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

MARTIN OZINGA III, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 1:13-cv-3292-TMD
U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, *et al.*	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STAY PROCEEDINGS

Despite the fact that defendants have agreed to the entry of preliminary injunctive relief in this case, plaintiffs would have this Court and the parties expend significant time and resources to address complex and unsettled issues of law that are *currently* being considered by the Seventh Circuit in substantially similar factual circumstances. Contrary to plaintiffs' arguments, a stay in this case is appropriate and well within the Court's discretion. Because plaintiffs would be protected by a preliminary injunction during the pendency of the requested stay, there would be no hardship to plaintiffs. As a result, considerations of judicial economy – as well as the burden that would be needlessly imposed on the parties were this litigation to proceed immediately – justify a stay. Furthermore, judicial economy would almost certainly be served by a stay, as the Seventh Circuit will be addressing legal issues that are the same or substantially similar to those presented in this case, involving facts that are analogous 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.

It is well-established that district courts have broad discretion in deciding whether to issue a stay pending the resolution of proceedings in another case. "[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); *see also, e.g., Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223 (7th Cir. 1993). Plaintiffs cite *Landis* for the proposition that the party seeking a stay "'must make out a *clear case of hardship or inequity* in being required to go forward' with the proceedings." Pls' Mem. in Opp'n to Defs.' Mot. to Stay ("Pls.' Mem.") at 4, ECF No. 20 (quoting *Landis*, 299 U.S. at 255) (emphasis added). But, as plaintiff acknowledges, such a showing is required only where there is a "fair possibility" that the stay will harm the non-movant. *Landis*, 299 U.S. at 255. The cases relied on by plaintiff – such as *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477 (10th Cir. 1983) – all reflect such a concern.

But in this case, there is no "fair possibility" that plaintiffs would be harmed by a stay, as they would be protected by a preliminary injunction during the pendency of the stay. Plaintiffs raise vague and unsupported concerns about uncertainty if these proceedings are stayed pending resolution of the appeals in *Grote* and *Korte*. Pls.' Mem. at 9. But what plaintiffs fail to appreciate is that any uncertainty would exist whether this case proceeds immediately or not. As an initial matter, this is not a case where the stay would be "unreasonably long," *Landis*, 299 U.S. at 258, as *Grote* and *Korte* were argued before the Seventh Circuit on May 22. Of course, plaintiffs would be protected by a preliminary injunction in the meantime. And if this litigation were to proceed as plaintiffs envision, the parties would first have to brief defendants' motion to

dismiss all of plaintiff's claims, which the Court would then need to decide. If any of plaintiffs' claims were to survive the motion to dismiss, plaintiffs have suggested that they would then seek discovery, which the government would oppose, necessitating further briefing. Finally, the parties would likely engage in summary judgment briefing. Even if all of this were completed prior to the Seventh Circuit's ruling and plaintiffs were to obtain a permanent injunction from this Court, defendants would likely appeal such a ruling. Thus, as the Court recognized during the status hearing on July 16, even a final judgment from this Court would not eliminate any uncertainty that plaintiffs' allegedly face. Furthermore, unless this Court accurately predicts the outcome of *Grote* and *Korte* in the Seventh Circuit, any opinions issued by this Court in the interim would be rendered irrelevant once the Seventh Circuit rules, resulting in an enormous waste of this Court's and the parties' efforts.

On the other hand, if the proceedings in this case are stayed pending the Seventh Circuit's ruling, this litigation can proceed expeditiously once the mandate issues from the Seventh Circuit. With the benefit of the Seventh Circuit's ruling, the issues in this case are likely to be significantly narrowed and/or clarified, if not resolved entirely. Thus, a stay is not likely to significantly affect the amount of time that plaintiffs spend in any legal limbo.

Plaintiffs' suggestion that the government has somehow conceded that they are "substantially injure[d]" by the challenged regulations, *see* Pls.' Mem. at 6, is both wrong and entirely irrelevant. As explained in their opening brief, defendants agreed to a stay not because they believe that plaintiffs are likely to succeed on the merits of their claim, nor because they concede that plaintiffs are injured by the challenged regulations, but because "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 assigned to the same

motions panel that decided *Grote* and *Korte* and would thus likely be granted for the reasons already articulated by the panel." Defs.' Mot. to Stay Proceedings ("Defs.' Mot.") at 2, ECF No. 17. Furthermore, the question before this Court right now is not whether plaintiffs are injured by the challenged regulations, but whether they would be harmed by a *stay*. For the reasons explained above, because plaintiffs will be protected by a preliminary injunction during the pendency of the stay, they would not be harmed.

Plaintiffs' argument that this case is not "substantially similar" to *Korte* and *Grote* is also misguided. To the contrary, the Seventh Circuit's ruling is very likely to be enormously important – if not dispositive – to the resolution of this case. Plaintiffs are wrong when they suggest that defendants' argument for a stay is premised on a particular outcome in *Korte* and *Grote*. *See* Pls.' Mem. at 2 (incorrectly suggesting that defendants' argument for a stay is premised on a particular outcome in *Korte* and *Grote*). As explained in defendants' initial brief in support of a stay, *see* Defs.' Mot. at 4, regardless of how the Seventh Circuit rules, the merits panel will be addressing complex legal issues that are substantially similar to those presented in this case, involving facts that are analogous 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 brought against the same defendants in this case. Among the questions that the Seventh 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, but not on the corporation's owners, 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.

These are largely novel questions of great importance, and the courts around the country that have thus far confronted these issues in similar cases have reached contradictory conclusions. *See id.* Thus, regardless of which party prevails on appeal and even if the Seventh Circuit's ruling does not entirely dispose of this case, the outcome of the Seventh Circuit appeals is likely to substantially affect the outcome of this litigation, and the Court and the parties will undoubtedly benefit from the Seventh Circuit's views. As the Supreme Court explained in *Landis*, "[e]specially in cases of extraordinary public moment, the individual may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." 299 U.S. at 256.

As a matter of judicial economy and common sense, it makes far more sense for the Court and the parties to await the Seventh Circuit's ruling before proceeding in this case. And because there would be no harm to plaintiff in the event of a stay, these are perfectly appropriate factors for the Court to consider. *See Ass'n of Irritated 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."); *Heuft Systemtechnik v. Viedojet Systems Int'l, Inc.*, 1993 WL 147506 (N.D. Ill. May 6, 1993), at *2 (citing "promoting judicial efficiency and economy" as a factor that courts consider in determining whether to stay proceedings); *cf. Chilcott*, 713 F.2d at 1485 (rejecting judicial economy as a reason to stay a case only where it would "lead to . . . broad curtailment of the access to the courts").

Finally, the undersigned counsel for defendants would like to correct an answer given to a question from the Court during the July 16 status hearing. At the hearing, the Court asked whether any courts have denied stays in similar circumstances. The undersigned answered that

he was not aware of any such denials. However, after giving the question further thought and speaking with some colleagues, it turns out that two courts have denied stays. First, in a case in a somewhat different procedural posture, *Tyndale House Publishers, Inc. v. Sebelius*, No. 1:12-cv-1635 (D.D.C.), the government moved for a stay of summary judgment briefing pending the resolution of an appeal to the D.C. Circuit in a similar case. The district court denied the motion without explanation in a Minute Order dated May 17, 2013, and summary judgment briefing is underway in that case. And second, in *Autocam Corp. v. Sebelius*, No. 1:12-cv-1096 (W.D. Mich.), the parties jointly moved for a stay of district court proceedings while the plaintiffs appealed the court's denial of a preliminary injunction in the same case. The court denied the joint motion in a brief order dated January 16, 2013, *see id.*, ECF No. 47 (attached as Exhibit 1), and the government moved to dismiss the plaintiffs' claims. The court has yet to rule on the government's motion and, more recently, has suggested that it will not do so until the Sixth Circuit rules in the pending appeal. Thus, if anything, the course of proceedings in *Autocam* illustrates why a stay is appropriate in this case. The undersigned assures this Court that he was in no way intending to mislead the Court with the original answer, but simply did not recall either of these examples during the status hearing. He sincerely apologizes for any confusion caused by his answer.[1]

[1] Plaintiffs' counsel has also suggested that *Colorado Christian University v. Sebelius* ("*CCU*"), No. 1:11-cv-3350 (D. Colo.), is relevant. It is not. In that case, the plaintiff (a non-profit Christian university) was situated very differently than plaintiffs here (a secular for-profit corporation and its owners). Because the plaintiff in *CCU* was protected by a temporary enforcement safe harbor, during which the government had promised to change the challenged regulations as they applied to the plaintiff and similarly situated entities, defendants moved to dismiss the complaint on the grounds that the case was not ripe for review and that the plaintiffs lacked standing. The plaintiffs then served the government with discovery requests, and defendants moved to stay discovery pending the resolution of the motion to dismiss. The Court denied the motion to stay discovery, but before discovery could proceed very far, the Court granted the government's motion to dismiss, ending the case. *See Colo. Christian Univ. v. Sebelius*, No. 1:11-cv-3350, 2013 WL 93188 (D. Colo. Jan. 7 2013). In any event, *CCU* is not at all analogous to this case. Among other differences, there was no preliminary injunction and no pending appeal in *CCU*. And a motion to stay discovery pending a ruling on a motion to dismiss is governed by a completely different standard than a motion to stay district court proceedings pending appeal.

For these reasons, and those articulated in defendants' initial brief in support of a stay, defendants ask this Court to stay all proceedings in this case pending resolution of the appeals in *Grote* and *Korte*.

Respectfully submitted this 17th day of July, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 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/ Benjamin L. Berwick
BENJAMIN L. BERWICK