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 TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM
IN OPPOSITION TO MOTION TO INTERVENE

The Defendants respectfully oppose the motion by 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") for leave to file a complaint-in-intervention in this action. The Movants are Texas businesses, with no asserted connection to the Eastern District of Oklahoma. The Movants seeks to litigate their potential federal tax liabilities under new provisions enacted in the Affordable Care Act, as well as the federal tax liabilities of their employees, who are also Texas residents with no asserted connection to this district. This Court is not the proper forum for these claims.

Background

The Movants are six limited liability companies organized under the laws of the State of Texas. (Proposed Complaint-in-Intervention, ¶¶ 5-10 (ECF 44-1).) Each of the Movants is

headquartered in San Antonio, Texas. (*Id.*, ¶¶ 5-10.) All of the Movants' full-time employees also reside in Texas. (*Id.*, ¶ 55.) The Movants do not contend that either they or any of their full-time employees have any connection to the Eastern District of Oklahoma.

The Movants do not offer health coverage to all of their full-time employees. (*Id.*, ¶ 57.) Under the Affordable Care Act, beginning in 2014, individuals within certain income levels who are not offered adequate coverage by their employers may be eligible for premium tax credits for the purchase of insurance through new exchanges established under the Act. *See* 26 U.S.C. § 36B. If one or more of the Movants' full-time employees receives a premium tax credit under Section 36B, the Movant who is the employer of that individual could be liable for the tax assessment that the Affordable Care Act prescribes for certain large employers that fail to offer adequate coverage to their employees, 26 U.S.C. § 4980H.

The Movants contend that the health insurance exchange in Texas will be operated by the federal government, rather than the State of Texas. (ECF 44-1, ¶ 55.) Under the Movants' reading of the Affordable Care Act, their employees would not be eligible to receive premium tax credits for the purchase of insurance through such a federally-facilitated exchange. (*Id.*, ¶¶ 39, 41.) The Movants reason that, if their employees do not receive these tax credits, the Movants' potential liability for the large employer tax penalty would not be triggered. (*Id.*, ¶¶ 52, 58-59.) The Movants seek declaratory and injunctive relief that would forbid the Defendants from awarding premium tax credits to individuals who purchase insurance through federally-facilitated exchanges, and from assessing or collecting any large employer tax penalty against the employers of such individuals. (*Id.*, p. 18.) The Movants seek permissive intervention under Rule 24(b) to pursue these claims in this Court. (ECF 44 at 2.)

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

It is a long-established rule in the federal courts that, where a "cause of action ha[s] not accrued to the [party] who undertook to bring the suit originally," the complaint must be dismissed for lack of jurisdiction even if another party later seeks to intervene in the action; "[t]he intervention could not cure this vice in the original suit." *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 163-64 (1911). In other words, "it is fundamental that an intervening claim cannot confer subject matter jurisdiction over the action it seeks to join." *Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living*, 675 F.3d 149, 160 (2d Cir. 2012) (internal quotation and alterations omitted); *see also City of Colorado Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1081 (10th Cir. 2009) (noting that 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.*, 675 F.3d at 160-61 (collecting cases).

The logic that underlies this rule is apparent. The Federal Rules of Civil Procedure "do not extend or limit the jurisdiction of the district courts or the venue of actions in these courts." Fed R. Civ. P. 82. Accordingly, intervention under Rule 24 cannot create jurisdiction in a case where jurisdiction was lacking over the original complaint. *See, e.g., Canatella v. California*, 404 F.3d 1106, 1113 (9th Cir. 2005). Thus, "since intervention contemplates an existing suit in a court of competent jurisdiction and because intervention is ancillary to the main cause of action,

intervention will not be permitted to breathe life into a 'nonexistent' law suit." *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965); *see also Lusardi v. Xerox Corp.*, 975 F.2d 964, 984-85 (3d Cir. 1992); *Black v. Cent. Motor Lines, Inc.*, 500 F.2d 407, 408 (4th Cir. 1974).

As the Defendants have explained in their motion to dismiss (ECF 41), this Court lacks jurisdiction over the complaint of the original plaintiff, the State of Oklahoma. Oklahoma lacks *parens patriae* standing to sue the federal government to litigate the federal tax credits and federal tax liabilities that would accrue to Oklahoma residents under the Affordable Care Act. (*See* ECF 41-1 at 9-15.) It further lacks standing to challenge its own potential liability for the Act's large employer tax penalty, as it is at best speculative that it will itself be subject to that tax penalty. (*See id.* at 15-16.) Further, its attempt to restrain the IRS from assessing or collecting the tax penalty is barred by the Anti-Injunction Act, 26 U.S.C. § 7421. (*See id.* at 16-18.) The complaint-in-intervention cannot cure these jurisdictional defects in the underlying complaint. As a result, this action should be dismissed for lack of jurisdiction.

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

To be sure, even upon dismissing the underlying complaint for lack of jurisdiction, a court may exercise its "discretion to treat [the] pleadings of an intervenor as a separate action to adjudicate claims raised by the intervenor." *Miller & Miller Auctioneers, Inc. v. G.W. Murphy Indus., Inc.*, 472 F.2d 893, 895 (10th Cir. 1973). In order to survive as a separate action, however, the intervenor's complaint must meet the usual requirements of jurisdiction and venue:

> [I]ntervention presupposes the pendency of an action in a court of competent jurisdiction and … intervention cannot cure jurisdictional defects or create jurisdiction. By the same token defects in venue cannot be cured by intervention. However, the court has discretion to treat the intervenor's claim as if it were a separate suit and may entertain it *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) (emphasis added). *See also Kruse v. Wells Fargo Home Mtge.*, 2006 WL 1212512, at *8 (E.D.N.Y. 2006) ("when the original plaintiffs upon whose claims jurisdiction and venue are based are dismissed from the case, plaintiffs must offer independent grounds for venue . . . the dismissal of the original named plaintiffs requires intervenors to provide some basis for venue").

Here, the proposed complaint-in-intervention cannot survive as a separate action in this Court. As an initial matter, the complaint-in-intervention does not state a claim over which this Court has subject-matter jurisdiction. The Movants seek to litigate their potential liability for the large employer tax liability under 26 U.S.C. § 4980H. As the Defendants have explained in their motion to dismiss the State of Oklahoma's complaint, the Anti-Injunction Act, 26 U.S.C. § 7421, prohibits such an attempt to restrain the assessment or collection of that tax penalty. (*See* ECF 41-1 at 16-18.)

But even apart from this jurisdictional bar, venue is plainly lacking in this Court, because the Movants reside in Texas and their suit has no connection to this district. Venue may be asserted in an action against federal officers in their official capacities in a "judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action." 28 U.S.C. § 1391(e). The Movants satisfy none of these possible bases for venue. The Movants reside in the Western District of Texas. *See* 28 U.S.C. § 124(d).[1] The Defendants reside in the District of Columbia. *See Miller v. Albright*, 523 U.S. 420, 427 (1998); *see also Reuben H. Donnelly Corp.*

[1] That district would be the appropriate venue for any refund action that the Movants might bring for the recovery of a payment of the large employer tax penalty. *See* 28 U.S.C. § 1402(a)(2); *see also* 26 U.S.C. § 6228(a) (venue provision for suit seeking review of partnership's administrative adjustment request).

v. FTC, 580 F.2d 264, 266 n.1 (7th Cir. 1978) (residence of governmental official is where he performs his official duties). And no event or omission has occurred in this district that gives rise to the claims that the Movants seek to assert here. *See Employers Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1165 (10th Cir. 2010) (to satisfy "substantial part" test under venue statutes, plaintiff must show acts or omissions that 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).

In sum, because this Court lacks jurisdiction over the complaint of the original plaintiff, the State of Oklahoma, the Movants must independently satisfy the ordinary requirements of jurisdiction and venue in order to proceed in this Court. They cannot meet those requirements, and as a result the motion to intervene should be denied.[2]

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 seek to extinguish the rights of their employees to receive premium tax credits under 26 U.S.C. § 36B. Under the

[2] Indeed, a number of authorities reason that a permissive intervenor must independently establish venue, even if the original plaintiff's complaint is not dismissed. "'[W]here intervention is not of right, ... an intervening plaintiff should be required to meet the venue requirements; if objection to this ground could have been made had the intervenor been joined originally as a plaintiff, the objection should be equally valid as against him as an intervene[or].'" *Don King Prods. v. Douglas*, 735 F. Supp. 522, 531-32 (S.D.N.Y. 1990) (quoting 3B James Wm. Moore et al., *Moore's Federal Practice* ¶ 24.19 (2d ed. 1987)) (ellipses in original). *See also Philadelphia Metal Trades Council v. Allen*, 2007 WL 1875791, at *3 (E.D. Pa. June 22, 2007). This rule is not universally followed, however. *See Shapo v. Engle*, 2000 WL 198435, at *5 (N.D. Ill. 2000) (citing 15 C. Wright & A. Miller, *Federal Practice and Procedure* § 3808 (2d ed. 1986)).

At least in cases involving federal officers, the better rule would be to require every permissive intervenor to establish venue independently, given that 28 U.S.C. § 1391(e) explicitly requires new parties who are joined to such cases to make an independent showing that venue is proper. The Court need not resolve that question here, however, as jurisdiction is plainly lacking over the original plaintiff's complaint, and all authorities agree that in such a case the proposed intervenor must show that its complaint survives as a stand-alone action.

Movants' theory, a determination that their employees are not eligible to receive these tax credits would ensure that the Movants may not be held liable for the large employer tax penalty under 26 U.S.C. § 4980H. Even if the Movants were correct to assert that they have standing to litigate their employees' tax liabilities, their claim would still fail for the absence of those employees from this litigation. The Movants' employees have an obvious interest in a proceeding that seeks to determine their future eligibility for those premium tax credits. Because those employees are absent from this forum, and because they cannot be joined to an action in this forum, the complaint-in-intervention cannot proceed here for the absence of indispensable parties under Federal Rule of Civil Procedure 19.

"A finding of indispensability under Fed. R. Civ. P. 19(b) has three parts." *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1278 (10th Cir. 2012). First, the court must find whether a party is required to be joined under Rule 19(a). Second, the court must determine whether that party can feasibly be joined. Third, the court must determine whether that party "is so important to the action that the action cannot 'in equity and good conscience' proceed in that person's absence." *Id.* at 1278-79 (quoting Fed. R. Civ. P. 19(b)). The Movants' employees are indispensable under this test.

First, the employees are required to be joined because "the court cannot accord complete relief" to the Movants in their absence. Fed. R. Civ. P. 19(a)(1)(A). The large employer tax penalty applies to certain large employers that fail to offer adequate coverage to their full-time employees, if one or more of their full-time employees is allowed a premium tax credit for the purchase of coverage on an exchange. *See* 26 U.S.C. § 4980H(a)(2), (b)(1). The Movants' claim for relief depends, then, on a ruling that their full-time employees are not eligible to receive these premium tax credits, and those employees must be joined in this action in order for the Movants

to gain complete relief under their theory. For the same reason, the Defendants would be "subject to a substantial risk of incurring … inconsistent obligations" in those employees' absence. One or more of the Movants' full-time employees could separately sue, in a forum where jurisdiction and venue is proper, to recover premium tax credits to which they contend they are entitled. As any judgment in this action would not bind those employees, the Defendants could face conflicting obligations from different courts. *See Northern Arapaho Tribe*, 697 F.3d at 1279.

Second, the employees cannot feasibly be joined in this Court, as it appears that personal jurisdiction is lacking here. The employees lack the requisite minimum contacts with this district that could support personal jurisdiction under either the specific jurisdiction test or the general jurisdiction test.[3] There is no reason to believe that those employees have "purposefully direct[ed] [their] activities at residents of [Oklahoma]," let alone that the Movants' suit resulted from "alleged injuries that arise out of or relate to those activities." *Intercon, Inc. v. Bell Atl. Internet Solutions, Inc.*, 205 F.3d 1244, 1247 (10th Cir. 2000) (internal quotation omitted). Thus, specific jurisdiction is lacking. Nor is there any reason to believe that the employees have contacts with Oklahoma that are "so continuous and systematic as to render [them] essentially at home in [Oklahoma]." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (internal quotation omitted). Thus, general jurisdiction is lacking. Because there is no personal jurisdiction over the Movants' employees, then, they cannot feasibly be joined here.

Third, the employees are so important to the Movants' complaint-in-intervention that the action cannot in equity and good conscience proceed in their absence. For the reasons described above, "a judgment rendered in the [employees'] absence might prejudice" them. *Enter. Mgt.*

[3] Oklahoma permits personal jurisdiction to the limits of due process. *See* Okla. Stat. tit. 12, § 2004(F).

Consultants, Inc. v. United States ex rel. Hodel, 883 F.2d 890, 894 n.4 (10th Cir. 1989). The employees would certainly suffer prejudice from a judgment that purports to determine their eligibility for substantial federal tax credits, without their participation. Further, that prejudice cannot be lessened or avoided. Because the Movants' liability (if any) for the large employer tax penalty is triggered when one or more of their full-time employees receives a premium tax credit, the Movants cannot gain relief under their theory without extinguishing those employees' eligibility for the tax credits. The judgment could not be adequate, given that the employees could relitigate their claim for premium tax credits without being bound by a judgment in this action. Finally, Congress has provided a different, and exclusive, forum for the Movants to litigate their federal tax liabilities, namely, a tax refund action under 26 U.S.C. § 7422. Each of the factors identified in Rule 19(b) thus weighs in favor of a finding that the employees are indispensable parties, without whom this action could not proceed. Because those employees could not be joined to an action in this district, the motion to intervene should be denied.

For similar reasons, at a minimum, this Court should exercise its discretion to deny the motion for permissive intervention. *See Kane County v. United States*, 597 F.3d 1129, 1135 (10th Cir. 2010) (motion for permissive intervention is subject to district court's discretion). Even if the complaint-in-intervention could survive a motion to dismiss for lack of jurisdiction, it would be more appropriate for the complaint to proceed in a forum to which the parties have a greater connection. Issues such as: (1) the adequacy of the health coverage offered by the Movants or by other members of the Movants' affiliated group of companies; (2) the potential eligibility of the Movants' employees for premium tax credits; (3) the Movants' present and future hiring plans; and (4) the Movants' potential liability under 26 U.S.C. § 4980H, among others, all involve events or omissions occurring outside this district. It would be preferable for

this Court to exercise its discretion to deny the Movants' request to proceed in a district to which neither they nor their employees have any connection.

CONCLUSION

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

DATED this 20th day of December, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2012, 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:

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