

temporarily enjoining the enforcement of K.S.A. § 65-4a10. Specifically, Defendant claims that amendments to the statute enacted in 2015 automatically rendered K.S.A. § 65-4a10 enforceable.

This Court held oral argument on Plaintiff's motion for preliminary injunctive relief against the Kansas Telemedicine Act on December 14, 2018, and suggested the parties file supplemental briefing to address the issue raised by Defendant regarding the status of K.S.A. § 65-4a10. Plaintiff now submits this supplemental brief and urges this Court to issue a ruling to clarify that K.S.A. § 65-4a10 remains enjoined and unenforceable.

II. BACKGROUND AND EXISTING STATUTORY SCHEME

On November 10, 2011, this Court issued a temporary restraining order barring the Attorney General and other defendants from enforcing the implementing regulations to K.S.A. §§ 65-4a01–4a12, a 2011 regulatory scheme concerning the licensing of medical facilities that provide abortions. Order Granting TRO Pending Hr'ing on Appl. for Temporary Inj. 1-3, *Hodes & Nauser v. Anderson*, No. 11C-1298 (Kan. Dist. Ct. Shawnee Cty. Nov. 10, 2011) (hereinafter the "2011 Restraining Order"). On December 2, 2011, the parties in *Hodes & Nauser* stipulated that the 2011 Restraining Order would "remain in effect pending the Court's issuance of a final judgment in this matter." Agreed Order 1, *Hodes & Nauser v. Anderson*, No. 11C-1298 (Kan. Dist. Ct. Shawnee Cty. Dec. 2, 2011) (hereinafter the "Agreed Order"). The Agreed Order made clear that both the statutory provisions codified at K.S.A. §§ 65-4a01–4a12, as well as the associated implementing regulations, would not be enforced during the pendency of the case. *Id.* The 2011 Restraining Order and the Agreed Order are referred to herein collectively as the "2011 Injunction." K.S.A. § 65-4a10, the medication in-person requirement, was among the statutory provisions covered by the 2011 Injunction.

III. LEGAL ARGUMENT

K.S.A. § 65-4a10 remains unenforceable under the 2011 Injunction. *First*, Defendant failed to take the necessary procedural steps to modify the 2011 Injunction, leaving it in full effect. Defendant’s prior representations confirm this understanding and should preclude him from asserting that K.S.A. § 65-4a10, as amended in 2015, is no longer covered by the 2011 Injunction. *Second*, even if Defendant had properly sought to modify the 2011 Injunction, the 2015 amendments, which simply clarify that the in-person requirement does not apply to a labor induction abortion performed in a hospital or a medical emergency, are insufficient to justify a modification to the 2011 Injunction.

Defendant failed to seek modification of the 2011 Injunction as required under K.S.A. § 60-910(a). Kansas law specifically prescribes how a party should seek to modify an existing injunction prior to a final judgment. Under K.S.A. § 60-910(a), a party “may apply to the judge of the court in which the action is brought, to vacate or modify” the injunction. As explained *infra* at 5-6, Defendant’s contention that the 2015 amendments materially altered the rationale upon which the 2011 Injunction was based finds no support in either the text of the amendments or Kansas case law. Moreover, Defendant is not at liberty to unilaterally determine that the amendments extinguished the existing injunction—such determination must be made by the court. *See Koch Eng’g Co. v. Faulconer*, 227 Kan. 813, 830, 610 P.2d 1094, 1106 (1980) (holding that even if an injunction was issued erroneously, “[t]he proper manner for a party to test the validity of an order of a court is not to defy the order, but to move to have it set aside in the court which issued it or in some court having supervisory jurisdiction.”). Defendant’s failure to follow the procedure outlined in K.S.A. § 60-910(a) should preclude him from now arguing that the 2015 amendments, on their own, altered the effect of the 2011 Injunction.

Indeed, Plaintiff relied on Defendant's public representations to the plaintiffs in *Hodes & Nausser v. Anderson*, No. 11C-1298, and Defendant's subsequent failure to seek modification of the 2011 Injunction from this Court. In 2015, Defendant stated the following in his answer to the plaintiffs' amended petition:

99. Aver that the Legislature amended various provisions of the Act in 2014 and 2015, including K.S.A. 2015 Supp. 65-4a10 (the medication-in-person requirement), and these amendments were not part of the agreed stay of enforcement entered into by the parties in 2011; and note that defendants will be filing a motion with the Court to modify the stay to allow the amended health and safety statutes to take effect.

Defs.' Answer to Pls.' Second Am. Verified Pet. ¶ 99, *Hodes & Nausser v. Anderson*, No. 11C-1298, (Kan. Dist. Ct. Shawnee Cty. Dec. 29, 2015). Defendant's answer unequivocally acknowledges that the 2015 amendments are not in effect, and that they cannot take effect absent modification of the 2011 Injunction by the Court.¹

Based upon Defendant's public statement and subsequent failure to seek modification of the 2011 Injunction, Plaintiff ultimately concluded that the 2015 amendments were not in effect and that the medication in-person requirement contained in K.S.A. § 65-4a10 remained unenforceable under the 2011 Injunction. Further, Plaintiff reasonably acted on this belief when it

¹ In addition to Defendant's statements in publicly-filed court documents, private communications between counsel for Defendant and plaintiffs' counsel in *Hodes & Nausser v. Anderson*, No. 11C-1298, further demonstrate Defendant's bad faith in arguing that the 2015 amendments are in effect. In 2016, Defendant's counsel explicitly inquired whether plaintiffs in that action would be willing to enter into a stipulation to allow the medication-in-person requirement to take effect, and informed plaintiffs' counsel that defendants would file a motion to modify the Agreed Order in the absence of such agreement. The plaintiffs in *Hodes & Nausser v. Anderson*, No. 11C-1298 declined to agree to any such stipulation, and opposing counsel never pursued the matter further with the Court. *See* Email from Tiseme Zegeye, Staff Attorney, Center for Reproductive Rights, to Sarah Warner, Attorney, Thompson, Ramsdell, Qualseth, & Warner, P.A. (April 14, 2016). *See* Exhibit B, attached to Pl.'s Reply to Def.'s Resp. Opp. to Pl.'s Mot. for Temporary Inj. and TRO.

began providing medication abortion using telemedicine in October 2018. Defendant’s contention that K.S.A. § 65-4a10, as amended in 2015, is in effect, despite Defendant’s failure to apply to the court for modification of the 2011 Injunction, is plainly prejudicial to Plaintiff. Indeed, Kansans for Life announced on December 14, 2018 that it had filed a complaint with the Board of Healing Arts alleging Plaintiff is providing “illegal” abortions using telemedicine.² See John Hanna, *Fate of Kansas’ ban on telemedicine abortions uncertain*, THE WASHINGTON POST (Dec. 12, 2018), https://www.washingtonpost.com/national/health-science/fate-of-kansas-ban-on-telemedicine-abortion-uncertain/2018/12/14/6109bec0-0003-11e9-a17e-162b712e8fc2_story.html?noredirect=on&utm_term=.5f77861f4752.

Additionally, because Defendant entered into the Agreed Order in *Hodes & Nauser v. Anderson*, No. 11C-1298, the court cancelled the Temporary Injunction Hearing scheduled for December 6-7, 2011. See Agreed Order 1. Had the parties not reached a stipulation and agreement that K.S.A. §§ 65-4a01–4a12 would not be enforced, presumably the Temporary Injunction Hearing would have gone forward, allowing the court to consider the evidence presented and to enter a temporary injunction order. For Defendant to now assert that K.S.A. § 65-4a10 is currently enforceable, without seeking leave of the Court to modify the 2011 Injunction, is an improper manipulation of the judicial process. Accordingly, this Court should bar Defendant from now claiming that the 2011 Injunction was invalidated by the 2015 amendments.

Finally, even if Defendant were to make a motion to this Court seeking to modify the 2011 Injunction, he cannot demonstrate that modification is warranted, given the insignificant changes

² K.S.A. § 65-4a10(d) states that a violation “shall constitute unprofessional conduct under” the Kansas Healing Arts Act, which authorizes the Board of Healings Arts to impose punishments for violation of the Act. See K.S.A. § 65-2836(b). Additionally, pursuant to K.S.A. § 65-2862, violation of the Kansas Healing Arts Act may be punishable as a misdemeanor.

contemplated by the 2015 amendments. While Kansas courts have not articulated the standard to be used when a party seeks to modify a preliminary injunction order, under federal law, judicial modification of an existing order is “guarded carefully: To obtain modification or dissolution of an injunction, a movant must demonstrate *significant changes* in fact, law, or circumstance since the previous ruling.” *Gooch v. Life Inv’rs Ins. Co. of Am.*, 672 F.3d 402, 414 (6th Cir. 2012) (citing precedent from 2nd, 3rd and 6th Circuits) (internal quotation marks omitted) (emphasis added). Further, these changes must “threaten to convert a previously proper injunction “into an ‘instrument of wrong,’ the law recognizes”” such that “judicial intervention may be necessary to prevent inequities.” *Id.* (quoting *Salazar v. Buono*, 130 S. Ct. 1803, 1816, 176 L.Ed. 2d 634 (2010) (plurality opinion)).

The 2015 amendments to K.S.A. § 65-4a10 created an exception for “an abortion performed in a hospital through inducing labor” and a medical emergency exception. K.S.A. §§ 65-4a10(b)(1) – (2) (as amended by 2015 Kan. Sess. Laws 1132). All other provisions of the medication in-person requirement remained unchanged. Defendant cannot demonstrate that these narrow exceptions change the circumstances necessitating the relief entered in the 2011 Injunction. The exceptions outlined in the 2015 amendments are simply irrelevant to the vast majority of women seeking medication abortion and thus have virtually no impact on the law’s effects and burdens. Nor do the 2015 amendments alter the fact that, because the second medication used in the medication abortion regimen is consumed outside of the physician’s presence, almost all complications—which are rare—will occur after patients have already left the provider’s office. *See* Pl.’s Mem. of Law in Supp. of Mot. for Temporary Inj. and TRO 6-7 (hereinafter “Pl.’s Mem.”).

Defendant has neither filed a motion to modify the 2011 Injunction nor raised any new facts or presented any compelling argument as to why these amendments warrant a modification. If anything, the facts have changed to more strongly support Plaintiff's position that the law confers no medical benefit, is therefore unconstitutional, and is harmful to the public's interest because it serves only to delay or preclude abortion care. *See generally* Pl.'s Mem. 5-9, 12-15, 20-21, 23-25.

For these reasons, Plaintiff respectfully requests that this Court declare that K.S.A. § 65-4a10 remains subject to the 2011 Injunction and is currently unenforceable.

Respectfully submitted,

/s/ Robert V. Eye

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* *Admitted Pro Hac Vice*

***Application Pending for Admission Pro Hac Vice*

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that on this 19th day of December, 2018, I electronically filed the above and foregoing with the Clerk of the Court using the Court's Electronic Filing System, which will send a notice of electronic filing to all counsel of record.

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