third, for an appropriations law (such as the FY 2015 and FY 2016 appropriations riders) to affect the underlying legal obligation, "[t]he intent of Congress to effect a change in the substantive law via provision in an appropriation act must be *clearly manifest*." *N.Y. Airways*, 369 F.2d at 749 (emphasis added); *see Moda*, 2017 WL 527588, at *18; *Prairie Cnty., Mont. v. United*

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[51] Those riders may have prevented HHS from complying with Section 1342's mandatory payment obligation, but as the Government argued in a separate case regarding cost-sharing reimbursements under the ACA, "the absence of an appropriation would not prevent the insurers from seeking to enforce that statutory right through litigation." Def.'s Mem. in Supp. of Mot. for Sum. J. at 20, *U.S. House of Representatives v. Burwell*, No. 1:14-cv-01967-RMC (Dec. 2, 2015 D.D.C.), ECF No. 55-1; *see Wetsel-Oviatt Lumber Co. v. United States*, 38 Fed. Cl. 563, 571 (1997) ("Insufficient appropriations at the agency level 'merely impose[] limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.'") (quoting *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)).

[52] As here, "[t]his rule applies with especial force when the provision advanced as the repealing measure was enacted in an appropriations bill." *United States v. Will*, 449 U.S. 200, 221-22 (1980) (emphasis added). Because appropriations laws "have the limited and specific purpose of providing funds for authorized programs," the statutory instructions included in them are presumed not to impact substantive law. *See TVA v. Hill*, 437 U.S. 153, 190 (1978).

States, 782 F.3d 685, 689 (Fed. Cir.), *cert. denied*, 136 S. Ct. 319 (2015) (holding that while Congress may have the legal authority prospectively to amend substantive preexisting statutory obligations, it must do so "expressly or by clear implication."). To determine whether Congressional intent was clearly manifest, courts generally look first to the language of the appropriations law. *See, e.g.*, *N.Y. Airways*, 369 F.2d at 750 ("If the purpose of the limiting language in the appropriation under consideration … was to suspend or amend section 406(c) of the Federal Aviation Act of 1958, it was not so expressed by statute."); *Moda* at *18. Courts then look to ancillary considerations, such as the legislative history of the appropriations law, although any congressional intent expressed therein must be "clear and uncontradicted." *N.Y. Airways*, 369 F.2d at 750; *Moda* at *18.

Several courts have refused to find that appropriations laws, similar to those at issue here, amended or repealed the Government's substantive obligations, while others have found the opposite when confronted with different statutes. *See Moda*, 2017 WL 527588, at *18. As this Court concluded in *Moda*, the FY 2015 and FY 2016 appropriations riders in this case did not manifestly amend or repeal the Government's "shall pay" obligation in Section 1342. *See id.* at *20-22. This Court analyzed the identical question and case law on this issue and held, "the statutory language" and wording of "[t]he appropriations riders as issue here" demonstrate that"[t]his case is more like the first group of cases" where "the appropriations riders limit only the use of funds appropriated to a specific account," but "do not expand the limitation to other sources of funds." *Id.* at *20 (citing *Gibney v. United States*, 114 Ct. Cl. 38 (1949)); *see id.* at *18-19 (analyzing *Gibney* and other cases in *Gibney*'s group: *United States v. Langston*, 118 U.S. 389

(1886), *N.Y. Airways*, and *District of Columbia v. United States*, 67 Fed. Cl. 292 (2005)).[53] Specifically, after carefully analyzing the *Langston*, *Gibney*, *New York Airways* and *District of Columbia* cases relied upon by Moda, and by Molina here,[54] this Court found that the FY 2015 and FY 2016 appropriations riders "did not modify or repeal the Government's obligation under Section 1342 to make 'payments out' to lossmaking QHP issuers." *Moda*, 2017 WL 527588, at *18-22. Distinguishing the *Dickerson*,[55] *Will*,[56] and *Republic Airlines*[57] cases relied upon by Defendant in *Moda*, the Court concluded that the appropriation riders did "not modif[y] the risk corridors program to make it budget-neutral." *Id.* at *22.[58]

Accordingly, no genuine dispute exists that the United States is liable to Molina under Section 1342 and its implementing regulations to make full annual risk corridors payments to Molina, and the Government has failed to make these payments in full and on time. Furthermore, Congress' FY 2015 and FY 2016 appropriations riders did not amend Section 1342 to make the statute budget neutral. As it did in *Moda*, this Court should find that Molina is entitled to summary judgment in its favor on Count I. *See Moda*, 2017 WL 527588, at *22.

IV. COUNT III: THE GOVERNMENT BREACHED AN IMPLIED-IN-FACT CONTRACT WITH MOLINA BY REFUSING TO MAKE FULL ANNUAL RISK CORRIDORS PAYMENTS

Additionally, this Court should recognize – as it did in *Moda* – that the facts here "just as

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53 *See also* GAO, *Principles of Federal Appropriations Law*, at 2-63 (4th ed., 2016 revision) (citing *Langston*, *Gibney*, *N.Y. Airways*, and other cases in which no "reduction by appropriation" was found), *available at* https://www.gao.gov/assets/680/675709.pdf.

54 This position is further supported by *Greenlee Cnty., Ariz. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007), *Slattery v. United States*, 635 F.3d 1298, 1320-21 (Fed. Cir. 2011), and *United States v. Vulte*, 233 U.S. 509, 514-15 (1914).

55 *United States v. Dickerson*, 310 U.S. 554 (1940).

56 *United States v. Will*, 449 U.S. 200 (1980).

57 *Republic Airlines, Inc. v. U.S. Dep't of Transp.*, 849 F.2d 1315 (10th Cir. 1988).

58 The risk corridors appropriations language in the riders: (i) does not suspend the underlying statutory mandatory payment obligation; (ii) does not prohibit the use of funding from "any other Act"; (iii) does not specify that the funding limits were imposed "notwithstanding" the substantive risk corridors obligation; and (iv) only limits the sources of funding that the Government may use to fulfill its statutory obligation to make risk corridors payments.

strongly indicate that the Government breached an implied-in-fact contract when it failed to pay" full annual risk corridors payments Molina. *Moda*, 2017 WL 527588, at *23. Accordingly, the Court should find in the alternative that Molina is entitled to summary judgment on Count III for the Government's breach of an implied-in-fact contract.

An implied-in-fact contract "is not created or evidenced by explicit agreement of the parties, but is inferred as a matter of reason or justice from the acts or conduct of the parties." *Prudential Ins. Co. of Am. v. United States*, 801 F.2d 1295, 1297 (Fed. Cir. 1986). To establish the Government's liability on Count III, Molina must show that there is no genuine dispute of material fact regarding four elements: (1) mutuality of intent to contract, (2) consideration, (3) "lack of ambiguity in offer and acceptance," and (4) that the "[G]overnment representative whose conduct is relied upon [has] actual authority to bind the [G]overnment in contract." *Moda*, 2017 WL 527588, at *23 (quoting *Lewis v. United States,* 70 F.3d 597, 600 (Fed. Cir. 1995)); *see Trauma Serv. Group v. United States,* 104 F.3d 1321, 1325 (Fed. Cir. 1997) (explaining that the elements of an implied-in-fact contract are identical to those of an express contract). As demonstrated below, Molina has satisfied all of these elements and is also entitled to summary judgment in its favor on Count III.

A. <u>There Was Mutuality of Intent to Contract</u>

As this Court recognized in *Moda*, because the Government does not intend to bind itself in contract whenever it creates a statutory or regulatory incentive program, *see Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985), courts "proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation." *Brooks v. Dunlop Mfg. Inc.*, 702 F.3d 624, 631 (Fed. Cir. 2012); *see Moda*, 2017 WL 527588, at *23. Statutory or regulatory provisions that *do* bind the Government in contract have certain hallmarks, which are present in this case, as they

were in *Moda*. *See Moda* at *23. First, the provision must create a program that offers specified incentives in return for the voluntary performance of private parties. *See Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 405-06 (Ct. Cl. 1957); *Moda* at *23. This performance must be in the form of an actual undertaking; simply "fill[ing] in the blanks of a Government prepared form," such as an application, does not constitute acceptance by performance. *Cutler-Hammer, Inc. v. United States*, 441 F.2d 1179, 1183 (Ct. Cl. 1971). Second, the provision must be promissory, giving the agency officials administering the program no discretion to decide whether or not to award incentives to parties who perform. *See Radium Mines*, 153 F. Supp. at 406; *Moda* at *23. "In short, statutes or regulations show the Government's intent to contract if they have the following implicit structure: if you participate in this program and follow its rules, we promise you will receive a specific incentive." *Moda* at *23.

In *Radium Mines*, for example, the Government created an incentive program in which an agency Circular promised payment at a "guaranteed minimum price" to private parties who had uranium and wished to sell it. 153 F. Supp. at 404-05. Further, the Government had restricted private uranium production to such an extent that private parties essentially produced uranium for sale to the Government only. *Id.* at 406. The Government argued that it did not intend to make an offer in its Circular, but merely an invitation to offer. *Id.* at 405. The Court of Claims rejected this argument, stating:

> It could surely not be urged that one who had complied in every respect with the terms of the Circular could have been told by the Government that it would pay only half the 'Guaranteed Minimum Price,' nor could he be told that the Government would not purchase his uranium at all."

Id. at 406. In *Radium Mines*, the agency officials had no discretion to determine (1) whether they would purchase uranium offered to them, or (2) the price they would pay producers. *See Moda*, 2017 WL 527588, at *24 (discussing *Radium Mines*). Therefore, the Circular was held to be an

offer, and the Government had shown intent to contract. *Id.* at 405-06; *see also Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 739 n.11 (1982) (citing *Radium Mines* as example of cases "where contracts were inferred from regulations promising payment").

Similarly, in *New York Airways*, a statute authorized the Civil Aeronautics Board to set a monthly subsidy for helicopter companies. *See* 369 F.2d at 744. The statute further stated, "The Postmaster General shall make payments out of appropriations for the transportation of mail by aircraft of so much of the total compensation as is fixed and determined by the Board under this section…." *Id.* at 745. Congress then failed to appropriate the necessary funds to pay the compensation the Board "fixed and determined," so the Postmaster General did not pay the helicopter companies. *Id.* at 745-46. While the Court of Claims in *New York Airways* found that helicopter companies could recover under the original statute, it also held in the alternative that "[t]he Board's rate order was, in substance, an offer by the Government to pay the plaintiffs a stipulated compensation for the transportation of mail, and the actual transportation of the mail was the plaintiffs' acceptance of that offer." *Id.* at 751. As in *New York Airways* and *Radium Mines*, this Court found in *Moda* that both of the required contractual elements were present here in the risk corridors context: (1) an incentive program that private parties could join voluntarily by performing services according to the program's rules, and (2) a firm Government promise to pay those parties a fixed amount if they performed the required services. *See Moda*, 2017 WL 527588, at *24 (discussing *Radium Mines* and *New York Airways*); *see also Baker v. United States*, 50 Fed. Cl. 483, 490 (2001) (recognizing that contracts can be "inferred from regulations promising payment" when the regulations are "promissory in nature") (citing *N.Y. Airways*, 117 Ct. Cl. at 816-17 and *Radium Mines*, 153 F. Supp. at 405-06).

The Court in *Moda* distinguished the cases relied upon by Defendant, such as *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12 (2011), and rejected Defendant's assertion that the

risk corridors program established in Section 1342 is not contractual.[59] *See Moda*, 2017 WL 527588, at *24. In *ARRA Energy*, the court articulated a simpler test than the Court of Claims' framework, namely, that the plaintiff "must point to specific language in [the statute] or to conduct on the part of the government that allows a reasonable inference that the government intended to enter into a contract." 97 Fed. Cl. at 27. Taking this statement quite literally, the *ARRA Energy* court found that Section 1603 of the American Recovery and Reinvestment Act of 2009 did not show the Government's intent to contract because it did not specifically require the Government to enter into contracts. *Id.* at 27-28. This Court in *Moda* properly rejected *ARRA Energy*'s narrow interpretation, and instead followed the Courts' analyses in *Radium Mines* and *New York Airways*, which did not turn on the invocation of the magic word "contract" in the statutes they examined. *See Moda* at *24. Both of those precedential cases examined the structure of the statutory programs that were before the Court of Claims, and determined whether the Government had expressed its intent to contract by using that structure. *See id.*

As this Court held in *Moda*, Molina has shown that the ACA clearly meets the criteria set out in *Radium Mines* and *New York Airways*. *See Moda*, 2017 WL 527588, at *24. First, it created an incentive program in the form of the Exchanges on which insurers could voluntarily sell QHPs. *See id.* The Molina Plaintiffs' performance went beyond merely filling out an application form; they needed to develop and offer QHPs for the Exchanges that would satisfy the ACA's new requirements and then sell those QHPs to consumers. *See id.*; 45 C.F.R. §§ 156.200, 156.210, 156.220, 156.230, 156.260, 156.270, 156.295, 156.410. In return for the insurers' participation, the Government promised the Molina Plaintiffs that they would receive risk corridors payments as a financial backstop if their annual allowable costs exceeded the statutory target set forth in

[59] *See, e.g.*, *W. Coast Gen. Corp. v. Dalton*, 39 F.3d 312, 315 (Fed. Cir. 1994) (holding that Court of Federal Claims decisions "do not set binding precedent for separate and distinct cases in that court").

Section 1342 and its implementing regulations. *See Moda* at *24. Finally, as this Court in *Moda* further concluded, and as discussed in detail *supra*, Section 1342 specifically directs the HHS Secretary to make risk corridors payments in specific sums, and HHS has no discretion to pay more or less than those sums. *See id.* Therefore, in this case, as in *Moda*, it is undisputed that the Government intended to enter into contracts with Molina, and there was mutuality of intent to contract. *See id.*

B. Molina Accepted the Government's Offer, and the Condition Precedent to Payment was Satisfied

As this Court held in *Moda*, here too Molina has demonstrated that there was offer and acceptance. Through the ACA, the Government offered to enter into a unilateral contract with insurers like Molina, which Molina accepted by its performance. *See Moda*, 2017 WL 527588, at *25 (citing *Contract*, Black's Law Dictionary (10th ed. 2014) and *Lucas v. United States*, 25 Cl. Ct. 298, 304 (1992)). The Government promised to make risk corridors payments in return for Molina's performance, and Molina accepted this offer through its performance: selling QHPs on the ACA Exchanges while adhering to the ACA's many requirements. *See id.*[60]

The Court in *Moda* rejected Defendant's argument that the insurer's "reliance" on the Government's promise to pay is immaterial to their contractual claim. *See Moda*, 2017 WL 527588, at *25. The Court correctly recognized that when the offeree fully performs under a unilateral contract in response to the offeror's promise of payment, one does not say that the offeree performed "in reliance" on the offeror's promise – although, to be sure, in all contracts the parties rely on each other's mutual promises to faithfully perform their end of the bargain, whether that is performance or payment. *See id.* Rather, this Court held in *Moda* that the QHP's

[60] Becoming a QHP was volitional for Molina. A health insurance issuer like Molina is not required to participate in the ACA Exchanges, but if it does, it commits to complying with an intricate set of specific obligations, in addition to becoming obligated to remit risk corridors charges. *See* 45 C.F.R. §§ 156.200, .210, .220, .230, .260, .270, .295, .410.

performance constituted an acceptance such that the Government's duty to pay had fully matured under the contract. *See id.* (citing Rest. (Second) of Contracts § 53 (Acceptance by Performance) and *Winstar Corp. v. United States*, 64 F.3d 1531, 1545 (Fed. Cir. 1995)). The Government's risk corridors payment obligation under the unilateral contract matured when Molina's QHPs satisfied the condition precedent: experiencing enough losses in a plan year to trigger the HHS Secretary's non-discretionary payment duties under Section 1342(b). *See id.* (defining a condition precedent as "an event that, if it does not occur, can discharge one party's duty to perform under the contract" (citing Restatement (Second) of Contracts § 224)); Decl. ¶¶ 4, 8-12. If all of Molina's QHPs had been profitable – or even had taken losses within three percent of their target amounts – then no risk corridors payments would have come due under Section 1342. *See Moda* at *25. It is undisputed, however, that a number of Molina's QHPs were unprofitable in plan years 2014 and 2015, thus satisfying the condition precedent. *See id.*; Decl. ¶¶ 4, 8-12.

C. There Was Consideration

In this case, as in *Moda*, the element of consideration has been established. *See Moda*, 2017 WL 527588, at *25. Consideration is a bargained-for performance or return promise. *See id.* (citing Restatement (Second) of Contracts § 71). Here, the Government offered consideration in the form of risk corridors payments under Section 1342. *See id.* In return, Molina offered performance under the contract by providing QHPs to consumers on the ACA Exchanges in California, Florida, Michigan, New Mexico, Ohio, Texas, Utah, Washington, and Wisconsin. *See* Decl. ¶ 3.

D. The HHS Secretary Had Actual Authority to Contract on the Government's Behalf

As this Court held in *Moda*, the HHS Secretary had implied actual authority to contract on behalf of the United States regarding the risk corridors program. *See Moda*, 2017 WL 527588, at *25. "An agent's actual authority to bind the Government may be either express or implied,"

Marchena v. United States, 128 Fed. Cl. 326, 333 (2016) (citing *Salles v. United States*, 156 F.3d 1383, 1384 (Fed. Cir. 1998)), and authority is implied when it is "considered to be an integral part of the duties assigned to a government employee." *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989) (citation omitted); *see Moda* at *25. Section 1342 states that the HHS Secretary "shall establish" the ACA risk corridors program and "shall pay" risk corridors payments. 42 U.S.C. § 18062(a) & (b); *see Moda* at *25. More generally, the Secretary is responsible for administering the ACA. *See Moda* at *25 (citing ACA §§ 1301(a)(1)(C)(iv), 1302(a)-(b), and 1311(c)-(d)); 76 FR 53903, 53903-04 (Aug. 30, 2011) (HHS Secretary's delegation of authority to CMS). As this Court held in *Moda*, the ACA itself creates a contractual framework, therefore, entering into contracts pursuant to the contractual structure of the risk corridors program is an integral part of the HHS Secretary's duties in administering and implementing the ACA. *See Moda* at *25. Thus, the HHS Secretary had actual authority to contract with Molina. *See id.*[61] Additionally, the GAO concluded in September 2014 that the HHS Secretary had actual authority to make risk corridors payments. *See* Comp. Gen. B-325630 (Sept. 30, 2014). The Government's payment of a small portion of the risk corridors amounts owed to Molina for CY 2014 further demonstrates its actual authority to do so.

Nor is the Government's contractual authority or its obligation to pay risk corridors constrained by the Anti-Deficiency Act ("ADA"), as Defendant contends. *See Moda*, 2017 WL

[61] Even if, *arguendo*, actual authority were lacking, Kevin Counihan, CMS's CEO of the ACA Marketplaces, ratified the terms of the contract through his acceptance of the benefits provided by Molina and his statements confirming the Government's obligations to the Molina Plaintiffs. *See Silverman v. United States*, 679 F.2d 865, 870 (Ct. Cl. 1982) (holding that the Government is bound by the terms of an implied-in-fact contract if it subsequently ratifies the contract by accepting the benefits flowing under it, even if a Government official initially lacked authorization to enter into the contract). Mr. Counihan's job description includes overseeing the ACA Marketplace, which makes entering into agreements with QHPs integral to his duties. *See* Compl. Ex. 88; *Telenor Satellite Servs. Inc. v. United States*, 71 Fed. Cl. 114, 121 (2006) (agent had implied actual authority to bind the Government where his authority was "an integral part of the duties").

527588, at *26. Although the ADA provides that the Government "may not … involve [the] government in a contract or obligation for the payment of money before an appropriation is made *unless authorized by law*." 31 U.S.C. § 1341(a)(1)(B) (emphasis added), this Court in *Moda* held that the ADA was not a bar to contractual recovery because it correctly concluded that the Secretary *is* explicitly authorized to make risk corridors payments in specific amounts under the ACA. *See Moda* at *26. Relying on the Court of Claims' decision in *New York Airways* that found the ADA inapplicable when "the Board's action created a 'contract or obligation (which) is authorized by law,'" this Court held in *Moda* that the HHS Secretary is "authorized by law" under the ACA to make risk corridors payments pursuant to implied-in-fact contracts with insurers,[62] and therefore the implied-in-fact contract does not fall under the Anti-Deficiency Act. *Id*. (citing *New York Airways*, 369 F.2d at 752).

Furthermore, as this Court held in *Moda*, just as the FY 2015 and FY 2016 appropriations riders did not modify the Government's statutory obligation to make full annual risk corridors payments to insurers, they also did not modify the Government's contractual obligation to Molina. *See Salazar v. Ramah Navajo Chapter*, 132. S.Ct. 2181, 2189 (2012) ("[T]he Government is responsible to the contractor for the full amount due under the contract, even if the agency exhausts the appropriation in service of other permissible ends."); *see Moda*, 2017 WL 527588, at *26 n.17.

Accordingly, the Court should find, as it found in *Moda*, that Molina has, as a matter of law, undisputedly satisfied all the elements to establish that the Government had and breached an

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[62] The Government's obligation to make risk corridors payments was written into Section 1342 ("shall pay") and its implementing regulations ("will pay"), thus making the payment obligation "authorized by law." *See Chevron U.S.A., Inc. v. United States*, 20 Cl. Ct. 86, 89 (1990) (rejecting Government's argument that the plaintiff's construction of the contract would violate the ADA because "[t]he statutory authority under which the defendant originally entered the contract … makes the payment of operational expenses 'authorized by law'").

implied-in-fact contract with Molina. *See Moda*, 2017 WL 527588, at *26. That implied-in-fact contract obligates the Government to make full annual risk corridors payments to Molina if (1) Molina sold QHPs on the ACA Exchanges and (2) any of those QHPs experienced sufficient losses in a plan year to trigger the Government's risk corridors payment obligations. *See id.* There is no dispute that Molina sold QHPs and suffered losses triggering the Government's payment obligation for CY 2014 and 2015. *See id.*; Compl. ¶¶ 234-236, 245-246, 253-258, 264-265; Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for Benefit Year 2014" (Nov. 19, 2015), Compl. Ex. 100; Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year" (Nov. 18, 2016), Compl. Ex. 87. The Government has failed to make full risk corridors payments to Molina on time, as promised, and thus has breached the implied-in-fact contract. *See id.* Therefore, there is no genuine dispute that the Government is liable to Molina under the implied-in-fact contract, and Molina is entitled to summary judgment in its favor on Count III. *See id.*

V. MOLINA IS ENTITLED TO SUMMARY JUDGMENT ON DAMAGES

There is no genuine dispute regarding the amount of Molina's damages under Counts I and III: $52,372,197.75.

A. Total Payments Owed

1. CY 2014

On November 19, 2015, CMS announced the risk corridors payments and charges it owed to each QHP issuer, including Molina, for CY 2014, and the amounts that issuers, including Molina, would receive from CY 2014 risk corridors collections, assuming full collections were received. *See* Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for Benefit Year 2014" (Nov. 19, 2015), Compl. Ex. 100 ("CY 2014 Risk Corridors Report"). .

CMS announced that the Government was required to pay Molina FL risk corridors

payments for CY 2014 of $39,035.74, but the Government declared that it would only make prorated payments to Molina FL equal to 12.6% of the amounts owed, $4,925.48 for CY 2014. *See id.* at Table 10 – Florida; Decl. ¶¶ 4-5.

2. CY 2015

On November 18, 2016, CMS announced the risk corridors payments and charges it owed to each issuer, including Molina, for CY 2015. *See* Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year" (Nov. 18, 2016), Compl. Ex. 87 ("CY 2015 Risk Corridors Report"). CMS stated that the risk corridors collections for CY 2015 would be used first towards the remaining CY 2014 risk corridors balances owed, and that risk corridors collections from CY 2016 will be intended to pay remaining risk corridors balances owed for the CY 2014 benefit year, and, if funds are available, to pay risk corridors balances owed for the 2015 benefit year. *See id.* at 1.

Molina CA's losses in the ACA California Individual Market for CY 2015 resulted in the Government acknowledging that it owes Molina CA a risk corridors payment of $1,784,227.07 for CY 2015. *See id*. at 3; Decl. ¶ 7.

Molina FL's losses in the ACA Florida Individual Market for CY 2015 resulted in the Government acknowledging that it owes Molina FL a risk corridors payment of $25,417,985.09 for CY 2015. *See* CY 2015 Risk Corridors Report. at 4; Decl. ¶ 8.

Molina UT's losses in the ACA Utah Individual Market for CY 2015 resulted in the Government acknowledging that it owes Molina UT a risk corridors payment of $3,557,849.34 for CY 2015. *See* CY 2015 Risk Corridors Report at 12; Decl. ¶ 9.

Molina WA's losses in the ACA Washington Individual Market for CY 2015 resulted in the Government acknowledging that it owes Molina WA a risk corridors payment of $238,552.08 for CY 2015. *See* CY 2015 Risk Corridors Report at 13; Decl. ¶ 10.

Molina WI's losses in the ACA Wisconsin Individual Market for CY 2015 resulted in the Government acknowledging that it owes Molina WI a risk corridors payment of $21,340,461.88 for CY 2015. *See* CY 2015 Risk Corridors Report at 13; Decl. ¶ 11.

In total, the Government is liable for and is required to pay Molina risk corridors payments for CY 2015 of $52,339,075.46, but the Government announced that it will not make any CY 2015 payments to Plaintiffs until the CY 2014 risk corridors shortfall has been corrected. *See* CY 2015 Risk Corridors Report at 1, 3-4, 12-13; Decl. ¶ 12.

B. Partial Payments Received

To-date, the Government has made partial payments to Molina totaling only $5,913.45, which the Government has treated as payment toward the CY 2014 risk corridors amounts owed. *See* Decl. ¶ 17.

C. Damages Amount

Subtracting the partial payments made from the total amounts owed, to-date, the following risk corridors payments to Molina remain unpaid by the Government: $33,122.29 for CY 2014, and $52,339,075.46 for CY 2015, for a total of $52,372,197.75. This is the undisputed amount of Molina's damages caused by the Government's breach of its statutory and contractual obligations.

Molina therefore requests that the Court instruct the Clerk to enter final judgment for Molina in the amount of $52,372,197.75, plus reasonable costs under RCFC 54(d).

VI. THE COURT SHOULD GRANT MOLINA INCIDENTAL DECLARATORY RELIEF REGARDING CY 2016 RISK CORRIDORS PAYMENTS

Because Molina is entitled to summary judgment for the Government's failure to make full annual risk corridors payments for CY 2014 and CY 2015, Molina also requests that the Court declare, as incidental to that monetary judgment, that applying the Court's reasoning, rationale and decision on Counts I and III, the Government is also obligated to pay full annual risk corridors payments to Molina for CY 2016. *See* Compl. at Prayer for Relief ¶ 6.

Molina anticipates that the Government owes it approximately $90 million in risk corridors payments for CY 2016. *See* Decl. ¶ 19; Press Release, Molina Healthcare Inc., *Molina Healthcare Reports Fourth Quarter and Year-End 2016 Results and Provides Fiscal Year 2017 Outlook and Guidance* (Feb. 15, 2017), App'x Ex. 115 ("Based upon current estimates, we believe our health plans are also owed approximately $90 million in Marketplace risk corridor payments from the federal government for calendar year 2016."). Based on its prior refusals to timely pay full risk corridors amounts due and its course of conduct to date, Molina anticipates that the Government will also breach its statutory and contractual obligation to make full annual CY 2016 risk corridors payments to Molina. The Government has clearly manifested its intent not to render performance, by stating in writing that no CY 2016 risk corridors payments will be made until all outstanding CY 2014 *and* CY 2015 risk corridors payments have been made to all QHPs—a current deficit of approximately $8.3 billion. As this Court has recognized, it will take a "miracle" – in reality, even more than that – for CY 2016 risk corridors payments to be made in full and on time. *See Moda*, 2017 WL 527588, at *17. Molina treats the Government's near-certain repudiation of its CY 2016 risk corridors payment obligations as a total breach.[63]

Specifically, Molina requests that the Court declare, as incidental to its monetary judgment regarding CY 2014 and CY 2015 risk corridors payments, that the United States is obligated to make full annual CY 2016 risk corridors payments to Molina, and that the Government will be liable to Molina if it breaches that obligation, with the amount of damages to be determined following Molina's submission of its CY 2016 risk corridors data to CMS by July 31, 2017. *See* 45 C.F.R. § 153.530(d) (requiring QHPs to submit risk corridors data "by July 31 of the year

[63] *See Land of Lincoln*, 129 Fed. Cl. at 101-02 ("If a party repudiates a contract, the claim 'ripens when performance becomes due or when the other party to the contract opts to treat the repudiation as a present total breach.'") (citing *Barlow & Haun, Inc. v. United States*, 118 Fed. Cl. 597, 616 (2014), *aff'd*, 805 F.3d 1049 (Fed. Cir. 2015)).

following the benefit year"). The law and facts are no different between the CY 2014 and CY 2015 risk corridors payments for which Molina is entitled to an entry of judgment for $52,372,197.75, and the CY 2016 risk corridors payments owed.

The Court has the power to grant Molina's incidental request for declaratory relief regarding CY 2016, because it is ancillary and incidental to Molina's money-mandating claims in Counts I and III regarding CY 2014 and CY 2015, over which the Court already has jurisdiction. *See* 28 U.S.C. § 1491(a)(1) & (2). Section § 1491(a)(1) provides this Court with jurisdiction over "any claim against the United States founded upon either the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States." To "provide an entire remedy and to complete the relief" offered under §1491(a)(1), Congress, through § 1491(a)(2) provided this Court with jurisdiction over other non-monetary claims for declaratory relief against the Government that are "incident of and collateral to any such judgment." Therefore, this Court has jurisdiction over requests for declaratory relief, like Molina's, that are incidental and collateral to Tucker Act claims for monetary relief. *See, e.g.*, *Lewis v. United States*, 67 Fed. Cl. 158, 160-61 (2005); *Cal. ex rel. Brown v. United States*, 110 Fed. Cl. 130, 133-34 (2013) ("As this Court has been granted the power to order declaratory relief, it is within this Court's discretion to make a determination as to the parties' contract rights upon the future occurrence of FERC's correction of prices for the Excluded Transaction and Summer Period sales.").

The Federal Circuit holds "that the Tucker Act grants the Court of Federal Claims jurisdiction to grant nonmonetary relief in connection with contractor claims, including claims requesting an interpretation of contract terms." *Alliant Techsys., Inc. v. United States*, 178 F.3d 1260, 1270 (Fed. Cir. 1999). In *Cal. ex rel. Brown*, the plaintiff had prevailed at trial on a Tucker Act breach of contract claim against the United States, and sought declaratory relief in the form of

orders that FERC shall not repeat the offending conduct in the parties' future dealings. *See* 110 Fed. Cl. at 131. The Court granted the plaintiff's request, finding the declaratory relief appropriate because the claim involved a live dispute between the parties, it would resolve the dispute, and future legal remedies would be inadequate because trial may need to be repeated on the same evidence, potentially with the loss of some live witness testimony. *See id.* at 134-35 (citing *Alliant*, 178 F.3d at 1271 and *CW Gov't Travel, Inc. v. United States*, 63 Fed. Cl. 369, 389-90 (2004)).

The interests of judicial economy and efficiency similarly support Molina's request for incidental declaratory relief in this case because, other than the actual risk corridors amounts due, the facts, claims and legal issues are the same between CY 2014 and 2015 on the one hand and CY 2016 on the other. It would not serve the interests of judicial economy and efficiency to force Molina to re-litigate the same issues anew for the CY 2016 risk corridors amounts owed by the Government. *See In re Aliphcon*, 449 Fed. App'x 33, at *1 (Fed. Cir. 2011) (granting declaratory judgment because any concerns about convenience that could weigh against declaratory judgment "were out-weighed by the concerns of judicial efficiency and inconsistent judgments presented by allowing two cases with overlapping claims to proceed in two different federal courts"); *Pac. Gas & Elec. Co. v. United States*, 110 Fed. Cl. 143, 147-48 (2013) (granting plaintiff's claim for declaratory judgment based on plaintiff's arguments that it "would be time-consuming and inefficient to have to retry each set of transactions individually").

CONCLUSION

Molina respectfully requests that this Court grant its Motion for Summary Judgment as to Counts I and III, and enter judgment for Molina on those Counts in the amount of $52,372,303.56, plus reasonable costs under RCFC 54(d), for the Government's failure to comply with its statutory/regulatory (Count I) and implied-in-fact contractual (Count III) obligations to make full

annual risk corridors payments for CY 2014 and CY 2015.

Additionally, Molina requests that the Court declare, as incidental to its monetary judgment regarding CY 2014 and CY 2015 risk corridors payments, that the United States is obligated to make full annual CY 2016 risk corridors payments to Molina, and that the Government will be liable to Molina if it breaches that obligation, with the amount of damages to be determined following Molina's submission of its CY 2016 risk corridors data to CMS by July 31, 2017.

Dated: March 14, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2017, a copy of the foregoing Plaintiff's Motion for Partial Summary Judgment and accompanying Declaration and Appendix were filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing with be sent to all parties by operation of the Court's ECF system.

s/ Lawrence S. Sher
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