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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

MONTANA MEDICAL ASSOCIATION, et al., Plaintiffs, and MONTANA NURSES ASSOCIATION, Plaintiff-Intervenor v. AUSTIN KNUDSEN, Montana Attorney General, and LAURIE ESAU, Montana Commissioner of Labor and Industry, Defendants.	Cause No. 9:21-cv-108 Hon. Donald W. Molloy **PLAINTIFF-INTERVENOR'S RESPONSE TO MOTION TO DISMISS**

Plaintiff-Intervenor the Montana Nurses Association ("MNA" or "the Nurses") satisfies all the elements of constitutional standing and the requirements for an association to litigate on behalf of its members. The State's arguments for

dismissal either overlook the actual contents of the Complaint, misstate the controlling law, or presume the ultimate merits questions of the case. The motion should be denied.

STANDARD

Taken together, Rules 8 and 12 require a plaintiff's allegations to be clear and plausible—not loquacious. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) ("the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

To establish the elements of constitutional standing, "[a]t the pleading stage, [the plaintiff] is merely required to allege facts demonstrating each element." *All. for Wild Rockies v. Savage*, No. CV 18-67-M-DWM, 2018 WL 10731198, at *4 (D. Mont. Dec. 20, 2018) (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016)).

A defendant's desire for more information may be satisfied through a motion for a more definite statement under Rule 12(e), or through discovery and the development of a case in the normal course. But a defendant's mere dissatisfaction with a plaintiffs' legal arguments in the complaint, or with the granularity of a plaintiff's factual allegations, rarely sounds in dismissal under Rule 12(b)(1) or

12(b)(6) if the allegations exist, are clear, and reach a threshold level of plausibility. *See Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." (cleaned up)); *All. for Wild Rockies*, 2018 WL 10731198, at *4-5 (defendant's disagreement with allegations not enough to dismiss plaintiff's complaint on standing grounds).

ARGUMENT

I. The Nurses incorporate by reference responsive arguments made by the Doctors in response to the State's Second Motion to Dismiss.

Consistent with the Court's order, Doc. 26, the Nurses hereby incorporate by reference the arguments made by the Montana Medical Association, et al. ("the Doctors"), in response to the State's Second Motion to Dismiss. *See* Doc. 23. Of note when extending the Doctors' arguments to MNA, MNA's members include both employees and employers (typically, APRNs who own and manage their own practices). Doc. 11-1 ("MNA Complaint" or "Complaint"), ¶ 15. This arises from MNA's dual role as both a professional association and a labor union.

II. The Nurses have constitutional and associational standing.

The requirements for constitutional standing are well-established and the Nurses satisfy them. In their complaint, the Nurses allege that the operation of HB702 invades their statutory and constitutional rights 1) to manage or to enjoy a

safe workplace, 2) to be free from discrimination, and 3) to equal protection, for example. *E.g.*, Complaint, ¶¶ 20; 23-78. *See Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." (emphasis added)). The Nurses trace the invasion of their rights to HB702, for which Defendants are responsible. *E.g.*, Complaint, ¶¶ 21-22; 26-30; 35-37; 41-44; 49; 52-54; 57-60; 63-68; 72-76. A favorable decision by the Court enjoining HB702 in the limited circumstances sought by the Nurses would redress HB702's invasion of their rights. *Id.* Just as in *Alliance for Wild Rockies*, "Defendants' disagreement with the allegations in the . . . Complaint does not undercut [MNA]'s assertion of [constitutional standing] at this stage of the proceeding." 2018 WL 10731198, at *5. As vigorously as the State disputes the Nurses' allegations on their merits, the allegations giving rise to standing are plainly contained within the Complaint and do not warrant dismissal under Rule 12.

The Nurses satisfy the requirements for associational standing as well. "An association . . . has standing if (1) its individual members would have standing in their own right, (2) the interests at stake in the litigation are germane to the organization's purposes, and (3) the case may be litigated without participation by individual members of the association." *Airline Serv. Providers Ass'n v. Los*

Angeles World Airports, 873 F.3d 1074, 1078 (9th Cir. 2017) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)).

The Nurses satisfy these requirements in the Complaint. Whether a plaintiff has sufficiently alleged jurisdiction "is ascertained by looking at the entire complaint, not merely to what purports to be the jurisdictional statement." 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1206 (4th ed. 2021). Throughout, the Complaint clearly and plausibly alleges that individual nurses will suffer the invasion of legally protected interests because of the operation of HB702. *E.g.*, Complaint ¶¶ 15-20; 29-30; 36-37; 42-43; 48; 52-53; 58-59; 63-68; 73-76. It is both clearly stated and beyond serious dispute that workplace safety for nurses is germane to the purposes of a professional organization for nurses. Complaint, ¶ 12 (MNA "advocates to protect the practice of professional nursing and to protect the public in all areas of healthcare. MNA has an established focus on workplace environment issues for nurses in Montana, especially issues related to workplace safety"). And the State has "identified no reason that the [association]'s members must participate individually in this case." *Airline Serv. Providers Ass'n*, 873 F.3d at 1079 (holding that association satisfied third prong for associational standing where adverse party failed to contest it).

There is no requirement that the Nurses name an individual member to establish associational standing. In arguing otherwise, the State appears to

misapprehend *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). The Ninth Circuit has expressly rejected the argument,

> that *Summers*, an environmental case brought under the National Environmental Policy Act, stands for the proposition that an injured member of an organization must always be specifically identified in order to establish Article III standing for the organization.
>
> The *Summers* Court refused to find standing based only on speculation that unidentified members would be injured by a proposed action of the National Forest Service . . . Where it is relatively clear, rather than merely speculative, that one or more members have been or will be adversely affected by a defendant's action, and where the defendant need not know the identity of a particular member to understand and respond to an organization's claim of injury, we see no purpose to be served by requiring an organization to identify by name the member or members injured.

Nat'l Council of La Raza v. Cegavske, 800 F.3d 1032, 1041 (9th Cir. 2015) (citing *Summers*, 555 U.S. at 488-89). The Ninth Circuit has repeatedly rejected attacks on standing under *Summers*, emphasizing the unique facts of that case in which "the [Supreme] Court concluded that there was 'a chance, but . . . hardly a likelihood, that [member]'s wanderings w[ould] bring him to a parcel about to be affected by a project unlawfully subject to the regulations.'" *Cottonwood Env't L. Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1080 (9th Cir. 2015) (quoting *Summers*, 555 U.S. at 495).

Here, the Complaint leaves no doubt that the nurses who are MNA's members do, in fact, work in healthcare settings where HB702 operates. *E.g.*,

Complaint ¶¶ 15-20. In the words of the *La Raza* court, 800 F.3d at 1041, "it is relatively clear, rather than merely speculative, that one or more [MNA] members have been or will be adversely affected by" HB702 on the Complaint's allegations. *E.g.*, Complaint ¶¶ 15-20; 29-30; 36-37; 42-43; 48; 52-53; 58-59; 63-68; 73-76. Thus, "the defendant need not know the identity of a particular member to understand and respond to [MNA]'s claim of injury." *La Raza*, 800 F.3d at 1041. It is unclear how naming an affected MNA member nurse would change the State's understanding of the claims at issue in this litigation.

Finally, though the State proceeds on a misapprehension of *Summers*, should the Court determine that MNA must name an individual member, MNA should be permitted leave to amend so that it may name an individual member. *See id.* (holding it was further error for district court to dismiss complaint without granting leave to amend).

III. The Nurses' allegations are sufficient.

The remainder of the State's arguments attack the Complaint's writing. Though the State fashions its contentions as coming under Rule 12(b)(1), they appear equally to invoke Rule 12(b)(6) and Rule 8. None of the arguments require dismissal at the pleading stage.

First, the State threads its motion with arguments that the Nurses have simply not said enough about their claims in the 23-page complaint. For example,

the State argues that "MNA's statement that its members are employed and provide direct nursing care in various medical settings is . . . insufficient." Doc 30 ("State's Brief"), at 5. Surely this statement is sufficient for the proposition it advances, and requires no more adornment or elaboration. The statewide organization that represents over 18,000 nurses both professionally and as a labor union states that its members work as nurses in healthcare settings. Complaint, ¶ 12. There is nothing implausible about that. But the State says it simply wants more and that the Complaint must be dismissed without it. This is not the law of dismissal at the pleading stage. A complaint must be more than "labels and conclusions, . . . a formulaic recitation of the elements of a cause of action," or "naked assertion[s]." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S., at 555). But it need not be garrulous, either. The Complaint, as written, clearly satisfies the technical requirements of Rule 8 and Rule 12 as well as the interests they advance: the State is well-apprised of the character of MNA's claims. *Twombly*, 550 U.S. at 555 (Rules 8 and 12 serve to provide defendant notice of plaintiff's claims). The case should proceed.

Second, the State renews its argument that only employers may assert claims against HB702. MNA cannot bring claims because it only represents employees, the State says. Not so. The Complaint has not changed since the last time the State raised this argument, when it opposed intervention: MNA represents both

employees *and* employers. Complaint, ¶ 15 ("APRNs, who have enjoyed full practice authority for over 40 years in Montana, also provide primary and specialty healthcare as independent practitioners in the healthcare settings defined above. In many instances, APRNs own or manage their own private practice to provide primary and/or specialty care."). Thus, even if the State were right that only employers may challenge HB702, the argument fails on its own terms against MNA.

Third, the State's other arguments largely presume the answers to the ultimate merits questions in the case. For example, the State argues that "this litigation will not alter existing health protocols at the healthcare settings employing MNA members." Doc. 30 at 8. Of course, the effects of this litigation hinge on its outcome, and MNA has alleged that the opposite will happen. In essence, the State's argument is this: because the State's interpretation of HB702 is correct and will win, the Nurses suffer no injury and therefore have no standing. The State has it all backwards. Proceedings at the pleading stage determine whether a case will proceed—not the resolution of merits issues that are the ultimate questions in the case. If disagreement with a plaintiff's pleadings alone could halt a complaint, no case would proceed. *Cf. Alliance for Wild Rockies*, 2018 WL 10731198, at *5.

Rule 12 measures the sufficiency of a complaint by its contents—not by a defendant's subjective reaction to them. The motion should be denied.

CONCLUSION

For the foregoing reasons, the Court should deny the motion to dismiss.

DATED this 14th day of January, 2022.

/s/ Raph Graybill
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Attorney for Plaintiff-Intervenor

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the requirements of Rule 1.5 and 7.1 USDCR, is double spaced, except for footnotes, quoted, and indented material, and it is proportionately spaced utilizing a 14 point Times New Roman type face. The total word count for this document is 1991 words, as calculated by the undersigned's word processing program.

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2022, an accurate copy of the foregoing document was served electronically through the Court's CM/ECF system on registered counsel.

/s/ Raph Graybill
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