UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

MERSINO MANAGEMENT COMPANY; KAREN A. MERSINO, Owner and Shareholder of Mersino Southwest, LLC and Mersino Enterprises, Inc., and RODNEY A. MERSINO, Owner and Shareholder of Mersino Management Company, Global Pump Company, LLC and Mersino Dewatering, Inc.,

Plaintiffs,

v.

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

Defendants.

Case No. 13-cv-11296-PDB-RSW

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Judge Paul Borman

Magistrate Judge R. Steven Whalen

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Elrod v. Burns, 427 U.S. 347 (1976)

Sherbert v. Verner, 374 U.S. 398 (1963)

Wisconsin v. Yoder, 406 U.S. 205 (1972)

And the Nineteen Cases in which Courts have granted the same injunctive relief requested by these Plaintiffs:

Monaghan v. Sebelius, No. 12-15488, slip op. (E.D. Mich. December 30, 2012)

Monaghan v. Sebelius, No. 12-15488, slip op. (E.D. Mich. March 14, 2013)

Legatus v. Sebelius, No. 12-12061, slip op. (E.D. Mich. October 31, 2012)

O'Brien v. U.S. Dep't of Health & Human Servs., No. 12-3357, order (8th Cir. Nov. 28, 2012)

Korte v. Sebelius, No. 12-3841, slip op. (7th Cir. Dec. 28, 2012)

Grote Indus. LLC v. Sebelius, No. 13-1077, slip op. (7th Cir. Jan. 30, 2013)

Annex Med. Inc. v. Sebelius, No. 13-1119, slip op. (8th Cir. Feb. 1, 2013)

Am. Pulverizer Co. v. Dep't of Health & Human Servs., No. 12-3459, slip op. (W.D. Mo. Dec. 20, 2012)

Newland v. Sebelius, No. 12-1123, slip op. (D. Colo. July 27, 2012)

Tyndale House Publishers, Inc. v. Sebelius, No. 12-1635, slip op. (D.D.C. Nov. 16, 2012)

Triune Health Group, Inc. v. U.S. Dep't of Health and Human Servs., No. 1:12-cv-06756 (N.D. Ill. Jan. 3, 2013)

Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs., 12-92, slip op. (E.D. Mo. Dec. 31, 2012)

Sioux Chief Mfg. Co., Inc. v. Sebelius, No. 13-36, order (W.D. Mo. Feb. 28, 2013)

Seneca Hardwood Lumber v. Sebelius, No. 12-207, slip op. (W.D. Pa. Apr. 19, 2013)

Lindsay, Rappaport & Postel LLC v. Sebelius, No. 13-1210, order (Mar. 20, 2013)

Gilardi v. Dep't of Health & Human Servs., No. 13-5069 , order (D.C. Cir. Mar. 29, 2013)

Bick Holding, Inc. v. Sebelius, No. 13-462, order (E.D. Mo. Apr. 1, 2013)

Am. Manufacturing Co. v. Sebelius, No. 13-295, slip op.(D. Minn. Apr. 2, 2013)

Hart Electric LLC v. Sebelius, No. 13-2253, order (N.D. Ill. Apr. 18, 2013)

Tonn and Blank Construction v. Sebelius, No. 12-325, order (N.D. Ill. Apr. 1, 2013)

REPLY

Plaintiffs rightfully seek the protections of an injunction because absent this relief, Plaintiffs will "suffer irreparable harm before a decision on the merits can be rendered." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

THE MANDATE SUBSTANTIALLY BURDENS PLAINTIFFS' RELIGIOUS BELIEFS: A substantial burden is "***substantial pressure on an adherent to modify his behavior or violate his beliefs***." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). Plaintiffs face a direct and inescapable burden: provide coverage believed to be immoral or suffer severe penalties. This is an archetypal burden which "make[s] unlawful the religious practice itself." *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961). A substantial burden occurs when one is required to choose between (1) doing something his faith forbids (or not doing something his faith requires), and (2) incurring financial penalties, legal enforcement by the government, or even the loss of a government benefit. *Thomas*, 450 U.S. at 718; *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).[1] The mandate explicitly makes unlawful Plaintiffs' religious practice of refraining from covering contraceptives, as Plaintiffs have done since Mersino Management's inception in compliance with Plaintiffs' strict adherence to their Catholic faith. The mandate bears direct responsibility for placing "substantial pressure" on Plaintiffs to provide a health plan that violates their religious beliefs, rendering their religious exercise refraining from immoral acts and operating Mersino Management in a manner consistent with deeply held religious beliefs—effectively impracticable.[2]

[1] **And the nineteen cases where the mandate has been enjoined.** *See* Pl's Br. (Doc. #10) at 1, n. 2. Note: Defendants' argue that twelve district courts have ruled in their favor but fail inform the court that the bulk of those cases have gone to the appellate courts who have *expressly disagreed* with those district court rulings and issued injunctions pending appeal to protect the precious rights at issue here. *O'Brien*; *Gilardi*; *Korte*; *Grote*; *Annex Med*.

[2] Defendants expressly acknowledged the burden that the mandate imposes upon religious exercise. Recognizing that providing insurance coverage of contraceptive services conflicts with "the religious beliefs of certain religious employers," Defendants have granted exemptions to certain employers. 76 Fed. Reg. 46,621, 46,623; 77 Fed. Reg.

PLAINTIFFS' RELIGIOUS EXERCISE IS NOT "TOO ATTENUATED" TO BE SUBSTANTIAL: This exact argument has been rejected time and time again in other courts,

> With respect, we think this misunderstands the substance of the claim. The 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 related services.[3]

The instant action is not based upon objection to employees' life choice, or to employees' use of their own money.[4] Rather, it stems from Plaintiffs' objection, based on their faith, to providing insurance coverage for drugs and information, because they believe providing such coverage is immoral. This religious faith does not merely object to Plaintiffs' own use of such items, but also prohibits them from providing health insurance coverage for such items. *Id.* ***Neither a corporate veil nor other legal technicalities give Plaintiffs moral absolution to providing coverage for items that they have religious beliefs against covering.*** This realization underscores Defendants' fundamental error: conceiving of the substantial burden analysis as an exercise in moral theology. The analysis ***does not*** measure moral beliefs, or weigh how morally "attenuated" one's theological objection is in relation to other immoral activity.

The Supreme Court explicitly rejected this moral theologizing. In *Thomas v. Review Board*, a plaintiff who objected to war was denied unemployment benefits after refusing to work

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8,725. Defendants have provided a temporary enforcement safe harbor (effective equivalent of a preliminary injunction) for any non-profit employers that object on religious grounds to the mandate. (http://cciio.cms.gov/resources/files/Files2/02102012/20120210-Preventive-Services-Bulletin.pdf (last visited May 22, 2013). The temporary safe harbor will likely become permanent. 77 Fed. Reg. 16,501, 16,503. Defendants discussed a safe harbor for "for-profit religious employers with [religious] objections." 77 Fed. Reg. 16,501, 16504.

[3] *Korte v. Sebelius*, No.12-3841, slip op. at *5 (7th Cir. Dec. 28, 2012); *see* Pl's Br. (Doc. #10) at 1, n. 2.

[4] Unlike in *Autocam*, where the court made issue that plaintiffs offered a flex-spending account, here Plaintiffs do not offer such account. *See Monaghan*, slip op. at *12; *Autocam v. Sebelius, et al.*, No. 12-1096, slip op. at *3 (W.D. Mich. Dec. 24, 2012) (which is not controlling on this court). Also in *Autocam*, the W.D. of Michigan focused on the fact that those plaintiffs did "not claim[] that any such payment obligation [*the penalties and fines attached to noncompliance with the mandate*] would be ruinous." Here, Plaintiffs claim such payment obligations *would* be ruinous and crippling. Furthermore, *Autocam* focused on the mandate's monetary sanctions and failed to focus on Plaintiffs' challenge: the constitutional violation which tramples upon the free exercise of religion.

in an armament factory. 450 U.S. at 714, 716. The government argued that working in a tank factory was not a cognizable burden on the plaintiff's beliefs because it was "sufficiently insulated" from his objection to war. *Id.* at 715. The Court rejected not only this conclusion, but the underlying premise that it is the court's business to draw moral lines. "*Thomas* drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs." *Id.* Likewise here, the notion that direct penalties and lawsuits are somehow not "substantial" burdens on an explicit religious belief (objecting to certain insurance coverage), because the court deems that activity morally insulated or attenuated from use of contraceptives, is plain legal error.

Under Defendants' analysis of substantial burden, churches themselves as well as Catholic hospitals, religious non-profit groups and others, would not even be able to bring RFRA claims against the mandate. Its rationale would allow the government to force even churches to include things such as surgical abortions in their health insurance coverage on the theory that insurance is "too attenuated" to merit moral offense. The mandate requires that Plaintiffs pay for and provide a health plan with contraception and abortifacients to employees. Plaintiffs' religious beliefs forbid such coverage—not just Plaintiffs' own use of the items but also covering these items. The burden is *directly imposed on Plaintiffs* by the mandate, and not alleviated by an employee's decision whether to make use of these drugs or services. The burden is not alleviated by the corporate form. The mandate is being directly imposed on Mersino Management and requiring action by Karen and Rodney Mersino. Forcing Plaintiffs to pay for and provide a health plan that includes contraception is tantamount to forcing Plaintiffs to

provide employees with vouchers for contraception paid for entirely by Plaintiffs themselves. This is exactly the type of direct burden RFRA was enacted to prevent.[5]

Courts routinely reject Defendants' assertion to find an insufficient burden on Plaintiffs' religious beliefs arising out of the distinction between Karen and Rodney Mersino as an individual and their company Mersino Management.[6] The mandate imposes the same substantial burden on Mersino Management as it does on its owners. The mandate requires Karen and Rodney Mersino to manage their company in a way that violates their religious faith. All penalties assessed against Mersino Management have a direct financial and practical impact on all Plaintiffs.[7] The mandate on Mersino Management applies "substantial pressure" on Plaintiffs to violate their beliefs. As in the many injunctions issued against the mandate, multiple courts have recognized that an owner of a company can bring religious exercise claims, because he/she is impacted by government burden on his/her business without a moral distinction between themselves and their companies.[8] *See, e.g., Stormans, Inc. v. Selecky*, 586 F.3d 1109, 111-20 & n.9 (9th Cir. 2009); *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 n. 15 (9th Cir. 1988); *Tyndale*, slip op. at *5-9.[9,10]

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[5] As noted in *Tyndale*, "Because it is the *coverage*, not just the use, of contraceptives at issue to which plaintiffs object, it is irrelevant that the use of contraceptives depends on the independent decisions of third parties. And even if this burden could be characterized as 'indirect,' the Supreme Court has indicated that indirectness is not a barrier to finding a substantial burden." *Tyndale*, slip op. at *13 (citing *Thomas*, 450 U.S. at 718) (emphasis added).

[6] *See* Pl.'s Br. (Doc. #10) at 1, n. 1.

[7] Mersino Management is an "s" corporation with pass through taxation, passed through to Karen and Rod Mersino.

[8] ***Townley* involved a closely-held mining equipment company. Almost identical to the Plaintiffs here, the company was 94% owned by a husband and wife who were both members of the Catholic Church. *Townley*, 859 F.2d at 611. The couple sought to run the company in accordance with their faith, as they were "unable to separate God from any portion of their daily lives, including their activities at the Townley company." *Id.* at 612. The court found that the corporation could assert the free exercise rights of its owners. *Id.* at 619-20, n.15.**

[9] The fact that Mersino Management is a distinct legal entity from Karen and Rodney Mersino is not relevant. The violation at issue here is moral and religious, not strictly legal. Karen and Rodney Mersino are morally the same actor vis-à-vis the mandate, even if for some purposes the company is distinct. A company does not think, act, and establish business values and practices, except through its human agency that defines the purpose of the company, hires employees, and complies with laws. The mandate forces Karen and Rodney Mersino to violate their beliefs to run their company pursuant to their Catholic faith. The mandate prohibits Plaintiffs from doing so.

[10] Defendants dismissed appeal, allowing injunctive relief. *Tyndale*, No. 13-5018, order (D.C. Cir., May 3, 2013).

PLAINTIFFS SEEK A NARROW EXEMPTION FOR THE PROTECTION OF FIRST AMENDMENT FREEDOMS: Plaintiffs do no seek to impose their beliefs on others. Plaintiffs' faith forbids them from providing contraception or abortifacients for others. Plaintiffs have never offered insurance for contraceptive coverage. Plaintiffs' employees are well aware of this and have chosen to continue working for Plaintiffs and not to seek other employment with different benefits. Plaintiffs seek to maintain the status quo during litigation.[11]

INJUNCTIVE RELIEF IS NOT BARRED: Plaintiffs filed for injunctive relief approximately one month prior to the mandate's effective date to Plaintiff's plan. Defendants provide no legal support for the contention that a preliminary injunction should be denied on this basis.[12] Defendants previously argued that motioning for an injunction from the mandate too soon meant harm was not imminent. *Newland v. Sebelius*, No. 12-1123, slip op. at 8 (D. Colo. July 27, 2012)("Defendants argue this harm, three months in the future, is not sufficiently imminent to justify injunctive relief."). In *Monaghan*, plaintiffs moved for a temporary restraining order nine days before their plan date, the Defendants raised this same argument and the court gave it the weight it deserved—none. Plaintiffs face irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (holding the loss of constitutional rights "unquestionably constitutes irreparable injury").

CONCLUSION

For these reasons and the reasons offered in (Doc. #10), Plaintiffs respectfully request that this Court grant their motion for preliminary injunctive relief.

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[11] Defendants exclude millions from the mandate. Pl's Br. (Doc. #10) at 12-14. Defendants have even consented to the same temporary relief Plaintiffs' seek. Pl's Br. (Doc. #10) at 1, n. 1; *Tyndale* (appeal dismissed by Defendants).

[12] Defendants cited cases that are not analogous. *Fund for Animals v. Frizzell*, 530 F.2d 982 (D.C. Cir. 1975) (challenge to regulations for sport hunting of migratory birds, but birds already migrated and plaintiffs "made no attempt to show irreparable harm"); *Huron Mountain Club v. U.S. Army Corps of Eng'rs*, No. 12-cv-197 (W.D. Mich. July 25, 2012)(court had no power to enjoin mining operations when federal regulations asserted by plaintiffs were inapplicable); *Badillo v. Playboy Entm't Grp.*, No. 04-cv-591 (M.D. Fla. Apr. 16, 2004)(sought to enjoin video months after its airing and with no proof defendants were still airing the video or that injunction would stop harm).

Respectfully submitted this 24th day of May, 2013.

Attorney for Plaintiffs:

THOMAS MORE LAW CENTER

s/ Erin Mersino
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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I certify that a copy of the foregoing has been served by ordinary U.S. Mail upon all parties for whom counsel has not yet entered an appearance electronically: None

THOMAS MORE LAW CENTER

s/ Erin Mersino
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