

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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<b>BARRON INDUSTRIES, INC., et al.,</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	<b>Case No. 1:13-cv-01330-KBJ</b>
<b>v.</b>	)	
	)	
<b>KATHLEEN SEBELIUS, et al.,</b>	)	
	)	
<b>Defendants.</b>	)	
_____	)	

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

Plaintiffs Barron Industries, Inc., Paul Barron, and Bruce Barron (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. (“RFRA”), and unopposed motion for 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).

In this unopposed 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.

In light of the ruling of a motions panel of the D.C. Circuit in *Gilardi*, No. 13-5069 (D.C. Cir. Mar. 29, 2013), granting an injunction pending appeal in a case similar to this one challenging the contraceptive coverage regulations, counsel for Defendants has indicated that Defendants do not oppose Plaintiffs’ motion for a preliminary injunction on *only* plaintiffs’ RFRA claim, until such time as the appeal in *Gilardi* is resolved. Although Defendants do not oppose Plaintiffs’ motion on RFRA grounds at this time, Defendants do not forfeit any legal rights or claims that they may have at a later date as 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 and not binding on this Court.<sup>1</sup> Defendants acknowledge,

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<sup>1</sup> Defendants note that they agree with the district court’s reasoning in denying the plaintiffs’ request for a preliminary injunction in *Gilardi v. Sebelius*, 926 F. Supp. 2d 273 (D.D.C. 2013), *appeal pending sub nom. Gilardi v. HHS*, No. 13-5069 (D.C. Cir.). For the reasons stated by the district court in that decision, as well as defendants’ opposition brief in *Gilardi*; the Sixth Circuit’s opinion in *Autocam Corp. v. Sebelius*, \_\_\_ F.3d \_\_\_, 2013 WL 5182544 (6th Cir. Sept. 17, 2013); the Third Circuit’s opinion in *Conestoga Wood Specialties Corp. v. Sebelius*, \_\_\_ F.3d \_\_\_, 2013 WL 3845365 (3d Cir. July 26, 2013); Chief Judge Briscoe’s dissent in *Hobby Lobby Stores, Inc. v. Sebelius*, \_\_\_ F.3d \_\_\_, 2013 WL 3216103, at \*41-\*55 (10th Cir. June 27, 2013), and the opinions of all of the other courts that have ruled in the government’s favor in similar cases, defendants do not believe that plaintiffs are likely to succeed on the merits of any of their claims, and believe that the unexplained decision of the motions panel in *Gilardi* was incorrect. Furthermore, that decision is not binding on this Court. *See United States v. Henderson*, 536 F.3d 776, 778 (7th Cir. 2008); *In re Rodriguez*, 258 F.3d 757, 759 (8th Cir. 2001); *Lambert v. Blackwell*, 134 F.3d 506, 513 n.17 (3d Cir. 1997).

Plaintiffs note that they agree with motions panel of the D.C. Circuit in *Gilardi*, No. 13-5069 (D.C. Cir. Mar. 29, 2013); the Tenth Circuit in *Hobby Lobby Stores Inc. v. Sebelius*, No. 12-6294, 2013 WL 3216103 (10th Cir. June 27,

however, 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, in light of the decision of the motions panel in *Gilardi*, would 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 the pending appeal in *Gilardi* is resolved. Defendants would also suggest that the preliminary injunction remain in effect until 30 days after the mandate issues from the D.C. Circuit in *Gilardi*, to give the Court and the parties sufficient time to assess the impact of the D.C. Circuit's ruling on this case.

Should this Court grant Plaintiffs' Unopposed Motion for a Preliminary Injunction, Plaintiffs further ask this Court to stay all proceedings in this case pending the resolution of the appeal in *Gilardi*. Defendants do not oppose this request.

District courts have broad discretion in deciding whether to issue a stay pending the resolution of proceedings in another case. "[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." *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *see also, e.g., Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 879 n.6 (1998); *Davis v. Billington*, 775 F. Supp. 2d 23, 29-30 (D.D.C. 2011). Indeed, "[a] trial court has broad discretion to stay all proceedings in an action pending the resolution of independent proceedings elsewhere." *Hisler v. Gallaudet Univ.*, 344 F. Supp. 2d 29, 35 (D.D.C. 2004); *see also, e.g., IBT/HERE Emp. Representatives' Council v. Gate Gourmet*

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2013); the Seventh Circuit in *Korte v. Sebelius*, No. 12-3841, slip op. (7<sup>th</sup> Cir. Dec. 28, 2012) and *Grote Indus. LLC v. Sebelius*, No. 13-1077, slip op. (7<sup>th</sup> Cir. Jan. 30, 2013); and the Eighth Circuit in *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, order (8<sup>th</sup> Cir. Nov. 28, 2012).

*Divs. Ams.*, 403 F. Supp. 2d 289, 292 (D.D.C. 2005) (same); *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979) (“A trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case.”).

If this case is not stayed, counsel for Defendants has indicated that Defendants will file a motion to dismiss the case for failure to state a claim. This motion will raise many of the same legal issues that are likely to be addressed by the D.C. Circuit. It would be highly inefficient to spend the resources and time of the parties and this Court for litigation to proceed on these issues simultaneously in both courts. *See Ass’n of Irrigated Residents v. Fred Schakel Dairy*, 634 F. Supp. 2d 1081, 1094 (E.D. Cal. 2008) (“[T]he district court has broad discretion to decide whether a stay is appropriate to promote economy of time and effort for itself, for counsel, and for litigants.”). Nor will there be any prejudice to Plaintiffs if the proceedings are stayed, as they will have the benefit of a preliminary injunction during the pendency of the stay.

Finally, Plaintiffs note that several district courts have stayed proceedings in similar circumstances in litigation challenging the contraceptive coverage regulations. *See, e.g.*, Order, *Willis Law v. Sebelius*, 1:13-cv-01124-CKK (D.D.C. Aug. 23, 2013); Order, *Bindon v. Sebelius*, No. 13-cv-1207-EGS (D.D.C. Aug. 13, 2013); Order, *Annex Medical, Inc. v. Sebelius*, No. 12-cv-02804-DSD-SER (D. Minn. Jan. 25, 2013), ECF No. 53; Order, *Korte v. Sebelius*, No. 3:12-cv-01072 (S.D. Ill. Dec. 28, 2012), ECF No. 63; Order, *Conestoga Wood Specialties, Corp. v. Sebelius*, No. 5:12-cv-06744 (E.D. Pa. Jan. 16, 2013), ECF No. 55; Order, *Hobby Lobby v. Sebelius*, No. 5:12-cv-01000 (W.D. Okla. Dec. 12, 2012), ECF No. 55.

For these reasons, Plaintiffs ask, and Defendants do not oppose, for this Court to stay all proceedings in this case pending resolution of the appeal in *Gilardi*.

Pursuant to Local Rule 7(m), undersigned counsel consulted with defendants' counsel, who represented that defendants do not oppose the relief request requested in this motion. Furthermore because of the motion is unopposed, Plaintiffs have not included a memorandum of law. If the Court requires a memorandum of law on these unopposed issues, Plaintiffs will provide one without delay.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully ask this Court to grant their unopposed motion for a preliminary injunction, enjoining defendants, until 30 days after the mandate issues from the D.C. Circuit in *Gilardi*, from enforcing against Barron Industries, Inc., their employee health plan(s), or their insurer(s) the statute and regulations that require plaintiffs to provide 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, as well as any penalties, fines, assessments, or enforcement actions for non-compliance, including those found in 26 U.S.C. §§ 4980D, 4980H, and 29 U.S.C. §§ 1132, 1185d.

Plaintiffs further respectfully ask this Court to stay all proceedings in this case until thirty days after the mandate issues from the D.C. Circuit in *Gilardi*.

Counsel for defendants has indicated to undersigned counsel that defendants do not seek a bond.

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

Respectfully submitted,

THOMAS MORE LAW CENTER  
/s/ Erin Elizabeth Mersino

Erin Elizabeth Mersino, Esq.  
(D.C. Court Bar No. MI 0060)  
24 Frank Lloyd Wright Drive  
P.O. Box 393  
Ann Arbor, Michigan 48106  
Tel (734) 827-2001  
Fax (734) 930-7160  
emersino@thomasmore.org

*Counsel for Plaintiffs*

### **CERTIFICATE OF SERVICE**

I hereby certify that on September 23, 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 upon counsel for all parties who has not yet entered an appearance electronically: None.

THOMAS MORE LAW CENTER

s/ Erin Mersino \_\_\_\_\_

Erin Mersino, Esq. (P70886)