IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOMINO'S FARMS CORPORATION and THOMAS MONAGHAN, Owner of Domino's Farms Corporation, Plaintiffs-Appellees, v. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, et al., Defendants-Appellants/ Cross-Appellees.	Case Nos.: 13-1654

RESPONSE IN OPPOSITION OF HOLDING APPEAL IN ABEYANCE AND COUNTER-MOTION REQUESTING AFFIRMATIVE RELIEF OF DISMISSAL OF APPEAL

Plaintiffs, by and through their undersigned counsel, respectfully oppose Defendants' "Motion to Hold Appeal in Abeyance," filed on June 24, 2013, and ask the Court instead to award Plaintiffs the affirmative relief of the dismissal of the government's interlocutory appeal for want of prosecution.

The Government's motion to hold its appeal in abeyance is tantamount to providing the court with consent to continue Plaintiffs' injunction against the HHS Mandate—thus alleviating this Court's need to review the *interlocutory* appeal. Since the Government does not need this issue addressed at this time then no need to interrupt the litigation by way of an interlocutory appeal exists, and the case

should be remanded back to the district court to resume the ordinary course of litigation.

An interlocutory district court order expressly granting a preliminary injunction is generally appealable under 28 U.S.C. § 1292(a)(1). While 28 U.S.C. § 1292(a)(1) gives an aggrieved party the right to take an immediate appeal, the exercise of this right, however, is *optional*. If no interlocutory appeal is taken from the district court's order on the injunction, the decision can be reviewed on appeal from the final judgment. *See, e.g.*, *Chambers v. Ohio Department of Human Services*, 145 F.3d 793 (6th Cir. 1998). The Court has even suggested that it is more appropriate to wait for a final judgment when the grant of a preliminary injunction is not immediately appealed. *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332, 338 (3d Cir. 1993).

Here, the proceedings were stayed in the district court. (R-45, Page ID #874-76). However, Defendants now want to halt litigation in the appellate court as well, delaying Plaintiffs from obtaining a judgment on the merits of the case.

At best, the Government's request to hold an interlocutory appeal in abeyance is an acknowledgement that Defendants do not really want to prosecute the appeal. At worst, it is an effort to manipulate the appellate court by picking and choosing which case it wants to move forward.

Here, Defendants want to push forward on *Autocam* because the Defendants lost on the issue of this preliminary injunction in the instant case. (R-39, Page ID #825-44); *also compare Autocam v. Sebelius*, No. 12-2673, Order (6th Cir. Dec. 28, 2012) to *Weingartz Supply Co. v. Sebelius,* No. 12-12061, slip op. (E.D. Mich. Oct. 31, 2012).[1] This Court should reject this self-serving procedural irregularity to case-shop. The government is not entitled to cherry-pick litigation of some proceedings, pursue only those it prefers, and put everything else on hold. Plaintiffs are, on the other hand, entitled to a full and fair hearing on their unique fact scenarios.

The Plaintiffs in the instant case do not present identical factual pleadings as the plaintiffs in *Autocam* nor are they similar in their procedural posture. District Court expressly held that this case is factually different than *Autocam*. *See* (R-39 at 8, Page ID #832) (discussing how Plaintiff Thomas Monaghan's beliefs are indistinguishable from Plaintiff Domino's Farms beliefs and how Plaintiffs' beliefs are incorporated into the daily operations of Plaintiff Domino's Farms); *see also* (*Id.* at 9, Page ID #833) ("The Court points to the fact that [Plaintiffs] provide[] a Catholic chapel and numerous mass services for its tenants, a Catholic bookstore on-site, and Catholic food options."). The District Court also held that the opinion

[1] Defendants have moved twice in the Sixth Circuit to hold appeals in abeyance due to the *Autocam* case. See *Weingartz Supply Co. v. Sebelius*, No. 13-1092 & 13-1093 (6th Cir.); *Eden Foods, Inc. v. Sebelius*, No. 13-1677 (6th Cir.). This court denied defendants' motion both times.

in *Autocam* "is not persuasive and is inapplicable here, given that this case is factually distinguishable from *Autocam*. (*Id.* at 12, Page ID #836). Therefore, it would contrary to common sense to stay this case pending a decision in *Autocam* when such a decision would be both unpersuasive and inapplicable.

Furthermore contrary to *Autocam*, the District Court granted an injunction to Plaintiffs. Much deference is given to the lower court in its decision to grant an injunction. A district court's grant of a preliminary injunction is reviewed on appeal only for *abuse of discretion*. *See Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati*, 363 F.3d 427, 432 (6th Cir. 2004). Within that framework, this Court reviews fact findings for clear error and issues of law de novo. *Hunter v. Hamilton Cnty. Bd. of Elections*, 635 F.3d 219, 233 (6th Cir. 2011). "**This standard of review is 'highly deferential' to the district court's decision.**" *Id.* (*quoting Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 541 (6th Cir. 2007)) (emphasis added). "The injunction will seldom be disturbed unless the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard"—***none of which took place here***. *Mascio v. Pub. Emps. Ret. Sys. of Ohio*, 160 F.3d 310, 312 (6th Cir. 1998).

Fed. R. App. P. 26(b) and 6th Cir. R. 26(b) guard against a party procedurally enlarging or extending its time to appeal. *See also Link v. Wabash R.*

Co., 370 U.S. 626 (1962) (recognizing "inherent power" of the court to dismiss case for want of prosecution). Indeed, the failure to abide by the court's briefing schedule alone may result in the dismissal of an appeal for want of prosecution. 6th Cir. R. 26(b) ("If the appellant does not timely process the appeal – including not timely filing a brief or required appendix or not meeting other deadlines – the court may dismiss the appeal for want of prosecution, impose sanctions, or both.")

Here, Defendants expressly seek to manipulate and extend this Court's briefing schedule because Defendants do not wish for their appeal to be heard beyond what the Court has set as the schedule in this case. Such action merits a dismissal for want of prosecution in this *interlocutory* appeal as that time should be used for adjudication of the merits of the case in district court, not languishing in abeyance whilst no progression occurs in the case. Such a request (for the appellate court to do nothing with an interlocutory appeal) implicitly demonstrates that an interlocutory appeal is not necessary. The defendants' appeal can be rightly and fully heard after a final judgment has been rendered in the case, which would be a more expeditious use of this Court's resources.

Respectfully submitted,

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July 3, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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