IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

TEXAS, KANSAS, LOUISIANA, INDIANA, WISCONSIN, and NEBRASKA,	§	
Plaintiffs,	§	
v.	§	Civil Action No. 7:15-CV-00151-O
UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, THOMAS E. PRICE, in his Official Capacity as SECRETARY OF HEALTH AND HUMAN SERVICES, UNITED STATES INTERNAL REVENUE SERVICE, and JOHN KOSKINEN, in his Official Capacity as COMMISSIONER OF INTERNAL REVENUE,	§	
Defendants.	§	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR EXTENSION OF TIME AND TO MODIFY SCHEDULING ORDER

Instead of substantively responding to Plaintiffs' Motion for Summary Judgment, now pending four months (since Jan. 6, 2017, ECF No. 53), Defendants return to the Court, once again at the eleventh hour, to seek yet another extension. This latest motion marks now the 7th extension initiated and sought by Defendants, *see* ECF Nos. 11, 30, 40, 44, 55, 57, and 59, and should be denied because the basis, "recent and possible legislative developments," is insufficient to establish good cause. Even if the American Health Care Act of 2017 ("AHCA") does become law—a speculative possibility to be sure—it does not moot the case or relieve Plaintiffs' injury. Plaintiffs seek to have their Motion for Summary Judgment adjudicated, and a final judgment entered.

The Legal Standard – "Good Cause"

The standard for whether an extension is appropriate is "good cause." Fed. R. Civ. P. 6(b)(1), 16(b)(4) ("A schedule may be modified only for good cause and with the judge's consent."); *see Reliance Ins. Co. v. La. Land & Exploration Co.,* 110 F.3d 253, 257 (5th Cir. 1997). Defendants don't mention the standard in their filing, nor do they bring forth good cause to place a minimum of *five months* between the filing of Plaintiffs' Motion for Summary Judgment and any substantive response thereto.

Whether "good cause" exists focuses on the diligence, or lack thereof, of the party seeking the extension. *Am. Tourmaline Fields v. Int'l Paper Co.,* 1998 WL 874825, at *1 (N.D. Tex. Dec. 7, 1998) (citing *Johnson v. Mammoth Recreations, Inc.,* 975 F.2d 604, 609 (9th Cir. 1992)); *Dall. Area Rapid Transit v. Foster*, 2002 WL 31433295, at *1 (N.D. Tex. Oct. 28, 2002). The alleged absence of prejudice to the Plaintiffs, Defs.' Mot. 2, which is untrue, is nevertheless insufficient to establish "good cause." *Id.; Price v. United Guar. Residential Ins. Co.,* 2005 WL 265164, at *4 (N.D. Tex. Feb. 2, 2005) (citing *Geiserman v. MacDonald,* 893 F.2d 787, 791 (5th Cir. 1990)).

Rather, to justify yet another extension, Defendants must show that, despite their best efforts, they could not have reasonably responded to Plaintiffs' Motion for

Summary Judgment by May 5, 2017 (after having four months to prepare such a response). *Am. Tourmaline Fields,* 1998 WL 874825, at *1 (citing 6A Wright, et al., *Federal Practice & Procedure,* § 1522.1 at 231 (2d ed. 1990)); *Sw. Bell Tel. Co. v. City of El Paso,* 346 F.3d 541, 546 (5th Cir. 2003) (citing *S & W Enters., LLC v. Southtrust Bank of Ala., NA,* 315 F.3d 533, 535 (5th Cir. 2003)). Yet Defendants offer nothing in this regard. Thus, the ability of Defendants to respond to Plaintiffs' Motion for Summary Judgment over the last four months must be presumed as a matter of law, thereby negating the existence of "good cause."

Speculation Does Not Constitute Good Cause

The sole source of justification offered by Defendants is an incorrect, and speculative, theory of mootness based on something that the federal government may or may not do. While Defendants claim that H.R. 1628 will eliminate the HIPF, they do not offer the Court or Plaintiffs any citation or language from the legislation to support that claim.

Nonetheless, even if this claim is true, Defendants hang their "good cause" on an enactment by a single chamber of Congress—an Act whose fate in the Senate, and the White House (if it were to reach the President's desk) remains to be seen. However, as a matter of law, speculation about future events is not good cause.[1]

[1] *See*, *e.g.*, *Castillo-Baltazar v. Holder*, 537 F. App'x 368, 369 (5th Cir. 2013) (speculative bid for prosecutorial discretion did not establish good cause); *Mehndy v. Holder*, 358 F. App'x 505, 506 (5th Cir. 2009) ("A request to continue proceedings in order to await a prospective or collateral event, such as the possibility of future relief, does not amount to good cause as such potential relief is speculative . . . ." (construing good cause standard under the Immigration and Nationality Act)); *Ahmed v. Gonzales*, 447 F.3d 433, 435 (5th Cir. 2006) ("the slim prospect of relief from removal based on the mere possibility that Ahmed might, at some later date, be granted a labor certification that would, in turn, only enable an employment-based visa petition is too speculative to establish the requisite 'good cause' for the granting of a continuance."); *Ramchandani v. Gonzales*, 434 F.3d 337, 339–40 & n.2 (5th Cir. 2005) (possible decision on an alien's pending labor certificate application is not good cause); *Witter v. INS*, 113 F.3d 549, 555–56 (5th Cir. 1997) (prospective outcome of criminal proceedings did not establish good cause); *Acuna–Hinojosa v. Lynch*, 653 F. App'x 463, 465 (7th Cir. 2016) (prospective outcome of application for postconviction relief does not establish good cause); *Hernandez–Chavez v. Lynch*, 650 F. App'x 532, 534 (9th Cir. 2016) (upholding denial of continuance for lack of good cause because the a prospective expunction of a criminal conviction is speculative); *Antia-Perea v. Holder*, 768 F.3d 647, 655 (7th Cir. 2014) (whether litigant would be granted a pardon is speculative and

The Insignificance of Legislative Action

Moreover, speculation about prospective changes in the law is, likewise, insufficient to establish good cause.[2] Even if the law does change, it does not constitute "good cause" for the Defendants not responding to Plaintiffs' Motion for Summary Judgment for months.[3]

As their sole basis for their motion, Defendants suggest the Court delay further because the Senate *might* do something, and the President *may* sign what it does. But Defendants do not stop there. Defendants incorrectly claim that if Congress passes the law, and the President signs it, those actions will moot the case *sub judice*. Defendants are wrong. Even if the HIPF is eliminated, the case is not mooted.

As the Court is aware, Plaintiffs seek a refund or disgorgement of the HIPFs paid to this point. Pls.' First Am. Compl. ¶ 69–71, 78–80, ECF No. 19. Though the Court dismissed the refund and disgorgement claims of Plaintiffs' First Amended Complaint, ECF No. 34 at 21, Plaintiffs maintain that they have a right to disgorgement or a refund of the HIPFs paid and shall appeal the Court's ruling once a final judgment is entered. However, preceding any claim Plaintiffs' have for a refund or disgorgement is a substantive finding that the HIPF is unlawful. In other words, Plaintiffs must prevail on the merits of their claims about the legality of the

insufficient to provide good cause for a continuance); *Paris v. U.S. Atty. Gen.*, 564 F. App'x 986, 990 (11th Cir. 2014) (finding that the outcome of a pending motion to vacate was too speculative to establish good cause for a continuance); *Huacho-Velarde v. Holder*, 382 F. App'x 54, 55 (2d Cir. 2010) (finding that "speculation does not constitute good cause and, therefore, does not merit a continuance."); *Yansick v. Temple Univ. Health Sys.*, 297 F. App'x 111, 115 (3d Cir. 2008) (finding that "vague and speculative allegations" are insufficient to establish good cause).

[2] *See*, *e.g.*, *Meza-Rivas v. Lynch*, No. 15-71882, 2017 WL 344308, at *1 (9th Cir. Jan. 24, 2017); *Romero v. Holder*, 585 F. App'x 735, 736 (9th Cir. 2014) (finding that the Congressional passage of comprehensive immigration reform was a "speculative possibility" that failed to establish good cause for a continuance); *Hyo Sung Choi v. Attorney Gen. of U.S.*, 309 F. App'x 610, 612 (3d Cir. 2009) (potential passage of legislation that would benefit litigant was insufficient good cause to justify a continuance).

[3] *See*, *e.g.*, *Patel v. Attorney Gen. of U.S.*, 523 F. App'x 121, 123 (3d Cir. 2013) (finding that even where DHS announced a policy change, that relief under that new change was entirely speculative and, thus, not good cause to justify a continuance).

HIPF in order to exercise any right to a refund. Thus, the Court's adjudication of the merits of Plaintiffs' claims is still a necessary step in this litigation.

Additionally, contrary to Defendants' claims that Congressional action may moot the case at hand, the American Health Care Act of 2017 (H.R. 1628), if enacted and signed into law, actually shows the exact opposite. For this matter to become arguably mooted, Congress not only must eliminate the HIPF, but also refund to Plaintiffs the past HIPFs paid. Upon inspecting the American Health Care Act of 2017, Plaintiffs can find no provision therein that purports to refund to the Plaintiffs the HIPFs paid to this point in time, plus interest. Thus, Defendants' speculation about what may or may not happen with the American Health Care Act of 2017 holds no genuine promise of actually mooting this matter.

Prejudice to Plaintiffs

Though Defendants' claim that the Plaintiffs will not be prejudiced by yet another delay, Defs.' Mot. 2, an alleged absence of prejudice to the Plaintiffs does not establish "good cause." *Price,* 2005 WL 265164, at *4. Moreover, the certainty of prejudice to Plaintiffs rises with each successive delay. Though the HIPF was suspended for 2017, 2018 is months away and Defendants cannot show the Court that Plaintiffs will not be required to begin paying the HIPF again in 2018, and Plaintiffs must budget HIPF expenses well in advance of payment. Nor can Defendants predict how long the appellate process in this matter may take or guarantee that it will be completed before Plaintiffs re-assume a new HIPF obligation.

What is clear, however, is that the longer the case is delayed the more certain it is that Plaintiffs will be re-saddled with the obligation to begin re-paying hundreds of millions to satisfy a HIPF obligation that they claim to be unlawful. Defendants' allegation of no prejudice is both factually unsubstantiated and insufficient to constitute good cause.

Prayer

Defendants failed to show good cause for their failure to respond to Plaintiffs' Motion for Summary Judgment after four months. Moreover, passage of the AHCA will not moot this case, and Plaintiffs will be prejudiced by any further delays.

"The filing of a request for an extension does not act as an automatic stay of the deadline, nor does it constitute good cause for an extension of the deadline. To the contrary, it is merely an invocation of the court's discretion." *Price*, 2005 WL 265164, at *3. Accordingly, if Defendants fail to respond to Plaintiffs' Motion for Summary Judgment on May 5, 2017, Plaintiffs aver that their Motion for Summary Judgment is ripe for adjudication and respectfully ask the Court to enter an order granting Plaintiffs' Motion for Summary Judgment, as well as enter a final judgment in this matter.

Dated: May 5, 2017.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas

JEFF LANDRY
Attorney General of Louisiana

CURTIS HILL
Attorney General of Indiana

BRAD SCHIMEL
Attorney General of Wisconsin

DOUG PETERSON
Attorney General of Nebraska

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY D. STARR
Deputy First Assistant Attorney General

MICHAEL C. TOTH
Special Counsel to the First Assistant Attorney General

ANDREW D. LEONIE
Associate Deputy Attorney General

/s/ Austin R. Nimocks
AUSTIN R. NIMOCKS
Associate Deputy Attorney General
Texas Bar No. 24002695
austin.nimocks@oag.texas.gov

ANGELA V. COLMENERO
Division Chief – General Litigation

THOMAS A. ALBRIGHT
Assistant Attorney General

ANDREW B. STEPHENS
Assistant Attorney General

DAVID J. HACKER
Senior Counsel

JOEL STONEDALE
Counsel

Office of Special Litigation
ATTORNEY GENERAL OF TEXAS
P.O. Box 12548, Mail Code 009
Austin, Texas 78711-2548
Tel: 512-936-1414

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that a copy of this pleading was served on all counsel of record listed below via e-mail and/or through this Court's CM/ECF system:

Benjamin C. Mizer
Principal Deputy Assistant Attorney General

John R. Parker
United States Attorney

Sarah Levine
Deputy Assistant Attorney General

Sheila M. Lieber
Deputy Director

Julie Straus Harris
Trial Attorney

Deepthy Kishore
Trial Attorney

United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W., Room 6109
Washington, D.C. 20530
(202) 616-8098

Counsel for Defendants

/s/ Joel Stonedale
JOEL STONEDALE