**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

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| TEXAS, et al.,<br><br>*Plaintiffs,*<br><br>v.<br><br>UNITED STATES OF AMERICA, et al.,<br><br>*Defendants.* | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Civil Action No. 4:18-cv-00779-O |

# REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

## INTRODUCTION

Monday is the deadline for Plaintiffs' Medicaid and CHIP managed care organizations ("MCOs") to pay the 2018 Health Insurance Providers Fee ("HIPF"). Plaintiffs seek temporary injunctive relief staying the payment deadline pending further resolution of this case.

First, as the Court held in the related case, *Texas v. United States*, No. 7:15-CV-00151-O (N.D. Tex.),[1] Plaintiffs have standing to pursue their claims against the HIPF, and the Anti-Injunction Act ("AIA") does not bar those claims. Second, Plaintiffs face irreparable harm absent an injunction on Monday, October 1, 2018. That day, absent relief from the Court, Plaintiffs will become liable to reimburse the MCOs to ensure their contracts are actuarially sound. The availability of disgorgement of the 2018 HIPF at some future date has not been finally determined by the Court in *Texas I*, nor by the Fifth Circuit in the pending appeal, *Texas v. United States*, No. 18-10545 (5th Cir.). Third, the public interest always favors injunctions that compel the government to follow the law, and Defendants will not be harmed by

[1] For consistency, Plaintiffs will use "*Texas I*" to refer to the related case, as Defendants have done.

such relief because they will still collect the total HIPF liability for 2018 from other covered entities. Fourth, Plaintiffs are likely to succeed on the merits of their claims that the IRS failed to exempt Plaintiffs' Medicaid and CHIP MCOs from HIPF liability when the plain language of the Affordable Care Act ("ACA") demands that result. And, fifth, the relief requested at this stage of the case is tailored appropriately to pause the October 1 payment deadline and prevent the IRS from unlawfully collecting the HIPF from Plaintiffs' MCOs. Thus, the Court should issue the temporary restraining order before October 1 and set this matter for a preliminary injunction hearing soon thereafter.

## ARGUMENT

### I. The Court Has Subject Matter Jurisdiction Over Plaintiffs' Claims.

As with *Texas I*, the Court has subject matter jurisdiction over Plaintiffs' Administrative Procedure Act claims. Plaintiffs possess standing to sue Defendants because Defendants are the cause of Plaintiffs injuries, and the AIA does not divest the Court of jurisdiction.

The imposition of the HIPF on Plaintiffs' contracts with MCOs is an injury-in-fact. *Texas v. United States* ("*Texas I*"), 300 F. Supp. 3d 810, 827 (N.D. Tex. 2018). This injury persists because the IRS continues to require Plaintiffs' Medicaid and CHIP MCOs to pay the HIPF. In *Texas I*, the injury arose from the U.S. Department of Health and Human Services' Certification Rule. The Rule required actuaries responsible for certifying Medicaid and CHIP contracts as actuarially sound to include the HIPF in the States' capitation rates (health insurance premiums), which resulted in Plaintiffs being responsible to reimburse their MCOs for the full cost of the HIPF. If Plaintiffs refused, they would lose Medicaid funding. *See* 42 U.S.C. § 1396b(m)(2)(A)(iii). The Rule gave "Texas two choices: include the HIPF in its capitation rates or lose Medicaid funds." *Texas I*, 300 F. Supp. 3d at 827. The Court's declaration that the Certification Rule is unlawful removed one injury inflicted by the federal government on the States under the HIPF. But other injuries remain.

The IRS is requiring Plaintiffs to pay a portion of the HIPF by including Plaintiffs' Medicaid and CHIP contracts in the calculation of total 2018 HIPF liability. Plaintiffs' actuaries attest that the States must continue to reimburse their MCOs for the HIPF payments to achieve actuarial soundness, because the IRS failed to exclude the Medicaid and CHIP contracts from its calculation of HIPF liability. App. 36–37, 42–43, 51, 58, 64, 491–92, ECF No. 9. The IRS could have issued correct bills, as Plaintiffs requested, or IRS could have clarified by regulation that Plaintiffs' Medicaid and CHIP contracts with MCOs are exempt from HIPF liability. If the IRS had excluded these contracts from the HIPF, then actuaries would have no basis to conclude that Plaintiffs must reimburse the HIPF liability of their MCOs because those MCOs would not incur the liability in the first place. Thus, the IRS is the cause of Plaintiffs' injuries, and equitable relief from the Court will redress those injuries.

Furthermore, in *Texas I*, the Court concluded that the AIA did not bar Plaintiffs' claims against the Certification Rule, because, applying *South Carolina v. Regan*, 465 U.S. 367 (1984), the Court found that Plaintiffs had "no alternative judicial remedy beyond the present action." *Texas I*, 300 F. Supp. 3d at 836. Defendants misconstrue this statement, and argue that since Plaintiffs may seek disgorgement after payment of the 2018 HIPF, if the Court's order remains intact after appeal, Plaintiffs' claims against the IRS are barred. Defs.' Br. 11–12, ECF No. 16. But the *Regan* exception to the AIA exists to provide aggrieved parties with a legal avenue by which to contest a particular tax when they have no other administrative or procedural avenues to pursue. *Regan*, 465 U.S. at 378. The legal avenue is the exception to the jurisdictional bar: in this case, the filing of a lawsuit seeking equitable relief against a tax on MCOs that is functionally imposed on the States. In other words, the *Regan* exception precludes application of the AIA as a bar to the Court's subject matter jurisdiction. But when the exception applies, parties may avail themselves of various forms of equitable relief. Sometimes backward looking equitable relief is appropriate, such as disgorgement in *Texas I*. But sometimes forward looking equitable relief is available, as here. Plaintiffs ask the Court for forward looking relief against the 2018 HIPF payment deadline and collection. *Regan* and the AIA permit this relief.

## II. Plaintiffs Have Shown an Imminent Threat of Irreparable Harm.

"To show irreparably injury if threatened action is not enjoined, it is not necessary to demonstrate that harm is inevitable and irreparable." *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986). Rather, a "plaintiff need show only a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Id.* (internal citations omitted).

On October 1, 2018, when Plaintiffs' MCOs pay the 2018 HIPF to the IRS, because the IRS failed to exempt Plaintiffs' Medicaid and CHIP contracts from calculation of the HIPF, Plaintiffs will be required to reimburse their MCOs in the name of actuarial soundness to continue receiving Medicaid and CHIP funding. Defendants do not dispute the fast-approaching October 1, 2018 deadline, nor do they dispute that this Court found that Plaintiffs suffered harm through the unlawful calculation and subsequent collection of the HIPF in prior fee years. Rather, Defendants argue that the *potential* availability of monetary relief, specifically equitable disgorgement, negates any irreparable harm. Defs.' Br. 5. If a final judgment in *Texas I* were in place and no appeal of that judgment pending, Plaintiffs may agree with Defendants that a remedy exists.

But there is no final judgment in *Texas I*. Defendants asked the Court to delay issuance of the final judgment disgorging the 2014–2016 HIPF, ECF Nos. 101 & 114, Defendants filed a notice of appeal as to the Court's declaration that the Certification

Rule was unlawful, ECF No. 92, and Defendants seek extra time to consider whether to appeal the Court's grant of disgorgement, ECF Nos. 101 & 114. In other words, the lack of finality in *Texas I* and Defendants' requests to delay that finality, raises the specter of irreparable injury in this case. While the Fifth Circuit should not reverse the Court's decision to grant equitable disgorgement of the 2014–2016 HIPF, if it reverses, and if Defendants are not enjoined now from collecting the 2018 HIPF, then Plaintiffs will be without a remedy to recover the taxes unlawfully imposed on them. The Court's equitable powers should work to prevent such an unjust result.

Defendants also contend that Plaintiffs delay in seeking judicial relief from the 2018 HIPF forecloses their ability to establish irreparable harm. Defs.' Br. 7–8. But Plaintiffs did not, and could not, know that the IRS would ignore the March 5, 2018 Order of the Court and fail to adjust its fee calculations to ensure that the 2018 HIPF was not unlawfully imposed on Plaintiffs' MCOs. Defendants are also defendants in *Texas I*, and knew about the Court's March 5 Order. And Plaintiffs provided the IRS with several opportunities to obviate the need for this emergency relief. They diligently pursued a remedy through the IRS's administrative channels as soon as the IRS issued the preliminary 2018 HIPF bills. They sent protest letters to the IRS, including copies of the Court's March Order, after learning through the preliminary 2018 HIPF assessments that the IRS refused to properly calculate the 2018 HIPF, and asked the IRS to recalculate the 2018 HIPF liability in a lawful manner. Then Plaintiffs waited to take legal action until they received the final 2018 HIPF bills from the IRS. When Plaintiffs received those final bills on or after August 31, 2018, Plaintiffs took immediate action on September 7, 2018, moving for leave to amend their complaint in *Texas I* to challenge the IRS's actions. When the Court denied Plaintiffs leave to amend, Plaintiffs filed this lawsuit the same day and moved for a temporary restraining order the next morning. ECF Nos. 1 &7. Plaintiffs did not unduly delay seeking relief against the IRS or the Court. Plaintiffs exhausted their administrative remedies and received a final determination of the 2018 HIPF liability before seeking the intervention of the Court.

Without the entry of a temporary restraining order followed by a preliminary injunction, Plaintiffs will be required to pay the 2018 HIPF through their Medicaid and CHIP MCOs with no clear path for recoupment. Because spending money to comply with a law constitutes irreparable harm when there is no established avenue through which that money can later be recovered, Plaintiffs have established the threat of irreparable harm. *See Paulsson Geophysical Servs., Inc. v. Sigmar*, 529 F.3d 303, 312 (5th Cir. 2008) (per curiam) ("The absence of an available remedy by which the movant can later recover monetary damages . . . may . . . be sufficient to show irreparable injury.") (citation omitted)). As a result, temporary and preliminary injunctive relief is proper.

## III. The Public Interest Favors the Entry of a Temporary Restraining Order, and the Balance of Equities Tips in Plaintiffs' Favor.

In considering preliminary injunctive relief, "courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (internal citation omitted). In this case, Plaintiffs will be required to pay hundreds of millions of dollars for which no final path of recovery or judicial relief is established. In contrast, even if the Court enters injunctive relief, the IRS *will* still collect $14.3 billion for the 2018 HIPF. Defendants' assertions that the IRS will need to do work to recalculate the HIPF liability for other covered entities is not an injury to the agency, rather it is yet a normal and proper responsibility of the agency to act under its Congressional mandate, a mandate that includes an obligation to exempt Plaintiffs' Medicaid and CHIP MCOs from HIPF liability. After injunctive relief is entered, the IRS may collect the 2018 HIPF by lawfully recalculating and reassessing the liability to ensure that the HIPF is not unlawfully procured from Plaintiffs.

In other words, the request for injunctive relief is a revenue neutral request as to the IRS that only requires the suspension of a payment deadline until the HIPF is lawfully imposed on the correct MCO contracts. Had the IRS correctly calculated the 2018 HIPF before issuing their final bills for the 2018 fee year, then the 2018 HIPF assessment would have been imposed on the MCOs Congress intended to tax through the ACA. Thus, Defendants' complaint of third-party harm falls flat because it assumes that the lawful imposition of a tax on the correct entities is per se harmful.

Moreover, the public has a vital interest in ensuring that federal agencies abide by federal statutes and the U.S. Constitution. The public does not have any interest in proper taxpayers failing to pay their fair share at the expense of others. Thus, the balance of equities and the public interest favor a prompt injunction.

**IV. Plaintiffs Are Likely to Prevail on the Merits of Their Claims.**

The ACA "expressly exempted states from paying the HIPF." *Texas I*, 300 F. Supp. 3d at 821. Defendants do not contest this conclusion. Defs.' Br. 14. The IRS, however, has imposed the 2018 HIPF liability on Plaintiffs' Medicaid and CHIP MCO contracts. The IRS failed to exclude these Medicaid and CHIP MCO contracts from its apportionment of the 2018 HIPF liability. As a result, actuaries who must still certify the "soundness" of Medicaid and CHP contracts, will require Plaintiffs to reimburse their MCOs for the HIPF payments. Thus, Plaintiffs will be forced to pay the tax from which they are exempted because the IRS failed to properly calculate the HIPF.

Defendants contend that these downstream consequences lay at the feet of the actuaries and the Medicaid Act's requirement of actuarial soundness. Defs.' Br. 12–13, 14. But the decision of actuaries, in congruence with the Medicaid Act's actuarial soundness requirement, to require States to reimburse MCO HIPF payments is not the cause of Plaintiffs' injuries. The cause is the IRS's failure to correctly calculate the apportionment of HIPF liability. Had the IRS acted lawfully and excluded

Plaintiffs' Medicaid and CHIP contracts from the HIPF, then the actuaries would not require Plaintiffs to reimburse those monies because they would not have been paid in the first place.

Defendants also assert that the ACA doesn't mean what it says when it excludes States from HIPF liability. The ACA expressly excludes "any governmental entity" from the definition of "covered entity" responsible for paying the HIPF. ACA § 9010(c)(2)(B). The IRS acknowledges this exemption, defining "governmental entity" as "[a]ny State or political subdivision thereof." 26 C.F.R. § 57.2(b)(2)(ii). And yet, the IRS still includes State Medicaid and CHIP contracts with MCOs in their calculation of the HIPF. Defendants say that the IRS complies with the ACA because it does not send directly to States a preliminary or final fee calculation each year. They also say that Congress did not exempt health insurance providers from the HIPF based on their provision of Medicaid or CHIP programs. Defs.' Br. 15. But Congress unequivocally said States are exempt from the HIPF, and since States are the recipients of Medicaid and CHIP funding, those program must be excluded from taxation by the IRS also.

Defendants postulate that HIPF liability is always passed onto insurance purchasers, including state employee health insurance programs. But whether insurance companies pass the costs of the HIPF onto insurance purchasers is not at issue in this case, as those purchasers are not sovereign states entitled to an express exemption from that liability under federal law. Nor do those insurance purchasers stand to lose hundreds of millions of dollars in federal Medicaid funding if they fail to reimburse the unlawfully assessed HIPF.

Finally, the IRS is due no deference in its decision to tax States through imposition of the HIPF on their Medicaid and CHIP MCOs because Congress *did* expressly exempt the States from HIPF liability. ACA § 9010(c)(2)(B). Since States receive Medicaid and CHIP funding, those programs must be excluded from HIPF liability calculations. Plaintiffs are likely to succeed on their claims that the IRS is acting unlawfully by imposing the 2018 HIPF on Plaintiffs.

## V. Plaintiffs' Proposed Order Requests Appropriately Tailored Relief.

Finally, Defendants take issue with several of Plaintiffs' specific requests for relief in their Proposed Order. But each of their concerns are easily resolved. First, Defendants can comply with Paragraph B of the Proposed Order, which requires them to notify Plaintiffs' MCOs of the Court's temporary restraining order, because they can simply contact the same MCOs they already contacted when they issued the preliminary and final 2018 HIPF bills.

Second, Paragraph B does not seek an indefinite temporary restraining order, although Plaintiffs could seek that relief. *In re Criminal Contempt Proceedings*, 329 F.3d 131, 137 (2d Cir. 2003). Instead, the Court may issue the temporary restraining order and set a preliminary injunction hearing within 14 days.

Third, Defendants argue that they cannot comply with Paragraph E of the Proposed Order, which would prohibit IRS from "receiving, collecting, or otherwise processing any payment" of the HIPF from Plaintiffs' MCOs. But if the Court issues the temporary restraining order with sufficient time to give MCOs notice of the ruling, then this paragraph may become moot. Even if an MCO does not receive notice of the order, and submits its payment, the IRS cannot lean on the automated nature of its payment processing system as a reason for the Court to deny Plaintiffs relief.

Fourth, Defendants argue that Paragraphs C and D of the Proposed Order, which would require IRS to issue new lawful bills to Plaintiffs' MCOs that exclude the Medicaid and CHIP contracts, would give Plaintiffs final relief on the merits at a preliminary stage of the case. Plaintiffs, however, included this request because some of the MCOs they contract with provide non-Medicaid and non-CHIP insurance to other insureds for which the IRS may collect the HIPF. Plaintiffs presumed the IRS would still want to collect those lawful taxes, while it is enjoined from collecting based on Plaintiffs' Medicaid and CHIP contracts.

Finally, the recalculation of HIPF liability is not as complicated as Defendants want the Court to believe. In *Texas I*, Plaintiffs provided the Court with a formula for calculating the HIPF. *Texas I*, Pls.' Resp. Br. 2, ECF No. 104. But how the IRS chooses to recalculate the fee is irrelevant to whether the Court should issue injunctive relief. The IRS's responsibilities is to correctly calculate and collect taxes. It is no response that the IRS should be allowed to collect an unlawful tax because it does not want to go to the trouble of calculating it in a lawful manner. Thus, Plaintiffs' Proposed Order should be entered in full.

## CONCLUSION

The Court should grant Plaintiffs' motion for a temporary restraining order before October 1, 2018, and set this matter for a preliminary injunction hearing.

Respectfully submitted this the 27th day of September 2018.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 27, 2018, I electronically filed the foregoing document through the Court's ECF system, which automatically serves notification of the filing on counsel for all parties.

*/s/ David J. Hacker*
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