

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 HEALTHCARE COOPERATIVE'S MOTION TO
APPOINT QUINN EMANUEL URQUHART & SULLIVAN, LLP AS CLASS COUNSEL**

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Plaintiff Common Ground Healthcare Cooperative (“Common Ground” or “Plaintiff”) respectfully requests that the Court grant Quinn Emanuel Urquhart & Sullivan, LLP’s (“Quinn Emanuel”) motion for appointment as Class Counsel under Rules of the United States Court of Federal Claims (“RCFC”) 23(c)(1)(B) and 23(g)(1).

PRELIMINARY STATEMENT

This is a putative class action against the federal government of the United States of America (“Government”), seeking to recover on behalf of Qualified Health Plan Issuers (“QHP Issuers”) the following amounts owed under the Affordable Care Act: (a) risk corridors amounts due for the 2016 benefit year, and (b) cost-sharing reduction (“CSR”) reimbursements. Common Ground has filed a motion for class certification of the Risk Corridors and CSR Classes parallel to this motion and requests that, pursuant to RCFC 23(c)(1)(B) and 23(g)(1), that the Court appoint Quinn Emanuel as Class Counsel for both classes.

Quinn Emanuel filed the first risk corridors case in the nation on behalf of Health Republic Insurance Company in a now-certified class action case in which Quinn Emanuel was appointed class counsel, and now has again filed the first case seeking unpaid 2016 risk corridor amounts, as well as the first CSR case. Several other QHP Issuers filed similar suits in this court and others, pursuing risk corridor payments for the 2014 and 2015 benefit years, but none have done so much to benefit so many QHP Issuers as Quinn Emanuel. The upcoming Federal Circuit argument that prompted the stay in this and the *Health Republic* action will address conclusions this Court reached after Quinn Emanuel briefed its opposition to the Government’s motion to dismiss. That appeal will also resolve the legal and factual arguments that Quinn Emanuel first brought to light in the *Health Republic* class action and continues to pursue here for an additional class of QHP Issuers. One hundred forty-nine separate QHP Issuers opted into the *Health*

Republic class, representing over \$2 billion in unpaid risk corridor amounts. Assuming the Court certifies the Risk Corridors Class here, a similar or higher number of issuers are expected to once again opt in.

This case also addresses unpaid CSR reimbursements, which, more than perhaps any other promised payment from the ACA, are meant to benefit middle- and low-income Americans. By renegeing on its obligation to reimburse QHP Issuers for CSR payments, the Government is all but ensuring that issuers across the nation—those that have not left the ACA exchanges due to the Government’s failure to pay full risk corridor amounts—will need to raise premiums and cut back coverage on those who need affordable healthcare the most. Quinn Emanuel is at the forefront of ensuring such payments are made in full and on a timely basis, and the expertise it has developed in connection with the risk corridors claims translates directly to the CSR claims. In short, Quinn Emanuel is perfectly situated to act as counsel for the CSR Class, just as it is for the Risk Corridors Class.

In addition, there can be no dispute that the individual attorneys leading this litigation, as well as the law firm generally, collectively possess the experience and expertise to represent the interests of the class. The three primary Quinn Emanuel attorneys leading this litigation are experienced trial lawyers, have tried multiple class action cases to verdict, and have obtained several nine-figure class action and individual settlements. They have also all represented classes of health plan providers, similar to the putative classes in this case, in cost-recovery actions and have successfully resolved those cases through settlement and the claims administration process. As a firm, Quinn Emanuel, which is the largest firm in the United States devoted solely to business litigation, is consistently recognized as among the best law firms in the world and has won several awards specifically for its class-action practice.

Finally, as it has demonstrated in the *Health Republic* case and here, Quinn Emanuel is willing to invest the resources necessary to litigate this case through trial and beyond, as appropriate. Quinn Emanuel has committed its substantial resources to this case and will continue to zealously represent the interests of the putative classes.

For these reasons, and the others discussed below, Quinn Emanuel respectfully requests that the Court appoint it Class Counsel for both the Risk Corridors and CSR Classes.

STATEMENT OF THE ISSUES

1. Whether Quinn Emanuel Urquhart & Sullivan, LLP, should be appointed Class Counsel for the Risk Corridors Class and CSR Class.

STATEMENT OF THE CASE

Plaintiff Common Ground set forth a comprehensive summary of this action in its Amended Complaint, ECF No. 10 (“Am. Compl.”), and briefly summarizes the relevant facts here.

A. Risk Corridors Claim

The Affordable Care Act (“ACA”), enacted in March 2010, changed the face of healthcare in the United States. Among other things, the ACA established Health Benefit Exchanges, which enabled insurers to sell individual and small group plans, known as Qualified Health Plans (“QHPs”). *See* 42 U.S.C. § 18021. Because QHP Issuers had no data or tools to predict the needs of the newly insured beneficiaries signing up for plans starting in 2014, there was significant financial uncertainty regarding who would sign up for coverage and what the medical cost for caring for this new population would be. Am. Compl. ¶ 2. In order to mitigate the risk to insurers and incentivize them to offer QHPs, the ACA included three interrelated premium stabilization programs, known as the 3Rs: reinsurance, risk corridors, and risk

adjustment. 42 U.S.C. §§ 18061-18063; Am. Compl. ¶ 4.

A risk corridors program is designed to mitigate risk for participants in a new insurance market by limiting both unexpectedly high gains and losses. Am. Compl. ¶ 5; *see* 42 U.S.C. § 18062. Section 1342 of the Affordable Care Act contained two related mandatory terms for all QHP Issuers: (1) any QHP Issuer agreeing to operate on an exchange would receive compensation from the Government if its losses exceeded a certain defined amount due to high utilization and high medical costs; and (2) the QHP Issuers were required to pay the government a percentage of any profits they made over similarly defined amounts. *See* 42 U.S.C. § 18062; 45 C.F.R. § 153.510.

Despite these express and binding obligations, Congress has passed legislation aimed at blocking the Government's timely payments to the QHP Issuers pursuant to the risk corridors program. In the spending bills for 2015, 2016, and 2017, Congress included riders that prohibited the Government from paying risk corridors payments from the funds established for and/or appropriated to the Centers for Medicare & Medicaid Services ("CMS") and its parent department, the United States Department of Health & Human Services ("HHS"). Am. Compl. ¶¶ 8-9.

The practical effect of the Spending Bills was to prevent CMS and HHS from paying QHP Issuers their full risk corridors receivables due for 2014. Am. Compl. ¶ 10. When CMS and HHS were unable to pay the QHP Issuers their full risk corridors receivables for 2014, many QHP Issuers experienced cash flow problems and/or were unable to meet regulatory reserve requirements. Am. Compl. ¶ 11. This required QHP Issuers to make other efforts to satisfy their cash flow and reserve shortfalls, or risk going out of business. *Id.* Some companies were unable to remedy the cash flow and/or reserve shortfalls, and, as a consequence, went out of business.

Id. These problems continued for the 2015 benefit year and again for the 2016 benefit year. Am. Compl. ¶¶ 11, 50-54.

By this lawsuit, Plaintiff seeks, on behalf of itself and all others similarly situated, full payment of the risk corridors payments it and the putative class is entitled to under the ACA for the 2016 benefit year, and which the Government currently owes.

B. CSR Claim

In addition to the 3Rs, the ACA includes other features designed to make affordable health insurance coverage available to millions of Americans, including subsidies to reduce premiums and out-of-pocket costs for eligible individuals purchasing insurance on the exchanges. Am. Compl. ¶ 14. One such critical feature is the CSR reimbursements created by Section 1402 of the ACA. Pursuant to Section 1402, QHP Issuers reduce the amount eligible insureds pay in out-of-pocket costs, and in exchange, the Government reimburses QHP Issuers for those amounts. This makes health insurance for those insureds more affordable, a concept embodied in the very name of the Affordable Care Act.

Pursuant to Section 1402, QHP Issuers pay a portion of eligible insureds' out-of-pocket costs, such as deductibles, co-pays, and similar expenses, thereby reducing the amount the eligible insureds must pay. In exchange for offering QHPs in the ACA exchanges and abiding by Section 1402's requirements, Section 1402 states that the Government will reimburse QHP Issuers for any CSR payments they make. Specifically, the ACA requires that the Secretaries of HHS and the Treasury "***shall make*** periodic and timely payments to the [QHP] issuer equal to the value of the reductions." Pub. L. No. 111-148 § 1402(c)(3)(A) [42 U.S.C. § 18071] (emphasis added). Given this money-mandating requirement, Common Ground similarly seeks repayment of owed CSR amounts, beginning in October 2017.

ARGUMENT

I. QUINN EMANUEL IS QUALIFIED TO REPRESENT THE PUTATIVE CLASSES UNDER THE FACTORS ENUMERATED IN RCFC 23(g)(1)(A)

RCFC 23(c)(1)(B) and 23(g)(1) require the Court to designate counsel to act on behalf of a certified class. The factors used to determine whom to appoint class counsel are set forth in RCFC 23(g)(1)(A). These factors include: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class. RCFC 23(g)(1)(A). In addition to these factors, the Court should also look to whether the proposed class counsel will fairly and adequately represent the interests of the class. RCFC 23(a)(4).

Common Ground respectfully submits that Quinn Emanuel more than satisfies these criteria, as the Court held when it certified the class in the *Health Republic* case. However, for the sake of completeness, Common Ground explains the basis for its position below.

A. Quinn Emanuel Identified, Developed, and Brought the Claims at Issue in This Risk Corridors and CSR Reimbursements Action

Quinn Emanuel easily satisfies the first factor for appointment as class counsel. In late 2015, Quinn Emanuel became aware of the problems presented by the government's failure to make risk corridors payments to the putative class, including the widespread damage that failure has already caused, and continues to cause, the class and their insureds. Declaration of Stephen A. Swedlow in Support of Motion to Appoint Quinn Emanuel as Class Counsel ("Swedlow Decl.") ¶ 2. After investigating the history and substance of the ACA's risk corridors provisions, HHS's subsequent implementing regulations, and other facts related to the putative class's claims, Quinn Emanuel developed and filed the first risk corridors lawsuit anywhere in the

United States. *Id.* ¶ 3.

Since February 2016, when Quinn Emanuel filed this lawsuit on behalf of Health Republic and the now-certified class in that case, some QHP Issuers filed their own complaints alleging similar theories of liability. *Id.* ¶ 3. Many of the materials that Quinn Emanuel identified and cited in the class complaint were subsequently cited and used in these individual lawsuits, and the pending Federal Circuit appeals for which this and the *Health Republic* case have been stayed will address conclusions this Court reached after Quinn Emanuel briefed them in opposition to the Government’s motion to dismiss. *Id.* ¶ 3. Similarly, those appeals will resolve the factual and legal issues first identified in Quinn Emanuel’s complaint and fully briefed on summary judgment in *Health Republic*. *Id.* ¶ 3.

This action represents two additional firsts: (a) the first class action seeking risk corridor payments for the 2016 benefit year, and (b) the first case seeking unpaid CSR reimbursements on behalf of QHP Issuers.

Given Quinn Emanuel’s work in identifying, investigating, and prosecuting risk corridor and CSR claims, the first 23(g)(1)(A) factor weighs in favor of appointing Quinn Emanuel class counsel. *See, e.g., Steele v. United States*, No. CV 14-1523, 2015 WL 4121607, at *4 (D.D.C. June 30, 2015) (finding first factor established due to “extensive work laying the groundwork that made these cases possible”); *Buonasera v. Honest Co., Inc.*, No. 16 CIV. 1125(VM), 2016 WL 3647601, at *1 (S.D.N.Y. June 22, 2016) (same, for counsel that “conducted the first and ... the most exhaustive investigation” into the claims at issue) (quoting movant’s brief); *Brigiotta’s Farmland Produce & Garden Ctr., Inc. v. United Potato Growers of Idaho, Inc.*, No. 4:10-CV-307-BLW, 2010 WL 3928544, at *2 (D. Idaho Oct. 4, 2010) (same, given counsel’s “independent investigation” and “substantial research”).

B. Quinn Emanuel Is Highly Experienced in Class Actions and Complex Litigation of Similar Size and Scope.

As the largest firm in the nation devoted solely to business litigation—with over 700 litigators worldwide, including more than 80 in the firm’s District of Columbia office—Quinn Emanuel has been described as a “global force in business litigation” by the *Wall Street Journal* and a “litigation powerhouse” by *The American Lawyer*. Swedlow Decl. ¶ 7. Quinn Emanuel has also been recognized by *Legal Business* three times as “US Law Firm of the Year.” *Id.* And *The American Lawyer* named the firm in 2015 as a “Litigation Department of the Year: Finalist.” *Id.* Quinn Emanuel also was named “firm of the year” for Commercial Litigation in 2015 by the *Legal 500 USA Awards*. *Id.*

When representing plaintiffs, Quinn Emanuel has won over \$60 billion in judgments and settlements. *Id.* ¶ 8. Quinn Emanuel also tries more cases than almost any other major law firm. *Id.* The firm’s partners have first-chaired over 2,600 trials and arbitrations, and won over 88%, including five 9-figure jury verdicts. *Id.*

This case combines and will draw on the firm’s extensive previous experience in the *Health Republic* case, as well as the firm’s broader class action and healthcare practices, both of which are recognized as among the nation’s best. For example, in 2013 and 2016, Quinn Emanuel was named the “Class Action Practice Group of the Year” by *Law360* for its work for plaintiffs and defendants in class action litigation. *Id.* ¶ 9. Because more than half of the firm’s partners regularly represent clients in class actions, Quinn Emanuel’s lawyers have extensive knowledge of the procedural and litigation dynamics unique to class actions as well as expertise in the underlying substantive areas of law. *Id.*

The Quinn Emanuel partners leading this case are also deeply experienced in class action and healthcare law, regularly litigate complex cases such as this, and are more than qualified to

lead the putative class to a successful result against the Government.

Stephen Swedlow—Mr. Swedlow is the Managing Partner of Quinn Emanuel’s Chicago office. Swedlow Decl. ¶ 10. He has been lead counsel in over 20 trials, multi-party jury trials and arbitrations, argued (and won) appeals, including several before state Supreme Courts and federal appellate courts. *Id.* He has been lead trial counsel for two class action trials that went to verdict, and has been lead counsel for class action settlements of \$63 million and \$100 million for health plan class actions. *Id.* Mr. Swedlow was a Trial Lawyer of the Year finalist in 2003 for obtaining the largest civil verdict in Illinois history, and has been named an Illinois “Super Lawyer” from 2006-2016. *Id.*

J.D. Horton—Mr. Horton is a partner in Quinn Emanuel’s Los Angeles office and has represented health plans in civil and regulatory actions for almost 20 years. *Id.* ¶ 11. He has obtained settlements of \$40 and \$28 million on behalf of two health plan classes related to prescription drug purchases and represented the Kaiser Foundation Health Plan in multiple enforcement proceedings brought by the Department of Managed Health Care, including in a 40-day trial that ended with the Court rejecting virtually the entirety of the Department’s case. *Id.* Among many other health plan providers, he has represented Blue Shield of California in a declaratory relief action against the Department of Managed Health Care, as well as a major health care service plan in an arbitration against a large IPO. *Id.*

Adam Wolfson—Mr. Wolfson is a partner in Quinn Emanuel’s Los Angeles office, focusing on class actions and plaintiff-side litigation. *Id.* ¶ 12. He was one of the principal co-lead counsel for plaintiffs in *In re Polyurethane Foam Antitrust Litigation*, where he helped obtain more than \$430 million in settlements on behalf of a certified class in a case alleging a price-fixing conspiracy in the flexible polyurethane foam industry. *Id.* He also obtained a \$283

million patent infringement and breach of contract trial verdict in 2014 on behalf of ViaSat, Inc. relating to its competitor's theft of innovative intellectual property and satellite designs. *Id.* He is currently representing a putative class of consumers harmed by supracompetitive ATM fees set by collusion amongst Visa, MasterCard, and their constituent bank investors, and is also representing a putative class of models in relation to breach of contract and Labor Law claims arising out of their misclassification as independent contractors by the nation's top modeling agencies. *Id.*

In addition to these particular attorneys, the many other attorneys with varying skillsets at Quinn Emanuel's disposal will ensure that the putative class always has the best possible expertise at their disposal during the pendency of this lawsuit.

C. Quinn Emanuel Is Deeply Experienced With the Applicable Law.

Through its investigation of these claims, its development of the novel legal theories represented in the *Health Republic* and *Common Ground* cases, its preparation and filing of both the *Health Republic* and *Common Ground* Complaints, its successful Opposition to the United States' Motion to Dismiss in the *Health Republic* case, its full briefing of summary judgment papers in the *Health Republic* case, its *amici* briefs in the pending Federal Circuit appeals for the *Moda* and *Land of Lincoln* cases, as well as its assistance to, cooperation with, and coordination of other plaintiff's counsel in later-filed risk corridors actions, Quinn Emanuel has demonstrated a mastery of the law related to every aspect of this suit. This includes the jurisdictional and procedural issues as well as the substantive law related to the ACA's risk corridors and CSR provisions. As demonstrated above, Quinn Emanuel's attorneys are also deeply experienced with pretrial and trial class action practice, and have obtained multiple nine-figure settlements in class action cases. Quinn Emanuel readily satisfies this factor as well.

D. Quinn Emanuel Has the Resources to Litigate This Case Through Trial and Appeal.

Finally, Quinn Emanuel has committed its substantial resources to this case (just as it has in *Health Republic*) and will continue to bring them fully to bear on behalf of the putative classes. Unlike many plaintiffs' firms that traditionally take on class action litigation, Quinn Emanuel is a full-service law firm that is not beholden to contingent income and is therefore able to fully fund such cases on an individual basis. Swedlow Decl. ¶ 13. From a practical perspective, this ensures that the firm is financially able to see cases through to the very end without fear of being unable to proceed at some late point in the case.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court appoint Quinn Emanuel as Class Counsel of the Risk Corridors and CSR Classes.

DATED: December 14, 2017

Respectfully submitted,

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

/s/ Stephen Swedlow _____

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CERTIFICATE OF SERVICE

I certify that on December 14, 2017, a copy of the attached Motion to Appoint Quinn Emanuel Urquhart & Sullivan, LLP, as Class Counsel was served via the Court's CM/ECF system on Defendant's counsel Charles Edward Canter.

/s/ Stephen Swedlow
Stephen Swedlow