

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 J. LEW, in his official capacity as Secretary of the
United States Department of the Treasury; the UNITED
STATES DEPARTMENT OF HEALTH AND HUMAN
SERVICES; the UNITED STATES DEPARTMENT OF LABOR;
and the UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.

**MOTION FOR AN ORDER PURSUANT TO F.R.CIV.P. 62(c) and REQUEST FOR
FORTHWITH DETERMINATION**

PLAINTIFFS 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, by and through their undersigned attorneys,
respectfully request, pursuant to F. R. Civ. P. 62(c) and F. R. A. P. 8(a) and the decision of the
U.S. Court of Appeals for the Tenth Circuit in *Hobby Lobby Stores Inc. v. Sebelius*, No. 12-6294,
2013 WL 3216103 (10th Cir.) (en banc), that the district court enter a preliminary injunction in

favor of the Plaintiffs pending the appeal of the district court's previous denial of Plaintiffs' motion for a preliminary injunction and, in support hereof, state as follows:

1. On March 5, 2013, Plaintiffs filed their Verified Complaint (Doc. 1) in this cause. On March 18, 2013, Plaintiffs filed their Motion for a Preliminary Injunction (Doc. 12) accompanied by Plaintiffs' Brief in Support of Motion for Preliminary Injunction (Doc. 13).
2. Thereafter, on May 10, 2013, the district court held a hearing on Plaintiffs' Motion for a Preliminary Injunction and entered its order from the bench denying Plaintiffs' motion. See Minute Order (Doc. 38).
3. In rendering its May 10, 2013 decision, the district court stated ". . . I recognize, as you all do, that what the Tenth Circuit will say soon enough may differ. . . . And therefore if the Tenth Circuit comes out the other way, as at least three circuits have on the issue, the plaintiffs are in no way foreclosed from coming back to this Court and once again requesting a preliminary injunction. This Court will follow the lead of the Tenth Circuit, no matter what direction that lead takes; and in fact, I would anticipate that if the Tenth Circuit rules in plaintiffs' favor, that there is a very good chance that this will be another one of those situations where the government might stipulate to an injunction." See attached Reporter's Transcript, Hearing on Plaintiffs' Motion for Preliminary Injunction, pp. 97-98.
4. On June 27, 2013, the U.S. Court of Appeals for the Tenth Circuit issued its decision in *Hobby Lobby Stores Inc. v. Sebelius*, No. 12-6294, 2013 WL 3216103 (10th Cir.) (en banc). In brief summary, the Tenth Circuit held that plaintiffs Hobby Lobby and Mardel: (a) were entitled to bring claims under the Religious Freedom Restoration Act ("RFRA"); (b) had established a likelihood of success that their rights under RFRA were substantially burdened by the HHS contraceptive-coverage mandate; and (c) had established irreparable harm.

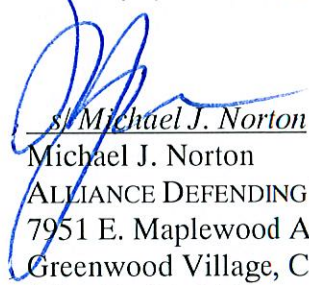
5. Inasmuch as the claims by these Plaintiffs herein are similar if not identical to those upheld by the Tenth Circuit in *Hobby Lobby*, these Plaintiffs' request for a preliminary injunction in this case pending appeal pursuant to F.R.Civ.P. 62(c), should be granted.
6. Therefore, Plaintiffs respectfully request that this Court grant Plaintiffs' motion for injunction pending appeal on the basis of submissions previously filed herein by the parties and the statements and arguments of counsel to this Court at the May 10, 2013 hearing on Plaintiffs' Motion for a Preliminary Injunction in consideration of the Tenth Circuit's decision in *Hobby Lobby*.
7. In light of the fact that Plaintiffs continue to suffer irreparable injury as a result of this Court's initial denial of their request for a preliminary injunction, it is in the interests of justice that Plaintiffs' request for an injunction pending appeal be granted and further that this request be determined on a **FORTHWITH** basis.
8. CERTIFICATE OF COMPLIANCE RE: CONSULTATION. Pursuant to D.C.COLO.LCiv.R. 7.1A, Plaintiffs certify that Natalie L. Decker, Esq., one of the attorneys for Plaintiffs, before the filing of this motion, telephonically consulted and conferred with attorneys for Defendants, to wit: Michelle R. Bennett, Esq., Trial Attorney, U.S. Department of Justice, Civil Division, Federal Programs Branch, 20 Massachusetts Avenue, NW, Washington, D.C. 200001 (202-305-8902) about this motion and the relief requested herein. Mr. Humphreys advised Ms. Decker that the Defendants had not yet determined what position, if any, to take with respect to this motion or the relief requested therein in light of the Tenth Circuit's *Hobby Lobby* decision. In addition and following this telephonic communication, counsel for the Plaintiffs advised counsel for the Defendants, via email, that, in light of the irreparable injury being suffered by Plaintiffs, Plaintiffs were obliged to file

this motion on Monday, July 1, 2013 whether or not the Defendants had decided on their position. Thus, as of the filing of this motion, the position of the Defendants, if any, is not known.

WHEREFORE, Plaintiffs, through counsel, respectfully plead as aforesaid and request that this Court grant Plaintiffs' motion and enter an injunction pending appeal in favor of the Plaintiffs and for such other and further relief as the Court may deem just and proper. In addition, Plaintiffs respectfully request that this motion be determined **FORTHWITH**. A proposed order is being filed concurrently herewith.

DATED this 1st day of July, 2013.

Attorneys for Plaintiffs:



s/ Michael J. Norton
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ARMSTRONG III; JOHN A. MAY; DOROTHY A. SHANAHAN; and CHERRY
CREEK MORTGAGE CO., INC., a Colorado corporation,

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

Defendants.

REPORTER'S TRANSCRIPT
HEARING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Proceedings before the HONORABLE R. BROOKE
JACKSON, Judge, United States District Court for the District
of Colorado, commencing at 9 a.m., on the 10th day of May,
2013, in Courtroom A902, Alfred A. Arraj United States
Courthouse, Denver, Colorado.

Proceeding Reported by Mechanical Stenography, Transcription
Produced via Computer by Kara Spitler, RMR, CRR,
901 19th Street, Denver, CO, 80294, (303) 623-3080

1 I noted before and I note again that in doing so, they
2 said that they were not addressing the issue whether a
3 corporation has free exercise rights. They were not addressing
4 the issue of whether or not the individual plaintiffs here have
5 to go it alone or that Cherry Creek Mortgage as a company has
6 its own right to free exercise of religion. That is an
7 enormously difficult issue. It is the issue identified by
8 Judge Kane as the substantial and difficult issue that under
9 the relaxed standard convinced him that the -- there was for
10 that purpose substantial likelihood of success.

11 But the relaxed standard does not apply, according to
12 the panel. And they determined that they did not have to
13 address that issue because either way, individually or
14 corporate-wise, there was a common failure to demonstrate a
15 substantial likelihood of success on the RFRA *prima facie* case,
16 and that sufficed to dispose of the motion for an injunction.

17 And because I think that is relevant, I have decided
18 that the proper thing for me to do is to follow the lead of the
19 motions panel and therefore I deny the motion, which is motion
20 no. 12, for a preliminary injunction.

21 In saying that, however, I recognize, as you all do,
22 that what the Tenth Circuit will say soon enough may differ.
23 The prediction of Judges Ebel and Lucero as to what the merits
24 panel would do may not turn out to be accurate. And therefore
25 if the Tenth Circuit comes out the other way, as at least three

1 circuits have, on the issue, the plaintiffs are in no way
2 foreclosed from coming back to this Court and once again
3 requesting a preliminary injunction. This Court will follow
4 the lead of the Tenth Circuit, no matter what direction that
5 lead takes; and in fact, I would anticipate that if the Tenth
6 Circuit rules in plaintiffs' favor, that there is a very good
7 chance that this will be another one of those situations where
8 the government might stipulate to an injunction.

9 Ms. Bennett has taken on a tiger by the tail, but she
10 also knows when to stop beating her head against the wall. But
11 that, for today, will be my decision. As I said, it was very
12 interesting, I really enjoyed reading your materials, and I
13 appreciate the quality of your arguments.

14 Thank you, folks.

15 Are there any questions?

16 MR. NORTON: Your Honor, would there be a written
17 order forthcoming, or is this --

18 THE COURT: I think if you want a written order,
19 you'll need to order the transcript. I don't intend to write
20 this up.

21 MR. NORTON: You what?


22 THE COURT: The transcript. The transcript will be my
23 written order.

24 MR. NORTON: Okay. Thank you, Your Honor.

25 THE COURT: Miss Bennett.

CERTIFICATE OF SERVICE

I, Michael J. Norton, hereby certify that on the 1st day of July, 2013, I caused the foregoing document to be served on all parties or their counsel of record through the Court's CM/ECF system if they are registered users or, if not, by placing a true and correct copy of the foregoing document in the U.S. Mail, first-class, postage prepaid to their address of record.


s/ *Michael J. Norton* _____
Michael J. Norton