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' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO STAY ISSUANCE OF FINAL JUDGMENT

Because Plaintiffs do not object to Defendants' request that the Court stay issuance of any final judgment in this action for a period of 60 days, and because good cause supports Defendants' request, this Court should grant that request. *See* Defs.' Mot. & Br. In Supp. Thereof, to Stay Issuance of Final J. (ECF No. 101) (Defendants' Motion); Pls.' Resp. to Defs.' Mot. to Stay Issuance of Final J 1 (ECF No. 104) (Plaintiffs' Response).

Defendants have moved the Court to stay issuance of any final judgment in this action for a period of 60 days to allow Defendants to determine whether to pursue an interlocutory appeal

under 28 U.S.C. § 1292(b). *See* Defs.' Mot. Although Plaintiffs "contest Defendants' arguments suggesting that [determining the amount of any disgorgement] will be complicated," Pls.' Resp. at 1, Plaintiffs do not oppose Defendants' motion to the extent it seeks to stay proceedings to determine the amount of any disgorgement or to stay entry of any final judgment in this matter. The Court, therefore, should grant Defendants' motion and stay issuance of any final judgment for a period of 60 days.[1]

Additionally, Defendants note that Plaintiffs' arguments that calculating the amount of any disgorgement would be "easy" are simply wrong. First, quantifying any disgorgement based on the Plaintiff States' capitation rates is quite complex. The Health Insurance Providers Fee (HIPF) is built into each capitation rate along with a myriad of other items including other taxes and fees, administrative expenses, adjustments, and claims experience. *See* Declaration of Christopher J. Truffer ¶¶ 22, 24 (ECF No. 63-1 at DA159) (Truffer Declaration). Further, how each of these data elements is taken into account in rate development is subject to the actuarial judgment and discretion of the Plaintiff States' actuaries; rate development is not merely a mechanical process by which every actuary makes uniform assumptions and takes the myriad costs into account in a uniform manner. *Id.* As far as Defendants are aware, the Plaintiff States' capitation rates are not itemized in a way that would readily reveal the amount attributable to the HIPF by the States and their actuaries as part of rate development. And to the extent that such level of detail about one specific rate development component (out of many components) could be discerned, the actuarial assumption used in the rate development might not necessarily match

[1] At this time, Defendants seek only a stay to allow them time to determine whether to pursue an interlocutory appeal. In their response to Defendants' Motion, however, Plaintiffs have gone further and "request[ed] that the court certify its August 21, 2018 order (ECF No. 100) and all prior rulings for [interlocutory appeal under 28 U.S.C. § 1292(b)]." *Id.* Because Plaintiffs' request was included in Plaintiffs' Response to Defendants' Motion, it is not properly before the Court and, accordingly, should be denied subject to renewal in a properly-filed motion. Fed. R. Civ. P. 7(b)(1).

what a Medicaid managed care organization (MCO) actually paid to the IRS as the HIPF for its coverage of Medicaid beneficiaries in the Plaintiff States. Truffer Decl. ¶ 24. To perform the necessary calculations, the parties would likely need, among other things, documentation or other evidence from the Plaintiff States and from each MCO with which the Plaintiff States contract to provide Medicaid and CHIP services. And it is possible that the parties might need to retain experts to assist them in performing these complex calculations.

Second, quantifying any disgorgement based on the amount of the HIPF that the Plaintiff States' MCOs paid to the IRS in a given year would be complicated. As Plaintiffs note, MCOs report to IRS their net premiums written in a year on IRS Form 8963. Contrary to Plaintiffs' assertion, the format of IRS Form 8963 does not "make[] it easy to discern which premiums relate to Medicaid or CHIP." Pls.' Resp. 2. Rather, Form 8963 only collects information about premiums paid on a covered entity basis, that is, it reflects the total premiums written by each MCO across all of that MCO's lines of business; it does not split up those premiums by state in which they were written, by plan for which they were written, or by type of insurance such as individual, group, Medicare, Medicaid, CHIP, or otherwise. *See* IRS, Form 8963 Final Fee Year 2018 (2018), *available at* https://www.irs.gov/pub/irs-utl/Form8963FinalFeeYear2018.xlsx; *see also* Truffer Decl. ¶ 23. To discern which premiums relate to Medicaid or CHIP coverage provided in the Plaintiff States, the parties would likely need to obtain documentation or other evidence from each MCO with which the Plaintiff States' contract to provide Medicaid and CHIP services. Moreover, to determine each covered entity's share of the HIPF, the IRS must calculate the "aggregate net premiums written taken into account for all covered entities," which becomes the denominator in the equation presented on page 2 of Plaintiffs' Response and on page 2 of IRS Letter 5066C. *See* Pls.' Resp. 2; Ex. A to Pls.' Resp. 2. Excluding from this

denominator the amount of premiums that could be attributed to the Medicaid and CHIP services provided by the Plaintiff States' MCOs would require recomputation of the HIPF shares for every covered entity in the country. The result of this recalculation would be to effectively shift the share of the HIPF that could be attributed to Medicaid and CHIP services in the six Plaintiff States to all other covered entities, including those that contract with the remaining states for Medicaid and CHIP services. And, most importantly, even if the IRS could determine the amount of the HIPF paid by the Plaintiff States' MCOs that is attributable to the Medicaid and CHIP services provided by those MCOs to the Plaintiff States, that would not translate to the amount the Plaintiff States paid in capitation rates that is attributable to the HIPF for the reasons discussed above.

Because Plaintiffs themselves believe interlocutory appeal of the Court's "August 18, 2018 order (ECF No. 100) and all prior rulings" is "appropriate," this Court should allow the parties to seek any appellate review of the Court's threshold rulings before beginning the complex and time-consuming process of quantifying any disgorgement. Accordingly, Defendants request that the Court grant their unopposed request to stay further proceedings regarding the calculation of any disgorgement, as well as the entry of any final judgment, for a period of 60 days to allow Defendants to determine whether to pursue an interlocutory appeal of the Court's threshold rulings.

Dated: September 21, 2018

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

ERIN NEALY COX
United States Attorney

JENNIFER D. RICKETTS
Director, Federal Programs Branch

MICHELLE R. BENNETT
CO Bar No. 37050
Senior Trial Counsel

/s/ *Julie Straus Harris*
JULIE STRAUS HARRIS
DC Bar No. 1021928
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW, Room 6118
Washington, DC 20530
Tel: (202) 353-7633
Fax: (202) 616-8470
E-mail: Julie.StrausHarris@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2018, I filed the foregoing document with the Clerk of Court via the CM/ECF system, causing it to be electronically served on Plaintiffs' counsel of record.

/s/ *Julie Straus Harris*
JULIE STRAUS HARRIS