

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

THOMAS MORE LAW CENTER; JANN
DeMARS; JOHN CECI; STEVEN
HYDER; and SALINA HYDER,

Plaintiffs,

v.

BARACK HUSSEIN OBAMA, in his
official capacity as President of the United
States; KATHLEEN SEBELIUS, in her
official capacity as Secretary, United States
Department of Health and Human Services;
ERIC H. HOLDER, JR., in his official
capacity as Attorney General of the United
States; TIMOTHY F. GEITHNER, in his
official capacity as Secretary, United States
Department of Treasury,

Defendants.

Case No. 2:10-cv-11156

**NOTICE OF
SUPPLEMENTAL
AUTHORITY**

Hon. George C. Steeh

Mag. Judge R. Steven Whalen

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Plaintiffs, by and through their undersigned counsel, respectfully submit this notice of
supplemental authority to bring to the Court's attention a decision by a sister court from the

Eastern District of Virginia denying a motion to dismiss in *Commonwealth of Virginia, Ex Rel. Kenneth T. Cuccinelli, II v. Sebelius*, Case No. 3:10-cv-00188-HEH (“*Commonwealth of Virginia*”), attached for the Court’s convenience as Exhibit 1 as retrieved from the PACER online service center. The court’s decision and memorandum opinion denying the motion to dismiss filed by the defendant Secretary of the Department of Health and Human Services touches upon many of the same issues (although not entirely) as are present in this case and should be helpful albeit hardly dispositive, especially in light of the different procedural postures of the case at bar and *Commonwealth of Virginia*.

However, Plaintiffs respectfully highlight an admission by the defendant in *Commonwealth of Virginia* which goes to an argument raised expressly in Plaintiffs’ Reply Brief (Doc. No. 18) in Support of the Motion for Preliminary Injunction currently pending before this Court. Specifically, in the court’s memorandum opinion in *Commonwealth of Virginia* at pages 30-31, the court notes:

The Secretary appeared to concede during oral argument, however, that if the ability to require the Minimum Essential Coverage Provision is not within the letter and spirit of the Constitution, then the penalty necessarily fails. As the Deputy Assistant Attorney General of the United States appeared to note in his response to the Court, “if it is unconstitutional, then the penalty would fail as well.” (Tr. 21:10-11, July I, 2010.)

As Plaintiffs’ Reply Brief argues at page 16:

Quite simply, if the Individual Mandate referenced in subsection (a) is not constitutional under the Commerce Clause and therefore illegal and invalid, subsection (b)(1)’s trigger of “fails to meet the requirement of subsection (a)” is never met. A trigger that cannot constitutionally be pulled is not a trigger. And this statutory analysis goes to the more fundamental point that Congress really intended the penalty to be just that: a penalty for failure to comply with the Individual Mandate and not a tax.

Respectfully submitted,

LAW OFFICES OF DAVID YERUSHALMI, P.C.

/s/ David Yerushalmi
David Yerushalmi
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2010, a copy of **PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY** was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

LAW OFFICES OF DAVID YERUSHALMI

/s/ David Yerushalmi
David Yerushalmi