

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HEALTH REPUBLIC INSURANCE
COMPANY,

Plaintiff,
on behalf of itself and all others
similarly situated,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

No. 1:16-cv-00259-MMS
(Judge Sweeney)

**PLAINTIFF HEALTH REPUBLIC INSURANCE COMPANY'S MOTION TO APPOINT
QUINN EMANUEL URQUHART & SULLIVAN, LLP AS INTERIM CLASS COUNSEL**

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
STATEMENT OF THE ISSUES.....	2
STATEMENT OF THE CASE.....	2
ARGUMENT	4
I. APPOINTING INTERIM CLASS COUNSEL IS APPROPRIATE FOR THIS LITIGATION TO PROCEED IN AN ORDERLY MANNER.....	4
II. QUINN EMANUEL IS QUALIFIED TO REPRESENT THE PUTATIVE CLASS UNDER THE FACTORS ENUMERATED IN RCFC 23(g)(1)(A).....	6
A. Quinn Emanuel Identified, Developed, and Brought the Claims at Issue in This Risk Corridors Action.....	6
B. Quinn Emanuel Is Highly Experienced in Class Actions and Complex Litigation of Similar Size and Scope.	7
C. Quinn Emanuel Is Deeply Experienced With the Applicable Law.	10
D. Quinn Emanuel Has the Resources to Litigate This Case Through Trial and Appeal.	10
CONCLUSION.....	11

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>In re Air Cargo Shipping Servs. Antitrust Litig.</i> , 240 F.R.D. 56 (E.D.N.Y. 2006).....	4
<i>Blue Cross & Blue Shield of North Carolina v. United States</i> , No. 1:16-cv-651 (Fed. Cl.).....	5
<i>Brigiotta’s Farmland Produce & Garden Ctr., Inc. v. United Potato Growers of Idaho, Inc.</i> , No. 4:10-CV-307-BLW, 2010 WL 3928544 (D. Idaho Oct. 4, 2010)	7
<i>Buonasera v. Honest Co., Inc.</i> , No. 16 CIV. 1125(VM), 2016 WL 3647601 (S.D.N.Y. June 22, 2016).....	7
<i>Evergreen Health Cooperative Inc. v. U.S. Dep’t of Health & Human Servs.</i> , No. 1:16-cv-2039 (D. Md.).....	5
<i>First Priority Life Ins. Co. v. United States</i> , No. 1:16-cv-587 (Fed. Cl.).....	5
<i>Land of Lincoln Mutual Health Ins. Co. v. United States</i> , No. 1:16-cv-744 (Fed. Cl.).....	5
<i>MacAlister v. Guterma</i> , 263 F.2d 65 (2d Cir. 1958).....	5
<i>Maine Community Health Options v. United States</i> , No. 16-cv-967 (Fed. Cl.).....	5
<i>Moda Health Plan, Inc. v. United States</i> , No. 1:16-cv-649 (Fed. Cl.).....	5
<i>New Mexico Health Connections v. United States</i> , No. 1:16-cv-1199 (Fed. Cl.).....	5
<i>Steele v. United States</i> , No. CV 14-1523, 2015 WL 4121607 (D.D.C. June 30, 2015)	6, 7
<i>In re Zyprexa Products Liab. Litig.</i> , 594 F.3d 113 (2d Cir. 2010).....	5
<u>Statutes</u>	
42 U.S.C. § 18021.....	2
42 U.S.C. § 18061.....	3

42 U.S.C. § 18062.....3
42 U.S.C. § 18063.....3
45 C.F.R. § 153.510.....3
Consolidated and Further Continuing Appropriations Act of 2015 (Pub. L. 113-235).....3
Consolidated Appropriations Act, 2016 (Pub. L. 114-113).....3

Other Authorities

Manual for Complex Litigation § 10.22 (4th ed. 2009).....4, 5

Plaintiff Health Republic Insurance Company (“Health Republic” or “Plaintiff”) respectfully requests that the Court grant Quinn Emanuel Urquhart & Sullivan, LLP’s (“Quinn Emanuel”) motion for appointment as Interim Class Counsel under Rule of the United States Court of Federal Claims (“RCFC”) 23(g)(3).

PRELIMINARY STATEMENT

This is a putative class action against the federal government of the United States of America (“Government”), filed under the Tucker Act, seeking to recover on behalf of Qualified Health Plan Issuers (“QHP Issuers”) the unpaid portion of the risk corridors payments due for program years 2014 and 2015 under the Affordable Care Act. In order to ensure the effective and efficient prosecution of this and related actions, the Court should appoint Quinn Emanuel as Interim Class Counsel.

This case filed on behalf of Health Republic by Quinn Emanuel was the first of its kind seeking to recover risk corridors payments from the Government. Several months later, many other QHP Issuers filed similar suits in this court and others, pursuing the same risk corridors payments. In addition to being the first firm to investigate and file this claim, Quinn Emanuel has now fully briefed the legal issues presented in the Government’s Motion to Dismiss. As a consequence, 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 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 settlements. Specifically, Mr. Swedlow and Mr. Horton

have represented classes of health insurance companies, similar to the putative class 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, 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 class.

For these reasons, and the others discussed below, Quinn Emanuel respectfully requests that the Court appoint it Interim Class Counsel.

STATEMENT OF THE ISSUES

1. Whether Quinn Emanuel Urquhart & Sullivan, LLP, should be appointed Interim Class Counsel.

STATEMENT OF THE CASE

Plaintiff Health Republic set forth a comprehensive summary of this action in its Complaint, ECF No. 1, and in its Opposition to the United States' Motion to Dismiss, ECF No. 11, at 5-18, and briefly summarizes the relevant facts here. 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.

Compl. ¶ 3. In order to mitigate the risk to insurers and incentive 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; Compl. ¶ 4.

This case focuses on the risk corridors program. A risk corridors program is designed to mitigate risk for participants in a new insurance market by limiting both unexpectedly high gains and losses. 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 Consolidated and Further Continuing Appropriations Act of 2015 (Pub. L. 113-235) ("2015 Spending Bill") and, a year later, in the Consolidated Appropriations Act, 2016 (Pub. L. 114-113), 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"). Compl. ¶ 9.

The practical effect of the 2015 Spending Bill was to prevent CMS and HHS from paying QHP Issuers their full risk corridors receivable due for 2014. 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. Compl. ¶ 11. This required QHP Issuers to make other efforts to satisfy their cash flow and reserve shortfalls, or risk going out of business. Compl. ¶ 11. Some companies were unable to remedy the cash flow and/or reserve shortfalls, and, as a consequence, went out of business. Compl. ¶ 11.

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, and which the Government currently owes. Quinn Emanuel is the law firm best situated to obtain this relief on behalf of Plaintiff and the class.

ARGUMENT

I. APPOINTING INTERIM CLASS COUNSEL IS APPROPRIATE FOR THIS LITIGATION TO PROCEED IN AN ORDERLY MANNER

“The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.” RCFC 23(g)(3). The *Manual for Complex Litigation* (“*Manual*”) recommends that the Court select and authorize one or more attorneys to act on behalf of other counsel and their clients early in class action proceedings. *Manual* § 10.22 (4th ed. 2004). Counsel so designated “assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties and parties’ counsel.” *Id.*

The designation of interim class counsel in cases such as these is “encouraged, and indeed is probably essential for efficient case management.” *In re Air Cargo Shipping Servs. Antitrust Litig.*, 240 F.R.D. 56, 57 (E.D.N.Y. 2006). “District courts typically appoint a lead counsel or plaintiffs’ steering committee to coordinate and conduct pretrial proceedings on behalf of all plaintiffs in order to avoid what otherwise might well become chaotic.[] Moreover, while individual plaintiffs are separately represented, they typically benefit also—often

predominantly—from the work of the lead counsel or committee.” *In re Zyprexa Products Liab. Litig.*, 594 F.3d 113, 130 (2d Cir. 2010). “The benefits achieved by consolidation and the appointment of general counsel, *i.e.*, elimination of duplication and repetition and in effect the creation of a coordinator of diffuse plaintiffs through whom motions and discovery proceedings will be channeled, will most certainly redound to the benefit of all parties to the litigation.” *MacAlister v. Guterma*, 263 F.2d 65, 69 (2d Cir. 1958).

Here, appointment of Quinn Emanuel as Interim Class Counsel will ensure the efficient prosecution of this action. After Quinn Emanuel filed this action, other plaintiffs filed at least seven other actions—six pending in the Court of Federal Claims and one in another federal court¹—alleging similar claims under the ACA against the United States Government (“Later-Filed Actions”). Quinn Emanuel has already worked cooperatively under the common interest privilege with counsel for Plaintiffs in several of the Later-Filed Actions and will continue to do so. Further, to the extent discovery is necessary to resolve the claims and defenses in this action and the Later-Filed Actions, the appointment of Quinn Emanuel as Interim Class Counsel would lead to orderly administration and prosecution of the claims on behalf of putative class members.² Finally, appointing Quinn Emanuel as lead counsel could potentially facilitate settlement discussions. *Cf. Manual* § 10.22 (interim counsel “assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties

¹ See *First Priority Life Ins. Co. v. United States*, No. 1:16-cv-587 (Fed. Cl.); *Moda Health Plan, Inc. v. United States*, No. 1:16-cv-649 (Fed. Cl.); *Blue Cross & Blue Shield of North Carolina v. United States*, No. 1:16-cv-651 (Fed. Cl.); *Land of Lincoln Mutual Health Ins. Co. v. United States*, No. 1:16-cv-744 (Fed. Cl.); *Maine Community Health Options v. United States*, No. 16-cv-967 (Fed. Cl.); *New Mexico Health Connections v. United States*, No. 1:16-cv-1199 (Fed. Cl.); *Evergreen Health Cooperative Inc. v. U.S. Dep’t of Health & Human Servs.*, No. 1:16-cv-2039 (D. Md.).

² Quinn Emanuel does not intend to interfere with counsel’s prosecution of the Later-Filed Actions, but will assist and cooperate to the extent mutually agreed by counsel.

and parties' counsel").

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

RCFC 23(g)(3) permits the Court to designate interim counsel to act on behalf of a putative class before certification. In determining whether to appoint interim counsel, courts typically apply the factors set forth in RCFC 23(g)(1)(A), which applies to appointing class counsel at the class certification stage. *See, e.g., Steele v. United States*, No. CV 14-1523, 2015 WL 4121607, at *3 (D.D.C. June 30, 2015). 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 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). In addition to these factors, the Court should also look to whether the proposed interim class counsel will fairly and adequately represent the interests of the class. RCFC 23(g)(4). Health Republic respectfully submits that Quinn Emanuel more than satisfies these criteria.

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

Quinn Emanuel easily satisfies the first factor for appointment as interim 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 Swedlow in Support of Motion to Appoint Quinn Emanuel as Interim 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 putative class, some putative class members have filed their own complaints alleging similar theories of liability. *Id.* ¶ 4. Many of the materials that Quinn Emanuel identified and cited in the class complaint were subsequently cited and used in these individual lawsuits. *Id.*

Given Quinn Emanuel’s works in identifying and investigating this case, the first 23(g)(1)(A) factor weighs in favor of appointing Quinn Emanuel interim class counsel. *See, e.g., Steele*, 2015 WL 4121607, at *4 (granting interim counsel motion based in part on “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) (appointing interim 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) (granting interim counsel motion based in part of 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. ¶ 5. For the third straight year, BTI Consulting Group (based on 300 interviews of companies representing over \$14 billion in revenue) has recognized Quinn Emanuel in 2015 as one of the four law firms that

“in-house counsel fear the most.” *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 \$47 billion in judgments and settlements, including \$28 billion in the last two years alone. *Id.* ¶ 6. Quinn Emanuel also tries more cases than almost any other major law firm. *Id.* The firm’s partners have first-chaired over 2,400 trials and arbitrations, and won over 88%, including five 9-figure jury verdicts. *Id.* In recent years, the firm has always handled at least one trial or arbitration per year involving \$1 billion dollars or more in alleged damages. *Id.*

This case combines and will draw on the firm’s 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.* ¶ 7. 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. ¶ 8. He has been lead counsel in over 20 trials and arbitrations, and has argued (and won) important 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.* ¶ 9. 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.* 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 and is 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.* ¶ 10. 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 a novel legal theory, its preparation and filing of the Complaint, its Opposition to the United States' Motion to Dismiss, as well as its assistance to, cooperation with, and coordination of other plaintiff's counsel in the Later-Filed Actions, Quinn Emanuel has demonstrated a mastery of the law related to every aspect of this suit, including the jurisdictional and procedural issues as well as the substantive law related to the ACA's risk corridors provision. 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 easily 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 and will continue to bring them fully to bear on behalf of the putative class. 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. ¶ 11. 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 Interim Class Counsel.

DATED: October 5, 2016

Respectfully submitted,

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

/s/ Stephen Swedlow _____

Stephen Swedlow
stephenswedlow@quinnemanuel.com
500 W. Madison Street, Suite 2450
Chicago, Illinois 60661-2510
Telephone: (312) 705-7400
Facsimile: (312) 705-7401

J.D. Horton
jdhorton@quinnemanuel.com
Adam B. Wolfson
adamwolfson@quinnemanuel.com
865 S. Figueroa Street
Los Angeles, California 90017
Telephone: (213) 443-3000
Facsimile: (213) 443-3100

Attorneys for Plaintiff Health Republic
Insurance Company and the Class

CERTIFICATE OF SERVICE

I certify that on October 5, 2016, a copy of the attached Motion to Appoint Quinn Emanuel Urquhart & Sullivan, LLP, as Interim Class Counsel was served via the Court's CM/ECF system on Defendant's counsel Charles Edward Canter.

/s/ Stephen Swedlow
Stephen Swedlow