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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

GREAT NORTHERN RESOURCES, INC., DYNAMIC SERVICE FIRE AND SECURITY, LLC, and WALTER VAN LEJA, on behalf of themselves and others similarly situated

Plaintiffs,

vs.

KATY COBA, in her Official Capacity as State Chief Operating Officer and Director of the Oregon Department of Administrative Services; OREGON DEPARTMENT OF ADMINISTRATIVE SERVICES; THE CONTINGENT; BLACK UNITED FUND OF OREON; DOES 1-10,

Defendants.

Case No. 3:20-cv-01866-IM (L)

State Defendants'

BRIEF CONCERNING WHETHER THOSE WHO FAILED TO SUBMIT GRANT APPLICATIONS BEFORE THE FUND CLOSED HAVE ANY CLAIM FOR RELIEF

INTRODUCTION

The Court questioned, and directed the parties to brief, whether those who failed to submit grant applications before the Fund closed have any claim for relief. The State Defendants provide this brief in response, explaining that they do not.

A plaintiff must demonstrate standing for each asserted claim and each form of relief sought, meaning that a plaintiff must establish standing separately for prospective injunctive relief and retrospective damages relief. Two of the named plaintiffs here, Dynamic Service Fire and Security ("Dynamic") and Mr. Van Leja (collectively, the "Non-Applicants") did not apply to the Fund before it closed to new applications on December 8, 2020, and therefore cannot apply before it expires on December 30, 2020. They cannot establish standing to pursue either type of relief.

Where a plaintiff posits an equal protection challenge and seeks to enjoin an ongoing program, that plaintiff need not actually bid or apply to establish standing, but rather must only demonstrate the plaintiff is "able and ready" to bid or apply, "and that a discriminatory policy prevents [plaintiff] from doing so on an equal basis." *Northeastern Florida Contractors v. City of Jacksonville*, 508 U.S. 656 (1993). That demonstration requires more, however, than a mere stated intention to apply or an application for the purposes of raising a generalized challenge. Here, Dynamic and Mr. Van Leja neither allege nor demonstrate that they are "able and ready" to apply – only that they would "wish to" apply *if* the Court intervenes to rewrite the Oregon Emergency Board's allocation, and the contract between the Department of Administrative Services ("DAS") and The Contingent, to omit race-based criteria. This expressed desire to apply if the Fund's requirements change—that is, if the Plaintiffs prevail in the very lawsuit they otherwise lack standing to bring—is insufficient to establish standing as a matter of law.[1]

[1] As discussed briefly below in Section B.3, the Court cannot, consistent with separation of powers principles and Oregon's severability statute, accept Plaintiffs' invitation to (1) rewrite the Emergency Board's allocation and the Grant Agreement with The Contingent so as to continue the Fund's administration past the December 30 expiration date, and (2) require further awards from the Fund after severing race-conscious criteria.

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Further, even if the Non-Applicants had alleged that they were "able and ready," which they did not, any claim for injunctive relief that they might have had is now moot because the application period closed on December 8, 2020 and the Fund expires on December 30, 2020. The Ninth Circuit recently made clear that where, as here, a challenged law or government program expires, the action presumptively is moot and appropriate for dismissal unless there is evidence supporting a reasonable expectation that the legislative body is likely to enact the same or substantially similar legislation in the future. *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1197-98 (9th Cir. 2019) (en banc). At no point during the three rounds of injunction briefing in this consolidated proceeding has any plaintiff presented such evidence.

Nor can Non-Applicants establish standing to pursue a damages claim. While in the context of an ongoing government set-aside program the inability to compete on "equal footing" can be a sufficient injury to justify injunctive relief, and in that context a plaintiff need only show that he is "able and ready," a plaintiff asserting standing in the damages context must show "more than that." *Braunstein v. Arizona Dep't of Transp.*, 683 F.3d 1177, 1186 (9th Cir. 2012). To wit, he must "demonstrate that, under a race-neutral policy, he would have received the benefit for which he now seeks compensation." *Donahue v. City of Boston*, 304 F.3d 110, 117 (1st Cir. 2002) (citing *Texas v. Lesage*, 528 U.S. 18, 21 (1999)). In other words, if the Non-Applicants are unable to establish that "they would have received the benefit [they] sought under a race-neutral policy," their claims should be dismissed for lack of standing. *See id.* Here, they cannot make the required showing because anyone who did not timely apply before the Fund's closure and expiration is ineligible. As such, anyone who did not apply cannot demonstrate that a race-blind approach would have resulted in their receiving the benefit – whether the named-plaintiff Non-Applicants or the non-applicants in the putative class. The Fund's closure and expiration are race-neutral, apply to all, and foreclose any argument that Non-Applicants would receive a benefit.

In sum, those who did not timely apply to the Fund have no viable claims for relief because they lack standing and any injunctive relief claims are moot.

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RELEVANT FACTUAL BACKGROUND

As the Court knows, this lawsuit concerns the Oregon Emergency Board's allocation of $62 million to DAS for a grant to defendant The Contingent, an Oregon-based non-profit with existing programs that serve Oregon's Black community. Pursuant to the Emergency Board's allocation, The Contingent was to use the granted Coronavirus Relief Fund ("CRF") funds to establish and administer a program known as the Oregon Cares Fund for Black Relief and Resiliency (the "Fund").

On December 8, 2020, The Contingent announced that it would no longer accept applications for the Fund. As The Contingent has explained to this Court, The Contingent did so because the Fund was oversubscribed: there were more applicants than available funds. (*See* Dkt. No. 45 at 6-7.) Furthermore, the Fund, on December 30, 2020, expired according to the terms of the Grant Agreement between The Contingent and DAS, and the requirements of the Emergency Board's allocation to DAS. (Dkt. No. 48, Ex. 1 § 3.)

Plaintiff Great Northern Resources sued on October 29, 2020, challenging the Fund's constitutionality. (ECF No. 1.) Great Northern had applied for relief through the Fund and received final denial of its application on November 9, 2020.

On Sunday, December 6, Plaintiffs filed their "First Amended Class-Action Complaint." The Complaint added Dynamic Service and Van Leja, and purports to bring suit on behalf of themselves and a class defined as "all current and future individuals, families, and businesses who (1) live or are based in Oregon; (2) have experienced or are experiencing hardship due to COVID-19; and (3) do not self-identify as [B]lack, and who therefore have been or are currently being disqualified from the relief from the Fund on account of race." (Am. Compl. ¶ 68.)

While Great Northern applied to the Fund and was rejected on grounds other than race, neither Dynamic nor Mr. Van Leja applied at all. With respect to Dynamic, the Complaint alleges only that Dynamic "wishes to apply for relief from the Fund." (Am. Compl. at p. 7, Heading C.) Dynamic further alleges that it "intends to apply and will apply for relief from the Fund if and

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when the courts enjoin the enforcement of the racial exclusions that render Dynamic Service ineligible for relief." (Am. Compl. ¶ 42.) Dynamic also alleges that "it has sustained and is continuing to suffer injury in fact by being disqualified for a government on account of race, and by being forced to compete in a race-based system for government benefits." (Am. Compl. ¶ 44.)

With respect to Mr. Van Leja, the Complaint alleges he "wishes to apply for individual and family relief from the Fund, but he is ineligible for this relief because he is not black [sic]." (Am. Compl. ¶ 47.) The Complaint also alleges that Mr. Van Leja "intends to apply and will apply for individual and family relief from the Fund if and when the courts enjoin the enforcement of the racial exclusions that render Mr. Van Leja and his family ineligible for relief." (Am. Compl. ¶ 48.) Like Dynamic, Mr. Van Leja alleges that he is sustaining injury by this disqualification. (Am. Compl. ¶ 50.)

ARGUMENT

A. Plaintiffs Bear the Burden of Establishing Standing for Each Claim and Form of Relief Sought.

1. Standing Is a Threshold Issue.

Standing is a "threshold matter central to [the Court's] subject matter jurisdiction." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 978 (9th Cir. 2011). A "'fundamental aspect of standing' is that it focuses primarily on the party seeking to get his complaint before the federal court rather than 'on the issues he wishes to have adjudicated.'" *United States v. Richardson*, 418 U.S. 166, 174 (1974) (quoting *Flast v. Cohen*, 392 U.S. 83, 98 (1968)). "In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue . . . ." *Flast*, 392 U.S. at 99-100. A proper party is required so that federal courts will not be asked to decide "ill-defined controversies over constitutional issues" or "a case which is of a hypothetical or abstract character." *Id.* at 100. "[T]he standing inquiry requires careful judicial examination of . . . whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 751-

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