

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

SHARPE HOLDINGS, INC., *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF  
HEALTH AND HUMAN SERVICES, *et al.*,

Defendants.

Case No. 2:12-cv-00092-DDN

**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO STAY  
PROCEEDINGS AND NOTICE OF NON-OPPOSITION TO PLAINTIFFS' MOTION  
FOR PRELIMINARY INJUNCTION**

In their Motion to Stay Proceedings and Notice of Non-Opposition to Plaintiffs' Motion For Preliminary Injunction, ECF No. 41, defendants explained that, 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), defendants do not oppose plaintiffs' motion for preliminary injunction, ECF No. 2, 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. It now appears that *O'Brien* – an appeal from the dismissal of an action similar to this one that has been fully briefed since mid-January – will proceed to oral argument shortly.<sup>1</sup> Absent a stay, defendants intend to move to dismiss this case for failure to state a claim, a motion that will present virtually identical issues as are now fully briefed and pending oral argument before the Eighth Circuit in *O'Brien*. Appellate review of any

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<sup>1</sup> On March 4, 2013, the Eighth Circuit decided not to consolidate *O'Brien* and *Annex Medical*. See Order, *O'Brien v. HHS*, No. 12-3357 (8th Cir. Mar. 4, 2013) (denying motion to consolidate).

decision by this Court could not proceed until after *O'Brien* is decided, and the outcome of *O'Brien* will significantly affect, if not control, the resolution of this case. Whether this case is stayed or not, *O'Brien* will be resolved on appeal first, and plaintiffs' desire for certainty will come from *O'Brien*, not from this case.

Given the Eighth Circuit appeals and defendants' non-opposition to a preliminary injunction until either appeal is resolved, defendants respectfully ask the Court to stay all proceedings in this case until the appeal in *O'Brien* or *Annex Medical* is resolved, whichever occurs first. As defendants explained in their motion, briefly staying this case pending resolution of either *O'Brien* or *Annex Medical* will conserve both the Court's and the parties' resources because the Eighth Circuit's decisions in those cases will "affect the future scope and necessity of litigation in this Court." *IBT/HERE Emp. Representatives' Council v. Gate Gourmet Div. Ams.*, 402 F. Supp. 2d 289, 292 (D.D.C. 2005); *see also Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.6 (1998) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936))); *see Bridgeport Hosp. v. Sebelius*, No. 09-cv-1344, 2011 WL 862250, at \*1 (D.D.C. Mar. 10, 2011) ("A party may be required 'to submit to delay not immoderate in extent and not oppressive in its consequences if . . . convenience will thereby be promoted.'" (quoting *Landis*, 299 U.S. at 254-55)); *e.g., Ass'n of Am. Physicians & Surgeons, Inc. v. Sebelius*, No. 1:10-cv-499-ABJ (D.D.C. Nov. 8, 2011) (granting stay pending court of appeals decision in a case raising similar issues); *Roman Catholic Archbishop of Washington v. Sebelius*, No. 12-cv-00815 (D.D.C. Nov. 2, 2012) (same). Plaintiffs, moreover, will not be prejudiced if the proceedings are stayed, as they will have the benefit of a preliminary injunction during the pendency of the stay.

Plaintiffs have not shown otherwise. Their attempt to distinguish this case from *O'Brien* and *Annex Medical* is wholly unpersuasive. And plaintiffs' assertions about the theoretical harms they will purportedly suffer if this case is briefly stayed are not only exaggerated, but also do not warrant the expenditure of this Court's and the parties' resources when the Eighth Circuit's resolution of *O'Brien* or *Annex Medical* appears to be just around the corner. Thus, defendants respectfully ask that this Court, like other district courts in this circuit in which similar cases are pending, to stay this action pending a ruling in *O'Brien* or *Annex Medical*, whichever is earlier. *See, e.g.*, Order, *Sioux Chief Mfg. Co. v. Sebelius*, No. 12-0036-CV-W-ODS (W.D. Mo. Feb. 28, 2013), ECF No. 9; Order, *Annex Medical, Inc. v. Sebelius*, No. 12-cv-02804-DSD-SER (D. Minn. Jan. 25, 2013), ECF No. 53.

### **ARGUMENT**

#### **I. Plaintiffs' Attempt To Distinguish *O'Brien* And *Annex Medical* Underscores The Propriety Of A Stay**

As defendants have already explained, the Eighth Circuit's review of *O'Brien* and *Annex Medical* will require addressing legal issues that are substantially similar to those presented in this case, involving facts that in many respects (but not all) 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. *O'Brien*, for example, is an appeal from the dismissal of another action challenging the preventive services coverage regulations. *See O'Brien v. HHS*, Case No. 4:12-CV-476 (CEJ), 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012) (dismissing similar claims under RFRA, the Free Exercise Clause, the Establishment Clause, the Free Speech Clause, and the Administrative Procedure Act). As noted already, if this case is not stayed, defendants intend to file a motion to dismiss all of plaintiffs' claims, which are similar to those at issue in *O'Brien*. Since, as plaintiffs

concede, “*O’Brien* is an appeal by plaintiffs whose case was dismissed in its entirety,” Pls.’ Response at 6, the Eighth Circuit’s review of that appeal will bear significantly upon – if not entirely control – this Court’s review of defendants’ anticipated dispositive motion.<sup>2</sup>

Plaintiffs suggest that *O’Brien* and *Annex Medical* “may” not impact this case because of two purported factual differences between this case and the two appeals. Pls.’ Response at 7. Neither is persuasive. First, plaintiffs’ contention that Sharpe Holdings somehow is “favorably situated” as a plaintiff, *id.* at 7, ignores the undisputed facts. In neither *O’Brien* nor *Annex Medical* are the individual owner plaintiffs as legally and factually distant from the secular, for-profit corporation plaintiff as Mr. Sharpe is from Sharpe Holdings. Unlike in *O’Brien* and *Annex Medical*, Sharpe Holdings is owned by another corporation (CNS Corp.), which is in turn wholly owned by a separate trust (Charles N. Sharpe Revocable Trust), of which Mr. Sharpe is the grantor, trustee, and beneficiary. *See* Decl. of Pl. Charles N. Sharpe, Dec. 20, 2012, ECF No. 4-2. Thus, Mr. Sharpe’s claim that his religious exercise is substantially burdened by a regulatory requirement imposed upon the health plan sponsored by Sharpe Holdings is, if anything, far more attenuated than in either *O’Brien* or *Annex Medical*. Second, the fact that this case includes employee plaintiffs, as well as the corporation and its alleged owner, Pls.’ Response at 7, does not strengthen plaintiffs’ case vis-à-vis the plaintiffs’ cases in *O’Brien* or *Annex Medical*. To the extent the Eighth Circuit’s disposition of claims by the owner and corporate plaintiffs in *O’Brien*

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<sup>2</sup> Although it is highly likely that *O’Brien* will be decided before *Annex Medical* (since *O’Brien* has been fully briefed since January), defendants note that the Eighth Circuit’s review of *Annex Medical* will also significantly inform any further proceedings in this case. As in *O’Brien*, among the questions that the Eighth Circuit may very well decide in *Annex Medical* 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.

or *Annex Medical* controls the disposition of the claims of Sharpe Holdings and Mr. Sharpe, the Eighth Circuit's rulings will necessarily control the claims of Sharpe Holdings' employees.<sup>3</sup>

In sum, because *O'Brien* and/or *Annex Medical* will significantly influence, and likely control, this Court's review of defendants' motion to dismiss and further proceedings in this case, defendants respectfully submit that it is "efficient for [the Court's] own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *IBT/HERE Emp. Reps.' Council*, 402 F. Supp. 2d at 292 (quoting *Levya v. Certified Grocers of Cal.*, 593 F.2d 857, 863-64 (9th Cir. 1979)).

## **II. Plaintiffs' Objections to a Brief Stay Pending Eighth Circuit Review of *O'Brien* or *Annex Medical* Do Not Counsel Against Staying This Case**

Despite the obvious similarities between the Eighth Circuit appeals and this case, plaintiffs maintain that a short stay will harm them because a stay purportedly will (1) cost plaintiffs the "right to litigate an issue" and (2) "extend the uncertain environment under which Plaintiffs currently operate." Pls.' Response at 4-5. Neither assertion requires the parties to litigate and this Court to decide issues that will soon be decided by the Eighth Circuit, particularly if plaintiffs enjoy preliminary injunctive relief during the pendency of the stay.

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<sup>3</sup> See also, e.g., Defs.' Mem. in Opp'n to Pls.' Mot. For TRO and Prelim. Inj. at 14 n.7, ECF No. 14 ("The Court need not specifically reach the burden alleged by Ms. Schaefer and Ms. Wilson because disposition of the claims of Sharpe Holdings and Mr. Sharpe will necessarily control their claims. If Sharpe Holdings and/or Mr. Sharpe prevail on their RFRA challenge (which they should not), Ms. Schaefer and Ms. Wilson will have received the relief they seek. If Sharpe Holdings and Mr. Sharpe do not prevail under RFRA, then it will be because any burden on the corporation or its owner is not a substantial burden on religious exercise, so *a fortiori*, Ms. Schaefer's and Ms. Wilson's far more removed claims of burden must fail as well."); *id.* at 3 ("Ms. Schaefer and Ms. Wilson are simply employees of the entity to which the regulations apply; the regulations place no obligation on them and thus cannot be said to substantially burden their religious exercise. That they pay premiums for group health coverage under which their colleagues might choose to procure health care to which they personally object imposes no burden, let alone a substantial one, on their religious exercise.").

First, the brief stay defendants seek will not cost plaintiffs their “right to litigate an issue.” Pls.’ Response at 4. As an initial matter, plaintiffs do not explain – and it is unclear – what “issue” they have in mind. In any event, *O’Brien* and/or *Annex Medical* will be decided by the Eighth Circuit before this case is, and either decision is likely to significantly affect the outcome of this litigation, including defendants’ anticipated motion to dismiss. That is a natural result, not of any stay, but of plaintiffs filing this case after *O’Brien* and *Annex Medical*. Moreover, the fact that plaintiffs are not parties in *O’Brien* or *Annex Medical*, Pls. Response at 4, does not mean that a short stay pending those appeals is inappropriate. To the contrary, courts routinely stay proceedings pending appeals involving other parties that will significantly affect the outcome of the case being stayed. *See, e.g., Ass’n of Am. Physicians & Surgeons, Inc. v. Sebelius*, No. 1:10-cv-499-ABJ (D.D.C. Nov. 8, 2011) (granting stay pending court of appeals decision in a case raising similar issues); *Roman Catholic Archbishop of Washington v. Sebelius*, No. 12-cv-00815 (D.D.C. Nov. 2, 2012) (same).

Second, plaintiffs miss the mark by suggesting that their desire for legal certainty is grounds for denying a brief stay. Pls.’ Response at 4-5. Again, *O’Brien* and/or *Annex Medical* will significantly affect the outcome in this case, whether the Court stays it or not. Plaintiffs’ uncertainty will not be alleviated by carrying on with briefing, arguing, and deciding defendants’ motion to dismiss at the same time that the Eighth Circuit reviews whether similar plaintiffs in similar cases stated a claim upon which relief can be granted (*O’Brien*) or have a likelihood of success on the merits (*Annex Medical*). Nor will denying a stay answer plaintiffs’ concerns about the “possibility of an unfavorable ruling” and the financial consequences of non-compliance. Pls.’ Response at 4. If, for example, the Eighth Circuit affirms dismissal of the claims in *O’Brien*, that affirmance will almost certainly mean that defendants’ anticipated motion to

dismiss should be granted; a reversal, on the other hand, would also significantly affect this Court's review of defendants' motion. A brief stay to await that ruling does not "extend" plaintiffs' uncertainty, Pls.' Response at 5; rather, it spares the parties and the Court time and effort while *O'Brien* is decided. Furthermore, because defendants do not oppose the entry of preliminary injunctive relief pending a ruling in either *O'Brien* or *Annex Medical*, plaintiffs will have certainty during the pendency of the stay about the preliminary injunctive relief they sought at the outset of this case. *See* Pls.' Mot. For TRO & Prelim. Inj., ECF No. 2.

In short, plaintiffs have failed to show a "fair possibility" that the stay defendants seek "will work damage" upon them. Granting a brief stay, by contrast, will promote "economy of time and effort for [the Court], for counsel, and for litigants," *Landis*, 299 U.S. at 254, and is an appropriate measure here, *see Bridgeport Hosp.*, 2011 WL 862250, at \*1 ("A party may be required 'to submit to delay not immoderate in extent and not oppressive in its consequences if . . . convenience will thereby be promoted.'" (quoting *Landis*, 299 U.S. at 254-55)).

### **CONCLUSION**

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 on this 21st day of March, 2013,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 21, 2013, I caused a true and correct copy of this Notice to be served on counsel by means of the Court's ECF system.

/s/ Jacek Pruski  
JACEK PRUSKI