IN THE UNITED STATES COURT OF FEDERAL CLAIMS

LOCAL INITIATIVE HEALTH AUTHORITY FOR LOS ANGELES COUNTY, d/b/a L.A. CARE HEALTH PLAN, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	No. 17-1542C Judge Wheeler

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AND MEMORANDUM OF LAW IN SUPPORT

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Plaintiff Local Initiative Health Authority for Los Angeles County, operating and doing business as L.A. Care Health Plan ("L.A. Care"), pursuant to Rule 56 of this Court's Rules ("RCFC"), respectfully moves for summary judgment on liability on Counts V and VI of its Amended Complaint (ECF No. 14). Count V challenges the Government's violation of its obligation to make full advance cost-sharing reduction ("CSR") payments to L.A. Care as required under the money-mandating CSR provisions under Sections 1402 and 1412 of the Patient Protection and Affordable Care Act ("ACA")[1] and implementing federal regulations. Count VI seeks recovery for the Government's breach of its implied-in-fact contract to make full CSR payments to L.A. Care. For the reasons demonstrated below, L.A. Care is entitled to summary judgment on liability on Counts V and VI as a matter of law.

INTRODUCTION

As this Court observed in *Moda Health Plan v. United States,* Congress passed the ACA in 2010 in a "dramatic overhaul of the nation's healthcare system." 130 Fed. Cl. 436, 441 (2017) (Wheeler, J.) (reversed on other grounds). The ACA "created a tectonic shift in the insurance market," which this Court recognized, "drastically enlarged the pool of eligible insurance purchasers," and "prohibited insurers from denying coverage or setting increased premiums based on a purchaser's medical history." *Id*. at 442. "Central to the Act's infrastructure was a network of 'Health Benefit Exchanges' ("Exchanges") on which insurers would offer Qualified Health Plans ("QHPs") to eligible purchasers." *Id*. at 441. The ACA included "a series of interlocking reforms designed to expand coverage in the individual health insurance market." *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). One of these reforms, the ACA's Cost-Sharing Reduction ("CSR") program enacted in section 1402 of the Affordable Care Act, 42 U.S.C. §

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[1] Pub. L. 111-148, 124 Stat. 119 (2010).

18071, was specifically aimed at ensuring that individuals had access to affordable insurance coverage and healthcare.

Under the CSR Program, in Sections 1402 and 1412, Congress expressly mandated that the Treasury Secretary "shall make periodic and timely payments" to insurers in advance that are "equal to the value of the [cost sharing] reductions" insurers are required to make to individual consumers. *See* 42 U.S.C. §§18071(c)(3), 18071(a)(2), 18082(c)(3). The cost sharing reductions offset eligible consumers' costs through reduced out-of-pocket expenses, such as deductibles, copayments, and coinsurance paid by individuals. *See* 42 U.S.C. §§18022(c)(3)(A), 18071(c)(2); *accord* 45 C.F.R. §§ 155.305(g), 156.410(a). In short, "[t]he premium tax credits and the cost-sharing reductions work together: the tax credits help people obtain insurance, and the cost-sharing reductions help people get treatment once they have insurance." *California v. Trump*, 267 F. Supp. 3d 1119, 1123 (N.D. Cal. 2017).

There is no dispute that Congress created an unambiguous mandatory "shall" pay obligation on the Government in Sections 1402 and 1412 to timely make the full advance CSR payments owed to QHPs each month. 42 U.S.C. § 18071(c)(3)(A); 42 U.S.C. § 18082(c)(3); 45 C.F.R. § 156.430(b)(1). In fact, beginning in January 2014, the Government actually made all of the required advance monthly CSR payments in full to all eligible QHPs, including L.A. Care, for 45 consecutive months without fail. *See* Am. Compl. ¶¶ 237, 247, 257; Am. Compl. Exs. 06, 55. Then, in October 2017, the Trump Administration abruptly announced that it would no longer make any further CSR payments citing a sudden lack of available appropriations. *See* Dan Mangan, *Obamacare bombshell: Trump kills key payments to health insurers*, CNBC, Oct. 12, 2017, Am. Compl. Ex. 64.

There is no dispute that L.A. Care agreed to become a QHP and developed and offered QHPs on the California ACA Exchange in July, 2013 and began offering QHPs on that

Exchange each month since January 2014. Am. Compl. ¶ 87, Am. Compl. Ex. 11. There is also no dispute that each month since January 2014, L.A. Care has made—and continues to make—all required offsetting cost-sharing reductions to eligible members to reduce their costs as required by Section 1402. *See* Am. Compl. ¶¶ 282-86. The Government's refusal to pay L.A. Care the advance CSR payments owed each month is a flagrant breach of the Government's statutory, regulatory and contractual obligations.

The Government's asserted excuse for failing to make the required CSR payments, a lack of appropriations, was recently rejected by the Federal Circuit in *Moda Health Plan, Inc. v. United States*, where the Court reaffirmed long-standing precedent and held that a similar "shall pay" obligation under the ACA's risk corridors program was "created by the statute itself," and was "unambiguously mandatory" even though "it provided no budgetary authority to the Secretary of HHS and identified no source of funds for any payment obligations beyond payments in" from profitable insurers on the ACA Exchanges. 892 F.3d 1311, 1320-22 (Fed. Cir. 2018). The Federal Circuit confirmed that the ACA's statutory mandatory payment obligation existed "independent of an appropriation to satisfy that debt," and further that insufficiency of appropriations "does not…cancel [the Government's] obligations, nor defeat the rights of other parties." *Id.* at 1321 (quoting *Ferris v. United States*, 27 Ct. Cl. 542, 546 (1892)).

Unlike the defenses it asserted in the risk corridors cases, however, here the Government cannot assert (and has not asserted) defenses based on supposed "budget neutrality" or subsequent acts of Congress to "suspend" its mandatory CSR payment obligations through passage of appropriations riders or any other Congressional action. *See Moda*, 892 F.3d at 1329; *see also Sanford Health Plan v. United States*, No. 18-cv-136 (Fed. Cl.), Government Motion to Dismiss, ECF No. 8. Instead, the only defense raised by the Government for failing to make the mandatory CSR payments owed under ACA Section 1402—a purported lack of appropriations—

has been squarely rejected by this Court and by the Federal Circuit analyzing a similar "shall pay" obligation under ACA Section 1342. *Moda*, 892 F.3d at 1320-22; *Molina Healthcare of California, Inc. v. United States*, 133 Fed. Cl. 14, 36 (2017) (Wheeler, J.).

Judge Kaplan in *Montana Health Co-op v. United States*, No. 18-143C, 2018 WL 4203938 (Fed. Cl. Sept. 4, 2018), recently granted summary judgment on liability in favor of the plaintiff insurer (and denied the Government's motion to dismiss), that asserted statutory CSR claims under § 1402 virtually identical claim to those asserted here by L.A. Care. Following the Federal Circuit's ruling in *Moda* and a "long" line of Supreme Court and Federal Circuit precedent, the Court in *Montana Health Co-op* rejected all of the Defendant's arguments and held that "the government violated a statutory obligation created by Congress in the ACA when it failed to provide Montana Health its full cost-sharing reduction payments for 2017" and "Congress's failure to appropriate funds to make those payments did not vitiate that obligation." 2018 WL 4203938 at *1. This Court should similarly find the Government liable for failure to pay L.A. Care its statutorily-mandated CSR payments and grant summary judgment on liability in favor of L.A. Care and against the Government for the same reasons articulated by Judge Kaplan.

In addition, this Court should find that the Government entered into an implied-in-fact contract with L.A. Care and breached its promise to make advance monthly CSR payments to L.A. Care to offset the required cost-sharing reductions L.A. Care was required to offer its eligible members each month. There is no dispute that the Government induced L.A. Care to participate in the California ACA Exchange, in part, though such promised advance monthly CSR payments and that the Government received the benefits of L.A. Care's participation on that Exchange since January 2014, expanding health insurance coverage for California residents, scores of whom previously were uninsured. There is also no dispute that the Government

continues to require L.A. Care to provide cost-sharing reduction offsets to all eligible members, even while the Government has reneged on its promise to make cost-sharing reduction payments to L.A. Care. But it is well-established that the Government's lack of appropriations defense does not limit its contractual obligations. *See Salazar v. Ramah Navajo Chapter*, 132. S.Ct. 2181, 2189 (2012) ("[T]he Government is responsible to the contractor for the full amount due under the contract, even if the agency exhausts the appropriation in service of other permissible ends."); *Molina*, 133 Fed. Cl. at 41.

Nor should this Court feel constrained by the Federal Circuit's *Moda* decision, which declined to find an implied-in-fact risk corridors contract because the Federal Circuit failed to apply the Supreme Court's controlling two-part test in *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.,* which requires courts to look beyond the text of the statute and examine the "the circumstances" surrounding the statute's passage and the conduct of the parties. 470 U.S. 451, 467-68 (1985); *see also Hercules, Inc. v. United States*, 516 U.S. 417, 424 (1996). As demonstrated below, properly applied, *Nat'l R.R. Passenger Corp.* compels a finding that the Government was contractually obligated to make monthly CSR payments to L.A. Care, an obligation that likewise is unaffected by a purported lack of appropriations.

Accordingly, the Court should find the Government liable and enter summary judgment in favor of L.A. Care on Counts V and VI of its Amended Complaint for violations of the mandatory CSR payment obligation in ACA Sections 1402 and 1412 and implementing regulations, and alternatively, for breach of an implied-in-fact contract. Otherwise, as this Court recognized in *Moda,* "to say to [L.A. Care], 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government." *Moda,* 130 Fed. Cl. at 466 (quoting *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970)); *see also United States v. Winstar Corp.*, 518 U.S. 839, 886 n.31 (1996) (plurality op.) ("It is very well to say that those who deal with the Government should

turn square corners. But there is no reason why the square corners should constitute a one way street.") (quoting *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387-388 (1947) (Jackson, J., dissenting)). Here, this Court should once again thwart the Government's "joke," compel the Government to turn a square corner, and grant summary judgment for L.A. Care.

STATEMENT OF THE ISSUES PRESENTED

1. Is the Government liable, under Count V, for its failure to meet its statutory and regulatory obligations to make full CSR payments to L.A. Care in 2017 and 2018 under the ACA Sections 1402 and 1412 and their implementing regulations?

2. Is the Government liable, under Count VI, for breach of its implied-in-fact contract with L.A. Care to make full CSR payments to L.A. Care in 2017 and 2018?

STATEMENT OF THE CASE AND UNDISPUTED FACTS

I. CONGRESS ENACTS THE ACA TO EXPAND HEALTH INSURANCE COVERAGE AND INCLUDES A COST-SHARING REDUCTION PROGRAM.

Congress passed the ACA in 2010, with the goal of creating a series of "interlocking reforms designed to expand" the availability of health insurance nationwide for individuals who previously lacked access to the marketplace. *King*, 135 S. Ct. at 2485. To achieve that goal, in the ACA Congress called for the creation of an Exchange in each State where individuals who wanted access to the marketplace could "compare and purchase insurance plans." *Id.* In addition to drastically enlarging the pool of eligible insurance purchasers with the ACA and expanding Medicaid eligibility, Congress provided subsidies to low-income insurance purchasers to help offset costs for health insurance premiums and out-of-pocket expenses for health care known as "cost-sharing" expenses (such as deductibles, co-pays, co-insurance, the annual limitation on cost-sharing, and similar expenses). *See* ACA §§ 1401, 1402, 1412; 45 C.F.R. § 156.430.

With respect to health insurance premiums, Section 1401 of the ACA amended the

Internal Revenue Code by providing "premium tax credits" from the Government that reduce monthly health insurance premiums on ACA Exchange plans for individuals who earn between 100% and 400% of the federal poverty level, and who satisfy additional criteria. *See* 26 U.S.C. § 36B (ACA § 1401).

Regarding cost-sharing expenses, Section 1402 of the ACA created the CSR program. Section 1402 mandates that, after being notified by HHS that a customer is eligible for CSR discounts, a QHP "shall reduce" at least some portion of that customer's out-of-pocket health care costs. 42 U.S.C. § 18071(a). Although Congress's design called for eligible enrollees to receive CSR discounts directly from QHP insurers, like L.A. Care, Congress did not intend for QHPs to bear the expense of the CSR discounts. Instead, Congress intended and mandated in Sections 1402 and 1412 of the ACA that the Government "shall" fully reimburse QHPs in advance for those CSR discounts through advance CSR payments from the Government to QHPs, subject to a later reconciliation.

II. THE ACA'S COST-SHARING REDUCTION PROVISIONS AND IMPLEMENTING REGULATIONS REQUIRE THAT FULL ADVANCE PAYMENTS BE MADE TO INSURERS.

In Section 1402, Congress authorized and expressly required that the Government "***shall*** make periodic and timely [CSR] payments" directly to QHPs, in an amount "***equal to*** the value of the" CSR discounts, to reimburse QHPs for the CSR discounts that QHPs are statutorily required to make to eligible customers. 42 U.S.C. § 18071(c)(3)(A) (emphasis added).
In addition, in Section 1412, Congress mandated HHS and Treasury to coordinate in providing CSR payments to QHPs in advance of the QHPs' provision of CSR discounts to eligible customers. *See* 42 U.S.C. § 18082(c)(3) ("Treasury ***shall*** make such advance [CSR] payment [to QHPs] at such time and in such amount as the [HHS] Secretary specifies ….") (emphasis added).

HHS echoed those mandatory statutory commands in its implementing regulations,

stating that QHPs "***will*** receive periodic ***advance*** payments" for their CSR discounts to eligible customers, calculated in accordance with other provisions of the subchapter that set forth CSR calculation methodologies. 45 C.F.R. § 156.430(b)(1)(emphasis added); *see also Montana Health Co-op*, at *2 (HHS' CSR regulations "provide, in pertinent part, that the 'issuer must ensure that an individual eligible for cost-sharing reductions . . . pays only the cost sharing required of an eligible individual for the applicable covered service.' 45 C.F.R. § 156.410(a)" and "that such insurers 'will receive periodic advance payments based on the advance payment amounts calculated in accordance' with a regulatory formula." (citing § 156.430(b)(1)).

HHS further established a CSR reimbursement process for providing advance CSR payments and later reconciling those payments against CSR discounts. *See* 45 C.F.R. § 156.430; CMS 2016 CSR Manual at 6 n.9, Am. Compl. Ex. 55. HHS and CMS established a payment approach under which the Government would make "monthly advance payments to issuers to cover projected cost-sharing reduction amounts and then reconcile those advance payments at the end of the benefit year to the actual cost-sharing reduction amounts." 78 FR 15409, 15486 (Mar. 11, 2013) (Final Rule), Am. Compl. Ex. 06. ("This approach fulfills the Secretary's obligation to make 'periodic and timely payments equal to the value of the reductions' under section 1402(c)(3) of the Affordable Care Act.").

Following implementation of the program, HHS continued to express its understanding that the statute requires full advance monthly CSR payments be made to QHPs. *See, e.g.*, 79 FR 13743, 13805 (Mar. 11, 2014) (Final Rule), Am. Compl. Ex. 25 ("Section 1402(c)(3) … directs the Secretary to make periodic and timely payments to the QHP issuer equal to the value of those reductions."); Bulletin, CMS, *Timing of Reconciliation of Cost-Sharing Reductions for the 2014 Benefit Year* at 1 (Feb. 13, 2015), Am. Compl. Ex. 59 ("[t]he [ACA] requires [QHPs] to provide cost-sharing reductions to eligible enrollees in such [silver] plans, ***and provides for issuers to be***

reimbursed for the value of those cost-sharing reductions" by the Government) (emphasis added); CMS 2016 CSR Manual at 6 & n.8 (Dec. 2016), Am. Compl. Ex. 55 (acknowledging that "periodic and timely payments equal to the value of [QHPs' CSR] reductions ***are required to be made to issuers*** … in advance" by the Government) (emphasis added).

Congress has not amended or repealed Section 1402 or Section 1412 since enactment of the ACA, and Congress has never taken any legislative action regarding the Government's obligation to make advance CSR payments to QHPs.

III. L.A. CARE OFFERS QHPS AND REDUCED COST-SHARING FOR INSUREDS ON THE CALIFORNIA EXCHANGE IN RELIANCE ON MANDATORY CSR REIMBURSEMENTS.

With this backdrop, and in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, L.A. Care agreed to become a QHP beginning in CY 2014 and continuing through the present, and accordingly developed and established ACA plans and premiums, executed QHP Agreements and participated in the California ACA Exchange, including fulfilling its obligation to reduce cost-sharing payments for eligible enrollees. On September 29, 2016, L.A. Care executed a QHP Issuer Contract for 2017-2019 with Covered California that is effective from October 1, 2016 through December 31, 2019, confirming its participation on the California ACA Exchange for CY 2017 through CY 2019 (the "CY 2017-2019 QHP Agreement"). Am. Compl. Ex. 58.

Starting in January 2014, for 45 consecutive months until October 2017, the HHS and Treasury Secretaries – including those in the current Administration– made the Government's monthly advance CSR payments to QHPs, including L.A. Care, as Congress required in the ACA and consistent with their interpretation of the Government's money-mandating payment obligations under the ACA. *See* CMS 2016 CSR Manual at 36, Am. Compl. Ex. 55 ("Payments to issuers for the cost-sharing reduction component of advance payments began in January

2014."). From 2014 through September 2017, the Government appropriately relied on the ACA's permanent appropriation, codified at 31 U.S.C. § 1324, to fund the advance CSR payments.

IV. THE GOVERNMENT BREACHES ITS COST-SHARING REDUCTION PAYMENT OBLIGATIONS.

On October 12, 2017, over a year after L.A. Care executed its QHP Issuer Contract for 2017-2019, the current Administration announced that the Government would no longer make CSR payments to QHPs. *See* Dan Mangan, *Obamacare bombshell: Trump kills key payments to health insurers*, CNBC, Oct. 12, 2017, Am. Compl. Ex. 64. An October 11, 2017 legal opinion signed by U.S. Attorney General Jeff Sessions and addressed to the Treasury Secretary and HHS Acting Secretary concluded that Section 1401 premium tax credits and Section 1402 CSR reimbursement were two distinct programs and asserted that the permanent appropriation in Section 1324 could only be used to fund Section 1401 premium tax credits. Am. Compl. Ex. 67. The next day, HHS and CMS issued a press release announcing that the agencies believed that "Congress has not appropriated money for CSRs, and we will discontinue these payments immediately." Press Release, HHS & CMS, *Trump Administration Takes Action to Abide by the Law and Constitution, Discontinue CSR Payments* (Oct. 12, 2017), Am. Compl. Ex. 65. On the same day, HHS Acting Secretary Eric Hargan issued a letter to CMS Administrator Seema Verma, instructing that "CSR payments to issuers must stop, effective immediately. CSR payments are prohibited unless and until a valid appropriation exists." Letter from Eric Hargan, HHS Acting Secretary, to Seema Verma, CMS Administrator (Oct. 12, 2017), Am. Compl. Ex. 66.

Pursuant to the Administration's decision, HHS and Treasury have not made any of the mandatory advance CSR payments to QHPs, like L.A. Care, in and after October 2017, nor has

the Government made any mandatory advance CSR payments for the CY 2018 plan year to date. The Government has refused to pay the CSR amounts owed in violation of its statutory and contractual mandatory payment obligations.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a); *see, e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "Issues of statutory interpretation and other matters of law may be decided on motion for summary judgment." *Santa Fe Pac. R.R. Co. v. United States*, 294 F.3d 1336, 1340 (Fed. Cir. 2002); *see Moda*, 130 Fed. Cl. at 454 (quoting *Santa Fe*); *Molina*, 133 Fed. Cl. at 15 (same). The Court in *Montana Health Co-op* agreed that "the parties' cross-motions present a single, purely legal issue: whether the federal government had a statutory obligation to provide Montana Health with the cost-sharing reduction payments described in § 1402 of the ACA, notwithstanding the lack of appropriations to fund such payments." 2018 WL 4203938, at *5. "Whether a contract exists is a mixed question of law and fact," and "[c]ontract interpretation itself also is a question of law." *Cienega Gardens v. United States*, 194 F.3d 1231, 1239 (Fed. Cir. 1998).

ARGUMENT

I. TUCKER ACT JURISDICTION EXISTS OVER L.A. CARE'S CLAIMS

A. Count V

In Count V, L.A. Care asserts that the United States breached a money-mandating statute, § 1402, and its implementing regulations in 45 C.F.R. § 156.430(b)(1). L.A. Care has unquestionably satisfied the Tucker Act jurisdictional requirements under the Tucker Act. *See Roberts v. United States*, 745 F.3d 1158, 1161 (Fed. Cir. 2014). First, § 1402 and its implementing regulations are clearly money-mandating. *See Molina,* 133 Fed. Cl. at 27

(cataloguing cases). Second, as a QHP, L.A. Care is a member of the class that Congress prescribed to receive CSR payments under the statute and regulations. The Court in *Montana Health Co-op* held that the Court "has jurisdiction under the Tucker Act over Montana Health's claim for monetary relief under § 1402 of the ACA" and HHS implementing regulations, 45 C.F.R. § 156.430(b)(1), concluding that "[t]hese provisions supply money-mandating sources of law for purposes of establishing this Court's Tucker Act jurisdiction." 2018 WL 4203938, at *4 ("[t]he 'use of the word 'shall' generally makes a statute money-mandating.'" (citing *Greenlee Cty. v. United States,* 487 F.3d 871, 877 (Fed. Cir. 2007) (quoting *Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003)).

B. <u>Count VI</u>

This Court unquestionably also has Tucker Act jurisdiction to hear L.A. Care's breach of implied-in-fact contract claim. *See Moda*, 130 Fed. Cl. at 450-51 (finding Tucker Act jurisdiction to hear breach of implied-in-fact contract claim regarding risk corridors); *Marchena v. United States*, 128 Fed. Cl. 326, 331 (2016) (Wheeler, J.) (recognizing that a "low threshold requirement" exists to establish jurisdiction over contract claims). A plaintiff claiming the Government has breached an implied-in-fact contract need only make a "non-frivolous *allegation* of a contract with the government." *Mendez v. United States*, 121 Fed. Cl. 370, 378 (2015) (quoting *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011)) (emphasis in original). In its Amended Complaint, L.A. Care alleges each of the elements of an implied-in-fact contract. *See, e.g.*, Am. Compl. ¶¶ 371-90. "[T]hese non-frivolous allegations are all that is required. Therefore, the Court also has subject-matter jurisdiction over [L.A. Care's] contract claim." *Moda,* 130 Fed. Cl. at 450 (citing *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81, 98-99 (2016)).

II. COUNT V: L.A. CARE IS ENTITLED TO SUMMARY JUDGMENT ON LIABILITY FOR THE GOVERNMENT'S VIOLATION OF ITS STATUTORY AND REGULATORY OBLIGATIONS TO MAKE FULL COST-SHARING REDUCTION PAYMENTS.

Section 1402 of the ACA mandates that, after being notified by HHS that a customer is eligible for CSR discounts, a QHP "shall reduce" a portion of that customer's out-of-pocket health care costs. 42 U.S.C. § 18071(a); *see Montana Health Co-op*, at *2 ("Pursuant to the cost-sharing reduction requirement, insurers offering health plans on the exchanges must reduce these enrollees' out-of-pocket costs for 'deductibles, coinsurance, copayments, or similar charges' by a specified amount. § 18071(a)(2); *id.* § 18022(c)(3)(A)."). In turn, the statute explicitly and unambiguously mandates that the Government fully reimburse QHPs for those CSR discounts through advance payments to the QHPs. Section 1402 authorizes and expressly requires that the Government "***shall*** make periodic and timely payments to the issue ***equal to*** the value of the reductions." 42 U.S.C. § 18071(c)(3)(A) (emphasis added); *see Montana Health Co-op*, at *2 (the ACA "states that insurers 'shall notify the Secretary [of Health and Human Services] of such reductions' and that 'the Secretary shall make periodic and timely payments to the issuer equal to the value of the reductions.' *Id.* § 18071(c)(3)(A)."). Section 1412 further requires HHS and Treasury to coordinate in providing CSR payments to QHPs in advance of the QHPs' provision of CSR discounts to eligible customers. *See* 42 U.S.C. § 18082(c)(3) ("Treasury ***shall*** make such advance [CSR] payment [to QHPs] at such time and in such amount as the [HHS] Secretary specifies ….") (emphasis added).

Congress's use of the word "shall" in Sections 1402 and 1412 clearly expressed its intent that advance CSR payments are a money-mandating obligation of the United States that the Government must make to QHPs, including L.A. Care. *See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("The mandatory 'shall' … normally creates an obligation impervious to judicial discretion."); *Molina*, 133 Fed.Cl. at 36 (noting "mountain

of controlling case law holding that when a statute states a certain consequence 'shall' follow from a contingency, the provision creates a mandatory obligation") (citations omitted); *Moda*, 130 Fed. Cl. at 455 (finding "shall pay" directive in risk corridors section of ACA to be "unambiguous"). The Court in *Montana Health Co-op* agreed that with respect to CSRs, "the statutory language clearly and unambiguously imposes an obligation on the Secretary of HHS to make payments to health insurers that have implemented cost-sharing reductions on their covered plans as required by the ACA." 2018 WL 4203938, at *5 (citing 42 U.S.C. § 18071(c)(3)(A)). L.A. Care has satisfied the requirements for payment from the Government under Sections 1402 and 1412 and the Government has a mandatory statutory obligation to pay the amounts owed to L.A. Care.[2]

Despite the existence of this mandatory "shall make" language, L.A. Care expects that the Government will argue, as it recently has in other CSR cases, including *Montana Health Co-op*, that there is no obligation to pay because there was not an appropriation to fund the CSR program. *See Montana Health Co-op,* at *5-6*; Sanford Health Plan v United States*, No. 18-136C, Government Motion to Dismiss, ECF No. 8 at 3. This argument ignores long-standing precedent and would eviscerate the meaning of a money-mandating statute. The Federal Circuit recently rejected this very argument in *Moda* in evaluating similar "shall pay" language in the risk corridors provision in Section 1342 of the ACA. Citing a well-established line of precedent, the Federal Circuit held that the "shall pay" language of Section 1342 was mandatory and

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[2] Indeed, the Government expressly admitted in *House v. Burwell* that "The [ACA] requires the government to pay cost-sharing reductions to issuers. . . . The absence of an appropriation would not prevent the insurers from seeking to enforce that statutory right through litigation." Defendants' Memorandum in Support of Their Motion for Summary Judgment, *U.S. House of Reps. v. Burwell*, No. 1:14-cv-01967-RMC, ECF No. 55-1 at 20 (D.D.C. Dec. 2, 2015).

created a binding obligation to pay.[3] *Moda,* 892 F.3d at 1320-22. Rejecting the Government's argument, the Federal Circuit acknowledged that "it has long been the law that the government may incur a debt independent of an appropriation to satisfy that debt[.]" *Id.* at 1321; *see also N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966) ("It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute."). The Court further explained that "the obligation is created by the statute itself, not by the agency. The government cites no authority for its contention that a statutory obligation cannot exist absent budget authority." *Moda,* 892 F.3d at 1322.

The Court in *Montana Health Co-op* considered and rejected all of the Government's arguments aimed at evading liability for making the statutorily-required advance monthly CSR payments to insurers, observing that "none of these arguments withstands scrutiny under controlling precedent, the most recent example of which is the court of appeals' decision in *Moda Health Plan*." 2018 WL 4203938, at *5. Specifically, the Court dispensed with the Government's argument "that § 1402 does not give rise to a statutory payment obligation because Congress has never appropriated funds to meet any such obligation," emphasizing that the Government "concede[d]" that the statutory "shall pay" risk corridors obligation in Section 1342 "created an obligation to make full risk-corridors payments without regard to appropriations or budget authority," that the Federal Circuit in *Moda* found was

[3] With respect to the risk corridors payments at issue in *Moda*, the Federal Circuit went on to hold that although Section 1342 created an express obligation to pay, the payment obligation was later capped or suspended by Congress through its enactment of subsequent appropriations riders. *Moda*, 892 F.3d at 1322-29. That holding does not apply in this case, because no appropriations riders or any subsequent statute placed any limitations on the mandatory obligation to make CSR payments.

"'unambiguously mandatory.'" *Id.* at *5-6 (citing *Moda,* 892 F.3d at 1320).[4] Judge Kaplan correctly recognized that the Federal Circuit "broke no new ground" in *Moda* by holding that the statutory "shall pay" obligation was enforceable without a specific appropriation or "budget authority," because "the lack of appropriated funds was irrelevant to whether such an obligation was enforceable in this court." *Id.* at *6 (citing *Moda*, 892 F.3d at 1321 ("'it has long been the law that the government may incur a debt independent of an appropriation to satisfy that debt, at least in certain circumstances.")); *see also Slattery v. United States*, 635 F.3d 1298, 1303, 1321 (Fed. Cir. 2011) (en banc) (failure to appropriate funds did not absolve the government of its statutory obligation to pay amounts owed); *Greenlee Cty.*, 487 F.3d at 877 (Congress's failure to appropriate funds does not "defeat a Government obligation created by statute" (quotation omitted)); *N.Y. Airways*, 369 F.2d at 748 ("It has long been established that the mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute.").

The Federal Circuit in *Moda* also recognized that the Government's urged appropriations limitation "would be inconsistent with *Langston*, where the obligation existed independent of any budget authority and independent of a sufficient appropriation to meet the obligation." *Id.* (citing *United States v. Langston*, 118 U.S. 389, 393 (1886)). This Court likewise specifically rejected the "supposed two-pronged test" the Government advanced in *Molina* that would require

[4] The Court in *Montana Health Co-op* also rejected the Government's argument that "failure to establish a permanent funding mechanism for the CSR payments" would "give rise to the implausible inference that Congress intended to consign CSRs 'to the fiscal limbo of an account due but not payable,'" concluding "[t]o the contrary, the lack of a permanent funding mechanism suggests that when it enacted the ACA, Congress anticipated that the CSR payments it obligated the government to pay in § 1402 would ultimately be funded through the annual appropriations process." *Id.* at *7.

a separate appropriation in addition to "shall pay" language, concluding that "[t]he Government is obligated to make full annual risk corridor payments under Section 1342 despite the absence of specific appropriations in the statute." 133 Fed. Cl. at 36-38.

The Court in *Montana Health Co-op* agreed, finding that the Government's failure to make the statutorily-mandated CSR payments was similar to its failure to pay in *Langston*, where the Supreme Court held that "'a bare failure to appropriate funds to meet a statutory obligation could not vitiate that obligation because it carried no implication of Congress's intent to amend or suspend the substantive law at issue.'" 2018 WL 4203938, at *6 (quoting *Langston*, 118 U.S. at 394). As in *Langston*, with respect to CSRs, Judge Kaplan observed "there was no relevant congressional action taken at all after the passage of the ACA. There have been no appropriations bills enacted that make reference to § 1402. All that exists is the payment obligation spelled out by the plain language of § 1402 and the 'bare failure to appropriate funds' that the Supreme Court found insufficient to establish the congressional intent necessary to vitiate a statutory payment obligation in *Langston*." 2018 WL 4203938, at *7.

Nor can the Government persuasively argue that its mandatory advance monthly CSR payment obligation should be "offset" by perceived premium increases by state insurance regulators. As Judge Kaplan correctly concluded in *Montana Health Co-op*, "[t]here is no evidence in either the language of the ACA or its legislative history that Congress intended that the statutory obligation to make CSR payments should or would be subject to an offset based on an insurer's premium rates. The Court concludes, therefore, that premium rates have no bearing on whether § 1402 created a statutory obligation to pay insurers compensation for the cost-sharing reductions they implemented." *Id.* at *7.

The "shall make" language of Section 1402 and 1412, like the "shall pay" language in Section 1342 at issue in *Moda* and *Molina,* creates an express, mandatory statutory payment

obligation for the Government, regardless of appropriations. Congress has not amended or repealed Section 1402 or Section 1412 or taken any legislative action since the enactment of the ACA regarding the Government's obligation to make advance CSR payments to QHPs. This Court therefore should hold the Government to its clear statutory obligation and require it to make the full risk corridors payments it owes to L.A. Care.

III. COUNT VI: THE GOVERNMENT BREACHED AN IMPLIED-IN-FACT CONTRACT WITH L.A. CARE BY REFUSING TO MAKE FULL COST-SHARING REDUCTION PAYMENTS.

In addition, the undisputed facts demonstrate that the Government entered into an implied-in-fact contract with L.A. Care and subsequently breached that contract when it failed to make full and timely advance CSR payments. The Court should make this finding "*regardless* of the Government's appropriation law defenses," because "later appropriation restrictions cannot erase a previously created contractual obligation." *Molina* at 41 (emphasis in original); *see also Salazar v. Ramah Navajo Chapter*, 132. S.Ct. at 2189.

To assert the existence of an implied-in-fact contract with the Government, a plaintiff must demonstrate: (1) mutuality of intent, (2) consideration, (3) offer and acceptance, and (4) actual authority to contractually bind the Government. *See Forest Glen Props., LLC v. United States*, 79 Fed. Cl. 669, 683 (2007). An implied-in-fact contract "is not created or evidenced by explicit agreement of the parties, but is inferred as a matter of reason or justice from the acts or conduct of the parties." *Prudential Ins. Co. of Am. v. United States*, 801 F.2d 1295, 1297 (Fed. Cir. 1986). Plaintiff unquestionably has alleged all requisite elements to state a non-frivolous implied-in-fact contract with the Government. Although the plaintiff in *Montana Health Co-op* also argued that the Government alternatively breached an implied-in-fact contract, the Court did not reach that claim "in light of its favorable disposition of Montana Health's statutory claim." 2018 WL 4203938, at *3 n. 4.

A. Controlling Law Requires the Court to Focus Beyond the Terms of the Statute.

As this Court correctly observed in *Moda*, the Government does not always "intend to bind itself whenever it creates a statutory or regulatory incentive program." *Moda*, 130 Fed. Cl. at 462-63; (citing *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985)); *see also Molina*, 133 Fed. Cl. at 41-42. The Supreme Court's controlling *Nat'l R.R. Passenger Corp.* test requires courts to "first … examine the language of the statute," and second, to review "the circumstances" surrounding the statute's passage and the conduct of the parties. 470 U.S. at 467-68; *see also Hercules*, 516 U.S. at 424 (intent to contract can be inferred from the "conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding").

The Federal Circuit in *Moda* declined to find an implied-in-fact-contract because it simply labeled risk corridors as an "incentive program," and looked *only* at the words of the statute finding no express "statement…evinced an intent to form a contract." *Moda*, 892 F.3d at 1330; *Molina*, 133 Fed. Cl. at 43 ("The Government advances form over substance by erroneously insisting that Congress cannot 'clear[ly] indicat[e]' an intent to contract without using those words. *Nat'l R.R.*, 470 U.S. at 465").[5] Although the Federal Circuit cited *Nat'l R.R. Passenger Corp., Moda,* at 1329, it failed to apply the Supreme Court's two-part test which requires a court to look beyond the statute's text and examine the surrounding circumstances and conduct of the parties. Critically, the Supreme Court's examination of the surrounding circumstances in *Nat'l R.R. Passenger Corp.* included the "legitimate expectation[s]" of the

[5] This Court in *Moda* expressly disagreed with *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12 (2011), because the Court there applied an overly narrow and "literal[]" interpretation of *Nat'l R.R. Passenger Corp.* test. *Moda*, 130 Fed. Cl. at 463-64. This Court further admonished that "[n]either *Radium Mines* nor *New York Airways* turned on the invocation of the magic word 'contract' in the statutes they examined." *Id*. Nor must the offer include the word "guarantee" as suggested by the Federal Circuit in *Moda*, 892 F.3d at 1330.

parties and whether "Congress would have struck" the bargain under such circumstances. 470 U.S. at 468-69. But the Federal Circuit in *Moda* did not examine these circumstances at all.

After reviewing these two factors in detail, the Supreme Court in *Nat'l R.R. Passenger Corp.* determined that Congress did not, through passage of the statute at issue, intend to contractually agree *not* to re-impose any rail passenger service responsibilities on the freight railroads. *Id*. at 471. Instead, the Court found that the statute did not obligate the Government to "agree[] with anyone to do anything," emphasizing that, by its terms, Congress had "'expressly reserved' its right to 'repeal, alter or amend,'" the statute "'at any time.'" *Id*. at 467. Here, in contrast to the statute in *Nat'l R.R. Passenger Corp.,* Sections 1402 and 1412 unambiguously required that the Secretary "shall make" the mandatory CSR payments through monthly advances. 42 U.S.C. § 18071(c)(3)(A); 42 U.S.C. § 18082(c)(3); *see also Moda*, 130 Fed. Cl. at 455; *Molina*, 133 Fed.Cl. at 36.

With respect to surrounding circumstances, the Supreme Court in *Nat'l R.R. Passenger Corp.* observed that "Congress would have struck a profoundly inequitable bargain" had it agreed to the contractual terms urged by the railroads because, the Court found, Congress would have received little in exchange for a promise *never* to impose rail passenger service obligations on the profitable freight railroads. 470 U.S. at 468. The Court also determined that the "circumstances of the Act's passage belie[d] an intent to contract away" the Government's "pervasive" regulation of the freight railroads, which historically included requiring them to undertake such passenger rail service obligations. *Id.* The Court remarked that Congress would not have "nonchalantly shed" its prior "pervasive" regulatory powers and that "the railroads had no legitimate expectation" that Congress would be contractually bound. *Id*. at 468-69.

Here, unlike the historical, pervasive regulation of the freight railroads which previously had required them to undertake rail passenger service obligations, the newly-created ACA

exchange markets were unprecedented, uncertain and risky—there had been no prior, longstanding regulatory regime requiring insurers to provide health coverage to existing (much less new) members on the ACA exchanges. *See King*, 135 S. Ct. at 2485; *cf. Nat'l R.R. Passenger Corp.*, 470 U.S. at 468. Moreover, unlike the freight railroads, the health insurers had a "legitimate expectation" that Congress would be bound to honor its "shall make" obligation to make advance monthly CSR payments to insurers selling QHPs on the ACA exchanges that, correspondingly, were bound to "reduce" their eligible customer's out-of-pocket health care costs under 42 U.S.C. § 18071(a). *See Moda,* 130 Fed. Cl. at 462-64; *cf. Nat'l R.R. Passenger Corp.*, 470 U.S at 469.

Further, unlike the "profoundly inequitable bargain" that Congress would have made by promising to lift the freight railroads' passenger rail service obligations, *Nat'l R.R. Passenger Corp.* at 468, the Government without question received valuable consideration from insurers participating on the ACA exchanges, which this Court has recognized was "[c]entral to" the ACA's infrastructure and furthered the ACA's stated goals of expanding healthcare coverage to millions of new and previously uninsured Americans. *Moda*, 130 Fed. Cl. at 441-42, 465. Congress obligated itself to make advance CSR payments to insurers because it knew the only feasible way to distribute the CSR benefit to eligible recipients was for insurers to serve as the conduit. In exchange for providing that service on behalf of the Government, insurers legitimately expected to be paid the agreed-upon advance monthly CSR payments. For these reasons, the Federal Circuit's holding and analysis on the implied-in-fact contract claim in *Moda* did not follow controlling precedent, was flawed and should not be followed.[6]

[6] Four risk corridors plaintiffs have sought hearing and/or rehearing en banc of the Federal Circuit's decision in *Moda* and *Land of Lincoln*. *See Moda Health Plan, Inc. v. United States*, No. 17-1994 (Fed. Cir.), ECF No. 89; *Land of Lincoln Mutual Health Insurance Company v. United States*, No. 17-1224 (Fed. Cir.), ECF No. 167; *Blue Cross and Blue Shield of North*

B. **There Was Mutuality of Intent to Contract.**

To establish the mutual intent element, L.A. Care need only demonstrate "language … or conduct on the part of the government that allows a reasonable inference that the government intended to enter into a contract." *ARRA Energy*, 97 Fed. Cl. at 27. Such intent can be inferred from the "conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." *Hercules,* 516 U.S. at 424.

Relying on *Radium Mines* and *New York Airways*, this Court held in *Moda* and *Molina* that the statutory language establishing the ACA's risk corridors program "meets the criteria," as set forth in these cases, to "bind the Government in contract" because: (1) the Government provided "a program that offers specified incentives in return for voluntary performance of private parties" in the "form of an actual undertaking," and (2) the CSR program's statutory provision is "promissory"—it gave HHS "no discretion to decide whether or not to award incentives to parties who perform." *Moda*, 130 Fed. Cl. at 463-64 (citing *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 406 (Ct. Cl. 1957), and *N.Y. Airways*, 369 F.2d at 744-46, 751); *Molina*, 133 Fed. Cl. at 42 ("The Secretary of HHS had no discretion to withhold or decrease payments under that [risk corridors] program.").[7] Under this controlling authority, these features of the CSR program confirm the Government's intent to contract.

Carolina v. United States, No. 17-2154 (Fed. Cir.), ECF No. 47; *Maine Community Health Options v. United States*, No. 17-2395 (Fed. Cir.), ECF No. 41.

[7] *See also Kentucky ex rel. Cabinet for Human Resources v. United States*, 16 Cl. Ct. 755, 756, 765 (1989)[7] (summary judgment granted against the Government for breach of an implied-in-fact contract found in a statute requiring that HHS "shall pay" a percentage of a state's expenditures back to the state in enforcing the child support obligations owed by parents); *Bowen v. Massachusetts*, 487 U.S. 879, 923 (1988) (Scalia, J., dissenting) (Medicaid provision in 42 U. S. C. § 1396b(a) which mandated that "the Secretary (except as otherwise provided in this section) *shall pay* to each State which has a plan approved under this subchapter" the amounts specified by statutory formula, "*itself can be analogized to a unilateral offer for contract*—offering to pay specified sums in return for the performance of specified services and inviting the States to accept the offer by performance." (emphasis added)).

Here, Sections 1402, 1412 and HHS's implementing regulations similarly established a program that promised full reimbursement in advance of L.A. Care's actual costs in providing CSR discounts to its eligible customers. It did so in order to induce L.A. Care's voluntary performance on the California ACA Exchange in the form of an actual undertaking. The CSR program was promissory in nature and gave HHS no discretion to decide whether or not to pay eligible QHPs who agreed to participate. Like Section 1402, the controlling statute in *New York Airways* directed the Government to make payments in exchange for services provided. *See* 369 F.2d at 745 (statute directed Postmaster General to "make payments out of appropriations for the transportation of mail by aircraft of so much of the total compensation as is fixed and determined by the Board under this section").

This Court's conclusion in *Molina* is equally applicable here: "[t]he function of the [CSR] program, and HHS's interpretation of it, along with the clear mandate that the Secretary of HHS make full [CSR] payments, manifest nothing but an intent to bind Congress to its word in exchange for insurers' participation in the Exchanges. It cannot be forgotten that the success of the ACA depended in no small part on insurers like [L.A. Care] agreeing to take a significant risk—a risk they thought they would be sharing with their Government." *Molina,* 133 Fed. Cl. at 45. Unlike the risk corridors program, however, under which the Federal Circuit in *Moda* asserted that insurers that included risk premiums, but suffered losses on the ACA Exchanges "would still be entitled to seek risk corridors payments," *Moda*, 892 F.3d at 1330, risk premium or not, insurers had no choice but to provide CSR discounts to eligible enrollees on the ACA Exchange in California under 42 U.S.C. § 18071(a).

L.A. Care has not only identified "circumstances surrounding the enactment of the ACA"—it has gone further, pointing to the core features of sections 1402 and 1412 and HHS's implementing regulations themselves, which plainly were promissory in nature and imposed

enforceable obligations on the Government. *See N.Y. Airways*, 369 F.2d at 751-52 (finding offer arising out of statutory language and formation of implied-in-fact contract based on the parties' conduct indicating an intent to contract where performance "was the plaintiff's acceptance of [the statutory] offer"); *Radium Mines*, 153 F. Supp. at 405-06 (finding implied offer in "promissory" regulation designed to induce plaintiffs to purchase uranium); *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 739 n.11 (1982) (citing *Radium Mines* as example of cases "where contracts were inferred from regulations promising payment").

Moreover, as L.A. Care has demonstrated, in and after 2011, the Government repeatedly manifested its intent to fully reimburse insurers for making cost-sharing reductions to encourage L.A. Care's participation on the ACA Exchange and in the CSR program. *See, e.g.*, Am. Compl. ¶¶ 236-37, 250-53; 78 FR 15409, 15488 ("QHP issuers will be made whole for the value of all cost-sharing reductions provided through the reconciliation process after the close of the benefit year"); 45 C.F.R. § 156.430(b)(1) (QHPs "***will*** receive periodic ***advance*** payments" for their CSR discounts to eligible customers) (emphasis added); 79 FR 13743, 13805 (emphasis added) Am. Compl. Ex. 25 (Section 1402 "directs the Secretary to make periodic and timely payments to the QHP issuer equal to the value of those reductions"), Am. Compl. Ex. 59 (2015 CMS bulletin stating that ACA "provides for issuers to be reimbursed for the value of those cost-sharing reductions" by the Government); CMS 2016 CSR Manual at 6 & n.8 , Am. Compl. Ex. 55 ("periodic and timely payments equal to the value of [QHPs' CSR] reductions are required to be made to issuers … in advance"). In contrast to the Federal Circuit's conclusion in *Moda,* 892 F.3d at 1330, here, there unquestionably was a "quid pro quo" where, in exchange for the Government's promise to make mandatory advance CSR payments, QHPs agreed to participate in the ACA Exchanges, provide expanded coverage to previously uninsured Americans and timely provide eligible members with cost-sharing offsets to reduce their health care costs. *See*

Molina, 133 Fed. Cl. at 42.

C. <u>L.A. Care Accepted the Government's Offer.</u>

L.A. Care has demonstrated the Government offered to make full and timely advance CSR payments, which L.A. Care accepted by becoming a QHP and performing. An offer must be manifested by conduct that indicates assent to the proposed bargain. *See Grav v. United States*, 14 Cl. Ct. 390, 393 (1988) (holding Government's offer in statute was accepted, forming implied-in-fact contract). Offer and acceptance can be found in the "conduct of the parties." *Forest Glen*, 79 Fed. Cl. at 684; *see also N.Y. Airways*, 369 F.2d at 751-52 (finding implied-in-fact-contract formed through acceptance of Government's offer arising in statute).

The Government's offer was made in the text of sections 1402 and 1412, the implementing regulations, and the Government's subsequent statements surrounding the implementation of the CSR program. The Government's repeated, undisputed statements before L.A. Care accepted the offer assured L.A. Care of the Government's intent to make full and timely advance CSR payments. *See, e.g.*, Am. Compl. ¶¶ 248-54; *see supra* at 24; 78 FR 15409, 15488; 45 C.F.R. § 156.430(b)(1); Am. Compl. Exs. 03, 06, 25, 55, 59.

Those statements incentivized L.A. Care to participate on the ACA Exchange. Becoming a QHP was volitional for L.A. Care, and was subject to the Government's discretion to certify L.A. Care as a QHP. Only after it was awarded QHP status, and accepted the Government's offer to participate on the ACA Exchange, did L.A. Care become obligated to provide CSR discounts to eligible enrollees or entitled to receive CSR payments. *See, e.g.*, Am. Compl. ¶¶ 19; 42 U.S.C. § 18071; *N.Y. Airways*, 369 F.2d at 751 (relying upon statements of "key congressmen" "throughout the years in question"). L.A. Care, by engaging in preparations and incurring significant expenses to become a QHP, and then selling QHPs on the California

Exchange and providing CSR discounts to eligible customers, accepted the offer and performed. *See, e.g.*, Am. Compl. ¶¶ 376-77.

As this Court correctly determined in *Moda* and *Molina*, the Plaintiffs accepted the Government's unilateral offer through their performance, which included "develop[ing] QHPs that would satisfy the ACA's requirements and then sell[ing] those QHPs to consumers." *Moda,* 130 Fed. Cl. at 464. Emphasizing the contractual nature of the QHPs' "actual undertaking," *id.* at 463, this Court concluded that the "[i]nsurers' performance went beyond filling out an application form." *Id*. at 464; *see also Molina*, 133 Fed. Cl. at 42.

The Government also accepted L.A. Care's services in performance of the contract requirements, knowing that L.A. Care had expended resources to become a QHP and to provide mandatory CSR discounts per the Government's requirements. *See, e.g.*, Am. Compl. ¶¶ 17-19; 42 U.S.C. §18021(a)(1) (QHPs that choose to participate must meet various requirements including providing package of "essential health benefits"). The Government's repeated actual monthly payment of advance payments to L.A. Care for the 45 consecutive months from January 2014 through September 2017 further confirms the parties' meeting of the minds. *See, e.g.*, Am. Compl. ¶¶ 237, 247, 257; CMS 2016 CSR Manual at 36, Am. Compl. Ex. 55 ("Payments to issuers for the cost-sharing reduction component of advance payments began in January 2014."); Am. Compl. Ex. 63; Email from Jeffrey Grant, Director, Payment Policy and Financial Management Group, CMS, to Eric F. De Waele, L.A. Care (June 30, 2017) (Reconciliation report showing advance CSR payments made to L.A. Care for 2015 and 2016); *see also Vargas v. United States*, 114 Fed. Cl. 226, 233 (2014) (finding that, among other facts, government's partial payment of amount owed under written agreement could support implied-in-fact contract).

D. **There Was Consideration.**

L.A. Care sufficiently asserts consideration. Am. Compl. ¶¶ 377-81. Defendant cannot credibly challenge that Plaintiff offered consideration in the form of promised advance CSR payments under Sections 1402 and 1412. *See Molina*, 133 Fed. Cl. at 42; *Moda*, 130 Fed. Cl. at 465. Nor can Defendant contest that in return, L.A. Care developed compliant QHPs and provided such plans to consumers on the ACA Exchange in California. L.A. Care also provided valuable CSR reductions to eligible California enrollees. *See Molina*, 133 Fed. Cl. at 42; *Moda*, 130 Fed. Cl. at 465. Only those QHPs, like L.A. Care, that actually provided cost-sharing reductions to eligible ACA Exchange members would be entitled to receive CSR payments from the Government.

E. **The HHS Secretary Had Actual Authority to Contract on the Government's Behalf.**

To satisfy the "actual authority" element, L.A. Care must show that expressly or implicitly "the officer whose conduct is relied upon had actual authority to bind the government in contract." *Lublin Corp. v. United States*, 98 Fed. Cl. 53, 56 (2011). "Authority to bind the government is generally implied when [it] is considered to be an integral part of the duties assigned to a government employee." *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989) (alterations omitted). Here, L.A. Care has demonstrated that an authorized Government agent entered into or ratified an implied-in-fact contract relating to the risk corridors CSR payments.

The HHS Secretary had actual authority to contract on the Government's behalf regarding the CSR program, as evidenced by Section 1402's instruction that the Secretary "shall establish" the program and "shall make" CSR payments, along with the Secretary's broad

obligation to administer and implement the ACA.[8] *See Molina*, 133 Fed. Cl. at 42-43 ("the Secretary of HHS has actual authority to contract on the Government's behalf"). Section 1402 explicitly authorized the Secretary to make CSR payments to QHPs. *Id.*; 42 U.S.C. § 18071(c)(3)(A); *see also United States v. Winstar Corp.,* 518 U.S. 839, 890 n.36 (1996) ("The authority of the executive to use contracts in carrying out authorized programs is . . . generally assumed in the absence of express statutory prohibitions or limitations."); *H. Landau & Co.,* 886 F.2d at 324*; Moda*, 130 Fed. Cl. at 465. L.A. Care has demonstrated that the implied-in-fact contracts were authorized or approved by Government representatives who had actual authority to bind the Government in contract as part of their employment duties. *See, e.g.*, Am. Compl. ¶¶ 384-85; Am. Compl. Ex. 67 (U.S. Attorney General Sessions acknowledging that Section 1412 "authorizes the federal government to make payments directly to insurers to offset the lost revenue these [CSR] reductions cause.").

L.A. Care also has demonstrated that HHS and CMS officials with authority repeatedly made statements regarding the Government's obligation to make full and timely CSR payments. *See, e.g.*, Am. Compl. ¶¶ 248-54; Am. Compl. Exs. 03, 06, 25, 55, 59, 61, 62. Furthermore, L.A. Care has demonstrated that Kevin Counihan, CMS's CEO of the ACA Marketplace, and his successor Randy Pate,[9] at all relevant times, ratified the terms of the contract through their acceptance of the benefits provided by L.A. Care and their statements confirming the Government's obligations. *See, e.g.*, *id.*; *see also Silverman v. United States*, 679 F.2d 865, 870 (Ct. Cl. 1982) (finding Government bound if it ratifies contract even if Government official

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[8] *See* ACA §§ 1001, 1301(a)(1)(C)(iv), 1302(a)-(b), 1311(c)-(d).

[9] Mr. Pate is the current CMS Deputy Administrator and the Director of the Center for Consumer Information and Insurance Oversight. Mr. Pate "leads CMS' work on the individual and small group markets, including the Health Insurance Exchanges." CMS Leadership, Center for Consumer Information and Insurance Oversight, Randy Pate, available at: https://www.cms.gov/About-CMS/Leadership/cciio/Randy-Pate.html.

lacked authorization to enter into it). Mr. Counihan and Mr. Pate's job included overseeing the ACA Marketplace, and entering into agreements with QHPs was integral to his duties. *See* Am. Compl. ¶ 97; Am. Compl. Ex. 15; FAR 1.601(a) (Agency heads have contract-making authority "by virtue of their position"); *Telenor Satellite Servs. Inc. v. United States*, 71 Fed. Cl. 114, 120 (2006) (agent had implied actual authority where authority was "an integral part of the duties"). Accordingly, L.A. Care has satisfied the authority element.

F. The Government Breached its Implied-In-Fact Contractual Obligations and L.A. Care is Entitled to Judgment.

Finally, L.A. Care has demonstrated that the Government breached its implied-in-fact contractual obligations by failing to pay the mandatory advance CSR payments owed to L.A. Care from October 2017 and for 2018 through the date of this filing. *See, e.g.*, Am. Compl. ¶¶ 283-87. Accordingly, the Court should find as a matter of law that no genuine dispute of material fact exists over L.A. Care's satisfaction of all the elements to establish that the Government had and breached an implied-in-fact contract with L.A. Care regarding CSR payments, for which the Government is liable to L.A. Care, and that L.A. Care is entitled to summary judgment in its favor on Count VI.

CONCLUSION

For all of the foregoing reasons, L.A. Care respectfully requests that this Court grant its Motion for Partial Summary Judgment on liability as to Counts V and VI for the Government's failure to comply with its statutory/regulatory (Count V) and implied-in-fact contractual (Count VI) obligations to make full CSR payments owed to L.A. Care for CY 2017 and CY 2018.

Dated: September 19, 2018

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2018, a copy of the foregoing Plaintiff's Motion for Partial Summary Judgment was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing with be sent to all parties by operation of the Court's ECF system.

s/ Lawrence S. Sher
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