UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

DIOCESE OF FORT WAYNE-SOUTH BEND, INC., *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 1:12-CV-159 JD
KATHLEEN SEBELIUS, in her official capacity as Secretary of the U.S. Department of Health and Human Services, *et al.*,	)	
Defendants.	)	

ORDER

On May 21, 2012, Plaintiffs filed a 9-count complaint against the U.S. Departments of Treasury, Labor, and Health and Human Services and their respective Secretaries seeking relief from government action (the Patient Protection and Affordable Care Act) requiring Plaintiffs, all nonprofit entities who adhere to the tenants of the Catholic faith, to provide or facilitate abortion-inducing drugs, contraceptive services and sterilization (characterized as "preventative care") through its health plans [1:12-cv-159, DE 1]. Assuming the Plaintiffs meet the safe-harbor provision, the Plaintiffs' next insurance plans begin January 2014, with the exception of Our Sunday Visitor, Inc. which has an insurance renewal date of October 2013. *Id.* Defendants have moved for dismissal of the complaint on the basis that the Court lacks jurisdiction because Plaintiffs lack standing and the case is not ripe [1:12-cv-159, DE 26]. The motion is fully briefed. The case has since been temporarily stayed [1:12-cv-159, DE 61] while the Court awaits the filing of a joint report from the parties providing their respective positions on an

extended stay of the proceedings given that identical issues now pend before the Seventh Circuit[1] and given the issuance of the proposed rules relative to the preventative care regulations.[2]

Now pending before the Court is Plaintiffs' motion to consolidate [1:12-cv-159, DE 44, DE 45] the underlying case with another case pending against the same defendants, *Tonn and Blank Construction LLC v. Sebelius, et al.*, No. 1:12-cv-325 ("Tonn and Blank case"). Plaintiffs believe consolidation is appropriate because the Plaintiffs are represented by the same law firm in both cases, Tonn and Blank is a wholly-owned subsidiary of Franciscan Alliance, Inc. (one of the Plaintiffs in the underlying action), and the same Defendants and government regulation are involved in both lawsuits. Tonn and Blank supports the consolidation request [1:12-cv-159, DE 44 at 3; 1:12-cv-325, DE 9].

Defendants oppose the motion to consolidate [1:12-cv-159, DE 46] arguing that at this stage of the litigation the Court is presented with entirely different issues and questions of law in the two pending cases, despite the fact that both cases raise similar legal claims and challenge the enforcement of the same regulation. The Defendants do not oppose the transfer of the cases to the same judge—which has already been accomplished for purposes of judicial efficiency given the similarities in the actions [1:12-cv-159, DE 47].

Discussion

Federal Rule of Civil Procedure 42(a) provides that: "If actions before the court involve a common question of law or fact, the court may: (1) join for hearing or trial any or all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid

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[1]*See University of Notre Dame v. Kathleen Sebelius, et al.*, No. 3:12-cv-253-RLM, 2012 WL 6756332 (N.D. Ind. Dec. 31, 2012), Appellate No. 13-1479.

[2]*See* 78 Fed. Reg. 8456 (Feb. 6, 2013).

unnecessary cost or delay." Thus, the issue of common questions of law or fact is a prerequisite for any consolidation. *Id*.

The primary purpose of consolidation is to promote convenience and judicial economy without causing prejudice to the parties. *See Adams v. Northern Indiana Public Service Co.*, No. 2:10-CV-469, 2012 WL 2375324, *1 (N.D. Ind. June 22, 2012); *Miller v. Wolpoff & Abramson, LLP*, No. 1:06-CV-207-TS, 2007 WL 2473431, *2 (N.D. Ind. Aug. 28, 2007). The court should consider whether the risks of prejudice and possible confusion are overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on the parties, witnesses and available judicial resources posed by multiple lawsuits, and the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned. *Adams*, 2012 WL 2375324, *1 (citations omitted). Rule 42 is designed to encourage consolidation and is a "managerial device [that] makes possible the streamlined processing of groups of cases, often obviating the need for multiple lawsuits and trials." *Miller*, 2007 WL 2473431, *2 (quoting 8 James W. Moore, et al., *Moore's Federal Practice* § 42.10, at 42-8 (3rd ed. 2005)). The decision to consolidate under Rule 42 is within the discretion of the trial judge. *Blue Cross Blue Shield of Mass., Inc. v. BCS Ins. Co.*, 671 F.3d 635, 640 (7th Cir. 2011).

A close look at the Tonn and Blank case reveals that it and the underlying case involve different outcome determinative facts which will require a distinct legal analysis in each case as to each Plaintiff in order to decide the issues raised. Most obvious is the fact that Tonn and Blank is a for-profit entity that is not eligible for the temporary safe harbor provision [1:12-cv-325, DE 1 at 9]; whereas, Plaintiffs in the underlying action may meet the safe harbor provision [1:12-cv-159, DE 1, DE 30]. Moreover, unlike Plaintiffs in the underlying action, Tonn and

Blank confirm that as a for-profit entity they cannot satisfy the definition of a religious employer [1:12-cv-325, DE 1 at 9]. While Tonn and Blank is currently providing preventative care services to which it objects [1:12-cv-325, DE 1 at 10], the Plaintiffs in the underlying case are not [1:12-cv-159, DE 30 at 20, 23]. Further, Defendants admit that they do not intend to claim that Tonn and Blank lacks standing or that its claims are unripe [1:12-cv-159, DE 46 at 2], which is the procedural argument raised by Defendants in their motion to dismiss the underlying action against the nonprofit entities [1:12-cv-159, DE 26, DE 27]. Instead, Defendants are addressing the merits of Tonn and Blank's claims (as they have done in their motion to dismiss), and they are not contesting standing or ripeness [1:12-cv-325, DE 24, DE 25].

Not only do the two cases present largely unrelated questions of law at this stage, but the cases are differently situated from a procedural standpoint. Relative to the underlying case, as the Court indicated, the case is temporarily stayed because identical issues now pend before the Seventh Circuit in *University of Notre Dame v. Kathleen Sebelius, et al.*, Appellate No. 13-1479 and because the issuance of the proposed rules are applicable to nonprofit companies like Plaintiffs in the underlying action. If the stay is lifted, then the Court would need to address the procedural arguments raised by Defendants in their motion to dismiss. Yet, relative to the Tonn and Blank case, the Court has issued an agreed preliminary injunction order given that the Seventh Circuit has twice granted similar relief pending appeal to other similarly situated parties. *See Grote v. Sebelius*, No. 13-1077, 2013 WL 362725, at *4 (7th Cir. Jan. 30, 2013); *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *4-5 (7th Cir. Dec. 28, 2012). Further, a request to stay the Tonn and Blank case pending the resolution of *Grote* and *Korte* is currently pending for the Court's consideration [1:12-cv-325, DE 38]—given that *Grote* and *Korte* involved for-profit

companies, similar to Tonn and Blank. Thus, it is evident that these two cases are proceeding on different courses which would make consolidation impractical.

While it is true that consolidation may be appropriate when cases involve a common question of law or fact, consolidation in the manner proposed by the Plaintiffs would not permit the most effective management of these cases while securing the "just, speedy, and inexpensive determination" of each case without risk of unfair prejudice to the litigants. *See* Fed. R. Civ. P. 1, 8(e); *A. Bauer Mech., Inc. v. Joint Arbitration Bd. of Plumbing Contractors' Assoc. and Chi. Journeymen Plumbers' Local Union 130, U.A.*, 562 F.3d 784, 790 (7th Cir. 2009) (internal citations and citations omitted); *Griffin v. Foley*, 542 F.3d 209, 217 (7th Cir. 2008) ("[d]istrict court judges, because of the very nature of the duties and responsibilities accompanying their position, possess great authority to manage their caseload.") (citations omitted). In fact, consolidating the underlying case with the Tonn and Blank case would do nothing to promote judicial efficiency given the distinct circumstances facing Plaintiffs in the two cases. These differing circumstances will require wholly separate legal considerations in order to determine whether Defendants are able to enforce the contested regulations against each Plaintiff. As such, inconsistent rulings in the cases are also unlikely.

Moreover, the parties would likely be prejudiced by any consolidation, given the distinct procedural posture of the cases and the likely delay to be caused by combining distinct legal issues into one case. While it is true that the cases contest the same government regulation as violating similar laws, the problem is that the legal analysis will not be the same in both cases. Consolidation would likely lead to a confusion of the issues and make disposition of the cases by way of trial or dispositive motion unnecessarily complex. Should future developments suggest

otherwise, the Court can revisit the subject of consolidation. However, given the above considerations, the Court, in its discretion, declines to consolidate the instant action with the Tonn and Blank case.

SO ORDERED.

ENTERED: April 1, 2013

/s/ JON E. DEGUILIO
Judge
United States District Court