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

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

**RESPONSE TO DEFENDANTS' MOTION TO STAY EXECUTION OF THE FINAL JUDGMENT PENDING APPEAL**

## ARGUMENT[1]

The United States asks the Court to stay execution of the final judgment pending resolution of all appeals in this matter. State Plaintiffs concede that both sides already filed notices appealing prior orders in this case, and will likely appeal the final judgment. But the United States is not entitled to an automatic stay. It must satisfy the same four factor test that any litigant must satisfy. Moreover, the Court should not consider the United States' request in a vacuum. Earlier this summer, in a case challenging the Affordable Care Act's individual mandate, the United States told the Fifth Circuit that the entire ACA, which includes the Health Insurance Providers Fee, is unconstitutional. Despite that concession, the United States continues to defend the HIPF in this case. The contradiction is remarkable, and the Court should not issue a stay of the final judgment under these circumstances.

### I. Rule 62 Does Not Automatically Grant the United States a Stay.

The United States contends that it is *entitled* to an *automatic* stay of a final judgment awarding an amount of money without the obligation to post a bond. Defs.'

[1] The State of Wisconsin does not oppose a stay of execution of the final judgment pending appeal. Thus, it does not join this brief.

Mot. to Stay 2, ECF No. 158. But Rule 62 and precedent do not agree. Normally, a party that posts a bond may obtain a stay of the final judgment. *See* Fed. R. Civ. P. 62(b) ("At any time after judgment is entered, a party may obtain a stay by providing a bond or other security."). But even this stay is not automatic. The court must "approve[] the bond or other security" first. *Id*. Thus, only when a party provides bond or other security, and only when the court approves it, may the party receive a stay.

By comparison, Rule 62(e) does not require the United States to post a bond *if* the court grants a stay on an appeal filed by the United States. *See* Fed. R. Civ. P. 62(e) ("The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government."). Of course, federal law does not require the United States to post security for damages or costs. 28 U.S.C. § 2408. But Rule 62(e) does not entitle the United States to an automatic stay. It says that a court may not require the United States to post a bond or other security "when granting a stay on an appeal by the United States. . . ." *Id*. The "when granting" language means that the court retains discretion to grant a stay in the first place. The court may choose to deny a stay, in which case the lack of a bond requirement becomes irrelevant. But if the court issues a stay, then the rules provide that the court may not require the United States to post a bond, which makes the rule consistent with 28 U.S.C. § 2408.

This plain reading of Rule 62 is not without support. *See In re Westwood Plaza Apartments, Ltd.*, 150 B.R. 163, 167 (Bankr. E.D. Tex. 1993); *C.H. Sanders Co., Inc. v. BHAP Housing Development Fund Co., Inc.*, 750 F. Supp. 67, 72–76 (E.D.N.Y. 1990); *United States v. U.S. Fishing Vessel Maylin*, 130 F.R.D. 684 (S.D. Fla. 1990). In *Westwood Plaza Apartments*, the U.S. Department of Housing and Urban Development, like Defendants here, argued that it was entitled to an automatic stay of a judgment. 150 B.R. at 165. The bankruptcy court rejected that argument because

subdivision (e) of the rule provides two conditions that must be satisfied before the court may issue a stay. "First, the appeal must be by the United States or an agency thereof. Second, a stay is granted by a court in favor of the United States." *Id.* at 166. The court found that these conditions were complete and not dependent on Rule 62(b).[2] If the United States posts a court-approved bond and complies with subdivision (b), then it should receive a stay. But if the United States does not want to post a bond, and avails itself of the requirements of subdivision (e), then the court retains discretion to grant or deny the stay. The court criticized courts in other circuits and treatises, some cited by Defendants here, which have found that Rule 62 provides an automatic stay for the United States. *Id.* at 166–67. And the court noted the separation of powers problems inherent in an Executive branch agency like DOJ possessing a categorical right to a stay on appeal regardless of whether the Judicial branch believes a stay is warranted. *Id.* at 167–68. Rule 62 does not provide the United States with an automatic stay. Instead, the United States, like all parties, must satisfy the normal factors for a stay. It fails to do so here.

## II. The United States Fails to Satisfy the Factors for a Stay.

The Court must consider four factors when deciding whether to grant a motion to stay execution of a final judgment pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

*Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). "The first two factors of the traditional standard are the most critical." *Id.* at 434. "It is not enough that the chance of success on the merits be better than negligible." *Id.* (citation and internal quotation marks omitted). Instead, the

[2] The court discussed subdivisions (e) and (d) because subdivision (d) previously contained the language now found in subdivision (b).

applicant for a stay must make a "strong showing" that it will prevail on appeal. Likewise, "simply showing some possibility of irreparable injury fails to satisfy the second factor." *Id.* at 434–35; *accord Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (rejecting the notion that the "possibility" of irreparable harm satisfies that factor in the similar injunctive relief analysis). Here, all factors point toward denial of the United States' motion.

Defendants fail to make a strong showing that they will prevail on appeal. First, the Court soundly rejected Defendants' arguments in opposition to Plaintiffs' non-delegation and disgorgement claims. Defendants provide no basis for the Court to reconsider its prior holdings now. Second, the United States' position in the case challenging the Affordable Care Act's individual mandate throws their likelihood of success in this case into serious doubt. The United States argued recently to the Fifth Circuit that the ACA's individual mandate is unconstitutional and not severable from the remaining portions of the statute. *See* Br. of U.S. 29–49, *Texas v. United States*, Dkt. No. 00514939490, Case No. 19-10011 (5th Cir.). The ACA created the HIPF; thus, by the United States own admission in the ACA individual mandate case, Plaintiffs should prevail in this case concerning the HIPF. Defendants cannot make a strong showing that they will prevail on appeal, when they conceded to the Fifth Circuit that they should lose.

A stay will substantially injure State Plaintiffs who have waited years to recover the unlawfully collected HIPF payments. As discussed in Plaintiffs' brief in support of prejudgment and postjudgment interest, ECF No. 147, Plaintiffs have lost not only the HIPF payments for each year, but also the prejudgment interest on those monies, which totals over $90 million. The Court's decision to deny Plaintiffs prejudgment and postjudgment interest compounds the States' substantial injuries as they are forced to wait for at least another year while the case goes up to the Fifth Circuit and possibly more years if it reaches the Supreme Court. During that time,

Plaintiffs' money will sit in the U.S. Treasury earning interest for the United States—interest that the States should earn instead. By allowing the States to execute the judgment now, the Court avoids inflicting those additional injuries on the States. Finally, it also bears mentioning that in recent years the federal government's ability to pay judgments has become less than certain. Earlier this year, Defendants sought a stay of the litigation because of a federal government shutdown due to a lack of appropriations. ECF No. 125. And similar shutdowns have happened in recent years. By contrast, State Plaintiffs have not shut down. Thus, even if the Fifth Circuit overturns the Court's judgment, Plaintiffs can return the judgment money to the United States.

## CONCLUSION

The United States, like any litigant, must satisfy the *Nken* test to obtain a stay of a final judgment. In light of the United States' conflicting positions in this case and the ACA individual mandate case, the Court should deny Defendants' request to stay execution of the final judgment pending appeal.

Respectfully submitted this 3rd day of September, 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 3, 2019, I electronically filed the foregoing document through the Court's ECF system.

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