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

DEFENDANTS' MOTION TO STAY EXECUTION OF JUDGMENT AND BRIEF IN SUPPORT

Defendants respectfully move the Court for an order staying execution of the July 30, 2019 Final Judgment until the conclusion of any appellate proceedings in this case. As explained herein, because the district court's order is a monetary judgment against the United States, the government is entitled to a stay as a matter of right, without posting a bond and without any showing of likelihood of success on the merits or irreparable harm. Moreover, a stay pending appeal would also be warranted under the standards applicable to private parties and non-monetary judgments.

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 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. To determine the amount of disgorgement pursuant to the Court's August 21 Order, Plaintiffs disclosed to Defendants information concerning the HIPF for tax years 2014, 2015, and 2016, and the Parties worked together to reach agreement on the amount that should be disgorged to each Plaintiff in a final judgment, which remains subject to appeal. Joint Status Report, ECF No. 144. On July 30, 2019, the Court entered a Final Judgment, which orders Defendants to pay each Plaintiff an amount specified in the Final

Judgment, and to submit the payments for processing within 30 days of this Final Judgment unless execution of the judgment is stayed pending appeal. Final Judgment 2-3, ECF No. 156. The payment amounts total $479,401,043.24. *Id.* at 2.

ARGUMENT

1. When a district court enters a monetary judgment against the federal government, Rule 62 of the Federal Rules of Civil Procedure entitles the government to an automatic stay pending appeal, without any showing of probability of success or irreparable injury. *See, e.g.*, *Hoban v. Wash. Metro. Area Transit Auth.*, 841 F.2d 1157, 1158-59 & n.3 (D.C. Cir. 1988) (per curiam) (construing similar provisions of local rule). This is so because private parties have an absolute right to a stay of a monetary judgment pending appeal upon the filing of an approved bond or other security, *see* Fed. R. Civ. P. 62(b), and the requirement for posting a bond or security has no application to the United States, *see* 28 U.S.C. § 2408; Fed. R. Civ. P. 62(e).

Rule 62(b) allows an appellant to obtain a stay pending appeal as of right by filing an approved bond or other security. The right to a stay pending appeal under Rule 62(b) is qualified only by Rule 62(a), which creates an exception for injunctions ("an interlocutory or final judgment in an action for an injunction") and several other limited exceptions. As the Fifth Circuit explained, Rule 62 "entitles a party appealing a money judgment to an automatic stay upon posting a[n approved] bond" or other security. *Hebert v. Exxon Corp.*, 953 F.2d 936, 938 (5th Cir. 1992).[1] The policy behind the rule is that a bond or other security "serves, in money judgment cases, as a kind-for-kind security to guarantee the judgment." *Id.* (internal quotation marks omitted).

In *Hebert*, the Fifth Circuit confirmed that any judgment that requires the payment of money falls within the letter and spirit of Rule 62(b). Although the district court had issued a

[1] Rule 62 was reorganized effective December 1, 2018. The provision entitling a party appealing a money judgment to an automatic stay upon posting an approved bond, previously located at Rule 62(d), is now found at Rule 62(b).

declaratory judgment in that case, the Fifth Circuit explained that because "the district court's declaratory judgment binds [the defendant] to pay a specific sum of money[,] . . . both the language of Rule 62[(b)] and its underlying rationale entitle [the defendant] to an automatic stay pending appeal in this case." *Id.* The court held that the Rule's application in that case was so "clear and indisputable" as to warrant the issuance of a writ of mandamus to overturn the district court's refusal to issue an automatic stay. *Id.* (internal quotation marks omitted).

Here, this Court has ordered the government to pay a sum of money to Plaintiffs. The text and underlying rationale of Rule 62 thus entitle the United States to an automatic stay pending appeal. The only distinction from *Hebert* is that the requirement to post an approved bond or other security does not apply to the federal government, which can be presumed to be willing and able, if the judgment is not ultimately overturned on appeal, to pay the judgment even in the absence of a bond. *See* 28 U.S.C. § 2408; Fed. R. Civ. P. 62(e); Wright & Miller, Fed. Practice & Procedure, § 2906. Because 28 U.S.C. § 2408 and Rule 62(e) provide that the federal government shall not be required to post a bond to obtain a stay pending appeal, the stay under Rule 62(b) is entirely automatic and unconditional when the government is the appellant. *See Hoban*, 841 F.2d at 1158-59 & n.3; *see also Dixon v. United States*, 900 F.3d 1257, 1268-69 (11th Cir. 2018) (holding that Rules 62(b) and (e) operate to "entitle[] the United States to a stay of a money judgment pending appeal without payment of a bond"); *In re Trans World Airlines, Inc.*, 18 F.3d 208, 212-13 (3d Cir. 1994) (affirming bankruptcy court's grant of United States' motion for stay pending appeal based on the federal government's entitlement to a stay as of right without posting a supersedeas bond pursuant to Rule 62); *Lightfoot v. Walker*, 797 F.2d 505, 507 (7th Cir. 1986) (noting that "Rule 62(e) . . . entitles the federal government (and its departments, agencies, and officers) to a stay of execution pending appeal, without its having to post a bond or other security").

2. A stay would also be warranted under the standards for a stay pending appeal

applicable to injunctions or money judgments where the non-federal government defendant does not provide a bond or other security. *See In re First S. Sav. Ass'n*, 820 F.2d 700, 704 (5th Cir. 1987). Under these familiar standards, a court considers:

> (1) Whether the movant has made a showing of likelihood of success on the merits; (2) Whether the movant has made a showing of irreparable injury if the stay is not granted; (3) Whether the granting of the stay would substantially harm the other parties; and (4) Whether the granting of the stay would serve the public interest.

Id. at 704. *See also Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). "To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or vice versa." *Id.*; *Ruiz v. Estelle*, 666 F.2d 854, 856 (5th Cir. 1982). Moreover, "the movant need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay." *Ruiz*, 666 F.2d at 856. Finding that the government is likely to succeed on appeal "does not require the trial court to change its mind or conclude that its determination on the merits was erroneous. Rather, the court must determine whether there is a strong likelihood that the issues presented on appeal could be rationally resolved in favor of the party seeking the stay." *United States v. Fourteen Various Firearms*, 897 F. Supp. 271, 273 (E.D. Va. 1995) (internal citation omitted.)

On several issues in this case—including the Court's holding that the Certification Rule violates the private non-delegation doctrine, and the Court's award of equitable disgorgement under the APA—the government has, at the very least, raised serious legal questions and presented a substantial case on the merits. The Supreme Court has invoked the non-delegation doctrine to

invalidate federal laws only twice and has not done so for more than 80 years. *See* Defs.' Br. in Supp. of Defs.' Mot. for Summ. J. & in Opp'n to Pls.' Mot. for Summ. J. at 34-35 & n.24, ECF No. 64 (citing cases). And counsel for Defendants are not aware of another case in which equitable disgorgement was awarded against the United States under the APA.

The other relevant factors also tip sharply in favor of a stay, for substantially the same reasons that the federal rules contemplate an automatic stay of money judgments against the United States. The absence of a stay would impose a substantial risk of irreparable harm on the federal government—requiring it to pay out a large sum of money now that may be difficult or impossible to recoup from the States should the federal government prevail on appeal. Indeed, the presumption that the federal government is willing and able, if the judgment is not ultimately overturned on appeal, to pay the judgment even in the absence of a bond, has not been extended to States, which have significantly smaller budgets. *See* Fed. R. Civ. P. 62(e); Wright & Miller, Fed. Practice & Procedure, § 2906; *see also Lightfoot*, 797 F.2d at 507 (holding that state does not enjoy entitlement to stay of execution pending appeal absent a bond that the United States enjoys).

Plaintiffs, on the other hand, would suffer no irreparable injury from a stay. It is well settled that monetary injuries are generally insufficient to establish irreparable harm where, as here, payment in full of any amount owed would be assured at the termination of the litigation. *See, e.g.*, *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("[I]t seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury.").

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court stay execution of the Final Judgment pending the conclusion of any appellate proceedings in this case.

Dated: August 12, 2019 Respectfully submitted,

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Counsel for Defendants

CERTIFICATE OF CONFERENCE

I hereby certify that, on June 5 and 6, 2019 and July 29, 2019, Defendants' counsel conferred with Plaintiffs' counsel concerning this motion. Plaintiffs Texas and Louisiana advised Defendants that they oppose this motion; Plaintiff Wisconsin advised Defendants that it does not oppose this motion; and Plaintiffs Indiana, Kansas, and Nebraska had not yet taken a position on the motion.

/s/ Julie Straus Harris
JULIE STRAUS HARRIS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was submitted on August 12, 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
JULIE STRAUS HARRIS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
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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

[PROPOSED] ORDER

Upon consideration of Defendants' Motion to Stay Execution of Judgment, it is hereby ORDERED that Defendants' motion is granted; and it is further ORDERED that the Final Judgment in this case is stayed pending the conclusion of any appellate proceedings in this case.

SO ORDERED on this ____ day of _____, 2019.

_____
REED O'CONNOR
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS