IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

MARTIN OZINGA III, MARTIN OZINGA IV, KARL OZINGA, JUSTIN OZINGA, AARON OZINGA, PAUL OZINGA, TIMOTHY OZINGA, JEFFREY OZINGA, and OZINGA BROS., INC, an Illinois corporation,	
Plaintiffs,	
vs.	**No. 1:13-cv-03292**
	Hon. Thomas H. Durkin
UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health & Human Services; UNITED STATES DEPARTMENT OF THE TREASURY; JACOB J. LEW, in his official capacity as the Secretary of the U.S. Department of the Treasury; UNITED STATES DEPARTMENT OF LABOR; and SETH D. HARRIS, Deputy Secretary of Labor, in his official capacity as Acting Secretary of the U.S. Department of Labor,	
Defendants.	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION FOR STAY

In their motion to stay, Defendants concede that the Seventh Circuit would have ordered the entry of an injunction order had this Court declined to do so, Defendant's Motion to Stay Proceedings, pp.1-2. But as the Government has agreed not to oppose Plaintiffs' motion for

temporary injunctive relief, it also has waived its right to appeal the entry of such an order. Defendants nevertheless seeks to continue to leave Plaintiffs in unrelieved legal jeopardy, on the speculation that the Seventh Circuit's resolution of the *Korte* and *Grote* cases will to some significant extent resolve issues in these proceedings as well.[1]

The premise of Defendants' argument is not only that the majority's opinion in *Korte* and *Grote* are inevitably wrong; it is also premised on the assumption, presumably, that Defendants arguments are wholly and inevitably correct, such that Plaintiffs not only are not entitled to proceed substantively on their claims; they also are not entitled to undertake any discovery of them. In short, Defendants' motion purports not only to predict the final outcome of *Korte* and *Grote*, but that its holdings will inevitably cut the legs out from under Plaintiffs' case as well.

Defendants' new motion purports to be raising only the Court's self-interested "efficiency" factors, traditionally considered in an entirely different context than that present here, namely when two or more separate but arguably similar litigations are pending on similar adjudicatory trajectories. But Defendant has made literally *no* showing that the litigations to which Defendants contend this Court ought to defer are "substantially similar" to this one in any way relevant to Defendants' motion. Moreover, the "efficiencies" for which Defendants are arguing seem more in the nature of the convenience to the *Defendants* of being excused by the requested stay from having to respond to the verified complaint and plaintiffs' discovery requests once such a responsive pleading is filed. This is never valid grounds for granting a stay.

[1] *Korte et al. v. Sebelius et al*., No 12-3841, 2012 WL 6757353 (7th Cir. December 28, 2012) (subsequently reiterated and reinforced in *Grote v. Sebelius*, No. 13-1077, 2013 WL 362725 (7th Cir. January 30, 2013), copies of both of which are attached to Plaintiff's Memorandum In Support of Their Motion for Preliminary Injunction, at Exhibits B, C.

ARGUMENT

Eight members of the Ozinga family, and their closely and privately held for-profit business Ozinga Bros, Inc., (collectively "Plaintiffs") seek to enforce their rights under the Religious Freedom Restoration Act, 42 U.S.C. §2000bb-1 (2006) (RFRA), the Administrative Procedures Act ("APA"), 5 U.S.C. *et seq*., and the Free Exercise, Free Association and Free Speech clauses of the First Amendment of the United States Constitution. Absent enforcement of these Constitutional and statutory rights, Plaintiffs contend, that under regulations promulgated by Defendants pursuant to the Patient Protection and Affordable Care Act ("ACA", see also 42 U.S.C. § 300gg-13(a)(4); 45 C.F.R. § 147.130) they are being unconstitutionally coerced into providing their employees, including members of their immediate family employed at Triune, with access to abortifacient contraceptives, sterilization and related drugs and services and counseling. Plaintiffs allege that as ardent and faithful adherents of their Christian faith, providing such access would itself be constitute material cooperation by evil, wrong, and sinful. (Plaintiffs' Joint Declaration (hereafter ("Declaration,") ¶¶ 10-50).

Defendants' wholly speculative and generic 'judicial efficiency' arguments, Motion to Stay, pp. 3., fall far short of overcoming the black-letter law that a district court has jurisdiction to proceed with a case even when there is a pending interlocutory appeal under 28 U.S.C. § 1292(a)(1). Indeed, district courts routinely decide the merits of cases despite pending interlocutory appeals concerning preliminary relief, a practice the Seventh Circuit has repeatedly endorsed. "Following the appeal of an interlocutory order the case "is to proceed in the lower court as though no such appeal has been taken . . . ." *United States v. City of Chi*., 534 F.2d 708, 711 (7th Cir. 1976) (quoting *Ex Parte Nat'l Enameling Co*., 201 U.S. 156, 162 (1906); see *Kusay v. United States*, 62 F.3d 192, 194 (7th Cir. 1995) (noting that a district court "may consider

whether to grant permanent injunctive relief while an appeal from a preliminary injunction is pending"); see also *Cont'l Training Servs., Inc. v. Cavazos*, 893 F.2d 877, 880-81 (7th Cir. 1990); *Chrysler Motors Corp. v. Int'l Workers Union*, 909 F.2d 248, 250 (7th Cir. 1990).

If it is well-settled law that a court should rarely grant a stay in the *very case* in which an interlocutory appeal is taken, a stay is even less appropriate in deference to interlocutory appeals in other cases allegedly raising similar issues. As the Supreme Court has noted, "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis v. N. American Co.*, 299 U.S. 248, 255 (1936) (vacating stay). Accordingly, "[t]he underlying principle clearly is that '[t]he right to proceed in court should not be denied except under the most extreme circumstances.'" *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983) (citation omitted*); Ohio Envtl. Council v. U.S. Dist. Ct., S. Dist. of Ohio*, 565 F.2d 393, 396 (6th Cir. 1977) (finding it "clear that a court must tread carefully in granting a stay . . . , since a party has a right to a determination of its rights and liabilities without undue delay").

This is no such "rare circumstance" here. Defendants have failed to make *any* showing, much less a strong showing that the [stay] remedy [is] necessary for the movant and that the disadvantageous effect on others would be clearly outweighed." *Chilcott*, 713 F.2d at 1484. Indeed, "if there is even a fair possibility that the stay for which [the movant] prays will work damage to someone else [e.g., the non-movant]," the movant "must make out a clear case of hardship or inequity in being required to go forward" with the proceedings. *Landis*, 299 U.S. at 255 (emphasis added). Defendants have not and cannot make out such a "clear case of hardship or inequity" to them if a stay is not granted.

To justify a stay, a movant must demonstrate four key circumstances, all of which by agreeing to injunctive relief here Defendants have implicitly conceded they cannot show: (1) whether Defendant has made a strong showing that it is likely to succeed on the merits ("no"); (2) whether the Defendant will be irreparably harmed absent a stay ("no"); (3) whether issuance of the stay will substantially injure Ozinga Bros. and the individual Ozinga plaintiffs, ("yes"); and (4) where the public interest lies ("against"). *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 1761 (2009); *Adams v. Walker*, 488 F.2d 1064, 1065 (7th Cir. 1973).

It is beyond peradventure that the Seventh Circuit's injunction orders in *Korte* and *Grote* were premised on findings adverse to Defendants' new stay motion. That these prior rulings also bar stay relief is especially obvious given that, of these four factors, the "most critical" first two factors were especially relied upon in the Seventh Circuit's Grote and Korte rulings. Nken, supra.

In *Korte* the Seventh Circuit also held that the plaintiffs there (and therefore by unavoidable implication Plaintiffs here also) had

> "established both a reasonable likelihood of success on the merits and irreparable harm, and that the balance of harms tips in their favor. RFRA prohibits the federal government from imposing a "substantial[] burden [on] a person's exercise of religion even if the burden results from a rule of general applicability" *unless* the government demonstrates that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1(a),(b). This is the strict-scrutiny test established in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L.Ed.2d 965 (1963), for evaluating claims under the Free Exercise clause. * * * It is an exacting standard, and the government bears the burden of satisfying it. "

Korte v. Sebelius, supra, 2012 WL at 6757353 at 2. Thus, to the extent that by agreeing not to oppose Plaintiffs' motion for injunctive relief, the Defendants' were acknowledging the binding effect of *Korte*, Defendants necessarily are conceding that they could not

make any better showing on these factors than they were able to do in these prior adjudications.

Moreover, by agreeing to an injunction order here, on the authority of the Seventh Circuit's *Korte* and *Grote* decisions, Defendants also necessarily conceded the third element of the applicable stay analysis here, namely whether allowing the government to enforce ACA against Plaintiffs would substantially injure them. As the Seventh Circuit noted in *Korte*:

> The government also argues that any burden on religious exercise is minimal and attenuated, relying on [*Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir. Dec. 20, 2012)] * * * With respect, we think [*Hobby Lobby*] misunderstands the substance of the claim. The religious-liberty violation at issue here inheres in the coerced coverage of contraception, abortifacients, sterilization, and related services, not—or perhaps more precisely, not only—in later purchase or use of contraception's or related services. * * * RFRA protects the same religious liberty protected by the First Amendment, and it does so under a more rigorous standard of judicial scrutiny; the loss of First Amendment rights "for even minimal periods of time, unquestionably constitutes irreparable injury,"[citations omitted].
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> We also conclude the balance of harms tips strongly in the Kortes' favor. An injunction pending appeal temporarily interferes with the government's goal of increasing cost-free access to contraception and sterilization. That interest, while not insignificant, is outweighed by the substantial religious liberty interests on the other side. The cost of error is best minimized by granting an injunction pending appeal. *Id.*

Against the backdrop of this preliminary injunction analysis, what of Defendants' stay motion, under standard "stay" analysis, remains to be decided or reconsidered? Not a thing.

Defendants attempt to suggest new and different grounds for the relief prayed for, namely whether in the interests of "judicial economy" proceedings herein ought to be stayed, pending "resolution" of the currently pending appeals in *Korte, supra*, and in *Grote , supra*, Motion, p. 1. But, in addition to the factors already decided adversely to them by implication, Defendants'

own cited authorities demonstrate that, to justify a stay Defendants at the threshold must show that all three elements, "claims, parties and available relief" in the cases to which they ask the Court to defer, are substantially the same, *and* that the stay requested will not work a particular hardship on the party opposing it. *Landis v. N. Am. Co.*, *supra*, 299 U.S. 248, 258 (stay denied, where distinct utility companies brought multiple suits challenging the Constitutionality of the same federal statute); *In re H & R Block Mortgage Corporation Prescreening Litigation*, 2007 WL 2710469, (stay denied where movant failed to establish an "identity" of parties or their privies).

Here the Plaintiffs are neither the same nor even distantly related in any way to the *Korte* or *Grote* plaintiffs, much less "in privity" with them. Not only are the parties here unrelated; there exist a myriad of key differences between and among the plaintiffs referenced that may prove highly relevant to key issues in these cases. For example, even were a publicly held corporation not entitled to express the religious convictions of its owners, a conclusion thrown into serious doubt in other contexts, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S.Ct. 876 (201), *how* closely a privately owned corporation need be held likely is a material issue. In each case brought to date by for-profit privately held corporations, the form of ownership has varied. Similarly, to what extent the nature of the coverage at issue, e.g. whether self-insurance, group plans, ERISA governed plans, or a hybrid version, affects the scope of a company's alleged obligations, under the challenged HHS Contraception Mandate is also an issue. Similarly the kinds of coverages at issue also vary from case to case. These differences too militate against a stay of any of these proceedings. The three cases just aren't "substantially similar" in ways relevant to stay analysis. For this reason too, Defendants' motion should be denied.

Defendants' failure to meet their burden on these stay factors is not outweighed by their wholly conclusory speculations about what issues in the *Korte* and *Grote* appeals the Seventh Circuit is "likely" to address, or which issues a "final" adjudication of these cases in the Seventh Circuit "may very well" decide. Motion, pp. 1, 3. *See e.g.: Grice Engineering, Inc. v J. G. Innovations, Inc.,* 691 F. Supp.2d 915, 921 (W. D. Wis. 2010) (where a movant's statements of "likely" outcomes was "simply too speculative to support a stay," and granting a stay would prejudice the opponent, stay denied). And the mere fact that a decision in a pending appeal may be "helpful" to a Court, has also never warranted suspending proceedings below pending such substantially unrelated appeals.

There is a good reason that mere speculation is not a sufficient ground for a stay. Speculations are just that: speculative. Any party opposing a stay can just as or possibly more readily speculate about efficiencies in their favor. Here, a material portion of the discovery that Defendants will have to provide will be the same in all three cases. This includes, for example, discovery regarding Defendants' allegedly "compelling interest" in enforcing PPACA's contraception mandate generally, and discovery regarding the extent to which the government has other, less intrusive, means available to it to enforce its alleged interest in providing contraceptives to the general public. *Korte, supra,* at *3. This would also include discovery proffered on the apparent "underinclusiveness" of the contraception mandate under PPACA. *See: Brown v. Entertainment Merchants Assoc.,* 131 S. Ct. 2729, 2740 (2011) (underinclusiveness of video game legislation "raises serious doubts" about whether government was in fact pursuing interests it invoked) 2742, *citing, Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 546, 113 S. Ct. 2217 (1993). Having gathered and produced their

discovery in any one of the three cited litigations, Defendants' burden of duplicating the same production in the other two litigations will be *de minimis*.

Finally, any stay of these proceedings will work a particularly egregious hardship on Plaintiffs here, another factor also fatal to Defendants' motion. *Landis v. North American Co.*, *supra*, 299 U.S. at 255, 57 S.Ct. at 166 (supplicant must make out clear case of hardship or inequity if there is even a fair possibility that the stay will work damage to someone else). This is because even as the preliminary injunctive order previously issued relieves the Plaintiffs' of their *current* statutory obligation to provide coverage highly offensive to their religious beliefs under ACA, the longer the controversy continues unresolved by a permanent injunction, the greater the accumulated potential fines the Plaintiffs face if a permanent injunction is not granted.

Plaintiffs also face the disproportionate hardship of the uncertainty the pendency of this litigation imposes over their day-to-day business operations. This ranges from time that management must spend away from their core business operations attempting to find alternative coverage, to the practical realities of attempting to keep in place alternative coverage commensurate with their goal of providing exemplary insurance coverage for all of their employees. In Interim Final Rules issued in August 2011, Defendants have acknowledged the burden that the uncertainty imposed by the implementation of the regulations at issue alone, even absent the challenges to implementation raised here, and in *Korte* and *Grote*. *See:* 75 Fed. Reg. 41,730.

The bottom line here remains that, whatever the final disposition of Defendants' appeal of this Court's preliminary injunction order, the appeal does not deprive the Court of its *obligation* to continue to adjudicate Plaintiffs' Constitutional and statutory claims. *Chrysler*

Motors Corporation v International Union, Allied Industrial Workers of America, AFL-CIO, 909 F2d 248, 250(7th Cir. 1990); *Shevlin v. Schewe*, 809 F.2d 447, 450-451 (7th Cir. 1987). Indeed, Federal courts have a "virtually unflagging obligation," absent "exceptional circumstances" to exercise jurisdiction, when a case is properly before it. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819(1976); *R.R. Street & Co., Inc. v. Vulcan Materials Co.*, 569 F.3d 711, 715 (7th Cir. 2009). *See also: Cherokee Nations of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (federal courts have a strict duty to exercise its jurisdiction in a timely manner), *citing, Landis v. North American Co.*, *supra*, 299 U.S. 248, 255. (1936).

The Seventh Circuit has already held that enforcement of the ACA will have a deleterious impact on parties like Plaintiffs, if enforced against them. Implicitly, by that holding, the Court also anticipated that Plaintiffs were entitled a prompt disposition of these their claims, regardless of the progress made by other plaintiffs in other litigations. Indeed, it is exactly because of such hardships on litigants that stays like those sought here are so disfavored, and why it is by now so well-settled that, absent exceptional circumstances not present here, a federal court's duty to exercise its jurisdictions, once properly evoked, is a "virtually unflagging" one.

CONCLUSION

WHEREFORE, for the reasons set forth herein, among others, Plaintiffs pray for the entry of an order denying Defendants' motion to stay, requiring Defendants to file a responsive pleading within ten (10) days of that Order, and for whatever other relief is justified in the premises.

Respectfully submitted on this July 15, 2013

s/ Kevin Edward White
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CERTIFICATE OF SERVICE

The undersigned, one of plaintiffs' counsels, hereby certify that on July 15, 2013, a true and correct copy of the foregoing **Plaintiffs' Memorandum In Opposition To Defendants' Motion for Stay** was caused to be filed electronically with this Court through the CM/ECF filing system and on the counsel listed below for the Defendants, by e-mail as indicated:

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