

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

RICHMOND DIVISION

COMMONWEALTH OF VIRGINIA)	
EX REL. KENNETH T. CUCCINELLI, II,)	
in his official capacity as)	
Attorney General of Virginia,)	
)	
Plaintiff,)	
v.)	Civil Action No. 3:10cv188
)	
KATHLEEN SEBELIUS,)	
Secretary of the Department)	
of Health and Human Services,)	
in her official capacity,)	
)	
Defendant.)	

**BRIEF OF THE COMMONWEALTH OF VIRGINIA
IN PARTIAL OPPOSITION TO MOTION OF
SECRETARY SEBELIUS REQUESTING
MODIFICATION OF THE
SCHEDULING ORDER**

The Commonwealth of Virginia filed this suit as Plaintiff in the Eastern District of Virginia with the expectation of receiving the benefits of the expedited scheduling practices of this District. On April 30, 2010, the Court issued its standard Order Setting Pretrial Conference and its standard Scheduling Order. The Order Setting Pretrial Conference among other things provides for setting a trial date at the June 3, 2010 pretrial conference. Paragraph 1 of the Scheduling Order requires that “any party which has not filed an Answer to the Complaint

shall do so within eleven (11) days after entry of this Scheduling Order.” This of course is also a standard provision insuring that the parties will be at issue by the date of the pretrial conference.

Although Secretary Sebelius complains that “there is a direct conflict between Fed. R. Civ. P. 12(a)(2) and the provision in paragraph 1 of the Scheduling Order” giving the United States 60 days in which to respond, the Commonwealth offered to agree to the requested extension so long as an answer was filed along with any dilatory motions. Instead, the Department of Justice has filed a motion to be excused from filing an answer until the Court rules on any motion to dismiss.

This Court has plenary power to establish what effect, if any, the filing of a motion to dismiss will have upon the date for filing an answer. Rule 12(a)(4). The motion states no ground for relieving Secretary Sebelius from the usual practices of this District. On the other hand the Commonwealth would be potentially prejudiced by being denied the early use of Rule 12(c) and by a possible delay in setting a trial date in this matter of urgent national concern.

Wherefore, the Commonwealth of Virginia prays that the Court will grant an extension of time until May 24, 2010 to answer and file any other motions that Secretary Sebelius may be advised to file and will deny the motion in all other respects. A proposed Order is attached.

Respectfully submitted,

/s/ Stephen R. McCullough
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May 5, 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:

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/s/ Stephen R. McCullough
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