IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

PLAINTIFF COMMON GROUND'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR CERTIFICATION OF THE COST-SHARING REDUCTION CLASS

I. PRELIMINARY STATEMENT

In its opposition brief, Defendant the United States (the "Government") does not contest that the putative cost-sharing reduction class (the "CSR Class") satisfies almost all of the requirements for class certification under Rule 23 of the Rules of the Court of Federal Claims ("RCFC"). Specifically, the Government does not dispute that the putative class exhibits numerosity, commonality (including common issues, similar treatment by the Government, and predominance of common issues), typicality and adequacy of representation with lack of conflicts. The Government's failure to contest these factors is remarkable because these characteristics are the hallmarks possessed by similarly-situated plaintiffs with a strong basis to proceed as a unified class.

The Government's opposition instead focuses on a very narrow issue—whether a class action is "superior" to numerous individual actions. According to the Government, it is not, because a class action "may … lead[] to multiple-complex mini-suits each requiring individual damages determinations." Opp. at 2. In making this argument, however, the Government does not contest that the liability determination in each of these "mini-suits" will be exactly the same. Nor does the Government explain why it will advance "the efficiency and economy of litigation" (*see* Opp. at 2) to crowd the Court's docket with hundreds of separate lawsuits. Rather, it argues solely that the determination of damages for the plaintiffs may be individualized.

As courts from the Supreme Court down have recognized, individualized damages issues are not relevant to class certification when all other certification requirements exist and common liability issues predominate. Thus, even assuming the Government was correct in its individualized damages theory—which, as discussed below, it is not—that issue is completely irrelevant to the issue now before the Court; *i.e.*, whether to certify the putative CSR Class. The Government's only argument against class certification is thus deficient as a matter of law and

should be rejected. Plaintiff Common Ground Healthcare Cooperative ("Common Ground") therefore respectfully requests that the Court certify the CSR class.

II. ARGUMENT

A. Where, as Here, Common Liability Issues Predominate, Individualized Damages Inquiries Have No Bearing on Class Certification

"Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal." *Comcast Corp. v. Behrend*, 569 U.S. 27, 42 (2013) (Ginsburg and Breyer, JJ., dissenting) (collecting citations). The Court of Federal Claims has repeatedly recognized this fact, certifying multiple different classes—and finding they are superior to other forms of adjudication—when the primary difference between class members is simply the amount of their respective damages. *See*, *e.g.*, *DeMons v. U.S.*, 119 Fed. Cl. 345, 355 (2014) (certifying class where the only real difference between class members was the amount of their damages, and noting that such individualized determinations do not preclude class certification); *Haggart v. U.S.*, 89 Fed. Cl. 523, 535 (2009) (same); *Barnes v. U.S.*, 68 Fed. Cl. 492, 498 (2005) (certifying class and noting "there scarcely would be a case that would qualify for class status in this court" if the need to determine damages on an individual basis precluded class certification.).

Here, there is literally no dispute that all putative CSR Class members have the same exact damages theory; *i.e.*, that the Government must pay all outstanding CSR amounts (which it has long acknowledged it must pay, and did so for years under the theory that the ACA provided an implied permanent appropriation for the CSR program). The unpaid CSR amounts will be proven using information from the Government's own files, likely a single spreadsheet. Nowhere in its opposition brief does the Government argue otherwise. *See* Opp. at 9-13.

Instead, the Government contends that "many"—not all—QHP issuers "may have"—but

not definitely—suffered "little to no harm" because "their CSR liabilities [which they must provide by law] are being offset by 2018 premiums that were raised in connection with the cessation of CSR payments." Opp. at 2. Specifically, the Government argues that "many insurers have been able to recoup CSR payments for 2018 by raising premiums to account for the non-payment of CSRs and those higher premium costs are then paid for by the Government through increased premium tax credits." Opp. at 10, *citing California*, 267 F. Supp. 3d at 1137-38. The Government never explains how this qualifies as an offset, nor does it explain how these raised premiums might negate the Government's obligation to make CSR payments. The Government fails to make such a showing because it cannot.

At the outset, the Government's argument does not apply at all to losses incurred in 2017. As *California* (the only authority relied upon by the Government on this point) notes, these targeted 2018 premium increases—which only some states in the nation permitted—were implemented as an emergency measure to prevent widespread, catastrophic harm to insureds stemming from the Government's repeated failure to pay amounts owed under the ACA. *See California v. Trump*, 267 F. Supp. 3d 1119, 1134-1136 (N.D. Cal. 2017). They applied only to the 2018 calendar year. As such, they were never intended to and did not remedy the harm to insurers due to the Government's failure to make CSR payments for the final months of 2017. *Id.* at 1139 n.22. These amounts are due to the putative class members and currently owing.

With respect to 2018 CSR payments, the Government argues that the rate increases approved by certain states to protect QHP issuers from some of the damage caused by the Government's failure to make CSR payments somehow absolves it of liability to make CSR payments because the amount it paid out in tax credits increased. *See, e.g.,* Opp. at 12. This

argument is completely wrong.[1] This Court does not, however, have to address that issue at this juncture because it is entirely irrelevant to class certification. The only question, according to the Government itself, is whether and to what extent 2018 damages exist for each class member. As noted above, however, individualized damages issues simply do not act as a bar to class certification where all other requirements are met. Here, the Government implicitly concedes (as it must) that liability for each of the CSR class members' claims depends on identical legal and factual issues. Common issues therefore predominate, *see DeMons*, 119 Fed. Cl. at 355; *Haggart*, 89 Fed. Cl. at 535; *Barnes*, 68 Fed. Cl. at 498, and the Government identifies no reason to believe that Common Ground has failed to satisfy any of the other class certification requirements.[2]

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[1] Section 1402 of the ACA, codified at 42 U.S.C. § 18071, states the Government "***shall make*** periodic and timely payments to the issuer equal to the value of the [cost-sharing] reductions" the QHP issuer provided its qualifying plan members. 42 U.S.C. § 18071(c)(3)(A) (emphasis added). This is clearly money-mandating. *See Britell v. U.S.*, 372 F.3d 1370, 1378 (Fed. Cir. 2004) ("[T]his type of mandatory language, e.g., 'will pay' or 'shall pay,' creates the necessary 'money mandate' for Tucker Act purposes."). The statute nowhere provides any reduction to that owed amount based on the premiums a QHP issuer charges its plan members. *See generally* 42 U.S.C. § 18071.

Although not the focus of this motion, the Government has not identified (and will not be able to identify) any statutory provision eliminating or reducing its CSR reimbursement obligation when states—as emergency measures designed to mitigate the damage the Government seems intent on causing the ACA exchanges—permitted some QHP issuers to raise premiums on silver plans.

To the extent the Government is claiming some sort of set-off defense, that only applies where each party ***owes each other money***. *See Local Oklahoma Bank, N.A. v. U.S.*, 59 Fed. Cl. 713, 721 (2004), *aff'd*, 452 F.3d 1371 (Fed. Cir. 2006). Here, the Government does not claim CSR Class members owed it anything as a result of the higher premiums they were allowed to charge. Set-off therefore does not apply as a matter of law. Even if it did, however, the Government is required to affirmatively establish "(i) a decision to effectuate a set-off, (ii) some action accomplishing the set-off, and (iii) a recording of the set-off." *Id.* (collecting citations). Common Ground is unaware of the Government ever taking such actions, and the Government does not claim in its opposition brief that it ever did so. Thus, even if the Government claimed some QHP issuers owed it some amounts as the result of their higher premiums (which it does not, *see generally* Opp.), as a matter of law, a set-off defense is unavailable.

[2] Even if the Government's brief could be construed to argue that some class members may not have a viable claim because they no longer have damages, that is not a bar to class certification, either. *See Rasmuson v. U.S.*, 91 Fed. Cl. 204, 215 (2010) ("A motion to certify class action under RCFC 23 does not require Plaintiff to establish liability.").

For these reasons, the Government's primary argument against class certification fails.

B. A Class Action is Far Superior to Hundreds of Individual, Consolidated Suits

As Common Ground noted in its opening brief, the superiority requirement focuses primarily on three factors, including "class members' interests in individually controlling the prosecution of separate actions," the "extent and nature of any litigation concerning the controversy already begun by class members," and "the likely difficulties in managing a class action." Br. at 27 (citing RCFC 23(b)(3)). At its core, this requirement is a cost-benefit analysis weighing "the manageability or fairness of a class action against the benefits to the system and the individual members likely to be derived from maintaining such an action." *Id.* (citing *Geneva Rock Products, Inc. v. U.S.,* 100 Fed. Cl. 778, 790 (2011)). Superiority is met when "'a class action would achieve economies of time, effort, and expenses, and promote uniformity of decisions as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Barnes*, 68 Fed. Cl. at 499 (quoting Fed. R. Civ. P. 23 advisory committee's note (1966 amendment, subdivision (b)(3))).

The Government provides no argument suggesting that class members have strong interests in litigating their own separate actions. *See generally* Opp. at 9-11. Nor does it argue—because it cannot—that numerous individual class members have filed their own lawsuits regarding CSR payments; indeed, the Government admits Common Ground was the first such plaintiff and only a handful of other QHP issuers have followed suit. *Id.* at 7. The evidence is that QHP issuers largely prefer to proceed in a class action on these types of claims. In the *Health Republic* risk corridors class action, 149 QHP issuers with nearly $2.2 billion in unpaid 2014 and 2015 risk corridor amounts elected to opt into the class rather than file individual lawsuits. This demonstrates the strong desire within QHP issuer ranks to proceed as part of a class and enjoy the efficiencies and economies of scale that brings.

The only superiority factor the Government addresses is the manageability of a class action in comparison to other forms of adjudication. It is more efficient, the Government argues, to consolidate separate, individual CSR cases than to have them proceed as a single class action. *Id.* at 10 ("Common Ground has not shown that RCFC 42, which authorizes the Court to consolidate matters involving common issues, is a less effective mechanism for considering CSR claims").

As an initial matter, the Government's conduct to date belies this argument. QHP issuers have filed several risk corridors lawsuits, yet the Government never moved to consolidate them under RCFC 42. Nor did the Government contest class certification of risk corridors classes in *Health Republic* or here, despite what it now claims is the supposed inferiority of that mechanism. With respect to CSR claims—which the Government concedes involve substantially overlapping legal issues and class members as the risk corridors lawsuits, *see* Opp. at 11-13—the Government similarly has not moved to consolidate the cases. As all this tellingly shows, the alternative the Government now advocates as "superior" to a class action is one it has not sought in over two years of litigation, and expressly waived with respect to two separate classes that substantially overlap with the putative CSR Class in terms of membership and incentives.

Instead of a class action, the Government proposes that QHP issuers with CSR claims file independent lawsuits, which can then be consolidated before this Court. In essence, the Government argues that QHP issuers should be forced to hire separate lawyers, spend time and money drafting their own complaints, pay filing and other related fees, generate a new index number with each case, and then either file a motion to consolidate their individual action with this case or force the Government to file its own motion requesting that relief. All of this,

according to the Government, will be more efficient, fair, and thus "superior" to a class action in which putative class members simply fill in a form to opt into a class with counsel who has been at the forefront of this litigation for over two years. Respectfully, the Government's position makes no sense, and it has been rejected in past cases. *See*, *e.g.*, *Filosa v. U.S.*, 70 Fed. Cl. 609, 622 (2006) (given similarly situated class members, "there is little benefit to having each proposed class member retain counsel, pay filing fees, and submit duplicative pleadings"); *see also* Opp. at 2 (admitting the purpose of the class action format is to maximize "the efficiency and economy of litigation").

Where "[a]ll plaintiffs are affected by the same [Government action], the defenses the government will likely use in response to plaintiffs' claims should be identical, and the law which the court will apply to resolve plaintiffs' claims should also be identical," a class action is clearly superior. *Haggart*, 89 Fed. Cl. at 535. This is particularly so where, as the Government argues as its sole objection to superiority here, the "most significant difference between individual claims likely will concern the amount of damages that should be awarded to individual plaintiffs should the government be found liable." *See id.* at 535-536. As discussed above, *see* Section II.A, "differences in individual damages are not determinative of class certification" and therefore do not affect a class action's superiority, particularly where, as here, notice "can be provided relatively easily." *Haggart*, 89 Fed. Cl. at 535-36; *see also Curry v. U.S.*, 81 Fed. Cl. 328, 338 (2008) (finding class action superior because, *inter alia*, "[i]f the Court were to subsequently determine, after all class members have opted-in, that damages needed to be determined on an individual basis, the class certification could be altered to cover just the issue of liability, under RCFC 23(c)(4)(A), and separate damages trials could be held").

C. There is No Reason to Defer Class Certification

The Government's final request is to defer the decision on class certification to some

unspecified point in the future. This request should be denied for several reasons.

First, the Government's suggestion (at 13) that the Federal Circuit's opinion in *Land of Lincoln* and/or *Moda* "may go far toward resolving the common legal question as to whether an insurer can recover CSR payments absent an appropriation by Congress" demonstrates why class certification is appropriate now. This issue, *by the Government's own admission*, is a "common legal question" to the entire CSR Class. Given that the purpose of class actions is to enhance (among other things) "uniformity of decision," *Barnes*, 68 Fed. Cl. at 499, it is exactly because the Federal Circuit's opinion may have some common bearing on the class that class members should be permitted to opt in now and more efficiently pursue their claims together.[3]

Second, the Government's request that this Court defer to the Northern District of California in *California v. Trump* should be given short shrift. As an initial matter, that case is solely about whether an appropriation *currently* exists to pay CSR amounts. If no such appropriation exists (as the District of Columbia already found), then the states' Administrative Procedure Act claim and requested relief fails. *California*, 267 F. Supp. 3d at 1121.[4] As the *California* Court expressly noted (albeit in *dicta*), QHP issuers have not been paid *at least* 2017 CSR amounts, and they can pursue those amounts under the jurisdiction conferred by the Tucker Act. *Id.* at 1139 n.22. Throughout its opinion, the *California* Court noted that the Government has unquestionably violated its clear obligation to pay CSR amounts. *Id.* at 1123 ("the [Affordable Care] Act ***requires the federal government to compensate the insurance companies***

[3] Notably, the Court has already stayed this case on the merits for the exact reason that *Land of Lincoln* and/or *Moda* may have some substantive impact on the claims. *See* Dkt. 9. Nevertheless, the Court permitted class certification briefing to proceed. Dkt. 12.

[4] "The legal problem in this case is that while the Act requires the insurance companies to be paid, it's unclear whether the Act actually appropriated money for these payments. If Congress doesn't appropriate money for a program, the Constitution prohibits the executive branch from spending money on that program—even if Congress previously enacted a statute requiring the expenditure."

for those [cost-sharing] reductions"), 1124 ("[The ACA] required the insurance companies to give people the [cost-sharing] reductions, and it ***required the federal government to pay the insurance companies in advance for these reductions***, but it did not explicitly make a permanent appropriation for the CSR payments to the insurance companies"), 1129 ("The cost-sharing reduction program requires the insurance companies to lower the amount consumers must pay out of pocket, and in turn ***requires the federal government to pay the companies for the reductions***"), 1133 ("In sum, ***the Affordable Care Act requires the federal government to pay insurance companies to cover the cost-sharing reductions. The federal government is failing to meet that obligation***.") (emphases added). It is ironic the Government relies on the *California* opinion here, because it clearly lays out why the Government is liable to the CSR Class members.[5]

If the Government would like to move to stay this case in favor of *California*, it should do so, and, in that motion, it should explain how its request satisfies the requirements for such a stay. But the Government has not taken any such steps. Instead, it claims only that *California* "might" provide "persuasive" (*i.e.*, non-binding) guidance regarding whether appropriations are available to pay CSR amounts. Given the CSR Class members clearly have ripe claims, the Government provides no reason why, in the meantime, they should be foreclosed from opting into a class to jointly pursue those claims, especially where the Government asserts no appropriation for CSR payments exists and it need not pay amounts owed by law.

III. CONCLUSION

For all the foregoing reasons, Common Grounds respectfully reiterates its request that the

[5] Although Common Ground generally disagrees with much of the *California* Court's conclusions about irreparable harm, the opinion does provide a good synopsis of CSRs' position in the broader ACA scheme, and the goal of the program. *See generally id.* at 1122-1126.

Court certify the CSR Class, just as it did without objection from the Government for the Risk Corridors Classes in this and the *Health Republic* case.

DATED: March 13, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 13, 2018, a copy of the attached Plaintiff Common Ground's Reply in Further Support of Its Motion For Certification of the Cost-Sharing Reduction Class was served via the Court's CM/ECF system on Defendant's counsel Marc S. Sacks.

/s/ Stephen Swedlow

Stephen Swedlow