

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

TEXAS,
KANSAS,
LOUISIANA,
INDIANA,
WISCONSIN, and
NEBRASKA,

Plaintiffs,

v.

CIVIL ACTION NO. 7:15-CV-00151-O

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 DAVID J. KAUTTER,
in his Official Capacity as
ACTING COMMISSIONER OF
INTERNAL REVENUE,

Defendants.

**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO
STAY ISSUANCE OF FINAL JUDGMENT**

Plaintiffs do not concede and, in fact, contest Defendants' arguments suggesting that the math will be complicated or that further proceedings are necessary. However, for the reasons explained herein, Plaintiffs concur that an interlocutory appeal under 28 U.S.C. § 1292 is appropriate and request that the court certify its August 21, 2018 order (ECF No. 100) and all prior rulings for that purpose. Plaintiffs oppose Defendants' motion to the extent it seeks a stay of all proceedings in this case, because today Plaintiffs will file a motion for leave to amend the operative complaint so they can seek immediate injunctive relief against the 2018

HIPF that IRS intends to collect by October 1, 2018.

Calculating the HIPF

Calculating the HIPF is easy. MCOs report their net premiums to IRS on a Form 8963. This spreadsheet-style form makes it easy to discern which premiums relate to Medicaid or CHIP. Once the IRS collects all of the Form 8963s, it employs the below simple formula, which it shows to the entities in a preliminary fee notice (called a letter 5066C), for example:

$$\begin{array}{r}
 \text{Net premiums for Hypothetical MCO} \\
 \$100,000,000,000.00 \\
 \div \\
 \$715,204,048,191.34 \\
 \text{Aggregate net premiums written taken for all covered entities} \\
 \text{(actual denominator used by IRS for 2018)} \\
 \times \\
 \$14,300,000,000.00 \\
 \text{Total HIPF for 2018} \\
 = \\
 \$1,999,429,398.67 \\
 \text{Hypothetical MCOs Share of 2018 HIPF}
 \end{array}$$

A copy of an actual 2018 HIPF Letter 5066C is attached (with sensitive taxpayer information redacted) for the benefit of the Court as Exhibit A. If the first (or top) number of the formula is reduced, and premiums for Medicaid and CHIP are appropriately removed, recalculating this formula is simple.

Plaintiffs have appropriately, and precisely, calculated the HIPF they have been required to pay. Defendants fail to identify incorrect calculations, but speculate, without basis, that the calculations are either wrong or too complicated to be done to this point. Neither basis is sustainable.

Contribution by the Federal Government is Irrelevant

While Defendants contend that a portion of any disgorgement belongs in their hands, that issue is not before the Court. Defendants have not pled any form of

contribution defense, or mitigation defense, as the Court previously noted. ECF No. 88 at 15 n.28. Because the Defendants have not pled anything, there is simply no jurisdictional basis for the Court to act upon any form of contribution request by Defendants.

By raising a question of contribution, Defendants attempt to conflate the simple process before the parties. What is clear and undisputed is that the IRS has Plaintiffs' money. The IRS neither manages/oversees Medicaid, nor does it provide Plaintiffs with financial contributions for Medicaid/CHIP. Thus, the job of the IRS is easy—to disgorge to Plaintiffs the *full* amounts claimed.

After Plaintiffs receive back the disgorged amounts, Plaintiffs and CMS can discuss whether any provision of federal law, *e.g.*, 42 U.S.C. § 1396b, or the Medicaid program, require any form of repayment, credit, offset, or otherwise. If Defendants are unsatisfied, have fully exhausted the administrative process articulated by Congress and its own regulations, have satisfied any and all other necessary prerequisites, and have a right to invoke the jurisdiction of the court, they can do so. Otherwise, with the IRS still in possession of the money, the circumstances aren't even ripe for any form of contribution claim.

Defendants' confusion of the questions in issue in this matter, and the nature of the Court's forthcoming judgment, should not dictate the next steps. Mathematically and logistically, the next steps are easy.

Interlocutory Appeal

However, notwithstanding Defendants' errors, and Plaintiffs' arguments, Plaintiffs do not oppose and, in fact, join Defendants' request for the Court to certify its rulings for interlocutory appeal under 28 U.S.C. § 1292.

A Stay Will Prejudice Plaintiffs

A stay of these proceedings while the parties appeal the Court's August 21, 2018 order will prejudice Plaintiffs. On or about August 31, 2018, IRS issued the final

bills to MCOs, requiring payment of the 2018 HIPF by October 1, 2018. Today, Plaintiffs will move for leave to amend their complaint, challenge the 2018 HIPF, and seek immediate injunctive relief from this Court. Thus, a stay will prevent them from seeking this relief before the month is out. And because the outcome of the appeal could alter the ability of Plaintiffs to seek disgorgement of the 2018 HIPF in the future, Plaintiffs necessitate injunctive relief now.

CONCLUSION

Though Plaintiffs disagree with Defendants substantive arguments, Plaintiffs do not oppose Defendants' request for the Court to certify its rulings for interlocutory appeal under 28 U.S.C. § 1292, but do oppose Defendants' request to stay all proceedings in this case.

Respectfully submitted this the 7th day of September, 2018.

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that on the 7th day of September, 2018, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Austin R. Nimocks
AUSTIN R. NIMOCKS

Exhibit A



Department of the Treasury
Internal Revenue Service
 1973 Rulon White Blvd, Mail Stop 4916 - IPF
 OGDEN, UT 84201-0051

Taxpayer ID Number	
Letter	5066C
Fee Year	2018
Notice Date	Jun. 13, 2018
To contact us	1-616-365-4617
Contact Fax Number	1-877-797-0235
Contact hours	8:00 a.m. - 4:30 p.m. ET

Annual Fee on Health Insurance Providers for 2018

Important Message about the Health Insurance Provider's Fee (IPF)

Preliminary calculation of your fee: \$ [REDACTED],114,141.54

DO NOT PAY AT THIS TIME

This is the preliminary calculation of your share of the fee imposed by the Patient Protection and Affordable Care Act of 2010 on covered entities engaged in the business of providing health insurance for United States health risks.

If you have questions, you can contact us at the number listed at the top of this letter.

Summary of your Health Insurance Provider Fee for 2018

This is only a preliminary calculation. Your fee may change when we make the final calculation.

DON'T PAY AT THIS TIME.

Your final fee calculation will reflect the amount (if any) you are required to pay by September 30th.

What You Need To Do

If you agree with the premiums being used to compute the preliminary fee calculation

- You don't pay now. By August 31st, we'll send you a final fee calculation, which may vary from the preliminary calculation of your fee. However, you do need to read the rest of this letter to see if we are requesting any additional information from you at this time.

If you don't agree with the premiums being used to compute the preliminary fee calculation

- You must follow the procedures in Notice 2013-76 and send us a corrected Form 8963, Report of Health Insurance Provider Information, with the correction box checked. You can submit your corrected report by efile or by mail to the address indicated on the form by Jul 16, 2018. If you mail your corrected report, please consider using Priority Mail® or an overnight delivery service, and please also fax it to 877-797-0235 to allow for prompt correction. When the IRS receives a corrected report by mail or fax, we will mail an acknowledgement to confirm receipt of the submission to the address indicated on the corrected Form 8963. If you do not receive an acknowledgement from us within 10 days of submission, please contact us by phone at 616-365-4617 (not a toll-free number) or by email at LBI.IPF@irs.gov.

For a detailed calculation of the preliminary fee, please see below. (Any final fee that is less than \$1 will be rounded to \$0.)

Preliminary Allocated Fee

The fee is calculated using the following premiums, which were determined as of Jun 07, 2018. Any information received after that date is not included in the fee calculation.

$$\left(\frac{\begin{array}{l} \text{*Net premiums written taken into} \\ \text{account for your entity:} \\ \text{*\$ } \blacksquare, 268,907,627.00 \\ \hline \text{\$ } \blacksquare, 204,048,191.34 \\ \text{Aggregate net premiums written taken} \\ \text{into account for all covered entities:} \end{array}}{\text{Aggregate net premiums written taken}} \right) \times \$14,300,000,000 = \text{Your share of fee } \$ \blacksquare, 114,141.54$$

	Total net premiums written for covered entity	Premiums subject to fee calculation
0% of ...	\$ 0 - \$ 25,000,000	\$0.00
50% of ...	\$ 25,000,001 - \$ 50,000,000	\$ \blacksquare, 500,000.00
100% of ...	premiums over \$ 50,000,000	\$ \blacksquare, 256,407,627.00

Sum of total net premiums written as reported
\$ \blacksquare, 306,407,627.00

Subtotal of premiums subject to fee
\$ \blacksquare, 268,907,627.00

Premiums eligible for partial exclusion for certain exempt activities:

Minus

Total eligible premiums reported:
\$0.00

Eligible premiums subject to fee:
\$0.00

**Net premiums taken into account for your entity:*

\$ \blacksquare, 268,907,627.00

About This Fee

The law requires covered entities engaged in the business of providing health insurance for United States health risks to pay an annual fee (Patient Protection and Affordable Care Act of 2010, Section 9010). The fee year is the calendar year in which the fee must be paid.

We're sending you this notice because you meet the criteria for fee liability.

If you are the designated entity of a controlled group, you are receiving this notice on behalf of all members of the controlled group.

All members of the controlled group are jointly and severally liable for this fee, but we're sending this letter only to you, the designated entity.

Additional Information

Visit the "Affordable Care Act Provision 9010 - Health Insurance Providers Fee" webpage at www.irs.gov/ACA9010.

Visit the IRS e-file webpage at www.irs.gov/Form8963efile.

Certain information from all filed Forms 8963 is publicly available in the Disclosure section of the "Affordable Care Act Provision 9010 - - - Health Insurance Providers Fee" webpage at www.irs.gov/ACA9010.

Keep this notice for your records.

If you need assistance, please don't hesitate to contact us.

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UNITED STATES OF AMERICA,
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in his Official Capacity as
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STATES INTERNAL REVENUE
SERVICE, and DAVID J. KAUTTER,
in his Official Capacity as
ACTING COMMISSIONER OF
INTERNAL REVENUE,

Defendants.



**[PROPOSED] ORDER GRANTING IN PART AND DENYING IN
PART DEFENDANTS' MOTION TO STAY ISSUANCE OF FINAL
JUDGMENT**

On this day came to be considered Defendants' Motion to Stay Issuance of Final Judgment (the "Motion"). This Court finds that certification of its August 21, 2018 order (ECF No. 100) and all prior rulings, pursuant to 28 U.S.C. § 1292, for an interlocutory appeal is appropriate because it may materially advance the ultimate termination of the litigation. However, Plaintiffs indicate they intend to move for leave to amend the operative complaint and seek immediate injunctive relief against the 2018 HIPF. Thus, a stay of this litigation is inappropriate at this time. Being fully advised, and for good cause shown, Plaintiffs' Motion is GRANTED in part and

DENIED in part.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the Court CERTIFIES its August 21, 2018 order (ECF No. 100) and all prior rulings, pursuant to 28 U.S.C. § 1292 for immediate appeal. This ORDER does not stay the proceedings in this case.

SO ORDERED this the _____ day of _____, 2018.

HON. REED O'CONNOR
UNITED STATES DISTRICT JUDGE