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# Coons v. Geithner - Plaintiff's Reply to U.S. Motion to stay Plaintiffs' Motion for Summary Judgement

Nick Coons

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

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| **NICK COONS, *et al.*,** | |
| **Plaintiffs,** | **No. 2:10-cv-1714-GMS** |
| **v.** | **Plaintiffs' Response to Defendants' Motion to Stay Plaintiffs' Motion for Summary Judgment and to Defendants' Opposition to Plaintiffs' Motion to Treat Defendants' Motion to Dismiss as one for Summary Judgment** |
| **TIMOTHY GEITHNER, *et al.*,** | |
| **Defendants.** | **ORAL ARGUMENT REQUESTED** |

## INTRODUCTION

On June 23, 2011, Defendants filed a Motion to Stay Plaintiffs' Motion for Summary Judgment in Part, as well as opposition to Plaintiffs' Motion to Treat Defendants' Motion to Dismiss as a Rule 56 Motion for Summary Judgment (Plaintiffs' 12(d) Motion). In support of their Motion, Defendants advance three main arguments: First, they argue that in filing summary judgment before Defendants' Rule 12(b)(1) Motion to Dismiss is resolved, Plaintiffs are asking this Court to exercise "hypothetical jurisdiction." (Defs.' Mem. Supp. Mot. Stay and

in Opp'n to Plffs.' Rule 12(d) Mot. (Mem.) 4-6.) Second, Defendants argue that that it would be a waste of resources to address a summary judgment motion at this time. (Mem. 4.) Third, Defendants claim if their (b)(1) Motion is denied, they "will wish to seek jurisdictional discovery" into Plaintiff Coons' financial resources because it is "impossible" for them to determine whether Coons will actually be subject to the minimum coverage provision when it takes effect in 2014. (*Id*. at 6.) In opposition to Plaintiffs' 12(d) Motion, Defendants argue that their citations to materials such as articles and statistics in support of their Motion to Dismiss does not warrant treating it as one for summary judgment. (*Id*. at 7-8.)

Plaintiffs submit that proceeding with summary judgment on Plaintiffs' Second Amended Complaint (Plaintiffs' Complaint) will require no additional time or resources that are not already being expended on Defendants' Motion to Dismiss. To be sure, in a case like this that involves purely legal issues with limited exception, Defendants' 12(b)(6) Motion is the functional equivalent of a Rule 56 motion for summary judgment. That explains why Defendants' Motion to Dismiss is essentially identical to the motions for summary judgment Defendants filed in the *Florida* and *Virginia* cases, (*Florida ex rel. Bondi v.* United States, 2011 WL 285683, at *24 (N.D. Fla. March 3, 2011); *Virginia ex rel. Cuccinelli v. Sebelius*, 702 F. Supp. 2d 598, 610 (E.D. Va. 2010)). Indeed, while Defendants argue that "requiring the parties and the Court to address plaintiffs' summary judgment motion at this time, including preparation of opposition papers and argument, would result in waste of time," (Mem. 4), they failed to identify a single issue they would be required to address on summary judgment that they have not already addressed in their Motion to Dismiss.

Defendants did not have to file a combined 12(b)(1) and (b)(6) Motion to Dismiss in this case; instead, they could have chosen to file only a 12(b)(1) Motion seeking dismissal solely on jurisdictional grounds, as they did for example in *Bellow v. HHS*, No. 1:10-cv-00165 (E.D. Tex. Mar. 15, 2011). If they had proceeded in this manner, they would have eliminated approximately 35 pages of briefing of the 12(b)(6) issues that, according to Defendants' own argument, would not be necessary to address even if the Court were to dismiss this case on jurisdictional grounds. Since Defendants do not dispute that their Motion to Dismiss is essentially identical to their motions for summary judgment in the *Virginia* and *Florida* cases, it is baffling that Defendants would persist in opposing moving forward with summary judgment proceedings. In fact, the only matter ostensibly standing in the way of proceeding with summary judgment is Defendants' contention that should this Court deny their Rule 12(b)(1) motion, they will need to conduct "jurisdictional discovery" to confirm Plaintiff Coons is indeed subject to the Individual Mandate. (Mem. 6.) However, even if such "discovery" were warranted, it would require no significant expenditure of time, and thus would not warrant staying summary judgment proceedings. Accordingly, Plaintiffs respectfully request that Defendants' Motion for Stay be denied and Plaintiffs' Rule 12(d) Motion be granted.

## I. Common Sense, Not Hypothetical Jurisdiction, Is at Issue

Defendants apparently would like this Court to believe that the only issue before the Court is Defendants' Motion to Dismiss for lack of jurisdiction. (*See* Mem. 1.) Defendants maintain that if their motion is granted in full, this case will never reach the merits; therefore, it is in the interest of judicial economy to stay summary judgment consideration. (*Id*. at 1-2.) But

that might arguably have been convincing only if Defendants had not proceeded with their broad-based Rule 12(b)(6) motion, which requires the parties to conduct briefing of summary judgment scope. This is why it is disingenuous at best for Defendants to cast Plaintiffs' summary judgment and 12(d) motions as ones that ask this Court to rule on the merits of Plaintiffs' Complaint before resolving the jurisdictional issues. Indeed, Plaintiffs' motions do not ask the Court to do this anymore than Defendants' Motion to Dismiss asks the Court to do.

Defendants cite a series of cases that address different jurisdictional issues, though none are relevant or analogous to this case. For example, Defendants cite to *Ticor Title Ins. Co. v. F.T.C.*, 625 F.Supp. 747, 750-751 (D.D.C. 1986), where the court stayed the case because administrative remedies had not been exhausted. Defendants also cite to *Steel Co. v. Citizens for a Better Environment*, where the Court rejected the doctrine of "hypothetical jurisdiction," under which "several Courts of Appeals . . . found it proper to proceed immediately to the merits question, despite jurisdictional objections." 523 U.S. 83, 1011-1016 (1998). To be clear, Plaintiffs do not dispute that Article III jurisdiction is always an antecedent question the courts must answer before passing judgment on the claims in a case. *Id.* at 1016.

Defendants also rely on another non-analogous case, *Ex Parte McArdle*, 74 U.S. 506 (1868), which held that when Congress repeals the Court's jurisdiction over the hearing of certain appeals, including jurisdiction over a case that was currently before the Court, the Court was "[w]ithout jurisdiction" and could not "proceed." *Id.* at 514. Likewise, *Public Citizen v. Bomer*, 274 F.3d 212 (5th Cir. 2002), involved a plaintiff who tried to use summary judgment "evidence" to defeat a motion to dismiss, while in *Hamrick v. Farmers Alliance Mutual Ins.* Co.,

No. 03-4202, 2004 WL 723649, *1 (D. Kansas March 11, 2004) (an unpublished case), the district court ruled that in that particular case, under those particular circumstances, it was in the interest of "judicial economy" to defer briefing on summary judgment.

Defendants also point to the proceedings in other cases challenging the Patient Protection and Affordable Care Act (PPACA),[1] where summary judgment proceedings were stayed pending jurisdictional rulings. However, in hindsight, the stays in those cases did little in terms of conserving judicial economy. That is because the scope of Defendants' motions to dismiss in cases like *Virginia*, *Florida* and *Mead v. Holder*, No. 10-00950 (D.D.C. Sept. 8, 2010), required the same investment of time and resources of the parties and the court as would have been required on a motion for summary judgment.

Defendants argue that "even in *Virginia* and *Florida*, upon which plaintiffs' rely upon heavily, summary judgment motions were filed only after those courts had ruled on motions to dismiss." (Mem. 6.) However, we now know that in those two cases, which were the first filed challenging PPACA, Defendants' motions to dismiss and motions for summary judgment were essentially identical. Indeed, the *Florida* plaintiffs foresaw that very outcome and proposed at their Rule 16 conference combined briefing of the (b)(1) and Rule 56 issues, due to the "overlapping arguments between what [the Government was] . . . arguing as a matter of law for dismissal, and what [the plaintiffs were] . . . arguing as a matter of law for a judgment in [their] favor as a matter of Summary Judgment under Rule 56." Florida, 3:10-cv-00091-RV, *12 (Doc.

[1]Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

44) (May 26, 2010) (excerpts from Transcript attached as Exh. 1). In that case, like here, Defendants had filed a "very broad-based Motion to Dismiss, not just on issues of justiciability or ripeness or standing [as was the case in *Bellow v. HHS*[2]]. . . but also on the basis of whether [their] causes of action state legal claims for which relief can be granted." *Id*. at 25. Ultimately, the *Florida* Court ordered sequential briefing; however, in setting the schedule in this manner, the Court recognized that there was not a "good, full grasp of how the issues [were] going to mesh" in terms of overlap. *Id*. at 28. We are now well-aware of how the issues relating to Defendants' 12(b)(6) Motion and those to be raised on summary judgment "mesh" and "overlap."[3] Accordingly, there is no purpose served by engaging in multiple and sequential briefing in this case.

**II. The Purported Need for Jurisdictional Discovery Does Not Support a Stay**

Thus, the sole issue ostensibly in the way of proceeding with summary judgment is Defendants' claim that should the Court deny their 12(b)(1) Motion to Dismiss, they will "wish to take jurisdictional discovery" relating to whether "Coons will actually be subject to the minimum coverage provision when it takes effect in 2014." (Mem. 6.) Defendants claim they

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[2]Defendants cite *Bellow* for their proposition that courts must determine jurisdiction before they can rule on the merits of those claims. (Mem. 5.) However, *Bellow* is distinguishable because at the time plaintiff Bellow filed a motion for summary judgment, Defendants had only filed a 12(b)(1) motion, and thus had not put the entire case before the Court as a matter of law through a 12(b)(6) Motion.

[3]Defendants rely on *Mead*, No. 10-00950, EFC 20, for the proposition that "it would be a waste of everyone's time and resources to have concurrent briefing on both Motions." (Mem. 6.) However, Plaintiffs here are seeking one set of briefings, not "concurrent briefing." Furthermore, the *Mead* stay did not in reality stay anything because there, as here, Defendants filed a broad based 12(b)(6) motion. *See* Exh. 2, *Mead* Table of Contents and Introduction.

will need facts such as "the nature of Coons' current employment, a description of his 'financial resources,' and his income and expenses." *Id*. However, the plaintiffs' declarations submitted in the *Florida* case were substantially similar to Mr. Coons' declaration, yet there is no indication that Defendants sought any such "jurisdictional" discovery in that case. *See* Declarations submitted in the *Florida*, Group Exh. 3.

Upon reviewing Defendants' Motion for Stay, Plaintiffs contacted Defendants to inquire about and attempt to address the discovery issue. Unfortunately, Plaintiffs' efforts to address this issue were to no avail, with Defendants declaring that they are "under no obligation" to discuss this matter. (*See* Correspondence, Exh. 4.) Accordingly, it is unclear what discovery Defendants claim they will need. For example, will they seek discovery that proves whether Mr. Coons is a member of an Indian tribe, whether he is a veteran, incarcerated, or eligible for Medicare or Medicaid? Would production of tax documents and a driver's license for Defendants' inspection satisfy Defendants' question as to whether Coons is subject to the Mandate? In any event, this is not the type of issue that should require formal discovery or create any disputed fact. Indeed, Plaintiff Coons is prepared to produce his tax documents for inspection by Defendants (to show he is subject to the Mandate), and a copy of his driver's license for Defendants' inspection (that shows his year of birth). While these are not documents any plaintiff would wish to file in the public docket, certainly Defendants' review of them should be sufficient to confirm any reasonably calculated jurisdictional questions they may have. Certainly, this is an issue that can be addressed swiftly, if Defendants are willing to work cooperatively.

## III. Plaintiffs' Rule 12(d) Motion Should be Granted

In opposing Plaintiffs' 12(d) Motion, Defendants cite a string of cases that discuss what a court may take into consideration when reviewing a Motion to Dismiss, without ever addressing the fact that their Motion to Dismiss is identical to their motions for summary judgment in the *Florida* and *Virginia* cases. (*See* Mem. 7-8.) Indeed, Plaintiffs do not dispute that matters attached to complaints or referenced therein, as well as public records of which a court can take judicial notice, *id*. at 8, can be considered in reviewing a motion to dismiss. However, the materials Defendants relied on in their Motion to Dismiss, which Plaintiffs refer to in their Rule 12(d) Motion, are neither materials that are attached to or cited in Plaintiffs' Complaint, nor are they materials of which the Court can take judicial notice.

Accordingly, while Defendants expended a great deal of space string-citing numerous cases that discuss judicial notice, they are of no consequence here. For example, in *Coit v. Biltmore Bank*, No. 2010 WL 20365663, *1 (D. Ariz, May 19, 2010), this Court held that it may take judicial notice of matters of public records from the Maricopa County Recorder's office. In *Anheuser-Busch, Inc. v. Schmoke*, 63 F,3d 1305, 1312 (4th Cir. 1995), the Fourth Circuit held that a court may take judicial notice of legislative history. *Tellabs, Inc. v. Makor Issues & Rights*, 551 U.S. 308, 322 (2007), held that when ruling on a 12(b)(6) motion, the Courts "ordinarily examine . . . documents incorporated into the complaint by reference and matters of which a court may take judicial notice." *Id.* *Daniels-Hall v. National Educ. Ass'n,* 629 F.3d 992, 998-999 (9th Cir. 2010), held that a "prospectus" referred to in the complaint, as well as information displayed on government websites, could be taken into consideration. Likewise, in

*Lazy Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008), the court noted that documents referenced in the complaint may be considered; while in *Kanelos v. County of Mohave*, 2011 WL 587203, *2 (Snow, J.) (D. Ariz, February 9, 2011), this Court held it may consider documents attached to the complaint or that are referenced extensively therein and accepted by all parties as authentic.

Thus, Defendants miss the point by focusing on the legislative history and other public records they relied on in their motion to dismiss, which Plaintiffs did not cite to in support of their 12(d) Motion. Instead, the documents at issue are those listed in Defendants' Table of Contents to Defendants' Motion to Dismiss (pp. xii and xiii), which are numerous publications and surveys containing argument, opinion and purported statistics. Nonetheless, the basis for treating Defendants' Motion to Dismiss as one for summary judgment has less to do with the fact that Defendants cited numerous documents in their Motion that are neither attached to nor referenced in the Complaint, nor are public records of which the Court can take judicial notice, and more to do with the fact that Defendants' 12(b)(6) Motion is for all intents and purposes the functional equivalent of a motion for summary judgment.

**CONCLUSION**

Defendants fail to present a single good reason this case should not proceed to summary judgment if Plaintiffs' standing is upheld. And it is entirely unclear as to why they would wish to stay summary judgment and engage in redundant briefing.[4] For the foregoing reasons,

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[4]Defendants appear to chide Plaintiffs for amending their Complaint on two occasions and for withdrawing their injunction motion. (*See* Mem. 1-2.) Those steps were taken to promote

Plaintiffs respectfully request that the Court deny Defendants' Motion for Stay of Plaintiffs' Motion for Summary Judgment, and grant Plaintiffs' Motion to Treat Defendants' Rule 12(b)(6) Motion as a Rule 56 Motion for Summary Judgment in Part.

**July 7, 2011**

**RESPECTFULLY SUBMITTED**,

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expeditious consideration of this case and in response to Defendants' actions implementing PPACA. Because PPACA's Medicaid mandates on Arizona were set to cripple the state's budget, Arizona requested and was granted "permission" from the federal government to discontinue coverage for a particular Medicaid population, something the state could not have otherwise done without jeopardizing all Medicaid matching funds. As a result, the claims of the twenty-nine state legislator-plaintiffs are not ripe, requiring their withdrawal and an amendment of the Complaint. The injunction motion was withdrawn based on Defendants' interpretation of certain provisions pertaining to the Independent Payment Advisory Board, which was set forth in a stipulation and entered by this Court. Most certainly, neither the withdrawal of the motion for preliminary injunction nor ensuing amendments to the Complaint are grounds for needlessly delaying summary judgment consideration. In any event, it is in both parties' interests to pursue the most expedient course for this litigation.

**CERTIFICATE OF SERVICE**

I, Diane Cohen, an attorney, hereby certify that on July 7, 2011, I electronically filed Plaintiffs' Response to Defendants Motion for Stay and Response to Defendants' Opposition to Plaintiffs' Motion to Treat Defendants' Motion to Dismiss as one for Summary Judgment, with the Clerk of the Court for the United States District Court, District of Arizona by using the CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the District Court's CM/ECF system.

s/ Diane S. Cohen