IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITEDHEALTHCARE OF NEW YORK, INC.,	*	
and	*	
OXFORD HEALTH INSURANCE, INC.,	*	
Plaintiffs,	*	
v.	*	Civil Action No. 1:17-cv-07694-JGK
MARIA T. VULLO, in her official capacity as Superintendent of Financial Services of the State of New York,	*	
Defendant.	*	

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR AN INJUNCTION PENDING APPEAL OF THE COURT'S ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND FOR A PERMANENT INJUNCTION

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INTRODUCTION

Plaintiffs' opening brief explained how each of the relevant factors weighs in favor of giving the Second Circuit a chance to consider the surpassingly important questions raised by this case *before* the Superintendent seizes nearly $65 million dollars meant for Plaintiffs to counter the effects of adverse selection, and places them beyond the remedial authority of the federal courts. The Superintendent's opposition does not dispute that Plaintiffs' claims raise issues crucial to the functioning of a massively complex federal statute. Nor does it make any attempt to explain how the federal government can implement and operate the ACA's carefully reticulated risk adjustment scheme if New York can simply unilaterally redistribute funds the Secretary of Health and Human Services has determined are needed to vindicate Congress's intent. Instead, the Superintendent tries to downplay the indisputably irreparable injury facing Plaintiffs by both engaging in unfounded speculation about the effects of an injunction on unspecified third-party insurers, and also ignoring that due to New York's insurance premium pricing requirements for the 2017 plan year, those insurers would actually receive a windfall as a result of the challenged regulation. That will not do. This Court should grant Plaintiffs' motion and preserve the status quo until the Second Circuit has weighed in.[1]

ARGUMENT

I. PLAINTIFFS MEET EACH OF THE REQUIREMENTS FOR INJUNCTIVE RELIEF PENDING THE RESOLUTION OF THEIR APPEAL.

A. Plaintiffs Will Suffer Irreparable Harm Absent An Injunction.

The first factor courts assess when considering a motion for injunction pending appeal is "whether the movant will suffer irreparable injury absent" the injunction. *LaRouche v. Kezer*, 20

[1] Plaintiffs filed a timely notice of appeal on August 28, 2018. Dkt. No. 79.

F.3d 68, 72 (2d Cir. 1994) (quoting *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993)). The Superintendent does not dispute that she intends to confiscate nearly $65 million of the federal risk-adjustment transfers that HHS has determined Plaintiffs must receive in order to counter the effects of adverse selection. *See* Pls.' Mem. 6. Nor does the Superintendent dispute that the Eleventh Amendment would bar any federal-court action to recover those funds in the event the Second Circuit later finds the challenged regulation is preempted. *See id.* Instead, the Superintendent urges this court to ignore that undisputed showing of irreparable injury in favor of a series of irrelevant and misguided arguments.

The Superintendent begins by claiming (at 3-4) that Plaintiffs have no interest in the federal risk adjustment transfers they expect because "the funds are still subject to the State's regulatory authority." That is wrong. The Superintendent has conceded that New York has no authority over HHS's transfers "[b]ecause the risk adjustment program is federally mandated and administered." SUMF ¶ 45. The text of the challenged regulation confirms that it targets funds already earmarked by federal authorities: the Superintendent bills recipients of "a payment transfer from the federal risk adjustment program" only "*after* the federal risk adjustment results are released," and the amount of the State's exaction is "equal to a uniform percentage of *that payment transfer* for the market stabilization pool." 11 N.Y.C.R.R. § 361.9(e)(1), (e)(1)(i) (emphases added). Unlike the state-administered benefits at issue in *Senape v. Constantino*, 936 F.2d 687, 691 (2d Cir. 1991), New York has chosen to "forego" any discretion to withhold, reduce, or otherwise "adjust" the amount of the federal transfers at issue here. *See* 45 C.F.R. § 153.310(a)(3). The Superintendent's post-distribution demand for payment is therefore nothing more or less than an exaction.

The Superintendent's next tack is to claim (at 4) that $65 million is insignificant in light of Plaintiffs' revenues. That is not the test. Plaintiffs need only show that they "will suffer

irreparable injury." *LaRouche*, 20 F.3d at 72 (internal quotation marks omitted). The Superintendent points to no authority that so much as suggests that Plaintiffs must show that the injury will devastate their businesses. To the contrary, "all that 'irreparable injury' means in this context is that unless an injunction is granted, the plaintiff will suffer harm which cannot be repaired." *Studebaker Corp. v. Gittlin*, 360 F.2d 692, 698 (2d Cir. 1966) (Friendly, J.); *accord Rockwell Int'l Sys., Inc. v. Citibank, N.A.*, 719 F.2d 583, 586 (2d Cir. 1983).

The Superintendent protests (at 5) that Plaintiffs' injury is not irreparable because it is monetary. The State made the very same argument in *United States v. New York*, 708 F.2d 92 (2d Cir. 1983) (per curiam), and lost. In that case, New York claimed that monetary losses were not irreparable because the plaintiff "could have sued [the State] in the New York Court of Claims" for damages. *Id.* at 93. The Second Circuit dismissed that contention out of hand. "New York's argument," the court explained "simply misses the mark; in deciding whether a federal plaintiff has an available remedy at law that would make injunctive relief unavailable, federal courts may consider only the available *federal* legal remedies." *Id.* There, as here, the plaintiffs' losses were "irreparable" because "*federal* damages against New York are constitutionally foreclosed" by the Eleventh Amendment. *Id.* at 94 (emphasis added); *see* Pls.' Mem. 6-7. New York's undisputed intention to seize $65 million in Plaintiffs' money is more than enough to establish Plaintiffs' entitlement to an injunction on the first factor.

B. The Superintendent's Predictions Of Harm To Third Parties Rely On Unsubstantiated Speculation.

The second factor courts consider—whether interested parties will suffer a "substantial injury" if an injunction issues—likewise cuts in favor of granting relief. *See LaRouche*, 20 F.3d at 72 (internal quotation marks omitted). As Plaintiffs explained, preserving the status quo pending

a decision from the Second Circuit would effect—at most—a modest delay in the State's receipt of Plaintiffs' money. *See* Pls.' Mem. 1, 14.[2]

The Superintendent's contrary argument is pure speculation. The opposition points to nothing in the record to support its overheated claims that such a brief delay would jeopardize the small-group market or injure smaller insurers. Instead, the Superintendent cites (at 5, 6) to a declaration filed earlier in this litigation, which asserted that two unidentified companies left New York's insurance market more than two years ago "with Federal risk adjustment liabilities playing [an unspecified] role." But the Superintendent identifies no company *presently* in the market that would be put at any risk by an injunction.

The fact is that any distribution under the 2017 Regulation sought to be enjoined here temporarily with respect to plan year 2017 would be a windfall, not a lifeline. That is because New York's insurers were required by the State's Department of Financial Services to account for their anticipated 2017 federal risk-adjustment receipts (in the case of insurers that are risk adjustment recipients such as Plaintiffs) or liabilities (in the case of insurers that are risk adjustment payors) in setting and obtaining state approval for their 2017 plan year premium rates *before* the State announced its plan to redistribute federal transfers. *See* New York State Dep't of Fin. Servs., *Instructions for the Filing of 2017 Premium Rates Individual and Small Group – "On" and "Off" Exchange Plans* 6-7 (Mar. 11, 2016), *see* Dkt. 81-1, Exh. A to Declaration of Jon-Michael Dougherty ("Dougherty Decl."), submitted herewith. The Department finalized those rates on August 5, 2016—more than a month before the challenged regulation was announced on

[2] The Superintendent's claim (at 5 n.4) that Plaintiffs failed to address the potential harm to other parties apparently ignores these passages.

September 9, 2016. *See* SUMF ¶ 46; Press Release, New York State Dep't of Fin. Servs., *Department of Financial Services Announces 2017 Health Insurance Rates* (Aug. 5, 2016), *available at* https://www.dfs.ny.gov/about/press/pr1608051.htm. By contrast, the Department took measures to prevent insurers from receiving the very same kind of windfall with respect to plan year ***2018*** by directing them to address the "[t]otal expected market-wide payments and charges under the federal risk adjustment, *including* the expected impact of New York's adjustment to federal risk adjustment." New York State Dep't of Fin. Servs., *Instructions for the Filing of 2018 Premium Rates Individual and Small Group – "On" and "Off" Exchange Plans* 7, (Apr. 19, 2017) (emphasis added), *see* Dkt. 81-2, Exh. B to Dougherty Decl. There is therefore no non-speculative risk of countervailing harm to weigh against the very real and irreparable injury facing Plaintiffs in the coming weeks with respect to the federal risk adjustment payments they will soon be receiving for plan year 2017.

C. Plaintiffs Have A Substantial Case On The Merits.

With respect to the third factor, Plaintiffs have "a substantial case on the merits" of their preemption claims. *LaRouche*, 20 F.3d at 72 (internal quotation marks omitted). And because the Court's rejection of Plaintiffs' non-preemption claims rests on its preemption holding, Plaintiffs have made the required showing as to both. *See* Pls.' Mem. 13-14.

Plaintiffs are aware of no other decision that addresses whether a State's effort to unilaterally redistribute ACA risk adjustment transfers is preempted, and the Superintendent points to none. The Court, too, understood that it was breaking new ground and indicated that it expected "the parties to take [its merits decision] to the Court of Appeals so that you get a final decision." Tr. 8:16-18. Even where "the Court remains confident in the soundness" of its decision, the presence of such "issue[s] of first impression" cuts in favor of granting a stay. *Jock v. Sterling Jewelers, Inc.*, 738 F. Supp. 2d 445, 447 (S.D.N.Y. 2010). After all, "where the district court has

had to address issues as to which the appellate courts have provided little direct guidance, the likelihood that an appellate court will take a different approach increases. In such circumstances, a court should hesitate to impose irreparable harm on a party who may seek appeal." *Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec.*, 842 F. Supp. 2d 720, 733 (S.D.N.Y. 2012); *see Cayuga Indian Nation of New York v. Pataki*, 188 F. Supp. 2d 223, 253 (N.D.N.Y. 2002) (finding "no need to engage in a detailed analysis of the relative merits of any appeal" where "the difficulties of the issues presented" make it "foolhardy to predict that there is no likelihood of success on appeal" (internal quotation marks and ellipses omitted)).

Even setting aside the novelty of the issues raised, Plaintiffs present a substantial case. Without attempting to address Plaintiffs' arguments from the text and structure of the ACA and its implementing regulations, *see* Pls.' Mem. 7-8, the Superintendent touts (at 6-7) the federal Government's informal endorsement of state efforts to "make adjustments" to their own insurance regulations. But even if those non-binding statements were Plaintiffs' only evidence—and they most certainly are not—this Court's interpretation of the regulations to permit "any state [risk-adjustment] programs operated under state authority" sweeps far beyond what HHS intended. Opinion & Order, Dkt. No. 66 at 26. To the contrary, HHS explained that, although "States that take such actions and make adjustments do not generally need HHS approval," changes that "involve[] a reduction to the risk adjustment transfers calculated by HHS" are specifically addressed by regulation and "require HHS review." Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2019, 83 Fed. Reg. 16,930, 16,960 (Apr. 17, 2018); *see* 45 C.F.R. § 153.320(d). Nothing in the Superintendent's cherry-picked quotations suggests that HHS meant to invite States to reduce or even eliminate federal risk-adjustment transfers altogether without so much as consulting HHS. There is at least a substantial possibility

that the Second Circuit will conclude that the Superintendent may not, under the guise of exercising parallel authority, oust HHS from its statutory duty to "take such actions as are necessary to implement" a risk-adjustment program on New York's behalf. 42 U.S.C. § 18041(c)(1); *cf. id.* § 18041(d) (state laws that "prevent the application of the provisions of this title" are not saved from preemption).

D. The Balance Of Equities Favors A Brief Injunction Pending Appeal.

Finally, the balance of equities tilts decisively in Plaintiffs' favor. *See LaRouche*, 20 F.3d at 72-73. Against Plaintiffs' substantial case and the imminent and irreparable harm they face absent an injunction, the inconvenience of a brief delay barely registers on the scale. The Superintendent's vague predictions of "immediate consequences" ignores the sequence of events described above. *See* pp. 4-5. The exaction sought to be enjoined simply is not needed to "stabilize" insurers that already realized premiums that fully accounted for federal risk-transfer liabilities.

CONCLUSION

For these reasons, and the reasons set forth in Plaintiffs' opening brief, this Court should grant the motion and enjoin enforcement of the 2017 Regulation pending resolution of Plaintiffs' appeal to the Second Circuit.

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CERTIFICATE OF COMPLIANCE

1. This reply complies with the type-volume limitations of the Court's standing rule 2.D because this reply contains 1,929 words, excluding the parts of the reply exempted by standing rule 2.D.

2. This reply complies with the typeface and formatting requirements of Local Rule 11.1 and the Court's standing rule 2.D.

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