UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN J. DIERLAM,

Plaintiff,

v. Case No. 4:16-CV-00307

JOSEPH R. BIDEN JR., in his official capacity as President of the United States, *et al.*,

Defendants.

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

NATURE AND STAGE OF THE PROCEEDING

On remand from the Fifth Circuit, Plaintiff John J. Dierlam filed a Second Amended Complaint challenging Defendants' implementation of § 1502(c) of the Patient Protection and Affordable Care Act (ACA or the Act), as well as the legality of other provisions of the ACA, including the minimum essential coverage provision, its religious exemptions, the individual shared-responsibility payment provision, and the preventive services coverage provision to the extent it requires coverage of contraceptive services. 2d Am. Compl. (2AC), ECF No. 94. Defendants moved to dismiss Counts I and III to VIII of the Second Amended Complaint in their entirety and Count II to the extent it sought prospective relief. Defs.' Partial Mot. Dismiss Pl.'s 2d Am. Compl. (Defs.' PMTD), ECF No. 104. After hearing argument from the parties, the Court granted Defendants' motion, dismissing Counts I, III, IV, V, VI, VII, and VIII in their entirety and dismissing Count II to the extent it sought prospective relief. Order, ECF No. 110. The only remaining claim is thus the portion of Count II seeking retrospective relief. Plaintiff now moves for leave to file a third amended complaint. Opp'd Mot. Leave File 3d Am. Compl. & Req. Clarif. (Mot.), ECF No. 111.

ISSUES PRESENTED

1. Should Plaintiff be permitted to file a third amended complaint?

Legal standard: Federal Rule of Civil Procedure 15(a)(2) requires leave of court to amend the complaint outside the time set for amendments as a matter of course. While leave "shall be freely given when justice so requires . . . it is by no means automatic." *Wimm v. Jack Eckerd Corp.*, 3 F.3d 137, 139 (5th Cir. 1993) (citations omitted). The decision to grant or deny leave to amend is at the district court's discretion. *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 566 (5th Cir. 2003).

2. Should the Court clarify its dismissal of Counts I, III, IV, V, VI, VII, and VIII in their entirety, and of Count II to the extent it sought prospective relief?

SUMMARY OF THE ARGUMENT

The Court should deny leave to file a third amended complaint because Mr. Dierlam has already had multiple opportunities to craft his allegations and because amendment would be futile—Mr. Dierlam lacks standing to bring the dismissed claims and those claims also fail to state a claim on which relief can be granted, and these deficiencies are not likely to be cured by amendment.

Defendants do not oppose the Court providing any clarification it thinks would be helpful regarding its dismissal decision, although Defendants already understand the Court to have dismissed all claims except for the portions of Count II (the RFRA claim) seeking retrospective relief. As to that claim, Defendants believe that referral to a magistrate judge for mediation or a settlement conference would be the most efficient course forward.

ARGUMENT

I. The Court Should Deny Leave to Amend Because Amendment Would Be Futile and Mr. Dierlam Has Already Had Multiple Opportunities to Amend.

Although Rule 15(a) provides that leave to amend "shall be freely given when justice so requires . . . it is by no means automatic." *Wimm*, 3 F.3d at 139 (internal citations omitted). "In deciding whether to grant leave to file an amended pleading, the district court may consider such factors 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, and futility of amendment." *Id*. (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Overseas Inns S.A. P.A. v. United States*, 911 F.2d 1146, 1150 (5th Cir. 1990) (additional citations omitted)). Whether

leave to amend should be granted is entrusted to the sound discretion of the district court, and that court's ruling is reversible only for an abuse of discretion. *Id.*

Here, leave to amend should be denied. First, it would be futile, as set forth below. *See* R. & R. on Defs.' Mot. Dismiss at 24, ECF 67 (Magistrate Judge Palermo explaining that Mr. Dierlam should not be granted leave to amend again because "a plaintiff should be denied leave to amend a complaint if the court determines that the proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on its face" (citation omitted)). Second, Mr. Dierlam has already had multiple opportunities to amend his complaint and has been unable to cure its deficiencies. There is no need to permit Plaintiff a fourth bite at the apple, which would likely be of "considerable length," and which would require the parties and the Court to expend additional resources in response. *See* Pl.'s Resp. Defs.' PMTD at 24-25, ECF No. 105 ("I am unaware of any rule which limits the size of a complaint but, this Third Amended Complaint will likely be of considerable length. The FRCP 8(a) prescription for a 'short and plain statement' can not [sic] be reasonably met under the higher standard to which I will be subject.").

Futility – "Although granting leave to amend a deficient complaint is generally favored, the court need not grant leave when doing so would be futile and plaintiff has already had an opportunity to put forth his best case after being apprised of the insufficiency of the complaint." *Lovett v. Harris Cnty. Dep't of Educ.*, No. CV H-20-3574, 2021 WL 4427046, at *2 (S.D. Tex. Sept. 27, 2021) (citing *Wiggins v. La. State University-Health Care Servs. Div.*, 710 F. App'x 625, 627 (5th Cir. 2017) and *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n*, 751 F.3d 368, 378 (5th Cir. 2014)).

Here, although Defendants cannot perfectly anticipate Mr. Dierlam's proposed amendments, given that he did not attach a proposed third amended complaint to his motion, it

does not appear that Mr. Dierlam could correct the significant issues the Court has identified with his claims because mootness and the legal flaws in his theories will not be resolved by adding additional facts or legal arguments. *See* Defs.' PMTD, ECF No. 104; Reply Supp. Defs.' PMTD, ECF No. 108.

As to Count I (regarding alleged violations of § 1502), in addition to other flaws, Mr. Dierlam lacks standing because any injury was not caused by the lack of notice and Count I fails to state a claim because § 1502 notice is not a necessary precondition to the obligation to make individual shared-responsibility payments. *Cf.* Trans. of Hearing (Trans.) 4:24-5:3, (Dec. 15, 2021) (as the Court noted, Mr. Dierlam "chose not to check health care because you didn't think your claimed injury could possibly be remedied because no policy out there could be made to align with your religious beliefs, so I don't see why it mattered whether you got notice or not."); Trans. 7:12-14 (as the Court noted, "[c]ompliance with 1502(c) is not a condition precedent to a taxpayer's responsibility to make sure -- responsibility for payments"). Given that, as a matter of law, § 1502 is not a condition precedent to individual shared-responsibility payments, this claim could not be salvaged through an amended complaint.

As to Counts III through VIII and the portions of Count II seeking prospective relief, these claims are now moot (or Mr. Dierlam lacks standing to bring them), due to the Religious Exemption Rule and zeroing out of the individual shared-responsibility payment. *Cf.* Trans. 10:7-9 (recognizing "the general rule that statutory changes discontinuing a challenge practice moot the plaintiff's prospective claims"); Trans. 9:4-11 ("It seems to me intervening events that occurred while litigation was pending may render a formerly live ongoing controversy moot and I think that's what happened here."); Trans. 9:16-17 ("[T]here's no way I can grant you any relief because Congress has already done that [zeroed out the individual shared-responsibility payment].").

Amending the complaint cannot "correct" these mootness problems, and it would thus be futile. In addition, Counts III through VIII suffer from a number of fatal *legal* flaws that will prevent Mr. Dierlam from stating a claim on which relief can be granted, regardless of what additional facts he might allege in an amended complaint. *See, e.g.*, Trans. 20:11-14 (as the Court acknowledged, "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?"); Trans. 22:11-14 (as the Court observed, "[t]he Supreme Court held it was indirect taxes in its holding that the minimum essential coverage provision of the ACA is not a tax that requires apportionment"); Trans. 24:24-25 (as the Court noted, "people with a healthy lifestyle are not a protected class under the Constitution, are they?").

Indeed, further emphasizing the futility of amendment, Mr. Dierlam does not generally argue that filing a third amended complaint will allow him to identify a new cause of action, set forth new facts establishing standing, or otherwise make substantive changes to the complaint that would overcome its existing defects, even assuming that were possible. Instead, Mr. Dierlam focuses on how amendment could improve the organization of his complaint or allow him to collect in one place legal arguments that have previously appeared in multiple locations throughout his briefing. *See* Mot. 3 ("I will consolidate the arguments from all previous submissions . . . ."); Mot. 4 ("I then request I be allowed to submit a Third Amended Complaint to address the issues indicated by the Court and the government as well as c*onsolidate and better explain the arguments and evidence* which is now scattered and developed in several documents created over the nearly six plus year history of this case." (emphasis added)). This rework would match his approach in the Second Amended Complaint, which largely reiterated factual allegations from earlier pleadings. But making non-substantive improvements or "cleaning up" a pleading is not an

appropriate reason to put the parties and the Court through the additional burdens of responding to and evaluating a third amended complaint where these non-substantive improvements will not correct the fundamental problems with Mr. Dierlam's legal theories.

Previous opportunities to amend – Mr. Dierlam has already amended his complaint twice—this would be his fourth bite at the apple. *See* 1st Am. Compl., ECF No. 32; 2AC. As the Fifth Circuit has held, "repeated failure to cure deficiencies by amendments previously allowed" counsels against granting further leave to amend. *Wimm*, 3 F.3d at 139.

Response to Mr. Dierlam's arguments – Nor do any of Mr. Dierlam's specific arguments in favor of amendment carry the day.

First, he argues that he should be granted leave to amend to "incorporate all the evidence and arguments in a new consolidated Complaint," Mot. 4, because the government objected to his attempt to incorporate arguments by reference in his response to Defendant's partial motion to dismiss. This argument mistakes the role of the complaint (to briefly set out the plaintiff's legal theories and the facts supporting his claims for relief[1]) with that of a brief, which sets out legal arguments and authorities in support of or in opposition to a specific motion.

Courts frown upon attempts to incorporate legal arguments by reference into briefing because doing so "is improper and would circumvent the page limit requirements established by the Court's Local Rules." Defs.' Reply Supp. PMTD 1 n.1, (quoting *Phoenix Licensing, L.L.C. v. Advance Am.*, No. 15-CV-1367, 2016 WL 6217180, at *10 (E.D. Tex. Oct. 25, 2016)). But the problem of inappropriate incorporation by reference is not a problem with the *complaint*. While

[1] *See* Fed. R. Civ. P. 8(a) (the complaint should contain "(1) a short and plain statement of the grounds for the court's jurisdiction, . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought").

including extensive legal argument in the complaint is generally unnecessary, Fed. R. Civ. P. 8(a), even if those arguments were asserted in the complaint, it would not relieve a party of its burden to articulate those arguments fully in a supporting or opposing memorandum. Accordingly, granting leave to amend the complaint would have no effect on Mr. Dierlam's improper attempt to incorporate arguments by reference into his briefing.

Second, Mr. Dierlam argues that an amended complaint is appropriate to "address the new objections" because he has "the impression this case is being unfairly tried in the pleading phase." Mot. 4. As previously discussed with regard to futility, Mr. Dierlam's claims were dismissed at the pleading stage because, among other things, he lacks standing to bring them and did not state a claim on which relief can be granted. These are not "new objections"—they are objections that were fully briefed in Defendants' partial motion to dismiss. Given the deficiencies in Mr. Dierlam's claims, it is entirely appropriate for this case to be resolved at the motion to dismiss phase pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). *See Huerta v. Shein*, 498 F. App'x 422, 424 (5th Cir. 2012) ("Rule 12(b)(6), however, authorizes a court to dismiss a claim on the basis of a dispositive issue of law. . . . A claim must be dismissed if as a matter of law it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." (cleaned up) (citations omitted)). Indeed, where this Court lacks jurisdiction to proceed, there is no reason for the Court or the parties to be burdened by proceeding to more advanced phases of litigation.

Third, Mr. Dierlam argues that because he intends to appeal, "[a]n Amended Complaint would serve justice as it would simplify the work of the Appeals Court as the arguments and evidence to date would be contained in a single document which is more succinct and decipherable." Mot. 4. "Cleaning up" the complaint for appeal is not an appropriate reason to

grant leave to amend. Indeed, the fact that Mr. Dierlam's primary goal in amending is non-substantive demonstrates the futility and inappropriateness of amendment. Granting leave to amend to make cosmetic restatements of the existing claims would necessitate a further round of motion to dismiss briefing, leading to the same result after further burdening the parties and the Court. Every case includes infelicities of drafting, which do not justify continued amendments. *See Jacquez v. Procunier*, 801 F.2d 789, 792-93 (5th Cir. 1986) ("At some point a court must decide that a plaintiff has had fair opportunity to make his case; if, after that time, a cause of action has not been established, the court should finally dismiss the suit.").

II. Defendants Do Not Oppose Clarification.

Mr. Dierlam also asks for "clarification from the Court on why the claims were dismissed," and, if his motion to amend is denied, a description of "what if any claims remain and how the Court plans to dispose of these claims." Mot. 4

Defendants do not oppose the Court providing any clarification that it deems appropriate regarding its reasoning for granting Defendants' partial motion to dismiss. As to what claims remain, Defendants understand that the only claim remaining is the portion of Count II, Plaintiff's RFRA claim, seeking retrospective relief—i.e., the portion seeking relief for individual shared-responsibility payments previously made by Mr. Dierlam.

For next steps regarding that claim, Defendants believe that a settlement conference or mediation may assist the parties in resolving the remaining portion of Count II, and respectfully request that the Court refer the parties to a magistrate judge for that purpose. If the parties are not able to reach a mutually agreeable resolution of the remaining portions of Count II, Defendants anticipate that further exploration of Mr. Dierlam's standing to raise that claim, followed by further briefing, may be necessary.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for leave to file a third amended complaint should be denied.

Dated: January 18, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2022, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system. Because Plaintiff is not registered on the CM/ECF system, I also served Plaintiff with a copy of the foregoing document by electronic mail.

Executed on January 18, 2022, in Washington, D.C.

/s/ Rebecca Kopplin
REBECCA KOPPLIN