UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

DO NO HARM,
Plaintiff,

v.

VITUITY, also known as,
CEP AMERICA LLC,
Defendant.

Case No. 3:23-cv-24746-TKW-HTC

MEMORANDUM IN SUPPORT OF PLAINTIFF'S EMERGENCY MOTION FOR *EX PARTE* TEMPORARY RESTRAINING ORDER
(RULING REQUESTED BY DECEMBER 17, 2023)

RULE 65(B) STATEMENT

Defendant Vituity is operating an unlawful incentive program that categorically excludes non-black physicians. Ex. A. The program offers applicants a $100,000 signing bonus and a partnership in exchange for the physician's agreeing to practice medicine as a Vituity partner at one of its locations, including Pensacola. Ex. A; Ex. C; Ex. E. But the deadline for applications is **December 17, 2023**. Ex. D. Do No Harm's member, Doctor A, is ready and able to apply to Vituity's program when it stops unlawfully discriminating against him. VC ¶¶8, 30-39. But he won't ever be able to apply unless this Court temporarily stops Vituity from closing the application period. A TRO is "necessary" and would be "restricted to … preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer." *Granny*

Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 439 (1974). To preserve this Court's jurisdiction and ability to decide the merits of its forthcoming motion for a preliminary injunction, Do No Harm asks this Court to enjoin Vituity "from closing the application window or picking [applicants] for the" incentive program. *American Alliance for Equal Rights v. Fearless Fund Mgmt.*, 2023 WL 6520763, at *1 (11th Cir.).

Given the rapidly approaching deadline, this Court should temporarily restrain Vituity now. *See Hardin v. Palmetto GBA*, 2020 WL 6804511, at *2 (N.D. Ala.) (holding that plaintiff would suffer immediate and irreparable injury because of imminent revocation of his "employment as a practicing physician"). This Court "may issue a temporary restraining order without written or oral notice to the adverse party or its attorney" if two conditions are satisfied. Fed. R. Civ. P. 65(b)(1). Both are here.

First, Do No Harm has alleged "specific facts in … a verified complaint" that "clearly show that immediate and irreparable injury … will result … before the adverse party can be heard in opposition." *Id.* 65(b)(1)(A). Explained below, racial discrimination is irreparable. *Fearless Fund*, 2023 WL 6520763, at *1; *Coal. for Equity and Excellence in Md. Higher Ed. v. Md. Higher Ed. Comm'n*, 295 F. Supp. 3d 540, 557-58 (D. Md. 2017). Do No Harm's verified complaint and the evidence attached to it unambiguously shows that Vituity is intentionally discriminating based on race. VC ¶¶23-39; Ex. A; Ex. B. And Vituity's advertised deadline is imminent, closing in 9 days.[1] VC ¶39. Explained

[1] Neither Do No Harm nor Doctor A were aware of this deadline because Vituity did not disclose it on its website. VC ¶39; Ex. A. They became aware of it only after finding a Vituity

below, Vituity is likely violating federal anti-discrimination law, as the Eleventh Circuit recently held for a similarly discriminatory program. *Fearless Fund*, 2023 WL 6520763, at *1. But even if this Court isn't sure, it is still "necessary to limit temporary relief for the plaintiff … to preserve the status quo while the parties prepare for briefing and a hearing on the plaintiff's request for injunctive relief." *Hardin*, 2020 WL 6804511, at *2.

Second, notice is not required before the Court grants limited and temporary relief to preserve the status quo and protect its ability to decide the merits. Fed. R. Civ. P. 65(b)(1)(B). Do No Harm's counsel has attempted in good faith to give notice to Vituity. Do No Harm's counsel has emailed its Verified Complaint and exhibits to Vituity's General Counsel and Assistant General Counsel. *See* Norris Dec. ¶¶4-5. Do No Harm also informed Vituity's counsel that its Emergency Motion for *Ex Parte* Temporary Restraining Order and this memorandum would be forthcoming. *Id.* ¶5. Do No Harm's counsel will email its motion and memorandum to Vituity's counsel promptly after filing. *Id.* Do No Harm's counsel will update the Court if it gets a response. *Id.* ¶6. In addition, Do No Harm is attempting to serve Vituity with those documents promptly. *Id.* ¶7. These efforts are reasonable under the circumstances. *See, e.g.*, *Barnett v. BAC Home Loan Servicing, L.P.*, 772 F. Supp. 2d 1328, 1338-39 (D. Or. 2011) ("Plaintiff's counsel has made reasonable efforts to notify Defendants" after he "emailed copies of the Complaint, Motion for Temporary Restraining Order, and Memorandum in

advertisement on a third-party website on December 6, and moved as quickly as they could to file this motion. VC ¶39.

Support" and granting motion "because there is insufficient time before [the relevant event] to compel Defendants to appear and to respond to the Motion"). Even if Vituity does not have "an opportunity to review the Verified Complaint," granting this motion is necessary to prevent the "immediate and irreparable injury" that would follow "absent entry of a temporary restraining order." *Hardin*, 2020 WL 6804511, at *1-2.

INTRODUCTION

"Racial discrimination is invidious in all contexts." *Students for Fair Admissions, Inc. v. Harvard*, 143 S. Ct. 2141, 2166 (2023) (cleaned up). It has been unlawful in private contracting at least since 1866, when Congress enacted the Civil Rights Act. 42 U.S.C. §1981. Section 1981 "protects the equal rights of all persons … to make and enforce contracts without respect to race." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006) (cleaned up). Congress also banned racial discrimination in medicine. Section 1557 of the Affordable Care Act prohibits racial discrimination in "any health program or activity, any part of which is receiving federal assistance." 42 U.S.C. §18116(a).

Defendant Vituity, a physician partnership, is operating a racially discriminatory program that blatantly violates the promise of race neutrality in both §1981 and the ACA. Its Bridge to Brilliance Incentive Program offers a "leadership incentive for Black physicians, with a sign-on bonus of up to $100,000." Ex. A. Non-black applicants are categorically excluded from forming this contract with Vituity.

This kind of rank discrimination has never been remotely lawful. Section 1981 bars private employers, like Vituity, from discriminating based on race when making

contracts. And section 1557 of the ACA bars healthcare businesses that receive federal financial assistance from discriminating based on race. Because Vituity's Bridge to Brilliance Incentive Program is a contract that discriminates on its face, it violates §1981 and the ACA.

Plaintiff, Do No Harm, has member physicians who are ready and able to apply for the program, but cannot because they are the wrong race. VC ¶¶30-39. This Court should temporarily restrain Vituity from closing the application window before it closes on December 17. That temporary relief will give the parties and the Court time to brief and argue the merits of Plaintiff's forthcoming motion for a preliminary injunction.

BACKGROUND

Vituity is a 100% physician-owned partnership that is principally engaged in the business of providing health care. VC ¶¶15-16. It has more than 450 locations where its partner physicians provide health care services to patients, including Pensacola, Florida. VC ¶17; Ex. A; Ex. C; Ex. E. Overall, it serves 8 million patients a year. VC ¶20; Ex. A. And Vituity receives federal financial assistance in its practice of medicine. VC ¶¶21-22.

Recently, Vituity launched its Bridge to Brilliance Incentive Program. VC ¶23; Ex. A. The program is available at all its 450 practice locations, including Pensacola. VC ¶26; Ex. E. The program seeks many kinds of physicians to join Vituity, including internal and hospital medicine. VC ¶23; Ex. A. But only if they're black. VC ¶24; Ex. A. The program "offer[s] a leadership incentive for Black physicians, with a sign-on bonus

of up to $100,000." VC ¶24; Ex. A. And the application requires applicants to confirm that they are black. VC ¶29; Ex. B. The program therefore categorically excludes non-black applicants. VC ¶25.

The program seeks to form a contract with applicants. Vituity offers physicians a partnership, a $100,000 signing bonus, and other benefits. VC ¶28; Ex. A. In exchange for those benefits, physicians must agree to take their practice to Vituity and work for Vituity at one of its onsite locations. VC ¶27; Ex. A. "To qualify, physicians must join [its] Partnership." VC ¶27; Ex. A. Vituity adds that applicants "[m]ust be willing to work onsite at any of our locations nationwide." VC ¶27; Ex. A. These locations include many locations in North Florida generally, and Pensacola specifically. VC ¶27; Ex. C.

Vituity's incentive program discriminates against Do No Harm's members. Doctor A, for example, is a physician member of Do No Harm. VC ¶30-31. He works in internal medicine and is a hospitalist in Florida. VC ¶¶31-32. He would like to apply to work at Vituity, including in Pensacola, through its incentive program. VC ¶37. It would provide him an unusually high bonus and a lucrative opportunity to provide patient care through an established partnership. VC ¶37. But he doesn't have that opportunity because Vituity has excluded non-black physicians. VC ¶¶34-38. It actively discriminates against him in the application itself, which requires that he confirm his race. VC ¶35; Ex. B. Doctor A is ready and able to apply to Vituity's incentive program if this Court orders it to stop discriminating against non-black physicians. VC ¶36.

The irreparable injuries from this racial discrimination are ongoing. But Vituity has made those injuries even more pronounced by imposing a quick, one-month deadline for physicians to apply. VC ¶39; Ex. D. Absent this Court's intervention, the physicians against whom Vituity is discriminating, including Doctor A, will be unable to apply before they can be heard in court. VC ¶39; Ex. D. Vituity intends to close the application process on December 17, 2023. VC ¶39; Ex. D.

ARGUMENT

Do No Harm is entitled to a preliminary injunction if it can satisfy four factors: it has "a substantial likelihood of success on the merits," it "will suffer irreparable harm" without preliminary relief, the balance of harms weighs in its favor, and an injunction "would not disserve the public interest." *GeorgiaCarry.Org, Inc. v. U.S. Army Corpsof Eng'rs*, 788 F.3d 1318, 1322 (11th Cir. 2015). The factors governing temporary restraining orders are identical. *Hardin*, 2020 WL 6804511, at *1. Do No Harm satisfies all four.

I. Do No Harm will likely succeed on the merits.

Vituity's incentive program violates two federal statutes. It violates section 1981 because it categorically excludes non-black physicians from applying and entering the partnership through the program, with its benefits. And it violates the ACA because organizations like Vituity that are principally engaged in providing healthcare and that receive federal financial assistance cannot racially discriminate at all. For either or both of those independent reasons, this Court should grant Do No Harm's motion.

A. Vituity's Incentive Program likely violates §1981.

Section 1981 states that "[a]ll persons … shall have the same right … to make and enforce contracts … and to the full and equal benefit of all laws … as is enjoyed by white citizens." 42 U.S.C. §1981(a). It "protects the equal right of all persons … without respect to race." *Domino's Pizza, Inc v. McDonald*, 546 U.S. 470, 474 (2006) (cleaned up). And its "broad terms" bar discrimination "against, or in favor of, any race." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976).

The statute applies to governmental and "nongovernmental" actors alike. §1981(c). It contains a federal cause of action "against discrimination in private employment on the basis of race." *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975); *see Jenkins v. Nell*, 26 F. 4th 1243, 1249 (11th Cir. 2022) ("Section 1981 prohibits intentional race discrimination in the making and enforcement of public and private contracts."). And it authorizes both equitable relief and damages. *See Johnson*, 421 U.S. at 459-60.

Vituity is violating §1981 by expressly excluding certain applicants from its incentive program based on race. The Bridge to Brilliance Incentive Program implicates the activities enumerated under §1981, including "making … of contracts." 42 U.S.C. §1981(b). A contract "need not already exist" to trigger §1981. *Domino's Pizza*, 546 U.S. at 476. The statute "protects the would-be contractor along with those who have already made contracts." *Id.* It "offers relief when racial discrimination blocks the creation of a contractual relationship." *Id.* The program involves and is designed to lead to

contractual relationships between Vituity and physicians. In exchange for paid employment, a partnership, and a $100,000 signing bonus, the physicians agree to work as partners at Vituity at one of its onsite locations, including Pensacola. Ex. A. That's exactly what physicians like Doctor A would like to do but are blocked from doing because of Vituity's discrimination. VC ¶¶30-39.

Vituity's facial race-based discrimination is intentional. Under §1981, "a plaintiff who alleges a policy that is discriminatory *on its face* is not required to make further allegations of discriminatory intent or animus." *Juarez v. Nw. Mut. Life Ins., 69* F. Supp. 3d 364, 370 (S.D.N.Y. 2014). And Vituity cannot escape liability for racial discrimination by saying that it hires non-black physicians outside the program (and pays them less). An employer cannot "discriminate against some employees on the basis of race … merely because he favorably treats other members" of that race. *Connecticut v. Teal*, 457 U.S. 440, 455 (1982). "So long as the plaintiff's [race] was one but-for cause of that decision, that is enough." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020). Non-black doctors are excluded from forming a contract with Vituity through the program because of their race. VC ¶¶30-39. That categorical exclusion is unlawful and cannot survive strict scrutiny. *See, e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 276 & n.23 (2003) (university violated §1981 by having a race-based admissions program that "purposeful[ly] discriminat[ed]"). As the Eleventh Circuit recently held for a similar "racially exclusionary program," Vituity's "is substantially likely to violate 42 U.S.C. § 1981." *Fearless Fund*, 2023 WL 6520763, at *1.

B. Vituity's Incentive Program likely violates the ACA.

Section 1557 of the ACA states that "an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 … be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance." 42 U.S.C. §18116(a). The ACA incorporates the "enforcement mechanisms" from Title VI, *id.*, including injunctive relief, *see Harvard*, 143 S. Ct. at 2156 & n.2, 2176 (granting injunctive relief to membership organization for violation of Title VI).

Section 1557, by incorporating Title VI, bans organizations from excluding people based on race. *See Gratz*, 539 U.S. at 276 & n.23. And a race-based exclusion cannot satisfy strict scrutiny. *Harvard*, 143 S. Ct. at 2156 & n.2, 2176 (holding that race-based admissions programs violate Title VI). Explained above, Vituity is intentionally discriminating based on race by excluding non-black physicians like Doctor A.

Do No Harm has proven the other elements of its ACA claim too. "The phrase 'health program or activity' in section 1557 plainly includes all the operations of a business principally engaged in providing healthcare." *T.S. v. Heart of CarDon LLC*, 43 F.4th 737, 743 (7th Cir. 2022). Vituity is a business principally engaged in providing healthcare. VC ¶¶15-22; Ex. A. It receives Medicare reimbursements. *See* VC ¶21. "[R]eimbursement[s] through Medicare and Medicaid" constitute "federal financial assistance." *Cummings v. Premier Rehab Keller, PLLC*, 596 U.S. 212, 217 (2022). And "section

1557 is not limited to the discrete portion of [Virtuity's] operations that receives Medicare and Medicaid reimbursements." *Heart of CarDon LLC*, 43 F.4th at 743. If Vituity discriminates *at all*, it violates section 1557. Therefore, Do No Harm is likely to succeed on the merits of its ACA claim.

II. Do No Harm and its members will suffer irreparable harm without immediate relief.

Do No Harm and its members will suffer irreparable harm absent interim relief. "The injury in cases of this kind is that a discriminatory classification prevents the plaintiff from competing on equal footing." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) (cleaned up); *see also Parents Involved*, 551 U.S. at 719 ("being forced to compete in a race-based system that may prejudice the plaintiff"). This "denial of equal treatment result[s] from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Ne. Fla Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). It is irreparable. *See, e.g.*, *Coal. for Equity*, 295 F. Supp. 3d at 557-58; *Fearless Fund*, 2023 WL 6520763, at *1 (citing *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir. 1984)); *Rogers v. Windmill Pointe*, 967 F.2d 525, 528 (11th Cir. 1992).

Moreover, the application process will close soon—well before this case could reach final judgment. Vituity has advertised that the application process will close on December 17, 2023. Ex. D. Once the application period closes and physicians have been selected, Doctor A will have "no do over." *League of Women Voters v. Newby*, 838 F.3d 1, 9 (D.C. Cir. 2016). He will have lost the opportunity to apply for or receive a

partnership under the program in the normal course. That lost opportunity based on racial discrimination, and the many benefits that the program and partnership provides, cannot be quantified or remedied with money damages. *MacGinnitie v. Hobbs Grp.*, 420 F.3d 1234, 1242 (11th Cir. 2005).

III. The balance of harms favors Do No Harm.

The balance of harms favors Do No Harm as well. As explained, the harm to it and its members is substantial: the harm of racial discrimination, the inability to compete on an equal footing, and the potential permanent loss of an opportunity to join a lucrative incentive program and partnership. Vituity, however, faces only the potential for a slight delay in its ability to select and hire physicians. This delay will "not substantially injure" Vituity. *League of Women Voters*, 868 F.3d at 12. Courts have recognized that a mere delay imposes little, if any, harm, especially where the deadline was "arbitrarily set in the first place." *GOS Operator, LLC v. Sebellius*, 2012 WL 175056, at *5 (S.D. Ala. Jan. 20). And Vituity brought any harm it might suffer on itself by adopting a racially discriminatory program. *See Kos Pharms., Inc. v. Andryx Corp.*, 369 F.3d 700, 728 (3d Cir. 2004). The balance of the harms favors an injunction. *See Fearless Fund*, 2023 WL 6520763, at *1.

IV. The public interest favors Do No Harm.

The public interest also favors Do No Harm. "[C]ivil rights actions vindicate a public interest." *Villano v. City of Boynton Beach*, 254 F.3d 1302, 1306 (11th Cir. 2001)

(citing *Williams v. Thomas*, 692 F.2d 1032, 1038 (5th Cir.1982)). And "[i]t is in the public interest for courts to carry out the will of Congress." *Myland Pharm., Inc. v. Shalala*, 81 F. Supp. 2d 30, 45 (D.D.C. 2000). Especially where, as here, Vituity has engaged in "[r]acial discrimination," which "is invidious in all contexts." *SFFA*, 143 S. Ct. at 2166 (cleaned up). The "public interest favors an injunction." *See Fearless Fund*, 2023 WL 6520763, at *1.

CONCLUSION

For all these reasons, this Court should grant Do No Harm's motion for a TRO, including *ex parte* if necessary.

Dated: December 8, 2023

Respectfully submitted,

/s/ Taylor A.R. Meehan

Thomas R. McCarthy** (DC Bar No. 489651)
Cameron T. Norris* (TN Bar No. 33467)
Taylor A.R. Meehan (VA Bar 97358)
C'Zar D. Bernstein* (DC Bar 1736561)
Consovoy McCarthy PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com
cam@consovoymccarthy.com
taylor@consovoymccarthy.com
czar@consovoymccarthy.com

* pro hac vice forthcoming
** pro hac vice pending

Attorneys for Do No Harm

RULE 7.1(F) CERTIFICATION

Under Local Rule 7.1(F), I certify that the above memorandum is 3137 words, excluding parts that can be excluded. The Motion itself does not exceed 500 words and therefore does not count toward the limitation on words for the memorandum.

/s/ Taylor A.R. Meehan

RULE 7.1 CERTIFICATION OF CONFERENCE

Do No Harm's counsel could not confer with opposing counsel because, when this time-sensitive motion was filed, no counsel had entered an appearance. This motion is properly filed *ex parte* for the reasons discussed in the accompanying Memorandum.

/s/ Taylor A.R. Meehan

CERTIFICATE OF SERVICE

On December 8, 2023, I e-filed this motion and attachments with the Court and co-counsel will email it to Defendant's general counsel. Do No Harm's counsel will also send this motion and attachments, via certified mail, to Defendant along with the other case-opening documents.

/s/ Taylor A.R. Meehan