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March 11, 2020

Via CM/ECF

Deborah S. Hunt,
Clerk of the Court,
United States Court of Appeals for the Sixth Circuit,
540 Potter Stewart U.S. Courthouse,
Cincinnati, Ohio 45202.

Re: Response to Notice of Supplemental Authority in *Buck v.*
Gordon, No. 19-1959

Dear Ms. Hunt:

Pursuant to Federal Rule of Appellate Procedure 28(j), Amici Curiae-Appellants Kristy and Dana Dumont hereby respond to the Notice of Supplemental Authority (ECF No. 32) filed by Plaintiff-Appellee St. Vincent Catholic Charities.

First, the United States Supreme Court's grant of certiorari in *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019) to consider certain Free Exercise and Free Speech questions at issue in *Fulton* has no bearing on this Court's consideration of the procedural question presented by the Dumonts' appeal: whether the district court erred in denying the Dumonts' motion to intervene pursuant to Federal Rule of Civil Procedure 24.

Second, Plaintiff-Appellee, in an attempt to show some form of continuity of interest between the State and Appellants, purports to notify the Court of a notice submitted by the State in *Dumont v. Gordon*, No. 2:17-cv-13080 (E.D. Mich.) with respect to the Dumonts' demand that the State comply with its obligations under the Settlement Agreement entered with the Dumonts and enforce the nondiscrimination provisions in its contracts with child placing agencies. But Plaintiff-Appellee's selective quotation from the State's filing fails to accurately and fully represent the State's position,

Deborah S. Hunt, Clerk of the Court

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including that the State has represented that it will “take no action” to comply with its obligations to Appellants under the Settlement Agreement and is refusing to enforce the nondiscrimination provisions in its contracts because of purported “potentially competing obligations.” The State’s full filing in *Dumont* is enclosed here for the Court’s convenience.

Respectfully submitted,
/s/ Ann-Elizabeth Ostrager

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*Counsel for Amici Curiae-Appellants
Kristy & Dana Dumont*

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

This the 11th day of March, 2020.

/s/ Ann-Elizabeth Ostrager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KRISTY DUMONT; DANA
DUMONT; ERIN BUSK-SUTTON;
and REBECCA BUSK-SUTTON,

Plaintiffs,

v.

ROBERT GORDON, in his official
capacity as the Director of the
Michigan Department of Health and
Human Services; and JENNIFER
WRAYNO, in her official capacity as
the Executive Director of the
Michigan Children's Services
Agency,

Defendants,

and

ST. VINCENT CATHOLIC
CHARITIES; MELISSA BUCK;
CHAD BUCK; and SHAMBER
FLORE,

Defendants-Intervenors.

No. 17-cv-13080-PDB-EAS

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

**NOTICE OF DUMONTS' DEMAND THAT MDHHS ENFORCE
ITS LONGSTANDING NONDISCRIMINATION POLICY AND,
UNLESS THIS COURT DIRECTS OTHERWISE, MDHHS'S PLAN
TO WAIT PENDING CHIEF JUDGE HOOD'S RULING**

Defendants Robert Gordon, in his official capacity as Director of the Michigan Department of Health and Human Services (MDHHS), and Joo Yeun Chang, in her official capacity as Executive Director of the Michigan Children's Services Agency¹ (collectively, "the Department"), by and through undersigned counsel, notify this Court that Plaintiffs Kristy and Dana Dumont have invoked the notice and cure provision of the Settlement Agreement (ECF No. 82) executed in this case. The Dumonts allege the Department is in breach of the Agreement by not enforcing its longstanding nondiscrimination policy. (Exhibit A.) The Dumonts also demand the Department take action to achieve compliance. *Id.*

The Department fully intends to continue enforcing its long-established nondiscrimination policy and meeting its obligations under the Settlement Agreement. But the Department is faced with a dilemma of potentially competing and contrary legal obligations. It is a named defendant in a separate lawsuit—also pending in this district—

¹ Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this Notice reflects the substitution of Children's Services Agency Executive Director Joo Yeun Chang for former Acting Children's Services Agency Executive Director Jennifer Wrayno, who was named in her official capacity.

challenging the nondiscrimination policy. (*Catholic Charities West Michigan v. Gordon et al.*, Case No. 2:19-cv-11661, Hood, C.J.). Catholic Charities West Michigan, the plaintiff in that case, filed a preliminary injunction motion to enjoin the Department from enforcing its policy. The motion is fully briefed and currently pending before Chief Judge Denise Page Hood.

These potentially competing obligations put the Department between a rock and a hard place. Consequently, unless otherwise directed by this Court, the Department will take no action while waiting for Chief Judge Hood to rule on the preliminary injunction motion.

The following details are relevant to this Notice:

1. On March 22, 2019, the Department entered into a settlement agreement with Plaintiffs, the Dumonts and Rebecca and Erin Busk-Sutton, to dispose of the claims in this action (the “Settlement Agreement”). That same day, the Department and Plaintiffs filed with this Court a Stipulation of Voluntary Dismissal with Prejudice, with the executed Settlement Agreement attached as Exhibit A. (ECF No. 82.) This Court entered an Order dismissing

Plaintiffs' claims "with prejudice pursuant to the terms of the Settlement Agreement" and retaining jurisdiction over the enforcement of the Settlement Agreement. (ECF No. 83, PageID.1469.)

2. Under the terms of the Settlement Agreement, unless prohibited by law or court order, the Department is required to enforce its long-standing nondiscrimination policy (Non-Discrimination Provision) against a child placing agency (CPA) "that the Department determines is in violation of, or is unwilling to comply with" the Provision, up to and including terminating the CPA's foster care case management services contract or adoption services contract.² (ECF No. 82, PageID.1445-1446, Settlement Agreement, Section 1(c).)

3. On April 25, 2019, Catholic Charities West Michigan (Catholic Charities) filed a new lawsuit against the Department and Michigan Attorney General Dana Nessel in her official capacity

² The Settlement Agreement acknowledges that the Department's contracts for foster care case management services and adoption services mandate "that contracted CPAs comply with the Department's non-discrimination statement prohibiting discrimination 'against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability' in the provision of services under contract with the Department (the 'Non-Discrimination Provision')."

(collectively, State Defendants), challenging the Department's long-established nondiscrimination policy as violative of state and federal law and the Michigan and U.S. constitutions. The litigation is currently pending in the United States District Court for the Eastern District of Michigan and assigned to Chief Judge Denise Page Hood. (*Catholic Charities West Michigan v. Gordon et al.*, Case No. 2:19-cv-11661, Hood, C.J.³)

4. On June 26, 2019, Catholic Charities filed a motion for preliminary injunction, seeking to enjoin the State from taking adverse action against Catholic Charities for refusing to comply with the terms of its foster care case management services contract and adoption services contract with the Department, as well as the Non-Discrimination Provision. (Case No. 2:19-cv-11661, ECF No. 11.) That motion was fully briefed as of August 7, 2019, and remains pending. (Case No. 2:19-cv-11661, ECF Nos. 22 and 25.)

³ Catholic Charities West Michigan originally filed its state *and* federal claims in the Michigan Court of Claims. (Court of Claims Case No. 19-cv-000072MM, Stephens, J.) Michigan law prohibits claimants from filing claims against the State and its departments in the Court of Claims where the claimant “has an adequate remedy upon his claim in the federal courts.” Mich. Comp. Laws § 600.6440.

5. In correspondence dated January 23, 2020, and attached as Exhibit A, the Dumonts invoked the notice and cure provision in Section 7 of the Settlement Agreement, demanding that the Department enforce the nondiscrimination provisions in its contracts with Catholic Charities, stating:

- a. “Catholic Charities West Michigan ("Catholic Charities"), a Michigan state-contracted CPA, has made clear in its litigation against the State, *Catholic Charities v. Michigan Department of Health and Human Services et al.*, No. 2:19-cv-11661-DPHDRG (E.D. Mich.), that it will not comply with the Non-Discrimination Provision of its Contracts and that it has engaged and will continue to engage in practices prohibited by the Non-Discrimination Provision. (Exhibit A, p. 1.)
- b. Pursuant to Section 7 of the Settlement Agreement, the Department has ninety (90) days to cure noncompliance allegations. If the alleged breach is not cured within 90 days of notice, the Dumonts may take appropriate action to enforce their rights and seek specific performance of the Settlement Agreement. (Exhibit A, p. 2.)

6. State Defendants believe the Settlement Agreement comports with state and federal law and is constitutionally firm. They are defending the Non-Discrimination Provision in the litigation filed by Catholic Charities.

7. The Dumonts’ January 23, 2020 demand letter and Catholic Charities’ motion for preliminary injunction seek to impose potentially

competing and contrary legal obligations on the Department. In the absence of further direction from this Court, the Department believes it is constrained by the pending preliminary injunction motion and will wait for Chief Judge Hood's decision.

8. Concurrent with filing this Notice, State Defendants submitted a motion in the lawsuit filed by Catholic Charities, asking Chief Judge Hood (i) for expedited consideration of Catholic Charities' pending motion for preliminary injunction, and (ii) to certify the question of state law interpretation, more specifically Mich. Comp. Laws §§ 722.124e and 124f, to the Michigan Supreme Court.

Respectfully submitted,

Dana Nessel
Attorney General

Dated: February 20, 2020

/s/ Toni L. Harris
Toni L. Harris (P63111)
Attorney for the Department
Michigan Department of
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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2020, I electronically filed a Notice of Dumonts' Demand That MDHHS Enforce Its Longstanding Nondiscrimination Policy And, Unless This Court Directs Otherwise, MDHHS's Plan To Wait Pending Chief Judge Hood's Ruling with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

/s/ Toni L. Harris
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EXHIBIT A

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January 23, 2020

Via Certified Mail and E-mail

Return Receipt Requested

Michigan Department of Health and Human Services, State of Michigan,
Director, Bureau of Legal Affairs,
333 South Grand Avenue,
Lansing, Michigan 48909.

Re: Dumont et al. v. Gordon et al., No. 2:17-cv-13080-PDB-EAS

To Whom It May Concern:

On behalf of Kristy Dumont and Dana Dumont (the “Dumonts”), we write in connection with the settlement agreement entered on March 22, 2019 between the Dumonts and Robert Gordon, in his official capacity as Director, Michigan Department of Health and Human Services and Jennifer Wrayno, in her official capacity as Acting Executive Director, Michigan Children’s Services Agency (together, the “State”). See *Dumont et al. v. Gordon et al.*, Case No. 2:17-cv-13080-PDB-EAS (E.D. Mich. Mar. 22, 2019) (the “Settlement Agreement”).¹

In the Settlement Agreement, the Department agreed to “enforce the Non-Discrimination Provision . . . against a [child placing agency (“CPA”)] that the Department determines is in violation of, or is unwilling to comply with, such provisions, up to and including termination of the Contracts . . . including without limitation . . . [i]n the event a CPA refuses to comply with the Non-Discrimination Provision . . . the Department will terminate the CPA’s Contracts.” (Settlement Agreement Section 1(c)).

Catholic Charities West Michigan (“CCWM”), a Michigan state-contracted CPA, has made clear in its litigation against the State, *Catholic Charities v. Michigan Department of Health and Human Services et al.*, No. 2:19-cv-11661-DPH-DRG (E.D. Mich.), that it will not comply with the Non-Discrimination Provision of its Contracts and that it has engaged and will continue to engage in practices prohibited by

¹ Terms defined in the Settlement Agreement have the same meaning in this letter unless given a different meaning in this letter.

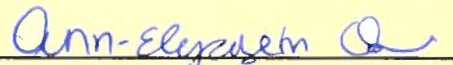
the Non-Discrimination Provision. Among other things, on May 15, 2019, in support of a motion seeking to enjoin the State from enforcing the Non-Discrimination Provision against CCWM, CCWM filed an official written policy stating it will only place children with “married couples made up of two parents of the opposite sex,” ECF No. 1-2, and a sworn declaration of Christopher Slater, CEO of CCWM, dated May 15, 2019, stating that such policy “prohibits Catholic Charities from recommending or facilitating child placements with same-sex couples.” ECF No. 1-3.

Notwithstanding the Department’s knowledge of CCWM’s refusal to comply with the Non-Discrimination Provision, on information and belief, on or about September 30, 2019, the Department renewed its Adoption Services Contracts, Nos. MA 190000001067, MA 190000001079 and MA 190000001093, with CCWM.

Accordingly, pursuant to Section 7 of the Settlement Agreement, which provides that “[i]n the event any Party . . . asserts that another Party is not in compliance with one or more of its obligations in this Agreement . . . [t]he asserting Party . . . shall provide the other Party with written notice of such assertion and a ninety (90) day opportunity to cure such noncompliance prior to taking legal action,” the Dumonts hereby provide written notice to the Department that the Department has failed to comply with its obligation under the Settlement Agreement to enforce the Non-Discrimination Provision, which prohibits discrimination on the basis of sexual orientation in the provision of services under contract with the Department.

If this breach is not cured within 90 days of this notice, the Dumonts will take appropriate action to enforce their rights, including, without limitation, by seeking leave from the Eastern District of Michigan to reopen *Dumont et al. v. Gordon* so that they may seek specific performance of the Settlement Agreement.

Sincerely,



Garrard R. Beehey
Ann-Elizabeth Ostrager
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