UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
FRANKFORT

COMMONWEALTH OF KENTUCKY, *ex rel.* MATTHEW G. BEVIN, GOVERNOR, SCOTT W. BRINKMAN, in his official capacity as Acting Secretary of the CABINET FOR HEALTH AND FAMILY SERVICES, STEPHEN P. MILLER, in his official capacity as Commissioner of the DEPARTMENT FOR MEDICAID SERVICES, Plaintiffs, v. RONNIE MAURICE STEWART, GLASSIE MAE KASEY, LAKIN BRANHAM, SHANNA BALLINGER, DAVE KOBERSMITH, WILLIAM BENNETT, SHAWNA NICOLE McCOMAS, ALEXA HATCHER, MICHAEL WOODS, SARA WOODS, KIMBERLY WITHERS, KATELYN ALLEN, AMANDA SPEARS, DAVID ROODE, SHEILA MARLENE PENNEY, and QUENTON RADFORD, Defendants.	)	Civil Action No. 3:18-00008-GFVT

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION OF THE KENTUCKY HOSPITAL ASSOCIATION FOR LEAVE TO INTERVENE

Defendants oppose the Motion of the Kentucky Hospital Association (the "Association") to intervene as an additional plaintiff in the lawsuit initiated by Plaintiff, the Commonwealth of Kentucky, by and through the Commonwealth's Governor, Matthew G. Bevin; its Acting Secretary of the Cabinet for Health and Family Services, Scott W. Brinkman; and its Commissioner of the Department for Medicaid Services, Stephen P. Miller.

The Association utterly fails to meet the requirements of Rule 24 of the Federal Rules of Civil Procedure for intervention in this already frivolous litigation. It all but concedes that it would

lack Article III standing to litigate against Defendants in its own right (which incidentally also is true of the Commonwealth). Additionally, the Association neglects entirely to identify affirmatively the arguments and positions it would take that will not be exhaustively addressed by the Commonwealth. In substance, the Association wants to file an *amicus* brief in support of the Commonwealth, but that is not a ground for intervention. The Court should deny the Motion.

BACKGROUND

Defendants are sixteen private individuals enrolled in Kentucky's Medicaid program. In January of this year, they filed a complaint in the United States District Court for the District of Columbia challenging the decision of the U.S. Secretary of Health and Human Services and other federal officials to grant a waiver to the Commonwealth of Kentucky of certain requirements of the traditional Medicaid program pursuant to Section 1115 of the Social Security Act. Complaint, *Stewart v. Hargan*, 1:18-cv-00152 (D.D.C. Jan. 24, 2018), ECF No. 1; *see also* 42 U.S.C. § 1315. Defendants' complaint alleges that the Secretary's decision to grant the Section 1115 waiver, which greenlights a program known as "Kentucky HEALTH," violates the Administrative Procedure Act ("APA") and the United States Constitution. Complaint at 76, *Stewart* (1:18-cv-00152.)

Shortly thereafter, rather than seeking to intervene in the District of Columbia action, the Commonwealth of Kentucky, by and through the Governor, the Acting Secretary of the Cabinet for Health and Family Services, and the Commissioner of the Department for Medicaid Services, retaliated by suing Defendants—Plaintiffs in the District of Columbia action—in this Court.[1] The

[1] The Commonwealth subsequently moved to intervene in the District of Columbia action, *Stewart v. Hargan*, 1:18-cv-00152 (D.D.C. Mar. 29, 2018), ECF No. 30, which the district court allowed the following day, Minute Order, *Stewart v. Hargan*, 1:18-cv-00152 (D.D.C. Mar. 30, 2018). As of the filing of this response, however, the Commonwealth has not moved to voluntarily dismiss the action it filed in this Court.

Commonwealth seeks declaratory relief establishing that Defendants' District of Columbia lawsuit against the Secretary has no merit.

In the Motion before the Court, the Association seeks to intervene in the Commonwealth's lawsuit as an additional plaintiff. By its own admission, the Association seeks the exact same relief the Commonwealth seeks and does not identify any arguments it plans to advance that the Commonwealth would not advance in its own right. It offers only that it will provide the outside perspective of those engaged in the business of providing health care services in Kentucky.

ARGUMENT

I. The Association Does Not Satisfy Rule 24(a)(2)'s Requirements For Intervention As Of Right.

The Association claims it "is seeking to intervene for the purpose of supporting the claims of the Commonwealth." Mot. at 4. That may suffice to justify its participation as an *amicus curiae*, but falls far short of what Rule 24(a) asks of would-be as-of-right intervenors. The Sixth Circuit "has construed Rule 24(a) to require a party attempting to intervene to establish: (1) the timeliness of the application to intervene; (2) the applicant's substantial legal interest in the case; (3) the impairment of the applicant's ability to protect that interest in the absence of intervention; and (4) the inadequate representation of that interest by parties already before the court." *Meeks v. Schofield*, 625 F. App'x 697, 703 (6th Cir. 2015).

Here, the Association cannot intervene because its interests will be adequately represented by the Commonwealth.[2] For representation to be inadequate, there must be more than a simple

[2] The Association's motion also likely fails because, as the Association all but concedes, it lacks Article III standing to proceed against these Defendants as a plaintiff. The Supreme Court in *Town of Chester v. Laroe Estates, Inc.*, recently held that "*at the least*, an intervenor as of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests." 137 S. Ct. 1645, 1651 (2017) (emphasis added). The Court's use of the phrase "at the least" strongly suggests that Article III standing also is required of a proposed intervenor seeking the same relief as the existing plaintiff. *See also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332,

difference of opinion regarding litigation tactics. *See Jordan v. Mich. Conference of Teamsters Welfare Fund*, 207 F.3d 854, 863 (6th Cir. 2000); *Steigerwald v. BHH, LLC*, 317 F.R.D. 615, 620 (N.D. Ohio 2016). There must be evidence that the existing representation may be *inadequate*. And in making that showing, "[a]lthough it is true that a proposed intervenor must show only 'that there is a *potential* for inadequate representation,' a presumption of adequate representation arises when a putative intervenor 'shares the same ultimate objective as a party to the suit."' *Reliastar Life Ins. Co. v. MKP Invs.*, 565 F. App'x 369, 373 (6th Cir. 2014) (citations omitted); *see Skyway Towers, LLC v. Lexington-Fayette Urban Cty. Gov't*, No. CV 5:15-301-KKC, 2016 WL 817133, at *4 (E.D. Ky. Feb. 29, 2016).

Here, the Association and the Commonwealth unquestionably share the same ultimate objective in this action: upholding the Section 1115 Medicaid waiver the federal government granted to Kentucky. *See* Mot. at 19 ("[T]he Commonwealth and the [Association] share a similar interest in Kentucky HEALTH being upheld."). In light of that undeniable fact, the Association simply cannot rebut the resulting presumption that the Commonwealth's representation will adequately protect its supposed interest in this case.

Where the presumption applies, "[a]n applicant for intervention as of right 'fails to meet his burden of demonstrating inadequate representation' if he cannot show 'collusion … between the representatives and an opposing party,' pursuit by the representative of an interest adverse to the interests of the proposed intervenor, or a representative's failure 'in the fulfillment of his duty.'" *Reliastar*, 565 F. App'x at 373. The Association has not made any of those showings.

352-53 (2006) (explaining that Article III standing is not "'dispensed in gross"' and is not "commutative") (citation omitted); *Donaldson v. United States*, 400 U.S. 517, 531 (1971) (holding that much like standing for a plaintiff under Article III, an intervenor must have a "significantly protectable interest"), *superseded by statute as stated in Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310 (1985).

Nor could it. It goes without saying that there is no collusion between the Commonwealth and the Defendants. Further, the Commonwealth is not pursuing an outcome that would be adverse to the Association; indeed, it seeks the same result that the Association seeks. And there is no evidence that the Commonwealth is not or could not zealously advocate the position that the Association seeks to promote. *See United Fin. Cas. Ins. Co. v. Wells*, No. Civ. A. 5:11-397-KKC, 2012 WL 6004150, at *2 (E.D. Ky. Nov. 30, 2012) (finding that proposed intervenor failed to prove representation inadequate based on failure to make showing under any of the above-listed factors).

Further, although other courts in the Sixth Circuit have held that "[a] proposed intervenor can overcome this presumption by showing that his requested relief differs from that of the parties, that she intends to make separate arguments unique to the intervenor, or that the parties would fail to present those separate arguments to the court," the Association comes up short even under those metrics. *Tigrett v. Cooper*, No. 10-2724-STA-tmp, 2011 WL 5025491, at *8 (W.D. Tenn. Oct. 21, 2011), *on reconsideration in part*, 2012 WL 691906 (W.D. Tenn. Mar. 2, 2012). The Association seeks the same relief that the Commonwealth seeks—a declaration that the Kentucky waiver is legal. *See Bagne v. JP Morgan Chase Bank, N.A.*, No. 08-CV-13646, 2008 WL 11355527, at *4 (E.D. Mich. Dec. 31, 2008) (finding presumption overcome where intervening plaintiff asserts additional claims against defendant). The Association does not identify any substantive justification for the Medicaid waiver that it alone can advance. *See Trimble v. Comair, Inc. (In re Air Crash at Lexington)*, No. 5:06-CV-316-KSF, 2007 WL 580858, at *10 (E.D. Ky. Feb. 20, 2007) (finding presumption not overcome where no novel arguments identified). And it does not assert that the Commonwealth is unlikely to make an argument it would advance, let alone with the level of specificity required to affirmatively prove that the Commonwealth's representation will be inadequate.

Thus, regardless of the standard, the Association has simply failed to rebut the presumption of adequate representation. Indeed, the Association does not even try to do so, as it does not even acknowledge the presumption in its brief. That omission is all the more glaring because the Association seeks to support a government party. Numerous courts have recognized that the presumption of adequate representation is particularly strong if '"the government is acting on behalf of a constituency it represents."' *Nextel West Corp. v. Twp. of Scio*, No. 07-11159, 2007 WL 2331871, at *2 (E.D. Mich. Aug. 13. 2007) (quoting *United States v. City of Los Angeles*, 288 F.3d 391, 401-02 (9th Cir. 2002)); *see Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 701 F.3d 466, 491 (6th Cir. 2012), *rev'd on other grounds sub nom. Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014); *United States v. Michigan*, 424 F.3d 438, 443-44 (6th Cir. 2005); *accord Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013); *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774-75 (7th Cir. 2007); *Daggett v. Comm'n on Governmental Ethics & Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999); *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 281 (5th Cir. 1996); *Mumford Cove Ass'n v. Town of Groton*, 786 F.2d 530, 535 (2d Cir. 1986). That strengthened presumption applies here because the Association is no different from any other constituent impacted by the validity of a challenged law, which the Commonwealth is perfectly capable of defending on its own. *See Ark Encounter, LLC v. Stewart*, 311 F.R.D. 414, 423 (E.D. Ky. 2015); *State v. U.S. EPA*, 313 F.R.D. 65, 69 (S.D. Ohio 2016); *see generally* 7C Charles Alan Wright et al., *Federal Practice & Procedure* § 1909, Westlaw (3d ed. database updated April 2017) (explaining that where presumption applies, intervening party must make a "concrete showing of circumstances in the particular case that make the representation inadequate").

The Association insists that "the Commonwealth is not capable of making all the same arguments" it seeks to advance. Mot. at 20 (internal quotation marks omitted). But it does not identify what those arguments would be, let alone explain why the Commonwealth "is not capable" of making them. There is a reason for that. As the Motion makes clear, the only actual difference between the Association and the Commonwealth are their respective "perspective[s] and purpose[s]." *Id*. at 18-19. But the fact that two parties have different motivations for seeking the same result does not mean that their positions themselves diverge so much as to make representation inadequate. *See QBE Ins. Corp. v. Green*, No. 5:14-cv-300-JMH, 2014 WL 5107409, at *2 (E.D. Ky. Sept. 30, 2014). At best, difference in perspectives warrant participation as an *amicus curiae*, not as an additional party.

Moreover, the notion that the Association's supposedly unique "perspective and purpose" could impact this litigation is particularly dubious. Fundamentally, the resolution of these claims turns on the validity of a particular federal executive action, which is traditionally litigated pursuant to the Administrative Procedure Act ("APA"). But in an APA claim, litigation is based upon the administrative record, not based on either new evidence developed in discovery or novel policy arguments raised by one of the litigants. As a result, whatever additional "perspective" the Association wishes to offer must already appear in the certified administrative record to have any substantive bearing on this litigation. And indeed, the Association did make its views known, as their comments appear prominently in the administrative record before the District of Columbia court. So given the nature of the specific claims presented here, it is highly unlikely that the Association's purportedly unique perspective would add anything of substance. *See Seminole Nation of Okla. v. Norton*, 206 F.R.D. 1, 10 (D.D.C. 2001) (rejecting Rule 24(a) intervention in APA case, noting "[a]s this Court's review is constrained to the administrative record, the only

potential for inadequacy in the representation of the DOI is the risk that the DOI will not vigorously defend itself against Plaintiff's APA claim. There is no indication in the record that any such risk exists"); *Habitat Educ. Ctr., Inc. v. Bosworth*, 221 F.R.D. 488, 495-96 (E.D. Wis. 2004) (rejecting intervention because "[i]f the purpose of the litigation is to secure a judicial determination as to whether an agency complied with statutory requirements and the court is limited to reviewing the administrative record, it is unlikely that a private party will be able to add much to the agency's submissions"); *Friends of the Wild Swan, Inc. v. U.S. Fish & Wildlife Serv.*, 896 F. Supp. 1025, 1027 (D. Or. 1995) (finding that proposed intervenors lacked "legally protectable interests" in APA action because proposed intervenors "merely seek to interject their interests and concerns, outside of the administrative record, in defense of the [agency's] decision"); *see also Alameda Water & Sanitation Dist. v. Browner*, 9 F.3d 88, 91 (10th Cir. 1993) (rejecting intervention in APA claim where proposed intervenor sought to "interject issues into this lawsuit that are not before the district court"). In any case, the Association can certainly seek the court's permission to discuss its perspective as an *amicus curiae*.

The Association argues, however, that because the Commonwealth regulates its members, that fact "alone demonstrate[s] that the interests of the [Association] sufficiently diverge from those of the Commonwealth such that the Commonwealth's representation may be inadequate." Mot. at 19. At least where the presumption applies, however, the Sixth Circuit disagrees. Indeed, it has explained that "[t]o accept this argument would render … the presumption of adequate representation … meaningless." *Blount-Hill v. Bd. of Educ. Of Ohio*, 195 F. App'x 482, 490 (6th Cir. 2006). Thus, in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), one of the two cases the Association cites, the Sixth Circuit held that the presumption was overcome not only because the existing party regulated the proposed intervenor, but also because there was evidence

that an existing party *already* had failed to represent the proposed intervenor's interests. *Id*. at 1247-48 (highlighting failure to appeal preliminary injunction). The Association has made no comparable showing here. Further, the second case the Association cites, *Linton ex rel. Arnold v. Commissioner of Health & Environment*, 973 F.2d 1311 (6th Cir. 1992), did not even address the presumption, making that case wholly inapposite.

Put simply, the Association has not carried its burden to rebut the presumption that the Commonwealth will adequately represent its interests because it has not provided concrete evidence demonstrating that the Commonwealth will provide inadequate representation of its views. It therefore is not entitled to intervention as of right under Rule 24(a)(2).

II. The Association Does Not Satisfy Rule 24(b)'s Requirements For Permissive Intervention.

The Association alternatively claims to meet the requirements of Rule 24(b) of the Federal Rules of Civil Procedure for permissive intervention. "To intervene permissively, a proposed intervenor must establish that the motion for intervention is timely and alleges at least one common question of law or fact." *Michigan*, 424 F.3d at 445. Here, Defendants agree that the Association satisfies those two elements. But that is not the end of the inquiry. Where those threshold requirements are satisfied, Rule 24(b) requires the Court to "balance undue delay and prejudice to the original parties, if any, and any other relevant factors to determine whether, in the court's discretion, intervention should be allowed." 424 F.3d at 445. Because those factors counsel strongly against allowing the Association to intervene, the Court should deny the Motion.

First, intervention would result in unwarranted delay because the Court would be forced to litigate the claims and argument of a party that lacks Article III standing to assert those claims on its own behalf. As discussed above, the Association lacks standing to seek any relief from these Defendants. That is true even assuming *arguendo* that the Commonwealth has standing in its own

right to assert these claims. As a result, intervention would do nothing more than add the additional burden of resolving claims brought by a party that could not proceed on its own.

Second, allowing the Association to intervene solely because it may eventually be affected by a decision declaring the legality of Medicaid waiver would allow any party affected by a challenged law to intervene. Such a broad rule of intervention creates a dangerous precedent for this litigation and in future cases. As this Court has explained, "the potential strains on judicial economy and the inevitable delays, confusion, and prejudice to the existing parties that would result from unrestricted intervention by any number of" parties affected by the health care industry in Kentucky "weigh against allowing permissive intervention in this situation." *Ark Encounter*, 311 F.R.D. at 425.

Third, because the Commonwealth will adequately represent the Association's interests, adding the Association as a further litigant will only bog down this litigation. Again, much as this Court explained in *Ark Encounter*, "[w]hile [the Association's] perspective is different from that of the Commonwealth, [it has] not demonstrated [its] contribution to the litigation will add unique value such that intervention is necessary …. Allowing [it] to intervene when [its] interests and goals are so similar to that of the Commonwealth's would likely result in duplication of the Defendants' efforts, thus resulting in undue delay." 311 F.R.D. at 426. The Association responds that it "is uniquely positioned to offer a state-wide perspective on the effects the Medicaid waiver, and its potential invalidation, will have on health care providers around Kentucky," Mot. at 22, but like the proposed intervenors in *Ark Encounter* that explanation fails to "identify how [the Association] would actually present different arguments that would contribute to the litigation in a way that would require intervention," 311 F.R.D. at 426; *accord Skyway Towers, LLC*, 2016 WL 817133, at *5 (explaining that "delay" is "undue" if proposed intervenor "has the same ultimate

objective" as existing party "and asserts essentially the same arguments," particularly when issue relates to review of validity of government decision).

To be sure, this Court is free to give the Association a forum as an *amicus curiae* on issues related to the merits, just as it did in *Ark Encounter*, 311 F.R.D. at 426 (holding that "[a]llowing the proposed intervenors the opportunity to participate in the remaining proceedings as *amici curiae* will allow them to present their perspective and adequately address their concerns") (citing *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 346 (6th Cir. 2007); *Blount-Hill v. Zelman*, 636 F.3d 278, 287-88 (6th Cir. 2011); *Stupak-Thrall v. Glickman*, 226 F.3d 467, 474 (6th Cir. 2000); *Bradley v. Milliken*, 828 F.2d 1186, 1194 (6th Cir. 1987). But the unique perspective that may justify participation as an *amicus* does not warrant adding the Association as a party seeking its own affirmative relief from Defendants.

CONCLUSION

The Court should deny the Motion to Intervene as additional plaintiffs filed by the Kentucky Hospital Association.

Dated: April 9, 2018

Respectfully submitted,

/s/ Anne Marie Regan

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CERTIFICATE OF SERVICE

I certify that on April 9, 2018, the foregoing was electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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