SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

KIRBY VINING, Plaintiff, v. EXECUTIVE BOARD OF THE DISTRICT OF COLUMBIA HEALTH BENEFIT EXCHANGE AUTHORITY, et al. Defendants.	Case No. 14-6496 Judge Herbert B. Dixon, Jr. Next Event: Initial Conference January 16, 2015

DEFENDANTS' REPLY
TO PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS

Defendants Executive Board of the District of Columbia Health Benefit Exchange Authority ("the Executive Board"), District of Columbia Health Benefit Exchange Authority ("the Authority"), and Mila Kofman (in her official capacity as Executive Director of the Authority), by and through their attorneys, hereby file this Reply to the Opposition filed by Plaintiff Kirby Vining on December 12, 2014, to Defendants' Motion to Dismiss the Complaint.

Plaintiff's opposition failed to show how he has either standing or a legal basis to proceed with claims that it is unlawful for Members of Congress and designated staff to purchase insurance through the District of Columbia's Small Business Health Options Program ("SHOP" or "the SHOP Exchange"). First, Defendant's motion established that as a matter of public record, no District taxpayer money was used to fund the operation of the D.C. Small Business Exchange, so Plaintiff's purported taxpayer standing does not exist. Plaintiff does not dispute this fact, and has otherwise failed to explain how District taxpayer standing can exist when there has been no expenditure of District taxpayer dollars. Second, Defendants provided clear legal

authority that District of Columbia law limiting the small business marketplace to small employers does not apply to Members of Congress and their staff because it is preempted by the Affordable Care Act and federal regulations requiring them to enroll on the SHOP Exchange in order to obtain an employer contribution from the federal government. Plaintiff has all but ignored this conflict preemption claim, attempting instead to challenge preemption theories that Defendant did not even make. No matter how Plaintiff wants to cast his argument, it fails as a matter of law and Plaintiff is not entitled to either an injunction or the extraordinary remedy of mandamus relief. The Defendants' motion should be granted and the Plaintiff's case dismissed with prejudice.

I. PLAINTIFF FAILS TO SHOW TAXPAYER STANDING TO BRING THIS CLAIM

Plaintiff fails to overcome the insurmountable problem he has with establishing taxpayer standing to bring this lawsuit. The law is clear that a municipal taxpayer does not have standing to challenge a municipal program if municipal taxpayer funds are not used to support the program in question. *See*, *e.g.*, *Ehm v. San Antonio City Council*, 269 Fed. Appx. 375, 377 (5th Cir. 2008); *ACLU-NJ v. Township of Wall*, 246 F.3d 258, 262-63 (3d Cir. 2001); *Doe v. Duncanville Indep. School Dist.*, 70 F.3d 402, 408 (5th Cir. 1995). Plaintiff cannot obtain taxpayer standing by simply arguing that "[d]efendants are spending monies from D.C.'s General Fund." (Opp. at 2.) Instead, he must have actually been injured by an expenditure of District taxpayer money on the Health Benefit Exchange Authority's SHOP Exchange that is illegal. *See Grayson v. AT & T Corp.*, 15 A.3d 219, 224 (D.C. 2011). *See Grayson v. AT & T Corp.*, 15 A.3d 219, 224 (D.C. 2011).[1]

[1] Plaintiff is wrong that D.C. Courts do not follow the prudential standing requirements of Article III. (*See* Opp. at 5.) In *Grayson*, the District's highest court sitting *en banc* concluded

A. There is no factual dispute about the funding of the SHOP Exchange

Plaintiff tries to avoid this problem by asserting that Defendants' motion to dismiss raises a "quintessential factual dispute." (*See* Opp. at 2.) But the only factual question on the standing issue is whether D.C. taxpayer money was used to fund the D.C. Small Business Exchange. Defendant directed the Court to public documents on District of Columbia Government websites that clearly show that the Exchange has never been funded with D.C. taxpayer dollars.[2] (Def. Motion at 7-8.) These documents confirm that the Council of the District of Columbia, in exercising its function to approve a city budget, allocated federal grant and other non-tax dollars to the Health Benefit Exchange Authority for the operation of the D.C. Small Business Exchange. Plaintiff does not dispute the validity or authenticity of the records Defendant cited, nor has Plaintiff provided any evidence to the contrary. Instead, Plaintiff attached pages from the exact same documents and claims he is entitled to a presumption of standing because the funds were appropriated from a "general" account (Opp. at 2), even though the documents show that funds that went into the general account to support the SHOP Exchange were not taxpayer

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that "even though Congress created the District of Columbia court system under Article I of the Constitution, rather than Article III, this court has followed consistently the constitutional standing requirement embodied in Article III…appellants must allege 'some threatened or actual injury resulting from ... putatively illegal action' in order for this court to assume jurisdiction"), 15 A.3d at 224.

[2] Plaintiff argues that the Court cannot consider this evidence for purposes of a motion to dismiss. But it is well established that the Court can take judicial notice of such facts within the public record without going outside of the four corners of the complaint. *See Washkoviak v. Student Loan Marketing Association*, 900 A.2d 168, n.15 (D.C. 2006) ("[T]he trial court is entitled to take judicial notice of matters of public record.") (quoting *In re Estate of Barfield*, 736 A.2d 991, 996 n.7 (D.C. 1999). *See also Drake v. McNair*, 993 A.2d 607, 661 (D.C. 2010) (trial court's reliance on information in public land records did not convert motion to dismiss to motion for summary judgment); *Bostic v. D.C.* 906 A.2d 327, 331-32 (D.C. 2006) (court took judicial notice that the United States employed the U.S. Capitol Police and not the District of Columbia). All of the documents cited by both Plaintiff and Defendants are a matter of public record.

dollars. (Def. Motion at 7-8). Without the use of any D.C. taxpayer money to fund the program that the Plaintiff attacks, the Plaintiff does not have standing as a taxpayer.

B. The law is clear that actual tax expenditures are required for taxpayer standing

Plaintiff criticizes the Defendants for "rely[ing] exclusively on federal taxpayer standing cases." (Opp. at 5.) Despite the fact that this is false, Plaintiff does not explain why those cases, which all stand for the proposition that a municipal taxpayer has no standing when no municipal taxpayer money is used to support the program under attack, do not apply to his case.

Indeed, it is odd that Plaintiff would criticize Defendants for relying on federal cases when he cites the federal decision in *Commack v. Waihee*, 932 F.2d 765, 770 (9th Cir. 1991), and then misreads the case. (*See* Opp. at 6.) The question in *Commack* was whether plaintiff, a taxpayer of Honolulu, had municipal standing to challenge in federal court a state law making Good Friday a holiday. *Id*. at 769. The Ninth Circuit said that "cases have made clear that municipal taxpayer standing is only available when there is an expenditure *of municipal funds* challenged." *Id*. at 770 (emphasis added). The court then cited *Freedom From Religion Found., Inc. v. Zielke,* 845 F.2d 1463, 1469–70 (7th Cir.1988), which held that municipal taxpayers have standing to challenge the improper use of tax revenues but *no standing* where there has been *no expenditure of city funds.* The *Commack* court also cited *Donnelly v. Lynch,* 691 F.2d 1029 (1st Cir. 1982), which held that "municipal taxpayers ... have standing to sue to challenge allegedly unconstitutional *use of their tax dollars.*" *Id.* at 1031 (emphasis added), *rev'd on other grounds,* 465 U.S. 668 (1984). The *Commack* court concluded that the plaintiffs had standing only because they alleged the use of funds generated by "the taxing governmental entities," meaning the State of Hawaii and the municipality of Honolulu. *Id*. at 771. Thus, *Commack* actually

defeats Plaintiff's argument here because no District money was used to fund the D.C. Small Business Exchange.

Plaintiff also cites the federal case of *District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 11 (D.C. Cir. 1988), which held that federal taxpayer standing was proper because the expenditures in question were federal funds appropriated by Congress. Plaintiff misreads this case, too. The relevant inquiry is not whether the City Council has "appropriated" funds; the question is whether the City Council appropriated District of Columbia taxpayer money, as opposed to appropriating federal money for a District program. In other words, for purposes of standing, where no D.C. money is involved, a District resident cannot challenge the appropriation of federal grant money as a municipal taxpayer, even though the act of appropriating the federal funds is by the City Council. And that is the situation here. Indeed, Plaintiff fails to cite a single case—state or federal—that stands for the proposition that a District of Columbia resident has standing to bring a taxpayer case when the funds used to operate the program under attack are not District of Columbia taxpayer funds. There are no such cases that support Plaintiff's argument on this point because that is not the law.[3]

Since Plaintiff cannot show how his District of Columbia taxpayer money goes to fund the Exchange and has alleged no other basis for standing, the Court lacks subject matter jurisdiction and his case must be dismissed.[4] "Standing requires 'individualized proof' of both

[3] Plaintiff engages in budget-talk semantics to argue that District of Columbia municipal funds are used to operate the D.C. Small Business Exchange. The "substantial evidence" (Opposition at 8) that Plaintiff submits with his opposition is the same information that Defendants filed with their motion. There remains no material dispute that about the funding of the D.C. Small Business Exchange.

[4] Nor does Plaintiff's argument that he may suffer future harm carry the day for him. (*See* Opp. at 10.) An allegation of future and recurring harm only has merit if there is evidence of some present harm. *See District of Columbia Common Cause v. District of Columbia*, 858 F.2d 1, 8-9

the fact and extent of injury." *Laufer v. Westminster Brokers, Ltd.*, 532 A.2d 130, 135 (D.C. 1987) (quoting *Consumer Federation of America v. Upjohn Co.*, 346 A.2d 725, 728 (D.C. 1975). Such "generalized grievances" as the one made by the Plaintiff in this lawsuit "do not warrant the exercise of jurisdiction." *Aeon Financial, LLC v. District of Columbia*, 84 A.3d 522, 530 (D.C. 2014) (quoting *Padou*, 70 A.3d at 212).

In sum, on its face, Plaintiff's complaint fails to show that he has standing to bring this lawsuit. The complaint should be dismissed for this reason alone.

II. D.C. CODE §31-3171.01(16)(A) DOES NOT APPLY TO THE ENROLLMENT OF CONGRESS AND DESIGNATED STAFF BECAUSE THE AFFORDABLE CARE ACT AND REGULATIONS PERMIT THEIR ENROLLMENT

Plaintiff argues that neither the ACA nor regulations can preempt District of Columbia law limiting employer size on its SHOP exchange to authorize the sale of health insurance to Members of Congress and designated staff. Plaintiff is wrong.

Congress imposed size limitations on state SHOP exchanges when it enacted the ACA, but also required the federal government to provide health insurance to Congress "through an Exchange established under" the ACA. 42 U.S.C. § 1312(d)(3)(D)(i). Consistent with this mandate, the Office of Personnel Management, which is authorized by Congress to contract with insurance carriers on behalf of federal employees under the Federal Employees Health Benefit Act, 5 U.S.C. § 8902, promulgated regulations that required Congress and designated staff to enroll in a health plan offered on the District of Columbia SHOP in order to receive an employer contribution from the federal government. *See* 5 C.F.R. § 890.102(c)(9); *see also* Preamble to 5

(D.C. Cir. 1988) (standing only if there is a showing of "a real and immediate threat of *repeated* injury") (emphasis added) (quoting *O'Shea v. Littleton*, 414 US. 488, 496 (1974); *Haase v. Sessions*, 835 F.2d 902, 911 (D.C. Cir. 1987) (plaintiff must show *likelihood* of *future* harm). Here, Plaintiff is not experiencing any present harm because no District taxpayer funds are being used, and thus his claim of "future harm" is far too speculative.

C.F.R. § 890, 78 Fed. Reg. 60653, 60654 (October 2, 2013).[5] Indeed, the District of Columbia created its Health Benefit Exchange under the Affordable Care Act and established size limitations for its SHOP Exchange within the parameters established by the Affordable Care Act. But because those size limitations conflict with OPM's determination to contract with plans on the District's SHOP Exchange and carry out the ACA's mandate for the health plans of Congress and staff, they simply do not apply to the enrollment of Congress and staff on the SHOP. When compliance with both federal and state regulations is a physical impossibility or when state law stands as an obstacle to the accomplishment and execution of the full purposes of Congress, that state law is preempted—as the size limitations imposed by the D.C. statute as applied to Congress and staff are, here. *See Angulo v. Gochnauer,* 772 A.2d 830, 836 (D.C. 2001).

Plaintiff does not dispute that this clear conflict exists but instead argues that "OPM [is] unlawfully attempting to rewrite a federal law." (Opp. at 16.) The Supreme Court has clearly stated many times that state law can be preempted by federal regulations as well as by federal statutes. *See, e.g., Geier v. American Honda Motor Company, Inc*., 529 U.S. 861 (2000); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 699 (1991) ("federal regulations have no less preemptive effect than statutes"); *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141 (1982). The District of Columbia Court of Appeals also recognizes that "there is no distinction between a federal statute and a federal regulation, as both can preempt state law." *See Angulo v. Gochnauer,* 772 A.2d 830, 836 (D.C. 2001). It is clear that the District's conflicting limitation of "not more than 50 employees" in §31-3171.01(16)(A) does not apply to Members of Congress and its staff. Plaintiff has no valid argument on the preemption issue.

[5] As noted in Plaintiff's Motion, even the Secretary of Health and Human Services through the Center for Medicare and Medicaid Services determined that the regulations rendered the size limitations inapplicable to members of Congress and their staff. *See* http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013.

III. PLAINTIFF IS NOT ENTITLED TO A WRIT OF MANDAMUS

In his Opposition, Plaintiff complains that the District did not address his request for a writ of mandamus. (Opp. at 17.) Plaintiff apparently fails to recognize that if his lawsuit is dismissed because he does not have proper taxpayer standing, or because the sale of health insurance on the District's Exchange to Member of Congress and their staff is lawful, his claim for a writ of mandamus also fails. In any event, Defendant Kofman is not failing to carry out a ministerial function. To the contrary, she has lawfully facilitated the enrollment of Congress and staff on the District of Columbia SHOP Exchange in accordance with both federal and District of Columbia law. In fact, if she refused to do so, she would be blocking the accomplishment and execution of the full purposes of Congress expressed in the Affordable Care Act and OPM regulations.

There is a high burden of proof in this jurisdiction for a plaintiff to be entitled to mandamus relief. In *District of Columbia v. Fitzgerald*, 953 A.2d 288, 298-99 (D.C. 2008), the court stated: "It is well established that the writ of mandamus is an extraordinary remedy, available only in those few cases where a trial court has refused to exercise or exceeded its jurisdiction." In addition, the court stated: "[T]he party seeking the writ must show that [its] right is clear and indisputable and that [it] has no other adequate means to obtain relief." *Id.* A court should issue the writ only for a "clear abuse of discretion." *Id*. This is not such a case. Because Director Kofman is administering the Health Benefit Exchange on behalf of the District in accordance with the requirements of the Affordable Care Act, Plaintiff cannot demonstrate even the minimal predicate for the extraordinary remedy of mandamus. To grant a writ of mandamus under these facts would permit plaintiffs to seek mandamus in every case where non-

extraordinary issues should be presented to the courts for judicial resolution. Therefore, Plaintiff's request for a writ of mandamus also should be dismissed.

IV. AN ORAL HEARING IS NOT NECESSARY

Plaintiff requests an Oral Hearing in this matter. (Opp. at 17.) An Oral Hearing is not a matter of right; it is committed to the sound discretion of the Court. SCR-Civil 12-I (f). The issues raised by this motion are solely matters of law that are clear and straightforward. No Oral Hearing is required.

CONCLUSION

For the above-stated reasons, and for the reasons set forth in the Defendants' Motion to Dismiss, the Court should dismiss the Plaintiff's complaint with prejudice.

Respectfully submitted,

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Dated: December 22, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December , 2014, I have caused to be served, by electronic filing, a true copy of this document on:

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