

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.

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

JOINT STATUS REPORT

Plaintiffs and Defendants (collectively, the “Parties”), by and through their counsel, and pursuant to the Court’s Order, ECF No. 136, hereby submit the following joint status report:

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 August 21, 2018, the Court granted in part and denied in part Plaintiffs' motion for entry of final judgment and for reconsideration of the Court's dismissal of their claims for refunds and other rulings. Order 17, ECF No. 100. The Court found that "Plaintiffs are entitled to equitable disgorgement of their HIPF payment" for 2014 through 2016. *Id.* at 15.

During a hearing on October 29, 2018, the Parties agreed that Plaintiffs would disclose to Defendants information concerning the HIPF for tax years 2014, 2015, and 2016, and work toward agreement on the amount that should be disgorged 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 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 reached agreement as to the amount of equitable disgorgement, Order 1, ECF No. 136. In case the Parties were unable to agree, the Court set a bench trial for June 12, 2019. Order 1, ECF No. 141.

As indicated in the joint pretrial order submitted on May 29, 2019, ECF No. 142, the Parties reached agreement 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 a trial to determine the amount of equitable disgorgement to be awarded. In response to the Parties' joint pretrial order, the Court cancelled the trial set for June 12, 2019. Order 1, ECF 143.

**THE PARTIES' AGREEMENT ON AMOUNT OF ANY
EQUITABLE DISGORGEMENT**

Pursuant to the Court's August 21, 2018 Order, the Parties agree that the following amounts represent reasonable approximations of the amount each Plaintiff State paid to account for its MCOs' HIPF payments for Medicaid and CHIP premiums for 2014-2016:

1. Texas: \$295,978,491.00
2. Kansas: \$56,555,998.00
3. Louisiana: \$63,801,573.16
4. Indiana: \$16,710,509.00
5. Wisconsin: \$23,218,829.08
6. Nebraska: \$23,135,643.00

Although the parties have reached agreement as to these amounts, Plaintiffs and Defendants may disagree as to the methodology of calculating each amount. Thus, the Parties agree that the methodology used to reach these amounts may not be used against any party in future official or unofficial administrative or judicial proceedings.

In reaching this agreement, the Parties have reserved their rights to appeal all prior orders and rulings in this case, including liability, the availability of disgorgement or any other remedy, the availability and calculation of any pre-judgment or post-judgment interest, and any other issue, but have agreed that no party will appeal the amount of any equitable disgorgement as set forth above.

THE PARTIES' DISPUTE OVER AVAILABILITY OF INTEREST

Although the Parties have reached agreement as to the amount of any equitable disgorgement as to each of the six Plaintiff States, and the Parties indicated in their joint pretrial order that no issues of fact or law remained contested, a contested issue of law has since emerged between the Parties. In particular, the

Parties disagree on whether the Court's final judgment should include pre-judgment and post-judgment interest on the amount of equitable disgorgement for each Plaintiff State.

In light of this dispute, the Parties respectfully request that the Court allow each side to brief the legal question of whether the Court should award State Plaintiffs pre-judgment and/or post-judgment interest on any disgorgement award, according to the following schedule:

June 19, 2019	State Plaintiffs shall file a brief, not to exceed 5 pages in length
July 1, 2019	Defendants shall file a response brief, not to exceed 5 pages in length
July 12, 2019	State Plaintiffs may file a reply brief, not to exceed 3 pages in length.

Additionally, the Parties respectfully request that within 7 days of the Court's resolution of the issue of the availability of interest on any disgorgement award, the Parties be permitted to file either (1) if the Court awards interest, a joint proposed final judgment consistent with the Parties' agreements as reflected herein, and a joint proposed order staying execution of the final judgment pending final resolution of all appeals in this matter (including issuance of the mandate); or (2) if the Court declines to award Plaintiffs post-judgment interest on any disgorgement award, a joint proposed final judgment and a schedule for briefing Defendants' motion to stay execution of the final judgment, which motion Plaintiffs Texas, Kansas, Louisiana, Indiana, and Nebraska have indicated they will oppose if interest is not awarded. The proposed schedule for briefing Defendants' motion to stay execution of the final judgment would provide for Defendants filing an opening brief and Plaintiffs Texas, Kansas, Louisiana, Indiana, and Nebraska filing a single response brief, each brief

not to exceed 5 pages in length, and allow for Defendants to file a reply brief not to exceed 3 pages in length.

Respectfully submitted this 7th day of June, 2019.

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CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Plaintiffs and Defendants jointly prepared this document. Counsel for Defendants authorized Plaintiffs to place her electronic signature on this document.

/s/ David J. Hacker
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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2019, I electronically filed the foregoing document through the Court's ECF system.

/s/ David J. Hacker
DAVID J. HACKER