IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

AMERICAN PULVERIZER CO., et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Case No. 12-3459-CV-S-RED**
	)	
UNITED STATES DEPARTMENT OF, HEALTH AND HUMAN SERVICES, et al.,	)	
	)	
Defendants.	)	

ORDER

Before the Court is Plaintiffs' Motion for a Preliminary Injunction (Doc. 16). On December 19, 2012, the Court held a telephone conference regarding this motion. During this telephone conference the Court addressed the Eighth Circuit's recent decision in *O'Brien v. U.S. Dep't of Health & Human Servs.*, 12-3357 (8th Cir. 2012). At this telephone conference, Plaintiffs and Defendants conceded that the facts and plaintiff in *O'Brien* are nearly identical to the case at hand. The Eighth Circuit's November 28, 2012 Order in *O'Brien* states that it concerns "Appellant's motion for stay pending appeal" and that "the motion is granted." The parties agree that they consider the November 28, 2012 Order as an order granting "Appellants' Motion for a Preliminary Injunction Pending Appeal", which was the only motion before the Eighth Circuit at the time of the November 28, 2012 opinion. For these reasons, the Court construes the Eighth Circuit's November 28, 2012 opinion as an order granting "Appellants' Motion for a Preliminary Injunction Pending Appeal" and, further, that the Eighth Circuit's November 28, 2012 opinion has established precedent that on facts similar to those presented in *O'Brien*, Plaintiffs are likely to succeed on the merits. The Court further notes that at the December 19, 2012 telephone conference, the Court discussed the possibility to stay the above

captioned case and maintain the status quo[1], which this Court construes as Plaintiffs' ability, on January 1, 2013, to make a choice regarding which insurance they provide to their employees without fear that they must comply with the Patient Protection and Affordable Care Act or face a fine. However, the Government indicated that they would not agree to a stay which would maintain the status quo, as defined by this Court, as the Government would view the stay as tantamount to a preliminary injunction. Accordingly, the Court sets forth the following ruling on Plaintiffs' Motion for a Preliminary Injunction.

BACKGROUND

I. The Mandate

Signed into law on March 23, 2010, the Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (2010), instituted a variety of healthcare reforms. Among its many provisions, it requires employers with fifty or more full-time employees to offer health insurance. Most relevant to the case at hand, the ACA requires group health plans to provide no-cost coverage for preventative care and screening for women. 42 U.S.C. 300gg-13(a)(4). However, unlike other provisions of the ACA, the preventative care coverage mandate does not apply to certain healthcare plans existing on March 23, 2010. 75 Fed. Reg. 34538-01, 34540 (June 17, 2010) and, further, exempts certain religious employers from any requirement to cover

[1]The Court notes that Defendants and the ACLU, ACLU of Eastern Missouri and the ACLU Foundation of Kansas and Western Missouri ("the ACLU"), who have filed an amicus brief in this case, argue that the status quo is Plaintiffs' continued coverage of contraceptive services currently covered by Plaintiffs' health plan. However, as shown above, the Court disagrees with this definition of the status quo. The Court notes that the entirety of this opinion is consistent with this Court's definition of the status quo. *See i.e. Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("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.").

contraceptive services. 76 Fed. Reg. 46621, 46626 (Aug. 3, 2011). Moreover, the Court notes that other exemptions to the ACA exist. *See i.e.*, 26 U.S.C. 4980H(c)(2)(B) (setting forth exemptions regarding small employers).

II. The Plaintiffs

Paul and Henry Griesediek ("the Griesedieks") own and control Plaintiff businesses: American Pulverizer Co., Springfield Iron and Metal, LLC, Hustler Conveyor Co., and City Welding ("Griesedieck Companies"), businesses involved in wholesale scrap metal recycling and the manufacturing of related machines. The Griesedieks are Evangelical Christians and believe that the use of contraceptive services is contrary to their religious beliefs. The Griesediek Companies currently employ approximately 150 employees who are covered by three separate health insurance policies. Each plan's renewal date is January 1, 2013. The health insurance policies currently provided by the Griesediek Companies cover contraceptive services. However, the Griesedieks wish to change these health insurance policies so that the polices do not provide certain contraceptive services and are consistent with their religious beliefs.

The Griesediek Companies do not qualify as a religious employer under the terms of the ACA, cannot qualify for the government's temporary safe harbor provision for non-profit entities, and, finally, because of changes made to the Griesediek Companies' health insurance plans, do not fall under the "grandfathered" status of the ACA. Accordingly, on January 1, 2013, the Griesedieks are faced with the choice of providing their employees with health insurance policies that include the contraceptive services required by the ACA or incurring fines for not complying with the requirements of the ACA. Accordingly, Plaintiffs argue that the ACA violates their rights under the

Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb *et seq*.[2]

STANDARD OF REVIEW

"The 'issuance of a preliminary injunction depends upon a 'flexible' consideration of (1) the threat of irreparable harm to the moving party; (2) balancing this harm with any injury an injunction would inflict on other interested parties; (3) the probability that the moving party would succeed on the merits; and (4) the effect on the public interest.'" *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 870 (8th Cir. 2012) (citing *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 733 (8th Cir. 2008) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). When considering these elements, "no single factor is determinative. The likelihood that plaintiff ultimately will prevail is meaningless in isolation." *Dataphase* at 113. Moreover, when considering the

> probability of success on the merits element, the Court is not required at an early stage to draw the fine line between a mathematical probability and a substantial possibility of success. This endeavor may, of course, be necessary in some circumstances when the balance of equities may come to require a more careful evaluation of the merits. But where the balance of other factors tips decidedly toward plaintiff a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation. *Id.*

DECISION

I. Threat of Irreparable Harm to Plaintiffs

Plaintiffs must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Here, Plaintiffs have demonstrated that, on January 1, 2013, they will be forced to either: provide their employees with health insurance

[2]The Court notes that Plaintiffs raise other claims in their complaint. However, Plaintiffs base their motion for preliminary injunction on their claim under RFRA.

policies that include the contraceptive services required by the ACA, which is against their religious beliefs, or incur fines for not complying with the requirements of the ACA. Accordingly, the Court finds that Plaintiffs have adequately established that they will suffer imminent irreparable harm absent injunctive relief. Accordingly, this factor favors the Court's entry of injunctive relief.

II. Any Injury the Injunction would Inflict on other Interested Parties

If this Court were to grant Plaintiffs' Motion for Preliminary Injunction, Defendants would not be able to enforce its regulations under the ACA. As Defendants argue, the ACA regulations are regulations that Congress found to be in the public interest. This injury hardly compares to the injury that Plaintiffs will sustain if this Court does not enter Plaintiffs' Motion for Preliminary Injunction. Accordingly, the Court finds that this factor favors the Court's entry of injunctive relief.

III. Effect on the Public Interest

Defendants argue that it would be contrary to the public interest to deny the 150 employees of the Griesedieck Companies the benefits of the ACA. However, this interest is undermined by the fact that the ACA contains numerous exemptions. Moreover, Defendants' stated interests are outweighed by the public's interest in the rights afforded by the RFRA. Accordingly, the Court finds that this factor favors the Court's entry of injunctive relief.

IV. Plaintiffs' Probability of Success on the Merits

As set forth above, when the Court considers the "probability of success on the merits" element and "the balance of other factors tips decidedly towards plaintiff a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation." *Dataphase* at 113. As the balance of all other factors tips towards this Court's entry of injunctive relief, the Court will now conclude whether Plaintiffs have raised questions "so serious

and difficult as to call for more deliberate investigation" and, if Plaintiffs have done so, this Court will enter injunctive relief.

Plaintiffs base their Motion for Preliminary Injunction on their RFRA claim. According to 42 U.S.C. 2000bb-1 the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except . . . if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

First, the Court must determine whether the ACA substantially burdens Plaintiffs' exercise of religion. Under RFRA, "a rule imposes a substantial burden on the free exercise of religion if it prohibits a practice that is both sincerely held by and rooted in the religious beliefs of the party asserting the claim." *U.S. .v. Ali*, 682 F.3d 705, 710 (8th Cir. 2012) (internal quotations omitted). Plaintiffs argue that the ACA imposes a substantial burden on the free exercise of their religion as, on January 1, 2013, Plaintiffs must either pay for a health plan that includes drugs and services to which they religiously object or incur fines. Accordingly, the Court determines that there is a substantial likelihood that Plaintiffs will able to prove, on the merits, that the ACA substantially burdens Plaintiffs' exercise of religion.

The Court notes that Defendants argue that Plaintiffs cannot show that the ACA substantially burdens any exercise of religion as the Griesedieck Companies are secular entities and, thus, cannot "exercise religion" under the RFRA. As stated in *Newland v. Sebelius*, 12-1123 (D.Co. July 27, 2012), which dealt with an issue similar to that presented before the Court, this "argument[] pose[s] difficult questions of first impression. Can a corporation exercise religion? . . . Is it possible to 'pierce the veil' and disregard the corporate form in this context?" The Court further notes that there

are many entities under which an individual can run a business, i.e. a corporation, partnership, LLC, closely-held subchapter-s corporation, or sole proprietorship. Does an individual's choice to run his business as one of these entities strip that individual of his right to exercise his religious beliefs? Accordingly, the Court finds that, at the least, Plaintiffs have indicated that this question merits "deliberate investigation."

The Court further notes that the ACLU argues that Plaintiffs have failed to show the ACA substantially burdens any exercise of religion as, though the Griesedieck Companies would provide the health insurance which provided the contraceptive services, any causation between the Griesedieck Companies and the use of the provided contraceptive services would be broken by the individual's own decision to use the contraceptive services. However, this argument is contrary to the Supreme Court's decisions in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Bd.*, 450 U.S. 707 (1981), which both indicate that "[w]hile the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas* at 718.[3] Accordingly, the Court finds that this argument does not conclusively illustrate that Plaintiffs have failed to show that the ACA substantially burdens Plaintiffs' exercise of religion and Plaintiffs have, at the least, indicated that this question merits "deliberate investigation."

However, even if Plaintiffs are able to demonstrate a substantial burden on their free exercise

[3]In *Sherbert*, the Supreme Court held that South Carolina could not constitutionally apply eligibility provisions of an unemployment compensation statute so as to deny benefits to a plaintiff who had refused employment which would require her to work on a Saturday when working on a Saturday was against the plaintiff's religious beliefs even though the South Carolina statute itself did not place any restriction on the plaintiffs' freedom of religion. In *Thomas*, the Supreme Court held that Indiana's denial of unemployment compensation benefits to a plaintiff who terminated his job because his religious beliefs forbade participation in the production of armaments violated the plaintiff's rights to free exercise of religion.

of religion, Defendants may justify the application of the ACA to Plaintiffs by illustrating that the ACA is the least restrictive means of furthering a compelling interest. *See Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 430 (2006) (stating that the strict scrutiny test applies to the RFRA). The Supreme Court has defined a compelling state interest as "a high degree of necessity." *Brown v. Entertainment Merchants Ass'n*, 131 S.Ct. 2729, 2741 (2011). Defendants argue that its compelling interest is safeguarding the public health by regulating the health care and insurance markets and, moreover, removing the barriers to economic advancement and political and social integration that have historically been placed on certain groups, such as women. As set forth above, significant exemptions to the ACA exist. Accordingly, these exemptions undermine any compelling interest in applying the preventative coverage mandate to Plaintiffs. Therefore, the Court finds that Plaintiffs have at least indicated that the question as to whether the Government has set forth a compelling interest merits "deliberate investigation." For these reasons, the Court concludes that Plaintiffs have raised questions concerning their likelihood of success on the merits that are so serious and difficult as to call for more deliberate investigation.

CONCLUSION

The long and short of it is that the balance of equities tip strongly in favor of injunctive relief in this case and that Plaintiffs have raised questions concerning their likelihood of success on the merits that are so serious and difficult as to call for more deliberate investigation. Accordingly, for the above stated reasons and the precedent presented in the *O'Brien* case in which the facts are nearly identical to the facts of the case at hand, the Court **GRANTS** Plaintiffs' Motion for a Preliminary Injunction. Defendants, their officers, agents, servants, successors in office, employees, attorneys, and those acting in concert or participation with them,

and including any insurance carriers, or third party insurance plan administrators with whom Plaintiffs may contract from group health benefits are **ENJOINED** from applying and enforcing against Plaintiffs any statutes or regulations that require Plaintiffs to include in their employee health benefit plan coverage for all FDA-approved emergency contraceptive methods, and related patient education and counseling for women with reproductive capacity, including the application of any penalties and fines, including those found in 26 U.S.C. §§ 4980D and 4980H, and any determination that the requirements are applicable to Plaintiffs. Moreover, as Defendants did not request a bond, did not offer any response to Plaintiffs' request that there was no reason to require a bond, and did not set forth any indication that they would sustain any costs or damages if they were wrongfully enjoined or restrained, the Court finds that Plaintiffs need not issue a security to the Court for this preliminary injunction. *See i.e.*, *In re President Casinos, Inc.*, 360 B.R. 272 (2007) ("A court is not required to order a bond to protect a party from economic damages that are speculative.").

IT IS SO ORDERED.

DATED: December 20, 2012

/s/ Richard E. Dorr
RICHARD E. DORR, JUDGE
UNITED STATES DISTRICT COURT