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Coons v. Geithner - U.S. Reply in Support of Stay

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14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE DISTRICT OF ARIZONA**

16 Nick Coons; et al.,)

17 Plaintiffs,)

18 vs.)

19 Timothy Geithner; et al.,)

20 Defendants)
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23)
24)
25)
26)

Case No.: CV-10-1714-PHX-GMS

**REPLY IN SUPPORT OF MOTION
TO STAY PROCEEDINGS ON
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

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ARGUMENT

Plaintiffs insist that proceeding to summary judgment in this case “will require no additional time or resources that are not already being expended on” the motion to dismiss. Opp’n 2, ECF No. 60. This is demonstrably false. If this Court denies the motion to stay, defendants will have to file an opposition to plaintiffs’ motion for summary judgment. Like the motions for summary judgment that the federal government filed in the *Virginia* and *Florida* cases, the opposition the government would file here would include dozens of exhibits that were not filed in support of the motion to dismiss. It would also include a separate controverting statement of facts and additional pages of argument. *See* Local Rule 56.1(b). And it would include argument on severability, which is not at issue in the motion to dismiss. Moreover, plaintiffs would be entitled to file a reply in support of their motion for summary judgment. *See* Local Rule 56.1(d). If this Court were to dismiss one or more counts of the second amended complaint either for lack of jurisdiction or failure to state a claim, much of this additional briefing would be unnecessary. Indeed, that is what happened in *Florida*, where the district court dismissed plaintiffs’ substantive due process claim at the motion to dismiss stage. In a case with more than sixty ECF filings already, nearly two hundred pages of substantive briefing, and no merits rulings yet, this Court should stay summary judgment proceedings in the interests of judicial economy.¹

¹ If this Court denies the motion to stay, defendants respectfully request a three week extension of time to oppose plaintiffs’ motion for summary judgment, to and including August 10, 2011. Defendants also respectfully request an enlargement of the page limits to forty pages.

1 These considerations of judicial economy alone justify a stay.² Independently,
2 however, a stay is warranted because proceeding to summary judgment would prejudice
3 defendants' ability to take jurisdictional discovery. Defendants believe that the second
4 amended complaint is subject to dismissal on its face—without the need for discovery—
5 for the reasons stated in the motion to dismiss. *See* Defs.' Second Mot. to Dismiss 11-13,
6 ECF No. 42. If the Court denies the motion to dismiss, however, defendants will wish to
7 take jurisdictional discovery. The scope of any discovery would depend in part on the
8 order or opinion that this Court might issue, and defendants are therefore not in a position
9 at this time to identify with specificity the information they may seek.
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11 Contrary to plaintiffs' suggestion, however, it is clear that such discovery could
12 extend beyond Coons' tax documents and driver's license. Opp'n 7. In previous
13 briefing, defendants have identified some of the factual information that is missing from
14 plaintiffs' second amended complaint. *See* Defs. Second Mot. to Dismiss 11-13, ECF
15 No. 42, Defs.' Reply 3-4, ECF No. 59. Plaintiff does not reveal anything about his
16 current financial situation. He does not disclose his employment history, whether he has
17 ever previously had health insurance through his employer or otherwise, or what type of
18 insurance he had. If he had coverage before, he has not explained why he dropped it.
19 Coons also has not disclosed anything about his current health, whether he has recently
20 been to a hospital or primary care physician, how he would pay for unexpected or
21 catastrophic medical costs, or whether he has sought health insurance in the past.
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25 ² Contrary to plaintiffs' suggestion, (Opp'n 1) defendants recognize that whether to grant
26 a stay is within this Court's discretion.

1 Depending on this Court's decision on the motion to dismiss, all of these questions could
2 be relevant to Coons' standing.

3 Finally, this Court should deny plaintiffs' Rule 12(d) motion to convert the
4 motion to dismiss into a motion for summary judgment. Plaintiffs say without
5 explanation that the materials cited in defendants' motion to dismiss are not "materials of
6 which the Court can take judicial notice." Opp'n 8. But, as defendants have explained,
7 this Court plainly may take judicial notice of all the materials cited in the motion to
8 dismiss. *See, e.g., Coit v. Biltmore Bank*, No. CV-10-0382, 2010 WL 2036563, at *1 (D.
9 Ariz. May 19, 2010) ("[M]atters of public record are the proper subject of judicial
10 notice.") (internal citation omitted). And contrary to plaintiffs' view (Opp'n 8-9), the
11 documents need not be explicitly referenced in the complaint in order to be considered on
12 a motion to dismiss. That they are judicially noticeable is enough. *See* 5B Wright &
13 Miller § 1357 (3d ed. 2004 and Supp. 2007) (when ruling on a motion to dismiss, courts
14 may consider "matters incorporated by reference or integral to the claim, *items subject to*
15 *judicial notice, matters of public record, orders, items appearing in the record of a case,*
16 *and exhibits attached to the complaint whose authenticity is unquestioned.*") (emphasis
17 added). Indeed, no court in any Affordable Care Act case has converted the
18 government's motion to dismiss into a motion for summary judgment.
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22 CONCLUSION

23 The motion to stay should be granted.
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ATED: July 14, 2011

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2011, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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