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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Federal Register

Other Authorities

At the Court's request, Plaintiff Montana Health CO-OP ("Plaintiff" or "Montana Health") respectfully submits this Supplemental Memorandum of Law in Further Support of its Motion for Partial Summary Judgment to brief Judge Wheeler's Opinion and Order granting summary judgment to plaintiff (and denying the Government's motion to dismiss) in *Moda Health Plan, Inc. v. United States*, No. CIV 16-649C, 2017 WL 527588 (Fed. Cl. Feb. 9, 2017).

Like Montana Health, plaintiff Moda asserted a claim for money damages under the risk corridors program ("RCP") created by Section 1342 of the Affordable Care Act ("ACA"), 42 U.S.C. § 18042, and its implementing regulations. Moda moved for summary judgment with respect to its statutory claim, asserting that it was entitled to full, annual risk corridors payments. The Government moved to dismiss Moda's complaint, asserting that (1) the Court lacked subject matter jurisdiction because no payments were "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 Moda's motion for partial summary judgment and denied the Government's motion to dismiss. 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 FY 2014 and FY 2015 payments were "presently due." Third, the Court granted partial summary judgment and held that the Government was liable to Moda because the RCP requires full, annual payments to QHP issuers as evidenced by: Section 1342's text; HHS's implementing regulations; Congress's obvious object and purpose in creating the RCP; and Congress's modeling of Section 1342 on Medicare Part D's annual RCP.[1] *Moda*, 2017

[1] Judge Wheeler further noted that HHS has confirmed the program's annual nature through repeated statements, annual payment calculations, and annual partial payments to insurers.

WL 527588, at *26 ("the Court finds that the Government made a promise in the risk corridors program that it has yet to fulfill. Today, the Court directs the Government to fulfill that promise.").

Montana Health respectfully submits that Judge Wheeler's opinion supports its motion for partial summary judgment.

I. THIS COURT HAS JURISDICTION OVER MONTANA HEALTH'S CLAIMS.

As two other judges of this Court (Judge Lettow and Judge Sweeney) have held, Judge Wheeler held that the Court has Tucker Act jurisdiction over statutory and contract claims for RCP payments. Judge Wheeler held that Section 1342 is "money-mandating" because it dictates that the Government "shall" pay amounts to be calculated by formula. *See Moda*, 2017 WL 527588, at *10. With respect to the implied-in-fact contract claim, Judge Wheeler also found that Moda made the requisite "non-frivolous *allegation* of a contract with the government" by pleading (1) mutuality of intent to contract based on the Government's offer of RCP payments if issuers offered QHPs on the exchanges, (2) consideration in the form of plaintiff offering QHPs in exchange for the Government's promise to make RCP payments, (3) acceptance in the form of the Government offering a unilateral contract and plaintiff accepting it by performing as required under the RCP, and (4) breach in the form of the Government failing to pay the full amount owed. *Moda*, 2017 WL 527588, at *11. Montana Health has argued that the same elements give rise to its implied-in-fact contract with the Government.[2] Compl. ¶¶ 90-98; Pl.'s Reply at 6.

[2] Notably, the Court in *Moda* first granted summary judgment with respect to Moda's statutory count, but also, in the alternative, granted summary judgment with respect to its implied-in-fact contract count. Montana Health has not moved for summary judgment with respect to its implied-in-fact contract count, but cites to Judge Wheeler's decision in support of its arguments—which the Government characterizes as "identical and related," Def.'s Mot. Stay at 1, ECF No. 8,—that the count survives the Government's motion to dismiss. *Moda*, 2017 WL 527588, at **11, 23-26.

Judge Wheeler also rejected the Government's argument that RCP claims are not "ripe." As in this case, the Government argued in Moda that any payments that *may* be 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. *Moda*, 2017 WL 527588, at **12-13. Judge Wheeler observed that Section 1342 "offer[s] clues as to Congress's intent" by requiring an RCP for "calendar years 2014, 2015, and 2016" rather than "calendar years 2014-2016" and by requiring the calculation of payment amounts, both in and out of the program, on a "plan year" basis rather than over the life of the program. *Id.* at *12; Pl.'s Br. at 28-29. Judge Wheeler also properly observed that Congress explicitly dictated that the ACA's RCP be "based on" the Medicare Part D RCP, which is administered on an annual basis. *Id.*; *see also* Pl.'s Br. at 30. As Judge Sweeney did in *Health Republic*, Judge Wheeler recognized in *Moda* that all of these factors suggest that Congress envisioned an annual program. *Id.* at **12-13.

Judge Wheeler observed that Congress knew that if HHS "'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.'" *Moda*, 2017 WL 527588, at *13 (citing *Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757, 776 (2017)). After all, as HHS itself stated at the time it promulgated its implementing regulations, "[t]he temporary Federally administered risk corridors program serves to protect against *uncertainty in rate setting* by qualified health plans *sharing risk in losses and gains with the Federal government*." Patient Protection and Affordable Care Act; Standards Related to Reinsurance, Risk Corridors and Risk Adjustment (Final RCP Rule), 77 Fed. Reg. 17,220, 17,220 (Mar. 23, 2012) (emphases added). The point is that if insurers lacked the resources to continue offering plans on the exchanges, they would either fail, leave the exchanges altogether, or dramatically increase premiums to remain afloat.

That is exactly what happened. *See* Pl.'s Reply at 1-2, 23; Transcript of Bench Trial 2612:9-10, *United States v. Aetna, Inc., et al.*, CA No. 16-1494 (Bates, J.) (D.D.C. Dec. 16, 2016) (Kevin Counihan—HHS's Director and Marketplace Chief Executive Officer at CMS—agreeing under oath that the Government's "non-payment of the risk corridor payments" in 2014 (beyond the partial 12.6% payment) "*had a deleterious effect on the solvency of some insurance companies.*") (emphasis added); *Health Republic*, 129 Fed. Cl. at 776 ("If these 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. Further, if enough insurers left the exchanges, one of the goals of the Affordable Care Act . . . would be unattainable."). Courts generally "do not 'interpret federal statutes to negate their own stated purposes.'" *Moda*, 2017 WL 527588, at *13 (citing *N.Y. State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973)).

II. MONTANA HEALTH IS ENTITLED TO PARTIAL SUMMARY JUDGMENT.

Having established that payments were required to be annual, Judge Wheeler then held that Section 1342 requires *full* annual payments—not subject to budget neutrality—and that liability attached pursuant to settled principles of fiscal law.

A. THE RCP REQUIRES FULL, ANNUAL PAYMENTS TO MONTANA HEALTH.

Judge Wheeler rejected the Government's arguments that (1) Congress intended the program to be budget neutral from the start, and (2) a later Congress somehow "affirmed" this purported intent. Govt. Br. at 31-42. He noted, as Montana Health argues, that the RCP's directive that HHS "*shall pay*" QHP issuers pursuant to a statutorily specified formula unambiguously indicates that "payments out" are not contingent on "payments in." *Moda*, 2017 WL 527588, at *15; Pl.'s Br. at 13-14, 18-20, 23-24; Pl.'s Reply at 5-6, 12, 26-27. And Judge

Wheeler observed that there was no language expressly conditioning "payments out" upon "payments in"—for example, Congress could have, *but did not*, add a subsection (c) to the RCP to that effect. *See Moda*, 2017 WL 527588, at *15. This Court should, like Judge Wheeler, find "the unambiguous language of Section 1342 dispositive." *Moda*, 2017 WL 527588, at *16.[3]

Judge Wheeler also found that the Government's two primary arguments on this issue actually favor plaintiffs. First, he rejected the Government's efforts to distinguish Medicare Part D from the RCP with respect to budget neutrality, noting that the fact that the two statutes are not identical does not render the RCP budget neutral. Indeed, he pointed out that other differences between the two statutes actually suggest 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). *Moda*, 2017 WL 527588, at *15. Second, Judge Wheeler rejected the Government's reliance on the fact that the Congressional Budget Office (CBO) did not score the RCP as somehow demonstrating that Congress believed that the RCP would be budget neutral, dubbing it "simply a failure to speak" and noted instead CBO's explicit statement that "risk corridor collections (which will be recorded as revenues) will not necessarily equal risk corridor payments, so that program can

[3] While Judge Wheeler found, as Montana Health has argued in this case, that the RCP is unambiguously *not* budget neutral under the plain meaning of Section 1342, Judge Wheeler also observed that HHS/CMS contemporaneously and repeatedly recognized, as did everyone in the industry, that the RCP is *not* budget neutral. *Moda*, 2017 WL 527588, at *17. HHS's multiple and consistent statements shortly after the ACA's passage buttress Montana Health's proposed interpretation that the statute is unambiguously not budget neutral.

have net effects on the budget deficit." *Moda*, 2017 WL 527588, at *15-16.[4] This Court, like Judge Wheeler, should reject the Government's arguments.

B. THE GOVERNMENT'S LIABILITY DOES NOT TURN ON THE AVAILABILITY OF FUNDING, BUT, IN ANY EVENT, BOTH *MODA* AND THE GAO AGREE THAT APPROPRIATIONS WERE AVAILABLE TO MAKE RCP PAYMENTS.

Judge Wheeler dispensed with the Government's strained argument that the RCP's lack of explicitly appropriated funds was fatal to whether liability attached. He rejected the proposition that the Court should conclude that "payments out" must be conditioned on "payments in" (i.e., that the RCP was budget neutral) based on this absence of explicit appropriations language. Rather, he found that the Government's obligation to make full annual payments was evident from the RCP's text and that none of the alleged fiscal infirmities subsequently extinguished the Government's liability.

The Government's argument in this regard conflates the distinct concepts of a statutory "obligation" on the one hand and an appropriation to fund that obligation on the other. This Court should likewise reject the Government's assertion that the mechanics of congressional appropriations have any bearing on the Government's independent legal obligation to make RCP payments.

Under the Tucker Act, Montana Health may recover money owed by the Government when the Government fails to meet its obligation under a money-mandating statute. *See. e.g.*, *Price v. Panetta*, 674 F.3d 1335, 1338-39 (Fed. Cir. 2012); *District of Columbia v. United States*, 67 Fed. Cl. 292, 302-305 (2005). The RCP is unequivocally money-mandating because, *inter alia*, it dictates that the Government "shall pay" RCP payments, as Judge Wheeler observed.

[4] Moreover, as Montana Health has noted, "the CBO is not Congress, and its reading of the statute is not tantamount to congressional intent." Pl. Br. at 25 n.19 (quoting *Sharp v. United States*, 580 F.3d 1234, 1238-39 (Fed. Cir. 2009)).

Moda, 2017 WL 527588, at *15; *see also Greenlee Cty., Ariz. v. United States*, 487 F.3d 871, 877 (Fed. Cir. 2007); *Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003); Pl.'s Br. at 18-19; Pl.'s Reply at 4-6. Whether, when, and how Congress may have appropriated funds for this purpose, absent a substantive repeal or amendment, are irrelevant to this Court's decision as to whether there is a legal *obligation* to make the payments in the first instance. There need not be a dedicated appropriation. *See, e.g., United States v. Langston*, 118 U.S. 389, 391-94 (1886) (finding the Government liable for its statutory promise of future payment, despite the absence of either a simultaneous appropriation or a sufficient future appropriation); *see also N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 809-10 (Ct. Cl. 1966) (upholding an agency practice of setting binding rates "for which no appropriations have been provided by Congress at the time of rate fixing"); *Gibney v. United States*, 114 Ct. Cl. 38, 51 (1949) ("Neither is a public officer's right to his legal salary dependent upon an appropriation to pay it. Whether it is to be paid out of one appropriation or out of another; whether Congress appropriate an insufficient amount, or a sufficient amount, ***or nothing at all***, are questions which are vital for the accounting officers, but which do not enter into the consideration of a case in the courts.") (emphasis added); I GAO, *Principles of Federal Appropriation Law*, 2-41 (3d ed. 2004) [hereinafter "GAO Redbook"], *available at* http://www.gao.gov/legal/redbook/overview ("The existence of a statute (organic legislation) imposing substantive functions upon an agency that require funding for their performance is itself sufficient authorization for the necessary appropriations." (citations omitted)).[5]

[5] The GAO's opinions are "give[n] special weight" on appropriations matters. *Nevada v. Dep't of Energy*, 400 F.3d 9, 16 (D.C. Cir. 2005).

Judge Wheeler indulged but appropriately rejected the Government's argument that there was no appropriation to satisfy its legal obligations under Section 1342. But this Court should not indulge the Government a second time because this Court's determination regarding whether Section 1342 created a legal obligation (it did: "s*hall pay*") is wholly distinct from whether and which appropriations may be used to fund it. An obligation is formed, and liability attaches, based on the statutory authorization mandating substantive functions, regardless of a dedicated appropriation. *See Langston*, 118 U.S. at 391-94; I GAO Redbook at 2-41; II GAO Redbook at 7-4. Accordingly, the Court's analysis can stop here—i.e., Section 1342 creates a legal obligation.

Nevertheless, should the Court indulge the Government's position, as Judge Wheeler did, then like Judge Wheeler it should find that the Government's contention that there were no funds available for RCP payments is, in any event, incorrect. For FY 2014, the first year in which the exchanges were operational and the RCP was in effect, Judge Wheeler and the GAO both agree that two sources of funding for RCP payments were available: (1) the 2014 CMS Program Management appropriation and (2) "payments in" from profitable plans. *Moda*, 2017 WL 527588, at *16; GAO, HHS Risk Corridors Program, B-325630 at 3-4 (Sept. 30, 2014), *available at* http://gao.gov/assets/670/666299.pdf ["GAO Letter"].

The CMS Program Management appropriation for FY 2014 included "other responsibilities" of CMS through September 30, 2014, "includ[ing] the risk corridors program." GAO Letter at 4. The Government argued in *Moda* as it does in this case that CMS's FY 2014 appropriation is irrelevant because payments for the 2014 benefit year were not due, and thus would not be paid, until 2015 at the earliest. But the Government's argument misses the mark because the availability of funds "relates to [CMS's] authority to *obligate* the appropriation"—

which occurred in FY 2014—"and does not necessarily prohibit payments after the expiration date for obligations previously incurred, unless the payment is otherwise expressly prohibited by statute." I GAO Redbook at 5-3-5-4 (citations omitted; emphasis added). It is black letter appropriations law that an "expired appropriation remains available for 5 years for the purpose of *paying obligations incurred* prior to the account's expiration and adjusting obligations that were previously unrecorded or under recorded." I GAO Redbook at 1-37 (emphasis added).[6] A legal "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." II GAO Redbook at 7-4 - 7-5 (emphasis added).

Thus, even taking the Government's argument at face value, there were in fact appropriations available to make RCP payments when the program began. *See Moda*, 2017 WL 527588, at **16, 17 n.13. The Government's emphasis on the RCP's lack of a specific appropriation is therefore misplaced. Indeed, as discussed further below, Judge Wheeler concluded that a third appropriation was also available to make up the difference: the Judgment Fund.

[6] Moreover, CMS's recording RCP payments as obligations of the Federal government in the fiscal years in which they are incurred "evidences the obligation but does not create it." II GAO Redbook at 7-8. The Government mistakes Montana Health's argument on this point, saying Montana Health erroneously treats HHS's recording of its RCP obligations as tantamount to "the United States admit[ting] that it presently owes full payment as calculated under section 1342." Gov. Br. at 26 n.11. Montana Health's position is clear that *Section 1342* creates the obligation. But HHS recording it certainly "evidences the obligation."

C. CONGRESS DID NOT EXTINGUISH THE GOVERNMENT'S LEGAL OBLIGATION TO MAKE RCP PAYMENTS IN THE 2015 AND 2016 SPENDING LAWS.

Finally, Judge Wheeler held that not only did Congress not intend Section 1342 to be budget-neutral, but also that neither the 2015 nor 2016 Spending Laws abrogated Section 1342. *See Moda*, 2017 WL 527588, at **17-21. As an initial matter, the Court noted that appropriations remained available to make 2015 RCP payments because Congress passed three continuing resolutions in the first two-and-a-half months of FY 2015 (before enacting the 2015 Spending Law that first restricted sources of RCP payments), which allocated roughly $750 million in unrestricted funds to the CMS Program Management appropriation to make RCP payments for FY 2015. *Moda*, 2017 WL 527588, at *17 n.13 (citing Continuing Appropriations Resolution, 2015, Pub. L. 113-164, § 101(a)(8), 128 Stat. 1867, 1867 (2014); Joint Resolution, Pub. L. 113-202, 128 Stat. 2069 (2014); Joint Resolution, Pub. L. 113-203, 128 Stat. 2070 (2014)); *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2189-90 (2012).

As was true with Moda, since the obligation to pay Montana Health arose in September 2014, when Montana Health's participation on the exchanges during benefit year 2015 was fixed and irrevocable, CMS had funds available to pay Montana Health.

But even with respect to the 2015 and 2016 Spending Laws (the first in December 2014), which restricted the sources of RCP payments, Judge Wheeler found that those laws did not effectuate a substantive repeal or amendment of Section 1342. Judge Wheeler noted that, generally, funding restrictions do not amend or repeal substantive law and repeals by implication are not favored. *Moda*, 2017 WL 527588, at *18 (citing *N.Y. Airways*, 369 F.2d at 749; *Langston*, 118 U.S. at 393). As he explained: "Repealing 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, 2017 WL 527588, at *18 (*citing Gibney*, 114 Ct. Cl. at 51). Therefore, an unmistakable intent to repeal or amend the substantive law must be "clearly manifest." *N.Y. Airways*, 369 F.2d at 749.

Judge Wheeler then conducted an in-depth analysis of the cases on which Moda and the Government principally relied for their respective positions (the same cases on which Montana Health and the Government rely in this case). He 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.[7] 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 this or any other Act" or funds "appropriated in this Act or any other Act" (thus effecting a substantive amendment), and Congress targeting only a specific funding source (thus limiting spending but not substantively amending law). *See Moda*, 2017 WL 527588, at **20-22.

Judge Wheeler concluded that because the language in the 2015 and 2016 Spending Laws limited only the use of funds appropriated to *one specific account* and did not expand the limitation to other sources of funds using Congress's typical language to do so, 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 **18-21. Moreover, Judge Wheeler found that the legislative history of the Spending Laws confirmed that Congress understood them to prohibit RCP payments from a specific account. *Id.* at *21. Because "the limitation in this case

[7] Judge Wheeler noted four relevant cases that "have refused to find a repeal or amendment." *Moda*, 2017 WL 527588, at **18-19 (citing *Langston*, 118 U.S. at 394; *Gibney*, 114 Ct. Cl. at 50; *New York Airways*, 369 F.2d at 815, 818; *District of Columbia*, 67 Fed. Cl. at 335). In contrast, Judge Wheeler notes two cases finding a repeal or amendment. *Id.* at **19-20 (citing *United States v. Dickerson*, 310 U.S. 554, 561-62 (1940); *United States v. Will*, 449 U.S. 200, 208 (1980)).

singles out a specific use for a specific account" and does not "bar any appropriated funds from being used for a given purpose," the Court found that the words did not "clearly manifest" an intent to repeal or amend.[8] *Id.* This Court too should find that the Spending Laws did not clearly manifest a sufficiently clear intent to repeal, but rather effectuated a limitation on the use of a specific account for a specific year.

Regardless of the actions of a later Congress, this Court can enter judgment for Montana Health irrespective of how such a judgment will be effectuated by the political branches. "The 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); *see also, e.g.*, *Slattery v. United States*, 635 F.3d 1298, 1317 (Fed. Cir. 2011) (en banc) ("The purpose of the Judgment Fund was to avoid the need for specific appropriations to pay judgments awarded by the Court of Claims."); *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].").

Although this Court's ability to enter judgment is not conditioned upon a specific source of funds being available, it is noteworthy that Judge Wheeler rejected the very same Government argument in *Moda* that the Government has raised here: that this Court cannot consider the availability of the Judgment Fund in making its liability determination. *Moda*, 2017 WL 527588, at *22. Having found that Congress intended to create liability, Judge Wheeler rejected that argument and recognized that the Judgment Fund is available to pay judgments, even where

[8] Indeed, the Court noted that precisely that language was used elsewhere in the 2015 Spending Law but was notably absent from the provision governing RCP payments. *See Moda*, 2017 WL 527588, at *21 (citations omitted).

the agency cannot pay because Congress has limited its funds. *Moda*, 2017 WL 527588, at **22-23 (citing *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1583 (Fed. Cir. 1994)); *Wetsel-Oviatt Lumber Co. v. United States*, 38 Fed. Cl. 563, 571 (1997)). Absent a repeal or amendment by Congress, "private parties may still recover their funds in this Court." *N.Y. Airways*, 369 F.2d at 749.

III. CONCLUSION

Montana Health respectfully submits that the *Moda* decision, which analyzed several key issues before the Court in the instant case, is instructive and weighs in favor of granting Montana Health's Motion for Partial Summary Judgment. For the reasons stated herein, and in Montana Health's opening and reply briefs, Montana Health respectfully requests that the Court grant Montana Health's Motion for Partial Summary Judgment.

Dated: February 23, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 23, 2017, a copy of the forgoing "Plaintiff's Supplemental Memorandum of Law 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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