

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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,

No. 13-1218

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, in her official
capacity as Secretary of Health and Human
Services, et al.,

Defendants-Appellees

**Motion To Hold Appeal In Abeyance Pending This Court's Decision In
Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294 (10th Cir.) (en banc)**

For the following reasons, the government respectfully moves to hold this appeal in abeyance pending this Court's decision in *Hobby Lobby Stores v. Sebelius*, No. 12-6294 (10th Cir.), which was heard before the en banc Court on May 23, 2013. Plaintiffs oppose this motion.

1. Plaintiff Cherry Creek Mortgage Company, Inc., is a full-service residential mortgage banking corporation. *See* R.1 ¶ 3. The corporation is licensed to do business in 27 states and has 730 full-time employees throughout its various

locations. *See* R.1 ¶¶ 3, 51. People employed by the corporation received health coverage for themselves and their family members through the Cherry Creek Mortgage Company group health plan, which is provided by CIGNA, the company's insurer. *See* R.1 ¶ 50. About 400 employees and their dependents are participants in this group health plan. *See* R.1 ¶ 51.

In December 2012, plaintiffs discovered that the Cherry Creek Mortgage Company group health plan covers Food and Drug Administration ("FDA")-approved contraceptives. *See* R.1 ¶ 53. Plaintiffs allege that the controlling shareholders of the corporation regard certain contraceptives (intrauterine devices, Plan B and Ella) as contrary to their religious beliefs because the devices and drugs can prevent the implantation of a fertilized egg in a woman's uterus. *See* R.1 ¶¶ 6, 53. The corporation, however, does not hire employees on the basis of their religion, and the employees thus are not required to share the religious beliefs of the company's controlling shareholders.

In this suit, plaintiffs claim that the Cherry Creek Mortgage Company's group health plan must be exempted from the federal requirement that the plan cover all forms of FDA-approved contraceptives, as prescribed by a health care provider. Plaintiffs contend that this exemption is required by the Religious Freedom Restoration Act ("RFRA") and the First Amendment because the controlling shareholders of the corporation have asserted a religious objection to

the plan's coverage of certain FDA-approved contraceptives. The district court denied plaintiffs' motion for a preliminary injunction from the bench on May 10, *see* R.38, and plaintiffs filed a notice of appeal on May 16, *see* R.39.

2. The same issues are presented in *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294 (10th Cir.), which was heard by the en banc Court on May 23. Here and in *Hobby Lobby*, the government's arguments are the same. Congress, in enacting RFRA, did not grant for-profit, secular corporations the right to deny employee benefits on the basis of religion. To the contrary, RFRA carried forward the pre-existing distinction between religious organizations, which may obtain religious exemptions from federal employment regulations, and secular companies, which may not. This distinction is grounded in the text of the First Amendment, and it avoids the Establishment Clause concerns that would arise if religion-based exemptions were extended to entities operating in the commercial, profit-making world. Plaintiffs cannot evade this distinction by declaring that a corporate regulation should be regarded as a substantial burden on the personal religious beliefs of a corporate officer or controlling shareholder, a contention that disregards settled principles of corporate law. Moreover, the particular burden of which plaintiffs complain here and in *Hobby Lobby* is too attenuated to be regarded as substantial. And the contraceptive-coverage requirement would survive strict scrutiny even if the Court were to conclude (incorrectly) that RFRA made

corporate regulations subject to strict scrutiny at the behest of a company's officers or controlling shareholders.

3. If this Court accepts the government's contentions in *Hobby Lobby*, the claims in this case will fail for the same reasons. Accordingly, the Court should hold this appeal in abeyance pending this Court's decision in *Hobby Lobby*.

4. Plaintiffs oppose this motion.

Respectfully submitted,

MARK B. STERN
(202) 514-1597

/s Alisa B. Klein

ALISA B. KLEIN
(202) 514-1597
alisa.klein@usdoj.gov
Attorneys, Appellate Staff
Civil Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W., Room 7235
Washington, D.C. 20530

June 13, 2013

CERTIFICATIONS

I hereby certify that

1. on June 13, 2013, I filed and served the foregoing motion on counsel of record through this Court's CM/ECF system;
2. all required privacy redactions have been made;
3. any required paper copies are exact versions of the document submitted electronically;
4. this electronic document was scanned for viruses with the most recent version of a commercial virus scanning program and found to be virus free.

/s Alisa B. Klein

Alisa B. Klein