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, vs. UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; CENTERS FOR MEDICARE & MEDICAID SERVICES; SYLVIA MATHEWS BURWELL, in her Capacity as Secretary of the United States Department of Health and Human Services; and THE UNITED STATES, Defendants.	No. 4:16-cv-00151-RGE-CFB **ORDER RE: PLAINTIFFS LIQUIDATORS' MOTION FOR PRELIMINARY INJUNCTION**

I. INTRODUCTION

Now before the Court is a Motion for Preliminary Injunction filed by Plaintiff 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.[1] Pls.' Mot. Prelim. Inj., ECF No. 17. The motion is resisted by Defendants United States Department of Health & Human Services; Centers for Medicare & Medicaid Services; Sylvia Mathews Burwell, in her Capacity as Secretary of the United States Department of Health and Human Services; and the United States.[2] Defs.' Br. Supp. Opp'n Pls.' Mot. Prelim. Inj., ECF No. 40. The matter came before the Court for hearing on June 29, 2016. Hr'g Pls.' Mot. Prelim. Inj. Mins., ECF No. 44. Attorneys Douglas Schmidt, Kirsten Byrd, and Mark Hill appeared on behalf of the Liquidators. *Id.* Attorneys Charles

[1] Plaintiffs are referred to collectively as "the Liquidators."
[2] Defendants are referred to collectively as "HHS."

Canter, Terrance Mebane, and Curtis Weidler appeared on behalf of HHS. *Id.* Both parties presented evidence and were given the opportunity to argue in support of their respective positions.

The Liquidators ask the Court to enter a preliminary injunction: 1) requiring the parties to apply Iowa law in the resolution of this dispute; 2) requiring HHS to comply with orders from the Iowa District Court for Polk County related to the liquidation of CoOportunity; 3) requiring HHS to obtain agreement from the Liquidators or permission from the Iowa District Court for Polk County (or other court of competent jurisdiction) before netting or otherwise reducing funds due to CoOportunity; and 4) requiring HHS to engage in negotiations and reach an agreement with the Liquidators within ten days to preserve funds in dispute pending final resolution of this case. ECF No. 17 at 12–13. HHS asserts the Court lacks jurisdiction to enter a preliminary injunction. Alternatively, HHS argues CoOportunity fails to satisfy the standards for obtaining a preliminary injunction.

For the reasons set forth below, the Court denies the Liquidators' request for a preliminary injunction.

II. SUMMARY OF RELEVANT FACTS

Although HHS reserves the right to contest the factual assertions in the Liquidators' filings, ECF No. 40 at 3 n.3, it appears the parties largely agree on the facts relevant to the resolution of the Motion for Preliminary Injunction. In its Reply, the Liquidators state "[t]here do not appear to be material disputes as to the underlying facts giving rise to this suit." Defs.' Reply Pls.' Mot. Prelim. Inj. 1 n.2, ECF No. 49. And, before the hearing, the parties submitted a "Joint Statement of Undisputed Facts for Purposes of the Preliminary Injunction Hearing." Statement Undisputed Facts Purposes Prelim. Injunction Hr'g, ECF No. 43. Both parties presented testimony at the preliminary injunction hearing. The Liquidators called Dan Watkins, Special Deputy Liquidator of CoOportunity. HHS presented testimony from Christen Young, the Principal Deputy Director of the Center for Consumer Information and Insurance Oversight within the Centers for Medicare & Medicaid Services. The Court looks to these sources in summarizing the facts relevant to the Motion for Preliminary Injunction. Additional facts are included in the Discussion section below, as warranted.

A. Federal Programs at Issue

The Consumer Operated and Oriented Plan (CO-OP) program was created as part of the Patient Protection and Affordable Care Act (ACA). 42 U.S.C. § 18042 (Supp. 2014). HHS is responsible for administering the CO-OP program. The CO-OP program was designed to bring new competition into the insurance market across the country through supporting the creation of not-for-profit insurance companies. To this end, the ACA provides for two types of loans: "start-up loans," to cover costs related to the creation of a not-for-profit insurance company, and "solvency loans," which enable CO-OPs to meet state solvency and capital requirements. 42 U.S.C. § 18042(b)(1); 45 C.F.R. § 156.520 (setting forth loan terms for CO-OP start-up and solvency loans).

The ACA also created three programs designed to stabilize the insurance marketplace. These programs, informally known as the "3Rs," took effect in 2014 and consist of reinsurance, risk adjustment, and risk corridors. 42 U.S.C. §§ 18061–63. HHS administers the risk corridors program nationwide and the risk adjustment and reinsurance programs on behalf of Iowa and Nebraska.

Ms. Young testified as to the risk adjustment program at the hearing, and the Court relies upon her testimony. The risk adjustment program is designed to ensure insurance companies insuring the "healthiest" individuals in the marketplace compensate those insuring the "sicker" individuals. The goal is to ensure insurance companies are fairly compensated for the risk they take to insure those who likely would not have been able to secure insurance coverage prior to the implementation of the ACA. The risk adjustment program is administered at the state level. *See* 42 U.S.C. § 18063; 45 C.F.R. §§ 153.310, 153.320. All insurance companies in Iowa provide HHS with their claim information. HHS uses this data to calculate a risk score for each insurance company. Those calculated to have "healthier" enrollees are directed to pay into the risk adjustment program. That money is then distributed to insurers in Iowa who have taken on "sicker" enrollees. The most recent risk adjustment amounts for each insurer in Iowa were set on June 30, 2016. Payments resulting from those risk adjustment amounts are expected to go to the insurance issuers on August 20, 2016. The risk assessment program is operated as part of a broader HHS payment system.

Ms. Young also testified regarding the risk corridors program. The risk corridors program is a temporary program (for 2014, 2015, and 2016) addressing the problem of issuer mispricing. *See* 45 C.F.R. § 153.510. The risk corridors program is administered at a national level. Each insurance issuer submits a report at the end of July for the previous benefit year. The information in the report reflects the premiums received, the claims paid out, and how reinsurance and risk adjustment programming applied to the issuer. Based upon that report, the issuer will either owe a charge into the risk corridors program or receive a payment from the risk corridors program. Payments made out are based upon the money paid into the program.

B. CoOportunity

CoOportunity was formed after the passage of the ACA as part of the CO-OP program. In February 2012, CoOportunity entered into a loan agreement with HHS. Pls.' Ex. 2, ECF Nos. 19–25. Under the terms of the loan agreement, CoOportunity received a start-up loan in the amount of $14,700,000 and a solvency loan in the amount of $97,912,100, totaling $112,612,100. In

September 2012, HHS and CoOportunity amended the loan agreement to increase the total amount of funding to $130,162,100. CoOportunity operated as a CO-OP in Iowa and Nebraska from October 2013 through February 2015.[3]

CoOportunity began experiencing financial difficulties toward the end of 2014. In December 2014, Nick Gerhart, in his capacity as the Iowa Commissioner of Insurance (the Commissioner), placed CoOportunity under a Supervision Order. After liquidation proceedings commenced in state court (discussed below), HHS issued a Notice of Termination of the loan agreement in February 2015.

CoOportunity and all other issuers submitted their data for the risk corridors benefit year 2014 in July 2015. In October 2015, HHS announced it expected to collect only $362 million into the risk corridors program for benefit year 2014. HHS received risk corridor payment requests totaling $2.87 billion. Based upon this shortfall, HHS applied a proration rate of 12.6% to all issuer requests for benefit year 2014. This 12.6% prorated amount resulted in HHS announcing in November 2015 it would pay CoOportunity approximately $16 million of its requested $130 million risk corridor claim.

In approximately November 2015, HHS placed CoOportunity on payment hold, which prevents funds that would otherwise be distributed to CoOportunity from being paid out. *See* Decl. Christsen Linke Young ¶ 10, ECF No. 38-2. In March 2016, HHS collected the start-up loan ($14.7 million) through set-off against receivables due to CoOportunity. Pls.' Ex. 7 at 1, ECF No. 33-2. HHS is currently holding approximately $7 million, which it intends to use to offset

[3] At the hearing, the parties confirmed the liquidation process in Iowa also concerns CoOportunity's Nebraska liquidation and winding up. The Court refers to the Iowa liquidation solely, but this reference encompasses Nebraska as well.

CoOportunity's federal debts, including its risk adjustment charges and federal tax liability. CoOportunity has a $2.65 million tax liability. Defs.' Exs. A, B, & C.

On June 30, 2016—the day after the hearing—HHS was expected to announce payable and receivables due to and from reinsurance and risk adjustment eligible plans. The parties have not supplemented the record to inform the Court of the amounts announced. At the time of the hearing, it was estimated CoOportunity would be assessed risk adjustment charges of $5.2 million for Iowa for benefit year 2015.

C. State Court Proceedings

In December 2014, the Commissioner filed a Petition for Rehabilitation and Request for Injunctive Relief in relation to CoOportunity in the Iowa District Court for Polk County. HHS has not filed an appearance in this state court case, which is assigned case number EQCE077579. In January 2015, the Commissioner filed a Petition for Order of Liquidation and Request for Other Relief in the same case. The Iowa District Court issued a Liquidation Order effective on February 28, 2015, and appointed the Liquidators. Pursuant to the Liquidation Order, the Liquidators are charged with marshalling all assets, winding down the business and paying the creditors of CoOportunity in accordance with the Iowa Insurers Supervision, Rehabilitation, and Liquidation Act, Chapter 507C of the Iowa Code. The Liquidators have regularly filed status reports in the Iowa District Court case.

The Liquidation Order states it prohibits any federal government entity from exercising any form of creditor self-help, including set-off or "refus[al] to transfer any funds or assets to the Liquidator's or Special Deputy's control without further order of [the Iowa District Court for Polk County]." Pls.' Ex. 1 at 18, ECF No. 18. The Liquidation Order also requires federal government entities to obtain prior approval from the Iowa District Court for Polk County before seeking to enforce its claims against CoOportunity, including by setting-off amounts owed. *Id.* at 20.

On March 11, 2016, HHS submitted a Proof of Claim to the Liquidators, indicating an estimated claim for $131,528,450.50. Pls.' Ex. 6, ECF No. 33-1. The Proof of Claim indicated HHS's claim had not been filed in court and included language stating the claim "may be entitled to first priority treatment pursuant to 31 U.S.C. § 3713." *Id.* at 3. Within the Proof of Claim, the United States stated the amounts claimed are "subject to setoff and/or recoupment rights," *id.*, and specified the filing of the Proof of Claim was not "an admission that the Iowa court proceeding over the liquidation proceeding has jurisdiction over the United States with respect to any matter identified in this Claim." *Id.* at 12.

D. Federal Complaint

On May 3, 2015, the Liquidators filed a Complaint for Declaratory Judgment and Injunctive Relief in this Court. The Complaint seeks judicial review of agency action pursuant to 5 U.S.C. § 702 of the Administrative Procedure Act.[4] Compl. ¶ 7, ECF No. 1. Alternatively, the Liquidators seek relief under the All Writs Act, 28 U.S.C. § 1651. ECF No. 1 ¶ 8.

There are two counts in the Liquidators' Complaint. Count I seeks declarations from this Court, while Count II seeks injunctive relief. In summary, the declarations sought in Count I include: 1) that Iowa law governs HHS's claims; 2) that HHS's netting of payments is arbitrary and capricious; 3) that HHS's claims to super-priority is arbitrary and capricious; 4) that the

[4] Title 5, Section 702 of the United States Code provides: "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." *See Cohen v. United States*, 650 F.3d 717, 723 (D.C. Cir. 2011) (discussing the application of § 702).

administrative hold put on CoOportunity's account is arbitrary and capricious; and 5) that the method of netting is arbitrary and capricious, in that it does not account for all monies owed to CoOportunity. In Count II, the Liquidators seek 1) an injunction mandating the release of the administrative hold on CoOportunity's account and prohibiting any such holds from being imposed in the future; and 2) an injunction prohibiting HHS from setting-off or netting any payments owed to CoOportunity against any debts claimed by HHS.

III. DISCUSSION

The Liquidators ask the Court to enter a preliminary injunction: 1) requiring the parties to apply Iowa law in the resolution of this dispute; 2) requiring HHS to comply with orders from the Iowa District Court for Polk County related to the liquidation of CoOportunity; 3) requiring HHS to obtain agreement from the Liquidators or permission from the Iowa District Court for Polk County (or other court of competent jurisdiction) before netting or otherwise reducing funds due to CoOportunity; and 4) requiring HHS to engage in negotiations and reach an agreement with the Liquidators within ten days to preserve funds in dispute pending final resolution of this case. ECF No. 17 at 12–13.

The Court's analysis begins with a discussion of the purpose of and standards for preliminary injunctions. Next, the Court briefly discusses, without deciding, the jurisdictional defects alleged by HHS. Finally, applying the appropriate standards, the Court determines the actions requested by the Liquidators in their Motion for Preliminary Injunction should be denied.

A. Preliminary Injunctions

"A preliminary injunction is an injunction that is issued to protect plaintiff from irreparable injury and to preserve the court's power to render a meaningful decision after a trial on the merits." 11A Charles Alan Wright, Arthur Miller, & Mary Kay Kane, *Federal Practice & Procedure*

§ 2947 (2013) (hereinafter Wright & Miller). A preliminary injunction is an extraordinary remedy. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997); *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003) (citations omitted). The purpose of a preliminary injunction "is not to determine any controverted right, but to prevent a threatened wrong or any further perpetration of injury, or the doing of any act pending the final determination of the action whereby rights may be threatened or endangered, and to maintain things in the condition in which they are at the time and thus to protect property or rights from further complication or injury until the issues can be determined after a full hearing." *Benson Hotel Corp. v. Woods*, 168 F.2d 694, 696 (8th Cir. 1948).

There are two types of preliminary injunctions: mandatory injunctions, which require a party to affirmatively take an action, and prohibitory injunctions, which require a party to refrain from a given action. 11A Wright & Miller § 2942; *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 484 (1996). The Liquidators seek a mandatory preliminary injunction in that they seek to make HHS submit to the jurisdiction of the Iowa District Court for Polk County and engage in negotiations to preserve funds. "It is fundamental that mandatory injunctive relief should be granted only under compelling circumstance inasmuch as it is a harsh remedy not favored by the courts." *Citizens Concerned for Separation of Church & State v. Denver*, 628 F.2d 1289, 1299 (10th Cir. 1980).

"The burden of establishing the propriety of a preliminary injunction is on the movant." *Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994). The decision to grant or deny a preliminary injunction rests in the discretion of the trial court. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 n.8 (8th Cir. 1981) (en banc). The factors set forth in *Dataphase Systems, Inc.* continue to guide courts in the Eighth Circuit when considering preliminary injunctions. The four *Dataphase* factors are: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Id.* at 113; *accord Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008) (setting forth four factors similar to the *Dataphase* factors). "No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh towards granting the injunction." *Calvin Klein Cosmetics Corp. v. Lenox Lab*., 815 F.2d 500, 503 (8th Cir. 1987). The *Dataphase* factors are not a "rigid formula."*Bandag, Inc. v. Jack's Tire & Oil, Inc.*, 190 F.3d 924, 926 (8th Cir. 1999) (internal quotations omitted).

B. Jurisdiction

HHS asserts this Court lacks jurisdiction to grant a preliminary injunction. HHS contends this Court may not preliminarily enjoin the United States because HHS has not waived sovereign immunity. Additionally, HHS argues this Court lacks jurisdiction to preliminarily enjoin the United States from exercising its set-off rights to collect taxes. Notably, no motion to dismiss has yet been filed as to the case as a whole and, at the hearing, HHS stated it was not seeking dismissal of the case for lack of subject matter jurisdiction.

This procedural posture distinguishes this case from *Laclede Gas Co. v. St. Charles County*, where the Eighth Circuit Court of Appeals indicated the preferred approach is to rule on a motion to dismiss for lack of jurisdiction, before considering a motion for preliminary injunction. 713 F.3d 413, 416–17 (8th Cir. 2013). Although a failure to first consider subject matter jurisdiction was not found to be reversible error, a concurrence highlighted "the procedural infirmity of the district court's proceedings," described the "shortcut" as "problematic," and "cautioned against continued tolerance of similar jurisdictional sidestepping by lower courts." *Id.* at 421, 422. (Bye, J., concurring). Nonetheless, without a pending motion to dismiss based upon lack of subject matter jurisdiction—and the full briefing and argument that would accompany such a filing—the Court declines to resolve the jurisdictional issues at this stage of the proceedings.

C. Consideration of the *Dataphase* Factors

The Liquidators contend their requested preliminary injunction is necessary "to bring order to the liquidation proceeding." ECF No. 17 ¶ 58. The harm the Liquidators seek to prevent is leaving the liquidation proceeding "in indefinite limbo." *Id.* ¶ 56. They contend that, without a preliminary injunction requiring HHS to comply with the Liquidation Order and apply Iowa law to this dispute, the Liquidator's efforts to carry out a fair, efficient, and timely liquidation of the company are hampered. *Id.* ¶ 53; ECF No. 17-1 at 17. The Liquidators further assert other creditors will be seriously prejudiced if no preliminary injunction is entered.

HHS resists the grant of a preliminary injunction on a number of grounds. As indicated above, HHS argues this Court lacks jurisdiction to grant a preliminary injunction. HHS further contends HHS cannot establish irreparable harm because monetary damages can adequately make the Liquidators whole; the balance of harms and public interest weigh against issuance of a preliminary injunction; and the Liquidators cannot establish a likelihood of success on the merits.

The Court now weighs these arguments in light of the *Dataphase* factors.

1. Likelihood of success on the merits

Consideration of a preliminary injunction "does not involve a final determination on the merits." *Benson Hotel Corp.*, 168 F.2d at 696. The Court is not deciding whether the movant will ultimately prevail. *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 371 (8th Cir. 1991). Indeed, at this stage of proceedings, "the court should avoid deciding with any degree of certainty who will succeed or not succeed." *O'Connor v. Peru State Coll.*, 728 F.2d 1001, 1002 (8th Cir. 1984). In considering the likelihood of success on the merits, the Court is to "flexibly weigh the case's particular circumstances to determine whether the balance of equities so favors the movant that justice requires the court to intervene . . . ." *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998) (quotations and citation omitted). At a minimum, the Liquidators must demonstrate they have "a fair ground for litigation" and their claims are worthy of "more deliberative investigation." *Wise v. United States*, 128 F. Supp. 3d 311, 317 (D.C. Cir. 2015) (quoting *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 841 (D.C. Cir. 1977)).

In order to succeed on the merits, the Liquidators must first establish this Court has subject matter jurisdiction over this case, including a waiver of sovereign immunity. *See United States v. King*, 395 U.S. 1, 4 (1969). It is well established the United States may not be sued without its consent. Erwin Chemerinsky, *Federal Jurisdiction* 657 (6th ed. 2012) (citing *Cohens v. Virginia*, 19 U.S. 264, 411–12 (1812)); 5 Kenneth Davis, *Administrative Law Treatise* 6–7 (2d ed. 1984) (quoting Blackstone); 2 Charles H. Koch, Jr., *Administrative Law and Practice* 210 (1984)).

In addition, the Liquidators seek to make HHS submit to the jurisdiction of the Iowa District Court handling the liquidation proceedings. Thus, in order to succeed on the merits, the Liquidators will also need to establish a waiver of sovereign immunity in the state court proceedings. *See, e.g.*, *TransAmerica Assurance Corp. v. Settlement Capital Corp.*, 489 F.3d 256, 260–61 (6th Cir. 2007) (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949)); *United States v. Hall*, 269 F.3d 940, 943 (8th Cir. 2001) (quoting *United States v. Nordic Vill.*, 503 U.S. 30, 33 (1992)).

Notably, "[t]he likelihood that plaintiff will ultimately prevail is meaningless" when considered in isolation. *Dataphase*, 640 F.2d at 113. "The threshold inquiry is whether the movant has shown the threat of irreparable injury." *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418

(8th Cir. 1987). The Court concludes this factor is neutral and now turns to the essential factor of irreparable harm.

2. Irreparable harm

"The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Bandag*, 190 F.3d at 926 (quotation omitted). As such, a preliminary injunction may only issue if the moving party demonstrates a sufficient threat of irreparable harm. *Id.* Irreparable harm cannot be found if a movant has an adequate remedy at law. *Frank B. Hall & Co v. Alexander & Alexander, Inc.*, 974 F.2d 1020, 1025 (8th Cir. 1992). Harm is "irreparable" if it can be avoided only by granting temporary injunctive relief and could not be reversed in further proceedings. *See, e.g.*, *Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 690 (8th Cir. 2003). A party alleging irreparable harm must show "the harm is certain and great and of such imminence that there is a clear and present need for equitable relief." *Powell v. Noble*, 798 F.3d 690, 702 (8th Cir. 2015) (quoting *S.J.W. ex rel. Wilson v. Lee's Summit R–7 Sch. Dist.*, 696 F.3d 771, 778 (8th Cir. 2012)).

The alleged irreparable harm the Liquidators rely upon includes 1) an inability to conduct the liquidation process in an efficient and timely manner and 2) prejudice to other creditors. The Liquidators cite concern for their own personal liability for wrongful payments created by allowing HHS to pursue a remedy independent of the state process, *see* 31 U.S.C. § 3713(b), and the inadequacy of the remedy available in the Court of Claims, *see Bowen v. Massachusetts*, 487 U.S. 879, 905–08 (1988) (noting the Court of Claims lack of power to grant equitable relief).

Additionally, the Liquidators state continued set-off will reduce the money available for distribution to the guaranty associations.[5]

Neither of these harms meets the established criteria for irreparable harm. First, it appears the Liquidators have an adequate remedy at law. Although it is not their preference, the Liquidators could make a claim in the Court of Claims under the Tucker Act. 28 U.S.C. § 1491; *see also F.T.C. v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (quoting *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)) (holding "[m]ere litigation expenses, even substantial and unrecoupable cost, does not constitute irreparable injury"). Mr. Watkins testified a claim in the Court of Claims would "take more time, more resources," but he acknowledged that "ultimately, if you win, the federal government would have to pay those monies."

The Liquidators rely on *Bowen v. Massachusetts* to support their claim that money damages would be insufficient to address their alleged harm. In *Bowen*, the state requested declaratory and injunctive relief after HHS determined some services provided to intermediate care facility residents did not qualify for reimbursement under the Medicaid program because they were "educational" services. 487 U.S. at 885–87. HHS contended monetary relief sought through the Claims Court under the Tucker Act was sufficient to address the alleged harm. *Id.* at 904. The *Bowen* Court disagreed, relying on the difficulty of monetizing the amount due under the grant-in-aid programs given the prospective nature of the payments and the complex ongoing relationship between the parties. *Id.* at 905–08.

[5] Mr. Watkins testified the Liquidators made an early access agreement for a $60 million distribution with the Iowa and Nebraska guaranty associations with approval of the Iowa District Court for Polk County. The agreement contains a "claw-back" clause directing if the money already distributed is needed back in the estate, the guaranty associations shall return the money.

The Court finds the type of harm in *Bowen* is not present here and an adequate remedy is available at law. *See, e.g.*, *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211–12 (2002) (stating cases like *Bowen* are "rare cases . . . [where an injunction is sought] not merely for past due sums, but for an injunction to correct the method of calculating payments going forward"); *United States v. Hall*, 269 F.3d 940, 942–43 (8th Cir. 2001) (recognizing the limitations of *Bowen*'s holding and denying injunctive relief where an adequate remedy at law existed in the Court of Claims). Money damages for the amount of the risk adjustment payment HHS expects to deduct or net against CoOportunity's funds due would be sufficient to address the Liquidators' harm. Based on each insurer's prior year enrollees, HHS is able to determine the risk adjustment amount owed. Unlike *Bowen*, the payments are exclusively retrospective rather than prospective. Any ongoing relationship between the parties is that required between any debtor and creditor. HHS's risk adjustment calculation for 2015 is the final calculation involving CoOportunity. The Liquidators' harm is not irreparable.

Mr. Watkins further acknowledged any money recovered from the federal government could be used to pay the guaranty associations and the other creditors the Liquidators allege will suffer harm if a preliminary injunction is denied. Mr. Watkins testified the guaranty associations take the priority of the policyholders, meaning these claims would be addressed first. *See* Iowa Code § 507C.42 (placing guaranty association claims in class 2 priority for distribution, following the class covering administrative costs). Regardless of how the alleged damages are recovered, this harm is not irreparable because the Liquidators have an adequate remedy at law.

Second, delay or inefficiency is not the type of irreparable harm justifying a preliminary injunction. Harm is "irreparable" if it cannot be reversed in subsequent proceedings. *Heartland Acad. Cmty. Church*, 335 F.3d at 690. The alleged harm can be reversed in a subsequent proceeding, despite the accompanying delay. This factor weighs against the issuance of a preliminary injunction.

3. Balance of harms

A failure to demonstrate irreparable harm is sufficient to deny a motion for a preliminary injunction. *Grasso Enters. LLC v. Express Scripts, Inc.*, 809 F.3d 1033, 1040 (8th Cir. 2016) (citing *Watkins, Inc.*, 346 F.3d at 844). Nonetheless, the Court will consider the remaining *Dataphase* factors to allow for a complete record for purposes of appellate review. *Cf. Home Instead, Inc. v. Florence*, 721 F.3d 494, 500 (8th Cir. 2013) (remanding for further proceedings when the district court had not considered all four *Dataphase* factors and citing other cases taking the same approach).

The Court must consider "the balance between the harm [to the movant] and the injury that the injunction's issuance would inflict on other interested parties, and the public interest." *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926, 929 (8th Cir. 1994). This factor requires the examination of the harm granting or denying the injunction poses to both parties to the dispute, as well as other interested parties. *Dataphase*, 640 F.2d at 114. "The policy against the imposition of judicial restraints prior to an adjudication of the merits becomes more significant when there is reason to believe that the decree will be burdensome." 11A Wright & Miller § 2948.2 (cited by *Winter*, 555 U.S. at 27); *see, e.g.*, *Adams v. Vance*, 570 F.2d 950, 954–57 (D.C. Cir. 1978) (denying injunctive relief to continue an exemption for Eskimos to hunt bowhead whale where an injunction would harm the Executive branch's efforts to promote international protection of marine mammals).

The Liquidators allege without an injunction the liquidation process will remain "in limbo," ECF No. 17 ¶ 56, and lack order, timeliness, and efficiency, *id.* ¶ 53. *See* Iowa Code § 507C.1

(articulating a purpose of the comprehensive insurer liquidation process as "[e]nhanced efficiency and economy of liquidation").

HHS alleges a preliminary injunction prohibiting HHS from netting CoOportunity's risk assessment program payments "would be very disruptive to the health insurance market in Iowa or Nebraska or in any state in which CoOportunity owed a risk adjustment charge." Ms. Young highlighted the risk assessment program is operated within a broader HHS payment system.

The Court finds the harm to HHS—the interrupted administration of the ACA—outweighs the harm to the Liquidators—the delay in CoOportunity's liquidation. Omitting CoOportunity's risk assessment and payments would lead to inaccurate HHS risk adjustment calculations for each insurer and inaccurate resulting adjustment payments to the pool of insurers statewide. The risk score HHS calculates for each insurer relies upon uniform consideration of each insurer statewide allowing HHS to accurately collect payments from insurers with low-risk enrollees and make payments to insurers with high-risk enrollees, a vital feature of the ACA. Omission of CoOportunity's risk score and the resulting payment, estimated at $5.2 million for the benefit year 2015, would be burdensome for HHS and hamper the administration of risk adjustment program in Iowa and of the ACA as a whole. The balance of hardships tip in HHS's favor. This factor weighs strongly against the issuance of a preliminary injunction.

4. The public interest

The final *Dataphase* factor directs consideration of the public interest. Public interest can include, for example, the impact on the national defense, *Winter*, 555 U.S. at 24; the protection of constitutional rights, *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *rev'd on other grounds Phelps-Roper v. City of Manchester, Mo.*, 687 F.3d 678 (8th Cir. 2012); or the importance of having government agencies fulfill their obligations, *Sierra Club v. U.S. Army Corps of Eng.*, 645 F.3d 978, 997 (8th Cir. 2011).

The Liquidators assert the sanctity of current and future CO-OP liquidations across the nation is the public interest at issue. The Liquidators state if the federal government is allowed to claim "super priority" and collect from CoOportunity contrary to the state procedure, "this would wreak havoc on any CO-OP insolvency and leave millions of dollars in policyholder level claims unpaid." ECF No. 1 ¶ 70. The Liquidators cite numerous provisions of the United States Code and ACA to support their proposition that Congress's intention under the ACA was for CO-OP insolvency to follow state-defined procedures. *See* 42 U.S.C. § 18042(b)(3) (directing the Secretary of HHS to promulgate regulations "taking into consideration any appropriate State reserve requirements, solvency regulations, and requisite surplus note arrangements").

HHS advances the public interest at issue as the administration of the ACA and the stability of the insurance marketplace. Ms. Young testified confidence in the risk adjustment program is crucial because insurers must "have confidence that when they take on these [high-risk] enrollees, they'll be fairly compensated for that risk."

The public interest of the uninterrupted administration of the ACA in Iowa, Nebraska, and the nation weighs strongly against the issuance of a preliminary injunction. There is inherent harm to the agency in preventing the agency from enforcing regulations Congress found in the public interest. *Nat'l Propone Gas Ass'n v. U.S. Dept. of Homeland Sec.*, 534 F. Supp. 2d 16, 20 (D.D.C. 2008) (citing, e.g., *Hunter v. Fed. Energy Regulatory Comm'n*, 527 F. Supp. 2d 9, 18 (D.D.C. 2007)). The risk adjustment program is vital to the stabilization of the insurance marketplace. An injunction would impede the public's interest in the administration of the ACA.

IV. CONCLUSION

The Court denies the Liquidators' Motion for a Preliminary Injunction. The Liquidators' alleged harm is not irreparable; there is an adequate remedy at law and money damages are sufficient to redress any harm. The harm to HHS's administration of the ACA outweighs the Liquidators' harm in delaying a portion of the liquidation proceeding. Finally, an injunction would impede the public's interest in uninterrupted administration of the ACA.

IT IS SO ORDERED.

Dated this 12th day of August, 2016.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE