

No. 23-20401

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

John J. Dierlam
Plaintiff-Appellant

v.

Joseph R. Biden, in his official capacity as President of the
United States; United States Department of
Health and Human Services; Xavier Becerra,
Secretary, U.S. Department of Health and
Human Services; United States Department of
Treasury; Janet Yellen, Secretary, U.S.
Department of Treasury; United States Department of Labor;
Julie A. Su, Acting Secretary, U.S. Department of Labor,
Defendants-Appellees

From the United States District Court, Southern District of Texas
USDC No. 4:16-CV-307

RECORD EXCERPTS OF APPELLANT



John J. Dierlam, pro se
5802 Redell Road
Baytown, Texas 77521
Phone: 281-424-2266
email: jdierlam@outlook.com

Fifth Circuit Court of Appeals

John J. Dierlam	§
pro se	§
versus	§
Joseph R. Bidden et. al.	§
USDC No. 4:16-CV-307	§
-----	§

NO. 23-20401

Table of Contents

1 Docket Sheet (ROA.1).....	1
2 Notice of Appeal, Dkt. 149, (ROA.1229).....	27
3 Final Judgment (claim 3) Dkt. 148, (ROA.1227-.....	29
4 Final Judgment (except claim 3) Dkt. 136 (ROA.1164).....	32
5 Magistrate Judge's Report and Recommendation, Dkt. 67, (ROA.508-532).....	34
6 Clarifying Memorandum (ROA.846-854).....	60
CERTIFICATE OF SERVICE.....	70

1 Docket Sheet

APPEAL,CLOSED,MOTREF

U.S. District Court
SOUTHERN DISTRICT OF TEXAS (Houston)
CIVIL DOCKET FOR CASE #: 4:16-cv-00307
Internal Use Only

Dierlam v. Obama et al

Assigned to: Judge Keith P Ellison

Referred to: Magistrate Judge Dena Hanovice Palermo

Cause: 28:1983 Civil Rights

Date Filed: 02/04/2016

Date Terminated: 06/14/2018

Jury Demand: None

Nature of Suit: 440 Civil Rights: Other

Jurisdiction: U.S. Government Defendant

Plaintiff

John J Dierlam

represented by **John J Dierlam**
5802 Redell Rd
Baytown, TX 77521
281-424-2266
PRO SE

V.

Defendant

Barack Hussein Obama

*in his official capacity as President of the
United States*

represented by **Daniel David Hu**
Office of the US Attorneys Office
1000 Louisiana
Ste 2300
Houston, TX 77002
713-567-9518
Fax: 713-718-3303
Email: daniel.hu@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Emily Sue Newton
US Dept of Justice
20 Massachusetts Ave NW
#7132
Washington, DC 20530
202-305-8356
Email: emily.s.newton@usdoj.gov
TERMINATED: 01/06/2022
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Elizabeth L. Kade
U.S Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave NW
Washington, DC 20001

202-616-8491
Email: Elizabeth.L.Kade@usdoj.gov
ATTORNEY TO BE NOTICED

Rebecca Michelle Kopplin
U.S. Department of Justice
1100 L Street NW
Washington, DC 20005
202-514-3953
Fax: 202-616-8470
Email: rebecca.m.kopplin@usdoj.gov
ATTORNEY TO BE NOTICED

Defendant

United States Department of Health and Human Services
Xavier Becerra, Secretary

represented by **Daniel David Hu**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Elizabeth L. Kade
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Emily Sue Newton
(See above for address)
TERMINATED: 01/06/2022
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Rebecca Michelle Kopplin
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Sylvia Mathews Burwell
in her official capacity as the Secretary of the US Department of Health and Human Services

represented by **Daniel David Hu**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Elizabeth L. Kade
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Emily Sue Newton
(See above for address)
TERMINATED: 01/06/2022
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Rebecca Michelle Kopplin

(See above for address)
ATTORNEY TO BE NOTICED

Defendant

United States Department of The Treasury
Janet Yellen, Secretary

represented by **Daniel David Hu**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Elizabeth L. Kade
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Emily Sue Newton
(See above for address)
TERMINATED: 01/06/2022
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Rebecca Michelle Kopplin
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Jacob J Lew
in his official capacity as the Secretary of the US Department of the Treasury

represented by **Daniel David Hu**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Elizabeth L. Kade
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Emily Sue Newton
(See above for address)
TERMINATED: 01/06/2022
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Rebecca Michelle Kopplin
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

United States Department of Labor
Martin Walsh, Secretary

represented by **Daniel David Hu**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Elizabeth L. Kade

(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Emily Sue Newton
(See above for address)
TERMINATED: 01/06/2022
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Rebecca Michelle Kopplin
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Thomas E Perez
*in his official capacity as the Secretary of
the US Department of Labor*

represented by **Daniel David Hu**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Elizabeth L. Kade
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Emily Sue Newton
(See above for address)
TERMINATED: 01/06/2022
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Rebecca Michelle Kopplin
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

President Joseph R. Biden
*President of the United States, in his official
capacity as President of the United States*

represented by **Daniel David Hu**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Rebecca Michelle Kopplin
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Xavier Becerra
*Secretary, U.S. Department of Health and
Human Services*

Defendant

Janet Yellen
Secretary, U.S. Department of Treasury

Defendant

Martin Walsh
Secretary, Department of Labor

Date Filed	#	Docket Text
02/04/2016	<u>1</u> (p.26)	COMPLAINT against Sylvia Mathews Burwell, Jacob J Lew, Barack Hussein Obama, Thomas E Perez, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury (Filing fee \$ 400) filed by John J Dierlam. (Attachments: # <u>1</u> (p.26) Civil Cover Sheet)(glyons, 4) (Entered: 02/04/2016)
02/04/2016		Full Filing fee: \$400 re: <u>1</u> (p.26) Complaint, receipt number HOU060116, filed. (glyons, 4) (Entered: 02/04/2016)
02/05/2016	<u>2</u> (p.59)	ORDER for Initial Pretrial and Scheduling Conference by Telephone and Order to Disclose Interested Persons. Counsel who filed or removed the action is responsible for placing the conference call and insuring that all parties are on the line. The call shall be placed to (713)250-5613. Telephone Conference set for 5/2/2016 at 09:30 AM by telephone before Judge Kenneth M. Hoyt. (Signed by Judge Kenneth M. Hoyt) Parties notified. (wbostic, 4) (Entered: 02/05/2016)
03/14/2016		Summons Issued as to All Defendants, U.S. Attorney and U.S. Attorney General. Issued summons returned to plaintiff by: In person, filed.(hler, 4) (Entered: 03/14/2016)
04/12/2016	<u>3</u> (p.64)	Unopposed MOTION for Extension of Time to Answer or Otherwise Respond to Plaintiff's Complaint by Sylvia Mathews Burwell, Jacob J Lew, Barack Hussein Obama, Thomas E Perez, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, filed. Motion Docket Date 5/3/2016. (Attachments: # <u>1</u> (p.26) Proposed Order)(Newton, Emily) (Entered: 04/12/2016)
04/13/2016	<u>4</u> (p.70)	ORDER granting <u>3</u> (p.64) Motion for Extension of Time to Answer. Telephone Conference set for 7/12/2016 at 08:45 AM before Judge Kenneth M. Hoyt.(Signed by Judge Kenneth M. Hoyt) Parties notified.(chorace) (Entered: 04/13/2016)
04/29/2016	<u>5</u> (p.71)	RETURN of Service of SUMMONS Executed as to Barack Hussein Obama served on 3/31/2016, answer due 5/31/2016, filed.(scastillo, 1) (Entered: 04/29/2016)

04/29/2016	<u>6 (p.72)</u>	RETURN of Service of SUMMONS Executed as to United States Department of Health and Human Services served on 3/25/2016, answer due 5/24/2016, filed.(scastillo, 1) (Entered: 04/29/2016)
04/29/2016	<u>7 (p.73)</u>	RETURN of Service of SUMMONS Executed as to Sylvia Mathews Burwell served on 3/25/2016, answer due 5/24/2016, filed.(scastillo, 1) (Entered: 04/29/2016)
04/29/2016	<u>8 (p.74)</u>	RETURN of Service of SUMMONS Executed as to United States Department of The Treasury served on 3/25/2016, answer due 5/24/2016, filed.(scastillo, 1) (Entered: 04/29/2016)
04/29/2016	<u>9 (p.75)</u>	RETURN of Service of SUMMONS Executed as to Thomas E Perez served on 3/29/2016, answer due 5/31/2016, filed.(scastillo, 1) (Entered: 04/29/2016)
04/29/2016	<u>10 (p.76)</u>	RETURN of Service executed as to Secretary of the Treasury. (yhausmann, 6) (Entered: 04/29/2016)
04/29/2016	<u>11 (p.77)</u>	RETURN of Service of SUMMONS Executed as to United States Department of Labor served on 3/29/2016, answer due 5/31/2016, filed.(scastillo, 1) (Entered: 04/29/2016)
04/29/2016	<u>12 (p.78)</u>	RETURN of Service as to Attorney General of the United States c/o US Department of Justics. (yhausmann, 6) (Entered: 04/29/2016)
04/29/2016	<u>13 (p.79)</u>	RETURN of Service Executed as to US Attorneys Office on 3/17/2016 re: Summons, filed.(scastillo, 1) (Entered: 04/29/2016)
05/17/2016	<u>14 (p.80)</u>	Unopposed MOTION for Extension of Time to Respond to Plaintiff's Complaint by Sylvia Mathews Burwell, Jacob J Lew, Barack Hussein Obama, Thomas E Perez, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, filed. Motion Docket Date 6/7/2016. (Attachments: # <u>1 (p.26)</u> Proposed Order)(Newton, Emily) (Entered: 05/17/2016)
05/18/2016	<u>15 (p.84)</u>	ORDER granting <u>14 (p.80)</u> Unopposed MOTION for Extension of Time to Respond to Plaintiff's Complaint ; Answer due for United States Department of Health and Human Services 5/26/2016; United States Department of Labor 5/26/2016; United States Department of The Treasury 5/26/2016.(Signed by Judge Kenneth M Hoyt) Parties notified.(chorace) (Entered: 05/18/2016)
05/24/2016	<u>16 (p.85)</u>	Unopposed MOTION for Leave to File Excess Pages by Sylvia Mathews Burwell, Jacob J Lew, Barack Hussein Obama, Thomas E Perez, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, filed. Motion Docket Date 6/14/2016. (Attachments: # <u>1 (p.26)</u>

		Proposed Order)(Newton, Emily) (Entered: 05/24/2016)
05/25/2016	<u>17 (p.90)</u>	ORDER granting <u>16 (p.85)</u> Motion for Leave to File Excess Pages.(Signed by Judge Kenneth M Hoyt) Parties notified.(chorace) (Entered: 05/25/2016)
05/26/2016	<u>18 (p.91)</u>	MOTION to Dismiss <u>1 (p.26)</u> Complaint, by Sylvia Mathews Burwell, Jacob J Lew, Barack Hussein Obama, Thomas E Perez, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, filed. Motion Docket Date 6/16/2016. (Attachments: # <u>1 (p.26)</u> Proposed Order)(Newton, Emily) (Entered: 05/26/2016)
06/14/2016	<u>19 (p.137)</u>	MOTION for John J Dierlam to Appear Pro Hac Vice by John J Dierlam, filed. Motion Docket Date 7/5/2016. (srussell, 2) (Entered: 06/15/2016)
06/14/2016	<u>20 (p.138)</u>	Unopposed MOTION for Admission to the Court's Electronic Filing and Notification System by John J Dierlam, filed. Motion Docket Date 7/5/2016. (srussell, 2) (Entered: 06/15/2016)
06/14/2016	<u>21 (p.141)</u>	MOTION for Extension of Time to Respond to Defendant's Motion to Dismiss by John J Dierlam, filed. Motion Docket Date 7/5/2016. (srussell, 2) (Entered: 06/15/2016)
06/16/2016	<u>22 (p.144)</u>	ORDER denying <u>19 (p.137)</u> Plaintiff's Motion to Appear Pro Hac Vice.(Signed by Judge Kenneth M Hoyt) Parties notified.(chorace) (Entered: 06/16/2016)
06/16/2016	<u>23 (p.145)</u>	ORDER denying <u>20 (p.138)</u> Motion for Admission to the Court's Electronic Filing and Notification System.(Signed by Judge Kenneth M Hoyt) Parties notified.(chorace) (Entered: 06/16/2016)
06/16/2016	<u>24 (p.146)</u>	ORDER granting <u>21 (p.141)</u> MOTION for Extension of Time to Respond to Defendant's Motion to Dismiss; Motion Related Deadline re: <u>18 (p.91)</u> Motion to Dismiss; (Responses due by 7/8/2016. (Telephone Conference set for 7/26/2016 at 09:00 AM before Judge Kenneth M Hoyt).(Signed by Judge Kenneth M Hoyt) Parties notified.(chorace) (Entered: 06/16/2016)
06/16/2016		***Set Deadlines as to <u>18 (p.91)</u> MOTION to Dismiss: Responses due by 7/8/2016. (chorace) (Entered: 06/16/2016)
07/06/2016	<u>25 (p.147)</u>	MOTION to Exceed the Page Count Limit on Response to Defendants Motion to Dismiss by John J Dierlam, filed. Motion Docket Date 7/27/2016. (Attachments: # <u>1 (p.26)</u> Proposed Order)(blacy, 4) (Entered: 07/06/2016)
07/07/2016	<u>26 (p.150)</u>	ORDER Granting <u>25 (p.147)</u> Motion for Leave to File Excess Pages.(Signed by Judge Kenneth M Hoyt) Parties notified.(jguajardo, 4) (Entered: 07/07/2016)

07/08/2016	<u>27 (p.151)</u>	MOTION to Amend <u>1 (p.26)</u> Complaint, by John J Dierlam, filed. Motion Docket Date 7/29/2016. (Attachments: # <u>1 (p.26)</u> Proposed Order)(mmapps, 4) (Entered: 07/08/2016)
07/08/2016	<u>28 (p.154)</u>	RESPONSE to <u>18 (p.91)</u> MOTION to Dismiss <u>1 (p.26)</u> Complaint, filed by John J Dierlam. (mmapps, 4) (Entered: 07/08/2016)
07/11/2016	<u>29 (p.202)</u>	ORDER granting <u>27 (p.151)</u> Motion to Amend Complaint.(Signed by Judge Kenneth M Hoyt) Parties notified.(chorace) (Entered: 07/11/2016)
07/15/2016	<u>30 (p.203)</u>	JOINT DISCOVERY/CASE MANAGEMENT PLAN by Sylvia Mathews Burwell, Jacob J Lew, Barack Hussein Obama, Thomas E Perez, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, filed.(Newton, Emily) (Entered: 07/15/2016)
07/18/2016	<u>32 (p.213)</u>	PLAINTIFF'S SUBMISSION OF FIRST AMENDED COMPLAINT against All Defendants filed by John J Dierlam.(szellers, 7) (Entered: 07/21/2016)
07/21/2016	<u>31 (p.212)</u>	MOTION for Elizabeth Kade to Appear Pro Hac Vice by Sylvia Mathews Burwell, Jacob J Lew, Barack Hussein Obama, Thomas E Perez, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, filed. Motion Docket Date 8/11/2016. (Newton, Emily) (Entered: 07/21/2016)
07/21/2016	<u>33 (p.248)</u>	ORDER Granting <u>31 (p.212)</u> Elizabeth L. Kade Motion to Appear Pro Hac Vice.(Signed by Judge Kenneth M Hoyt) Parties notified.(jguajardo, 4) (Entered: 07/21/2016)
07/26/2016	<u>34 (p.249)</u>	ORDER FOLLOWING TELEPHONE SCHEDULING CONFERENCE held on July 26, 2016 at 9:00 a.m. Appearances: John J. Dierlam (pro se), Elizabeth L. Kade, (Court Reporter: J. Sanchez). ETT: TBA. Bench trial. Initial disclosures and discovery are deferred until 30 days after the Court addresses the defendants' motion to dismiss (Dkt. No. 18). This matter will be addressed on motions as the suit raises only federal constitutional issues.(Signed by Judge Kenneth M Hoyt) Parties notified.(chorace) (Entered: 07/27/2016)
08/02/2016	<u>35 (p.250)</u>	Unopposed MOTION for Leave to File Excess Pages by Sylvia Mathews Burwell, Jacob J Lew, Barack Hussein Obama, Thomas E Perez, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, filed. Motion Docket Date 8/23/2016. (Attachments: # <u>1 (p.26)</u> Proposed Order)(Kade, Elizabeth) (Entered: 08/02/2016)
08/03/2016	<u>36 (p.255)</u>	

		ORDER Granting 35 (p.250) Motion for Leave to File Excess Pages. Response to Plaintiff's First Amended Complaint may be up to 35 pages in length. (Signed by Judge Kenneth M Hoyt) Parties notified.(jguajardo, 4) (Entered: 08/03/2016)
08/04/2016	37 (p.256)	MOTION to Dismiss 32 (p.213) Amended Complaint/Counterclaim/Crossclaim etc. by Sylvia Mathews Burwell, Jacob J Lew, Barack Hussein Obama, Thomas E Perez, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, filed. Motion Docket Date 8/25/2016. (Attachments: # 1 (p.26) Proposed Order)(Kade, Elizabeth) (Entered: 08/04/2016)
08/04/2016		(Court only) ***Motion(s) terminated in light of the newly filed Motion to Dismiss at Docket Entry No. 37: 18 (p.91) MOTION to Dismiss. (chorace) (Entered: 09/13/2016)
08/09/2016	38 (p.305)	Plaintiff's Unopposed Motion to Exceed the Page Count Limit on Response to Defendant's First Amended Motion to Dismiss Supporting Memorandum by John J Dierlam, filed. Motion Docket Date 8/30/2016. (Attachments: # 1 (p.26) Proposed Order)(vcantu, 5) (Entered: 08/10/2016)
08/17/2016	39 (p.308)	RESPONSE and Memorandum to 37 (p.256) MOTION to Dismiss 32 (p.213) Amended Complaint/Counterclaim/Crossclaim etc. , filed by John J Dierlam. (Attachments: # 1 (p.26) Proposed Order)(thanniable, 4) (Entered: 08/17/2016)
08/25/2016	40 (p.361)	ORDER denying 38 (p.305) Motion for Leave to File Excess Pages. (Signed by Judge Kenneth M Hoyt) Parties notified. (wbostic, 4) (Entered: 08/25/2016)
08/30/2016	41 (p.362)	MOTION for Clarification as to 40 (p.361) Order on Motion for Leave to File Excess Pages by John J Dierlam, filed. Motion Docket Date 9/20/2016. (ssilva, 7) (Entered: 08/31/2016)
09/22/2016	42 (p.365)	ORDER denying 41 (p.362) MOTION for Clarification as to 40 (p.361) Order on Motion for Leave to File Excess Pages.(Signed by Judge Kenneth M Hoyt) Parties notified.(gkelner, 4) (Entered: 09/22/2016)
12/08/2016	43 (p.366)	MOTION for Partial Summary Judgment against Defendants and Supporting Memorandum by John J Dierlam, filed. Motion Docket Date 12/29/2016. (Attachments: # 1 (p.26) Proposed Order)(bcampos, 1) (Entered: 12/12/2016)
12/08/2016	44 (p.379)	MOTION for Preliminary Injunction against Defendants and Supporting Memorandum by John J Dierlam, filed. Motion Docket Date 12/29/2016. (dterrell, 2) (Additional attachment(s) added on 12/12/2016: # 1 (p.26) Proposed Order, # 2 (p.59) Proposed Order) (dterrell, 2). (Entered:

		12/12/2016)
12/19/2016	<u>45 (p.404)</u>	MOTION to Stay <i>Briefing of Plaintiff's Motion for Preliminary Injunction and Motion for Partial Summary Judgment</i> by Sylvia Mathews Burwell, Jacob J Lew, Barack Hussein Obama, Thomas E Perez, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, filed. Motion Docket Date 1/9/2017. (Attachments: # <u>1 (p.26)</u> Proposed Order)(Kade, Elizabeth) (Entered: 12/19/2016)
01/10/2017	<u>46 (p.416)</u>	RESPONSE in Opposition to <u>45 (p.404)</u> MOTION to Stay <i>Briefing of Plaintiff's Motion for Preliminary Injunction and Motion for Partial Summary Judgment</i> , filed by John J Dierlam. (jengonzalez, 7) (Additional attachment(s) added on 1/17/2017: # <u>1 (p.26)</u> Proposed Order, # <u>2 (p.59)</u> Letter, # <u>3 (p.64)</u> Envelope) (jengonzalez, 7). (Entered: 01/17/2017)
01/19/2017	<u>47 (p.429)</u>	ORDER granting <u>45 (p.404)</u> Motion to Stay Briefing on the Plaintiff's Motion for Preliminary Injunction and Motion for Partial Summary Judgment.(Signed by Judge Kenneth M Hoyt) Parties notified.(chorace) (Entered: 01/19/2017)
03/08/2017	<u>48 (p.430)</u>	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: <u>47 (p.429)</u> Order on Motion to Stay by John J Dierlam, filed.(hler, 4) (Entered: 03/08/2017)
03/08/2017		Appeal Filing fee: \$505 re: <u>48 (p.430)</u> Notice of Appeal, receipt number 070743, filed. (hler, 4) (Entered: 03/08/2017)
03/08/2017	<u>49 (p.431)</u>	DKT13 TRANSCRIPT ORDER REQUEST by John Dierlam. This is to order a transcript of 7/26/2016. Court Reporter/Transcriber: Johnny Sanchez. This order form relates to the following: <u>48 (p.430)</u> Notice of Appeal, filed.(hler, 4) (Entered: 03/08/2017)
03/08/2017	<u>50 (p.432)</u>	REQUEST for Electronic Access to the Certified Record on Appeal re: <u>48 (p.430)</u> Notice of Appeal by John J Dierlam, filed.(hler, 4) (hler, 4). (Entered: 03/08/2017)
03/09/2017	<u>51 (p.433)</u>	Clerks Notice of Filing of an Appeal. The following Notice of Appeal and related motions are pending in the District Court: <u>48 (p.430)</u> Notice of Appeal. Fee status: Paid, filed. (Attachments: # <u>1 (p.26)</u> Notice of Appeal, # <u>2 (p.59)</u> Order, # <u>3 (p.64)</u> Docket Sheet) (dbenavides, 1) (Entered: 03/09/2017)
03/09/2017		Appeal Review Notes re: <u>48 (p.430)</u> Notice of Appeal. Fee status: Paid. The appeal filing fee has been paid or an ifp motion has been granted. Hearings were held in the case . Number of DKT-13 Forms expected: 1, filed.(dbenavides, 1) (Entered: 03/09/2017)

03/10/2017	<u>52 (p.1247)</u>	APPEAL TRANSCRIPT re Scheduling Conference held on July 26, 2016 before Judge Kenneth M Hoyt. Court Reporter J. Sanchez. Ordering Party: John Dierlam. This transcript relates to the following: <u>49 (p.431)</u> Appeal Transcript Request. Release of Transcript Restriction set for 6/8/2017., filed. (jsanchez,) (Entered: 03/10/2017)
03/13/2017	<u>53 (p.444)</u>	Notice of Filing of Official Transcript as to <u>52 (p.1247)</u> Transcript - Appeal., Party notified, filed. (hcarr, 4) (Entered: 03/13/2017)
03/13/2017		Notice of Assignment of USCA No. 17-20165 re: <u>48 (p.430)</u> Notice of Appeal, filed. (rnieto, 1) (Entered: 03/13/2017)
03/21/2017		(Court only) ***ROA requested by USCA (No. 17-20165) due by 4/5/2017. Set/Cleared Flags. APPEAL_NAT flag cleared. (avleal, 1) (Entered: 03/21/2017)
03/30/2017		Electronic record on appeal certified to the Fifth Circuit Court of Appeals re: <u>48 (p.430)</u> Notice of Appeal USCA No. 17-20165, filed.(avleal, 1) (Entered: 03/30/2017)
03/30/2017		Electronic Access to Record on Appeal Provided re: <u>48 (p.430)</u> Notice of Appeal to Alisa Beth Klein, Laura Myron, Mark Bernard Stern. Attorneys of record at the Circuit may <u>download the record from the Court of Appeals.</u> (USCA No. 17-20165), filed.(avleal, 1) (Entered: 03/30/2017)
03/30/2017	<u>54 (p.445)</u>	Transmittal Letter on Appeal re: <u>48 (p.430)</u> Notice of Appeal. The electronic record on CD is being sent to John Dierlam via regular mail. (USCA No. 17-20165), filed. (avleal, 1) (Entered: 03/30/2017)
04/12/2017	<u>55 (p.446)</u>	Order of USCA - JUDGMENT; Judgment issued as mandate 4/12/2017 re: <u>48 (p.430)</u> Notice of Appeal ; USCA No. 17-20165. appellees' opposed motion to dismiss the appeal for lack of jurisdiction is granted, filed.(dnoriega, 1) (Entered: 04/12/2017)
04/12/2017		(Court only) Set/Cleared Flags. STAYED flag cleared. (chorace) (Entered: 04/24/2017)
07/19/2017	<u>56 (p.449)</u>	MOTION to Reassign Case by John J Dierlam, filed. Motion Docket Date 8/9/2017. (bcampos, 1) (Entered: 07/20/2017)
08/08/2017	<u>57 (p.459)</u>	RESPONSE in Opposition to <u>56 (p.449)</u> MOTION to Reassign Case, filed by Sylvia Mathews Burwell, Jacob J Lew, Barack Hussein Obama, Thomas E Perez, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury. (Newton, Emily) (Entered: 08/08/2017)
08/15/2017	<u>58 (p.466)</u>	

		REPLY to Defendant's <u>57</u> (p.459) Response to Plaintiff's Motion to Reassign the District Court Judge, filed by John J Dierlam. (yhausmann, 6) (Entered: 08/16/2017)
09/19/2017	<u>59</u> (p.475)	NOTICE of <i>Filing of Proposed Order</i> re: <u>57</u> (p.459) Response in Opposition to Motion, by United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, filed. (Attachments: # <u>1</u> (p.26) Proposed Order)(Newton, Emily) (Entered: 09/19/2017)
09/22/2017	<u>60</u> (p.479)	MOTION for Chief Judge of SDTX to Hear or Rehear the Motion to Reassign the District Court Judge in this Case by John J Dierlam, filed. Motion Docket Date 10/13/2017. (BelindaSaenz, 7) (Entered: 09/25/2017)
09/29/2017	<u>61</u> (p.487)	MEMORANDUM AND ORDER entered DENYING <u>60</u> (p.479) MOTION for Chief Judge of SDTX to Hear or Rehear the Motion to Reassign the District Court Judge in this Case.(Signed by Chief Judge Lee H Rosenthal) Parties notified.(leddins, 4) (Entered: 09/29/2017)
10/03/2017	<u>62</u> (p.491)	RECUSAL ORDER. Judge Kenneth M Hoyt recused. Deadlines in scheduling orders subsist. Court settings are vacated.(Signed by Judge Kenneth M Hoyt) Parties notified.(chorace) (Entered: 10/03/2017)
10/03/2017	<u>63</u> (p.492)	NOTICE of Reassignment. Case reassigned to Judge Keith P Ellison. Judge Kenneth M. Hoyt no longer assigned to the case. Parties notified, filed. (chorace) (Entered: 10/03/2017)
10/12/2017	<u>64</u> (p.493)	The petition for a writ of certiorari filed with the Supreme Court has been denied (USCA No. 17-20165) (USSC No. 17-152), filed.(dbenavides, 1) (Entered: 10/12/2017)
10/16/2017	<u>65</u> (p.495)	NOTICE of Referral of Motion to Magistrate Judge Dena Hanovice Palermo re <u>37</u> (p.256) MOTION to Dismiss, filed. (olindor, 4) (Entered: 10/16/2017)
11/17/2017	<u>66</u> (p.496)	MOTION for Reconsideration and Request for Clarification by John J Dierlam, filed. Motion Docket Date 12/8/2017. (Attachments: # <u>1</u> (p.26) Proposed Order on Excess Pages, # <u>2</u> (p.59) Proposed Order on Injunction and Partial Summary Judgment)(gclair, 4) (Entered: 11/17/2017)
11/21/2017	<u>67</u> (p.508)	REPORT AND RECOMMENDATIONS re <u>37</u> (p.256) Motion to Dismiss. Objections to R&R due by 12/5/2017(Signed by Magistrate Judge Dena Hanovice Palermo) Parties notified.(cfelchak, 4) (Entered: 11/21/2017)
11/21/2017	<u>68</u> (p.533)	ORDER regarding <u>66</u> (p.496) Motion for Reconsideration. Dierlam's request regarding page length is granted and the request to lift stay is denied. (Signed by Judge Keith P

		Ellison) Parties notified.(gclair, 4) (Entered: 11/21/2017)
11/30/2017	<u>69 (p.535)</u>	MOTION for Extension of Time to File Objection by John J Dierlam, filed. Motion Docket Date 12/21/2017. (Attachments: # <u>1 (p.26)</u> Proposed Order)(cvillegas, 7) (Entered: 11/30/2017)
11/30/2017	<u>70 (p.542)</u>	ORDER granting <u>69 (p.535)</u> Motion for Extension of Time. Objections to R&R due by 12/12/2017.(Signed by Judge Keith P Ellison) Parties notified.(arivera, 4) (Entered: 11/30/2017)
12/01/2017	<u>71 (p.543)</u>	First MOTION for Extension of Time to File Response to Report and Recommendation by United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, filed. Motion Docket Date 12/22/2017. (Attachments: # <u>1 (p.26)</u> Proposed Order)(Newton, Emily) (Entered: 12/01/2017)
12/01/2017	<u>72 (p.547)</u>	ORDER granting <u>71 (p.543)</u> First MOTION for Extension of Time to File Response to Report and Recommendation Responses due by 12/12/2017..(Signed by Judge Keith P Ellison) Parties notified.(gkelner, 4) (Entered: 12/05/2017)
12/11/2017	<u>74 (p.568)</u>	OBJECTIONS to Report and Recommendations, filed by John J Dierlam. (AdrianDeLaRosa, 7) Modified on 12/19/2017 (AdrianDeLaRosa, 7). (mmapps, 4). (Entered: 12/12/2017)
12/12/2017	<u>73 (p.548)</u>	RESPONSE to <i>Report and Recommendation</i> , filed by United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury. (Newton, Emily) (Entered: 12/12/2017)
12/22/2017	<u>75 (p.589)</u>	REPLY to <u>73 (p.548)</u> Response to Magistrate Judge's Report and Recommendation on Defendant's Motion to Dismiss, filed by John J Dierlam. (vcantu, 5) (Entered: 12/26/2017)
01/22/2018	<u>76 (p.600)</u>	NOTICE of <i>Withdrawal of Counsel</i> by Sylvia Mathews Burwell, Jacob J Lew, Barack Hussein Obama, Thomas E Perez, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, filed. (Kade, Elizabeth) (Entered: 01/22/2018)
06/08/2018	<u>77 (p.603)</u>	NOTICE of Setting re <u>67 (p.508)</u> Report and Recommendations. Parties notified. Miscellaneous Hearing set for 6/14/2018 at 02:30 PM at Courtroom 3A Houston before Judge Keith P Ellison, filed. (arivera, 4) (Entered: 06/08/2018)
06/14/2018		Minute Entry for proceedings held before Judge Keith P Ellison. MISCELLANEOUS HEARING held on 6/14/2018. Argument heard on <u>67 (p.508)</u> Report and

		Recommendations and the parties' responses thereto. For reasons stated on the record, the Report and Recommendations are ADOPTED IN PART. <u>37 (p.256)</u> Defendants' Motion to Dismiss is GRANTED. Appearances:John Dierlam. Emily Sue Newton.(Court Reporter: B. Slavin)(Law Clerk: M. Drecun), filed.(arrivera, 4) (Entered: 06/14/2018)
06/14/2018	<u>78 (p.604)</u>	FINAL JUDGMENT. Case terminated on 6/14/18(Signed by Judge Keith P Ellison) Parties notified.(arrivera, 4) (Entered: 06/14/2018)
06/15/2018	<u>79 (p.605)</u>	AO 435 TRANSCRIPT REQUEST by Emily Newton for Transcript of Misc Hearing 6/14/18. Expedited (7 days) turnaround requested. Court Reporter/Transcriber: Bruce Slavin, filed. (ckrus, 4) (Entered: 06/15/2018)
06/27/2018	<u>80 (p.1255)</u>	TRANSCRIPT re: Hearing held on 6-14-18 before Judge Keith P Ellison. Court Reporter/Transcriber B. Slavin. Ordering Party Defendants Release of Transcript Restriction set for 9/25/2018., filed. (bslavin,) (Entered: 06/27/2018)
06/28/2018	<u>81 (p.607)</u>	Notice of Filing of Official Transcript as to <u>80 (p.1255)</u> Transcript. Party notified, filed. (jdav, 4) (Entered: 06/28/2018)
07/02/2018	<u>82 (p.608)</u>	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit by John J Dierlam, filed.(DesireeSillas, 4) (Entered: 07/02/2018)
07/02/2018	<u>83 (p.609)</u>	DKT13 TRANSCRIPT ORDER REQUEST by John Dierlam. This is to order a transcript of Misc. Hearing on 06/14/2018. Court Reporter/Transcriber: Bruce Slavin. This order form relates to the following: <u>82 (p.608)</u> Notice of Appeal, filed.(DesireeSillas, 4) (Entered: 07/02/2018)
07/02/2018		USCA Appeal Fees received \$ 505, receipt number 081354 re: <u>82 (p.608)</u> Notice of Appeal, filed.(hler, 4) (Entered: 07/02/2018)
07/03/2018	<u>84 (p.610)</u>	Clerks Notice of Filing of an Appeal. The following Notice of Appeal and related motions are pending in the District Court: <u>82 (p.608)</u> Notice of Appeal. Fee status: Paid. Reporter(s): B. Slavin, filed. (Attachments: # <u>1 (p.26)</u> Notice of Appeal) (JenniferLongoria, 1) (Entered: 07/03/2018)
07/03/2018		Appeal Review Notes re: <u>82 (p.608)</u> Notice of Appeal. Fee status: Paid. The appeal filing fee has been paid, and appellant is a pro se litigant. Hearings were held in the case. DKT13 form has been filed. Number of DKT-13 Forms expected: 0, filed.(JenniferLongoria, 1) (Entered: 07/03/2018)
07/13/2018		

		Notice of Assignment of USCA No. 18-20440 re: <u>82 (p.608)</u> Notice of Appeal, filed.(scastillo, 1) (Entered: 07/13/2018)
08/06/2018	<u>85 (p.612)</u>	Order of USCA Judgment re: <u>82 (p.608)</u> Notice of Appeal ; USCA No. 18-20440. the appeal is dismissed as of August 6, 2018 for want of prosecution, filed.(dbenavides, 1) (Entered: 08/06/2018)
08/17/2018	<u>86 (p.615)</u>	Fifth Circuit Court of Appeals LETTER advising The court has granted appellant's motion to reinstate the appeal; reinstating <u>82 (p.608)</u> Notice of Appeal (USCA No. 18-20440), filed.(dbenavides, 1) (Entered: 08/17/2018)
08/17/2018		(Court only) ***ROA requested from Fifth Circuit. Due 9/4/2018.*** <u>(PRIVATE ENTRY)</u> , filed. (dnoriega, 1) (Entered: 08/17/2018)
08/28/2018		Electronic record on appeal certified to the Fifth Circuit Court of Appeals re: <u>82 (p.608)</u> Notice of Appeal USCA No. 18-20440, filed.(dnoriega, 1) (Entered: 08/28/2018)
08/28/2018		Electronic Access to Record on Appeal Provided re: <u>82 (p.608)</u> Notice of Appeal to Matthew Collette & Lowell Sturgill. Attorneys of record at the Circuit may <u>download the record from the Court of Appeals</u> . (USCA No. 18-20440), filed.(dnoriega, 1) (Entered: 08/28/2018)
08/28/2018	<u>87 (p.616)</u>	Transmittal Letter on Appeal re: <u>82 (p.608)</u> Notice of Appeal. The electronic record on CD is being sent to John Dierlam via regular mail. (USCA No. 18-20440), filed. (dnoriega, 1) (Entered: 08/28/2018)
09/11/2018		Supplemental Electronic record on appeal certified to the Fifth Circuit Court of Appeals re: <u>82 (p.608)</u> Notice of Appeal USCA No. 18-20440, filed.(mperez, 1) (Entered: 09/11/2018)
09/11/2018		Electronic Access to Record on Appeal Provided re: <u>82 (p.608)</u> Notice of Appeal to Matthew Collette, Lowell Strugill, Jr.. Attorneys of record at the Circuit may <u>download the record from the Court of Appeals</u> . (USCA No. 18-20440), filed.(mperez, 1) (Entered: 09/11/2018)
09/11/2018	<u>88 (p.617)</u>	Transmittal Letter on Appeal re: <u>82 (p.608)</u> Notice of Appeal. The supplemental record is being sent to appellant, John Dierlam on cd via regular mail. (USCA No. 18-2440), filed. (mperez, 1) (Entered: 09/11/2018)
11/14/2018		Electronic Access to Record on Appeal Provided re: <u>82 (p.608)</u> Notice of Appeal to Sharon Swingle. Attorneys of record at the Circuit may <u>download the record from the Court of Appeals</u> . (USCA No. 18-20440), filed.(dnoriega, 1) (Entered: 11/14/2018)
10/13/2020	<u>89 (p.618)</u>	

		The petition for a writ of certiorari filed with the Supreme Court has been denied (USCA No. 18-20440) (USSC No. 19-1415), filed.(mperez, 1) (Entered: 10/13/2020)
12/08/2020	<u>90 (p.620)</u>	Order of USCA Judgment re: <u>82 (p.608)</u> Notice of Appeal ; USCA No. 18-20440. T IS ORDERED and ADJUDGED that the judgment of the District Court is VA CA TED, and the cause is REMANDED to the District Court for further proceedings in accordance with the opinion of this Court, filed.(dbenavides, 1) (Entered: 12/08/2020)
12/08/2020	<u>91 (p.623)</u>	Order of USCA Per Curiam re: <u>82 (p.608)</u> Notice of Appeal ; USCA No. 18-20440. For the reasons explained above, We VACATE the district court's dismissal of Dierlam's claims and REMAND for further proceedings consistent with this opinion and any ensuing precedents. If a party to this case later files a notice of appeal, the appeal should be assigned to the same panel.45, filed.(dbenavides, 1) (Entered: 12/08/2020)
02/22/2021	<u>92 (p.635)</u>	The petition for a writ of certiorari filed with the Supreme Court has been denied (USCA No. 18-20440) (USSC No. 20-946), filed.(scastillo, 1) (Entered: 02/23/2021)
04/20/2021	<u>93 (p.637)</u>	NOTICE of Setting. Parties notified. Status Conference set for 4/29/2021 at 03:00 PM in by telephone before Judge Keith P Ellison, filed. (arrivera, 4) (Entered: 04/20/2021)
04/29/2021		Minute Entry for proceedings held before Judge Keith P Ellison. STATUS CONFERENCE held on 4/29/2021. Plaintiffs Amended Complaint to be filed by May 10, 2021. The Government will have 45 days to respond. Appearances:John Dierlam. Emily Sue Newton.(Court Reporter: F. Warner)(Law clerk: D. Sanchez), filed.(arrivera, 4) (Entered: 04/29/2021)
05/05/2021	<u>94 (p.638)</u>	Second AMENDED COMPLAINT against All Defendants filed by John J Dierlam.(jdav, 4) (Entered: 05/10/2021)
05/07/2021	<u>95 (p.679)</u>	Opposed MOTION to Remove Judge Palermo from any further role in this case by John J Dierlam, filed. Motion Docket Date 5/28/2021. (jdav, 4) (Entered: 05/24/2021)
06/18/2021	<u>96 (p.687)</u>	Opposed MOTION for Extension of Time to Respond to Plaintiff's Second Amended Complaint by Joseph R. Biden, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, filed. Motion Docket Date 7/9/2021. (Attachments: # <u>1 (p.26)</u> Proposed Order)(Newton, Emily) (Entered: 06/18/2021)
06/18/2021	<u>97 (p.692)</u>	ORDER granting <u>96 (p.687)</u> Opposed MOTION for Extension of Time to Respond to Plaintiff's Second Amended Complaint. (Responses due by 7/8/2021.)(Signed by Judge Keith P Ellison) Parties notified.(olindor, 4) (Entered: 06/18/2021)

06/23/2021	<u>98 (p.693)</u>	RESPONSE to <u>96 (p.687)</u> Opposed MOTION for Extension of Time to Respond to Plaintiff's Second Amended Complaint filed by John J Dierlam. (MarcelleLaBee, 4) (Entered: 06/24/2021)
06/30/2021	<u>99 (p.699)</u>	OBJECTIONS to <u>96 (p.687)</u> Opposed MOTION for Extension of Time to Respond to Plaintiff's Second Amended Complaint, filed by John J Dierlam. (ShoshanaArnow, 4) (Entered: 07/01/2021)
07/02/2021	<u>100 (p.702)</u>	NOTICE of Setting as to <u>99 (p.699)</u> Objections. Parties notified. Motion Hearing set for 7/9/2021 at 11:30 AM in by telephone before Judge Keith P Ellison, filed. (arrivera, 4) (Entered: 07/02/2021)
07/02/2021	<u>101 (p.703)</u>	NOTICE of Setting as to <u>99 (p.699)</u> Objections. Parties notified. Motion Hearing reset for 7/13/2021 at 11:30 AM in by telephone before Judge Keith P Ellison, filed. (arrivera, 4) (Entered: 07/02/2021)
07/08/2021	<u>102 (p.704)</u>	Unopposed MOTION for Leave to File Excess Pages by United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, filed. Motion Docket Date 7/29/2021. (Attachments: # <u>1 (p.26)</u> Proposed Order)(Newton, Emily) (Entered: 07/08/2021)
07/08/2021	<u>103 (p.707)</u>	ORDER granting <u>102 (p.704)</u> Motion for Leave to File Excess Pages.(Signed by Judge Keith P Ellison) Parties notified.(ShoshanaArnow, 4) (Entered: 07/08/2021)
07/08/2021	<u>104 (p.708)</u>	MOTION to Dismiss <u>94 (p.638)</u> Amended Complaint/Counterclaim/Crossclaim etc. by United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, filed. Motion Docket Date 7/29/2021. (Newton, Emily) (Entered: 07/08/2021)
07/13/2021		Minute Entry for proceedings held before Judge Keith P Ellison. MOTION HEARING held on 7/13/2021. MOTION HEARING held on 07/13/2021 concerning Doc. 99. Appearances:John Dierlam. Emily Sue Newton.(Court Reporter: N. Forrest)(Law clerk: D. Sanchez), filed.(arrivera, 4) (Entered: 07/13/2021)
07/27/2021	<u>105 (p.749)</u>	RESPONSE to <u>104 (p.708)</u> MOTION to Dismiss <u>94 (p.638)</u> Amended Complaint/Counterclaim/Crossclaim etc. filed by John J Dierlam. (thanniable, 4) (Entered: 07/28/2021)
07/30/2021	<u>106 (p.783)</u>	Unopposed MOTION for Leave to File Excess Pages by United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, filed. Motion Docket Date 8/20/2021. (Attachments: # <u>1 (p.26)</u> Proposed Order)(Newton, Emily) (Entered: 07/30/2021)

07/30/2021	<u>107 (p.787)</u>	ORDER granting <u>106 (p.783)</u> Motion for Leave to File Excess Pages.(Signed by Judge Keith P Ellison) Parties notified.(gkelner, 4) (Entered: 07/30/2021)
08/02/2021	<u>108 (p.788)</u>	REPLY in Support of <u>104 (p.708)</u> MOTION to Dismiss <u>94 (p.638)</u> Amended Complaint/Counterclaim/Crossclaim etc. , filed by United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury. (Newton, Emily) (Entered: 08/02/2021)
12/07/2021	<u>109 (p.804)</u>	NOTICE of Setting as to <u>104 (p.708)</u> MOTION to Dismiss <u>94 (p.638)</u> Amended Complaint/Counterclaim/Crossclaim etc. . Parties notified. Motion Hearing set for 12/15/2021 at 10:30 AM in by telephone before Judge Keith P Ellison, filed. (arrivera, 4) (Entered: 12/07/2021)
12/15/2021		Minute Entry for proceedings held before Judge Keith P Ellison. MOTION HEARING held on 12/15/2021. Argument heard on <u>104 (p.708)</u> Partial MOTION to Dismiss. For reasons stated on the record, the Partial MOTION to Dismiss is GRANTED with prejudice. Appearances:John Dierlam. Emily Sue Newton.(Court Reporter: D. Smith)(Law clerk: L. Muloma), filed.(arrivera, 4) (Entered: 12/15/2021)
12/15/2021	<u>110 (p.805)</u>	ORDER Granting <u>104 (p.708)</u> Defendant's Partial Motion to Dismiss(Signed by Judge Keith P Ellison) Parties notified.(jguajardo, 4) (Entered: 12/20/2021)
12/27/2021	<u>111 (p.806)</u>	MOTION for Leave to File a Third Amended Complaint by John J Dierlam, filed. Motion Docket Date 1/18/2022. (BrandisIsom, 4) (Entered: 12/28/2021)
01/03/2022	<u>112 (p.816)</u>	MOTION for Rebecca M. Kopplin to Appear Pro Hac Vice by Joseph R. Biden, Sylvia Mathews Burwell, Jacob J Lew, Barack Hussein Obama, Thomas E Perez, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, filed. Motion Docket Date 1/24/2022. (Hu, Daniel) (Entered: 01/03/2022)
01/04/2022	<u>113 (p.817)</u>	AO 435 TRANSCRIPT REQUEST by Defendants for Transcript of Motion Hearing on 12/15/2022 before Judge Ellison. Expedited (7 days) turnaround requested. Court Reporter/Transcriber: Contract Court Reporter, filed. (Newton, Emily) (Entered: 01/04/2022)
01/04/2022	<u>114 (p.819)</u>	ORDER granting <u>112 (p.816)</u> MOTION for Rebecca M. Kopplin to Appear Pro Hac Vice (Signed by Judge Keith P Ellison) Parties notified.(olindor, 4) (Entered: 01/04/2022)
01/06/2022	<u>115 (p.820)</u>	NOTICE of attorney substitution by Joseph R. Biden, Sylvia Mathews Burwell, Jacob J Lew, Barack Hussein Obama, Thomas E Perez, United States Department of Health and Human Services, United States Department of

		Labor, United States Department of The Treasury. Attorney Rebecca Kopplin added. Attorney Emily Sue Newton terminated, filed. (Kopplin, Rebecca) (Entered: 01/06/2022)
01/14/2022	<u>116 (p.1295)</u>	TRANSCRIPT re: Motion proceedings held on 12/15/2021 before Judge Keith P Ellison. Court Reporter/Transcriber David Smith. Ordering Party Defendant Release of Transcript Restriction set for 4/14/2022., filed. (LanieSmith,) (Entered: 01/14/2022)
01/18/2022	<u>117 (p.822)</u>	Notice of Filing of Official Transcript as to <u>116 (p.1295)</u> Transcript. Party notified, filed. (RachelWillborg, 4) (Entered: 01/18/2022)
01/18/2022	<u>118 (p.823)</u>	RESPONSE in Opposition to <u>111 (p.806)</u> MOTION for Leave to File Third Amended Complaint, filed by Joseph R. Biden, Sylvia Mathews Burwell, Jacob J Lew, Barack Hussein Obama, Thomas E Perez, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury. (Kopplin, Rebecca) (Entered: 01/18/2022)
01/24/2022	<u>119 (p.834)</u>	NOTICE of Setting as to <u>111 (p.806)</u> MOTION for Leave to File Third Amended Complaint. Parties notified. Motion Hearing set for 1/28/2022 at 11:00 AM in by telephone before Judge Keith P Ellison, filed. (arrivera, 4) (Entered: 01/24/2022)
01/24/2022	<u>120 (p.835)</u>	RESPONSE to <u>118 (p.823)</u> Response in Opposition to Motion for Leave to File Third Amended Complaint, filed by John J Dierlam. (SamanthaWarda, 4) (Entered: 01/25/2022)
01/28/2022		Minute Entry for proceedings held before Judge Keith P Ellison. MOTION HEARING held on 1/28/2022 Argument heard on <u>111 (p.806)</u> Motion for Leave to File a Third Amended Complaint. For reasons stated on the record, the Motion is GRANTED. Plaintiff must file the Amended complaint within thirty (30) days. Appearances:John Dierlam. Rebecca Michelle Kopplin.(Court Reporter: M.Malone)(Law clerk: L. Muloma), filed.(arrivera, 4) (Entered: 01/28/2022)
02/08/2022	<u>121 (p.846)</u>	CLARIFYING MEMORANDUM(Signed by Judge Keith P Ellison) Parties notified.(arrivera, 4) (Entered: 02/09/2022)
02/18/2022	<u>122 (p.855)</u>	ORDER granting Motion for Extension of Time to File a Third Amended Complaint (Signed by Judge Keith P Ellison) Parties notified.(JosephWells, 4) (Entered: 02/18/2022)
02/22/2022	<u>123 (p.856)</u>	UNOPPOSED MOTION for Extension of Time For Plaintiff To File A Third Amended Complaint by John J Dierlam, filed. Motion Docket Date 3/15/2022. (mmarquez,

		5) (Entered: 02/24/2022)
02/28/2022		(Court only) ***Motion(s) terminated: <u>123 (p.856)</u> MOTION for Extension of Time To File A Third Amended Complaint. (arivera, 4) (Entered: 02/28/2022)
03/28/2022	<u>124 (p.861)</u>	Third AMENDED COMPLAINT against All Defendants filed by John J Dierlam. (Attachments: # <u>1 (p.26)</u> Amended Complaint 2, # <u>2 (p.59)</u> Amended Complaint 3, # <u>3 (p.64)</u> Amended Complaint 4)(JacquelineMata, 4) (Entered: 03/29/2022)
05/05/2022	<u>125 (p.1012)</u>	Unopposed MOTION for Leave to File Excess Pages by Xavier Becerra, Joseph R. Biden, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, Martin Walsh, Janet Yellen, filed. Motion Docket Date 5/26/2022. (Attachments: # <u>1 (p.26)</u> Proposed Order)(Kopplin, Rebecca) (Entered: 05/05/2022)
05/09/2022	<u>126 (p.1016)</u>	MOTION to Dismiss <u>124 (p.861)</u> Amended Complaint/Counterclaim/Crossclaim etc. (Motion Docket Date 5/31/2022.), MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM by Xavier Becerra, Joseph R. Biden, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, Martin Walsh, Janet Yellen, filed. (Attachments: # <u>1 (p.26)</u> Proposed Order, # <u>2 (p.59)</u> Exhibit A, # <u>3 (p.64)</u> Exhibit B, # <u>4 (p.70)</u> Exhibit C, # <u>5 (p.71)</u> Exhibit D)(Kopplin, Rebecca) (Entered: 05/09/2022)
05/10/2022	<u>127 (p.1085)</u>	ORDER granting <u>125 (p.1012)</u> Motion for Leave to File Excess Pages.(Signed by Judge Keith P Ellison) Parties notified.(ShoshanaArnow, 4) (Entered: 05/10/2022)
05/27/2022	<u>128 (p.1086)</u>	RESPONSE to <u>126 (p.1016)</u> MOTION to Dismiss <u>124 (p.861)</u> Amended Complaint/Counterclaim/Crossclaim etc. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by John J Dierlam. (JacquelineMata, 4) (Entered: 05/27/2022)
06/02/2022	<u>129 (p.1119)</u>	REPLY in Support of <u>126 (p.1016)</u> MOTION to Dismiss <u>124 (p.861)</u> Amended Complaint/Counterclaim/Crossclaim etc. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM , filed by Xavier Becerra, Joseph R. Biden, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, Martin Walsh, Janet Yellen. (Kopplin, Rebecca) (Entered: 06/02/2022)
09/06/2022	<u>130 (p.1131)</u>	MOTION for Opposed Motion for Temporary Injunction and Expedited Consideration on Defendant's Partial Motion to Dismiss by John J Dierlam, filed. Motion Docket Date 9/27/2022. (Attachments: # <u>1 (p.26)</u> Proposed Order)(DMcKinnieRichardson, 4) (Entered: 09/08/2022)

09/13/2022	<u>131 (p.1145)</u>	NOTICE of Setting. Parties notified. Status Conference set for 9/20/2022 at 11:30 AM in by telephone before Judge Keith P Ellison, filed. (arrivera, 4) (Entered: 09/13/2022)
09/19/2022	<u>132 (p.1146)</u>	RESPONSE in Opposition to <u>130 (p.1131)</u> MOTION Opposed Motion for Temporary Injunction and Expedited Consideration on Defendant's Partial Motion to Dismiss, filed by Xavier Becerra, Joseph R. Biden, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, Martin Walsh, Janet Yellen. (Kopplin, Rebecca) (Entered: 09/19/2022)
09/20/2022		Minute Entry for proceedings held before Judge Keith P Ellison. STATUS CONFERENCE held on 9/20/2022. The Court addressed issues related to the Plaintiffs Motion for Preliminary Injunction on the record. Appearances: John Dierlam, Rebecca Kopplin (Court Reporter: M. Capetillo)(Law Clerk: I.S.), filed.(arrivera, 4) (Entered: 10/07/2022)
09/28/2022	<u>133 (p.1153)</u>	REPLY to Response to <u>130 (p.1131)</u> MOTION Opposed Motion for Temporary Injunction and Expedited Consideration on Defendant's Partial Motion to Dismiss, filed by John J Dierlam. (AkeitaMichael, 4) (Entered: 09/28/2022)
10/13/2022	<u>134 (p.1162)</u>	NOTICE of Setting re: <u>130 (p.1131)</u> MOTION Opposed Motion for Temporary Injunction and Expedited Consideration on Defendant's Partial Motion to Dismiss, <u>126 (p.1016)</u> MOTION to Dismiss <u>124 (p.861)</u> Amended Complaint/Counterclaim/Crossclaim etc. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM . Parties notified. Motion Hearing set for 10/27/2022 at 02:30 PM in by video before Judge Keith P Ellison, filed. (arrivera, 4) (Entered: 10/13/2022)
10/21/2022	<u>135 (p.1163)</u>	NOTICE of Setting as to <u>130 (p.1131)</u> MOTION Opposed Motion for Temporary Injunction and Expedited Consideration on Defendant's Partial Motion to Dismiss, <u>126 (p.1016)</u> MOTION to Dismiss <u>124 (p.861)</u> Amended Complaint/Counterclaim/Crossclaim etc. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM , <u>124 (p.861)</u> Amended Complaint/Counterclaim/Crossclaim etc.. Parties notified. Motion Hearing set for 10/27/2022 at 02:30 PM in by telephone before Judge Keith P Ellison, filed. (arrivera, 4) (Entered: 10/21/2022)
10/27/2022		Minute Entry for proceedings held before Judge Keith P Ellison. Argument heard on [Doc. No. 130] MOTION for Temporary Injunction and Expedited Consideration on Defendants Partial Motion to Dismiss and [Doc. No. 126] MOTION to Dismiss. For reasons stated on the record, the Preliminary Injunction is DENIED. [Doc. No. 130]. The Motion to Dismiss is under advisement. [Doc. 126].

		Appearances: John Dierlam, Rebecca Kopplin (Court Reporter: D. Smith)(Law Clerk: I.S.), filed.(arrivera, 4) (Entered: 11/21/2022)
12/12/2022	<u>136 (p.1164)</u>	ORDER granting <u>126 (p.1016)</u> Motion to Dismiss;.(Signed by Judge Keith P Ellison) Parties notified.(arrivera, 4) (Entered: 12/12/2022)
12/30/2022	<u>137 (p.1165)</u>	MOTION to Vacate <u>136 (p.1164)</u> Order on Motion to Dismiss for Failure to State a Claim (Motion Docket Date 1/20/2023.), MOTION to Stay Pending Appeals Court Decision by John J Dierlam, filed. (AntonioBanda, 4) (Entered: 12/30/2022)
01/20/2023	<u>138 (p.1175)</u>	RESPONSE in Opposition to <u>137 (p.1165)</u> MOTION to Vacate <u>136 (p.1164)</u> Order on Motion to Dismiss, Order on Motion to Dismiss for Failure to State a Claim MOTION to Stay, filed by Xavier Becerra, Joseph R. Biden, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, Martin Walsh, Janet Yellen. (Kopplin, Rebecca) (Entered: 01/20/2023)
01/30/2023	<u>139 (p.1184)</u>	REPLY to <u>138 (p.1175)</u> Response to <u>137 (p.1165)</u> MOTION to Vacate <u>136 (p.1164)</u> Order on Motion to Dismiss, Order on Motion to Dismiss for Failure to State a Claim MOTION to Stay, filed by John J Dierlam. (HeatherCarr, 4) (Entered: 01/30/2023)
04/13/2023	<u>140 (p.1196)</u>	NOTICE of Setting as to <u>137 (p.1165)</u> MOTION to Vacate <u>136 (p.1164)</u> Order on Motion to Dismiss, Order on Motion to Dismiss for Failure to State a Claim MOTION to Stay. Parties notified. Motion Hearing set for 4/18/2023 at 04:30 PM in by telephone before Judge Keith P Ellison, filed. (arrivera, 4) (Entered: 04/13/2023)
04/14/2023	<u>141 (p.1197)</u>	NOTICE of Setting as to <u>137 (p.1165)</u> MOTION to Vacate <u>136 (p.1164)</u> Order on Motion to Dismiss, Order on Motion to Dismiss for Failure to State a Claim MOTION to Stay. Parties notified. Motion Hearing set for 4/18/2023 at 02:30 PM in by telephone before Judge Keith P Ellison, filed. TIME CHANGE. (arrivera, 4) (Entered: 04/14/2023)
04/17/2023		motion hearing to be reset. (arrivera, 4) (Entered: 04/17/2023)
04/18/2023	<u>142 (p.1198)</u>	NOTICE of Setting as to <u>137 (p.1165)</u> MOTION to Vacate <u>136 (p.1164)</u> Order on Motion to Dismiss, Order on Motion to Dismiss for Failure to State a Claim MOTION to Stay. Parties notified. Motion Hearing reset for 5/3/2023 at 02:30 PM in by telephone before Judge Keith P Ellison, filed. (arrivera, 4) (Entered: 04/18/2023)
05/03/2023		Minute Entry for proceedings held before Judge Keith P Ellison. MOTION HEARING held on 5/3/2023 on Plaintiffs Motion to Vacate. (ECF No. 137). The Court

		DENIED the Motion. Appearances: (Court Reporter: H. Alcaraz)(Law Clerk: I.S.) filed.(arrivera, 4) Modified on 6/12/2023 (arrivera, 4). (Entered: 06/09/2023)
05/22/2023		(Court only) ***Motion(s) terminated: 137 (p.1165) MOTION to Vacate 136 (p.1164) Order on Motion to Dismiss, Order on Motion to Dismiss for Failure to State a Claim MOTION to Stay. (arrivera, 4) (Entered: 05/22/2023)
06/01/2023	143 (p.1199)	MOTION for Summary Judgment by John J Dierlam, filed. Motion Docket Date 6/22/2023. (AkeitaMichael, 4) (Entered: 06/01/2023)
06/22/2023	144 (p.1209)	RESPONSE to 143 (p.1199) MOTION for Summary Judgment filed by Xavier Becerra, Joseph R. Biden, United States Department of Health and Human Services, United States Department of Labor, United States Department of The Treasury, Martin Walsh, Janet Yellen. (Kopplin, Rebecca) (Entered: 06/22/2023)
06/28/2023	145 (p.1218)	RESPONSE to 144 (p.1209) Response to Motion,, filed by John J Dierlam. (DarleneHansen, 4) (Entered: 06/29/2023)
07/21/2023		(Court only) ***Document Reopened: 143 (p.1199) MOTION for Summary Judgment. (arrivera, 4) (Entered: 07/21/2023)
07/21/2023	146 (p.1225)	NOTICE of Setting as to 143 (p.1199) MOTION for Summary Judgment. Parties notified. Motion Hearing set for 8/4/2023 at 02:00 PM in by telephone before Judge Keith P Ellison, filed. (arrivera, 4) (Entered: 07/21/2023)
07/21/2023	147 (p.1226)	NOTICE of Setting as to 143 (p.1199) MOTION for Summary Judgment. Parties notified. Motion Hearing reset for 8/8/2023 at 11:00 AM in by telephone before Judge Keith P Ellison, filed. (arrivera, 4) (Entered: 07/21/2023)
08/08/2023		Minute Entry for proceedings held before Judge Keith P Ellison. MOTION HEARING held on 8/8/2023. Appearances: John J Dierlam, Rebecca Michelle Kopplin.(Court Reporter: Malone), filed.(ArturoRivera, 4) (Entered: 09/08/2023)
08/11/2023	148 (p.1227)	ORDER granting in part and denying in part 143 (p.1199) Motion for Summary Judgment.(Signed by Judge Keith P Ellison) Parties notified.(arrivera, 4) (Entered: 08/11/2023)
08/18/2023	149 (p.1229)	NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: 148 (p.1227) by John J Dierlam, filed. (ghassan, 4) (Entered: 08/18/2023)
08/22/2023	150 (p.1231)	Clerks Notice of Filing of an Appeal. The following Notice of Appeal and related motions are pending in the District Court: 149 (p.1229) Notice of Appeal. Fee status: Not Paid. Reporter(s): F. Warner, N. Forrest, M. Malone, M.

		Capetillo, D. Smith, H. Alcaraz, filed. (Attachments: # 1 (p.26) NOA, # 2 (p.59) DKT13) (SarahCastillo, 1) (Entered: 08/22/2023)
08/22/2023		Appeal Review Notes re: 149 (p.1229) Notice of Appeal. Fee status: Not Paid. The appeal filing fee has not been paid, and appellant is a pro se litigant. Hearings were held in the case - Transcripts on file with the clerk's office re: Misc hearing held 6/14/2018, Motion Hearing held 12/15/2021, and Tele Conference held 7/26/16. DKT13 transcript order form(s) due within 14 days of the filing of the notice of appeal. Number of DKT-13 Forms expected: 7, filed. (SarahCastillo, 1) (Entered: 08/22/2023)
08/22/2023		Notice of Assignment of USCA No. 23-20401 re: 149 (p.1229) Notice of Appeal, filed.(SarahCastillo, 1) (Entered: 08/22/2023)
08/31/2023		APPEAL FILING FEE Filing fee: \$505.00 re: 149 (p.1229) Notice of Appeal, receipt number 4-1472, filed. (DamonBarrett, 4) (Entered: 08/31/2023)
08/31/2023	151 (p.1237)	DKT13 TRANSCRIPT ORDER REQUEST by J. Dierlam. No hearing for the date requested. This order form relates to the following: 149 (p.1229) Notice of Appeal, filed.(DarleneHansen, 4) (Entered: 09/01/2023)
08/31/2023	152 (p.1239)	DKT13 TRANSCRIPT ORDER REQUEST by J. Dierlam. This is to order a transcript of Motion Hearing on 10/27/22 before Judge Ellison. Court Reporter/Transcriber: David Smith. This order form relates to the following: 149 (p.1229) Notice of Appeal, Motion Hearing,, filed.(DarleneHansen, 4) (Entered: 09/01/2023)
09/07/2023	153 (p.1345)	APPEAL TRANSCRIPT re Motion Hearing held on August 8, 2023 before Judge Keith P Ellison. Court Reporter/Transcriber Mayra Malone. Ordering Party: Plaintiff. This transcript relates to the following: 151 (p.1237) Appeal Transcript Request. Release of Transcript Restriction set for 12/6/2023., filed. (Malone, Mayra) (Entered: 09/07/2023)
09/08/2023	154 (p.1241)	Notice of Filing of Official Transcript as to 153 (p.1345) Transcript - Appeal., Party notified, filed. (DarleneHansen, 4) (Entered: 09/08/2023)
09/21/2023	155 (p.1242)	USCA LETTER for the Fifth Circuit advising court reporter David Smith the transcript must be filed with the District Court Clerk within 30 days from the date the USCA received the purchase order (USCA No. 23-20401), filed.(SaraCelis, 1) (Entered: 09/22/2023)
09/25/2023	156 (p.1330)	TRANSCRIPT re: Motion Hearing held on 10/27/2022 before Judge Keith P Ellison. Court Reporter/Transcriber David S. Smith. Ordering Party John J. Dierlam Release of Transcript Restriction set for 12/26/2023., filed. (Smith,

		David) (Entered: 09/25/2023)
09/26/2023	<u>157 (p.1246)</u>	Notice of Filing of Official Transcript as to <u>156 (p.1330)</u> Transcript. Party notified, filed. (DarleneHansen, 4) (Entered: 09/26/2023)
09/26/2023		(Court only) Set/Cleared Flags. Appeal_Nat flag cleared. (EfrainGarcia, 1) (Entered: 09/26/2023)

2 Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

John J. Dierlam §
versus §
Joseph R. Biden, PRESIDENT OF THE §
UNITED STATES, in his official capacity §
as President of the United States; §
UNITED STATES DEPARTMENT OF HEALTH §
AND HUMAN SERVICES; Xavier Becerra, §
SECRETARY, U.S. DEPARTMENT OF §
HEALTH AND HUMAN SERVICES, in his §
official capacity as Secretary of the U.S., §
Department Health and Human Services; §
UNITED STATES DEPARTMENT OF §
TREASURY; Janet Yellen, SECRETARY, U.S. §
DEPARTMENT OF TREASURY, in her §
official capacity as the Secretary of the §
U.S. Department the Treasury; UNITED §
STATES DEPARTMENT OF LABOR; Martin §
Walsh, SECRETARY, DEPARTMENT OF §
LABOR, in his official capacity as the §
Secretary of the U.S. Department of §
Labor §
Defendants §

United States Courts
Southern District of Texas
FILED

AUG 18 2023

Nathan Ochsner, Clerk of Court

CIVIL ACTION NO. 4:16-cv-00307

Notice of Appeal To the 5th Circuit Court

Notice is hereby given that John J. Dierlam, plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the 5th Circuit the Dismissal of most of the charges in the 3rd Amended Complaint on 12/12/2022 and the Final Order granting only in part the one remaining charge by Judge Ellison on 8/11/2023.

Respectfully Submitted,
John J. Dierlam, pro se
5802 Redell Rd.
Baytown, TX 77521
Phone: 281-424-2266
email:jdierlam@outlook.com

John J. Dierlam

3 Final Judgment (claim 3)

ENTERED

August 11, 2023

Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN J DIERLAM,

Plaintiff,

VS.

JOSEPH R. BIDEN JR., *et al.*,

Defendants..

§
§
§
§
§
§
§
§

CIVIL ACTION NO. 4:16-CV-00307

ORDER

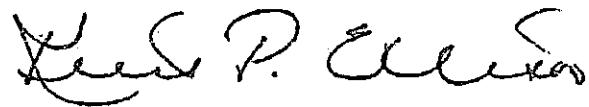
Pending before the Court is Plaintiff's Motion for Summary Judgment. ECF No. 143.

Plaintiff is seeking summary judgment on the retrospective portion of Claim 3 and several forms of prospective relief. Defendant does not oppose Plaintiff's request for a refund in the amount of \$5626.22 for the retrospective portion of Claim 3. ECF No. 144 at 2. Defendant opposes Plaintiff's request for prospective relief. *Id.* at 4.

After considering the Motions, the Parties' briefs, oral arguments, and all applicable law, the Court determines that Plaintiff's Motion for Summary Judgment is **GRANTED** as to the retrospective portion of Claim 3 and **DENIED** as to the extent that it seeks any other relief. The Court finds that Defendant is entitled to retrospective relief in the amount of \$5,626.22 for his past payments of the shared responsibility payment. The Court has already dismissed the prospective portion of Claim 3 and dismissed all other claims in their entirety. ECF No. 136. Therefore, there is no basis for the Court to award prospective relief.

IT IS SO ORDERED.

SIGNED at Houston, Texas, on this the 11th of August, 2023.



KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

4 Final Judgment (except claim 3)

4 4

ENTERED

December 12, 2022

Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN J DIERLAM,

Plaintiff,

VS.

BARACK HUSSEIN OBAMA, *et al.*,

Defendants.

§
§
§
§
§
§
§
§

CIVIL ACTION NO. 4:16-CV-00307

ORDER

Pending before the Court is Defendants' Partial Motion to Dismiss (Doc. 126). After considering the Motions, the Parties' briefs, oral arguments, and all applicable law, the Court determines that the Motion to Dismiss should be **GRANTED** as to Claims 1, 2 and 4-21 of Plaintiff's Third Amended Complaint in their entirety and Claim 3 to the extent it seeks prospective relief.

IT IS SO ORDERED.

SIGNED at Houston, Texas on the 12th of December, 2022.


Keith P. Ellison
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

5 Magistrate Judge's Report and Recommendation

ENTERED

November 21, 2017

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN J. DIERLAM,

§

Plaintiff,

§

v.

§

DONALD TRUMP,¹ in his official capacity as President of the United States, *et al.*,

§

§

§

§

Defendants.

§

CASE NO. 4:16-CV-307

§

§

REPORT AND RECOMMENDATION
ON DEFENDANTS' MOTION TO DISMISS

Before the Court is Defendants' Motion to Dismiss Plaintiff's First Amended Complaint. ECF No. 37.² Plaintiff's suit challenges Defendants'

¹ On February 4, 2016, Plaintiff filed suit against Defendants Barack Hussein Obama, in his official capacity as the president of the United States; the United States Department of Health and Human Services ("HHS"); Sylvia Mathews Burwell, in her official capacity as Secretary of HHS; the United States Department of the Treasury ("the Treasury"); Jacob J. Lew, in his official capacity as Secretary of the Treasury; the United States Department of Labor ("Labor"); and Thomas E. Perez, in his official capacity as Secretary of Labor. On January 20, 2017, Donald Trump succeeded President Obama as President of the United States. Pursuant to Federal Rule of Civil Procedure 25(d), President Trump, Acting Secretary of HHS Eric D. Hargan, Secretary of the Treasury Steven Mnuchin, and Secretary of Labor Alexander Acosta have been substituted as named Defendants in this action.

² On May 26, 2016, Defendants filed a motion to dismiss Plaintiff's original complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), which Plaintiff opposed and sought leave to amend. ECF No. 18, *see* ECF Nos. 27, 28. The Court granted Plaintiff leave to amend. ECF No. 29. On July 18, 2016, Plaintiff filed his First Amended Complaint ("Complaint"). On October 3, 2017, this case was reassigned to Judge Ellison after Judge Hoyt recused himself. ECF Nos. 62, 63. On October 16, 2017, the Court referred the Defendants' pending motion to dismiss to this Court for a report and recommendation in accordance with 28 U.S.C. § 636(b)(1)(B).

implementation of minimum essential coverage provision of the Patient Protection and Affordable Care Act (“ACA”), as well as the constitutionality of the individual mandate and the contraceptive services mandate. Pl.’s Amend. Compl., ECF No. 32. Because Plaintiff’s claims are now moot and he has failed to allege a substantial burden on his religious beliefs, the Court recommends that Plaintiff’s claims be dismissed.

I. BACKGROUND

Plaintiff John J. Dierlam is a lifelong Roman Catholic.³ Plaintiff opposes the use, funding, provision, and support of contraceptives. Plaintiff asserts that paying for or participating in a health insurance plan that provides coverage for contraceptives violates his sincerely-held religious beliefs. Plaintiff believes that life begins at conception, that the “practice of abortion, contraception, and sterilization [is] reprehensible and sinful,” and that “supporting these activities even indirectly” is contrary to the teachings of the Catholic Church. *Id.* at 6.

In 2012, Plaintiff was employed by ZXP Technologies (“ZXP”). At that time, he was enrolled in his employer-provided medical, dental, and vision insurance plans. *Id.* at 3. During the open enrollment period in the fall of 2012, Plaintiff learned that the medical insurance plans ZXP offered had changed for the

³ For the purposes of deciding this motion to dismiss, Plaintiff’s factual allegations are taken as true. *Brown v. Bd. of Trustees Sealy Indep. Sch. Dist.*, 871 F. Supp. 2d 581, 590 (S.D. Tex. 2012) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (Ellison, J.)).

upcoming year. In particular, Plaintiff asserts, “contraceptive coverage had been expanded and some abortion services probably would be covered within the next year.” *Id.* at 3-4. Plaintiff “decided to follow the teachings of [his] faith, drop medical coverage, and thereby not support these services through payment of premiums and fees.”⁴ *Id.* at 4. Plaintiff apparently made this decision without first obtaining replacement insurance.

Plaintiff attempted to find insurance that would provide coverage consistent with his faith. *Id.* at 5. First, he contacted at least three health insurance providers, but their plans included coverage for contraceptives. *Id.* Next, Plaintiff contacted a Christian medical bill sharing organization. Although this group provided coverage consistent with his religious beliefs, Plaintiff did not join the organization because he found the required Protestant affirmation inconsistent with his beliefs. *Id.* Finally, Plaintiff contacted an insurance representative for the State of Texas, who “indicated [that] they could not help” Plaintiff find suitable health insurance coverage. *Id.* Plaintiff subsequently “ceased all efforts” to obtain health insurance. *Id.* In both April 2014 and April 2015, pursuant to the ACA, Plaintiff was required to pay a penalty, termed a “shared responsibility payment,” because he did not have the required coverage. *Id.* at 10.

⁴ Plaintiff maintained enrollment in his dental and vision insurance plans “as there were no moral implications to do[ing] so.” ECF No. 32 at 4.

In his Complaint, Plaintiff challenges both the minimum essential coverage provision (the individual mandate) and the preventive services provision of the ACA that requires contraceptive coverage (the contraceptive mandate) based on his religious objection to participating in any health insurance plan that includes coverage for contraceptive services. Plaintiff seeks a declaration pursuant to 28 U.S.C. §§ 2201-2202 that the individual insurance mandate of the ACA is unconstitutional based on the Religious Freedom Restoration Act (“RFRA”), the Establishment Clause of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Free Exercise Clause of the First Amendment, the Taxing and Spending Clause,⁵ the Due Process Clause of the Fifth Amendment, and the “right to privacy and association.”⁶ ECF No. 32. Based on these same constitutional challenges, Plaintiff also seeks injunctive relief against enforcement of the individual mandate and an order requiring the Internal Revenue Service

⁵ The United States Supreme Court already determined that the ACA’s individual mandate is constitutional under Congress’ power to tax and spend. *Nat’l Fed’n of Indep. Bus. v. Sebelius* (“NFIB”), 567 U.S. 519, 574 (2012).

⁶ To the extent that Plaintiff claims that the ACA forces him to enter into a contract, thus violating his “right to privacy and association,” thus necessitating the refund of his shared responsibility payments, his claim fails to state a claim upon which relief can be granted and must be dismissed. ECF No. 32 at 17. The ACA does not require Plaintiff to enter into a contract, as he was never required to purchase health insurance. The Supreme Court has explained that if a person “chooses to pay [a shared responsibility payment] rather than obtain health insurance, they have fully complied with the law.” *NFIB*, 132 S. Ct. at 2597. Here, Plaintiff was able to avoid entering into a contract by making shared responsibility payments, and therefore his rights of privacy and association were not infringed.

(“IRS”) to refund his shared responsibility payment. *Id.*⁷

II. STANDARD OF REVIEW

Defendants contend that all of the claims in Plaintiff’s Complaint (other than the § 1502(c) claim) should be dismissed for failure to state a claim for relief. Defendants’ Motion to Dismiss, ECF No. 37.

A court may dismiss a complaint for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a ‘short and plain statement of the claim showing that the pleader is entitled to relief.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). However, “[m]otions to dismiss under Rule 12(b)(6) are viewed with disfavor and are rarely granted.” *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009) (citation omitted); *Duke Energy Intern., L.L.C. v. Napoli*, 748 F. Supp. 2d 656 (S.D. Tex. 2010) (Atlas, J.). “To survive a Rule 12(b)(6) motion to dismiss, a complaint ‘does not need detailed factual allegations,’ but must provide the plaintiff’s grounds for entitlement to relief – including factual allegations that when assumed to be true ‘raise a right to relief

⁷ Plaintiff also asserts a claim under § 1502, alleging that Defendants failed to provide him with the required statutory notice of services available through the Texas state health insurance exchange. See 42 U.S.C. § 18092 (hereinafter “§ 1502(c)”). Defendants’ motion seeks dismissal of this claim under Rule 12(b)(1) for lack of jurisdiction. ECF No. 37 at 11-15. Plaintiff concedes, however, that Congress did not create a private right of action to remedy lack of notice. ECF No. 32 at 9. Thus, this claim should be dismissed.

above the speculative level.”” *Culliver v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The complaint must include more than mere “labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555 (internal quotation marks and citations omitted). That is, a complaint must “contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (2009) (quoting *Twombly*, 550 U.S. at 570).

The ultimate question for the court to decide is whether the complaint states a valid claim when viewed in the light most favorable to the plaintiff. The court must accept well-pleaded facts as true, but legal conclusions are not entitled to the same assumption of truth. *Id.* at 678.

III. DISCUSSION

In 2010, Congress passed the ACA. Pub.L. No. 111-148, 124 Stat. 119 (2010). The ACA was intended to “increase the number of Americans covered by health insurance and decrease the cost of health care.” *NFIB*, 567 U.S. at 538. ACA requires non-grandfathered *group health plans* and *insurance providers* to cover four categories of preventative health services, without cost-sharing. One of these four categories is “preventative care and screenings” for women, requiring every *group health plan* and *insurance provider* to cover “all Food and Drug

Administration approved contraceptive methods and sterilization procedures,” a requirement known as the “contraceptive mandate.”⁸ See 42 U.S.C. § 300gg-13(a)(4); 77 Fed. Reg. 8725, 8726 (Feb. 15, 2012). It does not require anything from the employee or insured. *Real Alternatives, Inc. v. Secretary Department of Health and Human Services*, 867 F.3d 338, 344 (3d. Cir. 2017).

The ACA individual mandate requires an “applicable individual” to maintain minimum essential coverage, receive an exemption from the coverage requirement, or make a shared responsibility payment. 26 U.S.C. § 5000A; see *NFIB*, 567 U.S. at 539. An “applicable individual” is any individual except one who qualifies for a religious exemption, is not lawfully present, or is incarcerated. 26 U.S.C. § 5000A(d).

Here, Plaintiff challenges the individual mandate and the preventive services coverage provision. Plaintiff’s claims stem from his religious objection to contraceptive services, and his refusal to participate in any health insurance plan that conforms to the requirements of the contraceptive mandate.

A. The Department of Health and Human Services’ Recent Rule Renders Plaintiff’s Claims for Injunctive and Declaratory Relief Moot.

The Constitution of the United States limits the jurisdiction of the federal courts to “[c]ases” and “[c]ontroversies.” U.S. Const., art. III, § 2. The “case or

⁸ This requirement does not apply to “grandfathered” group health plans.

“controversy” requirement demands that a cause of action before a federal court present a justiciable controversy. “No justiciable controversy is presented . . . when the question sought to be adjudicated has been mooted by subsequent developments.” *Flast v. Cohen*, 392 U.S. 83, 95 (1968). The Fifth Circuit has held that the promulgation of new regulations may render moot “what was once a viable case.” *Sannon v. U.S.*, 631 F.2d 1247, 1250-51 (5th Cir. 1980). A federal court has an obligation to raise the issue of mootness, *sua sponte*, “if the facts suggest mootness notwithstanding the silence of the parties with respect to the issue.” *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 227 (5th Cir. 1998).

In considering Plaintiff’s claims, the Court is mindful of the premise that *pro se* litigants’ allegations must be liberally construed so as to ensure that their claims are not unfairly dismissed. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). However, a *pro se* litigant is not “exempt . . . from compliance with the relevant rules of procedural and substantive law.” *Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981).

In this case, even the most liberal construction cannot prevent dismissal, as the new rule moots Plaintiff’s claims. On May 4, 2017, more than a year after Plaintiff filed his Complaint and Defendants filed their motion to dismiss, President Trump issued an executive order, instructing the Secretary of Health and Human Services (“HHS”) to consider enacting amended regulations to address

conscience-based objections to the contraceptive mandate. “Executive Order Promoting Free Speech and Religious Liberty,” Exec. Order No. 13798, 82 Fed. Reg. 21675 (May 4, 2017). Within months, HHS issued an interim final rule, effective October 6, 2017, providing an exemption for (1) individuals who have sincerely held religious objections to contraceptives (2) whose employers or health insurance issuers “are willing to offer a policy accommodating the objecting individual.” 45 C.F.R. Part 147(II)(C)(2).

The adoption of this rule rendered Plaintiff’s claims for injunctive and declaratory relief moot, as Plaintiff can satisfy both prongs of this exemption. The sincerity of Plaintiff’s religious objection to contraception is not in dispute. ECF No. 37 at 17. Under the interim rule, individuals who object on religious grounds are exempt from purchasing health insurance plans that offer coverage for contraceptive services, and instead can purchase health insurance that does not cover contraceptive services.

The sole issue is whether Plaintiff can obtain such coverage. Plaintiff alleged that he searched for such coverage in 2014, but was unable to locate any coverage options that conformed to his religious beliefs. He did find a Christian bill sharing ministry, but did not believe that the required affirmation was consistent with his Catholic faith. However, Plaintiff apparently overlooked a Catholic health care sharing ministry that offers—and has offered since at least October 2014—a

“health care option . . . [c]onsistent with Catholic teaching.”⁹ Thus, Plaintiff may join the Catholic sharing ministry without violating his religious beliefs. In addition, because of this new exemption under the interim rule, the health care marketplace will adapt, if it has not done so to date, to provide insurance plans that do not cover contraceptive services. See, e.g., *Real Alternatives*, 867 F.3d at 346 (employer represented that its insurer would be willing to provide a plan that omits contraceptive coverage); *March for Life v. Burwell*, 128 F.Supp.3d 116, 132 (D.D.C. 2015) (representing that the employer would offer such insurance to its employees). The adoption of the interim final rule, and the immediate availability of a Catholic health care sharing ministry, has rendered Plaintiff’s claims for injunctive and declaratory relief moot.

B. Plaintiff Is Not Entitled to a Refund Of His Shared Responsibility Payment Because the Individual Mandate Did Not Impose a Substantial Burden On His Exercise of Religion.

Having determined that Plaintiff’s claims for injunctive and declaratory relief are moot, the Court turns next to Plaintiff’s request for a refund of his shared

⁹ In ruling on a Rule 12(b)(6) motion to dismiss, courts may “ordinarily examine . . . matters of which a court may take judicial notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Under Federal Rule of Evidence 201(b), a judicially noticed fact “must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). In this case, the Court takes judicial notice of the existence of Christus Medical Foundation Curo, a Catholic health care sharing ministry that is exempt from ACA’s individual mandate and offers financial protection to its members for health care costs on a basis that is consistent with the Catholic faith. *About CMF Curo*, CHRIST MEDICUS FOUNDATION, <https://cmfcuro.com/about-cmf-curo> (last visited Nov. 17, 2017).

responsibility payments for 2014 and 2015. Plaintiff has paid in full the shared responsibility payment he owed under the ACA. Therefore, this Court has jurisdiction. *Flora v. United States*, 362 U.S. 145, 146 (1960) (concluding that full payment of a tax assessment is a jurisdictional prerequisite to suit in federal district court). Invoking RFRA, Plaintiff claims that the shared responsibility payment constitutes a substantial burden on his exercise of religion.

1. RFRA requires a substantial burden on religious exercise.

Congress enacted RFRA “to provide very broad protection for religious liberty.” *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760-61 (2014). In enacting RFRA, Congress determined that “laws [that are] ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.”¹⁰ 42 U.S.C. § 2000bb(a)(2). “[T]o ensure broad protection for religious liberty, RFRA provides that the ‘Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.’” *Id.* at 2761 (citing 42 U.S.C. § 2000bb-1(a)). Under RFRA,

¹⁰ A brief historical detour is helpful in understanding the origins of RFRA. In cases including *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Supreme Court used a balancing test to determine whether government actions violated the Free Exercise Clause of the First Amendment. The balancing test considered whether the challenged action imposed a substantial burden on the exercise of religion and, if so, whether it was necessary to serve a compelling government interest. In *Employment Div., Dept. of Human Resources of Ore. V. Smith*, 494 U.S. 872 (1990), however, the Court abandoned the balancing test, holding that religiously neutral laws of general applicability could be applied to religious practices even absent a compelling government interest. In response to the Court’s decision in *Smith*, Congress enacted RFRA.

a plaintiff makes a *prima facie* case by “showing that the government substantially burdens a sincere religious exercise.” *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1126 (10th Cir. 2013). “If the Government substantially burdens a person’s exercise of religion, under the Act, that person is entitled to an exemption from the rule unless the Government ‘demonstrates that application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest.’” *Hobby Lobby*, 134 S. Ct. at 2760-61 (citing 42 U.S.C. § 2000bb-1(b)).

According to the Supreme Court, religious exercise is substantially burdened “when government action compels an individual ‘to perform acts *undeniably* at odds with fundamental tenets of [his] religious beliefs.’” *Real Alternatives*, 867 F.3d at 356 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)).

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting *substantial* pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.

Id. (quoting *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981)).

The threshold question, therefore, is whether the contraceptive mandate imposes a substantial burden on Plaintiff’s sincere exercise of religion. Plaintiff asserts that his sincerely held religious beliefs prohibit him from supporting the provision of certain contraceptive services, including “abortion, contraception, and

sterilization.” ECF No. 32 at 6-7. His religious beliefs lead him to fear possible “excommunication from the [Catholic] Church” should he “[support] these activities even indirectly.” *Id.* at 6. Defendants do not dispute the sincerity of Plaintiff’s religious beliefs. ECF No. 37 at 17. Defendants do, however, dispute the assertion that the contraceptive mandate imposes a substantial burden on Plaintiff’s exercise of religion. *Id.*

It is not the Court’s role to “determine what religious observance [a plaintiff’s] faith commands.” *Priests for Life v. U.S. Department of Health and Human Services*, 772 F.3d 229, 247 (D.D.C. 2014). While the Court may not make this factual inquiry, however, it remains the obligation of the Court to undertake a legal inquiry into the substantiality of the burden imposed on an individual’s exercise of religion. *See Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) (distinguishing between factual inquiries into the validity of a plaintiff’s belief, on the one hand, and legal inquiries into whether an alleged burden is substantial, on the other hand); *see also Bowen v. Roy*, 476 U.S. 693, 700-701 (1986) (explaining that the appropriate “frame of reference” for considering constitutional claims is “the Constitution, rather than an individual’s religion”). “Whether a burden is ‘substantial’ under RFRA is a question of law, not a question of fact.” *Geneva College v. Secretary U.S. Dept. of Health and Human Services*, 778 F.3d 422, 442 (3rd Cir. 2015).

The Court, therefore, is required to objectively assess whether the contraceptive mandate does, in fact, impose a substantial burden on Plaintiff's exercise of religion. The Fifth Circuit has yet to address the issue of whether an individual suffers a substantial burden on his religious exercise when the Government regulates group health care plans and health insurance providers, requiring them to offer coverage that includes contraceptive services the individual finds objectionable based on his religious beliefs. This claim is distinct from those RFRA claims found to be meritorious by the Supreme Court in *Hobby Lobby*, in which an employer objects to the contraceptive mandate. *Real Alternatives*, 867 F.3d at 355. To make this determination, the Court must examine the role that an insured plays in acquiring ACA-mandated coverage, as distinguished from the employer's role in providing and funding health insurance coverage under the ACA.

2. An employer who provides an ACA insurance plan and finds contraceptive services objectionable to religious beliefs is substantially burdened.

In *Hobby Lobby*, the Supreme Court narrowly held that the contraceptive mandate imposed a substantial burden on the ability of a for-profit closely held corporation to conduct business in accordance with its religious beliefs. *Hobby Lobby*, 134 S. Ct. at 2778-79. In reaching this conclusion, the Court considered that, to comply with the contraceptive mandate, the employer plaintiffs were

required to *provide* coverage for and *fund* contraceptive services that violated their religious beliefs. *Id.* at 2754-55, 2781. If the employer plaintiffs refused to do so, and instead “provid[ed] insurance coverage in accordance with their religious beliefs,” they would be “force[d] . . . to pay an enormous sum of money—as much as \$475 million per year in the case of Hobby Lobby.” *Id.* at 2779.

The Court did not elaborate on the role that the employer plays in the provision and funding of health care coverage to its employees, but this role is significant. Prior to the ACA, there was no requirement that an employer provide its employees with a healthcare plan.¹¹ However, over 60% of the Americans who have health coverage obtain it through an employer-sponsored plan.¹² In 1974, in recognition of the important role employers play in providing healthcare benefits to employees, Congress enacted the Employee Retirement Income Security Act (“ERISA”). ERISA mandated that once an employer decides to offer a health insurance plan to its employees, the plan must be run in accordance with certain

¹¹ See *ERISA and Healthcare Plan Enforcement*, FINDLAW, <http://employment.findlaw.com/wages-and-benefits/erisa-and-healthcare-plan-enforcement.html> (last visited Nov. 17, 2017); *Health Insurance Is the Foundation of a Comprehensive Benefits Package*, THE BALANCE, <https://www.thebalance.com/health-insurance-benefits-foundation-1918146> (last visited Nov. 17, 2017).

¹² Michelle Long et al., *Trends in Employer-Sponsored Insurance Offer and Coverage Rates, 1999-2014*, THE HENRY J. KAISER FAMILY FOUNDATION, <https://www.kff.org/private-insurance/issue-brief/trends-in-employer-sponsored-insurance-offer-and-coverage-rates-1999-2014/> (last visited Nov. 20, 2017).

minimum standards. 29 U.S.C. § 1001.¹³ In addition, under the fiduciary responsibilities specified in the law, individuals who manage and control plans must meet certain standards of conduct.¹⁴

An employer has choices with regard to both the design and funding of the plan.¹⁵ With regard to funding, the employer can choose either a fully-insured or a self-funded plan. Under a fully-insured plan, the employer contracts with an insurance company to cover employees and their dependents.¹⁶ Under a self-funded plan, the employer provides health or disability benefits to employees with its own funds and assumes direct risk for payment of the claims for benefits.¹⁷ Under either type of plan, the employer designs the plan and determines what services will be covered.¹⁸ The employer can decide to pay the entire cost of coverage on behalf of its employees, but typically shares the cost with them.¹⁹ In

¹³ *Health Plans & Benefits*, UNITED STATES DEPT. OF LABOR, <https://www.dol.gov/general/topic/health-plans/erisa> (last visited Nov. 17, 2017).

¹⁴ *Id.*

¹⁵ *What is the Difference Between Self-Funded and Fully-Insured Insurance Plans?*, BUSINESS BENEFITS GROUP, <https://www.bbgbroker.com/difference-between-self-funded-and-fully-insured-plans/> (last visited Nov. 17, 2017).

¹⁶ *Understanding Employer Self-Funding of Employee Health Benefits*, TEXAS DEPARTMENT OF INSURANCE, <https://www.tdi.texas.gov/pubs/consumer/cb108.html> (last visited Nov. 17, 2017).

¹⁷ *See id.*

¹⁸ *See id.*

¹⁹ *Health Insurance Is the Foundation of a Comprehensive Benefits Package*, THE BALANCE, <https://www.thebalance.com/health-insurance-benefits-foundation-1918146> (last visited Nov. 17,

addition, the employer can determine the rate of reimbursement for covered services under the plan. The terms of eligibility and covered benefits are set forth in a plan document, which tells plan participants what the plan provides and how it operates.²⁰

In addition to providing and funding health insurance coverage, employers are required to administer the employee healthcare benefit plan, including enrolling employees and making changes as necessary, deducting premiums from the employee's wages and remitting them to the insurance company, acting as a liaison between employees and the insurer, and, in some cases, terminating benefits and extending Consolidated Omnibus Budget Reconciliation Act ("COBRA") coverage.²¹ Employers are also responsible for ensuring compliance with reporting and disclosure requirements.²² It is clear, therefore, that an employer plays a significant role in the provision of insurance to its employees.

²⁰ 2017); *What is the Difference Between Self-Funded and Fully-Insured Insurance Plans?*, BUSINESS BENEFITS GROUP, <https://www.bbbroker.com/difference-between-self-funded-and-fully-insured-plans/> (last visited Nov. 17, 2017).

²¹ *Health Plans & Benefits: Plan Information*, UNITED STATES DEPT. OF LABOR, <https://www.dol.gov/general/topic/health-plans/planinformation> (last visited Nov. 20, 2017).

²² *Administering Your Employee Health Care Benefit Plan*, BIZFILINGS, <https://www.bizfilings.com/toolkit/research-topics/office-hr/administering-your-employee-health-care-benefit-plan> (last visited Nov. 17, 2017).

²² *Id.*

3. An employee is merely a consumer of healthcare coverage.

In contrast to the active role that an employer plays in making health insurance coverage available to employees, an employee's role is that of a passive recipient of health insurance coverage.

The term "participant," when used to describe employee recipients of employer-provided health insurance coverage, is a creation of ERISA. Under ERISA, a plan participant is "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 107 (1989). The term "participant," therefore, has limited meaning. It connotes nothing more than a person who may be entitled to a benefit—in this case, the benefit of health insurance coverage. Cf. *Firestone Tire & Rubber Co.*, 489 U.S. at 107.

ERISA confers several rights upon employee participants in health insurance plans. These rights include the right to notification, including the right to disclosure of important plan information, the right to a timely and fair process for benefit claims, the right to elect to temporarily continue group health coverage after losing coverage, the right to a certificate evidencing health coverage under a plan, and the right to recover benefits due under the plan.²³ Essentially, these rights ensure that consumers of health insurance coverage are treated fairly.

²³ *Health Plans & Benefits: Plan Information*, UNITED STATES DEPT. OF LABOR, <https://www.dol.gov/general/topic/health-plans/planinformation> (last visited Nov. 20, 2017).

A plan participant may decide whether he wants to be covered under the plan offered. If he does want coverage, then he is required to pay a premium, which is deducted from his pay check.²⁴ Once enrolled in the plan, the employee may decide which health care services he requires. After obtaining those health care services, he submits a claim for reimbursement. While an employer may underwrite all or part of the cost of an employee's health insurance coverage, the employee does not subsidize anyone else's coverage. This is particularly true in regard to contraceptive services, as the ACA requires contraceptive services to be provided at no cost to the employee. The employer bears the entire cost of the contraceptive mandate.²⁵

4. The Third Circuit has found that the ACA does not impose a substantial burden on individuals.

Since *Hobby Lobby*, those courts that have considered whether the contraceptive mandate may also impose a substantial burden on individuals have split.²⁶ In a well-reasoned opinion, the Third Circuit – the only circuit court to

²⁴ *What is the Difference Between Self-Funded and Fully-Insured Insurance Plans?*, Business Benefits Group, <https://www.bbbroker.com/difference-between-self-funded-and-fully-funded-plans> (last visited Nov. 17, 2017); *Administering Your Employee Health Care Benefit Plan*, BIZFILINGS, <https://www.bizfilings.com/toolkit/research-topics/office-hr/administering-your-employee-health-care-benefit-plan> (last visited Nov. 17, 2017).

²⁵ Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2010).

²⁶ *Compare Real Alternatives*, 867 F.3d at 360 (finding that although an individual employee was a consumer of coverage and availed himself of the ability to be reimbursed for services, he did not play an active role in his health insurance plan and his connection to other plan members' use of contraceptive services was too attenuated to impose a substantial burden on his exercise of

address this issue – concluded that the contraceptive mandate did not impose a substantial burden on an individual plaintiff’s exercise of religion. *Real Alternatives*, 867 F.3d at 360. Examining the role of an individual employee in a health insurance plan, the Third Circuit concluded that the employee was essentially a consumer of healthcare coverage. Unlike employers, the Third Circuit explained, individual employees are not “‘participa[nts]’ [in the health insurance marketplace] in the real sense of the word.” *Id.* “Subscribing to an insurance plan involves no real ‘participation,’ just as there is no active ‘participation’ when subscribing to a magazine or joining AARP or enrolling in a credit card that has membership benefits. These are all packages that involve a one-time enrollment, followed by essentially passive eligibility for certain services that the member opts in or out of.” *Id.* at 359. The relationship between an employee’s “decision to sign up for health insurance on the one hand and the provision of contraceptives to a particular individual on the other is ‘far too attenuated to rank as substantial.’” *Id.* at 360 (citing *Hobby Lobby*, 134 S. Ct. at 2798-99 (Ginsburg, J. dissenting)). The Third Circuit added that there “is a material difference between employers arranging or providing an insurance plan that includes contraceptive coverage – so that employees can avail themselves of that benefit – and becoming eligible to

religion) with *Wieland v. United States Department of Health and Human Services*, 196 F.Supp.3d 1010, 1017 (E.D. Mo. 2016) and *March for Life v. Burwell*, 128 F.Supp.3d 116, 129 (D.D.C. 2015) (finding in both cases that the contraceptive mandate put “substantial pressure on an adherent to modify his behavior and to violate his beliefs.””).

apply for reimbursement for a service of one's choosing." *Id.* at 361.

This Court agrees with the Third Circuit's reasoning. Employers and employees play substantially different roles in the health insurance marketplace. In holding that the contraceptive mandate imposed a substantial burden on employers in *Hobby Lobby*, the Supreme Court focused on the active role that employers play in the health insurance marketplace. Employers actually *provide* healthcare coverage to their employees and *subsidize* employees' premiums (and, in particular, employees' contraceptive coverage, which is generally provided at no cost to the employee). *See Hobby Lobby*, 134 S. Ct. at 2779. Employers must seek out health insurance companies, evaluate and customize available coverage options, design a plan, negotiate rates, choose how much to pay toward employees' premiums, and administer group health plans. Employers act as intermediaries between health insurance companies, which sell health insurance products to employers, and employees, who receive reimbursement for health services. Employees, on the other hand, play a passive role in accepting – or choosing not to accept – the benefit of health care coverage.

In this case, therefore, the contraceptive mandate did not impose a substantial burden on Plaintiff's exercise of religion. To follow the teachings of his faith, Plaintiff freely made a series of choices. First, he chose to discontinue his membership in his employer's health insurance plan. Next, he declined to join a

Christian medical bill sharing organization, although membership in the organization would have reduced Plaintiff's health care costs without compromising his religious beliefs regarding contraceptives. Finally, Plaintiff chose not to conduct a thorough search for alternative health insurance plans. Instead, he chose to radically alter his diet to reduce his risk of future disease. ECF No. 32 at 10.

For Plaintiff, the cost of these choices—choices Plaintiff made of his own accord—was a shared responsibility payment. Plaintiff was not required, as were the employer plaintiffs in *Hobby Lobby*, to actually provide coverage for and “[fund] . . . specific contraceptive methods.” 134 S. Ct. at 2779. At no time was Plaintiff forced to “engage in conduct that seriously violate[d] [his] religious beliefs.” *Id.* at 2775. Plaintiff was not required to use any of the contraceptive methods in question. *See id.* at 2799 (Ginsburg, J., dissenting). He was not required to “pay an enormous sum of money” to adhere to his faith; he was simply required to pay a small penalty. Had Plaintiff maintained coverage through his former employer, he would have been a passive recipient of benefits, not an active provider of contraceptive services. Any connection between Plaintiff’s membership in an employer-provided health care plan and the provision of contraceptives to another plan member is too attenuated to amount to a substantial burden. *See Real Alternatives*, 867 F.3d at 360.

To accept the premise of Plaintiff's argument as true would mean that a Jehovah's Witness could mount a constitutional challenge to a health insurance plan that provides coverage for blood transfusions. Individuals who are Jewish or Muslim could challenge a health care plan that provides coverage for medications derived from pigs. Christian Scientists could challenge a plan that provides coverage for vaccinations. *See Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting); *Real Alternatives*, 867 F.3d at 364 (listing a wide variety of medical treatments that some might find objectionable on religious grounds).

Health care plans provide coverage for a smorgasbord of medical services. In turn, individuals who are covered under the plan are free to choose from among these services based on myriad factors, including their religious beliefs. *See Hobby Lobby*, 134 S. Ct. at 2805 (Ginsburg, J., dissenting); *Real Alternatives*, 867 F.3d at 360 (the coverage offers a package of health benefits, but does not assure the availability of those services; it is for the individual employee to seek out and use or not). To suggest that Plaintiff's health care coverage somehow facilitates another person's decision to obtain contraceptive services, however, is to fundamentally misunderstand how the ACA works, the health insurance marketplace functions—and how individuals make personal decisions regarding their health.

C. Plaintiff Should Not Be Granted Leave To Amend Again.

“When a plaintiff’s complaint fails to state a claim, the court should generally give the plaintiff a chance to amend the complaint under Rule 15(a) before dismissing the action with prejudice, unless it is clear that to do so would be futile.” *Donnelly*, 2014 WL 429246, at *2 (citing *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002) (“[D]istrict courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal.”)). While it is within the discretion of the court to grant leave to amend, “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.’” *Id.* (citing 6 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *FEDERAL PRACTICE & PROCEDURE* § 1487 (2d ed. 1990); *Ayers v. Johnson*, 247 F.Appx. 534, 535 (5th Cir. 2007) (“[A] district court acts within its discretion when dismissing a motion to amend that is frivolous or futile.”)).

Here, Plaintiff has already been granted leave to amend. His amended pleading fails to allege facts sufficient to show he is entitled to relief. It would be futile to allow him to amend because a subsequent regulation has rendered his

claims moot. His statutory claim under RFRA fails, moreover, because he cannot show a substantial burden on his exercise of religion. The Court, therefore, should not grant Plaintiff a third bite at the apple.

IV. CONCLUSION

The Court recommends that Plaintiff's First Amended Complaint be **DISMISSED WITH PREJUDICE.**

Signed on November 21, 2017, at Houston, Texas.

Dena Palermo

Dena Hanovice Palermo
United States Magistrate Judge

6 Clarifying Memorandum

ENTERED

February 09, 2022

Nathan Ochsner, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

JOHN J DIERLAM,

§

Plaintiff,

§

VS.

§

CIVIL ACTION NO. 4:16-CV-00307

BARACK HUSSEIN OBAMA, *et al.*,

§

Defendants.

§

CLARIFYING MEMORANDUM

Before the Court is plaintiff John Dierlam's Motion for Clarification and Leave to Submit a Third Amended Complaint (Doc. 111). At a hearing on January 28, 2022, the Court **GRANTED** Mr. Dierlam's Motion. The Court now offers this clarification of its rulings and reasoning concerning mootness and standing.

I. FACTUAL BACKGROUND

On February 4, 2016, Plaintiff John Dierlam filed his initial complaint, challenging the Affordable Care Act (ACA) and requesting prospective and retrospective relief for myriad alleged violations of the United States Constitution and the Religious Freedom Restoration Act. *See, generally* Compl., ECF No. 1. However, as Mr. Dierlam's case was progressing, the ACA was evolving.

The Tax Cut and Jobs Act (TCJA) went into effect a year after Mr. Dierlam filed his lawsuit, reducing the shared-responsibility payment (imposed on individuals who failed to purchase health insurance) to \$0, but maintaining the individual mandate language. *See* Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (Dec. 22, 2017).

As well, in 2017, the Department of Health and Human Services and the Departments of Labor and the Treasury promulgated two Interim Final Rules (IFR) meant to protect religious objectors to the ACA's contraceptive mandate. "The first IFR significantly broadened the definition of an exempt religious employer." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2377 (2020). And "[t]he second IFR created a similar 'moral exemption' for employers." *Id.* at 2378. Part of the second IFR also included an "individual exemption," allowing "a willing plan sponsor" or "willing health insurance issuer" to offer a separate policy to individuals with objections to some or all contraceptive services. 82 Fed. Reg. at 47,812. The individual exemption is purely voluntary on the insurer's part, and therefore "cannot be used to force a plan (or its sponsor) or an issuer to provide coverage omitting contraception." *Id.* However, the two IFRs were enjoined until July 2020, when the Supreme Court's decision in *Little Sisters of the Poor* dissolved the nationwide injunction previously affirmed by the Third Circuit. 140 S. Ct. at 2373 (holding that the ACA authorized HHS to exempt or accommodate employers' religious or moral objections to providing no-cost contraceptive coverage).

And while all of this was happening, Mr. Dierlam was litigating his case. In November of 2017, Magistrate Judge Palermo found that the HHS exemption mooted all of Mr. Dierlam's claims for prospective relief, even though the exemption was still enjoined. R. & R. 9, ECF 67. However, the Government apparently disagreed with her holding, as it (1) orally withdrew its HHS-exemption-based mootness argument during this Court's hearing on Judge Palermo's report, and (2) did not include HHS exemption mootness arguments in its briefing to the Fifth Circuit. Tr. 3:7-11, ECF 80.

As for the TCJA, it went unaddressed by Judge Palermo because it became law after she issued her report. However, this Court ruled from the bench that the TCJA mooted all of Mr.

Dierlam's claims for prospective relief, again conflicting with the Government's more limited understanding of the TCJA as mooting only those of Mr. Dierlam's prospective claims based on the individual mandate's shared responsibility payments. Tr. 38:13-16, ECF 80. Mr. Dierlam consistently held that neither the TCJA nor the HHS exemption mooted any of his claims.

The Fifth Circuit—noting the piecemeal mootness analyses resulting from the way the ACA changed in real time during the course of this litigation—remanded the matter, ordering this Court to conduct a comprehensive mootness analysis in the first instance. *Dierlam v. Trump*, 977 F.3d 471, 478 (5th Cir. 2020), *cert. denied sub nom. Dierlam v. Biden*, 141 S. Ct. 1392 (2021). Specifically, the Fifth Circuit first wanted clarity on what effect this Court thinks the TCJA has on the mootness of Mr. Dierlam's claims. *See id.* (noting that “the district court only said: ‘I think, prospectively, it seems to be that most recent legislation does take care of the problem.’”)) Second, the Fifth Circuit wanted an HHS-mootness analysis that was not premised upon the supposed insufficiency of Mr. Dierlam's attempts to search for alternative health-insurance plans. *Id.*

After allowing Mr. Dierlam to amend his complaint, this Court held a hearing on the Government's second motion to dismiss, granting the motion after hearing oral argument on the mootness issue. *See* Min. entry 12.15.2021. Now, having granted Mr. Dierlam's motion for leave to file a third amended complaint, this Court elaborates upon its mootness and standing analyses per Mr. Dierlam's request.

II. DISCUSSION

A. Mootness

i. Legal Standard

The Court adopts in full the Fifth Circuit's articulation of the mootness doctrine¹: The doctrine of mootness arises from Article III of the Constitution, which provides federal courts with jurisdiction over a matter only if there is a live "case" or "controversy." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). "Accordingly, to invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Chafin v. Chafin*, 568 U.S. 165, 171–72 (2013) (cleaned up). This case-or-controversy requirement persists "through all stages of federal judicial proceedings." *Id.* at 172, 133 S.Ct. 1017.

If an intervening event renders the court unable to grant the litigant "any effectual relief whatever," the case is moot. *Calderon v. Moore*, 518 U.S. 149, 150 (1996). But even when the "primary relief sought is no longer available," "being able to imagine an alternative form of relief is all that's required to keep a case alive." *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 553 (7th Cir. 2014), *judgment vacated sub nom. Univ. of Notre Dame v. Burwell*, 575 U.S. 901 (2015). So "[a]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307–08 (2012).

Further, a case is not necessarily moot because it is uncertain whether the court's relief will have any practical impact on the plaintiff. "Courts often adjudicate disputes where the practical impact of any decision is not assured." *Chafin*, 568 U.S. at 175. For example, "the fact that a

¹ *Dierlam v. Trump*, 977 F.3d 471, 476–77 (5th Cir. 2020).

defendant is insolvent does not moot a claim for damages.” *Id.* at 175–76. And “[c]ourts also decide cases against foreign nations, whose choices to respect final rulings are not guaranteed.” *Id.* at 176.

When conducting a mootness analysis, a court must not “confuse[] mootness with the merits.” *Id.* at 174. This means that a court analyzing mootness in the early stages of litigation need only ask whether the plaintiff’s requested relief is “so implausible that it may be disregarded on the question of jurisdiction.” *Id.* at 177. “[I]t is thus for lower courts at later stages of the litigation to decide whether [the plaintiff] is in fact entitled to the relief he seeks.” *Id.*

ii. Analysis

The Court’s legal research confirmed virtually all of the government’s arguments regarding the mootness of Mr. Dierlam’s prospective claims.

As the Fifth Circuit explained in remanding this case for a mootness analysis, in 2017, the HHS “created new exemptions to the contraceptive mandate” for religious objectors like Mr. Dierlam, and the TCJA was enacted, reducing the shared-responsibility payment to \$0 beginning in tax year 2019. *Dierlam*, 977 F.3d at 473-74. And after the Supreme Court’s ruling in July 2020, the HHS exemptions were no longer enjoined.

By law, the definition of exempt religious employers has been broadened, including any employer who “objects … based on its sincerely held religious beliefs,” “to its establishing, maintaining, providing, offering, or arranging [for] coverage or payments for some or all contraceptive services.” *Little Sisters of the Poor*, 140 S. Ct. at 2377 (2020) (citing 82 Fed. Reg. 47812 (2017)). This definition includes nonprofits, for-profits, publicly traded entities and non-publicly traded entities, and it exempts them from the contraceptive coverage accommodations of the ACA. *Id.* at 2377-78. As a result, it is not the case, as Mr. Dierlam alleges, that “[a] medical

insurer is compelled to ... provide contraceptive coverage" to Mr. Dierlam or that Mr. Dierlam is "required to purchase medical insurance from [a] medical insurer[] [that] provides contraceptive coverage." Pl.'s Comp. ¶ 14, ECF 94.

And with the shared responsibility payment "zeroed out" by the TCJA, there is no enforcement mechanism to compel Mr. Dierlam to purchase health care coverage at all. *California v. Texas*, 141 S. Ct. 2104, 2114 (2021). Accordingly, the very action Mr. Dierlam demands—an exemption from having to participate in a health plan that covers contraceptive services that are inconsistent with his religious beliefs, *see* Pl.'s Comp. ¶¶ 43-45, ECF 94—has been issued, and any prospective injury Mr. Dierlam could allege based on the absence of such relief has thus been vitiated. *See Dierlam*, 977 F.3d at 473-74. Accordingly, Mr. Dierlam's requested relief has effectively been granted, and his claims for declaratory and injunctive relief are thus moot.

Mr. Dierlam first argues, citing a *Fox News* article from December 2020 and his personal predictions on the "normal inclination of Democrats", that his claims are not moot because Congress will simply reinstate the shared-responsibility payment. Pl.'s Resp. 10-11, ECF 105. Such unsupported speculation is not sufficient to establish the certainty necessary to invoke the rare exception to the general rule that statutory changes discontinuing a challenged practice moot plaintiff's prospective claims—even more so when such speculation remains unsubstantiated two years into the Biden administration. *See Fantasy Ranch Inc. v. City of Arlington, Tex.*, 459 F.3d 546, 564 (5th Cir. 2006) (recognizing that "statutory changes that discontinue a challenged practice are 'usually enough to render a case moot, even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.'"); *see also Cammermeyer v. Perry*, 97 F.3d 1235, 1238 (9th Cir. 1996) (commenting that "[t]he exceptions to this general line of holdings are rare and typically involve situations where it is virtually certain that the repealed law will be reenacted."))

Second, Mr. Dierlam argues that, even though the TCJA reduced the shared-responsibility payment to \$0, the language of the payment provision still remains and thus the reduction of the payment made “no substantive change.” Pl.’s Resp. 11, ECF 105. However, the Supreme Court in *California v. Texas* held directly to the contrary when it found that the TCJA “effectively nullified the penalty by setting its amount at \$0” such that the minimum essential coverage provision “has no means of enforcement.” 141 S. Ct. at 2112, 2114. Mr. Dierlam tries to argue that he is injured by the mere existence of the mandatory language, but his “problem lies in the fact that the statutory provision, while it tells [him] to obtain that coverage, has no means of enforcement. With the penalty zeroed out, the IRS can no longer seek a penalty from those who fail to comply.” *Id.* Because of this, “there is no possible Government action that is causally connected to the plaintiffs’ injury—the costs of purchasing health insurance. Or to put the matter conversely, that injury is not ‘fairly traceable’ to any ‘allegedly unlawful conduct’ of which the plaintiffs complain.” *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

Third, Mr. Dierlam argues that despite the Religious Exemption Rule, he is still injured because the previous requirement that all health plans include contraceptive coverage “so skewed the market” that “few if any insurers” will offer a policy without contraceptive coverage, and “[e]ven if a health insurance policy can be identified there is no assurance the insurer will remain in business or the policy can be maintained for other reasons.” Pl.’s Resp. 12, ECF 105. However, Mr. Dierlam cannot show causation where his putative injury “results from the independent action of some third party not before the court.” *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976). Here, where insurers are expressly permitted by law to give plaintiff a religious exemption, their decisions about whether to do so have very little to do with defendants. Similarly, Mr. Dierlam cannot establish redressability since he cannot show that “it is likely, as opposed to

merely speculative, that [his] injury will be redressed by a favorable decision.” *Inclusive Cmtys. Project*, 946 F.3d 649, 655 (5th Cir. 2019).

For these reasons, the Court found that the TJCA and the HHS’ exemptions moot all of Mr. Dierlam’s prospective claims.

B. Standing

The party invoking federal jurisdiction bears the burden of establishing the three elements of standing by first sufficiently alleging “an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual and imminent, not conjectural or hypothetical.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Second, a plaintiff must allege “a causal connection between the injury and the conduct complained of—the injury has to be fairly … trace[able] to the challenged action of the defendant, and not … th[e] result [of] the independent action of some third party not before the court.” *Id.* (citations omitted). And third, “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Id.* (citations omitted).

The Court’s analysis regarding standing tracks closely with its mootness analysis above because, as the Supreme Court has observed, “[m]ootness has been described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 & n.22 (1997) (quoting *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 387 (1980)). Therefore, this Court finds that Mr. Dierlam lacks standing for his prospective claims for the same reasons that this Court finds such claims moot.

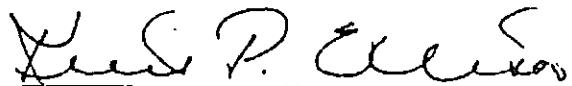
Next is Mr. Dierlam’s retrospective claim that the Government’s failure to notify him of his non-enrollment (in violation of § 1502(c) of the ACA) “caused . . . harm” and prevented him

from having standing to file suit for retrospective claims sooner. Pl.'s Compl. at ¶ 11, ECF 94. However, Mr. Dierlam "c[an] not [] . . . allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016), *as revised* (May 24, 2016). Here, where the purpose of § 1502(c) is to ensure that individuals who have not received minimum essential coverage are aware of coverage options, where any government notification would have simply directed Mr. Dierlam to HealthCare.gov, and where Mr. Dierlam admits that he was already aware of HealthCare.gov yet chose not to check it, no injury-in-fact exists. *See* § 1502(c); *see also* Pl.'s Compl. at ¶ 10, ECF 94. As such, Mr. Dierlam lacks standing to bring a claim based on the government's § 1502(c) failure to notify.

III. CONCLUSION

For the reasons detailed above, this Court found that Mr. Dierlam's prospective claims are moot as he lacks standing to bring them, and that his retrospective § 1502(c) claim is invalid for lack of standing. Mr. Dierlam should take care to ensure his third amended complaint does not suffer from the same mootness and standing insufficiencies.

SIGNED at Houston, Texas on this the 8th day of February, 2022.



KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

7 CERTIFICATE OF SERVICE.

Certificate of Service

I certify I have on November 10, 2023 mailed a copy of the above document to the clerk of the court at:

FIFTH CIRCUIT CLERK'S OFFICE
600 South Maestri Place
New Orleans, LA 70130

I have emailed a copy to the Defendant's counsel at Sarah.N.Smith@usdoj.gov and Alisa.Klein@usdoj.gov



Date: November 10, 2023
John J. Dierlam
5802 Redell Road
Baytown, TX 77521
Phone: 281-424-2266

5
Fifth Circuit Clerks Office
600 South Maestri Place
New Orleans, LA 70130

5
Fifth Circuit Clerks Office
600 South Maestri Place
New Orleans, LA 70130