IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

CHRISTOPHER YEP, MARY ANNE YEP, AND TRIUNE HEALTH GROUP, LTD., *an Illinois corporation*, Plaintiffs, v. UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES (HHS); KATHLEEN SEBELIUS, *in her official capacity as* SECRETARY OF THE U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES; UNITED STATES DEPARTMENT OF THE TREASURY; TIMOTHY F. GEITHNER, *in his official capacity as* SECRETARY OF THE U.S. DEPARTMENT OF THE TREASURY; UNITED STATES DEPARTMENT OF LABOR; HILDA L. SOLIS, *in her official capacity as* SECRETARY OF THE U.S. DEPARTMENT OF LABOR, Defendants.	Civil Action No. 12-cv-06756

RESPONSE OF PLAINTIFFS CHRISTOPHER YEP, MARY ANNE YEP AND TRIUNE HEALTH GROUP, LTD. IN OPPOSITION TO DEFENDANTS' MOTION FOR STAY

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Seeking the proverbial second bite of the apple,[1] Defendants move to stay all further proceedings herein, on grounds not materially different than those already disposed of by this Court's Preliminary Injunction Order (Doc.50) and thus not properly open to reconsideration.

Perhaps to avoid being too obvious in that regard, Defendants' new motion purports to be raising only self-interested "efficiency" factors to be considered in an entirely different context, namely when two or more separate but arguably similar litigations are pending on similar adjudicatory trajectories. But the litigations to which Defendants contend this Court ought to defer are not "substantially similar" to this one in any way relevant to their motion. Moreover, the 'efficiencies' for which Defendants are arguing seem more in the nature of the mere 'convenience' of being excused by the requested stay from having to respond to the verified complaint and plaintiffs' discovery requests once such a responsive pleading is filed.[2]

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[1] Defendants filed the instant motion (PACER Document ["Doc."] 58) to stay on March 11, 2013, just one week after filing their notice of appeal (Doc. 53) of this Court's January 3, 2013, Preliminary Injunction Order (Doc. 50). This brief is timely filed pursuant to the Court's March 18, 2013, Minute Order (Doc. 60).

[2] Plaintiffs filed their amended complaint (Doc. 21) herein on October 15, 2012. In response to Defendants' November 9, 2012, motion to dismiss for lack of jurisdiction and for failure to state a claim (Doc. 24), Plaintiffs filed their amended motion for a preliminary injunction (Doc. 37) supported by Plaintiffs' Joint Declaration of Christopher and Mary Anne Yep (Doc. 36.3, hereafter "Yeps Decl.") and its Memorandum of Law in Support of the Motion for Preliminary Injunction and Opposition to the Motion to Dismiss (Doc. 36.1). On January 3, 2013, the Court issued its Order (Doc. 50) granting the Preliminary Injunction requested by Plaintiffs. While the granting of the preliminary injunction seemingly implies that the Court has jurisdiction and that there are claims in this case upon which relief can be granted, the Court in its related Minute Order (Doc. 49) issued that same day stated it was "address[ing] only the preliminary injunction at this time," effectively and indefinitely postponing its ruling on Defendants' still pending Motion to Dismiss. Federal Rule of Civil Procedure 12(4)(A) directs that if "the court. . . postpones its disposition [of a motion to dismiss] until trial, the responsive pleading must be served within 10 days after notice of the court's action." Defendants have failed to date to file a responsive pleading which in Plaintiffs' view is now long overdue. Therefore, in addition to denying Defendants' Motion for Stay, Plaintiffs also request the Court to either deny Defendants'

Finally, and of equally dispositive importance, Defendants' speculative 'judicial efficiency' arguments fall far short of overcoming the Seventh Circuit precedent 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 seems obvious, contrary to Defendants' argument here, that a stay should be even less appropriate for *interlocutory* appeals in *other* factually dissimilar cases raising similar but not identical legal 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 v. N. American Co.*, 299 U.S. 248, 255 (1936) (vacating stay). Accordingly, "[t]he underlying principle clearly is that '[t]he right to proceed in court should not be

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(footnote 2 cont.)
Motion to Dismiss or at least order Defendants, pursuant to FRCP 12(4)(A), to file their responsive pleading within 10 days after notice of the court's action.

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 someone else [*e.g.*, the nonmovant]," 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). Defendants have not and cannot make out such a "clear case of hardship or inequity" to them if a stay is not granted. On the other hand, for the reasons more fully set forth below, Plaintiffs are clearly prejudiced by any delay in obtaining the final judicial relief they seek in this case.

For all of these reasons, Defendants' motion to stay should be denied.

ARGUMENT

Christopher Yep, Mary Anne Yep and their closely and privately held for-profit business Triune Health Group, Ltd., (collectively "Plaintiffs") seek to enforce their rights under the RELIGIOUS FREEDOM RESTORATION ACT, 42 U.S.C. §2000bb-1 (2006), the ADMINISTRATIVE PROCEDURES ACT ("APA"), 5 U.S.C. *et seq*., and the Free Exercise, Free Association and Free Speech clauses of the FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION. (Amended Complaint, Doc. 21). Absent enforcement of these

Constitutional and statutory rights, Plaintiffs contend that under regulations promulgated by Defendants pursuant to the PATIENT PROTECTION AND AFFORDABLE CARE ACT ("PPACA", *see also* 42 U.S.C. § 300gg-13(a)(4); 45 C.F.R. § 147.130), they are being unconstitutionally coerced into providing their employees, including members of their immediate family employed at Triune, with access to abortifacient contraceptives, sterilization and related drugs and services and counseling. Plaintiffs allege that as ardent and faithful adherents of the Roman Catholic religion, providing such access would itself constitute material cooperation by them with intrinsic evil, putting at risk their immortal souls. (Yeps Decl. ¶¶ 23–30, 55).

It is beyond peradventure that, in its January 3, 2013, preliminary injunction order, explicitly premised on the analysis of the Seventh Circuit's injunction order in *Korte, et al. v. Sebelius, et al*., No 12-3841, 2012 WL 6757353 (7th Cir. December 28, 2012) (subsequently reiterated and reinforced in *Grote v. Sebelius,* No. 13-1077, 2013 WL 362725 (7th Cir. January 30, 2013)), this Court has already decided, adversely to Defendants' new stay motion, each of the factors under the traditional four factor test of stay analysis: (1) whether Defendant has made a strong showing that it is likely to succeed on the merits ("no"); (2) whether the Defendant will be irreparably harmed absent a stay ("no"); (3) whether issuance of the stay will substantially injure Triune and the Yeps ("yes"); and (4) where the public interest lies ("against"). *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Adams v. Walker*, 488 F.2d 1064, 1065 (7th Cir. 1973). That these prior findings bar the stay relief sought now is especially obvious, as of these four factors, the first two are the "most critical." *Nken,* 556 U.S. at 434. Both have, as noted, already been determined adversely to Defendants.

In *Korte*, the Seventh Circuit also held that the plaintiffs there (and therefore by unavoidable implication Plaintiffs here also) had

> established both a reasonable likelihood of success on the merits and irreparable harm, and that the balance of harms tips in their favor. RFRA prohibits the federal government from imposing a "substantial[] burden [on] a person's exercise of religion even if the burden results from a rule of general applicability" *unless* the government demonstrates that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000bb-1(a),(b). This is the strict-scrutiny test established in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L.Ed.2d 965 (1963), for evaluating claims under the Free Exercise clause. . . . It is an exacting standard, and the government bears the burden of satisfying it.

Korte, 2012 WL at 6757353 at *2. Thus, to the extent it was acknowledging the binding effect of *Korte*, this Court's January 3, 2013, preliminary injunction order also found for Plaintiffs on the third element of the applicable stay analysis here, namely whether allowing the government to enforce PPACA against Plaintiffs would substantially injure them. As the Seventh Circuit noted in *Korte*:

> The government also argues that any burden on religious exercise is minimal and attenuated, relying on [*Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir. Dec. 20, 2012)]. … With respect, we think [*Hobby Lobby*] misunderstands the substance of the claim. The religious-liberty violation at issue here inheres in the coerced coverage of contraception, abortifacients, sterilization, and related services, not—or perhaps more precisely, not only—in later purchase or use of contraception's or related services. … RFRA protects the same religious liberty protected by the First Amendment, and it does so under a more rigorous standard of judicial scrutiny; the loss of First Amendment rights "for even minimal periods of time, unquestionably constitutes irreparable injury."

* * *

> We also conclude the balance of harms tips strongly in the Kortes' favor. An injunction pending appeal temporarily interferes with the government's goal of increasing cost-free access to contraception and sterilization. That interest, while not insignificant, is outweighed by the substantial religious liberty interests on the other side. The cost of error is best minimized by granting an injunction pending appeal.

Id. at *4–*5. Against the backdrop of this preliminary injunction analysis, what of Defendants' instant motion, under standard "stay" analysis, remains to be decided or reconsidered? Really nothing material whatsoever.

Defendants attempt to suggest new and different grounds for the relief prayed for, namely whether in the interests of "judicial economy" proceedings herein ought to be stayed, pending "resolution" of the currently pending appeals in *Korte* and *Grote,* (Motion, p. 1).[3] But, in addition to the factors already decided adversely to them in this Court's January 3, 2013, Order (Doc. 50), Defendants' own authorities demonstrate that, to justify a stay Defendants at the threshold must show that all three elements, "claims, parties and available relief" in the cases to which they ask the Court to defer, are substantially the same, *and* that the stay requested will not work a particular hardship on the party opposing it. *Landis v. N. Am. Co.*, 299 U.S. 248, 258 (stay denied, where distinct utility companies brought multiple suits challenging the constitutionality of the same federal statute); *In re H & R Block Mortgage Corporation Prescreening Litigation*,

[3] Although they have yet to file it, Defendants assert that they also are intending to ask the Seventh Circuit to suspend further consideration of their appeal of the Court's preliminary injunction order herein, pending its determination of both the *Korte* and in *Grote* cases. Motion (Doc.58) at 2, n. 1. This request Defendants must do, presumably, for consistency's sake. But as discussed further below, such tactical maneuvers here and in *Korte* and *Grote* only makes all the more speculative the purpose of awaiting the final dispositions of such other cases here. *Infra*, at 9.

2007 WL 2710469 (N.D. Ind., September 12, 2007) (stay denied where movant failed to establish an "identity" of parties or their privies).[4]

Here the Plaintiffs are neither the same nor even distantly related in any way to the *Korte* or *Grote* plaintiffs, much less in privity with them. Not only are the parties here unrelated, there exist a myriad of key differences between and among the plaintiffs referenced that may prove highly relevant to key issues in these cases. For example, even were a publicly held corporation not entitled to express the religious convictions of its owners, a conclusion thrown into serious doubt in other contexts, (*see e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S.Ct. 876 (2011)), *how* closely a privately owned corporation need be held likely is a material issue. Here, Plaintiff Triune is solely co-owned by the individual plaintiffs, while in *Korte* and *Grote* the form and percentages of ownership shares vary. Similarly, to what extent the nature of the coverage at issue, *e.g.* whether self-insurance, group plans, ERISA governed plans, or a hybrid version, affects the scope of a company's alleged obligations, under the challenged HHS Contraception Mandate is also an issue. Similarly the kinds of coverages at issue also vary from case to case. These differences, too, militate against a stay of any of these proceedings. The three cases just are not "substantially similar" in

[4] *Contra Serlin v. Arthur Anderson & Co.*, 3 F.2d 221, 223–24 (7th Cir. 1993) (stay allowed where parties were identical and claims for relief were essentially identical); *Hoosier Energy Rural Electric Cooperative, Inc v. Exelon*, 2005 WL 4882703 (S.D. Ind.) (where "race to the courthouse" by the same parties regarding the same dispute resulted in parallel proceedings in two separate jurisdictions, stay issued in latter filed action in favor of originally filed action, and only pending disposition in the first filed action of motion to enjoin the second filed action).

In Defendants' only other cited case, *Ass'n of Irritated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081(E.D. Cal. 2008), the court granted the motion to stay pending appeal for reasons not at issue here and in part because the parties were in agreement that a stay would be appropriate, among other things. In any event, none of Defendants' federal district court decisions warrant ignoring the Seventh Circuit's *Korte* analysis, of course. *Smentek v. Dart*, 683 F.3d 373, 377 (7th Cir. 2012) (*citing Camreta v. Green*, 131 S. Ct. 2020, 2033 n. 7 (2011)); *Wirtz v. City of South Bend*, 669 F.3d 860, 862-863 (7th Cir. 2012) (district court decisions not precedential).

ways relevant to stay analysis. For this reason, too, Defendants' motion should be denied.

Defendants' failure to meet their burden on these stay factors is not outweighed by their wholly conclusory speculations about what issues in the *Korte* and *Grote* appeals the Seventh Circuit is "likely" to address, or which issues a "final" adjudication of these cases in the Seventh Circuit "may very well" decide. Motion, pp. 1, 3. *See e.g.*, *Grice Engineering, Inc. v J. G. Innovations, Inc.,* 691 F. Supp.2d 915, 921 (W. D. Wis. 2010) (where a movant's statements of "likely" outcomes was "simply too speculative to support a stay," and granting a stay would prejudice the opponent, stay denied). And the mere fact that a decision in a pending appeal may be "helpful" to a Court, has also never warranted suspending proceedings below pending such substantially unrelated appeals.

There is a good reason that mere speculation is not a sufficient ground for a stay. Any party opposing a stay can just as or possibly more readily speculate about efficiencies in their favor. Here, a material portion of the discovery that Defendants will have to provide will be the same in all three cases. This includes, for example, discovery regarding Defendants' allegedly "compelling interest" in enforcing PPACA's contraception mandate generally, and discovery regarding the extent to which the government has other, less intrusive, means available to it to enforce its alleged interest in providing contraceptives to the general public. *Korte* at *3. This would also include discovery proffered on the apparent "underinclusiveness" of the contraception mandate under PPACA. *See Brown v. Entertainment Merchants Assoc.*, 131 S. Ct. 2729, 2740, 2742 (2011) (underinclusiveness of video game legislation "raises serious doubts" about whether government was in fact pursuing interests it invoked) (*citing Church of Lukumi*

Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 546 (1993)). Having gathered and produced their discovery on these topics in any one of the three cited litigations, Defendants' burden of replicating the same production in the other two litigations will be *de minimis*.[5]

Finally, any stay of these proceedings will work a particularly egregious hardship on Plaintiffs here, another factor also fatal to Defendants' motion. *Landis v. North American Co.,* 299 U.S. at 255 (supplicant must make out clear case of hardship or inequity if there is even a fair possibility that the stay will work damage to someone else). This is because even as the preliminary injunctive order previously issued relieves the Plaintiffs of their *current* statutory obligation to provide coverage offensive to their religious beliefs under PPACA, the longer the controversy continues unresolved by a permanent injunction, the greater the accumulated potential fines the Plaintiffs face if a permanent injunction is not granted. [6]

Plaintiffs do not only face hardship by the threat of fines, but they will not be able to readily locate health plans which allow them to practice their faith until the insurance market understands what it can legally provide. Insurance providers are not likely to be satisfied with a preliminary injunction and will instead await final adjudication of these issues before providing annual coverage to Plaintiffs, which does not violate Plaintiffs'

[5] If past is prologue, of course, the government's initial discovery will have to be supplemented regularly, just to keep the extent of its exemptions fully up to date. Fed. R. Civ. P. 26 (e) (duty to supplement). As of the filing of the Court's *Korte* opinion, Defendants had already exempted more than 190 million employees from the same compliance burden they seek to impose on Plaintiffs here. *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1298 (D. Colo. 2012). *See also Korte*, at *5.

[6] Plaintiffs have proposed but, to date, the government has refused to agree that, in the event the Plaintiffs' lawsuit is ultimately unsuccessful, the government will not seek such fines and penalties from the period of time within which the litigation was pending including the time in which a preliminary injunction was in effect. Presumably this is because the government does not want to continue to expand the already materially significant scope of enforcement exemptions already granted administratively. *See, supra*, note 4.

beliefs. As such, even Defendants' promise to not enforce the Mandate while the Preliminary Injunction is in effect would not end Plaintiffs' hardships.

Plaintiffs also face the disproportionate hardship of the uncertainty the pendency of this litigation imposes over their day-to-day business operations. This ranges from time that management must spend away from their core business operations attempting to find alternative coverage, to the practical realities of attempting to keep in place alternative coverage commensurate with their goal of providing exemplary insurance coverage for all of their employees. In Interim Final Rules issued in August 2011, Defendants have acknowledged the burden that the uncertainty imposed by the implementation of the regulations at issue alone, even absent the challenges to implementation raised here, and in *Korte* and *Grote*. *See* 75 Fed. Reg. 41,730.

The bottom line here remains that, whatever the final disposition of Defendants' appeal of this Court's preliminary injunction order, the appeal does not deprive the Court of its obligation to continue to adjudicate Plaintiffs' Constitutional and statutory claims. *Chrysler Motors Corporation v International Union, Allied Industrial Workers of America, AFL-CIO*, 909 F2d 248, 250 (7th Cir. 1990); *Shevlin v. Schewe*, 809 F.2d 447, 450–51 (7th Cir. 1987). Indeed, Federal courts have a "virtually unflagging obligation," absent "exceptional circumstances" to exercise jurisdiction, when a case is properly before it. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819 (1976); *R.R. Street & Co., Inc. v. Vulcan Materials Co.,* 569 F.3d 711, 715 (7th Cir. 2009). *See also Cherokee Nations of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (federal courts have a strict duty to exercise its jurisdiction in a timely manner) (*citing Landis v. North American Co.*, 299 U.S. 248, 255 (1936)).

The Seventh Circuit has already held that enforcement of the PPACA will have a deleterious impact on parties like Plaintiffs, if enforced against them. Implicitly, by that holding, the Court also anticipated that Plaintiffs were entitled a prompt disposition of these their claims, regardless of the progress made by other plaintiffs in other litigations. Indeed, it is exactly because of such hardships on litigants that stays like those sought here are so disfavored, and why it is by now so well-settled that, absent exceptional circumstances not present here, a federal court's duty to exercise its jurisdictions, once properly evoked, is a "virtually unflagging" one.

Conclusion

WHEREFORE, for the reasons set forth herein, among others, Plaintiffs pray for the entry of an order denying Defendants' motion to stay, requiring Defendants to file a responsive pleading within ten (10) days of that Order, and for whatever other relief is justified in the premises.

Submitted this March 25, 2013.

s/ Samuel B. Casey
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CERTIFICATE OF SERVICE

The undersigned Plaintiffs' counsel, hereby certify that on March 25, 2013, a true and correct copy of the foregoing was caused to be filed electronically with this Court through the CM/ECF filing system and Defendants, listed below, were served by email.

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