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' MOTIONS FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT AND FOR EXPEDITED CONSIDERATION OF THE MOTION TO AMEND

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INTRODUCTION

More than two years after expiration of the deadline for amending the pleadings in this case, Plaintiffs seek leave to file a second amended complaint that would add new claims against previously unchallenged regulations of the Internal Revenue Service ("IRS"), *see* 26 C.F.R. Pt. 57. Plaintiffs' motion should be denied.

First, Plaintiffs have not shown (or even attempted to show) good cause for their failure to comply with the deadline for amendment of pleadings in this Court's Scheduling Order. The IRS regulations that Plaintiffs now seek to challenge were promulgated in November 2013, nearly two years before this case was filed, and Plaintiffs have been aware of them and their import since that time. Plaintiffs provide no valid reason for why they could not have asserted their new claims against the IRS regulations before the Scheduling Order's deadline.

To be clear, Plaintiffs are not merely seeking to raise the same claims in the operative complaint as to another fiscal year. They instead seek to add entirely new claims, raising entirely new legal theories, against previously unchallenged regulations. Permitting such an amendment at this late stage would prejudice Defendants. District court proceedings are nearly at an end. The Court has ruled on the parties' cross-motions for summary judgment, resolving all of Plaintiffs' claims, and the only matter left is to determine the amount of any disgorgement. Allowing Plaintiffs to amend their complaint now would essentially require this litigation to begin anew, resulting in the expenditure of additional time and resources and delaying the ultimate resolution of the case.

Second, even if Plaintiffs could show good cause to amend the Scheduling Order, their motion still should be denied under Federal Rule of Civil Procedure 15(a). In addition to Plaintiffs' undue delay and the prejudice to Defendants, Plaintiffs' proposed amendment would be futile.

Plaintiffs would lack standing to raise their new claims because, as Plaintiffs now admit, the Medicaid Act's requirement that capitation rates be actuarially sound—which Plaintiffs do not challenge—is the cause of Plaintiffs' alleged injury, not the IRS regulations. Moreover, Plaintiffs' new claims would be barred by the Anti-Injunction Act, as they seek to restrain the IRS from collecting the Health Insurance Providers Fee ("HIPF") from Plaintiffs' Managed Care Organizations ("MCOs"). Finally, Plaintiffs' new claims would fail as a matter of law. The IRS regulations are entirely consistent with, and in many instances, merely parrot, the requirements of section 9010 of the Affordable Care Act ("ACA").

For these reasons, Plaintiffs' untimely motion for leave to file a second amended complaint should be denied.

ARGUMENT

I. LEAVE TO AMEND SHOULD BE DENIED BECAUSE PLAINTIFFS HAVE NOT SHOWN GOOD CAUSE TO MODIFY THE SCHEDULING ORDER

Plaintiffs' motion should be denied at the threshold because Plaintiffs have not shown good cause to modify this Court's March 2, 2016 scheduling order, which required "all motions requesting . . . **amendments** of pleadings" to be filed by April 26, 2016. Scheduling Order, ECF No. 23, at 2. Plaintiffs do not even acknowledge this deadline, much less provide good cause for missing it by more than two years.

"Federal Rule of Civil Procedure 16(b) governs amendment of pleadings after a scheduling order's deadline to amend has expired." *Fahim v. Marriott Hotel Servs., Inc.*, 551 F.3d 344, 348 (5th Cir. 2008). The Rule provides that, once a scheduling order has been entered, it "may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4); *see, e.g.*, *EEOC v. Serv. Temps Inc.*, 679 F.3d 323, 333-34 (5th Cir. 2012).

Consistent with Rule 16, this Court entered a Scheduling Order on March 2, 2016. *See* Scheduling Order, ECF No. 23. It stated: "By **April 26, 2016**, all motions requesting . . . **amendments** of pleadings shall be filed." *Id.* at 2. The Order further cautioned the parties as follows:

> **Please note that the Court has attempted to adhere to the schedule requested by the parties. In so doing, the Court assumes that the parties thoroughly discussed scheduling issues prior to submitting their status report and that the parties understand that the deadlines imposed in this Order are firmly in place, absent the few exceptions set forth below** [which are not relevant here].

Id. (emphasis in original).

To satisfy the good cause standard for modifying this Court's Scheduling Order, Plaintiffs must "show that the deadline[] [could not] reasonably be met despite the[ir] diligence." *Fahim*, 551 F.3d at 348. Courts generally consider four factors in determining whether good cause exists: "(1) the explanation for the failure to timely move for leave to amend; (2) the importance of the amendment; (3) potential prejudice in allowing the amendment; and (4) the availability of a continuance to cure such prejudice." *Id.* The Fifth Circuit, however, has indicated that the first and third factors are the most crucial. *See Hamburger v. State Farm Mut. Auto. Ins. Co.*, 361 F.3d 875, 883-84 (5th Cir. 2004) (If "the first and third factors militate against permitting [amendment of the scheduling order], the trial court [is] not obligated to [provide a continuance]. Otherwise, the failure to satisfy the rules would never result in exclusion, but only in a continuance."); *Fahim*, 551 F.3d at 348 (affirming denial of leave to amend based on only the first and third factors); *Reliance Ins. Co. v. Louisiana Land & Expl. Co.*, 110 F.3d 253, 257-58 (5th Cir. 1997) (same).

Consideration of the relevant factors requires denial of Plaintiffs' untimely motion for leave to amend.

A. Plaintiffs Have Not Adequately Explained Their Failure to Timely Move for Leave to Amend

Plaintiffs' motion should be denied at the outset because Plaintiffs do not even acknowledge the Scheduling Order's April 26, 2016 deadline for amending the pleadings, much less address the good cause standard in their brief. *See* Mot. for Leave to File a Second Am. Compl. ("Pls.' Mot.") at 4-8, ECF No. 105 (addressing Fed. R. Civ. P. 15(a) factors, not Rule 16(b)'s good cause standard). "When a party files an untimely motion for leave to amend and does not address the good cause standard under Rule 16(b)(4), this court typically denies the motion for that reason alone." *See Wachovia Bank, Nat. Ass'n. v. Schlegel*, No. 3:09-CV-1322-D, 2010 WL 2671316, at *3 (N.D. Tex. June 30, 2010). The Court should do so here.

In any event, Plaintiffs cannot establish good cause. Plaintiffs assert that their new claims "only ripened this month" when the IRS issued "final 2018 HIPF bills" to Plaintiffs' MCOs. Pls.' Mot. at 5-6. But that is nonsense. The IRS regulations that Plaintiffs now challenge for the first time, 26 C.F.R. Pt. 57, are not new; they were promulgated in November 2013. *See* Health Insurance Providers Fee, 78 Fed. Reg. 71,476 (Nov. 29, 2013). And the IRS has relied on those regulations (and on section 9010 of the ACA, pursuant to which the regulations were promulgated) to calculate the HIPF in the same manner since 2014. Thus, Plaintiffs did not need to await the issuance of "final 2018 HIPF bills" to know that the IRS would calculate the HIPF for Plaintiffs' MCOs (and all other "covered entities") in the same way it had done so in 2014, 2015, and 2016. Pls.' Mot. at 6. In fact, Plaintiffs appear to admit that their proposed new claims are "based on the same law and facts" as the claims asserted in the original and amended complaints. *Id.* When Plaintiffs filed those complaints to challenge the HIPF and HHS's Certification Rule, Plaintiffs

could have also asserted claims against the IRS regulations, which had been in existence for at least two years at that point.[1]

Plaintiffs expressly discussed the IRS regulations in their original and amended complaints, but failed to assert any claims challenging them. In the original complaint, which was filed in October 2015, Plaintiffs cited the IRS regulations multiple times, *see* Compl. ¶¶ 19-23, ECF No. 1, and even averred that "[t]he statute and regulations governing the Health Insurance Providers Fee include no specific language excluding the activities of for-profit managed care organizations providing Medicaid or CHIP services from being included in the fee calculations. Pub. L. 111-148, § 9010(c), 124 Stat. 865-866; 26 C.F.R. § 57.2(b)." *Id.* ¶ 22; *see also* Am. Compl. ¶¶ 19-23, ECF No. 19. But Plaintiffs did not assert any claims against the IRS regulations based on this allegation or any others. Whether Plaintiffs made a conscious decision not to include such claims or their failure was merely inadvertent, Plaintiffs cannot credibly claim that a challenge to the IRS regulations has only recently ripened.

Plaintiffs also suggest that their tardiness in seeking to add new claims should be excused because they did not realize that the Court's invalidation of HHS's Certification Rule would fail to redress their alleged injury. In particular, Plaintiffs note that, even without the Certification Rule, Plaintiffs' own actuaries "have determined, in their professional judgment, that the HIPF must still be added to capitation rates for Medicaid and CHIP contracts to be actuarially sound." Pls.' Mot. at 3. Again, however, Plaintiffs cannot credibly claim ignorance of this fact; even setting aside that it would have been apparent had Plaintiffs discussed the issue with their own actuaries,

[1] The IRS temporarily amended two provisions of the regulations (26 C.F.R. §§ 57.2(b)(3), 57.2(c)(3)(ii)) on February 26, 2015, *see* 80 Fed. Reg. 10,333, and finalized those amendments on February 26, 2018, *see* 83 Fed. Reg. 8,173. Plaintiffs, however, do not challenge those provisions or argue that their untimely motion for leave to amend was prompted by these amendments.

Defendants have been pointing this fact out to Plaintiffs and the Court from the beginning of this case. As early as January 2016, when Defendants filed their motion to dismiss, they argued that the Certification Rule was not the cause of, and its invalidation would not redress, Plaintiffs' alleged injury because, even in the absence of the Certification Rule, Plaintiffs likely would include the cost of the HIPF in their capitation rates "as a matter of good business practice." *See* Br. in Supp. of Defs.' Mot. to Dismiss Pls.' Compl. at 11-12, ECF No. 15.[2] Thus, Plaintiffs have known for more than two-and-a-half years that the claims asserted in their complaint may not redress their alleged injury. Plaintiffs could have—and should have—sought leave to amend their complaint before the Scheduling Order's deadline to assert an alternative challenge to the IRS regulations if they believed those regulations were in any way deficient. *See* Fed. R. Civ. P. 8(d)(3) ("A party may state as many separate claims . . as it has, regardless of consistency."). Because Plaintiffs knew of the potential deficiency they now seek to cure before the deadline for amendment of pleadings, Plaintiffs cannot show, as they must, that "the deadline[] [could not] reasonably [have been] met despite [Plaintiffs'] diligence." *Fahim*, 551 F.3d at 348; *see, e.g.*, *Cole v. Sandel Med. Indus., L.L.C.*, 413 F. App'x 683, 689 (5th Cir. 2011) (affirming denial of leave to amend where new claims "were based on the same set of facts as" the claims in the original compliant and "there [was] no reason [plaintiff] could not have asserted them well before [defendant] moved for summary judgment"); *In re Enron Corp. Sec., Derivative & ERISA Litig.*,

[2] *See also* Br. in Supp. of Defs.' Mot. to Dismiss Pls.' Am. Compl. at 10-11, ECF No. 27; Br. in Supp. of Defs.' Mot. for Summ. J. & in Opp'n to Pls.' Mot. for Summ. J. at 15-16, ECF No. 63 ("[T]o the extent that the States experience higher capitation rates as a result of the HIPF, the certification requirement in CMS' rate-setting regulation is not the cause. Nor would invalidation of the HHS regulations redress Plaintiffs' grievances because the Medicaid statute itself requires actuarially sound rates for Medicaid MCO contracts and presumably, Plaintiffs—which have offered no evidence that a change in longstanding HHS regulations would enable them to satisfy actuarial soundness while entirely ignoring the HIPF—would also want sound rates." (footnote omitted)).

610 F. Supp. 2d 600, 654 (S.D. Tex. 2009) (refusing to permit amendment where plaintiff "had knowledge of the facts and could initially have pled its theory in the alternative").[3]

B. Permitting Amendment Would Prejudice Defendants and the Prejudice Cannot Be Cured by a Continuance

Allowing Plaintiffs to amend their complaint to add new claims against regulations that were not previously challenged would also prejudice Defendants. District court proceedings in this case are nearly at an end. The parties fully briefed, and the Court ruled on, Defendants' motion to dismiss. Defendants produced the administrative record based on the claims asserted in Plaintiffs' operative complaint. The parties retained experts and exchanged expert reports. And the parties fully briefed, and the Court ruled on, cross-motions for summary judgment, resolving all of Plaintiffs' remaining claims. The only matter left is to determine the amount of any disgorgement.[4] Permitting Plaintiffs to amend their complaint at this late stage would essentially require the parties to begin this litigation anew, costing Defendants (and the Court) substantial time and resources and delaying the ultimate resolution of the case.

Plaintiffs maintain that Defendants will not be prejudiced because they have already "prepared their case based on prior HIPF assessments and collection." Pls.' Mot. at 7. But Plaintiffs are not merely seeking to raise the same claims in the operative complaint as to another

[3] If the Court were to grant Plaintiffs leave to file a second amended complaint (and it should not), the Court would need to reconsider whether Plaintiffs have standing to challenge the HHS Certification Rule given the admissions in Plaintiffs' proposed amended complaint. *See* Pls.' Proposed Second Am. Compl. ("Proposed Compl.") ¶ 60, ECF No. 105-1 (alleging that the Medicaid Act's requirement that capitation rates be actuarially sound, and not HHS's Certification Rule, is the cause of Plaintiffs' alleged injury).

[4] Defendants have requested that any determination regarding the quantity of disgorgement be stayed while Defendants consider whether to file an interlocutory appeal. Defendants intend to file a reply in support of their stay motion to address the arguments raised in Plaintiffs' response to that motion (ECF No. 104) on September 21, 2018, the deadline prescribed by the local rules.

fiscal year. Instead, they seek to add entirely new claims against previously unchallenged regulations. Courts routinely deny leave to file such amendments, which "make the complaint a moving target" or "untimely suggest[] . . . new theories of recovery," because they thwart the purpose of pleading—to crystallize the issues in dispute and to give each party clear notice of what will be contested. *Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 133 (D.D.C. 2013); *see, e.g.*, *Fahim*, 551 F.3d at 348 (affirming denial of leave to amend where defendant "would have been prejudiced if it had been forced to defend against a new claim and basis for recovery so late in the litigation"); *Squyres v. Heico Companies, LLC*, 782 F.3d 224, 239 (5th Cir. 2015) (finding prejudice where "another round of dispositive motions" would have been required); *Giles v. City of Dallas*, No. 3:10-CV-0786-N, 2012 WL 12877963, at *3 (N.D. Tex. Aug. 23, 2012) (holding amendment would prejudice defendant where it would introduce new claim and theory of recovery after defendant had filed summary judgment motion).

In short, Plaintiffs' proposed second amended complaint would "open entirely new vistas." *Sai v. Transportation Sec. Admin.*, No. CV 14-403 (RDM), 2018 WL 3381303, at *3 (D.D.C. July 11, 2018). Although Defendants have only had a few days to assess Plaintiffs' proposed new claims, and thus do not attempt to provide an exhaustive list of all issues that may arise, Defendants note that Plaintiffs' new claims may require the inclusion of additional parties, like Plaintiffs' MCOs and other "covered entities," either through joinder or interpleader. *See, e.g.*, Fed. R. Civ. P. 19, 20, 22. The ACA requires that the IRS collect a specified total amount in HIPFs from "covered entities" each year and, if Plaintiffs' new claims were to result in non-collection of some fees from some covered entities, more fees would need to be collected from others. *See* ACA § 9010(a), (b), (e). Moreover, if Plaintiffs were allowed to amend their complaint, Defendants would want to file a new motion to dismiss. If that motion were denied, a new and different

administrative record would need to be compiled to support the previously-unchallenged IRS regulations. And the parties would again have to brief, and the Court would have to resolve, new and different legal issues on summary judgment. Plaintiffs' new claims thus "would transform the fundamental nature of this case and . . . effectively require the case to be re-litigated from the beginning." *Shofner v. Shoukfeh*, No. 5:15-CV-152-C, 2017 WL 3841641, at *3 (N.D. Tex. Apr. 7, 2017). This do-over would thereby prejudice Defendants because it would be costly to defend and would delay resolution of the claims that have been at issue since the beginning of the case. *Sai*, 2018 WL 3381303, at *3 (explaining that this "approach to litigation offers no end," "is unfair to the opposing party," and "is at odds with the obligation of the Court and the parties to . . . 'secure[] the just, speedy, and inexpensive determination of every action and proceeding'"); *Manley v. Invesco*, No. CIV.A. H-11-2408, 2012 WL 2994402, at *3 (S.D. Tex. July 20, 2012) (denying leave to amend where "[t]he parties and the Court would need to undertake entirely different legal analysis").

The prejudice to Defendants, moreover, could not be cured by a continuance. First of all, there is nothing to continue. The only matter left for this Court to resolve is the amount of any disgorgement. In any event, a continuance does not cure prejudice where it would result in the expenditure of additional resources and significant delays in resolving the case, as undoubtedly would be the case here. *See, e.g.*, *Shofner*, 2017 WL 3841641, at *3; *Giles*, 2012 WL 12877963, at *3.

Furthermore, Plaintiffs have not offered or suggested any sort of continuance. They want just the opposite. If the Court grants them leave to amend the complaint, they intend to immediately move for a temporary restraining order or preliminary injunction, seeking relief by the end of this month. *See* Pls.' Mot. at 6, 8; *see also* ECF No. 106, at 2-3. Requiring Defendants

to litigate Plaintiffs' new claims, raising entirely new legal theories, on such an expedited basis, particular where Plaintiffs could have brought the claims years ago, is severely prejudicial to Defendants.

Because Plaintiffs have not shown good cause for extending the Scheduling Order's April 26, 2016 deadline to amend the pleadings, Plaintiffs' motion for leave to amend should be denied.[5]

II. LEAVE TO AMEND SHOULD BE DENIED UNDER FEDERAL RULE OF CIVIL PROCEDURE 15(a)

Even if Plaintiffs could show good cause to amend the Scheduling Order, their motion for leave to file a second amended complaint still should be denied under Federal Rule of Civil Procedure 15(a). *See S&W Enterprises, L.L.C. v. SouthTrust Bank of Alabama, NA*, 315 F.3d 533, 536 (5th Cir. 2003). In deciding whether to grant leave to amend under Rule 15(a), courts consider a variety of factors, including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of the amendment." *Jones v. Robinson Prop. Grp., L.P.*, 427 F.3d 987, 994 (5th Cir. 2005).

Here, Plaintiffs' undue delay, the prejudice to Defendants, and the futility of Plaintiffs' proposed new claims each justify denial of Plaintiffs' motion.

A. Plaintiffs' Motion Is Untimely and Would Cause Prejudice to Defendants

Plaintiffs did not seek leave to file a second amended complaint until September 7, 2018. That was nearly three years after the filing of Plaintiffs' original complaint in October 2015, *see*

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[5] Plaintiffs may believe their amendment is important, but this fact does not overcome the countervailing factors discussed above. *See, e.g.*, *Fahim*, 551 F.3d at 348. Moreover, the purported importance of Plaintiffs' proposed new claims is undermined by Plaintiffs' admission that the claims are only relevant "if an appellate decision invalidates this Court's order of equitable disgorgement." Pls.' Mot. at 3.

ECF No. 1, and two years and six months after the filing of Plaintiffs' amended complaint in February 2016, *see* ECF No. 19. That, by any measure, is "undue delay" justifying denial of leave to amend. *Jones*, 427 F.3d at 994. The Fifth Circuit has repeatedly upheld the denial of similarly tardy requests. *See, e.g.*, *Dixon v. Henderson*, 186 F. App'x. 426, 429 (5th Cir. 2006) (finding undue delay where new claim was presented two-and-a-half years after the action was initiated); *Little v. Liquid Air Corp.*, 952 F.2d 841, 846-47 (5th Cir. 1992) (more than one year).

The only case Plaintiffs cite for the proposition that leave to amend may be granted "even where a case has been on file for several months or years," Pls.' Mot. at 5, only underscores why leave to amend is unwarranted here. In that case, "no Scheduling Order ha[d] been entered, meaning no pretrial deadlines ha[d] been set," and the case was on hold while a similar case was being resolved. *Greco v. Nat'l Football League*, 116 F. Supp. 3d 744, 754-55 (N.D. Tex. 2015). Here, in contrast, a Scheduling Order was agreed to by the parties and entered by the Court, Plaintiffs missed its deadline for amending the pleadings by more than two years, and, in the meantime, the case has almost proceeded to final judgment, having been entirely resolved on the merits except for a single lingering issue about the calculation of damages. The Fifth Circuit has cautioned that courts should "more carefully scrutinize a party's attempt to raise new theories of recovery by amendment when the opposing party has filed a motion for summary judgment." *Parish v. Frazier*, 195 F.3d 761, 764 (5th Cir. 1999); *see Hunsinger v. Sko Brenner American, Inc.*, No. 3:13-cv-988-D, 2014 WL 1462443, at *14 (N.D. Tex. Apr. 15, 2014) ("[C]ourts routinely decline to permit the moving party to amend" "[w]hen leave to amend is sought after a summary judgment motion has been filed."). That instruction applies with particular force here, where the Court has already *ruled* on the parties' cross-motions for summary judgment, resolving all of

Plaintiffs' claims. *See Smith v. EMC Corp.*, 393 F.3d 590, 598 (5th Cir. 2004) (affirming denial of leave to amend "two months after the close of trial").

In addition to Plaintiffs' undue delay, permitting amendment at this late date would prejudice Defendants by injecting into the case new claims against previously unchallenged regulations. What Plaintiffs seek is a second bite at the apple, forcing Defendants to litigate a new set of theories of the case that Plaintiffs now deem advantageous only now that the Court has finally ruled on all of the claims they raised in more than two years of litigation. The prejudice to Defendants, which is discussed more fully above, provides another reason to deny Plaintiffs' motion under Rule 15(a). *See, e.g.*, *Strong v. Green Tree Servicing, L.L.C.*, 716 F. App'x 259, 264 (5th Cir. 2017) (affirming denial of leave to amend where plaintiff sought to add new claims in the middle of discovery, which would require defendant to develop new strategy); *Dixon*, 186 F. App'x at 429 (discussing "prejudice inherent in seeking to raise a new claim" late in a case); *Fakhuri v. Farmers New World Life Ins. Co.*, No. CV H-09-1093, 2010 WL 11579444, at *2 (S.D. Tex. July 12, 2010) (denying leave to amend where it would have forced defendants "to prepare defenses to new claims based on different theories of . . . liability a mere three months before trial[,] causing . . . prejudice . . . and constituting a fundamental alteration in the nature of this case").

B. Plaintiffs' Proposed Amendment Would Be Futile

Plaintiffs' motion for leave to amend also should be denied under Rule 15(a) because Plaintiffs' proposed amendment is futile. An amendment is futile if it would be subject to dismissal for lack of jurisdiction or failure to state a claim. *See J.R. Stripling v. Jordan Prod. Co.*, 234 F.3d 863, 873 (5th Cir. 2000); *Clemmer v. Enron Corp.*, 882 F. Supp. 606, 609 (S.D. Tex. 1995). That is the case here. The Court would lack jurisdiction over Plaintiffs' new claims because Plaintiffs

lack standing to assert them and the claims are barred by the Anti-Injunction Act ("AIA"). In addition, Plaintiffs' new claims would fail as a matter of law.

1. Plaintiffs Would Lack Standing to Assert Their New Claims Because the IRS Regulations Are Not the Cause of Plaintiffs' Alleged Injury

The "irreducible constitutional minimum of standing" requires that a plaintiff (1) have suffered an injury in fact, (2) that is caused by the defendant's challenged conduct, and (3) that is likely to be redressed by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Although this Court previously determined that Plaintiffs have standing to assert their claims against the HIPF and HHS's Certification Rule, Plaintiffs must separately demonstrate standing for their proposed new claims. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). They cannot do so because, at a minimum, the IRS regulations are not the cause of Plaintiffs' alleged injury.

Plaintiffs' proposed new claims are premised on the assertion that the IRS regulations "function or operate to impose the HIPF upon Plaintiffs." Proposed Compl. ¶ 109. But that is not the case. Section 9010 of the ACA imposes the HIPF on "covered entities," which is defined in the statute and the IRS regulations to include the MCOs with which Plaintiffs contract for Medicaid and CHIP services and other health insurance issuers, but not Plaintiffs themselves. *See* ACA §§ 9010(a)(1), (c); 26 C.F.R. §§ 57.2(b). Indeed, Plaintiffs admit as much, stating that the "IRS regulations . . . require *MCOs* to pay the HIPF." Pls.' Mot. at 3 (emphasis added).

Nor do the IRS regulations require the MCOs with which Plaintiffs contract to pass along the costs of the HIPF to Plaintiffs. Rather, as Defendants have repeatedly explained, it is the Medicaid Act's requirement that capitation rates be actuarially sound, *see* 42 U.S.C. § 1396b(m)(2)(A)(iii), that requires states to account for the HIPF (as well as other taxes and fees paid by MCOs) in their Medicaid capitation rates. Thus, any alleged injury to Plaintiffs is caused

by the Medicaid Act's actuarial soundness requirement (which Plaintiffs have never challenged), not the IRS regulations. Again, Plaintiffs acknowledge as much in their proposed second amended complaint, alleging that "the actuarial soundness requirement of 42 U.S.C. § 1396b(m)(2)(A)(iii) has caused Plaintiffs' actuaries, employing their best judgment and discretion, to conclude that actuarial soundness in 2018 can only result from a full, dollar-for-dollar imposition upon Plaintiffs of any 2018 HIPF liability upon their Medicaid or CHIP MCOs." Proposed Compl. ¶ 60. At the very least, under this Court's prior ruling on the parties' cross-motions for summary judgment, it is HHS's Certification Rule that has caused Plaintiffs' alleged injury, not the IRS regulations that Plaintiffs belatedly seek to challenge. *See* Mem. & Order at 1, ECF No. 88 ("It is . . . the [HHS] regulation—not the tax—that harms Plaintiffs.").

Because the IRS regulations are not the cause of Plaintiffs' alleged injury, Plaintiffs lack standing to challenge them and leave to amend should be denied.

2. The Anti-Injunction Act Would Bar Plaintiffs' New Claims

Even assuming Plaintiffs could establish standing, their proposed new claims would be barred by the AIA. The AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The Supreme Court has made clear that the AIA "could scarcely be more explicit" in barring suits seeking equitable relief restraining the collection of federal taxes. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974).

Plaintiffs' new claims undoubtedly fall within the AIA's bar. The claims seek to restrain the IRS from collecting the HIPF from Plaintiffs' Medicaid and CHIP MCOs. *See, e.g.*, Proposed Compl. ¶ 61 (asserting that Defendants "should be enjoined from collecting the 2018 HIPF . . . from Plaintiffs' Medicaid and CHIP MCOs"); *id.*, Prayer for Relief ¶¶ M-W. And the HIPF is a

tax for purposes of the AIA. *See* ACA § 9010(f)(1) (directing that the HIPF "shall be treated as [an] excise tax[]" for purposes of subtitle F of the Internal Revenue Code, which contains the AIA); *see also* Mem. & Order at 23, ECF No. 88.

This Court previously determined that the AIA "applies to Plaintiffs' claims" against the HIPF and HHS's Certification Rule, but nonetheless held that it had jurisdiction over those claims because Plaintiffs did not have an "adequate, alternative judicial remedy to contest the HIPF." *See* Mem. & Order at 23, 25, ECF No. 88 (citing *South Carolina v. Regan*, 465 U.S. 367 (1984)). Although Defendants disagree with the Court's application of *Regan* in its prior decision, even accepting the Court's reasoning, Plaintiffs' new claims would be barred by the AIA. The Court applied the *Regan* exception to allow Plaintiffs' HIPF and Certification Rule claims to proceed because it determined that, after dismissal of Plaintiffs' "claim for a HIPF refund," Plaintiffs did not have an adequate remedy to challenge the fact that the incidence of the HIPF is passed to them through their Medicaid managed-care contracts. *Id.* at 26. Under the Court's prior rulings, however, Plaintiffs have an adequate, alternative remedy to their new claims against the IRS regulations—two, in fact. Plaintiffs can (and have) challenged HHS's Certification Rule, and they can (and have) sought disgorgement of funds used to pay the HIPF. These alternate avenues for relief mean that the *Regan* exception does not save Plaintiffs' claims against the IRS regulations from dismissal under the AIA, even accepting this Court's prior application of *Regan*.[6]

[6] Defendants also believe that Plaintiffs' new claims would be barred by the Declaratory Judgment Act ("DJA"), 28 U.S.C. § 2201(a). Defendants recognize, however, that this Court previously determined that the HIPF is not a tax for purposes of the DJA. *See* Order at 8, ECF No. 100. Defendants raise the argument here merely to preserve it for any appeal.

3. Plaintiffs' New Claims Would Fail As a Matter of Law

Leave to amend also should be denied because Plaintiffs' proposed new claims fail to state a claim upon which relief may be granted. Plaintiffs allege that the IRS regulations conflict with section 9010 of the ACA because the regulations "fail[] to properly address Plaintiffs' exemption from the HIPF, or otherwise exempt premiums received by covered entities for Medicaid and CHIP services." Proposed Compl. ¶ 102. The IRS regulations, however, are consistent with, and in many instances, merely parrot, the requirements of the ACA. Thus, for the same reasons that this Court rejected Plaintiffs' claims against the HIPF, Plaintiffs' claims against the IRS regulations also would fail.

Section 9010 of the ACA provides that "[e]ach covered entity engaged in the business of providing health insurance shall pay to the Secretary not later than the annual payment date of each calendar year beginning after 2013 a fee in an amount determined under [a statutory formula]." ACA § 9010(a)(1). The statute defines "covered entity" as "any entity which provides health insurance for any United States health risk during the calendar year in which the fee . . . is due." *Id.* § 9010(c)(1). The statute further specifies that "governmental entit[ies]" are not "covered entities." *Id.* § 9010(c)(2)(B). Moreover, the statute states that "health insurance" does not include, among other things, "any medicare supplemental health insurance," but does not omit coverage provided under Medicaid or CHIP from the definition of "health insurance." *Id.* § 9010(h)(3).

The IRS regulations that Plaintiffs seek to challenge are entirely consistent with the statute's requirements. Like the statute, the IRS regulations provide that "governmental entit[ies]," including "State[s]," are not "covered entit[ies]." 26 C.F.R. § 57.2(b)(2)(ii). Accordingly, the IRS regulations do not impose the HIPF on states. Instead, as section 9010 of the ACA requires, the

IRS regulations impose the HIPF on "entit[ies] with net premiums written for health insurance for United States health risks in the fee year," such as "health insurance issuer[s]" and "health maintenance organization[s]." 26 C.F.R. § 57.2(b)(1).

Plaintiffs do not claim that the MCOs with which they contract for Medicaid and CHIP services are not "covered entities" under section 9010 of the ACA. Instead, they assert that, in calculating the annual HIPF for those covered entities, the IRS regulations should require exclusion of any premiums received by those MCOs for Medicaid and CHIP services. *See* Proposed Compl. ¶¶ 51, 102, 113. But Plaintiffs point to no provision of the ACA that requires—or even authorizes—this result. Indeed, the statute explicitly excludes from the definition of the term "health insurance" "any medicare supplemental health insurance," but does not exclude Medicaid or CHIP coverage. ACA § 9010(h)(3). The fact that Congress did not include an exclusion for the latter shows that it did not intend for these premiums to be excluded from calculation of an MCO's HIPF. At the very least, the IRS's decision to include such premiums is a reasonable interpretation of an ambiguous statute. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).

Plaintiffs also claim that the IRS regulations are contrary to the ACA because they do not permit Plaintiffs, which are not "covered entities" that pay the HIPF, to participate in the process for determining each covered entity's HIPF or to make a refund claim. *See* Proposed Compl. ¶¶ 103-104 (citing 26 C.F.R. §§ 57.6, 57.9). Again, however, the IRS regulations' provision of administrative processes and remedies for only covered entities is entirely consistent with the ACA. Section 9010(f)(1) states that, "for purposes of subtitle F of the Internal Revenue Code," HIPFs "shall be treated as excise taxes with respect to which only civil actions for refund *under procedures of such subtitle shall apply*." ACA § 9010(f)(1) (emphasis added). The procedures of

subtitle F, in turn, require that refund claims be submitted by the taxpayer. *See* 26 U.S.C. § 6511(a). Plaintiffs cite to nothing in the ACA (or any other law) that would require the IRS to provide an administrative process or remedy to non-taxpayers.

Plaintiffs also claim that the IRS has unlawfully withheld or unreasonably delayed agency action by failing to adopt Plaintiffs' preferred interpretation of section 9010 of the ACA, which would exclude premiums received by Plaintiffs' Medicaid and CHIP MCOs from the calculation of the HIPF. *See* Proposed Compl. ¶¶ 110-117. But the Administrative Procedure Act, 5 U.S.C. 706(1), can only be used to compel nondiscretionary agency action that is "demanded by law," *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64-65 (2004), and "clear and indisputable," *United States ex rel. Bernardin v. Duell*, 172 U.S. 576, 582 (1899). As explained above, Plaintiffs' preferred interpretation of the ACA is not supported by the text of section 9010. Indeed, what Plaintiffs ask the IRS to do is contrary to section 9010.

Lastly, Plaintiffs repackage several of their constitutional claims against the HIPF by seeking to challenge the IRS regulations on the same grounds. Specifically, Plaintiffs claim that the IRS regulations impose "an unconstitutional tax on Plaintiffs in violation of the Tenth Amendment . . . and the doctrine of intergovernmental tax immunity." Proposed Compl. ¶ 109. These proposed new claims would fail for the same reasons that Plaintiffs' identical challenges to the HIPF failed. *See* Mem. & Order at 58-61, ECF No. 88.

Because the Court would lack jurisdiction over Plaintiffs' proposed new claims and those claims would fail on the merits in any event, Plaintiffs' motion for leave to amend should be denied as futile.[7]

[7] Although the Court ordered expedited briefing of Plaintiffs' motion for leave to amend, the Court should deny Plaintiffs' request for expedited consideration of the motion. *See* ECF No. 106. Plaintiffs' delay in filing their motion for leave to amend is inexcusable, and what limited

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' motion for leave to file a second amended complaint as well as Plaintiffs' motion for expedited consideration of the motion to amend.

Dated: September 12, 2018

Respectfully submitted,

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explanation they provide makes no sense in light of the claims they actually seek to add to the complaint. *See supra*. Delay on Plaintiffs' part should not constitute an emergency for the Court.

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 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/ *Michelle R. Bennett*
MICHELLE R. BENNETT