IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

THE RELIGIOUS SISTERS OF MERCY, *et al.*, *Plaintiffs*, v. THOMAS E. PRICE, M.D., Secretary of the United States Department of Health and Human Services, *et al.*, *Defendants*.	No. 3:16-cv-386
CATHOLIC BENEFITS ASSOCIATION, *et al.*, *Plaintiffs*, v. THOMAS E. PRICE, M.D., Secretary of the United States Department of Health and Human Services, *et al.*, *Defendants*.	No. 3:16-cv-432

DEFENDANT UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S OPPOSITION TO *CBA* PLAINTIFFS' MOTION FOR ADDITIONAL STAY

Defendants have asked this Court to stay this litigation and remand the United States Department of Health and Human Services ("HHS") regulation at issue in these consolidated cases to HHS so that HHS may be given the opportunity to assess the necessity, reasonableness, and efficacy of the challenged aspects of the regulation in light of Plaintiffs' claims and another district court's conclusion that certain similar claims are likely to succeed. *See* Defs.' Mot for Voluntary

Remand and Stay ("Defs.' Mot.") (May 26, 2017), ECF No. 45. In response, the *Catholic Benefits Association* ("*CBA*") Plaintiffs have not filed an opposition to Defendants' request for a remand of the regulation to HHS and a stay of these proceedings, but rather have filed a motion that purports to seek an "additional stay directed at Defendant" the United States Equal Employment Opportunity Commission ("EEOC"), supposedly "to maintain the status quo while HHS revisits its regulation" and "until this Court rules on" the *CBA* Plaintiffs' prior "motion for a temporary restraining order." *CBA* Pls.' Mot. for Additional Stay in Response to Defs.' Mot. for Remand and Stay at 2, 9 ("*CBA* Pls.' Mot.") (May 30, 2017), ECF No. 46. But whereas Defendants' motion seeks a temporary stay *of this litigation*, the *CBA* Plaintiffs' motion asks this Court to temporarily stay certain *enforcement* by the EEOC. *See id.* at 9. The *CBA* Plaintiffs, therefore, do not seek a stay in the same sense that Defendants seek a stay. The *CBA* Plaintiffs do not seek an "additional stay"—they seek a mandatory injunction against the EEOC. The *CBA* Plaintiffs provide no legal or factual support for their novel motion, and their attempt at injunctive relief should be denied for all of the reasons discussed below, or any one of them.

As a preliminary matter, the *CBA* Plaintiffs have not brought their motion under Federal Rule of Civil Procedure 65 ("Injunctions and Restraining Orders"). They have not addressed the familiar *Winter*/*Dataphase* factors that govern the issuance of injunctions. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc).[1] The *CBA* Plaintiffs' "motion" thus "request[s] . . . a court order"

[1] *Cf. CBA* Pls.' Op. Br. in Supp. of Emer. Mot. for TRO ("*CBA* Pls.' TRO Mot.") (Dec. 28, 2016), ECF No. 4 (*CBA*, No. 3:16-cv-432) (addressing the *Winter*/*Dataphase* factors at least as to HHS's regulation). The *CBA* Plaintiffs represent that their TRO motion remains undecided. *See CBA* Pls.' Mot. at 2, 9. *But see* Order (Dec. 30, 2016), ECF No. 6 (*CBA*, No. 3:16-cv-432) (under seal); Am. Order Staying Enforcement (Jan. 23, 2017), ECF No. 17 (*CBA*, No. 3:16-cv-432). Regardless, it is not at all clear that the *CBA* Plaintiffs' TRO motion even attempts to address certain of the *Winter*/*Dataphase* factors—irreparable harm, the balance of the equities, and the public interest—

enjoining the EEOC but fails to "state with particularity the grounds for seeking the order," Fed. R. Civ. P. 7(b)(1), and does not provide adequate "notice to [Defendants]" of any request by the *CBA* Plaintiffs for a "preliminary injunction," Fed. R. Civ. P. 65(a)(1); *cf. James Luterbach Const. Co., Inc. v. Adamkus*, 781 F.2d 599, 603 n.1 (7th Cir. 1986) ("Rule 65(a)(2) of the Federal Rules of Civil Procedure seems to require a separate motion for temporary relief when it refers to 'an application for a preliminary injunction'" (quoting superseded version of Rule 65)). *See generally Dakota Access, LLC v. Archyambault*, No. 1:16-cv-296, 2016 WL 5107005, at *3 (D.N.D. Sept. 16, 2016) (Hovland, J.) ("It is well-established that the movant has the burden of establishing the necessity of a temporary restraining order or a preliminary injunction."). The *CBA* Plaintiffs' motion should be denied for this reason alone.[2]

Nonetheless, the *CBA* Plaintiffs' strategy is revealing, and confirms that even were they to file a proper motion for injunction against the EEOC, it would fail for at least three independent reasons. First, by skirting any meaningful discussion of the irreparable injury prong of the *Winter*/*Dataphase* test—"an *essential* part of that test," *see H&R Block Tax Servs., LLC v. Acevedo-Lopez*, 742 F.3d 1074, 1077 (8th Cir. 2014)—the *CBA* Plaintiffs have effectively conceded that they cannot "demonstrate that irreparable injury is *likely* in the absence of an injunction" against the EEOC, *Winter*, 555 U.S. at 22. In their present motion, the *CBA* Plaintiffs

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as to the EEOC. *Cf. CBA* Pls.' TRO Mot. at 20 (addressing these factors with reference to HHS's regulation). In any event, Defendants respectfully request the opportunity to respond to any proper motion for an injunction against the EEOC.

[2] As the *CBA* Plaintiffs acknowledge, *see CBA* Pls.' Mot. at 3-4, they have once before requested an injunction against the EEOC without filing a motion under Federal Rule of Civil Procedure 65: in their opposition to Defendants' motion for technical correction of this Court's December 30, 2016 Order, *see CBA* Pls.' Response to Defs.' Exped. Mot. for Tech. Correction at 2 (Jan. 20, 2017), ECF No. 15 (*CBA*, No. 3:16-cv-432). This Court granted Defendants' motion for technical correction but did not grant the injunction the *CBA* Plaintiffs requested in their opposition. *See* Am. Order Staying Enforcement (Jan. 23, 2017), ECF No. 17 (*CBA*, No. 3:16-cv-432).

suggest that they will face irreparable harm absent an injunction because they "would remain exposed to EEOC enforcement actions." *CBA* Pls.' Mot. at 3. This bare allegation does not satisfy the *CBA* Plaintiffs' burden of establishing irreparable harm.

Indeed, the absence of any factual support for the *CBA* Plaintiffs' alleged injuries is telling. Among the *CBA* Plaintiffs are two national membership organizations, *see CBA* Pls.' Am. Compl. ¶¶ 36, 44 (March 29, 2017), ECF No. 44, one of which (CBA) "has over 880 employer members plus over 5,000 member Catholic parishes, covering more than 90,000 employees and their families," *id.* ¶ 53. Yet the *CBA* Plaintiffs have not identified even *one* member who is subject to an allegedly injurious EEOC investigation under Title VII, notwithstanding that, as the *CBA* Plaintiffs themselves admit, the EEOC's interpretation of Title VII that they purport to challenge here had "already taken effect against [CBA]" members, *id.* ¶ 14, *years* before the *CBA* Plaintiffs filed suit, *see id.* ¶¶ 190-91; *cf. id.* ¶¶ 4, 160-70 (stating that insurance companies have cited HHS's regulation, not the EEOC, in explaining allegedly injurious changes to two CBA members' employee health benefit plans).

In addition, in the over five months since this action was filed, the *CBA* Plaintiffs have likewise failed to identify a single circumstance where one of their members has been subjected to an allegedly injurious investigation by the EEOC, "undercut[ting] the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggest[ing] that there is, in fact, no irreparable injury." *Avia Sports, Inc. v. Fingerhut Direct Mktg., Inc.*, No. 09-cv-1091, 2010 WL 2131007, at *1 (D. Minn. May 25, 2010). Nor have the *CBA* Plaintiffs provided this Court with any basis for concluding that, going forward, such an EEOC investigation or enforcement action is probable. Lacking such evidence, the *CBA* Plaintiffs must resort to referencing an amicus brief, filed more than nine months ago by the EEOC in litigation between other private parties, to assert

a "risk of enforcement . . . by the EEOC." *See CBA* Pls.' Mot. at 7. Clearly, an amicus brief in an unrelated action does not constitute a threat of irreparable injury against the *CBA* Plaintiffs that is "real," "substantial," and "immediate." *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983).

Second, and more fundamentally, CBA's failure to identify a member subject to an EEOC investigation or enforcement action is one reason (among many) why CBA lacks standing to sue the EEOC on its individual members' behalves. *See United Food & Comm. Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 554 (1996) (the associational standing "test's first requirement" is "that at least one of the organization's members [must] have standing to sue on his own"); *see, e.g.*, *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1206 (D.C. Cir. 2013) ("When a petitioner claims association standing, it is not enough to aver that unidentified members have been injured. Rather, the petitioner must specifically identify members who have suffered the requisite harm."); *Funeral Consumers Alliance, Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 344 (5th Cir. 2012) ("An organization lacks standing if it fails to adequately allege that there is a threat of injury to any individual member of the association and thus fails to identify even one individual member with standing." (alterations omitted)).[3]

Third, even if the *CBA* Plaintiffs had identified a cognizable threat of injury by the EEOC, their claims against that agency still could not succeed because they have not identified any final agency action subject to judicial review. *See Standing Rock Housing Auth. v. EEOC*, 585 F. Supp. 2d 1112, 1118 (D.N.D. 2008) (Hovland, J.) ("Under the Administrative Procedure Act . . . , a

[3] The *CBA* Plaintiffs have not only failed to identify a CBA member injured by the EEOC—they also have not identified at all any of their members, other than the three who are named Plaintiffs (out of the almost 6,000 CBA members total), to the Court or to Defendants. As such, even if the Court were to grant the *CBA* Plaintiffs' request for an injunction against the EEOC as to "the Catholic Benefits Association and its members and the Catholic Medical Association and its members," *CBA* Pls.' Mot. at 9, without knowing the identities of those members, it is not clear how the EEOC could comply with such an injunction.

federal court can only review 'final' agency actions." (quoting 5 U.S.C. § 704)). This Court is familiar with the EEOC's enforcement procedures as to private employers like the *CBA* Plaintiffs, *see id.* at 1116-17, and has already held that a challenge to an EEOC administrative subpoena—issued in the course of an ongoing EEOC enforcement action—is not ripe for, among other reasons, lack of final agency action, *see id.* at 1118-20. Here, where the *CBA* Plaintiffs have not even identified an impending (much less pending) EEOC investigation against any of their members, and instead attempt an abstract challenge to a statement on the EEOC's website, *see CBA* Pls.' Am. Compl. ¶ 189; *CBA* Pls.' Mot. at 6, there is no final agency action by the EEOC that this Court may review. Nor do EEOC amicus briefs suffice. *See Cinemark USA, Inc. v. U.S. Dep't of Justice*, No. 3:99-cv-183, 2000 WL 915091, at *4-6 (N.D. Tex. July 6, 2000) (holding that an agency amicus brief is not final agency action) (collecting cases). Of course, the lack of final agency action by the EEOC in this case does not leave employers like CBA members unable to pursue their challenge as necessary. As this Court and other courts have recognized, "'[i]f and when the EEOC . . . files suit in district court" against an employer, "the issue . . . will come to life, and the [employer] will have the opportunity to refute the charges.'" *Standing Rock Housing Auth.*, 585 F. Supp. 2d at 1120 (quoting *Georator Corp. v. EEOC*, 592 F.2d 765, 768 (4th Cir. 1979)); *see id.* (collecting cases).

Defendant the EEOC respectfully requests that the Court deny the *CBA* Plaintiffs' motion for an "additional stay"—a request for an injunction that fails to conform to the Federal Rules, that ignores the relevant factors, and that founders at multiple thresholds—and grant Defendants' motion for a voluntary remand and a stay of this litigation.[4]

[4] For the reasons Defendants have stated, *see* Defs.' Mot. at 4 n.5—including the *CBA* Plaintiffs' own assertion that their case "stands or falls" on their claims against HHS, *CBA* Pls.' TRO Mot. at 8; *see also CBA* Pls.' Mot. at 5 (stating that the EEOC "serve[s] as a backup" to HHS)—

Dated: June 13, 2017

Respectfully Submitted,

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Defendants continue to believe that remanding HHS's regulation to that agency and staying these consolidated cases in their entirety is the most appropriate and efficient course, and would avoid "piecemeal litigation," *see Sperry Rand Corp. v. Larson*, 554 F.2d 868, 871 n.3 (8th Cir. 1977).

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2017, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ *Adam Grogg*
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