

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

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|------------------------------------|---|---------------------------|
| _____                              | ) |                           |
| MARTIN OZINGA III, <i>et al.</i> , | ) |                           |
|                                    | ) |                           |
| Plaintiffs,                        | ) |                           |
|                                    | ) |                           |
| v.                                 | ) | Case No. 1:13-cv-3292-TMD |
|                                    | ) |                           |
| U.S. DEPARTMENT OF HEALTH &        | ) |                           |
| HUMAN SERVICES, <i>et al.</i>      | ) |                           |
|                                    | ) |                           |
| Defendants.                        | ) |                           |
| _____                              | ) |                           |

**DEFENDANTS’ MOTION TO STAY PROCEEDINGS AND NOTICE OF NON-  
OPPOSITION TO PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

In light of the rulings of a motions panel of the Seventh Circuit in *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 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 do not oppose plaintiffs’ pending Motion for Preliminary Injunction, ECF No. 16, on their Religious Freedom Restoration Act (RFRA) claim *only*, until such time as the appeals in *Grote* and *Korte* – which were argued before the Seventh Circuit on May 22 – 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’ oppositions to the plaintiffs’ motions for preliminary injunction in *Korte* and *Grote*, as well as the reasoning of the district courts in those cases, *see Grote Indus., LLC v. Sebelius*, \_\_\_ F. Supp. 2d \_\_\_, 2012 WL 6725905 (S.D. Ind. Dec. 27, 2012); *Korte v. U.S. Dep’t of Health & Human Servs.*, \_\_\_ F Supp. 2d \_\_\_, 2012 WL 6553996 (S.D. Ill. Dec. 14, 2012); Judge Rovner’s dissent in *Grote*, *see* 708 F.3d at 855-67; Chief Judge

Briscoe's dissent in *Hobby Lobby Stores, Inc. v. Sebelius*, \_\_\_ F.3d \_\_\_, 2013 WL 3216103, at \*41-\*55 (10th Cir. June 27, 2013); and all of the other courts that have ruled in the government's favor in similar cases,<sup>1</sup> defendants do not believe that plaintiffs are 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 *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).<sup>2</sup> Nonetheless, defendants acknowledge that, even if this Court were to agree with defendants and deny plaintiffs' 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 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*. "[T]he power to stay proceedings is incidental

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<sup>1</sup> See, e.g., *Conestoga Wood Specialities Corp. v. HHS*, No. 13-1144, 2013 WL 1277419 (3d Cir. Feb. 8, 2013); *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012); *Gilardi v. Sebelius*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 781150 (D.D.C. Mar. 3, 2013), *appeal pending sub nom. Gilardi v. HHS*, No. 13-5069 (D.C. Cir.); *Conestoga Wood Specialities Corp. v. Sebelius*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 140110, at \*12-\*14 (E.D. Pa. Jan. 11, 2013), *appeal pending*, No. 13-1144 (3d Cir.); *Autocam Corp. v. Sebelius*, No. 1:12-cv-1096, 2012 WL 6845677, at \*6-\*7 (W.D. Mich. Dec. 24, 2012), *appeal pending* No. 12-2673 (6th Cir.).

<sup>2</sup> In addition, motions panels in the Third and Sixth Circuits have reached different conclusions than the motions panel in *Grote* and *Korte*. See *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012), *reconsideration denied*, No. 12-2673 (6th Cir. Dec. 31, 2012); *Conestoga Wood Specialities Corp. v. HHS*, No. 13-1144, 2013 WL 1277419 (3d Cir. Feb. 8, 2013).

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). “When ruling on such a stay, courts have considered the following factors: (1) whether a stay will unduly prejudice or tactically disadvantage the non-moving party, (2) whether a stay will simplify the issues in question and streamline the trial, and (3) whether a stay will reduce the burden of litigation on the parties and on the court.” *Tap Pharm. Prods., Inc. v. Atrix Labs., Inc.*, No. 03-cv-7822, 2004 WL 422697, at \*1 (N.D. Ill. Mar. 3, 2004). “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. 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)); *see also, e.g., CIGNA HealthCare of St. Louis, Inc. v. Kaiser*, 294 F.3d 849, 851 (7th Cir. 2002); *Trippe Mfg. Co. v. Am. Power Conversion Corp.*, 46 F.3d 624, 629 (7th Cir. 1995); *GE Bus. Fin. Servs. Inc. v. Spratt*, No. 08-cv-6504, 2009 WL 1064608, at \*1 (N.D. Ill. Apr. 20, 2009); *Whirlpool Fin. Corp. v. Metropolis Capital Grp.*, No. 90-cv-5845, 1991 WL 212112, at \*3 (N.D. Ill. Oct. 7, 1991). “Generally a suit is duplicative of another if the ‘claims, parties, and available relief do not significantly differ between the two actions.’” *H&R Block*, 2007 WL 2710469, at \*1 (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., *Conestoga Wood Specialities Corp. v. HHS*, No. 13-1144, 2013 WL 1277419 (3d Cir. Feb. 8, 2013); *Autocam Corp. v. Sebelius*, No. 12-2673 (6th Cir. Dec. 28, 2012); *Gilardi v. Sebelius*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 781150 (D.D.C. Mar. 3, 2013), *appeal pending sub nom. Gilardi v. HHS*, No. 13-5069 (D.C. Cir.); *Conestoga Wood Specialties Corp. v. Sebelius*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 140110, at \*12-\*14 (E.D. Pa. Jan. 11, 2013), *appeal pending*, No. 13-1144 (3d Cir.); *Autocam Corp. v. Sebelius*, No. 1:12-cv-1096, 2012 WL 6845677, at \*6-\*7 (W.D. Mich. Dec. 24, 2012), *appeal pending* No. 12-2673 (6th Cir.), *with, e.g., Hobby Lobby*, 2013 WL 3216103; *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 likely file a motion dismiss.<sup>3</sup> 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. *Korte* and *Grote* were argued before the Seventh Circuit on May 22 – more than a month ago – and so are likely to be decided in the near future. And plaintiffs 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-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. In fact, in this District, Judge St. Eve recently granted an opposed motion to stay proceedings pending resolution of the appeals in *Korte* and

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<sup>3</sup> Defendants' response to plaintiffs' complaint is currently due on July 16. Defendants have filed an unopposed motion seeking an extension of this deadline to allow the Court to consider this motion to stay proceedings. *See* ECF No. 14. Specifically, defendants suggest that, if the Court declines to stay this case, defendants be given fourteen (14) days from the date of the Court's ruling on the motion to stay to file their motion to dismiss. Of course, if the Court grants a stay, defendants would not file a motion to dismiss until after the stay is lifted – and then only if necessary and appropriate in light of the Seventh Circuit's ruling.

*Grote*; a motion brought by the same defendants as in this case, opposed by similar plaintiffs on similar grounds as in this case, and granted in circumstances similar to those in this case. *See Triune Health Grp., Inc. v. U.S. Dep't of HHS*, No. 1:12-cv-06756 (N.D. Ill. April 2, 2013), ECF No. 64 (attached as Exhibit 1); *see also* Opinion & Order, *Monaghan v. Sebelius*, No. 2:12-cv-15488 (E.D. Mich. June 26, 2013), ECF No. 45 (attached as Exhibit 2).

For these reasons, defendants ask this Court to stay all proceedings in this case pending resolution of the appeals in *Grote* and *Korte*. Pursuant to this Court's Motions Practices, the undersigned contacted plaintiffs' counsel, who represented that plaintiffs oppose this motion.

Respectfully submitted this 13th day of July, 2013,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 13, 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