

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 M. AZAR II, 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 SERVICE

Defendants.

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

**DEFENDANTS' MOTION, AND BRIEF IN SUPPORT THEREOF, TO STAY
ISSUANCE OF FINAL JUDGMENT**

Defendants hereby move the Court to stay issuance of any final judgment in this action for a period of 60 days to permit Defendants to determine whether to pursue an interlocutory appeal under 28 U.S.C. § 1292(b).

On August 21, 2018, the Court entered an order granting in part and denying in part Plaintiffs' motion for reconsideration. *See* ECF No. 100. As relevant here, the Court determined that "Plaintiffs are entitled to disgorgement of their [Health Insurance Provider Fee ("HIPF")] payments." *Id.* at 14. The Court did not determine the amount of any disgorgement but

indicated that it would “issue a separate final judgment order pursuant to Federal Rule of Civil Procedure 58.” *Id.* at 17.

At this time, the Court does not have sufficient evidence before it to determine the amount of any disgorgement. Neither Plaintiffs’ motion for reconsideration nor their proposed judgment requested an amount to be disgorged, much less provided any evidence to support a particular sum. *See* ECF Nos. 95, 95-1. With their reconsideration motion, Plaintiffs submitted various tax refund forms in an effort to show that they had exhausted the Internal Revenue Code’s prerequisites to filing suit, *see* ECF No. 96, but Plaintiffs did not explain how they arrived at the amounts listed on those forms; nor did Plaintiffs submit any evidence to show that the amounts on the forms represent the sums Plaintiffs paid to the managed-care organizations (“MCOs”) with which they contract for Medicaid services to cover the cost of the HIPF.

Because the parties have not yet addressed the quantity of any disgorgement, further proceedings will be necessary before the Court can enter final judgment. Defendants anticipate that these proceedings may include discovery served on Plaintiffs, and possibly the Medicaid MCOs with which they have contracted, to determine what portion of the capitation rates paid by Plaintiffs were used by the MCOs to pay the HIPF, as well as further briefing and potentially an evidentiary hearing.

The proceedings to determine the amount of disgorgement will likely be complicated and burdensome for the parties. In addition to ascertaining the amounts of Plaintiffs’ payments to MCOs that are attributable to the HIPF, the parties will have to calculate any extent to which Plaintiffs’ payments were funded by federal Medicaid matching funds or other similar programs. Moreover, the proceedings would be rendered unnecessary if this Court’s August 21, 2018 order awarding disgorgement (ECF No. 100) or its March 5, 2018 order declaring the Certification

Rule unlawful (ECF No. 88) are ultimately reversed on appeal. Under these circumstances, the more efficient course for the parties and the Court would be to allow Defendants to seek any appellate review of the Court's threshold rulings before beginning the complex and time-consuming process of quantifying the disgorgement.

Defendants, however, need additional time to determine whether to seek interlocutory appeal under 28 U.S.C. § 1292(b). The United States may not pursue an appeal without authorization by the Solicitor General, *see* 28 C.F.R. § 0.20(b), who makes such determinations in consultation with all interested components of the Federal Government. Under 28 U.S.C. § 1292(b), a petition for leave to appeal a certification order must be filed in the court of appeals within ten days of the certification order. The 60-day period requested by Defendants will provide time for the Solicitor General to determine whether to authorize interlocutory appeal.

Accordingly, Defendants request that the Court stay further proceedings in this matter, as well as the entry of any final judgment, for a period of 60 days to allow Defendants to determine whether to pursue an interlocutory appeal of the Court's threshold rulings.

Dated: August 24, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

ERIN NEALY COX
United States Attorney

JENNIFER D. RICKETTS
Director, Federal Programs Branch

/s/ Michelle R. Bennett

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Counsel for Defendants

CERTIFICATE OF CONFERENCE

This is to certify that, on August 24, 2018, I conferred with Plaintiffs' counsel, Austin Nimocks, about the relief requested in this motion. Plaintiffs' counsel indicated that the motion is opposed.

/s/ Michelle R. Bennett

MICHELLE R. BENNETT

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2018, I filed the foregoing document with the Clerk of Court via the CM/ECF system, causing it to be electronically served on Plaintiffs' counsel of record.

/s/ Michelle R. Bennett
MICHELLE R. BENNETT

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**[PROPOSED] ORDER GRANTING DEFENDANTS'
MOTION TO STAY ISSUANCE OF FINAL JUDGMENT**

Upon consideration of Defendants' motion to stay issuance of final judgment, any response and reply thereto, and the entire record herein, it is hereby

ORDERED that Defendants' motion is GRANTED; and it is

FURTHER ORDERED that this case is STAYED, and final judgment shall not issue, for a period of 60 days to permit Defendants to determine whether to pursue an interlocutory appeal under 28 U.S.C. § 1292(b).

REED O'CONNOR
UNITED STATES DISTRICT JUDGE