UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MISSOURI DEPARTMENT OF SOCIAL SERVICES Plaintiff, v. UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, et al. Defendants.	)	Case No. 1:15-cv-01329 (EGS)

DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Plaintiff has failed to address, much less refute, the main argument of Defendants' motion to dismiss—a preliminary injunction entered in another case that is not a class action is not a valid basis for seeking permanent relief in a separate civil action brought by a different plaintiff. Plaintiff in this case is not a party in *Texas Children's Hospital v. Burwell*, No. 14-2060 (D.D.C. 2014). And the preliminary injunction in *Texas Children's* was crafted to protect only the plaintiffs in that case while the case is pending. It is not applicable to Missouri and is not permanent or final.

It is immaterial whether Plaintiff could have stated a valid claim if it had brought suit based on the same legal theories asserted by the plaintiffs in *Texas Children's*. Plaintiff in this case has not relied on those legal theories or arguments; indeed, Plaintiff seems to have gone out of its way to avoid doing so. Plaintiff instead has chosen to rely exclusively on an argument that

the preliminary injunction entered in *Texas Children's* entitles it to relief. That argument is incorrect, and this case should be dismissed.

1. A Claim Under the Declaratory Judgment Act Must Be Accompanied by a Judicially Remediable Right

As Defendants previously explained, Plaintiff asserts a single claim against Defendants: "Declaratory Judgment that CMS is enjoined from Implementing its Policy in FAQ 33." But the availability of declaratory relief presupposes the existence of a judicially remediable right—a right which Plaintiff does not have. *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011).[1] As explained in their motion to dismiss, the preliminary injunction entered in *Texas Children's* does not afford Plaintiff a right to seek declaratory relief in this case.

Plaintiff concedes that the Declaratory Judgment Act "does not create substantive rights," Pl.'s Opp. at 3, but argues that a plaintiff nevertheless can seek relief under the Declaratory Judgment Act without pointing to any other federal law that does confer an enforceable right or provide a cause of action. The cases Plaintiff cites do not support that proposition. In both cases, this Court concluded that because the plaintiff had alleged an actual injury to rights derived from the Constitution, giving rise to Article III standing and federal question jurisdiction, there was no further requirement that the plaintiff include a substantive count or claim for relief in addition to the request for declaratory relief. *See Comm. on Oversight and Gov't. Reform, U.S. House of Representatives v. Holder*, 979 F. Supp. 2d 1, 23 (D.D.C. 2013); *Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 81-82 (D.D.C. 2008). To illustrate, in *Holder*, the right asserted by the Committee on Oversight and Government

[1] Much of Plaintiff's opposition discusses whether this Court has subject matter jurisdiction over this action. That is simply a distraction because Defendants have not challenged this Court's subject matter jurisdiction. Rather, Defendants' motion questions whether Plaintiff has stated a claim for relief—that is, whether Plaintiff can identify a valid cause of action.

Reform—namely, a right to further a Congressional investigation by issuing subpoenas and enforcing them in court—derived from the legislative function assigned to Congress in Article I of the Constitution. *See Holder*, 979 F. Supp. 2d at 22.[2] Here, Plaintiff does not, and cannot, argue that it has any right under the Constitution to enforce the preliminary injunction entered by this Court in *Texas Children's*. And despite Plaintiff's suggestion, this case does not involve the "federal executive branch … compel[ling] a State to take actions contrary to the order of an Article III federal court." *See* Pl.'s Opp. at 4. It is undisputed that the preliminary injunction in *Texas Children's* does not instruct Missouri to do anything. The only question that Plaintiff has raised is whether the preliminary injunction prevents Defendants from disallowing federal financial participation if Missouri does not follow the policy—something Defendants have not done.

Because Plaintiff does not have a right under the Constitution to enforce the preliminary injunction in *Texas Children's*, it must have a statutory cause of action to proceed in federal court, as there would otherwise be no basis for Plaintiff's asserted right to relief. *See Holder*, 979 F. Supp. 2d at 23 (quoting *Miers*, 558 F. Supp. 2d at 81) ("'The Constitution itself does not confer in most settings the sort of affirmative right that the Committee is claiming exists here.'"); *see also Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("Private rights of action to enforce federal law must be created by Congress.").

2. Missouri Has Chosen to Rely Exclusively on the *Texas Children's* Preliminary Injunction, and It Is Irrelevant Whether Missouri Could Have Chosen to Bring Other Claims

According to Plaintiff, the fact that there are causes of action under which Plaintiff could theoretically seek declaratory relief—though the causes of action are not pled in the complaint

[2] The Government does not agree with this Court's ruling in *Holder*, but there is as yet no final appealable order.

and are not before this Court—is sufficient for this Court to find that Plaintiff has a right to seek declaratory relief to enforce the preliminary injunction entered in *Texas Children's*. This is not so.

Plaintiff first asserts that the Administrative Procedure Act ("APA") could provide Plaintiff with a cause of action. Yet the APA does not provide a means to enforce an injunction entered in another case involving different parties. In *Holland v. Nat'l Mining Ass'n*, 309 F.3d 808 (D.C. Cir. 2002), the D.C. Circuit rejected a claim that a permanent injunction in another case involving different parties established "law" for purposes of determining whether agency action was "not in accordance with law" under the APA, 5 U.S.C. § 706. *Id.* at 814–15. Plaintiff has not cited any contrary authority, nor has it cited any authority suggesting that a *preliminary* injunction entered in another case involving a different plaintiff could support a claim for judicial review under the APA.

Even if a preliminary injunction in another case could establish "law" for purposes of determining whether agency action was "not in accordance with law," the APA would still not provide Missouri with a cause of action to enforce the injunction in *Texas Children's* because the letter to Missouri dated May 1, 2015 is not final agency action subject to judicial review. The letter does not mark the consummation of the agency's decision-making process nor does it determine any rights or obligations. *See Reliable Automatic Sprinkler Co. v. CPSC*, 324 F.3d 726, 732 (D.C. Cir. 2003) (finding that a letter from the Consumer Product Safety Commission to a manufacturer could not be challenged under the APA because the agency had not yet taken the steps required under the statutory and regulatory scheme for its actions to have any legal consequences).

Similarly, with respect to Plaintiff's allegation that it could theoretically challenge the

disallowance that CMS "threatened" in the letter dated May 1, 2015, s*ee* Pl.'s Opp. at 4, that challenge would also not provide the requisite cause of action to sustain Plaintiff's request for relief, which seeks a declaration that the Order in *Texas Children's* applies to Missouri. Even if it did, the statutory authority that Plaintiff cites for this proposition makes clear that judicial review of a disallowance is not available for a threatened or hypothetical disallowance. In the context of an HHS disallowance against a State, judicial review is only available for a final decision of the independent HHS Departmental Appeals Board ("DAB") (reviewing a State appeal of the disallowance or an unfavorable reconsideration). *See* 42 U.S.C. § 1316(e)(2). The statute thus requires that a challenge to a disallowance go through an administrative review process, which can serve to focus the disputed issues and thus conserve judicial resources. And it is only the DAB's decision that can be challenged in court, as that is the final decision of the Secretary (*i.e.*, the final agency action). *See id.*

Plaintiff also claims that at the very least, it has the ability to pursue a mandamus action under 28 U.S.C. § 1361, which may be granted if "(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff." Pl.'s Opp. at 5. Yet Plaintiff has failed to demonstrate a clear right "to be free from implementation of the policy in FAQ No. 33", and has failed to demonstrate a clear duty on behalf of CMS "to refrain from implementing FAQ No. 33", given that the Order does not extend to Missouri. *See infra* pp 6-8. Moreover, Plaintiff fails to explain why there is no other adequate remedy available to Plaintiff when it can challenge any final disallowance decision through the procedure discussed above.

At this point, it is immaterial whether Plaintiff could have stated a valid claim under the APA if it had brought its own claim on the same legal grounds as the plaintiffs in *Texas*

Children's. Plaintiff here has relied exclusively on the preliminary injunction that is currently in force in *Texas Children's*; indeed, in drafting its complaint, Plaintiff appears to have gone out of its way not to assert claims similar to the underlying claims in *Texas Children's*. Plaintiff cannot seek an advisory opinion from this Court regarding claims not pled in the complaint and cannot amend its complaint merely by hinting that it might want to do so in an opposition to a motion to dismiss. *Cf. City of Harper Woods Emps. Retirement Sys. v. Olver*, 589 F.3d 1292, 1304 (D.C. Cir. 2009); *Ali v. Dist. of Columbia*, 278 F.3d 1, 8 (D.C. Cir. 2002). If Plaintiff seeks to amend its complaint, it should comply with Rule 15(a)(2) of the Federal Rules of Civil Procedure. *Pennsylvania ex rel. Zimmerman v. Pepsico*, 836 F.2d 173, 181 (3d Cir. 1988) ("It is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss.")

3. The Court's Preliminary Injunction in *Texas Children's* Does Not Extend to Missouri

As Defendants explained in their motion to dismiss, the Order entered in *Texas Children's* does not extend to the state of Missouri. This conclusion is not based solely on the fact that Missouri is not a party in *Texas Children's*. Rather, it is also based on the terms of the Order, which are limited to Defendants' actions with respect to Texas and Washington. This makes perfect sense in light of the fact that the plaintiffs in *Texas Children's* sought relief only for themselves in their application for a preliminary injunction. *Compare [Proposed] Order*, *Texas Children's Hospital*, No. 14-2060, ECF No. 3-2 (D.D.C. Dec. 5, 2015) *with Order*, *Texas Children's Hospital*, No. 14-2060, ECF No. 19 (D.D.C. Dec. 29, 2015).

Here, Plaintiff focuses solely on the first half of the Order, which states that "'Defendants are hereby ENJOINED from enforcing, applying, or implementing FAQ No. 33 pending further order of this Court.'" Pl.'s Opp. at 6 (quoting *Texas Children's Hospital*, No. 14-2060, ECF No. 19 (D.D.C. Dec. 29, 2014)). But Plaintiff fails to acknowledge the second half of the Order,

which states that "Defendants shall immediately notify the Texas and Washington state Medicaid programs that, pending further order by the Court, the enforcement of FAQ No. 33 is enjoined and that Defendants will take no action to recoup any federal DSH funds provided to Texas and Washington based on a state's noncompliance with FAQ No. 33." *Texas Children's Hospital*, No. 14-2060, ECF No. 19 (D.D.C. Dec. 29, 2014). Whether there might have been some basis to enter a broader injunction in the absence of a class action is beside the point, because the injunction sought by the plaintiffs in *Texas Children's* and entered by this Court pertained only to the two plaintiffs in that action. Indeed, in their earlier memorandum, Defendants noted that the plaintiffs in *Texas Children's* had not raised any dispute about whether Defendants have properly complied with the preliminary injunction. And the plaintiffs in *Texas Children's* have since filed a notice in that case specifically discussing the proceedings in this case, and they still have not disputed Defendants' compliance with the preliminary injunction. *See* Pls.' Notice of Supplemental Authority, *Texas Children's Hospital*, No. 14-2060, ECF No. 31 (Oct. 29, 2015).

To the extent that there is any ambiguity in the Order, general principles regarding the appropriate scope of injunctive relief, particularly in the case of a preliminary injunction, confirm that it would be highly unusual for this Court to enter such a broad order. *See United States Association of Reptile Keepers, Inc. v. Jewell*, No. 13–2007 (RDM), 2015 WL 2396074, at *3 (D.D.C. May 19, 2015), *appeal docketed*, No. 15-5199 (D.C. Cir. July 22, 2015) ("[B]ecause the Court has not finally determined that the rule is unlawful and because there is no evidence of irreparable harm to persons other than Plaintiffs or members of [plaintiff's association] before the Court, the Court concludes that its preliminary injunction should be limited in scope to protect only those persons." No. 13–2007 (RDM), 2015 WL 2396074, at *3 (D.D.C. May 19,

2015), *appeal docketed*, No. 15-5199 (D.C. Cir. July 22, 2015).[3] *Texas Children's* involved only two plaintiffs—not a class of similarly situated individuals or an association.

Because the preliminary injunction in *Texas Children's* does not extend to Missouri, Defendants could not have violated this Court's order by telling Missouri that it may disallow federal financial participation if it does not comply with the policy articulated in FAQ No. 33.

CONCLUSION

For the reasons articulated above and in Defendants' motion to dismiss, this Court should both dismiss Plaintiff's complaint for failure to state a claim.

Dated: November 6, 2015

Respectfully submitted,

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[3] Plaintiff cites *Fox Television Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30 (D.D.C. 2013) as an example of this Court entering a nationwide inunction in response to a preliminary injunction. But as this Court noted, that case involved a preliminary injunction under the Copyright Act, which "commands a nationwide injunction." *Fox Television Stations, Inc.*, 966 F. Supp. 2d at 51 (citing 17 U.S.C. § 502(b)).

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