

20 pages
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IN THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

KIRBY VINING)
16 Franklin Street, N.E.)
Washington, DC 20002)

Plaintiff,)

vs.)

EXECUTIVE BOARD OF THE)
DISTRICT OF COLUMBIA HEALTH)
BENEFIT EXCHANGE AUTHORITY,)
1100 15th Street, N.W., 8th Floor)
Washington, DC 20005,)

and)

MILA KOFMAN, in her official)
capacity as Executive Director of the)
District of Columbia Health Benefit)
Exchange Authority,)
1100 15th Street, N.W., 8th Floor)
Washington, DC 20005,)

and)

DISTRICT OF COLUMBIA HEALTH)
BENEFIT EXCHANGE AUTHORITY,)
1100 15th Street, N.W., 8th Floor)
Washington, DC 20005,)

Defendants.)

Serve **Executive Office of the Mayor**)
for the District of Columbia,)
1350 Pennsylvania Avenue, N.W.,)
Suite 316, Washington, DC 20004; and)
Serve **Office of the Attorney General**)
for the District of Columbia, 441 4th)
Street, N.W., 6th Floor South,)
Washington, D.C. 20001.)

Case Number: 14 - 0006496

FILED
CIVIL ACTIONS BRANCH
OCT 15 2014
Superior Court of the
District of Columbia
Washington, D.C.

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 COMPLETED

Case: 2014 CA 006496 B

BY: CAGCOJF

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
AND, IN THE ALTERNATIVE, PETITION FOR
WRIT OF MANDAMUS**

Plaintiff Kirby Vining, by and through his attorneys, brings this action for declaratory and injunctive relief against the Executive Board of the District of Columbia Health Benefit Exchange Authority, Mila Kofman, in her official capacity as Executive Director of the District of Columbia Health Benefit Exchange Authority, and the District of Columbia Health Benefit Exchange Authority. Plaintiff seeks a judgment declaring that the U.S. Congress' participation in the District of Columbia's "Small Business Exchange" is unlawful and an injunction prohibiting Defendants from allowing Congress to participate in the exchange or expending taxpayer dollars on Congress' participation. In the alternative, Plaintiff petitions for a writ of mandamus ordering Executive Director Kofman to cease and desist from allowing Congress to participate in the exchange. As grounds therefor, Plaintiff alleges as follows:

PARTIES

1. Plaintiff Kirby Vining is a taxpayer of the District of Columbia, residing at 16 Franklin Street, N.E., Washington, DC 20002. He has been a taxpayer, residing at that address since 1986. As a taxpayer of the District of Columbia, Plaintiff has the right to initiate a suit in equity to prevent the illegal use of public funds. *Calvin-Humphrey v. District of Columbia*, 340 A.2d 795, 799 (D.C. 1975); *see also District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 10 (D.C. Cir. 1988); *Roberts v. Bradfield*, 12 App. D.C. 453, 459 (D.C. 1898).

2. Defendant Executive Board of the District of Columbia Health Benefit Exchange Authority ("the Executive Board") is the governing body of the District of Columbia Health

Benefit Exchange. D.C. Code § 31-3171.05(a). The Executive Board has the express authority to sue and be sued. D.C. Code § 31-3171.06(c)(2).

3. Defendant Mila Kofman is the Executive Director of the District of Columbia Health Benefit Exchange Authority (“the Executive Director”). This action is brought against Executive Director Kofman in her official capacity.

4. Defendant District of Columbia Health Benefit Exchange Authority is an independent authority of the District of Columbia government. D.C. Code § 31-3171.02(a).

JURISDICTION

5. The Court has jurisdiction over this action pursuant to D.C. Code § 11-921(a).

FACTUAL ALLEGATIONS

6. The Patient Protection and Affordable Care Act (“ACA”) requires each State and the District of Columbia to establish two marketplaces for the purchase of health insurance: an “American Health Benefit Exchange” for individuals (“the Individual Exchange”) and a “Small Business Health Options Program” for small businesses (“the Small Business Exchange” or “the Exchange”).

7. In March 2012, the Council of the District of Columbia (“D.C. Council”) enacted “The Health Benefit Exchange Authority Establishment Act of 2011” (“the Exchange Act”) to comply with the ACA.

8. The Exchange Act established the “District of Columbia Health Benefit Exchange Authority” (“the Exchange Authority” or “the Authority”) and directed the Exchange Authority to create the two exchanges required by the ACA.

9. The Exchange Act also created an executive board and an executive director. Under the Act, the Executive Board governs the Exchange Authority generally and the Executive

Director serves as chief administrative officer and directs, administers, and manages the operations of the Authority.

10. To finance the Exchange Authority, the Act created the “District of Columbia Health Benefit Exchange Authority Fund” (“the Exchange Fund”). Among other monies, the Exchange Fund consists of monies from the General Fund – taxpayer money – appropriated by a line item in the annual budget approved by the D.C. Council.

11. In Fiscal Year 2013, the D.C. Council appropriated \$10,915,000 from the General Fund to the Exchange Fund.

12. In Fiscal Year 2014, the D.C. Council appropriated \$66,140,000 from the General Fund to the Exchange Fund.

13. As of October 1, 2014, the D.C. Council had not approved a budget for Fiscal Year 2015.

14. Monies appropriated from the General Fund to the Exchange Fund were used to establish the Small Business Exchange and, on information and belief, are being used to administer and operate the Exchange.

15. The Small Business Exchange began operating in October 2013.

16. Under the Exchange Act, a small business is a single employer having 50 or fewer full-time employees. D.C. Code § 31-3171.01(16)(A). Only small businesses that elect to provide coverage to all eligible employees or all eligible employees principally employed in the District of Columbia are eligible to participate in the Small Business Exchange. D.C. Code § 31-3171.01(11).

17. Since November 2013, the Exchange Authority has allowed the U.S. House of Representatives (“the House”) and the U.S. Senate (“the Senate”) (collectively “Congress”) to

use the Small Business Exchange to provide health insurance to some (but not all) congressional employees, including members of Congress, and these employees' spouses and dependents.

18. At all relevant times, the Executive Board and Executive Director Kofman knew that the House and the Senate were participating in the Small Business Exchange to provide health insurance to some (but not all) congressional employees. Beginning in early November 2013, the Exchange Authority conducted outreach efforts to the House and Senate about Congress' participation in the Small Business Exchange and provided weekly support sessions to assist members of Congress and their staffs with enrollment. These outreach efforts, weekly support sessions, and Congress' participation in the Exchange generally were discussed at a November 13, 2013 meeting of the Executive Board, and on November 20, 2013, Executive Director Kofman testified before the Senate's Small Business and Entrepreneurship Committee about Congress' participation in the Small Business Exchange. On information and belief, the Executive Board and Executive Director Kofman authorized and approved Congress' participation in the Small Business Exchange.

19. Neither the House nor the Senate is a small business under the Exchange Act, as each has more than 50 full-time employees.

20. When Congress applied to participate in the Small Business Exchange, representatives falsely asserted that the House and the Senate each employ 50 or fewer full-time employees. Specifically, records provided by the Exchange Authority in response to a Freedom of Information Act request show that both the House and the Senate falsely claimed that they each employ only 45 full-time employees.

21. On information and belief, the Executive Board and Executive Director Kofman knew that the House and the Senate each have more than 50 full-time employees and knew or should have known that Congress' certifications to the contrary were false.

22. At least 12,359 congressional employees and their spouses and dependents had obtained health insurance through the Small Business Exchange as of February 9, 2014. These 12,359 persons represent approximately 86 percent of the 14,289 persons enrolled in the Small Business Exchange between October 1, 2013 and September 9, 2014.

COUNT ONE
(Taxpayer Action – Declaratory and Injunctive Relief)

23. Plaintiff reaffirms paragraphs 1-22 as though fully restated herein.

24. Under the Exchange Act, both the House and the Senate are ineligible to participate in the Small Business Exchange because they each employ more than 50 full-time employees.

25. By allowing Congress to participate in the Small Business Exchange, Defendants are exceeding their lawful powers and operating the Small Business Exchange in an illegal, unlawful, and *ultra vires* manner.

26. Because the Small Business Exchange is financed through measurable appropriations from the General Fund and Defendants are exceeding their lawful powers and operating the Small Business Exchange in an illegal, unlawful, and *ultra vires* manner, Defendants have injured Plaintiff irreparably in his/her interests as a taxpayer and will continue to injure Plaintiff irreparably unless and until Congress' participation in the Exchange is declared unlawful and Defendants are enjoined from allowing Congress to continue to participate in the Exchange.

27. Plaintiff has no adequate or alternative remedy at law.

COUNT TWO
(Writ of Mandamus)

28. Plaintiff reaffirms paragraphs 1-27 as though fully restated herein.

29. Because the House and the Senate each employ more than 50 full-time employees, Defendant Kofman had a clear, non-discretionary, ministerial duty to deny them participation in the Small Business Exchange.

30. Defendant Kofman has failed and is failing to carry out this duty and will continue to fail to carry out this duty unless ordered to do so.

31. As a taxpayer and resident of the District of Columbia, Plaintiff has a clear and indisputable right to have Defendant Kofman carry out her public duties.

32. Plaintiff has no adequate or alternative means to obtain relief.

WHEREFORE, Plaintiff prays that the Court: (a) declare the House's and the Senate's participation in the Small Business Exchange to be unlawful; (b) enjoin Defendants from continuing to allow the House and the Senate to participate in the Small Business Exchange, or at a minimum, from expending further taxpayer funds on the House's and Senate's participation in the Small Business Exchange; (c) issue a writ of mandamus ordering Defendant Kofman to deny the House and the Senate further participation in the Small Business Exchange; (d) award Plaintiff reasonable attorneys' fees and costs; and (e) order such other and further relief as the Court finds just and equitable.

Dated: October 15, 2014

Respectfully submitted,



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