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. 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.	)	No. 6:11-cv-00030-RAW

REPLY TO OPPOSITION TO MOTION TO INTERVENE

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Plaintiffs-Intervenors 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 (collectively, "Movants"), by and through their undersigned attorneys, hereby file their Reply to Defendants' Memorandum In Opposition to Motion to Intervene ("Defs. Mem.").

PRELIMINARY STATEMENT

A motion to intervene under Fed. R. Civ. P. 24(b) raises a relatively small handful of issues that are apparent from the language of the Rule.

> (b) Permissive Intervention.
>
> > (1) *In General.* On timely motion, the court may permit anyone to intervene who:
> >
> > > (A) is given a conditional right to intervene by a federal statute; or
> > > (B) has a claim or defense that shares with the main action a common question of law or fact. . . .
> >
> > (3) *Delay or Prejudice.* In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Defendants' Opposition does not raise any objection to intervention based on any factor mentioned in Rule 24(b). In fact, Defendants' Opposition does not even address any of these factors. As a general rule, a party's failure to raise an issue at the appropriate time is treated as a waiver of that issue. *See, e.g., City of Colo. Springs v. Solis*, 589 F.3d 1121, 1135 n.5 (10th Cir. 2009) ("[A]rguments not raised in the opening brief are waived."). For this reason, Defendants should be deemed to have conceded that the Motion to Intervene was timely; that the Proposed Complaint in Intervention and the Amended Complaint share common issues of fact and law;

and that intervention will not delay or prejudice adjudication of either Oklahoma's or Defendants' rights. *Cf. Educ. Credit Mgmt. Corp. v. Bradco, Inc.*, 2008 U.S. Dist. LEXIS 39405 *7 (D. Kan. May 14, 2008) ("Plaintiff apparently concedes that these elements [of Rule 24(a)] have been met, as it does not discuss them in its response to the Motion to Intervene.").

Permissive intervention under Rule 24(b) is discretionary, and Movants do not suggest that the factors specified in Rule 24(b) is an exhaustive list of the factors a Court may take into account in the exercise of its discretion. However, Movants note that Defendants do not raise *any* arguments directed to the exercise of the Court's discretion until the very last paragraph of their Opposition. Defs. Mem., 9-10.[1]

The arguments in Defendants' Opposition all suffer from one or more of the following flaws: (1) they are not relevant to the issue of permissive intervention, which is the only issue involving the Proposed Complaint in Intervention before the Court at this stage of the proceedings; (2) they are based on the false premise that this Court does not have subject matter jurisdiction over any of Oklahoma's claims in its Amended Complaint, *see* Defs. Opp. at 4; (3) they are based on the incorrect assumption that the Anti-Injunction Act ("the AIA"), 26 U.S.C. § 7426(a), deprives this Court of subject matter jurisdiction over the claims in the Proposed Complaint in Intervention, *see* Defs. Opp. at 5; and/or (4) they lack any foundation because they rest entirely on assertions of purported "fact" that are plainly contradicted by the allegations of the Proposed Complaint in Intervention, the Amended Complaint, or both.

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[1] The lone paragraph in Defendants' Opposition addressing the exercise of the Court's discretion raises what amounts to a *forum non conveniens* argument as a purported basis to deny the Motion to Intervene. Defs. Mem., 9 ("it would be more appropriate for the complaint to proceed in a forum to which the parties have a greater connection.") Defendants' Opposition cites no authority supporting discretionary denial of a motion to intervene on these grounds, and counsel for Movants is not aware of any such authority.

Defendants also assert that Movants' employees are indispensable parties to Movants' claims who cannot be joined in this action, and that in equity and good conscience, Movants' claims cannot proceed in their absence. Building on this assertion, Defendants argue that the Motion to Intervene should be denied because Movants' claims would be subject to dismissal under Fed. R. Civ. P 19.

Defendants' alternative argument is not well taken. On a motion to dismiss for failure to join an indispensible person, the proponent of dismissal under Rule 19 bears the burden of showing, *first*, that that the absent person is a "necessary party" under Rule 19(a); and, *second*, that in equity and good conscience, the action should be dismissed rather than proceeding without the absent person. *Rishell v. Jane Phillips Episcopal Mem. Med. Ctr.*, 94 F.3d 1407, 1411 (10th Cir. 1996). Defendants' Opposition lacks evidence on which to base a finding that Movants' employees satisfy the requirements of Rule 19(a). Moreover, Defendants' argument for dismissal under Rule 19(b) is improperly based on the assumption that it will prevail on the merits of the challenge to the validity of the Final Rule under Section 36B of the Internal Revenue Code of 1986, as added by Section 1401 of the Affordable Care Act.

Accordingly, Defendants' Opposition should be overruled and Movants should be granted leave to intervene as Plaintiff-Intervenors in this action.

ARGUMENT

I. Defendants' Opposition Rests On an Inaccurate Reading of the Amended Complaint and the Proposed Complaint in Intervention.

Defendants' Opposition depends on an inaccurate reading of the Proposed Complaint in Intervention and of Oklahoma's Amended Complaint. Movants do not seek 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," as Defendants would have it. Defs. Mem., 1.

Movants ask this Court to declare that the Final Rule under Code § 36B is invalid for numerous reasons, not the least of which is that it is contrary to the plain meaning of the ACA.

Even if the Final Rule were upheld, Movants would be subject to the employer mandate under the ACA, but that fact alone need not necessarily result in Movants' liability for an "assessable payment" under Code § 4980H. An employer to which the employer mandate lawfully applies can satisfy the mandate in one of two ways (a) by offering an opportunity to its full time employees and their children under age 26 to enroll for coverage under an employer-sponsored group health plan that meets the ACA's minimum value and affordability requirements; or (b) to be exposed to an assessable payment. In Movants' situation, taking the first option requires advance planning and changing the Movants' current business plan. Thus, the need to choose brought about by the Final Rule currently impinges on Movants' rights. Nevertheless, if the planning obstacles can be overcome, being subject to the employer mandate cannot result in the employer's becoming liable for an assessable payment under Code § 4980H. Complaint in Intervention, ¶s 29, 31, 36-37, 43, 49, 50.

Defendants' interpretation of Oklahoma's Amended Complaint is also mistaken. Defendants argue that this Court lacks subject matter jurisdiction over the claims in the Amended Complaint because Oklahoma does not have standing under the *parens patriae* doctrine to seek redress for particular injuries of individual Oklahoma citizens. Defs. Mem. It is clear from the face of the Amended Complaint that Oklahoma's action seeks redress for the invasion of the State's own rights and interests. *See,* Amd. Comp., ¶s 44, 70, 73, 75, 76, and 81.

II. The Issues of Subject Matter Jurisdiction and Venue That Defendants Ask This Court To Decide Are Not Appropriate For Resolution On a Motion To Intervene.

Defendants begin their argument by asserting that a complaint-in-intervention cannot cure jurisdictional defects in an original complaint, a proposition for which Defendants rely on

the Second Circuit's opinion in *Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc.*, 675 F.3d 149, 160 (2d Cir. 2012). This argument assumes that this Court's subject matter jurisdiction over the claims in Oklahoma's Amended Complaint need some "propping up." Movants respectfully refer the Court to Oklahoma's Responding Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Amended Complaint ("OK Resp. Mem."), which shows that Defendants' assumption is mistaken.

In fact, Defendants' opening argument in opposition to Movants' intervention would not be dispositive of any motion to intervene in the Tenth Circuit, because "[a] court has discretion to treat pleadings of an intervenor as a separate action to adjudicate claims raised by the intervenor." *Miller & Miller Auctioneers, Inc. v. G. W. Murphy Industries, Inc.*, 472 F.2d 893, 895-96 (10th Cir. 1973), *citing, inter alia*, 7A Wright & Miller, FEDERAL PRACTICE & PROCEDURE, CIVIL, § 1917 (1972). *See, also, id.,* 472 F.2d at 896 ("The court may properly exercise this discretionary procedure where it appears the intervenor has a separate and independent basis for jurisdiction and in which failure to adjudicate the claim will result only in unnecessary delay."). As discussed in Point III below, Movants clearly have standing to bring the claims in the Proposed Complaint in Intervention.

Defendants' next argument is equally out of place in opposition to a motion to intervene. Defendants argue that "the proposed complaint-in-intervention cannot survive as a separate action in this Court" and that "the complaint-in-intervention does not state a claim over which this Court has subject-matter jurisdiction." Defs. Opp., 5. However, this argument is based on two mistakes. First, it relies on an inaccurate reading of the Proposed Complaint in Intervention, according to which "The Movants seek to litigate their potential liability for the large employer tax liability under 26 U.S.C. § 4980H." Defs. Opp., 5. This statement is not correct, as shown in

Point I above. Second, Defendants' argument relies on an argument Defendants made in their Memorandum in Support of its Motion to Dismiss the Amended Complaint, to the effect that "the Anti-Injunction Act, 26 U.S.C. § 7421, prohibits such an attempt to restrain the assessment or collection of that tax penalty [*sic*]." Defs. Opp., 5.

As Oklahoma explains in its Responding Memorandum, Defendants Motion to Dismiss fell short of asserting that the AIA divests this Court of subject matter jurisdiction over the Amended Complaint. Moreover, the AIA is not a jurisdictional statute, for the reasons set forth in Oklahoma's Responding Memorandum. Even if it were, this portion of Defendants' argument assumes that Defendants will prevail on their Motion to Dismiss the Amended Complaint. If that motion is unsuccessful, subject matter jurisdiction over the Proposed Complaint in Intervention becomes irrelevant to the Motion to Intervene. The Tenth Circuit has held that "parties seeking to intervene under Rule 24(a) or (b) need not establish Article III standing 'so long as another party with constitutional standing on the same side as the intervenor remains in the case.'" *San Juan County v. United States*, 503 F.3d 1163, 1172 (10th Cir. Utah 2007) (en banc), *citing and quoting San Juan County v. United States*, 420 F.3d 1197, 1205 (10th Cir. 2005). *See also City of Herriman v. Bell*, 590 F.3d 1176, 1183-84 (10th Cir. 2010), *citing and quoting City of Colo. Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1079 (10th Cir. 2009) (same).

Defendants next argue that the Motion to Intervene should be denied because the Proposed Complaint in Intervention cannot satisfy the venue provisions of 28 U.S.C. § 1391(e) as a stand-alone lawsuit in this judicial district. One flaw in this argument is that the defense of improper venue can be waived, *see* Fed. R. Civ. P. 12(h)(1), making consideration of venue premature. A more serious flaw in Defendants' argument is that it is based on the assumption that Defendants will prevail on their Motion to Dismiss the Amended Complaint. *See, e.g.,* Defs.

Opp. at 6 n.2 (commenting on a "better rule" relating to venue under 28 U.S.C. § 1391(e) but adding, "[t]he 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.). If Defendants do not prevail on their Rule 12(b)(1) challenge to Oklahoma's Amended Complaint, venue is not an issue with respect to the Proposed Complaint in Intervention.[2] Thus, the venue question need not be decided now and never be an issue.

III. This Court Has Subject Matter Jurisdiction Over Plaintiff Oklahoma's Amended Complaint.

Defendants' Opposition urges that this Court lacks subject matter jurisdiction over Oklahoma's Amended Complaint. Movants respectfully refer the Court to Plaintiff's Responding Memorandum in this regard.

IV. This Court Has Subject Matter Jurisdiction Over the Claims Set Out in the Proposed Complaint-in-Intervention.

Defendants' Opposition argues that this Court lacks subject matter jurisdiction over the claims in the Proposed Complaint in Intervention, advancing as the sole basis for such claim the assertion that the AIA deprives this Court of that subject matter jurisdiction. Defs. Opp. at 5. Movants respectfully refer the Court to Plaintiff's Responding Memorandum in this regard, which demonstrates the inapplicability of the AIA to the claims in this case.

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[2] Under the venue rule applicable in litigation against federal agencies, 28 U.S.C. 1391(e), venue is proper if "any" plaintiffs reside in the forum. *Sidney Coal Co. v. SSA*, 427 F.3d 336, 344-45 (6th Cir. 2005) (all plaintiffs could participate in the suit, even though only half were forum residents), *citing A.J. Taft Coal Co. v. Barnhart*, 291 F. Supp. 2d 1290, 1302 (N.D. Ala. 2003); *Exxon Corp. v. FTC*, 588 F.2d 895, 898-99 (3d Cir. 1978) (only one plaintiff need be a forum resident). Moreover, even if Oklahoma's claims were to be dismissed post-joinder, Movants' claims need not be dismissed for improper venue. *Exxon Corp.*, 588 F.2d 895, 899 ("venue is determined at the outset of the litigation and is not affected by a subsequent change in parties"), *citing* 3B Moore's Federal Practice ¶ 25.05, p. 25-167 (2d ed. 1978).

V. Dismissal of the Proposed Complaint in Intervention Under Rule 19 Is Not Required.

Defendants' next argument is that "the complaint-in-intervention cannot proceed here for the absence of indispensable parties under Federal Rule of Civil Procedure 19." Defs. Opp., 7. The party moving for dismissal pursuant to Rule 19 bears the burden of proof. *Rishell v. Jane Phillips Episcopal Mem. Med. Ctr.*, 94 F.3d 1407, 1411 (10th Cir. 1996). Thus, Defendants have the burden of showing that an absent person is "necessary" under Rule 19(a) and that such person is "indispensable," such that dismissal of the action is preferable to proceeding in the person's absence under Rule 19(b). Defendants' Opposition fails to satisfy both of Defendants' burdens under Rule 19.

Defendants appear to argue that Movants' employees are necessary solely under Rule 19(a)(1)(A), not Rule 19(a)(1)(B): "[Movants'] employees must be joined in this action in order for the Movants to gain complete relief under their theory." Defs. Mem., 7-8. This assertion is manifestly wrong. Movants can obtain complete relief by obtaining the declaratory and injunctive relief they seek in the Proposed Complaint in Intervention against Defendants alone. Once the invalidity of the Final Rule is established in a proceeding to which Defendants are parties, Defendants presumably will abide by the judgment in all the circumstances where it may apply. Defendants have offered no evidence that under Rule 19(a)(1)(A), Movants cannot obtain complete relief in this action unless their employees are joined.

Despite the appearance of invoking only Rule 19(a)(1)(A), Defendants' Opposition relies on some of factors relevant under Rule 19(a)(1)(B). That subdivision of Rule 19 requires a showing that there is a non-party who

> (B) . . . claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

> (i) as a practical matter impair or impede the person's ability to protect the interest; or
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Defendants evoke the "inconsistent judgment" standard from Rule 19(a)(1)(B)(ii). *See* Defs. Opp., 8, *citing Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1279 (10th Cir. 2012). However, Rule 19(a)(1)(B) applies only if there is an absent person who "*claims* an interest in the subject matter of the action." *See Davis v. Dosar-Barkus Band of the Seminole Nation of Oklahoma*, 192 F.3d 951, 958 (10th Cir. 1999), *citing and quoting* Rule 19(a)(1)(B) (emphasis in original). Defendants' Opposition does not assert that any of Movants' employees claim an interest in the subject matter of the action, much less offer evidence to that effect. This shortcoming is fatal to Defendants' efforts. The determination under Rule 19(a)(1)(B) of whether an absent person claims an interest in the subject matter of the action must be made on the basis of record facts. *Imperial v. Castruita*, 418 F. Supp. 2d 1174, 1178 (C.D. Cal. 2006); *Generadora de Electricidad del Caribe, Inc. v. Foster Wheeler Corp.*, 92 F. Supp. 2d 8, 14 (D.P.R. 2000). Defendants' Opposition fails to make the factual showing required under Rule 19(a)(1)(B).

Even if that showing had been made, Defendants have not satisfied their burden under Rule 19(b). The beneficiary of federal regulation is not a necessary indispensable party where the government itself is defending the regulation. *See, e.g., Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1259-60 (10th Cir. 2001); *Kansas v. United States,* 249 F.3d 1213, 1227 (10th Cir. 2001). In such cases, the absent party's interest is fully protected and it need not be joined. *Id.*

Finally, even if the absent employees otherwise qualified as indispensable parties under Rule 19, the Rule does not apply to cases in which the relevant dispute concerns public rights. In *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), the Supreme Court announced a public rights exception to Rule 19's indispensability analysis, holding that in a legal proceeding "narrowly restricted to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Id.* at 363. Since *National Licorice*, the Tenth Circuit has confirmed that Rule 19 indispensability analysis does not apply to pure public rights disputes. *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1280-1281 (10th Cir. 2012); *Southern Utah Wilderness Alliance v. Kempthorne*, 525 F.3d 966, 969, n. 2 (10th Cir. 2008).

The public rights exception is tailor-made for this case. It is based on a recognition that, in litigation over public rights, it may not be feasible to join all the parties affected by injunctive relief against governmental action. *See, e.g., Jeffries v. Georgia Residential Finance Authority*, 678 F.2d 919, 928-929 (11th Cir. Ga. 1982) ("when litigation seeks vindication of a public right, third persons who could be adversely affected by a decision favorable to the plaintiff do not thereby become indispensable parties"). This litigation impacts a matter of public rights which should be decided without reference to the joinder requirements of Rule 19.

CONCLUSION

For these reasons, the Movants request that leave be granted to allow their intervention.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on January 25, 2013, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the ECF registrants in this case.

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