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 FOR CLASS CERTIFICATION

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INTRODUCTION

Plaintiff Common Ground Healthcare Cooperative ("Common Ground") seeks certification of a class of Qualified Health Plan issuers ("QHP issuers") who did not receive full timely payments pursuant to the Affordable Care Act's ("ACA's") cost-sharing reduction ("CSR") provisions for the 2019 benefit year ("2019 CSR Class"). This case, which concerns the United States of America's (the "Government's") failure to make full timely payments to health insurers that provided QHPs on healthcare exchanges under the ACA is tailor-made for class certification, as explained below.

This Court already certified a class nearly identical to the 2019 CSR Class in this case. *See Common Ground Healthcare Cooperative v. United States*, 137 Fed. Cl. 630 (2018). On April 17, 2018, the Court entered an order certifying a class of QHP issuers who were owed CSR payments for the 2017 and/or 2018 benefit year ("2017-2018 CSR Class"). *Id.* at 644. The same arguments for certification apply here. The Government continued to fail to pay CSR amounts for the 2019 benefit year, and this Motion seeks to certify a class of QHP issuers that are owed payments for 2019. Indeed, the two classes are identical in nearly all material respects, except that the 2017-2018 CSR Class covered the 2017-2018 benefit years, while the proposed 2019 CSR Class covers the 2019 benefit year. Each member of the 2019 CSR Class was subject to the same requirements under the same statute and regulations and has been harmed in the same way by the same Government actions. The 2019 CSR Class, like the previously certified 2017-2018 CSR Class, satisfies the numerosity, typicality, commonality, adequacy of representation, and ascertainability requirements, and, given the substantial overlap in claims, a class action is superior to other types of individual actions. Each member of the 2019 CSR Class will look to the same evidence to prove liability and damages.

Moreover, the United States Supreme Court has already resolved the key issue in this case, albeit in the context of the risk corridors program: whether the language "shall pay" in the Affordable Care Act gives QHP issuers the ability to sue the Government under the Tucker Act to recover damages, despite a lack of appropriation from Congress. *See Maine Community Health Options v. United States*, No. 18-1023, 2020 WL 1978706, at *17 (U.S. April 27, 2020). The Supreme Court held that it does. *Id.* Specifically, the Supreme Court found that the relevant provision of the Affordable Care Act "established a money-mandating obligation, that Congress did not repeal this obligation, and that petitioners may sue the Government for damages in the Court of Federal Claims." *Id.* at *3. Like the risk corridors provision, the cost-sharing reduction provision in the Affordable Care Act creates a money-mandating obligation using "shall" pay language, and like the risk corridors program, Congress's failure to appropriate funds does not absolve the Government's obligation to pay. Thus, these common legal issues have already been resolved by the Supreme Court and will not require any individualized analysis.

Because the requirements for certification under Rule 23 of the United States Court of Federal Claims ("RCFC") are readily satisfied and certification of the 2019 CSR Class "serves public purposes of judicial economy and efficiency," *Singleton v. United States*, 92 Fed. Cl. 78, 82 (2010), the 2019 CSR Class should be certified. Plaintiffs therefore seek approval of the following class:

2019 CSR Class

> All persons or entities offering Qualified Health Plans under the Patient Protection and Affordable Care Act in the 2019 benefit year, and who made cost-sharing reductions for eligible insureds pursuant to Section 1402 of the Patient Protection and Affordable Care Act, but did not receive a "timely and periodic" payment from the Government of an amount "equal to the value of the reductions" provided to its insureds. Excluded from the Class is the Defendant and its members, agencies, divisions, departments, and employees.

FACTUAL BACKGROUND

I. THIS COURT ALREADY CERTIFIED A NEARLY IDENTICAL CSR CLASS

On April 17, 2018, this Court certified a class defined as follows:

> All persons or entities offering Qualified Health Plans under the Patient Protection and Affordable Care Act in the 2017 or 2018 benefit year, and who made cost-sharing reductions for eligible insureds pursuant to Section 1402 of the Patient Protection and Affordable Care Act, but did not receive a "timely and periodic" payment from the Government of an amount "equal to the value of the reductions" provided to its insureds. Excluded from the Class is the Defendant and its members, agencies, divisions, departments, and employees.

137 Fed. Cl. 630, at 644. The Court found that the class "satisfied all of the requirements set forth in RCFC 23 for maintaining a class action," *id.*, including "(i) numerosity–that the proposed class is so large that joinder is impracticable; (ii) commonality–that there are common questions of law or fact that predominate over questions affecting individual prospective class members and that the government has treated the prospective class members similarly; (iii) typicality–that its claims are typical of the proposed class; (iv) adequacy–that it will fairly represent the proposed class; and (v) superiority–that a class action is the fairest and most efficient method of resolving the suit," *id.* at 637 (citations omitted).

The Court also appointed Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel") as lead counsel for the class. *Id.* at 645. Further, the Court ordered the Government to provide to Plaintiff within thirty-one days "a list of potential class members" that included "the name of the individual or entity that is a potential class member; the current or last known electronic-mail address of the individual or entity (providing the name and electronic-mail of the person responsible for cost-sharing reduction receivables, if known), and the current or last known mailing address of the individual or entity." *Id.*

Given the nearly identical nature of the claims of the 2019 CSR Class and the claims of the 2017-2018 CSR Class, Plaintiff respectfully submits that the April 17, 2018 Class

Certification Order in this case is highly persuasive as to why the Court should grant certification of the 2019 CSR Class.

II. UNITED STATES SUPREME COURT ALREADY RESOLVED PRIMARY LEGAL ISSUE IN A WAY COMMON TO THE PROPOSED CLASS

As noted above, the United States Supreme Court has already resolved the key issue in this case on a classwide basis in the context of the risk corridors provision. Namely, a provision stating that the Government "shall pay" a particular sum "created an obligation neither contingent on nor limited by the availability of appropriations or other funds." *Maine Community Health Options*, 2020 WL 1978706, at *10. Moreover, the Supreme Court held that the QHP issuers "properly relied on the Tucker Act to sue for damages in the Court of Federal Claims" in the risk corridors cases. *Id.* at *13.

Although this Court already rejected the Government's arguments against certification of the 2017-2018 CSR Class, the Supreme Court's decision in *Maine Community Health Options* provides further support for class certification of cost-sharing reduction claims. In opposing certification of the 2017-2018 CSR Class, the Government argued that "Common Ground's allegation regarding risk corridors payments parallels its allegation regarding CSR payments," and if the appellate court were to "reject[] the insurers' premise in the risk corridors appeals, its reasoning may foreclose the CSR claims as well." Defendant's Opposition to Plaintiff's Motion for Certification of Cost-Sharing Reduction Class, Dkt. 26 (2/20/2018), at 11-12. The Supreme Court's *Maine Community Health Options* decision essentially resolves liability in favor of QHP issuers on a classwide basis.

The Government also argued that certification of the 2017-2018 CSR Class should be deferred pending guidance from the appellate courts in the *Land of Lincoln* and *Moda* cases on "the common legal question as to whether an insurer can recover CSR payments absent an

appropriation by Congress." Dkt. 26 at 13. The Supreme Court provided that guidance, and provided a common basis for liability and damages for the 2017-2018 CSR Class and the 2019 CSR Class, when it held that the risk corridors program "created an obligation neither contingent on nor limited by the availability of appropriations or other funds." *Maine Community Health Options*, 2020 WL 1978706, at *10.

III. THE COST-SHARING REDUCTION PROVISIONS OF THE ACA WERE DESIGNED TO REDUCE PREMIUMS AND OUT-OF-POCKET COSTS FOR LOW- AND MIDDLE-INCOME AMERICANS

The ACA includes 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. Second 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 shall 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).

IV. THE ACA COST-SHARING REDUCTION PROVISION HAS COMMON REQUIREMENTS AND THE GOVERNMENT'S FAILURE TO PAY HAS HAD COMMON EFFECTS

A. Mechanics of the ACA Cost-Sharing Reduction Reimbursements

Section 1402 requires QHP issuers to reduce out-of-pocket costs for eligible insureds (those who are eligible to receive tax credits under Section 1401 and whose household income is below 250% of the poverty level). Section 1402 then requires the Government to reimburse QHP issuers for the costs of those reductions.

Section 1402 of the ACA provides as follows:

> In the case of an eligible insured enrolled in a qualified health plan – (1) the Secretary shall notify the issuer of the plan of such eligibility; and (2) the issuer shall reduce the cost-sharing under the plan at the level and in the manner specified in subsection (c).

ACA § 1402(a) [42 U.S.C. § 18071]. "Cost-sharing" includes "deductibles, coinsurance, copayments, or similar charges." ACA § 1302(c)(3)(A)(i) [42 U.S.C. § 18022]. QHP issuers must reduce cost sharing for eligible insureds who enroll in "silver plans" through the exchanges, ACA § 1402(c)(2),[1] and QHP issuers must offer at least one "silver" plan in order to participate in the exchanges, ACA § 1301(a)(1)(C)(ii) [42 U.S.C. § 18021].

Section 1402 of the ACA further requires the Secretaries of HHS and the Treasury to reimburse QHP issuers for these cost-sharing reductions:

> An issuer of a qualified health plan making reductions under this subsection shall notify the Secretary of such reductions and the Secretary **shall make periodic and timely payments to the issuer equal to the value of the reductions.**

ACA § 1402(c)(3)(A) [42 U.S.C. § 18071] (emphasis added).

Section 1412 of the ACA established a program for making "advance payments" to QHP

[1] In a "silver" plan, the QHP issuer pays 70% of the average enrollee's health care costs, leaving the enrollee responsible (before application of any subsidy) for the other 30% through cost sharing. *See* 42 U.S.C. § 18022(d)(B).

issuers for CSR reimbursements provided by Section 1402. ACA § 1412 [42 U.S.C. § 18082]. Section 1412 provides that the "Secretary of the Treasury **shall make such advance payment** at such time and in such amount" as specified by HHS. *Id.* at § 1412(c)(3) (emphasis added). The details of this program are set out in implementing regulations. *See e.g.*, 45 C.F.R. § 156.430(b)(1) ("QHP issuer **will receive** periodic advance payments") (emphasis added).

Following the ACA's implementation, the Government established a CSR reimbursement schedule under which the Government would provide periodic advance payments to QHP issuers, which are then periodically reconciled to the actual amount of cost-sharing reductions provided to enrollees and providers. *See* ACA § 1412 [42 U.S.C. § 18082]; 45 C.F.R. § 156.430(b)-(d). Specifically, CMS established "a payment approach under which HHS would make monthly advance payments to issuers to cover projected cost-sharing reduction amounts, and then reconcile those advance payments at the end of the benefit year to the actual cost-sharing reduction amounts."[2] "After the close of the benefit year, QHP issuers must submit to HHS information on the actual value of the cost-sharing reductions provided" and HHS "would then reconcile the advance payments and the actual cost-sharing reduction amounts."[3] Finally, the Government would reimburse the QHP issuer "any amounts necessary to reflect the CSR provided or, as appropriate, the issuer [would] be charged for excess amounts paid to it."[4]

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[2] HHS Notice of Benefit and Payment Parameters for 2014, CMS (March 11, 2013), at 7, *available at* https://www.cms.gov/CCIIO/Resources/Files/Downloads/payment-notice-technical-summary-3-11-2013.pdf (last visited May 8, 2020).

[3] *Id.*

[4] Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Years 2014 and 2015, CMS, March 16, 2016, at 28, *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/CMS_Guidance_on_CSR_Reconciliation-for_2014_and_2015_benefit_years.pdf (last visited May 8, 2020); *see also* 45 C.F.R. § 156.430(e).

B. The Government's Failure to Pay Cost-Sharing Reduction Reimbursements Has Had Classwide Effects

In April 2013 (after the ACA was passed but before plans were being offered on exchanges), the Office of Management and Budget and HHS requested that Congress provide an appropriation designating funds for CSR payments. However, Congress did not provide the line item appropriation requested by HHS. *See* S. Rep. No. 113-71, 113th Cong. at 123 (July 11, 2013) (stating that "[t]he Committee recommendation does not include a mandatory appropriation, requested by the administration, for reduced cost sharing assistance . . . as provided for in sections 1402 and 1412 of the ACA") *available at* https://www.congress.gov/113/crpt/srpt71/CRPT-113srpt71.pdf (last visited May 8, 2020). No subsequent Congressional action has explicitly appropriated money for Section 1402 CSR reimbursements, but Congress also never repealed or amended the CSR provision. Further, Congress has never included any language in appropriations or other bills preventing HHS, CMS, or the Treasury from accessing certain funds or accounts to make CSR payments.

In January 2014, the Obama administration began making monthly advance payments to reimburse QHP issuers for cost sharing reductions.[5] The Obama administration cited Section 1324 as the appropriation for these payments.[6] Section 1324 establishes a permanent appropriation of "[n]ecessary amounts…for refunding internal revenue collections as provided

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[5] *See* Manual for Reconciliation of the Cost-Sharing Reduction Component of Advance Payments for Benefit Years 2014 and 2015, CMS, March 16, 2016, at 27 ("Payments to issuers of estimated monthly amounts began in January 2014."), *available at* https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/CMS_Guidance_on_CSR_Reconciliation-for_2014_and_2015_benefit_years.pdf (last visited May 8, 2020).

[6] *See* Letter from Sylvia M. Burwell, Dir., OMB, to Senators Ted Cruz and Michael S. Lee, at Responses p. 4 (May 21, 2014), ("cost-sharing subsidy payments are being made through the advance payments program and will be paid out of the same account from which the premium tax credit portion of the advance payments for that program are paid"), *available at* http://www.cruz.senate.gov/files/documents/Letters/20140521_Burwell_Response.pdf (last visited May 8, 2020).

by law," including "refunds due from" specified provisions of the tax code. 31 U.S.C. § 1324. The ACA amended the pre-existing, permanent appropriation embodied in 31 U.S.C. § 1324 to include "refunds due from" the premium tax credits established by Section 1401 the ACA. ACA § 1401 [26 U.S.C. § 36B].

The Trump administration initially continued the Obama administration's practice of paying monthly CSR reimbursements. However, on October 11, 2017, Attorney General Sessions submitted a letter to the Department of Treasury and HHS advising that 31 U.S.C. § 1324 could not be used to fund CSR reimbursements. Oct. 11, 2017 Ltr. from Sessions to Secretary of Treasury and Acting Secretary of HHS. The next day, on October 12, 2017, HHS announced that it would stop making CSR reimbursements: "In light of [Attorney General Session's] opinion—and the absence of any other appropriation that could be used to fund CSR payments—CSR payments to issuers must stop, effective immediately. CSR payments are prohibited unless and until a valid appropriation exists." Oct. 12, 2017 Mem. from E. Hargan to S. Verma re Payments to Issuers for Cost-Sharing Reductions (CSRs). And in fact, HHS has not paid CSR reimbursements to QHP issuers since September 2017.

Regardless of whether the Government reimburses QHP issuers for CSR payments, QHP issuers are still required by law to provide such reductions to eligible insureds. These unreimbursed costs are enormous. The CBO estimated that CSR reimbursements to QHP issuers would be $11 billion in fiscal year 2019 and will rise to $16 billion by 2027.[7] The Government's failure to make these payments to QHP issuers wreaked havoc in the insurance markets and with QHP issuers' bottom lines. Like other members of the 2019 CSR Class, Common Ground is

[7] *See* Federal Subsidies Under the Affordable Care Act for Health Insurance Coverage Related to the Expansion of Medicaid and Nongroup Health Insurance: Tables from CBO's January 2017 Baseline at 4, *available at* https://www.cbo.gov/sites/default/files/recurringdata/51298-2017-01-healthinsurance.pdf (last visited May 8, 2020).

owed monthly CSR reimbursements for 2019 that have not been paid. Second Am. Compl. ¶ 81. Common Ground estimates it will be owed $52-$55 million in CSR reimbursements for 2019, with the exact amount to be determined following the conclusion of CMS' claims reconciliation process. Mahaffey Decl. ¶ 6.

Pursuant to their obligations under Section 1402 of the Affordable Care Act, Common Ground and the 2019 CSR Class members complied with their obligations under the Affordable Care Act to offer cost-sharing reductions to eligible insureds. Mahaffey Decl. ¶ 5. Common Ground and the 2019 CSR Class members also complied with the statutory requirements to submit required data by the statutory deadline. Mahaffey Decl. ¶ 5. *See also* ACA § 1402 [42 U.S.C. § 18071]; ACA § 1412 [42 U.S.C. § 18082]; 45 C.F.R. § 156.430. Despite complying with all statutory and regulatory requirements to receive CSR reimbursement payments, each member of the 2019 CSR Class suffered the same harm: Common Ground and each member of the 2019 CSR Class has received zero dollars in CSR reimbursement payments after the Trump administration stated it would halt payments in October 2017, including amounts owed for the 2019 plan year. Mahaffey Decl. ¶¶ 5-6.

ARGUMENT

I. THE 2019 CSR CLASS SHOULD BE CERTIFIED

A court must undertake a "rigorous analysis" to determine whether the Rule 23 requirements for class certification have been satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011); *see also Geneva Rock Prod., Inc. v. United States*, 100 Fed. Cl. 778, 782 (2011) (stating that RCFC 23 "closely tracks the language of its analogue in the Federal Rules of Civil Procedure, and consequently this court has often looked to cases applying Fed. R. Civ. P. 23 to interpret RCFC 23"). "Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim." *Dukes*, 564 U.S. at 351; *see In re Hydrogen Peroxide*

Antitrust Litig., 552 F.3d 305, 316 (3d Cir. 2008) ("An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met"). At the same time, as the Supreme Court has reiterated, "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1194–95 (2013) (*citing Wal-Mart,* 564 U.S. at 351). "Merits questions may be considered to the extent – but only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 1195.

The proposed class satisfies the requirements of RCFC 23, which have been "succinctly described as comprising inquiry into the elements of numerosity, commonality, typicality, adequacy, and superiority." *Singleton,* 92 Fed. Cl. at 82; RCFC 23; *see also Geneva Rock,* 100 Fed. Cl. at 782.

A class action is maintainable under RCFC 23 when:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

RCFC 23(a). In addition, RCFC 23(b) requires the court to find that "'the United States has acted or refused to act on grounds generally applicable to the class,' that the common questions of law and fact predominate, and that the class action is superior to other methods for adjudicating the controversy." *Singleton,* 92 Fed. Cl. at 81-82 (quoting RCFC 23(b)).

Courts applying RCFC 23 have recognized that the rule should be accorded "a liberal

construction," which "serves public purposes of judicial economy and efficiency." *Singleton,* 92 Fed. Cl. at 82. Moreover, "the rule assumes that the court may certify a class on the basis of the complaint." *Toscano v. United States,* 98 Fed. Cl. 152, 154 (2011); *Douglas R. Bigelow Trust v. United States,* 97 Fed. Cl. 674, 676 (2011) (stating "the court must assume the truth of the factual assertions contained in the complaint").

A. Numerosity

RCFC 23(a)(1) permits class certification if "the class is so numerous that joinder of all members is impracticable." RCFC 23(a)(1). "Impracticable" does not mean that joinder must be "impossible." *King v. United States*, 84 Fed. Cl. 120, 123 (2008) (citing *Barnes v. United States*, 68 Fed. Cl. 492, 495 (2005)). Instead, the rule "requires examination of the specific facts of each case and imposes no absolute limitations." *Singleton*, 92 Fed. Cl. at 83 (quoting *Gen. Tel. Co. of the Nw., Inc. v. Equal Opportunity Comm'n,* 446 U.S. 318, 330 (1980) (internal alteration omitted)). Among the factors that courts evaluate when assessing the numerosity requirement are the number of potential class members, the geographic dispersal of members of the proposed class, and the size of individual claims. *King*, 84 Fed. Cl. at 123-125; *Geneva Rock*, 100 Fed. Cl. at 787. The fact that the Rules of the Court of Federal Claims permit only opt-in class actions renders the numerosity criterion "somewhat of an anomaly." *Haggart v. United States*, 89 Fed. Cl. 523, 530 (2009) ("Haggart I"). Because inclusion in the class requires affirmative effort on the part of class members, the need for stringent safeguards is less significant in class actions here than in opt-out class actions. *See, e.g., Jones v. United States*, 118 Fed. Cl. 728, 733 n.2 (2014) (contrasting opt-in actions with opt-out actions, "in which the stakes of not contacting a class member are high").

The numerical size of the proposed class is the most important factor in determining numerosity. *Brown v. United States*, 126 Fed. Cl. 571, 577 (2016). Although there is no "magic

number" that triggers a presumption of numerosity, *Singleton*, 92 Fed. Cl. at 83, "[i]n one popular view, any class larger than 40 is assumed to be sufficiently numerous." *Geneva Rock*, 100 Fed. Cl. at 787 (citing *Stewart v. Abraham,* 275 F.3d 220, 226–27 (3d Cir. 2001)); *King*, 84 Fed. Cl. at 124 ("While not outcome determinative, the number of potential class members is persuasive when determining numerosity: generally, if there are more than forty potential class members, this prong has been met.").

In *Singleton*, for example, even though the potential class members were clustered in a tight geographic area, the court found the numerosity requirement satisfied where "joinder of the estimated 135 potential claimants would entail a sufficient degree of extra difficulty and/or expense that makes it 'impracticable.'" 92 Fed. Cl. at 84. Classes consisting of fewer than two dozen members have been certified where doing so "promotes judicial economy because the alternative is multiple suits against the government." *Sears v. United States*, 124 Fed. Cl. 444, 450 (2015) (certifying subclass of 21 members). *See also Haggart v. United States,* 104 Fed. Cl. 484, 489 (2012) ("Haggart II") (certifying subclasses of 18 and 25 members); *Bigelow Trust,* 97 Fed. Cl. at 676 (certifying class that "likely exceeds 25" members); *Geneva Rock*, 100 Fed. Cl. at 788 (certifying class of 23 members).[8]

When certifying the 2017-2018 CSR Class, the Court noted that the fact that there were hundreds of potential class members, "standing alone, [was] sufficient to satisfy the numerosity requirement." 137 Fed. Cl. at 638. The same result is appropriate for the 2019 CSR Class.

[8] Courts routinely certify classes consisting of fewer than 100 members. *See, e.g., Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984) (finding no abuse of discretion in certification of class number 74 class members); *In re Cincinnati Radiation Litig.*, 187 F.R.D. 549, 552 (S.D. Ohio 1999) (80 class members); *Sagers v. Yellow Freight Sys., Inc.*, 529 F.2d 721, 734 (5th Cir. 1976) (holding 110 class members "clearly a sufficient number to meet the numerosity requirements of Rule 23(a)(1)"). In addition, under the Class Action Fairness Act, among the factors triggering federal jurisdiction is that a minimally diverse class action consists of 100 or more class members. 28 U.S.C. § 1332(d)(5)(B).

Hundreds of QHP issuers offered individual coverage in the ACA exchanges in 2019 and are owed CSR reimbursements.[9] Indeed, the 2017-2018 CSR Class already certified by the Court consists of 101 opt-in class members. *See* Dkt. 72. The number of class members in the 2019 CSR Class is significantly larger than many classes routinely certified, and the "extra difficulty and/or expense" involved in seeking to join each of them in this lawsuit satisfies the numerosity prong. *Singleton*, 92 Fed. Cl. at 84.

The alternative to class treatment is for individual plaintiffs to file individual cases, take the case to judgment, and potentially receive inconsistent rulings on the same legal issues before different judges. On the other hand, "certification of the proposed class will allow for consolidation of these claims, thereby reducing the time and expense of litigation [and] ensuring a consistent decision regarding the Government's liability." *DeMons v. United States*, 119 Fed. Cl. 345, 357 (2014); *see also Bright v. United States*, 603 F.3d 1273, 1285 (Fed. Cir. 2010) ("In short, we think that, all other considerations being equal, the laudable goal of avoiding 'multiplicity of actions' should prevail.")

Further, as noted by the Court in the order certifying the 2017-2018 CSR Class, the fact that members of the class are located throughout the country is "a fact that supports the conclusion that plaintiff has satisfied the numerosity requirement." 137 Fed. Cl. at 638. Although "not a heavily weighted factor" in the numerosity calculation, "[i]t is well settled that

[9] Number of Issuers Participating in the Individual Health Insurance Marketplaces, Kaiser Family Foundation, *available at* https://www.kff.org/other/state-indicator/number-of-issuers-participating-in-the-individual-health-insurance-marketplace/?currentTimeframe=0&selectedRows=%7B%22states%22:%7B%22all%22:%7B%7D%7D,%22wrapups%22:%7B%22united-states%22:%7B%7D%7D%7D&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D (last visited May 8, 2020); *see also* ACA § 1301(a)(1)(C)(ii) [42 U.S.C. § 18021] (QHP issuers must offer at least one "silver" plan in order to participate in the exchanges); ACA § 1402(c)(2) [42 U.S.C. § 18071] (QHP issuers must reduce cost sharing for eligible insureds who enroll in "silver plans" through the exchanges).

joinder is less practicable when potential class members are dispersed geographically." *Brown*, 126 Fed. Cl. at 578-79 (citations omitted); *King*, 84 Fed. Cl. at 124-25 ("If plaintiffs are dispersed geographically, then a court is more likely to certify a class action."). It is difficult to imagine a class with wider geographic dispersal than here, where potential members of the 2019 CSR Class are scattered throughout every one of the 50 states, further tilting the scale in favor of numerosity. *See Markham v. White*, 171 F.R.D. 217, 221 (N.D. Ill. 1997) (finding the numerosity requirement satisfied where the class of between 47 to 52 sexual harassment victims was scattered among five states).[10]

Finally, without the class device, many of the 2019 CSR Class members' claims might not be litigated at all. While some members of the class have very large claims, some QHP issuers may have claims small enough that retaining counsel to pursue the claims might "overwhelm their potential recoveries." *Brown*, 126 Fed. Cl. at 579. While the exact amounts of each class member's 2019 cost-sharing reduction damages are not yet known, the judgment for the 2017-2018 CSR Class shows that some class members had relatively small claims for the 2017-2018 benefit years. *See generally* Dkt. 72. For example, *Community Health Plan of Washington* (HIOS 18581) was owed $27,437.75, and *Group Hospitalization and Medical Services, Inc.* (HIOS 78079) was owed $34,867.41. *Id.* at 3. Thus, for the 2017-2018 benefit years, it would likely have cost these QHP issuers more to retain separate counsel, file a complaint, engage in motion practice, and obtain a judgment than the QHP issuer was entitled to recover.

[10] "In general, cases applying [Fed. R. Civ. P. 23] have been examined and followed in interpreting RCFC 23." *Haggart II*, 104 Fed. Cl. at 488 (internal quotation marks and citation omitted).

B. Commonality

The commonality requirement consists of a three-part test from related requirements of RCFC 23(a)(2) and (b):

> Commonality is a three-part test. RCFC 23(a)(2) requires that there be questions of law or fact common to the class; RCFC 23(b)(2) requires that the United States has acted or refused to act on grounds generally applicable to the class; and RCFC 23(b)(3) requires that the questions of law and fact common to class members predominate over questions particular to individual class members.

Singleton, 92 Fed. Cl. at 84; *see also Geneva Rock,* 100 Fed. Cl. at 788. All three prongs are met here.

1. Common Issues

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." RCFC 23(a)(2). Commonality is established where a classwide proceeding may "generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores*, 564 U.S. at 350 (citation omitted). Plaintiffs seeking to establish the existence of a common factual or legal issue must demonstrate that the putative class members' claims "depend upon a common contention…that it is capable of classwide resolution" and will "resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.*; *see also King*, 84 Fed. Cl. at 126 ("commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members") (quoting *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001)). The commonality requirement poses a low hurdle. *Singleton*, 92 Fed. Cl. at 84. Indeed, "even a single common question will do." *Dukes*, 564 U.S. at 359 (alterations and citation omitted).

In the context of granting Plaintiff's motion to certify the 2017-2018 CSR Class, the Court noted that the following issues were "common to all potential class members": "whether the pertinent statute and regulation mandate the payment of money, whether the government's

failure to make periodic cost-sharing reduction payments violates the pertinent statute and regulation," "whether the government is liable to the potential class members for its failure to make the payments," and "whether the government's liability for its failure to make cost-sharing reduction payments is mitigated by the increased premium tax credits it paid to insurers." 137 Fed. Cl. at 639. The same is true for the 2019 CSR Class. Here, the questions of law and fact common to the 2019 CSR Class that relate to the Government's failure to make timely and periodic CSR reimbursement payments include but are not limited to:

- whether Section 1402 of the Affordable Care Act is a money-mandating statute;
- whether 45 C.F.R. § 156.430 is a money-mandating regulation;
- whether the Government's failure to appropriate funds sufficient to make cost sharing reduction reimbursements to Plaintiff and the 2019 CSR Class absolves it of its statutory obligations;
- whether the Government violated its obligations to pay Plaintiff and the 2019 CSR Class cost sharing reduction reimbursement amounts in a periodic and timely fashion;
- whether the Government is liable to Plaintiff and the 2019 CSR Class for failing to pay cost sharing reduction reimbursements in a periodic and timely fashion; and
- whether increased premium tax credits mitigate the government's liability for its failure to make cost-sharing reduction payments.

Any one of the above issues would, standing alone, establish the requisite commonality under RCFC 23(a)(2). Thus, Plaintiff "has satisfied the common-issue requirement." 137 Fed. Cl. at 639.

2. Similar Treatment

RCFC 23(b)(2) requires that in order to maintain a class action, the United States must have "acted or refused to act on grounds generally applicable to the class." RCFC 23(b)(1). Where a "single act is the wellspring of all the putative class members' claims," there "can be

little question that the government acted on grounds applicable to the entire class" and the similar-treatment prong of the commonality test is satisfied. *Geneva Rock,* 100 Fed. Cl. at 788-89; *see generally Bigelow Trust,* 97 Fed. Cl. at 678; *Adams v. United States,* 93 Fed. Cl. 563, 575-76 (2010); *Haggart I*, 89 Fed. Cl. at 534; *see also Gross v. United States*, 106 Fed. Cl. 369*,* 380 (2012); *Barnes,* 68 Fed. Cl. at 496.

Here, the Government's failure to make timely and periodic CSR reimbursement payments is a single course of conduct that applies to the entire 2019 CSR Class. As the Court found with respect to the 2017-2018 CSR Class, "[t]here can be no dispute that [the Government's] failure to act is generally applicable to the class," and therefore, Plaintiff "has established this aspect of the commonality requirement." 137 Fed. Cl. at 640.

3. Predominance

A court certifying a class must find that under RCFC 23(b)(3), "questions of law or fact common to class members predominate over any questions affecting only individual members." RCFC 23(b)(3). The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 623 (1997). This requirement calls upon courts to examine whether individual questions – "where members of a proposed class will need to present evidence that varies from member to member" – or common questions – "where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized, class-wide proof" – are more prevalent. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (internal quotation marks, alteration, and citation omitted). When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class

members." *Id*. (citing 7AA C. Wright, *A. Miller, & M. Kane, Federal Practice and Procedure* § 1778 (3d ed. 2005)); *see also Barnes*, 68 Fed. Cl. at 496 (finding predominance "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof") (citing *Moore v. PaineWebber, Inc.,* 306 F.3d 1247, 1252 (2d Cir. 2002)).

Even "factual variation among the class grievances is acceptable as long as a common nucleus of operative fact exists." *Curry v. United States*, 81 Fed. Cl. 328, 334 (2008) (internal quotation marks and citation omitted). In *Barnes*, for example, even though the class members varied in the amount of hours they worked and the potential overtime pay to which they may be entitled, the Navy's systemic failure to comply with overtime-pay statutes predominated over any individual differences among the class. 68 Fed. Cl. at 496-97. *See also Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1437 (2013) (Ginsburg and Breyer, JJ., dissenting) ("Recognition that individual damages calculations do not preclude class certification under Rule 23(b)(3) is well nigh universal.").

Here, classwide issues far predominate over individual issues. The members of the 2019 CSR Class are subject to the same statutory and regulatory regime under the CSR provision of the ACA—the same requirements to be QHP issuers, the same obligations to provide ACA-compliant plans, the same reporting requirements, and the same requirements to provide cost-sharing reduction to insureds while being denied CSR reimbursements by the Government.

The determination of whether the Government breached its obligations to make periodic CSR reimbursements and what those payments should be are issues "susceptible to generalized, class-wide proof" for which the Class will look to common evidence and for which the proof will

generate common answers. *Tyson Foods*, 136 S. Ct. at 1045. Rejecting the United States' argument that individual damages issues precluded class certification, the Court certified the 2017-2018 CSR Class, finding that Plaintiff had "established that the common issues presented in this case predominate over the sole individualized issue." 137 Fed. Cl. at 640. And, indeed, the 2017-2018 CSR Class was able to reach a final damages determination in a timely fashion. *See* Dkt. 72. There is no reason to treat the 2019 CSR Class any differently.

C. Typicality

RCFC 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." RCFC 23(a)(3). Typicality "is intertwined with commonality," and the "named plaintiff need only show that its claims share the same essential characteristics as the claims of the class at large." *Geneva Rock,* 100 Fed. Cl. at 789-90 (quotation marks and internal citations omitted). "[T]he threshold is not high." *Singleton,* 92 Fed. Cl. at 84; *Bigelow Trust,* 97 Fed. Cl. at 678. Thus, the requirement is satisfied if the claims "of the representatives and the members of the class stem from a single event or unitary course of conduct, or if they are based on the same legal or remedial theory." *Geneva Rock,* 100 Fed. Cl. at 790 (citations omitted); *Bigelow Trust,* 97 Fed. Cl. at 678; *see also* NEWBERG ON CLASS ACTIONS § 3.29 (5th ed.) ("A plaintiff with typical claims will pursue his or her own self-interest in the litigation and, in so doing, will advance the interests of the class members, which are aligned with those of the representative.").

Here, typicality is easily satisfied, because the representative party, Common Ground, is stating the same claim, concerning the same conduct, and seeking the same relief as all members of the proposed 2019 CSR Classes. *See Mercier v. United States*, 138 Fed. Cl. 265, 273-74 (2018) (finding plaintiffs had "met this modest standard" where each named plaintiff shared the same essential characteristics as the class). If the named plaintiff can prove its claims, it would

be proving the claims of all 2019 CSR Class members. Again, the Court found that Common Ground met this requirement for the 2017-2018 CSR Class, *see* 137 Fed. Cl. at 641, and Plaintiff respectfully submits that the same result is appropriate for the 2019 CSR Class.

D. Adequacy

RCFC 23(a)'s final requirement mandates that the representative parties "fairly and adequately protect the interests of the class." RCFC 23(a)(4). The adequacy of representation requirement "has been held to encompass two components: adequacy of counsel as well as lack of conflict between the interests of named plaintiffs and the proposed class members." *Singleton,* 92 Fed. Cl. at 85 (citation omitted); *see also Adams,* 93 Fed. Cl. at 576. Each prong is satisfied here.

1. Adequacy of Representation

Proposed class counsel is "qualified, experienced and generally able to conduct the litigation." *Adams,* 93 Fed. Cl. at 576 (citation omitted); *see also Mercier*, 138 Fed. Cl. at 274 (finding adequacy requirement met where "class counsel have experience litigating similarly complex class actions and will devote time and energy to the litigation"). In appointing class counsel, a court must consider: (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 this 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). A court must also look to whether the proposed interim class counsel will fairly and adequately represent the interests of the class. RCFC 23(g)(4).

As the Court noted in granting Plaintiff's motion to certify the 2017-2018 CSR Class, "Quinn Emanuel has the experience and resources necessary to handle class actions," and has "performed the work necessary to identify and investigate the potential cost-sharing reduction

claims, and is well versed in the law regarding such claims." 137 Fed. Cl. at 642. This is even more true now that Quinn Emanuel has successfully obtained a verdict of over $1.5 billion on behalf of the 2017-2018 CSR Class. *See* Dkt. 72.

This case filed on behalf of Common Ground by Quinn Emanuel was the first of its kind seeking to recover CSR reimbursements from the Government on behalf of any QHP issuer.[11] Declaration of Stephen A. Swedlow in Support of Motion to Appoint Quinn Emanuel Urquhart & Sullivan, LLP as Class Counsel ("Swedlow Decl.") ¶ 3. With respect to the 2017-2018 CSR Class, Quinn Emanuel successfully moved for summary judgment, advocated for the 2017-2018 CSR Class in oral argument, and in October 2019 a judgment was awarded in favor of the 2017-2018 CSR Class for over $1.5 billion, representing class members' unpaid CSR claims from the 2017 and 2018 benefit years. *See Common Ground Healthcare Cooperative v. United States*, 142 Fed. Cl. 38, 53 (2019); *see also* Dkt. 72. Although several individual cost-sharing reduction cases were able to reach the Federal Circuit sooner than the class case, Quinn Emanuel filed two *amicus curiae* briefs on behalf of Common Ground in support of the claims of the QHP issuers in those cases (and thereby advanced the interests of the 2017-2018 CSR Class).[12] No other firm has more expertise than Quinn Emanuel in the substantive law and policy at issue in these cases.

In addition, there can be no dispute that the individual attorneys leading this litigation, as well as the law firm of Quinn Emanuel, collectively possess the experience and expertise to

[11] In addition, *Health Republic*, a related risk corridors case, was filed by Quinn Emanuel and was the first of its kind seeking to recover risk corridors payments from the Government. A class was certified in *Health Republic* seeking 2014-2015 risk corridors payments, and Quinn Emanuel was named class counsel. *See Health Republic Ins. Co. v. United States* No. 1:16-cv-00259 (Fed. Cl.). This Court also certified a 2016 risk corridors class in *Common Ground*, and Quinn Emanuel was named class counsel for that class. *See* Order, Dkt. 17 (1/8/2018).

[12] *See* Brief for *Amicus Curiae* Common Ground Healthcare Cooperative in Support of Plaintiffs-Appellees, *Sanford Health Plan, et al. v. United States*, No. 19-1290, ECF No. 31 (Fed. Cir. 5/8/2019); *see also* Brief for *Amicus Curiae* Common Ground Healthcare Cooperative in Support of Appellees and Affirmance, *Community Health Choice, Inc. v. United States*, No. 19-2102, ECF No. 41 (Fed. Cir. 3/17/2020).

represent the interests of the 2019 CSR 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 settlements. Swedlow Decl. ¶¶ 9-11. 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. Swedlow Decl. ¶¶ 6-8.

Finally, as demonstrated by its work for the 2017-2018 CSR Class and the risk corridors classes, 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 2019 CSR Class.

2. Lack of Conflict

There are no "conflicting, competing, or antagonistic interests as between the named Plaintiff[] and the proposed class" that would warrant a finding that the named plaintiff would not adequately protect the class's interest. *Singleton*, 92 Fed. Cl. at 86. Class members have a united interest in establishing the factual and legal basis of their claims, and there is no basis by which "the putative class members have interests that would put them at odds with one another." *Geneva Rock,* 100 Fed. Cl. at 790. "[B]ecause all plaintiffs would assert the same legal claim . . . arising out of the same government actions," the interests of the named plaintiff and the proposed class are aligned rather than opposed. *Haggart I*, 89 Fed. Cl. at 535. As the Court noted in granting the motion to certify the 2017-2018 CSR Class, it did not "discern any conflicts of interest, especially given the almost universal commonality of the issues requiring the court's resolution." 137 Fed. Cl. at 641.

E. Superiority

Finally, a plaintiff must demonstrate that a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." RCFC 23(b)(3). The superiority requirement is met where "a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Gross*, 106 Fed. Cl. at 383 (quoting FRCP 23 Advisory Committee Note (1966 Amendment)). Among the non-exhaustive factors that a court considers are the "class members' interests in individually controlling the prosecution of separate actions," RCFC 23(b)(3)(A); the "extent and nature of any litigation concerning the controversy already begun by class members," RCFC 23(b)(3)(B); and "the likely difficulties in managing a class action," RCFC 23(b)(3)(D). "Essentially, under this prong of the analysis, the court is obliged to conduct a cost-benefit analysis, weighing any potential problems with 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." *Geneva Rock*, 100 Fed. Cl. at 790 (alteration and internal citation omitted).

Not only is a class action superior to joinder or individual adjudication of the claims, but this case is in many respects the prototype for the sort of action warranting class treatment. A single Government action affected each of the 2019 CSR Class members in exactly the same way, and the Government has a list of each member of the 2019 CSR Class. Moreover, the Government already has (or soon will have) the data showing how much it owes each member of the Class. Resolution of the legal issues in this case on a classwide basis will "achieve economies of scale in time, effort, and expense because the court is dealing with common questions of law and fact." *Fauvergue v. United States*, 86 Fed. Cl. 82, 101 (2009), *rev'd on other grounds sub nom. Bright v. United States*, 603 F.3d 1273 (Fed. Cir. 2010); *see also King*,

84 Fed. Cl. at 128 ("Conducting this case as a class action is likely to achieve efficiencies in the use of the resources of both the parties and the court.")

The discrete categories of RCFC 23(b)(3) weigh in favor of a finding of superiority. There is nothing to indicate that a 2019 CSR Class member would benefit from individually controlling an action, and because the Court of Federal Claims permits only opt-in classes, RCFC 23(c)(2)(B)(v), there is no concern that a class member might be swallowed into a class that it would prefer not to participate in. Finally, there are no "likely difficulties," RCFC 23(b)(3)(D), in managing the class. The potential members of the 2019 CSR Class are a discrete class with claims arising out of the same statute and about whom the Government has information and should easily be able to calculate damages. *See Adams*, 93 Fed. Cl. at 577–78 (finding manageability where "the Government can mechanically identify and notify potential class members, as well as calculate their individual damages").

Where, as here, "[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," the superiority requirement is met. *Singleton*, 92 Fed. Cl. at 86 (quotation marks and citation omitted). Under these circumstances, treatment of the legal issues on a classwide basis will "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." *Gross*, 106 Fed. Cl. at 383 (internal quotation omitted); s*ee also Bigelow Trust*, 97 Fed. Cl. at 678 n.7 (finding the superiority requirement met where there was no claim "that the pursuit of a class action here would be less efficient than pursuing the claims represented here in individual or consolidated actions").

Finally, the Court rejected the United States' suggestion that the claims of the 2017-2018

CSR Class would more efficiently be resolved pursuant to RCFC 42 consolidation procedures, finding that "[t]here can be no question that the consolidation of cost-sharing reduction claims would be more cumbersome than allowing insurers to pursue their claims in a class action." Dkt. 30, at 16. In sum, the 2019 CSR Class is identically situated to the 2017-2018 CSR Class, for which the Court found that Plaintiff had "satisfied its burden of establishing that a class action is superior to other methods of resolving insurers' cost-sharing reduction claims." 137 Fed. Cl. at 644.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court grant its Motion for Class Certification.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 8, 2020, a copy of the attached Motion for Class Certification was served via the Court's CM/ECF system on Defendant's counsel of record.

/s/ Stephen Swedlow
Stephen Swedlow