

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Korte v. HHS, No. 3:12-CV-01072-MJR (S.D. Ill. Nov. 6, 2012), ECF No. 22, as well as the district courts' decisions denying preliminary relief in those cases, *see Grote Industries, LLC v. Sebelius*, ___ F. Supp. 2d ___, 2012 WL 6725905 (S.D. Ind. 2012); *Korte v. HHS*, ___ F. Supp. 2d ___, 2012 WL 6553996 (S.D. Ill. 2012), defendants do not believe that plaintiffs are likely to succeed on the merits of any of their 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 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). Nonetheless, defendants acknowledge that, even if this Court were to agree with defendants and deny plaintiffs' request for a preliminary injunction, plaintiffs 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.¹ Therefore, defendants do not oppose the entry of preliminary injunctive relief in favor of plaintiffs based on their 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*. Plaintiffs do not oppose this request.

¹ Defendants note that there are factors in this case that may distinguish it from *Grote* and *Korte*. Among other things, the individual plaintiff, Mr. Lindsay, is not the sole owner of the company; nor does he alone set the policies that govern the company. *See* Compl. ¶¶ 11-12. Instead, Mr. Lindsay is joined in these endeavors by at least two other individuals – neither of whom is a plaintiff in this case. *Id.* Defendants nevertheless believe it would be prudent for the Court to await the Seventh Circuit's views on the general legal issues presented in *Grote*, *Korte*, and this case, *see infra* p. 3, before assessing the import of these differences, and others, in this case.

“[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). In the *Grote* and *Korte* appeals, the Seventh Circuit will be addressing legal issues that are substantially similar to those presented in this case, involving facts that are analogous in many respects (but not all, *see supra* n. 1) 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. 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 the Seventh Circuit’s views.

If this case is not stayed, defendants will file a motion to dismiss the case for failure to state a claim. This motion 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 plaintiffs if the proceedings are stayed, as they 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 contraceptive coverage regulations. *See, e.g.*, Order, *Korte v. Sebelius*, No. 3:12-cv-01072 (S.D. Ill. Dec. 28, 2012), ECF No. 63; Order, *Annex Medical, Inc. v. Sebelius*, No. 12-cv-02804-DSD-SER (D. Minn. Jan. 25, 2013), ECF No. 53; Order, *Conestoga Wood Specialties, Corp. v. Sebelius*, No. 5:12-cv-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 5th day of March, 2013,

STUART F. DELERY
Principal Deputy Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

STEPHEN R. WIGGINTON
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 March 5, 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