

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JACQUELINE HALBIG, et al.,)
)
 Plaintiffs,)
)
 v.)
)
KATHLEEN SEBELIUS, in her official capacity)
 as U.S. Secretary of Health and Human Services,)
et al.,)
)
 Defendants.)
 _____)

Case No. 1:13-cv-00623-RWR

**DEFENDANTS’ MOTION TO DEFER BRIEFING ON SUMMARY JUDGMENT
PENDING THE RESOLUTION OF THEIR MOTION TO DISMISS, AND
FOR EXTENSION OF TIME TO FILE THEIR MOTION TO DISMISS**

The Patient Protection and Affordable Care Act (“Affordable Care Act,” or “Act”) establishes federal premium tax credits that, beginning in 2014, will provide financial assistance to millions of Americans in the purchase of insurance on newly-created health insurance Exchanges. Those Exchanges will be operated by states, or, where states choose not to do so consistent with federal standards, by the federal government. The plaintiffs have brought this suit, seeking to deprive participants in federally-operated Exchanges of the benefits of the Act’s premium tax credits. As the defendants will explain in their forthcoming motion to dismiss, this Court lacks jurisdiction to consider the plaintiffs’ attempt to litigate the federal tax liabilities of parties who are not before the Court.

More than a month before the due date for the defendants’ motion to dismiss, however, the plaintiffs have filed a motion for summary judgment, in an attempt to pretermitt this Court’s consideration of the jurisdictional defects in this complaint. It is this Court’s well-established practice to defer consideration of summary judgment pending the resolution of a jurisdictional

motion to dismiss, and it should follow that practice here. Further, due to conflicting obligations in the undersigned counsel's schedule, the defendants respectfully request a short extension of the time in which to respond to the plaintiffs' complaint, from July 8, 2013, the date on which a response would otherwise be due, to July 29, 2013. In the alternative, if the Court denies the motion to stay summary judgment briefing, the defendants respectfully request that the Court afford them until the same date, July 29, 2013, to file their motion to dismiss and their opposition to the summary judgment motion. Pursuant to Local Rule 7(m), the undersigned counsel has conferred with counsel for the plaintiffs, Michael Carvin, Esquire, and Mr. Carvin reports that the plaintiffs oppose the relief requested in this motion.

Background

On May 2, 2013, the plaintiffs filed their complaint in this action. (ECF 1.) The plaintiffs seek to challenge a regulation promulgated a year earlier by the Treasury Department and the IRS, which confirms those agencies' understanding that, beginning in 2014, the Affordable Care Act's federal premium tax credits will be available to individuals who purchase insurance on the Act's new health insurance Exchanges, whether those Exchanges are operated by a state or by the federal government. *See* 77 Fed. Reg. 30,377 (May 23, 2012). The complaint alleges that the Treasury Department and the IRS violated the Administrative Procedure Act (APA) in promulgating this regulation.

The United States Attorney's Office for the District of Columbia was served with a copy of the summons and complaint in this action on May 7, 2013 (ECF 15 at 2), and the defendants' response to the complaint is due to be filed, absent an extension, on July 8, 2013, Fed. R. Civ. P.

12(a)(2). On June 6, 2013, more than a month before the deadline for the defendants' response to the complaint, the plaintiffs filed a motion for summary judgment. (ECF 17.)

The defendants intend to file a motion to dismiss in the ordinary course of this litigation that will address the jurisdictional defects in the complaint. In particular, the defendants' motion will address whether the plaintiffs have standing to litigate the federal tax liabilities of parties who are not before the Court, and whether the Anti-Injunction Act, 26 U.S.C. § 7421, deprives the Court of jurisdiction over the plaintiffs' claims.

The undersigned counsel, however, has several conflicting obligations that will prevent him from completing that motion before the current deadline of July 8. In particular, among other responsibilities, the undersigned counsel is required to: (1) present argument on the government's motion to dismiss on June 20, 2013, in Muskogee, Oklahoma, in *Oklahoma v. Sebelius*, No. 6:11-cv-00030 (E.D. Okla.), a case raising issues similar to those presented here; (2) prepare and file the government's reply brief on summary judgment on or before July 5, 2013, in *Wood v. Betlach*, No. 3:12-cv-08098 (D. Ariz.); and (3) prepare for and present argument on the government's motion to dismiss on July 10, 2013, in *Ralls Corp. v. Committee on Foreign Investment in the United States*, No. 1:12-cv-01513-ABJ (D.D.C.).

Discussion

I. This Court Should Defer Summary Judgment Briefing Pending the Resolution of the Defendants' Forthcoming Motion to Dismiss

This Court has inherent authority to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). The district court's broad discretion on this score includes the "inherent power to control the sequence in which it hears matters on its calendar." *United*

States v. Western Elec. Co., 46 F.3d 1198, 1207 n.7 (D.C. Cir. 1995). In particular, when two parties present two motions, and both parties wish to have their motion heard, the court is permitted to consider first the motion that “addresses a specific and narrow issue,” rather than the motion that “encompass[es] issues far broader.” *United States v. Western Elec. Co.*, 158 F.R.D. 211, 220 (D.D.C. 1994), *aff’d*, 46 F.3d at 1207 n.7 (“[T]he [district] court’s explanation amply supports its exercise of discretion.”). In this case, the fundamental jurisdictional issues that will be raised in the defendants’ motion to dismiss, as well as interests of efficiency and judicial economy, make it appropriate for the Court to exercise its discretion to resolve the defendants’ motion to dismiss before beginning proceedings on the plaintiffs’ motion for summary judgment.

The defendants’ motion to dismiss will raise threshold questions concerning whether the plaintiffs have standing to bring their claims and whether the complaint otherwise falls within the Court’s constitutional and statutory jurisdiction. These questions should be resolved before any proceedings on the merits. *See Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006) (“The ‘first and fundamental question’ that we are ‘bound to ask and answer’ is whether the court has jurisdiction to decide the case.”) (internal quotation omitted); *see also Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (“Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.”) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)).

Because the defendants’ motion will request relief that would put an end to the litigation, requiring the parties and the Court to address the plaintiffs’ summary judgment motion at this time, including the preparation of opposition papers and argument, would result in a waste of the

Court's and the parties' resources. For this and related reasons, courts routinely defer consideration of motions for summary judgment while dispositive motions to dismiss remain pending. *See, e.g., Freedom Watch, Inc. v. Dep't of State*, --- F. Supp. 2d ---, 2013 WL 692770, at *3 (D.D.C. Feb. 27, 2013) ("Not needing more lawyers to spend more time on more briefs on more subjects in order to decide the motion to dismiss, the Court granted the motion to stay [summary judgment briefing]"); *see also Daniels v. United States*, --- F. Supp. 2d ---, 2013 WL 2352106, at *3 (D.D.C. May 30, 2013) (noting that district court stayed briefing on summary judgment pending its ruling on motion to dismiss); *Angulo v. Gray*, --- F. Supp. 2d ---, 2012 WL 5995734, at * 2 (D.D.C. Dec. 3, 2012) (same); *Rundquist v. Vapiano SE*, 2012 WL 5954706, at *1 n.1 (D.D.C. Nov. 9, 2012) (same); *Magritz v. Ozaukee Cnty.*, 894 F. Supp. 2d 34, 37 (D.D.C. 2012) (same); *Ticor Title Ins. Co. v. FTC*, 625 F. Supp. 747, 749 n.2 (D.D.C. 1986) (holding in abeyance plaintiff's motion for summary judgment "pending resolution of threshold questions of jurisdiction and justiciability").

It is particularly appropriate to defer summary judgment briefing pending the resolution of the motion to dismiss here. First, the resolution of the defendants' forthcoming motion to dismiss may (and, in the defendants' view, likely will) dispose of this case in its entirety. At a minimum, however, this Court's ruling on the motion to dismiss would narrow, or provide greater focus for, the issues remaining in this litigation. Second, in the event that the defendants' motion to dismiss does not entirely dispose of the litigation, the defendants should be afforded the opportunity to consider whether additional facts should be elicited through jurisdictional discovery before they are able to respond to the plaintiffs' summary judgment motion. *See Fed. R. Civ. P. 56(d)*. Third, the plaintiffs' challenge is brought under the APA.

Accordingly, if this case were to proceed to the merits, this Court would review the plaintiffs' claims on the basis of the administrative record. *See, e.g., Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010). No administrative record has been filed yet in this action. The defendants should not be forced to choose at this time between undertaking discovery that will prove to be unnecessary if the Court grants their motion to dismiss and relinquishing any ability to take discovery in the event the Court does not entirely dismiss the complaint. Similarly, the defendants should not be forced to brief summary judgment at this time without the benefit of the administrative record. Thus, requiring the defendants to respond to the plaintiffs' motion for summary judgment before the Court has ruled on the defendants' motion to dismiss would result in significant prejudice to defendants.

On the other hand, the plaintiffs would not suffer prejudice if this Court were to defer the litigation of the plaintiffs' summary judgment motion until after a ruling on the defendants' motion to dismiss. The plaintiffs have asserted a need to litigate summary judgment now in order to obtain a determination on their claims before 2014. (ECF 17 at 3.) The defendants contend, however, that their forthcoming motion to dismiss will resolve the plaintiffs' claims in their entirety, as this Court is likely to hold that jurisdiction is lacking over the plaintiffs' claims. But even under the plaintiffs' theory of the case, if they believe that time is running short for them, they have no one to blame for that state of affairs but themselves. The plaintiffs waited for a year before challenging a regulation that was promulgated in *May 2012*.¹ The plaintiffs'

¹ One set of plaintiffs here – GC Restaurants SA, LLC, and its subsidiaries – moved to intervene in another action in a district that plainly lacked venue over their claims, *see* Mot. to Intervene, *Oklahoma v. Sebelius*, No. 6:11-cv-00030, ECF 44 (E.D. Okla. filed Dec. 6, 2012), and the district court, unsurprisingly, denied intervention for that reason (among others), *see* Order, *Oklahoma v. Sebelius*, No. 6:11-cv-00030, ECF 59 (E.D. Okla. filed Mar. 4, 2013).

artificial delay should not force the Court and the defendants into the posture of “spend[ing] more time on more briefs on more subjects” that are not needed to resolve the motion to dismiss. *Freedom Watch, Inc.*, 2013 WL 692770, at *3.

In sum, because this Court has an obligation to examine its own jurisdiction before proceeding to the merits of this case, the Court should defer briefing on summary judgment until the resolution of the defendants’ motion to dismiss.

II. This Court Should Afford the Defendants Until July 29 to File Their Motion to Dismiss the Complaint

The current due date for the defendants’ response to the complaint is July 8, 2013. Due to the conflicting obligations of the undersigned counsel that are described above, the defendants will be unable to prepare their motion to dismiss before the current deadline. The defendants accordingly request a brief, 21-day extension of time, to and including July 29, 2013, in which to prepare and file their motion to dismiss the complaint. This short extension of time is reasonable, given the constraints on the undersigned counsel’s schedule and given the minimal effect that a short extension would have on the schedule for a resolution of this case.

If the Court denies the defendants’ motion to stay summary judgment briefing, the defendants respectfully request in the alternative that the Court afford them the same period of time, to and including July 29, 2013, in which to file their motion to dismiss and their opposition to the summary judgment motion.

These plaintiffs’ delay while pursuing a futile intervention motion does not counsel in favor of their request to depart from the usual litigation procedures, in which a motion to dismiss in this case would be decided first before the case proceeds to summary judgment.

Conclusion

For the foregoing reasons, the defendants respectfully request that the Court defer briefing on the plaintiff's motion for summary judgment pending its resolution of the defendants' forthcoming motion to dismiss. The defendants also respectfully request that the Court afford them an extension of time until July 29, 2013, in which to file their motion to dismiss. In the alternative, if the Court denies the motion to stay briefing, the defendants respectfully request that the Court afford them until July 29, 2013, to file their motion to dismiss and their opposition to the summary judgment motion.

Dated: June 13, 2013

Respectfully submitted,

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[PROPOSED] ORDER

Upon consideration of the defendant’s motion to defer briefing on summary judgment pending the resolution of their motion to dismiss, and for extension of time to file their motion to dismiss, and finding good cause therefor, it is hereby ORDERED that the motion is granted, and it is further ORDERED that:

1. further briefing on the motion for summary judgment filed by the plaintiffs (ECF 17) is stayed pending the Court’s resolution of the defendants’ forthcoming motion to dismiss the complaint; and
2. the defendants shall file their motion to dismiss the complaint on or before July 29, 2013.

IT IS SO ORDERED.

Dated: _____

 RICHARD W. ROBERTS
 United States District Judge