IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MERSINO MANAGEMENT COMPANY; KAREN A. MERSINO and RODENY A. MERSINO, Plaintiffs-Appellants, v. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, et al., Defendants-Appellees.	Case Nos.: 13-1944

APPELLANTS' RESPONSE TO GOVERNMENT'S MOTION TO VACATE ORAL ARGUMENT AND SUMMARILY AFFIRM LOWER COURT

Mersino Management Company, Karen A. Mersino, and Rodney A. Mersino (herein "Plaintiffs"), by and through their undersigned counsel, respectfully oppose the government's "Motion to Vacate Oral Argument And Summarily Affirm In Light of Today's Controlling Decision In *Autocam v. Sebelius*, No. 12-2673 (6th Cir.)" (herein "government's motion"), filed on September 17, 2013. Plaintiffs answer the government's motion as follows:

1. Plaintiffs oppose the government's motion to summarily decide the instant case *without any review or analysis of their case*. Such a motion is remarkable and volatile to our court system which allows a plaintiff, especially a plaintiff asserting a violation of First Amendment freedoms, a full and fair review

of his claim and unique fact scenario. The government forwards the broad and terse assertion that the instant case "presents the same legal issues" ruled upon by the panel decision in *Autocam v. Sebelius*, No. 12-2673 (6th Cir. Sept. 17, 2013). But each case raises *important factual differences* that appropriately would have implications on the panel's legal analysis.[1]

The respective plaintiff companies in the two cases have different corporate structures, different assignment of shareholders, different facts relating to their religiosity, different facts relating to their individual injuries to their religious freedom, different health insurance plan structures, different scopes to their religious objections, and different histories with respect to those practices. Importantly, Plaintiffs' employee health benefits plan is self-insured—a distinction left fully unaddressed by the Court's opinion in *Autocam*. This distinction is compulsory to the Court's standing and substantial burden analysis, as the Plaintiffs are the insurance issuer, and directly controlled by the Mandate. Several courts have found factors such as these significant in their treatment of such cases. *See, e.g.*, *Hobby Lobby v. Sebelius*, 2013 U.S. App. LEXIS 13316 (10th Cir. June 27, 2013); *Monaghan v. Sebelius*, No. 12-15488, slip op. (E.D. Mich. Dec 30, 2012 & Mar. 14, 2013); *Beckwith v. Sebelius*, No. 13-cv-648, slip op. (M.D. Fla. June

[1] The government filed an identical motion in *Eden Foods v. Sebelius*, No. 13-1677, order (6th Cir. Sept. 23, 2013). The Court *denied* the government's motion to summarily decide that case based upon *Autocam*.

25, 2013); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1116-20 (9th Cir. 2009); *EEOC v. Townley*, 859 F.2d 610, 619-20 n.15 (9th Cir. 1988).

Furthermore, the court in *Autocam* recognized that "on very rare occasions, a 'corporate entit[y] which [is] organized expressly to pursue religious ends . . . may have cognizable religious liberties independent of the people who animate them, even if they are profit seeking.'" *Id.*, slip op. at *14 (quoting *Grote*, 708 F.3d at 856 (Rovner, J., dissenting)). The Court also cited *Tyndale House Publishers, Inc. v. Sebelius*, 904 F. Supp. 2d 106 (D.D.C. 2012) as support for this proposition noting that the *Tyndale* court granted a preliminary injunction "on the basis of RFRA to a for-profit Christian bookseller that was closely held by a non-profit religious entity and several trusts, all of which were organized around the same religious beliefs." *Id.*. Therefore *Autocam* necessarily suggested one of two things: 1) that each plaintiff is still entitled to an independent review of his/her RFRA claim to determine whether the corporation meets the definition of a "person" under RFRA, *or* 2) that even our most religious "for-profit" corporations, such as the bible publisher *Tyndale House Publishers*, have no rights under RFRA.[2]

Only the first conclusion follows RFRA precedent which demands that the appropriate focus must be on "the particular claimant" and the individualized case

[2] It is important to note that the government chose to dismiss its appeal in *Tyndale* and allowed injunctive relief to stand during the pendency of the case. *Tyndale*, No. 13-5018, order (D.C. Cir., May 3, 2013).

before the court. *See Gonzales v. O Centro Espirita Beneficente*, 546 U.S. 418 (2006). Historically, there has never been an entire class of plaintiffs, which—as the government concedes—has standing to present a RFRA challenge to the court, but then is entirely removed from the protections of RFRA, nor should the Sixth Circuit create such a blacklist here.[3]

Numerous factual distinctions exist throughout the record to distinguish this case from *Autocam*, and Plaintiffs' claim should not be "summarily" decided without review of the individualized RFRA claim before the Court. In other cases, and in the instant case, the government has repeatedly argued the significance of factual differences as a reason for denying relief to particular plaintiffs or dismissing their claims. The government's briefs have certainly discussed these factual and legal distinctions as reasons for why it should succeed in this case.

[3] *See Beckwith*, slip op. at *25 ("Clearly, an individual employed by a secular corporation has the right to exercise religion concomitantly with her employment. *See Sherbert*, 374 U.S. at 404 (holding that an employee did not have to work a six-day week—in contravention of her religious beliefs—in order to qualify for state unemployment benefits). But, following the government's logic, that same individual would lose the right to exercise religion merely by changing hats and becoming the *employer* instead of *employee***.** Hypothetically, that same individual (acting now as an employer) would not be able to challenge—on religious freedom grounds—a federal law that compelled (by threat of substantial fines) all "secular," for-profit businesses to remain open seven days a week. The Court sees no reason to distinguish religious freedom rights based upon the manner and form that one chooses to make a living.") (*emphasis in original*).

It is important to note that the court in *Autocam* conducted no independent analysis of the employer's individual rights under RFRA. The court, in summary execution, concluded that the individual's claim was the same as the corporation, but then continued to find that a corporation *was not* a person under RFRA while an individual *was* a person under RFRA. *Ipso facto*, the Court itself deemed that the individual's claim was separate and distinct from the corporation's. Yet, the Court in *Autocam*, failed to address this glaring flaw in logic, Plaintiffs seek for this panel to address this outstanding and necessary analysis.

Nationally, there are over 72 separate lawsuits against the HHS Mandate including over 200 plaintiffs, some in the same district court or in the same United States Court of Appeals. Judges are hearing and reviewing these cases separately—and not acting outside of the regular course of procedure and "summarily" dismissing or "summarily" deciding cases without reviewing the merits of each individual case and issuing individual opinions for same.

In final argument, the panel in *Autocam* failed to address the Supreme Court's full reasoning in *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008) in denying preliminary relief. The panel concluded without analysis, "we need not consider the remaining preliminary injunction factors." *Autocam*, slip op. at *15.

When considering a motion for injunctive relief, the Court should balance the following factors: (1) whether the movant has a strong likelihood of success on

the merits, (2) whether the movant would suffer irreparable injury absent preliminary injunctive relief, (3) whether granting the preliminary injunctive relief would cause substantial harm to others, and (4) whether the public interest would be served by granting the preliminary injunctive relief. *Overstreet v. Lexington-Fayette Urban County Gov't,* 305 F.3d 566, 573 (6th Cir. 2002). "These factors are not prerequisites, but are factors that are to be balanced against each other." *United Food & Commer. Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998). The panel in *Autocam* chose to leave unaddressed factors (2)-(4)—irreparable injury absent preliminary injunctive relief, substantial harm to others, and whether the public interest would be served. As addressed in plaintiffs' briefing, these factors substantially weigh in favor of granting preliminary injunctive relief to the plaintiffs and simply cannot be "summarily" decided by *Autocam*—which failed to address these additional factors.

2. Plaintiffs are not currently protected by an injunction. Because they have refused to reject their faith and kneel to the government's demands that they provide support for what they sincerely believe are life-destroying drugs and procedures, they are facing the demise of their livelihood. Without the benefit of an injunction protecting them from crippling government fines, Plaintiffs will lose their business and all of the jobs that go with it. They require immediate relief and

will suffer significant harm without it. Therefore, in the interests of expediency, Plaintiffs are willing to forego oral argument. They renew their July 16, 2013 request for expedited relief.

WHEREFORE, Appellants respectfully plea as aforesaid.

Respectfully submitted,

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September 27, 2013

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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