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' REPLY IN SUPPORT OF MOTION TO STAY EXECUTION OF JUDGMENT

Federal Rule of Civil Procedure 62 and precedent from federal circuit courts of appeals make clear that the United States is entitled, as a matter of right, to a stay pending appeal of a money judgment against the government, without posting a bond and without any showing of likelihood of success on the merits or irreparable harm. Plaintiffs offer no persuasive authority controverting this clear rule, nor any compelling reason not to follow it. Moreover, under the standards applicable to stays pending appeal involving private parties and non-monetary judgments, a stay is warranted here, and Plaintiffs offer no convincing basis for finding otherwise.

ARGUMENT

1. As each federal circuit court to consider the issue has held, 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* Defs.' Mot. to Stay Execution of J. & Br. in Supp. 3, ECF No. 158 ("Defs.' Mot.") (citing cases from Third, Seventh, Eleventh, and D.C. Circuits).

Plaintiffs wholly ignore this persuasive authority, *see generally* Pls.' Resp. to Defs.' Mot. to Stay Execution of Final J. Pending Appeal, ECF No. 159 ("Pls.' Resp."), arguing instead that the government enjoys no entitlement to a stay under a "plain reading of Rule 62," *id.* 2. But Plaintiffs' "plain reading"—that a stay pending appeal upon posting a bond contemplated by Rule 62(b) "is not automatic" because "[t]he court must 'approve[] the bond or other security' first," *id.*—has been soundly rejected. *See, e.g.*, *Am. Mfrs. Mut. Ins. Co. v. Am. Broad.-Paramount Theatres, Inc.*, 87 S. Ct. 1, 3 (1966) (Harlan, Cir. J.) ("[I]t seems to be accepted that a party taking an appeal from the District Court is entitled to a stay of a money judgment as a matter of right if he posts a bond in accordance with Fed. R. Civ. P. 62[(b)] and 73(d)."); *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 636 F.2d 755, 759 (D.C. Cir. 1980) ("Beyond question, Rule 62[(b)] entitles the appellant who files a satisfactory supersedeas bond to a stay of money judgment as a

matter of right.").[1] The case law is clear that a court's discretion under Rule 62 is directed to ascertaining whether the bond or security offered will "protect[] the non-appealing party's rights pending appeal." *Poplar Grove Planting & Ref. Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1190-91 (5th Cir. 1979). There is no authority for Plaintiffs' proposition that a court may refuse to stay a money judgment where a party has moved for the stay and provided a satisfactory bond. And, as several circuit courts have held, because the United States is presumed willing and able to pay any money judgment after any appeals are resolved, the bond requirement applicable to private parties is dispensed with as unnecessary to protect the other party's rights pending appeal by the United States. *See, e.g.*, *Lightfoot v. Walker*, 797 F.2d 505, 507 (7th Cir. 1986).

2. Nor have Plaintiffs meaningfully challenged that Defendants would be entitled to a stay pending appeal under the standards applicable to injunctions or money judgments where the non-federal government defendant does not provide a bond. First, Plaintiffs wrongly argue the moving party must make a "strong showing" that it will prevail on appeal. Pls.' Resp. 4. But the Fifth Circuit has made clear that "a movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Campaign for S. Equal. v. Bryant*, 773 F.3d 55, 57 (5th Cir. 2014) (quotations

[1] Plaintiffs identify only three cases from other districts that they assert "support" their argument that Rule 62 does not entitle the United States to a stay pending appeal of a money judgment as a matter of right, but none of those cases is persuasive. Both *In re Westwood Plaza Apartments, Ltd.*, 150 B.R. 163 (Bankr. E.D. Tex. 1993), and *United States v. U.S. Fishing Vessel Maylin*, 130 F.R.D. 684 (S.D. Fla. 1990), are wholly inapposite because the judgments the government sought to stay in those cases were not *money* judgments. *See In re Westwood*, 150 F.R.D. at 164 (noting that government's motion sought to "stay implementation of the Plan of Reorganization pending appeal," rather than to stay a money judgment); *Maylin*, 130 F.R.D. at 686 (noting that judgment pursuant to which defendant forfeited his commercial fishing boat to the United States was not a "money judgment"); *see also id*. at 685 n.1 (recognizing that the "net effect of [sections (b) and (e) of Rule 62] working together is to gain the Government an automatic stay of all actions [in] which it appeals" a money judgment). As to *C.H. Sanders Co. v. BHAP Housing Development Fund Co.*, 750 F. Supp. 67 (E.D.N.Y. 1990), the fact that the United States filed this motion makes quite plain that here, unlike in that case, the United States is not arguing that its notice of appeal, or the mere existence of Rule 62 or any other rule, serves to *automatically* stay execution of the final judgment. *Contra id.* at 69 (noting that the government's "sole basis for resisting the relief sought is that the Notice of Appeal it filed operates to divest this Court of jurisdiction to issue any further orders in the proceeding and, in effect, gives rise to an 'automatic stay' of the enforcement of the judgment"). Moreover, a single bankruptcy court's "critici[sm]," Pls.' Resp. 3, of circuit court decisions provides weak fodder for ignoring the persuasive, well-reasoned, and broadly accepted holdings of those appellate courts.

and citations omitted). And Plaintiffs have not disputed that the government has raised serious legal questions and presented a substantial case on the merits, at least as to several issues in this case. *See* Defs.' Mot. 4-5. Instead, Plaintiffs argue that the Court rejected Defendants' arguments on these issues – that rejection being the very reason for the government's appeal – and that the United States' position in *Texas v. United States*, 340 F. Supp. 3d 579, 601 (N.D. Tex. 2018), *appeal docketed*, No. 19-10011 (5th Cir. Jan. 7, 2019), affects Defendants' likelihood of success in the appeal of this case. But the government's position in *Texas* is that the ACA was rendered invalid as of January 1, 2019, when Congress reduced the tax penalty associated with the individual mandate to $0. *Id.* There is no dispute that before 2019, the ACA was a valid exercise of Congress's taxing power under *NFIB v. Sebelius*, 567 U.S. 519, 574 (2012). *See* 340 F. Supp. at 601. Thus, the United States' position in *Texas* does not bear on this case concerning payments in 2014-16. Moreover, the Certification Rule set aside by the Court is not part of the ACA and the United States has an independent interest in defending that Rule apart from its interaction with the HIPF.

As to the balance of equities, Plaintiffs argue only that they have already lost interest on the monies contemplated by the Final Judgment. But the law is clear that Plaintiffs have no entitlement to interest against the United States. *See* Order, ECF No. 152. And while Rule 62 and the existence of the Judgment Fund assure that the United States will be able to satisfy the Final Judgment should it be upheld on appeal, Plaintiffs have not—and cannot—offer any real assurance that they would be able to repay the money in full should the federal government prevail on appeal.

CONCLUSION

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

Dated: September 17, 2019 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was submitted on September 17, 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