U.S. DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO.: 13-80990- DIMITROULEAS/Snow

KAWA ORTHODONTICS, LLP,

Plaintiff,

vs.

JACK LEW, *et al.*,

Defendants.
_____/

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Plaintiff Kawa Orthodontics, LLP ("Kawa Ortho"), by counsel and pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1, hereby moves this Court for summary judgment on all of its claims. Kawa Ortho respectfully submits that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law. The grounds for this motion are set forth more fully in the following Memorandum of Law.

MEMORANDUM OF LAW

I. Introduction.

This lawsuit raises a single, straightforward legal question: does the Executive Branch have the authority to ignore a clear, congressionally-imposed deadline affecting hundreds of thousands of employers and millions of employees across the country on a matter of unquestionable importance. One of the pillars of the Patient Protection and Affordable Care Act ("ACA") is the "employer mandate," which subjects certain large employers to tax penalties if they do not offer "affordable," "minimum essential" health insurance coverage to their

employees and their employees' dependents. Under the express terms of the ACA, large employers are obligated to offer such coverage beginning on January 1, 2014. They also are obligated to report information to the federal government about the insurance they do (or do not) offer to their employees and their employees' dependents. On or about July 2, 2013, Defendants unilaterally postponed the effective date of the "employer mandate" until "2015."

The answer to the question posed by this lawsuit is quite plainly "No." Defendants' delay of the mandate violates the Administrative Procedures Act ("APA"). It exceeds Defendants' statutory jurisdiction, authority, and limitations, is contrary to constitutional right, power, or privilege, and is otherwise not in accordance with law. Rejecting a date enacted into law by Congress and picking a new date more to the Executive Branch's liking is the epitome of arbitrary and capricious agency action. The Court should reject Defendants' lawlessness and restore the rule of law to the Executive Branch's implementation of the ACA. It should declare Defendants' postponement of the "employer mandate" to be unlawful, set aside Defendants' unlawful agency action, and reinstate the date established by Congress. The Court also should enjoin any further unauthorized delay of the mandate's effective date.

II. Statutory Background.

Under the ACA, most "large" employers, defined as employers who have more than 50 "full time equivalent" employees, face tax penalties if they do not offer "affordable," "minimum essential" health insurance coverage to their employees and their employees' dependents. 26 U.S.C. § 4980H. In addition, "large" employers also have certain annual reporting obligations under the ACA. 26 U.S.C. § 6056. These include having to certify whether they offer their full time employees and their employees' dependents the opportunity to enroll in "affordable," "minimum essential" health insurance coverage under an employer-sponsored plan, the length of

any waiting period, the months during which coverage was available, monthly premiums for the lowest-cost option, the employer plan's share of covered health care expenses, the number of full-time employees, and the name, address, and taxpayer identification number of each full-time employee. *Id.* Employers who "self-insure" have separate reporting obligations. 26 U.S.C. § 6055.

The ACA could not be any clearer: the obligation of employers with 50 or more "full time equivalent" employees to provide "affordable," "minimum essential" health insurance coverage to their employees and their employees' dependents under Section 4908H of Title 26 "shall apply to the months beginning after December 31, 2013." Pub. L. No. 111-148, § 1513(d), 124 Stat. 119, 256. Similarly, the reporting obligations under Section 6055 of Title 26 "shall apply to calendar years beginning after 2013." Pub. L. No. 111-148, § 1502(e), 124 Stat. 119, 252. Likewise, the obligations under Section 6056 of Title 26 "shall apply to the periods beginning after December 31, 2013." Pub. L. No. 111-148, § 1514(d), 124 Stat. 119, 257.

III. Factual Background.

Kawa Ortho incorporates herein by reference the Statement of Material Facts ("SOMF") it is filing contemporaneously with this motion pursuant to Local Rule 56.1. The material facts are summarized as follows.

Kawa Ortho is a Boca Raton based orthodontics and oral surgery practice that has been providing orthodontic treatment services to patients in Miami-Dade, Broward, and Palm Beach Counties for over 20 years. SOMF at ¶ 1. Kawa Ortho employs more than 50 full-time equivalent employees and offers these employees a choice of different group health insurance options as an employment benefit. SOMF at ¶ 2. Prior to July 2, 2013, Kawa Ortho spent

approximately 100 hours – which has an estimated value of approximately $1.2 million – and in excess of $5,000 in attorney's fees and costs in anticipation of the "employer mandate" provisions of the ACA taking effect on January 1, 2014. SOMF at ¶ 3. Kawa Ortho would not have made these substantial expenditures of time and resources in 2013 if the mandate had not been scheduled to take effect on January 1, 2014. SOMF at ¶ 4. Nor would it have incurred legal fees in 2013 in anticipation of the mandate taking effect on January 1, 2014. *Id.* It would have waited at least until 2014, if not later, to decide whether to expend its time and resources planning for the mandate, and may have decided not to expend any time and resources on the matter at all. *Id.*

On July 2, 2013, the U.S. Department of Treasury announced that the "employer mandate" was being delayed until 2015. SOMF at ¶ 5. This announcement was formalized on July 9, 2013, when the Internal Revenue Service issued Notice 2013-45, entitled "Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting) and 4980H (Employer Shared Responsibility Provisions)." SOMF at ¶ 6.

In addition to the "employer mandate" provisions of the ACA, the new health care law also contains a provision requiring employers to give notice to their employees about the availability of health insurance coverage through newly created public health insurance exchanges. SOMF at ¶ 7. The delay of the mandate created uncertainty about the notice requirement. Out of an abundance of caution, Kawa Ortho expended additional time and incurred additional expenses, including approximately $4,000 in additional attorney's fees, determining whether and how to comply with this exchange notice requirement. *Id.* Because of the delay of the "employer mandate" and continued uncertainty in the health insurance market in Florida and across the country associated with the implementation of the ACA, Kawa Ortho

anticipates that it will have to expend yet more time and resources in 2014 preparing for the mandate taking effect in 2015. SOMF at ¶ 8.

The effect of the delay is both costly and widespread. According to the White House's website, at least 200,000 employers in the United States employ more than 50 employees. SOMF at ¶ 10. Another government source, the Agency for Health Research and Quality of the U.S. Department of Health and Human Services, reports that the number of employers in the United States having more than 50 employees is as high as 1.6 million. SOMF at ¶ 11. In addition, according to the Congressional Budget Office, the delay of the "employer mandate" will result in an estimated loss of $10 billion in penalty payments by employers and approximately 1 million fewer people are expected to be enrolled in employment-based coverage in 2014 than the number previously projected, primarily because of the one-year delay in penalties on employers. SOMF at 12.

IV. Argument.

A. The Summary Judgment Standard.

Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The moving party "bears the initial responsibility of informing the district court of the basis for the motion" and identifying those portions of the record that "demonstrate the absence of a genuine issue of material fact." *Id.* at 323. Once the moving party has established the absence of a genuine issue of material fact, the non-moving party must go beyond the pleadings and by his own "affidavits, or by the 'depositions, answers to interrogatories, and admissions on

file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324. The non-moving party must rely on more than conclusory statements of allegations unsupported by facts. *Evers v. General Motors Corp.*, 770 F.2d 984, 986 (11th Cir. 1985).

As the question presented by this litigation is almost exclusively a question of law, there are no genuine disputes of material fact and the matter can appropriately be decided on summary judgment.

B. Defendants' Delay of the "Employer Mandate" Is Unlawful Under the APA.

Under the APA, agency action must be "set aside" if it is "in excess of statutory jurisdiction, authority, or limitations," "contrary to constitutional right, power, [or] privilege," or "otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (B), and (C). Agency action also must be "set aside" if it is "arbitrary [and] capricious." 5 U.S.C. § 706(2)(B). To evaluate the legality of an agency action, a court must measure it against the statutory directive. "If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (quoting *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *see also Toro v. Sec'y*, 707 F.3d 1224, 1228 (11th Cir. 2013); *Silva-Hernandez v. U.S. Bureau of Citizenship & Immigration Servs.*, 701 F.3d 356, 361 (11th Cir. 2012); *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011) (reiterating that an agency may not exceed a statute's clear boundaries); *Fin. Planning Ass'n v. Sec. and Exch. Comm'n*, 482 F.3d 481, 490 (D.C. Cir. 2007) (an agency's "failure to respect the unambiguous textual limitations" of a statutory provision is "fatal" to its regulatory efforts).

"Congress speaks through the laws it enacts" (*In re Aiken County*, 725 F.3d 255, 260 (D.C. Cir. 2013)), and the text of the ACA is clear and unambiguous. The ACA plainly states that the obligation of employers with 50 or more "full time equivalent" employees to provide "affordable," "minimum essential" health insurance coverage to their employees and their employees' dependents under Section 4908H of Title 26 "shall apply to the months beginning after December 31, 2013." Pub. L. No. 111-148, § 1513(d), 124 Stat. 119, 256. Similarly, the reporting obligations under Section 6055 of Title 26 "shall apply to calendar years beginning after 2013." Pub. L. No. 111-148, § 1502(e), 124 Stat. 119, 252. Likewise, the obligations under Section 6056 of Title 26 "shall apply to the periods beginning after December 31, 2013." Pub. L. No. 111-148, § 1514(d), 124 Stat. 119, 257. As a result, it is indisputable that the plain language of the ACA mandates that these obligations commence on January 1, 2014.[1] Defendants effectively conceded this fact when the U.S. Department of Treasury posted an announcement on its website stating that the "employer mandate" was being delayed until "2015." If Defendants believed that the language was not "clear and unambiguous," then they would not have had to "delay" anything. By seeking to delay these clear statutory mandates, Defendants "fail[ed] to respect the unambiguous textual limitations" of the ACA "employer mandate." *Fin. Planning Ass'n*, 482 F.3d at 490. For that reason alone, Defendants' action is "in excess of statutory jurisdiction, authority, or limitations," is contrary to their "constitutional right, power, [or] privilege," and is "not in accordance with law." 5 U.S.C. § 706(2)(A), (B), and

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[1] In addressing substantially similar language concerning the "individual mandate" provisions of the ACA, one court found, "[T]he date is definitively fixed in the Act and will occur in 2014, when the individual mandate goes into effect and the individual plaintiffs are forced to buy insurance or pay the penalty." *Florida. v. U.S. Dep't of Health and Human Servs.*, 716 F. Supp.2d 1120, 1145 (N.D. Fla. 2010), *aff'd in part, rev'd in part*, 648 F.3d 1235 (11th Cir. 2011), *aff'd in part, rev'd in part, Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

(C). By simply picking an alternative date apparently more to their liking than the date set by Congress, Defendants also acted arbitrarily and capriciously. 5 U.S.C. § 706(2)(B).

When it enacted the ACA, Congress made a deliberate policy choice to have the "employer mandate" obligations commence on January 1, 2014. Defendants seek to replace Congress' policy choice with their own policy choice, purportedly by providing "transitional relief" for 2014. Defendants' action is not "transitional relief." It is a deliberate and unequivocal policy change with very real consequences for hundreds of thousands of businesses and millions of employees across the country. SOMF at ¶¶ 10-12. It also will have a significant fiscal impact. According to the Congressional Budget Office, the delay of the "employer mandate" will result in an estimated loss of $10 billion in penalty payments by employers and approximately 1 million fewer people are expected to be enrolled in employment-based coverage in 2014 than the number previously projected, primarily because of the one-year delay in penalties on employers. SOMF at ¶ 12. Simply put, Defendants' unilateral postponement of the "employer mandate" is nothing short of a direct and deliberate disregard for clear policy choice made by Congress, as reflected in the unambiguous language of the ACA.

Nor is Defendants' "transitional relief" entitled to any *Chevron* deference. Where, as here, Congress has "unambiguously expressed [its] intent" through the plain language of a statute, no deference is afforded to an agency. *Chevron USA Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also Dimension Fin.*, 474 U.S. at 368 ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress."). To determine whether Congress' intent is clear, courts employ the traditional tools of statutory construction. *Silva-Hernandez*, 701 F.3d at 361. Courts must "begin by examining the text of the statute to determine whether its meaning is clear." *Harry v.*

Marchant, 291 F.3d 767, 770 (11th Cir. 2002) (*en banc*). They must also "presume that Congress said what it meant and meant what it said." *Id.* The U.S. Court of Appeals for the Eleventh Circuit has held, "Those who ask courts to give effect to perceived legislative intent by interpreting statutory language contrary to its plain and unambiguous meaning are in effect asking courts to alter that language." *CBS v. Primetime 24 J.V.*, 245 F.3d 1217, 1228 (11th Cir. Fla. 2001).

In the instant matter, Kawa Ortho asks the Court to do no more than require Defendants to apply the effective date of the "employer mandate" as unambiguously expressed by Congress in the ACA. It is Defendants who are, in effect, altering the plain language of the statute. IRS Notice 2013-45, which formalized Defendants' July 2, 2012 policy decision to delay the "employer mandate," states that the obligations of the "employer mandate" "will be fully effective for 2015." Nowhere in the ACA did Congress differentiate between the obligations it imposed on employers with more than 50 full-time equivalent employees in 2014 and the obligations it imposed on these "large" employers in 2015. Again, the plain language of the statute states that the obligations of the "employer mandate" under Section 4809H of Title 26 "shall apply to the months beginning after December 31, 2013" and that the obligations under Sections 6055 and 6056 of Title 26 "shall apply" "beginning after December 31, 2013." Pub. L. No. 111-148, §§ 1513(d) and 1514(d), 124 Stats. 119, 256-57. Kawa Ortho is merely asking that the plain language of the statute be restored. For that reason, Defendants' "transitional relief" is not entitled to, nor should it be afforded, *Chevron* deference.

In addition, in *In re Aiken County*, *supra*, another case that "raise[d] significant questions about the scope of the Executive's authority to disregard federal statutes," the Court declared that, "[u]nder Article II of the Constitution and relevant Supreme Court precedents, the President

must follow statutory mandates so long as there is appropriated money available and the President has no constitutional objection to the statute." 725 F.3d at 257, 259. At issue in *In re Aiken County* was a petition for writ of mandamus that sought to compel the Nuclear Regulatory Commission to adhere to a statutory deadline for completing the licensing process for approving or disapproving an application to store nuclear waste at Yucca Mountain in Nevada. As the Court explained:

> If the President has a constitutional objection to a statutory mandate . . . the President may decline to follow the law unless and until a final Court order dictates otherwise. But the President may not decline to follow a statutory mandate . . . simply because of policy objections. Of course, if Congress appropriates no money for a statutorily mandated program, the Executive obviously cannot move forward. But absent a lack of funds or a claim of unconstitutionality that has not been rejected by final Court order, the Executive must abide by statutory mandates. These basic constitutional privileges apply to the President and subordinate executive agencies.

725 F.3d at 259. In granting the petition, the Court concluded:

> It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law in the manner asserted in this case by the Nuclear Regulatory Commission. Our decision today rests on the constitutional authority of Congress and the respect that the Executive and the Judiciary properly owe to Congress in the circumstances here.

725 F.3d at 267.

The same is true in the instant matter. Defendants have not indicated that the President has a constitutional objection to the "employer mandate." Nor have Defendants suggested that they lack the funds necessary to implement the "employer mandate." Defendants simply seek to replace Congress' policy choice about when the "employer mandate" should take effect – January 1, 2014 – with their own policy choice – January 1, 2015. The constitutional authority of Congress and the respect that the Executive and the Judiciary properly owe to Congress

demands that Congress' policy choice prevail. Defendants' attempt to delay the effective date of the "employer mandate" is "in excess" of their "statutory jurisdiction, authority, or limitations," "not in accordance with law," "contrary to constitutional right, power, [or] privilege," and "arbitrary [and] capricious." 5 U.S.C. § 706(2)(A), (B), and (C). As a result, Defendants' action violates the APA and must be set aside.

C. Kawa Ortho Has Been Injured by Defendants' Unlawful Delay of the "Employer Mandate".

Nor can there be any genuine dispute of material fact that Kawa Ortho has been injured by Defendants' unlawful delay of the "employer mandate" or that Kawa Ortho has standing to seek legal remedies for its injury. Kawa Ortho must satisfy three familiar requirements to have standing under Article III of the Constitution: (1) "injury-in-fact"; (2) "a causal connection between the asserted injury-in-fact and the challenged action of the defendant"; and (3) "that the injury will be redressed by a favorable decision." *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 2013 U.S. App. LEXIS 22232, *10 (11th Cir. 2013); *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992)). "These requirements are the irreducible minimum required by the Constitution for a plaintiff to proceed in federal court." *Id.* at **10-11 (citing *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 664, 113 S. Ct. 2297, 2302, 124 L. Ed. 2d 586 (1993)).

In addition to past injury, a plaintiff seeking injunctive relief "must show a sufficient likelihood that he will be affected by the allegedly unlawful conduct in the future." *Id.* at *11 (quoting *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1284 (11th Cir. 2001)). Because injunctions regulate future conduct, a party has standing to seek injunctive relief only if

the party shows "a real and immediate – as opposed to a merely conjectural or hypothetical – threat of future injury." *Id.*; *Shotz*, 256 F.3d at 1081; *Wooden*, 247 F.3d at 1284 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 1665, 75 L. Ed. 2d 675 (1983)).

Kawa Ortho satisfies these elements in a way that cannot genuinely be disputed. It clearly has been injured and will continue to be injured for as long as the "employer mandate" is delayed. It expended substantial time and resources in anticipation of the mandate taking effect on January 1, 2014, the date set by Congress in the ACA. SOMF at ¶¶ 3-4 and 8. In incurring these "anticipatory compliance" costs, Kawa Ortho also incurred significant "opportunity costs," namely the estimated 100 hours of time it expended researching the ACA and the "employer mandate" and seeking and obtaining professional advice on how best to comply with the mandate. SOMF at ¶ 3. An "opportunity cost" recognizes that an opportunity given up by engaging in a particular activity is part of the cost of that activity. *See, e.g., Chronister Oil Co. v. Unocal Ref. and Mktg.*, 34 F.3d 462, 465 (7th Cir. 1994). Had Kawa Ortho not spent approximately 100 hours of time researching and seeking and obtaining professional advice on how best to comply with the mandate, it would have spent this time generating new patients for its practice. *Id.* Kawa Ortho estimates that it could have generated approximately $1.2 million in new revenue for its practice had it not spent approximately 100 hours of time determining how best to comply with the "employer mandate." *Id.*

It is well established that "anticipatory compliance" efforts constitute an "injury-in-fact" for purposes of standing. One particularly salient case, *Roman Catholic Archdiocese of New York v. Sebelius*, 907 F. Supp.2d 310 (E.D.N.Y. 2012), concerns a challenge to the ACA's "coverage mandate," which requires most group health insurance plans to provide coverage for, among other things, women's preventative care and screening, including contraception,

sterilization, and related counseling, without any form of cost-sharing. In *Roman Catholic Archdiocese of New York*, five employers affiliated with the Roman Catholic Church challenged the "coverage mandate" on religious freedom grounds. The Court found that the plaintiffs had standing:

> Plaintiffs here have established . . . present harms stemming from the future operation of the Coverage Mandate. These harms range from budgeting and administrative costs incurred in analyzing how to update their health plans once the Coverage Mandate becomes effective to diversion of funds away from ministries . . . Since each plaintiff employs numerous people, the practical realities of administering their employees' health care coverage require plaintiffs to undertake the preparations about which they now complain.

907 F. Supp.2d at 329-30. Kawa Ortho incurred these exact same type of "anticipatory compliance" costs, suffered an injury as a result, and will continue to be injured unless the delay is set aside.

At least two courts have held that "anticipatory compliance" costs constitute an "injury-in-fact" in legal challenges to the "employer mandate."[2] *Liberty University, Inc. v. Lew*, 2013 U.S. App. LEXIS 14052, **26-28 (D.C. Cir. July 11, 2013) (finding standing because the plaintiff "may well incur additional costs because of the administrative burden of assuring compliance with the employer mandate"); *Oklahoma v. Sebelius*, 2013 U.S. Dist. LEXIS 113232, **27-30 (E.D. Okla. Aug. 12, 2013) (same).

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[2] Based on media reports, a third court appears to have reached this same conclusion in a challenge to the "employer mandate," but the ruling was issued orally and a transcript has not yet been made available. The case is *Halbig v. Sebelius*, Case No. 13-623 (RWR) (D. District of Columbia). The oral ruling was made on October 22, 2013.

Numerous other courts also have held that "anticipatory compliance" costs constituted an "injury-in-fact" in legal challenges to the "individual mandate" provisions of the ACA.[3] One court declared, "It is established that the taking of current measures to ensure future compliance with a statute can constitute an injury." *Mead v. Holder*, 76 F. Supp.2d 16, 26 (D.D.C. 2011) (finding standing based on the plaintiffs' "needing to rearrange their finances now in anticipation of" the individual mandate). Other courts have ruled similarly. *Calvey v. Obama*, 792 F. Supp. 2d 1262, 1268 (W.D. Ok. 2011) (finding standing where "[i]t may be reasonably inferred from Plaintiffs' allegations that they must take steps now in preparation for the imminent requirement of the Act that they purchase health insurance"); *Goudy-Bachman v. U.S. Dep't of Health and Human Servs.*, 764 F. Supp.2d 684, 690-92 (M.D. Pa. 2011) (finding standing based on the plaintiffs' "financial planning and budgeting decisions [undertaken] in preparation for the implementation of the individual mandate"); *Thomas More Law Ctr. v. Obama*, 720 F. Supp.2d 882, 887-89 (E.D. Mich. 2010) (finding standing based on the plaintiffs' need to "reorganize their affairs" in order to comply with the "individual mandate"); *Florida*, 716 F. Supp.2d at 1145-47 (N.D. Fla. 2010) (finding standing based on a diversion of resources from "business endeavors" and a reordering of "economic circumstances" in order to comply with "individual mandate"). "Courts found that plaintiffs had standing because they were already incurring the opportunity costs of having to purchase health insurance – such as not purchasing a new car, reducing spending, or diverting money from other business goals." *Roman Catholic Archdiocese of New York*, 907 F. Supp. 2d at 329.

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[3] Of course, the individual mandate survived these and other legal challenges. *See generally Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

Other courts also have held that "anticipatory compliance" costs constitute "injuries-in-fact" in contexts having nothing to do with the ACA. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988) (finding booksellers had standing because they "w[ould] have to take significant and costly compliance measures"); *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 457-58 (D.C. Cir. 2012) (finding increased compliance costs constitute injury in fact sufficient to confer standing); *N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 122 (2d Cir. 2008); *State Farm Mut. Auto Ins. Co. v. Dole*, 802 F.2d 474, 480 (D.C. Cir. 1986) (finding suit ripe if challenged rule "would reasonably prompt a regulated industry, unwilling to risk substantial penalties by defying the policy, to undertake costly compliance measures"); *Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 287 (6th Cir. 1997) (finding standing based on compliance costs). Clearly, Kawa Ortho's "anticipatory compliance" efforts amply satisfy the "injury-in-fact" requirement of Article III standing.

Nor is Kawa Ortho's injury the least bit hypothetical or speculative. It is real. Kawa Ortho has already expended substantial time and expense time determining how best to comply with the "employer mandate" before the January 1, 2014 effective date. SOMF at ¶¶ 3-4 and 7-8. It also incurred substantial opportunity costs in doing so. *Id.* This injury will continue unless the unlawful delay is set aside. Kawa Ortho also reasonably believes that, even if the date set by Congress is not reinstated, it will have to expend yet more time and expense in anticipation of the new, unlawfully extended date. SOMF at ¶ 9. Consequently, there is a "real and immediate" threat of future injury as well. *Houston*, *supra* at *11.

Kawa Ortho's injury also is causally connected to Defendants' delay of the "employer mandate." In fact, were it not for the unlawful delay, Kawa Ortho would not have lost any of the value of the substantial time and resources it expended in anticipation of the mandate taking

effect on January 1, 2014. Like a litigant who spends its time and resources preparing for a trial, only to have the trial continued for a lengthy period of time, the loss of the time and resources Kawa Ortho has suffered and the opportunity costs it has incurred are directly, if not solely, the result of the delay. Also like a litigant whose trial has been continued, Kawa Ortho undoubtedly will have to spend yet more time and resources preparing for the new date when the mandate takes effect. SOMF at ¶ 9.

Finally, Kawa Ortho's injury will be redressed if the Court awards it the relief it seeks. Obviously, if the Court were to declare Defendants' delay of the mandate to be unlawful, set aside the unlawful delay and reinstate the date established by Congress, and enjoin Defendants from any further delays, Kawa Ortho would regain the value of the time and resources it expended and the opportunity costs it incurred. Thus, not only do the undisputed facts demonstrate that Kawa Ortho has standing to challenge Defendants' unlawful, unilateral delay of the mandate, but they also demonstrate that Kawa Ortho is entitled to relief.

V. Conclusion.

For the foregoing reasons, Kawa Ortho respectfully requests that the Court enter summary judgment in its favor on its APA claim against Defendants and declare Defendants' unilateral postponement of the "employer mandate" to be unlawful. The Court should also set aside Defendants' unlawful agency action, reinstate the date established by Congress, and enjoin any further unauthorized delay of the mandate's effective date.

Dated: December 13, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was electronically served through the Court's CM/ECF system, unless otherwise noted, on all counsel or parties of record on the Service List below, this 13th day of December, 2013.

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