IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PATSY LEVANG, CHERYL TUCK-SMITH, SUSAN JENNINGS, MARGO KNORR, KAREN POPE, and ANN WITT,	:	
Plaintiffs,	:	**Case No. 2:24-cv-00316-MHW-KAJ**
v.	:	**Judge Michael H. Watson**
KAPPA KAPPA GAMMA FRATERNITY, MARY PAT ROONEY, MARIA BROWN, NANCY CAMPBELL, BARB GOETTELMAN, LIZ WONG, KYLE DONNELLY, and BETH BLACK,	:	**Magistrate Judge Kimberly A. Jolson**
Defendants.	:	

DEFENDANTS' SUPPLEMENTAL BRIEF ADDRESSING PRECLUSION UNDER WYOMING LAW

Pursuant to the Court's July 15, 2024 Order, Defendants Kappa Kappa Gamma Fraternity ("Kappa"), Mary Pat Rooney, Maria Brown, Nancy Campbell, Barb Goettelman, Liz Wong, Kyle Donnelly, and Beth Black (collectively, "Defendants") submit this brief addressing the preclusive effective of *Westenbroek, et al. v. Kappa Kappa Gamma, et al.*, Case No. 23-CV-51-ABJ in the United States District Court for the District of Wyoming (the "Wyoming Case"). As addressed herein, Defendants agree that Wyoming law applies to the preclusion analysis in this case. The preclusion issues submitted for this Court's consideration are *res judicata*, issue preclusion and law of the case. Similar to Ohio law, Wyoming law dictates that the Plaintiffs are precluded from asserting the same claims and issues that have already been decided in the Wyoming Case.

The Tenth Circuit Court of Appeals' decision that the district court's dismissal of the Wyoming Case was not a final appealable order impacts the preclusion issues as of the date of this filing. Those issues are now issue preclusion and law of the case. Depending on the course of

action the Wyoming Case plaintiffs—who are represented by the same legal counsel as Plaintiffs in this case—elect, at any point in time, *res judicata* may become an issue for this Court. Therefore, all three preclusion issues are addressed in this briefing.

In light of the ongoing Wyoming Case, which has been pending since March of 2023, the Court should alternatively consider a discretionary stay until such time as the Wyoming Case is resolved with finality so as to preclude the Wyoming Case plaintiffs, Plaintiffs in this case and their privies from bringing successive redundant claims on already decided legal issues in different fora until they find a court willing to insert itself into the governance of a private organization.

BACKGROUND

That Plaintiffs' claims and the Wyoming Case are intertwined is unambiguous. Indeed, much of Plaintiffs' Complaint is devoted to their theory that Plaintiffs Levang and Tuck-Smith were dismissed from Kappa not for documented policy violations but because they supported the the Wyoming Case. But Plaintiffs also assert claims that mirror the Wyoming Case nearly perfectly. (*See* ECF No. 23, PageID 308–11.) Those claims are subject to preclusion analysis.

All of the claims in the Wyoming Case were dismissed by the district court without prejudice, but plaintiffs appealed that dismissal to the United States Court of Appeals for the Tenth Circuit and claimed it was a final appealable order because whether claims are dismissed with prejudice does not conclusively establish whether claims are a final appealable order. Plaintiffs argued they "couldn't write [an amended complaint] to get around the determination on the merit[s]." (ECF No. 36-1, PageID 615.) But the Tenth Circuit rejected plaintiffs' argument and granted Kappa and Mary Pat Rooney's motion to dismiss the appeal. The Tenth Circuit determined it lacked jurisdiction because the Wyoming Case dismissal was not a final appealable order and therefore returned the case to the Wyoming district court. *See Westenbroek v. Kappa Kappa Gamma Fraternity*, 2024 U.S. App. LEXIS 14237, *8 (10th Cir. 2024). Therefore, as of the date of

this filing, the case is back in the Wyoming district court and *res judicata* does not apply, but collateral estoppel and the law of the case do.

The Tenth Circuit specifically instructed, "Appellants may stand on their existing complaint and seek a dismissal with prejudice so that they may perfect an appeal, or they may amend the complaint and pursue further proceedings in the district court." *Id.* at *8. Nearly two months after the decision and true to counsel's representation at argument, the Wyoming plaintiffs have not attempted to cure the merits issues the district court identified with an amended complaint. The Tenth Circuit did not hold that the plaintiffs could step aside so their allies could try the same claims in a different court. And after the Tenth Circuit's dismissal, Plaintiffs' current counsel issued a statement, suggesting an intention to stand on the existing complaint and seek a dismissal with prejudice so they may perfect an appeal:

> May Mailman, Westenbroek v. Kappa Kappa Gamma lead counsel and Independent Women's Law Center director, issued the following statement:
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> "The Tenth Circuit desperately wanted to avoid the obvious, that Kappa's directors acted in bad faith when they forced the Wyoming chapter to initiate a male. We disagree the court lacked appellate jurisdiction. As we explained in our brief, appellate courts consider district court decisions that go to the merits of the case, which the Wyoming decision certainly did. Women deserve the camaraderie and safety of sororities, but unfortunately, it also appears they first need courts brave enough to say so."

See Tenth Circuit Dodges Ruling in Sorority Case Argued by Independent Women's Law Center, https://www.iwf.org/2024/06/12/tenth-circuit-dodges-ruling-kappa-case/.

As of this filing, the plaintiffs in the Wyoming Case have not sought to perfect their appeal or file an amended complaint. At any time, the status of the Wyoming Case may change and impact the applicability of *res judicata* in this case. Likewise, if this Court were to issue a decision, it could theoretically have a preclusive effect on the District Court of Wyoming or the Tenth Circuit.

DISCUSSION

A. The Court Should Apply Wyoming Law to the Preclusion Analysis, but, as a Practical Matter, Wyoming Law Does Not Lead to a Different Analysis

The Court should apply Wyoming law to the preclusion analysis in this matter because, even though the district court in the Wyoming Case was applying Ohio law, the court sat in Wyoming. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001). Under Wyoming law, "*res judicata* and collateral estoppel are related but distinct concepts which preclude the relitigation in a subsequent suit by the same parties or their privies of questions directly determined by a court of competent jurisdiction." Specifically, *res judicata* bars relitigation of previously litigated claims or causes of action, and collateral estoppel bars relitigation of previously litigated issues. *Id.* The tests are as follows:

> Four factors are examined to determine whether the doctrine of *res judicata* applies: (1) identity in parties; (2) identity in subject matter; (3) the issues are the same and relate to the subject matter; and (4) the capacities of the persons are identical in reference to both the subject matter and the issues between them.
>
> Collateral estoppel bars relitigation of previously litigated issues and involves an analysis of four similar factors: (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

Eklund v. PRI Envtl., Inc., 25 P.3d 511, 517 (Wyo. 2001) (internal citations omitted). As Defendants argued in their Reply in Support of the Motion to Dismiss, Plaintiffs failed to address the core of Defendants' preclusion arguments and their attempt to separate the derivative claims in this case from the ones asserted in the Wyoming Case was unavailing. (Reply ISO Mot. to Dismiss, ECF No. 27, PageID 364–68). A defendant can raise *res judicata* or collateral estoppel through a

motion to dismiss if the information is available to the court through notice of a prior court proceeding. *Peterson v. Laramie City Council*, 545 P3d 922, 929 (Wyo. 2024).

B. Even Though the Tenth Circuit Held the Wyoming Case Was Dismissed Without Prejudice, Claim Preclusion and the Law of the Case Doctrine Apply

The Tenth Circuit's intervening decision in the appeal of the Wyoming Case does not save Plaintiffs' claims here from dismissal. The Tenth Circuit held that even though the district court in the Wyoming Case fully addressed the merits of Plaintiffs' claims in its order on the motion to dismiss, that decision was not a final appealable order because the district court did not dismiss the case with prejudice and afforded the plaintiffs the opportunity to seek leave to amend the complaint. *See Westenbroek*, 2024 U.S. App. LEXIS 14237.

The Wyoming Supreme Court has held that, in some cases, dismissals without prejudice are not adjudications on the merits and do not serve as bars to subsequent litigation. *See Rawlinson v. Wallerich*, 132 P.3d 204, 207 (Wyo. 2006). That decision, however, specifically addressed a *voluntary* dismissal without prejudice by a plaintiff, not any determination by a court of legal issues based on the merits. *Id.* Dismissals where a court reaches the legal merits of an issue and determines that the plaintiff fails to state a claim due to a determination of that legal issue, but dismisses the complaint without prejudice, are of a fundamentally different character than a dismissal where a plaintiff voluntarily ends her prosecution of a complaint and dismisses without prejudice before a court is able to consider the legal merits of any issue or a case where the court dismissed on procedural grounds such as improper venue.

Defendants have not located a case from Wyoming where a court directly addresses the application of preclusion principles to a dismissal that is without prejudice but that is adjudged by a court on the merits, but consideration of Wyoming law on preclusion generally suggests that Wyoming courts would bar subsequent claims that would otherwise be precluded even when the court's dismissal is without prejudice. The Wyoming Supreme Court has recognized, "[a]n,

alignment of Wyoming's jurisprudence regarding *res judicata*, with that of the federal model, is a natural fit because our procedural rules are modeled upon the federal scheme, and indeed are identical in most respects with the federal experience." *Cermak v. Great West Cas. Co.*, 2 P.3d 1047, 1053 (Wyo. 2000). Wyoming courts look to federal precedent for guidance on preclusion issues. *See, e.g., Cermak v. Great West Cas. Co.*, 2 P.3d 1047, 1054 (citing Tenth Circuit cases for claim preclusion standard); *Mattheis Co. v. Mulligan*, 479 P.3d 1213, 1217 (Wyo. 2021) (considering Supreme Court precedent on the application and purpose of issue preclusion); *Worman v. Carver*, 44 P.3d 82, 86 (Wyo. 2002) (considering Supreme Court precedent on the purpose of the preclusion doctrines). Therefore, in the absence of a directly applicable Wyoming case, Wyoming courts would look to federal courts' preclusion case law for guidance.

Federal courts in the Tenth Circuit have recognized that a dismissal without prejudice bars relitigation of matters which were litigated even if there is no final judgment on the merits. *See, e.g., Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) (recognizing dismissal without prejudice had preclusive effect on legal issue in future action); *McNally v. Colo. State Patrol*, 122 Fed. App'x 899, 903 (10th Cir. 2004) (holding dismissal without prejudice bars relitigation of the issue which was litigated in the prior action); *McNabb v. USAF*, Case No. 15-981, 2016 U.S. Dist. LEXIS 192028, *10 (issue preclusion bars relitigation of matters adjudged even if dismissal was without prejudice and no final judgment on the merits).

Allowing parties to evade preclusion bars solely because the district court left them leave to amend their complaint, even though there were determinations by the court of legal issues that led to dismissal of their claims, would result in repeat litigation. This would encourage plaintiffs who have the merits of their claims rejected to forum shop and seek out a new court that is more receptive to their position to ignore a legal determination that has already been decided in defendant's favor. Avoidance of forum shopping and repeat litigation are key aspects of preclusion

law. *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1168 (10th Cir. 2000). If plaintiffs disagree with the district court's determination of legal issues, they should perfect their appeal to the Tenth Circuit, not try again in a different forum.

Wyoming's law of the case doctrine also applies to preclude relitigation of issues that have already been decided. The Wyoming Supreme Court considers the law of the case doctrine to be "in the same family as res judicata, collateral estoppel, and stare decisis." *Ultra Res., Inc. v. Hartman*, 346 P.3d 880, 896 (Wyo. 2015). "Under the 'law of the case' doctrine, a court's decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation." *Triton Coal Co. v. Husman, Inc.*, 846 P.2d 664, 667 (Wyo. 1993). The doctrine is "designed to avoid repetitious litigation and to promote consistent decision making." *Id.* at 667. It not only requires a trial court to adhere to its prior rulings on an issue of law, but also requires a court in a closely related case to adhere to those prior rulings on an issue of law. *Id.* at 668; *Mantle v. N. Star Energy & Constr., LLC*, 473 P.3d 279, 284 (Wyo. 2020). As the Wyoming Supreme Court explained, the law of the case doctrine is important because:

> [w]ithout something like it, an adverse judicial decision would become little more than an invitation to take a mulligan, encouraging lawyers and litigants alike to believe that if at first you don't succeed, just try again . . . The doctrine, therefore, provides incentive for parties to put their best effort into their initial submissions, encourages litigants to present all available claims and defenses, and avoids wasting judicial resources.

BTU W. Res., Inc. v. Berenergy Corp., 442 P.3d 50, 58 (Wyo. 2019) (quoting *Entek GRB, LLC v. Stull Ranches, LLC*, 849 F.3d 1239, 1240, 1242 (10th Cir. 2016) (Gorsuch, J.)).

Here, pursuant to the law of the case, the Wyoming district court determined a derivative claim does not lie under Ohio law based on a private organization's reasonable interpretation of undefined terms in its own governing documents. *See Westenbroek v. Kappa Kappa Gamma Fraternity*, No. 23-CV-51-ABJ, 2023 U.S. Dist. LEXIS 152458 (D. Wyo. Aug. 25, 2023). It also

determined the specific legal issues that: (1) "[d]efining 'woman' is Kappa Gamma's bedrock right as a private, voluntary organization – and one this Court may not invade;" and (2) Kappa's interpretation of the term "women" is "[a] "lawful interpretation – explicitly authorized per the sorority's Standing Rules – of an otherwise-silent bylaw." *Id.* at *29, *34. These decisions are binding precedent to be followed not only by the Wyoming district court, but also in this case as a closely related case. Allowing derivative plaintiffs in privity with the Wyoming plaintiffs to avoid that binding effect by asserting the same legal issues in near identical claims in a different court would undercut the application of the law of the case doctrine, inviting plaintiffs to take a mulligan after the adverse decision in the Wyoming Case. It would also waste judicial resources by allowing these near identical claims to proceed in different dressings in hopes of achieving a different result.

C. The Court Should Consider a Discretionary Stay of This Case Pending a Final Determination in the Wyoming Case

If the Court finds that issue preclusion and the law of the case do not mandate dismissal of Plaintiffs' claims because the order in the Wyoming Case is not yet final as of the date of this filing, the Court should stay this case until such time as the Wyoming Case is resolved with finality. Doing so would avoid concurrent litigation that could potentially reach conflicting results, thus preserving judicial economy and comity while discouraging forum shopping.

As discussed in prior pleadings, this case and the Wyoming Case address the same fundamental questions about Kappa's Fraternity Council's ability to interpret undefined terms in Kappa's Bylaws. Those questions were litigated through a motion to dismiss and fully briefed before the Tenth Circuit before Plaintiffs ever brought this case, and the ultimate disposition of the Wyoming Case will have a preclusive effect on this litigation and any case challenging Kappa's rights to govern itself as a private organization. The Wyoming District Court has already ruled on these issues. If Plaintiffs believe this decision is wrong, the path has been laid out by the Tenth Circuit – perfect the appeal in the Wyoming district court and appeal to the Tenth Circuit.

It is worth noting that a final decision of this Court would potentially bind the Wyoming district court if issued *before* the Wyoming Case is resolved, even though this case was brought nearly a year after the Wyoming Case. Even more concerning, such an event could result in simultaneous appeals of the same issue to two different circuit courts, potentially leaving the parties in an unworkable contradiction of decisions. A stay of this case would avoid any of these unseemly results while also advancing judicial economy. A district court has broad discretion to stay proceedings. *See Clinton v. Jones*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."); *Landis v. N. Am. Co.* 299 U.S. 248, 254 (1936) ("The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.").

A stay is appropriate where there is a "pressing need for the delay" and "neither the other party nor the public will suffer harm from the entry of the order." *Hutt v. Greenix Pest Control, LLC*, No. 2:20-cv-1108, 2021 U.S. Dist. LEXIS 65352, at *3 (S.D. Ohio April 5, 2021) (citing *Ohio Envtl. Council v. U.S. Dist. Ct.*, 565 F.2d 393, 396 (6th Cir. 1977)). Specifically, "the Court has the inherent power to stay proceedings pending the resolution of the same or related issues in another forum." *Hill v. Mitchell*, 30 F. Supp. 2d 997, 1000 (S.D. Ohio 1998). In assessing whether to grant a stay pending the resolution of another proceeding, courts have considered "the potentiality of another case having a dispositive impact on the case to be stayed, the judicial economy to be saved by waiting on a dispositive decision, the public welfare, and the hardship/prejudice to the party opposing the stay." *See Michael v. Ghee*, 325 F. Supp. 2d 829, 831 (N.D. Ohio 2004) (citing *Landis*, 299 U.S. at 255). The Northern District of Ohio held that where the resolution of pending "threshold legal questions . . . could dispose of the case or, at the very least, simplify the issues left

to litigate," a stay is appropriate. *Cybergenetics Corp. v. Inst. of Envtl. Sci & Research*, No. 5:19-CV-1197, 2020 U.S. Dist. LEXIS 20305, at *6 (N.D. Ohio Jan. 27, 2020).

Here, by its preclusive effect, the Wyoming Case will directly impact most of Plaintiffs' derivative claims. Moreover, conflicting decisions from this Court and the Wyoming district court would result in unworkable conflicts that would leave the parties without certainty as to Kappa's rights to govern itself as it sees fit. Avoiding this result with a stay would also serve judicial economy by ensuring that two courts do not concurrently spend time and resources resolving the same issue that the Wyoming Court has already ruled upon. There is also no prejudice to the parties or the public welfare from a stay, as Plaintiffs' interests are already being litigated in the Wyoming Case, where the plaintiffs in both cases have the same attorney.

CONCLUSION

For the reasons addressed herein, claim preclusion and law-of-the case operate to preclude relitigation of the claims and issues Plaintiffs seek to advance in their Complaint and therefore, the Court should grant the pending Motion to Dismiss. Alternatively, the Court should consider a discretionary stay of this case until the Wyoming Case is resolved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed with the U.S. District Court, Southern District of Ohio, on August 2, 2024, and served upon all parties of record via the Court's electronic filing system.

/s/ *Brian W. Dressel*
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