ELECTRONICALLY FILED
2013-Aug-23 10:16:35
60CV-13-2662

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
THIRD DIVISION

M. KENDALL WRIGHT, et al **PLAINTIFFS**

VS. **Case No. 60CV-13-2662**

THE STATE OF ARKANSAS, et al **DEFENDANTS**

RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

COME NOW the State of Arkansas, the Governor of Arkansas in his official capacity, the Attorney General of Arkansas in his official capacity, and the Director of the Arkansas Department of Health in his official capacity (collectively, the "State Defendants" or the "State"), by and through undersigned counsel, and offer the following Response to the Motion for Temporary Restraining Order and Preliminary Injunction filed by the Plaintiffs on August 15, 2013. The State Defendants are represented herein by the Office of the Arkansas Attorney General pursuant to Ark. Code Ann. § 25-16-702(a), which requires the Attorney General to serve as counsel for state agencies and entities when requested. *See id*. ("The Attorney General shall be the attorney for all state officials, departments, institutions, and agencies. Whenever any officer or department, institution, or agency of the state needs the services of an attorney, the matter shall be certified to the Attorney General for attention.").

1. "In determining whether to issue a preliminary injunction, two factors must be considered: (1) whether irreparable harm will result in the absence of an injunction, and (2) whether the moving party has demonstrated a likelihood of success on the merits." *Manila Sch. Dist. No. 15 v. Wagner*, 356 Ark. 149, 153, 148 S.W.3d 244 (2004) (citing *AJ & K Operating Co., Inc. v. Smith*, 355 Ark. 510, 140 S.W.3d 475 (2004); *Custom Microsystems, Inc. v. Blake*, 344 Ark. 536, 42 S.W.3d 453 (2001)). *See also Winter v. Natural Resources Defense Counsel*, 555 U.S. 7, 24-25 (2008) (To be entitled to a preliminary injunction, a plaintiff must show: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest). Arkansas courts do not distinguish between temporary restraining orders pursuant to Ark. R. Civ. P. 65, and preliminary injunctions. *See Three Sisters Petroleum, Inc. v. Langley*, 348 Ark. 167, 173-174, 72 S.W.3d 95 (2002) (holding that the courts treat temporary restraining orders the same as preliminary injunctions).

2. Regarding the likelihood of success on the merits, the Arkansas Supreme Court has held: "Of course, in order to justify a grant of preliminary injunctive relief, a plaintiff must establish that it will likely prevail on the merits at trial." *W.E. Long Co. v. Holsum Baking Co.*, 307 Ark. 345, 351, 820 S.W.2d 440 (1991) (citing *Smith v. American Trucking Ass'n*, 300 Ark. 594, 781 S.W.2d 3 (1989)). The test for determining the likelihood of success is whether there is a reasonable probability of success in the litigation. Such a showing "is a benchmark for issuing a preliminary injunction." *Custom Microsystems, supra*, 344 Ark. at 542.

3. Pursuant to Rule 10(c) of the Arkansas Rules of Civil Procedure, the State Defendants hereby incorporate by reference their Motion to Dismiss and Brief in support of their Motion to Dismiss, being filed contemporaneously herewith.

4. Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction should be denied because Plaintiffs' Complaint fails to state a claim upon which any relief can be granted by this Court. For the reasons explained in the State Defendants' Motion to Dismiss, Plaintiffs are unlikely to succeed on the merits of their Complaint; indeed, the Complaint should be dismissed. Accordingly, the Motion for a Temporary Restraining Order and Preliminary Injunction should be denied.

WHEREFORE, the State prays that the Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction be denied, that the Complaint be dismissed, and for all other just and appropriate relief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Colin R. Jorgensen, Assistant Attorney General, certify that on this 23rd day of August, 2013, I electronically filed the foregoing with the Circuit Court Clerk using the Arkansas Judiciary's eFlex electronic filing system, which shall provide electronic notification to the following:

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