UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AARP, Plaintiff, v. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant.	Case No. 1:16-cv-02113 (JDB) Hon. John D. Bates

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

AND

DEFENDANT'S OPPOSITION TO AARP'S CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Cases

Administrative Materials

Other Authorities

** The authorities upon which we principally rely are marked with asterisks.*

INTRODUCTION

In its opinion denying Plaintiff's motion for a preliminary injunction, this Court found that Plaintiff had not established a likelihood of success on the merits and explained that "nothing in either" the Americans with Disabilities Act ("ADA") or the Genetic Information Nondiscrimination Act ("GINA") "directly prohibits the use of incentives in connection with wellness programs" or even "speaks to the level of permissible incentives at all." *See* ECF No. 27 ("PI Op.") at 23. The Court held that the "determination as to what level of incentives is permissible is exactly the kind of agency determination to which the Court owes some deference," *id.* at 24 (emphasis omitted), and denied Plaintiff's motion on that basis.

As explained in Defendant's motion to dismiss or, in the alternative, for summary judgment, *see* ECF No. 31 ("Def's MSJ"), nothing in the administrative record undercuts the Court's initial judgment about this case. To the contrary, the administrative record ("A.R.") makes clear that in exercising the discretion delegated to it by Congress, the Equal Employment Opportunity Commission ("EEOC") weighed various policy alternatives, carefully evaluated the numerous comments submitted by interested parties, and explained why it made the choices that it did. The Administrative Procedure Act ("APA") requires nothing more. *See, e.g.*, *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 (D.D.C. 1995) ("In thoroughly reviewing the agency's actions, the Court considers whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors.").

Plaintiff's opposition and cross-motion for summary judgment, *see* ECF No. 35 ("Pl's Opp'n"), likewise provides no new argument that would undercut the Court's initial judgment. Invoking various canons of statutory construction, Plaintiff contends that the EEOC should have

selected Plaintiff's preferred meaning of "voluntary," which would preclude nearly all incentives. But whatever use interpretive canons have when a court interprets a statutory term on a blank slate, in this case the parties' dispute arises at step two of the *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), framework. *See, e.g.*, Pl's PI Mot. (ECF No. 2) at 25 (contending that Defendant's construction is "an unreasonable construction of the statutory language under *Chevron* Step II"). At step two, courts are bound to uphold an "agency interpretation as long as it is reasonable — regardless [of] whether there may be other reasonable, or even more reasonable, views." *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998). Indeed, "[i]f the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, [courts] give that reading controlling weight, even if it is not the answer 'the court would have reached if the question initially had arisen in a judicial proceeding.'" *Regions Hosp. v. Shalala*, 552 U.S. 448, 457 (1998) (quoting *Chevron*, 467 U.S. at 842, 843 & nn. 9, 11). If this case were amenable to resolution based on interpretive canons, it would have been resolved at *Chevron* step one.

Finally, before the Court may reach any of these issues, it must confirm its initial conclusion that Plaintiff has associational standing to bring this action under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). *See, e.g.*, *Dominguez v. UAL Corp.*, 666 F.3d 1359, 1362 (D.C. Cir. 2012) ("[E]very federal court has a 'special obligation to satisfy itself' of its own jurisdiction before addressing the merits of any dispute." (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986))). Defendant respectfully urges the Court to revisit its initial determination. While Plaintiff refers to the three individuals who have submitted declarations in this case as "members" of AARP, these individuals exhibit none of the "indicia of membership" identified by this Court and the D.C. Circuit: they do not elect the

organization's leadership, they do not guide the organization's activities, and they do not contribute to the organization financially. Plaintiff therefore cannot demonstrate that it "actually represents" these individuals, which is the very premise of associational standing. *See* PI Op. at 10. Nor has Plaintiff met its burden of establishing that any of its members have standing to sue in their own right.

For all of these reasons, and those discussed further below, dismissal of Plaintiff's complaint with prejudice is warranted.

ARGUMENT

I. Plaintiff Has Failed To Meet Its Burden Of Establishing Standing.

Article III's narrow limits on federal court jurisdiction are "founded in concern about the proper — and properly limited — role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). While there is a body of law that permits an organization that "itself has not suffered an injury" to bring suit, *see* PI Op. at 9, an association can only invoke this doctrine if it demonstrates that (1) it is a membership organization in the first place, and (2) it has members who would have standing to bring suit in their own right. *See generally id.* at 9-10. Plaintiff has satisfied neither of these requirements.

A. Plaintiff Has Failed To Identify Injured Members Who Satisfy The Indicia Of Membership.

1. To Invoke Associational Standing, AARP's Members Must Satisfy The Indicia Of Membership.

Both the D.C. Circuit and this Court have refused to permit organizations to invoke associational standing when they do not satisfy the "indicia of membership," which include electing the organization's leadership, guiding the organization's activities, and providing the organization's funding. *See Conservative Baptist Ass'n of Am., Inc. v. Shinseki*, 42 F. Supp. 3d 125, 133 (D.D.C. 2014) (Bates, J.); *Am. Legal Found. v. FCC*, 808 F.2d 84, 90 (D.C. Cir. 1987);

Fund Democracy, LLC v. SEC, 278 F.3d 21, 26-27 (D.C. Cir. 2002); *Gettman v. DEA*, 290 F.3d 430, 435 (D.C. Cir. 2002); *Health Research Grp. v. Kennedy*, 82 F.R.D. 21, 26 (D.D.C. 1979). AARP nevertheless contends that a "searching inquiry" into its status as a membership organization is unnecessary because it "plainly" is such an organization. *See* Pl's Opp'n at 16. In effect, Plaintiff invites the Court to conclude that it is a membership organization because it says it is.

The Court should decline that invitation. While AARP asserts that it is a traditional membership organization, *see* Pl's Opp'n at 16, the Court has appropriately concluded that relying on such labels "seems to beg the question: what then defines a 'traditional membership organization?'" PI Op. at 11. Unless the Court accepts Plaintiff's suggestion that any organization referring to its subscribers as "members" may invoke associational standing, courts must use the "indicia of membership" test articulated by the Supreme Court and the D.C. Circuit.[1] Plaintiff identifies no other possible test.[2]

[1] Plaintiff also points to a non-binding, thirty-year-old case from the Eastern District of Pennsylvania concluding that AARP may bring suit on behalf of its members. *See AARP v. E.I. Dupont de Nemours & Co.*, 677 F. Supp. 351, 354-55 (E.D. Pa. 1987). While that court made bare reference to the fact that AARP "represent[s] its members," *id.* at 356, the defendant in that case did not challenge AARP's status as a membership organization, and questioned only whether the suit was germane to AARP's organizational purpose. *See id.* at 355-56.

[2] Plaintiff asserts that is satisfies what it describes as an "initial requirement" — *i.e.*, that it has a "defined mission" and serves a "discrete, stable membership with a definable set of common interests." Pl's Opp'n at 17-18. Defendant does not dispute that AARP has a defined mission and serves members with common interests, but AARP cites no evidence that its membership is stable. Indeed, it appears that AARP's membership is actually quite volatile. *See, e.g.*, Ronald J. Vogel, *Medicare: Issues in Political Economy* 226 n.7 (1999) ("[A]bout 3.5 million AARP members die or let their memberships lapse each year, only to be replaced by 3.5 million new members."); *AARP, Losing Members Over Health Care, Faces Challenge From Grassroots Senior Advocacy Group*, http://www.foxnews.com/politics/2009/08/18/aarp-losing-members-health-care-faces-challenge-grassroots-senior-advocacy.html (Aug. 18, 2009) (quoting AARP spokesman for

2. AARP's Members Do Not Satisfy The Indicia Of Membership.

a) AARP's Members Play No Role In Electing The Organization's Leadership.

AARP has never disputed that by joining AARP and becoming a "member" of the organization, an individual obtains no role whatsoever in electing its leadership. Instead, the Board of Directors alone selects its members. This feature of AARP's structure distinguishes it from organizations that have typically been permitted to invoke associational standing. *See* Def's MSJ at 12-13; *cf., e.g., Sierra Club v. Aluminum Co. of Am.*, 585 F. Supp. 842, 851 (N.D.N.Y. 1984) ("[M]embers of the Sierra Club do in fact retain effective control over the organization. Generally of course, members pay dues and obtain voting rights by which they may control the activities of the Club through policy setting and election of a board of directors. Indeed, members join the organization with an expectation that they will have a voice in the policies and decisions of the organization."); *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 598 (D.C. Cir. 2015) (noting that "all of CSE's current members are voting members entitled to elect its Board, [and] no new voting members may join the organization unless approved by the present voting membership").

AARP contends that it has a "complex structure" pursuant to which "members choose representatives — who are also members — to make final decisions about the organization's actions." Pl's Opp'n at 19. There is nothing "complex," however, about AARP's structure: it is run by a Board of Directors that elected itself. *See* ECF No. 21-1 ("Boudreau Decl.") ¶ 6. The only "members [who] choose representatives" are the fewer than two dozen members (out of 38 million) who serve on the Board of Directors. *See id.* Attach D ("AARP Bylaws") art. V, sec. 3.

---

proposition that "the group loses some 300,000 members a month"). In any event, Plaintiff properly concedes that "[t]he *Hunt* indicia go beyond this initial requirement." Pl's Opp'n at 18.

All remaining members (including the three declarants tendered in this case) play no role at all in selecting the organization's leadership, a fact that "weighs heavily" against associational standing. *See Package Shop, Inc. v. Anheuser-Busch, Inc.*, No. 83-513, 1984 WL 6618, at *40 (D.N.J. Sept. 25, 1984) ("The organization essentially is run by people who are self-appointed, a fact which weighs heavily against its being considered a membership organization.").[3]

Plaintiff's argument is that so long as there are some individuals who both satisfy the indicia of membership (by virtue of their service on the Board of Directors) and happen to be called "members," it follows that any individual referred to as a "member" must also be treated as a member for purposes of associational standing. That approach makes little sense. Even if the Court is persuaded that AARP is a membership organization because it has some individuals (i.e., its Directors) who satisfy the indicia of membership, that does not mean that anyone bearing the title "member" must also be treated as a member for purposes of associational standing. Instead, the far more logical reading of the case law is that if certain "members" satisfy the indicia of membership by virtue of their status as Directors, then it is those individuals — and only those individuals — who should be treated as members for associational standing purposes. None of Plaintiff's declarants serves on the Board of Directors, and the fact that *other* members satisfy the indicia of membership by virtue of their separate appointments as Directors is irrelevant. Plaintiff

[3] Plaintiff invokes *Citizens Coal Council v. Matt Canestrale Contracting, Inc.*, 40 F. Supp. 3d 632 (W.D. Pa. 2014), Pl's Opp'n at 16-17, for the proposition that the absence of voting rights is not dispositive, but that case is distinguishable: As the *Citizens Coal Council* court noted, "unlike the board of directors/trustees in *Health Research Group* and *Package Shop*, CCC's Coordinating Committee and officers are not self-appointed or self-perpetuating." *Id.* at 638 (citations omitted). The court also noted that "the members of CCC on whose behalf this litigation is being brought meet regularly with and advise CCC's executive director," *id.* at 639; there is no evidence of such meetings and consultation in this case.

has not identified a single individual who both satisfies the indicia of membership and would have standing to sue in his or her own right.

b) AARP's Members Do Not Otherwise Guide Its Activities.

While it is undisputed that the lay "membership" of AARP has no say in electing the organization's leadership, Plaintiff contends that there are "numerous ways in which AARP members direct AARP's actions," including serving on policy committees and completing surveys. *See* Pl's Opp'n at 19. At the outset, it bears noting that only a miniscule percentage of AARP's members are permitted to participate in this way: only 147,000 of AARP's approximately 38 million "members" (approximately 0.386%) were invited to participate in AARP's 2016 Member Opinion Survey, *see* AARP, 2016 AARP Member Opinion Survey, http://www.aarp.org/research/topics/politics/info-2016/2016-member-opinion-survey.html,[4] and only twenty-five (approximately 0.0000065%) serve on the National Policy Council, *see* ECF No. 21-1 (Boudreau Decl.) ¶ 6.[5] The remaining 99.7% of AARP's members — including all the declarants in this case — play no role in guiding the organization and are thus identically situated to the individuals at issue in *Gettman*, 290 F.3d 430, and *American Legal Foundation*, 808 F.2d 84. *Cf.* Pl's Opp'n at 19 ("The cases that the EEOC invokes for this proposition . . . rejected associational standing claims because, among other reasons, the subscribers and viewers at issue played no role in the

[4] Prior to the 2016 survey, AARP had not conducted such a survey since 2012. *See* AARP, 2016 Member Opinion Survey, Initial Impressions/Insights at 5 (Aug. 6, 2016), http://www.aarp.org/content/dam/aarp/research/surveys_statistics/politics/2016%20mos/2016-initial-summary-ext.pdf.

[5] Members of the National Policy Council are appointed by the Board of Directors, not the membership as a whole. *See* AARP, National Policy Council Member Position Description and Selection Criteria, http://www.aarp.org/content/dam/aarp/about_aarp/aarp_policies/2015-12/NPC-Position-Description-and-Selection-Criteria-for-2016.pdf. Moreover, the "various policy committees" to which the Court referred in its preliminary injunction opinion, *see* PI Op. at 13, are subsets of the National Policy Council. *See* Boudreau Decl. ¶ 6.

organization's direction or financing." (emphasis omitted)). As stated above, it makes little sense to conclude that the declarants in this case may be treated as members of AARP because *other* individuals are permitted to serve on committees and respond to surveys. (For the same reason, it is highly relevant that the only declarant whom this Court has found would have standing to sue — Declarant A — does not contribute financially to AARP's activities. *See* Def's MSJ at 12.)

In any event, even if every single member of AARP were permitted to serve on advisory committees and to respond to surveys, that would still not mean that they have control over the organization sufficient for purposes of associational standing. As another court in this District has explained, "there is a material difference of both degree and substance between the control exercised by masses of Contributors tending to give more or less money to an organization depending on its responsiveness to their interests, or through the expression of opinion in the letters of Supporters, on the one hand, and the control exercised by Members of an organization as they regularly elect their governing body, on the other." *Health Research Grp.*, 82 F.R.D. at 27; *see also Package Shop,* 1984 WL 6618, at *41 ("More importantly, it does not appear that the membership can control the actions of the officers and trustees, most of whom they did not elect. There is an important difference between having the opportunity to express opinions through letters or telephone calls and the power to control the activities of an organization."). Customers regularly complete surveys and serve on focus groups for United Airlines, Netflix, Amazon, and other businesses, *see* Def's MSJ at 11-12, but that does not mean that customers have a meaningful say in how those businesses are run. Indeed, Plaintiff refuses to concede that Netflix cannot bring suit on behalf of its subscribers. *See* Pl's Opp'n at 18 n.5. That Plaintiff's proposed test leads to a massive expansion of associational standing to organizations never previously understood to be capable of invoking it shows why a rigorous application of the indicia of membership is necessary.

c) It Is Relevant That AARP's Bylaws State That It Has No Members.

Finally, it is highly relevant that AARP's bylaws indicate that it has no members under a D.C. Code provision defining a member as a "person that has the right . . . to select or vote for the election of directors or delegates or to vote on any type of fundamental transaction." *See* D.C. Code. § 29-401.02(24)(A); AARP Bylaws art. 3, sec. 2. Plaintiff contends that "[s]tate corporations law does not define which organizations may represent their members for associational standing purposes," Pl's Opp'n at 17, and that is correct insofar as organizations that satisfy the indicia of membership have been permitted to invoke associational standing, even if they lack certain corporate formalities. *See, e.g.*, *Concerned Citizens Around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663, 675 (E.D. La. 2010) (rejecting contention that plaintiff was "too disorganized and informal to adequately represent its members' interests" where "its members elect the organization's officers, and its members finance its activities"). What the case law does not say is that in evaluating whether an organization satisfies the "indicia of membership," a court should ignore its bylaws. Such a holding would make even less sense here, where the definition of a "member" under D.C. law significantly overlaps with the indicia of membership under associational standing case law. *Compare* D.C. Code. § 29-401.02(24)(A) (member is a "person that has the right . . . to select or vote for the election of directors or delegates or to vote on any type of fundamental transaction") *with, e.g.*, *Conservative Baptist Ass'n*, 42 F. Supp. 3d at 133 (indicia of membership include "electing the leadership of the association [and] guiding the association's activities").

B. Plaintiff Has Failed To Identify A Member Who Has Standing To Challenge The ADA Rule And The GINA Rule.

Even if the Court concludes that AARP's members satisfy the indicia of membership, such that it can even potentially invoke associational standing, it still must demonstrate that it has at

least one member who could bring this suit in his or her own right. AARP has failed to show that any of its declarants has standing to challenge the GINA Rule (at all) or the ADA Rule (to its full extent).

1. No Declarant Has Standing To Challenge The GINA Rule.

This Court previously held that neither Declarant B nor Declarant C would have standing to challenge the GINA rule. *See* PI Op. at 15. Plaintiff does not challenge that conclusion. The Court previously held, however, that Declarant A had standing to challenge the GINA rule because "it is likely that, once permitted to do so, [his employer] will adopt incentives for the collection of spousal information." *Id.* at 16. That conclusion was apparently premised on the notion that Declarant A's employer is free to make unilateral changes in the benefits that it offers its employees. As explained in Defendant's motion for summary judgment, that is not so: Declarant A's benefits are governed by a collective bargaining agreement between his union and his employer, and so Declarant A's employer can only adopt a spousal incentive program if it and Declarant A's union mutually agree upon such terms. Thus, while it is true that *Stillwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009), states that "when an agency adopts a rule with the purpose and substantially probable effect of economically helping regulated Party A, and . . . hindering Party B,' . . . 'Party B *ordinarily* will have standing to challenge the rule," *id.* (emphasis added), *Stillwell* does not hold that this is *always* true. Here, there is a significant external impediment to Declarant A's employer changing the terms of its benefits plan. It is unquestionably Plaintiff's burden to establish its standing, but Plaintiff has put forward no evidence whatsoever of a "substantial probability," PI Op. at 13, that his employer will begin a spousal incentive program.

2. No Declarant Has Standing To Challenge The ADA Rule To Its Full Extent.

The Court previously found that Declarant A has standing to challenge the ADA Rule. *See* PI Op. at 14. AARP has no answer, however, to the fact that Declarant A has such standing only to the extent that Declarant A is personally affected by the ADA Rule. *See* Def's MSJ at 14. While the challenged rules permit employers to adopt incentives equal to thirty percent of the total cost of self-only coverage, Declarant A's plan only levies an additional charge of one percent of the health insurance premiums for individuals who do not complete an online health risk assessment, as well as an additional one percent for individuals who do not participate in biometric screenings. *See* Def's MSJ at 14.[6] While some other individual might have standing to complain about incentives of thirty percent, individuals "can't obtain relief based on arguments that a differently situated person might present." *United States v. Skoien*, 614 F.3d 638, 645 (7th Cir. 2010). AARP may thus only complain about incentives of two percent, since it has failed to identify any member who currently experiences or is likely to experience incentives to the full extent authorized by the rules.[7]

Plaintiff also contends that Declarant C has standing to challenge the ADA Rule, *see* Pl's Opp'n at 22 n.7. The Court appropriately held, however, that a preliminary injunction could not issue as to Declarant C because he had already disclosed the information that he brought suit to

[6] Moreover, the employee's portion of health insurance premiums is generally paid with pre-tax dollars; that is, the employee's contribution is taken off the top of his paycheck, before income taxes are calculated. *See* 26 U.S.C. § 125; Prop. Treas. Reg. § 1.125-1(b)(1), Dep't of Treasury, Employee Benefits, Cafeteria Plans, 72 Fed. Reg. 43,938, 43,946 (Aug. 6, 2007). Thus, if an individual who pays a 25% marginal tax rate is charged an additional $300 per year because he declines to participate in a wellness program, his actual out-of-pocket cost is $225.

[7] Given that Plaintiff has previously conceded that some unidentified level of incentives is permissible, Declarant A would lack an injury-in-fact sufficient to challenge the ADA rule even under AARP's (erroneous) construction of the ADA and the Final Rule.

protect and would suffer no additional injury from disclosing it again. *See* PI Op. at 21 ("[I]t appears that the harm that AARP and Declarant C principally allege . . . has already occurred. A preliminary injunction, therefore, would serve little purpose."). That holding is equally dispositive of Declarant C's standing to seek permanent injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) ("standing to seek the injunction requested depended on whether he was likely to suffer future injury"); *Citizens for Responsibility & Ethics in Washington v. Exec. Office of President*, 587 F. Supp. 2d 48, 59 (D.D.C. 2008) ("Because injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party alleges, and ultimately proves, a real and immediate — as opposed to merely conjectural or hypothetical — threat of *future injury*." (emphasis added)). Declarant C's bare statement that his medical conditions "will only get worse," such that he will experience a new medical problem that he will not want to disclose, is far too speculative to support standing. *See, e.g., LPA Inc. v. Chao*, 211 F. Supp. 2d 160, 164 (D.D.C. 2002) ("For a plaintiff to have standing, the injury alleged must be actual or imminent, not conjectural or speculative; such injury must, at the very least, be 'certainly impending" (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 556 n.2 (1992)).[8]

II. Plaintiff's Claims Fail On The Merits Because The Court Must "Liberally Defer" To The Agency's Reasonable Construction Of Undefined Statutory Terms.

Even if the Court determines that Plaintiff has standing to bring this action, Plaintiff's claims fail on the merits for all the reasons that the Court identified in denying Plaintiff's motion for a preliminary injunction: the relevant statutory terms are undefined, the agency is entitled to deference in construing those terms, and the agency has done so in a reasonable manner.

[8] Defendant has previously explained why Declarant B lacks standing to challenge the ADA Rule. *See* Def's PI Opp'n (ECF No. 14) at 13. Plaintiff presents no new argument on this issue.

A. The Final ADA Rule Is Not Arbitrary, Capricious, Or Contrary To Statute.

1. The EEOC Has Reasonably Construed The ADA To Permit Incentives So Long As They Are Not Coercive.

The ADA provides that a workplace wellness program may include "voluntary medical examinations, including voluntary medical histories." 42 U.S.C. § 12112(d)(4)(B). Notwithstanding the Court's conclusion that the "determination as to what level of incentives is permissible is exactly the kind of agency determination to which the Court owes some deference," PI Op. at 24 (emphasis omitted), Plaintiff contends that the penalties permitted by the rules are so high as to be coercive.

Plaintiff contends that the "administrative record contains abundant proof that the 2016 ADA Rule permits employers to rob employees of a meaningful choice about whether to divulge personal medical information to employee wellness programs." Pl's Opp'n at 25. If by that Plaintiff means that the record contains comments from some individuals who would rather not choose between foregoing an incentive and participating in a workplace wellness program, Defendant concedes the point. This Court has already held, however, that "'[a] hard choice is not the same as no choice.'" PI Op. at 24 (quoting *United States v. Martinez-Salazar*, 528 U.S. 304, 315 (2000)); *see also EEOC v. Orion Energy Sys, Inc.*, 208 F. Supp. 3d 989, 1001 (E.D. Wis. 2016) (citing *Martinez-Salazar*). That the administrative record contains comments from people who think that the EEOC should have selected a different level of incentives does not change the fact that "[t]he determination as to what level of incentives is permissible is exactly the kind of agency determination to which the Court owes some deference." PI Op. at 24 (emphasis omitted).[9]

[9] Seeking to distinguish *Martinez-Salazar*, Plaintiff contends that it "did not involve [an] . . . express 'voluntary' requirement[]." Pl's Opp'n at 27-28. While that is true in a sense, it is irrelevant: Federal Rule of Criminal Procedure 24(b) provides that a criminal defendant is entitled to ten peremptory challenges, and *Martinez-Salazar* holds that a defendant is not deprived of one

Plaintiff is correct, of course, that some authorities construing other statutes (the Fair Labor Standards Act and the False Claims Act) have read voluntariness requirements to preclude an "adverse[] affect[on] . . . working conditions," *see* 29 C.F.R. § 785.28, or payment of "valuable consideration," *United States ex rel. Griffith v. Conn.*, No. 11-157, 2015 WL 779047, at *9 (E.D. Ky. Feb. 24, 2015). The EEOC agrees that one reasonable construction of the word "voluntary" precludes the use of any penalties or rewards (its prior regulations defined "voluntary" in just this way), and so there is nothing remarkable about the fact that a regulatory agency or a district judge writing on a blank slate might select that meaning. As noted above, other authorities have selected a definition of voluntary that allows incentives. *See, e.g.*, *Orion*, 208 F. Supp. 3d at 1001; *see also Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 589-90 (1937).

The dispositive point is that in this case the Court is not writing on a blank slate. As the Court has held, "[n]othing in either statute . . . directly prohibits the use of incentives in connection with wellness programs" or "speaks to the level of permissible incentives at all." PI Op. at 23; *see also* Pl's PI Mot. at 25 (contending that Defendant's construction of voluntary is "an unreasonable construction of the statutory language under *Chevron* Step II"). "[U]nder *Chevron*, courts are bound to uphold an agency interpretation [so] long as it is reasonable — regardless [of] whether there may be other reasonable, or even more reasonable, views." *Serono Labs.*, 158 F.3d at 1321; *see also* PI Op. at 22 ("Courts must 'liberally' defer to an agency's findings and sustain the

---

of his peremptory challenges when he voluntarily uses it to strike a potential jury member who should have been stricken for cause. The premise of the Court's opinion is that when a defendant uses a peremptory challenge in this manner, he makes a voluntary choice about which he cannot later complain. As Justice Scalia made explicit in his opinion concurring in the judgment, "[t]he fact that he *voluntarily* chose to expend one of [his peremptory challenges] upon a venireman who should have been stricken for cause makes no difference." *Martinez-Salazar*, 528 U.S. at 318 (Scalia, J., joined by Kennedy, J., concurring in the judgment) (emphasis added).

agency's interpretation of its authorizing statute so long as that interpretation is 'legally permissible,' even if the court would otherwise adopt a different interpretation." (quoting *Ctr. for Sustainable Econ.*, 779 F.3d at 600)). The fact that in other contexts some courts and agencies have construed the term "voluntary" to preclude the use of rewards and penalties is simply irrelevant to the present inquiry. Courts have also read the term "voluntary" to permit incentives, and it is the agency's prerogative, not Plaintiff's, to select which of the multiple reasonable interpretations of the statute best serves the public interest.

2. The EEOC Adequately Explained The Basis For Its Regulatory Action.

a) The EEOC Adequately Explained Why It Changed Its Position To Allow The Use Of Incentives.

Plaintiff's contention that the EEOC has failed to explain why it changed its position to permit the use of incentives in connection with employee wellness programs, *see* Pl's Opp'n at 31-38, repeats arguments that the Court has already rejected. As the Court explained in denying Plaintiff's motion for a preliminary injunction, "the agency has offered a seemingly reasonable explanation for its change of heart." PI Op. at 25. Specifically, "EEOC's previous interpretation of both the ADA and GINA, in prohibiting the use of incentives, narrowed the universe of permissible wellness programs employers could offer, thereby undermining provisions in HIPAA and the [Affordable Care Act (ACA)] that permitted employers to offer larger incentives in order to promote the use of wellness programs (and the reduction in healthcare costs that theoretically follows)." *Id.* "Accordingly, EEOC explained its desire to harmonize its regulations with the tri-department regulations that implement the ACA's 30% incentive cap in order to provide clarity to employers about the use of incentives." *Id.*

Rather than address the EEOC's stated reason, Plaintiff once again observes that Defendant has construed the term "voluntary" differently in the ADA and GINA.[10] That is both true and irrelevant. While Plaintiff now takes the position that "[s]tatutes with the same purposes and objective *must* be construed consistently," Pl's Opp'n at 32-33 (emphasis added), Plaintiff has previously made the accurate concession that "terms need not always be construed in the same manner." *See* Pl's PI Reply (ECF No. 17) at 22.[11] In any event, Plaintiff's reliance upon a canon of statutory construction — *i.e.*, the canon that like terms in related statutes may be presumed to have similar meanings — is particularly inappropriate in a case like this, where the Court is evaluating an agency's interpretation pursuant to *Chevron* step two. Interpretive canons are a "traditional tool of statutory interpretation" that are relevant when a Court determines if statutory language is unambiguous at *Chevron* step one. *See Chevron*, 467 U.S. at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *Mich. Citizens*

[10] Plaintiff states that Defendant has not "identif[ied] any new factual or legal developments[] that now *require* the ADA's definition of 'voluntary' to change course, but not GINA's." Pl's Opp'n at 32 (emphasis added). That is a straw man: Defendant does not contend that any developments "required" it to revise any of its regulations. Under *Chevron*, an agency may select one of multiple permissible interpretations even if it is not required to select that meaning. *See, e.g.*, *Serono Labs*, 158 F.3d at 1321.

[11] Attempting to back off this concession, Plaintiff now says that it "continue[s] to dispute that the agency has in any way justified these contrasting definitions or that there is such a justification." Pl's Opp'n at 32 n.9. That is a very different argument from a suggestion that identical terms *must* be construed identically. And in any event, there is a justification for why the EEOC amended the GINA rule to create a very narrow exception permitting incentives for spousal medical information, rather than permitting incentives for all genetic information: "EEOC concluded that collecting information from a spouse does not pose the same risk of genetic discrimination because the spouse's medical history does not reveal anything about the genetic history of the employee, even though spousal medical history is technically defined as 'genetic information' of the employee." PI Op. at 8 n.4. The same cannot be said, of course, of other kinds of genetic information, such as an employee's genetic tests.

for an Indep. Press v. Thornburgh, 868 F. 2d 1285, 1292-93 (D.C. Cir. 1989) ("If employment of an accepted canon of construction illustrates that Congress had a specific intent on the issue in question, then the case can be disposed of under the first prong of *Chevron*."). Here, however, Plaintiff contends only that the agency unreasonably interpreted the statute at *Chevron* step two — in other words, it has conceded that that the interpretive canons of construction do not yield an unambiguous result. The agency was thus permitted to select any reasonable interpretation that it wished.

This case is thus similar to *Michigan Citizens*, in which the Court noted that the Attorney General was "called upon to balance two legislative policies in tension" at *Chevron* step two. *See* 868 F.2d at 1293. In that case, the plaintiffs invoked canons of construction "to say that the Attorney General put too much weight on" a particular policy objective, but the Court held that it was "not now after *Chevron* . . . permitted to accept such an argument" and reiterated that "[i]f the agency's choice 'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *Id.* (quoting *Chevron*, 467 U.S. at 845).

Here, Plaintiff has conceded that the statutory language is ambiguous, *see supra*, and the Court has already found as much, *see* PI Op. at 23-24. Given that, in exercising its discretion at step two of the *Chevron* framework, the agency was not bound to employ any particular canon of construction, and it was free to exercise its discretion to define the term "voluntary" differently in two different statutory regimes. Plaintiff has no authority holding otherwise.

Plaintiff further contends that "harmony with HIPAA does not justify" the new definition of voluntary because "[t]he EEOC's no-penalty provision coexisted with HIPAA's 20%

penalty/incentive limit for a decade after the 2006 HIPAA rule." Pl's Opp'n at 33-34. It is of course objectively true that these provisions co-existed for a period of years, but that coexistence led to significant confusion for employers offering wellness programs. As the Court has recognized, this "limit[ed] employers' ability to make use of wellness programs and the changes wrought by the ACA — or at least generat[ed] uncertainty as to what was and was not permitted." PI Op. at 6; *see also, e.g., id.* at 25 ("Both the ADA and GINA rules acknowledge comments from employers and industry groups expressing concern and confusion as to the interplay between the ADA, GINA, and the incentives allowed under HIPAA."); A.R. 2895 (National Business Coalition on Health) ("NBCH applauds the efforts of the EEOC to reduce confusion by issuing the proposed regulations specific to worksite wellness plans."); A.R. 2923 (Council of Insurance Agents and Brokers) ("Recent uncertainty regarding treatment of wellness programs under the [ACA], the ADA, and [GINA] has had a dampening effect on employer creation and expansion of wellness programs. Thus, the Council very much appreciates the EEOC's efforts to bring more clarity to this topic."). It was well within EEOC's regulatory authority to try to resolve this confusion.

Plaintiff also contends that "'harmony' is not a valid goal for the ADA and HIPAA" because they "apply to different entities, regulate different activities, and serve different goals." Pl's Opp'n at 34. But while it is true that "HIPAA regulates insurers and group health plans," whereas the "ADA and GINA regulate employers," *id.*, the issue of workplace wellness programs arises at the intersection of those regulated entities: that is, where employers offer employees health plans that include wellness programs. Given that Congress amended the statutes regulating health insurers and group health plans to codify its support for these programs, it was reasonable for the EEOC to interpret its regulations to permit them. *See* PI Op. at 25.

Plaintiff further contends that "the wellness programs addressed by HIPAA [are not] coextensive with the practices regulated by the ADA and GINA's nondisclosure provisions." Pl's Opp'n at 34. Again, while it is true that "wellness programs that do not make any disability-related inquiries or require medical exams do not implicate the ADA's protections," *id.* at 35, the extension of wellness programs in the ACA was plainly intended to reach *all* workplace wellness programs offered in connection with a group health plan, whether they make disability-related inquiries or not. Similarly, while it is true that the limits added to HIPAA by the ACA apply only to health-contingent wellness programs while leaving participatory programs not subject to such limits, that shows that Congress intended there to be less regulation of these programs — not more.

b) The EEOC Adequately Explained Why It Selected The Level Of Permissible Incentives That It Did.

Plaintiff contends that "the agency has done nothing to explain or justify its selection of its new 'voluntary' definition." Pl's Opp'n at 36. Plaintiff presents this argument, however, subject to the incorrect premise that "HIPAA does not justify the 30% penalty/incentive limit." *Id.* As explained above, that is wrong: as the Court has already found, it was appropriate for the agency to align its limits with the limits selected by Congress. As the Court has noted, "EEOC explained its desire to harmonize its regulations with the tri-department regulations that implement the ACA's 30% incentive cap in order to provide clarity to employers about the use of incentives." PI Op. at 25.[12]

[12] Plaintiff contends at various points that the EEOC did not actually align its incentives with those selected by Congress in the ACA. *See, e.g.*, Pl's Opp'n at 35 n.11. It is true that under the ADA, the maximum permissible incentive is set at thirty percent of the cost of self-only coverage, rather than thirty percent of the cost of the plan in which the employee is enrolled, as under the ACA. The EEOC explained why this choice made sense in the context of the ADA and GINA: incentives are calculated on a person-by-person basis, rather than on a household basis. *See* ADA Final Rule, 81 Fed. Reg. 31,126, 31,136 (May 17, 2016) (reprinted at A.R. 12) ("Because the ADA's prohibitions on discrimination . . . apply only to applicants and employees, not their spouses and

This case thus bears no relationship to *Association of Private Colleges & Universities v. Duncan*, 870 F. Supp. 2d 133 (D.D.C. 2012), in which the court found that the agency had chosen a "compromise figure" unsupported by any "reasonable explanation." *See id.* at 154. Here, the agency had a "reasonable explanation": it selected the thirty percent figure to align its incentive limits with those under HIPAA. As the EEOC explained, it "believe[s] that the final rule interprets the ADA in a manner that reflects the ADA's goal of limiting employer access to medical information and is consistent with HIPAA's provisions promoting wellness programs." *See* ADA Final Rule, 81 Fed. Reg. 31,126, 31,129 (May 17, 2016) (reprinted at A.R. 5). "Accordingly, after the consideration of all of the comments, the Commission reaffirms its conclusion that allowing certain incentives related to wellness programs, while limiting them to prevent economic coercion that could render provision of medical information involuntary, is the best way to effectuate the purposes of the wellness program provisions of both laws." *Id.* AARP's disagreement does not mean that the agency did not have a reason or that the reason it articulated is arbitrary and capricious. *See, e.g.*, *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1141 n.45 (D.C. Cir. 1996) ("When [an agency] must select some, necessarily somewhat arbitrary figure, we will defer to the [agency's] expertise if it provides substantial evidence to support its choice and responds to substantial criticisms of that figure."); *Emily's List v. Fed. Elec. Comm'n*, 581 F.3d 1, 22. n.20 (D.C. Cir. 2009) ("Agencies generally do not violate the APA's deferential arbitrary-and-

---

other dependents, this rule does not address the incentives wellness programs may offer in connection with dependent or spousal participation. However, because medical history about an employee's family members, including an employee's dependents and spouse, is considered genetic information about the employee, incentives offered in exchange for an employee's family member to provide such information implicates Title II of GINA. The EEOC also publishes today a final rule under GINA concerning the extent to which employers may offer incentives for spouses and other family members to provide health-related information as part of a wellness program." (footnotes omitted)).

capricious standard when they employ bright-line rules for reasons of administrative convenience, so long as those rules fall within a zone of reasonableness and are reasonably explained.").

Plaintiff is simply wrong that the rule "gives no reasoned response to the numerous comments." Pl's Opp'n at 37. As the Court noted in denying Plaintiff's motion for a preliminary injunction, "EEOC acknowledged comments expressing concern that the 30% permissible incentive level was too high and could become coercive, but determined that this incentive level, 'although substantial,' was not coercive based on current insurance rates, but that incentives in excess of 30% of the cost of self-only coverage would be coercive." PI Op. at 26 (emphasis omitted); *see also* ADA Final Rule, 81 Fed. Reg. at 31,133 (reprinted at A.R. 9) (rejecting "suggestion that merely offering employees a choice whether or not to participate renders participation voluntary . . . [but] conclud[ing] that, given current insurance rates, offering an incentive of up to 30 percent of the total cost of self-only coverage does not, without more, render a wellness program coercive").[13]

Finally, the agency explained that a provision of the Internal Revenue Code added by the ACA, 26 U.S.C. § 4980H, creates an independent incentive for large employers (i.e., those with fifty or more full-time employees, including full-time equivalent employees) to offer affordable healthcare coverage to full-time employees, including those who decline to participate in wellness programs. *See* Def's MSJ at 19-20; ADA Final Rule, 81 Fed. Reg. at 31,132 (reprinted at A.R. 8). Specifically, under the ACA, if an employer with fifty or more full-time employees fails to offer

[13] As explained below, *see infra* Part II.B.3, the EEOC selected a limit of 30% on an individual basis; that is, such an incentive is permissible whenever any individual declines to participate in a wellness program, irrespective of choices made by his or her spouse. The EEOC explained why this choice made sense given the per-employee approach of the ADA and GINA, rather than the per-household approach of the ACA. *See also supra* note 12.

its full-time employees the opportunity to enroll in "affordable" coverage that provides minimum value, an excise tax may be imposed upon the employer if at least one of its full-time employees receives the premium tax credit for coverage in the Health Insurance Exchange.[14] Coverage is not "affordable" for this purpose if "the employee's required contribution . . . with respect to the plan exceeds 9.5% of the applicable taxpayer's household income." *See* 26 U.S.C. § 36B(c)(2)(C). Under the pertinent Treasury regulations defining affordability, incentives available for participation in employee wellness programs are (with the exception of tobacco-related incentives) treated as not earned. *See* 26 C.F.R. § 1.36B-2(c)(3)(v)(A)(4).

Plaintiff contends in response that "many ADA-covered employees" will not benefit from this incentive because they work at employers with fewer than fifty full-time employees. Pl's Opp'n at 38. The administrative record reveals, however, that most individuals offered workplace wellness programs work at large employers. *See* A.R. 7835 (RAND Report) ("[A]pproximately half of U.S. employers offer wellness promotion initiatives, and larger employers are more likely to have more complex wellness programs."); A.R. 7774 (Kaiser Report) ("A large majority of firms offering health benefits offer some type of wellness program, with large firms (200 or more workers) being more likely than smaller firms (3-199 workers) to do so.").

Plaintiff further contends that "tax penalties on companies that do not provide 'affordable' health insurance to some low-income individuals are no comfort to employees of *average* income." Pl's Opp'n at 38. However, if a large employer fails to offer coverage to at least 95% of its full-

[14] The excise tax is imposed upon large employers that fail to offer full-time employees (and their dependents) "minimum essential coverage" or that offer minimum essential coverage that is either not affordable or does not provide minimum value, and at least one full-time employee receives the premium tax credit with respect to health coverage purchased through the Health Insurance Exchanges. *See* 26 U.S.C. § 4980H.

time employees (and their dependents) — irrespective of their income level — it may be liable for a tax penalty.[15] And contrary to Plaintiff's suggestion, it is entirely reasonable to conclude that an individual is not "coerced" into participating in a wellness program if his insurance remains affordable, under a government definition, even if he declines to participate.

B. The Final GINA Rule Is Not Arbitrary, Capricious, Or Contrary To Statute.

Plaintiff further challenges the 2016 GINA Rule, on many of the same grounds that it challenges the 2016 ADA Rule. The GINA challenges are equally meritless.

1. The 2016 GINA Rule Is Internally Consistent.

Plaintiff first contends that the GINA rule "impermissibly allows wellness programs to collect spousal medical information . . . in a manner that the 2016 GINA rule defines as not 'voluntary.'" Pl's Opp'n at 39. The regulation provides, as a general rule, that no incentives may be paid for genetic information. *See* 29 C.F.R. § 1635.8(b)(2)(i)(B) (requiring that the "provision of genetic information by the individual [be] voluntary, meaning the covered entity neither requires the individual to provide genetic information nor penalizes those who choose not to provide it"); *id.* § 1635.8(b)(2)(ii) ("Consistent with, and in addition to, the requirements of paragraph (b)(2)(i) of this section, a covered entity may not offer an inducement (financial or in-kind), whether in the form of a reward or penalty, for individuals to provide genetic information."). There is, however, an exception: this prohibition applies "*except as described in paragraphs (b)(2)(iii) and (iv) of this*

[15] Under 26 U.S.C. § 4980H(a), if a large employer fails to offer coverage to at least 95% of its full-time employees (and their dependents), and at least one full-time employee receives the premium tax credit under 26 U.S.C. § 36B for coverage in the Exchange, the employer is subject to a tax penalty equal to, simplifying somewhat, $2,000 per year multiplied by the employer's number of full-time employees. *See* 26 U.S.C. § 4980H(a), (c)(1); 26 C.F.R. § 54.4980H-4(a). Even if a large employer is not liable for a payment under 26 U.S.C. § 4980H(a), in general, it will instead owe a payment under 26 U.S.C. § 4980H(b) for each full-time employee who receives the premium tax credit, which, subject to other eligibility conditions, will only be available to a full-time employee if the employee does not have an offer of affordable minimum value coverage from the employer.

section." *Id.* § 1635.8(b)(2)(ii) (emphasis added). And paragraph (b)(2)(iii) specifically provides that "a covered entity may offer an inducement to an employee whose spouse provides information about the spouse's manifestation of disease or disorder as part of a health risk assessment." *Id.* § 1635.8(b)(2)(iii). Agencies routinely issue general rules with various exceptions (as does Congress, and as do courts), and Plaintiff does not even offer a theory of why it was inappropriate for the EEOC to do so here.

Contrary to Plaintiff's contention that the EEOC was not at liberty to weigh policy considerations in construing an ambiguous statutory term, *see* Pl's Opp'n at 42, it is black letter law that an agency may consider policy at *Chevron* step two. *See, e.g.*, *Chevron*, 467 U.S. at 865 ("[T]he Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and . . . the decision involves reconciling conflicting policies." (footnotes omitted)); *Nat'l Cable & Telecomms Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 997 (2005) (finding that Commission's construction was "a reasonable policy choice for the [Commission] to make at *Chevron*'s second step."); *Agape Church, Inc. v. FCC*, 738 F.3d 397, 408 (D.C. Cir. 2013) ("The only question we face is whether the Sunset Order's interpretation of the viewability requirement is permissible under the statute. We cannot substitute our judgment for the agency's, especially when, as here, the decision under review requires expert policy judgment of a technical, complex, and dynamic subject." (citation omitted)); *New York v. U.S. EPA*, 413 F.3d 3, 26 (D.C. Cir. 2005) ("This policy choice, which reconciles conflicting interests in accuracy and efficiency, based on years of regulatory experience, is entitled to deference under *Chevron* Step 2 . . . .").

It therefore remains highly relevant that, as the EEOC explained, it could have interpreted voluntariness to permit incentives across the board, instead of just for spousal medical information. While Plaintiff complains that this argument is "perplexing" because "the agency did, in fact, adopt

a definition of 'voluntary' forbidding penalties/incentives conditioned on providing genetic information," Pl's Opp'n at 42, the regulation explicitly carves out an exception for spousal medical history. Plaintiff offers no theory as to why the agency was not entitled to create such a carve out.

2. The 2016 GINA Rule Is Consistent With GINA.

Plaintiff's arguments that the 2016 GINA Rule conflicts with the statute fail. Most importantly, they fail because, as the Court has found, "[n]either the ADA nor GINA offers a definition of the term 'voluntary'" and that "[n]othing in either statute . . . directly prohibits the use of incentives in connection with wellness programs" or "speaks to the level of permissible incentives at all." PI Op. at 23. The EEOC was thus free to adopt a definition of "voluntary" permitting the use of incentives, for all the same reasons that it was under the ADA.

Plaintiff's arguments suggesting a disconnect between the statute and the regulation are particularly poorly taken because (1) the requirement that the disclosure of genetic information be voluntary does not apply to spouses of employees, who have no employment relationship with the employer; and (2) even if the requirement of voluntariness did apply to spouses, asking spouses of employees to provide their own current health status information does not constitute a request for the spouse's genetic information under the statutory definition of genetic information. *See* Def's MSJ at 23-24. Plaintiff argues in response that "[t]he 2016 GINA Rule permits an employer to incentivize the *employee* for disclosing his or her spouse's information," Pl's Opp'n at 42-43, but that is simply not so: the regulation permits an employer to pay an incentive to an employee when the spouse provides information about *that spouse's own* manifestation of disease or disorder. *See* 29 C.F.R. § 1635.8(b)(2)(iii) ("[A] covered entity may offer an inducement to an employee whose *spouse* provides information about *the spouse's manifestation of disease or disorder* as part of a health risk assessment." (emphasis added)). That information is the employee's genetic

information under GINA, but it is not the genetic information of the spouse — the party who is providing it.[16] The Final Rule makes abundantly clear that it "retains the requirement that no inducement may be offered in return for the spouse providing his or her own genetic information, including results of his or her genetic tests." GINA Final Rule, 81 Fed. Reg. 31,143, 31,153 (May 17, 2016) (reprinted at A.R. 43).

3. The EEOC Adequately Explained Why It Selected The Level Of Permissible Incentives That It Did.

Plaintiff once again contends that Defendant failed to adequately explain why it selected the particular threshold for incentives that it did. While conceding that this challenge significantly duplicates its challenge under the ADA, Plaintiff contends that the "2016 GINA Rule is invalid for the additional reason that it doubles the penalties' coercive effect by permitting employers to penalize employees twice." *See* Pl's Opp'n at 44. The EEOC, however, adequately addressed this issue in the rulemaking process. As it explained:

> [W]e determined, in developing the final ADA rule on employer-sponsored wellness programs, that incentives in excess of 30 percent of the cost of self-only coverage offered in exchange for an employee answering disability-related questions or taking medical examinations as part of a wellness program would be coercive. We see no reason for adopting a different threshold where the employee's spouse is the individual whose health information is being sought.

GINA Final Rule, 81 at 31,154 (reprinted at A.R. 44). The EEOC recognized that the "combined total inducement will be no more than twice the cost of 30 percent of self-only coverage," *id.* at

[16] Plaintiff misstates Defendant's position on this point. Defendant's position, as set out above, is that the spouse's manifestation of disease or disorder (i.e., the information provided by the spouse) is not the spouse's genetic information under GINA. *See also* Def's MSJ at 24 ("[A]sking spouses of employees to provide their own current health status information does not constitute a request for the spouse's genetic information under the statutory definition of genetic information."). Defendant's argument is not, as Plaintiff would have it, that "a request for an employee's spouse's 'current health status' is not a request for the employee's genetic information." Pl's Opp'n at 43. It is the employee's genetic information under the GINA definition, but it is not provided by the employee. It is provided by the spouse.

31,146, but it selected a per-transaction approach in which 30 percent was deemed an appropriate incentive whenever any individual declines to participate in a wellness program — irrespective of choices made by his or her spouse. *See supra note* 12 (contrasting the per-individual approach of the ADA and GINA with the per-household approach of the ACA).

Finally, Plaintiff contends that both an "employee and the employee's spouse, if both are employed and insured separately, could be penalized [for withholding medical information] by *each* employer for twice this amount," bringing the total incentive to 120%. *See* Pl's Opp'n at 45. This is pure speculation: no declarant identified by AARP contends that he has experienced such a situation. Nor would AARP be able to find such a declarant: under Title I of GINA, which is administered by the Departments of Health and Human Services, Labor, and the Treasury, it would be impermissible underwriting for an employer to provide incentives or impose penalties for group health plan coverage based upon a spouse withholding medical information when the spouse is not covered by the employee's health insurance.[17]

[17] GINA Title I prohibits a group health plan from "collecting" (which includes requesting, requiring, or purchasing) genetic information, including family medical history, in connection with enrollment or at any time for underwriting purposes. 26 U.S.C. § 9802(d); 29 U.S.C. § 1182(d); 42 U.S.C. § 300gg-4(d). Thus, under GINA Title I, plans are generally prohibited from offering rewards in return for the provision of genetic information, which would include family medical history information collected as part of a Health Risk Assessment (HRA) or medical questionnaire. 26 C.F.R. § 54.9802–3T(d); 29 C.F.R. § 2590.702-1(d); 45 C.F.R. § 146.122(d). While "family member" includes spouses, there is nothing in GINA Title I that prohibits the collection of medical information from a spouse of an employee if the spouse is otherwise an enrolled beneficiary. 26 C.F.R. § 54.9802–3T(a)(2)(ii)(A); 29 C.F.R. § 2590.702-1(a)(2)(ii)(A); 45 C.F.R. § 146.122(a)(2)(ii)(A). In such a case, the collection of medical information is not a request for genetic information of a "family member" of the employee, but rather would be a request to the spouse directly as a beneficiary under the plan, therefore not implicating GINA Title I's prohibition on the collection of genetic information in connection with underwriting.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court grant its motion to dismiss or, in the alternative, for summary judgment, deny Plaintiff's cross-motion for summary judgment, and dismiss this case with prejudice.

Dated: May 30, 2017

Respectfully submitted,

JOYCE R. BRANDA
Deputy Assistant Attorney General

JOSHUA E. GARDNER
Assistant Branch Director

/s/ *Steven A. Myers*
STEVEN A. MYERS (NY Bar No. 4823043)
Trial Attorney
Federal Programs Branch
U.S. Department of Justice, Civil Division
Telephone: (202) 305-8648
Fax: (202) 616-8460
Email: Steven.A.Myers@usdoj.gov

Mailing Address:
Post Office Box 883
Washington, DC 20044

Courier Address:
20 Massachusetts Ave., NW Rm. 7334
Washington, DC 20001

Counsel for Defendant