IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MONTANA HEALTH CO-OP, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	No. 16-1427C Judge Victor J. Wolski

PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

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Plaintiff Montana Health CO-OP ("Plaintiff" or "Montana Health") submits this Supplemental Memorandum of Law in Further Support of its Motion for Partial Summary Judgment to brief: (1) Judge Wheeler's Opinion and Order in *Molina Healthcare v. United States*, 133 Fed. Cl. 14 (2017), and (2) Judge Bruggink's Opinion in *Maine Community Health Options v. United States*, 133 Fed. Cl. 1 (2017).[1]

At the outset, both the *Molina* and *Maine* courts agree that Section 1342 of the Affordable Care Act ("ACA"), 42 U.S.C. § 18042, is money-mandating, in that it "commands payment of money by the Secretary." Opinion at 12, *Maine Cmty. Health Options v. United States*, No. 16-967C (Bruggink, J.) (Fed. Cl. July 31, 2017), ECF No. 35 (*Maine*); Opinion and Order at 17, *Molina Healthcare v. United States*, No. 17-97C (Wheeler, J.) (Fed. Cl. Aug. 4, 2017), ECF No. 25 (*Molina*). Both courts also agree on basic interpretive presumptions disfavoring repeals by implication, repeals by appropriations, and retroactive repeals of obligations. Lastly, the courts agree that the framework for analyzing the extent of the Government's liability rests on two central questions:

1. Is the Government's money-mandating obligation to pay—which is already limited by the express terms of the statutory formula to a certain percentage of insurers' excess costs—also *implicitly* capped to the extent of "payments-in" (i.e., "budget neutral")?
2. Did the 2015 and 2016 Spending Riders fully repeal the Government's obligation?

See Molina at 24, 32; *Maine* at 12.

Despite this agreement, the courts disagree as to the appropriate analytical approach to answering them.

[1] Though both decisions were recently assigned their reporter volume and starting page numbers, the electronically available decisions are not yet paginated accordingly. For the Court's convenience, Plaintiff cites to the paginated versions published on the dockets for each case.

First, they disagree whether the answer to the second question somehow moots the inquiry into the first question. The *Molina* court recognized (correctly) that the court must determine the nature and extent, if any, of the Government's obligation to pay. Only then can the court analyze whether subsequent legislation succeeded in extinguishing *that* obligation. Subsequent legislation that merely blocks payment from individual accounts, without repealing the underlying obligation, leaves the court free to satisfy that obligation from the Judgment Fund. *Molina* at 3, 37-38. In contrast, the *Maine* court took a shortcut by asserting that it need "not reach the first issue because the answer to the second question is clear." *Maine* at 12. That was error. The *Maine* court put the cart before the horse in analyzing Congress's attempt to annul an obligation, before first analyzing what the obligation entailed.

Second, the *Molina* and *Maine* courts diverge on whether the Spending Riders should be examined under a purely textual analysis or augmented by perceived legislative intent. The *Molina* court properly relied on a textual analysis of the laws in question, *i.e.*, what Congress actually *wrote* and thereby accomplished (and failed to accomplish). The *Molina* court acknowledged that Congress temporarily blocked the agency's administrative ability to make RCP payments from one specific account (the CMS PM account). *Molina* at 28, 38. But the court scrutinized the Spending Riders and determined that, by their words, they did not substantively amend Section 1342 or declare Section 1342 capped at payments-in on a budget neutral basis. Nor did the Spending Riders block payment from "*any* Act." Had they done that, they would have swept in the Judgment Fund, which "[b]y an Act of Congress . . . [is] the source from which judgments from this Court will be paid." *Id*. at 27-28. The *Molina* court held that, to the contrary, the Spending Riders, by their plain language, temporarily eliminated one funding source but failed to substantively negate the Government's underlying obligation. *Id*. at 28, 38.

The court observed that the Judgment Fund was created to resolve precisely this situation, *viz*., an agency's inability or unwillingness to honor its extant payment obligation. *Id.* at 28-29.

By contrast, the *Maine* court focused on what Congress theoretically *intended* in order to interpret the text of the Spending Riders. Under *Maine*, because the Spending Riders blocked one CMS account, they "implicitly limited HHS to user fees funds to satisfy RCP payments." *Maine* at 10. The court then expanded this "implicit" premise in its central holding, stating that "Congress made clear its ***intention*** that ***no public funds*** be spent to reimburse risk corridors participants ***beyond their user fee contributions***." *Id.* at 21 (emphasis added). This was wrong. Conspicuously absent from the Spending Riders is any mention that "*no public* funds" may be spent on RCP reimbursements; Congress *could* have done so by barring payment from "this Act or any other Act," which Congress has done in the past. In fact, Congress used this precise language in other provisions of the *same* Spending Riders and could have done the same with respect to Section 1342.[2] The Government has offered no coherent explanation for why Congress expressly blocked access to *one* CMS account, if it supposedly "intended" that "no public funds" may be spent on RCP reimbursements, or if it sought to bar payment from "this Act or any other Act." The Spending Riders passed by Congress do not amend Section 1342;

[2] *See, e.g.*, Consolidated and Further Continuing Appropriations Act, 2015 (Pub. L. No. 113-235), § 716 ("None of the funds appropriated or otherwise made available by this or any other Act shall be used to pay . . . ."), § 717 ("None of the funds appropriated or otherwise made available by this or any other Act shall be used to pay . . . ."), § 718 ("None of the funds appropriated by this or any other Act shall be used to pay . . . ."), § 731 ("None of the funds made available by this or any other Act may be used to write, prepare, or publish . . . ."), § 735 ("None of the funds appropriated or otherwise made available by this or any other Act shall be used to pay . . . ."); Consolidated Appropriations Act, 2016 (Pub. L. No. 114-113), § 714 ("None of the funds appropriated or otherwise made available by this or any other Act shall be used to pay . . . ."), § 715 ("None of the funds appropriated or otherwise made available by this or any other Act shall be used to pay . . . ."), § 716 ("None of the funds appropriated by this or any other Act shall be used to pay . . . ."), § 733 ("None of the funds appropriated or otherwise made available by this or any other Act shall be used . . . .").

they do not state that "no public funds" may be spent on RCP reimbursements; they do not bar payment from "this Act or any other Act"; by their express terms, the Spending Riders block one CMS account as a source of funding. Seeking to divine Congress's "intent," beyond what it actually did, is rank speculation. Also conspicuously absent from the text of the Spending Riders is any mention that the Government's obligation was *capped* at the insurers' "user fee contributions." *Id*. Congress *could* have capped RCP payments to be budget neutral (by, for example, capping liability at "payments-in"). But the text contains no such statement. Like the *Molina* court, this Court should closely scrutinize the plain meaning of the Spending Riders to see what they *actually* said—and did not say.

Third, the courts diverge on whether the 2015 and 2016 Spending Riders were retroactive or prospective in effect, which affects the interpretative presumption the court must apply. Stated another way, the courts disagree whether Section 1342's money-mandating legal obligation attached, albeit undefinitized, before or after the passage of the Spending Riders in December. While both courts agree that "[o]bligation necessarily precedes payment," the *Maine* court determined that the Government was not actually liable for its "unmatured" obligation "until the end of the plan year after all the expenses are accounted for." *Maine* at 15. As such, the court held that "Congress timely intercepted its RCP obligations . . . by passing the appropriations provisions in December of each year." *Id*. The *Molina* court summarily rejected this proposition, stating "this Government argument is wholly without merit. Not only is there no authority to support this statutory interpretation, it is contrary to the function of the [RCP]." *Molina* at 33. The court made clear that the "binding" obligation of Section 1342 attached when participating QHP issuers committed to performance and "entered the Exchanges." *Id*. The Government became liable for its obligation long before—and independent of—when the

accountants and actuaries finally tabulated the gains/losses in July of the following year. *Id*. The *Maine* court's holding to the contrary, *i.e.*, that undefinitized or "unmatured" obligations are *not* obligations, defies logic and hornbook fiscal law. The Government itself knows better, which is why HHS repeatedly stated that it "is recording those amounts that remain unpaid . . . as a fiscal year obligation of the United States Government for which full payment is required." Compl. ¶ 18.

For the reasons herein, this Court should follow the *Molina* court and find that Montana Health is entitled to full payment of unpaid RCP payments for benefit years 2014 and 2015. The text of Section 1342 and the Spending Riders demonstrate that (1) Congress initially required full, annual payments for participating QHP issuers, and (2) under the plain text of the Spending Riders, subsequent Congresses merely blocked one CMS account as a funding source but failed to amend or repeal the Government's underlying obligation. And, as Judge Wheeler observed, in the absence of another appropriation, the Judgment Fund was created precisely for the circumstance presented by this case: discharging the Government's unpaid obligation.

PROCEDURAL BACKGROUND: *MOLINA* AND *MAINE*

Plaintiff Molina, like Montana Health, asserted a claim for money damages under the risk corridors program ("RCP") created by ACA Section 1342 and its implementing regulations. Molina moved for summary judgment with respect to its statutory claim and implied-in-fact contract claim, asserting that it was entitled to full and annual risk corridors payments. The Government moved to dismiss Molina's complaint, asserting that (1) the Court lacked subject matter jurisdiction because payments were not "presently due" and (2) the statutory claim was not ripe because payments were not due until, if at all, sometime in 2017. Deciding the case on the merits, Judge Wheeler granted Molina's motion for partial summary judgment on both

claims. First, the court held that Section 1342 is a money-mandating statute and, as such, the Court has subject matter jurisdiction. Second, the court held that the statutory claim was ripe because the statutory text required *annual* payments. Third, on the merits, the court held that Section 1342 required *full* payments to QHP issuers. Judge Wheeler observed that the statutory formula for calculating payments as a fixed percentage of an insurer's excess costs effectively "capped" the Government's exposure, and he therefore rejected the Government's proposition that Section 1342 contained a *second*, undisclosed but "implicit" cap limiting the Government's liability to the extent of "payments-in." The court based its conclusion that Section 1342 mandated full payments, without budget neutrality, on the following: (1) the plain text of Section 1342; (2) a comparison of Section 1342 to numerous other ACA provisions where Congress expressly affixed "budget neutral" caps; (3) Section 1342's express modeling on Medicare Part D's RCP, which Congress presumably knew was *not* budget neutral; (4) Congress's object and purpose in creating the RCP to avoid prospective premium hikes through Government risk sharing; and, (5) as a probative matter, HHS's initial interpretation and implementation of Section 1342 as not budget neutral.

The *Maine* court only had occasion to hear the statutory allegation; it did not analyze an implied-in-fact contract allegation. The *Maine* court first agreed that Section 1342 is unequivocally money-mandating. *Maine* at 4, 12. But it declined to determine the amount of money that it mandates, jumping instead to its sole holding that Congress was subsequently successful in retracting whatever (undefined) obligation Section 1342 may have created. *Id.* at 12, 21. In reaching that conclusion, the court grafted new language into the text of the Spending Riders that Congress had not written. Thus, the court decided to eschew *any* textual analysis of Section 1342 (the obligation) in favor of focusing *solely* on the Spending Riders, which it then

interpreted based on language not present in the text.

The *Molina* opinion is internally consistent; is harmonious with controlling case law regarding both plain meaning methodology and the resiliency of Government obligations; and is consistent with CMS's own characterization of the risk corridors program as expressed in its public statements contemporaneous with the promulgation of its implementing regulations and its launching of the program. *See* Pl.'s Mot. Partial Summ. J. ("Pl.'s Br.") at 10, ECF No. 5. The *Maine* decision, in contrast, depends too heavily on speculation about congressional intent, at the expense of the actual legislative text and sound principles of statutory interpretation. As such, the *Maine* decision is of no value as a guidepost for this Court to follow. Plaintiff respectfully submits that this Court should follow the *Molina* decision which counsels granting Plaintiff's current motion for partial summary judgment.

ARGUMENT

I. THIS COURT UNQUESTIONABLY HAS JURISDICTION.

Both the *Maine* and *Molina* courts agree that Tucker Act (28 U.S.C. § 1491(a)(1)) jurisdiction applies to these statutory and contract claims for RCP payments. The *Maine* court assumed jurisdiction over plaintiff's claims, citing to four decisions by other judges. *Maine* at 3.

The *Molina* court conducted a more thorough jurisdictional analysis and considered the Government's "ripeness" argument, concluding that its arguments failed and its motion to dismiss should be denied. The Government argued in *Molina*, as in this case, that any payments that *may* become due will not be actually due until, at the earliest, the end of the three-year program. Judge Wheeler rejected this analysis, holding that Section 1342 requires *annual* payments. *Molina* at 22. The *Molina* court first clarified that other courts had "muddied" two distinct concepts, *viz*., whether, under Section 1342, (1) "annual" RCP payments were required, and (2) "full" RCP payments were required. The first is a question of ripeness and the second

one goes to the merits. *Id*. at 20. The court held that Section 1342 required "annual" payments, making the matter ripe for adjudication, because the statutory text: (1) contained an RCP for each calendar year of the program's existence; (2) required calculation of payment amounts, both in and out of the program, on a plan year basis rather than over the life of the program; (3) expressly stated that the RCP was "based on" the RCP from Medicare Part D, which is administered on an annual (not multiyear) basis, which Congress was presumed to know; and, (4) as a probative matter, HHS had indicated repeatedly that it would make *annual* payments to insurers and had never stated that HHS could "choose not to make annual risk corridor payments to insurers." *Molina* at 22 (quoting *Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757, 778 (2017)). Judge Wheeler recognized that these statutory indicia required payments on an *annual* basis and, as such, Molina's claims were ripe for review. *Id.* at 22.

II. THE GOVERNMENT IS LIABLE FOR ITS FAILURE TO MAKE FULL RCP PAYMENTS UNDER A MONEY-MANDATING STATUTE.

As discussed below, *Molina* sets forth the correct analytical framework to resolve this dispute: First, the plain text of Section 1342 makes clear that the Government unequivocally "shall pay" when QHP issuers satisfied the statutory "payments out" trigger. The Government's payment obligation is expressly—and only—capped at a percentage of the insurer's losses, effectively capping the Government's exposure; the court should not strain to find a second, "implicit" budget-neutral cap where none was written. *Molina* at 24, 33. Second, the Government's payment obligation arose independently of, and without regard to, the availability of appropriations to pay it. *Id*. at 30-31. Third, the later Spending Riders, by their text, merely targeted a single source of funds; the two laws failed to vitiate the Government's underlying statutory obligation. *Id*. at 3, 26-29. Fourth, the presumption against retroactivity attaches to the Spending Riders because they were passed ***after*** the Government incurred the payment

obligation. These four points counsel granting Plaintiff's motion for partial summary judgment.

A. Section 1342 Requires "Full" RCP Payments Limited Only By the Percentage of Losses; There Is No "Implicit" Cap Based on Budget Neutrality.

The *Maine* court held that Section 1342 imposed a money-mandating obligation on the Government to make RCP payments. *Maine* at 4, 12. But the court avoided addressing whether Section 1342 mandated full RCP payments or was capped at budget neutrality, finding the question moot. *Id.* at 12.

The *Molina* court explicitly found fault in Judge Bruggink's indifference to the nature and extent of the Government's obligation. *Molina* at 37-38. The *Molina* court explained that a proper understanding of the obligation (when it attached and whether it was budget neutral) was a *predicate step* before the court could ascertain whether the Spending Riders vitiated that obligation. *Id*. The *Molina* court stated:

> One important difference between [*Maine*] and [*Molina's*] reasoning is that Judge Bruggink did not address whether Section 1342 was "budget neutral" when it was created . . . . Respectfully, the Court cannot properly resolve the second issue without resolving the first. Whether Section 1342 did initially commit the Government to make full annual risk corridor payments affects the legal test for determining whether Congress later vitiated that obligation.

Id. at 38. Next, the *Molina* court did the analysis that *Maine* failed to do. Judge Wheeler parsed the statutory scheme and held that Section 1342 "unequivocal[ly]" created an obligation for the Government to make "full" payments to participating insurers without limitation of budget neutrality. *Id.* at 3, 38. Judge Wheeler explained several reasons that the court reached this conclusion. First, the text mandated that the Government "shall pay" to the plan payment amounts calculated in accordance with the payment-out formula. *Id*. at 32. This statutory formula "explicitly capped the Government's liability at a certain percentage of a lossmaking insurer's allowable costs….[a]ccordingly, the Government must make full payments to insurers

up to the amount specified in Section 1342." *Id*.; *see also id.* n.16 (finding "completely untrue" the Government's assertion that a decision in plaintiff's favor would expose the Government to "uncapped liability"). The court held that the "shall pay" directive—juxtaposed with a detailed statutory formula—"unambiguously" indicated that "full" "payments out" were to be paid pursuant to that formula. *Id.* at 24-26.

Second, the *Molina* court rejected that the Government's allegation that "payments out" were somehow implicitly contingent on "payments in." *Id*. Applying a textual analysis, Judge Wheeler observed that "***[t]he words 'budget neutral' do not appear anywhere in the ACA's Section 1342 . . . [t]he Court should not add words if they are not there***." *Id*. at 3 (emphasis added). The court explained that the Government lacked textual footing to allege that Section 1342 contained a second, implicit "cap" on liability requiring budget neutrality. *Id*. at 3, 24-25.

To further support its textual rejection of budget neutrality, the court noted that Section 1342 was expressly modeled on Medicare Part D, which Congress knew was not budget neutral. *See id*. at 25. Judge Wheeler pointed out that other differences between the two statutes suggested Congress spoke *more* clearly in the RCP, in particular by mandating that HHS "shall pay" after establishing the ACA RCP (in contrast to the Medicare Part D statute, which merely states that HHS "shall establish" an RCP). *Id*.

Similarly, the court observed that the purpose of the RCP supports the rejection of budget neutrality. The Government sharing in the risk is a critical design feature of the RCP because it provides the "safety net" for QHP issuers to offer affordable premiums. *Id*. at 21; *see also id*. at 4, 25, 33. A budget-neutral program eliminates the Government's share of the risk and thus negates that central tenet of the RCP. Indeed, *if* the RCP were budget neutral and *all* issuers categorically experienced losses, no issuer would receive a penny, and the Government would

share no risk. This is an absurd result. Judge Wheeler declined to "add words" to Section 1342 and impose a budget neutral cap that would frustrate the very object and purpose of the ACA's RCP program. *Id*. at 3.

Lastly, the court rejected the allegation that the Congressional Budget Office's (CBO) lack of scoring on Section 1342 somehow demonstrated that the RCP was budget neutral. *See id*. at 25. Judge Wheeler held it was "simply a failure to speak." *Id*. The court observed that, on balance, CBO "may never have believed the [RCP] to be budget neutral." This was supported by two observations. First, the CBO initially scored the RCP's two companion programs (risk adjustment; reinsurance) as budget neutral, and presumably would have done the same for the RCP had it thought that. Second, when the CBO subsequently scored Section 1342, it announced that "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." *Id.*

For the above reasons, the *Molina* court held that Section 1342's obligation to make "full" payment in accordance with the calculation formula was mandatory, unambiguously stated, and overrides any agency discretion to administer the program in a budget neutral manner. *Id*. at 24, 32. This court should likewise hold. The *Maine* decision does not counsel differently.

B. The Government's Liability Does Not Depend on There Also Being a Dedicated Source of Funding for That Liability.

As Montana Health set forth in its briefing, an obligation created by statute is not dependent on a simultaneous appropriation, or the availability of funds to fulfill that obligation, at the time that the obligation is created. Pl.'s Supp. Mem. in Support of Partial Mot. Summ. J. at 6-10, ECF No. 26. The *Molina* court expressly agreed with this proposition. *See Molina* at

30-31. Although Congress has the power of the purse, it also possesses the fundamental right to create binding and unfunded obligations of the United States by legislation. *See id*. Nothing further is required to create an obligation.

In *Molina*, as in the case at bar, the Government alleged that a statutory obligation requires two ingredients in order to form: (1) mandatory "shall pay" language, and (2) "appropriated funds to satisfy that commitment." *Id.* at 30. The *Molina* court rejected this "supposed two-pronged test" as "completely contrary to a mountain of controlling case law holding that when a statute states a certain consequence 'shall' follow from a contingency, the provision creates a mandatory obligation." *Id*. Judge Wheeler examined those cases and concluded that "[t]he test for determining whether a statute obligates the Government does not change simply because the consequence following a contingency is the payment of money." *Id*.

Next, he clarified his earlier decision in *Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, *appeal docketed*, No. 17-1994 (Fed. Cir. May 9, 2017), explaining that "[w]hile the ruling in Moda Health Plan identified some funds available to make 2014 risk corridor payments, ***this finding was not necessary for the holding that the Government is statutorily obligated to make full annual risk corridor payments.***" *Id*. (emphasis added).

Lastly, Judge Wheeler canvassed the Government's cases and distinguished them as inapposite, pointing out that no case required available appropriations for the creation of a statutory obligation:

> Prairie County, Greenlee County, and Star-Glo do not hold that "shall pay" language, standing alone, fails to create an obligation for the Government to make payments. The Federal Circuit did not rule that the Government's obligation to make payments *depended* on a reference to a specific appropriation. In fact, the Federal Circuit noted that these decisions were in contrast to the "repeated[] recogni[tion] that the use of the word 'shall' generally makes a statute money-mandating.

Id. at 32 (emphasis in original). Indeed, Judge Wheeler observed that "not only is it possible for

a statute to ***authorize and mandate payments without making an appropriation***, [] GAO has found a prime example in [Section 1342]." *Id.* at 30 n.15 (quoting *United States House of Representatives v. Burwell*, 185 F. Supp. 3d 165, 185 (D.D.C), *appeal held in abeyance*, 676 F. App'x 1 (D.C. Cir. 2016)).

Expanding on Judge Wheeler's holding, Plaintiff notes that the Government obscures two distinct concepts: (1) Congress's creation of a legal "obligation" to pay in the first instance and (2) the means by which the Government later satisfies its obligation. Controlling precedent—cited by Judge Wheeler—has long recognized that statutory obligations can arise "where there is no appropriation":

> ***This court***, established for the sole purpose of investigating claims against the government, ***does not deal with questions of appropriations, but with the legal liabilities incurred by the United States*** under . . . ***the laws of Congress*** . . . . That ***such liabilities may be created where there is no appropriation of money to meet them*** is recognized in section 3732 of the Revised Statutes.

Collins v. United States, 15 Ct. Cl. 22, 35 (1879) (emphases added); *see United States v. Langston*, 118 U.S. 389, 391-94 (1886) (finding the Government liable for statutory promise of payment in absence of a specific appropriation); *Strong v. United States*, 60 Ct. Cl. 627, 630 (1925) (awarding statutorily mandated military pay despite lack of an appropriation); *Parsons v. United States*, 15 Ct. Cl. 246, 246-47 (1879) (awarding statutorily mandated payment despite lack of an appropriation, noting that "***[t]he absence of an appropriation constitutes no bar to the recovery of a judgment in cases where the liability of the government has been established.***") (emphasis added). The Government made precisely this point in another ACA case (citing the same cases that Montana Health has cited in this case):

> Under the Tucker Act, a plaintiff may bring suit against the United States in the Court of Federal Claims to obtain monetary payments based on statutes that impose certain types of payment obligations on the government. If the plaintiff is successful, it can receive the amount to which it is entitled from the permanent appropriation Congress has made in the

> Judgment Fund, 31 U.S.C. § 1304(a). ***The mere absence of a more specific appropriation is not necessarily a defense to recovery from that Fund.***

Def.'s Mem. in Supp. of Mot. Summ. J. at 11, *U.S. House of Representatives v. Burwell*, No. 1:14-cv-01967-RMC, 2015 WL 9316243 (D.D.C. Dec. 2, 2015) (*citing United States v. Mitchell*, 463 U.S. 206, 216 (1983); *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2191-92 (2012)) (emphasis added). Whether, when, and how Congress appropriates the required funds are irrelevant to this Court's decision regarding the Government's legal *obligation* to honor the payments in the first instance.[3]

C. Later Spending Riders Did Not Nullify or Modify the Government's Extant RCP Obligations.

As Judge Wheeler aptly observed, "the main area of disagreement [between *Molina* and *Maine*] is in determining what type of language Congress must use in its appropriations laws to vitiate a pre-existing statutory obligation." *Molina* at 3. The answer turns on the text of the 2015 and 2016 Spending Riders. Both courts agree with the interpretive presumption that:

> Courts should not infer Congress's intent to limit payment obligations to a single fund, or repeal a previous payment obligation, through logical inference . . . . When Congress intends to back out of a pre-existing commitment, it must say so clearly and decisively. There can be no room for inference when dealing with whether the Government will honor its statutory commitments.

Id. at 38; *see Maine* at 14-15.

After parsing the two Spending Riders, the *Molina* court ruled that "Congress did not clearly or adequately express an intent to [retroactively] make the program 'budget neutral' in the appropriation riders, given the previous unequivocal mandatory obligation undertaken in Section 1342." *Molina* at 38. By their terms, the Spending Riders merely restricted HHS's ability to use certain sources of money to make payments under the RCP; they did not change the

[3] The *Maine* court, in jumping ahead to whether the Spending Riders vitiated an obligation, did not specifically address the meaning and import of Section 1342 itself or the cited cases.

law or the Government's legal obligation under Section 1342, or signal an intent to modify what Congress had previously legislated in Section 1342. *See id*. Restricting appropriations alone, without more, does not amend the underlying legislation. *See Greenlee Cty., Ariz. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007); *Gibney v. United States*, 114 Ct. Cl. 38, 53 (1949) (noting that the court "know[s] of no case in which any of the courts have held that a simple limitation on an appropriation bill of the use of funds has been held to suspend a statutory obligation"). Nor does it absolve the Government of its obligation to make payments mandated by law. *See Molina* at 38. Even where an agency is unable or unwilling to honor an obligation, the Judgment Fund exists for the very purpose of discharging the Government's obligation. *See id.* at 28-29.

In addition to its textual analysis, the *Molina* court also conducted an in-depth analysis of the cases on which the parties relied for their respective positions (the same cases on which Montana Health and the Government rely in this case). Judge Wheeler focused on six cases in particular, two of which found that a later appropriation law repealed or amended a prior substantive law and four of which refused to do so.[4] The distinction in the two lines of cases, Judge Wheeler pointed out, was between Congress ***broadly curtailing spending*** for a program from appropriations contained in the relevant piece of legislation (thus effecting a substantive amendment), and Congress targeting and ***blocking only a specific funding source*** (thus limiting spending but not substantively amending law). *See id.* at 26-27.

Judge Wheeler concluded that because the language in the Spending Riders limited only

[4] In *Moda*, Judge Wheeler noted four relevant cases that "have refused to find a repeal or amendment." 130 Fed. Cl. at 459 (citing *Langston*, 118 U.S. at 394; *Gibney*, 114 Ct. Cl. at 50; *N.Y. Airways*, 369 F.2d at 815, 818; *District of Columbia v. United States*, 67 Fed. Cl. 292, 335 (2005)); *see also Molina* at 26-27. In contrast, Judge Wheeler notes two cases finding a repeal or amendment. *Molina* at 27 (citing *United States v. Dickerson*, 310 U.S. 554, 561-62 (1940); *United States v. Will*, 449 U.S. 200, 208 (1980)).

the use of funds appropriated to *one specific account* (CMS PM) and did not expand the limitation to other sources of funds using Congress's typical language to do so ("this Act or Any other Act"), those acts were comparable to the subsequent appropriations at issue in the line of cases finding that Congress did not intend to amend substantive law. *Id.* at 26-28, 33. Judge Wheeler, in *Moda*, similarly clarified that "the limitation in this case singles out a specific use for a specific account" and does not "bar any appropriated funds from being used for a given purpose," because the words did not "clearly manifest" an intent to repeal or amend.[5] *Moda*, 130 Fed. Cl. at 460-61. This Court should follow *Molina* and *Moda* in finding that the Spending Riders merely limited a single funding source; they did not clearly manifest an unambiguous intent to repeal the substantive commitments of Section 1342.

The *Maine* court conducted an analysis of substantially the same controlling precedent. But the court mishandled the "touchstone of statutory analysis" by giving the *actual text* of the Spending Riders short shrift. In attempting to distinguish *Maine* from Plaintiff's cited cases, the *Maine* court improperly elevated perceived congressional intent, as drawn from snippets of legislative history, over the plain text of what Congress *actually* legislated (and failed to legislate) in the two Spending Riders.

For example, relying on selective legislative history, Judge Bruggink asserted that "it is precisely the demonstrated clear Congressional intent that prevents the payment ***of federal funds*** to make RCP payments." *Maine* at 17 (emphasis added). In another example, Judge Bruggink held that because the Spending Riders blocked a single CMS account, they "***implicitly*** limited HHS to ***user fees funds*** to satisfy RCP payments." *Id.* at 10 (emphases added). As a third

[5] Indeed, the Court noted that precisely that language was used elsewhere in the 2015 Spending Rider but was notably absent from the provision governing RCP payments. *Moda*, 130 Fed. Cl. at 461.

example, the court enlarged this "implicit" conclusion by stating that "Congress made clear its ***intention*** that ***no public funds*** be spent to reimburse risk corridors participants ***beyond their user fee contributions***." *Id.* at 21 (emphases added).

These holdings are untenable. While Congress succeeded in limiting one CMS funding source, the text of the Spending Riders makes crystal clear that Congress either neglected or failed to broadly prevent *all* "federal funds" or "public funds" from making RCP payments. *Id*. at 17, 21. To accomplish that, Congress *could* have mandated that no funds "in this Act or any other Act" be used to make RCP payments, which would have blocked *all* federal/public funds. *Molina* at 27. But Congress did not. The Spending Riders only targeted one specific account—not all federal funds.

Also conspicuously absent from the statutory text is Judge Bruggink's speculation that Congress's "implicit[]" "intention" was to ***cap*** "RCP payments" at "user fee contributions." *Maine* at 10, 21. To accomplish that, the Spending Riders *could* have expressly stated Congress's intent that Section 1342 must be budget neutral and capped at "payments in." But the Spending Riders did not. They merely placed a temporary limitation on CMS's authority to use one particular funding account in order to pay its obligation—they did nothing to nullify the underlying obligation.

The limitation to what Congress actually did in the Spending Riders comes into even sharper relief when it is recalled that Congress's efforts to amend or repeal Section 1342 to either eliminate it or, at least, make it budget neutral in substance all failed through the legislative process, as Montana Health previously briefed. *See* Pl.'s Br. at 10. Even if, *arguendo*, Judge Bruggink "believed" that "Congress believed" that blocking one specific account would functionally nullify the obligation by blocking all potential federal funds, *Molina* at 37, none of

those speculative "belie[fs]" are memorialized in the text of the Spending Riders. For this Court, what matters is the language that garnered sufficient votes in Congress to actually become law—***not*** the perceived intent or desires of individual representatives. To that end, Montana Health has extensively briefed the appropriate textual analysis compelling the conclusion that, as Judge Wheeler again affirmed in *Molina*, the Spending Riders *did not by their express terms amend Section 1342 to eliminate its mandate to make annual and complete RCP payments*. *See Molina* at 33-37; *see also* Pl.'s Br. at 33-38; Pl.'s Reply in Support of Mot. Partial Summ. J. at 19-22, ECF No. 18; Pl.'s Supp. Mem. in Support of Partial Mot. Summ. J. at 10-13, ECF No. 26.

Moreover, after recognizing the controlling interpretative presumptions disfavoring repeals of substantive laws by implication, by appropriations, or by retroactive effect, Judge Bruggink failed to apply these legal presumptions. That was error. The legal standard for finding that a mere appropriation rider negated an existing statutory right is stringent—it is presumed not to happen. Here, the Spending Riders do not overcome the first of these two presumptions. First, even where the change would have only prospective effect, Congress is presumed not to amend preexisting substantive statutory obligations except where Congress signals otherwise "expressly or by clear implication." *Prairie Cty., Mont. v. United States*, 782 F.3d 685, 689 (Fed. Cir. 2015). Nothing in the Spending Riders expresses or clearly implies an intent to abolish the obligation created by Section 1342.

Second, this general rule of statutory interpretation "applies with ***especial force*** when the provision advanced as the repealing measure was enacted ***in an appropriations bill***." *Will*, 449 U.S. at 221-22 (emphases 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. *TVA v. Hill*, 437 U.S. 153, 190 (1978). "[I]t can be

strongly presumed that Congress will specifically address language on the statute books that it wishes to change," rather than by appropriations. *United States v. Fausto*, 484 U.S. 439, 453 (1988); *Greenlee Cty.*, 487 F.3d at 877 ("It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute.") (citing *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966)).

When the Spending Riders are analyzed under these two presumptions, it is apparent that their text cannot be interpreted as having accomplished what the Government and Judge Bruggink suggest. All Congress accomplished through the Spending Riders was to temporarily limit one funding source from which funds could be paid. That is a mere administrative point; it did not modify the Government's legal obligation. Congress tried to repeal the ACA. It failed. Congress tried to amend the RCP to be explicitly "budget neutral." It likewise failed. Congress's consolation prize—temporarily hobbling one CMS account—merely hampered the *agency's* internal ability to administer and pay its debts, but it left the underlying obligation intact. Under controlling presumptions, this Court cannot read Congress's hyper-specific mere appropriation rider to have sufficiently overcome the battery of stringent presumptions disfavoring repeal by implication or by appropriation.

D. The Presumption Against Retroactivity Attached to the Spending Riders Because They Passed Months After the Government Incurred the Obligation.

Even if the Government could overcome the stringent presumption against implied repeal by appropriation (which it cannot), the Government would run headlong into an insurmountable wall that its position, if adopted, would result in the *retroactive* abrogation of the Government's obligation. By the time Congress passed its Spending Riders in December of each of the benefit

years, Montana Health had *already* entered into its binding QHP agreement and actively performed for several months (since the fall). The Government's obligation to make full future payments to Plaintiff attached in the fall of each year (albeit undefinitized), well *before* Congress enacted any appropriation that restricted RCP funding for that year.

Judge Wheeler recognized this in *Molina*, where he flatly rejected—as "wholly without merit"—the Government's misplaced argument that any obligation existing under Section 1342 did accrue until all costs were tabulated in the year following the applicable benefit year. *Molina* at 33. The Molina court admonished the Government that:

> Not only is there no authority to support this statutory interpretation, it is contrary to the function of the [RCP]. ***Section 1342 was created to provide insurers with some protection*** against substantial losses while developing their QHPs ***well before any payment under the risk corridor program would have been expected . . . . Under the Government's interpretation, Section 1342 would not have served that function because insurers could only rely on Section 1342 after they had entered the Exchanges***.

Id. (emphases added). The court made clear that the "binding" obligation of Section 1342 attached when participating QHP issuers committed to performance and "entered the Exchanges." *Id*. The Government became liable for its obligation long before—and independent of—when the accountants and actuaries finally tabulated and definitized the gains/losses in July of the following year. *Id*. Precise definitization may affect when QHP issuers could perfect their legal claims for entitlement in filing before *this court*, but the underlying obligation arose under Section 1342 and attached when the QHP issuers committed to performance.

Black letter fiscal law supports Judge Wheeler's view that the Government's argument is wholly without merit. *Id*.; *see* II GAO, *Principles of Federal Appropriation Law*, 7-4 - 7-5 (3d ed. 2004), *available at* http://www.gao.gov/legal/redbook/overview (An "obligation arises when the definite commitment is made, ***even though the actual payment may not take place until a***

future fiscal year. . . . [T]he term 'obligation' includes both matured and unmatured commitments . . . . An unmatured commitment is a liability which is ***not yet payable*** but for which a definite commitment nevertheless exists.") (emphases added).

In contrast, the *Maine* court committed reversible error by expressly refusing to apply the presumption against retroactive application. *See Maine* at 13 n.4. According to the *Maine* court, "plaintiff's concerns regarding retroactivity are not implicated" because Congress's appropriations (the "interdict") came ***before*** "the entitlement [wa]s fixed." *Id*. at 13. Both premises are factually and legally invalid. The court's first mistake lay in erroneously concluding that the Government was not liable for any "unmatured" obligations "until the end of the plan year after all the expenses are accounted for." *Id.* at 15. According to the *Maine* court, only once the expenses were tabulated did the obligation of Section 1342 attach; prior to tabulation, Section 1342's "money-mandate" was hollow. Because of this mistaken formulation, the court found that Congress had "timely" enacted the Spending Riders *before* the Government incurred any obligation under Section 1342. *Id*. at 12-13. And based on that conclusion, the court rejected application of the presumption against retroactivity.

This syllogism was wrong at each step. The *Maine* court adopted the very proposition that Judge Wheeler had characterized as "wholly without merit" for frustrating the "function" of the RCP "because insurers could only rely on Section 1342 after they had entered the Exchanges." *Molina* at 33. Properly understood, the Government's obligation, albeit undefinitized (unmatured), attached no later than the fall of each year (prior to the benefit year) when the QHP issuers committed to perform, fixed their rates, and entered the Exchanges. *See id.* After that point, QHP issuers could not decline to sell QHPs on the Exchanges; their obligation to perform through the end of the benefit year is fixed and irrevocable. *See id.* These

QHP commitments were executed several months ***before*** each December when the Spending Riders (restricting RCP payments for each fiscal year) were passed. *See id.* Hence, the Government's undefinitized obligation to honor RCP payment pre-dated the passage of the Spending Riders. *See id.*

Because the Spending Riders curtailed payment obligations that had already attached months earlier, the *Maine* court should have analyzed the text of the Spending Riders under the more stringent presumption against ***retroactive repeals*** of obligations. The *Maine* court's mishandling of obligation accrual directly caused his reversible error in failing to apply the proper legal presumption when analyzing the Spending Riders.

In *Molina*, Judge Wheeler specifically faulted Judge Bruggink's failure to analyze the extent of the Government's obligation and flawed determination of when that obligation attached, which led Judge Bruggink to misapply the legal test for repealing an obligation:

> Judge Bruggink did not address whether Section 1342 was 'budget neutral' when it was created . . . . ***Whether Section 1342 did initially commit the Government to make full annual risk corridor payments affects the legal test for determining whether Congress later vitiated that obligation.*** Courts should not infer Congress's intent to limit payment obligations to a single fund, or repeal a previous payment obligation, through logical inference . . . . ***When Congress intends to [retroactively] back out of a pre-existing commitment, it must say so clearly and decisively***. There can be no room for inference when dealing with whether the Government will honor its statutory commitments. Given that Section 1342 clearly requires the Government to make full annual risk corridor payments, ***Congress cannot repeal this commitment by foreclosing the use of CMS Program Management funds alone***. The initial and unequivocal obligation created by Section 1342 stands.

Molina at 38 (emphases added). The *Molina* court properly analyzed the text of the Spending Riders under the correct presumption against retroactive application. The *Maine* court failed. Because the obligation attached each fall before the December Spending Riders, respectively, this Court should follow the *Molina* court and analyze the text of the Spending Riders under the proper presumption against them having *retroactive* effect.

III. ALTERNATIVELY, THE GOVERNMENT BREACHED AN IMPLIED-IN-FACT CONTRACT WITH MONTANA HEALTH.

The *Maine* court had no occasion to hear or consider arguments regarding implied-in-fact contract. The *Molina* court, however, affirmatively found that Section 1342 established an implied-in-fact contract and granted summary judgment for plaintiff on this count. Judge Wheeler found that Molina prevailed on its argument for breach of an implied-in-fact contract regardless of the Government's defenses because "later appropriation restrictions cannot erase a previously created contractual obligation." *Molina* at 38.

The Government in *Molina*, as in the case at bar, primarily attacked the formation of a contract on the grounds that the parties lacked "mutuality of intent" to contract. *Id*. at 39. The *Molina* court rejected this concern and found that the insurer had satisfied the court's two-step test when determining whether Congress intended to contract through legislation. *Molina* at 39-40 (citing *Moda*, 130 Fed. Cl. at 463; *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 405-06 (Ct. Cl. 1957)). Judge Wheeler relied on two prior Court of Claims cases in reaching the conclusion. Examining *Radium Mines*, Judge Wheeler observed that when a private party "complied in every respect with the terms" with a statutory incentive program but the Government restricted the benefits through regulation, the statute formed an implied-in-fact contract that required agency officials to purchase uranium at the statutorily "guaranteed minimum price." *Id*. (quoting *Radium Mines*, 153 F. Supp. at 406).

Examining *New York Airways*, Judge Wheeler noted that an implied contract arose where a statute directed payments "out of appropriations" in a fixed amount pursuant to a Board's order. Notwithstanding Congress's failure to appropriate sufficient funds, "[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*. (quoting *N.Y. Airways*, 369 F.2d at 751).

Applying these two cases, Judge Wheeler held that Congress created, via Section 1342, a program to incentivize insurers to participate in the Exchanges—something vitally necessary to the ACA's survival—and that the agency lacked discretion to withhold or decrease payments under that program. Under *Radium Mines* and *N.Y. Airways*, the Government statutorily extended an offer to enter into an agreement with participating insurers that, once accepted, had "both the structure and substance of a contract." *Molina* at 40.

The *Molina* court swiftly dispensed with the remaining elements of an implied-in-fact contract, finding that they were easily met. *Id*. at 40. Accordingly, this Court should follow the *Molina* court's analysis and likewise grant summary judgment to Montana Health on this count.

IV. THIS COURT MAY ENTER JUDGMENT FOR PLAINTIFF; PAYMENT CAN BE MADE FROM THE JUDGMENT FUND.

Following the rationale of *Molina* and *Moda*, this Court may enter judgment for Montana Health on its statutory and implied-contract claims. The Government remains fully liable for its underlying obligation, despite Congressional meddling with the agency's ability to discharge its debt. The Judgment Fund is a permanent appropriation to discharge its liability—the Fund was created to resolve precisely this situation. *See Molina* at 28-29. Absent a substantive repeal or amendment by Congress (which did not occur), "[t]he judgment of a court has nothing to do with the means—with the remedy for satisfying a judgment. It is the business of courts to render judgments, leaving to Congress and the executive officers the duty of satisfying them." Pl.'s Br. at 40 (citing *Gibney*, 114 Ct. Cl. at 52); *N.Y. Airways*, 369 F.2d at 748 ("The failure [of Congress] to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in [this Court].").

CONCLUSION

For the reasons above, Montana Health respectfully requests that the Court (i) GRANT its Motion for Partial Summary Judgment, and (ii) DENY the Government's Motion to Dismiss.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 8, 2017, a copy of the forgoing "Plaintiff's Supplemental Brief in Further Support of Its Motion for Partial Summary Judgment" was filed electronically using the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing will be served on Defendant's Counsel, Marcus Sacks, via the Court's ECF system.

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