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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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U.S. COURT OF
FEDERAL CLAIMS

BLUE CROSS AND BLUE SHIELD OF ARIZONA, INC.,

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

No. 18-282 C

COMPLAINT

Plaintiff Blue Cross and Blue Shield of Arizona, Inc. ("BCBS-AZ") brings this action against the United States Government ("United States" or "Government" or "Defendant") for money damages resulting from the United States' failure to make full payments to BCBS-AZ to compensate BCBS-AZ for certain losses resulting from its sale of qualified health plans for calendar years 2014, 2015, and 2016, as mandated by Section 1342 of the Patient Protection and Affordable Care Act (the "Affordable Care Act" or "ACA") and the risk corridors program administered by the U.S. Department of Health and Human Services ("HHS" or "Secretary"). BCBS-AZ states and alleges as follows:

NATURE OF THE CASE

1. Section 1342 of the Affordable Care Act mandates a risk corridors program through which issuers of qualified health plans ("QHPs"), such as BCBS-AZ, and the United States must annually share in losses and profits exceeding certain thresholds from the sale of QHPs during the first three benefit and calendar years 2014, 2015, and 2016 ("CY 2014", "CY 2015", and "CY 2016" respectively), the first three years of operation of the health insurance

exchanges established by the ACA (the "Marketplaces"). Pub. L. No. 111-148 § 1342, 124 Stat. 119, as amended by Pub. L. No. 111-152, 124 Stat. 1029 (2010) [42 U.S.C. § 18062].

2. Section 1342 mandates that when "a participating plan's [*i.e.*, QHP issuer's] allowable costs for any plan year are more than 103 percent . . . of the target amount," defined as "total premiums . . . reduced by the administrative costs of the plan," the "Secretary *shall pay* to the plan an amount" specified by a statutory formula. 42 U.S.C. § 18062(b)(1)(A), (c)(2) (emphasis added). When, on the other hand, a QHP issuer's allowable costs are *less* than the target amount by a certain percentage, then "the plan [*i.e.*, the QHP issuer] shall pay to the Secretary an amount" set by statute. *Id.* at § 18062(b)(2)(A).

3. The United States has admitted its obligations to make payments to BCBS-AZ pursuant to the risk corridors program but has failed to pay the full amount due to BCBS-AZ for CY 2014 and has failed to pay any amounts due to BCBS-AZ for CY 2015 and CY 2016.

4. The ACA created a new health insurance market – the Marketplaces – to expand access to affordable healthcare coverage, including to individuals who previously were unable to obtain or to afford such coverage, such as individuals with pre-existing conditions. Health insurance issuers such as BCBS-AZ lacked reliable data and experience in assessing the risks and setting premiums for this new population of insureds created by the ACA, including their health status and health care needs. The ACA therefore mandated implementation of three premium-stabilization programs – including the risk corridors program – to support the launch of the new Marketplaces. These programs were intended, *inter alia*, to encourage health insurance issuers to participate in the Marketplaces, to reduce the likelihood that the insurers would include in their premium development an additional amount to guard against the risk and uncertainty of

insuring this new and unknown population, and to provide for some year-over-year stability in premiums for consumers, particularly during the initial years of the Marketplaces' operations.

5. The Centers for Medicare & Medicaid Services ("CMS"), which is part of HHS, is charged with implementing the risk corridors program. CMS has explained that the program requires "the Federal Government and [QHP issuers] to share in profits or losses resulting from inaccurate rate setting from 2014 to 2016." 78 Fed. Reg. 15,410, 15,412 (March 11, 2013) (Exhibit 1). It is designed to permit issuers such as BCBS-AZ "to lower rates by not adding a risk premium to account for perceived uncertainties in the 2014 through 2016 markets." *Id.* at 15,413.

6. Between the enactment of the ACA in 2010 and the launch of the Marketplaces on January 1, 2014, BCBS-AZ designed and priced QHPs to be sold on the Arizona Marketplace. BCBS-AZ recognized the substantial uncertainty regarding the cost of providing health coverage to a previously uninsured population. Consistent with the plain terms of the ACA, its regulations, and the assurances provided by CMS and HHS, BCBS-AZ understood that the United States would annually share in BCBS-AZ's losses and profits from the sale of QHPs during CY 2014, CY 2015, and CY 2016.

7. For CY 2014, the first year of the Marketplaces and the risk corridors program, QHP issuers who made profits in excess of a certain threshold paid in the aggregate a total of $362 million into the risk corridors program. In the Small Group Market for CY 2014, BCBS-AZ made profits in excess of this threshold and accordingly paid the United States $216,623.22. However, BCBS-AZ suffered losses in the Individual Market triggering the United States' obligation under the program to compensate BCBS-AZ for the federal government's share of

those losses ($11,688,096.55). In total, 2014 QHP issuers that experienced excess losses requested compensation of $2.87 billion under the risk corridors program.

8. For CY 2015, the second year of the Marketplaces and the risk corridors program, QHP issuers who made profits in excess of a certain threshold were required to pay into the program. Unlike with CY 2014, BCBS-AZ did not make profits in excess of this threshold in the CY 2015 Small Group Market. BCBS-AZ did, however, suffer losses in the Individual Market for CY 2015, triggering the United States' obligation under the program to compensate BCBS-AZ for the Government's share of those losses in the amount of $51,990,665.22.

9. For CY 2016, the third and final year of the risk corridors program, QHP issuers who made profits in excess of a certain threshold were again required to pay into the program. As with CY 2014 and 2015, however, BCBS-AZ suffered losses in the Individual Market for CY 2016, triggering the United States' obligation to compensate BCBS-AZ for the Government's share of its losses in the amount of $10,845,468.60.

10. Before and after BCBS-AZ decided to offer QHPs in the individual market in 2014, CMS and HHS repeatedly acknowledged that "the Affordable Care Act requires the Secretary to make full payments to issuers." 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015) (Exhibit 2); *see also* 78 Fed. Reg. at 15,473 ("Regardless of the balance of payments and receipts, HHS will remit payment as required under section 1342 of the Affordable Care Act.") (Exhibit 1). Despite the unequivocal mandate in the ACA that the United States must annually share profits and losses with issuers, the United States has not paid BCBS-AZ in full for the Government's share of BCBS-AZ's CY 2014, CY 2015, and CY 2016 losses.

11. Instead, for CY 2014, CMS prorated the $362 million of payments received from QHP issuers across the $2.87 billion in due compensation for the Government's share of losses

under the risk corridors program. In late 2015, CMS announced that BCBS-AZ would be paid only about 12.6% of what it was owed under the program for CY 2014. *See* CMS, Risk Corridors Payments for the 2014 Benefit Year, Nov. 19, 2015 (Exhibit 3). CMS advised that it was "recording those amounts that remain unpaid" after about 87.4% of what is owed, or approximately $10,213,308.13 for BCBS-AZ—"as fiscal year 2015 obligation[s] of the United States Government for which full payment is required." *Id.*

12. In September 2016, CMS and HHS stated that "all 2015 benefit collections [would] be used towards remaining 2014 benefit year risk corridors payments, and no funds will be available at this time for 2015 benefit year risk corridors payments." *See* CMS, Risk Corridors Payments for 2015, Sept. 9, 2016 (Exhibit 4).

13. On November 18, 2016, CMS and HHS announced the issuer-level risk corridors payments and charges for CY 2015. *See* CMS, Risk Corridors Payments and Charge Amounts for the 2015 Benefit Year, Nov. 18 2016 (Exhibit 5). CMS announced that BCBS-AZ would be paid only $388,258.91 of the approximately $10 million still owed to BCBS-AZ for CY 2014 at the time. CMS announced that BCBS-AZ is owed $51,990,665.22 for its losses in the 2015 Individual Market – none of which was paid in 2016.

14. On November 15, 2017, CMS and HHS announced the issuer-level risk corridors payments and charges for CY 2016, the final year of the program. *See* CMS, Risk Corridors Payment and Charge Amounts for the 2016 Benefit Year, Nov. 15, 2017 (Exhibit 15). As in CY 2015, HHS announced that it will use all "2016 benefit year collections to make additional payments toward 2014 year payment balances." *Id.* CMS announced that BCBS-AZ would be paid only an additional $101,672.21 – a fraction of the approximately $10 million still owed to BCBS-AZ for CY 2014. CMS also announced that the Government's share of BCBS-AZ's CY

2016 losses is $10,845,468.60, and none of BCBS-AZ's CY 2015 or CY 2016 losses will be paid in 2017 or 2018.

15. CMS unambiguously stated that it would not make full and timely risk corridors payments to owed issuers for CY 2015 in 2016 and CY 2016 in 2017. *See id.* (Exhibit 15) ("Because 2015 benefit year collections were insufficient to pay 2014 benefit year payment balances in full, HHS will use 2016 benefit year risk corridors collections to make additional payments toward 2014 benefit year payment balances."); *see also* Ex. 5 ("Today, we are confirming that all 2015 benefit year risk corridors collections will be used to pay a portion of balances on 2014 benefit year risk corridors payments."). This deferral of payment violates the ACA and its implementing regulations. The risk corridors program requires payment on an annual basis. The risk corridors program was designed for issuers to share with the Government the financial risk of offering QHPs in the new Marketplaces for CY 2014, CY 2015, and CY 2016 and thus to encourage issuers to offer QHPs at lower premiums in the first three years of the Marketplaces. The effectiveness of the risk corridors program necessitates that the Government and participating health insurance issuers share financial risk *on an annual basis* in order to encourage issuers against building into premiums for QHPs sold in each of CY 2014, CY 2015, and CY 2016 an additional financial cushion due to the unknown cost of providing health insurance to the newly-covered population.

16. Pursuant to the Tucker Act, 28 U.S.C. § 1491, BCBS-AZ brings this action for money damages resulting from the United States' failure to pay BCBS-AZ for a share of its losses from the sale of QHPs in CY 2014, CY 2015, and CY 2016, as required by a money-mandating statute, § 1342 of the ACA, a money-mandating regulation, 45 C.F.R. § 153.510(b), and its implied-in-fact contract with BCBS-AZ.

PARTIES

17. Plaintiff Blue Cross Blue Shield of Arizona, Inc. is a non-profit corporation formed under the laws of Arizona with its principal place of business at 2444 W. Las Palmaritas Drive, Phoenix, Arizona 85021. BCBS-AZ has offered and continues to offer QHPs on the Arizona Marketplace since its launch in 2014.

18. Defendant is the United States of America. HHS and CMS are agencies of Defendant.

JURISDICTION

19. Jurisdiction and venue in this Court are proper pursuant to the Tucker Act, 28 U.S.C. § 1491(a), which allows the United States Court of Federal Claims to hear claims for monetary damages against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

20. Jurisdiction is founded on Section 1342 of the ACA, which specifies that the "Secretary shall establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016," 42 U.S.C. § 18062(a); HHS's regulation implementing the risk corridors program, which provides that "QHP insurers will receive payment from HHS in the following amounts, under the following circumstances," 45 C.F.R. § 153.510; and the implied-in-fact contract with the United States for payment of certain losses under the risk corridors program.

21. This controversy is ripe because CMS and HHS have recognized that additional amounts are presently due to BCBS-AZ for CY 2014, CY 2015, and CY 2016, but the Government has not paid those amounts in the manner required by Section 1342 of the ACA and its implementing regulations.

STATUTORY AND REGULATORY FRAMEWORK

22. The ACA substantially altered the rules governing the provision of health insurance coverage, including the pricing and benefits of health insurance coverage. 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." 42 U.S.C. §§ 300gg-1(a). The ACA also bars issuers from charging higher premiums on the basis of a person's gender or health status, including pre-existing conditions. *See* 42 U.S.C. §§ 300gg-1. To prevent adverse selection that occurs when consumers wait to obtain coverage until they have an injury or illness, the ACA imposes a financial penalty on individuals who do not obtain health care coverage.

23. The ACA established the Marketplaces through which consumers purchasing coverage in the individual or small group markets could compare different QHPs. The Marketplaces provide a number of mechanisms, also established by the ACA, to make QHPs more affordable; these mechanisms include the availability of premium tax credits and cost-sharing subsidies for eligible consumers purchasing certain QHPs.

24. As a result of the ACA's changes, insurers expected that a substantial number of people who had not previously had health insurance would purchase QHPs. Like all insurers, BCBS-AZ faced substantial uncertainty as to who would enroll, the health status of new enrollees, and the cost of providing health care coverage for these newly-insured individuals. At the time, neither the insurance industry, including BCBS-AZ, nor the Government, had data or models to accurately predict the total cost to provide this new coverage.

25. To mitigate the financial risk insurers faced due to these uncertainties, the ACA Section 1342 mandates a temporary risk corridors program through which all QHP issuers and

the Government share in losses and profits exceeding certain thresholds for QHPs offered during the first three years of the Marketplaces' operations. By enacting Section 1342 of the ACA, Congress recognized that, due to uncertainty about the population entering the Marketplaces during the first few years, QHP issuers may not be able to predict their risk accurately, and their premiums may reflect assumptions regarding costs that are ultimately lower or higher than anticipated.

26. Congress intended the ACA's three-year risk corridors program to be an important protection for consumers and health insurance issuers as millions of Americans obtained newly available, affordable coverage in newly established Marketplaces. The risk corridors program was one of three premium stabilization programs intended to induce participation in the Marketplaces by reducing the potential financial loss posed to health insurers, like BCBS-AZ, when estimating enrollments and costs for the unknown population gaining access to affordable health care coverage. This risk mitigation program provided for sharing of the financial risk between the Government and issuers of QHPs in each of the first three years of the Marketplace.

27. The risk corridors program is designed to "protect against uncertainty in rate setting for qualified health plans by limiting the extent of issuers' financial losses and gains." 78 Fed. Reg. 15,410, 15,411 (Mar. 11, 2013) (Exhibit 1). In addition, the program is designed to maintain affordability in the first three years of the health insurance exchanges by "permit[ting] issuers to lower rates by not adding a risk premium to account for perceived uncertainties in the 2014 through 2016 markets." *Id.* at 15,413. It does so by permitting the "Federal government and QHPs to share in profits or losses resulting from inaccurate rate setting from 2014 to 2016." *Id*. at 15,412.

28. Section 1342(a) is the statutory mandate for the risk corridors program:

> (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.

42 U.S.C. § 18062(a) (emphasis added).

29. Section 1342(b)(1) specifies when and how the Government must reimburse QHP Issuers, such as BCBS-AZ, for a share of losses sustained during CYs 2014, 2015, and 2016:

> (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.

Id. § 18062(b)(1) (emphasis added). The "target amount" is premiums net the administrative costs of the QHP. *Id*. § 18062(c)(2).

30. Section 1342(b)(2) specifies when and how QHP issuers must pay a share of profits earned during CYs 2014, 2015, and 2016 to the Government:

> (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.

Id. § 18062(b)(2).

Section 1342 of the Affordable Care Act has not been amended or repealed since its enactment in 2010.

31. Consistent with Section 1342(a) of the ACA, HHS and CMS established regulations to further clarify their implementation of the risk corridors program. *See* 45 C.F.R. §§ 153.500 *et seq*.

32. Section § 153.510 of the Code of Federal Regulations specifies the circumstances when the United States must pay QHP issuers for losses pursuant to the risk corridors program:

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

45 C.F.R. § 153.510 (emphasis added).

33. QHP issuers are obligated to bear the risk of potential gains and losses for offering QHPs on the Marketplaces *up to a specific threshold* set forth in Section 1342. Issuers of QHPs that pay more in benefits than they collect in premiums by a pre-determined percentage,

though, are entitled under the risk corridors program to receive a payment from the Government, and issuers of QHPs that pay less in benefits than they collect in premiums by a pre-determined percentage must make a payment to the Government under the program. Thus, the risk corridors program allows issuers of QHPs and the United States to annually share in the risk of inaccurate calculation of premiums for QHPs during the first three years of the Marketplaces.

34. If a QHP issuer such as BCBS-AZ owes the Government money under the program, the issuer must make that payment within 30 days after being notified of the amount owed. 45 C.F.R. § 153.510(d). The ACA equally calls for CMS and HHS to remit payment annually to QHP issuers on behalf of the United States.

35. HHS and CMS acknowledged in the Federal Register on July 15, 2011 and again on March 23, 2012, that "QHP issuers who are owed these amounts will want prompt payment" and that risk corridors "payment deadlines should be the same for HHS and QHP issuers." 76 Fed. Reg. 41930, 41943 (July 15, 2011) (Exhibit 7); 77 Fed. Reg. 17220, 17238 (Mar. 23, 2012) (Exhibit 8). This prompt payment of amounts due for a prior benefit year is necessary to effectuate the purpose of the risk corridors program, to share between the Government and QHP issuers the financial risk associated with offering QHPs during the initial years of the Marketplaces and to encourage QHP issuers to refrain from increasing premiums in CYs 2014, 2015, and 2016 to account for the cost uncertainty in connection with the same.

36. In Section 1342(a), Congress instructed that the ACA risk corridors program "shall be based on the program for regional participating provider organizations under part D of title XVIII of the Social Security Act." The referenced program is colloquially known as "Medicare Part D" – the program that provides Medicare coverage of outpatient prescription drugs. *See* Medicare Prescription Drug Improvement and Modernization Act of 2003, Pub. L.

No. 108-173, 117 Stat. 2066, 42 U.S.C. §§ 1395w-101 *et seq.* (2003). Under Medicare Part D, HHS makes annual risk corridors payments to Part D Plan Sponsors without regard for budget neutrality. *See* Government Accountability Office, Report GAO-15-447, at 14 (April 2015) ("For the Medicare Advantage and Medicare Part D risk mitigation programs, the payments that CMS makes to issuers are not limited to issuer contributions.") (Exhibit 9). Although the statutory language for the ACA risk corridors program differs slightly from the Medicare Part D risk corridors program, the differences do not equate to an intentional departure from annual payments for the ACA risk corridors program. Rather, the express direction that the risk corridor program "shall be based on . . ." the Part D risk corridors program indicates Congress intended to incorporate into the ACA risk corridors program the key features of the Part D risk corridors program, including annual payments into and out of the program by the Government and participating issuers, and the absence of budget neutrality in such payments.

FACTUAL BACKGROUND

37. Since the enactment of the ACA, HHS and CMS have publicly acknowledged their statutory and regulatory obligation to make full and timely payments under the risk corridors program to BCBS-AZ and other QHP issuers.

38. These public statements by HHS and CMS were made by representatives of the Government who had actual authority to bind the United States, including but not limited to Kevin Counihan, Director of the CMS Center for Consumer Information and Insurance Oversight ("CCIIO")and CEO of the Health Insurance Marketplaces, and his predecessors in that position; Andrew Slavitt, Administrator of CMS, and his predecessors in that position; and/or other CMS officials, all of whom had actual authority to bind the Government.

39. In March 2013, HHS issued the Notice of Benefit and Payment Parameters for 2014, the first year of the Marketplaces and the risk corridors program. HHS and CMS stated, "The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." *See* 78 Fed. Reg. at 15,473 (Exhibit 1).

40. BCBS-AZ decided to participate in the individual market by selling QHPs both "on" and "off" the Arizona Marketplace. In designing and pricing its QHPs, BCBS-AZ relied on the Government's representation that it would share in the risk of providing universal QHP coverage on the Marketplace by making annual payments under the risk corridors program.

41. For CY 2014, QHP issuers like BCBS-AZ had to elect to participate on the Marketplaces by September 2013, with open enrollment beginning on October 1, 2013. BCBS-AZ designed and priced its QHPs for CY 2014 in the spring and summer of 2013, and began selling these QHPs in October 2013. Coverage under the QHPs was effective on January 1, 2014.

42. On March 11, 2014, after BCBS-AZ had already designed, priced, and sold many of its CY 2014 QHPs in the Arizona Marketplace, and could no longer withdraw from selling QHPs for CY 2014, HHS proposed that its implementation of the risk corridors program would be budget neutral—that is, payments out under the program would be funded only by payments in. HHS's proposed rulemaking stated:

> We intend to implement this program in a budget neutral manner, and may make future adjustments, either upward or downward to this program (for example, as discussed below, we may modify the ceiling on allowable administrative costs) to the extent necessary to achieve this goal.

79 Fed. Reg. 13,744, 13,787 (Mar. 11, 2014) (Exhibit 10).

43. One month later, however, CMS abandoned its proposal to fund risk corridors payments solely by risk corridors receipts. Instead, CMS explained that "if risk corridors collections are insufficient to make risk corridors payments for a year, all risk corridors payments for that year will be reduced pro rata to the extent of any shortfall. Risk corridors collections received for the next year will first be used to pay off the payment reductions issuers experienced in the previous year . . . ." CMS, Risk Corridors Budget Neutrality, A1, Apr. 11, 2014 (Exhibit 11). HHS later explained that it "recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers." 80 Fed. Reg. 10,750, 10,779 (Feb. 27, 2015) (Exhibit 2). HHS stated that if "risk corridors collections . . . are insufficient to make risk corridors payments" after 2016, then "HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations." *Id.*

44. For CY 2015, QHP issuers had to elect to participate by October 2014, with open enrollment beginning on November 15, 2014. BCBS-AZ designed and priced its CY 2015 QHPs in the spring and summer of 2014, and began selling CY 2015 QHPs on the Marketplace in November 2014; the coverage was effective January 1, 2015.

45. In December 2014, Congress passed the Consolidated and Further Continuing Appropriations Act of 2015, which included an appropriations rider that prohibited CMS and HHS from using three specific sources of funds to make ACA risk corridors program payments:

> SEC. 227. None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services—Program Management" account, may be used for payments under section 1342(b)(1) of Public Law 111-148 (relating to risk corridors).

Pub. L. No. 113-235, at 362.

46. Congress's failure to appropriate sufficient funds for the risk corridors program payments due for CY 2014 and the restrictions enacted on the use of funds "made available by this Act" did not modify or repeal ACA Section 1342 and did not affect the United States' statutory obligation under Section 1342 to make a fully and timely risk corridor payment to BCBS-AZ. Moreover, the passage of the appropriations rider in December 2014 came more than a year *after* BCBS-AZ agreed to offer (and had priced, designed and sold) QHPs through the Arizona Marketplace and only two weeks before the *end* of BCBS-AZ's provision of health coverage under those plans for 2014. Thus, BCBS-AZ already had determined the premiums for QHPs sold on the Arizona Marketplace in CY 2014 and already had incurred significant losses by paying for health care services covered under these QHPs prior to the passage of the appropriations rider.

47. Furthermore, at the time of the enactment of the appropriation in December 2014, QHP issuers that intended to offer QHPs on the Marketplaces in CY 2015 had already been required to commit to participate in the Marketplaces for CY 2015. *See* 45 C.F.R. § 155 Subpart K; CCIIO, 2015 Letter to Issuers in Federally-facilitated Marketplaces, at 8, 27 (Mar. 14, 2014) (requiring issuers to commit by September 2014 to offer plans for the upcoming plan year) (Exhibit 12).

48. Once a QHP issuer has signed its QHP agreement with CMS, the issuer may not withdraw any of its QHPs from the Marketplaces and must accept all eligible applicants for coverage. *See* 45 C.F.R. § 156.290(a)(2); 45 C.F.R. § 147.104. Thus, by the time the December 2014 appropriations rider was enacted, BCBS-AZ already had incurred significant losses associated with offering QHPs in the Arizona Marketplace in CY 2014, had already designed and priced the QHPs BCBS-AZ would offer on the Arizona Marketplace in CY 2015 and already

had committed to providing such QHPs on the Marketplace for CY 2015. BCBS-AZ could not reverse its losses for CY 2014, nor could BCBS-AZ withdraw its CY 2015 QHPs from the Marketplace, nor change the pricing for such QHPs, nor deny any eligible applicants such coverage.

49. On July 21, 2015, CMS issued a letter to state insurance commissioners for consideration as premium rates for CY 2016 were being finalized. The letter includes a paragraph entitled "CMS remains committed to the risk corridor program" and states a belief that the 2014 risk corridors payments should be taken into account before decisions are made on final rates for 2016. Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to State Insurance Commissioners (July 21, 2015) (Exhibit 13).

50. In 2014, the Government's share of BCBS-AZ's claimed losses under the risk corridors program is $11,688,096.55, meaning BCBS-AZ was due that amount from CMS under the risk corridors program for CY 2014 even though BCBS-AZ incurred greater losses from offering QHPs in the Arizona Marketplace in CY 2014. CMS, Risk Corridors Payment and Charge Amounts for Benefit Year 2014, Nov. 19, 2015, at Table 43 (Exhibit 6).

51. On November 19, 2015, CMS announced that it would pay $1,474,788.42 to BCBS-AZ during the winter of 2015-2016, which is only about 12.6 percent of payments due from the United States. *Id*. The Government calculated this percentage by prorating the $363 million paid into the program by QHP issuers across the $2.8 billion due to QHP issuers for 2014.

52. Prior to this CMS announcement on November 19, 2015, CMS had required issuers like BCBS-AZ to design and price their CY 2016 QHPs, to decide whether to participate in the Marketplaces for CY 2016 and to begin selling CY 2016 QHPs. *See* CCIIO, FINAL 2016

Letter to Issuers in the Federally-facilitated Marketplaces (Feb. 20, 2015) (setting the deadline for commitment to offer plans by September 25, 2015 and the commencement of open enrollment as November 1, 2015) (Exhibit 14). BCBS-AZ was thus locked into participation in the Arizona Marketplace for each of the CYs 2015, and 2016 prior to HHS or CMS issuing statements that the full risk corridors program payment due for 2014 would not be paid and that BCBS-AZ would receive only a small pro rata share of the payment due.

53. In December 2015, Congress passed the Consolidated Appropriations Act, 2016, which included an appropriations rider that again prohibited CMS and HHS from using three specific sources of funds to make ACA risk corridors program payments:

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

Pub. L. No. 114-113.

54. Again, this restriction on the use of funds "made available by this Act" did not modify or repeal Section 1342 of the Affordable Care Act or otherwise change the United States' statutory obligation to make payment to BCBS-AZ under Section 1342.

55. In September 2016, CMS announced that it would make additional risk corridors payments to QHP issuers during the winter of 2016-2017 for their CY 2014 losses. CMS, Risk Corridors Payments for 2015, Sept. 9, 2016 (Exhibit 4). CMS further announced that it would make no risk corridors payments for CY 2015 losses during the winter of 2016-2017. *Id*.

56. On November 18, 2016, CMS confirmed that none of its CY 2015 risk corridors collections would be used to pay CY 2015 risk corridors payments. CMS, Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year, Nov. 18, 2016 (Exhibit 5).

57. On November 18, 2016, CMS announced that it would pay an additional $388,258.91 to BCBS-AZ for its CY 2014 losses, beginning in December 2016 (as collections are received). *Id*.

58. In May 2017, Congress passed the Consolidated Appropriations Act, 2017, which again included an appropriations rider that prohibited CMS and HHS from using three specific sources of funds to make ACA risk corridors program payments:

> SEC. 223. None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid—Program Management" account, may be used for payments under Section 1342(b)(1) of Public Law 111-148 (relating to risk corridors).

Pub. L. No. 115-31. This restriction on the use of funds "made available by this Act" did not modify or repeal Section 1342 of the Affordable Care Act or otherwise change the United States' statutory obligation to make payment to BCBS-AZ under Section 1342.

59. On November 15, 2017, CMS announced that none of its CY 2016 risk corridors collections would be used to pay CY 2015 or CY 2016 risk corridors payments. CMS, Risk Corridors Payment and Charge Amounts for the 2016 Benefit Year, Nov. 15, 2017 (Exhibit 15). Furthermore, according to CMS, BCBS-AZ will only be paid an additional $101,672.21 for its CY 2014 losses – a fraction of the $9,833,051 still owed to BCBS-AZ for that year. *Id*.

60. BCBS-AZ offered QHPs in the Arizona Marketplace for each of the CYs 2014, 2015, and 2016 to which the risk corridors program applies, and BCBS-AZ has complied in all material respects with all of the statutory and regulatory requirements to be eligible for the Government's payment of its share of its losses under the risk corridors program, but BCBS-AZ has not been paid. *See* 45 C.F.R. § 153.500 *et seq*.

61. Congress' failure to appropriate sufficient funds for risk corridors payments due for CYs 2014, 2015, and 2016, without modifying or repealing Section 1342 of the ACA, did not eliminate or abrogate the United States' obligation to make full and timely risk corridors payments to QHP issuers, including BCBS-AZ.

62. HHS recorded the 2014 amounts "that remain unpaid . . . as fiscal year 2015 obligation[s] of the United States Government for which full payment is required." CMS, Risk Corridors Payments for the 2014 Benefit Year, Nov. 19, 2015 (Exhibit 3). In September 2016, HHS announced that it was recording the 2014 and 2015 amounts that would remain unpaid as fiscal year 2016 obligations for which full payment is required. *See* CMS, Risk Corridors Payments for 2015, Sept. 9, 2016 (Exhibit 4). Payment is presently due for the remainder of the Government's share of BCBS-AZ's losses from the sale of QHPs in the Arizona Marketplace in CYs 2014, 2015, and 2016. No appropriation is available, however, for HHS to make the payment.

63. On June 17, 2016, BCBS-AZ sent a demand letter to HHS and CMS for prompt payment of the amounts due and owing to BCBS-AZ under the risk corridors program. As of this filing, BCBS-AZ has received no response from HHS or CMS.

COUNT I

Violation of Statutory and Regulatory Mandates to Make Payments

64. BCBS-AZ incorporates by reference paragraphs 1 through 64 above as if fully set forth herein.

65. Pursuant to Section 1342 of the ACA and its implementing regulations, the United States "shall establish" a risk corridors program under which 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" for CYs 2014, 2015, and 2016.

66. BCBS-AZ offered certified QHPs on the Arizona Marketplace in accordance with the processes prescribed by statute and regulation, and BCBS-AZ is a QHP issuer for purposes of payment under the risk corridors program. *See* 45 C.F.R. §§ 153.500, 155.20.

67. In 2014, 2015, and 2016, BCBS-AZ's allowable costs exceeded its target amount by more than 108%. BCBS-AZ timely submitted all of the necessary data and complied with all other requirements for obtaining a payment under the risk corridors program. *See* 45 C.F.R. § 153.530.

68. Accordingly, ACA § 1342 and its corresponding regulations mandate compensation by the Government to BCBS-AZ in the amount of $11,688,096.55 for CY 2014, $51,990,665.22 for CY 2015, and $10,845,468.60 for CY 2016. This mandate confers no discretion to the United States as to the amount or timing of this payment.

69. To date, the United States has made payments of $1,855,045, leaving $9,833,051 presently due to BCBS-AZ for CY 2014 as an obligation of the United States Government.

70. The United States' failure to provide full and timely compensation to BCBS-AZ in the amounts of $11,688,096.55 ($9,833,051 of which remains due and owing) for CY 2014, $51,990,665.22 for CY 2015, and $10,845,468.60 for CY 2016 is a violation of ACA § 1342 and its implementing regulations, and BCBS-AZ has been damaged thereby.

COUNT II

Breach of Implied-In-Fact Contract

71. BCBS-AZ incorporates by reference paragraphs 1 through 71 above as if fully set forth herein.

72. BCBS-AZ entered into a valid implied-in-fact contract with the United States regarding its obligation to make full and timely payments under the risk corridors program to BCBS-AZ in exchange for BCBS-AZ becoming a QHP issuer and offering QHPs on the Arizona Marketplace in CYs 2014, 2015, and 2016.

73. The Government made an unambiguous offer to BCBS-AZ of a contract, provided that BCBS-AZ fulfilled certain criteria, which BCBS-AZ could accept by performance.

74. Specifically, ACA § 1342 authorized HHS to enter into contracts to share in the profits and losses of issuers who offered QHPs on the Marketplaces in CYs 2014, 2015, and 2016. HHS's Notices of Benefit and Payment Parameters represented an offer to BCBS-AZ that if it sold QHPs, "[r]egardless of the balance of payments and receipts, HHS will remit payment as required under section 1342 of the Affordable Care Act," 78 Fed. Reg. at 15,473, meaning the United States would reimburse BCBS-AZ for a share of its losses if its allowable costs were "more than 108 percent of the target amount," 42 U.S.C. § 18062(b)(1)(B).

75. ACA § 1342 and its implementing regulations are an objective manifestation of the United States' intent to contract with insurers like BCBS-AZ.

76. By complying with its obligations under Section 1342 as well as 45 C.F.R. § 153.500, *et seq.*, and submitting all required data for risk corridors calculations by the deadline, BCBS-AZ accepted the United States' offer and thereby manifested its assent in the manner required by the ACA.

77. There was an implied-in-fact contract between BCBS-AZ and the United States.

78. The implied-in-fact contract was authorized or ratified by and through the words and actions of Kevin Counihan, Director of CCIIO and CEO of the Health Insurance Marketplaces, and his predecessors in that position; Andrew Slavitt, Administrator of CMS, and

his predecessors in that position; and/or other CMS officials, all of whom had actual authority to bind the Government, and was entered into with the mutual assent and consideration by both parties.

79. BCBS-AZ satisfied and complied with its obligations and/or conditions that existed under the implied-in-fact contract.

80. Pursuant to the implied-in-fact contract, the United States was obliged to reimburse BCBS-AZ for the Government's share of BCBS-AZ's eligible losses of $11,688,096.55 ($9,833,051 of which remains due and owing) for CY 2014, $51,990,665.22 for CY 2015, and $10,845,468.60 for CY 2016.

81. On behalf of the United States, CMS and HHS have acknowledged their obligation to render full risk corridors payments.

82. BCBS-AZ is entitled to damages equal to the benefit of its bargain with the United States: reimbursement as alleged in this lawsuit.

83. The United States breached its contract with BCBS-AZ by failing to timely pay BCBS-AZ the full amount owed for CYs 2014, 2015, and 2016 in accordance with the terms of the risk corridors program.

84. BCBS-AZ has not been paid amounts owed by the United States for CYs 2014, 2015, and 2016, which has resulted in injury and damages to BCBS-AZ as a result of the United States' breach of its contractual obligations in the amount of $11,688,096.55 ($9,833,051 of which remains due and owing) for CY 2014, $51,990,665.22 for CY 2015, and $10,845,468.60 for CY 2016.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff BCBS-AZ prays for judgment as follows:

A. Award BCBS-AZ monetary damages of $72,669,184.82 for the United States' nonpayment of the amount to which BCBS-AZ is entitled under Section 1342 of the ACA and 45 C.F.R. §§ 153.500, *et seq*., and any such other amounts due through the date of judgment;

B. Award post-judgment interest at the maximum rate permitted by law;

C. Award BCBS-AZ consequential damages, special damages, or other damages that result as a consequence of the United States' non-performance;

D. Award BCBS-AZ costs and attorney's fees as are available under applicable law; and

E. Award such other relief with respect to all risk corridor payments due BCBS-AZ under the risk corridors program for CY 2014 through CY 2016 as justice may require.

Dated: February 23, 2018

Respectfully Submitted:

s/ Leslie B. Kiernan

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