

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

_____)	
BICK HOLDINGS, INC., <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 4:13-cv-462
)	
KATHLEEN SEBELIUS, <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

**DEFENDANTS' UNOPPOSED MOTION TO STAY PROCEEDINGS
AND NOTICE OF NON-OPPOSITION TO PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

In light of the rulings of motions panels of the Eighth Circuit in *O'Brien v. HHS*, No. 12-3357, Order (8th Cir. Nov. 28, 2012), and *Annex Medical, Inc. v. Sebelius*, No. 13-1118, Order (8th Cir. Feb. 1, 2012), granting injunctions pending appeal in cases similar to this one challenging the contraceptive coverage regulations, defendants write to inform the Court that they do not oppose plaintiffs' Motion for Preliminary Injunction, ECF No. 8, on its Religious Freedom Restoration Act (RFRA) claim, until such time as the appeal in *O'Brien* or *Annex Medical* is resolved, whichever occurs first. In light of the pending appeals and defendants' non-opposition to a preliminary injunction until the appeal in *O'Brien* or *Annex Medical* is resolved, defendants move to stay all proceedings in this case until such time.

For the reasons stated in defendants' oppositions to plaintiffs' motions for preliminary injunction in *O'Brien* and *Annex Medical*, see Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Prelim. Inj., *O'Brien v. HHS*, No. 4:12-cv-00476-CEJ (E.D. Mo. Sept. 14, 2012), ECF No. 47; Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Prelim. Inj., *Annex Medical v. Sebelius*, No. 12-

cv-02804-DSD-SER (D. Minn. Dec. 12, 2012), ECF No. 17, as well as the district courts' decisions denying preliminary relief in those cases, *see O'Brien v. HHS*, ___ F. Supp. 2d ___, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012); *Annex Medical, Inc. v. Sebelius*, No. 12-cv-02804-DSD-SER, 2013 WL 203526 (D. Minn. Jan. 17, 2013), defendants do not believe that plaintiffs are likely to succeed on the merits of any of their claims, and believe that the decisions of the motions panels in *O'Brien* and *Annex Medical* were incorrect. Furthermore, the decisions of the motions panels in *O'Brien* and *Annex Medical* are not binding on this Court. *See In re Rodriguez*, 258 F.3d 757, 759 (8th Cir. 2001); *see also United States v. Henderson*, 536 F.3d 776, 778 (7th Cir. 2008); *Lambert v. Blackwell*, 134 F.3d 506, 513 n.17 (3d Cir. 1997).¹ Nonetheless, defendants acknowledge that, even if this Court were to agree with defendants and deny plaintiffs' request for a preliminary injunction, plaintiffs would likely then seek an injunction pending appeal, which would likely be granted for the reasons already articulated by the motions panels in *O'Brien* and *Annex Medical*.² *See Annex Medical*, No. 13-1118, Order at 5-6 (8th Cir. Feb. 1, 2012) (granting plaintiffs' motion for an injunction pending appeal, "consistent with the *O'Brien* order," because "there is a significant interest in uniform treatment of comparable requests for interim relief within this circuit"). Therefore, defendants do not

¹ In addition, motions panels in four other circuits have reached different conclusions than the motions panels in *O'Brien* and *Annex Medical*. *See Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012); *Autocam Corp. v. Sebelius*, No. 12-2673, Order (6th Cir. Dec. 28, 2012), *reconsideration denied*, No. 12-2673 (6th Cir. Dec. 31, 2012); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144, Order (3d Cir. Feb. 7, 2013); *Gilardi v. HHS*, No. 135039, Order (D.C. Cir. Mar. 21, 2013). And, the motions panel in *O'Brien* was divided. *See O'Brien*, No. 12-3357, Order (8th Cir. Nov. 28, 2012).

² Defendants note that there are factors in this case that may distinguish it from *O'Brien* and *Annex Medical*. Among other things, the individual plaintiffs do not wholly own the company plaintiffs. *See* Compl. ¶¶ 9, 12. Instead, there is at least one other shareholder who is not a plaintiff in this case. *Id.* Defendants nevertheless believe it would be prudent for the Court to await the Eighth Circuit's views on the general legal issues presented in *O'Brien*, *Annex Medical*, and this case, *see infra* p. 3, before assessing the import of these differences, and others, in this case.

oppose the entry of preliminary injunctive relief in favor of plaintiffs based on their RFRA claim at this time, to last until the pending appeal in *O'Brien* or *Annex Medical* is resolved, whichever occurs first. Defendants would suggest that the preliminary injunction remain in effect until 30 days after the mandate issues from the Eighth Circuit in *O'Brien* or *Annex Medical*, whichever occurs first, to give the Court and the parties sufficient time to assess the impact of the Eighth Circuit's ruling on this case.

Defendants also respectfully ask this Court to stay all proceedings in this case pending the resolution of the appeals in *O'Brien* and *Annex Medical*. Plaintiffs do not oppose this request.

“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes of its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). In the *O'Brien* and *Annex Medical* appeals, the Eighth Circuit will be addressing legal issues that are substantially similar to those presented in this case, involving facts that are analogous in many respects (but not all, *see supra* n. 2) to those in this case, challenging the same regulations that are challenged in this case, and raising claims that are also largely indistinguishable from those in this case brought against the same defendants as those in this case. Among the questions that the Eighth Circuit may very well decide are: (1) whether a for-profit, secular corporation can exercise religion under RFRA; (2) whether an obligation imposed on a corporation can be a substantial burden on the corporation's owners under RFRA; (3) whether any burden imposed on the corporation or its owners under the challenged regulations is too attenuated to qualify as “substantial” under RFRA; and (4) whether the

challenged regulations are narrowly tailored to serve compelling governmental interests. Thus, even if the Eighth Circuit's ruling does not entirely dispose of this case, the outcome of the appeals is likely to substantially affect the outcome of this litigation, and the Court and the parties will undoubtedly benefit from the Eighth Circuit's views.

If this case is not stayed, defendants will file a motion to dismiss the case for failure to state a claim. This motion will raise many of the same legal issues that are likely to be addressed by the Eighth Circuit. It would be highly inefficient to spend the resources and time of the parties and this Court for litigation to proceed on these issues simultaneously in both courts. *See Ass'n of Irrigated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1094 (E.D. Cal. 2008) (“[T]he district court has broad discretion to decide whether a stay is appropriate to promote economy of time and effort for itself, for counsel, and for litigants.”). Nor will there be any prejudice to plaintiffs if the proceedings are stayed, as they will have the benefit of a preliminary injunction during the pendency of the stay.

Finally, defendants note that several district courts – including the district court in *Annex Medical* – have stayed proceedings in similar circumstances in litigation challenging the contraceptive coverage regulations. *See, e.g., Order, Annex Medical, Inc. v. Sebelius*, No. 12-cv-02804-DSD-SER (D. Minn. Jan. 25, 2013), ECF No. 53; *Order, Korte v. Sebelius*, No. 3:12-cv-01072 (S.D. Ill. Dec. 28, 2012), ECF No. 63; *Order, Conestoga Wood Specialties, Corp. v. Sebelius*, No. 5:12-cv-06744 (E.D. Pa. Jan. 16, 2013), ECF No. 55; *Order, Hobby Lobby v. Sebelius*, No. 5:12-cv-01000 (W.D. Okla. Dec. 12, 2012), ECF No. 55.

For these reasons, defendants ask this Court to stay all proceedings in this case pending resolution of the appeal in *O'Brien* or *Annex Medical*, whichever occurs first.

Respectfully submitted this 28th day of March, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

s/ Michelle R. Bennett
MICHELLE R. BENNETT