UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

John J. Dierlam	§	
Plaintiff	§	
	§	
versus	§	
	§	CIVIL ACTION NO. 4:16-cv-00307
	§	
Joseph R. Biden, in his official capacity	§	
as President of the United States et. al.	§	
	§	
Defendants	§	

Reply to the DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT AND REQUEST FOR CLARIFICATION

Stage of Proceeding

About the year 2010, Congress passed Pub. L. No. 111-148 (PPACA) and Pub. L. No. 111-152 (HCERA), collectively known as the ACA. Provisions of the ACA require every individual, or their guardian, with a sufficient income as calculated in the ACA, to maintain a government approved and mandated health insurance policy or qualify for an exemption. Various exemptions may avoid the penalties. The ACA specifies little in what should be included in "minimum essential coverage," instead it gives fairly broad authority to HHS to define these specifics, 42 § 300gg-13(a)(4) is but one example of this delegation. It is here where the requirement that "minimum essential coverage" include contraceptive, sterilization, certain abortion services, and related counseling.

The Original complaint was filed Feb. 4, 2016 in US District Court for the Southern District of Texas which named the President of the United States and three government agencies for an implementation of this Law which violates much of the Bill of Rights and RFRA. This case was initially dismissed by this court on June 14, 2018. The appeals court on Oct. 15, 2020 reversed and remanded for lack of an analysis of mootness and standing. This Court on 12/20/2021 granted the government's PMTD in its entirety and dismissed almost all claims in the complaint. On 12/28/2021 I filed a Motion for leave to file a 3rd Amended Complaint. (Dkt# 111) The government opposes.

Issues Presented and Standard of Review

1) Should leave be granted Plaintiff to file a 3rd Amended Complaint?

From *Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594 (5th Cir. 1981),*

> In our review of the trial court's exercise of discretion, rule 15(a), of course, provides the starting point. "Discretion" may be a misleading term, for rule 15(a) severely restricts the judge's freedom, directing that leave to amend "shall be

> freely given when justice so requires". It evinces a bias in favor of granting leave to amend.

In my motion (Dkt# 111) and furthered in this Reply, I present multiple grounds for which justice requires a 3rd Amended Complaint, if this Court accepts any of these reasons even tangentially or it can not articulate a substantial reason to deny leave, this Court MUST grant the Motion. The government implies a much wider discretion on the part of the judge which is misleading; short of some evidence of abuse of the process, the *Dussouy* decision makes it clear a district judge has very little freedom to deny leave to amend.

Argument

I – The Complaint was previously amended to address identified deficiencies. No Failure has occurred to amend the majority of the claims in the Complaint because no specific fault has been identified. The court in the recent decision to dismiss did not indicate specific error in fact or law to invalidate the claims or warrant dismissal.

The government suggests a failure to successfully amend a Complaint after multiple attempts as a reason to deny any future attempt. In fact, the previous two attempts to amend were narrowly directed at what the Court or defendant's found deficient with a single claim. In the current situation, all claims in the Complaint are supposedly deficient with the possible exception of part of an RFRA claim, which is a much different circumstance as the vast majority of the claims have NEVER been amended nor were specific and concrete reasons provided for their deficiency. The Court has not provided any reason as to its finding the claims insufficient in Law or in the facts presented. How have I misinterpreted the Constitution, case law, or other legal theory in these claims? Which facts were either not accepted as true or deemed insufficient to support the claims? What specifically indicates I do not have standing or my claims are moot? I do not know the answer to these questions based upon the Court's previous hearing for the defendant's PMTD. It is in large part why I have submitted the Request for Clarification. If I can

receive some answer to these questions perhaps I can amend the Complaint to address these objections.

A – The "new objections" could not have been addressed in the PMTD as they were introduced well after that document or have not yet been created.

The "new objections" I mention in the Motion and cited on p.7 of the Defendants' Opposition to Plaintiff's Motion For Leave To File A Third Amended Complaint (O3AC) which the government claims were addressed in their PMTD could not possibly have been addressed by that document since any objection the Court may provide in the Request For Clarification as well as the objections brought up by the government in their Reply to my Response to their PMTD (RRPMD) and the hearing on the PMTD either have not yet occurred or occurred well after their PMTD.

For example, on p.2 of the government's Reply in support of their PMTD (RPMTD, Dkt# 108) they indicate the "unclean hands" doctrine I cited in my Response to the PMTD has "no place here" and I did not cite authority otherwise. I did omit the authority. It is correct that the "unclean hands" doctrine is very often used as a defense, however it is "not actually a defense, but a concept designed to protect the court from becoming a party to the transgressor's misconduct."[1] I can more fully develop and support an argument for the use of this doctrine with additional authority in an Amended Complaint.

B – The government quotes the Court from the transcript of the hearing on the Defendants' PMTD in an attempt to support the dismissal, however these quotes are overly broad and contain multiple factual errors which better support an argument in favor of a 3rd amended complaint.

1 – Claim I concerning the lack of a 1502(c) notice has many opportunities to better establish and clarify the legal underpinnings of a violation.

In response to the quote from the Transcript of the Dec. 15, 2021 PMTD Hearing

1 *In re Napster, Inc. Copyright Litigation, 191 F. Supp. 2d 1087 (N.D. Cal. 2002).* (internal citations and quotations will be omitted throughout this document.)

(Transcript) 4:24-5:3 provided on p.4 of the O3AC the 1502(c) notice is important since it was the claim of the agencies in documents to the court insurance policies existed which could meet my religious objections. (See p.17 of the government's MTD Plaintiff's First Amended Complaint Dkt#37) I did seek out other providers after I dropped my employer's insurance. It was not until I began this suit around 2016 when I discovered the agencies rules forced the HHS Mandate on every insurer. The conduct of the agencies in this matter is so egregious, duplicitous, self serving, harmful to the public interest and additionally involves blatant violation of the RFRA, 1st amendment, or at a minimum judicial estoppel. It is difficult for me to believe it can not be the subject of the violation of one or more laws whether that include the APA, the FTCA, or some other law or legal principle such as "unclean hands" or a violation of the public interest.

2 – A prospective claim can not be moot if the statute has not been repealed nor have the defendants met any burden to show the behavior will not be repeated. The current term of the Democrat majority Congress is not over even if their Omnibus bill appears to have failed for now.

On p.4 of the O3CA the government quotes the Transcript at 10:7-9, "the general rule that statutory changes discontinuing a challenge practice moot the plaintiff's prospective claims." Are all prospective tax related claims automatically dismissed in all courts when Congress changes tax rates, brackets, or penalties but does not repeal the rate, bracket, or penalty itself? A similar situation exists here. On pp.4-5 of the RPMTD the government quotes *Fantasy Ranch Inc. v. City of Arlington, Tex., 459 F.3d 546, 564 (5th Cir. 2006)* and *Cammermeyer v. Perry, 97 F.3d 1235, 1238 (9th Cir. 1996)* both are inapplicable as the statute in question has NOT been repealed, which is a logical prerequisite to make them apposite. The defendants have not met any burden to show the tax will not be raised and the "wrongful behavior" repeated, nor can they, as required in *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000).*

3 – A lack of neutrality and an intentional burden has been shown in the formulation of the HHS Mandate. What more does the free exercise and establishment claims lack?

On p.5 of the O3CA the government quotes the Transcript at 20:11-14, "isn't the law quite clear that a neutral and generally applicable law that has the incidental effect of burdening a particular religious practice is not unconstitutional?" The law is not neutral, generally applicable, and definitely the effect of burdening religion was not incidental. I have presented evidence to this effect which meets the requirements of precedent case law. (See pp.14-18 of my Response to the PMTD) What more does this Court require?

4 – The court identifies a class which was never claimed to be protected but was intended to demonstrate "arbitrary and capricious" construction.

On p.5 of the O3CA the government quotes from the Transcript at 24:24-25 "people with a healthy lifestyle are not a protected class under the Constitution, are they?" I never claimed they were. It is possible the Court meant this question to ridicule my actual position. Otherwise, I assume the judge is referring to:

> Many significant factors which will affect the cost of health care and the burden an individual will place on the health care system are not listed. These include drug use, illicit sex, overeating, as well as other factors. Therefore, a heavier burden will be placed on those individuals who refrain from these activities and choose a healthier life style. This perverse, anti-evolutionary selection may harm society and in time deteriorate overall health in the population as those who would maintain a healthier lifestyle will have less incentive to do so. (¶31 of the 2nd Amended Complaint)

This quote is from Claim VII which relates to a due process claim, provides evidence for "arbitrary and capricious" construction, and perhaps an equal protection claim. However, the classes in this equal protection claim actually fall along the lines of persons who qualified for an exemption from maintaining "minimum essential coverage" and the "Individual Mandate" from those who do not. Various Democrat constituencies were more likely to receive an exemption. In any case, the effect is contrary to the stated purposes of Congress.

5 – The defendants and the court focus on only one of the five major Constitutional violations identified in the Response to the the defendants' PMTD but less succinctly in the Complaint. The other violations receive no mention. Documents created much after the Complaint do provide support in case law.

Also from the same page of the O3CA, I did indicate evidence and a method to challenge the Supreme court's *Nat. Fedn. of Indep. Business v. Sebelius, 132 S. Ct. 2566, 567 U.S. 1, 183 L. Ed. 2d 450 (2012)* (NFIB) decision regarding the Individual Mandate in combination with the Individual Mandate Penalty is a direct tax. I also believe I may be able to put forth an argument to take up the claim in the unsuccessful *California v. Texas, 141 S. Ct. 2104 (2021)* case that a reduction of the tax to zero makes the ACA unconstitutional. The Supreme Court in that case found the claim to be valid but would not rule on the merits. The issue was the lack of standing of the appellees to bring suit.

In all cases above, the court often misconstrued my argument or substituted a different argument from the one I was making. If the court has difficulty understanding the Complaint or finds it difficult to follow the argument over multiple documents, it is yet another reason justice will be served to allow a Third Amended Complaint. If the comments regarding an issue are vague and amorphous, it is difficult to cure a problem if it is uncertain how it relates to the facts and law involved in the case. If the goal remains vague it is a much easier task to reshape the objective so it remains ever elusive. From an alternative viewpoint, very much like the panel majority in the IOM report[2] when it was faced with specific charges and allegations, the majority made a simple statement to the effect the dissenter was solitary and chose to ignore the charges. In Science consensus is immaterial, which suggests the panel conclusions had no basis in Science but were rooted in a belief system. Similarly, in the present case the specific evidence

2 Inst. of Med., Clinical Preventive Services for Women: Closing the Gaps 19-20, 109 (2011) ("IOM Rep."), http://iom.nationalacademies.org/Reports/2011/Clinical-Preventive-Services-for-Women-Closing-the-Gaps.aspx

and legal theories I put forth are simply ignored because they are not in line with the preferred belief system of this court and therefore can not be contemplated.

II – I believe my understanding of FRCP 8 is accurate. Inappropriate incorporation by reference can be cured by an amended complaint not in the Response where it occurred, but by making the incorporation unnecessary. The understanding of the implications of FRCP 8 on the part of the government and the court may be in doubt.

The government on p.6 of the O3CA indicates I lack understanding of FRCP 8(a). They are correct in the observation, changes to the complaint will not fix the "inappropriate incorporation by reference" in my Response to the PMTD. However, no other means exist at this point to address this problem other than a new amended complaint which contains the material inappropriately incorporated by reference. If the material is in a 3rd amended Complaint I would have no need to incorporate any material by reference. The argument the government advances here appears to favor rather than disfavor a Third Amended Complaint, and the point from my Motion remains valid.

FRCP 8(a) clearly anticipates a very low bar in which any argument or legal theory with any possibility of success despite how remote will be allowed to advance to trial. Additional evidence can be developed through discovery and both parties can better flesh out the appropriate legal support or lack thereof. Obviously, this court is holding me to a much higher standard. It appears I must produce a complaint in which the only remaining task is to pronounce sentence against the defendants. The Complaint must be much larger to lay out a substantially complete, air tight case for this reason. This Court was willing to hastily dismiss all counts against the government even though the government admitted some culpability for a violation of RFRA. At this point, it is not unreasonable to conclude this court will not entertain any charges against the government in this suit no matter how articulate or how well the facts and legal theory are plead.

As I mentioned at the Hearing on the defendant's PMTD, the data the judge was asking for, namely evidence on whether insurance policies which meet my objections are available at reasonable cost, can be discovered by commissioning an appropriately designed study to survey health insurance companies. Simple calculations can then QUANTIFY the damage to the market caused by the defendants. I would be willing to fund such a study provided it is reasonably within my means. Alternatively, interrogatories could be issued to all present and past health insurers in the individual marketplace for the same purpose. However, in stark violation of FRCP 8 and the prescription in *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 557, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)* that no probability of success be imposed, I will be denied a chance to obtain this data in discovery.

III – I am opposed to any referral to a Magistrate Judge. It is very unclear what culpability the defendants accept as the religious exemption to the HHS Mandate was crafted in such a way to force me to violate the Individual Mandate, retrospectively and prospectively. I agree a violation of my religious freedom has occurred and continues to occur, but is it just RFRA and how can only retrospective relief cure an ongoing violation?

I am opposed to any referral to a Magistrate Judge. I regard Judge Palermo's R&R a disaster for both parties which only muddied the water. It diverted time and attention away from the actual facts and law in this case. Other than a general announcement of the defendant's change in position shortly after the R&R (See p.2-4 of the Defendants' Response to Magistrate Judge's Report & Recommendation, Dkt# 73), the defendants have not stated exactly what culpability they accept in this particular case. Ever since I was forced to drop my employer's insurance at the end of 2012, I have not been covered by any health insurance. Therefore, no current health insurer willing to provide an exemption exits. The exemption only applies to some one who can identify a "willing" insurer, otherwise the person remains "an applicable individual," who is subject to the Individual Mandate. The religious exemption does not apply in

my case, prospectively or retrospectively. The defendants have not filed an answer, nor has any discovery been allowed. It would seem to me that any settlement would necessarily involve some investigation of the underlying violation of religious freedom, which could easily impinge upon evidence or involve discovery into some of the charges previously dismissed. I currently do not see how an agreement can be reached due to the great differences between the parties, but I am willing to listen to any proposal.

Conclusion

For the reasons stated above and in the previous Motion, leave to file a 3rd Amended Complaint should be granted. It saddens me, as indicated above, the Court has not taken this suit very seriously. The unconstitutional behavior of the Left and Democrats have not changed. The violations in the ACA were only a beginning. The vaccination, mask, and other mandates are in opposition to Science and have more a goal of tyranny like the ACA. Health authorities have simply lied in defense of Leftist political objectives in opposition to Science. Health care professionals have remained silent or cooperated in fear of retribution. These recent events in the field of health care are just a repetition of the history of what occurred in the ACA. An increasing toll of death and suffering can be expected as a result of the political goals of the demonic Left, much of which could have been avoided if the Court had acted early to rein in the unconstitutional abuse of the Left.

John J. Dierlam

Date: 1/22/2022
Respectfully Submitted,
John J. Dierlam

Certificate of Service

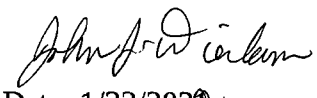
I certify I have on January 22, 2022 mailed a copy of the above document to the clerk of the court at:

United States District Clerk
Southern District of Texas
515 Rusk, Room 5300
Houston, TX 77002

as I do not have access to the Court's electronic filing system. I have also mailed a copy to Defendant's Counsel at:

Rebecca M. Kopplin
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, D.C. 20005

I have emailed a courtesy copy to the Defendant's counsel at Rebecca.M.Kopplin@usdoj.gov as well as the Case Manager for Judge Ellison at Arturo_Rivera@txs.uscourts.gov.



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