

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

_____)	
TONN AND BLANK CONSTRUCTION,)	
LLC,)	
)	
Plaintiff,)	
)	
v.)	Case No. 1:12-cv-00325-JD-RBC
)	
KATHLEEN SEBELIUS, <i>et al.</i>)	
)	
Defendants.)	
_____)	

**DEFENDANTS' MOTION TO STAY PROCEEDINGS AND NOTICE OF NON-
OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

In light of the rulings of a motions panel of the Seventh Circuit in *Grote v. Sebelius*, ___ F.3d ___, 2013 W L 362725 (7th Cir. Jan. 30, 2013), and *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012), granting injunctions pending appeal in cases similar to this one challenging the contraceptive coverage regulations, defendants write to inform the Court that they no longer oppose plaintiff's pending Motion for Preliminary Injunction, ECF No. 4, on its Religious Freedom Restoration Act (RFRA) claim, until such time as the appeals in *Grote* and *Korte* are resolved. In light of the pending appeals and defendants' non-opposition to a preliminary injunction until the appeals in *Grote* and *Korte* are resolved, defendants move to stay all proceedings in this case until such time.

For the reasons stated in Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Motion to Dismiss, ECF Nos. 25-26, defendants do not believe that plaintiff is likely to succeed on the merits of any of its claims, and believe that the decisions of the motions panel in *Grote* and *Korte* were incorrect. Furthermore, those decisions are not binding on this Court. *See* Defs.' Opp'n to Pl.'s Mot. for Prelim. Inj. ("Defs.'

Opp’n”) at 2-3 n.2, ECF No. 26; *see also United States v. Henderson*, 536 F.3d 776, 778 (7th Cir. 2008); *In re Rodriguez*, 258 F.3d 757, 759 (8th Cir. 2001); *Lambert v. Blackwell*, 134 F.3d 506, 513 n.17 (3d Cir. 1997).¹ Nonetheless, defendants acknowledge that, even if this Court were to agree with defendants and deny plaintiff’s request for a preliminary injunction, plaintiff would likely then seek an injunction pending appeal, which would likely be assigned to the same motions panel that decided *Grote* and *Korte* and would thus likely be granted for the reasons already articulated by the panel. Therefore, defendants do not oppose the entry of preliminary injunctive relief in favor of plaintiff based on its RFRA claim at this time, to last until the pending appeals are resolved. Defendants would suggest that the preliminary injunction remain in effect until 30 days after the mandate issues from the Seventh Circuit in *Grote* and *Korte*, to give the Court and the parties sufficient time to assess the impact of the Seventh Circuit’s ruling on this case.

Defendants also respectfully ask this Court to stay all proceedings in this case pending the resolution of the appeals in *Grote* and *Korte*. “[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes of its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936). “A district court has broad discretion to stay litigation ‘for reasons of wise judicial administration . . . whenever it is duplicative of a parallel action already pending in another federal court.’” *In re H&R Block Mortgage Corp., Prescreening Litig.*, No. 2:06-MD-230, 2007 WL 2710469, at *1 (N.D. Ind.

¹ In addition, motions panels in three other circuits have reached different conclusions than the motions panel in *Grote* and *Korte*. *See Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012); *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012), *reconsideration denied*, No. 12-2673 (6th Cir. Dec. 31, 2012); *Conestoga Wood Specialties Corp. v. Sebelius*, No. 13-1144 (3d Cir. Feb. 7, 2013).

Sept. 12, 2007) (quoting *Hoosier Energy Rural Electric Cooperative, Inc. v. Exelon Generation Co., LLC*, No. 1:04-cv-1761, 2005 WL 4882703, at *2 (S.D. Ind. Sept. 26, 2005)). “Generally a suit is duplicative of another if the ‘claims, parties, and available relief do not significantly differ between the two actions.’” *Id.* (quoting *Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223 (7th Cir.1993)). But “a court may stay an action in deference to an earlier lawsuit even if the parties and issues are not identical.” *Id.* Thus, the decision to stay proceedings while independent litigation is being resolved is largely discretionary with the Court, and should be made with an eye toward judicial economy and the effect on the litigants.

In the *Grote* and *Korte* appeals, the Seventh Circuit will be addressing complex legal issues that are substantially similar to those presented in this case, involving facts that are analogous to those in this case, challenging the same regulations that are challenged in this case, and raising claims that are also largely indistinguishable from those in this case brought against the same defendants as those in this case. Among the questions that the Seventh Circuit may very well decide are: (1) whether a for-profit, secular corporation can exercise religion under RFRA; (2) whether an obligation imposed on a corporation can be a substantial burden on the corporation’s owners under RFRA; (3) whether any burden imposed on the corporation or its owners under the challenged regulations is too attenuated to qualify as “substantial” under RFRA; and (4) whether the challenged regulations are narrowly tailored to serve compelling governmental interests. These are largely novel questions in this Circuit, and the courts around the country that have thus far confronted these issues in similar cases have reached contradictory conclusions. Compare, e.g., *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012), and *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F.Supp.2d 1278 (W.D. Okla. 2012), and *Conestoga Woods Specialties Corp. v. Sebelius*, __ F. Supp. 2d __,

2013 WL 140110 (E.D. Pa. Jan. 11, 2013), with, e.g., *Tyndale House Publishers, Inc. v. Sebelius*, ___ F.Supp.2d ___, 2012 WL 5817323 (D.D.C. Nov. 16, 2012). Thus, even if the Seventh Circuit's ruling does not entirely dispose of this case, the outcome of the appeals is likely to substantially affect the outcome of this litigation, and the Court and the parties will undoubtedly benefit from Seventh Circuit's views.

If this case is not stayed, defendants will continue to brief their pending motion to dismiss.² In addition, plaintiff has indicated that it might move for summary judgment on its RFRA claim. These motions will raise many of the same legal issues that are likely to be addressed by the Seventh Circuit. It would be highly inefficient to spend the resources and time of the parties and this Court for litigation to proceed on these issues simultaneously in both courts. *See Ass'n of Irrigated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1094 (E.D. Cal. 2008) ("[T]he district court has broad discretion to decide whether a stay is appropriate to promote economy of time and effort for itself, for counsel, and for litigants."). Nor will there be any prejudice to plaintiff if the proceedings are stayed, as it will have the benefit of a preliminary injunction during the pendency of the stay.

Finally, defendants note that several district courts – including the district court in *Korte* – have stayed proceedings in similar circumstances in litigation challenging the preventive services coverage regulations. *See, e.g., Order, Korte v. Sebelius*, No. 3:12-cv-01072 (S.D. Ill. Dec. 28, 2012), ECF No. 63; *Order, Conestoga Wood Specialties, Corp. v. Sebelius*, No. 5:12-cv-

² Defendants' reply in support of their motion to dismiss is currently due on February 22. *See Order*, ECF No. 36. Defendants intend to file a motion seeking an extension of this deadline to allow the Court to consider this motion to stay proceedings. Specifically, defendants suggest that, if the Court declines to stay this case, defendants be given fourteen days from the date of the Court's ruling on the motion to stay to file their reply brief. Of course, if the Court grants a stay, defendants would not file a reply brief until after the stay is lifted – and then only if necessary and appropriate in light of the Seventh Circuit's ruling.

06744 (E.D. Pa. Jan. 16, 2013), ECF No. 55; Order, *Hobby Lobby v. Sebelius*, No. 5:12-cv-01000 (W.D. Okla. Dec. 12, 2012), ECF No. 55.

For these reasons, defendants ask this Court to stay all proceedings in this case pending resolution of the appeals in *Grote* and *Korte*.

Respectfully submitted this 11th day of February, 2013,

STUART F. DELERY
Principal Deputy Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

DAVID A. CAPP
United States Attorney

JENNIFER RICKETTS
Director

SHEILA M. LIEBER
Deputy Director

/s/ Benjamin L. Berwick
BENJAMIN L. BERWICK (MA Bar No. 679207)
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue N.W., Room 7306
Washington, D.C. 20530
Tel: (202) 305-8573
Fax: (202) 616-8470
Email: Benjamin.L.Berwick@usdoj.gov

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to all parties.

/s/ Benjamin L. Berwick
BENJAMIN L. BERWICK