

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

COMMONWEALTH OF VIRGINIA)
EX. REL. KENNETH T. CUCCINELLI, II,)
)
Plaintiff,)
)
v.)
)
KATHLEEN SEBELIUS,)
SECRETARY OF THE DEPARTMENT OF)
HEALTH AND HUMAN SERVICES,)
)
Defendant.)
_____)

Civil Action No.: 3:10CV188

**MOTION TO MODIFY THE SCHEDULING ORDER
AND BRIEF IN SUPPORT THEREOF**

Defendant Kathleen Sebelius, Secretary of the Department of Health and Human Services, by the undersigned counsel, respectfully moves to modify one provision in the Scheduling Order issued by the Court on April 30, 2010.

The Defendant in this action is being sued in her official capacity as the Secretary of the Department of Health and Human Services. Pursuant to Rule 12(a)(2) of the Federal Rules of Civil Procedure, Defendant must file her answer or other responsive pleading within 60 days of service. This sixty day period expires on Monday, May 24, 2010.¹

On April 30, 2010, the Court issued its Order Setting Pretrial Conference and Scheduling Order. Paragraph 1 of the Scheduling Order contains the following provision. “Any party which

¹ The Office of the United States Attorney was served with process in this litigation by certified mail pursuant to the provisions of Rule 4(i)(1)(A) of the Federal Rules of Civil Procedure. The envelope containing process was postmarked with the date of March 23, 2010 and was received by the Office of the United States Attorney on March 24, 2010.

has not filed an Answer to the Complaint shall do so within eleven (11) days after entry of this Scheduling Order.” Pursuant to this provision of the Scheduling Order, Defendant’s Answer would be due May 11, 2010. This deadline reduces by almost two full weeks the 60 day period set forth by Fed. R. Civ. P. 12(a)(2).

Accordingly, there is a direct conflict between Fed. R. Civ. P. 12(a)(2) and the provision in paragraph 1 of the Scheduling Order. Defendant respectfully submits that, in light of the nature of this litigation and the interests designed to be protected by affording the United States and its officers 60 days in which to respond to a Complaint, she should be afforded the full 60 days to file an Answer or otherwise respond to the Complaint. Pursuant to Fed. R. Civ. P. 12(a)(4), the Defendant also respectfully submits that, if she files a motion to dismiss the Complaint, the time for the filing of her Answer be deferred until 14 days after a ruling on that motion to dismiss, should the Court deny that motion.

Counsel for the Defendant has contacted counsel for the Plaintiff. Plaintiff’s counsel states that he consents to the relief requested in this motion to the extent that the Defendant seeks until May 24, 2010, to respond to the Complaint, but that he opposes any relief that would afford the Defendant the right to move to dismiss or otherwise respond to the Complaint on that date without also filing an Answer to the Complaint.

A proposed Order is attached.

WHEREFORE, Defendant respectfully requests that the Court issue an Order that modifies paragraph 1 of the April 30, 2010 Scheduling Order and that directs her to file an Answer or otherwise respond to the Complaint on or before May 24, 2010.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May, 2010, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

E. Duncan Getchell, Jr.
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/s/
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