IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

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Class Counsel hereby responds to the one substantive objection submitted by counsel for Kaiser and United. The objection stakes out a surprisingly hostile position based on the erroneous premise that lodestar is the only appropriate measure here, and that the Court should somehow view (and treat) Class Counsel's fee request as antagonistic to a class that chose it as counsel and trusted it to pursue their interests doggedly at every turn, which it undoubtedly did. We respectfully submit that the request for a 5% fee award, to which the vast majority of the class has not objected,[1] is fully warranted. As discussed below and in the Petition, there is no reasonable dispute that Class Counsel: originally pioneered and developed the case theory, filed the class complaint months before any other plaintiffs filed their complaints copying Class Counsel's theory of recovery, willingly assisted other counsel to help individual plaintiffs file their own complaints (which largely repeated Class Counsel's complaint), diligently pursued this claim for over four years while helping to manage all the individual cases that adopted the class complaint theory, put all class members on notice prior to opting in that class members may pay 5% in attorney's fees to Class Counsel, and ultimately obtained a judgment for 100% of the amount sought under the claim, totaling $3.7 billion in total judgments. There also is no dispute that Class Counsel created the game plan and path for an additional $8 billion in value for other plaintiffs who filed their own claims often with the willing assistance of Class Counsel.

The substance of the objection boils down to one simple complaint – the objectors do not want to pay 5% of their full recovery (netting them 95% of the claim) and would rather pay one fifth of one percent, which is less than the actual hourly amount incurred by Class Counsel. For the reasons stated below, this objection should be disregarded by the Court because the requested fee of 5% is, in fact, reasonable under all the factors this Court uses to assess the reasonableness

[1] Nearly 90% of the approximately 70 organizations with plans in the class, representing $2.1 billion in damages, do not object.

of such an award, including the lodestar cross-check. The objectors' attempt to turn this into a lodestar-only, fee-shifting analysis does not change that conclusion, particularly due to their failure to actually address the reasonableness factors in any way.

I. Percentage of the Fund is the Appropriate Approach

The objection's central premise is that the lodestar cross-check is not just a reasonableness check, or one factor among many to be considered, but instead the *only* factor that matters. Objectors ignore that the class notice expressly informed potential class members that counsel would seek compensation as a percentage of the recovery, with lodestar used as a cross-check—not as the *only* relevant consideration. *Health Republic* Dkt. 50-1; *Common Ground* Dkt. 32-1. Knowing that class counsel would seek a percentage of the fund up to 5%, objectors chose to opt in. It is objectors, and not class counsel, who seek to evade the import of the class notice by insisting that the Court adopt a lodestar-only approach. *See Quimby v. United States*, 107 Fed. Cl. 126, 134 (2012) (binding opt-in class members to disclosed fee arrangement).

Even if objectors had not assented to the percentage-of-the-fund approach, courts overwhelmingly recognize that approach as the preferred method in common fund cases. Only 12% of courts still employ the lodestar approach. Fitzpatrick Dec. ¶ 14 (Dkt. 107-2). Although objectors cite a single case for the proposition that the lodestar method is appropriate in megafund cases (Obj. at 18-19), the overwhelming majority of megafund cases use the percentage-of-the-fund approach. Fitzpatrick Supp. Dec. ¶ 4 (Ex. 3). And they do so for good reason. The percentage approach is "favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005). The percentage method also "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *In re WorldCom, Inc.*

Sec. Litig., 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005). By contrast, the lodestar method "creates an unanticipated disincentive to early settlements, tempts lawyers to run up their hours, and compels district courts to engage in a gimlet-eyed review of line-item fee audits.'" *Id*. (internal quotation marks omitted); *see also Gokare v. Fed. Express Corp.*, 2013 WL 12094887, at *3 (W.D. Tenn. Nov. 22, 2013) ("[T]he lodestar method is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation and creates inherent incentive to prolong the litigation.") (quotation marks omitted).

The objection illustrates the failures of the lodestar approach and the benefits of the percentage method. Objectors' position is that the Court should employ a lodestar method to award class counsel less than the cost of the actual time it spent on these matters. That would create the exact sort of *dis*incentives the percentage-of-the fund approach avoids. In objectors' world, class counsel who innovate and doggedly pursue claims to maximize returns for class members should, at best, expect to receive a fraction of their typical hourly rate, and only if they pull off an improbable victory. If they do not, they should expect to receive nothing. Faced with such an *ex ante* opportunity, no competent counsel would bring a case like this as a class action. Instead, they would simply choose to pursue work paid by the hour, where there is little if any risk of non-payment, or would pursue only individual contingency actions with a fixed fee percentage. *See* Fitzpatrick Supp. Dec. ¶ 3.

As an example, Quinn Emanuel's engagement agreements with Health Republic and Common Ground provide for a 25% attorney's fee. Swedlow Dec. ¶ 8 (Dkt. 107-1). If the terms of the fee agreements were applied to Health Republic and Common Ground's recoveries in these matters, Quinn Emanuel would receive $28.6 million for representing just two entities. Objectors' position is that the Court should employ the lodestar method to slash counsel's fee by

75% ***because*** it represented 180 entities instead of two, and because it obtained a judgment orders of magnitude larger than those two entities' individual claims. That certainly is no way to structure incentives. *See, e.g.*, *WorldCom*, 388 F. Supp. 2d at 359 ("[T]o attract well-qualified plaintiffs' counsel who are able to take a case to trial, and who defendants understand are able and willing to do so, it is necessary to provide appropriate financial incentives.").

Indeed, employing objectors' approach would directly disadvantage them and all those like them in the future. When United and Kaiser opted in, they did so because, *inter alia*, that allowed them to pursue their risk corridor claims without bringing a lawsuit against the federal government, one of their biggest sources of revenue as administrators of Medicare and Medicaid plans. Their objection, while denigrating and mischaracterizing Class Counsel's role and responsibility in developing and pursuing the theory ***it*** originally pioneered, cannot credibly criticize the Quinn Emanuel's quality as class counsel. Kaiser, for its part, has hired Quinn Emanuel several times over many years for other complex litigation. And United specifically solicited Class Counsel to pitch for other unrelated contingency cases after choosing to opt into this case, based upon the quality of representation in this case. Swedlow Supp. Dec. ¶ 7 (Ex. 2).

Both objectors sought and received regular advice from Class Counsel on sensitive issues specific to their unique circumstances and goals. Both objectors were given the opportunity through Class Counsel to participate in the parallel litigations and appeals. Both were directly aware of the significant substantive role Class Counsel played in advising, mooting, substantively editing briefs in other cases, and influencing strategy in all the individual cases and appeals. Both objectors are sophisticated large entities with over $80 billion and $240 billion in annual revenues who chose to opt in after being informed of the fee expectations and after specifically exploring alternative counsel options. United specifically stated it considered hiring

counsel to file an individual claim both on an hourly basis and on contingency, but chose instead to opt into this class. Swedlow Supp. Dec. ¶ 9. United sought to actively participate in settlement discussions with the government without being a named plaintiff in a filed case against the government, because the government is and was United's biggest client. Same for Kaiser. *Id*. Both got what they bargained for, but now object to the fee petition in an obvious (and economically rational, albeit legally unsupportable) attempt to further increase revenue.[2]

If objectors get their way, it is hard to imagine why future class counsel will be incentivized to provide the arrangement that allows entities like United and Kaiser to satisfy all of their aims. The Court should reject objectors' effort to impose—contrary to the class notice—a widely-rejected lodestar approach that would signal to competent counsel that they should avoid representing classes in the Court of Federal Claims.

II. Class Counsel's Fee Request is Reasonable

A. Objectors do not address any of the seven reasonableness factors

Objectors' lodestar-only approach wholly fails to account for the seven factors almost universally used in this court when determining the reasonableness of a fee request: (1) the quality of counsel; (2) the complexity and duration of litigation; (3) the risk of non-recovery; (4) the fee that likely would have been negotiated between private parties in similar cases; (5) any class member's objections to the settlement terms or fees requested by class counsel; (6) the percentage applied in other class actions; and (7) the size of the award. *See, e.g., Kane Cty., Utah v. United States*, 145 Fed. Cl. 15, 18 (2019). There is a reason that objectors almost

[2] Indeed, during the objection period, Class Counsel was contacted by counsel for joining objector CareFirst, who attempted to negotiate a lower attorney's fee either for the class or for CareFirst individually. Swedlow Supp. Dec. ¶ 13. Class Counsel informed CareFirst that the Court must decide a reasonable attorney's fee for the class, and not for individual class members. *Id*.

entirely ignore the applicable legal standard: every factor supports the reasonableness of class counsel's fee request. *See generally* Petition at 9-28.

A brief summary of the factual background surrounding the supplemental notice may assist in demonstrating that 5% is fair and reasonable for all class members. In the days before it filed the supplemental notice motion with this Court, Class Counsel learned from other outside counsel and potential class members that other firms were signing up clients to pursue this exact claim in individual actions at contingencies of 15% and more, based in part upon the supposition that Class Counsel would seek and receive 33% of any recovery. In fact, the day before it filed the supplemental notice motion, Class Counsel met in person with several lawyers, including Frank O'Loughlin and Cindy Oliver of Lewis Roca, who represented QHP issuers that were deciding whether to opt into *Health Republic*. One of those entities, Colorado Health Insurance Cooperative, Inc. ("Colorado") was considering hiring Crowell & Moring, a respected law firm that ultimately did represent many QHP issuers in individual Risk Corridors cases all filed months and years after *Health Republic*. Mr. O'Loughlin requested the meeting with Class Counsel to assess their skill and to advise his clients whether to opt into the class. Later that same day, Class Counsel confirmed with other potential class members, including Common Ground, that contingency firms including Crowell were proposing terms for individual representations far in excess of 5%. As a consequence and based upon the settlement posture of the case at that time, Class Counsel supplemented the notice to self-limit the attorney's fees to 5%, which was objectively below the "market" contingency rate. Even after the supplement, Crowell was unwilling to reduce its contingency to 5%. Joe Holloway, Receivership Supervisor for Colorado, sent Crowell's "best and final" offer to Class Counsel revealing that even after the supplemental notice, the "market" rate for Risk Corridors contingency cases was above 5%. As

a consequence and based upon the recommendation of separate counsel, Colorado opted into this class. *See* Swedlow Supp. Dec. ¶¶ 10-11. This was not a unique or isolated circumstance.

In light of these facts and others set forth in the Petition, Objectors' failure to meaningfully address the factors used by the Court of Federal Claims to assess fee petitions demonstrates that a 5% fee is reasonable. Nearly two-thirds of the class member entities—and nearly 90% of the organizations whose entities opted in—do not object to Class Counsel's fee request.[3] These are sophisticated entities the same as the objectors, and they opted in based on the same notice. Class Counsel communicated with every class member during the objection period, and objecting required only a one sentence email to counsel (like those five organizations and two Kaiser entities submitted). In this context, the substantial number of entities not objecting, and their total recoveries, are significant. Indeed, application of the 5% fee to the non-objecting class members' recoveries alone would result in an award of over $100 million in fees.

B. The lodestar cross-check should not reduce the requested fee

The question is not whether the applicable factors favor counsel's fee request—objectors all but concede that they do. Instead, the only question remaining is whether the lodestar cross-check has an effect on the Court's reasonableness analysis. As an initial matter, objectors notably ignore that class counsel was not obligated to subject the fee award in this case to a lodestar cross-check—indeed, a majority of modern common fund cases, including several from this Court, do not use lodestar even as a check. Fitzpatrick Dec. ¶ 29. That class counsel

[3] This case differs from a typical class action suit, wherein a handful objectors seek to protect the interests of the whole class. Each class member in this case is sophisticated and most will receive substantial recoveries from these suits—indeed, some non-objecting organizations are set to receive hundreds of millions of dollars, and scores will receive tens of millions of dollars. These entities can be expected to protect their interests—yet they chose not to join the objection, even though doing so required nearly no resources or effort, and even though Kaiser and United apparently engaged in an organized effort to recruit objectors. *See* Swedlow Supp. Dec. ¶ 13.

nevertheless volunteered to undergo that cross-check does not change what it is—a final check on requested fees, made in light of—not instead of—the actual reasonableness factors.

Objectors mischaracterize the fee request as somehow inconsistent with the supplemental notice relating to attorney's fees. Objectors omit certain facts known to them that render this argument disingenuous. First, at the time of the supplemental notice, Class Counsel was in active settlement negotiations with the government to resolve the entire Risk Corridors liability. Those settlement discussions contemplated substantially full payment of the Risk Corridors claims and would have required substantially complete class participation to be acceptable to the government. The government contemplated the class action as the mechanism to resolve and pay the entire Risk Corridors liability. Swedlow Supp. Dec. ¶ 3. In that context, the supplemental notice identified both the extent of class participation and a lodestar cross check as factors that could have led to a percentage fee substantially lower than 5%, because, if substantially all class members received substantially full recovery, that would have meant $10 billion in settlement proceeds at a time Class Counsel had spent $2 million in lodestar. In that circumstance, a 250 times lodestar multiplier may have resulted in a fee request substantially lower than 5% ($500,000,000). However, another three years passed, two-thirds of eligible class members chose to pursue individual claims or wait to file, and Class Counsel continued to pursue and maintain this claim in the face of decreasing odds of ultimate success. In the end, Class Counsel prevailed. In light of this, the final lodestar cross-check is in no way inconsistent with either the letter or the spirit of the supplemental notice, nor of the fee Class Counsel requests. As the Court of Federal Claims noted in a case cited in the class notice here, "the lodestar cross-check provides information for the court's consideration, not a mandate," and it *"**does not trump the primary reliance on the percentage of common fund method***." *Geneva Rock Prods, Inc. v.*

United States, 119 Fed. Cl. 581, 595-96 (2015) (*rev'd in part on other grounds by Longnecker Prop. v. United States*, 2016 WL 9445914, at *1 (Fed. Cir. Nov. 14, 2016) (emphasis added).

In contrast, objectors' characterization of the cross-check severely misapprehends the nature of that exercise. Those arguments miss the mark in several respects.

1. Detailed billing records are unnecessary for a cross-check

Objectors cite a fee-shifting case, *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), for the proposition that Class Counsel is required to submit detailed billing records in support of a fee request. But this is not a fee-shifting case. Where fee-shifting is at issue, like in *Hensley*, the lodestar method is the sole, *mandatory* method to determine attorney's fees, and detailed records are necessary. But in a common fund case, where the fee request is based on the value class counsel created for the class members paying its fees, courts overwhelmingly prefer the percentage method for the very reason that it "spares the court and the parties the cumbersome, enervating, and often surrealistic process of lodestar computation." *Davis v. J.P. Morgan Chase & Co.*, 827 F. Supp. 2d 172, 184 (W.D.N.Y. 2011).[4] Thus, in conducting the lodestar *cross-check*—as distinct from the lodestar *method*—courts do not require detailed billing records, and instead routinely rely on declarations regarding the applicable lodestar. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306–07 (3d Cir. 2005) ("The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting. The district courts may rely on summaries submitted by the attorneys and need not review actual billing records.").[5]

[4] *See also Stanley v. U.S. Steel Co.*, 2009 WL 4646647, at *1 (E.D. Mich. Dec. 8, 2009) ("Use of the percentage method also decreases the burden imposed on the Court by eliminating a full-blown, detailed and time consuming lodestar analysis."); *Gokare*, 2013 WL 12094887, at *3 ("The inefficiency concerns that exist with the lodestar method would be significant here as combing through billing records for more than 9,346 hours of law firm work would require a large and unnecessary expenditure of judicial resources.").

[5] *See also In re Crocs, Inc. Sec. Litig.*, 2014 WL 4670886, at *4 n. 4 (D. Colo. Sept. 18, 2014) ("Because the Court has adopted the percentage method, the lodestar calculation is used

2. Class Counsel's submissions identify their lodestar

Class Counsel provided the number of hours spent on the *Health Republic* and *Common Ground* matters, the hourly rates for associates, partners, and staff, a blended rate for attorneys and staff, and detailed descriptions of the type of work class counsel performed. *See* Swedlow Dec. ¶¶ 9-11, 18-24. This work included, but is not limited to, developing the legal theory that ultimately resulted in a $12 billion industry-wide recovery; briefing on multiple dispositive motions; tending to the needs of hundreds of class members, including often-daily inquiries; participating as amicus in multiple appeals; and routinely advising counsel for individual litigants, including the Supreme Court parties. *See id.*; *see also* Swedlow Supplemental Dec. ¶¶ 5, 12. Courts routinely rely on declarations of precisely this sort in conducting a lodestar cross-check. *See, e.g., Smothers v. NorthStar Alarm Servs., LLC*, 2020 WL 1532058, at *8 (E.D. Cal. Mar. 31, 2020); *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1176 (S.D. Cal. 2007); *In re Lucent Techs., Inc., Sec. Litig.*, 327 F. Supp. 2d 426, 448 (D.N.J. 2004).[6] Objectors' demand for granular detail is not consistent with the less-exhaustive lodestar cross-check.

The cases objectors cite are inapposite *fee-shifting* cases, not common fund cases.[7] Objectors also suggest that "countless common fund cases have reduced hours in a lodestar cross-check based on insufficient billing records," but two of the four cases they cite utilize the

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only for comparison purpose. . . . Thus, the Court will not undertake an exhaustive lodestar analysis."); *Abbott v. Lockheed Martin Corp.*, 2015 WL 4398475, at *3 n.1 (S.D. Ill. July 17, 2015) ("The Court may rely on summaries submitted by attorneys and need not review actual billing records.")

[6] If the Court believes further detail is necessary, Class Counsel is of course willing to supplement its submissions as directed by the Court.

[7] *See* Objection at 8-9 (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Sabo v. United States*, 127 Fed. Cl. 606, 636 (2016); and *Am. Rena Int'l Corp. v. Sis-Joyce Int'l Co.*, 2015 WL 12732433, at *40 (C.D. Cal. Dec. 14, 2015).

lodestar *method*, not a lodestar *cross-check*,[8] and the other two cases, in turn, relied exclusively on authority from fee-shifting and lodestar *method* cases.[9] In other words, these two outlier courts made the same mistake as objectors, failing to differentiate between instances where lodestar is the sole relevant factor and those where it is used only as a check. The unfortunate reality is that objectors, through lawyers who have never sought to vindicate the objectors' risk corridors rights, are treating Class Counsel as if they are opposing counsel. Objectors get this case backward—the law rewards, not punishes, class counsel who obtain extraordinary results.

3. The Laffey matrix is no substitute for class counsel's actual hourly rates

Extending their fee-shifting theme, objectors argue the Court must assess whether class counsel's "requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." Objection at 11 (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)). The irony of the argument is that class counsel *did* provide exactly such evidence: many different attorneys offered risk corridor claim representation on contingency, but all were higher than the 5% class counsel requests.

Where objectors next err is by asking the Court to reduce class counsel's fee because its rates are higher than those found on the Laffey matrix. The Laffey matrix is a chart the Department of Justice created to help courts make determinations in fee-shifting cases against the government that purportedly reflects rates for counsel in the Washington, D.C. market.

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[8] *See* Objection at 9 (citing *Park v. Thomson Corp.*, 633 F. Supp. 2d 8 (S.D.N.Y. 2009), and *Lahiri v. Universal Music & Video Distribution Corp.*, 606 F.3d 1216, 1222 (9th Cir. 2010)).

[9] *See* Objection at 9 (citing *Bentley v. United of Omaha Life Ins. Co.*, No. 2020 WL 3978090 (C.D. Cal. Mar. 13, 2020); and *Il Fornaio (Am.) Corp. v. Lazzari Fuel Co.*, No. C 13-05197 WHA, 2015 WL 2406966, at *4 (N.D. Cal. May 20, 2015)). The relevant portions of *Bentley* relied on *Hensley*, *Gonzalez v. City of Maywood*, 729 F.3d 1196 (9th Cir. 2013), and *Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 945 (9th Cir. 2007), all fee shifting cases. *Il Fornaio* relied exclusively on *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 944 (9th Cir. 2011), a case which considered the district court's use of the lodestar *method*.

Courts, however, have repeatedly found that the Laffey matrix—which is based on rates from decades ago, adjusted for inflation, but not actual current analyses—is out of step with the actual market for sophisticated legal counsel.[10]

The Federal Circuit has furthermore noted that "the Laffey Matrix is imprecise and is merely a guide." *Yeressian v. Dep't of the Army*, 534 F. App'x 968, 971 (Fed. Cir. 2013). And even the D.C. Circuit has noted that the matrix is "crude," and that litigants should supplement it with "other evidence such as" surveys and affidavits reflecting market rates. *Eley v. D.C.*, 793 F.3d 97, 101 (D.C. Cir. 2015). Class counsel did just that, with public data and surveys identifying the rates class counsel's peer firms charge—including Kirkland & Ellis, whose participation in risk corridor litigation objectors tout. Silver Dec. ¶ 83-91.[11] Class Counsel's rates are aligned with the market for top-tier counsel who practice in major metropolitan areas, *id*., an assessment that comports with the findings of innumerable courts regarding Quinn Emanuel's rates.[12] Objectors present no contrary evidence, notwithstanding that they are repeat

[10] *See, e.g., Rosenfeld v. U.S. Dep't of Justice*, 904 F. Supp. 2d 988, 1003 (N.D. Cal. 2012) (rejecting Laffey matrix where plaintiff "submitted competent evidence showing market . . . substantially exceed the Laffey index"); *Entm't Software Ass'n v. Granholm*, 2006 WL 6306504, at *3 (E.D. Mich. Nov. 30, 2006) (rejecting application of the Laffey Matrix where it proved inconsistent with surveys of attorneys' rates); *Hous. Rights Ctr. v. Sterling*, 2005 WL 3320738, at *2 (C.D. Cal. Nov. 1, 2005) (finding that "rates of up to $1,000 per hour. . . . [are] much more in line with this Court's experience than is the Laffey Matrix").

[11] Objectors ask the court to ignore the opinions of Prof. Silver and Prof. Fitzpatrick, citing to one case each where a court disagreed with them. Objectors ignore the scores of courts that have relied on their insights, empirical data, and opinions. *See* Fitzpatrick Dec. ¶ 3; Silver Dec. ¶ 5 (Dkt. 107-3). Moreover, both experts provide detailed empirical data related to attorney's fees and assess class counsel's request in light of that data.

[12] *See, e.g., See Liqwd, Inc. v. L'Oréal USA, Inc.*, CIVIL ACTION NO. 17-14-JFB-SRF, 25-28 (D. Del. Dec. 16, 2019) (finding that Quinn Emanuel's "hourly rates and [] hours spent [are] reasonable"); Order Granting In Part Defendant Tsuburaya Productions Co. Ltd.'s Motion for Attorney's Fees and Full Costs, *UM Corp. v. Tsuburaya Productions Co., Ltd.*, CV 15-03764-AB (AJWx), (C.D. Calif., Aug. 1, 2018) (ECF No. 350); Report and Recommendation of Special Master, *Transweb, LLC v. 3M Innovative Props. Co.*, No. 10-cv-04413-FSH (D.N.J. Sept. 24, 2013) (ECF No. 567) (Special Master's ruling finding that Quinn Emanuel was a "premier

players in complex litigation who have retained Quinn Emanuel in other contexts and are unquestionably aware of the prevailing rates for sophisticated counsel, including risk corridor counsel.

The Department of Justice also recognizes that the Laffey matrix does not reflect the market for sophisticated counsel, and it has recently hired one of class counsel's experts, Prof. Fitzpatrick, to update the Laffey matrix to reflect current market rates for sophisticated counsel. Fitzpatrick Supp. Dec. ¶ 9. In fact, the new Laffey matrix will not only include exactly the sort of submissions class counsel made here; it will incorporate *Quinn Emanuel's hourly rates*. *Id.*

4. <u>The implied cross-check multiplier is reasonable here</u>

Objectors' proposal must be placed in perspective. Objectors maintain that the Court should apply a .88 lodestar multiplier, resulting in a 0.22% fee award. A 0.22% percentage of the fund award is lower than any of which class counsel is aware, let alone for counsel that pioneered and doggedly pursued a novel legal theory that resulted in billions of dollars of recovery, representing 100% of damages. Moreover, objectors ask the court to award an attorney's fee that is far, far less than they would have paid to pursue an individual case on an hourly basis, even though class counsel bore the risk of non-recovery. For instance, objector SHA LLC asks to pay approximately $35,000 on a $15 million recovery. Objector Presbyterian, across two entities, asks to pay about $30,000 on a nearly $12.9 million recovery. It is objectors, and not class counsel, who seek a windfall.

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litigation firm" and that total fees of $26,146,493.45 were reasonable); Civil Minutes re: Order Granting Motion for Attorneys' Fees, *Riverside Cnty. Dept. of Mental Health v. A.S.*, Case No. 08-cv-00503-ABC (C.D. Cal. Feb. 22, 2010) (ECF No. 123) (awarding full amount of attorneys' fees sought for work performed by Quinn Emanuel).

5. Better results warrant higher multipliers; the best results warrant the highest multipliers

The thrust of the objection is that class counsel's 5% fee request is unreasonable because courts typically apply lodestar multipliers lower than the one implied by the request. Class counsel does not deny that the multiplier implied by its request is at the high end of the range courts approve. The circumstances and results of this case, and the reasonableness factors to which the objectors do not respond, all show why that multiplier is reasonable.

As an initial matter, courts—including the Court of Federal Claims—have repeatedly approved large lodestar multipliers. *See* Pet. at 30-31 (identifying cases with awards involving lodestar multipliers as high as 66).[13] Moreover, because courts are not required to conduct a lodestar cross-check when awarding fees in a common fund case, many class counsel simply do not submit summaries of their lodestar unless they believe it helps them. Fitzpatrick Supp. Dec. ¶ 6. Thus, all else being equal, class counsel whose lodestar implies a relatively low multiplier are more likely than their high multiplier peers to highlight their lodestar in a fee application. *Id.* This selection bias, however, means that the data provided to courts skews *low* in terms of implied multipliers. *Id.* That is yet another reason a cross-check cannot and should not trump a full reasonableness analysis, and why objectors err in suggesting otherwise.

[13] *See also Kane Cty., Utah v. United States*, 145 Fed. Cl. 15, 20 (2019) (6.13 multiplier, and collecting cases approving or referencing approved multipliers between 5.39 to 19.6); *Farrell v. Bank of America Corp., N.A.*, 2020 WL 5230456 (9th Cir. Sept. 2, 2020) (10.15 multiplier); *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, 2009 WL 2408560, at *2 (D. Mass. Aug. 3, 2009) (8.3 multiplier); *In re Doral Financial Corp. Secs. Litig.*, No. MDL 1706, ECF No. 107 (S.D.N.Y. July 17, 2007) ("A 15.25% fee represents a reasonable multiplier of 10.26."); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005) (15.6 multiplier); *In re Rite Aid Corp. Sec. Litig.*, 146 F. Supp. 2d 706, 736 n.44 (E.D. Pa. 2001) (lodestar multiplier of 4.5-8.5 was "unquestionably reasonable"); *Conley v. Sears, Roebuck & Co.*, 222 B.R. 181, 182 (8.9 multiplier).

6. The results class counsel achieved are unprecedented in megafund cases, warranting a multiplier on the high end of the spectrum

Class Counsel's performance and forthrightness warrants its requested fee. Class Counsel pioneered and pursued a legal theory that resulted in a $12 billion industry-wide recovery—including $3.7 billion in these cases—representing a 100% recovery. A complete recovery renders this case unique among megafund cases, which often award high lodestar multipliers for recoveries that represent only a small fraction of the class's actual damages. Objectors' notion that the lodestar multiplier should be the same in a case with a settlement with a 20% recovery as it is in a case with a 100% recovery is misguided, unfair, and would create perverse incentives for future class actions. *See, e.g.*, *Rite Aid*, 146 F. Supp. 2d at 736 n.44 (if lodestar multiplier does not increase where counsel obtains abnormally good results, "the lodestar approach begins to dominate and supersede the percentage of the recovery formula").

Indeed, while objectors cite numerous cases involving lower multipliers, they never account for the recovery relative to the class's damages in those cases. Many of the cases objectors cite clearly address cents-on-the-dollar recoveries.[14] Likewise, megafund cases almost never approach even a 50% recovery, let alone the 100% recovery class counsel achieved here.[15] In each of those cases, had counsel achieved the same sort of total recovery achieved here, and

[14] *See, e.g.*, *Retta v. Millennium Prods., Inc*., 2017 WL 5479637, at *12 (C.D. Cal. Aug. 22, 2017) (approving a 3.5 lodestar multiplier on a 22% recovery); *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 379 (S.D.N.Y. 2013) (applying a 1.34 multiplier to a 24% recovery); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 2008 WL 4178151, at *6 (S.D. Tex. Sept. 8, 2008) (noting the class obtained a roughly 16% recovery of $7.2 billion out of $44 billion in potential damages); *In re Enron Corp. Sec., Derivative & ERISA Litig*., 586 F. Supp. 2d 732, 787-80 (approving a 5.2 multiplier).

[15] *See, e.g.*, *In re Wells Fargo & Co. Shareholder Deriv. Litig.*, 445 F. Supp. 3d 508 (N.D. Cal. 2020) (approving a 2.7 multiplier on a 6.9 to 9.6 percent recovery); *In re Credit Default Swaps Antitrust Litig.*, 2016 WL 2731524, at *8, *16 (S.D.N.Y. April 16, 2016) (awarding multiplier of 6 on a 15 to 23% recovery of Plaintiffs' estimate of $8–$12 billion in damages); *In re Citigroup Inc. Secs. Litig.*, 965 F. Supp. 2d 369, 401 (S.D.N.Y. 2013) (2.8 multiplier on a 9% recovery).

had the lodestar multiplier increased commensurately, the multiplier would have neared or substantially exceeded the multiplier implied by class counsel's request in these cases. Class counsel's unprecedented 100% recovery thus justifies a lodestar multiplier well in excess of the run-of-the-mill megafund case, where the class recovers just a sliver of its losses.[16]

7. Objectors' arguments for a lower multiplier ignore the law and facts, and urge perverse incentives for the future

Objectors assert three reasons they believe a high multiplier is inappropriate. None actually support such a notion.

First, objectors argue (at 14) that a low multiplier is warranted because this case did not involve extensive discovery. But that gets the cross-check and multiplier analysis wrong. It also ignores the proposition for which the cases objectors cite stand. The second reasonableness factor, the complexity and duration of the litigation, acts as a basis to support higher multipliers, because the harder class counsel works for the class, the more they should be rewarded, in order to align incentives in that and future cases. *See* Pet. at 16-17 (collecting cases). Discovery is often, but not always, one of the hallmarks of such work. *See* Objection at 14 (collecting cases). However, the lack of discovery in a case, like this one, where much of the record was already public and liability hinged on poring over that detailed public record and making nuanced legal arguments should not have a negative effect on class counsel's fees; otherwise, class counsel would be disincentivized from bringing important legal interpretative cases in the future just because they do not likely involve "discovery" that will push up lodestar unnecessarily. Further,

[16] Objectors devote a section of their brief to cherry-picking cases cited in class counsel's motion for the uncontroversial proposition that fee awards of 30-40% are commonplace, and pointing out that some of these cases featured low lodestar multipliers. Obj. at 19-20. But objectors miss the point: a lodestar cross-check, if it's applied, should be more rigorous where counsel ask for 40% of the recovery because class members' collection would be dramatically lower as a result. Not so where counsel asks for just 5% of the recovery.

calculating lodestar multipliers as Objectors appear to propose—applying a *higher multiplier* where discovery and motion practice already result in a *higher lodestar*—would doubly reward counsel based on the hours billed, rather than the results obtained. This is precisely the backward approach that the percentage-of-the-fund approach was meant to avoid. *See, e.g.*, *WorldCom*, 388 F. Supp. 2d 319, 355 (lodestar method "tempts lawyers to run up their hours").

Second, objectors argue (at 20) that the court should lower class counsel's fee award because it obtained substantial class participation, and the class notice suggested high levels of participation could lead to an attorney's fee below 5%. But as explained above, when the notice was drafted, class counsel contemplated the possibility an early settlement with the government, for nearly full amounts, and with nearly full participation from all potential class members—a scenario that would have resulted in a lodestar multiplier of approximately 250. *See* Swedlow Supp. Dec. ¶ 3. Had that settlement occurred, the lodestar cross-check may have thus provided a substantially different picture when assessing the reasonableness of a 5% award (on a $10 billion recovery). But that is not what happened. The class represents one-third participation, the risk corridors cases were litigated to judgment, and class counsel's lodestar increased substantially over the years to account for its continued pursuit of the claims, even when this case was partially stayed. In *this* scenario under *these* facts, the 5% counsel requests is justified and reasonable under the factors actually required by the law, which objectors do not address.

Third, objectors suggest (at 5-6, 19-20) that Class Counsel did not meaningfully contribute to the class's recovery. Objectors' suggestion is specious. Class Counsel was, by several months, the first to file a risk corridors case, and developed the Tucker Act legal theory that prevailed at the Supreme Court. Months after Class Counsel filed suit, other law firms filed copycat suits, including the cases that reached the Supreme Court. Many of those copycats—

including Moda, a Supreme Court party—were averse to filing suit, and only chose to do so after Class Counsel paved a viable path to victory. It is no exaggeration to say that the risk corridor litigation and recovery may never had happened if Class Counsel not filed *Health Republic*. And Class Counsel was never territorial: it regularly advised counsel for individual litigants, recognizing that a rising tide lifted all boats. Swedlow Dec. ¶¶ 9, 18, 22.

In addition to pioneering the risk corridors claim, Class Counsel likewise filed the first brief on the merits of the theory, when it responded to the government's motion to dismiss in *Health Republic*. This Court subsequently made the first favorable substantive ruling for any risk corridors plaintiff when it largely denied the motion to dismiss. *See Health Republic Insurance Co. v. United States*, 129 Fed. Cl. 757 (2017). Judge Wheeler's subsequent opinion granting plaintiffs summary judgment in *Molina Healthcare of California, Inc. v. United States*—which objectors tout as a milestone in risk corridors litigation—cites this Court's *Health Republic* opinion repeatedly, noting that it "remain[ed] the most thorough and instructive discussion of the Government's ripeness arguments." 133 Fed. Cl. 14, 30 (2017). When, by happenstance, other later filed cases proceeded to Federal Circuit faster than *Health Republic*, Class Counsel provided input with respect to the appeals, attended and participated in moot arguments, and submitted amicus briefs. Class Counsel's amicus briefs were extensively cited by Judge Wallach in his dissent from denial of *en banc* rehearing, which increased the likelihood that the Supreme Court would grant certiorari. *See Moda Health Plan, Inc. v. United States*, 908 F.3d 738, 747-48 (Fed. Cir. 2018) (Wallach, J., dissenting from denial of *en banc* rehearing).

Class Counsel likewise participated as other law firms presented its legal theory and arguments to the Supreme Court, again providing input and submitting amicus briefs. Objector United affirmatively recognized that Quinn was guiding the individual cases, as it sent an email

to Class Counsel indicating that "Quinn has worked closely with [counsel for Moda] throughout the life of these respective cases." Swedlow Supp. Dec. ¶ 5. It thus is no surprise that after entry of judgment in *Health Republic*, counsel for one of the largest contingents of QHPs contacted Class Counsel to say that its "class action was a bold and unprecedented move." *Id.* ¶ 5.

(a) Objectors' heavy reliance on *Clean Diesel* demonstrates an unfortunate lack of engagement with the facts of this case

Objectors' reliance on the auto dealer *Clean Diesel* case is particularly jarring. In that case, the court applied a lodestar approach to a megafund settlement directly resulting from a different settlement in an earlier related case brought by different counsel for a different category of plaintiffs (consumers). *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, 2017 WL 1352859, at *2 (N.D. Cal. Apr. 12, 2017). *This* case presents the exact opposite scenario: other firms and individual risk corridor litigants benefitted from Class Counsel's legwork and legal theory, not vice versa. The core of objectors' position is thus that class counsel's requested fees should be slashed by 95% because copycat cases proceeded to appeal first, mainly because of the opt-in period in which objectors chose to join the class. It is difficult to imagine a stronger disincentive to bringing novel, but valuable, class claims.

(b) Class counsel provides evidence of market rates to show what is reasonable, not to argue class members explicitly agreed to 5%

Finally, objectors misrepresent (at 20-21) class counsel's position with respect to the class notice. Objectors say that they did not agree to a 5% fee by opting in, but class counsel has never contended that class members had a binding contract to pay a 5% fee.[17] What class counsel pointed out—and what is true—is that all class members had fair warning that they may

[17] As noted above, objectors (and all other class members) did assent to use of the percentage-of-the-fund approach when they opted in, as the class notice expressly represented that Quinn Emanuel would seek fees as a percentage of the recovery, subject to a lodestar *cross-check* (not the lodestar *method*). *See supra* § I.

pay a 5% attorney's fee and they chose to opt in anyway, and that numerous class members were told to anticipate that Quinn Emanuel would seek a 5% attorney's fee.[18] Pet. at 23-24. Class members could have investigated other options, and many did, but they chose to opt in because Quinn Emanuel's offer represented the best deal available to them on the market. As discussed above, United in particular is an example of this. Swedlow Supp. Dec. ¶ 9.

Just like United, all of the objectors are sophisticated entities with in-house legal departments who were not in any sense misled by the notice. If objectors truly believe that the market presented superior alternatives, any them could have submitted a declaration to that effect. Instead, objectors remain silent about what their expectations were, and what alternatives they had available. The evidence is thus unrebutted that they had no obligation to opt in, knew they had other options for counsel, knew Class Counsel might seek up to 5%, and, in light of these facts, were not only comfortable with the possibility, but chose it as their perceived best option.

In short, the record amply supports a 5% attorney's fee and the associated lodestar multiplier. Under these circumstances, employing the lodestar cross-check to diminish class counsel's requested fee award would allow the tail to wag the dog, improperly subordinating every other relevant factor to the lodestar. *Geneva Rock Prods.*, 119 Fed. Cl. at 594.

III. Conclusion

For all the foregoing reasons, Class Counsel respectfully believes a 5% attorney's fee—on the lowest end of percentage fees typically approved in class litigation—is fully warranted.

[18] Objectors oddly suggest that class counsel's representations to class members are "pure inadmissible hearsay," but even if the hearsay rule applied to these fee petition proceedings, counsel's representations are offered to show notice to class members, not the truth of the matter asserted.

Dated: September 3, 2020

Respectfully submitted,

QUINN EMANUEL URQUHART & SULLIVAN, LLP

/s/ Stephen Swedlow

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Attorneys for Plaintiff Common Ground Healthcare Cooperative and the Class

Exhibit 1

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY Plaintiff, on behalf of itself and all others similarly situated, v. THE UNITED STATES OF AMERICA Defendant.	No. 1:16-cv-00259-MMS (Judge Sweeney)
COMMON GROUND HEALTHCARE COOPERATIVE Plaintiff, on behalf of itself and all others similarly situated, v. THE UNITED STATES OF AMERICA Defendant.	No. 1:17-cv-00877-MMS (Judge Sweeney)

OBJECTION OF CAREFIRST OF MARYLAND, INC., GROUP HOSPITALIZATION AND MEDICAL SERVICES, INC. (ALSO IDENTIFIED AS GHMSI IN DOCS. 82 AND 105) AND CAREFIRST BLUECHOICE, INC. TO CLASS COUNSEL'S MOTION FOR APPROVAL OF ATTORNEY'S FEE REQUEST AND JOINDER IN OPPOSITION AND OBJECTION FILED BY OBJECTING CLASS MEMBERS

CareFirst of Maryland, Inc., Group Hospitalization and Medical Services, Inc. (also identified as GHMSI in Docs. 82 and 105)[1] and CareFirst BlueChoice, Inc. hereby object to Quinn Emanuel's request for over $184 million in fees and join in the opposition and objection filed by Objecting Class Members and incorporate herein the arguments made by Objecting Class Members.

Respectfully submitted,

Patrick de Gravelles
Litigation General Counsel
CareFirst BlueCross BlueShield
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Email: patrick.degravelles@CareFirst.com
Attorney for CareFirst of Maryland, Inc., Group Hospitalization and Medical Services, Inc., and CareFirst BlueChoice, Inc.

[1] Doc. 82 and 105 contain references to both Group Hospitalization and Medical Services, Inc. as well as GHSMI. Those in fact are the same legal entity.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY, Plaintiff, on behalf of itself and all others similarly situated, v. THE UNITED STATES OF AMERICA Defendant.	No. 1:16-cv-00259-MMS (Judge Sweeney)
COMMON GROUND HEALTHCARE COOPERATIVE, Plaintiff, on behalf of itself and all others similarly situated, v. THE UNITED STATES OF AMERICA Defendant.	No. 1:17-cv-00877-MMS (Judge Sweeney)

GROUP HEALTH COOPERATIVE AND KAISER FOUNDATION HEALTHPLAN OF THE NW'S OBJECTION TO CLASS COUNSEL'S MOTION FOR APPROVAL OF ATTORNEY'S FEE REQUEST AND JOINDER IN OPPOSITION AND OBJECTION FILED BY OBJECTING CLASS MEMBERS

Group Health Cooperative and Kaiser Foundation Healthplan of the NW hereby object to Quinn Emanuel's request for over $184 million in fees and join in the opposition and objection filed by Objecting Class Members and incorporate herein the arguments made by Objecting Class Members.

Respectfully submitted,

/s/ Jack Burns
JACK BURNS
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501 West Broadway, 19th Floor
San Diego, CA 92101-3598
Telephone: 619.338.6588

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY Plaintiff, on behalf of itself and all others similarly situated, v. THE UNITED STATES OF AMERICA Defendant.	No. 1:17-cv-00877-MMS (Judge Sweeney)

OSCAR HEALTH'S OBJECTION TO CLASS COUNSEL'S MOTION FOR APPROVAL OF ATTORNEY'S FEE REQUEST AND JOINDER IN OPPOSITION AND OBJECTION FILED BY OBJECTING CLASS MEMBERS

Oscar Health Plan of California, Oscar Insurance Company of Texas, Oscar Insurance Corporation, and Oscar Insurance Corporation of New Jersey, hereby object to Quinn Emanuel's request for over $184 million in fees and join in the opposition and objection filed by the Objecting Class Members and incorporate herein the arguments made by the Objecting Class Members.

Respectfully submitted,

DocuSigned by:
Harold Greenberg
94E96B3943804B3...

HAROLD GREENBERG, ESQ.
General Counsel and Corporate Secretary
Oscar Health Plan of California
Oscar Insurance Company of Texas
Oscar Insurance Corporation
Oscar Insurance Corporation of New Jersey

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY, Plaintiff, on behalf of itself and all others similarly situated, v. THE UNITED STATES OF AMERICA Defendant.	No. 1:16-cv-00259-MMS (Judge Sweeney)
COMMON GROUND HEALTHCARE COOPERATIVE, Plaintiff, on behalf of itself and all others similarly situated, v. THE UNITED STATES OF AMERICA Defendant.	No. 1:17-cv-00877-MMS (Judge Sweeney)

PRESBYTERIAN INSURANCE COMPANY, INC. AND PRESBYTERIAN HEALTH PLAN, INC.'S OBJECTION TO CLASS COUNSEL'S MOTION FOR APPROVAL OF ATTORNEY'S FEE REQUEST AND JOINDER IN OPPOSITION AND OBJECTION FILED BY OBJECTING CLASS MEMBERS

Presbyterian Insurance Company, Inc. and Presbyterian Health Plan, Inc. hereby object to Quinn Emanuel's request for over $184 million in fees and join in the opposition and objection filed by Objecting Class Members and incorporate herein the arguments made by Objecting Class Members.

Respectfully submitted,

/s/ Margaret McNett

Margaret McNett

Vice President & Associate General Counsel
Presbyterian Insurance Company, Inc. and Presbyterian Health Plan, Inc.
9521 San Mateo Blvd. NE
Albuquerque, New Mexico 87113
505-923-6107

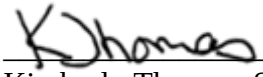
IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY Plaintiff, on behalf of itself and all others similarly situated, v. THE UNITED STATES OF AMERICA Defendant.	No. 1:17-cv-00877-MMS (Judge Sweeney)

PRIORITY HEALTH AND PRIORITY HEALTH INSURANCE COMPANY'S OBJECTION TO CLASS COUNSEL'S MOTION FOR APPROVAL OF ATTORNEY'S FEE REQUEST AND JOINDER IN OPPOSITION AND OBJECTION FILED BY KAISER AND UNITED

Priority Health and Priority Health Insurance Company hereby objects to Quinn Emanuel's request for over $184 million in fees and joins in the opposition and objection filed by Kaiser and United and incorporates herein the arguments made by Kaiser and United.

Respectfully submitted,



Kimberly Thomas, SVP and General Counsel

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY, Plaintiff, on behalf of itself and all others similarly situated, v. THE UNITED STATES OF AMERICA Defendant.	No. 1:16-cv-00259-MMS (Judge Sweeney)
COMMON GROUND HEALTHCARE COOPERATIVE, Plaintiff, on behalf of itself and all others similarly situated, v. THE UNITED STATES OF AMERICA Defendant.	No. 1:17-cv-00877-MMS (Judge Sweeney)

SHA, L.L.C AND SOUTHWEST LIFE AND HEALTH INSURANCE COMPANY'S OBJECTION TO CLASS COUNSEL'S MOTION FOR APPROVAL OF ATTORNEY'S FEE REQUEST AND JOINDER IN OPPOSITION AND OBJECTION FILED BY OBJECTING CLASS MEMBERS

SHA, L.L.C. and Southwest Life and Health Insurance Company hereby object to Quinn Emanuel's request for over $184 million in fees and joins in the opposition and objection filed by Objecting Class Members and incorporates herein the arguments made by Objecting Class Members.

Respectfully submitted,

David H. Ellenbogen
General Counsel
SHA, L.L.C.
August 20, 2020

David H. Ellenbogen
General Counsel
Southwest Life and Health Insurance Company
August 20, 2020

Exhibit 2

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

SUPPLEMENTAL DECLARATION OF STEPHEN A. SWEDLOW

I, Stephen Swedlow, declare:

1. I am the Managing Partner in the Chicago office of Quinn Emanuel Urquhart & Sullivan LLP, appointed class counsel in this matter. Except as set forth below, I make this declaration of my own personal knowledge and, if called to testify, I could and would competently testify hereto under oath.

2. As this Court is aware, the one substantive objection submitted in this case was incorrectly filed with the Court rather than submitted to Class Counsel as instructed by the Court in its Order. For avoidance of doubt, I personally sent the Order itself to every class member representative, including representatives for each objector. I then followed up with another written communication to all class member explicitly explaining that objections were to be sent directly to me by email. A copy of that email communication is submitted herewith as Exhibit 4. In addition, during the period for submitting objections, Class Counsel communicated with every single class member to obtain tax identification information requested by DOJ for submission of the Judgment to Treasury for payment. Suffice it to say, each and every class member was both aware of the objection period, aware of Class Counsel and informed of the method required for

submitting an objection. In addition to the one substantive objection, five other organizations (and two Kaiser entities omitted from the substantive objection) filed one sentence joinders and those joinders are submitted herewith as Exhibit 1.

3. At the time the supplemental notice issued in *Health Republic*, Class Counsel was in active settlement negotiations with the government to resolve the entire Risk Corridors liability. Both United and Kaiser were aware of this fact at the time. Those settlement discussions contemplated substantially full payment of the Risk Corridors claims and would have required substantially complete class participation to be acceptable to the government. The government contemplated the class action as the mechanism to resolve and pay the entire Risk Corridors liability. In that context, the supplemental notice identified both the extent of class participation and lodestar cross check as factors that could have led to a percentage fee substantially lower than 5%, because, if substantially all class members received substantially full recovery, that would have meant $10 billion in settlement proceeds at a time Class Counsel had spent $2 million in lodestar. At that time based upon those circumstances, a 250 times lodestar multiplier in a cross-check may have resulted in a fee request substantially lower than 5% ($500,000,000). However, another 3 years passed, two-thirds of eligible class members chose to pursue individual claims or wait to file, and Class Counsel continued to pursue and maintain this claim in the face of decreasing odds of ultimate success.

4. I personally informed both Kaiser and United about the settlement discussions with the government early in the case and personally informed both objectors how an early settlement (substantially all class participation collecting substantially all claimed amounts) could reduce the fee request down from 5%.

5. As the risk corridor litigation progressed, United affirmatively recognized in written communication with Class Counsel that we were guiding the individual cases. For example, a United in-house legal representative sent me an email indicating that "Quinn has worked closely with [counsel for Moda] throughout the life of these respective cases." Similarly, counsel for the other individual Risk Corridors plaintiffs also recognized the significant contribution Class Counsel made to this cause of action and theory. In fact, after the judgment in *Health Republic* issued, counsel for one of the largest contingents of QHPs contacted class counsel to say that Quinn Emanuel's "class action was a bold and unprecedented move." There may have never been any recovery for any QHP issuers if Class Counsel had not filed the first Tucker Act claim seeking to recover unpaid Risk Corridors amounts from the government.

6. I personally communicated with representatives from United and Kaiser informing each of them about Class Counsel's influence and impact on the other copycat individual cases both at the trial level and on appeal. None of that communication was referenced in the Objection filed with this Court. Both objectors are sophisticated large entities with over $80 billion and $240 billion in annual revenues who chose to opt in after I personally informed each of them of the fee expectations and after they each specifically informed me of their efforts at exploring alternative counsel options.

7. When United and Kaiser opted in, both entities informed me that they did so because, *inter alia*, that allowed them to pursue their risk corridor claims without bringing a lawsuit against the federal government, one of their biggest sources of revenue as an administrator of Medicare and Medicaid plans. Their objection, while denigrating and mischaracterizing Class Counsel's role and responsibility in developing and pursuing the theory ***it*** originally pioneered, cannot credibly criticize the Quinn Emanuel's quality as class counsel.

Kaiser, for its part, has hired Quinn Emanuel several times over many years for other complex litigation. And United specifically solicited me and my colleagues here at Quinn Emanuel to pitch United for other unrelated contingency cases after choosing to opt into this case based upon our quality of representation in this case.

8. Throughout the past four plus years both objectors (and many other class members) sought and received regular advice from Class Counsel on sensitive issues specific to their unique entity circumstances and goals throughout this entire litigation. Both objectors were given the opportunity through Class Counsel to participate in the parallel litigations and appeals. Both were directly aware of the significant substantive role Class Counsel played in advising, mooting, substantively editing briefs in other cases, and influencing strategy in all the individual cases and appeals.

9. United specifically stated to me that it considered hiring separate counsel to file an individual claim both on an hourly basis and on contingency, but chose instead to opt into this class. United sought the ability to actively participate in settlement discussions with the government without being a named plaintiff in a filed case against the government because the government is and was United's biggest client. Kaiser also indicated to me that there was an advantage to opting into the class rather than hiring counsel and filing an individual claim copying our complaint because Kaiser could participate in settlement discussions through Class Counsel without having to pay for and be named in a separate lawsuit against the government.

10. In the days before Class Counsel filed the supplemental notice motion with this Court, I personally learned from various other outside counsel and potential class members that other firms were signing up individual clients to pursue this exact claim in individual actions at contingencies of 15% and more, based in part upon the supposition that Class Counsel would

seek and receive 33% of any recovery. In fact, the day before it filed the supplemental notice motion, I personally met in person with several lawyers, including Frank O'Loughlin and Cindy Oliver of Lewis Roca, who represented QHP issuers that were deciding whether to opt into the Risk Corridors class. One of those entities, Colorado Health Insurance Cooperative, Inc. ("Colorado") was considering hiring Crowell & Moring, a respected law firm that ultimately did represent many QHP issuers in individual Risk Corridors claims against the government all filed months and years after Class Counsel's complaint. Mr. O'Loughlin requested the meeting with me and my colleagues at Quinn Emanuel to assess our level of skill and to advise his clients whether to opt into the class or pursue these claims individually. Later that same day, I personally confirmed with other potential class members, including Common Ground, that contingency firms including Crowell were in fact proposing terms for individual representations far in excess of 5%. As a consequence and based upon the settlement posture of the case at that time, Class Counsel chose to supplement the notice to self-limit the attorney's fees to 5%, which was objectively below the "market" contingency rate at that time. Even after the supplemental notice, I personally learned Crowell was unwilling to reduce its contingency down to 5% to match Class Counsel.

11. Joe Holloway, Receivership Supervisor for Colorado, sent Crowell's "best and final" contingency offer to Class Counsel revealing that even after the supplemental notice, the "market" rate for Risk Corridors contingency cases was still above 5% of the recovery. As a consequence and based upon the recommendation of separate counsel, Colorado chose to opt into this class. This was not a unique or isolated circumstance.

12. For avoidance of doubt, I have no dispute and am in no way disparaging Crowell or any other law firm that represents any of the individual Risk Corridors claimants. Each and

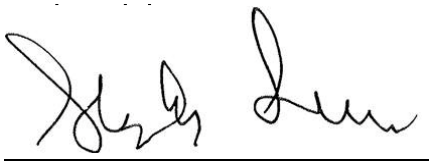
every one of the firms we have had the pleasure of working with was sophisticated, collaborative, responsive and zealously represented the interests of their clients. For example, shortly after the Moda and Land of Lincoln individual cases were filed, we regularly conducted strategy conference calls and meetings with Moda's counsel and Land of Lincoln's counsel to discuss argument and briefing tactics both at the trial and appellate level.

13. On August 14, 2020, I was contacted by Meryl Burgin, General Counsel of CareFirst BlueCross BlueShield, regarding the Fee Petition and potential objections. She informed me that she was meeting with her new CFO to decide whether to object to our fee petition and wanted to know whether we were amenable to negotiating a reduced fee for CareFirst individually. She also indicated that other entities were attempting to organize a "more formal" filing objecting to our Fee Petition. I indicated to her that objections should not be filed but are to be submitted to me as Class Counsel. She inquired whether Class Counsel would be interested in negotiating a reduced fee request to avoid objections. We considered both of these requests to negotiate a lower fee (both individually and in the aggregate) to avoid objections, then informed CareFirst in writing that "the Court must determine whether we have requested 'reasonable' fees for the class." A copy of this written communication and CareFirst's response is submitted herewith as Exhibit 5.

14. On July 30, 2020, I submitted a Declaration to this Court in support of Quinn Emanuel's Fee Petition in the above-captioned case. This Declaration serves as a supplement to that Declaration. I previously declared under penalty of perjury that Quinn Emanuel's lodestar on the *Health Republic* and *Common Ground* cases was over $10 million. Quinn Emanuel has continued to devote substantial resources responding to class member inquiries regarding case status, timing of payment, revenue recognition guidance and countless other concerns and

questions raised by class members awaiting payment. During the month of August 2020 alone, we participated in dozens of class member conference calls and responded to dozens of email inquiries. The lodestar continues to increase and will continue to increase until this case is closed and all class members have received payment. In fact, even the objectors to continue inquire to Class Counsel with concerns and individual issues. The objectors expect and continue to receive timely and informative answers from Class Counsel. Moreover, Class Counsel remains available to respond to inquiries and be available for meetings for every class member including the objectors. We take our commitment to representing every class members' interests seriously. Kaiser, for its part, emailed me yesterday for updated information on when the Judgment will be submitted to Treasury,[1] and United emailed me today with a separate inquiry on another matter. Further, Class Counsel continues to litigate on behalf of the Dispute Subclasses and are committed to pursuing claims for each individual class and subclass member until each and every entity is satisfied with the outcome or all appellate options are exhausted.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 3, 2020.



Stephen A. Swedlow

[1] Ironically, objector United delayed weeks longer than every other class member in providing its tax identification numbers to Class Counsel which in turn delayed DOJ's electronic submission of the judgment for payment to the Treasury.

Exhibit 3

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Health Republic Insurance Co, v. United States

No. 16-259C

Common Ground Healthcare Cooperative v. United States

No. 17-877C

SUPPLEMENTAL DECLARATION OF BRIAN T. FITZPATRICK

1. I submitted a declaration in support of class counsel's fee requests in these matters on July 30, 2020. I now submit this supplemental declaration to respond to the objection filed by Kaiser Foundation Health Plan et al. Nothing in the objection has caused me to change my opinion that class counsel's fee requests are reasonable.

2. The objectors asserted that courts have "rejected" my opinions as a fee expert. *See* p.3 n.6. But, as I noted in footnote 1 of my initial declaration, dozens of courts have relied on my opinions and my scholarly work to award fees in class actions. Although, of course, not every court has agreed with me every single time, the vast majority of courts have—even in the face of contrary expert opinions, *see, e.g.*, *Tennille v. W. Union Co.*, 2014 WL 5394624, at *2 (D. Colo. Oct. 15, 2014) ("I am persuaded by Mr. Fitzpatrick's concise and well reasoned analysis and expertise that Class Counsel's fee request is both reasonable and appropriate."). Furthermore, no court has ever said that I was unqualified to opine as an expert on this subject. As I noted in my initial declaration, I am the author of the most comprehensive empirical study that has ever been published of fee awards in class actions, and the topic continues to be a large focus of my academic work.

3. In a book I published last year with the University of Chicago Press, I described an unfortunate and counterproductive approach to fee awards that I see reflected in the objectors' arguments:

> Now, if you were a class member who had been swindled . . . and you had to decide how to pay the class's lawyer, how would you do it? Maybe if you were doing it at the end of the case, you would think to yourself, Well, the lawyer has already recovered all this money for me, so perhaps I should give him as little as possible so I can keep as much as possible for myself! That would be perfectly rational until you were swindled the next time and couldn't find a lawyer to represent you because the lawyer knew what you would do at the end of the case.

Brian T. Fitzpatrick, THE CONSERVATIVE CASE FOR CLASS ACTIONS 91 (2019). In particular, the objectors—who opted into the class with the understanding from the notice that class counsel intended to request a percentage of any common fund—want the court to use the lodestar method instead, but to do so after reducing class counsel's hours by 35%, after reducing class counsel's hourly rate by 35%, and then applying a multiplier of only 2.0. *See* pp.8-11, 17-22. This would end up paying class counsel a fee equal to 84.5% of their lodestar (0.65 * 0.65 * 2 = 0.845). This means that class counsel would have taken this case and worked on it *for years* with no guarantee they would get anything, win it spectacularly by *recovering 100% of damages*, only to be rewarded with a fee equal to *less* than they would have earned if they had *not* taken the case and instead simply billed their clients by the hour every month on other matters during all this time. Needless to say, no rational lawyer would have taken that deal if it had been offered to them at the outset of this case. As I note in the above quotation from my book, it is perfectly rational, if shortsighted, for the objectors to try to push that deal on class counsel now. But the great majority of courts shaping the law on class counsel fee awards over the years have made clear they should not engage in that sort of short-term, biased-by-hindsight thinking. We will not have much of a class action system if lawyers work for years at great financial risk and with no guarantee of success only to

receive less than their hourly rates at the end in the cases in which they are successful. In order to induce lawyers to take class action cases and to invest in them to the fullest, we have to think about fees ***ex ante***—i.e, what would the class and class counsel have agreed upon had they had the opportunity to bargain over fees at the outset? It is obvious that "nothing if you lose and 84.5% of the value of your time if you win" does not satisfy that test.

4. So what *would* satisfy that test? From everything I have reviewed in connection with these cases, it remains my opinion that the 5% class counsel requests is a more than reasonable estimate. As I noted in my initial declaration, sophisticated clients who hire lawyers on contingency use the percentage method and not the lodestar method. *See* ¶ 15. In this case, in fact, Health Republic and Common Ground each hired Quinn Emanuel to represent them on a straight contingency (of 25%) if the action did not proceed as a class action. Moreover, even in the biggest cases, sophisticated clients pay their lawyers much larger percentages than class counsel have requested here. *See id*. at ¶ 22. Further, what is true of sophisticated clients is true of judges. In my initial declaration, I set forth a table with every billion-dollar class action case of which I am aware. In Table 1, below, I recreate that list but expand it to include the fee method used by the court. As the Table shows, even in billion-dollar cases, judges almost never use the lodestar method; the objectors' focus on the *Volkswagen Diesel Engine* case to the contrary is an *extreme* outlier.[1] Finally, as the Table below also shows, when judges use the percentage method

[1] The objectors also ignore that this settlement on behalf of Volkswagen dealers followed a settlement earlier the same year in a virtually identical consumer case (see the second row in the Table). The consumer case used the percentage method when awarding class counsel fees, but the judge was concerned the lawyers in the follow-on dealer case would reap a windfall if he did the same for them. Needless to say, this is not follow-on litigation.

even in billion-dollar cases, the vast majority of awards are greater than the 5% requested by class counsel here.

Table 1: All federal class action settlements greater than or equal to $1 billion

Case	Settlement Amount	Fee Method	Fee Percentage
BP Gulf Oil Spill (2012)	$13 billion	Percent	4.3%
Volkswagen Diesel Engine (Consumer) (2017)	$10 billion	Percent	1.7%
Enron Securities Fraud (2008)	$7.2 billion	Percent	9.52%
Diet Drugs Products Liability (2008)	$6.4 billion	Percent	6.75%
WorldCom Securities (2005)	$6.1 billion	Percent	5.5%
Payment Card Interchange Fees Antitrust (2014)	$5.7 billion	Percent	9.56%
Visa Antitrust (2003)	$3.4 billion	Percent	6.5%
Indian Trust (2011)	$3.4 billion	Not specified	2.9%
Tyco Securities (2007)	$3.3 billion	Percent	14.5%
Cendant Securities (2003)	$3.2 billion	Percent	1.73%
Petrobras Securities (2018)	$3 billion	Lodestar	6.2%
AOL Securities (2006)	$2.65 billion	Percent	5.9%
Bank of America Securities (2013)	$2.4 billion	Not specified	6.5%
Foreign Exchange Antitrust (2018)	$2.31 billion	Percent	13%
Toshiba Diskette (2000)	$2.1 billion (total) $1 billion (cash)	Both	7.1% (total) 15% (cash)
Toyota Unintended Acceleration (2013)	$1.6 billion (est. total) $757 million (cash)	Percent	12.3% (total) 26.4% (cash)
Credit Default Swaps Antitrust (2016)	$1.87 billion	Percent	13.6%
Prudential Insurance (2000)	$1.8 billion	Percent	4.8%
Household Securities (2016)	$1.58 billion	Percent	24.7%
Syngenta Corn (2018)	$1.51 billion	Percent	33.33%
Volkswagen Diesel Engine (Dealer) (2017)	$1.2 billion	Lodestar	0.25%
Black Farmers Discrimination (2013)	$1.2 billion	Percent	7.4%
Tobacco Antitrust (2003)	$1.2 billion	Lodestar	5.9%
Chinese Drywall (2018)	$1.12 billion	Both	9.18%
TFT-LCD Antitrust (2013)	$1.1 billion	Percent	28.6%
Nortel Securities I (2006)	$1.1 billion	Percent	3%
Nortel Securities II (2006)	$1.1 billion	Percent	8%
Royal Ahold Securities (2006)	$1.1 billion	Percent	12%
Allapattah Contract (2006)	$1.1 billion	Percent	31.33%
Sulzer Hip (2003)	>$1 billion	Both	4.8%
Nasdaq Antitrust (1998)	$1 billion	Percent	14%
NFL Concussion (2018)	≈ $1 billion	Both	10.8%
N = 32			Low = 0.25% High = 33.33% Avg = 10.18% (total) 10.86% (cash)

Case	Settlement Amount	Fee Method	Fee Percentage
			Med = 7.25% (total) 7.70% (cash)

5. This brings me to the modified version of the lodestar method that some courts use: the percentage method "crosschecked" by the lodestar. As I noted in my initial declaration, clients who hire lawyers on contingency do not use a lodestar crosscheck because it would give their lawyers terrible incentives—incentives to try to drag cases out or not to care about how big the recovery gets. *See* ¶ 32. Even sophisticated clients who can monitor their lawyers do not want them working on contingency with such incentives. *See id.* Most courts, too, do not use the lodestar crosscheck—and those that do use it only as one of many factors. *See id.* at ¶ 29.

6. But even when the lodestar crosscheck is used, courts must ensure that it does not create the sort of detrimental incentives the percentage of fund method was designed to avoid in the first place. If the lodestar crosscheck is to be done here, does it make class counsel's 5% fee request unreasonable? In my opinion, it does not. As I said in my initial declaration, there is no doubt the multiplier here would be very high. But it would not be unprecedented—and that is true even though the observable data on lodestar multipliers probably skews lower than reality due to what we call "selection effects." More specifically, when lodestar multipliers are low, class action lawyers are happy to volunteer them to the court because it creates the impression that their fee requests are more reasonable. However, when multipliers are high, whether due to class counsel's efficiency or due to them obtaining an extraordinary result for the class, class action lawyers are much less willing to volunteer the data needed to make that determination with the court. Thus, in the observable data, we end up seeing all the low multipliers but not all the high multipliers. *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards*, 7

J. Empirical J. Stud. 811, 834 n.80 (2010) ("It should be emphasized . . . that [the settlements where courts used the lodestar cross check] may not be representative of the settlements where the percentage-of-the-settlement method was used without the lodestar cross-check."). For this reason, it is my opinion that class counsel's multiplier here is probably even more common than the data suggests.

7. But if a high multiplier still leads the court to believe that class counsel's fee request needs further justification, in my opinion, the court does not have to look far to find it: the class has recovered 100% of its damages. As I noted in my initial declaration, this is particularly unusual in the class action context; almost no class actions settle or resolve at such a high amount. *See* ¶ 27. Unusually good results are ample justification for unusually high lodestar multipliers, not the least of which because they align incentives in both this case and in future cases. That is, the reason class counsel's multiplier is high is because they recovered so much for the class. If fee awards are cut for that reason, then why would class counsel try hard to recover so much in future cases?

8. The objectors' arguments otherwise confuse statutory fee shifting cases with the common fund fee award at issue here—which is governed not by statute but by the common law of unjust enrichment. For example, the objectors suggest there is a strong presumption that multipliers should not exceed 1.0 when courts use the lodestar method. *See* p. 7 (quoting *Perdue v. Kenny A.,* 559 U.S. 542 (2010)). But *Kenny A*. was a statutory fee-shifting award, not a common fund fee award. *See, e.g., Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007) ("[T]he district court misapplied the principles that govern fee shifting cases to the common fund case before it.").

9. Likewise, the objectors urge the Court to reject class counsel's hourly rates—which are the real hourly rates class counsel charges their corporate clients for non-contingent work—in

favor of the rates called for by the Laffey Matrix. *See* pp. 11-12. But, again, the Laffey Matrix was created for a federal fee-shifting statute; it was neither designed for nor is required in common fund class actions like this one. Moreover, it is well-known that the data in the Laffey Matrix—gathered as it was decades ago—is extremely out of date. Although the Matrix has been revised over the years with inflation adjustments, it is not known how accurately these adjustments reflect the rates actually charged by firms practicing complex litigation in Washington DC. For this reason, the Department of Justice hired me to gather current data in order to create a new matrix. *See* Contract No. 15JA1620P00000231. The method I am using includes looking through court dockets to find cases where lawyers have revealed the hourly rates that real clients actually pay. In other words, the new matrix will be based on precisely the kind of rates that class counsel used in calculating their lodestar in this very case.

10. I have been compensated for this declaration at a rate of $950 per hour.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 3, 2020.

Brian T. Fitzpatrick

Nashville, TN

Exhibit 4

From: Stephen Swedlow
Sent: Saturday, August 1, 2020 4:05 PM
To: Stephen Swedlow; Benjamin Berkman
Subject: RE: Risk Corridors Update

We heard from DOJ yesterday and the government indicated they need either an Employer Identification Number if there is one or any other Taxpayer Identification Number for each entity that will receive payment from the Health Republic and Common Ground judgments. While we have several arguments as to why this should be unnecessary, we believe litigating this with the government will cause unnecessary delay for payment. As a consequence, PLEASE EMAIL BENJAMIN BERKMAN (cc'ed on this email) the entity name, HIOS ID, and EIN or TIN as soon as practicable. If you have any questions please feel free to email me or call me on my cell any time (773) 610-2512.

Below is a link where you can download the orders and fee petition documents I sent Thursday night, in case you had any difficulties opening my email. If you have a response or objection to the fee petition, please email it to me at stephenswedlow@quinnemanuel.com and Benjamin Berkman at benjaminberkman@quinnemanuel.com, in a PDF or Word document. Per the Court's orders, the deadline to submit a response to us is Thursday, August 20, 2020. Let us know if you have any questions.

Secure Delivery

To download, please click on the following link.

Click here to download the file(s) listed below

2020.7.23 Common Ground Judgment Order.pdf	73.86 KB
2020.7.23 HRIC Judgment Order.pdf	228.34 KB
Common Ground Fee Petition.zip	3.10 MB
HRIC Fee Petition.zip	3.10 MB

If the link above does not open, please copy and paste the following URL into your browser:
https://sendfile.quinnemanuel.com/pkg?token=2832dbcd-daad-4ab3-8146-83b68a20e885

Stephen Swedlow
Managing Partner – Chicago
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191 North Wacker Drive, Suite 2700
Chicago, IL 60606
312-705-7488 Direct
stephenswedlow@quinnemanuel.com

From: Stephen Swedlow
Sent: Thursday, July 30, 2020 9:16 PM
To: Stephen Swedlow <stephenswedlow@quinnemanuel.com>
Subject: FW: Risk Corridors Update

Attached please find the previously circulated Orders and two zip files containing the attorneys' fees motions filed pursuant to those Orders. We will be communicating with DOJ tomorrow regarding the timing of the Treasury payment and I will update this group again as soon as I have more certainty on the timing of payment from Treasury. Thanks

again to all of you for your patience, trust and support. We are very close to the finish for all of those in the non-dispute subclass and for those in the dispute subclasses we will be in touch within the next couple days to discuss next steps.

Stephen Swedlow
Managing Partner – Chicago
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stephenswedlow@quinnemanuel.com

From: Stephen Swedlow
Sent: Thursday, July 23, 2020 4:59 PM
To: Stephen Swedlow <stephenswedlow@quinnemanuel.com>
Subject: RE: Risk Corridors Update

I write to provide what I hope is a very good update on the risk corridors litigation. The Court today entered judgment in favor of the "non-dispute" subclasses in both the Health Republic and Common Ground lawsuits. Both Orders are attached to this email. For those of you with an ongoing dispute, we have been in constant contact and I will reach out to each of you individually regarding next steps. I will also email the larger group again next week with another update regarding timing of payment but at this point there should not be any impediment to payment this calendar year. Thanks from the bottom of my heart to each and every one of you for support, guidance, understanding, confidence and loyalty over the past many years. I am both happy to have brought all of these claims to resolution and some part of me will miss this fight. Luckily I still have the offset component to continue the fight. Congratulations to all of you and feel free to email or call with any questions. As I indicated, I should have more information on the timing of the treasury payment next week after the clerk provides the instructions for submission to the Department of Treasury, contact with Treasury itsef, and coordination with DOJ. There will also be submissions on "attorney's fees and nontaxable costs payable from the Non-Dispute Subclass's net judgment proceeds pursuant to RCFC 23(h)" that I will distribute to this group on the schedule enumerated in the attached Orders.

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From: Stephen Swedlow
Sent: Wednesday, June 24, 2020 2:08 PM
To: Stephen Swedlow <stephenswedlow@quinnemanuel.com>
Subject: Risk Corridors Update

I write to provide an update regarding the Risk Corridors cases. We had a lengthy meeting with the government yesterday that was productive. The government is prepared to stipulate to judgment for almost all of the amounts previously identified for class members by July 10 and once the Court enters that judgment, the judgment will be to Treasury for payment. Treasury usually pays judgments within 30-60 days. While the DOJ attorneys cannot and will not guarantee Treasury will pay within that time period, I am more optimistic now that you will receive money from this judgement this year. There are still some open issues we hope to have clarity on by the end of this week or first thing next week.

First and foremost, on the issue of offsets that the government raised in its most recent court filing – the government indicated it would only be pursuing offsets against entities in liquidation and only for ACA-related defaulted debts. The DOJ attorney indicated that he believed solvency loans were not subject to offset but would confirm that in his communication at the end of the week. We are supposed to receive a list of entities and the amounts of asserted offsets by the end of the week. We are not requiring or even suggesting parties accept this offset or the amount, but for purposes of defining who may be subject to the offset, the government has provided some clarity.

Second, government indicated that there is no desire on their part to delay payment to any class member and they anticipate class members to get paid expeditiously.

Third, the government indicated for non-liquidation entities, they will be prepared to stipulate to the previously identified amount for judgment. I pressed the government on whether and to what extent in this context HHS would consider revisions. The DOJ attorney in charge indicated that to the extent a party wants to stipulate to a lower number, he believes HHS would be amenable without delay. To the extent a claimant has a basis to seek a higher stipulated judgment, he would communicate that information to HHS but he speculated that it may delay the time for that entity to get a stipulated judgment. However, he did not know that conclusively. ***If you have previously indicated a discrepancy in the amount identified by the government, I will contact you separately to coordinate whether you are interested in contesting the amount at this time. If you agreed to the amount previously identified, you do not need to do anything or re-confirm. We have all the information previously sent to us and appreciate all of the timely efforts each of you made to give us a response before the government slowed the whole process down. Thanks again for your patience in that regard.

Finally, I want to express once again our gratitude and sincere appreciation for the confidence each of you have shown in me and our firm over the years. This is an enormous accomplishment by everyone one who assisted and most importantly by all of you for having the fortitude to pursue a claim against the government. We recognize that these decisions to opt into a case against the government were not taken lightly and I will forever feel honored to represent you in these matters. As always, feel free to email or call me. My cell is 773-610-2512.

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Stephen Swedlow
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Exhibit 5

From: Burgin, Meryl <Meryl.Burgin@carefirst.com>
Sent: Thursday, August 20, 2020 7:09 PM
To: Stephen Swedlow; Benjamin Berkman; De Gravelles, Patrick
Subject: RE: Risk Corridors Fee Petition

[EXTERNAL EMAIL]

Stephen – once again thank you for your response to our discussion last week. You have probably already seen the email from Patrick on my team, but I did want to follow up personally to let you know that for the reasons we discussed, we are joining the Opposition to the Fee Petition on behalf of our CareFirst companies.
Regards,
Meryl
Meryl D. Burgin
CareFirst BlueCross BlueShield
Executive Vice President, General Counsel & Corporate Secretary
Suite 700, CT10-06
1501 S. Clinton Street
Baltimore, Maryland 21224
(410) 528-7906
Meryl.Burgin@CareFirst.com
www.carefirst.com

From: Burgin, Meryl
Sent: Monday, August 17, 2020 6:18 PM
To: Stephen Swedlow ; Benjamin Berkman
Subject: RE: Risk Corridors Fee Petition
Stephen – thank you for your timely response to my inquiries. I am discussing with my client and will let you know the final decision.
Thanks again – Meryl
Meryl D. Burgin
CareFirst BlueCross BlueShield
Executive Vice President, General Counsel & Corporate Secretary
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Baltimore, Maryland 21224
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From: Stephen Swedlow <stephenswedlow@quinnemanuel.com>
Sent: Monday, August 17, 2020 1:29 PM
To: Burgin, Meryl <Meryl.Burgin@carefirst.com>; Benjamin Berkman <benjaminberkman@quinnemanuel.com>
Subject: Risk Corridors Fee Petition

Meryl:

Thanks for giving us the heads up on Friday afternoon you may object to the fee petition. I understand you are meeting with your new CFO/Client today or early this week. The deadline to get your objection to me is Thursday as you know. You asked us to consider whether we would negotiate a lower fee percentage for your client. You also asked us to consider withdrawing our current fee petition and proposing or negotiating a reduced percentage for the class. As for the first request, we believe that is not consistent with our obligations as class counsel nor with what the Court must determine when deciding whether we have requested "reasonable" fees for the class. Fees are determined on a classwide, not individual, basis, even though this is an opt in class action. As for the second request, we continue to believe our original request for 5% in fees is reasonable and warranted under the law for all the reasons outline in our petition and supporting documents.

I recognize this is a business decision for your client and respect your decision either way. I want to clarify the way in which fees will be paid in this case so there is no misunderstanding. Each class member does not receive individual payment from Treasury only to then pay money to class counsel and the claims administrator for fees and costs. As outlined in the Notice and the Court's Order, the Treasury will pay the amount of judgment to the claims administrator then the claims administrator will pay the appropriate amount (as determined by the Court taking into account fees and costs) to each class member pursuant to the payment instructions provided by each class member to the claims administrator. If you have any further questions, as always feel free to email or call me. My cell is 773-610-2512.

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