UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EDEN FOODS, INC. and MICHAEL POTTER, Chairman, President and Sole Shareholder of Eden Foods, 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; ACK LEW, Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants.
_____/

Civil Action No. 13-11229

Honorable Denise Page Hood

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

I. BACKGROUND

On March 20, 2013, Plaintiffs filed the instant action against Defendants Kathleen Sebelius, Secretary of the United States Department of Health and Human Services; United States Department of Health and Human Services ("HHS"); Seth Harris, Acting Secretary of the United States Department of Labor ("DOL"); Jack Lew, Secretary of the United States Department of the Treasury; and United States Department of the Treasury ("Treasury"). Plaintiffs allege the following claims: Violation of the First Amendment to the United States Constitution Free Exercise Clause (Count I); Violation of the First Amendment to the United States Constitution Free Exercise Clause (Count II); Violation of the First Amendment to the United States Constitution Free Exercise

Clause (Count III); Violation of the First Amendment to the United States Constitution Establishment Clause (Count IV); Violation of the First Amendment to the United States Constitution Free Exercise Clause (Count V); Violation of the Religious Freedom Restoration Act ("RFRA") (Count VI); Violation of the Administrative Procedure Act (Count VII); Violation of the Administrative Procedure Act (Count VIII); Violation of the Administrative Procedure Act (Count IX); and Violation of the Administrative Procedure Act (Count X).

The Complaint is a challenge to the regulations issued under the Patient Protection and Affordable Care Act (Pub. L. 111-148, March 23, 2010, 124 Stat. 119) and the Health Care and Education Reconciliation Act (Pub. L. 111-152, March 30, 2010, 124 Stat. 1029) (collectively, the "Affordable Care Act"). (Comp., ¶ 2) The Affordable Care Act mandates that health plans provide coverage with respect to women, such as additional preventive care and screenings and directs the Secretary of HHS to determine what would constitute "preventive care" under 42 U.S.C. § 30066-13(a)(4). (Comp., ¶ 4) Without notice of rulemaking or opportunity for public comment, HHS, DOL and the Treasury, adopted the Institute of Medicine ("IOM") recommendations in full and promulgated an interim final rule ("Mandate") which requires all group health plans and health insurance insurers offering group or individual health insurance coverage provide all FDA-approved contraceptive methods and procedures. 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130. (Comp., ¶ 5) The Mandate requires all insurance carriers, including Blue Cross/Blue Shield of Michigan, to provide coverage for contraception, abortion, and abortifacients in all of its insurance plans, group and individual. (Comp., ¶ 6)

Plaintiffs assert that the Mandate forces employers and individuals to violate their religious beliefs because it requires employers and individuals to pay for insurance from insurance issuers

which fund and directly provide for drugs, devices, and services which violate their deeply held religious beliefs. (Comp., ¶ 9) Plaintiffs seek to enjoin Defendants from implementing and enforcing provisions of the regulations, specifically the Mandate, asserting that the Mandate violates Plaintiffs' rights to the free exercise of religion under the First Amendment, the Religious Freedom Restoration Act, and the Administrative Procedure Act. (Comp., ¶ 12) Plaintiffs seek a Declaratory Judgment that the regulations, specifically the Mandate, violate Plaintiffs' rights to the free exercise of religion under the First Amendment, the Religious Freedom Restoration Act, and the Administrative Procedure Act. (Comp., ¶ 13)

Potter is the Chairman, President and sole shareholder of Eden Foods. (Comp., ¶ 15) Plaintiffs employ 128 full-time employees, are subject to the monetary penalties under the Affordable Care Act, and are forced under the Mandate by penalty of heavy fines to conduct business in a manner that violates their deeply held religious faith by providing and funding contraceptives and abortifacients. (Comp., ¶ 16) Eden Foods is a for-profit, natural foods company. (Comp., ¶ 76) Potter asserts he cannot compartmentalize his conscience or his religious beliefs from his daily work and actions as Chairman, President, and sole shareholder of Eden Foods. (Comp., ¶ 77) Plaintiffs share a common mission of conducting their business operations with integrity and consistent with the teachings, mission, and values of the Catholic Church. (Comp., ¶ 77) Plaintiffs purchase and provide group insurance through Blue Cross/Blue Shield of Michigan and provide this insurance to their employees. (Comp., ¶ 78)

Due to the Mandate, Plaintiffs are no longer allowed to exclude contraception and abortifacients from their insurance plan–and are forced to provide and pay for these services which violate their religious beliefs. (Comp., ¶ 89) Since Eden Foods' inception, Plaintiffs have excluded

objectionable coverage such as providing contraception and abortifacients from their insurance plan. (Comp., ¶ 90) When presented with a contract on February 21, 2013 amending the group insurance plan to include the contraception and abortifacients coverage, Plaintiffs refused to sign the contract. (Comp., ¶ 91) Plaintiffs learned on March 15, 2013 that their group insurance plan added the contraception and abortifacients coverage without their consent. (Comp., ¶ 93) Plaintiffs wish to conduct their business in a manner that does not violate the principles of their religious faith. (Comp., ¶ 94)

Plaintiffs assert they do not qualify for the "religious employer" exemption contained in 45 C.F.R. § 147.130(a)(1)(A) and (B). Since Plaintiffs do not qualify for the "religious employer" exemption, they are not permitted to take advantage of the "temporary safe-harbor" set forth at 77 Fed. Register 8725 (Feb. 15, 2012). (Comp., ¶ 119) Plaintiffs assert they must provide federal government-approved health insurance under the Affordable Care Act or pay substantial per-employee fines at $196,000 per year tax penalty. (Comp., ¶¶ 122-23) In addition, Plaintiffs assert that the Internal Revenue Code imposes a tax on any failure of a group plan to meet the requirements relating to group plan requirements which, for Plaintiffs, would be at $4,672,000 per year. (Comp., ¶ 124)

Plaintiffs assert that the Affordable Care Act is not neutral because some groups, both secular and religious, enjoy exemptions from the law, while certain religious groups do not. (Comp., ¶ 127) Plaintiffs claim that HHS has issued more than a thousand waivers regarding particular employers and other health insurance plan issuers from compliance with certain provisions of the Affordable Care Act. (Comp., ¶¶ 130-132) The Mandate indicates that the Health Resources and Services Administration ("HRSA") "may" grant religious exemptions to certain religious employers if they

meet certain criteria and the organization is a non-profit organization. 45 C.F.R. § 147.130(a)(iv)(A) and (B). (Comp., ¶¶ 184-85) There is no exemption for a for-profit company. (Comp., ¶ 188)

Plaintiffs filed a Motion for an Emergency Temporary Restraining Order and Preliminary Injunction. The Court denied the Motion for Emergency Temporary Restraining Order on March 22, 2013 and scheduled a hearing on the Motion for Preliminary Injunction. (Doc. No. 12) Defendants filed a response on April 19, 2013 and Plaintiffs replied on May 1, 2013. A Motion for Leave to File *Amicus Cureae* Brief was filed by the American Civil Liberties Union and American Civil Liberties Union Fund of Michigan (collectively, "ACLU") on April 19, 2013. To date, no opposition has been filed to the ACLU's motion.

II. ANALYSIS

A. Preliminary Injunction Standard

"The court may issue a preliminary injunction only on notice to the adverse party." Fed. R. Civ. P. 65(a)(1). Four factors must be balanced and considered before the Court may issue a preliminary injunction pursuant to Fed. R. Civ. P. 65(b): 1) the likelihood of the plaintiff's success on the merits; 2) whether plaintiff will suffer irreparable injury without the injunction; 3) the harm to others which will occur if the injunction is granted; and 4) whether the injunction would serve the public interest. *In re Delorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985); *In re Eagle-Pitcher Industries, Inc.*, 963 F.2d 855, 858 (6th Cir. 1992); and *N.A.A.C.P. v. City of Mansfield, Ohio*, 866 F.2d 162, 166 (6th Cir. 1989). The first factor is the most critical inquiry of the four criteria. *Mason County Med. Ass'n v. Knebel,* 563 F.22d 256, 261 (6th Cir. 1977). In making its determination the "district court is required to make specific findings concerning each of the four factors, unless fewer factors are dispositive of the issue." *Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.,* 119 F.3d

393, 399 (6th Cir. 1997).

B. Likelihood of Plaintiff's Success on the Merits

In their Motion for Preliminary Injunction, Plaintiffs assert that the Mandate violates Plaintiffs' rights under the RFRA and the First Amendment of the Constitution. Defendants respond that Plaintiffs have not shown a likelihood of success on their claim under the RFRA and the First Amendment's Free Exercise and Free Speech Clauses. The ACLU argues in support of Defendants' response that Plaintiffs are unlikely to succeed on the merits of their claim that the federal contraception rule infringes on Plaintiffs' religious liberty. The ACLU asserts that courts have squarely rejected Plaintiffs' argument that they have a right to discriminate against women and deny them benefits because of the companies' owners' religious beliefs. The Court addresses below Plaintiffs' RFRA and First Amendment claims.

1. RFRA

Plaintiffs argue that the HHS Mandate violates the RFRA, 42 U.S.C. § 2000bb *et seq*. The RFRA strictly prohibits the Government from substantially burdening a person's exercise of religion, 42 U.S.C. § 2000bb-1(a), except when the Government can demonstrate that application of the burden to the person furthers a compelling government interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(b). The RFRA was enacted 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 that case, the Supreme Court held that the right to the free exercise of religion under the First Amendment does not exempt an individual from a law that is neutral and of general applicability. The Supreme Court 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. 204 (1972).

The Court takes as true, Plaintiffs' deeply held religious beliefs. However, courts have held that the Mandate in question applies only to the corporate entity, not to its officers or owners, and that as to the individual owners, any burden imposed on them individually by the contraception mandate is remote and too attenuated to be considered substantial for purposes of the RFRA. *See Hobby Lobby Stores, Inc. v. Sebelius,* 870 F.Supp.2d 1278, 1294 (W.D. Okla. 2012); *Gilardi v. Sebelius,* 2013 WL 71150, at *9 (D.D.C. Mar. 3, 2013); *Conestoga Wood Specialties Corp. v. Sebelius,* 2013 WL 140110, at **10, 14 (E.D. Pa. Jan. 11, 2013); *Grote v. Sebelius,* 2013 WL 362725, at *6 (7th Cir. Jan. 30, 2013)(dissent).

The Tenth Circuit, in addressing a motion for an injunction pending resolution of the appeal on the Mandate issue, found that the plaintiffs/appellants failed to demonstrate entitlement to such relief. *See Hobby Lobby Stores, Inc. v. Sebelius,* 2012 WL 6930302 at *1 (10th Cir. Dec. 20, 2012). Three types of preliminary injunctions noted by the Tenth Circuit are specifically disfavored: injunctions that alter the status quo (the last peaceable uncontested status existing between the parties before the dispute developed); mandatory injunctions (requiring the nonmoving party to take affirmative action before trial on the merits); and injunctions that afford the movant all of the relief it could recover at the conclusion of a full trial on the merits. *Id.* The movant must show the preliminary injunction factors "weigh heavily and compellingly in its favor." *Id.* The Tenth Circuit, in denying the request for injunction, found that the plaintiffs/appellants failed to satisfy their burden

as to the first element on their RFRA claim, that the challenged mandate substantially burdened their exercise of religion. *Id.* at *2. Since the plaintiffs/appellants could not meet this burden, there is no need to further consider whether the defendants have shown that the mandate is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. *Id.* The Tenth Circuit agreed with the district court's substantial-burden analysis that:

> [T]he particular burden of which plaintiffs complain is that funds, which plaintiffs will contribute to a group health plan, might, after a series of independent decisions by health care providers and patients covered by the [corporate] plan, subsidize *someone else's* participation in an activity that is condemned by plaintiff[s'] religion. Such an indirect and attenuated relationship appears unlikely to establish the necessary "substantial burden."

Id. at *3 (quoting *Hobby Lobby Stores, Inc. v. Sebelius,* 870 F. Supp. 2d 1278, 1294 (W.D. Okla. 2012).

Plaintiffs in this case raise a similar argument that the Mandate substantially burdens their religious beliefs since the corporate entity providing at least part of the funds for its employees and its shareholder hold religious beliefs contrary to the Mandate's requirement that women be provided with birth control choices. The Tenth Circuit's analysis on this issue applies in this instance because an employee's participation (specifically women), after consultation with healthcare providers as to whether to take advantage of the birth control choices in the Mandate, is indirect and attenuated to the Plaintiffs' religious beliefs. The employee may or may not participate in the Mandate's offer.

On leave to appeal to the United States Supreme Court as to the denial of the preliminary injunction motion, Justice Sonya Sotomayor found that the applications did not satisfy the demanding standard for extraordinary relief sought because it is not "indisputably clear" that the

applicants are entitled to such relief. *Hobby Lobby Stores, Inc. v. Sebelius,* 133. S.Ct. 641, 643 (Dec. 26, 2012) (in chambers). Justice Sotomayor noted that the Supreme Court has yet to address similar RFRA or free exercise of religion claims brought by closely held for-profit-corporations and their controlling shareholders alleging that the mandatory provision of certain employee benefits substantially burdens their exercise of religion. *Id.* Justice Sotomayor recognized that lower courts have diverged on whether to grant temporary injunctive relief to similarly situated plaintiffs raising similar claims and that no court has issued a final decision granting permanent relief with respect to such claims. *Id.* While the applicants allege irreparable harm if they are forced to choose between complying with the contraception-coverage requirement and paying significant fines, they cannot show that an injunction is necessary or appropriate to aid in the Supreme Court's jurisdiction. *Id.*

The Sixth Circuit has addressed a motion for an injunction pending an appeal of the plaintiffs' motion for preliminary injunction which was denied by the district court in the Western District of Michigan. *Autocam Corp. v. Sebelius,* Case No. 12-2673 (Dec. 28, 2012) (Moore, Rogers and Griffin). The panel noted Justice Sotomayor's decision addressed above. Although the panel wrote that the divergence of opinion by the district courts establishes the possibility of success on the merits, in light of the lower court's reasoned opinion and the Supreme Court's recent denial of an injunction pending appeal, the panel concluded that the plaintiffs have not demonstrated more than a possibility of relief. *Id.* at 2. The panel further stated that purely monetary damages, in this case the penalty the corporate entity may have to pay, do not warrant an injunction. *Id.* at 3. Also, if the penalties are codified as a tax, which the district court so noted, then taxes cannot be subject to a preliminary or permanent enjoinment. *Id.; see Autocam Corp. v. Sebelius,* 2012 WL 6845677

(W.D. Mich. Dec. 24, 2012)(Jonker).

As stated by Justice Sotomayor and the Sixth Circuit, there are divergent opinions as to whether preliminary injunction should be granted pending a hearing on the merits before the district court on the Mandate issue based on a claim under the RFRA. In light of the above and that the initial issue of whether a corporate entity and its shareholder do not have such an established right under the RFRA, Plaintiffs in this case have not carried their burden to show that they are likely to succeed on the merits.

3. First Amendment Free Exercise Clause

Plaintiffs assert that the HHS Mandate violates the Free Exercise Clause of the First Amendment to the United States Constitution.

The Free Exercise Clause is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. *Sch. Dist. of Abington Twp. v. Schempp,* 377 U.S. 203, 223 (1963). Religious belief takes shape within the minds and hearts of individuals, and its protection is one of the more uniquely human rights provided by the Constitution. Courts have held that the nature, history and purpose of the Free Exercise Clause demonstrate that it is one of the "purely personal" rights and, as such, is unavailable to a secular, for-profit corporation. *See, Conestoga Wood,* 2013 WL 140110 at * 7. An incorporation's basic purpose is to create a legal entity, with legal rights, obligations, powers, and privileges different from those of natural individuals who created it, who own it, or whom it employs. *Id.* at *8, citing *Cedric Kushner Promotions, Ltd. v. King,* 533 U.S. 158, 163 (2001). The separation between a corporation and its owners means the corporation is not the alter ego of its owners for purposes of religious belief and exercise. *Conestoga Wood,* 2013 WL at *8.

For the reasons set forth above under the RFRA analysis and the law cited regarding corporate entities, Eden Foods has not carried its burden to show that it will likely succeed on the merits that it is able to proceed under the Free Exercise Clause of the First Amendment.

Regarding the individual Plaintiff Potter, as sole shareholder of Eden Foods, the Court is not persuaded at this time that he has demonstrated that the Mandate violates the Free Exercise Clause based on his argument that the Mandate is not neutral nor generally applicable.

The protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993). Where a law is found to violate the Free Exercise Clause, it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. *Id.* at 533. The Free Exercise Clause is not violated by a "valid and neutral law of general applicability on the ground that the law proscribes conduct that a plaintiff's religion prescribes. *Employment Div., Dep't of Human Res. of Or. v. Smith,* 494 U.S. 872, 879 (1990). A neutral law of general applicability need only be "rationally related to a legitimate government objective" to be upheld. *Combs v. Homer-Ctr. Sch. Dist.,* 540 F.3d 231, 243 (3d Cir. 2008). Courts have held that the Women's Preventive Healthcare Regulations are not specifically targeted at conduct motivated by religious belief. *O'Brien v. U.S Dep't of Health & Human Services,* 2012 WL 4481208, at *8 (E.D. Mo. Sept. 28, 2012). Even though exemptions were made for religious employees, this does not indicate that the regulations seek to burden religion but that the government made efforts to accommodate religious beliefs. *Id.* The purpose of the Women's Preventive Healthcare Regulations is not to target religion, but instead to promote public health and gender equality. *Id.* at *7; *Hobby Lobby,* 870 F.Supp.2d at 1289-90.

Since courts have held that the regulations at issue do not offend the Free Exercise Clause, the individual Plaintiff Potter has not carried his burden to show that he will likely succeed on the merits of his Free Exercise Clause claim.

The individual Plaintiff Potter has not shown anything new as to the Court's previous analysis on his Free Exercise claim. For the reasons set forth above in the RFRA analysis and the law cited in this section, individual Potter has not met his burden to show that he will likely succeed on the merits.

C. Irreparable Injury

Because the Court finds Plaintiffs have not carried their burden as to the likelihood of success on the merits factor, this Court need not address the remaining factors. Even if Plaintiffs could meet the likelihood of success factor, Plaintiffs harm is monetary. As noted above, the Sixth Circuit has found that purely monetary damages do not warrant an injunction. *Autocam,* Case No. 12-2673 at 3. In addition, if the penalties are codified as a tax, which the district court so noted, then taxes cannot be subject to preliminary or permanent enjoinment. *Id.; see Autocam Corp. v. Sebelius,* 2012 WL 6845677 (W.D. Mich. Dec. 24, 2012)(Jonker). It is well settled that a plaintiff's harm is not irreparable if it is fully compensable by money damages. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992); *Overstreet v. Lexington-Fayette Urban County Government,* 305 F.3d 566, 579 (6th Cir. 2002).

D. Harm to Others and Public Interest

Because Plaintiff is unable to meet the likelihood of success on the merits and irreparable injury factors, the two most important factors, these two other factors need not be addressed. However, based on both parties' briefs and the *amici* brief, these two remaining factors do not weigh

in favor of any party. There is public interest in being able to exercise one's religious belief under the RFRA and the First Amendment, but also in providing healthcare options to all.

III. CONCLUSION

For the reasons set forth above,

IT IS ORDERED that the Motion for Preliminary Injunction **(Doc. No. 10)** is DENIED.

IT IS FURTHER ORDERED that the Motion for Leave to File *Amicus Curiae* Brief **(Doc. No. 13)** is GRANTED.

S/Denise Page Hood
Denise Page Hood
United States District Judge

Dated: May 21, 2013

I hereby certify that a copy of the foregoing document was served upon counsel of record on May 21, 2013, by electronic and/or ordinary mail.

S/LaShawn R. Saulsberry
Case Manager