UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

NICK GERHART, *in his capacity as Liquidator of CoOportunity Health, Inc.*, and DAN WATKINS, *in his capacity as Special Deputy Liquidator of CoOportunity Health, Inc.*,	)	
Plaintiffs,	)	
v.	)	**No. 16-cv-00151**
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR MEDICARE & MEDICAID SERVICES, SYLVIA MATHEWS BURWELL, *in her capacity as Secretary of the U.S. Department of Health and Human Services*, and THE UNITED STATES,	)	
Defendants.	)	

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiffs state the following allegations and causes of action against Defendants.

Parties

1. Plaintiff, Nick Gerhart, is the Iowa Insurance Commissioner ("Commissioner") appointed by the District Court of Polk County, Iowa, to serve as the liquidator ("Liquidator") of CoOportunity Health, Inc. ("CoOportunity"), in the matter captioned *In re CoOportunity Health*, No. EQCE77579, pending before the District Court of Polk County, Iowa. Mr. Gerhart brings this suit in his capacity of Liquidator of CoOportunity.

2. Plaintiff, Dan Watkins, brings this suit in his capacity as the court-appointed Special Deputy Liquidator of CoOportunity.

3. Defendant, the U.S. Department of Health and Human Services ("HHS"), is an agency of the federal government.

4. Defendant, the Centers for Medicare & Medicaid Services ("CMS"), is an operating division of HHS and is an agency of the federal government.

5. Defendant, Sylvia Mathews Burwell, is the Secretary of HHS.

6. Defendant, the United States, is a proper defendant to this action under 5 U.S.C. § 702.

Jurisdiction and Venue

7. Plaintiffs seek judicial review of the agency action of Defendants pursuant to 5 U.S.C. § 702 of the federal Administrative Procedure Act ("APA"), which provides that "[a] person suffering legal wrong because of an agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

8. In the alternative, to the extent any of the relief requested herein is deemed unavailable under the APA, Plaintiffs seek such relief under the All Writs Act, 28 U.S.C. § 1651.

9. Plaintiffs seek a declaratory judgment and injunctive relief as to the agency actions addressed herein.

10. The Court has jurisdiction over this dispute and the parties, which include federal agencies, a federal official, and substantive causes of action arising under the laws of the United States.

11. Venue is proper in this Court because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district, this dispute impacted the CoOportunity Estate in this district, with such Estate being liquidated in a proceeding pending before the

District Court of Polk County, state of Iowa, and Plaintiff Nick Gerhart resides in and performs services in his capacity as Liquidator of CoOportunity in this district.

12. In addition, Defendants have expressly consented to the jurisdiction of this Court through their agreement to this forum in the Loan Agreement (described below) and have waived any claim of lack of jurisdiction or *forum non conveniens.*

CoOportunity Received Federal Funding Under the ACA to Operate as a "CO-OP"

13. On March 23, 2010, President Obama signed into law what is referred to as the "Patient Protection and Affordable Care Act" or "ACA."

14. The ACA established the Consumer Operated and Oriented Plan ("CO-OP") program, which authorized creation of nonprofit health insurance issuers to offer qualified health plans to individuals and small groups. 42 U.S.C. § 18042(a)(1)-(2).

15. Through the ACA, Congress authorized and directed HHS/CMS to establish and operate the CO-OP program.

16. On July 28, 2010, HHS issued a Funding Opportunity Announcement for the federal CO-OP program under the ACA.

17. In October 2011, CoOportunity[1] applied for federal funding to operate as a CO-OP.

18. The ACA authorized two loan types "to persons applying to become qualified nonprofit health insurance issuers" under the CO-OP program:

a. Start-up loans "to provide assistance to such person in meeting its start-up costs;" and

b. Solvency loans "to provide assistance to such person in meeting any

[1] At the time, CoOportunity operated under the name of Midwest Members Health.

> solvency requirements of States in which the person seeks to be licensed to issue qualified health plans." 42 U.S.C. § 18042(b)(1).

19. In 2012, HHS approved and authorized federal funding to CoOportunity to operate as a CO-OP as defined in 42 U.S.C. § 18042(a)(1)-(2).

20. On February 17, 2012, HHS/CMS and CoOportunity closed on a Loan Agreement that included Promissory Notes for a Start-up Loan to CoOportunity of $14,700,000 (Appendix 2) and a Solvency Loan to CoOportunity of $97,912,100 (Appendix 4).

21. The Solvency Loan is a "surplus note," meaning it is subordinated to other creditor claims, including policyholder level claims; the obligations under it are not subject to set-off; and under Iowa law, it may only be repaid upon approval of the Iowa Insurance Commissioner.

22. CoOportunity received the Start-up Loan and Solvency Loan from HHS/CMS pursuant to 42 U.S.C. § 18042(b)(a)(A)-(B) and the Loan Agreement.

CoOportunity Operated as an Insurer Licensed by the States of Iowa and Nebraska

23. Although CoOportunity received funding and was subject to the federal CO-OP program, the company was established and operated as an Iowa company licensed by the states of Iowa and Nebraska to issue health insurance plans in those states.

24. CoOportunity was established as an Iowa life insurance company incorporated and licensed to transact insurance under Iowa Code chapters 504 and 508. Iowa Code § 508.29 authorizes a life insurance company to enter into contracts for insurance for the health of persons and against personal injuries.

25. CoOportunity was licensed to do business in Iowa beginning on March 22, 2013. Its home office was at 2700 Westown Parkway, Suite 345, West Des Moines, Iowa 50266-1411.

26. Pursuant to Iowa Code §§ 507C.2(16) and 507C.3, CoOportunity is subject to the Iowa Insurers Supervision, Rehabilitation and Liquidation Act (hereinafter the "Liquidation Act"), chapter 507C, 2014 Code of Iowa ("Ch. 507C").

The Financial Collapse of CoOportunity and
Resulting State Rehabilitation and Liquidation Proceedings

27. CoOportunity first offered health insurance plans to individuals and groups during the "open enrollment" period beginning on October 1, 2013, for health insurance coverage effective January 1, 2014.

28. During 2014, CoOportunity's first year operating as a health insurer, the company experienced serious and sustained financial distress.

29. On April 30, 2014, HHS/CMS issued guidance that there were additional loan funds available.

30. On May 5, 2014, CoOportunity requested an additional $32.7 million in Solvency Loan funds from HHS/CMS, which CoOportunity reported was necessary due to the unanticipated high member enrollment and corresponding claims costs, as well as anticipated timing of 3Rs program repayments.

31. That request remained outstanding until September 2014, when HHS/CMS approved the additional funding.

32. On August 22, 2014, HHS/CMS issued guidance that additional loan funding was available to CO-OPs.

33. On September 22, 2014, CoOportunity submitted a request for an additional Solvency Loan of $55,000,000 to HHS/CMS. That request remained outstanding until December 2014.

34. On December 16, 2014, CMS advised CoOportunity and the Commissioner that it would not provide the additional $55 million in solvency funding to CoOportunity. On the same day that HHS/CMS notified CoOportunity that HHS/CMS was denying CoOportunity's request for an additional $55 million in solvency funding (December 16, 2014), Plaintiff, in his capacity as the Iowa Insurance Commissioner, placed CoOportunity under a Supervision Order due to its hazardous financial condition as defined by Iowa Code § 507C.9 and Iowa Admin. Code §§ 191-110.1-.8.

35. On December 23, 2014, the Commissioner filed in the District Court of Polk County for the state of Iowa a Petition for Rehabilitation Order and Request for Injunctive Relief in relation to CoOportunity. The Commissioner initiated the rehabilitation action due to financial concerns arising from insufficient capitalization and the apparent lack of available additional funding from HHS/CMS.

36. On December 23, 2014, the Polk County District Court issued an Order for Rehabilitation and appointed the Commissioner as the rehabilitator of CoOportunity ("Rehabilitator").

37. CoOportunity had an operating loss in 2014 in excess of $163 million.

38. As of December 31, 2014, CoOportunity's liabilities exceeded assets by over $48 million.

39. On January 29, 2015, the Rehabilitator filed a Petition for Order of Liquidation and Request for Other Relief.

40. Effective February 28, 2015, the Polk County District Court issued a Final Order of Liquidation ("Liquidation Order"), and determined that CoOportunity was insolvent and that any further attempt to rehabilitate the company was futile.

41. The Polk County District Order appointed the Commissioner, who had been serving as Rehabilitator of CoOportunity, as the Liquidator of CoOportunity pursuant to Iowa Code § 507C.18(1). In addition, the Polk County District Court appointed Dan Watkins, who had been serving as the Special Deputy Rehabilitator, as the Special Deputy Liquidator pursuant to Iowa Code § 507C.21.

42. In the Liquidation Order, the Polk County District Court expressly ruled that:

> No lender, bank, other institution (including any State or Federal governmental entity), person or other entity shall exercise any form of set-off, alleged set-off, lien, any form of self-help whatsoever or refuse to transfer any funds or assets to the Liquidator's or Special Deputy's control without further order of this Court.

See Liquidation Order, ¶ 45.

43. The Liquidation Order also prohibited any party that had contracted with CoOportunity "from declaring a default or terminating the existing contract on account of any contractual provisions which provides that insolvency, these liquidation proceedings, or any action by the Commissioner with respect to CoOportunity constitutes an event of default." Liquidation Order ¶ 46.

44. The Polk County District Court authorized the Liquidator and Special Deputy Liquidator to "institute any necessary legal action in any state or federal forum seeking appropriate relief (such as the filing of a declaratory judgment action) to prohibit any set-off or other adverse action by any party which may claim to have a right of set-off against CoOportunity." Liquidation Order ¶ 22.

45. HHS/CMS had extensive communications with representatives of the Liquidator and CoOportunity regarding the rehabilitation and ultimate liquidation of CoOportunity.

46. HHS/CMS, by and through their agents, received a copy of the proposed liquidation order before it was submitted to the Polk County District Court, and participated in setting some of the terms of the proposed liquidation order, e.g., the effective date of liquidation.

47. HHS/CMS, by and through their agents, also received a copy of the final Liquidation Order, which was the same in all material respects as the proposed liquidation order that HHS/CMS had the opportunity to review and comment on in advance of submission to the Polk County District Court.

48. HHS/CMS made no objection to the proposed liquidation order before it was submitted to the Polk County District Court or the final Liquidation Order entered by that Court.

49. Nebraska and Iowa both have state guaranty associations that cover policyholder claims up to a certain limit. To date, the guaranty associations have paid a total of $114.5 million in policyholder claims, with the Nebraska Life and Health Insurance Guaranty Association paying $77.4 million in policyholder claims and the Iowa Life and Health Insurance Guaranty Association paying $37.1 million in policyholder claims.

50. The guaranty association payments are policyholder level claims and recognized as higher priority claims than federal government claims under Iowa law.

Defendants Refuse to Acknowledge the Authority of the Iowa Liquidation Court or Application of State Law to the Insolvency Proceeding

51. The CO-OP program was entirely a creature of the ACA – that is, "but for" the legislation, the CO-OPs would not exist.

52. Congress authorized and appropriated billions of dollars to fund the start-up and solvency funding needed by the CO-OPs, making the federal government the largest investor in and founder of the CO-OP program.

53. It was obvious that in the event of a CO-OP insolvency, the predominate creditor claims would be policyholder and federal government claims.

54. Insurer rehabilitation and insolvency have long been under the exclusive jurisdiction of the states.

55. Congress did not alter that in the ACA.

56. To the contrary, the ACA and its implementing regulations reflect Congress's intent to preserve state regulation of health insurer solvency requirements and proceedings relating to financially distressed or insolvent insurers.

57. The ACA includes an express provision, under a clause titled "No interference with State regulatory authority," which states: "Nothing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title." 42 U.S.C. § 18041(d).

58. Congress directed the Secretary of HHS to promulgate regulations "with respect to the repayment of [loans to CO-OPs] *in a manner that is consistent with State solvency regulations and other similar State laws* that may apply." 42 U.S.C. § 18042(b)(3) (emphasis added).

59. The ACA provided that "[i]n promulgating such regulations, the Secretary shall provide that such loans shall be repaid within 5 years and such grants shall be repaid within 15 years, *taking into consideration any appropriate State reserve requirements, solvency regulations, and requisite surplus note arrangements* that must be constructed in a State to provide for such repayment prior to awarding such loans and grants." *Id.* (emphasis added).

60. In July 2011, CMS published proposed regulations implementing the ACA and noted that insurer liquidation is typically handled under state law rather than federal law, stating

as follows:

> State law establishes a variety of required regulatory actions if an insurer's RBC [risk based capital] falls below established levels or percent of RBC. *These regulatory interventions can range from a corrective action plan to liquidation of the insurer if it is insolvent. Solvency and the financial health of insurers is historically a State-regulated function.*[2]

61. There were several comments submitted in response to proposed regulations regarding plans to avert insolvency,[3] and HHS/CMS responded by noting that: "*[i]n the potential case of insurer financial distress, a CO-OP follows the same process as traditional issuers and must comply with all applicable State laws and regulations*."[4]

62. In the final regulation, HHS/CMS addressed the comments only by including ways to "reduc[e] the risk of insolvency."[5] HHS/CMS stated that "[m]ost of those who have expressed interest in the program are…likely to be viable because of their private support, healthcare experience, and business expertise."[6]

63. Thus, the implementing regulations attempted only to "reduce the risk of insolvency," but made no attempt to regulate the process of liquidation of an insolvent insurer, which was left to the states.

64. By recognizing and preserving the states' jurisdiction over any insolvency proceeding, the federal government, as the largest investor in the CO-OPs, consented to application of state law in relation to all aspects of the liquidation, including priority of claimants.

65. Congress did not express any intent, express or implied, to preempt state

[2] Proposed Rules, 45 C.F.R. Part 156, 76 FR 43237-01, July 20, 2011 (emphasis added).
[3] *See* Final Rules, Responses and Comments, 45 C.F.R. 156, E.6 and F Dec. 13, 2011.
[4] *Id.*
[5] *Id.* at Section F, "Alternatives Considered."
[6] *Id.*

regulation of insurer insolvency, including in relation to the CO-OPs.

66. Despite Congress's intent to preserve state regulation of insurer liquidation, and HHS/CMS's involvement in the Polk County District Court liquidation proceeding (e.g., review and comment on the Liquidation Order), the federal government filed a Proof of Claim in the Iowa insolvency proceeding, but stated the Proof of Claim "is not…an admission that the Iowa court presiding over the liquidation proceeding has jurisdiction over the United States with respect to any matter identified in this Claim, or a waiver or release of any rights related thereto…." The federal government concluded that "[a]ll such rights are hereby expressly reserved by the United States without exception and without purpose of confessing or conceding any right or claim by this filing or by any other participation in this proceeding."

67. Despite their involvement in the liquidation proceeding, Defendants now dispute application of the District Court's Liquidation Order that generally precludes self-help remedies by a creditor (e.g., set-off or netting payments) absent Court approval, and as set forth herein, Defendants have repeatedly, with knowledge of the Liquidation Order, violated the Liquidation Order that precludes self-help remedies.

68. Under Iowa law (as well as the law of other jurisdictions), policyholder level claims have priority over the federal government's claims in any liquidation of an insurer.

69. Defendants' claim that the federal government has "super priority" over all other claims and creditors, including policyholder level claims, contradicts the express intent of Congress and the implementing regulations to preserve application of state law.

70. If the federal government's claims are given "super priority" as Defendants claim, this would wreak havoc on any CO-OP insolvency and leave millions of dollars in policyholder level claims unpaid. That was not contemplated or authorized by Congress.

71. The Iowa court overseeing the liquidation of CoOportunity has been and still is the place where all of the pending issues should be resolved. However, because Defendants dispute the jurisdiction and authority of the Iowa Liquidation Court over the federal government's claim, there is a shadow of uncertainty over the Iowa liquidation proceeding and the Iowa Court's authority to resolve the HHS/CMS claim, which is integral to the liquidation of CoOportunity and resolution of other outstanding creditors' claims.

72. There is no doubt of this Court's authority and jurisdiction over Defendants. This action is therefore the most efficient and practical option to resolve the outstanding issues between Plaintiffs and Defendants because it avoids the risk and uncertainty caused by Defendants' position that the Iowa Liquidation Court does not have authority over it.

The Loan Agreement Between HHS/CMS And CoOportunity Confirms That State Law Controls And Requires That In The Event of Insolvency, Policyholder Level Claims Must Be Paid Before The Federal Government's Claims

73. When CoOportunity was notified that its application for federal funding had been approved, the loan terms were offered on a take-it-or-leave it basis.

74. HHS/CMS drafted the Loan Agreement and, with few exceptions not at issue here, requested that CoOportunity agree to the Loan Agreement terms without any possibility of negotiating different or amended terms.

75. The Loan Agreement expressly subordinates HHS/CMS's claims for payments under the Loan Agreement to policyholder claims.

76. In addition, the Loan Agreement expressly acknowledges that state law will control the insolvency of the CO-OP and priority of payments to the various creditors.

77. In a report prepared by the Office of Inspector General ("OIG") for HHS, the Inspector General for HHS noted that the OIG had "reviewed the CO-OP's…loan agreements."

78. The OIG concluded that although CMS had the right to terminate its loan agreements with the CO-OPs, in the event of such termination, "[a] CO-OP must resolve *any outstanding debts or other accommodation of outstanding claim obligations before repaying the loan funds to CMS*." [7]

79. The Inspector General recommended that HHS/CMS "pursue available remedies for recovery of funds from terminated CO-OPs, [but] in accordance with the loan agreements."

80. HHS/CMS had the opportunity to review and submit written comments on the Inspector General's report, and HHS/CMS "concurred with [the OIG's] recommendations." If HHS/CMS had not concurred, it would have called into question the solvency of all CO-OPs at that time.

81. On February 13, 2015, HHS/CMS issued a Notice of Termination of CMS Loan Agreement ("Notice of Termination") wherein HHS/CMS stated it "has no option but to conclude that CoOportunity is insolvent, and therefore within default consistent with Section 15.1(d) of the [L]oan [A]greement. Therefore, HHS/CMS will terminate the [L]oan [A]greement."

82. In its Notice of Termination, HHS/CMS declared:

a. "[A]ll obligations of CMS will be immediately terminated upon liquidation…"

b. "[T]he unpaid principal amount of the loans, together with all interest accrued and any additional sums that may be payable, will be immediately due upon termination, rather than due per the schedules included in the loan agreement."

[7] Levinson, Daniel R., on behalf of the Office of Inspector General for HHS, *Actual Enrollment and Profitability Was Lower Than Projections Made by the Consumer Operated and Oriented Plans and Might Affect Their Ability to*

c. "We of course realize that the *debts in question are otherwise subject to disposition under relevant provisions of Iowa law concerning liquidation proceedings*." (emphasis added)

83. This tracks Section 15.3 of the Loan Agreement, which states that in the event of certain "Events of Default," the federal government may declare:

a. "All obligations of [HHS/CMS] are immediately terminated."

b. "The unpaid Principal amount of the Loans,[8] together with all Interest accrued thereon, and all fees, costs, expenses, indemnities, and other amounts payable under this Agreement, are immediately due and payable, without further notice or cure opportunities to Borrower…."

c. "Borrower must immediately repay any unused Loan Funds to Lender *following the resolution of any outstanding debts and run out of outstanding claim obligations, consistent with State Insurance Laws."* (emphasis added)

84. Thus, HHS/CMS accelerated payments owed under the Loan Agreement, as provided for in Section 15.3(b) of the Loan Agreement, but acknowledged that the loan payments "in question are otherwise subject to disposition under relevant provisions of Iowa law concerning liquidation proceedings" pursuant to Section 15.3(c) of the Loan Agreement.

85. The Loan Agreement acknowledges application of "State Insurance Laws" to any termination of the CO-OP and allows for use of the federal start-up and solvency loan funds to wind down and resolve higher priority claims if required by a "State Solvency Payment Restriction," which is broadly defined to include any "State Insurance Law provision or

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Repay Loans Provided Under the Affordable Care Act," July 2015.

regulatory action by a State insurance…department….” Under Iowa law, policyholder level claims have priority over the federal government’s claims arising out of the Loan Agreement. Iowa Code § 507C.42. This constitutes a “State Solvency Payment Restriction” under which repayment of Loan funds is subordinated to payment of policyholder claims.

86. Under the Loan Agreement terms, and consistent with HHS/CMS’s Notice of Termination, Iowa law and the implementation of the regulatory action taken by the State Insurance Commissioner control priority payments to creditors, and policyholder level claims must be paid before the federal government’s claims.

The ACA Calls for Payments to and From
Health Issuers to Offset the Risks Associated with the ACA Rollout

87. The ACA created three risk mitigation programs, referred to as the “3R” programs, standing for federal Reinsurance, Risk Adjustment, and Risk Corridor programs. These programs are integral to the ACA, and directly benefit the federal government.

88. In particular, the ACA requires the government to subsidize lower-income insureds through the Advance Payment of Premium Tax Credits (“APTC”) and the Cost Sharing Reduction (“CSR”) programs. APTC assists lower-income individuals in paying premiums for health insurance plans purchased through the exchange. CSR is a discount that lowers the amount insureds have to pay out-of-pocket.

89. Without the 3Rs, the risks associated with the ACA roll-out (i.e., enrollment of the previously uninsured population with unknown health risks and pent up demand for services) would have necessitated higher premiums and shifted costs to insureds to protect against risk. The 3Rs were intended to allow insurers to offer quality, affordable plans, despite the uncertainty, because they protected against those risks.

[8] Under the Loan Agreement, “Loans” means “the Start-Up Loan and the Solvency Loan collectively.” Loan

90. The "Risk Corridor" program, established in 42 U.S.C. § 18062, is one of the "3R" programs intended to level the playing field for issuers and to protect insurers from loss risks associated with the launch of the ACA.

91. The Risk Corridor program was established to mitigate the pricing risk that issuers faced because they had very limited data to use to estimate who would enroll in plans operating under the 2014 ACA rules and what their health costs would be.

92. Without the 3R programs – and the Risk Corridor program in particular – the government would have sustained a much higher cost for the APTC and CSR programs.

93. Congress mandated that "[t]he Secretary shall establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums." 42 U.S.C. § 18062(a).

94. The Risk Corridor program is designed to limit insurer gains and losses. Under the program, a participating plan must either (1) pay to the Secretary of HHS certain sums if the plan's costs are less than a "target amount" of premium revenues or (2) if the plan's costs are greater than a certain percentage of the "target amount" of premium revenues, the "Secretary shall pay to the plan" certain sums.

95. Under the statute and HHS's implementing regulations, CoOportunity is owed $130 million under the Risk Corridor program for the 2014 policy year.

96. Under the statute, the "Secretary [of HHS] shall pay" this outstanding amount to CoOportunity.

97. On February 2, 2015, CMS issued a statement confirming:

Agreement, Section 2.1, Defined Terms, p. 5.

> HHS/CMS *anticipates that Risk Corridors collections will be sufficient to pay for all Risk Corridors payments*. 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 years….[9]

98. Despite its statutory mandate and assurance, HHS/CMS announced that participating plans would receive only up to 12.6 % owed to plans under the Risk Corridor program for 2014.

99. HHS/CMS attributed the shortfall on the Secretary's mandated payments to the plans to a shortfall in issuer payments into the program and purported limits on Defendants' ability to pay the remaining obligation despite this shortfall.

100. HHS/CMS has issued guidance indicating that amounts due for Risk Corridor payments will be made from available 2014 Risk Corridor revenues as well as 2015 and 2016 Risk Corridor revenues. Only after 100% of 2014 Risk Corridor payments are funded will 2015 and 2016 Risk Corridor revenues be applied to 2015 or 2016 Risk Corridor payments due.

101. Despite its statement that plans would receive up to 12.6% of Risk Corridor payments for 2014, HHS/CMS has not made *any* payment to CoOportunity for the Risk Corridor amount ($130 million) owed for 2014, although HHS/CMS has made Risk Corridor payments to other plans.

102. In addition, HHS has unilaterally, without written notice or legal justification, placed a "hold" on any payments owed to the CoOportunity Estate.

The Federal Agencies' Improper Administrative Hold on and Reduction of Payments Owed to CoOportunity

[9] *See* CMS FAX ID 8759, Pub'd 02/02/2015, available at: https://www.regtap.info/faq_viewe.php?i=8759, (emphasis added).

103. The Polk County District Court's Liquidation Order expressly prohibits unilateral set-off by any creditor.

104. HHS/CMS has received the Iowa Court's Liquidation Order.

105. Under Iowa law, set-off by a creditor is also prohibited unless the debt and credit at issue are "mutual."

106. Despite the prohibitions under the Iowa Court's Liquidation Order and Iowa law, HHS/CMS has repeatedly, and unilaterally, held or reduced payments owed to CoOportunity based on debts that HHS/CMS claims CoOportunity owes to HHS/CMS.

107. In addition, HHS/CMS has now imposed a unilateral "hold" on all payments owed to the CoOportunity Estate and has confirmed that the funds subject to hold will be set off to account for debts of CoOportunity.

108. The federal agencies' "netting" of payments is in violation of the Iowa Court's Liquidation Order, Iowa law, and even federal law because CoOportunity is owed $130 million under the Risk Corridor program, *far more* than the debts of CoOportunity to the federal government for obligations that are not expressly subordinated[10] to other creditor claims.

109. Any "netting" or set-off done by HHS/CMS or any other federal agency, including the IRS, is improper and in violation of the Liquidation Order because the debts the agencies claim they may recover through set-off or administrative hold (because the agencies contend they are not subordinate to other creditor claims) are substantially less than the

[10] The Solvency Loan is subordinated and, by its express terms, may be repaid only after all other creditor claims and upon the permission of the Insurance Commissioner. The Solvency Loan expressly provides that the obligations of CoOportunity under the Solvency Loan are not subject to offset. HHS/CMS has not claimed any set-off right in relation to the Solvency Loan. CMS has recently confirmed that the solvency loan is "comprehensively subordinate," meaning it is "subordinate to claims of policyholders, beneficiary claims, and all other classes of creditors other than another surplus note." *See* https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/CO-OP-Questions-Final-1-27-16.pdf.

$130 million that the Secretary of HHS has a statutory duty to pay CoOportunity under the Risk Corridor program but which the Secretary does not include in the netting or set-off calculations.

110. **"Netting" of the Start-Up Loan.** Without justification or authority, and in violation of the Iowa Court's Liquidation Order, HHS/CMS held and set off payments owed to CoOportunity based on amounts owed under the Start-up Loan for $14.7 million.

111. In particular, HHS/CMS notified Plaintiffs that it had placed an administrative "hold" on all payments owed to CoOportunity and that it had the right to set off for the start-up loan.

112. The first written confirmation that set off had been effectuated was in a footnote to the HHS/CMS Proof of Claim served on March 14, 2016, stating "The Debtor also received a Start-Up Loan in the amount of $14,700,000. The Start-Up loan *has been collected by offset against* [unspecified] receivables due to the Debtor and therefore is not at issue in this Proof of Claim."

113. HHS/CMS later issued a letter on March 22, 2016, stating: "[t]his letter is to inform you that [CMS] has recovered funds from CoOportunity sufficient to repay the outstanding amount of the Start-up Loan disbursed to CoOportunity Health under the terms of the CMS CO-OP Loan Agreement dated February 17, 2012. CMS recovered these funds by exercising its right of offset against payments due from CMS to CoOportunity Health." HHS/CMS did not specify exactly how it had "recovered" the funds except to drop a footnote stating: "[s]uch payments may include amounts owed under the reinsurance program, the risk adjustment program, and/or the risk corridors program."

114. This hold and decisions to setoff are improper and illegal because:

a. When CoOportunity was notified that its application for federal funding

had been approved, representatives of HHS/CMS drafted the Loan Agreement and related documents and notified CoOportunity representatives that, with the exception of the Solvency Loan, which the parties anticipate may need to be amended, the loan terms were offered on a take-it-or-leave it basis.

b. The Loan Agreement expressly subordinates the Start-up Loan (and Solvency Loan) to the claims of policyholders and other claimants, providing in relevant part as follows:

> 3.1 General
>
> Under this Agreement, Lender is providing to Borrower funds for CO-OP Program purposes through two Loans, *each of which shall be on par with the other for security purposes* and each of which shall be governed and controlled for all purposes by this Agreement, including its Appendices.[11]
>
> …
>
> 3.4 Security for the Loans
>
> The Loans and other Obligations will be general obligations of Borrower. Because *the intent of the Loans*, and the Solvency Loan in particular, is to provide financing to Borrower that meets the definitions of "risk based capital" for State Insurance Laws[12] purposes, *the Loans will have a claim on cash flow and reserves of Borrower that is subordinate to (a) claims payments, (b) Basic Operating Expenses, and (c) maintenance of required reserve funds while Borrower is operating as a CO-OP under State Insurance Laws.*

c. Repayment of the Start-up Loan is expressly subject to state law insurance requirements and regulatory action (which includes the Iowa insurance

[11] Section 3.1 (emphasis added).
[12] Defined as: "those State insurance laws and regulations that will govern Borrower in delivering the CO-OP QHP(s) for and within the particular State." See Loan Agreement, Clause 2—Definitions.

insolvency statutes), and state insurance law places policyholder level claims above claims of HHS/CMS. *See* Iowa Code § 507C.42 (priority of distribution); *see also U.S. v. Fabe*, 508 U.S. 491 (1993) (holding an Ohio statute that gave policyholders priority over the claims of the federal government was exempt from preemption); *State ex rel. Hager v. Iowa Nat'l Mut'l Ins. Co.*, 430 N.W.2d 420, 422-423 (Iowa S. Ct. 1988) (noting that Iowa Section 507C.42 is modeled after the NAIC Model Act, and priority of claims is "based on the relative social and economic importance of the claims likely to be asserted against an insurer…to carry out sound public policy by minimizing the damage done to the insured community when an insurer fails.").

d. Defendants have admitted that repayment of the Start-up Loan is subject to Iowa law and regulatory action, which includes Iowa law on priority of claims in the event of insurer liquidation.

e. The contractual and statutory prioritization of policyholder claims above loan repayments is not limited to cash payments, but also applies to any set-off.

f. Any set-off by HHS/CMS or any other federal agency, including the IRS, is improper because CoOportunity is owed more under the Risk Corridor program ($130 million) than all of the claimed debts even arguably subject to set-off.[13]

g. Set-off for amounts owed under the Start-up Loan is not authorized under

Iowa law, or the federal "netting" regulation that HHS promulgated under the ACA, 45 C.F.R. § 156.1215. The federal "netting" regulation does not list the Start-up or Solvency Loans among the categories of debts that may potentially be netted on payments to qualified health plans.

h. Finally, the Start-up and Solvency Loans to CoOportunity are, in effect, capital contributions rather than loans. The Loans were essential for the creation and implementation of the CO-OP program. CoOportunity would have never existed but for enactment of the ACA and the Congressional authorization for the Start-up Loans and Solvency Loans.

i. The timing of the Start-up Loan suggests that the transaction was nothing more than a capital contribution. The purpose of the Start-up Loan was to capitalize CoOportunity. The Start-up Loans used to create the CO-OPs were simply a governmental effort to facilitate the creation of CO-OPs under the ACA.

j. Because the Start-up Loan is, in reality, a capital contribution, its repayment is subordinate to all other claims against CoOportunity.

115. **Netting of Risk Adjustment, APTC, and CSR Debts from the Reinsurance Payments.** Under the "Reinsurance" portion of the "3R" program, CoOportunity was owed $71.7 million for the 2014 plan year. HHS/CMS netted certain debts of CoOportunity that HHS/CMS claimed CoOportunity owed, and did not make the full payment of $71.7 million.

116. In particular, HHS/CMS reduced the $71.7 million payment to CoOportunity for Reinsurance based on:

[13] The Solvency Loan is subordinate to all other claims against the CoOportunity Estate, and is not subject to set-off because HHS/CMS contractually gave up any claim relating to the Solvency Loan until all other claims are resolved.

a. $9.9 million HHS/CMS contends CoOportunity owed under the "Risk Adjustment" portion of the 3R program for Iowa and Nebraska;

b. $1.3 million for HHS/CMS's claimed overpayment to CoOportunity of sums paid under the advance payment of premium tax credit ("APTC") program of the ACA; and

c. $300,000 for HHS/CMS's claimed overpayments to CoOportunity of sums paid under the cost-sharing reduction ("CSR") program of the ACA.

117. **"Administrative Hold" on All Payments Owed to CoOportunity.** Finally, HHS/CMS has unilaterally imposed an indefinite "administrative" or "agency" hold on all payments owed to CoOportunity, and has advised that the funds subject to hold will be set off, even though it has issued the payments to other insurers, including:

a. $16.4 million that HHS/CMS determined *is* available to pay under the Risk Corridor program (due to insurer payments into the program) for the 2014 policy year.

b. $5.2 million owed to CoOportunity for the balance of the Reinsurance program payment to CoOportunity for 2014.

c. $700,000 owed to CoOportunity for the balance of the Risk Adjustment program payment to CoOportunity for 2014.

118. In addition, in March of 2016, HHS/CMS held payment owed to CoOportunity under the Reinsurance program for the 2015 policy year, even though it issued Reinsurance payments to other similarly situated CO-OPs.

119. On March 22, 2016, HHS/CMS issued a letter stating: "CMS received a request from the [IRS] to use portions of the remaining payments owed to CoOportunity Health by

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The Start-up Loan is subordinated by contract and by the statutory priority for claims under Iowa law.

CMS to offset income tax, excise tax, and other amounts due to the IRS under the [ACA]. In addition, CoOportunity owes or may owe CMS additional funds…. Therefore, *CMS will continue to hold funds* owed to CoOportunity Health *pending an analysis and potential offset* of these additional debts. After such analysis is completed and any further rights of offset have been exercised, CMS will release any remaining funds to CoOportunity Health." (emphasis added)

120. In the meantime, Plaintiffs recently received notice from the IRS that the IRS is imposing penalties and interest on payments the IRS claims CoOportunity owes, even though HHS/CMS is admittedly sitting on millions of dollars owed to CoOportunity "pending an analysis" that will be done by some unspecified date by an unspecified federal agency and any "potential offset."

121. This conduct is in violation of Iowa law, the Iowa Court's liquidation order, and even federal law to the extent it applies, to the detriment of the fair and efficient administration of the liquidation proceeding and other higher priority claims including policyholder level claims.

Count I – Requests for Declaratory Judgment

122. Plaintiffs incorporate by reference all prior allegations of this Complaint.

123. There are controversies between Plaintiffs and Defendants regarding various debits and credits as between the Estate of CoOportunity and Defendants, and any right by Defendants to set off payments owed to the Estate based on claims obligations of the Estate.

124. HHS/CMS has taken, and Secretary Burwell has caused HHS/CMS to take, agency actions that are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with Iowa law governing insolvency and federal law, as applicable, namely:

a. HHS/CMS has decided to disregard Iowa law of insolvency and the Order of the Polk County District Court by refusing to appear in the Iowa insolvency proceeding and by unilaterally engaging in set-off and netting based on HHS/CMS's erroneous legal determination that federal law alone applies and that its claims have super priority over other creditors.

b. HHS/CMS has decided not to pay the CoOportunity Estate $130 million (or any portion thereof) that HHS/CMS has a duty to pay under the Risk Corridors provision of the ACA, despite an express statutory directive that the Secretary of HHS "shall" pay such amount and the fact that HHS/CMS has issued partial Risk Corridor payments to other insurers.

c. HHS/CMS has unilaterally held, set off, and engaged in "netting" by eliminating or reducing "netted" and reduced payments that HHS/CMS has a legal obligation to pay to CoOportunity based on debts that HHS/CMS claims CoOportunity owes, even though the payments due CoOportunity far exceed the balance of all of its debts that are arguably subject to set-off. This is contrary to both Iowa insolvency law and the federal netting regulation that HHS/CMS has unlawfully applied.

d. HHS/CMS set off payments HHS/CMS is statutorily required to make to CoOportunity based on amounts owed under the Start-up Loan despite that the loan's terms subordinate both the Start-up Loan and the Solvency Loans to the claims of other creditors.

e. HHS/CMS placed an "administrative hold" on all payments HHS/CMS is required by law to make to CoOportunity. Such hold is not authorized by

any provision of state or federal law.

125. The above-listed agency actions also exceed HHS/CMS's statutory jurisdiction and authority, were made without statutory right, and were without observance of procedures required by law insofar as (i) they are based on an unlawful application of federal law to the priority of claims, rather than Iowa law as Congress intended; (ii) in the case of netting/set-off, are contrary to Iowa law, the Polk County District Court's Order, and the federal netting regulation which HHS/CMS claims applies but does not follow; and (iii) in the case of the administrative hold, are without any basis in law whatsoever.

126. All of the above-listed agency actions are final. There are no internal administrative remedies with respect to the above-listed agency actions. In the alternative, any internal administrative remedies that exist with respect to the above-listed agency actions are permissive, not mandatory, and the time to use such internal administrative remedies has expired.

127. Plaintiffs, as Liquidators of the CoOportunity Estate, are adversely affected and aggrieved by the above-listed agency actions insofar as the actions have illegally interfered with the orderly liquidation of the CoOportunity Estate, deprived the CoOportunity Estate of assets, and violated the rights of CoOportunity's creditors.

128. There exists no other adequate remedy in a court except the relief Plaintiffs seek herein under the APA. A monetary judgment alone is inadequate in light of the complex, and ongoing interaction between Plaintiffs and HHS/CMS under the 3R programs, which necessitates robust declaratory and equitable relief, as well as ongoing court oversight of HHS/CMS's future practices with respect to payments. Further, declaratory and equitable relief—relief only available from this court under the APA—is necessary to define the rights

and actions of the parties with respect to the Iowa insolvency proceeding and the steps HHS/CMS is required to take, or not take, on a prospective basis, in light of application of Iowa law governing priority or federal netting authority.

129. For the reasons set forth herein, Plaintiffs ask for the Court to hold unlawful each of the above-listed final agency actions.

130. For the reasons set forth herein, Plaintiffs also ask the Court to issue the following declarations:

a. **Application of State Law.** That Iowa law applies and controls the priority of all claims against the CoOportunity Estate, including the federal government's claims as asserted by Defendants.

b. **Defendants' Prior Set-offs.** That HHS/CMS's unilateral decisions to hold, net, reduce, or set off payments that HHS/CMS has a statutory duty to make to CoOportunity, including HHS/CMS's reduction of payments to CoOportunity under the Reinsurance provision of the ACA, are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law, and exceed HHS/CMS's statutory jurisdiction and authority.

c. **The Start-up Loan.** That the terms of the Loan Agreement subordinate repayment of the Start-up Loan to the claims of other creditors of CoOportunity and that HHS/CMS's decision that it has super-priority to other creditors is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law.

d. **Setting Aside Defendants' "Administrative Hold" on Payments to CoOportunity.** That HHS/CMS's unilateral decision to impose an

"administrative hold" on payments that HHS/CMS has a legal duty to pay to CoOportunity, with the intent to set off those funds, is arbitrary, capricious, an abuse of discretion, and is otherwise not in accordance with the law, and exceeds HHS/CMS's statutory jurisdiction and authority.

e. **Declaration Regarding Appropriate Method of Netting.** That, irrespective of whether federal or state law applies, any netting by any federal agency, including HHS/CMS and the IRS, must account for *all* debits and credits that are properly subject to "netting," including the $130 million that HHS/CMS has a legal duty to pay to CoOportunity for Risk Corridors, and that any other form of selective netting would be arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law, and exceed the federal agencies' statutory jurisdiction and authority.

f. In addition, if the Court concludes that Iowa law applies, Plaintiffs ask for declaratory judgment that:

    i. Any "set-off" or "netting" by HHS/CMS in relation to the 3R payments to CoOportunity is improper because there is no "mutuality" of debits and credits. The federal government is a mere conduit of issuer-paid funds in relation to elements of the 3R programs, particularly the Risk Adjustment and Reinsurance programs, and that portion of the Risk Corridor program that is issuer funded.

    ii. Amounts owed under the Start-up or Solvency Loan may

not be set off because the federal government's claims are contractually subordinated to policyholder claims.

h. In the alternative, if the Court concludes that the federal agencies are authorized to potentially net certain payments under the federal "netting" regulation, 45 C.F.R. § 1215, Plaintiffs ask for declaratory judgment that:

i. The federal netting regulation does not authorize set-off or netting to account for debts owed by CoOportunity under the Start-up or Solvency Loan, because such debts are not enumerated in the federal "netting" regulation and HHS/CMS's claims are contractually subordinated to policyholder claims.

ii. Any netting or reduction of payment may only be for debits and credits expressly enumerated in the federal "netting" regulation, 45 C.F.R. § 156.1215, and must account for *all* of the debits and credits enumerated in the "netting" regulation, including the $130 million that HHS/CMS has a legal duty to pay under the Risk Corridor program for 2014.

WHEREFORE, Plaintiffs ask the Court to enter the declaratory relief requested, and all other relief deemed just and equitable.

Count II – Requests for Injunctive Relief

131. Plaintiffs incorporate by reference all prior allegations of this Complaint.

132. For the reasons set forth herein, Plaintiffs ask for the following injunctive relief:

a. **Release of Administrative Hold on Payments.** An injunction directing Defendants to release the "administrative hold" on payments to CoOportunity and enjoining Defendants from any future attempt to impose an "administrative hold" or set-off on payments owed to CoOportunity.

b. **Proper Netting.** Consistent with the declaratory judgments requested herein, an order enjoining Defendants from any attempt to net, reduce, or set off any payment owed to CoOportunity to account for any debt claims by Defendants.

DEMAND FOR JURY TRIAL

To the extent there is any issue that may be determined by a jury in this matter, Plaintiffs hereby demand trial by jury.

Respectfully submitted,

/s/ Mark Hill

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