UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

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

PLAINTIFF TONN AND BLANK CONSTRUCTION, LLC'S
RESPONSE TO DEFENDANTS' MOTION TO STAY PROCEEDINGS

This case concerns important rights to religious liberty protected by the First Amendment and the Religious Freedom Restoration Act ("RFRA"). Defendants have mandated that Plaintiff Tonn and Blank Construction, LLC ("T&B") include in its employee health plan coverage for abortion-inducing drugs, contraception, sterilization, and related counseling on threat of onerous fines. T&B's request for a preliminary injunction against this Mandate—which would allow T&B to protect its rights to religious freedom while litigating this case—remains pending in this Court. (Doc. 4, Mot. for Prelim. Inj.) Given that the Seventh Circuit has twice granted similar relief pending appeal to other parties, *see Grote v. Sebelius*, No. 13-1077, 2013 WL 362725, at *4 (7th Cir. Jan. 30, 2013); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *4-*5 (7th Cir. Dec. 28, 2012), Defendants have now filed a motion indicating that they no longer oppose T&B's request, but seek to stay this case pending the outcome of the interlocutory appeals in *Korte* and *Grote*. (Doc. 38, Mot. to Stay ("Defs.' Motion").)

In response, T&B requests 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 plaintiff based on its RFRA claim at this time, to last until the pending appeals [in *Korte* and *Grote*] are resolved." (Defs.' Mot. at 2.) Indeed, Defendants' consent to the injunction comes whether or not this case is stayed. (*Id.*) T&B has no objection to Defendants' request that the injunction expire thirty days after the mandate issues in *Korte* and *Grote*, provided that the injunction can be extended, if appropriate, before that time. T&B does request, however, that the injunction include language prohibiting Defendants from enforcing the Mandate against T&B's insurer with respect to T&B's health plan, to ensure that T&B can get the mandated coverage removed from that plan. For the Court's convenience, T&B has attached a proposed order with language to that effect.

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 T&B operates. And *Grote* itself has not been stayed. It would be odd to stay this case for an appeal in another case that itself remains proceeding.

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 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).

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 *Korte* And *Grote* 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" T&B. *Landis*, 299 U.S. at 255. "[T]he fact that [T&B] is not a party in the [Seventh 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 T&B by extending the time within which it remains in legal limbo. The possibility of an unfavorable ruling is a contingency that T&B cannot ignore, as T&B could be subjected to onerous fines. (*See* Doc. 1, Compl. ¶¶ 47-51.) Additionally, T&B's health plan renews May 1 and must be renegotiated each year. (*See id.* ¶ 35.) Delaying these proceedings will extend the uncertain environment under which T&B currently operates, and this uncertainty will continue to hamper T&B's ability to budget, negotiate its health plans, and 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 T&B that has resulted from the uncertainty that already surrounds its 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, *Korte* and *Grote* are interlocutory appeals under 28 U.S.C. § 1292(a)(1). 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."). To give but one example, Defendants have argued that preliminary relief should be denied on the equities because the plaintiffs in those cases waited too long before filing suit. *See, e.g.*, *Korte*, 2012 WL 6757353, at *6 (Rovner, J., dissenting). Such an argument, if accepted on appeal, would have absolutely no bearing on the ultimate merits of any claim.

Further, even in the unlikely event that the Seventh Circuit would depart from its initial analysis that the plaintiffs were likely to succeed on the merits of their RFRA claim, *see id.* at *4-*5, any such reversal may ultimately have *no* impact on T&B. Although T&B's claims are similar to those raised in *Korte* and *Grote*, the parties in these actions are different. Both *Korte*

and *Grote* involve for-profit companies owned by *individuals* who seek to operate those companies consistently with their Catholic faith. *See Korte*, 2012 WL 6757353, at *1; *Grote*, 2013 WL 362725, at *1. T&B, by contrast, has a distinctly religious mission, as it was acquired to provide construction services to, and is closely affiliated with, *nonprofit organizations* that help provide the charitable works of the Catholic Church. (*See, e.g.*, Doc. 34, Pls.' Reply at 11.) Thus, if any for-profit company can assert RFRA rights, T&B is uniquely situated to do so. As T&B has indicated (*id.* at 10-11), it has a similar corporate structure to Tyndale House Publishers, Inc., a bible manufacturer also closely affiliated with religious entities. *See Tyndale House Publishers v. Sebelius*, No. 12-1635(RBW), 2012 WL 5817323 (D.D.C. Nov. 16, 2012). When granting preliminary relief, the *Tyndale* court noted that this "unique corporate structure serves to distinguish this case from other recent decisions" involving companies owned by individuals. *See id.* at *7 n.10. The same analysis could apply here.

Alternatively, should the Seventh Circuit adhere to the analysis in its initial decisions in *Grote* and *Korte*—that the plaintiffs 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, T&B contemplates moving for summary judgment seeking a permanent injunction solely on its RFRA claim, which T&B believes can be conclusively decided in its favor without extensive discovery. It would be efficient for the briefing on that claim to be undertaken contemporaneously with the briefing in the Seventh 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 for the Seventh Circuit's decisions in *Korte* and *Grote* could, in the end, harm judicial economy.

Fourth, and finally, Defendants' cited authorities do not require a different result. They rely primarily on *H&R Block*, but that decision *denied* the plaintiffs' motion to stay proceedings. The plaintiffs had sought a stay pending a ruling from the Seventh Circuit in a different case involving a similar issue. 2007 WL 2710469, at *1. While the Defendant conceded that the decision from the Seventh Circuit "would be helpful to the District Court," any appellate decision would not produce a result "that would control the District Court's ruling." *Id.* at *2. In addition, the district court pointed out that the plaintiff had failed to show that the facts of the two cases were the same. *Id.* at *3. For the reasons discussed, the same analysis applies in this case. A Seventh Circuit decision will not necessarily be controlling, and the facts are different.

Defendants also cite several cases challenging the Mandate that have been stayed pending appeal. (Defs.' Mot. at 4-5.) None of these cases, however, stayed an action pending proceedings in a different case. And the plaintiffs jointly moved for the stay; they did not oppose it. (*See* Doc. 54, Joint Mot. to Stay, in *Conestoga Wood Specialties Corp. v. Sebelius*, No. 5:12-cv-06744 (E.D. Pa. Jan. 15, 2013); Doc. 58, Joint Mot. to Stay, in *Korte v. U.S. Dep't of Health & Human Serv.*, No. 3:12-cv-01072 (S.D. Ill. Dec. 17, 2012); Doc. 54, Joint Mot. to Stay, in *Hobby Lobby Stores, Inc. v. Sebelius*, No. 5:12-cv-01000 (W.D. Okla. Dec. 10, 2012).) Here, T&B opposes the stay. A stay here would be particularly odd given that *Grote* has not been stayed. *See Grote Indus. v. Sebelius*, No. 4:12-cv-00134 (S.D. Ind., interlocutory appeal filed Jan. 9, 2013). It would be inequitable to permit *Grote* to proceed to the merits pending the Seventh Circuit appeal in that case, but to prohibit T&B from doing so in a different case.

CONCLUSION

For all of these reasons, the Court should grant T&B a preliminary injunction and should deny Defendants' Motion to Stay.

Respectfully submitted this 25th day of February, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2013, I filed the foregoing Plaintiff's Response to Defendants' Motion to Stay Proceedings with the Clerk of the United States District Court for the Northern District of Indiana, using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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