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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Case No. 11-cv-03350-CMA-BNB

COLORADO CHRISTIAN UNIVERSITY,
Plaintiff,
vs.
KATHLEEN SEBELIUS, et al.,
Defendants.

Proceedings before BOYD N. BOLAND, United States
Magistrate Judge, United States District Court for the
District of Colorado, commencing at 1:32 p.m., August 31,
2012, in the United States Courthouse, Denver, Colorado.

WHEREUPON, THE ELECTRONICALLY RECORDED PROCEEDINGS
ARE HEREIN TYPOGRAPHICALLY TRANSCRIBED...

APPEARANCES

ERIC S. BAXTER, Attorneys at Law, appearing for
the plaintiff.

MICHELLE R. BENNETT, Attorney at Law, appearing
for the defendant.

TELEPHONIC MOTIONS HEARING

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1 P R O C E E D I N G S

2 (Whereupon, the within electronically recorded
3 proceedings are herein transcribed, pursuant to order of
4 counsel.)

5 THE CLERK: Court is in session.

6 THE COURT: We're here this afternoon in Case
7 11-cv-3350, Colorado Christian University against Sebelius
8 and others, in connection with the Defendants' Renewed
9 Motion to Stay Discovery. Mr. Baxter is on the phone for
10 the plaintiff, Mr. Bennett is on the phone for the
11 defendants. I have allowed counsel who office in remote
12 places, Washington -- a remote place, Washington, D.C., to
13 appear by telephone because this matter was reset at my
14 request based on a last-minute scheduling conflict.

15 Mr. Baxter, can you hear me?

16 MR. BAXTER: Yes. Thank you, Your Honor.

17 THE COURT: Mr. Bennett?

18 MS. BENNETT: Yes, Your Honor.

19 THE COURT: Oh, I'm sorry, Ms. Bennett.

20 MS. BENNETT: That's okay.

21 THE COURT: I see Michelle, but I read Michael.
22 I'm sorry.

23 All right. Also pending is an Unopposed Motion
24 for Extension of Deadlines. I've read the -- let's start
25 with the Motion to -- Renewed Motion to Stay Discovery,

1 which I have read, I've read the response. There have been
2 a number of supplemental authorities submitted. I've
3 reviewed my previous order, the objection to my previous
4 order, the decision of the district judge in connection with
5 my previous order. Ms. Bennett, I'll hear anything more you
6 have to say in support of your motion.

7 MS. BENNETT: Thank you, Your Honor.

8 I just -- I would just like to, I guess, highlight
9 a few of the -- as Your Honor knows, you consider the five
10 factors in determining whether to grant a stay. As I
11 understand you're aware, there are now three cases, nearly
12 identical to this one, that have been dismissed for lack of
13 jurisdiction based on the same arguments -- the same
14 jurisdictional arguments that defendants advance here in
15 their pending motion and, to date, no court has rejected
16 defendants' jurisdictional arguments.

17 It's defendants' assertion that it would be an
18 undue burden and expense on them to have to engage in
19 discovery at this point in the event that their Motion to
20 Dismiss is later granted. To give Your Honor a sort of
21 sense of the burden, as you know, there are three defendant
22 agencies in this case. Plaintiff's requests are rather
23 broad in applying to any employees, officers, agents of the
24 -- of the agencies, whether they had specifically anything
25 to do the rulemaking or not, but assuming, for the purposes

1 of this argument, that we could limit that to just people
2 that had some input into this rulemaking, we estimate that
3 there'd be approximately 150 people with responsive
4 documents to the requests that we would -- we would need to
5 pull documents from.

6 And not considering objections, which, as I'll get
7 into in a moment, we think most of the requests would entail
8 a lot of documents that would be privileged. We anticipate
9 that there could be several hundred thousands of pages of
10 responsive material. To give Your Honor an example, I spoke
11 to one employee at one component of one of the agencies who
12 looked only through her e-mails for documents responding to
13 just two specific document requests, and she excluded any e-
14 mails dealing with the litigation, it was just e-mails
15 dealing with the policy of the regulations, and found 495 e-
16 mails, about 20 percent of which had attachments. As I
17 said, most of those were privileged, but just to give you a
18 sense of the magnitude of discovery involved here.

19 As I said, we expect that most of the documents
20 that we would have -- that we haven't already given
21 plaintiffs as part of the administrative would be
22 privileged, either by the deliberative process privilege,
23 attorney-client and work-product would probably be the main
24 ones. As I said, we already produced to the plaintiffs the
25 administrative record, which consists of the agencies'

1 collection of non-privileged material that the defendants
2 relied on in promulgating the regulations. That was almost
3 200,000 pages. So to the extent that plaintiffs request
4 information that defendants relied on in the rulemaking, it
5 would really, at this point, only be seeking documents that
6 defendants have said either they didn't rely on or were
7 privileged, and as I'm sure Your Honor's aware, even
8 pulling, reviewing, redacting and logging these documents
9 would be extremely time-consuming. And as I said, in light
10 of the fact that the defendants have a pending Motion to
11 Dismiss, we think that that would be an undue burden,
12 particularly if the motion is later -- is later granted.

13 With respect to the second factor, the harm to
14 plaintiffs, plaintiffs waited nearly nine months after
15 discovery commenced in this case to start serving any
16 discovery. Defendants don't think that waiting a little bit
17 longer while the court resolves the jurisdictional issues
18 will cause plaintiffs any harm. As Your Honor had said, I
19 think the approximate time in this district is six months
20 for deciding a Motion to Dismiss. I don't know if that's
21 from the filing or the fully briefing, but defendants'
22 motion has been fully briefed since May 18th.

23 Plaintiffs don't claim that there will be any
24 decline in evidentiary quality or witness availability
25 during this time frame. Their -- their assertion of harm is

1 that, assuming the court has jurisdiction, they need a
2 ruling on the legality of the regulations in time for their
3 next plan year, which starts on July 1st of 2013. As we've
4 noted in almost every filing, though, that doesn't take
5 account of the safe harbor, which protects plans for an
6 additional year, into July 2014.

7 And I also think it's relevant in this case that
8 defendants have promised to amend the regulations by August
9 of 2013 at the latest, so even if the court were to conclude
10 that it had jurisdiction and provide a ruling by July 2013
11 when plaintiff's plan year starts, the new regulations
12 wouldn't be in -- would be in effect, at the latest, a month
13 later. And so we don't really see in this instance that
14 plaintiffs have really shown any harm from a temporary stay
15 of discovery until the court can resolve the jurisdictional
16 issues.

17 With respect to the last three factors, I think
18 mostly convenience to the court and the public interest. As
19 we indicated, a lot of the material that plaintiff seeks
20 will be objectionable based on privilege, based on burden,
21 based on relevance, and so although I do think we could
22 probably work out some of our differences, as plaintiffs
23 suggests in their response, I think there would also be a
24 lot of things that the parties wouldn't be able to work out
25 and would require the court to resolve some objections, or

1 some discovery disputes generally, and I think that that
2 would use up the court's time and resources and, which
3 again, would be an undue use of those resources if
4 defendants' motion is later -- a Motion to Dismiss is later
5 granted.

6 Just one additional thing. I think in plaintiff's
7 response they cite United Financial Casualty Company for the
8 proposition that a stay of discovery is unwarranted in this
9 district, even when the pending Motion to Dismiss raises
10 jurisdictional issues, and I just wanted to point out that
11 in that case there were seven defendants and only one of
12 them had moved to dismiss for lack of jurisdiction. That's
13 not the case here. As we said, if our motion is granted,
14 then that will resolve the case. Also, there wasn't a
15 situation there, like there is here, where similar motions
16 have been granted, and, of course, those are not binding on
17 this -- on this court, but we do think they're persuasive,
18 and so we would urge Your Honor to look at the cases that we
19 cite in our brief which did impose a stay of discovery in
20 other cases where there was a challenge to subject matter
21 jurisdiction pending.

22 And so based on those factors, Your Honor, we
23 would ask again that you stay the case -- or stay discovery
24 temporarily until -- just until the jurisdictional issue is
25 resolved.

1 THE COURT: The plaintiff has brought to my
2 attention Judge Kane's preliminary injunction granted in the
3 Hercules case. What impact -- what do you make of the
4 significance of that case?

5 MS. BENNETT: Your Honor, first of all, with
6 respect to the -- that case is quite different here, that
7 involved a for-profit plaintiff, which doesn't qualify for
8 the safe harbor, and so -- and is not -- at least as it is
9 intended now -- is not going to benefit from the amendments
10 to the regulations that the agency is currently making, so
11 we didn't raise any jurisdictional arguments in that case,
12 and so --

13 THE COURT: So you --

14 MS. BENNETT: -- that doesn't impact the Motion to
15 Dismiss that we filed.

16 With respect to any discovery, the parties are --
17 first of all, we're still deciding whether to appeal that
18 case, and so the court has ordered us to meet, I think it's
19 near the end of October, to come up with some sort of a plan
20 for the rest of the case, and plaintiffs in that case have
21 indicated to me that they do not intend to seek any or will
22 only seek minimal discovery, so to the extent that
23 plaintiffs are suggesting that, well, you're going to have
24 to produce a bunch of stuff in that case, so what's the
25 burden here, I think that's just -- at least at this point,

1 based on what plaintiff's counsel in that case has told me
2 -- is not an issue.

3 THE COURT: So did I understand you to say that the
4 Motion to Dismiss in Judge Kane's case is not based on a
5 lack of jurisdiction?

6 MS. BENNETT: That's right, Your Honor, it's only
7 based on --it's based on the merits, it's based on failure
8 to state a claim. We have not raised any jurisdictional
9 arguments in that case and, again, that's because for-profit
10 organizations don't qualify for the enforcement safe harbor,
11 nor are they expected to benefit from the amended
12 regulations that the agency is currently working on.

13 THE COURT: Thank you.

14 Mr. Baxter?

15 MR. BAXTER: Thank you, Your Honor.

16 Let me respond first to your question about the
17 Hercules litigation, and then I'll try to respond of each of
18 Ms. Bennett's points after that.

19 The Hercules decision is significant because it
20 shows that there is substantial merit to the party's claim.
21 The judge in that -- Judge Kane in that case found there was
22 a substantial likelihood of success on the merits, and it's
23 not correct that the safe harbor protects non-profit
24 entities to the extent that is implied. The safe harbor
25 simply says that the government will not enforce or seek

1 penalties against a non-profit that is in violation of the
2 law, but in related proceedings, in the Wheaton case, the
3 Wheaton College case, defendants have already acknowledged
4 that the mandate is in fact -- will, in fact, still be in
5 effect against non-profits and they will be subject to
6 private enforcement claims which are allowed -- which are
7 provided under ERISA, ERISA's link into the Affordable Care
8 Act. So the reality of the matter is that on July 1st,
9 2013, Colorado Christian will be subject to the mandate, it
10 will be subject to potential private enforcement suits
11 regardless of the safe harbor.

12 I'd also like point out that even if there's no --
13 no discovery from Hercules, which is I'm not aware if the
14 plaintiff in that case decided he will seek discovery or
15 not, with 26 cases pending there's bound to be discovery in
16 one case or another, and there's no harm by requiring the
17 plaintiffs to go -- or the defendants to go forward with
18 their discovery obligations at this time.

19 It's also incorrect -- I think that there are some
20 kind of (inaudible) out there that all of the courts are
21 deciding -- you know, agree that there's no jurisdiction.
22 In the Nebraska case that the defendants cite, the judge
23 there, on standing, didn't reach any issues that are present
24 in this case. Several of the plaintiffs were not directly
25 subject to the regulation, and the court found that they

1 didn't have standing, and the parties that were directly
2 subject to the regulation were grandfathered, and so they --
3 they also weren't required to comply with the mandate.

4 In the two DC cases that have been decided, Judge
5 Boasberg's case looks at the merits. Judge Huvelle at the
6 hearing just last week, or the last two weeks, indicated
7 that she was not happy that she hadn't realized until the
8 day before the hearing that they were companion cases and
9 she was not comfortable having different decisions coming
10 out of the same district, and both of those decisions rely
11 on the same circuit opinions from the Third Circuit while
12 distinguishing DC cases, and there will be appeals, and
13 there's a Motion for Reconsideration on one of them and an
14 appeal had been filed in the other, and so I don't think
15 there's any indication that those cases will necessarily be
16 upheld or that other courts won't decide otherwise.

17 So, in essence, the claims here are the same they
18 were at the time that the defendants first filed their
19 motion for a stay. At that time they alleged that there was
20 going to be -- you know, there was going to be a
21 jurisdictional motion to dismiss, the court was aware of
22 that, the fact that there could be a dismissal in this case,
23 and even on the appeal up to Judge Arguello -- although she
24 denied the appeal for timeliness, she acknowledged that she
25 had authority if she thought there was some problem to grant

1 the relief that the defendants seek, and she chose not to.

2 So there's really nothing new here that would
3 justify a different ruling. It's really almost an attempt
4 to get around the fact that, you know, the clearly
5 (inaudible) standard from the -- from your first order
6 denying the stay back in January. Or February.

7 As far as the burden, again, there's nothing
8 different here than what was known at the time of the first
9 motion. There are procedures for, you know, narrowing
10 discovery or seeking protective orders that are available to
11 defendants. They have never consulted with us about the
12 burden of discovery. Today is the first time I've heard
13 about the number of people they think would be involved, or
14 the number of pages, and we're certainly willing to consult
15 with them on that and, if necessary, resolve any of those
16 issues by motion.

17 As far as Ms. Bennett mentioned that there's no
18 concern about the decline of evidentiary quality, again,
19 that's always a concern, there's -- with time documents are
20 lost. If we seek a 30(b)(6) or other deposition, the
21 knowledge and ability of that witness to prepare for the
22 deposition is impaired as time passes, and so we do think
23 that there is -- there is prejudice to Colorado Christian if
24 discovery is further stayed.

25 So finally, I would just reiterate that, you know,

1 this is -- if the defendants really wanted to avoid
2 discovery, that is completely within their control. They
3 could -- you know, they claim that they don't seek to impair
4 the religious liberty rights of the plaintiffs in this or
5 any of the other cases, that's why they put the safe harbor
6 in place, but the safe harbor's incomplete. There -- it
7 would not be difficult for them to simply grant a full
8 exemption, and that was requested of them in the Wheaton
9 College case, they refused to do that, and so by keeping the
10 pressure of the final regulation, which will take effect
11 against Colorado Christian University on July 1st, you know,
12 they've showed that they're not willing to do what it would
13 take to really put this -- you know, really take the burden
14 off the organizations like Colorado Christian, and so for
15 that reason alone, I would urge the Court to deny their
16 motion for a stay.

17 THE COURT: Thank you.

18 Ms. Bennett, anything more?

19 MS. BENNETT: Sure, Your Honor, just to follow-up
20 on a few points that Mr. Baxter made.

21 With respect to the private enforcement, I would
22 urge Your Honor to -- which you probably already have looked
23 at the Wheaton College decision, the court explicitly
24 addressed that issue and said that the speculative nature of
25 that did not create a standing or a ripe claim. And I'd

1 also note that in that case the college's plan year start in
2 January of 2013, whereas here, it's not until July of 2013,
3 and so as I mentioned before, the new regulations, the
4 agency intends to finalize them by August of 2013, so a
5 month later, and so the courts, both in Wheaton College and
6 in Belmont Abbey both addressed the speculative nature of
7 the private enforcement and said that that's not sufficient
8 to create jurisdiction.

9 I would also note that if you read the Wheaton
10 College decision, there's absolutely nothing in there about
11 the court in some way feeling bound by -- to adopt Judge
12 Boasberg's decision. She -- Judge Huvelle certainly
13 considered arguments that the parties made, had oral
14 argument on the issue and wrote her own separate decision,
15 and so there's no reason to think that it was in some way
16 because she felt bound by Judge Boasberg's decision.

17 With respect to plaintiff's assertion that there
18 -- well, with all these cases surely there will be discovery
19 in one. At this point, this is the only case where any
20 party has sought discovery against the defendants. We have,
21 as I indicated, moved to dismiss for lack of jurisdiction
22 all of the cases brought by non-profits, and we've also, in
23 instances where there has been some sort of moving forward
24 of discovery, a Rule 26 conference or what have you, we have
25 also moved to stay discovery and will continue to do so, and

1 so we don't think that provides any basis that eventually
2 there may be discovery in one of these cases to allow us to
3 go forward here.

4 And I think -- oh, with respect to plaintiff's
5 concern about evidentiary quality, first of all, I would
6 notice that this is the first time they've mentioned that,
7 it wasn't in their response, but as defendants indicated
8 before, we have taken measures to preserve documents and
9 data in the event that discovery is ultimately needed, and
10 so there's no concern about the evidentiary quality in that
11 regard, and so, again, for the reasons we stated, we would
12 request that the Court grant our motion.

13 THE COURT: Thank you.

14 The Defendants' Renewed Motion to Stay Discovery
15 is denied. Let me begin by emphasizing what is not before
16 me, and that is the Motion to Dismiss. I make no judgment
17 on the merits of that, that's a matter which the district
18 judge has reserved to herself, and I'm not going to attempt
19 to anticipate what her ruling would be based on the strength
20 or weaknesses of decisions in other jurisdictions.

21 Turning then to the five factors appropriately
22 considered with respect to the Motion to Stay, I find that
23 the interests of the plaintiff in proceeding expeditiously
24 to determination of this important issue -- which is an
25 important issue of public concern -- so that brings in also

1 the public interest, is substantial. This is an important
2 case. There are risks of enforcement against the plaintiff
3 which a stay would exacerbate, and so I find that those
4 interests, the interest of proceeding expeditiously and the
5 public interest weigh heavily in favor of having the matter
6 move forward and against a stay.

7 There is always burden on all parties to
8 litigation. Here, there's an argument that the burden is
9 undue on the defendants. I don't allow discovery which
10 imposes an undue burden. I allow that discovery which is
11 appropriate and necessary to the reasonable resolution of a
12 case. So if the discovery sought by the plaintiff is unduly
13 burdensome, that matter can be brought before me, and I'll
14 consider the arguments and make a decision on that so I can
15 address the burden issue separately and more precisely than
16 through an overall stay.

17 The convenience of the Court is not seriously
18 implicated either way. We are here to resolve disputes and
19 to prepare disputes for resolution, and so I find that that
20 doesn't -- that factor doesn't weigh either way, and there
21 are no non-party interests that I am aware of which weigh
22 heavily towards a stay. So I'm going to deny the Motion to
23 Stay for those reasons.

24 That brings us to the Unopposed Motion for
25 Extension of Deadlines. If I have understood that motion,

1 what you are seeking is an extension by which the defendants
2 must respond to the currently existing and outstanding
3 discovery of -- which would take that to October 1st. A
4 cutoff of the discovery -- I mean, an extension of the
5 cutoff discovery to two months after that, so that would be
6 December 3rd, and a dispositive motion deadline extension to
7 approximately a month after that, which would be giving you
8 a little extra time because of holidays surroundings there,
9 around January 11.

10 MR. BAXTER: Your Honor, this is --

11 THE COURT: Yes.

12 MR. BAXTER: -- this is Eric Baxter, if I may. I
13 think that we had asked -- I'm sure if you're assuming we
14 had asked for what you're ruling, we'd asked for December
15 29th for discovery cutoff, and then the dispositive motions
16 30 days after that. If we had from the date that the
17 government's responses were originally due, which was August
18 15th, we would have had 75 days after that for the discovery
19 cutoff, which would have put us at least -- I guess,
20 assuming that there's -- if the relief in the 30-day
21 requests from today were granted, that would put us into the
22 middle of December for the discovery cutoff deadline, and
23 then we would ask for two extra weeks after that just to
24 make sure -- just for clarification.

25 THE COURT: So I've misunderstood. What -- when do

1 you want the discovery -- the currently pending -- the
2 responses to the currently depending -- pending -- let me
3 start over. When do you want responses to pending discovery
4 due?

5 MR. BAXTER: So we had agreed to 30 days from
6 today, which would roughly be the 30th of September or
7 October 1st, that part's correct.

8 THE COURT: All right. And then a cutoff of what?

9 MR. BAXTER: I think we asked for December 29th for
10 the discovery cutoff, and then January 28th for the
11 dispositive motion.

12 THE COURT: All right. And that's -- those
13 extensions that you've said are what you still want, is that
14 right?

15 MR. BAXTER: Correct.

16 THE COURT: All right.

17 Do you agree with that, Ms. Bennett?

18 MS. BENNETT: Yeah, we have no objection to that.

19 THE COURT: All right. I will grant the Unopposed
20 Motion for Extension of Deadlines as follows: Responses to
21 currently outstanding discovery are due on October 1, the
22 discovery cutoff is extended to December 29th, and the
23 dispositive motion deadline is extended to January 28th,
24 2013.

25 MR. BAXTER: Your Honor, this is Mr. Baxter

1 again --

2 THE COURT: Yes, sir.

3 MR. BAXTER: -- and I apologize to make this
4 difficult.

5 Since we are -- since your order has just
6 requested us that number of days and the 29th falls on a
7 Saturday, I'm wondering if we can just for clarity say, you
8 know, January 2nd for the discovery cutoff deadline, which
9 puts us right past the first holiday, and then February --
10 February -- or, yeah, I guess that would be February 1st for
11 the dispositive motion deadline.

12 THE COURT: Any objection to that, Ms. Bennett?

13 MS. BENNETT: No, Your Honor.

14 THE COURT: All right, that's what I'll do then.
15 Let me make sure I've got it right. Responses due October
16 1; the discovery cutoff, January 2nd, 2013; the dispositive
17 motion deadline, February 1st, 2013, right?

18 MR. BAXTER: Correct.

19 THE COURT: Okay.

20 Mr. Baxter, anything else this afternoon?

21 MR. BAXTER: Nothing. Thank you, Your Honor.

22 THE COURT: Ms. Bennett?

23 MS. BENNETT: No, Your Honor. Thanks again for
24 allowing us to appear via phone.

25 THE COURT: Yes, thank you for making yourselves

1 available. Good day.

2 MR. BAXTER: Thank you, Your Honor.

3 THE CLERK: Court is in recess.

4

5 (Whereupon, the within hearing was then in
6 conclusion at 1:59 p.m. on August 31, 2012.)

7

8 I certify that the foregoing is a correct
9 transcript, to the best of my knowledge and belief, from the
10 record of proceedings in the above-entitled matter.

11

12 /s/ Bonnie Nikolas

September 04, 2012

13 Signature of Transcriber

Date

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