IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
Pensacola Division

Case No.: 3:10-cv-91-RV/EMT

STATE OF FLORIDA, by and through PAM BONDI, ATTORNEY GENERAL OF THE STATE OF FLORIDA;

STATE OF SOUTH CAROLINA, by and through ALAN WILSON, ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA;

STATE OF NEBRASKA, by and through JON BRUNING, ATTORNEY GENERAL OF THE STATE OF NEBRASKA;

STATE OF TEXAS, by and through GREG ABBOTT, ATTORNEY GENERAL OF THE STATE OF TEXAS;

STATE OF UTAH, by and through MARK L. SHURTLEFF, ATTORNEY GENERAL OF THE STATE OF UTAH;

STATE OF LOUISIANA, by and through JAMES D. "BUDDY" CALDWELL, ATTORNEY GENERAL OF THE STATE OF LOUISIANA;

STATE OF ALABAMA, by and through LUTHER STRANGE, ATTORNEY GENERAL OF THE STATE OF ALABAMA;

BILL SCHUETTE, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON BEHALF OF THE PEOPLE OF MICHIGAN;

STATE OF COLORADO, by and through JOHN W. SUTHERS, ATTORNEY GENERAL OF THE STATE OF COLORADO;

COMMONWEALTH OF PENNSYLVANIA, by and through THOMAS W. CORBETT, Jr.,

GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA, and WILLIAM H. RYAN, Jr., ACTING ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA;

STATE OF WASHINGTON, by and through ROBERT M. McKENNA, ATTORNEY GENERAL OF THE STATE OF WASHINGTON;

STATE OF IDAHO, by and through LAWRENCE G. WASDEN, ATTORNEY GENERAL OF THE STATE OF IDAHO;

STATE OF SOUTH DAKOTA, by and through MARTY J. JACKLEY, ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA;

STATE OF INDIANA, by and through GREGORY F. ZOELLER, ATTORNEY GENERAL OF THE STATE OF INDIANA;

STATE OF NORTH DAKOTA, by and through WAYNE STENEHJEM, ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA;

STATE OF MISSISSIPPI, by and through HALEY BARBOUR, GOVERNOR OF THE STATE OF MISSISSIPPI;

STATE OF ARIZONA, by and through JANICE K. BREWER, GOVERNOR OF THE STATE OF ARIZONA, and THOMAS C. HORNE, ATTORNEY GENERAL OF THE STATE OF ARIZONA;

STATE OF NEVADA, by and through JIM GIBBONS, GOVERNOR OF THE STATE OF NEVADA;

STATE OF GEORGIA, by and through SAMUEL S. OLENS, ATTORNEY GENERAL OF THE STATE OF GEORGIA;

STATE OF ALASKA, by and through DANIEL S. SULLIVAN, ATTORNEY GENERAL OF THE STATE OF ALASKA;

NATIONAL FEDERATION OF INDEPENDENT BUSINESS, a California nonprofit mutual benefit corporation;

MARY BROWN, an individual; and

KAJ AHLBURG, an individual;

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; TIMOTHY F. GEITHNER, in his official capacity as the Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF LABOR; and HILDA L. SOLIS, in her official capacity as Secretary of the United States Department of Labor,

Defendants.
_____/

PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT JOINING ADDITIONAL PLAINTIFF STATES AND MEMORANDUM IN SUPPORT

Pursuant to Rules 15, 20, and 21, Federal Rules of Civil Procedure, Plaintiffs hereby move for leave to file their Second Amended Complaint,[1] submitted

[1] The caption of this motion (and that of the Second Amended Complaint) reflects changes in the identities of various public officers by and through whom this action is brought on behalf of the Plaintiff States. Substitution of public officers is automatic under Rule 25(d), Federal Rules of Civil Procedure.

contemporaneously herewith, for the sole purpose of adding the following States as Plaintiffs:

> STATE OF OHIO, by and through MICHAEL DeWINE, ATTORNEY GENERAL OF THE STATE OF OHIO;
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> STATE OF KANSAS, by and through DEREK SCHMIDT, ATTORNEY GENERAL OF THE STATE OF KANSAS;
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> STATE OF WYOMING, by and through MATTHEW H. MEAD, GOVERNOR OF THE STATE OF WYOMING;
>
> STATE OF WISCONSIN, by and through J.B. VAN HOLLEN, ATTORNEY GENERAL OF THE STATE OF WISCONSIN;
>
> STATE OF MAINE, by and through WILLIAM J. SCHNEIDER, ATTORNEY GENERAL OF THE STATE OF MAINE; and
>
> TERRY E. BRANSTAD, GOVERNOR OF THE STATE OF IOWA, ON BEHALF OF THE PEOPLE OF IOWA.

As shown below, the inclusion and participation of these six States (the "Additional States") as Plaintiffs, following the recent cycle of elections nationally, is entirely proper, because the Additional States share the same interests, assert the same claims, and seek the same relief as the Plaintiff States in this litigation with respect to the same Act of Congress.[2] The Additional States have authorized the undersigned to advise the Court that they support this motion.

Moreover, joinder of the Additional States and the filing of the Second Amended Complaint to reflect that joinder will neither delay this action nor prejudice Defendants. The Additional States accept this action as it now stands, with the parties' cross-motions

[2] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (collectively the "ACA" or the "Act").

for summary judgment having been fully briefed and argued before the Court. Indeed, the only change made by the Second Amended Complaint is the identification of the Additional States as named Plaintiffs; even the paragraph numbers as between the Amended Complaint and the Second Amended Complaint remain the same.[3] Consequently, Defendants' Answer, which under Rule 15(a)(3) would be due 14 days after filing of the Second Amended Complaint is deemed effective, will require virtually no modification.[4]

Beyond these simple matters of form, the only effect of granting this motion would be to expand from 20 to 26 the number of Plaintiff States joining together to seek both a declaration that the ACA is unconstitutional and injunctive relief for the benefit of themselves and their citizens and residents. Thus, the requested relief will not result in any detriment to Defendants in defending this action; and the Additional States, after being permitted to be named as Plaintiffs, will be in a position to benefit from any equitable remedies that may be entered in this cause.[5]

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[3] Counts Two, Three, Five, and Six of the Amended Complaint were dismissed by the Court, per its Order and Memorandum Opinion dated October 14, 2010 [Doc. 79]. Those counts are realleged in the Second Amended Complaint in order to preserve them and avoid abandonment of them. (N.D. Fla. Local Rule 15.1 provides that "[m]atters not set forth in the amended pleading are deemed to have been abandoned.")

[4] In fact, only a single paragraph of the "Answer to Amended Complaint" [Doc. 81] – in which Defendants collectively respond to paragraphs 6-25 of the Amended Complaint – would need to be altered, for the limited purpose of admitting that the six Additional States are States.

[5] As acknowledged in the Certificate of Conference with Opposing Parties, *infra*, Defendants have indicated that they oppose this motion on the stated basis that it is inconsistent with this Court's Orders of April 14 and 23, 2010. Significantly, Defendants have not claimed that they would be prejudiced – the most important consideration under settled law, as demonstrated below. While the Court's April 14 Order did establish a

Memorandum in Support

Rule 20(a)(1), Federal Rules of Civil Procedure, allows parties to join together as plaintiffs in the same action if

> (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions and occurrences; and
>
> (B) any question of law or fact common to all plaintiffs will arise in the action.

Cf. Moore v. Comfed Savings Bank, 908 F.2d 834 (11th Cir. 1990) (joinder of all defendants held proper under Rule 20 because "all of these transactions arose out of a series of transactions or occurrences initiated by Land Bank and all of the claims involved the same question of law and fact.").

The proper procedure for a party to add plaintiffs is to seek leave to amend the complaint. 4 James Wm. Moore et al., Moore's Federal Practice ¶ 20.02[a][ii] (3d ed. 2009).

May 14 deadline for joining parties, that deadline was set in the context of fixing a date for filing the Amended Complaint *as a matter of course* pursuant to Rule 15(a)(1)(A), Defendants having filed no responsive pleading as of that time. Plaintiffs do not believe that the Court intended the May 14 deadline to bar all later requests for leave to add parties under Rule 15(a)(2). Plaintiffs' belief is implicitly supported by the Court's April 23 Order, which denied intervention by various outside parties under Rule 24, Federal Rules of Civil Procedure. There, the Court noted its concern that allowing intervenors with distinct claims could prevent resolution of this case "in an efficient and timely manner." [Doc. 37 at 2.] But the Court did not set a deadline for filing of motions to intervene. That the Additional Plaintiffs – who will not be introducing any collateral issues – could have sought to join this action through permissive intervention under Rule 24 underscores the appropriateness of their inclusion through amendment of the pleading pursuant to Rule 15.

Rule 15(a)(2), Federal Rules of Civil Procedure, governing amended and supplemental pleadings, provides that "[t]he court should freely give leave [to amend a pleading] when justice so requires."[6]

In *Foman v. Davis*, 371 U.S. 178 (1962), the Supreme Court set forth the standard to be applied in determining whether leave to amend a complaint should be granted, stating:

> In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as this rule requires, be "freely given."

Id. at 182. *See also Campbell v. Emory Clinic*, 166 F.3d 1157, 1161-62 (11th Cir. 1999) (quoting *Foman v. Davis*); *Nat'l Indep. Theatre Exhibitors, Inc. v. Charter Fin. Group*, 747 F.2d 1396, 1404 (11th Cir. 1984) (same).

Of the pertinent factors identified by the courts, prejudice to the opposing party is the most important to consider in determining whether leave to amend should be granted:

> However, unlike amendments as of course, amendments under Rule 15(a)(2) may be made at any stage of the litigation. The only prerequisites are that the district court have jurisdiction over the case and an appeal must not be pending. If these two conditions are met, the court will proceed to examine the effect and the timing of the proposed amendments to determine whether they would prejudice the rights of any of the other parties to the suit. If no prejudice is found, then leave normally will be granted.

6 C. Wright et al., Federal Practice and Procedure § 1484 (2010).

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[6] Similarly, Rule 21, Federal Rules of Civil Procedure, provides that, "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party."

There is no prescribed "time limit within which a party may apply to the court for leave to amend." *Id.* at § 1488. Indeed:

> [t]he courts have not imposed any arbitrary timing restrictions on requests for leave to amend and permission has been granted under Rule 15(a) at various stages of the litigation. These include: following discovery; after a pretrial conference; at a hearing on a motion to dismiss or for summary judgment; when the case is on the trial calendar and has been set for a hearing by the district court; at the beginning, during, and at the close of trial; after a judgment has been entered; and even on remand following an appeal.

Id. (citations omitted).

In the case at bar, the criteria for joinder under Rule 20(a) plainly are met. Plaintiff States, through the various causes of action set forth in their pleading, have raised facial constitutional challenges to the ACA, and the Additional States seek to assert exactly the same claims. Thus, the legal issues at stake are common to the Plaintiff States and the Additional States. Further, the parties agree, by their cross-motions for summary judgment, that there are no genuine issues of material fact – and no discovery has been undertaken by any party.

Moreover, none of the recognized factors that might weigh against allowing a requested amendment has any applicability here. Most importantly, no prejudice to Defendants would arise from allowing joinder of the Additional States. The Additional States accept the case as it is, with the summary judgment cross-motions having been fully briefed and argued. No new claims or defenses would arise from the filing of the Second Amended Complaint; no delay in the resolution of the summary judgment motions would result; and, apart from the minimal task of altering their Answer (as noted

above), Defendants will not be put to any additional burden or expense. Nor has there been any undue delay, bad faith or dilatory motive, or repeated failure to cure deficiencies by previous amendment.[7]

On the issues of timeliness, prejudice, and futility of amendment, *United States v. Oregon*, 745 F.2d 550 (9th Cir. 1984), is instructive. There, the appellate court, reversing the district court, allowed Idaho to intervene under Rule 24, Federal Rules of Civil Procedure. The Court stated:

> The key point in this appeal, however, is that the existing parties' concerns have little to do with timeliness. They do not suggest that their problems are materially different now than they would have been had Idaho sought to intervene a decade or more ago. We find no basis in the record for holding that the intervention would prejudice the existing parties because of the passage of time. … There is no serious dispute that Idaho has interests which may be affected by the disposition of this litigation. … As a party to the action, it will be able to invoke the district court's jurisdiction to secure adherence to orders of the district court.

Id. at 553.

Likewise, in the instant action, the inclusion of the Additional States as parties has "little to do with timeliness" and, as noted, would result in no prejudice to Defendants. Moreover, the requested amendment would not be a futile act, because the Additional States, like Plaintiff States, have a legitimate desire to obtain injunctive relief in order to

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[7] In sharp contrast, in *National Independent Theatre Exhibitors, Inc. v. Charter Financial Group*, "Charter and Columbia, both ready for trial, would have been prejudiced by the delay and expense occasioned by the largely repetitious discovery the new defendants would have required[,]" and amendment would have been futile. 747 F.2d at 1404. Similarly, in *Campbell v. Emory Clinic*, "[a]mendment at the late date offered would have been futile, caused undue delay and expense, and resulted in unfair prejudice to the individual defendants." 166 F.3d at 1162.

protect themselves, their citizens, and their residents from enforcement of the ACA by the Defendants, and seek to "invoke the District Court's jurisdiction to secure adherence to orders of the District Court."

Conclusion

For all the reasons stated above, Plaintiffs ask that their motion be granted and that their Second Amended Complaint be deemed effectively filed.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE WITH OPPOSING PARTIES

Pursuant to Local Rule 7.1(B) of the Northern District of Florida, the undersigned counsel hereby certifies that he conferred with counsel for Defendants in a good faith effort to resolve by agreement the issues raised in Plaintiffs' Motion for Leave to File Second Amended Complaint Joining Additional Plaintiff States, but that he was unsuccessful in reaching agreement. Defendants' counsel indicated that they believe Plaintiffs' Motion to be inconsistent with the Court's Order of April 23, 2010, denying motions to intervene; and that adding new parties now is, among other things,

inconsistent with the Court's Order of April 14, 2010, permitting amendment by May 14, 2010.

/s/ Blaine H. Winship
Blaine H. Winship
Special Counsel
Office of the Attorney General of Florida

CERTIFICATE OF SERVICE

I hereby certify that, on this 18th day of January, 2011, a copy of the foregoing motion was served on counsel of record for all Defendants through the Court's Notice of Electronic Filing system.

/s/ Blaine H. Winship
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Special Counsel
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