IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. Scott Pruitt, in his official capacity as Attorney General of Oklahoma,	)	
Plaintiff,	)	
v.	)	**No. 6:11-cv-00030-RAW**
KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; and NEAL S. WOLIN, in his official capacity as Acting Secretary of the United States Department of the Treasury,	)	
Defendants.	)	

DEFENDANTS' SUR-REPLY MEMORANDUM
IN OPPOSITION TO MOTION TO INTERVENE

Introduction

A group of Texas businesses has moved to intervene in this action, asking this Court to hold that their employees (who are all Texas residents) are not entitled to federal tax credits under the Affordable Care Act, and that consequently (under their theory) the businesses may not be subjected to a federal tax penalty for failure to provide adequate coverage to those employees. These businesses – GC Restaurants SA, LLC; Old England's Lion & Rose, LTD; Old England's Lion & Rose at Castle Hills, LTD; Old England's Lion & Rose at Sonterra, LTD; Old England's Lion & Rose Forum, LLC; and Old England's Lion & Rose at Westlake, LLC ("movants") – cannot demonstrate an independent basis for jurisdiction and venue in order to proceed in this Court. In addition, because the movants seek to extinguish the rights of their employees to the federal tax credits, the complaint-in-intervention cannot proceed in the absence of these parties. The motion to intervene accordingly should be denied.

Discussion

I. The Motion to Intervene Should Be Denied Because the Complaint-in-Intervention Cannot Survive in this Court as a Separate Action

A. The Complaint-in-Intervention Cannot Cure the Jurisdictional Defects in the Original Plaintiff's Complaint

As the defendants have explained in their motion to dismiss, this Court lacks jurisdiction over the complaint of the original plaintiff, the State of Oklahoma. Oklahoma's complaint pleads only a disagreement between the state and the federal government as to the proper interpretation of federal law, and it does not allege that this disagreement affects the state government itself in any way. The mere fact that Oklahoma and the federal government disagree in their reading of federal law does not give the state standing, for "a generalized grievance that the government is not acting in a way in which the State maintains is in accordance with federal laws is insufficient to demonstrate standing." *Wyoming v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992) (internal quotation and alterations omitted). Moreover, Oklahoma cannot claim standing to challenge the possibility that a tax assessment might be made against it in its capacity as a large employer. Oklahoma almost certainly offers adequate coverage to its state employees, and thus can offer only conjecture that it might be subject to an assessment under 26 U.S.C. § 4980H at some future date. "[S]tanding is not conferred by conjecture or speculation about future [events]." *Schultz v. Thorne*, 415 F.3d 1128, 1135 (10th Cir. 2005). In addition, Oklahoma's suit is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a), which prohibits pre-enforcement challenges to the assessment and collection of federal taxes, such as the large employer tax penalty at issue in this case.

The movants, accordingly, cannot intervene in a case where jurisdiction is lacking over the original plaintiff's complaint. The movants apparently do not dispute this principle, but, for

its part, Oklahoma contends that it does not matter if it lacks standing in this action, as that defect would be cured if the movants were allowed into the case. ECF 52 at 2. This argument flies in the face of long-settled case law, which holds that jurisdiction over the original plaintiff's complaint must first be determined, and the case must be dismissed if jurisdiction is lacking, before intervention is addressed. *See United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 163-64 (1911); *see City of Colorado Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1081 (10th Cir. 2009) (there must be "a justiciable case or controversy at the point at which intervention is sought" (internal quotation omitted)). "Indeed, this rule is so deeply entrenched in our jurisprudence that it is an axiomatic principle of federal jurisdiction in every circuit to have addressed the question." *Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living*, 675 F.3d 149, 160-61 (2d Cir. 2012) (collecting cases).

This Court must accordingly address the question of jurisdiction over Oklahoma's complaint, and must decide whether a live case exists here before turning to the motion to intervene. Because there is no jurisdiction over the original plaintiff's complaint, "intervention will not be permitted to breathe life into a 'nonexistent' law suit." *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965).

B. The Complaint-in-Intervention Cannot Survive in this Court as a Separate Action

The movants correctly note that, even where the underlying complaint is dismissed for lack of jurisdiction, a court may exercise its "'discretion to treat pleadings of an intervenor as a separate action to adjudicate claims raised by the intervenor.'" ECF 54 at 5, quoting *Miller & Miller Auctioneers, Inc. v. G.W. Murphy Indus., Inc.*, 472 F.2d 893, 895 (10th Cir. 1973). But to survive as a separate action in this Court, the intervenors' complaint must demonstrate an independent basis for jurisdiction and venue. The complaint-in-intervention may be entertained

here only "if it satisfies by itself the requirements of jurisdiction and venue." 7C C. Wright, A. Miller, & M.K. Kane, *Federal Practice and Procedure* § 1918, at 605-06 (3d ed. 2007).

The movants fail entirely to address this point. And they also fail to make any attempt to show that venue is proper over their complaint, other than to reason that "consideration of venue [is] premature" because venue objections might be waived. ECF 54 at 6. If any clarification is needed, the defendants do not waive their objection of lack of venue with respect to the proposed complaint-in intervention.

In any event, the movants would certainly fail in any attempt to justify bringing suit in this venue. Neither the movants nor the defendants reside in this district, and – given that neither the movants nor their employees have any connection with Oklahoma – no events or omissions giving rise to their asserted claim have occurred here. *See* 28 U.S.C. § 1391(e). *See also Employers Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1166 (10th Cir. 2010) (for purpose of venue, acts or omission must have a "close nexus" to the alleged claims). Thus, there is no basis for venue in this Court under 28 U.S.C. § 1391(e), and the motion to intervene should be denied for this reason alone.[1]

Jurisdiction is lacking over the complaint-in-intervention, as the movants seek relief that is barred by the Anti-Injunction Act. Their purpose in bringing suit is to ensure that the large employer tax penalty, 26 U.S.C. § 4980H, may not be assessed or collected against them. As the relief that they seek "would necessarily preclude" the Treasury Department from assessing or

[1] Indeed, this is fatal to the motion to intervene, whether or not Oklahoma's suit is dismissed. The movants assert that venue is proper in an action against federal government officials if any one plaintiff can satisfy the requirements of 28 U.S.C. § 1391(e). ECF 54 at 7 n.2. But this rule does not apply to parties seeking to join in an action that has already commenced; Section 1391(e) expressly provides that any such joinder must be made "in accordance with . . . such other venue requirements" as otherwise would be applicable. 28 U.S.C. § 1391(e)(1).

collecting a tax, the AIA applies to their claim. *Bob Jones Univ. v. Simon*, 416 U.S. 725, 732 (1974). The movants argue that they seek to enjoin enforcement of a Treasury regulation, not to directly restrain the assessment or collection of a particular tax. ECF 54 at 4. But the same argument was raised and rejected in *Bob Jones*; it did not matter that the challenge there was to the revocation of an IRS ruling letter, rather than directly to the application of a particular assessment of tax. Instead, the AIA applied because the relief that was sought would preclude the later assessment of tax against the plaintiff. *See id.*; *see also Alexander v. Americans United, Inc.*, 416 U.S. 752, 760-61 (1974); *Debt Buyers' Ass'n v. Snow*, 481 F. Supp. 2d 1, 9 (D.D.C. 2006) (AIA barred pre-enforcement challenge to Treasury regulation).

Thus, the movants must show that jurisdiction and venue is proper over their proposed complaint-in-intervention in order to proceed in this Court. They can make neither showing, and the motion to intervene should be denied.

II. The Motion to Intervene Should Be Denied Because Indispensable Parties Are Absent from This Forum

The motion to intervene fails for an additional reason. The movants' employees are necessary and indispensable parties to this proceeding, as the movants' claim for relief turns on their assertion that those employees' rights to federal tax credits under the Affordable Care Act should be extinguished. Because those employees are necessary parties, cannot be feasibly joined here, and are indispensable to the movants' suit, the movants should not be permitted to proceed in this Court. *See Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1278 (10th Cir. 2012).

The employees are necessary parties here because "the court cannot accord complete relief" to the movants in their absence. Fed. R. Civ. P. 19(a)(1)(A). The movants object that relief can run against the federal government alone. ECF 54 at 8. This is incorrect. Assuming

that the movants do not offer adequate coverage to their full-time employees, their liability for the large employer tax penalty could be triggered if any of their full-time employees receives the 26 U.S.C. § 36B tax credit for the purchase of insurance on an exchange. *See* 26 U.S.C. § 4980H(a)(2), (b)(1). This is why, as the movants themselves present their claim for relief, they seek to prevent the application of the premium tax credits and not only the large employer tax penalty. *See* ECF 44-1 at 18. And if the employees are not bound by a judgment here, there is no reason that one or more of them could not later bring their own action to recover premium tax credits; if they receive those credits, the large employer tax penalty would then run against the movants as a matter of law (assuming that the other conditions for the imposition of the tax penalty are met). *See* 26 U.S.C. § 4980H(a)(2), (b)(1).[2]

In addition, the employees are necessary parties because they "claim[] an interest relating to the subject of the action," and the disposition of this action may "as a practical matter impair or impede the persons' ability to protect the interest," and may "leave [the federal government] subject to a substantial risk of incurring . . . inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1)(B). The movants object that Rule 19(a)(1)(B) does not apply because no employee has appeared here to "claim" an interest in the action. ECF 54 at 9. But this turns the necessary parties inquiry on its head. The absent party need not appear to defend its interests; the point of Rule 19 is to protect parties who do have an interest, but cannot defend that interest because they are absent. And there can be no dispute that the employees have a significant

[2] Oklahoma protests that the defendants have not objected to the absence of its state employees from the action. ECF 52 at 4 n.7. But Oklahoma and the movants do not stand in the same posture. Oklahoma offers coverage to its employees that almost certainly would be deemed to be adequate for the purposes of 26 U.S.C. § 4980H. It is therefore unlikely that there are any Oklahoma state employees who could be eligible for premium tax credits under 26 U.S.C. § 36B, but who would stand to lose that eligibility in this suit. The movants, in contrast, allege that they offer no health coverage to their employees. Their employees, then, do have a direct interest in the premium tax credits, which the movants seek to extinguish here.

interest in a claim to premium tax credits that would be worth on average $5,000 per person annually. Nor can there be a dispute that the movants seek relief that places the federal government at risk of inconsistent obligations as between the movants and their employees.

There is also no dispute that the employees cannot be joined in this action, as they are Texas residents with no connection to this district. The movants thus do not dispute that personal jurisdiction is lacking over the employees. *See, e.g.*, *Intercon, Inc. v. Bell Atl. Internet Solutions, Inc.*, 205 F.3d 1244, 1247 (10th Cir. 2000).

Last, the employees are so important to the movants' complaint-in-intervention that the action cannot in equity and good conscience proceed in their absence, and they are therefore indispensable parties whose absence requires the denial of the motion to intervene. As explained above, "a judgment rendered in the [employees'] absence might be prejudicial" to them. *Enter. Mgt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 n.4 (10th Cir. 1989). The defendants explained in their prior brief that each of the factors under Rule 19(b) weighs in favor of a finding that the employees are indispensable. ECF 46 at 8-9. The movants do not dispute any of these factors, other than to deny that the employees are necessary parties here. But, as noted, under their own theory of the case, the movants must extinguish the employees' eligibility for premium tax credits in order to avoid the assessment or collection of the large employer tax penalty. Because the movants could not obtain that relief without the participation of the employees, and because those employees cannot be joined here, the complaint-in-intervention may not proceed.

The movants also argue that this case falls under the "public rights" exception to Rule 19. ECF 54 at 10. Under this exception, a suit seeking to vindicate rights that belong to the public at large – for example, a suit seeking to ensure compliance with environmental protection statutes –

would not require the participation of every person that might be affected by the litigation. *See Northern Arapaho Tribe*, 697 F.3d at 1280. This exception does not apply, however, where the complaint seeks relief that would impose burdens on an identifiable and discrete set of absent parties. "[I]t is not within the power of any tribunal to make binding adjudication of the rights in personam of parties not brought before it by due process of law." *National Licorice Co. v. NLRB*, 309 U.S. 350, 362 (1940). Because the movants' claim depends upon the adjudication of its employees' eligibility for benefits under federal law, and those persons are absent here, this case does not fall within the public rights exception.

* * *

At all events, this Court should exercise its discretion to deny the motion for permissive intervention. As the defendants have explained, there are numerous reasons that this Court should deny the movants' request to proceed in a forum to which they have no connection. ECF 46 at 9-10. The movants do not attempt to argue that this Court provides a preferable forum for the litigation of their claims. Indeed, the movants do not attempt to explain at all why they have chosen to proceed in this Court. They instead argue, without explanation, that the Court may not consider whether another forum would be preferable when it decides whether or not to grant permissive intervention. ECF 54 at 2 n.1. But it is settled that a court can, and should, address whether other forums are more suitable for a proposed intervenor's claims, assuming that the intervenor would not suffer prejudice if it did not proceed in the underlying action. *See CFTC v. Heritage Capital Advisory Servs., Ltd.*, 736 F.2d 384, 386-87 (7th Cir. 1984). The movants can identify no prejudice that they would suffer if they could not proceed in this Court; once again, the movants have no connection to this district at all. Permissive intervention accordingly should be denied.

CONCLUSION

For the reasons set forth above, the motion to intervene should be denied.

DATED this 8th day of February, 2013.

Respectfully submitted,

STUART F. DELERY
Principal Deputy Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

MARK F. GREEN
United States Attorney

SUSAN S. BRANDON
Assistant United States Attorney

s/ Joel McElvain
JENNIFER D. RICKETTS
Director
SHEILA M. LIEBER
Deputy Director
JOEL McELVAIN (D.C. Bar #448431)
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Phone: (202) 514-2988
Fax: (202) 616-8202
Email: Joel.McElvain@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

E. Scott Pruitt
Cornelius Neal Leader
Sandra D. Rinehart
Office of the Attorney General
313 NE 21st St.
Oklahoma City, Oklahoma 73105

Graydon Dean Luthey, Jr.
Craig A. Fitzgerald
GableGotwals
1100 ONEOK Plaza
100 West Fifth Street
Tulsa, Oklahoma 74103

s/ Joel McElvain
JOEL McELVAIN