

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

_____)	
THE STATE OF GEORGIA, et al.)	
)	
Plaintiffs,)	
)	
v.)	
)	Case No. 1:21-cv-163-RSB-BKE
JOSEPH R. BIDEN in his official)	
capacity as President of the United)	
States, et al.)	
)	
Defendants.)	
_____)	

**DEFENDANTS’ EMERGENCY MOTION TO CLARIFY SCHEDULING
ORDER IN LIGHT OF PLAINTIFFS’ INTENT TO FILE AMENDED
COMPLAINT AND REVISED PRELIMINARY INJUNCTION MOTION**

In their opposition to Plaintiffs’ request for expedited briefing in the above-captioned matter, Defendants noted that the Office of Management & Budget (OMB) Determination that Plaintiffs challenge had been superseded by a revised Determination. Defendants argued that OMB’s revised Determination “may moot or, at minimum, materially alter the scope of, Plaintiffs’ claims.” Dkt. 39. Consequently, Defendants suggested that “the appropriate next step is for Plaintiffs to review their claims and determine whether they intend to proceed with this lawsuit,” and suggested that “[t]o the extent Plaintiffs still wish to proceed, any claims they may bring should address the federal government’s updated policy.” *Id.* at 1-2.

At a telephonic hearing on November 10, 2021, the Court noted Defendants’ suggestion and inquired whether, in light of OMB’s revised Determination, Plaintiffs wished to take a “time out” to evaluate how they wished to proceed. Plaintiffs rejected

this suggestion, making clear that they wished to proceed on their initial Complaint and Preliminary Injunction motion, and renewed their request for expedited briefing.

On November 16, 2021, Plaintiffs notified Defendants that they intend to file an Amended Complaint on November 26, 2021, along with Plaintiffs' Reply Brief. Plaintiffs also added that their Reply Brief would serve as an amendment to their Motion for Preliminary Injunction.¹

Defendants hereby oppose this unilateral modification to what the parties previously agreed upon and what this Court ordered. Having declined to take the "time out" that this Court and Defendants suggested, Plaintiffs' anticipated actions would have Defendants filing a response brief on Friday, November 19, 2021 opposing a Complaint and Motion for Preliminary Injunction that will either not exist at the time Defendants' opposition is due, or at minimum, be moot when the Amended Complaint and Motion for Preliminary Injunction are filed. It does not serve the parties or the Court for Defendants to oppose filings that will be mooted imminently. Given the scope and importance of the issues raised, it is manifestly unfair for Defendants' sole opportunity to respond to arguments they will see for the first time

¹ Defendants' counsel responded to this email on the evening of November 16, 2021 and noted that Defendants opposed Plaintiffs' contemplated modification. Defendants' counsel invited Plaintiffs' counsel to follow up to discuss logistics and a potential scheduling call with the Court. By email dated November 17, 2021 at 3:25 pm, Plaintiffs' counsel stated that "Plaintiffs did not decline to amend the complaint." In Plaintiffs' view, they have a right to amend their Complaint under Fed. R. Civ. P. 15, and therefore maintain that they notified Defendants "as a courtesy, not a request for consent." See Government Exhibit A (email to Vinita Andrapalliyal from Charles E. Peeler).

on November 26, 2021 to come just five days after an amended filing, in a sur-reply. This is a situation entirely of Plaintiffs' own choosing; both Defendants and this Court proposed a different path. But having rejected those suggestions and chosen not to file an Amended Complaint previously, Plaintiffs should not be allowed to change their prior strategic election now, thereby maximizing the prejudice to Defendants in the process.

Accordingly, Defendants respectfully request that the Court confirm that the parties shall proceed on the existing schedule ordered by this Court, and order that Plaintiffs not be allowed to file an Amended Complaint and Preliminary Injunction motion. Alternatively, if this Court is inclined to allow Plaintiffs to file an Amended Complaint, Defendants request that this Court (i) relieve Defendants of their obligation to file an opposition on November 19; and (ii) that the Court schedule a telephonic status conference to discuss an amended briefing schedule as soon as practicable following Plaintiffs' filing of an Amended Complaint and Preliminary Injunction Motion on November 26, 2021 ensuring that Defendants are given adequate response times to respond to the new Amended Complaint and Motion for Preliminary Injunction before a hearing on the matter is held.

Dated: November 17, 2021

(signature page to follow)

Respectfully submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

BRAD P. ROSENBERG
Assistant Branch Director
Civil Division

/s/ Vinita B. Andrapallyal
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Attorneys for Defendants

Statkus, Shannon (USAGAS)

Subject: RE: Amending Complaint and PI Briefing

From: "Peeler, Charles E." <Charles.Peeler@troutman.com>

Date: November 17, 2021 at 3:25:55 PM EST

To: "Andrapalliyal, Vinita B. (CIV)" <Vinita.B.Andrapalliyal@usdoj.gov>

Cc: pauldunbar@bellsouth.net, "Melton, Harold D." <Harold.Melton@troutman.com>, "Josephson, Matthew (USAGAS)" <MJosephson@usa.doj.gov>, "Tseytlin, Misha" <Misha.Tseytlin@troutman.com>, esmith@scag.gov, edmund.lacour@alabamaag.gov, thomas.wilson@alabamaag.gov, thomas.wilson@alabamaag.gov, Drew Waldbeser <DWaldbeser@law.ga.gov>, melissaholyoak@agutah.gov, "Shedd, Michael" <MShedd@governor.sc.gov>, "Limehouse, Thomas" <TLimehouse@governor.sc.gov>, scott.zanzig@ag.idaho.gov, "Lambert, Grayson" <GLambert@governor.sc.gov>

Subject: [EXTERNAL] RE: Amending Complaint and PI Briefing

Vinita,

Plaintiffs did not decline to amend the complaint. Plaintiffs stated that they had no choice but to continue to seek a preliminary injunction by December 7 since the new OMB action did not change Defendants' vaccination deadline. Under FRCP 15, Plaintiffs are well within the period to amend the complaint as a matter of course. Our email was sent as a courtesy, not a request for consent. As long as the Defendants stick with the current timeline for full vaccination, there is no room to adjust our schedule and no need for another scheduling conference. If Defendants believe another scheduling conference is necessary, Plaintiffs will, of course, participate.

Let me know.

Thanks, Charlie

Charles E. Peeler

Partner

troutman pepper

Direct: 404.885.3409 | Mobile: 229.343.3905 | Internal: 11-3409

charles.peeler@troutman.com

From: Andrapalliyal, Vinita B. (CIV) <Vinita.B.Andrapalliyal@usdoj.gov>

Sent: Tuesday, November 16, 2021 7:42 PM

To: Peeler, Charles E. <Charles.Peeler@troutman.com>

Cc: pauldunbar@bellsouth.net; Melton, Harold D. <Harold.Melton@troutman.com>; Josephson, Matthew (USAGAS) <Matthew.Josephson@usdoj.gov>; Tseytlin, Misha <Misha.Tseytlin@troutman.com>; esmith@scag.gov; edmund.lacour@alabamaag.gov; thomas.wilson@alabamaag.gov; thomas.wilson@alabamaag.gov; Drew Waldbeser

<DWaldbeser@LAW.GA.GOV>; melissaholyoak@agutah.gov; Shedd, Michael
<MShedd@governor.sc.gov>; Limehouse, Thomas <TLimehouse@governor.sc.gov>;
scott.zanzig@ag.idaho.gov; Lambert, Grayson <GLambert@governor.sc.gov>
Subject: RE: Amending Complaint and PI Briefing

EXTERNAL SENDER

Hi Charlie,

Thanks for your email. Defendants oppose amendment of the Complaint at this point, given that Plaintiffs declined to take the opportunity to amend their Complaint last week at this Court's invitation. If Plaintiffs are still inclined to amend their Complaint, we would like to have another call with the Court to discuss the timing for our response. Please let us know if you agree to a call with the Court.

Vinita

From: Peeler, Charles E. <Charles.Peeler@troutman.com>
Sent: Tuesday, November 16, 2021 3:10 PM
To: Andrapalliyal, Vinita B. (CIV) <Vinita.B.Andrapalliyal@usdoj.gov>
Cc: pauldunbar@bellsouth.net; Melton, Harold D. <Harold.Melton@troutman.com>; Josephson, Matthew (USAGAS) <MJosephson@usa.doj.gov>; Tseytlin, Misha <Misha.Tseytlin@troutman.com>; esmith@scag.gov; edmund.lacour@alabamaag.gov; thomas.wilson@alabamaag.gov; thomas.wilson@alabamaag.gov; Drew Waldbeser <DWaldbeser@LAW.GA.GOV>; melissaholyoak@agutah.gov; Shedd, Michael <MShedd@governor.sc.gov>; Limehouse, Thomas <TLimehouse@governor.sc.gov>; scott.zanzig@ag.idaho.gov; Lambert, Grayson <GLambert@governor.sc.gov>
Subject: [EXTERNAL] Amending Complaint and PI Briefing

Vinita,

I saw the "Joint Motion to Modify Briefing Schedule and for Florida to File an Amended Complaint" in the *Florida v. Nelson* matter and wanted to inform you that plaintiffs in our case intend to follow a similar approach. Plaintiffs intend to file an amended complaint on November 26 with plaintiffs' reply brief. In addressing the new OMB action, plaintiffs' reply brief will serve as an amendment to plaintiffs' motion for preliminary injunction. Defendants are permitted to file a surreply by December 1 to address issues raised by plaintiffs regarding the new OMB action.

If you have questions about this approach or would like to discuss, please don't hesitate to give me a call.

Best regards,

Charlie Peeler

Charles E. Peeler

Partner

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