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February 17, 2017

VIA ECF

The Honorable Susan Richard Nelson
United States District Court
774 Federal Building
316 N. Robert Street
St. Paul, MN 55101

Re: *Thrivent Financial for Lutherans v. Thomas Perez and U.S. Department of Labor*
Court File No. 0:16–cv–03289–SRN–HB

Dear Judge Nelson:

Thrivent Financial for Lutherans ("Thrivent") opposes the Department of Labor's ("DOL") letter request to stay proceedings in this matter.

At the outset, DOL's request does not comply with Local Rule 7.1. This Court entered a Scheduling Order on October 20, 2016, setting a March 3, 2017 hearing date to adjudicate this case through cross-motions for summary judgment. DOL's request to stay proceedings and modify that scheduling order should have been submitted by formal notice and motion pursuant to Local Rules 16.3(a) and 7.1(b), not by informal letter request. This is particularly true because any stay could significantly prejudice Thrivent, and because the request involves substantial legal issues that cannot be fully addressed through letters to the Court. The request for a stay should be denied on that basis alone. *See Stephens v. Fed. Nat'l Mortg. Ass'n*, No. 12-2453, 2013 WL 656611, at *2 (D. Minn. Jan. 28, 2013) (denying motion to amend where the party has "not submitted a proper motion to the Court"), *R&R adopted*, 2013 WL 655513 (D. Minn. Feb. 22, 2013).

If the Court reaches the merits of the request, it should be denied because DOL has not satisfied the requirements for a stay. The party seeking a stay must demonstrate that it will suffer a "specific hardship or inequity if he or she is required to go forward." *Daywitt v. Minnesota*, No. 14-cv-4526 (WMW) (LIB), 2016 WL 3004626, at *5 (D. Minn. May 24, 2016). DOL's burden is "a heavy one," and thus "a presumption favors the party opposing a stay." *Id.*; accord *Bae Sys. Land & Armaments L.P. v. Ibis Tek, LLC*, 124 F. Supp. 3d 878, 890 (D. Minn. 2015) ("[A] stay is the exception, and not the rule.") (quotation marks and citation omitted).

DOL attempts to meet its burden by asserting that there is a "potential for change to the rulemaking" at issue based on the February 3, 2017 Presidential Memorandum directing the Secretary to "examine the Fiduciary Duty Rule." DOL thus argues that, because it is *possible* the rule could someday change in a way that could moot Thrivent's claim, the Court should refrain indefinitely from addressing fully-briefed motions for summary judgment. DOL's argument fails for a number of reasons.

First, DOL does not assert that it would suffer *any* hardship or inequity in the absence of a stay. DOL's bald assertion that it would be efficient to stay proceedings is insufficient under this Court's precedents to satisfy DOL's heavy burden.

Second, DOL's request rests on the speculative assertion that it "*could* act to revise or rescind the challenged provision." But the Presidential Memorandum does not instruct DOL to change the provisions challenged in this litigation (and such a hypothetical instruction would be of questionable validity under the Administrative Procedure Act in any case). Instead, it directs DOL to "prepare an updated economic and legal analysis" on specified topics related to the Fiduciary Duty Rule, and to consider revising or rescinding the rule in light of the results of that analysis. But DOL claims already to have *extensively* considered each of the specified topics when it conducted the existing rulemaking. *See, e.g.*, *Chamber of Commerce of the United States of Am. v. Perez*, Mem. in Supp. of Defs.' Consol. Opp'n to Pls.' Mots. for Summ. J. and Defs.' Consol. Cross-Mot. for Summ. J., No. 3:16-cv-1476-M (N.D. Tex. Aug. 19, 2016), ECF No. 68 at 25 (purported cost-benefit analysis); *id.* at 60 (purported impact on investors); *id.* at 61 (purported impact on litigation costs). Indeed, DOL has described the evidence in support of the rule as "overwhelming." Defs' Mem. at 1, ECF No. 24. Against this backdrop, it is far from certain that a new round of substantive rulemaking will even occur, much less lead to a revised rule that might moot this case.

The mere possibility that future administrative actions could moot Thrivent's claims is not sufficient to support a stay. *See, e.g.*, *City of Duluth v. Fond du Lac Band of Lake Superior Chippewa*, No. 09-2668, 2011 WL 721107, at *6 (D. Minn. Jan. 5, 2011) (denying stay request based on possible action by the National Indian Gaming Commission ("NIGC") where proponent of stay provided "only the rawest of speculation as to when the NIGC might conclude its internal review, what the results of that review might be, and what, if any, further administrative or legal action the NIGC might possibly take based upon the results of its review"), *R&R adopted*, 2011 WL 721246 (D. Minn. Feb. 22, 2011); *Austin v. Union Bond & Trust Co.*, No. 3:14-706, 2014 WL 7359058, at *15 (D. Or. Dec. 23, 2014) (Defendants requested a stay based on an application to DOL for an exemption that would moot plaintiff's claim. The court described defendants' subsequent decision to withdraw the request as "recogni[zing] reality" because "any prediction of whether and when the DOL will grant the request is speculative at best."); *Yourman v. Dinkins*,

No. 91-2197, 1992 WL 396833, at *1 (S.D.N.Y. Dec. 23, 1992) (denying defendants' request to stay proceedings "in anticipation of possible future congressional action that might moot part or all of the controversy.").[1] This is particularly true because the controversy remains ripe for resolution in the meantime.

Furthermore, any stay would directly harm Thrivent. Although DOL asserts that the challenged regulatory provision "will not be applicable for more than nine months in any event," this is an incomplete characterization of the rule. In fact, DOL's Best Interest Contract ("BIC") Exemption rule is scheduled to become applicable to Thrivent on April 10, 2017. The BIC Exemption's anti-arbitration condition—the subject of Thrivent's challenge here—is encompassed by the rule. Abiding by the BIC Exemption will require significant changes to Thrivent's business, including preparation to implement the new BIC agreements with members in the coming months. The requested stay would only create delay and uncertainty, which "constitutes a potentially grievous hardship for purposes of business planning and places [Thrivent] in a 'very real dilemma.'" *Louisiana Forestry Ass'n Inc. v. Sec'y U.S. Dep't of Labor*, 745 F.3d 653, 680 n.10 (3d Cir. 2014) (quoting *Abbott Labs. v. Gardner,* 387 U.S. 136, 153 (1967)). Unless DOL is amenable to stipulating that the BIC Exemption's anti-arbitration condition *will itself* be stayed during the pendency of any stay, litigation, or appeal, Thrivent will be harmed.

Finally, contrary to DOL's suggestion, a stay could significantly *harm* judicial efficiency. If the Court were to stay this case, but DOL left the challenged provisions intact, Thrivent would then need to seek emergency relief to prevent implementation of the rule. By contrast, in the absence of a stay, the motions for summary judgment will be presented in just two weeks, and the Court can address them in an orderly manner and without the need for an emergency hearing.

In summary, there is no basis to alter the current litigation schedule based on the mere *possibility* that DOL might one day adopt new rules. The letter request should be denied, and the summary judgment hearing should proceed as scheduled on March 3, 2017.

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[1] The only case law cited by DOL in support of its request arises in the context of reexaminations by the Patent and Trademark Office. But those cases are inapposite because, in that unique setting, "[c]ourts have adopted a liberal policy in favor of granting motions to stay proceedings pending the outcome of reexamination proceedings" due to the USPTO's expertise in deciding issues of patentability. *VData, LLC v. Aetna, Inc.*, No. 06-1701, 2006 WL 3392889, at *4 (D. Minn. Nov. 21, 2006); *see also Intermedics, Inc. v. Cardiac Pacemakers, Inc.*, No. 95-cv-716, 1998 WL 35253495, at *2–3 (D. Minn. June 15, 1998). Outside that context, courts disfavor stay requests.

If the Court desires oral argument on the letter request for a stay, then it should occur alongside the parties' summary judgment presentations at that hearing.

Very truly yours,

Mark L. Johnson

MLJ:cmb