[ORAL ARGUMENT NOT YET SCHEDULED]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRANCIS A. GILARDI, JR., et al.,
Plaintiffs-Appellants,

v. Appeal No. 13-5069

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,
Defendants-Appellees.
_____/

PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL BEFORE APRIL 1, 2013, AND TO EXPEDITE APPEAL

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INTRODUCTION

Pursuant to Fed. R. App. P. 8 and D.C. Cir. R. 8, Plaintiffs-Appellants move this Court for the entry of an order *before April 1, 2013*, granting them an injunction pending appeal against Defendants-Appellees' enforcement of the preventive services coverage provision of the Affordable Care Act and related regulations ("the Mandate"). Without such relief, Francis and Phillip Gilardi and the two family businesses they own and operate will be forced to make a stark and inescapable choice *just days from now*, on April 1, 2013: either arrange for and pay for contraceptive and sterilization procedures, including abortion-inducing drugs, in violation of their Catholic religious beliefs and company standards, or face crippling penalties (more than $14 million per year) imposed by the federal government. Contrary to the decision of the district court, which denied Plaintiffs' motion for a preliminary injunction on March 3, 2013, the Mandate substantially burdens Plaintiffs' religious exercise and violates their rights under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb, *et seq*. An injunction pending appeal will preserve the status quo, protect Plaintiffs' religious exercise, and not harm the interests of Defendants or the public, while this Court resolves the significant legal issues at hand.[1]/

[1]/ Owing to the district court's denial of Plaintiffs' motion for a preliminary injunction on March 3, 2013, and the impending April 1, 2013, date when

(Text of footnote continues on following page.)

To Plaintiffs' knowledge, there are currently forty-eight federal lawsuits challenging the Mandate: eighteen filed by for-profit employers and thirty filed by non-profit employers. At present, injunctive relief protects the religious exercise of for-profit employers in twelve cases, including in *Tyndale House Publishers v. Sebelius*, 2012 U.S. Dist. LEXIS 163965 (D.D.C. Nov. 16, 2012), *appeal docketed*, No. 13-5018 (D.C. Cir. Jan. 18, 2013), whereas such relief has been denied in five cases.[2]/

While this Court considers the similar, important legal issues raised in this appeal and in *Tyndale House Publishers*, the religious exercise of the plaintiffs in those two cases should be equally protected pending the outcome of the appeals.

> An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.

Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977). Thus, an injunction pending appeal should be issued.

Moreover, this Court should expedite the resolution of this appeal. If this Court

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Plaintiffs will be coerced to act against their religious beliefs on pain of financial penalty, requesting an injunction pending appeal first in the district court would have been "impracticable." *See* Fed. R. App. P. 8(a)(1); D.C. Cir. R. 8(a)(1).

[2]/ A list of most of the Mandate cases appears at HHS Mandate Information Central, http://www.becketfund.org/hhsinformationcentral/.

denies Plaintiffs injunctive relief, they will suffer irreparable harm, which warrants expedition, and even if this Court grants Plaintiffs injunctive relief, the issues in this appeal are of national significance and warrant a prompt disposition.[3]/

FACTUAL BACKGROUND

I. The Mandate, Its Exceptions, and Its Penalties

The statutory and regulatory background of the Mandate is set forth in the district court opinion. (Ex. E at 3-5.) In sum, all non-exempt employers, group health plans, and health insurance issuers must provide group or individual health coverage without cost-sharing for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity."[4]/

Plaintiffs are not exempt from the Mandate, but many other employers are. Grandfathered health plans, *i.e.*, plans in existence on March 23, 2010, that have not undergone any of a defined set of changes, are exempt from compliance with

[3]/ On March 4, 2013, Plaintiffs' counsel informed Defendants' counsel, Alisa Klein, that this motion would be filed. Fed. R. App. P. 8(a)(2)(C); D.C. Cir. R. 8(a)(2). Defendants oppose the grant of an injunction pending appeal, but consent to Plaintiffs' proposed expedited appeal schedule set forth herein. Attached as exhibits to this motion are the relevant parts of the district court record. Fed. R. App. P. 8(a)(2)(B)(ii)-(iii); D.C. Cir. R. 8(a)(3).

[4]/ Required Health Plan Coverage Guidelines, http://www.hrsa.gov/womensguidelines/; 42 U.S.C. § 300gg-13.

the Mandate.[5]/ Millions of Americans are enrolled in grandfathered plans. *See, e.g., Newland v. Sebelius*, 2012 U.S. Dist. LEXIS 104835, at *4, 23 (D. Col. July 27, 2012).[6]/ Even though the Mandate does not apply to grandfathered health plans, many provisions of the Affordable Care Act do. 75 Fed. Reg. 34538, 34542. Also, employers with fewer than fifty full-time employees are not required to provide employee health insurance and, as such, have no obligation to provide coverage of the goods and services set forth in the Mandate. 26 U.S.C. § 4980H(c)(2)(A).

Non-exempt employers with non-compliant insurance plans are subject to a penalty of $100 per day, per employee and potential enforcement suits, see 26 U.S.C. § 4980D(b); 29 U.S.C. §§ 1132, 1185d(a)(1), and face annual fines of roughly $2,000 per full-time employee (not counting the first thirty employees) if they provide no health insurance. *See* 26 U.S.C. §§ 4980H(a), (c)(1).

II. The Plaintiffs

Plaintiffs Francis A. Gilardi, Jr. and Philip M. Gilardi are the sole owners of Plaintiffs Fresh Unlimited, Inc., d/b/a Freshway Foods ("Freshway Foods"), and

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[5]/ *See* 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140; 75 Fed. Reg. 41726, 41731; *see also* 42 U.S.C. § 18011; 76 Fed. Reg. 46621, 46623.

[6]/ The government considers the ability to maintain grandfathered coverage to be a "right." 42 U.S.C. § 18011; 75 Fed. Reg. 34538. And, according to the Congressional Research Service, "Enrollees could continue and renew enrollment in a grandfathered plan *indefinitely*." Cong. Research Serv., RL 7-5700, Private Health Insurance Provisions in PPACA (May 4, 2012) (emphasis added).

Freshway Logistics, Inc. ("Freshway Logistics"). Together they set the policies governing the conduct of all phases of the two closely-held, family owned, Subchapter S corporations, based in Ohio. Freshway Foods is a fresh produce processor and packer with approximately 340 full-time employees. Freshway Logistics is a for-hire carrier of mainly refrigerated products with approximately fifty-five full-time employees. (Ex. A at ¶¶ 1-4; Ex. B at ¶¶ 1-4.)

The Gilardis are Catholic and sincerely believe that actions intended to terminate an innocent human life by abortion are gravely sinful. They also sincerely hold to the Catholic Church's teaching regarding the immorality of artificial means of contraception and sterilization. They manage and operate their companies to reflect the teachings, mission, and values of their Catholic faith, and they desire to continue to do so. (Ex. A at ¶¶ 5-6; Ex. B at ¶¶ 5-6.)

Examples of how Plaintiffs further their religious beliefs and moral values include the following: (1) For approximately the last ten years, the Gilardis have directed that a sign be affixed to the back of Freshway Foods trucks stating, "It's not a choice, it's a child," as a way to publically promote their religious beliefs concerning the sanctity of human life; (2) The Gilardis strongly support their Catholic parish, schools, and seminary financially and otherwise; (3) In or about 2004, the Gilardis drafted a statement listing values by which all their companies would be run. They listed "Ethics" first since that is their primary business value;

(4) Freshway Foods makes annual monetary and/or in-kind donations, primarily food, to many community non-profit charitable organizations; (5) Freshway Logistics donates a trailer for use by the local Catholic parish for the annual parish picnic and uses its trucks to deliver the food donated by Freshway Foods; (6) During Monthly Associate Appreciation Lunches, Plaintiffs provide their employees with alternative foods to accommodate their religious dietary requirements; and (7) Plaintiffs provide their Muslim employees with space to pray during breaks and lunches, and they adjust break periods during Ramadan to allow their Muslim employees, pursuant to their religion, to eat after sundown. (Ex. A at ¶ 7; Ex. A-1; Ex. B at ¶ 7.)

Moreover, Plaintiffs provide their full-time employees with a self-insured health plan that provides health insurance and prescription drug insurance. The plan is renewed on April 1. For approximately the last ten years, Plaintiffs have specifically excluded coverage of all contraceptives, abortion, and sterilization because paying for such services as part of a health plan would violate their sincerely-held religious beliefs. The Gilardis consider the provision of employee health insurance to be an integral component of furthering the mission and values of their companies and of their religious beliefs. To comply with the Mandate, they will have to violate their sincerely-held religious beliefs because they will have to direct their companies to arrange for, pay for, provide, or otherwise facilitate

employee health coverage for contraceptives, including abortion-inducing drugs, sterilization, and related education and counseling. (Ex. A at ¶¶ 8-11, 15, 18-19; Ex. A-2 at pp. 1-5; Ex. B at ¶¶ 8-11, 15, 18-19.)

If Freshway Foods and Freshway Logistics fail to comply with the Mandate, they face annual penalties of roughly $14.4 million (395 employees x $100 per day x 365 days) payable to the federal government that would have a crippling impact on their ability to survive economically and, by extension, would greatly harm the Gilardis financially. (Ex. A at ¶¶ 12-13, 16-17; Ex. B at ¶¶ 12-13, 16-17.)

LEGAL STANDARDS

Regarding Plaintiffs' motion for an injunction pending appeal, this Court balances "(i) the likelihood that the moving party will prevail on the merits; (ii) the prospect of irreparable injury to the moving party if relief is withheld; (iii) the possibility of harm to other parties if relief is granted; and (iv) the public interest." D.C. Cir. R. 8(a)(1). This Court has explained that

> a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay [or injunction pending appeal] if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed . . . may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors. . . .

Holiday Tours, Inc., 559 F.2d at 843-44; *see also Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011) (declining to reach the issue of whether this Court's sliding-scale approach for preliminary injunctions should be reconsidered).

Concerning Plaintiffs' motion to expedite this appeal, this Court considers whether "the delay will cause irreparable injury and . . . the decision under review is subject to substantial challenge," or whether "the public generally, or . . . persons not before the Court, have an unusual interest in prompt disposition." D.C. Cir. *Handbook of Practice and Internal Procedures*, at 33 (2011); D.C. Cir. R. 27(f).

ARGUMENT

I. An Injunction Pending Appeal Is Warranted.

A. The Mandate substantially burdens Plaintiffs' religious exercise.

Under RFRA, the federal government may only substantially burden a person's exercise of religion if "it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). A substantial burden is present when the government puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 717-18 (1981). This typically occurs when a law forces a person to choose between (1) doing something his faith forbids or discourages (or not doing something his faith requires or encourages),

and (2) incurring financial penalties, the loss of a government benefit, criminal prosecution, or other significant harm.

For example, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court held that a state's denial of unemployment benefits to a Seventh-Day Adventist employee, whose religious beliefs prohibited her from working on Saturdays, substantially burdened her exercise of religion. The Court explained that the regulation

> force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Id. at 404. Also, in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the Court held that a state compulsory school-attendance law substantially burdened the religious exercise of Amish parents who were fined five dollars after refusing to send their children to high school. The Court found the burden "not only severe, but inescapable," requiring the parents "to perform acts undeniably at odds with fundamental tenets of their religious belief." *Id*. at 218.

Plaintiffs here face a similar, inescapable choice. Absent injunctive relief, on April 1, 2013, they must either act contrary to their faith and directly subsidize and facilitate the provision of products and services they believe are immoral or incur over $14 million in annual penalties. The Mandate is akin to the hypothetical "fine imposed against appellant for her Saturday worship," *Sherbert*, 374 U.S. at 404,

and the Mandate requires Plaintiffs "to perform acts undeniably at odds with fundamental tenets of their religious belief." *Yoder*, 406 U.S. at 218.

The Seventh Circuit explained, in granting an injunction pending appeal preventing enforcement of the Mandate against a for-profit business and its owners, that "[t]he religious-liberty violation at issue here inheres in the *coerced coverage* of contraception, abortifacients, sterilization, and related services, *not*—or perhaps more precisely, *not only*—in the later purchase or use of contraception or related services." *Korte v. U.S. Dep't of Health & Human Servs.*, 2012 U.S. App. LEXIS 26734, at *8-9 (7th Cir. Dec. 28, 2012) (citation omitted) (original emphasis). Similarly, in *Tyndale House Publishers*, the court observed that

> the contraceptive coverage mandate affirmatively compels the plaintiffs to violate their religious beliefs in order to comply with the law and avoid the sanctions that would be imposed for their noncompliance. Indeed, the pressure on the plaintiffs to violate their religious beliefs is 'unmistakable.'" . . . Government action that creates such a Hobson's choice for the plaintiffs amply shows that the contraceptive coverage mandate substantially burdens the plaintiffs' religious exercise.

2012 U.S. Dist. LEXIS 163965, at *38-40 (quoting *Thomas*, 450 U.S. at 718).

1. The Plaintiff companies exercise religion.

The district court erred in holding that the companies here do not exercise religion, hold any religious beliefs, or take actions in accordance with religious principles. (Ex. E at 13-16.) Although the court declined to directly address whether a for-profit corporation can ever exercise religion (*id.* at 18), RFRA

protects the religious exercise of "a person," not just the exercise of a *religious person*. Although RFRA does not define the term "person," it is well-established that the term "person" generally includes both a natural person and a corporation.[7]/

Application of RFRA does not depend on the religiosity of the claimant but *the degree of pressure* the government applies to the claimant's religious exercise. Corporations, whether for-profit or non-profit, can, and often do, engage in a plethora of quintessentially religious acts, such as tithing, donating money to further religious causes, and committing themselves to act and speak pursuant to the teachings of a religious faith. As Justice Brennan once observed, it is possible "that some for-profit activities could have a religious character." *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 345 n.6 (1987) (Brennan, J., concurring). Under RFRA, a kosher deli would have a viable claim against a mandate that it sell pork, and a medical practice operated by pro-life doctors would have a viable claim against a mandate that it perform abortions.

[7]/ *See, e.g.,* 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise. . . 'person' . . . include[s] corporations . . . as well as individuals."); *Citizens United v. FEC*, 130 S. Ct. 876, 899 (2010) (noting that corporations are legal persons that enjoy free speech rights); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978) ("[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis.").

Courts have addressed the merits of religion-based claims brought by a business and/or its owners in numerous cases.[8]/ Where, as here, a company is owned and controlled by a few like-minded individuals who share the same religious values and run the company pursuant to those values, the company itself holds and/or asserts the values of its owners. *See, e.g., Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009); *Tyndale House*, 2012 U.S. Dist. LEXIS 163965, at *23-25.

The district court erred by distinguishing *Tyndale House Publishers* on the basis that the publishing company was uniquely religious despite its for-profit status. (Ex. E at 15-16.) While the publishing company shared the religious beliefs of its owners such that compliance with the Mandate would violate its rights under RFRA, there is no basis in RFRA or the First Amendment to suggest that some businesses are religious *enough* to exercise religion while others (such as the Plaintiff companies here) are *not* religious enough to do so. A "religious enough"

[8]/ *See, e.g., United States v. Lee*, 455 U.S. 252, 258-61 (1982); *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210-12 (2d Cir. 2012) (addressing free exercise claim brought by kosher deli and butcher shop and its owners); *Stormans, Inc*, 586 F.3d at 1127-38 (addressing free exercise claim of for-profit pharmacy and its owners); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620-21 & n.15 (9th Cir. 1988) (addressing free exercise defense raised by manufacturing company and its owners); *Attorney Gen. v. Desilets*, 636 N.E.2d 233 (Mass. 1994) (holding that a law prohibiting discrimination on the basis of marital status in housing substantially burdened the free exercise of a landlord who objected to facilitating the cohabitation of unmarried couples); *McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985) (addressing merits of a free exercise challenge brought by a for-profit health club and its owners).

standard is inescapably vague, and it would make no sense to hold, for example, that closely-held Company X engages in religious exercise when it financially supports religious charities and missions, or advocates in favor of religious causes, but closely-held Company Y does not engage in religious exercise when it does the same things for the same religious reasons, because Company X is considered "more religious" than Company Y.

As explained previously in the statement of facts, the record demonstrates that the Plaintiff companies have adopted, and operate in accordance with, the religious beliefs and values of their owners. Compliance with the Mandate would require the Plaintiff companies (and the Gilardis) to take actions contrary to their religious belief system. That is enough to establish a substantial burden under RFRA.

2. The Mandate substantially burdens the Gilardis' religious exercise.

The Gilardis have a religious obligation to operate their companies in a manner that is consistent with their Catholic faith. Ultimately, it is Francis and Philip Gilardi who face, and have to make, the difficult decision, absent relief from this Court, to either direct their companies to comply with the Mandate, in violation of their religious beliefs, or incur more than $14 million in annual penalties that will cripple the companies. *See Monaghan v. Sebelius*, 2012 U.S. Dist. LEXIS 182857, at *9 (E.D. Mich. Dec. 30, 2012) (noting that a corporation cannot "act (or sin) on its own" and that a court should not dispute an owner's assertion that the

Mandate's requirement that he direct his company to provide the required immoral coverage will cause him to commit a "grave sin").

The district court erred in holding that recognizing that the Mandate substantially burdens the Gilardis' religious exercise would require the court to ignore the corporate form and effectively treat the companies' assets as if they were the Gilardis' assets. (Ex. E at 10-12.) The Gilardis do not dispute that the companies are distinct legal entities that are directly subject to the Mandate, nor do they suggest that the companies' assets are, in fact, their own assets. Under the substantial burden test, however, courts examine the substantiality of "the coercive impact" on the claimant, *Thomas*, 450 U.S. at 717, *not* how direct or indirect *the source* of that coercive impact is. *Id.* at 718 ("While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."). It is readily apparent that the annual imposition of millions of dollars of penalties *upon the companies* for non-compliance with the Mandate would significantly harm *both the Gilardis and the companies.* Indeed, the specter of this significant harm substantially pressures *the Gilardis* to take actions that violate their religious beliefs and those of the companies (by complying with the Mandate).[9]/

[9]/ The Plaintiff companies are Subchapter S corporations and any penalty imposed on them would be passed through to the Gilardis, the sole shareholders, on a pro rata basis and subtracted from the Gilardis' gross income. *See Ardire v. Tax Comm'r*, 77 Ohio St. 3d 409, 674 N.E.2d 1155 n.1 (1997).

In other words, although the companies are distinct entities for purposes of corporate law, the threatened imposition of massive penalties against the companies has an undeniable "coercive impact" upon the Gilardis themselves for purposes of RFRA. *See id.* at 717. Corporations do not run themselves or comply with legal mandates except through human agency. The Gilardis would have to operate the companies in a way they believe to be immoral for the companies to provide a Mandate-compliant health plan. *See Korte*, 2012 U.S. App. LEXIS 26734, at *9 ("[T]he Kortes would have to violate their religious beliefs to operate their company in compliance with [the Mandate]."). The Gilardis' religious faith does not excuse their participation in, and facilitation of, immoral behavior because of a corporate veil or other legal technicalities; for purposes of substantial burden analysis, the dictates of Plaintiffs' religious beliefs control, not the nuances of corporate law.[10]/

The district court also erred in holding that the Mandate cannot substantially burden the religious exercise of the Gilardis because it applies by its literal terms to their companies. (Ex. E at 22-23.) The court distinguished *Thomas* on the basis that the claimant himself faced a financial loss (the denial of benefits), whereas here it

[10]/ Plaintiffs *do not* suggest that a burden upon a person's religious exercise is substantial merely because a plaintiff declares it to be so (Ex. E at 19-20); rather, the substantiality of a burden is measured by the real-world pressure that the claimant faces to take actions contrary to his faith, regardless of the directness or indirectness of the source of that pressure. *See Thomas*, 450 U.S. at 717-18.

is the companies that would face a financial loss. (*Id.* at 23.) This reliance on legal formalism ignores the reality that the imposition of massive penalties upon the companies *will harm both the companies and the Gilardis*.

Similarly, under the district court's reading of the law, the religious exercise of the parents in *Yoder* would not have been substantially burdened if Wisconsin had penalized *their children*, rather than them, for the children's failure to attend school, as the parents would not themselves be directly burdened by a government sanction. Such a conclusion would be incorrect, however, because the parents are the ultimate decision-makers concerning whether the children attend school and would feel substantial pressure to modify their behavior in a manner that violates their beliefs (by sending their children to school). As in various other areas of the law, the substantiality of the impact controls, rather than its source. *See generally Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) ("[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.") (citation omitted).

B. Defendants cannot satisfy strict scrutiny.

1. Defendants lack a compelling governmental interest in applying the Mandate to Plaintiffs.

Because the district court incorrectly held that the Mandate does not substantially burden Plaintiffs' religious exercise, it did not apply strict scrutiny. Defendants have proffered two compelling governmental interests for the Mandate:

health and gender equality. 77 Fed. Reg. 8725, 8729. What radically undermines the government's claim that the Mandate is needed to address a compelling harm to its asserted interests is the massive number of employees—tens of millions—whose health and equality interests are completely unaffected by the Mandate. *See, e.g., Tyndale*, 2012 U.S. Dist. LEXIS 163965, at *57-61; *Newland*, 2012 U.S. Dist. LEXIS 104835, at *23.

Defendants' alleged interests cannot be of the highest order when the Mandate does not apply to grandfathered health plans. The government itself has estimated that "98 million individuals will be enrolled in grandfathered group health plans in 2013." 75 Fed. Reg. 41726, 41732. When this figure is added to the number of employees of businesses with fewer than fifty employees, which can decline to provide a health plan without penalty, more than 100 million employees are left untouched by the Mandate.[11]/ "It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest of the highest order . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993) (citations and internal quotation marks omitted). Because there is little that is uniform about the Mandate, as demonstrated by the massive number of individuals

[11]/ Firms with fewer than 20 employees employ more than 20 million people. United States Census Bureau, http://www.census.gov/econ/smallbus.html.

who are untouched by it, this is not an instance where there is "a need for uniformity [that] precludes the recognition of exceptions to generally applicable laws under RFRA." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006).

2. There are other less restrictive means available to Defendants.

Assuming *arguendo* that the interests proffered by Defendants were compelling in this context, the Mandate is not the least restrictive means of furthering those interests. If the government wishes to further the interests in health and equality by means of free access to contraceptive services, it can do so in a variety of ways without coercing Plaintiffs, in violation of their religious exercise, to do so. For example, the government could (1) offer tax deductions or credits for the purchase of contraceptive services; (2) provide these services to citizens itself (as it *already does* for many individuals); (3) allow citizens who pay to use contraceptives to submit receipts to the government for reimbursement; or (4) provide incentives for pharmaceutical companies that manufacture contraceptives to provide such products to pharmacies, doctors' offices, and health clinics free of charge.

Each of these options would further Defendants' proffered compelling interests in a direct way that would not impose a substantial burden on persons such as Plaintiffs. Indeed, of the various ways the government could achieve its interests, it has chosen perhaps the *most burdensome* means for non-exempt employers with

religious objections to contraceptive services, such as Plaintiffs. *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (if the government "has open to it a less drastic way of satisfying its legitimate interests, it may not choose a [regulatory] scheme that broadly stifles the exercise of fundamental personal liberties").

C. Plaintiffs Satisfy the Remaining Injunction Factors.

Absent an injunction, Plaintiffs' religious exercise rights will be violated on a continuing basis beginning on April 1, 2013, when they will experience irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). An injunction preventing Defendants' enforcement of the Mandate against Plaintiffs will not harm Defendants' interests, especially because Defendants have already exempted millions of employees from the Mandate. The public interest weighs in favor of Plaintiffs; the public has a strong interest in the preservation of religious freedom. *See, e.g., Tyndale House*, 2012 U.S. Dist. LEXIS 163965, at *66-67; *Simms v. Dist. of Columbia*, 2012 U.S. Dist. LEXIS 93052, at *43 (D.D.C. July 6, 2012).

Lastly, an injunction pending appeal would preserve the status quo. The enactment and imminent enforcement of the Mandate against Plaintiffs created the present controversy. Before then, Plaintiffs exercised a freedom to fashion a health plan pursuant to their religious beliefs, which is what Plaintiffs have been doing for

the last ten years and what they want to continue to do.[12]/ *See Consarc Corp. & Consarc Eng'g v. U.S. Treasury Dep't*, 71 F.3d 909, 913 (D.C. Cir. 1997).

II. This Appeal Should Be Expedited.

For the above-stated reasons, Plaintiffs also request an expedited resolution of this appeal. Plaintiffs propose, with Defendants' consent, the following schedule: Plaintiffs' opening brief due April 8, 2013; Defendants' responsive brief due April 22, 2013; Plaintiffs' reply brief due April 29, 2013; and oral argument on May 16, 2013, which counsel understands is the last oral argument date before the summer recess.

CONCLUSION

Plaintiffs request that this Court grant this emergency motion *before April 1, 2013*, and enter an injunction pending appeal prohibiting Defendants and those acting in concert or participation with them from applying and enforcing the Mandate against Plaintiffs and any insurance carriers or third party insurance plan administrators with whom Plaintiffs may contract for group health benefits. This appeal should be expedited as well.

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[12]/ Plaintiffs' employees will not be harmed by an injunction. They have been covered by health insurance that has specifically excluded contraceptives, abortion, and sterilization for a decade. They would be similarly situated with the millions of employees covered by grandfathered or otherwise exempted plans. Also, enjoining the Mandate's enforcement will impose no monetary requirements on Defendants, and no bond should be required of Plaintiffs. *See* Fed. R. App. P. 8(a)(2)(E).

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March 6, 2013

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rules 8(a)(4) and 26.1, the undersigned certifies the following: Plaintiffs Fresh Unlimited, Inc., d/b/a Freshway Foods, and Freshway Logistics, Inc. have no parent companies, subsidiaries, or affiliates that have any outstanding securities in the hands of the public. Plaintiffs Fresh Unlimited, Inc., d/b/a Freshway Foods, and Freshway Logistics, Inc. are closely-held, family owned Subchapter S corporations and they issue no stock to the public. Plaintiff Fresh Unlimited, Inc., d/b/a Freshway Foods, is a fresh produce processor and packer, and Plaintiff Freshway Logistics is a for-hire carrier of mainly refrigerated products.

/s/ Colby M. May
Colby M. May
Counsel of Record
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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Plaintiffs-Appellants submit the following certificate pursuant to Circuit Rules 8(a)(4) and 28(a):

1. Parties, amici, and intervenors

The following list includes all parties and amicus curiae who appeared in the district court. The listed Plaintiffs-Appellants and Defendants-Appellants are parties to this appeal.

Plaintiffs-Appellants:

Francis A. Gilardi, Jr.

Philip M. Gilardi

Fresh Unlimited, Inc., d/b/a Freshway Foods

Freshway Logistics, Inc.

Defendants-Appellees:

United States Department of Health and Human Services

Kathleen Sebelius, in her official capacity as the Secretary of the United States Department of Health and Human Services

United States Department of the Treasury

Jacob J. Lew, in his official capacity as Secretary of the United States Department of the Treasury. Secretary Lew recently replaced Neal Wolin, the Acting Secretary

United States Department of Labor

Seth D. Harris, in his official capacity as the Acting Secretary of the United States Department of Labor

Amicus curiae:

State of Ohio, supporting Plaintiffs/Appellants

2. Rulings Under Review

Plaintiffs-Appellants are appealing from the order and supporting memorandum opinion of District Judge Emmet G. Sullivan entered on March 3, 2013, denying Plaintiffs-Appellants' motion for a preliminary injunction. The order and supporting memorandum opinion appear on the district court's docket at entries 33 and 34 respectively. The memorandum opinion appears on Lexis with the following citation: *Gilardi v. Sebelius,* 2013 U.S. Dist. LEXIS 28719 (D.D.C. Mar. 3, 2013).

3. Related Cases

The instant case was never previously before this Court or any other court, other than the district court from which this case has been appealed. Plaintiffs-Appellants are not aware of any cases pending in this Court that involve the same parties. Plaintiffs-Appellants note that other cases pending with this Court involve substantially the same issues:

Tyndale House Publishers v. Sebelius, No. 13-5018 (D.C. Cir.)

Wheaton College v. Sebelius, No. 12-5273 (D.C. Cir.)

Belmont Abbey College v. Sebelius, No. 12-5291 (D.C. Cir.)

Plaintiffs-Appellants provide the following list of cases, of which they are aware, that involve substantially the same issues involved in the instant appeal and that are currently pending in other United States Courts of Appeals:

Conestoga Wood Specialties Corp. v. Sebelius, No. 13-1144 (3d Cir.)

Zubik v. Sebelius, No. 13-1228 (3d Cir.)

Autocam Corp. v. Sebelius, No. 12-2673 (6th Cir.)

Legatus v. Sebelius, Nos. 13-1092, 13-1093 (6th Cir.)

Korte v. Sebelius, No. 12-3841 (7th Cir.)

Grote Indus. LLC v. Sebelius, No. 13-1077 (7th Cir.)

University of Notre Dame v. Sebelius, No. 13-1479 (7th Cir.)

O'Brien v. U.S. Dep't of Health & Human Servs., No. 12-3357 (8th Cir.)

Annex Med., Inc. v. Sebelius, No. 13-1118 (8th Cir.)

American Pulverizer v. U.S. Dep't of Health & Human Servs, No. 13-1395 (8th Cir.)

Newland v. Sebelius, No. 12-1380 (10th Cir.)

Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294 (10th Cir.)

/s/ Colby M. May

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cmmay@aclj-dc.org

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2013, I caused the foregoing motion and exhibits to be electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the counsel of record for Plaintiffs and Defendants who are registered users of the CM/ECF system. Counsel of record may obtain a copy of the foregoing and exhibits through the CM/ECF system.

/s/ Colby M. May
Colby M. May
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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRANCIS A. GILARDI, JR., et al.,
Plaintiffs-Appellants,

v. Appeal No. 13-5069

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,
Defendants-Appellees.
_____/

INDEX OF EXHIBITS SUPPORTING PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL BEFORE APRIL 1, 2013, AND MOTION TO EXPEDITE APPEAL

Exhibit A: Declaration of Plaintiff Francis A. Gilardi, Jr. along with Exhibits A-1 and A-2.

Exhibit B: Declaration of Plaintiff Philip M. Gilardi.

Exhibit C: Plaintiffs' Complaint for Declaratory and Injunctive Relief.

Exhibit D: Order Denying Plaintiffs' Motion for a Preliminary Injunction.

Exhibit E: Memorandum Opinion Denying Plaintiffs' Motion for a Preliminary Injunction.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANCIS A. GILARDI, JR., et al.,
Plaintiffs,

v. Civil Action No. 1:13-cv-00104-RBW

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,
Defendants.
_____/

DECLARATION OF PLAINTIFF FRANCIS A. GILARDI, JR.

I, Francis A. Gilardi, Jr., an adult resident of the State of Ohio and a plaintiff in the above-captioned case, make the following declaration, pursuant to 28 U.S.C. § 1746 and LCvR 11.2, based on my personal knowledge, unless otherwise noted:

1. My brother, Philip M. Gilardi, and I are the sole owners of Fresh Unlimited, Inc., d/b/a Freshway Foods (hereafter "Freshway Foods"), and Freshway Logistics, Inc. (hereafter "Freshway Logistics"). We each hold a 50% ownership stake in Freshway Foods and Freshway Logistics and, therefore, together own the full and controlling interest in both corporations.

2. I am the Chief Executive Officer and Treasurer of Freshway Foods and Freshway Logistics and Philip Gilardi is the President and Secretary. We are the only Directors of the two corporations, and together we set the policies governing the conduct of all phases of the two corporations.

3. Freshway Foods is a closely-held and family owned fresh produce processor and packer serving twenty-three states for over twenty-four years. It has approximately 340 full-time employees. Freshway Logistics is a closely-held and family owned for-hire carrier of mainly refrigerated products serving twenty-three states since 2003. It has approximately fifty-five full-

EXHIBIT A
Case No. 1:13-cv-00104-RBW

time employees.

4. Freshway Foods and Freshway Logistics are both located at 601 North Stolle Avenue, Sidney, Ohio, which is in Shelby County. Both entities are Subchapter S corporations and are incorporated under the laws of the State of Ohio.

5. I hold to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. I sincerely believe that actions intended to terminate an innocent human life by abortion are gravely sinful. I also sincerely believe in the Catholic Church's teaching regarding the immorality of contraception and sterilization.

6. I manage and operate Freshway Foods and Freshway Logistics in a way that reflects the teachings, mission, and values of my Catholic faith, and I desire to continue to do so.

7. Examples of how I further my religious beliefs and moral values through the two corporations include the following: (a) For approximately the last ten years, I have directed that on the back of the trucks I own with my brother, Philip, through a separate company, but which bear the name of Freshway Foods, that a sign be affixed stating, "It's not a choice, it's a child," as a way to promote my pro-life views to the public. Attached as Exhibit A-1 is a true and correct copy of a recent photograph of the back of one of our trucks with the pro-life sign on the lower, right-hand side of the rear door of the truck; (b) I strongly support financially and otherwise my Catholic parish, schools, and seminary; (c) In or about 2004, my brother, Philip, and I drafted a values statement listing values by which all our companies would be run. We listed "Ethics" first since that is our primary business value: "Ethics: Honest, Trustworthy and Responsible to: - Each Other; - Our Customers; - Our Vendors. Non-negotiable - Supersedes everything"; (d) At my direction, Freshway Foods makes annual monetary and/or in-kind donations, primarily food, to many community non-profit charitable organizations, including Agape, Compassionate Care,

the YMCA, Holy Angel's Soup Kitchen, United Way, Habitat for Humanity, American Legion, Bill McMillian's Needy Children, Elizabeth's New Life Center, and local schools; (e) At my direction, Freshway Logistics donates a trailer for use by the local Catholic parish for the annual parish picnic and uses its trucks to deliver the food donated by Freshway Foods to food banks outside the Sidney, Ohio, area; (f) At my direction, during our Monthly Associate Appreciation Lunches, we provide our Freshway Foods and Freshway Logistics employees with alternative foods to accommodate the types of foods our employees are allowed to eat pursuant to their religious beliefs; and (g) At my direction, Freshway Foods and Freshway Logistics provide our Muslim employees with space to pray during breaks and lunches, and, during Ramadan, break periods are adjusted to allow our Muslim employees, pursuant to their religion, to eat after sundown.

8. Moreover, Freshway Foods and Freshway Logistics provide our full-time employees with a self-insured employee health benefits plan that provides employees with health insurance and prescription drug insurance through a third-party administrator and stop loss provider. Employees of the two corporations may choose a basic option or a premier option from the plan. The plan is renewed on April 1. I understand that it takes us about sixty days to complete the process of obtaining health insurance coverage and enrolling our employees in that coverage.

9. For approximately the last ten years, and at my brother's and my direction, we have specifically excluded coverage of all contraceptives, abortion, and sterilization from our employee health insurance plan because paying for such services as a part of a health plan would violate my sincerely-held religious beliefs and moral values. Attached as Exhibit A-2 are true and correct copies of the benefits summary sheets for our current plan, which specifically excludes coverage of contraceptives, sterilization, and abortion as noted by the "Xs" in the

margins of the attachment.

10. I consider the provision of employee health insurance to be an integral component of furthering the mission and values of my corporations and of my religious beliefs and moral values.

11. My sincerely-held religious beliefs and moral values do not allow me to direct, or allow, Freshway Foods and Freshway Logistics to arrange for, pay for, provide, or facilitate employee health plan coverage for contraceptives, sterilization, abortion, or related education and counseling without violating my sincerely-held religious beliefs and moral values.

12. I understand that the Defendants in this lawsuit promulgated and implemented a mandate that requires Freshway Foods and Freshway Logistics to obtain and pay for employee health insurance coverage, without cost sharing, for "all Food and Drug Administration-approved contraceptive methods, sterilization procedures and patient education and counseling for all women with reproductive capacity" in plan years beginning on or after August 1, 2012. (hereafter "Mandate".) I also understand that FDA-approved contraceptive methods include abortion-inducing drugs.

13. I understand that the Mandate applies to Freshway Foods and Freshway Logistics because they each employ fifty or more full-time employees and are not exempt from the Mandate. In particular, I understand that my corporations do not fall within the "religious employer" exemption, as that term is defined by the Mandate, and they do not fall within any "temporary enforcement safe harbor" provided by Defendants to certain non-profit entities. I also understand that the employee health benefit plan for Freshway Foods and Freshway Logistics is not considered "grandfathered," and thus not exempt from the Mandate because since March 2010 the plan has undergone material changes, such as an increase in doctor visit co-pays of $10

for the basic option and $15 for the premier option.

14. To operate and manage Freshway Foods and Freshway Logistics consistent with my Catholic faith and values, I want to continue to be able to provide high quality, broad coverage health insurance for my full-time employees that excludes coverage for things I believe are morally wrong for me and my corporations to arrange for, pay for, provide, facilitate, or otherwise support.

15. I understand that by April 1, 2013, which is the renewal date for our employee health benefit plan, the Mandate will require me to direct Freshway Foods and Freshway Logistics, contrary to my religious beliefs and moral values, to arrange for, pay for, provide, facilitate, or otherwise support a health plan that includes contraceptives, including abortion-inducing drugs, sterilization, and related patient education and counseling and will prevent me and my corporations from obtaining an employee health benefit plan that comports with our religious beliefs and moral values.

16. I understand that if Freshway Foods and Freshway Logistics fail to comply with the Mandate or drop employee group health coverage entirely, then they could incur significant annual fines and/or penalties payable to the federal government that would have a crippling impact on their ability to survive economically and, by extension, would harm me financially.

17. In addition to fines and penalties, stopping all health coverage for our full-time employees would have a severe impact on our ability to compete with other companies that do offer health coverage and would have severe consequences for our employees who would have to find expensive individual policies in the private marketplace.

18. In my view, the Mandate requires me and Freshway Foods and Freshway Logistics to choose between (a) complying with the Mandate and violating our religious beliefs and moral

values and (b) not complying with the Mandate and having to pay annual fines and penalties in order to conduct business consistent with our religious beliefs and moral values.

19. In my view, the Mandate prevents me from following the dictates of my Catholic faith in the operation and management of Freshway Foods and Freshway Logistics, violates the religious-based principles by which Freshway Foods and Freshway Logistics are run, and will continue to violate my rights and those of my corporations unless we obtain relief from this court by April 1, 2013.

I declare under penalty of perjury that the above statements are true and correct to the best of my knowledge. Executed on January 23, 2013, in Sidney, Ohio.

Francis A. Gilardi, Jr. [1/]

[1/] The declaration electronically filed with the court bears the scanned original signature of Francis A. Gilardi, Jr. The original declaration, bearing the original signature, is being retained by his counsel in this action and is available for review on request by the court and defense counsel. LCvR 5.4(b)(5).

EXHIBIT A-1
Case No. 1:13-cv-00104-RBW

MEDICAL MUTUAL

Freshway Foods
SuperMed Plus
(Premier Plan)
Effective 04/01/12- NGF

SuperMed Plus

Benefits	Network	Non-Network
Benefit Period	January 1st through December 31st	
Dependent Age Limit	26 Removal upon End of Calendar Year	
Blood Pint Deductible	0 Pints	
Pre-Existing Condition Waiting Period	None	
Annual Benefit Period Maximum	Unlimited	
Benefit Period Deductible – Single/Family[1]	$500 / $1,000	$1,000 / $2,000
Coinsurance	80%	60%
Coinsurance Out-of-Pocket Maximum (Excluding Deductible) – Single/Family	$4,500 / $10,000	$9,000 / $20,000
Physician/Office Services		
Office Visit (Illness/Injury) (PCP)[2]	$25 copay, then 100%	60% after deductible
Office Visit (Illness/Injury) (Specialist)[2]	$50 copay, then 100%	60% after deductible
Urgent Care Office Visit[2]	$50 copay, then 100%	60% after deductible
Surgical Services in Physician's Office	$50 copay, then 100%	60% after deductible
All Immunizations (Unlimited)	100%	60% after deductible
Therapeutic Injectables, Drugs and Biologicals and Administration (excludes Contraceptive Injectables) (Unlimited)	100%	60% after deductible
Contraceptive Injectables	Not Covered	Not Covered
Allergy Testing and Treatment	100%	60% after deductible
Preventative Services		
Preventive Services, in accordance with state and federal law[3]	100%	60% after deductible
Routine Physical Exams (Age 21 and over; Unlimited)	100%	60% after deductible
Well Child Care Services including Exam, Routine Vision and Routine Hearing Exams, Immunizations and Laboratory Tests (Birth to age 21)	100%	60% after deductible
Routine Mammogram (One per benefit period)	100%	60% after deductible
Routine Pap Test (One per benefit period)	100%	60% after deductible
Routine Laboratory, X-Rays and Medical Tests (All ages)	100%	60% after deductible
Routine Endoscopic Services (All ages)	100%	60% after deductible
Outpatient Services		
Surgical Services (other than a physician's office)	80% after deductible	60% after deductible
Diagnostic /Therapeutic Services (CT Scans, MRIs and Nuclear Medicine	80% after deductible	60% after deductible
Diagnostic Services (Laboratory, X-rays and Medical Test)	80% after deductible	60% after deductible
Outpatient Professional Diagnostic Colonoscopy, Sigmoidoscopy, Proctosignoidoscopy, Anoscopy	80% after deductible	60% after deductible
Physical Therapy – Professional and Facility (24 visits per benefit period)	80% after deductible	60% after deductible
Occupational Therapy – Professional and Facility (20 visits per benefit period)	80% after deductible	60% after deductible

X

EXHIBIT A-2, p.1

Case No. 1:13-cv-00104-RBW

Benefits	Network	Non-Network
Speech Therapy – Facility and Professional (20 visits per benefit period)	80% after deductible	60% after deductible
Chiropractic Therapy – Professional Only (12 visits per benefit period)	80% after deductible	60% after deductible
Cardiac Rehabilitation - Facility and Professional	80% after deductible	60% after deductible
Accident Emergency in Emergency Room[4]	$200 copay, then 100%	
Medical Emergency in Emergency Room[4]	$200 copay, then 100%	
Non-Emergency use of an Emergency Room[4]	$200 copay, then 80% after deductible	$200 copay, then 60% after deductible
Inpatient Facility		
Semi-Private Room and Board	80% after deductible	60% after deductible
Diagnostic Services (Laboratory, X-Rays and Medical Test)	80% after deductible	60% after deductible
Professional Services	80% after deductible	60% after deductible
Maternity	80% after deductible	60% after deductible
Skilled Nursing Facility (180 days per benefit period)	80% after deductible	60% after deductible
Additional Services		
Ambulance (Unlimited)	80%	80%
Dental (Accident Only)	80% after deductible	80% after deductible
Diabetic Education and Training	100%	60% after deductible
Durable Medical Equipment including Prosthetic Appliances and Orthotic Devices (Unlimited)	80% after deductible	60% after deductible
Home Healthcare (100 visits per benefit period)	80% after deductible	60% after deductible
Hospice	80% after deductible	60% after deductible
Organ Transplants	80% after deductible	60% after deductible (Unlimited)
Weight Loss Surgical Services	Not Covered	Not Covered
Private Duty Nursing ($25,000 lifetime maximum)	80% after deductible	60% after deductible
TMJ Services	80% after deductible	60% after deductible
Sterilization and Abortion	Not Covered	Not Covered
Mental Health and Substance Abuse – Federal Mental Health Parity		
Inpatient Mental Health and Substance Abuse Services	**Benefits paid based on corresponding medical benefits**	
Outpatient Mental Health and Substance Abuse Services		

X

Note: Services requiring a copayment are not subject to the single/family deductible.

Non-Contracting and Facility Other Providers will pay the same as Non-Network.

Deductible expenses incurred for services by a network provider will only apply to the network deductible limits. Deductible expenses incurred for services by a non-network provider will only apply to the non-network deductible limits.

Coinsurance expenses incurred for services by a network provider will only apply to the network coinsurance out-of-pocket limits. Coinsurance expenses incurred for services by a non-network provider will only apply to the non-network coinsurance out-of-pocket limits.

Benefits will be determined based on Medical Mutual's medical and administrative policies and procedures.

In certain instances, Medical Mutual's payment may not equal the percentage listed above. However, the covered person's coinsurance will always be based on the lesser of the provider's billed charges or Medical Mutual's negotiated rate with the provider.

EXHIBIT A-2, p. 2
Case No. 1:13-cv-00104-RBW

[1]Maximum family deductible. Member deductible is the same as single deductible. 3-month carryover applies.
[2]The office visit copay applies to the cost of the office visit only.
[3] Preventive Services include evidence-based services that have a rating of "A" or "B" in the United States Preventive Services Task Force, routine immunizations and other screenings, as provided in the Patient Protection and Affordable Care Act.
[4]Copay is taken on the room charge and waived if admitted.

MEDICAL MUTUAL™

Freshway Foods
SuperMed Plus
(Basic Plan)
Effective 04/01/12 - NGF

SuperMed Plus®

Benefits	Network	Non-Network
Benefit Period	January 1st through December 31st	
Dependent Age Limit	26 Removal upon End of Calendar Year	
Blood Pint Deductible	0 Pints	
Pre-Existing Condition Waiting Period	None	
Annual Benefit Period Maximum	Unlimited	
Benefit Period Deductible – Single/Family[1]	$1,000 / $3,000	$2,000 / $6,000
Coinsurance	80%	60%
Coinsurance Out-of-Pocket Maximum (Excluding Deductible) – Single/Family	$4,000 / $8,000	$8,000 / $16,000
Physician/Office Services		
Office Visit (Illness/Injury) (PCP)[2]	$30 copay, then 100%	60% after deductible
Office Visit (Illness/Injury) (Specialist)[2]	$60 copay, then 100%	60% after deductible
Urgent Care Office Visit[2]	$50 copay, then 100%	60% after deductible
Surgical Services in Physician's Office	$60 copay, then 100%	60% after deductible
All Immunizations (Unlimited)	100%	60% after deductible
Therapeutic Injectables, Drugs and Biologicals and Administration (excludes Contraceptive Injectables) (Unlimited)	100%	60% after deductible
Contraceptive Injectables	Not Covered	Not Covered
Allergy Testing and Treatment	100%	60% after deductible
Preventative Services		
Preventive Services, in accordance with state and federal law[3]	100%	60% after deductible
Routine Physical Exams (Age 21 and over; Unlimited)	100%	60% after deductible
Well Child Care Services including Exam, Routine Vision and Routine Hearing Exams, Immunizations and Laboratory Tests (Birth to age 21)	100%	60% after deductible
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Routine Laboratory, X-Rays and Medical Tests (All ages)	100%	60% after deductible
Routine Endoscopic Services (All ages)	100%	60% after deductible
Outpatient Services		
Surgical Services (other than a physician's office)	80% after deductible	60% after deductible
Diagnostic /Therapeutic Services (CT Scans, MRIs and Nuclear Medicine	80% after deductible	60% after deductible
Diagnostic Services (Laboratory, X-rays and Medical Test)	80% after deductible	60% after deductible
Outpatient Professional Diagnostic Colonoscopy, Sigmoidoscopy, Proctosignoidoscopy, Anoscopy	80% after deductible	60% after deductible
Physical Therapy – Professional and Facility (24 visits per benefit period)	80% after deductible	60% after deductible
Occupational Therapy – Professional and Facility (20 visits per benefit period)	80% after deductible	60% after deductible

EXHIBIT A-2, p. 3
Case No. 1:13-cv-00104-RBW

Benefits	Network	Non-Network
Speech Therapy – Facility and Professional (20 visits per benefit period)	80% after deductible	60% after deductible
Chiropractic Therapy – Professional Only (12 visits per benefit period)	80% after deductible	60% after deductible
Cardiac Rehabilitation - Facility and Professional	80% after deductible	60% after deductible
Accident Emergency in Emergency Room[4]	$200 copay, then 100%	
Medical Emergency in Emergency Room[4]	$200 copay, then 100%	
Non-Emergency use of an Emergency Room[4]	$200 copay, then 80% after deductible	$200 copay, then 60% after deductible
Inpatient Facility		
Semi-Private Room and Board	80% after deductible	60% after deductible
Diagnostic Services (Laboratory, X-Rays and Medical Test)	80% after deductible	60% after deductible
Professional Services	80% after deductible	60% after deductible
Maternity	80% after deductible	60% after deductible
Skilled Nursing Facility (180 days per benefit period)	80% after deductible	60% after deductible
Additional Services		
Ambulance (Unlimited)	80%	80%
Dental (Accident Only)	80% after deductible	80% after deductible
Diabetic Education and Training	100%	60% after deductible
Durable Medical Equipment including Prosthetic Appliances and Orthotic Devices (Unlimited)	80% after deductible	60% after deductible
Home Healthcare (100 visits per benefit period)	80% after deductible	60% after deductible
Hospice	80% after deductible	60% after deductible
Organ Transplants	80% after deductible	60% after deductible (Unlimited)
Weight Loss Surgical Services	Not Covered	Not Covered
Private Duty Nursing ($25,000 lifetime maximum)	80% after deductible	60% after deductible
TMJ Services	80% after deductible	60% after deductible
Sterilization and Abortion	Not Covered	Not Covered
Mental Health and Substance Abuse – Federal Mental Health Parity		
Inpatient Mental Health and Substance Abuse Services	**Benefits paid based on corresponding medical benefits**	
Outpatient Mental Health and Substance Abuse Services		

X

Note: Services requiring a copayment are not subject to the single/family deductible.

Non-Contracting and Facility Other Providers will pay the same as Non-Network.

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Coinsurance expenses incurred for services by a network provider will only apply to the network coinsurance out-of-pocket limits. Coinsurance expenses incurred for services by a non-network provider will only apply to the non-network coinsurance out-of-pocket limits.

Benefits will be determined based on Medical Mutual's medical and administrative policies and procedures.

In certain instances, Medical Mutual's payment may not equal the percentage listed above. However, the covered person's coinsurance will always be based on the lesser of the provider's billed charges or Medical Mutual's negotiated rate with the provider.

EXHIBIT A-2, p. 4
Case No. 1:13-cv-00104-RBW

[1]Maximum family deductible. Member deductible is the same as single deductible. 3-month carryover applies.
[2]The office visit copay applies to the cost of the office visit only.
[3] Preventive Services include evidence-based services that have a rating of "A" or "B" in the United States Preventive Services Task Force, routine immunizations and other screenings, as provided in the Patient Protection and Affordable Care Act.
[4]Copay is taken on the room charge and waived if admitted.

MEDICAL MUTUAL™

Freshway Foods
Prescription Drug Program
Effective 04-01-12

Benefits	Copay	Day Supply
Benefit Period	January 1st through December 31st	
Dependent Age Limit	26 Removal upon End of Calendar Year	
X **Formulary Retail Program (No Contraceptive Coverage or Sexual Dysfunction Coverage)**		
Generic Copayment	$15	30
Formulary Copayment	$30	30
Non-Formulary Copayment	50% (Min. $50; Max. $300)	30
Diabetic Supplies[1]	$0	30
Asthmatic Supplies[2]	$0	30
X **Formulary Mail Order Program (No Contraceptive Coverage or Sexual Dysfunction Coverage)**		
Generic Copayment	$30	90
Formulary Copayment	$70	90
Non-Formulary Copayment	$200	90
Diabetic Supplies[1]	$0	90
Asthmatic Supplies[2]	$0	90

Note: In an effort to continue our commitment to quality care and help contain the increasing cost of prescription drug coverage, a formulary feature is included in your prescription drug benefit. A formulary drug is a FDA approved prescription medication reviewed by an independent Pharmacy and Therapeutics Committee brought together by Medco Health Solutions, Inc. Formulary drugs can assist in maintaining quality care while meeting your plan's cost containment objectives.

Benefits will be determined based on Medical Mutual's medical and administrative policies and procedures.

This document is only a partial listing of benefits. This is not a contract of insurance. No person other than an officer of Medical Mutual may agree, orally or in writing, to change the benefits listed here. The contract or certificate will contain the complete listing of covered services.

[1]Includes over-the-counter items, as well as insulin, syringes and needles, glucose monitors, meters or glucowatch
[2]Includes Replacement bags, Peak Flow Meters and Inhalation Spacers only.

EXHIBIT A-2, p. 5
Case No. 1:13-cv-00104-RBW

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANCIS A. GILARDI, JR., et al.,
Plaintiffs,

v. Civil Action No. 1:13-cv-00104-RBW

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al.,
Defendants.
_____/

DECLARATION OF PLAINTIFF PHILIP M. GILARDI

I, Philip M. Gilardi, an adult resident of the State of Ohio and a plaintiff in the above-captioned case, make the following declaration, pursuant to 28 U.S.C. § 1746 and LCvR 11.2, based on my personal knowledge, unless otherwise noted:

1. My brother, Francis A. Gilardi, Jr. and I are the sole owners of Fresh Unlimited, Inc., d/b/a Freshway Foods (hereafter "Freshway Foods"), and Freshway Logistics, Inc. (hereafter "Freshway Logistics"). We each hold a 50% ownership stake in Freshway Foods and Freshway Logistics and, therefore, together own the full and controlling interest in both corporations.

2. I am the President and Secretary of Freshway Foods and Freshway Logistics and Francis is the Chief Executive Officer and Treasurer. We are the only Directors of the two corporations, and together we set the policies governing the conduct of all phases of the two corporations.

3. Freshway Foods is a closely-held and family owned fresh produce processor and packer serving twenty-three states for over twenty-four years. It has approximately 340 full-time employees. Freshway Logistics is a closely-held and family owned for-hire carrier of mainly refrigerated products serving twenty-three states since 2003. It has approximately fifty-five full-time employees.

EXHIBIT B
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4. Freshway Foods and Freshway Logistics are both located at 601 North Stolle Avenue, Sidney, Ohio, which is in Shelby County. Both entities are Subchapter S corporations and are incorporated under the laws of the State of Ohio.

5. I hold to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. I sincerely believe that actions intended to terminate an innocent human life by abortion are gravely sinful. I also sincerely believe in the Catholic Church's teaching regarding the immorality of contraception and sterilization.

6. I manage and operate Freshway Foods and Freshway Logistics in a way that reflects the teachings, mission, and values of my Catholic faith, and I desire to continue to do so.

7. Examples of how I further my religious beliefs and moral values through the two corporations include the following: (a) For approximately the last ten years, I have directed that on the back of the trucks I own with my brother, Francis, through a separate company, but which bear the name of Freshway Foods, that a sign be affixed stating, "It's not a choice, it's a child," as a way to promote my pro-life views to the public; (b) I strongly support financially and otherwise my Catholic parish, schools, and seminary; (c) In or about 2004, my brother, Francis, and I drafted a values statement listing values by which all our companies would be run. We listed "Ethics" first since that is our primary business value: "Ethics: Honest, Trustworthy and Responsible to: - Each Other; - Our Customers; - Our Vendors. Non-negotiable - Supersedes everything"; (d) At my direction, Freshway Foods makes annual monetary and/or in-kind donations, primarily food, to many community non-profit charitable organizations, including Agape, Compassionate Care, the YMCA, Holy Angel's Soup Kitchen, United Way, Habitat for Humanity, American Legion, Bill McMillian's Needy Children, Elizabeth's New Life Center, and local schools; (e) At my direction, Freshway Logistics donates a trailer for use by the local

Catholic parish for the annual parish picnic and uses its trucks to deliver the food donated by Freshway Foods to food banks outside the Sidney, Ohio, area; (f) At my direction, during our Monthly Associate Appreciation Lunches, we provide our Freshway Foods and Freshway Logistics employees with alternative foods to accommodate the types of foods our employees are allowed to eat pursuant to their religious beliefs; and (g) At my direction, Freshway Foods and Freshway Logistics provide our Muslim employees with space to pray during breaks and lunches, and, during Ramadan, break periods are adjusted to allow our Muslim employees, pursuant to their religion, to eat after sundown.

8. Moreover, Freshway Foods and Freshway Logistics provide our full-time employees with a self-insured employee health benefits plan that provides employees with health insurance and prescription drug insurance through a third-party administrator and stop loss provider. Employees of the two corporations may choose a basic option or a premier option from the plan. The plan is renewed on April 1. I understand that it takes us about sixty days to complete the process of obtaining health insurance coverage and enrolling our employees in that coverage.

9. For approximately the last ten years, and at my brother's and my direction, we have specifically excluded coverage of all contraceptives, abortion, and sterilization from our employee health insurance plan because paying for such services as a part of a health plan would violate my sincerely-held religious beliefs and moral values.

10. I consider the provision of employee health insurance to be an integral component of furthering the mission and values of my corporations and of my religious beliefs and moral values.

11. My sincerely-held religious beliefs and moral values do not allow me to direct, or allow, Freshway Foods and Freshway Logistics to arrange for, pay for, provide, or facilitate employee

health plan coverage for contraceptives, sterilization, abortion, or related education and counseling without violating my sincerely-held religious beliefs and moral values.

12. I understand that the Defendants in this lawsuit promulgated and implemented a mandate that requires Freshway Foods and Freshway Logistics to obtain and pay for employee health insurance coverage, without cost sharing, for "all Food and Drug Administration-approved contraceptive methods, sterilization procedures and patient education and counseling for all women with reproductive capacity" in plan years beginning on or after August 1, 2012. (hereafter "Mandate".) I also understand that FDA-approved contraceptive methods include abortion-inducing drugs.

13. I understand that the Mandate applies to Freshway Foods and Freshway Logistics because they each employ fifty or more full-time employees and are not exempt from the Mandate. In particular, I understand that my corporations do not fall within the "religious employer" exemption, as that term is defined by the Mandate, and they do not fall within any "temporary enforcement safe harbor" provided by Defendants to certain non-profit entities. I also understand that the employee health benefit plan for Freshway Foods and Freshway Logistics is not considered "grandfathered," and thus not exempt from the Mandate because since March 2010 the plan has undergone material changes, such as an increase in doctor visit co-pays of $10 for the basic option and $15 for the premier option.

14. To operate and manage Freshway Foods and Freshway Logistics consistent with my Catholic faith and values, I want to continue to be able to provide high quality, broad coverage health insurance for my full-time employees that excludes coverage for things I believe are morally wrong for me and my corporations to arrange for, pay for, provide, facilitate, or otherwise support.

15. I understand that by April 1, 2013, which is the renewal date for our employee health benefit plan, the Mandate will require me to direct Freshway Foods and Freshway Logistics, contrary to my religious beliefs and moral values, to arrange for, pay for, provide, facilitate, or otherwise support a health plan that includes contraceptives, including abortion-inducing drugs, sterilization, and related patient education and counseling and will prevent me and my corporations from obtaining an employee health benefit plan that comports with our religious beliefs and moral values.

16. I understand that if Freshway Foods and Freshway Logistics fail to comply with the Mandate or drop employee group health coverage entirely, then they could incur significant annual fines and/or penalties payable to the federal government that would have a crippling impact on their ability to survive economically and, by extension, would harm me financially.

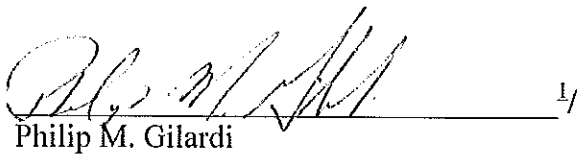
17. In addition to fines and penalties, stopping all health coverage for our full-time employees would have a severe impact on our ability to compete with other companies that do offer health coverage and would have severe consequences for our employees who would have to find expensive individual policies in the private marketplace.

18. In my view, the Mandate requires me and Freshway Foods and Freshway Logistics to choose between (a) complying with the Mandate and violating our religious beliefs and moral values and (b) not complying with the Mandate and having to pay annual fines and penalties in order to conduct business consistent with our religious beliefs and moral values.

19. In my view, the Mandate prevents me from following the dictates of my Catholic faith in the operation and management of Freshway Foods and Freshway Logistics, violates the religious-based principles by which Freshway Foods and Freshway Logistics are run, and will continue to violate my rights and those of my corporations unless we obtain relief from this court

before April 1, 2013.

I declare under penalty of perjury that the above statements are true and correct to the best of my knowledge. Executed on January 24, 2013, in Sidney, Ohio.



Philip M. Gilardi [1/]

[1/] The declaration electronically filed with the court bears the scanned original signature of Philip M. Gilardi. The original declaration, bearing the original signature, is being retained by his counsel in this action and is available for review on request by the court and defense counsel. LCvR 5.4(b)(5).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANCIS A. GILARDI, JR.
601 North Stolle Avenue
Sidney, Ohio 45365

PHILIP M. GILARDI
601 North Stolle Avenue
Sidney, Ohio 45365

Civil Action No. _____

FRESH UNLIMITED, INC., d/b/a
Freshway Foods
601 North Stolle Avenue
Sidney, Ohio 45365

FRESHWAY LOGISTICS, INC.
601 North Stolle Avenue
Sidney, Ohio 45365

Plaintiffs,

vs.

UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN SERVICES
200 Independence Avenue, SW
Washington, DC 20201

KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

UNITED STATES DEPARTMENT OF THE TREASURY
1500 Pennsylvania Avenue, NW
Washington, DC 20220

TIMOTHY F. GEITHNER, in his official capacity as the Secretary of the United States Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

EXHIBIT C

UNITED STATES DEPARTMENT OF
LABOR
200 Constitution Avenue, NW
Washington, DC 20210

HILDA L. SOLIS, in her official capacity as
Secretary of the United States Department
of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Defendants.
_____/

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Francis A. Gilardi, Jr., Philip M. Gilardi, Fresh Unlimited, Inc., d/b/a Freshway Foods, and Freshway Logistics, Inc. (hereafter collectively "Plaintiffs"), by and through their attorneys, bring this complaint against Defendants United States Department of Health and Human Services, Kathleen Sebelius, United States Department of the Treasury, Timothy F. Geithner, United States Department of Labor, Hilda L. Solis, and their successors in office (hereafter collectively "Defendants"). In support thereof, Plaintiffs allege the following based on information and belief:

INTRODUCTION

1. Plaintiffs seek judicial review concerning Defendants' violations of Plaintiffs' constitutional and statutory rights in connection with Defendants' promulgation and implementation of certain regulations adopted under the Patient Protection and Affordable Care Act of 2010 (hereafter "Affordable Care Act"), specifically those regulations mandating that non-exempt employers include in employee health benefit plans coverage of certain goods and services, regardless of whether the provision of such coverage violates the employer's religious beliefs and moral values.

2. Plaintiffs ask this court for declaratory and injunctive relief from the operation of a rule

promulgated by Defendants in or about February 2012 mandating that employee health benefit plans include coverage, without cost sharing, "all Food and Drug Administration ["FDA"]-approved contraceptive methods, sterilization procedures and patient education and counseling for all women with reproductive capacity" in plan years beginning on or after August 1, 2012 (hereafter "the Mandate"). 45 C.F.R. § 147.130(a)(1)(iv), as confirmed at 77 Fed. Reg. 8725 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration Guidelines[1]/ found at http://www.hrsa.gov/womensguidelines (last visited Jan. 21, 2013).

3. Plaintiffs Francis A. Gilardi, Jr. and Philip M. Gilardi are adherents of the Catholic faith and hold to the Catholic Church's teachings regarding the immorality of artificial contraceptives, sterilization, and abortion. They are the sole owners of Plaintiffs Fresh Unlimited, Inc., d/b/a Freshway Foods, and Freshway Logistics, Inc. with each holding 50% of the corporate shares. As the two owners with controlling interests in the two corporations, they conduct their businesses in a manner that does not violate their sincerely-religious beliefs or moral values, and they wish to continue to do so.

4. For approximately the last ten years, Plaintiffs' employee health benefit plan specifically has excluded contraceptives, abortion, and sterilization, pursuant to Plaintiffs' religious beliefs and moral values.

5. Plaintiffs Francis A. Gilardi, Jr. and Philip M. Gilardi have concluded that complying with the Mandate would require them to violate their religious beliefs and moral values because the Mandate requires them and/or the corporations they own and control to arrange for, pay for, provide, and facilitate contraception methods, sterilization procedures, and abortion because certain drugs and devices such as the "morning-after pill," "Plan B," and "Ella" come within the

[1]/ The Health Resources and Services Administration is an agency that is part of Defendant United States Department of Health and Human Services.

Mandate's and the Health Resources and Services Administration's definition of "Food and Drug Administration-approved contraceptive methods" despite their known abortifacient mechanisms of action.

6. Plaintiffs contend that the Mandate pressures them to either (1) comply with the Mandate and violate their religious beliefs and moral values or (2) incur ruinous fines and penalties if they choose to continue to conduct their businesses consistent with their religious beliefs and moral values.

7. Plaintiffs contend that the Mandate violates their rights under the Religious Freedom Restoration Act and the First Amendment to the United States Constitution and that it also violates the Administrative Procedure Act.

JURISDICTION AND VENUE

8. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343(a)(4), and 1346(a)(2) because it is a civil action against agencies and officials of the United States based on claims arising under the Constitution, laws of the United States, and regulations of executive departments and it seeks equitable or other relief under an Act of Congress, and also pursuant to 28 U.S.C. § 1361, as this court may compel officers and agencies of the United States to perform a duty owed Plaintiffs.

9. This court has jurisdiction to render declaratory and injunctive relief pursuant to 5 U.S.C. § 702, 28 U.S.C. §§ 2201-2202, 42 U.S.C. § 2000bb-1, and Federal Rules of Civil Procedure 57 and 65.

10. Venue is appropriate in this district pursuant to 28 U.S.C. § 1391(e) because Defendants reside in this district and a substantial part of the acts giving rise to Plaintiffs' claims occurred in this district.

11. This court has the authority to award Plaintiffs their costs and attorneys' fees pursuant to

28 U.S.C. § 2412 and 42 U.S.C. § 1988.

PLAINTIFFS

12. The Plaintiffs to this action are Francis A. Gilardi, Jr., Philip M. Gilardi, Fresh Unlimited, Inc., d/b/a Freshway Foods, and Freshway Logistics, Inc. Hereafter in this complaint, Plaintiffs Francis A. Gilardi, Jr. and Philip M. Gilardi will be referred to as "Francis Gilardi," "Philip Gilardi," or "Francis and Philip Gilardi"; Plaintiff Fresh Unlimited, Inc., d/b/a Freshway Foods will be referred to as "Freshway Foods"; and Plaintiff Freshway Logistics, Inc. will be referred to as "Freshway Logistics."

13. Francis and Philip Gilardi are individuals and citizens of the State of Ohio and the United States of America.

14. Francis and Philip Gilardi each hold a 50% ownership stake in Freshway Foods and Freshway Logistics, and, therefore, together they own the full and controlling interest in both companies.

15. Francis Gilardi is the Chief Executive Officer and Treasurer of Freshway Foods and Freshway Logistics and Philip Gilardi is the President and Secretary. They are the only Directors of the two corporations, and together they set the policies governing the conduct of all phases of the two corporations.

16. Freshway Foods is a closely-held and family owned fresh produce processor and packer serving twenty-three states for over twenty-four years. It has approximately 340 full-time employees.

17. Freshway Logistics is a closely-held and family owned for-hire carrier of mainly refrigerated products serving twenty-three states since 2003. It has approximately fifty-five full-time employees.

18. Freshway Foods and Freshway Logistics are both located at 601 North Stolle Avenue,

Sidney, Ohio, which is in Shelby County. Both entities are Subchapter S corporations and are incorporated under the laws of the State of Ohio.

DEFENDANTS

19. Defendant United States Department of Health and Human Services (hereafter "HHS") is an agency of the United States and is responsible for the administration and enforcement of the Mandate.

20. Defendant Kathleen Sebelius is Secretary of HHS and is named as a party only in her official capacity.

21. Defendant United States Department of the Treasury is an agency of the United States and is responsible for the administration and enforcement of the Mandate.

22. Defendant Timothy F. Geithner is Secretary of the Treasury and is named as a party only in his official capacity.

23. Defendant United States Department of Labor (hereafter "DOL") is an agency of the United States and is responsible for the administration and enforcement of the Mandate.

24. Defendant Hilda L. Solis is Secretary of DOL and is named as a party only in her official capacity.

FACTUAL ALLEGATIONS

25. Francis and Philip Gilardi hold to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. They sincerely believe that actions intended to terminate an innocent human life by abortion are gravely sinful.

26. Francis and Philip Gilardi also sincerely believe in the Catholic Church's teaching regarding the immorality of artificial means of contraception and sterilization.

27. Francis and Philip Gilardi manage and operate Freshway Foods and Freshway Logistics in a way that reflects the teachings, mission, and values of their Catholic faith, and they desire to

continue to do so.

28. Examples of how Plaintiffs further their religious beliefs and moral values include the following:

a. For approximately the last ten years, Francis and Philip Gilardi have affixed to the back of the trucks they own through a separate company, but which bear the name of Freshway Foods, a sign stating, "It's not a choice, it's a child," as a way to promote their pro-life views to the public;

b. Francis and Philip Gilardi strongly support financially and otherwise their Catholic parish, schools, and seminary;

c. In or about 2004, Francis and Philip Gilardi drafted a values statement listing values by which their companies would be run. They listed "Ethics" first since it is their primary business value: "Ethics: Honest, Trustworthy and Responsible to: - Each Other; - Our Customers; - Our Vendors. Non-negotiable - Supersedes everything";

d. Freshway Foods makes annual monetary and/or in-kind donations, primarily food, to many community non-profit charitable organizations, including Agape, Compassionate Care, the YMCA, Holy Angel's Soup Kitchen, United Way, Habitat for Humanity, American Legion, Bill McMillian's Needy Children, Elizabeth's New Life Center, and local schools;

e. Freshway Logistics donates a trailer for use by the local Catholic parish for its annual picnic. Freshway Logistics also uses its trucks to deliver the food donated by Freshway Foods to food banks outside the Sidney, Ohio, area;

f. During the Monthly Associate Appreciation Lunches, Plaintiffs provide alternative foods for their employees to accommodate the types of foods their employees are allowed to eat pursuant to their religious beliefs; and

g. Plaintiffs provide their Muslim employees with space to pray during breaks and lunches. During Ramadan, Plaintiffs adjust break periods to allow their Muslim employees, pursuant to their religion, to eat after sundown.

29. Moreover, Freshway Foods and Freshway Logistics provide their full-time employees with a self-insured employee health benefits plan that provides employees with health insurance and prescription drug insurance through a third-party administrator and stop loss provider. Employees of the two corporations may choose a basic option or a premier option from the plan. The plan is renewed on April 1.

30. For approximately the last ten years, Plaintiffs have specifically excluded coverage of all contraceptives, abortion, and sterilization, because paying for such services as a part of an employee health benefits plan would violate Plaintiffs' sincerely-held religious beliefs and moral values.

31. Like other non-cash benefits provided to employees, Plaintiffs consider the provision of employee health insurance an integral component of furthering their mission, values, and religious beliefs.

32. Plaintiffs cannot arrange for, pay for, provide, or facilitate employee health plan coverage for contraceptives, sterilization, abortion, or related education and counseling without violating their sincerely-held religious beliefs and moral values.

APPLICABLE PROVISIONS OF THE MANDATE

33. Under the Mandate being challenged herein and related Affordable Care Act provisions, an employer of fifty or more full-time employees, such as Plaintiffs, must offer, unless exempted, a group health plan to employees that includes coverage for all FDA-approved contraceptive methods, sterilization procedures, and related education and counseling.

34. The Mandate does not apply to employers of fewer than fifty full-time employees unless

those employers choose to offer their employees health insurance.

35. "Grandfathered" health plans are exempted from the Mandate. Such plans were in existence as of the enactment of the Affordable Care Act on or about March 23, 2010, and have not since been materially changed.

36. Plaintiffs' group health plan is not "grandfathered" as it has been materially changed since on or about March 23, 2010, for example, by increasing doctor visit co-pays by $10 and $15 for the basic option and the premier option respectively.

37. Permanently exempt from the Mandate are "religious employers," as defined at 45 CFR § 147.130(a)(1)(A) and (B). Temporarily exempted from the Mandate are non-profit employers with religious objections to covering contraceptive services, 77 Fed. Reg. 8725 (Feb. 15, 2012), and employers who satisfy the criteria of the "temporary enforcement safe harbor" do not have to comply with the Mandate until at least August 1, 2013. "Guidance on the Temporary Enforcement Safe Harbor for Certain Employers" (Aug. 15, 2012), http://cciio.cms.gov/resources/files/prev-services-guidance-08152012.pdf. (last visited Jan. 24, 2013).

38. Plaintiffs do not qualify as "religious employers" under 45 C.F.R. § 147.130(a)(1)(A) and (B), nor can they take advantage of the "temporary enforcement safe harbor" because of their for-profit status.

39. Accordingly, the Mandate applies to Plaintiffs as they employ fifty or more full-time employees and are not otherwise exempted from the Mandate.

40. The Mandate went into effect on August 1, 2012, for non-exempt for-profit employers, such as Plaintiffs, and the Mandate applies to the first health insurance plan-year starting after August 1, 2012.

41. Plaintiffs wish to renew health insurance coverage for their full-time employees on April

1, 2013, while, at the same time, continuing to exclude coverage for all FDA-approved contraceptive methods, including injectable contraceptives, abortion, sterilization procedures, and related patient education and counseling, as they have been doing for the past several years.

42. Under the terms of the Mandate and absent relief from this court, Plaintiffs will be required to violate their religious beliefs and moral values by providing their full-time employees with coverage of goods, services, activities, and practices that Plaintiffs consider sinful and immoral and which are currently excluded from their existing health plan.

43. Failure to comply with the Mandate will subject Plaintiffs to incur significant fines and penalties.

44. Failure to provide health insurance that complies with the Mandate may result in fines and penalties of $100 per day for each employee not properly covered, 26 U.S.C. § 4980D, as well as potential enforcement lawsuits, 26 U.S.C. §§ 1132, 1185d.

45. Should Francis Gilardi, Philip Gilardi, and Freshway Foods, pursuant to their sincerely-held religious beliefs and moral values, not provide health insurance that complies with the Mandate for their approximately 340 full-time employees, they would be subjected to daily fines and penalties of about $34,000, totaling over $12.4 million annually.

46. Should Francis Gilardi, Philip Gilardi, and Freshway Logistics, pursuant to their sincerely-held religious beliefs and moral values, not provide health insurance that complies with the Mandate for their approximately fifty-five full-time employees, they would be subjected to daily fines and penalties of about $5,500, totaling over $2 million annually.

47. Non-exempt employers with fifty or more full-time employees that fail to provide any employee health insurance plan are subjected to annual fines and penalties of $2,000 for each full-time employee, not counting thirty of them. 26 U.S.C. § 4980H.

48. The Mandate pressures Plaintiffs into choosing between complying with the Mandate's

requirements in violation of their religious beliefs and moral values or paying ruinous fines and penalties that would have a crippling impact on their ability to survive economically. The Mandate, therefore, imposes a substantial burden on Plaintiffs' religious exercise.

49. Any alleged interest Defendants have in providing free FDA-approved contraceptives, abortifacients, sterilization procedures, and related education and counseling services, without cost sharing, is not compelling as applied to Plaintiffs. In addition, any such interest can be advanced by Defendants through other more narrowly tailored means that would not require Plaintiffs to pay for and otherwise support coverage of such items through their employee health care plan in violation of their religious beliefs and moral values.

50. Plaintiffs lack an adequate or available administrative remedy.

51. Plaintiffs lack an adequate remedy at law.

CAUSES OF ACTION

COUNT I

Violation of the Religious Freedom Restoration Act

52. Plaintiffs repeat and re-allege the allegations in paragraphs 1 through 51 above and incorporate those allegations herein by reference.

53. Plaintiffs' sincerely held religious beliefs prevent them from arranging for, paying for, providing, or facilitating coverage for contraceptive methods, sterilization procedures, abortion, and patient education and counseling related to such procedures.

54. The Mandate, by requiring Plaintiffs to provide such coverage, imposes a substantial burden on Plaintiffs' free exercise of religion by coercing Plaintiffs to choose between continuing to conduct their businesses in accordance with their religious beliefs and moral values or paying substantial annual fines and penalties to the government.

55. The Mandate furthers no compelling governmental interest, nor is it necessary to prevent

any concrete harm to such an interest.

56. The Mandate is not narrowly tailored to furthering any compelling interest.

57. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

58. The Mandate and Defendants' threatened enforcement of the Mandate violates rights secured to Plaintiffs by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*

59. Absent injunctive and declaratory relief against the Mandate, Plaintiffs will suffer irreparable harm, and they request the relief set forth below in their prayer for relief.

COUNT II

Violation of the First Amendment's Free Exercise Clause

60. Plaintiffs repeat and re-allege the allegations in paragraphs 1 through 51 above and incorporate those allegations herein by reference.

61. Plaintiffs' sincerely held religious beliefs prevent them from arranging for, paying for, providing, or facilitating coverage for contraceptive methods, sterilization procedures, abortion, and patient education and counseling related to such procedures.

62. The Mandate, by requiring Plaintiffs to provide such coverage imposes a substantial burden on Plaintiffs' free exercise of religion by coercing Plaintiffs to choose between continuing to conduct their businesses in accordance with their religious beliefs and moral values or paying substantial annual fines and penalties to the government.

63. The Mandate is neither neutral nor generally applicable.

64. The Mandate furthers no compelling governmental interest, nor is it necessary to prevent any concrete harm to such an interest.

65. The Mandate is not narrowly tailored to furthering any compelling interest.

66. The Mandate is not the least restrictive means of furthering the Defendants' stated interests.

67. The Mandate and Defendants' threatened enforcement of the Mandate violates Plaintiffs' rights to the free exercise of religion as guaranteed by the First Amendment to the United States Constitution.

68. Absent injunctive and declaratory relief against the Mandate, Plaintiffs will suffer irreparable harm, and they request the relief set forth below in their prayer for relief.

COUNT III

Violation of the First Amendment's Free Speech Clause

69. Plaintiffs repeat and re-allege the allegations in paragraphs 1 through 51 above and incorporate those allegations herein by reference.

70. The First Amendment protects organizations as well as individuals from being compelled to speak and, in many circumstances, from being compelled to subsidize the speech of others.

71. Expenditures of money are a form of protected speech.

72. The Mandate compels Plaintiffs to arrange for, pay for, provide, and facilitate coverage for education and counseling related to contraception, sterilization, and abortion, which is speech to which Plaintiffs' morally object.

73. Plaintiffs believe that the aforementioned services, activities, and practices covered by the Mandate are contrary to their sincerely-held religious beliefs.

74. The Mandate compels Plaintiffs to subsidize goods, services, activities, practices, and speech that Plaintiffs believe to be immoral and, thereby, violates Plaintiffs' right to be free from uttering, subsidizing, or supporting compelled speech with which Plaintiffs disagree on religious and moral grounds.

75. The Mandate and Defendants' threatened enforcement of the Mandate violates Plaintiffs' free speech rights as guaranteed by the First Amendment to the United States

Constitution.

76. Absent injunctive and declaratory relief against the Mandate, Plaintiffs will suffer irreparable harm, and they request the relief set forth below in their prayer for relief.

COUNT IV

Violation of the Administrative Procedure Act

77. Plaintiffs repeat and re-allege the allegations in paragraphs 1 through 51 above and incorporate those allegations herein by reference.

78. The Affordable Care Act expressly delegates to the Health Resources and Services Administration, which is an agency that is part of Defendant United States Department of Health and Human Services, the authority to establish "preventive care" guidelines that a group health plan and health insurance issuer must abide by.

79. Given this express delegation, Defendants were obliged to engage in formal notice and comment rulemaking as prescribed by law before Defendants issued the guidelines that group health plans and insurers must abide by.

80. Proposed regulations were required to be published in the Federal Register and interested persons were required to be given a chance to take part in the rulemaking through the submission of written data, views, or arguments.

81. Defendants promulgated the "preventive care" guidelines without engaging in the formal notice and comment rulemaking as prescribed by law. Defendants delegated the responsibilities for issuing "preventive care" guidelines to a non-governmental entity, the Institute of Medicine, which did not permit or provide for broad public comment otherwise required by the Administrative Procedure Act.

82. Defendants also failed to engage in the required notice and comment rulemaking when Defendants issued the interim final rules and the final rule that incorporates the "preventive care"

guidelines.

83. The Mandate violates Section 1303(b)(1)(A) of the Affordable Care Act, which provides that "nothing in this title" "shall be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits for any plan year." 42 U.S.C. § 18023(b)(1)(A)(i) (codification of Section 1303 of the Affordable Care Act).

84. The Mandate violates the Religious Freedom Restoration Act as set forth in this complaint.

85. The Mandate violates the First Amendment to the United States Constitution as set forth in this complaint.

86. Defendants, in promulgating the Mandate, failed to consider the constitutional and statutory implications of the Mandate on for-profit employers such as Plaintiffs.

87. The Mandate and Defendants' actions are arbitrary and capricious, not in accordance with law or required procedure, and contrary to constitutional right, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

88. Absent injunctive and declaratory relief against the Mandate, Plaintiffs will suffer irreparable harm, and they request the relief set forth below in their prayer for relief.

PRAYER FOR RELIEF

89. Plaintiffs repeat and re-allege all allegations made above and incorporate those allegations herein by reference, and Plaintiffs request that this court grant them the following relief and enter final judgment against Defendants and in favor of Plaintiffs:

A. Enter a declaratory judgment that the Mandate and Defendants' enforcement of the Mandate against Plaintiffs violates the Religious Freedom Restoration Act;

B. Enter a declaratory judgment that the Mandate and Defendants' enforcement of the Mandate against Plaintiffs violates the Free Exercise Clause of the First Amendment to the

United States Constitution;

C. Enter a declaratory judgment that the Mandate and Defendants' enforcement of the Mandate against Plaintiffs violates the Free Speech Clause of the First Amendment to the United States Constitution;

D. Enter a declaratory judgment that the Mandate and Defendants' enforcement of the Mandate against Plaintiffs violates the Administrative Procedure Act;

E. Enter preliminary and permanent injunctions prohibiting Defendants, their officers, agents, servants, employees, successors in office, attorneys, and those acting in active concert or participation with them, including any insurance carriers or third party insurance plan administrators with whom Plaintiffs may contract for employee health benefits, from applying and enforcing against Plaintiffs the Mandate and any related regulations, rules, statutes, laws, penalties, fines, or assessments;

F. Award Plaintiffs their costs and attorney's fees associated with this action; and

G. Award Plaintiffs any further relief this court deems equitable and just.

Respectfully submitted on this 24th day of January, 2013,

/s/ Colby M. May

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANCIS A. GILARDI, JR., *et al.*	
Plaintiffs,	
v.	Civil Action No. 13-104(EGS)
KATHLEEN SEBELIUS, *et* al.	
Defendants.	

ORDER

For the reasons set forth in the accompanying Memorandum Opinion filed on this day, it is hereby

ORDERED that plaintiffs' motion for a preliminary injunction is **DENIED**; and it is further

ORDERED that because the Court has decided the motion on the papers pursuant to Local Civil Rule 65.1(d), the motions hearing currently scheduled for March 6, 2013 is hereby **CANCELED**.

SO ORDERED.

Signed: Emmet G. Sullivan
United States District Judge
March 3, 2013

EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANCIS A. GILARDI, JR., *et al.* Plaintiffs, v. KATHLEEN SEBELIUS, *et* al. Defendants.	Civil Action No. 13-104(EGS)

MEMORANDUM OPINION

Plaintiffs Francis A. Gilardi, Jr., Philip M. Gilardi, Fresh Unlimited, Inc., d/b/a Freshway Foods, and Freshway Logistics, Inc. filed a complaint on January 24, 2013 seeking declaratory and injunctive relief against defendants United States Department of Health and Human Services, Kathleen Sebelius, United States Department of the Treasury, Timothy F. Geithner, United States Department of Labor, Hilda L. Solis, and their successors in office. Plaintiffs allege several causes of action. Count I alleges a violation of the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb, *et seq*. Count II alleges a violation of the First Amendment's free exercise clause. Count III alleges a violation of the First Amendment's free speech clause. Finally, Count IV alleges a violation of the Administrative Procedure Act.

EXHIBIT E

Pending before the Court is plaintiffs' motion for a preliminary injunction. Plaintiffs seek injunctive relief as to Count I and allege that certain federal regulations promulgated under the Patent Protection and Affordable Care Act ("Affordable Care Act" or "ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), violate plaintiffs statutory rights under the Religious Freedom Restoration Act ("RFRA"), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb-1). Upon consideration of the motion, the opposition and reply thereto, the *Amicus Curiae* Brief of the State of Ohio, the entire record, and for the reasons explained below, plaintiffs' motion is **DENIED**.

I. BACKGROUND

Francis A. Gilardi, Jr. and Philip M. Gilardi (collectively the "Gilardis"), are Ohio residents and "adherents of the Catholic faith" who "hold to the Catholic Church's teachings regarding the immorality of artificial contraceptives, sterilization, and abortion." Compl. ¶ 3. The Gilardis are the sole owners of plaintiffs Fresh Unlimited, Inc., d/b/a Freshway Foods ("Freshway Foods") and Freshway Logistics, Inc. ("Freshway Logistics") (collectively the "Freshway Corporations"), both of which are Subchapter S corporations and are incorporated under the laws of the State of Ohio. The Freshway Corporations are engaged in the processing, packing, and shipping of produce and other refrigerated products, Compl. ¶¶ 16-18, and have a total

of about 400 employees between the companies, *id*. ¶¶ 17-18. The Gilardis each own a 50% share in the Freshway Corporations. They state that "[a]s the two owners with controlling interests in the two corporations, they conduct their businesses in a manner that does not violate their sincerely-held religious beliefs or moral values, and they wish to continue to do so." Compl. ¶ 3. The Freshway Corporations provide their full-time employees with a self-insured employee health benefits plan that provides employees with health insurance and prescription drug coverage through a third-party administrator and stop-loss provider. Compl. ¶ 29. The plan is to be renewed on April 1, 2013. *Id*.

Plaintiffs' claims arise out of certain regulations promulgated in connection with the Affordable Care Act. The Affordable Care Act requires that all group health plans and health insurance issuers that offer non-grandfathered group or individual health coverage to provide coverage for certain preventive services without cost-sharing, including, for "women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [("HSRA")]." 42 U.S.C. § 300gg-13(a)(4). The HSRA, an agency within the Department of Health and Human Services ("HHS"), commissioned the Institute of Medicine ("IOM") to conduct a study on preventive services

necessary to women's health. On August 1, 2011, HSRA adopted IOM's recommendation to include "the full range of Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity." *See* HRSA, Women's Preventive Services: Required Health Plan Coverage Guidelines ("HRSA Guidelines"), *available at* http://www.hrsa.gov/womensguidelines/ (last visited Mar. 2, 2013).

Several exemptions and safe-harbor provisions excuse certain employers from providing group health plans that cover women's preventive services as defined by HHS regulations. First, the mandate does not apply to certain "grandfathered" health plans in which individuals were enrolled on March 23, 2010, the date the ACA was enacted. 75 Fed. Reg. 34538-01 (June 17, 2010). Second, certain "religious employers" are excluded from the mandate. 76 Fed. Reg. 46,621 (Aug. 3, 2011); 45 C.F.R. § 147.130(a)(1)(iv)(A); see 78 Fed. Reg. 8456, 8459 (Feb. 6, 2013) (proposing to broaden the August 2011 definition of religious employer to ensure that "an otherwise exempt employer plan is not disqualified because the employer's purposes extend beyond the inculcation of religious values or because the employer serves or hires people of different religious faiths"). Third, a temporary enforcement safe-harbor provision applies to

certain non-profit organizations not qualifying for any other exemption. 77 Fed. Reg. 8725, 8726-77 (Feb. 15, 2012).

The parties agree that the Freshway Corporations do not qualify for any of these exemptions. As secular, for-profit employers, Freshway Foods and Freshway Logistics do not satisfy the definition of "religious employer" and are not eligible for the protection of the safe-harbor. The grandfathered plans provision also does not protect the corporations because the current health insurance plan has undergone material changes since 2010, including an increase in the cost of doctor visit co-pays. *See* Decl. of Francis A. Gilardi, Jr., ECF No. 21-2, at ¶ 13.

The Gilardis state that they "have concluded that complying with the Mandate would require them to violate their religious beliefs and moral values because the Mandate requires them and/or the corporations they own and control to arrange for, pay for, provide, and facilitate contraception methods, sterilization procedures, and abortion because certain drugs and devices such as the 'morning-after pill,' 'Plan B,' and 'Ella' come within the Mandate's . . . definition of 'Food and Drug Administration-approved contraceptive methods' despite their known abortifacient[1] mechanisms of action." Compl. ¶ 5.

[1] Plaintiffs use the word "abortifacient" to refer to drugs such as Plan B and Ella that they allege cause abortions. *See, e.g.*,

On February 8, 2013, plaintiffs moved for a preliminary injunction as to Count I, which alleges a violation of the Religious Freedom Restoration Act ("RFRA"). Plaintiffs argue that they satisfy the standard for a preliminary injunction because they are likely to succeed on the merits because the RFRA "substantially burdens" plaintiffs' free exercise of religion and defendants cannot establish that the regulations survive strict scrutiny. Furthermore, plaintiffs argue, they will suffer irreparable harm absent a preliminary injunction, the balance of equities tips in plaintiffs' favor, and the public interest favors a preliminary injunction.

II. STANDARD OF REVIEW

A plaintiff seeking a preliminary injunction must establish (1) a substantial likelihood of success on the merits; (2) that it is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest. *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). The purpose of a preliminary injunction "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenish*, 451 U.S. 390, 395 (1981). It is "an extraordinary and drastic

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Compl. ¶ 5. Plaintiffs do not allege that the regulations will require them to provide insurance coverage for the medical procedure of abortion.

remedy" and "should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). In this Circuit, these four factors have typically been evaluated on a "sliding scale," such that if "the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor." *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291-92 (D.C. Cir. 2009). The Circuit has recently stated, without holding, that existing Supreme Court precedent suggests "that a likelihood of success is an independent, free-standing requirement for a preliminary injunction." *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (citing *Winter* but finding that preliminary injunction was not appropriate even under less stringent sliding-scale analysis). Because this Court finds that plaintiffs have failed to establish a likelihood of success, a preliminary injunction is not appropriate under either standard, and the Court need not reach the issue raised in *Sherley*. *See, e.g., In re Akers*, --- B.R. ----, 2012 WL 5419318, at *4 (D.D.C. 2012) (stating that, "[w]hichever way *Winter* is read, it is clear that a failure to show a likelihood of success on the merits alone is sufficient to defeat a preliminary injunction motion"); *Arkansas Dairy Co-op Ass'n, Inc. v. U.S. Dep't of Agr.*, 573 F.3d 815, 832 (D.C. Cir. 2009) (declining to proceed to review remaining preliminary

injunction factors when plaintiff had shown no likelihood of success on the merits); *see Apotex, Inc. v. FDA*, 449 F.3d 1249, 1253 (D.C. Cir. 2006) (determining movant was not likely to succeed on the merits and declining to address the other factors).

III. DISCUSSION

A. Likelihood of Success on the Merits

The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1, provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section." Subsection (b) provides that "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is (1) in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

Congress enacted the RFRA in response to the Supreme Court's decision in *Employment Division, Department of Human Services of Oregon v. Smith*, 494 U.S. 872 (1990), in which the Court held that the right to free exercise of religion under the First Amendment does not exempt an individual from a law that is neutral and of general applicability, and explicitly disavowed the test used in earlier decisions, which prohibited the

government from substantially burdening a plaintiff's religious exercise unless the government could show that its action served a compelling interest and was the least restrictive means to achieve that interest. 42 U.S.C. § 2000bb. The purpose of the RFRA was to "restore the compelling interest test" as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Id*.

The RFRA does not define "substantial burden" but because the RFRA intends to restore *Sherbert v. Verner* and *Wisconsin v. Yoder*, those cases are instructive in determining the meaning of "substantial burden." In *Sherbert*, plaintiff's exercise of her religion was impermissibly burdened when plaintiff was forced to choose between following the precepts of her religion" resting and not working on the Sabbath and forfeiting certain unemployment benefits as a result, or "abandoning one of the precepts of her religion in order to accept work." 374 U.S. at 404. In *Yoder*, the "impact of the compulsory [school] attendance law on respondents' practice of the Amish religion [was found to be] not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with

fundamental tenets of their religious beliefs." 406 U.S. at 218.[2]

Plaintiffs argue that their exercise of religion is substantially burdened because "they must facilitate, subsidize, and encourage the use of goods and services that they sincerely believe are immoral or suffer severe penalties." Pls.' Mot. for Prelim. Injunction ("Pls.' Br.") at 13. Plaintiffs argue that the substantial burden imposed on the Freshway Corporations is the same as that imposed upon the Gilardis because the "beliefs of the Gilardis extend to, and are reflected in, the actions of the two corporations." *Id.* at 14.

As an initial matter, the Court is troubled by plaintiffs' apparent disregard of the corporate form in this case. Plaintiffs argue that "requiring the two corporations to provide group health coverage that the Gilardis consider immoral is the same as requiring the Gilardis themselves to provide such immoral coverage." *Id.* at 14. The Court strongly disagrees. The Gilardis have chosen to conduct their business through corporations, with their accompanying rights and benefits and limited liability. They cannot simply disregard that same

[2] In a recent case, the government conceded that the Controlled Substances Act placed a "substantial burden" on the "sincere exercise of religion" by a religious sect that would be prohibited from engaging in their traditional communion in which they used a hallucinogenic tea. *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 426 (2006).

corporate status when it is advantageous to do so. In a recent case dealing with similar issues, *Autocam Corp. v. Sebelius*, the court noted that

> [a]s corporate owners, [plaintiffs] quite properly enjoy the protections and benefits of the corporate form. But the legal separation of the owners from the corporate enterprise itself also has implcations at the enterprise level. A corporate form brings obligations as well as benefits. "When followers of a particular sect enter into commercial activities 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." *United States v. lee*, 455 U.S. 252, 263, n.3 (1982). Whatever the ultimate limits of this principle may be, at a minimum it means the corporation is not the *alter ego* of its owners for purposes of religious belief and exercise.

No. 12-1096, 2012 WL 6845677, at *7 (W.D. Mich. Dec. 24, 2012) (denying motion for preliminary injunction on similar facts), *injunction pending appeal denied*, No. 12-2673 (6th Cir. Dec. 28, 2013). Similarly, the court in *Conestoga Wood Specialties, Inc. v. Sebelius* stated that

> '[I]ncorporation'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). . . . It would be entirely inconsistent to allow [individual plaintiffs] to enjoy the benefits of incorporation, while simultaneously piercing the corporate veil for the limited purpose to challenge these regulations. We agree with the *Autocam court*, which stated that this separation between a corporation and its owners "at a minimum [ ] means the corporation is not the *alter ego* of its owners for the purposes of religious belief and exercise."

No. 12-6744, 2013 WL 140110, at *8 (E.D. Pa. Jan. 11, 2013), *injunction pending appeal denied*, No. 13-1144 (3d Cir. Jan. 29, 2013).

The Court agrees with the *Autocam* and *Conestoga* courts and finds that the Gilardis cannot simply impute their views onto the corporation such that requiring the corporation to provide preventive services coverage is the same as requiring the Gilardis personally to provide preventive services coverage. The Freshway Corporations are legally separate from the Gilardis. As such, their religious views, legal and statutory obligations, and benefits cannot be imputed to each other. Accordingly, they must be evaluated separately for purposes of the RFRA.

1. The Freshway Corporations' RFRA Claim

Plaintiffs argue that the substantial burden imposed on the Freshway Corporations is the same as that imposed upon the Gilardis because the "beliefs of the Gilardis extend to, and are reflected in, the actions of the two corporations." Pls.' Br. at 14. Plaintiffs contend that "requiring the two corporations to provide group health coverage that the Gilardis consider immoral is the same as requiring the Gilardis themselves to provide such immoral coverage." Pls.' Br. at 13. Defendants respond that the coverage regulations do not substantially burden any exercise of religion because secular, for-profit

corporations do not exercise religion. Defs.' Opp. to Pls.' Mot. for Prelim. Injunction ("Defs.' Br.") at 11-12.

As explained above, the Court declines to disregard the corporate form by imputing the religious beliefs of the Gilardis to the corporations they own. Accordingly, the Court must evaluate whether providing preventive services coverage will cause a substantial burden on the religious exercise of the Freshway Corporations.

(a) Substantial Burden

The RFRA states that "[g]overnment shall not substantially burden a person's exercise of religion . . . ." 42 U.S.C. §§ 2000bb-1(a). Accordingly, a threshold issue is whether the Freshway Corporations "exercise" religion. For the reasons explained below, the Court finds that they do not.[3]

The Freshway Corporations are secular, for-profit corporations that are engaged in the processing, packing, and shipping of produce and other refrigerated products, Compl. ¶¶ 16-18, and have a total of about 400 employees between the companies, *id*. ¶¶ 17-18. The complaint states the following allegations regarding the religious activities of the Freshway Corporations: Freshway Foods makes annual monetary and/or in-kind donations, primarily food, to many community non-profit

[3] Because the Court finds that the Freshway Corporations do not exercise religion, the Court does not reach the question of whether they are "persons" within the scope of the RFRA.

charitable organizations, including the YMCA, Habitat for Humanity, the American Legion, and Holy Angel's Soup Kitchen. Compl. ¶ 28(d). Freshway Logistics donates a trailer for use by the local Catholic parish for its annual picnic and uses its trucks to deliver food donated by Freshway Foods to food banks. Compl. ¶ 28(e). During monthly employee appreciation lunches, the Freshway Corporations provide alternative foods for their employees to accommodate restrictions posed by their various religions. Compl. ¶ 28(f). They also provide their Muslim employees with space to pray during breaks, and during Ramadan, employees are permitted to adjust break periods in order to eat after sundown in accordance with their religion. Compl. ¶ 28(g).

Several allegations in the complaint allege the Gilardis' religious activities taken in connection with the company. The complaint states that, for the last ten years "Francis and Philip Gilardi have affixed to the back of the trucks they own through a separate company, but which bear the name of Freshway Foods, a sign stating 'It's not a choice, it's a child,' as a way to promote their pro-life views to the public." Compl. ¶ 28(a). The Gilardis also drafted a values statement listing values by which the Freshway Companies would be run. The statement lists "Ethics: Honest, Trustworthy and Responsible to:

-Each Other; -Our Customers; -Our Vendors. Non-negotiable – Supersedes everything." Compl. ¶ 28(c).[4]

The Court is not persuaded that it must consider the Gilardis' actions in drafting values statements and in affixing a slogan to their delivery trucks. Even considering these actions, however, the court finds that they are insufficient to establish religious activity taken by the Freshway Corporations. The statement of values drafted by the Gilardis does not mention religion at all, and the affixing of a slogan to the back of a delivery truck is incidental, at most, to the activities of the corporations.

That leaves the Court with the stated activities of the Freshway Corporations. The corporations' charitable activities and accommodations of their employees who practice other religions, while commendable, do not establish that the Freshway Corporations themselves "exercise religion." Rather, the Court finds that the Freshway Corporations are engaged in purely commercial conduct and do not exercise religion under the RFRA.

The cases cited by plaintiffs do not compel a different result. For example, in *Tyndale House Publishers, Inc. v. Sebelius*, the court noted the "unique" structure of the

[4] The complaint also alleges that the Gilardis "strongly support financially and otherwise their Catholic parish, schools, and seminary." Compl. ¶ 28(b). The complaint does not allege any connection between this activity and the Freshway Corporations.

plaintiff corporation, which was formed to publish religious books and Bibles and was owned in large part by a non-profit religious entity. No. 12-1635, 2012 U.S. Dist. LEXIS 163965, at *24 n.10. In deciding whether Tyndale's owners had standing to assert a free exercise claim on Tyndale's behalf—a different issue than the issue currently before this Court—the court held that "when the beliefs of a closely-held corporation and its owners are inseparable, the corporation should be deemed the alter ego of its owners for religious purposes." *Id*. at *25. In this case, two large produce distribution companies are owned by two people who are members of the Catholic faith. The religious beliefs of the Gildardis cannot fairly be said to be "inseparable" from the religious beliefs of the Freshway Corporations. Indeed, on the record before the Court, there is nothing to suggest that the corporations have any religious beliefs. Accordingly, the Court finds *Tyndale* to be distinguishable from this case.

Plaintiffs also argue that the religious beliefs of the Gilardis should be taken into account because "corporations do not run themselves or comply with legal mandates except through human agency." Pls.' Reply in Supp. of Mot. for Prelim. Injunction ("Pls.' Reply") at 11. They further contend, citing the recent decision of *Korte v. United States Department of Health and Human Services*, that the Gilardis would have to

operate the companies in a manner that they believe to be immoral in order to comply with the preventive services requirement. *Id.* at 11 (citing No. 12-3841, 2012 U.S. App. LEXIS 26734, at *9 (7th Cir. Dec. 28, 2012)). In *Korte*, the district court denied injunctive relief on an RFRA claim to a secular, for-profit construction company that challenged the preventive services coverage requirement. No. 12-1072, 2012 WL 6553996 (S.D. Ill. Dec. 14, 2012). In that case, the district court found that any burden on the individual owners' religious beliefs caused by the corporation's coverage of contraceptive services was "too distant to constitute a substantial burden." *Id*. at *10. The Seventh Circuit granted an injunction pending appeal. 2012 U.S. App. LEXIS 26734, at *9. The Seventh Circuit held that the corporate form was not dispositive of the individual plaintiffs' claim because in order for the company to comply with the mandate, the individual plaintiffs would be required to violate their religious beliefs. *Id*. For the reasons stated above, the Court finds that the corporate form is dispositive in this case and should not be disregarded. In this respect, the court relies on several recent decisions. *See Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1291 (W.D. Okla. 2012) (distinguishing between the "purely personal" matter of religious exercise by a corporation's owners and the actions of a corporation), *injunction pending appeal denied*, No.

12-6294, 2012 WL 6930302 (10th Cir. Dec. 20, 2012); *Conestoga*, No. 12-6744, 2013 WL 140110, at *10 (E.D. Pa. Jan. 11, 2013) (treating corporation and its owners separate for purposes of RFRA and finding that the secular, for-profit corporation did not exercise religion); *see also Conestoga*, No. 13-1144, slip. op. at 3 (3d. Cir. Jan. 29, 2013) (adopting district court's reasoning that plaintiff corporation did not exercise religion under RFRA). To the extent that *Korte* suggests a different result, the Court declines to follow it.

The Court declines to reach the question of whether *any* secular, for-profit corporation can exercise religion. *Cf. Hobby Lobby Stores,* 870 F. Supp. 2d at 1291 (holding that plaintiff corporations lacked standing to pursue an RFRA claim and stating that "[g]eneral business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors."); *Briscoe v. Sebelius*, No. 13-285, 2013 U.S. Dist. LEXIS 26911, at *15 (D. Colo. Feb. 27, 2013) ("Secular, for-profit corporations neither exercise nor practice religion."). Rather, under the facts of this case, the Freshway Corporations do not exercise religion and therefore

cannot succeed on the merits of a claim that the regulations substantially burden their exercise of religion.

2. The Gilardis' RFRA Claim

The Gilardis allege that the regulations create a substantial burden on the Gilardis' exercise of religion because the regulations require them to "facilitate, subsidize, and encourage the use of goods and services that they sincerely believe are immoral or suffer severe penalties. It is this forced subsidization, and not the manner in which the employee may spend their own money or conduct their personal lives, to which plaintiffs object." Pls.' Br. at 13.

With respect to the Gilardis, defendants argue that the regulations do not create a substantial burden because they only apply to the corporations, not their owners. Defs.' Br. at 18. Defendants also argue that even if the regulations did create a burden on the Gilardis' exercise of their religion, that burden is too attenuated and indirect to be substantial. *Id*. at 23.

(a) Substantial Burden

As an initial matter, the Court declines to follow several recent cases suggesting that a plaintiff can meet his burden of establishing that a law creates a "substantial burden" upon his exercise of religion simply because he claims it to be so. *See Monaghan v. Sebelius*, No. 12-15488, 2012 U.S. Dist. LEXIS 182857, at *10-11 (E.D. Mich. Dec. 30, 2012) (stating that

because Monaghan claimed that "taking steps to have [the company] provide contraception coverage violates his beliefs as a Catholic," the court "will assume that abiding by the mandate would substantially burden Monaghan's adherence to the Catholic Church's teachings); *Legatus v. Sebelius*, No. 12-12061, 2012 U.S. Dist. LEXIS 156144, at *20 (E.D. Mich. Oct. 31, 2012) (stating that plaintiff shows a substantial burden simply by saying so). The Court agrees with the reasoning of the court in *Conestoga*, in stating that "[w]hile we wholeheartedly agree that 'courts are not arbiters of scriptural interpretation,'" the RFRA still imposes the requirement on courts to determine "whether the burden a law imposes on a plaintiff's stated religious belief is 'substantial.'" *Conestoga*, 2013 WL 140110, at *12 (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981)). Determining whether the impact of the regulation on plaintiffs' religious exercise is "substantial" thus necessarily requires an understanding of the nature of the religious exercise. Otherwise, as the *Conestoga* court noted, "[i]f 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 it was the case, then the standard expressed by Congress under the RFRA would convert to an 'any burden' standard." *Id*. at *13 (citing

Washington v. Klem, 497 F.3d 272, 279-81 (3d Cir. 2007)); *see Autocam*, 2012 WL 6845677, at *7 (stating that if a court cannot look beyond plaintiffs' assertion of religious belief, every governmental regulation would be subject to a "private veto"). Accordingly, the Court finds that it is necessary to determine the nature of plaintiffs' religious exercise in order to determine whether it has been "substantially burdened."

Here, plaintiffs have made several arguments regarding the nature of their religious exercise. The Gilardis "hold to the teachings of the Catholic Church regarding the sanctity of human life from conception to natural death. They sincerely believe that actions intended to terminate an innocent human life by abortion are gravely sinful." Compl. ¶ 25. The Gilardis "also sincerely believe in the Catholic Church's teaching regarding the immorality of artificial means of contraception and sterilization." *Id*. ¶ 26. The Gilardis state that they "have concluded that complying with the Mandate would require them to violate their religious beliefs and moral values because the Mandate requires them and/or the corporations they own and control to arrange for, pay for, provide, and facilitate contraception methods, sterilization procedures, and abortion because certain drugs and devices [come within the scope of the HRSA guidelines] despite their known abortifacient mechanisms of action." *Id*. ¶ 5. "Plaintiffs cannot arrange for, pay for,

provide, or facilitate employee health plan coverage for contraceptives, sterilization, abortion, or related education and counseling without violating their sincerely-held religious beliefs and moral values." *Id*. ¶ 32.

Having set forth the nature of the Gilardis' religious exercise, the Court must next determine whether the requirement that the Freshway Corporations comply with the regulations constitutes a "substantial burden" on the Gilardis' exercise of religion. The Court finds that it does not.

The regulations do not compel the Gilardis to personally "arrange for, pay for, provide or facilitate" health coverage. *See Hobby Lobby*, 870 F. Supp. 2d at 1294 ("The mandate in question applies only to Hobby Lobby and Marden, not to its officers or owners."). The regulations do not require the Gilardis to "personally support, endorse, or engage in pro-abortion or pro-contraception activity." *Briscoe*, 2013 U.S. Dist. LEXIS 26911, at *16. Rather, the regulations are imposed on the Freshway Corporations. For the reasons explained above, the Court declines to disregard the corporate form. Specifically, the Court finds that the Freshway Corporations are not the *alter egos* of the Gilardis for the limited purpose of asserting the Gilardis' religious beliefs.[5] The Gilardis remain

[5] Plaintiffs have not requested, nor does the Court understand their argument to be, that the Court find that the Freshway

free to personally oppose contraception and, indeed, even the regulations that are the subject of this lawsuit. Accordingly, the Court finds that the regulations do not impose a substantial burden on the Gilardis' exercise of religion.

The plaintiffs argue that "indirectness" is not a barrier to finding a substantial burden. Pls.' Br. at 13 (citing *Thomas*, 450 U.S. at 718). Plaintiffs argue that *Thomas* established that the impact of a "substantial burden" need not be direct. Pls.' Reply at 11. Plaintiffs misread *Thomas*. In that case, the Supreme Court held that Indiana's denial of unemployment compensation benefits to claimant, who quit his job because his religious beliefs forbade participation in the production of armaments, violated his First Amendment right to free exercise of religion. In that case, however, the burden of the denial of benefits rested with the person exercising his religion, not a separate person or corporate entity, as is the case here. The compulsion was indirect, rather than the burden, as in this case. *See Conestoga*, 2013 WL 140110, at *14 n.15 (distinguishing *Thomas*). The Court therefore finds *Thomas* to be distinguishable.

The Court also does not find the fact that the health insurance provided by the Freshway Corporations is through a

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Corporations are the *alter egos* of the Gilardis for all purposes.

"self-insurance" mechanism compels a different result. *Compare Tyndale*, 2012 U.S. Dist. LEXIS 163965, at *42-43 (finding that a self-insured plan differed materially from a group policy because in a self-insurance scheme the plaintiff "directly pays for the services used by its plan participants, thereby removing one of the 'degrees' of separation that the court deemed relevant in *O'Brien*") *with Briscoe*, 2013 U.S. Dist. LEXIS 26911, at *15 (denying injunctive relief under RFRA for plaintiff corporation that provided self-insured plan) *and Grote Industries, LLC v. Sebelius*, No. 12-134, 2012 WL 6725905, at *7 (S.D. Ind. Dec. 27, 2012) (same), *injunction granted pending appeal*, No. 13-1077, 2013 WL 362725 (7th Cir. Jan. 30, 2013). The Court finds that self-insurance, as is the case here, is not dispositive. The Freshway Corporations are providing the insurance, not the Gilardis. Accordingly, the Court finds that the Gilardis have failed to demonstrate a likelihood of success in establishing a "substantial burden" on their exercise of religion.

IV. CONCLUSION

For all of the foregoing reasons, the Court finds that plaintiffs have failed to demonstrate a likelihood of success on the merits, and plaintiffs' motion for a preliminary injunction is **DENIED**. Because the Court has decided the motion on the papers pursuant to Local Civil Rule 65.1(d), the motions hearing

currently scheduled for March 6, 2013 is hereby **CANCELED**. An appropriate Order accompanies this Memorandum Opinion.

Signed: Emmet G. Sullivan
United States District Judge
March 3, 2013