**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

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| COMMON GROUND HEALTHCARE COOPERATIVE,<br><br>Plaintiff,<br>on behalf of itself and all others similarly situated,<br><br>vs.<br><br>THE UNITED STATES OF AMERICA,<br><br>Defendant. | No. 1:17-cv-00877-MMS<br>(Judge Sweeney) |

**PLAINTIFF COMMON GROUND HEALTHCARE COOPERATIVE'S**
**MOTION FOR CLASS CERTIFICATION**

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## INTRODUCTION

Plaintiff Common Ground Healthcare Cooperative ("Common Ground") seeks certification of two separate classes of qualified health plan ("QHP") issuers: (1) a class of QHP issuers who did not receive full timely payments for the 2016 plan year pursuant to the ACA's risk corridors program ("Risk Corridors Class"), and (2) a class of QHP issuers who did not receive full timely payments pursuant to the ACA's cost-sharing reduction ("CSR") provisions ("CSR Class"). This case, which concerns the United States of America's (the "Government's") failure to make full timely payments to health insurers that provided QHPs on healthcare exchanges under two different provisions of the Affordable Care Act ("ACA") is tailor-made for class certification, as explained below.

This Court already certified a class nearly identical to the Risk Corridors Class in the related case, *Health Republic Ins. Co. v. United States*, 1:16-cv-00259 (MMS), Dkt. 30, (Fed. Cl.). and the same arguments for certification apply here. Indeed, the two classes are identical in nearly all materials respects, except that the *Health Republic* class covered the 2014-2015 benefit years, while the proposed Risk Corridors Class here covers the 2016 benefit year. Each member of the Risk Corridors Class was subject to the same requirements under the same statute and regulations and has been harmed in the same way by the same Government actions. The Risk Corridor Class, like the *Health Republic* class, likewise satisfies the numerosity, typicality, commonality, adequacy of representation, and ascertainability requirements, and, given the substantial overlap in claims, a class action is superior to other types of individual actions.

The CSR Class similarly warrants certification. Each member of the CSR Class was subject to the same statutory and regulatory requirements and suffered the same harms due to the same Government actions. Each member of the Risk Corridors Class and the CSR Class will

look to the same evidence to prove liability and damages. So, too, does the CSR Class satisfy the numerosity, typicality, commonality, adequacy of representation, ascertainability, and superiority requirements, for the same reasons as the Risk Corridor classes.

Because the requirements for certification under Rule 23 of the United States Court of Federal Claims ("RCFC") are readily satisfied and certification of both the Risk Corridors Class and the CSR Class "serves public purposes of judicial economy and efficiency," *Singleton v. United States*, 92 Fed. Cl. 78, 82 (2010), the Risk Corridors Class and CSR Class should be certified. Plaintiffs therefore seek approval of the following classes:

***Risk Corridors Class***

> All persons or entities offering Qualified Health Plans under the Patient Protection and Affordable Care Act in the 2016 benefit year, and whose allowable costs in the 2016 benefit year, as calculated by the Centers for Medicare and Medicaid Services, were more than 103 percent of their target amounts (as those terms are defined in the Patient Protection and Affordable Care Act). Excluded from the Class is the Defendant and its members, agencies, divisions, departments, and employees.

***CSR Class***

> All persons or entities offering Qualified Health Plans under the Patient Protection and Affordable Care Act in the 2017 or 2018 benefit year, and who made cost-sharing reductions for eligible insureds pursuant to Section 1402 of the Patient Protection and Affordable Care Act, but did not receive a "timely and periodic" payment from the Government of an amount "equal to the value of the reductions" provided to its insureds. Excluded from the Class is the Defendant and its members, agencies, divisions, departments, and employees.

## FACTUAL BACKGROUND

### I. THIS COURT ALREADY CERTIFIED A NEARLY IDENTICAL RISK CORRIDORS CLASS IN THE *HEALTH REPUBLIC* CASE

Plaintiff's counsel is counsel for the class of QHP issuers in the related case of *Health Republic Ins. Co. v. United States*, 1:16-cv-00259 (MMS), (Fed. Cl.). On January 3, 2017, this Court certified a class defined as follows:

> All persons or entities offering Qualified Health Plans under the Patient Protection and Affordable Care Act in the 2014 and 2015 benefit years, and whose allowable costs in either the 2014 or 2015 benefit years, as calculated by the Centers for Medicare and Medicaid Services, were more than 103 percent of their target amounts (as those terms are defined in the Patient Protection and Affordable Care Act). Excluded from the Class are the Defendant and its members, agencies, divisions, departments, and employees.

*Health Republic Ins. Co. v. United States*, Order at 1-2, Dkt. 30, 1:16-cv-00259 (MMS), (Fed. Cl. 1/3/2017). The Court found that the class "satisfied the requirements of RCFC 23," including "(i) numerosity–that the proposed class is so large that joinder is impracticable; (ii) commonality–that there are common questions of law or fact that predominate over questions affecting individual prospective class members and that the government has treated the prospective class members similarly; (iii) typicality–that his or her claims are typical of the proposed class; (iv) adequacy–that he or she will fairly represent the proposed class; and (v) superiority–that a class action is the fairest and most efficient method of resolving the suit." *Id.* at 1 (citing RCFC 23(a)-(b)).

The Court also appointed Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel") as lead counsel for the class. *Id.* at 2. The Court also ordered the Government to provide to plaintiff within ten days "a list of potential class members" that included "the name of the individual or entity that is a potential class member; the current or last known electronic-mail address of the individual or entity (providing name and email of person responsible for risk corridors receivables, if known); and the current or last known mailing address of the individual or entity." *Id.* at 2.

Given the substantial overlap between the claims in this case and in *Health Republic*, Plaintiff respectfully submits that the class certification Order in *Health Republic* is highly persuasive as to why the Court should grant certification of the Risk Corridors Class, as well as the CSR Class.

## II. THE AFFORDABLE CARE ACT'S 3R PROGRAMS WERE DESIGNED TO REDUCE UNCERTAINTY FOR INSURERS AND TO STABILIZE PREMIUMS

Upon its enactment on March 23, 2010, the ACA created a series of programs and effectuated a number of health care reforms. The ACA was intended to increase competition in health insurance markets and to expand health insurance coverage to millions of uninsured Americans. Declaration of M. Kate Bundorf ("Bundorf Decl.") ¶¶ 7, 9. To this end, it established Health Insurance Marketplaces, also called "Health Benefit Exchanges" (the "Exchanges"). These Exchanges enabled insurers to sell individual and small group plans. For health plans issued through the Exchange, these plans were required to satisfy specific criteria. Such plans are known as "Qualified Health Plans," or "QHPs." *See* 42 U.S.C. § 18021.

### A. The ACA Created the 3Rs to Work Together to Stabilize and Mitigate Risk

In the first few years of the Exchanges, experts anticipated that QHP issuers would face significant challenges and uncertainty in setting insurance premiums. *See* Bundorf Decl. ¶ 7. A key driver behind an insurance company's profits is its ability to actuarially predict how much an average insured will need in terms of health coverage. *Id.* ¶ 6. These predictions are used to price the insurer's plan premiums. *Id.* Due to the ACA Exchanges' novel makeup, coupled with the ACA requirement for guaranteed issue, QHP issuers could not engage in medical underwriting before providing insurance coverage and did not have any effective way to accurately predict the number and cost of the previously uninsured individuals who would be enrolling in their plans starting in 2014. *Id.* ¶ 7.

Congress explicitly recognized that this uncertainty could lead insurers to increase premiums and cause instability in the market. This is precisely why the ACA included three inter-related "premium stabilization programs," *i.e.*, the 3Rs: reinsurance, risk corridors, and risk adjustment. 42 U.S.C. §§ 18061-18063. The 3Rs targeted specific uncertainties in the new

Exchange markets and, as the Centers for Medicare and Medicaid Services ("CMS") has explained, were designed "to assist insurers through the transition period, and to create a stable, competitive and fair market for health insurance,"[1] particularly during the first few years of full ACA implementation. *See* Bundorf Decl. ¶¶ 8-9 (explaining the purpose and intended effect of each 3R program).

Discussing the risk corridors program specifically, CMS stated that "[d]ue to uncertainty about the population during the first years of Exchange operation, issuers may not be able to predict their risk accurately, and their premiums may reflect costs that are ultimately lower or higher than predicted." March 2012 Regulatory Impact Analysis, at 44. The risk corridors program would thus "protect against inaccurate rate setting in the early years of the Exchanges by limiting the extent of issuer losses and gains." *Id.* at 43; *see also* Bundorf Decl. ¶¶ 9-11 (discussing how and why a risk corridors program provides such protection).

## III. THE ACA RISK CORRIDORS PROGRAM HAS COMMON REQUIREMENTS AND THE GOVERNMENT'S FAILURE TO PAY HAS HAD COMMON EFFECTS

"The goal of the risk corridors program is to support the [Exchanges] by providing insurers with additional protection against uncertainty in claims costs during the first three years of the [Exchanges]."[2] "Issuers whose premiums exceed claims and other costs by more than a certain amount pay into the program, and insurers whose claims exceed premiums by a certain amount receive payments for their shortfall." *Id.*

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[1] CMS, "The Three Rs: An Overview" (Oct. 1, 2015) ("The Three Rs"), *available at* https://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2015-Fact-sheets-items/2015-10-01.html (last visited Dec. 13, 2017); *see also* CMS, "Regulatory Impact Analysis," (Mar. 16, 2012) ("March 2012 Regulatory Impact Analysis") at 38, *available at* https://www.cms.gov/CCIIO/Resources/Files/Downloads/hie3r-ria-032012.pdf (last visited Dec. 13, 2017).

[2] CMS, "The Three Rs," *supra* note 1.

### A. Mechanics of the ACA Risk Corridors Program

Section 1342(b) of the ACA mandates that the Secretary of the Department of Health and Human Services ("HHS"), for each of the first three years of full ACA implementation, must make risk corridors payments to any QHP issuer that, for the applicable year, had "allowable [health care] costs" that were more than three percent greater than a "target amount":

> (b) PAYMENT METHODOLOGY. —
>
> (1) PAYMENTS OUT. — The Secretary shall provide under the program established under subsection (a) that if —
>
> (A) a participating plan's allowable costs for any plan year are more than 103 percent but not more than 108 percent of the target amount, the Secretary shall pay to the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount; and
>
> (B) a participating plan's allowable costs for any plan year are more than 108 percent of the target amount, the Secretary shall pay to the plan an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount.
>
> (2) PAYMENTS IN.—The Secretary shall provide under the program established under subsection (a) that if—
>
> (A) a participating plan's allowable costs for any plan year are less than 97 percent but not less than 92 percent of the target amount, the plan shall pay to the Secretary an amount equal to 50 percent of the excess of 97 percent of the target amount over the allowable costs; and
>
> (B) a participating plan's allowable costs for any plan year are less than 92 percent of the target amount, the plan shall pay to the Secretary an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the excess of 92 percent of the target amount over the allowable costs.

42 U.S.C. § 18062(b). Both "allowable costs" and "target amounts" are defined on a plan year basis. *See* 42 U.S.C. § 18062(c)(1)(A) (defining allowable costs as certain costs "of a plan for any year"); 42 U.S.C. § 18062(c)(2) (defining "target amount" as total premiums less

administrative costs "of a plan for any year").

If a plan's allowable costs are more than three percent above the total of the plan's premium revenue less the plan's administrative costs, the plan shall receive a payment equal to 50 percent or more of the plan's costs over that three percent threshold. The annual risk adjustment and reinsurance payments are part of the calculation of a plan's allowable costs. 42 U.S.C. § 18062(c)(1)(B); 45 C.F.R. §153.530(b).

All Risk Corridors Class members are subject to the requirements set by HHS for participants in the risk corridor program, must satisfy certain requirements with respect to defining their premium data, allowable costs, and administrative costs, and must submit all necessary information for the risk corridor payment calculations by certain points established by statute, regulation, and HHS. 45 CFR §§ 153.510, 153.530. If QHP issuers abided by these requirements and satisfied the necessary criteria, they were eligible for "payments out" from the risk corridor program once the payments were calculated. Am. Compl. ¶ 33.

### B. The Government's Failure to Make Timely Full Payments Has Had Classwide Effects

On December 16, 2014, a year after QHP issuers already began offering insurance through the ACA-created Exchanges, Congress enacted the 2015 Spending Bill, which contained, among other provisions, a rider eliminating CMS/HHS's ability to make risk corridors payments from appropriated funds. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2491 (the "2015 Spending Bill") at 362. This was also over eighteen months after Risk Corridors Class member QHP issuers submitted proposed insurance premiums for regulatory approval. Am. Compl. ¶ 45. Congress included a similar provision in the following year's appropriations bill, Pub. L. No. 114-113 (the "2016 Spending Bill"), this time further specifying that special amounts appropriated to CMS and HHS

in 2016 could not be used to fund the risk corridors program. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 2624-25. In 2017, Congress once again enacted the same limitation to specific funds from the 2016 Spending Bill in the 2017 Spending Bill. Pub. L. No. 115-31 at Sec. 223.

Pursuant to their obligations under the Affordable Care Act and 45 CFR § 153.500 *et seq.*, Plaintiff and the Risk Corridors Class members complied with their statutory requirements throughout the year and submitted all required data for the risk corridor calculations by the statutory deadline. *See* 45 CFR § 153.530(d). The Government then calculated the risk corridor payments in and out, and announced the results on November 15, 2017. Am. Compl. ¶ 58.

Due to a variety of factors—including, among other things, the expected pricing risks in a new insurance market with dramatically new demographics and new benefit requirements, as well as a higher-than-expected percentage of sick individuals due to certain policy changes in 2013 that allowed consumers to renew non-ACA compliant health plans even after the Affordable Care Act became effective—Plaintiff and the Risk Corridors Class suffered substantial losses in 2016. Am. Compl. ¶ 58. Based on the Government's own official calculation, QHPs suffered $3.95 billion in compensable risk corridor losses. Am. Compl. ¶ 58. In CMS's November 15, 2017 statement, it informed Plaintiff and the Risk Corridors Class that they would receive none of the amounts they were owed under the risk corridor program for 2016, which reflected the fact that the $24.96 million the Government would be paying out to QHP issuers would be applied to outstanding 2014 risk corridor amounts, rather than used to reduce 2016 amounts. Am. Compl. ¶ 58. Each Risk Corridors Class member is identically situated with respect to risk corridors payments for the 2016 benefit year—each will receive *no payment* from the Government toward 2016 amounts. Am. Compl. ¶ 58.

## IV. THE COST-SHARING REDUCTION PROVISIONS OF THE ACA WERE DESIGNED TO REDUCE PREMIUMS AND OUT-OF-POCKET COSTS FOR LOW- AND MIDDLE-INCOME AMERICANS

In addition to the Three Rs, the ACA includes other features designed to make affordable health insurance coverage available to millions of Americans, including subsidies to reduce premiums and out-of-pocket costs for eligible individuals purchasing insurance on the exchanges. Am. Compl. ¶ 14. One such critical feature is the CSR reimbursements created by Section 1402 of the ACA. Pursuant to Section 1402, QHP issuers reduce the amount eligible insureds pay in out-of-pocket costs, and in exchange, the Government reimburses QHP issuers for those amounts. This makes health insurance for those insureds more affordable, a concept embodied in the very name of the Affordable Care Act.

Pursuant to Section 1402, QHP issuers pay a portion of eligible insureds' out-of-pocket costs, such as deductibles, co-pays, and similar expenses, thereby reducing the amount the eligible insureds must pay. In exchange for offering QHPs in the ACA exchanges and abiding by Section 1402's requirements, Section 1402 states that the Government will reimburse QHP issuers for any CSR payments they make. Specifically, the ACA requires that the Secretaries of HHS and the Treasury "***shall make*** periodic and timely payments to the [QHP] issuer equal to the value of the reductions." Pub. L. No. 111-148 § 1402(c)(3)(A) [42 U.S.C. § 18071] (emphasis added).

## V. THE ACA COST-SHARING REDUCTION PROVISION HAS COMMON REQUIREMENTS AND THE GOVERNMENT'S FAILURE TO PAY HAS HAD COMMON EFFECTS

### A. Mechanics of the ACA Cost-Sharing Reduction Reimbursements

Section 1402 requires QHP issuers to reduce out-of-pocket costs for eligible insureds (those who are eligible to receive tax credits under Section 1401 and whose household income is below 250% of the poverty level). Section 1402 then requires the Government to reimburse

QHP issuers for the costs of those reductions.

Section 1402 of the ACA provides as follows:

> In the case of an eligible insured enrolled in a qualified health plan – (1) the Secretary shall notify the issuer of the plan of such eligibility; and (2) the issuer shall reduce the cost-sharing under the plan at the level and in the manner specified in subsection (c).

ACA § 1402(a) [42 U.S.C. § 18071]. "Cost-sharing" includes "deductibles, coinsurance, copayments, or similar charges." ACA § 1302(c)(3)(A)(i) [42 U.S.C. § 18022]. QHP issuers must reduce cost sharing for eligible insureds who enroll in "silver plans" through the exchanges, ACA § 1402(c)(2),[3] and QHP issuers must offer at least one "silver" plan in order to participate in the exchanges, ACA § 1301(a)(1)(C)(ii) [42 U.S.C. § 18021].

Section 1402 of the ACA further requires the Secretaries of HHS and the Treasury to reimburse QHP issuers for these cost-sharing reductions:

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

ACA § 1402(c)(3)(A) [42 U.S.C. § 18071] (emphasis added).

Section 1412 of the ACA established a program for making "advance payments" to QHP issuers for CSR reimbursements provided by Section 1402. ACA § 1412 [42 U.S.C. § 18082]. Section 1412 provides that the "Secretary of the Treasury **shall make such advance payment** at such time and in such amount" as specified by HHS. *Id.* at § 1412(c)(3) (emphasis added). The details of this program are set out in implementing regulations. *See e.g.*, 45 C.F.R. § 156.430(b)(1) ("QHP issuer **will receive** periodic advance payments") (emphasis added).

Following the ACA's implementation, the Government established a CSR reimbursement

[3] In a "silver" plan, the QHP issuer pays 70% of the average enrollee's health care costs, leaving the enrollee responsible (before application of any subsidy) for the other 30% through cost sharing. *See* 42 U.S.C. § 18022(d)(B).

schedule under which the Government would provide periodic advance payments to QHP issuers, which are then periodically reconciled to the actual amount of cost-sharing reductions provided to enrollees and providers. *See* ACA § 1412 [42 U.S.C. § 18082]; 45 C.F.R. § 156.430(b)-(d). Specifically, CMS established "a payment approach under which HHS would make monthly advance payments to issuers to cover projected cost-sharing reduction amounts, and then reconcile those advance payments at the end of the benefit year to the actual cost-sharing reduction amounts."[4] "After the close of the benefit year, QHP issuers must submit to HHS information on the actual value of the cost-sharing reductions provided" and HHS "would then reconcile the advance payments and the actual cost-sharing reduction amounts."[5] Finally, the Government would reimburse the QHP issuer "any amounts necessary to reflect the CSR provided or, as appropriate, the issuer [would] be charged for excess amounts paid to it."[6]

### B. The Government's Failure to Pay Cost-Sharing Reduction Reimbursements Has Had Classwide Effects

In April 2013 (after the ACA was passed but before plans were being offered on exchanges), the Office of Management and Budget and HHS requested that Congress provide an appropriation designating funds for CSR payments. However, Congress did not provide the line item appropriation requested by HHS. *See* S. Rep. No. 113-71, 113th Cong. at 123 (July 11, 2013) (stating that "[t]he Committee recommendation does not include a mandatory

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[4] HHS Notice of Benefit and Payment Parameters for 2014, CMS (March 11, 2013), at 7, *available at* https://www.cms.gov/CCIIO/Resources/Files/Downloads/payment-notice-technical-summary-3-11-2013.pdf (last visited Dec. 13, 2017).

[5] *Id.*

[6] Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Years 2014 and 2015, CMS, March 16, 2016, at 28, *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/CMS_Guidance_on_CSR_Reconciliation-for_2014_and_2015_benefit_years.pdf (last visited Dec. 13, 2017); *see also* 45 C.F.R. 156.430(e).

appropriation, requested by the administration, for reduced cost sharing assistance . . . as provided for in sections 1402 and 1412 of the ACA") *available at* https://www.congress.gov/113/crpt/srpt71/CRPT-113srpt71.pdf (last visited Dec. 13, 2017). No subsequent Congressional action has explicitly appropriated money for Section 1402 CSR reimbursements, but Congress also never repealed or amended the CSR provision. Further, Congress has never included any language in appropriations or other bills preventing HHS, CMS, or the Treasury from accessing certain funds or accounts to make CSR payments.

In January 2014, the Obama administration began making monthly advance payments to reimburse QHP issuers for cost sharing reductions.[7] The Obama administration cited Section 1324 as the appropriation for these payment.[8] Section 1324 establishes a permanent appropriation of "[n]ecessary amounts…for refunding internal revenue collections as provided by law," including "refunds due from" specified provisions of the tax code. 31 U.S.C. § 1324. The ACA amended the pre-existing, permanent appropriation embodied in 31 U.S.C. § 1324 to include "refunds due from" the premium tax credits established by Section 1401 the ACA. ACA § 1401 [26 U.S.C. § 36B].

The Trump administration initially continued the Obama administration's practice of paying monthly CSR reimbursements. However, on October 11, 2017, Attorney General Sessions submitted a letter to the Department of Treasury and HHS advising that 31 U.S.C. §

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[7] *See* Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Years 2014 and 2015, CMS, March 16, 2016, at 27 ("Payments to issuers of estimated monthly amounts began in January 2014."), *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/CMS_Guidance_on_CSR_Reconciliation-for_2014_and_2015_benefit_years.pdf (last visited Dec. 13, 2017).

[8] *See* Letter from Sylvia M. Burwell, Dir., OMB, to Senators Ted Cruz and Michael S. Lee, at Responses p. 4 (May 21, 2014), ("cost-sharing subsidy payments are being made through the advance payments program and will be paid out of the same account from which the premium tax credit portion of the advance payments for that program are paid"), *available at* http://www.cruz.senate.gov/files/documents/Letters/20140521_Burwell_Response.pdf (last visited Dec. 13, 2017).

1324 could not be used to fund CSR reimbursements. Oct. 11, 2017 Ltr. from Sessions to Secretary of Treasury and Acting Secretary of HHS. The next day, on October 12, 2017, HHS announced that it would stop making CSR reimbursements: "In light of [Attorney General Session's] opinion—and the absence of any other appropriation that could be used to fund CSR payments—CSR payments to issuers must stop, effective immediately. CSR payments are prohibited unless and until a valid appropriation exists." Oct., 12, 2017 Mem. from E. Hargan to S. Verma re Payments to Issuers for Cost-Sharing Reductions (CSRs). And in fact, HHS has not paid CSR reimbursements to QHP issuers since September 2017.

Regardless of whether the Government reimburses QHP issuers for CSR payments, QHP issuers are still required by law to provide such reductions to eligible insureds. These unreimbursed costs are enormous. The CBO estimates that CSR reimbursements to QHP issuers will be $7 billion in fiscal year 2017, $10 billion in 2018, and rise to $16 billion by 2027.[9] While CSR reimbursements ended only two months ago, it is already clear that the Government's failure to make these payments to QHP issuers is wreaking havoc in the insurance markets and with QHP issuers' bottom lines. Like other members of the CSR Class, Common Ground is owed monthly CSR reimbursements for October, November, and December 2017 that have not been paid. Declaration of Cathy Mahaffey in Support of Motion for Class Certification ("Mahaffey Decl.") ¶ 6. Common Ground estimates it will be owed $12-13 million in unpaid CSR reimbursements for 2017, and estimates it will be owed $60 million in CSR reimbursements for 2018. *Id.*

Pursuant to their obligations under Section 1402 of the Affordable Care Act, Common

[9] *See* Federal Subsidies Under the Affordable Care Act for Health Insurance Coverage Related to the Expansion of Medicaid and Nongroup Health Insurance: Tables from CBO's January 2017 Baseline at 4, *available at* https://www.cbo.gov/sites/default/files/recurringdata/51298-2017-01-healthinsurance.pdf (last visited Dec. 13, 2017).

Ground and the CSR Class members complied with their obligations under the Affordable Care Act to offer cost-sharing reductions to eligible insureds. Mahaffey Decl. ¶¶ 4, 5. Common Ground and the CSR Class members also complied with the statutory requirements to submit required data by the statutory deadline. Mahaffey Decl. ¶ 5. *See also* ACA § 1402 [42 U.S.C. § 18071]; ACA § 1412 [42 U.S.C. § 18082]; 45 C.F.R. § 156.430. Despite complying with all statutory and regulatory requirements to receive CSR reimbursement payments, each member of the CSR Class suffered the same harm: Common Ground and each member of the CSR Class has received zero dollars in CSR reimbursement payments after the Trump administration stated it would halt payments in October 2017. Mahaffey Decl. ¶ 5.

## ARGUMENT

### I. THE RISK CORRIDORS AND CSR CLASSES SHOULD EACH BE CERTIFIED[10]

A district court must undertake a "rigorous analysis" to determine whether the Rule 23 requirements for class certification have been satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011); *see also Geneva Rock Prod., Inc. v. United States*, 100 Fed. Cl. 778, 782 (2011) (stating that RCFC 23 "closely tracks the language of its analogue in the Federal Rules of Civil Procedure, and consequently this court has often looked to cases applying Fed. R. Civ. P. 23 to interpret RCFC 23"). "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 564 U.S. at 351; *see In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 (3d Cir. 2008) ("An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when

[10] The two proposed classes are virtually identical in terms of potential class members (QHP issuers), the defendant (the Government), and theory of harm (the Government's failure to pay certain amounts owed under the ACA). The only difference is the section of the ACA that gives rise to the class claims. Given this overlap, the following discussion addresses both classes simultaneously.

necessary to determine whether a class certification requirement is met"). At the same time, as the Supreme Court has reiterated, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1194–95 (2013) (*citing Wal-Mart,* 564 U.S. at 351). "Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 1195.

The proposed classes satisfy the requirements of RCFC 23, which have been "succinctly described as comprising inquiry into the elements of numerosity, commonality, typicality, adequacy, and superiority." *Singleton,* 92 Fed. Cl. at 82; RCFC 23; *see also Geneva Rock Prods., Inc. v. United States,* 100 Fed. Cl. 778, 782 (2011).

A class action is maintainable under RCFC 23 when:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

RCFC 23(a). In addition, RCFC 23(b) requires the court to find that "'the United States has acted or refused to act on grounds generally applicable to the class,' that the common questions of law and fact predominate, and that the class action is superior to other methods for adjudicating the controversy." *Singleton,* 92 Fed. Cl. at 81-82 (quoting RCFC 23(b)).

Courts applying RCFC 23 have recognized that the rule should be accorded "a liberal construction," which "serves public purposes of judicial economy and efficiency." *Singleton,* 92 Fed. Cl. at 82. Moreover, "the rule assumes that the court may certify a class on the basis of the

complaint." *Toscano v. United States,* 98 Fed. Cl. 152, 154 (2011); *Douglas R. Bigelow Trust v. United States,* 97 Fed. Cl. 674, 676 (2011) (stating "the court must assume the truth of the factual assertions contained in the complaint").

**A. The Requirements of Rule 23(a) and (b) Are Readily Satisfied**

**1. Numerosity**

RCFC 23(a)(1) permits class certification if "the class is so numerous that joinder of all members is impracticable." RCFC 23(a)(1). "Impracticable" does not mean that joinder must be "impossible." *King v. United States*, 84 Fed. Cl. 120, 123 (2008) (citing *Barnes v. United States*, 68 Fed. Cl. 492, 495 (2005)). Instead, the rule "requires examination of the specific facts of each case and imposes no absolute limitations." *Singleton*, 92 Fed. Cl. at 83 (quoting *Gen. Tel. Co. of the Nw., Inc. v. Equal Opportunity Comm'n,* 446 U.S. 318, 330 (1980) (internal alteration omitted)). Among the factors that courts evaluate when assessing the numerosity requirement are the number of potential class members, the geographic dispersal of members of the proposed class, and the size of individual claims. *King*, 84 Fed. Cl. at 123-125; *Geneva Rock*, 100 Fed. Cl. at 787. The fact that the Rules of the Court of Federal Claims permit only opt-in class actions renders the numerosity criterion "somewhat of an anomaly." *Haggart v. United States*, 89 Fed. Cl. 523, 530 (2009) ("Haggart I"). Because inclusion in the class requires affirmative effort on the part of class members, the need for stringent safeguards is less significant in class actions here than in opt-out class actions. *See, e.g., Jones v. United States*, 118 Fed. Cl. 728, 733 n.2 (2014) (contrasting opt-in actions with opt-out actions, "in which the stakes of not contacting a class member are high").

The numerical size of the proposed class is the most important factor in determining numerosity. *Brown v. United States*, 126 Fed. Cl. 571, 577 (2016). Although there is no "magic number" that triggers a presumption of numerosity, *Singleton*, 92 Fed. Cl. at 83, "[i]n one

popular view, any class larger than 40 is assumed to be sufficiently numerous." *Geneva Rock*, 100 Fed. Cl. at 787 (citing *Stewart v. Abraham,* 275 F.3d 220, 226–27 (3d Cir. 2001)); *King*, 84 Fed. Cl. at 124 ("While not outcome determinative, the number of potential class members is persuasive when determining numerosity: generally, if there are more than forty potential class members, this prong has been met.").

In *Singleton*, for example, even though the potential class members were clustered in a tight geographic area, the court found the numerosity requirement satisfied where "joinder of the estimated 135 potential claimants would entail a sufficient degree of extra difficulty and/or expense that makes it 'impracticable.'" 92 Fed. Cl. at 84. Classes consisting of fewer than two dozen members have been certified where doing so "promotes judicial economy because the alternative is multiple suits against the government." *Sears v. United States*, 124 Fed. Cl. 444, 450 (2015) (certifying subclass of 21 members). *See also Haggart v. United States,* 104 Fed. Cl. 484, 489 (2012) ("Haggart II") (certifying subclasses of 18 and 25 members); *Bigelow Trust* at 676 (certifying class that "likely exceeds 25" members); *Geneva Rock*, 100 Fed. Cl. at 788 (certifying class of 23 members).[11]

Roughly 280 providers are owed money under the risk corridors provision of the ACA for 2016.[12] Likewise, hundreds of QHP issuers offered individual coverage in the ACA

[11] Courts routinely certify classes consisting of fewer than 100 members. *See, e.g., Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984) (finding no abuse of discretion in certification of class number 74 class members); *In re Cincinnati Radiation Litig.*, 187 F.R.D. 549, 552 (S.D. Ohio 1999) (80 class members); *Sagers v. Yellow Freight Sys., Inc.*, 529 F.2d 721, 734 (5th Cir. 1976) (holding 110 class members "clearly a sufficient number to meet the numerosity requirements of Rule 23(a)(1)). In addition, under the Class Action Fairness Act, among the factors triggering federal jurisdiction is that a minimally diverse class action consists of 100 or more class members. 28 U.S.C. 1332(d)(5)(B).

[12] Risk Corridors Payment and Charge Amounts for the 2016 Benefit Year, CMS, Nov. 15, 2017, *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-Amounts-2016.pdf (last visited Dec. 13, 2017).

exchanges in 2017 and are owed CSR reimbursements.[13] Indeed, the class already certified by the Court in *Health Republic* consists of 149 opt-in class members. The number of class members in both the Risk Corridors Class and CSR Class is significantly larger than many classes routinely certified, and the "extra difficulty and/or expense" involved in seeking to join each of them in this lawsuit satisfies the numerosity prong. *Singleton*, 92 Fed. Cl. at 84. The alternative to class treatment is for individual plaintiffs to file individual cases, take the case to judgment, and potentially receive inconsistent rulings on the same legal issues before different judges. On the other hand, "certification of the proposed class will allow for consolidation of these claims, thereby reducing the time and expense of litigation [and] ensuring a consistent decision regarding the Government's liability." *DeMons v. United States*, 119 Fed. Cl. 345, 357 (2014); *see also Bright v. United States*, 603 F.3d 1273, 1285 (Fed. Cir. 2010) ("In short, we think that, all other considerations being equal, the laudable goal of avoiding 'multiplicity of actions' should prevail.")

That members of the class are located throughout the country also weighs in favor of finding the numerosity prong satisfied. Although "not a heavily weighted factor" in the numerosity calculation, "[i]t is well settled that joinder is less practicable when potential class members are dispersed geographically." *Brown*, 126 Fed. Cl. at 578-79 (citations omitted); *King*, 84 Fed. Cl. at 124-25 ("If plaintiffs are dispersed geographically, then a court is more likely to certify a class action."). It is difficult to imagine a class with wider geographic dispersal

[13] Number of Issuers Participating in the Individual Health Insurance Marketplaces, Kaiser Family Foundation, *available at* https://www.kff.org/other/state-indicator/number-of-issuers-participating-in-the-individual-health-insurance-marketplace/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last visited Dec. 13, 2017); *see also* ACA § 1301(a)(1)(C)(ii) (QHP issuers must offer at least one "silver" plan in order to participate in the exchanges); ACA § 1402(c)(2) (QHP issuers must reduce cost sharing for eligible insureds who enroll in "silver plans" through the exchanges).

than here, where potential members of the Risk Corridors Class and CSR Class are scattered throughout nearly every one of the 50 states, further tilting the scale in favor of numerosity. *See Markham v. White*, 171 F.R.D. 217, 221 (N.D. Ill. 1997) (finding the numerosity requirement satisfied where the class of between 47 to 52 sexual harassment victims was scattered among five states).[14]

Finally, without the class device, many of the Risk Corridors Class and CSR Class members' claims might not be litigated at all. While some members of the class have very large claims, a number of QHP issuers have claims small enough that they might not be the subject of litigation if left on an individual basis. For example, UnitedHealthcare Insurance Company (PA) is owed $2,903.41 for 2016; Health Alliance Northwest Health Plan Inc. (WA) is owed $16,154.71 for 2016; and Medica Insurance Company (ND) is owed under $20,000,[15] amounts small enough that retaining counsel to pursue the claims might "overwhelm their potential recoveries." *Brown*, 126 Fed. Cl. at 579.

**2. Commonality**

The commonality requirement consists of a three-part test from related requirements of RCFC 23(a)(2) and (b):

> Commonality is a three-part test. RCFC 23(a)(2) requires that there be questions of law or fact common to the class; RCFC 23(b)(2) requires that the United States has acted or refused to act on grounds generally applicable to the class; and RCFC 23(b)(3) requires that the questions of law and fact common to class members predominate over questions particular to individual class members.

*Singleton,* 92 Fed. Cl. at 84; *see also Geneva Rock,* 100 Fed. Cl. at 788. All three prongs are met

[14] "In general, cases applying [Fed. R. Civ. P. 23] have been examined and followed in interpreting RCFC 23." *Haggart II*, 104 Fed. Cl. at 488 (internal quotation marks and citation omitted).

[15] Risk Corridors Payment and Charge Amounts for the 2016 Benefit Year, CMS, Nov. 15, 2017, *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-Amounts-2016 (last visited Dec. 13, 2017).pdf.

here.

**(a) Common Issues**

Rule 23(a)(2) requires that there "be questions of law or fact common to the class." RCFC 23(a)(2). Commonality is established where a classwide proceeding may "generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores*, 564 U.S. at 350 (citation omitted). Plaintiffs seeking to establish the existence of a common factual or legal issue must demonstrate that the putative class members' claims "depend upon a common contention . . . that it is capable of classwide resolution" and will "resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*; *see also King v. United States*, 84 Fed. Cl. 120, 126 (2008) ("commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members") (quoting *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001)). The commonality requirement poses a low hurdle. *Singleton*, 92 Fed. Cl. at 84. Indeed, "even a single common question will do." *Dukes*, 564 U.S. at 359 (alterations and citation omitted).

Questions of law and fact common to the Risk Corridors Class that relate to the Government's failure to timely make full risk corridors payments include but are not limited to:

- whether Section 1342 of the Affordable Care Act is a money-mandating statute;
- whether 45 CFR § 153.510 is a money-mandating regulation;
- whether the Government's failure to appropriate funds sufficient to make risk corridor payments to Plaintiff and the Class absolve it of its statutory obligations;
- whether the Government violated its obligations to pay Plaintiff and the Class risk corridor amounts in a reasonable time following the official calculation of those amounts; and
- whether the Government is liable to Plaintiff and the Class for failing to make risk corridor payments within a reasonable time following the official calculation of those amounts.

Questions of law and fact common to the CSR Class that relate to the Government's failure to make timely and periodic CSR reimbursement payments include but are not limited to:

- whether Section 1402 of the Affordable Care Act is a money-mandating statute;
- whether 45 CFR § 156.430 is a money-mandating regulation;
- whether the Government's failure to appropriate funds sufficient to make cost sharing reduction reimbursements to Plaintiff and the CSR Class absolves it of its statutory obligations;
- whether the Government violated its obligations to pay Plaintiff and the CSR Class cost sharing reduction reimbursement amounts in a periodic and timely fashion; and
- whether the Government is liable to Plaintiff and the CSR Class for failing to pay cost sharing reduction reimbursements in a periodic and timely fashion.

Any one of the above issues would, standing alone, establish the requisite commonality under RCFC 23(a)(2).

**(b) Similar Treatment**

RCFC 23(b)(2) requires that in order to maintain a class action, the United States must have "acted or refused to act on grounds generally applicable to the class." RCFC 23(b)(1). Where a "single act is the wellspring of all the putative class members' claims," there "can be little question that the government acted on grounds applicable to the entire class" and the similar-treatment prong of the commonality test is satisfied. *Geneva Rock,* 100 Fed. Cl. at 788-89; *see generally Bigelow Trust,* 97 Fed. Cl. at 678; *Adams v. United States,* 93 Fed. Cl. 563, 575-76 (2010); *Haggart I*, 89 Fed. Cl. at 534; *see also Gross v. United States*, 106 Fed. Cl. 369*,* 380 (2012); *Barnes,* 68 Fed. Cl. at 496.

Here, the Government has failed to make risk corridors payments within a reasonable time following the official calculation of those amounts. Likewise, the Government's failure to make timely and periodic CSR reimbursement payments is a single course of conduct that

applies to the entire CSR Class. These failures to comply with its statutory obligation are single courses of conduct that respectively apply to the entire Risk Corridors Class and CSR Class.

**(c) Predominance**

A court certifying a class must find that under RCFC 23(b)(3), "questions of law or fact common to class members predominate over any questions affecting only individual members." RCFC 23(b)(3). The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 623 (1997). This requirement calls upon courts to examine whether individual questions – "where members of a proposed class will need to present evidence that varies from member to member" – or common questions – "where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof" – are more prevalent. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (internal quotation marks, alteration, and citation omitted). When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Id*. (citing 7AA C. Wright, *A. Miller, & M. Kane, Federal Practice and Procedure* § 1778, pp. 123–124 (3d ed. 2005)); *see also Barnes*, 68 Fed. Cl. at 496 (finding predominance "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof") (citing *Moore v. PaineWebber, Inc.,* 306 F.3d 1247, 1252 (2d Cir. 2002)).

Even "factual variation among the class grievances is acceptable as long as a common nucleus of operative fact exists." *Curry v. United States*, 81 Fed. Cl. 328, 334 (2008) (internal

quotation marks and citation omitted). In *Barnes*, for example, even though the class members varied in the amount of hours they worked and the potential overtime pay to which they may be entitled, the Navy's systemic failure to comply with overtime-pay statutes predominated over any individual differences among the class. 68 Fed. Cl. at 496-97. *See also Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1437 (2013) (Ginsburg and Breyer, JJ., dissenting) ("Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal.").

Classwide issues far predominate over individual issues here for both classes. The members of the Risk Corridors Class are subject to the same regulatory regime under the risk corridors provision of the ACA—the same requirements to be QHP issuers, the same obligations to provide ACA-compliant insurance plans, the same requirements to track allowable costs and target amounts, the same reporting requirements, the same "payment in" requirements, and the same rights to "payments out." Participating in the same program, they were all affected by the same decisions made by the Government in the same way. Likewise, the members of the CSR Class are subject to the same statutory and regulatory regime under the CSR provision of the ACA—the same requirements to be QHP issuers, the same obligations to provide ACA-compliant plans, the same reporting requirements, and the same requirements to provide cost-sharing reduction to insureds while being denied CSR reimbursements by the Government.

The determination of whether the Government breached its obligations to make full annual risk corridors payments and to make timely and periodic CSR reimbursements and what those payments should be are issues "susceptible to generalized, class-wide proof" for which the Class will look to common evidence and for which the proof will generate common answers. *Tyson Foods*, 136 S. Ct. at 1045. All Risk Corridors Class members will look to the same

documents to determine both liability and damages, which the Government has already calculated.[16] Likewise, all CSR Class members will look to the same documents to determine liability and damages.

**3. Typicality**

RCFC 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." RCFC 23(a)(3). Typicality "is intertwined with commonality," and the "named plaintiff need only show that its claims share the same essential characteristics as the claims of the class at large." *Geneva Rock,* 100 Fed. Cl. at 789-90 (quotation marks and internal citations omitted). "[T]he threshold is not high." *Singleton,* 92 Fed. Cl. at 84; *Bigelow Trust,* 97 Fed. Cl. at 678. Thus, the requirement is satisfied if the claims "of the representatives and the members of the class stem from a single event or unitary course of conduct, or if they are based on the same legal or remedial theory." *Geneva Rock,* 100 Fed. Cl. at 790 (citations omitted); *Bigelow Trust,* 97 Fed. Cl. at 678; *see also* NEWBERG ON CLASS ACTIONS § 3.29 (5th ed.) ("A plaintiff with typical claims will pursue his or her own self-interest in the litigation and, in so doing, will advance the interests of the class members, which are aligned with those of the representative.").

Here, typicality is easily satisfied, because the representative party, Common Ground, is stating the same claim, concerning the same conduct, and seeking the same relief as all members of the proposed Risk Corridors and CSR Classes. *Fisher v. United States*, 69 Fed. Cl. 193, 200 (2006) (finding this "modest threshold" satisfied where "all prospective plaintiffs would be proceeding under essentially the same legal claim"). If the named plaintiff can prove its claims,

[16] Risk Corridors Payment and Charge Amounts for the 2016 Benefit Year, CMS, Nov. 15, 2017, *available at* https://www.cms.gov/CCIIO/Programs-and-Initiatives/Premium-Stabilization-Programs/Downloads/Risk-Corridors-Amounts-2016.pdf (last visited Dec. 13, 2017).

it would be proving the claims of all Class members.

**4. Adequacy**

RCFC 23(a)'s final requirement mandates that the representative parties "fairly and adequately protect the interests of the class." RCFC 23(a)(4). The adequacy of representation requirement "has been held to encompass two components: adequacy of counsel as well as lack of conflict between the interests of named plaintiffs and the proposed class members." *Singleton,* 92 Fed. Cl. at 85 (citation omitted); *see also Adams,* 93 Fed. Cl. at 576. Each prong is satisfied.

**(a) Adequacy of Representation**

Proposed Class counsel is "qualified, experienced and generally able to conduct the litigation." *Adams,* 93 Fed. Cl. at 576. In appointing class counsel, a court must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in this action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. RCFC 23(g)(1)(A). A court must also look to whether the proposed interim class counsel will fairly and adequately represent the interests of the class. RCFC 23(g)(4).

*Health Republic*, the related risk corridors case, was filed by Quinn Emanuel and was the first of its kind seeking to recover risk corridors payments from the Government. Declaration of Stephen A. Swedlow in Support of Motion to Appoint Quinn Emanuel Urquhart & Sullivan, LLP as Class Counsel ("Swedlow Decl.") ¶ 3. A nearly identical class was certified in *Health Republic* seeking 2014-2015 risk corridors payments. Quinn Emanuel fully briefed the Government's motion to dismiss, and on January 10, 2017, the Court entered an order primarily denying the Government's motion to dismiss. Then, Quinn Emanuel completed summary

judgement briefing on behalf of the certified class in *Health Republic.*[17]

In addition to risk corridors claims, this case filed on behalf of Common Ground by Quinn Emanuel was the first of its kind seeking to recover CSR reimbursements from the Government on behalf of any QHP issuer. Swedlow Decl. ¶ 6. As a consequence, no other firm has more expertise than Quinn Emanuel in the substantive law and policy at issue in these cases.

In addition, there can be no dispute that the individual attorneys leading this litigation, as well as the law firm of Quinn Emanuel, collectively possess the experience and expertise to represent the interests of the Risk Corridors Class and CSR Class. The three primary Quinn Emanuel attorneys leading this litigation are experienced trial lawyers, have tried multiple class action cases to verdict, and have obtained several nine-figure class action settlements. Swedlow Decl. ¶¶ 10-12. As a firm, Quinn Emanuel, which is the largest firm in the United States devoted solely to business litigation, is consistently recognized as among the best law firms in the world and has won several awards specifically for its class-action practice. *Id.* ¶¶ 7-9.

Finally, Quinn Emanuel is willing to invest the resources necessary to litigate this case through trial and beyond, as appropriate. Quinn Emanuel has committed its substantial resources to this case and will continue to zealously represent the interests of the Risk Corridors Class and CSR Class.

**(b) Lack of Conflict**

There are no "conflicting, competing, or antagonistic interests as between the named Plaintiffs and the proposed class" that would warrant a finding that the named plaintiff would not

[17] As this Court is aware, the *Health Republic* matter has been stayed pending resolution of the related *Land of Lincoln* and *Moda* appeals before the Federal Circuit. There has therefore not yet been a ruling on Quinn Emanuel's motion for summary judgment.

adequately protect the class's interest. *Singleton*, 92 Fed. Cl. at 86. Class members have a united interest in establishing the factual and legal basis of their claims, and there is no basis by which "the putative class members have interests that would put them at odds with one another." *Geneva Rock,* 100 Fed. Cl. at 790. "[B]ecause all plaintiffs would assert the same legal claim . . . arising out of the same government actions," the interests of the named plaintiff and the proposed class are aligned rather than opposed. *Haggart I*, 89 Fed. Cl. at 535.

**5. Superiority**

Finally, a plaintiff must demonstrate that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." RCFC 23(b)(3). The superiority requirement is met where "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Gross*, 106 Fed. Cl. at 383 (quoting FRCP 23 Advisory Committee Note (1966 Amendment)). Among the non-exhaustive factors that a court considers are the "class members' interests in individually controlling the prosecution of separate actions," RCFC 23(b)(3)(A); the "extent and nature of any litigation concerning the controversy already begun by class members," RCFC 23(b)(3)(B); and "the likely difficulties in managing a class action," RCFC 23(b)(3)(D). "Essentially, under this prong of the analysis, the court is obliged to conduct a cost-benefit analysis, weighing any potential problems with the manageability or fairness of a class action against the benefits to the system and the individual members likely to be derived from maintaining such an action." *Geneva Rock*, 100 Fed. Cl. at 790 (alteration and internal citation omitted).

Not only is a class action superior to joinder or individual adjudication of the claims, but this case is in many respects the prototype for the sort of action warranting class treatment. A single Government action affected each of the Risk Corridors Class members (and each CSR

Class member) in exactly the same way, and the Government has a list of each member of the Risk Corridors and CSR Classes. Moreover, the Government already has (or soon will have) the data showing how much it owes each member of both Classes. Resolution of the legal issues in this case on a classwide basis will "achieve economies of scale in time, effort, and expense because the court is dealing with common questions of law and fact." *Fauvergue v. United States*, 86 Fed. Cl. 82, 101 (2009), *rev'd on other grounds sub nom. Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010); *see also King*, 84 Fed. Cl. at 128 ("Conducting this case as a class action is likely to achieve efficiencies in the use of the resources of both the parties and the court.")

The discrete categories of RCFC 23(b)(3) weigh in favor of a finding of superiority. There is nothing to indicate that a Class member would benefit from individually controlling an action, and because the Court of Federal Claims permits only opt-in classes, RCFC 23(c)(2)(B)(v), there is no concern that a class member might be swallowed into a class that it would prefer not to participate in. Finally, there are no "likely difficulties," RCFC 23(b)(3)(D), in managing the class. These are two discrete classes with claims arising out of the same statute and about whom the Government has information and has even calculated damages. *See Adams*, 93 Fed. Cl. at 577–78 (finding manageability where "the Government can mechanically identify and notify potential class members, as well as calculate their individual damages").

Where, as here, "[a]ll plaintiffs are affected by the same [government action], the defenses the government will likely use in response to plaintiffs' claims should be identical, and the law which the court will apply to resolve plaintiffs' claims should also be identical," the superiority requirement is met. *Singleton*, 92 Fed. Cl. at 86 (quotation marks and citation omitted). Under these circumstances, treatment of the legal issues on a classwide basis will

"achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." *Gross*, 106 Fed. Cl. at 383 (internal quotation omitted); s*ee also Bigelow Trust*, 97 Fed. Cl. at 678 n.7 (finding the superiority requirement met where there was no claim "that the pursuit of a class action here would be less efficient than pursuing the claims represented here in individual or consolidated actions").

In short, "certification of the proposed class will allow for consolidation of these claims, thereby reducing the time and expense of litigation [and] ensuring a consistent decision regarding the Government's liability." *DeMons*, 119 Fed. Cl. at 357.

## CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant its Motion for Class Certification.

DATED: December 14, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on December 14, 2017, a copy of the attached Motion for Class Certification was served via the Court's CM/ECF system on Defendant's counsel Charles Edward Canter.

*/s/ Stephen Swedlow*
Stephen Swedlow