ORIGINAL

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS OF IDAHO HEALTH SERVICE, INC.

Plaintiff,

v.

THE UNITED STATES OF AMERICA,

Defendant.

No. 16-1384 C

COMPLAINT

Plaintiff Blue Cross of Idaho Health Service, Inc. ("Plaintiff" or "BCI"), by and through its undersigned counsel, brings this action against Defendant, the United States of America ("Defendant," "United States," or "Government"), and alleges the following:

INTRODUCTION

1. BCI brings this action to recover damages owed by Defendant for violations of the mandatory risk corridors payment obligations prescribed in Section 1342 of the Patient Protection and Affordable Care Act ("ACA"), and its implementing federal regulations, as well as Defendant's breaches of its risk corridors payment obligations under express or implied-in-fact contracts, Defendant's breaches of the covenant of good faith and fair dealing implied in Defendant's contracts with BCI, and Defendant's taking of Plaintiff's property without just compensation in violation of the Fifth Amendment of the U.S. Constitution.

2. Congress' enactment in 2010 of the ACA marked a major reform in the United States health care market.

3. The market reform extended guaranteed availability of health care to all Americans, and prohibited health insurers from using factors such as health status, medical

history, gender, and industry of employment to set premium rates or deny coverage.

4. The ACA introduced scores of previously uninsured or underinsured citizens into the health care marketplace, creating great uncertainty to health insurers, including Plaintiff, that had no previous experience or reliable data to meaningfully assess the risks and set the premiums for this new population of insureds under the ACA.

5. Congress, recognizing such uncertainty for health insurers, included three premium-stabilization programs in the ACA to help protect health insurers against risk selection and market uncertainty, including the temporary federally administered risk corridors program, which mandated that the Government pay health insurers annual risk corridors payments based on a statutorily prescribed formula to provide health insurers with stability as insurance market reforms began.

6. Under the statutory parameters of the risk corridors program, Qualified Health Plans ("QHPs") – such as Plaintiff – and the federal government share in the risk associated with the new marketplace's uncertainty for each of the temporary program's three years: 2014, 2015 and 2016. If the amount a QHP collects in premiums in any one of these years exceeds its medical expenses by a certain target amount, the QHP will make a payment to the Government. If annual premiums fall short of this target, however, Congress required the Government to make risk corridors payments to the QHP under a formula prescribed in Section 1342.

7. The temporary risk corridors program was designed to ease the transition between the old and new health insurance marketplaces and help stabilize premiums for consumers, and was modeled on a similar program in Medicare Part D signed into law by President George W. Bush.

8. The United States has specifically admitted in writing its obligations to pay the

full amount of risk corridors payments owed to BCI for calendar year 2014 ("CY 2014"), but Defendant has failed to pay the full amount due. Instead, the Government arbitrarily has paid Plaintiff only a pro-rata share – less than 12.6% – of the total amount due, asserting that full payment to BCI is limited by available appropriations, even though no such limits appear anywhere in the ACA or its implementing regulations or in BCI's contracts with the Government.

9. Plaintiff also recently complied with requirements to submit to CMS its CY 2015 risk corridors data, which shows that the Government owes BCI risk corridors payments of $39,222,169 under the Section 1342 formula. The Government, however, has clearly repudiated its obligation to make full and timely payment of the CY 2015 risk corridors payments owed to Plaintiff, and BCI seeks damages of at least $39,222,169 as a result of Defendant's recent confirmation that it will not pay BCI any risk corridors amounts for CY 2015 in violation of Section 1342, which BCI construes as a total anticipatory breach of the Government's contracts with BCI.

10. This action seeks monetary damages from the Government of at least $79,260,011.33, less any prorated payments made by the Government, which represents the amount of risk corridors payments owed to Plaintiff for CY 2014 and CY 2015.

11. Should this Court find that the United States failed to make full and timely CY 2014 and/or CY 2015 risk corridors payments to BCI in violation of Defendant's statutory, regulatory and/or contractual obligations, and/or Plaintiff's constitutional rights under the Fifth Amendment, then Plaintiff also seeks incidental declaratory relief from the Court regarding the Government's obligation to make full and timely risk corridors payments for CY 2015 and/ CY 2016, in accordance with the Defendant's legal obligations.

JURISDICTION AND VENUE

12. This Court has jurisdiction over this action and venue is proper in this Court pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), because Plaintiff brings claims for monetary damages over $10,000 against the United States founded upon the Government's violations of a money-mandating Act of Congress, a money-mandating regulation of an executive department, an express contract and/or an implied-in-fact contract with the United States, and a taking of Plaintiff's property in violation of the Fifth Amendment of the Constitution.

13. The actions and/or decisions of the Department of Health and Human Services ("HHS") and the Centers for Medicare & Medicaid Services ("CMS") at issue in this lawsuit were conducted on behalf of the Defendant United States within the District of Columbia.

PARTIES

14. Plaintiff BLUE CROSS OF IDAHO HEALTH SERVICE, INC. ("BCI"), an independent licensee of the Blue Cross and Blue Shield Association, is an Idaho mutual insurance corporation with headquarters located in Meridian, Idaho. BCI was and remains a QHP issuer on the Idaho Health Insurance Marketplace for CY 2014, CY 2015, and CY 2016.

15. Defendant is THE UNITED STATES OF AMERICA. The Department of Health and Human Services ("HHS") and the Centers for Medicare & Medicaid Services ("CMS") are agencies of the Defendant United States of America.

FACTUAL ALLEGATIONS

Congress Enacts the Patient Protection and Affordable Care Act

16. In 2010, Congress enacted the ACA, Public Law 111-148, 124 Stat. 119.

17. The ACA aimed to increase the number of Americans covered by health insurance and decrease the cost of health care in the U.S.

18. The ACA provides that "each health insurance issuer that offers health insurance coverage in the individual . . . market in a State must accept every . . . individual in the State that applies for such coverage." 42 U.S.C. § 300gg–1(a).

19. The ACA also bars insurers from charging higher premiums on the basis of a person's health. 42 U.S.C. § 300gg.

20. Beginning on January 1, 2014, individuals and small businesses were permitted to purchase private health insurance through competitive statewide marketplaces called Affordable Insurance Exchanges, Health Benefit Exchanges, "Exchanges," or "Marketplaces." ACA Section 1311 establishes the framework for the Exchanges. *See* 42 U.S.C. § 18031.

21. BCI participated and offered QHPs in the ACA Marketplace in Idaho in CY 2014, CY 2015, and CY 2016.

The ACA's Premium-Stabilization Programs

22. To help protect health insurers against risk selection and market uncertainty, the ACA established three premium-stabilization programs, which began in 2014: temporary reinsurance and risk corridors programs to give insurers payment stability as insurance market reforms began, and an ongoing risk adjustment program that makes payments to health insurance issuers that cover higher-risk populations (*e.g.*, those with chronic conditions) to more evenly spread the financial risk borne by issuers. These three premium-stabilization programs are known as the "3Rs."

23. This action only addresses the temporary, three-year risk corridors program, which began in CY 2014 and expires at the end of CY 2016, and is a "Federally administered program." 77 FR 17219, 17221 (Mar. 23, 2012), attached hereto at Exhibit 01.

24. While the risk adjustment and reinsurance programs are designed to share risk

between health plans, Congress designed the risk corridors program to share risk between insurers and the Government. If a health plan's adjusted loss ratio is higher than its target level by a certain percentage, the Government shares in some of the excess loss by making payments to the health plan, and if the adjusted loss ratio is lower than the target by the same percentage, then the health plan pays the Government some of its profit.

25. The Government's unilateral decision, detailed below, to belatedly interpret the risk corridors as requiring "budget neutrality" –that Government payments to qualifying insurers cannot exceed the amount of risk corridors charges the Government collects from insurers – is found nowhere in the ACA and would make insurers share the risk amongst themselves, instead of with the Government, in contravention of Congress' intent and design in passing the ACA.

26. Congress' overarching goal of the premium-stabilization programs, along with other Exchange-related provisions and policies in the ACA, was to make affordable health insurance available to individuals who previously did not have access to such 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 health insurer uncertainty.

27. Congress also strived to provide certainty and protect against adverse selection in the health care market while stabilizing premiums in the individual and small group markets as the ACA's market reforms and Exchanges began in 2014.

28. The financial protections that Congress provided in the statutory premium-stabilization programs, including the mandatory risk corridors payments, provided QHPs with the security – backed by federal law and the full faith and credit of the United States – to become participating health insurers in their respective states' ACA markets, at considerable cost to the QHPs, despite the significant financial risks posed by the uncertainty in the new health care

markets.

29. Since the ACA's rollout, BCI has worked in partnership with the federal government to make the ACA Exchanges successful in BCI's market by agreeing to participate as a QHP on the Idaho ACA Exchanges, rolling out competitive rates, and offering a broad spectrum of health insurance products.

30. In CY 2014, 2015, and 2016, BCI enrolled a majority of Idahoans who signed up for ACA coverage on the Idaho ACA Exchange. For CY 2014, of the over 76,000 Idahoans who applied for coverage through the Idaho Exchange, more than 55,000 joined BCI. For CY 2015, BCI enrolled approximately 49,500 out of a total of 85,000 total Idaho Exchange applicants. For CY 2016, BCI enrolled approximately 41,500 of Idaho's 94,000 total customers who enrolled for coverage on the Idaho Exchange. BCI's customers enjoyed access to BCI's state-wide network of over 10,000 providers, the largest in the state, which includes practitioners with a wide range of medical expertise.

31. BCI has demonstrated its willingness to be a meaningful partner in the ACA program, and has done so in good faith by fulfilling all of its obligations, with the understanding that the United States would likewise honor its statutory, regulatory and contractual commitments regarding, *inter alia*, the 3Rs, including the temporary risk corridors program.

32. The Government has failed to hold up its end of the bargain, necessitating the filing of this lawsuit.

The ACA's Risk Corridors Program

33. Section 1342 of the ACA expressly requires the Secretary of HHS to establish a temporary risk corridors program that provides for the Government to share in QHPs' gains or losses resulting from inaccurate rate setting annually from CY 2014 through CY 2016 in the

individual and small group markets. *See* 42 U.S.C. § 18062, attached hereto at Exhibit 02.

34. Congress required the ACA risk corridors program established in Section 1342 to be modeled after a similar program implemented as part of the Medicare Part D prescription drug benefit program that was signed into law by President George W. Bush. *See* 42 U.S.C. § 18062(a), Ex. 02 (mandating that the 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").

35. The risk corridors program applies only to participating plans that, like BCI, agreed to participate on the ACA Exchanges and accept the responsibilities and obligations of QHPs and were certified as QHPs. All insurers that elect to enter into agreements with the Government to become QHPs are required by Section 1342(a) of the ACA to participate in the risk corridors program.

36. By enacting Section 1342 of the ACA, Congress recognized that, due to uncertainty about the population entering the Exchanges during the first few years, health insurers may not be able to predict their risk accurately, and their premiums may reflect costs that are ultimately lower or higher than predicted.

37. Congress intended the ACA's temporary risk corridors provision as an important safety valve for consumers and insurers as millions of Americans would transition to new coverage in a brand new Marketplace, protecting against the uncertainty that health insurers, like BCI, would face when estimating enrollments and costs resulting from the market reforms by creating a mechanism for sharing risk between the Government and issuers of QHPs in each of the first three years of the Marketplace.

BCI is a QHP

38. Based on Congress' statutory commitments set forth in the ACA, including, but not limited to, Section 1342 and the risk corridors program, as well as on the Government's statements and conduct regarding its risk corridors obligations, BCI agreed to become a QHP, and to enter into QHP Agreements with CMS, a federal agency within HHS, and Your Health Idaho ("YHI"), the operator of Idaho's ACA Marketplaces. The QHP Agreements are attached to this Complaint at Exhibits 03 to 05.

39. BCI executed a QHP Agreement with CMS on September, 11, 2013, which is referred to herein as the "CY 2014 QHP Agreement." *See* Exhibit 03.

40. The CY 2014 QHP Agreement was executed 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.

41. Pursuant to Section III.a. of the CY 2014 QHP Agreement, the CY 2014 QHP Agreement had effective dates from the date of execution by the last of the two parties until December 31, 2014, the last day of CY 2014.

42. Section II.c. of the CY 2014 QHP Agreement states that CMS is obligated to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions."

43. In addition to certifying that BCI is a QHP, the CY 2014 QHP Agreement expressly states that it is governed by United States law and HHS and CMS regulations, stating specifically in Section V.g. that:

> This Agreement will be governed by 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, without regard to any

conflict of laws statutes or rules.

44. On November 4, 2014, BCI executed a QHP Agreement with YHI containing terms that were materially and substantially similar to those found in the CY 2014 QHP Agreement, which is referred to herein as the "CY 2015 QHP Agreement." *See* Exhibit 04.

45. Pursuant to Section 8.1 of the CY 2015 QHP Agreement, the CY 2015 QHP Agreement had effective dates from the date of execution by the last of the two parties until December 31, 2015, the last day of CY 2015.

46. On July 30, 2015, BCI executed a QHP Agreement with YHI with terms that were materially and substantially identical to those found in the CY 2015 QHP Agreement, which is referred to herein as the "CY 2016 QHP Agreement." *See* Exhibit 05.

47. Pursuant to Section 8.1 of the CY 2016 QHP Agreement, the CY 2016 QHP Agreement has effective dates from the date of execution by the last of the two parties until December 31, 2016, the last day of CY 2016.

48. Guidance from HHS and CMS to Issuers on Federally-Facilitated Exchanges ("FFE") and State Partnership Exchanges on April 5, 2013, stated that, "A signed QHP Agreement with CMS will complete the certification process in an FFE or State Partnership Exchange. The Agreement will highlight and memorialize many of the QHP issuer's statutory and regulatory requirements and will serve as an important reminder of the relationship between the QHP issuer and CMS." Letter from CMS to Issuers on Federally-Facilitated Exchanges and State Partnership Exchanges at 23 (Apr. 5, 2013), attached hereto at Exhibit 06.

49. Additionally, HHS and CMS confirmed in the April 5, 2013 Guidance that "Applicants will … be required to attest to their adherence to the regulations set forth in 45 C.F.R. parts 155 and 156 and other programmatic requirements necessary for the operational

success of an Exchange, and provide requested supporting documentation." *Id.* at 20.

50. Before BCI executed the CY 2014, CY 2015, and CY 2016 QHP Agreements, BCI executed several attestations certifying its compliance with the obligations it was undertaking by agreeing to become, or continuing to act as, a QHP on the ACA Exchanges in Idaho.

51. Plaintiff executed and submitted its CY 2014 attestations on the form required by CMS on or about April 25, 2013. *See* Program Attestations (Apr. 25, 2013), attached hereto at Exhibit 07.

52. Plaintiff's CY 2015 and CY 2016 attestations, executed and submitted respectively on or about June 11, 2014, and April 30, 2015, were comprised of CMS and YHI attestation forms. *See* State-based Exchange Issuer Attestations: Statement of Detailed Attestation Responses (June 11, 2014), attached hereto at Exhibit 08; Your Health Idaho Supplementary QHP Carrier Attestations (June 11, 2014), attached hereto at Exhibit 09; State-based Marketplace Issuer Attestations: Statement of Detailed Attestation Responses (April 30, 2015), attached hereto at Exhibit 10; Your Health Idaho Supplementary QHP Carrier Attestations (April 30, 2015), attached hereto at Exhibit 11.

53. By executing and submitting its annual attestations on CMS' and YHI's forms, BCI agreed to the many obligations and responsibilities imposed upon all QHPs that accept the Government's offer to participate in the ACA Exchanges. Those obligations and responsibilities that Plaintiff undertook include, *inter alia*, licensing, reporting requirements, employment restrictions, marketing parameters, HHS oversight of the QHP's compliance plan, maintenance of an internal grievance process, benefit design standards, cost-sharing limits, rate requirements, enrollment parameters, premium payment process requirements, participating in financial

management programs established under the ACA (including the risk corridors program), adhering to data standards, and establishing dedicated and secure server environments and data security procedures.

54. Through these annual attestations, BCI affirmatively attested that it would agree to comply with certain "Financial Management" obligations, including, among others:

> 2. Applicant attests that it will adhere to the risk corridor standards and requirements set by HHS as applicable for:
>
> a. risk corridor data standards and annual HHS notice of benefit and payment parameters for the calendar years 2014, 2015, and 2016 (45 CFR 153.510);
>
> b. remit charges to HHS under the circumstances described in 45 CFR 153.510(c).

Program Attestations at 1 (Apr. 25, 2013), Ex. 07; State-based Exchange Issuer Attestations: Statement of Detailed Attestation Responses at 2 (June 11, 2014) , Ex. 08; State-based Exchange Issuer Attestations: Statement of Detailed Attestation Responses at 2 (April 30, 2015), Ex. 10.

55. The financial risk sharing that Congress mandated through the risk corridors program was a significant factor in BCI's decision to agree to become a QHP and undertake the many responsibilities and obligations required for BCI to participate in the ACA Exchanges.

56. Had BCI known that the Government would fail to fully and timely make the risk corridors payments owed to BCI, then BCI's annual premiums on the Idaho ACA Exchanges would necessarily have been higher than actually charged, as a result of the increased risks in the Marketplace.

The Risk Corridors Payment Methodology

57. Under the risk corridors program, the federal government shares risk with QHP health insurers annually in "calendar years 2014, 2015, and 2016," 42 U.S.C. § 18062(a), Ex. 02,

by collecting charges from a health insurer if the insurer's QHP premiums exceed claims costs of QHP enrollees by a certain amount, and by making payments to the insurer if the insurer's QHP premiums fall short by a certain amount, subject to certain adjustments for taxes, administrative expenses, the other 3Rs programs, and other costs and payments.

58. Congress, through Sections 1342(b)(1) and (2) of the ACA, established the specific payment methodology to determine the risk corridors charge amounts the QHPs must pay to the Secretary of HHS and the risk corridors payment amounts the Secretary must pay to the QHPs if the risk corridors threshold is met.

59. The statute does not require that payments by the Government out to QHPs are constrained by the amount of payments received by the Government. *See* 42 U.S.C. § 18062.

60. Neither Section 1342 nor its implementing regulations create an account or fund for the Government to receive annual risk corridors charges in from QHPs, or for the Government to make annual risk corridors payments out to QHPs.

61. Section 1342 does not require the risk corridors program to be "budget neutral" – neither that term nor the concept of budget neutrality appear anywhere in Section 1342 or its implementing regulations.

62. The text of Section 1342(b) states:

> **(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(b), Ex. 02.

63. To determine whether a QHP in any year must pay into, or receive payments from, the Government under the risk corridors program, HHS compares allowable costs (essentially, claims costs subject to adjustments for health care quality, health IT, risk adjustment payments and charges, and reinsurance payments) and the target amount – the difference between a QHP's earned premiums and allowable administrative costs.

64. Pursuant to the Section 1342(b) formula, each year from CY 2014 through CY 2016, QHPs with allowable costs that are less than 97 percent of the QHP's target amount are required to remit charges for a percentage of those cost savings to HHS, while QHPs with allowable costs greater than 103 percent of the QHP's target amount will receive payments from HHS to offset a percentage of those losses.

65. Section 1342(b)(1) prescribes the specific payment formula from HHS to QHPs whose costs in a calendar year exceed their original target amounts by more than three percent.

66. Section 1342(b)(1)(A) requires that if a QHP's allowable costs in a calendar year

are more than 103 percent, but not more than 108 percent, of the target amount, then "the Secretary [of HHS] shall pay" to the QHP an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount.

67. Section 1342(b)(1)(B) further requires that if a QHP's allowable costs in a calendar year are more than 108 percent of the target amount, then "the Secretary [of HHS] shall pay" to the QHP an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the allowable costs in excess of 108 percent of the target amount.

68. Alternatively, Section 1342(b)(2) sets forth the amount of risk corridors charges that must be remitted to HHS by QHPs whose costs in a calendar year are more than three percent below their original target amounts.

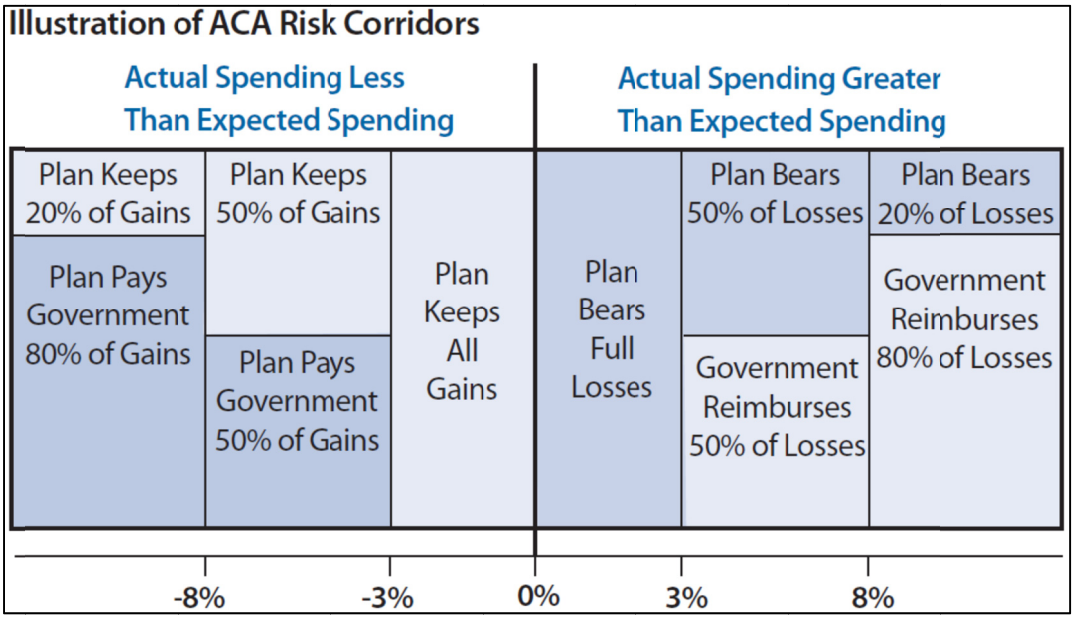
69. Section 1342(b)(2)(A) requires that if a QHP's allowable costs in a calendar year are less than 97 percent, but not less than 92 percent, of the target amount, then "the plan shall pay to the Secretary [of HHS]" an amount equal to 50 percent of the excess of 97 percent of the target amount over the allowable costs.

70. Section 1342(b)(2)(B) requires that if a QHP's allowable costs in a calendar year are less than 92 percent of the target amount, then "the plan shall pay to the Secretary [of HHS]" 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.

71. Through this risk corridors payment methodology, QHPs keep all gains and bear all losses that they experience within three percent of their target amount for a calendar year. For example, a QHP that has a target amount of $10 million in a given calendar year will not pay a risk corridors charge or receive a risk corridors payment if its allowable charges range between $9.7 million and $10.3 million for that calendar year.

72. HHS and CMS provided specific examples of risk corridors payment and charge calculations beyond the three percent threshold – published in the Federal Register dated July 15, 2011, at 76 FR 41929, 41943 – which illustrate risk corridors payments the Government must pay under different allowable cost, target amount, and gain and loss scenarios. *See* 76 FR 41929, 41943 (July 15, 2011), attached hereto at Exhibit 12.

73. The American Academy of Actuaries provided an approximate illustration of the risk corridors payment methodology – excluding the charge or payment of 2.5 percent of the target amount for gains or losses greater than eight percent – as follows:



Source: American Academy of Actuaries, *Fact Sheet: ACA Risk-Sharing Mechanisms* (2013), *available at* http://actuary.org/files/ACA_Risk_Share_Fact_Sheet_FINAL120413.pdf, attached hereto at Exhibit 13.

74. As detailed below, in CY 2014, BCI experienced allowable-cost losses of more than three percent of its target amounts in the Idaho ACA Individual and Small Group Markets, requiring the Government to make mandatory risk corridors payments to BCI under Section 1342.

75. Congress did not impose any financial limits or restraints on the Government's mandatory risk corridors payments to QHPs in either Section 1342 or any other section of the ACA.

76. Congress did not establish any particular fund or account in Section 1342 to receive risk corridors charges or payments, nor did Congress prescribe in Section 1342 the use or collection of "user fees" regarding the risk corridors program.

77. Congress also did not limit in any way the Secretary of HHS' obligation to make full risk corridors payments owed to QHPs, due to appropriations, restriction on the use of funds, or otherwise in Section 1342 or anywhere else in the ACA.

78. Congress has not amended Section 1342 since enactment of the ACA.

79. Congress has not repealed Section 1342.

80. HHS and CMS thus lack statutory authority to pay anything less than 100% of the risk corridors payments due to Plaintiff for CY 2014.

81. On March 11, 2013, HHS publicly affirmed – while health insurers, including BCI, were contemplating whether to agree to participate in the new Exchanges that were opening on January 1, 2014 – that "[t]he risk corridors program is not statutorily required to be budget neutral." HHS further confirmed that, "Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act." 78 FR 15409, 15473 (Mar. 11, 2013), attached hereto at Exhibit 14.

82. In deciding to become a QHP, BCI relied upon HHS' commitments to make full risk corridors payments annually to it as required in Section 1342 of the ACA regardless of whether risk corridors payments to QHPs are actually greater than risk corridors charges collected from QHPs for a particular calendar year.

83. The United States, however, has refused to make full and timely risk corridors payments to BCI for CY 2014 as required by Section 1342.

HHS' Risk Corridors Regulations

84. Congress directed HHS to administer the risk corridors program enacted in Section 1342. *See* 42 U.S.C. § 18062(a), Ex. 02. The HHS Secretary formally delegated authority over the Section 1342 risk corridors program to the CMS Administrator on August 30, 2011. *See* 76 FR 53903, 53903-04 (Aug. 30, 2011), attached hereto at Exhibit 15. Accordingly, CMS issued implementing regulations for the risk corridors program at 45 C.F.R. Part 153.

85. In 45 C.F.R. § 153.510, CMS adopted a risk corridors calculation "for calendar years 2014, 2015, and 2016," 45 C.F.R. § 153.510(a), that is mathematically identical to the statutory formulation in Section 1342 of the ACA, using the identical thresholds and risk-sharing levels specified in the statute. *See* 45 C.F.R. § 153.510, attached hereto at Exhibit 16.

86. The implementing regulations, just like the controlling statute, do not limit the amount of the Government's required annual payments out to insurers to the amount that insurers are required to pay in to the Government. *See* 45 C.F.R. § 153.510, Ex. 16.

87. The implementing regulations, like Section 1342, do not require the risk corridors program to be "budget neutral."

88. Specifically, 45 C.F.R. § 153.510(b) prescribes the method for determining risk corridors payment amounts that QHPs "will receive":

> (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.

89. Furthermore, 45 C.F.R. § 153.510(c) prescribes the circumstances under which QHPs "must remit" charges to HHS, as well as the means by which HHS will determine those charge amounts:

> (c) *Health insurance issuers' remittance of charges.* QHP issuers must remit charges to HHS in the following amounts, under the following circumstances:
>
> (1) If a QHP's allowable costs for any benefit year are less than 97 percent but not less than 92 percent of the target amount, the QHP issuer must remit charges to HHS in an amount equal to 50 percent of the difference between 97 percent of the target amount and the allowable costs; and
>
> (2) When a QHP's allowable costs for any benefit year are less than 92 percent of the target amount, the QHP issuer must remit charges to HHS in an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the difference between 92 percent of the target amount and the allowable costs.

90. Additionally, 45 C.F.R. § 153.510(d) imposes a 30-day deadline for a QHP to fully remit charge payments to HHS when the QHP's allowable costs in a calendar year are less than 97 percent of the QHP's target amount, specifically stating that:

> (d) *Charge submission deadline.* A QHP issuer must remit charges to HHS within 30 days after notification of such charges.

91. The Government first requested comment on the 30-day deadline for certain profitable QHPs to fully pay HHS in proposed rulemaking on December 7, 2012. *See* 77 FR 73118, 73164 (Dec. 7, 2012), attached hereto at Exhibit 17. The Government adopted the final rule on March 11, 2013. *See* 78 FR 15409, 15473 (Mar. 11, 2013), Ex. 14.

92. While CMS never imposed in the implementing regulations a specific deadline for HHS to tender full risk corridors payments to QHPs whose allowable costs in a calendar year are greater than 103 percent of the QHP's target amount, the Government also never contravened its earlier public statements that the deadline for the Government's payment of risk corridors payments to QHPs should be identical to the deadline for a QHP's remittance of charges to the Government. *See* 76 FR 41929, 41943 (July 15, 2011), Ex. 12; 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 01.

93. On July 15, 2011, CMS and HHS printed the following in its proposed rule in the Federal Register:

> HHS would make payments to QHP issuers that are owed risk corridor amounts from HHS within a 30-day period after HHS determines that a payment should be made to the QHP issuer. We believe that QHP issuers who are owed these amounts will want prompt payment, and also believe that the payment deadlines should be the same for HHS and QHP issuers.

76 FR 41929, 41943 (July 15, 2011), Ex. 12.

94. On March 23, 2012, CMS and HHS printed the following in its final rule in the Federal Register:

> While we did not propose deadlines in the proposed rule, we … suggested … that HHS would make payments to QHP issuers that are owed risk corridors amounts within a 30-day period after HHS determines that a payment should be made to the QHP issuer. *QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers*.

77 FR 17219, 17238 (Mar. 23, 2012), Ex. 01 (emphasis added).

95. Nothing in 45 C.F.R. Part 153 limits CMS' obligation to pay QHPs the full amount of risk corridors payments due based on appropriations, restrictions on the use of funds, or otherwise.

96. Nothing in 45 C.F.R. §§ 153.500 to .540 prescribes the use of "user fees"

regarding the risk corridors program.

97. BCI relied upon these statements by HHS and CMS in the Federal Register in deciding to agree to become a QHP in Idaho and accept the obligations and responsibilities of a QHP, believing that the Government would pay the full risk corridors payments owed to it within 30 days after it had been determined that Plaintiff experienced losses sufficient to qualify for risk corridors payments under Section 1342 of the ACA and 45 C.F.R. § 153.510.

98. The United States should have paid BCI the full CY 2014 risk corridors payments due by the end of CY 2015, but failed to do so.

99. The United States has failed or refused to make full and timely risk corridors payments to BCI for CY 2014 as required under Section 1342 of the ACA and 45 C.F.R. § 153.510.

HHS' and CMS' Recognition of Risk Corridors Payment Obligations

100. Since Congress' enactment of the ACA in 2010, HHS and CMS have repeatedly publicly acknowledged and confirmed to BCI and other QHPs their statutory and regulatory obligations to make full and timely risk corridors payments to qualifying QHPs.

101. These public statements by HHS and CMS were made by representatives of the Government who had actual authority to bind the United States.

102. BCI relied on these public statements by HHS and CMS to assume and continue its QHP status, including its continued participation in the Idaho ACA Exchanges.

103. On July 11, 2011, HHS issued a fact sheet on HealthCare.gov, "Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment," stating that under the risk corridors program, "qualified health plan issuers with costs greater than three percent of cost projections will receive payments from HHS to offset a percentage of

those losses." HealthCare.gov, "Affordable Insurance Exchanges: Standards Related to Reinsurance, Risk Corridors and Risk Adjustment" (July 11, 2011), attached hereto at Exhibit 18.

104. On March 23, 2012, HHS implemented a final rule regarding Standards Related to Reinsurance, Risk Corridors and Risk Adjustment (77 FR 17219). Although HHS recognized that it did not propose deadlines for making risk corridors payments, HHS stated that "QHP issuers who are owed these amounts will want prompt payment, and payment deadlines should be the same for HHS and QHP issuers." 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 01.

105. When HHS implemented a final rule on March 11, 2013, regarding HHS Notice of Benefit and Payment Parameters for 2014 (78 FR 15409), HHS confirmed, "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." 78 FR 15409, 15473 (Mar. 11, 2013), Ex. 14.

106. In April 2013, BCI executed and submitted its attestations regarding, *inter alia*, its adherence to the risk corridors program for CY 2014. *See* Ex. 07.

107. In September 2013, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, BCI executed the CY 2014 QHP Agreement and, upon approval and certification by CMS, became a QHP. *See* Ex. 03.

108. In February 2014, the Congressional Budget Office (CBO) published projections stating that, in contrast to the 3Rs' risk adjustment and reinsurance programs having "no net budgetary effect," the "payments and collections under the risk corridor program will not necessarily equal one another." CBO, "The Budget and Economic Outlook: 2014 to 2024" at 110 (Feb. 2014), attached hereto at Exhibit 19. The CBO's Table B-3 accordingly projected that

in FY 2015, the difference between risk corridors payments and collections would net the Government $1 billion in positive revenue. *Id.* at 109. The table further projected positive annual revenue for the United States from the risk corridors program of $2 billion and $4 billion for, respectively, FY 2016 and FY 2017. *Id.* The CBO projected that "over the 2015-2024 period, risk corridor payments from the federal government to health insurers will total $8 billion and the corresponding collections from insurers will amount to $16 billion, yielding net savings for the federal government of $8 billion." *Id.* at 110.

109. The CBO's February 2014 analysis clearly contemplated that risk corridors payments would be made annually and in full, instead of payments being withheld until sometime after the end of the risk corridors program in 2017. *See* CBO, "The Budget and Economic Outlook: 2014 to 2024" at 109-110 (Feb. 2014), Ex. 19. The CBO stated that "[c]ollections and payments for the … risk corridor programs will occur after the close of a benefit year. Therefore, collections and payments for insurance provided in 2014 will occur in 2015, and so forth." *Id.* at 110 n.6.

110. In HHS' response letter to the U.S. Government Accountability Office ("GAO") dated May 20, 2014, HHS again admitted 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), attached hereto at Exhibit 20.

111. In June 2014, BCI executed and submitted its attestations regarding, *inter alia*, its adherence to the risk corridors program for CY 2015. *See* Ex. 08; Ex 09.

112. On June 18, 2014, HHS sent to U.S. Senator Sessions and U.S. Representative Upton identical letters 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), attached hereto at Exhibit 21.

113. In November 2014, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, BCI executed the CY 2015 QHP Agreement. *See* Ex. 04.

114. On February 27, 2015, HHS' implementation of a final rule regarding HHS Notice of Benefit and Payment Parameters for 2016 (80 FR 10749), further confirmed that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers." 80 FR 10749, 10779 (Feb. 27, 2015), attached hereto at Exhibit 22.

115. In April 2015, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, BCI executed and submitted its attestations regarding, *inter alia*, its adherence to the risk corridors program for CY 2016. *See* Ex. 10; Ex. 11.

116. CMS' letter to state insurance commissioners on July 21, 2015, stated in boldface text that "**CMS remains committed to the risk corridor program.**" Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to State Insurance Commissioners (July 21, 2015), attached hereto at Exhibit 23.

117. In July 2015, in reliance on the Government's statutory, regulatory and contractual obligations and inducements described above, BCI executed the CY 2016 QHP Agreement. *See* Ex. 05.

118. On November 19, 2015, CMS issued a public announcement further confirming that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments

to issuers." Bulletin, CMS, "Risk Corridors Payments for the 2014 Benefit Year" (Nov. 19, 2015), attached hereto at Exhibit 24.

119. As recently as September 9, 2016 – after several lawsuits had been filed by other QHPs in the U.S. Court of Federal Claims that, like this lawsuit, seek monetary relief from the United States for breaches of the Government's risk corridors payment obligations – CMS publicly confirmed that "HHS recognizes that the Affordable Care Act requires the Secretary to make full payments to issuers," and that "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" (Sept. 9, 2016), attached hereto at Exhibit 25.

120. HHS' and CMS' direct statements to BCI have further unequivocally confirmed the agencies' position that full risk corridors payments are owed to Plaintiff and are a binding obligation of the United States.

121. CMS' letter to BCI on October 29, 2015, stated, "I wish to reiterate to you that the Department of Health and Human Services (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 Zelda Geyer-Sylvia, CEO, BCI (Oct. 29, 2015) (emphasis added), attached hereto at Exhibit 26. The letter further stated that "HHS is recording those amounts that remain unpaid following our 12.6% payment this winter as fiscal year 2015 obligations of the United States Government for which full payment is required." *Id.*

122. The CMS official who signed the October 29, 2015 letter, Kevin Counihan, listed his title as "Chief Executive Officer, Health Insurance Marketplaces," and "Director, Center for Consumer Information & Insurance Oversight." *Id.* More specifically, CMS's job description for Mr. Counihan states that "[i]n his role as Marketplace CEO, Kevin is responsible and

accountable for leading the federal Marketplace, managing relationships with state marketplaces, and running the Center for Consumer Information and Insurance Oversight (CCIIO), which regulates health insurance at the federal level." CMS Leadership, Center for Consumer Information and Insurance Oversight, Kevin Counihan, https://www.cms.gov/About-CMS/Leadership/cciio/Kevin-Counihan.html (last visited Oct. 5, 2016), attached hereto at Exhibit 27.

The United States' Failure to Honor its Obligations

123. Beginning in 2014, after BCI (which had executed the CY 2014 QHP Agreement with CMS in September 2013) had already agreed to participate in the CY 2014 Idaho ACA Exchanges in reliance upon the Government's risk corridors payment obligations, the Government announced that the United States would not honor those payment obligations.

124. Once a QHP commits to participate in the ACA Marketplace for a plan year, it is prohibited from withdrawing from the Exchange or discontinuing existing coverage until the conclusion of that plan year. *See, e.g.*, 45 C.F.R. § 156.290(a)(2); 45 C.F.R. § 147.104.

125. On March 11, 2014, HHS stated in a final rule in the Federal Register that "HHS intends to implement this [risk corridors] program in a budget neutral manner." 79 FR 13743, 13829 (Mar. 11, 2014), attached hereto at Exhibit 28.

126. This announcement was directly contrary to HHS' prior statement – made exactly one year earlier in the Federal Register, March 11, 2013 – which 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." 78 FR 15409, 15473 (Mar. 11, 2013), Ex. 14.

127. The American Academy of Actuaries stated in April 2014 that the proposed "new

budget neutrality policy … would change the basic nature of the risk corridor program retroactively" and "changes the nature of the risk corridor program from one that shares risk between issuers and CMS to one that shares risk between competing issuers." Am. Acad. of Actuaries, Comment to HHS on Proposed Rule, Exchange and Insurance Market Standards for 2015 and Beyond at 3 (Apr. 21, 2014), attached hereto at Exhibit 29.

128. HHS' "budget neutral" statement of March 11, 2014, was also contrary to Congress' intent for the Government to share risk with insurers, and Congress' direction to model the ACA risk corridors program on the Medicare Part D program, which is not required to be budget neutral. *See* 42 C.F.R. § 423.336, attached hereto at Exhibit 30; U.S. Gov't Accountability Office Report, *Patient Protection and Affordable Care Act: Despite Some Delays, CMS Has Made Progress Implementing Programs to Limit Health Insurer Risk*, GAO-15-447 (2015), attached hereto at Exhibit 31 ("For the Medicare Advantage and Medicare Part D risk mitigation programs, the payments that CMS makes to issuers are not limited to issuer contributions."); Am. Acad. of Actuaries, Comment to HHS on Proposed Rule, Exchange and Insurance Market Standards for 2015 and Beyond at 2 (Apr. 21, 2014), Ex. 29, ("The Part D risk corridor program is not budget neutral and has resulted in net payments to the Centers for Medicare and Medicaid Services (CMS). Similarly, the design of the ACA risk corridor program does not guarantee budget neutrality.").

129. HHS' statement was also contrary to the CBO's February 2014 published projections that the risk corridors program would net the Government $8 billion in positive revenue. *See* CBO, "The Budget and Economic Outlook: 2014 to 2024" at 110 n. 6 (Feb. 2014), Ex. 19.

130. The fundamental change in position by HHS and CMS to declare that the risk

corridors program would be "budget neutral" apparently was motivated by political considerations, not statutory or regulatory ones.

131. After the President released his Proposed Budget for FY 2015 on March 4, 2014, it was publicly reported that approximately $5.5 billion had been requested to cover expenses related to the risk corridors program. *See, e.g.,* Brianna Ehley, *$5.5 Billion for Obama's Contested Risk Corridors*, The Fiscal Times, Mar. 4, 2014, attached hereto at Exhibit 32; Alex Wayne, *Insurers' Obamacare Losses May Reach $5.5 Billion in 2015*, Bloomberg, Mar. 4, 2014, attached hereto at Exhibit 33.

132. A week later, on March 11, 2014, HHS and CMS published the final rule formalizing their about-face on the budget-neutrality requirements for the risk corridors program.

133. A month later, on April 11, 2014, HHS and CMS issued a bulletin entitled "Risk Corridors and Budget Neutrality," stating that:

> We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments. ***However, if risk corridors collections are insufficient to make risk corridors payments for a year, all risk corridors payments for that year will be reduced pro rata to the extent of any shortfall.*** Risk corridors collections received for the next year will first be used to pay off the payment reductions issuers experienced in the previous year in a proportional manner, up to the point where issuers are reimbursed in full for the previous year, and will then be used to fund current year payments. If, after obligations for the previous year have been met, the total amount of collections available in the current year is insufficient to make payments in that year, the current year payments will be reduced pro rata to the extent of any shortfall. If any risk corridors funds remain after prior and current year payment obligations have been met, they will be held to offset potential insufficiencies in risk corridors collections in the next year.

Bulletin, CMS, "Risk Corridors and Budget Neutrality" (Apr. 11, 2014) (emphasis added), attached hereto at Exhibit 34.

134. The April 11, 2014 Bulletin was the first instance in which HHS and CMS

publicly suggested that risk corridors charges collected from QHPs would be less than the Government's full mandatory risk corridors payment obligations owed to QHPs.

135. Only one month earlier, on March 11, 2014, HHS and CMS had publicly announced that "we believe that the risk corridors program as a whole will be budget neutral or, [sic] will result in net revenue to the Federal government in FY 2015 for the 2014 benefit year." 79 FR 13743, 13829 (Mar. 11, 2014), Ex. 28.

136. Nevertheless, CMS' April 11, 2014 Bulletin recognized that risk corridors payments are due annually, and lacked any express or implied statement that risk corridors payments for any year would not be due until sometime after the end of the risk corridors program in 2017.

137. HHS' and CMS' change in position to call for "budget neutrality" in the risk corridors program caused the CBO to update its projections for risk corridors payments and charges in April 2014. *See* CBO, "Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, April 2014" (Apr. 2014), attached hereto at Exhibit 35. CBO stated that it "believes that the Administration has sufficient flexibility to ensure that payments to insurers will approximately equal payments from insurers to the federal government, and thus that the program will have no net budgetary effect over the three years of its operation. (Previously, CBO had estimated that the risk corridor program would yield net budgetary savings of $8 billion.)" *Id.* at 18. Despite this revision, CBO's Table 3 continued to project that risk corridors payments would be made annually, rather than sometime after the end of the program in 2017. *See id.* at 10.

138. On December 16, 2014, Congress enacted the Cromnibus appropriations bill for fiscal year 2015, the "Consolidated and Further Continuing Appropriations Act, 2015" (the

"2015 Appropriations Act"). Pub. L. 113-235.

139. In the 2015 Appropriations Act, Congress specifically targeted the Government's existing, mandatory risk corridors payment obligations owed to QHPs, including Plaintiff, under Section 1342 of the ACA, limiting appropriations for those payment obligations from three large funding sources by including the following text at Section 227 of the 2015 Appropriations Act:

> ***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 (emphasis added), attached hereto at Exhibit 36.

140. Section 1342(b)(1) of Public Law 111-148 – referenced immediately above – is the ACA's prescribed methodology for the Government's mandatory risk corridors payments to QHPs.

141. Congress' failure to appropriate sufficient funds for risk corridors payments due for CY 2014, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridors payments to QHPs, including Plaintiff.

142. On October 1, 2015, after collecting risk corridors data from QHPs for CY 2014, HHS and CMS announced that it intended to prorate the risk corridors payments owed to QHPs, including Plaintiff, for CY 2014, stating that:

> Based on current data from QHP issuers' risk corridors submissions, issuers will pay $362 million in risk corridors charges, and have submitted for $2.87 billion in risk corridors payments for 2014. **At this time, assuming full collections of risk corridors charges, this will result in a proration rate of 12.6 percent.**

Bulletin, CMS, "Risk Corridors Payment Proration Rate for 2014" (Oct. 1, 2015), attached

hereto at Exhibit 37.

143. HHS and CMS further announced on October 1, 2015, that they would be collecting full risk corridors charges from QHPs in November 2015, and would begin making the prorated risk corridors payments to QHPs starting in December 2015. *See id.*

144. This December 2015 risk corridors payment schedule was consistent with an earlier payment schedule that CMS had provided to QHPs on April 14, 2015, before any CY 2014 risk corridors payments were due, specifically stating that the Government's "Remittance of Risk Corridors Payments and Charges" would be made on "9/2015 – 12/2015." Bulletin, CMS, "Key Dates in 2015: QHP Certification in the Federally-Facilitated Marketplaces; Rate Review; Risk Adjustment, Reinsurance, and Risk Corridors" (Apr. 14, 2015), attached hereto at Exhibit 38.

145. The risk corridors payment schedule that CMS announced was also consistent with its June 2015 presentations to insurers stating that in December 2015, "CMS will begin making RC [risk corridor] payments to issuers" for CY 2014. Presentation, CMS, "Completing the Risk Corridors Plan-Level Data Form 2014" (June 1, 2015), attached hereto at Exhibit 39.

146. HHS and CMS advised BCI by letter on October 29, 2015, that the Government "will not know the total loss or gain for the [temporary risk corridors] program until the fall of 2017 …. In the event of a shortfall for the 2016 program year, HHS will explore other sources of funding for risk corridors payments, subject to the availability of appropriations. This includes working with Congress on the necessary funding for outstanding risk corridors payments." Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to Zelda Geyer-Sylvia, CEO, BCI (Oct. 29, 2015), Ex. 26.

147. On April 1, 2016, CMS reaffirmed in a letter to another QHP that – although

"remaining risk corridor claims will be paid" – the amounts owed would be delayed and contingent upon the Government's receipt of sufficient risk corridors charges/collections for CY 2015 and/or CY 2016. Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to Highmark Health (Apr. 1, 2016), attached hereto at Exhibit 40.

148. Further delay in the Government's full payment of the CY 2014 and CY 2015 risk corridors amounts owed to BCI was announced on September 9, 2016, when CMS published a bulletin stating that "HHS anticipates that all 2015 benefit year collections will be used towards remaining 2014 benefit year risk corridors payments, and … [c]ollections from the 2016 benefit year will be used first for remaining 2014 benefit year risk corridors payments." Bulletin, CMS, "Risk Corridors Payments for 2015" (Sept. 9, 2016), Ex. 25.

149. The Government has thus left BCI, and other QHPs owed past-due risk corridors payments, to guess when—if ever—the United States will make the full CY 2014 and CY 2015 risk corridors payments owed to Plaintiff.

150. HHS and CMS failed to provide Plaintiff with any statutory authority for their unilateral decision to make only partial, prorated risk corridors payments for CY 2014, and to withhold delivery of full risk corridors payments for CY 2014 beyond CY 2015 or CY 2016.

151. Recognizing that the United States was acting in contravention of its statutory and regulatory payment obligations, on October 29, 2015, HHS and CMS sent a letter to BCI's CEO stating that:

> I wish to reiterate to you that the Department of Health and Human Services (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 following our 12.6% payment this winter as fiscal year 2015 obligations of the United States government for which full payment is required.

Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to Zelda Geyer-

Sylvia, CEO, BCI (Oct. 29, 2015), Ex. 26.

152. HHS and CMS made the same acknowledgement in a public bulletin on November 19, 2015, regarding CY 2014 risk corridors payments:

> 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), Ex. 24.

153. By stating that the remaining 87.4% of BCI's risk corridors payments for CY 2014 would be recorded "as fiscal year 2015 obligations of the United States government for which full payment is required," HHS and CMS admitted that full payment for CY 2014 was due and owing in 2015 – not at some future indeterminate date after CY 2016.

154. The Government's written acknowledgement of its risk corridors payment obligation for CY 2014, however, is an insufficient substitute for full and timely payment of the amounts owed as required by statute, regulation, contract, and HHS' and CMS' previous statements.

155. 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.

156. In the 2016 Appropriations Act, Congress again specifically targeted the Government's existing, mandatory risk corridors payment obligations owed to QHPs, including Plaintiff, under Section 1342 of the ACA, limiting appropriations for those payment obligations from three large funding sources by including the following text at Section 225 of the 2016 Appropriations Act:

> ***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 (emphasis added), attached hereto at Exhibit 41.

157. Again, Section 1342(b)(1) of Public Law 111-148 is the ACA's prescribed methodology for the Government's mandatory risk corridors payments to QHPs.

158. Congress' failure to appropriate sufficient funds for risk corridors payments due for CY 2014 and CY 2015, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridors payments to QHPs, including Plaintiff.

159. The proposed FY 2017 appropriations bill currently pending in the Senate contains restrictions on risk corridors appropriations identical to the language in the 2015 and 2016 Appropriation Acts. *See* S. 3040, Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2017, *available at* https://www.congress.gov/bill/114th-congress/senate-bill/3040/text.

BCI's Risk Corridors Payment Amounts for CY 2014

160. In a report released on November 19, 2015, HHS and CMS publicly announced QHPs' risk corridors charges and payments for CY 2014, and emphasized that "**Risk corridors charges payable to HHS are not prorated, and the full risk corridors charge amounts are noted in the chart below. Only risk corridors payment amounts are prorated.**" Bulletin, CMS, "Risk Corridors Payment and Charge Amounts for Benefit Year 2014" (Nov. 19, 2015) ("CY 2014 Risk Corridors Report"), attached hereto at Exhibit 42.

161. BCI's losses in the ACA Idaho Individual Market for CY 2014 resulted in the

Government being required to pay BCI a risk corridors payment of $39,437,313.04. *See* CY 2014 Risk Corridors Report at Table 13 – Idaho, Ex. 42.

162. The Government announced, however, that it will pay BCI a prorated amount of only $4,976,147.52 for BCI's losses in the ACA Idaho Individual Market for CY 2014. *See id.*

163. BCI's losses in the ACA Idaho Small Group Market for CY 2014 resulted in the Government being required to pay BCI a risk corridors payment of $600,529.29. *See id.*

164. The Government announced, however, that it will pay BCI a prorated amount of only $75,773.98 for BCI's losses in the ACA Idaho Small Group Market for CY 2014. *See id.*

165. Unlike some other QHPs, BCI did not have gains in the ACA Individual or Small Group Markets for CY 2014 that resulted in BCI being required to remit risk corridors charges to the Secretary of HHS. *See generally* CY 2014 Risk Corridors Report, Ex. 42.

166. Had BCI been required to remit a risk corridors charge to the Secretary of HHS, then BCI would have been required to remit 100% of the amount of the charge to HHS before the close of calendar year 2015, as it had affirmatively attested it would do. *See, e.g.*, *id.*; Program Attestations at 1 (Apr. 25, 2013), Ex. 07.

167. Plaintiff's risk corridors payments, and the Government's announced prorated payment amounts, for CY 2014 are summarized as follows:

Plaintiff	State / Market	Risk Corridors Amount	Prorated Amount	Percent Pro Rata
BCI	Idaho / Individual	$39,437,313.04	$4,976,147.52	12.6%
BCI	Idaho / Small Group	$600,529.29	$75,773.98	12.6%

168. In total, the Government is required to pay BCI risk corridors payments for CY 2014 of $40,037,842.33, but the Government announced that it would only make prorated payments to Plaintiff equal to 12.6% of the amounts owed ($5,051,921.50).

169. Had BCI been required to remit a risk corridors charge to the Secretary of HHS,

then BCI would have been required to pay the Government 100% of its CY 2014 Idaho Individual or Small Group market risk corridors charges – not some unilaterally determined fraction thereof – and to do so promptly. BCI was ready, willing, and able to satisfy this obligation to which it had attested, had BCI been required to do so.

170. The Government made some prorated risk corridors payments to Plaintiff for CY 2014 on December 21, 2015, February 23, 2016, and March 23, 2016, totaling $4,908,931.58, as of the date of the filing of this Complaint. This amount represents only approximately 12.26% of CY 2014 risk corridors payments that the Government owes to Plaintiff — even less than the 12.6% pro-rata amount that the Government stated it would pay BCI for CY 2014 risk corridors payments.

171. HHS lacks the authority, under statute, regulation or contract, to unilaterally withhold full and timely CY 2014 risk corridors payments from QHPs such as BCI.

Forecast Risk Corridors Payment and Charge Amounts for CY 2015

172. The Government has clearly stated that it will not make full and timely risk corridors payments to QHPs, including BCI, for CY 2015 by the end of CY 2016, *see, e.g.*, Bulletin, CMS, "Risk Corridors Payments for 2015" (Sept. 9, 2016), Ex. 25, breaching its risk corridors obligations for payments owed under the statute, regulations and contract for CY 2015 as well.

173. According to BCI's CY 2015 risk corridors data submitted to CMS on or about July 29, 2016, BCI expects that the Government owes BCI mandatory risk corridors payments in excess of $39,222,169 for CY 2015, based on the risk corridors formulas stated at Section 1342(b) of the ACA and 45 C.F.R. § 153.510(b).

174. In the 2016 Appropriations Act, Congress again specifically withheld

appropriations from three large funding sources for the Government's CY 2015 risk corridors payments. *See* 129 Stat. 2624, Ex. 41.

175. If the language in S. 3040, the Senate's proposed FY 2017 appropriations bill for HHS, is enacted, then the restrictions on risk corridors funding will continue into FY 2017. *See* S. 3040, Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2017, *available at* https://www.congress.gov/bill/114th-congress/senate-bill/3040/text.

176. HHS and CMS have repeatedly announced that CY 2015 risk corridors collections will first be paid for the 87.4% of CY 2014 risk corridors payments that remain due and owing to QHPs – approximately $2.5 billion – as a result of the Government's failure to provide full and timely CY 2014 risk corridors payments. *See, e.g.*, Bulletin, CMS, "Risk Corridors and Budget Neutrality" (Apr. 11, 2014), Ex. 34; 79 FR 30239, 30260 (May 27, 2014), attached hereto at Exhibit 43.

177. In its September 9, 2016 Bulletin, CMS confirmed that no CY 2015 risk corridors payments will be made by the end of CY 2016, stating that "based on our preliminary analysis, HHS anticipates that all 2015 benefit year collections will be used towards remaining 2014 benefit year risk corridors payments, and no funds will be available at this time for 2015 benefit year risk corridors payments." Bulletin, CMS, "Risk Corridors Payments for 2015," Ex. 25. Moreover, because CMS also states in the Bulletin that "[c]ollections from the 2016 benefit year will be used first for remaining 2014 benefit year risk corridors payments," the likelihood exists that *no* CY 2015 risk corridors payments – let alone *full* CY 2015 risk corridors payments – will *ever* be made by the United States. *Id.*

178. According to CMS' recent presentation to insurers, the Government's official

announcement regarding CY 2015 risk corridors payment and charge amounts is expected to be made in October 2016, after HHS and CMS have analyzed the relevant data recently collected from QHPs. *See* CMS, *Completing the Risk Corridors Plan-Level Data Form for the 2015 Benefit Year* at 7 (June 7, 2016), attached hereto at Exhibit 44.

179. The same CMS presentation represented to BCI and other QHPs that "CMS will begin making RC [risk corridor] payments to issuers" in "December 2016." *Id.*

BCI's and Other QHPs' Efforts to Resolve Issues Out of Court

180. Since learning of HHS' and CMS' decision not to make the full risk corridors payments owed to Plaintiff in a timely manner, BCI and other similarly situated QHPs have made significant efforts to resolve the issue. Unfortunately, their efforts to persuade HHS and CMS to honor the Government's statutory, regulatory and contractual obligations to make full and timely risk corridors payments have been unsuccessful to date.

181. On March 17, 2016, another QHP that is owed risk corridors payments for CY 2014 sent a formal demand letter to HHS and CMS. *See* Letter from Highmark to HHS and CMS (March 17, 2016), attached hereto at Exhibit 45.

182. The Government responded to the QHP's March 17, 2016 demand letter on April 1, 2016, affirming that "2014 risk corridor payments … will be paid," but repeating the Government's plan to make such payments out of CY 2015 risk corridors collections, and if necessary, CY 2016 collections – a position that is without support in Section 1342 or its implementing regulations. Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to Highmark Health (Apr. 1, 2016) ("Response Letter"), Ex. 40.

183. The Government has taken the extraordinary position that no risk corridors payments are due until some indeterminate date in 2017 or later, after the end of the risk

corridors program, when, according to the Government, total risk corridors charges and payments for all three years can be tallied and any balances due can be reconciled. *See* Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to Zelda Geyer-Sylvia, CEO, BCI (Oct. 29, 2015), Ex. 26 ("[W]e will not know the total loss or gain for the program until the fall of 2017, when the data from all three years of the program can be analyzed and verified.").

184. In other words, the Government now contends that, despite the fact that the ACA indicates – and CMS' guidance, communications and pronouncements to QHPs since its enactment substantiate – that risk corridors payment amounts mandated by Section 1342 are to be calculated and submitted to CMS annually, and paid to and received by QHPs annually, the United States is not obligated to make *any* risk corridors payments until some indeterminate time *after* all three years of the risk corridors program have expired.

185. There is no support for the Government's extraordinary position in Section 1342 of the ACA, 45 C.F.R. Part 153, the QHP Agreements, any other express or implied-in-fact agreements, or anywhere else in the ACA or its implementing regulations.

186. The Government's current position on when it is obligated to pay the risk corridors amounts due to QHPs for each year is contrary to the nature, purpose, intent, and language of Section 1342 and its implementing regulations, as well as the risk corridors program's role within the ACA as a temporary program designed to mitigate the potentially significant risks posed *each year* within the first three years of the ACA Exchanges and smooth out *annual* premiums.

187. HHS' and CMS' original and statutorily consistent position – not the Government's current, *post hoc* litigation interpretation – was that full risk corridors payments

due would be made annually.

188. Indeed, Section 1342(b)(1) provides that the Secretary "shall pay to the plan" a certain amount if the plan's allowable costs "for any plan year" exceed the targeted amount by a certain threshold. 42 U.S.C. § 18062(b)(1), Ex. 02. Section 1342(a) also directs that this payment schedule must apply annually in "calendar years 2014, 2015, and 2016." 42 U.S.C. § 18062(a).

189. CMS and HHS' guidance in the Federal Register in 2011 and 2012 stated that, just like the deadline for QHPs to remit risk corridors charges to the Government, HHS should make risk corridors payments to QHPs "within a 30-day period after HHS determines that a payment should be made to the QHP issuer." 76 FR 41929, 41943 (July 15, 2011), Ex. 12; 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 01.

190. Even CMS' April 11, 2014 Bulletin regarding "Risk Corridors and Budget Neutrality" acknowledged that risk corridors payments are due annually. *See* Bulletin, CMS, "Risk Corridors and Budget Neutrality" (Apr. 11, 2014), Ex. 34. The CBO's budget projections published both before and after the Government's politically motivated "budget neutral" announcement in March 2014 expressed an understanding that risk corridors payments would be made annually. *See* CBO, "The Budget and Economic Outlook: 2014 to 2024" at 109-110 (Feb. 2014), Ex. 19; CBO, "Updated Estimates of the Effects of the Insurance Coverage Provisions of the Affordable Care Act, April 2014" at 10, 18 (Apr. 2014), Ex. 35.

191. HHS asserted to the GAO in May 2014 that although "[t]o date, HHS has not made or received any payments under section 1342 of PPACA[,] HHS intends to begin collections and payments in fiscal year 2015." Letter from William B. Schulz, General Counsel, HHS, to Julia C. Matta, Assistant General Counsel, GAO (May 20, 2014), Ex. 20.

192. In April 14, 2015, before any CY 2014 risk corridors payments were due, CMS provided QHPs with written timelines, such as CMS' "Key Dates in 2015" specifically stating that the Government's "Remittance of Risk Corridors Payments and Charges" would be made on "9/2015 – 12/2015." Bulletin, CMS, "Key Dates in 2015: QHP Certification in the Federally-Facilitated Marketplaces; Rate Review; Risk Adjustment, Reinsurance, and Risk Corridors" (Apr. 14, 2015), Ex. 38.

193. In June 2015, CMS stated in presentations to insurers that in December 2015, "CMS will begin making RC [risk corridors] payments to issuers" for CY 2014. Presentation, CMS, "Completing the Risk Corridors Plan-Level Data Form 2014" (June 1, 2015), Ex. 39.

194. The Government then actually did make partial CY 2014 risk corridors payments at the end of CY 2015 and in the first quarter of CY 2016, demonstrating that the Government understands and acknowledges that risk corridors payments are due and owing annually.

195. Even after asserting its *post hoc* litigation position that no risk corridors payments are owed until 2017 or later, CMS' statements to BCI and other QHPs have undercut its stance.

196. CMS told QHPs in two presentations in June 2016 that "CMS will begin making RC [risk corridors] payments to insurers" for CY 2015 in "December 2016." CMS, *Completing the Risk Corridors Plan-Level Data Form for the 2015 Benefit Year* at 7 (June 7, 2016), Ex. 44.

197. CMS' September 9, 2016 Bulletin reaffirms CMS' true belief that an annual payment schedule is required, stating that "remittance of risk corridors payments" for CY 2015 will be made "on the same schedule as last year." Bulletin, CMS, "Risk Corridors Payments for 2015" (Sept. 9, 2016), Ex. 25.

198. These inconsistencies from CMS' statements and conduct belie the *post hoc* nature of the Government's current litigation position.

199. Confirming that HHS and CMS interpreted their risk corridors payment obligation to be an annual one for *each* of the three years of the temporary program, CMS officially booked its CY 2014 risk corridors shortfall obligation amount as a FY 2015 obligation – not as a FY 2017 obligation. *See, e.g.*, Bulletin, CMS, "Risk Corridors Payments for the 2014 Benefit Year" (Nov. 19, 2015), Ex. 24 ("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 of the United States Government for which full payment is required.").

200. The Government's Response Letter of April 1, 2016, states Defendant's final position regarding its refusal to fully and timely pay risk corridors payments owed for CY 2014 to QHPs, including BCI. *See* Ex. 40.

201. To the extent required, Plaintiff has exhausted its non-judicial avenues to remedy the Government's failure to provide the full and timely mandated risk corridors payments required by statute, regulation and contract.

COUNT I
Violation of Federal Statute and Regulation

202. Plaintiff realleges and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

203. Section 1342(b)(1) of the ACA mandates compensation, expressly stating that the Secretary of HHS "shall pay" risk corridors payments to QHPs in accordance with the payment formula set forth in the statute.

204. HHS' and CMS' implementing regulation at 45 C.F.R. § 153.510(b) also mandates compensation, expressly stating that HHS "will pay" risk corridors payments to QHPs in accordance with the payment formula set forth in the regulation, which formula is

mathematically identical to the formula in Section 1342(b)(1) of the ACA.

205. HHS' and CMS' regulation at 45 C.F.R. § 153.510(d) requires a QHP to remit charges to HHS within 30 days after notification of such charges.

206. HHS' and CMS' statements in the Federal Register on July 15, 2011, and March 23, 2012, state that risk corridors "payment deadlines should be the same for HHS and QHP issuers." 76 FR 41929, 41943 (July 15, 2011), Ex. 12; 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 01.

207. BCI was a QHP in CY 2014, *see* Ex. 03, and was qualified for and entitled to receive mandated risk corridors payments from the Government.

208. BCI is entitled under Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) to recover full and timely mandated risk corridors payments from the Government for CY 2014.

209. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $40,037,842.33 that the Government concedes it owes BCI for CY 2014. *See* Ex. 42.

210. The United States has failed to make full and timely risk corridors payments to BCI for CY 2014, despite the Government repeatedly confirming in writing that Section 1342 mandates that the Government make risk corridors payments.

211. Congress' failure to appropriate sufficient funds for risk corridors payments due for CY 2014, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' statutory obligation created by Section 1342 to make full and timely risk corridors payments to QHPs, including Plaintiff.

212. The Government's failure to make full and timely risk corridors payments to BCI for CY 2014 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).

213. As a result of the United States' violation of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b), BCI has been damaged in the amount of at least $40,037,842.33, less any prorated payments made by the Government, together with interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT II
Breach of Express Contract

214. Plaintiff realleges and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

215. BCI entered into a valid written QHP Agreement with CMS: the CY 2014 QHP Agreement. *See* Ex. 03.

216. The CY 2014 QHP Agreement was executed by representatives of the Government who had express or implied actual authority to bind the United States, and was entered into with mutual assent and consideration by both parties.

217. The CY 2014 QHP Agreement obligates CMS to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions." *Id.* at § II.c.

218. By agreeing to become a QHP, BCI agreed to provide health insurance on particular exchanges established under the ACA, and agreed and attested to accept the obligations, responsibilities and conditions the Government imposed on QHPs – subject to the implied covenant of good faith and fair dealing – under the ACA and, *inter alia*, 45 C.F.R. §§ 153.10 *et seq.* and 155.10 *et seq*. *See, e.g.*, *id.*; Program Attestations at 1 (Apr. 25, 2013), Ex. 07.

219. BCI satisfied and complied with its obligations and/or conditions under the CY 2014 QHP Agreement.

220. The CY 2014 QHP Agreement provides that it "will be governed by 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 …." Ex. 03 at § V.g.

221. The CY 2014 QHP Agreement therefore incorporates the provisions of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) into the CY 2014 QHP Agreement.

222. The Government's statutory and regulatory obligations to make full and timely risk corridors payments were significant factors material to BCI's agreement to enter into the CY 2014 QHP Agreement.

223. The Government's failure to make full and timely risk corridors payments to Plaintiff is a material breach of CMS' obligation to support BCI's functions as a QHP.

224. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $40,037,842.33, that the Government concedes it owes BCI for CY 2014. *See* Ex. 42.

225. Congress' failure to appropriate sufficient funds for risk corridors payments due for CY 2014, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' contractual obligation to make full and timely risk corridors payments to Plaintiff.

226. The Government's breach of Section 1342(b)(1) of the ACA and 45 C.F.R. § 153.510(b) by failing to make full and timely CY 2014 risk corridors payments to BCI is a material breach of the CY 2014 QHP Agreement.

227. As a result of the United States' material breaches of the CY 2014 QHP Agreement that it entered into with Plaintiff, BCI has been damaged in the amount of at least $40,037,842.33, less any prorated payments made by the Government, together with any losses

actually sustained as a result of the Government's breach, reliance damages, interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT III
Breach of Implied-In-Fact Contract

228. Plaintiff realleges and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

229. In the alternative, Plaintiff and the Government knowingly and voluntarily entered into valid implied-in-fact contracts regarding the Government's obligation to make full and timely risk corridors payments to BCI for CY 2014 in exchange for BCI's agreement to become a QHP and participate in the Idaho ACA Exchanges.

230. Section 1342 of the ACA, HHS' implementing regulations (45 C.F.R. § 153.510), and HHS' and CMS' repeated admissions regarding their obligation to make risk corridors payments were made by representatives of the Government who had express or implied actual authority to bind the United States, and constituted a clear and unambiguous offer by the Government to make full and timely risk corridors payments to health insurers, including Plaintiff, that agreed to participate as QHPs in the CY 2014 ACA Exchanges and were approved as certified QHPs by the Government.

231. BCI accepted the Government's offer by agreeing to become a QHP and to participate in and accept the uncertain risks imposed by the ACA Exchanges.

232. By agreeing to become a QHP, Plaintiff agreed to provide health insurance on particular exchanges established under the ACA, and to accept the obligations, responsibilities and conditions the Government imposed on QHPs – subject to the implied covenant of good faith and fair dealing – under the ACA and, *inter alia*, 45 C.F.R. §§ 153.10 *et seq.* and 155.10 *et seq*.

233. BCI certified its agreement by executing the QHP Agreements and the attestations required by the Government, including the attestations regarding risk corridors payments and charges. *See, e.g.*, Ex. 03; Ex. 07.

234. BCI satisfied and complied with its obligations and/or conditions which existed under the implied-in-fact contracts.

235. The Government's agreement to make full and timely risk corridors payments was a significant factor material to BCI's agreement to become a QHP and participate in the CY 2014 ACA Exchanges.

236. The parties' mutual intent to contract is further confirmed by the parties' conduct, performance and statements, including the execution by the parties of the CY 2014 QHP Agreement 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," *see* Ex. 03 at § V.g., BCI's execution of attestations including the attestations regarding risk corridors payments and charges, *see* Ex. 07, and the Government's repeated assurances that full and timely risk corridors payments would be made and would not be subject to budget limitations. *See, e.g.*, 78 FR 15409, 15473 (Mar. 11, 2013), Ex. 14.

237. Each of the implied-in-fact contracts were authorized or ratified by representatives of the Government who had express or implied actual authority to bind the United States (including but not limited to Kevin J. Counihan), were clearly founded upon a meeting of the minds between the parties and entered into with mutual assent, and were supported by consideration.

238. The risk corridors program's protection from uncertain risk and new market

instability was a real benefit that significantly influenced BCI's decision to agree to become a QHP and participate in the CY 2014 ACA Exchanges.

239. BCI, in turn, provided a real benefit to the Government by agreeing to become a QHP and participate in the CY 2014 ACA Exchanges in Idaho, despite the uncertain financial risk.

240. Adequate insurer participation was crucial to the Government's achieving the overarching goal of the CY 2014 ACA Exchange programs: 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 health insurer uncertainty.

241. The Government induced BCI to participate in the CY 2014 ACA Exchanges 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.

242. The Government repeatedly acknowledged its obligations to make full and timely risk corridors payments to qualifying QHPs for CY 2014 through its conduct and statements to the public and to BCI and other similarly situated QHPs, made by representatives of the Government who had express or implied actual authority to bind the United States. *See, e.g.*, 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 01; Letter from Kevin J. Counihan, CEO of Health Insurance Marketplaces, CMS, to Zelda Geyer-Sylvia, CEO, BCI (Oct. 29, 2015), Ex. 26; Response Letter (Apr. 1, 2016), Ex. 40.

243. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $40,037,842.33, that the Government

concedes it owes BCI for CY 2014. *See* Ex. 42.

244. Congress' failure to appropriate sufficient funds for risk corridors payments due for CY 2014, without modifying or repealing Section 1342 of the ACA, did not defeat or otherwise abrogate the United States' contractual obligation to make full and timely risk corridors payments to Plaintiff.

245. The Government's failure to make full and timely CY 2014 risk corridors payments to BCI is a material breach of the implied-in-fact contracts.

246. As a result of the United States' material breaches of its implied-in-fact contracts that it entered into with BCI regarding the CY 2014 ACA Exchanges, Plaintiff has been damaged in the amount of at least $40,037,842.33, less any prorated payments made by the Government, together with any losses actually sustained as a result of the Government's breach, reliance damages, interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT IV
Anticipatory Breach

247. Plaintiff realleges and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

248. BCI's express QHP Agreements for CY 2015 and CY 2016 were with YHI, the administrator of the Idaho ACA Exchange, rather than with CMS.

249. BCI and the United States knowingly and voluntarily entered into valid implied-in-fact contracts for CY 2015 regarding the Government's obligation to make full and timely risk corridors payments to BCI, in exchange for BCI's agreement to continue participating as a QHP on the Idaho ACA Exchanges (the "CY 2015 Agreements").

250. The CY 2015 Agreements were authorized or ratified by representatives of the Government who had actual authority to bind the United States (including but not limited to

Kevin J. Counihan), were clearly founded upon a meeting of the minds between the parties and entered into with mutual assent, and were supported by consideration.

251. BCI has fully performed its obligations under the CY 2015 Agreements.

252. In the course of performing its obligations as a QHP, BCI experienced losses qualifying it to CY 2015 risk corridors payments of approximately $39,222,169, pursuant to the data that BCI submitted to CMS on or about July 29, 2016.

253. The Government has clearly manifested its intent not to render performance under the CY 2015 Agreements, by stating in writing that the Government will not make full and timely risk corridors payments to BCI for CY 2015 by the end of CY 2016.

254. CMS' September 9, 2016 Bulletin expressly states that "no funds will be available at this time for 2015 benefit year risk corridors payments." Bulletin, CMS, "Risk Corridors Payments for 2015" (Sept. 9, 2016), Ex. 25.

255. Based on the Government's affirmative statement that "no funds will be available at this time for 2015 benefit year risk corridors payments," *id.*, BCI treats the Government's repudiation of its risk corridors payment obligations under the CY 2015 Agreements as a total breach.

256. As a result of the United States' repudiation of its payment obligations under the CY 2015 Agreements, Plaintiff has been damaged in the amount of at least $39,222,169, together with any losses actually sustained as a result of the Government's breach, reliance damages, interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT V
Breach of Implied Covenant of Good Faith and Fair Dealing

257. Plaintiff realleges and incorporates by reference all of the allegations contained in the preceding paragraphs as if fully set forth herein.

258. A covenant of good faith and fair dealing is implied in every contract, express or implied-in-fact, including those with the Government, and imposes obligations on both contracting parties that include the duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract.

259. The express or, alternatively, the implied-in-fact contracts entered into between the United States and Plaintiff regarding the CY 2014 ACA Exchanges created the reasonable expectations for BCI that full and timely CY 2014 risk corridors payments, which BCI regarded as an important part of the contract consideration, would be paid by the Government to QHPs, just as the Government expected that any CY 2014 risk corridors remittance charges owed would be fully and timely paid by QHPs to the Government.

260. By failing to make full and timely CY 2014 risk corridors payments to BCI, the United States has destroyed Plaintiff's reasonable expectations regarding the fruits of the express or, alternatively, the implied-in-fact contracts, in breach of an implied covenant of good faith and fair dealing existing therein.

261. Despite the Government's failure to honor its contractual obligations, had BCI been required to remit a risk corridors charge to the Government for CY 2014, Plaintiff would have done so in good faith as it had agreed and attested to do.

262. The CY 2014 QHP Agreement allows CMS to "undertake all reasonable efforts to implement systems and processes that will support [QHP] functions," but does not define standards for CMS' implementation of the function-supporting systems and processes.

263. Where, as here, an agreement affords CMS the power to make a discretionary decision without defined standards, the duty to act in good faith limits the Government's ability

to act capriciously to contravene Plaintiff's reasonable contractual expectations.

264. CMS is afforded discretion in determining the systems and processes that it will implement to support Plaintiff's functions as a QHP.

265. Congress granted HHS with rulemaking authority regarding the risk corridors program in Section 1342(a) of the ACA. HHS and CMS are permitted to establish charge remittance and payment deadlines that support QHP functions. HHS and CMS have an obligation to exercise the discretion afforded to them in good faith, and not arbitrarily, capriciously or in bad faith.

266. The United States breached the implied covenant of good faith and fair dealing by, among other things:

(a) Inserting in HHS and CMS regulations a 30-day deadline for a QHP's full remittance of risk corridors charges to the Government, but failing to create a similar deadline for the Government's full payment of risk corridors payments to QHPs, despite stating that QHPs and the Government should be subject to the same payment deadline (*see, e.g.*, 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 01);

(b) Requiring QHPs to fully remit risk corridors charges to the Government, but unilaterally deciding that the Government may make prorated risk corridors payments to QHPs, despite earlier stating that QHPs and the Government should be subject to the same payment deadline (*see, e.g.*, 77 FR 17219, 17238 (Mar. 23, 2012), Ex. 01);

(c) In Section 227 of the 2015 Appropriations Act, legislatively targeting the Government's risk corridors payment obligations to a small group of

QHPs to save the Government money by limiting funding sources for CY 2014 risk corridors payments, after BCI had undertaken significant expense in performing its obligations as a QHP in the Idaho ACA Exchanges based on BCI's reasonable expectation that the Government would make full and timely risk corridors payments if BCI experienced sufficient losses in CY 2014;

(d) In Section 225 of the 2016 Appropriations Act, legislatively targeting the Government's risk corridors payment obligations to a small group of QHPs to save the Government money by limiting funding sources for CY 2014 risk corridors payments, after BCI had undertaken significant expense in performing its obligations as a QHP in the Idaho ACA Exchanges based on BCI's reasonable expectation that the Government would make full and timely risk corridors payments if BCI experienced sufficient losses in CY 2014; and

(e) Making statements regarding risk corridors payments upon which BCI relied to agree to become a QHP and participate in the ACA Exchanges, (*see, e.g.*, 78 FR 15409, 15473 (Mar. 11, 2013) , Ex. 14 ("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."), then depriving BCI of full and timely risk corridors payments after Plaintiff had fulfilled its obligations as a QHP by participating in the Idaho ACA Exchanges and had suffered losses which the Government had

promised would be shared through mandatory risk corridors payments (*see, e.g.*, 79 FR 13743, 13829 (Mar. 11, 2014), Ex. 28 ("HHS intends to implement this [risk corridors] program in a budget neutral manner."); Am. Acad. of Actuaries, Comment to HHS on Proposed Rule, Exchange and Insurance Market Standards for 2015 and Beyond at 3 (Apr. 21, 2014), Ex. 29 ("The new budget neutrality policy … would change the basic nature of the risk corridor program retroactively" and "changes the nature of the risk corridor program from one that shares risk between issuers and CMS to one that shares risk between competing issuers.").

267. In the CY 2014 Risk Corridors Report, HHS and CMS acknowledged and published the full risk corridors payment amount, totaling $40,037,842.33, that the Government concedes it owes BCI for CY 2014. *See* Ex. 42.

268. Additionally, BCI's data submitted to CMS on or about July 29, 2016, states that BCI expects that the Government owes BCI mandatory risk corridors payments in excess of $39,222,169 for CY 2015.

269. As a direct and proximate result of the aforementioned breaches of the covenant of good faith and fair dealing, BCI has been damaged in the amount of at least $79,260,011.33, less any prorated payments made by the Government, together with any losses actually sustained as a result of the Government's breach, reliance damages, interest, costs of suit, and such other relief as this Court deems just and proper.

COUNT VI
Taking Without Just Compensation
in Violation of the Fifth Amendment to the U.S. Constitution

270. Plaintiff realleges and incorporates by reference all of the allegations contained in

the preceding paragraphs as if fully set forth herein.

271. The Government's actions complained of herein constitute a deprivation and taking of Plaintiff's property for public use without just compensation, in violation of the Fifth Amendment to the U.S. Constitution.

272. BCI has a vested property interest in its contractual, statutory, and regulatory rights to receive statutorily-mandated risk corridors payments for CY 2014 and CY 2015. BCI had a reasonable investment-backed expectation of receiving the full and timely CY 2014 and CY 2015 risk corridors payments payable to it under the statutory and regulatory formula, based on its QHP Agreement, its implied-in-fact contracts with the Government, Section 1342 of the ACA, HHS' implementing regulations (45 C.F.R. § 153.510), and HHS' and CMS' direct public statements.

273. The Government expressly and deliberately interfered with and has deprived Plaintiff of property interests and its reasonable investment-backed expectations to receive full and timely risk corridors payments for CY 2014 and CY 2015. On March 11, 2014, HHS for the first time announced, in direct contravention of Section 1342 of the ACA, 45 C.F.R. § 153.510(b) and its previous public statements, that it would administer the risk corridors program "in a budget neutral manner." 79 FR 13743, 13829 (Mar. 11, 2014), Ex. 28.

274. On April 11, 2014, HHS and CMS stated for the first time that CY 2014 risk corridors payments would be reduced pro rata to the extent of any shortfall in risk corridors collections. *See* Bulletin, CMS, "Risk Corridors and Budget Neutrality" (Apr. 11, 2014), Ex. 34.

275. Further, in Section 227 of the 2015 Appropriations Act and Section 225 of the 2016 Appropriations Act, Congress specifically targeted the Government's existing, mandatory risk corridors payment obligations under Section 1342 of the ACA, expressly limiting the source

of funding for the United States' CY 2014 and CY 2015 risk corridors payment obligations owed to a specific small group of insurers, including BCI. *See* 128 Stat. 2491, Ex. 36; 129 Stat. 2624, Ex. 41. HHS and CMS continue to refuse to make full and timely risk corridors payments to BCI, and therefore the Government has deprived Plaintiff of the economic benefit and use of such payments.

276. In its September 9, 2016 Bulletin, CMS confirmed that no CY 2015 risk corridors payments will be made by the end of CY 2016, and that past-due CY 2014 risk corridors payments will not be paid in full by the end of CY 2016 – the one-year anniversary of when the CY 2014 risk corridors payments should have been fully and timely paid.

277. The Government's action in withholding, with no legitimate governmental purpose, the full and timely CY 2014 and CY 2015 risk corridors payments owed to BCI constitutes a deprivation and taking of Plaintiff's property interests and requires payment to Plaintiff of just compensation under the Fifth Amendment of the U.S. Constitution.

278. BCI is entitled to receive just compensation for the United States' taking of its property in the amount of at least $79,260,011.33, less any prorated payments made by the Government, together with interest, costs of suit, and such other relief as this Court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against the Defendant, the United States of America, as follows:

(1) For Count I, awarding damages sustained by Plaintiff, in the amount of at least $40,037,842.33, subject to proof at trial, less any prorated risk corridors payments made by the Government, as a result of the Defendant's violation of Section 1342(b)(1) of the ACA and of 45

C.F.R. § 153.510(b) regarding the CY 2014 risk corridors payments;

(2) For Count II, awarding damages sustained by Plaintiff, in the amount of at least $40,037,842.33, subject to proof at trial, less any prorated risk corridors payments made by the Government, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's breaches of the CY 2014 QHP Agreement regarding the CY 2014 risk corridors payments;

(3) Alternatively, for Count III, awarding damages sustained by Plaintiff, in the amount of at least $40,037,842.33, subject to proof at trial, less any prorated risk corridors payments made by the Government, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's breaches of its implied-in-fact contract with Plaintiff regarding the CY 2014 risk corridors payments;

(4) For Count IV, awarding damages sustained by Plaintiff, in the amount of at least $39,222,169, subject to proof at trial, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's total anticipatory breaches of the implied-in-fact contracts entered into between the United States and Plaintiff regarding the CY 2015 risk corridors payments;

(5) For Count V, awarding damages sustained by Plaintiff, in the amount of at least $79,260,011.33, subject to proof at trial, less any prorated risk corridors payments made by the Government, together with any losses actually sustained as a result of the Government's breach, and reliance damages, as a result of the Defendant's breaches of the implied covenant of good faith and fair dealing that exists in the CY 2014 QHP Agreement or, alternatively, the implied-in-fact contracts regarding the CY 2014 and CY 2015 risk corridors payments;

(6) For Count VI, awarding damages sustained by Plaintiff, in the amount of at least

$79,260,011.33, subject to proof at trial, less any prorated risk corridors payments made by the Government, as a result of the Defendant's taking of Plaintiff's property without just compensation in violation of the Fifth Amendment to the U.S. Constitution regarding the CY 2014 risk corridors payments;

(7) Should the Court determine, under any Count, that the Government is liable to Plaintiff for monetary damages for failure to make full and timely risk corridors payments for CY 2014 and/or CY 2015, and thus enter judgment against the United States, Plaintiff further requests that the Court declare, as incidental to that monetary judgment, that based on the Court's legal determinations as to the Government's CY 2014 and/or CY 2015 risk corridors payment obligations, the Government must make full and timely CY 2015 and/or CY 2016 risk corridors payments to Plaintiff if it experiences qualifying losses during that year;

(8) Awarding all available interest, including, but not limited to, post-judgment interest, to Plaintiff;

(9) Awarding all available attorneys' fees and costs to Plaintiff; and

(10) Awarding such other and further relief to Plaintiff as the Court deems just and equitable.

Dated: October 24, 2016

Respectfully Submitted,

s/ Lawrence S. Sher

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