IN THE UNITED STATES COURT OF FEDERAL CLAIMS

BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	)	No. 16-651 C Judge Griggsby

PLAINTIFF'S SUR-REPLY TO THE UNITED STATES' MOTION TO DISMISS

Lawrence S. Sher (D.C. Bar No. 430469)
REED SMITH LLP
1301 K Street NW
Suite 1000-East Tower
Washington, DC 20005
Telephone: 202.414.9200
Facsimile: 202.414.9299
Email: lsher@reedsmith.com

Of Counsel:

Kyle R. Bahr (D.C. Bar No. 986946)
Conor M. Shaffer (PA Bar No. 314474)
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222
Telephone: 412.288.3131
Facsimile: 412.288.3063
Email: kbahr@reedsmith.com
cshaffer@reedsmith.com

Counsel for Plaintiff Blue Cross and Blue Shield of North Carolina

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

Regulations

Other Authorities

INTRODUCTION

Plaintiff Blue Cross and Blue Shield of North Carolina ("Plaintiff" or "BCBSNC"), with leave of this Court, respectfully files this sur-reply to respond to several new arguments, new case law, and related issues that Defendant raised in its reply brief ("Reply") (ECF No. 18) in support of its Motion to Dismiss ("Motion" or "Mot.") (ECF No. 10).

Relying on Judge Lettow's recent decision in the *Land of Lincoln* ("*Lincoln*") case,[1] which was issued after the filing of Plaintiff's opposition brief ("Opposition" or "Opp.") (ECF No. 14), but before Defendant's Reply was filed, Defendant improperly urges the Court in its Reply to look well beyond the pleadings on Defendant's pending motion to dismiss under 12(b)(1) and 12(b)(6), and instead to follow Judge Lettow's non-binding decision in *Lincoln*.[2] That decision, however, is readily distinguishable and should not be followed in this case because it: (a) involved a decision on the merits on a Motion on the Administrative Record ("AR") where there had been no agency proceedings at all, (b) applied an Administrative Procedure Act ("APA") standard of review and deference despite no agency decision having ever been made in any prior proceeding, and (c) ruled that the agency's "decision" should stand under a "contrary to law" standard that the Court borrowed from the APA. *See Lincoln*, 2016 WL 6651428, at *1, *14, *19.

Unlike *Lincoln,* there is no AR in this case, nor any motion for judgment pending upon it—nor will there be, because the AR procedure and APA standard employed in *Lincoln* are inapplicable to this case, which seeks damages under the Tucker Act for breach of a money-mandating obligation. The Court in *Lincoln* did not address a 12(b)(6) motion on the statutory

[1] *Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 16-744C, --- Fed. Cl. ----, 2016 WL 6651428 (Nov. 10, 2016) (Lettow, J.). The *Lincoln* case is not binding on this Court and already has been appealed to the Federal Circuit. *See Land of Lincoln Mut. Health Ins. Co. v. United States*, No. 17-1224 (Fed. Cir. Nov. 16, 2016).

[2] *See, e.g.*, *W. Coast Gen. Corp. v. Dalton*, 39 F.3d 312, 315 (Fed. Cir. 1994) (holding that Court of Federal Claims decisions "do not set binding precedent for separate and distinct cases in that court").

count, nor apply the *Iqbal*/*Twombly* governing standard to determine whether the plaintiff alleged a plausible claim for relief under the § 1342 money-mandating statute—the issue and standard presented here on Defendant's 12(b)(6) motion as to Count I. This case is not even at the summary judgment stage, when the parties can develop and the Court can consider the merits of Plaintiff's claims based on a complete and fulsome record and applying the appropriate, well-developed standards. *See, e.g.*, RCFC 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *SOS Int'l LLC v. United States*, 127 Fed. Cl. 576, 586 (2016) (Griggsby J.) (distinguishing between AR and summary judgment standards).

Defendant curiously relies heavily on the *Lincoln* decision to argue that the Court should dismiss all of BCBSNC's claims for lack of jurisdiction and ripeness, but the Court in *Lincoln* squarely *rejected* all of the identical jurisdiction and ripeness arguments Defendant raises here, finding that Defendant's arguments "address[] the merits," which the Court concluded "does not respond to the jurisdictional inquiry." *Lincoln*, 2016 WL 6651428, at *9 n.16. Accordingly, the Court in *Lincoln* held that it had subject-matter jurisdiction over all of Lincoln's statutory, contractual and takings claims, and that all such claims were ripe for adjudication. *Id.* at *10-14.

Likely motivated by its reliance on the *Lincoln* decision, Defendant attempts in the first paragraph of its Reply to re-frame the issues in this case, but there is no dispute here about Congress' power of the purse. The question before the Court on Defendant's 12(b)(6) motion is whether Plaintiff's well-pled allegations state plausible claims for relief in Counts I-V, with all facts and inferences construed in Plaintiff's favor. *See* Opp. at 16-17. Although Defendant now argues that a subsequent Congress' appropriations action can belatedly "bless" what Defendant now construes as the intent of an earlier Congress, a fully developed record will demonstrate that the text, purpose, and history of that earlier Congress' statute – § 1342 – prevent the Court from inferring any such intent through statutory interpretation, agency deference, or otherwise. If a

later Congress denies appropriations for a money-mandating statutory obligation created by an earlier Congress, binding precedent provides a plaintiff, like BCBSNC, with relief in this Court to enforce that obligation. *See, e.g.*, *Greenlee Cnty. v. United States*, 487 F.3d 871, 877-78 (Fed. Cir. 2007) (quoting *N.Y. Airways, Inc. v. United States*, 369 F.2d 743, 748 (Ct. Cl. 1966)). It is undisputed that § 1342 and its implementing regulations do not contain any language "restrict[ing] the government's liability or limit[ing] its contractual authority to the amount appropriated by Congress," and thus the Government's obligation to Plaintiff here is unfettered. *Id.* at 878.

Finally, Defendant's reliance on *Lincoln* regarding Counts II-V is misplaced. The Court's findings on the motion for judgment on the AR that it ordered, under the inapposite APA standard and deference it applied, formed the foundation for the Court's 12(b)(6) dismissal regarding the non-statutory counts. Those findings are therefore distinguishable and should not be followed in this case.

ARGUMENT

I. DEFENDANT'S 12(B)(1) ARGUMENTS ATTACK THE MERITS, NOT THE COURT'S SUBJECT-MATTER JURISDICTION OF PLAINTIFF'S CLAIMS

Although Defendant cites to the *Lincoln* decision no less than 11 times in its Reply while urging the Court to dismiss Plaintiff's claims under Rule 12(b)(1) for lack of jurisdiction and ripeness, the Court in *Lincoln* rejected all of the identical arguments Defendant asserts in this case and ruled against the Government, holding that the Court had jurisdiction over all of Plaintiff's claims (statutory, contractual and takings claims) and that all such claims were ripe for adjudication.[3] Addressing Defendant's 12(b)(1) motion in that case, Judge Lettow held that § 1342 is a money-mandating "shall pay" statute, as is its implementing regulation, and that the

[3] Defendant's Reply fails to address the case law relied upon by Plaintiff in its Opposition showing that this Court clearly has Tucker Act jurisdiction over Counts II-V. *See* Opp. at 23-24. Defendant has therefore conceded its 12(b)(1) motion regarding Counts II-V, and that portion of the Motion should be denied. *Lincoln* also supports jurisdiction over the contract and takings claims. *See Lincoln*, 2016 WL 6651428, at *10-11.

plaintiff's Count I claim was based upon § 1342 and its implementing regulation. Indeed, the Court held that it "has jurisdiction over Lincoln's claim," due in part to the fact that "the government concedes that at least *some* money was due and more may be due shortly." *Lincoln*, 2016 WL 6651428, at *9 (emphasis in original). The Court in *Lincoln* also rejected Defendant's argument, repeated here (*see* Reply at 3-12), that the "presently due" standard barred the plaintiff's claims, concluding that "[t]he government's argument reaches too far." *Id.*[4] Nevertheless, Defendant insupportably contends that this is "an independent element of jurisdiction." Reply at 3 n.1.

Even more perplexing is Defendant's reliance on *Lincoln* for its Rule 12(b)(1) motion to argue that this Court should apply *Chevron* deference to follow what Defendant argues is the agency's determination of *when* risk corridors payments are due under § 1342 (*i.e.*, a "three-year payment framework"). Reply at 5-10.[5] The Court in *Lincoln* flatly rejected Defendant's request to apply *Chevron* deference to HHS' decision "to apply a three-year framework" as part of its jurisdictional analysis, concluding that Defendant's "argument is misplaced" because "[t]he *Chevron* prongs apply to the merits of the case," not to "the jurisdictional inquiry [that] is separate from the merits of the case." *Lincoln*, 2016 WL 6651428, at *8, *9 n.16. (citing *Greenlee Cnty.*, 487 F.3d at 876).

Misleadingly, despite the fact that the Court in *Lincoln* expressly rejected all of its 12(b)(1) arguments, Defendant repeatedly cites and quotes the findings and statutory analysis the *Lincoln* Court made on the *merits* of the statutory count under the inapposite APA standard in that case, in support of Defendant's 12(b)(1) jurisdictional arguments here. None of those

---

[4] The Reply's newly cited *Massie* opinion (Reply at 3) does not require a different result, because there the Federal Circuit found that "the trial court strayed from the realm of legal remedies into that of equity." *Massie v. United States*, 226 F.3d 1318, 1321 (Fed. Cir. 2000). Plaintiff here seeks money damages for its claims.

[5] Defendant cites no authority suggesting that "deference" to the Government is appropriate in the Court's Rule 12(b)(1) analysis.

findings or statutory analysis on the merits derived from the anomalous AR in that case, however, are relevant to the Court's *jurisdictional* analysis here. *See id.* at *8-9 (recognizing the "jurisdictional inquiry is separate from the merits of the case"); s*ee also Clark v. United States*, 322 F.3d 1358, 1363 (Fed. Cir. 2003) ("The problem with the [government's] argument is that it confuses the issue of jurisdiction with the question of whether [Plaintiffs] can prevail on the merits."); *Palmer v. United States*, 168 F.3d 1310, 1312-13 (Fed. Cir. 1999) (chiding Defendant's improper intermingling of jurisdictional and merits-based arguments).[6]

Similarly, any consideration of Defendant's argument that the Court has no jurisdiction because the Government's interpretation of a "three-year framework" is "reasonable" would violate the 12(b)(1) standard of review, which requires that the Court "must assume all factual allegations to be true *and draw all reasonable inferences in the plaintiffs favor*." *Redondo v. United States*, 542 F. App'x 908, 910 (Fed. Cir. 2013) (citing *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995)) (emphasis added). Plaintiff's well-pled facts are controlling and establish jurisdiction under the governing standard. The Complaint and Plaintiff's Opposition set forth several valid reasons demonstrating why the Government's *post hoc* "three-year payment framework" is unreasonable and contrary to established case law.[7] *See, e.g.*, Compl. ¶ 149; Opp. at 21-22.

II. PLAINTIFF'S CLAIMS ARE RIPE

Not surprisingly, Defendant does not cite to or rely upon the *Lincoln* decision in furtherance of its ripeness arguments, because the Court in *Lincoln* rejected all of the identical

[6] Furthermore, Defendant now admits that if Plaintiff's claims are ripe – which they are, *see infra* – then "[t]he United States does not dispute that this Court is the proper forum to resolve BCBSNC's claims." Reply at 12 n.8.

[7] Until it understood the size of its liability for the risk corridors shortfall in the fall of 2015, HHS had never articulated to QHPs that it would refrain from collecting or making risk corridors payments until the completion of the three-year risk corridors program. In fact, all Government documents related to the risk corridors program support HHS' prior understanding and intent that payments be made by both parties on a yearly basis. *See, e.g.*, Compl. ¶¶ 109-110 & Ex. 20.

ripeness arguments Defendant raises here and held that all of the plaintiff's claims were ripe for adjudication. *See* Reply at 10-11; *Lincoln*, 2016 WL 6651428, at *11-14. Indeed, here, as they were in Lincoln's case, Plaintiff's claim for money damages to recover risk corridors amounts that are past due and owing are not "abstract and premature," as Defendant contends. Reply at 10.[8] Moreover, contrary to Defendant's suggestion, the precise amount of CY 2014 risk corridors payments due and owing to Plaintiff is not "unknown": it is $147,474,968.35. *Compare Reply* at 10 *with* Compl. ¶ 136. Because "ripeness [is] treated as a jurisdictional question," *CBY Design Builders v. United States*, 105 Fed. Cl. 303, 331 n.22 (2012), the facts and all reasonable inferences must be construed in Plaintiff's favor. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

Accepting Defendant's ripeness arguments would endorse the Government's ability to orchestrate an indefinite delay of this Court's review of any payment dispute by simply withholding payments due and assuring the Court that the issues will someday be worked out by the politicians. This Court consistently rejects such tactics designed to delay adjudication of ripe claims:

> [T]he failure of Congress or an agency to appropriate or make available sufficient funds does not repudiate the obligation; it merely bars … the Government from dispersing funds and forces [the plaintiff] to a recovery in the Court of Claims.

N.Y. Airways, 369 F.2d at 752.

Plaintiff's claims are not hypothetical, abstract or premature, and are ripe for adjudication.

---

[8] Just as in *Caraco Pharmaceutical*, first cited in Defendant's Reply at 10, "[i]n this case, both prongs of the ripeness inquiry are satisfied." *Caraco Pharm. Labs., Ltd. v. Forest Labs., Inc.*, 527 F.3d 1278, 1295 (Fed. Cir. 2008). Plaintiff claims that the Government has committed a "breach of a present obligation," and Defendant's speculative suggestion that $2.5 billion worth of "additional payments are forthcoming" from either the Administration or Congress for CY 2014 risk corridors payments should be met with abundant skepticism. *Compare* Reply at 10 *with, e.g.*, Compl.¶¶ 120, 162-63, 208.

III. THE COURT HAS JURISDICTION OVER PLAINTIFF'S REQUEST FOR DECLARATORY RELIEF

The Court has jurisdiction over Plaintiff's request for incidental declaratory relief because, should the Court find in Plaintiff's favor and award money damages on any Count, the facts, circumstances, and law pertaining to the CY 2014 breach would be identical – other than the amount owed – to the CY 2015 and CY 2016 breaches. *See* Compl. at Prayer for Relief ¶ 6. Any such relief would be incidental and collateral to a monetary judgment under Counts I-V, which gives the Court the discretion to grant limited declaratory relief. *See* Opp. at 58-60.

In any event, following its September 9, 2016 announcement regarding CY 2015 risk corridors (Mot. at App'x A248-A249), the Government confirmed on November 18, 2016, that it will not make any risk corridor payments owed for CY 2015. *See* CMS, *Risk Corridors Payment and Charge Amounts for the 2015 Benefit Year* (Nov. 18, 2016), attached as Exhibit 39. The Government also confirmed that it owes BCBSNC combined CY 2015 risk corridors payments of $215,313,093.70. *See id.* The interests of efficiency and judicial economy are advanced by not requiring Plaintiff to file a new Complaint regarding CY 2015 or CY 2016, but allowing the Court, if it finds the Government liable on any Count for CY 2014 risk corridors, to declare that the Government is similarly obligated to pay risk corridors amounts due for CY 2015 and CY 2016. *See* Opp. at 60. Both Defendant and the Court in *Lincoln* completely failed to consider the interests of judicial economy and efficiency, and did not address the *Aliphcon* and *Pac. Gas & Elec. Co.* cases that Plaintiff cited in its Opposition. *See generally Lincoln*, 2016 WL 6651428, at *11; Reply at 11-12; Opp. at 60.

IV. THE COURT MUST ANALYZE COUNT I UNDER THE 12(B)(6) GOVERNING STANDARD

A. *Lincoln*'s Administrative Record Procedure Renders That Decision Inapplicable to the Court's 12(b)(6) Analysis

As Plaintiff demonstrated in its Opposition, the governing standard on a 12(b)(6) motion is whether the well-pled facts in the Complaint – with all facts accepted as true and all inferences drawn in Plaintiff's favor – "state a claim to relief that is plausible on its face." *E.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); Opp. at 16-17. Defendant attempts to circumvent this standard in its Reply by relying heavily on the Court's rulings on the motion on the AR in the *Lincoln* case (*see* Reply at 12-15 (citing *Lincoln* seven times)), but the Court in *Lincoln* did *not* decide the statutory count on a 12(b)(6) motion or even on a motion for summary judgment. Rather, Judge Lettow, at the plaintiff's request, ordered the Defendant to create and file under RCFC 52.1 an AR in order to expedite the case.[9] But there were no agency proceedings before HHS or CMS, as the Government conceded on the record in *Lincoln*. *See Lincoln* Hr'g Tr. at 21:5-11 ("To our knowledge, I don't know that there is an administrative record.").[10] The Court in *Lincoln* subsequently ordered the parties to file motions on the AR, and then applied an APA standard of review, affording great deference to the Government (despite the absence of any agency proceedings). *See Lincoln*, 2016 WL 6651428, at *14. Applying the standard borrowed from the APA, the Court explained that it would review and uphold (not set aside) the agency's "decision" so long as it was "not contrary to law." *Id.*

It was erroneous for the Court to implement the AR procedure in *Lincoln* because there

[9] The plaintiff in *Lincoln* improvidently sought the inapplicable AR procedure to get an expedited decision, but even Judge Lettow questioned the appropriateness of the AR procedure in *Lincoln*. *See* Hr'g Tr. at 10:24-13:19, *Lincoln* (Aug. 12, 2016), ECF No. 14 [hereinafter *Lincoln* Hr'g Tr.].

[10] The Court ordered Defendant to create an AR in *Lincoln* where no actual record of prior agency proceedings existed, and thus Defendant compiled, in the words of Judge Lettow, "what it th[ought] the administrative record is." *Lincoln* Hr'g Tr. at 29:4-7. This resulted in a limited, one-sided record that was not supplemented or objected to by Lincoln nor developed after any discovery. It is highly unlikely that any supplementation of the AR could have even been made. *See, e.g.*, *Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1378-81 (Fed. Cir. 2009).

were no prior "proceedings before an agency." RCFC 52.1(a). If there had been, then an AR would have already been certified and filed in that case, as required by RCFC 52.1, but it was not. The agency "decision" to which the Court gave deference in *Lincoln* was not the product of any prior proceeding, but was a "final rule" published in the Federal Register on May 27, 2014. *Lincoln*, 2016 WL 6651428, at *18. The Court in *Lincoln* was required to, but did not, use "the administrative record already in existence, not some new record made initially in the reviewing court." *Home Prods. Int'l, Inc. v. United States*, 633 F.3d 1369, 1379 (Fed. Cir. 2011) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985)); *see also SOS Int'l LLC*, 127 Fed. Cl. at 586 (quoting *Axiom*, 564 F.3d at 1379). But there was no administrative proceeding before HHS or CMS on the plaintiff's risk corridor claim in *Lincoln*—or in any other risk corridors case.

It was also erroneous for the Court in *Lincoln* to apply an APA standard of review, and the Government agreed at the time. *See Lincoln* Hr'g Tr. at 21:6-7 (counsel for the Defendant conceding that "this isn't an APA case"). There was no final agency rule or order resulting from any administrative hearing or other proceeding involving Lincoln. *See U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813 (2016). The APA is very rarely applied in this Court, and only where a plaintiff challenges an agency's final decision following an agency proceeding, not in cases where, as here, a plaintiff seeks damages under a money-mandating statute.[11] *See, e.g.*, *Greenlee Cnty.*, 487 F.3d at 877 (reviewing a claim against the Interior Department for breach of the government's obligation to make payments under the Payment in Lieu of Taxes Act, a money-mandating statute, without applying an APA standard or discussing

[11] Although both the APA and the Tucker Act waive the sovereign immunity of the federal government in certain circumstances, "the APA's waiver of sovereign immunity is limited to cases seeking relief other than money damages." *Straughter v. United States*, 120 Fed. Cl. 119, 125 (2015). Claims for monetary compensation are "outside the scope of the waiver of sovereign immunity arising from Section 702 of the APA." *Lummi Tribe of Lummi Reservation v. United States*, 99 Fed. Cl. 584, 604 (2011) (distinguishing Tucker Act claims for monetary damages from APA claims for the return of property improperly denied through a final agency action).

deference to agency interpretation); 28 U.S.C. § 1491(b)(4) (authorizing the APA standard – 5 U.S.C. § 706 – to be used only in bid protests under subsection (b) of the Tucker Act, not money-mandating claims under subsection (a)).[12]

Because of the significant procedural distinctions involved in a motion on the AR, *Lincoln* should not be followed here even if this case were at the summary judgment stage. In *Bannum, Inc. v. United States*, the Federal Circuit highlighted "several reasons to differentiate between a summary judgment and a judgment on the administrative record" used in bid protest cases under the Court's 28 U.S.C. § 1491(b) jurisdiction. 404 F.3d 1346, 1356 (Fed. Cir. 2005). Those differences included: (i) different "burden-shifting and presumptions," (ii) a "different standard of review," and (iii) "restrict[ing] the evidence to the agency record," which is "consistent with a rule designed to provide for trial on a paper [agency] record, [and] allowing fact-finding by the trial court." *Id.* As this Court recognized in *SOS Int'l LLC*, "RCFC 52.1 limits the Court's review of an agency's procurement decision to the administrative record … so, unlike a summary judgment motion brought pursuant to RCFC 56, the existence of genuine issues of material fact does not preclude judgment upon the administrative record under RCFC 52.1." 127 Fed. Cl. at 586. Rather, under the AR procedure, "the Court's inquiry is whether, 'given all the disputed and undisputed facts, a party has met its burden of proof based on the evidence in the record.'" *Id.* (quoting *A&D Fire Prot., Inc. v. United States*, 72 Fed. Cl. 126, 131 (2006)). This RCFC 52.1 procedure should not have been applied in *Lincoln*, and the error should not be compounded by applying *Lincoln*'s AR findings here, especially on this Motion

[12] Even the cases cited by the Court in *Lincoln* do not support application of the APA standard in that case because they involved bid protest cases or appeals of clear final decisions issued by various federal agencies. For example, in *Weeks Marine, Inc. v. United States*, 575 F.3d 1352, 1358 (Fed. Cir. 2009), and *Centech Grp., Inc. v. United States*, 554 F.3d 1029, 1037 (Fed. Cir. 2009), the court applied the APA standard of review to its consideration of bid protests under its 28 U.S.C § 1491(b) jurisdiction. Similarly distinguishable are *Meyer v. United States*, 127 Fed. Cl. 372, 381 (2016), *Sursely v. Peake*, 551 F.3d 1351, 1355 (Fed. Cir. 2009), and *White v. United States*, 543 F.3d 1330, 1333 (Fed. Cir. 2008), which all involved appeals from agency final decisions made in administrative hearings that denied the aggrieved party a financial benefit, such as a death or employment benefit.

requiring application of the governing standards under Rule 12(b)(6). Accordingly, because of these differences in procedure, standards and circumstances, and the fact that it is not binding on this Court, the *Lincoln* decision on the AR as to the statutory count should not be followed in this case.[13]

B. Defendant's Statutory Interpretation Arguments Relying on *Lincoln* are Inapposite Here

The Court's analysis of the plaintiff's statutory claims in *Lincoln* also either overlooked or misconstrued certain arguments and authorities, and should not be followed here. Relying on *Lincoln*, Defendant argues that § 1342 has always been "budget neutral," and that Plaintiff is wrong in asserting that "the United States is required to make full payments" for risk corridors. Reply at 13-14. Those arguments go well beyond the pleadings, are unsupported, and are based on clearly disputed assertions, particularly where, as here, Defendant is forced to concede that HHS announced in March 2013 that "[t]he risk corridors program is not statutorily required to be budget neutral," Compl. ¶ 94 & Ex. 09, and that HHS repeatedly has acknowledged that § 1342 "requires the [HHS] Secretary to make full payments to issuers." *E.g.*, Compl. ¶¶ 102, 104 & Exs. 17, 18.[14] *Lincoln* overlooked these facts.

Also overlooked by the Court in *Lincoln* was the statute's plain text. Section 1342(b) contains two distinct clauses: the "payments out" clause (1), and the "payments in" clause (2). *See* Compl. ¶ 55; *Timex V.I., Inc. v. United States*, 157 F.3d 879, 883 (Fed. Cir. 1998) (finding error in agency's linking of two distinct clauses in a subparagraph when no such link existed in the statutory text). Congress included no language in § 1342(b), or anywhere else in the ACA,

---

[13] Most certainly, the 12(b)(6) governing standard does not permit the Court to dismiss Count I by concluding that the Government's conduct here is "reasonable," as Defendant wrongly suggests. *See* Reply at 12 (citing *Lincoln*, 2016 WL 6651428, at *18-19).

[14] Although Defendant contends that HHS' pre-April 2014 pronouncements through rule-making or guidance "have no force of law" (Reply at 5 n.3), Defendant cites no authority for this assertion, nor does it even attempt to address the agency's complete about-face on its budget neutrality interpretation between March 2013 and April 2014.

that in any way limits the amount of risk corridors payments to the amount collected.[15] Instead, § 1342(b)(1) mandates that if a QHP qualifies for risk corridors payments in a plan year, then HHS "shall pay" those risk corridors payments pursuant to the statutory formula, with no further qualification. This complies with the stated purpose of risk corridors, for *the Government* to share in the risk of inaccurate rate-setting by participating insurers. *See* Opp. at 6 n.14. HHS was correct in announcing in March 2013 that "[r]egardless of the balance of payments and receipts, HHS will remit payments as required under [§] 1342." Compl. ¶ 94 & Ex. 09. That was HHS' statutory "shall pay" obligation, and courts "may not add terms or provisions where Congress omitted them." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 168 n.16 (1993).

Precisely because § 1342 is not a "budget neutral" statute, the current Congressional majority subsequently introduced legislation – which failed – attempting to impose budget neutrality on the statute,[16] and ultimately passed the appropriations act riders limiting the sources of funding for risk corridors payments to resemble budget neutrality. If § 1342 was already budget neutral (as Defendant now contends), Congress would not have undertaken those efforts.

Defendant insupportably asserts that, under § 1342, risk corridors collections "are the only source of funding provided for" risk corridors payments. Reply at 13. But this ignores both the plain text of § 1342 and fundamental federal appropriations law, which holds that any money received by an agency (outside of its congressional appropriations) must be deposited in the Treasury's general fund pursuant to 31 U.S.C. § 3302(b), making those funds unavailable to the agency absent an appropriation. *See* GAO Red Book at 12-85 to -86 (3d ed. 2008). Defendant's argument implies that Congress established § 1342 as a "revolving fund," which "authorizes an

---

[15] Nor does Defendant provide any authority to support its contention that Congress intended to delegate to HHS the determination of whether Congress' "shall pay" risk corridors obligation should be budget neutral. This economical, budgeting determination is not a subject within HHS' specific regulatory expertise and carries large financial and political implications. *See, e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015).

[16] *See* Sen. Rubio's Obamacare Taxpayer Bailout Protection Act, S. 2214, 113th Cong. (2014).

agency to retain receipts and deposit them into the fund to finance the fund's operations." *Id.* at 12-85. But "[t]he legislation authorizing a revolving fund is a permanent, indefinite appropriation," *id.* at 12-87, and no such language can be found in § 1342. "Perhaps the most fundamental rule relating to revolving funds is that a federal agency may not establish a revolving fund unless it has specific statutory authority to do so." *Id.* at 12-89.

With the mandatory "shall pay" risk corridors payment obligation included in § 1342, Congress did not need to include additional appropriations language to confirm the obligation, as Defendant now contends. *See* Reply at 13-14. While "in some instances the statute creating the right to compensation (or authorizing the government to contract) may restrict the government's liability or limit its contractual authority to the amount appropriated by Congress," this is clearly not one of those scenarios. *Greenlee Cnty.*, 487 F.3d at 878. Here there is no language in the statute using the phase "subject to the availability of appropriations," or "[a]mounts are available only as provided in appropriations laws." *Id.* Instead, § 1342 is free from any such restrictions, which means that "[r]ather than limiting the government's obligation, a 'failure [of Congress] to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights [remain] enforceable in the Court of Claims.'" *Id.* at 877 (quoting *N.Y. Airways*, 369 F.2d at 748) (alterations in original). Neither Defendant's Reply regarding Count I, nor the *Lincoln* Court's statutory analysis on the motion for judgment on the AR, discuss this important binding precedent from *Greenlee County* and *New York Airways*.

Instead, Defendant and the Court in *Lincoln* curiously place great emphasis on the 2010 CBO Report already addressed in Plaintiff's Opposition. *See* Opp. at 31-32. Aside from the fact

that CBO reports cannot be used to determine statutory intent,[17] there is absolutely nothing in either the CBO's March 20, 2010 letter to Speaker Pelosi, or any of the preceding CBO letters to congressional leadership,[18] stating why risk corridors were omitted from all of those analyses. Inferring CBO's silence as meaning that § 1342 is budget neutral would violate the 12(b)(6) governing standard. Contrary to Defendant's assertion, Plaintiff addresses the relevance of Medicare Part D to statutory interpretation in its Opposition. *See* Opp. at 30. Neither Defendant's Reply nor the Court's decision in *Lincoln* consider, however, that the inferences drawn from Congress' requirement that the risk corridors program be "based on" Part D's similar program must be drawn in Plaintiff's favor at the 12(b)(6) stage.[19]

Finally, on their face, the riders in the FY 2015 and FY 2016 Appropriations Acts did not repeal, amend, or abrogate the original "shall pay" money-mandating obligation that Congress wrote into § 1342. Indeed, Defendant now admits in its Reply that "Congress did not intend to prohibit risk corridors payments entirely" through the appropriations riders. Reply at 19. As Plaintiff explained in its Opposition, the appropriations riders failed to rescind the Government's risk corridors payment obligation created by the Congress that enacted § 1342. *See* Opp. at 35-39. A later Congress' appropriations act cannot be used to determine the intent of an earlier Congress, because "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). Contrary to Defendant's suggestion, Plaintiff does not carry the burden in responding to a

---

[17] *See, e.g.*, *Sharp v. United States*, 580 F.3d 1234, 1238-39 (Fed. Cir. 2009) ("[T]he CBO is not Congress, and its reading of the statute is not tantamount to congressional intent.").

[18] CBO sent letters regarding the ACA to Sen. Baucus on October 7, 2009, Sen. Reid on November 18, 2009, Sen. Bayh on November 30, 2009, Sen. Reid on December 19, 2009, Sen. Reid on March 11, 2010, and Speaker Pelosi on March 18, 2010.

[19] Both the ACA statute, including the legislative history of Medicare Part D, and the implementing HHS regulations refer to the calculation of risk corridors payments on a yearly basis. Section 1342(b)(1) states that HHS "shall pay to the plan" a certain amount if the plan's allowable costs "for any plan year" exceed the target amount by a certain threshold. *See also* 45 C.F.R. § 153.510(b) ("any benefit year").

12(b)(6) motion to "refute[ ] … congressional purpose." Reply at 21. Rather, Defendant's motion must be denied because the Complaint's well-pled facts plausibly state a claim in Count I that the Government's failure to make full and timely CY 2014 risk corridors payments violated § 1342 and its implementing regulations.

V. COUNT II STATES A VALID BREACH OF EXPRESS CONTRACT CLAIM

Defendant insists in its Reply that the Court weigh the sufficiency of Plaintiff's evidence rather than construe the Complaint's allegations in Plaintiff's favor, as is required under Rule 12(b)(6). *See* Reply at 21-24. Section II.d of the CY 2014 QHP Agreement imposes a duty on the Government to "undertake all reasonable efforts to implement systems and processes that will support QHP[] functions." *See* Compl. Ex. 02.[20] The Complaint's well-pled allegations show that the Government breached that duty by failing to make full and timely risk corridors payments. *See, e.g.*, Compl. ¶¶ 166-79. Additionally, unlike the facts in the cases cited by Defendant, § V.g of the CY 2014 QHP Agreement references more than the general "laws of the United States." *See, e.g.*, Compl. ¶ 46. Finally, the *Lincoln* decision failed to address the argument that the risk corridors program was material to Plaintiff's decision to enter into the CY 2014 QHP Agreement. *See* Compl. ¶¶ 170, 174. Because Plaintiff plausibly alleges all essential elements of the Government's breach of an express contract, Defendant's 12(b)(6) motion should be denied for Count II. *See* Opp. at 41-44.

VI. COUNT III STATES A VALID BREACH OF IMPLIED-IN-FACT CONTRACT CLAIM

Defendant also relies heavily on *Lincoln* to support its argument that Plaintiff has failed to allege an implied-in-fact contract because the statutory language of the ACA does not specifically use the term "contract." Reply at 25-26. As the Court did in *Lincoln*, however,

[20] The QHP Agreement's plain language – the starting point of contract interpretation, as pointed out in *Lincoln* – clearly contemplates more than just electronics, and nothing in § II.d indicates that surrounding subsections or a "Companion Guide" should be used to interpret its terms.

Defendant's Reply ignores or overlooks Plaintiff's allegations that the Government's conduct, both at the time of statutory formation and afterwards, evidenced the parties' intent to be mutually bound by an implied-in-fact contract.

A. The "Surrounding Circumstances" Include Government Conduct

Defendant argues in its Reply that, because the ACA does not expressly use the word "contract," the Court should not find that the parties mutually agreed to enter into a contract for the risk corridors program. *See* Reply at 26.[21] Defendant's narrow contention, that acceptance and offer must be expressly set forth in the statute, disregards that the language of offer, acceptance, or contractual intent can be inferred from *the surrounding circumstances*—including the purpose, context, legislative history, or any other pertinent evidence of actual intent.[22] In *New York Airways*, in finding that the actions of the parties evidenced an intent to contract, the Court looked to more than the just the actions prior to passage of the statute. *See* 369 F.2d at 751. The Court explained, in addition to statements surrounding the act's passage:

> [I]t [wa]s equally manifest that throughout the years in question the key congressmen who spoke on the subject fully understood that the commitment to pay subsidy compensation decreed by the Board for helicopter carriers was a binding obligation of the Government in the courts even in the failure of Congress to appropriate the necessary funds.

Id. Additionally, relying on *United States Trust*, the District Court in *Nat'l Ed. Assoc.-Rhode*

---

[21] *Lincoln* specifically relied upon *Hanlin v. United States*, 316 F.3d 1325, 1331 (Fed. Cir. 2003) and *Radium Mines, Inc. v. United States*, 153 F. Supp. 403, 405-06 (Ct. Cl. 1957), in which the statutes at issue expressly used the word "contract," but failed to acknowledge that the lack of such terms is not a bar to finding an implied-in-fact contract was created. *Lincoln*, 2016 WL 6651428, at *22-23. Similarly, Defendant's cases have no applicability to Plaintiff's claim in Count III because they contain no mention of governmental conduct. *See* Reply at 24-29.

[22] *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 468 (1985); *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 17-18 (1977) (holding that while the language of the statute did not expressly state an intent to contract, it was "properly characterized as a contractual obligation" when considering the purpose of the agreement and the fact that the Government "received the benefit they bargained for"); *ARRA Energy Co. I v. United States*, 97 Fed. Cl. 12, 27 (2011) (finding plaintiff can overcome the presumption against statutorily-created contract rights by pointing to "conduct on the part of the government that allows a reasonable inference that the government intended to enter into a contract"); *Prudential Ins. Co. of Am. v. United States*, 801 F.2d 1295, 1297 (Fed. Cir. 1986) (finding an implied-in-fact contract "is not created or evidenced by explicit agreement of the parties, but is inferred as a matter of reason or justice from the acts or conduct of the parties").

Island found an implied-in-fact contract had been formed because the "plaintiffs voluntarily opted into the System, contributed to it, participated in it for four years, and made decisions about their lives in response to their settled relationship." *Nat'l Educ. Assoc.-R.I. v. Ret. Bd. of the R.I. Emps.' Ret. Sys.*, 890 F. Supp. 1143, 1161 (D.R.I. 1995); *see also id.* at 1152 (quoting *U.S. Trust*, 431 U.S. at 17 n.14) ("[T]his Court is not limited to an examination of statutory language when it determines whether a statute amounts to a contract," but also should evaluate "the circumstances"). Plaintiff's well-pled facts show that the combination of § 1342, 45 C.F.R. § 153.510, and the Government's conduct before and after Plaintiff agreed to become a QHP for CY 2014, plausibly support that the "conduct of the parties show[ ], in the light of the surrounding circumstances, their tacit understanding." *Hercules, Inc. v. United States*, 516 U.S. 417, 424 (1996); *see, e.g.*, Compl. ¶¶ 2-7, 88-104.

Defendant's attempt to distinguish the implied-in-fact contract in *New York Airways* from the facts here is unpersuasive. *See* Reply at 27. Relying on *Lincoln*, Defendant contends that *New York Airways* is distinguishable because, it claims, the Government is administering a program here, not procuring goods or services, and thus it argues the offer cannot be accepted by performance alone. *See id.* This is a distinction without a difference.[23] The ACA, like the FAA at issue in *New York Airways*, contained a mandatory payment obligation that, upon acceptance by the Plaintiff through participation in the risk corridors program, became a binding payment obligation. The ACA indicates a clear intent that the insurer "shall" receive payments calculated under the risk corridors program so long as it has agreed to be a QHP and provide its healthcare services to members on the ACA Exchanges according to the Government's terms. The promise of risk corridors payments induced Plaintiff to become a QHP, and Plaintiff agreed to participate

[23] Moreover, even if the Court finds the QHP Agreements do not create an express contract, the mere fact that the Government entered into the agreements with Plaintiff proves that Defendant did not simply view the ACA as a regulatory scheme. Instead, signing the QHP Agreements is part of the overall conduct between the parties evidencing their mutual intent to enter into an implied-in-fact contract.

on the North Carolina Exchange, thus accepting the Government's offer on the terms it proposed. Even *Baker v. United States*, cited by Defendant, recognized that in cases where the statutory obligation was "promissory in nature," such as in *New York Airways*, a contract can be implied-in-fact from regulations promising payment. 50 Fed. Cl. 483, 490 (2001); *see also Nat'l Educ. Assoc.-R.I.*, 890 F. Supp. at 1152 (citing Restat. (2d) of Contracts § 24) (recognizing that statute at issue "functioned as an offer" and that the "plaintiffs accepted the statutory offer by taking the actions that the statute required in order to participate in the System").

Defendant and the Court in *Lincoln* seem to overlook that participation in the risk corridors program was voluntary. It would never have been economically viable for Plaintiff to undertake the ACA's required obligations without a binding obligation from the Government to account for – and make prompt payment on – the substantial risk. "It would, indeed, have been madness … to have engaged in these transactions with no more protection than the Government's reading would have given [QHPs], for the very existence of their institutions would then have been in jeopardy from the moment their agreements were signed." *See United States v. Winstar Corp*., 518 U.S. 839, 848 (1996).[24]

B. HHS Officials Had Contractual Authority to Bind the Government

Defendant fails to mention that the Court in *Lincoln* rejected Defendant's argument, also made here, that the Anti-Deficiency Act ("ADA") barred the plaintiff's implied-in-fact contract claim. *See Lincoln*, 2016 WL 6651428, at *24 n.30 (finding that the ADA was not triggered due to HHS' authority to use general CMS appropriations prior to December 2014). As Plaintiff demonstrated in its Opposition, the Government's obligation to make risk corridors payments here was "authorized by law." *See* Opp. at 53-55. Moreover, contrary to Defendant's assertions,

[24] *See also Fifth Third Bank of W. Ohio v. United States*, 402 F.3d 1221, 1233 (Fed Cir. 2005) (citing *Winstar Corp.*, 518 U.S. at 848) (holding that the agreements would not have been formed if there was not a promise for special treatment of goodwill because the plaintiff "would not have decided to complete transactions with such dire consequences"); *Sinclair v. United States*, 49 Fed. Cl. 274, 280 (2001) (denying dismissal of plaintiff's breach of implied-in-fact contract claim under *Winstar's* "madness" analysis).

no separate requirement exists to also establish "budget authority" to allege an implied-in-fact contract against the Government, and Defendant cites no authority otherwise. *See* Reply at 28.[25] The Complaint alleges sufficient facts to support a reasonable inference that HHS officials had authority to enter into implied-in-fact contracts with Plaintiff. *See, e.g.*, Compl. ¶¶ 43, 89-94, 168, 182, 189.

C. Plaintiff Sufficiently Alleged Breach of the Implied-In-Fact Contract

Defendant further relies on the *Lincoln* decision to argue that this Court should defer to HHS' interpretation of the ACA and find that there was no breach of the parties' agreement. *See* Reply at 29. Defendant's reliance again is misplaced, however, because *Lincoln* is tainted by its overly deferential APA standard of review on a limited AR, improperly deferring to HHS' post-April 2014 position that the ACA established a "three-year payment framework" in which to make full payment of the annually calculated risk corridors payments. *See* Reply at 5-6, 10, 28-29. The *Lincoln* Court then employed that anomalous ruling on the statutory count to determine that HHS had discretion to determine when payments would be made and thus could not have "breached" its contractual payment obligation. *Lincoln*, 2016 WL 6651428, at *23-24. That erroneous determination in *Lincoln*, decided under the anomalous APA standard on the motion for judgment on the AR, should not be followed here. Because Plaintiff plausibly alleged that Defendant breached the parties' implied-in-fact contract by failing to fully and timely make its obligated CY 2014 risk corridors payments, Count III cannot be dismissed on 12(b)(6) grounds. *See* Opp. at 45 n.91.

[25] Defendant's reliance in its Reply on *Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442 (Fed. Cir. 1997), is misplaced. *See* Reply at 28. In *Cessna*, the Federal Circuit did not address the exception to the ADA relevant here, which allows the Government to obligate funds beyond the current fiscal year if "authorized by law." 31 U.S.C. § 1341(a)(1)(B). Instead, the court rejected the argument that the ADA had been violated by the obligation of multi-year contract payments prior to appropriation and apportionment of the funds, explaining that the Government has authority, in certain circumstances such as pursuant to 10 U.S.C. § 2306c, to enter into multi-year contracts prior to the appropriation of funds for periods of "up to five years, with option to extend performance by a period not exceeding three additional years." *Cessna* at 1449-50.

CONCLUSION

For the foregoing reasons, as well as those set forth in its Opposition, Plaintiff respectfully requests that the Court deny Defendant's Motion to Dismiss brought under Rule 12(b)(1) and Rule 12(b)(6) against Counts I-V.

Dated: December 6, 2016

Respectfully Submitted,

s/ Lawrence S. Sher

Lawrence S. Sher (D.C. Bar No. 430469)
REED SMITH LLP
1301 K Street NW
Suite 1000-East Tower
Washington, DC 20005
Telephone: 202.414.9200
Facsimile: 202.414.9299
Email: lsher@reedsmith.com

Of Counsel:

Kyle R. Bahr (D.C. Bar No. 986946)
Conor M. Shaffer (PA Bar No. 314474)
REED SMITH LLP
Reed Smith Centre
225 Fifth Avenue, Suite 1200
Pittsburgh, PA 15222
Telephone: 412.288.3131
Facsimile: 412.288.3063
Email: kbahr@reedsmith.com
cshaffer@reedsmith.com

Counsel for Plaintiff Blue Cross and Blue Shield of North Carolina

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2016, a copy of the foregoing Plaintiff's Sur-Reply to the United States' Motion to Dismiss was filed electronically with the Court's Electronic Case Filing (ECF) system. I understand that notice of this filing with be sent to all parties by operation of the Court's ECF system.

s/ Lawrence S. Sher
Lawrence S. Sher
Counsel for Plaintiff