UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

MAXMED HEALTHCARE, INC.,	§	No. SA:14–CV–988–DAE
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	
SYLVIA MATHEWS BURWELL, Secretary, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,	§	
	§	
Defendant.	§	

ORDER DENYING WITHOUT PREJUDICE PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Before the Court is a Motion for Preliminary Injunction filed by Plaintiff MaxMed Healthcare, Inc. ("Plaintiff") (Dkt. # 7). On March 23, 2015, the Court heard oral argument on the Motion. Joanna A. Hojdus, Esq., appeared at the hearing on behalf of Plaintiff; Mary F. Kruger, Esq., appeared at the hearing on behalf of Defendant Sylvia Mathews Burwell, Secretary, United States Department of Health and Human Services ("Defendant" or "HHS"). After careful consideration of the memoranda in support of and in opposition to the motion, and in light of the parties' arguments at the hearing, the Court, for the reasons that follow, **DENIES WITHOUT PREJUDICE** Plaintiff's Motion for Preliminary Injunction.

BACKGROUND

The present action is an appeal from the final administrative decision of the Departmental Appeals Board Medicare Appeals Council ("MAC"), which was issued on September 18, 2014. ("Compl.," Dkt. # 1 at 1.) Plaintiff is a state-licensed and Medicare-certified home health care provider located in San Antonio, Texas. (Id. at 2.)

On July 11, 2011, Medicare Administrative Contractor Palmetto GBA, L.L.C. ("Palmetto") notified Plaintiff of a $773,967.00 Medicare overpayment based upon a post-pay investigation and statistical sampling conducted by Health Integrity in 2010. (Id. at 3–4.) Health Integrity reviewed 40 claims, and denied payment as to 39 of those claims. (Id. at 4.) Plaintiff appealed Health Integrity's determination as to the claims and the extrapolation of overpayment to Palmetto. (Id.) On appeal, Palmetto confirmed Health Integrity's findings, denying payment on the 39 claims and upholding the extrapolation of overpayment. (Id.)

On May 1, 2012, Plaintiff appealed Palmetto's decision to the Medicare Qualified Independent Contractor ("QIC"), Maximus Federal Services, which upheld Palmetto's decision. (Id.) On September 26, 2012, Plaintiff appealed the QIC's decision to the Administrative Law Judge ("ALJ") at the Office of Medicare Hearings and Appeals ("OMHA"). (Id.) On April 24, 2014,

the ALJ issued a decision finding one claim in favor of Plaintiff, but concluding that the extrapolation methodology used by Health Integrity deviated from Medicare requirements and directed Health Integrity to correct the statistical sampling and recalculate a new overpayment extrapolation. (Id. at 4–5.)

On June 20, 2014, Plaintiff submitted a request for MAC review of the remaining claims found unfavorable by the ALJ. (Id. at 5.) Shortly thereafter, the Administrative Qualified Independent Contractor ("AdQIC") requested that MAC review the ALJ's decision regarding the overpayment extrapolation. (Id.) On July 7, 2014, Plaintiff submitted objections to the AdQIC's referral of the ALJ decision to the MAC. (Id. at 6.) On September 18, 2014, the MAC issued a decision reversing the ALJ's decision in part, finding that the statistical sampling and overpayment extrapolation were valid. (Id., Ex. 2 at 4.)

On November 7, 2014, Plaintiff filed its Complaint for Judicial Review in this Court, raising eight grounds for appeal and requesting that the Court set aside the MAC's final decision, prohibit HHS from prematurely recouping payments to reduce the alleged overpayment, and issue exemplary damages and attorney's fees and costs. (Id. at 11–12.)

On March 17, 2015, Plaintiff filed an Application for Ex Parte Temporary Restraining Order, seeking the issuance of a temporary restraining order to enjoin Defendant from collecting the disputed overpayment by

withholding Plaintiff's Medicare payments on a monthly basis. (Dkt. # 7 at 1.) Plaintiff claims that the proposed recoupment plan would force Plaintiff to terminate all 24 of its employees, make emergency transfers of 109 patients, and close operations. (Id.)

On the same day, this Court converted the Application for Ex Parte Temporary Restraining Order into a Motion for Preliminary Injunction and ordered Defendant to respond to the Motion. (Dkt. # 8 at 1–2.) On March 19, 2015, Defendant filed its Response. (Dkt. # 10.)

To date, $599,375.03 has been applied to the overpayment principal and interest, leaving a $420,266.41 balance consisting of both principal and interest. (Id. at 3.)

LEGAL STANDARD

To secure a preliminary injunction, a plaintiff must demonstrate "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of the injunction will not disserve the public interest." Janvey v. Alguire, 647 F.3d 585, 595 (5th Cir. 2011) (quoting Bynum v. Landreth, 566 F.3d 442, 445 (5th Cir. 2009)). Injunctive relief is "an extraordinary and drastic remedy"; it should only be granted when the movant has clearly carried the

burden of persuasion. Anderson v. Jackson, 556 F.3d 351, 360 (5th Cir. 2009) (internal quotation marks omitted) (quoting Holland Am. Ins. Co. v. Succession of Roy, 777 F.2d 992, 997 (5th Cir. 1985)).

DISCUSSION

Plaintiff asks the Court to enjoin Defendant from withholding future Medicare reimbursement payments to recoup the alleged outstanding Medicare overpayments. (Dkt. # 7 at 1–2.) To obtain a temporary restraining order, Plaintiff must show, among other things, that there is a substantial threat that irreparable harm will result if the injunction is not granted. In order to establish that there is a substantial threat of irreparable injury, Plaintiff must show "a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." Humana, Inc. v. Avram A. Jacobson, M.D., P.A., 804 F.2d 1390, 1394 (5th Cir. 1986).

Plaintiff contends that it will suffer imminent and irreparable injury if Defendant is not immediately enjoined from imposing the threatened recoupment because it will be forced to terminate all 24 of its employees, make emergency transfers of 109 patients, and shut down. (Dkt. # 7 at 14.) Plaintiff contends that such a shutdown will endanger the health and safety of its 109 beneficiaries and will prevent Plaintiff from ever repaying the overpayment. (Id.) Defendant counters that Plaintiff cannot show irreparable harm because Plaintiff's debt can be

satisfied through an extended repayment program and because economic harm is not the type of irreparable harm that supports injunctive relief. (Dkt. # 10 at 8–9.) Defendant further argues that Plaintiff's focus on patients is misplaced: because Plaintiff does not operate a physical facility and instead provides care directly in beneficiaries' homes, the transfer of patients means only that the patients would receive a new home health provider and not that they would be moved or disrupted. (Id. at 9.)

In the Medicare withholding context, going out of business can be sufficient evidence of irreparable injury.[1] See, e.g., Life Source Enters., Inc. v. Shalala, No. SA-00-CA-902, 2000 WL 33348793, at *5–6 (W.D. Tex. Nov. 9, 2000) (citing Midwest Family Clinic, Inc. v. Shalala, 998 F. Supp. 763, 771–72

[1] The Court finds distinguishable the two cases that Defendant cites in support of the proposition that Plaintiff's economic impact is not "irreparable harm" of the type supporting relief. In Griego v. Leavitt, No. 3:07-CV-1708-D, 2008 WL 2200052, at *11–12 (N.D. Tex. 2008), the court found the plaintiff's claims of the irreparable injury that his clinic would shut down to be unpersuasive. Noting that the plaintiff had not properly exhausted his claim, the court found that any recoupment made before the administrative process had been properly exhausted would be a "past injury" that is inapplicable to the irreparable injury consideration for the purposes of a preliminary injunction. Id. In the instant case, Plaintiff has exhausted the administrative process, rendering the reasoning set forth in Griego is inapplicable.

In Affiliated Professional Home Health Care Agency v. Shalala, 164 F.3d 282, 286 (5th Cir. 2009), while commenting on irreparable harm, the court found it unreasonable to conclude that the plaintiff's patients would be deprived of adequate home-based care if the plaintiff went out of business. Although Plaintiff makes this argument in its motion, impact on patients is an injury separate from the harm of going out of business.

(E.D. Michigan 1998)). Here, Plaintiff has proffered evidence in the form of an affidavit and a financial statement that the threatened withholding scheme would force it to shut down operations.

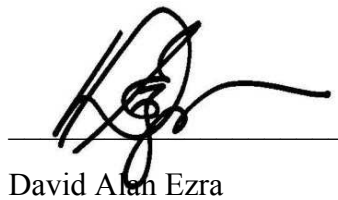
However, Plaintiff has failed to explain why the injury cannot be mitigated by an extended repayment plan, which is the standard remedy in these circumstances. Indeed, Defendant presents evidence that Plaintiff has reached out to discuss reinstating an extended repayment plan and represents that negotiation of an extended repayment plan is possible. Accordingly, the Court finds that there is no evidence of irreparable injury at this time, when the period for negotiating an extended repayment plan remains open and Defendant remains open to negotiation. Because all four elements must be present to obtain a preliminary injunction, the lack of irreparable harm is fatal to Plaintiff's claim and the Court **DENIES WITHOUT PREJUDICE** Plaintiff's Motion for a Preliminary Injunction.

CONCLUSION

For the reasons stated above, the Court hereby **DENIES WITHOUT PREJUDICE** Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction.

IT IS SO ORDERED.

DATED: San Antonio, Texas, March 23, 2015.



David Alan Ezra
Senior United States Distict Judge