Nos. 2022-1018, 2022-1019

United States Court of Appeals for the Federal Circuit

HEALTH REPUBLIC INSURANCE COMPANY,
Plaintiff-Appellee

KAISER FOUNDATION HEALTH PLAN INC.,
and additional parties stated on continuation page,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

Appeal from the United States Court of Federal Claims, No. 1:16-cv-00259-KCD
Judge Kathryn C. Davis

COMMON GROUND HEALTHCARE COOPERATIVE,
on behalf of itself and all others similarly situated,
Plaintiff-Appellee

KAISER FOUNDATION HEALTH PLAN INC.,
and additional parties stated on continuation page,
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant-Appellee

Appeal from the United States Court of Federal Claims, No. 1:17-cv-00877-KCD
Judge Kathryn C. Davis

APPELLANTS' OPENING BRIEF (CORRECTED)

SHEPPARD MULLIN RICHTER & HAMPTON LLP

Moe Keshavarzi
mkeshavarzi@sheppardmullin.com
333 South Hope Street
43rd Floor
Los Angeles, CA 90071-1422
Telephone: (213) 620-1780

John Burns
jburns@sheppardmullin.com
Matthew G. Halgren
mhalgren@sheppardmullin.com
501 West Broadway
19th Floor
San Diego, CA 92101-3598
Telephone: (619) 338-6500

Counsel for Appellants

COVER SHEET CONTINUATION PAGES

Because it is impossible to list all Appellants on the cover sheet, Appellants provide these continuation pages. The full list of Appellants in Case No. 2022-1018 is as follows:

KAISER FOUNDATION HEALTH PLAN INC., KAISER FOUNDATION HEALTH PLAN OF GEORGIA, KAISER FOUNDATION HEALTH PLAN OF THE MID-ATLANTIC STATES, INC., KAISER FOUNDATION HEALTH PLAN INC. OF COLO., KAISER FOUNDATION HEALTHPLAN OF THE NW, GROUP HEALTH COOPERATIVE, HARKEN HEALTH INSURANCE COMPANY, HEALTH PLAN OF NEVADA, INC., OXFORD HEALTH PLANS (NJ), INC., ROCKY MOUNTAIN HEALTH MAINTENANCE ORGANIZATION, INCORPORATED, UNITEDHEALTHCARE BENEFITS PLAN OF CALIFORNIA, UNITEDHEALTHCARE COMMUNITY PLAN, INC., UNITEDHEALTHCARE INSURANCE COMPANY, UNITEDHEALTHCARE LIFE INSURANCE COMPANY, UNITEDHEALTHCARE OF ALABAMA, INC., UNITEDHEALTHCARE OF COLORADO, INC., UNITEDHEALTHCARE OF FLORIDA, INC., UNITEDHEALTHCARE OF GEORGIA, INC., UNITEDHEALTHCARE OF KENTUCKY, LTD., UNITEDHEALTHCARE OF LOUISIANA, INC., UNITEDHEALTHCARE OF MISSISSIPPI, INC., UNITEDHEALTHCARE OF NEW ENGLAND, INC., UNITEDHEALTHCARE OF NEW YORK, INC., UNITEDHEALTHCARE OF NORTH CAROLINA, INC., UNITEDHEALTHCARE OF OKLAHOMA, INC., UNITEDHEALTHCARE OF PENNSYLVANIA, INC., UNITEDHEALTHCARE OF THE MID-ATLANTIC, INC., UNITEDHEALTHCARE OF THE MIDLANDS, INC., UNITEDHEALTHCARE OF THE MIDWEST, INC., UNITEDHEALTHCARE OF UTAH, INC., UNITEDHEALTHCARE OF WASHINGTON, INC., UNITEDHEALTHCARE OF OHIO, INC., ROCKY MOUNTAIN HEALTHCARE OPTIONS, INC., ALL SAVERS INSURANCE COMPANY, UNITEDHEALTHCARE INSURANCE COMPANY INC.

The full list of Appellants in Case No. 2022-1019 is as follows:

KAISER FOUNDATION HEALTH PLAN INC., KAISER FOUNDATION HEALTH PLAN OF GEORGIA, KAISER FOUNDATION HEALTH PLAN OF THE MID-ATLANTIC STATES, INC., KAISER FOUNDATION HEALTH

PLAN INC. OF COLO., KAISER FOUNDATION HEALTHPLAN OF THE NW, GROUP HEALTH COOPERATIVE, HARKEN HEALTH INSURANCE COMPANY, HEALTH PLAN OF NEVADA, INC., OXFORD HEALTH PLANS (NJ), INC., ROCKY MOUNTAIN HEALTH MAINTENANCE ORGANIZATION, INCORPORATED, UNITEDHEALTHCARE BENEFITS PLAN OF CALIFORNIA, UNITEDHEALTHCARE COMMUNITY PLAN, INC., UNITEDHEALTHCARE INSURANCE COMPANY, UNITEDHEALTHCARE LIFE INSURANCE COMPANY, UNITEDHEALTHCARE OF ALABAMA, INC., UNITEDHEALTHCARE OF COLORADO, INC., UNITEDHEALTHCARE OF FLORIDA, INC., UNITEDHEALTHCARE OF GEORGIA, INC., UNITEDHEALTHCARE OF KENTUCKY, LTD., UNITEDHEALTHCARE OF LOUISIANA, INC., UNITEDHEALTHCARE OF MISSISSIPPI, INC., UNITEDHEALTHCARE OF NEW ENGLAND, INC., UNITEDHEALTHCARE OF NEW YORK, INC., UNITEDHEALTHCARE OF NORTH CAROLINA, INC., UNITEDHEALTHCARE OF OKLAHOMA, INC., UNITEDHEALTHCARE OF PENNSYLVANIA, INC., UNITEDHEALTHCARE OF THE MID-ATLANTIC, INC., UNITEDHEALTHCARE OF THE MIDLANDS, INC., UNITEDHEALTHCARE OF THE MIDWEST, INC., UNITEDHEALTHCARE OF UTAH, INC., UNITEDHEALTHCARE OF WASHINGTON, INC., UNITEDHEALTHCARE OF OHIO, INC., ROCKY MOUNTAIN HEALTHCARE OPTIONS, INC., ALL SAVERS INSURANCE COMPANY, UNITEDHEALTHCARE INSURANCE COMPANY INC.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 22-1018; 22-1019

Short Case Caption Health Republic Insurance Company v. US

Filing Party/Entity Appellants Kaiser Foundation Health Plan, Inc., et al.

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: January 28, 2022

Signature: /s/Moe Keshavarzi

Name: Moe Keshavarzi

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☐ None/Not Applicable
See additional pages		

☑ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☑ None/Not Applicable ☐ Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable ☑ Additional pages attached

See additional pages		

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

FORM 9. Certificate of Interest – Additional Pages

The chart below contains the information requested by questions 1 and 3 of Federal Circuit Form 9. The parent corporations for each represented entity are listed to the right of each entity. In response to question 2, there are no real parties in interest other than the represented entities themselves.

1. Represented Entities	**3. Parent Corporations and Stockholders**
Kaiser Foundation Health Plan, Inc.	None
Kaiser Foundation Health Plan of Georgia	Kaiser Foundation Health Plan, Inc.
Kaiser Foundation Health Plan of the Mid-Atlantic States, Inc.	Kaiser Foundation Health Plan, Inc.
Kaiser Foundation Health Plan Inc. of Colo.	Kaiser Foundation Health Plan, Inc.
Kaiser Foundation Healthplan of the NW	Kaiser Foundation Health Plan, Inc.
Group Health Cooperative	Kaiser Foundation Health Plan, Inc.
Harken Health Insurance Company	UnitedHealthcare, Inc.
	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
Health Plan of Nevada, Inc.	Sierra Health Services, Inc.
	UnitedHealthcare, Inc.
	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
Oxford Health Plans (NJ), Inc.	Oxford Health Plans LLC
	UnitedHealth Group Incorporated

1. Represented Entities	**3. Parent Corporations and Stockholders**
Rocky Mountain Health Maintenance Organization, Incorporated	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
UnitedHealthcare Benefits Plan of California	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
UnitedHealthcare Community Plan, Inc.	AmeriChoice Corporation
	UnitedHealth Group Incorporated
UnitedHealthcare Insurance Company	UHIC Holdings, Inc.
	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
UnitedHealthcare Life Insurance Company	Golden Rule Financial Corporation
	UnitedHealth Group Incorporated
UnitedHealthcare of Alabama, Inc.	UnitedHealthcare, Inc.
	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
UnitedHealthcare of Colorado, Inc.	UnitedHealthcare, Inc.
	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
UnitedHealthcare of Florida, Inc.	UnitedHealthcare, Inc.
	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
UnitedHealthcare of Georgia, Inc.	UnitedHealthcare, Inc.
	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated

1. Represented Entities	**3. Parent Corporations and Stockholders**
UnitedHealthcare of Kentucky, Ltd.	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
UnitedHealthcare of Louisiana, Inc.	UnitedHealthcare, Inc.
	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
UnitedHealthcare of Mississippi, Inc.	UnitedHealthcare, Inc.
	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
UnitedHealthcare of New England, Inc.	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
UnitedHealthcare of New York, Inc.	AmeriChoice Corporation
	UnitedHealth Group Incorporated
UnitedHealthcare of North Carolina, Inc.	UnitedHealthcare, Inc.
	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
UnitedHealthcare of Oklahoma, Inc.	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
UnitedHealthcare of Pennsylvania, Inc.	Three Rivers Holdings, Inc.
	AmeriChoice Corporation
	UnitedHealth Group Incorporated
UnitedHealthcare of the Mid-Atlantic, Inc.	UnitedHealthcare, Inc.
	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated

1. Represented Entities	**3. Parent Corporations and Stockholders**
UnitedHealthcare of the Midlands, Inc.	UnitedHealthcare, Inc.
	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
UnitedHealthcare of the Midwest, Inc.	UnitedHealthcare, Inc.
	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
UnitedHealthcare of Utah, Inc.	UnitedHealthcare, Inc.
	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
UnitedHealthcare of Washington, Inc.	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
UnitedHealthcare of Ohio, Inc.	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
Rocky Mountain HealthCare Options, Inc.	Rocky Mountain Health Maintenance Organization, Incorporated
	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated
All Savers Insurance Company	Golden Rule Financial Corporation
	UnitedHealth Group Incorporated
UnitedHealthcare Insurance Company Inc.	UHIC Holdings, Inc.
	United HealthCare Services, Inc.
	UnitedHealth Group Incorporated

In response to question 5 of Federal Circuit Form 9, there are no related cases that must be identified pursuant to Federal Circuit Rule 47.5(b). The following appeal is identified pursuant to Federal Circuit Rule 47.5(a):

(1) The title and number of the earlier appeal:
Common Ground Healthcare Cooperative v. United States, No. 20-1286

(2) The date of decision:
September 30, 2020

(3) The composition of the panel:
Judges Reyna, Wallach, and Chen

(4) The citation of the opinion in the Federal Reporter:
The order disposing of the appeal was not published in the Federal Reporter.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Agency Materials and Secondary Sources

STATEMENT OF RELATED CASES

There are no related cases that must be identified pursuant to Federal Circuit Rule 47.5(b). The following appeal is identified pursuant to Federal Circuit Rule 47.5(a):

1. The title and number of the earlier appeal: *Common Ground Healthcare Cooperative v. United States*, No. 20-1286.

2. The date of decision: September 30, 2020.

3. The composition of the panel: Judges Reyna, Wallach, and Chen.

4. The citation of the opinion in the Federal Reporter: The order disposing of the appeal was not published in the Federal Reporter.

I. INTRODUCTION

Class Counsel Quinn Emanuel Urquhart & Sullivan LLP represented a class of health plans in challenging the federal government's failure to make required "risk corridor" payments under the Affordable Care Act. The merits of the case were ultimately decided by the Supreme Court's resolution of a single legal question in a different case brought by a different law firm. Due to that decision, the class in this case was awarded $3.7 billion.

Under the equitable common fund doctrine, Class Counsel deserves to be paid fairly for its work. What Class Counsel does not deserve, however, is the astronomical award the Claims Court granted it: a full 5% of the class fund, which totals more than $184 million and works out to an hourly fee of more than $18,000.

The Claims Court erred most significantly by failing to conduct a lodestar cross-check, which Class Counsel had promised in the class notice. Such cross-checks are critical to ensure fairness, especially in megafund cases like this. Giving Class Counsel the benefit of every doubt (notwithstanding its failure to submit any billing records), a cross-check reveals that the award amounts to a multiplier of more than 18. This significantly exceeds the low single digit multipliers that courts have repeatedly held constitute the acceptable range.

Class Counsel's attorney fee award is untenable. This Court should vacate the award and remand for entry of an award in a fair and reasonable amount.

II. STATEMENT OF JURISDICTION

The Claims Court had jurisdiction over these cases against the United States pursuant to 28 U.S.C. § 1491(a)(1). This court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) over these consolidated appeals from the Claims Court's Rule 54(b) judgments, which were entered on September 17, 2021. Appx29-30. The notices of appeal were timely filed on October 1, 2021. Appx2257, Appx3808; R. Ct. Fed. Cl. 58.1(a); Fed. R. App. P. 4(a)(1)(B)(i).

III. STATEMENT OF THE ISSUES

1. Did the Claims Court abuse its discretion in failing to conduct a proper lodestar cross-check on the attorney fee award?

2. Did the Claims Court abuse its discretion in evaluating the reasonableness of the award?

IV. STATEMENT OF THE CASE

A. Factual Background

To encourage health plans to participate in "Health Benefit Exchanges" meant to make health coverage more broadly available, the Affordable Care Act established the risk corridors program, which provided for reimbursements to health plans that suffered losses in the exchanges. 77 Fed. Reg. 17,220, 17,220 (2012); 42 U.S.C. § 18062(b). After the program began, however, Congress adopted an appropriations rider forbidding the Department of Health and Human

Services (HHS) from adequately funding the program. *See* Pub. L. No. 113-235, § 227, 128 Stat. 2130, 2491 (2014). HHS repeatedly acknowledged its statutory obligation to make full risk corridors payments, even if it caused a program deficit. *See, e.g.*, 78 Fed. Reg. 15,410, 15,473 (2013); 79 Fed. Reg. 30,240, 30,260 (2014). However, HHS never followed through on its obligation to make these payments.

B. Procedural History

In February 2016, Class Counsel filed the complaint in *Health Republic Insurance Company v. United States*, CFC Case No. 1:16-cv-259, challenging the government's failure to make risk corridors payments. Appx62. Other prominent law firms and health plans were also involved with the issue during the same period, and these firms brought several other separate lawsuits in early to mid-2016 challenging the government's nonpayment. *See, e.g.*, *First Priority Life Ins. Co. v. United States*, CFC Case No. 1:16-cv-587; *Moda Health Plan, Inc. v. United States*, CFC Case No. 1:16-cv-649; *Blue Cross & Blue Shield of N.C. v. United States*, CFC Case No. 1:16-cv-651; *Land of Lincoln Mut. Health Ins. Co. v. United States*, CFC Case No. 1:16-cv-744; *Me. Cmty. Health Options v. United States*, CFC Case No. 16-cv-967. The lawsuits were brought under the Tucker Act, the statute that waives sovereign immunity for claims against the United States based on a federal statute, like the Affordable Care Act provisions here. 28 U.S.C. § 1491(a)(1).

After the Claims Court denied the government's motion to dismiss, it appointed Quinn Emanuel as class counsel, appointed Health Republic as class representative, and certified the class as an opt-in class. Appx604-606. Class Counsel then sent a supplemental notice to prospective class members. In the notice, to induce health plans to join the class, Class Counsel made several important affirmative representations. First, it represented that 5% of the ultimate class recovery was the highest amount of attorney fees it would ever seek. Appx1389. Second, it represented that "[t]he fee may be substantially less than 5% depending upon the level of class participation represented by the final membership of the [class]." Appx1389.

Third, the notice reassured prospective class members that the fees "will be determined by the Court subject to . . . what is called a 'lodestar cross-check' (i.e., a limitation on class counsel fees based on the number of hours actually worked on the case)." Appx1389. The notice then cited two Court of Federal Claims cases that had considered the lodestar and had applied multipliers of 5.39 and 0.25 respectively. Appx1389 (citing *Geneva Rock Prod., Inc. v. United States*, 119 Fed. Cl. 581, 595 (2015) ("[A]n award 5.39 times the lodestar is reasonable under RCFC 23(h), given the complexity of the litigation, the diligent and skillful work by class counsel, and the pendency of the case for over six years."); *Loving v.*

Sec'y of Health & Hum. Servs., 2016 WL 4098722, at *6 (Fed. Cl. July 7, 2016) (awarding 25% of the lodestar amount)).

In June 2017, Class Counsel filed a parallel complaint in *Common Ground Healthcare Coop. v. United States*, CFC Case No. 1:17-cv-877, to challenge the nonpayment for the 2016 benefit year. Appx2260, Appx2279. The class notice in *Common Ground* also contained the assurances about the 5% maximum attorney fee recovery, the impact of class member participation on the fee, and lodestar cross-check. Appx2680. Ultimately 153 health plans opted into the *Health Republic* class and 130 opted into the *Common Ground* class. Appx1804.

Shortly thereafter, the nature of Class Counsel's role completely transformed because both cases were stayed pending the outcome of other cases, which other, unaffiliated counsel pursued separately. Appx1699-1700, Appx2285. Appeals by Moda, Blue Cross & Blue Shield of North Carolina, Land of Lincoln, and Maine Community Health Options ultimately made their way to the Supreme Court in the case *Maine Community Health Options v. United States*, 140 S. Ct. 1308 (2020).

During the stay, activity in *Health Republic* and *Common Ground* came to a halt. At the Federal Circuit and Supreme Court, the petitioners in *Maine Community Health Options* were represented by the law firms Kirkland & Ellis, Brown & Peisch, Barnes & Thornburg, Massey & Gail, Reed Smith, Covington & Burling, and Crowell & Moring. *See Moda Health Plan, Inc. v. United States*, 908

F.3d 738 (Fed. Cir. 2018); *Moda Health Plan, Inc. v. United States*, Pet'r's Br., 2019 WL 4235524 (Aug. 30, 2019). Multiple firms submitted amicus briefs, including Husch Blackwell, Akin Gump Strauss Hauer & Feld, Deutsch Hunt, Kiernan PLLC, Faegre Baker Daniels, Pepper Hamilton, McKenna Long & Aldridge, and McDermott Will & Emery. Appx2086, Appx2107; *Moda Health Plan*, 908 F.3d 738; *Land of Lincoln Mut. Health Ins. Co. v. United States*, 892 F.3d 1184 (Fed. Cir. 2018). Twenty-four states and the District of Columbia, the National Association of Insurance Commissioners, Wisconsin Physicians Service Insurance Corporation, and WPS Health Plan filed other amicus briefs. *See* Supreme Court Docket, Case No. 18-1023, *available at* https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-1023.html. During the stay, Class Counsel also authored amicus briefs in support of the petitioners in *Maine Community Health Options* at both the Federal Circuit and the Supreme Court. Appx2137, Appx2158.

Ultimately, the Supreme Court ruled in favor of the health plans, requiring that the government make the risk corridors payments. *Maine Cmty. Health Options*, 140 S. Ct. at 1331. Following the Supreme Court's decision, the two classes in the instant cases became entitled to the full amounts owed to them under the risk corridors program, which amounted to megafund recoveries of $1.9 billion in *Health Republic* and $1.8 billion in *Common Ground*. Appx1749, Appx3481.

Because the cases turned on a question of law, Class Counsel never had to take a single deposition or otherwise engage in significant development of the factual record.

The merits of the cases resolved, Class Counsel moved for attorney fees. However, notwithstanding the assurances made in the class notice, Class Counsel did not calibrate its request based on the high number of participants in the classes and the amount of work it expended on the cases (which Class Counsel claimed totaled approximately $10 million in attorney time, billed at a blended hourly rate of $1,033). Appx1763, Appx1792. Instead, Class Counsel requested the maximum amount it had set in the class notice, which was a full 5% of the class fund, i.e., $184 million. Appx1795. Concerned by this large request, 34 class members objected. Appx1966, Appx1988. After briefing on the attorney fee request was complete, the cases were transferred to a different judge. Appx2251, Appx3775.

The Claims Court granted Class Counsel the 5% award it requested. Appx1, Appx27-28. The Claims Court based this decision on the consideration of seven factors that the Court of Federal Claims often uses when calculating fees based on a percentage-of-the-fund. Appx9. Despite the clear provision in the class notice unequivocally stating that there would be a lodestar cross-check, the court determined as a general matter that it was not advisable to conduct a lodestar cross-

check on a fee award taken from a common fund, and so it did not conduct a cross-check. Appx10-11, Appx20-21. The court also did not take account of the fact that the classes had high participation. Appx20. The court then entered Rule 54(b) judgments, and a subset of the Objecting Class Members—consisting of health plans in the Kaiser and United Healthcare families—appealed. Appx29-30, Appx2257, Appx3808.

V. SUMMARY OF ARGUMENT

The common fund doctrine—which allows a court to use its equity powers to award attorney fees from a class fund—is meant to correct an unjust enrichment, not to give a windfall to lawyers. However, the Claims Court's award to Class Counsel of $184 million, amounting to an hourly rate of $18,000, is the epitome of a windfall (particularly given the comparatively limited scope of work Class Counsel ultimately undertook). Courts and scholars who have considered the issue have therefore persuasively argued that when, as here, a court makes an award from a common fund based on a percentage of that fund, the court should perform a lodestar cross-check to ensure that class counsel is not being paid too much or too little in light of the time and effort devoted to the case. The broad consensus is that a multiplier in the low single digits can be reasonable. There is no basis to conclude that the multiplier in excess of 18 effectively awarded in this case could

ever be reasonable, much less in the circumstances of this case, which, while presenting a novel legal issue, was not extraordinary.

This Court has not provided guidance on the use of the lodestar cross-check, and so judges in the Court of Federal Claims apply it or not based on their general beliefs on whether such cross-checks are useful. This results in a situation where the size of an attorney fee award can change by tens of millions of dollars based on the judge to which a case was randomly assigned. Such randomness in results should not be tolerated, and this Court should take this opportunity to provide instructions supporting use of the lodestar cross-check. It should then vacate the fee award and remand so that the Claims Court can apply the cross-check to this case. It is only by taking account of Class Counsel's investment of time in this case (as demonstrated by sufficient evidence) that an equitable result may be achieved.

Although the most significant problem with the Claims Court's fee award was its failure to use a lodestar cross-check, it also abused its discretion in a number of other ways. These included abdicating its responsibility to choose the most reasonable award and instead treating Class Counsel's requested fee as a default. The court also incorrectly concluded that the class members had agreed to a 5% fee award when in fact they had been told that such an award would only be

sought in certain circumstances that did not obtain here. These abuses of discretion also require vacating the award.

VI. ARGUMENT

A. Standard of Review

This Court reviews "the determination of reasonable attorney fees for abuse of discretion." *Haggart v. Woodley*, 809 F.3d 1336, 1354 (Fed. Cir. 2016). "However, errors of law in the award of attorney fees are corrected without deference." *Id.*

B. The Claims Court Abused Its Discretion by Failing to Apply a Reasonable Multiplier under a Lodestar Cross-Check

Objecting Class Members requested that the Claims Court subject any percentage-of-the-fund award to a lodestar cross-check as promised by the class notice. Appx1972. The Claims Court did not conduct a cross-check; it instead concluded that choosing a multiplier for a cross-check would be "a relatively arbitrary exercise." Appx24. It went on to state that "even if the Court applied the lodestar cross-check, a multiplier of 18–19 would, at least, not be outside the realm of reasonableness." Appx25. This constituted an abuse of discretion for a variety of reasons.

1. A Lodestar Cross-Check Is an Important Component of a Fee Award, Especially in Megafund Cases

At least in the context of a megafund case where a class member has identified a concern with the lodestar multiplier, a rough lodestar cross-check is an important tool for ensuring uniformity and fairness. Courts across the country have recognized the utility of this process, and the Claims Court abused its discretion by not employing it here.

(a) This Court Should Bring Uniformity to the Courts Over Which It Has Jurisdiction With Respect to Lodestar Cross-Checks

In explaining its decision not to consider the lodestar, the Claims Court stated that "[t]he Federal Circuit has not mandated the use of one approach over the other. Rather, binding precedent holds that this Court has discretion to choose between the percentage-of-the-fund or lodestar methods in a common fund case." Appx10. Indeed, this Court has explained that "[i]n common fund cases, district courts have applied the lodestar method to determine the amount of attorney fees. . . . Alternatively, as in this case, courts may determine the amount of attorney fees to be awarded from the fund by employing a percentage method." *Haggart*, 809 F.3d at 1355. This Court has not, however, addressed whether a lodestar cross-check should or must be used when using the percentage-of-the-fund method. In the absence of such guidance, the Claims Court held that, in common

fund cases, the percentage-of-the-fund method is inherently superior to the lodestar method, and lodestar cross-checks are not warranted. Appx10-12.

The Claims Court noted that other judges on the Court of Federal Claims have applied a lodestar cross-check to percentage-of-the-fund awards, though it made no effort to distinguish those cases. Appx10 n.3 (citing *Kane Cty., Utah v. United States*, 145 Fed. Cl. 15, 19 (2019) ("Finally, the Court has subjected Plaintiffs' fee request to a 'lodestar cross-check,' which compares the percentage fee 'against the fee that lead counsel would have been awarded on a lodestar basis' to ensure that the award is neither too low, nor too high."); *Geneva Rock Prod.*, 119 Fed. Cl. at 594 ("Moreover, a lodestar cross-check reveals that the court's recommended fee award reasonably reflects the hard work of counsel and avoids a windfall for plaintiffs' attorney.")). In fact, another judge of the Court of Federal Claims applied a lodestar cross-check in a megafund case the month after the Claims Court entered the order challenged in the instant appeal. *Mercier v. United States*, 2021 WL 5027950, at *11 (Fed. Cl. Oct. 29, 2021) (granting an award that was "approximately 2.95 times the lodestar amount, a very generous but reasonable recovery"). Even *Moore v. United States*, 63 Fed. Cl. 781, 789 (2005)—the case the Claims Court relied upon for the factors it used in evaluating the percentage-of-the-fund award—confirmed that its award was only "slightly above" the lodestar.

While lower courts have discretion in how they calculate reasonable fee awards, and while that discretion may result in some variation, the variation should not turn on each judge's personal beliefs about the general proposition of whether a lodestar cross-check has a place in common fund attorney fee awards. Rather, the law regarding when to use a lodestar cross-check should be subject to generally applicable guidelines. The alternative is the undesirable situation encountered here where a law firm's receipt of a windfall at the expense of the class it represents turns on one judge's disagreement with other judges of the same court about what the law should be.

This Court should take this opportunity to bring some standardization to the use of the lodestar cross-check in megafund cases. And, for the reasons provided in the sections that follow, that standardization should guide lower courts toward employing a lodestar cross-check. Indeed, as the Supreme Court has stated in the fee-shifting context, "the lodestar calculation is 'objective,' and thus cabins the discretion of trial judges, permits meaningful judicial review, and produces reasonably predictable results." *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). These are values that are also desirable in common fund cases.

(b) A Court's Equitable Power to Award Attorney Fees from a Common Fund Is Constrained by Fairness and Reasonableness

"In a certified class action, the court may award *reasonable* attorney's fees . . . ." R. Ct. Fed. Cl. 23(h) (emphasis added). Here, the fees were awarded under the common fund doctrine. Appx8-9 & n.2. "The common fund doctrine is rooted in the traditional practice of courts of equity and derives from the equitable power of the courts under the doctrines of quantum meruit and unjust enrichment. Under the common fund doctrine, 'a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to [] reasonable attorney[] fees from the fund as a whole.'" *Haggart*, 809 F.3d at 1351-52; *see also id.* at 1358 ("[T]he common fund is an equitable doctrine established for the primary purpose of addressing inequities resulting from the unjust enrichment of class members at the expense of the litigating party."). While it is important that lawyers be equitably compensated, it is also important that they not be awarded windfalls at the expense of the class.

> For the sake of their own integrity, the integrity of the legal profession, and the integrity of Rule 23, it is important that the courts should avoid awarding 'windfall fees' and that they should likewise avoid every appearance of having done so. To this end courts must always heed the admonition of the Supreme Court in *Trustees v. Greenough* [105 U.S. 527 (1881)] when it advised that fee awards under the equitable fund doctrine were proper only 'if made with moderation and a jealous regard to the rights of those who are interested in the fund.'

City of Detroit v. Grinnell Corp., 495 F.2d 448, 469-70 (2d Cir. 1974) (citations omitted), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

"At its heart, equity is about fairness." *Haggart*, 809 F.3d at 1359. A lodestar cross-check promotes fairness because it ensures "that the percentage award is not a windfall." 5 Newberg on Class Actions § 15:86 (5th ed. 2021). Thus, Newberg on Class Actions (the leading treatise in this field) observes that "[t]he benefits of the lodestar cross-check are several" and that "the value that the cross-check adds [is] underappreciated." *Id.* Other observers go further: one law review article, co-written by the former Chief Judge of the Northern District of California, describes a lodestar cross-check as an "ethical imperative." Vaughn R. Walker & Ben Horwich, *The Ethical Imperative of A Lodestar Cross-Check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases*, 18 Geo. J. Legal Ethics 1453, 1469-70 (2005).

The Claims Court asserted that a lodestar cross-check "'is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation,' and it creates incentives for inefficiency." Appx11. The Claims Court also described the process as "arbitrary." Appx11. Newberg observes that "costs of the lodestar cross-check are likely exaggerated." 5 Newberg on Class Actions § 15:86 (5th ed. 2021). With respect to the difficulty and time required for a cross-check,

"courts in nearly every circuit have held that, for the purposes of a cross-check, they need not scrutinize each individual billed hour, but may instead focus on the general question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." *Id.* Similarly, if a court is simply considering the overall reasonableness of the fees, the incentive for attorneys to manipulate individual time entries is reduced. And as long as courts are only checking to ensure that the multiplier falls in a reasonable range, the inconsistency or arbitrariness of choosing a particular multiplier should not be a concern: a percentage-of-the-fund award need only be "reduced when the lodestar cross-check indicates an unreasonably high implied multiplier." Walker & Horwich, *Ethical Imperative*, *supra*, at 1470.

"Ultimately controlling is the requirement that the award of attorneys' fees be reasonable." *Moore*, 63 Fed. Cl. at 786. A lodestar cross-check allows a court to determine whether an award is reasonable and fair in light of the hours worked on a case. It also allows for fairness across cases; as the Supreme Court explained in a fee shifting case, "[s]etting attorney's fees by reference to a series of sometimes subjective factors place[s] unlimited discretion in trial judges and produce[s] disparate results," whereas the lodestar can help bring about "reasonably predictable results." *Perdue*, 559 U.S. at 551-52 (2010). Thus, in order to achieve fair outcomes, "courts evaluating an application for the award of a

percentage fee should as a matter of course perform a lodestar cross-check." Walker & Horwich, *Ethical Imperative*, *supra*, at 1470.

(c) Other Courts Recognize the Merits of a Lodestar Cross-Check, Especially in Megafund Cases

In light of its clear merits, it should come as no surprise that courts around the country have recognized that a lodestar cross-check is an important tool, especially in megafund cases. This is because when "a common fund is extraordinarily large," a percentage-of-the-fund award "may result in a fee that is unreasonably large." *Alexander v. FedEx Ground Package Sys., Inc.*, 2016 WL 3351017, at *1 (N.D. Cal. June 15, 2016). "It is not one hundred fifty times more difficult to prepare, try, and settle a $150 million case than it is to try a $1 million case." *Id.* A lodestar cross-check thus helps ensure that class counsel are fairly compensated for the time they actually devote to a megafund case while guarding against windfalls and unjust enrichment, which would be repugnant to the equitable basis of the common fund doctrine.

Ever since convening its task force on court-awarded attorney fees many years ago, the Third Circuit has been a leader in developing the law in this field. *See In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 734 (3d Cir. 2001). As that court noted, when a fee award is based on a percentage of the fund, "absent unusual circumstances, the percentage will decrease as the size of the fund increases." *Id.* at 736. The court went on to explain that "'[t]he basis for this

inverse relationship is the belief that "[i]n many instances the increase [in recovery] is merely a factor of the size of the class and has no direct relationship to the efforts of counsel."' Accordingly, district courts setting attorneys' fees in cases involving large settlements must avoid basing their awards on percentages derived from cases where the settlement amounts were much smaller." *Id.* (citation omitted).

Applying these principles, the Third Circuit held that the district court's award of 5.7% of the fund was too high, even though it was on the low end of the range of other surveyed cases. *Id.* at 738. In reaching this holding, the court determined that the district court had abused its discretion by failing to consider the lodestar multiplier, which was either 7 or 10, depending on how it was calculated. *Id.* at 742. The court stated that "[e]ither of these multipliers [(7 or 10)] is substantially higher than any of the multipliers in the cases charted above, which range from 1.35 to 2.99, and is also significantly higher than the 'large' 5.1 multiplier" the court had questioned in a different case. *Id.* By failing to justify such a high lodestar multiplier, "the District Court strayed from all responsible discretionary parameters." *Id.* Thus, the court of appeals vacated the award and provided direction on remand: "we strongly suggest that a lodestar multiplier of 3 (the highest multiplier of the cases reviewed above) is the appropriate ceiling for a

fee award, although a lower multiplier may be applied in the District Court's discretion." *Id.*

Other courts of appeals have also endorsed the lodestar cross-check. For example, in a megafund case involving a settlement exceeding $3 billion and a fee award of 6.5% of the fund, the Second Circuit explained, "[a]s a 'cross-check' to a percentage award, courts in this Circuit use the lodestar method. Here, the lodestar yields a multiplier of 3.5, which has been deemed reasonable under analogous circumstances." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (citations omitted).

Similarly, the Ninth Circuit recently held, "The district court must gather sufficient information so that the lodestar is a meaningful crosscheck of the percentage-of-the-fund method." *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 768 F. App'x 651, 654 (9th Cir. 2019); *see also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002) ("Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award."). In other words, the cross-check must be carefully considered; it cannot merely be a rubber stamp.

To be sure, not every circuit requires use of the lodestar cross-check. *E.g.*, *Keil v. Lopez*, 862 F.3d 685, 701 (8th Cir. 2017) ("Although not required to do so, the court verified the reasonableness of its award by cross-checking it against the

lodestar method" and "determined that the fee award corresponded to a lodestar multiplier of 2.7," which "was in line with multipliers used in other cases . . . ."); *In re Home Depot Inc.*, 931 F.3d 1065, 1091 & n.25 (11th Cir. 2019) (noting that "[c]ourts often use a cross-check to ensure that the fee produced by the chosen method is in the ballpark of an appropriate fee" but clarifying that it did "not mean to suggest that a cross-check is required" because "[a] lodestar cross-check is a time-consuming exercise"). For the reasons explained above, however, Objecting Class Members submit that the courts that do require (or strongly encourage) a cross-check have the better argument, and that this Court should adopt that position in order to promote predictability and fairness.

The Ninth Circuit has provided a useful illustration that sums up why considering all relevant circumstances, including the lodestar multiplier, is so important:

> It is not difficult to demonstrate why courts cannot rationally apply any particular percentage [of the common fund]—whether 13.6 percent, 25 percent or any other number—in the abstract, without reference to all the circumstances of the case. To illustrate the point, we need only assume that the . . . settlement fund was $1.4 billion rather than roughly $700 million. Assume as well that all other variables remained constant—the merits of plaintiffs' case on the facts and the law, the skill and time of counsel required to develop the merits of the case in the litigation process, and counsel's hourly rates. Would Class Counsel still contend that 13.6 percent was a reasonable figure? An award of 13.6 percent of the fund would give Class Counsel a fee of $200 million, double the fee they actually seek for their effort in this case. Plainly, a fee of $200 million for the same

> effort by counsel with the same level of skill would be a windfall rather than a reasonable fee.

In re Washington Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1298 (9th Cir. 1994).

A lodestar cross-check is critical component in analyzing a percentage-of-the-fund award, particularly in a megafund case. The Claims Court abused its discretion by skipping this step.

2. A Lodestar Multiplier Exceeding 18 Is Far Too High

The Claims Court held that "even if the Court applied the lodestar cross-check, a multiplier of 18-19 would, at least, not be outside the realm of reasonableness." Appx25. This position is contrary to authority: in fact, a lodestar multiplier should be in the low single digits.

Based on data from around the country, Newberg on Class Actions explains that "[e]mpirical evidence of multipliers across many cases demonstrates that most multipliers are in the relatively modest 1-2 range; this fact counsels in favor of a presumptive ceiling of 4, or slightly above twice the mean." 5 Newberg on Class Actions § 15:87 (5th ed. 2021). Published circuit court decisions reflect similar understandings of what is reasonable. As noted above, the Third Circuit has "strongly suggest[ed] that a lodestar multiplier of 3 (the highest multiplier of the cases [it reviewed]) is the appropriate ceiling for a fee award." *In re Cendant Corp. PRIDES Litig.*, 243 F.3d at 742. The Second Circuit considered a multiplier

of 3.5 reasonable, citing with approval other cases that had determined ranges spanning from 1.35 to 4.5 to be appropriate. *Wal-Mart*, 396 F.3d at 123. The Ninth Circuit affirmed an award where the lodestar crosscheck yielded a multiplier of 3.65 based on "the substantial risk class counsel faced, compounded by the litigation's duration and complexity."[1] *Vizcaino*, 290 F.3d at 1051; *see also In re Nat'l Collegiate Athletic Ass'n*, 768 F. App'x at 653-54 (affirming an award where the lodestar crosscheck resulted in a multiplier of 3.66).

Staying within this range, a recent Court of Federal Claims decision rejected a percentage-of-the-fund award that would have resulted in a lodestar multiplier of 4.4 because such a large multiplier would constitute "a windfall to counsel, is not necessary to attract competent counsel to similar cases, and would necessarily be at the expense of the class members." *Mercier*, 2021 WL 5027950, at *11. The court instead selected a percentage resulting in a multiplier of 2.95, determining this was "a very generous but reasonable recovery" that "reflect[ed] the outstanding work of

[1] The Ninth Circuit provided an appendix detailing a survey of attorney fee awards in common fund cases, which found that most multipliers were between 1.0 and 4.0. *Vizcaino*, 290 F.3d at 1051 n.6, 1052-54. The survey included a single case with a double digit multiplier, *In re Merry-Go-Round Enterprises, Inc.*, 244 B.R. 327 (Bankr. D. Md. 2000). *Id.* at 1052. For the reasons discussed later in this section of this brief, *Merry-Go-Round* is inapposite, but even if it were apposite, at more than four standard deviations from the mean among the cases surveyed by the Ninth Circuit, its 19.6 multiplier would still be an outlier by a huge margin. *See Vizcaino*, 290 F.3d at 1051 n.6, 1052-54.

class counsel in this case, the length of the case, and the risk to counsel of recovering nothing despite investing substantial time, effort, and money." *Id.*

Other courts regularly apply even lower multipliers—in the range between 1 and 2—in complex cases brought by exceptional counsel, who assumed significant risks, and expended substantial resources in pursuing the case. *Ibarra v. Wells Fargo Bank, N.A.*, 2018 WL 5276295, at *6 (C.D. Cal. Sept. 28, 2018) (explaining that a multiplier of 2.0 "is within the range most commonly applied in class actions resulting in common fund judgments"); *Gattinella v. Michael Kors (USA), Inc.*, 2016 WL 690877, at *1-2 (S.D.N.Y. Feb. 9, 2016) (emphasizing "complex issues of liability and damages," "significant risks," "substantial resources" expended, and "exceptional work," concluding that the requested percentage award was too high because it would result in a multiplier of 2.4 which was "higher than what other courts, including this one, have typically awarded," and instead awarding a percentage yielding a multiplier of 1.94); *In re Citigroup Inc. Bond Litig.*, 988 F. Supp. 2d 371, 376, 379-80 (S.D.N.Y. 2013) (awarding fees that resulted in a 1.34 multiplier where "litigation was both broad in scope and complex," the case involved "risk of an unfavorable outcome brought on by changes in applicable case law," "the applicable law [wa]s far from simple," and the quality of counsel was "deserving of a substantial award," and collecting cases applying multipliers between 0.7 and 2.8); *In re Cook Med., Inc., Pelvic Repair Sys. Prods. Liab. Litig.*,

365 F. Supp. 3d 685, 701 (S.D.W. Va. 2019) (approving a 5% award in a megafund MDL case only after confirming that the multiplier of 1.8 was in the acceptable range and citing cases approving of multipliers between 1 and 4). In fact, Class Counsel's fee expert Brian T. Fitzpatrick, Appx1810, has conceded that most multipliers are below 2, and the average multiplier is 1.62. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2013 WL 12387371, at *13 (N.D. Cal. Nov. 5, 2013) (noting that Fitzpatrick "reported that of the 192 fee awards studied where 'a lodestar cross-check and the lodestar multiplier was ascertainable, the mean and median multipliers were 1.62 and 1.30'").

Courts reserve multipliers above this range for the most trend-setting cases, pursued by class counsel efficiently and at significant risk. *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 787-803 (S.D. Tex. 2008) shows how extraordinary a case must be to warrant a high multiplier of 5.2 and why the instant case is not extraordinary by comparison. *Enron* posed "extraordinary complexity and risk" as well as a "substantial financial burden." *Id.* at 790. Since every obvious culpable party had been shuttered, class counsel needed to pioneer a "a novel theory of scheme liability" to recover, and as a result there was a substantial risk of "little or no recovery." *Id.* at 791-93, 797. Nonetheless, class counsel made what was likely "the largest investment ever made in a single securities class action." *Id.* at 791.

The case, already "extremely complex," was made more complex because "in the course of th[e] litigation, various binding, higher-court decisions" made recovery "increasingly difficult." *Id.* at 788. The 6-year case involved "several hundred" fact depositions, "numerous" dispositive motions, "enormous energy and effort" on class certification issues, and pursuit through the district court, Fifth Circuit, and Supreme Court. *Id.* at 786-87. Additionally, an independent federal judge assigned to review the firm's billing records commented that he "would have expected the lodestar amount to be significantly higher," which showed that class counsel "was extremely efficient." *Id.* at 788. The court also found it notable that counsel acted virtually alone, distinguishing another case in which "three firms" had been involved. *Id.* at 803. Moreover, class counsel's efforts were thwarted by separate criminal and bankruptcy matters that eroded time and assets and complicated discovery. *Id.* at 772, 791-92.

None of the extraordinary circumstances that drove the *Enron* multiplier of 5.2 is present here. Class Counsel did not make "the largest investment ever made," an independent judge did not declare that it was "extremely efficient," it did not pursue a dwindling pool of funds, it was not thwarted by separate bankruptcies and criminal actions, it did not take hundreds of depositions, and it had considerable support from other lawyers who pursued their own cases for their own clients all the way to the Supreme Court.

In light of all of the above authority, the effective multiplier of more than 18 the Claims Court awarded is astronomical and unjustified. In holding that a multiplier exceeding 18 would be reasonable (if it were to conduct a lodestar cross-check, which it didn't do), the Claims Court cited three cases with high multipliers, though it did not provide any discussion as to why these cases were germane. Appx24-25; *cf. In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 340-41 (3d Cir. 1998) ("[C]ourts must take care to explain how the application of a multiplier is justified by the facts of a particular case.").

First, the Claims Court cited *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005). In that case, the court acceded to a 15.6 multiplier after making clear that the vast majority of megafund multipliers are between 1 and 2.95, noting that "[n]ot one member of the Settlement Class, which is made up of approximately 90 sophisticated businesses, objected to the" award, and emphasizing the "extraordinary support Plaintiffs have shown for counsel's request for fees," including that the general counsel of one class member submitted a declaration advocating for an even higher fee. *Id.* at *16-18.

Second, the Claims Court cited *In re Merry-Go-Round Enterprises, Inc.*, 244 B.R. 327 (Bankr. D. Md. 2000). *Merry-Go-Round* was not a class action, but rather was a bankruptcy proceeding brought under a set contingency fee agreement

that the court and bankruptcy trustee had approved in advance under 11 U.S.C. § 328(a). *Id.* at 332. As a result, the court declined to use a lodestar analysis. *Id.* at 335. The question in *Merry-Go-Round* was whether the contingency fee, which resulted in a 19.6 multiplier, was so high that it was unethical under the Rules of Professional Conduct. *Id.* at 335, 338. The court found that the award did not violate that different test. *Id.* at 341.

Third, the Claims Court cited *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1252 (Del. 2012), which involved a multiplier of 66. However, as the Claims Court acknowledged, in that case no lodestar cross-check was conducted. *Id.* at 1257; Appx25.

The fact that a handful of lower courts over the course of time have awarded extraordinary multipliers is not a sufficient reason to depart from the multiplier range that courts apply in the vast majority of cases. The Claims Court provided no basis to conclude that these outlier cases provide a basis for declining to follow the large number of megafund cases described above, including published federal appellate decisions setting the acceptable multiplier range in the low single digits. It was an abuse of discretion for the Claims Court to conclude that, if it were to conduct a cross-check (which, again, it did not do), a multiplier exceeding 18 would be reasonable. Accordingly, this Court should instruct that, when the Claims Court conducts a lodestar cross-check on remand, the multiplier should be

within the range generally recognized as acceptable, i.e., generally 1 to 2, and certainly no higher than 4.

3. The Inputs to the Lodestar Cross-Check Should Be Supported by Adequate Evidence

For purposes of a cross-check, courts "need not scrutinize each individual billed hour, but may instead focus on the general question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." 5 Newberg on Class Actions § 15:86 (5th ed. 2021). Accordingly, class counsel need not necessarily submit the same level of evidence in support of a cross-check as it would if the lodestar were being used to set the fee award in the first instance. However, the court assessing a fee request must still "gather sufficient information so that the lodestar is a meaningful crosscheck of the percentage-of-the-fund method." *In re Nat'l Collegiate Athletic Ass'n*, 768 F. App'x at 654. That means, at a minimum, "a summary of the hours expended by all counsel at various stages"; this is necessary because "lawyers have an incentive to increase their hours for cross-check purposes." *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307 n.16 (3d Cir. 2005).

Class Counsel's evidence does not meet even this low threshold. The sum total of Class Counsel's evidence about the fees expended is contained in this single paragraph in a declaration:

> To date, including both the *Health Republic* and *Common Ground* matters, Quinn Emanuel attorneys have worked almost 10,000 hours on these cases, at a blended rate of approximately $1,033 per hour. The Quinn Emanuel partners who have billed more than 100 hours on this matter have billed at rates ranging from $870 to $1,250 per hour. The Quinn Emanuel associates who have billed more than 100 hours on this matter have billed at rates ranging from $600 to $905 per hour. Moreover, to date, Quinn Emanuel paralegals, litigation support staff, and summer associates have worked over 400 hours on these matters at a blended rate of approximately $325 per hour. In total, Quinn Emanuel's lodestar on the *Health Republic* and *Common Ground* cases is over $10 million.

Appx1806-1807.

This estimate doesn't even purport to disclose the precise total number of hours billed, much less does it disclose how many hours were billed at each stage of the litigation and by whom. The claimed amount of time—"almost 10,000 hours"—is substantial, especially for a case that was stayed before any significant discovery occurred. However, without a more detailed breakdown, it is impossible to meaningfully engage with Class Counsel's request. Moreover, it is impossible to know whether Class Counsel's time was spent on tasks that may be factored into the lodestar. *See, e.g.*, *Prandini v. Nat'l Tea Co.*, 585 F.2d 47, 53 (3d Cir. 1978) (holding that the common fund doctrine does not permit including time spent pursuing attorney fees in the lodestar). It was therefore an abuse of discretion for the Claims Court to accept Class Counsel's evidence as sufficient. On remand, the Claims Court should be directed to either insist on adequate evidence or reduce the lodestar in recognition of Class Counsel's failure to submit sufficient proof.

* * *

The Claims Court should have conducted a lodestar cross-check, it should have limited its award to the accepted range of multipliers, and it should not have accepted Class Counsel's cursory evidence of its time spent on this case. These failures constituted an abuse of discretion which must be corrected on remand.

C. The Claims Court's Reasoning Was Unsound in Several Other Respects

The most significant defect in the Claims Court's order was its failure to conduct a meaningful lodestar cross-check as promised by the class notice and supported by the weight of authority. However, there were several other aspects of the order that constituted abuses of discretion. These also merit vacating the award.

1. The Claims Court Misunderstood the Nature of Its Task

The Claims Court seemed to conceive of its task as to take Class Counsel's requested fee as presumptively reasonable and then ask whether any of seven factors warranted a "reduction" in that request. *E.g.*, Appx13 ("The quality of Class Counsel is essentially undisputed here, and the Court finds nothing in this category that justifies a reduction in the requested fee."). Instead, the Claims Court should have recognized that, while Class Counsel's requested fee represented the upper limit of what it could award, it had an independent duty to protect the interests of the class and identify the fairest amount:

> During the fee-setting stage of common fund class action suits such as this one, plaintiffs' counsel, otherwise a fiduciary for the class, becomes a claimant against the fund created for the benefit of the class. This shift puts plaintiffs' counsel's understandable interest in getting paid the most for its work representing the class at odds with the class' interest in securing the largest possible recovery for its members. Because the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage, courts have stressed that when awarding attorneys' fees from a common fund, *the district court must assume the role of fiduciary for the class plaintiffs. As a fiduciary for the class, the district court must act with a jealous regard to the rights of those who are interested in the fund in determining what a proper fee award is*.

In re Mercury Interactive Corp. Sec. Litig., 618 F.3d 988, 994 (9th Cir. 2010) (cleaned up; emphasis added).

The Claims Court concluded that the Objecting Class Members' proposed fee award was too low. Appx22-23. That determination did not, however, mean that Class Counsel's request was reasonable or fair; the Claims Court still had a duty to scrutinize the request and "act with a jealous regard to the rights of" the class members. Nevertheless, the Claims Court seemed to treat the fee award process as a baseball arbitration, and having rejected the Objecting Class Members' proposal, it defaulted to Class Counsel's request. *See* Appx22-23. Disclaiming its duty as a fiduciary for the class, the Claims Court determined that "there is little reason for the Court to step in to protect the interests of sophisticated entities who made a considered decision to join these cases." Appx21. This was an abuse of discretion.

2. The Claims Court Abused Its Discretion in Its Analysis of the Hypothetical Fee that Would Have Been Negotiated in a Similar Case

"The Federal Circuit has not specified what considerations govern the assessment of the reasonableness of fee requests in common fund cases." *Mercier*, 2021 WL 5027950, at *9. In the absence of such guidance, the Claims Court joined other judges on the Court of Federal Claims in relying on a multi-factor test, which considers, among other things, "the fee that likely would have been negotiated between private parties in similar cases." Appx9 (quoting *Moore*, 63 Fed. Cl. at 787).

The Third Circuit has called into question the utility of this factor in megafund cases:

> We question the significance of this inquiry to class action lawsuits of this magnitude. While such private fee arrangements might be appropriate in smaller class actions or litigation involving individual plaintiffs, we do not believe they provide much guidance in cases involving the aggregation of over 8 million plaintiffs and a potential recovery exceeding $1 billion.

In re Prudential Ins. Co, 148 F.3d at 340. Comparing percentages awarded in large fund cases risks papering over potentially critical differences between the cases and therefore simply may not be useful. *Cf.* Appx18.

But even if this factor might have the potential to be helpful, the Claims Court's evaluation of this factor was defective. The Claims Court put great weight on the fact that members joined the class with knowledge of the 5% cap Class

Counsel had promised: "Objectors' affirmative choice to join these cases and pay, at most, the five percent fee identified in the class notices points strongly in favor of approving Class Counsel's fee." Appx20. This, however, ignores the other half of Class Counsel's assurance: that "[t]he fee may be substantially less than 5% depending upon the level of class participation represented by the final membership of the [class]" and that the fees "will be determined by the Court subject to . . . a 'lodestar cross-check' (i.e., a limitation on class counsel fees based on the number of hours actually worked on the case)." Appx1389, Appx2680. In other words, the class members did not join the class with an understanding that Class Counsel would get 5% of the fund no matter what. Rather, the class members joined the class with an understanding that Class Counsel would get 5% of the fund only if the class was not big enough and if the court concluded that Class Counsel actually worked enough hours to merit that award based on a lodestar cross-check. It was illogical for the Claims Court to reason that class members who found Class Counsel's whole promise reasonable would also have found half of the promise reasonable. As it turned out, Class Counsel did achieve substantial class participation (although it may have hoped for even more), and the "almost 10,000 hours" Class Counsel worked were not nearly enough to merit an award of 5% of the fund (i.e., more than $184 million).

The Claims Court compounded its error when it stated: "As the language of the notices makes clear, however, a reduction was not guaranteed. Nor would Class Counsel have authority to make such a guarantee because the ultimate decision to reduce a requested fee percentage, if at all, rests within the Court's discretion—whether based on class participation or through use of the lodestar cross-check." Appx20. But of course Class Counsel had authority to represent that it would seek different awards in different circumstances; it simply decided not to adhere to its representation. And again, the 5% award was not a default starting point to be "reduced"; rather, it was a cap that would only be reached in certain circumstances, and those circumstances did not end up materializing.

The Claims Court also stated that the fee paid to Class Counsel is lower than what the Objecting Class Members would have paid if they had pursued their claims individually. Appx21. First, that isn't correct: under the Claims Court's fee award, Class Counsel will receive more than $19 million from United's portion of the common fund, and Class Counsel will receive more than $34 million from Kaiser's portion of the common fund. *See* Appx2244-2250, Appx3770-3774. Both amounts are significantly higher than Class Counsel's claimed $10 million in hourly fees for this case. Thus, either of these entities would have been much better off hiring Quinn Emanuel separately and paying it an hourly fee than they are under the Claims Court's award in this class action. Second, it does not make

sense to deem a class counsel's fee award reasonable on the ground that it is lower than what a single party would have paid if proceeding individually. In many class actions, the claims are so small that the cost of individual representation would significantly exceed the value of each individual's claim; in those cases, representation by class counsel is always more economical. Even in cases where each party's claim is larger, the simple fact that it is more efficient to proceed as a class than individually does not support the inference that a particular class counsel fee award is per se reasonable. The Claims Court abused its discretion by basing its decision in part on this faulty reasoning.

3. The Claims Court Abused Its Discretion by Failing to Enforce the Class Notice

When Class Counsel failed to live up to its end of the bargain, the Claims Court should have embraced its role as a fiduciary of the class and, as specified by the class notice, it should have entered an award that took account of the large class participation and the lodestar. It did neither.

As Class Counsel conceded before the Claims Court, the *Health Republic* and *Common Ground* class members comprise "one-third of the total value of all risk corridors claims," representing "by orders of magnitude the largest contingent . . . represented by any law firm in risk corridors litigation." Appx1804. According to the class notice, this type of class participation is precisely the circumstance that should have made the fee award "substantially less than 5%."

Appx1389, Appx2680. Class Counsel says it was hoping for even broader participation. Appx2196. Even if that's so, the fact remains that the class attracted enough members to generate a multi-billion dollar fund. If the size of the class was to be taken into account when calculating the fee, that should be a large enough class to move the fee down from the 5% cap.

As for the lodestar cross-check, this should have been done for the reasons described *supra* Part VI(B). The fact that Class Counsel specifically told prospective class members that there would be a lodestar cross-check in order to induce them to join the class simply underscores the error in the Claims Court's failure to conduct a cross-check.

VII. CONCLUSION

For the foregoing reasons, this Court should vacate the Claims Court's attorney fee award and remand for further proceedings so that the Claims Court may conduct a proper analysis and lodestar cross-check of the award.

Dated: January 28, 2022 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *_/s/Moe Keshavarzi_*
MOE KESHAVARZI
JOHN BURNS
MATTHEW G. HALGREN
Attorneys for Appellants

ADDENDUM

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE COMPANY, Plaintiff, v. THE UNITED STATES, Defendant.	No. 16-cv-259C
COMMON GROUND HEALTHCARE COOPERATIVE, Plaintiff, v. THE UNITED STATES, Defendant.	No. 17-cv-877C Filed: September 16, 2021

OPINION AND ORDER

Before the Court are Class Counsel Quinn Emanuel Urquhart & Sullivan LLP's Motions for Approval of Attorney's Fee Request and Class Representative Incentive Award related to their representation of certain classes certified in the above-captioned cases. *See Health Republic* ECF No. 84; *Common Ground* ECF No. 107.[1] Class Counsel seek approval of an attorney's fee award of five percent, approximately $185 million of the combined $3.7 billion judgment recovered on the Non-Dispute Subclasses' risk corridors claims. They also seek approval of $100,000 incentive awards to both Health Republic Insurance Co. ("Health Republic") and Common Ground

[1] Because the briefing pertaining to the opposed fee request motions in both cases is substantively the same, for ease of reference this opinion and order will cite only to the briefing in *Health Republic*.

Healthcare Cooperative ("Common Ground") (collectively, "named Plaintiffs") as representatives of their respective classes, to be paid from Class Counsel's fee. The Court is tasked with determining the reasonableness of these awards. For the reasons that follow, the Court approves in part and denies in part Class Counsel's requests.

I. BACKGROUND

On February 24, 2016, Class Counsel filed a complaint on behalf of Health Republic as the first challenge to the Government's failure to make risk corridors payments to Qualified Health Plan ("QHP") issuers pursuant to Section 1342 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), 124 Stat. 119, and the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (2010), 124 Stat. 1029 (collectively, the "ACA"). *See* Pl.'s Class Action Compl., *Health Republic* ECF No. 1. The risk corridors program was designed to mitigate risk for QHP issuers participating in the new insurance market created by the ACA. It did so by providing QHP issuers compensation from the Government for any "losses exceed[ing] a certain defined amount due to high utilization and high medical costs," while on the other hand requiring QHP issuers to pay the Government "a percentage of any profits [QHP issuers] made over similarly-defined amounts." *Id.* ¶ 5. In the Complaint, Class Counsel argued on behalf of Health Republic and a putative class of QHP issuers that Section 1342 was a money-mandating statutory provision that required the Government to "pay any QHP certain amounts exceeding the target costs they incurred in [benefit years] 2014 and 2015," *id.* ¶ 60, notwithstanding Congress's decision not to appropriate sufficient funds to pay such amounts, *id.* ¶ 10. *Health Republic* was the first lawsuit filed challenging the Government's withholding of risk corridors payments and the first of its kind to raise a money-mandating theory of recovery under the Tucker Act. *Health Republic* ECF No. 84 at 9 (citing Decl. of Stephen A. Swedlow ¶ 8, ECF No. 84-1).

By August 2016, numerous other firms had brought similar suits in this court on behalf of individual QHP issuers, each arguing, among other things, that Section 1342 mandated the Government to make risk corridors payments. *See, e.g.*, *First Priority Life Ins. Co. v. United States*, No. 16-cv-587 (Fed. Cl.) (filed May 17, 2016); *Moda Health Plan, Inc. v. United States*, No. 16-cv-649 (Fed. Cl.) (filed June 1, 2016); *Blue Cross and Blue Shield of N.C. v. United States*, No. 16-cv-651 (Fed. Cl.) (filed June 2, 2016); *Me. Cmty. Health Options v. United States*, No. 16-cv-967 (Fed. Cl.) (filed Aug. 9, 2016); *see also Health Republic* ECF No. 84-1 ¶ 11.

The Government moved to dismiss Health Republic's Complaint, arguing that the Court of Federal Claims lacked subject matter jurisdiction under the Tucker Act because Section 1342 did not constitute a money-mandating statute providing a substantive right to payment. *See* Def.'s Mot. to Dismiss at 21–26, *Health Republic* ECF No. 8. The court rejected that argument and denied the Motion to Dismiss as to the Section 1342 claim. *See Health Republic Ins. Co. v. United States*, 129 Fed. Cl. 757 (2017).

At the same time the court was considering the Government's Motion to Dismiss, Health Republic was moving forward in the class certification phase. The Government did not oppose certification; consequently, on January 3, 2017, the court certified the proposed class in *Health Republic* and appointed Quinn Emanuel lead class counsel. Order at 1–2, *Health Republic* ECF No. 30. On February 24, 2017, exactly one year after it initiated suit, the court granted Class Counsel's proposed class notice plan. *See* Order, *Health Republic* ECF No. 42. Consistent with the opt-in nature of class actions in the Court of Federal Claims, Class Counsel's notice explicitly informed potential class members that they must affirmatively submit a Class Action Opt-In Notice Form to join the class, otherwise they would receive no benefit from the lawsuit. Updated Proposed Class Notice at 2, 5, *Health Republic* ECF No. 41-1. The notice advised potential class

members that, if successful, Class Counsel would seek permission to be compensated for their representation, which would be deducted from the amount of any recovery by the class. *Id.* at 7. It did not identify a particular amount or percentage of any proposed fee award. *See id.*; *see also Health Republic* ECF No. 84-1 ¶ 13.

According to Class Counsel, it later became known that potential class members were under the erroneous assumption that Class Counsel would be seeking a fee percentage in the ballpark of 30 percent of any judgment. Mot. to Suppl. Class Notice at 1, *Health Republic* ECF No. 50; *Health Republic* ECF No. 84-1 ¶ 13. To assuage those concerns, and with the court's approval, Class Counsel distributed a supplement to the class notice representing to potential class members that they would seek a fee of no more than five percent of the class's recovery. Proposed Suppl. Class Notice at 6, *Health Republic* ECF No. 50-1; Order, *Health Republic* ECF No. 51; *Health Republic* ECF No. 84-1 ¶ 15. The supplemental notice advised that the maximum award may be substantially reduced depending on the level of class participation and, in any event, would "be determined by the Court subject to, among other things, the amount at issue in the case and . . . a 'lodestar cross-check[.]'" *Health Republic* ECF No. 50-1 at 6. In sum, 153 QHP issuers opted into the *Health Republic* class. *Health Republic* ECF No. 84-1 ¶ 17.

In March 2017, Health Republic moved for summary judgment. *See* Pl.'s Mot. for Summ. J., *Health Republic* ECF No. 47. On June 27, 2017, before the court decided that Motion, Class Counsel filed a separate class action complaint in *Common Ground* for benefit year 2016. *See* Pl.'s Class Action Compl., *Common Ground* ECF No. 1. As in *Health Republic*, the court certified the proposed risk corridors class in *Common Ground* and appointed Quinn Emanuel as class counsel. Order at 2, 3, *Common Ground* ECF No. 17. It likewise approved Class Counsel's proposed class notice plan. Order, *Common Ground* ECF No. 25. The *Common Ground* class

notice also advised potential class members that they must affirmatively opt into the class to benefit from the lawsuit and that, if successful, Class Counsel would seek approval of at most a five percent attorney's fee award to be deducted from any class recovery. Am. Proposed Class Notice at 1, 4–5, 6, *Common Ground* ECF No. 24-1. The notice similarly stated that Class Counsel's fee request might be reduced depending on class participation and that the fee ultimately would be determined by the court subject to a lodestar cross-check. *Id.* at 6. In response, 130 QHP issuers opted into the *Common Ground* class. *Health Republic* ECF No. 84-1 ¶ 17.

Meanwhile, other risk corridors cases moved through the litigation process, with *Moda Health* being the first to reach and be granted summary judgment. *See Moda Health Plan, Inc. v. United States*, 130 Fed. Cl. 436 (2017). The favorable decision in *Moda* was in part a credit to Class Counsel's work in *Health Republic*, as it relied extensively on the court's decision denying the Government's request to dismiss Health Republic's Section 1342 claim. *See generally id.* (citing with approval *Health Republic Ins. Co.*, 129 Fed. Cl. at 770–72). The Government appealed the decision in *Moda Health*, and pending resolution of that and other related appeals, the court stayed further proceedings in the instant cases. Order, *Health Republic* ECF No. 62; Order, *Common Ground* ECF No. 9. The stays lasted approximately three years.

With *Health Republic* and *Common Ground* stayed, Class Counsel turned to filing amicus briefs on behalf of Health Republic, Common Ground, and additional parties in the United States Court of Appeals for the Federal Circuit. *Health Republic* ECF No. 84 at 12–13 (citing *Health Republic* ECF No. 84-1 ¶ 22). The Federal Circuit subsequently ruled in favor of the Government in each risk corridors appeal. *See Me. Cmty. Health Options v. United States*, 729 F. App'x 939 (Fed. Cir. 2018); *Moda Health Plan, Inc. v. United States*, 892 F.3d 1311 (Fed. Cir. 2018); *Land of Lincoln Mut. Health Ins. Co. v. United States*, 892 F.3d 1184 (Fed. Cir. 2018). A divided Federal

Circuit later denied the motion for rehearing *en banc* in *Moda Health*, with Judge Wallach and Judge Newman dissenting. *Moda Health Plan, Inc. v. United States*, 908 F.3d 738 (Fed. Cir. 2018). In his dissent, Judge Wallach cited several times Class Counsel's amicus submissions on behalf of Professor Kate Bundorf and other healthcare economists, as well as Health Republic and Common Ground. *See id.* at 747–48 (Wallach, J., dissenting).

In the subsequent Supreme Court proceedings, Class Counsel continued to work to assist the QHP issuers in the risk corridors appeals for the obvious reason that success on virtually identical claims (even in separate suits) would benefit the classes here. They again submitted amicus briefs (albeit on behalf of a group of healthcare economists, not Health Republic or Common Ground) at both the writ of certiorari and merits stages. *See Health Republic* ECF No. 84-1 ¶ 22; Opp'n and Obj. to Mot. for Approval of Atty's Fee Req. at 12–13, *Health Republic* ECF No. 89. Class Counsel also "provided comments, strategic suggestions, and assistance with argument to the firms and attorneys handling the Supreme Court arguments." *Health Republic* ECF No. 84 at 13 (citing *Health Republic* ECF No. 84-1 ¶ 22). In an 8-1 decision, the Supreme Court held that Section 1342 was a money-mandating statute that obligated the Government to make risk corridors payments to QHP issuers, and such obligation was not impliedly repealed by subsequent appropriation riders. *See Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323, 1327 (2020). The decision essentially vindicated the argument Class Counsel incepted in *Health Republic*. *See Health Republic* ECF No. 1 ¶¶ 60–63; *see also Health Republic*, 129 Fed. Cl. at 770. As a result of the Supreme Court's decision, the industry-wide recovery for QHP issuers amounts to roughly $12 billion. *Health Republic* ECF No. 84 at 7. The class members represented by Class Counsel here received a large chunk of that amount: $1.9 billion in *Health Republic* and $1.8 billion in *Common Ground*. *See* Rule 54(b) J. at 1, *Health Republic* ECF No.

83; *see* Order at 1, *Common Ground* ECF No. 111. This represents a 100 percent recovery of the classes' unpaid risk corridors payments. *Health Republic* ECF No. 84-1 ¶ 19.

Seeking compensation, Class Counsel filed their Motion for Approval of Attorney's Fee Request and Class Representative Incentive Award on July 30, 2020. Consistent with the ceiling set in the class notices, Class Counsel seek five percent of the common fund, or approximately $185 million of the combined $3.7 billion awarded in the instant cases. *Health Republic* ECF No. 84 at 7–8. They argue that such percentage is reasonable primarily based on the seven-factor test explicated in *Moore v. United States*, 63 Fed. Cl. 781, 787 (2005), and utilized by several judges of the Court of Federal Claims applying the percentage-of-the-fund fee methodology. *Health Republic* ECF No. 84 at 15 (citing *Kane Cty. Utah v. United States*, 145 Fed. Cl. 15, 18 (2019), *Lambert v. United States*, 124 Fed. Cl. 675, 683 (2015), *Quimby v. United States*, 107 Fed. Cl. 126, 133 (2012)). Class Counsel argue that each of the *Moore* factors supports the conclusion that they are entitled to the full five percent fee award requested. *Id.* Additionally, Class Counsel ask that the Court award, from their fees, $100,000 incentive awards to each of the named Plaintiffs in these cases. *Id.* at 38–39.

Thirty-four class members lodged a consolidated objection to Class Counsel's request. Although Objectors state that Class Counsel "should be compensated handsomely" for their work on the two class actions, they have a dramatically different understanding of what that means. *Health Republic* ECF No. 89 at 8. Objectors argue that Class Counsel are entitled to approximately $8.8 million, or about .22 percent of the common fund. *Id.* at 9; *see* Reply to Opp'n and Obj. to Mot. for Approval of Atty's Fee Req. at 19, *Health Republic* ECF No. 93. Contrary to the percentage-of-the-fund approach advocated by Class Counsel, Objectors ask the Court to apply either the lodestar method to determine Class Counsel's fees or to use the lodestar as a cross-check

against the requested fee percentage. *Health Republic* ECF No. 89 at 14. Under that methodology, they ask the Court to reduce the number of hours used to calculate Class Counsel's lodestar by 35 percent for failure to provide detailed billing records and to lower Class Counsel's blended hourly billable rate by 35–40 percent to align with the *Laffey* Matrix. *Id.* at 15–18. Additionally, Objectors argue that a risk multiplier of no more than two—instead of the 18–19 multiplier produced by Class Counsel's requested fee—is appropriate. *Id.* at 20, 24. Objectors state no objection to Class Counsel's request for incentive awards.

II. DISCUSSION

A. The Court Will Apply the Percentage-of-the-Fund Method to Determine Reasonable Attorney's Fees in These Common Fund Cases.

Rule 23 of the Rules of the United States Court of Federal Claims ("RCFC") permits this Court to "award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement" in a certified class action. RCFC 23(h); *see Moore*, 63 Fed. Cl. at 786 (attorney's fee awards are "committed to the sound discretion of the court"). In common fund cases, such as this, where "each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf," *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 (1980), "a litigant or a lawyer . . . is entitled to reasonable attorney fees from the fund as a whole," *Haggart v. Woodley*, 809 F.3d 1336, 1352 (Fed. Cir. 2016) (internal quotations and modifications omitted) (citing *Boeing*, 444 U.S. at 478). Awarding attorney's fees out of the common fund guarantees that each member of the class pays its fair share for class counsel's representation. *See Boeing*, 444 U.S. at 478 (common fund fee awards avoid unjustly enriching parties substantially benefitting from, while only minorly contributing to, the suit); *see also Kane Cty.*, 145 Fed. Cl. at 18. Here, the common fund between the two cases is approximately

$3.7 billion, from which five percent has been reserved pending resolution of Class Counsel's fee request.[2] *See* Order, *Health Republic* ECF No. 98; Order, *Common Ground* ECF No. 125.

Federal courts have taken differing approaches to determine the reasonableness of an attorney's fee request in common fund cases, and thus, one of the primary disputes between Class Counsel and Objectors is the methodology this Court should apply. Class Counsel request that the Court use the percentage-of-the-fund approach. *Health Republic* ECF No. 84 at 15. Under this approach, several judges of the Court of Federal Claims have utilized the seven *Moore* factors as guideposts for determining reasonableness. *Id.* (collecting cases). These factors consider:

> (1) the quality of counsel; (2) the complexity and duration of the litigation; (3) the risk of nonrecovery; (4) the fee that likely would have been negotiated between private parties in similar cases; (5) any class members' 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.

Moore, 63 Fed. Cl. at 787 (citing Manual for Complex Litigation § 14.121 (4th ed. 2004) ("MCL")). No single factor is necessarily dispositive; they can be weighed in the Court's discretion. *See, e.g.*, *Quimby*, 107 Fed. Cl. at 134 (considering each factor and determining that the fee likely to have been negotiated between the parties most justified the award).

Objectors, on the other hand, advocate for either the lodestar method or the lodestar as a cross-check against any percentage award. *Health Republic* ECF No. 89 at 14. No matter how it is used, the lodestar is calculated by multiplying the number of hours reasonably billed by class counsel in undertaking the litigation by the appropriate billable rates for their services. *See Geneva Rock Prods., Inc. v. United States*, 119 Fed. Cl. 581, 594–96 (2015). In a common fund case, the court may then increase or decrease the amount of the lodestar by a so-called risk multiplier (a

[2] The parties do not dispute that a common fund exists in these cases or that the common fund doctrine, as opposed to fee-shifting, applies.

number symbolizing the amount of risk or difficulty involved with the case). *Haggart*, 809 F.3d at 1355 n.19.

The Federal Circuit has not mandated the use of one approach over the other. Rather, binding precedent holds that this Court has discretion to choose between the percentage-of-the-fund or lodestar methods in a common fund case.[3] *See id.* at 1354–55. While the lodestar method is the preferred means of calculating attorney's fees in fee-shifting cases, it has fallen out of favor in cases where fees are paid from a common fund. *See Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 551 (2010); *see also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir. 2005) (stating that the percentage-of-the-fund 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"); *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1271 (D.C. Cir. 1993) ("[A] percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases."); MCL § 14.121 (stating that "the vast majority of courts of appeals now permit or direct district courts to use the percentage-fee method in common-fund cases" (internal notations omitted)). The reason for this is clear: "the lodestar method was designed to govern imposition of fees on the losing party," not the distribution of fees from victorious plaintiffs to their attorney. *Gisbrecht v. Barnhart*, 535 U.S. 789, 806 (2002) (determining the lodestar method to be inappropriate for judging reasonableness of contingency fee arrangement between attorney and claimant in social security case subject to statutory maximum fee percentage).

[3] Consistent with that discretion, other judges of the Court of Federal Claims have chosen to use the lodestar as a cross-check for the percentage-of-the-fund method, *see, e.g.*, *Kane Cty.*, 145 Fed. Cl. at 19; *Geneva Rock Prods.*, 119 Fed. Cl. at 594–95, while others have declined, *see, e.g.*, *Lambert*, 124 Fed. Cl. at 683 n.10; *Quimby*, 107 Fed. Cl. at 133–34.

But this is not the only reason why the lodestar method has been identified as a poor fit for common fund cases. More consequential criticisms emphasize that it "is difficult to apply, time-consuming to administer, inconsistent in result, and capable of manipulation," and it creates incentives for inefficiency. MCL § 14.121; *see Ramah Navajo Chapter v. Jewell*, 167 F. Supp. 3d 1217, 1242 (D.N.M. 2016) (The lodestar, "even when used as a cross check . . . has the effect of rewarding attorneys for the same undesirable activities that the percentage method was designed to discourage, namely 'incentiviz[ing] [class counsel] to multiply filings and drag along proceedings to increase their lodestar.'" (citation omitted)); *Jones v. Dominion Res. Servs.*, 601 F. Supp. 2d 756, 766 (S.D. W.Va. 2009) (The lodestar cross-check tends to "re-introduce[] the problems of the lodestar method." (internal quote omitted)).

Considering the circumstances of these cases, the Court believes the percentage-of-the-fund is the appropriate method for calculating Class Counsel's fee award. The lodestar method's primary emphasis on billable hours worked, with potential upward adjustment for the risks assumed by counsel, fails to appreciate certain factors important to analyzing the reasonableness of Class Counsel's fee request—for example, the class members' affirmative choice to join these suits (knowing the potential of a five percent fee) rather than to pursue individual claims subject to a higher market rate for attorney's fees and the tremendous 100 percent recovery they obtained. *See In re Synthroid Mktg. Litig.*, 325 F.3d 974, 975 (7th Cir. 2003) (attorney's fees should reflect the "market rate for legal services . . . rather than the compensation a judge thinks appropriate as a matter of first principles"). Thus, a nuanced, factor-based analysis will more appropriately gauge the reasonableness of Class Counsel's requested fee than Objectors' suggested use of the lodestar (either directly or as a cross-check), which relies on arbitrary premises and results in a grossly disproportionate fee award to Class Counsel in comparison to the complete recovery obtained by

the classes. *See Will v. Gen. Dynamics Corp.* No. 06-698-GPM, 2010 WL 4818174, at *3 (S.D. Ill. Nov. 22, 2010) ("The use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive." (citations omitted)).

Objectors rely on *In re Volkswagen "Clean Diesel" Marketing Sales Practices & Products Litigation*, MDL No. 2672 CRB (JSC), 2017 WL 1352859 (N.D. Cal. Apr. 12, 2017) ("*Clean Diesel*"), to support application of the lodestar method. *Health Republic* ECF No. 89 at 26. The comparison is unconvincing despite the .25 percent attorney's fee awarded in that case. First, in *Clean Diesel*, Volkswagen—the defendant—agreed to pay attorney's fees as part of a class settlement; the class members received their recovery without making *any* payment for class counsel's representation. *Clean Diesel*, 2017 WL 1352859, at *1. The court declined to address whether the common fund doctrine applied and, if so, which approach for calculating attorney's fees was appropriate. *Id.* at *2. It instead chose to apply the lodestar method because of its applicability in both common fund and fee-shifting cases. *Id.* As a result, *Clean Diesel* is not especially instructive.

Second, the facts of *Clean Diesel* differ substantially from those in the cases at bar. The *Clean Diesel* court cited three reasons for using the lodestar method to calculate fees in the "unique circumstances" of that case: (1) "much of the groundwork" for the class settlement was laid in negotiations preceding a separate class settlement (for which counsel had received compensation); (2) the separate settlement incentivized Volkswagen to quickly reach settlement in *Clean Diesel*; and (3) the high amount of the settlement at issue resulted primarily from the nature and value of the assets at issue. *Id.* The court held that the percentage method would overcompensate class counsel where counsel "did not expend significant additional time" reaching the settlement in *Clean Diesel* or "undertake significant additional risk." *Id.* As discussed further below, the same

cannot be said for Class Counsel's prosecution of the instant cases.[4] Additionally, these cases do not involve circumstances where a reduction in fees is necessary to protect class members from a suboptimal settlement or the pecuniary self-interest of class counsel. *See In re Subway Footlong Sandwich Mktg. & Sales Pracs. Litig.*, 869 F.3d 551, 556 (7th Cir. 2017) ("A class settlement that results in fees for class counsel but yields no meaningful relief for the class 'is no better than a racket.'" (citation omitted)); *see also Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 279 (7th Cir. 2002).

Accordingly, the Court will use the percentage-of-the-fund method to evaluate the reasonableness of Class Counsel's requested fee using the multi-factor analysis applied in *Moore*.

B. Class Counsel's Requested Attorney's Fee Is Reasonable.

An analysis of the relevant factors persuades the Court that a five percent fee is reasonable.

1. The Quality of Counsel

The quality of Class Counsel is essentially undisputed here, and the Court finds nothing in this category that justifies a reduction in the requested fee. Both Quinn Emanuel and the members of Class Counsel's team have a history of providing quality results for their clients, including in large class actions. *See Health Republic* ECF No. 84 at 16–18; *Health Republic* ECF No. 84-1 at ¶¶ 2–7. Despite the at times hyperbolic nature of their Motions, the facts show that Class Counsel demonstrated a degree of foresight in bringing these suits and focusing their attention on the

[4] The other cases relied on by Objectors also demonstrate the fact-specific nature of a court's decision to use either the percentage-of-the-fund or lodestar method in common fund cases. *Health Republic* ECF No. 89 at 25–26 (citing *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291 (9th Cir. 1994), and *Alexander v. FedEx Ground Package Sys., Inc.*, No. 05-cv-00038, 2016 WL 3351017 (N.D. Cal. June 15, 2016)). What is reasonable in one case, however, does not constrain the exercise of the Court's discretion in these cases. *Wash. Pub. Power*, 19 F.3d at 1296 (courts "should be guided by the fundamental principle that fee awards out of common funds be *reasonable under the circumstances*" (emphasis in original) (internal quotation marks omitted)).

Section 1342 claim several months before other parties began filing individual complaints based in part on the same legal theory. *See Health Republic* ECF No. 84 at 18–19. Even though Objectors call into question the novelty of the argument, they do not contest that Class Counsel pioneered the Section 1342 lawsuit by a matter of months or that the same argument they first pressed eventually persuaded the Supreme Court to rule in favor of QHP issuers. *See Health Republic* ECF No. 89 at 10 (referencing comments made by America's Health Insurance Plans in 2014 arguing that the Government was statutorily required to make risk corridors payments). That the favorable Supreme Court decision came down in separate, parallel cases handled by other counsel does not undermine the quality of Class Counsel's representation or the value added by class counsel to the broader risk corridors litigation. *See id.* at 12–13. Indeed, one reason other related cases beat Class Counsel to the high court was because Class Counsel, unlike in some of those cases, successfully defeated dismissal at the pleading stage. *See Health Republic* ECF No. 84 at 19. At the end of the day, what is more important is that Class Counsel's legal theory resulted in a huge award to the classes here. *In re Synthroid*, 325 F.3d at 979–80 (excellent outcome for class weighed against reducing fees); *see Health Republic* ECF No. 84-1 ¶ 24. As such, this factor weighs in favor of Class Counsel.

2. The Complexity and Duration of the Litigation

Courts have recognized that "[m]ost class actions are inherently complex." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000) (citing *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 477 (S.D.N.Y. 1998)). The instant cases are no exception. First, the legal question presented in these cases was not straightforward. As Class Counsel note, when they brought the *Health Republic* case in February 2016, there was little in the way of relevant binding precedent, both in terms of cases addressing money-mandating statutes

and in those interpreting Section 1342. *See Health Republic* ECF No. 84 at 21 ("'[r]arely has the [Supreme] Court determined whether a statute can fairly be interpreted as mandating compensation by the Federal Government" (internal quotation marks omitted) (quoting *Me. Cmty. Health Options*, 140 S. Ct. at 1329)). The number of diverging opinions in the Court of Federal Claims, the Federal Circuit, and Supreme Court suggest that while these cases "turned on purely legal issues," as Objectors emphasize (*Health Republic* ECF No. 89 at 9), the question of whether Section 1342 mandated risk corridors payments to QHP issuers was nonetheless complex enough to split multiple courts as to its proper resolution.

Additionally, although these cases did not involve contested class certification, discovery, or trial, Class Counsel engaged in litigation in either a direct or supporting role at every level before the class members in these cases were awarded judgment in their favor, including motion practice at the pleading and merits stages in *Health Republic* as well as participation in related appeals in both the Federal Circuit and Supreme Court. *See In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d 82, 94 (D.D.C. 2013) (rejecting "[a]n exclusive focus on the lack of discovery, merits briefing, and trial" in determining class counsel's fee award). These efforts spanned the course of over four years.

Objectors focus on the fact that *Health Republic* and *Common Ground* were stayed at a relatively early stage of the litigation pending the appeals in other risk corridors cases, and they diminish the overall influence Class Counsel had on the success of their claims, which they claim were secured in separate matters before the Supreme Court. *See Health Republic* ECF No. 89 at 9, 12–13, 26. In a different scenario, these arguments would likely gain traction. But not here. Objectors do not dispute that Class Counsel was first to file the Section 1342 claim in *Health Republic* months before other cases followed suit with, in part, identical claims. Nor do they

dispute that *Health Republic* failed to win the race to the Supreme Court only because Class Counsel succeeded in surviving dismissal, while other risk corridors cases did not or simply moved to judgment faster as individual (not class) claims. While it is not possible for this Court to divine to what extent Class Counsel's amicus arguments swayed the *Maine Community* majority, Objectors also do not dispute that Class Counsel pressed the classes' interests—albeit in a supporting role—during the course of the stays. Nor can they deny that Class Counsel's arguments had some objective impact in other trial court and intermediate appellate proceedings. *See Moda Health Plan*, 130 Fed. Cl. at 450–51; *Moda Health Plan*, 908 F.3d at 747–48 (Wallach, J., dissenting). Simply put, these are not cases in which Class Counsel merely rode the coattails of other innovative litigators.

Second, Class Counsel have been tasked with organizing and managing two large classes (153 members in *Health Republic* and 130 members in *Common Ground*, *Health Republic* ECF No. 84-1 ¶ 17). The logistics of administering such large class participation—for example, flying to meet with QHP issuers, fielding and resolving questions of class members and other issuers, assisting class members who faced insolvency—magnifies the complexity of these cases. *See Health Republic* ECF No. 84 at 22–23; *Health Republic* ECF No. 84-1 ¶¶ 18, 20–21; *In re Black Farmers Discrimination Litig.*, 953 F. Supp. 2d at 94 (acknowledging the "unenviable logistical challenges that confronted class counsel" in large class action). All told, Class Counsel brought together and have represented QHP issuers representing approximately one-third of the overall value of risk corridors claims. *Health Republic* ECF No. 84-1 ¶ 17. Thus, the second *Moore* factor also supports a finding of reasonableness.

3. The Risk of Nonrecovery

Victory was never a certainty in these and the other risk corridors cases. Success was dependent on a showing that Section 1342 created one of those "rare money-mandating obligation[s]" requiring the Government to make risk corridors payments to QHP issuers. *Me. Cmty.*, 140 S. Ct. at 1331. The Government vigorously opposed the claim, successfully securing dismissal of the same Section 1342 claim in other risk corridors lawsuits before multiple judges of the Court of Federal Claims. *See, e.g.*, *Me. Cmty. Health Options v. United States*, 133 Fed. Cl. 1 (2017); *Blue Cross and Blue Shield of N.C. v. United States*, 131 Fed. Cl. 457 (2017); *Land of Lincoln Mut. Health Ins. Co. v. United States*, 129 Fed. Cl. 81 (2016). Losses in the Federal Circuit, and that Court's later rejection of rehearing *en banc*, only compounded the risk of non-recovery. It would take a favorable decision by the Supreme Court to change the course.

As Objectors argue, the existence of multiple similar suits likely served to spread the risk, and the stays in *Health Republic* and *Common Ground* reduced the number of hours Class Counsel invested into risk corridors litigation at the trial court level. *See Health Republic* ECF No. 89 at 26, 29. But those factors do not significantly diminish the overall risk that the classes' Section 1342 claim would not succeed. *See Raulerson v. United States*, 108 Fed. Cl. 675, 678 (2013) (noting that "all litigation carries risk"). If anything, the consistent losses other firms faced in litigating the same claim increased the riskiness of any additional time Class Counsel spent on *Health Republic* and *Common Ground*. All totaled, Class Counsel accumulated 10,000 billable hours and assumed all litigation costs for which they may not have received any compensation at all had the outcome gone the other way. *Health Republic* ECF No. 84-1 ¶ 23. This factor, therefore, supports their fee request.

4. The Fee That Likely Would Have Been Negotiated Between Private Parties in Similar Cases

That Class Counsel are seeking a fee of only five percent weighs heavily in favor of reasonableness when compared to other fee awards in typical common fund cases. It is not atypical to find attorneys "regularly contract[ing] for contingent fees between 30% and 40% in non-class, commercial litigation." *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 123 (D.N.J. 2012); Decl. of Brian T. Fitzpatrick ¶ 23, ECF No. 84-2 ("[T]he most common percentages awarded by federal courts nationwide using the percentage method were 25%, 20% and 33%, with a mean award of 25.4% and a median award of 25%."). Fee awards in that range and higher have been awarded in class actions filed in the Court of Federal Claims. *See Raulerson*, 108 Fed. Cl. at 680 (approving a 33 percent fee on a $22 million settlement); *Quimby*, 107 Fed. Cl. at 134 (approving a 40 percent fee on a $74 million settlement).

More importantly, Class Counsel's five percent fee is also well below the market rate for attorney's fees in the risk corridors litigation. The 25 percent attorney's fee arrangement that Health Republic and Common Ground agreed to with Class Counsel before the certification of their respective classes reinforces this point, as do the higher rates sought by other firms representing QHP issuers. *See Health Republic* ECF No. 84-1 ¶ 8; *id.* ¶ 14 (averring that other firms' fee percentages were "in multiples" of Class Counsel's five percent fee); Suppl. Decl. of Stephen A. Swedlow ¶ 10, *Health Republic* ECF No. 93-2 (describing fees of 15 percent or more sought by other firms representing individual clients). Thus, by opting into the classes, Objectors received a substantial percentage reduction in the cost of pursuing their claims. The number of QHP issuers opting into the class after receiving notice of Class Counsel's maximum five percent fee suggests that many of the class members recognized the potential savings and considered the

requested fee to be at least a better deal than could be had by bringing their own individual lawsuits. *See Health Republic* ECF No. 84-1 ¶¶ 15–16; *Quimby*, 107 Fed. Cl. at 134.

The decision in *Quimby* affirms this analysis. There, using the same seven-factor test, the *Quimby* court approved a fee of 30 percent of a $74 million common fund largely because the fee award was in line with what would have been negotiated in similar cases. *Quimby,* 107 Fed. Cl. at 134. Although the size of the award gave the court some pause due to the unique circumstances in that case, it ultimately reasoned that "[a] contingent fee that is reached by the free consent of private parties should be respected as fair as between them." *Id.* In its discussion, the court emphasized the fact that the class members assented to the 30 percent fee arrangement by opting into the class after receiving notice that counsel would seek that fee. *Id.* "[B]y opting into the class, each member effectively accepted the offer of representation for a thirty percent contingency fee, and presumably concluded that a better deal could not be reached with their own counsel." *Id.*; *cf.* Restatement (Third) of the Law Governing Lawyers § 34 cmt. C. (Am. Law Inst. 2007) ("Fees agreed to by clients sophisticated in entering into such arrangements (such as a fee contract made by inside legal counsel in behalf of a corporation) should almost invariably be found reasonable.").

Similar reasons militate for the approval of Class Counsel's full fee request. First, Objectors, like the class members in *Quimby*, acted affirmatively to join the classes in these cases. *See Haggart v. United States*, 89 Fed. Cl. 523, 530 (2009) ("[F]or an opt-in class action [under RCFC 23], each participating member of the class must act affirmatively to participate . . ."). They did so after being fully advised by the class notices that Class Counsel would seek no more than five percent of any recovery. *See, e.g.*, *Health Republic* ECF No. 50-1 at 6; *Health Republic* ECF No. 84-1 ¶ 15. And they did so notwithstanding that there was a market for private counsel

representing individual QHP issuers with risk corridors claims. Notably, the class members in these cases consist of sophisticated entities with access to in-house legal counsel. *See Health Republic* ECF No. 84-1 ¶ 21; *Health Republic* ECF No. 93 at 26. As issuers of insurance plans, the class members are no strangers to the task of determining what costs are acceptable to bear relative to the risks involved in a particular venture. Objectors' affirmative choice to join these cases and pay, at most, the five percent fee identified in the class notices points strongly in favor of approving Class Counsel's fee.[5]

Two representations in Class Counsel's class notice need addressing, however. The notice stated that "the fee *may* be substantially less than 5% depending upon the level of class participation" and asserted that the fees would be subject to a lodestar cross-check. *See, e.g.*, *Health Republic* ECF No. 50-1 at 6 (emphasis added). Objectors point out that Class Counsel concede they achieved substantial class participation, which Objectors argue justifies reducing the percentages. *Health Republic* ECF No. 89 at 29 (quoting *Health Republic* ECF No. 84-1 ¶ 17). As the language of the notices makes clear, however, a reduction was not guaranteed. Nor would Class Counsel have authority to make such a guarantee because the ultimate decision to reduce a requested fee percentage, if at all, rests within the Court's discretion—whether based on class participation or through use of the lodestar cross-check.[6]

---

[5] Objectors emphasize the lack of a formal written agreement to a five percent fee, but that fact is not determinative. Given the circumstances discussed above, and consistent with *Quimby*, "by opting into the class, each member effectively accepted the offer of representation" for, *at most*, a five percent contingency fee. *Quimby*, 107 Fed. Cl. at 134.

[6] As additional context, Class Counsel state that at the time of the notice's issuance, they were involved in settlement negotiations with the Government for the entire risk corridors liability, not just the parties represented in *Health Republic*. Had a settlement been reached, it would have resulted in $10 billion in settlement proceeds at a time when Class Counsel had spent $2 million litigating *Health Republic*. *Health Republic* ECF No. 93-2 ¶ 3; *see* ECF No. 84-1 ¶ 10. Consequently, Class Counsel issued the supplemental notice in anticipation of an early settlement

In sum, especially where the other factors favor Class Counsel's five percent fee, there is little reason for the Court to step in to protect the interests of sophisticated entities who made a considered decision to join these cases and, as a result, will enjoy—even at the max rate of five percent—considerably lower costs than if they pursued their claims individually.

5. The Percentage Applied in Other Class Actions

A five percent fee is low compared to those awarded in numerous other class actions. *Health Republic* ECF No. 84 at 31–32 (collecting cases); *see Health Republic* ECF No. 84-2 ¶¶ 23, 26; *see also* Decl. of Charles Silver ¶¶ 49, 75–77, *Health Republic* ECF No. 84-3. Other judges of the Court of Federal Claims have previously acknowledged that "an award equal to one third of the common fund is commensurate with attorney fees awarded in other class action common fund cases." *Kane Cty.*, 145 Fed. Cl. at 19; *see Raulerson*, 108 Fed. Cl. at 680; *Moore*, 63 Fed. Cl. at 787. And multiple circuit courts have adopted benchmarks of between 20 and 30 percent for calculating percentage awards. *See Moore*, 63 Fed. Cl. at 787 (collecting cases and concluding that one-third of the common fund is a typical recovery).

Even in megafund cases such as this, where courts often decrease the percentage awarded as the size of class recovery increases, a five percent fee is well within the reasonable range of fees sought and, in fact, is on the low end of what is traditionally awarded. *See In re Payment Card Interchange Fee and Merch. Disc. Antitrust Litig.*, 991 F. Supp. 2d 437, 445 (E.D.N.Y. 2014) (10 percent fee was justified for awards between $1–2 billion, and eight percent fee was justified for awards between $2–4 billion); *Health Republic* ECF No. 84-2 ¶ 26 (table of billion-dollar class

---

and a reduction in their fee award due to the quick resolution of the entire risk corridors claims. *Health Republic* ECF No. 93-2 ¶ 3. Although a reduction may very well have been appropriate under those circumstances, the early settlement never materialized.

action awards and accompanying fee percentages); *Health Republic* ECF No. 84-3 at 182–83 (table of cases involving megafund percentage awards).

Accordingly, this factor weighs in Class Counsel's favor.

6. The Size of the Award

Where a successful lawsuit results in a multi-billion-dollar award, even a minute fee percentage can result in a sizeable award to counsel, the case at hand being such an example. In a vacuum, Class Counsel's proposed fee results in a seemingly massive award of approximately $185 million. But comparing that amount to the almost $3.7 billion awarded to the class members demonstrates the reasonableness of the request and weighs heavily in the Court's analysis. *See Raulerson*, 108 Fed. Cl. at 680 (comparing the size of the fee in relation to the size of the award).

Not surprisingly, the bulk of Objectors' arguments relate to this factor. Instead of the five percent Class Counsel seek, Objectors argue that an award of $8.8 million would be generous and any amount above $20 million would be "patently unreasonable." *Health Republic* ECF No. 89 at 28. As Class Counsel point out, the $8.8 million figure represents .22 percent of the common fund. *Health Republic* ECF No. 93 at 19.

Before addressing some of Objectors' arguments for reducing Class Counsel's fee, identifying exactly what Objectors are requesting is useful. With a little basic math it becomes evident that Objectors are seeking to pay an infinitesimal portion of their recovery to Class Counsel in attorney's fees. Take Rocky Mountain Health Maintenance Organization, Inc., for example, who seeks to pay fees of approximately $109,000 from its combined $49.5 million dollar judgment. *See Health Republic* ECF No. 83-1 at 6; *Common Ground* ECF No. 111-1 at 6. Or take Kaiser Foundation Health Plan Inc. of Colorado, who having received $141 million, now seeks to pay approximately $310,000 to Class Counsel. *See Health Republic* ECF No. 83-1 at 5; *Common*

Ground ECF No. 111-1 at 5. Notably, Objectors do not draw attention to the fact that their requested reductions would result in a .22 percent attorney's fee in exchange for the 100 percent recovery they obtained.

As explained above, the Court has determined that the percentage-of-the-fund is the proper approach to evaluate the reasonableness of Class Counsel's fee request. Accordingly, most of Objectors' specific arguments are irrelevant. The Court will nevertheless pause to address a few reasons why a reduction of fees is not justified.

a) Detailed Billing Records

First, Objectors contend that Class Counsel's fee request should be reduced because they provided only a declaration with a one-paragraph summation of their lodestar rather than submitting detailed billing records. *Health Republic* ECF No. 89 at 15. Extrapolating from decisions in several fee-shifting cases, Objectors assert that a 35 percent reduction in Class Counsel's lodestar is therefore warranted. *Id.* at 17–18 (citing *Am. Rena Int'l Corp. v. Sis-Joyce Int'l Co., LTD.*, No. CV 12-6972 FMO (JEMx), 2015 WL 12732433 (C.D. Cal. Dec. 14, 2015)). The Court finds the amount of Objectors' proposed reduction to be largely arbitrary and agrees with Class Counsel that detailed billing records are not required where the percentage-of-the-fund, or even the lodestar cross-check, is employed. *See In re Rite Aid Corp. Sec. Litig.*, 396 F.3d at 306 ("The lodestar cross-check calculation need entail neither mathematical precision nor bean-counting."); *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 465 n.18 (D.P.R. 2011) (using "the Court's common sense, experience, and familiarity with this case" to find that expending over 30,000 billable hours was reasonable without reviewing detailed billing records).

To the extent Objectors rely on fee-shifting cases (where the lodestar method is required) to argue for the necessity of detailed billing records, their argument is unavailing. *See Health*

Republic ECF No. 89 at 16 (collecting cases). Unlike in fee-shifting cases where the court must determine the *additional* amount a losing defendant must pay to compensate the plaintiff's attorneys, in common fund cases there is "no direct or immediate danger of unduly burdening the defendant," making rigorous scrutiny of billing records unnecessary.[7] *See Applegate v. United States*, 52 Fed. Cl. 751, 761 (2002) (quoting *Skelton v. Gen. Motors Corp.*, 860 F.2d 250, 254 (7th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989)). Instead, even if the Court were applying the lodestar method as a cross-check, it could simply determine the reasonableness of the fee based on its familiarity with the case. *Goldberger v. Integrated Res.*, 209 F.3d 43, 50 (2d Cir. 2000); *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d at 465 n.18.

b) The Lodestar Multiplier

Objectors argue that the fee sought by Class Counsel is unreasonable because it represents a multiple of 18–19 times their $10 million lodestar, and thus should be reduced after a cross-check of the percentage. *Health Republic* ECF No. 89 at 20, 24; *see Health Republic* ECF No. 84-1 ¶ 23. Objectors argue that a multiplier of two is commensurate with the work performed by Class Counsel. *Health* Republic ECF No. 89 at 24–25. Choosing a multiplier between the parties' opposing data points seems a relatively arbitrary exercise, at least compared to the multi-factor analysis performed above. Although Class Counsel concede that their requested fee results in an uncommonly high payout, they point to several cases where courts have approved similar or larger multipliers. *See Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, No. Civ. A. 03-4578, 2005 WL 1213926, at *18 (E.D. Pa. May 19, 2005) (multiplier of 15.6); *In re Merry-Go-*

[7] For the same reasons, the Court is not bound to use the *Laffey* Matrix here, as it was created to assist in analyzing awards under a fee-shifting statute. *Adolph Coors Co. v. Truck Ins. Exch.*, 383 F. Supp. 2d 93, 98 (D.D.C. 2005) ("[T]he *Laffey* Matrix, published by the United States Attorney's Office, is a concession by that office of what it will deem reasonable when a fee-shifting statute applies and its opponent prevails and seeks attorneys' fees.").

Round Enters., Inc., 244 B.R. 327, 335, 345 (D. Md. 2000) (multiplier of 19.6); *Am.'s Mining Corp. v. Theriault*, 51 A.3d 1213, 1252 (Del. 2012) (multiplier of 66, though no cross-check was conducted). Therefore, even if the Court applied the lodestar cross-check, a multiplier of 18–19 would, at least, not be outside the realm of reasonableness.

7. Objections to the Fee Request

Of the hundreds of class members in *Health Republic* and *Common Ground*, the Court received one substantive objection on behalf of 34 entities belonging primarily to two organizations: UnitedHealthcare (23 of the 34 entities) and Kaiser Foundation Health Plan (four of the 34 entities). *See Health Republic* ECF No. 89 at 8, 30; *Health Republic* ECF No. 93-2 ¶ 2. In total, nine individual organizations object to Class Counsel's request for a five percent fee. *See Health Republic* ECF No. 89 at 30. Although larger than those involved in other percentage-of-the-fund cases in this court, the number of objections is relatively low when viewed in the context of the classes here. *See, e.g.*, *Lambert*, 124 Fed. Cl. at 683–84; *Quimby*, 107 Fed. Cl. 126 at 134. According to Class Counsel, putting Objectors aside, 90 percent of the organizations whose entities opted into these suits, representing approximately $2.1 billion in damages, do not object to the fee. *Health Republic* ECF No. 93 at 7 n.1. Consequently, the final factor likewise supports the determination that Class Counsel's fee request is reasonable.

B. The Requested Incentive Awards Are Denied.

Lastly, Class Counsel ask that the Court approve two awards of $100,000 each to the named Plaintiffs, Health Republic and Common Ground. *Health Republic* ECF No. 84 at 38–39. Although not frequently addressed in the Federal Circuit, other courts have generally recognized that whether to approve an incentive award in a class action is a matter of the court's discretion. *See Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009); *Dial Corp. v. News*

Corp., 317 F.R.D. 426, 439 (S.D.N.Y. 2016); *Radosti v. Envision EMI, LLC*, 717 F. Supp. 2d 37, 52–53 (D.D.C. 2010).

As Class Counsel note, other courts have with some frequency found it appropriate to approve incentive awards to named plaintiffs in class actions as a reward for the benefits they conferred to the class and the burdens they bore as class representatives.[8] *See Health Republic* ECF No. 84 at 39 (citing *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 BMC JO, 2012 WL 5289514, at *11 (E.D.N.Y. Oct. 23, 2012)). But the circumstances in which those courts have granted incentive awards differ substantially from the circumstances at hand. Unlike the cases Class Counsel cite, where requests for incentive awards were granted as part of a court's broader approval of a class settlement and (importantly) were paid from the settlement fund, Class Counsel are requesting the awards to Health Republic and Common Ground be paid directly from their fee. Approval of incentive awards in the latter scenario is much rarer. *See* 5 Newberg on Class Actions § 17:5 (5th ed.) ("In some rare cases, courts have alluded to the idea that incentive awards may be [] paid by class counsel out of their fees and expenses." (collecting cases)).

This Court has concerns about the propriety of approving incentive awards paid from Class Counsel's fee. The Model Rules of Professional Conduct prohibit the sharing of attorney's fees with nonlawyers. *See* MODEL RULES OF PRO. CONDUCT R. 5.4(a) (AM. BAR ASS'N 2021). Similar rules exist in jurisdictions that likely govern Class Counsel's representation in the instant cases. *See, e.g.*, D.C. RULES OF PRO. CONDUCT R. 5.4(a) (2021); ILL. SUP. CT. R. 5.4(a) (2021); CAL. RULES OF PRO. CONDUCT R. 1-320(a) (2018). Other courts have reached different conclusions on

[8] On the other hand, incentive awards appear to be an infrequent issue in this court. Class Counsel have cited to only one case where a judge of the Court of Federal Claims approved an incentive award. *Health Republic* ECF No. 84 at 38 (citing *Russell v. United States*, 132 Fed. Cl. 361, 365 (2017) (approving incentive awards as part of class settlement)).

whether professional rules of conduct bar such awards. *Compare In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3960068, at *32 (N.D. Cal. Aug. 17, 2018) (declining to award incentive awards from attorney's fee, which "may run afoul of ethical rules," and instead directing payment of awards from the class settlement fund), *with In re Presidential Life Sec.*, 857 F. Supp. 331, 337 (S.D.N.Y 1994) (awarding incentive awards from attorney's fees and declining to enforce rule against fee-sharing where concerns of corruption were not at play). Regardless, this Court declines to exercise its discretion in a manner that would potentially sanction the violation of ethical rules, especially where the relevant rules do not recognize an exception for an attorney to share court-awarded fees with its client in the case for which the fees were awarded. *See In re UnumProvident Corp. Derivative Litig.*, No. 1:02-CV-386, 2010 WL 289179, at *8 (E.D. Tenn. Jan. 20, 2010) (noting lack of ethical concern with incentive award paid from attorney's fees given exception provided in applicable ethics rules but noting the "problematic nature" of such arrangement). Because the judgments have already been disbursed from the common fund to the Non-Dispute Subclasses (less five percent for potential attorney's fees), there is no alternate source of funds available from which the Court could consider making the incentive awards.

Consequently, Class Counsel's request for incentive awards to Health Republic and Common Ground is denied.

III. CONCLUSION

For these reasons, the Court finds Class Counsel's request for a five percent attorney's fee to be reasonable. Accordingly, Plaintiff's Motions (*Health Republic* ECF No. 84; *Common Ground* ECF No. 107) are **GRANTED** as to the fee request. Having determined pursuant to RCFC 54(b) that there is no just reason for delay, the Court directs the Clerk to enter judgment in *Health Republic* in the amount of $95,183,102.35 to be paid to Class Counsel from the Non-Dispute

Subclass fund. The Clerk is likewise directed to enter judgment in *Common Ground* in the amount of $89,665,569.32 to be paid from the Non-Dispute Subclass fund. Class Counsel's request to pay $100,000 incentive awards from their fees to Health Republic and Common Ground, respectively, is **DENIED**.

SO ORDERED.

Dated: September 16, 2021

/s/ Kathryn C. Davis
KATHRYN C. DAVIS
Judge

In the United States Court of Federal Claims

No. 16-259 C
Filed: September 17, 2021

HEALTH REPUBLIC INSURANCE COMPANY

v.

RULE 54(b) JUDGMENT

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed September 16, 2021, granting Class Counsel's motion for approval of attorney's fees request, denying Class Counsel's request for an incentive award, and directing the entry of judgment pursuant to Rule 54(b), there being no just reason for delay,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that Class Counsel is awarded $95,183,102.35 in attorney's fees to be paid to Class Counsel from the Non-Dispute Subclass fund.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

In the United States Court of Federal Claims

No. 17-877 C
Filed: September 17, 2021

COMMON GROUND HEALTHCARE COOPERATIVE

v.

RULE 54(b) JUDGMENT

THE UNITED STATES

Pursuant to the court's Opinion and Order, filed September 16, 2021, granting Class Counsel's motion for approval of attorney's fees request, denying Class Counsel's request for an incentive award, and directing the entry of judgment pursuant to Rule 54(b), there being no just reason for delay,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that Class Counsel is awarded $89,665,569.32 in attorney's fees to be paid to Class Counsel from the Non-Dispute Subclass fund.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Circuit Rule 32(b)(1). This brief contains 8,683 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: January 28, 2022 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *_/s/Moe Keshavarzi_*
MOE KESHAVARZI
JOHN BURNS
MATTHEW G. HALGREN
Attorneys for Appellants