UNITED STATES DISTRICT COURT
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.,*	)	**No. 16-cv-00151**
Plaintiffs,	)	**Plaintiffs' Motion for Preliminary Injunction and Brief in Support**
v.	)	
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR MEDICARE & MEDICAID SERVICES, SYLVIA MATHEWS BURWELL, *in her capacity as Secretary of the U.S. Department of Health and Human Services*, and THE UNITED STATES,	)	**Expedited Consideration Requested**
Defendants.	)	

Pursuant to Fed. R. Civ. P. 65, Plaintiffs respectfully move this Court for entry of a preliminary injunction against Defendants. Plaintiffs have been charged by the Polk County District Court with liquidation of an insolvent insurer based in Iowa, CoOportunity Health, Inc. ("CoOportunity"). CoOportunity was created under the federal Affordable Care Act ("ACA") and Defendants have been involved in *every stage* of the company. While Defendants have actively participated in the liquidation, they have repeatedly violated the Polk County District Court's order governing the liquidation, as well as Iowa law, by unilaterally engaging in self-help to recoup claimed debts. Preliminary injunctive relief is necessary because Defendants' conduct threatens the fair and orderly liquidation of the company and is prejudicial to other creditors' claims and the ability of Plaintiffs to carry out their liquidation duties.

Pursuant to LR 65, Plaintiffs set forth below the particular facts relied upon in support of their Motion, which Plaintiffs anticipate will not be disputed, and are attaching a Brief in Support of this Motion.

I. Background on CoOportunity Health, Inc.

1. For just over one year, CoOportunity operated in Nebraska and Iowa as a nonprofit health insurer established under the Consumer Operated and Oriented Plan ("CO-OP") program of the ACA.

2. On December 16, 2014, Nick Gerhart, in his capacity as the Iowa Commissioner of Insurance ("Commissioner") placed the company under a Supervision Order.

3. On December 23, 2014, the Commissioner obtained from the Polk County District Court an Order for Rehabilitation of the company in the matter currently captioned *In re Liquidation of CoOportunity Health*, Case No.: EQCE077579 ("Liquidation Case").

4. Effective February 28, 2015, the Polk County District Court issued a Final Order of Liquidation of the company ("Liquidation Order," attached as Ex. 1) and appointed Plaintiffs as Liquidator and Special Deputy Liquidator.

5. Defendants have never contested the authority of the Commissioner to place the company under supervision or to place the company in rehabilitation and ultimately liquidation.

6. Defendants have never contested the authority of the Polk County District Court to oversee the rehabilitation and ultimate liquidation of CoOportunity.

7. Defendants have never contested application of Iowa law to the liquidation process, at least as it pertains to all other creditors.

8. Under the Liquidation Order and Iowa Law, Plaintiffs are charged with marshalling all assets, winding down the company, and paying creditors in accordance with the

priority for distribution set forth in the Iowa Insurers Supervision, Rehabilitation and Liquidation Act ("Iowa Liquidation Act"), Chapter 507C of the Iowa Code.

9. Defendants, the Department of Health and Human Services ("HHS") and the Centers for Medicare & Medicaid Services ("CMS") operate the CO-OP program.

10. HHS/CMS reviewed and approved CoOportunity's application for federal start-up and solvency loan funding necessary to start CoOportunity.

11. The federal government may appear to be the largest single creditor of CoOportunity, but a large majority of CoOportunity's debt to the United States is through a Solvency Loan, which is a "surplus note," meaning it is expressly subordinated to other creditor claims, including policyholder level claims; the obligations under it are not subject to set-off; and it may be repaid only upon approval of the Iowa Insurance Commissioner.

12. Under the Iowa Liquidation Act, the claims at the policyholder level have *first* priority (after payment of administrative expenses of the liquidation), meaning that payments owed under enrollees' insurance policies are paid *before* all other creditors, including the federal government.

II. State Regulation of Insurance and Insurer Insolvency

13. The states have long been the primary regulator of the insurance industry, including the sub-field of insurer rehabilitation and insolvency.

14. In passing the ACA, Congress expressly intended for the states to continue to operate as the primary regulator of insurers, particularly in an ACA clause titled: "No interference with State regulatory authority," which provides, "Nothing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title." 42 U.S.C. § 10841(d).

15. Thus, to the extent anything in the ACA could be read to preempt any state authority in solvency matters, the express language of the ACA *requires* it to be construed in a manner that does not conflict.

16. Additional ACA provisions confirm Congress's desire to yield to state authority regarding solvency matters. When discussing the repayment of loans, for example, the ACA directed the Secretary of HHS to promulgate regulations "in a manner that is consistent with State solvency regulations and other similar State laws that may apply." 42 U.S.C. § 18042(b)(3).[1]

III. Defendants Acknowledged State Law Controls CO-OP Insolvency.

17. In 2011, CMS proposed the following regulation to assist in implementing the ACA and the creation of CO-OPs. It confirmed the role of state law in liquidation:

> State law establishes a variety of required regulatory actions if an insurer's RBC [risk based capital] falls below established levels or percent of RBC. These regulatory interventions can range from a corrective action plan to liquidation of the insurer if it is insolvent. Solvency and the financial health of insurers is historically a State-regulated function.

Proposed Rules, 45 C.F.R. Part 156, 76 FR 43237.01, July 20, 2011.

18. In response to several concerns raised during notice and comment about the ability of CO-OPs to avert insolvency, CMS once again confirmed that State law would govern any such proceeding: "In the potential case of insurer financial distress, a CO-OP follows the same process as traditional issuers and must comply with all applicable State laws and regulations." Final Rules, Responses and Comments, 45 C.F.R. 156, E.6 and F Dec. 13, 2011.

[1] *See also* 42 U.S.C. § 18042(b)(3) ("In promulgating such regulations, the Secretary shall provide that such loans shall be repaid within 5 years and such grants shall be repaid within 15 years, taking into consideration any appropriate State reserve requirements, solvency regulations, and requisite surplus note arrangements that must be constructed in a State to provide for such repayment prior to awarding such loans and grants.").

IV. The Loan Agreement that HHS/CMS Drafted Requires Application of Iowa Law and Subordinates the Federal Government's Claims to Policyholder Claims.

19. In the event that CoOportunity defaulted, the loan agreement between HHS/CMS and CoOportunity ("Loan Agreement") gave HHS/CMS the ability to accelerate payments, but stated that: "Borrower must immediately repay any unused Loan Funds to Lender following the resolution of any outstanding debts and run out of outstanding claim obligations, *consistent with State Insurance Laws*." Loan Agreement ¶ 15.3.c (emphasis added), attached as Ex. 2.

20. The Loan Agreement confirms that repayment of the start-up loan is subordinate to "claims payments." Loan Agreement § 3.4, attached as Ex. 2.

21. The Office of the Inspector General reviewed the CO-OP loan agreements and confirmed that CMS had the right to terminate its agreements with CO-OPs, *but*, "A CO-OP *must* resolve any outstanding debts or other accommodation of outstanding claim obligations *before repaying the loan funds to CMS*."[2]

22. HHS/CMS sent CoOportunity a Notice of Termination that declared the loan in default and accelerated payments due per the terms of the Loan Agreement. HHS/CMS then stated:

> We ***of course*** realize that the debts in question are otherwise subject to disposition under relevant provisions of Iowa law concerning liquidation proceedings.

See Ex. 5, CMS Letter of February 13, 2015 (emphasis added).

V. Under Iowa Law, Policyholder Claims Have Higher Priority than Other Creditors.

[2] Daniel R. Levinson, on behalf of the Office of Inspector General for HHS, *Actual Enrollment and Profitability Was Lower Than Projections Made by the Consumer Operated and Oriented Plans and Might Affect Their Ability to Repay Loans Provided Under the Affordable Care Act*, July 2015 (emphasis added), p. ii and 3, available at: http://www.oig.hhs.gov/oas/reports/region5/51400055.pdf.. Though HHS had the ability to review and submit comments on the Inspector General report, it elected not to do so, instead stating that HHS "concurred with [the OIG's] recommendations."

23. In Iowa insurance liquidations, the claims at the policyholder level have first priority (after payment of administrative expenses of the liquidation). *See* Iowa Code § 507C.42. In other words, payments owed for individuals' claims on the insurance policies are paid before other creditors, including the federal government. *See id.*

24. As a matter of public policy, policyholder claims have priority over other creditors. The overriding objective of the Iowa Liquidation Act is protection of those most affected by insurance company insolvency - the policyholders and healthcare providers.

25. In addition, both Nebraska and Iowa had the foresight to provide an additional layer of protection for policyholders and healthcare providers by establishing, through state statutes, guaranty associations that immediately cover their citizens' claims in the event of an insurer liquidation. By state statute, the guaranty associations step into the shoes of the policyholders and, thus, these paid claims are, policyholder-level claims (due to be paid before all other creditors) in the CoOportunity liquidation.

26. The guaranty associations pay covered healthcare provider claims of policyholders through assessment of other insurers within the state. The insurers may offset the assessment against their premium tax liability up to twenty percent of the amount of the assessment for each of the five calendar years following the year in which the assessment was paid. Funds reimbursed to the guaranty associations by the liquidation estate are distributed to the member companies to reduce the tax offset. Thus, to the extent there is a shortfall in reimbursing the guaranty associations for policyholder-level claims, Iowa and Nebraska state governments and their taxpayers will be impacted by that shortfall.

27. If there is less money for distribution for policyholder level claims due to Defendants' unilateral and unauthorized conduct in setting off or withholding money owed to the

CoOportunity estate, the states of Iowa and Nebraska, and their taxpayers, are the ones directly impacted.

VI. Defendants Have Participated in the Liquidation Case, But Have Repeatedly Violated the Liquidation Order and Will Continue to Do So.

28. The Polk County District Court entered the Liquidation Order effective February 28, 2015, which provides:

> No lender, bank, or other institution (including any State or Federal governmental entity), person, or other entity shall exercise any form of set-off, alleged set-off, lien, any form of self-help whatsoever or refuse to transfer any funds or assets to the Liquidator's or Special Deputy's control without further order of this Court.

See Ex. 1, Liquidation Order ¶ 45.

29. Thus, the Liquidation Order explicitly prohibits the federal government (and all other creditors) from engaging in unilateral "self-help" to recover debts owed by CoOportunity. This includes an express prohibition on unilateral reduction (also referred to as "netting" or "set-off") or withholding of payments due to CoOportunity.

30. On January 29, 2015, before the Liquidation Order was entered, HHS/CMS received a copy of the Petition for Order of Liquidation, which contained an express request for a court order barring any creditor from engaging in any form of unilateral self-help without permission from the Polk County District Court. *See* Ex. 3, 1/29/2015 Email from Schmidt to Grindal-Miller attaching Petition at p. 6, ¶ 31.(e).

31. On February 23, 2015, before the Liquidation Order was entered, HHS/CMS received a copy of the proposed liquidation order before it was entered. *See* Ex. 4, 2/23/2015 Email from Schmidt to Grindal-Miller with attachments.

32. HHS participated in crafting some of the terms (such as the proposed effective date and exact time of the liquidation) contained in the proposed order.

33. After the court issued the order, HHS did not express any objection to it.

34. HHS is also participating *in the liquidation itself*. On March 14, 2016, the federal government submitted a Proof of Claim to the Liquidator, asserting its calculation of the amounts owed to it by CoOportunity. Therein, the federal government opined that its Proof of Claim is not an "admission that the Iowa court presiding over the liquidation proceeding has jurisdiction over the United States with respect to any matter identified in this Claim, or a waiver or release of any rights related thereto." *See* Ex. 6, U.S. Proof of Claim (without exhibits), pp. 8-9.

35. In the summer of 2015, months after the Polk County District Court entered its Liquidation Order, everything changed. Even though HHS/CMS received the proposed order of liquidation (which contained these prohibitions) and the final Liquidation Order, HHS/CMS ignored the Polk County Court's Order and unilaterally reduced several payments due to CoOportunity.

36. In the Fall of 2015, HHS/CMS unilaterally placed an "administrative hold" on *all* payments scheduled to be made to CoOportunity. The Special Deputy Liquidator was first notified of the "hold" during a meeting with representatives of HHS/CMS and the Department of Justice in Bethesda, Maryland, in an attempt to negotiate a settlement. That day, the Special Deputy Liquidator also authorized a Reinsurance payment to HHS/CMS.

37. HHS/CMS has not provided any legal authority for its unilateral and indefinite hold on funds undisputedly owed to CoOportunity, and Plaintiffs have not located any such authority in the ACA statute or regulations.

38. It is illegal, arbitrary, capricious, and prejudicial for Defendants to place an indefinite hold on payments mandated by statute to CoOportunity based on the chance that the federal government may seek to "net" that payment in order to recoup a possible debt.

39. The first time HHS/CMS confirmed in writing that it had set off in order to recoup on the Start-up loan to CoOportunity ($14.7 million) was in the federal government's Proof of Claim that HHS/CMS filed with the Liquidator under the terms of the Liquidation Order. This is the same Order prohibiting *any* unilateral set-off against CoOportunity. In its Proof of Claim, HHS/CMS stated: "[CoOportunity] also received a Start-Up Loan in the amount of $14,700,000. The Start-Up loan has been *collected by offset* against receivables due to the Debtor and therefore is not at issue in this Proof of Claim." *See* Ex. 6, p. 2, n. 1.

40. HHS/CMS sent CoOportunity a letter dated March 22, 2016 confirming that CMS "ha[d] recovered funds from CoOportunity sufficient to repay the outstanding amount of the Start-up Loan disbursed to CoOportunity Health under the terms of the CMS CO-OP Loan Agreement dated February 17, 2012." See Ex. 7. The letter further stated that "CMS recovered these funds by exercising its right of offset against payments due from CMS to CoOportunity Health." *Id.*

41. HHS/CMS claimed that it was evaluating potential monies owed to the IRS as well as CMS, and was refusing to release *any funds* while it performs this analysis. The letter states: "CMS will continue to hold funds owed to CoOportunity Health pending an analysis and potential offset of these additional debts. After such analysis is completed and any further rights of offset have been exercised, CMS will release any remaining funds to CoOportunity Health." *Id.*

VII. The Federal Government Owes CoOportunity More than All of CoOportunity's Combined Debts Arguably Subject to a Right of Set-off.

42. CoOportunity is subject to several federal government programs by virtue of its operation under the terms of the ACA. Specifically, three risk-mitigation programs (known as the "3R" programs) operated to level issuer risk among health-insurance providers nationwide.

43. The ACA required that HHS administer a Risk Corridor program for calendar years 2014, 2015, and 2016. 42 U.S.C. § 18062(a).

44. Under the Risk Corridor program, CoOportunity is owed $130 million for the 2014 policy year alone.

45. The ACA directs that the Secretary of HHS "shall pay" amounts due under Risk Corridor. 42 U.S.C. § 18062(a).

46. Despite HHS's prior statements that it believed it would collect enough funds to make the required 2014 Risk Corridor payments in full, its estimates turned out to be woefully inaccurate. HHS has only paid 12.6% of the balances due to Risk Corridor participants for 2014.[3]

47. Although other similarly situated insurers, including CO-OPs, received at least the 12.6% paid out under the program, CoOportunity received *zero dollars* owed under Risk Corridor.

48. There is no justification for HHS failing to make *any* Risk Corridor payments to CoOportunity. When pressed on the matter, the correspondence revealed two actions HHS/CMS was taking (and continues to take) in direct violation of the law: "set-off" and "administrative hold."

49. Under the other "3R" programs—"Reinsurance" and "Risk Adjustment"—CoOportunity was owed $71.7 million for Reinsurance for the 2014 policy year, but HHS/CMS unilaterally reduced that payment by $11.5 million to "collect" $10 million CoOportunity owed for Risk Adjustment and $1.5 million owed due to the federal government's overpayment of

[3] Subsequent guidance issued by HHS stated that 2014 Risk Corridor balances would be paid in *full* before any 2015 or 2016 Risk Corridor payments would be made. In other words, HHS will use *receipts* from the 2015 and 2016 Risk Corridor payments to first pay 2014 Risk Corridor recipients before moving to the 2015 and then the 2016 recipients.

Advance Payment of Premium Tax Credits ("APTC") and Cost Sharing Reductions ("CSR") for the 2014 policy year.

VIII. There is Threat of Irreparable Harm Absent Injunctive Relief.

50. This case presents a scenario in which the health insurer, federal agencies, and state agencies have a complex, intertwined and ongoing relationship, extending well into the liquidation.

51. HHS/CMS are heavily intertwined in all CO-OPs, including CoOportunity. They authorized approximately $2 billion in funding to establish the 23 CO-OPs and have acted as regulators of the CO-OPs at the federal level, along with traditional state insurance regulators.

52. Even today, and into the future, HHS/CMS and CoOportunity are continually involved in routine exchange of information, data, and payments pursuant to the ACA and other legal obligations.

53. HHS/CMS's actions—particularly its refusal to acknowledge and follow state law in relation to the liquidation and its unilateral self-help conduct—are hampering the fair and legal administration of the liquidation; interfering with the Liquidator's and Special Deputy Liquidator's efforts to carry out their legal and fiduciary obligations to carry out a fair, efficient, and timely liquidation of the company; and are prejudicing other creditors' rights.

54. Defendants have put the liquidation proceeding in limbo by submitting a claim for millions of dollars from the CoOportunity estate, yet disputing the authority of the Polk County District Court and application of Iowa law. In the meantime, unlike all other creditors and in blatant violation of the Polk County District Court, HHS/CMS have engaged, and will continue to engage, in unilateral, selective, and illegal reduction or withholding of payments owed to the CoOportunity estate.

55. The Liquidator and Special deputy Liquidator have denied the federal government's Proof of Claim because Defendants effectuated improper transfers through the netting transactions and administrative hold on funds owed to CoOportunity. Defendants will have an opportunity to object to that denial but, given Defendants' claim that the Polk County District Court does not have authority over them and that Iowa law does not apply to them, the Liquidator and Special Deputy Liquidator will not be able to adjudicate or pay any other claims. This puts the liquidation and resolution of other creditors' claims in indefinite limbo.

56. If injunctive relief is not entered against Defendants, the liquidation proceeding will be left in indefinite limbo while Defendants are allowed to blatantly violate Iowa law, make up their own "rules of the game," and unilaterally reduce or withhold payments owed.

57. Within the next month, and extending into 2017, HHS/CMS also intends to take several of these unauthorized and illegal self-help actions once again. Once these actions are taken, particularly as to the 3Rs, they cannot be unwound because the amounts "collected" by HHS/CMS through its self-help conduct are then paid out to other insurers under the various ACA programs.

58. Thus, in order for this Court to be in a position to issue complete and effective relief on the merits of this case, it is imperative that this Court enter a preliminary injunction to preserve the status quo and to bring order to the liquidation proceeding.

Requested Relief

For the reasons set forth herein and in the attached Brief in Support, Plaintiffs respectfully move this Court for entry of a preliminary injunction to:

- Require that the parties apply Iowa state law in order to resolve their respective rights and obligations in the liquidation of CoOportunity;

- Require Defendants to comply with the Polk County District Court's Liquidation Order and all other orders and rulings in the Liquidation Case;
- Enjoin Defendants from engaging in further self-help conduct to recoup claimed debts of CoOportunity, including, but not limited to, unilateral withholding of money, set-off, or other reduction of payment due CoOportunity absent permission from this Court (or other court of competent jurisdiction) or agreement of the parties; and
- Require that the parties negotiate and reach agreement within the next 10 days on an arrangement that will preserve the funds in dispute until resolution of this suit, e.g., through payment into court, an escrow agreement, or other similar arrangement (if the parties are unable to agree, by default the money in dispute will be paid into Court).

As fully discussed in Plaintiffs' Brief, Plaintiffs are entitled to a preliminary injunction based on this Statement of Facts because:

- Plaintiffs are likely to succeed on the merits of their claims (*see* Brief in Support at pp. 4-14);
- Plaintiffs face a threat of irreparable harm absent a preliminary injunction (*see* Brief in Support at pp. 14-16);
- This threated harm outweighs any potential harm from granting an injunction (*see* Brief in Support at pp. 16-17); and
- Issuance of an injunction is in the public interest (*see* Brief in Support at p. 18).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on June 10, 2016, I electronically filed the foregoing with the Clerk of Court using the ECF system, causing electronic service on the following counsel that have entered an appearance for Defendants:

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UNITED STATES DISTRICT COURT
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PLAINTIFFS' BRIEF IN SUPPORT OF
THEIR MOTION FOR PRELIMINARY INJUNCTION

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I. Argument Summary

Until its financial collapse, CoOportunity Health, Inc. ("CoOportunity") operated in Nebraska and Iowa as a nonprofit health insurer established under the Consumer Operated and Oriented Plan ("CO-OP") program of the federal Affordable Care Act ("ACA"). The U.S. Department of Health and Human Services ("HHS"), Centers for Medicare & Medicaid Services ("CMS") operates the CO-OP program.

Effective February 28, 2015, the Polk County District Court issued a Final Order of Liquidation ("Liquidation Order") of the company and appointed Plaintiffs as Liquidator and Special Deputy Liquidator. Under the Liquidation Order and Iowa Law, Plaintiffs are charged with marshalling all assets, winding down the company, and paying creditors in accordance with the priority for distribution set forth in the Iowa Insurers Supervision, Rehabilitation and Liquidation Act ("Iowa Liquidation Act"), Chapter 507C of the Iowa Code.

At CoOportunity's inception, HHS/CMS reviewed and approved CoOportunity's application for necessary federal start-up and solvency funding. However, under the Iowa Liquidation Act, the claims at the policyholder level have *first* priority (after payment of administrative expenses of the liquidation), meaning that payments owed under enrollees' insurance policies are paid *before* all other creditors, including the federal government.

Even though the federal government has been involved in *each and every* stage of the company – from approving it and through rehabilitation and liquidation – Defendants have refused to acknowledge the authority and jurisdiction of the Polk County District Court overseeing the liquidation. Defendants also contest application of state law, claiming that the federal government has "super priority" over all other creditors under federal law. Although Defendants reviewed a proposed Liquidation Order before it was entered by the Polk County

District Court and even specified the effective date and time of the liquidation, Defendants now claim that they are not subject to the Order. Defendants have blatantly violated the Order by engaging in unilateral self-help to collect on CoOportunity's debts, to the detriment of all other creditors, and will continue to do so absent preliminary injunctive relief from this Court.

Plaintiffs and their representatives have exhausted all other reasonable means to address Defendants' conduct, including: (1) obtaining an order from the Polk County District Court that expressly prohibits self-help conduct, which Defendants have repeatedly violated and ignored; (2) months of extended negotiations to try to resolve the outstanding issues, which concluded abruptly when Defendants suggested that further negotiations would likely not be productive; (3) an extension of the deadline for the federal government to file a proof of claim in the Liquidation Case until March 15, 2016; and (4) more recently, additional good faith negotiations to at least preserve the status quo and protect the funds in dispute until full resolution, which Defendants also rejected.

Plaintiffs have no other choice but to ask this Court for preliminary injunctive relief in order to preserve the status quo and to protect the assets in dispute pending final resolution of these issues. In particular, Plaintiffs ask the Court to enter a preliminary injunctive order to:

- Require that the parties apply Iowa state law in order to resolve their respective rights and obligations in the liquidation of CoOportunity;
- Require Defendants to comply with the Polk County District Court's Liquidation Order and all other orders and rulings in the Liquidation Case;
- Enjoin Defendants from engaging in further self-help conduct to recoup claimed debts of CoOportunity, including, but not limited to, unilateral withholding of money,

set-off, or other reduction of payment due CoOportunity absent permission from this Court (or other court of competent jurisdiction) or agreement of the parties; and

- Require that the parties negotiate and reach agreement within the next 10 days on an arrangement that will preserve the funds in dispute until resolution of this suit, e.g., through payment into court, an escrow agreement, or other similar arrangement (if the parties are unable to agree, by default the money in dispute will be paid into Court).

As set forth below, the requested preliminary injunctive relief is as narrowly tailored as possible, and it is necessary to avoid the risk of irreparable harm and disruption to the underlying liquidation proceeding pending before the Polk County District Court. Plaintiffs offer the following argument in support of their Motion.

II. Standard For Preliminary Injunctive Relief

Plaintiffs' Complaint and Motion for Preliminary Injunction are brought under the APA, which contains a provision allowing this Court to issue a preliminary injunction:

> On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 705. "Courts have recognized that this standard is the same as the standard for issuance of a preliminary injunction." *Branstad v. Glickman*, 118 F. Supp.2d 925, 934 (N.D. Iowa 2000). In the Eighth Circuit, "[r]equests for preliminary injunction are analyzed under the four factors set forth in *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981)." *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 893 (8th Cir. 2013). The so-called *Dataphase* factors are "(1) the probability of success on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) whether the issuance of an injunction is in the

public interest." *Sanborn Mfg. Co., Inc. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 485-86 (8th Cir. 1993) (citing *Dataphase*, 640 F.2d at 114); *accord Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The *Dataphase* factors are not a "rigid formula," but injunctive relief is grounded in a demonstration of "irreparable harm and inadequacy of legal remedies." *Bandag, Inc. v. Jack's Tire & Oil, Inc.*, 190 F.3d 924, 926 (8th Cir. 1999).

III. CoOportunity Is Likely To Succeed On The Merits Of Its Claims.

The first factor for the Court to consider is whether Plaintiffs demonstrate a likelihood of prevailing on the merits. Plaintiffs need not prove a "greater than fifty percent" probability of prevailing, but only that it has a "fair chance" of success. *Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 690 (8th Cir. 2003). "[A]djudication of a motion for a preliminary injunction is not a decision on the merits of the underlying case." *Hubbard Feeds v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 603 (8th Cir. 1999). "At the early stage of a preliminary injunction motion, the speculative nature of this particular inquiry militates against any wooden or mathematical application of the [likelihood-of-success] test." *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998). "Likelihood of success on the merits requires that the movant find support for its position in governing law." *Branstad*, 118 F. Supp.2d at 939 (quoting *Curtis 1000, Inc. v. Youngblade*, 878 F. Supp. 1224, 1247 (N.D. Iowa 1995)). Here, Plaintiffs have more than satisfied this factor in determining whether to grant preliminary injunctive relief.

To resolve Plaintiffs' request for declaratory and injunctive relief, this case will involve determination of: (A) whether the rights and obligations of the federal government in relation to CoOportunity are controlled by Iowa law or federal law; (B) whether Defendants' unilateral reduction and withholding of money owed to CoOportunity, particularly in light of the federal

government's outstanding debts to CoOportunity and the express prohibitions in the Liquidation Order, is illegal, contrary to ACA statutory mandates, arbitrary, capricious, and an abuse of discretion; and (C) whether this dispute should be resolved in this Court. As set forth below, there is a likelihood that Plaintiffs will prevail on their claims for declaratory and injunctive relief.

A. Congress Intended For State Law To Apply To Liquidation Of CoOportunity, Including Resolution Of The Federal Government's Rights And Obligations.

Plaintiffs will likely prevail in their request for declaratory judgment that Iowa law applies and controls priority of distribution to creditors. Several sources of authority cited herein—state law, federal law, and contractual terms—confirm that Iowa law governs the liquidation and the priority of all claims against CoOportunity. *See* Motion for Preliminary Injunction, Statement of Facts ¶¶ 13-23. HHS has affirmatively asserted a claim in the Liquidation Case to receive money, but it refuses to abide by the terms of the Liquidation Order and Iowa law, which govern its adjudication.

The states have long been the primary regulator of the insurance industry, including the sub-field of insurer rehabilitation and insolvency. *See U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 499 (1993) (noting the states have historically "enjoyed a virtually exclusive domain over the insurance industry"); *In re Union Guarantee & Mortg. Co.*, 75 F.2d 984, 984-85 (2d Cir. 1935) ("Congress meant to leave to local winding up statutes the liquidation of such companies; that, since the states commonly kept supervision over them during their lives, it was reasonable that they should take charge on their demise"); *Solis v. Home Ins. Co.*, 848 F. Supp. 2d 91, 99 (D.N.H. 2012) (noting that "the insurance field, and the sub-field of insurance insolvency, are

areas traditionally occupied by the states"). Congress did not intend to alter that by enacting the ACA, particularly as it relates to the sub-field of insurer rehabilitation and insolvency.

There are *no provisions* within the ACA that address insurer solvency requirements or insurer rehabilitation or liquidation. Under the ACA's anti-preemption clause, those issues must remain within the purview of state insurance regulation. *See* 42 U.S.C. § 10841(d) (titled "No interference with State regulatory authority," and providing, "Nothing in this title shall be construed to preempt any State law that does not prevent the application of the provisions of this title.").

In response to several concerns raised during notice-and-comment about the ability of CO-OPs to avert insolvency, HHS/CMS confirmed that state law would govern any such proceeding: "In the potential case of insurer financial distress, a CO-OP follows the same process as traditional issuers and must comply with all applicable State laws and regulations." Final Rules, Responses and Comments, 45 C.F.R. 156, E.6 and F Dec. 13, 2011. As it relates to CoOportunity in particular, HHS/CMS confirmed after its financial collapse that "[w]e *of course* realize that the debts in question are otherwise subject to disposition *under relevant provisions of Iowa law concerning liquidation proceedings.*" *See* Ex. 5, CMS Letter of February 13, 2015 (emphasis added). HHS/CMS cannot circumvent Congress's intent by now invoking a "Netting Regulation" (discussed in subsection III.B, below) or federal statutes of general application.

B. Defendants' Unilateral Self-Help Is Illegal, Arbitrary, Capricious, And An Abuse Of Discretion In Light Of The Federal Government's Outstanding Debts To CoOportunity.

Defendants' unilateral self-help conduct is illegal and contrary to the law, as well as arbitrary, capricious, and an abuse of discretion. Plaintiffs challenge HHS's actions under the APA, which provides for judicial review of final agency actions. 5 U.S.C. §§ 702, 704.

"Agency action" also includes any alleged failure of an agency to act. *Kenney v. Glickman*, 96 F.3d 1118, 1122 n.3 (8th Cir. 1996). As relevant here, this Court "shall":

> **(2)** hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> > **(A)** arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> > . . .
> > **(C)** in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> >
> > **(D)** without observance of procedure required by law….

5 U.S.C. § 706.

There can be no dispute that—contrary to the Liquidation Order but with full knowledge of its prohibition against self-help absent Court permission—Defendants have selectively reduced (or withheld) payments owed to CoOportunity to collect on debts they claim are subject to a right to set-off. However, even if *all* of those debts are combined, they are still *less* than amounts owed by the federal government to CoOportunity. And, even if Defendants are entitled to these set-offs, they sought no permission, from *any* court, to engage in self-help. Under any jurisdiction's law, that is fundamentally unfair, arbitrary, capricious, and in violation of the law.

First, it is improper for HHS/CMS to unilaterally withhold or reduce payments owed to CoOportunity because this violates the Liquidation Order and impedes the fair and orderly administration of the liquidation. There is no ACA provision that authorizes Defendants to place a unilateral "hold" on funds owed to CoOportunity for an indefinite time period based on the mere possibility that Defendants may decide to net payments in order to collect a debt. Yet that is exactly what HHS/CMS has done by refusing to make *any* payment under Risk Corridor ($130 million). HHS/CMS continues to hold those funds for future set-off.

If HHS/CMS believed that reduction or withholding was warranted under the law, all HHS/CMS needed to do was notify the Polk County Court and request permission for the transaction. Instead, HHS/CMS has selectively engaged in self-help, with no notice to the Polk County District Court and minimal, mostly after-the-fact notice to Plaintiffs.

Even assuming there is a legal right to net or withhold payments, under any jurisdiction's laws, the netting should account for *all* mutual debits and credits subject to set-off rights.[1] The Government claims it may net payments under 45 C.F.R. § 156.1215 ("Netting Regulation"), promulgated under the ACA. Even assuming the Netting Regulation applies (versus Iowa law), the regulation requires that *all* debits and credits expressly identified in the regulation be accounted for in order to establish an issuer's debt. The Netting Regulation states:

> (b) Netting of payments and charges for later years. *In 2015 and later years, as part of its payment and collections process, HHS may net payments owed to issuers…against amounts due to the Federal government from the issuers…for* advance payments of the premium tax credit, advance payments of and reconciliation of cost-sharing reductions, payment of Federally-facilitated Exchange user fees, and risk adjustment, reinsurance, *and risk corridors payments and charges*.
>
> (c) Determination of debt. *Any amount owed to the Federal government by an issuer*…for advance payments of the premium tax credit, advance payments of and reconciliation of cost-sharing reductions, Federally-facilitated Exchange user fees, risk adjustment, reinsurance, *and risk corridors*, *after HHS nets amounts owed by the Federal Government under these programs*, *is a determination of a debt*.

45 C.F.R. § 156.1215(b) (emphasis added).

Plaintiffs have established that the ACA does not preempt the Iowa Insolvency Act, but even assuming the ACA preempts the Iowa Insolvency Act with respect to the federal Netting Regulation, it requires netting of payments for *all* of the following: "advance payments of the

[1] By its express terms, and in accordance with Iowa law in order for the federal solvency loan to be treated as surplus, the amounts owed under the federal solvency loan to CoOportunity are subordinate to all other creditors and may not be set off.

premium tax credit, advance payments of and reconciliation of cost-sharing reductions, payment of Federally-facilitated Exchange user fees, and risk adjustment, reinsurance, *and risk corridors payments* and charges." *Id.* (emphasis added). The Netting Regulation further provides that: "Any amount owed to the Federal government by an issuer…for advance payments of the premium tax credit, advance payments of and reconciliation of cost-sharing reductions, Federally-facilitated Exchange user fees, risk adjustment, reinsurance, *and risk corridors*, *after HHS nets amounts owed by the Federal Government under these programs, is a determination of a debt*." *Id.* (emphasis added).

Common law and other statutes addressing set-off similarly require reconciliation of *all* mutual debits and credits. For example, the federal bankruptcy code "authorizes the setoff of *all* mutual debts and credits, between the estate of a [debtor] and a creditor, and provides that *the account shall be stated and one debt set off against the other; and that only the balance shall be allowed and paid*." *Inter-State Nat'l Bank of Kansas City v. Luther*, 221 F.2d 382, 390 (10th Cir. 1955) (emphasis added); *see also Tyler v. Marine Midland Trust Co. of New York*, 128 F.2d 927, 928 (2nd Cir. 1942) (the Bankruptcy Act "allows setoff of *all* mutual debts and credits…."). Iowa law allows set-off, but only of mutual debits and credits, and any set-off must account for *all* debits and credits. *See* Iowa Code § 507C.30 (allowing setoff of "mutual debts or mutual credits" in which case "the balance only shall be allowed or paid").

Here, HHS/CMS has not considered amounts owed to CoOportunity under Risk Corridor ($130 million) in performing "netting" calculations or set-offs, which violates the very Netting Regulation that HHS/CMS has invoked to justify its self-help. HHS/CMS is picking and choosing which debits and credits it wants to "consider" when deciding what to set off and withhold from CoOportunity. Conveniently, HHS/CMS has decided to leave out of that equation

the $130 million it owes—by far the largest amount at issue for *either* side, and far in excess of any balance HHS/CMS even claims to be owed by CoOportunity ahead of other creditors. Of course, for any type of "set-off" to be fairly and accurately performed, all debits and credits subject to set-off right of both parties must be included in the calculation.[2]

To be sure, performing *any* set-off is a direct violation of the Liquidation Order and is not in accordance with law. But, further, the *manner* in which HHS/CMS is performing the set-off is, at the very least, arbitrary, capricious, and an abuse of discretion.

C. This Dispute Should Be Resolved In The Polk County District Court, But In Any Event, This Court Has Jurisdiction Over Plaintiffs' Request For Declaratory And Injunctive Relief.

The federal government's filing of a claim in the Liquidation Case obligates it to play by the rules of the liquidation. *See, e.g., Corcoran v. Hall & Co., Inc.*, 149 A.D.2d 165, 545 N.Y.S.2d 278, 282 (1989) ("it is well established that in filing a proof of claim in liquidation, a claimant submits itself to the jurisdiction of the liquidation court."); *Ito v. Inv'rs Equity Life Holding Co.*, 346 P.3d 118, 140 (Haw. 2015) (same). Because HHS refuses to play by the rules (in direct violation of law), Plaintiffs bring the present action pursuant to another express term of the Liquidation Order that authorizes Plaintiffs to "institute any necessary legal action in any state or federal forum seeking appropriate relief (such as the filing of a declaratory judgment action) to prohibit any set-off or other adverse action by any party which may claim to have a right of set-off against CoOportunity." *See* Liquidation Order, Ex. 1, ¶ 22.

[2] Consider a simple example. Tommy owes Frank $100 for a baseball ticket and $50 for dinner. Frank owes Tommy $20 for lunch. In HHS/CMS's view of the world, Tommy sends Frank an invoice for $30, telling him that he netted out the amount owed for the lunch, and that Frank should simply pay the rest (ignoring, of course, the largest expense at issue in any of the dealings).

Even though the federal government has participated in the liquidation and affirmatively sought monetary relief by submitting a proof of claim, the federal government insists that it is not bound by Iowa law, and is not subject to the authority and jurisdiction of the Iowa Court.

As an initial matter, whether the federal government must submit *its* claims against CoOportunity to the jurisdiction of the Iowa Court (rather than engaging in self-help in disregard of the Iowa Court's orders) turns solely on Congress' intent that Iowa law and, thus, Iowa courts should govern the liquidation of an Iowa ACA CO-OP. As discussed above, that intent is clear and express. Contrary to the argument Defendants make in their recently-filed Reply In Further Support Of A Motion For An Extension of Time (Doc. 16), Plaintiffs do not need to identify a waiver of sovereign immunity with respect to the Iowa Court because the doctrine of sovereign immunity applies only when a party asserts a claim *against* the United States, which CoOportunity has not done in the Iowa Court. *See, e.g.*, *Kaffenberger v. United States*, 314 F.3d 944, 950 (8th Cir. 2003) ("Sovereign immunity protects the United States *from being sued* unless Congress has expressly waived the government's immunity.") (emphasis added); *United States v. Kearns*, 177 F.3d 706, 709 (8th Cir. 1999) ("The United States is immune *from suit* except where Congress has waived that immunity.") (emphasis added). In any event, 42 U.S.C. § 10841(d) is sufficient to constitute such an express waiver, if required.

To the extent Defendants claim *this* Court lacks jurisdiction to order injunctive relief because the United States enjoys sovereign immunity, their arguments fail because Congress has waived sovereign immunity. To obtain relief against the federal government, a litigant must find an act of Congress that waives the government's immunity from suit. In a civil matter such as this, there are two potential avenues: (1) the Tucker Act, which allows claimants to bring suit against the federal government for money owed, but only in the Court of Federal Claims, 28

U.S.C. § 1491(a)(1); and (2) the Administrative Procedures Act ("APA"), which allows claimants to bring suit in a United States District Court (rather than the Court of Federal Claims) for redress of agency conduct that is illegal, arbitrary, or capricious, and that cannot be redressed through a simple money judgment, 5 U.S.C. §§ 701-706 and 28 U.S.C. § 1331.

This case falls within the District Court's jurisdiction under the APA. CoOportunity's Complaint seeks declaratory judgment and injunctive relief in relation to Defendants' ongoing conduct alleged to be illegal, contrary to statute, arbitrary and capricious. While the ultimate relief may entail a judgment that ultimately results in the federal government paying money (or foregoing improper set-off), the action is still properly in this Court because a money judgment will not provide full and adequate relief. Here, there is a specific need for declaratory and injunctive relief to regulate the ongoing, complex, and intertwined relationship between the parties.

In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the Supreme Court decided a similar case involving a complex and ongoing relationship between Massachusetts and federal agencies, and held that the District Court has jurisdiction under the APA. Massachusetts brought suit against HHS for HHS's refusal to reimburse the state for Medicaid expenditures, which HHS was going to effectuate by withholding funds from quarterly advances. The federal government challenged the District Court's jurisdiction, arguing that the Court of Federal Claims had exclusive jurisdiction under the Tucker Act. The Supreme Court rejected this argument, and held the District Court had APA jurisdiction. The Court explained that rather than seeking money damages to compensate for the harms sustained, the state was seeking "*to enforce the statutory mandate*, which happens to be one for the payment of money." *Id.* at 90 (emphasis added). So too here: Plaintiffs are seeking to enforce federal statutes and regulations that happen

to direct the payment of funds, but also to declare that the Iowa Liquidation Act will control this dispute and to enjoin Defendants from acting contrary to Iowa law.

The Court in *Bowen* also focused on the ongoing, intertwined, and complex relationship between the state and the federal agencies, and determined that a simple money judgment would not be an "adequate remedy." The Court explained that the federal Claims Court does not have the same power to grant equitable relief as United States District Courts. *Id.* at 905. Like Plaintiffs in this case, Massachusetts sought declaratory and injunctive relief regarding future payments under the ongoing Medicaid program. Because the Medicaid program (like the CO-OP program) is ongoing and a judgment in the case would require future cooperation between the parties, the Court was "not willing to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for prospective relief fashioned in the light of the rather complex ongoing relationship between the parties." *Id.*

Here, the Liquidators' claims arise out of and relate to the complex and ongoing relationship between CoOportunity, as a federal CO-OP under the ACA, HHS/CMS, state regulators, and the Iowa court overseeing the liquidation. As such, a basic money judgment simply will not be an adequate remedy. This is demonstrated by the statute creating the CO-OP program, 42 U.S.C. § 18042, which imposes federal regulation and oversight, while also requiring application of State law, including: (1) application of state law solvency requirements for insurers (42 U.S.C. § 18042(b)), (2) organization of CO-OPs "under State law" as nonprofit member corporations (*Id.* at 18042(c)(1)(A)); and (3) a mandate that all CO-OPs must "compl[y] with State insurance laws…including solvency and licensure requirements" (*id.* at § 18042(c)(5)).[3]

[3] The federal regulations for CO-OPs are similar, and illustrate the complex and intertwined relationship between HHS/CMS, the CO-OPs, state regulators, and federal and state law. *See, e.g.*, 45 C.F.R. §§ 156.500-520.

Similarly, several ACA programs illustrate the complex, intertwined, and ongoing relationship between the parties. For example, the ACA provides for payments under its "3R" programs (Reinsurance, Risk Adjustment, and Risk Corridor) as well as other payment programs that have occurred—and will continue to occur—on a rolling basis. These ACA programs require detailed data reporting by health insurance issuers, typically to HHS/CMS, with some regulatory oversight by HHS/CMS. In most cases, HHS/CMS acts as nothing more than a mere conduit of funds paid into HHS/CMS by issuers and then redistributed to issuers according to the statutory mandates and actuarial formulas.

Because the Liquidator and Special Deputy Liquidator are charged with marshalling the assets and timely paying creditors in a manner consistent with Iowa law (and the federal government has refused to comply with or recognize the authority of Iowa law), Plaintiffs need injunctive relief from the Court to regulate the parties' ongoing relationship. This injunctive relief will most assuredly include orders for the continued exchange of information and payments. The Court should therefore hold that it has jurisdiction over this dispute under the APA.

IV. There Is A Threat Of Irreparable Harm.

CoOportunity's likelihood of success on the merits "must be examined in the context of the relative injuries to the parties and the public." *Roudachevski v. All-Am. Care Centers, Inc.*, 648 F.3d 701, 706 (8th Cir. 2011). CoOportunity carries the burden to establish that it is likely to suffer irreparable harm in the absence of preliminary relief. *Winter*, 555 U.S. at 20. "A sufficient showing on this factor can be made, for example, by showing that the movant has no adequate remedy at law." *Branstad*, 118 F. Supp.2d at 942. Here, CoOportunity will suffer irreparable harm if the Court does not enter preliminary relief.

The illegal actions of HHS/CMS disrupt the orderly liquidation process that is supposed to be occurring in Polk County District Court, prejudicing other creditors and the ability of Plaintiffs to fulfill their liquidation duties. Courts in similar situations have found irreparable harm where a party's action threatened an orderly liquidation proceeding. For example, in *In re CD Liquidation Co.*, 462 B.R. 124 (Bankr. D. Del. 2011), an individual filed a lawsuit in another court asserting claims he alleged to be personal in nature and outside the purview of the liquidation proceeding. The court found otherwise, ruling that, if the claims were proper, they were to be asserted by the Liquidator. In enjoining the party's improper actions outside the bankruptcy proceeding, the court described the irreparable harm as follows:

> Likewise, the second element, irreparable harm, is satisfied both because Paladini is usurping the Liquidation Trustee's exclusive standing to assert claims for general harms, and because Paladini is violating the Bankruptcy Code's priority scheme for his benefit and to the detriment of the estate's other stakeholders. In addition, Paladini's improper lawsuit, if allowed to proceed, may give rise to inconsistent verdicts . . . .

Id. at 134-35 (citations omitted). So too here, where HHS/CMS is openly usurping the Iowa Code's priority scheme for its own benefit to the detriment of the other creditors. CoOportunity's Liquidator has an obligation to carry out the liquidation in accordance with Iowa law, and HHS/CMS is preventing him from doing so by unilaterally declaring its immunity from the Iowa liquidation process.

Second, HHS/CMS's improper set-off transactions and withholding of payments under the "administrative hold" continue today. In fact, HHS/CMS is due to make payments (or issue invoices) related to the ACA's Risk Adjustment and Reinsurance programs in July. As discussed, under the Risk Corridor program *alone*, HHS/CMS owes CoOportunity $130 million for 2014. Because HHS is paying only approximately 12.6% of 2014 Risk Corridor payments to applicable issuers, it plans to use the funds it *receives* via the Risk Corridor program for 2015 to

first pay the remaining 87.4% of 2014 payments due. If HHS/CMS follows its practice with respect to CoOportunity, however, it will improperly withhold or set-off these 2015 3R amounts, and CoOportunity will, again, receive nothing. HHS is not even setting CoOportunity's allocated funds aside, or placing them in any type of escrow until it can be determined whether their administrative actions are proper. Rather, they have and will use funds withheld from CoOportunity to pay *other issuers* and the IRS.[4]

Thus, it will be impossible to simply unwind HHS's improper agency actions at a later date if this Court determines they were, in fact, improper. This Court should issue a preliminary injunction to preserve the status quo as it existed before the challenged actions, and in a manner that would allow the Court to issue relief. *See Scott v. Benson*, 863 F. Supp.2d 836, 842 (N.D. Iowa 2012) ("The primary function of a preliminary injunction is to preserve the status quo until, upon final hearing, a court may grant full effective relief.") (citations omitted). It will be impossible for this Court to later order HHS/CMS to lawfully participate in the Iowa Liquidation Case if it is impossible to unwind the actions it has taken contrary to the Liquidation Order.

V. The Balance Of Harms Weighs In Favor Of Granting Preliminary Injunctive Relief.

The next *Dataphase*/*Winter* factor is whether the balance of equities tips in favor of preliminary injunctive relief. *Sak v. City of Aurelia, Iowa*, 832 F. Supp.2d 1026, 1046 (N.D. Iowa 2011). To balance the harms of a potential injunction, the Court "examines the harm of granting or denying the injunction upon both of the parties to the dispute and upon other interested parties, including the public, as well." *Branstad*, 118 F. Supp.2d at 942. "What must

[4] Plaintiffs have repeatedly asked HHS/CMS for relief in relation to anticipated Risk Adjustment charges for the 2015 policy year. CoOportunity had plans in effect for only the first two months of 2015. CoOportunity received $42 million in premium for those months and incurred claims during that period totaled $46 million. Preliminary reports project that CoOportunity will be assessed approximately $21 million, or 50% of its 2015 premium for Risk Adjustment. This is unprecedented and raises obvious red flags of anomalous results. If CoOportunity does not obtain relief, this would be yet another example of agency conduct that is arbitrary, capricious, and an abuse of discretion.

be weighed is the threat to each of the parties' rights and economic interests that would result from either granting or denying the preliminary injunction." *Id.*

Here, there is no harm to HHS/CMS if this injunction is entered. Plaintiffs are not seeking an injunction to determine whether HHS/CMS has the right or ability to set off funds owed. Plaintiffs are not seeking a definitive determination of monies to be paid. All Plaintiffs are asking is that HHS/CMS follow Iowa law and the orders of the court in the Liquidation Case (or this Court to the extent this Court deems it appropriate). If HHS/CMS believes that it has sufficient legal grounds to set off or withhold payments, it has the full ability to seek an order confirming the same. A preliminary injunction does not foreclose the Federal government's ability to seek any form of recourse it believes should be available.

On the other hand, several parties—namely, the other creditors—will be seriously prejudiced if this Court decides not to enter an injunction. HHS/CMS is the only creditor who is engaging in self-help measures to exclude assets from the liquidation estate in direct violation of the Liquidation Order. These are assets that should be processed in an orderly fashion through the state-court liquidation. Congress recognized that fact when the ACA was enacted. HHS/CMS did as well when they adopted the attendant regulations, when they entered into loan agreements, and when they corresponded with CoOportunity about the default. All of this is confirmed in writing. Only when it came time to participate in the liquidation itself did the government change course and decide it was above the law that it had previously put in place. The other liquidation creditors should not be prejudiced any longer by HHS/CMS's illegal self-help tactics.

VI. The Issuance Of An Injunction Is In The Public Interest.

The last *Dataphase*/*Winter* factor requires consideration of whether an injunction is in the public interest. *Sak*, 832 F. Supp.2d at 1046. "The Eighth Circuit Court of Appeals has recognized that 'the 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." *Id.* (quoting *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008)).

As discussed, Iowa places policyholder-level claims above all other creditors. By engaging in illegal self-help remedies, HHS/CMS is upending those priority rules and placing itself ahead of all other creditors. These priority laws are taken from the "Rehabilitation and Liquidation Model Act." As the Supreme Court of Iowa found, these were originally based upon the Wisconsin Statute, which succinctly described the purpose of the priority rules:

> According to the comments accompanying section 645.68 of the Wisconsin act, governing priority of distribution, the system of priority was chosen "based on the *relative social and economic importance of the claims* likely to be asserted against an insurer . . . to *carry out sound public policy* by minimizing the damage done to the insured community when an insurer fails."

State ex rel. Hager v. Iowa Nat. Mut. Ins. Co., 430 N.W.2d 420, 422-23 (Iowa 1988). Therefore, it is unquestionably in the public interest for this injunction to issue, and for the liquidation priority statute to be given its full effect. Allowing HHS/CMS to subvert this process based solely on its own interpretation of its available remedies is dangerous and is not in the public interest.

Conclusion

For the reasons set forth in their Motion and this Brief, Plaintiffs respectfully request that the Court grant all relief deemed just and equitable, including a preliminary injunction that:

- Requires that the parties apply Iowa state law in order to resolve their respective rights and obligations in the liquidation of CoOportunity;

- Requires Defendants to comply with the Polk County District Court's Liquidation Order and all other orders and rulings in the Liquidation Case;

- Enjoins Defendants from engaging in further self-help conduct to recoup claimed debts of CoOportunity, including, but not limited to, unilateral withholding of money, set-off, or other reduction of payment due CoOportunity absent permission from this Court (or other court of competent jurisdiction) or agreement of the parties; and

- Requires that the parties negotiate and reach agreement within the next 10 days on an arrangement that will preserve the funds in dispute until resolution of this suit, e.g., through payment into court, an escrow agreement, or other similar arrangement (if the parties are unable to agree, by default the money in dispute will be paid into Court).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on June 10, 2016, I electronically filed the foregoing with the Clerk of Court using the ECF system, causing electronic service on all counsel who have entered an appearance, and I also served the foregoing by email on the following counsel of record for Defendants:

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