UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITEDHEALTHCARE OF NEW YORK.

and

OXFORD HEALTH INSURANCE, INC.

Plaintiffs,

-against- 17-CV-7694

MARIA T. VULLO, in her official capacity as Superintendent of Financial Services of the State of New York,

Defendant

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR AN INJUNCTION PENDING APPEAL

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PRELIMINARY STATEMENT

Plaintiffs' application for an injunction pending appeal seeks, yet again, to subvert the State's important function of regulating and stabilizing New York's individual and small group health insurance markets. Despite this Court's decisive acknowledgment of New York's ability to implement State risk adjustment, Plaintiffs' wish to enjoin the administration of the State's regulatory mandate, stay the transfer of risk adjustment funds deemed critically necessary to the overall health of New York's marketplace and ultimately destabilize the small group health insurance market in New York, which covers over one million New Yorkers.

Plaintiffs' application for an injunction pending appeal fails to satisfy every element required for imposition of this drastic and disruptive relief. First, their unconvincing claim of potential success on appeal remains founded on their continued and inexplicable disregard for HHS' and CMS' repeated guidance that "explicitly acknowledged" New York's role in implementing risk adjustment under the ACA [Opinion and Order, Dkt. No. 66 at 21].

Second, their statement of irreparable harm is limited exclusively to potential exposure to monetary injury representing a negligible fraction of Plaintiffs' earnings, which pales in comparison to the potential harm to New York's markets and insurance consumers.

Third, Plaintiffs fail to justify the disruptive effects an injunction would have on New York's individual and small group health insurance markets and the substantial injury facing smaller domestic insurance companies and downstream insureds, should State risk adjustment payments be halted. Plaintiffs' application is completely silent with respect to this required element of the analysis.

Finally, Plaintiffs simply cannot articulate any convincing basis upon which the balance of equities or public interest do not tip decidedly in favor of protecting the State's insured population

and overall market health. On balance, any destabilization to New York's overall insurance marketplace that would accompany any delay in risk adjustment far outweighs the proportionately minimal monetary exposure to Plaintiffs' already massive bottom line.

Plaintiffs' application for an injunction pending appeal must be denied, as they do not satisfy any of the elements necessary for a grant of this extraordinary relief.

STATEMENT OF RELEVANT FACTS AND LEGAL BACKGROUND

Defendant's Motion to Dismiss [Dkt. Nos. 31-33] and Opposition/Reply papers [Dkt. Nos. 39-41] contain a complete discussion of the Federal and State risk adjustment paradigms and the statutory and procedural history relevant to issue before the Court. In the interest of judicial economy and avoidance of redundancy, these facts will not be restated and are incorporated by reference.

ARGUMENT

POINT I
PLAINTIFFS ARE NOT ENTITLED TO AN INJUNCTION PENDING APPEAL

In the Second Circuit a movant seeking a stay or injunction pending appeal bears the heavy burden of establishing all four of the following elements: (1) That the movant will suffer irreparable injury absent an injunction; (2) That a party will suffer substantial injury if an injunction is issued; (3) That the movant has demonstrated "a substantial possibility, although less than a likelihood, of success" on appeal, and; (4) That the public interests that may be affected. Hirschfeld v. Board of Elections, 984 F.2d 35, 39 (2d Cir. 1993) (citations omitted).

The decision to grant an injunction pending appeal is within the sound discretion of the Court and is considered an "extraordinary remedy". Silverstein v. Penguin Putnam, Inc., 368 F.3d 77, 84 (2d Cir. 2004). The movant's burden is particularly "high" where, as here, "they seek…to prevent enforcement of a statute [that was] … previously upheld and is presumed valid". Brown

v. Gilmore, 533 U.S. 1301, 1303 (2001).

In weighing the four elements required for an injunction, this court follows a flexible approach that requires "a lesser showing of harm if [movant] is likely to succeed on the merits and demand a more substantial showing of harm if the likelihood of success is low". Purdue Pharma L.P. v. Endo Pharm., Inc., 2004 U.S. Dist. LEXIS 2276, at *7-8 (S.D.N.Y. Feb. 13, 2004).

As Plaintiffs cannot carry their burden on any of the four elements, this Court should not exercise its discretion to grant an injunction pending appeal.

A. Plaintiffs Will Not Suffer Irreparable Harm Absent an Injunction

In considering a post-trial motion for injunction pending appeal, "the requirement of irreparable harm is applied more stringently … because the propriety of injury … has been judicially determined, and its imposition without further delay is surely more acceptable than prior to judgment". Malarkey v. Texaco Inc., 794 F. Supp. 1248, 1250 (S.D.N.Y. 1992) (citations omitted). That is to say that Plaintiffs' already onerous burden requires an even more severe demonstration of harm, as the Court has already weighed in on the propriety of State risk adjustment under 11 NYCRR § 361.9. Id.

Plaintiffs' sole statement of irreparable injury stems from the future transfer of up to $65 million into the State risk pool, pursuant to application of State risk adjustment under 11 NYCRR §361.9. Before analyzing the legal impact of this purely monetary statement of harm, some context is necessary.

First, as this Court previously recognized, the $65M represents nothing more than proceeds that Plaintiffs will receive pursuant to F-RAP but prior to application of any State risk adjustment. Dkt. No. 66 at 33. That is, Plaintiffs are claiming an irreparable injury from the "seizure" of monies not yet even realized by the companies, as the funds are still subject to the State's

regulatory authority. Id. (Plaintiffs' argument "simply merges [their] takings claim with their preemption claims…the 2017 NYRA is not preempted by the ACA"). Plaintiffs cannot claim irreparable injury from the "loss" of regulated funds in which they have no cognizable interest. Senape v. Constantino, 936 F.2d 687, 690 (2d Cir. 1991) (there is no recognized property interest in reimbursements in the face of regulatory "provisions that retain for the state significant discretionary authority…").

Second, the $65M represents a mere fraction of Plaintiffs' anticipated total Federal Risk Adjustment receivable. See Dkt. No. 40, Powell Decl. 2d ¶¶ 32-36. For example, Plaintiff Oxford Health Insurance received $315,374,112[1] under the 2015 Federal-Risk Adjustment program and $254,933,461 under the 2016 Federal-Risk Adjustment program. Id. ¶ 33. Their 2017 Federal-Risk Adjustment will also be over $200M[2]. Further, the $65M pales when put in context of Plaintiffs' total earnings. UnitedHealthcare, which is currently ranked 6th on the Fortune 500 list, reported operating revenues of $184,840,000,000 in 2016, taking in $144,118,000,000 in premium dollars alone. In New York, United companies collected over $14 billion in premium in 2016 according to their most recent filings with the National Association of Insurance Commissioners ("NAIC")[3].

Finally, Plaintiffs' statement of harm fails to contextualize the market-wide impact of the $65M State risk adjustment. While Plaintiffs lament the potential "loss" of a proportionately insignificant amount of money, the damage to smaller NY insurers (and by extension downstream consumers) should the State risk adjustment go unrealized is far more significant. Since the advent

[1] This value was reduced ultimately to $211,846,960, but only after one of the insurers in the NY market became insolvent. Powell Decl. 2d, ¶33.
[2] https://downloads.cms.gov/cciio/Summary-Report-Risk-Adjustment-2017.pdf.
[3] www.unitedhealthgroup.com/~/media/5D60EEEE258F4D2FA4BA765727C41D5C.ashx (last accessed Dec. 15. 2017).

of ACA Risk Adjustment two companies operating in New York's small group market have left the market with Federal risk adjustment liabilities playing a role. Dkt. No. 40, Powel Decl. 2d, ¶ 41. In reality, should the Court grant an injunction pending appeal, the smaller companies that will benefit from State risk adjustment are the only parties who would be irreparably harmed.

Irrespective of this context, Plaintiffs' statement of purported irreparable harm is of no legal significance. Irreparable harm is "harm not readily remediable monetarily". Monsanto Co. v. Homan McFarling, 302 F.3d 1291, 1296-97 (Fed. Cir. 2002); see also EEOC v. Local 638, 71 Civ. 2877, 1995 U.S. Dist. LEXIS 7756 at *5 (S.D.N.Y. Jun. 7, 1995) ("Irreparable injury means the kind of injury for which money cannot compensate"). Plaintiffs advance only monetary harm in support of their application for injunction and rank speculation about their inability of recovery in the event of appellate reversal.

B. New York's Insurance Market Will Suffer Substantial Injury if Risk Adjustment is Enjoined Pending Appeal

Plaintiffs' application for a stay ignores one of the four required elements for an injunction pending appeal. The Second Circuit requires a movant to analyze potential injury to non-moving parties in the event an injunction issues. Hirschfeld 984 F.2d at 39 (element two of four prong analysis). Plaintiffs' motion papers include no such analysis[4]. See generally Dkt. No. 71.

Plaintiffs' silence on this point is perhaps attributable to the overwhelming evidence that a stay or delay in New York's ability to implement State risk adjustment would have potentially far more significant impacts on the small group health insurance markets in the State. The effects of Federal Risk Adjustment on New York's market standing, without aid of a curative State counterpart are well documented and stark. Absent State market stabilization efforts New York

[4] As Plaintiffs bear the burden of establishing each of the four (4) elements to the injunction analysis, their failure to address one such element completely is alone grounds for denial of the instant application. Hirschfield 984 F.2d at 39.

ranks at or near the bottom of nearly every metric available to judge the impact of ACA risk adjustment. Dkt. No. 40, Powel Decl. 2d ¶¶ 21-30. Moreover, without the benefit of risk adjustment pursuant to 11 NYCRR §361.9, New York lost two insurance companies operating in the small group market, while Plaintiffs realized a windfall of unexpectedly large ACA Risk Adjustment payouts and high premiums from New York consumers. Id. ¶ 41.

Imposition of an injunction during the pendency of the appeal would create a risk of substantial injury to New York's insurance markets, smaller insurance carriers, and by extension all New York consumers. Such an injunction should not issue.

C. Plaintiffs Do Not Have a Substantial Possibility of Success on the Merits

To establish entitlement to injunctive relief, Plaintiffs must also demonstrate "a substantial possibility, although less than a likelihood, of success" on appeal. The probability of success is considered "the single most important factor" for such a request. In re Simpson, No. 17-10442, 2018 Bankr. LEXIS 1211, at *10-12 (Bankr. D. Vt. Apr. 23, 2018). While the prevailing standard does not require a demonstration of a "likelihood of success", it does require a showing of something more than a mere possibility of success on appeal. Blossom South, LLC v. Sebelius, 2014 U.S. Dist. LEXIS 6474, *8 (W.D.N.Y. 2014).

> The appellant must show more than simply some chance of success on appeal; since the appellant's arguments have already been considered and rejected by the court, the appellant must demonstrate a substantial showing of likelihood of success, not merely the possibility of success…Id.

Based upon this Court's thorough and decisive decision and the unambiguous Federal guidance on the ultimate issue of Federal preemption, Plaintiffs do not possess the requisite chance of success on appeal. As the Court recognized in the underlying Opinion and Order and repeatedly during Oral Argument, the presence of such comprehensive, definite and oft-repeated Federal

guidance on the issue of State involvement in risk adjustment belies Plaintiffs' chances of a successful appeal on the paramount issue of preemption.

> The fact that the agencies responsible for implementing the FRAP – HHS and CMS – have repeatedly stated that States may turn to their own authority to adjust for unintended consequences of the FRAP – and have acknowledged that there have been such unintended consequences – is strong evidence that the ACA does not preempt the 2017 NYRA. Dkt. No. 66, Opinion and Order at 27.

The Court is, of course, permitted to consider its analysis and evaluation in the underlying Opinion and Order when weighing the "possibility of success on appeal" element of the test for injunction. Warner-Lambert Co. v. Northside Assocs., 922 F. Supp. 840, 848 (S.D.N.Y. 1996).

Plaintiffs remain unable to meaningfully explain or distinguish HHS' and CMS' position encouraging states to "examine whether any local approaches…are warranted" and "take action and make adjustments" without Federal approval. Dkt. No. 66, Opinion and Order at 27 (citing 83 Fed. Reg. 16930, 16960). Plaintiffs offer nothing novel in support of the instant motion and their brief is merely a restatement of unconvincing arguments already considered and rejected by this Court. Such repetition of prior argument already brought before the court is not enough to satisfy the probability of success element. Local 1303-362 of Council 4 v. KGI Bridgeport Co., 2014 U.S. Dist. LEXIS 21644, at *19 (D. Conn. Feb. 10, 2014).

As noted above, in analyzing applications for injunction pending appeal courts apply a "sliding scale approach" that requires a greater demonstration of purported harm proportionate to the weakness of the movant's chance of success on appeal. See Purdue Pharma L.P. v. Endo Pharm., Inc., 2004 U.S. Dist. LEXIS 2276, at *7-8; see also Standard Havens Prods. v. Gencor Indus., 897 F.2d 511, 513 (Fed. Cir. 1990) ("The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor"). As demonstrated herein, Plaintiffs have both an excessively low chance of success

on appeal and a negligible statement of purported harm. In such circumstances, the injunction request should be denied.

D. The Equities Tip Markedly in Favor of Allowing New York the Ability to Stabilize its Health Insurance Market to the Benefit of the State's Insurance Consumers

As discussed throughout this memorandum, the balance of the equities and public interest overwhelming favor the Defendant. The public interest is unquestionably advanced by the unfettered and prompt administration of State risk-adjustment and stabilization of New York's small group insurance market which covers over one million New Yorkers. There is simply no comparison between the statewide interests that Defendant seeks to protect and a multi-billion dollar company's interest in protecting a disproportionately small amount of regulated money, in which they have no cognizable interest.

In light of the multiple smaller insurance companies who have already left the market in light of unchecked Federal risk adjustment, Plaintiffs' position that an injunction "merely imposes a modest delay" on the State is simply inaccurate. Any delay to State Risk Adjustment will have real and immediate consequences to market participants and consumers alike.

On balance the equities overwhelmingly favor permitting the stabilization of New York's markets to benefit the over one million New Yorkers covered by small group health insurance in the state who could be affected by any delay.

CONCLUSION

For the reasons set forth herein, Plaintiffs' Motion for an Injunction Pending Appeal must be denied.

Dated: Albany, New York
September 5, 2018

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