IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

DOMINO'S FARMS CORPORATION; and THOMAS MONAGHAN, Owner of Domino's Farms Corporation, Plaintiffs, v. KATHLEEN SEBELIUS, *et al.*, Defendants.	Case No. 2:12-cv-15488 Judge Lawrence P. Zatkoff Magistrate Judge Michael Hluchaniuk

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

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ARGUMENT

Plaintiffs Domino's Farms, a for-profit property management company, and its owner, Thomas Monaghan, seek to convert the Court's December 30, 2012 temporary restraining order ("TRO") into a preliminary injunction. Pls.' Mot. for Prelim. Inj. ("Pls.' Mot."), ECF No 20. The Court should deny plaintiffs' motion. Although defendants recognize that the Court effectively determined that plaintiffs met the requirements for preliminary injunctive relief in its December 31, 2012 Order and Opinion, defendants respectfully submit that the Court's analysis was flawed for the reasons set forth below and in defendants' opposition to plaintiffs' motion for a TRO, and that plaintiffs are not entitled to preliminary injunctive relief.[1]

As an initial matter, the Court's Order and Opinion did not address the recent reasoned motions panel decision of the Sixth Circuit in *Autocam Corporation v. Sebelius*, No. 12-2673, Order (6th Cir. Dec. 28, 2012), which defendants submitted in a notice of supplemental authority on December 30, 2012. *See* Defs.' Notice of Supp. Authority, ECF No. 15. In that case, the plaintiffs allege, as do the plaintiffs in this case, that complying with the regulations requires them to facilitate access to services to which the corporation's owners object on religious grounds. *See, e.g.*, Compl. ¶ 7, *Autocam Corp. v. Sebelius*, No. 1:12-cv-01096 (W.D. Mich. Oct. 8, 2012), ECF No. 1. After the district court denied the plaintiffs' motion for a preliminary injunction, *see Autocam Corp. v. Sebelius*, No. 1:12-cv-1096, 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012), the plaintiffs moved the Sixth Circuit for an injunction pending appeal with respect to their RFRA claim.

In denying the plaintiffs' motion for injunctive relief, a motions panel of the Sixth Circuit explained that "[t]o demonstrate a likelihood of success on appeal, '[i]t is not enough that the chance of success on the merits be better than negligible.'" *Autocam*, Order at 2 (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). The court concluded that, "in light of the lower court's

[1] Plaintiffs' memorandum of law in support of their motion to convert the TRO to a preliminary injunction is substantially similar to their memorandum of law in support of their motion for a TRO. *See generally* Pls.' Mot. Thus, rather than repeat the arguments contained in their opposition to plaintiffs' motion for a TRO, defendants incorporate those arguments by reference into this memorandum.

reasoned opinion in this case and the Supreme Court's recent denial of an injunction pending appeal in *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12A644, 2012 WL 6698888 (Sotomayor, J., in chambers), the plaintiffs have not demonstrated more than a possibility of relief." *Autocam*, Order at 2 (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). The court also determined that the plaintiffs had not established irreparable harm absent a preliminary injunction because, among other reasons, "it is not clear that the [preventive services coverage regulations] violate[] the plaintiffs' constitutional rights. And purely monetary damages generally do not warrant an injunction." *Id.* at 3. The court granted the plaintiffs' motion to expedite appeal of the district court's decision. *Id.* The plaintiffs then moved for reconsideration—relying heavily on the Seventh Circuit's order in *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353 (7th Cir. Dec. 28, 2012)—but the Sixth Circuit concluded that reconsideration was "unnecessary." *See Autocam Corp. v. Sebelius*, No. 12-2673, Order (6th Cir. Dec. 31, 2012). Although not binding on this Court, the Sixth Circuit's analysis is persuasive, as was the district court's reasoning in that case, and therefore counsels strongly against granting plaintiffs' motion for a preliminary injunction.

Apart from failing to address the most relevant Sixth Circuit decision, the Court's analysis in its Order and Opinion suffers from several other serious flaws. First, in determining that Mr. Monaghan's personal religious beliefs were burdened by the preventive services coverage regulations, the Court began by analyzing whether Mr. Monaghan has *standing* to bring his claim under RFRA. Order and Opinion at 5-6. Defendants, however, have never challenged Mr. Monaghan's standing. The relevant question is whether Mr. Monaghan's religious beliefs are substantially burdened by a regulation that applies only to the health plan of a wholly separate legal entity, the corporation Domino's Farms. By treating Mr. Monaghan and Domino's Farms as one and the same, the Court ignored the layers of legal separation between Mr. Monaghan and the corporation, only the latter of which is responsible for providing health coverage that includes contraceptive coverage. *See* Defs.' Opp'n to Emergency TRO at 11-13 ("Defs.' TRO Opp'n"), ECF No. 12.

The Supreme Court has stated that "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). And, even though Mr. Monaghan is the sole owner of Domino's Farms, the corporate form shields him from personal liability for Domino's Farm's debts. *See Klager v. Robert Meyer Co.*, 329 N.W.2d 721, 411 (Mich. 1982). Thus, as the District Court for the Eastern District of Pennsylvania recently explained in an analogous case, "[i]t would be entirely inconsistent to allow [Mr. Monaghan] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purposes of challenging these regulations." *Conestoga Wood Specialties Corp. v. Sebelius*, No. 5:12-cv-06744, 2013 WL 140110, *8 (E.D. Pa. Jan. 11, 2013); *see also Autocam*, 2012 WL 6845677, at *7 (finding no substantial burden on corporation's owners' religious exercise and remarking that "the corporation is not the *alter ego* of its owners for the purposes of religious belief and exercise"); *Hobby Lobby v. Sebelius*, 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012) (considering the layers of legal separation between the corporation, to which the regulations apply, and the owners in determining that the owners' religious exercise was not substantially burdened).[2]

Moreover, rather than grappling with the significant question of whether any burden imposed by the regulations on any religious exercise by plaintiffs qualifies as "substantial," as required to implicate RFRA, the Court merely "assume[d] that abiding by the mandate would substantially burden Monaghan's adherence to the Catholic Church's teachings." Opinion and Order at 7. But this approach reads RFRA's legal requirement of substantiality completely out of

[2] Although the Court noted that Domino's Farms "cannot act (or sin) on its own," Order and Opinion at 6, it is also true that Domino's Farms cannot incur liability on its own (*i.e.*, without human agency), but the corporate form nevertheless shields Mr. Monaghan from such liability. To the degree that the Court has determined that Domino's Farms is merely Mr. Monaghan's alter ego, then the corporate veil should be pierced for all purposes, not only for the purposes of religious exercise. A company and its owners cannot be treated as alter egos for some purposes and not others. *See, e.g.*, *Nautilus Ins. Co. v. Reuter*, 537 F.3d 733, 738 (7th Cir. 2008).

the statute, and would lead to anomalous results. As the court in *Conestoga* persuasively explained:

> If every plaintiff were permitted to unilaterally determine that a law burdened their religious beliefs, and courts were required to assume that such burden was substantial, simply because the plaintiff claimed that it was the case, then the standard expressed by Congress under RFRA would convert to an "any burden" standard. Aside from being contrary to the plain language of the RFRA, this type of blind application would permit any religious objector to refuse to comply with Congressional mandates based solely on stated religious objections, which could include laws dealing with public and workplace safety, and discrimination. . . . [F]or [ ] laws or regulations to violate the RFRA, there must be more than some burden on religious exercise. The burden must be substantial.

2013 WL 140110, at *13 (citations and quotation marks omitted); *see also id.* at *14 ("[A] line must be drawn delineating when the burden on a plaintiff's religious exercise becomes 'substantial.'"); *Autocam*, 2012 WL 6855677, at *7 ("Plaintiffs argue, in essence, that the Court cannot look beyond their sincerely held assertion of a religiously based objection to the mandate to assess whether it actually functions as a substantial burden on the exercise of religion. . . . This would subject virtually every government action to a potential private veto based on a person's ability to articulate a sincerely held objection tied in some rational way to a particular religious belief.").

Indeed, although the Court indicated that "[o]ther courts have assumed that a law substantially burdens a person's free exercise of religion based on that person's assertions," Order and Opinion at 7, in those cases, the courts ultimately rejected the plaintiffs' RFRA claims because the challenged laws met strict scrutiny, and therefore had no need to determine whether the plaintiffs' religious exercise was substantially burdened. *See May v. Baldwin*, 109 F.3d 557, 563-65 (9th Cir. 1997) (rejecting Rastafarian inmate plaintiff's RFRA claim because the requirement that he unbraid his hair was supported by a compelling interest and was the least restrictive means of promoting that interest); *Hamilton v. Schriro*, 74 F.3d 1545, 1555-56 (8th Cir. 1996) (concluding that challenged prison regulations did not violate RFRA because they satisfied strict scrutiny); *see also United States v. Lee*, 455 U.S. 252, 261 (1982) (rejecting the plaintiffs' free exercise claim, indicating that, "[w]hen followers of a particular sect enter into

commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity"). Had those courts determined that the challenged laws failed strict scrutiny, then a legal determination of whether the alleged burden was "substantial" would have been required in order to rule in the plaintiffs' favor. *Cf. Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 733, 737 (6th Cir. 2007) (indicating that "the first question" is whether the law "imposes a substantial burden," and that "'substantial burden' is a difficult threshold to cross").

In this case, as recognized by motions panels of the Sixth and Tenth Circuits, and various district courts, the burden on either Domino's Farms's or Mr. Monaghan's religious exercise—if any—is simply too remote and attenuated to qualify as "substantial." *See Autocam*, Order at 2-3 (relying on the district court's reasoned opinion in determining that the plaintiffs had not established more than a mere possibility of relief); *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, Order at 6-7 (10th Cir. Dec. 20, 2012) ("We do not think there is a substantial likelihood that this court will extend the reach of RFRA to encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship."); *see also Conestoga*, 2013 WL 140110, at *14; *Annex Medical, Inc. v. Sebelius*, No. 0:12-cv-02804, 2013 WL 101927, *4-5 (D. Minn. Jan. 8, 2013), *mot. for prelim. inj. pending appeal denied*, 2013 WL 203526 (D. Minn. Jan. 17, 2013); *Grote Industries, LLC v. Sebelius*, No. 4:12-cv-00134, 2012 WL 6725905, *5-7 (S.D. Ind. Dec. 27, 2012), *mot, for recons. denied*, 2013 WL 53736 (S.D. Ind. Jan. 3, 2013); *Korte v. U.S. Dep't of Health & Human Servs.*, 2012 WL 6553996, *9-11 (S.D. Ill. Dec. 14, 2012), *mot. for prelim. inj. pending appeal granted*, No. 12-3841 (7th Cir. Dec. 28, 2012); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 4:12-cv-00476, 2012 WL 4481208, *5-6 (E.D. Mo. Sept. 28, 2012), *mot. for stay pending appeal granted*, No. 12-3357 (8th Cir. Nov. 28, 2012). Plaintiffs' objection to "facilitating" the use of contraceptive services is essentially that "funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by [Domino's

Farms's] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiffs' religion." *Hobby Lobby*, Order at 7 (quoting *Hobby Lobby*, 870 F. Supp. 2d at 1294). But accepting such an attenuated burden as "substantial" for the purposes of RFRA would—much like assuming a substantial burden—make meaningless Congress's use of that word substantial in the statute, and would allow plaintiffs to attack a whole host of generally applicable laws designed to protect employees. *See, e.g.*, *Grote*, 2012 WL 6725905, at *6 ("If the financial support for health coverage of which Plaintiffs complain constitutes a substantial burden, secular companies owned by individuals objecting on religious grounds to such behaviors, including those businesses owned by individuals objecting on religious grounds to *all* modern medical care, could seek exemptions from employer-provided health care coverage for a myriad of health care needs, or for that matter, for any health care at all to its employees."). For example, under the same logic, plaintiffs could claim a substantial burden because, under minimum wage laws, Domino's Farms must pay its employees a wage, and that wage can—after an independent decision by an employee and her health care provider—be used to purchase contraception, or other goods and services to which Mr. Monaghan may object on religious. *See Autocam*, 2012 WL 6855677, at *6 (reasoning that plaintiffs will be "paying indirectly for the same services through wages" that their employees may choose to use "for contraception products and services"); *Conestoga*, 2013 WL 140110, at *13 (remarking that "Conestoga's employees are free to look outside of their insurance coverage and pay for and use any contraception . . . through the salary they receive from Conestoga"). This, of course, cannot be what Congress intended in enacting RFRA.[3]

Nevertheless, even if the challenged regulations were to somehow substantially burden any religious exercise by either Domino's Farms or Mr. Monaghan, plaintiffs' motion for a preliminary injunction should be denied because the regulations satisfy strict scrutiny. The two

[3] Plaintiffs cannot succeed on their RFRA or free exercise claims also because the challenged regulations apply only to Domino's Farms, which, as a secular, for-profit corporation, cannot exercise religion. *See* Defs.' TRO Opp'n at 8-11.

interests furthered by the regulations—the promotion of public health and the promotion of gender equality—are undeniably compelling. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984); *Buchwald v. Univ. of N.M.*, 159 F.3d 487, 498 (10th Cir. 1998); *Mead v. Holder*, 766 F. Supp. 2d 16, 43 (D.D.C. 2011). Although the Court concluded that defendants had not met their burden to establish that the government's interests are sufficiently compelling, the IOM Report shows that female employees (and covered spouses and dependents) are, as a whole, less likely to use contraceptive services when their company chooses to provide a plan that fails to cover such services without cost-sharing in light of the financial barriers to obtaining them, putting those female employees (and covered spouses and dependents), as well as their children, at risk of unhealthier outcomes. *See* INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS ("IOM REP.") 20, 103-04 (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited Jan. 28, 2013); *see also* Defs.' TRO Opp'n at 15-17. Moreover, as explained by members of Congress, "women have different health needs than men, and these needs often generate additional costs. Women of childbearing age spend 68 percent more in out-of-pocket health care costs than men." *See* 155 Cong. Rec. S12106-02, S12114 (daily ed. Dec. 2, 2009). Accordingly, this disproportionate burden on women creates "financial barriers . . . that prevent women from achieving health and well-being for themselves and their families." IOM REP. at 20. Thus, contrary to plaintiffs' suggestion, which the Court appears to have accepted, the preventive services coverage regulations clearly address an "actual problem in need of solving." Pls.' Mot. for Prelim. Inj. at 12-13, ECF. No. 8; Order and Opinion at 9. And that problem is particularly acute for women who work for companies, like Domino's Farms, that do not offer coverage for contraceptive services. *See* Defs.' TRO Opp'n at 17.

The challenged regulations are also the least restrictive means of advancing the government's compelling interests. Although plaintiffs suggest that the government could provide contraceptive services at no charge directly to individuals who want them, Pls.' Mot. at 7, plaintiffs ignore that, in order to be a less restrictive means, a proposed alternative must be

equally effective in advancing the government's compelling interests. *See, e.g.*, *Murphy v. State of Ark.*, 852 F.2d 1039, 1042-43 (8th Cir. 1988). Here, Congress determined that the most effective way to achieve the goals of the ACA, which include expanding recommended preventive services coverage, was to do so within the existing employer-based system. *See* H.R. Rep. No. 111-443, pt. II, at 984-86 (2010). Plaintiffs' proposed alternative—providing contraceptive services through existing government programs, like Title X, which have limited funding and a limited purpose—does not work within the existing employer-based system, and would therefore be less effective. *See* Defs.' TRO Opp'n at 18-21. Nor would a tax credit offered to employers who choose to participate be equally effective. Apart from requiring entirely new legislation, such a voluntary program would leave the employees (and covered spouses and dependents) of employers that decline to participate without the benefits of coverage for preventive services without cost sharing.

Finally, defendants respectfully submit that the Court also erred in determining that plaintiffs have established irreparable harm in the absence of injunctive relief, that enjoining the preventive services coverage regulations is in the public interest, and that the balance of harm tips in plaintiffs' favor. The Court's conclusions with respect to those preliminary injunction factors flowed entirely from its determination that plaintiffs are likely to succeed on the merits of their RFRA claim. Because, however, that is not the case for the reasons explained above and as recognized by a motions panel of the Sixth Circuit in *Autocam*, the remaining preliminary injunction factors weigh in favor of denying preliminary injunctive relief. *See McNeilly v. Land*, 684 F.3d 611, 621 (6th Cir. 2012) (recognizing that likelihood of success on the merits and irreparable harm inquiries merge in the free exercise context); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (vacating preliminary injunction and noting that "[t]here is a general public interest in ensuring that all citizens have timely access to lawfully prescribed medications"); *see also Annex*, 2013 WL 101927, at *5 (determining that the alleged irreparable harm resulting from the preventive services coverage regulations does not outweigh the government's interest in "providing for the health care of women and children").

CONCLUSION

For the foregoing reasons, and for the reasons set forth in defendants' opposition to plaintiffs' motion for a TRO, plaintiffs' motion for a preliminary injunction should be denied.

Respectfully submitted this 28th day of January, 2013,

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CERTIFICATE OF SERVICE

I certify that, on January 28, 2013, I electronically filed the foregoing paper with the Clerk of Court using the ECF system, which will send notification of such filing to the following:

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