IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JACQUELINE HALBIG, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:13-cv-00623-RWR
	)	
KATHLEEN SEBELIUS, in her official capacity as U.S. Secretary of Health and Human Services, *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY IN SUPPORT OF 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

There is, at a minimum, strong reason to doubt whether the plaintiffs have standing to bring their claims in this action, and whether this Court otherwise has Constitutional and statutory jurisdiction to hear those claims. The defendants intend, accordingly, to file a motion to dismiss this action in the ordinary course of this litigation. This Court should reject the plaintiffs' attempt to proceed directly to summary judgment briefing before the threshold jurisdictional defects in their complaint can be fully explored.

1. The plaintiffs assert, implausibly, that the case should proceed to summary judgment because there is "*no* argument . . . for dismissal of at least the *individual* plaintiffs." (ECF 19 at 3, plaintiffs' emphasis). To the contrary, the standing of the individual plaintiffs is very much in dispute, as will be explained in greater detail in the defendants' forthcoming motion to dismiss. Under the plaintiffs' theory, they seek to challenge the availability of the Affordable Care Act's premium tax credits to them – in other words, the provision of a *benefit* to them – because they anticipate that, in 2014: (1) they would not be able to obtain affordable health

insurance in the absence of the Act's subsidies, and that they therefore would be exempt from the tax penalty imposed by the Act's minimum coverage provision, 26 U.S.C. § 5000A; (2) their income level would be such that they would qualify for those subsidies, and those subsidies would subject them to the Section 5000A tax penalty; and (3) the value of (unsubsidized) catastrophic health insurance available to them if they are exempt under Section 5000A would be superior to that of (subsidized) qualifying health coverage. This "theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013). The individual plaintiffs' claims (as well as those of the business defendants) should be dismissed for lack of jurisdiction.

2. At a minimum, in the event that the Court does not dismiss the complaint at the pleading stage, the defendants should be afforded the opportunity to determine whether to pursue jurisdictional discovery. *See* Fed. R. Civ. P. 56(d). The plaintiffs' claim of standing rests on debatable factual assumptions, including assumptions concerning the individual plaintiffs' income levels, the costs and availability of different forms of unsubsidized and subsidized health insurance, and the income levels and insurance options of the business plaintiffs' employees. The plaintiffs offer no good reason why this Court should excuse their obligation to demonstrate a factual basis for their claim of standing before proceeding to summary judgment.

3. It is routine for courts to stay the briefing or the consideration of summary judgment motions pending the resolution of a motion to dismiss. The plaintiffs deny this "allegedly common practice," but the cases are legion in which this practice is followed, as shown by the cases previously cited by the defendants. (ECF 18 at 5.) *See also, e.g., Direct Supply, Inc. v.*

Specialty Hosps. of Am., LLC, 878 F. Supp. 2d 13, 18 n.5 (D.D.C. 2012); *Furniture Brands Int'l, Inc. v. U.S. Int'l Trade Comm'n*, 804 F. Supp. 2d 1, 3 (D.D.C. 2011); *La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 477 F. Supp. 2d 131, 140 (D.D.C. 2007), *aff'd in part*, 533 F.3d 837 (D.C. Cir. 2008) ; *Independence Fed. Sav. Bank v. Bender*, 230 F.R.D. 11, 13 (D.D.C. 2005); *Tozzi v. EPA*, 148 F. Supp. 2d 35, 40 (D.D.C. 2001); *Maryland Cas. Ins. Co. v. Newpark Towers Assocs.*, 1990 WL 183603, at *7 (D.D.C. 1990); *American Ins. Ass'n v. Selby*, 624 F. Supp. 267, 269 (D.D.C. 1985). The string cite could continue, but presumably the foregoing is enough to show that this Court does indeed follow the so-called "allegedly common practice" of staying summary judgment briefing.

4. The plaintiffs offer no good reason for the Court to depart from this common practice. They assert that they would suffer "irreparable injury" if summary judgment briefing does not proceed now. (ECF 19 at 5.) But the plaintiffs have not moved for a preliminary injunction, and there is good reason for their restraint on this score. Their alleged injuries – if those injuries exist at all, and if they are even remediable in this proceeding – are purely monetary. At bottom, the plaintiffs' claim is that they would be subject to an assessment under 26 U.S.C. § 5000A (for the individual plaintiffs) or 26 U.S.C. § 4980H (for the business plaintiffs) if they do not receive an advance determination that they are not subject to those provisions of the Internal Revenue Code. The plaintiffs offer no reason why they could not seek relief from what they contend to be an improper assessment under the ordinary tax refund procedures, *see* 26 U.S.C. § 7422. The plaintiffs' purely financial claim of injury would not support a claim for preliminary injunctive relief. *See Taylor v. RTC*, 56 F.3d 1497, 1507 (D.C. Cir. 1995).

In sum, there is real doubt whether this Court has jurisdiction to proceed in this action. The Court should first determine whether it has jurisdiction before requiring the parties to proceed with summary judgment briefing that will likely prove to be unnecessary. The defendants accordingly request that the Court defer briefing on summary judgment pending its resolution of the defendants' forthcoming motion to dismiss, and that it grant the defendants' request for a short extension of time to file that motion to dismiss.

Dated: June 17, 2013

Respectfully submitted,

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