IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

STATE OF TEXAS,
STATE OF KANSAS,
STATE OF LOUISIANA,
STATE OF INDIANA,
STATE OF WISCONSIN, and
STATE OF NEBRASKA

Plaintiffs,

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ALEX M. AZAR II, in his official capacity as SECRETARY OF HEALTH AND HUMAN SERVICES, UNITED STATES INTERNAL REVENUE SERVICE, and DAVID J. KAUTTER, in his official capacity as ACTING COMMISSIONER OF INTERNAL REVENUE SERVICE

Defendants.

Civ. No. 7:15-cv-00151-O

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR ENTRY OF JUDGMENT AND TO RECONSIDER THE COURT'S DISMISSAL OF PLAINTIFFS' CLAIMS FOR REFUNDS AND OTHER RULINGS

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INTRODUCTION

Plaintiffs seek reconsideration of a decision that this Court made nearly two years ago, dismissing Plaintiffs' claims for a refund of the Health Insurance Providers Fee ("HIPF") that is imposed on certain managed care organizations ("MCOs") with which Plaintiffs contract for Medicaid services. Plaintiffs' motion is meritless and should be denied.

This Court correctly held that Plaintiffs cannot pursue a refund claim under 28 U.S.C. § 1346(a)(1) because they "were neither directly subject to the HIPF, nor actually paid the relevant tax on behalf of the taxpayer assessed. Rather, Plaintiffs allege that they paid the full amount *to* the taxpayer against whom the tax was assessed." Mem. Op. & Order at 21, ECF No. 34 (citation omitted) (hereinafter "Aug. 2016 Order"). Plaintiffs do not provide any basis for the Court to reconsider this decision. Instead, they merely rehash the same arguments the Court previously rejected.

Furthermore, even if Plaintiffs had paid the HIPF to the federal government, their refund claims still would be subject to dismissal because Plaintiffs did not comply with the Internal Revenue Code's ("Code") jurisdictional prerequisites for bringing a refund action in federal court. Plaintiffs did not submit an administrative refund claim to the Internal Revenue Service ("IRS") before they filed suit; nor did they wait the necessary six-months after submitting such a claim before filing suit. The Supreme Court has made clear that these jurisdictional prerequisites cannot be excused merely because a taxpayer seeks to raise constitutional claims or asserts that exhaustion would be futile. Thus, even if the Court were to reverse its earlier decision, Plaintiffs' refund claims still would be barred for this alternative reason.

In their motion for reconsideration, Plaintiffs also assert, for the first time, that they have two other avenues for obtaining monetary relief from Defendants: *South Carolina v. Regan*, 465

U.S. 367 (1984), and the Administrative Procedure Act ("APA"). A motion for reconsideration is not a vehicle for raising new legal theories that could have been presented earlier. Nevertheless, even if the Court were to consider these belated arguments, they do not provide a basis for relief.

Regan recognized a narrow exception to the Anti-Injunction Act ("AIA"), which bars suits brought for the purpose of restraining the assessment or collection of a tax. Plaintiffs' refund claims do not seek to restrain the collection of a tax; they seek a refund of a portion of a tax already paid by third parties, the MCOs. Therefore, the AIA—and *Regan*'s exception to it—are inapplicable.

In addition, the APA does not authorize the Court to award the monetary relief Plaintiffs seek. Plaintiffs did not pay the HIPF, and thus, they are not seeking the return of specific funds they paid to the federal government. Rather, Plaintiffs seek compensation to substitute for the costs imposed on them as a result of having to account for the HIPF in the capitation rates they paid to MCOs. Such substitute relief (*i.e.*, money damages) is not available under the APA. For these reasons, Plaintiffs' motion for reconsideration should be denied.

Plaintiffs also request that the Court enter final judgment. Defendants do not object to the entry of final judgment, but Plaintiffs' proposed judgment, ECF No. 95-1, is overly broad as explained below and should be rejected.

STANDARD OF REVIEW

Plaintiffs do not identify the rule under which their motion for reconsideration is brought. Nevertheless, the Fifth Circuit has held that a motion seeking reconsideration of an "interlocutory order[]" that does not "end the action" should be considered under Federal Rule of Civil Procedure 54(b). *Austin v. Kroger Texas, L.P.*, 864 F.3d 326, 336 (5th Cir. 2017) (quoting Fed. R. Civ. P. 54(b)). Because the Court's August 2016 Order dismissing Plaintiffs' refund claims did not

resolve this case and the Court has not yet entered final judgment, *see* ECF No. 93, at 2, Plaintiffs' motion is governed by Rule 54(b). *See, e.g.*, *Austin*, 864 F.3d at 336; *Dos Santos v. Bell Helicopter Textron, Inc. Dist.*, 651 F. Supp. 2d 550, 553 (N.D. Tex. 2009).

Rule 54(b) permits a district court to "reconsider and reverse its decision for any reason it deems sufficient." *Austin*, 864 F.3d at 336. Although this standard is less exacting than the standards for evaluating motions for reconsideration under Federal Rules of Civil Procedure 59(e) and 60(b), "considerations similar to those under Rules 59 and 60" also inform the Court's analysis of a Rule 54(b) motion. *Dallas Cty. v. MERSCORP, Inc.*, 2 F. Supp. 3d 938, 950 (N.D. Tex. 2014) (citation omitted), *aff'd sub nom. Harris Cty. v. MERSCORP, Inc.*, 791 F.3d 545 (5th Cir. 2015). In particular, a motion for reconsideration is "not the proper vehicle for rehashing evidence, legal theories, or arguments" that were previously raised and rejected by the court. *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004); *see, e.g.*, *Dallas Cty.*, 2 F. Supp. 3d at 950-51 (denying 54(b) motion where movant merely repeated the same arguments it raised earlier); *Dos Santos*, 651 F. Supp. 2d at 553. A motion for reconsideration also cannot be used to "advanc[e] theories of the case that could have been presented earlier." *Arrieta v. Yellow Transp., Inc.*, No. 3:05-CV-2271-D, 2009 WL 129731, at *1 (N.D. Tex. Jan. 20, 2009) (citation omitted); *Rotella v. Mid-Continent Cas. Co.*, No. 3:08-CV-0486-G, 2010 WL 1330449, at *6 (N.D. Tex. Apr. 5, 2010) (denying Rule 54(b) motion where movant had "not adequately raise[d]" claim in its earlier briefing); *Dos Santos*, 651 F. Supp. 2d at 553.

ARGUMENT

I. PLAINTIFFS CANNOT PURSUE A REFUND CLAIM UNDER 28 U.S.C. § 1346(a)(1)

This Court previously held that it lacked jurisdiction over Plaintiffs' refund claims because Plaintiffs did not pay the HIPF. *See* Aug. 2016 Order at 21 (dismissing Count VII and Count X in part). That decision was correct, and there is no reason to reconsider it. Moreover, even if Plaintiffs had paid the HIPF to the federal government, they still could not pursue a refund claim under 28 U.S.C. § 1346(a)(1), as they failed to comply with the Code's jurisdictional prerequisites before filing this suit. For either (or both) of these reasons, the Court rightly dismissed Plaintiffs' refund claims.

A. The Court Correctly Dismissed Plaintiffs' Refund Claims

The Court previously determined that it lacked jurisdiction over Plaintiffs' refund claims because Plaintiffs were not "directly subject to the HIPF" and did not "actually pa[y] the [HIPF] on behalf of the taxpayer assessed." Aug. 2016 Order at 21. The Court explained that 28 U.S.C. § 1346(a)(1)—which waives the United States' sovereign immunity with respect to "[a]ny civil action . . . for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected"—does not authorize refund suits by third parties, like Plaintiffs, that do not actually pay the relevant tax and instead merely pay money to another party against whom the tax is assessed. *See* Aug. 2016 Order at 21. Plaintiffs ask the Court to reconsider this decision but offer nothing more than the same arguments this Court already considered and rejected.

Plaintiffs assert that the Court has jurisdiction over their refund claims under § 1346(a)(1) if one "*assum[es]* that the Plaintiffs are 'taxpayers,' and that the HIPF is 'assessed or collected' against them." Pls.' Mot. for Entry of Judgment & to Reconsider the Court's Dismissal of Pls.' Claims for Refunds & Other Rulings ("Pls.' Mot.") at 7, ECF No. 95 (emphasis added). That

statement, of course, merely begs the question whether Plaintiffs are taxpayers as to the HIPF and whether the HIPF is assessed against, or collected from, them. This Court previously determined that they are not and it is not. *See* Aug. 2016 Order at 21. Rather, it is MCOs that pay the HIPF and MCOs that are directly subject to the tax. *Id*. Plaintiffs do not provide any arguments to refute the Court's prior determination; indeed, they reinforce its correctness by acknowledging that "Plaintiffs don't even really pay a 'fee,' but 'capitation rates,' or insurance premiums, to the insurance companies that are contracted to provide Medicaid services." Pls.' Mot. at 16. Because the HIPF is assessed against and paid by MCOs, not Plaintiffs, § 1346(a)(1)'s limited waiver of sovereign immunity does not extend to Plaintiffs.

Although the Court previously rejected Plaintiffs' attempts to fit within the narrow exception to the rule against third-party refund suits recognized in *United States v. Williams*, 514 U.S. 527, 540 (1995), Plaintiffs again argue that the *Williams* exception applies here. *See* Pls.' Mot. at 8-9. This contention should be rejected at the threshold because *Williams* has been narrowed by statute. As the Fifth Circuit explained in *Wagner v. United States*, 545 F.3d 298 (5th Cir. 2008), Congress enacted 26 U.S.C. § 7426(a)(4) following *Williams* and thus "§ 7426 is now the only avenue for third party actions." 545 F.3d at 303. "[T]here can no longer be a good argument for allowing a third-party challenge to an assessment" outside the narrow categories set forth in § 7426. *Id*. Because Plaintiffs do not argue (and never have argued) that § 7426 applies here, the Court lacks jurisdiction over their refund claims.

In addition, even if the exception announced in *Williams* still survives, it does not help Plaintiffs. *Williams* addressed a situation in which the plaintiff, "though not assessed a tax, *paid the tax* under protest to remove a federal tax lien from her property." 514 U.S. at 531 (emphasis

added). Plaintiffs here, in contrast, have not actually paid the HIPF. It was (and is) paid by MCOs. Thus, as this Court previously held, *Williams* is distinguishable. *See* Aug. 2016 Order at 20-21.

Plaintiffs maintain that *Williams* does not require the party seeking a refund to pay the tax directly to the IRS so long as that party is "saddled with the full liability" for the amount of the tax. Pls.' Mot. at 8. Plaintiffs' reading of *Williams*, however, is not supported by its language. The Court repeatedly referred to the plaintiff in *Williams* as the person who paid the tax. *See, e.g.*, 514 U.S. at 529, 531, 534, 540. Moreover, in explaining the reasons for its decision, the Court focused on the fact that "the Government surely subjected [the plaintiff] to a tax" by "accepting her tax payment." *Id*. at 535. It is not sufficient, therefore, that Plaintiffs—as downstream purchasers of Medicaid services—may bear the economic burden of a portion of the HIPF imposed on the MCOs. To bring a refund suit under the exception recognized in *Williams* (assuming it still subsists), the party seeking a refund must actually pay the tax. *See, e.g.*, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. IRS*, 845 F.2d 139, 141–42 (7th Cir. 1988) (holding that the court lacked jurisdiction over refund claim by party that bore "the economic burden of [a] tax" where another party was actually subject to, and paid, the tax); 26 U.S.C. § 6402(a) (explaining that a tax refund may only be made to "the person who made the overpayment"); 26 C.F.R. § 57.9 (providing that "[a]ny claim for a refund of the [HIPF] must be made by the entity that paid the fee to the government"). Because Plaintiffs did not pay the HIPF, their refund claims were properly dismissed.

B. Plaintiffs' Failure to Comply with the Jurisdictional Prerequisites to Filing a Refund Suit Provides an Additional Basis for the Dismissal of Plaintiffs' Refund Claims

Even if the Court were to reverse its prior holding, Plaintiffs' refund claims still would be subject to dismissal for the independent reason that Plaintiffs did not comply with the Internal Revenue Code's jurisdictional prerequisites for filing a refund suit.

Before filing a refund action in federal court, a taxpayer "must comply with the tax refund scheme established in the Code." *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 4 (2008) (citation omitted). Under that scheme, a taxpayer must file an administrative refund claim with the IRS that complies with the applicable Treasury Regulations "before suit can be brought." *Id*. Specifically, 26 U.S.C. § 7422(a) provides:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, . . . or of any sum alleged to have been excessive or in any manner wrongfully collected, *until a claim for refund or credit has been duly filed with the Secretary*, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

Id. (emphasis added).

The Code also imposes a mandatory waiting period after a taxpayer submits an administrative refund claim to the IRS before the taxpayer may file suit. Section 6532(a)(1) specifies that "[n]o suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time[.]" 26 U.S.C. § 6532(a)(1).

Plaintiffs did not comply with these jurisdictional prerequisites before filing this action. Plaintiffs admit that Texas did not submit a refund claim to the IRS for tax year 2014 until "six days *after* this lawsuit was filed." Pls.' Mot. at 14 (emphasis added). And Texas did not file an

administrative refund claim for tax years 2015 or 2016 until May 2018—more than two-and-a-half years after this suit was filed. *See* ECF No. 96, at A1185-87. The remaining Plaintiffs also failed to submit a refund claim to the IRS for any of the relevant years until May 2018. *See id*. at A1188-A1226. Because Plaintiffs did not file an administrative refund claim with the IRS or comply with the mandatory waiting period *before* filing this suit, the Court lacks jurisdiction over Plaintiffs' refund claims.[1]

Plaintiffs do not dispute that they failed to comply with the Code's jurisdictional prerequisites. *See* Pls.' Mot. at 9-15. Instead, they maintain that their failure should be excused for various reasons or that the Court should treat their filing of this lawsuit as a valid informal claim. *See id*. These arguments are baseless.

1. Compliance with the Code's jurisdictional prerequisites cannot be excused

Plaintiffs ask the Court to excuse their failure to comply with the Code's requirements because (1) their lawsuit raises "serious constitutional questions," Pls.' Mot. at 9; (2) compliance would be futile, as the IRS purportedly would not act on, or would deny, Plaintiffs' administrative refund claims, *see id*. at 10-11; and (3) Plaintiffs challenge a generally applicable policy or practice, *see id*. at 11-12. The Supreme Court, however, has squarely rejected each of these arguments. In short, the Code establishes strict prerequisites for filing a refund action in federal

[1] Most of Plaintiffs' administrative refund claims are time-barred as well. The Code sets strict time limits for filing refund claims with the IRS. *See* 26 U.S.C. § 6511(a) (requiring administrative refund claim to be filed no later than "3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later"); 26 C.F.R. § 57.8(a). Because Plaintiffs did not pay the HIPF and they do not indicate when they provided capitation payments to their MCOs that accounted for the HIPF, it is difficult to determine the exact date by which Plaintiffs were required to submit their various administrative refund claims. Nevertheless, even under the most generous reading of § 6511(a), Plaintiffs' deadlines for filing an administrative refund claim for the 2014 and 2015 tax years likely would have expired before May 2018.

court, and "it is not within the judicial province to read out of the statute" those requirements. *United States v. Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 273 (1931); *see also Republic Petrol. Corp. v. United States*, 613 F.2d 518, 527 (5th Cir. 1980) ("[G]eneral principles of equity may not override statutory requirements for timely filing of tax refund claims.").

In *Clintwood Elkhorn Mining*, the Supreme Court dispensed with the notion that "the source of [a plaintiffs'] cause of action" determines whether the plaintiff is required to satisfy the Code's jurisdictional prerequisites. 553 U.S. at 9. As here, the plaintiffs in that case argued that their failure to file a proper administrative refund claim should not prevent them from raising a constitutional challenge to the tax at issue. *See id*. The Court rejected the argument, explaining that "Congress has the authority to require administrative exhaustion before allowing a suit against the Government, even for a constitutional violation," and that Congress did so in the Code. *Id*. Thus, the fact that Plaintiffs raise constitutional challenges to the HIPF does not excuse their failure to satisfy the Code's prerequisites to filing suit.

In *Felt*, the Supreme Court rejected Plaintiffs' second argument—that futility is a defense to failure to exhaust the Code's requirements. 283 U.S. at 272-73. Like Plaintiffs here, the *Felt* plaintiffs argued that filing an administrative claim was "a futile and unnecessary act" because it was "certain to be refused." *Id*. at 272. The Court rejected this argument in no uncertain terms.

> The necessity for filing a claim such as the statute requires is not dispensed with because the claim may be rejected. It is the rejection which makes the suit necessary. An anticipated rejection of the claim, which the statute contemplates, is not a ground for suspending its operation. Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and they mark the conditions of the claimant's right. . . . [I]t is not within the judicial province to read out of the statute the requirement of its words.

Id. at 273 (citations omitted).

Plaintiffs note that the Fifth Circuit has recognized futility as a defense to some administrative exhaustion requirements, *see* Pls.' Mot. at 10-11, but none of the cases they cite addressed the Code's jurisdictional prerequisites for a refund suit. To the contrary, the Supreme Court has made clear that those requirements cannot be dispensed with on the ground of futility. *See Felt*, 283 U.S. at 273; *see also, e.g.*, *Quarty v. United States*, 170 F.3d 961, 973 (9th Cir. 1999); *Gallo v. U.S. Dep't of Treasury*, 950 F. Supp. 1246, 1250 (S.D.N.Y. 1997).

Finally, as with Plaintiffs' first and second arguments, Plaintiffs' claim of an exception to the Code's requirements where a taxpayer seeks to challenge a generally applicable policy or practice is found nowhere in the language of the Code. Indeed, *Felt* itself involved a claim that the IRS had a policy or practice of "consistently refus[ing] to allow deductions from gross income for exhaustion of patents." 283 U.S. at 272. Despite the plaintiffs desire to challenge this general practice, the Court nonetheless determined that the action should be dismissed because the plaintiffs failed to submit an administrative refund claim. *See id*. at 272-73; *see also, e.g.*, *State Bank of Albany v. United States*, No. 71-CV-205, 1974 WL 719, at *2 (N.D.N.Y. June 18, 1974) (dismissing refund claim for failure to exhaust where the plaintiff challenged a generally applicable Treasury regulation). The only case Plaintiffs cite to support their position did not involve the Code; nor did it excuse the plaintiffs' failure to exhaust. *See* Pls.' Mot. at 11 (citing *Urban by Urban v. Jefferson Cty. Sch. Dist. R-1*, 89 F.3d 720 (10th Cir. 1996)). The Court thus may not excuse Plaintiffs' failure to comply with the Code's jurisdictional prerequisites.

2. Plaintiffs' complaint does not satisfy the Code's requirements

Plaintiffs argue, in the alternative, that they have complied with the Code's requirements because their "filing [of] this lawsuit and delivering it to . . . IRS" constitutes an informal claim. Pls.' Mot. at 12 (citations omitted). Where applicable, the informal claim doctrine may excuse a

taxpayer's failure to submit a timely administrative refund claim that complies with the formalities required by the Code and Treasury Regulations. *See PALA, Inc. Emps. Profit Sharing Plan & Tr. Agreement v. United States*, 234 F.3d 873, 877 (5th Cir. 2000). To constitute a valid informal claim, a taxpayer must submit a written claim to IRS within the statutory period that "describes the tax and year with sufficient particularity to allow the IRS to undertake an investigation" and "puts the IRS on notice that the taxpayer believes an erroneous tax has been assessed." *Id*. In addition, the taxpayer must subsequently correct the deficiencies in its informal claim by submitting a formal refund claim to the IRS. *Id*. at 879.

Plaintiffs' complaint does not qualify as an informal administrative refund claim. The Code requires a taxpayer to submit an administrative refund claim to the IRS *before* filing suit. *See* 26 U.S.C. § 7422(a). A complaint cannot, by its nature, be filed before a suit is initiated, and thus, a complaint cannot itself constitute an informal claim. For this reason, multiple courts have summarily rejected this argument. *See RadioShack Corp. v. United States*, 105 Fed. Cl. 617, 624 (2012) ("summarily reject[ing]" argument that a "complaint constitutes an informal refund claim"); *In re Long–Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 539 F. Supp. 2d 281, 292 (D.D.C. 2008) (The "suggestion that the court treat [a] civil complaint as a substitute for a properly filed administrative refund claim deserves little comment beyond the observation that it is meritless."), *aff'd in relevant part sub nom. Cohen v. United States*, 578 F.3d 1 (D.C. Cir. 2009); *Whittington v. United States*, 380 F. Supp. 2d 806, 813 (S.D. Tex. 2005) ("[I]t is clear that the mere filing of a complaint would not qualify as sufficient notice" to satisfy the informal claim doctrine.).[2]

[2] Contrary to Plaintiffs' assertion, *Stuart v. United States*, 130 F. Supp. 386 (Ct. Cl. 1955), does not stand for the proposition that "litigation" can qualify as an informal administrative claim. Pls.' Mot. at 13. *Stuart* did not address whether a complaint or any other litigation document can

Furthermore, even if the complaint could be viewed as an informal administrative claim, it would not help Plaintiffs. The informal claim doctrine only excuses compliance with the time limits imposed by the Code for filing an administrative refund claim. *See, e.g.*, *Pennoni v. United States*, 86 Fed. Cl. 351, 363 (2009); *PALA*, 234 F.3d at 877. It does not absolve a taxpayer of the separate obligations to submit an administrative refund claim before filing suit and to provide the IRS with at least six months to resolve that administrative claim before filing suit. *See, e.g.*, *Whittington*, 380 F. Supp. 2d at 813 (concluding the plaintiff "fail[ed] to comply with the mandatory six month waiting period" in 26 U.S.C. § 6532(a)(1) where she submitted an administrative refund claim to the IRS on "the same day th[e] lawsuit was filed"); *Provenzano v. United States*, 123 F. Supp. 2d 554, 558 (S.D. Cal. 2000) (same). Because Plaintiffs did not comply with these separate obligations, the Court lacks jurisdiction over their refund claims even if the complaint could be viewed as an informal claim.[3]

For similar reasons, Defendants' filing of a motion to dismiss in this case does not qualify as a "rejection" by the IRS of Plaintiffs' purported informal claim so as to absolve Plaintiffs of the

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constitute an informal claim. Instead, the court held that a "typed document" that the plaintiff sent to the IRS with his tax payment satisfied the informal claim doctrine because it "made a demand for the return of the [alleged] overassessment." *Stuart*, 130 F. Supp. at 387, 389. Plaintiffs here did not submit any similar document to the IRS before filing suit.

[3] Plaintiffs' complaint also suffers from additional flaws. It does not describe the amount, date, or MCO payee for each payment allegedly made by Plaintiffs with "sufficient particularity to allow the IRS to undertake an investigation" of Plaintiffs' refund claims. *PALA*, 234 F.3d at 877. In addition, the complaint only identifies amounts that Plaintiffs allegedly paid in certain years and does not encompass all of the years or amounts that Plaintiffs now appear to be seeking. *Compare* Am. Compl. ¶ 37, ECF No. 19, *with* ECF No. 96. Thus, even if the complaint could be viewed as an informal claim (and it cannot), it would not satisfy the Code's requirements for all of the amounts Plaintiffs seek. *See, e.g.*, *Lockheed Martin Corp. v. United States*, 39 Fed. Cl. 197, 202 (1997) (explaining that a taxpayer's claims in litigation may not substantially vary from what was presented to the IRS), *aff'd*, 210 F.3d 1366 (Fed. Cir. 2000); *Gustin v. IRS*, 876 F.2d 485, 488 (5th Cir. 1989).

obligation to correct the deficiencies in the informal claim by filing a formal refund claim. *See* Pls.' Mot. at 13-14. The Code requires a taxpayer to wait at least six months after filing an administrative claim before filing suit, unless the IRS rejects the claim in the interim. *See* 26 U.S.C. § 6532(a)(1). But, if a plaintiff files suit before the purported "rejection" (*i.e.*, the motion to dismiss), then the required statutory waiting period could not have elapsed.

3. Plaintiffs' remaining exhaustion arguments also are meritless

Plaintiffs contend that only one plaintiff needs to comply with the Code's jurisdictional prerequisites in order to permit all plaintiffs to sue. *See* Pls.' Mot. at 14-15. But Plaintiffs have not even established the premise of this proposition. As explained above, none of the Plaintiffs filed a proper administrative refund claim with the IRS or complied with the mandatory waiting period before filing suit.

In any event, even if Plaintiffs had shown that one of them exhausted their administrative remedies for one tax year, that would not vest the Court with jurisdiction over the other Plaintiffs or other tax years. The Fifth Circuit has made clear that "[i]t is not sufficient that . . . a claim involving the same ground has been filed for another year or by a different taxpayer." *Gustin*, 876 F.2d at 488 (citation omitted). The Code's jurisdictional prerequisites "must be met by each individual taxpayer plaintiff before he files suit—not before he opts into a lawsuit that met jurisdictional prerequisites because another taxpayer with a different claim satisfied the exhaustion requirements." *RadioShack*, 105 Fed. Cl. at 623. "Simply stated, [one plaintiff's] administrative tax refund claim is unique to [that plaintiff] and cannot form the jurisdictional predicate to enable another taxpayer, who has not yet filed an administrative claim, to join in [that plaintiff's] suit." *Id*.

Plaintiffs also maintain that any doubts about whether they satisfied the Code's jurisdictional prerequisites (and there are none) should be resolved in Plaintiffs' favor. *See* Pls.' Mot. at 15. The cases on which Plaintiffs rely, however, addressed "statutes levying taxes," *B & M Co. v. United States*, 452 F.2d 986, 990 (5th Cir. 1971), not provisions like those at issue here that impose conditions upon which the United States has consented to be sued. When construing statutes that waive the United States' sovereign immunity, the Supreme Court has made clear that the statute must be "strictly construed, in terms of its scope, in favor of the sovereign." *Lane v. Pena*, 518 U.S. 187, 192 (1996); *see, e.g.*, *Duffie v. United States*, 600 F.3d 362, 384 (5th Cir. 2010) ("Because tax refund suits are actions in which the sovereign has waived its immunity and consented to be sued, statutory provisions governing such suits are strictly construed." (citation omitted)); *Richardson v. United States*, 330 F. Supp. 102, 105 (S.D. Tex. 1971). Accordingly, Plaintiffs are not entitled to the benefit of any doubts (even assuming there were any).

For these reasons, the Court correctly dismissed Plaintiffs' refund claims under 28 U.S.C. § 1346(a)(1), and Plaintiffs' motion for reconsideration should be denied.

II. PLAINTIFFS DO NOT IDENTIFY ANY OTHER AVENUE FOR OBTAINING MONETARY RELIEF

Plaintiffs also contend that they can obtain monetary relief from the federal government via two other avenues: *South Carolina v. Regan*, 465 U.S. 367 (1984), and the APA. *See* Pls.' Mot. at 2-7, 15-18. Plaintiffs have not previously raised these arguments, and they cannot do so for the first time in a motion for reconsideration. *See Rotella*, 2010 WL 1330449, at *6 (denying motion for reconsideration under Rule 54(b) because the movant had "not adequately raise[d]" the claim in its earlier briefing). Indeed, even Plaintiffs' complaint does not request monetary relief under the APA. *See* Am. Compl. ¶¶ 46-68, 72-80 (Counts I-VI, VIII-X). Instead, Plaintiffs' APA claims seek only declaratory and injunctive relief, *see id.*, and, in particular, an injunction to

prevent "federal officials from *prospectively* collecting the [HIPF]," *id*. ¶ 77 (emphasis added). The Court can (and should) reject these arguments on this ground alone.

Nevertheless, even if the Court were to consider Plaintiffs' new arguments, they do not provide any basis for awarding Plaintiffs monetary relief.

A. *South Carolina v. Regan* Is Inapplicable

Plaintiffs' reliance on *Regan* is incomprehensible. *See* Pls.' Mot. at 15-18. *Regan* recognized a narrow exception to the AIA, which bars suits brought "for the purpose of restraining the assessment or collection of any tax," 26 U.S.C. § 7421(a). *See Regan*, 465 U.S. at 377. But Defendants have not raised the AIA as a defense to Plaintiffs' refund claims. Indeed, the AIA is irrelevant to Plaintiffs' refund claims because those claims do not seek to "restrain[] the assessment or collection of a[] tax." 26 U.S.C. § 7421(a). They instead seek a refund of a tax already assessed and paid by MCOs. Because Plaintiffs' refund claims do not implicate the AIA, *Regan*'s exception to the AIA is inapplicable and does not provide an avenue for Plaintiffs to obtain monetary relief.

In fact, the Court relied on its dismissal of Plaintiffs' refund claims in concluding that the *Regan* exception authorized it to adjudicate Plaintiffs' claims for injunctive relief against assessment of the HIPF. *See* Mem. Op. & Order at 26, ECF No. 88 (hereinafter "March 2018 Order"). Defendants disagree with that ruling for the reasons stated in their prior briefing. Nevertheless, if the Court determines that Plaintiffs' refund claims may proceed, then Plaintiffs' claims for injunctive relief would be barred by the AIA under this Court's reasoning because Plaintiffs would have an alternative remedy. *See id*. The Court thus would need to reconsider its March 2018 Order on the parties' cross-motions for summary judgment if it determines (contrary to Defendants' arguments) that Plaintiffs' refund claims may proceed.

B. The APA Does Not Authorize the Monetary Relief Plaintiffs Seek

Plaintiffs seek an order requiring Defendants to pay them an amount equivalent to the portion of the capitation rates that Plaintiffs paid to their MCOs that was attributable to the HIPF. The APA, however, does not permit this relief.

The APA does not authorize an award of "money damages." 5 U.S.C. § 702. Although not all judicial relief that "may require one party to pay money to another" constitutes money damages, *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988), the relief Plaintiffs seek here clearly does. The Supreme Court has distinguished between money damages or substitute relief, which the APA does not permit, and specific relief, which it does. *See id*. at 893-94; *see also Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 262 (1999) (explaining that "*Bowen*'s interpretation of § 702 . . . hinged on the distinction between specific relief and substitute relief, not between equitable and nonequitable categories of remedies"). Money damages are "compensatory"; they are "given to the plaintiff to *substitute* for a suffered loss." *Bowen*, 487 U.S. at 895 (citation omitted). Specific remedies, on the other hand, are "not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." *Id*. (citation omitted). The Court applied this distinction in *Bowen* to conclude that a suit to enforce 42 U.S.C. § 1396b(a)—which requires that "the Secretary 'shall pay' certain amounts for appropriate Medicaid services"—was an action for specific relief. 487 U.S. at 900. The Court explained that the plaintiffs sought "to enforce the statutory mandate itself," which just so happened to be "one for the payment of money." *Id*. The plaintiffs did not seek "money in compensation for the damage sustained by the failure of the Federal Government to pay as mandated." *Id*. (emphasis omitted)

Plaintiffs contend that this case is on all fours with *Bowen*, *see* Pls.' Mot. at 5, but it is not. Unlike in *Bowen*, where the applicable statute required that the Secretary "shall pay" certain

amounts to the States, 487 U.S. at 895, Plaintiffs here do not (and cannot) point to any "statutory entitlement or mandate" that requires Defendants to pay them money, *Haines v. Fed. Motor Carrier Safety Admin.*, 814 F.3d 417, 426 (6th Cir. 2016); *see also Hubbard v. EPA*, 982 F.2d 531, 538 (D.C. Cir. 1992) ("Whether we or someone else call a remedy restitutionary, equitable or anything else, it fits within § 702's waiver only if it gives the plaintiff the specific thing to which he was originally entitled" under an applicable statute or regulation.). Instead, Plaintiffs' claim is that a regulation impermissibly required them to pay capitation rates to certain MCOs to enable those MCOs to pay the HIPF to Defendants. Because Plaintiffs cannot point to any statute or regulation that entitles them to receive any specific funds from the federal government, they are not seeking a specific remedy that is authorized under the APA.

Nor do Plaintiffs seek the return of specific *res* (including money) that the federal government seized or otherwise obtained from them, as was the circumstance in most of the cases on which Plaintiffs rely. *See* Pls.' Mot. at 6 n.4. Plaintiffs did not pay the HIPF (to Defendants or otherwise); the MCOs with which Plaintiffs contracted for Medicaid services did. Moreover, the funds the MCOs used to pay the HIPF were not the same specific funds that Plaintiffs paid to the MCOs in the form of capitation rates to account for the HIPF. Plaintiffs, therefore, are not seeking the return of "specific monies," but rather, "compensation for the losses . . . [they] suffered" as a result of having to account for the HIPF in their capitation rates. *Bowen*, 487 U.S. at 899, 901 (citation omitted). Although "the fungibility [of] money can easily obscure[] the difference between (1) relief that seeks to compensate a plaintiff for a harm by providing a substitute for the loss, and (2) relief that requires a defendant to transfer a specific *res* to the plaintiff," this distinction matters under the APA. *Modoc Lassen Indian Hous. Auth. v. U.S. Dep't of Hous. & Urban Dev.*, 881 F.3d 1181, 1196 (10th Cir. 2017) (alterations in original) (internal citations

omitted), *petition for cert. filed sub nom. Fort Peck Hous. Auth. v. U.S. Dep't of Hous. & Urban Dev.*, -- U.S.L.W. --- (U.S. Mar. 27, 2018) (No. 17-1353). Here, the Court could not order Defendants to "return" the specific funds that Plaintiffs paid to MCOs through their capitation rates to account for the HIPF because Defendants do not have (and never had) those specific funds. The most the Court could do is require Defendants to pay Plaintiffs the "monetary equivalent" of those funds. *Id*. at 1197. "And that monetary equivalent amounts to substitute relief—*i.e.*, money damages," which are not authorized under the APA. *Id*. (citation omitted); *see, e.g.*, *id*. (concluding that sovereign immunity barred the court from ordering an agency to provide the plaintiffs with the "cash equivalent" of wrongfully withheld appropriations from certain fiscal years where the agency had already distributed those funds); *Diaz v. United States*, 517 F.3d 608, 612-13 (2d Cir. 2008) (holding that court could not order the government to pay the "monetary equivalent" of seized currency, which could "no longer be identified or located in the coffers of the government"; reasoning that "currency should be treated like any other seized property: if the property is no longer available, sovereign immunity bars the claimant from seeking compensation"). Accordingly, the Court should reject Plaintiffs' attempt to obtain monetary relief under the APA.

III. THE COURT SHOULD REJECT THE FINAL JUDGMENT PROPOSED BY PLAINTIFFS

Plaintiffs' motion also asks the Court to enter final judgment. Defendants do not object to the entry of a final judgment that is consistent with the Court's March 5, 2018 Memorandum Opinion and Order on the parties' cross-motions for summary judgment (although Defendants reserve the right to appeal that final judgment). The final judgment that Plaintiffs propose, however, would provide broader relief than the Court's March 2018 Order. The Court, therefore,

should decline to enter Plaintiffs' proposed final judgment to the extent that it provides more or different relief than the Court intended.

Plaintiffs' proposed final judgment would have the Court declare unlawful and set aside current 42 C.F.R. §§ 438.2-438.6. *See* ECF No. 95-1, ¶ 1. But only two portions of those regulations are at issue in this case. In its March 2018 Order, after thoroughly considering the different consequences of setting aside all of the regulations at 42 C.F.R. §§ 438.6(c)(1)(i)(A)-(C) (2002) or only setting aside the Certification Requirement at 42 C.F.R. § 438.6(c)(1)(i)(C)(2002), *see* March 2018 Order at 19-20, the Court stated that it intended to set aside only the Certification Requirement, which provided the following:

> (i) *Actuarially sound capitation rates* means capitation rates that . . . (C) Have been certified, as meeting the requirements of this paragraph (c), by actuaries who meet the qualification standards established by the American Academy of Actuaries and follow the practice standards established by the Actuarial Standards Board.

See March 2018 Order at 62 & n.56. This 2002 provision has been re-codified in the current version of the Code of Federal Regulations at 42 C.F.R. § 438.2 (definition of "Actuary") and 42 C.F.R. § 438.4(b)(6).[4] Those two regulations also contain other requirements that Plaintiffs have not challenged here. *See, e.g.*, 42 C.F.R. § 438.2 (defining other terms); *id*. § 438.4(a), (b)(1)-(5), (b)(7)-(9) (setting forth other requirements for capitation rates). Those unchallenged requirements

[4] Section 438.2 provides, in relevant part:

> Actuary means an individual who meets the qualification standards established by the American Academy of Actuaries for an actuary and follows the practice standards established by the Actuarial Standards Board. In this part, Actuary refers to an individual who is acting on behalf of the State when used in reference to the development and certification of capitation rates.

And § 438.4(b)(6) states that, "[t]o be approved by CMS, capitation rates must . . . [b]e certified by an actuary as meeting the applicable requirements of this part, including that the rates have been developed in accordance with the requirements specified in § 438.3(c)(1)(ii) and (e)."

should not be set aside. Nor should the Court set aside any provisions of 42 C.F.R. §§ 438.3, 438.5, or 438.6, which also are not at issue here. Accordingly, at most, the final judgment should declare unlawful and set aside § 438.2's definition of "Actuary" and § 438.4(b)(6).

The final judgment that Plaintiffs propose also would enjoin Defendants from "enforcing 42 C.F.R. §§ 438.2–438.6 or other regulations that function to impose liability for the [HIPF] upon Plaintiffs and their agencies." ECF No. 95-1, ¶ 2. If the Court sets aside the relevant regulatory provisions, there is no need for the Court to also enjoin Defendants from enforcing those provisions. In addition, Plaintiffs' proposed injunctive relief is broader than appropriate as explained above and vague in its reference to "other regulations" that Plaintiffs do not identify. *Id*. The final judgment thus should not include this proposed paragraph.

Finally, the final judgment should not award Plaintiffs any monetary relief, *see id*. ¶ 3, for the reasons explained above.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for reconsideration.

Dated: June 11, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2018, I filed the foregoing document with the Clerk of Court via the CM/ECF system, causing it to be electronically served on Plaintiff's counsel of record.

/s/ *Michelle R. Bennett*
MICHELLE R. BENNETT