IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHNSON WELDED PRODUCTS, INC.; and LILLI JOHNSON

Plaintiffs,

v.

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

Defendants.

Case No. 1:13-cv-00609-ESH

**PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY INJUNCTION AND STAY OF PROCEEDINGS**

Plaintiffs Johnson Welded Products, Inc. ("JWP") and Lilli Johnson (collectively referred to as "Plaintiffs"), by and through undersigned counsel, hereby submit this unopposed motion for a preliminary injunction based on their claim under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, and a stay of all proceedings in this case pending the resolution of *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069 (D.C. Cir.), which is currently before the U.S. Court of Appeals for the D.C. Circuit. *Gilardi* involves legal claims similar to those advanced by Plaintiffs in this case against the same federal regulations and the same federal defendants. Consequently, a decision on the merits by the D.C. Circuit in *Gilardi* will invariably affect the legal claims in this case. Moreover, the D.C. Circuit granted the appellants' motion for an injunction pending appeal, thereby granting the precise relief requested here by Plaintiffs. *See Gilardi,* No. 13-5069 (D.C. Cir. Mar. 29, 2013) (order granting motion for an injunction pending appeal).

Plaintiffs' plan year begins in July. Consequently, the challenged contraceptive services mandate will be operating in full force against Plaintiffs as of July 1, 2013, subjecting Plaintiffs to fines of approximately $27,000 per day that they are not in compliance with the mandate.

In this motion, Plaintiffs request an order enjoining Defendants, until thirty (30) days after the mandate issues from the D.C. Circuit in *Gilardi*, from enforcing against Plaintiffs, their employee health plans, the group health insurance coverage provided in connection with such plans, and/or their insurers the statute and regulations that require Plaintiffs to provide their employees insurance coverage for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," 77 Fed. Reg. 8725 (Feb. 15, 2012), as well as any penalties, fines, assessments, or any other enforcement actions for noncompliance, including those found in 26 U.S.C. §§ 4980D, 4980H, and 29 U.S.C. §§ 1132, 1185d.

Plaintiffs further ask this court to stay all proceedings in this case until thirty (30) days after the mandate issues from the court of appeals in *Gilardi.*

Pursuant to Local Rule 7(m), counsel for the parties discussed this motion, and Defendants' counsel stated that, for the reasons stated in the attached Memorandum of Points and Authorities, Defendants do not oppose the motion nor the entry of the proposed order enjoining the enforcement of the contraceptive services mandate against Plaintiffs and staying these proceedings pending resolution of *Gilardi*. Defendants' counsel has also indicated that Defendants do not request a bond.

WHEREFORE, Plaintiffs respectfully request that the court grant this motion and enter the proposed order.

Respectfully submitted,

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Plaintiffs,

v.

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

Defendants.

Case No. 1:13-cv-00609-ESH

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY INJUNCTION AND STAY OF PROCEEDINGS**

Plaintiffs request a preliminary injunction and a stay of all proceedings in this case pending the resolution of *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069 (D.C. Cir.), which is currently before the U.S. Court of Appeals for the D.C. Circuit. The *Gilardi* case is fully briefed, and oral argument is expected to be held this September 2013.

As noted in the motion, *Gilardi* involves legal claims similar to those advanced by Plaintiffs against the same federal regulations and the very same defendants. Consequently, a decision on the merits by the D.C. Circuit in *Gilardi* will invariably affect the legal claims in this case in that the circuit court's decision will be binding upon this court.

More important for purposes of the present motion, the D.C. Circuit granted the appellants' motion for an injunction pending appeal, thereby granting the precise relief requested here by Plaintiffs. *See Gilardi,* No. 13-5069 (D.C. Cir. Mar. 29, 2013) (order granting motion for an injunction pending appeal).

Indeed, in addition to the injunction granted by the D.C. Circuit in *Gilardi,* many other courts, including this one, *see Tyndale House Publishers v. Sebelius*, No. 12-1635 (RBW), 2012 U.S. Dist. LEXIS 163965 (D.D.C. Nov. 16, 2012) (granting motion for preliminary injunction, enjoining the enforcement of the contraceptive services mandate),[1] have preliminarily enjoined the contraceptive services mandate as applied against for-profit plaintiffs similar to Plaintiffs here, *see, e.g., Annex Med., Inc. v. Sebelius*, No. 13-118, 2013 U.S. App. LEXIS 2497 (8th Cir. Feb. 1, 2013) (granting injunction pending appeal); *Grote v. Sebelius*, 708 F.3d 850 (7th Cir. 2013) (same); *Korte v. U.S. Dep't of Health & Human Servs.*, No. 12-3841, 2012 U.S. App. LEXIS 26734 (7th Cir. Dec. 28, 2012) (same); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, 2012 U.S. App. LEXIS 26633 (8th Cir. Nov. 28, 2012) (same); *Triune Health Grp. v. U.S. Dep't of Health & Human Servs.*, No. 1:12-cv-06756, slip op. (N.D. Ill. Jan. 3, 2013) (granting preliminary injunction); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-3459-CV-S-RED, 2012 U.S. Dist. LEXIS 182307 (W.D. Mo. Dec. 20, 2012) (same); *Legatus v. Sebelius*, No. 12-12061, 2012 U.S. Dist. LEXIS 156144 (E.D. Mich. Oct. 31, 2012) (same); *Monaghan v. Sebelius*, No. 12-15488, 2013 U.S. Dist. LEXIS 35144 (E.D. Mich. Mar. 14, 2013) (same); *Newland v. Sebelius*, 881 F. Supp. 2d 1287 (D. Colo. 2012) (same), *appeal docketed*, No. 12-1380 (10th Cir. Sept. 26, 2012); *see also Sharpe Holdings, Inc. v. U.S. Dep't of Health & Human Servs.*, No. 2:12-CV-92-DDN, 2012 U.S. Dist. LEXIS 182942 (E.D. Mo. Dec. 31, 2012) (granting temporary restraining order).

As alleged in the Complaint, based on the teachings of the Catholic Church, and their own sincerely held beliefs, Plaintiffs do not believe that contraception, sterilization,

[1] Defendants voluntarily dismissed their appeal of the order granting a preliminary injunction in *Tyndale House Publishers*. *Tyndale House Publishers, Inc. v. Sebelius*, No. 13-5018, 2013 U.S. App. LEXIS 9208 (D.C. Cir. May 3, 2013) (granting motion for voluntary dismissal).

abortifacients, or abortion are properly understood to constitute medicine, health care, or a means of providing for the well-being of persons. Plaintiffs firmly believe these procedures involve gravely immoral practices. (Compl. at ¶¶ 61-66).

Plaintiffs desire to operate their business in a manner consistent with their Catholic religious beliefs, including in their choice of a health plan for themselves and their employees. However, the challenged regulations enforced by Defendants require group health plans, including the health plan provided by Plaintiffs, to include FDA approved contraceptive methods and sterilization procedures as well as patient education and counseling about those services. (Compl. at ¶¶ 41-60, 68-84).

Plaintiffs' religious principles and beliefs not only provide that abortion, contraception, and sterilization are immoral, but that paying for, and providing access to, the use of such products and services through a group health plan are immoral as well. Plaintiffs are thus confronted with a Hobson's choice: violate their religious beliefs in the management and operation of their business or pay the federal government substantial and economically crippling fines in order to act in accord with their faith. Indeed, Plaintiffs will face fines of approximately $27,000 per day that they are not in compliance with the government's contraceptive services mandate. (Compl. at ¶¶ 78-84).

Plaintiffs' plan year begins in July. Consequently, the contraceptive services mandate will be operating in full force against Plaintiffs as of July 1, 2013. (Compl. at ¶ 77).

In order for Plaintiffs to act consistently with their religious beliefs until the resolution of the *Gilardi* appeal, Plaintiffs request a preliminary injunction based on their claim under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*., enjoining Defendants until thirty (30) days after the mandate issues from enforcing against Plaintiffs, their employee health

plans, the group health insurance coverage provided in connection with such plans, and/or their insurers the statute and regulations that require Plaintiffs to provide their employees insurance coverage for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," 77 Fed. Reg. 8725 (Feb. 15, 2012), as well as any penalties, fines, assessments, or any other enforcement actions for noncompliance, including those found in 26 U.S.C. §§ 4980D, 4980H, and 29 U.S.C. §§ 1132, 1185d.

Under the Religious Freedom Restoration Act ("RFRA"), which was passed in 1993 in response to *Emp't Div. v. Smith*, 494 U.S. 872 (1990), the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . ." 42 U.S.C. § 2000bb-1(a). This general prohibition is not without exception. The government may justify a substantial burden on the free exercise of religion if the challenged law: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id*. at § 2000bb-1(b). In other words, Congress passed RFRA "to restore the compelling interest test" to neutral laws of general applicability that substantially burden religion. *See* 42 U.S.C. § 2000bb(b).

Under RFRA, "exercise of religion" is defined as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000bb-2(4) (referencing 42 U.S.C. § 2000cc-5(7)(A)). Plaintiffs' sincerely held religious beliefs at issue in this case fall within the protections afforded by RFRA. *See, e.g., Korte v. Sebelius*, No. 12-3841, 2012 U.S. App. LEXIS 26734, at *10 (7th Cir. Dec. 28, 2012) ("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 or related services."); *see also Thomas v. Rev. Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 713, 717-18 (1981) (holding that by denying employment benefits because the employee refused, on religious grounds, to work in a plant that produced armaments, the government imposed a substantial burden on the employee's exercise of religion by "putting substantial pressure on an adherent to modify his behavior and to violate his beliefs," noting that "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial"). Consequently, Defendants must justify under strict scrutiny the burden imposed by the contraception mandate upon Plaintiffs' religious beliefs. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430-31 (2006) ("RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.").

Based on the order issued by the D.C. Circuit in *Gilardi* and as noted in the motion, counsel for Defendants have indicated to Plaintiffs' counsel that they do not oppose Plaintiffs' motion for a preliminary injunction based on Plaintiffs' RFRA claim, until such time as the appeal in *Gilardi* is resolved. Counsel for Defendants further states the following: "For the reasons stated in Defendants' oppositions to the plaintiffs' motion for preliminary injunction in *Gilardi*, *see* Defs.' Opp'n to Pls.' Mot. for Prelim. Inj., *Gilardi v. Sebelius*, No. 1:13-cv-0104-EGS (D.D.C. Feb. 25, 2013), ECF No. 15; *see also* Defs.' Mem. in Opp'n to Pls.' Mot. for a Prelim. Inj., *Korte v. HHS*, No. 3:12-CV-01072-MJR (S.D. Ill. Nov. 6, 2012), ECF No. 28, as well as the district court's decision denying preliminary relief in that case, *see Gilardi v. Sebelius*, __ F. Supp. 2d __, 2013 WL 781150 (S.D. D.D.C. Mar. 3, 2013), Defendants do not believe that Plaintiffs are likely to succeed on the merits of any of their claims, and believe that

the decision of the motions panel in *Gilardi* was incorrect. Furthermore, it is Defendants' position that the decision of the motions panel is not binding on this court. *See United States v. Henderson*, 536 F.3d 776, 778 (7th Cir. 2008); *In re Rodriquez*, 258 F.3d 757, 759 (8th Cir. 2001); *Lambert v. Blackwell,* 134 F.3d 506, 513 n.17 (3d Cir. 1997). Nonetheless, Defendants acknowledge that, even if this court were to agree with Defendants and deny Plaintiffs' request for a preliminary injunction, Plaintiffs would likely then seek an injunction pending appeal, which would likely be assigned to the same motions panel that decided *Gilardi* and would thus likely be granted. Therefore, Defendants do not oppose the entry of preliminary injunctive relief in favor of Plaintiffs based on their RFRA claim at this time, to last until thirty (30) days after the mandate issues from the D.C. Circuit in *Gilardi*.[2]"

In addition to requesting that this court grant their unopposed motion for a preliminary injunction, Plaintiffs, joined by Defendants, further ask this court to stay all proceedings in this case until thirty (30) days after the mandate issues in *Gilardi*. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes of its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.").

As noted previously, the court of appeals in *Gilardi* will be addressing legal issues that are substantially similar to those presented in this case, involving facts that are analogous in

[2] Defendants' counsel also notes the following: "[T]here are factors in this case that may distinguish it from *Gilardi*. Among other things, the individual plaintiff, Ms. Johnson, is not the sole owner of the company. (*See* Compl. ¶ 13). Instead, Ms. Johnson shares ownership with her seven children—none of whom is a plaintiff in this case. *Id.* Defendants nevertheless believe it would be prudent for the court to await the D.C. Circuit's views on the general legal issues presented in *Gilardi* and this case before assessing the import of these differences, and others, in this case."

many respects to those in this case, challenging the same regulations that are challenged in this case, and raising claims that are also largely indistinguishable from those in this case brought against the very same defendants. Even if the D.C. Circuit's opinion does not entirely dispose of this case, the outcome of the appeal is likely to substantially affect the outcome of this litigation, and the court and the parties will undoubtedly benefit from the appellate court's views. And, as noted, Defendants do not oppose Plaintiffs' request for a stay.

In the final analysis, the requested injunction will simply preserve the *status quo*, protect Plaintiffs' religious exercise, and not harm the interests of Defendants or the public while the D.C. Circuit resolves similar legal claims.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this court to grant their unopposed motion for a preliminary injunction based on their RFRA claim, enjoining Defendants, until thirty (30) days after the mandate issues from the D.C. Circuit in *Gilardi*, from enforcing against Plaintiffs, their employee health plans, the group health insurance coverage provided in connection with such plans, and/or their insurers the statute and regulations that require Plaintiffs to provide their employees insurance coverage for "[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity," Fed. Reg. 8725, as well as any penalties, fines, assessments, or any other enforcement actions for noncompliance, including those found in 26 U.S.C. §§ 4980D, 4980H, and 29 U.S.C. §§ 1132, 1185d.

Plaintiffs further ask this court to stay all proceedings in this case until thirty (30) days after the mandate issues from the court of appeals in *Gilardi v. U.S. Dep't of Health & Human Servs.*, No. 13-5069 (D.C. Cir.).

Respectfully submitted,

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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 further 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.

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