IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEGATUS; WEINGARTZ SUPPLY COMPANY; and DANIEL WEINGARTZ, President of Weingartz Supply Company, Plaintiffs-Appellees/ Cross-Appellants, v. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, et al., Defendants-Appellants/ Cross-Appellees.	Case Nos.: 13-1092 & 13-1093

RESPONSE IN OPPOSITION OF HOLDING APPEAL NO. 13-1092 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 February 26, 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 because "it would be inefficient to concurrently litigate these issues in both courts." (R-51; R-53). However, Defendants now want to halt litigation in the appellate court as well, contrary to its prior agreement with Plaintiffs *and its representations to the district court*, and wrongfully 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 a transparent effort to manipulate the appellate courts by picking and choosing which cases it wants to move forward.

In the Tenth Circuit, the Defendants wanted to consolidate *Hobby Lobby* because they won that case but lost *Newland*, which was the earlier filed case. *Newland v. Sebelius*, No. 12-1380, Motion To Assign Related Appeals to the Same Panel (10th Cir. Filed Jan. 7. 2012); *see* (Exhibit 1- Plaintiffs' Response to Motion To Assign Related Appeals to the Same Panel). In the Eighth Circuit the Defendants kept *Sioux Chief* from being involved in the appeals and actually *consented to enjoin the HHS Mandate*. *Sioux Chief Mfg. Co., Inc. v. Sebelius*, No. 13-00036, Unopposed Motion To Stay Proceedings and Notice of Non-Opposition to Plaintiffs' Motion For Preliminary Injunction (W.D. Mo. Filed Feb. 28, 2013). Here, Defendants want to push forward on *Autocam* because the Defendants lost on the issue of this preliminary injunction for Plaintiffs Weingartz and Weingartz Supply Co., which was earlier filed. Compare *Autocam v. Sebelius*, No. 12-2673, Order (6th Cir. Dec. 28, 2012) to *Legatus v. Sebelius,* No. 12-12061, slip op. (E.D. Mich. Oct. 31, 2012). This Court should reject the Government's self-serving procedural irregularities to case- and forum-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. The government states that "[i]n analogous circumstances, other plaintiffs have given consent to the government's motion to hold its appeal in abeyance pending the disposition of an earlier filed appeal in another contraceptive-coverage case." *See American Pulverizer, Co. v. HHS*, No. 13-1395 (8th Cir.) (Unopposed Motion To Hold Appeal in Abeyance Pending This Court's Decision in a Related Appeal, filed 2/26/13). However in *American Pulverizer* where the lower court *granted* an injunction from the HHS Mandate, the pending precedent in the Eighth Circuit Court of Appeals consists of cases where the court *also granted* injunctive relief from the HHS mandate pending appeal. *See O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, Order (8th Cir. Nov. 28, 2012); *Annex Medical, Inc. v. Sebelius*, No. 13-1118, Order (8th Cir. Feb. 1, 2013).

Furthermore, 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 for several months 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

those months 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 for several months) 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 and logical use of this Court's resources.

Respectfully submitted,

THOMAS MORE LAW CENTER

/s/ Erin Mersino
Erin Mersino (P70886)
Richard Thompson, Esq. (P21410)
24 Frank Lloyd Wright Blvd.
P.O. Box 393
Ann Arbor, MI 48106
(734) 827-2001
emersino@thomasmore.org

March 6, 2013

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 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.

THOMAS MORE LAW CENTER

/s/ Erin Mersino
Erin Mersino (P70886)