



F.3d 398, 413 (5th Cir. 2007), the Court correctly concluded that disgorgement of the unlawfully collected HIPF was specific equitable relief permitted by the APA. Plaintiffs may also recover interest on the disgorged money.

Generally, “in 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 Congress v. Shaw*, 478 U.S. 310, 315 (1986). This rule “reflects the historical view that interest is an element of *damages* separate from *damages* on the substantive claim.” *Id.* at 314 (emphasis added).

But interest is not always damages; it assumes the character of the remedy to which it attaches. *See Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 946 (8th Cir. 1999) (discussing interest as being either legal or equitable relief); *Usery v. Associated Drugs, Inc.*, 538 F.2d 1191, 1194 (5th Cir. 1976) (awarding prejudgment interest on equitable back pay remedy). When interest attaches to a damages award, the interest is damages. *Shaw*, 478 U.S. at 314. But when interest attaches to an equitable remedy, such as disgorgement, then the interest is equitable. *See SEC v. Lipson*, 278 F.3d 656, 663 (7th Cir. 2002) (stating interest is “a legal remedy when the award to which it is attached is legal, and an equitable remedy when, as in this case, the award to which it is attached is equitable”) (citing *Kerr*, 184 F.3d at 946)).

For example, in civil asset forfeiture cases, the government pays interest on monies held unlawfully because the purpose in returning the money is to make the injured person whole. *See United States v. \$277,000 U.S. Currency*, 69 F.3d 1491, 1493 (9th Cir. 1995) (“We hold that the government is not generally liable for damages or interest prior to judgment, because of sovereign immunity. However, we also hold that to the extent that the government has profited from use of the property, especially where it has (actually or constructively) earned interest on money, it must disgorge those earnings along with the property itself.”). “[I]f the Government seized, for example, a pregnant cow and, after the cow gave birth, the Government was found

not to be entitled to the cow, it would hardly be fitting that the Government return the cow but not the calf.” *United States v. \$515,060.42 in U.S. Currency*, 152 F.3d 491, 505 (6th Cir. 1998). The same is true here. The Court should award the interest that the HIPF money earned while in the government’s possession.

Defendants unlawfully forced Plaintiffs to pay for the HIPF and earned interest off those payments. The Court already exercised its inherent and broad equitable power to order Defendants to disgorge the HIPF monies to enforce the ACA’s statutory mandate exempting States from payment. Because interest assumes the character of the remedy to which it attaches, awarding prejudgment and postjudgment interest based on the equitable disgorgement to each Plaintiff is an equitable remedy against which Defendants have no sovereign immunity.

## **II. The Court Should Award Plaintiffs Pre- and Postjudgment Interest.**

Prejudgment interest “forc[es] disgorgement of unjust enrichment” and accounts for the time value of money. Dan Dobbs, *Law of Remedies* 334 (2d ed. 1993). Postjudgment interest “remov[es] incentives the defendant might otherwise have to delay payment.” Dobbs 334. The Court should award both in this case.

First, the Court should award postjudgment interest to each Plaintiff. Postjudgment interest, which is “calculated from the date of entry of the judgment,” “shall be allowed on any money judgment in a civil case recovered in a district court.” 28 U.S.C. § 1961(a). In a damages case against the Small Business Administration, the Fifth Circuit held that section 1961 does not waive the United States’ immunity from interest. *A.L.T. Corp. v. Small Bus. Admin.*, 823 F.2d 126, 127 (5th Cir. 1987). But, as stated above, the Court here already held the APA waives Defendants’ immunity to equitable relief. Because interest assumes the form of the underlying remedy, the United States possesses no immunity from postjudgment equitable interest. This interest should be calculated based on “the weekly average 1-year constant maturity Treasury yield, as published by the . . . Federal Reserve System,

for the calendar week preceding.” 28 U.S.C. § 1961(a). The current rate is 1.99%.<sup>1</sup>

Alternatively, assuming Plaintiffs are “taxpayers” because the Court held that the HIPF is a tax for purposes of the Anti-Injunction Act, Order 8, ECF No. 100, it may award postjudgment interest based on Plaintiffs’ overpayment of taxes. 26 U.S.C. § 6621. The overpayment rate is the sum of the Federal short-term rate plus three percentage points. The current Federal short-term rate is 2.37%.<sup>2</sup> Thus, under section 6621, the postjudgment interest rate is 5.37%.

Second, the Court should award prejudgment interest that runs from the HIPF payment due dates each year to the date of the final judgment. “Prejudgment interest, like any other interest, is to compensate one for the time value of money.” *Gore, Inc. v. Glickman*, 137 F.3d 863, 868 (5th Cir. 1998) (awarding interest in administrative law case arising under Agricultural Marketing Agreement Act). Prejudgment interest prevents a wrongdoer from unjust enrichment during the time when it held the money and retained interest earned on that money. *Kerr*, 184 F.3d at 946.

During the years relevant to this case, MCOs paid the HIPF by September 30. ACA § 9101(a)(2). At that time, States, pursuant to the unlawful Certification Rule, became liable to reimburse the MCOs for those payments. Thus, the start date for Plaintiffs’ prejudgment interest should be October 1 in each relevant year. On or before that date the United States received the money and began earning interest on it. Because the purpose of prejudgment interest is to ensure that the offending party is not unjustly enriched by money it was not entitled to possess, prejudgment interest should run from October 1 each year.

When a claim is governed by a federal statute and the statute is silent on the calculation of prejudgment interest, state law is an appropriate source of guidance.

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<sup>1</sup> Bd. of Govs. of Fed. Resv. Sys., Selected Interest Rates (Daily) (release date June 18, 2019), <https://www.federalreserve.gov/releases/h15/>.

<sup>2</sup> IRS, Index of Applicable Federal Rates (AFR) Rulings, RR-2019-14, Table 1 (June 2019), <https://www.irs.gov/pub/irs-drop/rr-19-14.pdf>.

See, e.g., *Perez v. Bruister*, 823 F.3d 250, 274 (5th Cir. 2016) (applied in ERISA case). Texas law provides that prejudgment interest shall accrue at the prime rate as published by the Federal Reserve. Tex. Fin. Code § 304.003(a) & (c). The prime rate as of the date of this filing is 5.5%.<sup>3</sup>

Under this rubric, the formula for prejudgment interest is:

$$\frac{(\text{State HIPF payment for year}) \times 5.5\%}{365} \times \text{Days from Oct. 1 in relevant HIPF year to final judg. date}$$

The parties provided State HIPF payments for each year in the joint notice filed June 19, ECF No. 146. There are 1,723 days from October 1, 2014, to today; 1,358 days from October 1, 2015, to today; and 992 days from October 1, 2016, to today. Thus, the Court should award the following amounts of prejudgment interest:<sup>4</sup>

State	2014 Int.	2015 Int.	2016 Int.	Total Prejudgment Interest by State
TX	\$21,338,884.90	\$21,637,299.29	\$16,151,308.90	\$59,127,493.09
KS	\$3,545,800.20	\$4,603,322.73	\$3,049,837.78	\$11,198,960.71
LA	\$3,191,023.67	\$3,481,781.63	\$5,156,431.50	\$11,829,236.80
IN	\$1,147,888.45	\$928,593.14	\$1,158,668.15	\$3,235,149.74
WI	\$1,815,368.66	\$1,549,619.86	\$1,293,581.89	\$4,658,570.41
NE	\$1,400,183.25	\$1,926,119.84	\$1,245,158.16	\$4,571,461.25

### CONCLUSION

The Court's final judgment should disgorge to each Plaintiff the amounts provided in the Joint Report, ECF No. 144, award each Plaintiff postjudgment interest, and award prejudgment interest according to the formula set forth above.

<sup>3</sup> Bd. of Govs. of Fed. Resv. Sys., Selected Interest Rates (Daily) (release date June 18, 2019), <https://www.federalreserve.gov/releases/h15/>.

<sup>4</sup> Plaintiffs do not know when the Court will issue the final judgment; thus, they provide prejudgment interest calculations from the date the HIPF became due each year until this brief's filing date.

Respectfully submitted this 19th day of June, 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 19, 2019, I electronically filed the foregoing document through the Court's ECF system.

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