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

TONN AND BLANK CONSTRUCTION, LLC, Plaintiff, v. KATHLEEN SEBELIUS, *et al.* Defendants.	Case No. 1:12-cv-00325-JD-RBC

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,[1] plaintiff 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 plaintiff's arguments, a stay in this case is appropriate and well within the Court's discretion. Because plaintiff would be protected by a preliminary injunction during the pendency of the requested stay, there would be no hardship to plaintiff. 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,

[1] Plaintiff asks that any preliminary injunction issued by this Court "include language prohibiting Defendants from enforcing the Mandate against T&B's insurer with respect to T&B's health plan." Pl.'s Resp. at 2. Defendants have no objection to this request, and in fact included such language in the Proposed Order emailed to the Court and plaintiff coincident with the filing of defendants' motion to stay. That Proposed Order stated, in relevant part, "Defendants are hereby ENJOINED, until 30 days after the mandate issues from the Seventh Circuit in Grote v. Sebelius, No. 13-1077, and Korte v. Sebelius, No. 12-3841, from applying or enforcing the contraceptive coverage regulations against Tonn and Blank Construction, LLC, *or its employee health plan or insurer*" (emphasis added). It is entirely unclear why defendants' Proposed Order would not meet plaintiff's needs.

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. And finally, the fact that *Grote* has not been stayed in the district court is entirely immaterial, as the procedural posture of the district court proceedings in that case is such that a stay is unnecessary.

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). Plaintiff cites *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." Pl.'s Resp. to Defs.' Mot. to Stay Proceedings ("Pl.'s Resp.") at 3, ECF No. 41 (quoting *Landis*, 299 U.S. at 255) (emphasis in original). But, as plaintiff acknowledges, *see id.*, such a showing is required 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 plaintiff would be harmed by a stay, as plaintiff would be protected by a preliminary injunction during the pendency of the stay. Plaintiff raises vague and unsupported concerns about "uncertainty" and "legal limbo" if these proceedings are stayed pending resolution of the appeals in *Grote* and *Korte*. Pl.'s Resp. at 4.

But what plaintiff fails 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, and plaintiff would be protected by a preliminary injunction in the meantime. And if this litigation were to proceed as plaintiff envisions, the parties would first have to finish briefing defendants' motion to dismiss all of plaintiff's claims, which the Court would then need to decide. Next, if plaintiff's RFRA claim were not dismissed, plaintiff would move for summary judgment on its RFRA claim, *see* Pl.'s Resp. at 7, necessitating another opinion by this Court. Even if all of this were completed prior to the Seventh Circuit's ruling and plaintiff were to obtain a permanent injunction from this Court – which defendants believe would be unlikely for all of the reasons stated in Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Motion to Dismiss, ECF Nos. 25-26 – defendants would likely appeal such a ruling. 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 plaintiff spends in any "legal limbo."

Plaintiff's suggestion that "[i]t would be efficient" to brief summary judgment on their RFRA claim "contemporaneously with the briefing in the Seventh Circuit," Pl.'s Resp. at 7, is

similarly off-base. Plaintiff simply ignores the fact that the Court would first have to rule on defendants' pending motion to dismiss. And because the outcome of the proceedings in the Seventh Circuit are likely to have an enormous impact on this case, any briefing prior to the Seventh Circuit's ruling would be largely superfluous, and thus a waste of the parties' and the Court's time. 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").

Plaintiff is also wrong to suggest that it would be appropriate for this Court to stay proceedings only if it were certain that the Seventh Circuit's ruling would resolve this case "conclusively on the merits." *See* Pl.'s Resp. at 6. If that were the standard, no stay would ever be issued pending the outcome of an appeal in another case, or even in the same case. A court may issue a stay "even if the parties and issues are not identical." *Heuft Systemtechnik*, 1993 WL 147506, at *3; *see also Landis*, 299 U.S. at 256 ("True, a decision in the cause then pending in New York may not settle every question of fact and law in suits by other companies, but in all likelihood it will settle many and simplify them all."). And in fact, the Seventh Circuit's ruling

is very likely to be enormously important – if not dispositive – to the resolution of this case. As explained in defendants' initial brief in support of a stay, the Seventh Circuit 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.[2] Thus, even if the Seventh Circuit's ruling does not entirely

[2] Sixteen district courts have considered RFRA challenges to the contraceptive coverage requirement brought by for-profit companies and/or their owners. Nine have ruled in defendants' favor. *See Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278 (W.D. Okla. 2012), *appeal pending*, No. 12-6294 (10th Cir.); *Conestoga Wood Specialties Corp. v. Sebelius*, __ F Supp. 2d __, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013), *appeal pending*, No. 13-1144 (3d Cir.); *Autocam Corp. v. Sebelius*, No. 1:12-cv-1096, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012), *appeal pending*, No. 12-2673 (6th Cir.); *Grote Industries, LLC v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012); *Korte v. U.S. Dep't of Health & Human Servs.*, __ F Supp. 2d __, 2012 WL 6553996 (S.D. Ill. Dec. 14, 2012); *Annex Medical, Inc. v. Sebelius*, No. 12-cv-2804, 2013 WL 101927 (D. Minn. Jan. 8, 2013), *appeal pending* (8th Cir.); *O'Brien v. HHS*, __ F. Supp. 2d __, 2012 WL 4481208 (E.D. Mo. Sept. 28, 2012), *appeal pending*, No. 12-3357 (8th Cir.); *Briscoe v. Sebelius*, No. 1:13-cv-285-WYD-BNB, ECF No. 25 (D. Colo. Feb. 27, 2013); *Gilardi v. Sebelius*, No. 1:13-cv-104-EGS, ECF No. 34 (Mar. 3, 2013); *but see, e.g., Tyndale House Publishers, Inc. v. Sebelius*, __ F. Supp. 2d __, 2012 WL 5817323 (D.D.C. Nov. 16, 2012). And the outcomes also slightly favor defendants in the appellate courts, where three circuits – the Third, Sixth, and Tenth – have ruled that plaintiffs are not entitled to injunctive relief pending appeal, *see Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144 (3d Cir. Jan. 29, 2013); *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012); while two circuits – the Seventh and Eighth – have reached the opposite conclusion, *see Grote v. Sebelius*, __ F.3d __, 2013 WL 362725 (7th Cir. Jan. 30, 2013); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012); *Annex Medical, Inc. v. Sebelius*, No. 13-1118 (8th Cir. Feb. 1, 2013); *O'Brien v. HHS*, No. 12-3357 (8th Cir. Nov. 28, 2012). The Supreme Court has also denied relief pending appeal in *Hobby Lobby*, albeit applying a more rigorous standard. *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12A644, 2012 WL 6698888 (Dec. 26, 2012) (Sotomayor, J., in chambers).

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.

Finally, plaintiff misses the point when it repeatedly emphasizes that this case should not be stayed because the district court proceedings in *Grote* have not been stayed. *See* Pl.'s Resp. at 2, 8. Defendants have not sought a stay in *Grote* because nothing is happening in the district court at this time. The court has already denied the plaintiffs' motion for a preliminary injunction. *See Grote Industries, LLC v. Sebelius*, __ F. Supp. 2d __, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012). Indeed, that is the ruling that is currently on appeal. Furthermore, defendants' motion to dismiss is already fully briefed, and the district court need not – and defendants would not expect it to – decide that motion until after the Seventh Circuit issues its opinion. Nor have the plaintiffs in *Grote* sought to move forward with summary judgment, as plaintiff here seeks to do. In short, the district court proceedings in *Grote* require nothing of the court or the parties at this time, and thus – in stark contrast to this case – the interests of judicial economy and the conservation of the parties' time and resources would not be served by a stay.

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 4th day of March, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 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