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

TEXAS, et al., *Plaintiffs,* v. UNITED STATES OF AMERICA, et al., *Defendants.*	§ § § § § § § § § §	Civil Action No. 7:15-CV-00151-O

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF PREJUDGMENT AND POSTJUDGMENT INTEREST

ARGUMENT

Defendants unlawfully taxed State Plaintiffs hundreds of millions of dollars through rules implementing the Health Insurance Providers Fee ("HIPF"), despite statutory language prohibiting them from doing so. ACA § 9010(c)(2)(B). The United States received not only the benefit of that money, but also the interest on that money, which for State Plaintiffs reaches $100 million to date. The Court, sitting in equity, should not unjustly enrich the United States by immunizing it from disgorging the interest it earned, and continues to earn, on Plaintiffs' HIPF payments.

Plaintiffs seek pre- and postjudgment interest based on the disgorgement each State is entitled to recover from the federal government for the HIPF years at issue in this case (2014, 2015, 2016). Defendants contend they possess sovereign immunity from this interest in the same way they previously, and erroneously, argued that they possess sovereign immunity from disgorgement. Defs.' Opp'n 16–18, ECF No. 98. The Court already—correctly—rejected this argument. The APA waives the United States' immunity from "relief other than money damages," 5 U.S.C. § 702, which includes the equitable disgorgement of money paid and interest on the disgorged monies. The Supreme Court has "long recognized the distinction between an action

at law for damages . . . and an equitable action for specific relief—which may include an order providing for . . . 'the recovery of . . . *monies* . . . .'" *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949) (emphasis added)). As this Court already held, State Plaintiffs may recover equitable disgorgement "because the APA waives immunity for 'a suit seeking to enforce [a] statutory mandate,' and disgorgement in this case enforces Defendant's compliance with the ACA's mandate specifically exempting the states from paying the HIPF." Order 13, ECF No. 100 (quoting *Bowen*, 487 U.S. at 900).

Defendants reliance on *Library of Congress v. Shaw*, 478 U.S. 310 (1986), provides them no shelter. There, the Supreme Court held that a plaintiff may not recover interest on a Title VII attorney's fees award, which the Court labeled "damages," *id.* at 314, absent express statutory waiver or a contractual provision. Title VII allows a plaintiff to recover against the United States "costs the same as a private person." 42 U.S.C. § 2000e-5(k). But here, the APA provides a broad waiver of immunity, because it allows the recovery of "relief," except "money damages." 5 U.S.C. § 702. Relief includes interest. Thus, *Shaw* does not foreclose disgorgement of interest based on equitably disgorged money.

Defendants also have no answer to the well-established distinction between interest on damages and interest on equitable disgorgement. The distinction is critical to the remedial power of the Court and is yet another way *Shaw* does not shield Defendants. Plaintiffs seek to disgorge interest, which, like the underlying remedy of equitable disgorgement to which it attaches, falls squarely under the APA's waiver of sovereign immunity for "relief other than money damages." 5 U.S.C. § 702. The APA does not say: "relief other than money damages and interest." Instead, the APA provides a complete waiver for relief that enforces a statutory mandate, except for damages. *Bowen*, 487 U.S. at 900. Interest on disgorgement of the illegally collected HIPF funds is simply the complete relief to which Plaintiffs are entitled.

Moreover, Plaintiffs do not seek damages interest by another name. They seek interest on the equitable disgorgement awarded by the Court, which is not money damages. *See Bowen*, 487 U.S. at 893 ("The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'"). Defendants also cannot escape the character of the interest remedy sought here by distinguishing some of the cases Plaintiffs cite based on the fact that the defendants in those cases were non-governmental entities. The nature of a remedy does not change based on the type of defendant.

Defendants also misplace their reliance on *Economy Plumbing & Heating Co. v. United States*, 470 F.2d 585, 594 (Ct. Cl. 1972). *See* Defs.' Br. 2–3, ECF No. 150. That case is inapposite because the issue presented to the Court of Claims was whether a plaintiff could recover interest from the United States based on a contract claim. State Plaintiffs did not plead contract claims; they pleaded APA claims for equitable relief for which sovereign immunity has been waived.

Finally, the Court should calculate prejudgment interest starting on October 1 of each HIPF year. Additional evidence supporting this date as the proper start date is unnecessary because the Certification Rule itself required Plaintiffs to maintain actuarily sound MCO contracts. The MCOs had to pay the HIPF by September 30, and without an earmarked payment on that date, the contracts would not be actuarily sound. Thus, a proper calculation of prejudgment interest should begin on October 1 of each relevant year when Plaintiffs became liable to pay. (If necessary, Plaintiffs will submit declarations showing HIPF payment dates.)

CONCLUSION

The Court should ensure the United States is not enriched by its wrongs. *Allstate Ins. Co. v. Receivable Fin. Co., LLC*, 501 F.3d 398, 413 (5th Cir. 2007). Thus, Plaintiffs ask that the Court grant their request for pre- and postjudgment interest and utilize the formulas contained in their opening brief to calculate those amounts.

Respectfully submitted this 12th day of July, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2019, I electronically filed the foregoing document through the Court's ECF system.

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