UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

DOMINO'S FARMS CORPORATION; and THOMAS MONAGHAN, Owner of Domino's Farms Corporation, Plaintiffs, v. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; HILDA SOLIS, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; TIMOTHY GEITHNER, Secretary of the United States Department of the Treasury; and UNITED STATES DEPARTMENT OF THE TREASURY, Defendants.	Case No. 2:12-cv-15488 NOTICE OF MOTION AND BRIEF FOR TEMPORARY RESTRAINING ORDER Judge Lawrence P. Zatkoff Magistrate Judge Michael Hluchaniuk

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PLAINTIFFS' NOTICE OF MOTION AND EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER & BRIEF IN SUPPORT

PLEASE TAKE NOTICE that at the earliest possible time for the court to hear this motion, Plaintiffs Domino's Farms Corporation (hereinafter "Domino's Farms") and Thomas Monaghan (collectively "Plaintiffs"), by and through their undersigned counsel, will and hereby

do move the court for a Temporary Restraining Order pursuant to Fed. R. Civ. P. 65(b)(1) and LR 65.1 in order to prevent immediate irreparable injury to Plaintiffs' fundamental rights and interests.

In support of their motion, Plaintiffs rely upon the pleadings and papers of record, as well as their brief filed with this motion, and the declarations and exhibits attached hereto. For the reasons set forth more fully below, Plaintiffs hereby request that this court enjoin the enforcement of Defendants' Health and Human Services Mandate (hereinafter "HHS Mandate") which violates Plaintiffs' rights guaranteed by the First Amendment to the United States Constitution and the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb *et seq*. For the purposes of this request for a temporary restraining order, the Plaintiffs focus solely on Claims I-III and V-VIII of their complaint; however, Plaintiffs do not forfeit any of the claims alleged in their complaint.

1. The purpose for a TRO in this case is to permit Plaintiffs to continue to provide insurance to their employees that does not violate Plaintiffs' constitutionally and statutorily granted rights to free exercise of religion, free speech, and free association.

2. Without relief from this Court, the Plaintiffs will be irreparably harmed as the Plaintiffs' constitutional rights will be violated.

3. This TRO request requires immediate attention because the HHS Mandate applies to Plaintiffs on January 1, 2013.

4. Plaintiffs, individually and through counsel, have made attempts to resolve this matter prior to seeking this TRO. Plaintiffs have made contact with the Department of Justice, and specifically Brad Humphreys the Assistant United States Attorney assigned to the case.

5. On December 17th, 2012, Plaintiffs served all Defendants with the complaint.

6. On December 19th, 2012, Plaintiffs' counsel spoke with the Brad Humphreys of the Department of Justice, and no agreement pertaining to the TRO was reached. The parties did not reach concurrence.

7. With the limited amount of time before January 1, 2013 and inability to reach concurrence with the Defendants prior to this date, Plaintiffs had no choice but to seek this TRO with the court.

8. Plaintiffs' counsel will provide notice of this TRO request by sending a copy of this motion and brief to the Department of Justice via facsimile at (202) 616-8470. The phone number for the Department of Justice is (202) 514-3367.

Respectfully submitted this 21st day of December, 2012.

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ISSUE PRESENTED

I. Whether denying Plaintiffs the ability to offer health insurance without a mandate from the government which forces the Plaintiffs' to provide health insurance that violates their sincerely held religious beliefs, free speech, and freedom of association causes irreparable harm sufficient to warrant injunctive relief.

CONTROLLING AUTHORITY

American Pulverizer Co., et al. v. Dep't of Health & Human Servs, *et al.*, No. 12-3459, slip op. (W.D. Mo. December 20, 2012)

Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)

Elrod v. Burns, 427 U.S. 347 (1976)

Legatus, et al. v. Sebelius, et al., No. 12-12061, slip op. (E.D. Mich. October 31, 2012)

Newland, et al. v. Sebelius, et al., No. 12-1123, slip op. (D. Colo. July 27, 2012)

O'Brien v. U.S. Dep't of Health & Human Servs., No. 12-3357, order (8th Cir. November 28, 2012)

Sherbert v. Verner, 374 U.S. 398 (1963)

Tyndale House Publishers, Inc. v. Sebelius, et al., No. 12-1635, slip op. (D.D.C. Nov. 16, 2012)

Wisconsin v. Yoder, 406 U.S. 205 (1972)

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PLAINTIFFS'BRIEF IN SUPPORT OF MOTION AND EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER

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INTRODUCTION

Plaintiffs Domino's Farms and Thomas Monaghan bring this motion for a temporary restraining order to enjoin the unconstitutional and illegal directives of the HHS Mandate. Currently, the Defendants are forcing businesses and organizations which hold sincerely held religious beliefs to violate those beliefs by supplying contraceptive and abortifacient coverage. Such action blatantly disregards religious freedom and the right of conscience, and is nothing short of irreconcilable with the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"), and the First Amendment.

The burden forced on the Plaintiffs cannot be justified by the Defendants as using the least restrictive means or furthering a compelling interest. The Defendants offer numerous secular and even religious exemptions to the HHS Mandate, but fail to offer the same respect to the Catholic beliefs of the Plaintiffs—showing that Defendants either care so little about those professing Catholic beliefs that they will not be bothered to address their concerns or showing that Defendants are patently discriminating against and disrespecting those holding Catholic beliefs. Neither provides the Defendants with a constitutional justification for violating the law.

The scheme of exemptions imposed by the Defendants is not neutral nor generally applicable. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993); *Gonzales v. O Centro Espirita Beneficente Uniao de Vegetal*, 546 U.S. 418, 432-87 (2006). Defendants additionally seek to violate Plaintiffs' freedom of speech through the counseling that the HHS Mandate requires.

Defendants' illegal mandate poses an urgent threat to the Plaintiffs, forcing the Plaintiffs to comply by January 1, 2013. If this Court does not issue injunctive relief at the soonest possible date, Defendants will be irreparably harmed. Under the HHS Mandate, Plaintiffs are

forced to choose between violating their religious beliefs or violating federal law. Plaintiffs Domino's Farms and Thomas Monaghan could face penalties for noncompliance of the law with fines of $2,000 per employee per year at minimum. The fines are even more insurmountable if Plaintiffs Domino's Farms and Thomas Monaghan decided to offer insurance without the objectionable coverage. If Plaintiffs choose to violate their religious beliefs and offer health insurance in compliance with the Mandate, Plaintiffs and all of their employees will be forced to switch health care plans. These employees may then be forced to switch to an insurance plan they may not want, to potentially switch doctors, and to potentially pay higher premiums.

Being forced to violate one's sincerely held religious beliefs is a severe burden on the Plaintiffs. Facing imminent, irreparable harm to their religious freedom and Constitutional rights, Plaintiffs seek injunctive relief from the HHS Mandate. Five courts thus far, including the Eastern District of Michigan, have enjoined the HHS Mandate for for-profit companies indistinguishably situated and structured to the Plaintiffs. *See Legatus, et al. v. Sebelius, et al.*, No. 12-12061, slip op. (E.D. Mich. October 31, 2012); *O'Brien v. U.S. Dep't of Health & Human Servs.*, No. 12-3357, order (8th Cir. November 28, 2012); *American Pulverizer Co., et al. v. Dep't of Health & Human Servs*, *et al.*, No. 12-3459, slip op. (W.D. Mo. December 20, 2012); *Newland, et al. v. Sebelius, et al.*, No. 12-1123, slip op. (D. Colo. July 27, 2012); *Tyndale House Publishers, Inc. v. Sebelius, et al.*, No. 12-1635, slip op. (D.D.C. Nov. 16, 2012).

FACTUAL BACKGROUND

Domino's Farms Corporation is a for-profit, and is treated as a subchapter S corporation for income tax purposes. (Monaghan Decl. at ¶ 3 at Ex. 2; Leipold Decl. at ¶ 10 at Ex. 1). Plaintiff Domino's Farms is incorporated under the laws of Michigan. (Monaghan Decl. at ¶ 2 at

Ex. 2). Plaintiff Thomas Monaghan is the owner, sole shareholder, and sole director of Domino's Farms. (Monaghan Decl. at ¶¶ 13, 14 at Ex. 2).

Plaintiff Domino's Farms Corporation is the property management company for Domino's Farm Office Park, LLC and DF Land Development, LLC. (Monaghan Decl. at ¶ 4 at Ex. 2). Domino's Farms Office Park, LLC is a premier office park, home to over fifty successful corporations, professional firms, non-profits, and entrepreneurial businesses. (Monaghan Decl. at ¶ 5 at Ex. 2). Domino's Farms Office Park is 937,203 sq. ft. and Plaintiff Domino's Farms provides numerous first class services and amenities throughout. (Monaghan Decl. at ¶ 6 at Ex. 2). Some of the amenities and services Domino's Farms offers to its tenants include an on-site Catholic chapel, dining and catering, a bistro, a fitness center, and Catholic bookstore. (Monaghan Decl. at ¶ 7 at Ex. 2). The on-site chapel offers Mass four times daily and twenty three times a week. (Monaghan Decl. at ¶ 8 at Ex. 2). Domino's Farms also offers several in-house services, including on-site property maintenance, a twenty-four hour work order request system, twenty-four hour security, telephone and data/internet services, maintenance and housekeeping, office suite build-outs and enhancements, and secure loading and storage. (Monaghan Decl. at ¶ 9 at Ex. 2). Plaintiffs employ 45 full-time employees. Plaintiffs also employ 44 part-time employees, with regular part-time employees working approximately 28,800 hours per year. (Monaghan Decl. at ¶ 10 at Ex. 2).

Plaintiffs align their beliefs with Pope Paul VI's 1968 encyclical Humanae Vitae, which states "any action which either before, at the moment of, or after sexual intercourse, is specifically intended to prevent procreation, whether as an end or as a means"—including contraception—is a grave sin. (Monaghan Decl. at ¶¶ 12-15, 24-25, 31 at Ex. 2; Leipold Decl. at ¶ 14 at Ex. 1). Plaintiffs subscribe to authoritative Catholic teaching regarding the proper

nature of health care and medical treatment. For instance, Plaintiffs believe, in accordance with Pope John Paul II's 1995 encyclical Evangelium Vitae, that "'[c]ausing death' can never be considered a form of medical treatment," but rather "runs completely counter to the health-care profession, which is meant to be an impassioned and unflinching affirmation of life." *Id.* Plaintiffs do not believe that contraception or abortion properly constitute health care, and involve immoral practices and the destruction of innocent human life. (Monaghan Decl. at ¶¶ 24-25 at Ex. 2).

Due to these beliefs, Plaintiffs offer an insurance policy which specifically excludes coverage for contraception, sterilization, abortion, and abortifacients. (Leipold Decl. at ¶¶ 13-14 at Ex. 1; Monaghan Decl. at ¶ 23, 31-34 at Ex. 2). Plaintiffs designed its group health insurance plan through the Ave Maria Human Resources and Blue Cross/Blue Shield of Michigan which specifically excludes abortion, abortifcients, sterilization, and contraception from its insurance plan. (Leipold Decl. at ¶¶ 13-14 at Ex. 1; Monaghan Decl. at ¶ 23, 31-34 at Ex. 2).

However on January 1, 2013, Plaintiffs lose the right to make health care insurance decisions in line with their Catholic views. (Leipold Decl. at ¶¶ 12, 15 at Ex. 1; Monaghan Decl. at ¶ 35-37 at Ex. 2). On January 1, 2013, the Health and Human Services Mandate of the Affordable Care Act ("HHS Mandate") will go into effect against the Plaintiffs, and force Plaintiffs to pay, fund, contribute, provide, or support artificial contraception, sterilization, abortion, abortifacients or related education and counseling, in violation of their Constitutional rights and deeply held religious beliefs beginning at the end of their plan year. *See* 45 C.F.R. § 147.130 (a)(1)(iv), as confirmed at 77 Fed. Register 8725 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration (HRSA) Guidelines, (http://www.hrsa.gov/womensguidelines).

The Affordable Care Act called for health insurance plans to provide coverage and "not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines" and directed the Secretary of the United States Department of Health and Human Services, Defendant Sebelius, to determine what would constitute "preventative care." 42 U.S.C § 300gg-13(a)(4). Defendants United States Health and Human Services, United States Department of Treasury, and United States Department of Labor, published an interim final rule under the Affordable Care Act. 75 Fed. Reg. 41726 (2010), requiring providers of group health insurance to cover "preventive care" for women as provided in guidelines to be published on a later date.[1] *Id.* Prior to adopting those guidelines, Defendants accepted public comments. Upon information and belief, a large number of groups filed comments, warning of the potential conscience implications of requiring religious individuals and groups to pay for contraception, abortion, and abortifacients.

On February 15, 2012, Defendant United States Department of Health and Human Services ("HHS") promulgated the mandate that group health plans include coverage for all Food and Drug Administration-approved contraceptive methods and procedures, patient education, and counseling for all women with reproductive capacity in plan years beginning on or after August 1, 2012 (the "HHS Mandate"). *See* 45 C.F.R. § 147.130 (a)(1)(iv), as confirmed at 77 Fed. Register 8725 (Feb. 15, 2012), adopting and quoting Health Resources and Services Administration (HRSA) Guidelines, (http://www.hrsa.gov/womensguidelines). All FDA-

[1] Defendants directed the Institute of Medicine ("IOM") to compile recommended guidelines describing which drugs, procedures, and services should be covered as preventative care for women. (http://www.hrsa.gov/womensguidelines). IOM invited select groups to make presentations on the preventive care that should be mandated by all health plans. (http://www.nap.edu/openbook.php?record_id=13181&PAGE=217). No religious groups or groups opposing government-mandated coverage of contraception, abortion, and related education and counseling were invited to present. Defendants adopted the IOM recommendations in full. 76 Fed. Reg. 46621 (published Aug. 3, 2011); 45 C.F.R. § 147.130.

approved contraceptives included contraception, abortion, and abortifacients such as birth-control pills; prescription contraceptive devices, including IUDs; Plan B, also known as the "morning-after pill"; and ulipristal, also known as "ella" or the "week-after pill"; and other drugs, devices, and procedures. (http://www.hrsa.gov/womensguidelines).

The HHS Mandate applies to almost all group health plans and health insurance issuers, 42 U.S.C. § 300gg-13 (a)(1),(4), and forces Plaintiffs to provide "preventative care" by making available and subsidizing contraception, abortion, and abortifacients such as the "morning-after pill," "Plan B," and "ella." The HHS Mandate also requires group health care plans and insurance issuers to provide education and counseling for all women beneficiaries with reproductive capacity—even if paying for or providing such "services" violates one's consciences and deeply held religious beliefs.

The Affordable Health Care Act and the HHS Mandate include a number of exemptions; however, Plaintiffs do not fall under any of these exemptions. The allowable factors for receiving exemptions under the Affordable Health Care Act include: the age of the plan, 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. §147.140 (exempting plans that qualify for "grandfathered" status by meeting criteria such as abstaining from plan changes since the date of March 23, 2010); a non-profit company which qualifies as a "religious employer," 45 C.F.R. § 147.130 (a)(iv)(A) and (B) (exempting non-profit companies which adopt certain hiring practices and exist to further the organization's religious doctrine); and individuals of certain religions which disapprove of insurance in its entirety such as the Muslim or Amish religion, 26 U.S.C. § 5000A(d)(2)(A)(i)-(ii) (exempting members of "recognized religious sect or division" that conscientiously object to acceptance of public or private insurance funds).

Neither of Plaintiffs' health insurance plans is "grandfathered." (Leipold Decl. at ¶¶ 7-8 at Ex. 1; Monaghan Decl. at ¶ 38 at Ex. 2).[2] Plaintiffs do not qualify for the "religious employer" exemption contained in 45 C.F.R. § 147.130 (a)(iv)(A) and (B). (Leipold Decl. at ¶ 9 at Ex. 1).[3] The HHS Mandate indicates that the Health Resources and Services Administration ("HRSA") "may" grant religious exemptions to certain religious employers. 45 C.F.R. § 147.130(a)(iv)(A). Plaintiffs cannot be considered for such an exemption as Domino's Farms is a for-profit business. (Leipold Decl. at ¶ 10 at Ex. 1; Monaghan Decl. at ¶ 40 at Ex. 2).

On January 20, 2012, Defendant Sebelius announced that there would be no change to the religious exemption. (Ex. 6). She added that "[n]onprofit employers who, based on religious beliefs, do not currently provide contraceptive coverage in their insurance plan, will be provided an additional year, until August 1, 2013, to comply with the new law," on the condition that those employers certify they qualify for the extension. This announcement provided no relief to the Plaintiffs. Plaintiffs have not applied, as a for-profit company could not even be considered for the temporary safe-harbor provision. 77 Fed. Register 8725 (Feb. 15, 2012)

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[2] Plaintiffs' health care plan is not a grandfathered plan as: (1) the health care plan does not include the required "disclosure of grandfather status" statement; (2) Legatus does not take the position that its health care plan is a grandfathered plan and thus does not maintain the records necessary to verify, explain, or clarify its status as a grandfathered plan nor will it make such records available for examination upon request; and (3) the health care plan has an increase in a percentage cost-sharing requirement measured from March 23, 2010. *See* 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. §147.140; (Leipold Decl. at ¶¶ 7-8 at Ex. 1).

[3] The HHS Mandate allows HRSA to grant exemptions for "religious employers" who "meet[ ] all of the following criteria: (1) The inculcation of religious values is the purpose of the organization. (2) The organization primarily employs persons who share the religious tenets of the organization. (3) The organization serves primarily persons who share the religious tenets of the organization. (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code of 1986, as amended." 45 C.F.R. § 147.130(a)(iv)(B).

Defendant Sebelius also announced on January 20, 2012 that HHS "intend[s] to require employers that do not offer coverage of contraceptive services to provide notice to employees, which will also state that contraceptive services are available at sites such as community health centers, public clinics, and hospitals with income-based support," inherently acknowledging that contraceptive services are readily available without mandating Plaintiffs subsidize them. Yet, Defendants have forced the Plaintiffs to face this decision: comply with their deeply held religious beliefs or comply with federal law.

Plaintiffs' plan year begins on January 1, 2013. (Leipold Decl. at ¶ 12 at Ex. 1; Monaghan Decl. at ¶¶ 50, 53 at Ex. 2). On January 1, 2013, Plaintiffs will be forced to choose: comply with the HHS Mandate and violate their deeply held religious beliefs, or disobey federal law and incur the consequences. If Plaintiffs were to decide to terminate health care entirely in order to comply with their deeply held religious beliefs, the Plaintiffs face severe burdens. Plaintiffs face enormous penalties. Upon not providing insurance to its employees, Plaintiffs would incur a $2,000 annual fine *per employee*, of which they have approximately 170 employees. 26 U.S.C. § 4980H. The fines are even more insurmountable if Plaintiffs were to decide to offer insurance that did not comply with the HHS Mandate.

All Plaintiffs would face substantial competitive disadvantages upon discontinuing employee health insurance in that the Plaintiffs will no longer be able to offer health care and would face disadvantages in employee recruitment and retention. Plaintiffs and their employees would be forced to seek expensive insurance on the private market. As Plaintiffs confront the looming deadline of the effective date of the HHS Mandate, employees have expressed fears for themselves and their families about what would happen if Plaintiffs were forced to stop offering health insurance. All Plaintiffs wish to do is simply continue providing health insurance in

compliance with their sincere and deeply held religious beliefs, as they currently do. (Leipold Decl. at ¶¶ 20-22 at Ex. 1; Monaghan Decl. at ¶¶ 48-49 at Ex. 2). Without immediate relief from this Court, the Plaintiffs must choose between abandoning their faith to comply with federal law or violating federal law and incurring enormous consequences. (Leipold Decl. at ¶ 13-22 at Ex. 1; Monaghan at ¶¶ 50-56 at Ex. 2).

ARGUMENT

The factors to be weighed before issuing a TRO are the same as those considered for issuing a preliminary injunction. *See, e.g., Workman v. Bredesen,* 486 F.3d 896, 904-05 (6th Cir. 2007); *Southerland v. Fritz*, 955 F. Supp. 760, 761 (E.D. Mich. 1996). The standard for issuing a preliminary injunction in this Circuit is well established. In *Connection Distributing Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998), the court stated:

> In determining whether or not to grant a preliminary injunction, a district court considers four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

Id.; see also Hamilton's Bogarts, Inc. v. Michigan, 501 F.3d 644, 649 (6th Cir. 2007). Typically, the reviewing court will balance these factors, and no single factor will necessarily be determinative of whether or not to grant the injunction. *Connection Distributing Co.*, 154 F.3d at 288. However, because this case deals with a violation of Plaintiffs' First Amendment rights, the crucial and often dispositive factor is whether Plaintiffs are likely to prevail on the merits. *Id*.

A. Plaintiffs' Likelihood of Success on the Merits

It is not surprising that in our country founded by individuals, who sought refuge from religious persecution, the Supreme Court of our country has succinctly avowed,

> If there is any *fixed star in our constitutional constellation*, it is that *no official, high or petty*, can prescribe what shall be *orthodox* in politics, nationalism,

> *religion*, or other matters of opinion *or force citizens to confess by word or act their faith therein*.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (emphasis added).

The statement written by Justice Jackson in his majority opinion is considered one of the Court's greatest statements about our fundamental freedoms established by the Bill of Rights. It is upon this backdrop, and resting upon this body of jurisprudence built upon deference to the inalienable freedom of religion, that the constitutionality of the HHS Mandate must be decided.

i. The HHS Mandate violates the Religious Freedom Restoration Act.

Congress enacted the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, as amended, 42 U.S.C. § 2000bb *et seq.* (hereinafter "RFRA"), in response to *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), where, in upholding a generally applicable law that burdened the sacramental use of peyote, the Supreme Court held that the First Amendment's Free Exercise Clause did not require the court to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws, *id.* at 883-90. Congress, by enacting RFRA three years after the decision in *Smith*, purposefully adopted a statutory rule comparable to the constitutional rule rejected in *Smith*.

RFRA strictly prohibits the Federal Government from substantially burdening a person's exercise of religion, "even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a), except when the Government can "demonstrate[] that application of the burden to the person--(1) [furthers] a compelling government interest; and (2) is the least restrictive means of furthering that . . . interest." 42 U.S.C. § 2000bb-1(b). *See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (holding that RFRA applies to the federal government); *Newland, et al. v. Sebelius, et al.*, No. 12-1123, slip op. at 17-18 (D. Colo. July 27, 2012) (granting preliminary injunction from HHS Mandate due to violation of RFRA) (Ex. 7).

In its formulation of RFRA, Congress expressly adopted the compelling interest test of *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In both cases, the Court "looked beyond broadly formulated interests justifying the general applicability of government mandates, scrutinized the asserted harms, and granted specific exemptions to particular religious claimants." *Gonzales* at 431, *see also Yoder* at 213, 221, 236; *Sherbert* at 410. In *Sherbert*, the Court held that the State's denial of unemployment benefits to an employee who refused to work on Saturdays because of her religious beliefs was an impermissible burden on her free exercise of religion because it "force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404. In *Sherbert* the court held that the government could not impose the same kind of burden upon the free exercise of religion as it would impose a fine against noncompliant parties of the law. *Id.* at 402 ("Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views.") (internal citations omitted).

In *Yoder*, Amish and Mennonite parents of teenaged children held religious beliefs that prohibited them from sending their children to high school as required by Wisconsin law. *Yoder* at 207. Each parent was fined $5 per child for failing to comply with state law for not sending their children to school beyond the eighth grade in accordance with their sincerely held religious belief that "higher learning tends to develop values they reject as influences that alienate man from God." *Id.* at 208-13. The Court held that the impact of Wisconsin law, while recognizing the "paramount" interest in education that the law sought to promote, impermissibly compelled the parents to perform acts undeniably at odds with the fundamental tenets of their religious

beliefs. *Id.* at 218, 213, 221; *see also Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). The Court found that this compulsion "carries with it precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent," *Yoder* at 218; the same constitutionally forbidden compulsion is before the court in this case.

In accordance with the Supreme Court rulings in *Sherbert* and *Yoder*, and with the plain language of RFRA expressly enacted by Congress to protect religious freedom, the HHS Mandate substantially burdens the Plaintiffs' sincere exercise of religion. Furthermore, the federal government cannot "demonstrate[] that application of the burden to the person--(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

1. The HHS Mandate substantially burdens Plaintiffs' free exercise of religion.

Plaintiffs' operation of their health insurance plans according to their religious beliefs is the "exercise of religion" under the RFRA. RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). This includes not merely worship but actions in accordance with one's faith.

Pursuant to the teachings of the Catholic Church, Plaintiffs' sincerely held religious beliefs prohibit them from providing or purchasing health insurance coverage for contraception, abortion, abortifacients, or related education and counseling. Plaintiffs' compliance with these beliefs is a religious exercise. The HHS Mandate creates government-imposed coercive pressure on Plaintiffs to purchase insurance and provide contraception, abortion, and abortifacients—or in other words, *to change or violate their beliefs*. By failing to provide an exemption for the Plaintiffs' religious beliefs, the HHS Mandate not only exposes Plaintiffs Domino's Farms and Thomas Monaghan to substantial per employee fines for their religious exercise—roughly

$2,000 annually per employee, a fine significantly more severe than the $5 per student fine struck down by the Court in *Yoder*—but also exposes all Plaintiffs to substantial competitive disadvantages if they are no longer permitted to offer or purchase health insurance due to their religious beliefs. 26 U.S.C. §§ 4980D & 4980H; *Legatus, et al. v. Sebelius, et al.*, No. 12-12061, slip op. at 13 (E.D. Mich. October 31, 2012) (holding Plaintiffs likely to show HHS Mandate substantially burdens religious exercise); see also *Sherbert* at 374 U.S. at 403-04 (finding "a fine imposed against appellant" to be a quintessential burden). The HHS Mandate imposes a substantial burden on Plaintiffs' religious exercise by forcing Plaintiffs to violate their deeply held religious beliefs and the teachings of the Catholic Church to which they belong.

2. The HHS Mandate fails to use the least restrictive means and fails to justify a compelling interest.

The HHS Mandate furthers no compelling governmental interest and is not narrowly tailored to any compelling governmental interest, as contraceptives are currently readily available through other means without forcing the Plaintiffs to provide them.

It is the Defendants, not the Plaintiffs, who must demonstrate both a compelling interest and their use of the least restrictive means before this Court, even at the preliminary injunction stage. *Gonzales*, 546 U.S. at 428-30. *See also Newland,* slip op. at 11 ("The initial burden is borne by the party challenging the law. Once that party establishes that the challenged law substantially burdens her free exercise of religion, the burden shifts to the government to justify that burden. The nature of this preliminary injunction proceeding does not alter these burdens.") (quoting *Gonzales*, 546 U.S. at 429). In order to prove that Defendants' substantial burden on the Plaintiffs' religious liberties is justified, the Defendants would need to pass strict scrutiny—"the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The Defendants are charged to "specifically identify an 'actual problem' in need of

solving," and show that substantially burdening Plaintiffs' free exercise of religion is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (June 27, 2011). The government bears the burden of proof and "ambiguous proof will not suffice." *Id.* at 2739. Indeed, one District Court has already ruled that the government failed to meet this burden of proof under the HHS Mandate. *Newland*, slip op. at 17 ("Defendants have failed to adduce facts establishing that government provision of contraception services will necessarily entail logistical and administrative obstacles defeating the ultimate purpose of providing no-cost preventative health care coverage to women."); see also *Legatus,* slip op. at 22 (in weighing whether the Government applies the least restrictive means in the HHS Mandate, "The cost to Plaintiffs appears provably substantial. The cost to the Government appears provably small").

There is "no actual problem in need of solving", and forcing the Plaintiffs to violate their religious beliefs fails to offer any sort of "actually necessary solution." Forcing the Plaintiffs to provide and fund health insurance which makes contraceptives and abortifacients available to their employees serves only an ambiguous, non-compelling interest, and *at best* would serve the interest of *marginally* increasing access to contraceptives and abortifacients. Defendant Kathleen Sebelius herself has admitted that contraceptive services are already readily available "at sites such as community health centers, public clinics, and hospitals with income-based support." Physicians and pharmacies have traditionally also provided contraceptive and abortifacient services. There is no compelling reason for the HHS Mandate to take the matter one step further by forcing employers, such as the Plaintiffs, objecting upon sincere religious grounds to subsidize these services through the insurance plans they sponsor. If the Defendants were truly concerned with the lack of access to contraceptives and abortifacients in this country, the Defendants could provide those "preventative services" without burdening the Plaintiffs'

religious beliefs. Defendants could provide the "preventative services" directly, Defendants could arrange—although they admit this system is already in place—for the "preventative services" to be made available at community health centers, public clinics, and hospitals, or Defendants could even offer tax credits to those companies who comply with the HHS Mandate while not punishing those companies who do not based upon sincerely held religious beliefs.

Furthermore, the HHS Mandate fails to provide the least restrictive means of furthering Defendants' stated interests of providing contraceptives and abortifacients, as Defendant Health and Human Services has carved out a number of exemptions for secular purposes such as size of employer, the age and grandfathered status of a health insurance plan, waivers for high grossing employers, *inter alia*. The HHS Mandate imminently threatens violation of the Plaintiffs' rights secured to them by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq*.

ii. The HHS Mandate violates the First Amendment to the United States Constitution, Free Exercise Clause.

The First Amendment prohibits the government from making any law "respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend. I. Under the First Amendment, the government may not impose special restrictions, prohibitions, or disabilities on the basis of religious beliefs. *See generally McDaniel v. Paty*, 435 U.S. 618 (1978). "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *Id.* at 626. And as the Supreme Court acknowledged, "This principle that government may not enact laws that suppress religious belief or practice is . . . well understood. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993).

Unquestionably, the First Amendment protects Plaintiffs' right to express and exercise their religious beliefs. Under the Free Exercise Clause, the Supreme Court has ruled that the

government may only pass a law that burdens certain religious exercises when the law is facially neutral and of general applicability. *Id*. at 531 (discussing, *when not subject to the scrutiny and analysis of RFRA*, a facially neutral law of general applicability is permissible notwithstanding any incidental burdens it imposes, so long as the law passes rational basis review). *However*, when a law burdens religious exercise because it is *not actually neutral or generally applicable* it must be "justified by a compelling governmental interest" and be "narrowly tailored to advance that interest." *Id.* at 531-32 (*citing Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990)); *see also id.* at 547 ("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited'") (internal quotation and citation omitted).

In *Church of the Lukumi*, *supra*, the City of Hialeah enacted an ordinance prohibiting the public sacrifice of animals. *Id.* at 527. The ordinance also contained exemptions for the slaughtering of animals raised for food purposes and for sale in accordance with state law. *Id.* at 528. The ordinance had the stated purpose of promoting "public health, safety, welfare, and the morals of the community" and carried a maximum fine of $500. *Id.* at 528. The ordinance, however, prevented members of the church of Santeria from engaging in a principal aspect of their religious worship, which was the public, sacrificial killing of animals. *Id.* at 524-25. This practice was known to the Defendant prior to the enactment of the ordinance. *Id.* at 526-27.

In deciding that the ordinance was not neutral nor generally applicable, the Court examined whether the law "infringe[d] upon or restrict[ed] practices because of their religious motivation," or "in a selective manner impose[d] burdens only on conduct motivated by religious belief." *Id.* at 533, 543. The Court emphasized that the Free Exercise Clause "forbids

subtle departures from neutrality, and covert suppression of particular religious beliefs." *Id.* at 534 (internal quotations and citations omitted).

The Court in *Church of Lukumi* further adopted the reasoning from *Smith* that "in circumstances in which individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of 'religious hardship' without compelling reason.'" *Id.* at 537 (*quoting Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. at 884; *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (opinion of Burger, C.J.)

1. The HHS Mandate is not neutral nor generally applicable, and fails strict scrutiny.

Likewise, in the instant case, the HHS Mandate cannot avoid strict scrutiny as the law is not neutral nor generally applicable and the Defendants have set forth a number of individualized exemptions from the general requirement. Widespread individualized exemptions deny the mandate of general applicability. *Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012) ("At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny."); see also *Newland*, slip op. at 15 (holding that the scheme of exemptions in the HHS Mandate "completely undermines any compelling interest").

Despite being informed in detail of the imposition on Catholic belief beforehand, Defendants designed the Mandate and the religious exemptions to the Mandate in a way that made it impossible for Plaintiffs to comply with their religious beliefs. By design, the Defendants imposed the Mandate on some religious organizations or religious individuals but not on others, resulting in discrimination among religions. The Defendants have created a number of categorical exemptions and individualized exemptions, none of which alleviate the

chill imposed on the Plaintiffs' free exercise of religion. The Affordable Care Act and the HHS Mandate include exemptions for:

- Individual members of a "recognized religious sect or division" that conscientiously object to acceptance of public or private insurance funds in their totality, such as members of the Islamic faith or the Amish. 26 U.S.C. § 5000A(d)(2)(A)(i) and (ii).
- Employers with health care plans that are considered to be "grandfathered," which, amongst meeting other criteria, have been in place and remain unchanged since March 23, 2010. 42 U.S.C. § 18011(a)(2); 26 C.F.R. § 54.9815-1251T; 29 C.F.R. § 2590.715-1251; 45 C.F.R. § 147.140.
- Non-profit employers who qualify under the narrow exemption of a "religious employer." 45 C.F.R. § 147.130 (a)(iv)(A) and (B).

The HHS Mandate in its exemptions completely fails to address the constitutional and statutory implications on for-profit, secular employers such as Plaintiffs Domino's Farms and Thomas Monaghan. Furthermore, there is no exemption available for a member of the Catholic faith who conscientiously objects to the HHS Mandate on religious grounds. The HHS Mandate vests the Health Resources and Services Administration with unbridled discretion in deciding whether to allow exemptions to some, all or no organizations meeting the definition of "religious employers" or religious individuals.

For these reasons and those articulated in the previous section of this brief, the substantial burden the Defendants anchor onto the Plaintiffs' religious exercise is not narrowly tailored to any compelling governmental interest. The HHS Mandate violates the Plaintiffs' rights secured to them by the Free Exercise Clause of the First Amendment to the United States Constitution.

iii. The HHS Mandate violates the First Amendment to the Constitution, Free Speech and Expressive Association.

As the United States Supreme Court has long recognized, "spreading one's religious beliefs" and "preaching the Gospel" are activities protected by the First Amendment. *See Murdock v. Pennsylvania*, 319 U.S. 105, 110 (1943). Supreme Court precedent also "establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

Additionally, "[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." *Healy v. James*, 408 U.S. 169, 181 (1972) (citations omitted). The Sixth Circuit echoed this fundamental understanding of the right to association by stating, "Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of freedom of speech." *Connection Distributing Co.*, 154 F.3d at 295 (citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

Indeed, "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); *see also id*. at 636 (O'Connor, J., concurring) ("Even the training of outdoor survival skills or participation in community service might become expressive when the activity is intended to develop good morals, reverence, patriotism, and a desire for self-improvement.").

The government traditionally has not been allowed to force a person—who objects to an activity or conduct on moral grounds—to subsidize, and thereby endorse, conduct that he believes, teaches, or otherwise states is wrong. *See, e.g., Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that the government cannot compel state bar members to finance political and ideological activities of which they disagree); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) (holding that the government cannot require state employees to provide financial support for ideological union activities they oppose which are unrelated to collective bargaining); *Wooley v. Maynard*, 430 U.S. 705 (1977) (enjoining a state law which required that plaintiff affix the motto "Live Free or Die" on his license plate when the plaintiff, who was a Jehovah's Witness, found the motto morally repugnant).

Indeed, the First Amendment protects the right "to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." *Wooley v. Maynard,* 430 U.S. 705, 715 (1977). Therefore, Plaintiffs should not be compelled by the government to provide education and counseling against their deeply held beliefs. Plaintiffs should not be compelled to subsidize and endorse private conduct that it objects to—especially when Plaintiffs have chosen to express their faith through religious speech and assembly. Plaintiffs will be hard-pressed to effectively and persuasively communicate the Church's teachings that contraception, abortion, and abortifacients are immoral, yet simultaneously pay for and provide contraceptives. The precepts are irreconcilable.

Based on the speech at issue here (expressing one's faith), Plaintiffs are also protected by "the First Amendment's expressive associational right." *See Boy Scouts of America v. Dale*, 530 U.S. 640, 648-650 (2000) (finding that the Boy Scouts are protected by the First Amendment and stating, "It seems indisputable that an association that seeks to transmit . . . a system of values

engages in expressive activity"). In *Boy Scouts of America,* the Supreme Court held that "freedom of expressive association" under the Free Speech Clause prohibited the enforcement of a public accommodation law when it required the Boy Scouts be led by a homosexual scoutmaster. *Id*. at 648. The Supreme Court held that compelling the enforcement of the public accommodation law would "force the organization to send a message, both to the youth members and the world, that the [organization] accepts homosexual conduct as a legitimate form of behavior." *Id*. at 653. Correspondingly, in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group,* 515 U.S. 557 (1995), the Supreme Court held that the First Amendment gave the plaintiffs, organizers of a private St. Patrick's Day parade, the right to exclude a homosexual group from the parade, when the plaintiffs believed that the group's presence would communicate a message about homosexual conduct to which the plaintiffs objected. The First Amendment protected the plaintiffs' right "not to propound a particular point of view," *id.* at 575, and the Supreme Court protected the "principle of speaker's autonomy," *id.* at 580.

Since the First Amendment through its free speech and expressive association provisions protects nonreligious organizations based upon moral objections to exclude individuals whose mere *presence* was thought to send an objectionable message, then reasonably the Court should protect the free speech and association of the Plaintiffs who object to subsidizing and supporting certain messages and conduct based upon their deeply held religious beliefs. The compelled subsidization and support of contraceptives, abortion, and abortifacients in the instant case strikes at the heart of one's ability to communicate unambiguous moral teachings and religious beliefs, and one's ability to form associations that maintain adherence to those teachings.

The Defendants cannot compel speech and association they find favorable, but is volative of the Plaintiffs' religious beliefs. Based upon this, and all other reasons articulated in this brief,

the Plaintiffs have demonstrated a substantial likelihood of prevailing on the merits of their claims.

B. Plaintiffs Will Suffer Irreparable Harm Without Injunctive Relief.

Plaintiffs will be irreparably harmed absent the issuance of an injunction by this Court. The HHS Mandate deprives Plaintiffs of their fundamental First Amendment rights. And it is well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Legatus,* slip op. at 26 (holding the HHS Mandate causes irreparable harm to First Amendment rights, "The potential for harm to Plaintiffs exists, and with the showing Plaintiffs have made thus far of being able to convincingly prove their case at trial, *it is properly characterized as irreparable*.")(emphasis added); *see also Connection Distributing Co.*, 154 F.3d at 288 (quoting *Elrod*); *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief." (citing *Elrod*)).

Additionally, Plaintiffs will suffer financial harm. Plaintiffs Domino's Farms and Thomas Monaghan face per employee fines for noncompliance with the HHS Mandate. Plaintiffs face substantial competitive disadvantages if they are no longer permitted to offer or purchase health insurance due to remaining faithful and exercising their religious beliefs. Plaintiffs will incur costs and expenses due to the enforcement of the HHS Mandate. If an injunction does not issue, Plaintiffs will be forced to violate their religious beliefs or potentially forfeit health insurance.

C. Granting a Temporary Restraining Order Will Cause No Substantial Harm to Others.

In this case, the likelihood of harm to Plaintiffs is substantial because Plaintiffs' First Amendment freedoms and Plaintiffs' freedom of religion are at issue, and the deprivation of these rights, even for minimal periods, constitutes irreparable injury.

On the other hand, if Defendants are restrained from enforcing the HHS Mandate against Plaintiffs, Defendants will suffer no harm because the exercise of constitutionally protected expression can never harm any of the Defendants' or others' legitimate interests. *See Connection Distributing Co.*, 154 F. 3d at 288; *see also Legatus,* slip op. at 28 (holding that the HHS Mandate should be enjoined, "The Government will suffer some, but comparatively minimal harm if the injunction is granted. . . . The balance of harms tips strongly in Plaintiffs' favor."). The Defendants already exempt a number of other employers and individuals from the HHS Mandate. Allowing the Plaintiffs an exemption in order to stop a violation of their deeply held religious beliefs fails to cause harm to the Defendants. Any legitimate interest asserted by Defendants or others will remain fully protected by existing provisions of law.

In the final analysis, the question of harm to others as well as the impact on the public interest "generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation. . . ." *Connection Distribution Co.*, 154 F.3d at 288. For if Plaintiffs show that their First Amendment rights have been violated, then the harm to others is inconsequential. As demonstrated, the enforcement of Defendants' HHS Mandate on Plaintiffs violates the First Amendment; therefore, any "harm" to others is inconsequential.

D. The Impact of the Temporary Restraining Order on the Public Interest Favors Granting the Injunction.

The impact of the preliminary injunction on the public interest turns in large part on whether Plaintiffs' Constitutional rights are violated by the enforcement of Defendants' HHS Mandate. As the Sixth Circuit noted, "[I]t is always in the public interest to prevent the violation of a party's Constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties"). Aforementioned, the enforcement of Defendants' HHS Mandate is a direct violation of Plaintiffs' fundamental rights protected by the First Amendment. Therefore, the public interest is best served by preventing the Defendants from compelling individuals to violate their religious beliefs and rights of conscience, protected by RFRA and the First Amendment.

In the final analysis, the Defendants' HHS Mandate violates the Plaintiffs' fundamental Constitutional rights. The HHS Mandate forces the Plaintiffs to violate their deeply held religious beliefs of their Catholic faith. Without an injunction, Plaintiffs will be irreparably harmed.

CONCLUSION

Plaintiffs hereby request that this court issue a temporary restraining order. The HHS Mandate violates both RFRA and the First Amendment. Unless this Court issues a temporary restraining order prior to January 1, 2013 when the Plaintiffs need to comply with the HHS Mandate, Plaintiffs inescapably must choose between violating their religious beliefs or suffering massive financial penalties and harm to their goodwill and sustainability. Defendants, conversely, would face no harm from an injunction as the Mandate already exempts millions of

other companies and organizations. Plaintiffs seek for this Court to enjoin Defendants' requirement that Plaintiffs cover contraception, abortifacients, and counseling and education for the same, in their health plans. A form order is attached. (Ex. 5).

Respectfully submitted this 21st day of December, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2012, 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 by ordinary U.S. Mail and faxed upon all parties for whom counsel has not yet entered an appearance electronically:

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