IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:13-cv-00285-WYD

STEPHEN W. BRISCOE;
CONTINUUM HEALTH PARTNERSHIPS, INC.;
CONTINUUM HEALTH MANAGEMENT, LLC; and
MOUNTAIN STATES HEALTH PROPERTIES, LLC,

Plaintiffs,

v.

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; THOMAS E. PEREZ, in his official capacity as 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' SECOND EMERGENCY APPLICATION FOR TEMPORARY RESTRAINING ORDER PENDING THE COURT'S RULING ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION OR, IN THE ALTERNATIVE, A REQUEST FOR A PRELIMINARY IN JUNCTION and REQUEST FOR FORTHWITH CONSIDERATION

Plaintiffs move the Court for emergency injunctive relief in light of the Tenth Circuit's recent decision in *Hobby Lobby v. Sebelius*, __ F.3d __, 2013 WL 3216103 (10th Cir. June 27, 2013), and the *Hobby Lobby* district court's July 19, 2013 entry of a preliminary injunction on remand. Plaintiffs' motion should be denied because plaintiffs have not established that the balance of equities tips in their favor or that an injunction would be in the public interest. *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).[1] Although the *Hobby Lobby* district court concluded that the equitable balancing and public interest factors weighed in the plaintiffs favor in that case, that determination is in no way binding on this Court. Indeed, in denying plaintiffs' motion for a temporary restraining order, this Court has already indicated that the remaining preliminary injunction factors "do not tip strongly in the plaintiffs' favor." Order Denying Plaintiffs' Motion for a Temporary Restraining Order, ECF No. 25.

A majority of the Tenth Circuit did not reach the equitable balancing and public interest factors 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 absolve the employer of the requirement to pay unemployment compensation to its employees during a work stoppage. The court assumed that plaintiff had

[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 and that the plaintiffs had established that they would suffer irreparable harm in the absence of an injunction. 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 the companies' RFRA claim or irreparable harm with respect to the instant motion.

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 Continuum would significantly harm the company's employees and their families. As explained in defendants' opposition to plaintiffs' first motion for a temporary restraining order, and supported by the Institute of Medicine's report and recommendations, depriving Continuum's female employees and their family members the contraceptive coverage that Continuum currently provides would cause those women to have more difficulty accessing contraceptive services. Defs.' Mem. in Opp'n to Pls.' Mot. for TRO at 21, ECF No. 18, Feb. 12, 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 20-22, 36. 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 20-22, 36 (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). Continuum'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).

For these reasons, plaintiffs' motion should be denied.

Respectfully submitted this 1st day of August, 2013,

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 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/ Bradley P. Humphreys
BRADLEY P. HUMPHREYS