

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

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RIGHT TO LIFE OF MICHIGAN, a
Michigan non-profit corporation

CASE NO. 1:13cv1202

Hon. Robert J. Jonker

Plaintiff,

-v-

KATHLEEN SEBELIUS, in her official
capacity as Secretary of the United
States Department of Health and
Human Services

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES

JACK LEW, in his official capacity as
the Secretary of the United States
Department of the Treasury

UNITED STATES DEPARTMENT OF
THE TREASURY

THOMAS PEREZ, in his official
capacity as the Secretary of the United
States Department of Labor

UNITED STATES DEPARTMENT OF
LABOR

Defendants.

_____ /

PLAINTIFF'S BRIEF OPPOSING MOTION TO DISMISS

FACTUAL BACKGROUND

The Defendants generally stated the facts of this case accurately. However, there are certain “facts” with which Right to Life of Michigan (“RLM”) disagrees.

First, RLM challenges the Basic Protection and Affordable Care Act (“ACA”), as well as *all* the regulations (the “Mandate”). Missing from the original Verified Complaint, however, was a clear enough statement of the final regulation, to which the Defendants alluded in their Brief. This Plaintiff remedied that by filing a First Amended Complaint on January 27, 2014 (**Exhibit 1**), which renders moot Defendants’ motion, Plaintiff argues below.

RLM indeed suffers injuries from the ACA and the Mandate that it challenges. As noted in the First Amended Complaint (**Id**) it was forced, in violation of its religious convictions and sole purpose for existing, to purchase insurance that covered preventative services including FDA-approved contraceptives that cause abortions. This violates RLM’s First Amendment rights to freely exercise its religious convictions as a 501(c)(4) religious organization, First Amendment rights of free speech, and religious rights guaranteed by the Religious Freedom Restoration Act.

Defendants have generally and accurately stated the facts in the “Background” portion of their Brief. However, this Plaintiff disagrees with some of those “facts” too. While Plaintiff may have been less than perfectly unclear about which regulations it specifically challenged, the Verified Complaint nevertheless stated it “challenges the constitution of regulations (“Mandate”) arguably issued

under the “Patient Protection and Affordable Care Act” . . .” See Verified Complaint, ¶ 2. The remainder of the Verified Complaint specifically challenged the “Mandate”, but unclearly specified the Final Rule that went into effect in 2013. To the extent the Verified Complaint did not specifically challenge the Final Rule, the First Amended Complaint that Plaintiff filed January 27, 2014, did.

Plaintiff further disagrees that the so-called “safe harbor” was safe, or that it properly accommodated Plaintiff. Finally, Plaintiff challenges that the 2013 Final Rule or so-called accommodations were anything more than an accounting trick, and failed to consider Plaintiff’s religious convections. As such, this Plaintiff challenges the ACA and the Final Rule of 2013.

STANDARD OF REVIEW

Plaintiff has accurately stated the Standard of Review, but asserts that it is moot as is the motion to dismiss.

ARGUMENT

PLAINTIFF’S FIRST AMENDED COMPLAINT DATED JANUARY 27, 2014, SUPERSEDES THE VERIFIED COMPLAINT; THEREFORE, THE COURT SHOULD DENY THE DEFENDANTS’ MOTION.

On or about January 13, 2014, Plaintiff’s counsel spoke with legal counsel from the United States Attorney General’s Office, who asked Plaintiff’s counsel to concur with the relief requested in its then-soon-to-be-filed motion to dismiss. Plaintiff’s counsel asked defense counsel for an extension of time to file a First Amended Complaint to address Defendants’ concerns; however, this was refused. Therefore, on January 27, 2014, Plaintiff filed a First Amended

Complaint (**Exhibit 1**). The First Amended Complaint verified that Plaintiff challenges the ACA and all regulations promulgated pursuant to it, including the 2013 Final Rule.

It is given in almost every American jurisdiction that a later amended complaint supersedes all complaints and amended complaints filed previously. In Washer, et al v Bullitt, 110 US 558, 4 S Ct 249, 28 L Ed 249 (1884), the courts held that an amended petition which increased the amount in controversy from \$5,000.00 in the original petition to \$5,325.14 in the amended petition superseded the original petition. See 110 US at 561-562). The court held specifically:

“When a petition is amended by leave of the court, the cause proceeds on the amended petition.” (Id, p 562)

In LaFountain v Brevard, et al, 2009 WL 427245, (WD Mich, February 20, 2009), Plaintiff filed an amended complaint on February 6, 2009. The United States District Court for the Western District of Michigan “accepted LaFountain’s first amended complaint for filing.” (Id, p 1) The Western District of Michigan court, citing cases from its own jurisdiction and the U.S. Supreme Court, held:

“ [O]nce accepted, an amended complaint replaces the original.’ “ *Malik v. AT & T Mobility, LLC*, 2008 WL 4104555, *3 (W.D.Mich. Aug.29, 2008) (Maloney, C.J.) and *ABB, Inc. v. Reed City Power Line Supply Co.*, 2007 WL 2713731, *1 (W.D.Mich. Sept.18, 2007) (Maloney, J.) (both quoting *FL Dep’t of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 702, 102 S.Ct. 3304, 73 L.Ed.2d 1057 (1982) (White, J., concurring in part & dissenting in part o.g., joined by Powell, Rehnquist, & O’Connor, JJ .)). The filing of the amended complaint “render[s] the original complaint null and void....” *Malik*, 2008 WL 4104555 at *3 (quoting *Vadas v. US*, 527 F.3d 16, 22 n. 4 (2d Cir.2007)). See also *Essroc*, 2009 WL 129809 at * 1 (Maloney, C.J.) (“a prior ‘complaint is a nullity, because an amended complaint supercedes [sic] all prior complaints’ ”) (citing *B*

& H Med., LLC v. ABP Admin., Inc., 526 F.3d 257, 268 n. 8 (6th Cir.2008) (citations omitted)).” (Id)

The LaFountain, *supra*, Court also held:

“Because the original ‘complaint has been **superseded and nullified**, there is no longer a live dispute about the propriety or merit of [the] claims ... asserted therein.’ “ *Essroc*, 2009 WL 129809 at *1 (quoting *Van Vels v. Betten*, 2007 WL 2461933, *1 (W.D.Mich. Aug.27, 2007) (Maloney, J.) (citing *May v. Sheahan*, 226 F.3d 876, 879 (7th Cir.2000) (“If these ... superseded May’s original amended complaint, the present appeal would be moot because there would no longer be a live dispute over whether Sheahan is entitled to qualified immunity based on the allegations in the Amended Complaint.”)))” (Id, p 2; Emphasis supplied)

Attached to this brief is a copy of LaFountain, *supra*, as **Exhibit 2**. Other cases that follow this majority rule of law include Atlas Van Lines, et al v Poplar Bluff Transfer Co., et al, 209 F 3rd 1064 (CCA 8, 2000) (**Exhibit 3**); In Re Wireless Telephone Federal Cost Recoveries Litigation, 396 F 3rd 922, 60 Fed R Serv, 3d 914 (CCA 8, 2005) (**Exhibit 4**); and, Pavlik v Brand Scaffold Builders, LLC, 2008 WL 597160 (Ed Mich, 2008) (**Exhibit 5**).

Here, immediately after counsel with the Attorney General’s Office refused to provide Plaintiff additional time to file the First Amended Complaint, Defendant filed a motion to dismiss on January 13, 2014. According to FRCP 15(a)(1), Plaintiff was allowed to file its amended pleading **once as a matter of course**:

“(B) If the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading, or 21 days after service of a motion under Rule 12(B), (e), or (f), whichever is earlier.”

Therefore, Plaintiff had until February 3, 2014, to file its First Amended Complaint. On January 27, 2014, Plaintiff filed the First Amended Complaint in a timely fashion.

The First Amended Complaint addressed Defendants' alleged deficiencies in the Verified Complaint, and, according to the case law cited above, the First Amended Complaint superseded the Verified Complaint, rendering it a nullity. As such, Defendants' motion should be dismissed as moot, or denied.

On January 28, 2014, at 5:52 a.m., Plaintiff's counsel emailed legal counsel with the United States Attorney General's Office asking if it would withdraw its motion to dismiss based upon the First Amended Complaint. **(Exhibit 6)**. As of the date this answer to the motion is filed, the U.S. Attorney General's Office has failed and/or refused to dismiss its motion, in spite of almost universal case law that states the First Amended Complaint supersedes and renders a nullity the Verified Complaint.

RELIEF REQUESTED

Based upon the above, Plaintiff respectfully requests this Honorable Court to dismiss Defendant's motion as moot, or deny it.

Respectfully submitted by,

Dated: January 29, 2014

/s/ Michael B. Rizik Jr.
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Certificate of Service

I hereby certify that on January 29, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of all such filing to all parties.

/s/Michael B. Rizik, Jr.
Michael B. Rizik, Jr.