IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MDWISE MARKETPLACE, INC.	)	
Plaintiff,	)	No. 17-1958C MCW
	)	Judge Mary Ellen Coster Williams
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

PLAINTIFF'S CONSENT MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT

Pursuant to Rule 15(a)(2) of the Rules of the United States Court of Federal Claims, Plaintiff hereby moves the Court to file an amended complaint. The proposed Second Amended Complaint, attached to this motion, updates information for 2016 set forth in paragraphs 65, 105, 107, and financial amounts in paragraphs four and five of the Prayer for Relief.

Plaintiff has received Defendant's written consent to file the Second Amended Complaint. Therefore, Plaintiff respectfully request that the Court permit the filing of the Second Amended Complaint.

Respectfully submitted,

Dated: March 16, 2021

s/ William L. Roberts
William L. Roberts
william.roberts@faegredrinker.com
FAEGRE DRINKER BIDDLE & REATH LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Telephone: (612) 766-7000
Fax: (612) 766-1600

Counsel of Record for Plaintiff

Of Counsel
Jonathan W. Dettmann
jon.dettmann@faegredrinker.com
Nicholas J. Nelson
nicholas.nelson@faegredrinker.com
Evelyn Snyder
evelyn.snyder@faegredrinker.com
FAEGRE DRINKER BIDDLE & REATH LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Telephone: (612) 766-7000
Fax: (612) 766-1600

CERTIFICATE OF SERVICE

I certify that on March 16, 2021, a copy of the attached Consent Motion for Leave to File Second Amended Complaint was served via the Court's CM/ECF system on Defendant's counsel.

s/ William L. Roberts
William L. Roberts

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

MDWISE MARKETPLACE, INC.	)	
Plaintiff,	)	No. 17-1958C MCW Judge Mary Ellen Coster Williams
v.	)	
THE UNITED STATES,	)	
Defendant.	)	

SECOND AMENDED COMPLAINT

Plaintiff Marketplace, Inc. (f/k/a MDwise Marketplace, Inc.) ("Plaintiff" or "Marketplace"), by and through its undersigned counsel, brings this action against Defendant United States to recover money damages owed by Defendant for (1) violation of the mandatory risk corridors payment obligations imposed by Section 1342 of the Patient Protection and Affordable Care Act ("ACA"), and its implementing regulations; (2) breach of implied-in-fact contract between Marketplace and Defendant; (3) breach of the covenant of good faith and fair dealing; (4) violation of the mandatory Cost-Sharing Reduction ("CSR") payment obligations imposed by Section 1402 of the ACA, and its implementing regulations; and (5) breach of implied-in-fact contract between Marketplace and Defendant for CSR payment obligations. In support of this action, Plaintiff states and alleges as follows:

PARTIES

1. Plaintiff Marketplace, Inc. (f/k/a MDwise Marketplace, Inc.) is an Indiana non-profit organization with a principal place of business at 950 N Meridian Street, Suite 400, Indianapolis, IN 46204. Plaintiff was a Qualified Health Plan ("QHP") issuer on the Indiana Health Insurance Exchange through December 2017, after which it ceased participation on the Exchange.

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

JURISDICTION AND VENUE

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

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

FACTUAL BACKGROUND

I. RISK CORRIDORS

A. THE ACA'S RISK CORRIDORS PROGRAM

5. President Barack Obama signed the ACA into law on March 23, 2010, marking a major reform in the United States health care market. Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (March 23, 2010). The ACA expanded access to health care to nearly all Americans and prohibited insurers from denying coverage based on pre-existing conditions. *See* 42 U.S.C. § 300gg-1(a) (stating that an issuer "must accept every employer and individual in the State that applies for such coverage"). As part of the ACA, Congress authorized the creation of various programs to facilitate the formation and operation of health insurance marketplaces for insurers such as Marketplace. *See* 42 U.S.C. § 18031. These new health insurance marketplaces, or exchanges, offered consumers organized platforms to shop for coverage with specified benefit levels. Health plans offered on the exchanges are known as Qualified Health Plans ("QHPs"). The ACA required that an insurer comply with certain federally-mandated criteria in order to offer plans on the exchanges. Participating insurers are known as "QHP issuers." To become a QHP issuer, for example, an insurer must provide essential health benefits, meet network adequacy standards, and be certified in each marketplace in which it participates. *See* 42 U.S.C. § 18021.

6. Congress recognized that the ACA carried with it tremendous uncertainty for health insurers due to, among other things, the new population of previously uninsured individuals and a new regulatory environment. Because insurers had limited

information on how to set premiums accurately for these new markets, many of them would have been reluctant to participate for fear of incurring large losses. Likewise, participating insurers might have been inclined to charge higher premiums in response to the uncertainty, and the ACA's subsidies program would have required the government to absorb much of those increased costs.

7. To address these concerns, the ACA created three premium stabilization programs: a temporary Reinsurance program; a permanent Risk Adjustment program; and a temporary Risk Corridors program. These programs, commonly referred to as the "Three Rs," were critical to the implementation of the ACA and directly benefitted the Government. They took effect beginning in 2014. *See* 42 U.S.C. §§ 18061-18063.

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

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

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

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

> **(a) IN GENERAL**
> The Secretary shall establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums. Such program shall be based on the program for regional participating provider organizations under part D of title XVIII of the Social Security Act [42 U.S.C. 1395w–101 et seq.].
>
> **(b) PAYMENT METHODOLOGY**
> **(1) PAYMENTS OUT** The Secretary shall provide under the program established under subsection (a) that if—
> (A) a participating plan's allowable costs for any plan year are more than 103 percent but not more than 108 percent of the target amount, the Secretary ***shall pay*** to the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount; and
> (B) a participating plan's allowable costs for any plan year are more than 108 percent of the target amount, the Secretary ***shall pay*** to the plan an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount.
> **(2) PAYMENTS IN** The Secretary shall provide under the program established under subsection (a) that if—
> (A) a participating plan's allowable costs for any plan year are less than 97 percent but not less than 92 percent of the target amount, the plan shall pay to the Secretary an amount equal to 50 percent of the excess of 97 percent of the target amount over the allowable costs; and
> (B) a participating plan's allowable costs for any plan year are less than 92 percent of the target amount, the plan shall pay to the Secretary an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the excess of 92 percent of the target amount over the allowable costs.

42 U.S.C. § 18062 (emphasis added).

12. Nothing in the language or structure of Section 1342 links "payments out" with "payments in." The statutory formulas for calculating "payments out" and

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

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

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

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

45 C.F.R. § 153.510 (emphasis added). This payment methodology is the same as in the statute. Additionally, nothing in 45 C.F.R. Part 153 limits CMS's obligation to pay QHP issuers the full amount of Risk Corridors payments.

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

15. Marketplace is organized under Indiana law as a nonprofit corporation and is headquartered in Indianapolis, Indiana. Marketplace obtained its HMO license on August 6, 2014 to help provide vulnerable populations health care coverage in Indiana.

16. The Risk Corridors program was crucial to Marketplace's decision to become a QHP issuer and to offer and sell QHPs on the Indiana Health Insurance Exchange. Marketplace undertook the obligations and responsibilities of being a QHP issuer with the understanding that the Government would make the Risk Corridors payments prescribed by the statutory formula should Marketplace experience losses sufficient to qualify for Risk Corridors payments under Section 1342 and 45 C.F.R. § 153.510. Marketplace also established the pricing of the QHPs it offered based on the understanding that it would receive all Risk Corridors payments for which it qualified under Section 1342 and 45 C.F.R. § 153.510.

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

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

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

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

21. During program years 2015 and 2016 of the Risk Corridors program, Marketplace upheld its obligations as a QHP issuer under all relevant statutes and regulations.

22. Marketplace's loss for program year 2016 was sufficient under Section 18062 and 45 C.F.R. § 153.510 to qualify for mandatory Risk Corridors payments from the Government. For program year 2016, Marketplace is entitled to a Risk Corridors payment in the amount of $9,751,130.86, according to the statutory and regulatory formula of the Risk Corridors program. The Government has paid Marketplace nothing for program year 2016.

23. Thus, the Government owes Marketplace, but has failed to pay, a total of $9,751,130.86.

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

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

25. On March 11, 2013, in implementing final regulations, HHS responded in the Federal Register to a comment "ask[ing] for clarification on HHS's plans for funding risk corridors if payments exceed receipts," stating: "The Risk Corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014, 78 Fed. Reg. 15409, 15473 (Mar. 11, 2013).

26. One year later, on March 11, 2014, HHS reiterated that "[t]he risk corridors program is a mechanism for sharing risk for allowable costs between the Federal government and QHP issuers," and also stated that it "intends to implement this program

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

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

28. On May 27, 2014, HHS responded to concerns about its intent to administer the program in a budget neutral way over the three-year life of the program, stating, "As we stated in the bulletin, we anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments. . . In the unlikely event of a shortfall for the 2015 program year, HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers. In that event, HHS will use other sources of funding for the risk corridors payments, subject to the availability of appropriations." Patient

Protection and Affordable Care Act; Exchange and Insurance Market Standards for 2015 and Beyond, 79 Fed. Reg. 30240, 30260 (May 27, 2014).

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

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

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

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

2015 obligations of the United States Government for which full payment is required." Letter from Kevin Counihan, CEO of Health Insurance Marketplaces, CMS, to QHP Issuers (Oct. 19, 2015).

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

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

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

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

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

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

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

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

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

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

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

38. On December 16, 2014, Congress enacted the omnibus appropriations bill for fiscal year 2015, called the "Consolidated and Further Continuing Appropriations Act, 2015" (the "2015 Appropriations Act"). Pub. L. 113-235, 128 Stat. 2130 (Dec. 16.

2014). Section 227 of the 2015 Appropriations Act limited funding sources for Risk Corridors payments as follows:

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

128 Stat. 2491.

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

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

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

129 Stat. 2624.

41. But again, the 2016 Appropriations Act did not amend, and therefore had no impact on, the United States' statutory obligation created by Section 1342 to make full Risk Corridors payments to QHP issuers, including Marketplace. It did not repeal or amend the Risk Corridors payment formula contained in the ACA, nor did it modify the ACA's instruction that the Government "shall pay" the amount specified in the statute.

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

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

131 Stat. 543.

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

E. THE GOVERNMENT HAS FAILED TO MAKE RISK CORRIDORS PAYMENTS DUE TO MARKETPLACE

44. As detailed in Part B above (paragraphs 15 to 23), the Government owes Marketplace a Risk Corridors payment for program year 2016. As the Government's own annual Risk Corridors payment and charge announcement for 2016 concedes, Marketplace is entitled to a total of $9,751,130.86.

45. This payment is presently due.

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

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

II. COST-SHARING REDUCTIONS

A. THE ACA'S COST-SHARING REDUCTION (CSR) PROGRAM

48. One central purpose of the ACA is to make health insurance affordable and available to low- and middle-income Americans. *See, e.g., King v. Burwell*, 135 S. Ct. 2480 (2015). To that end, Section 1402 of the ACA establishes a Cost-Sharing Reduction ("CSR") program, codified at 42 U.S.C. § 18071 ("Section 1402"). The CSR program requires QHP issuers to reduce the out-of-pocket expenses for eligible insureds who enroll in a qualified silver plan and whose household income is not less than 100

percent but does not exceed 250 percent of the poverty line for a family of the size involved. The amount that QHP issuers reduce the cost-sharing is based on the insured's household income level within that range. *See* 42 U.S.C. § 18071(c)(1)-(2). The QHP issuers provide these reductions on behalf of eligible insureds up front so that the insureds do not have to bear the cost.

49. The Government is statutorily obligated to fully and timely reimburse the QHP issuers for the reductions they provide on behalf of their eligible insureds. Section 1402 of the ACA states:

> An issuer of a qualified health plan making reductions under this subsection shall notify the Secretary of such reductions and the Secretary ***shall make*** periodic and timely payments to the issuer equal to the value of the reductions.

42 U.S.C. § 18071(c)(3)(A) (emphasis added). The Secretary of HHS has no discretion to withhold the required CSR payments.

50. Section 1412(a) of the ACA requires HHS to establish a program for advance determination and payment to QHP issuers of CSR payments. 42 U.S.C. § 18082(a). Under this program, HHS must make an advance determination of the CSR and notify the Secretary of the Treasury of that determination. 42 U.S.C. § 18082(a)(1)-(2). The Secretary of the Treasury then "makes advance payments" of CSRs to QHP issuers. 42 U.S.C. § 18082(a)(3). Section 1412(c)(3) further provides that upon notification from HHS the Secretary of the Treasury "shall make" advance CSR payments. 42 U.S.C. § 18082(c)(3). Section 1402 and Section 1412 thus make advance CSR payments to QHP issuers a money-mandating obligation of the United States.

51. Congress has not amended or repealed Sections 1402 or 1412, 42 U.S.C. §§ 18071, 18082.

52. After Congress enacted the ACA, CMS and HHS implemented regulations related to the CSR program in the Code of Federal Regulations. Like the statute, the regulations require that QHP issuers provide the cost-sharing reductions for eligible insureds enrolled in silver plans. *See* 45 C.F.R. § 156.410. Also, like the statute, the regulations use mandatory payment language, stating that "[a] QHP issuer will receive periodic advance payments" for the CSR amounts due. 45 C.F.R. § 156.430(b).

53. HHS and CMS adopted a process of monthly advance CSR payments, together with a reconciliation at the end of the benefit year. In adopting its monthly advance payment approach, CMS and HHS explained, "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." 78 FR 15409, 15486 (Mar. 11, 2013).

B. MARKETPLACE'S PARTICIPATION IN THE COST-SHARING REDUCTION PROGRAM

54. Marketplace and CMS entered into a Qualified Health Care Plan Issuer Agreement for calendar year 2017 regarding Marketplace's provision of QHPs (the "2017 QHP Agreement"). Thus, Marketplace participated in the Indiana Health Insurance Exchange as a QHP issuer for calendar years 2015, 2016, and 2017.

55. Marketplace undertook the obligations and responsibilities of being a QHP issuer with the understanding that the Government would make the CSR payments as

required by Section 1402 and its implementing regulations. In particular, Marketplace set rates for the calendar-year 2017 plans in 2016, as required by the 2017 QHP Agreement and related regulations, and set those rates with the understanding that the Government would make the CSR payments as required by Section 1402, its implementing regulations. Marketplace could not change its rates for the calendar-year 2017 plans after they were offered and sold.

56. Marketplace offered and sold ACA-qualified health insurance plans, including silver plans to eligible insureds, during the "open enrollment" period beginning on October 1, 2016, for health insurance coverage effective January 1, 2017.

57. Marketplace upheld all of its obligations as a QHP issuer under all relevant statutes and regulations, including providing Cost-Sharing Reductions on behalf of its eligible insureds.

C. THE GOVERNMENT'S FAILURE TO MAKE CSR PAYMENTS TO MARKETPLACE

58. The Government fulfilled its statutory obligation to make timely CSR payments to issuers, including Marketplace, until October 2017. The Government made monthly payments estimated to be "equal to the value of the reductions" directly to participating insurers on or about the 20th of each month, until October 2017. Accordingly, through September 2017, the Government had been making its required "periodic and timely payments to the issuer equal to the value of the reductions," by making a monthly payment on or about the 20th of each month, until failing to do so on or around October 20, 2017.

59. On October 12, 2017, the White House released a statement from the Press Secretary stating, in its entirety:

> Based on guidance from the Department of Justice, the Department of Health and Human Services has concluded that there is no appropriation for cost-sharing reduction payments to insurance companies under Obamacare. In light of this analysis, the Government cannot lawfully make the cost-sharing reduction payments. The United States House of Representatives sued the previous administration in Federal court for making these payments without such an appropriation, and the court agreed that the payments were not lawful. The bailout of insurance companies through these unlawful payments is yet another example of how the previous administration abused taxpayer dollars and skirted the law to prop up a broken system. Congress needs to repeal and replace the disastrous Obamacare law and provide real relief to the American people.

60. On October 13, 2017, in a docket entry in the appeal of the district court's decision in *House v. Burwell*, the Executive Branch stated that "[HHS] has directed that [CSR] payments be stopped because it has determined that those payments are not funded by the permanent appropriation for 'refunding internal revenue collections,' 31 U.S.C. § 1324, or by any other appropriation. The upcoming October 18 payment thus will not occur." Litigation Notice at 1, *United States House of Representatives v. Azar*, No. 16-5202 (D.C. Cir. Oct. 13, 2017).

61. Also on October 13, 2017, CMS sent a letter to issuers stating that "[CMS] will discontinue payments of [CSR] to issuers effective in October. As a result, there will be a minor delay in the October payment cycle." Letter from Financial Management Coordination Center, CMS to Issuers (Oct. 13, 2017). The letter further stated that "CMS will withhold advance CSR payments for the current month of coverage and will not make any adjustment to CSR payment amounts related to retroactive enrollment data

changes for prior months of 2017. Issuers will therefore receive no net payment of 2017 advance CSR in the October and future payment cycles." *Id.* Moreover, "CSR reconciliation payments for the 2016 benefit year, including any payments owed as the result of reported discrepancies, will not be made." *Id.*

62. As noted, the Government had been making periodic and timely CSR payments to issuers in accordance with its statutory, regulatory, and contractual obligations since the beginning of the CSR program, until October 2017. Before the October 2017 announcement, the Secretary of HHS had taken the view that funding for CSR payments was within the scope of the permanent appropriation of 31 U.S.C. § 1324 and had made CSR payments as part of an integrated monthly payment and reconciliation process together with premium tax credits. On this basis, CSR payments continued throughout the pendency of the lawsuit initiated by the House of Representatives challenging the existence of an appropriation for such payments, until October 2017.

63. Sections 1402 and 1412, as money-mandating statutes, create a legal obligation on the part of the Government to make CSR payments to QHP issuers regardless of whether Congress has made a specific appropriation for CSR payments.

64. Since September 2017, the Government has not made its required CSR payments to QHP issuers. Marketplace ceased its participation on the Exchange as of December 31, 2017. Thus, the Government has failed to pay CSR payments due to Marketplace for the last quarter of 2017 – specifically, October, November, and December.

65. Marketplace has been damaged by the Government's breach of its mandatory obligation to make CSR payments as required by Sections 1402 and 1412. Specifically, the Government has failed to pay Marketplace CSR payments due for 2017 in the amount of $3,658,696.99; in addition, the Government has failed to pay Marketplace reconciled CSR payments due for benefit year 2016 in the amount of $537,451.52, for a total amount of CSR payments due of $4,196,148.71.

COUNT I
VIOLATION OF MONEY-MANDATING STATUTE (RISK CORRIDORS)

66. Marketplace hereby repeats and incorporates herein each and every allegation in paragraphs 1-47.

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

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

69. Marketplace was a QHP issuer in program years 2015 and 2016 and qualified for and was entitled to receive mandated Risk Corridors payments from the Government for program year 2016.

70. Marketplace satisfied all statutory and regulatory requirements for participation in the Risk Corridors Program in program years 2015 and 2016.

71. Marketplace is entitled under Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) to recover full Risk Corridors payments from the Government for program year 2016.

72. The Government has failed to make its full Risk Corridors payment to Marketplace for program year 2016, despite the Government repeatedly confirming that Section 1342 mandates that the Government make Risk Corridors payments, and that the Government owes Marketplace the full amount for program year 2016.

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

74. The Government's failure to make full and timely Risk Corridors payments to Marketplace for program year 2016 constitutes a violation and breach of the Government's mandatory payment obligations under Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b).

75. As a result of the Government's violation of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b), Marketplace has been damaged in the full amount it is still owed under the Risk Corridors program for program year 2016, together with interest, costs of this action, and such other relief as this Court deems just and proper.

COUNT II
BREACH OF IMPLIED-IN-FACT CONTRACT (RISK CORRIDORS)

76. Marketplace hereby repeats and incorporates herein each and every allegation in paragraphs 1-47.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

90. Under its implied-in-fact contract with the Government, Marketplace is entitled to recover full Risk Corridors payments from the Government for program year 2016.

91. Congress's attempts to limit funding sources for Risk Corridors payments did not and could not defeat or otherwise abrogate the United States' implied-in-fact contractual obligation to make full and timely Risk Corridors payments to Marketplace.

92. The Government's failure to make its full and timely Risk Corridors payment for program year 2016 to Marketplace is a material breach of the implied-in-fact contract.

93. As a direct and proximate result of the Government's breach of the implied contract, Marketplace has been damaged in the full amount it is still owed under the Risk Corridors program for program year 2016, together with interest, costs of this action, and such other relief as this Court deems just and proper.

COUNT III
BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING (RISK CORRIDORS)

94. Marketplace hereby repeats and incorporates herein each and every allegation in paragraphs 1-47, 79-93.

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

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

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

97. By failing to make its full and timely Risk Corridors payment owed for program year 2016 to Marketplace, the Government has destroyed or injured Marketplace's right to receive the benefits of the implied-in-fact contract, as it reasonably expected to receive, in breach of the implied covenant of good faith and fair dealing.

98. The Government breached the implied covenant of good faith and fair dealing by, at least: (1) promising through statute and regulation to make the Risk Corridors payments in the amounts specified, but subsequently failing to do so and instead making only partial, pro-rated payments to QHP issuers; (2) passing appropriations language in the 2015, 2016, and 2017 Appropriations Acts that targeted QHP issuers' rights to Risk Corridors payments by limiting funding sources to make payments, after Marketplace had undertaken significant expense and substantially performed its obligations under the contract; and (3) publicly making statements that the Government would make full Risk Corridors payments to QHP issuers, which

Marketplace relied on in agreeing to become a QHP issuer and in participating in the Exchange, but then failing to make full Risk Corridors payments after Marketplace had relied on the statements and performed the QHP contracts.

99. Under the implied covenant of good faith and fair dealing, Marketplace is entitled to recover full Risk Corridors payments from the Government for program year 2016.

100. As a direct and proximate result of the aforementioned breaches of the covenant of good faith and fair dealing, Marketplace has been damaged in the full amount it is still owed under the Risk Corridors program for program year 2016, together with interest, costs of this action, and such other relief as this Court deems just and proper.

COUNT IV
VIOLATION OF MONEY-MANDATING STATUTE (CSR)

101. Marketplace hereby repeats and incorporates herein each and every allegation in paragraphs 1-4, 48-65.

102. Pursuant to Section 1402 of the ACA and its implementing regulations at 45 C.F.R., § 156.430(b), the Government is required to "make periodic and timely payments to the issuer" for cost-sharing reductions provided by the QHP issuer to eligible insureds. Likewise, Section 1412 mandates that HHS notify the Secretary of the Treasury of eligible CSRs and that the Treasury "shall make such advance payment" to QHP issuers as HHS directs.

103. Marketplace is a qualified QHP issuer and, pursuant to its legal obligations, Marketplace provided CSRs to eligible insureds and provided notification of CSR amounts to CMS.

104. Marketplace has satisfied all statutory and regulatory requirements for participating in and receiving payments under the CSR program and is eligible and entitled to receive CSR payments from the Government under Sections 1402 and 1412 and implementing regulations, including 45 C.F.R. § 156.430(b).

105. The Government has failed to make full and timely CSR payments to Marketplace and has failed and refused to make any CSR payments to Marketplace for October, November, and December 2017; in addition, the Government has failed to pay Marketplace reconciled CSR payments due for benefit year 2016.

106. A failure, if any, by Congress to appropriate funds for CSR payments due, absent an amendment or repeal of Sections 1402 and 1412 of the ACA, could not defeat or otherwise abrogate the Government's statutory obligation created by Sections 1402 and 1412 to make full and timely CSR payments to QHP issuers, including Marketplace.

107. The Government's failure to make full and timely CSR payments to Marketplace for October, November, and December 2017 and failure to pay Marketplace reconciled CSR payments due for benefit year 2016 constitutes a violation and breach of the Government's mandatory payment obligations under Sections 1402 and 1412 of the ACA and 45 C.F.R. § 156.430(b).

108. As a result of the Government's violation of Sections 1402 and 1412 of the ACA and implementing regulations including 45 C.F.R. § 156.430(b), Marketplace has

been damaged in the full amount it is owed under the CSR program, together with interest, costs of this action, and such other relief as this Court deems just and proper.

COUNT V
BREACH OF IMPLIED-IN-FACT CONTRACT (CSR)

109. Marketplace hereby repeats and incorporates herein each and every allegation in paragraphs 1-4, 48-65, 101-108.

110. Marketplace entered into a valid implied-in-fact contract with the Government regarding the Government's obligation to make full and timely CSR payments to Marketplace in exchange for Marketplace's agreement to become a QHP issuer, sell QHPs on the Indiana Health Insurance Exchange, and follow the relevant statutes and regulations.

111. Sections 1402 and 1412 of the ACA, HHS's implementing regulations (45 C.F.R. § 156.430), and the CSR program as administered by HHS and CMS, through authorized representatives of the Government who had actual authority to bind the United States, constituted a clear and unambiguous offer by the Government to make full CSR payments to health insurers, including Marketplace, that agreed to participate and/or did participate as a QHP issuer in the CSR program.

112. Sections 1402 and 1412 specifically direct the Secretaries of HHS and Treasury to make CSR payments in specific sums, and neither HHS nor Treasury has discretion to pay less than those sums.

113. Marketplace accepted the Government's offer by agreeing to become a QHP issuer and by participating in the Indiana Health Insurance Exchange, selling ACA-

qualified plans to insureds eligible for cost-sharing reductions, and complying with all relevant statutes and regulations.

114. Marketplace satisfied and complied with its obligations under the implied-in-fact contract.

115. The Government's agreement to make full and timely CSR payments was a significant factor material to Marketplace's agreement to enter into the implied-in-fact contract and to participate in the CSR program under the ACA.

116. The parties' agreement is further confirmed by the parties' conduct, performance, and statements following Marketplace's acceptance of the Government's offer, the execution by the parties of QHP issuer agreements expressly incorporating "the laws and common law of the United State of America," and the Government's consistent performance of its obligation to make full and timely CSR payments until October 2017.

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

118. The CSR program's reimbursement to QHP issuers who covered low-income Americans under plans allowing for CSRs was a real benefit that significantly influenced Marketplace's decision to agree to become a QHP issuer and participate in the CSR program.

119. Marketplace, in turn, provided a real benefit to the Government by agreeing to become a QHP issuer and participate in the CSR program, and to insure low-income Americans who otherwise could not afford coverage. QHP issuer participation in the

CSR program benefited the Government in at least two ways. First, it helped the Government meet the statutory objective of expanding coverage by allowing QHP issuers to offer lower, government-subsidized premiums to eligible insureds. Second, it provided the Government an efficient mechanism to provide the benefit to eligible insureds on a monthly basis, instead of requiring insureds to incur higher costs up front and obtain the benefit in the form of a tax refund the following year.

120. The Government's failure and refusal to make full and timely CSR payments to Marketplace is a material breach of the implied-in-fact contract.

121. As a direct and proximate result of the Government's breach of the implied-in-fact contract, Marketplace has been damaged in the full amount it is owed under the CSR program.

122. Marketplace is entitled to compensation for all damages, together with interest, costs of this action, and such other relief as this Court deems just and proper.

PRAYER FOR RELIEF

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

1. For Count I, awarding Marketplace damages in the amount of at least $9,751,130.86 as a result of the Government's violation of Section 1342(b)(1) of the ACA and of 45 C.F.R. § 153.510(b) regarding the Risk Corridors payment for program year 2016;

2. For Count II, awarding Marketplace damages in the amount of at least $9,751,130.86 as a result of the Government's breach of its implied-in-fact contract with Marketplace regarding the Risk Corridors payment for program year 2016;

3. For Count III, awarding Marketplace damages in the amount of at least $9,751,130.86 as a result of the Government's breach of its implied covenant of good faith and fair dealing with Marketplace regarding the Risk Corridors payment for program year 2016;

4. For Count IV, awarding Marketplace damages in the amount of at least $4,196,148.71 as a result of the Defendant's violation of Sections 1402 and 1412 of the ACA and of 45 C.F.R. § 156.430(a) regarding CSR payments for program years 2016 and 2017;

5. For Count V, awarding Marketplace damages in the amount of at least $4,196,148.71 as a result of the Government's breach of its implied-in-fact contract with Marketplace regarding CSR payments for program years 2016 and 2017;

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

7. Awarding Marketplace all available attorneys' fees and costs; and

8. Awarding Marketplace such other and further relief to as the Court deems just and proper.

Dated: March 16, 2021

s/ William L. Roberts
William L. Roberts
william.roberts@faegredrinker.com
FAEGRE DRINKER BIDDLE & REATH LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Telephone: (612) 766-7000
Fax: (612) 766-1600

Counsel of Record for Plaintiff

Of Counsel
Jonathan W. Dettmann
jon.dettmann@faegredrinker.com
Nicholas J. Nelson
nicholas.nelson@faegredrinker.com
Evelyn Snyder
evelyn.snyder@faegredrinker.com
FAEGRE DRINKER BIDDLE & REATH LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Telephone: (612) 766-7000
Fax: (612) 766-1600

CERTIFICATE OF SERVICE

I certify that on March 16, 2021, a copy of the attached Second Amended Complaint was served via the Court's CM/ECF system on Defendant's counsel.

s/ William L. Roberts
William L. Roberts