IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, *et al.*,	)	
Plaintiffs,	)	Civ. No. 13-623 (PLF)
v.	)	
KATHLEEN SEBELIUS, *et al.*,	)	**JOINT STATUS REPORT**
Defendants.	)	

PARTIES' JOINT STATUS REPORT
ON SUMMARY JUDGMENT BRIEFING SCHEDULE

Per this Court's order of October 22, 2013, counsel for Plaintiffs and counsel for Defendants have conferred regarding an expedited briefing schedule for the parties' cross-motions for summary judgment. Counsel could not reach agreement. Accordingly, they have reproduced each side's position and proposed schedule below, for the Court's information in advance of the scheduled conference call with Chambers on Friday, October 25.

I. PLAINTIFFS' POSITION

As the Court has observed, time is of the essence in this matter, because Plaintiffs' suit raises serious questions about the legality of billions of dollars in federal subsidies that will begin to flow on January 1, 2014. Millions of individuals will be deciding, over the next few months, whether to purchase insurance on federal Exchanges. Moreover, thousands of employers are in the process of deciding whether to sponsor coverage for their employees or instead free them to obtain subsidized coverage on Exchanges. Whether subsidies are available on these Exchanges will be a critical factor in these decisions. Hence, this Court took the unusual step of resolving the Government's motion to dismiss in an oral opinion just a day after it was argued.

Expedition is not only needed here, but also perfectly practicable. Each of the issues not already resolved by the Court has already been briefed by the parties in connection with their motions to dismiss and for a preliminary injunction; the forthcoming briefs will elaborate and perhaps delve deeper into some of these issues, but should not require extensive additional work. Moreover, Defendants' counsel has also briefed many of these same issues in connection with similar challenges raised in *Oklahoma ex rel. Pruitt v. Sebelius*, No. CIV-11-30 (E.D. Okla.) (motion to dismiss briefed and decided), and *King v. Sebelius*, No. 3:13-cv-630 (E.D. Va.) (motion for preliminary injunction briefed).

Plaintiffs therefore respectfully propose a briefing schedule that would allow the case to be fully and finally submitted—including any oral argument that the Court may request—before the Thanksgiving holiday. This would allow a decision on the merits to be issued with sufficient time for the Court of Appeals to at least *consider* whether to stay this Court's order (if it vacates the regulation) or to impose its own interim injunction (if this Court upholds the rule), before the IRS Rule begins to take effect and the challenged subsidies begin to flow. Both sides—and the country at large—would benefit from such a schedule.[1]

In particular, Plaintiffs propose that the Government file its combined opposition to Plaintiffs' summary judgment motion and cross-motion for summary judgment by **November 1, 2013**, which is 10 days after the Court's denial of the motion to dismiss (reduced from the 14

[1] As discussed at the hearings earlier this week, the individual plaintiffs in this case have until February 15, 2014, to decide whether to purchase comprehensive coverage for 2014 or risk incurring a penalty. Recent news reports have claimed that the applicable date is instead March 31, 2014, but that is inconsistent with the relevant statute and regulation, which require coverage for a month to be purchased by the 15th of the prior month and exempt only short coverage gaps that are less than three months. *See* 45 C.F.R. § 155.410(c)(1); 26 U.S.C. § 5000A(e)(4). Either way, however, a ruling by January 1 is required here. *First*, as noted above, the individual plaintiffs need a ruling by that date, to allow an opportunity for the D.C. Circuit to act by February 15, 2014. *Second*, January 1 is the date when the challenged subsidies will begin to (irrevocably) flow, and by which millions of individuals and thousands of employers will have (irrevocably) committed themselves to decisions concerning Exchange coverage based on the potentially false premise that subsidies will be available in federal Exchanges.

days that the Court had initially ordered). Plaintiffs would then file a combined opposition-reply within 6 days, by **November 7, 2013**. The Government could then file a final reply within 6 days, by **November 13, 2013**. Oral argument, if requested by the Court, could be held during the week of **November 18**. (Plaintiffs would waive oral argument if holding such argument would delay submission of the case until December.)

In the alternative, the Government could have slightly longer to file its first brief (*e.g.*, by **November 5, 2013**), so long as all briefing was still complete by November 13. Under this scenario, Plaintiffs would file their combined opposition-reply within 3 days, by **November 8, 2013**; and the Government's reply would be due within 5 days, by **November 13, 2013.**

The Government's proposed briefing schedule, rather than being *expedited* as this Court expressed, is actually *longer than the ordinary schedule under the Local Rules*. While this Court earlier ordered the Government to respond to Plaintiffs' summary judgment motion (which has been pending for nearly five months, since early June) within *two* weeks of any denial of the Government's motion to dismiss (Dkt. No. 40)—which is consistent with the ordinary response time for such a motion (*see* LCvR 7(b))—the Government has proposed not filing a response for *four* weeks. Moreover, while the ordinary time for a reply brief is *one* week (*see* LCvR 7(d)), the Government is proposing that it be given *two* weeks for its final reply brief (which will be its *third* brief addressing the merits and its *fifth* addressing the same jurisdictional issues). To be blunt, this is not an expedited schedule; it is a delayed schedule. And it appears to be designed specifically to ensure that this Court will not be able to issue its decision on the merits before January 1, 2014, when billions of taxpayer dollars will begin to flow from the federal Treasury to the insurers serving the federal Exchanges. This Court should not countenance such manipulation on a case of this magnitude.

II. DEFENDANTS' POSITION

The defendants propose the following schedule with respect to summary judgment briefing in this matter:

1. The parties stipulate that an answer to the complaint need not be filed in this action;

2. The defendants' cross-motion for summary judgment, combined with their opposition to the plaintiffs' summary judgment motion, shall be filed on **November 18, 2013**;

3. The plaintiffs' combined opposition to the defendants' cross-motion and reply in support of their motion shall be filed on **December 2, 2013**;

4. The defendants' reply in support of their cross-motion shall be filed on **December 16, 2013**; and

5. If the court wishes to hold oral argument with respect to the cross-motions, the defendants would respectfully propose that argument be held during the **week of January 13, 2014**.

The defendants respectfully submit that this expedited schedule would comport with the Court's stated desire to issue a ruling in this matter on or before the date on which the plaintiff, David Klemencic, faces potential liability under the minimum coverage provision, 26 U.S.C. § 5000A. The enrollment period for coverage through an Exchange for 2014 is open until March 31, 2014. 45 C.F.R. § 155.410(b). The Administration is preparing guidance that will clarify that a taxpayer who enrolls in coverage through an Exchange by the end of the open enrollment period for 2014, *i.e.*, March 31, 2014, will not face liability under the minimum coverage provision for the months preceding that enrollment in coverage. Sandhya Somashekhar, *et al*., *Deadline Extended for Health Coverage*, Washington Post A1 (Oct. 24, 2013). The defendants' proposed schedule, then, contemplates that this Court could hold argument more than two

months before Mr. Klemencic potentially faces any Section 5000A liability. (Mr. Klemencic's potential liability for a failure to maintain qualifying coverage for the month of March, in any event, would have amounted only to $8.33 for the month, given his allegations of his projected income.)

In order to permit expedited consideration of this matter, the defendants agree to forgo jurisdictional discovery that otherwise could be sought with respect to the plaintiffs. As noted above, the parties have also agreed to forgo the filing of an answer in this action. The defendants, however, cannot agree to any further expedition of the briefing schedule. This Court has requested further briefing on summary judgment with respect to particular issues that it has identified. *See* Order (ECF 42) at 1-2. The defendants would require until November 18 to prepare a brief in compliance with the Court's request for fuller briefing, and to submit that brief for review within the Department of Justice and the defendant agencies.

Moreover, plaintiffs' counsel in this action have brought a second action challenging 26 C.F.R. § 1.36B-1(k). *See David King, et al. v. Sebelius*, No. 3:13-cv-00630-JRS (E.D. Va.). Counsel for the defendants is required to appear for argument on the plaintiffs' preliminary injunction motion in the *King* case on October 31, 2013, and the defendants' response to the complaint in that action is due to be filed on November 15, 2013. Thus, because plaintiffs' counsel have chosen to proceed in a second forum, counsel for the defendants faces significant scheduling constraints that would prevent the filing of a brief in this action earlier than November 18.

Although the plaintiffs have asserted a need for an earlier decision in this action, this Court has already determined that the plaintiffs do not face any likelihood of irreparable harm in the absence of emergency relief. Accordingly, this Court has denied the plaintiffs' motion for a

preliminary injunction. *See* Order (ECF 43) at 1. The plaintiffs express a desire to present their arguments to the court of appeals. They already have a vehicle to do so, however. This Court's order denying the preliminary injunction motion is an appealable order, *see* 28 U.S.C. § 1292(a)(1), and so the plaintiffs may already pursue an appeal of that order if they desire to proceed now in the court of appeals.

Respectfully submitted,

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