

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

ERIC H. HOLDER, JR.,	:	
ATTORNEY GENERAL OF THE	:	
UNITED STATES OF AMERICA,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
JUAN ANTONIO GAONA,	:	No. 5:10-cv-00494-XR
	:	
Defendant,	:	
	:	
v.	:	
	:	
PLANNED PARENTHOOD	:	
SEXUAL HEALTHCARE,	:	
	:	
Third-Party Defendant.	:	

MOTION TO STRIKE DEFENDANT’S SECOND-AMENDED ANSWER, SECOND-AMENDED COUNTERCLAIM AND JURY DEMAND

Eric H. Holder, Jr., Attorney General of the United States of America (the “United States Attorney General”), in his official capacity, by the undersigned attorneys, moves to strike Defendant’s Second-Amended Answer, Second-Amended Counterclaim and Jury Demand.

1. The Defendant did not request the Court’s leave to amend his answer, counterclaim and jury demand a second time. Pursuant to Rule 15(a)(1) of the Federal Rules of Civil Procedure, “a party may amend its pleading once as a matter of course,” prior to trial. FRCP 15(a)(1) (emphasis added). Any other amendments may be made “only with the opposing party’s written consent or the court’s leave.” FRCP 15(a)(2) (emphasis added). Here, the Defendant did not request the Court’s leave; this Court did not grant leave; nor did the opposing

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parties provide written consent. This Court must therefore strike Defendant's Second-Amended Answer, Second-Amended Counterclaim and Jury Demand.

2. Even if the Defendant had requested this Court's leave to amend his pleadings, this Court should deny such a request as the Defendant's amendment is futile. While Rule 15(a)(2) states that leave shall be freely given when justice so requires, "leave to amend properly may be denied . . . when amendment would be futile." United States ex rel. Willard v. Humana Health Plan of Texas Inc., 336 F.3d 375, 387 (5th Cir. 2003). The Defendant's Second-Amended Answer, Second-Amended Counterclaim and Jury Demand (Document No. 27) is identical to Defendant's First-Amended Answer, First-Amended Counterclaim and Jury Demand (Document No. 19), but for paragraphs 101 through 103. Through paragraphs 101 through 103 the Defendant purports to raise a "Sixth Cause of Action" counterclaim that argues the Freedom of Access to Clinic Entrances Act ("FACE Act"), 18 U.S.C. § 248 (1994), is unconstitutional "because it exceeds the power of Congress under the Commerce Clause." By the Defendant's own admission in prior pleadings, "lower courts have ruled against" parties raising such a claim, and he raises it "solely to preserve error for the Supreme Court." See Defendant's Response to Eric H. Holder, Jr., Attorney General of the United States of America's, Motion to Dismiss Defendant's First-Amended Answer, First-Amended Counter-claim, and Jury Demand, Document 26, paragraph 11, at 5. Such amendment is futile, and this Court should deny any request for leave sought by the Defendant to raise this issue.

3. In addition, even if the Defendant had requested this Court's leave to amend his pleadings, and this Court were to grant such leave, this Court must then dismiss the Defendant's counterclaims for the reasons stated in Plaintiff's prior Motion to Dismiss

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Defendant's First-Amended Answer, First-Amended Counterclaims and Jury Demand (Document No. 22), and for the following additional reason regarding Defendant's new counterclaim raised in paragraphs 101 through 103: Simply stated, every circuit court to have addressed the question of the constitutionality of the FACE Act under the Commerce Clause has uniformly ruled the FACE Act constitutional, including the Fifth Circuit having addressed the question on two occasions. See United States v. Bird, 401 F.3d 633 (5th Cir. 2005) ("*Bird II*"); United States v. Bird, 124 F.3d 667 (5th Cir. 1997) ("*Bird I*"); Norton v. Ashcroft, 298 F.3d 547 (6th Cir. 2002); United States v. Gregg, 226 F.3d 253 (3rd Cir. 2000); United States v. Weslin, 156 F.3d 292 (2nd Cir. 1998); Hoffman v. Hunt, 126 F.3d 575 (4th Cir. 1997); Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996); United States v. Soderna, 82 F.3d 1370 (7th Cir. 1996); United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996); Cheffer v. Reno, 55 F.3d 1517 (11th Cir. 1995).

WHEREFORE, the United States Attorney General respectfully requests this Court to issue an Order granting Plaintiff's Motion to Strike Defendant's Second-Amended Answer, Second-Amended Counterclaim and Jury Demand.

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Respectfully submitted,

JOHN E. MURPHY
United States Attorney
Western District of Texas

THOMAS E. PEREZ
Assistant Attorney General
Civil Rights Division

JONATHAN SMITH
Chief
Special Litigation Section

JULIE ABBATE
Deputy Chief
Special Litigation Section

/s/ Joseph C. Rodriguez

/s/ Wm. E. Nolan

JOSEPH C. RODRIGUEZ
Assistant United States Attorney
Western District of Texas
601 N.W. Loop 410
Suite 600
San Antonio, TX 78216
(210) 384-7100
(210) 384-7105 (fax)
joe.rodriguez@usdoj.gov
Ohio Bar Number 0072958

WILLIAM E. NOLAN
Senior Trial Attorney
U.S. Department of Justice
Civil Rights Division
Special Litigation Section
950 Pennsylvania Ave., N.W.
Washington, DC 20530
(202) 353-8560
(202) 514-6273 (fax)
william.nolan@usdoj.gov

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Plaintiff, :

v. :

JUAN ANTONIO GAONA, : No. 5:10-cv-00494-XR

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PLANNED PARENTHOOD :
SEXUAL HEALTHCARE, :

Third Party Defendant. :

ORDER

The Court, having considered Plaintiff’s Motion to Strike Defendant’s Second-Amended Answer, Second-Amended Counterclaim and Jury Demand, hereby GRANTS the Plaintiff’s Motion, and IT IS HEREBY ORDERED that the Defendant’s Second-Amended Answer, Second-Amended Counterclaim and Jury Demand are stricken from the above-styled and numbered cause.

SIGNED this ____ day of _____, 2010.

XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE

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CERTIFICATE OF SERVICE

I hereby certify that on this 23th day of November 2010 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Allan E. Parker, The Justice Foundation, 8122 Datapoint Drive, Suite 812, San Antonio, Texas 78229;

Richard Clayton Trotter, The Justice Foundation, 8122 Datapoint Drive, Suite 812, San Antonio, Texas 78229;

Kathleen Cassidy Goodman, Law Office of Kathleen Cassidy Goodman, PLLC, 8122 Datapoint Drive, Suite 805, San Antonio, Texas 78229; and

David L. Ortega, Oppenheimer, Blend, Harrison and Tate, Inc., 711 Navarro, Suite 600, San Antonio, Texas 78205.

/s/ Joseph C. Rodriguez

Joseph C. Rodriguez
Assistant United States Attorney