IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MODA HEALTH PLAN, INC. Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	))))))))))	Case No. 16-649 Judge Thomas C. Wheeler

AMENDED COMPLAINT

I. INTRODUCTION

1. The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 ("ACA"), significantly changed the health insurance market nationwide. By providing financial assistance for individuals to purchase "Qualified Health Plans" on the new "Health Insurance Marketplaces," and through a number of other health insurance market reforms, the ACA created access to affordable health insurance for millions of previously uninsured Americans. These other market reforms included prohibiting health insurers from denying coverage or setting premiums based on health status or medical history.

2. Due to the ACA's changes to the laws governing health insurance, and the absence of experience with Health Insurance Marketplaces, insurers lacked sufficient information to allow them accurately to set premium rates for Qualified

Health Plans. Specifically, insurers lacked information regarding the number and health expenses of the new enrollees that would enroll in Qualified Health Plans.

3. To encourage insurers to offer Qualified Health Plans despite this uncertainty, Section 1342 of the ACA established a temporary "Risk Corridors Program." The Risk Corridors Program was designed to help issuers of Qualified Health Plans weather short-term financial challenges caused by setting premium rates for a population about which the insurers lacked information. It was also intended to discourage participating insurers from being excessively conservative in their cost estimates, which would have increased premiums for the Qualified Health Plans and increased the Government's liability for premium tax credits to help low-income individuals purchase Qualified Health Plans.

4. Under this temporary Risk Corridors Program, the Government is legally responsible for making specific payments to participating insurers if their Qualified Health Plans' costs exceed target amounts during the first three years of operation of the Marketplaces (calendar years 2014 to 2016). While a Qualified Health Plan will still incur a loss if its costs exceed the target amount, the temporary Risk Corridors Program will cover some of those losses. Specifically, under the statute, if a participating plan's allowable costs for any plan year are between 103 and 108 percent of the target amount, the Government must pay the plan 50 percent of the amount in excess of 103 percent of the target amount; and if

a participating plan's allowable costs for any plan year are more than 108 percent of the target amount, the Government must pay the plan 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.

5. Plaintiff Moda Health Plan, Inc. ("Moda Health" or "Moda") has long been a leader in health care delivery innovation in the Pacific Northwest. At the time the ACA was passed, Moda Health was one of the largest health insurers in the region and one of the largest privately-held employers in the State of Oregon.

6. Consistent with its commitment to innovation and access to quality health care, Moda Health embraced the ACA and became a leading private sector partner implementing the new law. Moda Health created, priced, and sold Qualified Health Plans in Alaska, Oregon, and Washington. In Oregon, Moda Health enrolled more individuals in Qualified Health Plans through the Marketplace than any other issuer in 2014 and 2015. In 2014 alone, Moda Health's plans covered approximately 121,000 individuals in the Health Insurance Marketplaces. But for Moda's efforts, there would have been substantially less competition in the Marketplaces in Alaska and Oregon, and premiums for enrollees would have been substantially higher in those states.

7. Based upon its actual allowable costs, Moda Health is entitled to a risk corridors payment from the Government of $89,426,429.95 for its 2014

Qualified Health Plans, $133,951,163.07 for its 2015 Qualified Health Plans and $40,542,344.99 for its 2016 Qualified Health Plans.

8. However, the United States breached its statutory and contractual obligation to make full risk corridors payments. For the 2014 plans, the United States paid only $14,974,859.10 of the $89,426,429.95 that it owed. In addition, the United States did not pay any of the $133,951,163.07 to which Moda was entitled for its 2015 Qualified Health Plans, or any of the $40,542,344.99 to which Moda was entitled for its 2016 Qualified Health Plans.

9. This lawsuit seeks the recovery of the $248,945,078.91 shortfall the Government owes Moda Health for the 2014, 2015 and 2016 coverage years combined.

II. JURISDICTION

10. This Court has jurisdiction over this action pursuant to the Tucker Act, 28 U.S.C. § 1491, because Section 1342 is a money-mandating statute providing that, when certain easily determinable financial criteria are met, the Government "shall pay to the plan an amount" specified by statute. An implementing regulation, 45 C.F.R. § 153.510, similarly requires the Government to make payments of the same amounts. The Tucker Act is also the jurisdictional basis for Moda Health's claim based on the Government's breach of an implied-in-fact contract.

III. PARTIES

11. Plaintiff Moda Health is a health insurance company based in Portland, Oregon, with its principal place of business at 601 SW Second Avenue, Portland, OR 97204. Moda Health provides medical and dental insurance plans in Alaska, Oregon, and Washington.

12. Defendant is the United States of America ("the Government"). The United States Department of Health and Human Services ("HHS") is an Executive Agency of the United States government, tasked with administering the Section 1342 Risk Corridors Program. Responsibility for that program was delegated within HHS to the Centers for Medicare & Medicaid Services ("CMS").

IV. FACTUAL ALLEGATIONS

A. The Affordable Care Act and the Risk Corridors Program.

13. In 2010, Congress enacted the ACA. The ACA reformed health insurance markets nationwide, including by imposing new requirements on health insurers. For example, insurers can no longer deny coverage to individuals due to pre-existing conditions, and certain health plans must meet provider network adequacy requirements and cover essential health benefits, among many other new requirements.

14. The ACA also created new Health Insurance Marketplaces (also called "Health Exchanges") and authorized insurers to sell Qualified Health Plans

on those Marketplaces. Qualified Health Plans must provide essential health benefits, comply with network adequacy standards, and follow established limits on cost-sharing, among other things. Qualified Health Plans must be certified by each Marketplace in which they are sold. ACA § 1301, 42 U.S.C. § 18021.

15. An individual is eligible to purchase a Qualified Health Plan through a Marketplace if he or she: is a citizen or national of the United States, or a lawfully present non-citizen; is not incarcerated; and meets certain residency requirements. ACA § 1312(f), 42 U.S.C. § 18032(f); *see also* 45 C.F.R. § 155.305(a). Under Section 1401 of the ACA, an individual eligible to purchase a Qualified Health Plan may be eligible for a tax credit to offset the cost of the premium if his or her household income is between 100 percent and 400 percent of the federal poverty level, and he or she is not otherwise eligible for minimum essential health care coverage. *See id.* § 155.305(f). Under Section 1402 of the ACA, an individual eligible to purchase a Qualified Health Plan may be eligible for a cost sharing reduction if his or her household income is between 100 percent and 250 percent of the federal poverty level, and he or she is not otherwise eligible for minimum essential coverage. *See id.* § 155.305(g).

16. Under the ACA, Qualified Health Plan issuers had to navigate the new health insurance reforms while attempting to predict health care costs for a population (individuals purchasing Qualified Health Plans) about which the issuers

lacked information and experience. As a result, insurers faced significant challenges and uncertainties in setting premium rates for their Qualified Health Plans.

17. To address these uncertainties and to entice insurers to offer Qualified Health Plans, the ACA created three market stabilization programs, commonly called the "3Rs": reinsurance, risk adjustment, and risk corridors.

18. This lawsuit relates to the third program. Section 1342 of the Act directs the Secretary of HHS to make payments to Qualified Health Plans under the temporary Risk Corridors Program. Under the Risk Corridors Program, HHS must make payments to any Qualified Health Plan that, for the applicable year, had health care costs that were more than 3 percent greater than a target amount based on aggregate premiums charged by the plan in the applicable year. Specifically, Section 1342 provides in relevant part:

> (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**.

(emphasis added).

19. Section 1342(c) defines allowable costs as "an amount equal to the total costs (other than administrative costs) of the plan in providing benefits covered by the plan." Section 1342(c) defines target amount as "an amount equal to the total premiums (including any premium subsidies under any governmental program), reduced by the administrative costs of the plan."

20. The Risk Corridors Program partially protected Qualified Health Plan issuers in the individual and small group markets from uncertainty in rate setting for the first three years of ACA implementation, *i.e.*, 2014 through 2016, by transferring a portion of an issuer's losses to the federal Government. The Program only runs from 2014 to 2016 because Congress expected that insurers would need three years to learn about the new insurance market and Qualified Health Plan enrollees, after which they would have sufficient actuarial information to set accurate premiums. *See Standards Related to Reinsurance, Risk Corridors and Risk Adjustment*, 77 Fed. Reg. 17,220, 17,221, 17,236–39 (Mar. 23, 2012).

21. By limiting risk, the Risk Corridors Program encouraged issuers to participate in the Marketplaces. Without the program, insurers faced the possibility of significant losses given the unknown demographics of the new enrollees. In addition, the program allowed insurers to keep premium rates at

affordable levels by not adding a risk premium to account for actuarial uncertainties. CMS, *Reinsurance, Risk Corridors, and Risk Adjustment Final Rule* (Mar. 2012), *available at* https://www.cms.gov/cciio/resources/files/downloads/3rs-final-rule.pdf.

22. The Risk Corridors Program also addresses situations in which a health insurer had charged premiums higher than necessary (in retrospect) to cover its costs. Section 1342(b)(2) provides for payments ***by*** the health insurer ***to*** the Government in that circumstance:

> (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
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> (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.

23. In Section 1342(a), Congress instructed that the ACA Risk Corridors Program "shall be based on the program for regional participating provider organizations under part D of title XVIII of the Social Security Act." Commonly referred to as "Medicare Part D," that program provides comprehensive Medicare coverage of outpatient prescription drugs. *See* Medicare Prescription Drug

Improvement and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066, 42 U.S.C. §§ 1395w-101 *et seq*. (2003). The Medicare Part D program also utilizes risk corridors, under which the Government annually makes risk corridors payments to, or receives risk corridors payments from, plan sponsors, depending on whether a sponsor's actual expenses exceed, or fall short of, anticipated expenses, by specified amounts. 42 U.S.C. § 1395w-115(e).

B. Implementation of the ACA Risk Corridors Program.

24. On March 23, 2012, HHS promulgated final regulations implementing the ACA's Risk Corridors Program. 77 Fed. Reg. 17,220 (codified at 45 C.F.R. Part 153). The final rules require Qualified Health Plan issuers to "adhere to the requirements set by HHS in [§§ 153.500–.530] and in the annual HHS notice of payment and benefit parameters," and provide that "Qualified Health Plan issuers *will receive payment* from HHS" in amounts consistent with the statutory provisions of Section 1342(b)(1). 45 C.F.R. § 153.510 (emphasis added).

25. A year later, on March 11, 2013, HHS published another final rule that, among other things, included notice of benefit and payment parameters for calendar year 2014, to enable the insurers to establish their rates for the first year of the Marketplaces (2014). In the preamble, CMS stated: "The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342

of the Affordable Care Act." *Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014*, 78 Fed. Reg. 15,410, 15,473 (Mar. 11, 2013). In other words, consistent with the clear language of Section 1342, plans entitled to payments under the Risk Corridors Program would receive such payments in full, regardless of whether the aggregate amounts of such payments owed to Qualified Health Plans exceeded the aggregate amount of payments received by HHS from Qualified Health Plans whose expenditures fell short of the target amount.

26. CMS also provided that the deadline for the Government to make risk corridors payments to issuers "should be the same" as the deadline by which issuers with allowable annual costs that are less than 97 percent of the target amount must make risk corridors payments to the Government. 77 Fed. Reg. at 17,219. CMS ended up imposing a 30-day deadline for Qualified Health Plan issuers that owe payments under the program to make those payments to the Government, 45 C.F.R. § 153.510(d), and thus issuers that owed 2014 risk corridors payments remitted those payments to CMS before the end of calendar year 2015.

C. Regulatory Approval of Moda Health's 2014 Qualified Health Plans.

27. Through the enactment of the ACA in 2010, the regulations and the preambles thereto, as well as letters, memoranda, and other written and oral

communication, CMS offered to provide tax credits, cost sharing subsidies, risk corridors payments, and other reimbursement to qualified entities, such as Moda Health, that agreed to sell and provide Qualified Health Plan coverage in 2014 and/or 2015, under the terms and conditions set forth in the ACA, its implementing regulations, and CMS policy and guidance. *See, e.g.*, 45 C.F.R. Parts 144, 147, 148, 150, 153–156; *Exchange and Insurance Market Standards for 2015 and Beyond*, 79 Fed. Reg. 30,240, 30,260 (May 27, 2014); 78 Fed. Reg. 15,410; 77 Fed. Reg. 17,220; CMS, Federal Marketplace Progress Fact Sheet (May 31, 2013), *available at* https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/ffe.html; CMS, Letter to Issuers on Federally-Facilitated and State Partnership Exchanges (Apr. 5, 2013), *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/2014_letter_to_issuers_04052013.pdf.

28. Moda Health accepted CMS's offer to sell and provide Qualified Health Plan coverage. In 2012, Moda Health's actuaries began working on calculating premium rates for the unknown population that would purchase Qualified Health Plans. The actuaries considered a number of factors in calculating the rates, including: cost trends, the impact of merging high risk pools, the estimated cost of covering previously uninsured individuals (who may have accumulated untreated medical needs), and state and federal laws and policies.

29. Regulatory approval for Qualified Health Plans is a two-step process: (1) Qualified Health Plans' rates and other features must be approved by state insurance regulators for compliance with state and federal law; and (2) Qualified Health Plans must be certified by the Marketplace for compliance with the federal requirements governing Qualified Health Plans specifically. In states that choose to operate their own Marketplace, as Oregon had done for 2014, the state officials running the Marketplace certify the Qualified Health Plans for compliance with the federal Qualified Health Plan requirements. In states for which the federal government operates the Marketplace, such as Alaska, CMS certifies the Qualified Health Plans for compliance with the federal Qualified Health Plan requirements.

30. Moda Health submitted its Qualified Health Plan rates for 2014 to Alaska state regulators for review and approval on May 9, 2013 (small group) and May 23, 2013 (individual). Alaska state regulators approved Moda Health's rates on July 27, 2013.

31. Moda Health submitted its Qualified Health Plan rates for 2014 to Oregon state regulators for review and approval on April 29, 2013 (individual) and April 30, 2013 (small group). Oregon regulators approved Moda Health's rates on July 3, 2013.

32. Moda Health submitted its Alaska Qualified Health Plans to CMS for review and certification on or before May 3, 2013. Moda Health received a

certification agreement for its Alaska Qualified Health Plans on September 9, 2013, and it signed the certification on September 23, 2013.

33. Moda Health submitted its Oregon Qualified Health Plans to the "Cover Oregon" Marketplace for review and certification on April 30, 2013. Cover Oregon certified Moda Health's Oregon Qualified Health Plans on September 3, 2013.

Consistent with CMS regulations and policy, Moda Health began selling Qualified Health Plans to consumers in Alaska and Oregon on October 1, 2013, with coverage effective January 1, 2014. Throughout 2014, Moda Health provided health care coverage under these Qualified Health Plans to tens of thousands of Alaskans and Oregonians, under the terms required by state and federal law and policy.

D. Changes to the Qualified Health Plan Risk Pool Resulting from Actions of the Federal Government.

34. In the final months of 2013, many health insurers began to cancel existing health insurance policies that were not compliant with the new ACA reforms that would become effective January 1, 2014. The cancellation of these policies created significant political pressure on the Government, as many people had believed that the ACA would not cause them to lose their existing coverage.

35. On November 14, 2013, CMS responded by announcing a "transitional policy" designed to curb the cancellation of existing policies. Under

the transitional policy, any coverage in effect on October 1, 2013 was not considered noncompliant for failure to comply with certain ACA reforms that otherwise became effective on January 1, 2014. CMS announced that this transitional policy would apply only to plan years beginning before October 1, 2014. States were encouraged, but not required, to apply a similar transitional policy. Letter from Gary Cohen, Dir., Ctr. for Consumer Information and Ins. Oversight ("CCIIO"), CMS, to State Insurance Commissioners (Nov. 14, 2013), *available at* https://www.cms.gov/cciio/resources/letters/downloads/commissioner-letter-11-14-2013.pdf. Oregon and Alaska both applied the transitional policy.

36. Absent this transitional policy, which was not announced until after Moda and other issuers began selling Qualified Health Plans for 2014, millions of individuals who had existing individual market coverage that did not comply with the ACA would have had that coverage terminated and thus would have transitioned to a Qualified Health Plan effective January 1, 2014. These potential Qualified Health Plan enrollees, who ended up able to stay in their old plans under the transitional policy, were generally less expensive than those who were uninsured prior to their Qualified Health Plan enrollment, because the former group is less likely to have untreated health care conditions. Thus, the risk pool for Qualified Health Plans in Oregon and Alaska was more expensive than could have been anticipated when insurers set their premiums.

37. In its November 2013 announcement of the transition policy, CMS recognized that Qualified Health Plan issuers had set rates based on the assumption that individuals who had existing individual market coverage that did not comply with the ACA would have transitioned to a Qualified Health Plan effective January 1, 2014, something that would happen much less frequently due to the new transition policy. CMS assured issuers and state insurance commissioners that the risk corridors payments would at least partially offset any losses arising out of the new transition policy:

> Though this transitional policy was not anticipated by health insurance issuers when setting rates for 2014, the risk corridor program should help ameliorate unanticipated changes in premium revenue.

Id.

38. On March 5, 2014, CMS announced that it was extending its transitional policy for two years, *i.e.*, to policy years beginning on or before October 1, 2016. Memorandum from Gary Cohen, Dir., CCIIO, CMS, *Insurance Standards Bulletin Series – Extension of Transitional Policy through October 1, 2016* (Mar. 5, 2014), *available at* https://www.cms.gov/cciio/resources/regulations-and-guidance/downloads/transition-to-compliant-policies-03-06-2015.pdf. On February 29, 2016, CMS extended it again by one year, to policy years beginning on or before October 1, 2017, provided that all policies end by December 31, 2017. *See* Memorandum from Kevin Counihan, Dir. CIIOO, CMS, *Insurance Standards*

Bulletin Series – INFORMATION – Extension of Transitional Policy through Calendar Year 2017 (Feb. 29, 2016), *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/final-transition-bulletin-2-29-16.pdf.

E. Program Developments in 2014 and 2015.

39. Moda Health's Qualified Health Plans went into effect January 1, 2014. On March 11, 2014, over five months after Moda Health's Qualified Health Plans had gone to market at the state-approved premium rates, HHS published a final rule with the notice of benefit and payment parameters for the next calendar year, 2015. In the preamble, HHS stated that it projected that net risk corridors payments would be "budget neutral" for 2014, and thus HHS "intend[ed]" to implement the risk corridors program in a "budget neutral manner." *HHS Notice of Benefit and Payment Parameters for 2015*, 79 Fed. Reg. 13,744, 13,787, 13,829 (Mar. 11, 2014) (eff. May 12, 2014). This was not inconsistent with previous HHS statements, as it was simply a prediction by HHS that the program would be budget neutral, *i.e.*, that the aggregate amounts of payments owed to Qualified Health Plans whose expenditures exceeded the target amounts would be offset by payments received by HHS from Qualified Health Plans whose expenditures fell short of the target amounts. HHS did not indicate that it would implement the risk corridors program in a budget neutral manner even if payments to HHS by

Qualified Health Plans whose costs fell short were not sufficient to cover HHS's obligations to Qualified Health Plans whose costs exceeded premium revenues.

40. On April 11, 2014, over six months after Moda Health had begun selling 2014 Qualified Health Plans at approved rates, and over a year after HHS publicly stated that it would make full risk corridors payments "[r]egardless of the balance of payments and receipts" in the program, CMS issued questions and answers suggesting that, for 2015, if risk corridors collections were insufficient to make risk corridors payments for a year, all risk corridors payments for that year would be reduced pro rata to the extent of any shortfall. CMS indicated that risk corridors collections received for the next year would first be used to pay off the payment reductions issuers experienced in the previous year in a proportional manner, up to the point where issuers are reimbursed in full for the previous year. *See* CMS, Risk Corridors and Budget Neutrality (Apr. 11, 2014), *available at* https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/faq-risk-corridors-04-11-2014.pdf. After all issuers received full risk corridors reimbursement owed for the previous year, any remaining funds would be used to fund current year payments. *Id.* CMS's suggestion in this questions and answers document that the Risk Corridors Program would be implemented in a budget neutral manner, regardless of whether the incoming payments sufficed to cover the payments owed to issuers, conflicted with CMS's explicit statement in the March

11, 2013 Final Rule that "[t]he risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." 78 Fed. Reg. at 15,473.

41. Just a month later, in May 2014, HHS walked away from its April 2014 questions and answers by reaffirming that it had the legal authority to pay its entire risk corridors obligations regardless of the amount of payments the Government received through the program. Specifically, in a letter to the Government Accountability Office (GAO) dated May 20, 2014, HHS stated that the CMS's general Program Management appropriation for fiscal year 2014 (Pub. L. No. 113-76) gave it the authority to make full risk corridors payments. *See* Letter from William B. Schultz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014). Then, one week later, in the Final Rulemaking for Exchange and Insurance Market Standards for 2015 and Beyond, HHS reiterated that it was legally obligated to make risk corridors payments in full. While HHS "anticipate[d] that risk corridors collections will be sufficient to pay for all risk corridor payments," HHS explained that, "[i]n 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" and thus "HHS will use other sources of funding for the risk corridors payments,

subject to the availability of appropriations." *Exchange and Insurance Market Standards for 2015 and Beyond*, 79 Fed. Reg. 30,240, 30,260 (May 27, 2014).

42. On September 30, 2014, the U.S. Government Accountability Office ("GAO") issued a report on the ACA Risk Corridors Program, in which it concluded that the CMS Program Management fund for Fiscal Year ("FY") 2014 provides the Government with the authority and appropriations to make full risk corridors payments. GAO, *HHS—Risk Corridors Program*, B-325630 (Sept. 30, 2014), *available at* http://gao.gov/assets/670/666299.pdf.

F. Regulatory Approval of Moda Health's 2015 Qualified Health Plans.

43. Moda Health submitted its Qualified Health Plan rates to Alaska state regulators on July 10, 2014 (small group) and July 14, 2014 (individual). Alaska state regulators approved Moda Health's 2015 rates on September 4, 2014.

44. Moda Health submitted its Qualified Health Plan rates to Oregon state regulators on June 2, 2014. Oregon state regulators approved Moda Health's 2015 rates on September 4, 2014.

45. Moda submitted its Qualified Health Plan rates to Washington state regulators for approval on April 30, 2014. Washington state regulators approved Moda Health's 2015 rates on August 27, 2014.

46. Moda Health submitted its Alaska Qualified Health Plans to CMS for review and certification on or before June 27, 2014. Moda Health received a

certification agreement from CMS for Moda Health's Alaska Qualified Health Plans on November 5, 2014.

47. Moda Health submitted its Qualified Health Plans to Cover Oregon regulators for review and certification on June 26, 2014. Oregon regulators certified Moda Health's Oregon Qualified Health Plans in November 2014.

48. Moda Health submitted its Washington Qualified Health Plans to the Washington Marketplace for review and certification on June 6, 2014. The Washington Marketplace certified Moda Health's Washington Qualified Health Plans in November 2014.

49. Moda Health subsequently executed Qualified Health Plan Certification Agreements with CMS for Alaska and Oregon for calendar year 2015.

50. Consistent with CMS regulations and policy, Moda Health began selling 2015 Qualified Health Plans to consumers in Alaska, Oregon, and Washington on October 1, 2014. These Qualified Health Plans offered coverage effective January 1, 2015. Throughout 2015, Moda Health provided health care coverage under these Qualified Health Plans to tens of thousands of Alaskans, Washingtonians, and Oregonians, under the terms specified in state and federal law and policy.

G. Regulatory Approval of Moda Health's 2016 Qualified Health Plans.

51. Moda obtained similar regulatory approvals with respect to 2016 Qualified Health Plans, and sold such Plans to consumers in Alaska, Oregon, and Washington.

H. Congressional Action and the Government's Failure to Make Full Risk corridors Payments.

52. On December 16, 2014 — over a year after Moda Health began selling 2014 Qualified Health Plans on the Marketplaces, and over two months after Moda Health began selling 2015 Qualified Health Plans on the Marketplaces — Congress enacted the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, which contained the following provision:

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

53. On July 21, 2015, in a letter to state health insurance commissioners, CMS reaffirmed its commitment to making full risk corridors payments, on time and in full. CMS stated:

> CMS remains committed to the risk corridor program. As stated in our final payment notice for 2016, "We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments. HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers."

Kevin J. Counihan, Chief Executive Officer ("CEO"), Health Insurance Marketplace, Dir., CCIIO, CMS, to State Insurance Commissioners (July 21, 2015) *available at* https://www.cms.gov/cciio/resources/letters/downloads/doi-commissioner-letter-7-20-15.pdf.

54. However, on October 1, 2015 — exactly two years after Moda Health began selling 2014 Qualified Health Plans and one year after Moda Health began selling 2015 Qualified Health Plans — CMS announced that the risk corridors program would be "budget neutral" and that the Government would not make the full risk corridors payments for 2014. CMS stated that Qualified Health Plan issuers whose actual expenses exceeded their anticipated target amounts had submitted claims to the Government for $2.87 billion in risk corridors payments, and that Qualified Health Plan issuers whose actual expenses fell short of the target amount owed the Government $362 million in risk corridors charges. CMS stated that it would pay Qualified Health Plan issuers to whom money was owed only 12.6 percent of their 2014 risk corridors claims ($362 million divided by $2.87 billion). CMS asserted that the 87.4 percent shortfall would eventually be paid out of 2015 and 2016 risk corridors charges, but provided no explanation as to how

this $2.5 billion shortfall for calendar year 2014 ($2.87 billion minus $362 million) would or could be closed by amounts owed by Qualified Health Plans for 2015 and 2016. *See* CMS, Risk Corridors Payment Proration Rate for 2014 (Oct. 1, 2015), *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/RiskCorridorsPaymentProrationRatefor2014.pdf.

55. On November 19, 2015, CMS released a statement titled "Risk Corridors Payment and Charge Amounts for Benefit Year 2014." The statement included issuer-level data on the risk corridors charges and payments for the 2014 benefit year. It also confirmed that the 2014 risk corridors payment amounts will be prorated at 12.6 percent, and it indicated that HHS would beginning remitting payments to insurers in December 2015. CMS, Risk Corridors Payment and Charge Amounts for Benefit Year 2014 (Nov. 19, 2015), *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/RC_Obligation_Guidance_11-19-15.pdf.

56. Section 225 of the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, enacted on December 18, 2015, contained a provision identical to Section 227 of the Consolidated and Further Continuing Appropriations Act, 2015.

57. Section 223 of the Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, enacted on May 5, 2017, and providing for the fiscal year ending

September 30, 2017, contained a provision identical to Section 227 of the Consolidated and Further Continuing Appropriations Act, 2015

58. Congress has not repealed or amended Section 1342 of the ACA.

59. Moda Health met all statutory and regulatory requirements that Qualified Health Plans must satisfy to participate in and receive payments from the Risk Corridors Program.

I. Risk Corridors Payments Owed to Moda Health.

60. Moda Health is entitled to $89,426,429.95 in 2014 risk corridors payments, but CMS's payments amount to only $14,974,859.10. Thus, Moda Health has been underpaid by $74,451,570.85

61. Moda Health is entitled to $133,951,163.07 in 2015 risk corridors payments, and has not been paid any of that amount.

62. Moda Health is entitled to $40,542,344.99 in 2016 risk corridors payments, and has not been paid any of that amount.

63. The total amount owed Moda for years 2014, 2015 and 2016 combined is $248,945,078.91.

64. The premium rates Moda Health set for its Qualified Health Plans were lower than they would have been in the absence of the Government's promise of risk corridors. As a result, the Government's premium tax credit obligations

under the ACA, which help individuals pay premiums for Qualified Health Plans, were much less than they otherwise would have been.

65. In the wake of CMS's October 2015 announcement that it would pay only 12.6% of the 2014 risk corridors payments, the National Association of Insurance Commissioners ("NAIC") issued guidance to state insurance commissioners recommending against allowing insurers to count the risk corridors debts owed by the Government as admitted assets for purposes of the issuers being able to meet their reserve requirements. As a result of the Government's underpayment of 2014 risk corridors payments, Moda Health faced questions about its ability to meet its capital reserve requirements.

66. In November 2015, Oregon insurance regulators required Moda to raise private capital, limit its Oregon enrollment, and limit its premium payment option on the 2016 Oregon individual Marketplace. On January 28, 2016, Oregon insurance regulators issued an Order of Immediate Supervision of Moda Health due to concerns about the adequacy of Moda Health's capital reserves. Under the Order of Immediate Supervision, Moda Health was required to obtain sufficient capital and was prohibited from issuing new policies or renewing current policies. Alaska state regulators similarly prohibited Moda Health from issuing new policies or renewing existing policies in Alaska. The regulatory actions in Alaska and

Oregon were caused by the Government's failure to timely make the full 2014 risk corridors payments it owed to Moda Health

67. In February 2016, Moda Health came to an agreement with regulators in Alaska and Oregon to allow Moda Health to continue to operate in those states in 2016, contingent upon Moda Health's ability to raise private capital to replace the loss the of risk corridors payments due in 2014 and 2015.

68. Nevertheless, the Government's failure to pay the full amount of the risk corridors payments continued to threaten Moda Health's ability to sell Qualified Health Plans on the individual Marketplaces in Alaska and Oregon. Moda was forced to withdraw from the Alaska individual Marketplace. On May 2, 2016, Moda Health announced that it will not be selling Qualified Health Plans on the Alaska individual Marketplace in 2017. Moda Health's withdrawal severely harms consumers in Alaska. Before Moda's departure, Alaska consumers were served by only two Qualified Health Plan issuers. Now competition has been eliminated.

69. Moda Health has been able to raise sufficient private capital to allow it to continue to offer Qualified Health Plans on Oregon's Marketplace in 2016 and 2017. However, Moda Health was forced to, among other things, remove a large health care system from its network, limit its enrollment, and limit its premium payment options. The anticipated failure of the Government to make its 2015 risk

corridors payments caused Moda Health to further limit its provider network, geographic service area, and enrollment in Oregon for 2017, resulting in a 70 percent projected net enrollment loss from 2015 to 2017.

CLAIM FOR RELIEF

COUNT ONE
(Violations of Section 1342, Statutory Mandates and Statutory Authority)

70. Plaintiff re-alleges and incorporates ¶¶ 1–69 of the Complaint as if set forth fully herein.

71. Section 1342 of the ACA and 45 C.F.R. § 153.510 require the Government to pay qualified insurers statutorily defined amounts as part of the Risk Corridors Program.

72. Moda Health satisfied all statutory and regulatory requirements for participation in and payments under the Risk Corridors Program in 2014, 2015 and 2016.

73. The Government failed to provide the risk corridors payments owed to Moda Health for 2014, 2015 and 2016 in violation of Section 1342 and 45 C.F.R. § 153.510.

74. The mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not defeat a Government obligation created by statute. The Government is obligated to make full payment to an entity such as Moda Health, using the

Judgment Fund. Moda Health is entitled to full payment from the Judgment Fund for years 2014, 2015 and 2016 combined in the amount of $248,945,078.91.

75. Moda Health is also entitled to full payment based on any other available funds or legal theories.

COUNT TWO
(Breach of Implied-in-Fact Contract)

76. Plaintiff re-alleges and incorporates ¶¶ 1–75 of the Complaint as if set forth fully herein.

77. Moda Health and CMS entered into an implied-in-fact contract requiring CMS to make risk corridors payments to Moda Health in the amount specified in Section 1342 and CMS's implementing regulations. Specifically, Moda Health agreed to sell and provide health care coverage to individuals under Qualified Health Plans in 2014, 2015 and 2016, subject to state and federal laws, regulations, and policies, in exchange for timely reimbursement from the Government, including advance payment of tax credits for qualifying enrollees, cost sharing subsidies for qualifying enrollees, and risk corridors payments in the amount specified in Section 1342 and CMS's implementing regulations.

78. The terms of the offer and acceptance were unambiguously specified in the ACA and CMS's implementing regulations.

79. CMS agreed to this implied contract by and through the words and actions of Kevin Counihan, Director of CCIIO and CEO of the Health Insurance

Marketplaces, and his predecessors in that position; Andrew Slavitt, Administrator of CMS, and his predecessors in that position; and/or other CMS officials, all of whom had actual authority to bind the Government. The Parties' implied-in-fact contract is confirmed by the Parties' statements, actions, and performance.

80. Moda Health satisfied its contractual obligations by selling and providing Qualified Health Plan coverage to qualifying individuals in 2014 and 2015.

81. The Government breached its contractual duty to Moda Health by underpaying Moda for years 2014, 2015 and 2016 combined by the amount of $248,945,078.91.

82. The mere failure of Congress to appropriate funds does not defeat the Government's contractual obligations. The Government is obligated to make full payment to Moda Health, using the Judgment Fund. Moda Health is entitled to full payment from the Judgment Fund for years 2014, 2015 and 2016 combined in the amount of $248,945,078.91.

83. Moda Health is also entitled to full payment based on any other available funds or legal theories.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully asks this Court to enter judgment in its favor and against Defendant and to:

A. Award Plaintiff monetary relief equal to the difference between the amount Plaintiff received in risk corridors payments for 2014, 2015 and 2016 under Section 1342 and the amount it should receive or should have received under Section 1342;

B. Award damages sustained by the Plaintiff, in the amount equal to the difference between the amount Plaintiff received in risk corridors payments for 2014, 2015 and 2016 under Section 1342 and the amount it should receive or should have received under Section 1342;

C. Award Plaintiff such additional damages and other monetary relief as is available under applicable law;

D. To the extent available, award Plaintiff pre-judgment and post-judgment interest;

E. To the extent available, award Plaintiff costs and attorneys' fees; and

F. Award Plaintiff such other and further relief as this Court may deem necessary and proper.

Respectfully submitted,

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July 2, 2020