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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

FILED
AUG 7 2017
U.S. COURT OF
FEDERAL CLAIMS

WISCONSIN PHYSICIANS SERVICE INSURANCE CORPORATION and WPS HEALTH PLAN, INC.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

No. 17-1070 C

COMPLAINT

Plaintiffs Wisconsin Physicians Service Insurance Company and WPS Health Plan, Inc. (doing business as Arise Health Plan) (collectively, "WPS") by and through their undersigned counsel, hereby submit this Complaint against Defendant, the United States of America (the "Government"), and allege as follows based upon personal knowledge:

PRELIMINARY STATEMENT

1. WPS seeks to recover over $28.5 million the Government was obligated—but failed—to pay it under the "Risk Corridors Program" of the Patient Protection and Affordable Care Act ("ACA" or "Act"), Pub. L. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. § 18001, *et seq.* (2012)). The Government has flouted its express statutory and contractual obligations, injuring WPS and its policyholders. Not only has the Government improperly deprived WPS of mandatory and bargained-for compensation, these financial losses also forced WPS to withdraw one of its health plans from the Wisconsin market as of 2017. The Government must be held accountable for its actions and the harms they are causing to the very constituencies the ACA was intended to benefit.

2. Congress enacted the ACA in 2010 to expand access to healthcare and provide health insurance to previously uninsured individuals. Central to the ACA's framework was a network of Health Benefit Exchanges ("Exchanges" or "Marketplaces") on which health insurers like WPS would offer Qualified Health Plans ("QHPs") to eligible purchasers in state-wide marketplaces. To incentivize insurers to participate in the new Marketplaces and help ensure a stable health insurance market during the ACA's early stages, Congress created three premium-stabilization programs, including the Risk Corridors Program at issue here. The Risk Corridors Program requires the Government and insurers offering QHPs ("issuers") to share in profits or losses exceeding certain thresholds for the first three years of the ACA's implementation (2014-2016). In particular, the ACA mandates that the Government must reimburse QHP issuers in full for losses sustained in the Marketplaces during any of those three years, while requiring issuers that profit in the Marketplaces during any of those years to pay a percentage of that profit to the Government.

3. The Risk Corridors Program was designed to help insurers adapt to the Marketplaces and weather short-term financial challenges as they worked to set premiums for an unknown population of previously uninsured individuals. The program was also intended to discourage insurers from adopting overly conservative cost estimates and unduly increasing premiums.

4. Relying on the ACA's statutory guarantee that the Government would reimburse insurers' losses in the Marketplaces, WPS offered and sold QHPs on the federally-facilitated Marketplace in Wisconsin. Unfortunately, and partly due to unilateral actions taken by the Government, WPS suffered losses on these plans exceeding $28.5 million for the 2014, 2015, and 2016 risk corridors plan years. Yet despite the mandatory language of the ACA and the

Government's numerous written admissions that the ACA requires it to compensate WPS in full, the Government to date has reimbursed WPS for only roughly ***four percent*** of its losses.

5. In addition to depriving insurers of money to which they are statutorily and contractually entitled, the Government's disregard for its legal obligations is driving insurers from the market, and thus is undermining the ACA's core purpose of increasing competition in the health insurance industry and expanding coverage. Indeed, the Government's conduct forced WPS to withdraw its Arise Health Plan from the Marketplace in Wisconsin as of 2017.

6. In sum, WPS had compensable risk corridors losses of $6,415,135.24 in plan year 2014, $13,785,578.92 in plan year 2015, and $9,386,702 in plan year 2016. The Government has reimbursed WPS only $1,022,453 toward its 2014 losses and zero toward its 2015 losses. The Government has not yet announced payments for 2016, but it almost certainly will pay – at most – another trivial amount toward insurers' mounting losses. WPS therefore seeks compensation for its outstanding risk corridors payments for 2014 and 2015, and its anticipated payment for 2016, totaling over $28.5 million.

7. WPS is far from alone in its pursuit of risk corridors reimbursement in this Court. The Government's violation of its obligations has generated a flurry of litigation. Final merits decisions favoring issuers and the Government, respectively, are pending in consolidated appeals to the Federal Circuit. *Compare Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436, 466 (2017) (denying Government's motion to dismiss, granting cross-motion for summary judgment in favor of issuer, and later entering judgment in the amount of $209,830,445.79), *appeal filed*, No. 17-1994 (Fed. Cir. May 4, 2017)*, with Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 114 (2016) (granting Government's motion for judgment on administrative record and motion to dismiss), *appeal filed*, No. 17-1224 (Fed. Cir. Nov. 16, 2016).

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over Count I (Violation of ACA Section 1342) pursuant to the Tucker Act, 28 U.S.C. § 1491, because Section 1342 of the ACA is a money-mandating statutory provision, which provides that the Government "shall pay to the [QHP issuer]" an amount specified by the ACA on an annual basis. *See infra* ¶¶ 62-69.

9. This Court has subject matter jurisdiction over Count II (Breach of Implied-in-Fact Contract) pursuant to the Tucker Act, 28 U.S.C. § 1491, because WPS adequately pleads the elements of a contract with the Government. *See infra* ¶¶ 70-79.

10. This Court has subject matter jurisdiction over Count III (Illegal Exaction in Violation of United States Constitution) pursuant to the Tucker Act, 28 U.S.C. § 1491, because the remedy for the Government's violation of ACA Section 1342 entails a return of money unlawfully exacted from WPS. *See infra* ¶¶ 80-84.

11. Venue is proper in this Court because the Government's actions at issue in this lawsuit were taken in the District of Columbia.

PARTIES

12. Plaintiff Wisconsin Physicians Service Insurance Corporation ("WPSIC") is a non-profit service insurance corporation organized under the provisions of Chapter 613, Wisconsin Statutes, incorporated in Wisconsin and located at 1717 West Broadway, P.O. Box 8190, Madison, Wisconsin 53708-8190. WPSIC provides multiple types of health-related insurance in the State of Wisconsin.

13. Plaintiff WPS Health Plan, Inc., doing business as Arise Health Plan ("WPS Health Plan"), is a wholly-owned subsidiary of WPSIC, incorporated in Wisconsin and located at 421 Lawrence Drive, De Pere, Wisconsin, 54115. WPS Health Plan contracted with the Government to sell QHPs on the federally-facilitated Marketplace in Wisconsin from 2014 to 2016.

14. Defendant is the United States of America. The U.S. Department of Health and Human Services ("HHS") is the federal department tasked by statute with administering the Risk Corridors Program. 42 U.S.C. § 18062. HHS delegated rulemaking authority for the Risk Corridors Program to a federal agency, the Centers for Medicare & Medicaid Services ("CMS"). Delegation of Authorities, 76 Fed. Reg. 53,903, 53,903-04 (Aug. 30, 2011).

FACTUAL ALLEGATIONS

A. Overview of the ACA and the Risk Corridors Program

15. Congress overhauled the nation's healthcare system in 2010 when it passed the ACA. Among other things, the ACA provides that "each health insurance issuer that offers health insurance coverage in the individual . . . market in a State must accept every . . . individual in the State that applies for such coverage," and it bars issuers from charging higher premiums on the basis of a person's health status, including pre-existing conditions. 42 U.S.C. § 300gg-1.

16. The ACA established Marketplaces through which health insurance consumers in the individual or small group markets could compare and purchase QHPs. *Id.* § 18032(c). The ACA also included a number of mechanisms intended to make QHPs more affordable to certain consumers, including tax credits and cost-sharing subsidies. *E.g., id.* § 18031.

17. Insurers anticipated that many previously-uninsured individuals would purchase QHPs under the new ACA regime. However, there was substantial uncertainty about who would enroll in the QHPs and the health status of new enrollees. Issuers therefore lacked important information they generally rely on to price insurance premiums.

18. Congress recognized this uncertainty and included in the ACA several programs designed to mitigate the risk to insurers of setting premiums for their new customers. One of those programs was the Risk Corridors Program, under which the Government would share in issuers' losses and profits that exceeded certain thresholds. Congress limited the Risk Corridors Program

to the first three years of the ACA's implementation (2014-2016) based on the assumption that insurers would be able to assemble sufficient data in that period to price prospective insurance premiums accurately. Standards Related to Reinsurance, Risk Corridors, and Risk Adjustment, 77 Fed. Reg. 17,220, 17,220–21 (Mar. 23, 2012).

19. The terms of the Risk Corridors Program are set out in ACA Section 1342:

> (a) IN GENERAL.—The Secretary shall establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market ***shall participate*** in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums. Such program ***shall be based*** on the program for regional participating provider organizations under part D of title XVIII of the Social Security Act.
>
> (b) PAYMENT METHODOLOGY.—
>
> (1) PAYMENTS OUT.—The Secretary ***shall provide*** under the program established under subsection (a) that if—
>
> (A) a participating plan's allowable costs for any plan year are more than 103 percent but not more than 108 percent of the target amount, the ***Secretary shall pay*** to the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount; and
>
> (B) a participating plan's allowable costs for any plan year are more than 108 percent of the target amount, the ***Secretary shall pay*** to the plan an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount.
>
> (2) PAYMENTS IN.—The Secretary ***shall provide*** under the program established under subsection (a) that if—
>
> (A) a participating plan's allowable costs for any plan year are less than 97 percent but not less than 92 percent of the target amount, the plan ***shall pay*** to the Secretary an amount equal to 50 percent of the excess of 97 percent of the target amount over the allowable costs; and
>
> (B) a participating plan's allowable costs for any plan year are less than 92 percent of the target amount, the plan ***shall pay*** to the Secretary an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the excess of 92 percent of the target amount over the allowable costs.
>
> (c) DEFINITIONS.—In this section:

> (1) ALLOWABLE COSTS.—
>
> (A) IN GENERAL.—The amount of allowable costs of a plan for any year is an amount equal to the total costs (other than administrative costs) of the plan in providing benefits covered by the plan.
>
> (B) REDUCTION FOR RISK ADJUSTMENT AND REINSURANCE PAYMENTS.—Allowable costs shall be reduced by any risk adjustment and reinsurance payments received under section 1341 and 1343.
>
> (2) TARGET AMOUNT.—The target amount of a plan for any year is an amount equal to the total premiums (including any premium subsidies under any governmental program), reduced by the administrative costs of the plan.

42 U.S.C. § 18062 (emphases added).

20. Section 1342 does not condition the Government's obligation to make risk corridors "payments out" under subsection (b)(1) on the Government's collection of "payments in" under subsection (b)(2). There is no requirement of budget neutrality. Nor does Section 1342 authorize the Secretary of HHS to make partial annual payments. The statutory mandate is clear and unequivocal: "the Secretary shall pay" an issuer compensation for its losses, calculated on a plan-year basis, in full, according to the formula set out in the Act. Likewise, Section 1342 imposes reciprocal payment obligations on issuers that profit from their QHPs. On its face, Section 1342 is equally mandatory upon the Government and participating insurers.

21. Congress modeled the Risk Corridors Program on a program implemented as part of the Medicare Part D prescription drug benefit program, which also requires full and annual payments by the Government pursuant to a similar formula. 42 U.S.C. § 1395w-115(e)(3)(A).

B. HHS and CMS Implement the Risk Corridors Program

22. The HHS and CMS regulations confirm what the text of the ACA clearly states: insurers with losses in the Marketplaces are entitled to full risk corridors payments, regardless of "payments in" received by the Government. The regulations further provide that the Government is required to make payments to QHP issuers on an annual basis.

23. On March 23, 2012, after notice and comment, HHS promulgated final regulations for the Risk Corridors Program. Risk Corridors Establishment and Payment Methodology, 77 Fed. Reg. 17,220 (Mar. 23, 2012) (codified at 45 C.F.R. § 153). They provide that "QHP issuers with allowable costs greater than 103 percent of the QHP's target amount ***will receive*** payments from HHS" and that "HHS ***will pay***" QHP issuers pursuant to Section 1342(b)(1). *Id.* at 17,236, 17,251 (emphases added) (codified at 45 C.F.R. § 153.510).

24. In the same regulation, HHS explained that it was considering setting deadlines by which it would be required to pay issuers, and acknowledged that "QHP issuers who are owed these amounts [by HHS] will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers." *Id.* at 17,238.

25. On December 7, 2012, CMS proposed an additional rule "provid[ing] further detail and parameters" related to the Risk Corridors Program. HHS Notice of Benefit and Payment Parameters for 2014, 77 Fed. Reg. 73,118 (Dec. 7, 2012). In the "Summary of the Major Provisions," CMS stated that "[i]n this proposed rule, . . . ***we also propose an annual schedule for the program*** and standards for data submissions." *Id.* at 73,121 (emphasis added). CMS then proposed a deadline of "July 31 of the year following the applicable benefit year" for QHP issuers to submit charges to HHS for losses under the Risk Corridors Program. *Id.* at 73,164.

26. After a notice and comment period for the December 7, 2012 proposed rule, CMS promulgated its final regulations on March 11, 2013. HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15,410 (Mar. 11, 2013). The final regulations maintained the annual framework: "[f]or each benefit year, a QHP issuer must submit all information required under this section by July 31 of the year following that benefit year." *Id.* at 15,531.

27. In addition to setting an annual schedule for the Risk Corridors Program, CMS's final regulations also addressed a commenter's concern regarding "HHS's plans for funding risk corridors if payments [out] exceed [payments in]." CMS responded that "***[t]he risk corridors program is not statutorily required to be budget neutral***. Regardless of the balance of payments and receipts, HHS ***will remit payments*** as required under section 1342 of the Affordable Care Act." *Id.* at 15,473 (emphases added).

C. WPS Health Plan Contracts With the Government To Sell QHPs in the Federally-Facilitated Marketplace in Wisconsin for 2014

28. CMS manages a federally-facilitated Marketplace in the State of Wisconsin. The Government extended an offer for a contract that issuers could accept by selling QHPs there. In exchange for issuers selling QHPs and complying with requirements, the Government promised (and was required by the ACA) to make full risk corridors payments for losses. The terms of the Government's offer were set forth in the ACA and its implementing regulations. 45 C.F.R. Parts 144, 146-48; 77 Fed. Reg. 17,220; 78 Fed. Reg. 15,410; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30,240, 30,260 (May 27, 2014); *see also* CMS, Federal Marketplace Progress Fact Sheet (May 31, 2013), https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/ffe.html; Letter from CCIIO to Issuers on Federally-facilitated and State Partnership Exchanges (Apr. 5, 2013),https://www.cms.gov/cciio/resources/regulations-and-guidance/downloads/2014_letter_to_ issuers_04052013.pdf.

29. WPS actuaries began calculating premium rates for Wisconsin QHP populations in November 2012. On May 9, 2013, WPS Health Plan submitted its application to sell both individual and small group QHPs in the federally-facilitated Marketplace in Wisconsin, thereby accepting the Government's offer and forming an implied-in-fact contract.

30. CMS sent WPS Health Plan a counter-signed "Qualified Health Plan Certification Agreement and Privacy and Security Agreement Between Qualified Health Plan issuer and The Centers for Medicare & Medicaid Services" on September 30, 2013, embodying the parties' contract for risk corridors plan year 2014. Exhibit A.

31. By entering into this contract, WPS Health Plan assumed various obligations, including compliance with "standard rules of conduct," completion of "testing for each type of transaction it will implement," and instructions and formatting requirements for its transactions. *Id*. WPS Health Plan agreed to these obligations based on the reasonable, contractual understanding that the Government would fulfill its statutorily-mandated risk corridors reimbursement obligations in the event of losses in the Wisconsin Marketplace.

32. Open enrollment for the 2014 QHP year began on October 1, 2013. By the end of the 2014 risk corridors plan year, WPS Health Plan had enrolled 12,341 subscribers (16,944 members) in individual QHPs and 488 subscribers (905 members) in small group QHPs in the Wisconsin Marketplace.

D. Unanticipated Government Actions Significantly Degrade the QHP Risk Pool: The "Transitional Policy"

33. One of the fundamental changes that the ACA made to the health insurance market was to mandate that health insurance plans satisfy certain "essential [health benefits] coverage" standards. 26 U.S.C. § 5000A. Because many plans that existed prior to the ACA's enactment did not meet these standards, it quickly became apparent that some individuals and small businesses would see their health insurance coverage terminated because it did not comply with the ACA.

34. In response to political pressure, in November 2013 the Government announced a "transitional policy" to minimize plan terminations. Under the transitional policy, health plans in

the individual or small group markets that were in effect on October 1, 2013 would not be considered out of compliance with the ACA's reforms for the 2014 plan year. Letter from Gary Cohen, Dir., CCIIO, to State Ins. Comm'rs (Nov. 14, 2013), https://www.cms.gov/cciio/resources/letters/downloads/commissioner-letter-11-14-2013.pdf ("Transitional Policy Letter"). CMS encouraged States to adopt similar policies. *Id.* at 3.

35. The Wisconsin Office of the Commissioner of Insurance adopted a transitional policy on November 21, 2013, which allowed carriers to renew non-ACA compliant individual and small group coverage in effect on October 1, 2013 for the 2014 plan year. Memorandum from Theodore Nickel, Comm'r of Insurance, to All Insurers Authorized to Write Health Insurance in Wisconsin (Nov. 21, 2013), https://oci.wi.gov/Pages/Regulation/Bulletin20131121HealthPlans.aspx.

36. The transitional policy—unilaterally enacted by CMS ***after*** WPS Health Plan and other issuers had begun selling QHPs for 2014—drastically upset settled expectations regarding the QHP risk pool. Before the transitional policy, issuers expected that millions of individuals who had non-ACA-compliant plans would purchase QHPs in the Marketplaces. These consumers generally tended to be healthier (and thus less costly to insure) than previously-uninsured individuals. WPS Health Plan and other issuers had set premiums based on the Government-encouraged expectation that these healthier individuals would be part of the QHP risk pool. The transitional policy, however, removed these individuals from the QHP risk pool, leaving a less healthy and more expensive population than QHP issuers had reason to anticipate.

37. CMS recognized the negative impact that the transitional policy was likely to have on QHP issuers, and assured them that "[t]hough this transitional policy was not anticipated by health insurance issuers when setting rates for 2014, the risk corridor program should help

ameliorate unanticipated changes in premium revenue." Transitional Policy Letter 3. CMS further explained that it "intend[ed] to explore ways to modify the risk corridor program final rules to provide additional assistance" to issuers. *Id.*

38. Although the transitional policy was supposed to last for only one year, CMS and Wisconsin have twice extended the policy. In Wisconsin, the transitional policy now will extend through December 31, 2017. Bulletin, July 18, 2016, Extension of Transitional Health Insurance Plans Through December 31, 2017, Wisconsin Office of the Commissioner of Insurance (July 18, 2016), https://oci.wi.gov/Pages/Regulation/Bulletin20160718ExtensionTransitionalPol.aspx.

E. The Government Modifies the Risk Corridors Program To Account for the Transitional Policy and Reaffirms Its Payment Obligations

39. HHS promulgated further rules regarding the Risk Corridors Program on March 11, 2014. In the preamble, HHS explained that although the transitional policy likely would increase payments made out by the Government, HHS now projected that the Risk Corridors Program would be "budget neutral" (*i.e.*, that payments made into the program by profitable QHP issuers would offset payments made out of the program to issuers that suffered losses). HHS Notice of Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13,744, 13,829 (Mar. 11, 2014). Based on this optimistic but unsubstantiated assumption, HHS stated that it "intend[ed] to implement this program in a budget neutral manner." *Id.* at 13,787.

40. HHS did not state, however, that the program was ***required*** to be budget neutral. Indeed, just a month earlier, the Congressional Budget Office had made clear 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." The Budget and Economic Outlook: 2014 to 2024 at 59, Congressional Budget Office (Feb. 2014), http://www.cbo.gov/publication/45010.

41. HHS's March 11, 2014 rules did not address how HHS would satisfy its payment obligations to QHP issuers if risk corridors collections were insufficient to offset payments out. This question was answered in notice and comment rulemaking on May 27, 2014. There, HHS clarified and reaffirmed its obligation to make full risk corridors payments, even if collections were insufficient to cover payments out: "[i]n the unlikely event of a shortfall for the 2015 program year, ***HHS recognizes that the [ACA] 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 Fed. Reg. at 30,260 (emphasis added).

42. Accordingly, by May 27, 2014, the Government had confirmed that it would make full, annual risk corridors payments to QHP issuers, regardless of whether the program had incurred shortfalls and irrespective of "budget neutrality." Importantly, the Government did so despite the impending negative impact of the transitional policy on issuers.

F. CMS Approves WPS Health Plan's Application To Sell QHPs for 2015

43. On June 25, 2014, WPS Health Plan submitted its application to sell QHPs in Wisconsin for the 2015 risk corridors plan year. CMS sent WPS Health Plan a counter-signed "Qualified Health Plan Certification Agreement and Privacy and Security Agreement Between Qualified Health Plan issuer and The Centers for Medicare & Medicaid Services" on November 5, 2014, which embodied the parties' implied-in-fact contract. Exhibit B.

44. By entering into this contract, WPS Health Plan agreed to comply with the same obligations it undertook for the 2014 risk corridors plan year. *Id*. It did so based on the reasonable, contractual understanding—reaffirmed by the Government as of May 27, 2014—that the Government would fulfill its statutorily-mandated risk corridors reimbursement obligations in the event of losses in the Wisconsin Marketplace.

45. Open enrollment for the 2015 QHP year began on November 15, 2014. By the end of the 2015 risk corridors plan year, WPS Health Plan had enrolled 14,746 subscribers (20,388 members) in individual QHPs and 762 subscribers (1,394 members) in small group QHPs in the Wisconsin Marketplace.

G. Congress Purports To Restrict Appropriations for the Risk Corridors Program

46. Meanwhile, on September 30, 2014, the Government Accountability Office ("GAO") issued an opinion responding to a letter from U.S. Senator Jefferson B. Sessions, III and U.S. Representative Frederick Upton regarding the availability of appropriations for risk corridors payments. The GAO opinion concluded that in addition to risk corridors collections under ACA Section 1342, the portion of the CMS Program Management ("PM") appropriation allocated for "carrying out . . . [CMS's] responsibilities" would be available for risk corridor payments under the terms of the Fiscal Year 2014 CMS PM appropriation. Letter from Susan A. Poling, GAO General Counsel, to The Hon. Jeff Sessions & The Hon. Fred Upton, No. B-325630 (Sept. 30, 2014), http://gao.gov/assets/670/666299.pdf.

47. On December 16, 2014, Congress passed the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, for Fiscal Year 2015. Although Congress retained risk corridors "payments in" under Section 1342 as a source from which HHS could make risk corridors "payments out" to issuers, Congress made the broader CMS PM appropriation unavailable for risk corridors payments. *Id.* at div. G, tit. II, § 227, 128 Stat. at 2491. Congress did not, however, amend or repeal Section 1342, and the 2015 Appropriations Act did not constitute an amendment or repeal by implication of the Government's substantive obligations under the ACA.

48. Against this backdrop, in a July 21, 2015, letter to state health insurance commissioners, CMS again reaffirmed its obligation to make full risk corridors payments to QHP issuers. CMS emphasized that it "remains committed to the risk corridor program" and "***recognizes that the [ACA] requires the Secretary to make full payments to issuers***." Letter from Kevin J. Counihan, CCIIO Director and CEO of the Health Insurance Marketplaces, to State Insurance Commissioners (July 21, 2015), https://www.cms.gov/cciio/resources/letters/downloads/doi-commissioner-letter-7-20-15.pdf (emphasis added).

49. Congress later included in the Consolidated Appropriations Act of 2016 the same funding restriction for the Risk Corridors Program that it included in the 2015 Act. Pub. L. No. 114-113 at div. H, tit. II, § 225, 129 Stat. 2242, 2624. Again, however, Congress did not amend or repeal ACA Section 1342, and the 2016 Appropriations Act did not constitute an amendment or repeal by implication of the Government's substantive obligations under the ACA.

H. CMS Approves WPS Health Plan's Application To Sell QHPs in 2016

50. On May 13, 2015, WPS Health Plan submitted its application to sell QHPs in Wisconsin for the 2016 risk corridors plan year. CMS sent WPS Health Plan a counter-signed "Qualified Health Plan Certification Agreement and Privacy and Security Agreement Between Qualified Health Plan issuer and The Centers for Medicare & Medicaid Services" on October 9, 2015, which embodied the parties' implied-in-fact contract. Exhibit C.

51. By entering into this agreement, WPS Health Plan agreed to comply with the same obligations it undertook for the 2014 and 2015 risk corridors plan years. *Id*. It did so based on the reasonable, contractual understanding – further reaffirmed by the Government as of July 21, 2015 – that the Government would fulfill its statutorily-mandated risk corridors reimbursement obligations in the event of losses in the Wisconsin Marketplace.

52. Open enrollment for the 2016 QHP year began on November 1, 2015. By the end of the 2016 risk corridors plan year, WPS Health Plan had enrolled 14,433 subscribers (20,186 members) in individual QHPs and 1,051 subscribers (1,979 members) in small group QHPs in the Wisconsin Marketplace.

I. The Government Makes Only Small, Partial Risk Corridors Payments for 2014 and Makes No Risk Corridors Payments for 2015

53. On October 1, 2015, HHS announced that it owed issuers $2.87 billion in risk corridors payments for the 2014 risk corridors plan year. Risk corridors collections, however, were only $362 million (or 12.6 percent of payments owed to issuers). HHS then stated that it would pay QHP issuers with losses only 12.6 percent of their risk corridors claims. CMS, Risk Corridors Payment Proration Rate for 2014 (Oct. 1, 2015), https://www.cms.gov/ CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/ RiskCorridorsPaymentProrationRatefor2014.pdf.

54. CMS acknowledged that WPS Health Plan was entitled to $6,415,135.24 in risk corridors payments for the 2014 plan year for the individual market, but would receive a prorated payment of only $809,453.20. CMS, Risk Corridors Payment and Charge Amounts for Benefit Year 2014 at 30 (Nov. 19, 2015), https://www.cms.gov/CCIIO/ Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RC-Issuer-level-Report.pdf.

55. In an email dated October 1, 2015, Kevin Counihan, CCIIO Director and CEO of the Health Insurance Marketplaces, notified Michael Hamerlik, CEO of WPS, that "In the event of a shortfall for the 2016 program year, HHS will explore other sources of funding for risk corridors payments, subject to the availability of appropriations. This includes working with Congress on the necessary funding for ***outstanding risk corridors payments***" (emphasis added). One week later, in a letter dated October 8, 2015, Mr. Counihan notified issuers that 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 plan year 2015 obligations of the United States Government for which full payment is required" (emphasis added).

56. Contrary to these assurances, however, on November 18, 2016, HHS announced that 2015 risk corridors collections again were insufficient to satisfy the Government's outstanding payment obligations for the 2014 risk corridors plan year, let alone its obligations for the 2015 plan year. Accordingly, HHS stated that "all 2015 benefit year risk corridors collections will be used to pay a portion of balances on 2014 benefit year risk corridors payments." CMS, Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year 1 (Nov. 18, 2016), https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2015-RC-Issuer-level-Report-11-18-16-FINAL-v2.pdf. HHS did not specify the total amount of 2015 risk corridors collections or the percentage of 2014 risk corridors obligations that would be paid from the 2015 collections.

57. CMS now acknowledged that WPS Health Plan was entitled to an additional $13,564,987.77 (individual market) and $220,591.15 (small group market) in risk corridors payments for the 2015 plan year. *Id.* at 13. Yet HHS paid WPS Health Plan only ***$213,100***, all of which was credited to the Government's outstanding balance for the 2014 risk corridors plan year—roughly ***1.5 percent*** of the amount due for 2015.

58. Despite these shortages, on September 9, 2016, HHS again reaffirmed its obligation to make full risk corridors payments in a letter sent to all issuers, including WPS:

> As we have said previously, in the event of a shortfall for the 2016 benefit year, HHS will explore other sources of funding for risk corridors payments, subject to the availability of appropriations. This includes working with Congress on the necessary funding for outstanding risk corridors payments.

> ***HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers.*** HHS will record risk corridors payments due as an obligation of the United States Government for which full payment is required.

Risk Corridors Payment for 2015 Letter at 1 (Sept. 9, 2016) (emphasis added), https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-for-2015-FINAL.PDF.

59. According to WPS's calculations for the 2016 risk corridors plan year, WPS Health Plan had additional compensable losses of $9,386,702. HHS has not yet announced the risk corridors payments, if any, that will be made for the 2016 plan year. However, as this Court has observed, "barring a miracle," payments into the Risk Corridors Program for 2016 will not be nearly sufficient to cover the Government's obligations to issuers. *Moda Health Plan*, 130 Fed. Cl. at 457. Further, in other pending risk corridors cases, the Government has taken the position that it has no obligations under the Risk Corridors Program if payments in do not cover payments out and Congress does not specifically appropriate additional funds. Congress has not to date appropriated such funds and it seems virtually certain not to do so given the political climate.

J. WPS Has Suffered Damages as a Result of the Government's Failure To Make Complete and Annual Risk Corridors Payments

60. WPS has suffered direct monetary damages in the amount of the outstanding risk corridors payments to which it is entitled—$5,392,682.04 for the 2014 risk corridors plan year, $13,785,578.92 for the 2015 risk corridors plan year, and $9,386,702 for the 2016 risk corridors plan year. In total, WPS has incurred uncompensated losses of over $28.56 million.

61. The Government's failure to make complete annual risk corridors payments has injured WPS and its policyholders in additional ways. For example, WPSIC was forced to make large capital contributions to WPS Health Plan to keep it in compliance with Wisconsin's Risk-Based Capital requirements. Yet despite WPS's best efforts, WPS Health Plan's participation in

the Marketplace in Wisconsin became unsustainable. In October 2016, WPS announced that as of January 2017, it would no longer sell or renew individual QHPs through WPS Health Plan (or Arise Health Plan) on the Wisconsin Exchange.

CLAIMS FOR RELIEF

COUNT ONE
(Violation of ACA Section 1342)

62. WPS incorporates by reference and re-alleges each and every allegation of the preceding paragraphs 1 to 61, as if fully set forth herein.

63. WPS satisfied all requirements for payment under the Risk Corridors Program in plan years 2014 and 2015. WPS also complied with all applicable state and federal requirements in selling QHPs during the 2016 plan year, and will submit its request for 2016 risk corridors payments to HHS by the statutory deadline.

64. ACA Section 1342 and 45 C.F.R. § 153.510 require the Government to make full, annual risk corridors payments. The Government expressly and repeatedly has reaffirmed through agency guidance and correspondence with issuers that its payment obligations under the ACA are annual and mandatory.

65. The Government failed to make full, annual risk corridors payments in 2014 and 2015, as required by statute and regulation. For the 2014 risk corridors plan year, WPS suffered losses subject to reimbursement under the Risk Corridors Program in the amount of $6,415,135.24. For the 2015 risk corridors plan year, WPS suffered losses subject to reimbursement for the Risk Corridors Program in the amount of $13,785,578.92.

66. To date, the Government has made two payments to WPS for the 2014 risk corridors plan year only: $809,453.20 in 2014 and $213,000 in 2015. The Government still owes WPS $5,392,682.04 for the 2014 risk corridors plan year and $13,785,578.92 for the 2015 risk

corridors plan year—a total of ***$19,178,260.96***.

67. As for the Government's 2016 payment obligations, it is inconceivable that payments into the Risk Corridors Program for plan year 2016 will be sufficient to result in any material reimbursement to WPS, regardless of which year the Government designates for additional payment. Further, because Congress is virtually certain not to appropriate additional funds for the Risk Corridors Program, it is likewise virtually certain that the Government will not pay WPS anything close to the full amount of risk corridors payments to which it is entitled for plan year 2016.

68. As a direct and proximate result of the Government's violation of the ACA and its implementing regulations, WPS suffered monetary damages in the amount of $5,392,682.04 for the 2014 risk corridors plan year, and $13,785,578.92 for the 2015 risk corridors plan year. WPS also anticipates suffering further monetary damages of $9,386,702 for the 2016 plan year.

69. WPS is entitled now to recover its damages for plan years 2014 and 2015 totaling $19,178,260.96 from the Judgment Fund. WPS will be entitled to recover its statutory additional damages for plan year 2016 once the final payment determinations are made by the Government later this year. WPS is entitled to these damages irrespective of whether Congress otherwise specifically appropriated sufficient funds to cover the Government's Risk Corridors Program payment obligations. *See* 28 U.S.C. § 2517(a) ("every final judgment rendered by the United States Court of Federal Claims against the United States shall be paid out of any general appropriation . . . ."); 31 U.S.C. § 1304(a)(3)(A) ("Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when . . . (3) the judgment, award, or settlement is payable . . . (A) under section . . . 2517 . . . .").

COUNT TWO
(Breach and Anticipatory Breach of Implied-in-Fact Contracts)

70. WPS incorporates by reference and re-alleges each and every allegation of the preceding paragraphs 1 to 61, as if fully set forth herein.

71. Through the ACA and its implementing regulations, in 2013 the Government extended an offer for a unilateral contract that issuers, including WPS, could accept by issuing QHPs in the Marketplaces. The terms of the offer were unambiguously set forth in the ACA and its implementing regulations, which offered incentives to issuers in return for their voluntary participation in—and compliance with onerous requirements under—the Marketplaces.

72. Section 1342 and HHS regulations promulgated thereunder reflect a firm commitment by the Government that in exchange for issuers offering QHPs in the Marketplaces, the Government will make full and complete annual risk corridors payments. The ACA and its implementing regulations do not afford the Government any discretion in deciding whether and in what amount to make risk corridors payments to qualifying issuers.

73. WPS Health Plan accepted the Government's offer through performance by developing and selling QHPs in the Marketplace in Wisconsin for 2014 that satisfied all applicable requirements of state and federal law. This resulted in a contract between WPS Health Plan and the Government. Exhibit A. WPS Health Plan subsequently applied to sell QHPs in the Marketplace in Wisconsin for 2015 and 2016, and the Government accepted the applications, resulting in further annual contracts. Exhibits B-C.

74. The Secretary of HHS and her delegees, including, but not limited to, Kevin Counihan, CCIIO Director and CEO of the Health Insurance Marketplaces, and his predecessors, and Andrew Slavitt, Administrator of CMS, and his predecessors, authorized and/or ratified the contracts between WPS Health Plan and the Government through their words and actions. Each

of these individuals had actual authority to bind the Government.

75. WPS Health Plan fully satisfied its obligations under the parties' contracts, and all applicable requirements of state and federal law, through its sale of QHPs to qualifying individuals in the Marketplace in Wisconsin in 2014, 2015, and 2016. WPS Health Plan further satisfied its obligation to submit all data necessary to receive risk corridors payments for the 2014 and 2015 plan years and will submit all data necessary to receive risk corridors payments for the 2016 plan year by the statutory deadline.

76. The Government breached its contracts with WPS Health Plan by failing to make full annual risk corridors payments for the 2014 and 2015 plan years.

77. The Government anticipatorily breached its contract with WPS Health Plan with respect to its 2016 risk corridors payment obligations because—"barring a miracle"—the Government will not pay WPS anything remotely approaching the amount it is due for the 2016 plan year. *Moda Health Plan*, 130 Fed. Cl. at 457.

78. As a direct and proximate result of the Government's breaches of the parties' contracts, WPS suffered monetary damages in the amount of $5,392,682.04 for the 2014 risk corridors plan year, $13,785,578.92 for the 2015 risk corridors plan year, and $9,386,702 for the 2016 plan year.

79. WPS is entitled to damages from the Judgment Fund in the amount of $19,178,260.96 for plan years 2014 and 2015 for the Government's breach of contract, and in the amount of $9,386,702 for plan year 2016 for the Government's anticipatory breach of contract. WPS is entitled to these damages irrespective of whether Congress otherwise specifically appropriated sufficient funds to cover the Government's Risk Corridors Program payment obligations. *See* 28 U.S.C. § 2517(a); 31 U.S.C. § 1304(a)(3)(A).

COUNT THREE
(Illegal Exaction in Violation of United States Constitution)

80. WPS incorporates by reference and re-alleges each and every allegation of the preceding paragraphs 1 to 69, as if fully set forth herein.

81. WPS sold QHPs in Wisconsin from 2014 to 2016. As a condition of WPS's participation in the Marketplace in Wisconsin, the Government required WPS to insure applicants who were not previously insured and to make corresponding health care-related payments to non-governmental third parties as necessary. WPS made all required payments.

82. ACA Section 1342 requires the Government to cover the losses that WPS suffered as a result of its making qualifying payments to non-governmental third parties as part of its participation in the Marketplace in Wisconsin. By failing to pay WPS for the losses it incurred in making such payments, the Government has retained money to which WPS is legally entitled, and thus in effect has required WPS to pay money over to the Government.

83. The Government's actions violated Section 1342 and its implementing regulations, and constituted an illegal exaction in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution.

84. WPS is entitled now to the return of the sum that has been illegally exacted by the Government: $19,178,260.96—the amount of risk corridors payments to which WPS is entitled for the 2014 and 2015 risk corridors plan years. WPS will be entitled to the return of additional funds illegally exacted by the Government for plan year 2016 once the final payment determinations are made later this year. WPS is entitled to these damages irrespective of whether Congress otherwise specifically appropriated sufficient funds to cover the Government's Risk Corridors Program payment obligations. *See* 28 U.S.C. § 2517(a); 31 U.S.C. § 1304(a)(3)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in their favor and against Defendant, the United States of America, as follows:

A. Award WPS monetary relief in the amount of $19,178,260.96, the difference between the total risk corridors payments that WPS was entitled to receive under ACA Section 1342 for the 2014 and 2015 risk corridors plan years and the amount of risk corridors payments that the Government made to WPS for those years;

B. Award WPS monetary relief in the amount of $9,386,702, the amount of risk corridors payments that WPS will be entitled to receive for the 2016 risk corridors plan year, based on the virtual certainty that the Government will pay WPS little to none of this amount;

C. Declare that the Government's failure to make full annual risk corridors payments to WPS for the 2014 and 2015 risk corridors plan years violated ACA Section 1342 and its implementing regulations, breached the implied-in-fact contract between the Government and WPS Health Plan, and constituted an illegal exaction under the U.S. Constitution;

D. Award WPS pre-judgment and post-judgment interest at the maximum rate permitted by law;

E. Award WPS costs and attorneys' fees as available under applicable law; and

F. Grant all other relief as this Court deems just and appropriate.

Respectfully submitted,

/s/ Jason A. Levine
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