IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

NICK GERHART, in his capacity as Liquidator of CoOportunity Health, Inc., and DAN WATKINS, in his capacity as Special Deputy Liquidator of CoOportunity Health, Inc.,	:	
Plaintiffs,	:	Case No. 4:16-CV-00151
v.	:	
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR MEDICARE & MEDICAID SERVICES, et al.,	:	
Defendants.	:	

DEFENDANTS' BRIEF IN SUPPORT OF ITS OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 3

I. The Affordable Care Act 3

A. The "CO-OP" Program 4

B. The "3R" Programs 4

II. CoOportunity Health, Inc. 5

PRELIMINARY INJUNCTION STANDARD 7

ARGUMENT 8

I. The Court Lacks Jurisdiction to Grant a Preliminary Injunction 8

A. Sovereign Immunity Bars the Liquidators' Equitable Claims Because an Adequate Remedy Is Available in the Court of Federal Claims 8

B. The Court Lacks Jurisdiction to Enjoin the United States from Exercising Its Setoff Rights to Collect Taxes 12

II. The Liquidators Cannot Establish Irreparable Harm Because Monetary Damages Are Adequate 14

III. The Balance of Harms and Public Interest Weigh Against the Issuance of an Injunction 17

IV. The Liquidators Cannot Establish a Likelihood of Success on the Merits Because Netting and Offset Are Lawful 18

A. Both Federal and State Law Recognize HHS's Setoff and Netting Rights 19

B. The State Court Lacks Jurisdiction to Prevent the United States from Exercising Its Setoff Rights 21

C. The Balance of CoOportunity's Risk Corridors Payment is Not Presently Due 24

V. If the Court Grants a Preliminary Injunction, the Liquidators Must Provide Security 25

CONCLUSION 26

INTRODUCTION

After operating for little more than a year as a functioning health insurer, CoOportunity Health, Inc. ("CoOportunity") defaulted on $145 million in loans provided to it by the United States Department of Health and Human Services ("HHS"), Centers for Medicare & Medicaid Services ("CMS"). Moreover, in March 2015, after CoOportunity had already entered into state-supervised liquidation proceedings, HHS released to CoOportunity approximately $60 million in net benefit payments under programs created by the Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (March 23, 2010), 124 Stat. 119 (the "Act" or "ACA"). Notwithstanding its receipt of these ample benefits from the United States,[1] in this proceeding, CoOportunity seeks to bar HHS from exercising its right of setoff—a right provided by contract, common law and protected by both Federal and Iowa law.

In essence, the Liquidators seek to receive money under ACA benefits programs while disregarding amounts CoOportunity would have been required to pay under those same programs, as well as amounts that CoOportunity owes to the Internal Revenue Service for outstanding taxes. In seeking a preliminary injunction, the Liquidators ask this Court to immediately halt "netting" under the ACA, a form of setoff explicitly authorized by HHS regulations. Through netting, HHS offsets ACA-related payables and receivables in order to ensure it has sufficient funding to make payments to other health insurers and to facilitate timely collection; similarly, through offset, the United States collects other debts, such as outstanding taxes. The motion should be denied first because this Court lacks jurisdiction over what are actually claims for money—which are within the exclusive jurisdiction of the United States Court of Federal Claims to entertain—and lacks jurisdiction to enjoin the collection of Federal

[1] HHS, CMS, Secretary Sylvia Mathews Burwell, and the United States of America are collectively referred to as the "United States."

taxes, and second because CoOportunity fails to satisfy any of the standards for obtaining a preliminary injunction. Specifically, the Liquidators fail to demonstrate that they will incur irreparable harm absent the entry of an injunction, that the balance of harms or public interest weigh in favor of an injunction, or that they possess a likelihood of success on the merits of their claims.

The Liquidators cannot demonstrate that they will suffer irreparable harm if HHS is permitted to continue netting in accordance with its regulations because their only injury, if any injury is proven, is compensable through the payment of money damages. The dispute they present to this Court is solely over the United States' right to offset a finite sum of money. Thus, not only is such a claim solely within the exclusive jurisdiction of the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491, as such a claim, the complete and adequate remedy for the claim is monetary. Moreover, there is no merit to the Liquidators' vague and unsubstantiated assertion that netting will irreparably injure "the orderly liquidation process" of CoOportunity. The issue that netting presents for the liquidation process is solely one regarding the timing of payment of lower priority creditor claims—namely, the Liquidators' repayment to the guarantee associations who have already paid policyholder claims.

In contrast to the Liquidators' inability to demonstrate irreparable injury, the entry of an injunction against HHS would cause real and immediate harm to other health insurers and to the public through disruption of the operation of the interrelated ACA benefits programs. If HHS is unable to offset charges that would have been owed by CoOportunity via netting, payments to other operating insurers—who rely on the timely disbursement of ACA benefit payments—will be reduced. Likewise, uncertainty in risk adjustment payments to other insurers could cause those insurers to avoid providing coverage to the sickest enrollees, as well as raise their rates to

account for the uncertainty in full payment. Thus, the public interest and the balance of harms weigh against the issuance of an injunction.

Finally, the Liquidators cannot establish a likelihood of success on the merits because both Federal and state law unequivocally authorize the United States to collect CoOportunity's debts through netting and offset. The Liquidators do not argue otherwise. Rather, their proffered rationale for enjoining the United States from netting is the existence of a state court order purporting to require HHS to seek permission from a state court prior to netting. Firmly established principles of sovereign immunity preclude the application of that order to the United States. Accordingly, the motion should be denied.[2]

BACKGROUND[3]

I. The Affordable Care Act

The ACA "grew out of a long history of failed health insurance reform." *King v. Burwell*, __ U.S. __, 135 S. Ct. 2480, 2485 (2015). The Act sought to overcome these failures by "adopt[ing] a series of interlocking reforms designed to expand coverage in the individual health insurance market." *Id.* HHS is responsible for overseeing implementation of major provisions of the Act and for administering certain programs under the Act, either directly or in conjunction with other Federal agencies. *See, e.g.*, 42 U.S.C. §§ 18041(a)(1)(A), (c)(1). HHS has delegated many of its responsibilities under the ACA to CMS, which created the Center for Consumer Information and Insurance Oversight ("CCIIO") to oversee implementation of the

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[2] As discussed more fully below, if the Court is inclined to issue an injunction, the Court should also require that the Liquidators post a security bond in the amount of $5.2 million.

[3] The United States reserves the right to contest each and every factual allegation asserted by Liquidators in their motion and brief.

ACA's market reforms.[4] The Act also established a number of programs, the following of which are relevant to this case.

A. The "CO-OP" Program

Section 1322 of the ACA established the Consumer Operated and Oriented Plan, or "CO-OP," program. *See* 42 U.S.C. § 18042(a)(g). The CO-OP program provided loans to qualified applicants to foster the creation of new consumer-governed, nonprofit health insurance issuers known as "CO-OPs." 42 U.S.C. § 18042(a)(1)-(2). The program provided two types of CO-OP loans: loans for start-up costs ("start-up loans") and loans to enable CO-OPs to meet the solvency and capital reserving requirements of the states in which they are licensed to sell insurance ("solvency loans"). 42 U.S.C. § 18042(b)(1). As a condition of the loans, the Act requires CO-OPs to comply with all applicable Federal and state law and to enter into a loan agreement to comply with a comprehensive set of governance and funding provisions. 42 U.S.C. §§ 18042(b)(2)(C)(i)-(ii), (c)(5); Loan Agreement § 13.1.5.[5] Loan recipients that fail to make loan payments when due are "subject to any and all remedies available to CMS under law to collect the debt." 45 C.F.R. § 156.520(d).

B. The "3R" Programs

To mitigate pricing risks, the Act also established three premium stabilization programs, informally known as the "3Rs." These programs took effect in 2014 and consist of reinsurance, risk adjustment, and risk corridors. *See* 42 U.S.C. §§ 18061-18063.[6] HHS administers the risk

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[4] For ease of reference, HHS, CMS, and CCIIO are collectively referred to as "HHS."

[5] A copy of the Loan Agreement was attached to the Liquidators' motion as Exhibit 2.

[6] Risk adjustment is a permanent program targeting adverse selection (*i.e.*, the risk that insurers will enroll disproportionately healthy people in order to reduce claims costs). *See* 42 U.S.C. § 18063; Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 77 Fed. Reg.

corridors program nationwide and also administers the reinsurance and risk adjustment programs on behalf of the vast majority of states, including the state of Iowa. Declaration of Christen Linke Young ("Young Decl."), attached as Exhibit 1, at ¶ 6. In the course of establishing such programs, HHS promulgated a regulation providing that it may "net" amounts owed by issuers under the 3R programs against amounts HHS owes to the issuers under the same programs in order to facilitate its payment and collection process. 45 C.F.R. § 156.1215(b) (the "Netting Regulation"); *see also* 78 Fed. Reg. 72370.

II. CoOportunity Health, Inc.

CoOportunity is a former CO-OP and the recipient of $145.3 million in CO-OP loans. Young Decl. at ¶ 7. From January 1, 2014 until February 28, 2015, it provided health insurance coverage in the states of Iowa and Nebraska. *Id*. On March 2, 2015, the Iowa District Court for Polk County (the "State Court") issued a Final Order of Liquidation finding CoOportunity insolvent within the meaning of the Iowa Liquidation Act, Iowa Code § 507C.1 *et seq.*, and appointing the Liquidators to take possession of its assets and wind down its business (the "Liquidation Order"). [Dkt. No. 18]. The Liquidation Order authorized the Liquidators to "take

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17,220, 17,221 (Mar. 23, 2012). Reinsurance and risk corridors are temporary programs that seek to offset the effects of high claims costs on health insurance issuers during the first three years of the ACA's health insurance reforms. *See* 42 U.S.C. §§ 18061, 18062; Standards Related to Reinsurance, Risk Corridors and Risk Adjustment, 77 Fed. Reg. at 17,221. Under the reinsurance program, contributions are generally collected from health insurance issuers and self-insured group health plans for the 2014, 2015, and 2016 benefit years, and used to fund reinsurance payments to individual-market issuers that cover high-risk (and correspondingly high-cost) individuals. *See* 42 U.S.C. § 18061; 45 C.F.R. §§ 153.20, 153.400. Under the risk adjustment program, certain amounts (known as "charges") are collected from risk adjustment covered plans that enroll healthier than average enrollees and used to make payments to qualifying issuers that enroll sicker than average enrollees. *See* 42 U.S.C. § 18063. Under the risk corridors program, HHS collects money (also known as "charges") from issuers with low claims costs relative to premiums for the 2014, 2015, and 2016 benefit years and uses those collections to make payments to issuers with high claims costs relative to premiums for those years. *See* 42 U.S.C. § 18062. All three programs are modeled on similar programs established under the Medicare Program. *Compare* 42 U.S.C. §§ 18061-18063 *with id.* §§ 1395w-115(a)(2), (b), (c), (e); *see also id.* §§ 18062(a); 18063(b); 42 C.F.R. § 423.329(b)-(c).

any and all necessary actions (including, but not limited to, seeking specific injunctions against appropriate parties or the seeking of appropriate judicial relief—such as the filing of a declaratory judgment action—in any necessary forum), to prevent or enjoin, among other things, any improper or unlawful set-off of funds owed to CoOportunity[.]" Liquidation Order at 10, ¶17.

In the event of an insurer liquidation, such as CoOportunity's, both Nebraska and Iowa have "guaranty associations that immediately cover their citizens' claims." Pls.' Mot. at 6. The guaranty associations pay all covered healthcare provider claims. *Id.*

On July 31, 2015, the Liquidators filed a status report with the State Court stating:

> Recently, CMS advised the Liquidator that it will net out from the Reinsurance payment due CoOportunity the $1.6 million overpayment of [ACA consumer subsidies] and the $9.9 million in Risk Adjustment charges CMS calculates are required from CoOportunity. . . . The Liquidator has advised CMS it objects to the netting as violating the Iowa Liquidation Act and the Liquidation Order. . . . . The $11.5 million will be netted from the total $71.7 million Reinsurance payment due CoOportunity. However, the Department of Justice (DOJ) has represented that the full faith and credit of the United States Government stands behind any additional funds that may ultimately be determined to be owed to the CoOportunity estate under the ACA or its implementing regulations.

Special Deputy Liquidator's Second Status Report, attached as Exhibit 2, at 5.

On or about January 29, 2016, the Liquidators filed another status report with the State Court, indicating that CMS was continuing to net amounts due to and from CoOportunity and that CMS had implemented a hold on payables to CoOportunity "for possible setoff of amounts due CMS and other insurers and other possible obligations to the federal government." Special Deputy Liquidator's Third Status Report, attached as Exhibit 3, at 3.

In March 2016, HHS collected the startup loan through setoff against CoOportunity's 3R receivables for the 2014 benefit year. Young Decl. ¶ 10. On March 15, 2016, the United States submitted a proof of claim to the Liquidators, asserting claims for $131,520,171.13 under the

solvency loan and $8,279.37 in Federal reinsurance contributions, 45 C.F.R. § 153.405(c), as well as contingent and unliquidated claims for amounts due under the risk adjustment and consumer subsidy programs of the ACA.

On June 30, 2016, HHS expects to announce payables and receivables due to and from reinsurance and risk adjustment-eligible plans for benefit year 2015. Young Decl. ¶ 20. CoOportunity is estimated to owe approximately $ 5.2 million in risk adjustment charges. Young Decl. ¶ 23. Pursuant to the Netting Regulation, 45 C.F.R. § 156.1215(b), risk adjustment charges due from CoOportunity will be netted from its reinsurance and risk adjustment receivables (and other funds presently being held by HHS) in order to ensure that HHS has sufficient funds to make risk adjustment payments to other issuers entitled to receive risk adjustment payments. Young Decl. ¶ 23. HHS is currently holding approximately $ 7.1 million to be used to offset CoOportunity's Federal debts. *Id.* After HHS offsets CoOportunity's Federal debts, any remaining funds will be released.

PRELIMINARY INJUNCTION STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.,* 555 U.S. 7, 21 (2008). *See also Dataphase Sys., Inc. v. CL Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). A preliminary injunction is an extraordinary and drastic remedy, which is "never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008); *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987). The party seeking injunctive relief bears the burden of proving all the *Dataphase* factors. *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987).

ARGUMENT

I. The Court Lacks Jurisdiction to Grant a Preliminary Injunction

A. Sovereign Immunity Bars the Liquidators' Equitable Claims Because an Adequate Remedy Is Available in the Court of Federal Claims

"The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). A waiver of sovereign immunity is a necessary prerequisite to the exercise of jurisdiction over the United States by any court. *See, e.g.*, *United States v. King*, 395 U.S. 1, 4 (1969). Such a waiver "must be unequivocally expressed in the statutory text" and "strictly construed, in terms of its scope," in favor of the United States. *Lane v. Pena*, 518 U.S. 187, 192 (1996). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit," without regard to any perceived unfairness, inefficiency, or inequity. *Dept. of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). A plaintiff bears the burden of demonstrating a waiver of sovereign immunity. *V S Ltd. P'ship v. Dep't of Hous. & Urban Dev.*, 235 F.3d 1109, 1112 (8th Cir. 2000).

The Liquidators rely on the narrow waiver of sovereign immunity contained in the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* Where, as here, there is no independent statutory basis of judicial review, the APA waives sovereign immunity only for "final agency action for which there is no other adequate remedy." 5 U.S.C. § 704; *Great Rivers Habitat All. v. Fed. Emergency Mgmt. Agency*, 615 F.3d 985, 989 (8th Cir. 2010).

The Liquidators' primary claim in this case—and the central focus of the present motion—is their claim that the United States' intention to exercise offset or "netting" of ACA-related payables and receivables is unlawful. A *future* offset, however, does not constitute "final agency action" for which the APA confers jurisdiction. *See, e.g.*, *Mohawk Airlines, Inc. v. C. A. B.*, 329 F.2d 894, 897 (D.C. Cir. 1964) (agency's determination to offset funds was not final

agency action "until the offset was actually made"); *DRG Funding Corp. v. Secretary of HUD*, 76 F.3d 1212, 1214-15 (D.C. Cir. 1996) (agency determination that it could collect debts by administrative offset was not sufficiently final to confer jurisdiction under the APA where agency had not finally determined what debts were owed because if the agency's "administrative review ends with the conclusion that the corporation has no debt to [the agency], the corporation will have no reason to seek a judicial determination of the proper procedure for collecting one").

Moreover, the APA does not waive sovereign immunity for allegedly wrongful netting or setoff because adequate relief is available in the Court of Federal Claims (often referred to as the "Claims Court"). "A party may not circumvent the Claims Court's exclusive jurisdiction by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief *where the thrust of the suit is to obtain money from the United States*." *Christopher Village, L.P. v. United States*, 360 F.3d 1319, 1328 (Fed. Cir. 2004) (emphasis added).[7] *See also Veda, Inc. v. United States Dep't of Air Force*, 111 F.3d 37, 39 (6th Cir. 1997) ("[O]ne cannot circumvent exclusive jurisdiction in the Claims Court by suing simply for declaratory or injunctive relief in a case where such relief would be the equivalent of a judgment for money damages."); *Randall v. United States*, 95 F.3d 339, 346 (4th Cir. 1996) ("[T]o determine whether Plaintiff's suit is cognizable under the APA, the court must first examine whether he has an available remedy under the Tucker Act."); *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1099 (9th Cir. 1990) ("A party may not avoid the [Court of Federal Claims'] jurisdiction by framing an action against the federal government that appears to seek only equitable relief when the party's real effort is to obtain damages in excess of $10,000").

[7] The Federal Circuit has exclusive jurisdiction over appeals of a district court's ruling on a motion to transfer an action to the Court of Federal Claims. 28 U.S.C. § 1292(d)(4)(A).

Furthermore, courts have rejected the contention that the Court of Federal Claims lacks the ability to provide an adequate remedy solely because a plaintiff challenges both past and future conduct and seeks injunctive relief relating to the future conduct. "[E]ven though a plaintiff may often prefer a judicial order enjoining a harmful act or omission before it occurs, damages after the fact are considered an adequate remedy in all but the most extraordinary cases." *Suburban Mortgage Associates, Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1127 n.14 (Fed. Cir. 2007) (citation omitted). As the Federal Circuit has further explained:

> [T]he Court of Federal Claims can supply an adequate remedy even without an explicit grant of prospective relief. . . . In the event of success in its claims before the Court of Federal Claims, [plaintiff] will receive a refund of all payments . . . . illegally exacted[.] In the face of such a judgment, the United States could not proceed to assess further [] payments without again illegally exacting funds. *Res judicata* principles would require immediate refund of any assessment with interest. . . . Moreover, this court cannot imagine that the United States would continue to require the utility companies to pay unlawful exactions.

Consol. Edison Co. of New York v. U.S., Dep't of Energy, 247 F.3d 1378, 1384-85 (Fed. Cir. 2001); *see also Cathedral Square Partners Ltd. P'ship v. S. Dakota Hous. Dev. Auth.*, 679 F. Supp.2d 1034, 1043-44 (D.S.D. 2009) (although "the Court of Federal Claims does not have the power to grant future payments . . . any such prospective relief will be satisfied by the *res judicata* effect of a money judgment").

The Liquidators' primary contention is that the United States has unlawfully setoff amounts due to CoOportunity. Whether framed as an attack on setoff conducted by the United States in the past or as an attack on setoff that may take place in the future, the result is the same: the Court of Federal Claims can supply a complete remedy through an award of monetary damages. *See, e.g.*, *O'Connell v. Mills*, No. 13-15124, 2014 WL 354696, at *4 (E.D. Mich. Jan. 31, 2014) ("Because Plaintiff's complaint here, at bottom, challenges the garnishment of a portion of his monthly Social Security payments and seeks the return of the amounts withheld to

date, the principal relief at issue appears to be wholly monetary in nature, and it is doubtful whether the injunctive or prospective relief sought by Plaintiff is truly necessary."); *Briggs v. United States*, 564 F. Supp. 2d 1087, 1093 (N.D. Cal. 2008) ("a single, uncomplicated payment of money would provide [Plaintiff] with an entirely adequate remedy," because "once Plaintiff . . . was paid" the amounts withheld from him, "it would be unlikely (and inappropriate) for defendants to continue with . . . offsets" that a court had held to be unlawful) (internal quotation marks and citation omitted).

In an effort to establish a basis for this Court's exercise of jurisdiction, the Liquidators rely on *Bowen v. Massachusetts*, 487 U.S. 879 (1988). However, *Bowen* involved the interpretation of a party's rights under a Federal program. Here, CoOportunity has raised no dispute under the ACA, but only a contention that compliance with the ACA and its implementing regulations should be precluded by the Liquidation Order. As the Eighth Circuit has recognized, in considering *Bowen*, "the Administrative Procedure Act, by authorizing equitable relief but not money damages against the United States, does not waive the government's sovereign immunity from monetary relief that is 'compensation for the loss,' even if that monetary relief is labeled 'equitable.'" *United States v. Hall*, 269 F.3d 940, 942-43 (8th Cir. 2001) (citation omitted).

Moreover, the Liquidators are not like the plaintiffs in *Bowen*. The Liquidators represent a defunct health insurer, and their only relationship with the United States is to oversee a finite number of payments and collections based on business predating March 2015. They do not seek judicial guidance relating to interpretation of Federal regulations requiring payment; they seek guidance on a discrete legal issue—the permissibility of setoff in the face of the Liquidation Order. Thus, unlike in *Bowen*, a "naked money judgment" combined with the *res judicata*

effects of that judgment would provide complete and adequate relief. The Liquidators fail to establish that the APA confers jurisdiction on the Court to award the extraordinary relief they seek.[8]

B. The Court Lacks Jurisdiction to Enjoin the United States from Exercising Its Setoff Rights to Collect Taxes

CoOportunity's request that the Court enjoin the United States from effecting any setoffs includes enjoining the United States from collecting CoOportunity's tax liabilities. This Court lacks jurisdiction to issue such relief.

The Liquidators do not dispute that CoOportunity has tax liability. On CoOportunity's December 31, 2015 balance sheet, the Liquidators acknowledge a $2.65 million tax liability. *See* Exhibit 3, at 9. This liability comprises three types of taxes:

a. A penalty for the late filing of its 2014 Form 990 Return of Organization Exempt from Income Tax;[9]

b. An excise tax, known as the Patient-Centered Outcomes Research Trust Fund Fee, imposed by 26 U.S.C. § 4375;[10] and

c. A charge imposed on health-insurance providers. Section 9010 of the ACA, as amended by Section 10905 of the ACA, and as further amended by Section 1406 of the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152 (March 30, 2010), 124 Stat 1029.[11]

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[8] The Liquidators also have suggested that the Court has jurisdiction under the All Writs Act. However, the All Writs Act confines a court's authority to issue writs "in aid of" the issuing court's jurisdiction. 28 U.S.C. § 1651(a). "The All Writs Act cannot enlarge a court's jurisdiction" nor is it justifiable where there are alternative remedies available to a claimant. *Clinton v. Goldsmith*, 526 U.S. 529, 534-38 (1999) (citation omitted).

[9] This penalty, which is imposed under 26 U.S.C. § 6652, is treated as a tax for purposes of the Anti-Injunction Act. *See* 26 U.S.C. § 6665(a)(2).

[10] Section 4375 is part of Chapter 34 of the Internal Revenue Code ("Taxes on certain insurance policies").

[11] Congress intended that this charge be treated as an excise tax. *See id.* § 9010(f).

To the extent the Liquidators seeks to enjoin the United States from exercising its right of setoff to collect CoOportunity's tax liabilities, the Anti-Injunction Act ("AIA") prevents this Court from awarding that relief. The AIA states that "no suit for the purpose of retraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). *See also Nat'l Federation of Independent Businesses v. Sebelius*, 132 S.Ct. 2566, 2583 (2012) (explaining that the AIA "protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes" and that because of the AIA, "taxes can ordinarily be challenged only after they are paid, by suing for a refund.").[12] Setoff is one of the means by which the United States may collect tax debts.[13] *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947) (acknowledging that "[t]he government has the same right which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him."); *In re Nuclear Imaging Systems, Inc.*, 260 B.R. 724, 733 (Bankr. E.D. Pa. 2000) (denying creditor's motion to prohibit the IRS from collecting tax claim through setoff against debts owed to debtor by HHS). Consequently, under the AIA this Court may not enjoin the United States from using setoff to collect CoOportunity's tax debts.

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[12] There are statutory and judicial exceptions to the AIA, but none of them apply here. The judicial exception requires a movant to demonstrate that, without the injunction, it will suffer irreparable harm *and* that "it is clear that under no circumstances the government can ultimately prevail" on its claim. *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 (1962). Here, the Liquidators have admitted that CoOportunity has over $2.65 million in tax liability, thus foreclosing its ability to show that "under no circumstances" can the government prevail in establishing its claim.

[13] For purposes of setoff, all agencies of the United States are treated as a single unit. *See Cherry Cotton Mills v. United States*, 327 U.S. 536, 539 (1946); *In re Chateaugay Corp.*, 94 F.3d 772, 779 (2d. Cir. 1996). In addition to its common-law right of setoff, the United States also has a statutory right to set off its claims against any judgment that a plaintiff obtains against it. *See also* 31 U.S.C. § 3728.

II. The Liquidators Cannot Establish Irreparable Harm Because Monetary Damages Are Adequate

To prevail on a motion for a preliminary injunction, the Liquidators must demonstrate that irreparable harm is *likely* in the absence of an injunction; a mere *possibility* of harm is insufficient. *Winter*, 555 U.S. at 22; *see also Gelco Corp.*, 811 F.2d at 418. "In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Iowa Utils. Bd. v. Fed. Commc'ns Comm'n*, 109 F.3d 418, 425 (8th Cir. 1996). If the Court determines that there is no irreparable harm because the Liquidators' "alleged injuries could be healed with the balm of money damages, the [ ] court [is] not required to go further." *Gelco Corp.*, 811 F.3d at 420. The failure to show irreparable harm is, by itself, a sufficient ground upon which to deny a preliminary injunction, for "[t]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray*, 415 U.S. 61, 88 (1974).

The Liquidators assert three types of purportedly irreparable harm: (1) "disrupt[ion to] the orderly liquidation process that is supposed to be occurring in" the State Court, (2) "prejudic[e] [to] other creditors" and (3) prejudice to "the ability of Plaintiffs to fulfill their liquidation duties." Pls.' Br. at 15. None of these assertions amounts to harm that is incapable of cure through monetary relief.

First, this case is solely about the balance of debits and credits due between CoOportunity and the United States. CoOportunity long ago ceased being a going concern—there are no concerns about reputational interests, creditworthiness, ongoing relationships, or goodwill. The Liquidators simply seek to collect as much money as possible, as quickly as possible, from the United States in order to pay creditors, and more specifically, to repay the guarantee

associations. Such claims are quintessentially reparable by money damages. *See Tenant Affairs Bd. v. Pierce*, 693 F.2d 797 (8th Cir. 1982). Moreover, other creditors will not benefit from a preliminary injunction because no additional money will be provided to CoOportunity as a consequence of a preliminary injunction, as the Liquidators seek only to have funds placed in escrow.

Second, to the extent the Liquidators wish to challenge setoff and netting, the proper forum would be a suit for money damages in the Court of Federal Claims; money damages would make CoOportunity whole. *Cf. Greene v. United States*, 440 F.3d 1304, 1306 (Fed. Cir. 2006) (action in the Court of Federal Claims by liquidation receiver to recover money from the United States for insurance estate). "There simply cannot be any significant hardship in forcing a bankrupt corporation to wait for its money—if it has any coming." *DRG Funding Corp.*, 76 F.3d at 1215. *See also Wade v. Ogden*, No. 1:08-CV-148-CW, 2009 WL 2423535, at *3 (D. Utah Aug. 4, 2009) (rejecting a plaintiff's contention that liens against property constitute "an imminent threat of irreparable harm" because "the availability of a refund suit . . . negate[s] any claim of irreparable injury") (citations and internal quotation marks omitted).

The Liquidators' suggestion that it will be "impossible" to rectify the United States' actions because the funds have not been set aside and will have been spent (Pls.' Br. at 16) is meritless: a *monetary* injury can always be remedied by a *monetary* award. *See Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986) ("It is also well settled that economic loss does not, in and of itself, constitute irreparable harm"); *Ford v. Reynolds*, 316 F.3d 351, 355 (2d Cir. 2003) ("The only relief sought by the Speaker Plaintiffs is payment[.] Accordingly, any harm suffered by these plaintiffs can be remedied by monetary damages and injunctive relief should be denied."); *Carlson v. City of Duluth*, 958 F. Supp. 2d 1040, 1059 (D. Minn. 2013)

(citation omitted) ("It is well-established that where a party will only suffer potential monetary loss, and money damages are calculable, there is an adequate remedy at law and no irreparable harm exists.").

Third, permitting HHS to continue netting pursuant to Federal regulations (and consistent with Federal and state law) until a court of competent jurisdiction has proclaimed that it may not does not prejudice the Liquidators' ability to "fulfill their liquidation duties" or "disrupt the orderly liquidation process." Rather, litigating such issues in a court of competent jurisdiction is one of the Liquidators' express duties. *See* Liquidation Order at 10, ¶17.

This case is therefore entirely unlike *In re CD Liquidation Co.*, 462 B.R. 124 (Bankr. D. Del. 2011), on which the Liquidators rely. Pls.' Brief at 15. There, a liquidation trustee sought to enjoin an individual creditor from prosecuting a claim in a separate court that belonged to the trustee as successor-in-interest to the debtor's estate, and the court held that the defendant had no legal right to assert the claim, let alone in a separate forum. Here, the Liquidators do not dispute the legal basis for the United States' claim, and the United States has not disrupted the liquidation proceedings by filing a separate action in another forum. *In re CD Liquidation* simply has no bearing on this dispute.

Finally, the Liquidator's claim of irreparable harm also is undermined by their failure to seek injunctive relief for more than one year after learning that HHS would continue netting throughout the liquidation proceedings and for three months following collection of the startup loan. *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 895 (8th Cir. 2013) ("Novus's failure to seek injunctive relief for a period of seventeen months after Dawson quit paying royalties 'vitiates much of the force of [Novus's] allegations of irreparable harm.'") (citing *Beame*, 434 U.S. at 1313).

The Court need go no further. Because the Liquidators cannot establish irreparable harm, the motion should be denied.

III. The Balance of Harms and Public Interest Weigh Against the Issuance of an Injunction

"In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter*, 555 U.S. at 24. Also, the Court must consider both what public interests might be injured and what public interests might be served by granting or denying a preliminary injunction. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997-98 (8th Cir. 2011). "[T]he determination of where the public interest lies is also dependent on the determination of likelihood of success on the merits," because it is in the public interest to protect rights. *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008).

Here, the Liquidators suggest that absent an injunction, HHS's continued application of the Netting Regulation and exercise of its setoff rights would "disrupt the orderly liquidation process," prejudice other creditors, and affect the Liquidators' ability to "fulfill their liquidation duties." Pls.' Br. at 15. Those vague assertions do not identify any actual, concrete harm. Indeed, the liquidation process has and will continue as the Liquidators wind down the company and pay creditors as funds become available. No harm will come to the those other creditors because the Liquidators seek only to have funds placed in escrow—no additional money will be provided to CoOportunity as a consequence of a preliminary injunction.

In contrast, if HHS is precluded from exercising its regulatory right to net charges owed by CoOportunity, other still-operational health insurers will suffer in a very tangible way. HHS necessarily will have to reduce payments to other insurers who are entitled to receive payments under the same programs. Young Decl. ¶¶ 14, 21, 24. HHS estimates that CoOportunity will

owe $5.2 million in risk adjustment charges, which is collectable solely through netting, and which HHS would use to fund risk adjustment payments to insurers in Iowa. Young Decl. ¶ 23. This amount represents an more than 20 % of the estimated total risk adjustment charges to be collected in Iowa. Young Decl. ¶ 24. Absent collection from CoOportunity, those insurers who are entitled to receive risk adjustment payments will have their collective payments reduced by an estimated $5.2 million. Young Decl. ¶ 24.

Aside from the direct, financial implications of an injunction, HHS's inability to collect CoOportunity's risk adjustment debts through netting would also increase uncertainty regarding risk adjustment payments in insurance markets around the country. Young Decl. ¶ 25. The operation of the ACA's insurance markets depend on timely disbursements of such payments, and a disruption of that process would concretely harm participating insurers and beneficiaries by disrupting the operation of those markets. If issuers do not have confidence that risk adjustment will timely reimburse them for the risk they take on, they will face strong financial incentives to avoid the sickest enrollees, undermining the protections of the ACA. Young Decl. ¶ 13. This in turn could cause issuers to raise their rates to account for the uncertainly in receiving full and timely risk adjustment payments. Young Decl. ¶ 25.

Insurers depend on timely disbursements of risk adjustment payments, and a disruption of that process would concretely injure each insurer and the insurance market as a whole. Young Decl. ¶¶ 24-25. Accordingly, both the balance of harms and the public interest weigh against any injunction.

IV. The Liquidators Cannot Establish a Likelihood of Success on the Merits Because Netting and Offset Are Lawful

The Liquidators do not dispute either the existence or the amount of CoOportunity's debts to the United States. Rather, their grievance is with the United States' ability to collect

those debts through netting and setoff. Applicable statutory, regulatory, and common law firmly establish the United States' right to collect CoOportunity's debts through netting and offset.

A. Both Federal and State Law Recognize HHS's Setoff and Netting Rights

The Netting Regulation, which applies to all payments under the programs at issue here, expressly authorizes HHS, "as part of its payment and collections process," to take the very action that the Liquidators seek to enjoin. 45 C.F.R. § 156.1215(b) ("[CMS] may net payments owed to issuers . . . against amounts due to the Federal or State governments from the issuers" for ACA programs). *See also* 42 C.F.R. § 401.607(a)(2) ("CMS recovers amounts of claims due from debtors . . . by . . . [o]ffsets against monies owed to the debtor by the Federal government where possible."). Nothing in the Netting Regulation or the CO-OP regulations, 45 C.F.R. subpart F, provides an exception for CO-OPs in state-supervised insolvency proceedings. And the Liquidators have provided no reason why regulations providing for *payment* to insurers should continue to apply to CoOportunity, but the Netting Regulation, which merely provides for how that payment is determined, should not.

Moreover, the United States' right of setoff to collect mutual debts owed by an insolvent debtor also is firmly established under Federal law. *See, e.g.*, *Munsey Trust Co. of Washington, D.C.*, 332 U.S. at 239 ("The government has the same right which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.") (citations omitted); *United States v. DeQueen & E. R. Co.*, 271 F.2d 597, 599 (8th Cir. 1959) (acknowledging the government's right of "setoff, without limitation"); *United States v. Tafoya*, 803 F.2d 140, 141-42 (5th Cir. 1986) ("The right of setoff is 'inherent in the United States Government,' and exists independent of any statutory grant of authority to the executive branch.").

In any event, Iowa state law also expressly allows—and in fact *requires*—offset. The Iowa Liquidation Act states that "mutual debts or mutual credits between the insurer and another person in connection with an action or proceeding under this chapter *shall be set off and the balance only shall be allowed or paid*." Iowa Code § 507C.30(1) (emphasis added); *see also In re Liquidation of Home Ins. Co.*, 953 A.2d at 453 (rejecting argument that setoff should be disallowed because "the word 'shall' is unambiguous. It is mandatory, not permissive, language. Had the legislature intended to vest the liquidator with the discretion to disallow setoffs, it would have chosen more permissive language, such as 'may' or 'might.' Accordingly, we decline to read [the liquidation act] to authorize discretionary disallowance of otherwise qualifying setoffs.") (citations omitted); *Berger v. Cas' Feed Store, Inc.*, 543 N.W.2d 597, 599 (Iowa 1996) ("general right of setoff is well established").[14]

Nevertheless, the Liquidators contend that the United States' exercise of setoff and netting "is fundamentally unfair, arbitrary, capricious" and "impedes the fair and orderly administration of the liquidation." Pls.' Br. at 7. But Courts have repeatedly rejected the assertion by liquidators that a lawful setoff results in an improper preference or circumvents a state priority scheme. *See, e.g.*, *In re Liquidation of Home Ins. Co.*, 972 A.2d 1019, 1022-23

[14] The startup loan has already been collected via offset and is therefore not at issue for purposes of the preliminary injunction. Nevertheless, the CO-OP Loan Agreement between CMS and CoOportunity also unequivocally preserves and reinforces CMS's right of offset, providing as follows:

> Right of Set-Off
>
> *Notwithstanding any other provisions of this Agreement to the contrary*, in the event any Event of Default is not cured . . . within applicable notice and cure periods, Lender shall have at its disposal the full range of available rights, remedies and techniques to collect delinquent debts . . . *including* . . . *administrative offset* . . . ."

Loan Agreement § 19.12 (emphasis added).

(N.H. 2009) (noting that "setoff is an exception to the [priority framework] for discharging claims against an insolvent debtor"); *In re Liquidation of Realex Grp.*, 210 A.D.2d 91, 94 (N.Y. App. Div. 1994) ("Although permitting offsets may conflict with the statutory purpose of providing for the pro rata distribution of the insolvent's estate to creditors, the Legislature has resolved the competing concerns and recognized offsets as a species of *lawful* preference. Indeed, if an offset is otherwise valid, *there would seem to be no reason why its allowance should be considered a preference: it is 'only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent*'") (emphasis added) (quoting *Scott v. Armstrong*, 146 U.S. 499, 510 (1892); *Prudential Reinsurance Co. v. Superior Court*, 3 Cal. 4th 1118, 1124-25, 842 P.2d 48 (1992) (adopting position of "the majority of state and federal courts addressing the statutory right of setoff" and holding that setoff provision "may not reasonably be construed as conditioning [a creditor's] right to set off on the insolvent insurer's ability to pay in full the claims of those in higher priority classes"); *see also In re Agriprocessors, Inc.*, 547 B.R. 292, 325 (N.D. Iowa 2016) ("Setoffs are not 'transfers' . . . and, therefore, are not avoidable as preferences."). In short, the Liquidators' assertion that application of the Netting Regulation or exercise of the United States' setoff rights contravenes the Iowa priority scheme is meritless. Federal and state law authorize the United States' exercise of setoff and netting.

B. The State Court Lacks Jurisdiction to Prevent the United States from Exercising Its Setoff Rights

Because Federal and Iowa law expressly permit setoff, the Liquidators' only basis for contesting the United States' exercise of its setoff rights is the Liquidation Order, which purports to enjoin creditors from conducting setoff. *See, e.g.*, Pls.' Br. at 7-8, 17. As explained above, however, an unequivocal waiver of sovereign immunity by Congress is a necessary prerequisite

to the exercise of jurisdiction over the United States *by any court*. *See, e.g.*, *King*, 395 U.S. at 4; *Miller v. Tony & Susan Alamo Found.*, 134 F.3d 910, 915-16 (8th Cir. 1998). Sovereign immunity extends to any compulsive state action, not only formal lawsuits naming the United States as a defendant. *See United States v. Rural Elec. Convenience Co-op. Co.*, 922 F.2d 429, 433 (7th Cir. 1991) ("The general rule is that a suit is against the sovereign if the judgment would expend itself on the public treasury or domain, or interfere with public administration, . . . or if the effect of the judgment would be to restrain the Government from acting or compel it to act.") (internal quotations omitted); *Scheckel v. I.R.S.*, No. C03-2045 LRR, 2004 WL 1771063, at *2 (N.D. Iowa June 18, 2004) ("an injunction to prevent the IRS from collecting federal taxes" was a lawsuit against the sovereign even though United States not named as defendant). The government should not be hampered in its performance of activities essential to the governing of the nation, unless it has given its consent. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949).

Although the State Court has *in rem* jurisdiction over CoOportunity's assets and subject matter jurisdiction to administer claims and determine distributions, no waiver of sovereign immunity subjects the United States to the jurisdiction of the State Court such that the State Court can enjoin or compel any action by the United States. *See Cal. Ins. Gty. Ass'n v. Burwell*, No. 2:15-cv-0113-ODW, 2016 WL 1050190, *4 (C.D. Cal. Mar. 16, 2016) (holding that the McCarran-Ferguson Act, 15 U.S.C. § 1012, did not waive sovereign immunity so as to subject the United States to claims bar date in state insurance insolvency statute). Accordingly, the Liquidation Order cannot bind the United States or its agencies because the State Court lacks jurisdiction over the United States. *See TransAmerica Assurance Corp. v. Settlement Capital Corp.*, 489 F.3d 256 (6th Cir. 2007) (affirming district court holding that state court order

purporting to affect the rights of the United States was void as to the United States, having been entered without jurisdiction and without waiver of the United States' sovereign immunity); *Twin City Fire Insurance Co. v. Adkins*, 400 F.3d 293, 299 (6th Cir. 2005) ("Where a federal court finds that a state-court decision was rendered in the absence of subject matter jurisdiction . . . it may declare the state court's judgment void ab initio and refuse to give the decision effect in the federal proceeding.") (citations omitted); *O'Connell*, 2014 WL 354696, at *5 (denying injunctive relief and holding that a federal agency is not bound by the preclusive effect of a state court order from a state court action to which it is not a party); *Settlement Funding, LLC v. Garcia*, 533 F.Supp.2d 685, 691-94 (W.D. Tex. 2006) ("In the absence of a waiver of sovereign immunity, a court lacks subject matter jurisdiction over the United States. Thus, the Court finds that the Kentucky Order is not binding or enforceable against the United States[.]") (internal citation omitted).

And because the State Court's Liquidation Order is not binding on the United States, the United States was not required to request "permission" from the State Court before exercising its setoff rights, as the Liquidators suggest. *See TransAmerica Assur. Corp.*, 489 F.3d at 262 (6th Cir. 2007) ("Although a single instance of compelling the government to file paperwork might seem trifling, the core administrative concern . . . is national in scale, and under the plain language of *Larson*, compulsion itself is the vice that implicates federal sovereign immunity."). Thus, the Liquidators cannot obtain an order from this Court requiring the United States to submit to the jurisdiction of the State Court—only Congress can waive the United States' sovereign immunity. *Kaffenberger v. United States*, 314 F.3d 944, 950 (8th Cir. 2003).

C. The Balance of CoOportunity's Risk Corridors Payment is Not Presently Due

The Liquidators also argue that even if HHS is entitled to exercise its setoff and netting authority, it must account for $130 million owed to CoOportunity for risk corridors. Pls.' Br. at 9-10. That is incorrect because in its netting HHS already has taken account of all risk corridors amounts presently due to CoOportunity.

Section 1342 of the ACA (42 U.S.C. § 18062) and its implementing regulation, 45 C.F.R. § 153.510, merely establish the risk corridors program and the methodology for calculating payments and charges; they do not require HHS to pay for full risk corridors on an annual cycle, nor do they impose any other temporal constraints on when HHS must pay risk corridors. *See generally* 42 U.S.C. § 18062; 45 C.F.R. § 153.510. By declining to specify when payments were due and delegating to HHS the responsibility to "establish and administer" the risk corridors program, 42 U.S.C. § 18062(a), Congress conferred "broad discretion" to HHS "to tailor [the] . . . program to fit both its needs and its budget." *Contreras v. United States*, 64 Fed. Cl. 583, 599 (2005), *aff'd*, 168 F. App'x 938 (Fed. Cir. 2006). HHS exercised this discretion by establishing a three-year payment framework. Under this framework, if risk corridors calculated payments exceed changes for a given benefit year, as they did in fiscal year 2015 (for benefit year 2014), payments are temporarily reduced so as not to exceed HHS's collections of charges for that year; however, further payments for that benefit year are made in subsequent payment cycles, with final payment not due until the final payment cycle in 2017. *See* Centers for Medicare & Medicaid Services, *Risk Corridors and Budget Neutrality*, April 11, 2014, at 1;[15] Centers for Medicare & Medicaid Services, *Risk Corridors Payments for the 2014 Benefit Year*, November

[15] Available at https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/faq-risk-corridors-04-11-2014.pdf

19, 2015, at 1.[16] Thus, no additional risk corridors payments beyond the 12.6% paid to date—which was offset against CoOportunity's debts to the United States—are presently due; HHS can continue to net current debts and receivables as they come due.

V. If the Court Grants a Preliminary Injunction, the Liquidators Must Provide Security

Under Federal Rule of Civil Procedure 65(c), the 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 party found to have been wrongfully enjoined or restrained." *See Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1278 (N.D. Iowa 1995) (noting that "almost without exception, . . . courts in this circuit have required a bond before issuing a preliminary injunction" and collecting cases). "The amount of the bond rests within the sound discretion of the trial court." *Stockslager v. Carroll Elec. Co-op. Corp.*, 528 F.2d 949, 951 (8th Cir. 1976).

Here, the Liquidators seek to enjoin the collection of $5.2 million in risk adjustment debts and prevent HHS from holding funds for future setoff. Absent this collection, HHS will be required to reduce risk adjustment payments to those operating issuers in this amount. And without the ability to hold funds for future netting, HHS will not have the ability to later collect charges from CoOportunity, given its insolvency, or make reciprocal payments to other operation insurers. Moreover, HHS may face suits by other insurers for any reduction resulting from HHS's inability to collect the risk adjustment charges from CoOportunity. The Liquidators should be required to provide security in the amount of $5.2 million to protect both operating insurers and HHS if HHS is wrongfully enjoined.

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[16] Available at https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/RC_Obligation_Guidance_11-19-15.pdf

CONCLUSION

The motion for a preliminary injunction should be denied.

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Respectfully submitted,

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