IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:13-cv-00563-RBJ-BNB

W.L. (BILL) ARMSTRONG;
JEFFREY S. MAY;
WILLIAM L. (WIL) ARMSTRONG III;
JOHN A. MAY;
DOROTHY A. SHANAHAN; and
CHERRY CREEK MORTGAGE CO., INC., a Colorado corporation;

Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services;
SETH D. HARRIS, in his official capacity as Acting Secretary of the United States Department of Labor;
JACOB LEW, in his official capacity as Secretary of the United States Department of the Treasury;
UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;
UNITED STATES DEPARTMENT OF LABOR;
UNITED STATES DEPARTMENT OF THE TREASURY;

Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR AN ORDER PURSUANT TO F.R.CIV.P. 62(c)

Plaintiffs move the Court for an injunction pending their appeal of the Court's denial of their motion for a preliminary injunction in light of the Tenth Circuit's recent decision in *Hobby Lobby v. Sebelius*, 2013 WL 3216103 (10th Cir. June 27, 2013). The motion should be denied for two independent reasons. First, the Tenth Circuit's irreparable harm analysis in *Hobby Lobby* does not apply to the facts of this case where, unlike in *Hobby Lobby*, plaintiffs waited until three months after the contraceptive coverage requirement took effect as to Cherry Creek to file suit and seek preliminary injunctive relief and, during that time, continued to provide the contraceptive coverage to which they object. Second, plaintiffs have not established that the

balance of equities tips in their favor or that an injunction would be in the public interest – factors that the Tenth Circuit in *Hobby Lobby* remanded for the district court to consider in the first instance. The Court, accordingly, should deny plaintiffs' motion for an injunction pending appeal.

To obtain an injunction pending appeal, a plaintiff must show the same four elements necessary to obtain a preliminary injunction: likelihood of success on the merits, irreparable harm absent an injunction, the balance of equities tips in plaintiff's favor, and an injunction is in the public interest. *Town of Superior v. U.S. Fish & Wildlife Serv.*, 2012 WL 6737183, *1 (D. Colo. Dec. 28, 2012); *see also Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Plaintiffs have not established any of the final three elements.[1]

A bare majority of the *en banc* Tenth Circuit in *Hobby Lobby* determined that the company plaintiffs in that case had established irreparable harm. 2013 WL 3216103, at *1. It does not follow, however, that plaintiffs here have made the necessary showing. As defendants explained at the hearing on plaintiffs' motion for preliminary injunction, the facts in *Hobby Lobby* are different in relevant respects from the facts of this case. *See* Reporter's Transcript, Hearing on Plaintiffs' Motion for Preliminary Injunction ("Transcript") at 46-47 (May 10, 2013). The plaintiffs in *Hobby Lobby* brought suit and sought preliminary injunctive relief three months before the contraceptive coverage regulations required the companies' health plan to cover contraceptive services, and, at the time plaintiffs filed suit, the companies' plan explicitly excluded the contraceptive coverage to which plaintiffs object. *Hobby Lobby v. Sebelius*, 870 F. Supp. 2d 1278, 1285 (W.D. Okla. 2012). In contrast, plaintiffs here discovered that Cherry Creek's health plan covers the contraceptive services to which they object in December 2012, but waited until three months after the regulations took effect as to the company to file suit and

[1] Defendants believe a majority of the *en banc* Tenth Circuit wrongly decided that the for-profit companies in *Hobby Lobby* were likely to succeed on their Religious Freedom Restoration Act ("RFRA") claim. Nonetheless, defendants recognize that this Court is bound by that decision and thus do not challenge plaintiffs' ability to establish likelihood of success on the merits of Cherry Creek's RFRA claim with respect to the instant motion.

seek preliminary injunctive relief, all the while continuing to provide such contraceptive coverage. Compl. ¶ 53; Transcript at 92 (Judge Jackson: ". . . . [Plaintiffs] knew in December that this was in their plan, but they did not file a case until March and so far as the Court is aware, made little, if any, effort to obtain an immediate, emergent, forthwith injunctive hearing, putting us here in May, five to six months after they learned of it. . . .").

Because the relevant facts in this case are distinguishable from those in *Hobby Lobby*, the Tenth Circuit's decision on irreparable harm in that case is not controlling here. Plaintiffs in this case are not entitled to the equitable relief of an injunction when they have sat on their purported rights. *See, e.g., Mersino Mgmt. Co. v. Sebelius*, No. 13-cv-11296, Slip Op. at 2 n.1 (E.D. Mich. July 11, 2013) ("Delays in seeking injunctive relief" against the contraceptive coverage requirement "indicate to the Court that harm is not imminent and that speedy relief is not warranted. The failure to move forward with urgency in this action is all the more unexplainable given that Plaintiffs' counsel filed a nearly identical claim in this court over a year ago on behalf of other similarly situated plaintiffs."); *Autocam v. Sebelius*, 2012 WL 6845677, at *9 (W.D. Mich. Dec. 24, 2012) ("Equity does not favor the dilatory."); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276-77 (2d Cir. 1985) (vacating preliminary injunction because, *inter alia*, "[plaintiff's] failure to act sooner undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury" (quotation omitted)); *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (affirming denial of preliminary injunction because "[p]laintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm"); *Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (noting, in affirming denial of preliminary injunction, that delay of forty-four days after final regulations were issued was "inexcusable"). Indeed, this Court suggested as much at the hearing on plaintiffs' motion for preliminary injunction. Although the Court ultimately based its decision on plaintiffs' failure to satisfy the likelihood of success prong, the Court noted that "[t]oday is May 10. By your own admission, your clients knew about this in December. Five months, six months later here we are. How can

you say there's irreparable harm given that situation?" Transcript at 38; *see also id*. at 40 ("And that's why, it, it at least raises the question, if there is that kind of irreparable harm, why aren't you in court the next day after you learn that this is happening?"). Because plaintiffs have not established that they will suffer irreparable harm in the absence of preliminary injunctive relief, their motion should be denied.

Plaintiffs also have not shown that the balance of equities tips in their favor or that an injunction would be in the public interest, and thus, their motion should be denied on this basis as well. *See OfficeMax Inc. v. County Quick Print, Inc.*, 709 F. Supp. 2d 100, 115 (D. Me. 2010) (denying temporary restraining order based on a balancing of the equities despite court's conclusion that plaintiff was likely to succeed on the merits); *Alliance Research Corp. v. Telular Corp.*, 859 F. Supp. 400, 405-06 (C.D. Cal. 1994) (denying preliminary injunction even though plaintiff had established a reasonable likelihood of success on the merits). A majority of the Tenth Circuit did not reach these elements in *Hobby Lobby* and instead remanded the case to the district court to consider them in the first instance. 2013 WL 3216103, at *1. In doing so, Judge Bacharach noted, in his concurrence, that the district court must consider whether "the health reasons for promoting employee access to emergency contraceptives" outweigh "the public interest in extending RFRA protection to [the for-profit company plaintiffs in that case]." *Id*. at *38 (Bacharach, J., concurring). Judge Bacharach also observed that "the public interest in ensuring access to 'Plan B' for sexually active women of childbearing age" has been recognized by at least one appellate court. *Id*. (citing *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009)).

In analyzing the balance of equities and the public interest, the court should take into account the possibility of harm to third parties. *See, e.g., Doe v. Colautti*, 592 F.2d 704, 706 (3d Cir. 1979); *Winmark Corp. v. Schneeberger*, 2013 WL 1154506, *7 n.7 (D. Colo. Mar. 19, 2013). In *USX Corp. v. Pennsylvania Department of Labor and Industry*, 643 F. Supp. 1567 (M.D. Pa. 1986), for example, the court denied an employer's motion for a preliminary injunction that sought to relieve the employer of the requirement to pay unemployment

compensation to its employees during a work stoppage. The court assumed that plaintiff had established a likelihood of success on the merits but nevertheless denied the motion, in part, because of the possibility of harm to the plaintiff's employees, who were not a party to the action. *Id*. at 1573-75. The court explained that "there is a great possibility of harm to the steel workers if unemployment payments are enjoined" and "the public has an interest in seeing that unemployment payments are made so that the steelworkers would not have to rely upon the public fisc for support while [the employer's] appeal moves through the state system." *Id*. at 1575. Similarly, in *Keweenaw Bay Indian Community v. United States*, 1999 WL 33978509 (W.D. Mich. Sept. 30, 1999), the defendants' sought a preliminary injunction to close plaintiffs' casino. Although the court concluded that the defendants had "demonstrated actual success on the merits," *id*. at * 3, it denied the injunction based in part on the fact that "over 250 employees [of the casino] would lose their jobs" as a result of the closure, *id*. at *4.

Here, as in *USX Corp.* and *Keweenaw Bay Indian Community*, enjoining the contraceptive coverage requirement as to Cherry Creek would significantly harm the company's 730 employees and their families. As explained in defendants' opposition to plaintiffs' motion for preliminary injunction, and supported by the Institute of Medicine's report and recommendations, elimination of the contraceptive coverage that Cherry Creek currently provides to its female employees and their family members would cause those women to have more difficulty accessing contraceptive services. Defs.' Mem. in Opp'n to Pls.' Mot. for Prelim. Inj. at 15, ECF No. 19, Apr. 10, 2013 ("Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men. These costs result in women often forgoing preventive care." (citations omitted)); *id*. at 3, 14-16, 25. These women, in turn, would be at greater risk of negative health consequences for themselves and their newborn children and would be put at a competitive disadvantage in the workforce. *Id*. at 3, 14-16, 25 (explaining, among other things, that unintended pregnancy may delay entry into prenatal care, prolong behaviors that present risks for the developing fetus, and cause depression, anxiety, or other conditions; and that

contraceptive coverage helps avoid the increased risk of adverse pregnancy outcomes for pregnancies that are too closely spaced).

Cherry Creek's employees – who were not hired based on their religious beliefs and therefore do not necessarily share the religious beliefs of the company's owners – should not be deprived of the benefits, which they currently receive, of having a health plan through their employer that covers the full range of FDA-approved contraceptive services. *See Stormans*, 586 F.3d at 1139 (vacating preliminary injunction entered by district court and noting that "[t]here is a general public interest in ensuring that all citizens have timely access to lawfully prescribed medications," including emergency contraceptives). Cherry Creek's employees and their families have received contraceptive coverage through the company's health plan both before and after the challenged regulations took effect as to Cherry Creek, with plaintiffs doing next to nothing to alter this circumstance. Requiring an abrupt change in the employees' health plan, which they have come to rely on for covering the costs of their contraceptive care, would be particularly inequitable.

For these reasons, plaintiffs' motion for an injunction pending appeal should be denied.

Respectfully submitted this 17th day of July, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on July 17, 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/ Michelle R. Bennett
MICHELLE R. BENNETT
Trial Attorney