IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

THE RELIGIOUS SISTERS OF MERCY, *et al.*, *Plaintiffs,* v. NORRIS COCHRAN, Acting Secretary of the United States Department of Health and Human Service, *et al.*, *Defendants.*	No. 3:16-cv-386
CATHOLIC BENEFITS ASSOCIATION, *et al.* *Plaintiffs,* v. NORRIS COCHRAN, Acting Secretary of the United States Department of Health and Human Service, *et al.*,[1] *Defendants.*	No. 3:16-cv-432

MOTION TO MODIFY ORDER

Defendants hereby move the Court to modify its January 19, 2021 Memorandum and Order ("Order") to clarify (1) that Defendants do not violate the Order by taking any action under either Section 1557 or Title VII as to any entities that Defendants are unaware are covered by the scope of the Order, given that CBA has not identified its members; and (2) that the EEOC may take

[1] Acting Secretary Cochran has been automatically substituted for former Secretary Azar pursuant to Federal Rule of Civil Procedure 25(d).

administrative actions required by Title VII to allow individuals who allege discrimination to meet the statute's claim processing requirements. Defendants respectfully submit that the requested relief is necessary to meet the requirements of Federal Rule of Civil Procedure 65(d) and to ensure that individuals alleging discrimination are not prejudiced from effectively pursuing any separate suit under Title VII.

Defendants have contacted counsel for Plaintiffs regarding this motion, and Plaintiffs oppose.[2]

BACKGROUND

Given that the Court recently issued a lengthy decision in these cases, Defendants do not recount again here the full factual and procedural background. As relevant to this motion, on January 19, 2021, the Court granted Plaintiffs' motions for partial summary judgment and injunctive relief (Doc. Nos. 96, 98) as to their RFRA claims "challenging the interpretations of Section 1557 and Title VII that require the Catholic Plaintiffs to perform and provide insurance coverage for gender-transition procedures" and denied Plaintiffs' motions in all other respects. Order at 55. Specifically, the Court permanently enjoined HHS and its agents from

> interpreting or enforcing Section 1557 of the ACA, 42 U.S.C. § 18116(a), or any implementing regulations thereto against the Catholic Plaintiffs in a manner that would require them to perform or provide insurance coverage for gender-transition procedures, including by denying federal financial assistance because of their failure to perform or provide insurance coverage for such procedures or by otherwise pursuing, charging, or assessing any penalties, fines, assessments, investigations, or other enforcement actions.

Order at 55. The Court also permanently enjoined EEOC and its agents from

[2] Defendants are hopeful that the parties will reach agreement before the scheduled February 22, 2021 status conference that may render the relief requested in this motion unnecessary. Yet, Defendants file this motion out of an abundance of caution to account for the possibility that the deadline in Federal Rule of Civil Procedure 59(e) may be deemed to apply. *See* footnote 3, *infra*.

> interpreting or enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., or any implementing regulations thereto against the CBA and its members in a manner that would require them to provide insurance coverage for gender-transition procedures, including by denying federal financial assistance because of their failure to provide insurance coverage for such procedures or by otherwise pursuing, charging, or assessing any penalties, fines, assessments, investigations, or other enforcement actions.

Order at 56.

The Court instructed that the relief provided "shall be restricted to the Catholic Plaintiffs, their present and future members, anyone acting in concert or participation with them, and their respective health plans and any insurers or TPAs in connection with such health plan." *Id.* The Court also ordered that, to come within the scope of the permanent injunction, a CBA member must meet four criteria:

(a) The employer is not yet protected from interpretations of Section 1557 and Title VII that require the provision or coverage of gender transitions by any other judicial order;

(b) The CBA has determined that the employer meets the CBA's strict membership criteria;

(c) The CBA's membership criteria have not changed since the CBA filed its initial complaint on December 28, 2016; and

(d) The employer is not subject to an adverse ruling on the merits in another case involving interpretations of Section 1557 and Title VII that require the provision or coverage of gender transitions.

Order at 56–57.

ARGUMENT

The Court has discretion under Federal Rule of Civil Procedure 54(b) to modify an interlocutory order. *See Ames Dev., LLC v. Grand Forks Assocs. Ltd. P'ship*, Case No: 3:16-CV-257, 2018 WL 3309657, at *2 (D.N.D. May 10, 2018); *Jones v. Casey's General Stores*, 551 F.

Supp. 2d 848, 854 (S.D. Iowa 2008).[3] Defendants respectfully submit that modification of the Court's January 19, 2021 Order is necessary in two respects.

First, because the CBA Plaintiffs have not disclosed the identities of the CBA members, Defendants are unable to ascertain exactly what conduct the Court's injunction proscribes. Rule 65(d) requires that "[e]very order granting an injunction" must "state its terms specifically" and "describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Rule 65(d) "is designed to prevent uncertainty and confusion on the part of those to whom the injunction is directed, to avoid the possible founding of contempt citations on an order that is too vague to be understood, and to ascertain that the appellate court knows precisely what it is reviewing." *Calvin Klein Cosmetics Corp. v. Parfums de Coeur, Ltd.,* 824 F.2d 665, 669 (8th Cir.1987).

"The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid." *Schmidt v. Lessard*, 414 U.S. 473, 476 n.2 (1974)

[3] Defendants have styled this motion as one under Rule 54(b); however, Defendants acknowledge that the proper mechanism under the rules to seek modification of the injunctive relief contained in the Court's Order is not entirely clear in this Circuit. The plain language of Rule 54(b) authorizes the instant motion. Fed. R. Civ. P. 54(b); *see also Jones*, 551 F. Supp. 2d at 854. On the other hand, the Eighth Circuit has suggested that a motion for reconsideration of summary judgment orders that do not resolve all of the plaintiffs' claims should be construed as a Rule 60(b) motion. *Broadway v. Norris*, 193 F.3d 987, 989 (8th Cir. 1999). And to the degree the injunctive aspects of the Order constitute a "judgment," Rule 59(e) may apply. *See* Fed. R. Civ. P. 59(e); *see also Caney v. Bentley*, No. C16-2105-LTS, 2018 WL 9988205, at *1 (S.D. Iowa. June 4, 2018). In any event, the standards under Rule 54(b), Rule 59(e), and Rule 60(b) are largely similar. *See, e.g.*, *Ames Dev.*, 2018 WL 3309657, at *3 (looking to the standard under Rule 60(b) when analyzing a Rule 54(b) motion for reconsideration); *Kirt v. Fashion Bug #3252, Inc.*, 495 F. Supp. 2d 957, 965 (N.D. Iowa 2007) (concluding that same standard would apply under Rule 59(e) or Rule 54(b) in reconsidering a summary judgment ruling). Defendants respectfully submit that modification of the Court's Order is appropriate under any of those rules.

(citation omitted). Thus, courts have found injunctions too vague when they failed to provide sufficient notice of the individuals or entities against whom conduct was enjoined. *See, e.g.*, *Am. Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1411 (11th Cir. 1998) (injunction prohibiting entity from contacting "any donor whose name is contained on Plaintiff's [trade secret donor] lists" impermissibly vague because enjoined party had "no way to determine whether a given member of the public might happen to appear on" a list not in its possession); *NLRB v. Teamsters*, 419 F.2d 1282, 1283 (6th Cir. 1970) (injunction directing employers to cease from restraining or coercing the employees of a specified company "or the employees of any other employer within its jurisdictional territory" was too vague where, inter alia, the injunction failed to define the specified jurisdiction "and thus it provides no means of defining the people for whom protection is sought").

Here, because CBA has not disclosed the identities of its members, Defendants lack the necessary information to guard against the risk of contempt. Defendants therefore respectfully request that the Court modify the current injunction to make clear that they are not enjoined from taking any action against an entity if the agency officials directly responsible for taking any of the prohibited actions are unaware of the relevant entity's status as a CBA member or of the entity's relevant relationship to a CBA member. Defendants propose that, if either agency takes any of the prohibited actions against a CBA member or entity with a relevant relationship to a CBA member, the entity may notify the directly responsible agency official of the fact of the CBA member's membership in the CBA (and the satisfaction of criteria (a) through (d) described on pages 57–58 of the Court's order) or the entity's relationship to a CBA member. And once the official receives such notice from the CBA member and verification from CBA, the agency shall promptly comply with the Order as to the relevant entity.

Defendants respectfully submit that this proposed modification would continue to limit the relief the Court provided "to the Catholic Plaintiffs, their present and future actions, anyone acting in concert or participation with them, and their respective health plans and any issuers or TPAs in connection with such health plans," Mem. Op. at 56, while also providing necessary protection so that Defendants may otherwise carry out their statutory obligations without risk of violating the Order.[4] And, of course, once the responsible agency official is aware of the entity's status as a CBA member, or relevant relationship with such a member, the relevant agency will not proceed further to enforce Section 1557 and/or Title VII on the basis of the failure to perform or provide insurance coverage for gender-transition procedures.

Second, the EEOC requests modification of the Court's Order to permit it to take certain administrative steps necessary to process individuals' claims of discrimination; to inform entities—including the CBA members and entities that have relationships with them—that a claim of discrimination has been made against them; and to issue "right-to-sue" notices to protect the rights of claimants to bring suit on their own under Title VII if they so choose.

The need for these modification arises out of Title VII's unique statutory structure. Under Title VII, an individual who seeks redress for employment discrimination may not independently file suit in the first instance. Rather, the individual must start by filing an administrative charge of discrimination with the EEOC. *See* 42 U.S.C. § 2000e-5; 29 C.F.R. § 1601.7. Such charges must be filed within a strict time frame (within either 180 or 300 days of the alleged unlawful employment practice) in order for an individual to maintain a claim. *See* 42 U.S.C. § 2000e-

[4] Alternatively, CBA could provide Defendants with the identities of their members, and the identities of their respective health plans, issuers, and TPAs. Defendants' understanding, however, is that CBA is unwilling to provide that information. *See* CBA Reply at 12.

5(e)(1).[5] Once a charge is filed, the EEOC "shall serve a notice of the charge" upon the respondent "within ten days." 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.14(a). The EEOC must then investigate the charge and determine whether there is reasonable cause to believe that the charge is true. 42 U.S.C. § 2000e-5(b) (EEOC "shall make an investigation" and "shall" dismiss the charge and "promptly notify" the parties upon finding no reasonable cause, or if it finds cause, "shall" attempt to resolve the charge with the respondent); 29 C.F.R. § 1601.15.

If the EEOC dismisses a charge, the charging party may then bring its own suit against the employer named in the charge within 90 days of receipt of the Dismissal and Notice of Rights, which is often called a right-to-sue notice. *See* 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. §§ 1601.18(b) & 1601.19(a). Further, if the EEOC has not filed suit or entered into a conciliation agreement within 180 days after the charge is filed, the charging party may request a right-to-sue notice and file suit against the employer named in the charge within 90 days of receipt of the right-to-sue notice. *See* 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.28(a)(1); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 365 (1977) (holding that section 2000e-5(f)(1) is intended to enable an aggrieved person unwilling to await the conclusion of extended EEOC proceedings to institute a private lawsuit 180 days after a charge has been filed). Finally, if fewer than 180 days have passed

[5] Individuals interested in filing a charge of discrimination are encouraged to initiate the process themselves by submitting an "online inquiry" through EEOC's Public Portal and then scheduling an interview. *See* https://www.eeoc.gov/filing-charge-discrimination. Whether they have gone through this process, contacted the agency's Information Intake Group, or contacted an EEOC office directly, an individual's first contact with an EEOC employee will be with intake staff. EEOC's general practice is to prepare a formal charge of discrimination, called a "Form 5 Charge of Discrimination," after an intake officer clarifies the charging party's allegations. However, other documents may also qualify as a charge of discrimination, including letters and questionnaires sent to the EEOC by charging parties that satisfy the requirements of a charge. The EEOC may also receive charges from Fair Employment Practice Agencies, with whom EEOC has worksharing agreements, as well as other federal agencies. And the EEOC sometimes receives from charging parties or their attorneys completed "Form 5" charges of discrimination.

since the filing of the charge and the charging party requests a right-to-sue notice, the EEOC may issue the notice provided that the designated EEOC official determines "that it is probable that the Commission will be unable to complete its administrative processing of the charge within 180 days from the filing of the charge and has attached a written certificate to that effect." 29 C.F.R. § 1601.28(a)(2).

The current language of the Court's Order could arguably be interpreted to prohibit EEOC from accepting a charge on behalf of an individual alleging discrimination, from serving notice of the charge upon a CBA member, and from issuing a right-to-sue notice to individuals who allege discrimination. *See* Mem. Op. at 56 (prohibiting EEOC from, among other things, "charging" or "assessing any . . . investigations"). If the Order were to prohibit that conduct, it would interfere with individual claimants' ability to meet the preconditions in Title VII to bring suit for discrimination. *See* 42 U.S.C. § 2000e-5(e)(1), (f)(1); *see also Fort Bend Cnty., Texas v. Davis*, 139 S. Ct. 1843, 1851–52 (2019) (explaining that, while not jurisdictional, Title VII's claim-processing rules are mandatory and that the failure can comply is a "potentially dispositive defense").

It does not appear that the Court intended its injunction to create obstacles for private individuals to bring suit based on an alleged violation of Title VII. *See* Mem. Op. at 56 (declaring that "*EEOC's interpretation* of Title VII" violates RFRA (emphasis added)). Indeed, Plaintiffs brought suit only against federal government agencies, not private individuals, and those individuals' interests should not be prejudiced by the Court's Order. *Cf. Thompson v. Freeman*, 648 F.2d 1144, 1147 (8th Cir. 1981) ("[A] non-party may be enjoined under Rule 65(d) only when its interests closely identify with those of the defendant, when the nonparty and defendant stand in privity, or when the defendant represents or controls the nonparty." (quotations omitted).

However, unless the EEOC is able to accept charges and administratively process charges of discrimination, individual claimants may be unable to satisfy Title VII's claim processing requirements.

Accordingly, Defendants respectfully ask that the Court modify its Order to specify that, notwithstanding the Court's permanent injunction, EEOC may (1) take any action in connection with the acceptance of a charge for filing regardless of the source, including receiving an online inquiry via the agency's Public Portal or requesting or receiving a questionnaire or other correspondence from the charging party, when the charge concerns an allegation against a CBA member concerning the exclusion of gender-transition procedures from its insurance coverage; (2) accept a charge alleging that a CBA member does not provide insurance coverage for gender-transition procedures, and enter the charge into EEOC's computer systems; (3) serve notice of the charge upon a CBA member within ten days as required by 42 U.S.C. § 2000e-5(b); and (4) issue a right-to-sue notice to a charging party who has filed a charge against a CBA member concerning the exclusion of gender-transition procedures from its insurance plan in accordance with the requirements and procedures set forth in 42 U.S.C. § 2000e-5(b) & (f)(1) and 29 C.F.R. § 1601.28(a)(1) & (2).

CONCLUSION

For the foregoing reasons, Defendants respectfully ask that the Court modify its January 19, 2021 Memorandum and Order as proposed in the accompanying Proposed Order.

Dated: February 16, 2021

Respectfully Submitted,

BRIAN M. BOYNTON
Acting Assistant Attorney General

JENNIFER D. RICKETTS
Director, Federal Programs Branch

MICHELLE R. BENNETT
Assistant Director, Federal Programs Branch

/s/ *Bradley P. Humphreys*
BRADLEY P. HUMPHREYS
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L. Street, NW
Washington, DC 20005
Telephone: (202) 305-0878
Email: Bradley.Humphreys@usdoj.gov

Counsel for Defendants

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[PROPOSED] ORDER

Having considered Defendants' motion to modify the Court's January 19, 2021 Memorandum and Order ("Order"), any opposition submitted by Plaintiffs, and the entire record herein, IT IS HEREBY ORDERED:

The Court's Order is modified on page 57 to include the following language:

> Neither HHS nor EEOC violates this Order by taking any of the above-described actions against any CBA member, anyone acting in concert or participation with a CBA member, or a CBA member's health plans and any insurers or TPAs in connection with such health plans, if the agency

officials directly responsible for taking these actions are unaware of that entity's status as a CBA member or relevant relationship to a CBA member.

However, if either agency, unaware of an entity's status as a CBA member or relevant relationship to a CBA member, takes any of the above-described actions, the CBA member and the CBA may promptly notify a directly responsible agency official of the fact of the member's membership in the CBA (and the CBA's satisfaction of the (a)-(d) criteria, described above) or the entity's relevant relationship to a CBA member and its protection under this order. Once such an official receives such notice from the CBA member and verification of the same by CBA, the agency shall promptly comply with this order with respect to such member or related entity.

Nothing in this Order shall prevent EEOC from

(1) taking any action in connection with the acceptance of a charge for filing regardless of the source, including receiving an online inquiry via the agency's Public Portal or requesting or receiving a questionnaire or other correspondence from the charging party, when the charge concerns an allegation against a CBA member concerning the exclusion of gender-transition procedures from its insurance coverage;

(2) accepting a charge alleging that a CBA member does not provide insurance coverage for gender-transition procedures, and from entering the charge into EEOC's computer systems;

(3) serving notice of the charge upon a CBA member within ten days as required by 42 U.S.C. § 2000e-5(b); or

(4) issuing a right-to-sue notice to a charging party who has filed a charge against a CBA member concerning the exclusion of gender-transition procedures from its insurance plan in accordance with the requirements and procedures set forth in 42 U.S.C. § 2000e-5(b) & (f)(1) and 29 C.F.R. § 1601.28(a)(1) & (2).

SO ORDERED.

Dated: _____

_____
Peter D. Welte, Chief Judge
United States District Court