

have not been made to the IRS. Based on the evidence and arguments presented, the Court finds that if payments for the 2018 HIPF are made by the Managed Care Organizations (“MCOs”) that provide Plaintiffs’ Medicaid and Children’s Health Insurance Program (“CHIP”) services, Plaintiffs will incur liability for the 2018 HIPF. The incurrence of this liability conflicts with the will of Congress that Plaintiffs be exempt from the HIPF.

Notwithstanding an order from the Court in a related case on August 21, 2018, permitting Plaintiffs the ability to seek disgorgement from the IRS for HIPF payments made, *Texas v. United States*, 7:15-CV-00151-O, 2018 WL 4271450 (N.D. Tex. Aug. 21, 2018), the Defendants have already filed a notice of appeal intending to have the Court’s orders reviewed by the U.S. Court of Appeals for the Fifth Circuit. *See id.* at ECF No. 92. If the Fifth Circuit were to reverse this Court’s determination that disgorgement under the Administrative Procedure Act (“APA”) is an appropriate remedy for Plaintiffs regarding the encumbrance of HIPF liability, Plaintiffs are without a remedy to have returned to them the payment of monies from which they should be exempt. *Texas v. EPA*, 829 F.3d 405, 434 (5th Cir. 2016).

The Court finds that the threat of this result is irreparable harm. Indeed, “[t]o show irreparable injury if threatened action is not enjoined, it is not necessary to demonstrate that harm is inevitable and irreparable. The plaintiff need show only a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm.” *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986) (footnotes omitted).

Accordingly, it is the ORDER of this Court that:

- A. The Internal Revenue Service, David J. Kautter, Acting Commissioner of Internal Revenue, and all persons acting on their behalf or under their direction, are prohibited from enforcing the October 1, 2018 payment deadline for 2018 HIPF liability with respect to Plaintiffs’ Medicaid and

CHIP MCOs.

- B. The Internal Revenue Service, David J. Kautter, Acting Commissioner of Internal Revenue, and all persons acting on their behalf or under their direction, shall, no later than 48 hours following the issuance of this order, notify Plaintiffs' Medicaid and CHIP MCOs in writing that the October 1, 2018 payment deadline for 2018 HIPF liability is indefinitely suspended and that Plaintiffs' Medicaid and CHIP MCOs shall not remit payments for 2018 HIPF liability until later instructed.
- C. The Internal Revenue Service, David J. Kautter, Acting Commissioner of Internal Revenue, and all persons acting on their behalf or under their direction, shall, no later than 72 hours following the issuance of this order, notify Plaintiffs' Medicaid and CHIP MCOs in writing that the Internal Revenue Service will issue new, amended final fee calculations (Letters 5067C) for 2018 HIPF liability which exempts from its calculations premiums (capitation rates) for Medicaid and CHIP programs for Plaintiffs.
- D. The Internal Revenue Service, David J. Kautter, Acting Commissioner of Internal Revenue, and all persons acting on their behalf or under their direction, shall, no later than 30 days following the issuance of this order, issue new, amended final fee calculations (Letters 5067C) for 2018 HIPF liability to Plaintiffs' Medicaid and CHIP MCOs which exempt from its calculations MCO premiums (capitation rates) for Medicaid and CHIP programs for Plaintiffs.
- E. Additionally, to further guard against irreparable harm to Plaintiffs, the Internal Revenue Service, David J. Kautter, Acting Commissioner of Internal Revenue, and all persons acting on their behalf or under their direction, are prohibited from receiving, collecting, or otherwise

processing any payment that may be made, inadvertently or otherwise, from Plaintiffs' Medicaid and CHIP MCOs regarding any liability associated with the 2018 HIPF until such time as new, amended final fee calculations (Letters 5067C) for 2018 HIPF liability to Plaintiffs' Medicaid and CHIP MCOs, which properly exempt from its calculations premiums (capitation rates) for Medicaid and CHIP programs for Plaintiffs, are remitted and received by Plaintiffs' Medicaid and CHIP MCOs.

- F. Moreover, if the Internal Revenue Service, David J. Kautter, Acting Commissioner of Internal Revenue, or persons acting on their behalf or under their direction, receive, collect, or otherwise process any payment made by Plaintiffs' Medicaid and CHIP MCOs regarding any liability associated with the 2018 HIPF before the aforementioned conditions are satisfied, the Internal Revenue Service is directed to deposit into the registry of the Court, in accordance with Rule 67 of the Federal Rules of Civil Procedure and other applicable law, all such monies received or collected from Plaintiffs' Medicaid and CHIP MCOs for 2018 HIPF liability, along with an explanation of good cause by David J. Kautter, Acting Commissioner of Internal Revenue, regarding the noncompliance with the Court's order.
- G. Regarding all of the above prior orders, the Internal Revenue Service and David J. Kautter, Acting Commissioner of Internal Revenue, shall file with the Court, within 24 hours of compliance with each act, sufficient notice demonstrating the successful completion of each act. The filing of these notices will also provide counsel for Plaintiffs with timely notice of these actions.
- H. A hearing shall be held on Plaintiffs' motion for preliminary injunction

on the __ day of October, 2018 at __:__ a.m./p.m. CDT in the United States Courthouse in _____, Texas.

Rule 65(c) provides that “[t]he court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any part found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c). The amount of security required “is a matter for the discretion of the trial court,” and the Fifth Circuit has held district courts have discretion to “require no security at all.” *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996) (citing *Corrigan Dispatch Company v. Casa Guzman*, 569 F.2d 300, 303 (5th Cir. 1978)). The Court finds no evidence that Defendants will suffer any permanent financial loss requiring Plaintiffs to post security. Accordingly, the Court grants Plaintiffs’ request to waive the bond requirement.

SO ORDERED this the __ day of September, 2018 at __:__ a.m./p.m. CDT. This order shall expire following fourteen (14) days from issuance, at the time of entry, or until otherwise ordered by the Court. For good cause, the Court may extend the application of this order.

This order shall be promptly filed with the clerk’s office and entered in the record.

UNITED STATES DISTRICT JUDGE