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

SHARPE HOLDINGS, INC., et al., Plaintiffs, vs. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al., Defendants.	)	Case No. 2:12-cv-00092-DDN

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO STAY PROCEEDINGS AND NOTICE OF NON-OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This case concerns important rights to religious liberty protected by the First Amendment and the Religious Freedom Restoration Act ("RFRA"). Defendants have mandated that Plaintiffs Sharpe Holdings, Inc. ("Sharpe Holdings"), Charles N. Sharpe, Judi Diane Schaefer and Rita Joanne Wilson buy, provide and/or support employee health plan coverage for abortion-inducing drugs and related counseling on threat of onerous fines or other severe repercussions. Plaintiffs' request for a preliminary injunction against this Mandate—which would protect Plaintiffs' rights to religious freedom while litigating this case—remains pending in this Court, as does the Complaint's prayer for permanent injunctive relief. Doc. 2, Mot. for TRO and Prelim. Inj. Given that the Eighth Circuit has twice granted similar relief pending appeal to other parties, *see O'Brien v. HHS,* No. 12- 3357, Order (8th Cir. Nov. 28, 2012); *Annex Medical, Inc. v. Sebelius,* No. 13-1118, Order (8th Cir. Feb. 1, 2012), Defendants have now filed a motion indicating that they no longer oppose Plaintiffs' request for preliminary relief, but seek to stay this case pending

the outcome of the interlocutory appeals in *O'Brien* and *Annex Medical*. Doc. 41, Mot. to Stay ("Defs.' Motion").

In response, Plaintiffs request that the Court grant the agreed preliminary injunction, but deny a stay. A preliminary injunction should immediately issue because Defendants do not oppose "the entry of preliminary injunctive relief in favor of plaintiffs based on their RFRA claim at this time, to last until the pending appeal in *O'Brien* or *Annex Medical* is resolved." Defs.' Mot. at 3. Indeed, Defendants' consent to the injunction comes whether or not this case is stayed. *Id.* at 1, 3. Plaintiffs have no particular objection to Defendants' request that the agreed-upon preliminary injunction expire thirty days after the mandate issues in *O'Brien* or *Annex Medical*, provided that the injunction can be extended, on motion of Plaintiffs and if the Court deems it appropriate, before that time.

The Court should also deny Defendants' requested stay for the reasons explained below. In summary, to justify such a stay, a party generally "must make out a clear case of hardship or inequity." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). Defendants, however, rely solely on efficiency concerns that courts have found insufficient, overlooking that a delay would exacerbate the legal limbo in which Plaintiffs operate.

ARGUMENT

The Court should deny Defendants' motion for a stay because a party seeking such a stay must show exceptional circumstances and Defendants have not met that demanding standard.

A. A Party Must Show Exceptional Circumstances To Obtain A Stay.

It is 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 Eighth Circuit has repeatedly endorsed. "An appeal from an interlocutory order does not divest the trial court of jurisdiction to continue with other phases of the case. The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court, as though no such appeal had been taken, unless otherwise specially ordered." *Janousek v. Doyle*, 313 F.2d 916, 921 (8th Cir. 1963) (quoting *Ex Parte Nat'l Enameling Co.*, 201 U.S. 156, 162 (1906)); *see also Burns v. City of Apple Valley*, 30 Fed. Appx. 670 (8th Cir. 2002) (unpublished) ("Contrary to [appellant's] assertion, the District Court was not divested of jurisdiction once she filed her interlocutory appeal and thus it had the authority to grant final judgment in favor of defendants.")

Given that a court should rarely grant a stay in the *very case* in which an interlocutory appeal is taken, it is obvious that a stay should be even less appropriate for interlocutory appeals in *other cases* 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*, 299 U.S. at 255 (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").

To justify such a stay, therefore, the moving party must "make a strong showing that the 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 some one 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). In other words, "the burden is on the party seeking the stay to show that there is pressing need for delay, and that neither the other party nor the public will suffer harm" from it. *Ohio Envtl.*, 565 F.2d at 396. This showing "is of particular importance where the claim being stayed involves a not insubstantial claim of present and continuing infringement of constitutional rights." *Dellinger v. Mitchell*, 442 F.2d 782, 787 (D.C. Cir. 1971); *see Ali v. Quarterman*, 607 F.3d 1046, 1049 (5th Cir. 2010) (vacating order staying inmate's RLUIPA action pending outcome of similar suit by another inmate challenging the same practice of the Texas Department of Criminal Justice).

B. Defendants Have Not Established That The Interlocutory Appeals In *O'Brien* And *Annex Medical* Justify A Stay In This Case.

Defendants have failed to illustrate "extreme circumstances" to justify a stay. *Chilcott*, 713 F.2d at 1484 (citation omitted). *First*, there is at least a "fair possibility" that a stay "will work damage to" Plaintiffs. *Landis*, 299 U.S. at 255. "[T]he fact that [Plaintiffs are] not a party in the [Eighth Circuit appeal] is sufficient to show the fair possibility of harm required under *Landis*." *Meras Eng'g, Inc. v. CH20, Inc.*, No. C-11-0389 EMC, 2013 WL 146341, at *5 (N.D. Cal. Jan. 14, 2013). In addition to that obvious harm of losing one's right to litigate an issue, delay would prejudice Plaintiffs by extending the time within which it remains in legal limbo. The possibility of an unfavorable ruling is a contingency that Plaintiff cannot ignore, as Plaintiffs could be subjected to onerous fines.[1] *See* Doc. 1, Compl. ¶¶ 56-60. Delaying these proceedings

[1] Indeed, Plaintiffs in the instant case have inquired whether Defendants would waive their claim to fines and penalties that accrued during the stay Defendants request, should the Defendants prevail in the end. In other words, would the Defendants disclaim any interest in a "clawback" attempt for fines and penalties avoided during the preliminary injunction if the Plaintiffs end up unsuccessful on the merits? Defendants responded that they would not agree to such a disclaimer.

will extend the uncertain environment under which Plaintiffs currently operate, and this uncertainty will continue to hamper Plaintiffs' ability to budget, negotiate health plans, and/or otherwise plan for the future. *Cf. Roman Catholic Archdiocese of New York v. Sebelius*, ___ F. Supp. ___, 2012 WL 6042864, at *18 (E.D.N.Y., Dec. 4, 2012) (comparing impending enforcement of the Mandate to a "speeding train that is coming towards plaintiffs" and explaining that ignoring that speeding train "in the hope that it will stop might well be inconsistent with the fiduciary duties that plaintiffs' directors or officers owe to their members"); *In re H&R Block Mortg. Corp., Prescreening Litig.*, No. 2:06- MD-230, 2007 WL 2710469, at *3 (N.D. Ind. 2007) ("An indefinite stay of this pending litigation, aside from being unsettling to a defendant left with an uncertain future . . . , has other business implications to a corporate defendant."). A stay would thus compound the harm to Plaintiffs that has resulted from the uncertainty that already surrounds their operations.

Second, Defendants have not made "out a *clear case of hardship or inequity* in being required to go forward" with this case. *Landis*, 299 U.S. at 255 (emphasis added). Defendants' motion to stay is conspicuously void of any explanation why litigating this case would create *any* hardship for Defendants (beyond the normal burdens that stem from any litigation). *See Salinas v. City of San Jose*, No. 5:09–cv–04410 EJD, 2012 WL 2906052, at *2 (N.D. Cal. July 13, 2012) ("'[B]eing required to defend a suit, without more, does not constitute a 'clear case of hardship or inequity' within the meaning of *Landis*.'" (quoting *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1112 (9th Cir. 2005)). Instead, Defendants rely entirely on judicial economy to support their request. But "considerations of judicial economy . . . should rarely if ever lead to such broad curtailment of access to courts." *Chilcott*, 713 F.2d at 1485; *see also, e.g.*, *Ortega Trujillo v. Conover & Co. Commc'ns, Inc.*, 221 F.3d 1262, 1265 (11th Cir. 2000) ("The case law illustrates

that, in a case like this one, the interests of judicial economy alone are insufficient to justify such an indefinite stay."); *Patent Compliance Grp. , Inc. v. Hunter Fan Co.*, No. 10-2442, 2010 WL 3503818, at *2 (W.D. Tenn. Sept. 1, 2010) ("If the interest in judicial economy alone could not earn the federal government a stay in *Landis*, it cannot justify this Court's granting Hunter's Motion."); *ASUSTek Computer Inc. v. Ricoh Co., Ltd.*, No. C 07-01942 MHP, 2007 WL 4190689, at *2 (N.D. Cal. Nov. 21, 2007) ("Indeed, it is well-settled that 'case management standing alone is not necessarily a sufficient ground to stay proceedings.'" (citation omitted)). That is particularly true, where, as here, the claims being stayed alleged violations of important rights. *See Dellinger*, 442 F.2d at 787.

Third, it is not even clear that judicial economy would be served by a stay. A stay could end up harming judicial efficiency by delaying the ultimate resolution of this case for no reason. To begin with, neither *O'Brien* nor *Annex Medical* is an appeal that will necessarily resolve the case on its merits. *O'Brien* is an appeal by plaintiffs whose case was dismissed in its entirety, and *Annex Medical* is an appeal of a denial of a preliminary injunction. Such appeals are typically limited in scope, and may not resolve anything conclusively on the merits. *See, e.g.*, *Publ'n Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 478 (7th Cir. 1996) ("We are constrained by the limited scope of appellate jurisdiction under 28 U.S.C. § 1292(a)(1) in the context of reviewing a grant of a preliminary injunction, . . . and so we reach only so far as necessary to decide this appeal."); *U.S. Steel Corp. v. Fraternal Ass'n of Steelhaulers*, 431 F.2d 1046, 1048 (3d Cir. 1970) ("This limited review is necessitated because the grant or denial of a preliminary injunction is almost always based on an abbreviated set of facts, requiring a delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief."). Even in the

unlikely event that the Eighth Circuit would depart from its initial analysis that the plaintiffs in *O'Brien* and *Annex Medical* were likely to succeed on the merits of their RFRA claim, any such reversal may ultimately have *no* impact on Plaintiffs. Although Plaintiffs' claims are similar to those raised in *O'Brien* and *Annex Medical*, the parties in these actions are different. Plaintiffs here uniquely include employees of Sharpe Holdings who contribute premiums to an insurance plan upon which Defendants are attempting to force objectionable coverage. Further, Plaintiffs have demonstrated to the Court how extraordinarily intertwined the religious views of Charles N. Sharpe are to the mission and operation of Sharpe Holdings. Doc. 29, Reply, pp. 6-7. It is difficult to imagine any for-profit company more favorably situated than Sharpe Holdings to assert RFRA rights.

Alternatively, should the Eighth Circuit adhere to the analysis in its initial decisions in *O'Brien* and *Annex Medical*—that the plaintiffs there have shown a reasonable likelihood of success on the merits of their RFRA claim—judicial economy would be served by continuing the proceedings in this case in the interim. To conserve resources, for example, Plaintiffs contemplate moving for summary judgment seeking a permanent injunction solely on their RFRA claim, which Plaintiffs believe can be conclusively decided in their favor without extensive discovery. It would be efficient for the briefing on that claim to be undertaken contemporaneously with the briefing in the Eighth Circuit. In that circumstance, this Court would then be well situated to resolve whether permanent relief on this RFRA claim is appropriate in an expeditious fashion. In short, judicial economy is generally not itself sufficient to grant a stay, and, in any event, a stay awaiting the Eighth Circuit's decisions in *O'Brien* and *Annex Medical* could, in the end, harm judicial economy.

Fourth, Defendants' citation of stays in similar cases is inapposite. In each of those cases, the plaintiffs joined in or consented to the defendants' motion to stay. *Annex Medical, Inc. v. Sebelius*, No. 12-cv- 02804-DSD-SER, Doc. 52 (D. Minn. Jan. 24, 2013); *Sioux Chief Mfg. Co. v. Sebelius*, No. 12-0036-CV-W-ODS, Doc. 8 (W.D. Mo. Feb. 28, 2013); *Korte v. Sebelius*, No. 3:12-cv- 01072, Doc. 58 (S.D. Ill. Dec. 17, 2012); *Conestoga Wood Specialties, Corp. v. Sebelius*, No. 5:12-cv-06744, Doc. 54 (E.D. Pa. Jan. 15, 2013); *Hobby Lobby v. Sebelius,* No. 5:12-cv-01000, Doc. 54 (W.D. Okla. Dec. 10, 2012). In all but one of those cases—*Sioux Chief*—the plaintiffs had lost on their motions for preliminary injunctions at the district court level and consented to the stay while they were appealing those decisions.

Indeed, the Defendants' position in the case at bar is decidedly different from that in *Newland v. Sebelius,* 1:12-cv-01123, Doc. 53 (D. Colo. Dec. 18, 2012), when the Plaintiffs moved to stay the case pending the government's appeal to the Tenth Circuit, but Defendants wanted to go forward with their motion to dismiss. *Id*.

> A broad stay pending appeal would inappropriately and inefficiently delay resolution of this matter without any corresponding benefit and would leave open a significant question that will significantly affect, if not control, the disposition of this case. The Court's preliminary injunction order did not decide whether a for-profit, secular corporation can exercise religion within the meaning of the First Amendment or whether the preventive services coverage regulations substantially burden the company's owners' religious exercise. Instead, this Court held that those issues "pose difficult questions of first impression." . . . These merits arguments, which are raised in defendants' motion to dismiss, therefore remain to be decided. Nothing stands in the way of this Court doing so now, and the Court clearly has jurisdiction to do so. *See Conkleton v. Zavaras*, 2009 WL 1384166, at *2 (D. Colo. May 15, 2009) (unpublished) ("[A]n appeal from an interlocutory order granting or denying a preliminary injunction does not divest the district court of jurisdiction to proceed with the underlying action of the merits.").

Id. at *2. Defendants should not be allowed to pick and choose which cases get stayed.

CONCLUSION

For all of these reasons, the Court should grant Plaintiffs a preliminary injunction and deny Defendants' Motion to Stay.

Respectfully submitted this 18th day of March, 2013.

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Certificate of Service

I hereby certify that on March 18, 2013, the foregoing was filed electronically with the Clerk of the Court for the United States District Court for the Eastern District of Missouri to be served by operation of the Court's electronic filing system upon the following registered CM/ECF participants:

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