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 JACOB J. LEW, in his official capacity as Secretary of the United States Department of the Treasury,	)	
Defendants.	)	

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITIES

The defendants, Kathleen Sebelius, in her official capacity as Secretary of the United States Department of Health and Human Services, and Jacob J. Lew, in his official capacity as Secretary of the United States Department of the Treasury, by the undersigned counsel, respectfully submit this notice of supplemental authorities. There have been several recent developments that the Court may wish to take into account in its consideration of the defendants' motion to dismiss, particularly including a recent announcement (discussed in more detail below) by the Department of the Treasury that the tax on large employers under 26 U.S.C. § 4980H will not be assessed for 2014.

1. In Count I of its amended complaint, the plaintiff, the State of Oklahoma, has asked this Court to hold that the minimum coverage provision, 26 U.S.C. § 5000A, violates the Commerce Clause. (ECF 35, ¶¶ 38-44.) The defendants have argued that Oklahoma lacks standing to bring this claim, because Oklahoma is not subject to the minimum coverage

provision at all, and because there are no circumstances in which it would matter if that provision is valid only under the taxing power, or also under the Commerce Clause. (ECF 41-1 at 10-12.)

The United States District Court for the District of Columbia recently rejected a similar request by an individual plaintiff for a holding that Section 5000A violates the Commerce Clause. *Sissel v. U.S. Dep't of Health & Human Servs.*, --- F. Supp. 2d ---, 2013 WL 3244826 (D.D.C. June 28, 2013), *appeal docketed*, No. 13-5202 (D.C. Cir. July 8, 2013). The district court noted that "'a complaint does not suffice if it tenders naked assertions devoid of further factual enhancement,'" and that "'the plaintiff must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* at *3 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation and alterations omitted)). The district court held that the plaintiff had failed to state a claim under this standard. It noted the Supreme Court's holding that "Congress had the power to impose the exaction in § 5000A under the taxing power, and that § 5000A need not be read to do more than impose a tax. That is sufficient to sustain it." *Nat'l Fed'n of Indep. Business v. Sebelius*, 132 S. Ct. 2566, 2598 (2012) ("*NFIB*"). The district court reasoned that the plaintiff's theory was "premised on a misreading of the Supreme Court's opinion in *NFIB*," and it rejected the claim accordingly. *Sissel*, 2013 WL 3244826, at *6. The same result follows here. Oklahoma does not identify any circumstances in which Section 5000A "do[es] more than impose a tax," and there are no such circumstances.

2. In Counts II through V of its amended complaint, Oklahoma has asked this Court to prohibit the award of premium tax credits under 26 U.S.C. § 36B or any imposition of the large employer tax assessment under 26 U.S.C. § 4980H. (ECF 35, ¶¶ 45-81.) Oklahoma asserts that it has standing to pursue these claims because it is a large employer that is potentially subject to

the large employer tax assessment. (ECF 53 at 10-11.) In response, the defendants have noted that Oklahoma failed to plead any factual content supporting the conclusion that a large employer tax assessment is certainly impending against Oklahoma, as required under *Iqbal*. The defendants also noted that it is very unlikely that Oklahoma could plead such factual content, as that tax is unlikely to be assessed against the State. (ECF 41-1 at 15-16, ECF 57 at 4-7.)

A recent announcement from the Department of the Treasury underscores the latter point. On July 2, 2013, the Department of the Treasury announced that "it will provide an additional year before the ACA mandatory employer and insurer reporting requirements [described in 26 U.S.C. §§ 6055 and 6056] begin." The Department of the Treasury also announced that "[w]e recognize that this transition relief will make it impractical to determine which employers owe shared responsibility payments (under section 4980H) for 2014. Accordingly, we are extending this transition relief to the employer shared responsibility payments. These payments will not apply for 2014. Any employer shared responsibility payments will not apply until 2015." The announcement of transition relief "do[es] not affect employees' access to the premium tax credits available under the ACA (nor any other provision of the ACA)."

The announcement is available at www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx. The Department of the Treasury noted that it will shortly publish formal guidance describing this transition. The defendants will provide the Court with that guidance when it becomes available.

The Department of the Treasury's announcement underscores that Oklahoma has not pleaded, and could not plead, that it suffers a certainly impending injury from the large employer tax. No large employer will be subject to the tax in 2014, and Oklahoma has not pled factual

content supporting the conclusion that it is certain to be subject to the tax in 2015 or later years. Oklahoma accordingly has not pled a concrete injury.

3. Oklahoma also asserts that it has standing to pursue the claims in Counts II through V of the amended complaint because, in its view, Congress has granted it a statutory right to determine whether awards of premium tax credits or assessments of the large employer tax may be made. (ECF 53 at 8.) In response, the defendants have noted that, even assuming that Congress created such a statutory right here, Congress cannot waive the Article III requirement that a plaintiff must demonstrate the existence of a concrete injury, and a plaintiff's mere belief that the federal government is misinterpreting federal law is not such a concrete injury. (ECF 57 at 4, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992); *Allen v. Wright*, 468 U.S. 737, 754 (1984); and *Wyoming v. Lujan*, 969 F.2d 877, 881 (10th Cir. 1992).)

The Supreme Court recently reiterated that "[a] litigant 'raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.'" *Hollingsworth v. Perry*, --- S. Ct. ---, 2013 WL 3196927, at *7 (June 26, 2013) (quoting *Defenders of Wildlife*, 504 U.S. at 573-74). The Court held that "'an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.'" *Id.* (quoting *Allen v. Wright*, 468 U.S. at 754). Under this principle, Oklahoma lacks standing, because it has failed to identify any concrete injury that it suffers from the federal government's interpretation of federal law, other than that it disagrees with that interpretation.

4. The defendants have argued that the Anti-Injunction Act ("AIA"), 26 U.S.C. § 7421, bars Counts II through V of the amended complaint, because Oklahoma has brought suit for the

purpose of restraining the assessment and collection of the large employer tax assessment under 26 U.S.C. § 4980H. (ECF 41-1 at 16-18.) As Oklahoma notes in its notice of supplemental authority (ECF 64), the Tenth Circuit recently addressed the AIA in *Hobby Lobby Stores, Inc. v. Sebelius*, --- F.3d ---, 2013 WL 3216103 (10th Cir. June 27, 2013). *Hobby Lobby* involved a challenge to interim final regulations promulgated under the authority of the Public Health Services Act, which, *inter alia*, require a non-exempt, non-grandfathered group health plan to provide coverage for recommended preventive health services, which include coverage for all contraceptive services approved by the Food and Drug Administration as prescribed by a health care provider.[1] The regulations trigger freestanding, non-tax legal obligations. For example, the Department of Health and Human Services could enforce the regulations with respect to certain insurers. *See* 42 U.S.C. § 300gg-22. The Secretary of Labor is also authorized to enforce the requirement. *See* 29 U.S.C. § 1132(a)(5). An employer that violates the requirements of the regulations would also be subject to a tax assessment. *See* 26 U.S.C. § 4980D.

In *Hobby Lobby*, the government argued that the AIA did not bar a challenge to the contraceptive-coverage requirement. The Tenth Circuit agreed. It held that, because the plaintiffs were "seeking to enjoin the enforcement, by whatever method, of one HHS regulation that they claim violates their [Religious Freedom Restoration Act] rights," and the tax imposed by Section 4980D "is just one of many collateral consequences that can result from a failure to comply with the contraceptive-coverage requirement that they claim violates their RFRA rights." 2013 WL 3216103, at *7.

The reasoning of *Hobby Lobby* confirms that the AIA applies to a suit brought for the purpose of restraining the assessment or collection of a tax against a large employer under 26

1 The Departments of Health and Human Services, Labor, and the Treasury recently published final regulations on this subject. *See* 78 Fed. Reg. 39,870 (July 2, 2013).

U.S.C. § 4980H. Unlike the contraceptive coverage requirement enforceable under Section 4980D (which is not at issue here), Section 4980H does not impose any freestanding legal obligations, or "collateral consequences," apart from a large employer's obligation to pay a tax if the conditions for the imposition of the tax are met. A challenge to the application of Section 4980H thus can only be a challenge to the assessment or collection of a tax, and the AIA bars such a challenge.

As Oklahoma notes (ECF 64 at 3), three judges joined a concurring opinion in *Hobby Lobby* that reasoned that the Anti-Injunction Act is not jurisdictional. 2013 WL 3216103, at *35 (Gorsuch, J., concurring). As the defendants have previously discussed (ECF 57 at 10), this question is not material here. The defendants have raised the defense of the AIA here, and so this Court must reach the issue whether or not the statute is jurisdictional. In contrast, in *Hobby Lobby*, the government argued that the AIA did *not* apply, and so the court could have held that the AIA barred the suit only if it had first concluded that the AIA is jurisdictional.

Finally, this Court inquired at oral argument whether the AIA has been applied in pre-enforcement lawsuits brought by state governments to enjoin the assessment or collection of a tax. It has. *See California v. Regan*, 641 F.2d 721 (9th Cir. 1981); *Minnesota v. United States*, 525 F.2d 231 (8th Cir. 1975).

Copies of the Department of the Treasury's announcement (Tab A), the decision in *Sissel* (Tab B), and the decision in *Hollingsworth* (Tab C) are attached for the Court's convenience. The plaintiff has previously provided the Court with a copy of the decision in *Hobby Lobby*.

DATED this 8th day of July, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 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:

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