

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

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

*Plaintiffs,*

V.

UNITED STATES OF AMERICA,  
UNITED STATES DEPARTMENT  
OF HEALTH AND HUMAN  
SERVICES, ALEX AZAR, in his  
Official Capacity as SECRETARY OF  
HEALTH AND HUMAN SERVICES,  
UNITED STATES INTERNAL  
REVENUE SERVICE, and  
CHARLES P. RETTIG, in his Official  
Capacity as COMMISSIONER OF  
INTERNAL REVENUE.

### *Defendants.*

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Civil Action No. 7:15-CV-00151-O

## JOINT PRETRIAL ORDER

Plaintiffs and Defendants, by and through their respective counsel, and pursuant to Federal Rule of Civil Procedure 16 and Local Civil Rule 16.4, hereby submit this joint pretrial order for the Court's consideration.

## PROCEDURAL BACKGROUND

This case involves a challenge to the legality and constitutionality of a federal regulation requiring that States' contracts with managed care organizations ("MCOs") for the provision of Medicaid and Children's Health Insurance Program ("CHIP") services be actuarially sound, including by accounting for the annual Health

Insurance Providers Fee (“HIPF”) paid by the MCOs to the federal government. On March 5, 2018, the Court granted in part and denied in part the parties’ cross-motions for summary judgment. Mem. Op. & Order 62, ECF No. 88. The Court declared that “42 C.F.R. § 438.6(c)(1)(i)(C) delegates legislative power in violation of the United States Constitution and the [Administrative Procedure Act]” and set aside the regulation. *Id.*

On May 21, 2018, State Plaintiffs moved for entry of final judgment and for reconsideration of the Court’s dismissal of their claims for refunds and other rulings. Pls.’ Mot., ECF No. 95. Defendants opposed the motion. Defs.’ Opp., ECF No. 98. On August 21, 2018, the Court granted in part and denied in part Plaintiffs’ motion. Order 17, ECF No. 100. In particular, the Court found that “Plaintiffs are entitled to equitable disgorgement of their HIPF payment” for 2014 through 2016. *Id.* at 15.

Subsequently, Defendants moved to stay issuance of the final judgment to permit Defendants to determine whether to pursue an interlocutory appeal under 28 U.S.C. § 1292(b), Defs.’ Mot., ECF No. 101, and State Plaintiffs moved to amend their complaint to include a challenge to the 2018 HIPF, Pls.’ Mot., ECF No. 105. The Court denied Plaintiffs’ motion to amend the complaint, Order 3, ECF No. 113, and held a hearing on Defendants’ motion to stay, Order 1, ECF No. 117.

During the October 29, 2018 hearing, the parties agreed that Plaintiffs would disclose to Defendants information concerning the HIPF for tax years 2014, 2015, and 2016 to work toward agreement on the amount that should be disgorged as to each Plaintiff in a final judgment. The Court held another hearing on March 7, 2019, Order 1, ECF No. 134, at which the Court ordered the State Plaintiffs to deliver to Defendants all initial documents necessary for determining the amount of disgorgement by April 5, 2019, and ordered the parties to submit a joint status report by June 7, 2019, addressing whether the parties have reached agreement as to the

amount of disgorgement, Order 1, ECF No. 136. If the parties are unable to agree, the Court set a bench trial for June 12, 2019. Order 1, ECF No. 141.

### **UPDATE ON DISGORGEMENT NEGOTIATIONS**

The parties will submit a final joint status report on June 7, 2019, but advise the Court that as of today Defendants have reached agreement with the Plaintiffs as to the amount of any equitable disgorgement as to each of the six Plaintiff States, pursuant to the Court's August 21, 2018 Order, thereby obviating the need for trial on the amount of any equitable disgorgement to be awarded. The parties will detail the specifics of the agreement as to each state in the joint status report the parties intend to file by June 7, 2019, and expect to file a proposed final judgment with the joint status report. The parties note that although Defendants have reached agreement with the States as to the amount of any equitable disgorgement to be included in the Court's final judgment, and the parties have agreed not to appeal the amount of disgorgement awarded in this matter as to each Plaintiff State, all parties otherwise reserve the right to appeal all prior rulings in the case, including liability, the availability of disgorgement or any other remedy, and any other issue.

### **JOINT PRETRIAL ORDER**

#### **I. Summary of the Claims and Defenses of Each Party**

As discussed above, the Court already decided the questions of liability on cross-motions for summary judgment. State Plaintiffs prevailed only on their claim that 42 C.F.R. § 438.6(c)(1)(i)(C) unconstitutionally delegates legislative power. State Plaintiffs and Defendants have each noticed appeals of the summary judgment ruling. *See* ECF Nos. 92, 94. The Court also decided that "Plaintiffs are entitled to equitable disgorgement of their HIPF payment" for 2014 through 2016. State Plaintiffs appealed that ruling, ECF No. 118, and Defendants anticipate appealing that ruling once any judgment becomes final.

At this point, no factual questions remain for the bench trial.

**II. Statement of Stipulated Facts**

Because no factual issues remain for resolution at the bench trial, the parties submit that it is unnecessary to provide the Court with a list of stipulated facts at this time. Instead, the parties intend to detail the specifics of the agreement as to each state in the joint status report the parties intend to file by June 7, 2019.

**III. List of Contested Issues of Fact**

At this time, no issues of fact remain contested. Rather, the parties intend to detail the specifics of the agreement as to each state in the joint status report the parties intend to file by June 7, 2019.

**IV. List of Contested Issues of Law**

At this time, no issues of law as to the amount of any disgorgement remain contested. Rather, the parties intend to detail the specifics of the agreement as to the amount of any disgorgement as to each state in the joint status report the parties intend to file by June 7, 2019.

**V. Estimate of the Length of Trial**

Because the parties have reached agreement as to the amount of any equitable disgorgement as to each of the six Plaintiff States, the parties submit that a trial is unnecessary.

**VI. List of Any Additional Matters that Might Aid in the Disposition of the Case**

The parties are not currently aware of any additional matters that might aid in the Court's disposition of this case.

Approved as to form and substance:

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*COUNSEL FOR DEFENDANTS*

This Joint Pre-Trial Order is hereby approved this \_\_\_\_ day of \_\_\_\_, 2019.

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HONORABLE JUDGE REED O'CONNOR  
UNITED STATES DISTRICT JUDGE

**CERTIFICATE OF CONFERENCE**

I hereby certify that, on May 29, 2019, Plaintiffs' counsel conferred with Defendants' counsel concerning this joint pretrial order. Defendants' counsel authorized Plaintiffs to place her electronic signature on this document.

*/s/ David J. Hacker*  
DAVID J. HACKER

**CERTIFICATE OF SERVICE**

I hereby certify that on May 29, 2019, 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*  
DAVID J. HACKER