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* *Pro Hac Vice* Application in Process

**IN THE FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY**

JESSICA KALARCHIK, an individual,
and JANE DOE, an individual, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

STATE OF MONTANA, *et. al.*,

Defendants,

v.

WORLD PROFESSIONAL ASSOCIATION
FOR TRANSGENDER HEALTH,

Third-Party Defendant.

Case No. ADV-25-2024-0000261-CR

Hon. Mike Menahan

**REPLY IN SUPPORT OF THIRD-
PARTY DEFENDANT WORLD
PROFESSIONAL ASSOCIATION FOR
TRANSGENDER HEALTH’S MOTION
TO DISMISS**

I. INTRODUCTION

The State’s response to WPATH’s Motion to Dismiss (“Resp. Br.”) does not address the substance of WPATH’s arguments and offers no relevant authority suggesting that the Motion should be denied. As such, the State has failed to carry its burden to establish that this Court has personal jurisdiction over WPATH and has also failed to sufficiently plead a claim for

indemnification under Montana law. Additionally, the State has waived any defenses to WPATH's standing, First Amendment, and Consumer Protection Act arguments by completely ignoring them in its Response Brief. Although the State's failure is plain, WPATH submits this reply to address four fundamental defects in the State's response.

II. ARGUMENT

A. The State is Wrong on Personal Jurisdiction.

Although the State's brief extensively quotes from the statutory provisions that govern personal jurisdiction in Montana, it incorrectly applies multiple Montana cases and offers no relevant authority to support its claims for its discredited personal jurisdiction theory. For this reason alone, WPATH's Motion should be granted.

1. The State Simply Has Not Shown that WPATH Conducts Any Business – Much Less Regular Business – in the State of Montana.

The gravamen of the State's claim that WPATH is subject to this Court's jurisdiction is that WPATH allegedly conducts regular business in Montana. That business, the State argues, includes developing its Standards of Care with the assistance of Montana medical professionals; that medical professionals located in Montana happen to use the Standards of Care; and WPATH's dues-paying members include some Montana medical professionals. *See* Resp. Br. at 9. That's it. None of these facts, even accepted as true, would subject WPATH to personal jurisdiction in Montana.

As the Motion lays out, it is well-settled law that national organizations are not subject to personal jurisdiction simply because a few of their members reside in a specific state. *See* Mot. at 8-9 (citing cases). Likewise, as a case (*Edsall*) the State cites in its brief establishes, "soliciting members to pay annually" does not support the exercise of personal jurisdiction over WPATH because Montana courts have found that interstate communication does not constitute the

transaction of business in Montana. *See* Resp. Br. at 9. In *Edsall*, the court explained that “interstate communication is an almost inevitable accompaniment to doing business in the modern world, and cannot by itself be considered a ‘contact’ for justifying the exercise of personal jurisdiction.” *Edsall Constr. Co., Inc. v. Robinson*, 246 Mont. 378, 382, 804 P.2d 1039, 1042 (Mont. 1991) (quoting *Simmons v. State*, 206 Mont. 264, 670 P.2d 1372, 1380 (Mont. 1983)). Further, the State does not plausibly plead any facts to suggest that WPATH exercises control over the services offered by any Montana provider, and even if it had, it is *WPATH’s* conduct (not the conduct of a third party) that must create contacts with a forum state for purposes of jurisdiction. *See* Mot. at 9-10.

The cases the State cites to support its arguments that WPATH conducts regular business in Montana sufficient to establish jurisdiction are both factually and legally inapposite. The State claims that cases such as *Great Plains Crop Mgmt., Inc.* and *State ex rel. Goff* show courts exercising jurisdiction over a defendant that is similarly situated to WPATH. That is totally inaccurate. In *Great Plains*, the court determined that a non-resident defendant company was subject to the court’s jurisdiction only after it established that the parties engaged in phone calls, the defendant invited the plaintiff into the state where the defendant was located in the hope of making a sale to plaintiff, plaintiff ordered products from the defendant, and both parties considered plaintiff joining the defendant company in Montana. *Great Plains Crop. Mgmt., Inc. v. Tryco Mfg. Co.*, 554 F. Supp. 1025, 1026-27 (D. Mont. 1983). No such facts exist here. And in *State ex rel. Goff*, the court found personal jurisdiction over a defendant when the “locus of the contract” to purchase a stock exchange membership was in Montana because the parties’ contract negotiations took place through mail in Montana; delivery of the contract terms was contemplated and would be made in Montana; and the mortgage or lien retained by the seller of the stock would

have followed the stock exchange membership to Montana. *State ex rel. Goff v. District Court*, 157 Mont. 495, 487 P.2d 292, 294 (Mont. 1971). Neither *Great Plains Crop Mgmt., Inc.* nor *State ex rel. Goff* resemble this case. The State inappropriately—and without support—analagizes that since Montana medical practitioners may become WPATH members, that somehow that creates a contract and that contract’s locus is in Montana. *See* Resp. Br. at 11-12. Courts have held exactly the opposite. *See* Mot. at 9. The State has not and cannot allege that WPATH conducts regular business in the State of Montana for purposes of establishing personal jurisdiction.

The State also contends that WPATH regularly contracts with medical professionals in Montana and that those contracts alone establish this Court’s jurisdiction over WPATH. Here again, the State is misguided. Montana courts have held that “a non-resident does not subject himself to the jurisdiction of Montana by merely entering into a contract with a resident of Montana.” *Cimmaron Corp. v. Smith*, 2003 MT 73, ¶ 14, 315 Mont. 1, 67 P.3d 258 (Mont. 2003) (quoting *Edsall*, 246 Mont. at 382).

2. The State Fails to Plausibly Plead that WPATH Made Any Misrepresentations in Montana.

The State has failed to plausibly plead that WPATH made any misrepresentation, conspired to commit misrepresentations, or that any such misrepresentation occurred in Montana. Its Response Brief does not remedy this failure. The State relies on various cases that are completely inapplicable to the facts of this case to support its belief that WPATH is subject to jurisdiction in Montana due to unspecific, unsupported, vague, and conclusory allegations of misrepresentation. The State cites to cases involving allegations of physical harm caused by a pharmaceutical company’s products (*Bullard v. Rhodes Pharmacal Co.*, 263 F. Supp. 79 (D. Mont. 1967)), a personal injury case involving the sale of firearm ammunition (*Scanlan v. Norma Projektil Fabrik*, 345 F. Supp. 292 (D. Mont. 1972)), and a case involving a botched eye surgery (*McGee v. Riekhof*,

442 F. Supp. 1276 (D. Mont. 1978)) to support its theory. These cases are unlike the case here—a constitutional challenge to a state statute for prohibiting people from making changes to their government-issued identification documents to conform to their gender identity. As detailed in the Motion, WPATH has not made any misrepresentations—much less any misrepresentations in Montana—to justify jurisdiction. The State has not even attempted to argue otherwise, nor could it. The State’s new claim that “the State has an interest in deterring such interstate medical practices” – something it has not even alleged in its complaint that WPATH does (it can’t, as WPATH does not practice medicine) – is not enough to overcome the fact that the State has made no factual claim of misrepresentation or tortious conduct in Montana. *See* Mot. at 11-12.

3. The State’s Fourteenth Amendment Claim for Personal Jurisdiction is Baseless.

A court analyzes whether the exercise of jurisdiction over a non-resident defendant offends due process only after it determines that a court can exercise jurisdiction over the defendant under the “particular facts of the case.” *State of North Dakota v. Newberger*, 188 Mont. 323, 613 P.2d 1002, 1004 (Mont. July 2, 1980). As explained above and throughout the Motion, the State makes no plausible claim that WPATH has jurisdictional contacts with Montana. *See* Mot. at 6-10. Thus, the Court need not reach a due-process analysis. And even if the State could show that WPATH is subject to Montana’s jurisdiction under the facts of this case—which they cannot—due process would be offended to *grant* such jurisdiction, not to deny it. *See* Mot. at 6. Under the State’s theory, WPATH would be subjected to all fifty states’ jurisdiction simply because it publishes and makes available its Standards of Care to people across the country. That logic and outcome is absurd and would be unfair to any defendant.

B. The State Again Fails to Allege an Indemnification Claim.

1. The State Fixates on Whether It May be Exposed to Liability for Enforcing Legislation, But This is Immaterial to Whether WPATH Must Indemnify the State.

While irrelevant to whether WPATH must indemnify the State for any liability it assumes in the Underlying Litigation, the State focuses most of its argument for indemnification on whether the State may be found liable for attorneys' fees in a statutory challenge. Unsurprisingly, they can. In an effort to show that the State is at risk of monetary liability—allegedly because of WPATH's national statements—the State cites to two cases regarding challenges to legislation. These cases do not support the State's argument that WPATH must indemnify it in the Underlying Litigation and the cases are easily distinguishable. The State cites *Forward Montana v. State*, 2024 MT 75, 416 Mont. 175, 546 P.3d 778 (Mont. 2024) and *Barrett v. State*, 2024 MT 86, 416 Mont. 226, 547 P.3d 630 (Mont. 2024) to assert that the State may be exposed to liability to the underlying Plaintiffs because Montana courts have awarded attorneys' fees in disputes challenging enacted legislation. But *Forward Montana* and *Barrett* are not cases about indemnification, nor do they involve third-party allegations. The State has failed to set forth any evidence to support an indemnification claim against WPATH and thus, dismissal is appropriate.

In addition to the fact that the State's indemnification claim is unsupported by Montana law, it is also unsupported by logic. The State claims that WPATH should indemnify it for its costs associated with defending the Underlying Litigation. But in every possible scenario, indemnification is inappropriate.

- If the Underlying Plaintiffs win their case and the court relies on representations made by WPATH to reach its conclusion, then the alleged WPATH representations cannot be considered negligent misrepresentations. And thus, the State would not be entitled to indemnity.

- If the Underlying Plaintiffs win their case but the court does not rely on WPATH or its representations to reach its conclusions, then WPATH cannot be responsible to the State for costs, as WPATH would not have had anything to do with the State’s liability.
- If the Underlying Plaintiffs lose, then there is nothing to indemnify.

Plainly put, there is no scenario wherein WPATH can plausibly be obligated to indemnify the State in the Underlying Litigation.

2. The State Fails to Assert Any Evidence to Support an Indemnification Claim.

The Motion laid out why the State has failed to plead an indemnification claim or allege any facts which could support such a claim. The State does not remedy its shortcomings in its Response Brief.

Instead of detailing how WPATH’s conduct was allegedly negligent or causally connected to the Underlying Litigation, the State merely reiterates cases showing that the State can be liable for attorneys’ fees in cases like this—a fact WPATH has not contested.

Nor does the State have any response to WPATH’s argument that all of its “representations” are true. Throughout the entire Response Brief, and without any support, the State calls WPATH’s evidence-backed representations about gender dysphoria “negligent” and “misrepresentations.” However, even in the face of uncontradicted caselaw to the contrary (*see* Mot. at 12), the State fails to plausibly allege that WPATH’s statements were misrepresentations or the result of negligence.

Further, the State fails to articulate how any of WPATH’s statements were the cause of the issues at the heart of the Underlying Litigation. The State alleges that WPATH’s gender dysphoria “representations were relied upon and form the basis of Defendants’ cognizable claims against

WPATH.” Resp. Br. at 6. That is clearly false. The Underlying Litigation arose out of constitutional concerns about a Montana statute that prevents Montana residents from making certain changes to government-issued identification documents. The Underlying Litigation is a constitutional challenge and the extent of its relation to WPATH and WPATH’s publications is, at best, tangential. In these circumstances, dismissal of the indemnification claim against WPATH is appropriate.

C. The State Waived Any Defense to WPATH’s Standing, First Amendment, and Consumer Protection Act Arguments.

It is well-established that an opposing party waives an issue when it fails to respond to arguments on the issue set forth in a motion to dismiss. *See Mountain W. Farm Bureau Mut. Ins. Co. v. Brewer*, 2003 MT 98, ¶ 9, 315 Mont. 231, 69 P.3d 652 (Mont. 2003) (“[I]f a party fails to raise an issue or argue it in his or her brief, we will deem the issue waived and will not address it.”). This is exactly what the State has done here by failing to respond to the bulk of the Motion, including to important threshold arguments relating to the State’s standing to bring the case and to WPATH’s First Amendment protections. The Motion should be granted for these additional independent reasons.

WPATH argued in its Motion that the State’s Complaint should be dismissed because the State lacks standing to bring the suit, that allowing the suit to proceed would violate WPATH’s First Amendment protections, and that the State failed to sufficiently plead elements of its Montana Consumer Protection Act claim. Instead of responding to the whole of the Motion, the State only addresses arguments relating to personal jurisdiction and some, but not all, of WPATH’s arguments concerning indemnification. Due to the State’s failure to respond to all of the arguments made by WPATH in its Motion, this Court should grant WPATH’s Motion as to every argument that the State failed to respond to. *See, e.g., Medrano v. Carrington Foreclosure Servs. LLC*, No.

CV-19-04988-PHX-DWL, 2019 U.S. Dist. LEXIS 202149 (D. Ariz. Nov. 21, 2019) (explaining that an opposing party’s failure to respond to arguments in a motion to dismiss is an independent basis for granting a motion to dismiss); *see also Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries*, 238 F. Supp. 2d 174, 178 (D.D.C. 2002) (“[W]hen a plaintiff files an opposition to a motion to dismiss addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.”); accord *Jenkins v. Cnty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005) (finding plaintiff abandoned claims by not raising them in opposition brief). The State’s failure to respond to these three arguments is reason enough to grant the Motion and dismiss the Complaint in its entirety.

III. CONCLUSION

For all these reasons, and the others set forth in the Motion, the State has failed to carry its burden to show that this Court has personal jurisdiction over WPATH, has failed to prove that it has standing to bring this suit, has failed to sufficiently plead a claim for indemnification or a claim under the Montana Consumer Protection Act, and that its suit does not impermissibly infringe upon WPATH’s First Amendment Speech and Associational rights. Accordingly, WPATH’s Motion to Dismiss should be granted.

Dated: September 20, 2024

Respectfully submitted,

By:  _____

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I certify that the foregoing **REPLY IN SUPPORT OF THIRD-PARTY DEFENDANT
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