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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,

v.

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 Oregon**; **DOES 1–10**,

Defendants.

Case No. 3:20-cv-01866-IM

Plaintiffs' Reply to Nonprofit Defendants' Brief Re: Whether Those Who Failed To Submit Grant Applications Before The Fund Closed Have Any Claim For Relief

The Court's order of December 18, 2020, instructed us to brief "whether those who failed to submit grant applications before the Fund closed have any claim for relief." It did not ask us to brief whether a class should be certified, nor did it ask for briefing on the propriety of the class definition proposed in the first amended complaint.

The answer to the Court's question is that those who failed to apply before the Fund closed will have a claim for relief if they were "able and ready" to apply, or if they are "likely to apply . . . in the reasonably foreseeable future if" if the racial exclusion were enjoined. *See Carney v. Adams*, No. 19-309 (Dec. 10, 2020), slip op. at 6, 9–11. The nonprofit defendants appear to agree with this. *See* Nonprofit Defs.' Br. (ECF No. 66) at 1 (acknowledging that the "able and ready" standard applies). And the nonprofit defendants do not contest Mr. Leja's sworn declaration that both he and Dynamic Services were "able and ready" to apply to the Fund and have not done so "only" because of the racial exclusion. *See* Leja Decl. (ECF No. 39-2) at ¶¶ 11–12.

Instead, the nonprofit defendants spend the bulk of their brief complaining about the proposed class definition, which (in the defendants' view) is overly broad because it includes individuals who lack Article III standing. *See* Nonprofit Defs.' Br. (ECF No. 66) at 12–16. That is an issue for the Court to resolve if and when the plaintiffs move for class certification. A Court should not be issuing advisory opinions on the propriety of a class definition before the plaintiffs have moved for certification under Rule 23. And the plaintiffs are not even bound by the class definition in their complaint, and may amend that definition before seeking certification. All of this discussion in the nonprofit defendants' brief is premature, and it goes beyond the solitary issue that the Court's order instructed the parties to address.

The nonprofit defendants also complain that the plaintiffs "have presented no evidence establishing that all persons share Plaintiffs' grievance about the Fund."

Nonprofit Defs.' Br. (ECF No. 66) at 5. But the plaintiffs are not required to make such a showing at this stage of the litigation, as we have not yet moved for class certification. If and when the plaintiffs move for class certification, the Court can consider the class definition that the plaintiffs propose at that time, which need not track the class definition that appears in the first amended complaint. *See Chapman v. First Index, Inc.*, 796 F.3d 783, 785 (7th Cir. 2015). Nothing prevents the plaintiffs from asking this Court to certify a class that consists only of those who were "able and ready" to apply for relief, including those who never submitted an application because it would have been futile for them to do so. And nothing prevents the plaintiffs from asking the Court to certify an opt-in class that would require individualized proof that a class member is "able and ready" to apply to the Fund, and would have applied in the absence of the unlawful racial exclusion.

The nonprofit defendants' mootness argument is wrong for the reasons provided in our reply to the state defendants. *See* ECF No. 73 at 2–4. It remains possible for this Court to grant prospective relief, notwithstanding the defendants' efforts to close the fund to new applicants, because the remaining $8.8 million is being held in escrow and the plaintiffs are seeking a remedy that would require those funds to be distributed according to race-neutral criteria. *See id.*; *see also Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) ("A case becomes moot, however, 'only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" (*quoting Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012)); *United States v. Figueroa-Ocampo*, 494 F.3d 1211, 1217 (9th Cir. 2007) ("[T]he possibility of relief is sufficient to prevent mootness."); *Center for Biological Diversity v. Export–Import Bank of the United States*, 894 F.3d 1005, 1011 (9th Cir. 2018) ("To establish mootness, Defendants must show that 'there is no longer a possibility that [Plaintiffs] can obtain relief for [their] claim.'" (citation omitted)). The defendants do not believe that the plaintiffs are entitled to this remedy, but that goes to the merits and has

nothing to do with mootness. It certainly *possible* for the Court to grant prospective relief that redresses the injuries that Mr. Leja and Dynamic Service have alleged—it needs only to release the funds and order the defendants to distribute them on a race-neutral basis, without any preference given to those who applied when non-black applicants were barred from obtaining relief.

The nonprofit defendants try to get around this by pointing out that the first amended complaint does not specifically ask for this remedy. *See* Nonprofit Defs.' Br. (ECF No. 66) at 17. The reason for that is obvious: The defendants did not close the Fund to new applicants until *after* the plaintiffs filed their first amended complaint and added Leja and Dynamic Service to the lawsuit. So of course the first amended complaint does not specifically request relief that would reopen the Fund to new applicants and prohibit the defendants from allocating the remaining funds according to first-come-first-served. Litigants are not capable of anticipating their opposing party's next move through divination. But no matter: The first amended complaint *does* ask for "all other relief that the Court may deem just, proper, or equitable, or to which the plaintiffs and putative class members may be justly entitled,"[1] and that is all that is needed to preserve a remedy that is not specifically spelled out in the pleadings. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016); Fed. R. Civ. P. 54(c) ("Every other final judgment should grant the relief to which each party is entitled, *even if the party has not demanded that relief in its pleadings.*" (emphasis added); *Jet Inv., Inc. v. Department of Army*, 84 F.3d 1137, 1143 (9th Cir. 1996) ("[R]elief in damages is not foreclosed by plaintiff 's failure to ask for damages in prayer."); *see also New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1535 (2020) (Alito, J., dissenting) (collecting authorities).

1. First Amended Complaint (ECF No. 32) at ¶ 79(e).

The nonprofit defendants also contend that this Court cannot enjoin them from awarding the remaining funds according to first-come-first-served. *See* Nonprofit Defs.' Br. (ECF No. 66) at 17–18. But this argument goes to the merits; it does not support a finding of mootness. The issue of mootness turns on whether it is *possible* for a court to grant relief that would redress the injury that the plaintiffs allege; it is not concerned with whether a plaintiff can *ultimately obtain* the remedy that it requests. But in all events, the nonprofit defendants are wrong to insist that the Court is powerless to enjoin from distributing the remaining funds according to first-come-first-served. The entire application process has been tainted by an unlawful racial exclusion that deterred non-black individuals from applying, and distributing the remaining funds according to first-come-first-served would aggravate rather than eliminate the unlawful racial preference that the defendants established. It is certainly permissible for a court to require that the remaining funds be allocated according to a new process that is open to members of all races on equal terms; indeed, a remedy of that sort would be compelled if the Court were to find the racial exclusion unconstitutional.

Finally, the nonprofit defendants are wrong to contend that our requested remedy would violate the holding of *Planned Parenthood of Greater Washington & North Idaho v. U.S. Dep't of Health and Human Services*, 946 F.3d 1100 (9th Cir. 2020). *Planned Parenthood* holds that:

> A court does not have the power to decide the winner of, or to establish the criteria for, a grant competition, at least in this circumstance, but a court does have the power to decide that particular criteria are impermissible.

Id. at 1109. The plaintiffs, however, are *not* asking this Court to dictate any particular method of distributing the remaining funds. They are seeking only a remedy that would prevent the defendants from allocating the funds according to a process that is tainted by the unlawful racial exclusion. The current applicant pool has been skewed

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