IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY, Plaintiff, v. UNITED STATES, Defendant.	Case No. 1:16-cv-00259-MMS (Judge Sweeney)

MOTION FOR LEAVE TO FILE AMICUS CURIAE ON BEHALF OF THE UNITED STATES HOUSE OF REPRESENTATIVES

The United States House of Representatives (the "House") respectfully moves for leave to file as amicus curiae the enclosed memorandum. A proposed order is attached.[1]

Leave to file should be granted so that the House may inform this Court of clear grounds for dismissal of this action with prejudice. The law is clear that insurance companies operating on the health exchanges established pursuant to the Patient Protection and Affordable Care Act have no right to government handouts in excess of incoming funds under the Act's risk corridors program. This is because the program was intended to be budget-neutral and self-funding – i.e., outgoing payments would be covered by incoming payments – and Congress has confirmed this intent, not once but twice, through annual appropriations legislation. The Constitution provides

[1] The Bipartisan Legal Advisory Group ("BLAG") of the United States House of Representatives has authorized the filing of this motion and accompanying amicus brief on behalf of the House. The BLAG is comprised of the Honorable Paul Ryan, Speaker of the House, the Honorable Kevin McCarthy, Majority Leader, the Honorable Steve Scalise, Majority Whip, the Honorable Nancy Pelosi, Democratic Leader, and the Honorable Steny H. Hoyer, Democratic Whip, and "speaks for, and articulates the institutional position of, the House in all litigation matters." Rule II.8, Rules of the United States House of Representatives, *available at* http://clerk.house.gov/legislative/house-rules.pdf. The Democratic Leader and Democratic Whip decline to support the Group's position in this case.

in unambiguous terms that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," U.S. Const. art. I, § 9, cl. 7, and Congress has repeatedly exercised its constitutional authority to bar the payments at issue here.

The Department of Justice ("DOJ") knows that insurers have no right to excess payments. In later-filed cases brought by other insurers seeking excess payments, DOJ moved to dismiss for failure to state a claim on the ground that the Department of Health and Human Services ("HHS") has no obligation to make risk corridors payments in excess of program receipts. But DOJ has inexplicably failed to apprise this Court of those arguments and of the controlling precedents that mandate dismissal of Plaintiff Health Republic Insurance Company's complaint.[2] HHS, for its part, is apparently bent on paying insurers despite the absence of any legal obligation to do so. Allegedly in light of a non-existent "litigation risk," HHS recently took the extraordinary step of urging insurers to enter into settlement agreements with the United States in order to receive payment on their meritless claims. In other words, HHS is trying to force the U.S. Treasury to disburse billions of dollars of taxpayer funds to insurance companies even though DOJ has convincingly demonstrated that HHS has no legal obligation (and no legal right) to pay these sums. The House strongly disagrees with this scheme to subvert Congressional intent by engineering a massive giveaway of taxpayer money.

Particularly in light of Plaintiff's recent motion for class certification in this case, DOJ's troubling failure to raise these arguments here should not deprive this Court of the opportunity to consider these compelling grounds for dismissal of Plaintiff's claims, so as to resolve this case in a manner that is consistent with binding precedent and avoids the unnecessary expenditure of judicial resources.

[2] *See* United States' Mot. to Dismiss (ECF No. 8).

The House urges this Court to dismiss Plaintiff's claims with prejudice in light of the arguments set forth in the attached memoranda of law.

BACKGROUND

In 2010, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 ("ACA") was enacted into law. The ACA established Health Benefit Exchanges where individuals can obtain health insurance coverage, and contained certain risk mitigation provisions for Qualified Health Plans ("QHPs") that agreed to operate on these new exchanges. One of the risk mitigation provisions was the risk corridors program, a temporary measure that directed the U.S. Department of Health and Human Services to "establish and administer a program . . . for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums." ACA § 1342(a) (codified at 42 U.S.C. § 18062(a)); Compl. ¶ 21. In brief, if a QHP's allowable expenses exceed a target figure by certain specified percentages, government payments to the issuer would increase. *See* ACA § 1342(b)(1) (42 U.S.C. § 18062(b)(1)). If a QHP's allowable expenses fall below the target figure by certain specified percentages, then funds would be remitted to the government. *See* ACA § 1342(b)(2) (42 U.S.C. § 18062(b)(2)); Compl. ¶ 21. HHS determined in 2014, consistent with Congressional intent, that the risk corridors program payments would be handled in a "budget-neutral" manner, i.e., any outgoing payments under the program would be funded solely from incoming payments. *See* Compl. ¶ 31.

Plaintiff Health Republic Insurance Company is a QHP that provided health insurance in 2014 and 2015 through one of the state-based exchanges. Compl. ¶ 16. Plaintiff seeks risk corridors payments allegedly due and pleads only one Count for relief, "Violation of Statutory

and Regulatory Mandate to Make Payments." Compl. ¶¶ 59-63. Specifically, Plaintiff claims that "[a]s part of its obligations under Section 1342 of the ACA and/or its obligations under 45 C.F.R. § 153.510(b), the Government is required to, subject to certain explicit statutory and/or regulatory conditions, pay any QHP certain amounts exceeding the target costs they incurred in 2014 and 2015." Compl. ¶ 60. On behalf of the United States, DOJ has moved to dismiss this case for lack of subject matter jurisdiction, arguing that (i) because no payments are "presently due" to Plaintiff, this Court does not have jurisdiction under the Tucker Act, and (ii) Plaintiff's claims are not ripe for determination. *See* United States' Mot. to Dismiss at 16-20 (ECF No. 8). While DOJ's memorandum in support of its motion to dismiss provided certain pertinent legislative history explaining why the risk corridors program must be administered in a budget-neutral manner, *see id.* at 6-11, DOJ inexplicably failed to move to dismiss on the ground that Plaintiff had failed to state a claim in light of Congressional intent that the program be self-funding, and Congressional action barring the use of any external source of funds should the program not achieve its goal of budget neutrality.

This case, filed in February 2016, "was the first of its kind seeking to recover risk corridors payments from the Government." Pl. Health Rep. Ins. Co.'s Mot. to Appoint Quinn Emanuel Urquhart & Sullivan, LLP as Interim Class Counsel at 1 (ECF No. 15). Starting in May 2016, other QHPs began to file suits "pursuing the same risk corridors payments," *id.*, including at least seven other cases in this Court pending before other judges.[3] All of the plaintiffs in these

[3] *First Priority Life Ins. Co. v. United States*, 16-587-VJW (Fed. Cl., filed May 17, 2016) ("First Priority"); *Moda Health Plan, Inc. v. United States*, 16-649-TCW (Fed. Cl., filed June 1, 2016) ("Moda Health"); *Blue Cross & Blue Shield of N.C. v. United States*, 16-651-LKG (Fed. Cl., filed June 2, 2016) ("Blue Cross Blue Shield"); *Land of Lincoln Mutual Health Ins. Co. v. United States*, 16-744-CFL (Fed. Cl., filed June 23, 2016) ("Land of Lincoln"); *Me. Cmty. Health Options v. United States*, 16-967-JFM (Fed. Cl., filed Aug. 9, 2016); *N.M. Health Connections v*

(*Continued . . . .*)

later-filed cases – like Plaintiff in this case – allege that they are entitled to risk corridors payments due to a "Statutory and Regulatory Mandate to Make Payments."[4] In four of these later-filed cases, DOJ has filed a motion to dismiss making the same jurisdictional arguments it made here. DOJ also argues persuasively in those cases, however, that the plaintiff-insurers have failed to state a claim, because HHS has no legal obligation to make the payments at issue:

> Section 1342 does not require HHS to make risk corridors payments beyond those funded from collections. And even if that intent were unclear when the Affordable Care Act was enacted in 2010, Congress removed any ambiguity when it enacted annual appropriations laws for fiscal years 2015 that prohibited HHS from paying risks corridors amounts from appropriated funds other than collections. Thus, Moda has, to date, received all the payments it is owed.

United States' Mot. to Dismiss at 2, *Moda Health* (ECF No. 8).[5] (In the remaining later-filed cases, DOJ's motion to dismiss is not yet due.)

The House, through the filing of this proposed amicus curiae brief, seeks to apprise the Court of DOJ's additional merits arguments made in these later-filed risk corridors program cases, in order to ensure that this case is not resolved on the basis of a misleading and incomplete presentation of the controlling legal precedents.

United States, 16-cv-01199 (Fed. Cl., filed Sept. 26, 2016); *Blue Cross & Blue Shield of Minn. v. United States*, No. 16-1253-MCW (Fed. Cl. filed October 3, 2016) ("BCBS of Minn.").

[4] *See* Compl. ¶¶ 167-78, *First Priority* (ECF No. 1) (Count I, "Violation of Federal Statute and Regulation"); Compl. ¶¶ 154-65, *Blue Cross Blue Shield* (ECF No. 1) (same); Compl. ¶¶ 153-64, *Land of Lincoln* (ECF No. 1) (same); Compl. ¶¶ 68-74, *Moda Health* (ECF No. 1), (Count I, "Violations of Section 1342, Statutory Mandates and Statutory Authority"); Compl. ¶¶ 134-35, *BCBS of Minn.* (ECF No. 1).

[5] *See also* United States' Mot. to Dismiss at 25, *First Priority* (ECF No. 8); United States' Mot. to Dismiss at 32, *Blue Cross Blue Shield* (ECF No. 10); United States' Mot. to Dismiss at 22-31, *Land of Lincoln* (ECF No. 22).

ARGUMENT

This Court may in its discretion allow the participation of amicus curiae. *See Wolfchild v. United States*, 62 Fed. Cl. 521, 536-37 (2004). In considering whether to exercise such discretion, the Court may consider "the strength of information and argument presented by the potential amicus curiae's interests," the motion's timeliness, whether the parties consent to the motion, and "perhaps most importantly, the usefulness of the information and argument presented" by amicus curiae. *Id.* at 536. Applying these factors, the Court should grant the motion.

The House has a strong institutional interest in ensuring that federal statutes are defended in a manner consistent with Congressional intent, including the exercise of Congressional appropriations power. The central issue in this case – Plaintiff's purported entitlement to payments under the risk corridors program of the ACA – directly implicates Congress's institutional powers, both with respect to federal appropriations generally, *see* U.S. Const. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"), and risk corridors program payments in particular. Compl. ¶¶ 9-10, 35-39, 46 (describing relevant Congressional spending bills prohibiting the use of appropriated funds for the risk corridors program).[6]

[6] The House regularly appears as amicus curiae in cases in which its institutional powers are implicated. *See, e.g.*, Br. of *Amici Curiae* the [House] & 225 Individual Members of the U.S. House of Representatives in Supp. of Resp'ts, *Bank Markazi v. Peterson*, No. 14-770 (S. Ct. Dec. 23, 2015); Br. of *Amicus Curiae* the [House] in Supp. of Pet'r, *Renzi v. United States*, No. 11-557 (S. Ct. Dec. 2, 2011); Br. of the [House] as Amicus Curiae Supporting Affirmance, *Council of the Dist. of Columbia v. Gray*, No. 14-7067 (D.C. Cir. Aug. 7, 2014); Br. of the [House] as *Amicus Curiae*, *United States v. Renzi*, No. 13-10588 (9th Cir. Apr. 15, 2014); Br. of Amicus Curiae the [House] in Supp. of Appellant, *United States v. Rainey*, No. 13-30770 (5th Cir. Dec. 9, 2013); Br. of the [House] as Amicus Curiae Supporting Affirmance, *Cause of Action v. Nat'l Archives & Records Admin.*, No. 13-5127 (D.C. Cir. Nov. 25, 2013); Br. of the [House] as Amicus Curiae Supporting Affirmance . . . , *United States v. Verrusio*, No. 11-3080 (D.C. Cir.

(*Continued . . . .*)

The House's brief will alert the Court to compelling arguments mandating dismissal of this case – arguments that DOJ has raised in nearly identical cases. Plaintiff assumes – in contravention of Congress' exercise of its appropriation power and in violation of the law of this Circuit as well as settled principles of appropriations law – that where Congress enacts legislation creating a government benefits program, the beneficiaries of that program are entitled to receive the full amount of benefits provided for under that program, even in the absence of a corresponding appropriation of funds. That is incorrect, as DOJ has explained in four other cases pending in this Court involving nearly identical claims. *See supra* p.5 & n.5. In those other cases, DOJ argued (correctly) that insurer-plaintiffs who sought risk corridors program payments under a statutory formula failed to state a claim because there was no statutory entitlement to the payments they seek. DOJ explained that "Congress had not mandated that HHS make risk corridors payments in excess of collections" because "Congress planned the program to be self-funding." United States' Mot. to Dismiss at 22, *Moda Health* (ECF No. 8). DOJ went on to explain that "[t]he appropriations riders that Congress enacted after the ACA's passage further reinforce the conclusion that the liability of the United States is limited to amounts collected under the risk corridors program." *Id.* at 24. Because DOJ declined to raise those arguments here, the House's amicus curiae brief will aid the Court in its swift resolution of this case by introducing these meritorious legal arguments.

Feb. 5, 2013); Mem. . . . of the [House] as *Amicus Curiae*, *Council of the Dist. of Columbia v. Gray*, No. 1:14-cv-00655 (D.D.C. May 8, 2014); *In re Search of The Rayburn House Office Bldg. Room No. 2113*, 432 F. Supp. 2d 100, 105 (D.D.C. 2006), *rev'd sub nom., United States v. Rayburn House Office Bldg.*, 497 F.3d 654 (D.C. Cir. 2007); *Byrd v. Raines*, 956 F. Supp. 25, 27 (D.D.C. 1997); *United States v. Rose*, 790 F. Supp. 340, 340 (D.D.C. 1992); *United States v. Eichman*, 731 F. Supp. 1123, 1127 n.6 (D.D.C. 1990); *Webster v. Sun Co.*, 561 F. Supp. 1184, 1185 (D.D.C. 1983); *see also Atkins v. United States*, 556 F.2d 1028, 240-41 (Ct. Cl. 1977) (noting participation of Speaker of the House as amicus curiae at the invitation of the court, after DOJ conceded the unconstitutionality of the statute at issue).

Courts have allowed the participation of amici curiae where "one of the parties is not interested in or capable of fully presenting one side of the argument." *Wolfchild*, 62 Fed. Cl. at 537 (citing *Fluor Corp. v. United States*, 35 Fed. Cl. 284, 286 (1996)). That is true here. While DOJ is certainly capable of raising a merits argument (as it has done in the other cases pending in this Court) it has, for unknown reasons, declined to do so here. Accordingly, the House seeks leave to appear as amicus curiae to place their compelling legal arguments before this Court and to ensure that Congressional intent is not subverted in this case through inadequate representation of the interests of the United States.

Timeliness. The United States' motion to dismiss is fully briefed, but this fact is "not . . . an insurmountable obstacle to participation" by the House. *See Wolfchild*, 62 Fed. Cl. at 537 (allowing filing of amici curiae briefs even where "ensuing delay" lasted "several months"). Just last week, Plaintiff filed a motion for class certification in this action. *See* Pl. Health Rep. Ins. Co.'s Mot. for Class Certification (ECF No. 16); *see also* Pl. Health Rep. Ins. Co.'s Mot. to Appoint Quinn Emanuel Urquhart & Sullivan, LLP as Interim Class Counsel (ECF No. 15). Because the United States has yet to respond to the class certification and class counsel motions, the proposed amicus curiae memorandum will provide timely assistance to the Court in its resolution of this litigation by allowing the Court to consider arguments that would obviate the need for protracted briefing on class certification issues.

Consent. Counsel for the House sought consent for the House to participate as amicus curiae, but counsel for Plaintiff declined to consent. Counsel for the Department of Justice indicated that the Department takes no position on the House's request. The House notes that Federal Rule of Appellate Procedure 29(a) permits federal and state government entities to file amicus curiae briefs as a matter of right, and supports adoption of a similar course here.

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For the foregoing reasons, the House's motion should be granted.

Respectfully submitted,

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October 13, 2016

CERTIFICATE OF SERVICE

I certify that on October 13, 2016, I filed the foregoing document by the U.S. Court of Federal Claims' CM/ECF system.

/s/ Thomas G. Hungar
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PROPOSED ORDER

This Motion for Leave to File an Amicus Curiae Brief on Behalf of the United States House of Representatives is GRANTED for good cause. The attached Amicus Brief is accepted as filed.

IT IS SO ORDERED.

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MARGARET M. SWEENEY
Judge