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 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 SERVICE

Defendants.

Civ. No. 7:15-cv-00151-O

BRIEF IN OPPOSITION TO
PLAINTIFFS' MOTION AND BRIEF IN SUPPORT OF AN AWARD OF PREJUDGMENT AND POSTJUDGMENT INTEREST

In finding that plaintiffs were entitled to "equitable disgorgement," the Court held that "the APA waives immunity for 'a suit seeking to enforce [a] statutory mandate,'" and that "disgorgement in this case enforces Defendant's compliance with the ACA's mandate specifically exempting the states from paying the HIPF[,] . . . as a form of specific relief." Order 13, ECF No. 100. Now, plaintiffs argue that the same APA waiver of sovereign immunity on which the Court based its award of equitable disgorgement also waives sovereign immunity for pre- and postjudgment interest. *See* Pls.' Br. 1. However, the caselaw is clear that a party seeking interest from the United States must identify a separate explicit waiver of sovereign immunity for an interest award. Because plaintiffs have not and cannot identify a specific explicit waiver of sovereign immunity for an award of interest in this circumstance, their request for pre- and postjudgment interest must be rejected.

ARGUMENT

I. SOVEREIGN IMMUNITY BARS RECOVERY OF INTEREST HERE.

The Supreme Court has held that, "[i]n the absence of express congressional consent to the award of interest *separate* from a general waiver of immunity to suit, the United States is immune from an interest award." *Library of Cong. v. Shaw*, 478 U.S. 310, 314 (1986) (emphasis added); *see also id.* at 315; *McGehee v. Panama Canal Comm'n*, 872 F.2d 1213, 1214-17 (5th Cir. 1989). Although Congress placed the historical "no-interest rule" in 28 U.S.C. § 2516(a) and its precursor statutes, the Supreme Court "repeatedly has made clear that the Act merely codifies the traditional legal rule regarding the immunity of the United States from interest." *Shaw*, 478 U.S. at 317.

"The no-interest rule can be waived," but "only by 'specific provision by contract or statute, or express consent by Congress.'" *England v. Contel Advanced Sys., Inc.*, 384 F.3d 1372, 1379 (Fed. Cir. 2004) (quoting *Shaw*, 478 U.S. at 317). Accordingly, a general waiver of sovereign immunity for certain claims will not suffice to waive immunity for interest. *Shaw*, 478 U.S. at 318. "Nor can an intent on the part of the framers of a statute or contract to permit the recovery of

interest suffice where the intent is not translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed." *United States v. N.Y. Rayon Imp. Co.*, 329 U.S. 654, 659 (1947).

Plaintiffs cite no case—and defendants have found none—in which a court has either found that the APA waives sovereign immunity for interest or awarded interest under the APA.[1] Therefore, plaintiffs' suggestion that the APA's general waiver of sovereign immunity suffices to waive sovereign immunity for the award of interest is contrary to law and must be rejected.

Moreover, "the force of the no-interest rule cannot be avoided simply by devising a new name," and "the character or nature of interest cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term because it is still interest and the no-interest rule applies to it." *Id.* (citation omitted). Rather, the Court has rigidly enforced the requirement that the no-interest rule can only be waived by express affirmative statutory or contractual terms:

> [I]nterest has been ruled unavailable under statutes or contracts directing the United States to pay the "amount equitably due." And the United States is not liable for interest under statutes and contracts requiring the payment of "just compensation," even though it long has been understood that the United States is required to pay interest where the Constitution mandates payment under the Just Compensation Clause.

Shaw, 478 U.S. at 320; *see also, e.g.*, *Econ. Plumbing & Heating Co. v. United States*, 470 F.2d 585, 594 (Ct. Cl. 1972). For this reason, plaintiffs' cannot avoid this clear result by arguing that interest would be an equitable remedy just like the Court's disgorgement award. Pls.' Br. 2-3.

Plaintiffs' argument is no different from that rejected in *Economy Plumbing*. There,

[1] *Gore, Inc. v. Glickman*, 137 F.3d 863, 868 (5th Cir. 1998) ("*Gore II*")—in which the court awarded prejudgment interest on a refund the plaintiff recovered in *Gore, Inc. v. Espy*, 87 F.3d 767, 772-73 (1996), a case "governed by the [APA]"—is distinguishable from this case. In allowing prejudgment interest, the court explained that while the no-interest rule "would govern the parties' dispute over prejudgment interest if the case were indeed a claim against the United States, and if an award of prejudgment interest were to be paid from the public treasury," because the interest would be paid from an account that "contains no federal funds," the award "will not infringe on the sovereign immunity of the United States." *Gore II*, 37 F.3d at 870. The same cannot be said in the instant case.

plaintiffs argued that the Court of Federal Claims (then sitting as an appellate court) should award interest because "the government had their money for over 11 years," and thus "it is right and just for the government to have to pay interest." 470 F.2d at 594. While the court "agree[d] that equity and justice is on the side of the plaintiffs," it nonetheless held that "interest cannot be collected from the government on that basis," noting that the Supreme Court had explained in *N.Y. Rayon* that "[h]ad Congress desired to permit the recovery of interest in situations where the Court of Claims felt it just or equitable, it could have so provided. The absence of such a [statutory] provision is conclusive evidence that the court lacks any power of that nature." *Id.* (quotation omitted). Because plaintiffs have pointed to no applicable statutory provision specifically "permit[ting] the recovery of interest . . . where the [district court] felt it just or equitable," *id.*, their request for interest on this basis must similarly be rejected.[2]

Because the no-interest rule stems from the United States' sovereign immunity, cases addressing the availability or character of an interest award against a non-federal government defendant bear no relevance to plaintiffs' request for interest here. Thus, many of the cases cited by plaintiffs are wholly inapposite.[3]

Nor are plaintiffs aided by two cases they cite in which a circuit court of appeals effectively held that the federal government was liable for prejudgment interest, as those cases are limited to the civil-forfeiture context, are not binding on this Court, and represent the minority view. *See United States v. $277,000 U.S. Currency*, 69 F.3d 1491 (9th Cir. 1995); *United States v. $515,060.42 in U.S. Currency*, 152 F3d 491 (6th Cir. 1998). Notably, four other circuits refused

[2] *See also, e.g., Brazos Elec. Power Co-op., Inc. v. United States*, 52 Ct. Cl. 121, 123 (2002) (rejecting argument that because U.S. "benefitted from the use of [money] . . . it improperly received from [plaintiffs], . . . [it] should therefore pay . . . interest," as the court "has no authority to grant interest awards based on equity" under the no-interest rule).

[3] *See SEC v. Lipson*, 278 F.3d 656, 663 (7th Cir. 2002) (upholding interest award against private defendant); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 946 (8th Cir. 1999) (considering interest against private plan administrator); *Usery v. Assoc. Drugs, Inc.*, 538 F.2d 1191, 1194 (5th Cir. 1976) (awarding interest against private employer).

to award interest on money the courts determined had been "wrongly seized" by the government. *Smith v. Principi*, 281 F.3d 1384, 1388 n.2 (Fed. Cir. 2002) (citing cases from First, Second, Eighth, and Tenth Circuits). Moreover, within five years of the first of the decisions plaintiffs cite, Congress "amended the forfeiture statute [28 U.S.C. § 2465] to allow prospectively the recovery of interest." *Smith*, 281 F.3d at 1388 n.2. The amendment's legislative history reveals that Congress recognized the fragility of the argument that a party could recover from the United States interest on "wrongly seized money" absent express statutory authorization. *See* H.R. REP. 106-192, 19 (1999) ("Under current law, even if a property owner prevails in a forfeiture action, he may receive no interest for the time period in which he lost use of his property."). This amendment, of course, is of no help to plaintiffs, as this Court did not award disgorgement under the authority of the forfeiture statute. To the contrary, the amended forfeiture statute demonstrates how, when "Congress desire[s] to permit the recovery of interest . . . , it . . . so provide[s.]" *N.Y. Rayon Importing*, 329 U.S. at 660; *see* 28 U.S.C. § 2465(b)(1) ("in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for . . . post-judgment interest, as set forth in section 1961 of this title").[4]

Finally, 28 U.S.C. § 1961(a) cannot support awarding post-judgment interest here. As the Fifth Circuit explained in *A.L.T. Corp. v. Small Bus. Admin.*, 823 F.2d 126, 127-28 (5th Cir. 1987), § 1961(a) does not waive the United States' sovereign immunity for post-judgment interest. *Id.*

II. EVEN IF THE COURT FINDS PLAINTIFFS MAY RECOVER INTEREST, PLAINTIFFS HAVE NOT SHOWN THEIR CALCULATIONS ARE REASONABLE.

First, Plaintiffs' argument that prejudgment interest should be calculated from October 1 in each relevant year, based on the September 30 due date for managed care organizations' (MCOs)

[4] *See also Palmer v. United States*, 146 F.3d 361, 366 (6th Cir. 1998) (upholding postjudgment interest under Federal Tort Claims Act but reversing prejudgment interest award, because FTCA waives immunity only for the former).

HIPF payments to the IRS, should be rejected absent proof from plaintiffs that their payments to the MCOs to account for the MCOs' HIPF payments were made on October 1 each year. Documentation plaintiffs gave defendants to aid in the resolution of the disgorgement issue shows that at least some, if not all, of the payments were made after October 1.

Second, the Court has already rejected any classification of plaintiffs as "taxpayers" for the purposes of this case, *see* Mem. Op. & Order 21, ECF No. 34 (Aug. 4, 2016); Order 2, ECF No. 100 (Aug, 21, 2018), and, by the same reasoning, plaintiffs' alternative argument that interest should be calculated as provided in 26 U.S.C. § 6621 should be rejected.

Third, there is no basis for importing state law regarding the calculation of interest here. *See, e.g.*, *West Virginia v. United States*, 479 U.S. 305, 308-09 (1987) (noting, when calculating interest owed by a state to the federal government, that state law should only be adopted as the federal rule of decision where there is a "compelling reason for doing so[,]" and "[a] single nationwide rule [is] preferable to one turning on state law"). To the extent the Court finds that Congress has waived sovereign immunity for either pre- or postjudgment interest, the Court should consider the rate provided in 28 U.S.C. § 1961 (for each of the relevant years)[5] to reflect Congress's view as to the appropriate rate of any interest and apply it to any calculations here.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' motion and decline to award Plaintiffs any pre-judgment or post-judgment interest.

Dated: July 1, 2019 Respectfully submitted,

[5] Any interest, should it be awarded, should be calculated based on the prevailing rates for the periods to which the interest relates. Thus, if prejudgment interest is allowed for a period in 2014, the rate under 28 U.S.C. § 1961 should be based on the interest rate benchmarks prevailing during or at the beginning of that period in 2014. *See, e.g.*, 40 U.S.C. § 3116 (providing for annual interest rate update where interest is awarded for period more than one year).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was submitted on July 1, 2019 with the clerk of the court for the U.S. District Court, Northern District of Texas, via the electronic case filing system. I also certify that a copy of this document was served upon all parties, or their attorneys of record, by electronic delivery on this day.

/s/ Julie Straus Harris
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