

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

CYRIL B. KORTE, JANE E. KORTE,
and KORTE & LUITJOHAN
CONTRACTORS, INC.,

Plaintiffs,

v.

CASE NO. 3:12-CV-01072-MJR-PMF

UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN
SERVICES; SYLVIA M. BURWELL,
in her official capacity as the Secretary of
the United States Department of Health and
Human Services; UNITED STATES
DEPARTMENT OF THE TREASURY;
JACOB J. LEW, in his official capacity as the
Secretary of the United States Department of
the Treasury; UNITED STATES
DEPARTMENT OF LABOR;
and THOMAS E. PEREZ, in his official
capacity as Secretary of the United States
Department of Labor,

Defendants.

**PLAINTIFFS' RENEWED MOTION FOR
SUMMARY JUDGMENT ON COUNT I (RFRA)
AND INCORPORATED MEMORANDUM OF LAW**

Plaintiffs move this Court, pursuant to Fed. R. Civ. P. 54, 56, 65(d), and SDIL-LR 7.1, for the entry of an order granting them summary judgment and awarding them a permanent injunction and a final judgment on Count I of their complaint, which asserts that the Mandate at issue in this litigation violates Plaintiffs' rights under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, *et seq.* Plaintiffs state as follows:

1. There are no genuine issues of material fact in dispute in this case and, based on the reasoning and holdings in *Burwell v. Hobby Lobby Stores*, 134 S. Ct. 2751 (2014), and *Korte v.*

Sebelius, 735 F.3d 654 (7th Cir. 2013), *cert. denied*, *Burwell v. Korte*, 134 S. Ct. 2903 (2014), judgment should be entered in Plaintiffs' favor as a matter of law on Count I because the Mandate substantially burdens Plaintiffs' religious exercise and is not the least restrictive means of furthering a compelling government interest.

2. Plaintiffs rely on the more detailed reasons for granting this motion set forth in their incorporated memorandum of law and the declarations of Plaintiffs Cyril and Jane Korte, Doc. 7, Exs. A & B.

3. A proposed order has been submitted to the Court pursuant to Section 2.10 of the Court's CM/ECF User's Manual.

4. To preserve the resources and time of the parties and of this Court, Plaintiffs have separately filed a motion requesting a stay of the district court proceedings (other than with respect to this motion) that would be lifted automatically upon the resolution of this motion.

5. Plaintiffs preserve all other issues and claims raised in their complaint and a determination of costs and attorneys' fees for further proceedings.

Accordingly, for the above-stated reasons and those set forth in the incorporated memorandum of law and declarations, Plaintiffs request that this Court grant this motion in full and award them a permanent injunction and a final judgment on Count I of their complaint, which asserts that the Mandate violates their rights under RFRA.

INCORPORATED MEMORANDUM OF LAW

THE MANDATE

The Affordable Care Act requires group health plans to provide no-cost coverage for the preventative care and screening of women in accordance with guidelines created by the Health Resources and Services Administration (HRSA). 42 U.S.C. § 300gg-13(a)(4); *Hobby Lobby*, 134

S. Ct. at 2762; *Korte*, 735 F.3d at 660. The HRSA guidelines include, among other things, “[a]ll Food and Drug Administration approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity.” *Women’s Preventive Services: Required Health Plan Coverage Guidelines*, *Health Res. & Servs. Admin.*, <http://www.hrsa.gov/womensguidelines/> (last visited Oct. 3, 2014); 77 Fed. Reg. 8725 (Feb. 15, 2012); *Hobby Lobby*, 134 S. Ct. at 2762-63; *Korte*, 735 F.3d at 660; Doc. 54, Order at 2.

On August 1, 2011, Defendants promulgated an interim final rule, requiring all “group health plan[s] and . . . health insurance issuer[s] offering group or individual health insurance coverage” to provide coverage for all FDA-approved contraceptive methods and sterilization procedures as well as patient education and counseling about those services. 76 Fed. Reg. 46621, 46622 (Aug. 3, 2011); 45 C.F.R. § 147.130 (2011); *Hobby Lobby*, 134 S. Ct. at 2762. This interim rule was adopted as final, “without change,” on or about February 15, 2012, and the Mandate became effective in the first plan year on or after August 1, 2012, with respect to employers with fifty or more full-time employees. *See, e.g.*, 26 C.F.R. § 54.9815-2713; 29 C.F.R. § 2590.715-2713; 77 Fed. Reg. 8725, 8729 (Feb. 15, 2012); *Korte*, 735 F.3d at 660-61; Doc. 54, Order at 2. Non-exempt large employers that fail to provide an employee health insurance plan, and any non-exempt employers that fail to provide the coverage required by the Mandate in their health plan, are subject to fines and penalties. *See* 26 U.S.C. §§ 4980D(a)-(b), 4980H(a), (c)(1); 29 U.S.C. §§ 1132, 1185d; *Hobby Lobby*, 134 S. Ct. at 2762; *Korte*, 735 F.3d at 660.

Thus, the Mandate as it currently exists derives its authority from federal statutes, federal regulations, and the “guidelines” adopted on the website of the Health Resources and Services Administration.

UNDISPUTED MATERIAL FACTS

Plaintiff Korte & Luitjohan Contractors, Inc. (hereafter “K & L”) is a family owned, closely-held, full-service construction contractor serving Central and Southern Illinois for over fifty years. Plaintiffs Cyril and Jane Korte own a controlling interest in K & L, and they set the policies governing the conduct of all phases of the company. Cyril and Jane Korte hold to the teachings, values, and mission of the Catholic Church, including the Church’s teaching regarding the sanctity of human life from conception to natural death. They believe that actions intended to terminate an innocent human life by abortion are gravely sinful. They also adhere to the Catholic Church’s teaching regarding the immorality of contraception and sterilization. Cyril and Jane Korte seek to manage and operate K & L in a way that reflects their Catholic faith. Doc. 7, Ex. A, C. Korte Decl. at ¶¶ 1-5; Doc. 7, Ex. B, J. Korte Decl. at ¶¶ 1-5; *Korte*, 735 F.3d at 662-63, 682 n.17; Doc. 54, Order at 3-4, 17.

K & L currently has about ninety full-time employees. About seventy of those employees belong to unions and about twenty are non-union. K & L provides a group health insurance plan only for non-union employees because union employees are covered by separate health insurance through their respective unions over which Plaintiffs have no control. Cyril and Jane Korte consider the provision of employee health insurance an integral component of furthering the company’s mission and values. Doc. 7, Ex. A, C. Korte Decl. at ¶¶ 6-7; Doc. 7, Ex. B, J. Korte Decl. at ¶¶ 6-7; *Korte*, 735 F.3d at 662-63; Doc. 54, Order at 4-5.

The Mandate requires group health plans, such as the plan provided by K & L for its non-union employees, to include coverage, without cost-sharing, for contraceptives, including abortion-inducing drugs, sterilization, and related patient education and counseling. K & L is not exempt from the Mandate. If the company fails to comply with the Mandate or drops its

employee group health coverage, it could be subjected to annual fines and/or penalties. Doc. 7, Ex. A, C. Korte Decl. at ¶¶ 6-19; Doc. 7, Ex. B, J. Korte Decl. at ¶¶ 6-19; *Korte*, 735 F.3d at 658-63; Doc. 54, Order at 2-5.^{1/}

ARGUMENT

On June 30, 2014, the Supreme Court issued its decision in *Hobby Lobby*. In that case, the Court considered the application and enforcement of the Mandate against three for-profit, closely-held corporations and their owners violated their rights under RFRA. The Court held that the Mandate substantially burdened the religious exercise of the corporations and their owners and also held that the Mandate was not the least restrictive means of furthering a governmental interest. Thus, enforcement of the Mandate against the plaintiffs violated their rights under RFRA. 134 S. Ct. at 2759-60, 2767-85; *id.* at 2775 (“By requiring the Hahns and Greens [the owners] and their companies to arrange for [certain contraceptive] coverage, the HHS mandate demands that they engage in conduct that seriously violates their religious beliefs.”); *id.* at 2780 (“HHS has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases.”).

As with the plaintiffs in *Hobby Lobby*, Plaintiffs here run a closely-held family business pursuant to their religious faith. The Mandate substantially burdens Plaintiffs’ religious exercise because it forces them to choose to either comply with the Mandate and thereby violate their faith or not comply with the Mandate and pay significant annual fines and penalties. In addition, the Mandate is not the least restrictive means available to Defendants to further any compelling governmental interest; for example, the government could further its asserted interests by paying

^{1/} Plaintiffs have been protected by an injunction (whether an injunction pending appeal or a preliminary injunction) against the enforcement of the Mandate since December 28, 2012. *Korte v. Sebelius*, 528 Fed. Appx. 583, 2012 U.S. App. LEXIS 26734 (7th Cir. Dec. 28, 2012); Doc. 74, Order at 3; Doc. 82, Order.

for the objected-to goods and services itself with respect to employees of objecting employers. Consequently, the Mandate violates Plaintiffs' RFRA rights, and a permanent injunction and final judgment should be entered in their favor on Count I of the complaint as a matter of law. *See Hobby Lobby*, 134 S. Ct. at 2751, 2759-60, 2767-85.

The conclusion that the Mandate violates Plaintiffs' rights under RFRA is further supported by the decision of the United States Court of Appeals for the Seventh Circuit that granted Plaintiffs a preliminary injunction in the instant action. The Seventh Circuit's reasoning and holdings have only been bolstered by the Supreme Court's decision in *Hobby Lobby*, and demonstrate that summary judgment should be entered in Plaintiffs' favor on their RFRA claim. *See Korte*, 735 F.3d at 659 ("We hold that the plaintiffs—the business owners *and* their companies—may challenge the mandate. We further hold that compelling them to cover the[] services [required by the Mandate] substantially burdens their religious-exercise rights."); *id.* at 686-87 (explaining that Defendants have failed to show that the Mandate is the least restrictive means of achieving the government's stated goals).

Therefore, as a matter of law, Plaintiffs are entitled to a permanent injunction and a final judgment on Count I (RFRA) of their complaint based on the reasoning and holdings in *Hobby Lobby* and *Korte*. To provide Plaintiffs with the protection and relief they seek against the Mandate as it currently exists, which derives its authority from federal statutes, federal regulations, and the "guidelines" adopted on the website of the Health Resources and Services Administration, Plaintiffs believe that the order granting this motion should be worded as follows, which would also comply with Fed. R. Civ. P. 54, 58, and 65(d):

ORDERED that Defendants, their officers, agents, servants, successors in office, employees, attorneys, and those acting in concert or participation with them,

are **PERMANENTLY ENJOINED** from enforcing against Plaintiffs, their employee health plan(s), the health coverage provided in connection with such plan(s), and/or Plaintiffs' health insurance issuer(s), and/or their third party administrator(s) with respect to Plaintiffs' health plan(s), (1) the statute and regulations that require Plaintiffs to provide their employees with health insurance coverage for all Food and Drug Administration approved contraceptive methods, sterilization procedures, and related patient education and counseling to which Plaintiffs object on religious grounds, including, but not limited to, 42 U.S.C. § 300gg-13(a)(4); 26 C.F.R. § 54.9815-2713(a)(1)(iv); 29 C.F.R. § 2590.715-2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv); *Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act*, 77 Fed. Reg. 8725 (Feb. 15, 2012); *Health Resources and Services Administration, Women's Preventive Services Guidelines*, <http://www.hrsa.gov/womensguidelines/> (lasted visited Oct. 3, 2014), as well as (2) any penalties, fines, assessments, or any other enforcement actions for noncompliance, including but not limited to those found in 26 U.S.C. § 4980D and 29 U.S.C. §§ 1132, 1185d (collectively referred to as "the Mandate"), and it is

FURTHER ORDERED that the application and enforcement of the Mandate against Plaintiffs violates Plaintiffs' rights as protected by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*, and it is

FURTHER ORDERED that, because there is no just reason for delay, the Clerk of Court is directed to enter final judgment in favor of Plaintiffs and against Defendants on Plaintiffs' claim under the Religious Freedom Restoration Act, 42

U.S.C. § 2000bb, *et seq.* (Count I of Plaintiffs' complaint), consistent with this order.^{2/}

CONCLUSION

Accordingly, for the above-stated reasons, Plaintiffs request that this Court grant their motion for summary judgment on Count I (RFRA) of their complaint in full.

Respectfully submitted on this 3rd day of October, 2014,

/s/ Edward L. White III
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Counsel for Plaintiffs

^{2/} Federal Rule of Civil Procedure 54(b) authorizes this Court, in an action such as this one that presents more than one claim for relief, to direct the entry of a final judgment as to one or more, but fewer than all, claims if the Court expressly determines that there is no just reason for delay. The granting of final judgment in favor of Plaintiffs with respect to Count I is warranted since it would provide Plaintiffs with the relief they seek in this action.

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2014, I filed a true and correct copy of the foregoing with this Court through the Court's CM/ECF system, through which counsel who are registered users will receive notice of the filing and may obtain a copy, including Defendants' counsel, Bradley P. Humphreys, United States Department of Justice, Civil Division, Federal Programs Branch, 20 Massachusetts Avenue, N.W., Room 7219, Washington, D.C. 20530.

/s/ Edward L. White III
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