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

AUTOCAM CORPORATION, *et al.*,

Plaintiffs,

Case No. 12-cv-01096
Hon. ROBERT J. JONKER

v.

KATHLEEN SEBELIUS, *et al.*,

Defendants

PLAINTIFFS' SUPPLEMENTAL BRIEF ON ANTI-INJUNCTION ACT SUPPORTING MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

On December 4, 2012, the Court issued an order instructing the parties to be prepared to address three issues at the hearing set for December 17, 2012. To assist the Court in conducting this hearing, the Plaintiffs offer this supplemental brief answering the three questions.

Analysis of Question 1

> **Question 1**: Does the Anti-Injunction Act, 26 U.S.C. § 7421(a), apply to bar or limit relief the Court has power to order in this case to the extent Plaintiffs are seeking relief from the operation of any financial obligation under 26 U.S.C. § 4980D. The Court recognizes that the United States Supreme Court has determined that a challenge to the "shared responsibility payment" of the individual mandate in 26 U.S.C. § 5000A is subject to challenge despite the Anti-Injunction Act. *Natl'l Fed'n of Indep. Businesses v. Sebelius*, __U.S.__, 132 S. Ct. 2566, 2582-84, 183 L.Ed. 2d 450 (2012). However, as the Supreme Court noted, Congress described the "shared responsibility payment" under section 5000A as a "penalty," not a tax. *Id.* at 2583. In contrast, the payment imposed under section 4980D is, by the description of Congress, a tax, not a penalty.

No, the Anti-Injunction Act ("AIA") does not apply for several reasons. The Plaintiffs are challenging the HHS Mandate itself, and not just the monetary penalty imposed by 26 U.S.C.

§ 4980D.[1] Furthermore, Section 4980D is a penalty, rather than a tax, for AIA purposes. Congress labeled Section 4980D as a "penalty," structured it based on fault, and made the penalty so substantial that forcing compliance with the regulation rather than revenue to the government is the only possible goal. Under *Sebelius*, a clearly expressed congressional intent to treat a statute as a penalty, rather than a revenue-raising tax, would prevent the application of the AIA, but the indicia of legislative intent show Section 4980D is a penalty. To the extent Section 4980D is subject to the AIA at all, the Religious Freedom Restoration Act ("RFRA") controls over the AIA as the specific statute governing this type of injunction. And even if the AIA is controlling, the judicially-created exception bases on irreparable harm and success on the merits permits the Court to issue an injunction. These issues are analyzed below.

I. The AIA does not apply to Section 4980D.

A. Because Congress created the AIA to protect tax collection, its application is limited to statutes that manifest a congressional intent to raise tax revenue rather than regulate and penalize conduct.

The AIA, 26 U.S.C. § 7421(a), is a procedural statute with a single purpose: protecting tax collection from judicial meddling. "The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." *Enochs v. Williams Packing & Nav. Co.* 370 U.S. 1, 7 (1962); *see also NFIB v. Sebelius*, 132 S.Ct. 2566, 2583 (2012) ("This statute protects the Government's ability to collect a consistent stream of revenue, by barring litigation to enjoin or otherwise obstruct the collection of taxes."). The AIA

[1] This lawsuit concerns a challenge to the HHS Preventative Care Mandate, and 45 C.F.R. § 147.130 (the "HHS Mandate"). (Verif. Comp. at ¶¶ 2-3.) As detailed below, the HHS Mandate itself is a direct requirement that the Plaintiffs provide drugs and services, which is enforced through multiple mechanisms. Because the Court can enjoin the application of this Mandate without enjoining the penalty of Section 4980D, the AIA does not apply.

is to be read literally and applies to "truly revenue-raising tax statutes." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736-43 (1974).

The Supreme Court recently analyzed in the AIA in *Sebelius*. 132 S.Ct. at 2583. The Supreme Court determined that the AIA did not apply to the individual mandate because Congress had characterized the "individual responsibility payment" levied on taxpayers for failure to purchase insurance as a "penalty." *Id.* at 2583-93. *Sebelius* thus found that congressional intent could show that a statute was outside the reach of the AIA. Although *Sebelius* does not hold that a label alone controls, in that case, the Court did defer to Congress where it had plainly indicated an intent that the payment be treated as a penalty not a tax for the purpose of the AIA.

Sebelius did not make new law on this point. Courts have always looked to whether the statutory language reveals a legislative intent to regulate or a legislative intent to raise revenue when determining whether a measure was properly characterized as a tax within the meaning of the AIA. In doing so, courts have recognized that the AIA does not apply simply because Congress has used the label "tax" in a statute when the effect of the statute (and thus its intent) was to regulate rather than raise revenue. For example, the Seventh Circuit found that the "Marijuana Transfer Tax" was "penal in nature, and not enacted as a revenue-raising statute." *Robertson v. United States*, 582 F.2d 1126, 1127 (7th Cir. 1978). This is so even though Congress gave it the title "tax." *Id.; see also Tovar v. Jarecki*, 173 F.2d 449, 451 (7th Cir. 1949) (marijuana). Similarly, the AIA did not bar a suit to enjoin enforcement of a "tax" for violating the Prohibition Act, which was really a penalty and not a tax. *Lipke v. Lederer*, 259 U.S. 557, 562 (1922).

Precedent concerning the Tax Injunction Act ("TIA"), 28 U.S.C. § 1341, features this same focus on whether the statutory language reveals a legislative intent to regulate or to raise revenue.[2] Under the TIA, "the label given by a state for an assessment or charge is not dispositive of its character." *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 762 (10th Cir. 2010). The "touchstone" of a court's "inquiry is the purpose of the assessment." *Id.* at 761. This includes an examination of "the incentive structure created by a levy." *Id.* For TIA purposes, "an assessment is a tax when its purpose is to raise revenue, while levies assessed for regulatory or punitive purposes, even though they may also raise revenues, are generally not 'taxes.'" *Id.* (quotation omitted). Thus, a "regulatory penalty" is "not a tax, because its purpose is to regulate behavior rather than to raise revenue." *Id.* at 763. *Edmondson* involved a challenge to an Oklahoma statute that created "an incentive structure that, on pain of financial assessment, encourages employers to verify the employment authorization of their independent contractors" to prevent the hiring of illegal immigrants. *Id.* Although characterized as an assessment or tax, "the expressed primary goal of the Oklahoma Act is to regulate behavior." It was not a tax for TIA purposes, and it could be enjoined. *Id.*; *see also Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 728 (7th Cir. 2011) (en banc) (Posner, J.) (noting that the "distinction is between exactions designed to generate revenue . . . and exactions designed either to punish (fines, in a broad sense) rather than to generate revenue (the hope being that the punishment will deter, though deterrence is never perfect and therefore fines generate some state revenues)"). The text, structure, and purpose of the HHS Mandate enforcement mechanisms show that Section 4980D is a regulatory penalty and not a tax.

B. The Preventative Care Mandate is a penalty not a tax.

[2] The TIA prohibits federal injunctions against state taxes, and courts often look to AIA precedent when interpreting the TIA, and vice-versa. *See, e.g, Hibbs v. Winn*, 542 U.S. 88, 104 (2004) ("Just as the AIA shields federal tax collections from federal-court injunctions, so the TIA shields state tax collections from federal-court restraints.").

In 2010, Congress enacted the Affordable Care Act, including 42 U.S.C. § 300gg-13. This statute contains the Preventative Care Mandate and requires certain health plans to provide coverage without cost sharing, which ultimately included the HHS Mandate. Congress located the statute within Title 42 of the U.S. Code, covering public health and welfare. It is enforced in a variety of ways by the Secretary of Labor, private litigations, and the penalty in Section 4980D.

For example, the Affordable Care Act incorporated the requirements of the HHS Mandate into the Employee Retirement Income Security Act ("ERISA"), 29 USC § 1185d(a). ERISA permits plan beneficiaries or the Secretary of Labor to sue for the benefits included in the HHS Mandate. 29 USC § 1132(a).[3] The goal of these remedies is to secure compliance with the legal requirements governing benefit plans.

Along with changes to Title 42 (the underlying mandate) and Title 29 (allowing enforcement), the Affordable Care Act also made the changes to the Internal Revenue Code relevant here. Congress added 26 U.S.C. § 9815 to the Internal Revenue Code, titled "Additional market forms," which also incorporated the requirements of the HHS Mandate into the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191. Of particular importance to this case is HIPAA Section 402, codified as 26 U.S.C. § 4980D, which imposes massive penalties for failure to comply with group health care requirements. The actual language used by Congress shows that Section 4980D was intended as a penalty:

[3] In some circumstances, ERISA can also impose criminal penalties. *See* 29 USC § 1132. It is not immediately clear whether these penalties could ever be used to enforce issues related to the HHS Mandate.

SEC. 402. **PENALTY** ON FAILURE TO MEET CERTAIN GROUP HEALTH PLAN REQUIREMENTS.

(a) In General.--Chapter 43 of the Internal Revenue Code of 1986 (relating to qualified pension, etc., plans) is amended by adding after section 4980C the following new section: [then providing the language of Section 4980D]

P.L. 104-191 (emphasis added); *see also* H.R. CONF. REP. 104-736, at *155 (same). Thus, the actual act passed by Congress applied the label "penalty" to describe the enforcement mechanism of Section 4980D.

The features and function of Section 4890D also show it is a penalty. By its terms, Section 4980D is a "tax" on "noncompliance" that only applies to the period of noncompliance. The penalties are fault-based, and can be limited or waived if the employer "did not know, and exercising reasonable diligence would not have known" that it failed to comply or if the failure to comply was "due to reasonable cause and not to willful neglect." 26 U.S.C. § 4980D(c)(1) and (c)(4). The amount of the fine is calculated with reference to employees denied benefits, not income. Any revenue provided is incidental to noncompliance. And the amount of the fine is so draconian and out of proportion to any cost of benefits that it is plainly penal in nature. In this case, for example, the Plaintiff projects cost to comply would be approximately $100,000; the penalty for failure to comply is approximately $19,000,000 (based on persons enrolled in the plan as of today). *See* Supplemental Declaration of John Kennedy Attached as Exhibit A.[4] In all these ways, Section 4980D creates an incentive structure to force compliance and punish noncompliance. Put another way, Section 4980D is a penalty not a tax. When Section 4980D is seen as a provision designed to coerce compliance it parallels and complements the other remedies that Congress provided under Title 29, which governs employees benefits and

[4] A corrected version of the original Kennedy Declaration is also included as Exhibit B.

authorizes a plan participant, beneficiary, or the Secretary of Labor to bring an action to require compliance with benefits law. *See* 29 U.S.C. §1132.

The lesson of *Sebelius* is that if Congress intended the statutory section to serve as a penalty, as opposed to a revenue-raising tax, the AIA does not apply. In passing HIPAA, Congress explicitly labeled Section 4980D as a penalty, it functions as a penalty for noncompliance, and as a mechanism designed to ensure compliance it shares the thrust of other remedies available for noncompliance. For all these reasons, it is plain that Congress labeled Section 4980D as a penalty because it called the section and penalty and understood the section to be a penalty, not a revenue raising measure.

Indeed, the Government has responded to and defended the HHS Mandate (and the penalty that results under Section 4980D for failure to comply) in multiple cases. In each one, the Government has clearly stated the purpose of the HHS Mandate: forcing employers to provide certain coverage. In this case, the Government has argued that the interests behind the HHS Mandate are "in safeguarding the public health by regulating the health care and insurance markets," Resp. Br. at 18 (emphasis added), and removing barriers for women, *id.* at 19. The Government has *never* asserted an interest in taxation, raising revenue, or collecting taxes. The Government has *never* suggested that it would get any revenue from the "tax" or that employers really even have the option of paying the "tax" to avoid a violation of their religious beliefs. The Government's position has always been unequivocal: the HHS Mandate is designed to regulate behavior rather than raise revenue.[5]

[5] To the extent that the Court determines that the HHS Mandate, at least as applied through Section 4980D is a tax, the Plaintiffs will need to amend their complaint to add claims alleging that the tax is an unconstitutional penalty and that it violates the Origination Clause.

II. The RFRA permits the relief sought by the Plaintiffs and controls over the AIA.

To the extent the AIA applies at all, the RFRA controls over the AIA. The RFRA provides this Court with jurisdiction over the Plaintiffs' claims. *See* 42 U.S.C. § 2000bb-1(c) (creating right of action). Congress took pains to specify that the term "government" as used in the statute "includes a branch, department, agency, instrumentality, and official…of the United States…." 42 U.S.C. §200bb-2(1). Congress expressly crafted the RFRA to apply to all federal statutes, including those adopted before and after the RFRA, unless the statute explicitly controls over the RFRA. 42 U.S.C. § 2000bb-3. The AIA contains no language excluding it from the reach of the RFRA. *See* 26 U.S.C. § 7421.

Moreover, to the extent there is a conflict between the RFRA's attempt to provide a private right of action and the AIA's attempt to restrict it, the canons of statutory construction indicate that the RFRA wins out for two reasons. First, the RFRA was passed after the AIA. "A specific policy embodied in a later federal statute should control our construction of the earlier statute, even though it has not been expressly amended." *Detroit Receiving Hosp. and University Health Center v. Sebelius*, 575 F.3d 609, 614 (6th Cir. 2009) (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530-31 (1998)). The RFRA embodies a specific policy of allowing those burdened by a federal government action to enjoin that action in court. Second, the RFRA is the more specific statute (covering taxes that burden religion) as opposed to the AIA's more general provision (covering only certain taxes). "There is an additional canon of statutory construction which dictates that the specific statute controls over the more general provision." *United States v. Ware*, 161 F.3d 414, 423 (6th Cir. 1998). As the specific statute, the RFRA controls.

Congressional intent to make RFRA comprehensive in its reach is emphatic. Consequently, RFRA applies to the AIA and prohibits an application of the AIA that results in a substantial burden on religion. Since there is no question that using the AIA to bar Plaintiffs' request for relief would subject the Plaintiffs to the vicious bind arising from the HHS mandate and noncompliance penalty, there is no question that RFRA permits the Plaintiffs to secure the relief they seek in this case.

III. To the extent the AIA applies to this case, the Plaintiffs can claim the benefit of the judicially created exception for irreparable harm.

Even if the Court finds that the HHS Mandate cannot be blocked without enjoining Section 4980D, *and* that Section 4980D is a tax subject to the AIA, *and* that the AIA controls over the RFRA, the Plaintiffs are still entitled to an injunction. Where a plaintiff shows that the Government cannot ultimately prevail, a tax may be enjoined if the other equitable requirements (e.g. irreparable harm) are shown. *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. 1, 7 (1962); *see also Everett v. United States*, 10 F. App'x. 336, 337 (6th Cir. 2001) ("the statute is not applicable if the taxpayer was certain to succeed on the merits and could demonstrate that the collection would cause him irreparable harm"); *Vonderheide v. United States*, 178 F.3d 1297, 1999 WL 220134, at *1 (6th Cir. 1999) (AIA does not apply where government will not prevail and irreparable harm will occur because no other legal remedy exists); *Hezel v. United States*, 165 F.3d 27, 1998 WL 702311, at *1 (6th Cir. 1998) ("the statute is not applicable if the taxpayer was certain to succeed on the merits and could demonstrate that the collection would cause him irreparable harm.").[6]

The Plaintiffs requested relief under the more relaxed preliminary injunction standard requiring a mere likelihood of success on the merits. And the Plaintiffs have met that burden.

[6] This also shows that the AIA is not actually jurisdictional, which means that the Government can waive it.

But even were the Plaintiffs required to show certain—or actual—success on the merits, they have done so. For the reasons set forth in the Plaintiffs' earlier briefing, the HHS Mandate is unconstitutional and unlawful. And the Court should enjoin its application.

Analysis of Question 2

> **Question 2**: Other than possible exposure to the tax under 26 U.S.C. § 4980D, what enforcement risk do Plaintiffs face as of January 1, 2013, if they elect not to offer group health coverage with the challenged benefits?

The Plaintiffs are subject to other enforcement risks. In particular, the requirements of the HHS Mandate (as a part of the Affordable Care Act's minimum coverage requirements) are incorporated into ERISA. 29 USC § 1185d(a). And ERISA permits plan beneficiaries or the federal government to sue for those benefits included in the HHS Mandate. 29 USC § 1132(a). As of January 1, 2013, the Plaintiffs would be in violation of ERISA if they elect not to offer group health coverage with the challenged benefits and would be subject to enforcement under ERISA.

Analysis of Question 3

> **Question 3**: Is Plaintiffs' exposure for taxes imposed under section 4980D for failure to honor the challenged mandate limited to the lesser of 10% of the taxpayer's cost of the group health plan, or $500,000, under section 4980D(c)(3), at least until final resolution of Plaintiffs' challenges in this case?

No, the limitation in Section 4980D(c)(3) would not apply. This section only limits tax liability where the employer "did not know, and exercising reasonable diligence would not have known" that it failed to comply with the HHS Mandate, *id.* at (c)(1), or that its failure to comply was "due to reasonable cause and not to willful neglect," *id.* at (c)(4). First, this language appears designed to cover genuine oversights in creating a health plan. Autocam is not "mistaken" about the coverage requirements; it simply cannot accept them. The Government would certainly find that its refusal to comply would be willful, and Autocam has no reason to believe the Government would deem its failure to comply "reasonable cause" given the arguments it has advanced in this litigation. In any event, it is no great comfort to the Plaintiffs that the Government would be content to only penalize it in the amount allowed by the subsection for attempting to vindicate their rights. Second, the provisions at issue require that "it is established to the satisfaction of the Secretary," *id.* at (c)(1), and provides that the Secretary "may waive" a penalty, *id.* at (c)(4). The Secretary's discretion, though, is not something Autocam can count on and not something Autocam even appears to be eligible for. Thus, the limitation in Section 4980D(c)(3) does not apply.

CONCLUSION

For these reasons, the Court should grant the relief sought by the Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

Dated: December 17, 2012

/s/ Jason C. Miller
Jason C. Miller (P76236)
MILLER JOHNSON
250 Monroe Avenue, N.W., Suite 800
PO Box 306
Grand Rapids, Michigan 49501-0306
(616) 831-1700
millerj@millerjohnson.com

Patrick T. Gillen (P47456)
Fidelis Center for Law and Policy
CatholicVote Legal Defense Fund
Attorney for Plaintiffs
1025 Commons Circle
Naples, FL 34119
(734) 355-4728
ptgillen@avemarialaw.edu

Thomas Brejcha*
Peter Breen*
Thomas More Society
Attorneys for Plaintiffs
29 South LaSalle St. – Suite 440
Chicago, IL 60603
Tel. 312-782-1680
tbrejcha@thomasmoresociety.org
pbreen@thomasmoresociety.org
*Application for admission to be filed.

Attorneys for Plaintiffs

Exhibit A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AUTOCAM CORPORATION, *et al.*

Plaintiffs, Case No. 1:12-cv-01096-RJJ

v.

KATHLEEN SEBELIUS, *et al.*

Defendants.
____/

SUPPLEMENTAL DECLARATION OF JOHN KENNEDY

Pursuant to 28 U.S.C. § 1746, John Kennedy declares:

1. I am above the age of 18, of sound mind, and have personal knowledge as to the matters set forth herein.

2. I am the President and Chief Executive Officer of the Autocam corporations that are plaintiffs in this suit (referred to herein collectively as "Autocam").

3. Autocam's health insurance plan lost the possibility of grandfathering by virtue of a change in coverage effective on January 1, 2011. On that date, the plan was changed from having a $500 (single plan) deductible / $1,000 (family plan) deductible with 80-20% coinsurance to a high deductible health plan with a $2,000 (single) deductible / $4,000 (family) deductible in which Autocam contributes $1,500 in matching funds dollar for dollar annually to each employee's Health Savings Account (HSA).

4. The change was made as part of Autocam's effort to preserve a top-notch employee benefits plan with the same approximate out-of-pocket cost to each employee ($2,500 per year) while moving to a more consumer-oriented healthcare plan.

5. Autocam cannot comply with the HHS Mandate based on religious convictions. The actual expense for Autocam to comply with the HHS Mandate would be approximately $100,000 per year. The penalty for failure to comply, on the other hand, is approximately $19,000,000 per year based on the employees now covered by the plan.

6. I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 14, 2012

John Kennedy

Exhibit B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AUTOCAM CORPORATION, *et al.*

Plaintiffs,

Case No. 1:12-cv-01096-RJJ

v.

KATHLEEN SEBELIUS, *et al.*

Defendants.

______________________________/

DECLARATION OF JOHN KENNEDY

Pursuant to 28 U.S.C. § 1746, John Kennedy declares:

1. This Declaration is submitted in support of Plaintiffs' motion for preliminary injunction.

2. I am above the age of 18, of sound mind, and have personal knowledge as to the matters set forth herein.

3. I am the President and Chief Executive Officer of the Autocam corporations that are plaintiffs in this suit (referred to herein collectively as "Autocam").

4. Autocam does not meet the definition of a grandfathered plan. On January 1, 2011, Autocam's insurance plans were changed for reasons unrelated to the issues in this lawsuit. Autocam's plans have not continuously covered someone since March 23, 2010. Because of this, Autocam has been advised by its insurer and others that it is not considered grandfathered and will be subject to the HHS Mandate at its next plan year, which begins January 1, 2013.

5. We filed this lawsuit as soon as it was practical do so after consulting with our insurance provider. It took significant time to consult with our insurance provider and to asses any alternatives available to our employees in the private market and under the state exchanges contemplated by the PPACA. Autocam received its most recent (but still tentative) assessment of probable impact on its employees on October 2, 2012. It was not until that point that we had a realistic sense of the drastic and negative consequences our employees would suffer if Autocam was required to cease coverage in response to the HHS Mandate. This lawsuit was filed shortly after receiving that assessment. In particular, it took significant time to assess the status of the creation of the exchanges themselves in Michigan, as the political situation is in flux. It now seems certain that Michigan's exchanges will not take effect until 2014. This situation effectively leaves our employees with no other options to purchase affordable coverage comparable to Autocam's plan in 2013. In addition, the information about the coverage options that will be available to my employees indicates that many will be drastically and adversely affected if forced to seek coverage through the exchanges. My goal is to be able to preserve my existing plan, which provides generous benefits to my employees in keeping with my commitment to living out the social teachings of the Catholic Church, without being forced to cooperate in the provision of drugs and services that I believe are intrinsically evil.

6. Autocam currently provides generous wages and benefits to its employees. The average W-2 income for an hourly worker at Autocam is approximately $53,000 per year. Salaried employees typically earn more than hourly workers. Autocam also provides up to $1,500 per year towards a health savings account for our employees. These funds are owned by the employees and can be used for any lawful purpose.

7. We do not seek to control what an employee or his or her dependants do with the wages and healthcare dollars we provide. Our employees are free to make decisions with their

money—including the funds in their personal health savings account—that we do not agree with. Because our plan does not pay for the drugs and services that we object to, we are not engaging in material cooperation with evil.

8. Under Autocam's self-insured plan, application of the HHS Mandate would require us to directly pay for the purchase of drugs and services, including abortifacient drugs, in violation of our beliefs. Under Catholic doctrine, our financial support for these drugs and services through a self-insured plan would be material cooperation of evil. I cannot do that. But I do not want to terminate the benefits programs we have in place because all the information that I have currently available indicates that many of my employees will suffer drastic adverse consequences.

9. I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 13, 2012

John Kennedy