IN THE UNITED STATES COURT OF FEDERAL CLAIMS

COMMUNITY HEALTH CHOICE, INC.	)	No. 18-5 C
Plaintiff,	)	
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

COMPLAINT

Plaintiff Community Health Choice, Inc. ("Plaintiff" or "CHC"), by and through its undersigned counsel, brings this action against Defendant United States to recover money damages owed by Defendant for (1) violation of the mandatory risk corridors payment obligations imposed by Section 1342 of the Patient Protection and Affordable Care Act ("ACA"), and its implementing regulations; (2) breach of implied-in-fact contract between CHC and Defendant; and (3) breach of the covenant of good faith and fair dealing. In support of this action, CHC states and alleges as follows:

PARTIES

1. Plaintiff Community Health Choice, Inc. is a Texas non-profit organization with a principal place of business at 2636 South Loop West, Suite 125, Houston, TX 77054. CHC is a Qualified Health Plan issuer on the federal health insurance exchange in Texas ("the Texas Health Insurance Exchange").

2. Defendant is the United States, referred to herein as "Defendant" or "the Government." The Department of Health and Human Services ("HHS") and the Centers for Medicare & Medicaid Services ("CMS") are agencies of the Government and are responsible for overseeing federal administration of the Patient Protection and Affordable Care Act ("ACA").

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this matter and venue is proper in this Court pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), because CHC brings claims for damages over $10,000 against the United States founded upon the Government's violations of a money-mandating Act of Congress, a money-mandating regulation of an executive department, and an implied-in-fact contract with the United States.

4. The actions or decisions of the Government at issue in this lawsuit were conducted on behalf of the Government within the District of Columbia.

FACTUAL BACKGROUND

I. THE ACA'S RISK CORRIDORS PROGRAM

5. President Barack Obama signed the ACA into law on March 23, 2010, marking a major reform in the United States health care market. Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (March 23, 2010). The ACA expanded access to health care to nearly all Americans and prohibited insurers from denying coverage based on pre-existing conditions. *See* 42 U.S.C. § 300gg-1(a) (stating that an issuer "must accept every employer and individual in the State that applies for such

coverage"). As part of the ACA, Congress authorized the creation of various programs to facilitate the formation and operation of health insurance marketplaces for insurers such as CHC. *See* 42 U.S.C. § 18031. These new health insurance marketplaces, or exchanges, offered consumers organized platforms to shop for coverage with specified benefit levels. Health plans offered on the exchanges are known as Qualified Health Plans ("QHPs"). The ACA required that an insurer comply with certain federally-mandated criteria in order to offer plans on the exchanges. Participating insurers are known as "QHP issuers." To become a QHP issuer, for example, an insurer must provide essential health benefits, meet network adequacy standards, and be certified in each marketplace in which it participates. *See* 42 U.S.C. § 18021.

6. Congress recognized that the ACA carried with it tremendous uncertainty for health insurers due to, among other things, the new population of previously uninsured individuals and a new regulatory environment. Because insurers had limited information on how to set premiums accurately for these new markets, many of them would have been reluctant to participate for fear of incurring large losses. Likewise, participating insurers might have been inclined to charge higher premiums in response to the uncertainty, and the ACA's subsidies program would have required the government to absorb much of those increased costs.

7. To address these concerns, the ACA created three premium stabilization programs: a temporary Reinsurance program; a permanent Risk Adjustment program; and a temporary Risk Corridors program. These programs, commonly referred to as the "Three

Rs," were critical to the implementation of the ACA and directly benefitted the Government. They took effect beginning in 2014. *See* 42 U.S.C. §§ 18061-18063.

8. This action involves the Risk Corridors program, which operated only during the first three years of full implementation of the ACA; namely program years 2014, 2015, and 2016. The Risk Corridors program is explicitly "based on" a similar program: Medicare Part D. 42 U.S.C. § 18062(a).

9. Like the Risk Adjustment and Reinsurance programs, the Government created the Risk Corridors program in order to induce QHP issuers to participate in the ACA's exchanges and to offer QHPs at affordable rates, despite the uncertainty summarized above at paragraph 6. Indeed, CMS stated that "[t]he overall goal of these programs is to provide certainty and protect against adverse selection in the market while stabilizing premiums in the individual and small group markets as market reforms and Exchange[s] begin in 2014." Centers for Medicare & Medicaid Services, *Reinsurance, Risk Corridors, and Risk Adjustment Final Rule* (Mar. 2012).

10. Unlike the Risk Adjustment and Reinsurance programs, the Risk Corridors program was designed to share risk not merely among QHP issuers, but rather between QHP issuers and the Government. Patient Protection and Affordable Care Act; Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 76 Fed. Reg. 41930-01, 41942 (July 15, 2011) ("Risk corridors create a mechanism for sharing risk for allowable costs between the Federal government and QHP issuers."); Patient Protection and Affordable Care Act; Standards Related to Reinsurance, Risk Corridors and Risk Adjustment ,77 Fed. Reg. 17220-01 (Mar. 23, 2012) ("The 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; HHS Notice of Benefit and Payment Parameters for 2014, 77 Fed. Reg. 73118 , 73121 (Dec. 7, 2012) ("The temporary risk corridors program permits the Federal government and QHPs to share in profits or losses resulting from inaccurate rate setting from 2014 to 2016."), and 73200 ("The risk corridors program creates a mechanism for sharing risk for allowable costs between the Federal government and QHP issuers."). QHP issuers whose losses exceed a threshold amount would have a portion of those losses reimbursed by the Government, in accordance with a statutory formula. 42 U.S.C. § 18062(b)(1) ("payments out"). QHP issuers whose profits exceed a threshold amount would pay a portion of those profits to the Government, in accordance with another statutory formula. 42 U.S.C. § 18062(b)(2) ("payments in").

11. The Risk Corridors program was established in Section 1342 of the ACA, codified at 42 U.S.C. § 18062 ("Section 18062"), and states in relevant part:

> **(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. 1395w–101 et seq.].
>
> **(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.

42 U.S.C. § 18062 (emphasis added).

12. Nothing in the language or structure of Section 1342 links "payments out" with "payments in." The statutory formulas for calculating "payments out" and "payments in" to individual QHP issuers are independent of each other. Under the terms of the statute, any change in profit-sharing payments received by the Government–either from an individual QHP issuer or in the aggregate–would have no effect on the amounts of risk-sharing payments the Government "shall pay" to QHP issuers whose losses exceed the statutory threshold. Accordingly, like a QHP issuer's obligation to share profits with the Government if it gains, when a QHP issuer loses more than a threshold amount, the Government's obligation to make Risk Corridors payments is mandatory. Nothing in the statute suggests that the Government can pay anything less than the amount prescribed by the statutory formula.

13. Congress has not amended or repealed Section 1342, 42 U.S.C. §18062.

14. After Congress enacted the ACA, HHS and CMS implemented regulations related to the Risk Corridors program containing the same mandatory language and the same statutory formulas. The Risk Corridors regulation states, in relevant part:

> (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). This payment methodology is the same as in the statute. Additionally, nothing in 45 C.F.R. Part 153 limits CMS's obligation to pay QHP issuers the full amount of Risk Corridors payments.

II. CHC'S PARTICIPATION AS A QHP ISSUER IN THE ACA AND ITS RISK CORRIDORS PROGRAM

15. CHC is organized under Texas law as a not-for-profit corporation. CHC was formed in 1997 with a mission to improve the health of underserved children in Harris County by making health insurance more affordable. Today, CHC still serves the same mission, but has expanded its reach to the under-served residents of Southeast Texas. CHC offers plans on the state exchange and has a network of 10,000 doctors and 77 hospitals.

16. The Risk Corridors program was crucial to CHC's decision to become a QHP issuer and to offer and sell QHPs on the Texas Health Insurance Exchange. CHC

undertook the obligations and responsibilities of being a QHP issuer with the understanding that the Government would make the Risk Corridors payments prescribed by the statutory formula should CHC experience losses sufficient to qualify for Risk Corridors payments under Section 1342 and 45 C.F.R. § 153.510. CHC also established the pricing of the QHPs it offered based on the understanding that it would receive all Risk Corridors payments for which it qualified under Section 1342 and 45 C.F.R. § 153.510.

17. On September 23, 2013, CHC and CMS entered into a Qualified Health Care Plan Issuer Agreement regarding CHC's provision of insurance in program year 2014 (the "2014 QHP Agreement"). The 2014 QHP Agreement allowed CHC to participate in the Texas Health Insurance Exchange and made CHC eligible without limitation for the Risk Corridors program.

18. CHC offered and sold QHPs to individuals during the "open enrollment" period beginning on October 1, 2013, for health insurance coverage effective January 1, 2014.

19. On October 29, 2014, CHC and CMS entered into a Qualified Health Care Plan Issuer Agreement regarding CHC's provision of insurance in program year 2015 (the "2015 QHP Agreement"). The 2015 QHP Agreement allowed CHC to participate in the Texas Health Insurance Exchange and made CHC eligible without limitation for the Risk Corridors program.

20. CHC offered and sold QHPs to individuals during the "open enrollment" period beginning on November 15, 2014, for health insurance coverage effective January 1, 2015.

21. On October 8, 2015, CHC and CMS entered into a Qualified Health Care Plan Issuer Agreement regarding CHC's provision of insurance in program year 2016 (the "2016 QHP Agreement"). The 2016 QHP Agreement allowed CHC to participate in the Texas Health Insurance Exchange and made CHC eligible without limitation for the Risk Corridors program.

22. CHC offered and sold QHPs to individuals during the "open enrollment" period beginning on November 1, 2015, for health insurance coverage effective January 1, 2016.

23. Over the entire three years of the Risk Corridors program, CHC upheld its obligations as a QHP issuer under all relevant statutes and regulations.

24. For program year 2014, CHC fulfilled its obligation to the Government by making its full and timely payment of $4,628.30 to the Government under the Risk Corridors program.

25. For program years 2015 and/or 2016, CHC is entitled to a payment in the amount of $9,772,520, according to the statutory and regulatory formulas. This amount differs from the amount shown in CMS's annual payment and charge announcements. CHC has notified CMS of the discrepancy and requested correction of CMS's reports.

26. The Government has paid CHC nothing for program years 2015 and 2016.

27. In summary, the Government owes CHC, but has failed to pay, a total of $9,772,520 in Risk Corridors payments for the Risk Corridors program.

III. HHS HAS RECOGNIZED THE GOVERNMENT'S LEGAL OBLIGATION TO MAKE FULL RISK CORRIDORS PAYMENTS NOTWITHSTANDING ITS THREE-YEAR "BUDGET-NEUTRAL" IMPLEMENTATION

28. Beginning with initial rulemaking and continuing throughout the Risk Corridors program, HHS and CMS have repeatedly recognized through written public statements that the Government has a legal obligation to pay in full the Risk Corridors payments prescribed by Section 1342. HHS and CMS have recognized this legal obligation notwithstanding their so-called "budget-neutral" approach and Congress's annual appropriations riders that have restricted the sources of funds available to the Risk Corridors program. These public statements by HHS and CMS were made by representatives of the Government who had actual authority to bind the United States of America and who made the statements in their official capacity.

29. On March 11, 2013, in implementing final regulations, HHS responded in the Federal Register to a comment "ask[ing] for clarification on HHS's plans for funding risk corridors if payments exceed receipts," stating: "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." Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15409, 15473 (Mar. 11, 2013).

30. One year later, on March 11, 2014, HHS reiterated that "[t]he risk corridors program is a mechanism for sharing risk for allowable costs between the Federal government and QHP issuers," and also stated that it "intends to implement this program in a budget neutral manner." Patient Protection and Affordable Care Act; HHS Notice of

Benefit and Payment Parameters for 2015, 79 Fed. Reg. 13744, 13829 (Mar. 11, 2014).Simultaneously, HHS also stated, "Our initial modeling suggests that this adjustment for the transitional policy could increase the total risk corridors payment amount made by the Federal government . . . However, we estimate that even with this change, the risk corridors program is likely to be budget neutral or, will result in net revenue to the Federal government." *Id; see also* Bulletin, Center for Medicare & Medicaid Services, "Risk Corridors and Budget Neutrality," (April 11, 2014) ("We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments.")

31. On May 20, 2014, HHS stated in a letter to the U.S. Government Accountability Office ("GAO") that "Section 1342(b)(1) . . . establishes . . . the formula to determine the amounts the Secretary must pay to the QHPs if the Risk Corridors threshold is met." Letter from William B. Schulz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014).

32. On May 27, 2014, HHS responded to concerns about its intent to administer the program in a budget neutral way over the three-year life of the program, stating, "As we stated in the bulletin, we anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments. . . In the unlikely event of a shortfall for the 2015 program year, HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. In that event, HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations." Patient Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30240, 30260 (May 27, 2014).

33. On June 18, 2014, HHS sent a letter to U.S. Senator Sessions stating that "As established in statute . . . [QHP] plans with allowable costs at least three percent higher than the plan's target amount will receive payments from HHS to offset a percentage of those losses." Letter from Sylvia M. Burwell, Secretary, HHS, to U.S. Senator Jeff Sessions (June 18, 2014).

34. On February 27, 2015, in implementing its final rule regarding Notice of Benefit and Payment Parameters for 2016, HHS confirmed that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers." Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2016, 80 Fed. Reg. 10750, 10779 (Feb. 27, 2015).

35. On July 21, 2015, CMS sent a letter to state insurance commissioners, stating, "As stated in our final payment notice for 2016, 'We anticipate that risk corridors collections will be sufficient to pay for all risk corridors amounts. HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers.'" Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to State Insurance Commissioners (July 21, 2015).

36. In October 2015, when it was first applying its "budget-neutral" approach to the 2014 program year, HHS sent letters to QHP issuers "reiterat[ing] that [HHS] recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers, and that HHS is recording those amounts that remain unpaid . . . as fiscal year 2015 obligations of the United States Government for which full payment is required." Letter

from Kevin Counihan, CEO of Health Insurance Marketplaces, CMS, to QHP Issuers (Oct. 19, 2015).

37. On November 19, 2015, CMS stated in a public bulletin as follows:

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

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

38. On September 9, 2016, when it announced preliminary information about risk corridors for the 2015 program year, CMS stated in a public bulletin:

> 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.

Bulletin, CMS, "Risk Corridors Payments for 2015," (September 9, 2016).

39. Even as HHS and CMS pro-rated Risk Corridors payments to limit the total "payments out" to the total "payments in" for the combination of program years 2014, 2015, and 2016, HHS and CMS have never treated the partial payments as discharging the Government's full payment obligations. Each of the annual payment and charge announcements issued by CMS designates the full amount calculated pursuant to the formula specified by Section 1342 as the "HHS Risk Corridors Amount." *See* Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for Benefit Year 2014 (November 19, 2015; Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for 2015 Benefit Year (November 18, 2016); Bulletin, CMS, "Risk Corridors Payment and Charge

Amounts for the 2016 Benefit Year (November 15, 2017). And the announcements for program years 2015 and 2016 describe the partial payments being made as "Expected Payment Toward 2014 Amounts." Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for 2015 Benefit Year (November 18, 2016); Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for the 2016 Benefit Year (November 15, 2017). In those same announcements, all payments made under the Risk Corridors program have been designated by CMS and HHS as payments toward 2014 risk corridors payment balances. *Id.* This leaves the remaining balances for 2014 and the full amounts for 2015 and 2016 due, but unpaid. In so doing, HHS and CMS have acknowledged the Government's legal obligation to pay QHP issuers their Risk Corridors amounts in full.

40. HHS's statements and conduct confirm that full Risk Corridors payments are mandatory and remain a legal obligation of the Government.

IV. CONGRESS LIMITED HHS'S FUNDING SOURCES FOR RISK CORRIDORS BUT DID NOT CHANGE THE GOVERNMENT'S LEGAL OBLIGATION TO PAY

41. Congress has considered proposed amendments to, and repeal of, the Risk Corridors program. But Section 1342 has never been amended or repealed. It remains the law of the land.

42. On December 16, 2014, Congress enacted the omnibus appropriations bill for fiscal year 2015, called the "Consolidated and Further Continuing Appropriations Act, 2015" (the "2015 Appropriations Act"). Pub. L. 113-235, 128 Stat. 2130 (Dec. 16. 2014). Section 227 of the 2015 Appropriations Act limited funding sources for Risk Corridors payments as follows:

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

128 Stat. 2491.

43. But the 2015 Appropriations Act did not amend, and therefore had no impact on, the United States' statutory obligation created by Section 1342 to make full and timely Risk Corridors payments to QHP issuers, including CHC. It did not repeal or amend the Risk Corridors payment formula contained in the ACA, nor did it modify the ACA's instruction that the Government "shall pay" the amount specified in the statute.

44. On December 18, 2015, Congress enacted the Omnibus appropriations bill for fiscal year 2016, the "Consolidated Appropriations Act, 2016" (the "2016 Appropriations Act"). Pub. L. 114-113, 129 Stat. 2242 (Dec. 18, 2015). In Section 225 of the 2016 Appropriations Act, Congress again limited funding sources for Risk Corridors payments stating:

> 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).

129 Stat. 2624.

45. But again, the 2016 Appropriations Act did not amend, and therefore had no impact on, the United States' statutory obligation created by Section 1342 to make full Risk Corridors payments to QHP issuers, including CHC. It did not repeal or amend the

Risk Corridors payment formula contained in the ACA, nor did it modify the ACA's instruction that the Government "shall pay" the amount specified in the statute.

46. On May 5, 2017, Congress enacted the Omnibus appropriations bill for fiscal year 2017, the "Consolidated Appropriations Act, 2017" (the "2017 Appropriations Act"). Pub. L. 115-31, 131 Stat. 135 (May 5, 2017). In Section 223 of the 2017 Appropriations Act, Congress again limited the funding sources for Risk Corridors payments, stating:

> 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).

131 Stat. 543.

47. But again, Congress's 2017 Appropriations Act did not amend, and therefore had no impact on, the United States' statutory obligation created by Section 1342 to make full Risk Corridors payments to QHP issuers, including CHC. It did not repeal or amend the Risk Corridors payment formula contained in the ACA, nor did it modify the ACA's instruction that the Government "shall pay" the amount specified in the statute.

V. THE GOVERNMENT HAS FAILED TO MAKE RISK CORRIDORS PAYMENTS DUE TO CHC

48. As detailed in Part II above (paragraphs 15 to 27), the Government owes CHC a Risk Corridors payment in the amount of $9,772,520.

49. This payment is presently due.

50. The Government has failed to make this payment despite an express statutory mandate and repeated recognition that full Risk Corridors payments are legal obligations of the Government.

51. Given that 2016 was the final year of the Risk Corridors program, and hence no additional "payments in" to the Risk Corridors program will occur, there is no prospect of future payment to CHC under the Government's "budget-neutral" approach to administering this program.

COUNT I
VIOLATION OF MONEY-MANDATING STATUTE

52. CHC hereby repeats and incorporates herein each and every allegation in paragraphs 1-51.

53. Section 1342(b)(1) of the ACA mandates compensation, expressly stating that the Secretary of HHS "shall pay" Risk Corridors payments to QHP issuers in accordance with the payment formula set forth in the statute.

54. HHS's and CMS's implementing regulation at 45 C.F.R. § 153.510(b) also mandates compensation, expressly stating that HHS "will pay" Risk Corridors payments to QHP issuers in accordance with the payment methodology set forth in the regulation, which is identical to the methodology in Section 1342(b)(1).

55. CHC was a QHP issuer in program years 2014, 2015, and 2016.

56. CHC satisfied all statutory and regulatory requirements for participation in and payments under the Risk Corridors Program in program years 2014, 2015, and 2016.

57. CHC fulfilled its obligation by paying the Government $4,628.30 for program year 2014 of the Risk Corridors Program.

58. CHC is entitled under Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) to recover full Risk Corridors payments from the Government.

59. The Government has failed to make full Risk Corridors payments to CHC, despite the Government repeatedly confirming that Section 1342 mandates that the Government make Risk Corridors payments, and that the Government owes CHC the full amount of its Risk Corridors payments.

60. Congress's attempts to limit funding sources for Risk Corridors payments due for program years 2014, 2015, or 2016, without modifying or repealing Section 1342 of the ACA, did not and could not defeat or otherwise abrogate the Government's statutory obligation created by Section 1342 to make full and timely Risk Corridors payments to QHP issuers, including CHC.

61. The Government's failure to make full and timely Risk Corridors payments to CHC constitutes a violation and breach of the Government's mandatory payment obligations under Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b).

62. As a result of the Government's violation of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b), CHC has been damaged in the full amount it is still owed under the Risk Corridors program, together with interest, costs of this action, and such other relief as this Court deems just and proper.

COUNT II
BREACH OF IMPLIED-IN-FACT CONTRACT

63. CHC hereby repeats and incorporates herein each and every allegation in paragraphs 1-62.

64. CHC entered into a valid implied-in-fact contract with the Government regarding the Government's obligation to make full and timely Risk Corridors payments to CHC in exchange for CHC's agreement to become a QHP issuer, offer and sell ACA-qualified plans on the Texas Health Insurance Exchange, forfeit a portion of profits in accordance with the "payments in" provision of the Risk Corridors program, and follow the relevant statutes and regulations.

65. Section 1342 of the ACA, HHS's implementing regulations (45 C.F.R. § 153.510), and HHS's and CMS's admissions regarding their obligation to make Risk Corridors payments made by representatives of the Government who had actual authority to bind the United States, constituted a clear and unambiguous offer by the Government to make full Risk Corridors payments to QHP issuers, including CHC, that agreed to participate and/or did participate as a QHP issuer and that suffered qualifying losses.

66. Section 1342 specifically directs the Secretary of HHS to make Risk Corridors payments in specific sums, and HHS has no discretion to pay more or less than those sums.

67. CHC accepted the Government's offer by agreeing to become a QHP issuer and thereafter by participating in the Texas Health Insurance Exchange, under which it offered and sold QHPs, agreed to forfeit a portion of profits in accordance with the

"payments in" provision of the Risk Corridors program, complied with all relevant statutes and regulations, and accepted the otherwise uncertain risks imposed by the ACA.

68. CHC satisfied and complied with its obligations or conditions which existed under the implied-in-fact contract, which extends to and covers all of program years 2014, 2015, and 2016, during all of which CHC participated as a QHP issuer selling QHPs in the Texas Health Insurance Exchange.

69. The Government's agreement to make full and timely Risk Corridors payments was a substantial factor material to CHC's agreement to enter into its QHP Agreements and to its decision to participate in the ACA and its Risk Corridors program. Participation in the Risk Corridors program was mandatory for insurers who chose to become QHP issuers. *See* 42 U.S.C. § 18062(a) ("a qualified health plan…shall participate").

70. The parties' agreement is further confirmed by the parties' conduct, performance, and statements following CHC's acceptance of the Government's offer, the execution by the parties of the QHP Agreements expressly incorporating "the laws and common law of the United States of America, including without limitation such regulations as may be promulgated from time to time by the Department of Health and Human Services or any of its constituent agencies;" and the Government's repeated assurances that full and timely Risk Corridors payments would be made. *See, e.g.*, 78 Fed. Reg. 15409, 15473.

71. The implied-in-fact contract was authorized by representatives of the Government who had actual authority to bind the United States and was entered into with mutual assent and consideration by both parties.

72. The Risk Corridors program's protection from uncertain risk and new market instability was a real benefit that significantly influenced CHC's decision to agree to become a QHP issuer and to follow the applicable statutes and regulations for participation.

73. CHC, in turn, provided a real benefit to the Government by agreeing to become a QHP issuer and participate in the ACA, despite the otherwise uncertain financial risk.

74. Adequate insurer participation was crucial to the Government's achieving the overarching goal of the ACA: to make affordable health insurance available to individuals who previously did not have access to affordable coverage, and to help to ensure that every American has access to high-quality, affordable health care by protecting consumers from increases in premiums due to uncertainty in the new markets.

75. The Government induced CHC to participate in the ACA by including the Risk Corridors program in Section 1342 of the ACA and its implementing regulations, by which Congress, HHS, and CMS committed to help protect health insurers financially against risk selection and market uncertainty.

76. The Government repeatedly acknowledged its statutory and regulatory obligations to make full and timely Risk Corridors payments to qualifying QHP issuers

through its conduct and statements to the public and to CHC, made by representatives of the Government who had actual authority to bind the United States.

77. CHC fulfilled its obligation under the implied-in-fact contract for program year 2014 by paying $4,628.30 in Risk Corridors payments to the Government.

78. Under its implied-in-fact contract with the Government, CHC is entitled to recover full Risk Corridors payments from the Government.

79. Congress's attempts to limit funding sources for Risk Corridors payments due for program years 2014, 2015, and 2016, did not and could not defeat or otherwise abrogate the United States' implied-in-fact contractual obligation to make full and timely Risk Corridors payments to CHC.

80. The Government's failure to make full and timely Risk Corridors payments to CHC is a material breach of the implied-in-fact contract.

81. As a direct and proximate result of the Government's breach of the implied contract, CHC has been damaged in the full amount it is still owed under the Risk Corridors program, together with interest, costs of this action, and such other relief as this Court deems just and proper.

COUNT III
BREACH OF IMPLIED COVENANT OF
GOOD FAITH AND FAIR DEALING

82. CHC hereby repeats and incorporates herein each and every allegation in paragraphs 1-81.

83. A covenant of good faith and fair dealing is implied in every contract, including those with the Government, and imposes obligations on both contracting parties

that include the duty to refrain from doing anything that will destroy or injure the reasonable expectations of the other party's right to receive the benefits of the contract.

84. The implied-in-fact contract entered into between the Government and CHC regarding its participation as a QHP issuer under the ACA during program years 2014, 2015, and 2016 created the reasonable expectation for CHC that the Government would make full and timely Risk Corridors payments, which CHC relied on as an important part of the contract consideration, just as the Government expected that QHP issuers would fully and timely make (and did fully and timely make) the "payments in" to the Government under the Risk Corridors program.

85. CHC fully and timely paid in its 2014 Risk Corridors payments owed to the Government in the amount of $4,628.30.

86. By failing to make full and timely Risk Corridors payments owed to CHC, the Government has destroyed or injured CHC's right to receive the benefits of the implied-in-fact contract, as it reasonably expected to receive, in breach of the implied covenant of good faith and fair dealing.

87. The Government breached the implied covenant of good faith and fair dealing by, at least: (1) promising through statute and regulation to make the Risk Corridors payments in the amounts specified, but subsequently failing to do so and instead making only partial, pro-rated payments to QHP issuers; (2) passing appropriations language in the 2015, 2016, and 2017 Appropriations Acts that targeted QHP issuers' rights to Risk Corridors payments by limiting funding sources to make payments, after CHC had undertaken significant expense and substantially performed its obligations under

the contract; and (3) publicly making statements that the Government would make full Risk Corridors payments to QHP issuers, which CHC relied on in agreeing to become a QHP issuer and in participating in the Exchange, but then failing to make full Risk Corridors payments after CHC had relied on the statements and performed the QHP contracts.

88. Under the implied covenant of good faith and fair dealing, CHC is entitled to recover full Risk Corridors payments from the Government.

89. As a direct and proximate result of the aforementioned breaches of the covenant of good faith and fair dealing, CHC has been damaged in the full amount it is still owed under the Risk Corridors program, together with interest, costs of this action, and such other relief as this Court deems just and proper.

PRAYER FOR RELIEF

Wherefore, Plaintiff demands judgment against the Defendant, the United States, as follows:

1. For the First Cause of Action, awarding CHC damages in the amount of $9,772,520, together with any other losses sustained as a result of the Government's violation of Section 1342(b)(1) of the ACA and of 45 C.F.R. § 153.510(b) regarding CHC's Risk Corridors payment;

2. For the Second Cause of Action, awarding CHC damages in the amount of $9,772,520, together with any other losses sustained as a result of the Government's breach of its implied-in-fact contract with CHC regarding CHC's Risk Corridors payment;

3. For the Third Cause of Action, awarding CHC damages in the amount of $9,772,520, together with any other losses actually sustained as a result of the Government's breach of its implied covenant of good faith and fair dealing with CHC regarding CHC's Risk Corridors payment;

4. Awarding CHC all available interest, including, but not limited to, pre- and post-judgment interest;

5. Awarding CHC all available attorneys' fees and costs; and

6. Awarding CHC such other and further relief to as the Court deems just and proper.

Dated: January 2, 2018

s/ William L. Roberts

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